

EXHIBIT 1

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United States Court of Appeals
For the Eighth Circuit

No. 18-2717

Fresenius Kabi USA, LLC

Plaintiff - Appellant

v.

State of Nebraska; Nebraska Department of Correctional Services; Scott Frakes, in
his Official Capacity as Director of the Nebraska Department of Correctional Services

Defendants - Appellees

Appeal from United States District Court
for the District of Nebraska - Lincoln

Submitted: August 13, 2018
Filed: August 13, 2018
[Unpublished]

Before WOLLMAN, GRUENDER, and STRAS, Circuit Judges.

PER CURIAM.

Fresenius Kabi USA, LLC (“Fresenius Kabi”) appeals the district court’s¹ order
denying its motion for a temporary restraining order. It moves to expedite its appeal,

¹The Honorable Richard G. Kopf, United States District Judge for the District
of Nebraska.

see Fed. R. App. P. 2; 28 U.S.C. § 1657; & United States Court of Appeals for the Eighth Circuit, *Internal Operating Procedures* III.D., and it further moves for an injunction pending appeal, *see* Fed. R. App. P. 8(a).

Pursuant to an execution warrant issued by the Nebraska Supreme Court, the Nebraska Department of Correctional Services plans to execute Carey Dean Moore by lethal injection on August 14, 2018. Scott Frakes, the Director of the Nebraska Department of Correctional Services, disclosed that the drugs used in the execution include cisatracurium besylate and potassium chloride. On August 7, 2018, Fresenius Kabi brought suit alleging that the Department of Correctional Services improperly obtained these drugs from Fresenius Kabi's distributors. It sought injunctive and declaratory relief, as well as a temporary restraining order and preliminary injunction prohibiting Nebraska from using the drugs in connection with the planned execution. After conducting a hearing, the district court issued an order denying the motion for a temporary restraining order. Fresenius Kabi has filed an interlocutory appeal objecting to the denial of its motion for preliminary relief.

Nebraska has filed a motion to dismiss this appeal for lack of jurisdiction, and we must first ascertain whether we in fact do have jurisdiction. While 28 U.S.C. § 1292(a)(1) allows interlocutory appellate review of a preliminary injunction, ordinarily our jurisdiction does not extend to a temporary restraining order. *In re Champion*, 895 F.2d 490, 492 (8th Cir. 1990). But we have recognized jurisdiction where the temporary restraining order “is in substance a preliminary injunction.” *Edudata Corp. v. Sci. Computs., Inc.*, 746 F.2d 429, 430 (8th Cir. 1984) (per curiam). Here, Fresenius Kabi sought both a temporary restraining order and a preliminary injunction. The district court order addressed only the temporary restraining order. Nonetheless, as the Supreme Court has explained in a similar context, “[T]he District Court did not *call* its orders ‘injunctions’—in fact, it disclaimed the term—but the label attached to an order is not dispositive.” *Abbott v. Perez*, 138 S. Ct. 2305, 2319 (2018) (citation omitted). The Court emphasized that “where an order has the ‘practical effect’ of granting or denying an injunction, it should be treated as such for

purposes of appellate jurisdiction.” *Id.* Because that is the case here, we deny Nebraska’s motion to dismiss the appeal.

We review the denial of a motion for a preliminary injunction for an abuse of discretion. *Jones v. Kelley*, 854 F.3d 1009, 1013 (8th Cir. 2017) (per curiam). “An abuse of discretion occurs where the district court rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions.” *Powell v. Noble*, 798 F.3d 690, 697 (8th Cir. 2015). To determine whether to issue a preliminary injunction, the district court considers “(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 Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113-14 (8th Cir. 1981) (en banc). Here, the district court considered each of these factors. Finding that they all cut against Fresenius Kabi, it denied the motion for a temporary restraining order.

