James J. Pisanelli, Esq., Bar No. 4027
JJP@pisanellibice.com
Todd L. Bice, Esq., Bar No. 4534
TLB@pisanellibice.com
Debra L. Spinelli, Esq., Bar No. 9695
DLS@pisanellibice.com
Emily A. Buchwald, Esq. Bar No. 13442
EAB@pisanellibice.com
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
Telephone: 702.214.2100

Electronically Filed
Aug 17 2018 08:51 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

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

*Attorneys for Alvogen, Inc.*

E. Leif Reid, Esq., Bar No. 5750
EReid@lrrc.com
Daniel F. Polsenberg, Esq., Bar No. 2376
DPolsenberg@lrrc.com
Josh M. Reid, Esq., Bar No. 7497
JReid@lrrc.com
Kristen L. Martini, Esq., Bar No. 11272
KMartini@lrrc.com
LEWIS ROCA ROTHGERBER
CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
Telephone: 702-949-8200

*Attorneys for Hikma Pharmaceuticals USA, Inc.*

**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.

Case No. 76485

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

**REAL PARTIES IN INTEREST'S SUPPLEMENTAL APPENDIX**

**(VOLUME I OF III)**



Docket 76485 Document 2018-31873

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,

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

Real Parties in Interest.

## REAL PARTIES IN INTEREST'S SUPPLEMENTAL APPENDIX

| DESCRIPTION | VOLUME | PAGE |
|---|---|---|
| Respondent's Supplemental Answering Brief filed in Case No. 60715, Coleman v. State of Nevada, dated October 23, 2013 | I | 0001 – 0021 |
| *In re Pulaski County Circuit Court, Fifth Division, Hon. Wendell Griffin* Per Curiam Brief filed in Supreme Court of Arkansas Case No. 17-155, dated April 17, 2017 | I | 0022 – 0026 |
| Formal Order filed in Supreme Court of Arkansas Case No. 17-317, dated April 30, 2018 | I | 0027 - 0030 |
| Hikma Pharmaceuticals USA Inc.'s Motion to Intervene on Order Shortening Time, dated July 24, 2018 | I | 0031 – 0113 |
| Defendants' Opposition to Hikma Pharmaceuticals USA Inc.'s Motion to Intervene on Order Shortening Time, dated July 27, 2018 | I | 0114 – 0187 |
| Transcript of Hearing on Hikma Pharmaceuticals' Motion to Intervene, dated July 30, 2018 | I | 0188 – 0208 |
| Hikma Pharmaceuticals USA Inc.'s Complaint in Intervention, dated July 30, 2018 | II | 0209 - 0268 |
| Defendants' Motion to Stay Proceedings Pending Nevada Supreme Court Decision, dated August 1, 2018 | II | 0269 – 0353 |

| DESCRIPTION | VOLUME | PAGE |
|---|---|---|
| Plaintiff Alvogen's Opposition to Defendants' Motion to Stay Proceedings Pending Nevada Supreme Court Decision on Order Shortening Time; Countermotion to Accelerate Discovery Responses and Set Preliminary Injunction Hearing, dated August 3, 2018 | II | 0354 - 0369 |
| Notice of Entry of Order Granting Hikma Pharmaceuticals' Motion to Intervene, dated August 3, 2018 | II | 0370 - 0374 |
| Letter from Todd L. Bice, Esq. to Jordan T. Smith, Esq., dated August 3, 2018 | II | 0375 |
| Email from Jordan T. Smith, Esq. to Todd L. Bice, Esq., dated August 3, 2018 | II | 0376 - 0378 |
| Transcript of Hearing on Defendants' Motion to Stay Proceedings, dated August 6, 2018 | III | 0379 - 0397 |
| Hikma Pharmaceuticals' Joinder and Supplement to Alvogen, Inc.'s Motion for Preliminary Injunction, dated August 8, 2018 | III | 0398 - 0583 |

DATED this 16th day of August 2018.

PISANELLI BICE PLLC

By: _____

James J. Pisanelli, Esq., Bar No. 4027
Todd L. Bice, Esq., Bar No. 4534
Debra L. Spinelli, Esq., Bar No. 9695
Emily A. Buchwald, Esq., Bar No. 13442
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Kenneth G. Schuler, Esq.
(*pro hac vice* pending)
Michael J. Faris, Esq.
(*pro hac vice* pending)
Alex Grabowski, Esq.
(*pro hac vice* pending)
LATHAM & WATKINS LLP
330 North Wabash Avenue, Suite 2800
Chicago, IL 60611

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

*Attorneys for Real Party in Interest Alvogen*

E. Leif Reid, Esq., Bar No. 5750
Daniel F. Polsenberg, Esq., Bar No. 2376
Josh M. Reid, Esq., Bar No. 7497
Kristen L. Martini, Esq., Bar No. 11272
LEWIS ROCA ROTHGERBER
CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169

*Attorneys for Real Party in Interest*
*Hikma Pharmaceuticals USA, Inc.*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 16th day of August 2018, I electronically filed and served by electronic mail and United States Mail a true and correct copy of the above and foregoing **REAL PARTIES IN INTEREST'S SUPPLEMENTAL APPENDIX (VOLUME I OF III)** properly addressed to the following:

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

*Attorneys for Petitioners*

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

*Attorneys for Real Party in Interest*
*Hikma Pharmaceuticals USA, Inc.*

**SERVED VIA HAND-DELIVERY**

The Honorable Elizabeth Gonzalez
Eighth Judicial District court, Dept. XI
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

An employee of Pisanelli Bice PLLC

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Oct 23 2013 04:04 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

JOHN COLEMAN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 60715

# RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

**Appeal From Denial of Petition for Writ of Habeas Corpus**
**Eighth Judicial District Court, Clark County**

ROBERT M. DRASKOVICH, ESQ.
Nevada Bar No. 6275
GARY A. MODAFFERI, ESQ.
Nevada Bar No. 12450
815 S. Casino Center Blvd.
Las Vegas, Nevada 89101
(702) 474-4222

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar No. 003926
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Page Number:

**Cases**

**Statutes**



**Other Authorities**

# IN THE SUPREME COURT OF THE STATE OF NEVADA

| | |
|---|---|
| JOHN COLEMAN,<br>Appellant,<br>v.<br>THE STATE OF NEVADA,<br>Respondent. | Case No. 60715 |

## RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

**Appeal From Denial of Petition for Writ of Habeas Corpus**
**Eighth Judicial District Court, Clark County**

## ARGUMENT

Appellant requested supplemental briefing in order to address "the impact of [the] United States District Court, District of Nevada's Order Clarifying Injunctions as to Senate Bill 471." (Motion for Leave to Amend or Supplement Appellant's Reply Brief, filed April 4, 2013, p. 1). Appellant devoted an entire paragraph to addressing this order. (Supplemental Opening Brief (ASOB), filed October 17, 2013, p. 8).[1] Instead of addressing the issue he sought leave to argue, Appellant imposed a general attempt to fortify the various weak links in his

[1] Appellant's Supplemental Opening Brief is not paginated as required by NRAP Rule 32(a)(4). However, Appellant's discussion of the federal court's clarification order is found on page 8 of the Supplemental Opening Brief, counting the first page of the argument section as page 1.

previous contentions. Regardless of the number of times Appellant is allowed to re-state his complaints, the decision below must be affirmed because the district court correctly concluded that it lacked jurisdiction over the Parole Board (Board). Furthermore, Appellant's claims were procedurally barred.

This Court reviews a district court's denial of a post-conviction petition for writ of habeas corpus for an abuse of discretion. Berry v. Sheriff, Clark County, 93 Nev. 557, 571 P.2d 109 (1977). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). This Court will give deference to a district court's factual findings so long as they are supported by substantial evidence and are not clearly wrong. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994), cert. denied, 514 U.S. 1052, 115 S.Ct. 1431 (1995). The burden is on Appellant to show that the district court abused its discretion. Peterson v. Pittsburg Silver Peak Gold Mining Co., 37 Nev. 117, 140 P. 519 (1914).

## I.
## THE DISTRICT COURT LACKED JURISDICTION TO ENTERTAIN CHALLENGES TO LIFETIME SUPERVISION IN A POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS

NRS 34.720 limits post-conviction writs of habeas corpus to requests for relief from a judgment of conviction or sentence or challenges to the computation of time served. Appellant does not address either of these but instead attacks the

terms of lifetime supervision imposed by the Board. Chapter 34 does not convey jurisdiction over claims against the Board involving lifetime supervision. The district courts are vested only with the discretion to release a sex offender from lifetime supervision. NRS 176.0931(3). See also, McConnell v. State, 125 Nev. 243, 248-49, 212 P.3d 307, 311 (2009) (challenge to execution protocols not cognizable in habeas corpus); Bowen v. Warden, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984) (challenge to punitive segregation not cognizable in habeas corpus).

Appellant attempts to side-step the jurisdictional issue by claiming that the broad grant of discretion invested in the Board to set the conditions of lifetime supervision pursuant to NRS 213.1243(1) violates Article 5, §14(3) of the Nevada Constitution. This provision authorizes the Legislature to create laws conferring jurisdiction upon the district courts to impose sentence upon a convicted criminal. Id. Appellant did not challenge the constitutionality of NRS 213.1243(1) on the basis of Article 5, §14(3) below and as such this Court should decline to entertain this argument. See, McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998), cert. denied, 528 U.S. 937, 120 S.Ct. 342 (1999) ("Where a defendant fails to present an argument below and the district court has not considered its merit, we will not consider it on appeal").

Further, Appellant does nothing to support his argument other than to offer naked citation to Article 5, §14(3). Appellant's failure to offer discussion of

relevant authority in support of his contention precludes review. Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330, n. 38, 130 P.3d 1280, n. 38 (2006) (court need not consider claims unsupported by relevant authority); State, Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (unsupported arguments are summarily rejected on appeal); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Smith v. Timm, 96 Nev. 197, 606 P.2d 530 (1980) (mere citation to legal encyclopedia does not fulfill the obligation to cite to relevant legal precedent); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (failure to offer citation to relevant legal precedent justifies affirmation of the judgment below).

Appellant does not offer authority supporting his naked assertion because his position is unsustainable. Statutes enjoy a presumption of constitutionality and the challenger must "make a clear showing of invalidity." Id. "A facial challenge to a legislative Act is … the most difficult challenge to mount successfully." United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100 (1987). Further, "[a] statute is not unconstitutional merely because it is undesirable, unfair, or unjust." In re Juvenile Commitment Costs, 240 Mich.App. 420, 613 N.W.2d 348 (2000).

This Court has repeatedly approved of the imposition of specific conditions of lifetime supervision after the completion of any term of imprisonment,

probation or parole. Johnson v. State, 123 Nev. 139, 144, 159 P.3d 1096, 1098 (2007); Palmer v. State, 118 Nev. 823, 827, 59 P.3d 1192, 1194 (2002). Moreover, this Court has already held that Article 5, §14(3) does not limit the power of the Legislature to authorize governmental bodies other than the district courts to impose conditions upon convicted criminals. See, Paschall v. State, 116 Nev. 911, 914-15, 8 P.3d 851, 853-54 (2000) (Legislature may invest justice courts with jurisdiction to suspend DUI sentences on the basis of Article 6, §8 despite language of Article 5, §14(3)). Similarly, the broad grant of authority in the Board to impose the conditions of lifetime supervision after the completion of any term of imprisonment, probation or parole is permissible under the Nevada Constitution. See, Article 1, §2 (permitting executive agencies to adopt regulations that bind persons outside the agency). Indeed, Article 5, §14(3) itself supports the Legislature's authority to allow the Board to impose the specific conditions of lifetime supervision after the completion of any term of imprisonment, probation or parole since lifetime supervision is imposed through the district court's judgment of conviction and the imposition of specific terms is delegated to the Board. Such delegation is not inappropriate since this Court has held that "the Legislature may delegate to other bodies the power to make rules and regulations supplementing legislation as long as the power given is prescribed in terms

sufficiently definite to serve as a guide in exercising that power."[2] State v. Frederick, 129 Nev. ___, 299 P.3d 372, 375 (2013).

Respondent recognizes the gravity of Appellant's allegations but the alleged importance of a contention does not convey jurisdiction. Habeas corpus is not a replacement for an appeal. In Sanchez v. Warden, 89 Nev. 273, 510 P.2d 1362 (1973), this Court declined to reverse the denial of a post-conviction habeas corpus petition challenging the trial court's refusal to suppress an identification. Sanchez did not reach the merits "of the identification question because the appellant … waived his right to have the issue reviewed ... [because] no appeal was taken. No reason was ever given why there was no appeal." Id. at 274-75, 510 P.2d at 1363. Sanchez held that "[p]ost-conviction proceedings are not intended to be utilized as a substitute for appeal." Id. at 275, 510 P.2d at 1363.

