CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
P.O. BOX 12869
SALEM, OR 97309-0869

MARY MERTENS JAMES
Circuit Court Judge
PHONE: (503) 373-4303
FAX: (503) 373-4305

April 18, 2019

Via Email and Regular Mail

Reilley Keating, Crystal Chase, Patrick Michael, Nathaniel Garrett
Stoel Rives LLP
760 NW Ninth Ave Ste 3000
Portland OR 97205

Christina Beatty-Walters and Michael Krone
DOJ Trial Division
100 SW Market St
Portland OR 97201

Steven Wilker
Tonkon Torp LLP
888 SW 5th Ave Ste 1600
Portland OR 97204

Alletta Brenner
Perkins Coie LLP
1120 NW Couch St 10th Fl
Portland OR 97209

Cody Elliott and Erica Clausen
Miller Nash Graham & Dunn LLP
111 SW 5th Ave Ste 3400
Portland OR 97204

Re: Chevron U.S.A, Inc., v. Oregon DEQ et al.
Case No. 18CV51689

Dear Counsel:

This matter came before the Court on January 23, 2019, on Plaintiff's motions to show cause and extend temporary restraining order, the Court having allowed a temporary restraining order on November 13, 2018. Reilley Keating, Crystal Chase, Patrick Michael, and Nathaniel Garrett appeared for Plaintiff Chevron; Christina Beatty-Walters and Michael Krone appeared for Defendants Department of Environmental Quality (DEQ), Oregon Department of Justice (DOJ) and Richard Whitman; Steven Wilker appeared for Defendant Erik Lukens; Alletta Brenner appeared for Intervenor Renewable Energy Group, Inc.; and Cody Elliott and Erica Clausen appeared for Intervenor Western States Petroleum Association.

Following oral argument, the parties were permitted to supplement their positions with additional declarations, exhibits, or legal argument. Supplemental support for Plaintiff and Plaintiffs-Intervenors were submitted on February 6, 2019.

On February 8, 2019, pursuant to ORCP 79 C(2), all parties in this case filed a Stipulation that the trial on the merits shall be advanced and consolidated with the hearing on the pending motions for preliminary injunction. The parties agree that the Court should resolve this case without additional motions practice, discovery or trial. ORCP 79 C(2) permits the parties to "stipulate that the trial of the action on the merits * * * be advanced and consolidated with the hearing" on the motion for preliminary injunction. The parties made the stipulation for purposes of party and judicial efficiency. The parties agree that the Court's ruling on the pending motions for preliminary injunction should become the final order and serve as the basis for the entry of judgment.

As part of this stipulation, the parties agree that all declarations and exhibits are admitted as evidence, without objection from any party. The parties agree that any arguments about the evidence should go to the weight of the evidence, not admissibility. All parties agree that the defenses raised by the defendants in response to the motions shall be considered as though raised in an answer and argued at trial. The parties further agree that all briefs submitted (in connection with the TRO or preliminary injunction motions and including any brief submitted before, during, or after the January 23, 2019, hearing by permission of the Court) shall be considered by the Court as if presented at trial itself.

The Court accepts and takes judicial notice of the pleading index identifying all pleadings relevant to the consideration of the pending motions, and the exhibit index along with a copy of all declarations and exhibits submitted by the parties in this matter that are formally numbered as exhibits for the Court's reference. It is on this record, and based on the arguments made during the hearings, that the Court makes its findings and determination of declaratory and injunctive relief.

On February 08, 2019, the Court took the matter under advisement. The Court, having given careful consideration to the motion and memoranda, declarations, and the record, and being fully advised, issues the following decision:

Nature of Complaint

This is an action for declaratory and injunctive relief to prevent DEQ from disclosing confidential and proprietary trade secrets belonging to Chevron and other participants in the Oregon Clean Fuels Program in response to a public records request by Defendant Erik Lukens (Lukens). By Order dated November 6, 2018, the Attorney General of the Oregon Department of Justice (DOJ) ordered DEQ to disclose the individually-identifiable details of credit market transactions—to include the timing, volume, pricing, and identity of other contracting parties—concluding such information was not exempt from disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478 (PRL).

Chevron and Intervenors ("Plaintiffs") seek a declaration that the Attorney General misapplied the PRL and the Oregon Uniform Trade Secrets Act and that the information provided to DEQ constitutes trade secret information exempt from disclosure under the PRL. Plaintiffs also seek an order providing temporary, preliminary, and permanent injunctive relief prohibiting DEQ from directly or indirectly disclosing Chevron's (and other participants') trade secrets.

Parties

Chevron is a corporation organized and existing under the laws of the State of Pennsylvania with its principal place of business in San Ramon, California. DOJ is an administrative agency of the State of Oregon that is headed by Attorney General Ellen F. Rosenblum. Under ORS 192.407 and 192.411, the Attorney General reviews a state agency's denial of a request for public records under the

Oregon Public Records Law, ORS 192.311 to 192.478 (PRL). Collectively, the Oregon Department of Justice and the Attorney General are referred to as "DOJ." Defendant Oregon Department of Environmental Quality is an administrative agency of the State of Oregon headquartered in Multnomah County, and Richard Whitman is its Director. Collectively, these defendants are referred to as "DEQ." Defendant Erik Lukens ("Lukens") is the Editor of *The Bulletin*, the daily newspaper of Bend, Oregon. Lukens is joined as a necessary party pursuant to ORS 28.110.

Oregon's Statutory Clean Fuels Program

In 2009, the Oregon Legislature passed HB 2186, which authorized the Oregon Environmental Quality Commission to adopt rules to reduce the average carbon intensity of Oregon's transportation fuels by 10 percent over a 10-year period. The 2015 Oregon Legislature passed SB 324, allowing DEQ to fully implement the Clean Fuels Program (CFP) beginning in 2016. The CFP regulates importers of gasoline, diesel, ethanol and biodiesel. Businesses that produce ethanol and biodiesel in Oregon are also regulated parties.

Regulated parties, such as Chevron, must comply with all the provisions of the CFP. Under the CFP, regulated parties must comply with annual average carbon intensity standards. Regulated parties generate deficits when the carbon intensity of a specific fuel exceeds the clean fuel standard in a given year. Regulated parties generate credits when the carbon intensity of a specific fuel is lower than the clean fuel standard in a given year. By the end of each calendar year, regulated parties must balance their credits and deficits. Regulated parties that generate a deficit can achieve compliance with the program's annual standards in various ways, including by buying credits from other regulated parties and/or credit generators.

Credit generators are providers of fuels with carbon intensity that is lower than the baseline standard for gasoline or diesel fuel, as applicable. Credit generators are not required to participate in the CFP, but may voluntarily participate by registering with the program if they want to generate credits. Credit transactions are conducted through a DEQ-administered credit market that is managed through DEQ's CFP Online System. DEQ tracks credit transactions, but it does not broker individual credit sales or purchases. Those sales and purchases are privately negotiated at arm's length by credit generators and regulated parties.

Pursuant to ORS 468A.271(3)(a), DEQ is obligated to "calculate the volume weighted average price of credits and, no later than the last day of the month immediately following the month for which the calculation is completed, post the formula and the nonaggregated data the department used for the calculation and the results of the calculation on the department's website." The Oregon Legislature, however, also prohibited DEQ from posting "*any individually identifiable information or information that would otherwise constitute a trade secret under ORS 192.345.*" ORS 468A.271(3)(b). (Emphasis added.) To comply with its statutory mandate, DEQ makes publicly available on the CFP website a list of all credit transfers, identifying the date of the transaction, the number of credits transferred, and the average credit price:

https://www.oregon.gov/deq/FilterDocs/CFPCreditTransferActivityReport.xlsx.

In accord with the Oregon Legislature's directives and its own administrative rule, DEQ's publicly available information does not identify the parties to any particular transaction. *See* OAR 340-253-1055(2)(d) (DEQ must post on its website a monthly credit trading activity report that "[p]resents aggregated information on all fuel transacted within the state and does not disclose individual parties' transactions.") The information DEQ posts is publicly accessible for evaluation, oversight and research.

DEQ publishes a Clean Fuels Program Reporting Tool User Guide ("User Guide") for participants in the CFP. Page 2 of the User Guide provides, in part:

> "PRIVACY AND PROTECTION OF PERSONAL INFORMATION
> DEQ is committed to protecting the security of your personal and company information. We use a variety of security technologies and procedures to help protect your personal and company information from unauthorized access, use or disclosure. Access to personal and company information is limited to authorized system administration and application developers. *DEQ will treat the information you provide as confidential, except as may be required to be disclosed under the Oregon Public Records Law.*" (Emphasis added).

The User Guide obligates DEQ to withhold the information Chevron and other participants provided to DEQ to the extent such information is exempt from disclosure under the PRL.

Findings of Fact

As part of Oregon's Clean Fuels Program, Chevron was required to provide DEQ with information regarding the timing, volume, pricing, and counterparties involved in any transaction to purchase carbon "credits." Although DEQ publishes aggregate data regarding CFP credit transactions, DEQ is statutorily prohibited from disclosing the identity of any party to a particular transaction, thereby ensuring that competitors cannot ascertain any regulated party's confidential credit position and market strategy.

On or about October 10, 2018, Lukens submitted a public records request to DEQ, seeking the details, including the names of the parties, to all of the credit transfers in DEQ's CFP. Providing this information necessarily would require disclosure of individually-identifiable information of the CFP participants; under the program, Chevron (and other fuel suppliers) are mandated to provide individually-identifiable information regarding credit market transactions to DEQ. On or about October 18, 2018, DEQ denied Lukens' request, citing the trade secrets exemption to the PRL. DEQ's denial of the public records request was based on, and consistent with, prior decisions by DEQ to deny similar requests and prior informal advice provided by DOJ. The information sought by Lukens constitutes confidential protected trade secrets, which Chevron has taken measures to protect from disclosure. (*See* Plaintiff's Complaint, paragraphs 20-21). DEQ denied the request, concluding that the information sought is confidential, and not subject to the PRL.

However, by Order dated November 6, 2018, DOJ ordered DEQ to disclose the individually-identifiable details of credit market transactions—to include the timing, volume, pricing, and identity of other contracting parties—concluding it was not exempt from disclosure under the PRL. Disclosing the names of participants to particular transactions would necessarily disclose the timing, purchase/sale volumes and negotiated price of credits purchased (or sold) by every regulated party for every transaction under the CFP. The DOJ ordered DEQ to comply or announce its decision to seek judicial review by November 13, 2018. DEQ declined to seek judicial review of the November 6 Order and indicated its intent

to publicly disclose and post the information that is the subject of the November 6 Order on its CFP website on November 13, 2018.

Thirty-five participants in the CFP submitted declarations to the Attorney General asserting that disclosing individually-identifiable credit market transactions—to include the timing, volume, pricing, and identity of other contracting parties—would reveal confidential business information. These participants, which included both credit buyers and credit generators, provided detailed explanations of how they protect this information and how disclosure would put them at a competitive disadvantage. The declarations suggested that disclosure could have negative consequences to the overall credit market because, among other things, non-regulated credit generators (who are not required to participate in the CFP but can choose to voluntarily participate for the purpose of generating and selling credits) could manipulate credit prices.

