

1 **NOAS**

2 MATTHEW J. RASHBROOK

3 Nevada State Bar No. 12477

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11 *Attorneys for Petitioner*

12 *The Nevada Independent*

13 **EIGHTH JUDICIAL DISTRICT COURT**

14 **LAS VEGAS, NEVADA**

15 THE NEVADA INDEPENDENT,

Case No.: A-19-799939-W

16 Petitioner,

Dept. No.: XIV

17 vs.

18 RICHARD WHITLEY, in his official
19 capacity as the Director of the Nevada
20 Department of Health and Human Services,
21 and THE STATE OF NEVADA, ex rel. the
22 NEVADA DEPARTMENT OF HEALTH
23 AND HUMAN SERVICES;

NOTICE OF APPEAL

24 Respondents.

25 Notice is hereby given that The Nevada Independent, Petitioner above-named,
26 hereby appeals to the Supreme Court of Nevada from the final judgment entered in this

27 ///

28 ///

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///

1 action on the 4th day of September, 2020.

2 DATED this 22nd day of September, 2020.

3
4 /s/ Matthew J. Rashbrook

5 MATTHEW J. RASHBROOK

6 Nevada State Bar No. 12477

7 ROBERT L. LANGFORD, ESQ.

8 Nevada State Bar No. 3988

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16 *Attorneys for Petitioner*

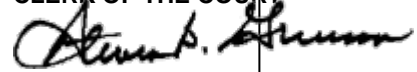
17 *The Nevada Independent*

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EIGHTH JUDICIAL DISTRICT COURT
LAS VEGAS, NEVADA

THE NEVADA INDEPENDENT,

Petitioner,

vs.

RICHARD WHITLEY, in his official
capacity as the Director of the Nevada
Department of Health and Human Services,
and THE STATE OF NEVADA, ex rel. the
NEVADA DEPARTMENT OF HEALTH
AND HUMAN SERVICES;

Respondents.

Case No.: A-19-799939-W

Dept. No.: XIV

CASE APPEAL STATEMENT

COMES NOW Petitioner, The Nevada Independent, by and through its attorneys,
Matthew J. Rashbrook, and Robert L. Langford, Esq., and, pursuant to Nev. R. App. P.
3(f), hereby files this Case Appeal Statement:

1. **Appellant filing this case appeal statement:** The Nevada Independent.
2. **Judge issuing the decision, judgment, or order appealed from:** the
Honorable Adriana Escobar.

1 3. **Identify each appellant and the name and address of counsel for each**
2 **appellant:**

3 MATTHEW J. RASHBROOK
4 Nevada State Bar No. 12477
5 ROBERT L. LANGFORD, ESQ.
6 Nevada State Bar No. 3988
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10 (702) 471-6565
11 matt@robertlangford.com
12 robert@robertlangford.com
13 Attorneys for Petitioner The Nevada Independent

14 4. **Identify each respondent and the name and address of counsel for each**
15 **appellant:**

16 Aaron D. Ford
17 Nevada Attorney General
18 Nevada Bar No. 7704
19 Steve Shevorski
20 Chief Deputy Attorney General
21 Nevada Bar No. 8256
22 555 E. Washington Ave., Ste. 3900
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24 Fax: 702-486-3768
25 sshevorski@ag.nv.gov
26 Attorneys for Respondent Richard Whitley and The State of Nevada

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Attorneys for Intervenor/Respondent Sanofi-Aventis U.S. LLC

5. **Indicate whether any attorney identified above in 3 or 4 is not licensed to practice in Nevada:**

All attorneys indicated above are licensed to practice in Nevada.

6. **Whether appellant was represented by appointed or retained counsel in the district court:** Appellant was represented by retained counsel in the District Court.

7. **Whether appellant is represented by appointed or retained counsel on appeal:** Appellant is represented by retained counsel on appeal.

8. **Whether appellant was granted leave to proceed in forma pauperis and the date of entry of the district court order granting such leave:** Appellant was not granted such leave.

9. **Date proceedings commenced in the district court:** August 8, 2019.

10. **Provide a brief description of the nature of the action and result in the district court:** Appellants sought production of public records relating to certain diabetes medications within the possession of Respondents by a Petition for Writ of Mandamus, seeking enforcement of the Nevada Public Records Act. Respondents and Intervenor contended that the records should not be produced. The Petition was denied.

11. **Has the case previously been the subject of an appeal to, or original proceedings in the Supreme Court:** No.

12. **Does the case involve child custody or visitation:** No.

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13. **Is there a possibility of settlement of this matter:** No.

DATED this 22nd day of September, 2020.

/s/ Matthew J. Rashbrook
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CASE SUMMARY

CASE NO. A-19-799939-W

Nevada Independent, Plaintiff(s)
vs.
Richard Whitley, Defendant(s)

§
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§
§
§

Location: **Department 14**
Judicial Officer: **Escobar, Adriana**
Filed on: **08/08/2019**
Cross-Reference Case Number: **A799939**

CASE INFORMATION

Case Type: **Writ of Mandamus**

Case Status: **08/08/2019 Open**

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number A-19-799939-W
Court Department 14
Date Assigned 08/08/2019
Judicial Officer Escobar, Adriana

PARTY INFORMATION


Plaintiff	Nevada Independent	<i>Lead Attorneys</i>
		Rashbrook, Matthew J. <i>Retained</i> 702-728-5300(W)
Defendant	State of Nevada - Dept of Health and Human Services	Shevorski, Steven G. <i>Retained</i> 702-634-5000(W)
	Whitley, Richard	Ford, Aaron D. <i>Retained</i> 775-684-1100(W)
Intervenor	Sanofi-Aventis U.S. LLC	Bailey, John R <i>Retained</i> 702-562-8820(W)
Other	Culinary Workers Union Local 226	More, Paul L. <i>Retained</i> 702-386-5107(W)


DATE


EVENTS & ORDERS OF THE COURT

INDEX




EVENTS

08/08/2019  Petition for Writ of Mandamus
Filed by: Plaintiff Nevada Independent
Petition for Writ of Mandamus















08/08/2019  Initial Appearance Fee Disclosure
Filed By: Plaintiff Nevada Independent
Initial Appearance Fee Disclosure

08/08/2019  Appendix
Filed By: Plaintiff Nevada Independent
Appendix to Petition for Writ of Mandamus

CASE SUMMARY
CASE NO. A-19-799939-W

08/09/2019	 Clerk's Notice of Hearing <i>Notice of Hearing</i>
08/27/2019	 Order Setting Hearing <i>Order Setting Hearing RE: Petition for Judicial Review</i>
10/15/2019	 Supplemental Brief Filed By: Plaintiff Nevada Independent <i>Supplemental Brief in Support of Petition for Writ of Mandamus</i>
10/17/2019	 Opposition Filed By: Defendant Whitley, Richard; Defendant State of Nevada - Dept of Health and Human Services <i>Opposition to The Nevada Independent's Petition for Writ of Mandamus and Motion to Dismiss</i>
10/21/2019	 Initial Appearance Fee Disclosure <i>Initial Appearance Fee Disclosure (NRS Chapter 19)</i>
10/21/2019	 Disclosure Statement Party: Intervenor Sanofi-Aventis U.S. LLC <i>NRCP 7.1 Disclosure Statement</i>
10/21/2019	 Motion to Intervene Party: Intervenor Sanofi-Aventis U.S. LLC <i>Motion to Intervene and Continue Hearing, on Shortened Time</i>
10/31/2019	 Opposition to Motion Filed By: Plaintiff Nevada Independent <i>Petitioner's Opposition to Sanofi-Aventis U.S. LLC's Motion to Intervene and to Continue Hearing</i>
11/01/2019	 Reply in Support Filed By: Intervenor Sanofi-Aventis U.S. LLC <i>Sanofi-Aventis U.S. LLC's Reply in Support of Motion to Intervene</i>
11/11/2019	 Errata Filed By: Plaintiff Nevada Independent <i>Errata</i>
11/21/2019	 Supplemental Brief Filed By: Intervenor Sanofi-Aventis U.S. LLC <i>Sanofi-Aventis U.S. LLC's Supplemental Brief in Support of Its Motion to Intervene</i>
12/03/2019	 Transcript of Proceedings <i>A799939 11-5-19 NEVADA INDEPENDENT VS RICHARD WHITLEY MTN TO INTERVENE TRANSCRIPT</i>
12/05/2019	 Supplemental Brief Filed By: Plaintiff Nevada Independent <i>Supplemental Brief in Opposition to Motion to Intervene and Reply to Proposed Response</i>
12/23/2019	 Order <i>Order Granting Sanofi-Aventis U.S. LLC's Motion to Intervene</i>

CASE SUMMARY
CASE NO. A-19-799939-W

12/23/2019	 Response Filed by: Intervenor Sanofi-Aventis U.S. LLC <i>Intervenor Sanofi-Aventis U.S. LLC's Response to Petitioner's Petition for a Writ of Mandamus</i>
01/03/2020	 Reply Filed by: Plaintiff Nevada Independent <i>Reply to Intervenor's Response</i>
01/17/2020	 List of Witnesses Filed By: Plaintiff Nevada Independent <i>Petitioner The Nevada Independent's Witness List</i>
01/17/2020	 Designation of Witness Filed By: Intervenor Sanofi-Aventis U.S. LLC <i>Sanofi-Aventis U.S. LLC's Disclosure of Witnesses</i>
01/17/2020	 Disclosure Statement Party: Defendant Whitley, Richard; Defendant State of Nevada - Dept of Health and Human Services <i>Respondents' Disclosure of Witnesses</i>
01/23/2020	 Reply in Support Filed By: Defendant Whitley, Richard; Defendant State of Nevada - Dept of Health and Human Services <i>Reply in Support of Motion to Dismiss</i>
01/30/2020	 Motion Filed By: Plaintiff Nevada Independent <i>Motion to Compel Testimony of James Borneman, Or In The Alternative, to Strike His Declaration</i>
01/31/2020	 Clerk's Notice of Nonconforming Document <i>Clerk's Notice of Nonconforming Document</i>
02/03/2020	 Opposition to Motion to Compel Filed By: Intervenor Sanofi-Aventis U.S. LLC <i>Sanofi's Opposition to Petitioner's Motion to Compel Testimony of James Borneman, or in the Alternative, to Strike His Declaration</i>
02/06/2020	 Clerk's Notice of Nonconforming Document and Curative Action <i>Clerk's Notice of Curative Action</i>
02/06/2020	 Clerk's Notice of Hearing <i>Notice of Hearing</i>
02/13/2020	 Motion for Leave to File Party: Other Culinary Workers Union Local 226 <i>Motion for Leave to File Brief Amicus Curiae</i>
02/14/2020	 Clerk's Notice of Nonconforming Document <i>Clerk's Notice of Nonconforming Document</i>
02/14/2020	 Non Opposition

CASE SUMMARY
CASE NO. A-19-799939-W

Filed By: Defendant State of Nevada - Dept of Health and Human Services
Notice of Non-Opposition to Culinary Union's Motion for Leave to File an Amicus Brief

02/14/2020



Notice of Non Opposition

Filed By: Plaintiff Nevada Independent
Notice of Non-Opposition

02/18/2020



Amended Certificate of Mailing

Filed By: Defendant Whitley, Richard; Defendant State of Nevada - Dept of Health and Human Services
Amended Certificate of Service to the Notice of Non-Opposition to Culinary Union's Motion for Leave To File An Amicus Brief

02/18/2020



Amended Certificate of Service

Party: Defendant Whitley, Richard; Defendant State of Nevada - Dept of Health and Human Services
Amended Certificate of Service

02/18/2020



Amended Certificate of Service

Party: Defendant Whitley, Richard; Defendant State of Nevada - Dept of Health and Human Services
Amended Certificate of Service

02/27/2020



Transcript of Proceedings

A799939 11-5-19 NEVADA INDEPENDENT VS RICHARD WHITLEY MTN TO INTERVENE TRANSCRIPT

02/27/2020



Transcript of Proceedings

Transcript of Proceedings Petition for Writ of Mandamus Motion to Compel Testimony of James Borneman, or in the Alternative, to Strike His Declaration 2/4/20

09/04/2020



Order Denying

Order Denying Petition for Writ of Mandamus

09/09/2020



Notice of Entry of Order

Filed By: Defendant Whitley, Richard; Defendant State of Nevada - Dept of Health and Human Services
Notice of Entry of Order

