

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS  
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DIVISION

MCKESSON MEDICAL-SURGICAL INC.,

Plaintiff,

v.

STATE OF ARKANSAS;

ARKANSAS DEPARTMENT OF  
CORRECTION;

HUTCHINSON, ASA, Governor of the State  
of Arkansas, in his official capacity;

and

KELLEY, WENDY, Director of the Arkansas  
Department of Correction, in her official  
capacity;

Defendants.

Case No.:

**VERIFIED COMPLAINT FOR EMERGENCY INJUNCTIVE RELIEF AND  
RETURN OF ILLEGALLY OBTAINED PROPERTY**

COMES NOW McKesson Medical-Surgical Inc. ("McKesson"), and for its Verified

Complaint for Damages and Emergency Injunctive Relief states as follows:

**PARTIES, JURISDICTION AND VENUE**

1. Plaintiff McKesson is a Delaware corporation with its principal place of  
business located at 9954 Maryland Drive, Suite 4000, Richmond, VA 23233.

2. Defendant State of Arkansas ("Arkansas"), led by its Governor Asa B.  
Hutchinson ("Hutchinson"), is the sovereign government of Arkansas.

3. Defendant Arkansas Department of Correction (“ADC”), led by its Director Wendy Kelley (“Kelley”), is an Arkansas state governmental entity, with its principal place of business located at 6814 Princeton Pike Road, Pine Bluff, AR 71602.

4. The Court has subject matter jurisdiction under Amendment 80 to the Constitution of Arkansas. This Court has personal jurisdiction over the Defendants under Ark. Code Ann. § 16-4-10 l(B). Venue is proper in Pulaski County under Ark. Code Ann. § 16-60-103 and Ark. Code Ann. § 16-60-104.

### **FACTS ON HOW ADC MISLED MCKESSON**

5. McKesson is a leading distributor for manufacturers seeking to distribute life-saving and life-enhancing products to healthcare providers and their patients.

6. Vecuronium bromide (“Vecuronium”) is a pharmaceutical product with a number of beneficial uses in traditional hospital settings. Vecuronium is listed on the World Health Organization’s List of Essential Medicines, the most safe and effective medicines used in any health system. McKesson does not manufacture Vecuronium, but it receives and distributes Vecuronium pursuant to a contractual relationship with Pfizer, Inc.

7. Vecuronium is also used by some state correctional facilities as an essential component of those states’ and facilities’ capital punishment regimen. The manufacturer of Vecuronium has included clauses in its sale agreements that prohibit distributors from selling specific drugs that are capable of being used in capital punishments to federal and state correctional facilities that engage in capital punishment. Vecuronium is one of the drugs McKesson is restricted from selling to such federal and state correctional facilities.

8. ADC has been a longstanding McKesson customer.

9. To make its purchases, ADC provided McKesson proof of a medical license issued to ADC's medical director. Over the course of the parties' relationship, ADC continuously relied upon the medical director's license to purchase medical products.

10. Under Arkansas State Medical Board's regulations, a licensed "physician may not . . . Prescribe or administer dangerous or controlled drugs to a person for other than legitimate medical purposes." Arkansas State Medical Board Regulations, § 17-95-704. "The treatment of pain with dangerous drugs and controlled substances is a legitimate medical purpose when done in the usual course of medical practice." Code Ark. R. 060.00.1-2.

11. McKesson would not intend to sell Vecuronium to ADC for any purposes unless ADC had a current medical license on file.

12. For the vast majority of their relationship, ADC's orders were much like the orders of many of McKesson's customers. ADC's purchases largely consisted of medical surgical supplies, including surgical gloves, syringes, stethoscopes, and other commonly-used medical products. ADC also purchased prescription pharmaceuticals, including lidocaine and aplisol, other commonly-used medical products. All of the foregoing products are standard items found in well-supplied medical facility.

13. On or about July 11, 2016, ADC leveraged its medical director's license to order 10 boxes containing 10 vials of 20mg/25ml Vecuronium. In so doing, ADC led McKesson to believe that the order was placed at the request of or for the benefit of the physician and would be used for a legitimate medical purpose, consistent with Arkansas State Medical Board Regulations.

14. In fact, ADC intended to use this product in connection with executions, a fact that was never disclosed to McKesson.

15. ADC also sought to circumvent McKesson's controls by placing the Vecuronium order over the phone through a familiar customer sales representative.

16. McKesson's sales representative requested ADC send an email confirmation. However, ADC declined to send an email and insisted the transaction be conducted via text.