Nonetheless, the Attorney General concluded that, whether or not the requested materials include trade secrets, "the public interest requires disclosure in any case." The Attorney General reached its conclusion after consulting University of Oregon Economics Professor Bill Harbaugh. According to the Attorney General, even though Harbaugh reported that the costs and benefits of disclosure on the CFP credit market are "uncertain," he opined that the public interest was "likely to be better served by publicly disclosing the details of individual transactions." *Id.* Harbaugh is not an attorney, and made no effort to address the Oregon Legislature's intent or policy determinations in setting the parameters for disclosure of private entities' trade secrets. Harbaugh's suggestion that specific information might be helpful to academic research was self-serving. It is baffling why the Attorney General would rely on this input in a legal opinion. The Attorney General did not consider the countervailing public interest in protecting trade secrets. The Attorney General declined to determine whether the information sought even constituted a trade secret.

The Attorney General ordered DEQ to disclose the data Lukens requested and gave DEQ seven days (until November 13, 2018) within which to comply or announce its intention to seek judicial review.

On November 13, 2018, on Plaintiff's motion, the Court entered a temporary restraining order, temporarily enjoining release of that same information and

ordering the State Defendants to show cause, if any, why a preliminary injunction should not be entered granting this same relief during the pendency of this action. Plaintiff and Plaintiffs-Intervenors submit that this decision, if not upheld, will allow Chevron's competitors to obtain and use Chevron's trade secret information in their own business strategies.

Relief Sought

Chevron brings this action for declaratory relief and for an injunction to prevent its confidential, proprietary and trade secret information from being publicly disclosed. Chevron seeks a declaration that the Attorney General misapplied the PRL and the Oregon Uniform Trade Secrets Act and that the information provided to DEQ constitutes trade secret information exempt from disclosure under the PRL. Chevron also seeks an order providing preliminary and permanent injunctive relief prohibiting DEQ from directly or indirectly disclosing Chevron's and other participants' trade secrets.

Justiciability of Plaintiff's Claims

After briefing was complete on Plaintiff Chevron U.S.A. Inc.'s ("Chevron") motion for a preliminary injunction and Plaintiff-Intervener Renewable Energy Group, Inc.'s ("REG") joinder in support of that motion, Defendant DOJ raised three new arguments regarding the justiciability of Plaintiffs' claims and the scope of any available injunctive relief. At the Court's invitation to respond to DOJ's belated arguments before ruling on the preliminary injunction motion, Chevron and REG jointly filed a supplemental memorandum to explain why each of DOJ's three arguments lack merit.[1] DOJ filed no response to the supplemental material but did argue each point at the preliminary injunction hearing. The Court addresses each before turning to the merits.

1. Immunity

First, DOJ argues that it and DEQ are immune from suit under the Uniform Trade Secrets Act's (UTSA) immunity provision, ORS 646.473(2), which provides that

[1] Chevron and REG are referred to herein collectively as "Plaintiffs."

public bodies and their agents are immune "from any *claim* or *action for misappropriation* of a trade secret that is *based on the disclosure or release of information* in obedience to or in good faith reliance" on an order of disclosure issued pursuant to the PRL. (Emphasis added). By its plain terms, this provision does not apply. The plain text and legislative history of the provision confirm that it comes into play only after a public agency has disclosed a third party's trade secrets; it has no relevance where, as here, a party seeks to enjoin threatened misappropriation before it has occurred. Logically, if the Court enjoins DEQ from disclosing Plaintiffs' trade secret information, any subsequent disclosure by DEQ would not be in "good faith" and the immunity provision would not apply.[2]

ORS 646.473 is entitled "limited immunity"; on its face, the provision applies only to a "claim *** for misappropriation of a trade secret." In turn, "a claim for misappropriation of trade secrets" ordinarily means a tort claim brought directly under the UTSA. *Cf. Douglas Med. Ctr., LLC v. Mercy Med. Ctr.*, 203 Or App 619, 622 (2006). Nothing in the plain language of ORS 646.473(2) indicates that the legislature also intended to immunize state actors from declaratory judgment and injunctive relief actions merely because the UTSA is incorporated into the PRL's unconditional exemption set forth at ORS 192.355(9)(a).

For years, DOJ agreed that the UTSA is incorporated into the PRL. DOJ now argues, however, that the PRL's separate definition of "trade secrets" means the UTSA has no application, except as to providing them with immunity! DOJ's interpretation of the PRL fails to recognize the fundamental distinction between the unconditional exemption for disclosure of trade secrets (under ORS 192.355(9)(a)), and the conditional exemption for disclosure of trade secrets (under ORS 192.345(2)). The mere disclosure of trade secrets triggers the conditional exemption, whereas misappropriation triggers the unconditional exemption, as it is misappropriation (and not mere disclosure) that Oregon law prohibits under the UTSA. The Legislature sensibly determined that when an

[2] Given the plain language of ORS 646.473(3) and the nature of Plaintiffs' claims, DOJ's invocation of the immunity provision is particularly misplaced. DOJ is a defendant in this case because it concluded that no PRL exemption applies to Plaintiffs' individually-identifiable information. Plaintiffs seek a declaration that DOJ's conclusion was legally erroneous, but that declaratory claim is not based on any disclosure or release of information by DOJ, as DOJ would not be the state agency disclosing Plaintiffs' trade secrets.

agency's disclosure would violate Oregon law, that disclosure is impermissible regardless of the public interest.

Under DOJ's reading of the statute, a third party could seek declaratory relief if the information at issue is a trade secret under the PRL's conditional exemption in ORS 192.344(2), but would be foreclosed in the more serious situation where the proposed disclosure would constitute an unlawful misappropriation of trade secrets under the UTSA, triggering the PRL's unconditional exemption under ORS 192.344(9)(a). That position is not defensible.

Although the inapplicability of ORS 646.473(2) is apparent from the plain text of the statute, legislative history confirms Plaintiffs' reading. *See Angle v. Bd. of Dentistry*, 294 Or App 470, 476, (2018) (When determining legislative intent, a court gives primary weight to the text and context of the statutory provision, but it "also may consider any useful legislative history, to discern and effectuate the legislative intent as reflected in the words of the statute."); *State v. Gaines*, 346 Or 160, 172 (2009) ("Legislative history may be used to confirm seemingly plain meaning and even to illuminate it[.]"). The legislature added ORS 646.473(2) to the UTSA at the behest of DOJ, which wanted "to make sure that local and state governments were protected from liability under the Public Records Law if they were required to disclose trade secrets." Decl. of Reilley Keating in Supp. of Suppl. Br. Ex. 1 (Minutes, Sen. Comm. on Judiciary, SB 298, Apr. 14, 1987). The purpose of the immunity provision was to "afford public bodies immunity when they disclose information under the Public Records Law." *Id.* Ex. 2 (Testimony, Senate Comm. on Judiciary, SB 298, April 7, 1987 (statement of Department of Justice AAG William F. Nessly, Jr.). Nowhere in the legislative history is evidence that, as DOJ now maintains, the legislature intended for ORS 646.473(2) to bar claims designed to evaluate the propriety of a trade secret disclosure before it occurs.

The UTSA's immunity provision also has no application when the plaintiff has a contractual right to prevent the misappropriation of trade secrets, as counsel for DOJ admitted at the preliminary injunction hearing. DOJ's concession is fatal because, just as in *Pfizer Inc. v. Oregon Dep't of Justice ex rel. Kroger*, 254 Or App 144 (2012), (*Pfizer)* Plaintiffs have an enforceable contract right to prevent the dissemination of their individually-identifiable information unless disclosure is required by the PRL (i.e., because no exemption applies). Because several PRL exemptions do apply, DEQ is contractually required to protect Plaintiffs'

confidential information. If all that were not enough, the immunity provision upon which DOJ relies has no bearing on Plaintiffs' claim that the Clean Fuels Program prohibits publication of their individually-identifiable information, whether that information constitutes a trade secret or not.

2. Standing

Second, DOJ argues that Plaintiffs lack standing and have no right to challenge the disclosure of information under the PRL. DOJ also argues that no party "has the right to challenge a decision to disclose records under the Oregon Public Records Law," other than the affected public entity. Resp. to Western States Petroleum Assoc.'s Joinder in Supp. of Motions to Show Cause at 6:2-4. DOJ's argument is not just novel, it is contrary to law and logic. DOJ argues that the PRL is a comprehensive statutory scheme and does not contemplate an action by a third party to prevent disclosure. According to DOJ, it can reverse DEQ's decision to withhold Plaintiffs' trade secrets and, even if DOJ's decision is demonstrably incorrect, there is nothing this Court can do about it unless DEQ itself challenges DOJ.

DOJ's claim of unfettered authority is wrong, and it is wrong because it begins from an erroneous premise. Contrary to DOJ's contention, the PRL "is **not** the exclusive means" of challenging an agency's records ruling: the Declaratory Judgments Act provides an alternative basis. *Oregonians for Sound Econ. Policy, Inc. v. State Acc. Ins. Fund Corp.,* 187 Or App 621, 629 (2003). Oregon courts have consistently construed the PRL to permit third parties, like Plaintiffs, to claim an exemption from disclosure. For example, in *Oregon AFSCME Council 75 v. State of Or., Dep't of Admin. Servs. and Kulongoski, Attorney General*, 150 Or App 87 (1997), a union representing state employees sued to prevent the State from disclosing to a reporter the names of employees who used 240 or more hours of sick leave. The trial court granted declaratory relief to the union and the State and Attorney General appealed. *Id.* at 89. The Court of Appeals noted, as DOJ argues, that the PRL only sets out procedures whereby the requestor can challenge an agency decision. *Id.* at 93. Nonetheless, the court proceeded to assess the union's claim, noting that the PRL has been "construed *** as permitting an individual to claim an exemption from disclosure." *Id.* at 93 n.5.

Oregon AFSCME thus belies DOJ's contention that the PRL must be strictly construed to bar claims by third parties who seek declaratory relief regarding their rights merely because the PRL does not expressly provide a mechanism for third parties to challenge improper orders of disclosure. *See* also, e.g., *Brown v. Guard Publishing Co.*, 267 Or App 552, 554-55 (2014) (complaint for declaratory and injunctive relief filed by intervenor energy wholesaler in action brought by public utility to prevent disclosure of trade secrets to newspaper following DOJ decision to override utility's decision to withhold); *Pfizer*, 254 Or App at 151 (declaratory relief action initiated by plaintiff drug company to enjoin disclosure of trade secrets by DOJ in response to public records request). These cases all involved individuals claiming an exemption from public disclosure challenging the Attorney General order to disclose under the PRL.

