EXHIBIT 5

EXHIBIT 5

James J. Pisanelli, Esq., Bar No. 4027
JJP@pisanellibice.com
Todd L. Bice, Esq., Bar No. 4534
TLB@pisanellibice.com
Debra L. Spinelli, Esq., Bar No. 9695
DLS@pisanellibice.com
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
Telephone: 702.214.2100

Kenneth G. Schuler, Esq. (*pro hac vice* pending)
kenneth.schuler@lw.com
Michael J. Faris, Esq. (*pro hac vice* pending)
michael.faris@lw.com
Alex Grabowski, Esq. (*pro hac vice* pending)
alex.grabowski@lw.com
LATHAM & WATKINS LLP
330 North Wabash Avenue, Suite 2800
Chicago, IL 60611
Telephone: 312.876.7659

Angela Walker, Esq. (*pro hac vice* pending)
angela.walker@lw.com
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304
Telephone: 202.637.3321

Attorneys for Plaintiff Alvogen, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

ALVOGEN, INC.,

Plaintiff,

v.

STATE OF NEVADA;

NEVADA DEPARTMENT OF CORRECTION;

JAMES DZURENDA, Director of the Nevada Department of Correction, in his official capacity;

IHSAN AZZAM, Ph.D, M.D., Chief Medical Officer of the State of Nevada, in his official capacity;

And JOHN DOE, Attending Physician at Planned Execution of Scott Raymond Dozier, in his official capacity;

Defendants.

HIKMA PHARMACEUTICALS USA, INC.,

Intervenor.

Case No.: A-18-777312-B

Dept. No.: XI

PLAINTIFF ALVOGEN'S OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING NEVADA SUPREME COURT DECISION ON ORDER SHORTENING TIME; COUNTERMOTION TO ACCELERATE DISCOVERY RESPONSES AND SET PRELIMINARY INJUNCTION HEARING

Date of Hearing: August 6, 2018

Time of Hearing: 9:00 a.m.

I. INTRODUCTION

After insisting on the time for expansive preliminary injunction discovery, and thereby delaying any preliminary injunction hearing, the Defendants (collectively the "State") now reverse course and ask for a full stay of any discovery or of a preliminary injunction hearing. The sole grounds for the State's abrupt about-face is its pending petition for extraordinary writ to the Nevada Supreme Court. But that Petition is predicated upon assertions at odds with the State's representations to this Court. At no time did the State tell this Court that it needed the injunction hearing to happen before November 30, 2018, because of a purported drug expiration.[1] Nor did the State inform the Supreme Court that the preliminary injunction hearing was extended because of *its* demands for a sweeping discovery window.

Regardless, the State's stay request is contrary to the purposes of effective appellate review. This Court's record is yet to be fully developed due to the lack of a preliminary injunction hearing, a delay occasioned by the State's prior demands for expansive discovery. Because a full, fair and complete record will facilitate the Supreme Court's review, the State's new-found position – a need for urgent action before November – counsels against further delay (*i.e.*, a stay). Instead, it warrants this Court expediting and narrowing the process and promptly holding a preliminary injunction hearing. Although Alvogen believes that the State's purported grounds for seeking expedited writ review are not well-founded, Alvogen proposes scheduling the preliminary injunction hearing in late September, which would thereby preserve more than adequate time to meet the State's declared deadline.

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[1] The State represented to the Supreme Court that it was in need of extraordinary review of this Court's TRO – instead of awaiting the preliminary injunction – because "a 200 milligram batch of Cisatracurium expires November 30, 2018. The current lethal injection protocol calls for 200 milligrams of Cisatracurium for each execution. Therefore, if the Court does not issue a ruling in time to use this November batch, the State will lose its ability to carry out an execution." Ex. 1, Motion to Expedite Decision By October 19, 2018, at 1.) Again, the State never made this assertion to this Court. Alvogen also has serious questions about the merits of the State's representations, because, *inter alia*, the State acknowledges that it has other batches of the same medication that will not expire until well into 2019, and, other than Mr. Dozier, media reports have noted that there are no "[d]eath row inmates in Nevada who have exhausted their appeals and are immediately eligible for execution." Michelle Rindels, *Nevada's death penalty by the numbers*, THE NEVADA INDEPENDENT (Apr. 3, 2017, 2:30 a.m.), https://thenevadaindependent.com/article/nevadas-death-penalty-numbers. Getting to the bottom of this issue – the truth – is precisely what a preliminary injunction hearing is all about.

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

In light of the State's new-found need for speed, Alvogen hereby countermoves to accelerate the preliminary injunction hearing and associated discovery. Rather than the 30 days for discovery responses allowed under NRCP 33, 34, and 36, Alvogen requests that this Court require responses within 15 days. Instead of the 120 days initially contemplated for discovery, the preliminary injunction hearing could be set for late September 2018. Again, this process will allow the Court to determine whether a preliminary injunction should issue well in advance of the deadlines claimed by the State.

II. ARGUMENT

The State fails to show any entitlement to a stay under Nevada Rule of Appellate Procedure 8(c). To the contrary, a stay is directly at odds with the State's claimed need for an urgent resolution of this dispute. Under NRAP 8, this Court must weigh "(1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition." NRAP 8(c). As the party seeking a stay, the State has the burden of showing that stay relief is warranted. *Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 658-69, 6 P.3d 982, 987 (2000).

Not one of these factors warrants a stay here. The entire jurisdictional basis for the State's pending writ petition is that it supposedly has no available remedy at law (*i.e.*, an appeal) because this Court has delayed the preliminary injunction hearing and has entered an extended TRO. As this Court knows, a TRO is not subject to an appeal, but a preliminary injunction can be appealed and is subject to accelerated appellate review. *See* NRAP 3A(b)(3); *Sicor, Inc. v Sacks*, 127 Nev. 896, 900, 266 P.3d 618, 620 (2011). Thus, the State's desired stay – postponing indefinitely any preliminary injunction hearing – is directly at odds with securing review of a full and fair record. Recall that in *Mikohn Gaming Corporation v. McCrea*, the Supreme Court warned against granting a stay when it is sought for dilatory purposes. 120 Nev. 248, 253, 89 P.3d 36, 40 (2004).

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400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

Not only would a stay be counterproductive to appellate review, the State cannot seriously suggest that it faces any irreparable harm by complying with discovery and participating in a preliminary injunction hearing. It is well settled that having to expend money, time and resources to participate in litigation is not irreparable or even serious harm. *Hansen.*, 116 Nev. at 658, 6 P.3d at 986–87.[2] After all, the purpose of expediting discovery and holding a preliminary injunction hearing is to determine the truth. Allowing the truth to come to light – particularly on such an important issue – counsels against any stay request. NRAP 8(c).

III. COUNTERMOTION TO EXPEDITE DISCOVERY RESPONSES

In light of the State's newly-espoused position, Alvogen countermoves this Court to shorten the response time for discovery requests and to schedule the preliminary injunction hearing. *See Sokolowski v. Adelson*, 2014 WL 12607722 at *2 (D. Nev. Jan. 30, 2014) (court has discretion to expedite discovery, particularly where there is a need in light of a pending motion for preliminary injunction). Following the Court's July 11, 2018 TRO, Alvogen sought limited discovery, including the identity of the John Doe, the attending physician, communications relating to the use of midazolam in the execution protocol, and depositions related to those communications. (Hr'g Tr., July 11, 2018, 76:18-24, 81:12-17, on file.) Alvogen thereafter promptly served its first set of requests for production and interrogatories. Recall that it is the ***State*** who insisted upon a need for "substantial discovery" that would take a large amount of time. (*Id.* at 77:15-78:3.) Recognizing the scope and breadth of discovery claimed by the State, the Court extended the temporary restraining order through the preliminary injunction hearing, which is to be held in 120 days. (*Id.* at 78:4-12.) The Court set a status check on discovery in 60 days, September 10, 2018. At no time did the State claim that this Court should shorten the discovery

[2] The State argues, relying on *Mikohn Gaming*, that this is an instance where increased litigation costs constitute irreparable harm. (Mot. at 6.) Hardly. *Mikohn Gaming* involved the appeal of an order related to the validity of an arbitration clause. 120 Nev. at 254, 89 P.3d at 40. The Supreme Court stayed the litigation for the duration of the appeal because the appellant would lose the benefits of arbitration. *Id.* The Court in *Mikohn* recognized that situation as being fundamentally different than the ordinary litigation expenditures at issue here. *Id.* at 253, 89 P.3d at 40 (citing *Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. at 658, 6 P.3d at 986-87).

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

window or claim that there was any deadline for holding the preliminary injunction hearing due to expiring drugs.

Nevada's discovery rules "grant broad powers to litigants promoting and expediting the trial of civil matters by allowing those litigants an adequate means of discovery during the period of trial preparation." *Maheau v. Eighth Jud. Dist. Ct.*, 88 Nev. 26, 42, 493 P.2d 709, 719 (1972). Here, because no answer has been filed, the Court did not hold a Rule 16.1 conference. However, consistent with Rule 26(a), the Court did allow discovery to proceed on the subject areas specifically identified by each party. (Hr'g Tr., July 11, 2018, 80:22-81:2, on file.)[3]

Even assuming the timing concerns the State now raises are valid, which is not clear, the solution is for this Court to accelerate the preliminary injunction hearing and set it for the end of September. The Court should also shorten the time period to respond to discovery from 30 days to 15, which would allow the parties to complete the narrow discovery warranted for a preliminary injunction hearing.

IV. CONCLUSION

The State's stay request is contrary to its claims for expedited resolution. Rather than delaying this case, Alvogen asks this Court to expedite the discovery responses and promptly schedule a preliminary injunction hearing, thereby alleviating the State's representations that it will not be able to carry out Mr. Dozier's execution after November 30, 2018, because of drug expirations.

DATED this 3rd day of August 2018.

PISANELLI BICE PLLC

By: _____

James J. Pisanelli, Esq., Bar No. 4027
Todd L. Bice, Esq., Bar No. 4534
Debra L. Spinelli, Esq., Bar No. 9695
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

and

[3] The Court also contemplated the possibility of hearing a motion to dismiss on a parallel track. (Hr'g Tr., July 11, 2018, 81:3-6.) If, as the State claims in its writ petition and Motion, Alvogen's claims fail as a matter of law (which they do not), the State should just move to dismiss the complaint. Again, a stay is counterproductive to what the State argues.

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

Kenneth G. Schuler, Esq.
Michael J. Faris, Esq.
Alex Grabowski, Esq.
LATHAM & WATKINS LLP
330 North Wabash Avenue, Suite 2800
Chicago, IL 60611

Angela Walker, Esq.
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304

Attorneys for Plaintiff Alvogen, Inc.

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and that on this 3rd day of August, 2018, I caused to be served via the Court's e-filing/e-service system and by email a true and correct copy of the above and foregoing **PLAINTIFF ALVOGEN'S OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING NEVADA SUPREME COURT DECISION ON ORDER SHORTENING TIME; COUNTERMOTION TO ACCELERATE DISCOVERY RESPONSES AND SET PRELIMINARY INJUNCTION HEARING** to the following:

Jordan T. Smith, Esq.
Assistant Solicitor General
555 East Washington Avenue, #3900
Las Vegas, Nevada 89101
JSmith@ag.nv.gov

E. Leif Reid, Esq.
Josh M. Reid, Esq.
Kristen L. Martini, Esq.
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169-5996

Kimberly Peets

An employee of Pisanelli Bice PLLC

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

*****

STATE OF NEVADA; NEVADA DEPARTMENT OF CORRECTIONS; JAMES DZURENDA, Director of the Nevada Department of Corrections, in his official capacity; IHSAN AZZAM, Ph.D., M.D., Chief Medical Officer of the State of Nevada, in his official capacity; and JOHN DOE, Attending Physician at Planned Execution of Scott Raymond Dozier in his official capacity,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE,

Respondents,

and

ALVOGEN, INC.,

Real Party in Interest.

Supreme Court Case No.: 76485

District Court Case No. A-18-777312-B

MOTION TO EXPEDITE DECISION BY OCTOBER 19, 2018

ADAM PAUL LAXALT
Attorney General
ANN M. MCDERMOTT (Bar No. 8180)
Bureau Chief
JORDAN T. SMITH (Bar No. 12097)
Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
555 East Washington Avenue, Suite 3900
Las Vegas, NV 89101
(702) 486-3894
jsmith@ag.nv.gov

For the second time in less than a year, a department in the Eighth Judicial District Court has entered an order that delayed a lawful capital sentence. And for the second time in less than a year, there is a serious risk that one or more drugs in the State's lethal injection protocol will expire before this Court has the opportunity to issue a decision. If a ruling comes too late, the State may lose its ability to carry out Scott Raymond Dozier's capital sentence—as happened when drugs expired during the prior related writ proceeding. Any drug expiration will hand death penalty opponents, and Alvogen, Inc., a win by default. A drug expiration may also force the State to find a substitute drug yet again, and this seemingly endless capital litigation process will start anew with another trudge to this Court. Even a ruling that comes after some (but not all) drugs expire will have an accordion effect that will deplete the State's supply and impair the State's ability to complete other capital sentences following Dozier. The more drugs that expire as a result of the District Court's restraining order, the less (or no) drugs that are available to vindicate other capital jury verdicts.

Much like the State's Diazepam supply in the previous Dozier writ, a 200 milligram batch of Cisatracurium expires November 30, 2018. The current lethal injection protocol calls for 200 milligrams of Cisatracurium for each execution. Therefore, if the Court does not issue a ruling in time to use this November batch, the State will lose its ability to carry out an execution. This will impact pending capital sentences and cause irreparable damage to the State's sovereign interests. *See New Motor Vehicle Bd. of Ca. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in

chambers) (holding that a State suffers irreparable injury any time a court enjoins it from effectuating statutes enacted by Representatives of the People).

Under 176.495(2), a supplemental warrant of execution must "appoint a week, the first day being Monday and the last day being Sunday, within which the judgment is to be executed. The first day of that week must be not less than 15 days nor more than 30 days after the date of the warrant."

Since November 30th is a Friday, a supplemental warrant cannot appoint the week of November 26, 2018 as there will not be a full week to complete the execution before the November batch expires. The next available full week begins Monday, November 12, 2018 and ends Sunday, November 18, 2018. To properly notice the week of November 12, 2018, based on the minimum 15-day deadline in NRS 176.495, the District Court (Judge Togliatti) will have to issue a supplemental warrant on or before Friday, October 26, 2018. Accordingly, to prevent a pyrrhic resolution in the State's favor, the Court needs to issue a decision at least one week before October 26th—Friday, October 19, 2018. However, cutting it too close to October 19th opens the door for another last minute lawsuit to stir enough confusion and delay that the drugs still expire.

This Court has already "recognize[d] the importance of this matter, both to Dozier and to the citizens of the State of Nevada, [and] the fact that this case has serious implications ...." *NDOC v. Eighth Jud. Dist. Ct.*, 417 P.3d 1117, 2018 WL 2272873, at *3 (Nev. 2018) (unpublished disposition). Thus, this is one of the rare instances when the

Court should issue a summary disposition with a reasoned opinion to follow. The Court has followed this process in other time sensitive matters.

For example, in *In re Candelaria*, 126 Nev. 408, 245 P.3d 518 (2010), the Court issued an order granting a motion to expedite briefing and required the appellant to file the opening brief two days later, the answering brief five days later, and the reply brief two days after that. (Case No. 55715, doc. 10-08312). Four days after briefing was complete, the Court issued an order setting oral argument with two days' notice. (*Id.* at docs. 10-09579; 10-09657). The parties argued the case on April 15, 2010 and the Court issued a disposition on the same day. (*Id.* at doc. 10-09868). The disposition stated "[a]s this matter warranted our expedited consideration and decision, we enter this order for the purposes of providing the parties immediate resolution. A detailed disposition in this matter will be forthcoming." (*Id.*).

The Court has followed a similar practice in other matters more recently. *See The Las Vegas Review Journal v. Eighth Jud. Dist. Ct.*, Case No. 75073 (2018) (directing answer to writ petition in 24 hours and issuing published decision granting the writ 15 days after the Court docketed the matter); *see also Wynn v. Eighth Jud. Dist. Ct.*, Case No. 74184 (2017) (directing answer one day after petition docketed, requiring party to file answer within 5 days, requesting a reply 3 days thereafter, and holding argument 3 months later); *Wynn v. Eighth Jud. Dist. Ct.*, Case No. 74063 (2017) (requesting answer within a month of docketing, requiring answer within 7 days, requesting a reply 3 days thereafter, and deciding matter within 3 months).

Unlike the previous Dozier writ proceeding, this matter does not involve "multiple, complex issues" of constitutional law. *Cf. NDOC v. Eighth Jud. Dist. Ct. (Dozier)*, Case No. 74679 (Mar. 27, 2018) (Order Denying Emergency Motion to Expedite). On the contrary, this matter presents straightforward legal questions about the District Court's authority to stay an execution and the (non)existence of a drug manufacturer's causes of action to interfere with a capital sentence. The sovereign and victim interests at stake warrant expedited treatment. *See Baze v. Rees*, 553 U.S. 35, 61 (2008) (accepting "the State's legitimate interest in carrying out a sentence of death in a timely manner."); *Ledford v. Comm'r, Georgia Dep't of Corr.*, 856 F.3d 1312, 1319 (11th Cir. 2017) ("Victims of crime also have an important interest in the timely enforcement of a sentence.").

For these reasons, Petitioners respectfully request that the Court expedite its decision in this matter and issue a disposition on or before October 19, 2018. *See* NRAP 2 ("On the court's own or a party's motion, the court may ... expedite its decision").

Dated: July 27, 2018.

/s/ Jordan T. Smith

Ann M. McDermott (Bar No. 8180)
Bureau Chief
Jordan T. Smith (Bar No. 12097)
Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
555 East Washington Avenue, Suite 3900
Las Vegas, NV 89101
jsmith@ag.nv.gov
Counsel for Petitioners

VERIFICATION

I, Jordan T. Smith, declare as follows:

1. I am currently employed in the Office of the Attorney General as the Deputy Solicitor General. I am counsel for Petitioners named herein.

2. I verify that I have read the foregoing Motion to Expedite Decision by October 19, 2018 and that the same is true of my own knowledge, except for matters stated on information and belief, and as to those matters, I believe them to be true.

3. I declare under the penalty of perjury of the laws of Nevada that the foregoing is true and correct.

Executed on this 27th day of July 2018 in Las Vegas, Nevada.

/s/ Jordan T. Smith
Jordan T. Smith (Bar No. 12097)
Deputy Solicitor General

CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion complies with the formatting requirements of NRAP 27(d) and the typeface and type-style requirements of NRAP 27(d)(1)(E) because this Motion has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 double-spaced Garamond font. This filing also complies with NRAP 32.

I further certify that I have read this Motion and that it complies with the page or type-volume limitations of NRAP 27(d)(2) and NRAP 32 because, it is proportionately spaced, and does not exceed 10 pages.

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Motion complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: July 27, 2018.

/s/ Jordan T. Smith
Jordan T. Smith (Bar No. 12097)
Deputy Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **MOTION TO EXPEDITE DECISION BY OCTOBER 19, 2018** with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on July 27, 2018.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that a courtesy copy was emailed to counsel for Respondents simultaneously with the filing of the foregoing.

A copy was also provided to the following:

James J. Pisanelli, Esq.
Todd Bice, Esq.
Debra Spinelli, Esq.
PISANELLI BICE, PLLC
400 South 7th Street, Suite 300
Las Vegas, NV 89101

Angela Walker
LATHAM & WATKINS, LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004-1304

Kenneth Schuler
Michael Faris
Alex Grabowski
LATHAM & WATKINS, LLP
330 North Wabash Avenue
Suite 2800
Chicago, IL 60611

Hon. Elizabeth Gonzalez
Eighth Judicial District Court
Department 11
200 Lewis Avenue
Las Vegas, NV 89155

/s/ Barbara Fell
An employee of the
Office of the Attorney General

EXHIBIT 4

EXHIBIT 4

OST
ADAM PAUL LAXALT
Attorney General
Ann M. McDermott (Bar No. 8180)
Bureau Chief
Jordan T. Smith (Bar No. 12097)
Deputy Solicitor General
State of Nevada
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
(702) 486-3306 (phone)
(702) 486-3773 (fax)
jsmith@ag.nv.gov

Attorneys for the Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

ALVOGEN, INC.,

Plaintiff,

v.

STATE OF NEVADA; NEVADA DEPARTMENT OF CORRECTIONS; JAMES DZURENDA, Director of the Nevada Department of Corrections, in his official capacity; IHSAN AZZAM, Ph.D, M.D., Chief Medical Officer of the State of Nevada, in his official capacity; and JOHN DOE, Attending Physician at Planned Execution of Scott Raymond Dozier, in his official capacity;

Defendants.

Case No. A-18-777312-B
Dept. No. XI

DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING NEVADA SUPREME COURT DECISION

ON ORDER SHORTENING TIME

Date of Hearing: 8/6/18
Time of Hearing: 9:00 AM

I. INTRODUCTION

Defendants' pending Petition in the Nevada Supreme Court presents two straightforward legal issues: (1) whether, given NRS 176.415, this Court has authority to enter a temporary restraining order in this context; and (2) whether Alvogen—and now Hikma—have private causes of action that allow drug manufacturers to interfere with a lawful capital sentence. If Defendants prevail on either one of these two issues, the

underpinnings of the TRO will be reversed (or vacated) and there will be no need for accelerated, invasive, and expensive discovery, or the planned preliminary injunction hearing.

Defendants moved to expedite their Petition and requested a ruling from the Supreme Court by October 19, 2018.[1] Within the hour, the Court granted the Defendants' motion and directed an answer from Alvogen by August 16, 2018.[2] The Court foreclosed any extensions and stated "[f]urther, the motion to expedite is granted. This court will expedite resolution of this petition to the extent that its docket allows."[3] There is every reason to believe that the Supreme Court will resolve the entire Petition in about two and a half months. Meanwhile, the Court's TRO will remain in place and neither Alvogen's Midazolam nor Hikma's Fentanyl will be used in an execution pending the Supreme Court's review. A short stay, therefore, will not prejudice Plaintiffs. On the other hand, the parties and the Court will benefit from the Supreme Court's guidance, and significant time, effort, and resources (public and private) will be saved. Accordingly, this Court should stay proceedings pending the Supreme Court's decision.

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…

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[1] Mot. to Expedite Decision by Oct. 19, 2018 (Ex. A).

[2] Order Granting Motion to Expedite and Directing Answer (Ex. B).

[3] *Id*.

