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July 8, 2020

Chief Justice Tani G. Cantil-Sakauye
and Associates Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, California 94102-4797

Re: ***Amgen, Inc. v. The California Correctional Health Care Services***
Case No. S262846

Dear Chief Justice Cantil-Sakauye and Associates Justices:

Under rule 8.500(g) of the California Rules of Court, the Chamber of Commerce of the United States of America respectfully submits this letter as amicus curiae urging this Court to grant review of the above-entitled case.

INTEREST OF AMICUS CURIAE

The Chamber is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents more than three million businesses, state and local chambers of commerce, and professional organizations. Thousands of the Chamber's members are California businesses, and thousands more do business in the state. The Chamber regularly advocates for the interests of its members by filing amicus curiae briefs in cases involving issues of significance to the California business community.

This case concerns whether, and under what circumstances, a trade secret owner may preclude the government from disclosing trade secret information in response to a California Public Records Act (PRA) request. This issue has extreme importance because businesses in today's knowledge-based economy increasingly rely on robust trade secret protection. Requiring companies to disclose trade secrets to the government as part of the regulatory process is one thing. The government then turning around and disclosing that information to the public (especially to competitors) is quite another. That is bad for business, bad for agencies, and ultimately bad for the public.

INTRODUCTION

California law has long protected trade secrets of private companies doing business in the state. Consistent with that tradition, Senate Bill No. 17 (SB 17) simply requires pharmaceutical companies to provide certain drug pricing information to entities covered by the statute. Nothing in SB 17 does away with general protection of trade secrets; to the contrary, it maintains trade secret protection by not calling for disclosure of this pricing information to competitors or the public at large. Thus, the trial court correctly enjoined the California Correctional Health Care Services (CCHCS) from unilaterally disclosing the trade secret pricing information that Amgen had provided to CCHCS solely to comply with SB 17.

The Court of Appeal’s reversal of that decision creates a bad rule of law and imposes significant costs on businesses, agencies, and the public. Developing new technologies and know-how that benefit the public is time-consuming and oftentimes very expensive work. Individuals and companies rely on robust trade secret protection to enable and protect that investment. For the government to pull the rug out from under that expectation can be devastating. If the California Legislature really intends that result, it knows how to say so. Without an express command, the default rule should remain that the government will protect trade secrets submitted to it as part of the regulatory process.

Otherwise, innovators will have to think twice before disclosing information to government agencies, impairing agencies’ ability to engage in cooperative back-and-forth discussions with the entities they regulate. And companies will also have to think twice before investing in trade secrets that could become worthless upon disclosure by the government.

LEGAL ARGUMENT

A. Senate Bill No. 17 does not strip pricing information of trade secret protection.

The plain language of the Government Code establishes that trade secrets submitted to the government are protected. The PRA specifies that, with exceptions not applicable here, it “does not require the disclosure of . . . any . . . [¶] [r]ecords, the disclosure of which is exempted or prohibited pursuant to . . . provisions of the Evidence Code relating to privilege.” (Gov. Code § 6254 subd. (k) (section 6254(k)).) Under the Evidence Code, “the owner of a trade secret has a privilege to refuse to

disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice” (an exception not applicable here). (Evid. Code § 1060.)

The Court of Appeal concluded that SB 17 strips pricing information of trade secret protection because it requires disclosure to the government and certain purchasers, and Amgen did not prove that the purchasers respected the information’s confidentiality. (Typed opn. 23-24.) That reasoning is backwards. Trade secret protection is the norm under section 6254(k), and the Legislature can overcome that default rule only with an express statement to the contrary—a statement that is wholly lacking in SB 17.

This Court’s decision in *State Farm Mutual Automobile Insurance Co. v. Garamendi* (2004) 32 Cal.4th 1029 (*Garamendi*), shows the proper analysis. This Court held that the PRA’s trade secret exemption did not prevent disclosure of certain financial information submitted to the Insurance Commissioner because the relevant statute expressly “require[d] public disclosure of ‘[a]ll information provided to the commissioner.’” (*Id.* at pp. 1043-1044.) The statute also expressly provided that the exemption in Government Code section 6254, subdivision (d) did not apply, “mak[ing] clear that these exemptions [from disclosure] do not apply.” (*Id.* at p. 1044.) In other words, the Court looked to whether the insurance statute overcame the default rule of trade-secret protection, and held that it did.