The PRL is not the exclusive mechanism available for challenging disclosure decisions. A declaratory judgment action is also an appropriate vehicle for challenging disclosure determinations. Plaintiffs are entitled to use the Declaratory Judgment Act to obtain a declaration that Plaintiffs' individually-identifiable information regarding credit market transactions is exempt from release under PRL. In either circumstance, the controlling principle of law is the same: the Declaratory Judgment Act provides an alternative and independent vehicle for determining the rights of affected parties.

3. Individualized Remedy

Third, DOJ took the position at the preliminary injunction hearing that any injunctive relief, if ordered, must be limited to Chevron and REG alone. In a case such as this one, the public interest favors the entry of an injunction that is sufficiently broad to protect the individually-identifiable information of all participants in the Clean Fuels Program. An injunction is not overbroad merely because it extends protection to persons other than prevailing parties in the lawsuit. Any injunction should ensure that all the individually-identifiable trade secret information transmitted to DEQ by participants in the Clean Fuels Program be maintained as confidential, as DEQ promised. An injunction limited to Plaintiffs' information would be a Pyrrhic victory. With only Chevron and REG's information withheld, it would be immediately obvious to any observer which transactions relate to them, as they would be, respectively, the only buyer and seller whose names were redacted from

disclosure. An injunction, if granted, must prevent the disclosure of all registered parties' individually-identifiable information.

Findings and Declarations

It is undisputed and the Court finds that Chevron's individually-identifiable information meets the UTSA's definition of a "trade secret." Chevron's individually-identifiable information is also exempt from disclosure under ORS 192.345(2) because the information satisfies the PRL's definition of a trade secret and Defendants offer no persuasive explanation for why the public interest requires disclosure. DEQ properly declined to disclose Chevron's trade secrets pursuant to a Public Records Law request, for three independently-sufficient reasons.

First, Chevron's individually-identifying information is unconditionally exempt from disclosure under ORS 192.355(9)(a) of the PRL, which exempts information the disclosure of which is prohibited under Oregon law. This unconditional exemption applies because the UTSA prohibits the misappropriation of trade secrets through unauthorized disclosure. Any disclosure of Chevron's trade secrets by DEQ would constitute a misappropriation under the UTSA.

Defendants argue that a trade secret may be exempt from disclosure under the PRL only under the conditional exemption set forth at ORS 192.345(2), and not under ORS 192.355(9)(a), which unconditionally exempts the disclosure of information "the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." Oregon Court of Appeals precedent is directly to the contrary. In *Pfizer*, the Court of Appeals held that the UTSA "is incorporated into the [Public Records Law] through ORS 192.502(9)(a)."[3] 254 Or App at 153 n.8. The Court of Appeals made clear that although ORS 192.501(2)[4] defines the term "trade secret" "for purposes of ***another*** OPRL exemption," which is conditioned on the public interest, ORS 192.502(9) provides an independent and unconditional exemption where disclosure would amount to misappropriation of a trade secret under the UTSA. *Id.* (emphasis added); *see also id.* at 160-61. *Pfizer*'s holding that the UTSA is incorporated into the Public Records Law through

[3] ORS 192.502(9)(a) subsequently was renumbered to ORS 192.355(9)(a).

[4] ORS 192.501(2) subsequently was renumbered to ORS 192.345(2).

ORS 192.355(9)(a) is binding precedent. *See Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 53-54 (1999).

DOJ is correct that, in *Pfizer Inc. v. Ore. Dep't of Justice*, it did not dispute that the UTSA is incorporated into the Public Records Law. *See Pfizer Inc. v. Ore. Dep't of Justice*, No. 08C-25184, 2009 WL 9049403 (Or Cir Jan. 28, 2009). That is because, for years, DOJ took the position that if information qualifies as a trade secret under the UTSA, "its 'misappropriation' by disclosure is prohibited *** and the records would be exempt from disclosure under the Public Records Law by ORS 192.502(9)." Declaration of Reilley D. Keating in Support of Reply in Support of Motion for Preliminary Injunction ("Keating Dec."), Ex. 1 at 2-3; *see also* Or. Dep't of Justice, *Attorney General's Public Records & Meetings Manual* at App. F-20 (Nov. 2014) (Attorney General order denying petition to disclose fee schedules and price lists provided to public agency during bidding process because the information was a trade secret and therefore exempt from disclosure under the UTSA "which is incorporated into" the ORS 192.355(9)(a)); *id.* at F-40 (denying petition because "[t]he information was also exempt under ORS 192.502(9), which incorporates the Uniform Trade Secrets Act").

At oral argument, counsel for DOJ offered no reason for arguing against its own holdings. But the fact that DOJ previously conceded what it now disputes does not make *Pfizer*'s holding mere dictum. Dictum refers to a statement that is not necessary to a court's decision. *Engweiler v. Persson*, 354 Or 549, 558 (2013). *Pfizer*'s holding that the UTSA is incorporated into the PRL was necessary to the court's determination that certain of the plaintiff's information was exempt from disclosure under ORS 192.355(9)(a). *See Pfizer*, 254 Or App at 166. Accordingly, *Pfizer* is binding on defendants and prevents the disclosure of trade secrets, as defined by the UTSA.

Second, in enacting the CFP, the Oregon Legislature expressly prohibited publication of Chevron's trade secret information on DEQ's website. ORS 468A.271. Permitting a newspaper to obtain Chevron's individually-identifiable information through a public records request and then publish that same information on the newspaper's website would flout the legislature's intent to keep individually-identifying information confidential. DEQ entered into an agreement with participants in the CFP that gives rise to a duty to maintain secrecy.

The conclusion that Chevron's trade secrets are unconditionally exempt from disclosure follows directly from the Court of Appeals' binding decision in *Pfizer, supra,* which held that ORS 192.355(9)(a) applies when a state agency obtains trade secrets pursuant to an agreement not to disclose unless the PRL requires otherwise. Where disclosure of a trade secret would amount to misappropriation—*i.e.*, because the information was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use (ORS 646.461(2)(d)(B))—disclosure would violate Oregon law.

Here, there is no tension, let alone an irreconcilable conflict, between ORS 192.355(9)(a) and ORS 192.345(2). Under ORS 192.345(2), information is conditionally exempt from disclosure so long as it meets the PRL's definition of a trade secret, full stop. Conversely, under 192.355(9)(a), information is unconditionally exempt from disclosure so long as it meets the UTSA definition of trade secret *and* where disclosure would amount to a misappropriation. *See Pfizer*, 254 Or App at 160. It makes sense for the legislature to have determined that where disclosure of a trade secret would amount to misappropriation—*i.e.*, because the information was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use (ORS 646.461(2)(d)(B))—disclosure would violate Oregon law and thus must be prevented in all circumstances. Conversely, when the government's disclosure of a trade secret would not violate Oregon law (*i.e.*, because the government acquired the trade secret under circumstances that did not require the government to maintain the secrecy of that information), the public interest in disclosure must be considered. The distinction codifies sound public policy that the government's violation of Oregon law cannot be justified by the public interest. The plain text and context of the statute and *Pfizer* compel the conclusion that information is exempt from disclosure under ORS 192.355(9)(a) when disclosure would amount to trade secret misappropriation under the UTSA.

Disclosing Chevron's individually-identifiable information would constitute a misappropriation of trade secrets under the UTSA. Defendants do not dispute that Chevron's individually-identifiable information constitutes a trade secret under the UTSA because it is a compilation of information that derives economic value because it is not generally known and is the subject of reasonable efforts to maintain that secrecy. *See* ORS 646.461(4). Defendants have not submitted any evidence to the contrary.

The CFP provides that "[t]he data posted on [DEQ's] website may not include any individually identifiable information or information that would otherwise constitute a trade secret under ORS 192.345." ORS 468A.271(3)(b). By its plain language, the statute prohibits and restricts the disclosure of (a) individually-identifiable information; and (b) information that otherwise constitutes a trade secret as defined in the PRL. Construing the plain language of ORS 192.355(9)(a), which exempts public records or information "the disclosure of which is *prohibited or restricted*" by Oregon law, and ORS 468A.271(b)(3), the individually-identifiable information is unconditionally exempt from disclosure.

DOJ attempts to distinguish the trial court decision in *Pfizer* in this regard by arguing that DEQ did not enter into a confidentiality agreement with the participants of the CFP. DOJ is wrong. DEQ's Clean Fuels Program Reporting Tool User Guide states: "The services that the Clean Fuels Program of [DEQ] provides to you are subject to the following Terms of Use." Keating Dec., Ex. 2. Among those Terms of Use is the confidentiality provision, which expressly states that "***DEQ will treat the information you provide as confidential, except as may be required to be disclosed under the Oregon Public Records Law***." *Id.* at 2 (emphasis added). This confidentiality provision is a material part of the "Terms of System Use Agreement," and is agreed to by "electronic signature" as "valid as if a paper version of the Terms of Use were delivered containing your original written signature." *See id.* at 2-4. The terms and conditions are thus contractual terms, no less binding on the parties than the confidentiality agreement in *Pfizer*. *See Beard v. PayPal, Inc.*, No. CIV.A. 09-1339-JO, 2010 WL 654390, at *1 (D Or Feb. 19, 2010).

Counsel for DOJ conceded at the preliminary injunction hearing, the UTSA "allows for the persistence of contractual remedies." Decl. of Reilley Keating in Supp. Of Suppl. Br. Ex. 4 (Tr. of Proceedings at 38:6-7 (Jan. 23, 2019)); *see* ORS 646.473(2) (providing that the UTSA "shall not affect *** [c]ontractual remedies, whether or not based upon misappropriation of a trade secret"). It was for that reason, DOJ's counsel asserted, that the plaintiff in *Pfizer Inc. v. Oregon Dep't of Justice ex rel. Kroger*, 254 Or App 144 (2012), was permitted to challenge the DOJ's proposed release of trade secret information. Decl. of Reilley Keating in Supp. of Suppl. Br. Ex. 4 (Tr. of Proceedings at 38:8-11). In this regard, *Pfizer* and this case are indistinguishable. DEQ entered into an agreement with Plaintiffs that

"obligate[s] [DEQ] to withhold the [trade secrets] to the extent that they are exempt from disclosure under the OPRL." 254 Or App at 158.

DOJ attempts to avoid this result by arguing that the legislature prohibited the publication of Chevron's information on DEQ's *website*, but did not intend to prohibit disclosure under the PRL. DOJ's argument defies the principle that the Court's role "is to ascertain legislative intent, not to slavishly apply all statutes literally." *State v. Rafal*, 21 Or App 114, 117 (1975). Having expressly prohibited DEQ from publishing the information on its website, the legislature could not have intended to permit a newspaper to obtain that same information through a public records request and then post it on the newspaper's website. In such case, the statutory prohibition in ORS 468A.271(3)(b) would be meaningless. The Court is required to interpret the Public Records Law exemption in a manner that also gives effect to ORS 468A.271(3)(b). *See, e.g., Burt v. Blumenauer*, 87 Or App 263, 265 (1987) ("When several statutory provisions are involved, we should render a construction that gives effect to all of them, if possible. * * * We cannot presume that the legislature enacted a meaningless statute.").

