IN THE SUPREME COURT OF THE STATE OF NEVADA

THE NEVADA INDEPENDENT, Appellant, 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, AND SANOFI-AVENTIS U.S. LLC, Respondents.	No.: 81844 DC No.: A-19-799939-W

APPELLANT'S REPLY BRIEF

(Appeal from denial of Petition for Writ of Mandamus)

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ARGUMENT

Although this matter was set in motion by the 2017 enactment of S.B. 539 and subsequent submissions from pharmaceutical manufacturers and pharmacy benefit managers ("PBMs") – the submissions themselves provoked by the relentless increases in the cost of essential diabetes treatments – it is nonetheless a matter arising under the NPRA, and it is that law, and the line of cases from this Court interpreting it, which governs the result herein.

The Nevada Public Records Act entitles Appellants to the public records at issue in this matter. As Respondents Whitley, the Nevada Department of Human Services ("DHHS," collectively, "State Respondents"), and Sanofi-Aventis U.S. LLC ("Sanofi") each concede in whole or in part, the public records sought herein are not made confidential by law[1]. (Sanofi Answering Brief ("Sanofi A.B."), 44:9 – 11, State Respondents' Answering Brief ("State A.B.") at 15.) They are not otherwise confidential, and even were a court to determine that they were, nonetheless a balancing of the interests would reveal that the public interest in disclosure dramatically outweighs the private interest

[1] N.B.: Sanofi concedes "[T]he DTSA does not expressly bestow confidentiality as to a specific type of records[.]"(Sanofi A.B., 44:9 – 11); State Respondents concede the "Information that essential diabetes drug makers submit subject to a request for confidentiality is not automatically protected but must be scrutinized by the Department. If the Department disagrees that the information is confidential, the burden is on the drug makers to go to court to prevent disclosure." (State A.B., 15.)

in secrecy. *Reno Newspapers, Inc. v. Haley*, 126 Nev. Adv. Rep. 23, 1 – 2, 234 P.3d 922, 923 (2010) ("The Nevada Public Records Act considers all records to be public documents available for inspection unless otherwise explicitly made confidential by statute or by a balancing of public interests against privacy or law enforcement justification for nondisclosure.").

S.B. 539 was passed by the Nevada Legislature to create transparency in the market for essential diabetes treatments, 1 J.A. 6, fn. 4, because Nevadans are dying from diabetes, and more specifically, from their inability to afford diabetes treatments. *Id.*, at 3 – 6. Over a tenth of Nevadans, 291,000, have diabetes, and over a quarter, 787,000, are pre-diabetic, proportions which are roughly consistent with corresponding national statistics. *Id.*, at 3.

Subsequently, as Sanofi details extensively (Sanofi A.B., *passim*), lobbyists representing Sanofi and others sued in the District of Nevada, in the apparent hope of thwarting S.B. 539. *See, generally, PhRMA v. Sandoval*, D. Nev. 2:17-cv-02315. Eventually, that matter was dismissed voluntarily. *Id.*, at ECF Nos. 95, 96; 3 J.A. 672 – 676.

Later, Sanofi and other pharmaceutical manufacturers, along with PBMs, submitted certain information pursuant to their obligations under Nev. Rev. Stat. §§ 439B.635, .640 and .645, to State Respondents, cognizant that State Respondents may not choose to keep that information confidential – in fact,

they were specifically advised by the language of NAC 439.735 that State Respondents would only *consider* their requests for confidentiality, as State Respondents agree:

> But protection is not automatic, nor is it total . . . Moreover, NAC 439.735 puts the burden on the drug manufacturers and PBMs to go to court and prevent disclosure of their information under the NPRA if the Department disagrees with their confidentiality claims.

(State's A.B., 39, citing NAC 439.735(1), (2), (5), and (6).)

State Respondents purportedly fear (State A.B., 33 – 34) that they could face liability under the DTSA should they produce the public records requested herein, but the federal courts who have examined this question have uniformly responded that State Respondents are immune from suit. *MedSense, LLC v. Univ. Sys. Of Md.*, 420 F. Supp. 3d 382, 392 (D. Md. Sept. 27, 2019); *Fast Enters. LLC v. Pollack*, 2018 U.S. Dist. LEXIS 161518, 7 – 9, 2018 WL 4539685, U.S. Dist. Mass. 16-cv-12149, Sept. 21, 2018.