In contrast, nothing in SB 17 expressly provides that “ ‘[a]ll information’ ” submitted pursuant to it “ ‘shall be available for public inspection.’ ” (*Garamendi, supra*, 32 Cal.4th at p. 1043.) In fact, SB 17 makes no mention of the PRA whatsoever. Thus, under the plain language of SB 17, the PRA’s default rules continue to apply. The Legislature knows how to require public disclosure when it wants to do so. (See *id.* at pp. 1043-1044.) The Legislature did not do so here.

The Court of Appeal noted that SB 17 requires disclosure to certain purchasers to give them more time to decide which drugs to purchase and to negotiate prices. (See typed opn. 23.) But the statute requires disclosure only to those purchasers; it otherwise maintains trade secret protection by not calling for disclosure of those documents to competitors or the public at large.

The Court of Appeal emphasized that SB 17 does not obligate recipients to keep the pricing information in the notices confidential. (Typed opn. 23-24.) But the critical question is not whether *statutory recipients must* keep the information confidential; it is whether the *rights holder undertakes* “ ‘[r]easonable efforts’ ” to

maintain the information's secrecy (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1454, emphasis added) despite "limited disclosure to noncompetitors" (*Masonite Corp. v. Cty. of Mendocino Air Quality Mgmt. Dist.* (1996) 42 Cal.App.4th 436, 451, fn.11).

What is "reasonable" depends on the "circumstances" of each case. (Civ. Code § 3426.1, subd. (d)(2).) Amgen twice marked the information "[c]onfidential," as the Court of Appeal recognized. (Typed opn. 8.) It is not clear what more Amgen could have done while complying with SB 17.

In the Court of Appeal's view, Amgen needed to present "evidence that the purchasers did not, and would not, disclose the information" to others. (Typed opn. 25). For what it is worth, Amgen's confidentiality designation was apparently successful, as there is no evidence that any of the required recipients disclosed the confidential, trade-secret information to others.

More importantly, such evidence would be legally irrelevant because what matters is that the Legislature did not expressly compel public disclosure. Instead, it expressly contemplated only limited disclosure. The Legislature could reasonably determine that disclosure to certain purchasers was necessary to achieve its objectives, but that there was no justification for requiring further disclosure of trade secret information to competitors or the public at large. And that is exactly the balance the Legislature struck in SB 17 by requiring limited disclosure without overriding the PRA's trade secret protections.

Abrogating trade secret protections, especially vis-à-vis competitors, should not be done lightly. To the extent that the Legislature desires such an abrogation, it must say so expressly to overcome section 6254 subdivision (k). That default rule ensures that the Legislature intends such a draconian result. And it gives individuals and businesses notice of when trade secrets will not be protected, so they can decide whether the investment in developing those secrets is worthwhile and whether to cooperate with agencies' requests for information.

B. The Court of Appeal's decision will harm businesses, administrative agencies, and the public.

The Court of Appeal's abrogation of the protection afforded by law to trade secrets would cause irreparable harm to businesses that rely on maintaining the secrecy of their trade secret information. It would discourage transparency between

businesses and regulators to the detriment of the administrative state. And it would upend the incentives necessary to foster innovation.

First, protecting the confidentiality of trade secrets is essential to commerce and the business community. “[P]rivate parties invest extensive sums of money” in research and development (*DVD Copy Control Ass’n, Inc. v. Bunner* (2003) 31 Cal.4th 864, 880) (*Bunner*), and “the large and growing importance of trade secrets to the U.S. economy” is well established (Almeling, *Four Reasons to Enact a Federal Trade Secrets Act* (2009) 19 Fordham Intell. Prop., Media & Ent. L.J. 769, 783). But public disclosure of a trade secret, “especially to a competitor,” destroys “the value of [the] property right” along with “the competitive advantage it affords the owner.” (Stephens, *Is the “Good Cause” Standard Inadequate to Protect Trade Secrets in Discovery Disputes?* (2015) 52-APR Hous. Law. 20, 20).

Public disclosure of trade secrets in response to a PRA request causes the same injury as unlawful misappropriation by a competitor—except that a rights holder has no recourse against CCHCS to recoup its substantial lost investment. The Legislature seemingly recognized as much in adopting the trade secret exemption in the first place. This Court should respect the Legislature’s decision to protect trade secrets, absent an express legislative statement to the contrary.

