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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

vs.

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

Respondents,

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

Real Parties in Interest.

Case No. 76485

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

**ALVOGEN'S EXPEDITED MOTION
TO VACATE SEPTEMBER 21, 2018,
ORAL ARGUMENT**

**Relief Requested before September 20,
2018**

Real Party in Interest Alvogen, Inc. ("Alvogen") moves this Court to vacate the September 21, 2018 oral argument scheduled for consideration of Petitioners' Writ Petition. Recent proceedings before the District Court have confirmed that such an argument can serve no purpose except to waste the time of this Court and that of the parties.

First of all, evidence developed before the District Court has confirmed that the Petitioners' (collectively the "State") claims for obtaining expedited review from this Court – the risks that the State might not be able to carry out the execution of Scott Dozier due to the expiration of one of the lethal injection drugs (Cisatracurium) – is simply inaccurate. The Chief Pharmacist for the Department of Corrections has confirmed that the State has an ample supply of drugs to carry out the Dozier execution well into 2019.¹ (*See* Ex. 1 at 86:20-87:21, 88:15-17 (Hr'g Tr., Sept. 12, 2018)).

¹ Indeed, the batch of Cisatracurium – the only drug that was supposedly going to expire on November 30, 2018 – could not even be accounted for by the State in the recent evidentiary hearing before the District Court. (*See* Ex. 1 at 156:5-18.) Moreover, the evidence before the District Court shows that that batch of Cisatracurium was compromised by the State's handling of it, which may explain why the State could no longer account for its existence. Regardless, there is simply no basis for the State's claim that this irrelevant batch of drugs should have any bearing on this Court's schedule.

Besides that, the current schedule and oral argument date can serve no substantive purpose at this point.² The District court commenced hearing evidence on the drug companies' motions for preliminary injunction. It has conducted three full days of evidence – considering the testimony of seven witnesses thus far – and is scheduled to complete the hearing on Monday, September 17, 2018. Thereafter, the district court intends to issue findings of fact and conclusions of law, either entering a preliminary injunction or denying such relief.

Respectfully, an oral argument just a few days later can serve no purpose. If the district court enters a preliminary injunction, it will do so based upon an extensive evidentiary record from a multi-day hearing, a record that will not be before this Court. Any preliminary injunctive relief, in other words, will be based upon a record that supersedes the existing temporary restraining order, which is the subject of the State's petition for extraordinary writ relief.

A couple of examples from the ongoing evidentiary hearing highlight the point, including with regard to the property claims asserted by the drug companies, claims that involve issues of both ownership and whether the State can qualify as a good faith purchaser. This Court has recognized that both issues involve quintessentially

² The State filed its Motion to Dismiss on September 6, 2018, which raised additional arguments not included in the State's Petition. At the hearing on September 10, 2018, the District Court ordered supplemental briefing and set the continued hearing for October 2, 2018.

factual inquiries. *See Perry v. Byrd*, 87 Nev. 431, 434 488 P.2d 550, 552 (1971) (holding that "whether the respondent acquired title" to property "was a factual question"); *Cooper v. Pacific Auto Ins.*, 95 Nev. 798, 801, 603 P.2d 281, 283 (1979) (stating that "whether or not a purchaser had notice of an outstanding claim or was buying in good faith is a factual determination"). Indeed, this Court has emphasized the wisdom of deference to the fact-finder's predicate determinations on such issues. *See Perry*, 87 Nev. at 434, 488 P.2d at 552 (concluding that "there was believable testimony before the trial court that the appellant was made aware of the respondent's interest" such that he was "not [one who] purchased in good faith for value").

Another example is the factual record presently being developed for the District Court concerning claims surrounding NRS 41.700. In its petition, the State asserts that there can be no violation of 41.700 based on, *inter alia*, its invocation of NRS 453.377(6). (*See* Pet. 36 n.22.) Yet, NRS 453.377(6) provides that 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." The undisputed evidence at the preliminary injunction hearing showed that the pharmacist who provided the drugs at issue to the Ely facility did not "dispense" any of them, that there is not "a pharmacy" at the Ely facility, and that she was not "designated by the Director of the Department of Corrections" to deliver those drugs to the

Ely facility. (Ex. 1 at 194:10-195:10.) These are just some of the many factual issues that are presently being addressed by the District Court, and which will be resolved prior to this Court's September 21 oral argument date.