Further, State Respondents complying with their obligations under the NPRA are not misappropriating under any theory – not only because the DTSA specifically entitles State Respondents to conduct otherwise lawful activity, but because the owners have allowed their purported trade secrets to pass to another with no promise that they will be held in confidence:

> The proprietor of a trade secret may not unilaterally create a confidential relationship without the

> knowledge or consent of the party to whom he discloses the secret.

Phillips v. Frey, 20 F.3d 623, 632 (5th Cir. 1994), *citing Smith v. Snap-On Tools Corp.*, 833 F.2d 578, 579-80 (5th Cir. 1988) (*citing* Restatement of Torts, comment j (1939)). "[A]bsent an express promise, appellee had no reasonable, investment-backed expectation that its information . . . would remain inviolate[.]" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1008, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984).

The conduct of Sanofi and other pharmaceutical manufacturers and PBMs, in knowingly passing the information to State Respondents when they had affirmative notice from State Respondents that State Respondents may not protect the information as confidential, means the information cannot meet any definition of a trade secret.

Nevadans have prioritized transparency in the market for essential diabetes treatments, the expression of which is explicit in Nev. Rev. Stat. 600A.030(5)(b), and that preference must be given effect in this matter. Where State Respondents have enacted regulations that frustrate that purpose, those regulations must be stricken. *Division of Ins. v. State Farm Mutual Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000). NAC 439.735, properly applied, presents no bar to production – the DTSA does not create even the possibility of liability for State Respondents, as they cannot face so much as suit under the

DTSA, let alone liability. *Fast Enters. LLC v. Pollack*, 2018 U.S. Dist. LEXIS 161518, 7 – 9, 2018 WL 4539685, U.S. Dist. Mass. 16-cv-12149, Sept. 21, 2018. (*See, also* Amicus Curiae Brief ("A.C.B."), 12:18 – 15:10.)

In sum, the NPRA presumes these records must be produced, and there is no basis upon which to withhold their production. They are not confidential. The DTSA does not limit their disclosure or create any possibility of liability for doing so. In any event, fear of a potential suit is not a sufficient basis upon which to refuse access to public records. *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011), *citing DR Partners v. Board of County Comm'rs*, 116 Nev. 616, 6 P.3d 465 (2000), *Reno Newspapers, Inc. v. Haley*, 126 Nev. Adv. Rep. 23, 14 – 16, 234 P.3d 922, 927 (2010) ("Finally, our caselaw stresses that the state entity cannot meet this burden with a non-particularized showing, or by expressing hypothetical concerns.").

The ruling of the district court must be reversed.

1. The Nevada Independent is Entitled to the Public Records Requested Herein Under the NPRA

State Respondents argue implicitly that the only relevant standard of review is for an abuse of discretion. (State A.B. at 12, at 15, at 16, at 22, at 23.) The law, however, is clear: "[W]hen the writ petition includes questions of statutory construction, this court will review the district court's decision de novo." *Reno Newspapers, Inc. v. Haley*, 126 Nev. Adv. Rep. 23, 5, 234 P.3d

922, 924 (2010), *citing Las Vegas Taxpayer Comm. V. City Council*, 125 Nev. 165, 172, 208 P.3d 429, 433 – 34 (2009).

As this Court has outlined numerous times, NPRA law requires the Court to examine whether the records in controversy are "explicitly made confidential by statute[,]" *Reno Newspapers, Inc. v. Haley*, 126 Nev. Adv. Rep. 23, 1 – 2, 234 P.3d at 923 – the inquiry, whether "the Legislature has *expressly and unequivocally* created an exemption or exception by statute," *id.* at 6, at 924 – 25 (emphasis added), *citing Cowles Pub. Co. v. Kootenai County Bd.*, 144 Idaho 259, 159 P.3d 896, 899 (Idaho 2007) – and failing that, whether the governmental entity can "prove confidentiality by a preponderance of the evidence[,]" *id.* at 7, at 925, and therefore satisfy the Court that the private or government interest in "nondisclosure [outweighs] the general policy in favor of an open and accessible government[.]" *Id.*

