

No. A04-2150

---

STATE OF MINNESOTA  
IN COURT OF APPEALS

---

State of Minnesota,  
Appellant,

vs.

GlaxoSmithKline plc,  
Respondent.

---

**BRIEF OF RESPONDENT GLAXOSMITHKLINE PLC**

---

Mike Hatch  
Attorney General  
State of Minnesota

Michael J. Vanselow (#152754)  
445 Minnesota Street, Suite 1100  
St. Paul, MN 55101-2131  
Telephone: (651) 296-9418

**Attorneys for Appellant  
State of Minnesota**

Michael A. Lindsay (#0163466)  
Dorsey & Whitney LLP  
Suite 1500, 50 South Sixth Street  
Minneapolis, MN 55402-1498  
Telephone: (612) 340-2600

George S. Cary  
Sara D. Schotland  
Cleary Gottlieb Steen & Hamilton  
2000 Pennsylvania Avenue, N.W.  
Washington, DC 20006  
Telephone: (202) 974-1500

**Attorneys for Respondent  
GlaxoSmithKline plc**

---

**TABLE OF CONTENTS**

	Page
TABLE OF AUTHORITIES .....	iv
COUNTERSTATEMENT OF LEGAL ISSUES.....	1
I. COUNTERSTATEMENT OF THE CASE.....	3
II. COUNTERSTATEMENT OF FACTS.....	6
1. The Appellant’s Confidentiality Undertakings .....	6
a) Productions Subject To August 2003 Confidentiality Agreement .....	6
b) Productions Subject To Additional Confidentiality Representations and July 2004 Protective Order .....	8
2. Appellant Files Motion to Release Confidential Documents to the Public .....	10
3. Judge Albrecht’s October 2004 Order .....	12
4. Appellant Initiates Appeals Proceedings .....	13
5. Supreme Court Ruling.....	13
6. Developments in the Canadian Import Litigation.....	14
III. SUMMARY OF ARGUMENT .....	14
IV. ARGUMENT .....	16
A. Standard Of Review .....	16
B. Judge Albrecht Did Not Abuse His Discretion In Determining That The Documents At Issue Should Remain Confidential Under The Protective Order And Rule 26 .....	17
1. Pre-Trial Discovery Is Presumed Private.....	17
a) Decisions Allowing Access To Court Records Are Inapposite ....	18
b) Pretrial Discovery Is Intended Only For Litigation Purposes.....	21

2. Discovery Relating To Protected First Amendment Activities Is Appropriately Subject To Confidential Treatment .....	22
a) Several Of The Documents At Issue Involve The Exercise Of GSK's First Amendment Rights .....	22
b) GSK's Associational Privacy Rights Are Appropriately Safeguarded Under Rule 26 .....	25
3. Protective Orders Appropriately Protect The Privacy Interests Of Litigants And Third Parties.....	27
4. The Appellant's Argument That GSK Cannot Assert First Amendment Rights Because The State Has Alleged That GSK Committed Antitrust Violations Must Be Rejected .....	28
5. GSK Appropriately Substantiated Its Confidentiality Claims .....	30
6. Confidential Business Information Was Appropriately Protected .....	32
7. The District Court's Explanation Was Sufficient.....	33
8. Public Policy Is Served By Enforcing Litigants' Agreements To Treat Private Discovery As Confidential .....	34
C. Judge Albrecht Did Not Abuse His Discretion In Ruling That The Appellant Had Contractually Committed To Provide Confidential Treatment To Those Documents That Pertain To Petitioning Activity.....	36
1. The Appellant Committed To Providing Confidential Treatment To GSK's Petitioning Documents .....	37
2. Now That GSK Has Relied On The Appellant's Representations Of Confidential Treatment For First Amendment Petitioning Documents, It Would Be Fundamentally Unfair To Allow The Appellant To Publicize The Documents .....	39
D. The Confidential Documents Also Remain Protected Under The Minnesota Government Data Practices Act Despite The Appellant's Filing Of A Complaint In Ramsey County.....	42
1. Private Parties May Invoke Minn. Stat. § 13.39 .....	44
2. An Investigation Does Not Become Inactive When A Complaint Is Filed .....	44

3. None Of The Narrow Exceptions To The Pending Investigations Clause  
Apply In This Case ..... 47

V. CONCLUSION.....49

CERTIFICATE OF COMPLIANCE WITH MINN. R. APP. P 132.01, Subd. 3.....50

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Adolph Coors Co. v. Wallace/AFL-CIO Coors Boycott Committee</i> , 570 F. Supp. 202 (N.D. Cal. 1983).....	26
<i>Am. Computer Trust Leasing v. Jack Farrell Implementing Co.</i> , 136 F.R.D. 160 (D. Minn. 1991) .....	40
<i>Antioch v. Scrapbook Borders, Inc.</i> , 291 F. Supp. 2d 980 (D. Minn. 2003).....	24
<i>Assoc'td Contract Loggers, Inc. v. U.S. Forest Service</i> , 84 F. Supp. 2d 1029 (D. Minn. 2000).....	22, 23
<i>Australia/Eastern USA Shipping Conference v. U. S.</i> , 537 F. Supp. 807 (D.D.C. 1982) .....	26
<i>Black Panther Party v. Smith</i> , 661 F.2d 1243 (D.C. Cir. 1981) .....	26
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) .....	22
<i>In re Buscaglia</i> , 518 F.2d 77 (2d Cir. 1975) .....	29
<i>In re Can. Import Antitrust Litig.</i> , 2005 U.S. Dist. LEXIS 18949 (D. Minn. Aug. 26, 2005) .....	5, 6, 14, 29, 30
<i>Canadian Import Antitrust Litig.</i> , No. 04-2724 (JNE/JGL), Report and Recommendation, (D. Minn. Feb. 28, 2005) .....	6
<i>Chicago Tribune Co. v. Bridgestone/Firestone Inc.</i> , 263 F.3d 1304 (11th Cir. 2001) .....	19
<i>Cipollone v. Liggett Group, Inc.</i> , 785 F.2d 1108 (3d Cir 1986) .....	28
<i>In re Continental Ill. Sec. Litig.</i> , 732 F.2d 1302 (7th Cir. 1984) .....	20
<i>In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.</i> , 101 F.R.D. 34 (C.D. Cal. 1984).....	18, 30
<i>ETSI Pipeline Project v. Burlington Northern, Inc.</i> , 674 F. Supp. 1489 (D.D.C. 1987) .....	26

<i>Ealy v. Littlejohn</i> , 569 F.2d 219 (5th Cir. 1978).....	26
<i>Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.</i> , 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961).....	23, 24, 29
<i>Eilers v. Palmer</i> , 575 F. Supp. 1259 (D. Minn. 1984).....	26
<i>Encyclopedia Brown Prods. v. H.B.O.</i> , 26 F. Supp. 2d 606 (S.D.N.Y. 1998).....	18, 32
<i>FDIC v. Ernst &amp; Ernst</i> , 677 F.2d 230 (2d Cir. 1982) .....	41
<i>First Am. Title Co. v. S.D. Land Title Ass'n</i> , 714 F.2d 1439 (8th Cir. 1983) .....	23
<i>First Nat'l Bank v. Marquette Nat'l Bank</i> , 482 F. Supp. 514 (D. Minn. 1979), <u>aff'd</u> , 636 F.2d 195, 197 (8th Cir. 1980), <u>cert. denied</u> , 450 U.S. 1042 (1981).....	24
<i>Fischer Sand v. City of Lakeville</i> , 874 F. Supp. 957 (D. Minn. 1994).....	24
<i>Gannett Co., Inc., v. DePasquale</i> , 443 U.S. 368 (1979).....	19
<i>Gelb v. AT&amp;T</i> , 813 F. Supp. 1022 (S.D.N.Y. 1993) .....	20
<i>Gibson v. Fla. Legislative Investigation Committee</i> , 372 U.S. 539 (1963) .....	25
<i>Grandbouche v. Clancy</i> , 825 F.2d 1463 (10th Cir. 1987).....	26
<i>Herbert v. Lando</i> , 441 U.S. 153 (1979) .....	28
<i>IBP Confid. Bus. Docs Litig. v. Iowa Beef Processors Inc.</i> , 797 F.2d 632 (8th Cir. 1986) .....	24
<i>Int'l Action Ctr. v. United States</i> , 207 F.R.D. 1 (D.D.C. 2002).....	26
<i>Int'l Society for Krishna Consciousness v. Lee</i> , 1985 U.S. Dist. LEXIS 22188 (S.D.N.Y. Feb. 28, 1985).....	26
<i>Int'l Union v. Nat'l Right to Work Legal Defense &amp; Educ. Found.</i> , 590 F.2d 1139 (D.C. Cir. 1978) .....	26
<i>Jennings v. Peters</i> , 162 F.R.D. 120 (N.D. Ill. 1995).....	21
<i>Lewitus v. Colwell</i> , 479 F. Supp. 439 (D. Md. 1979).....	29

<i>Littlejohn v. Bic Corp.</i> , 851 F.2d 673 (3d Cir. 1988).....	18
<i>Mason v. Spiegel, Inc.</i> , 610 F. Supp. 401 (D. Minn. 1985) .....	42
<i>McMaster v. Pung</i> , 984 F.2d 948 (8th Cir. 1993).....	45, 46
<i>Medtronic Inc. v. Boston Scientific Corp.</i> , 2003 U.S. Dist. LEXIS 2286 (D. Minn. Feb. 14, 2003) .....	40
<i>Misc. Docket Matter No. 1 v. Misc. Docket Matter No.2</i> , 197 F.3d 922 (8th Cir. 1999) .....	1, 21, 28
<i>NAACP</i> , 357 U.S. at 459, 78 S. Ct. 1163 .....	23
<i>New Hampshire v. Maine</i> , 532 U.S. 742 (2001).....	41, 42
<i>In re New York Times</i> , 828 F.2d 110 (2d Cir. 1987).....	28
<i>Nixon v. Warner Communications</i> , 435 U.S. 589 (1978) .....	18
<i>Pansy v. Borough of Stroudsburg</i> , 23 F.3d 772 (3d Cir. 1994) .....	18, 19
<i>Pratt &amp; Whitney Canada, Inc. v. United States</i> , 14 Cl. Ct. 268 (1988).....	20
<i>Reliance Ins. Co. v. Barron's</i> , 442 F. Supp. 1341 (S.D.N.Y. 1977).....	32
<i>Reliance Ins. Co. v. Barron's</i> , 428 F. Supp. 200 (S.D.N.Y. 1977).....	19
<i>In re Remington Arms Co.</i> , 952 F.2d 1029 (8th Cir. 1991) .....	28
<i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555 (1980).....	19
<i>SEC v. Thestreet.com</i> , 273 F.3d 222 (2d Cir. 2001) .....	41
<i>Seattle Times Co. v. Rhinehart</i> , 467 U.S. 20 (1984) .....	passim
<i>Senart v. Mobay Chemical Corp.</i> , 597 F. Supp. 502 (D. Minn. 1984) .....	23
<i>Turick v. Yamaha Motor Corp.</i> , 121 F.R.D. 32 (S.D.N.Y. 1988).....	32
<i>U.S. v. Bell</i> , 217 F.R.D. 335 (M.D. Pa. 2003).....	29
<i>U. S. v. Garde</i> , 673 F. Supp. 604 (D.D.C. 1987) .....	26

<i>U.S. v. Rx Depot, Inc.</i> , 290 F. Supp. 2d 1238 (N.D. Okla. 2003) .....	6
<i>U.S. v. Wilson</i> , 154 F.3d 658 (7th Cir. 1998).....	28, 29
<i>Vermont v. Leavitt</i> , 2005 U.S. Dist. LEXIS 20864 (D. Vt. Sept. 19, 2005) .....	6
<i>Welch v. Wildwood Golf Club</i> , 146 F.R.D. 131 (W.D. Pa. 1993).....	27
<i>Wilk v. Am. Medical Ass'n</i> , 635 F.2d 1295 (7th Cir. 1980) .....	35
<i>Zenith Radio Corp. v. Matsushita Electric Indus. Co.</i> , 529 F. Supp. 866 (E.D. Pa. 1981) .....	20, 41

