

No. A04-2150

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STATE OF MINNESOTA

IN COURT OF APPEALS

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State of Minnesota,

Appellant,

vs.

GlaxoSmithKline plc,

Respondent.

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**BRIEF AND APPENDIX OF APPELLANT STATE OF MINNESOTA**

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## LEGAL ISSUES

- I. Did the district court err in concluding that the State's consent to a protective order precluded the State from challenging the confidentiality designations of the documents at issue when the order expressly allowed the State to do so?

The district court ruled that the State was precluded from challenging the confidentiality designations of the 45 documents at issue because the State consented to the entry of the court's July 13, 2004 protective order even though that order expressly allowed the State to challenge these designations.

Most apposite authorities:

- Minn. R. Civ. P. 26.03
- July 13, 2004 Protective Order

- II. Did the district court err in concluding that Minn. Stat. § 13.39 precluded the State from publicly disclosing the documents at issue when the State had terminated its investigation and commenced a lawsuit and when the disclosure of the documents would aid the law enforcement process, promote public health and dispel widespread rumor or unrest?

The district court ruled that the State was precluded from publicly disclosing the 45 documents at issue because they were nonpublic investigative data under Minn. Stat. § 13.39. The court did not analyze whether the conditions authorizing disclosure of such data in Section 13.39, Subdivision 2 were met in this case.

Most apposite authorities:

- Minn. Stat. § 13.39
- *Westrom v. Minnesota Dep't of Labor and Industry*, 686 N.W.2d 27 (Minn. 2004)
- *City Pages v. State of Minnesota*, 655 N.W.2d 839 (Minn. Ct. App. 2003)
- *Star Tribune v. City of Minneapolis*, No. 97-21727, 1997 WL 1048497 (D. Minn. Mar. 12, 1997)
- *Seeger v. State of Minnesota*, No. C1-00-416, 2000 WL 1221508 (Minn. Ct. App. Aug. 29, 2000)

III. Did the district court err in summarily concluding, without making any findings or undertaking any analysis under Minn. R. Civ. P. 26.03, and without any supporting affidavit from Respondent, that all the documents at issue are confidential pursuant to an alleged First Amendment privilege that Respondent had not even claimed applied to most of the documents?

The district court ruled that the 45 documents at issue were all confidential because they reflected petitioning conduct protected by a First Amendment privilege even though Respondent never claimed that this alleged privilege applied to most of the documents.

Most apposite authorities:

- Minn. R. Civ. P. 26.03
- First Amendment, U.S. Constitution
- *Turick v. Yamaha Motor Corp.*, 121 F.R.D. 32 (S.D.N.Y. 1988)
- *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977)
- *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34 (C.D. Cal. 1984)
- *Bonzel v. Pfizer, Inc.*, No. C4-02-298, 2002 WL 1902526 (Minn. Ct. App. Aug. 20, 2002).

## STATEMENT OF THE CASE

This litigation involves the status of documents produced to Appellant State of Minnesota (“the State”) by Respondent GlaxoSmithKline plc (“GSK”) pursuant to a Minn. Stat. § 8.31 Civil Investigative Demand (“CID”) the State served on GSK on May 30, 2003. The purpose of the CID was to investigate GSK’s efforts, together with other prescription drug manufacturers, to block the importation of cheaper, Canadian prescription drugs into the United States in violation of Minnesota’s antitrust laws.

This appeal arises from Hennepin County District Court Judge C. Peter Albrecht’s denial of the State’s motion challenging GSK’s confidentiality designations with respect to 45 documents that GSK produced to the State in response to the State’s CID. The terms of the district court’s July 13, 2004 protective order specifically allow the State to challenge any of GSK’s confidentiality designations. The district court, however, issued an Order on October 13, 2004, ruling that the State could not challenge the confidentiality of the documents at issue because the State agreed to the entry of the court’s protective order. The court also ruled that the documents could not be publicly disclosed because they were nonpublic investigative data under Minn. Stat. § 13.39 and that the documents were confidential because they constituted petitioning conduct protected by a First Amendment privilege. The State brings this appeal from the district court’s October 13, 2004 decision.<sup>1</sup>

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<sup>1</sup> This Court dismissed the State’s appeal in its December 22, 2004 Order, concluding that the district court’s October 13, 2004 order was not appealable. Appendix (“A”)-106. In (Footnote Continued on Next Page)

## STATEMENT OF THE FACTS

### 1. GlaxoSmithKline plc

GSK is a large, multinational company engaged in the business of manufacturing and selling prescription and other consumer drug products. State's October 11, 2004 Complaint ("Complaint").<sup>2</sup> With operations in 117 countries and sales in 2003 totaling over \$35 billion, GSK is one of the world's largest pharmaceutical companies. *Id.* Some of GSK's more well-known drugs include the anti-depressant Paxil, the asthma drug Advair, the nasal depressant Flonase, the ulcer drug Zantac, and the smoking cessation drug Zyban. *Id.*

### 2. GSK Leads Drug Industry Boycott of Canadian Drug Imports

Because of the exorbitant cost of prescription drugs in the United States, many Minnesotans and other Americans have opted or been financially forced to purchase their prescription drugs from Canadian pharmacies.<sup>3</sup> *Id.* Prescription drug prices in Canada are substantially cheaper than in the United States because Canada, like all other industrialized nations except the United States, regulates the price of such drugs. *Id.*

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(Footnote Continued From Previous Page)

its July 14, 2005 decision, the Minnesota Supreme Court reversed and remanded this matter to this Court for consideration of the merits of the State's appeal. A-109.

<sup>2</sup> Pursuant the Supreme Court's March 16, 2005 Order, the State filed its Ramsey County District Court Complaint against GSK under seal with the Supreme Court since the Complaint references and attaches various of the documents at issue here that are currently confidential pursuant to the district court's July 13, 2004 protective order.

<sup>3</sup> Numerous public entities, including municipalities and states, are also now buying or planning to buy their prescription drugs from Canada in light of high U.S. drug prices. *Id.*

On January 21, 2003, the Minnesota Senior Federation (“MSF”), a nonprofit organization for Minnesota seniors, launched a Canadian prescription drug importation program. Pursuant to an agreement between the MSF and CanadaRx, a Canadian pharmacy, the program allows MSF members to purchase their prescription drugs through the mail from Canada at greatly reduced prices. The MSF has estimated that its members save an average of over 52 percent by ordering their drugs through CanadaRx. *Id.*

On the same day the MSF announced its new drug importation program, GSK announced that it would no longer supply prescription drugs to: (1) Canadian pharmacies that exported drugs to the United States; and (2) Canadian wholesalers that supplied such blacklisted pharmacies. Consistent with its announcement, GSK then implemented strict measures to prevent Canadian pharmacies and wholesalers from supplying prescription drugs to U.S. consumers. Many of the Canadian wholesalers and pharmacies vehemently protested GSK’s mandates, arguing that they violated Canadian and provincial antitrust laws. *Id.*

As set forth in detail in the State’s Complaint against GSK, GSK has orchestrated a concerted industry boycott of Canadian drug imports to protect its profits. Numerous of the world’s largest pharmaceutical manufacturers, including Pfizer, Wyeth Laboratories, Eli Lilly, and AstraZeneca, have joined in GSK’s boycott. GSK organized this concerted boycott by working directly with these other drug companies and through industry trade associations, including the U.S.’s Pharmaceutical Research and Manufacturers of

America (“PhRMA”) and Canada’s Research-Based Pharmaceutical Companies (“Rx&D”). *Id.*

The 45 documents at issue here contain direct evidence of unlawful concerted action by GSK and other drug companies to block the importation of prescription drugs from Canada. They reveal the true motivation for the industry’s opposition to the importation of these drugs. They also contain incriminating evidence of an industry campaign to deceive the public regarding the safety of drugs imported from Canada. *Id.*

The drug industry’s illegal boycott of Canadian imports to United States citizens ultimately and directly hinders the ability of Minnesotans of all ages who cannot afford the high cost of prescription drugs in the United States to buy their drugs from Canadian pharmacies. In so doing, the industry’s boycott directly jeopardizes the health of such Minnesotans. *Id.*

