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June 24, 2021

VIA E-MAIL

The Honorable Aaron D. Ford
Attorney General
State of Nevada
100 North Carson Street
Carson City, Nevada 89701

Re: Demand to: Return Hikma Pharmaceuticals USA Inc.'s Ketamine; Cease and Desist Illegal and Tortious Actions, and; Preserve Records

Dear General Ford:

This law firm represents Hikma Pharmaceuticals USA Inc. ("Hikma"), a leading manufacturer and provider of healing and life-saving branded and non-branded generic medicines in the United States. Hikma has been informed that on May 26, 2021, the Nevada Department of Corrections ("NDOC") knowingly made the illegal purchase of 50 vials of 500mg/5ml of Hikma's Ketamine product,[1] a Schedule III controlled substance, with the intention of illegally using Hikma's product as part of a new lethal injection protocol for an execution scheduled in July 2021. NDOC's purchase and intended use of Hikma's products for capital punishment is in violation of state and federal law, in knowing violation of Hikma's property and proprietary interests in its products, and these actions will cause significant damage to Hikma's business reputation and the interests of its investors.

A. DEMAND TO RETURN HIKMA'S KETAMINE

Accordingly, Hikma demands: 1) The immediate return of all of Hikma's Ketamine product in the possession of NDOC, or its employees or agents,[2] within seven (7) business days of the receipt of this letter, and; 2) Confirmation in writing from The Office of the Attorney General ("OAG") that NDOC, and its employees or agents, will not use, or attempt to use, Hikma's Ketamine for capital punishment. Hikma's demand for the return of its product is made pursuant to state and federal law, and its property and proprietary interests in its products.[3] Failure to comply with Hikma's demand will result in legal action against the State of Nevada, NDOC and

[1] NDC: 00143-9509-10
[2] This includes any Hikma Ketamine in the possession of any agency, subdivision, employee or agent of the State of Nevada for NDOC's use in capital punishment.
[3] *See* 21 CFR 7.46, and; NRS 104.9620(1)(a); *See also Wyeth v. Rowatt*, 126 Nev. 446, 468 (2010), and; *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606 (2000).

any employee, officer or agent of the State of Nevada that violates state or federal law towards the misuse of Hikma's product for capital punishment.

This is not Hikma's first rodeo with NDOC on this issue, and the OAG and NDOC are well aware of Hikma's long history of opposing the purchase and misuse of its life-saving products for capital punishment. NDOC and the OAG are also aware of the controls Hikma has in place in order to prevent corrections departments from using its products for capital punishment. Hikma's Ketamine is listed on Hikma's restricted drug list, which means that Hikma requires departments of correction or correctional facilities in the United States "to provide 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" to purchase these products. In 2018, Hikma sued the State of Nevada, NDOC, the NDOC Director and Nevada's Chief Medical Officer in order to prevent NDOC from using its medicines in capital punishment, which litigation resulted in the successful return of Hikma's product from NDOC. I respectfully suggest that you take the time to review the discovery and evidence in this case.[4] It is nothing less than shocking, and embarrassing for the State of Nevada.

Hikma communicated with NDOC as recently as May 10, 2021, expressing its opposition to the use of its medicines for capital punishment by NDOC, and requested information on any Hikma products in NDOC's possession that it intended to use for capital punishment. The OAG acknowledged Hikma's May 10th request in a response letter dated May 28, 2021, which was just two days after NDOC purchased Hikma's Ketamine. In Hikma's 2018 lawsuit against NDOC, the court found that NDOC's purchase of Hikma's products for use in capital punishment ". . . qualifies as subterfuge. 'In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan stratagem, or artifice of evasion.'"[5] The OAG's non-response to Hikma, just two days after NDOC's purchase of Hikma's Ketamine, followed shortly thereafter by NDOC's publication of a new lethal injection protocol that includes Ketamine, which has never been used for capital punishment, appears to follow the same course of conduct NDOC used in 2018 to illegally acquire and use Hikma's product for capital punishment.

B. NDOC'S ACTIONS VIOLATE THE LAW

Hikma has taken proactive action to prevent the sale and distribution of its products to NDOC, and NDOC's misuse of its products in the State of Nevada's lethal injection protocol. Hikma published, and NDOC is aware of, its policies regarding its refusal to sell to state departments of corrections for use in executions, and its vehement objection to the misuse of its products for such purpose. Hikma specifically notified NDOC numerous times in writing of

[4] Case No. A-18-777312-B.
[5] *See* Case No. A-18-777312-B, September 28, 2018 Findings of Fact and Conclusions of Law, ¶ 271 (quoting *United Airlines, Inc. v. McMann,* 434 US. 192, 203 (1977)).