Further, and as this Court has additionally repeatedly made clear, as the Legislature has made clear the paramount importance of access to public records for the healthy function of a democratic government, "all statutory provisions related to the Act must be construed liberally in favor of the Act's purpose" and "In contrast, any exemption, exception, or a balancing of the interests that restricts the public's right to access a governmental entity's records must be construed narrowly." *Id.* at 6, at 924, citing NRS 239.001(3),

2007 Nev. Stat., ch. 435 § 2, at 2061. Indeed, since the Amendments to the NPRA referred to by this Court in *Haley*, drafted in the 2007 Legislative Session, the Nevada Legislature has continued to exhibit a stalwart commitment to public records access, further amending and expanding the Nevada Public Records Act. Most recently, the Nevada Legislature reaffirmed its commitment to public records access by the amendments now found at Nev. Rev. Stat. § 239.340, which provide civil penalties for instances of willful failure by governmental entities to comply with the NPRA. 2019 Nev. Stat., ch. 612 § 1 at 4002.

a. The DTSA Does not Make the Records Confidential, as State Respondents and Sanofi Concede.

Sanofi concedes: "[T]he DTSA does not expressly bestow confidentiality as to a specific type of records[.]" (Sanofi A.B., 44:9 – 11).

State Respondents agree: "Information that essential diabetes drug makers submit subject to a request for confidentiality is not automatically protected but must be scrutinized by the Department. If the Department disagrees that the information is confidential, the burden is on the drug makers to go to court to prevent disclosure." (State A.B., 15.)

In other words, Respondents are conceding the truth The Nevada Independent has illustrated at every stage: the DTSA lays out criteria, but does not explicitly, operating on its own, make any given thing confidential. (O.B.,

15:4 – 20:3.) The actions of a given person, and the nature of a given thing, are what may create a confidential trade secret. *Mastronardi Int'l Ltd. v. SunSelect Produce (Cal.), Inc.*, 2019 U.S. Dist. LEXIS 143934, 28 – 29, 2019 WL 3996608, E.D. Ca. Aug. 23, 2019, *quoting Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 723 (7th Cir. 2003) (discussing Illinois Trade Secrets Act) ("'[A] trade secret is one of the most elusive and difficult concepts in the law to define. In many cases, the existence of a trade secret is not obvious; it requires an ad hoc evaluation of all the surrounding circumstances.'").

b. NAC 439.735 Does Not Render These Public Records Confidential, as State Respondents Agree, and to Whatever Extent They are Understood to, it Must be Invalidated.

NAC 439.735 does not create confidentiality. If it is found to, it is an improper regulation that conflicts with S.B. 539 and the NPRA, and it must be stricken as it exceeds the grant of authority used to create it, and offends S.B. 539 and the NPRA.

The plain text of NAC 439.735 requires DHHS to decide whether producing certain information submitted to them in response to an NPRA request would subject them to liability under the DTSA. It therefore does not create confidentiality. It simply requires DHHS to make a determination.

To the extent that DHHS correctly applies NAC 439.735 and reaches a determination that it is never subject to liability under the DTSA, as each federal court examining the question has found, the NAC may only be offensive insomuch as it creates a needless delay, which offends the NPRA – a point made clear by the 2019 amendments to the NPRA. 2019 Nev. Stat., ch. 612 § 1 at 4002.

But, to the extent that NAC 439.735 is found to create confidentiality, it exceeds the grant of authority given DHHS under S.B. 539, conflicts with the overall goals of S.B. 539 and with the NPRA, and it must be stricken.

i. NAC 439.735 and .740 Do not Declare Submissions of Manufacturers and PBMs Confidential.

The phrase "declared by law to be confidential," in Nev. Rev. Stat. § 239.010 means "*explicitly* made confidential by statute" *Reno Newspapers, Inc. v. Haley*, 126 Nev. Adv. Rep. 23, 1 – 2, 234 P.3d at 923 (emphasis added). (Section 1, *supra*.)

NAC 439.735 does not explicitly render anything confidential. It states that, met with an NPRA request for the records, DHHS must review submissions received pursuant to Nev. Rev. Stat. §§ 439B.635 and .640, and determine whether DHHS could face liability under the DTSA if they produced those submissions. In fact, State Respondents agree:

> Information that essential diabetes drug makers submit subject to a request for confidentiality is not automatically protected but must be scrutinized by the Department. If the Department disagrees that the information is confidential, the burden is on the drug makers to go to court to prevent disclosure.

