

IN THE CIRCUIT COURT OF COLE COUNTY  
STATE OF MISSOURI

THE REPORTERS COMMITTEE FOR	)	
FREEDOM OF THE PRESS et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 14AC-CC00254
	)	
DEPARTMENT OF	)	
CORRECTIONS,	)	
	)	
Defendant.	)	

DEFENDANT’S SUGGESTIONS IN OPPOSITION OF PLAINTIFFS’  
MOTION FOR JUDGMENT ON THE PLEADINGS

**Background**

Plaintiffs allege in their pleadings they made several records requests to the Department of Corrections (“Department”) seeking records that would identify the pharmacist, pharmacy, and laboratories used in producing drugs used for executions. Plaintiffs’ Petition ¶¶ 15, 17, 19, 21, 23. They alleged that the Department withheld the records that would identify the pharmacy and laboratories. Plaintiffs’ Petition ¶¶ 14, 16, 18, 20, 22, 25. Plaintiffs further pled that the Department “announced on October 22, 2013, that it had added a compounding pharmacy to its execution team” and had made “public a new execution protocol.” Plaintiffs’ Petition ¶¶ 13, 31, 32, 33. However, no copy of the execution protocol was attached to their petition, nor was the text of the Department’s protocol quoted or referenced.

Plaintiffs filed a motion for judgment on the pleadings, arguing that the Department's interpretation of the "execution team" in § 546.720 is overly broad. Plaintiffs' Suggestions at 2, Plaintiffs' Petition ¶ 36.

### Legal Standard

The standard for a motion for judgment on the pleadings is "whether the moving party is entitled to judgment as a matter of law on the face of the pleadings." *Ocello v. Koster*, 354 S.W.3d 187, 197 (Mo. 2011); *RGB2, Inc. v. Chestnut Plaza, Inc.*, 103 S.W.3d 420, 424 (Mo. App. W.D. 2003). "This court will not blindly accept the legal conclusions drawn by the pleaders from the facts." *Ocello*, 354 S.W.3d at 197 (Mo. 2011) (citations omitted). "The well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion." *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 599 (Mo. banc 2007). "Matters quoted in, attached to, or incorporated by reference into the pleadings may be considered." *In re Marriage of Busch*, 310 S.W.3d 253, 259 (Mo. App. E.D. 2010) (citations omitted) "However, matters not properly incorporated into the pleadings may not be considered." *Id.*

"Before the court can grant a motion for a judgment on the pleadings, all averments in all pleadings must show no material issue of fact exists; that all that exists is a question of law." *Paragon Lawns, Inc. v. Barefoot, Inc.* 304 S.W.3d 298, 301 (Mo. App. W.D. 2010) (citations omitted).

## Argument

*The execution protocol is a material issue of fact not found in the pleadings.*

A judgment on the pleadings cannot be granted here because a material issue of fact exists that was not included “on the face of the pleadings.” *See Ocello*, 354 S.W.3d at 197. Plaintiffs argue that the Department exceeded its authority under § 546.720 by adding members to the execution team which the statute does not authorize. Section 546.720.2 states in relevant part:

The director of the department of corrections shall select an execution team ... The identities of members of the execution team, **as defined in the execution protocol of the department of corrections**, shall be kept confidential.

(Emphasis added). For this Court to rule whether the director of the Department exceeded his authority in naming the execution team, it is material to know how the Department “defined” the “members of the execution team.” That definition, by the plain language of §546.720.2, is found “in the execution protocol of the department of corrections.”

The execution protocol is not “quoted in, attached to, or incorporated by reference” in Plaintiffs’ petition. *See In re Marriage of Busch*, 310 S.W.3d at 259. Instead, Plaintiffs only reference a small portion of a press release where the Department *announces* it changed the protocol. Plaintiffs’ Petition ¶¶ 13, 32, 33. Section 546.720.2 instructs the Department to define the team

in the protocol, not a press release. It would be a meaningless exercise for this Court to address only an excerpt of a press release that paraphrases the execution protocol rather than the protocol itself.

There should be no dispute over how the Department defines the execution team because “the section of an execution protocol that directly relates to the administration of lethal gas or lethal chemicals is an open record.” § 546.720.2. In fact, the Department has already provided the protocol to the Plaintiffs and despite their repeated arguments that the protocol includes only companies<sup>1</sup>, the protocol itself specifically includes certain individuals. However, the protocol was not part of Plaintiffs’ petition and cannot be considered in a motion for judgment on the pleadings which is limited to the well pleaded facts “on the face of the pleadings.” *See Ocello*, 354 S.W.3d at 197.

*Plaintiffs raise matters outside the pleadings.*

In addition to failing to include material facts in their pleadings, Plaintiffs have peppered their motion for judgment on the pleadings with matters not raised in their petition. Plaintiffs cite First Amendment cases while no First Amendment claims were raised in their petition. Plaintiffs’

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<sup>1</sup> Plaintiffs’ Petition ¶¶ 13, 32, 33, 34; Motion for Judgment on the Pleadings ¶ 3; Suggestions at 4, 6-7.

Suggestions, pgs 8, 9, 12. More egregiously, Plaintiffs' urge the Court to "take judicial notice" of numerous historical facts regarding executions not raised in the petition. *See* Plaintiffs' Suggestions at 6, fn 2 and pgs. 9-12. It is well established that in a motion for judgment on the pleadings, a "trial court may not consider unpleaded matters by taking judicial notice of them." *In re Marriage of Busch*, 310 S.W.3d at 259. (citations omitted).

### **Conclusion**

Because Plaintiffs did not include material facts in their petition, and raised matters outside of the pleadings, Plaintiffs' motion for judgment on the pleadings should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri CaseNet, on September 11th, 2014, to:

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