Appellant cannot escape Sanchez by complaining that the specific conditions of lifetime supervision were not disclosed at plea since they are irrelevant to notice of the claim. Appellant is complaining that the sentence of lifetime supervision was an empty shell into which the Board could pile any condition it desired.

---

[2] The necessary guidance is found in NRS 176A.410. While NRS 176A.410 relates to probation, common sense dictates that since probation, parole and lifetime supervision are forms of community supervision that the conditions of each would be similar. Moreover, such a common sense approach is required by the rules of statutory construction. Nevada State Democratic Party v. Nevada Republican Party, 127 Nev. __, __, 356 P.3d 1, 7 (2011) ("Where a statute lacks plain meaning, this court will consult legislative history, related statutes and context as interpretive aids.").

(ASOB, p. 9). Regardless of the merits of the contention, Appellant was aware of the basis for the allegation when he signed his plea agreement. Appellant could have raised the issue in a direct appeal.

This Court has rejected the contention that sex offenders need to wait until a statutory condition is imposed before challenging it. In In the Matter of T.R., 119 Nev. 646, 648, 80 P.3d 1276, 1277 (2003), this Court faced an appellant challenging "as unduly vague, the application of Nevada's adult sex offender registration and notification provisions to an adjudicated juvenile sex offender upon reaching his twenty-first birthday[.]" This Court rejected the contention that "T.R. lacks standing … [because] T.R. has not yet been subject to a hearing regarding his possible duty to register as an adult sex offender[.]" Id. at 651-52, 80 P.3d at 1279-80. T.R. makes it clear that Appellant should have challenged lifetime supervision on direct appeal.[3]

*It is important to note that affirmance of the district court will not leave Appellant without a remedy*. While traditional post-conviction relief is not available, Appellant could still pursue injunctive relief pursuant to NRS 33.010.

---

[3] What distinguishes T.R. from Palmer v. State, 118 Nev. 823, 59 P.3d 1192 (2002), is that the T.R. appellant had notice of the claim since he was informed of the possibility of adult sex offender registration whereas the record in Palmer was "silent with respect to whether Palmer was advised that he would be subject to lifetime supervision[.]" Palmer, 118 Nev. at 825, 59 P.3d 1193. Since Appellant was aware that he was subject to lifetime supervision his situation is more analogous to that of T.R.

See, Flamingo Paradise Gaming v. Chanos, 125 Nev. 502, 217 P.3d 546 (2009) (criminal penalties in Nevada Clean Indoor Air Act unconstitutionally vague on appeal from grant of injunctive and declaratory relief); Lamb v. Doe, 92 Nev. 550, 554 P.2d 732 (1976) (reversal injunctive and declaratory relief against criminal bookmaking laws); Qualified Patients Association v. City of Anaheim, 187 Cal.App.4th 734, 115 Cal. Rptr. 3d 89 (2010) (Patients Association sought declaratory judgment that state's medical marijuana laws preempted ordinance imposing criminal penalties for operating a medical marijuana dispensary).

## II.
## THE PETITION WAS PROCEDURALLY BARRED

Application of the procedural bars is mandatory. State v. Eighth Judicial District Court, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). This Court has concluded that "[h]abeas corpus petitions … filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Id. Accord, Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984).

A petition for writ of habeas corpus must be brought within 1 year from the filing of a judgment of conviction or remittitur. NRS 34.726(1); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998). The one year filing deadline is strictly enforced. See, Gonzales v. State, 118 Nev. 590, 595-96, 53

P.3d 901, 904 (2002) (Filing 2 days after the expiration of 1 year deadline required denial of petition). Further, a presumption of prejudice to the State arises if a petition is not filed within 5 years of the filing of a judgment of conviction or remittitur. NRS 34.800(2).[4] Appellant's Judgment of Conviction was filed on August 2, 2002. (Appellant's Appendix (AA), p. 10-12). Appellant did not appeal. (AA 107-08). Appellant did not file his petition until January 13, 2012. (AA 13). As such Appellant's petition was in violation of both the 1 year and 5 year rules. Even if the time to file is computed from July 27, 2007, the date the specific conditions of lifetime supervision were imposed upon Appellant, the petition was still time barred. (AA 108).

Appellant attempts to escape his procedural defaults by arguing the clock never started to tick. Appellant contends this Court's holding in Whitehead v. State, 128 Nev. __, 285 P.3d 1053 (2012), that the failure to specify a restitution amount in a judgment of conviction prevented a conviction from becoming final, must be expanded to require that a conviction imposing lifetime supervision is not

[4] Appellant attempts to avoid application of NRS 34.800(2) by claiming that the State would not suffer prejudice because the burdens imposed by a hearing on lifetime supervision would be minimal. (ASOB, p. 2, 10). However, the end game of such a hearing could impose the very prejudice NRS 34.800(2) protects against because Appellant is really contending that since the conditions were not disclosed there was no meeting of the minds sufficient to support a valid plea. (Appellant's Opening Brief, p. 13, footnote 37, 15, 18-19; AA 15, 17-18). If that view is adopted there is no valid plea and conviction. See, State v. Crockett, 110 Nev. 838, 877 P.2d 1077 (1994) (plea negotiations subject to contract principles).

final since the Board retains the authority to amend the specific conditions. However, Appellant ignores the rhyme behind the reasoning in Whitehead. Unlike Appellant's claims regarding lifetime supervision, Whitehead was solidly grounded in specific statutory language. This Court reached the holding it did because "NRS 176.105(1) states that 'the judgment of conviction must set forth … any term of imprisonment, the amount and terms of any fine, restitution or administrative assessment.' Another provision, NRS 176.033(1)(c), requires the district court to 'set an amount of restitution' when it determines that restitution 'is appropriate' as a part of a sentence." Id. at __, 285 P.3d at 1055.

Whitehead does not reach lifetime supervision because the Legislature never intended for the terms of lifetime supervision to be imposed at plea or sentencing. As this Court recognized in Palmer, "[l]ifetime supervision is a mandatory special sentence imposed upon all sex offenders … Like parolees and probationers, offenders subject to lifetime supervision are overseen by the Division of Parole and Probation and are required to conform their behavior to certain conditions, which are determined by the Parole Board after a hearing." Palmer, 118 Nev. at 827, 59 P.3d at 1194 (footnotes omitted). As such, this Court did not require that the specific conditions of lifetime supervision be determined at plea and instead held that "the record of a plea canvass … should reflect that a defendant entering a plea of guilty to a sexual offense … has been specifically advised that lifetime

supervision is a consequence of the plea." Id. at 831, 59 P.3d at 1197.[5] This conclusion was re-affirmed in Johnson v. State, 123 Nev. 139, 144, 159 P.3d 1096, 1098 (2007), where this Court stated that "[a] defendant need not be informed of the specific conditions of lifetime supervision at entry of plea because those conditions are not determined until after a hearing conducted just prior to the expiration of the defendant's term of imprisonment, parole, or probation."

The petition was time barred since the clock began ticking on August 2, 2002, or July 27, 2007. (AA 10, 107-08). A procedural default can be waived upon a showing of good cause and prejudice. NRS 34.726(1); 34.800(1); 34.810(1),(3). "[G]ood cause means a substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (internal quotation marks and citation omitted). "[A] petitioner must show that an impediment external to the defense prevented him … from complying with … procedural default rules." Id. An impediment external to the defense can be demonstrated by a showing "that the factual or legal basis for the claim was not reasonably available to counsel or that … interference by officials made

[5] Appellant failed to provide the transcript of his plea canvass so this Court cannot evaluate the extent of any notice regarding the imposition of lifetime supervision. This failure is fatal because "[i]t is [Appellant]'s responsibility ... to make and transmit an adequate appellate record to this court. When evidence upon which the lower court's judgment rests is not included in the record, it is assumed that the record supports the district court's decision." M&R Investment Company, Inc. v. Mandarino, 103 Nev. 711, 718, 748 P.2d 488, 493 (1987).

compliance impracticable." Id. However, "appellants cannot … manufacture good cause[.]" Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 526 (2003), rehearing denied, 120 Nev. 307, 91 P.3d 35 cert. denied, 543 U.S. 947, 125 S.Ct. 358 (2004).

Appellant attempts to fabricate good cause and prejudice by arguing that his failure to comply with the timing requirements of Chapter 34 can be ignored because of the ongoing litigation related to lifetime supervision, the drafting of the statute, the ongoing nature of his complaints, and because of the extent of the impact of the conditions of lifetime supervision upon his life. None of these establish good cause or prejudice sufficient to ignore Appellant's extensive delay. Appellant's complaints about the allegedly poorly drafted lifetime supervision statute and the open-ended nature of his complaints actually cut against a finding of good cause and prejudice. As discussed in Section I, the alleged ongoing and unbridled discretion invested in the Board to impose specific conditions of lifetime supervision has been present since the day Appellant signed the plea agreement and as such he was on notice to pursue any claims he might have. Likewise, the ongoing litigation of lifetime supervision also weighs against a finding of good cause or prejudice. The federal district court issued the permanent injunction on October 7, 2008. American Civil Liberties Union of Nevada v. Cortez Masto, 719 F.Supp.2d 1258, 1258 (2008) (Masto I), overruled, American Civil Liberties Union of Nevada v. Masto, 670 F.3d 1046, 1052-53 (2012) (Masto II). Between the

imposition of specific conditions of lifetime supervision on Appellant on July 27, 2007, and the October 7, 2008, permanent injunction in Masto I, Appellant's decision to wait until January 13, 2012, to pursue relief is inexplicable and certainly does not establish good cause or prejudice. (AA 13, 107-08).

Similarly, the life impact of the conditions of lifetime supervision should also have spurred Appellant to pursue more immediate relief and do not provide excuse for his failure to comply with the procedural mandates of Chapter 34. Since the day of his plea, Appellant knew that every version of NRS 213.1243 since enactment in 1995 invested the Board with wide discretion to assign conditions of lifetime supervision. NRS 213.1243(1) (see 1995 and 1997 versions). Appellant was aware of the nature of the conditions that might be imposed pursuant to lifetime supervision since his Judgment of Conviction set forth the requirements of NRS 176.410, conditions at least as intrusive as those he now complains about. (AA 11-12). Certainly the litigation regarding lifetime supervision that culminated with the permanent injunction of Masto I on October 7, 2008, should have encouraged Appellant to pursue relief.

## CONCLUSION

WHEREFORE, the State respectfully requests that this Court AFFIRM the decision below.

Dated this 23rd day of October, 2013.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

## CERTIFICATE OF COMPLIANCE

1. **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 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more and contains 3,194 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and 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 every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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 23rd day of October, 2013.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

## CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 23rd day of October, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General

ROBERT M. DRASKOVICH, ESQ.
GARY A. MODAFFERI, ESQ.
Counsel for Appellant

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

*/s/ j. garcia*
Employee, Clark County
District Attorney's Office

JEV//jg

# SUPREME COURT OF ARKANSAS

**NO. 17-155**

Order Delivered: April 17, 2017

IN RE PULASKI COUNTY CIRCUIT COURT, FIFTH DIVISION, HON. WENDELL GRIFFEN


**PER CURIAM**

"Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and confidence." Ark. Code Judicial Conduct, Preamble.

Amendment 80, section 4, provides that this court exercises general superintending control over all the state courts. "Superintending control is an extraordinary power that is hampered by no specific rules or means." *Parker v. Crow*, 2010 Ark. 371, 368 S.W.3d 902. Rule 2.11 of the Arkansas Code of Judicial Conduct states in pertinent part, "A judge shall disqualify himself or herself in any proceeding in which . . . the judge . . . has made a public statement . . . that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy." The United States Supreme Court has explained that, "A fair trial in a fair tribunal is a basic requirement of

due process. Fairness of course requires an absence of actual bias in the trial of cases." *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623 (1955).

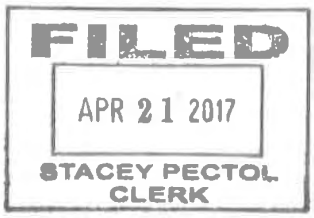
To protect the integrity of the judicial system this court has a duty to ensure that all are given a fair and impartial tribunal. We find it necessary to immediately reassign all cases in the Fifth Division that involve the death penalty or the state's execution protocol, whether civil or criminal. The administrative judge shall be responsible for determining the appropriate division(s) to receive these cases. In addition, this court instructs the Sixth Judicial District to submit a new administrative plan to this court for approval by close of business on Tuesday, April 18, 2017 that reflects the permanent reassignment of all cases referenced above, future cases involving this subject matter, and any other changes in case assignment to ensure all litigants in this district receive a fair and impartial tribunal. Judge Wendell Griffen is referred to the Judicial Discipline and Disability Commission to consider whether he has violated the Code of Judicial Conduct.

KEMP, C.J., concurring in part and dissenting in part, with written opinion to follow.

