

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

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 Emergency Injunctive Relief and Return of Illegally Obtained Property states as
follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff McKesson is a Virginia 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. § 16-4-101(B). Venue is proper in Pulaski County under Ark. Code Ann. § 16-60-103 and Ark. Code Ann. § 16-60-104.

FACTS

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 surgical 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 a manufacturer.

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. In order to purchase prescription drugs from McKesson, ADC provided McKesson with proof of a medical license issued to a purchasing physician. Over the course of the parties' relationship, ADC continuously relied upon the medical 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, Ark. Code Ann. § 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 knowingly sell any prescription drug to ADC for any purpose unless the 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 McKesson customers. ADC largely purchased medical surgical supplies, including surgical gloves, syringes, stethoscopes, and other commonly-used medical products. ADC also purchased prescription pharmaceuticals, including lidocaine and aplisol. All of the foregoing products are standard items found in well-supplied medical facility.

13. On or about July 11, 2016, ADC leveraged the medical license referenced above 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 licensed 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 placed 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 message.

17. ADC had the Vecuronium shipped to ADC's administrative building, the address used for the healthcare facility's previous orders.

18. An ADC representative, Rory Griffin, ADC Deputy Director, has testified that ADC undertook these actions with full knowledge that the manufacturer does not permit sales of Vecuronium to state correctional facilities that administer capital punishment. *See* Exhibit A, pp. 868-869, 871 (UNDER SEAL); attached hereto as Exhibit F is a true and correct copy of an Affidavit of Rory Griffin filed in the case captioned *Johnson, et al. v. Kelley, et al.*, No. 60CV-15-2921, in Pulaski County Circuit Court.

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 Mr. Griffin 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. For the following month, McKesson urged ADC to live up to its promises. McKesson made another plea in September 2016, when 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.

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

26. ADC has now expressed its intent to use the Vecuronium in executions in the coming days.

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

28. There has been significant public discussion of ADC's intent to administer capital punishment within days using the Vecuronium obtained from McKesson, including through reporting on a *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.

29. 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. *See* Exhibit A, pp. 868-869, 871 (UNDER SEAL). Additionally, Mr. Griffin submitted an affidavit in a separate litigation confirming his knowledge that distributors generally will not sell drugs for the administration of

capital punishment. *See* Exhibit F. Mr. Griffin further testified that he knew McKesson's policies prohibited ADC's purchase of Vecuronium.

30. 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.

31. 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.

32. Finally, Mr. Griffin admitted that the Vecuronium would not be dispensed by a licensed medical doctor for a legitimate medical purpose, but would instead be injected by infusion teams into inmates to administer capital punishment.

33. 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.

34. On April 13, 2017, Ms. Kelley, Mr. Griffin's supervisor, admitted that ADC was fully aware that manufacturers barred distributors like McKesson from selling drugs to correctional facilities that are used to administer capital punishment. A copy of the transcript is attached hereto as Exhibit B.

35. 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.

36. Under Arkansas and federal law, a physician who purchases drugs from a distributor for distribution to persons other than patients or consumers is acting as a wholesale

distributor and must hold a valid state wholesale distributor's license. Arkansas Pharmacy Board, Regulation 8 - Wholesale Distribution, 8-00-0001(i); FDCA § 503(e)(4).

37. On information and belief, the medical license that ADC provided McKesson was not a wholesale distributor's license.

38. McKesson would not knowingly sell drugs to a wholesale distributor who does not hold a valid state license for wholesale distribution.

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

39. Paragraphs 1 through 38 are incorporated by reference as if fully set forth herein.

40. 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 using it for something other than a medically legitimate purpose. McKesson does not seek a monetary judgment, only protection from the Defendants' unlawful conduct.

41. McKesson will suffer grave reputational harm if the product in question is used for purpose that is not a medically legitimate purpose. As detailed above, by providing a medical license to McKesson and then diverting its product for a use that is not a medically legitimate purpose, ADC has effectively duped McKesson. Should it be allowed to proceed with its current intended use of this diverted product – in a manner that is inconsistent with the medical license – ADC's actions will 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.

42. Attached hereto as Exhibit G is a transcript of a hearing on a motion for a protective order containing statements of Jennifer Merritt, the Assistant Attorney General for Arkansas. Among other things, Ms. Merritt asserts that by associating a distributor with ADC and the administration of capital punishment “you are also possibly affecting their ability to carry out their business at all if they are unable to procure drugs from the FDA-approved manufacturers that these drugs came from.” *See* Exhibit G, p. 12.

43. ADC bears no corresponding risk. A temporary restraining order and injunction here would not bar ADC’s efforts to administer capital punishment. 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 capital punishment, and ADC has not conducted an execution since 2005. It can wait longer to identify a method to administer capital punishment without using diverted products in a manner contrary to the medical license. 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.

44. 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, based on a medical license that required it be used *only* for a legitimate medical purpose. By using an established customer service relationship and its physician'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**

45. Paragraphs 1 through 44 are incorporated by reference as if fully set forth herein.

46. On or about July 11, 2016, ADC relied upon the existing medical license issued to a doctor 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.

47. 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.

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

49. 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.

50. 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).

51. 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 the Vecuronium to ADC.