17. To further the implication that the Vecuronium was for a legitimate medical purpose, ADC had the Vecuronium shipped to ADC's administrative building, the address used for the healthcare facility's previous orders.

18. ADC undertook these actions with full knowledge that the manufacturer does not permit sales of Vecuronium to state correctional facilities that administer capital punishment.

19. McKesson received an inquiry from the manufacturer about this sale on July 20, 2016.

20. Immediately thereafter, on July 21, 2016, McKesson spoke to Rory Griffin, ADC Deputy Director, and requested a return of the Vecuronium.

21. Mr. Griffin indicated to McKesson that the Vecuronium had been set aside for return. In response, McKesson promised to refund ADC's payment. McKesson immediately began processing ADC's refund, issuing a credit for the product, on July 27, 2016, even though the product itself had not yet been returned.

22. Thereafter, McKesson sought to secure the return of the Vecuronium. To speed the Vecuronium's return, McKesson provided a pre-paid shipping label.

23. Thereafter, ADC failed to communicate with McKesson for over a week. On August 3, 2016, Mr. Griffin reported that Ms. Kelley had refused to return the 10 boxes of Vecuronium.

24. Mr. Griffin stated that Ms. Kelley would only return the product if McKesson provided an alternative drug to be used in executions.

25. For the following month, McKesson urged ADC to live up to its promises. McKesson made a final plea in September 2016, when Darrell Rawlings, McKesson's Vice President of Prescription Category and Programs, sent a letter to Ms. Kelley and her counsel demanding the return of the 10 boxes of Vecuronium.

26. ADC has never returned the Vecuronium. To this day, the Vecuronium remains in ADC's possession, as does the funds McKesson returned to ADC on ADC's promise to return the Vecuronium.

27. ADC has now expressed its intent to use the Vecuronium in executions in the coming weeks.

28. ADC has not conducted an execution since November 2005.

29. There has been significant public discussion of ADC's intent to put inmates to death within days using the Vecuronium obtained from McKesson, including through reporting on an on-going *habeas corpus* action brought in the United States District Court for the Eastern District of Arkansas by the inmates by Defendants for execution. *See* Exhibits C-E.

30. On April 12, 2017, Mr. Griffin testified in the *habeas* action. Mr. Griffin testified that he is aware all manufacturers prohibit the sale of Vecuronium to states and correctional facilities that administer capital punishment. A copy of the transcript is attached hereto as Exhibit A.

31. Mr. Griffin further testified that he knew McKesson's policies prohibited his purchase of Vecuronium.

32. Mr. Griffin testified that he contacted a McKesson sales representative that he had previously used for products used in traditional healthcare settings. Mr. Griffin also testified that he knew the employee who sold him the Vecuronium was making a mistake, i.e., that he was not authorized to sell this product to ADC for their undisclosed purpose.

33. Mr. Griffin acknowledged that ADC was keeping the Vecuronium despite the fact that it had accepted a full refund of the purchase price from McKesson nearly a year ago.

34. Mr. Griffin's acquisition of regulated pharmaceuticals under false pretenses was unauthorized, ultra vires, and in bad faith. The use of property acquired by improper means is unauthorized and ultra vires.

35. Yesterday, Ms. Kelley, Mr. Griffin's supervisor, admitted that ADC was fully aware that manufacturers barred distributors like McKesson from selling lethal drugs to correctional facilities that administer capital punishment. A copy of the transcript is attached hereto as Exhibit B.

36. As a result of the intense public backlash against Defendants' plans, McKesson has been publicly identified as the distributor responsible for providing Vecuronium to ADC.

**COUNT I: REQUEST FOR TEMPORARY RESTRAINING ORDER,  
PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION**

37. Paragraphs 1 through 36 are incorporated by reference as if fully set forth herein.

38. McKesson seeks a temporary restraining order, a preliminary injunction and a permanent injunction because absent same, McKesson will suffer irreparable harm and

McKesson lacks an adequate remedy at law to compensate McKesson for ADC's conduct in obtaining Vecuronium and for ADC's intent to use the illegally obtained Vecuronium in the execution of ADC inmates. McKesson does not seek a monetary judgment, only protection from the Defendants' unlawful conduct.

39. McKesson will suffer grave reputational harm for being associated with the planned executions of the seven inmates using products that the manufacturer banned for such purpose. Reputational harms will also impact McKesson's relationships with its contractual partners. Manufacturers that prohibit the sale of lethal pharmaceuticals to states and correctional facilities that administer capital punishment may be less likely to enter into business arrangements with McKesson if products McKesson distributed are used in state-sponsored executions. McKesson has a significant commercial interest in ensuring that its contracts are implemented correctly. Such harms cannot be adequately remedied later through a monetary judgment against ADC and Arkansas.

