

**RECEIVED**

**Jun 11 2021**

S.C. SUPREME COURT

**EXHIBIT 1**

**Order Denying Preliminary Injunction, June 11, 2021**

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Freddie Eugene Owens and Brad Keith  
Sigmon,

Plaintiffs,

v.

Bryan P. Stirling, in his official capacity as  
Director of the South Carolina Department of  
Corrections; South Carolina Department of  
Corrections; and Henry McMaster, in his  
official capacity as Governor of the State of  
South Carolina,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2021CP4002306

**ORDER DENYING PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

This matter came before the Court for consideration of Plaintiffs' "Motion for Preliminary Injunction and Expedited Discovery and Hearing," which was filed on May 17, 2021. "Defendants' Joint Response to Motion for a Preliminary Injunction" was filed on June 3, 2021; and Plaintiffs filed a Reply thereto on June 7, 2021.

Oral arguments on the motion were heard at the Richland County Judicial Center on June 7, 2021. Plaintiffs were represented by J. Christopher Mills, Esquire, and Hannah Freedman, Esquire; Defendant Henry McMaster ("the Governor") was represented by W. Grayson Lambert, Esquire; and Defendants Bryan P. Stirling ("Stirling") and the South Carolina Department of Corrections ("SCDC") were represented by Daniel Plyler, Esquire.

Having fully considered the parties arguments, the Court DENIES Plaintiffs' Motion for Preliminary Injunction, as is more fully set forth below.

## BACKGROUND

Plaintiffs are inmates at the South Carolina Department of Corrections (“SCDC”), both having been convicted of murder and sentenced to death. They have each been on death row for about two decades now, and they have exhausted their direct and collateral appeals. *See Owens v. Stirling*, 967 F.3d 396 (4th Cir. 2020), *cert. denied*, 141 S. Ct. \_\_\_\_, No. 20-975, 2021 WL 1520801 (U.S. Apr. 19, 2021); *Sigmon v. Stirling*, 956 F.3d 183 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 1094 (2021). Therefore, the Supreme Court of South Carolina issued notices setting execution dates for Plaintiffs – one on June 18, 2021, and the other on June 25, 2021.

At the time of Plaintiffs’ convictions, South Carolina law provided for execution by both electrocution and lethal injection. *See* 1995 S.C. Acts No. 108, §1 (codified at S.C. CODE ANN. §24-3-530(A) (2007)) (“the 1995 law”). Under that law, an inmate had to elect one of those methods fourteen days before his execution. *Id.* If he made no election, lethal injection was the default method of execution. *Id.*

In its 2021 session, the South Carolina General Assembly revised the 1995 law, changing the default method of execution to electrocution and adding another method of execution, a firing squad. *See* 2021 S.C. Acts No. 43, R-56, S. 200 (codified at S.C. CODE ANN. §24-3-530) (“the 2021 law”). Under the 2021 law, a “person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the penalty by electrocution or, at the election of the convicted person, by firing squad or lethal injection, if it is available at the time of election.” *Id.* at §1. The 2021 law “applies to persons sentenced to death as provided by law prior to and after [its] effective date.” *Id.* at §3.

Within days of the Governor signing off on the 2021 law, Plaintiffs filed this action to challenge its constitutionality. They contend that the 2021 law violates: (i) the Due Process

Clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution; (ii) the prohibitions on *ex post facto* punishment in Article I, Section 9, Clause 3 of the United States Constitution and Article I, Section 4 of the South Carolina Constitution; and (iii) the non-delegation doctrine implicit in Article I, section 8 of the South Carolina Constitution. Thus, Plaintiffs filed their “Motion for Preliminary Injunction and Expedited Discovery and Hearing,” asking this Court to enjoin Stirling, SCDC and the Governor from taking any action pursuant to the 2021 law, thereby staying their scheduled executions.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

South Carolina’s courts have been clear that “[t]he remedy of an injunction is a drastic one and ought to be applied with caution.” *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). Such a remedy can only be used in very limited circumstances. *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). To establish entitlement to injunctive relief, a plaintiff must demonstrate a likelihood of success on the merits, that they will suffer irreparable harm in the absence of an injunction, and that they have no adequate remedy at law. *Helsel v. City of North Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992).

