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.

Respondent.

Case No. 76485

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

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, Appellants, vs. ALVOGEN, INC., Respondent.	Case No. 76510

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I. INTRODUCTION

The State[1] continues to needlessly multiply these proceedings and waste the Court's time, refusing to concede the obvious: The State's premature writ petition and notice of appeal (Case Nos. 76485 and 76510, respectively), both of which challenged the District Court's July 11, 2018 temporary restraining order ("TRO"), are now plainly moot. The District Court has entered a preliminary injunction and the State filed a notice of appeal and protective notice of appeal (Case Nos. 77100 and 77365, respectively) as to the preliminary injunction.[2] Predictably, the issues the State presents in challenging the preliminary injunction are substantively identical to those it presents relative to the TRO.[3]

On July 11, 2018, the District Court found that Alvogen, Inc. ("Alvogen") was entitled to temporary injunctive relief to maintain the status quo pending a

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[1] Petitioners/Appellants State of Nevada, State of Nevada Department of Corrections, James Dzurenda, and Ihsan Azzam are collectively referred to as the "State."

[2] On December 7, 2018, this Court entered an order consolidating Case Nos. 77100 and 77365 because "the two orders arise from the same district court matter and involve the same parties."

[3] The only differences are due to the procedural posture of the TRO, with the State's complaints in both being centered on NRS 176.415 and its claims that a pharmaceutical company cannot recover its product once placed in the stream of commerce and cannot suffer irreparable harm from its product's misuse. *Compare* State's Writ Petition (Case No. 76485) at p. 1 (Issues Presented) with State's Opening Brief on Appeal (Case No. 77100) at p. 1 (Issues Presented).

preliminary injunction hearing, and entered a TRO that prohibited the State from using Alvogen's products in capital punishment while allowing it to conduct executions with products other than Alvogen's. On September 28, 2018, following an evidentiary hearing spread over four days, the District Court entered its 43-page Findings of Fact and Conclusions of Law, finding that Alovgen is entitled to preliminary injunctive relief to continue the status quo pending trial on the merits. The preliminary injunction supersedes the TRO, which now has no legal effect.

Once the District Court decided and entered the preliminary injunction, the State's challenge to the TRO became moot. There is nothing for this Court to decide relative to the now-superseded TRO. All of the issues about which the State complains will be decided in its preliminary injunction appeal. Accordingly, any enforceable judgment that the State might obtain in its appeal of the TRO can be sought in its appeal from the preliminary injunction just as well. Thus, this Court should dismiss Case Nos. 76485 and 76510, as contemplated in the Court's Order to Show Cause, and deny the State's Motion to Consolidate and Hold Case No. 76510 in Abeyance.

II. ARGUMENT

A. Issues Raised in Case Nos. 76485 and 76510 are Moot.

This Court has long held that it is the duty of every judicial tribunal to "decide actual controversies by a judgment which can be carried into effect, and not to give

opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it." *Nat'l Collegiate Athletic Ass'n v. Univ. of Nev., Reno.*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981). A case must present a live controversy throughout the proceedings: "even though a case may present a live controversy at its beginning, subsequent events may render the case moot." *Id*. (citing *Univ. Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004).) This Court resolves only actual controversies, rather than rendering "opinions on moot or abstract questions." *Boulet v. City of Las Vegas*, 96 Nev. 611, 613, 614 P.2d 8, 10 (1980). A case is moot when a court is unable to resolve a controversy through "an enforceable judgment." *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010).

In its Order to Show Cause, entered on October 30, 2018, this Court correctly characterized the issues raised by the State related to the TRO as moot based on the District Court's entry of a superseding preliminary injunction. Because the TRO is no longer in effect, there is no live controversy regarding the TRO and this Court cannot enter an enforceable judgment relating to the now-superseded TRO.

Unwilling to concede the obvious, the State urges this Court to still entertain these challenges to the TRO, asserting that this Court should decide whether NRS 176.415 allows a district court to enter a TRO that has the effect of delaying an execution. This argument is baseless. As this Court knows, the State's shopworn

arguments about NRS 176.415 are already before this Court in the State's appeal as to the preliminary injunction. Put another way, regardless of the merits (or lack thereof) of any of the State's arguments with respect to NRS 176.415, there is no additional relief that this Court can afford that will not already be available in the State's preliminary injunction appeal.

Nor would granting the State's motion to consolidate its TRO petition with its preliminary injunction appeal somehow magically revive the former. If anything, the State's request is just another confession that the TRO petition is moot. The issues the State presents relative to the TRO have been presented to, and will be resolved by, this Court in the State's appeal of the District Court's preliminary injunction. Respectfully, the procedure of consolidation is a mechanism to preserve judicial resources when different live cases present similar issues. *See* NRAP 3(b); *Barnes v. Eighth Judicial Dist. Ct.*, 103 Nev. 679, 680, 748 P.2d 483, 484 (1987). Consolidation is not a process to waste judicial resources to attempt to resuscitate a case that is obviously moot.

