

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 REPLY BRIEF

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I. SUMMARY OF ARGUMENT

GlaxoSmithKline plc (“GSK”) identified critical errors in the Court of Appeals’ April 18, 2006 decision, among them:

(i) The Protective Order in this case expressly required that if the State initiated litigation following its antitrust investigation, any filing of GSK’s confidential documents would be placed under seal. The Court of Appeals, however, erroneously concluded that the safeguards of the Protective Order were lost when the State attached such discovery documents to its Complaint. In most cases, complaints do not contain material subject to a protective order or other protected pre-trial discovery and are thus in the public domain. The Court of Appeals erred in approving a practice that would enable the State to circumvent the Protective Order and vitiate the presumption of privacy that attaches to pre-trial discovery, particularly where the State could have filed a redacted version of its Complaint.

(ii) The court erred in its analysis of GSK’s assertion of associational privacy rights by concluding that:

- GSK did not provide evidentiary support for its claims, disregarding GSK and PhRMA affidavits regarding chilling effect;
- Associational privacy (a) is limited to circumstances involving threats of physical or harsh retaliation and (b) does not apply to political advocacy by corporations;
- GSK cannot assert associational privacy where an antitrust violation is claimed, disregarding the fact that the 32 petitioning documents address

activities that are protected under the First Amendment and immune under the antitrust laws.

(iii) The court applied an erroneous standard of review. Judge Albrecht's confidentiality determinations were governed by the abuse of discretion standard.

(iv) The court erroneously concluded that a data subject with access to the data may not invoke the protections of the Pending Investigations Clause of the Minnesota Government Data Practices Act ("MGDPA"), Minn. Stat. §13.39.

(v) The court erroneously concluded that §13.39 of the MGDPA lapsed when the State filed its Complaint in Ramsey County.

The State's August 28, 2006 Opposition Brief is filled with rhetoric and mudslinging but does little to rebut GSK's arguments. The State mischaracterizes the 38 documents at issue as evidencing an antitrust conspiracy and claims it will need to litigate its case in Ramsey County under "a shroud of secrecy." Plaintiff's Opposition Brief ("Opp.") at 11. This Court is not, however, tasked with determining whether GSK or any of its subsidiaries have violated the antitrust laws.¹ Nor is the issue before this Court whether the State will have to try its case in secret. In fact, this Court already determined in its July 14, 2005 opinion that "the state's prediction of a 'secret' trial is premature." GSK Brief Appendix ("App.") at 87. Far from "concealing" documents as suggested by the State, GSK turned over the documents to the State² and in this appeal simply asks that

¹ As discussed below, GSK denies this allegation.

² The State incorrectly argues that "GSK simply designated and stamped as confidential nearly every page of the 40 boxes of documents it produced." Opp.-8-9.

their confidential treatment be maintained at this early stage of the proceedings. The only issue before this Court is whether the Court of Appeals erred in reversing Judge Albrecht's discretionary determination, following in camera review, that GSK's 38 documents were entitled to confidential treatment. It bears emphasis that Judge Albrecht stated in his October 13, 2004 ruling that he had reviewed the documents at issue in the State's motion to unseal (App.-92-100); the State's assertion that he reviewed only three documents is totally incorrect.³

When the State sued GSK's subsidiary, SmithKline Beecham Corporation d/b/a GlaxoSmithKline ("SB Corp."), the State chose in its Complaint to quote extensively from and attach 21 of the 38 documents that Judge Albrecht found were confidential and subject to a protective order.⁴ The State thus filed its Complaint under seal pursuant to the Protective Order and Judge Albrecht's ruling. However, all other materials in the Ramsey County proceedings and before the Court of Appeals, including briefs, orders, and hearing transcripts, are available to the public. The one document that is not publicly available — the Complaint — results from the State's tactical choice to refrain from filing a redacted complaint.

GSK's reply will address the issues presented by this appeal and demonstrate that the Court of Appeals made critical errors that the State's wordplay cannot disguise.

More than 3,500 of the documents GSK produced, amounting to over 20,000 pages, were not designated as "confidential."

³ Opp.-15, n. 10. The three documents that the State is referring to were, in fact, reviewed twice in camera.

⁴ The State repeatedly and carelessly claims that all 38 documents at issue were attached to its Complaint, when, in fact, only 21 of these documents were so attached.

II. ARGUMENT

A. The State Does Not Rebut GSK's Argument That Pre-Trial Discovery Is Subject To A Presumption Of Privacy

It is telling that the State does not address the key authority relied on by GSK, and cited by this Court in its July 18, 2005 opinion, Seattle Times v. Rhinehart, 467 U.S. 20 (1984). In this leading case, the U.S. Supreme Court found that restricting access to material obtained in discovery does not offend either the constitutional or the common law right of access.

