

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

	)	
	)	Case No. 16-3072
	)	
In re: Missouri Department of Corrections.	)	Related Cases:
	)	
	)	W.D. Mo.: 2:16-MC-09005
	)	S.D. Miss.: 3:15-CV-00295
	)	

**MOTION TO INTERVENE**

Proposed Intervenor M7,<sup>1</sup> for its Motion to Intervene, states as follows:

**I. Introduction**

If this Court denies the relief sought by the Department of Corrections (“Department”) in its Petition for Writ of Prohibition or Mandamus and Supplemental Petition for Writ of Prohibition or Mandamus (“Writs”), M7’s life and well-being will be placed directly in jeopardy and M7’s constitutional First Amendment right to anonymity will be violated. Out of fear for personal safety and well-being, M7 is compelled to seek intervention in this matter and plead this Court to reconsider its September 2, 2016 Order denying the Department’s Writs seeking to prohibit the district court from enforcing a subpoena requiring the disclosure of M7’s identity as a supplier of drugs used for lethal injections for

---

<sup>1</sup> Contemporaneous with this Motion to Intervene, M7 has filed a Motion to Proceed Anonymously under the pseudonym M7.

executions in Missouri. Pursuant to Federal Rule of Civil Procedure 24, M7 is entitled to mandatory, or alternatively, permissive, intervention in this matter in order to assert a claim that enforcement of the subpoena will be unduly burdensome and subject M7 to personal danger and financial ruin and violate M7's First Amendment rights to freedom of speech.

## II. Argument

Intervention by right is required pursuant to Federal Rule of Civil Procedure 24(a)<sup>2</sup> if the movant “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect that interest, unless existing parties adequately represent that interest.” Accordingly, a proposed intervenor will be permitted to intervene as a matter of right upon satisfying the following three conditions: (1) the intervenor has a recognized interest in the subject matter of the litigation; (2) the interest might be impaired by the disposition of the case; and (3) the interest will not be adequately protected by the existing parties. *South Dakota ex rel. Barnett v. U.S. Dept. of Interior*, 317 F.3d 783, 785 (8<sup>th</sup> Cir. 2003). In this case, it is clear that M7 has established all three conditions.

M7 undoubtedly has a recognized interest in the subject matter of the Writs. The Writs seek an order from this Court prohibiting the district court from

---

<sup>2</sup> Although Rule 24, on its face, applies only to motions to intervene in District Courts, it is clear that parties may also intervene in writ proceedings brought in federal appellate courts. *See, e.g., In re AT&T Corporation*, 2000 WL 1013580 (D.C. Cir. 2000); *Izumi Seimitsu Kogyo Kobushiki Kisha v. U.S. Philips Corp.*, 510 U.S. 27 (1993).

enforcing a subpoena that, among other things, would require the Department to release the identity of the supplier of lethal chemicals. M7 is the supplier whose identity will be revealed if the subpoena is allowed to be enforced. Accordingly, M7 has a direct interest in the outcome of the Writs and the enforcement of the Subpoena.

More importantly, M7's interest may be impaired as a result of the outcome of these proceedings. If the Subpoena is enforced, disclosure of M7's identity will unduly burden M7 by posing a threat to M7's safety and financial well-being. Specifically, as recognized by this Court, revealing the identity of the supplier often leads suppliers, due to pressure from death-penalty opponents, to refuse to sell drugs used for lawful executions. *See Zink v. Lombardi*, 783 F.3d 1089, 1106, 1113 (8<sup>th</sup> Cir. 2015) (en banc); *In re Lombardi*, 741 F.3d 888, 889, 896 (8<sup>th</sup> Cir. 2014) (en banc). Indeed, as set forth in M7's Declaration, attached to M7's Petition for Rehearing or Rehearing En Banc as Exhibit A, if the Subpoena is enforced and M7's identity is revealed, M7 will cease supplying Missouri with pentobarbital in order to prevent retribution, both physical and financial, from death-penalty opponents. If this Court's Order denying mandamus relief is allowed to stand, the Subpoena will be enforced and M7 will, at best, be forced to cease its lawful sale of prescription drugs to the state of Missouri and, at worst, be subjected to personal retribution from death-penalty opponents. Accordingly,

M7's interests in protecting its identity as a supplier of lethal injection drugs is undeniably at stake in this proceeding, and, unless this Court rehears the Writs and allows M7 to intervene, M7's interests will be impaired without affording M7 any opportunity to protect those interests. This is particularly true where M7 was not informed of the Subpoena, which was not directed to M7, until Friday, September 2, 2016, after this Court's Order denying the Writs and allowing enforcement of the Subpoena.

