

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

FRESENIUS KABI USA, LLC,

PLAINTIFF

v.

CASE NO. 4:18-cv-03109

**STATE OF NEBRASKA; THE NEBRASKA
DEPARTMENT OF CORRECTIONAL
SERVICES; and SCOT FRAKES, in his
Official Capacity as Director of the
Nebraska Department of Correctional
Services,**

DEFENDANTS

***AMICI CURIAE* BRIEF OF THE STATES OF ARKANSAS, ALABAMA, ARIZONA,
FLORIDA, GEORGIA, IDAHO, INDIANA, LOUISIANA, NEVADA, OKLAHOMA,
SOUTH CAROLINA, TENNESSEE, TEXAS, AND UTAH IN OPPOSITION TO
MOTION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR
PRELIMINARY INJUNCTION**

The States of Arkansas, Alabama, Arizona, Florida, Georgia, Idaho, Indiana, Louisiana, Nevada, Oklahoma, South Carolina, Tennessee, Texas, and Utah submit this *Amici curiae* brief in opposition to Plaintiff's Motion for Temporary Restraining Order (Doc. 7) and Motion for Preliminary Injunction (Doc. 8).

INTRODUCTION

This lawsuit is the third iteration of the latest nationwide campaign being waged by anti-death-penalty activists to deny States access to drugs necessary to carry out lawful executions. This latest campaign began last year when McKesson Medical-Surgical, Inc. filed a strikingly similar—and equally meritless—lawsuit seeking to prevent Arkansas from using lawfully acquired drugs to carry out just sentences of death. There, McKesson filed an eleventh-hour state court complaint alleging that it had seller's remorse and did not want the drugs that it had sold Arkansas to be used in executions. And while McKesson was initially successful—obtaining an *ex parte*

temporary restraining order from a trial judge who was later stripped of his power to hear execution-related cases due to his conduct in issuing that order—following a hearing before another judge and review by the Arkansas Supreme Court, Arkansas carried out multiple executions using lawfully acquired drugs.¹

But what we now know is that Arkansas's encounter with McKesson was only the first such lawsuit. Indeed, less than a month ago, Alvogen, Inc. filed a similarly meritless lawsuit arguing that it was entitled to halt a Nevada execution because it did not want lawfully acquired drugs being used to perform an execution. As in Arkansas, that lawsuit was filed at the last second and was at least initially successful, with Alvogen obtaining a temporary restraining order from a state trial court. That case is now on appeal to the Nevada Supreme Court, and that court should send the same strong message that the Arkansas Supreme Court did when it vacated the restraining order that McKesson initially acquired from a judge who was later stripped of his power to hear execution-related cases.

This Court should likewise join the Arkansas Supreme Court in refusing such frivolous claims. Indeed, to grant injunctive relief in response to Plaintiff Fresenius Kabi USA, LLC's claim would only encourage future meritless filings by pharmaceutical companies at the behest of anti-death-penalty activists who are committed to stopping lawful executions at any cost. Plaintiff's request for injunctive relief should be denied.

¹ The Arkansas Supreme Court determined that Pulaski County Circuit Judge Wendell Griffen, who was initially assigned to the case and issued the *ex parte* TRO, was incurably prejudiced against capital punishment and barred him from all death penalty cases. Judge Griffen subsequently sued the justices of the Arkansas Supreme Court in federal court, and the Eighth Circuit later dismissed Judge Griffen's lawsuit. See *In re Kemp*, 894 F.3d 900 (8th Cir. 2018) (granting petition for mandamus and finding that the judge failed to state any claim for relief against the Arkansas Supreme Court for removing him from capital cases).

ARGUMENT

I. Plaintiff’s meritless claims mirror those rejected by the Arkansas Supreme Court.

This is the second lawsuit in as many months brought by a pharmaceutical manufacturer seeking to stop a lawful execution. The first manufacturer lawsuit was brought last month by Alvogen seeking to stop an execution in Nevada. The trial court in that case entered a temporary restraining order preventing the execution from going forward.² The State of Nevada has asked the Nevada Supreme Court to dissolve that stay of execution.³ That case remains pending, but the Nevada Supreme Court should follow its Arkansas counterpart and dissolve that stay.