1. The Case Law Does Not Support The State's Assertion That The Presumption Of Privacy Inherent In Pre-Trial Discovery Documents Disappears Simply Because The Plaintiff Attaches Them To A Complaint

Pre-trial discovery materials are presumptively private. The rebuttable presumption of access only attaches to that portion of discovery that forms the basis of an adjudication on the merits. GSK's opening brief cited decisions from several courts of appeals defining "judicial records" to which a presumption of access attaches. Some courts, including Minnesota federal courts and the First, Fourth, and Ninth Circuits, apply this presumption to orders and other documents that "determine the substantive rights of litigants."⁵ Other courts, such as the Eleventh Circuit, define judicial records as documents that arise from "judicial resolution of the merits." Chicago Tribune v.

⁵ Simon v. Searle, 119 F.R.D. 683, 684 (D. Minn. 1987); In re Boston Herald, 321 F.3d 174, 189 (1st Cir. 2003); Anderson v. Cryovac, 805 F.2d 1 (1st Cir. 1986); In re Policy Mgmt. Sys., 1995 U.S. App. LEXIS 25900, at *13 (4th Cir. Sept. 13, 1995); Rushford v. New Yorker, 846 F.2d 249, 252 (4th Cir. 1988); Foltz v. State Farm, 331 F.3d 1122, 1136 (9th Cir. 2003).

Bridgestone/Firestone, 263 F.3d 1304, 1312 (11th Cir. 2001).⁶ While the Minnesota Supreme Court has not adopted a definition of judicial record for presumption of access purposes, Star Tribune v. Minn. Twins follows Chicago Tribune in distinguishing pre-trial discovery from material “filed in connection with pretrial motions that require judicial resolution of the merits.” 659 N.W.2d 287, 296 (Minn. Ct. App. 2003).

This distinction for public access purposes between “judicial records” involving substantive legal rights or adjudications on the merits and other court records makes sense given that a primary justification for the public’s right of access to judicial records is the public’s interest in overseeing the judiciary. Zenith Radio v. Matsushita, 529 F. Supp. 866, 898 (E.D. Pa. 1981) (“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.”).

Star Tribune supports GSK’s position that pre-trial discovery documents filed with early-stage motions are not considered judicial records and that only documents filed with records that require judicial resolution on the merits are subject to a presumptive public right of access.

Generally, private documents generated during discovery that are not filed with the court are not considered “judicial records.” United States v. Anderson, 799 F.2d 1438, 1441 (11th Cir. 1986) (stating that “documents collected during discovery are not ‘judicial records.’”); State ex rel. Mitsubishi, 605 N.W.2d at 873 (stating that “neither the press nor the public have a common law right to examine discovery materials as they are being generated in the course of pretrial discovery”). The common-law presumption of

⁶ Similar tests applicable in other circuits are discussed in GSK’s Opening Brief at 23-24.

access generally only extends to documents that have been filed with the court. State ex rel. Mitsubishi, 605 N.W.2d at 874. Furthermore, documents that are filed with discovery motions are not subject to the common-law right of access, whereas discovery documents “filed in connection with pretrial motions that require judicial resolution of the merits” of the case are subject to the common-law right. Chicago Tribune Co. v. Bridgestone/Firestone, 263 F.3d 1304, 1312 (11th Cir. 2001).

659 N.W.2d at 295-296. While the State selectively quotes the sentence stating that a presumption of access extends to documents filed with the court, review of the entire paragraph clarifies that the court followed the majority rule defining judicial records as filings that require resolution on the merits. The court commented that the right of access does not attach to documents filed in connection with discovery motions, because while these documents lead to a judicial decision, these are not decisions on the merits.

A Minnesota federal case directly contradicts the State’s assertion that a complaint and pre-trial discovery attached to a complaint are considered judicial records for presumption of access purposes in Minnesota:

While plaintiffs would have the law be otherwise, there is no established right of public access to prejudgment records in civil cases.... This Court clearly has discretion to deny access to documents filed, but not admitted into evidence or relied upon by the Court.... The presumption of public access to judicial records has force only when the Court relies on particular documents to determine the litigants’ substantive rights.

Simon v. Searle, 119 F.R.D. 683, 684 (D. Minn. 1987).

The State is unable to cite any precedent for the proposition that pre-trial discovery attached to a complaint is subject to a presumption of access. In re Coord. Pretrial Proceedings in Petroleum Prods. Antit. Litig., 101 F.R.D. 34 (C.D. Cal. 1984),

cited by the State, was a decision lifting the seal on summary judgment papers. This decision reflects that documents essential to merits adjudications are judicial records and presumptively accessible by the public. The court observed: “At the summary judgment stage of the litigation, the public interest in access is every bit as strong as it would be at trial.” *Id.* at 39.⁷ Here, there has not yet been an adjudication of the factual merits of the case, nor have the parties sought such a ruling in the form of a summary judgment motion. SB Corp. filed its Answer last month; no discovery has yet been propounded and the case is in its infancy.

