

EXHIBIT 1

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DISTRICT COURT
CLARK COUNTY, NEVADA

ALVOGEN, INC.,

Plaintiff,

v.

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.,
SANDOZ INC.

Intervenors.

Case No.: A-18-777312-B

Dept. No.: XI

**ORDER GRANTING PRELIMINARY
INJUNCTION TO PLAINTIFF AND
DENYING PRELIMINARY INJUNCTION
TO INTERVENORS**

Dates of Hearing: September 11, 12, 13
and 17, 2018

Time of Hearing: 9:30 a.m.

PISANELLI BICE PLLC
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LAS VEGAS, NEVADA 89101

1 For the reasons set forth in the Findings of Fact and Conclusions of Law entered in this
2 matter on September 28, 2018, attached hereto as Exhibit 1, the Court rules as follows on the
3 pending motions for preliminary injunction.

4 ^{has granted} The Court grants Alvogen, Inc.'s motion for preliminary injunction and hereby
5 enjoins the Defendants and their officers, agents, servants, and employees as well as those in
6 active concert or participation with Defendants who receive actual notice, from using Alvogen's
7 midazolam product in capital punishment.

8 2. The Court after balancing the hardships finds that Alvogen has met its burden
9 under NRCP 65(a) for issuance of a preliminary injunction to preserve the status quo and prevent
10 irreparable harm that would occur if Defendants misuse Alvogen's midazolam product in capital
11 punishment.

12 3. Alvogen will suffer irreparable harm to its reputation as a company that produces
13 life-enhancing and life-saving drugs if Defendants are allowed to misuse its midazolam product.

14 2. The Court further orders that the \$10,000 in security that Alvogen posted for the
15 temporary restraining order in this action shall continue and shall serve as security for this
16 preliminary injunction.

17 5. The Court denies Hikma Pharmaceuticals USA, Inc.'s motion for preliminary
18 injunction;

19 6. The Court denies Sandoz, Inc.'s motion for preliminary injunction;

20
21 
DISTRICT COURT JUDGE

22 Respectfully submitted:

23 PISANELLI BICE PLLC

24 By: 

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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 COURT
JUDGE,

Respondents,

and

ALVOGEN, INC.; HIKMA
PHARMACEUTICALS USA, INC.;
AND SANDOZ INC.,

Real Parties in Interest.

Case No.: 76485

Electronically Filed
Nov 29 2018 09:50 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

Case No.: 76510

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

Appellants,

vs.

ALVOGEN, INC.,

Respondent.

**RESPONSE TO ORDER TO SHOW CAUSE AND MOTION TO
CONSOLIDATE AND HOLD CASE NO. 76510 IN ABEYANCE**

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Deputy Solicitor General

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I. INTRODUCTION

Despite the District Court's rush through discovery and a preliminary injunction hearing to preempt this Court's ruling, the State's Petition is not moot.¹ A preliminary injunction does not necessarily moot appellate proceedings related to a temporary restraining order. There are at least three live issues here. There is still a live controversy over the District Court's authority under NRS 176.415 to issue a *temporary restraining order* that has the substantive effect of staying an execution. Because the District Court's TRO conflicts with NRS 176.415, the State's Petition invoked this Court's jurisdiction under NRS 176.492 to dissolve the TRO as an improper stay of execution, in addition to seeking mandamus or prohibition. Thus, there is also a ripe dispute about whether NRS 176.492 applies. The subsequent preliminary injunction did not (and could not) moot these issues because the preliminary injunction appeal (Case No. 77100) cannot resolve any TRO-specific questions raised in Case Number 76485. At minimum, the interplay between NRS Chapter 176 and the District Court's authority to issue a TRO is capable of repetition yet evading review given the short timeframes associated with TROs. This Court's resolution of these issues may allow the State to recover on the "continuing" TRO bond, which vests the State with a viable financial stake in the outcome of the Petition proceeding.

¹ Case No. 76485.

Rather than dismiss this proceeding as moot, the Court would serve the interests of judicial economy by consolidating the State's Petition in Case Number 76485 with the State's appeal from the preliminary injunction in Case Number 77100 while holding the State's protective appeal in Case Number 76510 in abeyance. At the very least, this Court should consider the *amici* briefs filed by fifteen sister-States and the Clark County District Attorney when deciding the preliminary injunction appeal. These briefs demonstrate the vital importance of the issues presented, both locally and nationally.

