

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

No. 16-3072

In re: Missouri Department of Corrections,  
Petitioner

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M7,

Intervenor

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Richard Jordan and Ricky Chase,  
Respondents.

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Appeal from U.S. District Court for the Western District of Missouri - Jefferson City  
(2:16-mc-09005-SRB)

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**DECLARATION OF THOMAS P. DINAPOLI**

1. I, THOMAS P. DINAPOLI, give the following declaration under penalty of perjury under the laws of the United States of America:
2. My name is THOMAS P. DINAPOLI. I am over the age of eighteen and am competent to give sworn testimony. I have personal knowledge of the facts stated below.
3. I am providing this declaration to the Court at the request of James W. Craig and Emily M. Washington, attorneys for Richard Jordan and Ricky Chase, Respondents.

4. I am the Comptroller of the State of New York. As Comptroller, I am the Trustee of the New York State Common Retirement Fund (“the Fund”), which holds the assets of the New York State and Local Retirement System (the “System”). I have held this Office since February 2007.
5. As Trustee, I am responsible for overseeing the Fund’s investments on behalf of the System’s more than one million members, retirees and beneficiaries.
6. As of September 16, 2016, the Fund held 529,702 shares in Akorn, Inc. (“Akorn” or “the Company”) valued at \$15,048,833.82.
7. I have personal knowledge of Akorn’s commitment to prevent the use of its products to conduct or support capital punishment through lethal injections or other means based upon the following.
8. On November 13, 2014, at my direction, a Director of Corporate Governance in my Office submitted to Akorn a shareholder resolution for consideration of stockholders at the Company’s next annual meeting and requested that the resolution be included in the Company’s proxy statement. A copy of the resolution is attached as Exhibit A to this Declaration.
9. The resolution asked Akorn to issue a report at reasonable expense and excluding confidential information, describing the Company’s policy position regarding whether the Company or its subsidiaries will provide products for purposes of aiding executions, and including an analysis of potential reputational risks associated with such policy position. Exhibit A.

10. The resolution cited controversy surrounding the death penalty and noted that Akorn had been identified as a distributor of Midazolam, a drug that had been adopted by several states for potential use in lethal injections. Exhibit A.
11. The resolution further stated that, as Akorn had become embroiled in the issue, it had been exposed to reputational risk, jeopardized its role and reputation as a provider of health oriented products, and faced possibility of increased financial and legal risk resulting from the actual use of its products in executions – all of which could be detrimental to shareholders' investments. Exhibit A.
12. In response to the submission of the shareholder resolution, communications ensued between my Office and a representative of Akorn. By letter dated February 27, 2015, Akorn's General Counsel informed my Office that, as demonstrated by the restricted distribution program it had in place for Nembutal (pentobarbital), the Company had long held the belief that its products should not be used to conduct or support capital punishment. A copy of the letter is attached as Exhibit B.
13. Akorn's General Counsel stated that the Company strongly objected to the use of its products to conduct or support capital punishment. To formalize this belief, Akorn adopted the following policy:

The employees of Akorn are committed to furthering human health and wellness through our vast portfolio of products. In the interest of promoting these values, Akorn strongly objects to the use of its products to conduct or support capital punishment through lethal injection or other means. To prevent the use of our products in capital punishment, Akorn will not sell any product directly to any prison or other correctional institution and we will restrict the sale of known components of lethal injection protocols to a select group of wholesalers who agree to use their best efforts to keep these products out of correctional institutions.

Exhibit B.

