

Nos. 23-2180, 23-2181

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

ANTHONY DUNN, et al.,
Plaintiffs-Appellants/Cross-Appellees,

v.

SANTA FE NATURAL TOBACCO CO., INC., et al.,
Defendants-Appellees/Cross-Appellants.

On Appeal From The United States District Court
For The District Of New Mexico

No. 1:16-md-2695-JB-LF (MDL No. 2695)
(The Honorable James O. Browning)

**DEFENDANTS-APPELLEES' RESPONSE TO
PLAINTIFFS-APPELLANT'S MOTIONS TO FILE PROVISIONALLY
SEALED BRIEF AND VOLUMES OF THEIR APPENDIX**

Defendants-Appellees/Cross-Appellants Santa Fe Natural Tobacco Co. ("Santa Fe"), Reynolds American Inc., and R.J. Reynolds Tobacco Co. hereby respond to Plaintiffs-Appellants'/Cross-Appellees' Motion To File A Provisionally Sealed Brief and Motion To File Provisionally Sealed Volumes Of The Appendix, both filed on March 4, 2024 (collectively, the "Motions"), and to this Court's March 5, 2024, order directing Defendants-Appellees to respond to the Motions:¹

¹ Defendants-Appellees' response does not need to remain under seal. However, all of the attachments to the response need to remain under seal to

1. Plaintiffs-Appellants did not confer with Defendants-Appellees before filing their Motions, contrary to Tenth Circuit Rule 27.1.

2. Having now reviewed the documents at issue, Defendants-Appellees' position is that *none* need to be filed under seal in this Court, several may be filed publicly without objection, and it is practicable to publicly file a version of the remaining documents with genuinely limited redactions. These redactions are needed to safeguard the ongoing confidentiality interests of three non-parties and, ironically, one of Plaintiffs-Appellants' own experts. A chart summarizing Defendants-Appellees' position follows on page 8.

3. Plaintiffs-Appellants sought the Court's permission to file "provisionally under seal" eight documents (collectively, the "Relevant Documents"):

- (1) Plaintiffs-Appellants' Opening Brief in this Court;
- (2) Expert Testimony of Jennifer Pearson, Ph.D., MPJ ("Pearson Report") (Plaintiffs-Appellants' App'x, Vol. II);
- (3) Report of K. Michael Cummings, Ph.D., MPH ("Cummings Report") (Plaintiffs-Appellants' App'x, Vol. II);
- (4) Report of Timothy Dewhirst, Ph.D. ("Dewhirst Report") (Plaintiffs-Appellants' App'x, Vol. II);
- (5) Report of Prof. Jean-Pierre H. Dubé, Ph.D. ("Dubé Report") (Plaintiffs-Appellants' App'x, Vol. II);

preserve the confidentiality of the information that Defendants-Appellees are seeking permission to redact. *Infra*.

- (6) Response Report of Prof. Jean-Pierre H. Dubé, Ph.D. (“Dubé Response Report”) (Plaintiffs-Appellants’ App’x, Vol. II);
- (7) Defendants’ proposed findings of fact and conclusions of law regarding plaintiffs’ motion for class certification (“Defendants’ Proposed Findings & Conclusions”) (Plaintiffs-Appellants’ App’x, Vol. III); and
- (8) The district court’s Sealed Memorandum Opinion And Order on the plaintiffs’ motion for class certification (“Sealed District Court Order”) (Plaintiffs-Appellants’ App’x, Vols. IV–V).

4. Plaintiffs-Appellants stated that they “do not believe that the redacted information [in their Opening Brief]” and “any of the [Relevant Documents in their Appendix]” “satisfy the requirements of Circuit Rule 25.6.” But Plaintiffs-Appellants noted that the documents include information or materials that were “filed under seal in the district court,” and asked to have the materials filed “provisionally under seal to allow the Defendants-Appellees an opportunity to notify this Court if they believe that the requirements of Circuit Rule 25.6 are satisfied, and, if so, to establish that.” Plaintiffs-Appellants’ Mot. to File Provisionally Sealed Opening Br. at ¶ 4 (Mar. 4, 2024); Plaintiffs-Appellants’ Mot. to File Provisionally Sealed Appendix Volumes at ¶ 3 (Mar. 4, 2024).

