IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
TWELFTH DIVISION

MCKESSON MEDICAL-SURGICAL, INC. PLAINTIFF

vs. Case No. 60cv-17-1960

STATE OF ARKANSAS;
ARKANSAS DEPARTMENT OF CORRECTION;
ASA HUTCHINSON, in his official capacity as
Governor of Arkansas; and
WENDY KELLEY, in her official capacity as
Director of the Arkansas Department of Correction DEFENDANTS

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

McKesson's complaint essentially alleges that McKesson made a mistake nine months ago when it sold vecuronium bromide to the ADC, a drug that can be used in lethal injection under Arkansas law. McKesson asks that the ADC be enjoined from using the drug it purchased from McKesson in lethal-injection executions, and that the ADC be ordered to return the drug to McKesson. McKesson's complaint fails as a matter of law for at least three reasons: (1) the relief McKesson seeks amounts to a stay of executions and this Court lacks jurisdiction to grant a stay of executions as a matter of settled Arkansas law; (2) the complaint is barred by sovereign immunity because McKesson seeks to control the actions of the State; and (3) the complaint fails to state a viable cause of action as a matter of law. The complaint should be dismissed with prejudice[1] for failure to state facts upon which relief can be granted. Ark. R. Civ. P. 12(b)(6).[2]

[1] As the Court is well aware, McKesson already took a voluntary dismissal under Ark. R. Civ. P. 41 in Case No. 60cv-17-1921. The second dismissal should be with prejudice.

I. Standard of Review

On a motion to dismiss under Ark. R. Civ. P. 12(b)(6), the courts treat the facts alleged in the complaint as true and view them in the light most favorable to the plaintiffs. *Dockery v. Morgan*, 2011 Ark. 94, at 6-7, 380 S.W.3d 377 (citing *McNeil v. Weiss*, 2011 Ark. 46, 378 S.W.3d 133). "However, our rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief." *Id*. at 7. (Citing Ark. R. Civ. P. 8(a)(1); *Born v. Hosto & Buchan, PLLC*, 2010 Ark 292, 372 S.W.3d 324). The Court should "treat only the facts alleged in the complaint as true but not the plaintiff's theories, speculation, or statutory interpretation." *Id*. (Citing *Hodges v. Lamora*, 337 Ark. 470, 989 S.W.2d 530 (1999)). The appellate courts ask "whether the circuit judge abused his or her discretion" in ruling on a motion to dismiss. *Id*. (Citing *Doe v. Weiss*, 2010 Ark. 150, 2010 WL 1253216).

II. Argument

McKesson alleges that the ADC, a "longstanding McKesson customer" (Complaint, ¶ 8), somehow "misled" McKesson by purchasing vecuronium bromide from McKesson through the ADC's medical director—as the ADC has always purchased drugs from McKesson through their "longstanding" supplier-customer relationship. McKesson alleges that the ADC declined to affirmatively alert McKesson that the ADC intended to use the vecuronium bromide to carry out executions in Arkansas—a disclosure that is not required under any statute or common law theory. McKesson acknowledges as it must that the ADC's use of vecuronium bromide for lethal injection is expressly authorized under the Arkansas method-of-execution act, Ark. Code Ann. § 5-4-617(c). McKesson alleges that *after its voluntary sale of vecuronium bromide to the*

[2] The Defendants contend that their Motion to Change Venue (and the Motion to Dismiss) should be acted upon before the Court considers McKesson's request for preliminary injunctive relief. McKesson's request for preliminary injunctive relief should be heard by the transferee court, which the Defendants have an absolute statutory right to transfer to.

ADC, McKesson received an inquiry from the manufacturer about McKesson's sale of the drug to the ADC. Complaint, ¶ 19. McKesson then asked the ADC to return the drug (*id*., ¶ 20), and according to McKesson, ADC Deputy Director Rory Griffin "indicated to McKesson that the Vecuronium had been set aside for return" (*id*., ¶ 21)—but ADC Director Wendy Kelley ultimately declined to return the drug to McKesson. *Id*., ¶ 23. The ADC *did* offer to return the drug if McKesson would provide an alternative drug to be used in executions—but McKesson was not interested in an exchange. *Id*., ¶ 24.

A. The complaint should be dismissed because McKesson seeks a stay of executions and this Court lacks jurisdiction to stay executions under settled Arkansas law.

