

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

RICHARD JORDAN and RICKY CHASE

Plaintiffs

THOMAS EDWIN LODEN, JR.

Putative Intervenor

vs.

No. 3:15-cv-00295-HTW-LRA

**MARSHALL L. FISHER, Commissioner,
Mississippi Department of Corrections, in
his Official Capacity; EARNEST LEE
Superintendent, Mississippi State Penitentiary,
in his Official Capacity; THE MISSISSIPPI
STATE EXECUTIONER, in his Official
Capacity; an UNKNOWN EXECUTIONERS,
in their Official Capacities**

Defendants

**MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE
TO TAKE JURISDICTIONAL DISCOVERY**

COME NOW Defendants Marshall Fisher, Commissioner of the Mississippi Department of Corrections, (“MDOC”), and Earnest Lee, Superintendent of the Mississippi State Penitentiary at Parchman, the Mississippi State Executioner and Unknown Executioners (collectively referred to as “MDOC” or the “State Defendants”) in their official capacities and respectfully submit this Memorandum in Opposition to Plaintiffs’ Motion for Leave to Take Jurisdictional Discovery as follows, to-wit:

The Court should deny Plaintiffs’ Motion, which is nothing more than a last-ditch effort to stave off dismissal. Plaintiffs have shown no need for jurisdictional discovery, and this Court should not countenance an unwarranted fishing expedition into MDOC’s efforts to procure lethal injection drugs. Under *Glossip v. Gross*, 135 S. Ct. 2726 (Jun. 29, 2015), Plaintiffs cannot even get this lawsuit out of the starting gate, much less to the point where discovery might be justified.

Plaintiffs' failure to "plead . . . a known and available alternative," *Glossip*, 135 S. Ct. at 2739, tees this lawsuit up for immediate and summary dismissal. "Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009); *see also Zink v. Lombardi*, 783 F.3d 1089, 1105-06 (8th Cir. 2015) ("In any event, the Supreme Court has rejected the notion that discovery must be available to a plaintiff who cannot allege sufficient factual matter to suggest plausibly an entitlement to relief.").

ARGUMENT

I. Plaintiffs Have Shown No Need for Jurisdictional Discovery

A. Plaintiffs' Challenge to Commissioner Fisher's "Veracity" is Based on Pure Supposition.

The only relevant jurisdictional issue is mootness, and the information sought by Plaintiffs is not probative of that issue. Commissioner Fisher informed the Court under penalty of perjury that MDOC has destroyed its expired stock of pentobarbital and MDOC's efforts to replenish that supply have been wholly unsuccessful. Declaration of Marshall Fisher, at 1-2 [Doc. 25-1]. The only "need" for jurisdictional discovery asserted by Plaintiffs is that in response to past public records requests by the Justice Center, MDOC has not produced additional documents reflecting attempts to procure lethal injection drugs. Motion for Discovery, at 6 [Doc. 32].

Actually, in response to those repeated requests, MDOC produced copies of all responsive documents, which included invoices, purchase orders, and the like, but redacted highly sensitive and confidential information that could identify MDOC's supplier(s). *See, e.g.,*

Attachments to Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, [Doc. 31-1, 31-2]. Plaintiffs challenge Commissioner Fisher's unequivocal, sworn statements for lack of supporting documentation, based purely on supposition, arguing that the absence of documentation "is baffling to Plaintiffs, and raises doubt as to the veracity of the Commissioner's assertions." Motion for Discovery, at 6 [Doc. 32]. Plaintiffs' statement is a complete *non sequitur*. Plaintiffs effectively argue that documents *must* have been created during procurement efforts, so Commissioner Fisher is lying. Plaintiffs are wrong on both counts.

The fact that additional records do not exist to further document MDOC's procurement efforts in no way calls into question the *veracity* of Commissioner Fisher's Declaration. That shows only that MDOC has chosen only to document its procurement efforts in purchasing documents created when the transaction(s) are completed. Nothing more, nothing less.

B. Even Under the "Voluntary Cessation" Standard, Commissioner Fisher's Affidavit Satisfies the "Lighter Burden" of a Governmental Official to Show Mootness.

Per Commissioner Fisher, MDOC *must* change the protocol because of the unavailability of certain drugs. The changes are not voluntary, but necessary. Even if this were a voluntary cessation situation, which it is not, circuit precedent requires that Commissioner Fisher, a public official acting in his official capacity, be taken at his word. *Stauffer v. Gearhart*, 741 F.3d 574, 582 (5th Cir. 2014). Mootness doctrine generally requires a defendant to prove that "subsequent events [have] made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 324 (5th Cir. 2009). However, governmental entities bear a lighter burden to "prov[e] that the challenged conduct will not recur once the suit is dismissed as moot." *Id.* In that regard, the Fifth Circuit has instructed:

[G]overnment actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties. Without evidence to the contrary, we assume that formally announced changes to official governmental policy are not mere litigation posturing.

We will not require some physical or logical impossibility that the challenged policy will be reenacted absent evidence that the voluntary cassation is a sham for continuing possibly unlawful conduct.

Sossamon, 560 F.3d at 325 (holding that affidavit from prison official was sufficient to establish mootness, because allegedly wrongful practice could not “reasonably be expected to recur”); *see also Cooley v. Strickland*, 588 F.3d 921, 923 (2009) (vacating stay of execution mooted by amendment of state’s lethal injection protocol, and holding there was no basis in the “record or for that matter in common sense for assuming that the State will do anything other than what is has told us in court filings”).