DECLARATION OF JORDAN T. SMITH, ESQ. IN SUPPORT OF ORDER SHORTENING TIME

I, JORDAN T. SMITH, ESQ., hereby declare as follows:

1. I am the Deputy Solicitor General of the State of Nevada and counsel for Defendants in the above-entitled action. I make this Declaration in support of Defendants' Motion to Stay Proceedings Pending Nevada Supreme Court Decision and the accompanying request for an order shortening time. I have personal knowledge of the facts stated herein, except those stated upon information and belief, which I believe to be true. I am competent to testify to the facts stated herein.

2. On July 11, 2018, this Court entered a temporary restraining order precluding Defendants from using Alvogen, Inc.'s drug, Midazolam, in Scott Dozier's execution, which was scheduled for later that day.

3. In accordance with NRS 176.492, Defendants filed a petition with the Nevada Supreme Court challenging the TRO on July 25, 2018. On July 27, 2018, Defendants filed a motion to expedite the Nevada Supreme Court proceedings and requested a ruling on or before October 19, 2018. Within an hour of that motion being filed, the Supreme Court granted Defendants' request and directed an answer by August 16, 2018. Defendants' reply is due 11 days thereafter. The Supreme Court foreclosed any time extensions. In light of the Supreme Court's prompt action, I expect that the Court will rule on the Petition by Defendants' requested October 19th date.

4. As stated in this Motion, significant time, effort, and resources will be saved by staying proceedings pending the Supreme Court's decision. Those judicial economies will be lost if this Motion is heard in the ordinary course. Therefore, good cause exists to hear this Motion on shortened time. At the hearing on July 30, 2018, the Court suggested that this Motion could be heard at the status check scheduled for August 6, 2018.

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

Jordan T. Smith (Bar No. 12097)
Deputy Solicitor General

ORDER SHORTENING TIME

Good cause appearing, it is hereby ordered that the foregoing **DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING NEVADA SUPREME COURT DECISION** shall be heard on shortened time on the 6 day of August, 2018, at the hour of 9 o'clock a.m in Department 11 of the Eighth Judicial District Court in and for Clark County, Nevada.

DATED: August 2, 2018

DISTRICT COURT JUDGE

Respectfully submitted:

ADAM PAUL LAXALT
Attorney General

By: _____
Ann M. McDermott (Bar No. 8180)
Bureau Chief
Jordan T. Smith (Bar No. 12097)
Deputy Solicitor General

Attorneys for Defendants

II. ARGUMENT

A. Standard for Granting a Stay Pending Writ Review.

Nevada Rule of Appellate Procedure 8(a) generally requires a party seeking a stay to first move in the lower court before requesting relief from the Nevada Supreme Court. *See* NRAP 8(a). This rule applies to original petitions. NRAP 8(a)(1)(A); *see also Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). When considering a stay, courts weigh a number of factors: (1) whether the object of the petition will be defeated if the stay is denied; (2) whether petitioner will suffer irreparable injury if the stay is denied; (3) whether the real party in interest will suffer irreparable harm if a stay is granted; and (4) whether petitioner is likely to prevail on the merits of the petition. NRAP 8(c). No single factor is dispositive and, if one or two factors are especially strong, those may counterbalance other weak factors. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

B. Defendants' Petition Presents Substantial Questions for Supreme Court Review.

A party requesting a stay "does not always have to show a probability of success on the merits, the movant must 'present a *substantial case* on the merits when a serious legal question is involved ….." *See Hansen*, 116 Nev. at 659, 6 P.3d at 987 (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)) (emphasis added). A stay is appropriate when the appeal does not appear frivolous or merely an attempt to delay. *Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 40. A stay may be entered even if the appeal's merits are unclear at this stage. *See id.* at 254, 89 P.3d at 40.

Here, Defendants have presented a substantial case on the merits of serious legal questions. As set forth more fully in Defendants' Petition,[4] there is a substantial question about whether this Court's TRO offends NRS 176.415 and exceeds the Court's authority to stay an execution. Defendants' Petition also raises a substantial doubt about whether Alvogen possesses a private right of action or retains a reversionary property interest in

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[4] (Ex. C).

drugs after they are sold through intermediary distributors. Defendants' Motion to Expedite demonstrates that its Petition was not filed to delay and the Supreme Court's prompt action on the Motion indicates that the Petition is not frivolous. *See Wirth v. Fifth Jud. Dist. Ct.*, 2016 WL 3280375, at *1 (Nev. June 13, 2016) (unpublished disposition) ("it appeared from this court's review that Wirth had set forth an issue of arguable merit and had no adequate remedy at law. Thus, this court directed the State to file an answer") (internal citations omitted). This factor weighs in favor of entering a stay.

C. If a Stay is Denied, Defendants will Suffer Harm and the Objects of the Petition Will Be Defeated.

Courts can consider these two factors together. "Although irreparable or serious harm remains part of the stay analysis, this factor will not generally play a significant role in the decision whether to issue a stay." *Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 39. And even though increased litigation costs do not always rise to irreparable harm, the Nevada Supreme Court has stayed proceedings, in part, because a party "will be forced to spend money and time preparing for trial, thus potentially losing the benefit of [the issue being appealed]." *Id.* at 253-54, 89 P.3d 39-40.

The same is true in this case. There is a good chance that Defendants—and Plaintiffs—will unnecessarily spend significant time and resources conducting accelerated discovery and preparing for a preliminary injunction evidentiary hearing that the Supreme Court finds unwarranted. Without a stay, the parties will engage in document and ESI discovery, numerous depositions, and inevitable discovery disputes requiring the Court's intervention. The parties can avoid these costs by waiting for the Supreme Court's decision.

Moreover, the objects of Defendants' Petition will be defeated if a stay is denied. One object of Defendants' Petition is to establish that Plaintiffs do not possess a cause of action or property interest that entitles them to unlock the doors to discovery. That object will be lost if the Court allows discovery on claims that the Supreme Court ultimately finds meritless. The other object of Defendants' Petition is to establish that the Court

does not have authority to enter an injunction that has the substantive effect of staying an execution in violation of NRS 176.415. This object too will be lost if the parties proceed to a preliminary injunction hearing. Consequently, these two factors counsel for a stay.

D. Plaintiffs Will Not Suffer Any Harm From a Stay.

Conversely, the Plaintiffs will not suffer any harm if the Court grants a stay while the Supreme Court reviews the important issues presented. The only injury that Plaintiffs identify is the alleged irreparable harm from the "use" of their products in Scott Dozier's execution. (*See, e.g.,* Alvogen Compl. ¶¶ 42-43 ("If Defendants are not enjoined from *using* the Alvogen Midazolam product in the upcoming execution of Scott Raymond Dozier, Alvogen will suffer immediate and irreparable injury") (capitalizations omitted; emphasis added)); Hikma Compl. in Intervention ¶ 13 ("If Defendants are allowed to … *use* Hikma's product for lethal injection, Defendants' action will result in Hikma's immediate and irreparable harm") (emphasis added)).

But because the Court's TRO will remain in place pending the Nevada Supreme Court's decision on the Petition, Defendants do not have the ability to use the State's three-drug lethal injection combination and thus cannot "use" Plaintiffs' drugs in an execution during this requested stay. The Court's TRO has halted all executions in the State. As a result, Plaintiffs' alleged irreparable harm will not occur while Defendants' Petition remains pending. At most, Plaintiffs might protest the delay associated with Defendants' Petition. Yet "a mere delay in pursuing discovery … normally does not constitute irreparable harm." *Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 39. The potential savings from a stay far outweigh any prejudice to Plaintiffs, and this factor militates toward a stay.

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III. CONCLUSION

For these reasons, all NRAP 8(c) factors weigh in favor of granting a stay and Defendants respectfully request that the Court stay further proceedings until the Nevada Supreme Court issues a decision on Defendants' pending Petition.

DATED this 1st day of August, 2018.

ADAM PAUL LAXALT
Attorney General

By: _____
Ann M. McDermott (Bar No. 8180)
Bureau Chief
Jordan T. Smith (Bar No. 12097)
Deputy Solicitor General
Attorneys for Defendants

EXHIBIT A

EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF NEVADA

*****

STATE OF NEVADA; NEVADA DEPARTMENT OF CORRECTIONS; JAMES DZURENDA, Director of the Nevada Department of Corrections, in his official capacity; IHSAN AZZAM, Ph.D., M.D., Chief Medical Officer of the State of Nevada, in his official capacity; and JOHN DOE, Attending Physician at Planned Execution of Scott Raymond Dozier in his official capacity,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE,

Respondents,

and

ALVOGEN, INC.,

Real Party in Interest.

Supreme Court Case No.: 76485

District Court Case No. A-18-777312-B

MOTION TO EXPEDITE DECISION BY OCTOBER 19, 2018

ADAM PAUL LAXALT
Attorney General
ANN M. MCDERMOTT (Bar No. 8180)
Bureau Chief
JORDAN T. SMITH (Bar No. 12097)
Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
555 East Washington Avenue, Suite 3900
Las Vegas, NV 89101
(702) 486-3894
jsmith@ag.nv.gov

For the second time in less than a year, a department in the Eighth Judicial District Court has entered an order that delayed a lawful capital sentence. And for the second time in less than a year, there is a serious risk that one or more drugs in the State's lethal injection protocol will expire before this Court has the opportunity to issue a decision. If a ruling comes too late, the State may lose its ability to carry out Scott Raymond Dozier's capital sentence—as happened when drugs expired during the prior related writ proceeding. Any drug expiration will hand death penalty opponents, and Alvogen, Inc., a win by default. A drug expiration may also force the State to find a substitute drug yet again, and this seemingly endless capital litigation process will start anew with another trudge to this Court. Even a ruling that comes after some (but not all) drugs expire will have an accordion effect that will deplete the State's supply and impair the State's ability to complete other capital sentences following Dozier. The more drugs that expire as a result of the District Court's restraining order, the less (or no) drugs that are available to vindicate other capital jury verdicts.

Much like the State's Diazepam supply in the previous Dozier writ, a 200 milligram batch of Cisatracurium expires November 30, 2018. The current lethal injection protocol calls for 200 milligrams of Cisatracurium for each execution. Therefore, if the Court does not issue a ruling in time to use this November batch, the State will lose its ability to carry out an execution. This will impact pending capital sentences and cause irreparable damage to the State's sovereign interests. *See New Motor Vehicle Bd. of Ca. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in

chambers) (holding that a State suffers irreparable injury any time a court enjoins it from effectuating statutes enacted by Representatives of the People).

Under 176.495(2), a supplemental warrant of execution must "appoint a week, the first day being Monday and the last day being Sunday, within which the judgment is to be executed. The first day of that week must be not less than 15 days nor more than 30 days after the date of the warrant."

Since November 30th is a Friday, a supplemental warrant cannot appoint the week of November 26, 2018 as there will not be a full week to complete the execution before the November batch expires. The next available full week begins Monday, November 12, 2018 and ends Sunday, November 18, 2018. To properly notice the week of November 12, 2018, based on the minimum 15-day deadline in NRS 176.495, the District Court (Judge Togliatti) will have to issue a supplemental warrant on or before Friday, October 26, 2018. Accordingly, to prevent a pyrrhic resolution in the State's favor, the Court needs to issue a decision at least one week before October 26th—Friday, October 19, 2018. However, cutting it too close to October 19th opens the door for another last minute lawsuit to stir enough confusion and delay that the drugs still expire.

This Court has already "recognize[d] the importance of this matter, both to Dozier and to the citizens of the State of Nevada, [and] the fact that this case has serious implications …."*NDOC v. Eighth Jud. Dist. Ct.*, 417 P.3d 1117, 2018 WL 2272873, at *3 (Nev. 2018) (unpublished disposition). Thus, this is one of the rare instances when the

Court should issue a summary disposition with a reasoned opinion to follow. The Court has followed this process in other time sensitive matters.

For example, in *In re Candelaria*, 126 Nev. 408, 245 P.3d 518 (2010), the Court issued an order granting a motion to expedite briefing and required the appellant to file the opening brief two days later, the answering brief five days later, and the reply brief two days after that. (Case No. 55715, doc. 10-08312). Four days after briefing was complete, the Court issued an order setting oral argument with two days' notice. (*Id.* at docs. 10-09579; 10-09657). The parties argued the case on April 15, 2010 and the Court issued a disposition on the same day. (*Id.* at doc. 10-09868). The disposition stated "[a]s this matter warranted our expedited consideration and decision, we enter this order for the purposes of providing the parties immediate resolution. A detailed disposition in this matter will be forthcoming." (*Id.*).

The Court has followed a similar practice in other matters more recently. *See The Las Vegas Review Journal v. Eighth Jud. Dist. Ct.*, Case No. 75073 (2018) (directing answer to writ petition in 24 hours and issuing published decision granting the writ 15 days after the Court docketed the matter); *see also Wynn v. Eighth Jud. Dist. Ct.*, Case No. 74184 (2017) (directing answer one day after petition docketed, requiring party to file answer within 5 days, requesting a reply 3 days thereafter, and holding argument 3 months later); *Wynn v. Eighth Jud. Dist. Ct.*, Case No. 74063 (2017) (requesting answer within a month of docketing, requiring answer within 7 days, requesting a reply 3 days thereafter, and deciding matter within 3 months).

Unlike the previous Dozier writ proceeding, this matter does not involve "multiple, complex issues" of constitutional law. *Cf. NDOC v. Eighth Jud. Dist. Ct. (Dozier)*, Case No. 74679 (Mar. 27, 2018) (Order Denying Emergency Motion to Expedite). On the contrary, this matter presents straightforward legal questions about the District Court's authority to stay an execution and the (non)existence of a drug manufacturer's causes of action to interfere with a capital sentence. The sovereign and victim interests at stake warrant expedited treatment. *See Baze v. Rees*, 553 U.S. 35, 61 (2008) (accepting "the State's legitimate interest in carrying out a sentence of death in a timely manner."); *Ledford v. Comm'r, Georgia Dep't of Corr.*, 856 F.3d 1312, 1319 (11th Cir. 2017) ("Victims of crime also have an important interest in the timely enforcement of a sentence.").

For these reasons, Petitioners respectfully request that the Court expedite its decision in this matter and issue a disposition on or before October 19, 2018. *See* NRAP 2 ("On the court's own or a party's motion, the court may … expedite its decision").

Dated: July 27, 2018.

/s/ Jordan T. Smith

Ann M. McDermott (Bar No. 8180)
Bureau Chief
Jordan T. Smith (Bar No. 12097)
Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
555 East Washington Avenue, Suite 3900
Las Vegas, NV 89101
jsmith@ag.nv.gov
Counsel for Petitioners

VERIFICATION

I, Jordan T. Smith, declare as follows:

1. I am currently employed in the Office of the Attorney General as the Deputy Solicitor General. I am counsel for Petitioners named herein.

2. I verify that I have read the foregoing Motion to Expedite Decision by October 19, 2018 and that the same is true of my own knowledge, except for matters stated on information and belief, and as to those matters, I believe them to be true.

3. I declare under the penalty of perjury of the laws of Nevada that the foregoing is true and correct.

Executed on this 27th day of July 2018 in Las Vegas, Nevada.

/s/ Jordan T. Smith
Jordan T. Smith (Bar No. 12097)
Deputy Solicitor General

CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion complies with the formatting requirements of NRAP 27(d) and the typeface and type-style requirements of NRAP 27(d)(1)(E) because this Motion has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 double-spaced Garamond font. This filing also complies with NRAP 32.

I further certify that I have read this Motion and that it complies with the page or type-volume limitations of NRAP 27(d)(2) and NRAP 32 because, it is proportionately spaced, and does not exceed 10 pages.

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Motion complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: July 27, 2018.

/s/ Jordan T. Smith
Jordan T. Smith (Bar No. 12097)
Deputy Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **MOTION TO EXPEDITE DECISION BY OCTOBER 19, 2018** with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on July 27, 2018.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that a courtesy copy was emailed to counsel for Respondents simultaneously with the filing of the foregoing.

A copy was also provided to the following:

James J. Pisanelli, Esq.
Todd Bice, Esq.
Debra Spinelli, Esq.
PISANELLI BICE, PLLC
400 South 7th Street, Suite 300
Las Vegas, NV 89101

Kenneth Schuler
Michael Faris
Alex Grabowski
LATHAM & WATKINS, LLP
330 North Wabash Avenue
Suite 2800
Chicago, IL 60611

Angela Walker
LATHAM & WATKINS, LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004-1304

Hon. Elizabeth Gonzalez
Eighth Judicial District Court
Department 11
200 Lewis Avenue
Las Vegas, NV 89155

/s/ *Barbara Fell*
An employee of the
Office of the Attorney General

EXHIBIT B

EXHIBIT B

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA; THE STATE OF NEVADA DEPARTMENT OF CORRECTIONS; JAMES DZURENDA, DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTIONS; IHSAN AZZAM, PH.D., M.D., CHIEF MEDICAL OFFICER OF THE STATE OF NEVADA IN HIS OFFICIAL CAPACITY; AND JOHN DOE, ATTENDING PHYSICIAN AT PLANNED EXECUTION OF SCOTT RAYMOND DOZIER IN HIS OFFICIAL CAPACITY,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ,
Respondents,
and
ALVOGEN, INC.,
Real Party in Interest.

No. 76485

FILED

JUL 27 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER GRANTING MOTION TO EXPEDITE AND DIRECTING ANSWER

This original petition to dissolve a stay of execution and for a writ of mandamus or prohibition challenges a district court temporary restraining order. In addition, the Clark County District Attorney has filed an amicus curiae brief, and petitioners have moved to expedite the resolution of this matter.

Having reviewed the petition and the amicus curiae brief, it appears that an answer may assist this court in resolving this matter.

Therefore, real party in interest, on behalf of respondents, shall have 20 days from the date of this order to file and serve an answer, including authorities, against issuance of the requested writ. NRAP 21(b)(1). Thereafter, petitioners shall have 11 days from service of the answer to file and serve any reply. No extensions of time will be granted.

Further, the motion to expedite is granted. This court will expedite the resolution of this petition to the extent that its docket allows.

It is so ORDERED.

Douglas, C.J.

cc: Hon. Elizabeth Goff Gonzalez, Chief Judge
Attorney General/Carson City
Attorney General/Las Vegas
Latham & Watkins LLP/Chicago
Latham & Watkins LLP/Washington DC
Pisanelli Bice, PLLC
Clark County District Attorney
Eighth District Court Clerk

EXHIBIT C

EXHIBIT C

IN THE SUPREME COURT OF THE STATE OF NEVADA

*****

STATE OF NEVADA; NEVADA DEPARTMENT OF CORRECTIONS; JAMES DZURENDA, Director of the Nevada Department of Corrections, in his official capacity; IHSAN AZZAM, Ph.D, M.D., Chief Medical Officer of the State of Nevada, in his official capacity; and JOHN DOE, Attending Physician at Planned Execution of Scott Raymond Dozier in his official capacity, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE, Respondents, and ALVOGEN, INC., Real Party in Interest.	Supreme Court Case No.: District Court No.: A-18-777312-B

PETITION TO DISSOLVE STAY OF EXECUTION UNDER NRS 176.492 AND PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

ADAM PAUL LAXALT
Attorney General
ANN M. MCDERMOTT (Bar No. 8180)
Bureau Chief
JORDAN T. SMITH (Bar No. 12097)
Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
555 East Washington Avenue, Suite 3900
Las Vegas, NV 89101
(702) 486-3894
jsmith@ag.nv.gov

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ROUTING STATEMENT

The Nevada Supreme Court should retain this matter because it involves the death penalty. NRAP 17(a)(1). This matter also raises questions of first impression and nationwide public importance about a district court's authority to stay an execution and whether a pharmaceutical manufacturer has a private cause of action against the State to interfere with an execution. *See* NRAP 17(a)(10)-(11).

ISSUES PRESENTED

1) NRS 176.415 allows a stay of execution in only six limited circumstances. A private third-party's civil litigation is not among the enumerated circumstances. Did the District Court offend NRS 176.415 when it granted a pharmaceutical manufacturer's request for a temporary restraining order barring the State from using one of the manufacturer's drugs in capital punishment when the order's substantive effect was to stop a court ordered, imminent execution?

2) A statutory cause of action extends only to plaintiffs within the statute's "zone of interest." NRS 41.700 is a "social host" law. Is a pharmaceutical manufacturer within NRS 41.700's zone of interests and thus able to sue the State?

3) NRS Chapter 453, the Uniform Controlled Substances Act, contains no express private right of action. Instead, it only authorizes the State Board of Pharmacy and Attorney General to bring civil actions, including those for injunctions. Did the District Court err when it implied causes of action under NRS Chapter 453 and allowed

a pharmaceutical manufacturer to use them as a predicate to the primary claim for a temporary restraining order?

4) Under the common law, a use restriction or servitude may attach to real property, and is enforceable against third parties, but a use restriction will not run down the stream of commerce with mere chattel or goods. Did the District Court err when it found that a pharmaceutical manufacturer has an enforceable property interest in its drugs as against a third-party purchaser, the State, because the manufacturer allegedly imposed a contractual resale condition on the distributor from whom the State purchased the drugs?

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

On the morning of Scott Raymond Dozier's scheduled execution, the District Court halted the execution based on a legal theory never before accepted in Nevada or anywhere else in the Nation. In an unprecedented temporary restraining order, the District Court ruled that pharmaceutical manufacturers have causes of action to stop a State from using their drugs in a lawful execution. The District Court reached this conclusion even though the State indirectly purchased the drug from a third-party intermediary with no contractual obligation—with anybody—to prevent sales to the State. At the time of the purchase, neither the State nor the third-party distributor had a legal duty to refrain from buying or selling the drug. And neither the State nor the third-party distributor needed an elaborate ruse or "subterfuge" to evade supposed

manufacturer sale "controls"—no controls existed, despite the manufacturer's public relations comments to the contrary.

The manufacturer, Alvogen, Inc., filed this lawsuit to salvage its image and shift the blame to the State for Alvogen's failure to impose the controls that it was touting to anti-death penalty advocates. For Alvogen (and similarly situated drug manufacturers), this lawsuit has little downside. Whether it ultimately wins or loses, Alvogen scores points in the public relations arena just for bringing this lawsuit while it remains unbothered by the turmoil it has inflicted on Nevada's criminal justice system and the victims.

Here, the District Court took the PR bait. It held that purchasers (State or private) *never* acquire *full* title to *any* product when a manufacturer imposes a use or resale condition on a distributor. Instead, the District Court found that post-sale restraints on goods act as restrictive covenants, and create enforceable reversionary interests, that allow manufacturers to sue third-party purchasers whenever the manufacturer dislikes how the purchasers use the goods, even if their use is lawful. But unlike real property covenants, the common law has not recognized servitudes on chattel, personal property, or goods. Consequently, even if Alvogen *had* imposed a resale condition on its distributor (it didn't), that condition would not run down or attach to the State. Manufacturers do not retain a property interest in products that their distributors resell and they cannot sue States to recover lawfully purchased drugs.

