IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

STACEY JOHNSON, JASON MCGEHEE, BRUCE WARD, TERRICK NOONER, JACK JONES, MARCEL WILLIAMS, KENNETH WILLIAMS, DON DAVIS and LEDELL LEE — PLAINTIFFS

v. — No. 60CV-15-2921

WENDY KELLEY, in her official capacity as Director of the Arkansas Department of Correction, and ARKANSAS DEPARTMENT OF CORRECTION — DEFENDANTS

MEMORANDUM ORDER CONCERNING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT, AND DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Introduction

In this lawsuit Plaintiffs contend that Act 1096 of 2015 and the method of execution (hereafter "MOE") protocol it prescribes violate the Arkansas Constitution in several respects. Both parties have filed motions for summary judgment pursuant to Rule 56 of the Arkansas Rules of Civil Procedure. Plaintiffs moved for partial summary judgment on September 30, 2015. On October 16, 2015, Defendants filed their reply to that motion, and moved for summary judgment in their favor as to all claims asserted by Plaintiffs.

On November 2, 2015, Plaintiffs filed their reply to Defendants' response to Plaintiffs' summary judgment and, pleading separately, moved to extend time to respond to Defendants' summary judgment motion concerning two claims: (1) Plaintiffs' claim that Act 1096 violates Article II, § 8 of the Arkansas Constitution, and (2) that the three-drug MOE protocol involving injection of midazolam violates the guarantee against

cruel or unusual punishment. The Court denied that motion on November 17, 2015. Later that day, Plaintiffs issued notice that they would stand on their November 9, 2015 response in opposition to Defendants' summary judgment motion. On November 25, 2015, Defendants filed their reply to Plaintiffs' response to Defendants' summary judgment motion, and their response to Plaintiffs' motion for summary judgment on two claims: (1) that Act 1096 violates Article II, § 6 of Arkansas Constitution, and (2) that Act 1096 violates Article II, § 9 of the Arkansas Constitution. The Court has received and studied the cross motions for summary judgment, supporting briefs, and accompanying exhibits submitted by the parties.

Defendants have also moved for a protective order to shield disclosure of the information the Court ordered that they disclose in its scheduling ordered dated October 12, 2015. The Court has reviewed that motion and its supporting brief, the response and supporting brief filed by Plaintiffs, and the reply filed by Defendants. The Court also heard arguments on Defendants' motion for protective order, but delayed ruling on that motion at the urging of both sides until all summary judgment motions have been decided.

For the reasons set forth below, Plaintiffs' motion for partial summary judgment is granted in part, and denied in part. Defendants' motion for summary judgment is granted in part, and denied in part. Defendants' motion for protective order is denied. Defendants are ordered to produce the material and make the disclosures mentioned in the Court's October 12 scheduling order no later than noon on Friday, December 4, 2015.

Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs' Article II, § 17 Claim

In their motion for partial summary judgment, Plaintiffs first urge the Court to grant summary judgment in their favor on their allegation that Act 1096 of 2015 violates Article II, § 17 of the Arkansas Constitution (Claim 1). Article II, § 17 of the Arkansas Constitution states: "No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed ... ."

The Court finds that there are no disputed facts on Plaintiffs' Contracts Clause allegation (Claim 1). Specifically, the parties do not dispute that a written partial agreement was executed on June 14, 2013 which states, in pertinent part, as follows:

...

> WHEREAS, the plaintiffs in *Johnson v. Wilson,* Pulaski Co. Circuit Court, Case No. 60CV-13-1204, have filed a civil action challenging ADC's [Arkansas Department of Correction] decision to withhold certain documents after receiving a request under the Arkansas Freedom of Information Act ("FOIA").
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> ...
>
> NOW, THEREFORE, the parties agree as follows:
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> ...
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> 6. The defendants agree that, within 10 business days after ADC adopts a new lethal-injection protocol, ADC will provide a copy of the new protocol to counsel for the plaintiffs. In addition, the defendants agree that, within 10 days after they obtain possession of any drugs that ADC intends to use in a lethal-injection procedure, the defendants will notify the plaintiffs' counsel that it [sic] has obtained the drugs and will specify which drugs have been obtained and disclose the packing slips, package inserts, and box labels received from the supplier.

Furthermore, there is no dispute that Plaintiffs Marcel Williams, Jason McGehee, Bruce Ward, Terrick Nooner, Jack Jones, Stacey Johnson, Kenneth Williams, and Don Davis are parties to the settlement agreement/contract executed by the parties, that Ray

Hobbs (then ADC Director) was a party to the June 2013 agreement, and that Defendant ADC was a party to it.

There is also no dispute that Act 1096 of 2015 was enacted several months after the June 2013 agreement, and that § 2(i)(2) of the Act states:

> The department shall keep confidential all information that may identify or lead to the identification of: ...(B) The entities and parties who compound, test, sell, or supply the drug or drugs described in subsection (c) of this section [pertaining to the lethal-injection drugs authorized for execution of capital punishment], medical supplies, or medical equipment for the execution process.

Defendants now argue that they have no obligation to disclose the information they agreed to disclose in the June 2013 partial settlement agreement with Plaintiffs. Thus, the Court finds that there are no disputed facts regarding Claim 1 (Plaintiffs' Contracts Clause Claim).

Rule 56(c)2 of the Arkansas Rules of Civil Procedure mandates that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law on the issues specifically set forth in the motion. A partial summary judgment, interlocutory in character, may be rendered on any issue in the case, including liability."