14. To further show its commitment to this policy, Akorn indicated that it planned to issue a press release, a copy of which was attached to the February 27, 2015 letter, stating that it adopted a comprehensive policy that condemned the use of its products in execution protocols. The press release specifically named midazolam and hydromorphone hydrochloride that would now be subject to restrictions similar to those in place for the sale of pentobarbital. A copy of the press release is attached as Exhibit C to this Declaration.
15. The press release enumerated several actions Akorn would take to restrict the use of its products in execution protocols. Akorn announced it was no longer accepting direct orders from prison systems, and was working to ensure its distributors and wholesalers would agree to not sell certain of its products – specifically naming midazolam and hydromorphone – to departments of correction and secondary wholesalers, and to use best efforts in other sales channels to prevent the sale of both products to prison systems. Exhibit C.
16. Additionally, Akorn announced it had written to “attorneys general and heads of departments of correction of the states that currently execute inmates or have prisoners on death row along with the United States Attorney General, the United States Secretary of Defense, the Director of the Federal Bureau of Prisons and the Chairman of the Department of Defense Corrections Council reiterating the company's policy on the appropriate use of its products.” Further, Akorn announced it was seeking the return of any of its products that may have been inappropriately purchased to aid in the execution process. Exhibit C.

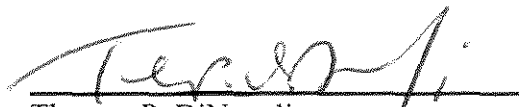
17. Following the Akorn announcement of its comprehensive policy and restricting midazolam and hydromorphone hydrochloride as it had restricted pentobarbital, it was my understanding and the understanding of professional staff in my Office who engaged with the Company that Akorn now had sufficient controls in place to restrict the sale of its products to prison systems for use in execution protocols.
18. As such, Akorn addressed our concern regarding the potential for reputational, financial and legal risk referenced in the resolution – and related impact on shareholder value – and we withdrew our shareholder resolution.
19. I am aware that the supplier of lethal chemicals, including pentobarbital, to the Missouri Department of Corrections, identified only as “M7,” has intervened in the present litigation seeking to have its name held in confidence and not revealed to anyone other than the Missouri Department of Corrections.
20. A May 13, 2016 *New York Times* article reporting on a recent execution in which Missouri administered pentobarbital, noted that Akorn is the only approved company making that drug. A copy of the article is attached as Exhibit D.
21. Given that Akorn is reported to be the sole licensed manufacturer of pentobarbital, it is possible that the Missouri Department of Corrections obtained Akorn’s product for use in its executions.
22. Based on representations made to my Office by Akorn, it is my understanding that if the pentobarbital sold by M7 to the Missouri Department of Corrections is manufactured by the Company, that sale could have violated Akorn’s restrictions on the sale of its products to departments of corrections for use in capital punishment, thereby undermining the Company’s comprehensive policy that I believe manages the

reputational, financial and legal risk noted in my Office's shareholder resolution.

Exhibits A and B.

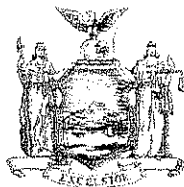
23. As an investor, it is my opinion that the identity of M7 should be revealed so as to provide transparency to Akorn's shareholders with respect to the efficacy of the Company's policy and its efforts to restrict the use of its products from being used to conduct or support capital punishment.
24. It is also my opinion that shielding the identity of the Missouri Department of Corrections' supplier of pentobarbital could hamper Akorn shareholders' efforts to measure, assess and manage investment risk.
25. I declare under penalty of perjury under the laws of the United States of America that the facts stated above are true and correct.

This the 28 day of September, 2016.

  
Thomas P. DiNapoli  
Comptroller of the State of New York

## **Exhibit A**

THOMAS P. DINAPOLI  
STATE COMPTROLLER



STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

DIVISION OF CORPORATE GOVERNANCE  
59 Maiden Lane-30th Floor  
New York, NY 10038  
Tel: (212) 383-1428  
Fax: (212) 383-1331

November 13, 2014

Mr. Joseph Bonaccorsi  
Senior Vice President, General Counsel, and  
Secretary  
Akorn, Inc.  
1925 West Field Court, Suite 300  
Lake Forest, Illinois 60045

Dear Mr. Bonaccorsi:

The Comptroller of the State of New York, Thomas P. DiNapoli, is the trustee of the New York State Common Retirement Fund (the "Fund") and the administrative head of the New York State and Local Retirement System. The Comptroller has authorized me to inform of his intention to offer the enclosed shareholder proposal for consideration of stockholders at the next annual meeting.

