

2. An opinion from the District of New Jersey overruling a defendant's confidentiality designations for certain documents produced in discovery because the defendant did not satisfy its burden to show that the documents contained information that was proprietary, contained trade secrets, and/or was highly confidential, and applying the ruling to thousands of other documents produced by the defendant that had also been designated as confidential.

In *In re Valsartan N-Nitrosodimethylamine, Losartan, & Irbesartan Prod. Liab. Litig.*, No. cv-19-2875 (RBK/JS), 2021 WL 75258, (D.N.J. Jan. 8, 2021), U.S. Magistrate Judge Joel Schneider of the District of New Jersey required Defendant to de-designate documents as not confidential both because Defendant procedurally waived its designations under the terms of the court's protective order and because Defendant did not satisfy its burden in asserting that the documents were proprietary, contained trade secrets, and/or were highly confidential or that Defendant would suffer particularized serious harms in de-designating the documents.

In this products liability multidistrict litigation, Plaintiffs alleged that Defendants manufactured, distributed, and sold generic medications contaminated with cancer-causing chemicals. *Id.* at *1. Near the close of discovery, Plaintiffs sought to have five documents produced by one Defendant de-designated and produced as not confidential. Plaintiffs also requested that the court treat the five challenged documents as exemplars and require the Defendant to de-designate tens of thousands of similar documents.

Magistrate Judge Schneider first addressed whether Defendant had waived its claim of confidentiality over the five challenged documents. The protective order entered by the court provided that if the parties disagree following an initial challenge to a confidentiality designation, "the proponent of the designation being challenged shall present the dispute to the Court." *Id.* at *2. Despite Plaintiffs informing Defendant that it was required to bring the dispute to the court's attention, Defendant failed to do so. *Id.* at *4. Because Defendant failed to comply with the procedure in the protective order, Magistrate Judge Schneider found that Defendant waived its confidentiality designation. Magistrate Judge Schneider, however, declined to find a procedural waiver for any documents beyond the five challenged. *Id.* at *7. Because the Plaintiff challenged only the five documents, "[i]t would be inequitable to rule that [Defendant] waived its Confidentiality designations as to possibly tens of thousands of documents when only five documents are at issue and [Defendant] was not on notice that plaintiffs would make a waiver request as to all of [Defendant's] documents."

Notwithstanding the waiver, Magistrate Judge Schneider addressed the substance of Defendant's confidentiality designations. He noted that the protective order permits parties to designate as confidential only information that is "proprietary, trade secret and/or highly sensitive commercial information, and which is believed in good faith by the Producing Party to have the potential, if disclosed, for causing competitive harm to it or giving a competitive advantage to others." *Id.* at *2. Magistrate Judge Schneider also noted that the designating party has the burden of showing that good cause for the designation exists, specifically that "disclosure will work a clearly defined and serious injury to the party seeking confidentiality." *Id.* at *3. That showing requires "specific demonstrations of fact supported where possible by affidavits and concrete examples, rather than broad, conclusory allegations of potential harm."

As an initial point, Magistrate Judge Schneider explained that he did not need to accept the Defendant's affidavits supporting the designations at "face value." *Id.* at *5. Instead, under an independent review, he determined that the confidentiality designations failed for two reasons. *Id.* at *6. First, "the emails do not contain "proprietary, trade secret and/or highly confidential information." Second, the emails do not have the potential "for causing [significant] competitive harm to [Defendant] or giving a competitive advantage to others." Defendant argued that the "confidential" nature of the documents was enough to support its designations, but Magistrate Judge Schneider indicated that bare assertions that information is proprietary and/or highly confidential are insufficient to support confidentiality designations. Simply because a document is nonpublic does not mean it is proprietary, especially for routine business communications.

Magistrate Judge Schneider found that the subject documents involved "what appears to be routine business communications" and that they did not appear to reflect any proprietary procedure or practice. Defendant's affidavits did not, for example, allege that Defendant "did anything different than any other similarly situated company," nor did Defendant allege that the emails reflected any "proprietary or secret" approach to its business. Further, "nothing in the emails reflect a particular concern or worry by the authors of the emails that the distribution of the emails should be limited." Additionally, "none of the emails list or reference proprietary formulas or ingredients other than general references that are likely accessible in documents prepared by or filed with the [Food and Drug Administration]." Finally, "none of the emails discuss or reference [Defendant's] business plans, revenues, or profits."

Mere allusion to harm is also insufficient to support a confidentiality designation. *Id.* at *7. Rather, the designating party must show "that a particularized serious harm would or could result from the de-designation of its documents." Defendant failed to explain how the release of the documents would cause harm, and Magistrate Judge Schneider concluded that Defendant would not be harmed by the release of "routine business communications." Separately, in response to Defendant's alternative argument that Plaintiffs had not shown any need for the documents at issue, Magistrate Judge Schneider noted that "plaintiffs' need for de-designation or prejudice resulting from a Confidentiality designation is not a relevant factor to consider."

Unlike with the procedural default, Magistrate Judge Schneider did not limit the scope of his substantive review findings to the five documents. Instead, he directed Defendant to "apply the ruling to all of its document designations [and] remove its designations that are inconsistent with the Court's ruling."