09/22/2020



Notice of Appeal

Filed By: Plaintiff Nevada Independent
Notice of Appeal

09/22/2020



Case Appeal Statement

Filed By: Plaintiff Nevada Independent
Case Appeal Statement

HEARINGS

11/05/2019



Motion to Intervene (9:30 AM) (Judicial Officer: Escobar, Adriana)

Motion to Intervene and to Continue Hearing, on Shortened Time

Matter Continued;

Minute order posted 12/16/19

Journal Entry Details:

Mr. Bailey stated that the information the petitioner is seeking contains trade secrets. Although the state is able to articulate the basis for not disclosing the information, they don't have personal knowledge of the irreparable harm to his client, should the trade secrets become

CASE SUMMARY

CASE NO. A-19-799939-W

public. Opposition by Mr. Rashbrook. Further arguments regarding the four prongs of the American Home Assurance case. COURT ORDERED, matter CONTINUED for further briefing. CONTINUED TO: 11/19/19 9:30 AM CLERK'S NOTE: The above minute order modified to reflect that the matter was continued and not taken under advisement. 11/7/19 //dh;

11/14/2019



Minute Order (8:30 AM) (Judicial Officer: Escobar, Adriana)

Briefing Schedule Set; Regarding Further Briefing and Continuance

Journal Entry Details:

Sanofi-Aventis U.S. LLC s (Sanofi) Motion to Intervene (Motion) came on for hearing before Department XIV of the Eighth Judicial District Court, the Honorable Adriana Escobar presiding, on November 5, 2019. Attorney Matthew J. Rashbrook appeared on behalf of Petitioner Nevada Independent (Petitioner). Attorney John R. Bailey appeared on behalf of Potential Intervenor Sanofi-Aventis U.S., LLC (Sanofi). After reviewing the pleadings and hearing the arguments regarding Sanofi s Motion to Intervene, the Court hereby CONTINUES the Hearing on Petitioner s Writ of Mandamus to Tuesday, December 17, 2019, and ORDERS supplemental briefing as discussed herein under Inadequate Representation from Current Respondent. Legal Standard The Nevada Supreme Court has held that the moving party must meet four requirements to intervene pursuant to NRCP 24(a)(2) (2019): 1. That it has a sufficient interest in the litigation s subject matter. 2. That it could suffer an impairment of its ability to protect that interest if it does not intervene. 3. That its interest is not adequately represented by existing parties. 4. That its application is timely. Am. Home Assur. Co. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark, 122 Nev. 1229, 1238 (2006). Determining whether an applicant has met these four requirements is within the district court s discretion. Id. Inadequate Representation from Current Respondent The third element Sanofi must establish to intervene and the nexus of the Court s request for supplemental briefing is that its interest is not adequately represented by the state. Am. Home Assur. Co., 122 Nev. at 1238. Sanofi argues that the State cannot adequately represent its interest because the State cannot fully detail the steps Sanofi takes to maintain and protect its trade secrets and confidential information, cannot fully and adequately describe the irreparable harm, and cannot sufficiently describe the prejudice Sanofi would suffer if the Court issues the writ. The Court requires more detailed information regarding Sanofi s arguments. It is therefore ORDERED that Sanofi and the parties submit supplemental briefs addressing the following questions: 1) Sanofi argues that the State cannot fully detail the steps Sanofi takes to maintain and protect its trade secrets and confidential information. However, Sanofi has already provided such information to the Department in support of its successful effort to convince the Department to keep the contents of its annual reports confidential. Intervenor s Response to Petitioner s Petition for a Writ of Habeas Corpus 8-9. Based in part on this information, the Department denied the records request. a. Is the information already disclosed by Sanofi to the Department regarding the steps it takes to maintain the confidentiality of its trade secrets and confidential information insufficient? Why? b. Can any such inadequacy be remedied by Sanofi augmenting the information it has already submitted to the Department? Why? 2) Similarly, Sanofi argues that the State cannot fully and adequately describe the irreparable harm and prejudice Sanofi would suffer if the Court issues the writ. However, Sanofi has already provided the Department with information about the harm it would suffer if its annual reports are disclosed. Intervenor s Resp. 10:7. a. Is the information already disclosed by Sanofi to the Department regarding the harm it may suffer from disclosure adequate? Why? b. Can any inadequacy be remedied by Sanofi augmenting the information it has already submitted to the Department? Why? 3) Sanofi s argument, which focuses on the information available to the State, overlooks important considerations in determining whether Sanofi s interests can be adequately represented by the State. The State s ability to represent Sanofi s interests does not necessarily mean their respective interests are and will continue to be aligned. Accordingly, Sanofi and the parties should brief the following: a. Are the interests of Sanofi and the State aligned? b. How and to what extent should the Court consider the potential for the interests of the State and Sanofi to diverge in determining whether the State can adequately represent Sanofi s interests? Briefing Schedule Sanofi must file supplemental briefing on the above by Thursday, November 21, 2019. Petitioner must submit supplemental briefing in response to Sanofi s supplemental briefing by Thursday, December 5, 2019. That supplemental briefing should also address the arguments Sanofi makes regarding confidentiality and trade secrets in its Response to the Writ. See Motion to Intervene, Ex. 1. Thus, the Court hereby CONTINUES the hearing on Petitioner s Petition for Writ of Mandamus and Motion to Intervene to Tuesday, December 17, 2019 at 9:30 am. CLERK'S NOTE: Counsel notified via e-mail: Matthew Rashbrook (matt@nvlitigation.com) John Bailey (jbailey@baileykennedy.com) Robert Langford (robert@robertlangford.com);

CASE SUMMARY

CASE NO. A-19-799939-W

12/16/2019

**Minute Order** (10:30 AM) (Judicial Officer: Escobar, Adriana)

Granted; Proposed Intervenor Sanofi-Aventis U.S. LLC's Motion to Intervene

Journal Entry Details:

Proposed Intervenor Sanofi-Aventis U.S. LLC s (Sanofi) Motion to Intervene (Motion) came on for hearing before Department XIV of the Eighth Judicial District Court, the Honorable Adriana Escobar presiding, on November 5, 2019. Attorneys Robert Langford and Matthew J. Rashbrook appeared on behalf of Petitioner Nevada Independent (Petitioner). Attorney John R. Bailey appeared on behalf of Sanofi. Steven Shevorski appeared on behalf of the State of Nevada Department of Health and Human Services (the State or the Department). After considering the moving papers and arguments of counsel, the Court requested supplemental briefing, which Sanofi and Petitioner provided. After considering the moving papers, arguments of counsel, and supplemental briefing, the Court enters the following order


GRANTING Sanofi s Motion: NRCP 24(a) Nevada requires a party show the following to intervene as a matter of right, pursuant to NRCP 24(a): (1) That it has a sufficient interest in the litigation's subject matter (2) That it could suffer an impairment of its ability to protect that interest if it does not intervene, (3) That its interest is not adequately represented by existing parties, and (4) That its application is timely. Am. Home Assur. Co. v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 122 Nev. 1229, 1238 (2006). Determining whether an applicant has met these four requirements is within the district court's discretion. Id. The very purpose of intervention is to permit the parties to protect their own interests when it might otherwise cause irreparable harm to permit the litigation to go forward [without the intervenor]. United States v. City of Detroit, 712 F.3d 925, 944 (6th Cir. 2013). Here, Sanofi meets all requirements to allow it to intervene as a matter of right in this case on a Writ of Mandamus (Writ): I. Sufficient Interest The resolution of Petitioner s claims will actually affect Sanofi s interests. S. Cal. Edison Co. v. Lynch, 307 F.3d 794, 803 (9th Cir.). Petitioner seeks disclosure of Sanofi s annual reports, which includes information about producing, manufacturing, marketing, and selling its drugs. While a trade secret defense does not excuse Sanofi from disclosing its report to the Department, it does apply to third parties. This information is so confidential that Sanofi protects it even internally within the company. II. Irreparable Harm Sanofi argues that competitors would gain unfair competitive advantage by learning its business strategies and tactics. Further, Consumers would gain an unfair advantage and use this information in negotiations with insurers and other parties in the healthcare system. Additionally, Sanofi contends that requiring disclosure here would affect its negotiations all over the nation. Petitioner argues that Sanofi s reports cannot qualify as having trade secrets because NRS 600A.030(5)(b) expressly de-categorizes information within these disclosures as a trade secret, and NRS 600A preempts NAC 439.735. However, Petitioner only cites to cases that predate the statutes and administrative codes in question, and the Legislative intent points to a different interpretation. Division of Ins., 116 Nev. 290, 293 (2000); Roberts, 104 Nev. 33, 37 (1988). To illustrate, page four (4) of the Approved Regulation of the Department of Health and Human Services document LCB File No. R042-18 (R042-18) explains that when the Department decides on whether the public disclosure of information would constitute misappropriation of a trade secret under federal Defend Trade Secrets Act (DTSA), it may consider the trade secrets definition under Exemption 4 of Freedom of Information Act (FOIA), which 18 U.S.C. 1839 covers. Additionally, the Supremacy Clause of the U.S. Constitution explains that when state and federal law conflict, federal law preempts state law. U.S. Const. art. VI, cl. 2. Here, NRS 600A.030(5)(b) conflicts with 18 U.S.C. 1839 by expressly de-categorizing information within these disclosures as a trade secret. Thus, 18 U.S.C. 1839 preempts 600A.030(5)(b), to the extent it conflicts. Taking all of these facts collectively, the Court finds that Sanofi sufficiently showed irreparable harm could result if the Court does not allow it to intervene. III. Inadequate Representation Sanofi explains that while the State can adequately represent the confidentiality issues generally the State cannot fully detail the steps Sanofi takes to maintain and protect its trade secrets and confidential information; nor can the State adequately articulate the irreparable harm and prejudice Sanofi will suffer if the Court grants Petitioner s Writ. Sanofi explains that the State has generalized knowledge of Sanofi s safeguards for its confidential information. To the extent that the Court might have questions that go beyond the information already provided, if permitted to intervene Sanofi can respond to the Court directly at that time. Moreover, Sanofi avers that the State does not have the same vested interest in protecting Sanofi s trade secrets from public disclosure or in protecting Sanofi from irreparable harm. The Department s main role is to protect and promote the health and safety of Nevada residents not to ensure that Sanofi is able to competitively develop, market, and sell pharmaceuticals and healthcare solutions in the global market. Sanofi claims that only it can fully protect its trade secrets from public disclosure and prevent harm to its competitive position. R042-18 also touches on this issue. Page four (4) of R042-18 explains that an implicated entity whose interests could be impacted by disclosures may file a motion to intervene on the matter. The Court concludes that these facts show that the State cannot adequately represent Sanofi s individual interests. IV. Timeliness Sanofi s Motion is timely


CASE SUMMARY

CASE NO. A-19-799939-W

under NRCP 24 since it was filed prior to trial, and will not cause Petitioner prejudice. Rather, Sanofi would be prejudiced if it is not allowed to intervene and represent its interests. The Court finds that Sanofi timely filed its Motion. Conclusion Petitioner failed to present argument to sufficiently overcome the arguments for each NRCP 24(a) element that Sanofi provides. NRCP 24(b) Sanofi also satisfies the requirements for the Court to discretionarily grant its intervention, pursuant to NRCP 24(b). The public records request at issue in Petitioner s Writ seeks trade secrets and other confidential information from Sanofi. Thus, adverse effects or irreparable harm could impact Sanofi through the decision on this matter. Costs and Attorney s Fees Issue Petitioner contends that Sanofi should not be permitted to intervene because Sanofi s participation will cause the Petitioner to incur additional costs and attorney s fees that it will not be able to recover should it prevail in this action. Opp n. at 7:21-8:14. However, neither NRS 12.130 nor NRCP 24 provides exceptions that would bar a third party from intervening in an action because there is no mechanism for a petitioner to recover its costs and fees should the petitioner prevail. The Court finds that Petitioner s argument on this point not persuasive in determining whether to allow Sanofi to intervene in this matter. Conclusion Based on the foregoing, the Court GRANTS Sanofi s Motion to Intervene. To allow all parties additional time to brief the issues in the Writ, and to disclose any witnesses, the Court hereby continues the hearing on the Writ to January 31, 2020 at 10:00 am. The final day for supplemental briefing from all parties will be January 3, 2020. The final day to disclose any witnesses will be January 17, 2020. The Court will issue an order granting the same. CLERK'S NOTE: This minute order was electronically served by Courtroom Clerk, Denise Husted, to all registered parties for Odyssey File and Serve. 12/16/19 //dh;

01/31/2020 **CANCELED Petition for Writ of Mandamus (10:00 AM)** (Judicial Officer: Escobar, Adriana)
Vacated