When determining whether an injunction should issue, the circuit court examines the “merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient *prima facie* showing of entitlement to relief.” *Compton v. S.C. Dep’t of Corr.*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011). The plaintiff “need not prove an absolute legal right.” *Levine v. Spartanburg Reg’l Servs. Dist., Inc.*, 626 S.E.2d 38, 42 (Ct. App. 2005). Rather, once a “*prima facie* showing has been made entitling the plaintiff to injunctive relief, a temporary

injunction will be granted without regard to the ultimate termination of the case on the merits.” *Helsel*, 307 S.C. at 32, 413 S.E.2d at 826.

Here, there is no dispute that Plaintiffs will suffer irreparable harm in the absence of an injunction. Without court intervention, Plaintiffs will be put to death in a matter of days. However, though the loss of life may be a horrendous consequence – whether for Plaintiffs or their victims – this Court’s analysis cannot be based on sympathy, retribution or any other emotion. Rather, Plaintiffs must next demonstrate a likelihood of success on the merits of their claims. They have failed to do so.

### **I. *Ex Post Facto* Law**

Plaintiffs’ first contention is that the 2021 law amounts to an impermissible *ex post facto* law. In other words, Plaintiffs argue that, by changing the default method of execution from lethal injection to electrocution, the punishment for their crimes has increased. The Court disagrees.

It is clear that both the Constitution of the United States and the Constitution of the State of South Carolina forbid *ex post facto* legislation. U.S. Const. art. I § 10 (“No State shall . . . pass any . . . *ex post facto* law”); S.C. Const. art. I § 4 (“No . . . *ex post facto* law . . . shall be passed”). Therefore, legislative bodies are forbidden from enacting any “law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.” *Calder v. Bull*, 3 U.S. 386, 390 (1798). In other words, a law is *ex post facto* when it “produces a sufficient risk of increasing the measure of punishment attached to the covered crimes,” *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 509 (1995).

At the time of Plaintiffs’ convictions, South Carolina provided, “A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years.” S.C. CODE ANN. § 16-3-20(A) (2002);

S.C. CODE ANN. §16-3-20(A) (2006). The law – entitled “Punishment for Murder” – remains the same today. S.C. CODE ANN. §16-3-20(A) (2010). The 2021 law, however, is found in Title 24 of the South Carolina Code of Laws, the same title which establishes SCDC and provides the framework for a number of topics, ranging from the wearing of jewelry by prisoners to the disposition of a prisoner’s body once a death sentence is carried out. There is a distinct difference between a punishment itself and the manner in which a sentence is effected.

This principle was discussed in *Malloy v. South Carolina*, 237 U.S. 180 (1915). In that matter, Malloy was scheduled to be executed when the General Assembly changed the law concerning the method of execution. *Id.* Malloy challenged the change in law, calling it *ex post facto* legislation. *Id.* at 183 (“The contention in behalf of plaintiff in error most earnestly relied on is this: Any statute enacted subsequent to the commission of a crime which undertakes to change the punishment therefor is *ex post facto* and unconstitutional unless it distinctly modifies the severity of the former penalty.”). In rejecting Malloy’s argument, the Court explained, “The [South Carolina] statute under consideration did not change the penalty – death – for murder, but only the mode of producing this, together with certain nonessential details in respect of surroundings.” *Id.* at 185. “The punishment was not increased, and some odious features incident to the old method were abated.” *Id.*