### **3. Minnesota CID Enforcement Proceedings**

Minn. Stat. § 8.31 authorizes the Minnesota Attorney General to investigate suspected violations of state laws and to serve CIDs requiring persons to answer interrogatories and/or produce documents. *Id.* at subd. 2. The Attorney General may conduct this discovery “without commencement of a civil action and without leave of court.” *Id.* If a person served with a CID refuses to comply, the Attorney General may commence an enforcement proceeding in district court. *Id.*

### **4. State CID Issued to GSK**

Pursuant to Minn. Stat. § 8.31, the State served a CID on GSK on May 30, 2003. A-1. The purpose of the State’s CID was to investigate GSK’s efforts, together with

other drug manufacturers, to block the importation of cheaper, Canadian prescription drugs into the United States. The State's CID requested that GSK produce various documents to the State. *Id.*

#### **5. Parties' Confidentiality Agreement**

Before it would produce any documents responsive to the State's CID, GSK demanded a confidentiality agreement. On August 4, 2003, the State entered into such an agreement with GSK ("the Agreement"). A-13. The Agreement, commonly known as an umbrella-type confidentiality agreement, allowed GSK to initially mark documents it considered confidential *and explicitly gave the State the right to challenge GSK's confidentiality designations. Id.* at ¶ 5. The Agreement placed the burden on GSK to justify its confidentiality designations to a district court in the event of a challenge by the State. *Id.*

#### **6. State's CID Enforcement Proceeding**

After producing some documents located within the United States to the State, GSK refused to produce its additional documents located in Canada -- the site of the boycott -- and the United Kingdom -- the location of its headquarters. The State brought a motion to compel the production of these documents. GSK responded with a motion for a protective order to block the State's investigation. The district court issued an Order dated May 7, 2004, granting the State's motion to compel and denying GSK's motion for a protective order. A-18.

**7. State's Motion Regarding the Production of Allegedly Privileged GSK Documents**

GSK next refused to produce certain documents it claimed were privileged. Accordingly, the State brought a motion to compel the production of these documents. While the district court had this motion under consideration, GSK offered to produce most of the documents it had claimed were privileged if the State agreed to the district court's *in camera* review of the remaining documents. Before it would produce its documents, GSK demanded that the Court enter a protective order. The district court entered such an order, which GSK drafted, on July 13, 2004. A-31. This order contained substantially the same terms as the parties' prior confidentiality agreement, *including an express provision and procedure allowing the State to challenge any of GSK's confidentiality designations*. *Id.* at ¶ 5. GSK subsequently produced the documents it had voluntarily agreed to produce, and the district court reviewed the remaining documents *in camera*. The district court ultimately ordered GSK to produce some of the documents the court had reviewed and ruled that other of the documents did not have to be produced. A-37.

**8. GSK's Document Productions and Confidentiality Designations**

GSK produced a total of approximately 40 boxes containing approximately 125,000 pages of documents to the State. Instead of making a good faith, individualized determination of whether each document GSK produced was confidential, GSK simply designated and stamped as confidential nearly every page in the 40 boxes of documents it

produced.<sup>4</sup> A-52. For instance, GSK even stamped as confidential hundreds of public newspaper articles included in its productions, as well as correspondence GSK sent to outside entities, including the very Canadian pharmacies GSK is boycotting. *Id.*

GSK also failed to designate, as required under the protective order, the basis of its confidentiality claims. GSK further largely redacted the vast majority of the documents it agreed to produce to the State, including large sections of many of the documents at issue in this appeal. *Id.*

### **9. State's Motion Re: Confidentiality of Certain GSK Documents**

On September 9, 2004, the State brought a motion challenging GSK's confidentiality designations with respect to 45 of GSK's documents. A-43. As is evident from the State's Complaint, these documents reveal incriminating anti-competitive

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<sup>4</sup> Courts and commentators have universally condemned precisely this sort of abusive tactic involving umbrella protective orders. *See, e.g., State of Minnesota v. Philip Morris Inc.*, 606 N.W.2d 676, 688 (Minn. Ct. App. 2000) (umbrella protective order afforded protection to documents that parties "in good faith deemed confidential"); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 41 (C.D. Cal. 1984) (noting that umbrella protective orders are important in large cases to avoid individual confidentiality determinations on countless documents, but that problems arise if parties have "abused their authority to designate documents "Confidential"). Even defense counsel caution defendant corporations against such improper tactics:

Do not over-designate. Too often, companies designate virtually every document as confidential, sometimes those already in the public domain. Over-designation undermines the integrity of the protective order and makes it difficult to convince the court that an order is truly needed to protect "trade secrets."

Anita Hotchkiss & Diane M. Fleming, *Protecting and Enforcing Protective Orders: Easier Said Than Done*, 71 Def. Couns. J. 161, 165 (Apr. 2004).

activity by GSK in violation of Minnesota's antitrust laws. The State requested that the district court unseal these documents because they are not, in fact, confidential. *Id.*

On October 13, 2004, the district court denied the State's motion, incorrectly concluding that the State could not challenge the confidentiality of the 45 documents because it had voluntarily entered into a protective order. A-96. The district court also ruled that the documents at issue were nonpublic investigative data under Minn. Stat. § 13.39, and that only the court had the authority to approve the public disclosure of this data under the conditions described in Subdivision 2 of Section 13.39. *Id.* Although the parties briefed the issue, the court never analyzed whether any of those conditions were, in fact, satisfied in this case. *Id.* Finally, the district court summarily concluded without any findings or analysis, or any affidavit from GSK, that all 45 of the documents were confidential under the First Amendment because they constituted protected petitioning activity, even though GSK never even asserted the First Amendment as a basis for its confidentiality designation for the majority of these documents. *Id.* The district court also failed to identify or apply the applicable legal confidentiality standards under Minn. R. Civ. P. 26.03. *Id.* Because of the numerous serious errors in the district court's order, the State filed this appeal. A-105.

#### **10. State's Commencement of Lawsuit/Termination of Investigation**

Before the district court decided the State's motion regarding GSK's confidentiality designations, the State commenced a lawsuit against GSK in Ramsey County District Court on the merits of its antitrust and other legal claims. The State's Complaint alleges that GSK orchestrated and participated in a drug industry boycott of

Canadian drug imports in violation of Minnesota's antitrust laws. The State's Complaint expressly references and attaches many of the documents at issue here which reveal the industry's concerted boycott and an industry campaign of deception aimed at the public regarding the safety of Canadian drug imports.

#### **11. Secrecy Shroud Over GSK's Documents and State's Litigation**

If the district court's decision is not reversed, the State's Complaint will remain under seal, and the State will be forced to litigate this case under a shroud of secrecy, enabling GSK to continue to hide its unlawful conduct and conspiracy. This secrecy shroud will cover virtually every aspect of this litigation, including the pleadings, depositions, written discovery requests and responses, motions, hearings and the trial of this case and, in so doing, will substantially harm the public interest in the enforcement of the State's antitrust laws.<sup>5</sup> As the Minnesota Newspaper Association ("MNA") stated in its amicus brief to the Minnesota Supreme Court in this case, the district court's decision will, if not reversed, deprive Minnesota news organization, and the public in general, "of any ability to monitor what is arguably one of the most important actions brought by the Attorney General in years." *Id.* at 4.

Various private litigants have commenced antitrust lawsuits against GSK over the same conduct the State has been investigating, including a suit brought in Minnesota in federal district court. *See In re Canadian Import Antitrust Litigation*, Court File

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<sup>5</sup> In fact, the October 6, 2004 hearing regarding the State's confidentiality motion at issue here was closed to the public and press by the district court because of GSK's concern that the parties "might possibly" desire to reference the contents of some of the supposedly "confidential" documents.

No. 0:04-cv-02724-JNE-JGL (D. Minn.). The federal court recently dismissed this case without resolving the plaintiffs' state law claims, allowing these plaintiffs to recommence their suit in state court. These plaintiffs will face motions to dismiss in their state court suit. If the documents at issue here are kept confidential, the state district court and plaintiffs in this re-commenced case, as well as other similarly situated litigants and courts, will not have the benefit of the highly relevant and highly incriminating evidence the State obtained in its investigation of GSK. This will directly undermine the State's strong public interest in the enforcement of its antitrust laws.