# SUPREME COURT OF ARKANSAS

No. 17-155

Opinion Delivered: April 21, 2017




IN RE PULASKI COUNTY CIRCUIT COURT, FIFTH DIVISION, HON. WENDELL GRIFFEN

CONCURRING IN PART; DISSENTING IN PART.

**JOHN DAN KEMP, Chief Justice**

For the reasons set forth below, I concur in part in and dissent in part from this court's per curiam order, *In re Pulaski Cty. Cir. Ct., Fifth Div.*, No. 17-155 (Apr. 17, 2017) (assignment order).

On April 15, 2017, the State of Arkansas filed an emergency petition requesting that this court vacate a temporary restraining order ("TRO") filed by Circuit Judge Wendell Griffen of the Pulaski County Circuit Court, Fifth Division. *Emergency Petition for Writ of Mandamus, Writ of Prohibition, Writ of Certiorari, or Supervisory Writ* (Apr. 15, 2017) (No. CV-17-299). Judge Griffen had previously granted the TRO and enjoined the Arkansas Department of Correction from using a drug sold by respondent McKesson Medical-Surgical, Inc. ("McKesson") as part of a lethal-injection protocol used in Arkansas executions. In its petition, the State contended that Judge Griffen demonstrated "actual bias," that he could not "avoid the appearance of unfairness," and that "his impartiality might reasonably be questioned" in granting the TRO after attending two anti-death-

penalty rallies and after publicly expressing his views about medications used in the executions. The State sought two types of relief: (1) to vacate the TRO through an extraordinary writ and (2) "to remove Judge Griffen from this case."

This court's per curiam order of assignment states as follows:

> To protect the integrity of the judicial system this court has a duty to ensure that all are given a fair and impartial tribunal. We find it necessary to immediately reassign all cases in the Fifth Division that involve the death penalty, or the state's execution protocol, whether civil or criminal. The administrative judge shall be responsible for determining the appropriate division(s) to receive these cases. In addition, this court instructs the Sixth Judicial District to submit a new administrative plan to this court for approval by close of business on Tuesday, April 18, 2017 that reflects the permanent reassignment of all cases referenced above, future cases involving this subject matter, and any other changes in case assignment to ensure all litigants in this district receive a fair and impartial tribunal. Judge Wendell Griffen is referred to the Judicial Discipline and Disability Commission to consider whether he has violated the Code of Judicial Conduct.

*In re Pulaski Cty. Cir. Ct.*, No. 17-155, at 2.

I would reassign Judge Griffen "from this case," *McKesson Medical-Surgical, Inc. v. State*, No. 60CV-17-1921, Pulaski Cty. Cir. Ct., 5th Div. (Apr. 14, 2017), and I agree with the majority to refer him to the Judicial Discipline and Disability Commission ("Commission") to consider whether he violated the Arkansas Code of Judicial Conduct. *See* Ark. Jud. Discipline & Disability Comm'n R. 6 (stating that the Commission "shall have jurisdiction over any 'judge' regarding allegations of misconduct").

I disagree with this court's decision to reassign all cases in the Pulaski County Circuit Court, Fifth Division, that involve the death penalty or the State's execution protocol because the Commission has not yet investigated any allegations of misconduct against Judge Griffen. Any action taken by the Commission after an investigation of a judge is governed by the Rules of Procedure of the Arkansas Judicial Discipline and Disability Commission.



RPAPP0025

Pursuant to Arkansas Constitution amendment 66, Arkansas Code Annotated sections 16-10-401 through 16-10-411 (Repl. 2010 & Supp. 2015), and Rules 1 through 15 of the Rules of Procedure of the Arkansas Judicial Discipline and Disability Commission, the supreme court is authorized to review judicial-discipline matters filed with the Commission.

All judges are afforded the procedural rights provided in amendment 66, and my opinion should not be deemed a judgment about, or determination of, any issues that are or could be pending before the Commission or this court. Accordingly, I concur in part and dissent in part.

Concur in part; dissent in part.

ELECTRONICALLY FILED
Pulaski County Circuit Court
Larry Crane, Circuit/County Clerk
2018-Apr-30 14:15:47
60CV-17-1960
C06D12 : 4 Pages

# FORMAL ORDER

**STATE OF ARKANSAS,** )
)
SUPREME COURT )

**SCT.**

**BE IT REMEMBERED,** THAT A SESSION OF THE SUPREME COURT BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON APRIL 26, 2018, AMONGST OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

SUPREME COURT CASE NO. CV-17-317

STATE OF ARKANSAS; ARKANSAS DEPARTMENT OF CORRECTION; ASA HUTCHINSON, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ARKANSAS; WENDY KELLEY, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE ARKANSAS DEPARTMENT OF CORRECTION APPELLANTS

V. APPEAL FROM PULASKI COUNTY CIRCUIT COURT, TWELFTH DIVISION – 60CV-17-1960

HON. ALICE GRAY, CIRCUIT JUDGE AND MCKESSON MEDICAL-SURGICAL, INC. APPELLEES

JOINT MOTION TO DISMISS IS GRANTED. WOMACK, J., CONCURS. SEE **CONCURRING OPINION** THIS DATE.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF THE ORDER OF SAID SUPREME COURT, RENDERED IN THE CASE HEREIN STATED, I, STACEY PECTOL, CLERK OF SAID SUPREME COURT, HEREUNTO SET MY HAND AND AFFIX THE SEAL OF SAID SUPREME COURT, AT MY OFFICE IN THE CITY OF LITTLE ROCK, THIS 26TH DAY OF APRIL, 2018.

Stacey Pectol

CLERK

BY: _____

DEPUTY CLERK

ORIGINAL TO CLERK (W/COPY OF OPINION)

CC: JENNIFER L. MERRITT, SENIOR ASSISTANT ATTORNEY GENERAL
MICHAEL B. HEISTER, STEVEN W. QUATTLEBAUM, JOHN E. TULL III, AND MICHAEL N. SHANNON
HONORABLE ALICE GRAY, CIRCUIT JUDGE (W/COPY OF OPINION)

# SUPREME COURT OF ARKANSAS

No. CV-17-317

Opinion Delivered: April 26, 2018

STATE OF ARKANSAS, ARKANSAS DEPARTMENT OF CORRECTION, ASA HUTCHINSON, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ARKANSAS; WENDY KELLEY, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE ARKANSAS DEPARTMENT OF CORRECTION
APPELLANTS

V.

MCKESSON MEDICAL-SURGICAL, INC.
APPELLEE

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[NO. 60CV-17-1960]

HONORABLE ALICE S. GRAY, JUDGE

CONCURRING OPINION.

**SHAWN A. WOMACK, Associate Justice**

I join in the court's vote to grant the parties' joint motion to dismiss this case as moot due to the expiration of the State's supply of vecuronium bromide. I write separately to highlight two points. First, to note what I believe to be unacceptable conduct by the circuit court in the handling of this case. Specifically, the blatant disregard for the law shown by this judge in refusing to consider and rule upon the threshold issue of venue. Second, to draw attention to the new mandatory provisions in the law regarding venue in certain actions, as passed by the General Assembly in 2017.

On April 18, 2017, the State filed a motion to change venue pursuant to Act 967 of 2017, which amended Arkansas Code Annotated § 16-60-201(e) to read:

(1) A defendant in a civil action under § 16-60-104(3) may obtain an order for a change of venue by motion requesting a transfer to one (1) of the following counties:

(A) Pulaski County;

(B) Any county in which one (1) of the plaintiffs, or in the case of a certified class action, any member of the class, resides, conducts business, or maintains a principal place of business; or

(C) If no plaintiff is a resident of Arkansas, any county in the state of Arkansas.

(2) The venue of the civil action shall be changed upon a showing that the proposed transferee county is a proper venue as set forth in this subsection.

Act 967 had an emergency clause, and it went into effect on April 5, 2017.

Despite the amended venue statute being in effect and dictating that venue "*shall* be changed" upon satisfaction of its conditions, the circuit court declined to rule on the State's venue-change motion. It instead reached and granted McKesson's request for injunctive relief, leading directly to an interlocutory appeal and later to the appeal we have just dismissed today. After the issue had been briefed, the circuit court finally deigned to hear arguments about venue at a hearing on July 12, 2017. That hearing combined arguments on the venue issue with the State's motion to dismiss on sovereign immunity grounds. When the circuit court denied the motion to dismiss, however, it again declined to address the venue issue. The court claimed that it was "going to take this transfer under advisement and make the decision as soon as possible." No decision has been forthcoming.

Good-faith legal arguments can be had about McKesson's residency for the purposes of the statute, and therefore whether the State satisfied the requirements for securing the statute's mandatory venue transfer. As it happens, those arguments *were* had, both when the State initially moved to change venue at the outset of litigation and when a hearing was



RPAPP0029

finally held several months later. Even if the circuit court had issued its ruling at the July hearing, reaching the foundational issue of venue only after ruling on the merits of the case and generating two separate appeals to this court would have been putting the horse well after the cart. The circuit court's dilatory handling of the State's motion to change venue, whether willful or not, has altered the entire texture of this litigation.

Electronically Filed
7/26/2018 8:19 AM
Steven D. Grierson
CLERK OF THE COURT

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

*Attorneys for Intervenor*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

ALVOGEN, INC.,

Plaintiff,

vs.

STATE OF NEVADA;

NEVADA DEPARTMENT OF CORRECTION;

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

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

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

Defendants.

Case No. A-18-777312-B

Dept. No. XI

**HIKMA PHARMACEUTICALS USA INC.'S MOTION TO INTERVENE ON ORDER SHORTENING TIME**

Date of Hearing:

Time of Hearing:

Intervenor Hikma Pharmaceuticals USA Inc. ("Hikma"), through its counsel of Lewis Roca Rothgerber Christie LLP, moves to intervene in this action as a matter of right pursuant to NRCP 24(a). Alternatively, Hikma moves for permissive intervention under NRCP 24(b). This

///

///



Case Number: A-18-777312-B



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

Motion is made in accordance with EDCR 2.20 and 2.26, and based upon the following Memorandum of Points and Authorities, the attached Exhibit, and the pleadings and paper on file herein.

DATED this 24th day of July, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Josh M. Reid*
E. LEIF REID, ESQ., SBN 5750
JOSH M. REID, ESQ., SBN 7497
KRISTEN L. MARTINI, ESQ., SBN 11272
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

*Attorneys for Intervenor*

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

**DECLARATION OF JOSH M. REID IN SUPPORT OF APPLICATION FOR ORDER SHORTENING TIME**

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

1. I am admitted to practice law in the State of Nevada and the courts of Clark County.

2. I am counsel of record for Hikma in the above-referenced action and make this Declaration in support of Hikma's Motion to Intervene on Order Shortening Time ("Motion").

3. 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.

4. As set forth in the Motion, and as alleged in the proposed Complaint in Intervention, attached hereto as **Exhibit A**, on July 10, 2018, Plaintiff Alvogen, Inc. ("Alvogen") filed its Complaint for Emergency Injunctive Relief and Return of Illegally-Obtained Property ("Alvogen Complaint"), and *Ex Parte* Application for Temporary Restraining Order and Motion for Preliminary Injunction; *Ex Parte* Motion for Order Shortening Time. Through this action Alvogen seeks to enjoin Defendants from using Alvogen's Midazolam Product in capital punishment until further order of this Court.

5. I am informed and believe that on or about July 10, 2018, Hikma received notice that the State of Nevada had confirmed its intention to execute Scott Raymond Dozier, scheduled for July 11, 2018, using the drug fentanyl in its lethal injection protocol. Hikma manufactures fentanyl, but at the time that Hikma received notice of Defendants' planned use for the Dozier execution, it remained unclear whether Defendants were in possession of Hikma's fentanyl product ("Hikma's Fentanyl").

6. 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 ("TRO") the same day, prohibiting and enjoining Defendants from using Alvogen's Midazolam Product in capital punishment until further order of the Court. This Court further ordered that the "TRO will remain in effect pending the preliminary injunction hearing completion," and



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

scheduled a status check for September 10, 2018, related to the discovery being conducted in preparation for the preliminary injunction hearing.

7. As a result of the Court's issuance of the TRO, the State of Nevada postponed the execution of Scott Raymond Dozier until further notice.

8. After the Court's issuance of the TRO and the State of Nevada's postponement of the execution, Hikma was able to confirm that Defendants are in possession of Hikma's Fentanyl. Hikma also manufactures midazolam, although it does not appear that Defendants are in possession of any Hikma product besides Hikma's Fentanyl that may be used in its lethal injection protocol. As articulated in the instant Motion, Hikma has an interest in the property and transactions that are at issue in this action concerning Defendants' acquisition of medicines for the purpose of executing Scott Raymond Dozier, and others.

