

No. A04-2150

**STATE OF MINNESOTA
IN SUPREME COURT**

State of Minnesota,

Respondent,

vs.

GlaxoSmithKline plc,

Appellant.

BRIEF OF RESPONDENT STATE OF MINNESOTA

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LEGAL ISSUES

1. Did the Court of Appeals properly interpret Minnesota's sunshine law, the Minnesota Government Data Practices Act, to allow disclosure of the documents at issue where multiple statutory conditions explicitly allowing such disclosure were triggered?

The Court of Appeals properly interpreted the Minnesota Government Data Practices Act to allow the disclosure of the documents at issue where: (1) the documents were made part of a court record as contemplated by the statute's plain language; and (2) explicit statutory conditions allowing the State the discretion to disclose the documents were met.

Most apposite authorities:

- Minn. Stat. § 13.39
- *Westrom v. Minnesota Dep't of Labor and Industry*, 686 N.W.2d 27 (Minn. 2004)
- *Star Tribune v. City of Minneapolis*, No. 97-21727, 1997 WL 1048497 (D. Minn. Mar. 12, 1997)
- *Seeger v. State of Minnesota*, No. C1-00-416, 2000 WL 1221508 (Minn. Ct. App. Aug. 29, 2000), *rev. denied* (Minn. Nov. 15, 2000)
- *City Pages v. State of Minnesota*, 655 N.W.2d 839 (Minn. Ct. App. 2003), *rev. denied* (Apr. 15, 2003)

2. Did the Court of Appeals properly conclude that any First Amendment associational privacy right does not prevent disclosure of the documents at issue where, on balance, Appellant did not show sufficient circumstances justifying their continued concealment?

The Court of Appeals properly conducted a balancing test under the First Amendment to the U.S. Constitution and determined that Appellant did not present sufficient evidence that disclosure of the documents at issue would interfere with any associational privacy rights.

Most apposite authorities:

- U.S. Constitution, First Amendment
- *In the Matter of GlaxoSmithKline plc*, 699 N.W.2d 749 (Minn. 2005)
- *In re Rahr Malting Co.*, 632 N.W.2d 572 (Minn. 2001)
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- *U.S. v. Wilson*, 154 F.3d 658 (7th Cir. 1998), *cert. denied*, 525 U.S. 1081 (1999)

3. Does Minn. R. Civ. P. 26.03(g) justify continued concealment of the documents at issue when Appellant cannot meet its burden of showing a clearly defined and very serious injury to its competitive position?

Although the Court of Appeals did not decide this issue, this Court should consider it in the interest of justice. Minn. R. Civ. P. 26.03 does not justify continued concealment of the documents at issue where GSK cannot meet its burden of showing the requisite injury to its business, the documents are not of the type protected by Rule 26.03, and GSK did not take appropriate measures to ensure the confidentiality of the documents.

Most apposite authorities:

- Minn. R. Civ. P. 26.03
- Minn. R. Civ. App. P. 103.04
- *Turick v. Yamaha Motor Corp.*, 121 F.R.D. 32 (S.D.N.Y. 1988)
- *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 101 F.R.D. 34 (C.D. Cal. 1984)
- *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986)
- *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994)

STATEMENT OF THE CASE

This appeal relates to the purported confidentiality of a small subset of documents Appellant GlaxoSmithKline plc (“GSK”) produced to the State of Minnesota (“State”) pursuant to a Minn. Stat. § 8.31 Civil Investigative Demand (“CID”) the State served on GSK on May 30, 2003. The purpose of the State’s CID was to investigate GSK’s efforts, together with other prescription drug manufacturers, to block the importation of cheaper Canadian prescription drugs into the United States in violation of Minnesota’s antitrust laws. The majority of the documents at issue now form the basis for the State’s antitrust

lawsuit against GSK filed under seal in Ramsey County District Court in December 2004. These documents are attached as exhibits to the State's Complaint against GSK.¹

On October 13, 2004, the Hennepin County District Court, Judge H. Peter Albrecht, denied the State's request for a determination that a small number of documents GSK produced in response to the State's CID were not confidential. The State sought to disclose these documents because they directly evidence a drug company conspiracy to block imports of cheaper prescription drugs from Canada. The district court erroneously reasoned that a protective order and confidentiality agreement between the parties precluded disclosure and that the First Amendment and Minn. Stat. § 13.39, part of the Minnesota Government Data Practices Act, also prevented disclosure of the documents.

The State sought the Court of Appeals' review of the district court's decision by petition for discretionary review and appeal of right, both of which the Court of Appeals denied. This Court then granted review and reversed and remanded the matter back to the Court of Appeals, holding that the district court's order was appealable. *In the Matter of GlaxoSmithKline plc.*, 699 N.W.2d 749 (Minn. 2005).

On April 18, 2006, the Court of Appeals issued the decision that is the subject of the instant appeal. The Court of Appeals reversed the Hennepin County District Court's decision, holding that the State could challenge GSK's confidentiality designations

¹ The Ramsey County District Court denied GSK's motion to dismiss the case on March 10, 2006. Both the Minnesota Court of Appeals and this Court denied GSK's petitions for discretionary review of that decision. As a result, this case will now move forward with discovery and a trial.

pursuant to the plain language of the protective order and confidentiality agreement governing the documents and that neither the Minnesota Government Data Practices Act or the First Amendment to the U.S. Constitution barred disclosure of the documents.

GSK sought discretionary review of the Court of Appeals' decision as to the latter two issues only, *i.e.* the interpretation of the Minnesota Government Data Practices Act and the First Amendment. On June 28, 2006, this Court granted GSK's petition for discretionary review as to these issues.

STATEMENT OF FACTS

1. GlaxoSmithKline plc

GSK is a large, multinational company engaged in the business of manufacturing and selling prescription and other consumer drug products. State's October 8, 2004 Complaint.² With operations in 117 countries and sales in 2003 totaling over \$35 billion, GSK is one of the world's largest pharmaceutical companies. *Id.* Some of GSK's most popular drugs include the anti-depressant drug Paxil, the asthma drug Advair, the nasal depressant drug Flonase, the ulcer drug Zantac, and the smoking cessation drug Zyban. *Id.*

² The State previously filed this Complaint ("Complaint") against GSK under seal with this Court in connection with the prior appeal in this matter involving the appealability of the Hennepin County District Court's confidentiality decision. *See In the Matter of GlaxoSmithKline plc*, Nos. A04-2150, A04-2151, Supplemental Appendix of Appellant State of Minnesota, filed on March 29, 2005.

2. GSK Leads Drug Industry Boycott of Canadian Drug Imports

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

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

On the same day the MSF announced its new drug importation program, GSK announced that it would no longer supply prescription drugs to Canadian pharmacies that exported drugs to the United States or to Canadian wholesalers that supplied such blacklisted pharmacies. *Id.* GSK then implemented strict measures to prevent Canadian pharmacies and wholesalers from supplying prescription drugs to U.S. consumers. *Id.*

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

As set forth in detail in the State's Complaint, GSK has orchestrated a concerted pharmaceutical industry boycott of Canadian drug imports to protect its profits. Numerous of the world's largest pharmaceutical manufacturers, including Pfizer, Wyeth Laboratories, Eli Lilly, and AstraZeneca joined the boycott. GSK organized this concerted boycott by working directly with these other drug companies and through industry trade associations, including the U.S. Pharmaceutical Research and Manufacturers of America ("PhRMA")⁴ and Canada's Research-Based Pharmaceutical Companies ("Rx&D"). *Id.* The documents at issue contain direct evidence of this unlawful concerted action by GSK and other drug companies to block the importation of prescription drugs from Canada. *Id.*

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

3. State CID Issued to GSK

Minn. Stat. § 8.31 authorizes the Minnesota Attorney General to investigate suspected violations of state laws and to serve CIDs requiring persons to answer interrogatories and/or produce documents. *Id.* at, subd. 2. The Attorney General may

⁴ PhRMA has played an active role in this appeal and the prior appeal regarding these issues before this Court by filing amicus curiae briefs in an attempt to ensure that the documents evidencing its role in this conspiracy remain hidden.

conduct this discovery “without commencement of a civil action and without leave of court.” *Id.* If a person served with a CID refuses to comply, the Attorney General may commence an enforcement proceeding in district court. *Id.* Such a proceeding is commenced by a motion, not a summons and complaint, and may ultimately entail multiple motions, as in this matter.