## STANDARD OF REVIEW

While a district court's decision regarding the confidentiality of documents under a protective order is ordinarily reviewable under an abuse of discretion standard,<sup>6</sup> the district court in this case committed numerous legal errors that are reviewable de novo and that constitute such an abuse of discretion. "An error in the application of law . . . is an abuse of discretion." *State v. Babcock*, 685 N.W.2d 36, 40 (Minn. Ct. App. 2004) (citing *Kroning v. State Farm Auto Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997)), *rev. denied* (Minn. Oct. 20, 2004). "[A] de novo standard of review is used to determine whether the district court erred in its application of the law." *Art Goebel, Inc. v. North Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997).

The first issue in this appeal is whether the district court erred in construing its own protective order. It is well established that a determination regarding the meaning of words used in a legal document is a question of law. *See, e.g., London, Anderson & Hoeft, Ltd., v. Minnesota Lawyers Mut. Ins. Co.*, 530 N.W.2d 576, 577-78 (Minn. Ct. App. 1995); *see also Kienlen v. Kienlen*, 34 N.W.2d 351, 354 (Minn. 1948) ("The written order or decree of a court can have no other meaning than that which the actual words used therein convey.").

The second issue in this appeal concerns the legal interpretation of a state statute in the Minnesota Government Data Practices Act which is also clearly reviewed de novo.

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<sup>6</sup> *See, e.g., Bonzel v. Pfizer, Inc.*, No. C4-02-298, 2002 WL 1902526, \*5 (Minn. Ct. App. Aug. 20, 2002) (district court's decision that documents were confidential under a protective order is subject to an abuse of discretion standard).

*See In re Blilie*, 494 N.W.2d 877, 881 (Minn. 1993) (the interpretation of statutes is a question of law); *AFSCME Union Local 3456 v. Grand Rapids Pub. Utilities Comm'n*, 645 N.W.2d 470, 473 (Minn. Ct. App. 2002), *rev. denied* (Minn. Aug. 6, 2002), (“Construction of the Data Practices Act is a legal issue that this court reviews de novo.”).

Finally, the third issue in this appeal involves the construction of the First Amendment to the U.S. Constitution and the construction of Rule 26.03 of the Minnesota Rules of Civil Procedure, both of which are clearly questions of law that are reviewed de novo. *See, e.g., Hamilton v. Commissioner of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999) (the interpretation of the constitution is a question of law); *Nguyen v State Farm Mut. Auto Ins. Co.*, 558 N.W.2d 487, 489-90 (Minn. 1997) (the construction of a court rule is a question a law).<sup>7</sup>

### SUMMARY OF ARGUMENT

This appeal raises important legal issues regarding the ability of parties to cloak litigation over matters of great public concern under a shroud of secrecy. Specifically, this appeal presents the issue of whether GSK can hide from the public direct incriminating evidence the State has uncovered of GSK’s unlawful conspiracy with other

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<sup>7</sup> The district court also abused its discretion by failing to analyze the conditions for public disclosure of investigative data in Minn. Stat. § 13.39, subd. 2 and in failing to analyze the legal confidentiality standards under Minn. R. Civ. P. 26.03. *See Bonzel v. Pfizer, Inc.*, No. C4-02-298, 2002 WL 1902526, at \*5-6 (Minn. Ct. App. Aug. 20, 2002) (while district court’s decision to enter umbrella protective order may have been permissible, it abused its discretion by not exercising its discretion in determining that the challenged documents were confidential).

drug companies to block Canadian drug imports. As the Minnesota Supreme Court strongly signaled in its decision two months ago, the district court's October 13, 2004 decision is replete with errors and should be reversed.

As a threshold matter, the district court erred as a matter of law in ruling that the State could not challenge GSK's confidentiality designations because the State agreed to the entry of the court's July 13, 2004 protective order. As the Supreme Court correctly concluded, that order expressly and unambiguously allows the State to challenge GSK's confidentiality designations with regard to any and every document GSK produces to the State.

The Supreme Court also correctly reasoned that the district court erred in ruling that the documents at issue are nonpublic investigative data under Minn. Stat. § 13.39. Because the State concluded its investigation and commenced litigation against GSK, and included the documents in the court record, the documents no longer constitute nonpublic investigative data. Moreover, even if the documents are still nonpublic under Section 13.39, that statute expressly allows the State to make the documents public where, as here, the State has determined that the disclosure of the documents would aid the law enforcement process, promote public health and dispel widespread rumor or unrest.

The district court also erred in its cursory conclusion, without any authority or analysis, that the documents at issue are confidential under the First Amendment. As the Supreme Court correctly recognized, there is no authority for any such alleged First Amendment protection for documents like those at issue here that not only do not

evidence any political petitioning activity, but, in fact, contain direct evidence of illegal conduct in violation of the State's antitrust laws.

The district court never analyzed the only relevant question here -- namely, whether the documents are confidential under the applicable Minn. R. Civ. P. 26.03 legal standards. Based on an analysis of these standards, GSK failed to establish, and could not possibly establish, that the documents at issue are confidential. The public disclosure of these incriminating documents will not work a "clearly defined and very serious injury" to GSK's competitive position. These documents evidence illegal activity and are not even the type of documents protected by Rule 26.03. GSK also did not take appropriate measures to ensure the confidentiality of the documents. In fact, GSK actually shared many of the documents with its competitors, negating any possible confidentiality claim.

The district court further erred in failing to make any findings supporting its confidentiality ruling and in making such a ruling in the absence of any affidavit from GSK supporting its confidentiality designations. Based on a correct Rule 26.03 analysis, and in light of the very strong judicial disdain for secrecy in litigation, this Court should reverse and hold that the documents at issue here are not confidential.

## **ARGUMENT**

### **I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE STATE COULD NOT CHALLENGE GSK'S CONFIDENTIALITY DESIGNATIONS BECAUSE THE STATE CONSENTED TO THE ENTRY OF THE COURT'S PROTECTIVE ORDER.**

As the Minnesota Supreme Court recognized in its July 14, 2005 decision, the district court committed a fundamental error of law in ruling that the State could not

challenge GSK's confidentiality designations because the State agreed to the entry of the court's July 13, 2004 protective order and the parties' August 4, 2003 confidentiality agreement. A-118, at n.3. The Supreme Court stated that "[t]he district court's conclusion that the state's request [challenging confidentiality] was precluded by the Protective Order or the Confidentiality Agreement does not consider that both documents specifically authorized the state to object to GSK's confidentiality designations and to seek district court review." *Id.* Indeed, both the protective order and the confidentiality agreement expressly and unambiguously permit the State to challenge GSK's confidentiality designations with respect to *any* document GSK so designates.

**A. The District Court Ignored The Plain and Express Language Of Its Own Protective Order.**

The district court's protective order is commonly known as an "umbrella" protective order. Such an order permits a party producing documents in discovery to initially designate the documents it considers to be confidential according to the standards and procedures set forth in the order. The receiving party may then challenge the producing party's confidentiality designations. If the parties cannot resolve their dispute over the confidentiality of the documents at issue, the district court then determines whether the contested documents are confidential.

The parties' confidentiality agreement and the district court's protective order here expressly and unambiguously gave the State the right to challenge any documents GSK designates as confidential. Notwithstanding this provision, the district court inexplicably determined that the State was foreclosed from challenging GSK's confidentiality

designations because the State consented to the entry of the court's protective order. The district court expressed concern that if the documents at issue were found not to be confidential, the court's protective order would be "worth less than the paper on which [it is] printed." A-104. The district court missed the point that the very paper on which its protective order was printed never guaranteed the confidentiality of GSK's documents. Rather, for the sake of efficiency, it merely established a procedure whereby GSK could initially designate documents as confidential and the State could challenge such designations, just as it did in its motion. The district court's decision that the State could not challenge GSK's confidentiality designations constitutes reversible error.

The district court's error here has important ramifications for other litigants that enter into similar umbrella confidentiality agreements, or agree to the entry of such umbrella protective orders. That is, if district courts are free to disregard the terms of such orders that allow parties to challenge confidentiality designations, the express intentions of the parties will be thwarted and an unjustifiable shroud of secrecy will cover all such litigation. The district court's decision also has important ramifications to the State, which is accountable to the public and should not have to litigate matters of great public concern in secret.