02/04/2020  **Motion to Compel (1:30 PM)** (Judicial Officer: Escobar, Adriana)
Denied;
Journal Entry Details:
Following arguments by counsel, COURT ORDERED, a minute order will be issued.;

02/14/2020  **Minute Order (4:08 PM)** (Judicial Officer: Escobar, Adriana)
Minute Order Re: Motion to Compel
Minute Order - No Hearing Held;
Journal Entry Details:

Petitioner The Nevada Independent s (Petitioner) Motion to Compel Testimony of James Borneman, or In The Alternative, to Strike His Declaration, which Intervenor Sanofi Aventis U.S. LLC (Sanofi) opposed, came on for hearing on February 4, 2020 before Department XIV of the Eighth Judicial District Court, the Honorable Adriana Escobar presiding. Attorney Matthew J. Rashbrook appeared on behalf of Petitioner. Attorney John R. Bailey, Sarah Harmon, and Rebecca Crooker appeared on behalf of Sanofi. Attorney Steven Shevorski appeared on behalf of Respondent the State of Nevada Department of Health and Human Services (Respondent). After considering the moving papers and arguments of counsel, the Court enters the following order: As Petitioner cites, Rule 2.21(c) of the Eighth Judicial District Court Rules (EDCR) explains that [a]ffidavits/declarations must contain only factual, evidentiary matter, conform with the requirements of N.R.C.P. 56(e), and avoid mere general conclusions or argument. Affidavits/declarations substantially defective in these respects may be stricken, wholly or in part. Rule 56(e) of the Nevada Rules of Civil Procedure (NRCP) states as follows: If a party fails to properly support an assertion of fact or fails to properly address another party s assertion of fact as required by Rule 56(c), the court may: (1) give an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if the motion and supporting materials including the facts considered undisputed show that the movant is entitled to it; or (4) issue any other appropriate order. NRCP 56(c) states that [a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. Here, the Court concludes Mr. Boreman s declaration is not based solely on his personal knowledge. However, the Court, under the clear discretion allowed under NRCP 56 (e), will consider all pleadings and supporting documents in the context of the Petition for Writ of Mandamus (Petition) as a whole. Thus, the entire record will receive the weight of credibility it is due for the Court to decide on the Petition. Moreover, the Court does not find reasonable grounds to compel Mr. Borneman an affiant to Sanofi s Reponses to the Petition to testify, as Respondent, rather than Sanofi, bears the burden of proof in the underlying Petition. Based on the foregoing, the court DENIES Petitioner s Motion. The Court will issue its own

CASE SUMMARY

CASE NO. A-19-799939-W

order denying the same. CLERK'S NOTE: The above minute order has been distributed to: Robert L Langford robert@robertlangford.com Matthew J Rashbrook Matt@robertlangford.com Mary J. Pizzariello mpizzariello@ag.nv.gov Traci A. Plotnick tplotnick@ag.nv.gov Katherine Reed KReed@ag.nv.gov Steven G. Shevorski sshevorski@ag.nv.gov John R. Bailey jbailey@baileykennedy.com Sarah E. Harmon sharmon@baileykennedy.com Dennis L. Kennedy dkennedy@baileykennedy.com Bailey Kennedy, LLP bkfederaldownloads@baileykennedy.com ;

02/21/2020



Petition for Writ of Mandamus (1:30 PM) (Judicial Officer: Escobar, Adriana)

Decision Made;

Journal Entry Details:

Following arguments by counsel, *COURT ORDERED*, a minute order will be issued.;

03/19/2020

CANCELED Motion to Compel (9:30 AM) (Judicial Officer: Escobar, Adriana)

Vacated

Petitioner's Motion to Compel Testimony of James Borneman, Or In The Alternative, to Strike His Declaration

04/21/2020



Minute Order (7:00 PM) (Judicial Officer: Escobar, Adriana)

Petition for Writ of Mandamus

Denied;

Journal Entry Details:

Petitioner The Nevada Independent s (Petitioner) Petition for Writ of Mandamus (Petition), was opposed by Respondents Richard Whitley in his official capacity for the Nevada Department of Health and Human Services (the Department) (collectively, Respondents), as well as Intervenor Sanofi Aventis U.S. LLC (Sanofi), came on for hearing on February 21, 2020 before Department XIV of the Eighth Judicial District Court, the Honorable Adriana Escobar presiding, Attorney Matthew J. Rashbrook appeared on behalf of Petitioner, Attorney Steven Shevorski appeared on behalf of Respondents, Attorneys John R. Bailey and Sarah Harmon appeared on behalf of Sanofi. After considering the moving papers and arguments of counsel, the Court enters the following order: Regulations created by the Department are presumed valid. NRS 233B.090; see also Montage Marketing, LLC v. Washoe County ex rel. Washoe County Bd. of Equalization, 134 Nev. 294, 300 (2018). To develop procedural avenues to protect information required as disclosures under Nevada Revised Statute (NRS) NRS 439B.635 or 439B.640, the Department developed Nevada Administrative Code 439. If the Department receives a request for public records pursuant to NRS 239.010 seeking disclosure of any information for which a manufacturer or pharmacy benefit manager has submitted a request for confidentiality pursuant to subsection 1, the Department will, after notifying the manufacturer or pharmacy benefit manager: Undertake an initial review to determine whether the Department reasonably believes that public disclosure of the information would constitute misappropriation of a trade secret for which a court may award relief pursuant to the federal Defend Trade Secrets Act (DTSA) of 2016, 18 U.S.C. 1836, as amended. In undertaking its initial review, the Department will consider, as persuasive authority, the interpretation and application given to the term trade secrets in Exemption 4 of the federal Freedom of Information Act, 5 U.S.C. 552(b)(4), as amended. NAC 439.735(3). If, after undertaking its initial review pursuant to subsection 3, the Department reasonably believes that public disclosure of the information would constitute misappropriation of a trade secret for which a court may award relief pursuant to the federal Defend Trade Secrets Act of 2016, 18 U.S.C. 1836, as amended, the Department will provide the requester of the public records with written notice that the Department must deny the request for public records on the basis that the information is confidential pursuant to the federal Defend Trade Secrets Act of 2016, 18 U.S.C. 1836, as amended. NAC 439.735(4). Pursuant to NRS 600A.030(5), the trade secret definition [d]oes not include any information that a manufacturer is required to report pursuant to NRS 439B.635 or 439B.640, information that a pharmaceutical sales representative is required to report pursuant to NRS 439B.660 or information that a pharmacy benefit manager is required to report pursuant to NRS 439B.645, to the extent that such information is required to be disclosed by those sections. However, the federal Defend Trade Secrets Act of 2016, 18 U.S.C. 1836 (DTSA), which Nevada Arbitration Code (NAC) 439.735(1) codifies as a Nevada law protection, provides an express protection for information otherwise required to be disclosed under NRS 439B: In complying with NRS 439B.635, 439B.640 or 439B.645, if a manufacturer or pharmacy benefit manager reasonably believes that public disclosure of information that it submits to the Department would constitute misappropriation of a trade secret for which a court may award relief pursuant to the federal Defend Trade Secrets Act of 2016, 18 U.S.C. 1836, as amended, the manufacturer or pharmacy benefit manager may submit to the

CASE SUMMARY
CASE NO. A-19-799939-W

Department a request to keep the information confidential. 18 U.S.C. 1839(3) defines trade secrets as: the term trade secret means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if the owner thereof has taken reasonable measures to keep such information secret; and the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information. If a request for inspection, copying or copies of a public book or record open to inspection and copying is denied, the requester may apply to the district court in the county in which the book or record is located for an order either permitting the requester to inspect or copy the book or record or requiring the person who has legal custody or control of the public book or record to provide a copy to the requester, as applicable. NRS 239.011(1). The Department bears the burden to prove that its interest in nondisclosure clearly outweighs the public's interest in access. Reno Newspapers, Inc. v. Gibbons, 127 Nev. 873, 880 (2011). When determining the validity of an administrative regulation, courts generally give great deference to an agency's interpretation of a statute that the agency is charged with enforcing. State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co., 116 Nev. 290, 293 (2000) Here, while Petitioner bears the burden of proving that it is entitled to this remedy, the burden is ultimately on the Department to prove, by a preponderance of the evidence, that the information it declined to provide to Petitioner was confidential. NRS 239.0113. On April 3, 2019, the Department denied, in part, Petitioner's request for certain annual reports. In said denial, the Department explained as follows: DHHS is denying disclosure of the fields not included in Appendix 2 on the basis that the information is confidential pursuant to the federal Defend Trade Secrets Act (DTSA) of 2016, 18 U.S.C. 1836, as amended. This determination is based on DHHS's review of the DTSA, and on the information provided by drug manufacturers and PBMs in the completed RFCs submitted to DHHS pursuant to NAC 439.735, Subsection 2. Please note that a copy of this letter will be sent to manufacturers and PBMs that submitted an RFC. Petition, Exhibit 2-2. On June 24, 2019, the Department denied, in part, Petitioner's follow-up request for certain annual reports, on the same grounds explained above. Petition, Exhibit 2-4. On August 8, 2019, Petitioner filed the instant Petition. Petitioner raised several chief arguments in the instant Petition. First, Petitioner argues that to the extent the agency-related regulations at issue conflict with statutory law, the regulations are invalid, that the DTSA explicitly states it does not preempt state law, and thus, NAC 439.730 740 is invalid and must be invalidated. Division of Ins. v. State Farm Mutual Ins. Co., 116 Nev. 290, 293 (2000). Petition, 11:11 15. Petition, 11:1 6. This Court disagrees. The Department in its broad discretion to implement regulations to foster efficient enforcement of codified legislation developed NAC 439.730 740, respectively, to ensure the NPRA coincided with the DTSA protections. See Case 2:17-cv-02315 at Doc. 1, p. 20. Had the Department failed to carve out these procedural protections, the courts would become inundated with cases in which the compelled disclosing parties claim they did not have the opportunity to protect their trade secrets from mass disclosures. Moreover, the confidentiality protections are not automatic. The Department notifies the entity with information implicated in the NPRA request and gives said entity 30 days to claim any confidentiality protections. The Department then analyzes the requested information through the DTSA confidentiality and trade-secret lenses to confirm whether said information should be protected. Only after this process does the Department conclude whether the information should be protected. The Court does not find grounds to find that NAC 439.730 740 is unenforceable. Next, Petitioner argues that the Legislature showed clear intent to allow the public access to these records, and the Department violated the NPRA by denying Petitioner's requests because DTSA does not apply to Petitioner's requests in a manner that would particularly place the requested reports under confidentiality protections. Petition, 12:18 24; Supplement to Petition, 5:8 7:26. The Court is not persuaded by this argument. The DTSA definition for trade secrets places these reports squarely under confidentiality protections. 18 U.S.C. 1839(3). Specifically, and as both Respondent and Intervenor highlight, these reports derive independent economic value, actual or potential, from not being generally known to, or readily ascertainable by other people who can obtain economic value from its disclosure or use and is subject to reasonable efforts to maintain its secrecy. Id. 1839(3). These efforts include significant limitations on who receives said information the Department and high-level employees privatizing the information that is shared, and submitting prompt requests to the Department to exclude said reports from disclosure based on their trade-secret qualities. Based on the foregoing, the Court concludes that the Department proved, by a preponderance of the evidence, that the denied disclosures have confidentiality protections pursuant to the DTSA. Thus, the Court DENIES Petitioner's Petition. Counsel for Respondents to prepare an order including findings of fact and conclusions of law, to be reviewed by counsel for Petitioner as to form and content. The order is to be submitted to Chambers in Microsoft word

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-19-799939-W

format by email to dept14lc@clarkcountycourts.us, and to Diana Powell at PowellD@clarkcountycourts.us. CLERK'S NOTE: Counsel notified via email: Matthew Rashbrook (matt@nvlitigation.com) Steven Sherovski (steven.sherovski@akerman.com) John Bailey (jbailey@baileykennedy.com) ;

DATE

FINANCIAL INFORMATION

Plaintiff Nevada Independent

Total Charges

294.00

Total Payments and Credits

24.00

Balance Due as of 9/23/2020

270.00

DISTRICT COURT CIVIL COVER SHEET

County, Nevada

Case No. _____

(Assigned by Clerk's Office)

I. Party Information *(provide both home and mailing addresses if different)*

Plaintiff(s) (name/address/phone): The Nevada Independent 7455 Arroyo Crossing Parkway Suite 220 Las Vegas, NV 89113	Defendant(s) (name/address/phone): Richard Whitley, Director of the Nevada Department of Health and Human Services, and The State of Nevada, ex rel. the Nevada Department of Health and Human Services
Attorney (name/address/phone): Matthew J. Rashbrook, Robert L. Langford, Esq. Robert L. Langford & Associates 616 S. 8th Street Las Vegas, NV 89101	Attorney (name/address/phone):

CASE NO: A-19-799939-W
Department 14

II. Nature of Controversy *(please select the one most applicable filing type below)*


Civil Case Filing Types

Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate <i>(select case type and estate value)</i> <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ Civil Writ <input type="checkbox"/> Writ of Habeas Corpus <input checked="" type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		Other Civil Filing Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

8/8/2019

Date


 Signature of litigating party or representative

See other side for family-related case filings.