The Court of Appeal suggested that neither the business community nor any individual manufacturer would be harmed because each manufacturer would have access to the trade secret information of the other. (Typed opn. 36.) But under that rationale, there would be no need for trade secret protections to exist at all, which is obviously wrong. Some competitors are more successful at innovating than others, and their trade secrets can be more valuable. Sound public policy and experience confirm that innovators should be rewarded for their own investments, while would-be free-riders should be discouraged from piggybacking on the investments of others. (See *Bunner, supra*, 31 Cal.4th at p. 880 [a trade secret owner should be permitted to “reap the fruits of its labor”].) Instead, others should undertake the hard work of undertaking their own innovation, which could provide additional benefits to the public.

Second, protecting the confidentiality of trade secrets is essential to promote transparency between businesses and regulators. In many (if not most) sectors, businesses interact regularly with administrative agencies on matters touching the full scope of their operations. And agencies routinely ask for trade secrets. But adopting the Court of Appeal’s interpretation would discourage businesses from

sharing sensitive information with regulators out of reasonable fear that the information could become public through PRA requests. That would undermine, rather than advance, the interests of administrative agencies by hindering the government’s ability to carry out its police powers and “to provide accountability . . . for prescription drug pricing.” (Health & Saf. Code § 127676, subd. (b)(1).)

California law should foster a cooperative, not confrontational, relationship between administrative agencies and the businesses they regulate. An active and open exchange between the two redounds to the benefit of both, so that companies can engage with the government on matters such as licensing, zoning, and taxation—trusting that agencies will not disclose on a whim the trade secrets shared in confidence with regulators.

Finally, protecting the confidentiality of trade secrets is necessary to foster innovation and new technologies that benefit the public. As courts have recognized, “[t]rade secret law promotes the sharing of knowledge[] and the efficient operation of industry” (*Kewanee Oil Co. v. Bicron Corp.* (1974) 416 U.S. 470, 493 [94 S.Ct. 1879, 40 L.Ed.2d 315] (*Kewanee*)), and “maintains important standards of commercial ethics,” by “promot[ing] and reward[ing] innovation and technological development” (*Bunner, supra*, 31 Cal.4th at p. 878; see also *id.* at p. 880 [“trade secret law ‘acts as an incentive for investment in innovation’ ”]; White & Sanney, *Managing the Risks of FOIA-able Trade Secrets* (2014) 14 Wake Forest J. Bus. & Intell. Prop. L. 316, 326 [trade secret law “advance[es] innovation by incentivizing certain intellectual endeavors”]).

Adopting the Court of Appeal’s interpretation, and permitting CCHCS to determine unilaterally when a rights holder’s trade secret information may be disclosed to the public, would upend these incentives and discourage innovators from investing substantial resources. The risk that trade secret information will be disclosed by a government actor with no interest in maintaining its secrecy can simply be too great to justify the upfront investment necessary to develop the trade secret in the first place. (See Miller, *Confidentiality, Protective Orders, and Public Access to the Courts* (1991) 105 Harv. L.Rev. 427, 473 [“the risk of disclosure of [trade secret] property undermines a business’s willingness to incur the often enormous expenses of developing information-based assets”].) That would deprive the public of “technological and scientific advancement [that would otherwise benefit] the Nation.” (*Kewanee, supra*, 416 U.S. at p. 493.)

Chief Justice Tani G. Cantil-Sakauye
and Associates Justices
July 8, 2020
Page 7

By contrast, a plain language interpretation of the PRA's trade secret exemption would provide rights holders with reasonable assurance that their trade secret information will be protected, and would encourage businesses to invest in developing new technologies that benefit the public. Maintaining the proper balance of incentives is more important than ever in today's information age: "As the United States continues its shift to a knowledge- and service-based economy, the economic strength and competitiveness of firms increasingly depend upon their know-how and intangible assets." (Thomas, Cong. Research Serv. (2014) R41391, *The Role of Trade Secrets in Innovation Policy 2*.) That makes robust trade secret protection essential.

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that this Court grant the petition for review and reverse the Court of Appeal's decision.

Respectfully Submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On July 8, 2020, I served true copies of the following document(s) described as **Amicus Curiae Letter In Support of Petition for Review** on the interested parties in this action as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 8, 2020, at West Hills, California.



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