**B. The State Never Agreed That Any Of GSK's Documents Are Confidential And Never Waived Its Express Right To Challenge GSK's Confidentiality Designations.**

GSK falsely claims that the State agreed in the parties' July 6, 2004 Stipulation that certain of the 45 documents at issue are confidential. In fact, the State *never* agreed that these, or any other of GSK's documents, are confidential. As explained below,

GSK's argument, which the district court did not accept, is fundamentally flawed on multiple levels.

First, GSK erroneously claims that a stipulation between the parties *regarding the production* of certain documents GSK had initially claimed were privileged was effectively a waiver of the State's right to contest GSK's confidentiality designations concerning these documents. The parties' July 6, 2004 Stipulation expressly recognized that the documents produced by GSK, which GSK had initially claimed were privileged, would be "subject to" the district court's protective order, which clearly allows the State to challenge the confidentiality of any document. A-39. GSK reaffirmed this understanding in its July 19, 2004 cover letter -- referenced in the district court's October 13, 2004 Order -- which accompanied its production of these documents. A-100. There was no other understanding between the parties and no contrary representation on which GSK could have reasonably relied. GSK never requested, and the district court never ordered, that the State's right to contest GSK's confidentiality designations does not apply or extend to this population of documents.<sup>8</sup>

Second, GSK's waiver argument makes no sense in that GSK contends that the State agreed that all of these documents are confidential *without ever having even seen*

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<sup>8</sup> In fact, GSK's counsel drafted the protective order and knew at all times that the order allowed the State to challenge GSK's confidential designations precisely as it did here. Had GSK understood or desired that the State not have the right to challenge GSK's confidentiality designations as to this population of documents, its counsel presumably would have reflected as much in the protective order they drafted.

*the documents*. The State would never have agreed, sight unseen, with GSK's unilateral determination that these documents are confidential.

Finally, GSK's argument simply does not work because most of the 45 documents at issue here were produced by GSK *before* the State's alleged agreement that these were confidential.<sup>9</sup> GSK hopes the Court will overlook the fact that its estoppel argument, even if meritorious, has absolutely no application whatsoever to most of the 45 documents at issue here.

**II. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE DOCUMENTS AT ISSUE ARE NONPUBLIC DATA UNDER MINN. STAT. § 13.39 AND, THEREFORE, CANNOT BE PUBLICLY DISCLOSED.**

In concluding that the 45 documents at issue are nonpublic data under Minn. Stat. § 13.39 of the Minnesota Government Data Practices Act ("MGDPA"), the district court made several fundamental and reversible legal errors.<sup>10</sup> First, as the Supreme Court recognized, the district court erred in failing to recognize that the State's termination of its investigation and commencement of its lawsuit renders Section 13.39 inapplicable.<sup>11</sup>

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<sup>9</sup> Only 15 of the 45 documents at issue in this motion, or one-third, were included in the production of First Amendment privileged documents upon which GSK relies here. The remaining 30 documents were included in prior productions that are completely distinct from the group of documents that GSK contends gives rise to its estoppel argument.

<sup>10</sup> GSK has consistently mischaracterized the State's argument regarding the applicability of Section 13.39. The State has never argued that this statute supersedes the district court's protective order. Rather, it has always argued, and still argues, that this statute simply does not give GSK some independent right to hide its documents from the public not found in the protective order, as GSK contends.

<sup>11</sup> GSK argues that the protective order in this case continued in force even after the State commenced its lawsuit against GSK. This argument does nothing to help GSK since it completely begs the question of whether the specific documents at issue here are, in fact, confidential under that order.

Second, the district court erred in concluding that it had the sole authority to determine if the conditions for release of protected investigative data exist under Section 13.39, Subdivision 2. Finally, the district court erred in failing to analyze whether any of the conditions under Section 13.39, Subdivision 2 exist in this case.

**A. Minn. Stat. § 13.39 Does Not Preclude The State From Publicly Disclosing Investigative Data Once The State's Investigation Is Concluded And The State Commences Litigation.**

Under clear Minnesota statutory and case law, even documents that may have been nonpublic during a State investigation under Minn. Stat. § 13.39 do not remain so after the State has completed its investigation and commenced litigation, as the State has done here. As the Minnesota Supreme Court made clear, this case does not involve, as GSK alleges, the issue of whether the documents at issue are inactive investigatory data since that classification is only relevant when a civil action is *not* brought. A-118, at n.3. Rather, as the Supreme Court observed, the pertinent question is whether commencement of the State's Ramsey County action makes otherwise investigative data public. *Id.* Section 13.39, in fact, directly addresses what happens when the State chooses to present investigative data to the court or make it part of the court record in a civil action: "Any civil investigative data presented as evidence in court or made part of the court record *shall be public.*" *Id.*, Subd. 3.<sup>12</sup> Here, the State's Complaint against GSK was presented to the Hennepin County District Court and is part of the court record. It has also been

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<sup>12</sup> See *Montgomery Ward & Co., Inc. v. County of Hennepin*, 450 N.W.2d 299, 306 (Minn. 1990) (investigative data made part of court record shall be public).

filed with the Ramsey County District Court. Therefore, the data is no longer nonpublic under Section 13.39's plain language.

The language of this statute is supported by decisions of this Court and the Minnesota Supreme Court, including the Supreme Court's recent decision in *Westrom v. Minnesota Dep't of Labor and Industry*, 686 N.W.2d 27 (Minn. 2004). In that case, the Supreme Court indicated that upon the filing of a contested case proceeding, the investigative data in that case would have become public. *See also Star Tribune v. City of Minneapolis*, No. 97-21727, 1997 WL 1048497, \*2 (D. Minn. Mar. 12, 1997) (where civil investigative data was attached to supporting affidavit, but later removed, Section 13.39 did not apply because this evidence was presented to the court); *Seeger v. State of Minnesota*, No. C1-00-416, 2000 WL 1221508, \*2 (Minn. Ct. App. Aug. 29, 2000) (private welfare data became public when it was submitted as part of an administrative proceeding). *See also McMaster v. Pung*, 984 F.2d 948, 952 (8th Cir. 1993) (investigative data was confidential under Section 13.39 until the investigation was completed). Were it otherwise, the State would have to file its complaints under seal if they referenced any State data obtained through the State's investigation. This is a preposterous result devoid of any basis in Minnesota law.

This construction of Section 13.39 is also directly consistent with the statute's purpose:

The legislature's principal purpose in adopting Minn. Stat. § 13.39 was to prevent government agencies from being at a continual disadvantage in litigation by having to *prematurely* disclose their investigative work product to opposing parties or to the public.

*Star Tribune v. Minn. Twins Ptsh'p*, 659 N.W.2d 287, 298 (Minn. Ct. App. 2003) (citing Op Atty. Gen. 852 (Aug. 4, 2000)); Margaret Westin, *The Minnesota Government Data Practices Act: A Practitioner's Guide and Observations on Access to Government Information*, 22 Wm. Mitchell L. Rev. 839, 864 n. 156 (1996). In other words, this provision protects the State, not GSK. The fundamental purpose of Section 13.39 is to prevent the government from suffering a disadvantage by having to prematurely disclose its investigative data before its investigation is concluded. This purpose is advanced if the State is allowed to choose when it will release its investigative data, either under the conditions articulated in Subdivision 2, or when it ends its investigation and commences suit as it did here.

If, on the other hand, the State cannot ever release its investigative data until a lawsuit is essentially over and all appeal rights have expired, a provision which was intended to aid the State would instead shackle it, prohibiting it from releasing data which the public has the right to see and which would aid the State's law enforcement effort. Furthermore, such a construction turns the purpose of the Act, which is to allow public access to government data, completely on its head.<sup>13</sup>

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<sup>13</sup> It is ironic that GSK attempts to use Minnesota's open records law to hide its activity from public examination. The MGDPA is a sunshine law. It creates a presumption that government data is accessible to the public, a premise that is bedrock to a free and democratic society. See Minn. Stat. §§ 13.01, 13.03. See also e.g., Donald A. Gemberling & Gary A. Weissman, *Data Practices at the Cusp of the Millenium*, 22 Wm. Mitchell L. Rev. 767, 771 (1996) ("The MGDPA's core concept, as the Minnesota Supreme Court has termed it, is that data maintained by governmental agencies are in the public domain."). The Act certainly was not intended to shield a business engaging in illegal activity from public exposure of that activity.