Hikma's strenuous objection to NDOC's use of any of its products for lethal injunction as being contrary to the U.S. Food and Drug Administration's ("FDA") indication, Hikma's intention in manufacturing the products for the well-being of patients in need, and Hikma's values as an organization. As mentioned above, Hikma has already litigated with NDOC regarding the use of its products in capital punishment. Nonetheless, it appears that NDOC has ignored Hikma's repeated demands and, in knowing violation of Hikma's legal rights, express communications with NDOC and express policies and controls, NDOC surreptitiously obtained Hikma's Ketamine for use in an execution.

NRS 453.391(1), provides that "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." NDOC, and its employees and agents, qualify as a "person" for purposes of the foregoing. *See* NRS 453.113. Paralleling these statutes, the Nevada Administrative Code reads, in pertinent part, "A person who is licensed as a physician or physician assistant shall not . . . [a]cquire any controlled substances from any pharmacy or other source by misrepresentation, fraud, deception or subterfuge." NAC 630.230. NDOC's acquisition of Hikma's Ketamine was unlawful because the acquisition was: 1) In derogation and violation of Hikma's property rights, and; 2) Undertaken for purposes of administering it for a non-therapeutic use (an execution) as well as unlawfully furnishing it to non-physician administrators.

NRS 453.381(1), states that "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." A physician may not use a non-physician to evade that prohibition. Execution by lethal injection using Hikma's Ketamine is not a "legitimate medical purpose" based on the uses for which Hikma's Ketamine is approved. 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").

NRS 41.700, states that 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). Furthermore, a person who "knowingly 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 also liable for wrongdoing caused as a result of the use of the controlled substance. NRS 41.700(b). NDOC's obtainment of Hikma's Ketamine was in derogation and violation of Hikma's property rights, and it was undertaken in a scheme to unlawfully administer it for a non-theraputic use (an execution) as well as for unlawfully furnishing it to non-physician administrators.

NDOC is wrongfully in possession of Hikma's property, Hikma's Ketamine. Under Nevada law, the doctrines of replevin and conversion allow for Hikma's recovery of its own property. Replevin involves four elements: 1) The plaintiff's ownership of the property; 2) A right to immediate possession; 3) The defendant's wrongful taking of the property, and; 4) a demand for its return. *Johnson v. Johnson*, 27 P.2d 532, 533 (1933). Conversion is "a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such title or rights." *M.C. Multi-Family Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 910, (2008). Further, "conversion is an act of general intent, which does not require wrongful intent and is not excused by care, good faith, or lack of knowledge." Id. at 910-11, 193 P.3d at 542-43. Hikma has a property right in not only it products, including Hikma's Ketamine, but also its right to deal—or refuse to deal—with particular prospective customers with respect to its products. Particularly, Hikma benefits from "the 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, and, of course, [to] announce in advance the circumstances under which he will refuse to sell." *See United States v. Colgate*, 250 U.S. 300, 307 (1919). Hikma has exercised those rights both generally in its statements to the public, and specifically in communications and litigation with NDOC. To wit, Hikma specifically wrote to NDOC to expressly warn them that they were customers with whom Hikma refused to deal—both directly and indirectly—with regard to the acquisition of Hikma's Ketamine.

NDOC was on actual notice that they could not purchase any product, including Hikma's Ketamine, 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. NDOC was also on actual or notice that Hikma's distributors were not authorized to transfer any Hikma product, including Hikma's Ketamine, to NDOC for purposes of utilizing it in an execution. Because NDOC had actual notice that they could not in good faith acquire title to Hikma's Ketamine, Hikma's Ketamine is neither the property of NDOC nor the State of Nevada, and must be returned to Hikma.

Hikma demands that NDOC cease and desist further illegal and tortious actions relating its products, and that it take all necessary steps to ensure that Hikma's Ketamine is not used as part of its execution protocol. If NDOC continues its knowingly illegal and tortious conduct, Hikma will take appropriate measures to seek damages from the State of Nevada, NDOC and any employee, officer or agent of the State of Nevada that violates state or federal law towards the misuse of Hikma's product for capital punishment.

C. DEMAND TO PRESERVE RECORDS

The OAG and the following parties: NDOC; NDOC Director Charles Daniels; NDOC employees and agents involved in the purchase, storage and use of medicine; NDOC employees and agents involved in capital punishment; the Nevada Department of Health and Human Services; Chief Medical Officer Dr. Ihsan Azzam; All State of Nevada officers, employees and agents involved in developing NDOC's June 2021 Execution Manual; All State of Nevada officers, employees and agents involved in NDOC's May 2021 purchase of Hikma's Ketamine (hereinafter referred to as "the Parties") are hereby given notice to immediately take all steps necessary to prevent the destruction, loss, concealment or alteration of any paper, document or electronically stored information ("ESI") and other data or information generated by and/or stored on your or the parties' computers and storage media (e.g., hard disks, USB memory sticks, backup tapes, etc.) and e-mail related to (1) NDOC's purchase, storage and intended use of Hikma's Ketomine; (2) the determination to use Ketomine as part of NDOC's June 2021 Execution Protocol, and; (3) Hikma's requests, and NDOC's actions in response, to not use its products for capital punishment.