1 **ORDR**

2 **DISTRICT COURT**

3 **CLARK COUNTY, NEVADA**

4 **THE NEVADA INDEPENDENT,**

Case No. A-19-799939-W
Dept. No. XIV

5 **Petitioner,**

6 **vs.**

7 **RICHARD WHITLEY, in his official capacity**
8 **as the Director of the Nevada Department of**
9 **Health and Human Services, and THE**
10 **STATE OF NEVADA, ex rel. the NEVADA**
11 **DEPARTMENT OF HEALTH AND HUMAN**
12 **SERVICES,**

13 **Respondents.**

14 **ORDER DENYING PETITION FOR WRIT OF MANDAMUS**

15 The Court heard argument on the Nevada Independent's (the Independent)
16 Petition for Writ of Mandamus (Petition) on February 21, 2020. Matthew J. Rashbrook
17 appeared for Petitioner; Steve Shevorski appeared for Richard Whitley as Director of the
18 Nevada Department of Health and Human Services and State of Nevada ex rel. the
19 Nevada Department of Health and Human Services (collectively, Respondents); and John
20 R. Bailey, Sarah E. Harmon, and Rebecca L. Crooker appeared for Intervenor Sanofi-
21 Aventis U.S. LLC (Sanofi). The Court, after considering the moving papers and
22 arguments of counsel, denies the Petition and enters the following findings of fact and
23 conclusions of law:

24 **I. Findings of Fact**

25 1. The Independent submitted a public records request to Respondents on
26 January 17, 2019. The Independent sought (i) the names of pharmaceutical
27 manufacturers and pharmacy benefit managers that submitted annual reports pursuant
28 to Nevada Senate Bill 539¹, (ii) annual reports submitted by 98 pharmaceutical
manufacturers, including Sanofi, and 7 pharmacy benefit managers (and any others who

¹ Nevada's legislature passed Nevada Senate Bill 539 in 2017. SB 539 was, in the main, codified as 439B. Relevant here, as explained below, SB 539 also amended NRS 600A.030(5)'s definition of a trade secret under Nevada state law.

submitted reports), and (iii) written opinions (including drafts) by the Nevada Attorney General's Office relating to SB 539's implementation in 2017.

2. Respondents responded in writing on April 3, 2019. Respondents stated that they would disclose the following information, which was contained in Appendix 2 of their letter:

1) Drug Manufacturer Essential Diabetes Drug Reports (NRS 439B.635)

- i) Drug Manufacturer Name
- ii) Nonproprietary Prescription Drug Name
- iii) Proprietary Prescription Drug Name
- iv) National Drug Code (NDC)
- v) Wholesale Acquisition Cost (WAC) Price History
- vi) Increase in WAC Unit Price
- vii) Date of Increase in WAC Price

2) Drug Manufacturer Essential Diabetes Drug Price Increase Reports (NRS 439B.640)

- i) Drug Manufacturer Name
- ii) Non-Proprietary Drug Name
- iii) Proprietary Drug Name
- iv) NDC

3) PBM Essential Diabetes Drug Reports (NRS 439B.645)

- i) A list of PBMs that submitted reports

(bold in original). Respondents did not disclose the following information from the Drug Manufacturer Essential Diabetes Drug Reports (NRS 439B.635):

- The Cost of Producing the Drug;
- Total Administrative Expenditures Relating to the Drug;
- Profit Manufacturer Earned from the Drug;
- Percentage of Manufacturer's Total Profit for the Period During Which the Manufacturer Has Marketed the Drug for Sale that Is Attributable to Drug;
- Total Amount of Financial Assistance Provided through Patient Prescription Assistance Programs;
- Cost Associated with Consumer Coupons and for Consumer Copayment Assistance Programs;
- Manufacturer Cost Attributable to Redemption of Consumer Coupons and Use of Consumer Copayment Assistance Program; and
- Aggregate of All Rebates Manufacturers Provided to Pharmacy Benefit Managers for Drug Sales in Nevada.

3. In their written response, Respondents explained that, pursuant to NAC 439.735(4), they had undertaken a review of the material requested to determine whether

Respondents reasonably believed that the disclosure of the material would constitute a misappropriation of a trade secret under the federal Defend Trade Secrets Act of 2016, 18 U.S.C. §1836, as amended (DTSA). Respondents explained that they reasonably believed the requested information was not subject to the Nevada Public Records Act (NPRa) because it was confidential pursuant to the DTSA.

4. The Independent submitted another public records request to Respondents on June 11, 2019. The Independent sought (i) the names of pharmaceutical manufacturers and pharmacy benefit managers that submitted annual reports pursuant to Nevada Senate Bill 539, (ii) annual reports submitted by 72 pharmaceutical manufacturers, including Sanofi, and 7 pharmacy benefit managers (and any others who submitted reports).

5. Respondents responded in writing on June 24, 2019. Respondents stated that they would disclose the following information, which was contained in Appendix 2 of their letter:

1) Drug Manufacturer Essential Diabetes Drug Reports (NRS 439B.635)

- i) Drug Manufacturer Name
- ii) Nonproprietary Prescription Drug Name
- iii) Proprietary Prescription Drug Name
- iv) National Drug Code (NDC)
- v) Wholesale Acquisition Cost (WAC) Price History
- vi) Increase in WAC Unit Price
- vii) Date of Increase in WAC Price

2) Drug Manufacturer Essential Diabetes Drug Price Increase Reports (NRS 439B.640)

- i) Drug Manufacturer Name
- ii) Non-Proprietary Drug Name
- iii) Proprietary Drug Name
- iv) NDC

3) PBM Essential Diabetes Drug Reports (NRS 439B.645)

- i) A list of PBMs that submitted reports

(bold in original). Respondents did not disclose the following information from the Drug Manufacturer Essential Diabetes Drug Reports (NRS 439B.635):

- The Cost of Producing the Drug;
- Total Administrative Expenditures Relating to the Drug;
- Profit Manufacturer Earned from the Drug;

Percentage of Manufacturer's Total Profit for the Period During Which the Manufacturer Has Marketed the Drug for Sale that Is Attributable to Drug;

- Total Amount of Financial Assistance Provided through Patient Prescription Assistance Programs;
- Cost Associated with Consumer Coupons and for Consumer Copayment Assistance Programs;
- Manufacturer Cost Attributable to Redemption of Consumer Coupons and Use of Consumer Copayment Assistance Program; and
- Aggregate of All Rebates Manufacturers Provided to Pharmacy Benefit Managers for Drug Sales in Nevada.

6. Similar to their earlier response noted above, Respondents explained again that, pursuant to NAC 439.735(4), they had undertaken a review of the material requested to determine whether Respondents reasonably believed that the disclosure of the material would constitute a misappropriation of a trade secret under the DTSA. Respondents explained that they reasonably believed the requested information was not subject to the NPRA, because it was confidential pursuant to the DTSA.

7. The Independent filed a petition for writ of mandamus on August 8, 2019, and Respondents opposed and moved to dismiss the Petition on October 17, 2019. After being granted leave to intervene, Sanofi opposed the Independent's petition on December 23, 2019. The Independent filed a reply in response to Sanofi's opposition on January 3, 2020. Respondents filed a reply supporting their motion to dismiss on January 23, 2020.

8. The Court set the matter for hearing on February 21, 2020. No party called fact witnesses. Counsel for the Independent, counsel for Respondents, and counsel for Sanofi presented legal argument for the Court's consideration.

II. Conclusions of Law

A. Legal Background

1. The Nevada Public Records Act starts with the general rule that "unless otherwise declared by law to be confidential, all public books and public records of a

1 governmental entity must be open at all times during office hours to inspection by any
2 person. . . .” NRS 239.010(1).

3 2. Nevada Senate Bill 539, now codified in part as Nevada Revised Statutes
4 439B, institutes certain requirements for the Nevada Department of Health and Human
5 Services (HHS or the Department), manufacturers of pharmaceuticals, and pharmacy
6 benefit managers, among others. It has four relevant parts. First, NRS 439B.630 requires
7 HHS to compile (1) a “list of prescription drugs [including insulin and biguanides] that
8 the Department determines to be essential for treating diabetes in this State”; and (2) a
9 “list of prescription drugs described in subsection 1 that have been subject to [a
10 significant price] increase in the wholesale acquisition.” Second, NRS 439B.635 requires
11 the manufacturer of a drug included on the list described by NRS 439B.630 (1)-(2), to
12 submit to HHS an annual report that contains certain information about the cost of the
13 drug. Third, NRS 439B.640 requires the manufacturer to submit a report to HHS
14 concerning the reasons for the cost increase, if any. Fourth, NRS 439B.645 requires
15 pharmacy benefit managers to report to HHS detailed information relating to the rebates
16 that they negotiated and provided.

17 3. SB 539 also amended NRS 600A.030, as follows:

18 ‘Trade secret’ . . .

19 Does not include any information that a manufacturer is
20 required to report pursuant to NRS 439B.635 or 439B.640,
21 information that a pharmaceutical sales representative is
22 required to report pursuant to NRS 439B.660 or information
23 that a pharmacy benefit manager is required to report
24 pursuant to NRS 439B.645, to the extent that such information
25 is required to be disclosed by those sections.

26 NRS 600A.030 (5)(a).

27 4. After SB 539’s passage, and as a result of the resolution in *Pharm. Research*
28 & *Mfrs. of Am. v. Sandoval*, 2:17-cv-02315-JCM-CWH, U.S. Dist. Ct. Dist. of Nev., which
29 concerned a challenge to the constitutionality of SB 539’s requirement of disclosure of
30 trade secrets to HHS, Respondents promulgated corresponding regulations, found in
31 Section 439 of the Nevada Administrative Code (NAC).

5. Pursuant to NAC 439.735, “[i]n complying with NRS 439B.635, 439B.640 or 439B.645, if a manufacturer or pharmacy benefit manager reasonably believes that public disclosure of information that it submits to the Department would constitute misappropriation of a trade secret for which a court may award relief pursuant to the federal Defend Trade Secrets Act of 2016, 18 U.S.C. § 1836 (DTSA), as amended, the manufacturer or pharmacy benefit manager may submit to the Department a request to keep the information confidential.” NAC 439.735(1). If the Department is faced with a public records request, it then must determine if it agrees with this assessment. NAC 439.735(3). If it agrees that the information requested is confidential, it must deny the public records request. NAC 439.735(4). If the Department does not agree, then it provides the affected entity at least 30-days’ notice and allows the entity to go to court to defend its alleged trade secrets. NAC 439.735(5).

The Defend Trade Secrets Act, 18 U.S.C. 1839(3) defines “trade secrets” as:

all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if the owner thereof has taken reasonable measures to keep such information secret; and the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

6. Thus, while public policy calls for transparency under NRS 239.010(1), the legislature made clear that the Nevada law was not designed to circumvent the protections enumerated under federal law.

B. Petitioner’s Request for Mandamus is Denied

7. Mandamus is an extraordinary remedy to compel the performance of an act that the law requires as a duty resulting from an office, trust or station. *State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 929, 267 P.3d 777, 779 (2011). Petitioner bears the burden to demonstrate that a writ of mandamus is warranted. *Am. Home Assurance Co. v. Dist.*

1 *Ct.*, 122 Nev. 1229, 1234, 147 P.3d 1120, 1124 (2006). Mandamus is the appropriate
2 procedural remedy to compel production of the public records sought in this case. *See*,
3 *e.g.*, *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990).