40. ADC bears no corresponding risk. A temporary restraining order and injunction here would not bar ADC's efforts to put its inmates to death. ADC can find other means to complete these executions. Further, ADC's interest bears no urgency. It has taken ADC decades to schedule the inmates for the death chamber, and ADC has not conducted an execution since 2005. It can wait longer to identify a method to put inmates to death without using deceit to illegally obtain pharmaceuticals. Finally, Defendants' financial burdens will not be increased as a result of this litigation, as McKesson only seeks injunctive relief from the imminent and irreparable harm threatened by Defendants' conduct.

41. McKesson has demonstrated a likelihood of success on the merits as discussed above. McKesson's contractual relationships in this particular instance do not allow it

to sell lethal pharmaceuticals to state correctional facilities that administer capital punishment. ADC intentionally and knowingly sought to purchase pharmaceuticals it knew McKesson was not authorized to sell to it. By using an established customer service relationship and its medical director's license, ADC led McKesson to believe that the Vecuronium was being purchased at a doctor's direction and for a legitimate medical purpose. ADC later promised to set aside the product for return. In response, McKesson refunded the monies used in the purchase. McKesson kept its end of the bargain by issuing a credit for the products. ADC repudiated its promise and has kept both the Vecuronium and the refunded monies.

**COUNT II: RESCISSION BASED ON MISREPRESENTATION  
OF A MEDICAL LICENSE**

42. Paragraphs 1 through 41 are incorporated by reference as if fully set forth herein.

43. On or about July 11, 2016, ADC relied upon the existing medical license that was on file with McKesson and that had been used to purchase medical supplies for legitimate medical purposes, to place a purchase for Vecuronium.

44. Under the State of Arkansas's regulations for physicians, a licensed physician "may not . . . [p]rescribe or administer dangerous or controlled drugs to a person for other than legitimate medical purposes." Arkansas State Medical Board Regulations, § 17-95-704.

45. McKesson would not have sold the Vecuronium to ADC without a legitimate medical license.

46. ADC therefore led McKesson to believe that the Vecuronium would be used only for "legitimate medical purposes," otherwise a physician would not be able to prescribe or administer the Vecuronium.



47. The administration of capital punishment is not a legitimate medical purpose, as defined in Arkansas law. *See* Ark. Code Ann. § 17-95-704(e)(3), (4)(A) (2017).

48. Moreover, based on the sworn testimony of Mr. Griffin, ADC concealed the purpose of the purchase to McKesson because ADC knew that if it represented to McKesson that the purpose was the administration of capital punishment, McKesson would not have sold ADC the Vecuronium.

49. McKesson reasonably relied on the representations that ADC presented to it in purchasing the Vecuronium.

50. Because of ADC's representation, McKesson has suffered and continues to suffer injuries, including, but not limited to reputational injury arising out of (i) association with the distribution of drugs used for the administration of capital punishment, (ii) the corresponding damage to business and investor relationships, and (iii) other damages to be proven at trial.

**COUNT III: RESCISSION BASED ON UNILATERAL MISTAKE**

51. Paragraphs 1 through 50 are incorporated by reference as if fully set forth herein.

52. On or about July 11, 2016, ADC purchase 10 boxes containing 10 vials of 20mg/25ml Vecuronium.

53. Under an existing agreement, Vecuronium is one of the drugs McKesson is not permitted to sell to state correctional facilities that administer capital punishment.

54. Under the State of Arkansas's regulations for physicians, a licensed physician "may not . . . [p]rescribe or administer dangerous or controlled drugs to a person for other than legitimate medical purposes." Ark. Code Ann. § 17-95-704(e)(3) (2017).

55. McKesson would not have sold the Vecuronium to ADC without a legitimate medical license, nor would it have sold the Vecuronium to ADC with knowledge that it would be used to administer capital punishment.

56. ADC through active concealment and/or bad faith induced McKesson into selling Vecuronium to ADC, with knowledge that McKesson was not allowed to sell Vecuronium to ADC for the administration of capital punishment.

57. McKesson would not have entered an agreement to sell ADC Vecuronium had McKesson known that it would not be used for a legitimate medical purpose, pursuant to the regulations of the Arkansas Medical Board which govern physicians in the State of Arkansas.

58. The mistake involved, the agreement to sell Vecuronium to ADC, is of great consequence and enforcing the agreement as made would be unconscionable.

