In the Supreme Court of Nevada

STATE OF NEVADA; NEVADA DEPARTMENT OF CORRECTIONS; JAMES DZURENDA, Director of the Nevada Department of Corrections, in his official capacity; IHSAN AZZAM, PhD., 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 Judge,

Respondents,

and

ALVOGEN, INC.,

Real Party in Interest.

Supreme Court No. 76485

District Court No. A-18-777312-B

HIKMA PHARMACEUTICALS USA INC.'S EMERGENCY MOTION UNDER NRAP 27(E) TO AMEND THE CAPTION AND APPEAR AS A REAL PARTY IN INTEREST

(IMMEDIATE ACTION REQUESTED)

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I. INTRODUCTION

Hikma Pharmaceuticals USA Inc. ("Hikma"), a current co-plaintiff in the underlying litigation, moves pursuant to NRAP 27(e) to amend the caption and appear in this matter as a real party in interest to be heard on Petitioners' Petition to Dissolve Stay of Execution under NRS 176.492 and Petition for Writ of Mandamus or Prohibition ("Writ Petition"). *See* NRAP 21(a)(2) ("The petition shall include in the caption: the name of each petitioner; the name of the appropriate judicial officer, public tribunal, corporation, commission, board or person to whom the writ is directed as the respondent; and the name of each real party in interest, if any."). Hikma requests that its status as a real party in interest to the Writ Petition be considered immediately so that Hikma may be permitted to be file an opposition to Petitioners' Emergency Motion Under NRAP 27(e) to Stay the District Court Proceedings Pending the Court's Decision on the Petition ("Motion to Stay"), and an Answer or joinder to real party in interest Alvogen, Inc.'s ("Alvogen") Answer to the Writ Petition under the expedited timeline set forth in this Court's July 27, 2018, Order. As a co-plaintiff in the underlying action and a real party in interest to this writ proceeding, Hikma seeks an Order

from this Court on an emergency basis so that it may appear and be heard in this writ proceeding.

II. PERTINENT FACTUAL BACKGROUND

Hikma is a pharmaceutical manufacturer of the fentanyl that is currently in possession of Petitioners (the "State") and identified by the State as one of the three components to its lethal injection protocol that the State intends to use in the upcoming execution of Scott Raymond Dozier. On July 24, 2018, Hikma submitted to the district court its Motion to Intervene in the underlying action on an Order Shortening Time. The State filed its Writ Petition with this Court on July 25, 2018.

On July 25, 2018, the district court granted Hikma's request to hear Hikma's Motion to Intervene on an expedited basis, and held a hearing for the same on July 30, 2018. *See* Ex. 1. Over the State's objection, the district court granted Hikma's Motion to Intervene based on the common questions of law and fact raised by Alvogen and Hikma in the underlying matter, pursuant to NRCP 24(b). *See id.* Hikma filed its Complaint in Intervention in the underlying action on July 30, 2018. *See* Ex. 2.

On August 2, 2018, the State filed Defendants' Motion to Stay

Proceedings Pending Nevada Supreme Court Decision on Order Shortening Time in the underlying action. *See* Ex. 3. The district court held a hearing on the Motion to Stay on August 6, 2018, at which Alvogen and Hikma objected to the State's request. In addition to the arguments made by Alvogen, in which Hikma joined, Hikma further objected to a stay of the underlying action because it was not a party to the district court's temporary restraining order; thus, it should be allowed to proceed with discovery in the district court proceedings. The district court denied the State's stay request and granted Alvogen's countermotion, and Hikma's joinder therein, to expedite the discovery proceedings in the underlying action and schedule the preliminary injunction hearing. Hikma has since filed its Joinder in and Supplement to Alvogen's Motion for Preliminary injunction with the district court.

On August 7, 2018, the State filed its Motion to Stay before this Court, requesting immediate action under NRAP 27(e).

This motion now follows.

III. ARGUMENT

Standing to appear in writ proceedings is broader than standing to appear in an appeal. *See, e.g.*, *State ex rel. Tidvall v. Eighth Judicial*

Dist. Court, 91 Nev. 520, 524, 539 P.2d 456, 458 (1975) (holding that the state superintendent of banks, not a party to the underlying litigation, had standing to petition for a writ of prohibition to protect and enforce a statutory privilege). As succinctly stated by one court,

> it is fundamental that an action must be prosecuted by one who has a beneficial interest in the outcome. In a mandamus proceeding, it is the parties in the underlying proceeding, not the courts . . . which have a beneficial interest in the outcome of a case; the role of the respondent court is that of a neutral party.

Mun. Court v. Superior Court, 857 P.2d 325, 326 (Cal. 1993) (internal brackets and quotation marks omitted); *accord Ng v. Superior Court*, 61 Cal. Rptr. 2d 49, 52 (Cal. Ct. App. 1997) ("[I]f . . . mandamus is sought against a court, the respondent judge . . . is a neutral party in the controversy between the plaintiff and defendant in the main action. The adverse party in that action is the real party in interest.") (quoting 8 Witkin, California Procedure, § 148 (3d ed. 1985), *overruled on other grounds by Curie v. Superior Court*, 16 P.3d 166, 174 n.6 (Cal. 2001)).

Due to the fact that the State is attempting to limit Hikma's ability to seek relief in the underlying action through the Writ Petition, Hikma has a direct interest in the outcome of the Writ Petition and

should be added as a real party in interest to this writ proceeding, just as it is a party in the underlying action.

Hikma has an interest in the correct application of Nevada law that is the subject of the Writ Petition. Any ruling by this Court on the Writ Petition will have an impact on Hikma's case. This fact is evidenced in the papers filed by the State in the underlying action. In its motion to stay filed in the underlying action, the State argued that a ruling on its Writ Petition by this Court could limit Hikma's ability to seek injunctive relief before the district court, and requested that the district court stay all discovery until a ruling is made on the Writ Petition. *See* Ex. 3 at 1-2. The State made similar arguments in its Motion to Stay filed before this Court on August 7, 2018. The State does not, and cannot, dispute that Hikma has a substantial interest in the outcome of the Writ Petition and these proceedings. Based on its direct interest in this matter, allowing Hikma to participate in these proceedings before this Court as a real party in interest is warranted.

Moreover, Hikma's participation in these proceedings before this Court as a real party in interest will not prolong or complicate these proceedings, as Hikma agrees to comply with the timelines established

in this Court's July 27, 2018, Order Granting Motion to Expedite and Directing Answer. Real party in interest Alvogen has consented to this instant request, and Hikma will most likely join in Alvogen's Answer to the Writ Petition.

IV. CONCLUSION

For the foregoing reasons, an Order amending the caption and granting Hikma permission to appear in this matter as a real party in interest is warranted.

Dated this 8th day of August, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Josh M. Reid*
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Attorneys for Hikma Pharmaceuticals USA Inc.

NRAP 27(e) CERTIFICATE

I, Josh M. Reid, Esq., declare as follows:

1. I am counsel of record of Hikma Pharmaceuticals USA Inc. ("Hikma").

2. I verify that I have read the foregoing Emergency Motion Under NRAP 27(e) to Amend the Caption and Appear as a Real Party In Interest ("Motion"), and the same is true of my own knowledge, except for matters stated upon 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. In short, on July 27, 2018, this Court issued an Order granting Petitioner's Motion to Expedite and directed real party in interest Alvogen, Inc. to answer the Writ Petition within 20 days, or August 20, 2018. Without immediate recognition of Hikma as a real party in interest for the Writ Petition, which Alvogen, Inc. supports, Hikma will be unable to be heard on Petitioners' request for a stay of the district court action, or answer the Writ Petition, or file a joinder to real party in interest Alvogen Inc.'s answer, and further participate in the Court's review of the underlying district court litigation to which Hikma is a party.

4. 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 required.

I have made every practicable effort to notify this Court and all counsel of record of the filing of this Motion. On August 6, 2018, I spoke with Deputy Solicitor General Jordan T. Smith and informed him that Hikma was going to file a motion to participate as a real party in interest in this writ proceeding, and he stated that he could not consent to Hikma's motion. My office is emailing copies of the motion and this certificate to each of the listed attorneys for petitioners and real parties in interest.

5. A courtesy copy of this Motion is being emailed to all parties to this proceeding.

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

Attorneys for real party in interest Hikma Pharmaceuticals USA Inc.:

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Josh M. Reid
Kristen L. Martini
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Attorneys for Petitioners:

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Executed on this 8th day of August, 2018.

*/s/ Josh M. Reid*_____
JOSH M. REID (SBN 7497)

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 proportionately-spaced typeface using Office Word in size 14 double-spaced Century Schoolbook 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 certify that to the best of my knowledge, information, and belief, this Motion is not frivolous or interposed for an improper purpose.

Dated this 8th day of August, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Josh M. Reid*

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Attorneys for Hikma Pharmaceuticals USA Inc.

NRAP 26.1 DISCLOSURE

Counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed for the Justices of this Court to evaluate possible disqualification or recusal.

Hikma Pharmaceuticals USA Inc., formerly known as West-Ward Pharmaceuticals Corp., is a Delaware corporation with its principal place of business located at 246 Industrial Way West, Eatontown, New Jersey. Hikma is a subsidiary of Hikma Pharmaceuticals PLC, a publicly traded company on the London Stock Exchange. Hikma has been represented in this litigation by E. Leif Reid, Josh M. Reid, and Kristen L. Martini of Lewis Roca Rothgerber Christie LLP.

Dated this 8th day of August, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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Attorneys for Hikma Pharmaceuticals USA Inc.