The law has been settled in Arkansas for decades that "whatever enactment abrogates or lessens the means of the enforcement of a contract impairs its obligations." *Scougale v. Page*, 194 Ark. 280, 106 S.W.2d 1023 (1937). Although Defendants insist that Act 1096 does not substantially impair any rights Plaintiffs claim under the 2013 agreement, and argue that Act 1096 is reasonable and necessary to

serve an important public purpose; that argument begs the question. Act 1096 explicitly directs the ADC to maintain, as confidential, all information that may identify or lead to identification of the entities and persons who compound, test, sell, or supply the drug or drugs used in the lethal-injection protocol. Act 1096 directs the ADC to not disclose that information in litigation without first applying for a protective order regarding disclosure, a mandate that is clearly at odds with what the ADC agreed to do in the June 2013 settlement. Act 1096 directs the ADC to only disclose package inserts and labels for lethal-injection drugs approved by the Food and Drug Administration (FDA), reports from independent test laboratories, and the ADC procedure for administering the lethal-injection drugs (including the contents of the lethal-injection drug box) only if information that might identify the compounding pharmacy, testing laboratory, seller, or supplier of the lethal-injection drugs is redacted and maintained as confidential.

In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the Supreme Court of the United States held that state laws which impair the state's contractual obligations are constitutional only, without deferring to the legislature's judgment, if a court determines that impairing the contract "is reasonable and necessary to serve an important public purpose." As a matter of constitutional law, judicial review of governmental interference with contractual obligations involves "heightened scrutiny." *United States v. Winstar Corp.*, 518 U.S. 839, 876 (1996). Under this standard, Defendants must justify governmental interference with contractual obligations by showing that the interference serves "an important public purpose," is "necessary" to effect that purpose, and that the interference is "reasonable." *See*, *United States Trust Co. v. New Jersey*, supra, at 25-26.

Defendants argue that "there is no current contract between the ADC and the Plaintiffs in this case" and that, even if there was such a contract, "Act 1096 trumps any contractual disclosure rights as a matter of law because it was a valid exercise of the General Assembly's police power." (Defendants' November 25, 2015 Reply to Plaintiffs' Response to Defendants' Cross-Motion for Summary Judgment and Response to Plaintiffs' Cross-Motion for Summary Judgment on Claims 2 and 3, page 3). The "no current contract" argument is not plausible or persuasive. Plaintiffs have not abandoned the June 2013 disclosure agreement. Plaintiffs have not released Defendants from the disclosure obligation Defendants agreed to perform in the June 2013 agreement.

Defendants argue that the non-disclosure provision of § 2(i)(2) of Act 1096 is necessary in order for the ADC to fulfill its duty to carry out capital punishment by lethal injection, and that Defendants were only able to procure the existing supply of lethal-injection drugs after Act 1096 was enacted and a supplier was confident that its identity would be shielded from discovery. Act 1096 mandates that the ADC withhold disclosure of that information. However, the legislation does not, and cannot, guarantee that a trial court will issue a protective order shielding this information from disclosure.

Defendants rely heavily on the affidavit of ADC Director Wendy Kelley. Director Kelley asserts in that affidavit that her efforts to obtain a barbiturate for the ADC's use in its lethal-injection protocol "were unsuccessful," that "[p]otential suppliers of lethal drugs declined to supply them to the ADC and explained that they were concerned that they would suffer adverse publicity and lose business if they were identified as suppliers," that the "supplier who sold to the ADC the FDA-approved drugs currently in the Department's possession for use in executions only agreed to sell those drugs to the

ADC for use in executions after receiving a copy of Act 1096 of 2015 and confirming that the ADC is required by law to keep its identity confidential unless ordered to disclose the information in litigation," and that "[t]he supplier of ADC's current supply of execution drugs has made clear ... that it will not supply any additional drugs for the ADC to use in executions." (See, Kelley affidavit at Exhibit 1 to Defendants' Motion for Summary Judgment). Defendants contend that Director Kelley's affidavit establishes the necessity for the non-disclosure provision of Act 1096. In other words, Defendants argue that without concealing the information they agreed to disclose in the June 2013 agreement, Arkansas will not be able to carry out capital punishment. There are several obvious reasons why that argument is flawed.

The first reason is historical. Defendants agreed in June 2013 to disclose the information, now legislatively-mandated as non-disclosable, without a court order. Defendants procured lethal-injection drugs before Act 1096 was enacted. Public sentiment about capital punishment does not justify breaking a governmental obligation to disclose the information called for in the June 2013 agreement.

However, when counsel for Defendants urged the Court to issue a protective order, she asserted that the supplier of the lethal-injection drugs now possessed by the ADC, covertly sold them to the ADC despite a directive from the manufacturer(s) of the drugs that the drugs would not be used for capital punishment. That admission, whether inadvertent or not, is not only telling. It appears nowhere in Director Kelley's affidavit.

Obviously, the government cannot force a drug manufacturer or supplier to produce and supply lethal-injection drugs. However, it is historically inaccurate, to put it

charitably, for Defendants to profess that they are unable to obtain lethal-injection drugs because Plaintiffs insist on holding them to their agreement to disclose the source of the lethal-injections drugs. Drug manufacturers are free to not provide pharmaceutical products for capital punishment. People opposed to capital punishment are free to object to it, and are free to withhold patronage from drug manufacturers who provide pharmaceutical drugs for capital punishment.

In the June 2013 agreement, the ADC agreed to "disclose the packing slips, package inserts, and box labels received from the supplier" of any drugs that ADC intends to use in a lethal-injection procedure within 10 days after obtaining possession of the drugs. The Court holds that § 2(i)2 of Act 1096 statutorily mandates that the ADC violate that agreement. As such, § 2(i)(2) of Act 1096 violates the prohibition on legislation that abrogates or impairs the obligation of contracts found at Article II, § 17 of the Arkansas Constitution.

The Court grants partial summary judgment in favor of Plaintiffs, accordingly. Because § 2(i)(2) of Act 1096 violates Article II, § 17 of the Arkansas Constitution, that provision of the statute is hereby declared void, effective immediately.

