

No. A04-2150

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota, by its Attorney
General, Mike Hatch,

Respondent,

vs.

GlaxoSmithKline plc,

Appellant.

APPELLANT'S BRIEF

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I. STATEMENT OF ISSUES

1. *Whether the Court of Appeals erred in finding that the presumption of privacy accorded to pre-trial discovery documents can be defeated by the State's decision to attach such discovery documents to its Complaint.*

Pre-trial discovery documents enjoy a presumption of privacy before such documents are introduced into evidence and become materials on which a court relies in determining a litigant's substantive rights. Discovery documents do not become "judicial records" with a presumption of public access merely because they are attached to a complaint.

Principal Authorities: Seattle Times v. Rhinehart, 467 U.S. 20 (1984);
Minneapolis Star & Tribune v. Schumacher, 392 N.W.2d 197 (Minn. 1986);
Star Tribune v. Minn. Twins Partnership, 659 N.W.2d 287 (Minn. Ct. App. 2003);
In re GlaxoSmithKline plc, No-A04-2150 (Minn. July 14, 2005) (Opinion) (App.-84-91).

2. *Whether the Court of Appeals erred in denying GlaxoSmithKline plc's ("GSK") documents confidentiality protections (a) on the basis that GSK had provided "no evidence" that release of the documents would cause undue burden, while ignoring affidavits submitted by GSK and the Pharmaceutical Research and Manufacturers of America ("PhRMA") explaining why release of confidential documents would inhibit associational privacy rights and political expression, and (b) on the basis that a business organization does not enjoy the same associational privacy rights and protections as other citizens.*

The Court of Appeals ignored affidavits provided by GSK and PhRMA to the district court and the Court of Appeals, explaining the burden that would result from public dissemination of the documents at issue: inhibition of political expression and chilling of associational privacy rights.

Corporations have a right to political expression and freedom of association; in fact, collective petitioning is immune under the antitrust laws. The Court of Appeals in effect nullified the ability of corporate citizens to claim the violation of associational privacy rights as a basis for protecting confidential information under Rule 26 by erroneously ruling that (a) associational privacy protections are not available to a defendant as soon as the defendant is *charged* with violating state law and (b) associational privacy cannot be invoked unless physical reprisal is threatened.

Principal Authorities: First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978);
Associated Contract Loggers v. U.S. Forest Service, 84 F. Supp. 2d 1029 (D. Minn. 2000);
Kellar v. VonHoltum, 568 N.W.2d 186 (Minn. Ct. App. 1997);
Metro. Rehab. Services v. Westberg, 386 N.W.2d 698 (Minn. 1986);
Minn. R. Civ. P. 26.03;
Affidavit of Janie Kinney, May 25, 2004 (App.-101-104);
Affidavit of Bruce Kuhlik, September 26, 2004 (App.-105-108).

3. *Whether the confidentiality protections of the Minnesota Government Data Practices Act's Pending Investigations Clause, Minn. Stat. § 13.39, Subd. 2, apply to civil investigative data submitted by a data subject, where the data have not been introduced into evidence but where a civil suit was subsequently filed.*

The Court of Appeals' decision that the subject of an investigation cannot invoke the protections of the Data Practices Act where the subject has access to the data, conflicts with this Court's ruling in Westrom v. Minn. Dep't of Labor & Indus., 686 N.W.2d 27, 36 (Minn. 2004) (holding that under Minn. Stat. §13.39, nonpublic civil investigative data remains nonpublic even where the data subject has access to the data).

The Court of Appeals also erred in finding that the State's attaching 21 of the 38 documents at issue to the State's Complaint caused all 38 documents to lose their Data Practices Act protections because they became court records. Minn. Stat. §13.39, Subd. 3, provides that civil investigative data is protected until it is introduced into evidence or made part of a court record.

Principal Authorities: Westrom v. Minn. Dep't of Labor & Indus., 686 N.W.2d 27 (Minn. 2004);
Navarre v. S. Wash. County Schs., 652 N.W.2d 9 (Minn. 2002);
Deli v. Hasselmo, 542 N.W.2d 649 (Minn. Ct. App. 1996);
Anjoorian v. Minn. Dep't of Pub. Safety, 1998 Minn. App. LEXIS 819, at *7 (Minn. Ct. App. July 21, 1998) (App.-196-199);
Minn. Stat. § 13.39 (App.-249).

II. STATEMENT OF THE CASE

This appeal concerns the confidentiality of 38 documents that the Appellant, GlaxoSmithKline plc, produced to the State of Minnesota under a confidentiality agreement and a protective order in response to a civil investigative demand (“CID”) initiated by the State in 2003 in connection with an antitrust enforcement investigation.

In September 2004, following the completion of GSK’s document production, the State moved the district court, the Hon. H. Peter Albrecht, to allow it to publicly disseminate 38 of GSK’s confidential documents, mostly relating to GSK and PhRMA’s political advocacy efforts. The State also attached 21 of the 38 documents to a complaint that it subsequently filed under seal in Ramsey County.¹ After reviewing all 38 documents in camera, Judge Albrecht found that they pertain primarily to petitioning activity that is protected under the First Amendment.² Judge Albrecht accordingly denied the State’s motion to release GSK’s documents to the public on October 13, 2004 (“Albrecht Order”), determining that they were protected under Minn. R. Civ. P. 26.03 (“Rule 26”) and the Minnesota Government Data Practices Act. App.-92-100.

¹ Minnesota v. SmithKline Beecham Corporation d/b/a GlaxoSmithKline, No. C8-04-12244 (Ramsey County Dec. 27, 2004) (Complaint). The State served its unfiled Complaint on GSK and provided a courtesy copy to Judge Albrecht prior to his October 2004 ruling. The State did not officially file its Complaint in Ramsey County, however, until December 2004.

² 32 of the 38 documents reflect either petitioning activity or the associational privacy of GSK or a third party. Eight of these 32 documents as well as the six remaining documents also contain information that is confidential on other grounds (“business confidential”).

The State sought review of Judge Albrecht's ruling. The Court of Appeals initially denied review, but on July 14, 2005, this Court ruled that the State had an appeal as of right and remanded the matter to the Court of Appeals for further consideration ("July 14 Opinion"). App.-84-91.

Following remand, the Court of Appeals issued a ruling on April 18, 2006, reversing the Albrecht Order. App.-8-23. The Court of Appeals ruled that the documents were not subject to protection under Rule 26 because GSK had not demonstrated any harm to associational privacy interests. The Court of Appeals recognized the right of association but ruled that GSK and PhRMA, as business organizations, could not invoke such a right to protect petitioning documents. The Court of Appeals also denied the applicability of the Pending Investigations Clause of the Data Practices Act because a complaint had been filed and because GSK, the subject of the investigation, had access to the data.

On May 15, 2006, GSK filed a petition for review identifying, among other errors, that contrary to the Court of Appeals' decision, GSK and PhRMA had filed affidavits demonstrating the harm to their associational privacy interests that release of the documents would cause. GSK also pointed out that the Data Practices Act continues to protect the confidentiality of documents submitted by a data subject even after a lawsuit is filed unless and until the data are admitted into evidence. App.-2-7.

On June 28, 2006, this Court granted GSK's petition for review. App.-1.

III. STATEMENT OF FACTS

In May 2003, the Attorney General of Minnesota began an antitrust investigation into restrictions that GSK's Canadian subsidiary, GlaxoSmithKline Inc. ("GSK-Canada"), had imposed on the resale of its prescription drugs. GSK-Canada imposed these restrictions to prevent the unlawful export of its drugs from Canada to the United States, where they were being diverted by third parties.³ On May 30, 2003, the Attorney General issued a CID (App.-36) requiring that, in addition to the production of commercial documents, GSK produce political petitioning documents relating to "state, province or federal legislative efforts regarding the importation of prescription drugs from Canada." App.-36. On September 30, 2003, the Attorney General posted on his web site a report criticizing the pharmaceutical industry and its political activity. App.-257-310. The report also criticized the federal Food and Drug Administration ("FDA") for refusing to certify as safe, and thus permit, Canadian drug imports. App.-279.

Below GSK provides a brief recitation of the facts leading up to this appeal. GSK provides this chronology not to re-litigate the issue of whether the State had a right to challenge GSK's confidentiality designations,⁴ but rather (a) to establish the applicable

³ GSK-Canada's drugs are not labeled in conformity with U.S. FDA specifications and cannot lawfully be sold in the United States for the U.S. market. GSK maintains that restrictions on the resale of Canadian drugs that cannot be legally sold in the United States are appropriate and lawful and that no antitrust action to promote illegal trade in such drugs is viable. See In re Canadian Import Antitrust Litig., 385 F. Supp. 2d 930 (D. Minn. 2005); Vermont v. Leavitt, 402 F. Supp. 2d 466 (D. Vt. 2005); United States v. Rx Depot, 290 F. Supp. 2d 1238 (N.D. Okla. 2003).