II. ARGUMENT

A. The Mootness Standard

"The question of mootness is one of justiciability." *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). A case becomes moot when "this court is unable to grant effective relief." *Id.* "A civil case will not be considered moot if an aggrieved party diligently and actively seeks relief from discernible and substantial consequences flowing from a lower tribunal's judgment." *Boulet v. City of Las Vegas*, 96 Nev. 611, 613-14, 614 P.2d 8, 10 (1980). The party asserting mootness has a heavy burden. *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979).

A subsequent preliminary injunction does not necessarily moot appellate proceedings related to a TRO. *See H-D Michigan, LLC v. Hellenic Duty Free Shops S.A.*, 694 F.3d 827, 841 (7th Cir. 2012) ("Although the TRO was superseded by a preliminary injunction entered on December 20, 2011, these issues remain ripe for review.") (citing *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 313-18 (1999))

(plaintiffs’ eventual victory on the merits did not render moot the question of whether the preliminary injunction had properly issued; provisional remedy was not necessarily justified by defendant’s contractual liability); *American Can Co. v. Mansukhani*, 742 F.2d 314, 320-21 (7th Cir. 1984) (validity of TRO reviewed after it had been superseded by later preliminary injunction; TRO had caused injury to defendant prior to preliminary injunction hearing)); *see also* Eric Dobrusin & Katherine E. White, *Intellectual Property Litigation* § 5.08 (Aspen Pub. 3d ed. 2018) (“When a preliminary injunction supersedes a temporary restraining order, the temporary restraining order does not necessarily become moot.”).

B. There Remain Live Issues or Issues Capable of Repetition Yet Evading Review.

A case is not moot as long as any single issue remains viable, as the remaining issue satisfies the case-or-controversy requirement. *See Valley Health Sys., LLC v. Estate of Doe*, 134 Nev. Adv. Op. 76, 427 P.3d 1021, 1026 n.1 (2018); *Toxco, Inc. v. Chu*, 801 F. Supp. 2d 1, 6 (D. D.C. 2011).

Here, the first issue in the State’s Petition persists. The State argues that NRS 176.415 bars the District Court’s TRO because the order had the substantive effect of staying Dozier’s execution in a circumstance that the statute does not allow. NRS 176.415 outlines six instances in which a stay of execution is appropriate and a drug company’s private litigation is not one of them. This first question presented is limited to TROs and, unlike the question presented in Case Number 77100, does not

encompass preliminary injunctions. Since the TRO constitutes an improper stay of execution, the State invoked this Court's jurisdiction under NRS 176.492, which permits a petition to an appellate court "to dissolve a stay which was improperly entered." Accordingly, there is also an associated controversy about whether NRS 176.492 applies.

The later preliminary injunction did not moot the TRO-specific issues. The preliminary injunction appeal will not resolve whether a District Court has authority to enter a TRO in the first place. For instance, even if the Court rules that NRS 176.415 does not allow a district court to issue a *preliminary injunction*, the appeal will not necessarily decide whether a district court has the authority to enter a TRO because a TRO is not involved in the appeal. Nor will the preliminary injunction appeal determine whether the State can invoke NRS 176.492 to dissolve a TRO that substantively halts an execution. The Court can still grant effective relief to the State by deciding these issues in the Petition proceeding.

Alternatively, the intersection between a TRO and NRS Chapter 176 is an issue of public importance that is capable of repetition, yet evading review. This Court "may still consider [a] case as a matter of widespread importance capable of repetition, yet evading review" if "(1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important." *Bisch v. Las Vegas Metro Police Dep't*, 129 Nev. 328, 334, 302 P.3d 1108, 1113 (2013). Those conditions are met here.

This Court has repeatedly recognized the important issues presented in this case generally and it is no less true for the specific controversy over a district court's power to halt an execution with a TRO. It is a scenario that is likely to reoccur but avoid review due to subsequent preliminary injunctions. TROs typically have short fifteen-day time periods, NRC 65(b), and preliminary injunctions will often overtake TROs before this Court can conduct its review. As this case demonstrates, the State and capital victims will incur undue delay if a preliminary injunction moots the State's efforts to dissolve a TRO under NRS 176.492. The State promptly filed its Petition and successfully moved to expedite. But through a combined effort to slow this matter and hurry the lower court proceedings, the preliminary injunction issued before this Court could rule. In the meantime, the ability to use batches of lethal injection drugs lapsed. The same can be expected in the future. Therefore, if the Petition is moot at all, it falls within the exception for cases that are capable of repetition, yet evading review. *See Vickery v. Ardagh Glass Inc.*, 85 N.E.3d 852, 857 (Ind. Ct. App.) (reviewing TRO that was superseded by a preliminary injunction "because it is an issue of utmost public importance that is likely to recur in the future.").