4 8. Nevada courts initially presume that “all government-generated records are
5 open to disclosure.” *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623,
6 628 (2011). The state entity bears the burden of overcoming this presumption by proving,
7 by a preponderance of the evidence, that the requested records are confidential. NRS
8 239.0113; *DR Partners v. Bd. of Cnty. Comm.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000).
9 Without a statutory provision that explicitly declares a record to be confidential, any
10 limitations on disclosure must be based upon a broad balancing of the interests involved,
11 *DR Partners*, 116 Nev. at 622, 6 P.3d at 468. In that circumstance the state entity has the
12 burden to prove that its interest in nondisclosure outweighs the public's interest in access
13 *Gibbons*, 127 Nev. at 880, 266 P.3d at 628. The state entity cannot meet that burden
14 with a non-particularized showing, or by expressing hypothetical concerns. *Id.* (citations
15 omitted).

16 9. Regulations created by a state agency are presumed valid. NRS 233B.090;
17 *see also Montage Marketing, LLC v. Washoe County ex rel. Washoe County Bd. of*
18 *Equalization*, 134 Nev. 294, 300 (2018).

19 10. The Independent argues that NAC.439.730 and 740 are invalid. The Court
20 disagrees. The Court defers to the Respondents’ reasonable interpretation of a statute
21 they are charged with enforcing. *State, Div. of Insurance v. State Farm*, 116 Nev. 290,
22 293, 995 P.2d 482, 485 (2000). The Independent’s lawsuit can only succeed by finding a
23 direct conflict between the unambiguous language of the statute and the agency’s
24 regulation. *Clark Co. Social Service Dep’t v. Newkirk*, 106 Nev. 177, 179, 789 P.2d 227,
25 228 (1990).

26 11. HHS, in its broad discretion to implement regulations to foster efficient
27 enforcement of codified legislation, developed NAC 439.730 and 740 to ensure the Nevada
28 Public Records Act complied with the DTSA protections. Had the Respondents failed to

1 carve out these procedural protections, the courts would become inundated with cases in
2 which the compelled disclosing parties claim they did not have the opportunity to protect
3 their trade secrets from mass disclosures.

4 12. The confidentiality protections are not automatic. Respondents notify the
5 entity with information implicated in the NPRA request. The targeted entity then has 30
6 days to claim any confidentiality protections. Respondents then analyze the requested
7 information through the DTSA confidentiality and trade-secret requirements to confirm
8 whether the allegedly confidential information should be protected. Only after this
9 process has been completed do Respondents reach a conclusion as to protection of the
10 information.

11 13. The Independent next argues that the records it seeks are not declared by
12 law to be confidential, and that Respondents violated the NPRA by denying the
13 Independent's requests because the DTSA does not apply in a manner that would place
14 the requested reports under confidentiality protections. Again, the Court is not persuaded
15 by the Independent's argument. The DTSA's definition for trade secrets places these
16 reports squarely under confidentiality protections. 18 U.S.C. 1839(3). Specifically, and as
17 both Respondents and Sanofi highlight, these reports derive independent economic value,
18 actual or potential, from not being generally known to, or readily ascertainable by, other
19 people who can obtain economic value from their disclosure or use and are subject to
20 reasonable efforts to maintain their secrecy. *Id.* 1839(3). These efforts include
21 Respondents placing significant limitations on who receives said information,
22 Respondents and high-level employees privatizing the information that is shared, and the
23 affected entity submitting prompt requests to Respondents to exclude said reports from
24 disclosure based on their status as confidential data or information that derives economic
25 value from not being generally known, and thus protected, trade secrets under the DTSA.

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27 ///

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III. Order

IT IS HEREBY ORDERED that Petitioners' petitioner for writ of mandamus is denied.

Dated this 4th day of September, 2020



HONORABLE ADRIANA ESCOBAR
DISTRICT COURT JUDGE

05A D9E A945 2F08
Adriana Escobar
District Court Judge

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Nevada Independent, Plaintiff(s) | CASE NO: A-19-799939-W
7 vs. | DEPT. NO. Department 14
8 Richard Whitley, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order Denying was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 9/4/2020

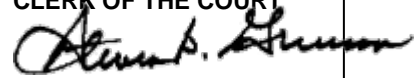
15 Sarah Harmon	sharmon@baileykennedy.com
16 Dennis Kennedy	dkennedy@baileykennedy.com
17 John Bailey	jbailey@baileykennedy.com
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21 Mary Pizzariello	mpizzariello@ag.nv.gov
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23 Matthew Rashbrook	Matt@robertlangford.com
24 Eddie Rueda	erueda@ag.nv.gov

25
26
27
28

1 If indicated below, a copy of the above mentioned filings were also served by mail
2 via United States Postal Service, postage prepaid, to the parties listed below at their last
3 known addresses on 9/8/2020

4 Aaron Ford State of Nevada - Attorney General
5 Attn: Aaron D. Ford
6 100 N. Carson Street
7 Carson City, NV, 89701-4717

8 Paul More McCracken Stemerman & Holsberry
9 Attn: Paul L. More
10 1630 South Commerce Street - Suite A-1
11 Las Vegas, NV, 89102
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(702) 486-3420 (phone)
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Attorneys for Respondents

DISTRICT COURT

CLARK COUNTY, NEVADA

THE NEVADA INDEPENDENT,

Petitioner,

vs.

RICHARD WHITLEY, in his official capacity
as the Director of the Nevada Department of
Health and Human Services, and THE
STATE OF NEVADA, ex rel. the NEVADA
DEPARTMENT OF HEALTH AND HUMAN
SERVICES,

Respondents.

Case No. A-19-799939-W
Dept. No. XIV

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that an Order Denying Petition for Writ Mandamus was entered on the 4th day of September, 2020, a copy of which is attached hereto as Exhibit "A".

DATED this 9th day of September, 2020.

AARON D. FORD
Attorney General

By: /s/ Steve Shevorski
Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel

Attorneys for Respondents

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I electronically filed the foregoing document with the Clerk of
3 the Court by using the electronic filing system on the 9th day of September, 2020, and e-
4 served the same on all parties listed on the Court's Master Service List.

5
6 /s/ Eddie Rueda
Eddie Rueda, an employee of the
7 Office of the Attorney General
8
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EXHIBIT A

EXHIBIT A

1 **ORDR**

2 **DISTRICT COURT**

3 **CLARK COUNTY, NEVADA**

4 **THE NEVADA INDEPENDENT,**

Case No. A-19-799939-W
Dept. No. XIV

5 **Petitioner,**

6 **vs.**

7 **RICHARD WHITLEY, in his official capacity**
8 **as the Director of the Nevada Department of**
9 **Health and Human Services, and THE**
10 **STATE OF NEVADA, ex rel. the NEVADA**
11 **DEPARTMENT OF HEALTH AND HUMAN**
12 **SERVICES,**

13 **Respondents.**

14 **ORDER DENYING PETITION FOR WRIT OF MANDAMUS**

15 The Court heard argument on the Nevada Independent's (the Independent)
16 Petition for Writ of Mandamus (Petition) on February 21, 2020. Matthew J. Rashbrook
17 appeared for Petitioner; Steve Shevorski appeared for Richard Whitley as Director of the
18 Nevada Department of Health and Human Services and State of Nevada ex rel. the
19 Nevada Department of Health and Human Services (collectively, Respondents); and John
20 R. Bailey, Sarah E. Harmon, and Rebecca L. Crooker appeared for Intervenor Sanofi-
21 Aventis U.S. LLC (Sanofi). The Court, after considering the moving papers and
22 arguments of counsel, denies the Petition and enters the following findings of fact and
23 conclusions of law:

24 **I. Findings of Fact**

25 1. The Independent submitted a public records request to Respondents on
26 January 17, 2019. The Independent sought (i) the names of pharmaceutical
27 manufacturers and pharmacy benefit managers that submitted annual reports pursuant
28 to Nevada Senate Bill 539¹, (ii) annual reports submitted by 98 pharmaceutical
manufacturers, including Sanofi, and 7 pharmacy benefit managers (and any others who

¹ Nevada's legislature passed Nevada Senate Bill 539 in 2017. SB 539 was, in the main, codified as 439B. Relevant here, as explained below, SB 539 also amended NRS 600A.030(5)'s definition of a trade secret under Nevada state law.

submitted reports), and (iii) written opinions (including drafts) by the Nevada Attorney General's Office relating to SB 539's implementation in 2017.

2. Respondents responded in writing on April 3, 2019. Respondents stated that they would disclose the following information, which was contained in Appendix 2 of their letter:

1) Drug Manufacturer Essential Diabetes Drug Reports (NRS 439B.635)

- i) Drug Manufacturer Name
- ii) Nonproprietary Prescription Drug Name
- iii) Proprietary Prescription Drug Name
- iv) National Drug Code (NDC)
- v) Wholesale Acquisition Cost (WAC) Price History
- vi) Increase in WAC Unit Price
- vii) Date of Increase in WAC Price

2) Drug Manufacturer Essential Diabetes Drug Price Increase Reports (NRS 439B.640)

- i) Drug Manufacturer Name
- ii) Non-Proprietary Drug Name
- iii) Proprietary Drug Name
- iv) NDC

3) PBM Essential Diabetes Drug Reports (NRS 439B.645)

- i) A list of PBMs that submitted reports

(bold in original). Respondents did not disclose the following information from the Drug Manufacturer Essential Diabetes Drug Reports (NRS 439B.635):

- The Cost of Producing the Drug;
- Total Administrative Expenditures Relating to the Drug;
- Profit Manufacturer Earned from the Drug;
- Percentage of Manufacturer's Total Profit for the Period During Which the Manufacturer Has Marketed the Drug for Sale that Is Attributable to Drug;
- Total Amount of Financial Assistance Provided through Patient Prescription Assistance Programs;
- Cost Associated with Consumer Coupons and for Consumer Copayment Assistance Programs;
- Manufacturer Cost Attributable to Redemption of Consumer Coupons and Use of Consumer Copayment Assistance Program; and
- Aggregate of All Rebates Manufacturers Provided to Pharmacy Benefit Managers for Drug Sales in Nevada.

3. In their written response, Respondents explained that, pursuant to NAC 439.735(4), they had undertaken a review of the material requested to determine whether

Respondents reasonably believed that the disclosure of the material would constitute a misappropriation of a trade secret under the federal Defend Trade Secrets Act of 2016, 18 U.S.C. §1836, as amended (DTSA). Respondents explained that they reasonably believed the requested information was not subject to the Nevada Public Records Act (NPRa) because it was confidential pursuant to the DTSA.

4. The Independent submitted another public records request to Respondents on June 11, 2019. The Independent sought (i) the names of pharmaceutical manufacturers and pharmacy benefit managers that submitted annual reports pursuant to Nevada Senate Bill 539, (ii) annual reports submitted by 72 pharmaceutical manufacturers, including Sanofi, and 7 pharmacy benefit managers (and any others who submitted reports).

5. Respondents responded in writing on June 24, 2019. Respondents stated that they would disclose the following information, which was contained in Appendix 2 of their letter:

1) Drug Manufacturer Essential Diabetes Drug Reports (NRS 439B.635)

- i) Drug Manufacturer Name
- ii) Nonproprietary Prescription Drug Name
- iii) Proprietary Prescription Drug Name
- iv) National Drug Code (NDC)
- v) Wholesale Acquisition Cost (WAC) Price History
- vi) Increase in WAC Unit Price
- vii) Date of Increase in WAC Price

2) Drug Manufacturer Essential Diabetes Drug Price Increase Reports (NRS 439B.640)

- i) Drug Manufacturer Name
- ii) Non-Proprietary Drug Name
- iii) Proprietary Drug Name
- iv) NDC

3) PBM Essential Diabetes Drug Reports (NRS 439B.645)

- i) A list of PBMs that submitted reports

(bold in original). Respondents did not disclose the following information from the Drug Manufacturer Essential Diabetes Drug Reports (NRS 439B.635):

- The Cost of Producing the Drug;
- Total Administrative Expenditures Relating to the Drug;
- Profit Manufacturer Earned from the Drug;

Percentage of Manufacturer's Total Profit for the Period During Which the Manufacturer Has Marketed the Drug for Sale that Is Attributable to Drug;

- Total Amount of Financial Assistance Provided through Patient Prescription Assistance Programs;
- Cost Associated with Consumer Coupons and for Consumer Copayment Assistance Programs;
- Manufacturer Cost Attributable to Redemption of Consumer Coupons and Use of Consumer Copayment Assistance Program; and
- Aggregate of All Rebates Manufacturers Provided to Pharmacy Benefit Managers for Drug Sales in Nevada.

6. Similar to their earlier response noted above, Respondents explained again that, pursuant to NAC 439.735(4), they had undertaken a review of the material requested to determine whether Respondents reasonably believed that the disclosure of the material would constitute a misappropriation of a trade secret under the DTSA. Respondents explained that they reasonably believed the requested information was not subject to the NPRA, because it was confidential pursuant to the DTSA.

