EFiled: Jan 05 2022 03:32PM EST
Transaction ID 67210534
Case No. 2021-1118-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LEBANON COUNTY EMPLOYEES' RETIREMENT FUND and TEAMSTERS LOCAL 443 HEALTH SERVICES & INSURANCE PLAN, Plaintiffs, v. STEVEN H. COLLIS, RICHARD W. GOCHNAUER, LON R. GREENBERG, JANE E. HENNEY, M.D., KATHLEEN W. HYLE, MICHAEL J. LONG, HENRY W. MCGEE, ORNELLA BARRA, D. MARK DURCAN, and CHRIS ZIMMERMAN Defendants, -and- AMERISOURCEBERGEN CORPORATION, Nominal Defendant.	)	C.A. No. 2021-1118-JTL **PUBLIC INSPECTION VERSION FILED JANUARY 5, 2022**

VERIFIED STOCKHOLDER DERIVATIVE COMPLAINT

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Dated: December 30, 2021

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Plaintiffs Lebanon County Employees' Retirement Fund and Teamsters Local 443 Health Services & Insurance Plan (together "Plaintiffs"), by their attorneys, respectfully submit this Verified Stockholder Derivative Complaint for the benefit of nominal defendant AmerisourceBergen Corporation ("ABC," "AmerisourceBergen" or the "Company") against certain current members of its Board of Directors (the "Board") and executive officers Steven G. Collis, and Chris Zimmerman (collectively, the "Individual Defendants") seeking to remedy the Individual Defendants' breaches of fiduciary duties.

Plaintiffs make these allegations upon personal knowledge as to those allegations concerning Plaintiffs and, as to all other matters, upon information and belief based on the investigation of the undersigned counsel, which includes the review and analysis of: (i) AmerisourceBergen's public filings with the United States Securities and Exchange Commission ("SEC"); (ii) press releases and other publications disseminated by AmerisourceBergen, related parties, and related non-parties; (iii) certain of AmerisourceBergen's internal Board minutes and Board-level materials obtained through an action pursuant to 8 *Del. C.* § 220 seeking the inspection of Company books and records; (iv) the proceedings of litigation filed against the Company concerning AmerisourceBergen's distribution of opioids by numerous Attorneys General and other government officials; (v) Congressional reports and investigations concerning AmerisourceBergen's distribution of opioids;

and (vi) other publicly available information concerning AmerisourceBergen and the Individual Defendants.

I. NATURE OF THE ACTION

1. While being one of the three biggest drug distributors in the United States has its benefits, ensuring that your distribution platform does not contribute to massive illegal opioid sales is an obligation that comes with the territory. Employees must know that. Senior managers must know that. And members of the board of directors must know that.

2. This stockholder derivative suit arises from the failure of directors and officers of AmerisourceBergen to adopt, implement or oversee reasonable policies and practices to prevent the unlawful distribution of deadly and highly addictive drugs, and their repeated failure to act when undeniable evidence of widespread illegal opioid sales emerged. Rather, certain members of senior management and ABC's Board have long reflected just the type of "devil may care" attitude that is synonymous with a breach of fiduciary duty. As a result, ABC has faced serious threats of the loss of its drug distribution licenses, and has suffered billions of dollars in fines and harm.

3. ABC is licensed by the United States Drug Enforcement Administration ("DEA") to distribute these controlled substances. This licensing, and the applicable laws and regulations, impose affirmative legal obligations on ABC to implement and

maintain effective systems for monitoring, detecting, preventing, and reporting suspicious orders of controlled substances. ABC is required to investigate suspicious orders, block their shipment, and report them to the DEA.

4. Despite the Company and the Board's knowledge of these obligations, including from prior regulatory actions against ABC, the Board for many years: (i) failed to take good faith steps to ensure that ABC had an effective compliance monitoring system for its distribution of opioids and other controlled substances, and (ii) approved business plans that doubled down on the sale to independent pharmacies knowing that the Company's monitoring system was not effective and the independent pharmacies were a major source of improperly distributed opioids and other controlled substances.

5. In short, ABC's directors and officers have meaningfully exacerbated the opioid epidemic that continues to plague the United States. Simply stated, the regulatory scheme has real world application. The consequences for the Board's failure has been predictably tragic for the country. The abuse of opioids has grown dramatically, harming communities across the country and killing hundreds of thousands of Americans.

6. The consequences of the Board's failure has also been predictably disastrous for the Company. ABC has been, *inter alia*, (i) the subject of a U.S. Senate investigation and report of its failure to comply with the law for its distribution of

opioids in Missouri, (ii) the subject of a Congressional investigation and report of its failure to comply with the law for its distribution of opioids in West Virginia, (iii) named as a defendant in more than 1,800 lawsuits by State Attorneys General, states, cities, counties, sovereign Native American tribes and others in a massive Multidistrict Litigation ("Opioid MDL") based on ABC's failure to follow the law for the distribution of opioids, and (iv) the target of a long running and expanding U.S. Department of Justice ("DOJ") civil and criminal investigation. To date, ABC has paid or agreed to pay almost $7 billion in fines and settlements regarding the improper distribution of opioids.

7. On April 24, 2007, the DEA issued an Order to Show Cause and Immediate Suspension that suspended ABC's license to distribute controlled substances through the Company's Orlando, Florida distribution center. The DEA asserted that ABC failed to maintain effective controls against diversion of hydrocodone, a controlled substance. On June 22, 2007, the Company entered into a settlement with the DEA in which the Company agreed to implement a more sophisticated monitoring program for distribution of controlled substances. Two months later, the suspension was lifted. The Board was well aware of this DEA action and settlement, as it is described in the Company's annual report signed by the directors for five consecutive years, including the majority of the current directors.

8. In early 2007, ABC agreed to acquire Bellco Drug Corporation ("Bellco") for $235 million. Bellco sold drugs, including opioids and other controlled substances, to independent pharmacies. Bellco primarily operated in the New York metropolitan area. Shortly after the Company agreed to this acquisition, Bellco entered into a Consent Judgment with the DEA (the "Bellco Consent Judgment") for violations of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (the "Controlled Substances Act" or "CSA"). The Bellco Consent Judgment required Bellco to: (i) forfeit its controlled substances license, (ii) divest itself of all controlled substances in inventory, and (iii) pay a fine of $800,000. It further provided that Bellco's license to distribute prescription opioids would only be reinstated after, *inter alia*, Bellco implemented an enhanced anti-diversion, order management, and compliance program. Based on this DEA action, ABC paid a reduced price for Bellco of $190 million. The Board was well aware of this DEA action and settlement with Bellco, as it is described in the Company's annual report signed by the directors for five consecutive years, including the majority of the current directors.

9. Despite these DEA actions, neither ABC's senior executives nor the Board focused on the legal requirements to have a compliant suspicious order monitoring program for opioids that flagged suspicious orders, investigated them, stopped their shipment and reported them to the DEA. Indeed, for years ABC reported almost no suspicious orders to the DEA, even as it distributed hundreds of

millions of opioids dosages. Instead, management and the Board focused, *inter alia*, on increased sales, especially to smaller, independent pharmacies, so ABC would increase market share on higher margin relationships.

