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

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

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 request for injunctive relief should be denied.[1]

McKesson is not likely to succeed on the merits of its complaint 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.

[1] The Defendants contend that their Motion to Change Venue 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.

McKesson also cannot establish irreparable harm under the facts of this case. McKesson's allegations about loss of property do not qualify as irreparable harm because McKesson has already been paid for the drug that it sold to the ADC and the loss of a product can be remedied with money damages in any event. McKesson's allegations about reputational injury are incredible and implausible because the ADC is required to maintain McKesson's confidentiality by law and has always maintained McKesson's confidentiality and the confidentiality of all of the ADC's suppliers of drugs to be used in lethal injection. McKesson's confidentiality as a supplier of lethal-injection drugs was only breached when *McKesson* initiated litigation in which *McKesson publicly identified itself* as a supplier of drugs to be used in Arkansas's executions. McKesson should not be permitted to fabricate a reputational injury based entirely and exclusively on McKesson's own public statements, and simultaneously ignore the fact that its statements make clear to the world that it is not associated with Arkansas's executions and indeed that it is affirmatively against the use of its drugs in such executions.

McKesson's request for an injunction should be denied.

I. Standard of Review

Arkansas courts evaluate temporary restraining orders and preliminary injunctions under the same standards. *Three Sisters Petroleum, Inc. v. Langley*, 348 Ark. 167, 173-174, 72 S.W.3d 95 (2002). "In determining whether to issue a preliminary injunction, two factors must be considered: (1) whether irreparable harm will result in the absence of an injunction, and (2) whether the moving party has demonstrated a likelihood of success on the merits." *Manila Sch. Dist. No. 15 v. Wagner*, 356 Ark. 149, 153, 148 S.W.3d 244 (2004). *See also Custom Microsystems, Inc. v. Blake*, 344 Ark. 536, 42 S.W.3d 453 (2001). Regarding the likelihood of success on the merits, the Arkansas Supreme Court has held: "Of course, in order to justify a

grant of preliminary injunctive relief, a plaintiff must establish that it will likely prevail on the merits at trial." *W.E. Long Co. v. Holsum Baking Co.*, 307 Ark. 345, 351, 820 S.W.2d 440 (1991) (internal citations omitted). The test for determining the likelihood of success on the merits is whether there is a reasonable probability of success in the litigation. Such a showing "is a benchmark for issuing a preliminary injunction." *Custom Microsystems*, 344 Ark. at 542.

The standard of review on appeal for a temporary restraining order or a preliminary injunction is whether the circuit court abused its discretion—regarding both likelihood of success and irreparable harm. *AJ & K Operating Co., Inc. v. Smith*, 355 Ark. 510, 518, 140 S.W.3d 475 (2004). "Any suggestion in our caselaw that a conclusion by the circuit court that irreparable harm and likelihood of success on the merits are factual determinations, subject to an abuse of discretion standard, is incorrect." *Id.*

Because McKesson seeks equitable relief, the Court should consider that "[o]ne of the cardinal principles of equity, often applied by the courts, is that equity will lend its aid only to those who are vigilant in asserting their rights." *Hamilton v. Smith*, 212 Ark. 893, 898, 208 S.W.2d 425 (1948) (citing *Sims v. Petree*, 206 Ark. 1023, 178 S.W.2d 1016). "Hence, it must appear that the judgment complained of was not the result of any inattention or negligence on the part of the person aggrieved and he must show a clear case of diligence to entitle himself to an injunction." *Hanna v. Morrow*, 43 Ark. 107, 110, 1884 WL 936 (1884). McKesson complains at length about the ADC's purchase of vecuronium bromide from McKesson in July 2016 and the ADC's refusal of McKesson's pleas through September 2016 that the ADC return the drug (Complaint, ¶¶ 13-24)—but McKesson rested on its laurels until filing its first complaint late in the day on Friday, April 14, 2017, with executions scheduled for Monday, April 17, 2017. McKesson has not been diligent and should not be rewarded for its intentional delay.

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 ADC*, McKesson received an inquiry from the manufacturer about McKesson's sale of the drug to the ADC. Complaint, ¶ 19. McKesson 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.

McKesson's complaint fails on these allegations, even if they stand unrebutted at the hearing scheduled in this matter. The request for a temporary restraining order or preliminary injunction should be denied because McKesson is *not* likely to succeed on the merits of its complaint, and McKesson fails to establish irreparable harm warranting injunctive relief.

A. McKesson is *not* likely to succeed on the merits 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).

McKesson is not likely to succeed on the merits 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 order that McKesson seeks here—the Court lacks jurisdiction to grant the requested relief.

B. McKesson is *not* likely to succeed on the merits because the complaint is barred by sovereign immunity.

Even if the Arkansas Supreme Court permitted circuit courts to grant stays of executions, McKesson is not likely to succeed on the merits because the complaint 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. *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.

McKesson's request for a temporary restraining order or preliminary injunction should be denied because the complaint is barred by sovereign immunity and no exception to sovereign immunity applies.