(State A.B., 15.)

Sanofi's argument that NAC 439.735 "bestow[s] confidentiality" (Sanofi A.B., 44:9 – 13) may appear novel, but upon examination is a shell game – Sanofi concedes that "the DTSA does not expressly bestow confidentiality" (*Id.*, 44:9 – 10), but then suggests that NAC 439.735 does (*Id.*, 44:12 – 13), notwithstanding that in such circumstances, NAC 439.735 specifies the following required response to the requester: "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)(a).

The plain language of NAC 439.735 makes it clear that it does not declare anything to be confidential, it requires DHHS to follow a certain procedure and make certain determinations in the event DHHS receives an NPRA request for material a pharmaceutical manufacturer or PBM submitted pursuant to Nev. Rev. Stat. §§ 439B.635, .640 or .645 for which the manufacturer or PBM has requested confidentiality:

> 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: . . .
>
> (b) 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 of 2016, 18 U.S.C. § 1835, 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)(b). The plain language makes clear that the effect of NAC 439.735 is to require DHHS to go through a review procedure and determine whether producing the requested public records would constitute a misappropriation under the DTSA for which DHHS could face liability. By its clear terms, it does not operate independently to create confidentiality.

DHHS applied NAC 439.735 incorrectly in this instance, because State Respondents are immune from suit under the DTSA, and because none of the material sought is a trade secret, and it therefore cannot be misappropriated.

The DTSA does not so much as provide a cause of action against State Respondents: "This chapter does not prohibit or create a private right of action for – 1) any otherwise lawful activity conducted by a governmental entity of

the United States, a State, or a political subdivision of a State[.]" 18 U.S.C. 1833(a)(1) (emphasis added). (*See, also* A.C.B. 12:18 – 15:10.)

That no cause of action lies in this situation was the finding of the District of Massachusetts in *Fast Enters. LLC v. Pollack*. 2018 U.S. Dist. LEXIS 161518, 10, 2018 WL 4539685, U.S. Dist. Mass. 16-cv-12149, Sept. 21, 2018. ("[B]ecause the DTSA does not create a cause of action in such circumstances, the case is dismissed.") Respondents each argue (Sanofi A.B., 70:17 – 72:13, State A.B., 33) that Whitley could face liability under the *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908) doctrine, which creates a narrow window within which certain state officials may face suits for injunctive relief, but neither addresses the holding of *Fast Enters.*, which specifically rejected that argument, in light of analogous cases from the 6th Circuit Court of Appeals and the United States Supreme Court:

> In the context of other laws, such as the Americans with Disabilities Act, courts have determined that a suit against a defendant in his or her official capacity 'is, for all intents and purposes, against the state . . . as the real party-in-interest.

Fast Enters. LLC v. Pollack. 2018 U.S. Dist. LEXIS 161518, 8, 2018 WL 4539685, U.S. Dist. Mass. 16-cv-12149, Sept. 21, 2018, *quoting Mingus v. Butler*, 591 F.3d 474, 482 (6th Cir. 2010), *citing Will v. Michigan Dep't of State Police*, 491 U.S. 48, 71, 109 S. Ct. 2304 (1989).

Further, no suit can be brought against State Respondents because the DTSA provides a cause of action for misappropriation, and a trade secret is not misappropriated when acquired innocently: "In general, it is only when the theft is accomplished by a tort or a breach of contract that there is liability." *Bondpro Corp. v. Siemens Power Generation, Inc.*, 463 F.3d 702, 709 (7th Cir. 2006). (*See, also* A.C.B. 12:4 – 17.)

Sanofi attempts to distinguish the case at bar from *Amgen Inc. v. California Correctional Health Care Services*, 47 Cal.App.5th 716, 260 Cal. Rptr. 3d 873 (Cal. App. 2020), by arguing that, unlike the statutory scheme in *Amgen*, the NAC § 439.735 requirement to submit a request for confidentiality "creates a duty to maintain the confidentiality of the trade secrets or limit their use[,]" and therefore not only is the DHHS rendered subject to liability under the DTSA if they release these records pursuant to an NPRA request simply by virtue of the fact that Sanofi or others *requested* confidentiality, they would also be liable simply for *using the information* contained within the records. (Sanofi A.B., 67:5 – 16) Sanofi's interpretation leads to an absurd result.

