MINNESOTA STATE LAW LIBRARY

5

No. A04-2150

STATE OF MINNESOTA

IN COURT OF APPEALS

State of Minnesota,

Appellant,

vs.

GlaxoSmithKline plc,

Respondent.

REPLY BRIEF OF APPELLANT STATE OF MINNESOTA

MICHAEL A. LINDSAY
Atty. Reg. No. 0163466
Dorsey & Whitney LLP
Suite 1500, 50 South Sixth Street
Minneapolis, MN 55402
(612) 340-2600

GEORGE S. CAREY
SARA D. SCHOTLAND
Cleary Gottlieb Steen & Hamilton
2000 Pennsylvania Avenue N.W.
Washington, DC 20006
(302) 974-1500

ATTORNEYS FOR RESPONDENT

MIKE HATCH
Attorney General
State of Minnesota

MICHAEL J. VANSELOW
Deputy Attorney General
Atty. Reg. No. 152754

PAUL B. CIVELLO
Assistant Attorney General
Atty. Reg. No. 0293532

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 296-2367 (Voice)
(651) 296-1410 (TTY)

ATTORNEYS FOR APPELLANT

CHARLES R. SCHEFFLER
Atty. Reg. No. 183295
Mohrman & Kaardal, P.A.
33 South Sixth Street, Suite 4100
Minneapolis, MN 55402
(612) 341-1074

MARGARET M. ZWISLER
ELIZABETH B. McCALLUM
Howrey Simon Arnold & White, LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

ATTORNEYS FOR AMICUS CURIAE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF FACTS 1

STANDARD OF REVIEW 1

ARGUMENT 2

I. THE STATE DID NOT WAIVE ITS EXPRESS RIGHT TO CONTEST GSK'S CONFIDENTIALITY DESIGNATIONS AS TO DOCUMENTS IT HAD NOT RECEIVED OR REVIEWED AND IS NOT, THEREFORE, ESTOPPED FROM CHALLENGING THESE DESIGNATIONS 2

A. The State Did Not Seek To Modify The Protective Order, But Rather To Rely Upon Its Express Terms To Challenge GSK's Confidentiality Designations 3

B. The State Never "Contractually Committed" To Hold Any GSK Documents Confidential. 4

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. 6

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 7

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. 11

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 11

III. GSK MISREPRESENTS THE RECORD AND THE RELEVANT CASE LAW IN ARGUING THAT THE DOCUMENTS AT ISSUE ARE PROTECTED AS CONFIDENTIAL UNDER THE FIRST AMENDMENT. 13

A. GSK Only Ever Claimed That 15 Of The Documents At Issue Were Subject To A "First Amendment Privilege." 14

B. GSK Misrepresents The Relevant Case Law. 15

C. PhRMA's Claims That the Documents at Issue are Protected Under the First Amendment are Without Merit. 16

1. The Documents At Issue Are Not PhRMA's Documents. 16

2. The Documents At Issue Evidence Business Activity In Potential Violation Of Minnesota's Antitrust Laws, Not Petitioning Or Associational Activity Protected by The First Amendment. 17

IV. THE DOCUMENTS ARE NOT CONFIDENTIAL UNDER THE APPLICABLE MINN. R. CIV. P. 26.03 LEGAL STANDARDS WHICH THE DISTRICT COURT NEVER IDENTIFIED OR APPLIED. 18

A. The Protective Order Here Should Be Strictly Construed In Light Of The Strong Judicial Disdain For Secrecy In Litigation. 19

B. The Documents At Issue Do Not Satisfy Minn. R. Civ. P. 26.03's Confidentiality Standards. 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Amer. Computer Trust Leasing v. Jack Farrell Implement Co.,
136 F.R.D. 160 (D. Minn. 1991) 3

Assoc. Container Transp. (Australia) Ltd. v. United States,
705 F.2d 53 (2d Cir. 1983) 15

Bates v. City of Little Rock,
361 U.S. 516 (1960) 18

Chicago Tribune Co. v. Bridgestone/Firestone, Inc.,
263 F.3d 1304 (11th Cir. 2001) 22

Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,
365 U.S. 127 (1961) 15

Gibson v. Florida Legislative Investigation Comm.,
372 U.S. 539 (1963) 16

McMaster v. Pung,
984 F.2d 948 (8th Cir. 1993) 9

Medtronic, Inc. v. Boston Scientific Corp.,
2003 U.S. LEXIS 2286 (D. Minn. Feb. 14, 2003) 4

NAACP v. Alabama,
357 U.S. 449 (1958) 16

Nat'l Soc'y of Prof'l Eng'rs v. U.S.,
435 U.S. 679 (1978) 19

North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.,
666 F.2d 50 (4th Cir. 1981) 15