10. The acquisition of Bellco—knowing its regulatory failures—was a part of the Board approved plan to increase ABC's business with independent pharmacies. Even though independent pharmacies were known to play an outsized role in the illicit diversion of opioids and other controlled substances, ABC adopted a "light touch" franchise model for independent pharmacies to help increase its market share. The opioid epidemic growing and raging around ABC was well known to the Company and its directors and officers. Defendants, however, did not take it seriously. For example, an email circulated among senior compliance staff contained lyrics for a song named "OxyContinVille" (a parody of Jimmy Buffet's "Margaritaville") describing people who suffer from opioid addiction driving from Kentucky to Florida to buy pills:

> Headin' for strip malls
> Drivin' till night falls
> All of these tourists, carrying cash
> Lookin' for pill mills
> Getting' in line for my Florida stash
> Wastin' away again in OxyContinville
> Searchin' for my last doctor to shop
> Some people claim that there's a gov'nor to blame
> But I'm glad, he's just a corporate sop

I drove from Kentucky
Hoped to get lucky
Stockpiling meds for me and for you

11. This email callously jokes about the opioid epidemic and the diversion of the opioids feeding the epidemic. It also reflects the tone at the top of ABC, which disregarded the opioid crisis and its legal obligations to have a proper order monitoring system for opioids. Instead, the actions taken by ABC's directors and officers, including expanding their "light touch" business with independent pharmacies, allowed ABC to fuel the growing opioid epidemic.

12. The Board knew that regulators and prosecutors were looking to hold distributors accountable for feeding the nation's opioid problem, but did not do what their duties required to protect the Company and its public stockholders. In March 2012, ABC's CEO informed the Board of the DEA's suspension of another drug distributor's license at its Florida distribution center for its improper distribution of opioids to independent pharmacies. In 2012, the Audit Committee (and later the Board) learned of a DOJ investigation into ABC's distribution of opioids.

13. The DOJ investigation continued and grew. In 2013, the Company was sued by West Virginia for illegal distribution of opioids. In late 2013, [redacted]

[redacted] Yet the Board failed to act.

14. [redacted] The Audit Committee immediately recognized the seriousness of the regulatory threat to its core business, and discussed the risk factors in ABC's public filings, including "the potential impact of suspension or revocation by the United States Drug Enforcement Administration of any of the Company's registrations. . . ."

15. Thereafter, while the Board received occasional litigation updates on the expanded DOJ investigation and the civil lawsuits being filed (all of which related to the Company's distribution of opioids), from 2010 and 2016, the Board received only one presentation on diversion control. Based on the Board materials produced, during that entire time period the Board did not take any action about diversion control. Instead, the Board just passively received this extremely limited litigation-focused information.

16. ABC's Audit Committee was supposed to be overseeing management and ABC's compliance with the law, including compliance related to suspicious order

monitoring for opioids and diversion control. The Audit Committee members were well aware of the risks and growing evidence of ABC's non-compliance. The Audit Committee received regular litigation updates [redacted] as well as the civil lawsuits being filed against ABC alleging the Company's failure to comply with the legal requirements for the safe distribution of opioids, and the Company's contribution to the opioid crisis.

17. Based on the Audit Committee materials produced, despite a few generic reports highlighting the importance of diversion controls, the Audit Committee consistently failed to take action about diversion control. Indeed, between 2010 and mid-2017, Internal Audit did not review nor audit ABC's diversion controls.

18. All the while, the number of suspicious orders ABC reported to the DEA was almost non-existent, despite it being a core element of a diversion program and critical for the DEA to be able to identify and investigate abuse of opioids. [redacted]

19. [redacted]

[redacted]

20. The Board still failed, however, to fix the problem. Lawsuits continued to mount alleging ongoing violations of the Company's obligation to maintain an effective suspicious order monitoring program.

21. The Board's failure to act on this mission critical regulatory requirement, while at the same time expanding distribution to independent pharmacies, had inevitable materially harmful consequences.

22. In 2017, the Opioid MDL was established, with more than 1,800 lawsuits filed against ABC (and other defendants) by states, counties, cities, various government entities and others. The Opioid MDL plaintiffs alleged that ABC failed to follow the law for the monitoring and distribution of opioids, and otherwise helped fuel the opioid crisis.

23. In July 2018, a report by the U.S. Senate Homeland Security & Governmental Affairs Committee, Ranking Member's Office titled *A Flood of 1.6 Billion Doses of Opioids into Missouri and the Need for Stronger DEA Enforcement* (the "Missouri Report"), focused on, *inter alia*, ABC's supply of prescription opioids to pill mill pharmacies. ABC was the largest distributor of prescription opioids in the

state, shipping more than 668 million units to the state of Missouri from 2012 through 2017. Yet during that same time period, ABC only filed with the DEA 245 suspicious order reports for orders originating from Missouri. According to the Missouri Report, AmerisourceBergen "consistently failed to meet [its] reporting obligations over the past ten years."

24. In December 2018, the U.S. Congress Energy and Commerce Committee released a report titled *Red Flags and Warning Signs Ignored: Opioid Distribution and Enforcement Concerns in West Virginia* (the "West Virginia Report"). The investigation revealed that ABC distributed 248.16 million doses of hydrocodone and oxycodone to West Virginia pharmacies between 2005 and 2016. Given West Virginia's population of 1.8 million people, the volume of opioids ABC distributed into the state represented nearly 140 dosage units for every West Virginian. The report found that ABC failed to block or report to the DEA suspicious orders in West Virginia, with the numbers reported to the DEA ranging from a high of 792 orders in 2013 to a low of ***3 orders*** in 2016. The Board had been on notice of ABC's failure to comply with the legal requirements for diversion control of opioids for years, including from ABC's settlement of an earlier lawsuit by the State of West Virginia.

25. Numerous State Attorneys General filed lawsuits against ABC for its ongoing failure to comply with the legal requirements to monitor, block and report to

the DEA suspicious orders of opioids. Three of these lawsuits help to highlight ABC's systemic and long running failures to comply with the law to help prevent the diversion of prescription opioids, which was fueling the opioid crisis.

26. The State of Delaware filed suit against ABC and other opioid manufacturers and distributors for creating and fueling Delaware's opioid crisis. The Delaware complaint alleges that ABC allowed diversion of opioids by failing to adhere to industry and DEA guidance regarding opioid red flags that have been known since 2007. The Delaware Superior Court denied ABC's motion to dismiss in February 2019.

27. The State of Tennessee sued ABC alleging that ABC is "substantially responsible for the opioid epidemic in Tennessee." The complaint alleged that ABC's diversion control program was flawed, *inter alia*, because: (i) customer due diligence was, for many years, performed by sales representatives who were incentivized to increase sales, an obvious conflict of interest; (ii) the diversion program was understaffed and underfunded; and (iii) threshold levels for suspicious order monitoring were set artificially high, allowing many problematic orders to slip through with no red flags. The complaint cites numerous examples, including a 2015 ABC consultant report that recommended a complete halt to distribution of controlled substances to a Nashville pharmacy. Ignoring the report entirely, in 2016, over one million doses of opioids were sent by ABC to the pharmacy in question.

28. New York's Attorney General ("NYAG") filed a complaint against ABC and others for failing to comply with the legal requirements for the distribution of opioids in that state. The complaint, alleged specific details of ABC's long running deficiencies, including: (i) from 2007 to 2015, the official onboarding process for new customers relied on self-reporting; (ii) diversion control was massively understaffed, including that Bellco had only two employees dedicated to diversion control; and (iii) ABC set its drug order thresholds very high to avoid the flagging of suspicious orders. This action settled in the middle of trial with ABC and three other defendants paying $1.18 billion.