9. As a practical matter, if Hikma's request for intervention is denied, Hikma's ability to protect its interests may be impaired, for any relief afforded to Alvogen will pertain to Alvogen's products, not Hikma's. And, Hikma's request is timely. While the existing parties to this action are about to begin the discovery process in preparation for the preliminary injunction hearing, they have yet to do so. Hikma intends to join in Alvogen's motion for preliminary injunction, but with respect to Hikma's products, and will seek to participate in the discovery process and preliminary injunction hearing if allowed by this Court. Hikma seeks shortened time on its Motion to Intervene as a result.

10. Moreover, because this Court's TRO extends only to Alvogen's Midazolam Product, Hikma's products are still at risk to be used in the State of Nevada's execution of Scott Raymond Dozier, which may occur upon the issuance of a new death warrant. Thus, Hikma seeks a decision on its request to intervene on shortened time so that Hikma may seek immediate temporary relief from this Court to protect Hikma's products—the request of which would raise the same legal issues and substantially similar facts as those presented in Alvogen's request—should the need arise. If intervention is allowed on shortened notice, the scenario requiring Hikma to initiate a new, separate action—thereby creating the risk of inconsistent decisions, or delay as a result of subsequent consolidation—to obtain such immediate relief is avoided altogether.

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

11. For these reasons, good cause exists to shorten time and hold the hearing on Hikma's Motion to Intervene as soon as possible.

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

DATED this 24th day of July, 2018.

JOSH M. REID, ESQ.

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

**ORDER SHORTENING TIME**

TO: ALL PARTIES AND THEIR ATTORNEY OF RECORD:

IT IS HEREBY ORDERED that the time for hearing on Hikma Pharmaceuticals USA Inc.'s Motion To Intervene is hereby shortened and shall be heard on the 30 day of July, 2018, at 9, p.m./a.m., in Department XI in the above-entitled court, or, alternatively, as soon thereafter as counsel may be heard.

IT IS FURTHER ORDERED that the briefing schedule concerning Hikma Pharmaceuticals USA Inc.'s Motion to Intervene be set as follows:

Defendants shall have up to and including _____, 2018, by 5:00 p.m. to file a response to the Motion. Plaintiff Hikma Pharmaceuticals USA Inc. shall have up to and including _____, 2018, by 5:00 p.m. to file a reply.

DATED this 25 day of July, 2018.

DISTRICT COURT JUDGE

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: /s/ *Josh M. Reid*
E. LEIF REID, ESQ., SBN 5750
JOSH M. REID, ESQ., SBN 7497
KRISTEN L. MARTINI, ESQ., SBN 11272
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

*Attorneys for Intervenor*

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

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

Hikma, as a pharmaceutical company that manufactures medicines to promote the well-being of patients in need, seeks to intervene in this action to protect its interests. This action involves Defendants' illegal and unauthorized acquisition and possession of medicines that make up the novel, three-drug protocol that Defendants intend to use to execute Scott Raymond Dozier, and potentially other condemned inmates. Plaintiff Alvogen, Inc. ("Alvogen"), is a manufacturer of midazolam—a one-third component to the new lethal injection protocol—and has alleged various statutory and common law claims against Defendants, further seeking to preliminarily and permanently enjoin Defendants from using its products for executions. Hikma is a manufacturer of both fentanyl and midazolam and, like Alvogen, only recently discovered through media sources that Defendants illegally obtained possession and intend to use one of its products, Fentanyl Citrate Injection, USP C-II ("Hikma's Fentanyl"), in an illegal manner as one of the other one-third components to the protocol for Scott Raymond Dozier's execution. Defendants' actions and intended use of Hikma's Fentanyl are contrary to Hikma's express admonitions, made both publicly and directly to Defendants, the U.S. Food and Drug Administration's approved use of the drug, and Nevada law.

If Defendants are permitted to retain their unlawful possession of Hikma's Fentanyl and proceed with their wrongful use of Hikma's products, Hikma will suffer irreparable damage 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. Hikma seeks to raise substantially the same legal issues and claims as those raised by Alvogen in this matter, which are based on a substantially similar set of facts.

Thus, Hikma has a compelling interest in the property and transactions that are the subject of this lawsuit. Resolution of this action as a practical matter, based on the factual and legal issues and claims raised herein, will affect Hikma's substantial interests. Hikma is entitled to protect those interests and will be harmed if precluded from doing so because, while adjudicating the

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

overarching legal and factual issues in the case, Alvogen seeks to protect its specific property rights, not Hikma's. Consequently, in the absence of Hikma's intervention in this action, a decision in favor of Alvogen will not extend to prevent Defendants from illegally obtaining and misusing Hikma's products, including Hikma's Fentanyl, in the upcoming execution of Scott Raymond Dozier. For these reasons, Hikma is entitled to intervene as a matter of right, pursuant to Nevada Rule of Civil Procedure 24(a).

To the extent any question remains as to Hikma's intervention right, Hikma alternatively seeks leave for permissive intervention under Rule 24(b). Permissive intervention is proper for the reasons that Hikma has alleged the same claims for relief, predicated on the same legal and similar factual bases, as those alleged by Alvogen in this case. Moreover, Hikma seeks to preliminarily and permanently enjoin Defendants from using its products, including Hikma's Fentanyl and midazolam, for executions conducted by the State of Nevada, including the execution of Scott Raymond Dozier. Alvogen has already requested that Defendants be preliminarily and permanently enjoined from using Alvogen's Midazolam Product in executions, and specifically the Dozier execution.

Because of the (1) similar legal questions; (2) substantially similar factual underpinnings surrounding Defendants' unlawful acquisition and use of the drugs, and these manufacturers' public and direct notices to Defendants that these products could not be used in executions; and (3) timeliness of the instant Motion, no existing party will suffer prejudice as a result of Hikma's intervention. Accordingly, an order allowing Hikma to intervene in this action is warranted.

## II. FACTUAL BACKGROUND

Hikma's mission is to treat illnesses and save lives by providing patients with access to high-quality and affordable medicines. To maintain Hikma's reputation for producing safe, high-quality products, Hikma has always been and is committed to going beyond mere compliance with the law and strives to uphold the highest ethical standards in everything it does.

In an attempt to ensure that its products are 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

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

use in lethal injection protocols. 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. A** at Ex. 2 (*Use of Products in Capital Punishment*, HIKMA, http://www.hikma.com/about/our-policies/use-of-products-in-capital-punishment (last accessed July 24, 2018)). Hikma has also refused the direct sale of its products to United States 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. Hikma's website further publishes 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 for lethal injection protocols, publishing them on Hikma's restricted list. *See id.* These drugs include Hikma's Fentanyl and midazolam products. *Id.*

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 inappropriate use that violates Hikma's policy and values and is counter to Hikma's interests.

In 2016, for example, Hikma exercised its right not to sell its products to Defendants for use in lethal injection, and gave Defendants written notice that Hikma vehemently objected to the use of any of its products for lethal injection. On December 20, 2016, in confirming this policy, Hikma sent letters to Nevada's Attorney General Adam Laxalt, Governor Brian Sandoval, and



LEWIS ROCA ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

Defendant Dzurenda, in which Hikma stated, "We object 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 ("2016 Letters"). *See* **Ex. A** at Ex. 3 (emphasis added). Hikma notified these recipients that such use of any of its products 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 [its] values as an organization.

*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. *Id.* Hikma further stated,

> 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.* By the end of September 2017, after discovering that fentanyl was being considered for use in lethal injections, Hikma specifically named its Fentanyl and midazolam products on the restricted list.

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 (Nev. Dist. Ct. 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 cocktail. This decision was extremely controversial because it represents the first time any state in the country included the already-controversial drug fentanyl as

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

part of its lethal injection protocol. The State's novel misuse of the drug in executions renders it experimental, and thus exacerbates the already existing controversy.

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 its drugs. 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. A** at Ex. 4. Hikma restated that such use of any Hikma products is contrary to its therapeutic purpose and FDA approved-use, in addition to being contradictory to the intended use of the products and Hikma's organizational values. *Id.* 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.*

Although Hikma at the time was not aware of the State being in possession of Hikma products for such purpose and communicated the same, to be sure, Hikma reiterated,

> [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.*

Hikma's actions here are consistent with those of other pharmaceutical companies that have taken affirmative action to exercise their rights to not sell their products for use in lethal injection. *See* **Ex. A** at Ex. 1. More than 20 American and European pharmaceutical companies have taken similar action, including Alvogen in this specific case.

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

Like Alvogen and other pharmaceutical companies, Hikma has an important interest in protecting its business reputation and meeting its fiduciary duties to its shareholders and investors. Experts have commented 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 a U.S. subsidiary of an international pharmaceutical company that is publicly traded on the London Stock Exchange, Hikma has taken multiple proactive actions in order to protect its rights and values, and also to protect its shareholders and investors.

Similar to Hikma, Alvogen sent Defendants letters strongly objecting to the use of Alvogen's products in capital punishment, specifically identifying that Alvogen's Midazolam Product should not be used in executions for running counter to the FDA-approved therapeutic and medical uses for these products. Alvogen Compl. 6-7. Alvogen, too, explained the controls it has in place to ensure that its products are not purchased for use in lethal injections, including that it does not accept orders from any state departments of corrections and prohibits its customers from selling to the same. *Id.* Alvogen's website reiterates that its product should not be used in execution protocols. *See id.* at 7.

Similar to what Alvogen alleges with respect to its Midazolam Product, *e.g.*, *id.* at 7, in spite of Hikma's written demands and warnings to not have its products used in conjunction with lethal injection, Defendants acted to illegitimately obtain Hikma's Fentanyl to use in its lethal injection protocol.

On or about July 10, 2018, Hikma was informed, just as Alvogen was, 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. 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.

This Court heard argument on Alvogen's *Ex Parte* Application for a Temporary Restraining Order at 9 a.m. on July 11, 2018, and issued the Temporary Restraining Order



LEWIS ROCA ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

("TRO") the same day. The TRO prohibited and enjoined Defendants from using Alvogen's Midazolam product in capital punishment until further order of the Court. The TRO is specifically limited to Alvogen's Midazolam Product.

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 in that case compelled NDOC to disclose the lethal injection procedures it planned to implement in Scott Raymond Dozier's execution. *Id.* The documents included a list of the drugs to be included in the lethal injection cocktail along with the invoices related to NDOC's purchase of those specific drugs. These invoices identified Hikma's Fentanyl product, NDC/UPC 00641-6027-25. *See* **Ex. A** at 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.

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 where Nevada's executions take place (over 200 miles away from its Las Vegas building). *See id.* Defendants' purchase of Alvogen's Midazolam Product were placed through the same wholesale distributor, and billed and shipped to the same NDOC's administrative building in Las Vegas. *E.g.*, Alvogen Compl. 11-12.

In order to purchase Hikma's Fentanyl and Alvogen's Midazolam Product, NDOC was required to provide Cardinal Health with proof of a medical license issued to NDOC's medical director. NDOC's purchase orders to Cardinal Health for Hikma's Fentanyl and Alvogen's Midazolam Product used the Nevada Chief Medical Officer's license to illegally obtain the products. In doing so, NDOC intended Cardinal Health to believe that the orders for the products were being placed at the request or for the benefit of the physician and the medications would be

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

used for a legitimate medical purpose, consistent with Nevada's Controlled Substances Act and the Nevada State Board of Medical Examiners regulations.

NDOC acquired Hikma's Fentanyl and Alvogen's Midazolam Products from Cardinal Health when it was aware that both manufacturers had strongly objected to and prohibited the use of all of their products in executions. NDOC acquired Hikma's Fentanyl and Alvogen's Midazolam Product nonetheless through a source that was not authorized to sell to the NDOC for the non-approved use in an execution.

Following Defendants' receipt of Hikma's 2016 Letters, *see* **Ex. A** at Ex. 3, and following Alvogen's April Letters, Defendants sought to circumvent both manufacturers' policies by purchasing the Hikma Fentanyl and Alvogen's Midazolam Product through an unsuspecting intermediary and without disclosing to said intermediary that they planned to use the products for an execution. Defendants were thus able to illicitly obtain both Hikma's Fentanyl and Alvogen's Midazolam Product in a manner that Defendants would not have been able to accomplish had they disclosed that they planned to use the products for an execution.

Even after receiving Hikma's 2017 Letters and Alvogen's April Letters reiterating their objections to NDOC's use of any of their products for executions, Defendants thereafter announced their intention to use Hikma's Fentanyl and Alvogen's Midazolam Product in the lethal injection protocol for Scott Raymond Dozier—a non-medical purpose for which neither are allowed nor intended to be used. Defendants' proposed use for Hikma's Fentanyl and Alvogen's Midazolam Product is unequivocally contrary to the intended therapeutic or medical use for this product. While neither manufacturer takes any position on the death penalty itself, these products were manufactured to meet the therapeutic or medical needs of healthcare patients—not to be used in state-facilitated executions of convicted felons.