Pursuant to Minn. Stat. § 8.31 and state antitrust statutes, the State served a CID on GSK on May 30, 2003. State’s App. (“SA”) 1-12. The State’s CID requested that GSK produce documents regarding its joint efforts with other drug manufacturers to block the importation of cheaper, Canadian prescription drugs into the United States. *Id.*

4. Parties’ Confidentiality Agreement and Protective Order

Before it would produce any documents responsive to the State’s CID, GSK demanded a confidentiality agreement. On August 4, 2003, the State entered into such an agreement with GSK. SA 13-17. The Agreement, commonly known as an umbrella-type confidentiality agreement, allowed GSK to initially mark documents it considered confidential and allowed the State the explicit right to challenge GSK’s confidentiality designations. SA 14-15. The agreement placed the burden on GSK to justify its confidentiality designations to a district court in the event the State challenged them. *Id.*

5. GSK’s First Challenge To The CID

After producing some documents originating from its United States locations, GSK refused to produce any documents from Canada, the site of the boycott, or the United Kingdom, GSK’s headquarters. The State, therefore, brought a motion to compel

compliance with its CID. GSK responded with a motion for a protective order, challenging the State's authority to issue the CID and to obtain documents from Canada and the United Kingdom. On May 7, 2004, the Hennepin County District Court granted the State's motion to compel and denied GSK's motion for a protective order. SA 18-30.

6. GSK's Second Challenge To The CID

GSK next refused to produce certain documents it claimed were privileged under the First Amendment. Accordingly, the State brought a second motion to compel the production of these documents. While the district court had this motion under consideration, GSK offered to produce most of the documents it had claimed were privileged subject to the entry of a protective order. The district court entered such an order on July 13, 2004. SA 31. GSK subsequently produced the documents it had agreed to produce and the district court reviewed the remaining disputed documents in camera. The district court ultimately ordered GSK to produce five of the documents it had reviewed, determining that a First Amendment privilege did not apply to these five documents. SA 37-38. Three of these documents are included in the documents at issue in this appeal. *Id.*

7. GSK's Document Productions and Confidentiality Designations

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

produced.⁵ SA 48. For instance, GSK even stamped as confidential hundreds of public newspaper articles included in its productions as well as correspondence GSK sent to outside entities, including the very Canadian pharmacies GSK is boycotting. *Id.*

8. State's Motion Challenging Confidentiality Of Certain Documents

On September 9, 2004, the State brought a motion challenging GSK's confidentiality designations with respect to 45 of the documents GSK produced. SA 39-40. On October 13, 2004, the district court denied the State's motion, incorrectly concluding that the State could not challenge the confidentiality of these documents because it had agreed to a protective order. App. 100.⁶ The district court also ruled that the documents at issue were nonpublic investigative data under Minn. Stat. § 13.39 and that only the court had the authority to approve the public disclosure of this data under the conditions described in Section 13.39, subd. 2. App. 98-99. Although the parties briefed the issue, the court did not analyze whether any of those conditions were satisfied in this case. *Id.* Finally, the district court summarily concluded without any findings or analysis that the documents at issue were confidential under the First Amendment because they

⁵ Courts and commentators have universally condemned precisely this sort of abusive tactic. *See, e.g., State of Minnesota v. Philip Morris Inc.*, 606 N.W.2d 676, 688 (Minn. Ct. App. 2000) (umbrella protective order afforded protection to documents parties "in good faith deemed confidential"); *In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litig.*, 101 F.R.D. 34, 41 (C.D. Cal. 1984) (noting that problems can arise if parties "abuse[] their authority to designate documents 'Confidential'"). Even corporate defense counsel caution their clients against such improper tactics. *E.g., Anita Hotchkiss & Diane M. Fleming, PROTECTING AND ENFORCING PROTECTIVE ORDERS: EASIER SAID THAN DONE*, 71 Def. Couns. J. 161, 165 (Apr. 2004).

⁶ This portion of the ruling, which, like the rest of the district court's decision, was reversed by the Court of Appeals, is not part of the current appeal.

constituted protected petitioning activity, even though GSK never even asserted a First Amendment petitioning privilege for many of the documents at issue.⁷ *Id.* The district court also failed to identify or apply the legal confidentiality standards under Minn. R. Civ. P. 26.03. *Id.*

9. State's Commencement of Lawsuit

Before the district court ruled on the State's motion regarding GSK's confidentiality designations, the State commenced a lawsuit against GSK in Ramsey County District Court on the merits of its antitrust and other legal claims. The State's Complaint alleges that GSK orchestrated and participated in a drug industry boycott of Canadian drug imports in violation of Minnesota's antitrust laws. The State's Complaint expressly references and attaches many of the documents at issue here.

The State provided a copy of the Ramsey County District Court Complaint, with exhibits, to the Hennepin County District Court on October 8, 2004, prior to the Hennepin County District Court's October 13, 2004 confidentiality ruling. App. 97. The State also filed its lawsuit with its Complaint under seal in the Ramsey County District Court on December 16, 2004. SA 52.

10. Ramsey County District Court's Denial of GSK's Motion To Dismiss

On March 10, 2006, the Ramsey County District Court, Judge Michael T. DeCourcy, denied GSK's motion to dismiss the State's antitrust lawsuit against it. SA 53.

⁷ The district court did not discuss or make any conclusions regarding any First Amendment associational privacy right.

In the context of its motion to dismiss the State's consumer protection claims, GSK specifically raised the issue of whether the State had sufficient evidence to prove various elements of those claims. SA 94-96. GSK's motion specifically stated that it was "based on all the pleadings, files and records herein" SA 64. Judge DeCourcy's order denying GSK's motion similarly stated that it was "based on all the files, records, and proceedings herein" SA 53.

GSK subsequently requested interlocutory certification of the denial of its motion to dismiss under Minn. R. Civ. App. P. 103.03(i). SA 101. On June 26, 2006, Judge DeCourcy denied GSK's request. *Id.* GSK also requested discretionary review of the denial of its motion to dismiss from the Minnesota Court of Appeals and this Court. These requests were also denied on May 9, 2006 and July 19, 2006, respectively. SA 106; 108.

11. Continued Substantial Harm Caused by Shroud of Secrecy Over GSK's Documents and State's Litigation.

As a result of the Hennepin County District Court's October 13, 2004 Order, the State had to file its Complaint with the Ramsey County District Court under seal, where it currently remains. If the district court's decision is not reversed, the State will continue to be forced to litigate this case under a pervasive shroud of secrecy, enabling GSK to continue to hide its unlawful conduct and conspiracy. This shroud of secrecy covers virtually every aspect of this litigation and, in so doing, substantially harms the public interest in the enforcement of the State's antitrust laws. Every day it continues, the pharmaceutical industry's illegal concerted boycott of Canadian drug imports, led by

GSK, and its deceptive public information campaign aimed at deterring such imports, is directly harming the lives of Minnesotans as well as the State's fiscal health.⁸

SUMMARY OF ARGUMENT

For the past two years, GSK has hidden important documents of great public concern evidencing its role in a drug company conspiracy to block importation of prescription drugs from Canada. Originally, GSK tried to block the State's investigation of this matter altogether by challenging the State's authority to investigate it under Minnesota's antitrust laws. When that failed, GSK opted for a tactic almost as effective - - force the State to litigate its antitrust case against GSK in secret. To that end, GSK has thrown up every possible roadblock in an attempt to keep the public from ever seeing the documents it was forced to produce to the State and which now form the basis of the State's antitrust lawsuit against it. It is time for the secrecy to end. As this Court has already recognized, effective enforcement of the state's antitrust and other laws *must* be done publicly, for deterrence and educational purposes.

The Court of Appeals correctly decided that neither the Minnesota Government Data Practices Act ("MGDPA") nor the First Amendment to the U.S. Constitution bars disclosure of the documents at issue. First, as the Court of Appeals explicitly recognized, the MGDPA's investigative data provision, Minn. Stat. § 13.39, was primarily intended to

⁸ The Court is no doubt also aware of the extraordinary public interest in the subject of Canadian prescription drug imports. There have been many thousands of media stories regarding this topic since GSK launched the industry's boycott. The extraordinary public interest in this litigation is also evidenced by the requests of the Minnesota Newspaper Association and PhRMA to appear as amicus curiae in this case.

allow *the State* to keep investigative data confidential during the conduct of its investigation, not to allow investigatory subjects to indefinitely conceal data forming the basis for a public law enforcement agency's antitrust lawsuit. Section 13.39, subd. 3 explicitly provides that data becomes public once it is "made part of a court record." As the Court of Appeals correctly recognized, the documents at issue have been "made part of a court record" both because they were filed with the Ramsey County District Court as exhibits to the State's Complaint and because they were provided to the Hennepin County District Court prior to the filing of the Complaint in Ramsey County. The Court of Appeals also correctly determined that the State is entitled to release the documents at issue under Section 13.39, subd. 2, which allows such release when it will aid the law enforcement process, promote public health or safety, or dispel widespread rumor or unrest, all of which are applicable here.

Second, the Court of Appeals correctly held that the First Amendment to the U.S. Constitution does not bar disclosure of the documents at issue. The Court of Appeals correctly determined that GSK did not demonstrate the "clear and compelling circumstances" necessary to shield documents based on an alleged First Amendment associational right.

Finally, this Court can and should review the merits of whether the documents at issue are protected under Minn. R. Civ. P. 26.03(g) governing protective orders. Under the applicable Rule 26.03 standard, GSK cannot meet its burden of showing that the documents at issue warrant further concealment from the public.