The same can be said of the 2021 law in this case. Plaintiffs have known for many years that they were to be punished for their crimes by the loss of their own lives. Nothing has changed about that; “there was no change in the quantum of punishment attached to the crime.” *See Dobbert v. Florida*, 432 U.S. 282, 294 (1977). While the 2021 law may contain procedural changes to the manner of effecting Plaintiffs’ sentences, procedural changes do not amount to *ex post facto* violations. *See id.*; *see also Montana v. Fitzpatrick*, 684 P.2d 1112, 1113 (Mont. 1984)

(“Death by lethal injection is not a legislatively created punishment. The punishment is the sentence of death.”); *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997) (“[T]he sentence was death, and that sentence remains in place. The change in method does not make the sentence more burdensome and so does not violate the *Ex Post Facto* Clause.”). Because this is well-established law, the Court finds that Plaintiffs have made neither a *prima facie* showing of entitlement to relief nor a likelihood of success on the merits of their claim.

## II. Due Process Violation

Plaintiffs’ next argument is that they have a vested, statutory right to be executed by lethal injection rather than electrocution or firing squad. They argue (without legal support for their claim) that Defendants are attempting to revoke this vested right without due process, which is unconstitutionally impermissible. The Court disagrees that such a right exists.

One of the founding principles in the law is that no state shall “deprive any person of life, liberty, or property, without due process of law” U.S. Const. Am. XIV; *see also* S.C. Const. art. I, §3 (“The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.”). However, “In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law.” *Sloan v. S.C. Bd. of Physical Therapy Examiners*, 370 S.C. 452, 483, 636 S.E.2d 598, 614 (2006) (citations omitted). He may likewise show the arbitrary deprivation of a cognizable interest in life or liberty.

Plaintiffs have done none of that here. Instead, Plaintiffs – in a somewhat arbitrary and capricious manner on their part – contend that they have a vested statutory right to elect lethal

injection as their manner of execution. According to them, they have relied on the 1995 statute which allowed them to reject electrocution as their manner of death and made decisions consistent with that reliance at the time of trial. Plaintiffs neither offer support for this contention. Plaintiffs also fail to point to any legal precedent which would buttress their argument, perhaps because there is none (at least, none that was located by this Court).

Rather than making a *prima facie* showing of entitlement to relief, it appears that Plaintiffs are attempting to advance a novel, untested legal theory. The Court finds that no *prima facie* showing has been made and, therefore, no likelihood of success on the merits of this claim. For this reason, injunctive relief is not warranted.

### **III. Remaining Arguments**

Plaintiffs' remaining arguments concerning the 2021 law – that it is void for vagueness and that violates the non-delegation doctrine – are also unavailing. The Court finds that these ancillary arguments lack foundation and support. Plaintiffs are unlikely to prevail in an argument that the 2021 law is void because of certain grammatical rules, as the law on its face can be clearly understood. Similarly, the contention that the 2021 law gives Stirling “unfettered discretion” such that it violates the government’s separation of powers is lacking in support. The Court can find no likelihood of success on the merits of either of these claims; therefore, injunctive relief must be denied.

### **CONCLUSION**

Despite Plaintiffs' best efforts, the Court finds that they have failed to make the requisite showing of a likelihood of success on the merits of their claims. Without such a showing, it is wholly inappropriate for this Court to attempt to usurp the authority of the Supreme Court of South

Carolina by effectively nullifying the execution notices which have been served on Plaintiffs after dozens of years of otherwise unsuccessful appeals.

IT IS, THEREFORE, ORDERED that Plaintiffs' "Motion for Preliminary Injunction and Expedited Discovery and Hearing" is DENIED.

AND IT IS SO ORDERED.



Richland Common Pleas

**Case Caption:** Freddie Eugene Owens , plaintiff, et al vs Bryan P Stirling , defendant,  
et al  
**Case Number:** 2021CP4002306  
**Type:** Order/Temporary Injunction

So Ordered

Jocelyn Newman

## **EXHIBIT 2**

### **Communications Between SCDC Director Stirling & South Carolina Supreme Court about Execution Method Availability**

# SMITH ROBINSON

Forward thinking. Results driven.

