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FILEDSuperior Court of California
County of Los Angeles

MAR 11 2019

Sherri R. Carter, Executive Officer/Clerk

By *F. Becerra, Jr.*, Deputy
Fernando Becerra, Jr.SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, CENTRAL DISTRICT

AMGEN INC.,

Plaintiff/Petitioner,

vs.

THE CALIFORNIA CORRECTIONAL
HEALTH CARE SERVICES, an agency of the
State of California,

Defendant/Respondent.

Case No. 18-stcp-03147

Complaint filed: December 11, 2018

**ORDER GRANTING
PETITIONER AMGEN INC.'S MOTION
FOR A PRELIMINARY INJUNCTION**Judge: Hon. Mitchell L. Beckloff
Dept.: 86
Hearing Date: January 9, 2019
Time: 9:30 a.m.

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1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 On January 9, 2019, at 9:30 a.m., Petitioner Amgen Inc.'s ("Amgen") motion for a
3 preliminary injunction and motion to file records under seal came on for hearing before this Court in
4 Department 86.

5 Amgen's motion for a preliminary injunction seeks to enjoin Respondent California
6 Correctional Health Care Services ("CCHGS") from disclosing a notice provided to it by Amgen
7 pursuant to Senate Bill 17 ("Notice"). Amgen sought to enjoin CCHCS from disclosing the Notice,
8 pursuant a request under the California Public Records Act, on the grounds that (i) the Notice
9 contains confidential, proprietary, and trade secret protected information, including trade secret
10 pricing and pricing strategy; (ii) the Notice is not subject to disclosure under the Public Records Act;
11 and (iii) disclosure of the Notice would cause immediate and irreparable harm to Amgen.

12 Having considered the arguments and papers submitted, and finding good cause,

13 **IT IS HEREBY ORDERED** that:

14 1. The Court **GRANTS** Amgen's motion for a preliminary injunction. A copy of the Court's
15 February 1, 2019 ruling is attached hereto as Exhibit A.

16 2. Amgen's Notice or information ^{contained} in Amgen's Notice ^{by CCHGS} shall not be disclosed to any third parties
17 pursuant to a Public Records Act request or otherwise.

18 3. Nothing in this Order shall prevent CCHCS from disclosing a price increase ^{to the Wholesale Acquisition Cost (WAC)} implemented by
19 Amgen ^{for the medications in the Notice} that ~~has become publicly available~~; and

20 4. Amgen shall post a preliminary injunction undertaking in the amount of \$2,000.00.

21
22 Date: February ^{3/11} 2019

23 By:

24 Hon. Mitchell L. Beckloff

25
26 * lodged with the court at the conclusion of the
27 hearing dated November 15, 2018
28

OBJECTIONS CONSIDERED / ALTERNATIVE ORDER CONSIDERED

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EXHIBIT A

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Sherri R. Carter, Executive Officer/Clerk
By [Signature] Deputy
Fernando Becerra, Jr.

RULING ON SUBMITTED MATTER

Case No. 18-STCP-03147

OSC Re: PRELIMINARY INJUNCTION

This matter is before the court on Petitioner Amgen Inc.'s motion for a preliminary injunction. Petitioner seeks to prevent Respondent, California Correctional Health Care Services, from disclosing Petitioner's alleged confidential and proprietary trade secrets pursuant to a California Public Records Act request (Gov't Code § 6251 *et seq.*) prior to trial of its writ petition. Respondent opposes the motion.

The petition has not yet been set for trial.

At issue here is whether and to what extent, if any, Respondent may disclose certain price increase information provided to it by Petitioner prior to Petitioner effectuating the price increase. The parties agree any preliminary injunction would operate only until Petitioner implements the noticed price increase and that price increase become public.

APPLICABLE STANDARDS

The California Public Records Act (CPRA) is found at Government Code section 6251, *et seq.* The legislature enacted the CPRA to clarify "the scope of the public's right to inspect public records . . ." (*County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 825.) The CPRA "was enacted for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies." (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 425-426.) "The CPRA embodies a strong policy in favor of disclosure of public records . . ." (*California State University, Fresno Ass'n, Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 831.)

