

STATE OF MINNESOTA

TAX COURT

COUNTY OF ANOKA

REGULAR DIVISION

Lowe's Home Centers, LLC,
(Blaine)

Petitioner,

vs.

County of Anoka,

Respondent.

**ORDER GRANTING COUNTY'S
MOTION TO COMPEL DISCOVERY
AND DENYING LOWE'S MOTION
FOR PROTECTIVE ORDER**

File Nos: 02-CV-16-1535
02-CV-17-1662

Filed: April 13, 2018

This matter came before the Honorable Bradford S. Delapena, Chief Judge of the Minnesota Tax Court, on respondent Anoka County's motion to compel discovery and petitioner Lowe's Home Centers, LLC's motion for a protective order.

Thomas R. Wilhelmy and Judy S. Engel, Fredrikson & Byron, P.A., represent petitioner Lowe's Home Centers, LLC.

Jason J. Stover and Christine Carney, Assistant County Attorneys, represent respondent Anoka County.

These consolidated cases concern the market value of the Lowe's store in Blaine, Minnesota. Respondent Anoka County moves to compel discovery of gross sales information for Lowe's stores in the Twin Cities metropolitan area. In response, petitioner Lowe's Home Centers, LLC moves the court for an order barring discovery of the requested information. We grant the County's motion to compel, deny Lowe's reciprocal motion barring discovery, and order the County not to disclose the gross sales information to third parties except as specified in a protective order also filed today.

Based upon all the files, records, and proceedings herein, the court now makes the following:

ORDER

1. The County's motion to compel discovery of gross sales information for Lowe's stores in the Twin Cities metropolitan area is granted.

2. Within 21 days of the date of this order, Lowe's shall produce in accordance with Minn. R. Civ. P. 34 all documents responsive to Request Number 4 of Respondent's First Set of Requests for Production for documents for stores in the Twin Cities metropolitan area. Lowe's objections to that document request are overruled.

3. The County shall not disclose to third parties gross sales information for Lowe's stores except as specified in a protective order also filed today.

4. Within 30 days of the date of this Order, the County may file and serve an affidavit or declaration setting forth its expenses, including attorney fees, incurred in connection with its motion to compel. Minn. R. Civ. P. 37.01(d)(1). Any opposition to the County's affidavit or declaration must be filed and served within 10 days of service of the County's expense statement.

IT IS SO ORDERED.

BY THE COURT,




Bradford S. Delapena, Chief Judge
MINNESOTA TAX COURT

DATED: April 13, 2018

MEMORANDUM

I. BACKGROUND

These consolidated cases involve the market value of the Lowe's store in Blaine as of January 2, 2015 and 2016.

A. The County's Requests for Production and Lowe's Response

In its First Set of Requests for Production of documents, the County asked Lowe's to produce "annual gross sales and store performance ranking of each Lowe's Home Centers, LLC stores in Minnesota."¹ During a telephone call on October 17, 2017, the parties agreed to extend discovery response dates, and Lowe's asserted that the County had requested "certain items ... that Lowe's may consider proprietary (i.e., gross retail sales and store performance rankings)."² During the same call, the County offered "to enter into a protective agreement concerning the data" to avoid further discovery delays.³

During a site inspection of Lowe's Blaine store on October 20, 2017, the parties again discussed the County's request for gross sales information. Counsel for Lowe's asserted that Lowe's considered this information to be "highly proprietary" and not subject to release.⁴ The County again offered a protective agreement.⁵ On November 3, 2017, Lowe's served the County with its Responses to Respondent's First Set of Requests for Production,⁶ which included the following:

¹ Affidavit of Judy S. Engel, Esq., Ex. A, at 3 (Jan. 3, 2018); *see also* Memorandum of Law in Support of Respondent's Motion to Compel Discovery and Other Relief 1 (filed Nov. 27, 2017).

² Carney Decl. ¶ 2.

³ Carney Decl. ¶ 2.

⁴ Carney Decl. ¶ 4.

⁵ Carney Decl. ¶ 4.

⁶ Engel Aff., Ex. A, at 3.

REQUEST NO. 4: From January 1, 2012, to the present, documents sufficient to show the annual gross sales and store performance ranking of each Lowe's Home Centers, LLC stores in Minnesota.