7. The Independent filed a petition for writ of mandamus on August 8, 2019, and Respondents opposed and moved to dismiss the Petition on October 17, 2019. After being granted leave to intervene, Sanofi opposed the Independent's petition on December 23, 2019. The Independent filed a reply in response to Sanofi's opposition on January 3, 2020. Respondents filed a reply supporting their motion to dismiss on January 23, 2020.

8. The Court set the matter for hearing on February 21, 2020. No party called fact witnesses. Counsel for the Independent, counsel for Respondents, and counsel for Sanofi presented legal argument for the Court's consideration.

II. Conclusions of Law

A. Legal Background

1. The Nevada Public Records Act starts with the general rule that "unless otherwise declared by law to be confidential, all public books and public records of a

1 governmental entity must be open at all times during office hours to inspection by any
2 person. . . .” NRS 239.010(1).

3 2. Nevada Senate Bill 539, now codified in part as Nevada Revised Statutes
4 439B, institutes certain requirements for the Nevada Department of Health and Human
5 Services (HHS or the Department), manufacturers of pharmaceuticals, and pharmacy
6 benefit managers, among others. It has four relevant parts. First, NRS 439B.630 requires
7 HHS to compile (1) a “list of prescription drugs [including insulin and biguanides] that
8 the Department determines to be essential for treating diabetes in this State”; and (2) a
9 “list of prescription drugs described in subsection 1 that have been subject to [a
10 significant price] increase in the wholesale acquisition.” Second, NRS 439B.635 requires
11 the manufacturer of a drug included on the list described by NRS 439B.630 (1)-(2), to
12 submit to HHS an annual report that contains certain information about the cost of the
13 drug. Third, NRS 439B.640 requires the manufacturer to submit a report to HHS
14 concerning the reasons for the cost increase, if any. Fourth, NRS 439B.645 requires
15 pharmacy benefit managers to report to HHS detailed information relating to the rebates
16 that they negotiated and provided.

17 3. SB 539 also amended NRS 600A.030, as follows:

18 ‘Trade secret’ . . .

19 Does not include any information that a manufacturer is
20 required to report pursuant to NRS 439B.635 or 439B.640,
21 information that a pharmaceutical sales representative is
22 required to report pursuant to NRS 439B.660 or information
23 that a pharmacy benefit manager is required to report
24 pursuant to NRS 439B.645, to the extent that such information
25 is required to be disclosed by those sections.

26 NRS 600A.030 (5)(a).

27 4. After SB 539’s passage, and as a result of the resolution in *Pharm. Research*
28 *& Mfrs. of Am. v. Sandoval*, 2:17-cv-02315-JCM-CWH, U.S. Dist. Ct. Dist. of Nev., which
29 concerned a challenge to the constitutionality of SB 539’s requirement of disclosure of
30 trade secrets to HHS, Respondents promulgated corresponding regulations, found in
31 Section 439 of the Nevada Administrative Code (NAC).

5. Pursuant to NAC 439.735, “[i]n complying with NRS 439B.635, 439B.640 or 439B.645, if a manufacturer or pharmacy benefit manager reasonably believes that public disclosure of information that it submits to the Department would constitute misappropriation of a trade secret for which a court may award relief pursuant to the federal Defend Trade Secrets Act of 2016, 18 U.S.C. § 1836 (DTSA), as amended, the manufacturer or pharmacy benefit manager may submit to the Department a request to keep the information confidential.” NAC 439.735(1). If the Department is faced with a public records request, it then must determine if it agrees with this assessment. NAC 439.735(3). If it agrees that the information requested is confidential, it must deny the public records request. NAC 439.735(4). If the Department does not agree, then it provides the affected entity at least 30-days’ notice and allows the entity to go to court to defend its alleged trade secrets. NAC 439.735(5).

The Defend Trade Secrets Act, 18 U.S.C. 1839(3) defines “trade secrets” as:

all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if the owner thereof has taken reasonable measures to keep such information secret; and the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

6. Thus, while public policy calls for transparency under NRS 239.010(1), the legislature made clear that the Nevada law was not designed to circumvent the protections enumerated under federal law.

B. Petitioner’s Request for Mandamus is Denied

7. Mandamus is an extraordinary remedy to compel the performance of an act that the law requires as a duty resulting from an office, trust or station. *State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 929, 267 P.3d 777, 779 (2011). Petitioner bears the burden to demonstrate that a writ of mandamus is warranted. *Am. Home Assurance Co. v. Dist.*

1 *Ct.*, 122 Nev. 1229, 1234, 147 P.3d 1120, 1124 (2006). Mandamus is the appropriate
2 procedural remedy to compel production of the public records sought in this case. *See*,
3 *e.g.*, *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990).

4 8. Nevada courts initially presume that “all government-generated records are
5 open to disclosure.” *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623,
6 628 (2011). The state entity bears the burden of overcoming this presumption by proving,
7 by a preponderance of the evidence, that the requested records are confidential. NRS
8 239.0113; *DR Partners v. Bd. of Cnty. Comm.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000).
9 Without a statutory provision that explicitly declares a record to be confidential, any
10 limitations on disclosure must be based upon a broad balancing of the interests involved,
11 *DR Partners*, 116 Nev. at 622, 6 P.3d at 468. In that circumstance the state entity has the
12 burden to prove that its interest in nondisclosure outweighs the public's interest in access
13 *Gibbons*, 127 Nev. at 880, 266 P.3d at 628. The state entity cannot meet that burden
14 with a non-particularized showing, or by expressing hypothetical concerns. *Id.* (citations
15 omitted).

16 9. Regulations created by a state agency are presumed valid. NRS 233B.090;
17 *see also Montage Marketing, LLC v. Washoe County ex rel. Washoe County Bd. of*
18 *Equalization*, 134 Nev. 294, 300 (2018).

19 10. The Independent argues that NAC.439.730 and 740 are invalid. The Court
20 disagrees. The Court defers to the Respondents’ reasonable interpretation of a statute
21 they are charged with enforcing. *State, Div. of Insurance v. State Farm*, 116 Nev. 290,
22 293, 995 P.2d 482, 485 (2000). The Independent’s lawsuit can only succeed by finding a
23 direct conflict between the unambiguous language of the statute and the agency’s
24 regulation. *Clark Co. Social Service Dep’t v. Newkirk*, 106 Nev. 177, 179, 789 P.2d 227,
25 228 (1990).

26 11. HHS, in its broad discretion to implement regulations to foster efficient
27 enforcement of codified legislation, developed NAC 439.730 and 740 to ensure the Nevada
28 Public Records Act complied with the DTSA protections. Had the Respondents failed to

1 carve out these procedural protections, the courts would become inundated with cases in
2 which the compelled disclosing parties claim they did not have the opportunity to protect
3 their trade secrets from mass disclosures.

4 12. The confidentiality protections are not automatic. Respondents notify the
5 entity with information implicated in the NPRA request. The targeted entity then has 30
6 days to claim any confidentiality protections. Respondents then analyze the requested
7 information through the DTSA confidentiality and trade-secret requirements to confirm
8 whether the allegedly confidential information should be protected. Only after this
9 process has been completed do Respondents reach a conclusion as to protection of the
10 information.

11 13. The Independent next argues that the records it seeks are not declared by
12 law to be confidential, and that Respondents violated the NPRA by denying the
13 Independent's requests because the DTSA does not apply in a manner that would place
14 the requested reports under confidentiality protections. Again, the Court is not persuaded
15 by the Independent's argument. The DTSA's definition for trade secrets places these
16 reports squarely under confidentiality protections. 18 U.S.C. 1839(3). Specifically, and as
17 both Respondents and Sanofi highlight, these reports derive independent economic value,
18 actual or potential, from not being generally known to, or readily ascertainable by, other
19 people who can obtain economic value from their disclosure or use and are subject to
20 reasonable efforts to maintain their secrecy. *Id.* 1839(3). These efforts include
21 Respondents placing significant limitations on who receives said information,
22 Respondents and high-level employees privatizing the information that is shared, and the
23 affected entity submitting prompt requests to Respondents to exclude said reports from
24 disclosure based on their status as confidential data or information that derives economic
25 value from not being generally known, and thus protected, trade secrets under the DTSA.

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III. Order

IT IS HEREBY ORDERED that Petitioners' petitioner for writ of mandamus is denied.

Dated this 4th day of September, 2020



HONORABLE ADRIANA ESCOBAR
DISTRICT COURT JUDGE

05A D9E A945 2F08
Adriana Escobar
District Court Judge

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Nevada Independent, Plaintiff(s) | CASE NO: A-19-799939-W
7 vs. | DEPT. NO. Department 14
8 Richard Whitley, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order Denying was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 9/4/2020

15 Sarah Harmon	sharmon@baileykennedy.com
16 Dennis Kennedy	dkennedy@baileykennedy.com
17 John Bailey	jbailey@baileykennedy.com
18 Bailey Kennedy, LLP	bkfederaldownloads@baileykennedy.com
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21 Mary Pizzariello	mpizzariello@ag.nv.gov
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8 Paul More McCracken Stemerman & Holsberry
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Mandamus

COURT MINUTES

November 05, 2019

A-19-799939-W Nevada Independent, Plaintiff(s)
vs.
Richard Whitley, Defendant(s)

November 05, 2019 9:30 AM Motion to Intervene

HEARD BY: Escobar, Adriana **COURTROOM:** RJC Courtroom 14C

COURT CLERK: Denise Husted

RECORDER: Sandra Anderson

REPORTER:

PARTIES

PRESENT: Bailey, John R Attorney
 Langford, Robert L Attorney
 Rashbrook, Matthew J. Attorney

JOURNAL ENTRIES

- Mr. Bailey stated that the information the petitioner is seeking contains trade secrets. Although the state is able to articulate the basis for not disclosing the information, they don't have personal knowledge of the irreparable harm to his client, should the trade secrets become public. Opposition by Mr. Rashbrook. Further arguments regarding the four prongs of the American Home Assurance case. COURT ORDERED, matter CONTINUED for further briefing.

CONTINUED TO: 11/19/19 9:30 AM

CLERK'S NOTE: The above minute order modified to reflect that the matter was continued and not taken under advisement. 11/7/19 //dh

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Mandamus

COURT MINUTES

November 14, 2019

A-19-799939-W	Nevada Independent, Plaintiff(s)
	vs.
	Richard Whitley, Defendant(s)

November 14, 2019	8:30 AM	Minute Order	Regarding Further Briefing and Continuance
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HEARD BY: Escobar, Adriana

COURTROOM: RJC Courtroom 14C

COURT CLERK: Denise Husted

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Sanofi-Aventis U.S. LLC s (Sanofi) Motion to Intervene (Motion) came on for hearing before Department XIV of the Eighth Judicial District Court, the Honorable Adriana Escobar presiding, on November 5, 2019. Attorney Matthew J. Rashbrook appeared on behalf of Petitioner Nevada Independent (Petitioner). Attorney John R. Bailey appeared on behalf of Potential Intervenor Sanofi-Aventis U.S., LLC (Sanofi).

After reviewing the pleadings and hearing the arguments regarding Sanofi s Motion to Intervene, the Court hereby CONTINUES the Hearing on Petitioner s Writ of Mandamus to Tuesday, December 17, 2019, and ORDERS supplemental briefing as discussed herein under Inadequate Representation from Current Respondent.

Legal Standard

The Nevada Supreme Court has held that the moving party must meet four requirements to intervene pursuant to NRCP 24(a)(2) (2019):

1. That it has a sufficient interest in the litigation s subject matter.
2. That it could suffer an impairment of its ability to protect that interest if it does not intervene.
3. That its interest is not adequately represented by existing parties.
4. That its application is timely.

Am. Home Assur. Co. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark, 122 Nev. 1229, 1238 (2006). Determining whether an applicant has met these four requirements is within the district court s discretion. Id.

Inadequate Representation from Current Respondent

The third element Sanofi must establish to intervene and the nexus of the Court s request for supplemental briefing is that its interest is not adequately represented by the state. Am. Home Assur. Co., 122 Nev. at 1238.

Sanofi argues that the State cannot adequately represent its interest because the State cannot fully detail the steps Sanofi takes to maintain and protect its trade secrets and confidential information, cannot fully and adequately describe the irreparable harm, and cannot sufficiently describe the prejudice Sanofi would suffer if the Court issues the writ.