CERTIFICATE OF SERVICE

I certify that on August 8, 2018, I submitted the foregoing HIKMA PHARMACEUTICALS USA INC.'S EMERGENCY MOTION UNDER NRAP 27(E) TO AMEND THE CAPTION AND APPEAR AS A REAL PARTY IN INTEREST for filing *via* the Court's eFlex electronic filing system. Simultaneous electronic notification and/or email notification will be sent to the following:

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I further certify that a copy of this document will be served by hand de-

livery to:

Honorable Elizabeth Gonzalez
Department 11
EIGHTH JUDICIAL DISTRICT COURT
200 Lewis Avenue
Las Vegas, Nevada 89155

/s/ Jessie M. Helm
An Employee of Lewis Roca
Rothgerber Christie LLP

EXHIBIT 1

EXHIBIT 1

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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

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EXHIBIT 2

EXHIBIT 2

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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

HIKMA PHARMACEUTICALS USA INC.'S COMPLAINT IN INTERVENTION

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.

COMES NOW Intervenor Hikma Pharmaceuticals USA Inc. ("Hikma"), through its counsel of Lewis Roca Rothgerber Christie LLP, and for its Complaint in Intervention alleges and complains against Defendants as follows:

PARTIES, JURISDICTION, AND VENUE

1. Intervenor Hikma, formerly known as West-Ward Pharmaceuticals Corp., is a Delaware corporation with its principal place of business located at 246 Industrial Way West, Eatontown, New Jersey. Hikma is a subsidiary of Hikma Pharmaceuticals PLC, a publicly-traded company on the London Stock Exchange.

2. Upon information and belief, Plaintiff Alvogen, Inc. ("Alvogen"), is a Delaware corporation with its principal place of business located at 10 Bloomfield Avenue, Pine Brook, New Jersey.

3. Defendant State of Nevada is the sovereign government of Nevada.

4. Defendant Nevada Department of Corrections ("NDOC"), led by its Director James Dzurenda ("Dzurenda"), is a Nevada state governmental entity, with offices in Nevada, including at 3995 West Russell Road, Las Vegas, Nevada, 89118.

5. Defendant Dr. Ihsan Azzam, Ph.D., M.D., serves as the Nevada State Chief Medical Officer at the Nevada Department of Health and Human Services, Division of Public and Behavioral Health, with offices in Nevada, including in Las Vegas.

6. Defendant John Doe I is an individual who was going to serve as the attending physician at the planned execution of inmate Scott Raymond Dozier. To the extent there are

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multiple individuals who serve as attending physicians at the future execution of Scott Raymond Dozier, or any other execution performed in the future by the State of Nevada, they are named herein as John Doe II, John Doe III, *et seq.*

7. This Court has jurisdiction over these Defendants as each of them is an entity or agent of the State of Nevada, conducting business in Nevada. Venue is proper in this Court pursuant to NRS 13.020, as material events giving rise to this action, including Defendants' unauthorized acquisition of the drug Fentanyl, occurred in Clark County, Nevada.

INTRODUCTION

8. Nearly one-hundred years ago, the United States Supreme Court made it very clear that a manufacturer of a product has the right to not sell its products to certain individuals or entities, and that there is a "long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *See United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). This right, commonly referred to as the "*Colgate* doctrine," continues to be recognized and applied by the Court. *See Pac. Bell Tele. Co. v. Linkline Communications, Inc.*, 555 U.S. 438, 448 (2009). Since its inception, Hikma has had a mission to treat illnesses and enhance lives by providing patients with access to high quality and affordable medicines. Upon learning that some states, including the State of Nevada, were considering new medicines to use in their lethal injection protocols, Hikma exercised its rights and took proactive action to prevent its medicines from being used in this use that is inconsistent with the U.S. Food and Drug Administration's ("FDA") approved therapeutic and medical uses for its products and counter to Hikma's values as an organization, the interests of its customers, and the financial interests of Hikma and its shareholders.

9. In 2016, Hikma exercised its right not to sell its products to the State of Nevada for use in lethal injection, and gave written notice to Defendants that Hikma objected in the strongest possible terms to the use of any of its products for lethal injection. Again in 2017, Hikma took proactive action to enforce its rights and provided another written notice to Defendants to restate its policy and position on the use of these drugs in which it stated that "[w]e object in the strongest possible terms to the use of any or our products for lethal injection." In addition, Hikma has taken

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additional proactive actions to prevent its products from being used for lethal injection, including placing certain controls on the sale of its products.

10. Hikma is not the only pharmaceutical company that has taken affirmative action to exercise its rights to not sell their products for use in lethal injection. More than 20 American and European pharmaceutical companies have taken action to prevent their products from being used for lethal injections. *See* **Ex. 1**. Similar to other pharmaceutical companies, Hikma has an important interest in protecting its business reputation and meeting its fiduciary duties to its shareholders. Experts have commented, for example, that a pharmaceutical company's involvement with lethal injection may open the company to liability, including the loss of large institutional investors and litigation from their shareholders. *See id.* As U.S. a subsidiary of an international pharmaceutical company publicly traded on the London Stock Exchange, Hikma has taken multiple proactive actions to protect its rights and values, and also to protect its business and investor and prospective investor relations.

11. In spite of Hikma's written demands and warnings not to have its products sold and used in conjunction with lethal injection, Defendants took action to illegitimately acquire Hikma's products and use them as part of their lethal injection protocol.

12. NDOC has acknowledged that they have made attempts to maintain the secrecy of and/or conceal their acquisition and possession of Hikma's fentanyl product ("Hikma's Fentanyl") because of a concern that information as to "where a state obtains execution drugs" may be used "to persuade the manufacturer and others to cease selling that drug for execution purposes." *Am. Civil Liberties Union of Nev. Found. v. State*, Case No. 18-OC-00163, Order Granting In-Part Emergency Pet. Issuing Writ of Mandamus, at 4 (Nev. Dist. Ct. July 6, 2018).

13. Now that Defendants have acquired Hikma's product to use it in conjunction with a lethal injection protocol (over the specific objections of Hikma) Defendants have violated Hikma's rights and Nevada law relating to controlled substances. If Defendants are allowed to continue to circumvent Nevada law, and Hikma's recognized right to use its own business judgment to determine how its products may be sold and used, and use Hikma's product for lethal injection,

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Defendants' actions will result in Hikma's immediate and irreparable harm, damage to Hikma's hard-earned business reputation, and financial damage to Hikma and its shareholders.

GENERAL ALLEGATIONS

I. HIKMA'S MANUFACTURE AND APPROVED DISTRIBUTION OF FENTANYL

14. The Hikma Group acquired West-Ward Pharmaceuticals Corp., now known as Hikma, more than 20 years ago. Since then, it has become a leading manufacturer and provider of quality oral, liquid, inhalant, and injectable branded and non-branded generic medicines in the United States. Hikma aims to improve lives by providing patients access to high-quality, affordable medicines. Hikma's medicines are used thousands of times a day around the world to treat illnesses and save lives. It has built a global reputation for the same.

15. Among its products in the United States, Hikma manufactures and distributes a product called Fentanyl Citrate Injection, USP C-II ("Hikma's Fentanyl"), which is in the narcotic (opiate) analgesics class of medications.

16. Upon information and belief, eight other manufactures produce fentanyl in the United States.

17. Fentanyl is a synthetic opioid that was originally developed in 1959 or 1960 as a powerful, intravenous anesthetic for surgery. Fentanyl has been approved by the FDA since 1972 (but in combination since 1968) for use in as an analgesic (pain relief) and anesthetic. It is used to treat sudden breakthrough pain that occurs despite continuous treatment with pain medication, and in people who suffer from severe, long-term pain, primarily in cancer patients but also in other chronic, intense pain scenarios presenting with non-cancerous maladies. It is also the most often used intraoperative analgesia.

18. Fentanyl has become extremely important in severe, chronic pain management in the practice of modern-day medicine due to its effectiveness, as well as its minimal or nonexistent effects to the cardiovascular system and plasma histamine (distinguishing it from other μ-opioid receptor agonists), its rapid onset of action and short duration of effects, and the ease and low cost in synthesizing and preparing for the marketplace.

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19. Fentanyl is a Schedule II controlled substance; therefore, it has a high potential for abuse, with use potentially leading to severe psychological or physical dependence.

20. To maintain Hikma's reputation for producing safe, high-quality products, Hikma is committed to going beyond mere compliance with the law and strives to uphold the highest ethical standards in everything it does.

21. In an attempt to ensure that its fentanyl product, among other products, is used responsibly, Hikma has placed controls on the purchase and use of its products. Such controls include internal policies and procedures, and contracts with its customers to restrict the supply of Hikma products for the distribution and use in lethal injection protocols.

22. Hikma has refused the direct sale of its products to departments of corrections for use in capital punishment, and works directly with its distribution partners to add restrictions for unintended use to its distribution contracts.

23. Hikma states its policy against the use of any of its products in capital punishment on its website:

> We object in the strongest possible terms to the use of any of our products for the purpose of capital punishment. Not only is it contrary to the intended label use(s) for the products, but it is also inconsistent with our values and mission of improving lives by providing quality, affordable healthcare to patients.

Ex. 2 (http://www.hikma.com/about/our-policies/use-of-products-in-capital-punishment/ (last accessed July 24, 2018)). Hikma's website further publishes the various controls it has in place "to prevent these products from being used for the purpose of capital punishment," including that Hikma "will not accept orders for these products directly from any Departments of Correction or correctional facilities in the United States, unless accompanied by an original, raised seal copy of an affidavit signed by the state attorney general (or governor), certifying under penalty of perjury that the product(s) will not be used for capital punishment," and that Hikma "will only sell these same drugs to pre-selected commercial customers who agree that they will not then sell them to Departments of Corrections/correctional facilities, or to secondary distributors or retail pharmacies." *Id.* Hikma also restricted particular drugs that have a heightened potential of misuse

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for lethal injection protocols, publishing them on Hikma's restricted list. *See id.* These drugs include Hikma's Fentanyl and midazolam products. *Id.*

II. DEFENDANTS ADD FENTANYL TO THE STATE'S LETHAL INJECTION PROTOCOL, THE FIRST STATE TO DO SO

24. Upon information and belief, NDOC, like other death-penalty states, was well-aware of certain drug manufacturers' restrictions on the use of their drugs in executions. According to the Las Vegas Review-Journal, as reported on October 7, 2016, NDOC sent out 247 requests for proposals on September 2, 2016, to manufactures for the purchase of the drugs that it intended to use in legal injunctions after the stockpile of at least one of the drugs in its possession expired. (Nevada's last execution occurred in 2006.) Not one response was received. Because no pharmaceutical companies bid to supply the drugs for lethal injections, Nevada prison officials were on the record as stating that "the state will have to explore its options to carry out executions." *See* Alvogen Compl. for Emergency Injunctive Relief & Return of Illegally-Obtained Prop. at Ex. 1.