This case must be viewed in its proper context: the United States Supreme Court in *Glossip v. Gross*, 135 S. Ct. 2726, 2015 WL 2473454 (June 29, 2015), and the Arkansas Supreme Court in *Kelley v. Johnson*, 2016 Ark. 268, 496 S.W.3d 346, have both explicitly acknowledged the successful tactics of anti-death-penalty advocates pressuring manufacturers and suppliers to prevent states from obtaining and using the drugs necessary for carrying out lawful death sentences.

What McKesson seeks through this complaint, for all intents and purposes, is a stay of the executions scheduled for April 20, 24, and 27, 2017. As repeatedly explained by both ADC Director Kelley and ADC Deputy Director Griffin at the trial referenced in McKesson's complaint (and in the transcripts attached under seal as Exhibits A and B to the Complaint), the ADC has no additional vecuronium bromide beyond what it purchased from McKesson, and the ADC has no other source from which to purchase vecuronium bromide. Vecuronium bromide is a required drug under Arkansas's lethal-execution protocol established in Ark. Code Ann.

§ 5-4-617(c). If the ADC cannot use the vecuronium bromide that it purchased from McKesson (and that McKesson willingly sold to the ADC), then the executions cannot go forward.

The Arkansas Supreme Court has already overturned the temporary restraining order that McKesson seeks—because this Court lacks jurisdiction to grant such relief. *See State et al. v. Griffen et al*., Ark. Sup. Ct. No. CV-17-299 (Formal Order, Apr. 17, 2017). And the Arkansas Supreme Court has previously held—in another case where Circuit Judge Griffen attempted to stay executions with a temporary restraining order—that "the circuit court acted in excess of its jurisdiction in staying the executions" and therefore the Court "lift[ed] the stay of the executions entered by the circuit court." *Kelley v. Griffen et al*., Ark. Sup. Ct. No. CV-15-829 (Oct. 20, 2015) (per curiam). *See also Singleton v. Norris*, 332 Ark. 196, 964 S.W.2d 366 (1988) (a circuit court does not have jurisdiction to issue a stay of jurisdiction); Ark. Code Ann. § 16-90-506(c) (providing that the only officers who have the power to stay executions are the Governor, the ADC Director, and the Clerk of the Supreme Court).

The complaint should be dismissed because as a matter of law—including the law of this case that was originally filed as Case No. 60cv-17-1921 in which the Arkansas Supreme Court overturned the very temporary restraining order that McKesson seeks again here—the Court lacks jurisdiction to grant the requested relief.

B. The complaint is barred by sovereign immunity.

Even if the Arkansas Supreme Court permitted circuit courts to grant stays of executions, the complaint fails as a matter of law because it is barred by sovereign immunity. *See* Ark. Const. art. 5, § 20 ("The State of Arkansas shall never be made defendant in any of her courts."). As the sovereign-immunity rule has been commonly stated, "if a judgment for the plaintiff will operate to control the action of the State or subject it to liability, the suit is one against the State

and is barred by the doctrine of sovereign immunity." *Ark. Tech. Univ. v. Link*, 341 Ark. 495, 502, 17 S.W.3d 809 (2000) (emphasis added) (citing cases). "[W]here the pleadings show that the action is, in effect, one against the state, the trial court acquires no jurisdiction." *Fireman's Ins. Co. v. Ark. State Claims Comm'n*, 301 Ark. 451, 455, 784 S.W.2d 771 (1990).

Although McKesson does not seek monetary damages, McKesson *does* seek to force the ADC to return the vecuronium bromide to McKesson. And at a minimum, McKesson seeks to have the drug impounded so that the ADC cannot use the drug in executions. At bottom, McKesson plainly seeks a judgment that will "operate to control the action of the State." The complaint is therefore barred by sovereign immunity, and should be dismissed. *See Ark. Dept. of Envt'l Quality v. Al-Madhoun*, 374 Ark. 28, 30, 32-34, 285 S.W.3d 654 (2008) (overturning circuit court ruling that sovereign immunity only applied to requests for monetary relief and reaffirming that request for injunctive relief that "seek to control the actions" of the State is barred by sovereign immunity).