STATE CASES

<i>Anjoorian v. Minn. Department of Public Safety</i> , 1998 Minn. App. LEXIS 819 (Minn. Ct. App. July 21, 1998).....	2, 43, 44, 45
<i>BE &amp; K Constr. Co. v. Peterson</i> , 464 N.W.2d 756 (Minn. Ct. App. 1991).....	27
<i>Bauer v. Blackduck Ambulance Ass'n</i> , 614 N.W.2d 747 (Minn. Ct. App. 2000).....	42
<i>Bonzel v. Pfizer</i> , 2002 Minn. App. LEXIS 977 (Minn. Ct. App. 2002).....	16, 33
<i>Britt v. Superior Court</i> , 574 P.2d 766 (Cal. 1978).....	25, 26
<i>Caucus Distributing Inc. v. Commissioner of Commerce</i> , 422 N.W.2d 264 (Minn. Ct. App. 1988).....	26
<i>City Pages v. Minn.</i> , 655 N.W.2d 839 (Minn. Ct. App. 2003) .....	48
<i>Clayworth v. Pfizer</i> , Case No. RG 04-172428, Order Sustaining Second Demurrer with Leave to Amend (Cal. Super. Ct., Alameda County, Apr. 18, 2005).....	6
<i>Deli v. Hasselmo</i> , 542 N.W.2d 649 (Minn. Ct. App. 1996).....	44, 47, 48
<i>Erickson v. MacArthur</i> , 414 N.W.2d 406 (Minn. 1987) .....	16, 25
<i>Everest Dev. v. City of Roseville</i> , 566 N.W.2d 341 (Minn. Ct. App. 1997) .....	46
<i>Keating v. Philip Morris Inc.</i> , 417 N.W.2d 132 (Minn. Ct. App. 1987).....	30

<i>Keller v. VonHoltum</i> , 568 N.W.2d 186 (Minn. Ct. App. 1997).....	23, 24
<i>Kroning v. State Farm Auto. Ins.</i> , 567 N.W.2d 42, 45-46 (Minn. 1997) .....	16, 17
<i>Metro. Rehab. Serv. v. Westberg</i> , 386 N.W.2d 698 (Minn. 1986).....	25
<i>Minn. Twins P'shp. v. Hatch</i> , 592 N.W.2d 847 (Minn. 1999) .....	30
<i>Minn. v. Philip Morris, Inc.</i> , 606 N.W.2d 676 (Minn. Ct. App. 2000).....	40
<i>Minneapolis Star &amp; Tribune Co. v. Schumacher</i> , 392 N.W.2d 197 (Minn. 1986).....	1, 16, 17, 19
<i>Minnesota v. Alpine Air Prods., Inc.</i> , 490 N.W.2d 888 (Minn. Ct. App. 1992) .....	30
<i>Minnesota v. Colonna</i> , 371 N.W.2d 629 (Minn. Ct. App. 1985).....	25
<i>Montgomery Ward v. County of Hennepin</i> , 450 N.W.2d 299 (Minn. 1990) .....	passim
<i>Navarre v. S. Wash. County Sch.</i> , 652 N.W.2d 9 (Minn. 2002) .....	2, 43, 44
<i>O'Leary v. Miller &amp; Schroeder Invs. Corp.</i> , 2004 Minn. App. LEXIS 146 (Minn. Ct. App. Feb. 10, 2004).....	41
<i>Olympic Club v. Super. Ct.</i> , 229 Cal. App. 3d 358 (Cal. Ct. App. 1991) .....	26, 27
<i>In re Rahr Malting Co.</i> , 632 N.W.2d 572 (Minn. 2001).....	1, 14, 15, 19
<i>Seeger v. State of Minnesota</i> , 2000 Minn. LEXIS 919 (Minn. Ct. App. Aug. 29, 2000) .....	46
<i>Smith v. Mankato State University</i> , 1995 Minn. App. LEXIS 984 (Minn. Ct. App. Aug. 1, 1995) .....	2, 46
<i>Star Tribune v. Minn. Twins P'ship</i> , 659 N.W.2d 287 (Minn. Ct. App. 2003) .....	passim
<i>State ex rel. Mitsubishi Heavy Indus. America, Inc. v. Milwaukee Circuit Court</i> , 605 N.W.2d 868 (Wis. 2000).....	17
<i>Tremco, Inc. v. Holman</i> , 1997 Minn. App. LEXIS 847 (Minn. Ct. App. July 29, 1997) .....	30

*Westrom v. Minn. Department of Labor & Industrial*, 686 N.W.2d 27 (Minn. 2004) ..... 43, 44, 45

STATE STATUTES

Minn. Stat. § 13.02 ..... 42

Minn. Stat. § 13.37 ..... 7, 10, 36

Minn. Stat. § 13.39 ..... passim

Minn. R. Civ. P. 26 ..... passim

Minn. R. App. P. 110.03 ..... 39

MISCELLANEOUS AUTHORITIES

8 Wright & Miller, Federal Practice and Procedure § 2043 (1994)..... 32

Herr, Annotated Manual For Complex Litigation § 21.432 (2003)..... 34, 35

## COUNTERSTATEMENT OF LEGAL ISSUES

- a. Are confidential documents produced in pre-trial discovery subject to a greater level of protection than evidence introduced at trial and other court records?

Most apposite authorities:

- Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984)
- Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197(Minn. 1986)
- In re Rahr Malting Co., 632 N.W.2d 572 (Minn. 2001).

- b. Do the protections of Minn. R. Civ. P. 26 extend beyond “trade secrets” and can these be invoked to protect a constitutional privilege and the associational privacy of litigants and third parties and to avoid oppression?

Most apposite authorities:

- Minn. R. Civ. P. 26
- Misc. Docket Matter No. 1 v. Misc. Docket Matter No.2, 197 F.3d 922 (8th Cir. 1999)

- c. Did Judge Albrecht abuse his discretion in finding that the Appellant could not reverse his commitment to respect the confidentiality of documents that GSK produced in discovery by arguing that they were not “trade secrets,” having (a) elicited documents from GSK relating to petitioning activity and (b) entered into a confidentiality agreement, a protective order, and a discovery compromise wherein documents falling into the category of First Amendment protected activity were to be protected?

Most apposite authorities:

- Confidentiality Agreement (Aug. 6, 2003)
- Protective Order (July 13, 2004)

- d. Do the confidentiality protections of the Pending Investigations Clause of the Minnesota Government Data Practices Act continue to apply to investigative data after a civil suit is filed in light of statutory provisions that protect the confidentiality of such data after a suit is filed unless and until such data are introduced as evidence or until appeal rights are exhausted?

Most apposite authorities:

- Minn. Stat. § 13.39, Subd. 2, 3

- Anjoorian v. Minn. Dep't of Pub. Safety, 1998 Minn. App. LEXIS 819, at \*8 (Minn. Ct. App. July 21, 1998) (GSK A.-127-130)
- Smith v. Mankato State Univ., 1995 Minn. App. LEXIS 984 (Minn. Ct. App. Aug. 1, 1995) (GSK A.-208-211)
- Navarre. v. S. Wash. County Sch., 652 N.W.2d 9, 29 (Minn. 2002)

Respondent GlaxoSmithKline plc (“GSK”) urges that the Court affirm the ruling of the Honorable Peter Albrecht (“October Order”) sustaining the confidentiality of 38 documents that GSK has already provided to the Appellant, the Minnesota Attorney General (“AG”), in compliance with a civil investigative demand (“CID”).<sup>1</sup>

## **I. COUNTERSTATEMENT OF THE CASE**

This case involves a challenge to a discovery ruling by a district court finding that documents that reflect GSK's exercise of its constitutional rights to petition the government are entitled to confidential treatment. The district court's decision was appropriate and certainly not an abuse of its wide discretion to regulate pre-trial discovery.

*First, pre-trial discovery enjoys a presumption of privacy.* The documents provided to the Appellant in response to his CID are confidential. Without question, GSK intended its communications concerning its petitioning strategy and deliberations on public policy issues to be private. The documents at issue include confidential internal documents that pertain to GSK's exercise of its First Amendment rights to petition Congress and federal agencies, confidential third party association documents, and confidential internal GSK business documents.

---

<sup>1</sup> Contrary to the AG's brief, only thirty-eight documents are at issue here because, as Judge Albrecht noted in the decision under review, GSK withdrew confidentiality claims for six of the forty-five documents before oral argument on the AG's motion. A seventh document has been public all along because GSK never designated it as confidential. (AG Appendix (“AG A.-”) 96-104).

*Second, Rule 26 protects a broad spectrum of confidential information and is not limited to just "secret formulae" and other financial secrets. Rule 26 provides protection where discovery would be burdensome, oppressive or invade privacy.*

*Third, the Appellant specifically committed to protect the confidentiality of documents that fall into the category of "petitioning documents." In this appeal, the Appellant seeks relief from his obligation to preserve the confidentiality of documents produced to him on the condition and with his agreement that he would respect the confidentiality of documents that fall under the rubric of petitioning documents. The Appellant argued before the district court that the court should relieve him of his confidentiality commitment because the documents at issue do not contain trade secrets. Judge Albrecht correctly rejected the Appellant's argument that only certain types of confidential documents – those containing trade secrets – are entitled to confidentiality.*

Since he specifically solicited such documents, the Appellant knew when entering into his confidentiality commitments that the documents for which protection was sought included First Amendment government petitioning documents. It is not an abuse of the broad discretion afforded district courts for the court to protect the constitutional rights of respondents by preventing public disclosure of their confidential petitioning documents and to hold litigants to the agreements and compromises that they make to facilitate discovery.

*Fourth, Judge Albrecht correctly found that the Minnesota Government Data Practices Act continues to protect documents obtained during a government agency's investigation, even after the filing of a civil action. Several provisions of the Act expressly reference the treatment of investigative data after a civil action has been filed.*

Specific provisions of the Act – such as those providing that data can be released only after appeal rights have been exhausted – demonstrate that the filing of a complaint does not negate the Act’s protections.

*Finally, the Appellant’s efforts to publicize the content of GSK’s confidential documents must be assessed in the context that the viability of the State’s underlying antitrust action in Ramsey County is doubtful.* The Appellant issued his CID to investigate whether GSK violated the antitrust laws when GSK’s Canadian operations imposed restrictions to prevent the importation into the United States of GSK drugs that cannot lawfully be sold in the United States. A Minnesota federal district court ruled on August 29, 2005 that the importation of Canadian drugs into the U.S. is illegal and that no action may lie under the federal antitrust laws to redress illegal trade. Can. Import Antitrust Litig., 2005 U.S. Dist. LEXIS 18949 (Aug. 26, 2005) (GSK Appendix (“GSK A.-”) 137-141. GSK’s U.S. subsidiary has moved to dismiss the State’s Ramsey County action on the basis that no antitrust action is viable where the trade at issue is illegal. Even assuming, arguendo, that the State’s Ramsey County action survives GSK’s pending motion to dismiss, the Appellant may continue to use the 38 documents at issue in his litigation. He cannot, however, post them on his web site or use them for non-litigation purposes. Because the October Order only precludes the Appellant from publicizing the contents of GSK’s confidential documents, it cannot be an abuse of discretion.

District courts have wide latitude in ruling on discovery and protective order disputes under Minn. R. Civ. P. 26. Judge Albrecht’s October Order was appropriate and certainly not reversible as an abuse of discretion.