Reliance Ins. Co. v. Barron's
428 F. Supp. 200 (S.D.N.Y. 1977) 22

Sanitation and Recycling Indus. v. City of New York,
107 F.3d 985 (2d Cir. 1997) 19

Star Tribune v. City of Minneapolis,
No. 97-21727, 1997 WL 1048497 (D. Minn. Mar. 12, 1997) 8

Sweezy v. New Hampshire,
354 U.S. 234 (1957) 18

Turick v. Yamaha Motor Corp.,
121 F.R.D. 32 (S.D.N.Y. 1988) 23

U.S. v. Bell,
217 F.R.D. 335 (M.D. Pa. 2003) 18

U.S. v. Wilson,
154 F.3d 658 (7th Cir. 1998) 18

United Mine Workers v. Pennington,
381 U.S. 657 (1965) 15

STATE CASES

Bonzel v. Pfizer, Inc.,
No. C4-02-298, 2002 WL 1902526 (Minn. Ct. App. Aug. 20, 2002) 22

Kroning v. State Farm Auto Ins. Co.,
567 N.W.2d 42 (Minn. 1997) 1

Montgomery Ward & Co., Inc. v. County of Hennepin,
450 N.W.2d 299 (Minn. 1990) 8

Seeger v. State of Minnesota,
No. C1-00-416, 2000 WL 1221508 (Minn. Ct. App. Aug. 29, 2000) 8

Smith v. Mankato State University,
Nos. C2-95-98/C4-95-99, 1995 WL 450811 (Minn. Ct. App. Aug. 1, 1995) 10

Star Tribune v. Minn. Twins Ptsh'p,
659 N.W.2d 287 (Minn. Ct. App. 2003) 9

State v. Babcock,
685 N.W.2d 36 (Minn. Ct. App. 2004) 1

State v. Philip Morris, Inc.,
606 N.W.2d 676 (Minn. Ct. App. 2000) 4

Westrom v. Minnesota Dep't of Labor and Industry,
686 N.W.2d 27 (Minn. 2004) 8

STATE STATUTES

Minn. Stat. § 13.39 ..... passim

Minn. Stat. § 13.43, subd. 2 10

OTHER AUTHORITIES

Op Atty. Gen. 852 (Aug. 4, 2000) 10

STATEMENT OF FACTS

GSK concedes in its "Counterstatement of Facts" that all of the documents it produced to the State, including the subset of documents at issue in this appeal, were always regarded by the parties as explicitly "subject to" the parties' Confidentiality Agreement and/or the district court's July 13, 2004 protective order. GSK Br. at 7. This is exactly what the State has argued throughout this litigation -- that the documents GSK produced to the State designated as confidential were "subject to" the right of the State, under the express terms of the Confidentiality Agreement and the protective order, to challenge such designations in the district court.

STANDARD OF REVIEW

GSK notes, and the State agrees, that a district court's decision regarding the confidentiality of documents under a protective order is ordinarily reviewable under an abuse of discretion standard. GSK does not dispute or cite contrary authority regarding the State's further clarification that the alleged specific errors of the district court are legal errors that are reviewable de novo and that would 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). As the State previously explained, the three specific issues in this appeal: (1) whether the district court erred in construing the meaning of words used in a legal document -- namely, its own protective order; (2) the legal interpretation of a statute in the Minnesota

Government Data Practices Act; and (3) the construction of the First Amendment and Minn. R. Civ. P. 26.03, are all clearly questions of law that are reviewed de novo.[1]

ARGUMENT

I. THE STATE DID NOT WAIVE ITS EXPRESS RIGHT TO CONTEST GSK'S CONFIDENTIALITY DESIGNATIONS AS TO DOCUMENTS IT HAD NOT RECEIVED OR REVIEWED AND IS NOT, THEREFORE, ESTOPPED FROM CHALLENGING THESE DESIGNATIONS.

The district court erroneously accepted GSK's illogical and wholly unsupported argument that the State should be estopped from challenging the confidentiality of GSK's documents because the State agreed that some of the documents GSK previously produced would be subject to the district court's July 13, 2004 protective order. The Minnesota Supreme Court flatly rejected this argument in its July 14, 2005 Order:

> The 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.

A-118, n.3. Having had its estoppel argument so roundly rejected by the Supreme Court, GSK now tries to rehabilitate it before this Court by dressing it up in slightly newer clothes. It is, nevertheless, the same meritless argument, and this Court should follow the Supreme Court and categorically reject it.

---

[1] 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.

A. The State Did Not Seek To Modify The Protective Order, But Rather To Rely Upon Its Express Terms To Challenge GSK's Confidentiality Designations.

