

**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-LO-TCB

**MEMORANDUM IN SUPPORT OF COUNTERCLAIM PLAINTIFFS’
MOTION FOR LEAVE TO FILE DOCUMENTS UNDER SEAL**

Pursuant to Local Civil Rule 5(C), Counterclaim Plaintiffs Altria Client Services, LLC (“ACS”), Philip Morris USA Inc. (“PM USA”), and Philip Morris Products S.A. (“PMP”) (collectively, “PMP/Altria”) hereby move the Court for leave to file PMP/Altria’s Motion for Leave to Serve Supplemental Expert Reports (“Motion”) and accompanying Exhibits 2–21, under seal.

All of the materials Counterclaim Plaintiffs seek to file under seal are confidential under the stipulated protective order.

I. DESCRIPTION OF MATERIALS SOUGHT TO BE SEALED

Counterclaim Plaintiffs seek leave to file the following documents under seal:

- PMP/Altria’s Memorandum in Support of Their Motion for Leave to Serve Supplemental Expert Reports

- Exhibit 2, Email chain between J. Koh and J. Michalik (Nov. 5, 2020)
- Exhibit 3, RJREDVA_001449123, Regulatory Submission Support for the Vuse Alto Electronic Nicotine Delivery System (ENDS)
- Exhibit 4, RJREDVA_001450878, Alto Premarket Tobacco Product Application
- Exhibit 5, Deposition of E. Hunt (Nov. 20, 2020)
- Exhibit 6, Email from J. Michalik to J. Koh (Feb. 19, 2021)
- Exhibit 7, Reynolds' Third Supp. Resp. to Interrog. No. 16 (Feb. 19, 2021)
- Exhibit 8, Reynolds' Fourth Supp. Resp. to Interrog. No. 1 (Mar. 5, 2021)
- Exhibit 9, Expert Report of K. Kodama (Mar. 31, 2021)
- Exhibit 10, Deposition of E. Hunt (Apr. 14, 2021)
- Exhibit 11, Expert Report of P. Meyer (Feb. 24, 2021)
- Exhibit 12, Expert Report of J. Abraham (Feb. 24, 2021)
- Exhibit 13, Ltr. from D. McNeely to J. Michalik (Apr. 26, 2021)
- Exhibit 14, Email from J. Michalik to D. McNeely (Apr. 30, 2021)
- Exhibit 15, Supp. Expert Report of P. Meyer (Apr. 26, 2021)
- Exhibit 16, Deposition of S. Peddycord (Apr. 16, 2021)
- Exhibit 17, Reynolds' Initial Disclosures (Sept. 9, 2021)
- Exhibit 18, Reynolds' Third Supp. Resp. to Interrog. No. 4 (Mar. 24, 2021)
- Exhibit 19, Reb. Report of R. Sullivan (Mar. 24, 2021)
- Exhibit 20, Supp. Expert Report of J. Abraham (Apr. 26, 2021)
- Exhibit 21, Email from L. Smith (Apr. 26, 2021)

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-272, 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. Counterclaim Defendants will have an opportunity to respond, and once the “public has had ample opportunity to object” to PMP/Altria’s 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, PMP/Altria seeks to seal and to redact from the public record only information that the parties must keep confidential by the stipulated protective order. PMP/Altria will file publicly a redacted version of the Motion, in addition to a sealed version. 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 public has no legitimate interest in information confidential to PMP/Altria and Counterclaim Defendants. *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 PMP/Altria seeks to seal and redact includes confidential, proprietary, and competitively sensitive business information of PMP/Altria, Counterclaim Defendants, and/or third parties, each of which could face harm if such information were to be released publicly.

Third, there is support for PMP/Altria’s Motion, under seal, with a publicly filed version containing strictly limited redactions. As an initial matter, the stipulated protective order requires that this information remain confidential. And the redacted portions of the Motion only pertain to this confidential information. Moreover, the exhibits filed under seal contain competitively sensitive business information. Sealing these materials is therefore proper because the public’s interest in access is outweighed by a party’s interest in “preserving confidentiality” of limited amounts of confidential information “normally unavailable to the public.” *Flexible Benefits Council v. Feltman*, No. 08-cv-371, 2008 WL 4924711 (E.D. Va. Nov. 13, 2008), at *1; *U.S. ex rel. Carter*, 2011 WL 2077799, at *3.

III. CONCLUSION

For the foregoing reasons, PMP/Altria respectfully requests that the Court grant this Motion and enter the attached proposed Order.

Dated: April 30, 2021

Respectfully submitted,

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