⁴ This Court observed in its July 14, 2005 opinion at n.3 that the State retained a right to challenge GSK's confidentiality designations in the August 2003 Confidentiality Agreement and the July 2004 Protective Order. App.-91.

confidentiality definitions in the underlying confidentiality agreements; (b) to document that both GSK and PhRMA provided affidavits explaining the burden and chill of First Amendment rights that would follow from public disclosure of certain confidential petitioning strategy and associational privacy documents; and (c) to provide the Court with relevant background on the status of the State's Ramsey County litigation.

A. Events Leading Up To Judge Albrecht's October 2004 Order

The August 2003 Confidentiality Agreement. Before GSK produced any documents to the State, the parties entered into a Confidentiality Agreement in August 2003. App.-189-193. The Agreement 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 26.03." App.-189.

The State's Motion To Compel Production Of Documents. After GSK had substantially completed its CID production, in May 2004, the State moved to compel production of GSK and PhRMA petitioning documents that GSK had withheld on the basis that the documents related to confidential petitioning activity. App.-162-164. GSK, in its opposition to the State's motion, relied on case law demonstrating that courts apply a balancing test when government discovery is alleged to intrude on First Amendment petitioning rights. App.-165-188. GSK requested that the court weigh the potential chilling effect of disclosure against the State's alleged need for the specific documents which were of tangential relevance to the antitrust claims. App.-172-175.

The Kinney Affidavit. GSK submitted the affidavit of Janie Kinney, the Vice-President for Federal Government Relations of GSK's U.S. subsidiary, to Judge Albrecht on June 3, 2004. App.-101-104. Kinney described the chilling effect that public disclosure of GSK's lobbying communications would have on the company's ability to advocate policy positions and petition the government in the future, including on subject matters wholly unrelated to drug importation. App.-103. If petitioning documents that reflect informal exchanges of ideas, brainstorming, notes, and discussions were made public, legislators and policymakers "would be far more reluctant to have open and frank discussions on controversial or unpopular issues." App.-102.

The Protective Order. On June 17, 2004, at a hearing before Judge Albrecht, GSK offered a "discovery compromise" to resolve its dispute with the State about production of petitioning documents. App.-95. Under this compromise, which was embodied in a July 6, 2004 discovery stipulation (App.-158-161), GSK agreed to produce 940 of the 1060 previously withheld documents reflecting collective and unilateral petitioning activity, but only on the condition that the State agree to a protective order to further safeguard the confidentiality of these documents. App.-95-96.

The Protective Order entered by the court on July 13, 2004 adopted a definition of "confidentiality" paralleling that of the Confidentiality Agreement. It allowed GSK to designate documents as "confidential" (a) if they contained trade secret information *or* (b) if "GSK assert[ed] another legal basis for treating the document as confidential, including that such documents contain[ed] confidential research, development, commercial *or other information that could be subject to a protective order pursuant to*

Minnesota Rule of Civil Procedure 26.03.” (emphasis added). App.-150. GSK subsequently produced all 940 documents subject to the Protective Order and the Confidentiality Agreement on July 19, 2004. App.-194-195.

As the second part of their discovery compromise, the parties also agreed to request that Judge Albrecht conduct an in camera review of the remaining 120 internal GSK petitioning documents. App.-158-159. On July 10, 2004, Judge Albrecht conducted an in camera review of the 120 documents, totaling 678 pages, and required that GSK produce to the State only 11 additional pages. App.-156-157. This production was also subject to the Confidentiality Agreement and Protective Order.

State’s Motion To Release Confidential Documents. On September 9, 2004, the State filed a motion to release to the public a subset of GSK’s confidential documents.⁵ The State argued that these documents should be made public because they did not contain “protected trade secret” formulae. App.-120. GSK’s opposition pointed out that the Protective Order and Confidentiality Agreement adopted a broader definition of confidentiality co-extensive with the protections of Rule 26. GSK also stated that the documents that the State sought to disseminate and that are at issue in this appeal reflect collective petitioning activities protected under the First Amendment. They include emails, memoranda and correspondence with respect to the development of a petitioning

⁵ The State’s original motion sought to release 45 documents. GSK withdrew its objection to the release of six of these documents prior to oral argument before Judge Albrecht; a seventh document was already in the public domain as it was not designated as confidential. In re GlaxoSmithKline plc, No. MC 03-015992 (Minn. Dist. Ct., Hennepin County Sept. 28, 2004) (Affidavit of Craig A. Benson) (filed under seal).

agenda and internal consideration of advocacy strategy concerning proposed revision of federal law banning Canadian drug imports. App.-122-149.

PhRMA Affidavit. Many of the 38 documents were authored by PhRMA, a voluntary, non-profit trade association representing the United States research-based pharmaceutical industry. PhRMA sought and was granted limited intervention in the CID proceedings and submitted an affidavit by its Senior Vice President, Bruce Kuhlik, explaining that many of the confidential documents the State sought to publicly disclose “fell squarely” within PhRMA’s confidentiality policy. App.-105-108.

Release of these documents to the public would compromise PhRMA’s First Amendment rights and associational privacy. In order to effectively develop and implement its public policy advocacy agenda, PhRMA staff must have the ability to conduct a full and candid exchange of policy views with PhRMA member companies, and particularly with PhRMA board members. Disclosure of the PhRMA documents at issue in the Attorney General’s motion would compromise this free exchange of information and would seriously jeopardize PhRMA’s ability to represent its members’ interests in shaping and pursuing an effective policy advocacy agenda.

App.-108.

B. Judge Albrecht’s October 2004 Order

On October 8, 2004, the State served its then-unfiled Complaint on GSK and provided a courtesy copy to Judge Albrecht. App.-97. Judge Albrecht thereafter conducted another in camera review with respect to the documents that the State proposed to release to the public. On October 13, 2004, Judge Albrecht issued an order denying the State’s motion to unseal the protected documents at issue. App.-92-100. Judge Albrecht ruled that the State had committed to holding GSK’s petitioning documents confidential as part of the resolution of a discovery dispute. Second, he found

that under the Pending Investigations Clause of the Data Practices Act, data gathered as part of a “pending civil legal action” does not lose its protected nonpublic designation until the proceeding becomes inactive. App.-97-98. Third, the Judge stated that he had conducted another in camera review and found that “GSK’s Documents qualify for protection under Rule 26.” App.-99.

C. Filing Of The Ramsey County Complaint

On December 27, 2004, the State filed its previously served Complaint under seal in Ramsey County district court, naming GSK’s U.S. subsidiary as the defendant.⁶ The State had attached to the Complaint 21 of the 38 documents at issue on this appeal. The State has never sought to file a public or redacted version of the Complaint.

D. The State’s Appeal Of Judge Albrecht’s October 2004 Order

The State sought review of Judge Albrecht’s Order. Although the Court of Appeals initially dismissed the State’s appeal (and denied a petition for discretionary review), this Court ruled on July 14, 2005 that the State had an appeal as of right and remanded to the Court of Appeals for consideration of the merits. App.-84-91.

E. The Court Of Appeals’ Decision Under Review Here

On April 18, 2006, the Court of Appeals issued the decision now on review to this Court. The Court of Appeals first found that both the Confidentiality Agreement and the Protective Order authorized the State to challenge GSK’s confidentiality designations. App.-12.

⁶ Minnesota v. SmithKline Beecham Corporation d/b/a GlaxoSmithKline, No. C8-04-12244 (Ramsey County, Dec. 27, 2004) (Complaint).

Second, the Court of Appeals characterized the Data Practices Act as a “law of access” that was “intended to benefit the government, protecting specific kinds of data until the government entity finishes its investigation and decides whether to file a civil action.” App.-15. The Court of Appeals found that GSK’s documents could not be classified as nonpublic data under the statute because GSK, having provided the State with the documents, already had access to the data at issue. App.-16. The Court of Appeals also held that, since some of the documents were attached to a complaint filed in Ramsey County district court, they were now “court records” subject to access under Minn. Stat. §13.39, Subd. 3. App.-18.

Third (ignoring the Kinney and PhRMA affidavits), the Court of Appeals found that there was no evidence on the record to substantiate GSK’s claim that public disclosure would interfere with any associational rights of GSK or PhRMA or subject them to discrimination or retaliation. App.-22.

GSK filed a petition for review on May 15, 2006 (App.-2-7), which this Court granted on June 28, 2006. App.-1.

F. Status of Ramsey County Proceedings

The litigation in Ramsey County remains at an early stage, as the parties have been litigating GSK’s motion to dismiss the Complaint.⁷ The Ramsey County district court denied GSK’s motion, but by agreement of the parties, GSK has not yet filed an

⁷ GSK’s motion to dismiss was based on Judge Joan Erickson’s dismissal of an analogous federal private antitrust action, In re Canadian Import Antitrust Litig., 385 F. Supp. 2d 930 (D. Minn. 2005).

answer. No discovery has yet occurred, nor has either GSK or the State introduced facts into evidence or filed a motion for summary judgment.