## II. COUNTERSTATEMENT OF FACTS

In 2003, the Minnesota AG began an antitrust investigation into restrictions that GSK's Canadian subsidiary, GlaxoSmithKline Inc. ("GSK-Canada"), imposed to prevent the unlawful export of its drugs from Canada into the United States.<sup>2</sup> On May 30, 2003, the AG issued a CID requiring that GSK provide certain documents related to his investigation.<sup>3</sup> Among other requests, he specifically asked GSK to identify and produce political petitioning documents relating to "state, province or federal legislative efforts regarding the importation of prescription drugs from Canada."<sup>4</sup>

### 1. The Appellant's Confidentiality Undertakings

#### a. Productions Subject To August 2003 Confidentiality Agreement

GSK and the Appellant entered into a Confidentiality Agreement in August 2003 ("Confidentiality Agreement").<sup>5</sup> The Confidentiality Agreement was not limited to trade secret information. The Agreement specifically allowed GSK to designate documents as "confidential" if they contained either: (a) "trade secret" information or (b) "information that could be subject to a protective order pursuant to Minnesota Rule of Civil Procedure

---

<sup>2</sup> GSK maintains that restrictions on the resale of Canadian drugs that cannot be legally sold in the U.S. are appropriate and lawful. Can. Import Antitrust Litig., U.S. Dist. LEXIS 18949 (GSK A.-137-141); see also Can. Import Antitrust Litig., No. 04-2724, Report and Recommendation, (D. Minn. Feb. 28, 2005) (GSK A.-142-164); Vermont v. Leavitt, 2005 U.S. Dist. LEXIS 20864 (D. Vt. Sept. 19, 2005) (GSK A.-219-229); Clayworth v. Pfizer, Case No. RG 04-172428 (Cal. Super. Ct., Alameda County, Apr. 18, 2005) (order sustaining second demurrer with leave to amend at 4) (GSK A.-165-172); U.S. v. Rx Depot, Inc., 290 F. Supp. 2d 1238 (N.D. Okla. 2003).

<sup>3</sup> Demand for Answers to Interrogatories and Request for Documents ("CID") (May 30, 2003) (AG A.-1-12).

<sup>4</sup> CID, Interrogatory No. 8 (AG A.-8).

<sup>5</sup> Confidentiality Agreement (AG A.-13-17).

26.03.”<sup>6</sup> Following entry of the Confidentiality Agreement, GSK produced thousands of responsive documents from its U.S. subsidiary, SmithKline Beecham Corporation d/b/a GlaxoSmithKline (“GSK-U.S.”) between July and October 2003. This production and all subsequent productions were explicitly subject to the Confidentiality Agreement and the Minnesota Government Data Practices Act (“Data Practices Act”), Minn. Stat. § 13.39, Subd. 2(a) (“the Pending Investigations Clause”), which ensures confidential treatment of information collected by the state until an investigation becomes inactive.<sup>7</sup>

GSK opposed the production of documents from its Canadian subsidiary on the basis of an Ontario statute prohibiting the removal of certain documents from Ontario. Judge Albrecht, however, in a decision issued on May 7, 2004, granted the Appellant’s motion to enforce the CID and required GSK to produce non-U.S. documents.<sup>8</sup> GSK thereafter produced documents from Canada and the U.K., again subject to the Confidentiality Agreement and the Data Practices Act.<sup>9</sup>

---

<sup>6</sup> ¶ 2 provides that a document is confidential if it contains: “a) trade secret information” within the meaning of Minn. Stat. § 13.37, Subd. 1(b) 2002; or [if] (b) GSK assert[ed] another legal basis for treating the documents as confidential, including that such documents contain confidential research, development, or commercial information that could be subject to a protective order pursuant to Minnesota Rule of Civil Procedure 26.03.” (Emphasis added) (AG A.-13).

<sup>7</sup> Other productions were also made on June 4, 2004 and July 19, 2004 (subject to protections of the Confidentiality Agreement and the Data Practices Act).

<sup>8</sup> Order Granting State’s First Motion to Compel Compliance with the CID (May 7, 2004) (AG A.-18-30).

<sup>9</sup> Letters from C. Benson to M. Vanselow (May 27, 2004) (GSK A.-1-7).

**b. Productions Subject To Additional Confidentiality Representations and July 2004 Protective Order**

On May 7, 2004, the Appellant filed a second motion to compel seeking production of petitioning documents withheld by GSK under the First Amendment privilege. GSK, in its opposition to production, cited case law holding that courts apply a balancing test when government discovery is alleged to intrude on First Amendment petitioning rights.<sup>10</sup> GSK requested the court to weigh the potential chilling effect of disclosure against the Appellant's alleged need for the specific documents which were of tangential relevance to the antitrust claims.<sup>11</sup> GSK presented an affidavit by J. Kinney, Vice President for Federal Government Relations, GSK-U.S., describing the chilling effect that disclosure of GSK lobbying communications would have on its ability to advocate policy positions and petition the government in the future, including on subject matters wholly unrelated to drug importation.<sup>12</sup>

On June 7, 2004, at a hearing before Judge Albrecht, GSK offered a "discovery compromise" specific to the Appellant's investigation.<sup>13</sup> GSK opposed production to the Appellant of GSK or Pharmaceutical Research Manufacturers Association ("PhRMA") documents that reflected confidential political and lobbying strategy with respect to legislation pertaining to Canadian drug importation. As part of the compromise, however, GSK offered to produce to the Appellant over 1,000 First Amendment

---

<sup>10</sup> GSK Response to AG's Second Motion to Compel (June 3, 2004) (GSK A.-8-31).

<sup>11</sup> Id.

<sup>12</sup> GSK A.-32-35.

<sup>13</sup> There was no court reporter or audio tape of the hearing.

privileged documents that reflected both collective and unilateral petitioning activity, but only on condition that these petitioning documents would be treated as confidential.

After much negotiation, the parties entered into a Final Stipulation on July 6, 2004, which laid out the terms of the compromise:

(1) GSK would produce over 1,000 First Amendment Protected Documents to the AG, (2) Judge Albrecht would review 120 additional First Amendment protected internal GSK documents and decide which of these documents needed to be produced to the AG, (3) the AG agreed to a Protective Order to cover all First Amendment Protected Documents, (4) GSK would produce to the AG any additional Protected Documents determined by Judge Albrecht as being subject to production, (5) the parties agreed that “the decision of the judge will be final” and that “[n]either party will appeal the decision in whole or in part.”<sup>14</sup>

A key aspect of the compromise was that the Protective Order would assure the confidentiality of petitioning documents.

On July 10, 2004, the District Court conducted in camera review of the 120 additional internal GSK documents. As a result of its review, the court largely affirmed GSK’s assessment that the documents so designated were protected by the First Amendment and that their slight (if any) relevance to the Appellant’s antitrust investigation did not outweigh the burden (that is, the invasion of GSK’s First Amendment rights). Judge Albrecht required GSK to produce to the Appellant, subject to the Protective Order, only 11 pages, out of 678 pages he reviewed.<sup>15</sup>

Judge Albrecht also signed the negotiated Protective Order on July 13, 2004 (“Protective Order”), which governed confidential treatment of all documents relating to

---

<sup>14</sup> AG A.-39-42 (emphasis added).

<sup>15</sup> July 13, 2004 Order (AG A.-37-38).

petitioning activity that GSK provided to the Appellant.<sup>16</sup> Paragraph 2 of the Protective Order, like the Confidentiality Agreement, provided a definition of confidential information co-extensive with Rule 26:

GSK may designate any documents that it has produced to the State pursuant to the CID as “confidential” either by designating each document as such or by designating an entire group of confidential documents. GSK may designate documents as “confidential” only if they contain: (a) “trade secret information” within the meaning of Minn. Stat. § 13.37, Subd. 1(b) 2003; or (b) GSK asserts another legal basis for treating the document as confidential, including that such documents contain confidential research, development, commercial or other information that could be subject to a protective order pursuant to Minnesota Rule of Civil Procedure 26.03.<sup>17</sup>

## **2. Appellant Files Motion to Release Confidential Documents to the Public**

On September 9, 2004, the Appellant filed a motion to release to the public certain confidential GSK documents, including documents reflecting or pertaining to collective petitioning activities protected under the First Amendment.<sup>18</sup> The Appellant argued that the documents in question did not contain “protected trade secrets.”<sup>19</sup> The Appellant defined “trade secrets” by reference to the definition of trade secret in Minn. Stat. § 13.37, Subd. 1(b) as including “a formula...technique or process” that “derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.”<sup>20</sup>

---

<sup>16</sup> AG A.-31-36.

<sup>17</sup> Id. at 1 (emphasis added).

<sup>18</sup> AG Memorandum Regarding Confidentiality (Sept. 9, 2004) (AG A.-45-55).

<sup>19</sup> Id. at 8.

<sup>20</sup> Id. at 5.

GSK filed its opposition on September 29, 2004 pointing out that: (i) The definition of “confidentiality” in the Confidentiality Agreement and the Protective Order was not limited to trade secret formulae, but extended to confidential information eligible “for protection under Rule 26.” Rule 26 protects litigants and third parties from annoyance, embarrassment, oppression or undue burden or expense; (ii) Since government petitioning activity, including legislative lobbying, was a subject of the CID and the specific focus of the Appellant’s second motion to compel, the Appellant was well aware of the nature of GSK’s confidentiality claims when he entered into the Confidentiality Agreement in August 2003 and the subsequent Protective Order in July 2004; and (iii) Under the Pending Investigation Clause of the Data Practices Act, discovery and other nonpublic data that are collected by government agencies in a pending investigation must be kept confidential until the matter becomes inactive.<sup>21</sup>

The Appellant filed a reply brief on October 4, 2004 again arguing that “none of the documents reveal confidential trade secrets...”<sup>22</sup> He focused his arguments on larger policy issues – including, for example, whether the Protective Order to which he had agreed was in the public interest.<sup>23</sup> The parties argued the motion in camera on October 6, 2004.

---

<sup>21</sup> GSK A.-36-63.

<sup>22</sup> AG Reply Brief Regarding Confidentiality at 13 (AG A.-69-92).

<sup>23</sup> Id. at 2.

The Appellant served a complaint against GSK on October 8, 2004, citing several of the Protected Documents that he sought to unseal in his September 9 motion.<sup>24</sup>

### 3. Judge Albrecht's October 2004 Order

On October 13, 2004, Judge Albrecht issued an order denying the Appellant's motion to unseal the protected documents at issue.<sup>25</sup> Judge Albrecht ruled that the Appellant's motion to unseal should be denied for three reasons. First, the Appellant entered into the July 2004 Protective Order covering GSK's confidential and First Amendment Privileged documents as part of the resolution of a discovery dispute. The Judge observed that the Appellant brought his second "Motion to Compel Discovery specifically to overcome GSK's objections to produc[ing]...petitioning documents. The ensuing negotiations...concerned First Amendment privilege exclusively."<sup>26</sup> The Judge noted that there was "never any discussion" of trade secret confidentiality such as "shielding drug formulations or secret research from public view."<sup>27</sup> Judge Albrecht determined that the Appellant was bound by his agreements. He explained that society, as a whole, would not "benefit from a state of affairs that encouraged parties to enter freely into [confidentiality] agreements with the understandable foreboding that they are worth less than the paper on which they are printed."<sup>28</sup> Second, under the Pending Investigations Clause of the Data Practices Act, data gathered as part of a "pending civil

---

<sup>24</sup> SmithKline Beecham Corporation d/b/a GlaxoSmithKline, No. C8-04-12244 (Dec. 23, 2004) (Complaint).

<sup>25</sup> October Order (Oct. 13, 2004) (AG. A.-96-104).

<sup>26</sup> Id. at 8.

<sup>27</sup> Id.

<sup>28</sup> Id. at 9.

legal action” does not lose its protected nonpublic designation until the proceeding becomes inactive.<sup>29</sup> Third, the Judge stated that he had conducted another in camera review and found that the “GSK Documents qualify for protection under Rule 26.”<sup>30</sup>

#### **4. Appellant Initiates Appeals Proceedings**

On November 12, 2004, the Appellant appealed Judge Albrecht’s October Order.<sup>31</sup> A panel of this Court denied the petition for discretionary review on December 8, 2004.<sup>32</sup> A separate panel granted GSK’s motion to dismiss the appeal as of right for lack of appellate jurisdiction on December 22, 2004.<sup>33</sup>

The Appellant filed his complaint under seal against GSK-U.S. in Ramsey County on December 27, 2004. The Minnesota Supreme Court granted discretionary review of both Court of Appeals orders on February 15, 2005.<sup>34</sup>

#### **5. Supreme Court Ruling**

On July 14, 2005, the Supreme Court issued its decision (“July 14 Ruling”). The Court held that the Appellant had an appeal as of right because the October Order was a final order affecting a substantial right in a special proceeding. The Court remanded to the Court of Appeals for consideration of the merits. The Supreme Court held that it would not consider the merits because they were not raised in the Appellant’s petition for review and not extensively briefed by GSK.

---

<sup>29</sup> Id. at 6.

<sup>30</sup> Id. at 8.