Third, even assuming the trade secrets at issue here are only conditionally exempt under ORS 192.345(2) of the PRL, the public interest does not require disclosure. Defendants do not explain how the public interests they identify would be served by disclosing the names of participants to credit transactions, when DEQ already makes publicly available all other information regarding credit transactions. At the least, Defendants' public interest arguments, which are entirely speculative, are not in equipoise with (let alone outweigh) the public harm that would result from disclosure. The Court notes that both parties amply briefed these concerns, and the Court took into consideration the declarations of defendants' witnesses, which provided no plausible explanation how or why disclosing the names of participants in CFP credit transactions would promote, much less is required by, the public interest.

Because Chevron's individually-identifiable information is a trade secret under ORS 192.345(2), disclosure is exempted unless Defendants show that the public interest requires disclosure. *See City of Portland v. Anderson*, 163 Or App 550, 554 (1999) (burden is on requester to prove that the public interest requires disclosure). Neither DOJ nor Lukens offers a plausible, let alone persuasive, reason why the public interest favors, much less mandates disclosure. Nor do they

suggest how disclosure would make *government's* activities more transparent where, as here, DOJ seeks to disclose a *private* entity's information merely because it is in the government's possession. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 US 749, 774, 109 S Ct 1468, 103 L Ed 2d 774 (1989) (explaining that the purpose of public records laws "is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed") (emphasis in original).

"'Mere speculation about hypothetical public benefits'" cannot justify disclosure of Chevron's trade secrets. *Tuffly v. U.S. Dep't of Homeland Sec.*, 870 F3d 1086, 1098 (9th Cir. 2017) (quoting *U.S. Dep't of State v. Ray*, 502 US 164, 179, 112 S Ct 541, 116 L Ed 2d 526 (1991)). If the rule was otherwise, and "a totally unsupported suggestion that the interest in finding out" individually-identifiable information justified disclosure, agencies like DEQ "would have no defense against requests for production of private information." *Ray*, 502 US at 179.

Defendant Lukens offers a different public interest rationale, claiming that disclosing participants' individually-identifying information will help the public evaluate how the program is functioning. Because only the *names* of participants to certain credit transactions are prohibited from disclosure under the Clean Fuels Program, Lukens must demonstrate that the "'marginal additional usefulness' of the names" requires disclosure. *Lahr v. Nat'l Trans. Safety Bd.*, 569 F3d 964, 978 (9th Cir 2009) (citation omitted). Yet Lukens nowhere explains how disclosing the *names* of participants—when all other information regarding credit transactions is already public—will help the public "watch their government at work in a way they are prohibited from doing now." Lukens Dec. ¶ 4.

As the Supreme Court explained in analogous circumstances, when the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, "the requester must establish more than a bare suspicion in order to obtain disclosure." *Nat'l Archives & Records Admin. v. Favish*, 541 US 157, 174, 124 S Ct 1570, 158 L Ed 2d 319 (2004). Because there is a presumption of legitimacy accorded to the government's official conduct, "the requester must produce evidence that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred." *Id.* Here, Lukens proffers no evidence that there are

structural problems in or government mismanagement of the CFP. The allegation that the government might be mismanaging the CFP, unsupported by any evidence, cannot justify disclosure. *See id.* at 174-75.

Misappropriation of a trade secret is an irreparable injury that equity will protect, regardless of whether the misappropriation "would result in substantial damage." *Holland Devs., Ltd. v. Mfrs. Consultants, Inc.*, 81 Or App 57, 65 (1986). That is why the Oregon Legislature has authorized courts to enjoin actual or *threatened* misappropriation of trade secrets. *See* ORS 646.463(1).

The declarations submitted by Chevron and the Plaintiffs-Intervenors establish that disclosure of such confidential information will result in competitive harm.

Conclusion

Based on the record, and the pleadings, together with applicable law, the Court grants Plaintiffs' request for declaratory and injunctive relief. DOJ and DEQ are enjoined from publicly disclosing individually-identifiable information regarding participants in the Clean Fuels Program. The DOJ incorrectly concluded that no PRL exemption applies to Plaintiffs' individually-identifiable and trade secret information and erroneously ordered DEQ to disclose it, notwithstanding DEQ's express decision to withhold the information.

Plaintiffs' individually-identifiable information regarding credit market transactions is exempt from release under PRL, either (a) because disclosure is prohibited under ORS 192.355(9)(a), or (b) because the information is conditionally exempt from disclosure under ORS 192.345(2) and the public interest does not require disclosure of this information.

DOJ and DEQ are permanently enjoined from publicly disclosing individually-identifiable information regarding participants in the Oregon Clean Fuels Program including but not limited to credit market transactions sought by Lukens in his public records request. The statutory provision providing for confidentiality and nondisclosure of individually-identifiable and trade secret information applies to all CFP participants—not only the Plaintiffs—and is necessary to protect the program's overriding goal of promoting the use of lower-carbon fuels in Oregon. The injunction applies to all participants in the CFP because an injunction limited

to redacting only Plaintiffs' trade secrets effectively would disclose Plaintiffs' protected information.

Plaintiffs may submit a post judgment motion for costs and attorney fees.

Will Counsel for plaintiffs kindly submit a Judgment consistent with this decision?

Very truly yours,

Mary Mertens James
Circuit Court Judge

MMJ/clt
cc: File

IN THE CIRCUIT COURT FOR THE STATE OF OREGON

FOR THE COUNTY OF MARION

CHEVRON U.S.A. INC., a Pennsylvania corporation,

Plaintiff,

and

RENEWABLE ENERGY GROUP, INC., a Delaware corporation; and **WESTERN STATES PETROLEUM ASSOCIATION**, a California nonprofit corporation,

Plaintiffs-Intervenors,

v.

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, an agency of the State of Oregon; **RICHARD WHITMAN**, in his official capacity as the Director of the Oregon Department of Environmental Quality; **OREGON DEPARTMENT OF JUSTICE**, acting by and through its Attorney General **ELLEN F. ROSENBLUM**; and **ERIK LUKENS**, an individual,

Defendants.

Case No. 18CV51689

GENERAL JUDGMENT

Judge: Hon. Mary James

This matter came before the Court on January 23, 2019, on Plaintiff Chevron U.S.A., Inc.'s ("Plaintiff") Motion to Show Cause and Extend Temporary Restraining Order as a Preliminary Injunction, together with the joinders submitted by Plaintiffs-Intervenors Renewable Energy Group, Inc. ("REG") and Western States Petroleum Association ("WSPA") (collectively,

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

"Preliminary Injunction Motion"). Supplemental briefing on the motions was submitted by Plaintiff and Plaintiff-Intervenors on February 6, 2019.

On February 8, 2019, pursuant to ORCP 79 C(2), the parties stipulated that the trial on the merits should be advanced and consolidated with the hearing on the Preliminary Injunction Motion. The parties agreed that the Court's ruling on the Preliminary Injunction Motion should serve as the basis for entry of judgment in this action.

On April 18, 2019, this Court issued a written decision granting the Preliminary Injunction Motion and granting Plaintiff and Plaintiff-Intervenors' request for declaratory and injunctive relief.

Now, therefore, based on the record, pleadings and applicable law, IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of Plaintiff and Plaintiff-Intervenors on their Complaints and against Defendants and as follows:

1. Attached as Exhibit 1 is a copy of the Court's April 18, 2019 written decision, which is fully incorporated as if restated herein.

2. Chevron, REG, and members of WSPA are participants in Oregon's Clean Fuels Program ("CFP"), which is administered by the Oregon Department of Environmental Quality and whose Director is Richard Whitman (collectively, "DEQ"). As CFP participants, Chevron, REG, members of WSPA, and other participants provide DEQ with certain individually-identifiable information regarding credit market transactions.

3. Pursuant to ORS 28.010 and 28.020, the Court finds, concludes, and declares that:

(a) The individually-identifiable information belonging to Chevron, REG, and members of WSPA constitutes (1) a "trade secret" as defined in the Oregon Uniform Trade Secrets Act ("OUTSA"), ORS 646.461(4); and (2) a "trade secret" as defined in ORS 192.345(2).

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

(b) Individually-identifiable information regarding credit market transactions is exempt from release under the Oregon Public Records Law ("PRL") for three independently-sufficient reasons:

(i) First, the individually-identifying information is unconditionally exempt from disclosure under ORS 192.355(9)(a), which exempts information the disclosure of which is prohibited under Oregon law. This unconditional exemption applies because the OUTSA prohibits the misappropriation of trade secrets through unauthorized disclosure. Any disclosure of trade secrets by DEQ would constitute a misappropriation under the OUTSA.

(ii) Second, the individually-identifying information is unconditionally exempt from disclosure under ORS 192.355(9)(a), which, as noted above, exempts information the disclosure of which is prohibited under Oregon law. Pursuant to ORS 468A.271(3)(b), the Oregon legislature prohibited DEQ from posting "any individually identifiable information or information that would otherwise constitute a trade secret under ORS 192.345." Permitting a newspaper to obtain individually-identifiable information through a public records request and then publish that same information on the newspaper's website would flout the legislature's intent to keep individually-identifying information private.

(iii) Third, even assuming the trade secrets at issue here are only conditionally exempt under ORS 192.345(2) of the PRL, the public interest does not require disclosure. Defendants' witnesses provided no plausible explanation how or why disclosing the names of participants in CFP credit transactions would promote, much less is required by, the public interest.

(c) For the reasons stated *supra* in paragraphs (2)(a) through (c), DOJ erred by ordering DEQ to disclose such individually-identifiable information.

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

4. Pursuant to ORS 28.080, it is further declared, ordered, and adjudged that DOJ and DEQ are permanently enjoined from publicly disclosing individually-identifiable information regarding credit market transactions by participants in the CFP, including but not limited to the identity of the parties to individual credit market transactions sought by Defendant Lukens in his public records request. This injunction applies to the individually-identifiable information of all CFP participants because an injunction limited to redacting only Chevron's and REG's trade secrets would effectively disclose Chevron's and REG's protected information. For purposes of clarity, this Court's injunction does not preclude DEQ from complying with its statutory obligation to post data pursuant to ORS 468A.271(3), ORS 468A.271(4), or OAR 340.253-1055(1), (2).

Signed: 10/8/2019 04:25 PM

Circuit Court Judge Mary M. James

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

Jointly Submitted by:

STOEL RIVES LLP

By: */s/ Nathaniel P. Garrett*

Joel A. Mullin, OSB No. 862533
joel.mullin@stoel.com
Reilley D. Keating, OSB No. 073762
reilley.keating@stoel.com
Crystal S. Chase, OSB No. 093104
crystal.chase@stoel.com
STOEL RIVES LLP
760 S.W. Ninth Avenue, Suite 3000
Portland, Oregon 97205
Telephone: 503.224.3380
Facsimile: 503.220.2480

and

Nathaniel P. Garrett, *admitted pro hac vice*

Attorneys for Plaintiff
Chevron U.S.A. Inc.

