

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
TWELFTH DIVISION**

MCKESSON MEDICAL-SURGICAL INC.

PLAINTIFF

VS.

NO. 60CV-17-1960

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

DEFENDANTS

ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

On the 19th day of April, 2017, this cause came on for hearing before the Court on Plaintiff's Motion for Temporary Restraining Order or Preliminary Injunction. Plaintiff appeared through its counsel, Steven W. Quattlebaum and John E. Tull. Defendants appeared by and through their counsel, Solicitor General Lee Rudofsky and Senior Assistant Attorney General Colin Jorgensen.

Having reviewed Plaintiff's Complaint, Plaintiff's Motion for Temporary Restraining Order or Preliminary Injunction, and responsive pleadings of Defendants and all briefs, and having fully considered the evidence presented at the hearing and arguments of counsel, the Court hereby FINDS and ORDERS:

1. This Court denied Plaintiff's request for a temporary restraining order insofar as Plaintiff requested ex-parte relief. This Court instead scheduled a hearing on Plaintiff's Motion for Temporary Restraining Order or Preliminary Injunction as there was sufficient time for Defendants to be heard on the Motion the following day.

2. Article 5, section 20 of the Arkansas Constitution provides that the State of Arkansas shall never be made a defendant in any of her courts. *Arkansas Dept. of Community Correction v. City of Pine Bluff*, 2013 Ark. 36, 425 S.W.3d 731. The doctrine of sovereign immunity has been extended to include state agencies. *Id.* In determining whether the doctrine of sovereign immunity applies, the court must decide whether a judgment for a plaintiff will operate to control the action of the State or subject it to liability. *Id.* If so, the suit is one against the State and is barred by the doctrine of sovereign immunity. *Id.*

3. However, there are several exceptions to the defense of sovereign immunity. One exception to the sovereign immunity defense is that a state agency acted outside of its authority, ultra vires, and in bad faith. *See Fitzgiver v. Dorey*, 2013 Ark. 346, 429 S.W.3d 234. A state agency may be enjoined if it can be shown that the agency's action is ultra vires or outside the authority of the agency. *Id.* A state agency may also be enjoined from acting arbitrarily, capriciously, in bad faith, or in a wantonly injurious manner. *Id.*

4. The Court finds that the defense of sovereign immunity is inapplicable to the facts of this case as Plaintiff sufficiently pled and sufficiently proved at this hearing that Defendants' conduct was outside of their authority, ultra vires, and made in bad faith. This Court therefore has jurisdiction to hear and decide this matter.

5. To justify a grant of preliminary injunctive relief, a plaintiff must establish that irreparable harm will result in the absence of an injunction or restraining order and that the plaintiff has a likelihood of success on the merits. *Three Sisters Petroleum, Inc. v. Langley*, 348 Ark. 167, 72 S.W.3d 95 (2002). The test for determining the likelihood

of success on the merits is whether there is a reasonable probability of success in the litigation. *Id.*

6. The Court finds that Plaintiff has established a reasonable probability of success on its claims for:

- (a.) Rescission Based on Misrepresentation of a Medical License and Rescission Based on Unilateral Mistake;
- (b.) Replevin; and
- (c.) Unjust Enrichment.

Thus, Plaintiff established a likelihood of success on the merits in this litigation.

7. The Court finds that in the absence of a preliminary injunction, Plaintiff will suffer irreparable harm which cannot be adequately compensated by money damages or redressed by a court of law.

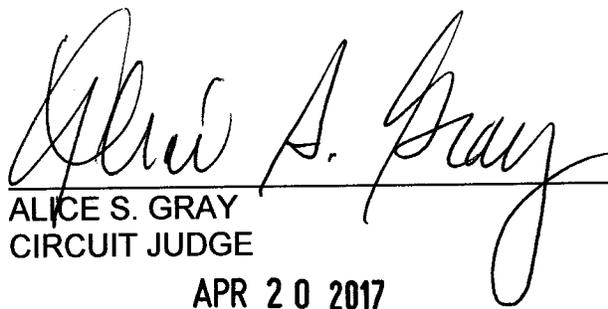
8. Based upon these findings, the Court hereby restrains and enjoins Defendants from using or disposing of the vecuronium bromide they obtained from Plaintiff. This prohibition shall remain in effect until further order of the Court. At this time, the Court is not ordering Defendants to return the vecuronium bromide to Plaintiff as a final hearing has not been held.

9. The parties may contact the Court's Trial Court Administrator to schedule a hearing on Defendants' Motion to Dismiss and Defendants' Motion for Change of Venue, said hearing to occur on an agreed date and time that occurs after the deadline for all responses and replies have passed. No one has requested that response and reply times be shortened. Plaintiffs are entitled to formally respond to Defendants' Motion to Dismiss and Motion for Change of Venue. Any party may also request that a

final hearing be scheduled on Plaintiff's Motion for Temporary Restraining Order or Preliminary Injunction.

FOR THE FOREGOING REASONS, Plaintiff's Motion for Temporary Restraining Order or Preliminary Injunction is hereby granted. Defendants are hereby restrained and enjoined from using or disposing of the vecuronium bromide they obtained from Plaintiff until further order of the Court.

IT IS SO ORDERED.



ALICE S. GRAY
CIRCUIT JUDGE

APR 20 2017

DATE

cc: Steven W. Quattlebaum
John E. Tull
Lee Rudofsky
Colin Jorgensen