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8 **SUPERIOR COURT OF ARIZONA**
9 **MARICOPA COUNTY**

10 ACLU OF ARIZONA, a non-profit, civil
rights organization

11 Plaintiff

12 vs.

13 ARIZONA DEPARTMENT OF
14 CORRECTIONS, a state agency

15 Defendant.
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Case No. CV2013-013531

**DEFENDANT'S RESPONSE IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR TEMPORARY
RESTRAINING ORDER**

(Assigned to Hon. Arthur Anderson)

Hearing: October 7, 2013, 1:30 pm

18 Defendant, Arizona Department of Corrections, by its undersigned counsel, hereby
19 responds in opposition to Plaintiff's motion for a temporary restraining order. The grounds for
20 this opposition are more fully stated in the accompanying Memorandum of Points and
21 Authorities, but may be summarized as follows:

22 1. The Arizona Department of Corrections has produced all documents responsive to the
23 Plaintiff's public records request, redacting information made confidential by law and
24 withholding only the identity of executioners and other persons who participate or perform
25 ancillary functions in an execution and any information contained in records that would identify
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1 those persons, because such information is specifically made confidential and not subject to
2 disclosure pursuant to A.R.S. § 13-757 (C).

3 2. Plaintiff's argument that the aforesaid statute, A.R.S. § 13-757 (C) only applies to
4 "natural persons" is without merit, because it directly contradicts the applicable statutory
5 definition contained in A.R.S. § 1-215 (29).

6 3. Plaintiff has failed to satisfy any of the standards for a temporary restraining order or a
7 preliminary injunction, and especially cannot satisfy the requirement of irreparable harm, since
8 the information Plaintiff seeks has been made public by a federal court order.

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. Summary of Relevant Facts**

11 Although Plaintiff confuses this public records case with some sort of a constitutional
12 claim on behalf of the condemned inmates, the fact remains that this is nothing but a case about
13 the scope of the Public Records Laws. *E.g.* Motion for TRO at 10. The Plaintiff alleges that on
14 September 17, 2013, it made a public record request seeking documents and information
15 concerning the lethal injection drugs to be used in the executions of Edward Schad, Jr. and
16 Robert Glen Jones, Jr. Under date of September 23, 2013, the Arizona Department of
17 Corrections ("ADC") sent eleven pages of records. Following discussions, on September 25,
18 2013, ADC responded with further documents. Plaintiff's own petition demonstrates that ADC
19 provided everything requested except information that would identify persons who participate or
20 perform ancillary functions in an execution and any information contained in records that would
21 identify those persons. Petition, ¶ 9.

22 The Plaintiff contends that ADC is obligated to disclose the person or persons who
23 manufactured, distributed or supplied the execution drugs as well as other information that
24 would further identify that person or those persons, including the lot number and expiration
25 dates of the drugs, the National Drug Code of the particular manufacturer and lot number of the
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1 drug, the DEA classification and reference numbers on the package insert and invoices, among
2 other things. For convenience, this brief calls all such persons collectively the “drug supplier”
3 and refers to the items of drug-identifying information as the “drug information.”

4 On October 4, 2013, in a related federal proceeding, the U.S. District Court ordered ADC
5 to file a document in the court’s public docket containing the name of the drug manufacturer
6 and the other drug information Plaintiff seeks in this action. Copies of the court’s decision and
7 the required filing are attached as Attachments 1 and 2 to this filing. It is noteworthy that even
8 the federal court refused to order disclosure of the execution team. Att. 1 at 2.

9 Although Plaintiff argues that the information about the drug supplier and the drug
10 information are needed to evaluate 8th Amendment defenses for Schad and Jones, that assertion
11 is belied by the actual litigation histories of those cases, which are summarized below. In
12 addition, Plaintiff would lack standing to assert such claims on behalf of the inmates in any
13 event.

14 Edward Schad was sentenced to death by the Superior Court in Yavapai County in 1981.
15 Schad (then 35 years old) murdered 74 year old Lorimer Grove by strangling him, stole his car,
16 used his credit cards and wrote himself a check on Mr. Grove’s account. Schad’s case has been
17 heavily litigated in the three decades since his conviction. *E.g. State v. Schad*, 129 Ariz. 557,
18 633 P.2d 366 (1981), *cert. denied*, 455 U.S. 983 (1982); *State v. Schad*, 142 Ariz. 619, 691 P.2d
19 710 (1984); *State v. Schad*, 163 Ariz. 411, 788 P.2d 1162 (1989), *aff’d Schad v. Arizona*, 501
20 U.S. 624 (1991); *Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011), *cert. denied* 133 S.Ct. 432
21 (2012); and *Ryan v. Schad*, 133 S.Ct. 2548 (2013). As shown above, Schad and Jones have
22 matters pending before the federal courts even as this is written. No one could doubt that the
23 legal system has thoroughly examined, reexamined and examined again all matters pertaining to
24 these executions.