Lastly, M7's interests are not adequately protected by existing parties to the litigation. At the outset, it is important to note that the burden to show this element is minimal. *Chiglo v. City of Preston*, 104 F.3d 185, 187 (8<sup>th</sup> Cir. 1997). Moreover, although a government entity is generally presumed to represent the interests of its citizens as *parens patriae*, “[i]f the citizen stands to gain or lose from the litigation in a way different from the public at large, the *parens patriae* would not be expected to represent him.” *Id.* at 187-88. Indeed, if a citizen would be affected by a proceeding more severely than the public at large, the state's representation of the public interest is deemed insufficient to protect the citizen's interest. *Id.* at 188. Here, the Department has argued that the Subpoena should not be enforced because it poses an undue burden on the State of Missouri. Namely, the Department argues that revealing the identity of the supplier will prevent Missouri from being able to carry out capital punishment because Missouri will no

longer have access to lethal chemicals due to the decision of suppliers to cease sale of the chemicals. Accordingly, the Department's interest in seeking a Writ and quashing the Subpoena differs from M7's interest in the same. Specifically, in contrast to the Department's interest in having access to chemicals necessary to carry out capital punishment, M7's interest is personal in nature and concerns M7's personal safety and financial well-being. Furthermore, M7 has a First Amendment right to remain anonymous, a right that has not been asserted by the Department. Because these interests are different than the interests sought to be protected by the Department, M7's interests will not be adequately protected by the Department's involvement.<sup>3</sup>

Even if this Court determines that M7 is not entitled to intervention as a matter of right under Federal Rule of Civil Procedure 24(a), M7 alternatively requests permissive intervention pursuant to Federal Rule of Civil Procedure 24(b)(1)(B). Permissive joinder is allowed for anyone who has a claim that shares with the main action a common question of law or fact. Here, as set forth in more

---

<sup>3</sup> Furthermore, it should also be noted that M7 has the additional ability and interest of providing direct evidence to support mandamus relief. Notably, the decision to deny the Writs was based, in part, on a finding that the suppliers' alleged intentions to cease supplying pentobarbital to the Department was hearsay and speculative. *See* September 2, 2016 Order, p. 3-4. If M7 is allowed to intervene in this action and the Court rehears the Writs, M7 is prepared to submit evidence that it will cease to supply pentobarbital if the Subpoena is enforced and M7's identity is revealed. *See* M7's Declaration, attached to M7's Petition for Rehearing or Rehearing En Banc as Exhibit A.

detail above, M7's claim is that the Subpoena should be quashed because it poses an undue burden under Federal Rule of Civil Procedure 45 and because it violates M7's First Amendment rights. This claim is in common with the Department's claim set forth in the Writs that the Subpoena should be quashed on the grounds that it poses an undue burden on the Department in revealing the supplier's identity. Accordingly, in the event that this Court denies M7 leave to intervene as a matter of right, this Court should nevertheless permit M7 to intervene in this matter.

### **III. Conclusion**

M7 has established grounds to intervene in this proceeding as a matter of right. Specifically, M7's interest in protecting its identity as a supplier of lethal chemicals is directly at stake in these proceedings. If this Court refuses to rehear the Writs and grant M7 leave to intervene, the Subpoena will be enforced, resulting in a determination of M7's interests without any opportunity of M7 to protect its interests. Moreover, because M7's interests are different from the interests of the Department in seeking the Writs, M7's interests are not adequately represented by the parties to this proceeding. Alternatively, even if M7 is not entitled to intervene as a matter of right, M7's claim that the Subpoena should be quashed on the basis that it poses an undue burden is in common with the Department's Writs, and therefore, M7 is entitled to permissive intervention. Pursuant to Rule 24(c),

Intervenor has contemporaneously filed its Proposed Petition for Rehearing or Rehearing En Banc.

WHEREFORE, Proposed Intervenor M7 respectfully requests that the Court grant the Motion to Intervene, order that M7 is a Petitioner in this proceeding by intervention, and grant any other necessary or appropriate relief.

Respectfully submitted,

BLITZ, BARDGETT & DEUTSCH, L.C.

By: /s/ Aaron W. Sanders  
Teresa Dale Pupillo, #42975  
Aaron W. Sanders, #16-0219  
120 South Central Ave., Suite 1500  
St. Louis, Missouri 63105  
(314) 863-1500  
(314) 863-1877 (facsimile)  
[tpupillo@bbdlc.com](mailto:tpupillo@bbdlc.com)  
[asanders@bbdlc.com](mailto:asanders@bbdlc.com)

Counsel for Intervenor M7

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 8<sup>th</sup> day of September, 2016, the above was filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit under the CM/ECF system. Participants in the case who are registered EM/ECF used will be served by the CM/ECF system.

/s/ Aaron W. Sanders