I submit the enclosed proposal to you in accordance with rule 14a-8 of the Securities Exchange Act of 1934 and ask that it be included in your proxy statement.

A letter from J.P. Morgan Chase, the Fund's custodial bank verifying the Fund's ownership of Akorn, Inc., shares, continually for over one year, is enclosed. The Fund intends to continue to hold at least \$2,000 worth of these securities through the date of the annual meeting.

We would be happy to discuss this initiative with you. Should the Akorn board decide to endorse its provisions as company policy, the Comptroller will ask that the proposal be withdrawn from consideration at the annual meeting. Please feel free to contact me at (212) 383-1428 and or email at [pdoherty@osc.state.ny.us](mailto:pdoherty@osc.state.ny.us) should you have any further questions on this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Patrick Doherty".

Patrick Doherty  
Director of Corporate Governance



## POLICY ON DEATH PENALTY DRUGS

Whereas, public controversy and human rights concerns regarding the use of the death penalty have escalated in recent years, in particular after a 2014 execution in Oklahoma received considerable public attention due to its prolonged duration and the convict's apparently unexpected physical reaction after lethal injection drugs were administered;

Akorn has been identified as a distributor of Midazolam, a drug that has been adopted by several states for potential use in lethal injections;

Many of Akorn's peers in the pharmaceutical industry, including Hospira, APP Pharma, and PAR Pharmaceuticals have taken steps to prevent their products from being utilized for lethal injections, but Akorn has not taken similar preventive actions;

International human rights groups have publicly called on Akorn to take steps to prevent Midazolam from being used in executions, and the Company has become a focus of public and media attention as one of the likely sources for lethal injection drugs;

Intense public outcry opposing the death penalty led the European Union to enact regulations in 2011 restricting the export of anesthetics used in lethal injection executions. As a result, states have been forced to look to domestic corporations, including Akorn for alternative drugs. As Akorn has become embroiled in the death penalty controversy, it has been exposed to reputational risk, and jeopardizes its role and reputation as a provider of health oriented products. There is also the possibility of increased financial and legal risk to the company resulting from the actual use of its products in executions;

**Therefore be it Resolved that:** Shareholders request that the Company issue a report at reasonable expense and excluding confidential information, describing the company's policy position regarding whether the company or its subsidiaries will provide products for purposes of aiding executions, and including an analysis of potential reputational risks associated with such policy position.

## **Exhibit B**



Sterile Ophthalmics and Injectables

February 27, 2015

Mr. Patrick Doherty  
Director of Corporate Governance  
State of New York, Office of the State Comptroller  
59 Maiden Lane, 30<sup>th</sup> Floor  
New York, NY 10038

Dear Mr. Doherty:

I am in receipt of your letter and shareholder proposal dated November 13, 2014. We always welcome feedback from our customers, suppliers, regulators, stakeholders and shareholders.

As demonstrated by the restricted distribution program we have in place for Nembutal<sup>®</sup> Sodium Solution (pentobarbital sodium injection, USP), Akorn has long held the belief that our products should not be used to conduct or support capital punishment. We appreciate you drawing the issue of the use of midazolam and hydromorphone in capital punishment to our attention.

Akorn strongly objects to the use of any of its products to conduct or support capital punishment. To formalize this belief, Akorn has adopted the below policy:

The employees of Akorn are committed to furthering human health and wellness through our vast portfolio of products. In the interest of promoting these values, Akorn strongly objects to the use of its products to conduct or support capital punishment through lethal injection or other means. To prevent the use of our products in capital punishment, Akorn will not sell any product directly to any prison or other correctional institution and we will restrict the sale of known components of lethal injection protocols to a select group of wholesalers who agree to use their best efforts to keep these products out of correctional institutions.

To further show our commitment to this policy, we plan to release the attached press release on Tuesday, March 3, 2015.