1 Robert Glen Jones, Jr. was sentenced to death by the Superior Court in Pima County in
2 2000. Jones murdered six people and badly injured others in the course of two armed robberies.
3 *State v. Jones*, 197 Ariz. 290, 297-298, 4 P.3d 345, 352-53, (2000), *cert. denied* 532 U.S. 978
4 (2001). Jones has also thoroughly litigated his case through the federal system. *E.g. Jones v.*
5 *Ryan*, 691 F.3d 1093 (9th Cir. 2012), *cert. denied* 133 S.Ct. 2831 (2013).

6 **II. Legal Authority and Argument**

7 Plaintiff has sought a very unusual sort of temporary restraining order, one purporting to
8 direct the Department of Corrections to stop withholding records that identify the drug supplier.
9 It is in fact a mandatory injunction to disclose this information. Therefore, to prevail, the
10 Plaintiff must meet the standards for a preliminary injunction. The Plaintiff must show (1) a
11 strong likelihood of success on the merits; (2) irreparable harm if the injunction is not granted;
12 (3) that the harm to the requesting party outweighs the harm to the party opposing the
13 injunction; and (4) that public policy favors the granting of the injunction. *Smith v. Arizona*
14 *Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410, 132 P.3d 1187, 1190 (2006); *Shoen v.*
15 *Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1991). The legal test is not an absolute
16 scale, but a “sliding” one. *Smith*, 212 Ariz. at 410, 132 P.3d at 1190. Thus, a moving party
17 might prevail by showing either (1) probable success on the merits and the possibility of
18 irreparable injury, or (2) the presence of serious questions and that the balance of hardships tips
19 sharply in favor of the moving party. *Smith*, at 411, 132 P.3d at 1191.

20 **No possibility of success on the merits.**

21 Plaintiff will not succeed on the merits. Since the record demonstrates that ADC has
22 withheld only information that would identify the person who manufactured and/or delivered
23 the drugs necessary for a legal execution, the first inquiry must be whether that information is
24 subject to the public records laws at all. In this case, the governing statute is A.R.S. § 13-757
25 (C). It provides as follows:
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1 The identity of executioners and other persons who participate
2 or perform ancillary functions in an execution and any
3 information contained in records that would identify those
4 persons is confidential and is not subject to disclosure pursuant
 to title 39, chapter 1, article 2.

5 Title 39, chapter 1, article 2 of the Arizona Revised Statutes is the Arizona Public
6 Records law, A.R.S. § 39-121 et seq.

7 As a matter of statutory construction, there can be no doubt that a person who
8 manufactures and delivers the necessary drug for a legal execution by lethal injection
9 participates or performs ancillary functions in an execution. The primary goal in statutory
10 interpretation is to determine and give effect to the intention of the Legislature, and the plain
11 words of a statute are the most reliable indicator of the statute’s meaning. *DeVries v. State*, 221
12 Ariz. 201, 204, ¶ 6, 211 P.3d 1185, 1188 (App. 2009); *New Sun Bus. Park, LLC v. Yuma Cnty.*,
13 221 Ariz. 43, 46, ¶ 12, 209, P.3d 179, 182 (App. 2009). “When the language is clear and
14 unambiguous, and thus subject to only one reasonable meaning, we apply the language without
15 using other means of statutory construction.” *Baker v. University Physicians Healthcare*, 231
16 Ariz. 379, 383, 296 P.3d 42, 46 (2013). Common meaning may be evidenced by dictionary
17 definitions. *Simpson v. Owens*, 207 Ariz. 261, 273, ¶ 35 (App. 2004) (courts may reference
18 well-known and reputable dictionaries when construing statutes).