None of the limited exceptions to sovereign immunity apply. Only two exceptions are even conceivably implicated here. The first exception is for illegal or unconstitutional acts. *See Cammack v. Chalmers*, 284 Ark. 161, 162-63, 680 S.W.2d 689 (1984). But the complaint does not allege that the ADC acted illegally or unconstitutionally, save for the frivolous "unlawful takings" claim that fails because it is undisputed that the ADC paid McKesson for the drug. The second exception is for circumstances where an agency is about to act in a manner that is *ultra vires*—meaning "without authority of the agency"—or is about to act arbitrarily, capriciously, in bad faith, or in a wantonly injurious manner. *See Ark. State Game and Fish Comm'n*, 256 Ark. 930, 930-32, 512 S.W.2d 540 (1974). This exception is for acts of state officials or agencies that unreasonably or malevolently exceed the authority and discretion they have been given. *See Gray v. Ouachita*

Creek Watershed District, 234 Ark. 181, 183-84, 351 S.W.2d 142 (1961). But McKesson's complaint does not and could not allege this. The ADC is specifically authorized to purchase and use vecuronium bromide in lawful executions. The ADC does not act arbitrarily, capriciously, in bad faith, or wantonly when doing so—as a matter of law.

The complaint should be dismissed because it is barred by sovereign immunity and no exception to sovereign immunity applies.

C. The complaint should be dismissed because McKesson fails to state a viable cause of action against the ADC.

Even if the complaint was not barred by sovereign immunity and by the fact that this Court lacks jurisdiction to stay executions, McKesson has failed to state a claim against the ADC. McKesson attempts to assert numerous claims—rescission, replevin, unjust enrichment, and so on—but most if not all of the claims asserted by McKesson are *remedies*, not *causes of action*. In any event, the bottom line is that McKesson willingly sold a drug to the ADC and then experienced seller's remorse. McKesson asked the ADC to return the drug *after the transaction* but the ADC declined. None of the claims asserted by McKesson, nor any statute or common-law theory, support McKesson's apparent belief that a person who purchases a product must use that product in a certain way *as dictated by the seller after the completion of the transaction*, or must return the product *on demand by the seller after the completion of the transaction*. McKesson is unlikely to succeed on the merits of any claim arising out of these facts because there is no such viable claim.

McKesson's claims all seem to be premised on McKesson's belief that the ADC violated or is in violation of Arkansas State Medical Board statutes and regulations (complaint, ¶ 10), or laws regulating drug wholesalers (*id.*, ¶ 36), or other rules and regulations applicable to the medical license of the ADC's purchasing physician (*id.*, ¶¶ 9-10, 36-37). These allegations are

specious, and to the extent that they are used to support the claims subsequently asserted in the complaint, the whole complaint collapses along with them. *First*, McKesson is not the enforcement authority for any of the statutes and regulations sprinkled throughout its complaint, and McKesson has no private right of action to enforce those statutes and regulations or any other source of law cited in McKesson's papers. *See, e.g.*, *Cent. Okla. Pipeline, Inc. v. Hawk Field Services, LLC*, 2012 Ark. 157, at 19, 400 S.W.3d 701 ("[W]e discern no legislative intent for a private cause of action to arise under section 17-25-313. As there is no private right of action, it follows that the Hawk defendants cannot be held vicariously liable for the alleged failure of its employees to give notice under the statute."); *Branscumb v. Freeman*, 360 Ark. 171, 200 S.W.3d 411 (2004) (declining to recognize a private cause of action for negligence against the owner of an uninsured motor vehicle based solely on a violation of the Arkansas Motor Vehicle Safety Act and the Arkansas motor Vehicle Liability Insurance Act); *Young v. Blytheville Sch. Dist.*, 2013 Ark. App. 50, at 7, 425 S.W.3d 190 ("Because the Act does not expressly provide for a private right of action or for any kind of remedy, the trial court did not err in its ruling on this point.").

Second, the ADC is presumed to follow any statutes or regulations that may apply to the ADC just as all government officials are presumed to follow the law. *See, e.g.*, *Hobbs v. Jones*, 2012 Ark. 293, at 15, 412 S.W.3d 844 ("[W]e presume that officials act with good faith and follow the law in carrying out their duties[.]"); *Cotton v. Fooks*, 346 Ark. 130, 134, 55 S.W.3d 290 (2001) ("[T]his court presumes that public officials will act lawfully and sincerely in good faith in carrying out their duties and will not engage in any subterfuge that will give rise to [plaintiff's] fears."); *Commercial Printing Co. v. Rush*, 261 Ark. 468, 477, 549 S.W.2d 790 (1977) ("There is the presumption that public officials act lawfully, sincerely in good faith in

carrying out their duties."); *French v. State*, 256 Ark. 298, 303, 506 S.W.2d 820 (1974) ("We have long held that a presumption in favor of due performance of official duties always exists.").