25. Other states in which the death penalty is implemented have also looked to locate alternative compounds for their legal injection protocols as a result of drug manufacturers' opposition to having their medicines used in executions. Upon information and belief, some states started to experiment with mixtures of drugs that were never intended for this purpose.

26. On December 20, 2016, Hikma sent letters to Nevada's Attorney General Adam Laxalt, Governor Brian Sandoval, and Defendant Dzurenda, in which Hikma vehemently objected to any of its products being used for lethal injection ("2016 Letters"). Hikma stated, "We object in the strongest possible terms to the use of **any of our products** for lethal injection," including Hikma's Fentanyl, and again made clear that its objection should be applied to all of its products. **Ex. 3 (emphasis added)**. Hikma notified these recipients that such use was

> inconsistent with the FDA indication and contrary to [Hikma's] intention of manufacturing the product for health and well-being of patients in need, but also it is completely counter to our values as an organization.

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Id. Hikma stated that it was not aware of Defendants having possession of any of its products at that time, but noted that its objection was made because it had become aware that some states were considering new compounds to use in lethal injections.

27. Hikma further explained,

> In the event that we were forced to implement additional controls to prevent these uses, it may have the unintended consequence of potentially preventing certain patients from receiving these medicines despite having a genuine need. This outcome would not be beneficial for anyone, particularly the people of Nevada. We believe that Nevadans deserve high quality, generic medicines and we are very pleased to continue to play a role in manufacturing much needed products to improve health. As such, we hope that you will give serious consideration to the positions that we have set forth in this letter and be our partner in furthering our values and policy.

Id.

28. By the end of September 2017, in addition to its general prohibitions, Hikma expressly placed its fentanyl and midazolam products on the restricted list.

29. In November 2017, in Scott Raymond Dozier's habeas corpus case (*Dozier v. State*, Case No. 05C21503, Notice of Redacted Version of the State of Nev.'s Execution Protocol (Dist. Ct. Nev. Nov. 11, 2017), the State filed a redacted version of NDOC's Executional Manual, dated November 7, 2017, wherein it confirmed that fentanyl was one of the three drugs consisting of Nevada's new lethal injection protocol.

30. This was the first time any state in the country included fentanyl as part of its lethal injection protocol. This fact means that the State's novel misuse of the drug in executions is experimental.

31. According to Josh Bloom, Senior Director of Chemical and Pharmaceutical Sciences of the American Council on Science and Health, the State's decision to use fentanyl in Scott Raymond Dozier's execution rendered him "flabbergasted,"

> You got something that's killing hundreds of people a day across the United States, and you got prisons who can't get death penalty drugs, so they're turning to the drug that's killing hundreds of people across the United States. . . . This sounds like an article from the Onion[, a news satire website].

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32. Upon information and belief, shortly before the NDOC's execution manual was published, the drug manufacturer Pfizer indicated that the fentanyl and diazepam that NDOC originally intended to use to execute Scott Raymond Dozier were Pfizer products. Pfizer objected to NDOC's use of its products for lethal injections, and demanded return of the products.

33. Upon information and belief, Nevada prisons spokeswoman Brooke Keast rejected any assertion that the State was obligated to return their product.

34. As another reminder to Defendants in light of the on-going controversy, on December 17, 2017, Hikma sent letters to Nevada's Attorney General Adam Laxalt, Governor Brian Sandoval, and Defendant Dzurenda, in which Hikma again vehemently objected to any of its products being used for lethal injection ("2017 Letters"). *See* **Ex. 4**. Hikma restated that such use of any Hikma products is contrary to the FDA approved-use, in addition to being contradictory to the intended use of the products and Hikma's organizational values. *Id.*

35. Hikma echoed its 2016 Letters in stating that it has certain controls in place to prevent departments of corrections from using its products for lethal injection, "including the restriction of any direct sales to Departments of Corrections of restricted products, or sales to customers." *Id.*

36. Although Hikma was not aware of the State being in possession of Hikma products for such purpose and communicated the same, to be sure, Hikma echoed,

> [W]e are writing again to restate our policy and our position on the use of these drugs: We object in the strongest possible terms to the use of any of our products for lethal injection.
>
> We wrote to you on this same topic this time last year, and are reaching out to advise you that we have had to extend the restriction of products to include additional drugs, as states continue to experiment with new cocktails. There is a list of restricted products on our website which we keep current.
>
> To this point, we would like to make clear that our objection should be applied to any and all West-Ward and Hikma products, not just those on our restricted list.

Id.

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III. DEFENDANTS ILLEGALLY OBTAINED HIKMA'S FENTANYL PRODUCT FOR DEFENDANTS' INTENTIONAL AND UNAPPROVED USE IN SCOTT RAYMOND DOZIER'S EXECUTION

37. On or about July 10, 2018, Hikma was informed that the State had confirmed its intention to execute Scott Raymond Dozier on Wednesday, July 11, 2018, using fentanyl and midazolam in its three-drug protocol. At that time, it was unclear whether Defendants were in possession of Hikma's Fentanyl or midazolam products.

38. On July 10, 2018, Hikma was notified of Alvogen's initiation of the instant lawsuit, and Alvogen's request for a preliminary injunction. Through these filings, Alvogen confirmed that Defendants were intending to use Alvogen's Midazolam Product in the execution, not Hikma's.

39. This Court heard argument on Alvogen's *ex parte* application for a Temporary Restraining Order at 9 a.m. on July 11, 2018. This Court issued the Temporary Restraining Order the same day, prohibiting and enjoining Defendants from using Alvogen's Midazolam Product in capital punishment until further order of the Court.

40. After the hearing on Alvogen's *ex parte* application, Hikma obtained copies of documents produced as a result of a court order in litigation initiated by the American Civil Liberties Union of Nevada. *See Am. Civil Liberties Union of Nev. Found. v. State*, Case No. 18 OC 00163 1B, Order Granting In-Part Emergency Pet. Issuing Writ of Mandamus (Nev. Dist. Ct. July 6, 2018). The court order compelled NDOC to disclose the lethal injection procedures it planned to implement in Scott Raymond Dozier's execution. The documents included a list of the drugs to be included in the lethal injection protocol along with the invoices related to NDOC's purchase of those specific drugs. These invoices identified Hikma's Fentanyl, NDC/UPC 0061-6027-25. *See* **Ex. 5**. These invoices further showed that NDOC placed multiple small orders of the drugs over a number of months, with some orders following the last by only one day.

41. The invoice for Hikma's Fentanyl was from one of Hikma's wholesale distributors, Cardinal Health, placed on September 28, 2017, for shipment the next day, and addressed to be billed and shipped to the Nevada Department of Correction Center Pharmacy, located at the NDOC's administrative building in Las Vegas—not to the Ely State Prison, which is where

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Nevada's executions take place and located over 200 miles away from its Las Vegas building. *See id.*

42. Under the product description, Cardinal Health referenced message 121: "This product is required by the FDA to be dispensed with a medication guide. . . ." *Id.*

43. In order to purchase Hikma's Fentanyl, NDOC was required to provide Cardinal Health with proof of a medical license issued to NDOC's medical director.

44. Under Nevada's Uniform Controlled Substances Act, codified at NRS Chapter 453, "a physician . . . may prescribe or administer controlled substances only for a legitimate medical purpose and in the usual course of his or her professional practice." NRS 453.381(1) (emphasis added). A physician is not allowed to use a non-physician to evade that prohibition.

45. Upon information and belief, NDOC's purchase order to Cardinal Health for Hikma's Fentanyl used the Nevada Chief Medical Officer's license to obtain Hikma's Fentanyl. In doing so, NDOC intended Cardinal Health to believe that the order was placed at the request or for the benefit of the physician and would be used for a legitimate medical purpose, consistent with Nevada's Controlled Substances Act, and the Nevada State Board of Medical Examiners' regulations.

46. NDOC acquired Hikma's Fentanyl from Cardinal Health when it was aware that Hikma strongly objected to and prohibited the use of all of its products in executions, as being contrary to FDA-approved therapeutic and medical uses, and Hikma's intention of manufacturing products for the health and well-being of patients in need, and values as a company. *See* **Ex. 2**.

47. NDOC was further aware of the approved and disapproved uses of fentanyl in Cardinal Health's invoice message informing NDOC that fentanyl "is required by the FDA to be dispensed with a medication guide." *See* **Ex. 5**.

48. NDOC acquired Hikma's Fentanyl nonetheless through a source that was not authorized to sell to the NDOC for the non-approved use in an execution.

49. Following Defendants' receipt of Hikma's 2016 Letters, *see* **Ex. 3**, Defendants thereafter sought to circumvent Hikma's policy by purchasing the Hikma Fentanyl through an unsuspecting intermediary and without disclosing to said intermediary that they planned to use the

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Hikma's Fentanyl product for an execution. Defendants were thus able to obtain the Hikma Fentanyl in a manner that they would not have been able to accomplish had they disclosed that they planned to use the Hikma Fentanyl for an execution.

50. Even after receiving Hikma's 2017 Letters reiterating its objection to NDOC's use of any of its products for executions, *see* **Ex. 4**, Defendants thereafter announced their intention to use Hikma's Fentanyl in the lethal injection protocol for Scott Raymond Dozier—a purpose for which it is neither allowed nor intended to be used. While Hikma takes no position on the death penalty sentence imposed upon Scott Raymond Dozier, Hikma's products were manufactured to promote the health and well-being of patients in need—not in state-facilitated executions.