The District Court also accepted Alvogen's boilerplate concerns about business reputational harm and bad press. In doing so, the TRO put the interests of Big Pharma over the interests of Nevada's capital murder victims. But the Nevada Legislature has rightfully made the State's and victims' interests paramount. Last minute execution stays impose disruption and costs on the justice system and take an emotional toll on victims. State law thus narrowly restricts the circumstances in which a court may impose a stay. A drug manufacturer's lawsuit is not one of them. Accordingly, the District Court lacked the authority to enter any TRO that had the substantive effect of staying the execution.

Even if the District Court had the theoretical authority to enter the TRO, the Legislature has not created a private cause of action that remotely supports Alvogen's lawsuit or its requested injunction. Alvogen invokes a social host law and criminal statutes that do not contemplate, or provide for, private enforcement. The Legislature did not enact these statutes to protect drug manufacturers' commercial interests. By contrast, Nevada's statutes *do* contemplate lethal injection using controlled substances. Nevada's elected representatives have chosen lethal injection as the State's method of execution and have authorized the Nevada Department of Corrections[1] to take all necessary steps to complete its lawful mandate. It is illogical to think that the Legislature

[1] This brief refers to Petitioners as the "State" or "NDOC."

approved lethal injection, on the one hand, yet *silently* created causes of action to impede the State's chosen method of execution, on the other.

The District Court's ruling will have significant consequences in Nevada and the other thirty death penalty States. The TRO will not only prevent the execution of Dozier—a two-time murderer who has voluntarily submitted to his sentence after sitting on death row for over a decade—it will also open the floodgates for yet *another* nationwide wave of death penalty litigation that will stall capital sentences indefinitely. After condemned inmates battle for decades in state and federal courts, complete strangers with a strong political and public relations agenda, but a weak connection to an execution, can for the first time invade the process at the eleventh hour. This time it was a pharmaceutical company. Next time, in the District Court's view, it might be the manufacturers of the IV, the syringe, the needles or, even, the latex gloves. Why not, for instance, the chef of the inmate's last meal? It's easy to see where this road leads.

Every time a commercial interest engages in this newfound litigation tactic, it will cite the District Court's ruling. Nevada is now the outlier among the States. The District Court's TRO will make it harder to complete duly imposed capital sentences not just in Nevada, but everywhere—an unfortunate reality that has already received national and international attention.[2] One law professor who studies the death penalty has observed

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[2] BBC News, *Drug Company Lawsuit Stalls Nevada Inmate's Opioid Execution* (July 11, 2018) ("Wednesday's ruling marks the first time a drug maker successfully sued to block an execution.") *available at* https://www.bbc.com/news/world-us-canada-44797905;

that the District Court's order "is going to have reverberating effects across any death-penalty state using drugs or lethal injection."[3]

This matter presents straightforward legal questions about when a court may stay an execution and the existence (or not) of Alvogen's asserted private causes of action. The Court needs no further factual development to answer these questions, especially given the time-sensitive nature and important statewide public policy issues at stake. Therefore, this Court should dissolve the District Court's TRO under NRS 176.492 as an improperly entered stay of execution, or issue a writ of mandamus or prohibition vacating the TRO.

II. FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED BY THE PETITION

A. A Jury Convicts Dozier for Murdering and Mutilating Jeremiah Miller.

In 2002, Dozier killed Jeremiah Miller at the La Concha Inn in Las Vegas and gruesomely dismembered Miller's body in a bathtub. *See Dozier v. State*, 128 Nev. 893,

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Daily Mail.com, *Nevada Murderer's Execution is Blocked after Pharmaceutical Company Sues to Stop it Because they Don't Want their Drug Used to Kill* (July 11, 2018) ("The previous challenge, brought last year by a different [intermediary] company in Arkansas, ultimately failed to stop the execution.") *available at* http://www.dailymail.co.uk/news/article-5943753/Nevada-murderers-execution-blocked-drug-companys-lawsuit.html.

[3] Patrik Jonsson, *Outspoken Death-Row Inmate Calls Nevada's Bluff*, Christian Science Monitor (July 20, 2018) (quoting Deborah Denno) *available at* https://www.csmonitor.com/USA/Justice/2018/0720/Outspoken-death-row-inmate-calls-Nevada-s-bluff.

381 P.3d 608, 2012 WL 204569, at *1 (2012) (unpublished disposition). Dozier cut Miller's torso into two pieces, put them in a suitcase, and ditched the suitcase in an apartment complex dumpster. *Id.* Authorities never found Miller's head, lower arms, or lower legs. *Id.* Prior to the murder, Dozier "expressed his intention to 'jack' a drug dealer." *Id.* Dozier stole money that Miller intended to use to buy methamphetamine ingredients and spent it on clothes, drugs, and electronics. *Id.* After the murder, witnesses saw tools and a gun in Dozier's hotel room and Miller's decapitated body in the bathtub. *Id.* at *4. Dozier admitted that he killed Miller, and Dozier lamented that he had not done enough to prevent the police from identifying the body. *Id.* at *2.

A jury convicted Dozier of first-degree murder and sentenced him to death in 2007. *Id.* at *1. In 2012, this Court affirmed the conviction in part and rejected Dozier's argument that "the death penalty is cruel and unusual." *Id.* at *11. The Court held that "considering the calculated nature in which Dozier murdered the victim and then severed his body into pieces and disposed of it, the prior murder, and the evidence in mitigation … Dozier's death sentence was not excessive." *Id.* The United States Supreme Court denied Dozier's petition for writ of certiorari. *Dozier v. Nevada*, 567 U.S. 938 (2012) (mem.).[4]

[4] Arizona courts have also convicted Dozier of another murder. *Arizona v. Dozier*, Case No. 1 CA-CR 05-0463 (Ariz. App. Apr. 11, 2006).

B. Dozier Submits to His Sentence but the Case Makes Its Way to This Court.

After his conviction, Dozier filed a postconviction writ of habeas corpus in state court. *NDOC v. Eighth Jud. Dist. Ct.*, 417 P.3d 1117, 2018 WL 2272873, at *1 (Nev. 2018) (unpublished disposition). Years later, Dozier decided to suspend his habeas proceeding "and have his duly-imposed death sentence carried out." *Id.* The habeas court, the Honorable Jennifer Togliatti, found Dozier competent to make this decision and she signed a warrant of execution. *See id.* As the entity statutorily tasked with carrying out an execution, NRS 176.355, NDOC released its execution manual and disclosed its lethal injection protocol using Diazepam, Fentanyl, and Cisatracurium. *NDOC*, 2018 WL 2272873, at *2.

"Despite the fact that Dozier had indicated that he did not want to pursue postconviction relief, [Judge Togliatti] permitted attorneys from the Federal Public Defender (FPD) to associate with Dozier's state postconviction attorney." *Id.* at *1. The FPD filed briefs requesting discovery and making claims that using Cisatracurium would constitute cruel and unusual punishment under the Eighth Amendment. *Id.* at **1-2. Judge Togliatti conducted an "evidentiary hearing," which involved taking testimony from only one witness. *Id.* She then enjoined NDOC from using Cisatracurium and ordered NDOC to execute Dozier using only the other two drugs. *Id.* at *2.

NDOC and the Clark County District Attorney filed separate writ petitions for mandamus or prohibition in this Court seeking to vacate the injunction. *See id* at *1. This Court granted the DA's petition. *Id.* at **1-3. It held that Judge Togliatti lacked inherent authority to consider a method of execution challenge within the context of a habeas corpus proceeding because such a challenge is outside NRS Chapter 34's narrow statutory framework. *Id.* at **2-3. This Court emphasized "that courts should show 'restraint in resorting to inherent power,' particularly where the legislature has enacted a statute or rule covering a certain area." *Id.* at *3 (quoting *Degen v. United States*, 517 U.S. 820, 823-24 (1996); *Hunter v. Gang*, 132 Nev. Adv. Op. 22, 377 P.3d 448, 454-55 (Ct. App. 2016) ("We remind courts that because inherent authority is not regulated by the Legislature or the people, it is more susceptible to misuse, and thus should be exercised sparingly.")). And the Court expressed concern that the FPD did not follow established procedures. "When proper procedures are followed, the parties, the courts, and the public tend to understand the type of case being litigated, the overall framework that applies to it, and the relevant rules and tests that control the ultimate outcome. We regret that this did not happen here." *Id.*

C. NDOC's Supply of Diazepam Expires and It Purchases Midazolam from Third-Party Cardinal Health.

While the writ petitions were pending before this Court, NDOC's supply of Diazepam expired. (App. 259). As a result, NDOC searched for, and in the ordinary course of business, ordered an alternative drug—Midazolam—from its usual medical

supplier, Cardinal Health. (*Id.*; App. 252-54). States have routinely used Midazolam in lethal injection protocols since Florida first employed it in October 2013. *Glossip v. Gross*, 135 S. Ct. 2726, 2734 (2015). To date, States have used Midazolam in approximately thirty-three executions.[5] Most recently, Ohio used Midazolam on July 18, 2018.[6]

As the United States Supreme Court has recounted, States resorted to Midazolam because "anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the [other] drugs used to carry out death sentences." *Id.* at 2733. Over time, States were "unable to acquire sodium thiopental or pentobarbital" so "some States have turned to midazolam, a sedative in the benzodiazepine family of drugs." *Id.* at 2734. The Supreme Court upheld the States' use of Midazolam against an Eighth Amendment challenge in *Glossip v. Gross*. The Court held that "Oklahoma's use of a massive dose of midazolam in its execution protocol" does not entail a "substantial risk of severe pain." *Id.* at 2731.

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[5] *See* Death Penalty Information Center, *Execution lists, available at* https://deathpenaltyinfo.org/execution-list-2018.

[6] *Id.* Alvogen and other death penalty opponents often highlight Midazolam's presence in the "botched" executions of Clayton Lockett and Joseph Wood. (*See* App. 162-63). But the problems in those executions were not attributable to Midazolam. As the United States Supreme Court noted "Oklahoma's investigation into [Lockett's] execution concluded that the difficulties were due primarily to the execution team's inability to obtain an IV access site. And the Wood execution did not involve the protocol at issue here … When all of the circumstances are considered, the Lockett and Wood executions have little probative value for present purposes." *Glossip*, 135 S. Ct. at 2746.

NDOC ordered Midazolam from Cardinal Health on May 9, 2018 and May 10, 2018, and received it on May 10, 2018 and May 14, 2018, respectively. (App. 252-53). Alvogen turned out to be the manufacturer of the Midazolam that the State received. (*See* App. 186-87, 240-41). Alvogen began selling generic Midazolam in August 2017—almost four years after Midazolam became a staple of lethal injection protocols across the country and two years after the Supreme Court approved its use. (App. 185). Approximately twenty-eight executions used Midazolam before Alvogen started manufacturing it, and States have used Midazolam five times since.[7]

When NDOC ordered the Midazolam, Alvogen had no contractual agreement with Cardinal Health prohibiting Cardinal Health from selling Midazolam to correctional departments. (App. 186). Richard Harker, one of Alvogen's Vice Presidents, attested that Alvogen and Cardinal Health did not enter into an agreement restricting the sale of Midazolam until May 28, 2018—almost three weeks after NDOC's first order. (*Id.*). On that date, Alvogen and Cardinal Health finally "amended their Generic Wholesale Service Agreement to include sales under Alvogen's Controlled Distribution Program Schedule." (*Id.*).[8]

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[7] *See supra* note 5.

[8] Mr. Harker alleges that NDOC ordered additional Midazolam on May 29, 2018, after Alvogen and Cardinal Health finalized their agreement. (App. 187). That invoice is not in the record. Nor is there any evidence that NDOC knew that they finalized the agreement the day before. But, in any event, this factual discrepancy is not material to the merits of this Petition, as it creates no personal property servitude on the drugs as discussed below.

Alvogen and Cardinal Health signed the underlying Generic Wholesale Service Agreement eight years earlier, in March 2010. (App. 232). But the parties did not enter into the addendum to restrict any sales until May 28, 2018. (*Id.*). In other words, Alvogen did not impose *any* legally enforceable restrictions on Cardinal Health's ability to sell drugs for more than eight years after they first signed the Generic Wholesale Service Agreement, and for almost a year after it started to manufacture Midazolam. Again, no restrictive agreement was in place between Alvogen and Cardinal Health when NDOC ordered the drug from Cardinal Health.

Instead, Mr. Harker conceded that he was only under the "impression" that Cardinal Health was not selling Midazolam to correctional departments. (App. 186). Mr. Harker apparently interpreted the lack of such sales as evidence that Cardinal Health was refusing to sell to States, although he identified no attempted purchases or overt refusals to sell. (*See id.*). Essentially, Mr. Harker equated correlation with causation. (*See id.*).

After doing business with Cardinal Health for eight years, and about a year after manufacturing Midazolam, Mr. Harker recalls that Alvogen and Cardinal Health finally got around to finalizing a restrictive agreement. He explained, "Alvogen and Cardinal subsequently entered into *negotiations* regarding the formal terms on which Cardinal would restrict such sales." (*Id.*) (emphasis added). This belated negotiation process and the missing formal (*i.e.* material) terms show that there was no enforceable contract between Alvogen and Cardinal Health. Even if there was, NDOC is not a party to any

agreement with Alvogen, and neither the Generic Wholesale Service Agreement nor the Controlled Distribution Program Schedule binds NDOC. Alvogen does not plead or identify any supposed misrepresentation or omission that NDOC made directly to Alvogen.

The most Alvogen did to discourage sales to correctional departments was to send letters to States and to put a nonspecific disclaimer on its website. (App. 240, 243-46, 186). The letters, sent before the State's purchase, expressed an "objection" to using Alvogen's products in capital punishment and asked the State to return any products in its possession. (App. 245). The letters did not claim or hint that Alvogen maintained a post-sale property interest in drugs sold through its distributors.

Much like its letters, the website disclaimer states that "Alvogen does not accept *direct* orders from prison systems or departments of correction." (App. 186) (emphasis added). Alvogen "work[s] to ensure its distributors and wholesalers do not resell, either directly or indirectly this product, to prison systems or departments of correction." (*Id.*). Of course, NDOC did not purchase *directly* from Alvogen, and Alvogen *wasn't* working with Cardinal Health to restrict the Midazolam sales to NDOC until *after* the purchases.

D. NDOC Discloses the Protocol and is Ordered to Identify Drug Manufacturers.

After receiving the drugs from Cardinal Health, NDOC updated its lethal injection protocol to substitute Midazolam for Diazepam. (App. 259, 261-329). The protocol now calls for a 500 milligram dose of Midazolam followed by doses of

Fentanyl and Cisatracurium. (App. 311). The 500 milligram dose is the same dose the United States Supreme Court approved in *Glossip*. 135 S. Ct. at 2734.

"NDOC presented [the] revised execution protocol to the current Chief Medical Officer. The current Chief Medical Officer concurred that the drugs in the NDOC execution protocol (Midazolam, Fentanyl and Cisatracurium) are appropriate and effective for the use intended." (App. 259); *see also* NRS 176.355(2)(b) (requiring the Director of NDOC to "consult[] with the Chief Medical Officer."). A short time later, Judge Togliatti entered a supplemental Order and Warrant of Execution setting the execution for the week of July 9, 2018. (App. 1-5). NDOC later designated July 11, 2018 as the date for the execution. (*See* App. 187).

As provided for in the execution manual, NDOC publicly released the updated manual seven days before the execution, on July 3, 2018. (App. 281) (stating that NDOC will publish the manual "upon order of the Governor prior to a scheduled execution."). The same day, the ACLU of Nevada filed an "emergency" Nevada Public Records Act action in the First Judicial District Court seeking documents related to the lethal drugs' suppliers and manufacturers. (App. 9). Without requiring proper service, allowing NDOC to file a brief, or informing NDOC that it would *sua sponte* address the petition's merits, the First Judicial District Court arranged a July 5th conference call with the parties. (*See* App. 61-62).

On the call, the First Judicial District Court required NDOC to address the merits. (*See* App. 62, 64-65). NDOC argued that the requested documents could be

subject to confidentiality claims under the *Bradshaw* balancing test because "anti-death penalty advocates use information about where a state obtains execution drugs, such as that requested by the ACLUNV, to persuade the manufacturer and others to cease selling that drug for execution purposes." (App. 64).[9] By objecting to disclosing its name, NDOC argued *to protect* Alvogen's identity, and its business reputation. NDOC had no need to hide its purchase from Alvogen or Cardinal Health because the sales documentation was readily available to both of them. In the end, the First Judicial District Court ordered NDOC to produce the requested documents within the next business day. (*See* App. 66). Without the ACLU's lawsuit, and the First Judicial District Court's hurried order, NDOC would not have revealed Alvogen as the Midazolam manufacturer.

E. Alvogen Files Suit on the Eve of the Execution and the District Court Stays the Execution.

Once NDOC complied with the First Judicial District Court's order, the public learned for the first time that Alvogen manufactured the State's supply of Midazolam. (App. 186, 235-38, 240-41, 250). The day before the execution, July 10, 2018, Alvogen

[9] *See Wood v. Ryan,* No. CV-14-1447-PHX-NVW J, 2014 WL 3385115, at *6 (D. Ariz. July 10, 2014) ("The usefulness of the identity of the manufacturer to public debate on the death penalty is attenuated. The real effect of requiring disclosure, however, is to extend the pressure on qualified suppliers not to supply the drugs, as has happened in the past.") rev'd, 759 F.3d 1076 (9th Cir. 2014), vacated, 135 S. Ct. 21 (2014) (agreeing with the district court).

sued the State. (App. 73). Alvogen also filed an Application for Temporary Restraining Order and Motion for Preliminary Injunction on an order shortening time. (App. 154).

Alvogen asserted that NDOC obtained the Midazolam through false pretenses, and that NDOC's purchase and planned use of the drug violated NRS 453.331(1)(d), NRS 453.381(1), NRS 453.391(1), and NRS 41.700(1)(a)-(b). These statutes variously impose criminal penalties for obtaining a controlled substance by "subterfuge" and bar using controlled substances for certain purposes. (*See* App. 160-61). Alvogen argued that it retained a property interest in the drugs, which NDOC converted, entitling Alvogen to replevin. (App. 176-78). Without identifying the threatened loss of any specific customer or business relationship during the two business days between NDOC's court ordered disclosure and the lawsuit, Alvogen claimed that NDOC's use of Midazolam would cause irreparable injury to its business reputation. (App. 180-83). Alvogen expressed concern about negative media reports and that "the public, customers, employees, and prospective investors" would think that it "is acting hypocritically in light of its public stance that its therapeutic products are designed to enhance human health." (App. 180). This concern about hypocrisy apparently didn't extend to touting product controls while neglecting to impose any actual contractual conditions on distributors like Cardinal Health.

The District Court scheduled a hearing on Alvogen's TRO request for the next morning—the day of the execution. (App. 347). After entertaining argument, the District Court granted Alvogen's TRO request. The District Court explained that it did

not consider its ruling "an issue of a stay of execution." (App. 414). "The issue presented here," as the District Court framed it, "is the plaintiff's right to decide not to do business with someone, including the government, especially if there's a fear of misuse of their product." (*Id.*).

The District Court found that, in its opinion, Alvogen has a reasonable probability of success on the merits because "the State knew its intended use of midazolam was not one approved by the FDA." (*Id.*). Nor was the State a bona fide purchaser, in the District Court's view, because Alvogen's earlier letters purportedly put the State on notice that Alvogen did not approve using Midazolam for executions. (*See* App. 415). Although Alvogen could not identify even a single potentially lost customer, and merely complained about negative press, the District Court concluded that there is a reasonable probability that Alvogen "will suffer irreparable damages, including damages to its business reputation." (*Id.*). The District Court "prohibited and enjoined [the State] from using Alvogen's product midazolam in capital punishment under further order of th[e] Court." (App. 430).

The District Court's TRO put NDOC into a Catch-22: NDOC was still subject to Judge Togliatti's order to complete Dozier's execution during the week but, because of the TRO, NDOC could no longer use the approved three drug combination. As a result, NDOC arranged a conference call with Judge Togliatti and the parties to Dozier's habeas case to discuss the TRO's effect on the execution scheduled for later that night. (App. 434). Judge Togliatti acknowledged that neither NDOC nor Dozier

was requesting a stay of the execution, but "in light of the Court order from Department 11," it was "impossible" for NDOC to carry out the execution. (App. 440-41). Judge Togliatti then entered an order staying her prior execution warrant. (App. 444). Had the District Court denied Alvogen's TRO, the execution would have proceeded and Judge Togliatti would not have been forced to enter this order.

III. REASONS FOR GRANTING THE PETITION

A. This Court Has Jurisdiction Over this Petition Under NRS 176.492 Because the District Court Improperly Stayed Dozier's Execution.

Within ten days of a stayed execution, NRS 176.492 permits a petition to an appellate court "to dissolve a stay which was improperly entered." Here, the District Court's TRO undeniably had the substance and effect of staying the execution. The TRO enjoined NDOC from using Midazolam, the first drug in NDOC's vetted and approved three-drug combination. Without Midazolam, NDOC no longer had (or has) the means to carry out the execution. The TRO made it impossible to complete Dozier's sentence. On the contrary, if the District Court had denied Alvogen's request, the execution would have gone forward. There is thus no question that the District Court's ruling produced a stay.

But NRS 176.415 expressly limits the circumstances in which a stay of execution may issue. It provides:

> The execution of a judgment of death must be stayed only:
>
> 1. By the State Board of Pardons Commissioners as authorized in Section 14 of Article 5 of the Constitution of the State of Nevada;

> 2. By the Governor if the Governor grants a reprieve pursuant to Section 13 of Article 5 of the Constitution of the State of Nevada;
>
> 3. When a direct appeal from the judgment of conviction and sentence is taken to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution;
>
> 4. By a judge of the district court of the county in which the state prison is situated, for the purpose of an investigation of sanity or pregnancy as provided in NRS 176.425 to 176.485, inclusive;
>
> 5. By a judge of the district court in which a motion is filed pursuant to subsection 5 of NRS 175.554, for the purpose of determining whether the defendant is intellectually disabled; or
>
> 6. Pursuant to the provisions of NRS 176.0919 [genetic marker analysis] or 176.486 to 176.492 [habeas corpus], inclusive.

