

**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

[PROPOSED] ORDER GRANTING DEFENDANT’S RENEWED MOTION TO SEAL

This matter is before the Court on the renewed motion filed by Defendant R.J. Reynolds Vapor Company (“RJR”) hereby moves the Court for leave to file under seal its Memorandum in Opposition to Plaintiff’s Motion for a Permanent Injunction or, Alternatively, an Ongoing Royalty (“Opposition Brief”) and Exhibits 1-4, 10-14, 19, 25, 28-31, 39, 42, and 44 thereto (“Exhibits”) (*see* Dkt. 1421), pursuant to Local Civil Rule 5(C) and 5(H).

Before this Court may seal documents, it must consider both substantive and procedural requirements. 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). 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 v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978). In particular, a corporation's "strong interest in preserving the confidentiality of its proprietary and trade-secret information . . . may justify partial sealing of court records." *Doe v. Pub. Citizen*, 749 F.3d 246, 269 (4th Cir. 2014); *see also Apple, Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1218, 1228-29 (Fed. Cir. 2013).

The common law "presumes a right of access to all judicial records and documents." *Level 3 Commc'ns, LLC v. Limelight Networks, Inc.*, 611 F. Supp. 2d 572, 577 (E.D. Va. 2009). However, the presumption "can be rebutted if countervailing interests heavily outweigh the public interests in access." *Id.* (quoting *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988)). For example, "courts have refused to permit their files to serve . . . as sources of business information that might harm a litigant's competitive standing" and have sealed such information from the public. *Id.* (quoting *Nixon*, 435 U.S. at 598). Courts consider whether the movant has borne its "burden of showing some significant interest that outweighs the presumption." *Id.* (quoting *Rushford*, 846 F.2d at 253). The First Amendment's right of public access is "much stronger than the guarantee provided by the common law." *Id.* Accordingly, this Court has held that the First Amendment guarantee of public access "applies where efforts are made to seal documents offered into evidence before a court in the course of a public jury trial." *Id.* at 579. In determining whether "a particular document sought to be sealed is subject to the First Amendment's presumptive right of access, the court must weigh and balance competing interests." *Id.* The presumption may be overcome "by an overriding interest based on findings that closure is essential to preserve higher values." *Id.* at 580. Courts have recognized that the presumption may be overcome where "confidential commercial information, such as a trade secret," must be protected. *Id.* at 582.

Procedurally, the Court must: “(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.” *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000) (citing *Stone*, 855 F.2d at 181). Public notice can be satisfied through the docketing of a party’s motion to seal. *Stone*, 855 F.2d at 181 (explaining that to satisfy the notice requirement courts must either “notify persons present in the courtroom of the request” or “docket it ‘reasonably in advance of deciding the issue’”); *Adams v. Object Innovation, Inc.*, No. 11-cv-00272-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).

Upon consideration of RJRV’s motion to seal and its memorandum in support thereof, the Court hereby **FINDS** as follows:

1. The public has received notice of the request to seal and has had reasonable opportunity to object. RJRV’s sealing motion was publicly docketed in accordance with Local Civil Rule 5. Philip Morris Products S.A. (“PMP”) and Altria Client Services, LLC/Philip Morris USA Inc. (collectively, “Altria/PM”) have had an opportunity to respond. The “public has had ample opportunity to object” to RJRV’s motion and, because “the Court has received no objections,” the first requirement under *Ashcraft*, 218 F.3d at 302, has been satisfied. *GTSI Corp. v. Wildflower Int’l, Inc.*, No. 1:09-cv-123-JCC, 2009 WL 1248114, at *9 (E.D. Va. Apr. 30, 2009); *U.S. ex rel. Carter v. Halliburton Co.*, No. 1:10-cv-864-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.”).

2. RJRV seeks to seal and redact from the public record only information designated by the parties as confidential. RJRV has filed a publicly redacted version of its Opposition Brief and Exhibits, in addition to a sealed version, and has redacted only those limited portions it seeks to seal. This selective and narrow protection of confidential material constitutes the least drastic method of shielding the information at issue. *Adams v. Object Innovation, Inc.*, No. 3:11-cv-272-REP-DWD, 2011 WL 7042224, at *4 (E.D. Va. Dec. 5, 2011) (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, PMP, Altria/PM, or third parties. The information that Reynolds seeks to seal includes confidential, proprietary, and competitively sensitive business information of RJRV, PMP, Altria/PM, and third parties, any of which could face harm if such information were to be released publicly. Specifically, the sensitive information that Reynolds moves for leave to file under seal and to redact from the public versions relates to and discusses confidential information of RJRV, PMP, Altria/PM, and third parties, such as confidential and proprietary information made available to FDA as part of the regulatory process; licensing agreements with third parties; internal business documents; and non-public financial information, including forecasts, costs analyses, internal plans regarding distribution and marketing, and financial information for individual VUSE product lines. These materials fall within the Protective Order and RJRV has maintained the confidentiality of these documents.

3. There is support for filing RJRV’s Opposition Brief and Exhibits under seal. RJRV’s Opposition Brief and Exhibits contain material that falls within the scope of the Stipulated Protective Order. 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. 1:08-cv-00371-JCC, 2008 WL 4924711, at *1 (E.D. Va. Nov. 13, 2008); *U.S. ex rel. Carter*, 2011 WL 2077799, at *3.

Therefore, based on the findings above, for good cause shown, it is hereby

ORDERED that the motion is **GRANTED**, and RJRV is granted leave to file a **REDACTED** version of RJRV’s Opposition Brief and Exhibits 1-4, 10-14, 19, 25, 28-31, 39, 42, and 44 and to file **UNDER SEAL** un-redacted versions of RJRV’s Opposition Brief and Exhibits 1-4, 10-14, 19, 25, 28-31, 39, 42, and 44.

And **FURTHER ORDERED** that the un-redacted versions of RJRV’s Opposition Brief and Exhibits shall remain **SEALED** until further order of the Court.

ENTERED this _____ day of _____, 2023.

Alexandria, Virginia

LEONIE BRINKEMA

UNITED STATES DISTRICT JUDGE