B. The State Has Not Shown Issues Capable of Repetition Yet Evading Review.

Similarly without merit is the State's attempt to avoid dismissal by suggesting that its writ petition and protective appeal are "a matter of widespread importance capable of repetition, yet evading review." *Bisch v. Las Vegas Metro Police Dep't*, 129 Nev. 328, 334-5, 302 P.3d 1108, 1113 (2013). That is an exception to the

mootness doctrine, where "[i]f an issue is capable of repetition, yet will evade review, the issue will not be treated as moot." *Langston v. State, Dept. of Motor Vehicles*, 110 Nev. 342, 344, 871 P.2d 362, 363 (finding that the exception did not apply because "the issues raised by appellant are factually specific to her case and therefore not of the character considered capable of repetition"). This is not such a case.

First, the State has not even attempted to identify another situation in which the outcome is "capable of repetition," other than a single, inapposite case from Indiana. (Resp. at 5 (citing *Vickery v. Ardagh Glass Inc.*, 85 N.E.3d 852, 857 (Ind. Ct. App.).) In *Vickery*, the appellant challenged whether Indiana's rules regarding the entry of TROs on an ex parte basis violated due process. The Court agreed to consider that challenge only because it implicated all TRO requests made in Indiana and raised important issues of public importance. Here, by contrast, the State has not even attempted to identify another instance in which the issue it has raised will be repeated.

Second, it is simply not the case that the issues the State raises will evade review. The State ignores the fact that TRO's are not themselves appealable orders. They are of a short duration – generally, limited to 14 days – and automatically expire or are superseded by a preliminary injunction. And of course, a preliminary injunction order is expressly reviewable. *See* NRAP 3A(b) (listing judgments upon

which an appeal can be taken). There is nothing in a TRO – particularly the District Court's now-superseded TRO here – that escapes review in the appeal of the preliminary injunction ruling. The District Court's TRO simply maintained the status quo until the District Court could resolve the motion for preliminary injunction, which it has now done and which the State has appealed. This Court can resolve any actual controversies in the State's appeal of the District Court's preliminary injunction in Case No. 77100.

C. The Existence of a Bond Does Not Create a Live Controversy.

The State's argument that its writ petition and protective appeal are not moot based on Alvogen's posting of a bond further strains credulity. Citing no cases, the State claims that since the District Court carried over the bond for the TRO, "the preliminary injunction did not completely supersede the TRO and a portion of the TRO remains effective." (Resp. at 6.) Yet tellingly, the State fails to identify any aspects of the TRO that were not superseded by the preliminary injunction. And equally revealing, the State fails to identify any issues that are not covered by its appeal of the preliminary injunction ruling.

Nor does the State explain how its suggestion that it "might" seek to recover on the bond somehow creates a live and active controversy for the TRO. (Resp. at 7.) Respectfully, the State knows that it is wasting time for this Court and the parties, simply trying to avoid conceding that its challenges to the TRO were

premature and futile. The District Court entered a preliminary injunction with the same bond. If the State actually has a claim to the bond, it will be from a reversal of the preliminary injunction, not the TRO, because the TRO is *no longer in effect*. The State cannot in good faith suggest otherwise. Indeed, as the State does not identify any relief from the TRO that is not available from its appeal on the preliminary injunction, the existence of a bond does "not prevent the controversy from becoming moot." *Am. Can Co. v. Mansukhani*, 742 F.2d 314, 320 (7th Cir. 1984) (finding a live controversy existed because a party had already moved to recover damages resulting from injunctive relief).

D. This Court Should Dismiss the Protective Notice of Appeal as Moot.

Relying solely on a federal criminal case, the State asks this Court to hold its protective appeal in abeyance while this Court decides what it believes should be consolidated appellate matters. (Resp. at 8 (citing *United States v. Owen*, 553 F.3d 161, 164-65 (2d Cir. 2009).) In *Owen*, the Second Circuit noted that the normal course was to hold the protective notice of appeal in abeyance while the district court ruled on outstanding motion practice. *Id*.

By contrast, the State here asks this Court to hold its mooted protective appeal in abeyance while the Court considers the same issues raised in its preliminary injunction appeal. *Compare* Pet. To Dissolve Stay of Execution under NRS 176.492 and Pet. for Writ of Mandamus or Prohibition, Case No. 76485, July 25, 2018, at 1-2

(stating issues presented in the writ petition) *with* Docketing Statement, Case No. 76510, Oct. 10, 2018 at C-5 (stating identical issues on appeal). With no basis on which to hold the protective appeal in abeyance, and given the Court's inability to grant relief from the now-superseded TRO, the Court should dismiss Case No. 76510 as moot.[4]

III. CONCLUSION

The District Court's preliminary injunction order rendered the State's writ petition and protective appeal moot as to the TRO. The Court should deny the State's Motion to Consolidate and Hold Case No. 76510 in Abeyance, and instead dismiss Cases Nos. 74685 and 76510.

DATED this 24th day of December, 2018.

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[4] The State's own conduct confesses that the matter is moot. On November 21, 2018, the Court entered its Order Granting Telephonic Extension, ordering the State to file and serve its opening brief and appendix by December 10, 2018. As of December 24, 2018, the State still has not filed or served its opening brief or appendix.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 24th day of December, 2018, I electronically filed and served through the Court's CM/ECF system a true and correct copy of the above and foregoing **ALVOGEN, INC.'S REPLY TO RESPONSE TO ORDER TO SHOW CAUSE AND MOTION TO CONSOLIDATE AND HOLD CASE NO. 76510 IN ABEYANCE** addressed to the following:

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