**B. The District Court Erred In Deciding That The State Could Not Determine Whether The Conditions Authorizing The Disclosure Of Investigative Data In Minn. Stat. § 13.39, Subd. 2 Exist In This Case.**

Section 13.39 also permits a government agency to exercise its discretion to disclose even nonpublic investigative data if certain conditions exist. Here, the district court held that the court, and not the State, decides whether any of these conditions for disclosure exist. As discussed below, this holding directly contravenes the statutory language.

Section 13.39, Subdivision 2 provides that: "Any agency ... may make any data classified as confidential or protected nonpublic pursuant to this subdivision accessible to any person, agency, or the public *if the agency ... determines* that the access will aid the law enforcement process, promote public health or dispel widespread rumor or unrest." (emphasis supplied). The statute is clear, therefore, that the state agency or, in this case, the Attorney General's Office, makes the determination whether the conditions apply in the first instance.<sup>14</sup> Although the district court may review a state agency's decision that one or more of these conditions exist in a given case,<sup>15</sup> the Legislature gave the State, not

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<sup>14</sup> See *Deli v. Hasselmo*, 542 N.W.2d 649, 655 (Minn. Ct. App. 1996), *rev. denied* (Minn. April 16, 1996) (Section 13.39 gives the university the discretion to determine if making investigative data accessible to the public will dispel widespread rumor); *City Pages v. State of Minnesota*, 655 N.W.2d 839, 843 (Minn. Ct. App. 2003) (state has the discretion to decide to make investigative data accessible to the public); Minn. Dep't of Admin. Advisory Op.: 95-054 (Dec. 20, 1995) (MPHA has the discretion to determine pursuant to Section 13.39 if publicly disclosing investigative data will aid the law enforcement process, promote public health or dispel widespread rumor or unrest).

<sup>15</sup> See, e.g., *Deli*, 542 N.W.2d at 655-56 (after university made investigative data public, plaintiff sued alleging that university erroneously determined that the release of the data would dispel widespread rumor).

the district court, the right to make this determination in the first instance. As argued below, the district court's more significant error here was in completely failing to analyze whether any of these conditions are satisfied here.

**C. The District Court Erred In Failing To Recognize That Each Of The Conditions Which Permit The Public Disclosure Of Investigative Data Exist In This Case.**

While acknowledging that even nonpublic investigative data can be made public if one of the three conditions in Section 13.39, Subdivision 2 exist, the district court inexplicably and erroneously failed to analyze whether any of these conditions actually exist in this case, even though the parties directly briefed this very issue. Indeed, it is difficult to imagine a case in which the satisfaction of these conditions could be more clear.

First, release of the documents at issue here would directly and substantially aid the antitrust law enforcement process. There is a very immediate and concrete antitrust and law enforcement objective to be served by the State's ability to share the documents at issue. For instance, as noted above, private litigants have brought antitrust lawsuits against GSK over the same conduct the State has been investigating. These plaintiffs are facing, or will face, motions to dismiss. The courts in these cases, including the Minnesota state district court that will preside over a re-commenced MSF case, deserve the benefit of examining the highly relevant and incriminating evidence produced by GSK to the State, despite the fact that GSK and other drug companies would greatly prefer that the plaintiffs and the courts in these other cases never see these incriminating documents. The sharing of these documents with the public would also encourage

potential witnesses to come forward and encourage other similar lawsuits directly in aid of the State's important law enforcement objectives. This would also help further the State's compelling interest in deterrence of violations of its antitrust laws. As the Supreme Court aptly observed in its July 14, 2005 decision, to be fully effective, the State's enforcement of its antitrust laws "usually must be done publicly, for educational purposes and to deter similar conduct by others." A-114.

Second, release of the documents would also unquestionably "promote public health." GSK has repeatedly told the public that the reason behind the drug companies' boycott of the importation of cheaper Canadian prescription drugs into the United States is that Canadian drugs are not safe for consumption in the United States. The public rhetoric surrounding this issue has even risen to the level of linking the importation of Canadian prescription drugs with the threat of terrorism. GSK's documents would shed important light on this issue by showing the true motivating force behind the boycott. Moreover, the disclosure of GSK's unlawful conduct may affect the current national debate over Canadian drug imports and thereby positively affect the health of Minnesotans and other U.S. citizens who cannot afford to pay the exorbitant price of prescription drugs in the U.S. and are forced to try to purchase their drugs from Canada.

Third, the release of the documents would also "dispel widespread rumor or unrest." The safety of Canadian drugs and the true motivation behind the Canadian drug boycott are issues which are almost daily in the local, state, national or international news, making their impact indisputably "widespread." Furthermore, GSK's and other drug companies' frequent public statements regarding the allegedly compromised safety

of Canadian drugs have created confusion and unrest among purchasers of those drugs, which is, of course, precisely what GSK and other drug companies intended. GSK's documents directly bear on the validity of such public statements and are critical to telling the whole and true story about the safety and efficacy of drugs imported from Canada.

GSK mistakenly relies on *Westrom*. In *Westrom*, unlike here, the Department of Labor and Industry did not justify its release of the data at issue based on the disclosure conditions in Minn. Stat. § 13.39. As the Court explicitly acknowledged:

Thus, the Westroms argue that section 13.39 prohibits the release of civil investigative data by deeming it to be protected nonpublic data or confidential data, unless such release is expressly determined to be appropriate to aid law enforcement, promote public health or safety, or dispel widespread rumor or unrest. DOLI made no express determination of a need to release the data under section 13.39 and does not attempt to justify the release of the orders and objections on that basis.

686 N.W.2d at 33. *Westrom*, then, has no bearing on this issue of whether the disclosure conditions in Minn. Stat. § 13.39 apply.<sup>16</sup>

Because one or all three of these conditions for disclosure of investigative data apply here, Section 13.39 does not bar the State from disclosing the GSK documents at issue separate and apart from the fact of the State's commencement of its lawsuit.

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<sup>16</sup> GSK also incorrectly relies on *Deli v. Hasselmo*, 542 N.W.2d 649 (Minn. Ct. App. 1996). In *Deli*, the court was required to reconcile competing MGDPA provisions -- one dealing with the release of personnel data and the other with Section 13.39. The court held that the importance of extending substantial privacy protection to employee data prevailed. *Id.* at 655-56. Here, on the other hand, no personnel data is at issue and GSK does not argue otherwise. Therefore, *Deli* has no bearing here.

**III. THE DISTRICT COURT ERRED IN SUMMARILY CONCLUDING, WITHOUT ANY ANALYSIS, THAT THE DOCUMENTS AT ISSUE ARE CONFIDENTIAL UNDER THE FIRST AMENDMENT AND IN FAILING TO IDENTIFY AND APPLY THE APPLICABLE MINN. R. CIV. P. 26.03 LEGAL STANDARDS.**

Because Minn. Stat. § 13.39 does not preclude the State from publicly disclosing GSK's documents at issue here for the reasons discussed above, the sole remaining question is whether the documents are actually confidential under the standards applicable under Minn. R. Civ. P. 26.03. The district court's analysis of this issue is incomplete and replete with errors. Contrary to the district court's cursory conclusion, the documents at issue here are not confidential under the First Amendment for a host of reasons discussed below. As also explained below, the documents are not confidential under the applicable Minn. R. Civ. P. 26.03 legal standards which the district court never identified or applied.

**A. The District Court Erred In Concluding That The GSK Documents At Issue Are Confidential Under The First Amendment.**

The district court characterized all the documents at issue as subject to a First Amendment privilege. This is flatly wrong. Indeed, even GSK claimed that only 15 out of the 45 documents in contention were subject to any purported First Amendment privilege.<sup>17</sup> The district court's decision also included no analysis whatsoever explaining how these documents are protected from disclosure by the First Amendment. In fact, they are not, for the many reasons discussed below.

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<sup>17</sup> For the remainder of the documents, GSK only claimed commercial/privacy protection under Rule 26.03.

First, as the Minnesota Supreme Court correctly noted in its July 14, 2005 decision, “the [district court’s] conclusion that there is a First Amendment privilege for ‘petitioning documents’ is not clearly recognized in case law.” A-118, at n.3. Likewise, the MNA noted in its amicus brief that there is “no precedent” for GSK’s claimed First Amendment privilege and that the district court ignored the long line of cases articulating a First Amendment-based right to *obtain* public access. (emphasis in original) *Id.* at 12.