Smith Robinson Holler DuBose and Morgan, LLC

COLUMBIA 2530 Devine Street, Columbia, SC 29205  
P: 803.254.5445 F: 803.254.5007

SUMTER 126 N. Main Street, Sumter, SC 29151  
P: 803.778.2471 F: 803.778.1643

CAMDEN 935 Broad Street, Camden, SC 29020  
P: 803.432.1992 F: 803.432.0784

Reply To: Daniel C. Plyler  
Columbia Office

June 3, 2021

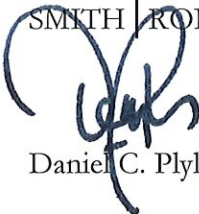
The Honorable Daniel E. Shearouse  
Clerk of Court for South Carolina Supreme Court  
Supreme Court Building  
1231 Gervais Street  
Columbia, SC 29201

RE: Brad Keith Sigmon, SK # 6008

Dear Mr. Shearouse:

Pursuant to S.C. Code Ann. Section 24-3-530(B), the Director of the Department of Corrections is required to certify by affidavit under the penalty of perjury to the Supreme Court the available methods of execution. Please find enclosed the certification of Director Bryan Stirling regarding the available methods of execution.

Very truly yours,

SMITH ROBINSON  
  
Daniel C. Plyler

cc: J. Christopher Mills, Esquire ([chris@chrismillslaw.com](mailto:chris@chrismillslaw.com))  
Lindsey S. Vann, Esquire ([lindsey@justice360sc.org](mailto:lindsey@justice360sc.org))  
Emily C. Paavola, Esquire ([emily@justice360sc.org](mailto:emily@justice360sc.org))  
Hannah Freedman, Esquire ([hannah@justice360sc.org](mailto:hannah@justice360sc.org))  
Megan Barnes, Esquire ([megan@justice360sc.org](mailto:megan@justice360sc.org))  
Brendan Van Winkle, Esquire ([brendan@justice360sc.org](mailto:brendan@justice360sc.org))  
Joshua Snow Kendrick, Esquire ([josh@kendrickleonard.com](mailto:josh@kendrickleonard.com))  
Gerald "Bo" King, Esquire ([Gerald\\_king@fd.org](mailto:Gerald_king@fd.org))  
Melody Brown, Esquire ([mbrown@scag.gov](mailto:mbrown@scag.gov))

**THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

---

The State,

Respondent,

v.

Brad Keith Sigmon,

Appellant.

Appellate Case No. 2002-024388

---

Greenville County  
(Trial Court Case No. 2001GS2307629,  
2001GS2307630, 2001GS2307631)

---

---

**AFFIDAVIT OF BRYAN P. STIRLING  
DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF  
CORRECTIONS**

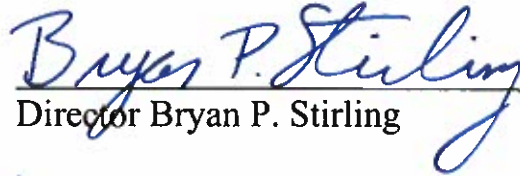
PERSONALLY APPEARED BEFORE ME, BRYAN P. STIRLING, who  
being duly sworn, deposes and states as follows:

1. I am over the age of eighteen and competent to give this testimony.
2. I serve as the Director of the South Carolina Department of Corrections (hereinafter "Department"), having first been appointed as interim to this position in October of 2013 and later confirmed by the South Carolina Senate as Director thereafter.
3. Pursuant to S.C. Code Ann. Section 24-3-530(B), I am charged with certifying, under penalty of perjury, the available methods of execution upon receiving a notice of execution issued by the South Carolina Supreme Court.
4. According to S.C. Code Ann. Section 25-3-530, there are three, statutorily approved methods of execution. Specifically, the General

Assembly has approved electrocution, lethal injection, and firing squad as methods for carrying out a lawful sentence of death.