2. Judge DeCourcy’s Denial Of SB Corp.’s Motion To Dismiss Was Not An Adjudication On The Merits

Judge DeCourcy’s order denying SB Corp.’s motion to dismiss did not rule on the merits or resolve any fact dispute, and it in no way relied on the 38 documents.⁸ The question at issue in SB Corp.’s motion to dismiss was whether the allegations in the complaint stated a claim – assuming the allegations to be true. GSK argued that the State’s complaint failed to state a claim, primarily because there can be no antitrust injury where the trade allegedly restrained, the importation of drugs, is illegal. *In re Canadian Import Antitrust Litig.*, 385 F. Supp. 2d 930 (D. Minn. 2005). Judge DeCourcy denied

⁷ The State also cites *A.P. v. M.E.E.*, 821 N.E.2d 1238 (Ill. App. Ct. 2004), where an Illinois court found error in the sealing of court orders and criticized the sealing of the entire court file. In *Brown & Williamson Tobacco v. FTC*, 710 F.2d 1165 (6th Cir. 1983) the court did not address pre-trial discovery attached to a complaint but merely the unsealing of documents at the conclusion of the case.

⁸ Nor did the district court “determine the substantive rights of litigants.” See *In re Policy Mgmt. Sys.*, 1995 U.S. App. LEXIS 25900, at *13.

the motion on the basis that a state plaintiff, unlike a private plaintiff, is not subject to antitrust standing requirements.⁹

None of the briefs quoted GSK's documents nor did the State attach them. Even if the State had attached the documents to the motion to dismiss, they would not have become judicial records because, unlike a motion for summary judgment, a motion to dismiss does not require resolution of the merits or resolution of contested facts. A ruling on a motion to dismiss requires a legal determination of whether the allegations in the complaint are legally sufficient to state a claim for relief.¹⁰ Documents play no role in this determination. In re Policy Mgmt. Sys., 1995 U.S. App. LEXIS 25900, at *13 (4th Cir. Sept. 13, 1995).

3. The Public's Right Of Access Does Not Extend To Material Subject To A Protective Order

In most cases, complaints do not contain material subject to a protective order and are accessible to the public under the Minnesota Rules of Public Access to Records of the Judicial Branch.¹¹ However, the Rules of Public Access also specifically provide that complaints and other records are inaccessible to the public where court orders, rules or other applicable laws prevent such public access. Rule 4(f) (Supp.-21); State v. C.P.H., 707 N.W.2d 699 (Minn. Ct. App. 2006) (under Rule 4, certain records are not accessible

⁹ "The State of Minnesota, in pleading a per se violation..., is not required to prove an antitrust injury." SA.-59.

¹⁰ Elzie v. Comm'r of Pub. Safety, 298 N.W.2d 29, 32 (Minn. 1980). "When deciding whether to grant a motion to dismiss pursuant to Minn. R. Civ. P. 12.02(e), the district court is only to consider the evidence alleged in the petition." Higgins v. Harold-Chevrolet-Geo, 2004 Minn. App. LEXIS 1303, at *12 (Minn. Ct. App. 2004)(Supp.-17).

¹¹ Rule 2, <http://www.courts.state.mn.us/rules/publicaccess/accessrules.pdf> (Supp.-19).

absent a court order). The Minnesota Judicial Branch, in fact, maintains a table that identifies the types of information and records not accessible to the public. This includes “depositions, documents, and other information sealed by court order.”¹² Here, the State’s Complaint is not subject to public access because it attaches and directly quotes from documents that are subject to a protective order and a confidentiality agreement.

The Protective Order in this case specifically provides that the information designated as confidential will remain confidential even after a complaint is filed:

All confidential documents and materials under this Order that are filed with the Court (in these proceedings or in any litigation filed as a result of the State’s investigation, pending further Order of the presiding judge in such proceedings) shall be filed in sealed envelopes...

Each document filed under seal may be returned to the source that filed it: (1) if no appeal is taken, within ninety days after the State completes its investigation or a final judgment is rendered; or (2) within thirty days after the mandate of the last reviewing court which disposes of this litigation in its entirety is filed (“the final resolution of this litigation”).

App.-153.

The State cites cases such as Skolnick v. Alzheimer, 730 N.E.2d 4 (Ill. 2000), for the proposition that complaints are generally in the public domain. However, none of the decisions cited by the State address the scenario here: where the Complaint quotes from and attaches documents that are protected by a protective order. Skolnick in fact distinguishes pleadings from information released during discovery, noting that “discovery is distinct from documents that are filed with the court.” Id. at 19. Discovery

¹² Table on Limits on Public Access to Case Records, <http://www.courts.state.mn.us/rules/publicaccess/case.pdf> (Supp.-50).

is “not open to the public at common law, and, in general, [it is] conducted in private as a matter of modern practice.” Id.