Accordingly, the current schedule has been overtaken by subsequent evidentiary events. Again, should the District Court enter a preliminary injunction, any challenge to it will necessarily involve a detailed review of the District Court's record, something that will not be before this Court on the present schedule. And of course, if the District Court denies a preliminary injunction to the drug companies, then the State's present petition is moot. A September 21, 2018 oral argument on the State's present petition will simply be a waste of this Court's valuable time and cause the parties to needlessly waste their resources. The September 21, 2018 oral argument should be vacated.

DATED this 14th day of September, 2018.

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Alvogen, Inc.*

NRAP 27(e) CERTIFICATE

I, Todd L. Bice, declares as follows:

1. I am one of the attorneys representing Real Party in Interest Alvogen, Inc.

2. I certify that I have read the foregoing expedited motion and that the contents of it is true to my own knowledge, except for matter stated upon information and belief, and as to those matters, I believe them to be true.

3. As set forth in the motion, the basis for requesting expedited consideration is that the relief sought is this Court vacating its September 21, 2018 oral argument on the State's writ petition because it can serve no purpose at this point. Because relief is needed in less than 14 days, Alvogen must file this motion as seeking expedited consideration.

4. I have contacted the Clerk's office of the Supreme Court to inform it of this forthcoming motion and I have informed the State's counsel, Jordan T. Smith, on September 14, 2018, that I intended to file this motion with this Court. I have also caused a copy of this motion to be served on all counsel via email.

5. Below are the telephone numbers and office addresses of the attorneys participating in this action and their respective parties:

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DATED this 14th day of September, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion 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 motion has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in double-spaced Times New Roman. I further certify that I have read this motion and that it complies with NRAP 21(d).

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 in this motion 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 motion is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 14th day of September, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 23rd 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 **ALVOGEN'S EMERGENCY MOTION TO VACATE SEPTEMBER 21, 2018**

ORAL ARGUMENT properly addressed to the following:

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An employee of PISANELLI BICE PLLC

EXHIBIT 1

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

ALVOGEN INC.

Plaintiff

vs.

STATE OF NEVADA, NEVADA
DEPARTMENT OF CORRECTIONS,
et al.

Defendants
.

CASE NO. A-18-777312-B

DEPT. NO. XI

**Transcript of
Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

EVIDENTIARY HEARING RE PRELIMINARY INJUNCTION - DAY 2

WEDNESDAY, SEPTEMBER 12, 2018

COURT RECORDER:

JILL HAWKINS
District Court

TRANSCRIPTION BY:

FLORENCE HOYT
Las Vegas, Nevada 89146

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

APPEARANCES:

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FOR THE INTERVENORS:

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DAVID McELHINNEY, ESQ.
DANIEL R. POLSENBERG, ESQ.
J. COLBY WILLIAMS, ESQ.
PHILIP R. ERWIN, ESQ.

1 A Yeah.

2 Q In other words, I don't want to try and trick you
3 and there's no intent that anything here is any different from
4 yours.

5 A Okay.

6 Q So just assuming that I got it right for the sake
7 of today, how's that?

8 A Okay.

9 Q All right. What this reflects now are the three
10 drugs that the State has that they intend to use for the
11 execution of Scott Dozier, is that right?

12 A Yes.

13 Q And they are maintained by the State in one or
14 different locations throughout the State. Do you know?

15 A They are all at Ely State Prison at this point.

16 Q Okay. And so by way of expiration, you understand
17 that the State cannot or will not use any of these drugs once
18 it expires; correct?

19 A That's my understanding, yes.

20 Q Okay. So if I were to tell you then hypothetically
21 that if we use November 30th, 2018 as a cut-off, right, if
22 Mr. Dozier is not executed until the day after November 30th,
23 is it your understanding from this chart that the State still
24 possesses sufficient drugs to carry out the execution? In
25 other words, November 30th, there's no deadline at all, is

1 there?

2 A I don't know if I could answer that, but if you're
3 asking me if a sufficient drug would remain, yes.

4 Q All right. Can you look at that chart and tell us
5 when it is by expiration date that the State would be lacking
6 at least one of the three drugs the combination?

7 A I'm not privy to the exact protocol. I don't know
8 what the dose of fentanyl is, etcetera, so I'm going to guess
9 February 2019.

10 Q Here?

11 A Yes.

12 Q What about these three or these four?

13 A You know, I don't remember how much fentanyl is
14 required.

15 Q But in any event, we know it has nothing to do with
16 2018?

17 MR. GILMER: Objection. Relevance.

18 THE COURT: Overruled.

19 THE WITNESS: I would say the cisatracurium and
20 midazolam, there's enough of that, but I'm not sure about the
21 fentanyl after February 1st of '19.

