

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, :  
 :  
 Plaintiff, :  
 v. : Civil Action  
 : No. 99-2496 (GK)  
 PHILIP MORRIS INCORPORATED, :  
 et al., :  
 :  
 Defendants. :

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O R D E R #36<sup>1</sup>

Addendum to Protective Order for Highly Sensitive Information

Upon consideration of the parties' numerous submissions regarding the provision of additional protection for highly sensitive materials, the oral representations of counsel, and the entire record herein, it is this \_\_\_\_\_ day of November 2000, **ORDERED** that:

1. This Addendum shall supplement the Court's Protective Order Governing Confidential Information (Order #7, filed March 3, 2000) ("Protective Order"), to provide additional protection for Highly Sensitive Trade Secret Material and Information. All of the terms described in the present Addendum shall have the same meaning and applicability as those used in the Protective Order,

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<sup>1</sup> The Court is, with the issuance of this Order, implementing a new numbering system. Each order (and memorandum opinion) in this case will now be numbered sequentially, based on the date it is issued, with the sole exception of orders relating to motions for admission pro hac vice, which will not be numbered at all. This Addendum, for example, is the thirty-sixth order or opinion in this case, excluding orders relating to motions for admission pro hac vice.

except to the extent that this Addendum specifically provides further protection to certain material and information.

2. The further protections of this Addendum are strictly limited to material and information which are both Trade Secrets and Highly Sensitive.

"Trade Secret" shall be as defined in Paragraph 3 of the Protective Order: i.e., information, including a formula, pattern, compilation, program, device, method, technique or process that

(a) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure and use; and

(b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

"Highly Sensitive" shall be defined as material or information which is so proprietary or competitively sensitive that its disclosure to a competitor would cause irreparable competitive injury. For purposes of this Addendum, Highly Sensitive Trade Secret Material and Information shall be divided into two categories: Category II (Formula Information, as defined in Paragraph 10 herein) and Category I (all other information).

3. Any party may designate material or information as

Highly Sensitive Trade Secret upon a good faith basis after reasonable due diligence that the material or information meets the criteria of Paragraph 2 of this Addendum. Nothing in this Addendum, however, creates a presumption or implies that any material or information designated by a party as Highly Sensitive Trade Secret actually meets the criteria of Paragraph 2, and such determination may be made at a later time by this Court.

4. Unless the additional protections of Paragraph 10 of the Addendum are sought (i.e., the material or information is Category II), the producing party shall designate material or information as Highly Sensitive Trade Secret by placing or affixing on the material or information in a manner which will not interfere with its legibility the words "[INITIALS OF DESIGNATING PARTY] - CONFIDENTIAL - CATEGORY I: US v. PM, 99CV2496."

5. Category I material or information shall be produced in the following manner:

a. The producing defendant shall produce one true and correct copy of such material or information to a Designated Attorney or Designated Staff person. A "Designated Attorney" is defined as an attorney who is a full-time employee of the Department of Justice, who represents the United States in the present litigation, and who has a need to review Category I information for purposes of the present litigation. A "Designated Staff" person is defined as a non-attorney who is a full-time

employee of the Department of Justice, who is assisting a Designated Attorney in the present litigation, and who has a need to review Category I information for purposes of the present litigation.

b. Such material or information shall be produced and maintained in a locked, windowless, and otherwise secure room, on premises exclusively occupied by Department of Justice personnel. Such premises may consist of any floor, area, or suite of offices in a building so long as such area, floor, or suite of offices are exclusively occupied by Department of Justice personnel. Access to such premises shall also require key card access, and shall be limited to Designated Attorneys and Designated Staff persons.

c. All offices of Designated Attorneys and Designated Staff persons shall be made sufficiently secure and isolated from other Department of Justice personnel, so as to prevent the accidental release of such information. Designated Attorneys and Designated Staff persons may remove and make as many copies as they deem appropriate of Category I material or information, provided that such copies remain at all times in the secure offices of Designated Attorneys or Designated Staff persons, or are removed from the premises pursuant to another provision of this Addendum.

d. Only Designated Attorneys, and not more than fifteen (15) Designated Staff persons, shall have access to copies of Category I material and information.