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. A** at Ex. 6. Hikma reminded these recipients, including NDOC—once again—of Hikma's position on the misuse of its medicines in executions. *See id.*

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

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.*

Hikma demanded that NDOC immediately return all of its Fentanyl, and other products, intended for use in executions for a full refund, for such use would represent a serious misuse of life-saving medicines. *Id.* Hikma specifically requested that 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.* Defendants have not responded to Hikma's letter.

Likewise, Defendants have refused Alvogen's offer to return Alvogen's Midazolam Product for a full refund. Alvogen Compl. 20.

Just as Defendants did with respect to Alvogen's Midazolam Product, Defendants obtained Hikma's Fentanyl to use it in an unintended and unapproved manner, and Defendants have violated Hikma's rights and Nevada law as well. 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 the unintended and unapproved use of lethal injection, 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 investors.

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

## III. HIKMA IS ENTITLED TO INTERVENTION AS A MATTER OF RIGHT

The procedural mechanism governing a prospective party's ability to intervene in a matter is Rule 24 of the Nevada Rules of Civil Procedure. Traditionally, Rule 24 "receives liberal construction in favor of applicants for intervention." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003), *as amended* (May 13, 2003).

Under NRCP 24(a), a prospective intervenor

> shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

*See also* NRS 12.130. Intervention as a matter of right must be permitted if the applicant can establish the following four requirements: "(1) that it has a sufficient interest in the litigation's subject matter, (2) that it could suffer an impairment of its ability to protect that interest if it does not intervene, (3) that its interest is not adequately represented by existing parties, and (4) that its application is timely." *Am. Home Assur. Co. v. Eighth Judicial Dist. Ct.*, 122 Nev. 1229, 1238, 147 P.3d 1120, 1126 (2006). As discussed below, each of the four requirements are satisfied, demonstrating that Hikma is entitled to intervene as a matter of right.

### A. Hikma Has a Sufficient Interest in the Litigation's Subject Matter

The first requirement in the analysis under Rule 24(a) is whether the applicant can "show a 'significantly protectable interest.'" *Am. Home Assur. Co.*, 122 Nev. at 1239, 147 P.3d at 1127 (citing *S. Ca. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002)). The Ninth Circuit Court of Appeals has explained that a "significantly protectable interest" is "one that is protected under the law and bears a relationship to the plaintiff's claims." An applicant can satisfy this requirement by demonstrating that "the resolution of the plaintiff's claims actually will affect the applicant." *Donnelly v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998).

There can be no reasonable dispute that Hikma has a "significantly protectable interest" in the subject matter of this litigation under the first prong of the Rule 24(a) analysis. As an initial matter, Hikma's property rights in its products are "protected under the law." *See Am. Home Assur. Co.*, 122 Nev. at 1239, 147 P.3d at 1127. Nearly 100 years ago, the United States Supreme



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

Court made it clear that a manufacturer of a product has the right to not sell their 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." *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 Tel. Co. v. Linkline Communications, Inc.*, 555 U.S. 438, 448 (2009). Hikma, like any other seller of products, has protected property rights in its products—including in Hikma's Fentanyl that was unlawfully obtained by and in the possession of Defendants for use in Scott Raymond Dozier's execution.

To complete the first prong of the Rule 24(a) analysis, Hikma's interest "bears a relationship to the plaintiff's claims." *See Am. Home Assur. Co.*, 122 Nev. at 1239, 147 P.3d at 1127. In the Alvogen Complaint, Alvogen seeks, *inter alia*, "preliminary/permanent injunctive relief precluding the use of any Alvogen drug, including Midazolam, in carrying out any capital punishment." Alvogen Compl. 25. Hikma seeks the very same relief, but seeks such relief for its own products, specifically including Hikma's Fentanyl. *See generally* **Ex. A**. Both Alvogen and Hikma's claims raise similar questions of law with parallel fact patterns. *Compare* Alvogen's Compl. *with* **Ex. A**. Both Alvogen and Hikma seek to prevent the use of their products, which Defendants unlawfully obtained to facilitate an unlawful use, capital punishment, consequently damaging Alvogen's and Hikma's reputations and goodwill.

Because Hikma's interest is (1) protected under law, and (2) bears a relationship to Alvogen's claims, Hikma has a significantly protectable interest in the subject matter of the existing litigation. Accordingly, Hikma is entitled to intervention of right to protect that interest.

**B. Hikma's Ability to Protect Its Interest Will Be Impaired if It Is Not Permitted to Intervene**

An applicant meets the second prong of the Rule 24(a) analysis upon showing that its "ability to protect its interest in the litigation's subject matter might be impaired by the disposition of the [existing] action." *Am. Home Assur. Co.*, 122 Nev. at 1240, 147 P.3d at 1128. This consideration is "focused upon the future effect pending litigation will have on that interest."

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

*Palmer v. Nelson*, 160 F.R.D. 118, 122 (D. Neb. 1994). "'[I]mpairment' exists if the decision of a legal question would, as a practical matter, foreclose rights of the proposed intervenor in a subsequent proceeding . . . ." *Lake Inv'rs Dev. Grp., Inc. v. Egidi Dev. Grp.*, 715 F.2d 1256, 1260 (7th Cir. 1983).

The disposition of the instant action in Hikma's absence will impede Hikma's rights and its ability to adequately protect its interests. At best, while Alvogen and Hikma raise identical questions of law and allege nearly identical factual backgrounds, resolution of the claims in Alvogen's favor alone would not guarantee that Defendants would be barred from using Hikma's products. Alvogen and Hikma are not in privity with one another. Consequently, any resolution of Alvogen's claims will not prohibit Defendants from using Hikma's products, including Hikma's Fentanyl or midazolam product, for the unintended and unlawful purpose of facilitating execution of capital punishment. This would harm Hikma's reputation and goodwill. Alvogen only seeks injunctive relief as it relates to use of Alvogen's products. Thus, Hikma's products are not encompassed in Alvogen's prosecution of this matter.

At worst, resolution of Alvogen's claims in favor of Defendants could create a legal precedent that would permit Defendants to use Hikma's products with impunity, harming Hikma, all without Hikma being afforded an opportunity to be heard on the matter that is already being litigated before this Court. Were Hikma forced to file an independent action to obtain the relief it now seeks, a substantial risk of inconsistent and conflicting outcomes and decisions arises. Even if an independent action was later consolidated with this action, the parties to this action are likely to be engaging in the discovery process without Hikma, causing additional delay and causing duplication of time and efforts.

In summary, irrespective of how Alvogen's claims are resolved, proceeding without allowing Hikma to intervene will impair Hikma's ability to protect its interests. Good reasons exist to grant intervention in this regard.

**C. Hikma's Interest Is Not Adequately Represented by the Existing Parties**

An applicant may establish the third prong of the Rule 24(a) analysis by demonstrating that the existing litigants do not adequately represent the applicant's interests. *Am. Home Assur. Co.*,



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

122 Nev. at 1241, 147 P.3d at 1128. However, the applicant's burden to establish this prong is "minimal." *Id.* Courts generally consider three factors in determining the adequacy of representation:

> (1) [a]re the interests of a present party in the suit sufficiently similar to that of the absentee such that the legal arguments of the latter will undoubtedly be made by the former; (2) is that present party capable and willing to make such arguments; and (3) if permitted to intervene, would the intervenor 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, 954-55 (9th Cir. 1977).

As discussed *supra*, Alvogen cannot adequately represent Hikma's interests in this matter. Alvogen appropriately seeks relief to which it has standing to request; that is, an injunction prohibiting Defendants from using Alvogen's Midazolam Product. Thus, a judgment in favor of Alvogen will not extend to prevent Defendants from using Hikma's Fentanyl, or any other Hikma product. Allowing Hikma to intervene would consequently "add some necessary element to the proceedings which would not be covered by the parties in the suit." *See id.* at 955. This prong weighs decidedly in favor of allowing intervention as a matter of right.

**D. Hikma's Application Is Timely**

For the final consideration in the Rule 24(a) analysis, an applicant establishes the fourth prong by showing that the application to intervene is timely. NRCP 24(a). "Determining whether an application is timely under NRCP 24 involves examining 'the extent of prejudice to the rights of existing parties resulting from the delay' and then weighing that prejudice against any prejudice resulting to the applicant if intervention is denied." *Am. Home Assur. Co.*, 122 Nev. at 1244, 147 P.3d at 1130 (quoting *Dangberg Holdings Nevada, L.L.C. v. Douglas Cty.*, 115 Nev. 129, 141, 978 P.2d 311, 318 (1999)). "[T]he timeliness of an application may depend on when the applicant learned of its need to intervene to protect its interests." *Id.* Some courts parse this inquiry into a four-factor test, which considers "(1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; [and] (4) any other unusual circumstances." *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000).

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

Under all factors, it cannot reasonably be disputed that Hikma's application is timely. Several facts exist to support the veracity of this proposition. First, Hikma only learned about the possibility that Defendants may be in possession of Hikma's products, triggering Hikma's interest in this specific case, on July 10, 2018.

Second, the original parties, Alvogen and Defendants, will suffer no prejudice caused by any delay. The delay of 14 days from Alvogen's initiation of this action is too minimal to have caused prejudice. As a result of this Court's TRO, the State of Nevada postponed the execution of Scott Raymond Dozier without affording any consideration to Hikma's potential intervention. Moreover, while the Court has allowed the parties to conduct discovery in preparation for the preliminary injunction hearing, the parties have yet to schedule or serve any discovery in this case. Given that discovery has yet to commence, and the legal and factual issues that Hikma will raise are identical and substantially similar, respectively, to those raised by Alvogen, no original party to this action will suffer prejudice if Hikma is permitted to intervene.

Third, Hikma will suffer prejudice if it is precluded from joining in this case. As addressed *supra*, without the intervention of Hikma, (1) if Alvogen prevails on its claims, the judgment will not encompass Hikma's products, and Defendants will continue to use Hikma's products in the lethal injection protocol to the detriment of Hikma's reputation and goodwill; and (2) if Defendants prevail, it could create precedent that would preclude Hikma from successfully challenging future illicit and unauthorized use of its products.

Finally, there are no "unusual circumstances" militating against permitting intervention as a matter of right. Hikma will seek the same relief as Alvogen, with the sole exception being that Hikma's products be protected. Hikma will raise the same questions of law arising under substantially similar fact patterns. In the interest of judicial efficiency, Hikma's claims should be heard simultaneously and in conjunction with Alvogen's claims in this case, where discovery can proceed in a streamlined fashion with all interested parties present to avoid duplication. Hikma's request to intervene is timely.

For the foregoing reasons, Hikma is entitled to intervention as a matter of right.

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

## III. ALTERNATIVELY, AN ORDER GRANTING HIKMA PERMISSION TO INTERVENE UNDER NRCP 24(b) IS APPROPRIATE

NRCP 24(b) sets forth the requirements for permissive intervention: "Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common." Where the claims of the plaintiff and the applicant are substantially the same, the commonality test for permissive intervention is easily met. *See, e.g., Epstein v. Weiss*, 50 F.R.D. 387, 395 (E.D. La. 1970). Moreover, "[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* "The most important question to be resolved in the determination of the timeliness of an application for intervention is not the length of the delay by the intervenor but the extent of prejudice to the rights of existing parties resulting from the delay." *Lawler v. Ginochio*, 94 Nev. 623, 626, 584 P.2d 667, 669 (1978).

Hikma has alleged claims for relief that are substantially similar to Alvogen's alleged claims, therefore warranting permission to intervene. While these claims may have slight variances factually, they share identical questions of law and parallel factual backdrops. *Compare* Alvogen Compl. *with* **Ex. A.**

Moreover, as discussed above, Hikma's intervention will not result in undue delay or prejudice the adjudication of the rights of the original parties. Hikma now seeks to enter the litigation only 14 days after the initiation of this action, and 13 days after this Court issued the TRO and allowed the parties to commence discovery in preparation for the preliminary injunction hearing. At this initial stage of litigation, no original party will suffer prejudice if Hikma is permitted to intervene.

## IV. CONCLUSION

This litigation involves Hikma's significantly protectable interest, which will be impaired without Hikma's intervention, and for which the Alvogen cannot adequately represent. Moreover, Hikma's request to intervene is timely. Accordingly, pursuant to NRCP 24(a), Hikma is entitled to intervention of right.

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

Alternatively, Hikma's claims present common questions of law and fact as those raised in the Alvogen complaint and Hikma's request to intervene is timely and would not prejudice the original parties. Thus, if the Court finds Hikma is not entitled to intervention of right, it should exercise its discretion to grant Hikma permissive intervention under NRCP 24(b).

DATED this 24th day of July, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Josh M. Reid*
E. LEIF REID, ESQ., SBN 5750
JOSH M. REID, ESQ., SBN 7497
KRISTEN L. MARTINI, ESQ., SBN 11272
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

*Attorneys for Intervenor*

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

**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 Motion To Intervene On Order Shortening Time** 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.