The purpose of a complaint is to provide notice pleading of allegations and to state a claim, not to attach or summarize pre-trial discovery. The State chose not to file a redacted version of its Complaint or one that does not directly quote or reveal the substance of GSK’s confidential documents. This procedure was certainly available to balance privacy interests with public access concerns. The courts routinely encourage such redaction, where as here, court records and complaints involve sensitive information covered by a protective order. Prairie Island v. Minn. Dep’t of Pub. Safety, 658 N.W.2d 876, 888 (Minn. Ct. App. 2003) (“When a document contains both public and nonpublic information, it is appropriate to redact the protected information and release the public information.”).

B. The Court Of Appeals’ Denial Of GSK’s First Amendment Rights Was Based On Fundamental Factual And Legal Errors

1. The Court Of Appeals’ Statement That GSK Provided “No Evidence” That Public Disclosure Would Interfere With Its Associational Privacy Rights Was Flatly Wrong

In an effort to rescue the Court of Appeals’ decision, the State characterizes it as “conclud[ing] that the evidence in the record...was insufficient to substantiate GSK’s claim.” Opp.-28. To the contrary, the Court of Appeals 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.” App.-22. The State attempts to minimize the Court of Appeals’ disregard of the Kinney and PhRMA affidavits.

However, the Court of Appeals entirely ignored these affidavits that explained the chilling effect that public disclosure of the documents could have on GSK's and PhRMA's ability to lobby the government and to meet in private to discuss such petitioning efforts. The State's citation to cases where courts have rejected conclusory affidavits in fact reflects that courts routinely address the sufficiency of affidavits presented in support of confidentiality claims. The Court of Appeals outright ignored the affidavits here and did not reject them as deficient.

Kinney's affidavit explained that legislators and policymakers would be reluctant to meet with GSK on controversial issues such as drug importation if it were known that they were meeting with industry:

In some instances, the mere fact of such communications could be used in campaigns against the legislator by opposing candidates. If disclosure is compelled of documents that reflect informal exchanges of ideas, brainstorming, notes, discussions, etc., people would be far more reluctant to have open and frank discussions on controversial or unpopular issues.

Kinney Aff. ¶8 (App.-102). This potential chill would not only affect GSK's ability to meet with legislators on Canadian drug import legislation but on other topics as well. Id. ¶11. Kinney also expressed concern that 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 "could put an end to any further email or other informal written communication between GSK Government Affairs and other PhRMA members with respect to legitimate issue advocacy." Id. ¶13. The affidavit filed

by PhRMA similarly addressed both the potential chill on collective petitioning and associational privacy rights. App.-105-108.¹³

The State cites inapposite authority holding that a document-by-document justification of confidentiality must be provided. First, this ignores the fact that document-by-document privilege and business confidentiality justifications were provided to Judge Albrecht immediately prior to his in camera review of all 38 documents at issue,¹⁴ and that Judge Albrecht could rely on the documents themselves in determining the appropriate scope of protection. Second, the Kinney affidavit was not submitted to support individual confidentiality claims but rather to describe the chilling effect on GSK's associational privacy rights that public release of these documents could have. Whenever a First Amendment privilege is invoked, it is appropriate and customary for the party claiming the privilege to submit an affidavit explaining the asserted violation.¹⁵

The State also notes that GSK submitted the Kinney affidavit prior to the State's motion to publicize the documents at issue, implying that the affidavit is a nullity. The Kinney affidavit was first filed in opposition to the State's motion to compel production of documents that GSK had withheld on the basis of First Amendment privilege. GSK

¹³ The State mischaracterizes GSK's right to collectively petition the government as separate and distinct from its right to associate with others for the same purpose. First Amendment protections, of course, encompass both.

¹⁴ Supp.-1-3.

¹⁵ See Weinberger v. Maplewood Review, 648 N.W.2d 249, 259 (Minn. Ct. App. 2002); Int'l Soc'y for Krishna Consciousness v. Lee, 1985 U.S. Dist. LEXIS 22188, at *27 (S.D.N.Y. Feb. 28, 1985); Australia Shipping v. U.S., 537 F. Supp. 807, 812 (D.D.C. 1982).

was concerned, even before production of such documents, that their release to the State would soon be followed by an attempt to release them to the public. The affidavit applied equally to GSK's opposition to the State's motion to compel production of petitioning documents and to the State's follow-on motion, two months later, to unseal the confidential documents.

2. The Court Of Appeals Erroneously Concluded That Associational Privacy Rights Can Only Be Asserted By Dissident Groups That Are Objects of "Harsh Retaliation"

The Court of Appeals held that GSK and PhRMA could not claim associational privacy right protections because they were not the objects of "harsh retaliation" or groups whose "personal safety" and "survival" were threatened. Corporations routinely rely on Rule 26 protections to prevent undue burden, oppression or harassment. In this case, the particular burden asserted by GSK is the threatened violation of its First Amendment rights of expression and association. The Court of Appeals denied these rights by holding:

GSK asserts that disclosing the documents would have a chilling effect on its ability to freely associate. Associational privacy has been elevated over disclosure when there is a group that has been an object of harsh retaliation and disclosure is not just embarrassing, but threatening to the personal safety, if not the very survival of its members....