Plaintiffs' Article II, § 6 Claim

Defendants move for summary judgment, and argue, as a matter of law, that Plaintiffs have no constitutional right to access documents that may identify execution drug suppliers under Article II, § 6 of the Arkansas Constitution. However, Defendants concede that Article II, § 6 "guarantees a qualified right of access to governmental proceedings that (1) have historically been open to the press and public, and when (2) public access plays a significant factor in the functioning of the process at issue and the

government as a whole, citing *Ark. Television Co. v. Tedder*, 281 Ark. 152, 154, 662 S.W.2d 174, 175 (1983). Defendants admit that they possess documents that would identify execution drug suppliers. However, Defendants contend that, as a matter of law, Plaintiffs have no constitutional right to access those documents.

The Court finds that there are no issues of material fact concerning Plaintiffs' allegation that § 2(i)(2)--the non-disclosure provision--of Act 1096 of 2015 violates Article II, § 6 of the Arkansas Constitution. Section 2(i)(2) of Act 1096 bans disclosure of information that would identify lethal injection drug suppliers. The June 2013 agreement between the parties shows that Plaintiffs have sought that information for years. Exhibit 3 to the Amended Complaint shows that on April 12, 2013, following a Freedom of Information Act (FOIA) request, Shea Wilson of the Arkansas Department of Correction sent an email message to counsel for Plaintiffs which included an attachment disclosing a packing slip for lethal injection drugs. This packing slip provided information including the name and address of the supplier, West-Ward Pharmaceutical Corp., a description of the drugs provided, batch numbers, quantity, the dates provided, and to whom it was provided.

Act 1096 of 2015 was enacted in the face of that history, and in the face of the parties' June 2013 agreement whereby Defendants promised to disclose packing slips and other information that would identify the supplier of lethal-injection drugs within 10 days after obtaining possession of those drugs. Defendants have produced nothing that contradicts that factual precedent. Defendants assert that these facts show that Plaintiffs are not entitled to judgment in their favor. To the contrary, these are pertinent, and undisputed, facts.

These facts show that the information sought was public record, and was available to any citizen of the State of Arkansas who asked for them by FOIA request before Act 1096 of 2015 was enacted. The Arkansas FOIA statute was enacted in 1967. Lethal injection has been Arkansas' chosen method of execution for those sentenced to death after July 4, 1983. This means that since the inception of the lethal injection method of execution, any citizen of the State of Arkansas could have, and may have, requested the names of suppliers and manufacturers of the lethal injection drugs the State planned to use in executions, and, if or when they did, they would be entitled to receive this information as a matter of law.

The fact that the State previously provided this information on request, and entered into an agreement with Plaintiffs to provide this information, does not support the conclusion that disclosure will inhibit or hinder the State's ability to carry out lethal injections, or in any way harm the State and the citizens of Arkansas by making the lethal injection process more difficult. Instead, those facts clearly show that before Act 1096 was enacted, there was a precedent for doing so, "a tradition of accessibility." *Press-Enterprise Co. v. Superior Court,* 478, U.S. 1 (1986).

Defendants mistakenly rely on *Zinc v. Lombardi,* 783 F.3d 1089 (2015). In *Lombardi,* the prisoners alleged that Missouri did not include the suppliers of drugs for lethal injections as members of the confidential execution team, nor make their identities confidential, by statute or regulation, until October 2013. The *Lombardi* court notes, "the prisoners do not even allege that the information was accessible to the public before October 2013." *Lombardi* is distinguishable. Unlike the prisoners in *Lombardi,* Plaintiffs' argument is not that the information sought was only made confidential with the

enactment of Act 1096. Plaintiffs' argument is that the information sought was publicly accessible for as long as Arkansas has carried out lethal injections, for decades.

Second, Plaintiffs have also shown that disclosure of the entities and persons who compound, test, sell, or supply the lethal injection drugs will play a significant role in the functioning of the lethal injection process. In Exhibit 7 to the Amended Complaint, Larry D. Sasich, PharmD, MPH, FASHP, opines that the oversight of compounding pharmacies in the United States is "at best haphazard." Dr. Sasich further states that the use of contaminated Pentobarbital in prior executions illustrates the high risk of needless suffering posed by the use of compounded drugs in lethal injections, and that the lethal injection procedure may be painful and give rise to serious complications if, or when, the drugs are obtained from disreputable sources. The more damning evidence that supports Plaintiff's arguments on this issue is the ADC's history of obtaining lethal injection drugs from a disreputable source, a wholesaler operating illegally from the back of a driving school.

Defendants worked to conceal information about the sources for lethal injection drugs to be used in carrying out capital punishment under Act 1096 even before executions using lethal injection drugs were suspended in Oklahoma. The Oklahoma Department of Correction used a wrong drug as part of its injection protocol to execute Clayton Lockett and misstated the drug that was used. In Arizona, Missouri, and Ohio, executions have been marked by reports that condemned inmates experienced and gave symptoms of being in pain, writhed, and otherwise appeared to suffer pain without relief over a prolonged period before dying. Given this history and growing sense of national concern, Defendants' argument that the condemned death row inmates, in this

case, have no constitutional right to know who supplies the drugs that will cause their deaths is unpersuasive.

The issue is whether Defendants are entitled to judgment as a matter of law. The Court holds that they are not. Plaintiffs have met both prongs established in the *Press-Enterprise* case, that is, the information sought has "historically been open to the press and general public," and access to that information would play "a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co. v. Superior Court,* 478, U.S. 1 (1986).