The public's right to disclosure is not absolute. "In California, the Act includes two exceptions to the general policy of disclosure of public records: (1) materials expressly exempt from disclosure pursuant to [Government Code] section 6254; and (2) the "catchall exception" of [Government Code] section 6255, which allows a government agency to withhold records if it can demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure." (*City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1017.)

Petitioner's request for a preliminary injunction turns on the applicability of this first exemption, Government Code section 6254.

"[A] court will deny a preliminary injunction unless there is a reasonable probability that the plaintiff will be successful on the merits, but the granting of a preliminary injunction does not amount to an adjudication of the merits." (*Beehan v. Lido Isle Community Assn.* (1977) 70

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Cal.App.3d 858, 866.) "The function of a preliminary injunction is the preservation of the status quo until a final determination of the merits." (*Ibid.*)

"Trial courts traditionally consider and weigh two factors in determining whether to issue a preliminary injunction. They are (1) how likely it is that the moving party will prevail on the merits, and (2) the relative harm the parties will suffer in the interim due to the issuance or nonissuance of the injunction." (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1420.) "[T]he greater the ... showing on one, the less must be shown on the other to support an injunction." (*Ibid.* [quoting *Butt v. State of California*, (1992) 4 Cal.4th 668, 678].) The burden of proof is on the petitioner as the moving party "to show all elements necessary to support issuance of a preliminary injunction." (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1481.) The court is required to consider both factors.

Preliminary injunctive relief requires the use of competent evidence to create a sufficient factual showing on the grounds for relief. (See, e.g., *Ancora-Citronelle Corp. v. Green* (1974) 41 Cal.App.3d 146, 150.) A plaintiff seeking injunctive relief must also show the absence of an adequate remedy at law should it prevail at trial. (Code of Civ. Pro. § 526, subd. (a)(4).)

A preliminary injunction ordinarily cannot take effect unless and until the plaintiff provides an undertaking for damages which the enjoined defendant may sustain by reason of the injunction if the court finally decides that the plaintiff was not entitled to the injunction. (See Code of Civ. Pro. § 529, subd. (a); *City of South San Francisco v. Cypress Lawn Cemetery Ass'n*, (1992) 11 Cal. App. 4th 916, 920.)

Likelihood of Success on the Merits

Petitioner argues it is likely to succeed on the merits of its petition. Relying on subdivision (k) of Government Code section 6254 and Evidence Code section 1060, Petitioner asserts it can prevent Respondent from disclosing its notice of a potential price increase (the Notice) it provided to Respondent as required by Senate Bill (SB) 17. (See *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 775 [explaining subdivision (k) extends exemption to records under Evidence Code section 1060 pertaining to trade secrets].)¹ Petitioner contends the pricing information contained in the Notice is highly sensitive, confidential, proprietary and a trade secret under Civil Code section 3426.1.

SB 17 codified in part at Health and Safety Code section 127675 *et seq.* provides:

"A manufacturer of a prescription drug with a wholesale acquisition cost more than forty dollars (\$40) for a course of therapy shall notify each person purchaser described in section 127675 if the increase in the wholesale acquisition cost of a prescription drug is more than 16%, including the proposed increase in the cumulative increases that occurred within the previous 2 calendar years prior to the current year. . . ." (Health and Saf. Code § 127677, subd. (a).)

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"The notice required . . . shall be provided in writing at least 60 days prior to the planned effective date of the increase." (*Id.* at subd. (b).)

Respondent argues SB 17 reflects a legislative decision the pricing information it requires – even if a trade secret – is not exempt from disclosure. Respondent asserts the public interest requires disclosure. It also contends Petitioner's Notice is not a trade secret. Finally, Respondent raises Petitioner's failure to join the CPRA requestor, Thomson Reuters, as fatal to Petitioner's success on the merits.

The court reviewed the Notice at issue herein. (Petitioner lodged the Notice with the court when the hearing concluded at the court's request and with the consent of the parties.)

Petitioner transmitted the Notice to Respondent by email. The Notice is brief; it is only two pages in length. The first page contains the typical and well-known email format: "From," "To," "Subject" and "Date" along with a two-sentence narrative. The email includes an attached chart.