The OAG and the Parties should anticipate that much of the information subject to disclosure and responsive to discovery in any legal action by Hikma is stored on your client's current and/or former electronic systems, media and other devices (including voice messaging or voicemail systems, online repositories, smartphones, tablets or other portable storage devices).

ESI should be afforded the broadest possible definition and includes, but it not limited to, all digital communications (e.g., e mail, voicemail, instant messaging), Word and WordPerfect documents and drafts, spreadsheets and tables (e.g., Excel and Lotus 123 worksheets), accounting application data (e.g., QuickBooks, Money or PeachTree/Sage 50), image and facsimile files (including PDF, TIFF, JPG and GIF images), sound recordings (including WAV and MP3 files), video recordings, all databases, all contact and relationship management data, calendar and diary application data, online access data (including temporary, internet files, history and cookies), all presentations (including PowerPoint), all network access and server activity logs, all data created or stored on any smartphone (including personal smartphones used in the conduct of an officer or employees duties), tablet or portable storage device, all CAD files and all backup and archived files.

Adequate preservation of ESI requires more than simply refraining from efforts to destroy or dispose of such evidence. The OAG and the Parties must also intervene to prevent loss due to routine operations and employ proper techniques to safeguard all such evidence.

Because hard copies do not preserve electronic search ability or metadata, they are not an adequate substitute for ESI. If information exists in both electronic and paper form, the OAG and the Parties are obligated to preserve them both.

I. LITIGATION HOLD

The OAG and the Parties are requested to immediately initiate a litigation hold for potentially relevant ESI, documents and tangible things and to act diligently and in good faith to secure an audit compliance with that litigation hold. The OAG and the Parties are also requested to preserve and not destroy all passwords, decryption procedures (including, if necessary, the software to decrypt the files), network access codes, ID names, manuals, tutorials, written instructions, decompression or reconstruction software and any and all other information and things necessary to access, view and (if necessary) reconstruct any ESI. The OAG and the Parties should not pack, compress, purge, or dispose of any file or any part thereof.

The OAG and the Parties are further requested to immediately identify and modify or suspend features of your client's operations, information systems and devices that, in routine operations, operate to cause the loss of documents, tangible items or ESI. Examples of such features and operations include, but are not limited to, purging the contents of e-mail repositories by age, capacity or other criteria, using data or media wiping, disposal, erasure or encryption utilities or devices, overwriting, erasing, destroying or discarding backup media, reassigning, reimaging or disposing of systems, servers, devices or media, running antivirus or other programs that alter metadata, using metadata stripper utilities and destroying documents or any ESI by age or other criteria.

II. ELECTRONIC DATA TO BE PRESERVED

All ESI relevant to the dispute should be preserved, including, but not limited to:

a) All e-mail and information about e-mail (including message contents, header information and logs of electronic mail system usage) sent or received by anyone related to the above-referenced matter or containing information that refers to or relates to the above-referenced matter.

b) All logs of activity on computer systems that may have been used to process or store electronic data containing information that refers to or relates to the above paragraph and this paragraph.

c) All word processing files and file fragments containing information that refers to or relates to the above-referenced matter.

d) All other electronic data containing information that refers to or relates to the above-referenced matter including, but not limited to all computer systems, databases, networks, electronic processing systems, computer servers, personal and network computers, hard drives, online data storage, laptops and other devices, archives, backup or disaster recovery systems or

other storage media, internet data, personal digital assistants, handheld wireless devices (smartphones, iPhones and the like), including personal devices, voicemail, e-mail, text messages, tweets, content on social media websites, pagers, employee time record systems, cloud data, iPods, as well as copies of any software required to utilize the hardware including keycodes, handbooks or other documents that give guidance in operation, reading or interpreting data.

III. STORAGE

With respect to online storage and/or direct access storage devices attached to your client's servers and workstations, in addition to the above, the OAG and the Parties are not to modify or delete any ESI "deleted" files and/or file fragments existing on the date of this letter's delivery that contain potentially relevant information.