STANDARD OF REVIEW

The Court of Appeals properly applied a de novo standard of review to the district court's interpretation of the MGDPA and the First Amendment. As GSK admits, App. Br. at 17 n. 9, the construction of a statute or constitutional provision is reviewed de novo. See *Matter of Blilie*, 494 N.W.2d 877, 881 (Minn. 1993) (the interpretation of a statute is a question of law); *AFSCME Union Local 3456 v. Grand Rapids Pub. Utilities Comm'n*, 645 N.W.2d 470, 473 (Minn. Ct. App. 2002), *rev. denied* (Minn. Aug. 6, 2002) (“construction of the Data Practices Act is a legal issue that this court reviews de novo”); *Hamilton v. Commissioner of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999) (the interpretation of the constitution is a question of law).

Attempting to sidestep the de novo standard of review that clearly applies here, GSK constructs a third issue it contends the district court decided, in addition to its construction of the MGDPA and the First Amendment. Specifically, GSK argues that the district court determined that “GSK’s documents were subject to a presumption of privacy and pre-trial protection under Rule 26.” App. Br. at 17. Not surprisingly, GSK does not cite the district court’s decision to support this determination because the district court made no such holding. Rather, the district court’s decision addressed three issues, all of which are legal issues subject to de novo review: (1) the interpretation of the MGDPA; (2) the interpretation of the First Amendment; and (3) the interpretation of whether the protective order and confidentiality agreement allowed the State to challenge GSK’s confidentiality designations. The district court did *not* address the issue of

whether pre-trial documents enjoy a presumption of privacy and protection under Minn. R. Civ. P. 26 as GSK inaccurately states. Nor did it engage in a document-by-document analysis of whether Rule 26.03 applied to protect the documents.⁹ Therefore, GSK's argument that the district court engaged in the type of analysis of the documents at issue that may be subject to an abuse of discretion standard is wholly unsupported by the district court's decision.

The Court of Appeals correctly recognized the distinction between applying the law, which warrants a de novo standard of review, and consideration of whether a particular document warrants confidentiality protection under a protective order, which warrants a more deferential abuse of discretion standard of review. *E.g., Bonzel v. Pfizer, Inc.*, No. C4-02-298, 2002 WL 1902526 (Minn. Ct. App. Aug. 20, 2002). As the Court of Appeals stated, "Because the factual basis of the confidentiality of any specific document is not before us, this appeal addresses legal, not factual disputes." App. 12.¹⁰

⁹ In fact, the district court's failure to conduct any Minn. R. Civ. P. 26.03 analysis (other than interpretation of the First Amendment) was one of the errors the State asserted on appeal.

¹⁰ GSK's and PhRMA's assertion that the district court conducted in camera reviews of all the documents at issue is false. While the district court reviewed a small subset of documents that GSK contended were protected by the First Amendment, it did *not* review any of the documents GSK produced in its initial rounds of production, including numerous documents GSK claimed were protected by the First Amendment but which it voluntarily produced to the State. Moreover, as to the small subset of documents the district court did review, it released only five of them to the State, determining that these five were not protected by a First Amendment disclosure privilege. SA 37-38. Of these five, only three are among the documents at issue in this appeal. *Id.*

ARGUMENT

The Minnesota Court of Appeals' April 18, 2006 opinion explicitly addressed three main issues: (1) whether the parties' confidentiality agreement and protective order permitted the State to challenge GSK's confidentiality designations; (2) whether the MGDPA prohibited the State from disclosing the documents at issue; and (3) whether the First Amendment prohibited the State from disclosing the documents at issue. App. 11-12. Because GSK has not appealed the first issue, the only two issues remaining are the latter two issues the Court of Appeals addressed.¹¹ For the reasons discussed below, the Court of Appeals' determination was correct and its decision should be affirmed.

Moreover, although neither the district court or Court of Appeals addressed the issue, this Court should, in the interest of justice, determine the merits of whether Minn. R. Civ. P. 26.03(g) governing protective orders warrants continued confidentiality of the documents at issue. An examination of the applicable Rule 26.03 standard demonstrates that GSK cannot meet its heavy Rule 26.03 burden.

¹¹ Although the Court of Appeals rejected the applicability of both a petitioning privilege and an associational privacy right under the First Amendment, GSK has appealed only the latter issue. In so doing, GSK has abandoned as a basis for the alleged confidentiality of the documents the *only* grounds upon which the district court found the documents to be confidential under the First Amendment.

I. THE COURT OF APPEALS CORRECTLY HELD THAT MINN. STAT. § 13.39 DOES NOT BAR DISCLOSURE OF THE DOCUMENTS AT ISSUE WHERE CONDITIONS WITHIN THAT STATUTE EXPLICITLY ALLOWING DATA DISCLOSURE WERE TRIGGERED.

The Court of Appeals correctly determined that the MGDPA, Minnesota's sunshine law, does not bar disclosure of the documents at issue for two, independent reasons. First, the Court of Appeals applied Section 13.39's plain language which explicitly states that investigative data can be disclosed once it is "made part of a court record." Minn. Stat. § 13.39, subd. 3. Because the documents at issue have clearly been "made part of a court record" in both Hennepin and Ramsey County District Courts, the Court of Appeals properly held that they were not protected from disclosure under Section 13.39. Second, the Court of Appeals correctly concluded that the State could disclose the documents at issue under Section 13.39, subd. 2, a wholly independent provision of the civil investigatory data statute which allows the State to disclose data if certain conditions exist, which they did here.

A. Once The State Made The Documents At Issue "Part Of A Court Record," Minn. Stat. § 13.39's Investigative Data Protections No Longer Applied.

GSK argues that Minn. Stat. § 13.39 bars disclosure of the documents at issue because they constitute investigative data protected by that Section. Its argument contradicts the plain language of the statute, and the Court of Appeals, therefore, properly rejected it.

Minn. Stat. § 13.39, subd. 3 explicitly states that any civil investigative data which is "made part of a court record *shall be public.*" (emphasis supplied). Here, the

documents at issue were “made part of a court record” twice - first, when they were provided to the Hennepin County District Court as part of the State’s Complaint in October 2004, and again, in December 2004, when they were filed as part of the State’s Complaint in Ramsey County District Court. Thus, Section 13.39’s plain language is clear that the documents, which are now the foundation of an active lawsuit, are no longer investigative data and are, therefore, public.

Section 13.39’s plain language is uniformly supported by Minnesota case law, including this Court’s decision in *Westrom v. Minnesota Dep’t of Labor and Industry*, 686 N.W.2d 27 (Minn. 2004). In that case, the Court indicated that upon the filing of a contested case proceeding the investigative data in that case would have become public. *Id.* at 36. See also *Montgomery Ward & Co., Inc. v. County of Hennepin*, 450 N.W.2d 299, 306 (Minn. 1990) (investigative data made part of court record is public); *Star Tribune v. City of Minneapolis*, No. 97-21727, 1997 WL 1048497, *2 (D. Minn. Mar. 12, 1997) (where civil investigative data was attached to supporting affidavit, but later removed, Section 13.39 did not apply because this evidence was presented to the court); *Seeger v. State of Minnesota*, No. C1-00-416, 2000 WL 1221508, *2 (Minn. Ct. App. Aug. 29, 2000), *rev. denied* (Minn. Nov. 15, 2000) (private welfare data became public when it was submitted as part of an administrative proceeding).¹² Were it otherwise, the

¹² GSK’s reliance on unpublished dicta in *Smith v. Mankato State Univ.*, No. C2-95-98, 1995 Minn. App. LEXIS 984 (Minn. Ct. App. Aug. 1, 1994), is misplaced. In that case, the private parties seeking disclosure of government investigative documents did not even argue that those documents were “made part of a court record,” as the State argues here.

(Footnote Continued On Next Page.)

State would have to file all its complaints under seal if they referenced any data obtained through the State's investigation. This is a preposterous result devoid of any basis in Minnesota law.¹³

Section 13.39's plain language allowing disclosure once the State has presented the data to a court is also directly consistent with the provision's fundamental purpose, which is to allow the State to determine when to release its investigative data:

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

Star Tribune v. Minn. Twins Psh'p, 659 N.W.2d 287, 298 (Minn. Ct. App. 2003) (citing Op Atty. Gen. 852 (Aug. 4, 2000)) (emphasis added); Margaret Westin, THE MINNESOTA GOVERNMENT DATA PRACTICES ACT: A PRACTITIONER'S GUIDE AND OBSERVATIONS ON ACCESS TO GOVERNMENT INFORMATION, 22 Wm. Mitchell L. Rev. 839, 864 n. 156 (1996). As the Court of Appeals correctly recognized, "The statute is 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. This purpose is

In any event, *Smith* was decided on personnel and student data grounds, not under Section 13.39.