29. Various Attorneys General, ABC and other opioid distributors reached a global settlement that will require the distributors to pay $21 billion over the next 18 years, with ABC alone agreeing to pay over $6 billion. The settlement also required ABC and the other distributors to adopt specific improvements to correct the ongoing deficiencies in their suspicious order monitoring program, as well as provide greater board-level oversight of opioid-related compliance programs.

30. Delaware Attorney General Kathy Jennings played a central role in State Attorney Generals' actions against ABC and others. Attorney General Jennings' July 22, 2021 press release explained the impact of the conduct by ABC and others:

> Tragically, just last year, nationwide opioid overdose deaths rose to a record 93,000, a nearly 30 percent increase over the prior year. In recent

> years, Delaware has experienced the second-worst rate of overdose deaths in America, after West Virginia.
>
> From 2006 to 2012 alone, opioid manufacturers, distributors, and pharmacies shipped 276 million prescription opioids – more than 100,000 a day, with the potency of 5.5 tons of morphine – into Delaware. In that period, more than 2 million prescription pills were shipped into Selbyville – a community which was only home to about 2,000 residents.
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> * * *
>
> . . . Delaware stands to receive more than $100 million from the settlement – a sum second only to the tobacco master settlement agreement – over the course of 17 years, with $20 million coming to Delaware in the first year. . . .
>
> * * *
>
> No amount of money can make whole the families who have paid the true costs of the opioid epidemic[.] Delawareans from Selbyville and Seaford to Middletown and Claymont have suffered enormously, all because the world's largest drug dealers were insatiable in their pursuit of profit. Now communities across this country are struggling to keep up with demand for life-saving treatment, prevention, and abatement. We fought hard for a settlement that helps them do that and that saves lives; now we have it. We are hard at work getting our local partners signed on to this agreement so that we can maximize the amount of money that goes to Delawareans.

31. Forced to look in the mirror and recognize how the corporation they oversaw helped contribute to a nationwide public health crisis, a conscientious board may have taken action to hold the CEO to account. Nothing of the sort happened

here, as the Board made no effort to hold management responsible for these enormous failures to comply with the law and the damage it caused the Company. For example, stockholders for years sought accountability for management for dealing with the opioid crisis, but the Board would have none of it.

32. To the contrary, the Board has continued to thumb its nose at stockholders and regulators alike. Shortly after the Company agreed to pay over $6 billion over 18 years to settle most of the civil lawsuits, the Board determined to exclude this enormous settlement from the CEO's compensation calculation, even though Defendant Steven H. Collis has been at the helm of the Company for more than ten years – a significant portion of the relevant time period here.

33. The Board sat idly by for years and failed to take action to oversee ABC's compliance with this mission critical regulatory requirement. It failed to implement or maintain an effective compliance program, and allowed ABC to operate unlawfully. And when faced with the devastating consequences of its inaction and that of senior management, ABC has continued to fail to take responsibility, instead using its power to enrich those who should no longer even be employed by the Company. While this lawsuit cannot change the tragic consequences of the Defendants' conduct, it can and should hold the corporate fiduciaries responsible for their breaches of fiduciary duty.

II. THE PARTIES

A. Plaintiffs

34. Plaintiff Lebanon County Employees' Retirement Fund ("Lebanon") has held shares of AmerisourceBergen continuously since 2007.

35. Plaintiff Teamsters Local 443 Health Services & Insurance Plan ("Local 443") has held shares of AmerisourceBergen continuously since 2010.

B. Nominal Defendant

36. Nominal Defendant ABC is a Delaware corporation with its principal offices located at 1300 Morris Drive, Chesterbrook, Pennsylvania. ABC was formed in 2001 following a merger between Bergen Brunswig Corporation ("Bergen Brunswig") and AmeriSource Health Corporation ("AmeriSource Health"). ABC is a pharmaceutical sourcing and distribution company. The Company's shares are publicly traded on the New York Stock Exchange under ticker symbol "ABC."

37. Nominal Defendant ABC does business through its subsidiaries and operating divisions. Until 2017, the Company's pharmaceutical distribution segment consisted of two operating segments: AmerisourceBergen Drug Corporation ("ABDC") and AmerisourceBergen Specialty Group, LLC ("ABSG").

38. ABDC distributes healthcare products and supplies, including opioids, and provides pharmacy management and other consulting services to institutional

healthcare providers such as hospitals and retail pharmacies. ABDC is headquartered in Chesterbrook, Pennsylvania.

39. ABSG is the parent entity for a group of companies that serve the specialty pharmaceuticals market, including in the areas of biotechnology, blood-plasma, and oncology. ABSG and its subsidiaries provide pharmaceutical distribution and related services directly to physicians and to institutional healthcare providers, including hospitals. ABSG is based in Frisco, Texas.

C. Director Defendants

40. Defendant Steven H. Collis ("Collis") is the Company's Chairman, President, and CEO and is the Chair of the Executive Committee. Collis has been a member of the Board since 2011 and has served as the Board's Chairman since March 2016. Collis founded the Specialty Group at AmeriSource Health in 1994, which later became ABSG, and has held various positions at ABC and its subsidiaries and predecessors. From August 2001 to September 2007, Collis was the Senior Vice President ("SVP") of ABC and President of ABSG, and then succeeding to EVP and President of ABSG from September 2007 to September 2009. From ABSG, Collis moved to ABDC and served as its EVP and President from September 2009 to November 2010. Collis then became President and Chief Operating Officer ("COO") of ABC and was elected to ABC's Board in May 2011. In July 2011, Collis became President and CEO of ABC, positions he still holds. During the period of wrongdoing

here, Defendant Collis received over 100 million dollars of compensation for his service as an executive of the Company.[1]

41. Defendant Richard W. Gochnauer ("Gochnauer") has been a member of the Board since September 2008. He currently serves as Chair of the Finance Committee and is a member of the Compensation and Succession Planning Committee and the Executive Committee. Gochnauer was a member of the Governance and Nominating Committee from 2010 to 2018. Gochnauer was a member of the Audit and Corporate Responsibility Committee from 2011 to 2012. Gochnauer has also been a director of UGI Corporation, a natural gas and electric power distribution company, since 2011 and served on its Audit and Governance Committee.

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[1] From 2011–2020, Collis received $101,375,156 in total compensation. *See* AmerisourceBergen Corp., Form DEF 14A (Proxy Statement) (Jan. 28, 2021) at 46, available at: https://www.sec.gov/Archives/edgar/data/1140859/000110465921008422/tm2039342-1_def14a.htm; AmerisourceBergen Corp., Form DEF 14A (Proxy Statement) (Jan. 19, 2018) at 44, available at: https://www.sec.gov/Archives/edgar/data/0001140859/000104746918000269/a2234204zdef14a.htm; AmerisourceBergen Corp., Form DEF 14A (Proxy Statement) (Jan. 23, 2015) at 37, available at: https://www.sec.gov/Archives/edgar/data/1140859/000104746915000370/a2222662zdef14a.htm; AmerisourceBergen Corp., Form DEF 14A (Proxy Statement) (Jan. 20, 2012) at 32, available at: https://www.sec.gov/Archives/edgar/data/0001140859/000119312512017842/d278986ddef14a.htm.

