

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

PHILIP MORRIS PRODUCTS S.A.,

Plaintiff,

v.

R.J. REYNOLDS VAPOR COMPANY,

Defendant.

Case No. 1:20-cv-00393-LMB-WEF

**MEMORANDUM IN SUPPORT OF DEFENDANT’S MOTION TO REDACT
PORTIONS OF THE NOVEMBER 4, 2022, HEARING TRANSCRIPT**

Pursuant to Local Civil Rule 5(C), Defendant R.J. Reynolds Vapor Company (“RJR”) respectfully moves the Court to designate as “Confidential” pursuant to the Stipulated Protective Order (Dkt. 103) and to redact certain portions of the transcript of the hearing held before the Court on November 4, 2022 (Dkt. 1436), on the grounds that they reflect confidential business information under the protective order.

I. DESCRIPTION OF MATERIALS SOUGHT TO BE SEALED

RJR respectfully seeks leave to file the following from the November 4, 2022, transcript:

- Page 22:18 (redact the two words after “retain”);
- Page 22:20 (redact the two words after “retain”);
- Page 23:16 (redact the four words before “it is very unique”);
- Page 23:21 (redact the two words after “retain”);
- Page 27:15 (redact the fraction before “for the ’265 patent”);
- Page 29:16-17 (redact the rest of the sentence after “Solo G2”);
- Page 30:4 (redact the three words before “has changed”);
- Page 30:5 (redact the entire line);
- Page 30:7 (redact the end of the sentence following “G2”);
- Page 30:15 (redact the end of the sentence following “data was that it”);
- Page 33:4 (redact the two words before “split of the profit”);

- Page 33:18 (redact the two words after “was worth”);
- Page 33:20 (redact the two words after “percentage, took”);
- Page 34:12 (redact the two words after “only taking”);
- Page 34:17 (redact the two words after “Just saying”);
- Page 39:11 (redact the two words after “It’s worth”);
- Page 41:21 (redact the two words after “that’s their profits”);
- Page 43:23 (redact the two words before “of the profits”); and
- Page 44:4 (redact the two words after “operating profit of”).

II. LEGAL STANDARD

The law of the regional circuit applies to non-substantive issues of patent law, including the question whether to seal district court records. *See Uniloc 2017 LLC v. Apple, Inc.*, 964 F.3d 1351, 1357 (Fed. Cir. 2020). A motion to seal implicates both substantive and procedural requirements. *Va. Dep’t of State Police v. Wash. Post*, 386 F.3d 567, 576 (4th Cir. 2004).

Substantively, the Court must determine the nature of the information and the public’s right to access. *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180-81 (4th Cir. 1988). “The right of public access to documents or materials filed in a district court derives from two independent sources: the common law and the First Amendment.” *Va. Dep’t of State Police*, 386 F.3d at 575. “While the common law presumption in favor of access attaches to all ‘judicial records and documents,’ the First Amendment guarantee of access has been extended only to particular judicial records and documents.” *Stone*, 855 F.2d at 180 (internal citation omitted). Moreover, the common law right to inspect records and documents “is not absolute.” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). Accordingly, some documents “fall within the common law presumption of access, while others are subject to the greater right of access provided by the First Amendment. Still others may not qualify as ‘judicial records’ at all.” *U.S. v. Moussaoui*, 65 F. App’x 881, 889 (4th Cir. 2003) (internal citation omitted).¹

¹ “Judicial records” are “documents filed with the court [that] play a role in the adjudicative process, or adjudicate substantive rights.” *In re U.S. for an Order Pursuant to 18 U.S.C. Section*

Although “the Supreme Court has not addressed whether the First Amendment’s right of access extends to civil trials or other aspects of civil cases . . . , the Fourth Circuit[] ha[s] recognized that the First Amendment right of access extends to civil trials and some civil filings.” *Am. Civil Liberties Union v. Holder*, 673 F.3d 245, 252 (4th Cir. 2011). Even so, public access to civil trial records “is not absolute,” and restrictions can be justified by concerns that such records “might . . . become a vehicle for improper purposes,” such as where the records serve “as sources of business information that might harm a litigant’s competitive standing.” *Nixon*, 435 U.S. at 598.