5. On Thursday, May 27, 2021, my office received a copy of an Execution Notice issued by the Clerk for the South Carolina Supreme Court regarding Brad Keith Sigmon.
6. I hereby certify that, as of this date, the only statutorily approved method of execution available to the South Carolina Department of Corrections is electrocution.

FURTHER AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
Director Bryan P. Stirling

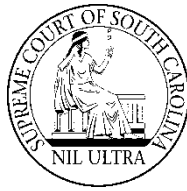
SWORN TO BEFORE ME THIS 3rd

DAY OF June, 2021

N. Dayne Haile (SEAL)

NOTARY PUBLIC FOR S.C.

COMMISSION EXPIRES: 3/12/2024



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA  
29211  
1231 GERVAIS STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1080  
FAX: (803) 734-1499  
[www.sccourts.org](http://www.sccourts.org)

June 4, 2021

Bryan Peter Stirling, Esquire  
Director, South Carolina Department of Corrections  
4444 Broad River Road  
Columbia, SC 29210

Re: The State v. Brad Keith Sigmon  
Appellate Case No. 2002-024388

Dear Mr. Director:

Your affidavit dated June 3, 2021, has been received.

You are requested to provide an explanation as to why two methods of execution under the statute, lethal injection and firing squad, are currently unavailable. This explanation should be served and filed by noon on Tuesday, June 8, 2021.

Very truly yours,

CLERK

cc: Alan McCrory Wilson, Esquire  
Donald J. Zelenka, Esquire  
Melody Jane Brown, Esquire

Megan Elizabeth Barnes, Esquire  
Joshua Snow Kendrick, Esquire  
Barton Jon Vincent, Esquire  
Daniel Clifton Plyler, Esquire



HENRY McMASTER, Governor  
BRYAN P. STIRLING, Director

June 8, 2021

**RECEIVED**

**Jun 08 2021**

**S.C. SUPREME COURT**

The Honorable Daniel E. Shearouse  
Clerk of Court for South Carolina Supreme Court  
Supreme Court Building  
1231 Gervais Street  
Columbia, SC 29201

RE: The State v, Brad Keith Sigmon  
Appellate Case No. 2002-024388

Dear Mr. Shearouse:

This letter is in response to your June 4, 2021 letter asking for an explanation as to why two of the statutorily approved methods of execution, lethal injection and firing squad, are not available in the execution of Brad Keith Sigmon.

As to lethal injection, the South Carolina Department of Corrections (SCDC) has been unable, despite numerous and diligent attempts, to acquire the drugs necessary, in useable form, to perform a lethal injection. SCDC, like many other departments of corrections across the nation,<sup>1</sup> has been repeatedly told, in no uncertain terms, by manufacturers of the drugs needed for a lethal injection that they will not sell SCDC such drugs. Attached is a copy of the most-recent correspondence from a major manufacturer of the drugs needed for lethal injection as an example of the numerous correspondence SCDC has received. *See* Exhibit A. SCDC has received similar letters from manufacturers of the necessary drugs over the years.

Since all of SCDC's efforts to obtain the necessary drugs from a manufacturer of such drugs have failed, SCDC has also explored having a licensed pharmacy and pharmacist compound the drugs. Those efforts have also been unsuccessful.

As for firing squad, SCDC does not currently have the necessary policies and protocols, as required by the statute, for an execution by firing squad. SCDC began working on acquiring the necessary information needed for the development of policies and protocols for a firing squad as soon as the Bills that were making their way through the General Assembly were amended to add firing squad as a statutorily approved method of execution. SCDC's process of developing the policies and protocols for a firing squad entails working with other States that already have firing squad available as a method of

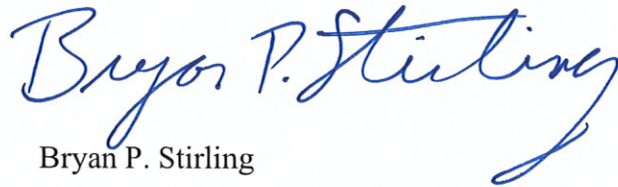
<sup>1</sup> *See Glossip v. Gross*, 576 U.S. 863, 135 S.Ct. 2726, 196 L.Ed.2d 761 (2015)