42. Defendant Lon R. Greenberg ("Greenberg") has been a member of the Board since May 2013. He currently serves as Chair of the Audit and Corporate Responsibility Committee and has been a member of the Audit and Corporate Responsibility Committee since 2013. Greenberg is also a member of the Governance and Nominating Committee and the Executive Committee. Before he joined ABC's Board, Greenberg was the CEO of UGI Corporation, a position he held from 1995 until his retirement in April 2013. He was Chairman of UGI Corporation's Board of Directors from 1996 to January 2016 and still holds the position of Chairman Emeritus. Greenberg is also Chair of the Board of Directors of the United Way of Greater Philadelphia and Southern New Jersey.

43. Defendant Jane E. Henney, M.D. ("Henney") has been a member of the Board since January 2002. She was a member of the Audit and Corporate Responsibility Committee from 2004 to 2010. She is a member of the Executive Committee and serves ex officio on each of the Board's other committees. Dr. Henney has been the designated Lead Independent Director of ABC's Board since March 2016. Prior to joining ABC's Board, Dr. Henney was Commissioner of the United States Food and Drug Administration ("FDA") from 1998 to 2001. She was also Deputy Commissioner of Operations at the FDA from 1992 to 1994.

44. Defendant Kathleen W. Hyle ("Hyle") has been a member of the Board since May 2010. She was a member of the Audit and Corporate Responsibility

Committee from 2010 to 2017 and its Chairperson from 2011 to 2016. She serves on the Compensation and Succession Planning Committee and the Finance Committee.

45. Defendant Michael J. Long ("Long") has been a member of the Board since May 2006. He was a member of the Audit and Corporate Responsibility Committee from 2011 to 2017. He currently serves as Chair of the Compensation and Succession Planning Committee and is a member of the Governance and Nominating Committee and the Executive Committee.

46. Defendant Henry W. McGee ("McGee") has been a member of the Board since November 2004. He currently serves as Chair of the Governance and Nominating Committee. He is a member of the Executive Committee and was a member of the Audit and Corporate Responsibility Committee from 2009 to 2015 and from 2018 to present.

47. Defendant Ornella Barra ("Barra") is a member of the current Board and has served the Board since January 2015. She was a member of the Board of Directors of Alliance Boots GmbH, a subsidiary of Walgreens Boot Alliance between June 2007 and February 2015. She is also Chair of the Corporate Social Responsibility Committee, a member of the Finance Committee and a member of the Compliance and Risk Committee.

48. Defendant D. Mark Durcan ("Durcan") is a member of the current Board and has served the Board since September 2015. He is the Chair of the Finance Committee and member of the Audit Committee and Executive Committee

49. Defendants Collis, Gochnauer, Greenberg, Henney, Hyle, Long, Barra, and Durcan are sometimes collectively referred to as the "Director Defendants."

50. Attached as Exhibit A is a chart depicting the Board and committee membership of the Director Defendants since 2008.

D. Executive Defendants

51. Collis, as the president and CEO, is also an officer of the Company.

52. Chris Zimmerman ("Zimmerman"), is currently the Senior Vice President, Corporate Security & Regulatory Affairs, a position he has held for the last four years, since his promotion from Vice President, Corporate Security and Regulatory Affairs, a title he held since 2001. Zimmerman was also the Chief Compliance Officer of ABC from March 2012 until October 2018.

53. Collis and Zimmerman are collectively referred to as the "Executive Defendants."

E. Relevant Non-Parties

54. Dennis M. Nally ("Nally") is a member of the current Board and has served on the Board since January 2020. He is the Chair of the Audit Committee, a

member of the Compensation and Succession Planning Committee and a member of the Executive Committee.

55. John G. Chou ("Chou") has been the Executive Vice President of ABC since August 2011 and Chief Legal & Business Officer for ABC since June 2017. Chou has been with ABC since 2002 and, prior to his current positions, Chou held various titles including SVP, General Counsel, and Secretary.

III. JURISDICTION AND VENUE

56. This action arises under the laws of the State of Delaware because it pertains to breaches of fiduciary duty by directors and officers of a corporation incorporated in Delaware.

57. The Delaware Court of Chancery has *in personam* jurisdiction of each Individual Defendant herein, as (i) ABC is a Delaware corporation and (ii) each Individual Defendant was a director and/or senior officer of ABC, and as such assented as a matter of law to the jurisdiction of this Court under 10 *Del. C.* § 3114.

58. Venue is proper in this Court. Paragraph 6 of the Stipulation and Order for the Production and Exchange of Confidential Information entered by the Court on May 8, 2020 in Plaintiffs' Section 220 Action[2] provides that "[a]ny action arising

[2] *See Lebanon Cty. Emps.' Ret. Fund v. AmerisourceBergen Corp.*, C.A. No. 2019-0527-JTL (Del. Ch. May 8, 2020) (ORDER) (Trans. ID 65626516).

out of or relating to the Demand shall be brought only in accord with Section 8.05 of the Amended and Restated Bylaws of AmerisourceBergen."[3] Section 8.05 (now Section 8.06) of AmerisourceBergen's operative bylaws, in turn, has a Chancery Court forum clause for, *inter alia*, derivative actions.[4]

IV. FACTUAL BACKGROUND

A. The United States is in the Throes of an Opioid Crisis

59. For more than two decades, the United States has been in the midst of an opioid epidemic. According to the Centers for Disease Control and Prevention, since 1996, there have been nearly 218,000 overdose deaths related to prescription opioids. Between 2000 and 2015, the rate of opioid overdose deaths in the United States more than tripled. Overdose deaths involving opioids reached 69,710 in 2020,

[3] AmerisourceBergen further amended and restated its bylaws on August 13, 2020 after Plaintiffs made their initial Demand. *See* AmerisourceBergen Corp., Form 8-K (Aug. 13, 2020), available at https://www.sec.gov/ix?doc=/Archives/edgar/data/1140859/000114085920000037/abc-20200813.htm. The operative forum clause is now Section 8.06. *See* Ex. 3.1 to Form 8-K (Aug. 13, 2020).

[4] *See* Amended And Restated Bylaws of AmerisourceBergen Corporation (Amended and restated as of August 13, 2020), at § 8.06(a) ("[T]he Court of Chancery of the State of Delaware shall be the sole and exclusive forum for . . . any derivative action or proceeding brought on behalf of the Corporation."), available at https://www.sec.gov/Archives/edgar/data/1140859/000114085920000037/abcamendedandrestatedb.htm.

up from 50,963 in 2019.[5] Lives lost from opioid overdoses now represent the vast majority of drug overdoses in the country.[6]

60. In the late 1990s, the pharmaceutical industry, including ABC, made a massive push to increase the use of prescription opioids to treat pain management. Producers made new formulations of extended release opioids, which were marketed as non-addictive and superior pain management options. Working in lockstep, producers and distributors aggressively marketed and distributed these medications to pharmacies, doctors, and patients in the pursuit of maximum profit. As the major players in the distribution chain recognized, opioid based pain pills have at all times been highly addictive, and would be fatally dangerous when misused.