Yet another similar lawsuit—by a pharmaceutical supplier—perhaps best illustrates what this case is really about. In that April 2017 case, McKesson sought to block multiple executions by securing an eleventh-hour injunction that would have made it nearly impossible for Arkansas to perform lawful executions, no matter how meritless the underlying claim. Similar to what Plaintiff has done here, McKesson sought to regain possession of the supply of vecuronium bromide—one of the three drugs in Arkansas’s execution protocol, *see* ARK. CODE ANN. 5-4-617(c)(2)—that McKesson had sold to the Arkansas Department of Correction (“ADC”) in 2016. McKesson, like Plaintiff, sued based on little more than seller’s remorse, claiming that: (1) ADC officials obtained the vecuronium under false pretenses; (2) McKesson was entitled to the return of the vecuronium under a variety of state-law theories; and (3) the use of McKesson’s vecuronium would harm McKesson’s reputation. Each of these claims was meritless.⁴

² *See* Case No. A-18-777312-B, Clark Cty. Nev. Dist. Ct.

³ Case No. 76485, Nev. Sup. Ct.

⁴ The briefing for the ADC’s emergency motion for stay in the Arkansas Supreme Court is available in the Appendix beginning at A456, and the entire docket is publicly available at the

McKesson first claimed that it was entitled to rescission based on misrepresentation because, it alleged, the ADC led it to believe that the 100 vials of vecuronium that the ADC purchased would be used for medical purposes, not in executions. Setting aside that dubious allegation, the ADC (like corrections departments across the country) has the authority to purchase execution drugs by state statute, *see* ARK. CODE ANN. 5-4-617(b)–(c)(2), and that statute does not require the ADC to disclose a drug’s intended use. McKesson was, therefore, not entitled to a rescission of the sale on this theory.

McKesson further argued that it was entitled to rescission of the sale because it would not have sold drugs to the ADC had it known the drugs would be used to carry out lawful executions. Under Arkansas law, McKesson was required to prove four elements to prevail on this claim: (1) the mistake had such a great consequence that it would be unconscionable to enforce the contract as actually made; (2) the mistake related to a material feature of the contract; (3) the mistake occurred notwithstanding the exercise of reasonable care by the party making the mistake; and (4) rescission would not cause “serious prejudice” to the other party. *See Mtn. Home Sch. Dist. No. 9 v. T.M.J. Builders, Inc.*, 858 S.W.2d 74, 78 (Ark. 1993).

McKesson failed to meet any of those elements. There was nothing unconscionable about enforcing a simple transaction. How the vecuronium would be employed was not a material feature of the agreement because no party ever discussed that issue. For that same reason, McKesson did not exercise reasonable care with regard to ascertaining the vecuronium’s purpose. Finally, rescission would have caused serious prejudice to the ADC because it would not be able

following link on the Arkansas Judiciary’s webpage by searching for case number CV-17-317: https://caseinfo.arcourts.gov/cconnect/PROD/public/ck_public_gry_doct.ep_dktrpt_setup_idx Amici’s description of the proceedings in *McKesson* is taken from the publicly available briefing in that case.

to fulfill its statutory duty to carry out lawful death sentences. Thus, McKesson failed to show that it was entitled to a rescission of the sale due to its own mistake.

McKesson next argued that it was entitled to retake possession of the vecuronium because the ADC was unjustly enriched when McKesson unilaterally provided the ADC with an account credit for the purchase price of the vecuronium and demanded the return of the drugs. But under Arkansas law, a claim for unjust enrichment does not lie when the property at issue was conferred unilaterally by the plaintiff. *See City of Alexander v. Doss*, 284 S.W.3d 74, 78 (Ark. 2008). The ADC never requested a refund nor agreed to the vecuronium's return, and McKesson's choice to unilaterally issue a refund was nothing more than a litigation tactic. This claim was, therefore, entirely meritless.⁵

McKesson was also required to show irreparable harm in order to obtain injunctive relief. *See Three Sisters Petroleum, Inc. v. Langley*, 72 S.W.3d 95 (Ark. 2002). McKesson primarily claimed reputational injury due to its "association" with lawful executions. Of course, there is no reason to think a pharmaceutical supplier's reputation would suffer any harm from executions being carried out using drugs it supplied, especially when it claimed to have supplied those drugs unwittingly and vociferously objected to their use. Moreover, as in many states, Arkansas correction officials are not allowed to disclose the identity of execution drugs' suppliers. *See* ARK. CODE ANN. 5-4-617. Thus, any reputational harm suffered by McKesson was due to it casting aside the benefit of that statutory secrecy and filing its lawsuit. McKesson failed to show it would suffer irreparable harm absent an injunction, and its motion should have been denied.