IV. SUMMARY OF ARGUMENT

- **The 38 Documents At Issue Are Pre-Trial Discovery Documents Entitled To A Presumption Of Privacy.**

This appeal concerns documents produced by GSK in response to a CID – an investigative proceeding begun by the State prior to initiating litigation. As the July 14 Opinion and other precedent of this Court and of the U.S. Supreme Court have recognized, a presumption of privacy applies to pre-trial discovery. The Court of Appeals, however, erroneously found that the State can avoid the presumption of privacy afforded to pre-trial discovery merely by filing a complaint attaching or quoting documents that the State has obtained in response to a CID. While a complaint initiates a lawsuit, it is not by itself a “judicial record” to which a presumption of open access attaches. A “judicial record” is a document filed with the court on which the court relies in determining a litigant’s substantive rights.

Judicial decisions and the judicial records on which they are based enjoy a rebuttable presumption of openness to ensure the accountability of the judicial decision-making process. In contrast, pre-trial discovery documents are presumed private. This is because unless and until discovery materials are admitted as evidence and form the basis of judicial decision-making, public disclosure serves no judicial accountability function. In addition, the courts recognize that discovery typically includes informal or incomplete communications (such as e-mails) that could be misinterpreted. A presumption of

privacy thus attaches to pre-trial discovery documents and remains with them, preventing their public disclosure unless and until they are admitted into evidence or they otherwise become “judicial records.”

- **Judge Albrecht Did Not Abuse His Discretion In Finding That Rule 26 Protects The Privacy Of The Documents At Issue Here.**

Corporations, like other citizens, have a constitutionally protected right to freedom of association and to political expression. GSK and PhRMA have provided uncontested affidavits explaining that release of GSK’s confidential documents would chill their ability to communicate with certain legislators or government agencies, violate GSK’s and PhRMA’s associational privacy rights, and cause them undue burden and harm. Judge Albrecht did not abuse his discretion under Rule 26 in finding that GSK’s 38 documents should remain confidential, given that the Confidentiality Agreement and the Protective Order broadly defined “confidentiality” as any information protected under Rule 26. App.-150, 189. Information that if released would cause undue burden and oppression (such as violation of First Amendment rights) is properly held confidential via a protective order under Rule 26.

- *The Court Of Appeals Erred In Finding That GSK Provided No Evidence To Substantiate Its Confidentiality Claims.*

The Court of Appeals committed clear error when it ignored the affidavits that GSK and PhRMA submitted to Judge Albrecht (and to the Court of Appeals⁸) to explain why release of the 38 documents would cause it undue burden and specifically impair its

⁸ In re GlaxoSmithKline plc, No-A04-2150 (Minn. Ct. App., Oct. 17, 2005) (GSK Brief at 8, 31, 33). App.-41, 64, 66.

ability to effectively conduct political advocacy. The Court of Appeals inexplicably ignored the affidavit from GSK's U.S. subsidiary's Vice President for Government Relations, Janie Kinney. App.-101-104. The Kinney affidavit specified the harmful effects that disclosure of GSK lobbying communications would have on its ability to advocate policy positions and petition the government. The Court of Appeals also ignored the affidavit of PhRMA's Senior Vice President, Bruce Kuhlik. App.-105-108. The PhRMA affidavit explained that public dissemination of these documents would infringe on PhRMA's associational privacy and could inhibit public officials from communicating with PhRMA in the future, not only on the issue of drug importation but also on other public policy issues.

- *The Court Of Appeals Erroneously Found That The Freedom Of Association Only Applies To "Association For Lawful Purposes," Implying That A Defendant Named In An Antitrust Complaint Cannot Obtain A Protective Order.*

The Court of Appeals cited a wholly inapposite case, United States v. Wilson, 154 F.3d 658, 665 (7th Cir. 1998), for the proposition that the freedom of association only applies to lawful association. Wilson had nothing to do with protective orders. In that case, the defendants were convicted of the crime of physically obstructing access to abortion clinics in contravention of a statute mandating free access. The Seventh Circuit held (unsurprisingly) that such activity was not protected association.

The issue in this appeal is not whether it will ultimately be found that GSK entered into any agreements with competitors that violate Minnesota antitrust laws. Rather, this appeal concerns whether confidentiality designations will be retained, at least during this

pre-trial stage, for documents that Judge Albrecht reviewed in camera and that he confirmed ought to be protected. App.-92-100.

Moreover, the Court of Appeals ignored the axiom that petitioning activity, unilateral or collective, is not illegal under the Noerr-Pennington doctrine and, in fact, that it is immune from antitrust enforcement under state and federal antitrust law. See E. R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 136-38 (1961); Kellar v. VonHoltum, 568 N.W.2d 186, 192-93 (Minn. Ct. App. 1997).

- *The Court Of Appeals Erred In Finding That Associational Privacy Rights Do Not Warrant A Protective Order Because GSK And PhRMA Are Business Organizations And Cannot Show A Threat Of Physical Retaliation.*

First Amendment rights extend to business organizations, not just dissident groups. The Court of Appeals erroneously denied associational privacy protections on the basis that “associating purely for financial gain does not come under the umbrella of First Amendment protection.” App.-21. The 38 documents at issue relate to government petitioning and other political advocacy efforts by GSK and PhRMA. These petitioning efforts were specifically related to legislative initiatives to legalize importation of drugs from Canada and other similar political advocacy. “Constitutional freedom of association protects the right of an individual to associate with others for the purpose of expressing and advancing ideas and beliefs.” Metro. Rehab. Services v. Westberg, 386 N.W.2d 698, 700 (Minn. 1986). The U.S. Supreme Court has also repeatedly ruled that corporations have a right to petition the government on matters of economic concern.

The Court of Appeals also found that concern over chill of petitioning rights was not an appropriate subject of protection under Rule 26. The court relied on precedent holding that political petitioning documents may be *discoverable*. This precedent is inapposite. This appeal does not concern the discoverability of the 38 documents (already produced to the State) but only whether they are confidential at the complaint stage before they are introduced into evidence.

- **Minn. Stat. §13.39 Protects Investigative Data After A Complaint Is Filed Unless And Until It Is Admitted Into Evidence.**

Independent from the argument that GSK's documents at issue are pre-trial discovery documents that are presumed private and protected under Rule 26, GSK also argues that its documents are separately protected under the Minnesota Government Data Practices Act.

- *The Court Of Appeals Erred In Finding That The Data Practices Act Solely Serves To Protect The State From Premature Disclosure Of Investigative Data And Does Not Protect Private Parties.*

The case law establishes that the Data Practices Act serves both to protect the State from premature disclosure of investigative data and also to protect privacy interests of data subjects whose documents are being publicly disclosed.

- *The Court Of Appeals' Decision Ignores The Statute's Requirement That Data Remain Protected Until Introduced Into Evidence Or Subsumed In A Court Record.*

Minn. Stat. §13.39, 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," (App.-249) necessarily implying that the investigative data remains protected until so introduced.

The mere filing of a complaint does not make it “part of a court record” for the purpose of determining public access to otherwise protected data.

- *The Court of Appeals Erroneously Concluded That GSK Could Not Claim The Protections Of The Data Practices Act Because It Was The “Subject Of The Data” At Issue.*

This Court has specifically ruled that under Minn. Stat. §13.39, data remains confidential even when available to the data subject. In Westrom v. Minn. Dep’t of Labor & Indus., this Court held that, “*data collected by state agencies... as part of an active investigation undertaken for the purpose of the commencement or defense of a pending civil legal action ...* are classified as protected nonpublic” regardless of whether the subject of the data already has access to the data. 686 N.W.2d 27, 33 (Minn. 2004) (emphasis in original).

V. ARGUMENT

A. **The Court Of Appeals Erred In Applying A De Novo Standard Of Review To Judge Albrecht’s Discretionary Determination That GSK’s Documents Are Subject To A Presumption Of Privacy And Protection Under Rule 26.**

The Court of Appeals improperly applied a de novo standard of review to Judge Albrecht’s discretionary determination that GSK’s documents were subject to a presumption of privacy and pre-trial protection under Rule 26.⁹ 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. This Court has recognized that:

⁹ De novo review did, of course, apply to the questions of law involved, such as those raised under the Data Practices Act.

The proper standard of review for questions of access under the common law standard is abuse of discretion. The trial court is in the best position to weigh fairly the competing needs and interests of the parties. The right of access is therefore best left to the sound discretion of the trial court, “a discretion to be exercised in light of the relevant facts and circumstances of the particular case.”