Plaintiffs' Article II, § 9 Claim

Defendants' summary judgment motion concerning Plaintiffs' claim that Act 1096 and the lethal-injection protocol it authorizes violate the ban on cruel or unusual punishment stated at Article II, § 9 of the Arkansas Constitution is denied. The Court finds that there are disputed facts concerning whether the lethal-injection protocol using midazolam will subject Plaintiffs to a substantial risk of conscious and prolonged pain.

In Exhibit 5 to the Amended Complaint, Craig W. Stevens, P.H.D., opines that midazolam cannot induce general anesthesia, and a prisoner sedated only with midazolam would experience intense pain and suffering from the administration of vecuronium bromide and potassium chloride, but be unable to communicate his distress. Defendants, in contrast, rely on the fact that midazolam protocols have been upheld by numerous courts, namely Oklahoma. Given that factual dispute, summary judgment is not appropriate.

Arkansas has the authority to execute Plaintiffs' death sentences. That authority does not render Plaintiffs helpless to protect themselves from being put to death with

lethal injection drugs and using a protocol that will subject them to a substantial risk of pain.

Under Arkansas law governing euthanization of animals, "humanely killing" is defined as "causing the death of an animal in a manner intended to limit the pain or suffering of the animal as much as reasonably possible under the circumstances." Ark. Code Ann. § 5-62-102 (12). Subsection 8 of that statute defines "cruel mistreatment" as "any act that causes or permits the continuation of unjustifiable pain or suffering." Subsection 11 of that statute defines "euthanizing" as "humanely killing an animal accomplished by a method that utilizes anesthesia produced by an agent that causes painless loss of consciousness and subsequent death,... ." And Subsection 21 of A.C.A. 5-62-102 defines "torture" as "[t]he knowing commission of physical injury to a dog, cat, or horse by the infliction of inhumane treatment ... causing the dog, cat, or horse intensive or prolonged pain ... ."

Judging from Defendants' argument, people condemned to death for committing murder have "no constitutional right to information or documents that may identify entities and persons who compound, test, sell, or supply drugs for the execution process," even when executions using lethal injections have been marked by pain that would fit the definition of "cruel mistreatment" if suffered by domestic pets and livestock in Arkansas. The Court rejects the notion that domestic pets and livestock in Arkansas have the right to die free of unjustifiable and prolonged pain, but that the constitutional guarantee against "cruel or unusual punishment" found in the Arkansas Constitution allows people who commit murders to be put to death as if they have no entitlement to such right.

Plaintiffs' Procedural Due Process Claim

Plaintiffs argue that the non-disclosure mandate of Act 1096 violates procedural due process by denying them access to all evidence about the sourcing of the drugs that will be used for their executions. Plaintiffs further argue that this information is crucial to ensuring that their executions comply with the ban on cruel or unusual punishment. Defendants, on the other hand, argue that Plaintiffs do not have a due process right to discover the information sought, or to enable them to discover grievances and to litigate effectively once in court.

Both parties have moved for summary judgment on this claim. However, "the fact that both parties have moved for summary judgment does not establish that there is no issue of fact. A party may concede that there is no issue if his legal theory is accepted and yet maintain that there is a genuine dispute as to material facts if his opponent's theory is adopted." *Wood v. Lanthrop,* 249 Ark. 376 (1970).

The facts are undisputed that Act 1096, as applied to these Plaintiffs, has been interpreted by Defendants as justifying concealing information about the source of lethal injection drugs from the Plaintiffs, the condemned people who will be the object of those drugs. Due process requires that persons threatened with deprivation of constitutional rights (in this instance Plaintiffs allege that they are at substantial risk of suffering cruel or unusual punishment) are entitled to a meaningful opportunity to challenge the governmental action that threatens them. The notion that Plaintiffs can meaningfully assert their "cruel and unusual punishment" claim without access to information about the source of the agents they allege will render their deaths "cruel and unusual punishment" is absurd on its face. Defendants' motion for summary judgment concerning Plaintiffs' procedural due process claim is denied.

Plaintiffs' Substantive Due Process Claim

Defendants' motion for summary judgment concerning Plaintiffs' substantive due process claim must be denied because the facts are disputed concerning whether the sedative (midazolam), mandated for administration by Act 1096, is effective to render a person unconscious and insensitive to pain. The parties submitted affidavits from scientists that are in direct conflict. Defendants' motion for summary judgment concerning Plaintiffs' substantive due process claim is denied.

Plaintiffs' Separation of Powers Claim

Defendants' summary judgment motion concerning Plaintiffs' allegation that Act 1096 impairs the judicial function is granted. Plaintiffs allege that Act 1096, on its face, is an unlawful legislative encroachment into the judicial power. Act 1096 requires the ADC to seek a protective order before disclosing information that identifies the manufacturers, suppliers, testing laboratories, and test results related to drugs used during lethal injections. That requirement is a directive to the executive branch that does not encroach on the judicial function of deciding whether information shielded from disclosure by Act 1096 is relevant for purposes of discovery. Nor does the non-disclosure requirement prevent trial courts from deciding whether to grant a motion for protective order.

Plaintiffs argue, and the undisputed facts show, that Defendants have sought the protective order as part of a wholesale effort to thwart disclosure about the sources of lethal-injection drugs. That effort included lobbying for enactment of Act 1096 and its non-disclosure provisions, and now asserting the non-disclosure provisions as a constitutional basis for denying Plaintiffs information about the sources of lethal injection

drugs. However, as the subsequent discussion concerning Defendants' Motion for protective order will show, the Court finds no basis for issuing a protective order. Defendants' motion for summary judgment on this point is granted. Plaintiffs' motion for partial summary judgment on this point is denied.

