

STATE OF WISCONSIN,

 PLAINTIFF

 Vs.

 AMGEN, INC., ET AL.,

 DEFENDANTS

**DECISION ON PLAINTIFF'S
 MOTION TO DE-DESIGNATE
 DOCUMENTS.
 AUGUST 3, 2008**

CASE NO. 04-CV-1709

Appearances

Plaintiff by Atty. Charles Barnhill
 Defendants by Atty. Beth Kushner
 Defendant Novartis by Atty. Jennifer Amundsen
 Defendant GlaxoSmithKline by Attys. Jon P. Axelrod, Richard Cutler & Michael Newman

Plaintiff State of Wisconsin, claiming that several defendants have improperly designated discovery documents as “confidential,” has moved for an order requiring them to “de-designate all documents marked confidential that were created more than five years ago absent a document-by-document showing that disclosure of any such document is likely to lead to commercial injury.” The relief sought is said to be “consistent with orders currently being entered in the MDL.”

The State’s request is based largely on its assertion that internal communications, sales plans, strategies, and similar documents that are five or more years old are *per se* non-confidential because they cannot, under any circumstances, contain information that might have a present competitive impact.

Defendants (collectively, and some individually) oppose the motion, arguing, among other things, that the Protective Order sets forth specific procedures governing the

designation of “confidential” documents during the discovery process—and for challenging those designations—and that the State has not followed those procedures.

The parties have briefed the issues, and although the last principal brief was filed on or about November 27, 2007, the parties had requested that the Motion be held in abeyance pending proceedings then ongoing in circuit court. On August 15, 2008, Plaintiff’s counsel advised me that it was withdrawing its motion as against twenty Defendants (or sets of Defendants)—comprising, in essence, all Defendants who have complied with the December 6, 2007, order entered in the Pennsylvania Average Wholesale Price Litigation. The Motion presumably remains in effect as against the remaining Defendants—at least a few of whom have filed letters in recent days pointing out that compliance with Plaintiff’s request to review and de-designate documents labeled “confidential” which no longer occupy that status would be unduly burdensome.¹

The parties have indicated that this Motion is now ready for decision on the briefs as filed.

Under the terms of the Protective Order, information designated “confidential” by the producing party may be disclosed only to the State’s employees, counsel for the parties, and actual or potential experts or consultants retained by a party to assist in the litigation—as long as those experts or consultants are not current employees of a party or any of its affiliates.² (P.O., at ¶ 4) In other words, the principal effect of a “confidential” designation is that no information so designated may be disclosed to anyone not connected to the case, or anyone who is a current employee of any other party or its affiliate entities. It is thus not a question of Plaintiff’s access to the information or its ability to use the information in this litigation. The designation does not restrict Plaintiff in that regard; it only prevents Plaintiff from disclosing the information to other defendants or to persons or entities with no connection to the action.

¹ The most recent such document was received on or about August 27, 2008.

² Others to whom such information may be disclosed are, of course, court reporters, copy services and any mediators or special masters appointed by the trial court to assist the discovery process.

Several sections of the Protective Order are relevant:

3. The designation “CONFIDENTIAL” shall be limited to information that any producing party ... in good faith, believes to contain (a) proprietary or commercially sensitive information; (b) personal financial information; or (c) information that should otherwise be subject to confidential treatment under **Civil Rule 26.03(1)(g)**. The designation “CONFIDENTIAL” does not include information or materials available to the public including, without limitation, catalogs, advertising materials, and the like.

* * * * *

5. The designation “HIGHLY CONFIDENTIAL” or “ATTORNEY EYES ONLY” shall be limited to information that any producing party ... in good faith, believes to contain ... current and past (to the extent they reflect on current) methods, procedures and processes relating to the pricing of pharmaceuticals; ... marketing plans and methods; ... business planning and financial information; [and]... trade secrets ...; ... past or current company personnel or employee information; and ... other “CONFIDENTIAL” information (as defined in Paragraph 3) the disclosure of which is likely to cause competitive or commercial injury to the producing party.