In Sanofi's vision, the point of S.B. 539 was for DHHS to collect this information, and then simply possess it for time immemorial, but to never do anything with it other than keep it locked away in a vault, segregated from any DHHS employee who may use the information. Such a reading makes a

mockery of S.B. 539 and of the law of statutory interpretation: "statutory interpretation should avoid absurd or unreasonable results." *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 227, 19 P.3d 245, 248 (2001), *citing General Motors v. Jackson*, 111 Nev. 1026, 1029, 900 P.2d 345, 348 (1995).

NAC 439.735 is clear, State Respondents simply applied it incorrectly here. It does not automatically render records confidential; it requires DHHS to conduct a review to determine potential liability under the DTSA. In this instance, DHHS reached a mistaken conclusion regarding whether it could face potential liability under the DTSA, and that mistaken determination should be corrected by this Court.

ii. <u>To any Extent the NAC 439.735 or .740 Frustrate the Purpose of S.B. 539 or the NPRA, They are Invalid and Must be Stricken.</u>

As discussed in the Opening Brief (37 – 41), NAC 439.735 has the effect of delaying the production of public records in response to NPRA requests, and the offending portions should be stricken. (O.B., 40.)[2] The Legislature recently amended the NPRA in 2019, enshrining a right to seek relief from the district

[2] State Respondents suggest (State A.B., 40), that The Nevada Independent raises the matter of delayed production due to NAC 439.735 for the first time on appeal, but The Independent objected to the regulations in its initial Petition, specifically mentioning the 30-day waiting period, and again in its Supplemental Brief in Support. 1 J.A. 7, ⁋ 48, and 11, ⁋ 66, and 244:20 – 245:12.

court if the production of public records is "unreasonably delayed[,]" clearly delineating the Legislature's continued dedication to timely production of records under the NPRA. 2019 Nev. Stat., ch. 612 § 1 at 4007.

To whatever extent NAC 439.735 or .740 frustrate either the larger purpose of S.B. 539, or the NPRA, this Court should strike those regulations, as it has repeatedly done in similar previous cases. *Clark Cty. Sch. Dist. v. Las Vegas Review-Journal*, 134 Nev. Adv Rep. 84, 9 – 10, 429 P.3d 313, 317 – 18 (2018), *Comstock Residents Ass'n v. Lyon Cty. Bd. of Comm'rs*, 134 Nev. Adv. Rep. 19, 10, 414 P.3d 318, 322 (2018).

"The mere enacting of the mentioned administrative regulation obviously cannot countermand the statutory mandate." *Clark Co. Social Service Dep't v. Newkirk*, 106 Nev. 177, 179, 789 P.2d 227, 228 (1990).

The relevant enabling statute is Nev. Rev. Stat. § 439B.685. The plain language of the statute authorizes the Department to "adopt such regulations as it determines to be necessary and advisable to carry out the provisions of NRS 439B.600 to 439B.695, inclusive."

While State Respondents argue (State A.B., 37), that their power to adopt regulations under Nev. Rev. Stat. § 439B.685 is "plenary," this position seems to be in clear conflict with the cases of this Court. As discussed in the Opening Brief (38 – 39), the general grant of authority in this case bears no resemblance

to those in cases in which this court has upheld regulations that limit access to public records have featured very specific grants of authority that directed the executive branch to exclude certain information or documents from the NPRA. *City of Sparks v. Reno Newspapers, Inc.*, 133 Nev. 398, 401 – 402, 399 P.3d 352 – 355 – 56 (2017).

State Respondents interpretation that the grant of authority under Nev. Rev. Stat. § 439B.685 allows a plenary power seems to invite absurd results – and implicate the nondelegation doctrine. "Separation of powers 'is probably the most important single principle of government.'" *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 299 – 300, 212 P.3d 1098, 1108 (2009) *quoting Galloway v. Truesdell*, 83 Nev. 13, 18, 422 P.2d 237, 241 (1967).

The enabling statute here does not direct State Respondents to conceal otherwise public records from the public view. When it has the effect of doing so, it offends its statutory mandate, and the NPRA, and must therefore be stricken. By contrast to regulations upheld by this Court, the legislative grant is nonspecific, and any inquiry into the legislative intent behind S.B. 539 reveals the urgent desire for transparency expressed by the Legislature at every step. NAC 439.735 should be stricken.

