

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA; NEVADA
DEPARTMENT OF CORRECTIONS;
JAMES DZURENDA, Director of the Nevada
Department of Corrections, in his official
capacity; IHSAN AZZAM, Ph.D, M.D., Chief
Medical Officer of the State of Nevada, in his
official capacity; and JOHN DOE, Attending
Physician at Planned Execution of Scott
Raymond Dozier in his official capacity,

Petitioners,

vs.

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

Respondents,

and

ALVOGEN, INC.,

Real Party in Interest.

Supreme Court Case No.: 76485
District Court Case No. A-18-777312-B

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Elizabeth A. Brown
Clerk of Supreme Court

**EMERGENCY MOTION UNDER NRAP 27(e) TO REINSTATE TEMPORARY STAY, EN
BANC RECONSIDERATION, AND APPOINTMENT OF JUSTICES**

ACTION REQUESTED BY MONDAY, AUGUST 20, 2018¹

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

¹ Subsequent to the Court's Order of August 16, 2018 Denying Stay and Scheduling Oral Argument, the District Court rescheduled a hearing, to discuss a Motion to Intervene filed by Sandoz Inc. and the preliminary junction hearing, on August 21, 2018.

I. RULING UNDER REVIEW

On August 7, 2018, Petitioners filed an Emergency Motion to Stay District Court Proceedings and requested immediate action. The next day, by a five to one vote, this Court entered a temporary stay and directed Real Parties in Interest to file a prompt response to the stay motion. Justice Pickering did not participate and later recused from this matter. Yesterday, in its Order Denying Stay and Scheduling Oral Argument this Court – by a three to two vote – lifted the temporary stay and scheduled oral argument for September 12, 2018. Neither Justice Pickering nor Justice Gibbons participated in that decision.

II. ARGUMENT

Six members of the Court heard Petitioners' Motion to Stay and five of those members voted to enter a temporary stay, with three Justices deciding to lift the stay of the district court proceedings pending resolution of Petitioner's Writ Petition.

NRS 2.140 provides

"Four justices constitute a quorum for the transaction of business, excepting such business as may be done at chambers or by panels. *The concurrence of four justices who heard the argument is necessary to pronounce a judgment, except in business done at chambers or by panels.*" (emphasis added).

Under NRS 2.140, four Justices were needed to pronounce a final ruling on whether the stay remained in place. Instead, because of non-participation and a recusal, by two Justices, ultimately only five Justices decided the stay motion. Since two of those five Justices dissented, only three Justices voted to lift the stay, not the four required by NRS 2.140. Therefore, the temporary stay should have remained in place until the Court appoints

substitute judges to return it to its full complement to decide the stay (or at least obtain the four votes required by NRS 2.140).

Even putting NRS 2.140 aside, given the undisputed and exceptionally important interests at stake in this proceeding and the 3-2 split of the non-recused Justices, the motion for a stay should be decided by a full en banc Court. Otherwise, this important issue that was already decided one way by the full court (albeit on a temporary basis), will be decided the opposite way by a mere three members of this seven member Court.

III. CONCLUSION

Accordingly, Petitioners respectfully request that the Court appoint judges to replace any Justice that may be recused, or not participating, on the stay motion and also, ultimately, the merits. Nev. Const. art. 2, §4(2)-(3) (allowing appointment of court of appeals or district court judges to replace disqualified Justice). After appointment of additional Justices, the Court should reconsider en banc whether the temporary stay granted on August 8, 2018 should be made permanent while the Court considers the merits.

Dated: August 17, 2018.

/s/ Ann M. McDermott
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
amcdermott@ag.nv.gov
Counsel for Petitioners

NRAP 27(e) Certificate

I, Ann M. McDermott, declare as follows:

1. I am currently employed in the Office of the Attorney General as the Chief of the Bureau of Litigation. I am counsel for Petitioners named herein.

2. I verify that I have read the foregoing Emergency Motion under NRAP 27(e) to Reinstate Temporary Stay, En Banc Reconsideration, and Appointment of Justices 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. The relief sought in this Motion was presented in the State's Emergency Motion Under NRAP 27(e) To Stay District Court Proceedings Pending This Court's Decision On the Petition filed August 7, 2018 and was denied yesterday, Thursday, August 16, 2018. The State is filing this Motion at the earliest possible time.

4. The District Court has rescheduled a hearing for August 21, 2018 at 9:00 a.m. to discuss a Motion to Intervene filed by Sandoz Inc. and to discuss the preliminary injunction hearing.

5. The facts showing the existence and nature of the emergency are set forth in the Motion. As described above, and consistent with its Emergency Motion Under NRAP 27(e) To Stay District Court Proceedings Pending This Court's Decision On the Petition, action by August 20, 2018 is requested to avoid irreparable harm. *See Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253-54, 89 P.3d 36, 39-40 (2004).

6. I have made every practicable effort to notify the Supreme Court and opposing counsel of the filing of this Motion. The State alerted opposing counsel to the filing of this Motion shortly before it was submitted for e-filing. I also called the Clerk of Court's Office before filing. A courtesy copy was emailed to all parties.

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

Counsel for Alvogen, Inc.

James J. Pisanelli, Esq.
Todd Bice, Esq.
Debra Spinelli, Esq.
PISANELLI BICE, PLLC
400 South 7th Street, Suite 300
Las Vegas, NV 89101
Tel: 702-214-2100

Kenneth Schuler
Michael Faris
Alex Grabowski
LATHAM & WATKINS, LLP
330 North Wabash Ave., #2800
Chicago, IL 60611
Tel: 312-876-7659

Angela Walker
LATHAM & WATKINS, LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304
Tel: 202-637-3321

Counsel for Hikma Pharmaceuticals USA Inc.

E. Leif Reid, Esq.
Josh M. Reid, Esq.
Kristen L. Martini, Esq.
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996
Tel: 702-949-8200

Counsel for Sandoz Inc. (Proposed Intervenor)

J. Colby Williams, Esq.
Philip R. Erwin, Esq.
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, NV 89101
Tel: 702-382-5222

Noel B. Ix., Esq.
PEPPER HAMILTON LLP
301 Carnegie Center, Suite 400
Princeton, NJ 08540
Tel: 609-452-0808

Andrew Kantra, Esq
300 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103
Tel: 215-981-4000

Executed on this 17th day of August 2018 in Las Vegas, Nevada.

/s/ Ann M. McDermott
Ann M. McDermott (Bar No. 8180)
Chief, Bureau of Litigation

CERTIFICATE OF COMPLIANCE

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

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

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

Dated: August 17, 2018.

/s/ Ann M. McDermott
Ann M. McDermott (Bar No. 8180)
Chief, Bureau of Litigation

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **EMERGENCY MOTION UNDER NRAP 27(E) TO REINSTATE TEMPORARY STAY, EN BANC RECONSIDERATION, AND APPOINTMENT OF JUSTICES** with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on August 17, 2018.

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

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

A copy was also provided to the following:

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

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

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

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

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

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

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

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