61. Between 1999 and 2014, the sale of prescription opioids in the United States practically quadrupled despite the lack of an increase in the amount of pain

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[5] *See* Lenny Bernstein & Joel Achenbach, *Drug overdose deaths soared to a record 93,000 last year*, WASH. POST (July 14, 2021), available at: https://www.washingtonpost.com/health/2021/07/14/drug-overdoses-pandemic-2020/?utm_campaign=wp_post_most&utm_medium=email&utm_source=newsletter&wpisrc=nl_most&carta-url=https%3A%2F%2Fs2.washingtonpost.com%2Fcar-ln-tr%2F342506b%2F60ef08539d2fda945a03a70d%2F5e5fc024ae7e8a0d54ad0dd4%2F11%2F70%2F60ef08539d2fda945a03a70d.

[6] *Id.*

reported by Americans.[7] The strategically expanded prescription of opioid medications led to widespread misuse. Meanwhile, these medications proved far more addictive and dangerous than the pharmaceutical industry led the nation to believe.[8]

62. As millions of people in this country became addicted to opioids, "pill mills" popped up to supply the illegal market. Though prescription opioids were clearly being diverted for non-medical use, prescribers, pharmacies, and distributors alike ensured that the massively profitable distribution network they had created continued to function seamlessly.

63. The increased diversion of prescription opioids led to skyrocketing addiction, overdose and death rates. As regulators cracked down on illicit prescription opioids, opioid addicts turned to even more dangerous substances, such as heroin and fentanyl, leading to even more death.

64. To help fight the epidemic, the DEA increased scrutiny of drug distributors like ABC to try to get them to comply with their legal obligations to help

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[7] Rose A. Rudd, et al., *Increases in Drug and Opioid Overdose Deaths - United States, 2000-2014*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Jan. 1, 2016), available at: https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6450a3.htm.

[8] *Id.*

identify and prevent potential diversion of prescription pills. [redacted].[9]

65. In August 2016, the United States Surgeon General published an open letter to physicians nationwide, enlisting their help in combating this "urgent health crisis."[10] According to that letter, the misuse of and addiction to opioids had mushroomed into a national crisis affecting public health as well as social and economic welfare.[11]

66. The misuse of prescription opioids in this country has also created an enormous economic burden, including the costs of healthcare, addiction treatment, and the involvement of criminal justice system. This economic burden has been estimated as costing the country $78.5 billion a year, over one third of which is due

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[9] LEBANON_023558 at 768 [redacted]

[10] Letter from Vivek H. Murthy, M.D., U.S. Surgeon General (Aug. 2016), available at: http://i2.cdn.turner.com/cnn/2016/images/08/25/sg.opioid.letter.pdf.

[11] *Id. See also* Julie Hirschfeld Davis, *Trump Declares Opioid Crisis a 'Health Emergency' but Requests No Funds*, N.Y. TIMES (Oct. 26, 2017), available at: https://www.nytimes.com/2017/10/26/us/politics/trump-opioid-crisis.html; Executive Office of the President, Proclamation No. 9499, 81 Fed. Reg. 65173 (Sept. 16, 2016) (proclaiming "Prescription Opioid and Heroin Epidemic Awareness Week"), available at: https://www.federalregister.gov/documents/2016/09/22/2016-22960/prescription-opioid-and-heroin-epidemic-awareness-week-2016.

to increased healthcare and substance abuse treatment costs.[12] In another study, the true economic cost of the opioid epidemic was estimated to be $1.02 trillion in 2017, including the cost of opioid use disorder (estimated to be $471 billion) and fatal opioid overdose (estimated to be $550 billion).[13]

B. AmerisourceBergen's Business and Role in the Opioid Epidemic

67. ABC is a wholesaler of pharmaceutical drugs and distributes opioids throughout the country. ABC is one of the "Big Three" wholesale pharmaceutical companies, along with Cardinal Health, Inc. ("Cardinal Health") and McKesson Corporation ("McKesson"). The Big Three account for approximately 85% to 90% of all wholesale revenues from pharmaceuticals distributed within the United States.

68. According to a June 2017 publication by the University of Southern California's Leonard D. Schaeffer Center for Health Policy & Economics, as of 2015, the Big Three had the following respective market share of the wholesale

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[12] National Institute on Drug Abuse, *Opioid Overdose Crisis*, NATIONAL INSTITUTES OF HEALTH (Mar. 11, 2021), available at: https://www.drugabuse.gov/drug-topics/opioids/opioid-overdose-crisis. *See also* Curtis Forence et al., *The Economic Burden of Prescription Opioid Overdose, Abuse and Dependence in the United States, 2013*, US National Library of Medicine, NATIONAL INSTITUTES OF HEALTH, available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5975355/.

[13] Curtis Florence, Feijun Luo & Ketra Rice, *The economic burden of opioid use disorder and fatal opioid overdose in the United States, 2017*, Drug Alcohol Dependence, Vol. 218 (Jan. 1, 2021), available at: https://doi.org/10.1016/j.drugalcdep.2020.108350.

pharmaceutical segment: (i) McKesson – 32.7%; (ii) ***ABC – 31.6%***; and (iii) Cardinal Health – 20.7%.

69. ABC and its competitors utilize a delivery method to pharmacies called "just-in-time" delivery. This means that most pharmacies obtain drug deliveries every day—sometimes multiple times a day—to allow the pharmacies to hold as little inventory as possible. Because these deliveries are made on such a frequent basis, ***distributors know exactly how many individual opioid pills they are delivering to each pharmacy***. Distributors like ABC are thus uniquely situated to determine whether a pharmacy is facilitating the diversion of prescription opioid pills.

70. The Company sold opioids to both large chain pharmacies and independent pharmacies nationwide. The Company's two largest customers, Walgreens Boots Alliance, Inc. and Express Scripts, Inc., accounted for approximately 33% and 12%, respectively, of ABC's revenue in the fiscal year ended September 30, 2020.[14]

71. The Company recognized, however, that independent pharmacies offered a unique opportunity. Focusing on smaller, independent pharmacies would

[14] *See* AmerisourceBergen Corp., Form 10-K (Nov. 19, 2020), at 4 & 9, available at: https://www.sec.gov/ix?doc=/Archives/edgar/data/0001140859/000114085920000050/abc-20200930.htm.

allow AmerisourceBergen to increase market share on client relationships that lack the bargaining power of national chains, leading to higher margins for ABC.

72. Independent pharmacies typically run lean businesses compared to the national chain pharmacies and lack the infrastructure needed to prevent diversion of opioids. Without the personnel or protocols in place, independent pharmacies have played a devastating and disproportional role in the opioid epidemic.[15]

73. Distributors of opioids, such as ABC, have played a large role in the proliferation of the opioid crisis by failing to stop suspicious orders in compliance with the Controlled Substances Act and other laws, thereby allowing opioids to be dispensed to individuals that abuse them or sell them to others to be abused.

74. In a *60 Minutes* interview in October 2017, former DEA agent Joe Rannazzisi, who headed the Office of Diversion Control for the DEA for more than a decade, described ABC's pharmaceutical distribution industry as "out of control," stating that "[w]hat they wanna do, is do what they wanna do, and not worry about

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[15] Jenn Abelson, et al., *As overdoses soared, nearly 35 billion opioids—half of distributed pills—handled by 15 percent of pharmacies*, THE WASH. POST (Aug. 12, 2019), available at: https://www.washingtonpost.com/investigations/the-opioid-crisis-15-percent-of-the-pharmacies-handled-nearly-half-of-the-pills/2019/08/12/b24bd4ee-b3c7-11e9-8f6c-7828e68cb15f_story.html.

what the law is. And if they don't follow the law in drug supply, people die. That's just it. People die." He further explained:

> JOE RANNAZZISI: The three largest distributors are Cardinal Health, McKesson, and AmerisourceBergen. They control probably 85 or 90 percent of the drugs going downstream.
>
> [INTERVIEWER]: You know the implication of what you're saying, that these big companies knew that they were pumping drugs into American communities that were killing people.
>
> JOE RANNAZZISI: That's not an implication, that's a fact. That's exactly what they did.