App.-21-22. Later in its order, the court reiterated its discrimination or retaliation test:

"There is no evidence on the record before us to substantiate the claim that the proposed public disclosure would interfere with the associational rights of GSK or subject GSK and the firms with which it may be associated to discrimination or retaliation." App.-22.

While many associational privacy cases do involve dissident groups, the case law does not require physical reprisal as a criterion. The protection of associational privacy justified withholding documents altogether in several cases in which fear of reprisal was not even mentioned. Eilers v. Palmer, 575 F. Supp. 1259 (D. Minn. 1984) (denying request for disclosure of names of individuals/groups funding plaintiff's lawsuit); Australia Shipping v. U.S., 537 F. Supp. 807 (D.D.C. 1982) (antitrust investigation involving business).

Here, GSK's and PhRMA's associational privacy interests are not invoked to withhold production; the 38 documents have already been produced to the State. GSK simply raises the threat to its associational privacy to prevent public disclosure at this early stage of the litigation.

3. The Court Of Appeals Improperly Analyzed GSK's Associational Privacy Claim As An Association "For Financial Gain" When The Documents In Fact Address Political Expression

The Court of Appeals erred in denying GSK's associational privacy claims based on precedent holding that "associating purely for financial gain does not come under the umbrella of First Amendment protection." April 18, 2006 Decision (citing Metro. Rehab. v. Westberg, 386 N.W.2d. 698, 700 (Minn. 1986))(App.-21). In Metro Rehab., petitioner alleged novel rights to associate for economic gain – political expression was not involved. Metro Rehab. specifically distinguishes First Amendment protections applicable to expression of ideas and beliefs. The 32 petitioning documents reflect GSK's efforts to lobby the government – paradigmatic political expression. Business

organizations have the same rights to political expression as do any other individuals or associations. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776-77 (1978).

4. The Court Of Appeals Erred In Concluding That GSK Could Not Invoke Freedom Of Association Because Such Association Only Applies To Association “For Lawful Purposes”

The Court of Appeals erred in denying GSK’s associational privacy claims by analogizing to cases involving criminal prosecution. The court cited to the inapposite case of U.S. v. Wilson, 154 F.3d 658 (7th Cir. 1998), where the defendants were convicted of physically obstructing access to abortion clinics. Unlike the defendants in Wilson, GSK did not engage in illegal, violent conduct, but rather in lawful, collective petitioning activity.

The cases cited by the State are also inapposite. U.S. v. Bell, 217 F.R.D. 335 (M.D. Pa. 2003), involves the facilitation of an illegal, abusive tax scheme and recognizes “a right to associate for the purpose of engaging in those activities protected by the First Amendment....” Id. at 343. Similarly, Lewitus v. Colwell, 479 F. Supp. 439 (D. Md. 1979), involves an association that “was not politically or ideologically based; it was for the purpose of racing and purchasing horses....” Id. at 444. Lewitus recognizes that the First Amendment’s associational freedom is intended to encompass “the freedom to associate for the promotion of political and social ideas....” Id.

Petitioning activity is not only protected under the First Amendment, but it is also immune from antitrust challenges under the Noerr-Pennington doctrine. Kellar v. VonHoltum, 568 N.W.2d 186, 193 (Minn. Ct. App. 1997). Since collective lobbying is protected political association and cannot violate the antitrust laws, the State cannot claim

that documents related to such activity are inherently illegal. See GSK Opening Brief (“Br.”) at 39.¹⁶

Further, the State cites no finding by any court, much less the court below, that GSK’s relevant conduct violated any laws. Neither Judge DeCourcy¹⁷ nor any other judge has determined that any GSK entity has violated the antitrust laws by restricting illegal drug importation (or that the 38 documents in any way evidence such violation). In fact, allegations that GSK’s imposition of import restrictions violates the antitrust laws have been dismissed by other courts. In Minnesota federal court, Judge Ericksen dismissed a private plaintiff federal antitrust class action against GSK and other pharmaceutical companies alleging that the imposition of import restrictions was illegal. In re Canadian Import Antitrust Litig., 385 F. Supp. 2d at 934. Judge Ericksen ruled that Canadian drug imports are misbranded and, thus, themselves illegal. She dismissed the case explaining that “importation of these drugs is unlawful and, therefore, not the type of activity which federal antitrust laws were designed to protect.” Id. at 932. In a second action filed against GSK and other pharmaceutical companies, a California state court similarly ruled that restrictions on the “unlawful importation” of Canadian drugs cannot

¹⁶ The State’s argument that Noerr is irrelevant because it was not the basis of SB Corp.’s motion to dismiss makes no sense. The motion to dismiss was grounded on the position that the Complaint failed to state a claim because no plaintiff may bring an antitrust action to challenge restrictions on drug importation which is illegal under the U.S. regulatory regime. A Noerr defense applicable to First Amendment petitioning activity was included in SB Corp.’s Answer and will no doubt be developed by SB Corp. as one of several grounds for summary judgment.