C. The Petition is Not Moot Because of the Continuing Bond.

A preliminary injunction does not moot issues regarding the validity of a TRO where the party obtaining the TRO executes a bond and there is a substantial possibility that the enjoined party will seek recovery under the bond. *Am. Can Co. v. Mansukhani*, 742 F.2d 314, 320 & n.7 (7th Cir. 1984); *U.S. v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1223,

1229 n.10 (11th Cir. 2015) (stating “the traditional rule that issues raised by an expired injunction are not moot if one party was required to post an injunction bond.”).

To the extent an appellate court’s disposition of the issues raised by the expired or superseded TRO may dictate the proper treatment of the TRO bond, the bond prevents mootness. *Medtronic, Inc. v. Janss*, 729 F.2d 1395, 1399 (11th Cir. 1984). Any claim against the bond “could depend, in part, on the validity of the temporary restraining order. Under these circumstances, the existence of the bond precludes the case from becoming moot.” *N. Stevedoring & Handling Corp. v. Int’l Longshoremen’s & Warehousemen’s Union, Local No. 60*, 685 F.2d 344, 346-47 (9th Cir. 1982) (quotations and citations omitted).

The District Court required Alvogen to post a \$10,000 TRO bond, which the District Court later ordered “*shall continue* and shall serve as security for this preliminary injunction.”² The District Court directed that “the \$10,000 in security that Alvogen posted for the temporary restraining order in this action shall continue”³ Therefore, the preliminary injunction order did not completely supersede the TRO and a portion of the TRO remains effective. If the State prevails on its Petition in Case Number

² Order Granting Prelim. Inj. to Pl. & Denying Prelim. Inj. to Intervenorors ¶ 2 (Oct. 2, 2018) (emphasis added), Ex. 1.

³ *Id.*

76485, it will seek recovery under the continuing bond. The State's financial stake in the bond is enough to avoid mootness.⁴

D. The Court Should Consolidate the Petition With the Preliminary Injunction Appeal.

Instead of dismissing the State's Petition, the Court should consolidate it with the pending preliminary injunction appeal in Case Number 77100. The two proceedings present nearly identical issues and similar facts. The interests of judicial economy and speedy disposition weigh in favor of consolidation and joint resolution. *See* NRAP 3(b); *Prieur v. D.C.I. Plasma Ctr. of Nevada, Inc.*, 102 Nev. 472, 473, 726 P.2d 1372, 1372 (1986) (consolidating two appeals with identical issues and similar facts); *Turnipseed v. Truckee-Carson Irr. Dist.*, 116 Nev. 1024, 1028, 13 P.3d 395, 397 (2000) ("This court consolidated the Tribe's petition for a writ of mandamus and the Engineer's appeal of the district court's order denying the change of venue."). At the least, the Court should consider the *amici* briefs filed by fifteen States and the Clark County District Attorney. These briefs make contributions that will assist the Court in rendering a decision and they represent the importance of the issues presented.

⁴ There are two aspects of the State's Petition that are moot. After granting the preliminary injunction, the District Court granted the State's Motion to Dismiss the causes of action based on NRS 453.381(1) and NRS 453.391(1). An order has not yet been entered on the Motion to Dismiss. The two objects of the State's Petition that this Court has recognized remain ripe: "the TRO should be dissolved both because it amounts to an improper stay of execution in violation of NRS 176.415 and because no law allows for the drug manufacturers to retain rights over its distributed products." (Order Denying Stay and Scheduling Oral Argument (Case No. 76485 Aug. 16, 2018)). Alvogen still lacks any viable cause of action.

Finally, this Court should hold the protective appeal in Case Number 76510 in abeyance while the Court decides the consolidated appellate matters. *See United States v. Owen*, 553 F.3d 161, 164-65 (2d Cir. 2009) (stating that a “protective” notice of appeal should be held in abeyance until it becomes effective).

III. CONCLUSION

For these reasons, the State’s Petition in Case Number 76485 is not moot and should be consolidated with the State’s appeal from the District Court’s preliminary injunction in Case Number 77100. The State’s protective appeal in Case Number 76510 should be held in abeyance pending the Court’s decision in the consolidated matters.

Dated: November 28, 2018.

/s/ Jordan T. Smith

Jordan T. Smith (Bar No. 12097)

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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.

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: November 28, 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 **RESPONSE TO ORDER TO SHOW CAUSE AND MOTION TO CONSOLIDATE AND HOLD CASE NO. 76510 IN ABEYANCE** with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on November 28, 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.

A copy was also provided to the following:

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