James J. Pisanelli
Todd L. Bice
Debra L. Spinelli
PISANELLI BICEP LLC
400 South 7th Street, Suite 300
Las Vegas, NV 89101
*Attorneys for Plaintiff*

Kenneth G. Schuler
Michael Faris
Alex Grabowski
LATHAM & WATKINS LLP
330 North Wabash Ave., Suite 2800
Chicago, IL 60611
*Attorneys for Plaintiff*

Angela Walker
LATHAN & WATKINS LLP
555 Eleventh Street NW, Suite 1000
Washington, DC 20004-1304
*Attorneys for Plaintiff*

Jordan T. Smith
Assistant Solicitor General
555 East Washington Ave., #3900
Las Vegas, NV 89101

DATED this 26th day of July, 2018.

/s/ ANNETTE JARAMILLO
an employee of Lewis Roca Rothgerber Christie LLP

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

# EXHIBIT A

# EXHIBIT A

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

*Attorneys for Intervenor*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

ALVOGEN, INC.,

Plaintiff,

vs.

STATE OF NEVADA;

NEVADA DEPARTMENT OF CORRECTION;

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

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

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

Defendants.

HIKMA PHARMACEUTICALS USA INC.,

Intervenor,

vs.

STATE OF NEVADA;

NEVADA DEPARTMENT OF CORRECTION;

Case No. A-18-777312-B

Dept. No. XI

**HIKMA PHARMACEUTICALS USA INC.'S COMPLAINT IN INTERVENTION**

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

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

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

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

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

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,

LEWIS ROCA ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

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.

LEWIS ROCA ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

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

LEWIS ROCA ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

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.

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

*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].



LEWIS ROCA ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

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.*

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

## 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

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

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



LEWIS ROCA ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

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

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

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.

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

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



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

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.

LEWIS ROCA ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

HIKMA
QUALITY

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

Dear Governor Sandoval,

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

20 December 2016

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

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

Dear Mr. Dzurenda,

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

# EXHIBIT 4

# EXHIBIT 4

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

12 December 2017

The Honorable Adam Paul 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 from distributors and other intermediaries 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 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.

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

12 December 2017

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

Dear Mr. Sandoval,

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 from distributors and other intermediaries 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 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.

Registered in England No. 5557934

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

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

12 December 2017

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

Dear Mr. Dzurenda,

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 from distributors and other intermediaries 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 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.

Registered in England No. 5557934

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

 ROUTE/STOP 307 / 010

RO

CardinalHealth

DEA RW-0263056 FED ID 68-0158739

| CUST. NO. | DATE | ORIGINAL INVOICE |
|---|---|---|
| 163264 | 9/29/17 | 3232190 |

| FEG 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 | | | | DESCRIPTION | SIZE | FORM | RETAIL PRICE | | | UNIT PRICE | EXTENSION | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 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
DUE DATE 8351

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

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

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

307 / 010

**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

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

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:

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

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

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

Dear Governor Sandoval:

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

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



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

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").

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

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.

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

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

LEWIS ROCA ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

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

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

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.

LEWIS ROCA ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

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,"

LEWIS ROCA ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

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

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

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

LEWIS ROCA ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

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;

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 ___ day of July, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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

*Attorneys for Intervenor*

LEWIS ROCA ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

# 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.

**You have 4 free articles remaining.**
**Subscribe to The Times**

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
QUALITY

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

Registered in England No. 5557934

**OPPS**
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' OPPOSITION TO HIKMA PHARMACEUTICALS USA INC.'S MOTION TO INTERVENE ON ORDER SHORTENING TIME**

Date of Hearing: July 30, 2018
Time of Hearing: 9:00 a.m.

## I. INTRODUCTION

As predicted, the novel temporary restraining order precluding Defendants from using Alvogen, Inc.'s drug in Scott Dozier's execution has prompted other drug makers to pile into this action looking for an easy public relations victory. Having obtained a favorable ruling, even a manufacturer of Fentanyl—the drug at the center of the Nation's opioid crisis—has the temerity to assert that *its* reputation is somehow made *worse* by a *lawful*

execution but not, apparently, *illegal and fatal* overdoses from the opioid.[1] Hikma Pharmaceuticals USA Inc.'s intervention seeks to stretch the unprecedented TRO even farther. Unlike Alvogen, Hikma does not pretend to have any contractual restrictions on its third-party distributor, Cardinal Health. It merely refers to agreements with other unnamed "distributors." Hikma, instead, relies on its website disclaimer and sporadic letters. These political policy statements are legally ineffective and do not create an enforceable restrictive covenant or "personal property servitude" on drugs purchased through distributors. Hikma has no legally recognized interest at stake in these proceedings.

Worse still, Hikma asks this Court to enjoin the State's use of drugs that it has never purchased from Hikma and that the State does not possess. The State's Midazolam was manufactured by Alvogen, not Hikma. Yet Hikma requests an injunction for that too. Hikma's intervention will significantly prolong and complicate this case. Hikma's reputation and involvement with Fentanyl, the opioid crisis, and related lawsuits will greatly expand the current scope of discovery and threaten the expedited posture of this case and the Nevada Supreme Court proceeding.[2] With Scott Dozier's execution already stayed, and the pending writ petition, there is no need for another emergency TRO from this Court. The Court should require Hikma to file its own separate lawsuit that can proceed in the ordinary course.

## II. ARGUMENT

### A. Hikma Cannot Intervene As of Right.

Nevada Rule of Civil Procedure 24 governs intervention as of right and permissible intervention. For intervention as of right, a movant needs an unconditional statutory right or "an interest relating to the property or transaction which is the subject of the action [that] is so situated that the disposition of the action may as a practical matter impair or

---

[1] (Mot. to Intervene 10-11).

[2] The State has moved to expedite the Nevada Supreme Court proceedings. All discovery in this case should be stayed pending the outcome the State's Petition. The State intends to file such a stay motion in short order.

impede the applicant's ability to protect that interest unless the applicant's interest is adequately protected by existing parties." NRCP 24(a); *See Am. Home Assur. Co. v. Eighth Jud. Dist. Ct.*, 122 Nev. 1229, 1235, 147 P.3d 1120, 1124 (2006).

Hikma has neither a statutory right nor a "significantly protectable interest." *Am. Home Assur. Co.*, 122 Nev. at 1239, 147 P.3d at 1127 (quotations omitted). A "significant protectable interest" is one "protected under the law and bears a relationship to the plaintiff's claims." *Id.* (citing *S. California Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002)). As explained in Defendants' Petition to the Nevada Supreme Court,[3] drug manufacturers do not retain a reversionary property interest in drugs sold through distributors even if the manufacturers purportedly impose contractual resale conditions on their direct intermediary distributors.

In an unbroken line of precedent from Lord Coke in 1628 to the United States Supreme Court in 2017, the common law rule is that 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)); *see also Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538 (2013).

Drug manufacturers like Alvogen and Hikma have long tried to enforce their use and resale conditions on subsequent purchasers, and courts have long rejected their attempts. "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." *Garst v. Hall & Lyon Co.*, 61 N.E. 219 (Mass. 1901); *John D. Park & Sons Co. v. Hartman*, 153 F. 24, 39 (6th Cir. 1907) ("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

---

[3] Due to the order shortening time setting the hearing on this matter in two business days, Defendants attach and incorporate all arguments made in their Petition to the Nevada Supreme Court. (Ex. A).

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.") (emphases added).

Likewise, the Supreme Court has rejected manufacturers' claims that personal property servitudes attach to their goods as a corollary to their right not to do business with anyone. The Supreme Court held that just "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." *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404 (1911).[4]

The so-called "*Colgate Doctrine*" did not alter this established common law rule. After *Colgate*, the Supreme Court held, that in *Colgate* "[w]e had no intention to overrule or modify the doctrine of *Dr. Miles Medical Co. v. Park & Sons Co.*, where the effort was to destroy the dealers' independent discretion through restrictive agreements." *United States v. A. Schrader's Son*, 252 U.S. 85, 99 (1920). The Court noted the obvious difference between *Colgate*, on one hand, and Alvogen and Hikma, on the other:

> It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements-whether express or implied from a course of dealing or other circumstances-with all customers throughout the different states which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers and there is no contract or combination which imposes any limitation on the purchaser. In the second, the parties are combined through agreements designed to *take away dealers' control of their own affairs* and thereby destroy competition and restrain the free and natural flow of trade amongst the states.

*Id.* at 99-100 (emphasis added).

The State did not deal directly with Hikma and Hikma does not identify a single misrepresentation or omission the State made (or failed to make) to it. *See Lynch,* 307 F.3d

---

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

at 803 (affirming denial of intervention because, in part, "SoCal Edison is in privity with the California Power Exchange Corporation, not with Reliant or Mirant."). Accordingly, to the extent Hikma actually imposed an enforceable condition on Cardinal Health (it doesn't even allege a contract), that condition does not run to or bind the State. Nor does a hypothetical condition create a restrictive covenant on the drugs that the State purchased. Hikma's letters and website disclaimer do not act as an indefinite easement on personal property that Hikma can unilaterally invoke whenever it decides that its drugs are used in a manner incompatible with its political agenda. Thus, Hikma has no protectable interest recognized under the law. *Am. Home Assur. Co.*, 122 Nev. at 1239, 147 P.3d at 1127; *Fierro v. Grant*, 53 F.3d 338 (9th Cir. 1995) (denying intervention because condemned inmates do not have a "significantly protectable interest" in their mode of execution).

Even if Hikma has a protectable property interest, this litigation will not impair its interest. Alvogen's Midazolam is the only drug currently at issue in this case. Aside from the ordinary effects of judicial precedent and stare decisis, Hikma will not be prejudiced by this Court's decision. (*Cf.* Mot. to Intervene 18). Hikma's ownership, or not, of its drugs will not be a part of any ruling from this Court, and Hikma will remain free to pursue its own separate action, if it deems necessary. *Worlds v. Dep't of Health & Rehab. Servs., State of Fla.*, 929 F.2d 591, 594-95 (11th Cir. 1991) ("As this court has recently remarked, 'a potential stare decisis effect does not automatically supply the practical disadvantage warranting intervention. Appellant will now have the opportunity to return to the district court in the separate suit").[5]

Hikma's interests related to stare decisis are adequately protected by Alvogen's counsel. Hikma concedes that it "raises substantially the same legal issues and claims as those raised by Alvogen in this matter, which are based on a substantially similar set of facts." (Mot. to Intervene 7). Hikma's own authority demonstrates that intervention is not

---

[5] Hikma's NRCP 24(a) interpretation is a one-way ratchet. Hikma can claim that it is allowed to intervene anytime a legal rule might tangentially impact its interests but, if it declines to intervene and the State prevails, Hikma would surely argue that the ruling does not have preclusive effect.

warranted. (*Id*. at 19). As Hikma points out, the Ninth Circuit has found adequate representation when (1) the existing party will make the same "legal arguments" as the intervenor; (2) the existing party is "capable and willing to make such arguments;" and (3) the intervenor would not add a *legal* element to the suit—not simply add an additional prayer for relief. *Blake v. Pallan*, 554 F.2d 947, 954-55 (9th Cir. 1977). In *Blake*, the Ninth Circuit affirmed the denial of intervention and explained that "the Commissioner has not explained what legal argument or tactical decisions he would employ that the plaintiffs are not utilizing or would not also employ. Because the Commissioner seeks injunctive relief while the plaintiffs seek recovery of damages does not alter the fact that before either forms of relief are granted the initial violations by the defendants must first be proven." *Id*. at 955.

Likewise, Hikma does not describe any legal argument or tactical decision that Alvogen is failing to make. *Hairr v. First Jud. Dist. Ct.*, 132 Nev. Adv. Op. 16, 368 P.3d 1198, 1202 (2016) (affirming denial of intervention because there was adequate representation. Intervenor failed to identify any differing or conflicting arguments that it would make). Hikma's self-interested request for an injunction does not change the outcome. Alvogen is more than capable of advocating for a favorable legal rule and Hikma's input is unnecessary.

Finally, Hikma's request to intervene is untimely. "[T]he timeliness of an application may depend on when the applicant learned of its need to intervene to protect its interests." *Am. Home Assur. Co.*, 122 Nev. at 1244, 147 P.3d at 1130. Hikma claims its Motion is timely because it "only learned about the possibility that Defendants may be in possession of Hikma's products … on July 10, 2018. (Mot. to Intervene 20). But the State announced its intent to use Fentanyl in Dozier's execution on August 17, 2017.[6] By Hikma's own acknowledgment, the State purchased Hikma's Fentanyl shortly thereafter—on September 28, 2017. (Mot. to Intervene 13). Hikma's letters in December 2017 stated "we are not aware

---

[6] *NDOC Press Release* (Aug. 17, 2017) *available at* http://doc.nv.gov/uploadedFiles/docnvgov/content/About/Press_Release/press%20release%20exec%20drugs.pdf

that Nevada is in possession of any of these products ...." (Hikma Ex. 4). In other words, Hikma didn't bother to check with its own distributors—between August and December—to confirm whether the State made any purchases. Hikma was not taking "proactive action to enforce its rights." (Mot to Intervene 11). Rather, Hikma was sleeping on its rights and should not be allowed to intervene.