19 The following definitions are taken from *Webster’s II New Riverside University*
20 *Dictionary* (1988). “Participates” means “to join or share with others; to take part.” It is
21 obvious that lethal injection requires a drug, so the drug supplier can be said to take part in an
22 execution. Certainly the drug supplier at least performs an ancillary function. “Ancillary
23 means “subordinate” or “auxiliary.” “Function” means “the activity for which one is
24 specifically fitted or employed.” The person who supplies the lethal injection drug thus
25 performs an ancillary function for the execution, in the sense that the person performs the
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1 activity of supplying the drug and the drug itself is subordinate to the major activity of the
2 execution but utterly necessary for the major activity.

3 The Plaintiff makes the surprising argument that the word “persons” in A.R.S. § 13-
4 757 means only “natural” persons (that is, only individual human beings) and not any sort of
5 business entity. This argument is without merit because A.R.S. § 1-215 (29) provides as
6 follows: “‘person’ includes a corporation, company, partnership, firm, association or society, as
7 well as a natural person.” A.R.S. § 1-215 expressly provides that its definitions apply in the
8 statutes and laws of this State. Thus, the persons protected by A.R.S. § 13-757 include all
9 kinds of business entities as well as “natural” persons. Defendant calls upon the Plaintiff to
10 admit that Plaintiff overlooked this statutory definition and to withdraw the argument.

11 Defendant’s refusal to disclose identifying information is in consonance with the
12 obvious legislative intention in enacting A.R.S. § 13-757 (C). When courts order an execution,
13 it is easy to foresee that persons involved in carrying out the court order could be the subject of
14 revenge by the condemned person’s confederates, friends and relatives. Therefore, disclosing
15 the name of the person who provides execution drugs could actually create a risk of physical
16 reprisals and revenge, even death. It would also subject those innocent persons to attacks by
17 those strongly opposed to the death penalty. It might even result in economic boycotts or
18 physical picketing. Finally, as even the ACLU acknowledges, disclosing the identity of the
19 drug supplier might make it more difficult for ADC to obtain the necessary drugs in the future.
20 This Court should keep in mind that ADC only executes persons when they are sentenced to
21 death by this Superior Court and an appropriate warrant is issued. Therefore, to use political
22 pressure and threats to defeat a lawful execution also defeats the lawful orders of the Arizona
23 Supreme Court and the trial courts.

24 Nor is this any sort of empty imagining. As the Plaintiff points out, in 2010, the United
25 States District Court held in proceedings involving another execution (Landrigan) that it could
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1 ignore the confidentiality requirement of state law and order the publication of the identity of
2 the drug supplier. As a result, the identity became public knowledge with a predictable
3 outcome. In discussing Arizona's refusal to disclose the identifying information, the Chief
4 Judge of the U.S. Court of Appeals for the Ninth Circuit stated as follows:

5 Because Landrigan did not meet his burden, the state had no
6 duty to come forward with any information. Indeed, Arizona
7 had good reason not to; just twenty-four hours after the state
8 attorney general conceded that the drug was imported from
9 Great Britain, one journalist suggested that the company might
10 be criminally liable under an EU regulation that makes it
11 illegal to "trade in certain goods which could be used for
12 capital punishment, torture, or other cruel, inhuman or
13 degrading treatment." See Clive S. Smith, The British
14 Company Making a Business out of Killing, The Guardian
15 (Oct. 26, 2010, 4:00 p.m.),
16 <http://www.guardian.co.uk/commentisfree/cifamerica/2010/oct/26/jeffrey-landrigan-execution-sodium-thiopental>. Certainly,
17 Arizona has a legitimate interest in avoiding a public attack on
18 its private drug manufacturing sources, particularly when
19 Hospira-the only source of sodium thiopental within the
20 United States-hasn't yet announced when the drug will actually
21 be available for executions or how much it plans to produce.
22 Although the district court may have been annoyed with the
23 state for failing to provide the information Landrigan's lawyers
24 wanted to see, the fact remains that Landrigan was not entitled
25 to the information because he failed to make a threshold
26 showing that he will suffer harm.

20 *Landrigan v. Brewer*, 625 F.3d 1132, 1143 (9th Cir. 2010) (Kozinski, J. and others,
21 dissenting from denial of rehearing). The Chief Judge's prediction came true when Hospira
22 never did produce more sodium thiopental and the states were forced to switch to pentobarbital.
23 These facts demonstrate that the Legislature's concerns were valid: unless information about
24 the drug suppliers is held as confidential and not subject to public records review, public policy
25 will be thwarted and innocent persons will suffer.