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c. Respondents Cannot Meet Their Burden Under the NPRA.

Notwithstanding State Respondents' suggestion to the contrary,[3] in the absence of a statutory exemption, Nevada law requires a governmental entity seeking to withhold public records to prove, by a preponderance of the evidence, that it is entitled to do so, and that its policy interest in non-disclosure outweighs the public interest. *E.g.*, *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 88, 343 P.3d 608, 614 (2015).

Respondents in turn each suggest The Nevada Independent had some obligation to inquire of the State Respondents for any requests for confidentiality submitted by Sanofi and others. (State A.B. at 12, 21, 39, Sanofi A.B. at 61 – 62). Of course, no such obligation ever existed.

Nevada law is explicitly clear on this subject: under Nev. Rev. Stat. § 239.011, when its request for public records was denied, The Independent was entitled to seek relief from the district court. As a laundry list of cases from this Court have made clear, the correct means by which to do that was petitioning for a writ of mandamus. *E.g.*, *DR Partners v. Board of County Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000), *citing Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990) ("Mandamus is the

[3] " . . . the Independent failed to meet its burden to show that it had a clear right to the records it requested." (State A.B., 15.)

appropriate procedural remedy to compel production of the public records sought in this case.").

Further, and in any case, "Nevada is a notice-pleading jurisdiction and pleadings should be liberally construed to allow issues that are fairly noticed to the adverse party." *Nevada State Bank v. Jamison Family Partnership*, 106 Nev. 792, 801, 801 P.2d 1377, 1383 (1990). Clearly, given the responses (Sanofi's Motion to Intervene and supporting documents alone spanned approximately 200 pages of text and exhibits, 2 J.A. 257 – 455), Respondents had fair notice of The Nevada Independent's position on the relevant issues. The Petition and Supplemental Brief in Support describes, in at least some level of detail, a claim that State Respondents improperly failed to comply with their obligations under the NPRA, that their interpretation of liability under the DTSA and confidentiality was mistaken, and that the regulatory scheme enacted by State Respondents was either structurally flawed or incorrectly applied, or both. *See, generally*, 1 J.A. 1 – 14, 235 – 246. As discussed herein throughout, in the case that the records sought are not made confidential by law, it is the obligation of State Respondents to prove their confidentiality at common law and not the obligation of The Nevada Independent to prove otherwise. *E.g.*, *Blackjack Bonding*, 131 Nev. at 88, 343 P.3d at 614.

Respondents each attempt to stretch the argument further still, suggesting certain inferences be drawn from The Independent's purported failure to seek or protest the requests for confidentiality at a time and place more convenient to Respondents: in Sanofi's case, that the request for confidentiality and the allegations therein are undisputed (Sanofi A.B. 61:15 – 62:7); State Respondents suggest the request for confidentiality and declaration of James Borneman, submitted by Sanofi, can stand in for evidence State Respondents failed to offer in support of their defenses (State A.B. 21 – 23). In an apparent attempt to distract from the fact that they placed no evidence before the district court – in other words, no possibility exists State Respondents have created a preponderance – State Respondents baselessly suggest that The Nevada Independent is challenging the claimed trade secret status for the first time on appeal. The record belies this quite plainly.

The Nevada Independent has, at every step of the litigation, disputed the claim that the public records requested herein are trade secrets[4], or indeed, that they could be.[5]

Generally, proving that a party took reasonable steps to protect a trade secret requires that the party place evidence before a fact-finder. *Learning*

[4] *E.g.*, 1 J.A. 7, ¶ 43, 1 J.A. 12, ¶ 70, 1 J.A. 238 – 244, 3 J.A. 741 – 757,
[5] *E.g.*, 4 J.A. 755:26 – 757:7, 4 J.A. 783:22 – 784:14, 4 J.A. 846:12 – 849, 4 J.A. 941:3 – 21.

Curve Toys, Inc. v. PlayWood Toys, Inc., 342 F.3d 714 (7th Cir. 2003). In fact, "'only in an extreme case can what is a 'reasonable' precaution be determined [as a matter of law], because the answer depends on a balancing of costs and benefits that will vary from case to case.'" *Id.*, *quoting Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 179 (7th Cir. 1991).