Although the State agreed that certain documents GSK produced in response to the State's second motion to compel compliance with its CID would be produced "subject to" the district court's protective order, the State *never* waived its right to contest GSK's confidentiality designations regarding those, or any other, documents. The State simply agreed that the documents would be treated in accordance with the terms of that order, which, as the Minnesota Supreme Court recognized, expressly and unequivocally allows the State to contest GSK's confidential designations in the district court.[2] GSK would have this Court believe that the State agreed that these documents are all confidential *without ever having seen the documents.* The State never agreed, and never would have agreed, that documents *it had never seen* were, in fact, all confidential. The State would never have been willing to rely on GSK's self-proclaimed determination that these documents are confidential and to waive its express right under the protective order to contest these designations.[3]

---

[2] In fact, GSK's counsel drafted the protective order and knew at all times that the order allowed the State to challenge GSK's confidentiality designations.

[3] GSK's citation to *Amer. Computer Trust Leasing v. Jack Farrell Implement Co.*, 136 F.R.D. 160 (D. Minn. 1991), is not even remotely helpful to its argument that the State somehow reversed a prior commitment. In that case, a litigant, who did not contest the confidentiality of certain customer lists it was provided under a protective order, sought to reverse its position and use the lists to solicit additional clients. Here, conversely, the State has objected to GSK's confidentiality designations as to the affected documents and is invoking the very process GSK drafted and the district court approved to resolve such a dispute.

In an attempt to support its estoppel argument, GSK cites cases purporting to show that the State should not be able to modify the substantive terms of the protective order. *See, e.g., State v. Philip Morris, Inc.*, 606 N.W.2d 676 (Minn. Ct. App. 2000); *Medtronic, Inc. v. Boston Scientific Corp.*, 2003 U.S. LEXIS 2286 (D. Minn. Feb. 14, 2003). These cases are wholly irrelevant. The State did not ask the district court to modify the order. Quite to the contrary, the State relied upon the express terms of the order which give it the clear right to ask the district court to overturn GSK's confidentiality designations with regard to the affected documents. If anyone requested such a modification, *de facto* or otherwise, it was GSK, which argued that the district court should modify the protective order to eliminate the State's express right to contest GSK's confidentiality designations *before* the State ever had a chance to review the affected documents. In effectively granting this modification, the district court erred.[4]

B. The State Never "Contractually Committed" To Hold Any GSK Documents Confidential.

GSK tries to give its flawed estoppel argument a different look by making the novel and erroneous argument that the State "contractually committed" to hold the documents at issue confidential. GSK bases this claim on a single line in the State's reply brief in its motion to compel documents for which GSK had claimed a so-called

[4] GSK's estoppel argument is also flawed because, as discussed in Argument III, only 15 of the 45 documents at issue, or one-third, were included in the production of First Amendment privileged documents. 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.

"First Amendment privilege," and on its false characterization of the hearing on that motion. This argument is baseless for numerous reasons.

First, the line from the State's reply brief upon which GSK relies merely states that the parties' Confidentiality Agreement in this case, like all confidentiality agreements, provides assurance against disclosure *according to its terms*. It is absurd to suggest that the State agreed in this sentence of its brief to modify the parties' Confidentiality Agreement to deprive the State of its express right to challenge GSK's confidentiality designations with respect to documents *the State had never even seen*.[5]

Second, the parties' Confidentiality Agreement expressly provides (State's Appendix at A-15 at ¶ 7) that GSK can apply to the court for a modification of the Agreement. GSK never requested that the court modify this Agreement to deprive the State of its express right to contest GSK's confidentiality designations for some subset of the documents GSK produced.

Third, as discussed in Argument III, most of the documents at issue in this appeal (30 of 45 documents) were not even at issue in the State's prior motion to compel and, therefore, any alleged "contract" based on a representation made during that motion cannot possibly apply to them.

Fourth, GSK did not rely on any alleged side "contract" between the parties when it produced its documents. GSK's cover letter accompanying its production to the State indicates that, at the time GSK produced its allegedly "First Amendment privileged"

[5] Moreover, the idea that a legal argument made to a court could ever form a "contract" with an adverse party is absurd.

documents, it understood that the MGDPA and the protective order governed any claim of confidentiality -- not some alleged side "contract." (July 19, 2004 Letter quoted in October 13, 2004 Order, at 5, at A.-100).

Finally, GSK's representations regarding the State's alleged "contractual commitments" made at the hearing on the State's motion to compel are false, unsupported by a transcript or other evidence, and should be disregarded. GSK's own acknowledgement that a Final Stipulation between the parties was reached on July 6, 2004 only "[a]fter much negotiation" (GSK Br. at 9) belies its claim that any "contractual commitment" was made at the June 17, 2004 hearing, almost three weeks earlier.

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.

GSK's arguments that the 45 documents at issue are nonpublic data under Minn. Stat. § 13.39 of the Minnesota Government Data Practices Act ("MGDPA") are altogether flawed. First, GSK essentially ignores the Supreme Court's observation that the district court erred in failing to rule that the State's termination of its investigation and commencement of its lawsuit renders Section 13.39 inapplicable.[6] Second, GSK completely ignores the district court's further error in concluding that it had sole authority to determine if the conditions for release of protected investigative data existed under Section 13.39, Subdivision 2. Finally, while the district court also erred in failing

[6] 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 very order.

to analyze whether any of the conditions under Section 13.39, Subdivision 2 exist in this case, GSK tries unsuccessfully to supply the district court's missing analysis.

A. Minn. Stat. § 13.39 Makes Investigative Data Public Once The State's Investigation Is Concluded And The State Commences Litigation.

As the Minnesota Supreme Court has already made clear, this case does not involve the issue of whether the documents at issue are inactive investigative data since that classification is relevant only 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 the investigative data public. *Id.* Section 13.39 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.* at Subd. 3. 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 filed with the Ramsey County District Court. Therefore, the data is no longer nonpublic under Section 13.39's plain language.

GSK's only response to the Supreme Court's description of the relevant issue here is its conclusory argument, devoid of any analysis or authority, that the filing of investigative data with a complaint should not be equivalent to making the data part of a court record. GSK's argument here is both logically flawed and contrary to Minnesota case law. For example, in *Star Tribune v. City of Minneapolis*, No. 97-21727, 1997 WL 1048497, *2 (D. Minn. Mar. 12, 1997), which GSK simply ignores, the court found that

the attachment of civil investigative data to an affidavit filed with the court made the attachment public even though the affidavit was later removed from the court file. If investigative data attached to an affidavit is considered a presentation to the court under Section 13.39, then certainly the attachment of such data to a Complaint presented to two courts constitutes presentation to the court under Section 13.39.

GSK is also unable to distinguish any of the numerous cases the State cites directly supporting the plain language of Section 13.39. For example, GSK references the Supreme Court's decision in *Westrom v. Minnesota Dep't of Labor and Industry*, 686 N.W.2d 27 (Minn. 2004), which directly supports the State's position. 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. *Id.* at 36-37. GSK's analysis of this case actually supports the State's argument in that it cites the Court's statement that investigative data must be kept confidential "while an investigation is ongoing." Here, in contrast, the State has indisputably ended its investigation.

GSK also mentions *Montgomery Ward & Co., Inc. v. County of Hennepin*, 450 N.W.2d 299, 306 (Minn. 1990), in which the Supreme Court held that investigative data made part of the court record is public. GSK simply argues that that case involved pre-trial discovery -- a distinction wholly without a difference in regard to the issue of whether investigative data becomes public when made part of the court record.

GSK also cites *Seeger v. State of Minnesota*, No. C1-00-416, 2000 WL 1221508, *2 (Minn. Ct. App. Aug. 29, 2000), which held that private welfare data became public when it was submitted as part of an administrative proceeding, and argues that this case

did not involve private investigative data under Section 13.39. While that is correct, the case is nonetheless authority for the treatment of other analogous private data that has been presented to a court.

Finally, GSK discusses *McMaster v. Pung*, 984 F.2d 948, 952 (8th Cir. 1993), in which the court held that certain investigative data in the form of a tape was confidential under Section 13.39 "until that investigation was completed." GSK argues that the investigation in that matter appears to have been concluded "[u]nlike this case." Whether that investigation was already concluded may indeed be unclear. What is not unclear, however, is that the State's investigation in this case was, in fact, concluded and GSK cannot suggest otherwise. GSK also erroneously contends that there was no suggestion that the tape in that case would become public after the investigation concluded. To the contrary, that is precisely what the court said when it stated that the tape was confidential under Section 13.39 "until that investigation was completed."

The construction of Section 13.39 by all of these courts is also directly consistent with the statute's "principal purpose" which is to prevent any disadvantage to government agencies from 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)).[7] This principal purpose is advanced if, and only if, the State is allowed to decide when to

[7] The fact, as GSK alleges, that private parties can also invoke this statute does nothing to undermine this "principal purpose" of the statute.

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.

As the State previously explained, were the law otherwise, as GSK advocates, the State would have to file its complaints under seal if they referenced any State data obtained through the State's presuit investigation. This is a preposterous result devoid of any basis in Minnesota law and for which GSK has absolutely no response in its brief.[8]

Finally, GSK's reliance on *Smith v. Mankato State University*, Nos. C2-95-98/C4-95-99, 1995 WL 450811 (Minn. Ct. App. Aug. 1, 1995), does not help its argument. That case dealt with the requested release of certain private employment data under Minn. Stat. § 13.43, subd. 2. In response to the Appellants' argument that the data should be considered investigative data under Section 13.39, the court concluded that even if the data was investigative under Section 13.39, it was not yet inactive and, therefore, not public. This case is simply of no help to GSK because there is no indication that the data at issue there was ever made part of the court record, unlike in this case.[9]

---

[8] GSK also erroneously argues that the law, as reflected in these many cases, effectively renders four other provisions in Section 13.39 meaningless. That is simply not true. Each of the four provisions GSK cites are fully operative. Investigative data that has not been made part of a court record, or otherwise released under Section 13.39, subd. 2, remain confidential until "inactive." Inactive data can become active again if the state renews an action. A court can review confidential data that has not already been made public *in camera* when a civil action is pending. Finally, as the State has alleged, it can publish investigative data when, as in this case, it makes the data part of a court record.