PERKINS COIE LLP

By: */s/ Alletta S. Brenner*

Christopher W. Rich, OSB No. 990954
CRich@perkinscoie.com
Alletta S. Brenner, OSB No. 142844
ABrenner@perkinscoie.com
PERKINS COIE LLP
1120 NW Couch Street, 10th Floor
Portland, Oregon 97203
Telephone: 503.727.2000
Facsimile: 503.727.2222

Attorneys for Plaintiff-Intervenor
Renewable Energy Group, Inc.

MILLER, NASH, GRAHAM, & DUNN LLP

By: */s/ Cody J. Elliot*

Cody J. Elliot, OSB No. 091027
cody.elliot@millernash.com
Erica A. Clausen, OSB No. 170902
erica.clausen@millernash.com
Katelyn J. Fulton, OSB No. 183404
Katelyn.fulton@millernash.com
MILLER, NASH, GRAHAM, & DUNN LLP
3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Telephone: 503.224.5858
Facsimile: 503.224.0155

Attorneys for Plaintiff-Intervenor
Western States Petroleum Association

OREGON DEPARTMENT OF JUSTICE

By: */s/ Renee Stineman*

Christina L. Beatty-Walters, OSB No. 981634
Carla A. Scott, OSB No. 054725
Renee Stineman, OSB No. 994610
Department of Justice
100 SW Market Street
Portland, OR 97201
Telephone: 971.673.1880
Facsimile: 971.673.5000

Attorneys for Defendants
Oregon Department of Environmental Quality, Richard Whitman, and Oregon Department of Justice

TONKON TORP LLP

By: */s/ Steven M. Wilker*

Steven M. Wilker, OSB No. 911882
Steven.wilker@tonkon.com
TONKON TORP LLO
888 SW 5th Avenue, Ste 1600
Portland, OR 97204
Telephone: 503.802.2040
Facsimile: 503.972.3740

Attorneys for Defendant
Erik Lukens

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
P.O. BOX 12869
SALEM, OR 97309-0869

MARY MERTENS JAMES
Circuit Court Judge
PHONE: (503) 373-4303
FAX: (503) 373-4305

April 18, 2019

Via Email and Regular Mail

Reilley Keating, Crystal Chase, Patrick Michael, Nathaniel Garrett
Stoel Rives LLP
760 NW Ninth Ave Ste 3000
Portland OR 97205

Christina Beatty-Walters and Michael Krone
DOJ Trial Division
100 SW Market St
Portland OR 97201

Steven Wilker
Tonkon Torp LLP
888 SW 5th Ave Ste 1600
Portland OR 97204

Alletta Brenner
Perkins Coie LLP
1120 NW Couch St 10th Fl
Portland OR 97209

Cody Elliott and Erica Clausen
Miller Nash Graham & Dunn LLP
111 SW 5th Ave Ste 3400
Portland OR 97204

Re: Chevron U.S.A, Inc., v. Oregon DEQ et al.
Case No. 18CV51689

Dear Counsel:

This matter came before the Court on January 23, 2019, on Plaintiff's motions to show cause and extend temporary restraining order, the Court having allowed a temporary restraining order on November 13, 2018. Reilley Keating, Crystal Chase, Patrick Michael, and Nathaniel Garrett appeared for Plaintiff Chevron; Christina Beatty-Walters and Michael Krone appeared for Defendants Department of Environmental Quality (DEQ), Oregon Department of Justice (DOJ) and Richard Whitman; Steven Wilker appeared for Defendant Erik Lukens; Alletta Brenner appeared for Intervenor Renewable Energy Group, Inc.; and Cody Elliott and Erica Clausen appeared for Intervenor Western States Petroleum Association.

Following oral argument, the parties were permitted to supplement their positions with additional declarations, exhibits, or legal argument. Supplemental support for Plaintiff and Plaintiffs-Intervenors were submitted on February 6, 2019.

On February 8, 2019, pursuant to ORCP 79 C(2), all parties in this case filed a Stipulation that the trial on the merits shall be advanced and consolidated with the hearing on the pending motions for preliminary injunction. The parties agree that the Court should resolve this case without additional motions practice, discovery or trial. ORCP 79 C(2) permits the parties to "stipulate that the trial of the action on the merits * * * be advanced and consolidated with the hearing" on the motion for preliminary injunction. The parties made the stipulation for purposes of party and judicial efficiency. The parties agree that the Court's ruling on the pending motions for preliminary injunction should become the final order and serve as the basis for the entry of judgment.

As part of this stipulation, the parties agree that all declarations and exhibits are admitted as evidence, without objection from any party. The parties agree that any arguments about the evidence should go to the weight of the evidence, not admissibility. All parties agree that the defenses raised by the defendants in response to the motions shall be considered as though raised in an answer and argued at trial. The parties further agree that all briefs submitted (in connection with the TRO or preliminary injunction motions and including any brief submitted before, during, or after the January 23, 2019, hearing by permission of the Court) shall be considered by the Court as if presented at trial itself.

The Court accepts and takes judicial notice of the pleading index identifying all pleadings relevant to the consideration of the pending motions, and the exhibit index along with a copy of all declarations and exhibits submitted by the parties in this matter that are formally numbered as exhibits for the Court's reference. It is on this record, and based on the arguments made during the hearings, that the Court makes its findings and determination of declaratory and injunctive relief.

On February 08, 2019, the Court took the matter under advisement. The Court, having given careful consideration to the motion and memoranda, declarations, and the record, and being fully advised, issues the following decision:

Nature of Complaint

This is an action for declaratory and injunctive relief to prevent DEQ from disclosing confidential and proprietary trade secrets belonging to Chevron and other participants in the Oregon Clean Fuels Program in response to a public records request by Defendant Erik Lukens (Lukens). By Order dated November 6, 2018, the Attorney General of the Oregon Department of Justice (DOJ) ordered DEQ to disclose the individually-identifiable details of credit market transactions—to include the timing, volume, pricing, and identity of other contracting parties—concluding such information was not exempt from disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478 (PRL).

Chevron and Intervenors ("Plaintiffs") seek a declaration that the Attorney General misapplied the PRL and the Oregon Uniform Trade Secrets Act and that the information provided to DEQ constitutes trade secret information exempt from disclosure under the PRL. Plaintiffs also seek an order providing temporary, preliminary, and permanent injunctive relief prohibiting DEQ from directly or indirectly disclosing Chevron's (and other participants') trade secrets.

Parties

Chevron is a corporation organized and existing under the laws of the State of Pennsylvania with its principal place of business in San Ramon, California. DOJ is an administrative agency of the State of Oregon that is headed by Attorney General Ellen F. Rosenblum. Under ORS 192.407 and 192.411, the Attorney General reviews a state agency's denial of a request for public records under the

Oregon Public Records Law, ORS 192.311 to 192.478 (PRL). Collectively, the Oregon Department of Justice and the Attorney General are referred to as "DOJ." Defendant Oregon Department of Environmental Quality is an administrative agency of the State of Oregon headquartered in Multnomah County, and Richard Whitman is its Director. Collectively, these defendants are referred to as "DEQ." Defendant Erik Lukens ("Lukens") is the Editor of *The Bulletin*, the daily newspaper of Bend, Oregon. Lukens is joined as a necessary party pursuant to ORS 28.110.

Oregon's Statutory Clean Fuels Program

In 2009, the Oregon Legislature passed HB 2186, which authorized the Oregon Environmental Quality Commission to adopt rules to reduce the average carbon intensity of Oregon's transportation fuels by 10 percent over a 10-year period. The 2015 Oregon Legislature passed SB 324, allowing DEQ to fully implement the Clean Fuels Program (CFP) beginning in 2016. The CFP regulates importers of gasoline, diesel, ethanol and biodiesel. Businesses that produce ethanol and biodiesel in Oregon are also regulated parties.

Regulated parties, such as Chevron, must comply with all the provisions of the CFP. Under the CFP, regulated parties must comply with annual average carbon intensity standards. Regulated parties generate deficits when the carbon intensity of a specific fuel exceeds the clean fuel standard in a given year. Regulated parties generate credits when the carbon intensity of a specific fuel is lower than the clean fuel standard in a given year. By the end of each calendar year, regulated parties must balance their credits and deficits. Regulated parties that generate a deficit can achieve compliance with the program's annual standards in various ways, including by buying credits from other regulated parties and/or credit generators.

Credit generators are providers of fuels with carbon intensity that is lower than the baseline standard for gasoline or diesel fuel, as applicable. Credit generators are not required to participate in the CFP, but may voluntarily participate by registering with the program if they want to generate credits. Credit transactions are conducted through a DEQ-administered credit market that is managed through DEQ's CFP Online System. DEQ tracks credit transactions, but it does not broker individual credit sales or purchases. Those sales and purchases are privately negotiated at arm's length by credit generators and regulated parties.

Pursuant to ORS 468A.271(3)(a), DEQ is obligated to "calculate the volume weighted average price of credits and, no later than the last day of the month immediately following the month for which the calculation is completed, post the formula and the nonaggregated data the department used for the calculation and the results of the calculation on the department's website." The Oregon Legislature, however, also prohibited DEQ from posting "*any individually identifiable information or information that would otherwise constitute a trade secret under ORS 192.345.*" ORS 468A.271(3)(b). (Emphasis added.) To comply with its statutory mandate, DEQ makes publicly available on the CFP website a list of all credit transfers, identifying the date of the transaction, the number of credits transferred, and the average credit price:

https://www.oregon.gov/deq/FilterDocs/CFPCreditTransferActivityReport.xlsx.

In accord with the Oregon Legislature's directives and its own administrative rule, DEQ's publicly available information does not identify the parties to any particular transaction. *See* OAR 340-253-1055(2)(d) (DEQ must post on its website a monthly credit trading activity report that "[p]resents aggregated information on all fuel transacted within the state and does not disclose individual parties' transactions.") The information DEQ posts is publicly accessible for evaluation, oversight and research.

DEQ publishes a Clean Fuels Program Reporting Tool User Guide ("User Guide") for participants in the CFP. Page 2 of the User Guide provides, in part:

> "PRIVACY AND PROTECTION OF PERSONAL INFORMATION
> DEQ is committed to protecting the security of your personal and company information. We use a variety of security technologies and procedures to help protect your personal and company information from unauthorized access, use or disclosure. Access to personal and company information is limited to authorized system administration and application developers. *DEQ will treat the information you provide as confidential, except as may be required to be disclosed under the Oregon Public Records Law.*" (Emphasis added).

The User Guide obligates DEQ to withhold the information Chevron and other participants provided to DEQ to the extent such information is exempt from disclosure under the PRL.

Findings of Fact

As part of Oregon's Clean Fuels Program, Chevron was required to provide DEQ with information regarding the timing, volume, pricing, and counterparties involved in any transaction to purchase carbon "credits." Although DEQ publishes aggregate data regarding CFP credit transactions, DEQ is statutorily prohibited from disclosing the identity of any party to a particular transaction, thereby ensuring that competitors cannot ascertain any regulated party's confidential credit position and market strategy.