51. Upon confirming that Defendants intended to use Hikma's Fentanyl in the scheduled lethal injection of Scott Raymond Dozier on July 11, 2018, Hikma hand-delivered its third notices to Nevada's Attorney General Adam Laxalt, Governor Brian Sandoval, and Defendant Dzurenda ("2018 Letters"). *See* **Ex. 6**. Hikma reminded these recipients, including NDOC—once again—of Hikma's position on the misuse of its medicines in executions. *See id.*

52. Hikma stated its belief that NDOC is in possession of Hikma's Fentanyl, and that it may be used in a pending execution, additionally stating,

> Despite our best efforts to ensure our medicines are used only for their intended medicinal purposes—including a requirement that these products are only supplied to pre-authorized customers who agree in writing not to sell them to Departments of Corrections or other entities that intend to use them for lethal injection-some states continue to attempt to procure our products from distributors and other intermediaries for use in lethal injection. Not only is this inconsistent with the FDA indication and contrary to our intention of manufacturing the product for the health and well-being of patients in need, but it is also completely counter to our company values.

Id.

53. Hikma demanded that NDOC immediately return all of Hikma's Fentanyl, and other products, intended for use in executions, in exchange for a full refund for such use would represent a serious misuse of life-saving medicines. *Id.* Hikma specifically requested that

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Defendant Dzurenda and other NDOC officials not circumvent Hikma's carefully-prepared controls or potentially undermine these specifically drafted legal provisions in its agreements. *Id.*

54. Defendants have not responded to Hikma's letter.

IV. DEFENDANTS CONTINUED MISUSE OF HIKMA'S FENTANYL IN EXECUTIONS, INCLUDING THAT OF SCOTT RAYMOND DOZIER, WILL CAUSE HIKMA TO SUFFER IMMEDIATE AND IRREPARABLE INJURY

55. Since NDOC's declaration of its new and untested lethal injection protocol to be used in the execution of Scott Raymond Dozier, including the novel use of fentanyl in the execution, a media frenzy has exploded. NDOC's decision to use fentanyl has been widely criticized.

56. The severe criticism communicated by the American public, medical and legal professionals, and scholars alike, leads to Hikma as the manufacturer of the first-time use of this already controversial drug in this even more divisive execution. As more fully set forth herein, Defendants' actions have caused, and will continue to cause, unless preliminarily and permanently enjoined, substantial and irreparable injury to Hikma including, but not limited to, reputational injury arising out of (i) association with the manufacture of drugs used for executions, (ii) the corresponding damage to business and investor and prospective investor relationships, (iii) damage to goodwill, and (iv) other irreparable harm to be proven at trial.

FIRST CLAIM FOR RELIEF
(Unlawful Obtainment of a Controlled Substance)

57. Hikma incorporates the preceding paragraphs as though fully set forth herein.

58. Upon information and belief, Defendants sought to circumvent Hikma's controls by issuing purchase orders for Hikma's Fentanyl for completion in September 2017 with an unsuspecting distributor. Thus, on or about September 28, 2017, the NDOC Pharmacy submitted a purchase order for Hikma's Fentanyl to Cardinal Health, a wholesaler for Hikma's Fentanyl, for use in the execution of Scott Raymond Dozier scheduled for July 11, 2018. Fentanyl is a Schedule II controlled substance. The purchase orders were scheduled to be completed the next day.

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59. Upon information and belief, including the procedures outlined in the NDOC Execution Manual, Defendant Azzam, the Nevada Chief Medical Officer, a licensed physician, acquired and/or directed the acquisition of Hikma's Fentanyl by or for Defendants and in active concert with the other Defendants.

60. Under Nevada law, "a person shall not . . . unlawfully take, obtain or attempt to take or obtain a controlled substance from a manufacturer, wholesaler, pharmacist, physician, . . . or any other person authorized to administer, dispense or possess controlled substances." NRS 453.391(1). Defendants each qualify as a "person" for purposes of the foregoing. *See* NRS 453.113.

61. As described above in Paragraphs, Defendants knew that Hikma "object[s] in the strongest possible terms to the use of any of [its] products for lethal injection," including Hikma's Fentanyl, and again made clear that its objection should be applied to all of its products. **Ex. 3.** Indeed, on December 20, 2016, Hikma sent the 2016 Letters to Defendants informing them that such use was

> inconsistent with the FDA indication and contrary to [Hikma's] intention of manufacturing the product for health and well-being of patients in need, but also it is completely counter to our values as an organization.

Id. Defendants also knew that Hikma was forced to implement additional controls to prevent uses of its products in lethal injections. *Id.* As described above in Paragraph 12, the NDOC's own statements in other litigation related to Scott Raymond Dozier's execution further show that the NDOC was aware of and actively fought disclosure of certain execution-related information because such information had been used to persuade manufacturers to cease selling their products for executions.

62. Upon information and belief, following their receipt of the 2016 Letters, Defendants, at the direction of and/or with the approval of Defendant Azzam, thereafter sought to circumvent Hikma's policy by purchasing Hikma's Fentanyl through an unsuspecting intermediary and without disclosing to said intermediary the contents of the 2016 Letters and/or the fact that they sought to obtain Hikma's Fentanyl for non-therapeutic purposes (*i.e.*, an

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execution). Defendants were thus able to illicitly obtain Hikma's Fentanyl in a manner that they would not have been able to accomplish had they disclosed the contents of said letter and/or their intended non-therapeutic use of Hikma's Fentanyl to the intermediary.

63. Upon information and belief, Defendants sought to circumvent Hikma's controls by issuing purchase orders for Hikma's Fentanyl for completion in September 2017 with an unsuspecting distributor. Upon information and belief, Defendants, including Defendant Azzam, acted in concert with one another to acquire Hikma's Fentanyl from Cardinal Health. At the time of their actions, Defendants knew and had been placed on notice that Hikma, along with all other FDA-approved sources, had prohibited the distribution, sale, and transfer of such drugs for use in execution protocols. Upon information and belief, Defendants acted in concert with one another—and with at least one physician in violation of Nevada law—to acquire Hikma's Fentanyl through a source that was not authorized to sell to NDOC for the non-approved use in an execution.

64. To further the implication that Hikma's Fentanyl was for a legitimate medical purpose, Defendants specified that Hikma's Fentanyl should be shipped to NDOC's Central Pharmacy at the NDOC's administrative building in Las Vegas, rather than directly to the Ely State Prison, where Nevada's newly-constructed execution chamber is located. By way of the foregoing, Defendants thus tacitly and erroneously misrepresented that Hikma's Fentanyl would be used for legitimate medical purposes.

65. Defendants undertook these actions with full knowledge that Hikma does not permit sales of any of its products, including Hikma's Fentanyl, to state correctional facilities nor to any entity for purposes of capital punishment.

66. Based upon the foregoing, and upon information and belief, NDOC's purchase from Cardinal Health leveraged the NDOC Chief Medical Officer's license to illicitly obtain Hikma's Fentanyl. In so doing, NDOC intended Cardinal Health to believe that the order was placed at the request of, or for the benefit of, the physician and would be used for a legitimate medical purpose, consistent with Nevada's Controlled Substances Act and Nevada State Board of Medical Examiners regulations.

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67. Further, Defendants obtained Hikma's Fentanyl in an unlawful manner for the reasons explained in Hikma's Fourth and Fifth Claims for Relief, as Defendants' acquisition of Hikma's Fentanyl is in derogation of, and violates, Hikma's property rights.

68. Further, Defendants obtained Hikma's Fentanyl in an unlawful manner for the reasons explained in Hikma's Second and Third Claims for Relief, as Defendants' acquisition of Hikma's Fentanyl was undertaken for purposes of unlawfully administering it for a non-therapeutic use (an execution) as well as for unlawfully furnishing it to non-physician administrators.

69. Because of Defendants' wrongdoing, Hikma has suffered and continues to suffer injuries, including, but not limited to reputational injury arising out of (i) association with the manufacture of drugs used for executions, (ii) the corresponding damage to business and investor and prospective investor relationships, (iii) damage to goodwill, and (iv) other irreparable harm to be proven at trial.

SECOND CLAIM FOR RELIEF
(Administration of a Controlled Substance for an Illegitimate Purpose)

70. Hikma incorporates the preceding paragraphs as though fully set forth herein.

71. Under Nevada law, "a physician . . . may prescribe or administer controlled substances only for a legitimate medical purpose and in the usual course of his or her professional practice." NRS 453.381(1). A physician may not use a non-physician to evade that prohibition.

72. Under the NDOC's Execution Manual, "an attending physician or other properly trained and qualified medical professional" will be present at the execution to assess the inmate's need for pre-execution sedatives, observe the preparation of the lethal drugs, advise on the venipuncture for the delivery of the lethal drugs, monitor the inmate's consciousness during the execution, and respond in the event the execution is ordered to be stopped. *See* Nevada Department of Corrections, *Execution Manual § 110.02—Execution of Condemned Inmate* (Effective Date: June 11, 2018).

73. As the "Attending Physician," the doctor who attends the execution is ultimately responsible for the care and treatment of the patient, including the administration of any drugs to

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that patient. *See, e.g.*, Center for Medicare and Medicaid Services, *Glossary* (last accessed July 19, 2018), https://www.cms.gov/apps/glossary/default.asp?Letter=ALL (defining the attending physician as the licensed physician "who has primary responsibility for the patient's medical care and treatment"); Educational Commission for Foreign Medical Students, Health Care Team (last accessed July 19, 2018), https://www.ecfmg.org/echo/team-doctors-attending-physician.html (stating that the attending physician is "ultimately responsible for all patient care" and "has legal and ethical responsibility for directing care of the patient").