Plaintiffs' Substantive Cruel or Unusual Punishment Claim

Defendants' motion for summary judgment concerning Plaintiffs' substantive cruel or unusual punishment claim is denied for the same reasons that Defendants' summary judgment motion concerning Plaintiffs' substantive due process claim is denied. Both sides have submitted conflicting affidavits concerning the efficacy of midazolam and whether the three-drug protocol prescribed by Act 1096 poses a substantial risk that Plaintiffs will experience cruel or unusual punishment. Because there are disputed issues of fact concerning Plaintiffs' substantive cruel or unusual punishment claim, summary judgment is inappropriate for any party.

Plaintiffs' Public Expenditures Clause Claim

Finally, Defendants' summary judgment motion concerning Plaintiffs' claim that Act 1096 violates the requirement that the State publicly make available "[a]n accurate and detailed statement of the receipts and expenditures of public money, the several amounts paid, [and] to whom and on what account" is denied, and Plaintiffs motion for partial summary judgment on that ground is granted. There are no disputed facts surrounding this issue.

Defendants are mistaken in their argument that the constitutional requirement found at Article 19, Section 12 of the Arkansas Constitution somehow authorizes the legislature to decide to conceal when public money is spent, to whom it is paid, and the

purposes for those expenditures. Article 19, Section 12 is a constitutional mandate for disclosure, not a suggestion that the General Assembly may disclose this information or not do so as it desires.

Defendants' Motion for Protective Order

Defendants have moved for a protective order "to shield them from making the disclosures contemplated by the Court's October 12, 2015, Scheduling Order pursuant to Rule 26(c) of the Arkansas Rules of Civil Procedure." That Order states, in pertinent part, as follows:

> Defendants are hereby ordered to identify or otherwise object to disclosure of the identity of the manufacturer, seller, distributor, and supplier of any lethal injection drugs to be used in the execution of any of the plaintiffs not later than October 21, 2015. If Defendants move for a protective order as to disclosure of this information, pursuant to Rule 26(c) of the Arkansas Rules of Civil Procedure, Defendants shall, with the motion, set forth with particularity and provide any supplemental information Defendants desire the Court to consider regarding any facts or circumstances bearing on the motion for protective order.
>
> Defendants are hereby ordered to produce, not later than October 21, 2015, to counsel for Plaintiffs and the Court, un-redacted package inserts, shipping labels, laboratory test results, and product warning labels pertaining to any drugs Defendants will administer during the method of execution (MOE) protocol for each Plaintiff.

Defendants base their motion for protective order on four arguments. First, Defendants contend that Plaintiffs waived their right to conduct discovery "on the provenance of the ADC's FDA-approved drugs" by filing a motion for partial summary judgment on their cruel or unusual punishment and other disclosure-related claims. Defendants also argue that an order compelling disclosure of the information mentioned in the Scheduling Order would have the practical effect of deciding the merits of this litigation before the Court renders a final ruling. Defendants also contend that the identities of the manufacturers and suppliers of lethal-injection drugs to be used in

Plaintiffs' executions are not relevant to any claim pending in this litigation. Finally, Defendants contend that because § 2(i) of Act 1096 of 2015 requires the ADC to preserve the confidentiality of all information that may identify or lead to the identification of "entities and persons who compound, test, sell, or supply" lethal injection drugs, the Court should "defer to the legislature's policy choices and follow the confidentiality provision absent a compelling reason not to, which is absent in this case."

Plaintiffs contend that the merits of their "disclosure claims" should be adjudicated before the Court orders disclosure. Plaintiffs ask the Court to first determine whether summary judgment is appropriate on Claim 2 (Freedom of Speech and Press), and Claim 8 (Public Expenditures Clause), then, if the Court finds the secrecy provision of Act 1096 unconstitutional, Plaintiffs assert that there is no need for a protective order as there is no basis for Defendants to keep the requested information secret from the public at large. In the alternative, if Claims 2 and 8 fail on the merits, the "prudent course" is for the Court to address the remaining "disclosure claims," Claim 1 (Contract Clause), Claim 3 (Cruel or Unusual Punishment (Procedural)), Claim 4(a) (Due Process (Procedural)), and 5(b) (Separation of Powers), on the merits, before issuing a protective order. If Plaintiffs are successful on the remaining "disclosure claims," they argue that a protective order should allow the "Prisoners, their experts, and their attorney to learn the identities of the manufacturers and suppliers of the drugs Defendants intend to use in executions."

Because the Court has addressed the summary judgment motions filed by both parties, a decision concerning Defendants' motion for protective order will not have the effect of prematurely deciding the merits of the competing arguments about Plaintiffs'

claims that Act 1096 violates Article II, § 17 (the impairment of contracts clause), Article II, § 6 (the public right to access documents clause), and Article II, § 12 (the public expenditures clause) in the Arkansas Constitution. Therefore, the Court finds that Defendants' motion for protective order is ripe for decision.

Defendants' motion for protective order is governed by Rule 26 of the Arkansas Rules of Civil Procedure, which states, in pertinent part, as follows:

> (b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues in the pending actions, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, identity and location of any books, documents, or other tangible things and the identity and location of persons who have knowledge of any discoverable matter or who will or may be called as a witness at the trial of any cause. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> ...
>
> (c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, stating that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file

specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

The Arkansas Rules of Civil Procedure clearly adopt a liberal position on discovery in civil litigation. Except for privileged matters, a party may obtain discovery of any information that is relevant to "the issues" in pending litigation, including information that, while not admissible as evidence in its own right, is reasonably calculated to lead to the discovery of admissible evidence (Rule 26(b)1). Thus, the Court's analysis of Defendants' motion for protective order is governed by the following factors:

- Is the information sought (identity of lethal injection drug supplier and manufacturers, etc.) relevant to issues in the case? Why not?
- If the information is discoverable, is it privileged?
- If the information is (a) discoverable and (b) not privileged, is it otherwise sensitive?
    - Is it proprietary?
    - Is it classified?
    - Is it typically shielded from disclosure?
    - Will disclosure subject defendants or non-parties to undue harm (due to embarrassment, injury, etc.)?