If your office is satisfied with our response, we would appreciate a timely confirmation of the withdrawal of your November 13, 2014 shareholder proposal. I am happy to discuss any questions or concerns you may have.

Sincerely,

Joseph Bonaccorsi  
General Counsel

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HERA  
TEARS

## **Exhibit C**



investors/Media:  
Dewey Steadman  
Executive Director, Investor Relations  
(847) 582-6923  
investor.relations@akorn.com

**FOR IMMEDIATE RELEASE**

## **Akorn Adopts Comprehensive Policy to Support the Use of its Products to Promote Human Health**

**- Akorn Will Not Ship Directly to Prisons -**

**- Programs to Be Put In Place to Limit Potential Product Diversion for Executions -**

LAKE FOREST, Ill. – March 3, 2015 -- Akorn, Inc. (Nasdaq: AKRX), today announced the company has adopted a comprehensive policy that endorses the use of its products to promote human health and wellness and condemns the use of its products - particularly midazolam and hydromorphone hydrochloride - in execution protocols.

Akorn's policy statement regarding the appropriate use of its products is as follows:

*The employees of Akorn are committed to furthering human health and wellness through our vast portfolio of products. In the interest of promoting these values, Akorn strongly objects to the use of its products to conduct or support capital punishment through lethal injection or other means. To prevent the use of our products in capital punishment, Akorn will not sell any product directly to any prison or other correctional institution and we will restrict the sale of known components of lethal injection protocols to a select group of wholesalers who agree to use their best efforts to keep these products out of correctional institutions.*

### **Direct Sales to Prisons Prohibited**

Earlier this year, Akorn adopted a policy not to accept direct orders from prison systems. Departments of Correction in the United States who wish to purchase Akorn products for a legitimate medical need may purchase from our approved list of wholesalers. However, prison purchases of hydromorphone hydrochloride injection, USP, and midazolam injection, USP, through these wholesalers will not be allowed.

### **Wholesalers Engaged to Help Control Distribution of Midazolam and Hydromorphone**

Building upon Akorn's prohibition of direct sales into prisons, the company is working to ensure that its distributors and wholesalers agree to not resell midazolam and hydromorphone to departments of correction and secondary wholesalers. In addition, Akorn plans to work with wholesalers and distributors to ensure that best efforts are used in other sales channels to prevent the sale of both products to prison systems.

### **Akorn Seeking the Return of Midazolam and Hydromorphone from Prison Systems**

Akorn has dispatched a letter to the attorneys general and heads of departments of correction of the states that currently execute inmates or have prisoners on death row along with the United States Attorney General, the United States Secretary of Defense, the Director of the Federal Bureau of Prisons and the Chairman of the Department of Defense

Corrections Council reiterating the company's policy on the appropriate use of its products. In addition, Akorn is seeking the return of any the company's products that may have been inappropriately purchased to aid in the execution process.

#### About Akorn

Akorn, Inc. is a specialty pharmaceutical company engaged in the development, manufacture and marketing of multisource and branded pharmaceuticals. Akorn has manufacturing facilities located in Decatur, Illinois; Somerset, New Jersey; Amityville, New York; Hettlingen, Switzerland and Paonta Sahib, India where the company manufactures ophthalmic, injectable and specialty non-sterile pharmaceuticals. Additional information is available on the company's website at [www.akorn.com](http://www.akorn.com).