¹³ GSK's half-hearted attempt to argue that to be "made part of a court record" under Section 13.39, subd. 3, the Complaint and its exhibits would have to "form the basis for a judicial decision," App. Br. at 46, is simply devoid of support in the statute's plain language or the case law interpreting it and should, therefore, be rejected. See e.g., *Star Tribune v. City of Minneapolis*, 1997 WL 1048497 at *2 (where data was attached to affidavit, filed, and later removed, data was rendered public under Section 13.39).

advanced if the State is allowed to choose when it will release its investigative data when it ends its investigation and commences suit as it did here.

If, on the other hand, the State cannot ever release its investigative data until a lawsuit is essentially over and all appeal rights have expired as GSK argues, a provision which was intended to aid the State would instead shackle it, prohibiting it from releasing data which the public has the right to see and which would aid the State's law enforcement effort. Furthermore, such a construction turns the purpose of the Act, which is to allow public access to government data, completely on its head.¹⁴

B. The State Is Entitled To Release The Documents At Issue Under Minn. Stat. § 13.39, subd. 2, Because It Appropriately Determined That The Disclosure Conditions Under That Provision Were Satisfied.

As the Court of Appeals correctly recognized, the State is also entitled to release the documents at issue under Section 13.39, subd. 2, regardless of whether it has made the data part of a court record under subdivision 3 of that statute. Subdivision 2 explicitly allows the State, in its discretion, to release civil investigative data if certain conditions apply:

¹⁴ It is ironic that GSK attempts to use Minnesota's open records law, to hide its activity from public examination. The MGDPA creates a presumption that government data is accessible to the public, a premise that is bedrock to a free and democratic society. *See* Minn. Stat. §§ 13.01, 13.03. *See also e.g.*, Donald A. Gemberling & Gary A. Weissman, DATA PRACTICES AT THE CUSP OF THE MILLENIUM, 22 Wm. Mitchell L. Rev. 767, 771 (1996) ("The MGDPA's core concept, as the Minnesota Supreme Court has termed it, is that data maintained by governmental agencies are in the public domain."). The Act certainly was not intended to shield a business engaging in illegal activity from public exposure of that activity.

Any agency, political subdivision, or statewide system may make any data classified as confidential or protected nonpublic pursuant to this subdivision accessible to any person, agency or the public if the agency, political subdivision, or statewide system determines that the access will aid the law enforcement process, promote public health or safety or dispel widespread rumor or unrest.

Id.

As the Court of Appeals noted, “The MDGPA plainly gives discretion to the governmental entity conducting the investigation to decide whether one of those factors justifies disclosure.... We note that the state agency is the party that the legislature intended to protect from constant and untimely disclosure.” App. 17. *See also City Pages v. State of Minnesota*, 655 N.W.2d 839, 843 (Minn. Ct. App. 2003), *rev. denied* (Minn. Apr. 15, 2003) (state has discretion to make investigative data accessible to the public).

Although only one of the disclosure conditions need apply, here the State justifiably determined that all three apply. Indeed, it is difficult to imagine a case in which the satisfaction of these conditions could be more clear.

First, release of the documents at issue would directly and substantially aid the antitrust law enforcement process. There is a very immediate and concrete law enforcement objective to be served by the State’s ability to share the documents at issue. For instance, numerous private litigants have brought antitrust lawsuits against GSK over the same conduct the State is prosecuting. These plaintiffs are facing, or will face, motions to dismiss or for summary judgment. The courts in these cases deserve the benefit of examining the highly relevant evidence produced by GSK to the State, despite

the fact that GSK and other drug companies prefer that the plaintiffs and the courts in these other cases never see these important documents.¹⁵ The sharing of these documents with the public would also encourage potential witnesses to come forward and encourage other similar lawsuits directly aiding the State's important law enforcement objectives. *E.g., Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) ("Openness in the courtroom discourages perjury and may result in witnesses coming forward with new information ..."). It would also help further the State's compelling interest in deterring violations of its antitrust laws. As this Court aptly observed, to be fully effective, the State's enforcement of its antitrust laws "usually must be done publicly, for educational purposes and to deter similar conduct by others." *GlaxoSmithKline plc*, 699 N.W.2d at 755.

Second, release of the documents would also unquestionably "promote public health." GSK has repeatedly told the public that the reason behind the drug companies' boycott of Canadian prescription drugs is that Canadian drugs are not safe for consumption in the United States. The public rhetoric surrounding this issue has even risen to the level of linking the importation of Canadian prescription drugs with the threat

¹⁵ In fact, the State has received requests for the documents at issue from plaintiffs in at least two private lawsuits regarding the antitrust conspiracy that forms the basis for the State's Complaint. The State has had to deny these requests due to the ongoing confidentiality dispute at issue here. Additionally, the State is aware that GSK is using the pending confidentiality dispute in this litigation to argue that it should not have to produce similar documents in at least one other lawsuit pending in California.

of terrorism.¹⁶ GSK's documents would shed important light on this issue by showing the true motivating force behind the boycott. Moreover, the disclosure of GSK's unlawful conduct may affect the current national debate over Canadian drug imports and thereby positively affect the health of Minnesotans and other U.S. citizens who cannot afford to pay the exorbitant price of prescription drugs in the U.S.

Third, the release of the documents would also "dispel widespread rumor or unrest." The safety of Canadian drugs and the true motivation behind the Canadian drug boycott are issues which are almost daily in the local, state, national or international news, making their impact indisputably "widespread." Furthermore, GSK's and other drug companies' frequent public statements regarding the allegedly compromised safety of Canadian drugs have created confusion and unrest among purchasers of those drugs. GSK's documents directly bear on the validity of such public statements and are critical to telling the whole and true story about the safety and efficacy of drugs imported from Canada.

GSK's attempt to argue that these conditions do not apply is wholly unpersuasive. First, contrary to GSK's assertion, the State does not contend that a court cannot review the State's application of the disclosure conditions in Section 13.39, subd. 2. Rather, the

¹⁶ PhRMA, amicus curiae in this case, even went so far as to commission the writing of a novel, which PhRMA instructed should revolve around a fictional terrorist attack on the U.S. through the poisoning of drugs imported from Canada. The authors eventually broke their relationship with PhRMA and changed the plot to involve a drug company commissioning the terrorist attack on Canadian imports to frighten American consumers. See <http://www.onthemedial.org/transcripts/transcripts_102105_pharma.html>.

district court's error in this case was its conclusion that State cannot determine in the first instance if the disclosure conditions apply, which, as the Court of Appeals held, contradicts the plain language and purpose of the statute. App. 17.

Second, GSK's self-serving conclusions that disclosure of the documents would not meet the conditions in the statute is unconvincing. Citing *Deli v. Hasselmo*, 542 N.W.2d 649 (Minn. Ct. App. 1996), GSK maintains that "dispelling widespread rumor" requires rumors "that threaten community repose." App. Br. at 47. These are precisely the type of rumors at issue here. While *Deli* involved a rumor regarding one school employee, this case deals with rumors deliberately spread by GSK and other drug companies regarding the safety of drugs taken by millions of Americans -- rumors that do indeed threaten community repose because they intentionally, and the State maintains, inaccurately, cast doubt on the safety of those drugs.

GSK also weakly maintains that the promotion of public health and safety are not at issue here because the documents do not "bear on a toxic spill." App. Br. at 48. Minn. Stat. § 13.39, subd. 2 is not so limited. Because the documents shed light on the safety of prescription drug imports from Canada, the public is entitled to their disclosure.

GSK's conclusory claim that the release of the documents would not aid the law enforcement process is similarly unpersuasive. As discussed above, the release of the documents would directly aid other lawsuits and the identification of witnesses in the current lawsuit. Moreover, release of the documents would "deter similar conduct by

others,” *GlaxoSmithKline plc*, 699 N.W.2d at 755, which would certainly aid the law enforcement process in that it would reduce illegal conduct.¹⁷

II. MINN. R. CIV. P. 26.03 DOES NOT BAR THE RELEASE OF THE DOCUMENTS AT ISSUE BASED ON AN ALLEGED FIRST AMENDMENT ASSOCIATIONAL PRIVACY RIGHT.

The only other basis for continued confidentiality of the documents at issue asserted by GSK is Minn. R. Civ. P. 26.03 governing the issuance of protective orders. GSK erroneously asserts that the documents at issue should remain sealed because they would violate its First Amendment associational privacy rights, thereby causing it undue burden and oppression under Rule 26.03. GSK also incorrectly claims that the documents at issue should be afforded a presumption of privacy, despite the fact that they have already been filed with the Ramsey County District Court as part of the State’s antitrust Complaint against GSK and have formed the basis for that court’s denial of GSK’s motion to dismiss. As discussed below, the Court of Appeals properly rejected both of these arguments.

¹⁷ GSK also asserts that the Court of Appeals erred in its conclusion that the documents at issue could not satisfy Minn. Stat. § 13.02’s definition of nonpublic data, which encompasses data that is neither public nor “accessible to the subject of the data.” The Court of Appeals reasoned that, because GSK clearly had access to the data, it could not be nonpublic under this definition. App. 16. Even if this determination was incorrect, any error is harmless where, as discussed above, two independent bases for disclosure exist under Section 13.39.