On or about October 10, 2018, Lukens submitted a public records request to DEQ, seeking the details, including the names of the parties, to all of the credit transfers in DEQ's CFP. Providing this information necessarily would require disclosure of individually-identifiable information of the CFP participants; under the program, Chevron (and other fuel suppliers) are mandated to provide individually-identifiable information regarding credit market transactions to DEQ. On or about October 18, 2018, DEQ denied Lukens' request, citing the trade secrets exemption to the PRL. DEQ's denial of the public records request was based on, and consistent with, prior decisions by DEQ to deny similar requests and prior informal advice provided by DOJ. The information sought by Lukens constitutes confidential protected trade secrets, which Chevron has taken measures to protect from disclosure. (*See* Plaintiff's Complaint, paragraphs 20-21). DEQ denied the request, concluding that the information sought is confidential, and not subject to the PRL.

However, by Order dated November 6, 2018, DOJ ordered DEQ to disclose the individually-identifiable details of credit market transactions—to include the timing, volume, pricing, and identity of other contracting parties—concluding it was not exempt from disclosure under the PRL. Disclosing the names of participants to particular transactions would necessarily disclose the timing, purchase/sale volumes and negotiated price of credits purchased (or sold) by every regulated party for every transaction under the CFP. The DOJ ordered DEQ to comply or announce its decision to seek judicial review by November 13, 2018. DEQ declined to seek judicial review of the November 6 Order and indicated its intent

to publicly disclose and post the information that is the subject of the November 6 Order on its CFP website on November 13, 2018.

Thirty-five participants in the CFP submitted declarations to the Attorney General asserting that disclosing individually-identifiable credit market transactions—to include the timing, volume, pricing, and identity of other contracting parties—would reveal confidential business information. These participants, which included both credit buyers and credit generators, provided detailed explanations of how they protect this information and how disclosure would put them at a competitive disadvantage. The declarations suggested that disclosure could have negative consequences to the overall credit market because, among other things, non-regulated credit generators (who are not required to participate in the CFP but can choose to voluntarily participate for the purpose of generating and selling credits) could manipulate credit prices.

Nonetheless, the Attorney General concluded that, whether or not the requested materials include trade secrets, "the public interest requires disclosure in any case." The Attorney General reached its conclusion after consulting University of Oregon Economics Professor Bill Harbaugh. According to the Attorney General, even though Harbaugh reported that the costs and benefits of disclosure on the CFP credit market are "uncertain," he opined that the public interest was "likely to be better served by publicly disclosing the details of individual transactions." *Id.* Harbaugh is not an attorney, and made no effort to address the Oregon Legislature's intent or policy determinations in setting the parameters for disclosure of private entities' trade secrets. Harbaugh's suggestion that specific information might be helpful to academic research was self-serving. It is baffling why the Attorney General would rely on this input in a legal opinion. The Attorney General did not consider the countervailing public interest in protecting trade secrets. The Attorney General declined to determine whether the information sought even constituted a trade secret.

The Attorney General ordered DEQ to disclose the data Lukens requested and gave DEQ seven days (until November 13, 2018) within which to comply or announce its intention to seek judicial review.

On November 13, 2018, on Plaintiff's motion, the Court entered a temporary restraining order, temporarily enjoining release of that same information and

ordering the State Defendants to show cause, if any, why a preliminary injunction should not be entered granting this same relief during the pendency of this action. Plaintiff and Plaintiffs-Intervenors submit that this decision, if not upheld, will allow Chevron's competitors to obtain and use Chevron's trade secret information in their own business strategies.

Relief Sought

Chevron brings this action for declaratory relief and for an injunction to prevent its confidential, proprietary and trade secret information from being publicly disclosed. Chevron seeks a declaration that the Attorney General misapplied the PRL and the Oregon Uniform Trade Secrets Act and that the information provided to DEQ constitutes trade secret information exempt from disclosure under the PRL. Chevron also seeks an order providing preliminary and permanent injunctive relief prohibiting DEQ from directly or indirectly disclosing Chevron's and other participants' trade secrets.

Justiciability of Plaintiff's Claims

After briefing was complete on Plaintiff Chevron U.S.A. Inc.'s ("Chevron") motion for a preliminary injunction and Plaintiff-Intervener Renewable Energy Group, Inc.'s ("REG") joinder in support of that motion, Defendant DOJ raised three new arguments regarding the justiciability of Plaintiffs' claims and the scope of any available injunctive relief. At the Court's invitation to respond to DOJ's belated arguments before ruling on the preliminary injunction motion, Chevron and REG jointly filed a supplemental memorandum to explain why each of DOJ's three arguments lack merit.[1] DOJ filed no response to the supplemental material but did argue each point at the preliminary injunction hearing. The Court addresses each before turning to the merits.

1. Immunity

First, DOJ argues that it and DEQ are immune from suit under the Uniform Trade Secrets Act's (UTSA) immunity provision, ORS 646.473(2), which provides that

[1] Chevron and REG are referred to herein collectively as "Plaintiffs."

public bodies and their agents are immune "from any *claim or action for misappropriation* of a trade secret that is *based on the disclosure or release of information* in obedience to or in good faith reliance" on an order of disclosure issued pursuant to the PRL. (Emphasis added). By its plain terms, this provision does not apply. The plain text and legislative history of the provision confirm that it comes into play only after a public agency has disclosed a third party's trade secrets; it has no relevance where, as here, a party seeks to enjoin threatened misappropriation before it has occurred. Logically, if the Court enjoins DEQ from disclosing Plaintiffs' trade secret information, any subsequent disclosure by DEQ would not be in "good faith" and the immunity provision would not apply.[2]

ORS 646.473 is entitled "limited immunity"; on its face, the provision applies only to a "claim *** for misappropriation of a trade secret." In turn, "a claim for misappropriation of trade secrets" ordinarily means a tort claim brought directly under the UTSA. *Cf. Douglas Med. Ctr., LLC v. Mercy Med. Ctr.*, 203 Or App 619, 622 (2006). Nothing in the plain language of ORS 646.473(2) indicates that the legislature also intended to immunize state actors from declaratory judgment and injunctive relief actions merely because the UTSA is incorporated into the PRL's unconditional exemption set forth at ORS 192.355(9)(a).

For years, DOJ agreed that the UTSA is incorporated into the PRL. DOJ now argues, however, that the PRL's separate definition of "trade secrets" means the UTSA has no application, except as to providing them with immunity! DOJ's interpretation of the PRL fails to recognize the fundamental distinction between the unconditional exemption for disclosure of trade secrets (under ORS 192.355(9)(a)), and the conditional exemption for disclosure of trade secrets (under ORS 192.345(2)). The mere disclosure of trade secrets triggers the conditional exemption, whereas misappropriation triggers the unconditional exemption, as it is misappropriation (and not mere disclosure) that Oregon law prohibits under the UTSA. The Legislature sensibly determined that when an

[2] Given the plain language of ORS 646.473(3) and the nature of Plaintiffs' claims, DOJ's invocation of the immunity provision is particularly misplaced. DOJ is a defendant in this case because it concluded that no PRL exemption applies to Plaintiffs' individually-identifiable information. Plaintiffs seek a declaration that DOJ's conclusion was legally erroneous, but that declaratory claim is not based on any disclosure or release of information by DOJ, as DOJ would not be the state agency disclosing Plaintiffs' trade secrets.

agency's disclosure would violate Oregon law, that disclosure is impermissible regardless of the public interest.

Under DOJ's reading of the statute, a third party could seek declaratory relief if the information at issue is a trade secret under the PRL's conditional exemption in ORS 192.344(2), but would be foreclosed in the more serious situation where the proposed disclosure would constitute an unlawful misappropriation of trade secrets under the UTSA, triggering the PRL's unconditional exemption under ORS 192.344(9)(a). That position is not defensible.

Although the inapplicability of ORS 646.473(2) is apparent from the plain text of the statute, legislative history confirms Plaintiffs' reading. *See Angle v. Bd. of Dentistry*, 294 Or App 470, 476, (2018) (When determining legislative intent, a court gives primary weight to the text and context of the statutory provision, but it "also may consider any useful legislative history, to discern and effectuate the legislative intent as reflected in the words of the statute."); *State v. Gaines*, 346 Or 160, 172 (2009) ("Legislative history may be used to confirm seemingly plain meaning and even to illuminate it[.]"). The legislature added ORS 646.473(2) to the UTSA at the behest of DOJ, which wanted "to make sure that local and state governments were protected from liability under the Public Records Law if they were required to disclose trade secrets." Decl. of Reilley Keating in Supp. of Suppl. Br. Ex. 1 (Minutes, Sen. Comm. on Judiciary, SB 298, Apr. 14, 1987). The purpose of the immunity provision was to "afford public bodies immunity when they disclose information under the Public Records Law." *Id.* Ex. 2 (Testimony, Senate Comm. on Judiciary, SB 298, April 7, 1987 (statement of Department of Justice AAG William F. Nessly, Jr.). Nowhere in the legislative history is evidence that, as DOJ now maintains, the legislature intended for ORS 646.473(2) to bar claims designed to evaluate the propriety of a trade secret disclosure before it occurs.

The UTSA's immunity provision also has no application when the plaintiff has a contractual right to prevent the misappropriation of trade secrets, as counsel for DOJ admitted at the preliminary injunction hearing. DOJ's concession is fatal because, just as in *Pfizer Inc. v. Oregon Dep't of Justice ex rel. Kroger*, 254 Or App 144 (2012), (*Pfizer)* Plaintiffs have an enforceable contract right to prevent the dissemination of their individually-identifiable information unless disclosure is required by the PRL (i.e., because no exemption applies). Because several PRL exemptions do apply, DEQ is contractually required to protect Plaintiffs'

confidential information. If all that were not enough, the immunity provision upon which DOJ relies has no bearing on Plaintiffs' claim that the Clean Fuels Program prohibits publication of their individually-identifiable information, whether that information constitutes a trade secret or not.

2. Standing

Second, DOJ argues that Plaintiffs lack standing and have no right to challenge the disclosure of information under the PRL. DOJ also argues that no party "has the right to challenge a decision to disclose records under the Oregon Public Records Law," other than the affected public entity. Resp. to Western States Petroleum Assoc.'s Joinder in Supp. of Motions to Show Cause at 6:2-4. DOJ's argument is not just novel, it is contrary to law and logic. DOJ argues that the PRL is a comprehensive statutory scheme and does not contemplate an action by a third party to prevent disclosure. According to DOJ, it can reverse DEQ's decision to withhold Plaintiffs' trade secrets and, even if DOJ's decision is demonstrably incorrect, there is nothing this Court can do about it unless DEQ itself challenges DOJ.

