

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

RICHARD E. GLOSSIP, *et al.*,

Plaintiffs,

v.

KEVIN J. GROSS, *et al.*,

Defendants.

Case No: CIV-14-665-F

**Plaintiff Fairchild's Motion to Supplement His Opposition to
Defendant Patton's Motion for Summary Judgment**

COMES NOW Plaintiff Richard Fairchild, and pursuant to Fed. R. Civ. P. 7(b), respectfully requests an order from this Court permitting Plaintiff to supplement his Opposition to Defendant Patton's Motion for Summary Judgment. In support of this motion, Plaintiff states as follows:

1. On August 18, 2015, Defendant Patton filed a Motion for Summary Judgment as to Plaintiff Fairchild's claims. (Doc. 223).
2. On September 15, 2015, Plaintiff Fairchild filed his Opposition to Defendant Patton's Motion for Summary Judgment, attaching a document concerning the continued ability of Texas Department of Criminal Justice (TDCJ) to obtain pentobarbital for executions

carried out since the preliminary injunction hearing. (Doc. 235 at 23, Ex. 14).

3. Opposing counsel was contacted and does not object provided allowance of a response to Plaintiff's Supplement.
4. On September 23, 2015, Defendant Patton filed his Reply to Plaintiff's Response to Motion for Summary Judgment. (Doc. 246). In reply, Defendant Patton alleged, among other things: Texas and Missouri are different states with *different ways to access pentobarbital*. Those states' ability to obtain pentobarbital is not in any way relevant to ODOC's ability to obtain pentobarbital. (Doc. 246 at 6) (Emphasis added).
5. On September 23, 2015, Plaintiff learned through the Virginia Department of Corrections' ("VDOC") response to an open records request that the Virginia Department of Corrections purchased pentobarbital from the TDCJ. Exhibit 24 (Declaration of Robert Lee), Exhibit 24-A (letter from VDOC dated 9-16-15).

6. The records obtained by Mr. Lee show that TDCJ was the “supplier” and the VDOC was the “purchaser” of three bottles of pentobarbital, received by the VDOC on August 26, 2015. Exhibit 24-B (Drug Enforcement Administration (“DEA”) official order form 222).
7. Each bottle of pentobarbital received from the supplier TDJC does not have a manufacturer’s label, but rather is labeled with a label created by the supplier which states only: “Pentobarbital 50mg/ml, MDV Solution 50 ml, Lot: 04142015@8, Use By: 4/14/2016.” Exhibit 24-C (Photograph of bottles of pentobarbital).
8. These documents illustrate that pentobarbital is available to the ODOC through the TDCJ, and provide additional support for Plaintiff’s previous documentation supporting that there is a factual dispute regarding availability of pentobarbital to ODOC.
9. The TDCJ is compounding or producing pentobarbital within its department for use in executions. There are no known obstacles to ODOC compounding or producing pentobarbital in the same manner as does TDCJ.

10. At minimum, this new information adds to the factual dispute on availability of alternative drugs to Defendants. If Defendants continue to assert they cannot obtain alternative drugs, there is a factual dispute concerning their ability to obtain them from the supplier TDJC, as Virginia has, or to produce them in the same or similar manner that TDJC does. This factual dispute is due to be litigated at trial. Further, Plaintiff has promptly presented this new information upon obtaining same. He cannot present further facts that may exist as to this issue at this time. See Exhibit 25 (Declaration of Patti Palmer Ghezzi), Exhibits 25 A-G (emails). Summary judgment should be denied on this claim based on the current factual disputes and, alternatively, before summary judgment is granted, the opportunity for further discovery should be afforded. Fed. R. Civ. P. 56(d) and (e)(1).

WHEREFORE, Plaintiff Fairchild respectfully requests an order from this Court permitting him to supplement his Opposition to Patton's Motion for Summary Judgment with documentation and authority to support the availability of pentobarbital to the ODOC.

Respectfully submitted,

s/ Patti Palmer Ghezzi

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 2015, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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s/Patti Palmer Ghezzi

Patti Palmer Ghezzi