52. McKesson reasonably relied on ADC's actions in purchasing the Vecuronium.

53. 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, in violation of its supplier contract, for a use that is not a legitimate medical purpose (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

54. Paragraphs 1 through 53 are incorporated by reference as if fully set forth herein.

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

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

57. 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).

58. 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 for something other than a legitimate medical purpose.

59. 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.

60. 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.

61. The mistake involved, the agreement to sell Vecuronium to ADC, is of great consequence and enforcing the agreement as made would be unconscionable. Indeed, ADC acknowledged the mistake and agreed to return the product at issue.

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

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

64. 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.

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

COUNT IV: REPLEVIN

66. Paragraphs 1 through 65 are incorporated by reference as if fully set forth herein.

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

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

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

70. ADC tacitly misrepresented the purpose of the purchase, *i.e.*, that it was for a legitimate medical purpose, to obtain the Vecuronium.

71. McKesson would not have sent the Vecuronium to ADC if McKesson had known the intended purpose for the Vecuronium.

72. McKesson is the rightful owner of the Vecuronium and has a present and immediate right of possession to the Vecuronium.

73. The Vecuronium is not the property of ADC or the State of Arkansas.

74. ADC has refused to return the Vecuronium to McKesson.

75. McKesson has a specific interest in the Vecuronium that is in the possession of ADC, because ADC intends to use McKesson's property for the administration of capital punishment, in violation of agreements between McKesson and manufacturers.

76. 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 boxes of 20mg/25ml Vecuronium to McKesson, as well an Order from the Court requiring an impoundment of the 10 boxes of 20mg/25ml Vecuronium pending a hearing on its status.

COUNT V: UNJUST ENRICHMENT

77. Paragraphs 1 through 76 are incorporated by reference as if fully set forth herein.

78. After McKesson shipped 10 boxes containing Vecuronium to ADC, McKesson spoke to an ADC representative, Mr. Griffin, and requested a return of the Vecuronium on or about July 21, 2016.

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

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

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

82. 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.

83. 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

84. Paragraphs 1 through 83 are incorporated by reference as if fully set forth herein.

85. 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.

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

87. 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 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.

Respectfully submitted,

QUATTLEBAUM, GROOMS & TULL
PLLC

111 Center Street, Suite 1900
Little Rock, AR 72201
(501) 379-1700
squattlebaum@qgtlaw.com
jtull@qgtlaw.com
mshannon@qgtlaw.com
mheister@qgtlaw.com

By: /s/Steven W. Quattlebaum

Steven W. Quattlebaum (84127)
John E. Tull (84150)
Michael N. Shannon (92186)
Michael B. Heister (2002091)

COVINGTON & BURLING LLP

One CityCenter

850 Tenth Street, NW

Washington, DC 20001-4956

Tel: (202) 662-5463

eposner@cov.com

cdenig@cov.com

brazi@cov.com

jdougherty@cov.com

jcloar@cov.com

By: [PRO HAC MOTION TO BE FILED]

Ethan Posner

Christopher Denig

Benjamin J. Razi

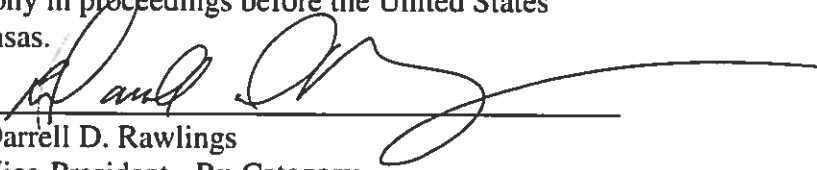
Jon-Michael Dougherty

Jonathan L. Cloar (2013102)

*Counsel for Plaintiff McKesson Medical-Surgical
Inc.*

VERIFICATION

I, Darrell D. Rawlings, Vice-President - Rx Category and Programs at McKesson Medical-Surgical Inc., state on oath that the above allegations are true and accurate to the best of my knowledge. I further state that certain exhibits attached to Plaintiff's Amended Verified Complaint contain transcripts of sworn testimony in proceedings before the United States District Court for the Eastern District of Arkansas.

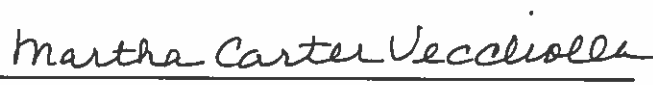


Darrell D. Rawlings
Vice-President - Rx Category
McKesson Medical-Surgical Inc.

County of Henrico)

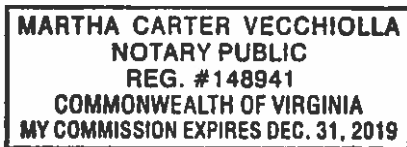
Commonwealth of Virginia)

Subscribed to and sworn to me, a notary public, this April 17, 2017.



Notary Public

My Commission Expires: 12-31-19



CERTIFICATE OF SERVICE

I do hereby certify that on this 18th day of April, 2017, I filed the foregoing document with the Clerk of the Pulaski County Circuit Clerk and I served a copy on the following *via* electronic mail:

Lee P. Rudofsky (lee.rudofsky@arkansas.gov)
Nicholas Bronni (nicholas.bronni@arkansas.gov)
Colin Jorgensen (colin.jorgensen@arkansas.gov)
323 Center Street, Suite 200
Little Rock, Arkansas 72201

/s/Steven W. Quattlebaum
Steven W. Quattlebaum