¹⁷ Judge DeCourcy’s denial of the motion to dismiss simply finds that the State’s allegations are sufficient to state a claim. The judge makes no factual findings or findings that a violation has occurred.

form the basis of the plaintiffs' price-fixing claim (the only remaining claim at issue in that case).¹⁸

Moreover, SB Corp. has numerous defenses in the Ramsey County action, among them, that vertical restrictions, such as restrictions on imports imposed by sellers to prevent illegal diversion of GSK Canada product that does not conform to FDA regulations, are reasonable restrictions. The State cannot presume that an antitrust violation will be proven.

5. The Court Of Appeals Applied An Erroneous Balancing Test To The District Court's Rule 26 Confidentiality Determination

The State's opposition repeats the Court of Appeals' erroneous balancing test: "Clear and compelling circumstances must exist to shield associational privacy from disclosure." App.-22. The Court of Appeals cited no authority for this "clear and compelling circumstances" test, no doubt because such a standard is unprecedented. It is especially inappropriate where the issue before the Court of Appeals was whether Judge Albrecht abused his discretion in finding that the documents are confidential after having reviewed the documents in camera and having determined that GSK had good cause to maintain the confidentiality of the information under Rule 26. App.-92-100. The issue in this appeal relates only to document confidentiality at an early stage of litigation, not to the withholding of documents from production or the sealing of court proceedings or trial. The presumption of privacy continues to attach to the pre-trial discovery at issue.

¹⁸ Clayworth v. Pfizer, No. RG04-172428, Order Sustaining Demurrer with Leave to Amend (Cal. Super. Ct., Alameda County, Apr. 18, 2005) (Supp.-7).

C. The Court Of Appeals' Errors In Analyzing GSK's Rights Under The MGDPA Provide Independent Grounds For Reversal

The Court of Appeals made two salient errors in its analysis of the MGDPA: The court assumed that the MGDPA exists to benefit the Government and that §13.39 may not be invoked by data subjects with access to the data.

1. The State Offers No Rebuttal To GSK's Argument That The Court of Appeals Mischaracterized The MGDPA As Intended To Benefit Only The Government

GSK's Opening Brief identified a fundamental error: the Court of Appeals assumed that the MGDPA exists to protect the State from premature disclosure of investigative data (App.-8-23), ignoring that an additional purpose of the Act is to protect the privacy interests of data subjects whose documents are being disclosed.¹⁹ The State does not take issue with GSK's authority on this point.

2. Contrary To The Court Of Appeals, A Data Subject With Access To The Data May Invoke The Protections Of The MGDPA

As the State implicitly concedes,²⁰ the Court of Appeals plainly erred when it found that GSK could not rely on §13.39 "because GSK provided the state with documents; GSK, as the subject of the documents, obviously had access to them." App.-16. This finding clearly contravenes this Court's holding in Westrom v. Minn. Dep't of Labor & Indus., 686 N.W.2d 27, 36 (Minn. 2004), that under §13.39, nonpublic civil

¹⁹ Westrom v. Minn. Dep't of Labor & Indus., 686 N.W.2d 27 (Minn. 2004); Navarre v. S. Washington County Schs., 652 N.W.2d 9 (Minn. 2002); Deli v. Hasselmo, 542 N.W.2d 649 (Minn. Ct. App. 1996); Montgomery Ward v. County of Hennepin, 450 N.W.2d 299, 307 (Minn. 1990).

²⁰ Opp., n. 17 ("Even if this determination was incorrect, any error is harmless where... two independent bases for disclosure exist under Section 13.39.").

investigative data remains nonpublic even where the data subject has access to the data. This fundamental error requires reversal because, contrary to the State, no independent bases for disclosure exist.

3. None Of The Subd. 2 Exceptions To The Pending Investigations Clause Apply

As Judge Albrecht held after in camera review, release of the documents at issue is not required in the interest of public safety, to dispel widespread rumor or to serve law enforcement.²¹

The documents at issue are either petitioning documents related to lobbying efforts or other “business confidential” documents. They do not bear on product defects or other safety hazards. The documents also do not, as the State claims, contradict public statements that illegal drug importation raises serious safety concerns. It is ironic that the State seeks to invoke the public safety exception when the FDA has criticized the State’s initiatives to encourage the importation of Canadian drugs as “unsafe, unsound, and ill-considered.”²² A December 2005 FDA press release is illustrative of the FDA’s concerns that “drugs ordered from so-called ‘Canadian’ Internet sites are not drugs of known safety and efficacy”:

An FDA operation found that nearly half of the imported drugs FDA intercepted from four selected countries were shipped to fill orders that consumers believed they were placing with “Canadian” pharmacies. Of the drugs being promoted as “Canadian,” based on

²¹ After the State determined that the three exceptions applied, Judge Albrecht reviewed this determination and ruled in GSK’s favor. Contrary to the State’s claims, the district court did not prevent the State from making such a determination in the first instance.