Sanofi submitted the Declaration of James Borneman in support of its claims of confidentiality. As discussed previously, the Declaration was deeply flawed, and it was an abuse of discretion for the district court to admit it into evidence without even allowing The Nevada Independent an opportunity to cross-examine Mr. Borneman, in clear contravention of the requirements of E.D.C.R. 2.21 and N.R.C.P. 56(e). (O.B. 34 – 37.) Contrary to Sanofi's argument, it is proper for The Nevada Independent to raise this abuse of discretion on appeal, and for this Court to consider the matter. *Consol. Generator-Nevada v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) ("[S]ince CGN is appealing from a final judgment the interlocutory orders entered prior to the final judgment may properly be heard by this court.").

Even in the event this Court prefers not to disturb the district court's decision to consider Mr. Borneman's Declaration, there is insufficient evidence upon which to base a finding that Sanofi's information was ever a trade secret.

As discussed above, State Respondents placed no evidence before the district court. State Respondents' suggestion that the district court did not abuse its discretion in basing its decision on a complete absence of evidence, in reliance on *Cty. Of Clark v. Doumani*, 114 Nev. 46, 53 n.2, 952 P.2d 13, 17 n.2 (1998), is misplaced.

This Court, in *Doumani*, reviewied a discretionary act of a local government – a completely different context from a petition for enforcement of the NPRA. *Doumani*, simply states that, whether a district court hears additional evidence, beyond whatever the commission or council whose decision it was reviewing had entertained, the standard before this Court is for an abuse of discretion: "We see no reason, however, to make a distinction in the standard of review based on whether the district court has taken additional evidence."

Very clearly, the ruling in *Doumani* is specific to the context of reviews of zoning decisions of local governments, and has no application, even by analogy, to this case, where a wealth of caselaw has made clear that it is a preponderance of *evidence* which must be put before a district court before that court can correctly rule in favor of a governmental entity seeking to withhold public records. *E.g.*, *Blackjack Bonding*, 131 Nev. at 88, 343 P.3d at 614.

In sum, numerous federal district and circuit courts have drawn the same

conclusion: the existence of a trade secret must be proven by evidence. In this circumstance, Respondents made affirmative choices not to place evidence before the district court. They must not now be rewarded for that decision.

No evidence was placed before the district court by State Respondents, and that which was brought by Sanofi was fraught with reliability concerns (O.B. 34:11 – 37:3). There is no basis upon which to find that Respondents have carried their burden under the NPRA. The order of the district court should be reversed, and production of the public records ordered.

d. Nev. Rev. Stat. § 600A.030(5)(b) Specifically Exempts These Public Records from Being Considered Trade Secrets Under Nevada Law.

Sanofi attempts to read an ambiguity into S.B. 539 by inventing a conflict between Nev. Rev. Stat. § 600A.030(5)(b) and other portions of S.B. 539, in an effort to encourage this Court to ignore the plain text of the law, the Legislative Counsel's Digest (regarding Nev. Rev. Stat. § 600A.030(5)(b): "AN ACT relating to prescription drugs . . . providing that certain information does not constitute a trade secret." 2017 Statutes of Nevada, ch. 592, Legislative Counsel's Digest, 4295 – 96), and the on-record statements of countless legislators made during the actual debate on S.B. 539 and predecessor legislation, and instead prefer the submissions of counsel for the Legislature in

the *PhRMA v. Sandoval* matter in determining legislative intent. (Sanofi A.B., 51:5 – 55.)

Particularly given that Nevada's Legislature is composed entirely of part-time citizen legislators[6], it seems obvious that Amicus Curiae Culinary Workers Union Local 226's explanation is correct – the opinions expressed in the name of the Nevada Legislature in the *PhRMA v. Sandoval* matter are actually the opinions of the Legislative Counsel Bureau. (A.C.B., 22:10 – 15.) Further still, given the extensive debate regarding S.B. 539 and predecessor legislation in the Nevada Legislature, there is no need to make guesses about which legislators were in contact with LCB during the *PhRMA v. Sandoval* litigation, if any, or what their opinions were – there are myriad preferable sources from which to determine legislative intent, including lengthy recorded debate, if that determination is necessary. 1 J. A. 6.