The attached chart has headings directed toward SB 17 compliance. Petitioner fairly characterizes the information in the Notice as follows: "(i) a list of Amgen's drugs for which potential price increases may go into effect, (ii) each drug's current list price, and (iii) the range of possible, though not final, price increases (in dollar and percentage terms). (Motion 8:19-21.)

Civil Code section 3426.1, subdivision (d) defines "Trade Secret" as "information, . . . that (1) [d]erives independent economic value . . . from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Petitioner argues its pricing information is highly sensitive, proprietary and therefore, a trade secret.

Petitioner asserts the law clearly holds pricing information meets the statutory requirements of a trade secret. Plaintiff relies on *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, which "recognized that information related to cost and pricing can be trade secret." (*Id.* at 1455.) In particular, the court in *Whyte* noted that "cost and pricing information not readily known in the industry—information such as the cost of materials, labor, overhead, and profit margins—[can be a] trade secret." (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1456.)

Here, Petitioner demonstrates it makes reasonable efforts to maintain the secrecy of the pricing information. The evidence shows Petitioner maintains the confidentiality of its drug prices, contemplated drug prices, and the processes and policies concerning its drug pricing. (Wan Decl., ¶ 18) Petitioner further educates its employees on the confidentiality of changes in drug prices and requires strict adherence to confidentiality policies. (Wan Decl., ¶ 18.) Petitioner

also limits employee access to information regarding drug prices and potential changes to drug prices. (Wan Decl., ¶ 18.) Petitioner disclosed the pricing information to registered purchasers through the Notice solely for the purpose of complying with SB 17, otherwise Petitioner would not have disclosed it. (Wan Decl., ¶ 6.)

With respect to the other statutory element of a trade secret, Petitioner submits evidence the pricing information in the Notice contains independent economic value. Petitioner expended time, effort, and money to properly calibrate its prices for products as well as make determinations regarding price changes. (Wan Decl., ¶ 10.) Petitioner's pricing strategy provides Petitioner with a competitive advantage over competitors. (Wan Decl., ¶ 10.)

The pricing information contained in the Notice shows a range of prices contemplated for specified drugs. As argued by Petitioner, the range provides Petitioner's competitors with a pricing strategy. It allows those competitors to predict and counter Petitioner's business plans. It informs competitors which drugs are subject to a price increase and allows competitors to lower prices on competing drugs. The *range* of possible price increases for certain medications would never be publicly known even after Petitioner completed a price increase.

In opposition, Respondent contends Petitioner is not likely to succeed on its claim because the information contained in the Notice is not a trade secret. It argues SB 17 requires only disclosure of the date of the Wholesale Acquisition Cost (WAC) increase, the current WAC for the drug, the dollar amount of the increase and whether the increase is necessitated by change or improvement in the drug (if so, then what change or improvement). (Oppo. 10:21-25 [citing Health & Saf. Code § 127677, subd. (c)].)

Respondent relies on the holding in *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029 for support. In that case, State Farm Insurance Company was required to file a "community service statement" with the Insurance Commissioner; State Farm included a statement the information disclosed was a "trade secret" and the information could not be disseminated. After the Insurance Commissioner indicated the submitted information was public record subject to public inspection, the information was provided to a third party without State Farm's consent; State Farm filed a lawsuit to compel the return of this information. Ultimately, the court determined the Insurance Commissioner had properly promulgated regulations pursuant to an enabling statute that stripped the information of any trade secret protection. (*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1047.)

Respondent contends the facts here are similar because Government Code section 127677 requires the disclosure of information to third parties (statutorily defined registered purchasers) and to the Office of Statewide Health Planning and Development (OSHPD) for publication on the agency's website.² By compelling the disclosure of this information, Government Code section 127677 strips the pricing information of any trade secret protection.

The *Garamendi* decision turned on the scope of legislation specifically providing that a particular exemption in the CPRA did not apply and the Insurance Commissioner's authority to

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promulgate regulations pursuant to the statute. In *Garamendi*, the legislature addressed public disclosure and the CPRA.

Garamendi, however, is different than the situation herein. SB 17 does not address the CPRA. In fact, Government Code section 127679, subdivision (b) recognizes a manufacturer's right to withhold nonpublic information from required reports. The statute provides for internet publication by OSHPD of information provided by the manufacturer which is in the "public domain" or otherwise "publicly available."

