

**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.

No. 1:20-cv-393-LMB-TCB

**MEMORANDUM IN SUPPORT OF PHILIP MORRIS' RENEWED MOTION FOR
LEAVE TO FILE DOCUMENTS UNDER SEAL**

Pursuant to Local Civil Rule 5(C), and the Court's Order dated March 22, 2023 (Dkt. 1454), Plaintiff Philip Morris Products S.A. ("Philip Morris") respectfully moves the Court for leave to file under seal its Brief in Support of Philip Morris' Motion For a Permanent Injunction or, Alternatively, an Ongoing Royalty ("Opening Brief"), Reply in Support of Philip Morris' Motion For a Permanent Injunction or, Alternatively, an Ongoing Royalty ("Reply Brief") (together, "Briefs"), and Exhibits 5, 18, 23-24, 27, 38, 41, 43-44, 47-48, 56, 65-66, 76, and 78 thereto ("Exhibits").¹

In addition, pursuant to Local Civil Rule 5(C), and the Court's Order dated March 30, 2023 (Dkt. 1456), Philip Morris respectfully requests that the Court maintain under seal its Memorandum Opinion, entered March 30, 2023 (Dkt. 1455) ("Memorandum Opinion").

¹ Philip Morris is no longer seeking to file under seal Exhibits 4, 11, 13-17, 19-20, 22, 26, 30-31, 34-36, 40, 42, and 51 to Philip Morris' Opening Brief, and Exhibits 57-58, 70, 74-75, and 77 to Philip Morris' Reply Brief, in view of the Court's Order.

I. DESCRIPTION OF MATERIALS SOUGHT TO BE SEALED

Philip Morris respectfully seeks leave to file the following documents under seal:

- An unredacted version of the Memorandum Opinion (Dkt. 1455);
- An unredacted version of Philip Morris' Opening Brief;
- Exhibit 5 to Philip Morris' Opening Brief, which is the confidential declaration of Dr. Moira Gilchrist, dated August 12, 2022;
- Exhibit 18 to Philip Morris' Opening Brief, which includes excerpts from a design document that Reynolds produced and designated as confidential business information subject to the Protective Order;
- Exhibit 23 to Philip Morris' Opening Brief, which includes excerpts from the deposition transcript of Moira Gilchrist, dated June 18, 2021, which Philip Morris designated as confidential subject to the Protective Order;
- Exhibit 24 to Philip Morris' Opening Brief, which includes excerpts of a financial spreadsheet that Altria Client Services, LLC produced and designated as confidential business information subject to the Protective Order;
- Exhibit 27 to Philip Morris' Opening Brief, which includes excerpts from a presentation that Philip Morris produced and designated as confidential business information subject to the Protective Order;
- Exhibit 38 to Philip Morris' Opening Brief, which includes excerpts from a presentation that Reynolds produced and designated as confidential business information subject to the Protective Order;
- Exhibit 41 to Philip Morris' Opening Brief, which includes excerpts from a document that Reynolds produced and designated as confidential business information subject to the Protective Order;
- Exhibit 43 to Philip Morris' Opening Brief, which includes excerpts from a presentation that Reynolds produced and designated as confidential business information subject to the Protective Order;
- Exhibit 44 to Philip Morris' Opening Brief, which is the Declaration of Paul K. Meyer, dated August 12, 2022, that was designated by Philip Morris as including information produced by Reynolds as confidential under the Protective Order;
- Exhibit 47 to Philip Morris' Opening Brief, which includes excerpts from a document that Reynolds produced and designated as confidential business information subject to the Protective Order;

- Exhibit 48 to Philip Morris' Opening Brief, which includes excerpts from the deposition transcript of Dr. James Figlar, dated June 3, 2022, that Reynolds designated as containing confidential business information subject to the Protective Order;
- Exhibit 56 to Philip Morris' Opening Brief, which are royalty reports produced by Philip Morris as confidential business information subject to the Protective Order;
- An unredacted version of Philip Morris' Reply Brief;
- Exhibit 65 to Philip Morris' Reply Brief, which includes excerpts from the deposition transcript of Moira Gilchrist, dated June 18, 2021, which Philip Morris designated as confidential subject to the Protective Order;
- Exhibit 66 to Philip Morris' Reply Brief, which includes excerpts from Reynolds' Second Supplemental Objections and Responses to Interrogatories, dated April 30, 2021, that Reynolds designated as containing confidential business information subject to the Protective Order;
- Exhibit 76 to Philip Morris' Reply Brief, which is the Reply Declaration of Paul K. Meyer, dated September 9, 2022, which was designated by Philip Morris as including information produced by Reynolds as confidential under the Protective Order; and
- Exhibit 78 to Philip Morris' Reply Brief, which includes excerpts from the Expert Report of Ryan Sullivan, Ph.D., that Reynolds designated as containing confidential business information subject to the Protective Order.

The Memorandum Opinion, Briefs, and Exhibits 5, 23, 24, 27, 44, 56, 65, and 66 contain PMP's confidential business information. The Memorandum Opinion, Briefs, and Exhibits 18, 38, 41, 43, 47-48, 76, and 78 contain information designated as confidential business information by R.J. Reynolds Vapor Company ("Reynolds"). Philip Morris takes no position as to the appropriateness of Reynolds' designated material for sealing. For the Briefs and Exhibit 44, Philip Morris' information sought to be sealed is identified in green, and Reynolds' information sought to be sealed is identified in yellow. Philip Morris will separately provide the Court with its proposed redactions to the Memorandum Opinion.

II. ARGUMENT

Although there is a general presumption that the public has the right to access documents

in the files of the courts, this presumption may be overcome “if the public’s right of access is outweighed by competing interests.” *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000) (citation omitted); *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988). To determine whether the interests in sealing the records outweigh the public’s right of access, a court must follow a three-step process: (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) articulate specific reasons and factual findings supporting its decision to seal. *Ashcraft*, 218 F.3d at 302; *Adams v. Object Innovation, Inc.*, No. 11-cv-00272, 2011 WL 7042224, at *4 (E.D. Va. Dec. 5, 2011), *report and recommendation adopted*, 2012 WL 135428 (E.D. Va. Jan. 17, 2012). All three requirements are satisfied here.

First, the public has received notice of the request to seal and will have a reasonable opportunity to object. In accordance with Local Civil Rule 5 procedures, this sealing motion was publicly docketed, satisfying the first requirement. Reynolds will have an opportunity to respond, and once the “public has had ample opportunity to object” to Philip Morris’ motion and “the Court has received no objections,” the first *Ashcraft* requirement may be deemed satisfied. *See GTSI Corp. v. Wildflower Int’l, Inc.*, No. 09-cv-00123, 2009 WL 1248114, at *9 (E.D. Va. Apr. 30, 2009); *U.S. ex rel. Carter v. Halliburton Co.*, No. 10-cv-00864, 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.”).

Second, Philip Morris seeks to seal and to redact from the public record only information designated by the parties and third-parties (e.g., Altria Client Services, LLC) as confidential. Philip Morris will file publicly a redacted version of its Briefs and Exhibits, in addition to sealed

versions, and will redact only those limited portions it seeks to seal.² Further, Philip Morris will provide the Court with its proposed redactions to the Memorandum Opinion, proposing to redact 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*, 2011 WL 7042224, at *4 (finding that plaintiffs’ “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 Philip Morris, Reynolds, or third parties. *See Adams*, 2011 WL 7042224, at *4 (“[T]here is no legitimate public interest in disclosing the proprietary and confidential information of [the defendant] ... and disclosure to the public could result in significant damage to the company.”). The information that Philip Morris seeks to seal and redact includes confidential, proprietary, and competitively sensitive business information which could cause harm if such information were to be released publicly. For example, certain of the materials sought to be sealed includes highly confidential terms of agreements that Philip Morris has entered into that, if disclosed, would allow third parties to increase their negotiating position against Philip Morris in the future. Similarly, certain of the materials sought to be sealed include highly confidential sales data that, if disclosed, would allow competitors to gain an unfair advantage over Philip Morris in the market. Further, other materials sought to be sealed describe Philip Morris’ highly confidential future plans in the market which, if disclosed, could harm Philip Morris by, for example, allowing competitors to position themselves to more effectively compete against Philip Morris.

² Reynolds has requested that Exhibit 47 to Philip Morris’ Opening Brief be filed under seal in its entirety. Philip Morris takes no position on whether Reynolds’ request is proper.

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