<sup>31</sup> AG A.-105.

<sup>32</sup> GSK A.-64.

<sup>33</sup> AG A.-106-108.

<sup>34</sup> GSK A.-65.

## 6. Developments in the Canadian Import Litigation

Since the July 14 Ruling, a federal district court in Minnesota issued a decision dismissing with prejudice an antitrust litigation initiated by private plaintiffs seeking to use antitrust laws to interfere with pharmaceutical companies' efforts to stop illegal importation of their products. Can. Import Antitrust Litig., 2005 U.S. Dist. LEXIS 18949 (GSK A.-137-141). Like the Appellant's complaint, the federal class action challenged alleged restrictions preventing the importation of price controlled Canadian drugs – drugs that the FDA has found may not legally be imported. Judge Ericksen found that “drugs imported from Canada for personal use in the United States are misbranded” and otherwise violate federal law.<sup>35</sup> Judge Ericksen decided not to exercise supplemental jurisdiction and dismissed the state law claims without prejudice.<sup>36</sup>

GSK's motion to dismiss the Appellant's Ramsey County action is scheduled for argument on November 16, 2005.

## III. SUMMARY OF ARGUMENT

The Supreme Court's July 14 Ruling recognizes that “GSK is correct that documents produced as discovery are not presumed to be public....” (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984)).<sup>37</sup> The Supreme Court further notes that a presumption of access is afforded to trial proceedings, but that “the [S]tate's prediction of a ‘secret trial’ is premature.” Id. The July 14 Ruling also recognizes that “district courts have broad discretion to issue protective orders.” Id.

---

<sup>35</sup> Id. at \*3-4.

<sup>36</sup> Id. at \*10.

<sup>37</sup> July 14 Ruling at 3 (AG A.-114).

This Court's review of Judge Albrecht's October Order should reflect the following unassailable propositions:

- Protective order determinations are reviewable only for abuse of discretion;
- Pre-trial discovery enjoys a presumption of confidentiality – in contrast to the closing of court rooms for trials or other proceedings;
- GSK has a First Amendment right to petition the Government and participate in political associations;
- Intrusions on a party's First Amendment rights are appropriately minimized through protective orders;
- Rule 26 protects the privacy rights of litigants and third parties; and
- Rule 26 – the standard of confidentiality in the GSK-AG Confidentiality Agreement and Protective Order – protects more than just “trade secrets.”

Judge Albrecht appropriately concluded that the Appellant committed to protecting the confidentiality of political petitioning documents as part of a discovery compromise without which GSK would not have voluntarily produced the documents requested. Having specifically elicited petitioning documents from GSK, the Appellant understood the nature of the confidentiality that GSK was seeking to protect. Having agreed to a compromise whereby he would receive the petitioning documents on the condition that he would abide by a protective order, the Appellant could not then claim that those petitioning documents as a category were not confidential because they did not reflect trade secret formulae.

Judge Albrecht also appropriately held that, in addition to being protected under Rule 26, the documents at issue are also protected under the Data Practices Act. The Act states that government investigative data remain protected from public disclosure until the investigation is abandoned or “appeal rights are exhausted” (Minn. Stat. § 13.39,

Subd. 3), clearly recognizing that statutory protections continue even after a complaint is filed. Another provision (Minn. Stat. § 13.39, Subd. 2(a)) anticipates “in camera review” of investigative documents by courts. These and other provisions of the Act would be rendered nugatory by the State’s interpretation of the Act’s protections.

#### **IV. ARGUMENT**

The district court did not abuse its discretion in upholding the confidentiality of GSK’s 38 confidential documents.

##### **A. Standard Of Review**

A district court’s decision to protect the confidentiality of documents via a protective order is subject to review under an abuse of discretion standard. A court has broad discretion to fashion protective orders. Star Tribune v. Minn. Twins P’ship, 659 N.W.2d 287, 293 (Minn. Ct. App. 2003); Erickson v. MacArthur, 414 N.W.2d 406, 409 (Minn. 1987) (Rule 26.03 “gives the trial court broad discretion to fashion protective orders and to order discovery only on specified terms and conditions.”); Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197, 206 (Minn. 1986) (“The proper standard of review for questions of access under the common law standard is abuse of discretion.”); Bonzel v. Pfizer, 2002 Minn. App. LEXIS 977 at \*15 (Minn. Ct. App. 2002) (GSK A.-131-136).

An appellate court may not reverse a district court’s discovery decisions unless the district court, “exercised its discretion in an arbitrary or capricious manner, or based its ruling on an erroneous view of the law.” Montgomery Ward v. County of Hennepin, 450 N.W.2d 299, 306 (Minn. 1990). See also Kroning v. State Farm Auto. Ins., 567

N.W.2d 42, 45-46 (Minn. 1997) (A trial court's "ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion.").

**B. Judge Albrecht Did Not Abuse His Discretion In Determining That The Documents At Issue Should Remain Confidential Under The Protective Order And Rule 26.**

**1. Pre-Trial Discovery Is Presumed Private**

In Star Tribune, this Court recognized that in determining whether documents should remain confidential, the threshold inquiry was "whether [the documents] have historically been open to the public." 659 N.W.2d at 296-97 (citing Schumacher, 392 N.W.2d at 204). Star Tribune cited State ex rel. Mitsubishi Heavy Indus. Am., Inc. v. Milwaukee Circuit Court, 605 N.W.2d 868, 877-78 (Wis. 2000), for the proposition that judicial "discovery documents generated in a civil action are not public records and that no First Amendment right of access extends to such materials." Star Tribune, 659 N.W.2d at 297 (emphasis added). Star Tribune quoted "the seminal case" of Seattle Times, for the proposition that a protective order entered on a showing of good cause which "is limited to the context of pretrial civil discovery... does not offend the First Amendment" right of judicial access. 467 U.S. at 37. Star Tribune specifically contrasts the presumption of privacy accorded to private discovery with that accorded to judicial records.

The Supreme Court's July 14 Ruling agrees with GSK that documents produced in discovery are not presumed to be public:

GSK is correct that documents produced as discovery are not presumed to be public and that district courts have broad discretion to issue protective orders, such as to protect trade secrets and similar commercial information. Minn. Civ. P.

26.03(g); Seattle Times, 467 U.S. at 33 (holding that “pretrial depositions and interrogatories are not public components of a civil trial”) (emphasis added).<sup>38</sup>

In Seattle Times, a newspaper sought to disseminate information obtained pursuant to court-ordered discovery. 467 U.S. at 20. The newspaper argued that it should only be restricted from disseminating information if the opposing party showed there was a compelling interest. Id. at 31. The Court rejected this view, observing that liberal discovery is “provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes.” Id. at 34. The constitutional right of access is not as strong with regard to discovery material as it may be with other court documents. Id. at 26-27.

**a. Decisions Allowing Access To Court Records Are Inapposite**

In an effort to avoid the finding in the July 14 Ruling that there is no presumption of access with respect to documents produced in discovery by GSK, the Appellant quotes decisions that allow access to court records.<sup>39</sup> Such decisions recognize a constitutional right of access to documents – such as court decisions and documents actually offered at trial and relied on by the court – that are part of the judicial record and that, unlike in this case, formed the basis of judicial-decision-making.<sup>40</sup>

---

<sup>38</sup> AG A.-114.

<sup>39</sup> The presumption of public access to court proceedings and records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. Nixon v. Warner Communications, 435 U.S. 589, 598 (1978).

<sup>40</sup> In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 101 F.R.D. 34, 42-43 (C.D. Cal. 1984); Encyclopedia Brown Prods. v. H.B.O., 26 F. Supp. 2d 606, 612 (S.D.N.Y. 1998); Littlejohn v. Bic Corp., 851 F.2d 673, 678 (3d Cir. 1988). In Pansy (footnote continued on next page...)

The July 14 Ruling also clarifies that the presumption of openness applies to trials and court records. The Supreme Court observes that the “state’s prediction of a ‘secret’ trial is premature,” and that “for many centuries, both civil and criminal trials have traditionally been open to the public.”<sup>41</sup> The July 14 Ruling notes that even the presumption of openness applicable to trials and court records can be overcome by constitutional considerations:

Although the state’s prediction of a “secret” trial is premature, we cannot ignore that court proceedings and documents enjoy a “presumption of openness” that generally may be overcome only by showing that a party’s constitutional rights would be at risk if the proceeding or document is made public. See Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197, 203-04 (Minn. 1986) (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573, 575-81 (1980)); see also Gannett, 443 U.S. at 386 n.15 (“For many centuries, both civil and criminal trials have traditionally been open to the public.”). In civil actions, “[e]ach case involves a weighing of the policies in favor of openness against the interests of the litigant in sealing the record. In re Rahr Malting Co., 632 N.W.2d 572, 576 (Minn. 2001) (citing Schumacher, 392 N.W.2d at 202-03).<sup>42</sup>

Neither the sealing of court records nor the closing of trials or hearings is involved in this appeal. This appeal involves pretrial discovery – which the July 14 Ruling agrees is not subject to a presumption of public access.

---

(...footnote continued from previous page)

v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994), a newspaper sought disclosure of a settlement agreement involving the Chief of Police’s settlement of a Civil Rights claim. The case did not involve pretrial discovery, and the state records act mandated disclosure. Reliance Ins. Co. v. Barron’s, 428 F. Supp. 200 (S.D.N.Y. 1977) pre-dated Seattle Times and involved a prior restraint on a magazine. Chicago Tribune Co. v. Bridgestone/Firestone Inc., 263 F.3d 1304, 1315 (11<sup>th</sup> Cir. 2001), though cited by the Appellant, supports GSK’s position and rejects a newspaper’s attempt to obtain pre-trial discovery based on a showing of good cause even though the newspaper sought the documents on the basis of public safety.

<sup>41</sup> July 14 Ruling at 5-6 (AG A.-113-114).

<sup>42</sup> Id.

Numerous cases explain the rationale for distinguishing between a public right of access to court records and the presumption of privacy afforded to pre-trial discovery. In Zenith Radio Corp. v. Matsushita Electric Indus., a district court explained: “If the purpose of the common law right of access is to check judicial abuses, then that right should only extend to materials upon which a judicial decision is based.” 529 F. Supp. 866, 898 (E.D. Pa. 1981) (another case cited by the Appellant). See also In re Continental Ill. Sec. Litig., 732 F.2d 1302, 1310 (7th Cir. 1984) (allowing access to court records introduced as evidence in connection with motion to terminate claims allows “public scrutiny of judicial decision-making....”). Pre-trial discovery will often elicit ambiguous and ill-formulated correspondence, written notes and emails. In Pratt & Whitney Canada, Inc. v. United States, 14 Cl. Ct. 268, 274 (Cl. Ct. 1988), the court observed that “[D]iscovery is generally conducted privately...[W]ith respect to discovery materials there is no opportunity to rebut prejudicial information unless such information is submitted for the consideration of the court.”<sup>43</sup>

The Appellant’s Ramsey County complaint, attaching pre-trial discovery may be a court pleading, but it is not a “judicial record” that forms the basis of judicial decision-making. When and if any of the 38 documents become court records, for example, when they are introduced at trial, GSK may shoulder the burden of demonstrating that access should be restricted. At this stage, however, there is no presumption of access with respect to the 38 documents produced in pre-trial discovery.

---

<sup>43</sup> See also Gelb v. AT&T, 813 F. Supp 1022,1035-36 (S.D.N.Y. 1993) (Proposals that there ought to be a rule of general public access to discovery “have not carried the day.”)

**b. Pretrial Discovery Is Intended Only For Litigation Purposes**

The purpose of pretrial discovery is the collection of documents and other information for use in litigation – not for use in political or publicity campaigns. The political nature of the Appellant’s attack on the pharmaceutical industry in general, and GSK in particular, was presented to Judge Albrecht and is part of the record here.<sup>44</sup> Jennings v. Peters, 162 F.R.D. 120, 122 (N.D. Ill. 1995) (protective order granted to limit defendants’ use of deposition testimony for purposes of trial and settlement; court expresses concern that “in the absence of a protective order” deposition testimony could “[find] its way into the union election campaign.”); Misc. Docket Matter No. 1 v. Misc. Docket Matter No.2, 197 F.3d 922, 925 (8th Cir. 1999) (Although the rules of civil procedure permit liberal discovery, it “is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes,” citing Seattle Times, 467 U.S. at 34.)