74. Execution by lethal injection is not a "legitimate medical purpose." *See, e.g.*, American Medical Association, Code of Medical Ethics Opinion 9.7.3 (stating that "as a member of a profession dedicated to preserving life when there is hope in doing so, a physician must not participate in a legally authorized execution").

75. Defendants threatened and continue to threaten to have a physician administer and/or direct and supervise the administration of Hikma's Fentanyl for a purpose that is neither therapeutic nor in furtherance of the "healing arts" (as they are called under Nevada law), but rather to facilitate a patient's death. The administration of Hikma's Fentanyl for a lethal injection constitutes the administration of a controlled substance for a purpose (ending a life) that does not qualify as a legitimate medical purpose.

76. Accordingly, to the extent permitted to implement Defendants' proposed execution protocol, John Doe I will violate Nevada law by directing the administration of Hikma's Fentanyl, a controlled substance, for a purpose that is outside of the therapeutic purposes set forth in the Hikma labeling and for a use (ending a life) that does not qualify as a legitimate medical purpose.

77. To the extent that Defendants intend to employ non-physicians to administer Hikma's Fentanyl, John Doe I would again be acting in violation of Nevada law, as the attending physician is ultimately responsible for the administration of anesthetic agents like Hikma's Fentanyl. *See* NAC 630.830 (prohibiting a delegating practitioner from delegating or allowing a medical assistant "to administer an anesthetic agent which renders a patient unconscious or semiconscious").

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78. Unless enjoined, Defendants' threatened and imminent wrongdoing will cause Hikma to suffer injuries, including, but not limited to reputational injury arising out of (i) association with the manufacture of drugs used for executions, (ii) the corresponding damage to business and investor and prospective investor relationships, (iii) damage to goodwill, and (iv) other irreparable harm to be proven at trial.

THIRD CLAIM FOR RELIEF
(Unlawful Furnishing of a Controlled Substance)

79. Hikma incorporates the preceding paragraphs as though fully set forth herein.

80. Under Nevada law, a person who "knowingly and unlawfully services, sells or otherwise furnishes a controlled substance to another person" is liable for wrongdoing or damage caused as a result of the use of the controlled substance. NRS 41.700(1)(a)-(b).

81. Defendants' furnishing of Hikma's Fentanyl to John Doe I and/or non-physician administrators is unlawful because, *inter alia*, it was obtained from Hikma and/or Cardinal Health for an illegitimate medical purpose in violation of NRS 453.381(1).

82. Further, Defendants' furnishing of Hikma's Fentanyl to John Doe I and/or non-physician administrators is unlawful for the reasons set forth in Hikma's Fourth and Fifth Claims for Relief, as Defendants' acquisition of Hikma's Fentanyl is in derogation of, and violates, Hikma's property rights.

83. Further, Defendants' furnishing of Hikma's Fentanyl to John Doe I and/or non-physician administrators is unlawful because Defendants' acquisition of Hikma's Fentanyl was undertaken for purposes of unlawfully administering it for a non-therapeutic use (an execution) as well as for unlawfully furnishing it to non-physician administrators.

84. Under Nevada law, a person who "[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," is liable for any wrongdoing or damage caused as a result of the use of the controlled substance. NRS 41.700(1)(b).

85. Defendants intend to imminently allow another person—John Doe I and/or non-physician administrators—to use a controlled substance (Hikma's Fentanyl) on their premises.

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Defendants' proposed conduct is unlawful for the reasons set forth *supra*. Defendants' imminently threatened wrongdoing will be in violation of Nevada law for this independent reason.

86. Unless enjoined, Defendants' threatened and imminent wrongdoing will cause Hikma to suffer injuries, including, but not limited to reputational injury arising out of (i) association with the manufacture of drugs used for executions, (ii) the corresponding damage to business and investor and prospective investor relationships, (iii) damage to goodwill, and (iv) other irreparable harm to be proven at trial.

FOURTH CLAIM FOR RELIEF
(Replevin)

87. Hikma incorporates the preceding paragraphs as though fully set forth herein.

88. Upon information and belief, Defendants sought to circumvent Hikma's controls by issuing purchase orders for Hikma's Fentanyl for completion in September 2017 with an unsuspecting distributor, Cardinal Health. Based on those purchase orders to be completed in September 2017, Cardinal Health shipped to Defendants a total of 25 2ml vials of 50mcg/ml Hikma's Fentanyl.

89. As set forth above, Defendants knew or should have known that the distributor was not permitted, allowed, or authorized to sell Hikma's Fentanyl or other Hikma products to NDOC and the remaining Defendants, let alone for the purpose of an execution. Indeed, Hikma had written to Defendants in December 2016—prior to their illicit acquisition of Hikma's Fentanyl—to warn them that Hikma "object[s] in the strongest possible terms to the use of any of [its] products for lethal injection," including Hikma's Fentanyl, and that certain controls were in place to prevent such usage. Hikma's website further published the various controls it has in place to "to prevent these products from being used for the purpose of capital punishment," including that Hikma "will not accept orders for these products directly from any Departments of Correction or correctional facilities in the United States, unless accompanied by an original, raised seal copy of an affidavit signed by the state attorney general (or governor), certifying under penalty of perjury that the product(s) will not be used for capital punishment," and that Hikma "will only sell these same drugs to pre-selected commercial customers who agree that they will not then sell them to

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Departments of Corrections/correctional facilities, or to secondary distributors or retail pharmacies."

90. Upon information and belief, NDOC wrongfully took possession of Hikma's Fentanyl by tacitly misrepresenting that it would be used for a legitimate medical purpose.

91. As set forth in its 2016 Letters to Defendants, in light of its clear and unambiguous communications and restrictions regarding the sale of Hikma's Fentanyl, Hikma is the rightful owner of its Fentanyl and has a present and immediate right of possession to said property.

92. Given the unambiguous contents of Hikma's 2016 Letters and its public statements regarding its corporate policies, Defendants were on actual and/or constructive notice that they could not purchase any product, including Hikma's Fentanyl, directly from Hikma absent an original, raised seal copy of an affidavit signed by the Attorney General, certifying under penalty of perjury that the products will not be used for capital punishment. Defendants were also on actual and/or constructive notice that Hikma's distributors were not authorized to transfer any Hikma product, including Hikma's Fentanyl, to Defendants for purposes of utilizing it in an execution. Thus, Defendants had actual and/or constructive notice that they could not in good faith acquire title to Hikma's Fentanyl. Hence, Hikma's Fentanyl is neither the property of NDOC nor the State of Nevada.

93. Defendants received additional actual or constrictive notice when Hikma again notified Defendants through Hikma's 2017 and 2018 Letters, that none of Hikma's products could be used for lethal objection, and that it had controls in place to prevent departments of corrections from using Hikma products for capital punishment or sales to customers. Defendants were aware that their possession of Hikma's Fentanyl was unlawful.

94. Hikma has a specific interest in Hikma's Fentanyl vials that are in the possession of NDOC because NDOC intends to use Hikma's property for the administration of capital punishment, in violation of Hikma's policies and agreements between Hikma and its distributor(s).

95. In its 2018 Letter, Hikma specifically demanded that Defendants immediately return to Hikma its Fentanyl intended for use in executions, and any other products which have

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been obtained for that purpose in exchange for a full refund. Hikma also requested that Defendants not circumvent Hikma's controls, intentions, and legal provisions and agreements.

96. In spite of said demand, Defendants have refused to return Hikma's Fentanyl that they illicitly and improperly obtained.

97. Hikma's Fentanyl is approved by the FDA solely for the therapeutic uses as an analgesic (pain relief) and anesthetic.

98. Defendants have announced plans to utilize Hikma's Fentanyl for a purpose for which it is neither indicated nor intended to be used—*to wit*, in Defendants' lethal injection protocol. While Hikma takes no position on the death penalty sentence imposed upon Scott Raymond Dozier, Hikma's products were developed to save and improve patients' lives and their use in executions is fundamentally contrary to this purpose.

99. Hikma has a property right in both its Fentanyl and its right to deal—or refuse to deal—with particular prospective customers with respect to said drug. The Supreme Court of the United States long ago recognized the "right of [a] trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal, and, of course, [to] announce in advance the circumstances under which he will refuse to sell." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Hikma has exercised those rights both generally in its statements to the public and to prison officials and specifically in communications with Defendants. Thus, as set forth supra, Hikma specifically wrote to NDOC (through Defendant Dzurenda) and the Nevada Attorney General to specifically warn them that they were customers with whom Hikma refused to deal—both directly and indirectly—with regard to the acquisition of Hikma's Fentanyl.

100. Defendants' actions are wrongful vis-à-vis Hikma because, *inter alia*, they are inconsistent with Hikma's property rights, they do not constitute the appropriate and therapeutic use for Hikma's Fentanyl for a legitimate medical purpose, they are contrary to the therapeutic uses for which the drug can be utilized, and they risk grave harm to Hikma's reputation and goodwill.

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101. Because of Defendants' wrongdoing, Hikma has suffered and continues to suffer injuries, including, but not limited to reputational injury arising out of (1) association with the manufacture of drugs used for executions, (ii) the corresponding damage to business and investor relationships, (iii) damage to goodwill, and (iv) other irreparable harm to be proven at trial.

FIFTH CLAIM FOR RELIEF
(Conversion)

102. Hikma incorporates the preceding paragraphs as though fully set forth herein.

103. NDOC has undertaken a distinct act of dominion wrongfully exerted over Hikma's personal property, Hikma's Fentanyl, in denial of, or inconsistent with his title or rights therein, or in derogation, exclusion, or defiance of such title or rights.

104. NDOC has dominion over Hikma's Fentanyl because NDOC is currently in possession of Hikma's Fentanyl.

105. Given the unambiguous contents of Hikma's 2016 Letters and its public statements regarding its corporate policies, Defendants were on actual and/or constructive notice that they could not purchase Hikma's Fentanyl directly from Hikma and that Hikma's distributors were not authorized to transfer Hikma's Fentanyl to Defendants for purposes of utilizing it in an execution. Thus, Defendants had actual and/or constructive notice that they could not in good faith acquire title to Hikma's Fentanyl.