²² FDA Letter to Governor Pawlenty (Feb. 23, 2004) (App.-322).

accompanying documentation, 85 percent actually came from 27 countries around the globe. A number of these products also were found to be counterfeit.²³

Two Secretaries of the U.S. Department of Health and Human Services have found that they cannot issue a certification that drug importation would “pose no additional risk to the public’s health and safety.” 21 U.S.C. § 384(l).

Similarly, the “dispel rumor” exception does not justify release of the documents when it is the FDA and HHS’s position that imported drugs are unsafe. Deli v. Hasselmo, is an example of a case that rejected a state agency’s exaggerated claims that release of investigative data is needed to “dispel widespread rumor and unrest,” noting that “§13.39 contemplates rumors that threaten the community repose.” 542 N.W.2d 649, 655, 656 (Minn. Ct. App. 1996). No such rumors exist here, nor would one expect them to exist where GSK’s public statements have been entirely consistent with the FDA’s press releases on this topic.

The State offers no argument to contradict GSK’s point that the law enforcement exception applies to criminal law enforcement, not civil antitrust enforcement. Br.-48. The State asserts that in two cases, private litigants have brought similar antitrust suits against GSK and that these litigants need these documents. However, in both cases the counts alleging illegality of import restrictions have been dismissed.²⁴ Should other actions be filed, the relevant courts will supervise their own discovery. Further, contrary to the State, publicizing these documents is not needed to encourage witnesses to come

²³ Supp.-62.

²⁴ In re Canadian Import Antitrust Litig., 385 F. Supp. 2d at 934; Clayworth v. Pfizer, supra.

forward or to deter anticompetitive conduct since the Attorney General has vigorously publicized this action on his website and in campaign literature. App.-311-321. Finally, the enforcement of import restrictions occurred in 2003 and is not ongoing. The Complaint alleges no wrongful conduct beyond this date.

4. The Best Construction Of The MGDPA Is That Investigative Data Is Protected Until Introduced Into Evidence

The State claims that the documents became public when a subset of them was attached to the Complaint. The MGDPA provides a balance between the privacy rights of data subjects and legitimate litigation use of such data: Under §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.” None of these contingencies has yet occurred. As noted above, a Complaint does not qualify as a “judicial record” for public access purposes, nor was the evidence presented at trial. The Court of Appeals’ erroneous finding to the contrary led it to conclude that the protections of §13.39 no longer apply.²⁵

Contrary to the State’s assertions, there is no language in Westrom that the filing of a complaint renders an investigation inactive.

D. This Court Should Not Sit In The First Instance To Determine Business Confidentiality

This Court should not entertain the State’s extraordinary request that this Court address in the first instance the confidentiality of the 14 of 38 documents that GSK has

²⁵ In neither Montgomery Ward, 450 N.W.2d 299, nor Seeger v. State, 2000 Minn. App. LEXIS 919 (Aug. 29, 2000), did the facts involve §13.39.

designated as protected “business confidential” documents under Rule 26.03(g). As a threshold matter, to the extent that the State argues that the presumption of pre-trial discovery is lost because it decided to attach some of GSK’s confidential documents to the Complaint, only some of the business confidential documents were attached (9 of 14). More fundamentally, neither the district court nor the Court of Appeals decided this issue and there is no precedent for the State’s request that this Court usurp the function of these lower courts.

1. The State’s Request That This Court Examine The 14 Documents Is Illogical Because The Status Of All 38 Documents Would Need To Be Reviewed

GSK has asked this Court to reinstate Judge Albrecht’s ruling. Even if the case is remanded, however, the status of all 38 documents will need to be considered based on the guidance of this Court. Thus, the State’s unusual proposal does not offer efficiencies.

2. The State’s Request That This Court Go Beyond The Issues Identified In GSK’s Petition Would Prejudice GSK

The State requests that this Court address issues not presented for review to this Court in GSK’s May 15, 2006 petition and issues not addressed by the Court of Appeals in its April 18, 2006 Decision. It would be prejudicial to GSK if this Court were to rule on the business confidentiality issue. In its Opening Brief, GSK devoted the pages to which it is entitled under the Court’s briefing limits to the issues presented in the petition. If the State wished to argue that this Court should consider additional issues, then under Minn. R. Civ. App. P. 117, Subd. 4, it should have conditionally requested that review in its response to GSK’s petition, so that this Court could have decided whether to permit

that review and GSK could fairly be apprised of the issues that it needed to address in its Opening Brief.