* * * * *

17. In designating information “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” ... the producing ... party ... will make such designation only as to that information that it in good faith believes is “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” The failure of a party to exercise good faith in the designation of information as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” ... may subject that party to sanctions, including the imposition of attorney’s fees and costs.

* * * * *

23. ... Any party may object, in writing, to the designation by another party by specifying the information in issue and its grounds for questioning the designation. In the event that any party ... disagrees at any point in these proceedings with the designation by the producing party, the parties shall try first to resolve said dispute in good faith on an informal basis. If the parties cannot resolve the dispute within twenty-one (21) days of service of a written

objection, the party that designated the information may file a motion for a protective order within twenty-one (21) days after the parties' informal attempts at resolution have concluded. The party that designated the information "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" ... shall have the burden of demonstrating the propriety of its designation.

In its motion, the State asserts that among the items Defendants have designated "confidential" are catalogs sold to the public, journal articles, contracts with purchasers requiring confidentiality for a period of only three years, and even some blank pages; and it says that this is evidence of Defendants' "bad faith" in making their designations. It also asserts that Judge Saris, in the multi-district litigation, has found "similar abuse" in those cases and, in response, has (a) ordered the record opened to public inspection "unless there's a good reason for excluding it," and (b) limited the protective orders in the cases to recent documents, stating that pricing information more than five years old "is not sensitive commercial information."

Defendants argue that the State's request violates the provisions of the Protective Order setting forth a procedure for challenging confidentiality designations—a procedure in which the objecting party must "specify[] the information in issue and the grounds for questioning the designation" (P.O., at ¶ 3), after which the parties must meet and confer to attempt to resolve the dispute informally. If informal resolution is not forthcoming, the burden shifts to the designator to seek a protective order and "demonstrate the propriety of its designation." The State, Defendants say, has simply made a blanket objection to all confidential designations for documents five or more years old, and, in doing so, has misread and/or misapplied the provisions of the Protective Order, as well as Judge Saris's actions.

Taking the latter first, the State points to a brief excerpt from Judge Saris's remarks during the course of an otherwise undescribed "Settlement Hearing" in October, 2006, in litigation in the Eastern District of Massachusetts captioned *New England Carpenters Health Fund, et al. v. First Databank, Inc., and McKesson Corporation*, where the judge is reported as having remarked that, based on her own "long history with

pharmaceutical litigation,” she feels that “in general the defendants grossly overstate confidentiality [and] basically print ‘confidential’ on everything.” She stated that, as a result, she was going to “open it all up to the public record unless there’s a good-faith basis for excluding it.” The State also quotes from a “Minute Order” attributed to Judge Saris—apparently a docket entry—in *Citizens for Consumer Justice, Inc., et al. v. Abbott Laboratories, et al.*, which states:

Electronic ORDER entered granting in part [4446] Motion to Protect Confidential Proprietary Commercial Information. “Allowed only in part. I find that pricing information from more than 5 years ago is not sensitive commercial information. Accordingly, all average acquisition costs from 2002 to date may be redacted. All other information in Exhibit B shall be publicly available. Just because Cardinal states something is confidential does not necessarily mean it can establish good cause to seal. For example, it is inconceivable that commercial information from the 1990’s is sensitive business information now.

The State asks me to make a similar determination in this case—in essence, that no internal market- or price-related strategies or communications that are more than five years old can—presumably as a matter of uncontested fact (or law)—contain information which, in Judge Saris’s words, might in any way constitute “sensitive business information now.”

Defendants point out that the Saris materials contain no information as to the companies involved in either *New England Carpenters Health Fund* or *Citizens for Consumer Justice*, and that, in any event, the comments were made during a “settlement hearing ... to determine whether the court would grant preliminary approval of a settlement proposal,” in which the issue presented was *not*—as it is in this case—one of substantiating the “confidential” destination under the terms of the Protective Order. Rather, the issue in *New England Carpenters* was whether the public would be able to judge the fairness of the settlement being proposed by the parties in light of the fact that some of the documents presented in support of the approval motion were designated as

“confidential” and thus were not available for public inspection. To me, that is a significant distinction.