⁵ McKesson also argued that the ADC's possession of the vecuronium after McKesson's decision to unilaterally refund the purchase amounted to an unconstitutional taking, but the trial court did not award injunctive relief on that basis.

In the face of these numerous deficiencies, the trial court nevertheless granted an *ex parte* temporary restraining order at the close of business on Friday, April 14, 2017, preventing the ADC from using the vecuronium in any executions, the first of which was scheduled for the following Monday. Contemporaneous with issuing that order, the trial judge participated in an anti-death-penalty protest, which led to the Arkansas Supreme Court removing that judge from all death penalty cases. *See generally In re Kemp*, 894 F.3d 900 (8th Cir. 2018). The Arkansas Supreme Court also vacated that TRO on a writ of certiorari the following business day after it was entered.

The case was reassigned, and the new trial court judge issued a preliminary injunction against the ADC on the day an execution was scheduled to be conducted. While that injunction was in force, no executions could be carried out, as the ADC did not have any other supply of vecuronium. The same day, the ADC sought an emergency stay of the injunction pending appeal to the Arkansas Supreme Court. In order to be entitled to that extraordinary remedy, the ADC was required to demonstrate that it was likely to succeed in showing that the trial court abused its discretion in issuing the injunction. *See Smith v. Pavan*, 2015 Ark. 474, at 3 (per curiam). The Arkansas Supreme Court granted the emergency stay that afternoon, and the scheduled execution took place that evening. App. 490. The ADC used its lawfully acquired supply of vecuronium in a total of four executions in April 2017.⁶

The case is strikingly similar to McKesson's frivolous lawsuit against Arkansas. As in Arkansas's case, a pharmaceutical company sued on the eve of an execution seeking to stop that execution from being carried out, bringing meritless claims and seeking an injunction that is nearly impossible to appeal in time for an execution to be performed. Indeed, just like in Arkansas's case,

⁶ Briefing was later completed, but before the case was decided, the vecuronium expired and was disposed of. The parties jointly moved to dismiss the case.

this case involves a pharmaceutical company incongruously filing a lawsuit claiming reputational harm from being associated with lawful executions when, but for their filing suit, no one would have assumed their drugs might be used to perform executions. Just as would have been the case in Arkansas, if Plaintiff is allowed to succeed, there is a substantial risk that pharmaceutical companies—prodded by anti-death-penalty activists and the criminal defense bar—will flood the courts with similar last-minute filings every time a State attempts to perform a lawful sentence of death. To prevent that, as the Arkansas Supreme Court did in a functionally identical case, this Court should deny Plaintiff’s request for injunctive relief.

II. These lawsuits are nothing more than a procedural end-run around state laws designed to protect the execution process.

These lawsuits did not come out of nowhere—they are the most recent battle in the well-documented “guerilla war against the death penalty.” Transcript of Oral Argument at 14:20–25, *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (No. 14-7955) (question of Alito, J.). As the Supreme Court recently recounted, “anti-death-penalty advocates [have] pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences.” *Glossip v. Gross*, 135 S. Ct. 2726, 2733 (2016). Numerous lawsuits have been initiated around the country for the purpose of undermining States’ ability to carry out executions. *See, e.g., Zink v. Lombardi*, 783 F.3d 1089, 1106 (8th Cir. 2015) (“In this capital litigation, it should be remembered that one stated objective of the prisoners’ lawsuit is to pressure the State’s suppliers and agents to discontinue providing the drugs and other assistance necessary to carry out lawful capital sentences.”).