As set forth in the Fourth Circuit’s decision in *Ashcraft v. Conoco, Inc.*, a court has the authority to seal court documents “if the public’s right of access is outweighed by competing interests.” 218 F.3d 288, 302 (4th Cir. 2000). Before granting a motion to seal, a court must consider the following: “(1) provide public notice of the request to seal and allow interested parties a reasonable opportunity to object, (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives.” *Id.*; *Adams v. Object Innovation, Inc.*, No. 3:11CV00272-REP-DWD, 2011 WL 7042224, at *4 (E.D. Va. Dec. 5, 2011), *report & recommendation adopted*, 2012 WL 135428 (E.D. Va. Jan. 17, 2012).

Procedurally, Local Civil Rule 5(C) requires that, when a party moves to file material under seal that another party has designated as confidential, “the party designating the material as confidential must file a response to the motion complying with requirements (2), (3), and (4) above along with a proposed order” that “shall recite the findings required by governing case law to support the proposed sealing.” Loc. R. Civ. P. 5(C). These requirements are: “(2) A statement

2703(D), 707 F.3d 283, 290 (4th Cir. 2013).

why sealing is necessary, and why another procedure will not suffice, as well as appropriate evidentiary support for the sealing request; (3) References to the governing case law, an analysis of the appropriate standard to be applied for that specific filing, and a description of how that standard has been satisfied; [and] (4) Unless permanent sealing is sought, a statement as to the period of time the party seeks to have the matter maintained under seal and how the matter is to be handled upon unsealing.” *Id.*

III. ARGUMENT

The transcript of the November 4, 2022, hearing held before the Court contains confidential business information of RJRV. The portions of the transcript Reynolds moves the Court to redact includes non-public financial information such as profit margins of individual VUSE products. These materials fall within the Protective Order and RJRV has maintained the confidentiality of these documents.

A. THE PUBLIC HAS AMPLE NOTICE.

The public has received notice of the request to seal and will have a reasonable opportunity to object. RJRV’s sealing motion is being publicly docketed in accordance with Local Civil Rule 5, and RJRV now files this memorandum in support of sealing. PMP will have an opportunity to respond, and once the “public has had ample opportunity to object” to RJRV’s sealing motion and “the Court has received no objections,” the first requirement under *Ashcraft*, 218 F.3d at 302, may be deemed satisfied. *GTSI Corp. v. Wildflower Int’l, Inc.*, No. 1:09CV123 (JCC), 2009 WL 1248114, at *9 (E.D. Va. Apr. 30, 2009); *United States. ex rel. Carter v. Halliburton Co.*, No. 1:10CV864 (JCC/TCB), 2011 WL 2077799, at *3 (E.D. Va. May 24, 2011) (“[T]he parties provided public notice of the request to seal that allowed interested parties a reasonable opportunity to object—nearly two weeks.”).

B. RJRV SEEKS THE LEAST DRASTIC MEASURES.

RJRV seeks to seal and redact from the public record only information that the parties must keep confidential pursuant to the Stipulated Protective Order. (Dkt. 103.) This selective and narrow protection of confidential material constitutes the least drastic method of shielding the information at issue. *Adams*, 2011 WL 7042224, at *4 (The “proposal to redact only the proprietary and confidential information, rather than seal the entirety of his declaration, constitutes the least drastic method of shielding the information at issue.”). The public has no legitimate interest in information that is confidential to RJRV. *Id.* The information that RJRV seeks to seal includes confidential and competitively sensitive business information of RJRV which could face harm if such information were to be released publicly. No procedure other than filing this information under seal is sufficient to preserve the confidential and sensitive nature of the information.

C. THE MATERIALS ARE HIGHLY SENSITIVE AND CONFIDENTIAL.

There is support for redacting from the public record portions of the November 4, 2022, hearing transcript. The limited portions of the hearing transcript that RJRV moves the Court to redact contain material that falls within the scope of the Stipulated Protective Order. (Dkt. 103.) Placing these materials under seal is proper because the public’s interest in access is outweighed by a party’s interest in “preserving confidentiality” of the limited amount of confidential information that is “normally unavailable to the public.” *Flexible Benefits Council v. Feltman*, No. 1:08CV00371 (JCC), 2008 WL 4924711, at *1 (E.D. Va. Nov. 13, 2008); *United States ex rel. Carter*, 2011 WL 2077799, at *3. As RJRV previously explained in its Motion to Seal Trial Exhibits (Dkt. 1243), that was granted by the Court “to the extent that plaintiffs do not object” (Dkt. 1266), materials concerning, in relevant part, financial information (Dkt. 1243 at 10-13; Dkt.

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