"When interpreting a statutory provision, this court looks first to the plain language of the statute." *Clay v. Eighth Judicial Dist. Court of State*, 129 Nev. 445, 451, 305 P.3d 898, 902, *citing Bigpond v. State*, 128 Nev. 108, 114, 270

[6] The 79th, or 2017, Session of the Nevada Legislature, adjourned sine die on June 6, 2017. The next time the Nevada Legislature gaveled in was February 4, 2019, for the 80th, or 2019, Session. The entirety of the Nevada Legislature's involvement in *PhRMA v. Sandoval* took place while the Legislature was not in session. 2:17-cv-02315, ECF Nos. 39 (Motion to Intervene by Nevada Legislature, filed September 26, 2017), 97 (Order Granting Unopposed Motion for Voluntary Dismissal without Prejudice, filed June 28, 2018).

P.3d 1244 (2012). "[S]ubsections of a statute will be read together to determine the meaning of that statute." *Cable v. State ex rel. ITS Emplrs. Ins. Co.*, 122 Nev. 120, 126 (2006), *citing Diamond v. Swick*, 117 Nev. 671, 676, 28 P.3d 1087, 1090 (2001).

Notwithstanding all the foregoing, while legislative intent "'is the controlling factor[,]'" "The starting point for determining legislative intent is the statute's plain meaning[.]" *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) *quoting Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983). "[W]hen a statute 'is clear on its face, a court can not go beyond the statute in determining legislative intent.'" *Id.* Generally, "legislative history, reason, and public policy" offer insight to an ambiguous statute. *Id., citing Robert E.*, 99 Nev. at 445 – 48, 664 P.2d at 959 – 61.

Every aspect of legislative intent behind S.B. 539 leads to the conclusion that the Nevada Legislature enacted the statutory scheme to create transparency in an opaque market. 1 J.A. 6, fn.4. Consider Nev. Rev. Stat. § 439B.685(1)(a), which refers to DHHS "striv[ing] to ensure that consumers receive accurate information regarding . . . prescription drugs[.]"

However, no inquiry into legislative intent is necessary here, because no ambiguity exists in Nev. Rev. Stat. § 600A.030(5)(b). The statute plainly states that, to whatever extent Nev. Rev. Stat. §§ 439B.635, .640, .645 or .660 require

individuals or entities to disclose information, that information is not a trade secret.

No inquiry into the legislative intent is necessary here, as Nev. Rev. Stat. § 600A.030(5)(b) is clear and only subject to one reasonable interpretation. But, should this Court engage in an examination of the intent of the Legislature in enacting it, the Legislative Counsel's Digest is instructive: "AN ACT relating to prescription drugs . . . providing that certain information does not constitute a trade secret." 2017 Statutes of Nevada, ch. 592, Legislative Counsel's Digest, 4295 – 96.

e. Even Were These Records Determined to be Confidential, Nonetheless the Overwhelming Weight of the Balancing Test Would Favor Disclosure.

Given the plain language of Nev. Rev. Stat. 600A.030(5)(b), it appears the law of Nevada precludes a finding of confidentiality in this instance. Even were this Court to determine the records herein were confidential, nonetheless The Nevada Independent should still be granted access to them.

This Court has acknowledged that many public policy questions are "better left to the Legislature[,]" *Renown Health, Inc. v. Vanderford*, 126 Nev. Adv. Rep. 24, 7, 235 P.3d 614, 616 (2010), *citing Nevada Hwy. Patrol v. State, Dep't Mtr. Veh.*, 107 Nev. 547, 550 – 1, 815 P.2d 608, 610 – 1 (1991); *Niece v. Elmview Group Home*, 131 Wn. 2d 39, 929 P.2d 420, 428 (Wash.

1997). Where, as here, the Legislature has spoken so clearly, this Court should give effect to the clearly stated intent of the Legislature and order production of the records The Nevada Independent is entitled to under the NPRA.

CONCLUSION

For the foregoing reasons, The Independent respectfully requests this Court reverse the ruling of the district court and order Respondents Whitley and DHHS produce the requested public records, as they are obligated to under the NPRA.

DATED this 25th day of June, 2021.

/s/ Matthew J. Rashbrook

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ATTORNEY'S CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not contain more than 5,924 words.

3. Finally, I hereby certify that I have read this appellate brief, and do the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 25th day of June, 2021.

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CERTIFICATE OF MAILING

I hereby certify and affirm that Appellant's Reply Brief was filed electronically with the Nevada Supreme Court on the 25th day of June, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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