EXHIBIT A

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 REYNOLDS'S RENEWED MOTION TO SEAL

This matter is before the Court on the motion filed by R.J. Reynolds Vapor Company ("Reynolds") to renew its motion to file under seal trial exhibits (Dkts. 1241, 1243) that contain confidential information of Reynolds and of third parties, 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 Reynolds's motion to seal and its memorandum in support thereof, the Court hereby **FINDS** as follows:

1. Reynolds's request satisfies the substantive requirements. Its request is narrowly tailored. Reynolds seeks to seal and redact from the public record information designated by Reynolds and non-parties as confidential. The majority of the exhibits and redacted information that Reynolds requests be sealed were not the subject of witness testimony and were not displayed to the jury at trial. Reynolds seeks to seal pre-market applications (PMTAs) for its VUSE products, CAD files, licensing agreements and negotiations with non-parties, and non-public financial information, including forecasts, costs analyses (including cost information from Reynolds's third-party supplier), and financial information for individual VUSE product lines. These materials fall within the Protective Order and Reynolds has maintained the confidentiality of these documents.

2. Each of these documents serve "as sources of business information that might harm [Reynolds's] competitive standing." *Nixon*, 435 U.S. at 598. Here, Reynolds's "strong interest in

preserving the confidentiality of its proprietary and trade-secret information . . . justif[ies] partial sealing of court records." *Doe*, 749 F.3d at 269; *see also Apple, Inc.*, 727 F.3d at 1218, 1228-29.

The CAD files for the VUSE products are particularly sensitive technical information that is confidential. The public has no need for the entire files themselves. Instead, witnesses, including expert witnesses, were permitted to describe facts found in the CAD files and even used images derived from the CAD files. These exhibits contain innumerable "details that were not referenced during testimony or by counsel during opening statements or closing arguments." *Syngenta Crop Prot., LLC v. Willowood, LLC*, No. 1:15-CV-274, 2017 WL 6001818, at *6 (M.D.N.C. Dec. 4, 2017). Moreover, given the nature of these files, they cannot be redacted.

Full copies of the Vuse PMTAs are not necessary for the public to understand what happened at trial. In particular, this is a patent infringement case that does not turn on the data in the form submitted to FDA, so the PMTAs "will shed no light" on the issues the jury considered at trial. *In re Incretin-Based Therapies Prod. Liab. Litig.*, 2015 WL 11658712, at *3. The PMTAs also disclose the composition of the e-liquid in the Vuse products which is a trade secret and is not relevant to the claims of patent infringement in this case. In addition to the product-related details, the structure and content of Reynolds's PMTA submissions are also confidential and competitively sensitive, because they provide insight into Reynolds's decisions and strategy regarding scientific content, tests, and data and the organization of this information as provided in the PMTAs. Witnesses, including expert witnesses, were permitted to describe the facts found in the PMTAs and use images derived from the PMTAs. However, their testimony did not disclose the regulatory submissions themselves. These exhibits contain innumerable "details that were not referenced during testimony or by counsel during opening statements or closing arguments." *Syngenta*, 2017 WL 6001818, at *6; *see also Airboss Rubber Compounding (NC), Inc. v. Kardoes Rubber Co.*,

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