C. McKesson is *not* likely to succeed on the complaint 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 is unlikely to succeed on the merits because the complaint fails to state a viable 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.* The complaint should be dismissed for failure to state a 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."). 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 the ADC—and McKesson is therefore unlikely to succeed on the merits of its complaint. McKesson's request for a temporary restraining order or preliminary injunction should be denied.

D. McKesson cannot show that irreparable harm will result in the absence of a temporary restraining order or injunction.

McKesson also fails the irreparable harm prong of its request for a temporary restraining order or preliminary injunction. McKesson identifies two distinct harms that it claims it will suffer in the absence of an injunction: (1) loss of property because the ADC will use the vecuronium bromide for executions and then the vecuronium bromide cannot be returned to McKesson; and (2) reputational injury as a result of McKesson's (manifestly false) "association" with the State's executions. McKesson's loss of its drug is not irreparable harm for at least two reasons. *First*, McKesson has already been paid for the drug by the ADC. The fact that McKesson unilaterally decided to refund the ADC's payment is of no moment, especially since the ADC disclaims any right to the refund. *Second*, the loss of a product in the marketplace can be remedied with monetary damages. *See AJ & K Operating Co.*, 355 Ark. at 520 ("In order for there to be irreparable harm sufficient to support a temporary restraining order, the harm must be such that it cannot be adequately addressed by money damages or in a court of law").

McKesson's tireless platitudes about the vast reputational injury that it claims it will suffer by association with Arkansas's executions are entirely incredible and implausible. McKesson has never said or done anything to intentionally associate itself with executions. If McKesson had done a bit more legal research beyond searching for legal claims that don't exist

under the facts of this case after months of delay, McKesson would have discovered that its identity as a supplier of execution drugs (even if unwitting) is expressly confidential under Arkansas law. The ADC is required to "keep confidential all information that may identify or lead to the identification of . . . the entities . . . who . . . test, sell, or supply the drug or drugs . . . for the execution process." Ark. Code Ann. § 5-4-617(i)(2)(B). Given the ADC's duty to protect McKesson's confidentiality under the confidentiality provisions of Section 5-4-617, it is simply untrue that McKesson would be publicly associated with Arkansas's executions if not for the fact that McKesson decided to publicly announce that the ADC will be using a drug purchased from McKesson by filing this lawsuit.

The evidence will show that the ADC is very protective of the confidentiality of its sellers and suppliers of executions drugs, and has never publicly disclosed the identities of *any* seller or supplier of execution drugs since the passage of the confidentiality provisions of Section 5-4-617—and that includes McKesson. McKesson does not allege, and will have no evidence whatsoever, that the ADC has "associated" McKesson with Arkansas's executions—and the ADC simply would not do so. Interestingly, in its complaint McKesson refers to a remark by an Assistant Attorney General for the State at a hearing in 2015 where the confidentiality provisions and the State's difficulties in procuring drugs were discussed.[2] That entire hearing was about a motion for a protective order that the ADC requested in order to prevent public disclosure of the identities of the ADC's manufacturers and sellers and suppliers of drugs to be used in lethal injection. *See* Complaint Exhibit G. That hearing is but one example of the many great lengths

[2] The remark of the Assistant Attorney General quoted in ¶ 42 of McKesson's complaint came in response to a hypothetical posed by the court in that case (Circuit Judge Wendell Griffen). The Assistant Attorney General later clarified that "I might have said something earlier and I want to make sure I correct my statement for the record. I have no idea what is in the ADC's supplier's contract with the drug manufacturers. So I didn't want to suggest that they were in breach of contract by providing drugs to ADC." Complaint Exhibit G at Ab 114.

to which the ADC has gone and will go to protect the confidentiality of its suppliers—including McKesson.

Even more importantly, despite the confidentiality provisions and the apparent fact that neither the State nor anybody else (aside from McKesson) has ever publicly associated McKesson with Arkansas's executions, McKesson decided to sue and make clear to the entire world that McKesson is not in any way, shape, or form, a willing participant in executions. The only reason that McKesson has appeared in the media in recent days is because of McKesson's complaint and McKesson's own outreach on this issue. *See* Exhibit 1C (*Washington Post* article noting McKesson's release of a statement noting that it sold vecuronium bromide to the ADC). McKesson should not be permitted to fabricate a reputational injury based entirely and exclusively on McKesson's own public statements, and simultaneously ignore the fact that its statements make clear to the world that it is not associated with Arkansas's executions and indeed that it is affirmatively against the use of its drugs in such executions.

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 McKesson is unlikely to succeed on the merits 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 McKesson is unlikely to succeed on the merits for that reason alone. McKesson is also unlikely to succeed on the merits because at bottom, the complaint utterly fails to articulate a viable cause of action against the State even taking the allegations in the complaint as true. McKesson's request for a temporary restraining order or preliminary injunction should be denied.

WHEREFORE, the Defendants pray that McKesson's motion for a temporary restraining order or preliminary injunction is denied, and for all other just and appropriate relief.

Respectfully submitted,

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By: /s/ Colin R. Jorgensen

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CERTIFICATE OF SERVICE

I, Colin R. 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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