

**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 REYNOLDS'S MOTION TO SEAL DOCUMENTS IN
SUPPORT OF OPPOSITION TO PM/ALTRIA'S DAUBERT MOTION TO
EXCLUDE THE DESIGN-AROUND TESTIMONY OF DAVID CLISSOLD**

Pursuant to Rule 5.2(d) of the Federal Rules of Civil Procedure and Rule 5(C) of the Local Civil Rules, RAI Strategic Holdings, Inc., and R.J. Reynolds Vapor Company (collectively, "Reynolds") respectfully submit this memorandum in support of their Motion to Seal. The proposed sealed material includes confidential, proprietary, and competitively sensitive business information of Reynolds and Altria Client Services LLC, Philip Morris USA Inc., and Philip Morris Products S.A. (collectively "PM/Altria") 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, 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 288, 302 (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. 11CV00272-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 Reynolds moves for leave to seal include highly confidential and proprietary business information of Reynolds, PM/Altria, and third parties, and should be kept under seal permanently for the reasons described below.

II. DESCRIPTION OF MATERIALS SOUGHT TO BE SEALED

Reynolds seeks leave to file under seal un-redacted versions of the following:

1. Reynolds's Opposition to PM/Altria's Daubert Motion to Exclude the Design-Around Testimony of David Clissold; and
2. Accompanying Exhibits 1-4 and 6.

Specifically, the sensitive information that Reynolds moves for leave to file under seal, and to redact from the publicly filed versions relates to and discusses confidential information of Reynolds, PM/Altria, and third parties, such as expert reports that include descriptions of confidential license agreement terms, internal business documents, and deposition testimony regarding confidential business information.

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. Reynolds's sealing motion was publicly docketed in accordance with Local Civil Rule 5. PM/Altria will have an opportunity to respond and, once the "public has had ample opportunity to object" to Reynolds's 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. REYNOLDS HAS SOUGHT THE LEAST DRASTIC MEASURES.

Reynolds seeks to seal and redact from the public record only information that the parties must keep confidential pursuant to the Stipulated Protective Order. (Dkt. 103.) Reynolds has filed publicly redacted versions of Reynolds's Opposition to PM/Altria's Daubert Motion to Exclude the Design-Around Testimony of David Clissold and accompanying Exhibits 1-4 and 6, in addition to sealed versions of those filings, and has 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 information that Reynolds seeks to seal includes confidential, proprietary, and competitively sensitive business information of Reynolds, PM/Altria, and 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 Reynolds, PM/Altria, and 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 Opposition to PM/Altria's Daubert Motion to Exclude the Design-Around Testimony of David Clissold and accompanying Exhibits 1-4 and 6 under seal, with publicly filed versions containing strictly limited redactions. These filings contain material that falls within the scope of the Stipulated Protective Order, (Dkt. 103.), including confidential license terms and discussions of those terms, along with other confidential internal business documents. 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); *United States. ex rel. Carter*, 2011 WL 2077799, at *3. In particular, disclosing the confidential terms of license agreements, and the other internal business documents, would be highly prejudicial to the business interests of Reynolds, PM/Altria, and third parties, and the public has no legitimate interest in obtaining such information.

IV. CONCLUSION

For the foregoing reasons, Reynolds respectfully requests that that the Court grant this Motion and enter the proposed Order.

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