1 In the related federal proceedings by Schad and Jones, Defendant filed a copy of a letter
2 that proves this point with an even more recent example. The State of Texas recently used a
3 compounding laboratory to supply the execution drug. After Texas (which has no analogue to
4 A.R.S. § 13-757 (C)) was forced to disclose the pharmacy's role, the pharmacy was engulfed in
5 a "firestorm" of constant press inquiries, hate mail and messages, and litigation involvement.
6 Attachment 3 to this brief is the pharmacy's letter to Texas authorities, stating that if they knew
7 they would be publically named, they never would have sold Texas the drugs.

8 Plaintiff's citation of the unreported (and vacated) decision in *Landrigan v. Brewer*,
9 CV-10-2246-PHX-ROS, 2010 WL 4269559 (D. Ariz. Oct. 25, 2010) *aff'd* 625 F.3d 1144 (9th
10 Cir. 2010), *vacated* 131 S.Ct. 445 (2010), does not provide even persuasive authority to support
11 Plaintiff's position. What the district court held (in discussing the State's "Disclosure
12 Obligations") was that state law "privileges" like A.R.S. § 13-757 (C) do not apply in federal
13 proceedings. *Id.* at * 11. The case does not mention the Arizona Public Records Laws at all.
14 The limited discussion of the federal judge's views on A.R.S. § 13-757 (C) is pure dicta, and it
15 is obviously wrong given the plain language of the statute. Perhaps more to the point, the U.S.
16 Supreme Court held in no uncertain terms that the district court's views on the State's
17 "disclosure obligations" were completely wrong, and instead the State had no disclosure
18 obligations at all unless the inmate first makes a strong showing that the drug was "unlawfully
19 obtained," or "sure or very likely to cause serious illness and needless suffering," which
20 Landrigan had not. 131 S.Ct. at 445.

21 Whether or not the federal court was bound to honor A.R.S. § 13-757 (C), this Court
22 surely is. It requires the Court to deny the TRO.

23 **No harm, much less irreparable harm.**

24 Plaintiff will suffer no harm if the injunction is not granted. Plaintiff imagines, without
25 any showing, that the ADC will use contaminated or expired drugs and therefore the ACLU
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1 must intervene in the execution to save the day. As shown by the attached federal court order
2 and required disclosure, the ACLU and everyone else who cares now has that information, and
3 the ACLU's imaginings were groundless. On this record, the ACLU will be in the same
4 position with or without some sort of TRO from this Court directing ADC to disclose the drug
5 supplier's identifying information.

6 **Great harm for the State if the TRO were granted.**

7 The harm to the State would greatly exceed any imagined harm to the ACLU. If the
8 Court ignored the confidentiality statute and required ADC (presumably now and for every
9 future execution) to publish the identity of every drug supplier, history demonstrates that at
10 least one thing will surely happen: persons opposed to the death penalty will use any means
11 they deem necessary to harass, intimidate and injure the supplier, to deter the supplier from
12 ever participating in another execution. They will inflict the "firestorm" that the Texas
13 pharmacy colorfully described in Attachment 3. There is also the risk that innocent employees
14 of the drug supplier will be the subject of personal attacks or even revenge by the condemned
15 men's confederates, relatives or friends. Thus, the harm to the State would dwarf the
16 imaginary harm to the ACLU.

17 **The proposed TRO would violate public policy.**

18 As shown above, the injunction would harm and thwart the express public policy of the
19 State, which is to exempt information like the identity of the drug supplier from public
20 inspection under the Public Records Laws. The requirement that the court not issue an
21 injunction that would thwart public policy is not only part of the judicially-created standard in
22 cases like *Smith*, 212 Ariz. at 410, 132 P.3d at 1190; it also has a specific statutory basis.
23 Under A.R.S. § 12-1801(3), this Court is authorized to issue injunctive relief only when the
24 applicant is entitled to it "under the principles of equity." Perhaps the most fundamental
25 equitable principle of all is that equity "will not be applied to frustrate the purpose of the laws
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1 or to thwart public policy.” 30A C.J.S. Equity § 99 (2012). Subjecting the identity of drug
2 suppliers to public records requests would do just that.

3
4 CONCLUSION

5 For all of the foregoing reasons, the motion for a TRO must be denied. The court
6 should also order an award of costs and attorneys’ fees and such other relief as may be
7 appropriate in favor of the Defendant.

8 Dated this 7th day of October, 2013.

9 THOMAS C. HORNE
10 Attorney General

11 /s/ Charles A. Grube
12 Charles A. Grube
13 Attorneys for Defendant

14 This document was electronically
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