Respondent also argues Government Code section 6254, subdivision (k), merely *permits* certain public records to be withheld by a but does not *require* that these records not be disclosed. (See *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1262. ["[T]he exemptions from disclosure provided by section 6254 are permissive, not mandatory: They allow nondisclosure but do not prohibit disclosure."]) Rather, Respondent notes "the privilege Government Code section 6254, subdivision (k) incorporates should be applied conditionally on a clear showing that disclosure is against the public's interest." (*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 777.)

As discussed at the hearing, however, without the ability to bring a reverse-CPRA action, Petitioner's trade secret protection would be left to the discretion of Respondent. Division One of this district's Court of Appeal has recognized the legitimacy of a reverse-CPRA action. (*Pasadena Police Officer's Ass'n v. Superior Court* (2015) 240 Cal.App.4th 268, 274-275.)

Respondent contends the public interest is not advanced by preventing the disclosure. Respondent correctly notes in enacting SB 17, the Legislature found requiring parties to declare large increase in the WAC of prescription drugs encouraged "accountability to the state for prescription drug pricing." (Health & Saf. Code § 127676, subd. (b).)

Here, there is no dispute a large increase in the WAC will be disclosed publicly. Petitioner does not contend once it has instituted a price increase the price increase is a trade secret. Thus, the legislature's intent to "improve data transparency" through a transparency database and to avoid reporting health care information "through many disparate systems" is not thwarted through recognizing a manufacturer's trade secret information for up to 60 days before the price increase is effectuated. (Health & Saf. Code § 127671.)

The court recognizes Petitioner provided the Notice to all registered purchasers. (Respondent indicates there are 174 such purchasers in the state.) Respondent contends the release of the information by Petitioner undermines Petitioner's claim of trade secrets because the information has been released to many who have no obligation to preserve the confidentiality of the information.

Respondent is correct. That said, the law compelled Petitioner to make the disclosure. While the information was released to registered purchasers, there is no evidence the pricing information in the Notice is "generally known to the public" or Petitioner's competitors. (Civ. Code § 3426.1, subd. (d)(1).) (See *Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1522

[information not readily ascertainable]; See also *DVD Copy Control Ass'n, Inc. v. Bunner* (2004) 116 Cal.App.4th 241, 251 [trade secret status "not necessarily" destroyed if not known by "potential competitors or other persons to whom the information would have some economic value"].)

Given the foregoing, the court finds Petitioner has sufficiently demonstrated a likelihood of success on the merits for purposes of this preliminary injunction.

Balance Relative Harms

As noted earlier, the court must consider "the relative harm the parties will suffer in the interim due to the issuance or nonissuance of the injunction." (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley, supra*, 105 Cal.App.4th at 1420.) Such consideration requires the court to evaluate the harm Petitioner is likely to sustain if the preliminary injunction is denied compared to the harm Respondent is likely to suffer if the injunction issued. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70.)

Petitioner urges once its trade secret is disclosed, the "trade secret status is lost forever with irreparable harm." (*Wallis v. PHL Associates, Inc.* (2008) 168 Cal.App.4th 882, 888.) That is, competitors will be free to act on the information.

Petitioner also argues disclosure of the pricing information in the Notice would put Petitioner "at a significant competitive disadvantage by providing [Petitioner's] competitors valuable non-public information and insights about [Petitioner's] pricing strategy, internal decision-making, internal forecasts, and a roadmap for [Petitioner's] potential actions with respect to certain products." (Wan Decl., ¶ 12.) Specifically, competitors will be able to use the information to make their own pricing determinations to (1) undercut Petitioner's prices, (2) dump competing drugs to decrease Petitioner's sales, (3) start publicly campaigning against Petitioner's products, or (4) negotiate sales contracts with potential clients and strengthen their existing client base. (Wan Decl., ¶ 13.)

Lastly, Petitioner contends Respondent will suffer no harm if the preliminary injunction is granted. If Petitioner effectuates a price increase and selects some price within the disclosed range, the actual WAC will become publicly available and disclosed.