The Legislature has authorized a stay of execution in these—and only these—circumstances. *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518, 521 (2014) (stating that legislative expression of one thing excludes another). None of the circumstances apply here. There is certainly no indication that the Legislature permitted district courts to halt an execution based on a pharmaceutical manufacturer's vague reputational worries about bad media reports. "'Last minute stays [of execution] ... represent an interference with the orderly processes of justice which should be avoided in all but the most extraordinary of circumstances.'" *Reid v. Johnson*, 333 F. Supp. 2d 543, 553 (E.D. Va. 2004) (quoting *Stockton v. Angelone*, 70 F.3d 12, 13 (4th Cir.1995)). NRS 176.415 properly reflects that the public interest rests firmly on the side of denying a stay in all but the most extreme scenarios. *See id.*

The District Court could not exercise its equitable powers to grant a TRO that collides with NRS 176.415. As this Court held in the prior writ petition involving Dozier's execution, courts must show restraint when invoking equitable powers "where the legislature has enacted a statute or rule covering a certain area." *NDOC*, 2018 WL 2272873, at *3 (citations omitted); *see also Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990) (discussing "inherent equitable powers"). This restraint is even greater in the capital punishment context. *See NDOC*, 2018 WL 2272873, at *3. NRS 176.415 covers the entire field of when a court may impose a stay of an execution and the District Court's TRO impermissibly conflicts with it. Accordingly, the TRO is an inappropriate use of the District Court's equitable authority and must be set aside.

To be sure, the District Court sought to distance its ruling from NRS Chapter 176. It denied that it was dealing with "an issue of a stay of an execution." (App. 414). This Court, however, examines the lower court order's actual function and effect; the Court does not limit itself to the labels that district courts attach to their orders. *Hospitality Int'l Grp. v. Gratitude Grp., LLC*, 387 P.3d 208, 2016 WL 7105065, at *1 (Nev. 2016) (unpublished disposition) (holding that the Court had appellate jurisdiction because an order was "functionally" a preliminary injunction even though district court titled it a "temporary restraining order"); *Taylor v. Barringer*, 75 Nev. 409, 410, 344 P.2d 676, 676 (1959) (holding that order "is in effect a final judgment although entitled 'an order.'").

The focus is on what an order "substantively accomplishes" and what it "'actually *does*, not what it is called.'" *Lee v. GNLV Corp.*, 116 Nev. 424, 427, 996 P.2d 416, 418 (2000) (quoting *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994) and citing *State, Taxicab Auth. v. Greenspun*, 109 Nev. 1022, 1025, 862 P.2d 423, 425 (1993); *Hallicrafters Co. v. Moore*, 102 Nev. 526, 528-29, 728 P.2d 441, 443 (1986); *Bally's Grand Hotel v. Reeves*, 112 Nev. 1487, 1488, 929 P.2d 936, 937 (1996)).

Though styled as a TRO, the order's real-world consequence was to stay Dozier's execution. The TRO enjoined the State "from *using* Alvogen's product midazolam in capital punishment." (App. 430) (emphasis added). Alvogen likewise moved the District Court to stop NDOC's *use* of Midazolam.[10] Alvogen claimed that "Defendants' intended *use*" would cause it irreparable harm. (App. 180) (emphasis added). Alvogen asserted that "the prohibited *use* of Alvogen's product would also negatively impact Alvogen's business relationships …. In addition, the *use* of the Alvogen Midazolam Product risks creating [an] erroneous misperception in the minds of the public …." (*Id.*) (emphases added); (App. 181) ("Defendants' *use* of the Alvogen Midazolam Product would interfere with the operation of its legitimate business") (emphasis added). Alvogen also argued that "[t]here was no urgency warranting the immediate and

[10] *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 584, 245 P.3d 1190, 1194 (2010) (holding that, "regardless of label," courts will construe a motion to reconsider, vacate, set aside or reargue a final judgment as a tolling motion if timely filed).

wrongful *use* of the Alvogen Midazolam Product by July 11, 2018." (App. 182) (emphasis added).

Of course, the "use" to which the District Court and Alvogen were referring was the "use" in Dozier's execution. That was the only "use" at issue. And given the scarcity of available drugs, and the prior Diazepam expiration, "using" Midazolam was the only available means to carry out the execution. By enjoining NDOC's "use" of Midazolam, the District Court made it impossible to carry out the sentence.

NDOC cautioned the District Court that a TRO would stay the execution. (App. 372-73, 376) ("But, again, make no mistake. [Alvogen] wants to say this isn't about stopping an execution, this is just about one drug. If the court enters a preliminary injunction enjoining the use of midazolam, there will be no execution tonight."). Alvogen understood that its requested relief would act as a stay. It simply proclaimed that "Defendants can pursue their desire to execute Dozier *later*" with other drugs. (App. 182) (emphasis added). A request to postpone an execution is the same as asking for a stay. The District Court's TRO improperly imposed a stay *in fact*, if not in name.

No other pharmaceutical manufacturer has ever obtained a TRO staying an execution. A recent Arkansas case is the closest analogue. In *McKesson Medical-Surgical, Inc. v. Arkansas*, Case No. 60CV-17-1960 (Ark. Cir. Ct. 2017), McKesson, a distributor like Cardinal Health, filed two actions to prevent Arkansas from using Vecuronium

Bromide in a series of upcoming executions.[11] As with Alvogen, McKesson alleged that Arkansas misled it by purchasing the drug without affirmatively alerting it that Arkansas intended to use the drug in an execution. (App. 478, 457).

In the first action, the circuit court entered an ex parte TRO on April 14, 2017. (App. 447). The Arkansas Supreme Court vacated the order on a writ of certiorari the next judicial day. (App. 450).[12] After the court reversed the first TRO, McKesson dismissed its complaint but then re-filed a nearly identical pleading with another TRO request. (App. 457). The second lower court initially denied the TRO but held a preliminary injunction hearing and granted it. (App. 452).

Once more, Arkansas appealed to its supreme court. (App. 456). Arkansas argued that the lower court lacked authority and jurisdiction to stay executions. (App. 461-62, 475). Arkansas asserted that "[t]he circuit court's injunction is in reality a stay of the executions [because] the ADC has no additional vecuronium bromide beyond what it purchased from McKession, and the ADC has no other source from which to purchase vecuronium bromide." (App. 461). Arkansas explained that the executions

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[11] The State has included the briefs and opinions from this case in the Appendix because they are unavailable on Westlaw. Alvogen cited and relied on this case in the lower court. (App. 177, 338). However, Alvogen failed to disclose to the District Court that the Arkansas Supreme Court summarily vacated the lower court rulings. (App. 411) (conceding need to "supplement the record with regard" to the *McKesson* case).

[12] The Arkansas Supreme Court subsequently determined that this particular lower court judge was incurably prejudiced against capital punishment and barred him from all death penalty cases. *See In re Kemp*, 894 F.3d 900 (8th Cir. 2018) (granting petition for mandamus and finding that the judge failed to state any claim for relief against the Arkansas Supreme Court for removing him from capital cases).

could not go forward without using this drug. (*Id.*). Like the District Court's TRO here, Arkansas asserted the "circuit court's order prohibits the ADC from using that vecuronium bromide and therefore operates as a stay of executions as long as it remains in effect." (*Id.*).

McKesson echoed Alvogen and the District Court here. It countered that it did not seek, and the circuit court did not grant, a stay of an execution. (App. 475). Rather, McKesson claimed that it "filed suit to prevent the drugs that it supplied, and that ADC obtained through misrepresentation and mistake, from being used by ADC. As a result, the circuit court's order precludes ADC only from using McKesson's specific product. The order does not enjoin ADC from using other drugs or means to conduct executions." (*Id.*). It was irrelevant, according to McKesson, that Arkansas did not have other means to carry out the executions. (*Id.*). "That ADC may not have other drugs available for its intended purposes … does not somehow transform an order not to dispose of a particular product into a stay of executions." (*Id.*). A few hours later, on the same day as the second TRO, the Arkansas Supreme Court sided with the State and granted Arkansas's emergency motion for an immediate stay of the circuit court's injunction. (App. 490). Arkansas used the Vecuronium Bromide in four executions after the Arkansas Supreme Court stayed the lower court's injunction.

The same result should obtain here. The District Court's TRO imposed a stay on Dozier's execution because it deprived the State of its only method of carrying out the sentence. Both Alvogen and the District Court were aware of the TRO's impact on

the execution later that night. Alvogen cannot ignore the TRO's ramifications by taking a myopic view of its requested relief or the TRO's effect. The TRO went far beyond just requiring NDOC to preserve a drug; it stopped an execution.

The TRO therefore violated NRS 176.415, and this Court has jurisdiction and the ability to dissolve it under NRS 176.492. *See Workman v. Bredesen*, 486 F.3d 896, 904 (6th Cir. 2007) ("[T]he practical effect of an injunction, *which simultaneously operates to stay* Workman's long-delayed execution and to give us authority to review it.") (quotations omitted; emphasis added); *Boltz v. Jones,* 182 F. App'x 824, 825 (10th Cir. 2006) (vacating TRO that stayed execution in § 1983 action "challenging the pharmaceutical means by which the execution will be accomplished.").

B. This Court Should Also Exercise Its Original Jurisdiction.

In addition to its authority under NRS 176.492, this Court should exercise its original jurisdiction. The Nevada Constitution empowers this Court to issue writs of prohibition and mandamus. NEV CONST. art. VI, § 4. Writ relief is an extraordinary remedy and the decision to entertain a writ petition ultimately lies within this Court's discretion. *Cheung v. Eighth Jud. Dist. Ct.*, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005). When exercising its discretion, this Court considers whether the petition raises an important issue of law that requires clarification, public policy interests, urgency, strong necessity, judicial economy, and sound judicial administration. *Clay v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 48, 305 P.3d 898, 901 (2013).

Each consideration weighs heavily in favor of entertaining this Petition. The Petition presents important issues of law and first impression about a District Court's authority to stay an execution and whether drug manufacturers possess a private cause of action to interfere with lawful capital sentences. This Court has already recognized the public policy interests surrounding Nevada's capital punishment regime generally and Dozier's execution in particular. *See NDOC,* 2018 WL 2272873, at *3 ("[W]e recognize the importance of this matter, both to Dozier and to the citizens of the State of Nevada"). The District Court's ruling also has public policy implications that will resonate outside Nevada into every other capital punishment jurisdiction. Politically motivated drug manufacturers will now cite the District Court's ruling in other states to impede legislatively authorized, and duly imposed, capital sentences—just as Alvogen tried to mislead the District Court with the Arkansas *McKesson* case. *See supra* note 11.

There is a strong urgency and necessity to expeditiously resolve the issues presented. The District Court's TRO stayed an execution that was only a few hours away. The District Court did so after Dozier has spent more than a decade on death row and after NDOC has spent almost a year embroiled in litigation, including prior proceedings in this Court. More broadly, the District Court's ruling effectively halts all executions in Nevada, not just Dozier's, because it leaves the State without the ability to carry out any capital sentence. The United States Supreme Court has accepted "the State's legitimate interest in carrying out a sentence of death *in a timely manner*." *Baze v. Rees*, 553 U.S. 35, 61 (2008) (emphasis added). "Victims of crime also have an important

interest *in the timely enforcement* of a sentence." *Ledford v. Comm'r, Georgia Dep't of Corr.*, 856 F.3d 1312, 1319 (11th Cir. 2017), cert. denied sub nom. *Ledford v. Dozier*, 137 S. Ct. 2156 (2017) (quotations omitted; emphasis added). The TRO damages the State's and victims' timeliness interests each day that it is erroneously in place. "Each delay, for its span, is a commutation of a death sentence to one of imprisonment." *Thompson v. Wainwright*, 714 F.2d 1495, 1506 (11th Cir. 1983).

The State is also battling against the clock for another reason. As days pass, and litigation drags on, all three drugs in NDOC's lethal injection protocol get closer to expiring. Denying this Petition may cause some, or all, of the drugs to expire before this Court issues a definitive opinion—as happened with the Diazepam in the earlier writ proceeding. Thus, even if the State prevails, the drug expirations may prevent it from imposing the jury's sentence—as happened with the earlier writ proceeding. If that occurs again, death penalty opponents will have won this nationally important legal issue by default. But for Jeremiah Miller's family, "justice delayed will be justice denied." *Guardians Ass'n v. Civil Serv. Comm'n of City of New York*, 463 U.S. 582, 627 (1983) (Marshall, J., dissenting).

Refusing this Petition will not serve judicial economy. The issues presented here will not go away if delayed to another day. This Petition presents purely legal questions about the District Court's authority to stay an execution and whether Alvogen has a cognizable cause of action. No factual development is needed to answer these statutory interpretation questions. Judicial economy and administration will be enhanced by

answering these questions before the State and parties engage in expensive, and protracted litigation that will virtually guarantee the State's drug supply expires. Simply put, if the District Court lacks the power to enter a stay, or Alvogen has no cause of action, then there is no need for discovery into Alvogen's supposed reputational or financial injuries (if any). The Court will save significant public and private resources by entertaining this Petition.

This Court has entertained writ petitions arising from TROs when appropriate. *Cox v. Eighth Jud. Dist. Ct.*, 124 Nev. 918, 193 P.3d 530 (2008) (granting writ of mandamus to vacate TRO); *State ex rel. Hersh v. First Jud. Dist. Ct.*, 86 Nev. 73, 464 P.2d 783 (1970) (granting in part writ of prohibition declaring a TRO void); *State ex rel. Friedman v. Eighth Jud. Dist. Ct.*, 81 Nev. 131, 399 P.2d 632 (1965) (granting writ of prohibition and certiorari declaring TRO void).[13]

And while writ relief is generally unavailable if the petitioner has a "plain, speedy, and adequate remedy in the ordinary course of law[,]" NRS 34.170; NRS 34.330, a motion to set aside or vacate a TRO, or even a direct appeal after a preliminary

[13] Because of the parties' discovery needs, the District Court extended the TRO beyond the 15-day limit that NRCP 65(b) prescribes and, functionally, it could constitute an appealable preliminary injunction. *Hospitality Int'l Grp.,* 2016 WL 7105065, at *1. Out of an abundance of caution, Petitioners have filed a protective notice of appeal concurrently with this writ. If necessary, this Court should treat this Petition as the State's appellate brief. *See Clark Cty. Liquor & Gaming Licensing Bd. v. Clark*, 102 Nev. 654, 658, 730 P.2d 443, 446 (1986) (treating appeal as a writ of mandamus to avoid unfairness).

injunction, is not always a "speedy and adequate" remedy. *See Pub. Serv. Comm'n v. Eighth Jud. Dist. Ct.*, 61 Nev. 245, 123 P.2d 237, 240 (1942) (granting agency's writ of prohibition to vacate a TRO that prevented a government hearing). This is especially so when the lower court's TRO will prevent the State from carrying out its lawful enforcement functions for "many months." *See id.* "To withhold the writ under such circumstances would not be exercising a proper discretion." *Id.*[14]

1. A Writ of Mandamus Should Issue to Correct the District Court's Erroneous Interpretation and Application of Law.

A writ of mandamus "may be issued … to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station," NRS 34.160, "or to control a manifest abuse or arbitrary or capricious exercise of discretion." *State v. Eighth Jud. Dist. Ct.*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011).[15] "A manifest abuse of discretion is a clearly erroneous interpretation of the law or a

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[14] *See also Ashokan v. State, Dep't of Ins.*, 109 Nev. 662, 667, 856 P.2d 244, 247 (1993) ("Nonetheless, despite the availability of an adequate legal remedy, this court has decided to exercise its constitutional prerogative to entertain the writ."); *State ex rel. Armstrong v. State Bd. of Exam'rs*, 78 Nev. 495, 497-98, 376 P.2d 492, 493-94 (1962) (holding that when the Court confronts a question of law, "the mere fact that other relief may be available does not necessarily supersede the remedy of mandamus").

[15] Alternatively, the Court should issue a writ of prohibition. A writ of prohibition is the counterpart to a writ of mandamus. NRS 34.320. It arrests the proceedings of a lower court "when such proceedings are without or in excess of the [court's] jurisdiction …." *Id.* "A writ of prohibition serves to stop a [lower] court from carrying on its judicial functions when it is acting outside its jurisdiction." *Stephens Media, LLC v. Eighth Jud. Dist. Ct.*, 125 Nev. 849, 857, 221 P.3d 1240, 1246 (2009) (quotations omitted). This Court should arrest the District Court from staying Dozier's execution in violation of NRS 176.415, as discussed above.

clearly erroneous application of a law or rule." *Id.* at 932, 267 P.3d at 780 (quotation marks and alteration omitted). In the context of a writ, just as elsewhere, this Court reviews questions of law *de novo*. *Picardi v. Eighth Jud. Dist. Ct.*, 127 Nev. 106, 110, 251 P.3d 723, 725 (2011), abrogation on other grounds recognized by *Tallman v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 71, 359 P.3d 113, 120 (2015).

At the TRO hearing, Alvogen explained that it was only focusing on NRS 41.700 for purposes of the temporary restraining order. (App. 353-54). Its other alleged NRS Chapter 453 violations merely served as the "predicate" acts to establish a violation under NRS 41.700. (App. 356, 368-69). Ultimately, the District Court held that Alvogen "has a reasonable probability of establishing claims under replevin and NRS 41.700." (App. 415, 165-66 (citing *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enterprises, LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009) (stating the elements for preliminary injunction))). But the District Court clearly erred on two legal grounds. First, the District Court erred when it concluded Alvogen possessed a private cause of action under NRS 41.700 and NRS Chapter 453, individually or collectively. Second, the District Court erred when it found that Alvogen might replevy the drugs because it retained a property interest in the Midazolam that NDOC purchased from Cardinal Health.[16]

[16] The District Court's interpretation and application of NRS 176.415 is also clearly erroneous as set forth above.

2. NRS 41.700

NRS 41.700 creates civil liability for a "person" who "[k]nowingly and unlawfully serves, sells or otherwise furnishes a controlled substance to another person" or "[k]nowingly allows another person to use a controlled substance in an unlawful manner on premises or in a conveyance belonging to the person allowing the use or over which the person has control." Damages are limited to those "*caused as a result of the person using the controlled substance.*" *Id.* (emphasis added). "A person who prevails in an action … may recover his or her actual damages …." NRS 41.700(2).

The State, its departments, officials, and contractors are not "persons" who can be liable under NRS 41.700. NRS 0.039 defines "person" as used in the Nevada Revised Statutes as "a natural person, any form of business or social organization and *any other nongovernmental legal entity* including, but not limited to, a corporation, partnership, association, trust or unincorporated organization." (emphasis added). It expressly states that "[t]he term does not include a government, governmental agency or political subdivision of a government." NRS 0.039. It's unsurprising that the Legislature would not, and did not, make the State potentially liable for its own handling of controlled substances in its sovereign capacity. The State therefore cannot be a defendant under NRS 41.700 and cannot be liable.

Nor can Alvogen invoke NRS 41.700's protection. Alvogen does not have standing to invoke NRS 41.700 because it is not within the "zone of interests" that this statute protects. "[A] statutory cause of action extends only to plaintiffs whose interests

'fall within the zone of interests protected by the law invoked.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014); *see also Anse, Inc. v. Eighth Jud. Dist. Ct.*, 124 Nev. 862, 867-69, 192 P.3d 738, 742-43 (2008). Courts must decide whether this particular plaintiff falls within the class of entities that the Legislature has given a right to sue under this substantive statute. *Lexmark Int'l, Inc.*, 134 S. Ct. at 1387. "In other words, we ask whether [the plaintiff] has a cause of action under the statute." *Id.*

To determine whether a plaintiff falls within the "zone of interests," courts use traditional tools of statutory interpretation. *Id.* at 1387-88. Courts do not consider whether, in their judgment, the Legislature *should* permit the plaintiff's suit; courts only analyze whether the Legislature in fact did so. *Id.* at 1388. On its face, NRS 41.700 does not describe the potential victims within the statute's "zone of interest" that may recover their "actual damages" "as a result of the person using the controlled substance." At the TRO hearing, the State argued that an examination of the purpose and legislative history would show that a drug manufacturer is not "within the class of persons the [L]egislature was concerned about when it enacted 41.700." (App. 394). Alvogen disputed that reading of the statute. (App. 403). Because Alvogen and the State advanced two reasonable, but conflicting, interpretations, the statute is ambiguous and the Court may look to legislative history as a guide. *Coleman v. State*, 134 Nev. Adv. Op.

28, 416 P.3d 238, 240 (2018).

NRS 41.700 was introduced in the 2007 Legislature as Senate Bill 7.[17] Senator Valerie Wiener sponsored the bill and described it as "social hosting" legislation. *Written Testimony of Sen. Wiener on S.B. 7* (Feb. 8, 2007).[18] Senator Wiener characterized the bill as an effort to curb underage substance abuse. *See generally id.* According to Senator Wiener, "this 'social hosting' legislation would ensure that adults who knowingly serve, sell, or otherwise furnish alcohol to an underage drinker—*or a controlled substance to anyone*—are civilly liable for any damages caused by the inebriated drinker or substance abuser." *Id.* (emphasis added).

John R. Johansen, a representative of the Department of Public Safety, also understood the bill as "social hosting" legislation. *Minutes of the Senate Committee on Judiciary* (Feb. 8, 2007).[19] The Nevada Trial Lawyers Association's President, Robert R. Jensen, testified in support of the bill because "Dramshop liability is imposed on people for furnishing alcohol or controlled substances." *Id.* Mr. Jensen flatly stated that "this bill targets parents or adults who know they are providing alcohol to teens and are aware there is potential to harm." *Id.* A Mothers Against Drunk Driving representative supported the bill and complimented the "social host law as a deterrent to parents and

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[17] *Available at* https://www.leg.state.nv.us/Session/74th2007/Reports/history.cfm?ID=15

[18] *Available at* https://www.leg.state.nv.us/Session/74th2007/Minutes/Senate/JUD/Final/91.pdf

[19] *Available at* https://www.leg.state.nv.us/Session/74th2007/Minutes/Senate/JUD/Final/91.pdf.

other adults from providing alcohol to minors." *Id.* The bill provides an avenue for "[p]arents [to] receive money due to the social-hosting law …" *Id.*

Senator Wiener explained at a later hearing that "[t]his bill is used if an inebriated behavior causes damage to person or property." *Assembly Committee on Judiciary* (May 3, 2007).[20] Assemblyman Horne shared Senator Wiener's concern that parents would allow children to consume substances at home "[b]ut if they leave and cause damage or hurt somebody else, it is not unreasonable that the parent should be held liable. If they allow that practice and allow their children's friends to come over and drink as well, then they should be liable for any actions resulting from that." *Id.* Senator Wiener distinguished licensed vendors from the bill's targets. "The major distinction with this bill was to address the social hosting component where someone is engaged with an underage drinker." *Id.* Her intent "was to address the social setting where we see an epidemic of this happening. I wanted to address this piece of it because we have had established Dram Shop law for quite a long time." *Id.* The bill was "not aimed toward the participation in the religious experience or celebration; it is the inebriated underage drinker causing harm to person or property." *Id.* The bill does not "capture anything about what happens *until there is damage*." *Id.* (emphasis added).