RESPONSE: Petitioner objects to this request on the ground that it is overly broad, unduly burdensome, and not likely to lead to discovery of admissible evidence and to the extent it seeks information regarding other Lowe's stores without regard to the differences in physical characteristics of the property and location. Petitioner further objects to this Request to the extent that it seeks annual gross sales, which are highly confidential and proprietary information that Petitioner does not release publicly.⁷

B. The Parties' Correspondence

On November 9, 2017, the County offered to narrow the scope of the above request to include only gross sales information for stores "located in the 7-county metro area, for years 2012-2017."⁸ The County also offered, for the third time, to enter into a protective agreement and attached to its e-mail a proposed agreement.⁹ On November 13, 2017, Lowe's responded, refusing to produce the requested gross sales information and again asserting that the information is not relevant because there is "no generally accepted appraisal practice nor any case law precedent for estimating market rent ... based on a percentage of retail sales."¹⁰ The next day, the County replied, reiterating that gross sales information is relevant for evaluating retail locations.¹¹ Later that same day, Lowe's rejoined that its position was unchanged.¹²

C The Parties' Motions

Following this exchange, the County filed on November 27, 2017, a motion seeking to compel Lowe's to produce the gross sales information and requesting "reasonable attorneys' fees

⁷ Engel Aff., Ex. A, at 3.

⁸ Carney Decl., Ex. B.

⁹ Carney Decl., Exs. B-C.

¹⁰ Carney Decl., Ex. D.

¹¹ Carney Decl., Ex. E.

¹² Carney Decl., Ex. F.

and costs” incurred in bringing its motion.¹³ The County contends, among other things, that the requested information “is directly relevant to location adjustments” and “to counter Lowe’s argument that retail stores in general ... are increasingly obsolete.”¹⁴ The County further argues that Lowe’s objection that the requested information is “highly confidential and proprietary” should be rejected “given [the] County’s repeated offers to sign a ... protective order.”¹⁵

On January 3, 2018, Lowe’s filed its opposition to the County’s motion and also moved for an order barring discovery of the requested gross sales information.¹⁶ Lowe’s contends that the information: (1) is “irrelevant under ... the broad standards of relevancy for discovery”; (2) is “highly proprietary trade secret data”; and (3) is being sought for “an improper purpose.”¹⁷ Lowe’s thus asks us to file a protective order “permitting [Lowe’s] to withhold the retail sales data.”¹⁸

II. GOVERNING LAW

The Minnesota Rules of Civil Procedure “govern the procedures in the Tax Court, where practicable.” Minn. Stat. § 271.06, subd. 7 (2016). Rule 26 “provides for broad discovery in civil proceedings.” *Erickson v. MacArthur*, 414 N.W.2d 406, 407 (Minn. 1987). Parties may obtain discovery through document requests. Minn. R. Civ. P. 26.02(a). Rule 26.02 governs the scope and limits of discovery and provides in part as follows:

¹³Anoka County’s Motion to Compel Discovery and for Other Relief (filed Nov. 27, 2017).

¹⁴ Mem. Law Supp. Resp’t’s Mot. Compel Disc. & Other Relief 1.

¹⁵ Mem. Law Supp. Resp’t’s Mot. Compel Disc. & Other Relief 5.

¹⁶ Petitioner’s Notice of Motion and Motion for Protective Order (filed Jan. 3, 2018); Proposed Protective Order (filed Jan. 3, 2018).

¹⁷ Petitioner’s Memorandum in Support of Motion for Protective Order and in Opposition to Respondent’s Motion to Compel 4 (filed Jan. 3, 2018).

¹⁸ Pet’r’s Mem. Supp. Mot. Protective Order & Opp’n Resp’t’s Mot. Compel 21.

Discovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality, including without limitation, the burden or expense of the proposed discovery weighed against its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. Subject to these limitations, parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party Upon a showing of good cause and proportionality, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Minn. R. Civ. P. 26.02 (b). If a party fails to answer or respond to discovery requests, the propounding party may move for an order compelling answers or the production of documents.

Minn. R. Civ. P. 37.01(b).

“To prevent public disclosure of matters produced in discovery, the party or person from whom discovery is sought may move for a protective order under Minn. R. Civ. P. 26.03.” *State ex rel. Humphrey v. Philip Morris Inc.*, 606 N.W.2d 676, 686 (Minn. App. 2000). Protective orders “permit discovery of relevant information while protecting a privilege by limiting access to the information.” *Id.* Moreover, “[p]rotective orders may also promote cooperation in discovery if litigants know the information they provide will not be widely disseminated.” *Id.* (citation omitted). Protective orders thus serve the overall objectives of discovery: “to encourage the exchange of relevant information by the parties prior to trial and to discourage and prevent unjust surprise and prejudice at trial.” *Gale v. Cty. of Hennepin*, 609 N.W.2d 887, 891 (Minn. 2000).

