

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO, <i>ex rel.</i> HOGAN LOVELLS US	:	
LLP and ELIZABETH A. OCH	:	
1601 Wewatta Street, Ste. 900	:	Case No. 2016-1776
Denver, CO 80202,	:	
	:	
Relators,	:	ORIGINAL ACTION
	:	IN MANDAMUS
	:	
v.	:	
	:	
OHIO DEPARTMENT OF	:	
REHABILITATION AND CORRECTION	:	
777 W. Broad Street	:	
Columbus, OH 43222,	:	
	:	
Respondent.	:	

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***AMICI CURIAE* BRIEF IN SUPPORT OF RELATOR  
ON BEHALF OF FRESENIUS KABI USA, LLC AND SANDOZ INC.**

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## STATEMENT OF INTEREST OF AMICI CURIAE

Fresenius Kabi USA, LLC and Sandoz Inc. (the Manufacturers), for their *amicus* brief, state:

The Manufacturers submit this *amicus curiae* brief in support of the disclosure of records in response to Relators' public-records request. Fresenius Kabi USA, LLC is a US-based subsidiary of Fresenius Kabi AG based in Germany and part of the Fresenius group of companies. Fresenius Kabi USA<sup>1</sup> is focused on providing drugs for the care of critically and chronically ill patients. It takes its stated mission – “Caring for Life” – very seriously, and, to that end Fresenius Kabi has sought to ensure that its medicines will not be used for lethal injection executions (though it takes no position on capital punishment). Fresenius Kabi manufactures, markets and distributes codes of each of Potassium Chloride, Rocuronium Bromide and Midazolam in the United States.

Sandoz Inc. is a Colorado corporation with corporate offices located at 100 College Road West, Princeton, New Jersey. One drug in its portfolio is Rocuronium Bromide, which is currently marketed in the United States but subject to a restricted distribution system as Sandoz does not support the use of any of its drugs for off-label use in connection with lethal injection.

As the manufacturers of the medicines listed in Ohio's execution protocol, *amici curiae* have an interest in knowing information relating to the drugs that ODRC has purchased for use in executions.

The Manufacturers are among over two dozen U.S. and international pharmaceutical companies which have instituted supply chain controls to prevent the sale of their medicines for

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<sup>1</sup> Fresenius Kabi USA, LLC was known until August 2012 as APP Pharmaceuticals, LLC, when its name was changed. Certain of its drugs still carry labeling and packaging referring to APP Pharmaceuticals. For simplicity, we refer to Fresenius Kabi throughout this brief even where labeling may reflect the name APP.

use in capital punishment, and in doing so, help ensure the availability of these drugs for patient care. *Pfizer Blocks the Use of Its Drugs in Executions*, N.Y. TIMES, May 13, 2016, at A1, available at <https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html>. The Manufacturers have made their position clear in public, have notified state authorities and departments of correction, and have instituted distribution controls to ensure that the drugs are only used to save and sustain lives of patients for whom they are needed.

The Manufacturers have significant commercial and other interests in ensuring the proper implementation of the controls. The use of the medicines in lethal injections carries with it serious reputational, fiscal, and legal risks for the manufacturers of these medicines. See, for example, the lawsuit brought by the family of Dennis McGuire, executed in Ohio in 2014, against pharmaceutical manufacturer Hospira, which attracted national and international coverage. *Family Sues in Protracted Ohio Execution*, N.Y. T, Jan 25, 2014 at A2, available at <https://www.nytimes.com/2014/01/26/us/family-sues-in-protracted-ohio-execution.html?mcubz=0>.

The Manufacturers have a keen and important interest in knowing whether any department of corrections have obtained their drugs despite and in contravention of their distribution controls and contracts. The Manufacturers have not requested to have records pertaining to them classified as confidential under R.C. 2949.221. To the contrary, the Manufacturers have publicly stated their opposition to the use of their medicines in executions. They have communicated directly with Departments of Corrections and Government officials in executing states affirming their intention to enforce their contractual rights and minimize associated reputational, fiscal, and legal risks by ensuring that their medicines not be diverted for use in capital punishment. As an example, Fresenius Kabi has written to Ohio's Governor

Kasich in September, 2013 and, together with two members of the Ohio Senate, on December, 2014, and, indeed, in December 2014, provided written testimony on HB 663, which was amended and became R.C. 2949.221, in regard to provisions that would have voided any agreements between manufactures and their distributors which seek to ensure that department of corrections cannot purchase drugs for their use in execution.

Any refusal by the state to disclose the manufacturers of its lethal injection drugs directly undermines the Manufacturers' interests, impeding their ability to preserve the integrity of their contracts. Recognizing the Manufacturers' interests, R.C. 2949.221 only extends confidentiality to companies that have affirmatively requested this right. Because the Manufacturers have not requested confidentiality, any records in ODRC's possession pertaining to the Manufacturers do not fall within this exemption and should thus be disclosed. To the extent that these records indicate a violation of manufacturer contracts, release of this information would allow the manufacturers to enforce their contractual rights and take appropriate steps to prevent future diversion of their medicines.

### **STATEMENT OF THE CASE AND FACTS**

The Amici defer to and adopt the Relators' Statement of the Case and Facts.

### **ARGUMENT**

### **PROPOSITIONS OF LAW**

#### **Proposition of Law No. I**

Mandamus is the appropriate remedy to compel compliance with R.C. 149.43.

Proposition of Law No. II

A public body may not invoke an exception under R.C. 149.43 without providing evidence that the exception applies.

Proposition of Law No. III

The Court should award Relators their reasonable attorneys' fees under R.C. 149.43(C)(2).

The Amici defer to and adopt the Propositions of Law of Relators.

**SUMMARY**

For the reasons set forth above, *Amici Curiae* respectfully request that the Court enter judgment on Relators' Petition and issue a writ of mandamus compelling ODRC to comply with its obligations under R.C. 149.43.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing *Amici Curiae* Brief in Support of Relator on Behalf of Fresenius Kabi USA, LLC and Sandoz Inc. was filed on the 10<sup>th</sup> day of July, 2017 and a copy served via First Class Mail, postage prepaid on the following:

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