

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 PMI/ALTRIA'S MOTION FOR
LEAVE TO FILE DOCUMENTS UNDER SEAL**

Pursuant to Local Civil Rule 5(C), Plaintiffs Altria Client Services, LLC, Philip Morris USA Inc., and Philip Morris Products S.A. (collectively, "PMI/Altria") hereby move the Court for leave to file their Brief in Support of PMI/Altria's *Daubert* Motion to Exclude Design-Around Testimony of RR's Expert, David Clissold ("Brief") and Exhibits 1-5, 9, 10 under seal.

PMI/Altria also respectfully move for leave to file publicly a redacted version of the Brief that omits confidential information. All of the materials PMI/Altria seek to file under seal have been designated by at least one party as confidential under the stipulated protective order.

I. DESCRIPTION OF MATERIALS SOUGHT TO BE SEALED

PMI/Altria seek leave to file the following documents under seal:

- An un-redacted version of their Brief in Support of PMI/Altria's *Daubert* Motion to Exclude Design-Around Testimony of RJR's Expert, David Clissold;

- Exhibit 1, which are excerpts from the confidential Expert Report of David B. Clissold, Esq. in Response to Amended and Supplemented Opening Report of Stacy Ehrlich;
- Exhibit 2, which are excerpts from the confidential deposition transcript of David Clissold taken May 14, 2021;
- Exhibit 3, which are excerpts from the confidential Report of Ryan Sullivan, Ph.D. (March 24, 2021);
- Exhibit 4, which are excerpts from the confidential Opening Expert Report of Paul K. Meyer (February 24, 2021);
- Exhibit 5, which are excerpts from the confidential deposition transcript of Ryan Sullivan, Ph.D. taken May 11, 2021;
- Exhibit 9, which are excerpts from the confidential Opening Expert Report of Stacy Ehrlich (February 24, 2021);
- Exhibit 10, which are excerpts from the confidential transcript of the Open/Closed Sessions from 337-TA-1199 (January 27, 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-00272, 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. Defendants will have an opportunity to respond, and once the “public has had ample opportunity to object” to PMI/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, PMI/Altria seek to seal and to redact from the public record only information that the parties must keep confidential pursuant to the stipulated protective order. PMI/Altria will file publicly a redacted version of its Brief 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 PMI/Altria and RJR. *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 PMI/Altria seek to seal and redact

includes confidential, proprietary, and competitively sensitive business information of the parties 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 PMI/Altria's Brief 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 Brief only pertain to this confidential information. Moreover, the exhibits filed under seal contain information that the parties have designated as 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, 2008 WL 4924711, at *1; *U.S. ex rel. Carter*, 2011 WL 2077799, at *3.

III. CONCLUSION

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

Dated: January 21, 2022

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 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.