

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,

v.

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

Respondents.

and

ALVOGEN, INC.; and HIKMA :
PHARMACEUTICALS USA :
INC., :

Real Parties in Interest. :

Supreme Court Case No: 76485

District Court No: A-18-777312-B

FILED

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***AMICUS CURIAE* BRIEF OF SANDOZ INC. IN SUPPORT OF REAL
PARTIES IN INTEREST'S OPPOSITION TO PETITIONERS'
EMERGENCY MOTION UNDER NRAP 27(E) TO STAY DISTRICT
COURT PROCEEDINGS PENDING THIS COURT'S DECISION ON THE
PETITION**

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STATEMENT OF *AMICUS CURIAE*

Sandoz Inc. (“Sandoz”) submits this *amicus curiae* brief in support of Respondents’ Opposition to Petitioners’ Emergency Motion under NRAP 27(e) to Stay District Court Proceedings Pending This Court’s Decision on the Petition. Sandoz is a Colorado corporation with corporate offices located at 100 College Road West, Princeton, New Jersey. Sandoz contributes to society’s ability to support growing healthcare needs by pioneering novel approaches to help people around the world access high-quality medicine.

Like Real Parties in Interest Alvogen, Inc. (“Alvogen”) and Hikma Pharmaceuticals USA Inc. (“Hikma”), Sandoz has a long-standing, publicly-stated opposition to the misuse of its products in capital punishment. Sandoz strongly objects to the unauthorized and wrongful use of its drugs as part of the State of Nevada’s (“the State’s”) execution protocol. Allowing the State to proceed with its plan to use one of Sandoz’s drugs to execute Scott Dozier by lethal injection will work a significant and irreparable harm to its reputation and cause substantial injury resulting from, among other things, damage to business and investor relationships and damage to goodwill.

Sandoz has a unique interest in the outcome of this proceeding because it will impact Sandoz’s pending Motion to Intervene in the District Court action. Sandoz only recently learned that the State obtained one of its drugs, a

muscle relaxant known as Cisatracurium, and identified it as one planned for use in the execution of Scott Dozier. Sandoz promptly moved to intervene before Petitioners filed their Emergency Motion with this Court. If a stay is granted, Sandoz, despite being a manufacturer of a drug in the State's lethal injection protocol, would not be a party to the underlying action, even though (i) the outcome could directly affect the usage of its product in Scott Dozier's execution, and (ii) Petitioners have identified the expiration date of Cisatracurium as a primary reason for granting their stay request.

STATEMENT OF THE CASE AND FACTS

Among its products in the United States, Sandoz manufactures and distributes Cisatracurium Besylate Injection (Abbreviated New Drug Application number 200154) ("Sandoz's Cisatracurium"). Cisatracurium is one of three drugs, along with Midazolam and Fentanyl, that make up the State's current execution protocol, which the State plans to use to execute Scott Dozier by lethal injection. The manufacturer of Midazolam, Alvogen, filed this action in Clark County District Court against Petitioners on July 10, 2018, alleging various statutory and common law claims and seeking an injunction enjoining Petitioners from using Alvogen's products to perform executions. Hikma, a manufacturer of Fentanyl, moved to intervene in that action on July 25, 2018, after learning Petitioners intended to use its Fentanyl in Mr. Dozier's execution. That motion was granted

on July 31, 2018, and on August 8, 2018, this Court similarly granted Hikma's motion to appear as a real party in interest in this writ proceeding. (*See* Order Granting Mot. to Appear at 2).

Sandoz's products, like Alvogen's and Hikma's, have been obtained by the Nevada Department of Corrections ("NDOC") for a non-approved purpose in circumvention of Sandoz's longstanding and public objection to the use of its products for capital punishment. The State knew such acquisitions were illegitimate, as evidenced by its efforts to conceal its actions even when faced with public requests for disclosure. It took a lawsuit by the ACLU and an order by First Judicial District Judge Wilson on July 6, 2018 to force the State to disclose the drugs it intended to use in Dozier's execution. (App. Vol. I, 186). With that disclosure, Sandoz was informed of the State's improper purchases and promptly sought relief.

To protect its interests, on August 3, 2018, Sandoz submitted a Motion to Intervene on Order Shortening Time in the District Court action before Judge Elizabeth Gonzalez, asserting many of the same causes of action brought by Alvogen and Hikma, but with respect to its drug, Cisatracurium. *See* Motion for Leave, Exhibit A (Sandoz Inc.'s Motion to Intervene). An argument on Sandoz's motion was scheduled to take place on August 9, 2018, but on August 8, 2018, this Court granted a temporary stay of proceedings in response to the States'

Emergency Motion to Stay Proceedings, preventing the District Court from making a decision on Sandoz's pending motion.