DOJ's claim of unfettered authority is wrong, and it is wrong because it begins from an erroneous premise. Contrary to DOJ's contention, the PRL "is **not** the exclusive means" of challenging an agency's records ruling: the Declaratory Judgments Act provides an alternative basis. *Oregonians for Sound Econ. Policy, Inc. v. State Acc. Ins. Fund Corp.*, 187 Or App 621, 629 (2003). Oregon courts have consistently construed the PRL to permit third parties, like Plaintiffs, to claim an exemption from disclosure. For example, in *Oregon AFSCME Council 75 v. State of Or., Dep't of Admin. Servs. and Kulongoski, Attorney General*, 150 Or App 87 (1997), a union representing state employees sued to prevent the State from disclosing to a reporter the names of employees who used 240 or more hours of sick leave. The trial court granted declaratory relief to the union and the State and Attorney General appealed. *Id.* at 89. The Court of Appeals noted, as DOJ argues, that the PRL only sets out procedures whereby the requestor can challenge an agency decision. *Id.* at 93. Nonetheless, the court proceeded to assess the union's claim, noting that the PRL has been "construed *** as permitting an individual to claim an exemption from disclosure." *Id.* at 93 n.5.

Oregon AFSCME thus belies DOJ's contention that the PRL must be strictly construed to bar claims by third parties who seek declaratory relief regarding their rights merely because the PRL does not expressly provide a mechanism for third parties to challenge improper orders of disclosure. *See* also, e.g., *Brown v. Guard Publishing Co.*, 267 Or App 552, 554-55 (2014) (complaint for declaratory and injunctive relief filed by intervenor energy wholesaler in action brought by public utility to prevent disclosure of trade secrets to newspaper following DOJ decision to override utility's decision to withhold); *Pfizer*, 254 Or App at 151 (declaratory relief action initiated by plaintiff drug company to enjoin disclosure of trade secrets by DOJ in response to public records request). These cases all involved individuals claiming an exemption from public disclosure challenging the Attorney General order to disclose under the PRL.

The PRL is not the exclusive mechanism available for challenging disclosure decisions. A declaratory judgment action is also an appropriate vehicle for challenging disclosure determinations. Plaintiffs are entitled to use the Declaratory Judgment Act to obtain a declaration that Plaintiffs' individually-identifiable information regarding credit market transactions is exempt from release under PRL. In either circumstance, the controlling principle of law is the same: the Declaratory Judgment Act provides an alternative and independent vehicle for determining the rights of affected parties.

3. Individualized Remedy

Third, DOJ took the position at the preliminary injunction hearing that any injunctive relief, if ordered, must be limited to Chevron and REG alone. In a case such as this one, the public interest favors the entry of an injunction that is sufficiently broad to protect the individually-identifiable information of all participants in the Clean Fuels Program. An injunction is not overbroad merely because it extends protection to persons other than prevailing parties in the lawsuit. Any injunction should ensure that all the individually-identifiable trade secret information transmitted to DEQ by participants in the Clean Fuels Program be maintained as confidential, as DEQ promised. An injunction limited to Plaintiffs' information would be a Pyrrhic victory. With only Chevron and REG's information withheld, it would be immediately obvious to any observer which transactions relate to them, as they would be, respectively, the only buyer and seller whose names were redacted from

disclosure. An injunction, if granted, must prevent the disclosure of all registered parties' individually-identifiable information.

Findings and Declarations

It is undisputed and the Court finds that Chevron's individually-identifiable information meets the UTSA's definition of a "trade secret." Chevron's individually-identifiable information is also exempt from disclosure under ORS 192.345(2) because the information satisfies the PRL's definition of a trade secret and Defendants offer no persuasive explanation for why the public interest requires disclosure. DEQ properly declined to disclose Chevron's trade secrets pursuant to a Public Records Law request, for three independently-sufficient reasons.

First, Chevron's individually-identifying information is unconditionally exempt from disclosure under ORS 192.355(9)(a) of the PRL, which exempts information the disclosure of which is prohibited under Oregon law. This unconditional exemption applies because the UTSA prohibits the misappropriation of trade secrets through unauthorized disclosure. Any disclosure of Chevron's trade secrets by DEQ would constitute a misappropriation under the UTSA.

Defendants argue that a trade secret may be exempt from disclosure under the PRL only under the conditional exemption set forth at ORS 192.345(2), and not under ORS 192.355(9)(a), which unconditionally exempts the disclosure of information "the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." Oregon Court of Appeals precedent is directly to the contrary. In *Pfizer*, the Court of Appeals held that the UTSA "is incorporated into the [Public Records Law] through ORS 192.502(9)(a)."[3] 254 Or App at 153 n.8. The Court of Appeals made clear that although ORS 192.501(2)[4] defines the term "trade secret" "for purposes of ***another*** OPRL exemption," which is conditioned on the public interest, ORS 192.502(9) provides an independent and unconditional exemption where disclosure would amount to misappropriation of a trade secret under the UTSA. *Id.* (emphasis added); *see also id.* at 160-61. *Pfizer*'s holding that the UTSA is incorporated into the Public Records Law through

[3] ORS 192.502(9)(a) subsequently was renumbered to ORS 192.355(9)(a).

[4] ORS 192.501(2) subsequently was renumbered to ORS 192.345(2).

ORS 192.355(9)(a) is binding precedent. *See Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 53-54 (1999).

DOJ is correct that, in *Pfizer Inc. v. Ore. Dep't of Justice*, it did not dispute that the UTSA is incorporated into the Public Records Law. *See Pfizer Inc. v. Ore. Dep't of Justice*, No. 08C-25184, 2009 WL 9049403 (Or Cir Jan. 28, 2009). That is because, for years, DOJ took the position that if information qualifies as a trade secret under the UTSA, "its 'misappropriation' by disclosure is prohibited *** and the records would be exempt from disclosure under the Public Records Law by ORS 192.502(9)." Declaration of Reilley D. Keating in Support of Reply in Support of Motion for Preliminary Injunction ("Keating Dec."), Ex. 1 at 2-3; *see also* Or. Dep't of Justice, *Attorney General's Public Records & Meetings Manual* at App. F-20 (Nov. 2014) (Attorney General order denying petition to disclose fee schedules and price lists provided to public agency during bidding process because the information was a trade secret and therefore exempt from disclosure under the UTSA "which is incorporated into" the ORS 192.355(9)(a)); *id.* at F-40 (denying petition because "[t]he information was also exempt under ORS 192.502(9), which incorporates the Uniform Trade Secrets Act").

At oral argument, counsel for DOJ offered no reason for arguing against its own holdings. But the fact that DOJ previously conceded what it now disputes does not make *Pfizer*'s holding mere dictum. Dictum refers to a statement that is not necessary to a court's decision. *Engweiler v. Persson*, 354 Or 549, 558 (2013). *Pfizer*'s holding that the UTSA is incorporated into the PRL was necessary to the court's determination that certain of the plaintiff's information was exempt from disclosure under ORS 192.355(9)(a). *See Pfizer*, 254 Or App at 166. Accordingly, *Pfizer* is binding on defendants and prevents the disclosure of trade secrets, as defined by the UTSA.

Second, in enacting the CFP, the Oregon Legislature expressly prohibited publication of Chevron's trade secret information on DEQ's website. ORS 468A.271. Permitting a newspaper to obtain Chevron's individually-identifiable information through a public records request and then publish that same information on the newspaper's website would flout the legislature's intent to keep individually-identifying information confidential. DEQ entered into an agreement with participants in the CFP that gives rise to a duty to maintain secrecy.

The conclusion that Chevron's trade secrets are unconditionally exempt from disclosure follows directly from the Court of Appeals' binding decision in *Pfizer, supra,* which held that ORS 192.355(9)(a) applies when a state agency obtains trade secrets pursuant to an agreement not to disclose unless the PRL requires otherwise. Where disclosure of a trade secret would amount to misappropriation—*i.e.*, because the information was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use (ORS 646.461(2)(d)(B))—disclosure would violate Oregon law.

Here, there is no tension, let alone an irreconcilable conflict, between ORS 192.355(9)(a) and ORS 192.345(2). Under ORS 192.345(2), information is conditionally exempt from disclosure so long as it meets the PRL's definition of a trade secret, full stop. Conversely, under 192.355(9)(a), information is unconditionally exempt from disclosure so long as it meets the UTSA definition of trade secret *and* where disclosure would amount to a misappropriation. *See Pfizer*, 254 Or App at 160. It makes sense for the legislature to have determined that where disclosure of a trade secret would amount to misappropriation—*i.e.*, because the information was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use (ORS 646.461(2)(d)(B))—disclosure would violate Oregon law and thus must be prevented in all circumstances. Conversely, when the government's disclosure of a trade secret would not violate Oregon law (*i.e.*, because the government acquired the trade secret under circumstances that did not require the government to maintain the secrecy of that information), the public interest in disclosure must be considered. The distinction codifies sound public policy that the government's violation of Oregon law cannot be justified by the public interest. The plain text and context of the statute and *Pfizer* compel the conclusion that information is exempt from disclosure under ORS 192.355(9)(a) when disclosure would amount to trade secret misappropriation under the UTSA.

Disclosing Chevron's individually-identifiable information would constitute a misappropriation of trade secrets under the UTSA. Defendants do not dispute that Chevron's individually-identifiable information constitutes a trade secret under the UTSA because it is a compilation of information that derives economic value because it is not generally known and is the subject of reasonable efforts to maintain that secrecy. *See* ORS 646.461(4). Defendants have not submitted any evidence to the contrary.

The CFP provides that "[t]he data posted on [DEQ's] website may not include any individually identifiable information or information that would otherwise constitute a trade secret under ORS 192.345." ORS 468A.271(3)(b). By its plain language, the statute prohibits and restricts the disclosure of (a) individually-identifiable information; and (b) information that otherwise constitutes a trade secret as defined in the PRL. Construing the plain language of ORS 192.355(9)(a), which exempts public records or information "the disclosure of which is *prohibited or restricted*" by Oregon law, and ORS 468A.271(b)(3), the individually-identifiable information is unconditionally exempt from disclosure.

DOJ attempts to distinguish the trial court decision in *Pfizer* in this regard by arguing that DEQ did not enter into a confidentiality agreement with the participants of the CFP. DOJ is wrong. DEQ's Clean Fuels Program Reporting Tool User Guide states: "The services that the Clean Fuels Program of [DEQ] provides to you are subject to the following Terms of Use." Keating Dec., Ex. 2. Among those Terms of Use is the confidentiality provision, which expressly states that "***DEQ will treat the information you provide as confidential, except as may be required to be disclosed under the Oregon Public Records Law***." *Id.* at 2 (emphasis added). This confidentiality provision is a material part of the "Terms of System Use Agreement," and is agreed to by "electronic signature" as "valid as if a paper version of the Terms of Use were delivered containing your original written signature." *See id.* at 2-4. The terms and conditions are thus contractual terms, no less binding on the parties than the confidentiality agreement in *Pfizer*. *See Beard v. PayPal, Inc.*, No. CIV.A. 09-1339-JO, 2010 WL 654390, at *1 (D Or Feb. 19, 2010).