5. With one exception, each proposed redaction addressed below applies to information and documents produced by three non-parties— Buzzback Market Research; Truth Initiative and Zoom Insights (collectively,

“the Non-Parties”)—in response to subpoenas and in reliance on the parties’ commitment to safeguard their confidentiality. Plaintiffs-Appellants did not communicate with the Non-Parties before representing to this Court that none of the redacted material warranted ongoing confidential treatment.

6. In response to the Motions, Defendants did communicate with the Non-Parties. All three affirmed that they do not waive the confidentiality undertaking the parties extended in exchange for obtaining the documents without objection. And after Defendants-Appellees asked Plaintiffs-Appellants to confer with their expert witness, Jennifer Pearson, PhD, Dr. Pearson now asserts a confidentiality interest in continued redaction of information that Plaintiffs-Appellants previously told this Court did *not* merit such protection.

Relevant Documents That May Be Publicly Filed Without Redaction

7. Three of the Relevant Documents—Plaintiffs-Appellants’ Opening Brief, the Dubé Report, and the Dubé Response Report—contain no non-party confidential information, and Defendants-Appellees have no objection to the public filing of those three documents without redaction.

**Relevant Documents That May Be Publicly Filed
With Limited Redactions By Agreement of The Parties**

8. As for the remaining five Relevant Documents, it is practicable to publicly file a version with redactions limited to protecting the confidential

information of the Non-Parties and Dr. Pearson, and, in one instance only, confidential information of the Defendants-Appellees. *Therrien v. Target Corp.*, 617 F.3d 1242, 1259 (10th Cir. 2010); *see also* Tenth Cir. R. 25.6(B) (“Redaction is preferable to filing an entire document under seal.”). Versions of those five Relevant Documents with the proposed redactions highlighted in yellow are being submitted under seal as Exhibits A-E.

9. Under Tenth Circuit Rule 27.1, Defendants-Appellees have been authorized by Plaintiffs-Appellants to represent that they have no objection to public filing of the five Relevant Documents in the form attached as Exhibits A-E.

10. Beyond Plaintiffs-Appellants’ agreement, in support of their request for limited redactions, Defendants-Appellees offer the following explanation.

11. Three documents (the Pearson Report, Defendants’ Proposed Findings & Conclusions, and the Sealed District Court Order) include discussions of an as-yet unpublished study conducted by Dr. Pearson using data collected by Truth Initiative. Both had previously asserted that the information is proprietary and confidential. In conflict with Plaintiffs-Appellants’ representation to this Court, both Dr. Pearson and counsel for Truth Initiative have since stated that they do not waive confidential treatment of this information.

12. Two documents (the Cummings Report and Defendants' Proposed Findings & Conclusions) include discussions of research surveys conducted by Buzzback Market Research in 2014 and 2017. Buzzback produced this information to Plaintiffs-Appellants in response to their subpoena and in reliance on their commitment to treat the Buzzback information as confidential under the governing protective order. Counsel for Buzzback has stated that this information remains confidential.

13. One document (Defendants' Proposed Findings & Conclusions) includes discussion of research findings by Zoom Insights for Defendant-Appellee Santa Fe. Counsel for Zoom Insights has stated that this information, produced in response to a subpoena served by Plaintiffs-Appellants, remains "confidential and proprietary"; that Zoom Insights produced the information based on Plaintiffs-Appellants' "agreement that the documents would be kept confidential"; and that "[h]ad such an agreement not been reached, Zoom Insights would have objected to the non-party subpoena and resisted production." Zoom Insights therefore maintains that this information "should not be filed publicly."