Third, and most importantly, the ADC has full legal authority to use the vecuronium bromide that it purchased from McKesson for executions under Arkansas law. In fact, the ADC is *required* by law to use vecuronium bromide for executions under the three-drug protocol outlined in Ark. Code Ann. § 5-4-617(c) ("The department shall select one (1) of the following options for a lethal-injection protocol, depending on the availability of the drugs: (1) a barbiturate; or (2) Midazolam, followed by *vecuronium bromide*, followed by potassium chloride.") (Emphasis added). Regardless of any other statutes or regulations applicable to vecuronium bromide, it cannot be honestly disputed that the ADC has legal authority to use vecuronium bromide to carry out executions in Arkansas.

In addition to the specious allegations about inapplicable statutes and regulations, McKesson's claims are all dependent on McKesson's basic contention that the ADC somehow "misled" or tricked McKesson during McKesson's sale of vecuronium bromide to the ADC. This allegation is demonstrably incorrect as will be shown by the evidence—but the Court need not concern itself with whether or to what extent McKesson was misled because even the facts stated in the complaint fail to establish any viable cause of action. McKesson does not allege that the ADC affirmatively represented that the ADC would *not* use the vecuronium bromide in executions, nor does McKesson allege that the ADC made any affirmative representation about what the ADC might or might not do with the drug. At most, McKesson alleges that *McKesson* made certain *assumptions* based on the "longstanding" customer-supplier relationship between the parties—and the ADC failed to affirmatively correct McKesson's incorrect assumptions. McKesson cannot sue the ADC for its own incorrect assumptions.

McKesson has no legal authority whatsoever to compel the ADC to use the vecuronium bromide in a certain way, or compel the ADC to return the drug to McKesson, after a transaction in which McKesson sold the drug to the ADC and the ADC paid for the drug. McKesson has no contract with the ADC requiring the ADC to perform any act specific to the purchase of this drug or any drug, or requiring the ADC to return the drug under certain conditions or restricting the ADC's use of the drug in any way. The parties engaged in a mutual transaction with no contractual obligations or other restrictions on future behavior—and that is all. McKesson cannot now claim regret based on its own incorrect assumptions and use inapplicable equitable theories to prevent the ADC from carrying out lawful executions. The complaint fails to state facts sufficient to support *any* cause of action against ADC, and should be dismissed with prejudice accordingly.

III. Conclusion

McKesson offers tireless platitudes about the vast reputational injury that McKesson will suffer if the ADC is permitted to use the vecuronium bromide that McKesson sold to the ADC—but given the confidentiality provisions of Ark. Code Ann. § 5-4-617 and the presumption that the ADC upholds those confidentiality provisions and would never publicly reveal the identity of McKesson as a supplier of lethal-injection drugs—any harm brought on McKesson is entirely a result of McKesson's voluntary sale of a drug to the ADC and *McKesson's decision to publicly identify itself* as a supplier of a drug to be used in lethal injections. If McKesson was really concerned about its reputation, McKesson would not have filed this lawsuit. McKesson, or perhaps the battalion of attorneys driving this litigation, is really seeking a stay of executions.

But this Court lacks jurisdiction to stay executions under settled Arkansas law—and the complaint should be dismissed for this reason alone. This Court also lacks jurisdiction to control

the actions of the State in litigation filed against the State under the doctrine of sovereign immunity—and the complaint should be dismissed for that reason alone. At bottom, the complaint also utterly fails to articulate a viable cause of action against the State even taking the allegations in the complaint as true. McKesson's complaint should be dismissed with prejudice for failure to state facts upon which relief can be granted.

WHEREFORE, the Defendants pray that McKesson's Complaint is dismissed with prejudice, and for all other just and appropriate relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Colin Jorgensen, do hereby certify that on this 19th day of April, 2017, I filed the foregoing document vie the eFlex electronic filing system, and I served a copy on the following via email:

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