At the final hearing on the bill, Jennifer Chisel, a committee policy analyst, described the bill's purpose as a "social host bill which imposes civil liability for damages

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[20] A*vailable at* https://www.leg.state.nv.us/Session/74th2007/Minutes/Assembly/JUD/Final/1167.pdf.

that result if the host knowingly provides alcohol or drugs or allows the consumption of alcohol or drugs by a minor on his premises." *Assembly Committee on Judiciary* (May 16, 2007).[21] Assemblyman Horne provided an example of the class of victims that the bill was designed to protect: "Let us say the Smith family serves alcohol to minors. One of the minors leaves the premises and gets in a car accident and John Doe is injured. John Doe wants to sue the Smith family for serving alcohol to that minor." *Id.*

Against this background, NRS 41.700's purpose is apparent. The Legislature enacted the statute to provide a remedy to anyone that a minor hurts after being knowingly plied with alcohol or controlled substances in a social setting. The social hosting problems that prompted NRS 41.700 are a far cry from Alvogen's claims in this lawsuit. Needless to say, the State is not acting as a "social host" and is not providing controlled substances, in the form of lethal injections drugs, to minors who are then going to somehow physically harm Alvogen. The Legislature was concerned about Dramshop-type liability and providing a remedy for personal injury and property damage. The Legislature was not creating a mechanism for drug manufacturers to pursue reputational injury claims, and it is a perversion of NRS 41.700 to twist it as a device for drug manufacturers to stay an execution. *See S. Nev, Labor Mgmt. Cooperation Comm. ex rel. Melendez v. Clark Cty. Sch. Dist.*, No. 65547, 2016 WL 383147, at **1-2 (Nev.

[21] *Available at* https://www.leg.state.nv.us/Session/74th2007/Minutes/Assembly/JUD/Final/1321.pdf

Jan. 28, 2016) (unpublished disposition) (stating that statutory standing inquiry overlaps with implied cause of action inquiry).[22]

3. NRS Chapter 453

Even though Alvogen has no cognizable cause of action under NRS 41.700, it still invokes three provisions in NRS Chapter 453, the Uniform Controlled Substances Act, as so-called "predicates:" NRS 453.331, NRS 453.381, and NRS 453.391. Each provision provides a criminal penalty, not a private right of action. NRS 453.331(2) ("A person who violates this section is guilty of a category C felony and shall be punished as provided in NRS 193.130."); NRS 453.421 ("A person who violates any provision of NRS 453.371 to 453.391, inclusive, is guilty of a category C felony and shall be punished as provided in NRS 193.130.").

Alvogen acknowledges that these statutes do not expressly provide for private rights of action so it argues, instead, that implied causes of action exist. (App. 169, 172,

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[22] The Court need not address the underlying merits of any NRS 41.700 violation. For present purposes, it suffices to note that the State did not act "unlawfully." *See, e.g.,* NRS 453.377(6) ("A controlled substance may be dispensed by: A pharmacy in an institution of the Department of Corrections to a person designated by the Director of the Department of Corrections to administer a lethal injection to a person who has been sentenced to death."); NRS 454.213(1)(k) ("a drug or medicine referred to in NRS 454.181 to 454.371, inclusive, may be possessed and administered by: Any person designated by the head of a correctional institution."); NRS 454.215 (setting forth when NDOC employees may dispense a dangerous drug); NRS 454.221(2)(f) (exempting from dangerous drug criminal penalties "[a] pharmacy in a correctional institution to a person designated by the Director of the Department of Corrections to administer a lethal injection to a person who has been sentenced to death."); *see also* NRS 454.201(1) (defining "dangerous drug" as "[a]ny drug which has been approved by the Food and Drug Administration for general distribution"); *see infra* note 23.

174). But there is a strong presumption against creating a private cause of action when the Legislature has not expressly provided one. *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 959 n.11, 194 P.3d 96, 101 n.11 (2008) (parenthetically explaining and quoting *Maldonado v. Dominguez*, 137 F.3d 1, 7 (1st Cir. 1998)). This Court will only find an implied cause of action on rare occasions. *Id.* (citing *Provencher v. Town of Enfield*, 936 A.2d 625, 630 (Conn. 2007) ("[I]t is a rare occasion that [the Connecticut Supreme Court] will be persuaded that the legislature intended to create something as significant as a private right of action but chose not to express such an intent in the statute.")).

Whether an implied cause of action exists is a question of legislative intent. *Id.* at 958, 194 P.3d at 100-01. Without establishing legislative intent, "'a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'" *Id.* at 959, 194 P.3d at 101 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286-87(2001)). This Court examines three factors to determine if there is an implied cause of action: "(1) whether the plaintiffs are 'of the class for whose special benefit the statute was enacted;' (2) whether the legislative history indicates any intention to create or to deny a private remedy; and (3) whether implying such a remedy is 'consistent with the underlying purposes of the legislative [sch]eme.'" *Id.* at 958-59, 194 P.3d at 101 (footnotes and quotations omitted).

There is no suggestion, anywhere, that the Legislature meant these statutes to specially benefit drug manufacturers. Alvogen points to no such evidence. In fact, Alvogen concedes that it "is not aware of any legislative history that speaks" to any

legislative intention to create a private remedy. (App. 170, 172, 274). Indeed, implying a private remedy is inconsistent with the legislative scheme. The Legislature has expressly authorized the Investigation Division of the Department of Public Safety to enforce NRS Chapter 453. NRS 453.271. The Attorney General and district attorneys are allowed to bring a civil enforcement action. NRS 453.553. Any civil action must be brought in the name of the State of Nevada. *Id.* The statutes also permit the State Board of Pharmacy and Attorney General to bring an action to enjoin a violation of NRS Chapter 453. NRS 453.276. These actions too must be brought in the name of the State. *Id.* Because the Legislature restricted the ability to obtain an injunction to the Board and the Attorney General in the name of the State, Alvogen was not entitled to seek—and the District Court could not grant—the TRO at issue. *See Thomas*, 130 Nev. Adv. Op. 52, 327 P.3d at 521 (stating that legislative expression of one thing excludes another).

NRS Chapter 453 clearly indicates a legislative intent for state actors to enforce controlled substances laws, not private entities that manufacture controlled substances. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 316 (2012) (stating that implied private actions "take responsibility for suit out of the hands of public officials, who will presumably exercise their discretion in the public interest,

and place it in the hands of those who would use it for private gain.").[23]

Since NRS Chapter 453's provisions contain no private cause of action, they cannot serve as the predicate offenses for a violation of NRS 41.700, even if Alvogen were within NRS 41.700's "zone of interest." *See Almond Hill Sch. v. U.S. Dep't of Agric.*, 768 F.2d 1030 (9th Cir. 1985) (holding that FIFRA's lack of express or implied private causes of action, and comprehensive enforcement scheme, precluded it from serving as a predicate for a § 1983 action); *Smith v. Oppenheimer Funds Distrib., Inc.*, 824 F. Supp. 2d 511, 521 (S.D.N.Y. 2011) ("Plaintiff must assert a predicate violation of a substantive provision of the ICA which itself has a private right of action."); *Dugar v. Coughlin*, 613 F. Supp. 849, 852 (S.D.N.Y. 1985) ("The other provisions of Title 18 do not secure rights to plaintiff. He can neither sue directly under them, nor can he use them as a predicate for a section 1983 action."); *Gassman v. Clerk of the Circuit Court of Cook Cty.*, 71 N.E.3d 783, 790 (Ill. App. 2017) ("When a plaintiff seeks to use a statutory enactment

[23] The District Court found that "[t]he plaintiff has a reasonable probability of success of establishing the State knew its intended use of midazolam was not one approved by the FDA." (App. 414). This statement's relevancy is unclear. A private entity has no cause of action under the federal Food, Drug, and Cosmetic Act or the federal Controlled Substances Act. *Jones v. Hobbs*, 745 F. Supp. 2d 886 (E.D. Ark. 2010), aff'd sub nom. *Williams v. Hobbs*, 658 F.3d 842 (8th Cir. 2011) (holding that condemned inmates had no private right of action under FDCA or CSA to challenge alleged use of lethal injection drugs without FDA approval or a prescription. Congress vested the Executive Branch with complete discretion to enforce those statutes); *Durr v. Strickland*, 602 F.3d 788, 789 (6th Cir. 2010) (holding that condemned inmate had no private right of action under FDCA or CSA to challenge use of Midazolam "without a prescription from a licensed medical practitioner and distributed without authorization").

as a predicate for a tort action seeking damages, he must demonstrate that a private right of action is either expressly granted or implied in the statute.").[24]

4. Replevin

Replevin is a common law cause of action to recover personal property or goods wrongfully detained. *Perkins v. Barnes*, 3 Nev. 557, 559-60 (1867) (involving case where original owner sued purchaser who bought property from an intermediary). This Court has long held that "[u]nder our practice, the plaintiff makes out a case when he shows property or right of possession in himself, and an unauthorized detention by the defendant." *Id.* at 559.

Alvogen asserts that it retained a property interest in the Midazolam sold through Cardinal Health because Alvogen purportedly placed "controls" or use restrictions on the drug that attached to the product and ran with it down the stream of commerce. Alvogen alleges that "in light of its clear and unambiguous communications and restrictions regarding the sale of its Midazolam Product, Alvogen is the rightful owner of the Midazolam product and has a present and immediate right of possession to said property." (App. 91). Alvogen continues that it has a specific property interest in

[24] As a factual matter, NDOC did not violate any of NRS Chapter 453's provisions but the Court need not reach this factual dispute because Alvogen lacks a viable cause of action and the State cannot be liable under this Chapter. NRS 453.281(3) ("No liability is imposed by the provisions of NRS 453.011 to 453.552, inclusive, upon any authorized state, county or municipal officer engaged in the lawful performance of his or her duties."); *see supra* note 22. Similarly, the State is entitled to sovereign immunity under NRS 41.031 and NRS 41.032, but the court also need not address this issue.

NDOC's drugs "because NDOC intends to use Alvogen's property for administration of capital punishment, in violation of Alvogen's policies and agreements with Alvogen and its distributor(s)." (*Id.*). According to Alvogen, an end-user does not "acquire title" if it does not abide by the resale and use restrictions Alvogen placed on the intermediary-distributor. (App. 91, 365-66). In this way, Alvogen treats its so-called controls and use restrictions like real property servitudes or restrictive covenants that give it an enforceable reversionary property interest.

But the common law does not permit servitudes or covenants on chattel, personal property, or goods that are enforceable against downstream purchasers; the common law has only tolerated use restrictions on real property, and even then with some skepticism. "It is also a general rule of the common law that a contract restricting the use or controlling subsales cannot be annexed to a chattel so as to follow the article and *obligate the subpurchaser by operation of notice*. A covenant which may be valid and run with land will not run with or attach itself to a mere chattel."[25] *John D. Park & Sons Co. v. Hartman*, 153 F. 24, 39 (6th Cir. 1907) (emphasis added; collecting cases) (holding that drug wholesaler obtained "absolute title" to medicine despite its knowledge that purchase breached restrictions that drug manufacturer imposed on intermediary-seller).

Use restrictions on third-party end-users infringe the right of alienation, and "[t]he right of alienation is one of the essential incidents of a right of general property

[25] This rule makes sense because, unlike real property, there is no comprehensive recording system for personal property or goods.

in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand." *Id.* at 39.

The United States Supreme Court recently highlighted that, "[a]s Lord Coke put it in the 17th century, if an owner restricts the resale or use of an item after selling it, that restriction 'is voide, because ... it is against Trade and Traffique, and bargaining and contracting betweene man and man.'" *Impression Prod., Inc. v. Lexmark Int'l, Inc.*, 137 S. Ct. 1523, 1526 (2017) (quoting 1 E. Coke, *Institutes of the Laws of England* § 360, p. 223 (1628)). Lord Coke gave a simple example: "[If] a man be possessed of ... a horse, or of any other chattell ... and give or sell his whole interest ... therein upon condition that the Donee or Vendee shall not alien[ate] the same, the [condition] is voi[d], because his whole interest ... is out of him, so as he hath no possibilit[y] of a Reverter …." *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538 (2013) (quotations omitted). The Supreme Court has explained that "[w]ith these last few words, Coke emphasizes the importance of leaving buyers of goods free to compete with each other when reselling or otherwise disposing of those goods. American law too has generally thought that competition, including freedom to resell, can work to the advantage of the consumer." *Id.*

The Supreme Judicial Court of Massachusetts's decision in *Garst v. Hall & Lyon Co.*, 61 N.E. 219 (Mass. 1901) is an apt illustration. There, the plaintiff manufactured a proprietary medicine called "Phenyo-Caffein," made from a secret formula. *Id.* "The plaintiff [sold] all Phenyo-Caffein subject to the conditions of a contract in which each

purchaser agrees that he will not sell nor allow any one in his employ to sell it for prices less than those specified in the agreement for the different sizes of boxes, and promises to pay the plaintiff an agreed sum as damages if he violates this contract." *Id.*

The defendant, "with full knowledge of the conditions under which the medicine is sold by the plaintiff," acquired the medicine in large quantities and intended to resell it in violation of those conditions. *Id.* The defendant did not have a contract or agreement with the plaintiff. *Id.* Nor did the defendant buy the medicine from "the firm of wholesalers who received it from the plaintiff, and who agreed to sell it subject to the above conditions." *Id.* Rather, the defendant "bought it of a person who bought either from this firm or from a purchaser from this firm." *Id.* The plaintiff sued to stop defendant's resale on terms that conflicted with the plaintiff's contract with its intermediary wholesalers. *See id.*

The court held that "[t]he purchaser from a purchaser has an absolute right to dispose of the property. He may consume it, or sell it to another. The plaintiff has contracts from his vendees in regard to the prices at which they will sell if they sell at all. If they sell in violation of their contracts with the plaintiff, he has a remedy against them to recover his damages. This right is founded on the personal contract alone, and it can be enforced only against the contracting party." *Id.* (internal citation omitted). The court rejected the plaintiff's contention that the resale condition attached to, and ran with, the medicine. "To say that this contract is attached to the property, and follows it through successive sales which severally pass title, is a very different proposition. We

know of no authority, not of any sound principle, which will justify us in so holding." *Id.*[26]

Setting aside whether, at the time NDOC purchased the drugs, Alvogen had an enforceable contract with Cardinal Health that restricted the sale of Midazolam (it didn't, but the Court need not address this factual issue), NDOC is in the same position as the defendant in *Garst*. Alvogen's hypothetical contractual condition would bind only Cardinal Health, as Alvogen's intermediate vendee or distributor. NDOC purchased the drug from Cardinal Health, not Alvogen, and NDOC has no direct contract, or contact, with Alvogen. Under the common law, Alvogen's resale condition did not create a reversionary property interest that attached to the medicine or otherwise follow through to NDOC's successive purchase from Cardinal Health.[27] The resale condition did not somehow cloud NDOC's title to the drugs or retain a property interest in Alvogen. *See* NRS 104.2403.

Alvogen's letters and website disclaimer are irrelevant. Notice of a condition on

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[26] Since state common law cases upholding "personal property servitudes" are exceedingly thin, at best, "[s]ecurity interests … are a much more common mechanism for encumbering personal property. Moreover, as compared to personal property servitudes, security interests have a more solid legal foundation because they are authorized and governed by state statutory law (the UCC) rather than a few common law decisions." John F. Duffy & Richard Hynes, *Statutory Domain and the Commercial Law of Intellectual Property*, 102 VA. L. REV. 1, 60 (2016). Alvogen has not, and could not, make a claim that it possessed a security interest in the drugs under the UCC. *See* NRS 104.2401. Even if it could, abusing a security interest to interfere with Nevada's sovereign criminal justice and death penalty policies would undoubtedly be void as against public policy.

[27] Alvogen's conversion claim fails for the same reasons.

an intermediary bequeaths no personal property servitude. *Hartman*, 153 F. at 39; *Garst*, 61 N.E. at 219. Thus, NDOC was no more bound to Alvogen's conditions than the *Garst* defendant, and Alvogen cannot assert a reversionary interest in its goods. To the extent Alvogen has any complaint, it is under its alleged contract with Cardinal Health.

The cases Alvogen relied on below are not to the contrary. (App. 176-77). In *Tempur-Pedic Int'l, Inc. v. Waste To Charity, Inc.*, No. 07 2015, 2007 WL 535041 (W.D. Ark. Feb. 16, 2007), a mattress manufacturer received an ex parte TRO against a charitable organization that was reselling donated mattresses in violation of a contract between them. The TRO extended to apparent third-party agents that co-conspired with the charitable organization in "a scheme to defraud Tempur-Pedic by selling misappropriated mattresses for profit, below retail value and in contravention of the general purpose of Tempur-Pedic's donation of the goods." *Id.* The third-parties do not appear to be independent purchasers. For example, the opinion does not mention whether the third parties purchased the mattresses from the charitable organization. But the court noted that within a day of the manufacturer's investigative inquiry to the charitable organization, the third parties were no longer willing to resell the mattress. *Id.* at *3. The court implied that the charitable organization warned the third parties that the manufacturer was snooping. *See id.*

Additionally, the court emphasized that it was treating the charitable organization as a *thief* who could not pass good title. The court cited an Arkansas case with the parenthetical explanation that "[t]he general rule-as regards all personal property except

money and negotiable paper-is, that a purchaser from a thief acquires no title against the true owner, in the absence of limitations and estoppel." *Id.* at *7 (quoting *Eureka Springs Sales Co. v. Ward*, 290 S.W.2d 434, 436 (Ark. 1956)). By treating the charitable organization as a thief, the manufacturer was not trying to enforce a use restriction or servitude on a good like Alvogen is trying to do here. The mattress manufacturer was simply recovering stolen property. This is an unremarkable proposition. *See Alamo Rent-A-Car, Inc. v. Mendenhall*, 113 Nev. 445, 452, 937 P.2d 69, 74 (1997) ("The owner of stolen goods is not divested of title therein by the theft, and even though an innocent subsequent purchaser may be treated as having title as against everyone but the rightful owner, a sale by the thief ... does not vest title on the purchaser as against the owner....."). Alvogen has not—and could not—make a claim that Cardinal Health is a thief unable to transfer title to NDOC.[28]

Once again, Alvogen points to the Arkansas *McKesson* case in which the lower court found that a drug distributor's replevin claim against the State had a likelihood of success on the merits. (App. 177, 338). Unlike Alvogen here, McKesson had a direct

[28] For purposes of void and voidable title, there is a difference between a buyer and a thief, and theft and breach of contract. *State v. Mermis*, 20 P.3d 1044, 1049 (Wash. App. 2001). Cardinal Health did not obtain the drugs from Alvogen by "fraud" within the UCC's meaning and so did not obtain only "voidable" title. *Id.* at 748 n.28; NRS 104.2403(1)(d); *Alamo Rent-A-Car, Inc.*, 113 Nev. at 452 n.1, 937 P.2d at 73 n.1 (stating buyer that obtained car through fraud had voidable title). Because Cardinal Health did not simply have voidable title, NDOC's status as a good faith purchaser for value, and the District Court's finding on this point, are irrelevant—even though NDOC did act in good faith at all times. NRS 104.2403; (App. 415).

relationship with the State and so, under the common law, had a more plausible ability to enforce any use restrictions that may have existed between them. Still, the Arkansas Supreme Court summarily vacated the TRO on the same day, thus showing that a replevin claim does not even lie for a drug distributor with a direct connection to the State.

Notwithstanding common law practice and history, the District Court held that Alvogen has the "right to decide not to do business with someone, including the government, especially if there's a fear of misuse of their product." (App. 414). Yet, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911),[29] the United States Supreme Court described the difference between choosing one's customers and imposing impermissible servitudes on goods later resold to third parties. Like *Garst* and this case, *Dr. Miles* involved a medicinal manufacturer. *Id.* 374. The manufacturer sold "its medicines to jobbers and wholesale druggists, who in turn sell to retail druggists for sale to the consumer. [The manufacturer] fixed not only the price of its own sales to jobbers and wholesale dealers, but also the wholesale and retail prices." *Id.*

The defendant was a drug wholesaler who had formerly dealt with the manufacturer and knew about the manufacturer's sale conditions. *Id.* at 381. As with Alvogen here, the manufacturer alleged that the defendant "had unlawfully and fraudulently procured [the medicines] from the [manufacturer's] 'wholesale and retail

[29] Overruled on other grounds by *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

agents' by means 'of false and fraudulent representations and statements, and by surreptitious and dishonest methods, and by persuading and inducing, directly and indirectly,' a violation of their contracts." *Id.* at 382. The defendant supposedly concealed the source of its supply and sold the drugs at cut rates. *Id.* The manufacturer sought an injunction and claimed damage to its business goodwill. *Id.* at 375-75, 382.

Before the Supreme Court, the drug manufacturer rested on the same argument as the District Court below. The manufacturer urged that "as the manufacturer may make and sell, or not, as he chooses, *he may affix conditions as to the use of the article* or as to the prices at which purchasers may dispose of it. The propriety of the restraint is sought to be derived from the liberty of the producer." *Id.* at 404 (emphasis added). The Supreme Court retorted, "[b]ut because a manufacturer is not bound to make or sell, it does not follow in case of sales actually made he may impose upon purchasers *every sort of restriction*. Thus, a general restraint upon alienation is ordinarily invalid." *Id.* (emphasis added). A manufacturer cannot impose use or price restrictions on third-party purchasers even if "the restriction be known to purchasers." *Id.* at 405.

The Supreme Court reasoned that servitude-esque restrictions on a product's use or resale are void as against public policy. *Id.* at 405-06. The public welfare is the first consideration. *Id.* at 406. "The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary

to public policy, and therefore void. That is the general rule." *Id.* (quotations omitted).

The public policy interests are especially strong where, as here, the manufacturer is seeking to impose a use restriction on a third-party State that would frustrate the most sovereign of state interests—duly enacted laws and capital sentence jury verdicts. *State v. Lafferty*, 20 P.3d 342, 373 (Utah 2001) ("[T]he death penalty is the most solemn and final act that the state can take against an individual.") (quotations omitted). Contrary to Alvogen's public relations and commercial preferences, the Nevada Legislature has authorized capital punishment. Manufacturers, like Alvogen, may be free to refuse to deal directly with the State. And manufacturers may impose use and price restrictions on those entities with whom they deal directly. But it would be injurious to the public interest if drug manufacturers, which do not deal directly with States, are allowed to enforce use restrictions that are aimed at preventing capital sentences, against the will of the People in that State. Manufacturers should be limited to asserting their rights (if any) against their contractual distributors. Intermediary-distributors can decide for themselves whether they want to assist States with the States' statutory criminal justice mandates, notwithstanding any agreements with manufacturers. The common law allows intermediaries to freely pass title to drugs without any manufacturer use conditions.