In response to such abusive litigation practices, States have passed legislation to protect their execution processes from interference. For example, the state trial court in Arkansas could not have issued a stay of any of the scheduled executions. In order to promote consistency and

avoid last-minute, piecemeal litigation in the trial courts, only the Arkansas Supreme Court may stay an execution. ARK. CODE ANN. 16-90-506(c)(3). Other states—including Nebraska—have imposed similar restrictions. *See State v. Moore*, 730 N.W.2d 563, 564 (Neb. 2007) (execution warrants, which are issued by the Nebraska Supreme Court, can only be stayed by the Nebraska Supreme Court); ARIZ. R. CRIM. P. 32.4(g) (restricting stays to Arizona Supreme Court); CAL. PENAL CODE 3700 (West) (limiting stays of execution to when appeals are taken); IDAHO CODE ANN. 19-2708, 2715(1) (limiting judicial stays to automatic stays); IND. R. CRIM. P. 24(g)(1) (the Indiana “Supreme Court . . . ha[s] exclusive jurisdiction to stay the execution of a death sentence”); MISS. CODE ANN. 99-39-29 (limiting the issuance of stays to the Mississippi Supreme Court); NEV. REV. STAT. 176.415 (limiting district court authority to stay executions); *State v. Steffen*, 639 N.E.2d 67, 76 (Ohio 1994) (“[A]n execution set by the Supreme Court of Ohio may not be stayed by any other court.”); OKLA. STAT. tit. 22 § 1001.1(C) (limiting stays to appellate courts); S.C. CODE ANN. 17-25-370 (limiting judicial stays to the South Carolina Supreme Court); S.D. CODIFIED LAWS 23A-27A-21 (barring courts other than the South Dakota Supreme Court from issuing stays).

But due to the difficulty in obtaining execution drugs in the first place, *see Glossip*, 135 S. Ct. at 2733–34, a trial-court injunction that prevents a state from using its supply of execution drugs would lead to the same result: an execution stay. Thus, lawsuits like those brought by McKesson and Alvogen—and Plaintiff’s lawsuit here—represent little more than an end-run around state laws that prevent state trial courts from staying executions. If lawsuits like McKesson’s and Alvogen’s were not bad enough, Plaintiff has taken the fight against the death penalty to a new front. Having little hope of successfully abusing Nebraska’s courts to secure a stay of the upcoming execution, Plaintiff has instead turned to the federal courts. Indeed, Plaintiff

has admitted as much in its Complaint. *See* Compl. ¶ 45 (noting “the lack of any state-law procedure for [Plaintiff] to challenge Defendants’ use of its products in an execution”).

Further, last-minute lawsuits by pharmaceutical companies and concomitant injunctions, like those in the lawsuits brought by McKesson and Alvogen, are particularly problematic due to the strict timelines often involved in execution cases. In Arkansas, for example, death warrants issued by the Governor are only valid for a single day; if the execution is not completed before midnight, the death warrant is no longer valid, and a new one must be issued designating another day. ARK. CODE ANN. 16-90-501(a). But before any execution can take place, the inmate may petition for clemency, a process overseen by the Arkansas Parole Board. Clemency applications are due no later than forty days prior to the scheduled execution date. *See* ARK. ADMIN. CODE 158.00.1-4.8. At least thirty days prior to the execution date, the Parole Board must also conduct a hearing on the inmate’s request for clemency before submitting its recommendation to the Governor. *See id.* Finally, Arkansas law provides for a thirty-day notice period before the Parole Board may provide its recommendation regarding clemency to the Governor. ARK. CODE ANN. 16-93-204. This months-long process begins anew each time an execution cannot take place on the date designated in an execution warrant.

Other states have similarly strict timelines. *See* ALA. CODE. 15-18-82(a) (the sentence must be executed “on the day set for the execution”); CAL. PENAL CODE 1227 (ten-day period); FLA. STAT ANN. 922.11(1) (governor designates, and the warden sets a day); GA. CODE ANN. 17-10-34, 17-10-40 (period set by trial court); IDAHO CODE ANN. 19-2705 (“the judge passing sentence shall . . . sign and file a death warrant fixing a date of execution”); KAN. STAT. ANN. 22-4013(b) (seven-day period); KY. REV. STAT. 431.128 (governor generally designates the day of execution); LA. STAT. ANN. 15:567(B) (death warrants “specify the date upon which the person condemned shall