It would certainly be prejudicial to GSK for this Court to render a decision on confidentiality when this Court, sitting as an appellate court, has not undertaken and would not appropriately undertake an in camera review of the business confidential documents.

3. The State Has Failed To Make A Showing That The Interest Of Justice Requires This Court To Consider Business Confidentiality

This Court will not consider issues not raised in a petition for review except where necessary in the “interest of justice.” Minn. R. Civ. App. P. 103.04. No such showing has been made by the State.

The State cites two exceptional cases holding that an appellate court may base its decision on a theory not presented to the trial court where the question raised for the first time on appeal is plainly decisive of the entire controversy on its merits and where there is no possible advantage or disadvantage to either party in not having had a prior ruling on the question by the trial court: Harms v. Indep. Sch. Dist., 450 N.W.2d 571 (Minn. 1990), and Holen v. Minneapolis-St. Paul Metro. Airports Comm’n, 84 N.W.2d 282 (Minn. 1957).

This precedent does not apply here. The Holen court ruled on an issue not considered by the lower court because it was based on a newly enacted statute that was not yet available when the lower court made its ruling. 84 N.W.2d at 286-290. Harms addressed a question that the trial court did not reach due to its erroneous holding. 450

N.W.2d at 577-78. Notably, no facts were in dispute, neither party would gain or lose from not having had a prior ruling, and the decision would bring a lengthy litigation to an expeditious end.

By contrast, here, the issue was considered by the trial court (Judge Albrecht performed an in camera inspection of the 38 documents and found that all 38 documents were protected under Rule 26.03 (App.-99)). If the basis for Judge Albrecht's decision is not sufficiently clear for review, then the appropriate course is remand, not reversal. The State's extraordinary request would effectively supplant the province of the district court. The request is especially inappropriate when discretionary determinations as to confidentiality of documents are in the domain of the district court in first instance.

Moreover, in contrast to Holen, this Court's ruling on the 14 confidential business documents would also not be dispositive of the entire controversy. The Ramsey County litigation will continue in any event (regardless of the outcome here), and even in the narrower "litigation" before Judge Albrecht regarding the 38 documents, the status of the remaining non-business confidential, associational privacy documents would still need to be considered under whatever guidance this Court provides.

4. The State's Criticism Of Umbrella Protective Orders Does Not Justify Such Review

Minnesota courts have recognized that in a complex litigation, umbrella protective orders "will expedite production, reduce costs, and avoid the burden on the court of document-by-document adjudication." Star Tribune, 659 N.W.2d at 294 n.6. The State's views about the undesirability of umbrella protective orders are irrelevant at this stage

because the State chose to enter into a valid protective order and a confidentiality agreement at the outset of this case.

5. The State's Discussion Of GSK's Confidential Business Documents Is Misleading

Given word limits and the fact that the merits are not before this Court, GSK will not further address the confidentiality of the 14 business confidential documents. GSK does, however, wish to rebut two of the State's particularly egregious assertions.

First, the State cites cases where the parties did not adopt the broad definitions of confidentiality to which the State agreed in this case. The definitions of confidentiality in this case refer not only to "trade secret information" but also to other "information that could be subject to a protective order pursuant to Minnesota Rule of Civil Procedure 26.03."²⁶ Rule 26.03 goes beyond trade secrets and provides protection for other confidential commercial information.²⁷

Second, the State alleges, with no support, that GSK shared confidential business information with its competitors, which is simply incorrect. The State seems to confuse two distinct classes of confidential documents: (i) those associational privacy documents 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 documents containing commercial business information (which GSK of course did not share with its competitors).

²⁶ App.-150.

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

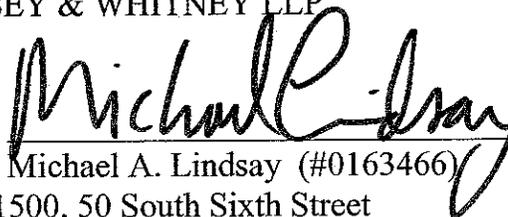
III. CONCLUSION

The Court of Appeals ignored affidavit evidence, erroneously analyzed GSK's First Amendment rights, and otherwise committed substantial errors in Rule 26 and MGDPA analysis. GSK respectfully requests that the appellate decision be reversed and that Judge Albrecht's order be reinstated.

Dated: September 8, 2006

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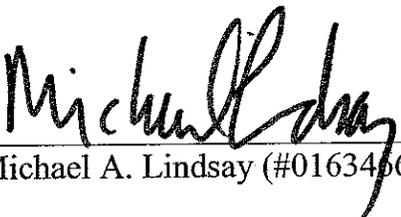
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CERTIFICATE OF COMPLIANCE
WITH MINN. R. CIV. APP. P. 132.01, SUBD. 3

The undersigned certifies that the Brief submitted herein contains 6,953 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.


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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).