Recognizing a property interest, and related causes of action, so foreign to the common law would effectively end capital punishment. Unless this Court emphatically rejects Alvogen's arguments *as a legal matter*, commercial interests associated with any

product used in an execution, however remote, will be able to file a last second lawsuit to delay an execution—no matter the method. From the rope weaver, armorer, electrician, and chemist, to the pharmacist and everyone in between. But the decision to abolish capital punishment should be left to the People and their Representatives. It should not be done through the backdoor by inventing a cause of action at the behest of commercial interests and, above all, to the detriment of the criminal justice system and murder victims.[30]

IV. CONCLUSION AND RELIEF SOUGHT

For these reasons, Petitioners respectfully request that the Court dissolve the District Court's stay of Dozier's execution or, alternatively, issue a writ of mandamus or prohibition vacating the District Court's temporary restraining order.

Dated: July 25, 2018.

/s/ Jordan T. Smith

Ann M. McDermott (Bar No. 8180)
Bureau Chief
Jordan T. Smith (Bar No. 12097)
Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
555 East Washington Avenue, Suite 3900
Las Vegas, NV 89101
(702) 486-3894
jsmith@ag.nv.gov
Counsel for Petitioners

[30] *See Baze*, 553 U.S. at 61 ("Reasonable people of good faith disagree on the morality and efficacy of capital punishment, and for many who oppose it, no method of execution would ever be acceptable. But as Justice Frankfurter stressed in *Resweber*, '[o]ne must be on guard against finding in personal disapproval a reflection of more or less prevailing condemnation.'").

VERIFICATION

I, Jordan T. Smith, declare as follows:

1. I am currently employed in the Office of the Attorney General as the deputy solicitor general. I am counsel for Petitioners named herein.

2. I verify that I have read the foregoing Petition to Dissolve Stay of Execution Under NRS 176.492 and Petition for Writ of Mandamus or Prohibition; and that the same is true of my own knowledge, except for matters stated on information and belief, and as to those matters, I believe them to be true.

3. I declare under the penalty of perjury of the laws of Nevada that the foregoing is true and correct.

Executed on this 25th day of July 2018 in Las Vegas, Nevada.

/s/ Jordan T. Smith
Jordan T. Smith (Bar No. 12097)
Deputy Solicitor General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in double-spaced Garamond and contains 13,448 words. I further certify that I have read this brief and that it complies with NRAP 21.

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: July 25, 2018.

/s/ Jordan T. Smith
Jordan T. Smith (Bar No. 12097)
Deputy Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **PETITION TO DISSOLVE STAY OF EXECUTION UNDER NRS 176.492 AND PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on July 25, 2018.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that a courtesy copy was emailed to counsel for Respondents simultaneously with the filing of the foregoing.

A copy was also provided to the following:

James J. Pisanelli, Esq.
Todd Bice, Esq.
Debra Spinelli, Esq.
PISANELLI BICE, PLLC
400 South 7th Street, Suite 300
Las Vegas, NV 89101

Kenneth Schuler
Michael Faris
Alex Grabowski
LATHAM & WATKINS, LLP
330 North Wabash Avenue, Suite 2800
Chicago, IL 60611

Angela Walker
LATHAM & WATKINS, LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304

Hon. Elizabeth Gonzalez
Eighth Judicial District Court
Department 11
200 Lewis Avenue
Las Vegas, NV 89155

/s/ *Barbara Fell*
An employee of the
Office of the Attorney General

EXHIBIT 3

EXHIBIT 3

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8/1/2018 6:29 PM

E. LEIF REID, ESQ., SBN 5750
JOSH M. REID, ESQ., SBN 7497
KRISTEN L. MARTINI, ESQ., SBN 11727
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996
Tel: 702.949.8200
Fax: 702.949.8398
Email: lreid@lrrc.com
jreid@lrrc.com
kmartini@lrrc.com

Attorneys for Intervenor

DISTRICT COURT

CLARK COUNTY, NEVADA

ALVOGEN, INC.,

Plaintiff,

vs.

STATE OF NEVADA;

NEVADA DEPARTMENT OF CORRECTION;

JAMES DZURENDA, Director of the Nevada Department of Correction, in his official capacity;

IHSAN AZZAM, Ph.D, M.D., Chief Medical Officer of the State of Nevada, in his official capacity;

And JOHN DOE, Attending Physician at Planned Execution of Scott Raymond Dozier, in his official capacity;

Defendants.

HIKMA PHARMACEUTICALS USA INC.,

Intervenor,

vs.

STATE OF NEVADA;

NEVADA DEPARTMENT OF CORRECTION;

Case No. A-18-777312-B

Dept. No. XI

INTERVENOR'S REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS (FIRST SET)

JAMES DZURENDA, Director of the Nevada Department of Correction, in his official capacity;

IHSAN AZZAM, Ph.D, M.D., Chief Medical Officer of the State of Nevada, in his official capacity;

And JOHN DOE, Attending Physician at Planned Execution of Scott Raymond Dozier, in his official capacity;

Defendants.

TO: DEFENDANTS STATE OF NEVADA, NEVADA DEPARTMENT OF CORRECTIONS, JAMES DZURENDA, IHSAN AZZAM, AND JOHN DOE I; AND THEIR COUNSEL OF RECORD

Pursuant to Rule 34 of the Nevada Rules of Civil Procedure, Hikma Pharmaceuticals USA Inc., through its undersigned counsel of record, propounds the following Requests for Production of Documents to Defendants State of Nevada, the Nevada Department of Corrections, James Dzurenda, Ihsan Azzam, and John Doe I. Production shall occur within (30) days of service hereof, at the offices of LEWIS ROCA ROTHGERBER CHRISTIE, 3993 Howard Hughes Pkwy, Suite 600, Las Vegas, NV 89169-5996.

INSTRUCTIONS

1. You shall furnish such information as is available to you. You must answer each Request completely and in a straightforward manner. If you cannot answer a Request completely, you must answer it to the extent possible, explain why you cannot answer completely, and state the nature of the information that you are unable to furnish.

2. You should make a reasonable and good faith effort to obtain responsive documents and/or information to these Requests by inquiring of persons (as defined herein) known to you to have knowledge or information relating to this action.

3. If you claim any form of privilege, whether based on statute or otherwise, as a ground for not answering a Request, or any portion thereof, you shall provide:

(a) the nature of the privilege (including work product) being claimed and, if the privilege is governed by state law, indicate the state's privilege rule being invoked; and

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(b) the following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information:

i. for documents:

1) the author(s);
2) the addressee(s) and other recipient(s);
3) where not apparent, the relationship of the author(s), addressee(s), and recipient(s) to each other;
4) the type of document (e.g., letter or memorandum)
5) the general subject matter of the document;
6) the date of the document; and
7) such other information as is sufficient to identify the document;

ii. for oral communications:

1. name(s) of any person making the communication;
2. name(s) of any person(s) present while the communication was made;
3. where not apparent, the relationship of any person present to any person making the communication;
4. the date and place of communication; and
5. the general subject matter of the communication.

4. Whenever a Request is answered in whole or in part by referring to a previous production, you should state:

(a) the date the document was produced;

(b) the title of the responsive pleading in which it was produced; and

(c) the Bates-stamp number(s) of each such document.

5. If you are aware of any documents or copies thereof that may be responsive to these Requests but are no longer in your possession, custody, or control, or have been lost or destroyed, identify each document in detail, including: (i) whether the document is missing, lost, or destroyed; (ii) whether the document has been transferred or delivered to another person and, if so, at whose request; (iii) who prepared it; (iv) to whom it was prepared for and sent to; (v) when it was prepared or sent; (vi) the content of the document; (vii) the person who destroyed it; and (viii) why it was lost or destroyed.

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6. Format of production

(a) All documents, including all electronically stored material and information ("ESI"), will be produced in electronic format, with standard load files suitable for loading into a litigation support database. The load files will define document breaks, attachments, and other information identified herein.

(b) Defendants will produce all ESI, including emails, as kept in the normal course of business in its fully functional native format (e.g., Outlook mail message file, formula-functional Excel spreadsheets, PowerPoint presentations, Word documents, etc.), with all available metadata intact and identify the file, source, and custodian from which each document was obtained.

(c) Defendants will produce all ESI as a processed native production with branded natives and proper load files.

(d) For all ESI produced, defendants will maintain family relationships among all parents and attachments by ensuring that attachments immediately follow their parent email or other file, and setting the "BEGATTACH" and "ENDATTACH" metadata fields appropriately.

(e) If Defendants determine that an ESI file needs to be redacted on any asserted privilege ground, the file will be rendered in TIFF, and the TIFF will be redacted and produced. However, to the extent that the text is searchable in the native format, Defendants will provide searchable text for those portions of the document that have not been redacted. Metadata associated with these redacted ESI files will be produced to the extent that it does not disclose information designed to be protected by the redaction.

(f) If Defendants intend to produce any ESI that exists in encrypted format or is password protected, the means of gaining access to those files must be provided.

(g) Defendants will produce extracted text for each document produced. Each extracted text file will be produced as a .txt file with the filename corresponding to the Bates number of the associated document.

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(h) Defendants will brand all TIFF images in the lower right-hand corner with its corresponding Bates number, using a consistent font type and size. The Bates number must not obscure any part of the underlying image.

(i) All TIFF image file names will be identical to the corresponding Bates numbered images, with a ".tif file extension.

(j) Defendants will use a CD, DVD, hard drive, or share third-party FTP site for its ESI production, and will cooperate in good faith to use the highest-capacity available media to minimize associated overhead. Defendants will label the physical media with the production date, media volume name, and document number range.

7. Unless stated otherwise, the time period to which these Requests refer is July 1, 2016, through the date of production. If a document prepared before this period is necessary for a correct or complete understanding of any document covered by a Request, you must produce the earlier or subsequent document as well. If any document is undated and the date of its preparation cannot be determined, the document shall be produced if otherwise responsive to the production Request.

8. These Requests are continuing in nature and must be supplemented as necessary up until the date of the conclusion of this action, including any appeals. If, after making an initial production in response hereto, you become aware of additional responsive documents, notice thereof should be provided to counsel for Intervenor immediately and such documents should be produced promptly thereafter.

DEFINITIONS

For purposes of these Requests, the following definitions shall apply:

1. The term "Document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Rule 34(a) of the Nevada Rules of Civil Procedure. It shall mean and includes "duplicate" as defined in NRS 52.195; "original" as defined in NRS 52.205; "photographs" as defined in NRS 52.215; "writings" and "recordings" as defined in NRS 52.225; and shall also mean all written or graphic matter or any other means of preserving thought or expression of every type and description including, but not limited to, originals, drafts, signed or unsigned documents regardless of whether approved, sent, received, redrafted, or executed, computer-sorted and

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Las Vegas, NV 89169-5996
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computer-retrieved information, copies or duplicates that are marked with any notation or annotation, copies or duplicates that differ in any way from the original, correspondence, memoranda, reports, notes, minutes, contracts, agreements, books, records, vouchers, invoices, purchase orders, ledgers, diaries, logs, calendar notes, computer printouts, computer disks and programs, records, card files, press clippings, manuals, lists, audit paperwork, financial analyses, tables, advertisements or other promotional material, audited or unaudited financial statements, newspapers or newsletters, diagrams, photographs, telegrams, statements recorded in any way, drawings, specifications, property surveys, summaries, inter-office or intra-office communications, notations of any sort of conversations, and other writings or recordings. A draft or non-identical copy is a separate document within the meaning of this term. "Document" also includes any removable "Post-it" notes or other attachments affixed to any of the foregoing.

2. "Communication(s)" means the transmission of information (in the form of facts, ideas, inquiries or otherwise) by any medium including, without limitation, orally, by personal meeting, in writing, by telephone, letter, telegraph, teleconference, facsimile, telex, telecopy, wire, radio, television, electronic mail, magnetic tape, floppy disk, diagram, graph, chart, drawing, text message, chat room, social media including Facebook and Twitter, or posting or other display on the Internet or the World Wide Web.

3. "Person" means any natural person, firm, association, organization, partnership, business, trust, corporation, joint venture or any type of entity including, but not limited to, any public entity or governmental entity.

4. "Concerning" means concerning, relating to, referring to, mentioning, describing, evidencing, or constituting.

5. "Defendants," "You," and "Your" means the State of Nevada, the Nevada Department of Corrections, James Dzurenda, Ihsan Azzam, and John Doe I.

6. "NDOC" means the Nevada Department of Corrections.

7. "Hikma" means Intervenor Hikma Pharmaceuticals USA Inc., along with any of its present and former predecessors, predecessors-in-interest, successors, assigns, affiliates, direct or indirect subsidiaries, parents, and trusts; all firms, corporations, and other entities acting under

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common control with Hikma, in joint venture with Hikma, or under licensing or partnership agreements with Hikma; all entities that own or are owned by Hikma in whole or in part; and all divisions and operating units thereof.

1. "Hikma's Fentanyl" means Fentanyl Citrate Injection, USP C-II, a narcotic (opiate) analgesics class of medications.

8. The "Dozier Execution" means the execution of Scott Raymond Dozier that was previously scheduled to take place via lethal injection on Wednesday, July 11, 2018, at Ely State Prison.

9. The "2016 Letters," attached as Exhibit 3 to Hikma's Complaint in Intervention, refers to the letters dated December 20, 2016, that Hikma sent to Defendant James Dzurenda, Director of the Nevada Department of Correction, Governor Brian Sandoval; and Attorney General Adam Laxalt.

10. The "2017 Letters," attached as Exhibit 4 to Hikma's Complaint in Intervention, refers to the letters dated December 12, 2017, that Hikma sent to Defendant James Dzurenda, Director of the Nevada Department of Correction, Governor Brian Sandoval; and Attorney General Adam Laxalt.

11. The "2018 Letters," attached as Exhibit 6 to Hikma's Complaint in Intervention, refers to the letters dated July 11, 2018, that Hikma sent to Defendant James Dzurenda, Director of the Nevada Department of Correction, Governor Brian Sandoval; and Attorney General Adam Laxalt.

REQUESTS FOR PRODUCTION

REQUEST NO. 1:

Any and all documents related to the 2016 Letters.

REQUEST NO. 2:

Any and all documents related to the 2017 Letters.

REQUEST NO. 3:

Any and all documents related to the 2018 Letters.

/ / /

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REQUEST NO. 4:

Any and all documents related to Defendants' attempts to obtain and purchase orders for Hikma's Fentanyl, including but not limited to internal and external communications planning or discussing the purchase, purchase orders, invoices, and shipping records.

REQUEST NO. 5:

Any and all documents related to Defendants' attempts to obtain and purchase orders for fentanyl from other distributors and providers, including but not limited to internal and external communications planning or discussing the purchase, purchase orders, invoices, and shipping records.

REQUEST NO. 6:

Any and all documents related to Defendants' planned use of Hikma's Fentanyl in any execution, including but not limited to internal and external communications planning or discussing the product.

REQUEST NO. 7:

Any and all documents related to Defendants' use of fentanyl in the State's execution protocol, including but not limited to internal and external communications planning or discussing the product and decision to use in the State's execution protocol.

REQUEST NO. 8:

Any documents, regardless of date, describing policies, manuals, or procedures in effect related to NDOC's drug purchases.

REQUEST NO. 9:

Any and all documents related to John Doe I's anticipated participation in the Dozier Execution, including but not limited to internal and external communications discussing the participation and manuals, policies, or standard operating procedures describing the role of an attending physician or non-physician administrator at an execution generally and the Dozier execution specifically.

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REQUEST NO. 10:

Any and all documents related to alternatives to the use of Hikma's Fentanyl in the Dozier Execution, including but not limited to internal and external communications regarding the suitability or availability of drugs other than fentanyl and/or the possibility of acquiring fentanyl produced or distributed by a source other than Hikma.

REQUEST NO. 11:

Any and all documents related to communications between Defendants and Cardinal Health, including but not limited to communications regarding the acquisition or consideration of any drug for use in any lethal injection protocol.

REQUEST NO. 12:

Any and all documents related to communications involving Defendants' requests for proposals sent to pharmaceutical companies to supply drugs for lethal injections, including but not limited to the requests reported by the Las Vegas Review-Journal on October 7, 2016, and any responses to any such requests. This request includes communications related to what "options" Defendants considered if drugs were not found.

REQUEST NO. 13:

Any and all documents from January 1, 2016, to present related to whether any pharmaceutical manufacturer or distributor would "no longer provide the chemicals to the state" for use in executions as reported by the Las Vegas Review-Journal on November 27, 2016. This request includes, without limitation, any documents related to any actual or potential restrictions on such purchases of which NDOC was aware, any documents related to such restrictions, or any documents related to NDOC's actual or potential responses to, or plans or efforts to avoid or circumvent such restrictions.

REQUEST NO. 14:

Any and all documents, regardless of date, that Defendants consult, rely on, describe, or identify in answering any of Hikma's Interrogatories.

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Las Vegas, NV 89169-5996
Lewis Roca ROTHGERBER CHRISTIE

REQUEST NO. 15:

Documents, regardless of date, sufficient to show your purchases of fentanyl, including from other distributors and manufacturers, for purposes consistent with its FDA-approved uses each year since 2013.

REQUEST NO. 16:

Any and all documents related to DEA number AS2995922 or any other DEA number Defendants have provided to Cardinal Health in the course of making any purchase.

REQUEST NO. 17:

Any and all documents related to Defendants' statement at the July 11, 2018, hearing that "most drugs ordered by the Department of Corrections go to the central Las Vegas office." Hr. Tr. 49:6-7 (July 11, 2018).

DATED this 1st day of August, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: /s/ *Josh M. Reid*

E. LEIF REID, ESQ., SBN 5750
JOSH M. REID, ESQ., SBN 7497
KRISTEN L. MARTINI, ESQ., SBN 11272
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

Attorneys for Intervenor

3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996
Lewis Roca ROTHGERBER CHRISTIE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Lewis Roca Rothgerber Christie LLP, and that on this 1st day of August, 2018, I caused to be served via the Court's e-filing/e-service system and by email a true and correct copy of the above and foregoing **INTERVENOR'S REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS (FIRST SET)** to the following:

James J. Pisanelli, Esq.
Todd L. Bice, Esq.
Debra L. Spinelli, Esq.
PISANELLI BICE, PLLC
400 South 7th Street, Suite 300
Las Vegas, NV 89101
JJP@pisanellibice.com
TLB@pisanellibice.com
DLS@pisanellibice.com
Attorneys for Plaintiff

Kenneth G. Schuler, Esq.
Michael Faris, Esq.
Alex Grabowski, Esq.
LATHAM & WATKINS LLP
330 North Wabash Ave., Suite 2800
Chicago, IL 60611
kenneth.schuler@lw.com
michael.faris@lw.com
alex.grabowski@lw.com
Attorneys for Plaintiff

Angela Walker, Esq.
LATHAM & WATKINS LLP
555 Eleventh Street NW, Suite 1000
Washington, DC 20004-1304
angela.walker@lw.com
Attorneys for Plaintiff

Jordan T. Smith, Esq.
Assistant Solicitor General
555 East Washington Avenue, #3900
Las Vegas, Nevada 89101
JSmith@ag.nv.gov
Attorney for Defendant Nevada State of Department of Corrections and State of Nevada

/s/ Dawn M. Hayes
An employee of Lewis Roca Rothgerber Christie LLP

3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996
Lewis Roca ROTHGERBER CHRISTIE

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E. LEIF REID, ESQ., SBN 5750
JOSH M. REID, ESQ., SBN 7497
KRISTEN L. MARTINI, ESQ., SBN 11727
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996
Tel: 702.949.8200
Fax: 702.949.8398
Email: lreid@lrrc.com
jreid@lrrc.com
kmartini@lrrc.com

Attorneys for Intervenor

DISTRICT COURT

CLARK COUNTY, NEVADA

ALVOGEN, INC.,

Plaintiff,

vs.

STATE OF NEVADA;

NEVADA DEPARTMENT OF CORRECTION;

JAMES DZURENDA, Director of the Nevada Department of Correction, in his official capacity;

IHSAN AZZAM, Ph.D, M.D., Chief Medical Officer of the State of Nevada, in his official capacity;

And JOHN DOE, Attending Physician at Planned Execution of Scott Raymond Dozier, in his official capacity;

Defendants.

HIKMA PHARMACEUTICALS USA INC.,

Intervenor,

vs.

STATE OF NEVADA;

NEVADA DEPARTMENT OF CORRECTION;

Case No. A-18-777312-B

Dept. No. XI

INTERVENOR'S INTERROGATORIES TO DEFENDANT NEVADA DEPARTMENT OF CORRECTIONS (FIRST SET)

JAMES DZURENDA, Director of the Nevada Department of Correction, in his official capacity;

IHSAN AZZAM, Ph.D, M.D., Chief Medical Officer of the State of Nevada, in his official capacity;

And JOHN DOE, Attending Physician at Planned Execution of Scott Raymond Dozier, in his official capacity;

Defendants.

TO: DEFENDANT NEVADA DEPARTMENT OF CORRECTIONS, AND ITS COUNSEL OF RECORD

Pursuant to Rule 33 of the Nevada Rules of Civil Procedure, Hikma Pharmaceuticals USA Inc., through its undersigned counsel of record, propounds the following Interrogatories to Defendant Nevada Department of Corrections, to be answered under oath and delivered within (30) days of service hereof, at the offices of LEWIS ROCA ROTHGERBER CHRISTIE LLP, 3993 Howard Hughes Parkway, Suite 600, Las Vegas, Nevada 89169.

DEFINITIONS

1. The definitions provided in Intervenor's Requests for Production of Documents to Defendants [First Set] are incorporated by reference herein.

2. To "Identify" an individual is to provide his or her full name, employment title, the nature of his or her occupational responsibilities, and current address.

INTERROGATORIES

INTERROGATORY NO. 1:

Identify Defendant John Doe, the attending physician who was scheduled to be the attending physician at the Dozier Execution or who may be scheduled to supervise any future execution in which Hikma's Fentanyl could be used.

INTERROGATORY NO. 2:

Identify any other physicians and/or non-physician administrators scheduled to attend the Dozier Execution or who may be scheduled to attend any future execution in which Hikma's Fentanyl could be used.

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INTERROGATORY NO. 3:

Identify any NDOC employees, and any other persons of whom you are aware of, involved with NDOC's acquisition of Hikma's Fentanyl.