106. Hikma has true right or title to Hikma's Fentanyl because, *inter alia*, they were sold without authorization, in direct contravention of Hikma's stated policy of not selling its Fentanyl, or any of its products, directly to departments of corrections and other entities, and not allowing its distributors to sell Hikma's Fentanyl to customers for use in lethal injections, and in violation of Hikma's fundamental property right to refuse to sell to Defendants (either directly or indirectly), and because Defendants illicitly obtained possession of said product.

107. NDOC's dominion is wrongfully exerted because NDOC was aware of Hikma's policy of not selling any of its products to Departments of Corrections for use in carrying out lethal injections. Indeed, Hikma's 2016 Letters sent to NDOC informed them that Hikma "object[s] in the strongest possible terms to the use of any of [its] products for lethal injection,"

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including Hikma's Fentanyl, and again made clear that its objection should be applied to all of its products. As described in Paragraph 12 above, NDOC's own statements in other litigation related to this execution further show that NDOC was aware of and actively fought disclosure of certain execution-related information because such information had been used to persuade manufacturers to cease selling their products for executions.

108. NDOC's dominion is wrongfully exerted for the additional reasons set forth *supra*, in Hikma's Second and Third Claims for Relief.

109. Upon information and belief, following their receipt of Hikma's 2016 Letters, Defendants thereafter sought to circumvent Hikma's policy by purchasing Hikma's Fentanyl through an unsuspecting intermediary and without disclosing to said intermediary the contents of the 2016 Letters and/or the fact that they sought to obtain Hikma's Fentanyl for purposes of a non-therapeutic use (*i.e.*, an execution). Defendants were thus able to obtain Hikma's Fentanyl in a manner that they would not have been able to accomplish had they disclosed the contents of said letter and/or their intended non-therapeutic use of Hikma's Fentanyl to the intermediary.

110. Defendants received additional actual or constrictive notice of Hikma's policies when Hikma again notified Defendants through Hikma's 2017 and 2018 Letters, that none of Hikma's products could be used for lethal objection, and that it had controls in place to prevent departments of corrections from using Hikma products for capital punishment or sales to customers. Defendants were aware that their possession of Hikma's Fentanyl was unlawful. In its 2018 Letter, Hikma specifically demanded that Defendants immediately return to Hikma its Fentanyl intended for use in executions, and any other products which have been obtained for that purpose in exchange for a full refund. Hikma also requested that Defendants not circumvent Hikma's controls, intentions, and legal provisions and agreements.

111. In spite of said demand, Defendants have refused to return Hikma's Fentanyl that they improperly obtained.

112. Defendants have announced plans to utilize Hikma's Fentanyl for a purpose for which it is neither indicated nor intended to be used—*to wit*, in Defendants' lethal injection protocol. While Hikma takes no position on the death penalty sentence imposed upon Scott

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Raymond Dozier, Hikma's products were developed to save and improve patients' lives and their use in executions is fundamentally contrary to this purpose.

113. Hikma has a property right in both its Fentanyl and its right to deal—or refuse to deal—with particular prospective customers with respect to said drug. The Supreme Court of the United States long ago recognized the "right of [a] trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal, and, of course, [to] announce in advance the circumstances under which he will refuse to sell." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Hikma has exercised those rights both generally in its statements to the public and to prison officials and specifically in communications with Defendants. Thus, as set forth *supra*, Hikma specifically wrote to NDOC (through Defendant Dzurenda) and the Attorney General to specifically warn them that they were customers with whom Hikma refused to deal—both directly and indirectly—with regard to the acquisition of Hikma's Fentanyl.

114. Defendants' actions are wrongful vis-à-vis Hikma because, *inter alia*, they are inconsistent with Hikma's property rights, they do not constitute the appropriate and therapeutic use for Hikma's Fentanyl for a legitimate medical purpose, they are contrary to the therapeutic uses for which the drug can be utilized, and they risk grave harm to Hikma's reputation and goodwill.

115. Because of Defendants' wrongdoing, Hikma has suffered and continues to suffer injuries, including, but not limited to reputational injury arising out of (i) association with the manufacture of drugs used for executions, (ii) the corresponding damage to business and investor relationships, (iii) damage to goodwill, and (iv) other irreparable harm to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Intervenor Hikma prays for relief as follows:

1. For a preliminary and permanent injunction precluding the use of any Hikma drug, including Hikma's Fentanyl and midazolam, in carrying out any capital punishment and further ordering NDOC to return immediately all of Hikma's Fentanyl to Hikma, as well as requiring an impoundment of all of Hikma's Fentanyl possessed by Defendants pending a hearing on its status;

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2. For declaratory relief as requested herein;

3. For an award of attorneys' fees and costs of suit as allowed by law; and

4. For such other and further relief as this Court deems appropriate under the circumstances.

DATED this 30th day of July, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: /s/ *Josh M. Reid*
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Attorneys for Intervenor

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CERTIFICATE OF SERVICE

Pursuant to Nevada Rule of Civil Procedure 5(b) and E.D.C.R. 8.05, I certify that I am an employee of Lewis Roca Rothgerber Christie LLP, and that on this day, I caused a true and correct copy of the foregoing **Hikma Pharmaceuticals USA Inc.'s Complaint in Intervention** to be served via the Court's File & Serve Electronic Filing System, on all interested parties in the above-referenced matter. The date and time of the electronic service is in place of the date and place of deposit in the mail.

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Attorney for Defendant Nevada State of Department of Corrections and State of Nevada

DATED this 30th day of July, 2018.

/s/ *Annette Jaramillo*
an employee of Lewis Roca Rothgerber Christie LLP

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EXHIBIT 1

EXHIBIT 1

The New York Times

Pfizer Blocks the Use of Its Drugs in Executions

By Erik Eckholm

May 13, 2016

The pharmaceutical giant Pfizer announced on Friday that it had imposed sweeping controls on the distribution of its products to ensure that none are used in lethal injections, a step that closes off the last remaining open-market source of drugs used in executions.

More than 20 American and European drug companies have already adopted such restrictions, citing either moral or business reasons. Nonetheless, the decision from one of the world's leading pharmaceutical manufacturers is seen as a milestone.

"With Pfizer's announcement, all F.D.A.-approved manufacturers of any potential execution drug have now blocked their sale for this purpose," said Maya Foa, who tracks drug companies for Reprieve, a London-based human rights advocacy group. "Executing states must now go underground if they want to get hold of medicines for use in lethal injection."

The obstacles to lethal injection have grown in the last five years as manufacturers, seeking to avoid association with executions, have barred the sale of their products to corrections agencies. Experiments with new drugs, a series of botched executions and covert efforts to obtain lethal chemicals have mired many states in court challenges.

The mounting difficulty in obtaining lethal drugs has already caused states to furtively scramble for supplies.

Some states have used straw buyers or tried to import drugs from abroad that are not approved by the Food and Drug Administration, only to see them seized by federal agents. Some have covertly bought supplies from loosely regulated compounding pharmacies while others, including Arizona, Oklahoma and Ohio, have delayed executions for months or longer because of drug shortages or legal issues tied to injection procedures.

A few states have adopted the electric chair, firing squad or gas chamber as an alternative if lethal drugs are not available. Since Utah chooses to have a death penalty, "we have to have a means of carrying it out," said State Representative Paul Ray as he argued last year for authorization of the firing squad.

Lawyers for condemned inmates have challenged the efforts of corrections officials to conceal how the drugs are obtained, saying this makes it impossible to know if they meet quality standards or might cause undue suffering.

"States are shrouding in secrecy aspects of what should be the most transparent government activity," said Ty Alper, associate director of the death penalty clinic at the University of California, Berkeley, School of Law.

Before Missouri put a prisoner to death on Wednesday, for example, it refused to say in court whether the lethal barbiturate it used, pentobarbital, was produced by a compounding pharmacy or a licensed manufacturer. Akorn, the only approved company making that drug, has tried to prevent its use in executions.

Pfizer's decision follows its acquisition last year of Hospira, a company that has made seven drugs used in executions including barbiturates, sedatives and agents that can cause paralysis or heart failure. Hospira had long tried to prevent diversion of its products to state prisons but had not succeeded; its products were used in a prolonged, apparently agonizing execution in Ohio in 2014, and are stockpiled by Arkansas, according to documents obtained by reporters.

Because these drugs are also distributed for normal medical use, there is no way to determine what share of the agents used in recent executions were produced by Hospira, or more recently, Pfizer.

Campaigns against the death penalty, and Europe's strong prohibitions on the export of execution drugs, have raised the stakes for pharmaceutical companies. But many, including Pfizer, say medical principles and business concerns have guided their policies.

"Pfizer makes its products to enhance and save the lives of the patients we serve," the company said in Friday's statement, and "strongly objects to the use of its products as lethal injections for capital punishment."

Pfizer said it would restrict the sale to selected wholesalers of seven products that could be used in executions. The distributors must certify that they will not resell the drugs to corrections departments and will be closely monitored.

David B. Muhlhausen, an expert on criminal justice at the Heritage Foundation, accused Pfizer and other drug companies of "caving in to special interest groups." He said that while the companies have a right to choose how their products are used, their efforts to curb sales for executions "are not actually in the public interest" because research shows, he believes, that the death penalty has a deterrent effect on crime.

Pressure on the drug companies has not only come from human rights groups. Trustees of the New York State pension fund, which is a major shareholder in Pfizer and many other producers, have used the threat of shareholder resolutions to push two other companies to impose controls and praised Pfizer for its new policy.

"A company in the business of healing people is putting its reputation at risk when it supplies drugs for executions," Thomas P. DiNapoli, the state comptroller, said in an email. "The company is also risking association with botched executions, which opens it to legal and financial damage."