Counsel for DOJ conceded at the preliminary injunction hearing, the UTSA "allows for the persistence of contractual remedies." Decl. of Reilley Keating in Supp. Of Suppl. Br. Ex. 4 (Tr. of Proceedings at 38:6-7 (Jan. 23, 2019)); *see* ORS 646.473(2) (providing that the UTSA "shall not affect *** [c]ontractual remedies, whether or not based upon misappropriation of a trade secret"). It was for that reason, DOJ's counsel asserted, that the plaintiff in *Pfizer Inc. v. Oregon Dep't of Justice ex rel. Kroger*, 254 Or App 144 (2012), was permitted to challenge the DOJ's proposed release of trade secret information. Decl. of Reilley Keating in Supp. of Suppl. Br. Ex. 4 (Tr. of Proceedings at 38:8-11). In this regard, *Pfizer* and this case are indistinguishable. DEQ entered into an agreement with Plaintiffs that

"obligate[s] [DEQ] to withhold the [trade secrets] to the extent that they are exempt from disclosure under the OPRL." 254 Or App at 158.

DOJ attempts to avoid this result by arguing that the legislature prohibited the publication of Chevron's information on DEQ's *website*, but did not intend to prohibit disclosure under the PRL. DOJ's argument defies the principle that the Court's role "is to ascertain legislative intent, not to slavishly apply all statutes literally." *State v. Rafal*, 21 Or App 114, 117 (1975). Having expressly prohibited DEQ from publishing the information on its website, the legislature could not have intended to permit a newspaper to obtain that same information through a public records request and then post it on the newspaper's website. In such case, the statutory prohibition in ORS 468A.271(3)(b) would be meaningless. The Court is required to interpret the Public Records Law exemption in a manner that also gives effect to ORS 468A.271(3)(b). *See, e.g.*, *Burt v. Blumenauer*, 87 Or App 263, 265 (1987) ("When several statutory provisions are involved, we should render a construction that gives effect to all of them, if possible. * * * We cannot presume that the legislature enacted a meaningless statute.").

Third, even assuming the trade secrets at issue here are only conditionally exempt under ORS 192.345(2) of the PRL, the public interest does not require disclosure. Defendants do not explain how the public interests they identify would be served by disclosing the names of participants to credit transactions, when DEQ already makes publicly available all other information regarding credit transactions. At the least, Defendants' public interest arguments, which are entirely speculative, are not in equipoise with (let alone outweigh) the public harm that would result from disclosure. The Court notes that both parties amply briefed these concerns, and the Court took into consideration the declarations of defendants' witnesses, which provided no plausible explanation how or why disclosing the names of participants in CFP credit transactions would promote, much less is required by, the public interest.

Because Chevron's individually-identifiable information is a trade secret under ORS 192.345(2), disclosure is exempted unless Defendants show that the public interest requires disclosure. *See City of Portland v. Anderson*, 163 Or App 550, 554 (1999) (burden is on requester to prove that the public interest requires disclosure). Neither DOJ nor Lukens offers a plausible, let alone persuasive, reason why the public interest favors, much less mandates disclosure. Nor do they

suggest how disclosure would make *government's* activities more transparent where, as here, DOJ seeks to disclose a *private* entity's information merely because it is in the government's possession. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 US 749, 774, 109 S Ct 1468, 103 L Ed 2d 774 (1989) (explaining that the purpose of public records laws "is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed") (emphasis in original).

"'Mere speculation about hypothetical public benefits'" cannot justify disclosure of Chevron's trade secrets. *Tuffly v. U.S. Dep't of Homeland Sec.*, 870 F3d 1086, 1098 (9th Cir. 2017) (quoting *U.S. Dep't of State v. Ray*, 502 US 164, 179, 112 S Ct 541, 116 L Ed 2d 526 (1991)). If the rule was otherwise, and "a totally unsupported suggestion that the interest in finding out" individually-identifiable information justified disclosure, agencies like DEQ "would have no defense against requests for production of private information." *Ray*, 502 US at 179.

Defendant Lukens offers a different public interest rationale, claiming that disclosing participants' individually-identifying information will help the public evaluate how the program is functioning. Because only the *names* of participants to certain credit transactions are prohibited from disclosure under the Clean Fuels Program, Lukens must demonstrate that the "'marginal additional usefulness' of the names" requires disclosure. *Lahr v. Nat'l Trans. Safety Bd.*, 569 F3d 964, 978 (9th Cir 2009) (citation omitted). Yet Lukens nowhere explains how disclosing the *names* of participants—when all other information regarding credit transactions is already public—will help the public "watch their government at work in a way they are prohibited from doing now." Lukens Dec. ¶ 4.

As the Supreme Court explained in analogous circumstances, when the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, "the requester must establish more than a bare suspicion in order to obtain disclosure." *Nat'l Archives & Records Admin. v. Favish*, 541 US 157, 174, 124 S Ct 1570, 158 L Ed 2d 319 (2004). Because there is a presumption of legitimacy accorded to the government's official conduct, "the requester must produce evidence that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred." *Id.* Here, Lukens proffers no evidence that there are

structural problems in or government mismanagement of the CFP. The allegation that the government might be mismanaging the CFP, unsupported by any evidence, cannot justify disclosure. *See id.* at 174-75.

Misappropriation of a trade secret is an irreparable injury that equity will protect, regardless of whether the misappropriation "would result in substantial damage." *Holland Devs., Ltd. v. Mfrs. Consultants, Inc.*, 81 Or App 57, 65 (1986). That is why the Oregon Legislature has authorized courts to enjoin actual or *threatened* misappropriation of trade secrets. *See* ORS 646.463(1).

The declarations submitted by Chevron and the Plaintiffs-Intervenors establish that disclosure of such confidential information will result in competitive harm.

Conclusion

Based on the record, and the pleadings, together with applicable law, the Court grants Plaintiffs' request for declaratory and injunctive relief. DOJ and DEQ are enjoined from publicly disclosing individually-identifiable information regarding participants in the Clean Fuels Program. The DOJ incorrectly concluded that no PRL exemption applies to Plaintiffs' individually-identifiable and trade secret information and erroneously ordered DEQ to disclose it, notwithstanding DEQ's express decision to withhold the information.

Plaintiffs' individually-identifiable information regarding credit market transactions is exempt from release under PRL, either (a) because disclosure is prohibited under ORS 192.355(9)(a), or (b) because the information is conditionally exempt from disclosure under ORS 192.345(2) and the public interest does not require disclosure of this information.

DOJ and DEQ are permanently enjoined from publicly disclosing individually-identifiable information regarding participants in the Oregon Clean Fuels Program including but not limited to credit market transactions sought by Lukens in his public records request. The statutory provision providing for confidentiality and nondisclosure of individually-identifiable and trade secret information applies to all CFP participants—not only the Plaintiffs—and is necessary to protect the program's overriding goal of promoting the use of lower-carbon fuels in Oregon. The injunction applies to all participants in the CFP because an injunction limited

to redacting only Plaintiffs' trade secrets effectively would disclose Plaintiffs' protected information.

Plaintiffs may submit a post judgment motion for costs and attorney fees.

Will Counsel for plaintiffs kindly submit a Judgment consistent with this decision?

Very truly yours,

Mary Mertens James
Circuit Court Judge

MMJ/clt
cc: File

CERTIFICATE OF READINESS

Pursuant to UTCR 5.100

The submission is ready for judicial signature because:

☐ 1. Each opposing party affected by this order or judgment has stipulated to the order or judgment, as shown by each opposing party's signature on the document being submitted.

☒ 2. Each opposing party affected by this order or judgment has approved the order or judgment, as shown by signature on the document being submitted or by written confirmation or approval sent to me.

☐ 3. I have served a copy of this order or judgment on all parties entitled to service and:

☐ a. No objection has been served on me.

☐ b. I received objections that I could not resolve with the opposing party despite reasonable efforts to do so. I have filed a copy of the objections I received and indicated which objections remain unresolved.

☐ c. After conferring about objections _(opposing party)__ agreed to independently file any remaining objection.

☐ 4. The relief sought is against an opposing party who has been found in default.

☐ 5. An order of default is being requested with this proposed judgment.

☐ 6. Service is not required pursuant to subsection (3) of this rule, or by statute, rule or otherwise.

☐ 7. This is a proposed judgment that includes an award of punitive damages and notice has been served on the Director of the Crime Victims' Assistance Section as required by subsection (4) of this rule.

DATED: October 8, 2019

PERKINS COIE LLP

By: */s/ Alletta S. Brenner*
Alletta S. Brenner, OSB No. 142844

Attorneys for Plaintiff-Intervenor
Renewable Energy Group, Inc.

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **GENERAL JUDGMENT** on:

Joel A. Mullin
Reilley D. Keating
Crystal S. Chase
Stoel Rives LLP
760 S.W. Ninth Avenue, Suite 3000
Portland, Oregon 97205
joel.mullin@stoel.com
reilley.keating@stoel.com
crystal.chase@stoel.com

Attorneys for Plaintiff
Chevron U.S.A. Inc.

Cody J. Elliott
Erica A. Clausen
Katelyn J. Fulton
Miller, Nash, Graham & Dunn LLP
3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, OR 97204
katelyn.fulton@millernash.com
cody.elliott@millernash.com
erica.clausen@millernash.com

Attorneys for Plaintiff-Intervenor
Western States Petroleum Association

Christina Beatty-Walters
Carla Scott
Renee Stineman
Oregon Department of Justice
Trial Division
100 SW Market St
Portland OR 97201
tina.BeattyWalters@doj.state.or.us
carla.a.scott@doj.state.or.us
renee.stineman@doj.state.or.us

Attorneys for Defendants
Oregon Department of Environmental Quality, Richard Whitman, and Oregon Department of Justice

Steven Wilker
Tonkon Torp LLP
888 SW Fifth Ave., Suite 1600
Portland, OR 97204
steven.wilker@tonkon.com

Attorneys for Defendant
Erik Lukens

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//

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Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

by causing a true copy thereof, addressed to the last-known address of the above, to be sent by the following indicated method or methods:

[X] by **sending via the court's electronic filing system** (if party's counsel has self-selected for e-service)

[X] by **email**

[X] by **U.S. Mail**, first-class postage prepaid, from Portland, Oregon

[ ] by **hand delivery**

DATED: October 8, 2019

PERKINS COIE LLP

By: */s/ Alletta S. Brenner*

Christopher W. Rich, OSB No. 990954
CRich@perkinscoie.com
Alletta S. Brenner, OSB No. 142844
ABrenner@perkinscoie.com
PERKINS COIE LLP
1120 NW Couch Street, 10th Floor
Portland, Oregon 97203
Telephone: 503.727.2000
Facsimile: 503.727.2222
Telephone: 503.727.2000
Facsimile: 503.727.2222

Attorneys for Plaintiff-Intervenor
Renewable Energy Group, Inc.

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222