[9] The State could decide to keep investigative data private after commencing litigation if, unlike here, it decided not to make such data part of the court record.

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, Subdivision 2 clearly 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 explained in the State's initial brief, this holding directly contravenes the statutory language and applicable caselaw. GSK does not even try to justify the district court's error as to this issue.

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.

Because the district court inexplicably and erroneously failed to analyze whether any of the conditions in Section 13.39, subd. 2, in fact, exist in this case, GSK simply makes up an explanation for what it contends the district court was thinking and tries to provide the missing analysis of this issue. GSK is off-base on both accounts.

First, GSK contends that the district court neglected to analyze these conditions because the State conceded that they were inapplicable. Not only is this allegation false, as is readily evident from the State's briefs, but the district court also never stated that it would not analyze these factors because of any so-called concession by the State. Instead, after citing and discussing these conditions, and also emphasizing who should decide whether these conditions are satisfied, the district court inexplicably failed to analyze whether the conditions actually applied in this case even though both sides had thoroughly briefed the issue.

Second, GSK's substituted analysis of the application of these conditions is flawed. Release of the documents here would unquestionably directly and substantially aid the antitrust law enforcement process. GSK's only response to this argument is its contention that the State has already "amply publicized" its investigation and lawsuit. While GSK may feel that this matter has been sufficiently publicized, there is no question that the State's ability to share the documents at issue would directly aid other similar litigants, encourage potential witnesses to come forward, and encourage other similar lawsuits. As the Supreme Court very 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 (emphasis added).

The release of the documents would also "promote public health." GSK merely argues that this is not a case dealing with "product defects," suggesting that only such a case could ever promote the public's health and safety. Moreover, GSK has repeatedly told the public that Canadian drugs are defective because they are not safe for consumption in the United States. It has even tried to link the importation of Canadian prescription drugs with the threat of terrorism.[10] GSK's documents belie its assertion that

[10] The drug industry has tried to persuade consumers that Canadian drugs are manufactured in less trustworthy facilities than drugs sold in the United States, invoking fears of terrorism. In fact, drugs sold through Canadian pharmacies are manufactured in the same facilities as drugs sold in the United States. The industry's trade group, Pharmaceutical Researchers and Manufacturers of America ("PhRMA"), even went so far as to commission the writing of a novel, which PhRMA instructed should revolve around a fictional terrorist attack on the United States through the poisoning of drugs (Footnote Continued on Next Page)

Canadian drug imports are unsafe and show the true motivating force behind the boycott which may also affect the current national debate over Canadian drug imports and thereby positively affect the health of American consumers who cannot afford to pay the exorbitant price of prescription drugs in the U.S.

Finally, the release of the documents would also "dispel widespread rumor or unrest." GSK contends that there are no rumors surrounding Canadian drugs. In fact, the safety and origin of Canadian drugs and the true motivation behind the Canadian drug boycott are the subjects of rumor almost daily in the local, state, national or international news. Furthermore, GSK has itself created confusion and unrest among purchasers of those drugs, which is, of course, precisely what it and other drug companies intended. GSK's documents are critical to telling the whole and true story about the safety and efficacy of drugs imported from Canada.

III. GSK MISREPRESENTS THE RECORD AND THE RELEVANT CASE LAW IN ARGUING THAT THE DOCUMENTS AT ISSUE ARE PROTECTED AS CONFIDENTIAL UNDER THE FIRST AMENDMENT.

