

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

RAI STRATEGIC HOLDINGS, INC. and
R.J. REYNOLDS VAPOR COMPANY,

Plaintiffs and Counterclaim Defendants,

v.

ALTRIA CLIENT SERVICES LLC; PHILIP
MORRIS USA INC.; and PHILIP MORRIS
PRODUCTS S.A.

Defendants and Counterclaim Plaintiffs.

Civil Action No. 1:20-cv-393

**DEFENDANTS' MEMORANDUM IN RESPONSE TO, AND IN SUPPORT OF,
PLAINTIFFS' MOTION TO SEAL PLAINTIFFS' MOTION FOR LEAVE TO FILE
SUPPLEMENTAL MATERIALS AND EXHIBIT A IN SUPPORT OF PLAINTIFFS'
SECOND MOTION TO COMPEL RESPONSIVE DOCUMENT RELATED TO
DEFENDANTS' '374 PATENT INFRINGEMENT COUNTERCLAIM**

Pursuant to Local Civil Rule 5(C), Defendants Altria Client Services LLC (“ACS”), Philip Morris USA Inc. (“PM USA”), and Philip Morris Products S.A. (“PMP”) (collectively, “Defendants”) submit this memorandum in response to, and in support of, Plaintiffs RAI Strategic Holdings, Inc.’s and R.J. Reynolds Vapor Company’s (collectively, “Plaintiffs”) Motion to Seal Plaintiffs’ Motion for Leave to File Supplemental Materials and Exhibit A in Support of Plaintiffs’ Second Motion to Compel Responsive Document Related to Defendants’ ’374 Patent Infringement Counterclaim. (*See* Dkts. 503, 506.) The proposed sealed material includes confidential, proprietary, and competitively sensitive business information of Plaintiffs, Defendants, and/or third parties that falls within the scope of the Stipulated Protective Order. (Dkt. 103.) These confidential materials should remain under seal.

I. LEGAL STANDARD

Local Civil Rule 5 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) [] along with a proposed order” that “shall recite the findings required by governing case law to support the proposed sealing.”

The materials that Plaintiffs move for leave to seal include highly confidential and proprietary business and technological information of the Defendants and third parties and should be kept under seal permanently for the reasons described below.

II. DESCRIPTION OF MATERIALS SOUGHT TO BE SEALED

Plaintiffs seek leave to file under seal an un-redacted version of Plaintiffs’ Motion for Leave to File Supplemental Materials in Support of their Second Motion to Compel Responsive Documents Related to Defendants’ ’374 and accompanying Exhibit A. Specifically, the sensitive

information that Plaintiffs move for leave to file under seal, and to redact from a publicly filed version, includes proprietary and commercially sensitive information and documents of Defendants and third parties.

III. 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-REP-DWD, 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 has had reasonable opportunity to object. Plaintiffs’ sealing motion was publicly docketed a week ago on March 19, 2021, in accordance with Local Civil Rule 5, and Defendants now file this memorandum in support of sealing. Since the “public has had ample opportunity to object” to Plaintiffs’ motion and “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.”).

Second, Plaintiffs seek to seal and redact from the public record only information that the parties must keep confidential pursuant to the Stipulated Protective Order. (Dkt. 103.) Plaintiffs have filed publicly a redacted version of Plaintiffs’ Motion for Leave to File Supplemental Materials in Support of their Second Motion to Compel Responsive Documents Related to Defendants’ ’374 Patent Infringement Counterclaim and Exhibit A thereto (Dkt. 507), in addition to a sealed version, and have 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*, 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 Defendants, Plaintiffs, and/or third parties. *Id.* at *4. The information that Plaintiffs seek to seal includes confidential, proprietary, and competitively sensitive business information of Defendants, who 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.

Third, there is support for filing portions of Plaintiffs’ Motion for Leave to File Supplemental Materials in Support of their Second Motion to Compel Responsive Documents Related to Defendants’ ’374 Patent Infringement Counterclaim and accompanying Exhibit A under seal, with a publicly filed version containing strictly limited redactions. 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. As noted, the portions of Plaintiffs’ Motion for Leave to File Supplemental Materials in Support of their Second Motion to Compel Responsive Documents Related to Defendants’ ’374 Patent Infringement Counterclaim and accompanying Exhibit A that are redacted concern confidential information of Defendants and/or third parties.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiffs’ Motion to Seal be granted and that such sealing be maintained until further Order of this Court.

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