Less than a decade ago, lethal injection was generally portrayed as a simple, humane way to put condemned prisoners to death. Virtually all executions used the same three-drug combination: sodium thiopental, a barbiturate, to render the inmate unconscious, followed by a paralytic and a heart-stopping drug.

In 2009, technical production problems, not the efforts of death-penalty opponents, forced the only federally approved factory that made sodium thiopental to close. That, plus more stringent export controls in Europe, set off a cascade of events that have bedeviled state corrections agencies ever since.

Many states have experimented with new drug combinations, sometimes with disastrous results, such as the prolonged execution of Joseph R. Wood III in Arizona in 2014, using the sedative midazolam. The state's executions are delayed as court challenges continue.

Under a new glaring spotlight, deficiencies in execution procedures and medical management have also been exposed. After winning a Supreme Court case last year for the right to execute Richard E. Glossip and others using midazolam, Oklahoma had to impose a stay only hours before Mr. Glossip's scheduled execution in September. Officials discovered they had obtained the wrong drug, and imposed a moratorium as a grand jury conducts an investigation.

A majority of the 32 states with the death penalty have imposed secrecy around their drug sources, saying that suppliers would face severe reprisals or even violence from death penalty opponents. In a court hearing this week, a Texas official argued that disclosing the identity of its pentobarbital source "creates a substantial threat of physical harm."

But others, noting the evidence that states are making covert drug purchases, see a different motive. "The secrecy is not designed to protect the manufacturers, it is designed to keep the manufacturers in the dark about misuse of their products," said Robert Dunham, executive director of the Death Penalty Information Center, a research group in Washington.

Georgia, Missouri and Texas have obtained pentobarbital from compounding pharmacies, which operate without normal F.D.A. oversight and are intended to help patients meet needs for otherwise unavailable medications.

But other states say they have been unable to find such suppliers.

Texas, too, is apparently hedging its bets. Last fall, shipments of sodium thiopental, ordered by Texas and Arizona from an unapproved source in India, were seized in airports by federal officials.

For a host of legal and political reasons as well as the scarcity of injection drugs, the number of executions has declined, to just 28 in 2015, compared with a recent peak of 98 in 1999, according to the Death Penalty Information Center.

A version of this article appears in print on May 13, 2016, on Page A1 of the New York edition with the headline: Pfizer Prohibits Use of Its Drugs for Executions

EXHIBIT 2

EXHIBIT 2

Use of products in capital punishment

Hikma aims to improve lives by providing patients with access to high quality, affordable medicines. Our medicines are used thousands of times a day around the world to treat illness and save lives.

We object in the strongest possible terms to the use of any of our products for the purpose of capital punishment. Not

only is it contrary to the intended label use(s) for the products, but it is also inconsistent with our values and mission of improving lives by providing quality, affordable healthcare to patients.

While none of our products should ever be used for the purpose of capital punishment, in the table below, we have identified certain products that carry heightened risk of misuse for lethal injection protocols. Accordingly, to prevent these products from being used for the purpose of capital punishment, we will not accept orders for these products directly from any Departments of Correction or correctional facilities in the United States, unless accompanied by an original, raised seal copy of an affidavit signed by the state attorney general (or governor), certifying under penalty of perjury that the product(s) will not be used for capital punishment. Further, we will only sell these same drugs to pre-selected commercial customers who agree that they will not then sell them to Departments of Corrections/correctional facilities, or to secondary distributors or retail pharmacies.

We vigorously monitor the distribution of these products and support industry serialization efforts that will help enhance these controls while continuing to promote our values and mission.

Further, transparency is one of our core values, and as such we object to attempts by any entity, person or state to obscure or hide the source of products for lethal injection. It is imperative that we are not impeded from protecting patient health and the integrity of our products and our supply chain.

Name / Description
HYDROMORPHONE 2MG/ML VIAL X 25
HYDROMORPHONE 40MG/20ML VIAL X 1
MIDAZOLAM 10MG/10ML VIAL X 10
MIDAZOLAM 10MG/2ML VIAL X 10
MIDAZOLAM 10MG/2ML VIAL X 25

MIDAZOLAM 2MG/2ML VIAL X 10
MIDAZOLAM 2MG/2ML VIAL X 25
MIDAZOLAM 50MG/10ML VIAL X 10
MIDAZOLAM 5MG/5ML VIAL X10
MIDAZOLAM 5MG/ML VIAL X 25
PHENOBARBITAL 130MG/ML VIAL X 25
PHENOBARBITAL 65MG/ML VIAL X 25
ETOMIDATE 20 MG/10 ML VIAL X 10
ETOMIDATE 40 MG/20 ML VIAL X 10
Fentanyl Citrate Injection, USP C-II (AMPULS) 100 mcg / 2 mL
Fentanyl Citrate Injection, USP C-II (AMPULS) 250 mcg / 5 mL
Fentanyl Citrate Injection, USP C-II (AMPULS) 1000 mcg / 20 mL
Fentanyl Citrate Injection, USP C-II (VIALS) 100 mcg / 2 mL
Fentanyl Citrate Injection, USP C-II (VIALS) 250 mcg / 5 mL
Fentanyl Citrate Injection, USP C-II (VIALS) 1000 mcg / 20 mL
Fentanyl Citrate Injection, USP C-II (VIALS) 2500 mcg / 50 mL

EXHIBIT 3

EXHIBIT 3

Hikma Pharmaceuticals PLC
1 New Burlington Place
London W1S 2HR
United Kingdom
Tel: +44 20 7399 2760
Fax: +44 20 7399 2761

20 December 2016

The Honorable Adam Laxalt
Attorney General
State of Nevada
Old Supreme Ct. Bldg.
100 N. Carson St.
Carson City, NV 89701
USA

Dear Mr. Laxalt,

Hikma aims to improve lives by providing patients with access to high quality, affordable medicines. Our medicines are used millions of times a day to treat illness and save lives. This has been our mission for more than 40 years and one that is shared by our US subsidiary, West-Ward.

We are extremely dismayed to learn that, despite our best efforts to ensure our medicines are used only for their intended medicinal purposes, some states continue to attempt to procure our products for use in lethal injection. Not only is this an off-label use and inconsistent with the FDA indication and contrary to our intention of manufacturing the product for the health and well-being of patients in need, but also it is completely counter to our values as an organization.

You are likely aware that to prevent Phenobarbital Sodium, Midazolam Hydrochloride and Hydromorphone Hydrochloride being used by Departments of Corrections for lethal injection, we have put certain controls in place. While we are not aware that Nevada is in possession of any of these products intended for this purpose, we are writing to restate our policy and our position on the use of these drugs: We object in the strongest possible terms to the use of any of our products for lethal injection.

In addition, we have become aware that some states are considering a new list of compounds to use in lethal injection. We would like to make clear that our objection should be applied to all West-Ward products, not just Phenobarbital Sodium, Midazolam Hydrochloride and Hydromorphone Hydrochloride.

In the event that we were forced to implement additional controls to prevent these uses, it may have the unintended consequence of potentially preventing certain patients from receiving these medicines despite having a genuine medical need. This outcome would not be beneficial for anyone, particularly the people of Nevada. We believe that Nevadans deserve high quality, generic medicines and we are very pleased to continue to play a role in manufacturing much needed products to improve health. As such, we hope that you will give serious consideration to the positions that we have set forth in this letter and be our partner in furthering our values and policy.

Sincerely,

Brooke S Clarke
VP Corporate Affairs

Hikma Pharmaceuticals PLC
1 New Burlington Place
London W1S 2HR
United Kingdom
Tel: +44 20 7399 2760
Fax: +44 20 7399 2761

20 December 2016

The Honorable Brian Sandoval
Governor
State of Nevada
Capitol Building
Carson City, NV 89701
USA

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20 December 2016

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Mr. James Dzurenda
Director
Department of Corrections
5500 Snyder Ave
P.O. Box 7011
Carson City, Nevada 89701
USA

Dear Mr. Dzurenda,

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Brooke S Clarke
VP Corporate Affairs

EXHIBIT 4

EXHIBIT 4

HIKMA
QUALITY

Hikma Pharmaceuticals PLC
1 New Burlington Place
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12 December 2017

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You are likely aware that to prevent our products being used by Departments of Corrections for lethal injection, we have put certain controls in place including the restriction of any direct sales to Departments of Corrections of restricted products, or sales to customers

While we are not aware that Nevada is in possession of any of these products intended for this purpose, we are writing again to restate our policy and our position on the use of these drugs: We object in the strongest possible terms to the use of any of our products for lethal injection.

We wrote to you on this same topic this time last year, and are reaching out to advise you that we have had to extend the restriction of products to include additional drugs, as states continue to experiment with new cocktails. There is a list of restricted products on our website which we keep current.

To this point, we would like to make clear that our objection should be applied to any and all West-Ward and Hikma products, not just those on our restricted list.

In the event we were forced to implement additional controls to prevent diversion and misuse, it may have the unintended consequence of potentially preventing certain patients from receiving these medicines despite having a genuine medical need. This outcome would not be beneficial for anyone, particularly the good people of your state. High quality, generic medicines play a vital role in improving health. As such, we hope you will be our partner in furthering our values and upholding our policy.

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VP Corporate Affairs

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We wrote to you on this same topic this time last year, and are reaching out to advise you that we have had to extend the restriction of products to include additional drugs, as states continue to experiment with new cocktails. There is a list of restricted products on our website which we keep current.

To this point, we would like to make clear that our objection should be applied to any and all West-Ward and Hikma products, not just those on our restricted list.

In the event we were forced to implement additional controls to prevent diversion and misuse, it may have the unintended consequence of potentially preventing certain patients from receiving these medicines despite having a genuine medical need. This outcome would not be beneficial for anyone, particularly the good people of your state. High quality, generic medicines play a vital role in improving health. As such, we hope you will be our partner in furthering our values and upholding our policy.