As the State explained in its initial brief, the district court erred in concluding, without any analysis whatsoever, that the GSK documents at issue were subject to a "First Amendment privilege" and, therefore, protected as confidential. In attempting to fill the analytical vacuum left by the district court's Order, GSK distorts the record before

---

(Footnote Continued From Previous Page)
imported from Canada, as part of its campaign to scare consumers away from cheaper Canadian pharmaceuticals. The authors eventually broke their relationship with PhRMA and changed the plot to involve a pharmaceutical company commissioning the terrorist attack on Canadian imports to frighten American consumers. *Available at* http://www.onthemedia.org/transcripts/transcripts_102105_pharma.html

this Court, ignores the Minnesota Supreme Court's rejection of GSK's claimed "First Amendment privilege," and undertakes an irrelevant and misleading analysis of the *Noerr-Pennington* doctrine. This Court should reject GSK's arguments and find that nothing in this record and the relevant case law supports confidentiality protection derived from a so-called "First Amendment privilege."[11]

A. GSK Only Ever Claimed That 15 Of The Documents At Issue Were Subject To A "First Amendment Privilege."

GSK asserts that the district court did not err when it declared that all the documents at issue "were correctly designated as petitioning documents subject to First Amendment privilege." A-103. Simultaneously, GSK claims that, according to its own calculations, only 32 of the documents "reflect either First Amendment protected petitioning activity or the associational privacy of GSK or a third party" -- that is, by GSK's own admission, fewer than 32 of the documents at issue have anything to do with petitioning activity. GSK Brief, at 22, n.45. Both assertions cannot be correct and, in this case, both are quite wrong.

In the district court, GSK designated only 15 of the documents at issue as subject to a "First Amendment privilege." In its brief, GSK now belatedly tries to back out of this harmful fact by claiming that its original designations were not really accurate and

[11] GSK makes a red herring argument that this case does not deal with the issue of access to judicial records under the First Amendment. The State never claimed it does. The issue here is not the State's constitutional right to access court records. Rather, the sole issue is whether the GSK documents at issue are confidential under Rule 26.03 because the disclosure of the documents would work a clearly defined and very serious injury to GSK's business.

that it re-designated the documents after they became at issue. Even if this implausible explanation were true, GSK cannot reconcile its partial designation of the documents as First Amendment privileged with the district court's finding that all fall under the protection of the First Amendment. No matter how GSK tries to slice it, the district court clearly erred.

B. GSK Misrepresents The Relevant Case Law.

GSK ignores the Minnesota Supreme Court's observation that the district court's "*conclusion that there is a First Amendment privilege for 'petitioning documents' is not clearly recognized in case law.*" A-118 (emphasis added). GSK then launches into a lengthy and irrelevant discussion of the *Noerr-Pennington* doctrine in an attempt to make up this absence of authority.

The State does not argue, as GSK implies, that a corporation does not have a First Amendment right to petition the government. Rather, the State argues that the documents at issue do not reflect any such petitioning activity and, even if they did, they are neither privileged nor confidential. The *Noerr-Pennington* doctrine is merely a defense to antitrust liability; it is not a discovery privilege. It stands for the general proposition that a defendant's petitioning activity cannot form the basis for antitrust liability. *See United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Such petitioning activity, however, can be used as evidence of antitrust violations. *See, e.g., Pennington*, 381 U.S. at 670, n.3 (noting that evidence of petitioning activity was admissible, at the trial court's discretion, "if it tends reasonably to show the purpose and character" of an alleged

broader scheme that violates the antitrust laws). Moreover, numerous cases have held that the *Noerr-Pennington* doctrine is not a privilege. *See, e.g., Assoc. Container Transp. (Australia) Ltd. v. United States*, 705 F.2d 53, 59-60 (2d Cir. 1983); *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50, 53 (4th Cir. 1981) (stating that "[t]here is no authority for fitting the Noerr-Pennington doctrine into the 'privilege' exception to [Rule 26].") GSK cites no case law, because there is none, holding that the *Noerr-Pennington* doctrine protects the confidentiality of petitioning documents.

C. PhRMA's Claims That The Documents At Issue Are Protected Under The First Amendment Are Without Merit.

PhRMA's *amicus* brief parrots GSK's arguments that "PhRMA's" documents are protected as petitioning and associational activity under the First Amendment. PhRMA is mistaken for several reasons.[12]

1. The Documents At Issue Are Not PhRMA's Documents.

All of the documents at issue in this case are documents that the State obtained from GSK, not from PhRMA. Accordingly, PhRMA's arguments about its own confidentiality policy and practices are irrelevant. The issue before the district court

[12] The facts of the cases PhRMA cites for the general proposition that the documents at issue should be afforded blanket First Amendment protection are far afield from the facts of this case. For example, PhRMA repeatedly cites civil rights and other cases where a governmental entity is 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 PhRMA to equate a drug company group's documents about how to control commercial markets with a civil rights group's struggle to maintain the physical safety of its members is wholly unconvincing.

concerned the steps GSK took, or more appropriately, did not take, to safeguard the confidentiality of the documents in its own files.[13]

2. The documents at issue evidence business activity in potential violation of Minnesota's antitrust laws, not petitioning or associational activity protected by the First Amendment.

PhRMA contends that many of the documents at issue should be kept secret because they reflect First Amendment petitioning or associational activity. Yet the documents at issue simply do not fit PhRMA's characterization. In fact, as the state argued in its initial brief, the documents do not reflect First Amendment activity at all, but rather business activity relating to the Canadian drug import issue.