6. No person shall disclose or permit the disclosure, in any form whatsoever, of any Category I material or information to any other person or entity, except in the following circumstances:

a. Disclosure may be made to the Court and its personnel without restriction. Paragraph 11 of the Protective Order shall apply in its entirety to any such filing of a document containing Category I information or information derived from Category I information, except that the cover page of the filed document shall be marked: "[INITIALS OF DESIGNATING PARTY] - CONFIDENTIAL - CATEGORY I: US v. PM, 99CV2496."

b. Disclosure may be made to counsel in this action and staff persons employed by such counsel, provided that prior to disclosure, each such person must agree to be bound by the terms of the Protective Order and this Addendum by executing the Confidentiality Agreement annexed hereto as Exhibit A.

c. Disclosure may be made to any officer, director, or employee of any party who is providing assistance in connection with this litigation, to the extent necessary to render such assistance, provided that:

i. Prior to disclosure, each such person must agree to be bound by the terms of the Protective Order and this Addendum by executing the Confidentiality Agreement annexed hereto as Exhibit A; and

ii. Disclosure may not be made to any officer, director, or employee of any party which is a manufacturer of cigarettes, or which is currently a corporate affiliate of a manufacturer of cigarettes, absent agreement of the party producing and designating the Category I material or information or order of the Court for good cause shown.

d. Disclosure may be made to persons whose depositions are taken by any party so long as such disclosure is made during the course of the deposition, provided that:

i. Prior to disclosure, each such person must agree to be bound by the terms of the Protective Order and this Addendum by executing the Confidentiality Agreement annexed hereto as Exhibit A; and

ii. Disclosure of Category I material or information produced by one party may not be made to any deponent who is currently an officer, director, or employee of any other party which is a manufacturer of cigarettes, or which is currently a corporate affiliate of a manufacturer of cigarettes, absent agreement of the party producing and designating the Category I material or information or order of the Court for good cause shown.

e. Disclosure may be made to consultants, investigators, or

experts (collectively "experts") employed by the parties or their counsel to assist in the preparation and trial of this litigation, provided that:

i. Prior to disclosure, each such person must agree to be bound by the terms of the Protective Order and this Addendum by executing the Confidentiality Agreement annexed hereto as Exhibit A; and

ii. Disclosure of Category I material or information produced by one party may not be made to any expert who is currently an officer, director, or employee of any other party which is a corporate affiliate of a manufacturer of cigarettes, absent agreement of the party producing and designating the Category I material or information of the Court for good cause shown; and

iii. Disclosure of Category I material or information may not be made to any expert who has been determined by a Court or other competent tribunal to have violated the terms of a protective order in any other litigation.

f. Disclosure may be made to any attorney representing a party to any other lawsuit relating to smoking and health, provided that such attorney agrees to be bound by all of the provisions of the Protective Order and this Addendum by executing a Confidentiality Agreement and by executing, filing, and serving an Affidavit of Compliance with this Court, in the forms attached hereto as Exhibits A and B, respectively. Each such attorney shall thereafter be bound by all of the provisions of this Addendum and all of the terms of the Protective Order.

g. Disclosure may be made to any governmental agency or law enforcement agency, provided that prior to disclosure, an appropriate representative of the agency must agree to be bound by all of the provisions of the Protective Order and this Addendum by executing a Confidentiality Agreement and by executing, filing, and serving an Affidavit of Compliance with this Court, in the forms attached hereto as Exhibits A and C, respectively. Each such agency shall thereafter be bound by all of the provisions of this Addendum and all of the terms of the Protective Order.

h. The Confidentiality Agreements executed pursuant to this paragraph shall be retained by counsel for the receiving party.

7. No material or information relevant to this action shall be withheld from production in this litigation on the basis that it is Confidential or Highly Sensitive Trade Secret.

8. No material or information shall be produced on paper which is specially treated in any manner so as to limit the ability of the receiving party to copy or image the material or information. Any copy or image made by any receiving party, however, shall contain in full the Confidential Category I designation "[INITIALS OF DESIGNATING PARTY] - CONFIDENTIAL - CATEGORY I: US v. PM, 99CV2496."; and all copies and images shall be entitled to the same protections as the material or information originally produced.