The Honorable Daniel Shearouse  
Clerk to the Supreme Court of South Carolina  
June 8, 2021  
Page 2

---

execution, and SCDC is currently working on establishing policies and protocols for an execution by firing squad and expects to have those policies and protocols finalized in the next few weeks. After those policies and procedures are finalized, the process will then turn to implementation, and the time frame for implementation will be dependent on the finalized policies and procedures.

Very truly yours,

A handwritten signature in blue ink that reads "Bryan P. Stirling". The signature is written in a cursive style with a long, sweeping tail on the letter "g".

Bryan P. Stirling

cc: Alan McCrory Wilson, Esquire  
Donald J. Zelenka, Esquire  
Melody Jane Brown, Esquire  
Megan Elizabeth Barnes, Esquire  
Joshua Snow Kendrick, Esquire  
Barton Jon Vincent, Esquire  
Daniel Clifton Plyler, Esquire



Corporate Headquarters  
Hikma Pharmaceuticals USA Inc.  
200 Connell Drive 4th Floor  
Berkeley Heights, NJ 07922

T 1.908.673.1030 F  
1.908.673.1042

May 10, 2021

The Honorable Henry McMaster  
Governor, State of South Carolina

Alan Wilson  
Attorney General

Bryan Stirling  
Head, Department of Corrections

RECEIVED

Jun 08 2021

S.C. SUPREME COURT

RECEIVED

JUN 07 2021

DIRECTOR

Dear Governor McMaster, Mr. Wilson, and Mr. Stirling:

Hikma is a global pharmaceutical company committed to improving patient lives by providing access to high quality, affordable medicines. Our medicines are used by medical professionals and patients millions of times each day to treat illness and save lives. This has been our mission for more than 40 years.

As Hikma has done in past years, I am writing to remind you of our objection in the strongest possible terms to the use of any of our products for lethal injection and to request confirmation in writing that the state of South Carolina or any facility run directly by the state of South Carolina is not in possession of any Hikma/West-Ward products that it intends to use for capital punishment.

Despite our best efforts to ensure our medicines are used only for their intended medicinal purposes, including a requirement that they only be supplied to pre-authorized customers who agree not to sell them to Departments of Correction or other entities that intend to use them for capital punishment, some states continue to attempt to procure our products from distributors and other intermediaries for this purpose. Not only is this contrary to our intention of manufacturing medicines for the health and well-being of patients in need, but also it is completely counter to our company values.

As a result, we have had to extend the restriction of products to include a broad range of medicines. This list of restricted products is kept current on our website at [www.hikma.com](http://www.hikma.com). We would like to make clear that our objection to the use of our medicines in capital punishment should be applied to all our products, whether manufactured within or outside the US.

We also request that the Director and other relevant South Carolina Department of Corrections officials not circumvent our carefully prepared controls or take any actions that would undermine the specially drafted legal provisions in our agreements. In the event we are forced to implement additional controls to prevent diversion and misuse of our medicines, such action may have the unintended consequence of potentially preventing certain patients from receiving these medicines despite having a genuine medical need. This outcome would not be beneficial for anyone, particularly the good people of South Carolina.

High quality, generic medicines play a vital role in improving health. As such, we hope you will be our partner in furthering our values and upholding our policy prohibiting the use of our medicines in capital punishment.



Corporate Headquarters  
Hikma Pharmaceuticals USA Inc.  
200 Connell Drive 4th Floor  
Berkeley Heights, NJ 07922

T 1.908.673.1030 F  
1.908.673.1042

Kindly respond to this request by June 11, 2021.

Thank you.

Steven H. Weiss  
Head of US Communications and Public Affairs  
[sweiss@hikma.com](mailto:sweiss@hikma.com)

---