Furthermore, because the documents at issue reflect *illegal* business activity -- as is evident from the State's Complaint filed under seal with the Ramsey County District Court and this Court -- they do not enjoy First Amendment protection. *See, e.g., U.S. v. Wilson*, 154 F.3d 658, 665 (7th Cir. 1998); *U.S. v. Bell*, 217 F.R.D. 335, 343 (M.D. Pa. 2003) ("The freedom of association does not extend to ... unlawful activity."). Neither PhRMA nor GSK, therefore, has a right to hide behind the First Amendment in trying to shield these documents from disclosure.[14]

---

[13] In fact, in contrast to PhRMA, GSK offered absolutely no evidence whatsoever of *any* measures it took to preserve the confidentiality of its documents.

[14] GSK suggests in its Counterstatement of the Case, *id.* at 5, that the Court should look favorably on GSK's position in this appeal because of GSK's view that the merits of the State's antitrust lawsuit against GSK are "doubtful," citing a recent federal district court order dismissing some federal antitrust claims regarding Canadian drug imports brought against GSK by some private plaintiffs. GSK fails to highlight the fact that the federal court in that case expressly refused to dismiss the state antitrust and other state law claims of those private plaintiffs. It also neglects to mention the many advantages the
(Footnote Continued on Next Page)

Additionally, PhRMA's ostensible political/advocacy mission cannot shield its members. GSK and other drug companies cannot engage in illegal commercial activity using PhRMA as a vehicle. Rather, when mixed political and business activities are taking place, whether through PhRMA or any other group, the business activity must be subject to law enforcement and public scrutiny and deserves no special protection under the First Amendment. *See Sanitation and Recycling Indus. v. City of New York*, 107 F.3d 985, 999 (2d Cir. 1997) ("Tangential legitimate purposes pursued by a trade association whose defining aim ... is to further an illegal anticompetitive scheme will not shield the association from government action to root out the illegal activity."). In the final analysis, the State's antitrust laws trump PhRMA's and GSK's confidentiality claims.[15]

IV. THE DOCUMENTS ARE NOT CONFIDENTIAL UNDER THE APPLICABLE MINN. R. CIV. P. 26.03 LEGAL STANDARDS WHICH THE DISTRICT COURT NEVER IDENTIFIED OR APPLIED.

Not only did the district court err in concluding that the documents at issue are confidential under the First Amendment, but the court further erred in failing to identify and apply the applicable legal confidentiality standard under Minn. R. Civ. P. 26.03. Protective orders like the July 13, 2004 order at issue here should be strictly construed in light of the strong public and judicial disdain for secrecy in litigation. The documents at

(Footnote Continued From Previous Page)
State has, as a law enforcement agency, over private plaintiffs in litigating such an antitrust case.

[15] The Minnesota Newspaper Association submitted an *amicus curiae* brief to the Minnesota Supreme Court in support of the State's position in which it set forth the public interest in open access to judicial proceedings and court records. The public interest in open access regarding this litigation would be frustrated by GSK's and PhRMA's illegitimate claims of confidentiality.

issue are not confidential based on an analysis of the Rule 26.03 standards. 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 a sufficient affidavit from GSK.

A. The Protective Order Should Be Strictly Construed In Light Of The Strong Judicial Disdain For Secrecy In Litigation.

As the State previously noted, there has been growing judicial and public criticism of secrecy agreements and orders that hide litigation documents and other data from the public. GSK would very much like the Court to ignore this backdrop claiming that the dispute over the pros and cons of secrecy in litigation is irrelevant. In fact, this background is highly relevant to why courts, including this Court, should strictly construe such protective orders.

GSK makes the strawman argument that the State seeks to prohibit all protective orders. The State has never argued as much and does not argue so here.[16] While the State recognizes that there are some legitimate uses for such orders, it also notes that all such orders must be strictly construed in light of the overwhelming public and judicial criticism of such secrecy orders.

[16] The State voluntarily agreed to the confidentiality agreement and protective order in this matter and never asked to be relieved of that agreement and order. To the contrary, the State requests that the Court enforce the State's express right under the agreement and order to challenge GSK's improper confidentiality designations.

B. 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. Rule 26.03(g) permits courts to prevent the disclosure of trade secrets or "other research, development, or commercial information." The district court did not, in fact, find a single one of GSK's documents to be confidential under this Rule. In fact, the district court never even articulated or applied the confidentiality standard under this Rule.[17] Had it done so, it would necessarily have determined that: (1) GSK's documents are not even the type of documents that are protected under this Rule; (2) GSK did not explain, as it must, how the disclosure of the documents would result in a *"clearly defined and very serious injury"* to GSK's business; (3) GSK disclosed many of the documents to outsiders, including its direct competitors, negating any conceivable confidentiality claim; (4) GSK did not properly safeguard the alleged confidentiality of the documents; and (5) the documents reveal evidence of unlawful conduct. Finally, even if GSK's documents are confidential under the above standards, the presumption and interest in public access to the documents outweighs any alleged harm to GSK's competitive position from disclosure and amply justifies the disclosure of the documents.