A. The Court Of Appeals Correctly Determined That Any First Amendment Associational Privacy Right Does Not Bar The Release Of The Documents At Issue Because GSK Did Not Demonstrate Clear And Compelling Circumstances Justifying The Concealment Of Documents Forming The Basis For The State's Antitrust Lawsuit.

GSK maintains that the Court of Appeals erred in its determination that a First Amendment associational privacy right does not prevent the disclosure of the documents at issue. It alleges three such errors: (1) that the Court of Appeals ignored its lobbyist's conclusory affidavit; (2) that the Court of Appeals determined that businesses do not enjoy First Amendment associational privacy rights; and (3) that the Court of Appeals improperly relied on the fact that the documents at issue form the basis for the State's antitrust lawsuit against it. These contentions distort the Court of Appeals' holding and should be rejected.¹⁸

¹⁸ In the context of its associational privacy rights discussion, GSK appears to attempt to reargue its prior contention that a First Amendment "petitioning privilege," based on the *Noerr-Pennington* defense to antitrust liability, protects the confidentiality of the documents at issue. App. Br. at 38-39. GSK, however, did not identify its purported "petitioning privilege" argument as an issue on appeal. This makes sense, because it was flatly and correctly rejected by the Court of Appeals, which followed the clear consensus of the federal courts in holding that there is no such privilege. App. 20. It also tracks this Court's determination that, "the conclusion that there is a First Amendment privilege for 'petitioning documents' is not clearly recognized in the case law." *In re GlaxoSmithKline plc*, 699 N.W.2d at 756 n.3. It is also worth noting that GSK did not even raise the *Noerr-Pennington* doctrine as a defense to the State's lawsuit against it on its recent motion to dismiss. If GSK does not raise the doctrine as a defense to the State's lawsuit, it is certainly not entitled to use it to conceal documents.

1. GSK's self-serving affidavit does not justify further concealment of the documents at issue.

GSK argues that the Court of Appeals' First Amendment associational privacy analysis was faulty because it purportedly "ignored" the Affidavit of Janie Kinney, one of GSK's employees. GSK's self-serving Kinney Affidavit is an altogether insufficient basis for reversal of the Court of Appeals' well-reasoned decision for several reasons.

First, the Kinney Affidavit was not even submitted in response to the State's motion to compel disclosure of the documents at issue. Rather it was submitted *four months before* the State even filed the motion giving rise to this appeal. The Kinney Affidavit was filed in connection with the State's second motion to compel production of documents, which was necessitated by GSK's refusal to produce certain documents based on a First Amendment privilege. Thus, the Kinney Affidavit does not even pertain to the vast majority of the documents at issue here, which were provided to the State in prior productions long before Kinney even signed her Affidavit.

Second, even if this Affidavit had been submitted in connection with the proper motion, it simply does not rise to the level of clear and compelling circumstances warranting further concealment of the documents at issue. Kinney's Affidavit merely discusses general concerns she has about the disclosure of documents. It does not specifically reference or support GSK's confidentiality claims with respect to the documents at issue here. *See In re Rahr Malting Co.*, 632 N.W.2d 572, 576 (Minn. 2001) (conclusory affidavit insufficient to seal court records); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1180 (same); *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d

157, 166 (3d Cir. 1991) (“burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the protective order.”). As discussed above, it could not, since she signed it four months before the State even brought its motion to disclose the documents. Accordingly, the premature and overly general Kinney Affidavit falls woefully short of the type of particularized evidence necessary here.¹⁹

Third, the Court of Appeals did not “ignore” GSK’s Affidavit. Although the Court of Appeals did not specifically reference the Affidavit, it did conclude that the evidence in the record - including the Affidavit - was insufficient to substantiate GSK’s claim that disclosure of the documents would interfere with its associational privacy rights. This is not surprising in light of the general and conclusory nature of the Kinney Affidavit. In the final analysis, the Court of Appeals appropriately engaged in a weighing of the competing concerns and determined that no clear and compelling circumstances existed to justify further concealment of the documents at issue. Reversible error simply cannot be predicated on the lack of specific mention of an affidavit in the Court of Appeals’ decision, particularly where the decision shows that the Court of Appeals engaged in the appropriate analysis.²⁰

¹⁹ Moreover, the Kinney Affidavit does not even center on associational privacy. Kinney is a lobbyist. As such, her Affidavit is focused on the alleged harm to GSK’s right to petition the government, not its association with other drug companies.

²⁰ PhRMA’s argument that the similarly conclusory affidavit of its general counsel, Bruce Kuhlik, requires reversal is unpersuasive for the same reasons. Kuhlik’s Affidavit contains one paragraph regarding associational privacy which simply concludes that
(Footnote Continued On Next Page.)

2. The Court of Appeals never determined that businesses do not have First Amendment associational privacy rights.

GSK also tries to manufacture an appealable issue by simply mischaracterizing the Court of Appeal's decision. It attempts to do so by falsely claiming that the Court of Appeals held that business organizations do not have associational privacy rights. Because the Court of Appeals made no such ruling, this argument is a clear red herring.

In its First Amendment associational privacy discussion, the Court of Appeals discussed several overarching principles applicable to the analysis, including the doctrine's purpose, that it only extends to lawful association, and that "associating purely for financial gain does not come under the umbrella of First Amendment protection." App. 21. GSK latches on to the latter language, that association purely for financial gain is not First Amendment protected, and misstates the Court of Appeal's holding. GSK erroneously claims that the Court of Appeals made the blanket conclusion that businesses do not have First Amendment associational privacy rights. The Court of Appeals made no such conclusion. Rather, it simply, and quite correctly, noted, based on this Court's decision in *Metro. Rehabilitation Svcs., Inc. v. Westberg*, 386 N.W.2d 698, 701 (Minn. 1986), that where the sole purpose of association is financial gain, it does come under the First Amendment's umbrella.²¹ The Court of Appeals did not even go on to determine

release of the documents would harm PhRMA. Like Kinney's Affidavit, such unsupported conclusions fall far short of the showing a company must make to keep documents forming the basis for the State's antitrust lawsuit confidential.

²¹ This Court's holding in *Metro. Rehabilitation Svcs.* is supported by numerous other courts, including the U.S. Supreme Court. See e.g., *Lewitus v. Colwell*, 479 F. Supp. 439, (Footnote Continued On Next Page.)

that such was the case here. In fact, as its decision clearly shows, the Court of Appeals instead proceeded to expressly determine that GSK's associational privacy claim required a balancing of the interests at stake, and that GSK simply did not make the requisite showing tipping the scales in its favor.

3. The Court of Appeals properly weighed the fact that the documents at issue are alleged to evidence illegal activity and form the basis for the State's antitrust lawsuit against GSK.

Finally, GSK complains that the Court of Appeals erred by considering the reality that the documents at issue form the basis for the State's antitrust Complaint against GSK and are alleged to evidence illegal activity in violation of Minnesota's antitrust laws. Just as discussed above, however, GSK distorts the Court of Appeals' analysis with respect to this issue.

Relying on well-established precedent, the Court of Appeals correctly observed that, "Freedom of association permits individuals to associate for *lawful purposes*" App. 21 (emphasis in original) (citing *U.S. v. Wilson*, 154 F.3d 658, 665 (7th Cir. 1998), *cert denied*, 525 U.S. 1081 (1999)).²² While this accurate observation was part of its background analysis of the First Amendment associational freedom issue, the Court of

444 (D. Md. 1979) (First Amendment's associational freedom is intended to encompass "the freedom to associate for the promotion of political and social ideas.... Where no political or ideological association is involved, several courts, including the Supreme Court, have concluded that First Amendment freedoms do not come into play.") (citing *Bates v. Little Rock*, 361 U.S. 516 (1960); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

²² See also e.g., *U.S. v. Bell*, 217 F.R.D. 335, 343 (M.D. Pa. 2003) ("The freedom of association does not extend to unlawful activity.").

Appeals did not made its final conclusion on this basis. Rather, it concluded that resolution of GSK's associational privacy claim "requires that a court balance the right against the State's interest in publicly prosecuting violations of its antitrust laws." App. 22. The Court of Appeals concluded that, on balance, the State's interest in publicly enforcing the antitrust laws outweighed GSK's unsubstantiated interest in associational privacy. *Id.*

If the Court were to countenance GSK's argument that a First Amendment associational privacy right requires that all meetings between it and its drug company competitors be shielded from public view, the State would *never* be able to publicly litigate an antitrust case. Such an extreme result would be antithetical to the purpose of a public law enforcement office, as this Court has already aptly recognized.

In short, GSK's attempts to distort the Court of Appeals' decision to create an error are unpersuasive. The Court of Appeals' opinion must be read as a whole. When this is done, it shows a thorough and well-reasoned weighing of the factors at issue that should be affirmed.

B. The Court of Appeals Correctly Determined That The Documents At Issue, Which Have Been Filed With The Court, Are Not Entitled To A Presumption of Privacy, But Are Instead Afforded A Presumption Of Access.