Fresenius Kabi nevertheless argues that the district court gave significant weight to improper and irrelevant factors, failed to consider its likelihood of success on the merits, and improperly pitted its private interests against the democratic process. It claims that the district court misconstrued its concern for its business interests as “a calculated, abolitionist ploy to challenge the democratic will of Nebraskans.” While we recognize that Fresenius Kabi takes no stand on capital punishment, we find nothing inappropriate in the district court’s recognition that a preliminary injunction would frustrate Nebraska’s plans to execute Mr. Moore. Indeed, *Dataphase* specifically requires the district court to consider the public interest. Nor does the district court’s analysis of Fresenius Kabi’s likelihood of success warrant reversal. As Fresenius Kabi rightly notes, the short timetable required the district court to issue an opinion under considerable time pressure, and both parties agreed that live witness testimony was not necessary. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (noting that the limited purpose of and haste surrounding a preliminary injunction allow “evidence that is less complete than in a

trial on the merits”). In light of the nature of this action, it was not an abuse of discretion for the district court to treat the likelihood-of-success factor less exhaustively than Fresenius Kabi would have preferred, especially when the three other *Dataphase* factors clearly weighed in favor of the state. Indeed, the district court reasonably concluded that Fresenius Kabi was not likely to suffer irreparable injury because the injury it alleged was too speculative to support a preliminary injunction. This alone is sufficient to support its denial of the preliminary injunction. *Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 915 (8th Cir. 2015) (“[T]he absence of irreparable injury is by itself sufficient to defeat a motion for a preliminary injunction.”).

Consequently, we grant Fresenius Kabi’s motion for an expedited appeal, we affirm the district court order denying a preliminary injunction, and we deny as moot Fresenius Kabi’s motion for a preliminary injunction pending appeal.

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' SECOND NOTICE OF SUPPLEMENTAL AUTHORITIES

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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.).

On August 13, 2018, Petitioners filed a Notice of Supplemental Authorities alerting this Court to the United States District Court for the District of Nebraska’s decision in *Fresenius Kabi USA, LLC v. State of Nebraska*, Case No. 4:18-cv-03109-PGK (D. Neb. Aug. 10, 2018), which denied a temporary restraining order and preliminary injunction in a similar lawsuit by another drug manufacturer.

Later that same day, the Eighth Circuit Court of Appeals affirmed per curiam the Nebraska district court’s denial of the drug company’s request for injunctive relief. *Fresenius Kabi USA, LLC v. State of Nebraska*, Case No. 18-2717 (8th Cir. Aug. 13, 2018) (Ex. 1). First, the Eighth Circuit denied Nebraska’s motion to dismiss the appeal for lack of jurisdiction because, even though the district court styled its ruling as denying a TRO, the order had the “practical effect” of denying an injunction for purposes of appellate review. (*Id.* at 2-3).

Next, the Eighth Circuit found “nothing inappropriate in the district court’s recognition that a preliminary injunction would frustrate Nebraska’s plans to execute Mr. Moore,” and the Eighth Circuit did not fault the district court for considering the effects on the democratic process. (*Id.* at 3). The Eighth Circuit held that the district court did not abuse its discretion when it found that the drug company had no likelihood of success on the merits or when the district court “reasonably concluded that Fresenius Kabi was not likely to suffer

irreparable injury because the injury it alleged was too speculative to support a preliminary injunction.” (*Id.* at 4).

Following the Eighth Circuit’s affirmance, Mr. Moore’s execution went forward on August 14, 2018 using Diazepam, Fentanyl, Cisatracurium, and Potassium Chloride¹—the first three drugs were in Nevada’s previous lethal injection protocol before the State’s Diazepam supply expired. (Pet. 9). “Witnesses [to Moore’s execution] reported no complications, only some coughing before Moore stopped moving.”²

Three courts—the Arkansas Supreme Court, the United States District Court for the District of Nebraska, and the Eighth Circuit—have now rejected the claims that the drug manufacturers assert here. Drug manufacturers simply do not possess viable causes of action or property interests that allow them to interfere with lawful capital sentences and frustrate the will of the People. (Pet. 18-50). This Court should reject the drug manufacturers’ claims as a matter of law just as these other courts have done.

Dated: August 15, 2018.

/s/ Jordan T. Smith
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¹ Ashley May, *Nebraska’s First Execution by Lethal Injection Using Fentanyl*, USA Today (Aug. 14, 2018) available at <https://www.usatoday.com/story/news/nation-now/2018/08/14/nebraska-execute-carey-moore-using-opioid-fentanyl/984608002/>

² *Id.*

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 15, 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' SECOND NOTICE OF SUPPLEMENTAL AUTHORITIES** with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on August 15, 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.

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