The Court finds that none of these factors justify non-disclosure.

The Relevancy Test

The Court holds that the information Defendants seek to withhold from disclosure is relevant to issues Plaintiffs have raised in their various claims. Plaintiffs have alleged from the outset of this litigation that Defendants "promised to reveal to [Plaintiffs] any future source of execution drugs in exchange for [Plaintiffs] dropping their challenges to the ADC's then-existing execution procedure." (Complaint filed June 29, 2015,

Paragraph 10(a), page 4). Defendants, while challenging Plaintiffs' claim that Act 1096 of 2015 worked to impair or abrogate the agreement Plaintiffs have alleged, acknowledge that the information they are ordered to disclose by the Scheduling Order is related to Plaintiffs' abrogation of contracts claim (Claim 1) in this litigation.

The Ordered Information is Not Privileged

Rule 501 of the Arkansas Rules of Evidence states:

> Except as otherwise provided by constitution or statute or by these or other rules promulgated by the Supreme Court of this State, no person has a privilege to:
> (1) refuse to be a witness;
> (2) refuse to disclose any matter;
> (3) refuse to produce any object or writing; or
> (4) prevent another from being a witness or disclosing any matter or producing any object or writing.

Defendants acknowledge that Act 1096 of 2015 does not create a privilege. Defendants have not asserted any privilege from disclosure recognized by the Arkansas Rules of Evidence.

Rule 508 of the Arkansas Rules of Evidence recognizes governmental privileges. Rule 508 states:

> (a) If the law of the United States creates a governmental privilege that the courts of this State must recognize under the Constitution of the United States, the privilege may be claimed as provided by the law of the United States.
> (b) *No other governmental privilege is recognized except as created by the Constitution or statutes of this State.*
> (c) Effect of sustaining claim. If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court shall make any further orders the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding upon an issue as to which the evidence is relevant, or dismissing the action. (Emphasis added).

The Court holds that the information covered by the Scheduling Order is not privileged.

Whether contested information is relevant for purposes of discovery has long been recognized to be a matter for the sound discretion of the trial court. Although

Defendants rely heavily on decisions from other jurisdictions that ruled disclosure of the type of information sought by Plaintiffs in this litigation not relevant, those rulings are not controlling on this Court. At most, they show how other courts have addressed the relevancy question. Rulings from other courts are suggestions, not mandates, regarding the relevancy issue.

Defendants' Reliance on *In re: Ohio Execution Protocol Litigation*

Defendants insist that the recent decision by the United States District Court for the Southern District of Ohio in *In re: Ohio Execution Protocol Litigation,* No. 2:11-cv-1016, 2015 WL 6446093 (S.D. Ohio Oct. 26, 2015) is pertinent to, and instructive about the disclosure issue in this case. In *Ohio Execution Protocol Litigation*, a federal trial judge granted a motion by defendants for a protective order shielding the identities of persons and entities needed to acquire execution drugs and related materials. In that case, as in this case, the defendants argued that without disclosure they "will not be able to obtain the drugs, materials, and testing necessary to carry out a lawful execution... because, according to Defendants, persons and entities who do not have anonymity would be subjecting themselves to risk of harassment, harm, or similar undesirable consequences that would chill, if not preclude, their willingness to supply the drugs or related assistance." (*Supra*, p. 1).

Ohio Execution Protocol Litigation is distinguishable from this case in several glaring respects. First, the Ohio legislature enacted a nondisclosure statute in November 2014 which (a) amended the definition of "public record" to exclude "information and records that are made confidential, privileged, and not subject to disclosure" under Ohio law; (b) included information identifying persons who

manufacture, compound, prescribe, import, transport, distribute, supply, administer, use, or tests execution drugs within the nondisclosure provision; (c) made information concerning such persons "privileged under law" and; (d) established a cause of action in favor of any "person, employee, former employee, or individual" whose identity and participation in providing execution drugs and materials is revealed, with relief that includes actual damages, punitive damages, attorney's fees, and court costs. The court relied on that statute in concluding that there was good cause for a requested protective order, but expressed concern "about issuing a blanket protective order that enables Defendants to exceed the scope of Ohio's execution protocol and secrecy statute." (*Supra*, p. 7).

Furthermore, the court in *Ohio Execution Protocol Litigation*, with commendable candor, acknowledged that "some of Defendants' assertions of burdens or prejudice connected to disclosure are largely speculative or conclusory, if not outright hyperbolic." Supra, p. 2). Yet, while acknowledging that "all the witnesses who were asked agree that there has not been a single known threat against a compounding pharmacy that might supply drugs to Ohio," and that "mere possibility of a fringe group of extremists does not invariably translate into a burden or prejudice sufficient to warrant issuance of a protective order," the court in *Ohio Execution Protocol Litigation* considered the Defendants' "speculative," "conclusory," "if not outright hyperbolic" assertions probative that disclosure of the identity of the suppliers of execution drugs would pose a tangible and prejudicial burden on their ability to obtain execution drugs, supplies, and materials.

Despite what the court in *Ohio Execution Protocol Litigation* concluded, conjecture, speculation, and surmise that suppliers of execution drugs might face

adverse publicity, unpopularity, and non-specific threats (including un-proven threatened sanctions from manufacturers with whom they have agreed they will not provide the drugs for executions), does not prove disclosure will unduly burden the Defendants in this case. Defendants already possess execution drugs. They do not need a protective order to protect them from the risk of not being able to procure what they already have.