22 BY MR. PISANELLI:

23 Q Do you know what the FDA recommended dosage is of
24 fentanyl?

25 A Well, for pain?

1 Q For its intended use.
2 MR. GILMER: Objection. Relevance.
3 THE COURT: Overruled.
4 THE WITNESS: It's a very small amount. Maybe
5 50 micrograms.
6 BY MR. PISANELLI:
7 Q And do you know what the FDA says is a lethal dose?
8 A No, but that also is very dependent on the person
9 and how much tolerance they have, so I don't know if that's
10 defined.
11 Q In other words, how much -- whether you would need
12 to go into the batch that lapsed all the way down in November
13 2021, that's just outside of your expertise?
14 A Yes. I don't remember what the protocol says.
15 Q All right. We just know that November 30th is no
16 deadline at all. Fair enough?
17 A For expiration of drug I would agree with that.
18 Q Okay, very good. Thank you.
19 THE COURT: Mr. Pisanelli, do you have a copy of
20 that chart for the clerk to mark as D1? Thank you. You've
21 been in here enough and know the answer to that question.
22 Emily had you prepared.
23 MR. PISANELLI: She does. She always has us
24 prepared. Thank you.
25 THE COURT: And you have 18 more minutes.

1 A Yes.

2 Q And if we go to the third page there's an expiration
3 date of July 2018, is that right?

4 A Yes.

5 Q Now, Ms. Fox, have you seen one of these forms for
6 the Sandoz cisatracurium that expires in November 2018?

7 A I don't think I have.

8 Q Did your office prepare a label similar to the
9 second page that we see attached to both of these batches for
10 the November 30th, 2018 expiration?

11 A We would have. If we sent it out we certainly would
12 have. I don't see it here.

13 Q Ms. Fox, I'll represent to you that I have not been
14 provided with a copy of such forms from the State as it
15 relates to the Sandoz cisatracurium that expires November
16 30th, 2018. So have you seen either one of those forms for
17 that batch?

18 A I don't remember seeing it, no.

19 Q Okay. And then the last thing, if you'll turn to
20 Exhibit 53, which has already been admitted. Let me know when
21 you get there.

22 A Okay, I'm there.

23 Q Okay. I'm going to ask you some questions about
24 pages 78 through 81 and you can find that number in the lower
25 right-hand corner.

1 A I don't acknowledge the letters, if that's what
2 you're asking me. The letters I do not acknowledge. I don't
3 have any relationship with any of those companies.

4 MR. PISANELLI: Thank you, Your Honor.

5 THE COURT: There's apparently someone whispering in
6 your ear.

7 MR. PISANELLI: I mean one second, Your Honor.

8 (Pause in the proceedings)

9 BY MR. PISANELLI:

10 Q This word "dispensing" has caused us a little
11 confusion. I'm hoping that you can clarify it for us. First
12 of all, there was no dispensing. As that term of art is used
13 by you in your business, there was no dispensing by a pharmacy
14 in Ely; is that right?

15 A That's true.

16 Q All right. Who did you dispense these drugs to?
17 You don't have to give me -- well, do you know the identity of
18 the actual person you dispensed them to in the State's --

19 THE COURT: That's a yes or no answer.

20 THE WITNESS: Yes, I know.

21 BY MR. PISANELLI:

22 Q Okay. Start with the title. This was a nurse?

23 A Yes.

24 Q Okay. And how did you make the decision to dispense
25 these controlled substances to that particular nurse?

1 A She is our director of nursing.

2 Q Okay. And --

3 A So she runs the institution, the medical component

4 of the institution.

5 Q Did the director specifically tell you to dispense

6 to her?

7 A No.

8 Q Did the director designate anyone to receive those

9 drugs, or did you just do this on your own?

10 A I did this on my own.

11 MR. PISANELLI: All right. Thanks.

12 THE COURT: Mr. Reid.

13 MR. REID: I'll be brief, Your Honor.

14 I wanted to take a look at this. May I approach?

15 THE COURT: But you need to keep your voice up.

16 MR. REID: Yeah. I will put -- what exhibit is it?

17 THE COURT: D1.

18 MR. REID: D1?

19 THE COURT: How's that for help?

20 MR. REID: D, as in David --

21 THE COURT: D, as in demonstrative.

22 MR. REID: Demonstrative. Okay.

23 REDIRECT EXAMINATION

24 BY MR. REID:

25 Q So looking at the table here, how many micrograms of

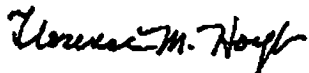
CERTIFICATION

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

9/13/18

DATE