Second, even if such a privilege were recognized, the documents at issue would not fall within its protection, because they do not reflect First Amendment activity. First Amendment petitioning activity requires that an entity or group actually *petition* the government for redress. U.S. Const. amend. I. GSK’s documents show no such thing. Rather, an examination of these documents shows that they are largely documents discussing, for example, how GSK plans to stop Canadian imports into the United States, its media relations surrounding this issue, and its meetings with other drug companies regarding these issues. Although a few of these documents outline the status of legislative bills, they are *not* GSK communications with legislators or regulatory authorities, but instead broadly reflect GSK’s business activity with respect to the Canadian internet issue -- not any First Amendment petitioning activity.<sup>18</sup>

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<sup>18</sup> The State filed under seal with the district court a chart found at Exhibit A to the Second Affidavit of Michael J. Vanselow in support of the State’s underlying motion that explains on a document-by-document basis why no First Amendment activity is reflected in the documents at issue. That Exhibit and chart is included in the district court record that has been provided to this Court.

Third, these documents do not reflect any protected First Amendment associational activity. If every potential antitrust defendant could raise the First Amendment to bar the release of documents reflecting illegal activity, no illegal conspiracy would ever be uncovered. If GSK's definition of associational activity were adopted, every document in its possession that was ever shared with another entity would be covered by the First Amendment. Simply because some of the documents at issue may indicate that certain activity took place in a group does not mean protected First Amendment associational rights are implicated. Indeed, it is precisely such concerted activity here that constitutes an illegal boycott. GSK has the burden of showing that the group activity is of the type encompassed and protected by the First Amendment. Illegal activity is *not* so encompassed. As one court aptly summarized:

Freedom of association permits individuals to associate for *lawful purposes* and provides a right to join with others to pursue goals independently protected by the First Amendment.... But the goals must be independently protected by the First Amendment; *there is no right to join with others to engage in illegal activities that are not protected by the First Amendment.*

*U.S. v. Wilson*, 154 F.3d 658, 665 (7th Cir. 1998) (emphasis supplied). *See also U.S. v. Bell*, 217 F.R.D. 335, 343 (M.D. Pa. 2003) ("The freedom of association does not extend to ... unlawful activity.").

Here, GSK's documents evidence illegal activity -- not the type of activity afforded protection under the First Amendment. GSK, therefore, has no right to hide behind the First Amendment in trying to shield these documents from disclosure. It is

indeed ironic that GSK tries to invoke a constitutional amendment designed to foster a free press to shield its illegal acts from the public and press.<sup>19</sup>

Moreover, the First Amendment's associational freedom is intended to encompass "the freedom to associate for the promotion of political and social ideas." *Lewitus v. Colwell*, 479 F. Supp. 439, 444 (D. Md. 1979) (citing *Bates v. Little Rock*, 361 U.S. 516 (1960); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)). "Where no political or ideological association is involved, several courts, including the Supreme Court, have concluded that First Amendment freedoms do not come into play." *Id.* at 445 (citations omitted). Here, GSK's documents primarily evidence association for a business purpose (in addition to a potentially illegal anticompetitive purpose) -- not for the advancement of a political agenda. Therefore, the First Amendment's associational rights are not triggered. *Id.* (association for business and social purpose not encompassed by First Amendment). *See also In the Matter of Buscaglia*, 518 F.2d 77, 79 (2d Cir. 1975) ("The First Amendment does not make a social club a sanctuary for crime.")<sup>20</sup>

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<sup>19</sup> GSK cites civil rights and other cases where a governmental entity was trying to compel the production of a political advocacy group's membership list. *See NAACP v. Alabama*, 357 U.S. 449 (1958); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963). For GSK to equate a drug company group's documents about how to illegally manipulate commercial markets with a civil rights group's struggle to maintain the physical safety of its members is absurd.

<sup>20</sup> In *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), the Supreme Court considered and rejected a union's argument that its picketing activity could not be regulated under Missouri's antitrust laws. In that case, labor union members picketed a competitor's warehouse in an effort to force the competitor into joining an unlawful combination to stop selling ice to nonunion salespeople. The Court held that the antitrust laws trumped the union's First Amendment objections, stating:

(Footnote Continued on Next Page)

Finally, even GSK concedes that any First Amendment protection is not absolute. To the extent a court engages in any type of balancing of the interests at stake, the First Amendment must yield to the antitrust laws when it is being used as a tool to hide illegal, anticompetitive behavior. The State's vital governmental interest in enforcing its antitrust laws and maintaining free competition as the rule of trade clearly supersedes GSK's argument that it somehow has a First Amendment right to secretly collude with its competitors. *See Giboney*, 336 U.S. at 502.

**B. The Documents Are Not Confidential Under The Applicable Minn. R. Civ. P. 26.03 Legal Standards Which The District Court Never Identified Or Applied.**

The district court further erred in failing to identify and apply the applicable legal confidentiality standards under Minn. R. Civ. P. 26.03. Protective orders should be strictly construed in light of the strong judicial disdain for secrecy in litigation. The documents at issue are not confidential based on an analysis of the Rule 26.03 standards.

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[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. *Such an expansive interpretation of constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreement and conspiracies deemed injurious to society.*

*Id.* at 502 (emphasis supplied). Similarly, in *Nat'l Society of Professional Engineers v. U.S.*, 435 U.S. 679 (1978), another antitrust case, the Supreme Court held that a trial court's injunction regarding the content of a professional association's ethical canons did not violate the First Amendment, stating, "The First Amendment does not make it ... impossible ever to enforce laws against agreements in restraint of trade ...." (citation omitted). *Id.* at 697.

The district court also committed reversible error in failing to make any findings to support its decision and in concluding that the documents are confidential without the requisite evidentiary basis in the form of an affidavit from GSK.

**1. The protective order here should be strictly construed in light of the strong judicial disdain for secrecy in litigation.**

There has been growing judicial and public criticism of secrecy agreements and orders that hide litigation documents and other data from the public.<sup>21</sup> There are many arguments advanced against such litigation secrecy. For example, some note that such secrecy contravenes our very form of governance. David S. Sanson, *The Pervasive Problem of Court Sanctioned Secrecy and the Exigency of National Reform*, 53 Duke L. J. 807, 816 (Nov. 2003) (“[I]t is irrational that courts allow parties to hide wrongdoing that affects public health and safety behind the hermetic seals of court-approved protective orders. Such practice is deleterious to the egalitarian premise of any democratic form of government.”).<sup>22</sup>

Others argue that such secrecy agreements and orders inhibit information sharing between litigants or potential litigants and thereby create duplication and inefficiencies in the judicial system. *See, e.g., Wilk v. American Medical Ass’n*, 635 F.2d 1295, 1299 (7th

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<sup>21</sup> Even defense counsel have recognized that “[t]he harsh truth is that the era of broad, agreed-upon protective orders covering virtually every document is gone.” Anita Hotchkiss & Diane M. Fleming, *Protecting and Enforcing Protective Orders: Easier Said than Done*, 71 Def. Couns. J. 161, 161 (Apr. 2004).

<sup>22</sup> *See also* Joseph F. Anderson, Jr., *Hidden From the Public By Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. Rev. 711, 741 (Summer 2004) (“Openness in judicial proceedings fosters a greater understanding of, and appreciation for, our legal system. More importantly, it provides a check on unbridled judicial power.”).

Cir. 1981) (“This presumption [in favor of public access] should operate with all the more force when litigants seek to use discovery in aid of collateral litigation on similar issues, for in addition to the abstract virtues of sunlight as a disinfectant, access in such cases materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process.”); *see also* Anderson, 55 S.C. L. Rev. at 743-47 (duplicative discovery justifies the refusal to keep documents sealed).

Still others note how such secrecy provisions operate to hide tortious or other illegal activity from the public, thereby endangering even more members of the public.

As one commentator aptly explained:

Agreements to keep criminal or tortious conduct secret that are made in connection with litigation share at least this much in common with conspiracy: they make it more likely that the crime or tort will go undetected, more likely, if you will, that the criminal or tortfeasor will be successful.

Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 Hofstra L. Rev. 783, 801 (2002).

Likewise, in its July 14, 2005 decision, the Supreme Court emphasized that there is a “presumption of openness” as to court proceedings and documents. A-113. It is against this backdrop of strong general judicial disdain for secrecy in litigation that this Court should evaluate GSK’s confidentiality claims in this case.

**2. The documents at issue do not satisfy Minn. R. Civ. P. 26.03's confidentiality standards.**

GSK's reliance on Minn. R. Civ. P. 26.03(g) as a basis for its confidentiality designations is misplaced. The documents at issue are not protected from disclosure under an application of the established burden and legal standards under this Rule.

**a. There are numerous factors courts consider in determining whether a document should be found to be confidential under Minn. R. Civ. P. 26.03.**

The law is well-established that a party claiming that its documents are confidential, and should not be publicly disclosed, has the burden of showing "good cause" for a Rule 26.03 protective order. *See* Minn. R. Civ. P. 26.03; 2 Douglas D. McFarland & William J. Keppel, MINNESOTA CIVIL PRACTICE § 1508 (3d ed. 1999). As one federal court explained:

The requirement of good cause is based upon one of the fundamental premises of discovery: Discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings.

*Turick v. Yamaha Motor Corp.*, 121 F.R.D. 32, 35 (S.D.N.Y. 1988). This burden applies with the same force to blanket or umbrella protective orders such as the protective order in this case. *See Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 121 F.R.D. 264, 268 (M.D.N.C. 1988).

To satisfy its good cause showing, the party seeking to keep its documents confidential is required to show that disclosure of the allegedly confidential information will work a "clearly defined and very serious injury" to the party's business. *Turick*, 121

F.R.D. at 35 (emphasis in original).<sup>23</sup> In the case of umbrella protective orders, this showing must be made as to *each and every document* challenged by the requesting party. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786-87 (3d Cir. 1994).

In establishing the requisite showing of a clearly defined and very serious injury, a party cannot rely on mere vague and stereotyped or conclusory allegations. "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986). *See also* Charles A. Wright, Arthur R. Miller & Richard C. Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2035 (2d ed. 1994).<sup>24</sup>

Minn. R. Civ. P. 26.03(g) permits courts to prevent the disclosure of trade secrets or "other research, development, or commercial information." As a general matter, confidential business information is entitled to less protection from disclosure than trade secrets. *See Littlejohn v. Bic Corp.*, 851 F.2d 673, 685 (3d Cir. 1988). Because GSK is not alleging that any of the documents at issue in this motion reveal trade secrets, the

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<sup>23</sup> *See also Encyclopedia Brown Productions, Ltd. v. Home Box Office, Inc.*, 26 F. Supp. 2d 606, 613 (S.D.N.Y. 1998) (same); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 202-03 (S.D.N.Y. 1977) (same) (citing *United States v. IBM Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975)); *see also Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 891 (E.D. Pa. 1981). GSK erroneously contends that this is an out-dated standard because Fed. R. Civ. P. 26 was amended in 1970. All of the above cases post-date 1970. Moreover, this is precisely the Rule 26 standard that courts still apply today. *See, e.g., Constand v. Cosby*, No. 05-1099, 2005 WL 1324883, \*7 (E.D. Pa. June 2, 2005) (good cause for a protective order requires showing of a clearly defined and serious injury).

<sup>24</sup> It is also clear that the mere potential embarrassment from disclosure of a document is not enough to find the document confidential, especially where, as in this case, the party seeking to avoid disclosure is a business enterprise. *Pansy*, 23 F.3d at 787

only question here is whether they contain other confidential “research, development, or commercial information” such that they may not be publicly disclosed. Minnesota’s appellate courts have not defined the precise contours of these terms under Rule 26.03. It is clear, however, as explained below, that certain categories of documents do *not* satisfy this standard under this Rule.

**1. Some types of documents do not warrant any protection from disclosure.**

Some entire types or categories of documents simply do not warrant any protection as confidential. As the court stated in *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 101 F.R.D. 34 (C.D. Cal. 1984), which involved an alleged horizontal antitrust conspiracy in the oil industry:

Some of the briefs contain the proponents’ interpretations of historical events in the oil industry, *of meetings and conversations that are alleged to have involved price fixing*, of the effects of federal regulations on the prices and supply of petroleum products, and of the effects of recent developments in antitrust law on the viability of plaintiffs’ damage claims. Certainly, public disclosure of these types of arguments would not adversely affect defendants’ trade secret interests, competitive positions, or privacy rights.

*Id.* at 39 (emphasis supplied). Because of the nature of these types of documents, they were simply not confidential under Rule 26 without regard to the weighing of any interests.

**2. There can be no confidentiality claim as to documents disclosed to others.**

A party also clearly cannot claim confidentiality as to a document it disclosed to others, especially the parties' competitors. Such sharing of documents is quintessentially inconsistent with any conceivable claim of confidentiality.<sup>25</sup>

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<sup>25</sup> See *Nestle Foods Corp. v. Aetna Casualty and Surety Corp.*, 129 F.R.D. 483, 484 (D. N.J. 1990) (“[A]s a matter of common sense, if one were truly fearful of competitive disadvantages, one would make every effort to properly safeguard information to prevent disclosure to competitors. In the instant case, defendants have been quite open in sharing the allegedly confidential information with their competitors.”); *EOP-Nicollet Mall, L.L.C. v. County of Hennepin*, Nos. 28793, 29743, 28457, 2004 WL 1161412, \*2-4 (Minn. Tax Ct. May 3, 2004) (recognizing trade secret protection for certain real estate information because of risk that information would be disclosed to competitors). As the court made clear in *Medtronic, Inc. v. Boston Scientific Corp.*, No. Civ. 99-1035, 2003 WL 352467, \*1 (D. Minn. Feb. 14, 2003), a protective order protects commercial information which, if disclosed, could harm a party’s “competitive position.”

**3. A document cannot be considered confidential if reasonable steps were not taken to preserve the document's confidentiality.**

Likewise, a party cannot claim that a document is confidential if the party did not take reasonable steps to keep the document confidential, even as to employees of the party. *See Wyeth v. Natural Biologics, Inc.*, No. Civ. 98-2469, 2003 WL 22282371, \*20 (D. Minn. Oct. 2, 2003) (party established physical security and numerous controls and procedures that it employed to maintain the secrecy of its documents); *EXDS v. Devcon Construction, Inc.*, No. C05-0787 PVT, 2005 WL 2043020, \*6 (N.D. Cal. Aug. 24, 2005) (same).<sup>26</sup>

**4. A document that evidences unlawful activity cannot be confidential.**

Moreover, a document clearly cannot be considered confidential under Rule 26 if it contains evidence of an unlawful antitrust conspiracy. There are many cases in Minnesota and elsewhere that hold that documents protected from disclosure by the attorney-client privilege and/or the work product doctrine that evidence crimes, fraud or other unlawful activity, including illegal antitrust conspiracies, enjoy no protection from disclosure. *See, e.g., State of Minnesota v. Philip Morris Inc.*, 606 N.W.2d 676, 691 (Minn. Ct. App. 2000).<sup>27</sup> If such documents are not protected from disclosure under the

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<sup>26</sup> *See also* Hotchkiss & Fleming, 71 Def. Couns. J. at 166 (“The company that does not restrict its employees from access to commercially sensitive documents will have a difficult time proving they are truly confidential. Companies need to treat their proprietary materials with the utmost discretion inside and outside of litigation.”).

<sup>27</sup> *See also* *McCaslin v. McCaslin*, No. C1-95-1243, 1996 WL 81500, \*4 (Minn. Ct. App. Feb. 27, 1996); *In re Burlington Northern, Inc.*, 822 F.2d 518, 514 n.3 (5th Cir. 1987) (a (Footnote Continued on Next Page)

far greater protection afforded by the attorney-client privilege, they certainly cannot be protected from public disclosure as confidential documents under Rule 26.03(g).