The litany of references to specific GSK-confidential documents in the Appellant’s Complaint, as filed under seal, is a backdoor vehicle to publicize such confidential documents. In this case, the publication of GSK’s confidential documents would serve no litigation purpose because the Appellant is already in possession of the documents and he may use them in the preparation and litigation of the State’s case.

---

<sup>44</sup> Press Release, Hatch Takes Dual Action on Pharmaceutical Industry Front (Sept. 30, 2003), [http://www.ag.state.mn.us/consumer/PR/PR\\_PharmaceuticalReport\\_093003.htm](http://www.ag.state.mn.us/consumer/PR/PR_PharmaceuticalReport_093003.htm) (GSK A.- 66-68); Press Release, Hatch Applauds Landmark Decision that Prescription Drugs May Legally be Imported from Canada (May 10, 2004), [http://www.ag.state.mn.us/consumer/PR/PR\\_040510GlaxoSmithKline.htm](http://www.ag.state.mn.us/consumer/PR/PR_040510GlaxoSmithKline.htm) (GSK A.-69-71); “AGO Files Lawsuit on Canadian Boycott,” The Minnesota Perspective Newsletter from Hatch for Attorney General Volunteer Committee (April 21, 2004) (GSK A.-72-75).

**2. Discovery Relating To Protected First Amendment Activities Is Appropriately Subject To Confidential Treatment**

**a. Several Of The Documents At Issue Involve The Exercise Of GSK's First Amendment Rights**

At stake here is GSK's fundamental right and ability to petition the government. Releasing GSK's constitutionally protected petitioning and associational privacy documents will chill GSK's right to communicate with certain legislators or government agencies and prevent it from engaging in the very political expression that is protected under the First Amendment.<sup>45</sup> As the July 14 Ruling observes: "GSK has claimed that a constitutional right – a petitioning privilege under the First Amendment to the United States Constitution – is implicated."

Corporations, as well as individuals, have a fundamental constitutional right to political expression:

The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people...[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs...."

Buckley v. Valeo, 424 U.S. 1, 14 (1976) (cit. omit.). A Minnesota federal court has similarly recognized that petitioning is a constitutional right:

Plaintiffs astound the Court when they assert that the First Amendment does not protect effective petitioning activities, stating – without citation to any authority whatsoever – that "once defendants act on their beliefs – more importantly – once defendants seek to involve the government in enforcing their beliefs, they cross

---

<sup>45</sup> Thirty-two of the thirty-eight documents reflect either First Amendment protected petitioning activity or the associational privacy of GSK or a third party. Eight of these documents are also business confidential. The remainder of the documents are business confidential.

the line separating valued and protected freedoms from unconstitutional manipulation of the government's police powers....”

This assertion is so clearly wrong as to beggar conventional legal analysis. The right to petition is absolutely fundamental to the First Amendment. “To hold ... that people cannot freely inform the government of their wishes would ... be particularly unjustified.” Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1965); accord NAACP, 357 U.S. at 459, 78 S.Ct. 1163. The Constitution itself even makes it more clear: Citizens have the right “to petition the Government for a redress of grievances.” It is beyond conception that this cherished right is so cabined that it is lost at the very moment the petition might possibly achieve success....

Freedom of belief is not a passive right: citizens are not limited to merely sitting idly thinking about their political, moral, and religious beliefs; democracy is founded upon them acting upon those beliefs in efforts to effect change.

Assoc'td Contract Loggers, Inc. v. U.S. Forest Service, 84 F. Supp. 2d 1029, 1034 (D. Minn. 2000).

The Noerr-Pennington doctrine<sup>46</sup> recognizes that corporate citizens, like private citizens, are entitled to exercise their First Amendment rights to petition the government. See First Amer. Title Co. v. S.D. Land Title Ass'n, 714 F.2d 1439, 1447 (8th Cir. 1983) (Noerr bars Sherman Act claim where businesses collectively lobbied legislature in exercise of First Amendment petitioning rights); Senart v. Mobay Chemical Corp., 597 F. Supp. 502, 506 (D. Minn. 1984) (Business lobbying in opposition to federal government safety regulations to further business interests is “protected by the First Amendment.”); Keller v. VonHoltum, 568 N.W.2d 186, 192-93 (Minn. Ct. App. 1997) (“[T]he Noerr-Pennington doctrine protects a citizen's First Amendment right to ‘petition the

---

<sup>46</sup> Noerr, 365 U.S. at 136-38 (“The Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.” In light of the constitutionally guaranteed right to petition, a contrary conclusion “would raise important constitutional questions”).

Government for redress of grievances,' by immunizing individuals from liability for injuries allegedly caused by their petitioning of the government or participating in public processes in order to influence governmental decisions.”); Antioch v. Scrapbook Borders, Inc., 291 F.Supp.2d 980, 999 (D. Minn. 2003) (“Notwithstanding the absence of apposite Minnesota authority, we have no hesitation in concluding that, if faced with the question, the Minnesota Courts would apply the Noerr-Pennington doctrine to a Minnesota antitrust claim.”)<sup>47</sup>

The Appellant’s argument that the First Amendment only applies to communications directed to legislators (AG Br. at 29) is incorrect. First Amendment protections extend to communications and activity directed to enlist allies in political advocacy.

By its very nature, the right to petition the government goes beyond direct petitioning activity. Rather, the right to petition the government necessarily includes all manner and mode of communication directed not only to the government but also to those individuals and entities whose support and influence may contribute materially to the legislative campaign being waged.

IBP Confidential Bus. Docs Litig. v. Iowa Beef Processors Inc., 797 F.2d 632, 641 (8th Cir. 1986).

Judge Albrecht did not abuse his discretion in concluding that the documents so designated here are First Amendment privileged documents.

---

<sup>47</sup> See also First Nat’l Bank v. Marquette Nat’l Bank, 482 F. Supp. 514, 524-25 (D. Minn. 1979), aff’d, 636 F.2d 195, 197 (8th Cir. 1980), cert. denied, 450 U.S. 1042 (1981); Fischer Sand v. City of Lakeville, 874 F. Supp. 957, 959 (D. Minn. 1994).

**b. GSK's Associational Privacy Rights Are Appropriately Safeguarded Under Rule 26**

Minnesota recognizes the propriety of protective orders to protect the privacy interests of litigants in documents collected during a state government investigation. Minnesota v. Colonna, 371 N.W.2d 629, 633-34 (Minn. Ct. App. 1985) (appropriate for court to enter a protective order to safeguard personal data subpoenaed in government investigations). Two of the cases cited by the Appellant, in fact, illustrate that Minnesota courts routinely grant protective orders to ensure the protection of privacy rights – noting the broad protections afforded under R. 26. Montgomery Ward, 450 N.W.2d. at 307 (valuation data to be released subject to protective order to protect privacy interests of other taxpayers); MacArthur, 414 N.W.2d 406 at 410 (protective order should be carefully fashioned to protect privacy interests of eyewitnesses). While these decisions involve personal privacy, the constitutional privacy interests of GSK and PhRMA and other third parties are not less worthy of protection.

The freedom of association is recognized by Minnesota courts:

Although “freedom of association” is not mentioned in the text of either the federal or the state constitution, the Supreme Court of the United States, in certain circumstances, has recognized it as derivative of federal first amendment guarantees of free speech, press, petition, and assembly and protected by the due process clause.

Méto Rehab. Serv. v. Westberg, 386 N.W.2d 698, 700 (Minn. 1986). This associational privacy right extends to all organizations, not just dissident groups. Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 544 (1963); Britt v. Superior Court, 574 P.2d 766, 772 (Cal. 1978) (all legitimate groups are beneficiaries of First Amendment protections).

Some courts have denied discovery on associational activities altogether to avoid infringement of First Amendment rights. Caucus Distrib. Inc. v. Comm’r of Commerce, 422 N.W.2d 264, 268 (Minn. Ct. App. 1988) (“The compelled disclosure of an individual’s affiliation with an organization may, standing alone, constitute an intrusion into the first amendment rights of privacy of association and belief”); Eilers v. Palmer, 575 F.Supp. 1259 (D. Minn. 1984) (Reversing magistrate’s order requiring, subject to protective order, that plaintiffs disclose names of those funding lawsuit due to chill on First Amendment activity and minimal relevance).<sup>48</sup>

Where, as here, a litigant has produced documents bearing on First Amendment rights, confidentiality is appropriately provided to protect associational privacy. Olympic Club v. Superior Court, 229 Cal. App. 3d 358, 365 (Cal. Ct. App. 1991) (Balancing

---

<sup>48</sup> Int’l Soc’y for Krishna Consciousness v. Lee, No. 75 Civ. 5388 (MJL), 1985 U.S. Dist. LEXIS 22188, at \*20, \*26-8, \*30-32, \*44 (S.D.N.Y. Feb. 28, 1985) (Granting the Society’s motion for protective order because the discovery: (i) posed a cognizable danger to the Society’s ability to carry out First Amendment activities; (ii) the First Amendment interests of the Society were not overridden by a compelling interest of the airlines; (iii) many of the interrogatories were egregiously overbroad; and (iv) the information sought was not relevant to the central issue of whether the policies at issue governing access to terminals constitute “state action,” and whether airport terminals were public forums) (GSK A.-173-191); Adolph Coors Co. v. Wallace/AFL-CIO Coors Boycott Comm., 570 F. Supp 202, 208 (N.D. Cal. 1983) (The court must (i) inquire “whether the precise material sought by discovery is truly ‘relevant;’” (ii) “balance the rights and interests of each litigant,” considering the particular circumstances and the public interest; (iii) ensure that the discovery request as framed is the “least inclusive and intrusive for gathering the information” requested). See also Grandbouche v. Clancy, 825 F.2d 1463, 1465-67 (10th Cir. 1987); Int’l Union v. Nat’l Right to Work Legal Def. & Educ. Found., 590 F.2d 1139, 1152-53 (D.C. Cir. 1978); Ealy v. Littlejohn, 569 F.2d 219, 229 (5th Cir. 1978); Int’l Action Ctr. v. U. S., 207 F.R.D. 1, 3-4 (D.D.C. 2002); ETSI Pipeline Project v. Burlington Northern, Inc., 674 F. Supp. 1489, 1490 (D.D.C. 1987); U. S. v. Garde, 673 F. Supp. 604, 607 (D.D.C. 1987); Australia/Eastern USA Shipping Conference v. U. S., 537 F. Supp. 807, 812 (D.D.C. 1982); Black Panther Party v. Smith, 661 F.2d 1243, 1269-70 (D.C. Cir. 1981); Britt, 574 P.2d at 771.

associational privacy concerns against government interest in compelling data on club membership practices in discrimination suit and suggesting confidentiality order to minimize concerns); Welch v. Wildwood Golf Club, 146 F.R.D. 131, 140-41 (W.D. Pa. 1993) (Protective order must be tailored to address associational privacy concerns); cf. BE & K Constr. Co. v. Peterson, 464 N.W.2d 756, 758 (Minn. Ct. App. 1991) (Granting a trade association leave to intervene to protect the confidentiality of information related to licensing and examination. If data sought by contractors “is determined to be public and available for disclosure without a protective order, its members’ privacy interests could be irreparably harmed.”).

Judge Albrecht’s protection of GSK’s association privacy rights was appropriate and certainly not an abuse of discretion.

### **3. Protective Orders Appropriately Protect The Privacy Interests Of Litigants And Third Parties**

Many of the 38 documents at issue involve the privacy interests of third parties, for example the Pharmaceutical Research and Manufacturers of America (“PhRMA”) and its Canadian counterpart, Rx&D.

In Seattle Times, the Supreme Court recognized the importance of protective orders in safeguarding “the privacy interests of litigants and third parties.” 467 U.S. at 35. A primary objective of protective orders is to avoid disclosure of information that “if publicly released, could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes.” Id.<sup>49</sup> See also

---

<sup>49</sup> In Cipollone v. Liggett Group, Inc., 785 F.2d 1108 (3d Cir 1986), the Third Circuit instructed the lower court to determine whether the defendant has shown “with some  
(footnote continued on next page...)