75. Jim Geldhof, a 40-year DEA veteran, said that ABC, among other distributors, never made the effort to "do the right thing. And there was no good faith effort. Greed always trumped compliance. It did every time."[16] As he explained, "I can tell you with 100 percent accuracy that we were in there on multiple occasions trying to get them to change their behavior. And they just flat out ignored us."[17]

76. Over the course of the epidemic, ABC has stood out among the Big Three for its unwillingness to identify suspicious orders, even among customers that regularly exceeded their thresholds and presented multiple red flags of diversion.

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[16] Bill Whitaker, *Ex-DEA agent: Opioid crisis fueled by drug industry and Congress*, CBS NEWS (Oct. 17, 2017), available at https://www.cbsnews.com/news/ex-dea-agent-opioid-crisis-fueled-by-drug-industry-and-congress/.

[17] *Id.*

77. The State of Florida alleged that ABC actively engaged in deceptive marketing to boost its own sales of opioids despite knowing about high order histories and widespread diversion of opioids. For example, ABC published false and misleading studies promoting opioids and then used those studies in its marketing materials.[18] Those studies "promot[ed] myths about opioids" and were published by scientists working for "AmerisourceBergen's Xcenda consulting and marketing division, who have co-authored such studies with scientists working for Teva."[19]

C. The Company's Positive Obligations Respecting Anti-Diversion, Order Monitoring, and Compliance Programs

78. Prescription narcotics—such as opioids—are highly regulated for the purpose of reducing the widespread diversion of these drugs out of legitimate channels into illegal markets, while providing the drug industry with a unified approach to controlling dangerous drugs.[20] As distributors are uniquely positioned to identify opioid diversion in the supply chain, the law imposes positive obligations on such companies to avoid supplying potentially unlawful orders and to alert regulators when they notice irregularities. This means that ABC is subject to

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[18] *State of Florida v. Purdue Pharma L.P. et al.*, Case No. 2018-CA-001438 (Nov. 16, 2018), ¶ 131.

[19] *Id.*

[20] *See* 1970 U.S.C.C.A.N. 4566, 4571-72.

extensive federal and state regulations with respect to its distribution of opioids. ABC's directors and executives knew about their obligations, as the Company's SEC filings acknowledge that AmerisourceBergen's business is "highly regulated."

79. From at least 2013 through 2020, ABC's Form 10-K filings noted the Company is subject to, *inter alia*, the "operating and security standards of the DEA," and stated "We are required to hold valid DEA and state-level licenses, meet various security and operating standards and comply with the Controlled Substances Act and its accompanying regulations governing the sale, marketing, packaging, holding and distribution of controlled substances."

1. The Controlled Substances Act

80. The CSA implemented regulations establishing a framework allowing the federal government to regulate the use of controlled substances for legitimate medical, scientific, research, and industrial purposes, and prevent these substances from being diverted for illegal purposes. Prescription opioids are regulated at the federal level as a Schedule II controlled substance.

81. Under the CSA, ABC must maintain effective anti-diversion, order management, and compliance programs. Specifically, the CSA requires ABC to maintain "effective control against diversion of particular controlled substances [including opioids] into other than legitimate medical, scientific, and industrial

channels," to "design and operate a system to disclose to [the Company] suspicious orders of controlled substances," and to inform the DEA of such orders.

82. The Company has affirmative obligations to identify and investigate suspicious orders. ABC can only complete an order flagged as suspicious when, after conducting its due diligence, the recipient can determine that the order is not likely to be diverted into illegal channels. If the Company is unable to determine the order is not likely to be diverted into illegal channels, it must decline to ship the order. This is known as the "No Shipping Requirement."[21] The Company is legally required to have an effective anti-diversion, order management and compliance program.

2. ABC's Specific Legal Obligations

(a) ABC's 2007 Settlement with the DEA

83. On April 24, 2007, the DEA issued an Order to Show Cause and Immediate Suspension that temporarily suspended a license to distribute controlled substances held by ABDC for its Orlando, Florida distribution center.

84. The DEA asserted that ABC failed to maintain effective controls against diversion of hydrocodone, a controlled substance.[22] According to the DEA, "[i]n

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[21] *See Southwood Pharms., Inc., Revocation of Registration*, 72 Fed. Reg. 36487, 36501 (Drug Enf't Admin. July 3, 2007); *Masters Pharm., Inc. v. Drug Enf't Admin.*, 861 F.3d 206, at 212–13 (D.C. 2017).

[22] News Release, *DEA Suspends Orlando Branch of Drug Company from Distributing Controlled Substances*, DRUG ENFORCEMENT AGENCY (Apr. 24, 2007),

spite of being warned by DEA about the characteristics of rogue internet pharmacies, this [ABC distribution center] distributed 3.8 million dosage units of hydrocodone between January 1, 2006 and January 31, 2007 to rogue pharmacies" that were "engaged in schemes to dispense controlled substances based on prescriptions that were written for other than legitimate medical purposes."[23]

85. The Company entered into a consent order with the DEA (the "DEA Consent Order") which detailed other pharmacies where ABDC (i) "knew that orders of an unusual size were 'suspicious,'" (ii) "knew that orders that deviate[d] from a normal pattern were 'suspicious,'" (iii) "knew that orders of unusual frequency were 'suspicious,'" and (iv) failed to apprise itself of publicly-available information which would have indicated that the pharmacies were filling prescriptions for other than legitimate medical purposes.

86. Following an investigation, the DEA "determined that the continued registration of this company constitute[d] an imminent danger to public health and

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available at: https://www.dea.gov/sites/default/files/divisions/mia/2007/mia042407p.html.

[23] *Id.*

safety."[24] As a result, the DEA suspended the ability of the Company's Orlando facility to serve retail customers.[25]

87. Subsequently, on June 22, 2007, the Company entered into a settlement with the DEA (the "2007 Settlement") whereby the Company agreed to implement a more sophisticated monitoring program and submit to a DEA inspection before its distributing license would be reinstated (the "2007 Monitoring Program").[26]

88. The 2007 Monitoring Program required, *inter alia*, more rapid identification and daily reporting of orders that should have indicated diversion of controlled substances, and in some instances, the halting of shipments of orders that required further investigation by the Company.[27]

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[24] *See Southwood Pharm., Inc.*, 72 Fed. Reg. 36487, 36501 (Drug Enf't Admin. July 3, 2007).

[25] The Company's Orlando facility was given special dispensation to continue to distribute controlled substances to hospitals, clinics and U.S. Department of Defense facilities. *See* News, *AmerisourceBergen Signs Agreement with DEA Leading to Reinstatement of Its Orlando Distribution Center's Suspended License to Distribute Controlled Substances*, AMERISOURCEBERGEN CORP. (June 22, 2007), available at: https://investor.amerisourcebergen.com/news/news-details/2007/AmerisourceBergen-Signs-Agreement-with-DEA-Leading-to-Reinstatement-of-Its-Orlando-Distribution-Centers-Suspended-License-to-Distribute-Controlled-Substances/default.aspx.