GSK also maintains that the documents at issue are entitled to a "presumption of privacy" because they are "pre-trial discovery" and not judicial records, which GSK admits are accorded a presumption of openness. GSK's analysis is faulty for two reasons. First, the documents at issue are not "pre-trial discovery." The State has filed them with

the Court in connection with its antitrust lawsuit against GSK, and the parties and the Court have relied upon them in connection with a motion to dismiss, rendering them judicial records afforded a presumption of access. Second, and most importantly, regardless of whether they are “pre-trial discovery” or judicial records, the Court of Appeals properly conducted a weighing of the interests at stake to determine that documents at issue should be public.

1. The documents at issue are judicial records afforded a presumption of access.

a. The documents at issue have been filed with the Court as part of the State’s Complaint.

In its attempt to find a factor weighing in favor of keeping the documents at issue secret, GSK constructs an argument that the documents should be afforded a presumption of privacy because they are “pre-trial discovery.” Its argument ignores the fact that the documents at issue simply do not fall into that category. Rather than a slough of pre-trial depositions, responses to written discovery, and the like, the documents at issue constitute a select and small body of documents which are the foundation of the State’s antitrust allegations against GSK. These documents have been filed with the Ramsey County District Court as part and parcel of the State’s Complaint against GSK.

Complaints which have been filed with the court are court records afforded a presumption of privacy. In *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 202 (Minn. 1986), the court balanced the relative interests at stake in releasing settlement documents and transcripts filed with the court. Although the Court determined

that, on balance, the settlement documents should remain private, it never questioned the obvious fact that the documents, which had been filed with the court, just like the documents at issue here, constituted court records afforded a presumption of privacy. *Id.*

Similarly, in *Star Tribune v. Minnesota Twins Pshp.*, 659 N.W.2d at 296, the court recognized the clear distinction between documents that have been filed with the court and those that have not, stating, “The common law presumption of access generally only extends to *documents that have been filed with the court.*” (emphasis supplied).

This same distinction - filed vs. not filed -- was also correctly recognized by the Court of Appeals in its decision, in which it stated, “The common-law presumption of access only extends to documents that have been filed with the court.” App. 18 (citing *State ex rel. Mitsubishi Heavy Indus. Am., Inc v. Cir. Ct.*, 605 N.W.2d 868, 874 (Wis. 2000)). *See also A.P. v. M.E.E.*, 821 N.E.2d 1238, 1248 (Ill. Ct. App. 2004) (“pleadings are not protected [as private] like much of the information that surfaces during pretrial discovery. The pleadings, motions, and other papers filed with the court assume the presumption of public access”); *Skolnick v. Altheimer & Gray*, 730 N.E.2d 4, 17 (Ill. 2000) (“the counterclaim in this case became part of the court file once the trial court granted leave to file the pleading”); *Under Seal v. Under Seal*, 326 F.3d 479, 486 (4th Cir. 2003) (presumption in favor of public disclosure of court record applies to government complaint); *Huntsman-Christensen Corp. v. Entrada Indus., Inc.*, 639 F. Supp. 733, 737 (D. Utah 1986) (complaint is court record entitled to common law presumption of access); *In re Coordinated Pretrial Proceedings in Petroleum Products*

Antitrust Litig., 101 F.R.D. 34, 43 (C.D. Cal 1984) (explicitly rejecting argument that documents filed with the court must form basis of judicial decision to be considered presumptively open); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1180-81 (documents filed in government administrative proceeding open to public).

Notably, none of the cases GSK cites directly address whether documents that have been filed with the court as part of a complaint constitute judicial records. Simple common sense dictates that a complaint and the attached documents which evidence its allegations are integral and significant enough to the overall judicial decision-making process that they should be accessible to the public, absent particularly compelling reasons, which have not been shown here.²³ This is particularly so where, as here, the State is the party bringing the lawsuit to enforce Minnesota's antitrust laws on behalf of the public interest.

²³ Because public access to a complaint, as distinguished from pre-trial discovery, is at issue here, the Court could easily determine that a First Amendment right of access applies to render the documents at issue accessible to the public. As this Court explained in *Schumacher*, some courts have established a constitutional right of access for court files and records which have "historically and philosophically been presumed open to the public." 392 N.W.2d at 203. Unlike the settlement documents at issue in *Schumacher*, a complaint forms the very basis for an action and all subsequent decisions regarding that action and, should, therefore, be publicly accessible. Regardless of whether a constitutional or common law right of access is applied, however, it is clear that parties opposing access must make a strong and specific showing of the need for secrecy, which the Court of Appeals properly determined GSK did not do. *E.g.*, *Skolnick*, 730 N.E.2d at 17 ("regardless of whether we proceed under a common law or first amendment analysis, we reach the same conclusion").

b. The documents at issue have formed the basis for a substantive judicial decision.

Moreover, the documents at issue have also formed the basis for a substantive judicial decision, namely the Ramsey County District Court's denial of GSK's motion to dismiss. GSK brought a motion to dismiss the State's antitrust suit on numerous grounds, including the State's standing to bring suit, preemption, and the State's ability to prove its consumer protection claims. GSK's challenges to the State's consumer claims were specifically predicated on whether the State could show, for example, fraud in connection with a sale for its Consumer Fraud Act Claim, whether the State had pled its factual allegations with sufficiently particularity, and whether the State had disparaged the product of a specific company for its Deceptive Trade Practices Act claim. SA 94-96.²⁴ Thus, GSK, itself, put the allegations in the Complaint, and the documents supporting those allegations, directly at issue in this case.

GSK also specifically stated in its Notice of Motion that the motion to dismiss was "based on all the pleadings, files and records herein," which certainly includes the Complaint and its attachments. SA 64. Similarly, the district court's order specifically stated that it was based on "the files, records, and proceedings herein," which also encompasses the Complaint and its attachments. SA 53. Moreover, the State's counsel specifically referenced the documents at issue at oral argument, arguing that the State's suit should not be dismissed because the documents constitute such strong evidence of an

²⁴ The Ramsey County District Court correctly held that these issues raised fact questions inappropriate for adjudication on a motion to dismiss.

antitrust violation.²⁵ GSK, therefore, fails its own test for whether the documents are judicial records because they have now been used as the basis for judicial decision making, in addition to being filed in the court record.²⁶ *See also Minnesota Twins Psh'p*, 659 N.W.2d at 296 (documents filed in connection with pretrial motions that require judicial resolution of the merits of the case are subject to a presumption of access).²⁷

2. The Court of Appeals properly weighed the interests at stake.

Ultimately, the issue of whether the documents at issue are entitled to a presumption of privacy is immaterial. Regardless of whether the documents constitute court records afforded such a presumption, the bottom line is that the Court of Appeals properly engaged in a weighing of the interests at stake. As this Court has directed on at least three occasions, one involving the same parties present here, "Each case involves a weighing of the policies in favor of openness against the interests of the litigants in sealing the record." *Rahr*, 632 N.W.2d at 576. *See also GlaxoSmithKline plc*, 699

²⁵ The State could not discuss the content of the sealed documents individually at oral argument due to the fact that the court hearing was open.

²⁶ GSK reviews the law of various federal courts in an attempt to construct a restrictive definition of a "judicial record" afforded a presumption of openness. It concludes that judicial records are only those documents "used to determine a litigant's substantive rights and/or ... necessary for the performance of the judicial function." Both are met here. It is certainly necessary that a judge consider the complaint and its attachments to adjudicate a motion to dismiss. Further, the motion to dismiss determined substantive rights of the parties.

²⁷ GSK's reliance on *In re Policy Mgmt. Sys. Corp.*, 67 F.3d 296 (4th Cir. 1995), is misplaced. There the court held that documents filed in conjunction with a motion to dismiss were not judicial records because the court cannot rely on documents outside the pleadings on such a motion. In that case, however, the documents at issue were not part of the pleadings, as they clearly are here.

N.W.2d at 755 (“district courts presiding over civil actions are directed to weigh policies in favor of openness against the interests of the litigants in sealing the record”); *Schumacher*, 392 N.W.2d at 202 (“A balancing test is applied to determine whose interests should prevail.”).

The Court of Appeals explicitly engaged in a weighing of the parties’ competing interests exactly as it should have, stating, “Resolution of such a claim of privacy requires that a court balance the right against the state’s interest in publicly prosecuting violations of its antitrust laws.” App. 22. GSK obviously does not like the Court of Appeals’ determination that the scales tip decidedly in favor of the State in this case, but the bottom line is that the Court of Appeals conducted the appropriate balancing analysis and arrived at the proper conclusion.

GSK weakly argues that the State has no legitimate purpose in public release of the documents at issue. Nothing could be further from the truth, as cases discussing this very issue consistently hold. *E.g.*, *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1170; *Schumacher*, 392 N.W.2d at 202 (“The right to inspect and copy records is considered fundamental to a democratic state.... and serves to produce an informed and enlightened public opinion.”) (collecting cases).