Hikma's intervention will also unduly delay a resolution of this case and prejudice the State as set forth below.

**B. The Court Should Not Allow Hikma to Permissively Intervene.**

For permissive intervention, a movant must possess a conditional statutory right or show that its "claim or defense and the main action have a question of law or fact in common." NRCP 24(b). "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id*; *see also Hairr*, 132 Nev. Adv. Op. 16, 368 P.3d at 1202.

Hikma's causes of action are nearly identical to Alvogen's claims for relief. Even so, permissive intervention is still inappropriate because its involvement will delay these proceedings to the State's prejudice. The necessary scope of discovery will expand significantly if Hikma and issues related to Fentanyl and the opioid crisis are allowed into this proceeding. There is likely a mountain of evidence that Hikma's reputation has been damaged (if at all) by its association with the addictive drug it willingly chose to manufacture and its involvement, including through West-Ward Pharmaceuticals, in the opioid crisis. This is an area rife with discoverable information related to its reputation and business. The voluminous, anticipated discovery on these issues—which are unique to Hikma—will unavoidably prolong the ultimate resolution of the entire case.[7] In the meantime, Dozier's execution could remain stayed and continue to damage the interests of the State and victims. *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.*

[7] Additionally, the proceedings will be unduly complicated because the State will not waive the tort cap for Hikma's claims, even if the State is allowed to do so for Alvogen's claims—itself a doubtful proposition.

*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.").

Moreover, Hikma waited two weeks after the Court entered its temporary restraining order and after the State has challenged that order in the Nevada Supreme Court. *See Service Employees Intern. Union Local 1 v. Husted*, 515 Fed. App'x 539 (6th Cir. 2013) (upholding district court's denial of intervention where voters waited more than two weeks after parties completed briefing on complex motion for preliminary injunction). Hikma's intervention will pose a significant risk of upsetting the expedited schedule in this Court and the Nevada Supreme Court. *Id*. at *3.

If Hikma had timely intervened, the State could have raised issues related to it with the Nevada Supreme Court. *Nevada v. United States Dep't of Labor*, No. 4:16-CV-731, 2017 WL 3780085, at *2 (E.D. Tex. Aug. 31, 2017) (finding intervention untimely, in part, because "Defendants have filed an interlocutory appeal regarding the Court's injunction order."). Further, the fact that this matter involves an execution is an "unusual circumstance" that weighs heavily against any additional delay that intervention may cause. *See Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000).

## III. CONCLUSION

For these reasons, Defendants respectfully request that the Court deny Hikma's Motion to Intervene.

DATED this 27th day of July, 2018.

ADAM PAUL LAXALT
Attorney General

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

**CERTIFICATE OF SERVICE**

I hereby certify that on the 27th day of July, 2018, service of the foregoing **DEFENDANTS' OPPOSITION TO HIKMA PHARMACEUTICALS USA INC.'S MOTION TO INTERVENE ON ORDER SHORTENING TIME** was made this date by electronic filing to:

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

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

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

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

# 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.:

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

Electronically Filed
Jul 25 2018 05:06 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

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

Docket 76485 Document 2018-28597

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Constitutional Provisions**



**Statutes**

**Other Authorities**

**Rules**

## 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

[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,

---

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.

---

[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]

---

[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

---

[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

---

[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

---

[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

---

[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,

---

[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

---

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

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

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

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

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

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

Alvogen has not—and could not—make a claim that Cardinal Health is a thief unable to transfer title to NDOC.[28]

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

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

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

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

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

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

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

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

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

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

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

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

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

## IV. CONCLUSION AND RELIEF SOUGHT

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

Dated: July 25, 2018.

*/s/ Jordan T. Smith*

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

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

## VERIFICATION

I, Jordan T. Smith, declare as follows:

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

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

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

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

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

## CERTIFICATE OF COMPLIANCE

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

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

Dated: July 25, 2018.

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

## CERTIFICATE OF SERVICE

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

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

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

A copy was also provided to the following:

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

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

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

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

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

Electronically Filed
8/7/2018 11:02 AM
Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

| | | |
|---|---|---|
| ALVOGEN INC.<br><br>Plaintiff<br><br>vs.<br><br>STATE OF NEVADA, NEVADA DEPARTMENT OF CORRECTIONS, et al.<br><br>Defendants | .<br>.<br>.<br>.<br>.<br>.<br>.<br>.<br>.<br>.<br>. | CASE NO. A-18-777312-B<br><br>DEPT. NO. XI<br><br>**Transcript of Proceedings** |

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

**HEARING ON HIKMA PHARMACEUTICALS' MOTION TO INTERVENE**

MONDAY, JULY 30, 2018

APPEARANCES:

| | |
|---|---|
| FOR THE PLAINTIFF: | TODD L. BICE, ESQ.<br>JAMES J. PISANELLI, ESQ.<br>KENNETH SCHULER, ESQ.<br>MICHAEL FARRIS, ESQ. |
| FOR THE DEFENDANTS: | JORDAN T. SMITH, ESQ.<br>ANN McDERMOTT, ESQ. |
| FOR THE MOVANT: | DANIEL R. POLSENBERG, ESQ.<br>KRISTEN L. MARTINI, ESQ. |
| COURT RECORDER: | TRANSCRIPTION BY: |
| JILL HAWKINS<br>District Court | FLORENCE HOYT<br>Las Vegas, Nevada 89146 |

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

LAS VEGAS, NEVADA, MONDAY, JULY 30, 2018, 9:20 A.M.

(Court was called to order)

THE COURT: Alvogen.

MS. MARTINI: Good morning. Kristen Martini from Lewis Roca on behalf of Hikma. And with me today is Dan Polsenberg.

MR. BICE: Good morning, Your Honor. Todd Bice on behalf of plaintiff Alvogen.

MS. MCDERMOTT: 'Morning, Your Honor. Ann McDermott on behalf of the Nevada Department of Corrections.

MR. SMITH: Good morning, Your Honor. Jordan Smith on behalf of the defendants.

THE COURT: It's better to see you in person than on the video.

MR. SMITH: Me, as well, Your Honor. Good to see you.

THE COURT: Good morning.

It's your motion.

MS. MARTINI: Good morning, Your Honor. To be clear, like Alvogen Hikma is seeking intervention in this action not to stay the execution of Mr. Dozier. Hikma does not take a position with respect to the death penalty or the sentence imposed upon Mr. Dozier. Rather, Hikma seeks intervention in this case to specifically protect the proprietary interests in its property, its business reputation

and goodwill, and its investors' interests. This is a compelling interest that Hikma has in the transaction of property at issue in this lawsuit, and the resolution of this lawsuit will affect Hikma's substantial rights.

The identical legal issues, the duplicate claims, and substantially similar factual background as alleged by Alvogen and Hikma, together with the lack of any undue prejudice to any existing party and the timeliness of Hikma's motion demonstrate that intervention is appropriate. Hikma's intervention in this action is the most efficient, streamlined means to get to the same ends. Hikma is prepared to join in and supplement Alvogen's motion for preliminary injunction and participate in the discovery process in this case and diligently prosecute its claims within the time allotted by this Court.

In addition, intervention in this case would preserve Hikma's real party in interest status before the Nevada Supreme Court to be heard on this matter with the State's pending writ.

Hikma seeks intervention based on both grounds. Hikma believes that intervention is allowed is as a matter of right under Rule 24(a), and, alternatively, Hikma's going to ask this Court to exercise its sound discretion to permit intervention under Rule 24(b), having all of the elements been met in this case.

With respect to intervention as a matter of right the first consideration is whether Hikma has a protectable interest in the subject matter of this lawsuit. This Court has already concluded that a manufacturer of products whose products are in possession of the State at this point in time and intended to be used in Mr. Dozier's execution have a protectable interest in that property. The Court concluded that when it issued the TRO preventing defendants from using Alvogen's midazolam. Hikma is in the same position. It is --

THE COURT: Well, you're not in the same position factually.

MS. MARTINI: Well, we are also manufacturers.

THE COURT: You have some similar issues, but they had some different factual issues than you do.

MS. MARTINI: Right. But we still have the same protectable interests as a manufacturer of products under the Colgate doctrine in the Tempurpedic case where our rights to deal and who we want to deal with, and we have that protectable interest under the law.

In relation to that first element of consideration is whether Hikma's claims bear a resemblance to Alvogen's claims. A comparison of the proposed complaint with Alvogen's complaint filed in this case show that the five claims that Hikma has alleged are duplicative of the claims alleged by Alvogen in this case. Both manufacturers seek the same relief

and seek to protect their reputation and goodwill through this litigation.

Turning to the second element for consideration under intervention as a matter of right, the consideration is whether Hikma's substantial interests will be impaired if intervention is not allowed. It's right will be impaired. That consideration goes to whether the resolution of this case will affect Hikma's interests. In this case there are identical questions of law, duplicative legal claims, and substantially similar facts. But any resolution in favor of Alvogen in this case is not going to extend to Hikma to protect its specific products, particularly fentanyl, or compel the State to return Hikma's fentanyl. As a result, Hikma is going to be left without being able to assert its rights in this same matter that presents overlapping questions of law and fact.

Alternatively, if defendants succeed in this action, then it will establish legal precedent that may allow defendants to continue to possess Hikma's fentanyl and use it in Mr. Dozier's execution.

As a part of the consideration for its elements is issues of judicial economy and finality. Indeed, Hikma is capable of filing its independent action, but that raises the risk of inconsistent decisions if it's before two different courts. Obviously Hikma would file a motion to consolidate

based on overlap and common questions of law and fact, and would do so on an order shortening time. However, in that event in a matter of days we're going to be in the exact same position that we're in right now. There will be no delay if Hikma's allowed to intervene in this case. We anticipate prosecuting our claims diligently within the discovery time period allotted by this Court. And, again, it would preserve Hikma's real party in interest rights to appear before the Nevada Supreme Court within the time already prescribed on the order expediting resolution of this matter. Intervention in this case would foster judicial economy and finality.

Let's turn to the third element, which is whether Hikma's interests are already adequately represented by the existing parties to this case. As I mentioned before, Alvogen's complaint deals specifically with Alvogen's midazolam product. It does not extend to Hikma's products. The burden on the intervener in this case is minimal. A different interest alone has been held to meet this test. Alvogen's lawyers do not represent Hikma. Alvogen lacks standing to enforce and protect Hikma's rights to its fentanyl specifically, and lacks standing to compel defendants to return Hikma's fentanyl to it.

The final consideration is whether Hikma's motion to intervene is timely. Alvogen initiated this action on July 10, and Hikma's motion to intervene on order shortening time

was submitted to this Court for consideration on the order on July 24th. That is a mere 14-day delay in filing. Delay and time lapse alone is not sufficient to prevent intervention as a matter of right. The real consideration here is whether the parties' interests are prejudiced as a result of that 14-day delay. There is no prejudice that will occur as a result of Hikma's intervention. The TRO has already been granted, Mr. Dozier's execution has already been stayed, this Court has allowed for discovery in this case. The motion on the preliminary injunction hearing, the hearing has yet to be set, and we are willing and ready to participate within this Court's discovery time frame without any undue delay. And there won't be any delay to the writ proceedings besides the fact that the Supreme Court has already articulated that no extensions of time will be granted. But we will -- upon intervention we will immediately file with the Supreme Court and attempt to be heard within the time allotted.

Hikma, on the other hand, will suffer prejudice as a result of not being allowed to intervene for the reasons that I already articulated with respect to whether its rights are going to be protected in this case. That won't happen here without our intervention.

So in light of judicial, economy, the timeliness of the motion, Hikma's protected rights, and inadequacy representation in this case Hikma submits that intervention as

a matter of right is appropriate. But, in the alternative, we would request that this Court exercise its sound discretion and allow intervention under Rule 24(b) and allow us to permissively intervene.

The considerations for permissive intervention are whether there's common questions of law and fact. A comparison of the proposed complaint in this case with Alvogen's demonstrates the similar factual backgrounds. It's the same transaction. It's the State's intent to use manufacturers' products in its lethal injection cocktail for Mr. Dozier.

As part of that consideration is whether Hikma's intervention will result in some unfair delay or undue delay. As I articulated before, we fully intend to comply with all parts of the discovery process, going in tandem with Alvogen, resolving this in the most effect and efficient manner.

And, again, our intervention would give us the -- more of a standing in order to assert our real party in interest position before the Supreme Court and be heard. There won't be any delay as a result of that. And for these reasons we believe that all elements have been met for Hikma's intervention as a matter of right. Alternatively, that permissive intervention is warranted.

THE COURT: Thank you.

Mr. Bice, anything from your side?