5. **Even if otherwise confidential, a document may be disclosed if the public's interest in access to the document outweighs the private interest in avoiding disclosure.**

Furthermore, even if a document is confidential under the above standards, a court should nevertheless allow its disclosure if the presumption and interest in public access to the document outweighs the harm to the other party's competitive position from disclosure. *See Encyclopedia Brown Productions, Ltd.*, 26 F. Supp. 2d at 612-13. That is, even confidential documents should be disclosed if the public interest in access is sufficiently strong. One such strong interest in access that outweighs a contrary interest in confidentiality is the public's health and safety. *Pansy*, 23 F.3d at 787.<sup>28</sup>

- b. **None of GSK's documents at issue here are confidential under the Rule 26.03 standards.**

In light of these legal standards, this Court should find that none of the documents at issue in this matter are confidential and that GSK has not met its burden of showing that disclosure of the documents will work an impermissible "*clearly defined and very*

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civil violation of the antitrust laws is a "crime" or "fraud" for purposes of abrogating the attorney/client privilege).

<sup>28</sup> As the Third Circuit explained in *Pansy*, cases involving a public parties and a public issue should weigh against any confidentiality ruling. *Id.*

*serious injury*” to its business.<sup>29</sup> These documents simply are not protected as confidential on many grounds:

- None of the documents here reveal confidential trade secrets.
- The documents are nearly identical in nature to the types of documents that the court found not to be confidential in *Petroleum Prods. Antitrust Litig.* discussed above. They simply reflect company and industry communications regarding a concerted Canadian drug import boycott.
- GSK has not explained how the disclosure of the documents would result in a “*clearly defined and very serious injury*” to GSK’s business. In fact, it is inexplicable how the disclosure of these documents could result in *any* harm to GSK’s competitive position when many of these documents were actually shared with GSK’s competitors. GSK’s arguments are nothing more than vague, stereotypic and conclusory allegations that plainly cannot justify the denial of public access. For almost every document, GSK’s attorneys simply provide a cryptic summary of what the document is or includes. This is inadequate. GSK provides no analysis, with respect to *any* document, as to how disclosure of the document would cause a clearly defined and very serious injury to GSK’s competitive position.
- Many of GSK’s documents were disclosed to outsiders, including GSK’s own direct competitors, as well as the very targets of the drug company boycott, negating any possible confidentiality claim.
- Most of the documents reveal no evidence that their alleged confidentiality was ever identified or properly safeguarded. There is no original indication anywhere on most of documents that they were ever intended or required to be treated confidentially or that access to such documents was in any way restricted. GSK also provided no evidence as to the steps it took to keep these documents

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<sup>29</sup> In Exhibit A to the Second Affidavit of Michael J. Vanselow in support of the State’s underlying motion, included under seal in the district court record, the State discusses in detail on a document-by-document basis why each of the documents that GSK claims contains protected proprietary information does not, in fact, satisfy the legal confidentiality standards under Rule 26.03.

confidential. GSK's attorneys merely contend with regard to most of the documents that it "appears" the distribution was internal or limited and/or that it "presumes" there was no external distribution of the document. This falls far short of the requisite safeguarding.

- As is clear from the State's Complaint, the documents reveal evidence of unlawful conduct. They also evidence improper conduct by federal officials relating to Canadian drug imports.<sup>30</sup>

There is also extraordinary public interest in the issues of Canadian drug imports and the pharmaceutical industry's concerted efforts to block these imports. This compelling public interest amply justifies the disclosure of the documents even if they are otherwise confidential. As noted above, the press' right to access the documents under the MGDPA also weighs heavily against any confidentiality status.<sup>31</sup> Indeed, the MNA noted in its amicus brief that the district court's decision will effectively deprive Minnesota news organizations, and the public in general, "of any ability to monitor what is arguably one of the most important actions brought by the Attorney General in years." *Id.* at 4.<sup>32</sup> GSK has certainly not shied away from placing its version of the Canadian

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<sup>30</sup> The fact that GSK desperately wants to prevent public disclosure of these documents because they will subject it to adverse publicity is ultimately immaterial to the Court's analysis. See *Gelb v. American Telephone & Telegraph Co.*, 813 F. Supp. 1022, 1035 (S.D.N.Y. 1993) ("good cause" is not established merely by the prospect of negative publicity); *Petroleum Prods. Antitrust Litig.*, 101 F.R.D. at 39 ("It is not the duty of the federal courts to accommodate the public relations interests of litigants.").

<sup>31</sup> As the MNA observed in its amicus brief, the balancing of these interests are magnified when, as in this case, the litigation pits one of the most powerful agencies of state government against a private enterprise with enormous financial resources whose products directly touch the lives of countless citizens. *Id.* at 5.

<sup>32</sup> In its amicus brief, the MNA echoes the State's argument that the district court's order will necessarily cloak this entire litigation under a shroud of secrecy. *Id.* at 13-14.

drug importation story before the public. The public is now entitled to know the rest of the story that GSK is hiding.

**C. The District Court Also Erred In Failing To Make Any Findings To Support Its Conclusion That The Documents Here Are Confidential And In Reaching This Conclusion In The Absence Of Any Affidavits From GSK Supporting Its Confidentiality Designations.**

In deciding that documents are confidential under Rule 26.03, a district court must make findings to support its determination. *See Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1314 (11th Cir. 2001) (findings of fact made by a district court as to the question of whether there is good cause for the issuance of a Rule 26(c) protective order need to be sufficiently detailed to permit meaningful appellate review); *Pansy*, 23 F.3d at 789 (same). Here, the district court made no such findings. Its decision merely contains the conclusory, and legally insufficient, statement that the documents reflect protected petitioning activity.

The district's error here is very akin to the district court's error in finding that certain documents were confidential pursuant to an umbrella protective order in *Bonzel v. Pfizer, Inc.*, No. C4-02-298, 2002 WL 1902526, at \*5 (Minn. Ct. App. Aug. 20, 2002). In that case, this Court found that the district court failed to exercise its discretion in determining whether certain documents were actually confidential under the same type of umbrella protective order the district court entered in the instant case. *Id.* at 5-6. This Court noted that the district court's initial assessment that some documents could contain proprietary information and warranted confidential treatment did not excuse the court from determining whether the specific documents at issue were, in fact, confidential.

*Id.*<sup>33</sup> This Court ultimately concluded that “the district court did not fulfill its obligation to act as a gatekeeper to insure that the protective order did not become overbroad in its application.” *Id.* at 5.

GSK’s only responsive argument is that the district court stated that it reviewed all of the documents at issue. The fact that it reviewed them does nothing to excuse its failure to make *any* findings justifying its confidentiality ruling.

Similarly, the district court in this case also erred in concluding that the documents are confidential without *any* affidavits from GSK supporting its confidentiality designations. The law is clear that a party claiming that documents are confidential under Rule 26 must submit evidence to the court in the form of an affidavit attesting to the specific grounds for the designation. *See Turick v. Yamaha Motor Corp.*, 121 F.R.D. 32, 35 (S.D.N.Y. 1988) (allegations in attorney’s affidavit justifying confidentiality claim do not provide requisite showing of potential harm to competitive position or that there is good cause for a Rule 26 protective order); *Reliance Ins. Co.*, 428 F. Supp. at 203 (hearsay allegations in attorney’s affidavit are insufficient to warrant issuance of Rule 26 protective order). Here, GSK never submitted *any* affidavits justifying its confidentiality designations. As discussed above, the affidavits of its counsel upon which it now relies are plainly legally insufficient to satisfy GSK’s burden under Rule 26.03. Because the

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<sup>33</sup> The Court also noted in *Bonzel* that it would also be inappropriate for the district court to deny access to entire documents if only portions of the documents contained confidential information. *Id.*

district court was without a legally sufficient factual basis upon which to determine that the documents at issue are confidential, the court committed reversible error.

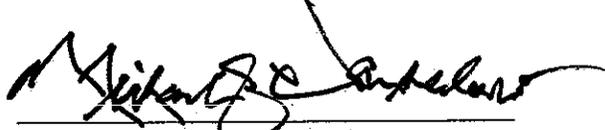
### CONCLUSION

For the above-stated reasons, the State respectfully requests that this Court reverse the October 13, 2004 decision of the district court and rule that the 45 GSK documents at issue are not confidential.

Dated: September 12, 2005

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

**WITH MINN. R. APP. P 132.01, Subd. 3**

The undersigned certifies that the Brief submitted herein contains 12,115 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2002, the word processing system used to prepare this Brief.



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MICHAEL J. VANSELOW

AG- #147767-v1

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).