Minneapolis Star & Tribune v. Schumacher, 392 N.W.2d 197, 206 (Minn. 1986)

(emphasis added). Other decisions applying an abuse of discretion standard to district courts’ confidentiality determinations include: Star Tribune v. Minn. Twins Partnership, 659 N.W.2d 287, 293 (Minn. Ct. App. 2003); Bonzel v. Pfizer, 2002 Minn. App. LEXIS 977, at *15 (Minn. Ct. App. Aug. 20, 2002) (App.-206); Smith v. Mankato State Univ., 1995 Minn. App. LEXIS 984, at *8 (Minn. Ct. App. Aug. 1, 1995) (App.-241-246). See also Montgomery Ward v. County of Hennepin, 450 N.W.2d 299, 306 (Minn. 1990).

Confidentiality determinations are a subset of discovery rulings, and thus are also reviewable for abuse of discretion. E.g., Erickson v. MacArthur, 414 N.W.2d 406, 407 (Minn. 1987).

Deference to the district judge is especially appropriate in this case, given that Judge Albrecht conducted an in camera review of the specific documents at issue in reaching his conclusion that they were protected under Rule 26.¹⁰ App.-92-100.

B. The 38 Documents Represent Pre-Trial Discovery Entitled To A Presumption Of Privacy.

The 38 documents at issue here are pre-trial discovery documents. They have never been admitted into evidence and have not formed the basis of a judicial ruling

¹⁰ Some of the 38 documents were subject to two in camera reviews, in July 2004 and October 2004.

adjudicating substantive rights of the parties. The fact that 21 of the 38 documents were attached to the State's Complaint (filed under seal) does not transform any of these documents into judicial records to which a presumption of public access attaches.

1. This Court's July 14 Opinion And Extensive Case Law Establish That Pre-Trial Discovery Enjoys A Presumption Of Privacy.

It is axiomatic that pre-trial discovery enjoys a presumption of privacy. There is neither a common law nor First Amendment right of public access to pre-trial discovery. This Court's July 14 Opinion recognizes the well-established principle 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 Co. v Rhinehart, 467 U.S. 20, 33 (1984) (holding that "pre-trial depositions and interrogatories are not public components of a civil trial").

App.-88. The July 14 Opinion noted that a "presumption of openness" applies to court proceedings and trials.¹¹ While explaining that, "for many centuries, both civil and criminal trials have traditionally been open to the public," this Court found that here, the "state's prediction of a 'secret' trial is premature." App.-87.

¹¹ 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. See Nixon v. Warner Commc'ns, 435 U.S. 589, 598 (1978). The July 14 Ruling notes that even the presumption of openness applicable to trials and court records "involves a weighing of the policies in favor of openness against the interests of the litigant in sealing the record" (citing In re Rahr Malting, 632 N.W.2d 572, 576 (Minn. 2001) and Schumacher, 392 N.W.2d at 202-03). App.-88.

The July 14 Opinion cited the landmark U.S. Supreme Court decision, Seattle Times, 467 U.S. 20, in which the U.S. Supreme Court rejected a newspaper's attempts to disseminate information obtained pursuant to court-ordered discovery. The newspaper argued that, under the First Amendment, it should only be restricted from disseminating information if the opposing party showed a compelling interest in keeping the documents confidential. Id. at 31. The Court disagreed, 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. Discovery is a matter of legislative grace. Id. at 32. The Court found that "a litigant has no First Amendment right of access to information made available only for the purposes of trying his suit." Id. at 32. Control of information provided in discovery does not raise a "specter of government censorship." Id. at 32. The Court distinguished discovery materials, which have not historically been in the public domain, from judicial records. Id. at 26-27.

The July 14 Opinion also cited Schumacher, 392 N.W.2d at 204 (common law presumption of privacy attaches where documents have not been "historically and philosophically presumed open to the public") and State ex rel. Mitsubishi Heavy Indus. Am. v. Cir. Ct. for Milwaukee, 605 N.W.2d 868, 877-78 (Wis. 2000) (common law and First Amendment right of access does not extend to pre-trial discovery).

2. Policy Reasons For Protection Of Privacy Of Pre-Trial Discovery

Important policy reasons underlie the confidentiality protections afforded to pre-trial discovery. First, the courts are concerned with protecting the privacy interests of

litigants and third parties. The fact that the case involves a topic of interest to the public does not justify public dissemination of discovery. See Seattle Times, 467 U.S. 20; Minn. Twins Partnership, 659 N.W.2d at 297 (denying access in case involving possible elimination of Minnesota Twins franchise and pointing out that “discovery documents generated in a civil action are not public records and that no First Amendment [or common law] right of access extends to such materials”). Second, pre-trial discovery will often elicit ambiguous and ill-formulated correspondence, written notes, and emails that may be misinterpreted. Pratt & Whitney Can. v. United States, 14 Cl. Ct. 268, 274 (1988) (“Discovery materials themselves are not subject to the common law right of access to judicial records.... With respect to discovery materials, there is no opportunity to rebut prejudicial information unless such information is submitted for the consideration of the court.”). Third, the protection of discovery’s confidentiality also encourages a full and open discovery process by litigants. As the First Circuit stated in Anderson v. Cryovac: If access to pre-trial discovery “were to be mandated, the civil discovery process might actually be made more complicated and burdensome than it already is.” 805 F.2d 1, 36 (1st Cir. 1986).

3. A Complaint Is Not A Judicial Record To Which A Presumption Of Access Attaches.

A rebuttable presumptive right of access applies to court decisions and “judicial records” actually offered at trial and relied on by the court in reaching dispositive decisions on the merits or in determining substantive legal rights. These records form the

basis of judicial decision-making. A complaint, however, is not such a judicial record that forms the basis of a dispositive judicial decision resolving substantive legal rights.

a. Why Judicial Records Enjoy A Presumption Of Access

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. “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.” Zenith Radio v. Matsushita Electric Indus., 529 F. Supp. 866, 898 (E.D. Pa. 1981). See also In re Continental Ill. Sec. Litig., 732 F.2d 1302, 1310 (7th Cir. 1984) (granting access to court records introduced as evidence in connection with a motion to terminate claims allows “public scrutiny of judicial decision-making....”); Wilk v. Am. Med. Ass’n, 635 F.2d 1295, 1299 (7th Cir. 1980) (“Unless and until introduced into evidence, the raw fruits of discovery are not in the possession of a court. 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.”).

b. Definition Of Judicial Record

While Minnesota state law has not defined “judicial record” for purposes of right of public access determinations, it is instructive to review the definitions adopted by the federal Courts of Appeal. These courts typically consider whether court documents or their attachments have been used to determine a litigant’s substantive rights and/or were necessary for the performance of the judicial function. For example, the First Circuit defined judicial records as “materials on which a court relies in determining the litigants’

substantive rights.” In re Boston Herald, 321 F.3d 174, 189 (1st Cir. 2003); Cryovac, 805 F. 2d 1. In the Fourth and Ninth Circuits, the “judicial record” test similarly turns on whether material has been relied upon “in determining litigants’ substantive rights.” In re Policy Mgmt. Sys., 1995 U.S. App. LEXIS 25900, at *13 (4th Cir. Sept. 13, 1995) (providing that documents submitted in connection with a motion to dismiss are not judicial records) (App.-232-240). The mere filing of a document with the court does not render the document “judicial.” Id. The Fourth Circuit held:

Documents filed as part of a dispositive motion such as a summary judgment motion lose their status of being ‘raw fruits of discovery’... summary judgment adjudicates substantive rights and serves as a substitute for trial.

Id. at *9-10 (citing Rushford v. New Yorker, 846 F.2d 249, 252 (4th Cir. 1988)). See also Foltz v. State Farm, 331 F.3d 1122, 1136 (9th Cir. 2003) (expressly adopting the Fourth Circuit rule).

Other Circuits apply slightly different definitions, which also make clear that a complaint is not considered a judicial record for purposes of public access. The Second Circuit defines a judicial record as a document that is “relevant to the performance of the judicial function and useful in the judicial process.” United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995). “[T]he mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access.” Id. The Seventh Circuit distinguishes between materials generated by pre-trial discovery which are afforded confidential treatment and “those documents, usually a small subset of all discovery, that influence or underpin the judicial decision” which enjoy a presumption of public access. Baxter Int’l v. Abbott Labs, 297 F.3d 544, 545 (7th Cir.

2002). Similarly, the Eleventh Circuit inquires whether the material at issue “[was] filed in connection with a pre-trial motion that requires judicial resolution of the merits.” Chicago Tribune v. Bridgestone Firestone, 263 F.3d 1304, 1312-13 (11th Cir. 2001). “Documents collected during discovery are not ‘judicial records.’” United States v. Anderson, 799 F.2d 1438, 1441 (11th Cir. 1986).

While the Eighth Circuit has not adopted a definition of “judicial record,” it has expressly rejected a “strong presumption favoring access,” and it instead gives deference to the trial court on questions of access. Webster Groves Sch. Dist. v. Pulitzer Publishing, 898 F.2d 1371, 1376 (8th Cir. 1990).