Moreover, few things are as untrustworthy as unsubstantiated conjecture. As Sir Arthur Conan Doyle's most famous character remarked, "It is a capital mistake to theorize before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts."[1] The court in *Ohio Execution Protocol Litigation* appears to have succumbed to the "capital mistake" of twisting what it acknowledged as no proof of "a single known threat" into a finding that disclosing the identities of the persons, entities, or other suppliers of execution drugs, materials, and supplies would not only burden the defendants in that case, but that it would pose "an undue burden," as that is the evidentiary prerequisite for issuing a protective order.

As the Arkansas Supreme Court has forcefully declared, "substantial evidence is evidence that a reasonable mind would accept as sufficient to support a conclusion and force the mind beyond speculation and conjecture." *Ozark Gas Pipeline Corp. v. Ark. Psc*, 342 Ark. 591 (2000) Citing *Bohannon v. Arkansas State Bd. of Nursing*, 320 Ark. 169 (1995). It is "defined as 'evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty; it must force the mind to

[1] Sir Arthur Conan Doyle, A SCANDAL IN BOHEMIA, from THE ADVENTURES OF SHERLOCK HOLMES.

pass beyond suspicion or conjecture.'" *Id.* Citing *Routh Wrecker Serv., Inc. v. Washington*, 335 Ark. 232 (1998).

This Court declines Defendants' encouragement to flatter the court in *Ohio Execution Protocol Litigation* by imitating its "capital mistake." A protective order must be based on something far more substantial than "speculative' "conclusory," or "outright hyperbolic" assertions. And even if it is true that the Defendants obtained lethal injection drugs from a supplier who fears economic sanctions for violating agreements not to provide drugs for lethal injections, Defendants have no standing to assert that third-party fear as a basis for obtaining a protective order in this litigation. A drug supplier that provides drugs for use in capital punishment contrary to an agreement or policy with a drug manufacturer is not entitled to be held harmless by the State for breaking a contract, let alone, be provided a governmental shield from public disclosure for having done so.

Defendants argue that disclosure will subject suppliers of lethal injection drugs to criticism or negative publicity. Defendants have cited no provision in the Constitution of Arkansas which vests any governmental vendor, including suppliers of lethal injection drugs, with the right to anonymity. There is no constitutional right for a governmental vendor, including a vendor who supplies lethal injection drugs used for capital punishment, to enjoy governmental protection from criticism. Defendants' concern that suppliers of lethal injection drugs will be criticized for doing so does not constitute an undue burden that justifies imposition of a protective order.

Act 1096 of 2015 does not Bar Disclosure

Defendants also rely on a provision of Act 1096 of 2015 as justification for their motion for protective order and contend that disclosure of the information prescribed by the Court's Scheduling Order is tantamount to a ruling on the merits of this litigation. Neither contention bears up under careful scrutiny.

It is true that Act 1096 of 2015 contemplates that the information sought by Plaintiffs and ordered disclosed by the Court's Scheduling Order will be treated as confidential. Section 2 (i) and (j) of Act 1096 read as follows:

> (i)(1) The ... identities of the entities and persons who participate in the execution process or administer the lethal injection are not subject to disclosure under the Freedom of Information Act of 1967, § 25-19-101 et seq.
> (2) The department shall keep confidential all information that may identify or lead to the identification of: (A) the entities and persons who participate in the execution process or administer the lethal injection; and (B) the entities and persons who compound, test, sell, or supply the drug or drugs described in subsection (c) of this section, medical supplies, or medical equipment for the execution process.
> (3) *The department shall not disclose the information covered under this subsection in litigation without first applying to the court for a protective order regarding the information under this subsection.*
> (j) The department shall make available to the public any of the following information upon request, so long as the information that may be used to identify the compounding pharmacy, testing laboratory, seller, or supplier is redacted and maintained as confidential: (1) package inserts and labels, if the drug or drugs described in subsection (c) of this section have been made by a manufacturer approved by the United States Food and Drug Administration; (2) reports obtained from an independent testing laboratory; and (3) the department's procedure for administering the drug or drugs described in subsection (c) of this section, including the contents of the lethal-injection box. (Emphasis added).

Act 1096 makes the information that the Scheduling Order describes confidential, not privileged. There is no governmental privilege to withhold information about the identities of persons or entities who sell, distribute, manufacture, or supply lethal

injection drugs to the State of Arkansas, whether in the Arkansas Rules of Evidence or any Arkansas legislation, as was stated above.

Act 1096 explicitly, and correctly, contemplates that litigation concerning discoverability about the identities of sellers, manufacturers, suppliers, and distributors of lethal injection drugs will be resolved by courts and judges on a case-by-case basis. The General Assembly of Arkansas has, to be sure, directed that a motion for protective order will be asserted to prevent voluntary disclosure of this information. The General Assembly, however, did not ban disclosure.

Defendants are mistaken by their contention that disclosure amounts to a decision on the merits of Plaintiffs' claims. That contention is contradicted by Defendants' argument that "production of information regarding manufacturers and suppliers *now* would do nothing to prove the merits of whether [Plaintiffs] are contractually entitled to such disclosures." (Defendants' brief in support of motion for protective order, page 10).

Furthermore, there are no valid reasons to limit disclosure to Plaintiffs' counsel as Defendants urge the Court to do by way of a protective order. The information covered by the Scheduling Order is not ordinarily or customarily secret by any means. As previously mentioned, this information was available to any member of the public via a Freedom of Information Act request until Act 1096 was enacted. Entities that manufacture, distribute, supply, and market lethal injection drugs are obliged to disclose what they are making, distributing, supplying, and selling.

It is common knowledge that capital punishment is not universally popular. That reality is not a legitimate reason to shield the entities that manufacture, supply, distribute, and sell lethal injection drugs from public knowledge.