II. Plaintiffs’ Transparent Purpose Is To Learn the Identity of MDOC’s Drug Supplier(s).

In light of the Justice Center’s ongoing efforts to identify MDOC’s drug suppliers, Plaintiffs should hardly be “baffl[ed]” that MDOC only documents purchases of drug procurement as required by state law. Plaintiffs’ request for “jurisdictional discovery” is nothing but smoke and mirrors, an attempt to gain *something* out of this lawsuit, the merits of which have been rendered untenable by *Glossip*.

Plaintiffs’ true motivation is shown by the first of their proposed interrogatories:

Please state the name, physical address, and telephone number of all persons, agencies, companies, or other entities MDOC has contacted in an attempt to obtain sodium thiopental, pentobarbital, *or any other drug for use in lethal injections* from January 2014 to the present.

Motion for Leave, at 8 (emphasis added) [Doc. 32].

The Court should not be fooled by this bit of legal legerdemain intended to permit Plaintiffs to learn the identity of entities that have supplied lethal injection drugs to MDOC in the past, and those from which MDOC may attempt to obtain drugs in the future. This is highly confidential and sensitive information which MDOC is fighting fiercely in state court to protect. The requested discovery would be an abusive fishing expedition which would permit Plaintiffs to interfere with MDOC's ongoing procurement efforts. Plaintiffs have no legitimate need for the names of the prospective suppliers that MDOC has contacted. That information is utterly irrelevant to any claim raised in this lawsuit.

The Justice Center has made strenuous efforts over the last two years to identify and expose entities which have supplied lethal injection drugs to MDOC. In this regard, Plaintiffs and MDOC are currently engaged in a bitter dispute over whether confidential documents reflecting the identity of drug supplier(s) are exempt from production under the Mississippi Public Records Act. The second lawsuit in as many years concerning this issue is presently pending on appeal before the Mississippi Supreme Court, styled *Mississippi Department of Corrections vs. The Roderick and Solange MacArthur Justice Center*, No. 2015-CA-00431-SCT.

The parties agreed to dismiss the first suit¹ as moot after the Justice Center learned the identity of MDOC's then-supplier of drugs and publicly disclosed that information, effectively eliminating that pharmacy as a drug supplier to MDOC. Considering that the Justice Center's motivation for obtaining this information is to expose MDOC's drug supplier(s) so they will refuse to sell lethal drugs to MDOC in the future, it would be "baffling" if MDOC had not taken

¹ *The Roderick & Solange MacArthur Justice Center, Michelle Byrom, and Charles Crawford v. MDOC*; Chancery Court of Hinds County, Mississippi, First Judicial District, Cause No. G2014-261.

steps to keep the procurement process as confidential as possible. That includes MDOC's eminently reasonable practice of documenting drug purchases only when complete, in accordance with state law.

III. MDOC Has No Conceivable Motivation to Announce it Must Change the Current Lethal Injection Protocol Unless it Is True.

Plaintiffs should be content that MDOC lacks the ability to use pentobarbital in future executions and move on. Considering Plaintiffs' position on the use of compounded pentobarbital in executions, one could reasonably expect Plaintiffs to be pleased with Commissioner Fisher's *admission* that the State no longer has pentobarbital *in any form* for executions, has not been able to obtain any pentobarbital for executions *in any form*, and does not expect to be able to obtain any pentobarbital *in any form* for executions. MDOC and Commissioner Fisher have absolutely no motivation to change the State's lethal injection protocol, an event absolutely sure to produce litigation, unless the change was necessary and unavoidable.

Further, Plaintiffs' argument that certain other states have figured out a way to obtain "pentobarbital" is disingenuous at best. Plaintiffs are well aware that the only injectable form of pentobarbital approved by the FDA for sale in the U.S., marketed under the brand name Nembutal, is unavailable to MDOC or any other state for use in executions. *See* Complaint, at ¶¶ 61-63 [Doc. 1]. Nembutal, like sodium thiopental, was a victim of the backdoor, supply-side attack being waged by anti-death-penalty advocates to choke off the supply of suitable lethal injection drugs available to the states. *Glossip*, 135 S. Ct. at 2733-34. Further, Plaintiffs admit that the drugs obtained by Texas, Missouri, and Georgia are not Nembutal, but *compounded* pentobarbital: "[m]oreover, other state departments of correction continue to obtain and utilize

compounded pentobarbital in lethal injection executions.” Plaintiffs’ Memorandum In Opposition to Motion Dismiss, at 4 [Doc. 31]. Significantly, in this action, Plaintiffs allege the use of compounded pentobarbital is unconstitutional (which means compounded pentobarbital is not, according to the Plaintiffs, a known and available alternative). Further, Commissioner Fisher’s Declaration proves the State does not plan to use pentobarbital in any form for Plaintiffs’ executions.

CONCLUSION

For the foregoing reasons, Plaintiffs’ Motion for Leave to Take Jurisdictional Discovery should be denied.

THIS the 28th day of July, 2015.

Respectfully submitted

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

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CERTIFICATE OF SERVICE

This is to certify that I, Paul E. Barnes, Special Assistant Attorney General for the State of Mississippi, have electronically filed the foregoing document with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

James W. Craig
Emily M. Washington
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This the 28th day of July, 2015.

s/Paul E. Barnes