

**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 Counterclaim Plaintiffs’ PMP/Altria’s Memorandum in Support of their Opposition to RJR’s Motion for Summary Judgment (“Memorandum”) and Exhibits 1-2, 7-11, 13-15 and 17-25 under seal.

PMP/Altria also moves for leave to file publicly a redacted version of the Memorandum that omits confidential information. All of the materials PMP/Altria seeks to file under seal are confidential under the stipulated protective order.

I. DESCRIPTION OF MATERIALS SOUGHT TO BE SEALED

PMP/Altria seeks leave to file the following documents under seal:

- An un-redacted version of PMP/Altria’s Memorandum;

- Exhibit 1, which is excerpts from the deposition of Joseph C. McAlexander III (May 14, 2021);
- Exhibit 2, which is excerpts from the deposition of Loi Ying Liu (March 23, 2021);
- Exhibit 7, which is the Declaration of John Abraham relating to U.S. Patent Nos. 10,104,911 and 10,555,556 (June 15, 2021);
- Exhibit 8, which is the Declaration of John Abraham relating to U.S. Patent No. 10,104,911 (June 15, 2021);
- Exhibit 9, which is excerpts from the deposition of Kelly Kodama (May 28, 2021);
- Exhibit 10, which is the Responsive Expert Report of Kelly Kodama (March 24, 2021);
- Exhibit 11, which is excerpts from the deposition of John Abraham (May 11, 2021);
- Exhibit 13, which is excerpts from RJR's Objections and Responses to PMP/Altria's First Set of Interrogatories (September 17, 2020);
- Exhibit 14, which is excerpts from the deposition of Eric Hunt (April 14, 2021);
- Exhibit 15, which is excerpts from the deposition of Nicholas Gilley (December 3, 2020);
- Exhibit 17, which is the Declaration of Joseph C. McAlexander (June 15, 2021);
- Exhibit 18, which is the Declaration of Harold J. Walbrink (June 15, 2021);
- Exhibit 19, which is excerpts from RJR's 1st Supplemental Response to PMP/Altria's Eighth Set of Interrogatories (April 28, 2021);
- Exhibits 20 - 24, which are technical documents produced by RJR; and
- Exhibit 25, which is excerpts from the deposition of Sean Daugherty (November 20, 2020);

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-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 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-JCC, 2009 WL 1248114, at *9 (E.D. Va. Apr. 30, 2009); *U.S. ex rel. Carter v. Halliburton Co.*, No. 10-cv-00864-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, 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 its Memorandum in addition to a sealed version. Moreover, the exhibits filed under seal contain competitively sensitive information the disclosure of which would cause harm. 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 that is 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 filing portions of PMP/Altria’s Memorandum 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 Memorandum 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 that is “normally unavailable to the public.” *Flexible Benefits Council v. Feltman*, No. 08-cv-00371-JCC, 2008 WL 4924711, 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: June 16, 2021

Respectfully submitted,

/s/ Maximilian A. Grant
Maximilian A. Grant (VSB No. 91792)
max.grant@lw.com
Lawrence J. Gotts (VSB No. 25337)
lawrence.gotts@lw.com
Matthew J. Moore (*pro hac vice*)
matthew.moore@lw.com
Jamie Underwood
jamie.underwood@lw.com (*pro hac vice*)
LATHAM & WATKINS LLP
555 Eleventh Street, N.W., Ste. 1000
Washington, DC 20004
Tel: (202) 637-2200; Fax: (202) 637-2201

Clement J. Naples (*pro hac vice*)
clement.naples@lw.com
LATHAM & WATKINS LLP
885 Third Avenue
New York, NY 10022-4834
Tel: (212) 906-1200; Fax: (212) 751-4864

Gregory K. Sobolski (*pro hac vice*)
Greg.sobolski@lw.com
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111
Tel: (415) 391-0600; Fax: (415) 395-8095

Brenda L. Danek (*pro hac vice*)
brenda.danek@lw.com
LATHAM & WATKINS LLP
330 North Wabash Avenue, Suite 2800
Chicago, IL 60611
Tel: (312) 876-7700; Fax: (312) 993-9767

*Counsel for Defendants and Counterclaim
Plaintiffs Altria Client Services LLC, Philip
Morris USA Inc., and Philip Morris
Products S.A.*

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.