[26] *See id.* The Company denied the DEA's allegations. AmerisourceBergen Corp., Form 10-K (Nov. 28, 2007) at 11–12, available at https://www.sec.gov/Archives/edgar/data/1140859/000119312507255013/d10k.htm

[27] *See supra* note 25.

89. The 2007 Monitoring Program also required a more rigorous examination process before the delivery of controlled substances to newly signed customers.[28]

90. In reliance on the 2007 Monitoring Program's anticipated performance, on August 25, 2007, the DEA reinstated the Company's Orlando distribution center's license to distribute controlled substances.[29] The distribution center immediately resumed shipment of controlled substances to its customers.[30]

91. At the time the Company instituted the 2007 Monitoring Program, it understood that further controls against diversion of controlled substances such as opioids could be required.[31]

92. The Board was well aware of the 2007 Settlement with the DEA, as it is described in the Company's Form 10-Ks for 2007, 2008, 2009, 2010 and 2011. The majority of the current Board of the Company was on the Board when the 2011 Form

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[28] *Id.*

[29] AmerisourceBergen Corp., Form 10-K (Nov. 28, 2007) at 11–12, available at: https://www.sec.gov/Archives/edgar/data/1140859/000119312507255013/d10k.htm

[30] News Release, A*merisourceBergen, DEA Reinstates AmerisourceBergen's Orlando Distribution Center's Suspended License to Distribute Controlled Substances*, (Aug. 27, 2007), available at: https://www.sec.gov/Archives/edgar/data/1140859/000119312507189992/dex991.htm.

[31] *See supra* note 29 (AmerisourceBergen Corp., Form 10-K (Nov. 28, 2007)) at 12.

10-K was filed and is signed by them.[32] The 2007 Settlement placed the Board and ABC's senior officers (including the Executive Defendants) on notice of the Company's compliance failure, giving them clear knowledge that the Company's practices were insufficient under the law and should be a larger focus of the Board's oversight.

(b) The Bellco Consent Judgment

93. Bellco has operated as a wholly owned subsidiary of the Company since October 2007.

94. In June 2007, prior to ABC's acquisition of Bellco, Bellco entered into a Consent Judgment to resolve a then-pending DEA investigation into Bellco's violations of the Controlled Substances Act.

95. The Company was aware of Bellco's ineffective anti-diversion, order management and compliance program prior to acquiring Bellco. When ABC initially announced that it would be acquiring Bellco (in March of 2007), it announced a purchase price of $235 million.[33] The Bellco Consent Judgment occurred subsequent

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[32] The 2011 Form 10-K was signed by, *inter alia*, defendants Collis, Guttman, Gochnauer, Henney, Hyle, Long and McGee.

[33] News Release, *AmerisourceBergen to Acquire Bellco Health*, AmerisourceBergen Corp. (Mar. 28, 2007), available at: https://www.sec.gov/Archives/edgar/data/1140859/000119312507067170/dex991.htm.

to that announcement, and when the acquisition was consummated in October 2007, the price was reduced to $190 million.[34] ABC confirmed that the reason for the reduction in price was the Bellco Consent Judgment.[35]

96. The Bellco Consent Judgment required Bellco to: (i) forfeit its controlled substances license, (ii) divest itself of all controlled substances in inventory, and (iii) pay a fine of $800,000. The Bellco Consent Judgment provided that Bellco's license to distribute prescription opioids would only be reinstated after, *inter alia*, Bellco implemented an enhanced anti-diversion, order management, and compliance program that passed inspection by the DEA.[36]

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[34] Press Release, *AmerisourceBergen Acquires Bellco Health for $190 Million*, AmerisourceBergen (Oct. 1, 2007), available at: https://investor.amerisourcebergen.com/news/news-details/2007/AmerisourceBergen-Acquires-Bellco-Health-for-190-Million/default.aspx.

[35] Andis Robeznieks, *DEA Probe Puts Sting on Acquisition Price*, MODERN HEALTHCARE (Oct. 2, 2007), available at: https://www.modernhealthcare.com/article/20071002/NEWS/310020025/dea-probe-puts-sting-on-acquisition-price.

[36] AmerisourceBergen Corp., Form 10-K (Nov. 25, 2009) at 10 ("Bellco Drug received its new DEA registration on February 12, 2008 and resumed distribution of controlled substances. While we expect to continue to comply with all of the DEA's requirements, there can be no assurance that the DEA will not require further controls against the diversion of controlled substances in the future or will not take similar action against any other of our distribution centers in the future."), available at: https://www.sec.gov/Archives/edgar/data/1140859/000095012309066012/c92934e10vk.htm.

97. The Board was well aware of the Bellco Consent Judgment, as it is described in the Company's Form 10-Ks for 2007, 2008, 2009, 2010 and 2011. The majority of the current Board of the Company was on the Board when the 2011 Form 10-K was filed and signed by them.[37]

98. Accordingly, as a result of the 2007 Settlement and Bellco Consent Judgment, ABC understood and agreed to positive compliance obligations and the Board was on notice of the failures with the Company's anti-diversion protocols.

99. Despite the foregoing, the Company was focused on increasing its sales and profits rather than addressing the pervasive failures in its anti-diversion and compliance programs.

D. The Board Failed to Oversee the Company's Diversion Controls

1. Diversion Control is Kept Off the Board's Radar

100. The Audit Committee met on May, 12, 2010.[38] [redacted]

[37] The 2011 Form 10-K was signed by, *inter alia*, defendants Collis, Guttman, Gochnauer, Henney, Hyle, Long and McGee.

[38] LEBANON_012852.

[39] Internal Audit's May 12, 2010 presentation said nothing about the Company's diversion controls.

101. The Board held a quarterly meeting on May 11, 2012.[40] The meeting materials indicate that the Board, among other items, reviewed the strategy with respect to the independent pharmacy market.[41] The Board did not discuss diversion controls much less the outside auditor's direct warning on the subject.

102. The Audit Committee met again on August 11, 2010. The Committee was presented with a risk assessment for ABDC for fiscal year 2011. [42] [43] The Committee's material mentioned no oversight role for the Committee, the Board, or even Internal Audit. The Board was simply left out of the compliance process entirely.

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[39] LEBANON_012852 at '853.

[40] LEBANON_013036.

[41] LEBANON_022296 at '307.

[42] LEBANON_021644 at '733.

[43] LEBANON_021644 at '736.

103. The Board's next quarterly meeting was on August 12, 2010. [redacted].[44] [redacted]"[45] The Board's materials include no reference to the Company's diversion control efforts.

104. The Board's next quarterly meeting was on November 11, 2010. [redacted] The materials reflect no discussion of the Company's diversion controls.[46]

105. The Audit Committee met on February 1, 2011. [redacted] Diversion control was not discussed.

106. The Audit Committee next met on February 16, 2011. The Committee received a general Compliance Program Update, [redacted]

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[44] LEBANON_014225 at '227 (emphasis added).

[45] LEBANON_014225 at '227.

[46] LEBANON_012870.

[47] LEBANON_012888 at '890.

[redacted], but was silent on DEA Compliance.[48]

107. The Board held its next quarterly meeting on February 17, 2011. [redacted][49] [redacted][50]

108. [redacted]

[48] LEBANON_021973 at '2031.

[49] LEBANON_012898 at '903.

[50] LEBANON_012898 at '903.