Trial courts have broad discretion to regulate discovery and to issue suitable protective orders. *In re Paul W. Abbott Co., Inc.*, 767 N.W.2d 14, 17-18 (Minn. 2009); *Baskerville v. Baskerville*, 246 Minn. 496, 507, 75 N.W.2d 762, 769 (1956). As relevant here, Minnesota law provides:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

...

(g) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; or

....

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

Minn. R. Civ. P. 26.03. Minnesota law defines “trade secret” as follows:

Subd. 5. **Trade secret.** “Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Minn. Stat. § 325C.01, subd. 5 (2016). “Generally, the burden of demonstrating good cause [under Rule 26.03] rests with the party seeking a protective order.” *Star Tribune v. Minnesota Twins P’ship*, 659 N.W.2d 287, 293 (Minn. App. 2003) (citation omitted).

III. ANALYSIS

In support of its motion to compel discovery, the County submits evidence that gross sales information is broadly relevant to evaluating retail locations and to estimating market rent. This evidence and pertinent precedent support the County’s contention that gross sales information is discoverable in this dispute concerning the market value of a large retail property.

A. Evaluation of Retail Location Generally

Market participants use trade-area analysis to evaluate retail locations and their respective competitive positions within an overall retail market. *Menard, Inc. v. Cty. of Clay*, No. 14-CV-12-1500 et al., 2015 WL 5944893, at *8-9 (Minn. T.C. Sept. 18, 2015), *amended*, 2016 WL 382891 (Minn. T.C. Jan. 29, 2016), *aff'd*, 886 N.W.2d 804 (Minn. 2016); *see also J.C. Penney Properties, Inc. v. Cty. of Ramsey*, No. 62-CV-09-6316 et al., 2014 WL 3749300, at *4 (Minn. T.C. July 18, 2014) (noting that a retailer “analyzed the respective trade areas of the two properties, the demographics of their trade areas, the competition within the trade areas, [and] the level of business each location was expected to generate”). We have long recognized the connection between the quality of a retail location and the retail sales likely to be generated at that location: “The value of a large retail store depends significantly on location, which creates retail traffic which converts to sales.” *Allied Cent. Stores v. Cty. of Hennepin*, Nos. TC-4720 & TC-5542, 1988 WL 21105, at *3 (Minn. T.C. Feb. 11, 1988). Consequently, evidence of actual gross sales at particular retail locations can be especially useful to property valuation.

The evidence in this case underlines the point. Mr. James McComb, the County’s market research consultant, avers that “[s]tore performance data can lead to reliable evidence of superior locations for retailers” and thus “can be very useful in distinguishing good locations from bad locations, and strong trade areas from weaker ones.”¹⁹ He further indicates that when purchasing or leasing, “*all retailers* are interested in store-specific sales performance information.”²⁰ In addition, McComb notes that for “similarly-managed, similarly-marketed, prototypical stores,” gross sales information can help determine “how each prototype performs in

¹⁹ Affidavit of James B. McComb ¶¶ 4, 7 (Jan. 10, 2018).

²⁰ McComb Aff. ¶ 8 (emphasis in original).

a given trade area and the impact of competitive stores.”²¹ Mr. Ethan Waytas, the County’s expert appraiser,²² explains that “store sales compared to other sites in an area reflect a location’s access, visibility, population, median income, etc.,”²³ and that “if a store sales are high relative to other sites [in the area] it will indicate a strong location.”²⁴

The testimony of Mr. David Green, Vice President of Tax for Lowe’s Home Centers, L.L.C.,²⁵ verifies the testimony of these County witnesses and further establishes the value to market participants of store-specific gross sales data. Lowe’s submits Green’s testimony to establish that “[d]isclosure of the retail sales and revenue information ... would significantly and materially harm Lowe’s by giving its competitors and unfair competitive advantage.”²⁶ To that end, Green avers that “sales and revenue information is extremely valuable to the home improvement ... retail market, especially to Lowe’s competitors.”²⁷ Green explains:

[T]he competitor could analyze the retail sales performance of the Lowe’s store and see whether it is performing at the level that the competitor would expect or desire for a store of that type in that trade area. This would reduce the risk to the competitor of opening its own store in that trade area without that retail sales information.²⁸

Although it was not submitted for this purpose, Green’s testimony confirms that gross sales information is relevant to evaluating retail locations. This, in turn, makes gross sales information relevant to determining market value.

²¹ McComb Aff. ¶ 7.

²² Declaration of Ethan Waytas ¶ 2 (Jan. 10, 2018).

²³ Waytas Decl. ¶ 9.