The public has a right to know what is transpiring in courts of law for at least three compelling reasons. First, community involvement in the legal process is critical to public acceptance of that process. “The community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases. Civil cases frequently

involve issues crucial to the public - for example ... antitrust issues.” *Brown & Williamson Tobacco*, 710 F.2d at 1170 (refusing to seal FTC administrative record). Second, there is a need for public accountability. “In either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption.” *Id.* Third, openness encourages full fact-finding. “Openness in the courtroom discourages perjury and may result in witnesses coming forward with new information...” *Id.*²⁸ All of these reasons apply with full force here.

This need for openness is even more critical where, as here, government enforcement of the state’s laws is involved. As this Court has emphasized, “To be fully effective, such enforcement usually must be done publicly, for educational purposes and to deter similar conduct by others.” *GlaxoSmithKline plc.*, 699 N.W.2d at 755; *Petroleum Products Antitrust Litig.*, 101 F.R.D. at 39 (openness of civil proceedings is especially important in cases involving government enforcement).²⁹

²⁸ As the court aptly summarized in *Brown & Williamson Tobacco*, “Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public’s need to know.” 710 F.2d at 1180.

²⁹ The fact that this case involves a government enforcement action also distinguishes it from the cases upon which GSK relies, which involve the media’s attempt to obtain access to court documents. A public agency has an even greater and more direct interest than the media in public accountability and enforcement of the state’s laws.

III. GSK CANNOT MEET ITS SUBSTANTIAL RULE 26.03 BURDEN OF DEMONSTRATING ANY OTHER GROUNDS FOR CONTINUED CONCEALMENT OF THE DOCUMENTS AT ISSUE.

Because neither the MDGPA or First Amendment associational privacy rights bar the disclosure of the documents at issue, the only remaining argument for non-disclosure is Minn. R. Civ. P. 26.03(g), which GSK has asserted protects 13 of the documents at issue as confidential “commercial information.” Although neither the district court or the Court of Appeals decided this issue, the State requests that this Court do so in the interests of justice. An analysis of Minn. R. Civ. P. 26.03 legal standards makes clear that GSK cannot establish that the documents at issue are confidential.

A. The Court Should Exercise Its Discretion To Determine Whether GSK Can Show Grounds For Further Concealment Of The Documents At Issue Under Minn. R. Civ. P. 26.03(g).

Minn. R. Civ. App. P. 103.04 provides that this Court may “take any . . . action as the interest of justice may require.” More specifically, this Court has stated, in the context of its orders granting Rule 117 petitions for review, that unless the order granting review specifically limits the issues, the Court customarily allows parties considerable latitude in their presentation of the case, including the identity of the issues the Court will consider. *Hapka v. Paquin Farms*, 458 N.W.2d 683, 686 (Minn. 1990). Further, this Court also has the authority to consider issues that were not included in the Rule 117 petition for review. *See Baker v. Ploetz*, 616 N.W.2d 263, 267-68 (Minn. 2000).

The Court has also made it clear that it will even consider and decide issues that were never decided by *any* court below where the facts are not disputed, the question is

decisive of the entire controversy, there is no advantage or disadvantage to either party in not having a prior ruling on the question, and a decision by this Court would bring the litigation to an expeditious conclusion. *See Harms v. Independent School District No. 300*, 450 N.W.2d 571, 577 (Minn. 1990) (citing *Holen v. Minneapolis-St. Paul Metro. Airports Comm'n*, 84 N.W.2d 282 (Minn. 1957)).

Finally, the Court is similarly authorized to decide cases based upon its power of accelerated review set forth in Minn. R. Civ. App. P. 118. Such accelerated review is permitted, *inter alia*, if the case is of imperative public importance as to justify deviation from the normal appellate procedure.³⁰

Based on the above authorities, this Court can and should decide the merits of the Minn. R. Civ. P. 26.03(g) issue in this case. First, the interest of justice calls for a prompt resolution of the merits for the many reasons discussed throughout this brief. This case involves significant matters of great public importance, including the health of many Minnesotans who rely on more affordable Canadian prescription drugs. GSK's motion to dismiss the State's antitrust lawsuit against it in Ramsey County District Court has been denied, and the State's case is now moving forward. The public has the right to scrutinize these proceedings for all the reasons discussed above. If a second remand of these issues is ordered, the confidentiality issue, which has already been pending for two years, will

³⁰ While the parties can request accelerated review, the Court can also order it on its own motion. *Id.*

drag on even longer, and possibly even longer than the litigation of the merits of the State's case.³¹

Second, because the Court's order granting review did not specifically limit the scope of the Court's review, the Court also has its customary considerable latitude to determine the issues it will review.

Third, this Court can consider the merits under the principles articulated in *Baker* and *Harms*. The facts relating to the Rule 26.03 issue are not disputed, determination of this question would be decisive of the entire controversy, there is no clearly possible advantage or disadvantage to either party in not having a prior ruling on the question by the Court of Appeals or the district court, and a decision by this Court would bring this litigation to an expeditious conclusion and avoid further remand and possible future trips to this Court on the Rule 26.03 issue.

Finally, this Court can also decide the merits on its own motion for accelerated review under Rule 118. For the reasons discussed above, this case is of imperative public importance as to justify deviation from the normal appellate procedure and to require immediate resolution by this Court.

³¹ At a minimum, the State urges this Court to hold that the documents which GSK has claimed are protected by the MDGPA or the First Amendment are not confidential, and only the documents it claims are subject to another Rule 26.03 grounds for non-disclosure should be subject to remand. GSK previously filed an affidavit with the Hennepin County District Court stating under oath that only 13 of the documents at issue are protected by Rule 26.03 grounds other than the First Amendment and should clearly be held to this statement. SA 109.

B. GSK Cannot Show Grounds For Further Concealment Of The Documents At Issue Under Minn. R. Civ. P. 26.03 Standards.

There has been growing judicial and public criticism of secrecy agreements and orders that hide litigation documents and other data from the public. There are many arguments advanced against such litigation secrecy. For example, some note that such secrecy contravenes our very form of governance. David S. Sanson, *THE PERVASIVE PROBLEM OF COURT SANCTIONED SECRECY AND THE EXIGENCY OF NATIONAL REFORM*, 53 *Duke L. J.* 807, 816 (Nov. 2003) (“[I]t is irrational that courts allow parties to hide wrongdoing that affects public health and safety behind the hermetic seals of court-approved protective orders. Such practice is deleterious to the egalitarian premise of any democratic form of government.”).³²

Others argue that such secrecy agreements and orders inhibit information sharing between litigants or potential litigants and thereby create duplication and inefficiencies in the judicial system. *See, e.g., Wilk v. American Medical Ass’n*, 635 F.2d 1295, 1299 (7th Cir. 1981); Anderson, 55 *S.C. L. Rev.* at 743-47 (duplicative discovery justifies the refusal to keep documents sealed).

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

³² *See also* Joseph F. Anderson, Jr., *HIDDEN FROM THE PUBLIC BY ORDER OF THE COURT: THE CASE AGAINST GOVERNMENT-ENFORCED SECRECY*, 55 *S.C. L. Rev.* 711, 741 (Summer 2004) (“Openness in judicial proceedings fosters a greater understanding of, and appreciation for, our legal system. More importantly, it provides a check on unbridled judicial power.”).

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

Susan P. Koniak, ARE AGREEMENTS TO KEEP SECRET INFORMATION LEARNED IN DISCOVERY LEGAL, ILLEGAL, OR SOMETHING IN BETWEEN?, 30 Hofstra L. Rev. 783, 801 (2002).

Likewise, in its July 14, 2005 decision, this Court emphasized the “presumption of openness” as to court proceedings and documents. *GlaxoSmithKline plc*, 699 N.W.2d at 755. It is against this backdrop of strong general judicial disdain for secrecy in litigation that this Court should evaluate GSK’s confidentiality claims in this case.

1. The documents at issue do not satisfy Minn. R. Civ. P. 26.03’s confidentiality standards.

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

a. Courts consider numerous factors in determining whether a document is confidential under Minn. R. Civ. P. 26.03.

The law is well-established that a party claiming that its documents are confidential has the burden of showing “good cause” for a Rule 26.03 protective order. *See* Minn. R. Civ. P. 26.03; 2 Douglas D. McFarland & William J. Keppel, MINNESOTA CIVIL PRACTICE § 1508 (3d ed. 1999). As one federal court explained:

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

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

To satisfy its good cause showing, the party seeking to keep its documents confidential is required to show that disclosure of the allegedly confidential information will work a “*clearly defined and very serious injury*” to the party’s business. *Turick*, 121 F.R.D. at 35 (emphasis in original).³³ In the case of umbrella protective orders, this showing must be made as to *each and every document* challenged by the requesting party. See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786-87 (3d Cir. 1994).

In establishing the requisite showing of a clearly defined and very serious injury, a party cannot rely on mere vague and stereotyped or conclusory allegations. “Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.” *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d

³³ See also *Encyclopedia Brown Productions, Ltd. v. Home Box Office, Inc.*, 26 F. Supp. 2d 606, 613 (S.D.N.Y. 1998) (same); *Reliance Ins. Co. v. Barron’s*, 428 F. Supp. 200, 202-03 (S.D.N.Y. 1977) (same) (citing *United States v. IBM Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975)).