9. Provided that portions of testimony meet the standard for designation as Highly Sensitive Trade Secret Information as defined in Paragraph 2, testimony given during depositions may be designated Highly Sensitive Trade Secret Information by indicating that fact on the record at the deposition. If a Designating Party has advised the court reporter that Highly Sensitive Trade Secret Information has been disclosed during a deposition, the court reporter shall include on the cover page of the transcript the designation "[INITIALS OF DESIGNATING PARTY] - CONFIDENTIAL - CATEGORY I: US v. PM, 99CV2496." Within ten (10) business days of receipt of the

initial deposition transcript, the Designating Party shall advise the court reporter and opposing counsel of the specific pages and lines in which Highly Sensitive Trade Secret Information appears. The court reporter shall supplement the transcript to mark the specific pages and lines designated as Highly Sensitive Trade Secret Information and amend the cover page to reflect that these specific designations have been made. The Plaintiff may have immediate access to the deposition transcript, but prior to receipt of the page and line designations, shall treat the entire transcript as Highly Sensitive Trade Secret Information. In the event that the Designating Party does not designate specific pages and lines as Highly Sensitive Trade Secret Information within ten (10) business days of receipt of the initial designation transcript, the entire transcript shall cease to be treated as Highly Sensitive Trade Secret Information.

10. Category II protections: The further protection of this Paragraph shall apply to material and information produced by any defendant which meets the definition of Paragraph 2 herein for Highly Sensitive Trade Secret Information and which also relates to formulas for cigarettes, as detailed in Paragraph 10(a) below:

a. The designation "Trade Secret Formula" (also referred to as "Category II") shall be limited to Highly Sensitive Trade Secret Material and Information which discloses formulas for cigarettes designed, manufactured or marketed by defendants or their corporate affiliates. The Trade

Secret Formula designation shall not apply to material or information relating to testing that was, is, or could be performed by a third party on commercially-available cigarettes, including but not limited to quality control testing.

b. This paragraph supplements this Court's Protective Order and other provisions of this Addendum in order to provide additional protection for Trade Secret Formula Material and Information. All of the provisions of this Court's Protective Order and this Addendum apply with equal force to Trade Secret Formula Material and Information except to the extent that this Paragraph 10 specifically provides further protection to such material or information.

c. Any producing defendant may designate material or information as Trade Secret Formula upon a good faith determination that the material or information meets the criteria of Paragraphs 2 and 10(a). However, nothing in this Addendum creates a presumption or implies that any material or information designated by a defendant as Trade Secret Formula actually meets the criteria of Paragraphs 2 and 10(a), and such determination may be made at a later time by this Court.

d. The producing defendant shall designate material or information as Trade Secret Formula by placing or affixing on the material or information in a manner which will not interfere with its legibility the words "[INITIALS OF DESIGNATING PARTY] - CONFIDENTIAL - CATEGORY II: US v. PM, 99CV2496."

e. Within 14 days of the filing of this Addendum, each party which has Trade Secret Formula Material or Information covered by a pending discovery request in this litigation shall notify the requesting party of the estimated volume of such material or information.

f. No person shall disclose or permit the disclosure, in any form whatsoever, of any Category II material or information to any other person or entity, except in the following circumstances and after the execution of the appropriate Confidentiality Agreement or Affidavit of Compliance, attached hereto as Exhibits A, B and C:

i. Disclosure may be made to the Court and its personnel.

Paragraph 11 of the Protective Order shall apply to any such filing of Category II material or information except that 1) the cover page of the filed document shall be marked: "[INITIALS OF DESIGNATING PARTY] - CONFIDENTIAL - CATEGORY II: US v. PM, 99CV2496.", 2) unredacted copies of such filing shall be served only upon counsel for the producing party, and 3) counsel for other parties shall be served copies of such filing with the Category II material or information redacted.

ii. Disclosure may be made to Designated Attorneys and Designated Staff persons at the United States Department of Justice. The Department of Justice shall be permitted to maintain one copy of Category II material or information at its Washington, D.C. offices. Such material or information shall be produced and maintained in a locked, windowless, and otherwise secure room ("Secure Room") on premises exclusively occupied by Department of Justice personnel. Such premises may consist of any floor, area, or suite of offices in a building so long as such area, floor, or suite of offices are exclusively occupied by Department of Justice personnel. Category II material and information may be stored in the same secure room required for Category I material and information (see Paragraph 5(b) herein), provided that the two categories of information are stored in separate areas of the room, in separate locked file cabinets, with procedures in place so that the two categories of information are not inadvertently intermingled. Access to such premises shall also require key card access. Access to the Secure Room at the Department of Justice shall be restricted to Sharon Y. Eubanks and Paul M. Honigberg. Other Designated Attorneys and Designated Staff at the Department of Justice who are actively involved in the litigation may have access to the Category II material and information for review as necessary in the litigation only upon the express designation of either Ms. Eubanks or Mr. Honigberg. A permanent record of individuals who have had access to Category II documents shall be maintained by the Department of Justice. All Category II material and information, as well as any notes made by Designated Attorneys and Designated Staff persons pertaining thereto, shall be kept in the Category II area within the Secure Room when not in use. The Department of Justice shall not make additional copies of Category II material or information except (1) for filings with the