²⁴ Waytas Decl. ¶ 9.

²⁵ Affidavit of David Green ¶ 2 (Jan. 3, 2018).

²⁶ Green Aff. ¶ 8.

²⁷ Green Aff. ¶ 8.

²⁸ Green Aff. ¶ 8(c).

1. Location Adjustments

The County argues that “comparative information is directly relevant to location adjustments to be made by [the] County’s appraiser.”²⁹ We agree. Mr. Waytas avers that “gross sales information ... can be used to provide a preliminary ranking of location.”³⁰ We have previously held that revenue estimates can be used to support location adjustments. *Am. Multi-Cinema, Inc. v. Cty. of Hennepin*, No. 27-CV-12-8506, 2016 WL 1555490, at *15 (Minn. T.C. Apr. 13, 2016) (“In making her location adjustments, Ms. Anderson considered both the likely revenue that would be devoted to movie attendance within a comparable property’s trade area and—by specifying the number of screens within that trade area—the revenue that each screen in the trade area could be expected to capture.”).

2. External Obsolescence

Next, the County argues that gross sales information is “relevant to rebut claims of ... external obsolescence.”³¹ Again we agree. We have previously recognized that reduced retail sales can be a reflection of external obsolescence. *Menard*, 2015 WL 5944893, at *17. Commenting on an appraiser’s use of two former Lowe’s stores to compute overall depreciation for a separate retail property, we noted in *Menard*: “The fact that Lowe’s closed the stores for ‘insufficient sales,’ however, indicates that depreciation at these stores may well be attributable to external obsolescence not shared by the subject property.” *Id.*

²⁹ Mem. Law Supp. Resp’t’s Mot. Compel Disc. & Other Relief 1.

³⁰ Waytas Decl. ¶ 9.

³¹ Reply Memorandum of Law in Support of Respondent’s Motion to Compel Discovery and Memorandum in Opposition to Motion for Protective Order 15 (filed Jan. 10, 2018).

B. Market Rent

Finally, the County contends that “gross sales can be used as part of an income analysis,” for estimating market rent.³² Mr. Waytas states that “gross sales information can be used as support for the market rent conclusion by comparing typical industry standard ratios of rent to gross sales for other commercial stores. The result ... indicates if the market rent could be supported with store sales.”³³ Again we agree.

Minnesota law has long recognized that gross sales information is an input for the percentage-of-retail-sales technique for estimating market rent under the income capitalization approach to value. *See Montgomery Ward & Co. v. Cty. of Hennepin*, 450 N.W.2d 299, 303 (Minn. 1990); *see also J.C. Penney Properties, Inc. v. Cty. of Hennepin*, No. 27-CV-10-07609 & 27-CV-11-08714, 2013 WL 6043899, at *2 (Minn. T.C. Aug. 21, 2013) (collecting cases). Although this method of computing market rent is not favored, *see, e.g., Am. Multi-Cinema*, 2016 WL 1555490, at *4-5, it is permitted so long as certain foundational elements can be established. *Id*; *see also Macy’s Retail Holdings, Inc. v. Cty. of Hennepin*, No. 27-CV-09-15221 et al., 2014 WL 5823033, at *16 (Minn. T.C. Nov. 6, 2014) (concluding that foundational elements were not satisfied), *amended*, 2015 WL 653381 (Minn. T.C. Feb. 13, 2015). At this early stage of the case, we are concerned with discoverability, not whether a party will ultimately be able to satisfy foundational requirements. Gross sales information is discoverable with respect to the market rent of a retail property.

³² Reply Mem. Law Supp. Resp’t’s Mot. Compel Disc. & Mem. Opp’n Mot. Protective Order 15.

³³ Waytas Decl. ¶ 8.

C. Gross Sales Information Subject to Protection

Although we deny Lowe's request for a protective order "permitting [Lowe's] to withhold the retail sales data,"³⁴ we credit Mr. Green's unchallenged testimony indicating that Lowe's considers the requested gross sales information "to be market-sensitive, highly proprietary and confidential trade secrets,"³⁵ and that its disclosure "would significantly and materially harm Lowe's by giving its competitors and unfair competitive advantage."³⁶ Accordingly, pursuant to Minn. R. Civ. P. 26.03, we order that the County shall not disclose gross sales information for Lowe's stores to third parties except as specified in a protective order also filed today.

B.S.D.

³⁴ Pet'r's Mem. Supp. Mot. Protective Order & Opp'n Resp't's Mot. Compel 21.

³⁵ Green Aff. ¶ 4.

³⁶ Green Aff. ¶ 8.