Cir. 1986). *See also* Charles A. Wright, Arthur R. Miller & Richard C. Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2035 (2d ed. 1994).³⁴

Minn. R. Civ. P. 26.03(g) permits courts to prevent the disclosure of trade secrets or “other research, development, or commercial information.” As a general matter, confidential business information is entitled to less protection from disclosure than trade secrets. *See Littlejohn v. Bic Corp.*, 851 F.2d 673, 685 (3d Cir. 1988). Because GSK is not alleging that any of the documents at issue in this case reveal trade secrets, the only question here is whether they contain other confidential “research, development, or commercial information” such that they may not be publicly disclosed. Neither this Court or the Court of Appeals has defined the precise contours of these terms under Rule 26.03. It is clear, however, as explained below, that certain categories of documents do *not* satisfy this standard.

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

Some entire types or categories of documents simply do not warrant any protection as confidential. As the court stated in *Petroleum Products Antitrust Litig.*, 101 F.R.D. at 39, which involved an alleged horizontal antitrust conspiracy in the oil industry:

Some of the briefs contain the proponents’ interpretations of historical events in the oil industry, *of meetings and conversations that are alleged to have involved price fixing*, of the effects of federal regulations on the prices and supply of petroleum products, and of the effects of recent developments

³⁴ It is also clear that the mere potential embarrassment from disclosure of a document is not enough to find the document confidential, especially where, as in this case, the party seeking to avoid disclosure is a business enterprise. *Pansy*, 23 F.3d at 787.

in antitrust law on the viability of plaintiffs' damage claims. Certainly, public disclosure of these types of arguments would not adversely affect defendants' trade secret interests, competitive positions, or privacy rights.

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

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

A party also clearly cannot claim confidentiality as to a document it disclosed to others, especially the parties' competitors. Such sharing of documents is quintessentially inconsistent with any conceivable claim of confidentiality.³⁵

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

Likewise, a party cannot claim that a document is confidential if the party did not take reasonable steps to keep the document confidential, even as to employees of the party. *See Wyeth v. Natural Biologics, Inc.*, No. Civ. 98-2469, 2003 WL 22282371, *20 (D. Minn. Oct. 2, 2003) (party established physical security and numerous controls and procedures that it employed to maintain the secrecy of its documents); *EXDS v. Devcon*

³⁵ *See Nestle Foods Corp. v. Aetna Casualty and Surety Corp.*, 129 F.R.D. 483, 484 (D. N.J. 1990) (“[A]s a matter of common sense, if one were truly fearful of competitive disadvantages, one would make every effort to properly safeguard information to prevent disclosure to competitors. In the instant case, defendants have been quite open in sharing the allegedly confidential information with their competitors.”). As the court made clear in *Medtronic, Inc. v. Boston Scientific Corp.*, No. Civ. 99-1035, 2003 WL 352467, *1 (D. Minn. Feb. 14, 2003), a protective order protects commercial information which, if disclosed, could harm a party's “competitive position.”

Construction, Inc., No. C05-0787 PVT, 2005 WL 2043020, *6 (N.D. Cal. Aug. 24, 2005) (same).³⁶

iii. A document that evidences unlawful activity cannot be confidential.

Moreover, a document clearly cannot be considered confidential under Rule 26 if it contains evidence of an unlawful antitrust conspiracy. *Petroleum Products Antitrust Litig.*, 101 F.R.D. at 39. There are many cases in Minnesota and elsewhere that hold that documents which would otherwise be protected from disclosure by the attorney-client privilege and/or the work product doctrine, but that evidence crimes, fraud or other unlawful activity, including illegal antitrust conspiracies, lose their protection from disclosure. *See, e.g., State of Minnesota v. Philip Morris Inc.*, 606 N.W.2d 676, 691 (Minn. Ct. App. 2000).³⁷ If such documents are not protected from disclosure under the far greater protection afforded by the attorney-client privilege, they certainly cannot be protected from public disclosure as confidential documents under Rule 26.03(g).

³⁶ *See also* Hotchkiss & Fleming, 71 Def. Couns. J. at 166 (“The company that does not restrict its employees from access to commercially sensitive documents will have a difficult time proving they are truly confidential. Companies need to treat their proprietary materials with the utmost discretion inside and outside of litigation.”).

³⁷ *See also McCaslin v. McCaslin*, No. C1-95-1243, 1996 WL 81500, *4 (Minn. Ct. App. Feb. 27, 1996).

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

Furthermore, even if a document is confidential under the above standards, a court should nevertheless allow its disclosure if the presumption and interest in public access to the document outweighs the harm to the other party's competitive position from disclosure. *See Encyclopedia Brown Productions, Ltd. v. Home Box Office, Inc.*, 26 F. Supp.2d 606, 612-13 (S.D.N.Y. 1998). That is, even confidential documents should be disclosed if the public interest in access is sufficiently strong. One such strong interest in access that outweighs a contrary interest in confidentiality is the public's health and safety. *Pansy*, 23 F.3d at 787.³⁸

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

In light of these legal standards, this Court should find that none of the documents at issue in this matter are confidential and that GSK has not met its burden of showing that disclosure of the documents will work an impermissible "*clearly defined and very serious injury*" to its business.³⁹ These documents simply are not protected as confidential on many grounds:

³⁸ As the Third Circuit explained in *Pansy*, if a case involves a public party and a public issue, these factors weigh against a confidentiality ruling. *Id.*

³⁹ In Exhibit A to the Second Affidavit of Michael J. Vanselow in support of the State's underlying motion, included under seal in the district court record, the State discusses in detail on a document-by-document basis why each of the documents that GSK claims
(Footnote Continued On Next Page.)

- None of the documents here reveal confidential trade secrets.
- The documents are nearly identical to the types of documents that the court found not to be confidential in *Petroleum Prods. Antitrust Litig.* discussed above. They simply reflect company and industry communications regarding a concerted Canadian drug import boycott.
- GSK has not explained how the disclosure of the documents would result in a “*clearly defined and very serious injury*” to GSK’s business. In fact, it is inexplicable how the disclosure of these documents could result in *any* harm to GSK’s competitive position when many of these documents were actually shared with GSK’s competitors. GSK’s arguments are nothing more than vague, stereotypic and conclusory allegations that plainly cannot justify the denial of public access. For almost every document, GSK’s attorneys simply provide a cryptic summary of what the document is or includes. This is inadequate.
- Many of GSK’s documents were disclosed to outsiders, including GSK’s own direct competitors, as well as the very targets of the drug company boycott, negating any possible confidentiality claim.
- Most of the documents reveal no evidence that their alleged confidentiality was ever identified or properly safeguarded. There is no original indication anywhere on most of documents that they were ever intended or required to be treated confidentially or that access to such documents was in any way restricted. GSK also provided no evidence as to the steps it took to keep these documents confidential. GSK’s attorneys merely contend with regard to most of the documents that it “appears” the distribution was internal or limited and/or that it “presumes” there was no external distribution of the document. This falls far short of the requisite safeguarding.
- As is clear from the State’s Complaint, the documents reveal evidence of unlawful conduct.⁴⁰

contains protected proprietary information does not, in fact, satisfy the legal confidentiality standards under Rule 26.03.

⁴⁰ The fact that GSK desperately wants to prevent public disclosure of these documents because they will subject it to adverse publicity is ultimately immaterial to the Court’s
(Footnote Continued On Next Page.)

There is also extraordinary public interest in the issues of Canadian drug imports and the pharmaceutical industry's concerted efforts to block these imports. This compelling public interest amply justifies the disclosure of the documents even if they are otherwise confidential. Indeed, the MNA noted in its amicus brief, filed in the prior proceeding before this Court, that the district court's decision will effectively deprive Minnesota news organizations, and the public in general, "of any ability to monitor what is arguably one of the most important actions brought by the Attorney General in years." *Id.* at 4. GSK has certainly not shied away from placing its version of the Canadian drug importation story before the public. The public is now entitled to know the rest of the story that GSK is hiding.

analysis. *See Gelb v. American Telephone & Telegraph Co.*, 813 F. Supp. 1022, 1035 (S.D.N.Y. 1993) ("good cause" is not established merely by the prospect of negative publicity); *Petroleum Prods. Antitrust Litig.*, 101 F.R.D. at 39 ("It is not the duty of the federal courts to accommodate the public relations interests of litigants.").

CONCLUSION

For the foregoing reasons, the State requests that the Court affirm the April 18, 2006 decision of the Court of Appeals and, in the interest of justice, determine that no Minn. R. 26.03 grounds exist upon which to predicate further concealment of the documents at issue.

Dated: August 28, 2006

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CERTIFICATE OF COMPLIANCE

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

The undersigned certifies that the Brief submitted herein contains 13,896 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2002, the word processing system used to prepare this Brief.


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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).