59. The mistake relates to a material feature of the contract.

60. The mistake occurred despite McKesson at all times using reasonable care to prevent such a mistake from occurring.

61. Based on the manner in which ADC entered the agreement with McKesson for the sale of Vecuronium, and the purpose for which ADC intends to use the Vecuronium, the enforcement of the contract would be inequitable and unconscionable.

62. Rescission of the contract based on McKesson's unilateral mistake will not prejudice ADC or the State of Arkansas.

#### **COUNT IV: REPLEVIN**

63. Paragraphs 1 through 62 are incorporated by reference as if fully set forth herein.

64. On or about July 11, 2016, McKesson shipped 10 boxes containing 10 vials of 20mg/25ml Vecuronium to ADC.

65. Despite its promises to return the Vecuronium to McKesson, ADC has failed to do so.

66. As set forth above, ADC knew that McKesson was not allowed to sell ADC Vecuronium.

67. ADC tacitly misrepresented the purpose of the purchase, *i.e.*, that it was for a legitimate medical purpose, to obtain the 10 vials of 20mg/25ml Vecuronium.

68. McKesson is the rightful owner of the 10 vials of 20mg/25ml Vecuronium and has a present and immediate right of possession to the 10 vials of 20mg/25ml Vecuronium.

69. The 10 vials of 20mg/25ml Vecuronium are not the property of ADC or the State of Arkansas.

70. ADC has refused to return the 10 vials of 20mg/25ml Vecuronium to McKesson.

71. McKesson has a specific interest in the 10 vials of 20mg/25ml Vecuronium that are in the possession of ADC, because ADC intends to use McKesson's property for the administration of capital punishment, in violation of McKesson's policies and agreements between McKesson and manufacturers.

72. McKesson requests an Order from the Court pursuant to Ark. Code Ann. § 18-60-801 *et seq.*, directing ADC to return immediately the entirety of the 10 vials of 20mg/25ml Vecuronium to McKesson, as well an Order from the Court requiring an impoundment of the 10 vials of 20mg/25ml Vecuronium pending a hearing on its status.

### **COUNT V: UNJUST ENRICHMENT**

73. Paragraphs 1 through 72 are incorporated by reference as if fully set forth herein.

74. After McKesson shipped 10 boxes containing 10 vials of 20mg/25ml Vecuronium to ADC, McKesson spoke to an ADC representative, Mr. Griffin, and requested a return of the Vecuronium on or about July 21, 2016.

75. Mr. Griffin indicated to McKesson that the Vecuronium would be set aside for return, and in response, McKesson promised to refund ADC's payment.

76. On July 27, 2016, McKesson returned ADC's payment by means of issuing a credit for the product.

77. On August 3, 2016, Mr. Griffin reported that Ms. Kelley had refused to return the 10 boxes of Vecuronium.

78. After refunding ADC's purchase by issuing a credit, ADC retained McKesson's product, contrary to the fundamental principles of justice, equity, and good conscience.

79. ADC's acceptance of the benefit without payment to McKesson for its full value, despite the promise to return the Vecuronium, is inequitable under the circumstances.

### **COUNT VI: UNLAWFUL TAKING**

80. Paragraphs 1 through 79 are incorporated by reference as if fully set forth herein.

81. McKesson immediately returned ADC's funds by issuing a credit based on ADC's statement to set aside the 10 boxes of Vecuronium for return to McKesson. ADC has had

the funds and the Vecuronium ever since, and has refused to return the Vecuronium to McKesson.

82. McKesson has a current and present property interest in the Vecuronium.

83. ADC has taken the Vecuronium from McKesson without just compensation.

### **PRAYER FOR RELIEF**

WHEREFORE, McKesson requests that the Court issue a temporary restraining order, preliminary injunction, and/or permanent injunction as outlined above; and grant it all other just and equitable relief to which it may be entitled. Provided, however, that McKesson does not seek monetary damages for any of its claims, and, therefore, the relief McKesson seeks will not increase the State of Arkansas's financial obligations. Pursuant to Ark . Code Ann. § 18-60-807, McKesson also requests that its property, the 10 vials of 20mg/25ml Vecuronium, be impounded pending a hearing on its status. McKesson seeks only equitable relief, including, but not limited to, rescission, as well as any other appropriate and just relief.

I, Steve Quattlebaum, state on oath that the above allegations are, on information and belief, true to the best of my knowledge.

Steve Quattlebaum

Dated: April 14, 2017

Respectfully submitted,

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