Beyond that, I do not know what evidence was before Judge Saris, what companies were involved in the litigation, or how the judge’s views on the subject may have been informed by her personal experience with cases involving pharmaceutical manufacturers. And it seems to me that the State, by asking me to adopt what, in the absence of record evidence, appears to be a leap of faith on Judge Saris’s part, is requesting that I attempt a similar jump—one I note that other judges, in other contexts, have declined to embark upon. *See, for example, Center for Auto Safety v. Nat’l Highway Traffic Safety Administration*, 93 F.Supp.2d 1, 16 (D.D.C. 2000) (“information does not become stale merely because it is old,” because insights may be gained from such information that “would allow a competitor to determine the direction of the company’s past and current efforts in research and development ... and thus beat them to new advancements.”); *Timken Co. v. United States Customs Service*, 1983 WL 486422 (D.D.C. 1983) (release of pre-1973 information in 1981 could still possibly harm the competitive position of the companies from which it was obtained.); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 529 F.Supp. 866 (E.D. PA 1981) (“old business data may be extrapolated and interpreted to reveal a business’ current strategy, strengths and weaknesses,” and, in the hands of “an able and shrewd competitor,” such data could be used for “competitive purposes”). I agree with Defendants that Judge Saris’s observations about her experience with certain unspecified pharmaceutical-industry neither bear upon the present litigation nor do they necessarily reflect either the conduct of the Defendants in this case, or the documents they have produced.

I note also in this regard that, in a related section of the Protective Order (§ 5), the parties have recognized (with respect to information designated “highly confidential”) that “past ... methods, procedures and processes relating to the pricing of pharmaceuticals,” as well as past “marketing plans and methods” and “business planning ... information” can “reflect on current [methods, procedures, plans, etc.]” to the degree

that they may be designated “highly confidential.”³ It thus appears that the parties themselves have recognized at least the possibility that older documents or information may bear upon current business interests to a degree that would warrant protection.

I am unable, on this record, to conclude or determine, as the State would have me do, that the passage of five years, *per se*, renders business strategies, plans and other measures competitively harmless to the extent they may never properly be considered “confidential” within the meaning of the Protective Order.

And, as Defendants point out, under the express terms of the Order, it is only after the State has “specif[ied] the information in issue and its grounds for questioning the designation,” that the burden shifts to Defendants to demonstrate “the propriety of [their] designation[s].” And they assert that the State’s blanket objection to designation of any document as “confidential” based solely on its age does not meet the “specification” requirement of the Order.

I agree. The parties contemplated that the terms of the Protective Order would govern resolution of disputes over discovery designations, and designed a procedure to deal with such disputes. The State argues that its request to de-designate all materials that are five or more years old is justified because, they assert, Defendants have violated the “good faith” provisions of the order by attaching “blanket” confidential designations to thousands of pages of materials. But that puts the cart before the horse. The procedures set forth in the Protective order require the State to specify the information at issue and set forth “its grounds for questioning” the Defendants’ designations. It is only then that the burden shifts to Defendants to demonstrate the propriety of the challenged designations. And if the materials are determined to have been improperly designated—

³ Paragraph 5 of the Order, as indicated, limits the “highly confidential” designation to information the producing party believes to contain “current and past (*to the extent they reflect on current*) methods, procedures and processes relating to the pricing of pharmaceuticals” (emphasis added).

and that Defendants have acted in bad faith in making the designations—the fee- and cost-shifting provisions of the Order may come into play.⁴

Finally, the State maintains that having to undertake a “document-by-document review” of millions of pages of material—presumably in order to be able to “specify” its challenges to confidentiality designations—would be unduly burdensome and would “cripple the discovery process.” It is true that the district court in *Zenith Radio* noted the difficulty, if not the impossibility, of individually reviewing tens of thousands of documents “in order to determine whether [their] continuing confidential status is justified...” It also appears, however, that the *Zenith Radio* court rejected the attempt of the plaintiff in that case to de-designate millions of pages of “confidential” discovery materials, concluding that “wholesale declassification cannot rationally be sustained without reviewing each of the countless separate documents or at least the many discrete categories which constitute the mass of protected documents.” 529 F.Supp. at 893.⁵