MR. BICE: Your Honor, we're not opposed to this motion. We haven't taken a position on it. The only thing I would add concerning Hikma's petition is they've said that they will cooperate and get the discovery done. I guess in fairness to them I should disclose up front that it is my intention -- I haven't had a chance to talk to Mr. Smith. It is my intention if I can't work out a deal with Mr. Smith to accelerate the response dates on written discovery. We've served ours already, but I am going to come back to the Court and ask that the Court modify those deadlines so that we can meet your discovery schedule. Because I don't think we can if I get objections 30 days later only to then have to fight it out. And, as the Court will recall, in Wynn-Okada we did that. The Court gave a deadline for objections. So I only disclose that in light of Counsel's statement that they would agree to meet the record, because I didn't have a chance to talk to them about that beforehand, Your Honor.

THE COURT: All right. Thank you.

Mr. Smith, Ms. McDermott?

MR. SMITH: Just on that point, Mr. Bice, when did you serve the discovery? We haven't seen those yet.

MR. BICE: More than a week ago.

MR. SMITH: Okay. We have to talk about -- we'll talk it over on that one.

THE COURT: You're confirming with the team.

MR. BICE: Last Tuesday.

THE COURT: Mr. Pisanelli, no jokes.

MR. PISANELLI: It was a pretty good one.

(Pause in the proceedings)

MR. SMITH: Thank you, Your Honor. I find it a little bit ironic that the maker of fentanyl, which is at the center of the nation's opioid crisis and responsible for illegal overdoses every day is going to come into court and claim reputational injury from being associated with a lawful execution. When, for example, has Hikma sued an overprescribing pharmacist to get their alleged property back and stop those illegal uses? I'm unaware of any instance like that. And I think there's two reasons for that. One, of course, is Hikma makes a lot of money from those type of illegal diverted uses. You can see from the invoice here that the State's lawful purchase netted them about 83 bucks. So when it won't hurt their bottom line and it aligns with their political agenda, then they come into court asserting a property interest. But when they make a lot of money from other illegal uses they don't allege a property interest.

And as to my second point, they don't actually have an alleged property interest in this case. It's been the rule of common law since 1628 when Lord Coke said it and when the U.S. Supreme Court repeated it last year in 2017, it's not often you have literally centuries of unbroken precedent, but

the rule of common law is that, unlike real property, a manufacturer does not impose a restrictive covenant or personal property servitude on movable goods, chattel, including medicine. You might be able to do that with real property, but you can't do it with movable property.

As Your Honor pointed out at the TRO hearing, it is true that a manufacturer can choose who they deal with directly. But what a manufacturer can't do is impose some sort of reversionary property interest that runs to end users who purchase through a third-party distributer. In that case the manufacturer's recourse is through any contract they may have with a third-party distributer. And in this case, unlike Alvogen, Hikma doesn't allege or doesn't provide any affidavit claiming they had a contract precluding Cardinal Health's sale of fentanyl to the State.

Now, Alvogen's contractor, of course, was entered into three weeks after the State's purchase.

THE COURT: First purchase.

MR. SMITH: First purchase, that's right. Then there's the debate about the May 29th one, and knowledge of that, there's a debate about that. But three weeks after the State's first purchase. So -- but at least Alvogen claims there was a contract. Here Hikma doesn't even claim that it had a restrictive contract with Cardinal Health. At best it points to its Website disclaimer. That Website disclaimer

doesn't impose any legal obligation on Cardinal Health. It certainly doesn't impose any legal obligation on the State, who didn't deal directly with Hikma. So Hikma does not have a protectable interest in this case.

And related to the timeliness of the intervention, I'd like to walk through the timeline with you a little bit. The State announced its intent to use fentanyl in Mr. Dozier's execution on August 17th, 2017, in a press release.

THE COURT: Prior to Judge Togliatti's rulings; correct?

MR. SMITH: Excuse me. I'm sorry?

THE COURT: Fentanyl was in the cocktail Judge Togliatti ruled on.

MR. SMITH: That's correct, Your Honor. That's correct.

THE COURT: Just making sure we're all clear from that.

MR. SMITH: That's right. And then -- so it was first announced in a press release August 17th that fentanyl would be used. That received, of course, national and international attention, because fentanyl hasn't been used in a lethal injection protocol before. Then if you look at Exhibit 5 to Hikma's motion, that's the invoice of the State's purchase. The State purchased fentanyl from Hikma in September of 2017, one month after the -- one month after the

State's announcement.

Then you look at Exhibit 6 to Hikma's motion, and that's a letter from Hikma in December of 2017. And what's that letter say? That letter restates its policy how it doesn't like capital punishment, it doesn't want its drugs used in lethal injection cocktails, but then it says something very interesting. It says, quote, "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." So, in other words, between September of 2017 when the State purchased Hikma's fentanyl and when Hikma sent this letter in December of 2017 Hikma wasn't even apparently confirming with its own distributors whether the State had actually purchased any of Hikma's fentanyl at all. In its brief it talks about taking proactive steps. It talks about, quote, "carefully prepared controls." The fact that in December of 2017, three months after the State's purchase, Hikma was completely unaware that the State had even purchased any of its fentanyl demonstrates that Hikma, like Alvogen, didn't have any legally effective controls in place at the time of the State's purchase.

Again, this whole lawsuit, this idea that the State engaged in some fraudulent scheme, some subterfuge to obtain the drugs is just blame shifting from the fact that Hikma, just like Alvogen, didn't have any of the controls in place

that it was claiming to its anti-death penalty advocate friends that it had. What a party can't do is stick its head in the sand, ignore the fact that it may be being -- their drugs or not their drugs, and they come at the last minute and attempt to intervene in a lawsuit. You can't sleep on your rights like that and have your intervention be timely.

And the State will suffer prejudice if Hikma is allowed to intervene. And the proceedings in this court, this Court set a pretty ambitious discovery schedule. Mr. Bice wants us to --

THE COURT: It's for preliminary injunction. I don't usually give that long.

MR. SMITH: Well, I understand.

THE COURT: You asked for it, not me.

MR. SMITH: Well, I didn't willingly ask for it.

THE COURT: That's not true, Mr. Smith.

MR. SMITH: It is true, Your Honor. Alvogen is making broad claims of reputational injury. Your Honor knows you have to establish what their reputation is in the industry and how it's going to hurt compared to other actions that have been involved. And that can't be done in the five days we were talking about setting a preliminary injunction hearing. It simply can't be done. And it certainly can't be done with regard to Hikma's reputation. Hikma's reputation with regard to fentanyl, which they acknowledge in their brief is a

controversial drug, its involvement in the opioid crisis and related lawsuits will greatly expand the scope of discovery just on the reputational claims alone. And so Hikma's involvement here will prolong the discovery period, especially if Mr. Bice is talking about cutting short discovery responses.

But more significantly, Hikma's intervention here will prejudice the State's pending writ petition with the Nevada Supreme Court. The State filed its petition last Wednesday. On Friday it moved to expedite, asking for a decision by the Nevada Supreme Court on October 19th. And that date's based upon statutory deadlines for supplemental warrants of execution and the fact that certain drugs expire on November 30th. The court granted that I think within the hour and said no extensions. If Hikma's allowed to intervene here and they're contemplating joining the TRO, that will require additional briefing in this court and additional briefing in the Nevada Supreme Court that puts that October 19th deadline in jeopardy.

I understand most of their claims may overlap, but our defenses to Hikma are unique, specifically laches, which has to do with the timing issue we're discussing and some of the issues I brought up on the 11th with regard to Mr. Williams's client, Sandos, the fact that fentanyl has been announced for over a year almost now and no action was taken.

So there are going to be other unique defenses to Hikma related to the TRO that will have to be briefed in this court and briefed in the Nevada Supreme Court, which will put the expedited briefing schedule there in jeopardy. The State needs a ruling by October 19th so if the State prevails that it's not a pyrrhic victory. So I think Hikma's intervention here will delay not only the discovery proceedings here, but, more importantly, the proceedings in the Nevada Supreme Court.

So we'd ask that its motion be denied.

THE COURT: Thank you.

Anything else?

MS. MARTINI: Your Honor, defendants challenge the property interests that Hikma's alleging, and in doing so they're re-arguing what it already argued -- the State already argued to this Court in the TRO hearing two weeks ago. It's the same argument that it's raising before the Nevada Supreme Court. But twice defendants just stated that Hikma is in the same position as Alvogen. We are the same. So basically what defendants are asking this Court to do is reconsider its decision in already issuing the TRO and now turn around and say, oh, such manufacturers don't have a property right in the products.

The perspective of timeliness of the motion, defendants are arguing the merits of the case. We have alleged in the complaint that there were contracts in place

with the distributors. While they're pinning down specific dates and deadlines, our understanding is that there was a contract amendment before the State ordered Hikma's fentanyl. Regardless of that, Hikma submitted letters to the State in 2016 specifically stating that they could not use Hikma's products in capital punishment regimes. And the State was in possession of those letters. The Website published the same. So for them to now come in and say, oh, you know, we didn't tell you, we didn't disclose that we were in fact using or purchasing Hikma's products, but you sat on your rights. No one was aware of what specific products were being used and where those products came from until the First Judicial District Court ordered the production of those specific documents. And that happened on July 6th. Again, Alvogen filed its complaint on July 10th, and Hikma submitted its motion on order for intent to this Court on July 24th. Nothing has happened in this case since then in order -- that would warrant any delay or undue prejudice.

And Your Honor is correct. It was the State who asked for substantial discovery in this case. Mr. Bice's request that discovery be -- have shortened time periods for response, Hikma is fully on board. And even if there was a separate action pending because of the procedural of this case and Mr. Dozier's impending execution, Hikma would still seek expedited discovery. We would seek the exact same thing. So

they'd be working in tandem to get to the same ends. This is the most efficient way in order to have everyone's matters be heard and not consume judicial resources unnecessarily.

The Nevada Supreme Court issued an answer on order shortening time, which I believe are due -- is due August 16th, and Hikma's participation in that writ proceeding will not delay anything. The State's writ petition specifically says that --

THE COURT: Polsenberg's not going to ask for an extension, huh?

MS. MARTINI: Excuse me?

THE COURT: Polsenberg's not asking for an extension?

MS. MARTINI: No. He's just -- he's just here. He's not allowed to ask for anything. But the defendants even argue in a writ petition that the Supreme Court can resolve those issues based on the legal arguments and no additional discovery is required. So there's no -- the State has not articulated any specific prejudice as a result of Hikma being able to be heard in this case and in the writ, as well.

THE COURT: Thank you.

I'm going to grant permissive intervention under Rule 24(b). However, like Sandos, Inc., Hikma is not going to have any relief under the TRO, but it will allow you to participate in this litigation. You need to file your

complaint in intervention within five days.

MS. MARTINI: Thank you. And, Your Honor, I have a proposed order that actually grants the relief under 24(a) and (b). Would you like to have it to mark it up, or would you like me to submit a separate one?

THE COURT: It reflects what I said?

MS. MARTINI: Yes.

THE COURT: Great.

MS. MARTINI: Thank you.

THE COURT: Okay. Now, Mr. Bice, did you work out your issue with Mr. Smith? Or are you guys going to call me later if you can't work it out?

MR. BICE: I would ask the Court, if it's not too much of a burden, to do the following. Could you put us on for a status check next Monday? And if we can't work it out -- if we work it out, we'll vacate it. If we can't work it out, we'll be here on Monday to discuss it with the Court.

MR. SMITH: Full disclosure, before I was aware that Mr. Bice was serving discovery we were planning on moving to stay discovery pending the expedited writ.

THE COURT: I read that in your brief. But I've got to get a motion before I can do something, and then --

MR. SMITH: Yeah. Understood. So perhaps I'll get that filed ASAP, and then --

THE COURT: How about I set a status check for

Monday. And if you get the motion set on an OST, I'll put it on Monday, too. How's that?

MR. SMITH: Sounds good, Your Honor.

THE COURT: What happened with our friend from Sandos, Mr. Williams?

MR. BICE: I've spoken to Mr. Williams, Your Honor, and I'm unclear on exactly what they are doing. I'll tell him that we are planning on being --

THE COURT: If he's going to do something, he needs to do it fast.

MR. BICE: Understood.

THE COURT: Okay. Anything else? Better that you're all there at one time than doing it in piecemeal fashion.

MR. BICE: Thank you, Your Honor.

THE COURT: Have a great day. 'Bye. See you Monday.

THE CLERK: August 6th at 9:00 a.m.

THE PROCEEDINGS CONCLUDED AT 9:44 A.M.

* * * * *

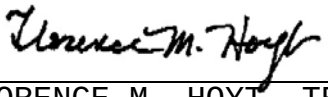
**CERTIFICATION**

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

**AFFIRMATION**

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

**FLORENCE HOYT**
**Las Vegas, Nevada 89146**



FLORENCE M. HOYT, TRANSCRIBER

8/6/18

DATE