be put to death”); MISS. CODE. ANN. 99-19-106 (Mississippi Supreme Court “set[s] an execution date for a person sentenced to the death penalty”); MONT. CODE ANN. 46-19-103(1) (trial courts “set the date of execution”); NEB. REV. STAT. 29-2528 (Nebraska Supreme Court “appoint[s] a day certain for the execution of the sentence”), 2543(1) (Nebraska Supreme Court “issue[s] a warrant . . . establishing a date for the enforcement of the sentence . . . to proceed at the time named in the warrant”); NEV. REV. STAT. 176.495(2) (seven-day period); N.H. REV. STAT. 630:5(XVII) (Governor “determine[s] the time of performing [an] execution”); N.M. STAT. ANN. 31-14-1 (2006) (warrant “must . . . appoint a day on which the judgment is to be executed”); N.C. GEN. STAT. 15-194(a) (Secretary of the Department of Public Safety “schedule[s] a date for the execution”); OHIO REV. CODE 2949.22(B) (“A death sentence shall be executed . . . on the day designated by the judge passing sentence or otherwise designated by a court in the course of any appellate or postconviction proceedings.”); OKLA. STAT. tit. 22 § 1001 (execution date automatically set from when a stay is lifted); OR. REV. STAT. 137.463(7) (date set by trial court); 61 PA. CONS. STAT. 4302(a)(1)–(2) (requiring warrants to specify a day of execution; if the specified day passes, the Governor must issue a new warrant); S.C. CODE ANN. 17-25-370 (automatically setting execution for a designated day); S.D. CODIFIED LAWS 23A-27A-15 (warrants last one week); TENN. CODE ANN. 40-30-120(a) (Tennessee Supreme Court sets a date); TEX. CODE CRIM. PROC. ANN. arts. 43.141, 43.14 (court of conviction sets an execution day and sentence must be carried out after 6:00 p.m.); UTAH CODE ANN. 77-19-6(2) (warrants specify particular days); VA. CODE ANN. 53.1-232.1 (sentencing court fixes a day); WASH REV. CODE ANN. 10.95.160(1) (trial courts issue death warrants that “appoint a day on which” the sentence will be executed); WYO STAT. ANN. 7-13-906 (death warrants “fix[] a date of execution”).

As a result, lawsuits like McKesson's, Alvogen's, or Plaintiff's do not even need to succeed on the merits in order to achieve the desired outcome and prevent an execution. Instead, they merely have to result in an injunction preventing a state from carrying out an execution on the scheduled date. And that alone might delay an execution long enough that a state's drugs could expire. Thus, this Court—like the Arkansas Supreme Court in response to McKesson's lawsuit—should prevent Plaintiff from abusing the litigation process and statutes that were originally designed to ensure an orderly execution process and deny Plaintiff's request for injunctive relief.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiff's motions for injunctive relief.

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General

/s/ Nicholas J. Bronni
NICHOLAS J. BRONNI*
Arkansas Solicitor General
DYLAN L. JACOBS*

Assistant Solicitor General
OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center St., Suite 200
Little Rock, AR 72201
Phone: (501) 682-6302
Fax: (501) 682-2591
Email: Nicholas.Bronni@arkansasg.gov
Dylan.Jacobs@arkansasag.gov

*Admitted *pro hac vice*

STEVE MARSHALL
Alabama Attorney General

MARK BRNOVICH
Arizona Attorney General

PAMELA JO BONDI
Florida Attorney General

CHRISTOPHER M. CARR
Georgia Attorney General

LAWRENCE G. WASDEN
Idaho Attorney General

CURTIS T. HILL, JR.
Attorney General of Indiana

JEFF LANDRY
Louisiana Attorney General

ADAM LAXALT
Nevada Attorney General

MIKE HUNTER
Oklahoma Attorney General

ALAN WILSON
Attorney General of South Carolina

HERBERT H. SLATERY III
Attorney General and Reporter,
State of Tennessee

KEN PAXTON
Texas Attorney General

SEAN D. REYES
Utah Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to all parties who have entered an appearance.

/s/ Nicholas J. Bronni
Nicholas J. Bronni