14. Finally, one document (the Dewhirst Report) includes a brief discussion of confidential information produced by Defendant-Appellee Santa Fe, reflecting internal discussions regarding strategic planning among senior

levels of Santa Fe’s management. Such “confidential business records are examples of the types of private information this court has allowed to be sealed.” *Luo v. Wang*, 71 F.4th 1289, 1304 (10th Cir. 2023). Redaction of that passage will protect Santa Fe’s ongoing confidentiality interest while enabling public filing of a redacted version of the Dewhirst Report.

15. The proposed redactions implicate only a small portion of the five Relevant Documents:

- **Sealed Memorandum Opinion & Order:** Redactions would affect approximately 1.5 pages, out of a 429-page document. These redactions are identical to those reflected in the public version of the Opinion & Order that the district court entered. *In re: Santa Fe Natural Tobacco Co. Mktg & Sales Pracs. & Products Liability Litig.*, No. 16-md-2695 (D.N.M. Sept. 19, 2023), ECF 404.
- **Dewhirst Report:** Redactions would affect approximately 1 page, out of a 100-page report (including attachments).
- **Pearson Report:** Redactions would affect approximately $\frac{3}{4}$ page, out of a 53-page report (including attachments).
- **Defendants’ Proposed Findings & Conclusions:** Redactions would affect portions of 21 pages (amounting to approximately 10 pages of redacted material), out of a 202-page submission.
- **Cummings Report:** Redactions would affect approximately 2.5 pages, out of a 21-page report.

16. Defendants-Appellees respectfully request that the Court allow Exhibits A-E to be filed under seal to enable the Court to evaluate Defendants-Appellees’ requests for redaction. If the Court authorizes filing of redacted

versions of these documents, the parties will cooperate promptly to provide the Court with redacted versions suitable for public filing.

17. The following chart summarizes Defendants-Appellees’ positions regarding the Relevant Documents:

DOCUMENT	DEFENDANTS-APPELLEES’ POSITION
Plaintiffs-Appellants’ Opening Brief	May be publicly filed without redactions.
Dubé Report	May be publicly filed without redactions.
Dubé Response Report	May be publicly filed without redactions.
Pearson Report	Contains confidential information; a version may be publicly filed with the redactions shown in Exhibit A at page 2 App. 20.
Cummings Report	Contains confidential information; a version may be publicly filed with the redactions shown in Exhibit B at pages 2 App. 68-70, 74.
Dewhirst Report	Contains confidential information; a version may be publicly filed with the redactions shown in Exhibit C at pages 2 App. 109-10, 139.
Defendants’ Proposed Findings & Conclusions	Contains confidential information; a version may be publicly filed with the redactions shown in Exhibit D at pages 3 App. 34, 49, 58, 63-69, 75-79, 81, 100-01, 168, 170.
Sealed Memorandum Opinion & Order	Contains confidential information; a version may be publicly filed with the redactions shown in Exhibit E at pages 4 App. 121-22, 295; 5 App. 1.

WHEREFORE, Defendants-Appellees, with Plaintiffs-Appellants' consent, respectfully request that: (1) Plaintiffs-Appellants' Opening Brief, the Dubé Report, and the Dubé Response Report be publicly filed without redactions; (2) the Court allow Exhibits A-E to be filed under seal to enable the Court to evaluate Defendants-Appellees' requests for redaction; and (3) the Court authorize the Pearson Report, the Cummings Report, the Dewhirst Report, Defendants' Proposed Findings & Conclusions, and the Sealed Memorandum Opinion & Order to be publicly filed with the redactions reflected in Exhibits A through E.

Dated: April 9, 2024

Respectfully submitted,

/s/ Melanie B. Stambaugh

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the portions exempted by Federal Rule of Appellate Procedure 27(a)(2)(B) and 32(f), it contains 1,573 words (as calculated by Microsoft Word).
2. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Tenth Circuit Rule 32(A), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word (version 2302) in 14-point Calisto MT.

Dated: April 9, 2024

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CERTIFICATE OF ELECTRONIC SUBMISSION

I hereby certify that, on April 9, 2024, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit via the court's CM/ECF system. All parties are represented by counsel of record who are registered CM/ECF users and who will be served by the Court's CM/ECF system.

Dated: April 9, 2024

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