Misc. Docket Matter No. 1, 197 F.3d at 925 (Rule 26 authorizes protective orders to prevent discovery abuse, such as infringement of the “privacy interests of litigants and third parties” and avoidance of “embarrassment, oppression, or undue burden or expense.”); In re Remington Arms Co., 952 F.2d 1029, 1033 (8th Cir. 1991) (“discovery may seriously implicate privacy interests of litigants”).<sup>50</sup> Businesses no less than individuals are entitled to have their privacy respected.

Mere public curiosity does not qualify as a legitimate public interest outweighing defendant’s privacy rights. Seattle Times, 467 U.S. at 35 (citing Herbert v. Lando, 441 U.S. 153 (1979)); Star Tribune, 659 N.W.2d at 295 (“the need to assure confidentiality outweighed the public’s right to obtain documents” produced in pretrial discovery).

**4. The Appellant’s Argument That GSK Cannot Assert First Amendment Rights Because The State Has Alleged That GSK Committed Antitrust Violations Must Be Rejected**

The Appellant’s argument that GSK as a purported antitrust violator may not assert First Amendment Rights is meritless. First, the Appellant cites wholly inapposite cases in which defendants who had committed crimes invoked the First Amendment;<sup>51</sup> at

---

(...footnote continued from previous page)

specificity that the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position.” Id. at 1121. Cipollone does not involve First Amendment rights.

<sup>50</sup> In re New York Times, 828 F.2d 110, 116 (2d Cir. 1987) (“[T]he privacy interests of innocent third parties as well as those of defendants that may be harmed by disclosure...should weigh heavily in a court’s balancing equation.”).

<sup>51</sup> In U.S. v. Wilson, 154 F.3d 658, 665 (7th Cir. 1998), the defendants physically obstructed access to abortion clinics, in violation of the Freedom of Access to Clinic Entrances Act. GSK did not engage in illegal, violent conduct, but rather in lawful, collective petitioning activity.

U.S. v. Bell, 217 F.R.D. 335, 343 (M.D. Pa. 2003) provides that the First Amendment

(footnote continued on next page...)

issue here is the confidentiality of documents that reflect GSK's First Amendment petitioning activity.<sup>52</sup> Political petitioning is lawful. It is not criminal whether done individually or collectively. Noerr specifically provides immunity for collective lobbying activity.

Second, the case law cited by the Appellant does not relate to document confidentiality. Rule 26 is not at issue in these decisions.

Third, while the Appellant argues that the documents at issue are "incriminating,"<sup>53</sup> he has jumped the gun in arguing here that an antitrust violation has occurred. Each of the courts that have addressed the merits of importation claims have concluded that the trade is illegal. In fact, in the Can. Import Antitrust Litig., Judge Eriksen recently dismissed federal antitrust claims because the allegedly restrained trade

---

(...footnote continued from previous page)

does not protect lawless conduct whether done individually or by association. Bell recognizes that there is "a right to associate for the purpose of engaging in those activities protected by the First Amendment..." Id. There was nothing illegal about GSK individually lobbying the government and thus nothing illegal about it doing so through a trade association. Unlike in Bell, there was no preliminary finding that GSK's conduct was illegal or an incitement of imminent lawless conduct.

In re Buscaglia, 518 F.2d 77 (2d Cir. 1975), is inapplicable since GSK did not engage in illegal gambling or racketeering or any other illegal activity.

Lewitus v. Colwell, 479 F.Supp. 439 (D. Md. 1979), is also inapplicable. "Mr. Lewitus' association with [other individual] was not politically or ideologically based; it was for the purpose of racing and purchasing horses...." Id. at 444.

<sup>52</sup> The Appellant's citation to the crime fraud exception to attorney-client privilege claims is also inapposite, and in any event the Appellant has made no showing of crime or fraud.

<sup>53</sup> It is inappropriate for the Appellant to (mis)characterize the content of documents filed under seal. Contrary to the Appellant's claims (AG Br. at 41), if the 38 documents must be characterized, they do not reflect "company and industry communications regarding a concerted Canadian drug import boycott"; rather they disclose legislative messages, petitioning strategy, and business impact.

is illegal.<sup>54</sup> It is axiomatic that Minnesota antitrust laws are interpreted consistently with federal antitrust law.<sup>55</sup> GSK has recently moved to dismiss the antitrust action that the Appellant has filed in Ramsey County on the basis that no antitrust claim is viable where a company seeks to protect illegal trade of its products.

Protective orders are a routine feature of antitrust litigation. The Appellant can marshal no support for the extraordinary proposition that defendants in antitrust litigations cannot exercise their rights under protective orders or otherwise seek to protect confidential documents from disclosure to the public.<sup>56</sup>

#### **5. GSK Appropriately Substantiated Its Confidentiality Claims**

The Appellant raises a belated argument (not raised in his briefs before Judge Albrecht) that GSK provided only attorney affidavits and that these were improper.

---

<sup>54</sup> GSK A.-137-141.

<sup>55</sup> E.g., Minnesota v. Alpine Air Prods., Inc., 490 N.W.2d 888, 894 (Minn. Ct. App. 1992); Minn. Twins P'shp. v. Hatch, 592 N.W.2d 847, 851 (Minn. 1999) (state antitrust action not viable where Baseball is exempt from federal antitrust laws); Tremco, Inc. v. Holman, 1997 Minn. App. LEXIS 847, at \*3 (Minn. Ct. App. July 29, 1997) (GSK A-212-218) (dismissing antitrust claims under Minnesota state law for failing to demonstrate antitrust injury, and in so doing relying on precedent established by federal cases applying federal antitrust law: "Minnesota antitrust law should be interpreted consistently with federal court interpretations of the Sherman Act"); Keating v. Philip Morris Inc., 417 N.W.2d 132, 136 (Minn. Ct. App. 1987).

<sup>56</sup> The Appellant's reliance on Petroleum Prods., 101 F.R.D. at 34, must be rejected as the documents at issue in that case did not relate to political advocacy or lobbying activity nor did the case involve an assertion of the chilling of First Amendment rights. The case involved standard business commercial documents. There is no indication that a protective order is unavailable to defendants in an antitrust litigation.

Privilege claims are routinely supported by attorney affidavits; GSK was not making a trade secret claim.<sup>57</sup>

In any event, contrary to the Appellant's claims, GSK presented an affidavit from J. Kinney, its Vice-President for Government Relations, GSK-U.S., specifying the harm that disclosure of GSK lobbying communications would have on its ability to advocate policy positions and petition the government.<sup>58</sup> GSK's director of government affairs was the appropriate affiant to address the chilling effect of petitioning documents. This was not a counsel affidavit, but a declaration by the most appropriate official with respect to the subject matter of First Amendment privilege claims.

In addition, for each document at issue before Judge Albrecht, GSK provided a basis for its confidentiality claims.<sup>59</sup> Further, Judge Albrecht specifically stated that he had conducted a document-specific review of the documents at issue in reaching his conclusion that they were protected under Rule 26.<sup>60</sup>

Judge Albrecht had sufficient information about each document and did not abuse his discretion in determining that the documents at issue were confidential.

---

<sup>57</sup> A business person's testimony would be more appropriate where, for example, a confidentiality claim is based on the amounts that a litigant has spent on research or the potential loss of sales volume should a litigant's trade secrets become known to competitors.

<sup>58</sup> The Kinney affidavit was attached to GSK's opposition to the AG's second motion to compel, and presented to the Appellant prior to the June 17, 2004 hearing. (GSK. A.-32-35).

<sup>59</sup> October Order (AG A.-96) (citing "GSK's Supplemental Response" and noting GSK's identification of six documents as not confidential and one additional document as never having been designated confidential); Affidavit of C. Benson (Sept. 29, 2004) (Record at tab 43); GSK Supplemental Submission (Oct. 6, 2004) (Record at tab 96).

<sup>60</sup> October Order at 8 (AG A.-103).

## 6. Confidential Business Information Was Appropriately Protected

Several of the documents at issue are protected as confidential business information (some of these documents are also protected under the First Amendment).

The Appellant offers a New York case, Turick v. Yamaha Motor Corp., 121 F.R.D. 32, 35 (S.D.N.Y. 1988), as the litmus test for confidentiality and argues that GSK did not show that disclosure of confidential information will work a “clearly defined and very serious injury” to the party’s business. Turick is not the governing authority, as the parties here entered confidentiality agreements applying all the Rule 26 standards (including protection of privacy and avoidance of oppression).

Judge Albrecht correctly rejected the Appellant’s argument that a protective order can issue only if the information sought to be protected constitutes a “trade secret.”<sup>61</sup> The Appellant entered into confidentiality agreements on two occasions providing that information may be designated “confidential” if it is either (a) “trade secret information” or (b) “other information that could be subject to a protective order pursuant to Minnesota Rule of Civil Procedure 26.03.”<sup>62</sup>

---

<sup>61</sup> October Order at 8 (AG. A.-103). A broader range of confidential commercial information is subject to protection under Rule 26 than the Appellant posits. The Appellant’s citation limiting the definition of confidentiality to trade secrets, Reliance Ins. Co. v. Barron’s, 442 F. Supp. 1341 (S.D.N.Y. 1977), turned on the issue of a “prior restraint” of newspaper publication and does not reflect the Minnesota approach. See 8 Wright & Miller, Federal Practice and Procedure § 2043 (1994). (In its current form, Rule 26, “[o]n its face, goes beyond trade secrets to provide protection for ‘other confidential research, development, or commercial information’”). Encyclopedia Brown involved court records, not pretrial discovery. 26 F. Supp.2d 606.

<sup>62</sup> Confidentiality Agreement, (Aug. 6, 2003), ¶ 2 (AG. A.-13); Protective Order (July 13, 2004), ¶ 2 (AG. A.-31).

The Appellant incorrectly argues that GSK shared many of the documents at issue with its competitors as part of an industry campaign to stop Canadian Internet drug sales. The Appellant confuses two distinct confidentiality justifications for protecting different classes of documents: (i) those pertaining to collective First Amendment petitioning activity (which may have been shared among trade association members but were kept confidential within the association) and (ii) those containing commercial business information (which GSK of course did not share with its competitors). As discussed in the affidavit submitted by PhRMA to Judge Albrecht, the PhRMA documents as to which GSK has asserted confidentiality claims were kept confidential within the association.<sup>63</sup> None of the GSK documents classified as falling under the second category, containing confidential commercial business information, were shared with competitors.

Thus the confidentiality of GSK and PhRMA documents were respected.

#### **7. The District Court's Explanation Was Sufficient**

Having explained the several grounds under which the 38 documents at issue qualified for protection, Judge Albrecht was not required to provide a document specific explanation as to the confidentiality of each document. Judge Albrecht acted as a "gatekeeper" and carefully reviewed GSK's confidentiality claims (contrast Bonzel, where the district court was found to have allowed the parties to make their own determinations as to which documents would be held confidential without reviewing the documents. 2002 Minn. App. LEXIS 977 at \*14 (GSK A.-135)).

---

<sup>63</sup> PhRMA Amicus Declaration of Bruce Kuhlik in Support of GSK (Sept. 26, 2004) (GSK A.-76-81).

District courts who have busy dockets and who undertake in camera inspections should not be required to provide detailed explanations regarding the confidentiality of each and every document they review. Even district court rulings withholding production of documents from a litigant, e.g., on the basis of attorney-client privilege, typically explain the basis of the court's ruling without applying the general explanation to each specific document.

Assuming, arguendo, that the Court determines that the district court here may not have sufficiently explained the basis for confidentiality of some subset of documents or should have done so on a document-specific basis, the remedy, of course, would be to remand to Judge Albrecht for a more particularized explanation, not to make the documents public.

**8. Public Policy Is Served By Enforcing Litigants' Agreements To Treat Private Discovery As Confidential**

The Appellant's views on the policy debate about the pro's and con's of confidentiality agreements or protective orders are irrelevant because the Appellant chose to enter into the Protective Order and the Confidentiality Agreement and is now bound by both documents. Minnesota courts routinely approve umbrella protective orders because they promote full discovery and expedite pretrial proceedings. In Star Tribune, the court recognized the value of umbrella protective orders in complex litigation: "an umbrella...order will expedite production, reduce costs, and avoid the burden on the court of document-by-document adjudication." 659 N.W.2d at 293 (citing Herr,

Annotated Manual For Complex Litigation § 21.432, at 79 (2003)).<sup>64</sup> Any arguments that Minnesota should prohibit the use of protective orders generally would be more properly addressed to the state legislature.