In Simon v. Searle, a Minnesota federal district court observed that there is no right of access to pre-judgment records in civil cases: “[T]he presumption of access to judicial records has force only when the Court relies on particular documents to determine the litigants’ substantive rights.... [The court does not sanction] wholesale filing of discovery materials...until it is clear said materials will be relied on and considered by the Court.” 119 F.R.D. 683, 684 (D. Minn. 1987).

The fact that the State unilaterally attached 21 of the 38 documents at issue to the Complaint thus does not negate the presumption of privacy applicable to pre-trial discovery. The Complaint and the attached discovery do not represent a “judicial record” that has formed the basis of dispositive judicial decision-making. As noted above, the Ramsey County action is at a very preliminary stage. GSK’s motion to dismiss the State’s action was based solely on a pure legal question (whether the antitrust laws allow the State to pursue an action where the trade allegedly restrained, importation of drugs

from Canada, has been declared illegal under federal law by the FDA). The issue in the motion to dismiss was not whether the State could prove its allegations, but whether the basic allegations stated a claim. None of the 38 documents at issue were introduced by the State in connection with GSK's motion to dismiss, nor were they mentioned in any way in Judge DeCourcy's opinion.¹²

When and if any of the 38 documents become judicial records (for example, when they form the basis of a summary judgment ruling or are introduced at trial), GSK may shoulder the burden of rebutting the presumption that, at that point, access should be allowed. At the current stage, however, there is no presumption of access with respect to the 38 documents produced in pre-trial discovery.

4. Pre-Trial Discovery Should Not Be Used For Political Or Publicity Purposes.

The purpose of pre-trial discovery is the collection of documents and other information for use in litigation. See Misc. Docket Matter No. 1 v. Misc. Docket Matter No. 2, 197 F.3d 922, 925 (8th Cir. 1999) (Pre-trial discovery "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). As GSK advised Judge Albrecht, at the time it submitted the Kinney affidavit, there was (and remains) substantial risk that the Attorney

¹² Even where, unlike here, documents have been introduced in connection with a motion to dismiss, these materials are not necessarily considered judicial records to which the presumption of public access attaches. See In re Policy Mgmt. Sys., 1995 U.S. App. LEXIS 25900 (4th Cir. Sept. 13, 1995) (App.-232-240).

General would publicize confidential GSK and PhRMA documents.¹³ The Attorney General has posted on his web site and included in his campaign literature a political attack on the pharmaceutical industry, which, among other things, criticizes the industry's supposed close ties with legislators and regulators.¹⁴ Cf. Jennings v. Peters, 162 F.R.D. 120, 122 (N.D. Ill. 1995) (granting protective order to limit defendants' use of deposition testimony for purposes of trial and settlement and expressing concern that "in the absence of a protective order" deposition testimony could "[find] its way into the union election campaign").

The public dissemination of GSK's confidential documents would serve *no legitimate litigation purpose*, at this early stage, before they are introduced into evidence and form the basis of a merits ruling.¹⁵

C. The Court Of Appeals Erred In Finding That GSK And PhRMA, As Business Organizations, Could Not Invoke Associational Privacy As A Basis For Rule 26 Protection Of Confidential Petitioning Documents.

The Confidentiality Agreement and Protective Order in this case expressly apply a definition of confidentiality co-extensive with the protections allowable under Rule 26.

¹³ GSK will of course not discuss the substance of the sealed documents, except to state that they have been reviewed by Judge Albrecht who determined that they reflect lawful petitioning activity and pertain to political advocacy and strategy.

¹⁴ 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. App.-311-314. See also 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. App.-315-317. "AGO Files Lawsuit on Canadian Boycott," The Minnesota Perspective Newsletter from Hatch for Attorney General Volunteer Committee (April 21, 2004) App.-318-321.

¹⁵ At that stage, Judge DeCourcy will be called upon to balance GSK's privacy rights against a rebuttable presumption of access. Schumacher, 392 N.W.2d 197.

Rule 26 authorizes courts to limit discovery or frame protective orders as necessary to avoid “annoyance, embarrassment, oppression, or undue burden” on the part of litigants. Because public dissemination would chill GSK’s associational privacy and petitioning rights, release of the documents at issue here would cause GSK undue burden and oppression.

The Court of Appeals recognized that “Minnesota Courts will fashion discovery relief, in the form of a protective order, to protect the freedom of association.” April 18 Order at 14 (App.-21) (citing Caucus Distributors v. Comm’r of Commerce, 422 N.W.2d 264, 268 (Minn. Ct. App. 1988); Eilers v. Palmer, 575 F. Supp. 1259 (D. Minn. 1984); Minnesota v. Colonna, 371 N.W.2d 629, 633-34 (Minn. Ct. App. 1985)). Two of these cases (Caucus Distributors and Eilers) in fact denied discovery altogether on associational activities – to avoid infringement of First Amendment rights.¹⁶

While recognizing that the protection of associational privacy is generally an appropriate subject for a protective order, the Court of Appeals nonetheless ruled that

¹⁶ Many courts have denied discovery into First Amendment protected activity based on application of a First Amendment balancing test, including where a business is a defendant. See Australia/E. USA Shipping Conference v. United States, 537 F. Supp. 807, 812 (D.D.C. 1982). Examples of cases discussing the First Amendment balancing test include: Grandbouche v. Clancy, 825 F.2d 1463, 1465-67 (10th Cir. 1987); Black Panther Party v. Smith, 661 F.2d 1243, 1269-70 (D.C. Cir. 1981); Int’l Union v. Nat’l Right to Work, 590 F.2d 1139, 1152-53 (D.C. Cir. 1978); Ealy v. Littlejohn, 569 F.2d 219, 229 (5th Cir. 1978); Int’l Soc’y for Krishna Consciousness v. Lee, 1985 U.S. Dist. LEXIS 22188, at **20, 26-8, 30-32, 44 (S.D.N.Y. Feb. 28, 1985) (App.-207-231); Int’l Action Ctr. v. United States, 207 F.R.D. 1, 3-4 (D.D.C. 2002); ETSI Pipeline v. Burlington Northern, 674 F. Supp. 1489, 1490 (D.D.C. 1987); United States v. Garde, 673 F. Supp. 604, 607 (D.D.C. 1987); Adolph Coors Co. v. Wallace/AFL-CIO Coors Boycott Comm., 570 F. Supp 202, 208 (N.D. Cal. 1983); Britt v. San Diego Unified Port Dist., 574 P.2d 771 (Cal. 1978).

GSK could not obtain confidential treatment for the documents at issue. The Court of Appeals made three critical errors on this issue: First, the court ignored the affidavits that GSK and PhRMA submitted showing the burden that would result from disclosure of the documents in question. Second, failing to acknowledge that the documents here pertain to political expression protected under the First Amendment, the court erred in concluding that business organizations do not enjoy freedom of association. Third, the court erred in finding that the subject of an antitrust investigation may not claim confidentiality protections.

1. The Court Of Appeals Committed Clear Error In Ruling That There Was No Evidence On The Record To Substantiate GSK's Associational Privacy Claims.

The Court of Appeals inexplicably concluded that GSK provided “no evidence on the record...to substantiate the claim that the proposed public disclosure would interfere with the associational rights of GSK” and other firms. App.-22.

On the contrary, GSK presented to the district court (as well as the Court of Appeals¹⁷) an affidavit from GSK's U.S. subsidiary's Vice-President for Federal Government Relations specifying the harm that disclosure of GSK lobbying communications would have on its ability to advocate policy positions and petition the government. Kinney Affidavit, App.-101-104. “Many issues that are the subject of federal legislation are controversial and politically charged, with strong advocates on both sides making impassioned arguments. In order for policymakers such as legislators

¹⁷ In re GlaxoSmithKline plc, No-A04-2150 (Minn. Ct. App., Oct. 17, 2005) (GSK Brief at 8, 31, 33). App.-41, 64, 66.

to make wise and informed decisions as to their position on various issues, they need to have access to information from constituents representing a wide range of perspectives on the issue.” App.-102. Policymakers will often solicit views from or listen to persons or entities with whom they may not agree or whose views may be politically unpopular. “In some instances, the mere fact of such communications could be used in campaigns against the legislator by opposing candidates.” App.-102. If disclosure of such informal brainstorming sessions or exchanges of ideas is made subject to public dissemination, “people would be far more reluctant to have open and frank discussions [or to have discussions at all] on controversial or unpopular issues.” App.-102.

This potential chill would not only affect GSK’s ability to meet with legislators on the issue of pending legislation with respect to importation of Canadian drugs, but on a host of other topics. GSK and other pharmaceutical companies provide input to policymakers on an array of important issues, including “AIDS drug availability to developing countries, patent protection, Medicare reform, tort reform, effective treatments for people who want to stop smoking and the like.” App.-103.