Brooke S Clarke
VP Corporate Affairs

EXHIBIT 5

EXHIBIT 5

S (623) 478-8500

CARDINAL HEALTH
600 N 83RD AVE
TOLLESON, AZ 85353

PAGE 1 OF 1 ROUTE/STOP 307 / 010

RO

CardinalHealth

DEA RW-0263056 FED ID 68-0158739

CUST. NO.	DATE	ORIGINAL INVOICE
153264	9/29/17	3232190
REG NO.	CUST. DEA NO.	ORDER NO.	CUSTOMER P.O. NUMBER
CA00001	AS2995922	5265965	17XCO0039
	ORDER DATE	CONF. NO.	
	9/28/17	03582	

BILL TO
NV DEPT OF CORRECTION CTR PHCY
CENTRAL PHCY
3955 W RUSSELL RD-CASA GRANDE
LAS VEGAS, NV 89118

SHIP TO
NV DEPT OF CORRECTION CTR PHCY
CENTRAL PHCY
3955 W RUSSELL RD-CASA GRANDE
LAS VEGAS, NV 89118
FORM 222: 17XCO0039

ITEM NUMBER	NDC/UPC	QTY ORDERED	QTY SHIPPED	CMI	DESCRIPTION	SIZE	FORM	CS	RETAIL PRICE	UNIT PRICE	EXTENSION	NOTE CODE
4726162	00641-6027-25	1	1	CT	FENTANYL CIT50MCG/ML 25X2ML C2	25	SF	2		15.23	1523	CT
	TOTE# 3											
	see message(s): 121											
5094883	17478-0030-25	2	2	CT	FENTANYL CIT50MCG/ML 25X2ML C2	25	AM	2		34.14	6828	CT
	TOTE# 3											
	see message(s): 121											
			3		PIECES SHIPPED					SUBTOT	8351	
			3		TOTAL PIECES SHIPPED							

---------- S U M M A R Y ----------

Total RX	83.51
NET AMOUNT	83.51

INVOICE SHIP DATE: 9/28/2017

For SDS Visit: http://www.mycardinalsdspd.com

PLEASE REMIT YOUR PAYMENTS TO FOLLOWING ADDRESS:
CARDINAL HEALTH 110, LLC
C/O BANK OF AMERICA
PO BOX 56412
LOS ANGELES, CA 90074-6412

Messages

121 This product is required by the FDA to be dispensed with a medication guide. To obtain a medication guide for this product, please visit http://www.fda.gov/Drugs/DrugSafety/ucm085729.htm

FOR DELIVERY 9/29/17
10/29/17 8351
DUE DATE

307 / 010

Note Codes: T Taxable; CO Contract Item Override; SP Special Pricing; CT Contract; SN Special Net; OV Price Override; CS Source Contract

Omit Codes: C Dropship; 2 DC Out; 3 Mfr Out; 4 Not stocked; 5 Mfr Disc; 6 DC Disc; 7 Drug Recall; 8 New item stock unavail; 9 Restricted item; S Regulatory Review

List Chemical Designations: E - Ephedrine; P - Phenylpropanolamine; S - Pseudoephedrine; L - Other List Chemical

Customer is a final dispenser purchasing for own use and will not redistribute prescription pharmaceuticals into the secondary market.

The prices shown on this invoice are net of discounts provided at the time of purchase. Some of the products listed on this invoice may be subject to additional discounts or rebates. Please refer to your contract for any specific additional discounts or rebates that may apply to these purchases. You may have an obligation pursuant to 42 USC §1320a-7b to report discounts and rebates to Medicare, Medicaid or other governmental health care programs.

Effective January 1, 2015, DSCSA Transaction Data for qualified prescription drugs can be accessed via your usual ordering platform, such as Order Express or Med eCommerce, or at cardinalhealth.com/trace.

EXHIBIT 6

EXHIBIT 6

Lewis Roca
ROTHGERBER CHRISTIE

Lewis Roca Rothgerber Christie LLP
One East Liberty Street
Suite 300
Reno, NV 89501

775 823 2900 main
775 823 2929 fax
lrrc.com

Kristen L. Martini
Admitted in California and Nevada
775.321.3446 direct
775.823.2929 fax
kmartini@lrrc.com

July 11, 2018

VIA HAND DELIVERY

Mr. James Dzurenda
Director, Nevada Department of Corrections
Stewart Facility
5500 Snyder Avenue, Bldg. 17
Carson City, Nevada 89701

RE: Hikma Pharmaceuticals PLC Products--Prohibited Use in Executions in the State of Nevada

Dear Director Dzurenda:

We represent Hikma Pharmaceuticals PLC regarding the above-referenced matter. Enclosed please find a letter from our client advising you of its position with regard to the same.

Very truly yours,

Kristen L. Martini
Lewis Roca Rothgerber Christie LLP

KLM
Enclosure

hikma.

Hikma Pharmaceuticals PLC
1 New Burlington Place
London W1S 2HR

T (0) 20 7399 2760

July 11th, 2018

The Honorable Brian Sandoval
Governor, State of Nevada

Mr. Adam Paul Laxalt
Attorney General, State of Nevada

Mr. James Dzurenda
Director, Nevada Department of Corrections

Nevada State Capital Building
101 N Carson St # 1,
Carson City, NV 89701

via Fax

Dear Governor Sandoval, Mr. Laxalt and Mr. Dzurenda,

Further to our correspondence to you in 2016 and 2017, I am writing to you to remind you again of Hikma's position on the misuse of our medicines in executions. We object in the strongest possible terms to the use of any of our products for the purpose of capital punishment. Hikma aims to improve lives by providing patients with access to high quality, affordable medicines. Our medicines are used millions of times a day to treat illness and save lives. This has been our mission for more than 40 years.

We understand that the State of Nevada Department of Corrections is in possession of fentanyl made by our company, Hikma, and that it may be used in a pending execution.

Despite our best efforts to ensure our medicines are used only for their intended medicinal purposes -- including a requirement that these products are only supplied to pre-authorized customers who agree in writing not to sell them to Departments of Correction or other entities that intend to use them for lethal injection -- some states continue to attempt to procure our products from distributors and other intermediaries for use in lethal injection. Not only is this inconsistent with the FDA indication and contrary to our intention of manufacturing the product for the health and well-being of patients in need, but it is also completely counter to our company values.

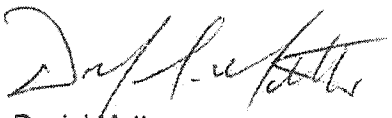
We request that Nevada immediately return to us any Hikma or West-Ward fentanyl intended for use in executions, and any other of our products which have been obtained for this purpose, in exchange for a full refund, unless the State of Nevada is prepared to provide to us an original, raised seal copy of an affidavit signed by the Governor or Attorney General, certifying under penalty of perjury that the product(s) will only be used for patient care, not capital punishment. The use of these products in executions would represent a serious misuse of life saving medicines.

(more)

We also request that the Director and other relevant Nevada Department of Corrections officials not circumvent our carefully prepared controls or potentially undermine these specifically drafted legal provisions in our agreements. In the event we were forced to implement additional controls to prevent diversion and misuse, it may have the unintended consequence of potentially preventing certain patients from receiving these medicines despite having a genuine medical need. This outcome would not be beneficial for anyone, particularly the good people of Nevada. High quality, generic medicines play a vital role in improving health. As such, we hope you will be our partner in furthering our values and upholding our policy.

I look forward to receiving your response.

Sincerely,



Daniel Motto
Executive Vice President
Hikma/West-Ward Pharmaceuticals

Lewis Roca
ROTHGERBER CHRISTIE

Lewis Roca Rothgerber Christie LLP
One East Liberty Street
Suite 300
Reno, NV 89501

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lrrc.com

Kristen L. Martini
Admitted in Califomia and Nevada
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kmartini@lrrc.com

July 11, 2018

VIA HAND DELIVERY

The Honorable Adam Paul Laxalt
Attorney General, State of Nevada
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511

RE: Hikma Pharmaceuticals PLC Products--Prohibited Use in Executions in the State of Nevada

Dear Attorney General Laxalt:

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Very truly yours,

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KLM
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hikma.

Hikma Pharmaceuticals PLC
1 New Burlington Place
London W1S 2HR

T (0) 20 7399 2760

July 11th, 2018

The Honorable Brian Sandoval
Governor, State of Nevada

Mr. Adam Paul Laxalt
Attorney General, State of Nevada

Mr. James Dzurenda
Director, Nevada Department of Corrections

Nevada State Capital Building
101 N Carson St # 1,
Carson City, NV 89701

via Fax

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(more)

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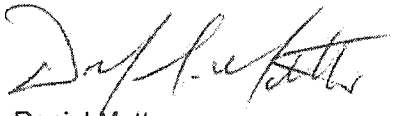

Daniel Motto
Executive Vice President
Hikma/West-Ward Pharmaceuticals

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ROTHGERBER CHRISTIE

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July 11, 2018

VIA HAND DELIVERY

The Honorable Brian Sandoval
Governor, State of Nevada
State Capitol Building
101 N. Carson Street
Carson City, NV 89701

RE: Hikma Pharmaceuticals PLC Products--Prohibited Use in Executions in the State of Nevada

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KLM
Enclosure

hikma.

Hikma Pharmaceuticals PLC
1 New Burlington Place
London W1S 2HR

T (0) 20 7399 2760

July 11th, 2018

The Honorable Brian Sandoval
Governor, State of Nevada

Mr. Adam Paul Laxalt
Attorney General, State of Nevada

Mr. James Dzurenda
Director, Nevada Department of Corrections

Nevada State Capital Building
101 N Carson St # 1,
Carson City, NV 89701

via Fax

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(more)

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I look forward to receiving your response.

Sincerely,

Daniel Motto
Executive Vice President
Hikma/West-Ward Pharmaceuticals

EXHIBIT 3

EXHIBIT 3

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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[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

---

[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

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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:

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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

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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

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[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.
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