Contrary to the Appellant's suggestion that protective orders are inimical to public policy, in this case, the parties' August 2003 Confidentiality Agreement and July 2004 Protective Order actually facilitated information sharing.<sup>65</sup> Without the Appellant's confidentiality assurances, GSK would have opposed production of many of the documents the Appellant now seeks to unseal. Nor can the Appellant argue that he was unaware of the "public interest" in Canadian drug imports when he stipulated to the Protective Order in this case.

The Appellant's efforts to evade protective order commitments – far from advancing public policy – would undermine the acceptance of umbrella protective orders in complex litigation. If the AG can disregard his confidentiality undertakings, respondents in government investigations will be more resistant to disclosing confidential documents.

---

<sup>64</sup> The Appellant incorrectly argues that GSK "simply designated and stamped as confidential nearly every page of the 40 boxes of documents it produced." AG Br. at 8-9. GSK produced over three and a half thousand documents, over 20,000 pages, which were *not* designated as "confidential." GSK's document production focused on responsiveness to the CID requests. GSK relied on its ability under the umbrella confidentiality agreements to designate documents as confidential and thereby preserve the privacy of its production.

<sup>65</sup> Wilk v. Am. Medical Ass'n, 635 F.2d 1295, 1299 (7th Cir. 1980) is inapposite; that case dealt with preventing repetitive discovery of the same documents (there the exact same documents had been produced in a similar litigation in another state).

**C. Judge Albrecht Did Not Abuse His Discretion In Ruling That The Appellant Had Contractually Committed To Provide Confidential Treatment To Those Documents That Pertain To Petitioning Activity**

The July 14 Ruling, *in dictum*, asks whether the district court appropriately ruled that the Appellant had bound himself to respect the confidentiality of the 38 documents given a provision in the protective order allowing the Appellant to challenge confidentiality designations of specific documents. The answer to this question is that while the Appellant retained the right under the Protective Order to challenge the confidentiality of specific documents, he could not categorically deny that GSK's documents could be protected unless they were "trade secrets." The Appellant made specific representations in order to extract documents from GSK. Those representations precluded the Appellant from challenging a confidentiality designation simply on the basis that the document was not a trade secret.

The Appellant did retain the right to argue that specific documents did not pertain to political petitioning or were not confidential business information. Far from advancing a document-specific challenge, however, the Appellant's September 2004 motion argued that the confidentiality claims on the documents in question were not "trade secrets" under Minn. Stat. § 13.37, Subd. 1(b) and so could not be kept confidential.<sup>66</sup> Having agreed to protect the confidentiality of First Amendment privileged and other confidential documents as a category and failing to challenge the confidentiality of specific documents, it was not an abuse of discretion for the district judge to require the Appellant to abide by his commitments.

---

<sup>66</sup> AG Memorandum Regarding Confidentiality at 8 (Sept. 9, 2004) (AG A.-45-55).

The Appellant argues that not all of the documents at issue here were initially designated as First Amendment privileged. The Appellant ignores that until he filed a motion to disclose the documents at issue, GSK had relied primarily on its general “confidential” designations since it was producing documents in expectation of confidential treatment by virtue of the August 2003 Confidentiality Agreement. Once the Appellant filed his motion to publicize part of GSK’s production, GSK specifically reviewed the challenged documents to ascertain the effect of disclosure on its petitioning activity and asserted privilege claims where appropriate.<sup>67</sup>

**1. The Appellant Committed To Providing Confidential Treatment To GSK’s Petitioning Documents**

The district court correctly observed<sup>68</sup> that the Appellant could not claim surprise that GSK’s production included petitioning documents and not “trade secret” documents – he had specifically requested “petitioning” documents in his CID:

All documents...from 1998 to the present, between [GSK] and any other pharmaceutical manufacturer, pharmaceutical wholesaler or distributor, lobbyist, PhRMA, Rx&D, the FDA, Health Canada, the Canada Competition Bureau, or anyone else regarding: a) the importation of prescription drugs from Canada; b) the MSF/CanadaRx drug importation program or any other Canadian drug importation program; c) state, province or federal legislative efforts regarding the importation of prescription drugs from Canada.

Interrog. No. 8, AG A-8 (emphasis added).

The Appellant thus understood that he was receiving petitioning documents in August 2003 when he signed the Confidentiality Agreement. The same day that the

---

<sup>67</sup> As Judge Albrecht noted, GSK withdrew confidentiality claims as to six documents as to which privilege claims did not seem appropriate (AG A.-96).

<sup>68</sup> October Order at 8 (AG A.-103).

Appellant issued the CID, he posted on his website a critique of the pharmaceutical industry's political activity in Washington.<sup>69</sup> GSK's political advocacy was thus a primary focus of the Appellant's investigation.

The Appellant's May 7, 2004 second motion to compel specifically requested documents relating to First Amendment privilege.<sup>70</sup> GSK had opposed production of petitioning documents but stated that if any such documents were ordered to be produced "at the very minimum ... a protective order should be required."<sup>71</sup> As part of the resolution of a dispute over the scope of production of documents, the Appellant represented that if the documents were provided to him, he would protect them from disclosure. The Appellant stated that, "the parties' confidentiality agreement...already ensures against public disclosure of any documents produced."<sup>72</sup> Judge Albrecht's Order also recited the colloquy at a June 17, 2004 hearing specifically conducted to address First Amendment privilege issues. There, GSK offered as a compromise to produce certain First Amendment privileged documents that it had previously withheld if the Appellant agreed to keep them confidential. The discussion at the hearing concerning GSK's discovery compromise also reflected the parties' understanding that the additional petitioning documents produced by GSK would be subject to the Appellant's

---

<sup>69</sup> GSK A.-66-75, *supra* note 44.

<sup>70</sup> AG Memorandum in Support of Second Motion to Compel (May 7, 2004) (GSK A.-82-106).

<sup>71</sup> GSK Response to AG Second Motion to Compel at 19 (June 3, 2004) (GSK A.-26).

<sup>72</sup> AG Reply Memorandum in Support of Second Motion to Compel at 10 (June 10, 2004) (emphasis added) (GSK A.-107-117).

confidentiality commitments. The District Court's first-hand observations from that untranscribed hearing are entitled to deference.<sup>73</sup>

In fact, in its October Order, the District Court cited to correspondence between GSK's counsel and the Appellant surrounding the July hearing expressly conditioning production of the petitioning documents on the Appellant's commitment to hold them confidential under the Protective Order.<sup>74</sup> While the Appellant was free to challenge the confidentiality claims on specific petitioning documents, he chose not to do so. Instead, he switched positions and belatedly claimed, contrary to his prior representations, that the entire category of petitioning documents is not entitled to protection. This he cannot do.

The District Court did not abuse his discretion in finding that the Appellant is bound by his contractual commitments like any other litigant.

**2. Now That GSK Has Relied On The Appellant's Representations Of Confidential Treatment For First Amendment Petitioning Documents, It Would Be Fundamentally Unfair To Allow The Appellant To Publicize The Documents**

All of GSK's petitioning documents were provided in reliance on the Appellant's confidentiality commitments. In particular, in July 2004, GSK entered into a discovery compromise at a point in time when it could have continued to litigate against the production of First Amendment privileged documents – it did so based on the understanding that petitioning documents would be held confidential. The Appellant was free to challenge the confidentiality of particular documents as not falling within First

---

<sup>73</sup> The Appellant did not invoke the procedures set forth in Minn. R. App. P. 110.03 for the preparation of a record where no transcript is available.

<sup>74</sup> Letter from P. Civello to S. Schotland (June 29, 2004); letter from C. Benson to P. Civello (July 19, 2004) (GSK A.-118-121).

Amendment privilege, but not to claim that First Amendment documents were inherently unprotectable. GSK relied on the Appellant's confidentiality commitment.

As this Court noted in a case requesting a modification of a protective order: "Reliance comes into play if a person or party cooperates with discovery only upon the assurance that the information will not be revealed...Modifying protective orders to reveal matters that the parties disclosed with the expectation of limited dissemination could undermine their use in future cases." Minn. v. Philip Morris, Inc., 606 N.W.2d 676, 688 (Minn. Ct. App. 2000).

Courts have rejected "bait and switch" tactics whereby a party is induced to disclose confidential information, as was GSK, and then after the fact its adversary seeks to retract its confidentiality commitment. Am. Computer Trust Leasing v. Jack Farrell Implementing Co., 136 F.R.D. 160 (D. Minn. 1991) (refusing to allow a party to reverse its prior commitment to confidentiality to further non-litigation purposes). Here, the Appellant seeks to use confidential information for political or publicity (i.e., non-litigation) purposes, just as in Jack Farrell, the recipient sought to use confidential information for business (non-litigation) purposes. Medtronic Inc. v. Boston Scientific Corp., 2003 U.S. Dist. LEXIS 2286, at \* 4 (D. Minn. Feb. 14, 2003) (GSK A.- 192-194) ("Where a party or deponent has reasonably relied on a protective order granted under Fed. R. Civ. P. 26(c), the district court should not modify it absent a showing of improvidence in the grant of [the] order or some extraordinary circumstance or compelling need.").<sup>75</sup>

---

<sup>75</sup> In a leading case cited by Medtronic, the Second Circuit observed:

(footnote continued on next page...)

While the district court did not expressly invoke the estoppel doctrine, in fact that doctrine would support Judge Albrecht's conclusion.<sup>76</sup> The purpose of the judicial estoppel doctrine "is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." New Hampshire v. Maine, 532 U.S. 742, 750 (2001).

[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Id. at 749 (cit. omit.). The Appellant's change of position on the criteria for confidentiality satisfies the factors for invoking judicial estoppel: (1) the later representation is inconsistent with the party's earlier position; (2) the district court accepted the party's earlier position or relied upon it; (3) GSK would be prejudiced as it turned over sensitive documents whose production it could otherwise have resisted. 532 U.S. at 750-51. See also Bauer v. Blackduck Ambulance Ass'n, 614 N.W.2d 747, 749

---

(...footnote continued from previous page)

[P]rotective orders issued under Rule 26(c) serve "the vital function . . . of 'securing the just, speedy, and inexpensive determination of civil disputes . . . by encouraging full disclosure of all evidence that might conceivably be relevant. This objective represents the cornerstone of our administration of civil justice.'" [cit omit.]...[I]f previously-entered protective orders have no presumptive entitlement to remain in force, parties would resort less often to the judicial system for fear that such orders would be readily set aside in the future.

SEC v. Thestreet.com, 273 F.3d 222, 229 (2d Cir. 2001). See also FDIC v. Ernst & Ernst, 677 F.2d 230, 232 (2d Cir. 1982); Matsushita, 529 F. Supp. at 894 (The plaintiffs voluntarily entered into the confidentiality order and they "cannot now attempt to undo what they have willingly wrought, having made their bed, they must sleep in it.").

<sup>76</sup> O'Leary v. Miller & Schroeder Invs. Corp., 2004 Minn. App. LEXIS 146 (Minn. Ct. App. Feb. 10, 2004) (GSK A.-195-201) (upholding Judge Albrecht's decision that a group of investors was estopped from denying a mortgage in contradiction of prior assertions).

(Minn. Ct. App. 2000) (doctrine protects court from being “manipulated by chameleonic litigants” who change their position); Mason v. Spiegel, Inc., 610 F. Supp. 401 (D. Minn. 1985) (applying related doctrine of equitable estoppel where a party’s litigation representations have induced the adversary’s detrimental reliance).

If confidentiality commitments such as those made by the Appellant are lightly disregarded, it will create a perverse incentive discouraging litigants from producing confidential documents in government enforcement and other types of litigation. Litigants will be concerned that protective order commitments will not be honored and that their sensitive documents will be released (through disclosure or publication in the press) if that advances the non-litigation political agenda of the other party.

It cannot be an abuse of discretion for a district judge to enforce confidentiality agreements entered into by litigants.