Court, (2) by consent of the producing party, or (3) by order of the Court. No computer maintained in the secure room may be networked, or otherwise linked, to any computer located outside the secure room. The computers in the secure room may be linked only with other computers in the secure room and may be used only by Designated Attorneys and Designated Staff persons.

iii. Disclosure of Category II information may be made to experts employed by the Department of Justice to assist in the preparation and trial of this litigation provided that 1) such experts may review such material or information but may not be provided with nor make copies of such material or information absent consent of the producing party or further order of this Court, and 2) prior to disclosure, the identity and resume of any such experts shall be provided to the Court in camera and ex parte along with an affirmation that such expert is not currently employed by a manufacturer of cigarettes or a corporate affiliate of a manufacturer of cigarettes.

iv. Disclosure of Category II material or information may be made to persons whose depositions are taken by the Plaintiff so long as such disclosure is made during the course of the deposition, provided that 1) the deponent is a current or former officer, director, or employee of the producing party or a corporate affiliate of the producing party, 2) the deponent is an expert retained by the producing party (individually or jointly by defendants), 3) by consent of the producing party, or 4) by further order of this Court. Any Category II documents used as deposition exhibits shall be retained only by the Department of Justice and counsel for the producing party.

v. Disclosure of documents may be made to any other counsel of record in this litigation in the following manner: (1) they shall be marked: "[INITIALS OF DESIGNATING PARTY] - CONFIDENTIAL - CATEGORY II: US v. PM, 99CV2496.", (2) unredacted copies of such filing shall be served only upon counsel for the producing party, and (3) counsel for other parties shall be served copies of such filing with the Category II material or information redacted.

vi. Disclosure shall not be made to any attorney representing a party to any other lawsuit or to any other

governmental agency or law enforcement agency absent the consent of the producing party or further order of this Court (or another court of appropriate jurisdiction).

vii. No material or information shall be withheld from production or in any way redacted other than as expressly permitted above on the basis that they contain Trade Secret Formula Material or Information.

viii. To the extent that copies of Category II material or information are permitted to be removed from the Secure Room pursuant to a provision of this Addendum, such copies must remain at all times in the Washington, D.C., metropolitan area.

11. Provided that portions of testimony meet the standard for designation as Highly Sensitive Trade Secret Information as defined in Paragraphs 2 and 10, testimony given during depositions may be designated as Category II information by indicating that fact on the record at the deposition. If a Designating Party has advised the court reporter that Category II information has been disclosed during a deposition, the court reporter shall include on the cover page of the transcript the designation "[INITIALS OF DESIGNATING PARTY] - CONFIDENTIAL - CATEGORY II: US v. PM, 99CV2496." Within ten (10) business days of receipt of the initial deposition transcript, the Designating Party shall advise the court reporter and opposing counsel of the specific pages and lines in which Category II information appears. The court reporter shall supplement the transcript to mark the specific pages and lines designated as Category II information and amend the cover page

to reflect that these specific designations have been made. The Plaintiff may have immediate access to the deposition transcript, but prior to receipt of the page and line designations, shall treat the entire transcript as Category II information. In the event that the Designating Party does not designate specific pages and lines as Category II information within ten (10) business days of receipt of the initial designation transcript, the entire transcript shall cease to be treated as Category II.

12. Nothing in this Addendum shall prevent or otherwise restrict any counsel in this action from rendering legal, non-business advice to their clients and, in the course thereof, relying generally on an examination of Category I or Category II material or information, provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not directly or indirectly disclose any Category I or Category II material or information.

13. If any party or individual who has been given access to Category I or Category II material or information in accordance with this Addendum is served with a subpoena requiring disclosure or production of such material or information or documents containing or embodying it, such person shall promptly notify the party producing the Category I or Category II material or information and provide it with a copy of the subpoena.