Plaintiffs did not Waive their Discovery Rights

From the outset of this litigation, Plaintiffs have continuously demanded the information covered by the Scheduling Order. Actually, Plaintiffs allege they sought this information in previous litigation between the parties, and that Defendants agreed to disclose it, voluntarily, before Act 1096 was enacted—at the behest of Defendants—to make the information confidential after Defendants agreed to disclose it.

Plaintiffs have suggested that Defendants may be obtaining lethal injection drugs from unreliable sources, that if compounded drugs are used they may be ineffective or may be produced by unreliable vendors, and that midazolam (the first drug to be used in the three-drug lethal injection protocol prescribed by Act 1096) is, itself, ineffective to render someone unconscious and insensitive to pain. Defendants have strenuously disputed those contentions. Both sides filed motions for summary judgment, supported by conflicting affidavits and other materials, as the parties struggled to present their competing positions to the Court ahead of the scheduled executions of two Plaintiffs on October 21. Defendants filed their motion for summary judgment before filing an answer to the amended complaint. The Court has now addressed the summary judgment motions.

The Arkansas Supreme Court issued a stay of executions to allow for a proper and full resolution of this case, including discovery and trial. The discovery

contemplated by the Scheduling Order is consistent with that objective, the Supreme Court's stay, and the reasons that underlie it.

Defendants' argument that Plaintiffs waived discovery by filing their summary judgment motion is erroneous. A party who files a motion for summary judgment does not concede that no material issue of fact exists in the case. *Chick-a-Dilly Properties, Inc. v. Hilyard,* 42 Ark. App. 120 (1993) Citing *Wood v. Lathrop,* 249 Ark. 376 (1970). "That argument is opposed to both reason and to authority." *Id.* "The mere fact that both parties seek summary judgment does not constitute a waiver of a full trial or the right to have the case presented to a jury." *Wood v. Lathrop,* 249 Ark. 376 (1970). Neither party has waived the right to a full trial, which includes the right to conduct discovery.

Defendants' "Attorneys' Eyes Only" Contention

Defendants argue that Plaintiffs "have no legitimate need to know the identity of proximate supplier(s) or middlemen," and that "disclosure of that information would serve to destruct [sic] the constitutionally-protected business interest of nonparty(ies) to this litigation, who provided the drugs to the ADC in reliance on the confidentiality afforded by Act 1096."

As stated above, Defendants do not cite any legal authority that business vendors with the Arkansas Department of Correction have a constitutional right to anonymity. If there is, in fact, some "constitutionally-protected business interest of nonparty(ies) to this litigation," as Defendants contend, Defendants have failed to explain where that right is expressed in the Constitution of Arkansas or the Constitution

of the United States, and/or how that right has been recognized by the Arkansas Supreme Court.

Moreover, Defendants cite no legal authority—whether in Arkansas or elsewhere—for the manifestly untenable proposition that attorneys are entitled to withhold information about discovery from their clients, let alone, that courts are authorized to condone such secrecy.

To the contrary, Defendants' position flies in the face of the ethical responsibility every lawyer owes any client. Rule 1.4 of the Arkansas Rules of Professional Conduct states, in pertinent part, as follows:

> **Rule 1.4. Communication.**
>
> (a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules. (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Defendants do not suggest how, or why, Rule 1.4 is inapplicable to counsel for the Plaintiffs in this litigation. Defendants do not suggest how, or why, Plaintiffs are not entitled to the level of ethical conduct from their attorneys contemplated by Rule 1.4. Defendants do not suggest how, or why, this Court should behave as if Rule 1.4 does not exist. Beyond that, Defendants do not suggest how, or why, this Court is somehow authorized to issue a protective order that would, in effect, subject counsel for Plaintiffs to discovery sanctions for engaging in conduct every Arkansas lawyer is ethically obligated to provide any client.

Attorneys have a fiduciary duty to communicate with their clients. That duty is not client-specific. It applies to attorneys who represent death row inmates convicted of committing murders as well as attorneys who represent other parties. The contention that this or any other Court should treat the attorney-client relationships of the attorneys and Plaintiffs in this litigation in a different manner from the way the law respects the ethical obligation of attorneys to clients in other litigation is not only unfair – It is unethical.

Conclusion

For the foregoing reasons, Plaintiffs' Motion for Partial Summary Judgment is hereby GRANTED as to Claim 1 (impairment of contracts). Defendants' Motion for Summary Judgment as to Claim 1 is DENIED. The Court holds that the non-disclosure provision within Act 1096 of 2015, § 2(i)2, violates Article II, § 17 of the Arkansas Constitution, and hereby declares § 2(i)2 of Act 1096 of 2015 null and void, effective immediately.

Plaintiffs' Motion for Partial Summary Judgment as to Claim 2 (right to access governmental information) is hereby GRANTED. The Court holds that the non-disclosure provision in Act 1096 of 2015 violates Article II, § 6 of the Arkansas Constitution. Defendants' Motion for Summary Judgment as to Claim 2 is DENIED.

Plaintiffs' Motion for Partial Summary Judgment as to Claims 3 (Cruel or Unusual Punishment – Procedural), 4(a) (Procedural Due Process), and 8 (Public Expenditures Clause), is hereby GRANTED. Defendants' Motion for Summary Judgment concerning those Claims is DENIED.

Defendants' Motion for Summary Judgment as to Claim 5(b) (Separation of Powers – Judicial Encroachment), is hereby GRANTED. Plaintiffs' Motion for Summary Judgment as to Claim 5 is DENIED. Defendants' Motion for Summary Judgment as to all other claims asserted by Plaintiffs is DENIED.

Defendants' Motion for a Protective Order is hereby, and in all respects, DENIED.

Defendants are ordered to produce the information prescribed by the Court's Scheduling Order, as set forth therein and at page 1 herein, not later than Noon on December 4, 2015.

ORDERED this 3rd day of December, 2015.

CIRCUIT JUDGE