#### Forward Looking Statements

This press release includes statements that may constitute "forward-looking statements", including projections of certain measures of Akorn's results of operations, projections of sales, projections of certain charges and expenses, projections related to the number and potential market size of ANDAs, projections with respect to timing and impact of pending acquisitions, and other statements regarding Akorn's goals, regulatory approvals and strategy. Akorn cautions that these forward-looking statements are subject to risks and uncertainties that may cause actual results to differ materially from those indicated in the forward-looking statements. These statements are made pursuant to the safe harbor provisions of the Private Securities Litigation Reform Act of 1995. Because such statements inherently involve risks and uncertainties, actual future results may differ materially from those expressed or implied by such forward-looking statements. You can identify these statements by the fact that they do not relate strictly to historical or current facts. They use words such as "anticipate," "estimate," "expect," "project," "intend," "plan," "believe," and other words and terms of similar meaning in connection with a discussion of future operating or financial performance. Factors that could cause or contribute to such differences include, but are not limited to: statements relating to future steps we may take, prospective products, prospective acquisitions, future performance or results of current and anticipated products and acquired assets, sales efforts, expenses, the outcome of contingencies such as legal proceedings, and financial results. These cautionary statements should be considered in connection with any subsequent written or oral forward-looking statements that may be made by the Company or by persons acting on its behalf and in conjunction with its periodic SEC filings. You are advised, however, to consult any further disclosures we make on related subjects in our reports filed with the SEC. In particular, you should read the discussion in the section entitled "Cautionary Statement Regarding Forward-Looking Statements" in our most recent Annual Report on Form 10-K, as it may be updated in subsequent reports filed with the SEC. That discussion covers certain risks, uncertainties and possibly inaccurate assumptions that could cause our actual results to differ materially from expected and historical results. Other factors besides those listed there could also adversely affect our results.

## **Exhibit D**

**The New York Times** <http://nyti.ms/1WwQjiv>

U.S.

# Pfizer Blocks the Use of Its Drugs in Executions

By ERIK ECKHOLM MAY 13, 2016

The pharmaceutical giant Pfizer announced on Friday that it had imposed sweeping controls on the distribution of its products to ensure that none are used in lethal injections, a step that closes off the last remaining open-market source of drugs used in executions.

More than 20 American and European drug companies have already adopted such restrictions, citing either moral or business reasons. Nonetheless, the decision from one of the world's leading pharmaceutical manufacturers is seen as a milestone.

"With Pfizer's announcement, all F.D.A.-approved manufacturers of any potential execution drug have now blocked their sale for this purpose," said Maya Foa, who tracks drug companies for Reprieve, a London-based human rights advocacy group. "Executing states must now go underground if they want to get hold of medicines for use in lethal injection."

The obstacles to lethal injection have grown in the last five years as manufacturers, seeking to avoid association with executions, have barred the sale of their products to corrections agencies. Experiments with new drugs, a series of botched executions and covert efforts to obtain lethal chemicals have mired many states in court challenges.

The mounting difficulty in obtaining lethal drugs has already caused states to furtively scramble for supplies.



Some states have used straw buyers or tried to import drugs from abroad that are not approved by the Food and Drug Administration, only to see them seized by federal agents. Some have covertly bought supplies from loosely regulated compounding pharmacies while others, including Arizona, Oklahoma and Ohio, have delayed executions for months or longer because of drug shortages or legal issues tied to injection procedures.

A few states have adopted the electric chair, firing squad or gas chamber as an alternative if lethal drugs are not available. Since Utah chooses to have a death penalty, "we have to have a means of carrying it out," said State Representative Paul Ray as he argued last year for authorization of the firing squad.

Lawyers for condemned inmates have challenged the efforts of corrections officials to conceal how the drugs are obtained, saying this makes it impossible to know if they meet quality standards or might cause undue suffering.

"States are shrouding in secrecy aspects of what should be the most transparent government activity," said Ty Alper, associate director of the death penalty clinic at the University of California, Berkeley, School of Law.

Before Missouri put a prisoner to death on Wednesday, for example, it refused to say in court whether the lethal barbiturate it used, pentobarbital, was produced by a compounding pharmacy or a licensed manufacturer. Akorn, the only approved company making that drug, has tried to prevent its use in executions.

Pfizer's decision follows its acquisition last year of Hospira, a company that has made seven drugs used in executions including barbiturates, sedatives and agents that can cause paralysis or heart failure. Hospira had long tried to prevent diversion of its products to state prisons but had not succeeded; its products were used in a prolonged, apparently agonizing execution in Ohio in 2014, and are stockpiled by Arkansas, according to documents obtained by reporters.