The Court requires more detailed information regarding Sanofi s arguments. It is therefore ORDERED that Sanofi and the parties submit supplemental briefs addressing the following questions:

- 1) Sanofi argues that the State cannot fully detail the steps Sanofi takes to maintain and protect its trade secrets and confidential information. However, Sanofi has already provided such information to the Department in support of its successful effort to convince the Department to keep the contents of its annual reports confidential. Intervenor s Response to Petitioner s Petition for a Writ of Habeas Corpus 8-9. Based in part on this information, the Department denied the records request.
 - a. Is the information already disclosed by Sanofi to the Department regarding the steps it takes to maintain the confidentiality of its trade secrets and confidential information insufficient? Why?
 - b. Can any such inadequacy be remedied by Sanofi augmenting the information it has already submitted to the Department? Why?
- 2) Similarly, Sanofi argues that the State cannot fully and adequately describe the irreparable harm and prejudice Sanofi would suffer if the Court issues the writ. However, Sanofi has already provided the Department with information about the harm it would suffer if its annual reports are disclosed. Intervenor s Resp. 10:7.
 - a. Is the information already disclosed by Sanofi to the Department regarding the harm it may suffer from disclosure adequate? Why?
 - b. Can any inadequacy be remedied by Sanofi augmenting the information it has already submitted to the Department? Why?

3) Sanofi's argument, which focuses on the information available to the State, overlooks important considerations in determining whether Sanofi's interests can be adequately represented by the State. The State's ability to represent Sanofi's interests does not necessarily mean their respective interests are and will continue to be aligned. Accordingly, Sanofi and the parties should brief the following:

- a. Are the interests of Sanofi and the State aligned?
- b. How and to what extent should the Court consider the potential for the interests of the State and Sanofi to diverge in determining whether the State can adequately represent Sanofi's interests?

Briefing Schedule

Sanofi must file supplemental briefing on the above by Thursday, November 21, 2019.

Petitioner must submit supplemental briefing in response to Sanofi's supplemental briefing by Thursday, December 5, 2019. That supplemental briefing should also address the arguments Sanofi makes regarding confidentiality and trade secrets in its Response to the Writ. See Motion to Intervene, Ex. 1.

Thus, the Court hereby CONTINUES the hearing on Petitioner's Petition for Writ of Mandamus and Motion to Intervene to Tuesday, December 17, 2019 at 9:30 am.

CLERK'S NOTE: Counsel notified via e-mail:

Matthew Rashbrook (matt@nvlitigation.com)
John Bailey (jbailey@baileykennedy.com)
Robert Langford (robert@robertlangford.com)

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Mandamus

COURT MINUTES

December 16, 2019

A-19-799939-W	Nevada Independent, Plaintiff(s)
	vs.
	Richard Whitley, Defendant(s)

December 16, 2019	10:30 AM	Minute Order	Proposed Intervenor Sanofi-Aventis U.S. LLC's Motion to Intervene
--------------------------	-----------------	---------------------	--

HEARD BY: Escobar, Adriana

COURTROOM: RJC Courtroom 14C

COURT CLERK: Denise Husted

RECORDER:

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- Proposed Intervenor Sanofi-Aventis U.S. LLC s (Sanofi) Motion to Intervene (Motion) came on for hearing before Department XIV of the Eighth Judicial District Court, the Honorable Adriana Escobar presiding, on November 5, 2019. Attorneys Robert Langford and Matthew J. Rashbrook appeared on behalf of Petitioner Nevada Independent (Petitioner). Attorney John R. Bailey appeared on behalf of Sanofi. Steven Shevorski appeared on behalf of the State of Nevada Department of Health and Human Services (the State or the Department). After considering the moving papers and arguments of counsel, the Court requested supplemental briefing, which Sanofi and Petitioner provided.

After considering the moving papers, arguments of counsel, and supplemental briefing, the Court enters the following order GRANTING Sanofi s Motion:

NRCP 24(a)

Nevada requires a party show the following to intervene as a matter of right, pursuant to NRCP 24(a):

- (1) That it has a sufficient interest in the litigation's subject matter
- (2) That it could suffer an impairment of its ability to protect that interest if it does not intervene,
- (3) That its interest is not adequately represented by existing parties, and
- (4) That its application is timely.

Am. Home Assur. Co. v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 122 Nev. 1229, 1238 (2006).

Determining whether an applicant has met these four requirements is within the district court's discretion. Id.

The very purpose of intervention is to permit the parties to protect their own interests when it might otherwise cause irreparable harm to permit the litigation to go forward [without the intervenor]. United States v. City of Detroit, 712 F.3d 925, 944 (6th Cir. 2013).

Here, Sanofi meets all requirements to allow it to intervene as a matter of right in this case on a Writ of Mandamus (Writ):

I. Sufficient Interest

The resolution of Petitioner's claims will actually affect Sanofi's interests. S. Cal. Edison Co. v. Lynch, 307 F.3d 794, 803 (9th Cir.). Petitioner seeks disclosure of Sanofi's annual reports, which includes information about producing, manufacturing, marketing, and selling its drugs. While a trade secret defense does not excuse Sanofi from disclosing its report to the Department, it does apply to third parties. This information is so confidential that Sanofi protects it even internally within the company.

II. Irreparable Harm

Sanofi argues that competitors would gain unfair competitive advantage by learning its business strategies and tactics. Further, Consumers would gain an unfair advantage and use this information in negotiations with insurers and other parties in the healthcare system. Additionally, Sanofi contends that requiring disclosure here would affect its negotiations all over the nation.

Petitioner argues that Sanofi's reports cannot qualify as having trade secrets because NRS 600A.030(5)(b) expressly de-categorizes information within these disclosures as a trade secret, and NRS 600A preempts NAC 439.735. However, Petitioner only cites to cases that predate the statutes and administrative codes in question, and the Legislative intent points to a different interpretation. Division of Ins., 116 Nev. 290, 293 (2000); Roberts, 104 Nev. 33, 37 (1988).

To illustrate, page four (4) of the Approved Regulation of the Department of Health and Human Services document LCB File No. R042-18 (R042-18) explains that when the Department decides on whether the public disclosure of information would constitute misappropriation of a trade secret under federal Defend Trade Secrets Act (DTSA), it may consider the trade secrets definition under Exemption 4 of Freedom of Information Act (FOIA), which 18 U.S.C. 1839 covers.

Additionally, the Supremacy Clause of the U.S. Constitution explains that when state and federal law conflict, federal law preempts state law. U.S. Const. art. VI, cl. 2. Here, NRS 600A.030(5)(b) conflicts with 18 U.S.C. 1839 by expressly de-categorizing information within these disclosures as a trade secret. Thus, 18 U.S.C. 1839 preempts 600A.030(5)(b), to the extent it conflicts.

Taking all of these facts collectively, the Court finds that Sanofi sufficiently showed irreparable harm could result if the Court does not allow it to intervene.

III. Inadequate Representation

Sanofi explains that while the State can adequately represent the confidentiality issues generally the State cannot fully detail the steps Sanofi takes to maintain and protect its trade secrets and confidential information; nor can the State adequately articulate the irreparable harm and prejudice Sanofi will suffer if the Court grants Petitioner's Writ.

Sanofi explains that the State has generalized knowledge of Sanofi's safeguards for its confidential information. To the extent that the Court might have questions that go beyond the information already provided, if permitted to intervene Sanofi can respond to the Court directly at that time.

Moreover, Sanofi avers that the State does not have the same vested interest in protecting Sanofi's trade secrets from public disclosure or in protecting Sanofi from irreparable harm. The Department's main role is to protect and promote the health and safety of Nevada residents not to ensure that Sanofi is able to competitively develop, market, and sell pharmaceuticals and healthcare solutions in the global market. Sanofi claims that only it can fully protect its trade secrets from public disclosure and prevent harm to its competitive position.

R042-18 also touches on this issue. Page four (4) of R042-18 explains that an implicated entity whose interests could be impacted by disclosures may file a motion to intervene on the matter.

The Court concludes that these facts show that the State cannot adequately represent Sanofi's individual interests.

IV. Timeliness

Sanofi's Motion is timely under NRCP 24 since it was filed prior to trial, and will not cause Petitioner prejudice. Rather, Sanofi would be prejudiced if it is not allowed to intervene and represent its interests.

The Court finds that Sanofi timely filed its Motion.

Conclusion

Petitioner failed to present argument to sufficiently overcome the arguments for each NRCP 24(a) element that Sanofi provides.

NRCP 24(b)

Sanofi also satisfies the requirements for the Court to discretionarily grant its intervention, pursuant to NRCP 24(b). The public records request at issue in Petitioner's Writ seeks trade secrets and other confidential information from Sanofi. Thus, adverse effects or irreparable harm could impact Sanofi through the decision on this matter.

Costs and Attorney's Fees Issue

Petitioner contends that Sanofi should not be permitted to intervene because Sanofi's participation will cause the Petitioner to incur additional costs and attorney's fees that it will not be able to recover should it prevail in this action. Opp'n. at 7:21-8:14. However, neither NRS 12.130 nor NRCP 24 provides exceptions that would bar a third party from intervening in an action because there is no mechanism for a petitioner to recover its costs and fees should the petitioner prevail.

The Court finds that Petitioner's argument on this point not persuasive in determining whether to allow Sanofi to intervene in this matter.

Conclusion

Based on the foregoing, the Court GRANTS Sanofi's Motion to Intervene.

To allow all parties additional time to brief the issues in the Writ, and to disclose any witnesses, the Court hereby continues the hearing on the Writ to January 31, 2020 at 10:00 am.

The final day for supplemental briefing from all parties will be January 3, 2020.

The final day to disclose any witnesses will be January 17, 2020.

The Court will issue an order granting the same.

CLERK'S NOTE: This minute order was electronically served by Courtroom Clerk, Denise Husted, to all registered parties for Odyssey File and Serve. 12/16/19 //dh

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Mandamus

COURT MINUTES

February 04, 2020

A-19-799939-W Nevada Independent, Plaintiff(s)
vs.
Richard Whitley, Defendant(s)

February 04, 2020 1:30 PM Motion to Compel

HEARD BY: Escobar, Adriana **COURTROOM:** RJC Courtroom 14C

COURT CLERK: Denise Husted

RECORDER: Sandra Anderson

REPORTER:

PARTIES

PRESENT: Bailey, John R Attorney
 Harmon, Sarah E. Attorney
 Rashbrook, Matthew J. Attorney
 Shevorski, Steven G. Attorney

JOURNAL ENTRIES

- Following arguments by counsel, COURT ORDERED, a minute order will be issued.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Mandamus

COURT MINUTES

February 14, 2020

A-19-799939-W	Nevada Independent, Plaintiff(s)
	vs.
	Richard Whitley, Defendant(s)

February 14, 2020	4:08 PM	Minute Order
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HEARD BY: Escobar, Adriana	COURTROOM: RJC Courtroom 14C
-----------------------------------	-------------------------------------

COURT CLERK: Tia Everett

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Petitioner The Nevada Independent s (Petitioner) Motion to Compel Testimony of James Borneman, or In The Alternative, to Strike His Declaration, which Intervenor Sanofi Aventis U.S. LLC (Sanofi) opposed, came on for hearing on February 4, 2020 before Department XIV of the Eighth Judicial District Court, the Honorable Adriana Escobar presiding, Attorney Matthew J. Rashbrook appeared on behalf of Petitioner. Attorney John R. Bailey, Sarah Harmon, and Rebecca Crooker appeared on behalf of Sanofi. Attorney Steven Shevorski appeared on behalf of Respondent the State of Nevada Department of Health and Human Services (Respondent). After considering the moving papers and arguments of counsel, the Court enters the following order:

As Petitioner cites, Rule 2.21(c) of the Eighth Judicial District Court Rules (EDCR) explains that [a]ffidavits/declarations must contain only factual, evidentiary matter, conform with the requirements of N.R.C.P. 56(e), and avoid mere general conclusions or argument. Affidavits/declarations substantially defective in these respects may be stricken, wholly or in part.

Rule 56(e) of the Nevada Rules of Civil Procedure (NRCP) states as follows:

If a party fails to properly support an assertion of fact or fails to properly address another party s assertion of fact as required by Rule 56(c), the court may: (1) give an opportunity to properly support

or address the fact; (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if the motion and supporting materials including the facts considered undisputed show that the movant is entitled to it; or (4) issue any other appropriate order.