Public disclosure of interactions between the company’s government affairs personnel and other companies’ government affairs representatives would also have a chilling effect on the companies’ associational privacy rights. Dissemination of informal emails and meeting notes surrounding PhRMA meetings would have an “immediate and direct chilling effect on the companies’ rights of association and the companies’ right to collectively petition the government.” App.-103. “Such disclosure could put an end to any further email or other informal written communication between GSK Government

Affairs [personnel] and other PhRMA members with respect to legitimate issue advocacy.” App.-103.

Similarly, PhRMA’s affidavit explained that “some of the most sensitive information in PhRMA’s possession includes any documents reflecting communications among PhRMA staff or between PhRMA staff and its member companies about PhRMA’s activities, plans and goals in developing and implementing public policy advocacy positions” for the industry. PhRMA Affidavit, App.-106. “In order to effectively develop and implement its public policy advocacy agenda, PhRMA staff must have the ability to conduct a full and candid exchange of policy views with PhRMA member companies, and particularly with PhRMA board members.” Public disclosure “of the PhRMA documents at issue in the Attorney General’s motion would compromise this free exchange of information and would seriously jeopardize PhRMA’s ability to represent its members’ interests in shaping and pursuing an effective policy advocacy agenda.” App.-108.

It is well-established that affidavits showing burden and oppression are the appropriate vehicle to substantiate confidentiality claims. See Tavoulaareas v. Washington Post, 724 F.2d 1010, 1023-24 (D.C. Cir. 1984), modified by Tavoulaareas v. Washington Post, 111 F.R.D. 653 (D.D.C. 1986) (protective order appropriately entered where Mobil vice-president described in general terms the negative effect that release of materials related to business relationships allegedly tainted by nepotism would have on Mobil’s business in Saudi Arabia).

GSK and PhRMA's affidavits – ignored by the Court of Appeals – were not controverted by the State.

2. Ignoring That The 38 Documents At Issue Involve Political Expression, The Court Of Appeals Erred In Finding That A Business Organization May Not Invoke Rule 26 To Protect Against Violations Of Associational Privacy Rights.

Judge Albrecht did not abuse his discretion in concluding that confidential treatment under Rule 26 is appropriate for GSK's petitioning and associational privacy documents. Rule 26 allows protective orders to be crafted to prevent undue burden, oppression, annoyance or embarrassment. The public release of GSK's documents would, in fact, cause undue burden and oppression due to the chilling of First Amendment and associational privacy rights resulting from such release.¹⁸

Freedom of association is recognized by Minnesota courts as well as by the U.S. Supreme Court:

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.

Metro. Rehab. Services, 386 N.W.2d at 700. "Constitutional freedom of association protects the right of an individual to associate with others for the purpose of expressing

¹⁸ Protective orders are routinely granted to protect the privacy of social association. The First Amendment interest in protecting political expression in an important public policy debate – such as whether imports of prescription drugs from Canada should be legalized – is even more worthy of protection than social associational privacy. Olympic Club v. Superior Court, 229 Cal. App. 3d 358, 365 (Cal. Ct. App. 1991) (balancing 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).

and advancing ideas and beliefs.” Id. “One of those precious associational freedoms is the right of ‘like-minded persons to pool their resources in furtherance of common political goals.’” Minn. Republican Party v. State ex rel. Spannaus, 295 N.W.2d 650, 652 (Minn. 1980) (quoting Buckley v. Valeo, 424 U.S. 1, 22 (1976)).

a. Corporations Have Associational Privacy Rights.

The Court of Appeals erroneously rejected GSK’s assertion of associational privacy rights, in effect applying a “fear of reprisal” standard to justify Rule 26 protection. The court noted that many of the cases where First Amendment privilege has been invoked, for example to bar discovery, involve groups that faced a threat of harsh retaliation. However, from this fact the Court of Appeals derived an erroneous “fear of reprisal” standard that would make it impossible for corporate citizens to obtain Rule 26 protection for confidential documents, even when they provide evidence that public disclosure would have a chilling effect on their associational privacy rights and political expression.

The case law is clear that not only dissident groups fearing retaliation but all legitimate associations – economic, social or political – may invoke First Amendment associational privacy rights. See Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539, 557-58 (1963) (groups involved in legal activity “are to be protected in their rights of free and private association”); Britt v. San Diego Unified Port Dist., 574 P.2d 771, 772-73 (Cal. 1978) (explaining that associational privacy protection can be invoked by associations whether popular or unpopular). As the U.S. Supreme Court stated:

[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, *economic*, educational, religious, and cultural ends.

Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) (emphasis added).

b. Political Expression By Corporations Is Protected Under The First Amendment.

The Court of Appeals also misconstrued this Court's Metro. Rehab. Services decision as supporting its conclusion that associating for financial gain does not come under the umbrella of First Amendment protection. Metro. Rehab. Services involved a challenge by a doctor to regulations that preclude registration of an individual as a rehabilitation consultant if he is affiliated with a service vendor. The plaintiff made a novel argument that these rules violated his so-called "freedom of association for economic gain." Metro. Rehab. Services, 386 N.W.2d at 700. In Metro. Rehab. Services the freedom of association at issue was not freedom of association to express political views, nor did it involve a business's right to rely on Rule 26. Metro. Rehab. Services, in fact, supports GSK's position: This Court carefully distinguished plaintiff's economic livelihood claim from the First Amendment's protection of association "for the purpose of expressing and advancing ideas and beliefs." Id. GSK and other pharmaceutical companies who participate in PhRMA lobbying and advocacy activity are associating to express political views. The majority of the documents at issue relate to petitioning activity with respect to revising the current legislative and regulatory regime which bans Canadian drug imports.

Individuals, associations *and* corporations have a fundamental constitutional right to political expression. The First Amendment affords the broadest protection to such political expression in order:

to assure 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, 424 U.S. at 14 (citations omitted).

A business's expression of views in connection with issues of political concern, such as whether federal law should be changed to legalize importation of Canadian drugs, is protected political speech. The U.S. Supreme Court has made clear that the First Amendment protects political expression regardless of the identity of the speaker or the content of the speaker's views. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776-77 (1978) (corporate expenditures to publicize views on an upcoming referendum on taxation lie "at the heart of the First Amendment's protection"); Thornhill v. Alabama, 310 U.S. 88, 103 (1940) (self-interested speech on issues of public concern is protected by the First Amendment); Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976) (economically motivated speech is protected by the First Amendment); Consolidated Edison v. Public Service Comm'n of N.Y., 447 U.S. 530, 544 (1980) (utility company's discussion with its customers on energy policy is protected by the First Amendment).

The Court of Appeals' denigration of the First Amendment rights of a corporate citizen flies in the face of the U.S. Supreme Court's admonition in Bellotti:

“[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.” ... It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

435 U.S. at 776-77 (citation omitted).

GSK’s petitioning documents reflect collective efforts to petition legislators and regulators on the issue of proposed prescription drug importation legislation that would legalize and facilitate drug imports. The documents at issue reflect specific internal discussions relating to the association’s collective petitioning efforts as well as discussions of allies, possible opponents, and likely legislative outcomes.

Any association that wishes to collectively petition the government in support of (or opposition to) proposed legislation must communicate to discuss such legislation. These communications will likely include the association’s political goals, positions, allies, opponents, petitioning strategies, and agendas. These discussions are “the type of speech indispensable to decision-making in a democracy” and “free discussion of governmental affairs” that the U.S. Supreme Court found protected under the First Amendment in Bellotti. 435 U.S. at 776-77. The freedom of association “protects the right of an individual to associate with others for the purpose of expressing and advancing ideas and beliefs.” Metro. Rehab. Services, 386 N.W.2d at 700.

c. Associational Privacy Rights Of Third Parties

The Court of Appeals also erred in failing to recognize PhRMA’s associational privacy rights, again apparently because the Court of Appeals found that business

associations cannot invoke Rule 26 protection. Cf. Seattle Times, 467 U.S. at 35 (recognizing the importance of protective orders to safeguard the “privacy interests of litigants *and third parties*”) (emphasis added); Misc. Docket Matter No. 1, 197 F.3d at 925-26 (discussing Rule 26 protection of a non-party).

GSK and PhRMA should not be disabled from exercising their First Amendment rights simply because they are business organizations rather than associations of individuals or dissident groups. Because public release of GSK’s documents would violate GSK and PhRMA’s First Amendment rights and cause undue burden under Rule 26, these documents should remain confidential.

3. The Court Of Appeals Erred In Finding That GSK Cannot Assert First Amendment Rights Simply Because The State Has Alleged That GSK Committed Antitrust Violations.

The Court of Appeals’ conclusion that the defendant in an antitrust enforcement action cannot obtain Rule 26 protection to safeguard confidential information is incorrect and must be reversed.

a. The Documents Relate To Political Petitioning – A Protected Activity.

In concluding that GSK’s documents were not protected under Rule 26, the Court of Appeals cited a wholly inapposite case, Wilson, 154 F.3d 658. Wilson involved a defendant who had been *convicted of a crime* – physical obstruction of access to an abortion clinic – who sought a declaration that a statute prohibiting such access was unconstitutional. The case did not address confidentiality of documents or protective orders. In finding that acts of physical violence and threats of force are not

constitutionally protected, Wilson observed that the Constitution protects rights of expression and freedom of association for legitimate expression – whether the association pursues “political, social, economic, educational, religious, [or] cultural ends.” 154 F.3d at 665 (citing Roberts, 468 U.S. at 622). This appeal does not involve violent conduct nor does it require the Court to conclude whether GSK violated the State’s antitrust laws. Rather, this appeal addresses the pre-trial confidentiality of a subset of pre-trial discovery documents that relate to GSK’s political advocacy activity.

Moreover, the Noerr-Pennington doctrine recognizes that corporate citizens, like private citizens, are entitled to exercise their First Amendment rights to petition the government. Kellar, 568 N.W.2d at 193. Political speech by corporations is not actionable under the State’s antitrust or consumer practices laws. Id. at 193. In Kellar, the court affirmed the lower court’s dismissal of antitrust and business tort claims against defendant bankers for restraint of trade, unfair competition and defamation. Id. As the court explained:

Generally, the Noerr-Pennington doctrine protects a citizen’s First Amendment right to “petition the 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. See Noerr, 365 U.S. at 138... (“right of petition” is protected by Bill of Rights)... The doctrine provides that private individuals’ efforts to induce government action in their own self-interest cannot be the basis of liability even if their conduct is motivated by an anti-competitive purpose or injures a competitor.

Kellar, 568 N.W.2d at 193 (citations omitted). See also First Am. Title v. S.D. Land Title Ass’n, 714 F.2d 1439, 1447 (8th Cir. 1983) (Noerr bars antitrust claim where businesses collectively lobbied legislature in exercise of First Amendment petitioning rights); Senart

v. Mobay Chem., 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); Antioch v. Scrapbook Borders, 291 F. Supp. 2d 980, 999 (D. Minn. 2003) (predicting that “the Minnesota Courts would apply the Noerr-Pennington doctrine to a Minnesota antitrust claim”).¹⁹

GSK’s right to petition, individually or collectively through PhRMA, involves lawful activity and the exercise of a fundamental constitutional right:

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.” [Noerr, 365 U.S. at 137]... 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.

Associated Contract Loggers v. U.S. Forest Service, 84 F. Supp. 2d 1029, 1034 (D. Minn. 2000) (citations omitted).

i. The Court Of Appeals Cited Inapposite Precedent When It Found That The Threat Of A Chill On Petitioning Rights Does Not Support Confidential Treatment Of GSK’s Petitioning Documents.

Most of the documents at issue in this appeal concern GSK’s and PhRMA’s political advocacy with respect to Congressional legislation that would legalize and

¹⁹ See also Fischer Sand v. City of Lakeville, 874 F. Supp. 957 (D. Minn. 1994); First Nat’l Bank v. Marquette Nat’l Bank, 482 F. Supp. 514 (D. Minn. 1979), aff’d, 636 F.2d 195 (8th Cir. 1980), cert. denied, 450 U.S. 1042 (1981).

liberalize the importation of Canadian drugs – a public policy issue as to which GSK and other citizens are entitled to express their views. The Court of Appeals incorrectly found that GSK’s petitioning rights were not implicated. The court observed that the Noerr antitrust defense for collective petitioning activity does not automatically bar production of lobbying documents in discovery, citing N.C. Electric Membership v. Carolina Power, 666 F.2d 50 (4th Cir. 1981). App.-20. GSK’s appeal, however, does not concern documents withheld from production and, thus, N.C. Electric, which did not address confidentiality, is inapposite.²⁰ Moreover, GSK’s assertion of confidentiality rests on Rule 26 and the Data Practices Act. Noerr is relevant here because it establishes that (a) GSK and PhRMA, like any other citizen, may express their views on whether legislation should be changed to legalize Canadian drug imports and that (b) collective lobbying does not violate the antitrust laws and thus GSK’s petitioning documents are subject to First Amendment protection.²¹

²⁰ The Court of Appeals addressed this precedent as relevant to protection against “disclosure.” App.-18. The court may have confused the holding, which addressed disclosure in the context of an obligation to produce documents (not at issue in this appeal), with the issue of public disclosure or public dissemination of confidential information (which was not at issue in N.C. Electric but is at issue here).

²¹ The Noerr Court, in holding that the antitrust laws did not forbid businesses from associating together for the purpose of influencing the passage or enforcement of laws, observed that a contrary construction “would raise important constitutional questions.” 365 U.S. at 138.

b. Protective Orders Protecting A Defendant's Confidential Information Are Routine Features Of Antitrust And Other Business Litigation.

It is remarkable for the Court of Appeals to suggest that defendants in antitrust actions cannot avail themselves of Rule 26 protective orders. It is not unusual that the State would enter into a confidentiality agreement and protective order with GSK in this antitrust litigation. Minnesota, like other states, routinely uses protective orders in CID litigation. See, e.g., Minn. Twins v. Minnesota, 592 N.W.2d 847, 856 (Minn. 1999) (finding that the subject of the State's antitrust investigation was entitled to a protective order under Minn. R. Civ. P. 26.03).

Minnesota case law is clear that protective orders are appropriate to protect business privacy interests. See Montgomery Ward, 450 N.W.2d. at 307-08 (suggesting that privacy interest of businesses can be protected through protective order assuring confidentiality); BE&K Constr. v. Peterson, 464 N.W.2d 756, 758-59 (Minn. Ct. App. 1991) (holding that trade association may intervene to protect the confidentiality of information related to licensing and examination; “[i]f nonpublic licensing information is made accessible to the public, [trade association] members would have no interests to protect” and the “damage would be irreparable”). See also Tavoulaareas, 724 F.2d at 1015.

c. The Court Of Appeals Improperly Denied GSK The Benefit Of Associational Privacy Protections On The Basis That An Antitrust Violation Has Been Charged Before GSK Has Even Answered The Complaint, Much Less Had An Opportunity To Litigate Its Defenses.

Just because the State has alleged an antitrust violation does not mean that an antitrust violation has occurred. A Minnesota federal court recently dismissed a federal antitrust action challenging import restrictions imposed by GSK-Canada and other companies on the basis that such restrictions could not violate the antitrust laws because Canadian drugs may not lawfully be sold in the U.S.²² In any event, GSK has numerous substantive defenses to the State's action in Ramsey County, including that it did not enter into any unlawful agreements with its competitors and that vertical restrictions imposed by GSK-Canada to prevent the diversion of GSK-Canada product to the United States were lawful and proper.

It would be a pernicious public policy result to hold that a defendant cannot obtain confidential treatment under a protective order merely because it has been served with a complaint and charged by the State with having violated State law. Such a result would discourage compliance with CIDs and otherwise complicate discovery in litigation brought by the State. Moreover, it would raise serious due process concerns by, in essence, imposing a penalty (loss of associational privacy) before the merits were adjudged and without a legitimate reason for doing so.

²² In re Canadian Import Antitrust Litig., 385 F. Supp. 2d 930 (D. Minn. 2005).

D. GSK’s Confidential Documents Are Protected Under The Minnesota Government Data Practices Act Unless And Until They Become Inactive Data, Are Introduced Into Evidence, Or Become Court Records.

The Pending Investigations Clause of the Data Practices Act, Minn. Stat. § 13.39, Subd. 2, prohibits the release of investigative data in “pending civil legal actions”²³ by deeming it to be protected nonpublic data (as to business entities) or confidential data (as to individuals). Subd. 2(a), Civil Actions, provides in pertinent part:

...[1] [D]ata 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 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...)

Minn. Stat. §13.39, Subd. 2(a) (emphasis added).

This Court has confirmed that the Data Practices Act prohibits the release of nonpublic civil investigative data. Westrom, 686 N.W.2d 27 (state agency violated Data Practices Act by release of nonpublic investigative data pertaining to business’s compliance with state law).²⁴ Nonpublic investigative data must be kept confidential while an investigation is ongoing, whether or not such data are business confidential or otherwise privileged.

The Court of Appeals made three errors in determining that the civil investigative data that GSK submitted is not or is no longer protected by the Data Practices Act. First,

²³ “A ‘pending civil legal action’ includes but is not limited to judicial, administrative or arbitration proceedings.” Minn. Stat. § 13.39, Subd. 1.

²⁴ Navarre v. S. Wash. County Schs., 652 N.W.2d 9, 23-29 (Minn. 2002); Star Tribune, 659 N.W.2d at 297-99; Anjoorian v. Minn. Dep’t of Pub. Safety, 1998 Minn. App. LEXIS 819, at *7 (Minn. Ct. App. July 21, 1998). App.-196-199.

the Court of Appeals appears to have doubted the ability of investigative subjects to invoke the protections of the Act. Second, the Court of Appeals ignored the Westrom precedent (although it was a case discussed by GSK), which provides that the confidentiality protections of §13.39 apply even where investigative data subjects themselves submitted or otherwise have access to the data. Third, the Court of Appeals erroneously concluded that attaching investigative data to a complaint satisfies the provisions of §13.39, Subd. 3, that a document becomes public when the investigation becomes inactive or when the document is introduced into evidence or it becomes a court record.