It is true, as the State notes, that the *Zenith Radio* court also suggested that the parties should “take an anatomical view of the case” and begin to resolve the discovery disputes by first identifying the broader categories of documents and information at issue. Indeed, it seems to me that such a procedure is precisely what the de-designation

⁴ Additionally, the State argues, as indicated above, that Defendants should be found to have acted in bad faith in making their designations because included in the materials designated “confidential” are journal articles, advertisements, some “blank pages,” and other plainly non-confidential materials. Defendants point out, however, that, because the confidentiality provisions of the Protective Order are framed in terms of “documents,” individual pages that are part of larger documents will be included in the “confidential” designation. As an example, they note that many of the items the State points to were part of “larger and self-evident document families”—such as e-mails and their attachments, or journal articles attached to confidential internal communications.

The State also attempts to distinguish between “information” and “documents” insofar as those terms appear in the Protective Order. It argues, for example, that the confidentiality provisions of the order protect only “information” and not “documents” or “families of documents.” I do not see the Order’s interchangeable use of those terms as indicating such a distinction, and the State has not explained how one can exist without the other: *e.g.*, a document containing no information, or information that is not presented in a document or other “readable” format.

⁵ Defendants suggest that even more serious problems would befall them should they be required to review and re-designate the existing array of produced documents. Defendant Novartis Pharmaceuticals Corporation, for example, states in its August 20, 2008, letter, that it has produced eleven million pages of documents in this case and that “re-reviewing its entire production” would cost approximately \$1.86 million for the reviewers’ time alone, exclusive of the cost of training and supervision.

provisions of the Protective Order contemplate—not a blanket request to de-designate any and all documents five or more years old, based on an unproven supposition that no documents of such an age can possibly contain, or lead to, information with a present competitive impact, but rather, in the language of the Order, specification of the information sought to be de-designated together with a statement of the grounds for the challenge. And it is only at that point that the burden shifts to the Defendants to justify their designations.

The materials submitted by the State on the instant motion setting forth the facts leading up to the impasse comprise: (a) a request by the State for the Special Discovery Master to mediate the dispute, which was declined after Defendants objected to such a process; (b) a letter from the State’s attorneys to Defendants’ counsel asserting that they see nothing “confidential” in many of the five-year old documents, and stating that if Defendants do not agree to de-designate all documents more than five years old, the State will seek an order to that effect; and (c) a letter from Defendants’ counsel to the attorneys for the State rejecting the “blanket” de-designation request, and suggesting that, because of the large number of defendants, a better procedure would be “to address any concerns that you may have with counsel responsible for the particular production and particular designation.”⁶

Because it appears that the State has not followed the specific provisions of the Protective Order with respect to its de-designation requests and, further, has not satisfied me that its request for a blanket de-designation of all documents more than five years old has either legal or factual support, I deny its Motion to De-Designate Documents Marked Confidential by Defendants That are More Than Five Years Old, filed on or about October 15, 2007.⁷

⁶ Defendants point out in their brief that “[e]ach time Plaintiff’s counsel has raised a concern regarding specific designations, the producing Defendant has responded [as contemplated by the Protective Order],” and that the State has raised its designation concerns with only a handful of the thirty-seven defendants in this case.

⁷ On November 27, 2007, the State filed a Motion for Leave to Supplement its Reply Memorandum in this case—seeking to hold proceedings on this motion in abeyance while it deposed a witness from whom one

Dated at Madison, Wisconsin, this 3rd day of August, 2008

William Eich
Special Discovery Master

of the Defendants, Glaxo-Smith-Kline, had obtained and filed an affidavit in support of its separate brief in opposition to Plaintiff's Motion to De-Designate. The State maintains that it should be allowed to test the basis for statements in the witness's affidavit relating to the continuing competitive dangers of disclosure of some corporate documents that are more than five years old. Because, however, I have not relied upon, or even considered, the affidavit in disposing of the instant motion, I see no need to extend the proceedings further and thus deny Plaintiff's November 7, 2007, motion as well.