**D. The Confidential Documents Also Remain Protected Under The Minnesota Government Data Practices Act Despite The Appellant’s Filing Of A Complaint In Ramsey County**

The Pending Investigations Clause, Minn. Stat. § 13.39, prohibits the release of investigative data in “pending civil actions”<sup>77</sup> by deeming it to be protected nonpublic data (as to business entities)<sup>78</sup> or confidential data (as to individuals):

Subd. 2. Civil Actions...[1] data collected by state agencies...[2] as part of an active investigation [3] undertaken for the purpose of the commencement...of a pending civil legal action, or which are retained in anticipation of a pending civil

---

<sup>77</sup> A “pending civil legal action” includes but is not limited to judicial, administrative or arbitration proceedings.

<sup>78</sup> Subd. 13. “Protected nonpublic data” means data not on individuals which is made by the Data Practices Act or federal law applicable to the data (a) not public and (b) not accessible to the subject of the data.” Minn. Stat. § 13.02, Subd. 3, 13 (2002).

legal action, are classified as protected nonpublic data...in the case of data not on individuals and confidential...in the case of data on individuals....)<sup>79</sup>

The Minnesota Supreme Court has confirmed the Data Practices Act prohibition against releasing nonpublic data while investigative proceedings are pending. Westrom v. Minn. Dep't of Labor & Indus., 686 N.W.2d 27 (Minn. 2004) (State agency violated Data Practices Act by release of nonpublic investigative data pertaining to business's compliance with state law).<sup>80</sup> "Nonpublic investigative data" must be kept confidential while an investigation is ongoing, whether or not such data are "business confidential or otherwise privileged."

The July 14 Ruling (fn. 3) notes that the "pertinent question" is whether active investigative data somehow became inactive when suit was filed. The Court notes that GSK's procedural briefing on the Appellant's right to appeal did not fully address the Data Practices "merits" issue. Id.

GSK demonstrates below that the necessary interpretation of the statutory language is that investigative data remains protected after a civil action is filed unless and until such information becomes introduced into evidence or becomes a court record (for example when the case is tried). Attaching private discovery to a complaint as the Appellant has done in this case does not convert such discovery into evidence or a court record.

---

<sup>79</sup> An irrelevant exception has been omitted from text. The exception provides: "(b) A complainant has access to a statement provided to a state agency, statewide system or political subdivision under (a)."

<sup>80</sup> Navarre v. S. Wash. County Sch., 652 N.W.2d 9, 29 (Minn. 2002), Star Tribune, 659 N.W.2d at 297-98; Anjoorian, 1998 Minn. App. LEXIS 819, at \*8 (GSK A.-129-130).

## 1. Private Parties May Invoke Minn. Stat. § 13.39

The Appellant's argument that Section § 13.39 solely serves to protect the State from premature disclosure of investigative data and does not protect GSK is belied by the holdings in Westrom, 686 N.W.2d at 27, Navarre, 652 N.W.2d at 9, and Deli v. Hasselmo, 542 N.W.2d 649 (Minn. Ct. App. 1996). In these cases, plaintiffs were found to have privacy rights in investigative data protected under the Pending Investigations Clause. The "purpose of MGDPA is to balance the rights of data subjects to protect personal information with the right of [the] public to know within [the] context of effective government operation." Anjoorian, 1998 Minn. App. LEXIS, at \*8 (GSK A.-129-130) (citing Montgomery Ward, 450 N.W.2d at 307).

## 2. An Investigation Does Not Become Inactive When A Complaint Is Filed

The Pending Investigations Clause continues to apply even after a complaint has been filed. The Appellant's interpretation would be in direct conflict with the express language of the statute and would render meaningless at least four statutory provisions: (i) The provision stating that civil investigative data become "inactive" upon exhaustion of appeal rights. Minn. Stat. § 13.39, Subd. 3 ("Civil investigative data become inactive upon the occurrence of any of the following events . . . (3) exhaustion of or expiration of rights of appeal by either party to the civil action"); (ii) The provision that inactive data can again become active "if the state...or its attorney decides to renew a civil action", specifically references a civil action as a sign that an investigation is active; (iii) Subd. 2(a) provides for judicial review in camera of protected materials requested by a non-party "during the period of time when a civil action is pending" to determine whether

disclosure is warranted;<sup>81</sup> and (iv) Subd. 3 allows for publication of civil investigative data when such data are “presented as evidence in court or made part of a court record” (implying that the investigative data remains protected until so introduced).

Each of these provisions makes clear that the protections of § 13.39 continue even after an enforcement action is filed. Use of terminology such as “pending civil action,” “exhaustion of appeal rights,” “in camera review,” and “court record” reflect an intent to provide for continuing confidentiality of data first collected by an investigator while an investigation is pending.

As this Court noted in Anjoorian, 1998 Minn. App. LEXIS 819, at \*5 (GSK A.-129), under § 13.39, civil investigative data “become inactive when the state agency, or the chief attorney acting for that agency, decides not to pursue a civil action (emphasis added).” Here the AG has decided to pursue a civil action. Contrary to the Appellant’s assertions, there is no language in Westrom, or any of the other cases cited by the Appellant, in support of the proposition that the filing of a lawsuit renders an investigation inactive.<sup>82</sup>

---

<sup>81</sup> Subd. 2a., Disclosure of data, provides:

During the time when a civil legal action is determined to be pending under subdivision 1, any person may bring an action in the district court in the county where the data is maintained to obtain disclosure of data classified as confidential or protected nonpublic under subdivision 2. . . . The data in dispute shall be examined by the court in camera.

<sup>82</sup> The Appellant cites McMaster v. Pung, 984 F.2d 948, 952 (8th Cir. 1993) (“investigative data was confidential under Section 13.39 until the investigation was completed.”). In McMaster an inmate claimed a violation of his constitutional rights because his counsel was not given access to a tape of an interview with the inmate. Unlike this case, it appears that the Investigator’s proceeding against the inmate concluded when his investigation was complete. There was no complaint or proceeding (footnote continued on next page...)

In Smith v. Mankato State Univ., 1995 Minn. App. LEXIS 984 (Minn. Ct. App. Aug. 1, 1995) (GSK A.-208-211), teachers filed a civil action after they were fired by a university. The teachers, who had alleged improprieties by a colleague, sought access to university records concerning the fellow teacher “during the discovery process.” Id. at \*7. This Court found that the personnel exception of the Data Practices Act should preclude release, but even if the records in question were considered investigative records under § 13.39, an investigation was pending until appeals rights were exhausted:

Appellants argue that the investigative files should be considered public investigative data under Minn. Stat. § 13.39 subs. 1, 2. But even if the data gathered by MSU was gathered in anticipation of a civil action by appellants, as they allege, the data would not become inactive (and therefore public) until exhaustion of this appeal. (citation omitted).

Id. at \*8-9, § 13.39, Subd. 3(3). Cf. Everest Dev. v. City of Roseville, 566 N.W.2d 341, 344 (Minn. Ct. App. 1997) (settlement documents not protected nonpublic data because not created for purpose of commencement or defense of a pending civil action – implicitly distinguishing documents collected to litigate).

---

(...footnote continued from previous page)

against the inmate that followed the investigation, and no suggestion the tape would have become public should such a proceeding have occurred.

The Appellant asserts that Montgomery Ward, 450 N.W.2d at 306, stands for the proposition that all “investigative data made part of the court record shall be public.” In Montgomery Ward, a taxpayer was trying to uncover the government’s methodology and findings in valuing the taxpayer’s own property; in the process he needed to determine the values of comparable houses. Section 13.39 is not addressed. Here pre-trial discovery is not part of the court record as no decision on the merits has been reached.

In Seeger v. State of Minnesota, 2000 Minn. App. LEXIS 919 (Minn. Ct. App. Aug. 29, 2000) (GSK A.-202-207), the pending investigations clause of § 13.39 was not even at issue.

### 3. None Of The Narrow Exceptions To The Pending Investigations Clause Apply In This Case

As a threshold matter, the Appellant cannot justify disregarding the Data Practices Act based on the three exceptions in § 13.39, Subd. 2. Such an argument is inconsistent with the August 2003 and July 2004 confidentiality undertakings which recognize the applicability of Data Practices Act protections.<sup>83</sup> While the Appellant complains that Judge Albrecht did not specifically address the applicability of these exceptions, he declined to do so because the Appellant's argument at the October 6, 2004 in camera hearing apparently conceded their inapplicability.

In any event, contrary to the Appellant's argument, none of the exceptions to the Pending Investigation Clause, § 13.39, Subd. 2, apply in this case.<sup>84</sup> There are no "rumors" that affect the "community repose." In Deli, 542 N.W.2d at 649, this Court rejected the argument that "the dispelling widespread rumor exception" excused a statement by a government official denying that a school employee had been exonerated of charges of sexual misconduct while an investigation was pending into the employee's sexual misconduct. The court observed that "[o]rdinary rumors are part of everyday life; section 13.39 contemplates rumors that threaten the community repose." Id. at 656. Given the Data Practices Act's primary interest in privacy protection, the court ruled, a

---

<sup>83</sup> Confidentiality Agreement, (Aug. 6, 2003), ¶ 6 (AG A.-15); Protective Order (July 13, 2004), ¶ 6 (AG A.-33).

<sup>84</sup> Section 13.39, Subd. 2 provides: "Any agency, political subdivision, or statewide system may make data classified as confidential or protected nonpublic pursuant to this subdivision accessible to any person, agency or the public if the agency, political subdivision, or statewide system determines that the access will aid the law enforcement process, promote public health or safety or dispel widespread rumor or unrest."

“threat to fundamental necessities” would be required. Id. at 655-56.<sup>85</sup> In Deli, as here, the state had argued that it had unfettered discretion to determine whether the “rumor exception” justified release. Deli shows that a state agency could not arbitrarily invoke an exception and negate the statutory protections.

Nor would publication of GSK’s confidential information further the public safety. The documents are sought in connection with an antitrust investigation and bear on petitioning activity – they do not deal with product defects. The underlying antitrust enforcement action seeks to promote foreign drug imports – which the FDA has declared are unsafe.<sup>86</sup>

Nor would publication of GSK’s confidential documents serve “law enforcement objectives.” The Appellant has amply publicized that he has initiated an investigation and enforcement action as to whether state antitrust laws were violated by GSK’s efforts to prevent illegal importation of its drugs from Canada.<sup>87</sup> Disclosure of GSK’s confidential documents is not warranted even assuming arguendo that the law enforcement objective could be invoked to address the subject matter of antitrust enforcement.

---

<sup>85</sup> City Pages v. Minn., 655 N.W.2d 839, 843 (Minn. Ct. App. 2003) does not support the AG’s unbridled discretion to invoke the statutory exceptions and release data. The data at issue in that case was the State’s own billing records, which it voluntarily disclosed.

<sup>86</sup> FDA Letters to Gov. Pawlenty (2/23/04 and 5/24/04), <http://www.fda.gov/oc/opacom/hottopics/importdrugs/pawlenty022304.html> and <http://www.fda.gov/importeddrugs/pawlenty0524.html> (GSK A.-122-126).

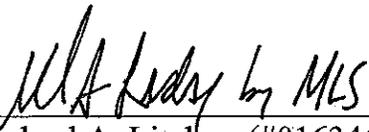
<sup>87</sup> GSK A.-66-75, supra note 44.

It would be not only contrary to the purposes of the Pending Investigations Clause, but an adverse public policy outcome for the Appellant to evade the confidentiality protections that the statute affords to those who comply with civil investigative demands.

**V. CONCLUSION**

Judge Albrecht's ruling upholding the confidentiality of the 38 Documents was correct, should be affirmed, and certainly was not an abuse of discretion.

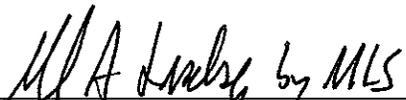
Respectfully submitted,

  
\_\_\_\_\_  
Michael A. Lindsay (#0163466)

Dated: October 17, 2005

**CERTIFICATE OF COMPLIANCE**  
**WITH MINN. R. APP. P 132.01, Subd. 3**

The undersigned certifies that the Brief submitted herein contains 13,561 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 2000, the word processing system used to prepare this Brief.

  
\_\_\_\_\_  
Michael A. Lindsay (#0163466)