Because these drugs are also distributed for normal medical use, there is no way to determine what share of the agents used in recent executions were produced by Hospira, or more recently, Pfizer.

Campaigns against the death penalty, and Europe's strong prohibitions on the export of execution drugs, have raised the stakes for pharmaceutical companies. But many, including Pfizer, say medical principles and business concerns have guided their policies.

"Pfizer makes its products to enhance and save the lives of the patients we serve," the company said in Friday's statement, and "strongly objects to the use of its products as lethal injections for capital punishment."

Pfizer said it would restrict the sale to selected wholesalers of seven products that could be used in executions. The distributors must certify that they will not resell the drugs to corrections departments and will be closely monitored.

David B. Muhlhausen, an expert on criminal justice at the Heritage Foundation, accused Pfizer and other drug companies of "caving in to special interest groups." He said that while the companies have a right to choose how their products are used, their efforts to curb sales for executions "are not actually in the public interest" because research shows, he believes, that the death penalty has a deterrent effect on crime.

Pressure on the drug companies has not only come from human rights groups. Trustees of the New York State pension fund, which is a major shareholder in Pfizer and many other producers, have used the threat of shareholder resolutions to push two other companies to impose controls and praised Pfizer for its new policy.

"A company in the business of healing people is putting its reputation at risk when it supplies drugs for executions," Thomas P. DiNapoli, the state comptroller, said in an email. "The company is also risking association with botched executions, which opens it to legal and financial damage."

Less than a decade ago, lethal injection was generally portrayed as a simple, humane way to put condemned prisoners to death. Virtually all executions used the same three-drug combination: sodium thiopental, a barbiturate, to render the inmate unconscious, followed by a paralytic and a heart-stopping drug.

In 2009, technical production problems, not the efforts of death-penalty opponents, forced the only federally approved factory that made sodium thiopental to close. That, plus more stringent export controls in Europe, set off a cascade of events that have bedeviled state corrections agencies ever since.

Many states have experimented with new drug combinations, sometimes with disastrous results, such as the prolonged execution of Joseph R. Wood III in Arizona in 2014, using the sedative midazolam. The state's executions are delayed as court challenges continue.

Under a new glaring spotlight, deficiencies in execution procedures and medical management have also been exposed. After winning a Supreme Court case last year for the right to execute Richard E. Glossip and others using midazolam, Oklahoma had to impose a stay only hours before Mr. Glossip's scheduled execution in September. Officials discovered they had obtained the wrong drug, and imposed a moratorium as a grand jury conducts an investigation.

A majority of the 32 states with the death penalty have imposed secrecy around their drug sources, saying that suppliers would face severe reprisals or even violence from death penalty opponents. In a court hearing this week, a Texas official argued that disclosing the identity of its pentobarbital source "creates a substantial threat of physical harm."

But others, noting the evidence that states are making covert drug purchases, see a different motive. "The secrecy is not designed to protect the manufacturers, it is designed to keep the manufacturers in the dark about misuse of their products," said Robert Dunham, executive director of the Death Penalty Information Center, a research group in Washington.

Georgia, Missouri and Texas have obtained pentobarbital *from compounding pharmacies*, which operate without normal F.D.A. oversight and are intended to help patients meet needs for otherwise unavailable medications.

But other states say they have been unable to find such suppliers.

Texas, too, is apparently hedging its bets. Last fall, shipments of sodium thiopental, ordered by Texas and Arizona from an unapproved source in India, were seized in airports by federal officials.

For a host of legal and political reasons as well as the scarcity of injection drugs, the number of executions has declined, to just 28 in 2015, compared with a recent peak of 98 in 1999, according to the Death Penalty Information Center.

A version of this article appears in print on May 14, 2016, on page A1 of the New York edition with the headline: Pfizer Prohibits Use of Its Drugs for Executions.

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