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

The Court of Appeals mischaracterized the Data Practices Act as meant purely to benefit the government. App.-15. Section 13.39, in part, does serve to protect the State from premature disclosure of investigative data, but it is also meant to protect the privacy interests of data subjects whose documents are being disclosed. See Westrom, 686 N.W.2d 27; Navarre, 652 N.W.2d 9; Deli v. Hasselmo, 542 N.W.2d 649 (Minn. Ct. App. 1996). “The purpose of the Data Practices Act is to ‘reconcile the rights of data subjects to protect personal information from indiscriminate disclosure with the right of the public to know what the government is doing.’” Montgomery Ward, 450 N.W.2d at 307 (citation omitted). See also Anjoorian v. Minn. Dep’t of Pub. Safety, 1998 Minn. App. LEXIS 819, at *8 (App.-199); Itasca County Bd. of Comm’rs v. Olson, 372 N.W.2d 804, 807 (Minn. Ct. App. 1985).

The protection of the privacy rights of data subjects, in fact, serves an important public policy objective: the promotion of and full compliance with civil investigative demands and other discovery requests. If the protections of the Data Practices Act are disregarded and data subjects' documents are released in violation of the Act, respondents will be far more reluctant to comply with agency information requests in the future.

2. The Court Of Appeals Ignored This Court's Westrom Opinion, Which Protects Investigative Data Under §13.39 Even When It Is Accessible To The Data Subject.

The Court of Appeals inexplicably ignored this Court's Westrom opinion, which specifically addressed the issue of whether civil investigative data that is accessible to the data subject may still be considered "non-public investigative data" under the Act. In Westrom, this Court considered the apparent conflict between Minn. Stat. § 13.02 and Minn. Stat. § 13.39 on this issue. The Department of Labor in that case, similar to the Court of Appeals here, had argued that under Minn. Stat. § 13.02, Subd. 13, data is only defined as "protected nonpublic" if it is "not accessible to the subject of the data." Westrom, 686 N.W.2d at 36. This Court first observed that "obviously, the orders and objections, [the investigative data at issue], were accessible to the Westroms," the data subjects. This Court then applied the rule of statutory construction under which special provisions (§ 13.39 – dealing specifically with civil investigative data) usually override more general provisions (§13.02 – classifying a variety of types of data as confidential):

[S]ection 13.39, subdivision 2, appears to override these [§13.02] definitions when it states that data that qualifies as civil investigative data “are classified as protected nonpublic data pursuant to section 13.02, subdivision 13, in the case of data not on individuals and confidential pursuant to section 13.02, subdivision 3, in the case of data on individuals.

...

Section 13.39, subdivision 2, is the special provision because it deals specifically with the subject of civil investigative data. It prevails over the general provisions of section 13.02 subdivisions 3, and 13, which provide definitions that are applicable in all other circumstances to classify data as confidential data on individuals or protected nonpublic data.

Westrom, 686 N.W.2d at 36. The Court of Appeals in this case sua sponte decided that GSK could not avail itself of the protections of the Pending Investigations Clause, because GSK had access to the data. This holding is untenable in light of Westrom’s holding that §13.39, Subd. 2, protects investigative data even where the data is available to the subject.

3. Contrary To The Court Of Appeals Opinion, Data Practices Act Protections Did Not Terminate When The State Filed Its Complaint.

The Court of Appeals’ erroneous finding that the Complaint was a “judicial record” for access purposes led it to conclude that the protections of the Pending Investigations Clause no longer apply once the State filed its Complaint incorporating GSK’s documents.

Under Minn. Stat. §13.39, Subd. 3, civil investigative data may become public when such data are “presented as evidence in court or made part of a court record,” or when the data become “inactive.” Subd. 3 provides that investigative data become inactive through (i) “a decision by the [State] not to pursue the civil action;”

(ii) “expiration of the time to file a complaint...” or (iii) “exhaustion of or expiration of rights of appeal by either party to the civil action.” Thus, as long as investigative data are not presented as evidence, made part of a court record, or become inactive, they remain protected under the Data Practices Act.

In Smith v. Mankato State Univ., 1995 Minn. App. LEXIS 984 (Minn. Ct. App. Aug. 1, 1995) (App.-241-246), five former teachers filed a civil action against their former university employer. The teachers, who had alleged improprieties by a colleague, sought access to university records concerning the investigation of the teachers’ allegations “during the discovery process.” Id. at *7. The Court of Appeals found that the personnel exception of the Data Practices Act precluded release, but that even if the records in question were considered investigative records under Minn. Stat. § 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.

Id. at *8-9 (citation omitted).

The Court of Appeals erred in finding that GSK’s confidential documents had been “made part of a court record” within the meaning of Minn. Stat. §13.39, Subd. 3, when the State attached 21 of the 38 documents to its Complaint in Ramsey County. As discussed supra, a complaint is not evidence introduced in court, nor is it a court record that reflects or that forms the basis of a judicial decision.

GSK's 38 documents remain protected *active* investigative data. The State has not decided to abandon its civil action, the time to file a complaint has not expired, nor have the parties exhausted their rights of appeal. On the contrary, the State is still at the outset of its action in Ramsey County; GSK had not even filed its answer when this opening brief was filed.

4. None Of The Narrow Exceptions To Minn. Stat. §13.39, Subd. 2., Apply In This Case.

The Court of Appeals held that the Data Practices Act gives discretion to the State to decide if any of the three exceptions in §13.39, Subd. 2 – dispelling widespread rumor, public safety, or law enforcement – justify public disclosure. Judge Albrecht appropriately found that the State's decisions implementing these exceptions are reviewable by the district court. Navarre and Deli are examples of cases where the district courts, and later the appellate courts, reviewed and reversed state agencies' decisions that the above exceptions justified public release of investigative data.

In Deli, 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. 542 N.W.2d at 656. In Deli, as here, the State had argued that it had unfettered discretion to determine whether the “rumor exception” justified release. This Court explained that “[o]rdinary rumors are a part of everyday life; section 13.39 contemplates rumors that threaten the community repose.” Id. at 655. Deli thus shows that a state agency cannot

arbitrarily invoke an exception and negate statutory protections, and that a district court may review the State's decision for abuse of discretion.

Publication of GSK's confidential information would also not promote the public safety. Where documents bear on a toxic spill, the State might logically apply the public safety exception. Here, the 38 documents at issue were sought in connection with an antitrust investigation and generally relate to government petitioning regarding Congressional legislation to alter the statutory ban on imports of prescription drugs from Canada. It is ironic that the State would invoke the public safety exception when the State's lawsuit against GSK seeks to promote foreign drug imports – which the FDA has declared are *unsafe*.²⁵

The "law enforcement" exception under Section 13.39 is inapposite in civil investigations, such as this. The public release of descriptions of wanted criminals, for example, would aid the law enforcement process in ways that the release of the documents at issue would not. In any event, the State did not show, by affidavit or otherwise, how publication of these documents would aid any law enforcement efforts.

Judge Albrecht properly reviewed the State's application of the three exceptions under § 13.39, Subd. 2, and appropriately determined them to be inapplicable in this case.

VI. CONCLUSION

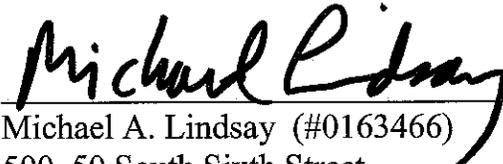
The Court of Appeals ruling should be reversed and Judge Albrecht's October 2004 order reinstated. GSK's government petitioning and pre-trial discovery documents,

²⁵ FDA Letters to Gov. Pawlenty (Feb. 23, 2004 and May 24, 2004), <http://www.fda.gov/oc/opacom/hottopics/importdrugs/pawlenty022304.html> and <http://www.fda.gov/importeddrugs/pawlenty0524.html>. App.-322-326.

to which no presumption of public access attaches at this early stage of the Ramsey County action, are separately protected under both Rule 26 and the Data Practices Act.

Dated: July 27, 2006

DORSEY & WHITNEY LLP

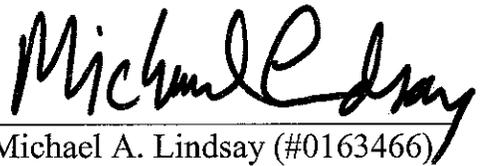
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CERTIFICATE OF COMPLIANCE
WITH MIN. R. CIV. APP. P. 132.01, SUBD. 3

The undersigned certifies that the Brief submitted herein contains 13,275 words and complies with the type/volume limitations of Minn. R. Civ. App. P. 132.01, Subd. 3. 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)

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