INTERROGATORY NO. 4:

Identify any NDOC employees, and any other persons of whom you are aware of, involved with the decision to include fentanyl in the State's execution protocol and decision to administer Hikma's Fentanyl in any executions, including the Dozier Execution.

INTERROGATORY NO. 5:

Identify any NDOC employees, and any other persons of whom you are aware of, who were aware of Hikma's 2016 Letter, addressed to Defendant Director Dzurenda, including those who received Hikma's 2016 Letter, including copies, prior to July 10, 2018.

INTERROGATORY NO. 6:

Identify any NDOC employees, and any other persons of whom you are aware of, who were aware of Hikma's 2017 Letter, addressed to Defendant Director Dzurenda, including those who received Hikma's 2017 Letter, including copies, prior to July 10, 2018.

DATED this 1st day of August, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: /s/ *Josh M. Reid*

E. LEIF REID, ESQ., SBN 5750
JOSH M. REID, ESQ., SBN 7497
KRISTEN L. MARTINI, ESQ., SBN 11272
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996
Attorneys for Intervenor

3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996
Lewis Roca ROTHGERBER CHRISTIE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Lewis Roca Rothgerber Christie LLP, and that on this 1st day of August, 2018, I caused to be served via the Court's e-filing/e-service system and by email a true and correct copy of the above and foregoing **INTERVENOR'S INTERROGATORIES TO DEFENDANT NEVADA DEPARTMENT OF CORRECTIONS (FIRST SET)** to the following:

James J. Pisanelli, Esq.
Todd L. Bice, Esq.
Debra L. Spinelli, Esq.
PISANELLI BICE, PLLC
400 South 7th Street, Suite 300
Las Vegas, NV 89101
JJP@pisanellibice.com
TLB@pisanellibice.com
DLS@pisanellibice.com
Attorneys for Plaintiff

Kenneth G. Schuler, Esq.
Michael Faris, Esq.
Alex Grabowski, Esq.
LATHAM & WATKINS LLP
330 North Wabash Ave., Suite 2800
Chicago, IL 60611
kenneth.schuler@lw.com
michael.faris@lw.com
alex.grabowski@lw.com
Attorneys for Plaintiff

Angela Walker, Esq.
LATHAM & WATKINS LLP
555 Eleventh Street NW, Suite 1000
Washington, DC 20004-1304
angela.walker@lw.com
Attorneys for Plaintiff

Jordan T. Smith, Esq.
Assistant Solicitor General
555 East Washington Avenue, #3900
Las Vegas, Nevada 89101
JSmith@ag.nv.gov
Attorney for Defendant Nevada State of Department of Corrections and State of Nevada

/s/ Dawn M. Hayes
An employee of Lewis Roca Rothgerber Christie LLP

3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996
Lewis Roca ROTHGERBER CHRISTIE

EXHIBIT 2

EXHIBIT 2

James J. Pisanelli, Esq., Bar No. 4027
JJP@pisanellibice.com
Todd L. Bice, Esq., Bar No. 4534
TLB@pisanellibice.com
Debra L. Spinelli, Esq., Bar No. 9695
DLS@pisanellibice.com
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
Telephone: 702.214.2100

Kenneth G. Schuler, Esq. (*pro hac vice forthcoming*)
kenneth.schuler@lw.com
Michael J. Faris, Esq. (*pro hac vice forthcoming*)
michael.faris@lw.com
Alex Grabowski, Esq. (*pro hac vice forthcoming*)
alex.grabowski@lw.com
LATHAM & WATKINS LLP
330 North Wabash Avenue, Suite 2800
Chicago, IL 60611
Telephone: 312.876.7659

Angela Walker, Esq. (*pro hac vice forthcoming*)
angela.walker@lw.com
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304
Telephone: 202.637.3321

Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

ALVOGEN, INC.,

Plaintiff,

v.

STATE OF NEVADA;

NEVADA DEPARTMENT OF CORRECTIONS;

JAMES DZURENDA, Director of the Nevada Department of Correction, in his official capacity;

IHSAN AZZAM, Ph.D, M.D., Chief Medical Officer of the State of Nevada, in his official capacity;

And JOHN DOE, Attending Physician at the Planned Execution of Scott Raymond Dozier, in his official capacity;

Defendants.

Case No.: A-18-777312-B

Dept. No.: XI

PLAINTIFF'S REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS [FIRST SET]

TO: Defendants State of Nevada, the Nevada Department of Corrections, James Dzurenda, Ihsan Azzam, and John Doe I; and

TO: THEIR COUNSEL OF RECORD

Pursuant to Rule 34 of the Nevada Rules of Civil Procedure, Alvogen, Inc., through its undersigned counsel of record, propounds the following Requests for Production of Documents to Defendants State of Nevada, the Nevada Department of Corrections, James Dzurenda, Ihsan Azzam, and John Doe I. Production shall occur within (30) days of service hereof, at the offices of PISANELLI BICE PLLC, 400 South 7th Street, Suite 300, Las Vegas, Nevada, 89101.

INSTRUCTIONS

1. You shall furnish such information as is available to you. You must answer each Request completely and in a straightforward manner. If you cannot answer a Request completely, you must answer it to the extent possible, explain why you cannot answer completely, and state the nature of the information that you are unable to furnish.

2. You should make a reasonable and good faith effort to obtain responsive documents and/or information to these Requests by inquiring of persons (as defined herein) known to you to have knowledge or information relating to this action.

3. If you claim any form of privilege, whether based on statute or otherwise, as a ground for not answering a Request, or any portion thereof, you shall provide:

(a) the nature of the privilege (including work product) being claimed and, if the privilege is governed by state law, indicate the state's privilege rule being invoked; and

(b) the following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information:

i. for documents:

1) the author(s);

2) the addressee(s) and other recipient(s);

3) where not apparent, the relationship of the author(s), addressee(s), and recipient(s) to each other;

4) the type of document (e.g., letter or memorandum);

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LAS VEGAS, NEVADA 89101

5) the general subject matter of the document;

6) the date of the document; and

7) such other information as is sufficient to identify the document;

ii. for oral communications:

1) name(s) of any person making the communication;

2) name(s) of any person(s) present while the communication was made;

3) where not apparent, the relationship of any person present to any person making the communication;

4) the date and place of communication; and

5) the general subject matter of the communication.

4. Whenever a Request is answered in whole or in part by referring to a previous production, you should state:

(a) the date the document was produced;

(b) the title of the responsive pleading in which it was produced; and

(c) the Bates-stamp number(s) of each such document.

5. If you are aware of any documents or copies thereof that may be responsive to these Requests but are no longer in your possession, custody, or control, or have been lost or destroyed, identify each document in detail, including: (i) whether the document is missing, lost, or destroyed; (ii) whether the document has been transferred or delivered to another person and, if so, at whose request; (iii) who prepared it; (iv) to whom it was prepared for and sent to; (v) when it was prepared or sent; (vi) the content of the document; (vii) the person who destroyed it; and (viii) why it was lost or destroyed.

6. Format of production

(a) All documents, including all electronically stored material and information ("ESI"), will be produced in electronic format, with standard load files suitable for loading into a

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litigation support database. The load files will define document breaks, attachments, and other information identified herein.

(b) Defendants will produce all ESI, including emails, as kept in the normal course of business in its fully functional native format (e.g., Outlook mail message file, formula-functional Excel spreadsheets, PowerPoint presentations, Word documents, etc.), with all available metadata intact and identify the file, source, and custodian from which each document was obtained.

(c) Defendants will produce all ESI as a processed native production with branded natives and proper load files.

(d) For all ESI produced, defendants will maintain family relationships among all parents and attachments by ensuring that attachments immediately follow their parent email or other file, and setting the "BEGATTACH" and "ENDATTACH" metadata fields appropriately.

(e) If Defendants determine that an ESI file needs to be redacted on any asserted privilege ground, the file will be rendered in TIFF, and the TIFF will be redacted and produced. However, to the extent that the text is searchable in the native format, Defendants will provide searchable text for those portions of the document that have not been redacted. Metadata associated with these redacted ESI files will be produced to the extent that it does not disclose information designed to be protected by the redaction.

(f) If Defendants intend to produce any ESI that exists in encrypted format or is password protected, the means of gaining access to those files must be provided.

(g) Defendants will produce extracted text for each document produced. Each extracted text file will be produced as a .txt file with the filename corresponding to the Bates number of the associated document.

(h) Defendants will brand all TIFF images in the lower right-hand corner with its corresponding Bates number, using a consistent font type and size. The Bates number must not obscure any part of the underlying image.

(i) All TIFF image file names will be identical to the corresponding Bates numbered images, with a ".tif" file extension.

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(j) Defendants will use a CD, DVD, hard drive, or share third-party FTP site for its ESI production, and will cooperate in good faith to use the highest-capacity available media to minimize associated overhead. Defendants will label the physical media with the production date, media volume name, and document number range.

7. Unless stated otherwise, the time period to which these Requests refer is July 1, 2017 through the date of production. If a document prepared before this period is necessary for a correct or complete understanding of any document covered by a Request, you must produce the earlier or subsequent document as well. If any document is undated and the date of its preparation cannot be determined, the document shall be produced if otherwise responsive to the production Request.

8. These Requests are continuing in nature and must be supplemented as necessary up until the date of the conclusion of this action, including any appeals. If, after making an initial production in response hereto, you become aware of additional responsive documents, notice thereof should be provided to counsel for the Plaintiff immediately and such documents should be produced promptly thereafter.

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DEFINITIONS

For purposes of these Requests, the following definitions shall apply:

1. The term "Document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Rule 34(a) of the Nevada Rules of Civil Procedure. It shall mean and includes "duplicate" as defined in Nevada Revised Statute ("NRS") 52.195; "original" as defined in NRS 52.205; "photographs" as defined in NRS 52.215; "writings" and "recordings" as defined in NRS 52.225; and shall also mean all written or graphic matter or any other means of preserving thought or expression of every type and description including, but not limited to, originals, drafts, signed or unsigned documents regardless of whether approved, sent, received, redrafted, or executed, computer-sorted and computer-retrieved information, copies or duplicates that are marked with any notation or annotation, copies or duplicates that differ in any way from the original, correspondence, memoranda, reports, notes, minutes, contracts, agreements, books, records, vouchers, invoices, purchase orders, ledgers, diaries, logs, calendar notes, computer printouts, computer disks and programs, records, card files, press clippings, manuals, lists, audit

paperwork, financial analyses, tables, advertisements or other promotional material, audited or unaudited financial statements, newspapers or newsletters, diagrams, photographs, telegrams, statements recorded in any way, drawings, specifications, property surveys, summaries, inter-office or intra-office communications, notations of any sort of conversations, and other writings or recordings. A draft or non-identical copy is a separate document within the meaning of this term. "Document" also includes any removable "Post-it" notes or other attachments affixed to any of the foregoing.

2. "Communication(s)" means the transmission of information (in the form of facts, ideas, inquiries or otherwise) by any medium including, without limitation, orally, by personal meeting, in writing, by telephone, letter, telegraph, teleconference, facsimile, telex, telecopy, wire, radio, television, electronic mail, magnetic tape, floppy disk, diagram, graph, chart, drawing, text message, chat room, social media including Facebook and Twitter, or posting or other display on the Internet or the World Wide Web.

3. "Person" means any natural person, firm, association, organization, partnership, business, trust, corporation, joint venture or any type of entity including, but not limited to, any public entity or governmental entity.

4. "Concerning" means concerning, relating to, referring to, mentioning, describing, evidencing, or constituting.

5. "Defendants," "You," and "Your" means the State of Nevada, the Nevada Department of Corrections, James Dzurenda, Ihsan Azzam, and John Doe I.

6. "NDOC" means the Nevada Department of Corrections.

7. "Alvogen" means Plaintiff Alvogen, Inc. along with any of its present and former predecessors, predecessors-in-interest, successors, assigns, affiliates, direct or indirect subsidiaries, parents, and trusts; all firms, corporations, and other entities acting under common control with Alvogen, in joint venture with Alvogen, or under licensing or partnership agreements with Alvogen; all entities that own or are owned by Alvogen in whole or in part; and all divisions and operating units thereof.

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8. The "Alvogen Midazolam Product" means Midazolam Hydrochloride Injection, Solution (Abbreviated New Drug Application number 090850) manufactured or distributed by Alvogen.

9. The "Dozier Execution" means the execution of Scott Raymond Dozier that was previously scheduled to take place via lethal injection on Wednesday, July 11, 2018, at Ely State Prison.

10. The "April 20, 2018 Letters," attached as Attachment A hereto, refers to the letters Alvogen sent to Timothy Filson, the Warden of Ely State Prison; Defendant James Dzurenda, Director of the Nevada Department of Correction; Governor Brian Sandoval; and Attorney General Adam Laxalt.

REQUESTS FOR PRODUCTION

REQUEST NO. 1:

Any and all documents related to the April 20, 2018 Letters.

REQUEST NO. 2:

Any and all documents related to Defendants' attempts to obtain and purchase orders for the Alvogen Midazolam Product, including but not limited to internal and external communications planning or discussing the purchase, purchase orders, invoices, and shipping records.

REQUEST NO. 3:

Any and all documents related to Defendants' attempts to obtain and purchase orders for midazolam from other distributors and providers, including but not limited to internal and external communications planning or discussing the purchase, purchase orders, invoices, and shipping records.

REQUEST NO. 4:

Any and all documents related to Defendants' planned use of the Alvogen Midazolam Product in any execution, including but not limited to internal and external communications planning or discussing the product.

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LAS VEGAS, NEVADA 89101

REQUEST NO. 5:

Any and all documents related to Defendants' use of midazolam in the State's execution protocol, including but not limited to internal and external communications planning or discussing the product or any documents discussing the replacement of diazepam with midazolam for use in the State's executions.

REQUEST NO. 6:

Any documents, regardless of date, describing policies, manuals, or procedures in effect related to NDOC's drug purchases.

REQUEST NO. 7:

Any and all documents related to John Doe I's anticipated participation in the Dozier Execution, including but not limited to internal and external communications discussing the participation and manuals, policies, or standard operating procedures describing the role of an attending physician or non-physician administrator at an execution generally and the Dozier execution specifically.

REQUEST NO. 8:

Any and all documents related to alternatives to the use of Alvogen Midazolam Product in the Dozier Execution, including but not limited to internal and external communications regarding the suitability or availability of drugs other than midazolam and/or the possibility of acquiring midazolam produced or distributed by a source other than Alvogen.

REQUEST NO. 9:

Any and all documents related to communications between Defendants and Cardinal Health, including but not limited to communications regarding the acquisition or consideration of any drug for use in any lethal injection protocol.

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400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

REQUEST NO. 10:

Any and all documents related to communications involving Defendants' requests for proposals sent to pharmaceutical companies to supply drugs for lethal injections, including but not limited to the requests reported by the Las Vegas Review-Journal on October 7, 2016 and any responses to any such requests. This request includes communications related to what "options" Defendants considered if drugs were not found.

REQUEST NO. 11:

Any and all documents from January 1, 2016 to present related to whether any pharmaceutical manufacturer or distributor would "no longer provide the chemicals to the state" for use in executions as reported by the Las Vegas Review-Journal on November 27, 2016. This request includes, without limitation, any documents related to any actual or potential restrictions on such purchases of which NDOC was aware, any documents related to such restrictions, or any documents related to NDOC's actual or potential responses to, or plans or efforts to avoid or circumvent such restrictions.

REQUEST NO. 12:

Any and all documents, regardless of date, that Defendants consult, rely on, describe, or identify in answering any of Alvogen's interrogatories.

REQUEST NO. 13:

Documents, regardless of date, sufficient to show your purchases of midazolam, including from other distributors and manufacturers, for purposes consistent with its FDA-approved uses each year since 2013.

REQUEST NO. 14:

Any and all documents related to DEA number AS2995922 or any other DEA number Defendants have provided to Cardinal Health in the course of making any purchase.

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LAS VEGAS, NEVADA 89101

REQUEST NO. 15:

Any and all documents related to Defendants' statement at the July 11, 2018 hearing that "most drugs ordered by the Department of Corrections go to the central Las Vegas office." July 11, 2018 Hr. Tr. 49:6-7.

DATED this 24th day of July, 2018.

PISANELLI BICE PLLC

By: _____

James J. Pisanelli, Esq., Bar No. 4027
Todd L. Bice, Esq., Bar No. 4534
Debra L. Spinelli, Esq., Bar No. 9695
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

and

Kenneth G. Schuler, Esq.
Michael J. Faris, Esq.
Alex Grabowski, Esq.
LATHAM & WATKINS LLP
330 North Wabash Avenue, Suite 2800
Chicago, IL 60611

Angela Walker, Esq.
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and that on this 24th day of July, 2018, I caused to be served via the Court's e-filing/e-service system and by email a true and correct copy of the above and foregoing **PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS (FIRST SET)** to the following:

Jordan T. Smith, Esq.
Assistant Solicitor General
555 East Washington Avenue, #3900
Las Vegas, Nevada 89101
JSmith@ag.nv.gov

Kimberley Peets

An employee of Pisanelli Bice PLLC

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

EXHIBIT A

State Governor
State Attorney General
Director of the State Department of Corrections

April 20, 2018

Dear Attorney General Laxalt,

My name is Andrea Sweet and I am a Vice President, Legal Affairs at Alvogen, Inc.

Alvogen is aware that certain medicines we manufacture for specific healthcare applications are currently sought by some correctional facilities in the US for use in lethal injection executions.

I am writing to communicate in the clearest possible terms that Alvogen strongly objects to the use of its products in capital punishment. While Alvogen takes no position on the death penalty itself, our products were developed to save and improve patients' lives and their use in executions is fundamentally contrary to this purpose.

To ensure our products are not purchased for use in lethal injection executions, Alvogen does not accept orders from any state departments of corrections. Further, Alvogen has controls in place and directs its customers not to sell its medicines to correctional facilities or otherwise for use in connection with lethal injection executions. These controls reflect our company's policy of ensuring the appropriate use of our medicines.

The use of Alvogen products, such as midazolam or rocuronium, in executions clearly runs counter to the FDA-approved indication for these products. If your state has purchased products manufactured by Alvogen for use in capital punishment procedures – either directly or indirectly – we ask that you immediately return our products in exchange for a full refund.

Finally, I have been informed that some states have implemented "secrecy policies/laws" which they hope will enable them to bypass company control systems and purchase manufactured medicines for use in executions. Alvogen closely tracks the distribution of its medicines as required by law and will take action in case of such diversions. Transparency across the supply chain is important to protect public health and the commercial interests of healthcare companies.

If you require further clarification regarding our opposition to the misuse of medicines in executions or have questions about specific products you have purchased from Alvogen, please do not hesitate to contact me; I would be glad to discuss these issues further.

Sincerely,

Andrea Sweet
Vice President, Legal Affairs

10 Bloomfield Avenue
Building B
Pine Brook, NJ 07058

Phone 973 796 3400
Fax 973 796 3439

info@alvogen.com
www.alvogen.com

State Governor
State Attorney General
Director of the State Department of Corrections

April 20, 2018

Dear Governor Sandoval,

My name is Andrea Sweet and I am a Vice President, Legal Affairs at Alvogen, Inc.

Alvogen is aware that certain medicines we manufacture for specific healthcare applications are currently sought by some correctional facilities in the US for use in lethal injection executions.

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Sincerely,

Andrea Sweet
Vice President, Legal Affairs

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Fax 973 796 3439

info@alvogen.com
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State Governor
State Attorney General
Director of the State Department of Corrections

April 20, 2018

Dear Mr. Dzurenda,

My name is Andrea Sweet and I am a Vice President, Legal Affairs at Alvogen, Inc.

Alvogen is aware that certain medicines we manufacture for specific healthcare applications are currently sought by some correctional facilities in the US for use in lethal injection executions.

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If you require further clarification regarding our opposition to the misuse of medicines in executions or have questions about specific products you have purchased from Alvogen, please do not hesitate to contact me; I would be glad to discuss these issues further.

Sincerely,

Andrea Sweet
Vice President, Legal Affairs

10 Bloomfield Avenue
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Pine Brook, NJ 07058

Phone 973 796 3400
Fax 973 796 3439

info@alvogen.com
www.alvogen.com

State Governor
State Attorney General
Director of the State Department of Corrections

April 20, 2018

Dear Warden Filson,

My name is Andrea Sweet and I am a Vice President, Legal Affairs at Alvogen, Inc.

Alvogen is aware that certain medicines we manufacture for specific healthcare applications are currently sought by some correctional facilities in the US for use in lethal injection executions.

I am writing to communicate in the clearest possible terms that Alvogen strongly objects to the use of its products in capital punishment. While Alvogen takes no position on the death penalty itself, our products were developed to save and improve patients' lives and their use in executions is fundamentally contrary to this purpose.

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The use of Alvogen products, such as midazolam or rocuronium, in executions clearly runs counter to the FDA-approved indication for these products. If your state has purchased products manufactured by Alvogen for use in capital punishment procedures – either directly or indirectly – we ask that you immediately return our products in exchange for a full refund.

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Sincerely,

Andrea Sweet
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DLS@pisanellibice.com
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
Telephone: 702.214.2100

Kenneth G. Schuler, Esq. (*pro hac vice forthcoming*)
kenneth.schuler@lw.com
Michael J. Faris, Esq. (*pro hac vice forthcoming*)
michael.faris@lw.com
Alex Grabowski, Esq. (*pro hac vice forthcoming*)
alex.grabowski@lw.com
LATHAM & WATKINS LLP
330 North Wabash Avenue, Suite 2800
Chicago, IL 60611
Telephone: 312.876.7659

Angela Walker, Esq. (*pro hac vice forthcoming*)
angela.walker@lw.com
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304
Telephone: 202.637.3321

Attorneys for Plaintiff

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

DISTRICT COURT

CLARK COUNTY, NEVADA

ALVOGEN, INC., Plaintiff, v. STATE OF NEVADA; NEVADA DEPARTMENT OF CORRECTIONS; JAMES DZURENDA, Director of the Nevada Department of Correction, in his official capacity; IHSAN AZZAM, Ph.D, M.D., Chief Medical Officer of the State of Nevada, in his official capacity; And JOHN DOE, Attending Physician at the Planned Execution of Scott Raymond Dozier, in his official capacity; Defendants.	Case No.: A-18-777312-B Dept. No.: XI **PLAINTIFF'S INTERROGATORIES TO DEFENDANT, NEVADA DEPARTMENT OF CORRECTIONS [FIRST SET]**

TO: Defendant Nevada Department of Corrections; and

TO: THEIR COUNSEL OF RECORD

Pursuant to Rule 33 of the Nevada Rules of Civil Procedure, Alvogen, Inc., through its undersigned counsel of record, propounds the following interrogatories to Defendant the Nevada Department of Corrections, to be answered under oath and delivered within (30) days of service hereof, at the offices of PISANELLI BICE PLLC, 400 South 7th Street, Suite 300, Las Vegas, Nevada, 89101.