Earlier, the District Court heard extensive arguments on July 11, 2018, and entered a TRO prohibiting the State from using *Alvogen's Midazolam* pending further order. (App. Vol. II, 429-31) (emphasis added). The District Court has not yet had the chance to consider any injunctive relief to prohibit the State from using Sandoz's Cisatracurium. The District Court explicitly did not prohibit or stay Dozier's execution: "the determination that I'm making today and the issues that have been presented to the Court are not an issue of a stay of execution. The issue presented here 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." (App. Vol. II, 414:17-22).

The District Court also refused to treat the TRO as a preliminary injunction, noting the different standard and need to hold an evidentiary hearing. (App. Vol. II, 417:9-12). When the District Court sought to set the preliminary injunction hearing, a hearing in which Sandoz hoped to participate, the State requested that the District Court delay that hearing in favor of discovery. (App. Vol. II, 423:14-18). Indeed, the State demanded "substantial" discovery (App. Vol. II, 417:18-25, 418:15-25), prompting the District Court to allow 120 days of discovery. (App. Vol. II, 419:4-5). While the District Court was willing to hold

the preliminary injunction hearing on an expedited basis (App. Vol. II, 419:24-25), the State opposed doing so, citing its discovery. (App. Vol. II, 421:16-21).

Now the State has reversed course before this Court, asserting that “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 proceedings.” (Mot. to Expedite at 1). The State insists that it needs resolution well before November 30, 2018 because a batch of Cisatracurium would allegedly expire, meaning that “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.” (Mot. to Expedite at 1).

ARGUMENT

I. Sandoz will be uniquely prejudiced if this Court stays proceedings pending its decision on the State’s Petition.

Sandoz submits this brief to highlight the impact that a stay of proceedings would have on its intervention motion pending before the District Court and its corresponding ability to protect its rights.

A stay would effectively prevent Sandoz from intervening in the District Court action, which has direct implications for its interests. Sandoz seeks to assert its right to refuse business with those that would misuse its products.

There is a long-recognized right to “freely [] exercise [one’s] own independent discretion as to parties with whom he will deal.” *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1211 (9th Cir. 2007) (quoting *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1517-23 (10th Cir. 1984)); *see also United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Sandoz also has an interest in the protection of its reputation and goodwill.

Given these significant protectable interests, there should be “little difficulty concluding that the disposition of th[e] case may, as a practical matter, affect [Sandoz].” *California ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006). Unless Sandoz is able to intervene, it will have no voice as a party to this litigation, including the proceedings before this Court. Sandoz’s voice is critical to a just and efficient resolution of this matter. Neither Alvogen nor Hikma has any reason (or standing) to represent Sandoz’s interests in this matter, and there is no TRO in place with respect to Sandoz’s Cisatracurium. Accordingly, Sandoz’s presence would “add some necessary element to the proceedings which would not be covered by the parties in the suit.” *Blake v. Pallan*, 554 F.2d 947, 955 (9th Cir. 1977).

In fact, Petitioners identify the looming expiration date of Cisatracurium as a primary reason for granting their emergency motion. (*See Mot. to Expedite* at 1-2). Staying all District Court proceedings will prevent Sandoz

from intervening to protect its rights, and is particularly prejudicial given that Cisatracurium is what the State has argued demands immediate court attention. A stay of the District Court proceedings would allow the State to accelerate a decision with regard to Alvogen's and Hikma's claims and the State's ability to carry out an execution, while preventing Sandoz from protecting its rights with respect to its Cisatracurium in the same timeframe.

II. Staying all District Court proceedings would be an inefficient use of judicial resources.

A stay of all District Court proceedings, preventing Sandoz from intervening in the action, also undermines the efficient use of judicial resources to resolve essentially identical claims of all interested parties in one proceeding. *See, e.g., Lockwood v. Langendorf United Bakeries, Inc.*, 324 F.2d 82, 93 (9th Cir. 1963) (acknowledging it is "sensible and efficient judicial administration to permit inclusion in the litigation" of similar questions presented). While Sandoz also has unique interests, Sandoz's claims arise from the same factual basis as the claims of Alvogen and Hikma, and are based on largely the same legal issues and theories of liability. If Sandoz cannot intervene in the District Court action as a result of a stay in proceedings, Sandoz would need to pursue a separate action, which would be judicially inefficient given the substantial overlap in the claims of Sandoz, Alvogen and Hikma.

III. Sandoz joins in Alvogen's Argument and Countermotion.

Amicus defers to and adopts the Argument and Countermotion to Dismiss the Writ Petition in Alvogen's Opposition to Emergency Motion Under NRAP 27(e) to Stay District Court Proceedings Pending This Court's Decision on the Petition.

CONCLUSION

For the reasons set forth above, *amicus curiae*, respectfully requests that the Court deny Petitioners' Emergency Motion.

DATED this 13th day of August, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, J. Colby Williams, hereby certify that I have read this *Amicus curiae* brief, and to the best of my knowledge and information, and belief, it is not frivolous or interposed for any improper purpose. 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 Microsoft Word in size 14 font in double-spaced Times New Roman and contains 2414. I further certify that I have read this brief and that it complies with NRAP 21.

I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. 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 this 13th day of August, 2018

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