14. If any attorney of record in this action or any attorney who has filed an Affidavit of Compliance becomes aware of any violation of, or facts constituting good cause to believe any violation of this Addendum or the Protective Order may have occurred or is about to occur, such attorney shall immediately report that there may have been such a violation to the Court.

15. This Addendum, the Protective Order, and the undertakings and agreements embodied therein shall survive Termination (as Termination is defined in Paragraph 16 below) and continue in full force and effect thereafter absent further order of this Court.

16. Within thirty (30) days of Termination, all material and information, including but not limited to court papers, drafts, and notes containing Category I or Category II material or information and all copies thereof (other than exhibits to the official court record) shall be returned to the producing party or, at the sole option of the producing party, shall be destroyed.

"Termination" is defined for purposes of this Paragraph as conclusion of all aspects of this litigation, or insofar as production is made for use in other litigation, conclusion of that other litigation.

17. To the extent that any attorney, expert or other individual is bound by a protective order in other litigation which is more stringent than the Protective Order or Addendum in the present

litigation, that individual shall be bound by the more stringent protective order.

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Gladys Kessler  
U.S. District Judge

**Copies to:**

Sharon Y. Eubanks  
Department of Justice  
Civil Division, Torts Branch  
P.O. Box 340  
Ben Franklin Station  
Washington, DC 20044

Timothy M. Broas  
Winston & Strawn  
1400 L Street, NW  
Washington, DC 20005

Fred W. Reinke  
Clifford, Chance, Rogers & Wells  
607 14th Street, NW  
Washington, DC 20005



EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 99-CV-02496 (GK)
	)	
PHILIP MORRIS INCORPORATED, et al., )	)	
	)	
Defendants.	)	

AFFIDAVIT OF COMPLIANCE

STATE OF \_\_\_\_\_ )  
 \_\_\_\_\_ )  
 COUNTY OF \_\_\_\_\_ )

COMES NOW \_\_\_\_\_, who being first duly sworn on oath, states the following:

1. I am an attorney licensed to practice in the State of \_\_\_\_\_.
2. I am one of the attorneys for the plaintiffs in the case of \_\_\_\_\_

(insert caption, venue and court file number).

3. I hereby acknowledge receipt of and agree to be bound by the terms thereof of the Protective Order dated March 2, 2000, filed March 3, 2000 ("Protective Order"), and the Addendum to Protective Order for Highly Sensitive Material and Information, dated and filed November 15, 2000 ("Addendum"), in United States v. Philip Morris Incorporated, et al, in the District Court for the District of Columbia (hereinafter "Court"), and I hereby submit to the jurisdiction of this Court for the purpose of enforcement of said Protective Order and Addendum.

Dated: \_\_\_\_\_

\_\_\_\_\_  
(Attorney)

Subscribed and sworn to  
before me this \_\_\_\_\_  
day of \_\_\_\_\_, 2000,  
Witness my hand and  
official seal.

\_\_\_\_\_  
Notary Public

EXHIBIT C

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 99-CV-02496 (GK)
	)	
PHILIP MORRIS INCORPORATED, et al., )	)	
	)	
Defendants.	)	

AFFIDAVIT OF COMPLIANCE

STATE OF \_\_\_\_\_ )  
 )  
 COUNTY OF \_\_\_\_\_ )

COMES NOW \_\_\_\_\_, who being first duly sworn on oath, states the following:

1. I am \_\_\_\_\_ [insert name and title] and I am authorized to represent \_\_\_\_\_ [insert name of agency] for purposes of this Affidavit of Compliance.

2. I hereby acknowledge receipt and agree that \_\_\_\_\_ [insert name of agency] shall be bound by the terms of the Protective Order dated March 2, 2000, filed March 3, 2000 ("Protective Order"), and the Addendum to Protective Order for Highly Sensitive Material and Information, dated and filed November 15, 2000 ("Addendum"), in United States v. Philip Morris Incorporated, et al, in the District Court for the District of Columbia (hereinafter "Court"), and that \_\_\_\_\_ [insert name of agency] hereby submits to the jurisdiction of this Court for the purpose of enforcement of said Protective Order and Addendum.

Dated: \_\_\_\_\_  
\_\_\_\_\_ (Authorized Agent)

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2000  
Witness my hand and official seal.

\_\_\_\_\_  
Notary Public