GSK makes several more immaterial strawmen arguments in regard to this issue. For example, GSK argues that the State contends the protective order in this case only applies to "trade secrets." The State has *never* made this argument. In fact, it was

[17] Because the district court did not even analyze Rule 26.03, GSK tries unsuccessfully to argue how the documents are still confidential under this Rule without ever explaining how they satisfy the applicable legal standard.

actually the State that defined what could be designated and considered as confidential under the parties' original confidentiality agreement. None of the documents satisfy the Rule 26.03(g) standard of "other research, development, or commercial information."

GSK also makes the erroneous strawman argument that the State contends that the district court had to justify its confidentiality ruling as to each individual document. Again, the State has *never* argued as much. The State has pointed out that a district court must make *findings* to support its confidentiality 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).[18] Here, the district court clearly made no such findings. Its decision merely contains the wholly conclusory, and legally insufficient, statement that the documents are confidential because they reflect protected petitioning activity.

GSK contends that it took steps to protect the confidentiality of its documents because it did not share "some" of these with its competitors. GSK failed to provide any evidence that it sought to restrict access to these documents. The documents were not marked as confidential and GSK failed to provide any explanation as to how access to the documents was in any way restricted (*e.g.*, by limited rights of computer access, locked file cabinets, limited support staff access, destruction restrictions, etc.).

---

[18] *See also Bonzel v. Pfizer, Inc.*, No. C4-02-298, 2002 WL 1902526, *5 (Minn. Ct. App. Aug. 20, 2002).

The district court also erred in finding that the documents are confidential without any affidavits from GSK supporting its confidentiality designations. As the State previously noted, 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. Here, GSK never submitted *any* affidavits justifying its confidentiality designations as to the specific documents at issue here. The affidavits of its counsel upon which GSK has relied are legally insufficient to satisfy GSK's burden under Rule 26.03.[19]

Likewise, the affidavit of Janie Kinney, upon which GSK only now purports to rely, is equally inadequate to provide a sufficient factual basis upon which the court could determine that the documents at issue are confidential. Kinney's affidavit discusses some concerns she has about the disclosure of documents in general. It does not reference or support GSK's confidentiality claims with respect to a single one of the 45 documents at issue here. In fact, it could not do so given that Kinney signed her affidavit in May 2004 and the State did not even bring its motion to unseal the 45 documents until four months later. This affidavit falls woefully short of the type of particularized factual affidavit from a client necessary to support a confidentiality claim.

---

[19] *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. v. Barron's*, 428 F. Supp. 200, 203 (S.D.N.Y. 1977) (hearsay allegations in attorney's affidavit are insufficient to warrant issuance of Rule 26 protective order).

Since it has no persuasive legal arguments to justify its confidentiality designations, GSK resorts to its tired ad hominem harangue that the State is only pursuing this litigation because of the Attorney General's so-called personal political agenda. It is actually quite surprising that GSK continues to make such non-legal attacks after Justice Paul Anderson expressly admonished GSK's counsel for doing so at the May 31, 2005 oral argument before the Supreme Court.[20]

[20] After GSK's counsel repeatedly referred to the State's lawsuit as "Mr. Hatch's" or "the Attorney General's" lawsuit, Justice Anderson interrupted GSK's counsel and strongly admonished her that this is the "State's" lawsuit and not the Attorney General's personal suit as she kept claiming.

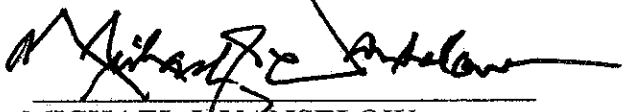
CONCLUSION

For the reasons stated above, and in its initial brief, the State respectfully requests that this Court reverse the district court's October 13, 2004 decision and rule that the 45 GSK documents at issue are not confidential.

Dated: Nov. 3, 2005

Respectfully submitted,

MIKE HATCH
Attorney General
State of Minnesota



MICHAEL J. VANSELOW
Deputy Attorney General
Atty. Reg. No. 152754

PAUL B. CIVELLO
Assistant Attorney General
Atty. Reg. No. 0293532

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 296-2367 (Voice)

ATTORNEYS FOR APPELLANT STATE OF MINNESOTA

CERTIFICATE OF COMPLIANCE

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

The undersigned certifies that the Brief submitted herein contains 6,641 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.

MICHAEL J. VANSELOW

AG: #1509446-v1