In opposition, Respondent argues that Petitioner has not carried its burden of showing irreparable harm, noting the pricing information in the Notice has already been widely disclosed to 174 registered purchasers in the public and private sector. Nothing requires these third-party purchasers to keep this information confidential. (Opp. 8:8.) Thus, there can be no additional injury by Respondent's compliance with the CPRA request where there has already been a substantial disclosure to entities not required to maintain the secrecy of the information. Moreover, any reaction to the disclosure of this information would occur under any circumstances were the increase in the WAC is implemented and published in 60 days. (Oppo. 12:19-21.)

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While there may have already been disclosure to the 174 registered purchasers in the state as required by SB 17, there is no evidence those purchasers have not voluntarily complied with Petitioner's request to maintain the confidentiality of the information.³ More importantly, the audience to whom Petitioner actually disclosed the pricing information was not Petitioner's competitors. Therefore, public dissemination of the pricing information could be harmful to Petitioner notwithstanding Petitioner's compliance with SB 17.

The court finds the balance of relative harms tips in Petitioner's favor.

Petitioner's Failure to Join Thomson Reuters

Petitioner gave notice of these proceedings to Thomson Reuters, the CPRA record requestor. Thomson Reuters has chosen (at this point) to intervene in this litigation. The court finds Petitioner's failure to join Thomson Reuters is not fatal to its request for a preliminary injunction.

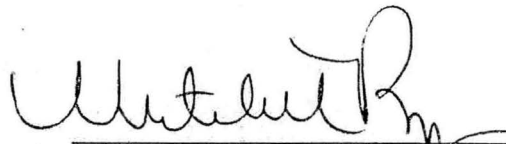
CONCLUSION

The court finds Petitioner has met its burden for purposes of a preliminary injunction. Respondent shall not release the information contained in the Notice unless and until Petitioner effectuates a price increase to the WAC for the medications in the Notice. Petitioner shall post a \$2,000 undertaking.

Petitioner shall prepare a formal order.

IT IS SO ORDERED.

Dated: February 1, 2019



Hon. Mitchell L. Beckloff
Judge

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¹ Government Code section 6254, subdivision (k) provides an exemption from disclosure under the CPRA of "Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Evidence Code section 1060 provides, "If he or his agent or employee claims the privilege, 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."

² The drug manufacturer "may limit the information reported [to OSHPD] . . . to that which is otherwise in the public domain or publicly available." (Gov't Code § 127679, subd. (b).)

³ The court agrees with Respondent that Petitioner's notice that the material is confidential does not impose an obligation of secrecy on the recipient. (Oppo. 12 n. 6.)

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1 **PROOF OF SERVICE**

2 I am employed in the County of Los Angeles, State of California. I am over the age of 18
3 and not a party to the within action. My business address is 523 West 6th Street, Suite 400, Los Angeles, California 90014.

4 On February 13, 2019, I served the foregoing document(s) described as:

5 **LETTER TO THE HONORABLE MITCHELL L. BECKLOFF DATED**
6 **FEBRUARY 13, 2019;**

7 **[PROPOSED] ORDER GRANTING PETITIONER AMGEN INC.'S MOTION FOR**
8 **A PRELIMINARY INJUNCTION**

9 on the interested parties in this action as stated below:

10 Via Email:

11 The California Correctional Health Services
12 The Office of the Attorney General of California
13 Sharon L. O'Grady
14 *sharon.ogradey@doj.ca.gov*
15 Paul Stein
16 *paul.stein@doj.ca.gov*

17 ☒ (BY E-MAIL) By transmitting a true copy of the foregoing document(s) to the e-mail
18 addresses set forth above.

19 ☐ (BY OVERNIGHT DELIVERY) I deposited in a box or other facility regularly maintained
20 by FedEx, an express service carrier, or delivered to a courier or driver authorized by said
21 express service carrier to receive documents, a true copy of the foregoing document(s) in a
22 sealed envelope or package designated by the express service carrier, addressed as set forth
23 above, with fees for overnight delivery paid or provided for.

24 ☐ (BY PERSONAL SERVICE) I caused a true copy of the foregoing document(s) to be
25 placed in a sealed envelope and delivered by hand to the offices of each interested party at
26 the above addressee(s) via messenger.

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

Executed on February 13, 2019, at Los Angeles, California.

23 Varun Behl

24 (Type or print name)

23 *Varun Behl*
24 (Signature)

03/12/2019