With regard to all electronic media used for offline storage, including magnetic tapes and cartridges and other media, containing any electronic data meeting the criteria of this letter, the OAG and the Parties are requested to stop any activity that may result in the loss of such electronic data. This activity includes rotation, destruction, overwriting and/or erasure of such media in whole or in part. Additionally, this activity includes all removable electronic media used for data storage in connection with your client's computer systems, including magnetic tapes and cartridges and all other media, whether used with personal computers, workstations, servers or other computers and whether containing backup and/or archive data sets and other electronic data, for all of your client's computer systems.

IV. PERSONAL COMPUTERS

The OAG and the Parties must take immediate steps to preserve all ESI on all personal computers used by officers, directors, and employees, including all secretaries and assistants, which in any way relate to a potential lawsuit by Hikma as referenced above, and the events and causes of action described in this letter. As to these devices, (1) a true and correct copy is to be made of all such ESI, including all active files and completely restored versions of all deleted electronic files and file fragments, (2) full directory listings (including hidden files) for all directories and subdirectories (including hidden directories) on such fixed devices should be written, and (3) all such copies and listing are to be preserved until this litigation is ended. As to CDs, DVDs, thumb drives, magnetic tapes and cartridges and other non-fixed media relating to this matter, they are to be collected and stored pending resolution of this litigation.

V. PORTABLE SYSTEMS

In addition to your immediate preservation of ESI, documents and tangible items in your client's business, on servers and workstations, the OAG and the Parties should also determine if any home or portable systems may contain potentially relevant data or information. To the extent

that officers, agents or employees have sent or received potentially relevant e-mails or created or reviewed potentially relevant documents away from the office, you must preserve the contents of systems, devices, and media used for these purposes (including not only potentially relevant data from portable and home computers, but also from portable thumb drives, CD-R discs, smartphones, tablets, voice mailboxes or other forms of ESI storage). Additionally, if any employees, officers, or agents used online or browser-based e-mail accounts or services to send or receive potentially relevant messages and attachments, the contents of these account mailboxes should be preserved.

VI. EVIDENCE CREATED OR ACQUIRED IN THE FUTURE

With regard to documents, tangible things and ESI that are created or come into the OAG's or the Parties' custody, possession, or control subsequent to the date of delivery of this letter, potentially relevant evidence is to be preserved in the same manner as described above. The OAG and the Parties should take all appropriate action to avoid destruction of potentially relevant evidence.

Please forward a copy of this letter to all persons and entities possessing or controlling potentially relevant evidence. Your obligation to preserve potentially relevant evidence is required by law. The OAG and the Parties are hereby given notice to immediately take all steps necessary to prevent the destruction, loss, concealment or alteration of any paper, document or electronically stored information ("ESI") and other data or information generated by and/or stored on your or the parties' computers and storage media (e.g., hard disks, USB memory sticks, backup tapes, etc.) and e-mail related to this letter as described above.

The OAG and the Parties should anticipate that much of the information subject to disclosure and responsive to discovery in this action is stored on your client's current and/or former electronic systems, media and other devices (including voice messaging or voicemail systems, online repositories, smartphones, tablets or other portable storage devices).

ESI should be afforded the broadest possible definition and includes, but it not limited to, all digital communications (e.g., e mail, voicemail, instant messaging), Word and WordPerfect documents and drafts, spreadsheets and tables (e.g., Excel and Lotus 123 worksheets), accounting application data (e.g., QuickBooks, Money or PeachTree/Sage 50), image and facsimile files (including PDF, TIFF, JPG and GIF images), sound recordings (including WAV and MP3 files), video recordings, all databases, all contact and relationship management data, calendar and diary application data, online access data (including temporary, internet files, history and cookies), all presentations (including PowerPoint), all network access and server activity logs, all data created or stored on any smartphone, tablet or portable storage device, all CAD files and all backup and archived files.

Adequate preservation of ESI requires more than simply refraining from efforts to destroy or dispose of such evidence. The OAG and the Parties must also intervene to prevent loss due to routine operations and employ proper techniques to safeguard all such evidence.

Because hard copies do not preserve electronic search ability or metadata, they are not an adequate substitute for ESI. If information exists in both electronic and paper form, you and the Parties are obligated to preserve them both.

D. CONCLUSION

While Hikma is ready and willing to take all appropriate measures to protect its reputation, its property and proprietary interests in order to, once again, prevent NDOC from illegally using its products for capital punishment, it hopes that it can resolve this matter without pursuing litigation. Accordingly, please contact me at your earliest convenience in an effort to achieve a resolution of this matter.

Sincerely,

FENNEMORE CRAIG, P.C.

Josh Reid

cc: The Honorable Governor Steve F. Sisolak
Director Charles Daniels, Nevada Department of Corrections
D. Randall Gilmer, Chief Deputy Attorney General