DEFINITIONS

1. The definitions provided in Plaintiff's Requests for Production of Documents to Defendants [First Set] are incorporated by reference herein.

2. To "Identify" an individual is to provide his or her full name, employment title, the nature of his or her occupational responsibilities, and current address.

INTERROGATORIES

INTERROGATORY NO. 1:

Identify Defendant John Doe, the attending physician who was scheduled to be the attending physician at the Dozier Execution or who may be scheduled to supervise any future execution in which the Alvogen Midazolam Product could be used.

INTERROGATORY NO. 2:

Identify any other physicians and/or non-physician administrators scheduled to attend the Dozier Execution or who may be scheduled to attend any future execution in which the Alvogen Midazolam Product could be used.

INTERROGATORY NO. 3:

Identify any NDOC employees involved with NDOC's acquisition of the Alvogen Midazolam Product.

INTERROGATORY NO. 4:

Identify any NDOC employees involved with the decision to include midazolam in the State's execution protocol and decision to administer the Alvogen Midazolam Product in any executions, including the Dozier Execution.

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

INTERROGATORY NO. 5:

Identify any NDOC employees who received Alvogen's April 20, 2018 Letter, including copies, or who were aware of the April 20, 2018 Letter prior to July 10, 2018.

INTERROGATORY NO. 6:

Identify all other persons (other than persons heretofore listed) who the Defendants intend to call as witnesses at the upcoming preliminary injunction hearing and the intended subject matter of their testimony.

DATED this 24th day of July, 2018.

PISANELLI BICE PLLC

By: _____

James J. Pisanelli, Esq., Bar No. 4027
Todd L. Bice, Esq., Bar No. 4534
Debra L. Spinelli, Esq., Bar No. 9695
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

and

Kenneth G. Schuler, Esq.
Michael J. Faris, Esq.
Alex Grabowski, Esq.
LATHAM & WATKINS LLP
330 North Wabash Avenue, Suite 2800
Chicago, IL 60611

Angela Walker, Esq.
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304

Attorneys for Plaintiff

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and that on this 24th day of July, 2018, I caused to be served via the Court's e-filing/e-service system and by email a true and correct copy of the above and foregoing **PLAINTIFF'S INTERROGATORIES TO NEVADA DEPARTMENT OF CORRECTIONS (FIRST SET)** to the following:

Jordan T. Smith, Esq.
Assistant Solicitor General
555 East Washington Avenue, #3900
Las Vegas, Nevada 89101
JSmith@ag.nv.gov

Kimberly Peets
An employee of Pisanelli Bice PLLC

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

EXHIBIT 1

EXHIBIT 1

E. LEIF REID, ESQ., SBN 5750
JOSH M. REID, ESQ., SBN 7497
KRISTEN L. MARTINI, ESQ., SBN 11727
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996
Tel: 702.949.8200
Fax: 702.949.8398
Email: lreid@lrrc.com
jreid@lrrc.com
kmartini@lrrc.com

Attorneys for Intervenor

DISTRICT COURT

CLARK COUNTY, NEVADA

ALVOGEN, INC., Plaintiff, vs. STATE OF NEVADA; NEVADA DEPARTMENT OF CORRECTION; JAMES DZURENDA, Director of the Nevada Department of Correction, in his official capacity; IHSAN AZZAM, Ph.D, M.D., Chief Medical Officer of the State of Nevada, in his official capacity; And JOHN DOE, Attending Physician at Planned Execution of Scott Raymond Dozier, in his official capacity; Defendants.	Case No. A-18-777312-B Dept. No. XI **ORDER GRANTING HIKMA PHARMACEUTICALS' MOTION TO INTERVENE**

This matter came before the Court on Hikma Pharmaceuticals USA Inc.'s ("Hikma") Motion to Intervene on July 30, 2018, at 9:00 a.m., with Kristen L. Martini, Esq., and Daniel Polsenberg, Esq., of the law firm Lewis Roca Rothgerber Christie LLP, appearing on behalf of Hikma, Todd L. Bice, Esq., and James J. Pisanelli, Esq., of the law firm Pisanelli Bice PLLC, appearing on behalf of Plaintiff Alvogen, Inc., and Jordan T. Smith, Esq., and Ann M. McDermott, Esq., of Office of the Attorney General, appearing on behalf of Defendants.

Having considered the papers filed on behalf of Hikma, and argument of counsel, and good cause appearing therefore, THE COURT HEREBY FINDS THAT:

Hikma has met its burden in establishing that its permissive intervention in this case under NRCP 24(b) is warranted, where the Hikma's claims and the main action have questions of law and fact in common, and Hikma's intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

THEREFORE IT IS HEREBY ORDERED THAT Hikma's Motion to Intervene is GRANTED.

DATED this 31 day of July, 2018.

DISTRICT COURT JUDGE

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By:

E. LEIF REID, ESQ., SBN 5750
JOSH M. REID, ESQ., SBN 7497
KRISTEN L. MARTINI, ESQ., SBN 11272
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

Attorneys for Intervenor

Lewis Roca ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

IN THE SUPREME COURT OF THE STATE OF NEVADA

*****

STATE OF NEVADA; NEVADA DEPARTMENT OF CORRECTIONS; JAMES DZURENDA, Director of the Nevada Department of Corrections, in his official capacity; IHSAN AZZAM, Ph.D, M.D., Chief Medical Officer of the State of Nevada, in his official capacity; and JOHN DOE, Attending Physician at Planned Execution of Scott Raymond Dozier in his official capacity,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE,

Respondents,

and

ALVOGEN, INC.,

Real Party in Interest.

Supreme Court Case No.: 76485

District Court Case No. A-18-777312-B

EMERGENCY MOTION UNDER NRAP 27(e) TO STAY DISTRICT COURT PROCEEDINGS PENDING THIS COURT'S DECISION ON THE PETITION

IMMEDIATE ACTION REQUESTED

ANN M. MCDERMOTT (Bar No. 8180)
Bureau Chief
JORDAN T. SMITH (Bar No. 12097)
Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
555 East Washington Avenue, Suite 3900
Las Vegas, NV 89101
(702) 486-3894
jsmith@ag.nv.gov

I. INTRODUCTION

As predicted in the Petition, the District Court's unprecedented temporary restraining order precluding the State from using a drug manufacturer's product in a lawful execution has prompted other drug makers to pile into the District Court looking for an easy public relations victory. Since the State filed its Petition, the District Court allowed Hikma Pharmaceuticals USA Inc.—the manufacturer of the second drug in the lethal injection protocol (Fentanyl)—to intervene.[1] Sandoz Inc.—the manufacturer of the third drug (Cisatracurium)—has also recently moved to participate and there is a hearing on Sandoz's intervention on Thursday, August 9, 2018. The drug manufacturers have sought expedited and invasive discovery as well as a preliminary injunction evidentiary hearing.[2]

Rather than wait for this Court's expedited decision on the State's Petition to determine if the drug manufacturers even have a single viable cause of action entitling them to unlock the doors to discovery, the District Court denied on Monday, August 6, 2018 the State's Motion to Stay Proceedings pending this Court's expedited decision and, instead, granted Real Party in Interest Alvogen Inc.'s Countermotion to *Accelerate*

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1 (Ex. 1).

2 (Exs. 2-3). While not yet formally a party, it is expected that the District Court will allow Sandoz to intervene over the State's objection and that Sandoz will seek similar discovery.

Discovery Responses.[3] Alvogen and the District Court claimed that further factual development, and the preliminary injunction hearing, would assist this Court with its appellate review and they set a path to a hurried conclusion before this Court rules.

But the State's pending Petition presents two purely legal issues: (1) whether, given NRS 176.415, the District Court has authority to enter a TRO that has the substantive effect of staying an execution; and (2) whether Alvogen—now Hikma and soon to be Sandoz—have private causes of action that allow drug manufacturers to interfere with lawful capital sentences. These are straightforward questions of law and no amount of additional facts or evidence will change their answer. If the State prevails on either one of these two issues, the underpinnings of the TRO will be reversed (or vacated) and there will be no need for accelerated discovery or the planned preliminary injunction hearing. Significant time, effort, and resources (public, private, and judicial) will be saved by awaiting this Court's guidance.

Without a stay, the parties may proceed to a preliminary injunction evidentiary hearing that is impermissible under NRS 176.415, or conduct the hearing under an erroneous legal standard. Moreover, absent a stay, the parties may engage in unnecessary discovery, with inevitable disputes that will also likely end up in this Court. Allowing discovery to proceed enables the drug manufacturers to obtain discovery, and

[3] The District Court orally made these rulings from the bench. The transcript and order are not yet available. The District Court also denied the State's request for a temporary stay to file this Motion with this Court.

impose burdens on the State, that they are not entitled to without a cognizable cause of action. The public deserves a resolution to these important legal issues in the most efficient manner without risking the waste of taxpayer resources.

On the other hand, with a stay in place, the Court's TRO will remain effective and preclude the State from using its lethal injection protocol. The State will remain unable to use Alvogen's Midazolam, Hikma's Fentanyl, or Sandoz's Cisatracurium pending this Court's review. A short stay, therefore, will not prejudice the drug manufacturers. Accordingly, judicial economy weighs in favor of staying the District Court proceedings pending this Court's decision.

II. STATEMENT OF FACTS

A. The District Court Stays Dozier's Execution and Sets a Discovery Schedule.

On July 11, 2018—the morning of Scott Dozier's scheduled execution—the District Court entered a TRO barring the State from using Alvogen's Midazolam when carrying out Dozier's sentence. (App. 430). Because Midazolam is the first drug in the State's three-drug lethal injection protocol, the TRO deprived the State of its only means to complete Dozier's sentence and, consequently, the order had the substantive effect of staying the execution. With the TRO in place, the execution was an impossibility and the State was left with no choice but to quickly return to Judge Togliatti, the issuing judge, and ask her to relieve the State of its obligation under the execution order and warrant to carry out the sentence during that week. (App. 432-46).

Immediately after granting the TRO, the District Court inquired about the parties' discovery needs prior to the preliminary injunction hearing. (App. 416-24). The District Court considered setting the evidentiary hearing for the next week. (App. 421). But given Alvogen's broad and vague claims of business reputational harm, the State requested substantial discovery to preserve its ability to adequately defend itself, including discovery on Alvogen's industry reputation and Alvogen's knowledge of Midazolam's use in other executions. (App. 418-19). Because of the State's discovery needs, the Court contemplated a discovery period of approximately 120 days. (App. 419-20; Pet. 28 n.13). The State explained "I don't think it's accurate to blame this [discovery] delay upon the State … the delay for the preliminary injunction hearing isn't because of the discovery the State *wants to seek*, *it's the nature of the claims that have been brought*." (App. 420) (emphasis added). In other words, if this Court concludes (for the first time in the Nation) that Alvogen actually possesses a viable cause of action, the State must have time to prepare its case. The District Court set a 60-day status check, on September 10, 2018. (App. 421, 424).

B. The State Files Its Petition and the Court Expedites Its Decision.

Within the timeframe set by NRS 176.492, the State filed its Petition with this Court on July 25, 2018. Two days later, the State moved to expedite the Court's decision and asked for a decision on or before October 19, 2018 due to the upcoming expiration of a batch of Cisatracurium. (Mot. to Expedite, July 27, 2018, on file). Within the hour, this Court granted the motion to expedite and directed Alvogen to file an answer by

August 16, 2018. (Order Granting Mot. to Expedite & Directing Answer, July 27, 2018, on file). The Court foreclosed any extensions and stated "[f]urther, the motion to expedite is granted. This court will expedite resolution of this petition to the extent that its docket allows." (*Id.*).

In light of this Court's decision to expedite, and because the Petition presents threshold questions about the District Court's authority to issue an injunction and the viability of Alvogen's purported claims for relief, the State moved the District Court on shortened time to stay discovery pending this Court's expedited decision.[4] Alvogen opposed the State's motion and counter-moved to expedite discovery and to set the preliminary injunction hearing at the end of September—before this Court may rule in October.[5] Even though Alvogen did not deny that the State had set forth a substantial case on the merits of its legal issues, and did not claim it would suffer irreparable harm from a stay, the District Court denied the State's Motion to Stay and shortened the response time for the parties to answer written discovery and notice depositions. The District Court also denied the State's request for a temporary stay to allow it to renew its stay motion with this Court.

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[4] (Ex. 4).

[5] (Ex. 5). In its opposition and countermotion, Alvogen—like the Federal Public Defender's Office in the last Dozier proceeding—tried to conjure a controversy about the "veracity" of the State's representation of the drug expiration dates. There is no basis for Alvogen's accusation just as there was no basis for the FPD's.

III. ARGUMENT

A. Standard for Granting a Stay Pending Writ Review.

Nevada Rule of Appellate Procedure 8(a) requires a party seeking a stay to first move in the lower court before requesting relief from this Court. NRAP 8(a); *see also Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). Yesterday, the State requested this stay from the District Court and was denied.

When considering a stay, this Court weighs a number of factors: (1) whether the object of the petition will be defeated if the stay is denied; (2) whether petitioner will suffer irreparable injury if the stay is denied; (3) whether the real party in interest will suffer irreparable harm if a stay is granted; and (4) whether petitioner is likely to prevail on the merits of the petition. NRAP 8(c). No single factor is dispositive and, if one or two factors are especially strong, those may counterbalance other weak factors. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

B. The State's Petition Presents Substantial Questions for this Court's Review.

A party requesting a stay "does not always have to show a probability of success on the merits, the movant must 'present a *substantial case* on the merits when a serious legal question is involved ….'" *See Hansen*, 116 Nev. at 659, 6 P.3d at 987 (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)) (emphasis added). A stay is appropriate when the appeal does not appear frivolous or merely an attempt to delay. *Mikohn Gaming*

Corp., 120 Nev. at 253, 89 P.3d at 40. A stay may be entered even if the appeal's merits are unclear at this stage. *See id.* at 254, 89 P.3d at 40.

Here, the State has presented a substantial case on the merits of serious legal questions. As set forth more fully in the Petition, there is a substantial question about whether the District Court's TRO offends NRS 176.415 and exceeds the District Court's authority to stay an execution. The Petition also raises a substantial doubt about whether Alvogen possesses a private right of action or retains a reversionary property interest in drugs after they are sold through intermediary distributors. The State's motion to expedite—and this Court's decision to grant it—demonstrates that the Petition was not filed to delay. Additionally, this Court's prompt action expediting and directing an answer indicates that the Petition is not frivolous. *See Wirth v. Fifth Jud. Dist. Ct.*, 2016 WL 3280375, at *1 (Nev. June 13, 2016) (unpublished disposition) ("it appeared from this court's review that Wirth had set forth an issue of arguable merit and had no adequate remedy at law. Thus, this court directed the State to file an answer") (internal citations omitted).

C. If a Stay is Denied, the State will Suffer Harm and the Objects of the Petition Will Be Defeated.

Courts can consider these two factors together. "Although irreparable or serious harm remains part of the stay analysis, this factor will not generally play a significant role in the decision whether to issue a stay." *Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 39. And even though increased litigation costs do not always rise to irreparable

harm, this Court has stayed proceedings, in part, because a party "will be forced to spend money and time preparing for trial, thus potentially losing the benefit of [the issue being appealed]." *Id.* at 253-54, 89 P.3d 39-40.

The same is true in this case. There is a high probability that the State—and the drug manufacturers—will unnecessarily spend significant time and resources conducting accelerated discovery and preparing for a preliminary injunction evidentiary hearing that this Court finds unwarranted. Without a stay, the parties will engage in document and ESI discovery, numerous depositions, and inevitable discovery disputes requiring intervention by the District Court and, ultimately, this Court. The parties can avoid these costs by waiting for this Court's expedited decision.

Moreover, the objects of the State's Petition will be defeated if a stay is denied. One of the Petition's objects is to establish that drug manufacturers do not possess a cause of action or property interest that entitles them to discovery in the first place. That object will be lost if the Court allows extensive discovery on claims that the Court soon finds meritless. The other object of the State's Petition is to establish that the District Court does not have authority to enter an injunction that has the substantive effect of staying an execution in violation of NRS 176.415. This object too will be lost if the parties proceed to a preliminary injunction hearing that is legally impermissible. These two factors counsel for a stay.

D. Alvogen Will Not Suffer Any Harm From a Stay.

Conversely, Alvogen will not suffer any harm if the Court grants a stay while it reviews the important issues presented. The only alleged injury that Alvogen identified is the supposed irreparable harm from the "use" of its products in Dozier's execution. (*See, e.g.,* App. 81-82; Pet. 21-22).

But because the District Court's TRO will remain in place pending this Court's decision, the State does not have the ability to use the three-drug lethal injection combination and thus cannot "use" the drug manufacturers' products in an execution during this requested stay. The District Court's TRO has halted all executions in the State. For instance, even if another inmate like Dozier "volunteered," the State could not proceed. As a result, Alvogen's alleged irreparable harm will not occur while this Court reviews the Petition. At most, Alvogen might protest the delay associated with the Petition. Yet "a mere delay in pursuing discovery … normally does not constitute irreparable harm." *Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 39.

This is especially so where, as here, the party has failed to present a cause of action warranting discovery in the first place. *See In re Lombardi*, 741 F.3d 888, 896 (8th Cir. 2014) (granting mandamus and holding that it was a clear abuse of discretion to order discovery "of sensitive information [that would] prevent the State from acquiring lethal chemicals necessary to carry out the death penalty" when the condemned inmates failed to state a claim); *Jones v. Comm'r, Georgia Dep't of Corr.*, 812 F.3d 923, 925 (11th Cir. 2016) (Marcus, J., concurring in the denial of initial hearing *en banc*) (stating that Federal

Rules of Civil Procedure required condemned inmate to state a claim for relief "before he was entitled to discovery on his Eighth Amendment claim").

In sum, the potential savings from a stay far outweigh any perceived prejudice to Alvogen or the other drug manufacturers.

IV. CONCLUSION

For these reasons, all NRAP 8(c) factors weigh in favor of granting a stay and the State respectfully requests that the Court stay further District Court proceedings pending this Court's decision on the State's Petition.

Dated: August 7, 2018.

/s/ Jordan T. Smith

Ann M. McDermott (Bar No. 8180)
Bureau Chief
Jordan T. Smith (Bar No. 12097)
Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
555 East Washington Avenue, Suite 3900
Las Vegas, NV 89101
jsmith@ag.nv.gov
Counsel for Petitioners

NRAP 27(e) Certificate

I, Jordan T. Smith, declare as follows:

1. I am currently employed in the Office of the Attorney General as the Deputy Solicitor General. I am counsel for Petitioners named herein.

2. I verify that I have read the foregoing Emergency Motion under NRAP 27(e) to Stay District Court Proceedings Pending This Court's Decision on the Petition and that the same is true of my own knowledge, except for matters stated on information and belief, and as to those matters, I believe them to be true.

3. The facts showing the existence and nature of the emergency are set forth in the Motion. As described above, relief is needed in less than 14 days to avoid irreparable harm. *See Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253-54, 89 P.3d 36, 39-40 (2004). Immediate action is requested.

4. The relief sought in this Motion was presented to the District Court and was denied yesterday, Monday, August 6, 2018. The State is filing this Motion at the earliest possible time.

5. I have made every practicable effort to notify the Supreme Court and opposing counsel of the filing of this Motion. The State's intent to file this Motion was expressed at the District Court hearing yesterday and opposing counsel were alerted to the filing of this Motion shortly before it was submitted for e-filing. I also called the Clerk of Court's Office before filing. A courtesy copy was emailed to all parties.

6. Below are the telephone numbers and office addresses of the known participating attorneys:

Counsel for Alvogen, Inc.

James J. Pisanelli, Esq.
Todd Bice, Esq.
Debra Spinelli, Esq.
PISANELLI BICE, PLLC
400 South 7th Street, Suite 300
Las Vegas, NV 89101
Tel: 702-214-2100

Kenneth Schuler
Michael Faris
Alex Grabowski
LATHAM & WATKINS, LLP
330 North Wabash Ave., #2800
Chicago, IL 60611
Tel: 312-876-7659

Angela Walker
LATHAM & WATKINS, LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304
Tel: 202-637-3321

Counsel for Hikma Pharmaceuticals USA Inc.

E. Leif Reid, Esq.
Josh M. Reid, Esq.
Kristen L. Martini, Esq.
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996
Tel: 702-949-8200

Counsel for Sandoz Inc. (Proposed Intervenor)

J. Colby Williams, Esq.
Philip R. Erwin, Esq.
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, NV 89101
Tel: 702-382-5222

Noel B. Ix., Esq.
PEPPER HAMILTON LLP
301 Carnegie Center, Suite 400
Princeton, NJ 08540
Tel: 609-452-0808

Andrew Kantra, Esq
300 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103
Tel: 215-981-4000

Executed on this 7th day of August 2018 in Las Vegas, Nevada.

/s/ Jordan T. Smith
Jordan T. Smith (Bar No. 12097)
Deputy Solicitor General

CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion complies with the formatting requirements of NRAP 27(d) and the typeface and type-style requirements of NRAP 27(d)(1)(E) because this Motion has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 double-spaced Garamond font. This filing also complies with NRAP 32.

I further certify that I have read this Motion and that it complies with the page or type-volume limitations of NRAP 27(d)(2) and NRAP 32 because, it is proportionately spaced, and does not exceed 10 pages.

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Motion complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: August 7, 2018.

/s/ Jordan T. Smith
Jordan T. Smith (Bar No. 12097)
Deputy Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **EMERGENCY MOTION UNDER NRAP 27(E) TO STAY DISTRICT COURT PROCEEDINGS PENDING THIS COURT'S DECISION ON THE PETITION** with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on August 7, 2018.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that a courtesy copy was emailed to counsel for Real Parties in Interest simultaneously with the filing of the foregoing.

A copy was also provided to the following:

James J. Pisanelli, Esq.
Todd Bice, Esq.
Debra Spinelli, Esq.
PISANELLI BICE, PLLC
400 South 7th Street, Suite 300
Las Vegas, NV 89101

Kenneth Schuler
Michael Faris
Alex Grabowski
LATHAM & WATKINS, LLP
330 North Wabash Avenue, Suite 2800
Chicago, IL 60611

Angela Walker
LATHAM & WATKINS, LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304

Hon. Elizabeth Gonzalez
Eighth Judicial District Court
Department 11
200 Lewis Avenue
Las Vegas, NV 89155

E. Leif Reid, Esq.
Josh M. Reid, Esq.
Kristen L. Martini, Esq.
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

/s/ Barbara Fell
An employee of the
Office of the Attorney General