

**IN THE 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.

Case No. 1:20-cv-00393-LO-TCB

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO SEAL

Pursuant to Rule 5.2(d) of the Federal Rules of Civil Procedure and Rule 5(C) of the Local Civil Rules, Plaintiffs RAI Strategic Holdings, Inc., and R.J. Reynolds Vapor Company (collectively, “Plaintiffs”) respectfully submit this memorandum in support of their Motion to Seal Reynolds’s Reply in support of Motion to Dismiss Counterclaim and Affirmative Defenses and Opposition to Counterclaim Plaintiffs’ Cross-Motion for Attorneys’ Fees and Costs and accompanying Exhibits P, Q, R, S, T, and U.

The proposed sealed material includes confidential, proprietary, and competitively sensitive business information of Plaintiffs, Defendants, and/or third parties and 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, the party must file contemporaneously with the material for which sealing is requested a motion for leave to file under seal, a non-confidential supporting memorandum, and a separate non-confidential notice that specifically identifies the motion as a sealing motion, and a non-confidential proposed order that recites the findings required by governing case law to support the propose sealing. The non-confidential memorandum must include:

- (1) A non-confidential description of what material has been filed under seal;
- (2) A statement why sealing is necessary, and why another procedure will not suffice, as well as appropriate evidentiary support for the sealing request;
- (3) References to the governing case law, an analysis of the appropriate standard to be applied for that specific filing, and a description of how that standard has been satisfied;
- (4) Unless permanent sealing is sought, a statement as to the period of time the party seeks to have the matter maintained under seal and how the matter is to be handled upon unsealing.

Loc. R. Civ. P. 5(C).

“[T]he right [of the public] to inspect and copy judicial records is not absolute.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978). Access to court records has been denied where “court files might have become a vehicle for improper purposes.” *Id.* 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). As set forth in the Fourth Circuit’s decision in *Ashcraft v. Connoco, Inc.*, a court has the authority to seal court documents “if the public’s right of access is outweighed by competing interests.” 218 F.3d 282, 288 (4th Cir. 2000). Before granting a motion to seal, a court must consider the following: “(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.” *Id.*; *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 met here.

The materials that Plaintiffs move for leave to seal include highly confidential and proprietary business information of the Plaintiffs, Defendants, and/or 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 un-redacted versions of Reynolds’s Reply in support of Motion to Dismiss Counterclaim and Affirmative Defenses and Opposition to Counterclaim Plaintiffs’ Cross-Motion for Attorneys’ Fees and Costs and accompanying Exhibits P, Q, R, S, T, and U.

Specifically, the sensitive information that Plaintiffs move for leave to file under seal, and to redact from the publicly filed versions, includes:

1. Reynolds's Reply in support of Motion to Dismiss Counterclaim and Affirmative Defenses and Opposition to Counterclaim Plaintiffs' Cross-Motion for Attorneys' Fees and Costs;
2. Exhibit P, letter from Nicole Smith to Jennifer Koh, March 3, 2021;
3. Exhibit Q, excerpts of the deposition transcript of Robert L. Ripley (March 15, 2021);
4. Exhibit R, excerpt of the deposition transcript of Grier S. Fleischhauer (March 11, 2021);
5. Exhibit S, email correspondence from Jennifer Koh to Nicole Smith, March 10, 2021;
6. Exhibit T, email correspondence from Nicole Smith to Jennifer Koh, March 18, 2021;
7. Exhibit U, pages 13 and 14 of the Expert Report of Dr. Travis Blalock.

III. ARGUMENT

A. THE PUBLIC HAS HAD AMPLE NOTICE.

The public has received notice of the request to seal and has had reasonable opportunity to object. Plaintiffs' sealing motion was publicly docketed in accordance with Local Civil Rule 5. Defendants will have an opportunity to respond and, once 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, may be deemed 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.").

B. PLAINTIFFS HAVE SOUGHT THE LEAST DRASTIC MEASURES.

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 a publicly redacted version of Reynolds's Reply in support of Motion to Dismiss Counterclaim and Affirmative Defenses and Opposition to Counterclaim Plaintiffs' Cross-Motion for Attorneys' Fees and Costs and accompanying Exhibits P, Q, R, S, T, and U, in addition to sealed versions, and have redacted only those limited portions they seek 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 information that Plaintiffs seek to seal includes confidential, proprietary, and competitively sensitive business information of Plaintiffs, Defendants, and/or third parties, each of which could face harm if such information were to be released publicly. The public has no legitimate interest in information that is confidential to Plaintiffs, Defendants, and/or third parties. *Id.* at *4. No procedure other than filing this information under seal is sufficient to preserve the confidential and sensitive nature of the information.

C. THE MATERIALS ARE HIGHLY SENSITIVE AND CONFIDENTIAL.

There is support for filing Reynolds's Reply in support of Motion to Dismiss Counterclaim and Affirmative Defenses and Opposition to Counterclaim Plaintiffs' Cross-Motion for Attorneys' Fees and Costs and accompanying Exhibits P, Q, R, S, T, and U under seal. Reynolds's Reply in support of Motion to Dismiss Counterclaim and Affirmative Defenses and Opposition to Counterclaim Plaintiffs' Cross-Motion for Attorneys' Fees and Costs and accompanying Exhibits P, Q, R, S, T, and U contain material that falls within the scope of the

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