NRCP 56(c) states that [a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

Here, the Court concludes Mr. Boreman's declaration is not based solely on his personal knowledge. However, the Court, under the clear discretion allowed under NRCP 56(e), will consider all pleadings and supporting documents in the context of the Petition for Writ of Mandamus (Petition) as a whole. Thus, the entire record will receive the weight of credibility it is due for the Court to decide on the Petition. Moreover, the Court does not find reasonable grounds to compel Mr. Borneman an affiant to Sanofi's Responses to the Petition to testify, as Respondent, rather than Sanofi, bears the burden of proof in the underlying Petition.

Based on the foregoing, the court DENIES Petitioner's Motion. The Court will issue its own order denying the same.

CLERK'S NOTE: The above minute order has been distributed to:

Robert L Langford robert@robertlangford.com
Matthew J Rashbrook Matt@robertlangford.com
Mary J. Pizzariello mpizzariello@ag.nv.gov
Traci A. Plotnick tplotnick@ag.nv.gov
Katherine Reed KReed@ag.nv.gov
Steven G. Shevorski sshevorski@ag.nv.gov
John R. Bailey jbailey@baileykennedy.com
Sarah E. Harmon sharmon@baileykennedy.com
Dennis L. Kennedy dkennedy@baileykennedy.com
Bailey Kennedy, LLP bkfederaldownloads@baileykennedy.com

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Mandamus

COURT MINUTES

February 21, 2020

A-19-799939-W Nevada Independent, Plaintiff(s)
vs.
Richard Whitley, Defendant(s)

**February 21, 2020 1:30 PM Petition for Writ of
Mandamus**

HEARD BY: Escobar, Adriana

COURTROOM: RJC Courtroom 14C

COURT CLERK: Denise Husted

RECORDER: Sandra Anderson

REPORTER:

PARTIES

PRESENT: Bailey, John R Attorney
 Harmon, Sarah E. Attorney
 Rashbrook, Matthew J. Attorney
 Shevorski, Steven G. Attorney

JOURNAL ENTRIES

- Following arguments by counsel, COURT ORDERED, a minute order will be issued.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Mandamus

COURT MINUTES

April 21, 2020

A-19-799939-W	Nevada Independent, Plaintiff(s)
	vs.
	Richard Whitley, Defendant(s)

April 21, 2020	7:00 PM	Minute Order
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HEARD BY: Escobar, Adriana	COURTROOM: RJC Courtroom 14C
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COURT CLERK: Denise Husted

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Petitioner The Nevada Independent s (Petitioner) Petition for Writ of Mandamus (Petition), was opposed by Respondents Richard Whitley in his official capacity for the Nevada Department of Health and Human Services (the Department) (collectively, Respondents), as well as Intervenor Sanofi Aventis U.S. LLC (Sanofi), came on for hearing on February 21, 2020 before Department XIV of the Eighth Judicial District Court, the Honorable Adriana Escobar presiding, Attorney Matthew J. Rashbrook appeared on behalf of Petitioner, Attorney Steven Shevorski appeared on behalf of Respondents, Attorneys John R. Bailey and Sarah Harmon appeared on behalf of Sanofi. After considering the moving papers and arguments of counsel, the Court enters the following order:

Regulations created by the Department are presumed valid. N RS 233B.090; see also Montage Marketing, LLC v. Washoe County ex rel. Washoe County Bd. of Equalization, 134 Nev. 294, 300 (2018).

To develop procedural avenues to protect information required as disclosures under Nevada Revised Statute (NRS) NRS 439B.635 or 439B.640, the Department developed Nevada Administrative Code 439. If the Department receives a request for public records pursuant to NRS 239.010 seeking disclosure of any information for which a manufacturer or pharmacy benefit manager has submitted a request for confidentiality pursuant to subsection 1, the Department will, after notifying the

manufacturer or pharmacy benefit manager:

Undertake an initial review to determine whether the Department reasonably believes that public disclosure of the information would constitute misappropriation of a trade secret for which a court may award relief pursuant to the federal Defend Trade Secrets Act (DTSA) of 2016, 18 U.S.C. 1836, as amended. In undertaking its initial review, the Department will consider, as persuasive authority, the interpretation and application given to the term trade secrets in Exemption 4 of the federal Freedom of Information Act, 5 U.S.C. 552(b)(4), as amended.

NAC 439.735(3).

If, after undertaking its initial review pursuant to subsection 3, the Department reasonably believes that public disclosure of the information would constitute misappropriation of a trade secret for which a court may award relief pursuant to the federal Defend Trade Secrets Act of 2016, 18 U.S.C. 1836, as amended, the Department will provide the requester of the public records with written notice that the Department must deny the request for public records on the basis that the information is confidential pursuant to the federal Defend Trade Secrets Act of 2016, 18 U.S.C. 1836, as amended.

NAC 439.735(4).

Pursuant to NRS 600A.030(5), the trade secret definition [d]oes not include any information that a manufacturer is required to report pursuant to NRS 439B.635 or 439B.640, information that a pharmaceutical sales representative is required to report pursuant to NRS 439B.660 or information that a pharmacy benefit manager is required to report pursuant to NRS 439B.645, to the extent that such information is required to be disclosed by those sections.

However, the federal Defend Trade Secrets Act of 2016, 18 U.S.C. 1836 (DTSA), which Nevada Arbitration Code (NAC) 439.735(1) codifies as a Nevada law protection, provides an express protection for information otherwise required to be disclosed under NRS 439B:

In complying with NRS 439B.635, 439B.640 or 439B.645, if a manufacturer or pharmacy benefit manager reasonably believes that public disclosure of information that it submits to the Department would constitute misappropriation of a trade secret for which a court may award relief pursuant to the federal Defend Trade Secrets Act of 2016, 18 U.S.C. 1836, as amended, the manufacturer or pharmacy benefit manager may submit to the Department a request to keep the information confidential.

18 U.S.C. 1839(3) defines trade secrets as:

the term trade secret means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether

tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if the owner thereof has taken reasonable measures to keep such information secret; and the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

If a request for inspection, copying or copies of a public book or record open to inspection and copying is denied, the requester may apply to the district court in the county in which the book or record is located for an order either permitting the requester to inspect or copy the book or record or requiring the person who has legal custody or control of the public book or record to provide a copy to the requester, as applicable. NRS 239.011(1).

The Department bears the burden to prove that its interest in nondisclosure clearly outweighs the public's interest in access. *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880 (2011). When determining the validity of an administrative regulation, courts generally give great deference to an agency's interpretation of a statute that the agency is charged with enforcing. *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293 (2000)

Here, while Petitioner bears the burden of proving that it is entitled to this remedy, the burden is ultimately on the Department to prove, by a preponderance of the evidence, that the information it declined to provide to Petitioner was confidential. NRS 239.0113.

On April 3, 2019, the Department denied, in part, Petitioner's request for certain annual reports. In said denial, the Department explained as follows:

DHHS is denying disclosure of the fields not included in Appendix 2 on the basis that the information is confidential pursuant to the federal Defend Trade Secrets Act (DTSA) of 2016, 18 U.S.C. 1836, as amended. This determination is based on DHHS's review of the DTSA, and on the information provided by drug manufacturers and PBMs in the completed RFCs submitted to DHHS pursuant to NAC 439.735, Subsection 2. Please note that a copy of this letter will be sent to manufacturers and PBMs that submitted an RFC.

Petition, Exhibit 2-2.

On June 24, 2019, the Department denied, in part, Petitioner's follow-up request for certain annual reports, on the same grounds explained above. Petition, Exhibit 2-4.

On August 8, 2019, Petitioner filed the instant Petition. Petitioner raised several chief arguments in the instant Petition. First, Petitioner argues that to the extent the agency-related regulations at issue conflict with statutory law, the regulations are invalid, that the DTSA explicitly states it does not preempt state law, and thus, NAC 439.730-740 is invalid and must be invalidated. *Division of Ins. v.*

State Farm Mutual Ins. Co., 116 Nev. 290, 293 (2000). Petition, 11:11 15. Petition, 11:1 6.

This Court disagrees. The Department in its broad discretion to implement regulations to foster efficient enforcement of codified legislation developed NAC 439.730 740, respectively, to ensure the NPRA coincided with the DTSA protections. See Case 2:17-cv-02315 at Doc. 1, p. 20. Had the Department failed to carve out these procedural protections, the courts would become inundated with cases in which the compelled disclosing parties claim they did not have the opportunity to protect their trade secrets from mass disclosures.

Moreover, the confidentiality protections are not automatic. The Department notifies the entity with information implicated in the NPRA request and gives said entity 30 days to claim any confidentiality protections. The Department then analyzes the requested information through the DTSA confidentiality and trade-secret lenses to confirm whether said information should be protected. Only after this process does the Department conclude whether the information should be protected. The Court does not find grounds to find that NAC 439.730 740 is unenforceable.

Next, Petitioner argues that the Legislature showed clear intent to allow the public access to these records, and the Department violated the NPRA by denying Petitioner s requests because DTSA does not apply to Petitioner s requests in a manner that would particularly place the requested reports under confidentiality protections. Petition, 12:18 24; Supplement to Petition, 5:8 7:26.

The Court is not persuaded by this argument. The DTSA definition for trade secrets places these reports squarely under confidentiality protections. 18 U.S.C. 1839(3). Specifically, and as both Respondent and Intervenor highlight, these reports derive independent economic value, actual or potential, from not being generally known to, or readily ascertainable by other people who can obtain economic value from its disclosure or use and is subject to reasonable efforts to maintain its secrecy. Id. 1839(3). These efforts include significant limitations on who receives said information the Department and high-level employees privatizing the information that is shared, and submitting prompt requests to the Department to exclude said reports from disclosure based on their trade-secret qualities.

Based on the foregoing, the Court concludes that the Department proved, by a preponderance of the evidence, that the denied disclosures have confidentiality protections pursuant to the DTSA. Thus, the Court DENIES Petitioner s Petition.

Counsel for Respondents to prepare an order including findings of fact and conclusions of law, to be reviewed by counsel for Petitioner as to form and content. The order is to be submitted to Chambers in Microsoft word format by email to dept14lc@clarkcountycourts.us, and to Diana Powell at PowellD@clarkcountycourts.us.

CLERK'S NOTE: Counsel notified via email:

Matthew Rashbrook (matt@nvlitigation.com)

Steven Sherovski (steven.sherovski@akerman.com)

John Bailey (jbailey@baileykennedy.com)



EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE
NOTICE OF DEFICIENCY
ON APPEAL TO NEVADA SUPREME COURT

MATTHEW J. RASHBROOK
616 S. EIGHTH ST.
LAS VEGAS, NV 89101

DATE: September 23, 2020
CASE: A-19-799939-W

RE CASE: THE NEVADA INDEPENDENT vs. RICHARD WHITLEY, in his official capacity as the Director of the Nevada Department of Health and Human Services; THE STATE OF NEVADA, ex rel. THE NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES

NOTICE OF APPEAL FILED: September 22, 2020

YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.

PLEASE NOTE: DOCUMENTS **NOT TRANSMITTED HAVE BEEN MARKED:**

- ☒ \$250 – Supreme Court Filing Fee (Make Check Payable to the Supreme Court)**
 - If the \$250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.
- ☐ \$24 – District Court Filing Fee (Make Check Payable to the District Court)**
- ☒ \$500 – Cost Bond on Appeal (Make Check Payable to the District Court)**
 - NRAP 7: Bond For Costs On Appeal in Civil Cases
 - *Previously paid Bonds are not transferable between appeals without an order of the court.*
- ☐ Case Appeal Statement
 - NRAP 3 (a)(1), Form 2
- ☐ Order
- ☐ Notice of Entry of Order

NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:

"The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. The district court clerk shall apprise appellant of the deficiencies in writing, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (g) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

Please refer to Rule 3 for an explanation of any possible deficiencies.

*****Per District Court Administrative Order 2012-01, in regards to civil litigants, "...all Orders to Appear in Forma Pauperis expire one year from the date of issuance." You must reapply for in Forma Pauperis status.***

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; ORDER DENYING PETITION FOR WRIT OF MANDAMUS; NOTICE OF ENTRY OF ORDER; DISTRICT COURT MINUTES; NOTICE OF DEFICIENCY

THE NEVADA INDEPENDENT,

Plaintiff(s),

vs.

RICHARD WHITLEY, in his official capacity as the Director of the Nevada Department of Health and Human Services; THE STATE OF NEVADA, ex rel. THE NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant(s),

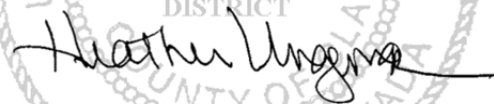
Case No: A-19-799939-W

Dept No: XIV

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 23 day of September 2020.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk

