

EXHIBIT 1

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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

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PETITIONERS' NOTICE OF SUPPLEMENTAL AUTHORITIES

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

Pursuant to Nevada Rule of Appellate Procedure 31(e), Petitioners hereby advise the Court of “pertinent and significant authorities [that have] come to [their] attention after [their] brief has been filed, but before a decision” has been rendered. *See also Nevada Appellate Practice Manual* § 10:142 (2016 ed.). The United States District Court for the District of Nebraska issued the attached decision denying a temporary restraining order and preliminary injunction on Friday, August, 10, 2018 in a copy-cat lawsuit filed in Nebraska by another drug manufacturer. *Fresenius Kabi USA, LLC v. State of Nebraska*, Case No. 4:18-cv-03109-PGK (D. Neb. Aug. 10, 2018) (Memorandum and Order, Ex. 1).

Emboldened by the District Court’s order in this case, a drug manufacturer filed an eleventh hour suit in Nebraska federal court on August 7, 2018 seeking to halt the use of its drugs in an execution scheduled for Tuesday, August 14, 2018. (*Id.* at 1-2). Like the drug companies in this case, the manufacturer asserted that Nebraska improperly obtained the drugs from the manufacturer’s distributors in violation of the manufacturer’s policies and distribution agreements. (*Id.* at 4). The manufacturer requested injunctive and declaratory relief and asserted six causes of action, including replevin. (*Id.*).

Notably, like Scott Dozier, the condemned inmate in Nebraska, Carey Dean Moore, “wants his death sentence to be carried out, and he has directed his court-appointed lawyers to do nothing.” (*Id.* at 2). The federal court noted at the outset, that “[w]hile he is not a party, [Moore] is at the center of this lawsuit. Legal realism and

common decency require that he not be forgotten There is absolutely no doubt of his competence or his guilt. I will not allow the Plaintiff to frustrate Mr. Moore and the laws of the State of Nebraska by Plaintiff's last-minute lawsuit." (*Id.* at 1). So unlike the District Court in this case, the Nebraska federal court rightly realized that this is not simply a "business dispute;" it has real-world consequences for Dozier as well as his victims' families.

First, the federal court held that the drug manufacturer did not establish irreparable harm warranting a preliminary injunction. Among other reasons, the court determined that the harm was far too speculative based on the manufacturer's "worries that if it is in any way associated with the execution, its reputation will be harmed because many health care professionals, investors, much of the public, and indeed even the European Union, detest the death penalty." (*Id.* at 7). The manufacturer had taken steps to restrict its products' use, had written letters to governors, and indeed filed the much publicized lawsuit to avoid association with the death penalty. (*Id.* at 7-8). Under these circumstances, "there is no reason for a rational actor to conclude that the Plaintiff will bear any responsibility for Mr. Moore's death, and thus, there is no rational basis to conclude that Plaintiff will suffer irreparable injury." (*Id.* at 8).

On the balance of the hardships prong, the court reasoned that the "the harm to Plaintiff if I do nothing seems vanishingly small to none at all. On the other hand, the State of Nebraska will be greatly and irreparably harmed if I grant the Plaintiff the relief it seeks." (*Id.* at 8). The court recognized that Nebraskans had recently passed a

referendum to reinstate capital punishment by an overwhelming margin. (*Id.* at 8-9). Therefore, the will of the people was plain and staying the execution would frustrate their will. (*Id.* at 9).

The upcoming drug expiration dates were also significant. The court characterized as “laughable” the manufacturer’s argument that a TRO would “merely delay things.” (*Id.*) The court observed that numerous lawsuits have been initiated around the country to pressure drug companies to refuse to supply the States as part of a campaign to undermine the States’ ability to carry out executions. (*Id.*) “It would simply be impossible to implement the death penalty before that expiration date if I granted the temporary restraining order at this time given the administrative and legal hoops that would have to be jumped through.” (*Id.*) In effect, the TRO would be “tantamount to nullifying Nebraska law.” (*Id.* at 10).

On the merits, “to say the least, this is a very strange suit.” (*Id.*) The court found that “[t]here is virtually no legal authority that is directly on point regarding any counts in the complaint.” (*Id.*) The manufacturer was unlikely to prevail under either a “substantial probability” test or the lower “fair chance of prevailing” standard. (*Id.*) The court also denied the manufacturer’s request for expedited discovery. (*Id.* at 5).

Finally, the court held that the public interest weighs heavily in favor of the State. (*Id.* at 11). The court could not “say with a straight face that the public interest in any way favors the Plaintiff. Sure, the Plaintiff just might, although it is very doubtful, suffer

harm to its reputation. But the public interest is far broader than corporate self-interest. In this case, it has everything to do with the functioning of democracy.” (*Id.* at 11-12).

The District Court’s TRO accepting Alvogen’s “strange” claims for relief also frustrates the will of Nevadans. (Pet. 30-50). The TRO had the substantive effect of staying Dozier’s execution and nullifying Nevada law as well as a duly constituted jury verdict. (Pet. 18-25). This Court should vacate the District Court’s TRO just as the Nebraska federal court denied it in the first place.

Dated: August 13, 2018.

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

CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion complies with the formatting requirements of NRAP 31(e), NRAP 27(d), and the typeface and type-style requirements of NRAP 27(d)(1)(E) because this Motion has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 double-spaced Garamond font. This filing also complies with NRAP 32.

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

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

Dated: August 13, 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 **PETITIONERS' NOTICE OF SUPPLEMENTAL AUTHORITIES** with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on August 13, 2018.

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

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

A copy was also provided to the following:

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

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

J. Colby Williams, Esq.
Philip R. Erwin, Esq.
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, NV 89101

Andrew Kantra, Esq.
PEPPER HAMILTON LLP
300 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103

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

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

Noel B. Ix., Esq.
PEPPER HAMILTON LLP
301 Carnegie Center, Suite 400
Princeton, NJ 08540

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

/s/ Barbara Fell

An employee of the
Office of the Attorney General

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Before the present one, the Nebraska Supreme Court has given Mr. Moore seven execution dates. This time Mr. Moore wants his death sentence to be carried out, and he has directed his court-appointed lawyers to do nothing. Indeed, Mr. Moore has sought to have his lawyers dismissed. There is absolutely no doubt of his competence or his guilt. I will not allow the Plaintiff to frustrate Mr. Moore and the laws of the State of Nebraska by Plaintiff's last-minute lawsuit.

Brief Background

The drug protocol that will be used to kill Mr. Moore has been publicly available since November 9, 2017, when Director Frakes publicly notified another death row inmate of the four drugs that would be used. On January 19, 2018, Director Frakes gave the same public notice to Mr. Moore. *See* Nebraska Department of Corrections, *NDCS Provides Notice of Substances to be Employed in an Execution by Lethal Injection* (January 19, 2018).² The four drugs that are to be used to carry out the death penalty are: (1) Diazepam; (2) Fentanyl Citrate; (3) Cisatracurium Besylate; and (4) Potassium Chloride.

On April 3, 2018, the Nebraska Attorney General sought a death warrant from the Nebraska Supreme Court. On May 25, 2018, the State of Nebraska filed a motion to expedite consideration of the motion for execution warrant. Attached to that motion was an affidavit of Director Frakes that represented under oath the following:

5. The Nebraska Department of Correctional Services has possession of the substances to be administered for execution by lethal injection, all of which have expiration dates as follows:
 - a. Diazepam, expiration date of September 1, 2019;
 - b. Fentanyl Citrate, expiration date of August 31, 2019;

² Available at <https://corrections.nebraska.gov/ndcs-news-releases?page=2>.

- c. Cisatracurium Besylate, expiration date of October 31, 2018; and
 - d. Potassium Chloride, expiration date of *August 31, 2018*.
6. The substances were obtained from a licensed pharmacy in the United States, and have been chemically analyzed and verified as required by 69 Neb. Admin. Code, ch. 11, § 008.

(Italics in original.)

On July 5, 2018, the Nebraska Supreme Court issued the death warrant. The court set the execution date for August 14, 2018, at a time to be chosen by the Department of Corrections. The Department of Corrections decided to execute the warrant at 10:00 a.m.

On July 24, 2018, the President and Chief Executive Officer of the Plaintiff sent a letter to the Governor of Nebraska, presumably by United States mail. (Filing No. 1-6, Ex. E to the Complaint.) Noting that he had written “your predecessor on more than one occasion regarding lethal injection,” the author made a demand upon the Governor. The author demanded that “you immediately disclose the quantities, lot numbers, inventory logs, and invoices for any Fresenius Kabi drugs the state may have acquired for executions, and that you return any such drugs to us without delay.” According to the Plaintiff, in a letter dated July 31, 2018, and mailed August 1, 2018, an aide to the Governor responded that Plaintiff’s letter was construed as a public records request and that the Governor did not have custody of those records. (Filing No. 11 at CM/ECF p. 3 n.1.)

After the close of business on Tuesday, August 7, 2018, and at 5:55 p.m., the Plaintiff filed the complaint in this matter. The Plaintiff alleged that it manufactured and distributed Cisatracurium Besylate (“Cisatracurium”) and Potassium Chloride (“KCL”). It alleged that the Nebraska Department of Corrections planned to use both

of these drugs to execute Moore, and the Plaintiff suspected that these drugs had been obtained improperly from distributors doing business with the Plaintiff.

The complaint does not seek damages. It seeks injunctive and declaratory relief. It sets forth six counts.

Count I seeks a temporary restraining order prohibiting Defendants from employing the Cisatracurium and KCL improperly or illegally obtained from Plaintiff in the execution of Mr. Moore. Count II alleges tortious interference with business relationships in that one or more of the Defendants are alleged to have obtained Cisatracurium and KCL in violation of Plaintiff's policies and distribution agreements. Count III sets out a section 1983 claim alleging that the Defendants, acting under color of state law, through the procurement and threatened use of Cisatracurium and KCL, will proximately cause interference with interstate commerce if they do not return the drugs. Count IV alleges another section 1983 claim based upon alleged violation of the Due Process Clause because of the Defendants' refusal to return the two drugs and the lack of any state-law procedure to contest the use of Plaintiff's products in executions. Count V is a replevin action seeking return of the Cisatracurium and KCL obtained from Plaintiff or from its distributors. Count VI is a declaratory judgment action seeking a declaration that Plaintiff is entitled to return of the Cisatracurium and KCL and a declaration that the Defendants must refrain from using these products in Nebraska's lethal injection protocol.³

³ Where, as here, declaratory relief is sought, courts are particularly reluctant to issue such relief to halt matters involving state-law enforcement. Mary Kay Kane, 10B Fed. Prac. & Proc. Civ. § 2759, Discretion of Court (4th ed.) (“[T]he courts particularly are reluctant to resolve important questions of public law in a declaratory action and *under usual circumstances will not use declaratory judgments to halt state-law enforcement.*”) (footnote omitted & emphasis added). *See also Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) (describing the “nonobligatory nature” of the remedy provided in the Declaratory Judgment Act).

On Wednesday, August 8, 2018, after I had denied Plaintiff's request for expedited discovery⁴, I conferred with counsel during an on-the-record telephone conference. I gave counsel the opportunity to select from various dates and times for the temporary restraining order hearing and noted my availability on Thursday, Friday, and Monday. Counsel requested a hearing on Friday, and accordingly, I set the matter for 3:00 p.m. on that date. It was further agreed that there would be no live testimony, and the parties intended to rely solely upon affidavits. I gave Defendants until the close of business on Thursday, August 9, 2018, to respond. The temporary restraining order hearing has been held as scheduled. I now deny the motion.

Dataphase

In *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981), the court, sitting en banc, clarified the standard district courts should apply when considering a motion for preliminary injunctive relief:

(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Dataphase, 640 F.2d at 114. "No single factor in itself is dispositive; rather, each factor must be considered to determine whether the balance of equities weighs toward granting the injunction." *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998).

⁴ I denied the request for expedited discovery (Filing Nos. 7-1 & 7-2) because, among several other reasons, it was too broad. It sought information (quantities, lot numbers, inventory logs, and invoices) on *all* substances to be used in the execution and not merely the two drugs at issue.

I believe the *Dataphase* case must be applied to requests for a temporary restraining order. *See, e.g., S.B. McLaughlin & Co. v. Tudor Oaks Condo. Project*, 877 F.2d 707, 708 (8th Cir. 1989) (affirming district court's issuance of preliminary injunction after expiration of TRO where district court applied *Dataphase* standard in analyzing TRO; noting that the district court "held a hearing at which it indicated that Eighth Circuit standards favored the granting of a temporary restraining order (TRO). *See Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 112 (8th Cir.1981).").

I note a slight quirk in the "merits" factor analysis. *See Planned Parenthood v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008). *Rounds* explains that the "substantial probability of success on the merits" standard is appropriate when a party is seeking to enjoin "'governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes.'" *Id.* (quoting *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995)). As to cases "where a preliminary injunction is sought to enjoin something other than government action based on presumptively reasoned democratic processes," "district courts should still apply the familiar 'fair chance of prevailing' test." *Id.* Here Plaintiff seeks, in effect, to enjoin enforcement of the duly enacted death penalty. Regardless, Plaintiff cannot prevail under either standard.

Analysis

I will examine each of the four *Dataphase* factors separately. After that, I will synthesize those factors and explain my conclusion.

The threat of irreparable harm to the movant

Primarily, the Plaintiff claims that its reputation will be irreparably harmed if I allow the execution to proceed using drugs manufactured and distributed by Plaintiff. There are serious problems with Plaintiff's assertions. Although preliminary relief may

be ordered to prevent harm to a movant's reputation and goodwill, "a finding of reputational harm may not be based on 'pronouncements [that] are grounded in platitudes rather than evidence.'" *Titaness Light Shop, LLC v. Sunlight Supply, Inc.*, 585 F. App'x 390, 391 (9th Cir. 2014) (unpublished) (quoting *Herb Reed Enters., LLC v. Florida Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013)).

First, there is *no* evidence that the Cisatracurium that will be used in the execution was manufactured or distributed by the Plaintiff. Indeed, the Plaintiff admits that there are two other firms who manufacture and distribute the drug in the United States. (Filing No. 11 at CM/ECF p. 4.) There is no way of knowing whether the Plaintiff's Cisatracurium will be used, and therefore, no reason for anyone to think that the Plaintiff will somehow be complicit in the execution of Mr. Moore. That being true, Plaintiff's claim of irreparable injury as to this drug fails completely.⁵

Second, the claim of injury in fact—let alone irreparable injury—made by Plaintiff regarding both drugs is far too speculative. The Plaintiff worries that if it is in any way associated with the execution, its reputation will be harmed because many health care professionals, investors, much of the public, and indeed even the European Union, detest the death penalty. Plaintiff worries that those persons or entities will take out their fury on the Plaintiff.

The Plaintiff has made it widely known that it takes active measures to prohibit the use of any of its drugs for the purpose of executions. For example, there is evidence that since at least August 29, 2012, the Plaintiff has sought to prohibit all its distributors from selling various restricted products to state and federal prisons. (Filing

⁵ Plaintiff is on somewhat stronger ground when it comes to KCL. Evidence has been presented that the Department of Corrections is in possession of 30-milliliter vials of KCL in a specific concentration and "[P]laintiff is the only manufacturer of which it is aware" that sells such 30 ml. vials of the drug in that specific concentration. (Filing No. 11 at CM/ECF p. 2.)

No. 9 at CM/ECF p. 81 ¶¶ 6 & 7; Filing No. 9 at CM/ECF pp. 83-84 ¶ 3(b).)⁶ Moreover, over the years, the Plaintiff has written several letters to various Nebraska Governors making the company's position well-known and very publicly so. Indeed, this lawsuit has generated world-wide coverage of the Plaintiff's desire to avoid any association with the death penalty. *See, e.g., French Press Agency, German drug maker sues to halt planned execution in Nebraska*, The Guardian (Wednesday, August 8, 2018). Consequently, there is no reason for a rational actor to conclude that the Plaintiff will bear any responsibility for Mr. Moore's death, and thus, there is no rational basis to conclude that Plaintiff will suffer irreparable injury.

To the extent the Plaintiff makes other claims of irreparable injury, they are of the "make weight" variety. For example, it is hard to believe that withholding the small amount of KCL in the possession of Nebraska will have any impact on interstate commerce or the alleged national or world-wide shortage of the drug. Moreover, given the fact that the KCL held by Nebraska is set to expire this month, it could not be redistributed to address any shortage in any event.

The state of balance between this harm [harm to the movant] and the injury that granting the injunction will inflict on other parties litigant

As noted above, and at least at this point, the harm to Plaintiff if I do nothing seems vanishingly small to none at all. On the other hand, the State of Nebraska will be greatly and irreparably harmed if I grant the Plaintiff the relief it seeks.

I start by recognizing the elephant in the room. The Nebraska Death Penalty Repeal Veto Referendum, also known as Referendum 426, was held on November 8,

⁶ There is an interesting question, however, whether Plaintiff failed to add the two drugs at issue to the restrictions *until June 22, 2018*. (Compare Filing No. 9 at CM/ECF p. 83 ¶ 2 (2012 controls apparently limited to Diprivan and Propofol) with Filing No. 9 at CM/ECF pp. 85-86 (June 22, 2018, control apparently adding Cisatracurium, KCL, and other drugs).)

2016. The measure asked voters whether they wanted to repeal or maintain a law passed by the Nebraska Legislature that eliminated the death penalty. Voters overwhelmingly (about 60%) repealed the death penalty ban implemented by LB 268 and reinstated the death penalty in the State of Nebraska. The will of the people, as very currently understood, is plain.

With the elephant visualized, if I temporarily stay the execution to “protect” Plaintiff, I will frustrate the will of the people. The Nebraska Supreme Court after careful and full consideration has *ordered* that the death penalty be implemented on August 14.⁷ The supplies necessary to effectuate the command of the Nebraska Supreme Court will begin to expire on August 31, 2018. One of those drugs is KCL. It would simply be impossible to implement the death penalty before that expiration date if I granted the temporary restraining order at this time given the administrative and legal hoops that would have to be jumped through.

Plaintiff argues that the Defendants will suffer no harm because, after all, any temporary restraining order would merely delay things. Respectfully, that argument is laughable. Let’s be honest. As the Supreme Court recently recounted, “anti-death-penalty advocates [have] pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences.” *Glossip v. Gross*, 135 S. Ct. 2726, 2733 (2015). Numerous lawsuits have been initiated around the country for the purpose of undermining the states’ ability to carry out executions. *See, e.g., Zink v. Lombardi*, 783 F.3d 1089, 1106 (8th Cir. 2015) (“In this capital litigation, it should be remembered that one stated objective of the prisoners’ lawsuit is to pressure the State’s

⁷ “IT IS FURTHER ORDERED that Scott R. Frakes, Director of the Nebraska Department of Correctional Services, shall proceed on Tuesday, August 14, 2018, between the hours of 12:01 a.m. and 11:59 p.m., to carry said sentence of death into execution by administering to appellant, Carey Dean Moore, an intravenous injection of a substance or substances in a quantity sufficient to cause death, as provided by law.”

suppliers and agents to discontinue providing the drugs and other assistance necessary to carry out lawful capital sentences.”). It is therefore no surprise that the Legal Director of the Nebraska ACLU has filed an affidavit in support of Plaintiff in this case. (Filing No. 9 at CM/ECF pp. 22-23.)

Decades have slipped by since Mr. Moore was sentenced to death. The people of Nebraska have spoken. Any delay now is tantamount to nullifying Nebraska law, particularly given the rapidly approaching expiration of two of the drugs and the total absence of any feasible alternatives. (*See* Affidavit of Director Frakes, Filing No. 26-1 at CM/ECF pp. 5-6 ¶¶ 15-18.) For example, “I have attempted to purchase additional substances to be administered for execution by lethal injection from the supplier who supplied the current substances. That supplier is unwilling to provide additional substances.” (*Id.* at CM/ECF p. 5 ¶ 17.) Moreover, “I do not, at present nor at any time in the future, have an alternative supplier for any of the four substances to be administered for execution by lethal injection.” (*Id.* at CM/ECF p. 6 ¶ 18.)

In short, the balance of the harms tips heavily in favor of the Defendants.

The Merits

To say the least, this is a very strange suit. There is virtually no legal authority that is directly on point regarding any counts of the complaint.

Factually, Director Frakes has sworn that:

7. The substances were obtained from a licensed pharmacy in the United States, and have been chemically analyzed and verified as required by [the Nebraska Administrative Code].

8. The Nebraska Department of Correctional Services did not obtain any of the substances in its possession by any fraud, deceit or misrepresentation by the Department or, to the best of the affiant's knowledge, by any fraud, deceit or misrepresentation by any official of the State of Nebraska.
9. The Nebraska Department of Correctional Services did not engage in any measures to circumvent Fresenius Kabi's distribution control.
10. The Nebraska Department of Correctional Services does not and did not have any contract with Fresenius Kabi.

(Filing No. 26-1 at CM/ECF p. 3.)

Unless Director Frakes is lying, it would seem that Plaintiff will have a rough row to hoe on any of the claims asserted in the complaint. In short, I cannot say that the Plaintiff has a "substantial probability of success on the merits." Nor can I say that Plaintiff has a "fair chance of prevailing."

The Public Interest

The public interest weighs heavily in favor of Defendants. Many people of good faith object to the death penalty. However, the electoral processes of Nebraska have worked as they were intended. The Nebraska Legislature decided to kill the death penalty, and after that, and very recently, the people decided to resurrect it. While I have no beef with corporations—German or otherwise—I cannot say with a straight face that the public interest in any way favors the Plaintiff. Sure, the Plaintiff just might, although it is very doubtful, suffer harm to its reputation. But the public interest

is far broader than corporate self-interest. In this case, it has everything to do with the functioning of a democracy.

Conclusion

Although Plaintiff's counsel are some of the best and brightest, and they have made every conceivable argument possible for their client while under enormous time pressures, the Plaintiff has come up short on every *Dataphase* factor. It would be a gross abuse of my discretion if I granted a temporary restraining order. Therefore,

IT IS ORDERED that the motion for a temporary restraining order (Filing No. 7) is denied.⁸

DATED this 10th day of August, 2018.

BY THE COURT:

s/ *Richard G. Kopf*
Senior United States District Judge

⁸ The parties are advised that no Magistrate Judge has been assigned to this case. Therefore, the parties should jointly contact me directly when they believe it is proper to further progress this case.

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
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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
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THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
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GONZALEZ, DISTRICT COURT JUDGE,

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Real Party in Interest.

Supreme Court Case No.: 76485

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Elizabeth A. Brown
Clerk of Supreme Court

**PETITIONERS' REPLY IN SUPPORT OF EMERGENCY MOTION UNDER NRAP
27(e) TO STAY DISTRICT COURT PROCEEDINGS PENDING THIS COURT'S
DECISION ON THE PETITION AND OPPOSITION TO COUNTERMOTION TO
DISMISS**

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

Rather than address why it should obtain discovery before this Court determines as a legal matter whether it even has a cause of action or whether the District Court can issue an injunction, Alvogen seeks to re-litigate the Court's decision to expedite consideration of the Petition. As described in the Motion to Expedite, a batch of the Cisatracurium will soon expire and that is sufficient to justify this Court's expedited treatment.

The State will suffer prejudice if it is forced to engage in invasive and extensive discovery while this Court considers the validity of the TRO. A litigant is not entitled to impose the burdens of discovery on an adversary unless it has a viable cause of action in the first place. The purpose of discovery is to develop facts and evidence toward proving the elements of a cognizable claim for relief. If there is no claim for relief, then there are no elements to prove, and discovery is a wasteful exercise in futility—at the expense of Mr. Dozier and his stated desire to be executed, the victims of his crimes, and the taxpayers.

Alvogen and the other drug manufacturers should not be permitted to go on a fishing expedition *unless and until* this Court determines that they have a cause of action to start with.¹ Similarly, there is no need for a time-consuming and expensive

¹ Alvogen asserts that the State ignores its replevin claim. (Resp. 7-8). Not so. The State's Petition demonstrates that Alvogen does not have a property interest in any drugs sold through third parties. (Pet. 40-50). Alvogen's lack of a property interest is fatal to its claims, like the federal District Court of Nebraska ruled last Friday with regard to another drug manufacturer's similar lawsuit. (*See* State's Notice of Supplemental Authorities, filed Aug. 13, 2018, Ex. 1).

preliminary injunction hearing if the District Court does not have authority to issue an injunction. *See Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253-54, 89 P.3d 36, 39-40 (2004) (stating that irreparable harm “will not generally play a significant role in the decision whether to issue a stay” but issuing a stay, 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].”). No amount of factual development will alter the existence (or not) of a cause of action or the District Court’s authority.

Until this Court clarifies whether drug manufacturers have a viable cause of action to interfere with a lawful execution, the State is unable to conduct its statutory mandate to carry out executions through other medications. The manufacturer of any substitute drug will simply file another cookie-cutter lawsuit like Alvogen’s and the parties will be back in the same place. Even if the State were to change its method of execution through legislation, the manufacturer of *any* product used in *any* method could intercede to stop an execution under the District Court’s reasoning.

Moreover, it is well-known that it is no easy task to find substitute drugs. “[A]nti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences.” *Glossip v. Gross*, 135 S. Ct. 2726, 2733 (2015). Alvogen has recognized that “after its stockpile of at least one drug used in executions expired, the Nevada Department of Corrections on September 2, 2016 sent out 247 requests for proposals to manufacturers for the purchase of those drugs. Not one

supplier offered to fulfill the request.” (App. 77). Hikma also highlighted the State’s unanswered requests for proposals. (Ex. 2 to Hikma Mot. to Amend the Caption ¶ 24).

The primary jurisdictional basis for the State’s Petition is NRS 176.492, which allows a petition to dissolve an improperly granted stay of execution. (Pet. 18). The District Court’s TRO had the substantive effect of staying the execution because it barred one of the three drugs and made it impossible to carry out the sentence using the State’s three-drug protocol. The TRO left the State with no choice but to return to Judge Togliatti or risk contempt.

Thus, the State’s Petition falls under NRS 176.492 and jurisdiction under NRS 176.492 is not discretionary. To be sure, mandamus is an alternative jurisdictional hook but it is not the only basis or even the primary one. And even if mandamus was the only grounds for the Petition, this Court has entertained writ petitions arising from TROs before. *See Cox v. Eighth Jud. Dist. Ct.*, 124 Nev. 918, 920, 193 P.3d 530, 531 (2008) (per curiam before Hardesty, Parraguirre, and Douglass, JJ.). The reasons that the Court should entertain the Petition are set forth more fully at pages 18 through 29 of the Petition. Without question, there are important issues of first impression at stake as the *amici* briefs demonstrate and entertaining the Petition will serve judicial economy.

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Accordingly, the State respectfully requests that the Court stay further District Court proceedings until this Court decides the threshold legal questions and the State requests that the Court deny Alvogen's countermotion to dismiss the Petition.

Dated: August 13, 2018.

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

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 5 pages.

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

Dated: August 13, 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 **PETITIONERS' REPLY IN SUPPORT OF EMERGENCY MOTION UNDER NRAP 27(E) TO STAY DISTRICT COURT PROCEEDINGS PENDING THIS COURT'S DECISION ON THE PETITION AND OPPOSITION TO COUNTERMOTION TO DISMISS** with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on August 13, 2018.

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

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

A copy was also provided to the following:

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

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

J. Colby Williams, Esq.
Philip R. Erwin, Esq.
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, NV 89101

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

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

Noel B. Ix., Esq.
PEPPER HAMILTON LLP
301 Carnegie Center, Suite 400
Princeton, NJ 08540

(cont. on next page)

Andrew Kantra, Esq
PEPPER HAMILTON LLP
300 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103

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

/s/ Barbara Fell

An employee of the
Office of the Attorney General