[51] LEBANON_022468 at '556.

[redacted][52] There was no reference in the Board materials to the Company's diversion controls.

109. On April 22, 2011, Zimmerman circulated a parody of The Beverly Hillbillies theme song to the senior members of the ABC diversion control team, Edward Hazewski (then ABC's Director of the Diversion Control Program and now the Director of Corporate Security and Regulatory Affairs), Steve Mays (Vice President of Regulatory Affairs), Paul Ross (Senior Director of Corporate Security and Regulatory Affairs), Robert Crow (Emergency Response and Crisis Management), and Julie Eddy (Director of State Government Affairs. As the Vice President of Corporate Security and Regulatory Affair in charge of diversion compliance, Zimmerman's email reflected the callously deaf tone at the top of ABC when it came to ABC's role in preventing diversion:

> Come and listen to a story about a man named Jed
> A poor mountaineer, barely kept his habit fed,
> The one day he was lookin at some tube,
> And saw that Florida had a lax attitude.
> About pills that is, Hillbilly Heroin, "OC"
> Well the first thing you know ol' Jed's a drivin South,
> Kinfolk said Jed don't put too many in your mouth,
> Said Sunny Florida is the place you ought to be
> So they loaded up the truck and drove speedily.
> South, that is. Pain Clinics, cash 'n carry.
> A Bevy of Pillbillies!

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[52] LEBANON_022468 at '576.

Well now it's time to say Howdy to Jed and all his kin.
And they would like to thank Rick Scott fer kindly inviting them.
They're all invited back again to this locality
To have a heapin helpin of Florida hospitality
Pill Mills that is. Buy some pills. Take a load home.
Y'all come back now, y'hear?

110. On May 6, 2011, Zimmerman sent another email to the diversion control leadership team at ABC, commenting on the recently passed Florida legislation designated to crack down on pill mills. Zimmerman colorfully wrote "Watch out Georgia and Alabama, there will be a max exodus of Pillbillies heading north."

111. The Audit Committee met on May 12, 2011. The Committee received a copy of the Enterprise Risk Management Update that was previously presented to the Board on February 17, 2011 [redacted][53] Absent from that list was any mention of DEA compliance or the Company's diversion controls. [redacted][54]

112. The Board next met on May 13, 2011. [redacted]

[53] LEBANON_022041 at '143.

[54] LEBANON_022041 at '147.

[redacted][55] [redacted]

[redacted][56] [redacted]

[redacted][57] There was no discussion of DEA compliance or diversion controls.

113. The Audit Committee met on August 10, 2011. [redacted]

[redacted][58] There was no discussion of DEA compliance or diversion controls.

[redacted]

[redacted][59] The Company's diversion controls are not even mentioned in the meeting materials.

114. [redacted]

[redacted][60] [redacted]

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[55] LEBANON_012944 at '949–50.

[56] LEBANON_014425 at '537.

[57] LEBANON_014425 at '539.

[58] LEBANON_012955 at '958.

[59] [redacted] *See* LEBANON_022198 at '292.

[60] LEBANON_022198 at '260.

[redacted][61] Though this data mining could readily be configured to let AmerisourceBergen better identify suspicious orders, the Company (facing no Board-level pressure to comply with the law) made no effort to use these tools to improve its suspicious order monitoring program.

115. The Board held its next quarterly meeting on August 11, 2011. [redacted][62] There was no mention of diversion controls or the opioid epidemic.[63]

116. The Audit Committee next met on November 9, 2011. [redacted]

[61] LEBANON_022198 at '260 [redacted]

[62] LEBANON_014577 at '746.

[63] LEBANON_014577 at '747; *see also* LEBANON_014577 at '750.

[redacted][64] [redacted]

[redacted][65] [redacted]

includes no reference to DEA compliance or diversion controls.[66]

117. The Board next met on November 10, 2011. [redacted]

[redacted][67] Collis had previously served as the Company's executive participant on the HDA's board of directors until David W. Neu, who was the then-President of ABDC, replaced him in late 2011.[68] [redacted]

[redacted][69] DEA regulations were not discussed [redacted]

[redacted]

118. The Audit Committee met on February 29, 2012. [redacted]

[redacted]

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[64] LEBANON_022882 at '3073.

[65] LEBANON_022882 at '3080; *see also* LEBANON_022882 at '095 [redacted]

[redacted]

[66] LEBANON_022882 at '3091.

[67] LEBANON_012986 at '987.

[68] LEBANON_012986 at '987.

[69] LEBANON_012986 at '987.

[redacted][70] The meeting materials make no specific reference to the Company's diversion controls.[71] And the 2012 Audit Plan approved by the Committee did not provide for any compliance audits concerning DEA Compliance or diversion controls.

119. The Board met on March 1, 2012, [redacted][72] [redacted][73] [redacted]

[70] LEBANON_013007 at '010.

[71] LEBANON_023107 at '198.

[72] LEBANON_015008 at '158–59; *see also* LEBANON_013012 at '015.

[73] LEBANON_013012 at '014.

[redacted][74] In other words, ABC would ensure an easy onboarding process for its independent pharmacy network.

120. At the same Board meeting, [redacted][75] The suspension of Cardinal Health's license to distribute controlled substances resulted from that company's business dealings with four independent retail pharmacies.[76] [redacted][77] [redacted] should have been a red flag of the risks associated with AmerisourceBergen's opioid distributions. [redacted] however, made no reference to DEA compliance or the Company's diversion controls.

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[74] LEBANON_015008 at '160.

[75] LEBANON_013012 at '134.

[76] *See* Donna Leinwand Leger, *DEA Suspends Cardinal Health's Lakeland Facility's License*, ABC NEWS (Feb. 3, 2012), available at: https://abcnews.go.com/Business/dea-suspends-cardinal-healths-lakeland-facilitys-license/story?id=15509944.

[77] LEBANON_015008 at '038–47.

2. Regulators Begin Scrutinizing ABC's Practices, But the Board Fails to Take Action

121. The Audit Committee met on May 9, 2012. During the meeting, in connection with the Company's draft Form 10-Q for the quarterly period ended March 31, 2012,[78] [redacted][79] The Committee sat idly [redacted][80]

122. The Board next met on May 10, 2012.[81] [redacted][82] [redacted]

[78] LEBANON_013028 at '032–35.

[79] LEBANON_013028 at '035.

[80] LEBANON_013028 at '035.

[81] LEBANON_015222 at '225.

[82] LEBANON_015222 at '282.

[redacted][83] The Audit Committee's compliance-related update to the Board did not discuss DEA compliance or diversion controls.[84]

123. [redacted][85] The materials and minutes made no specific reference to risks concerning DEA compliance or the Company's diversion controls.[86] [redacted][87] Though [redacted] highlighted the business risks related to ABC's growth strategy targeting the independent pharmacy market, he did not identify or discuss the increased legal risks associated with the increasing sales to independent pharmacies.[88]

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[83] *See* LEBANON_015222 at '280 [redacted]

[84] LEBANON_013036 at '041–42.

[85] LEBANON_013036 at '039.

[86] LEBANON_015222 at '287–89.

[87] LEBANON_015222 at '289 (emphasis added).

[88] LEBANON_015222 at '287 [redacted]

124. The Audit Committee met on August 8, 2012. [redacted]

[redacted][89] [redacted]

[redacted][90]

125. [redacted]

[redacted][91] [redacted]

[redacted][92]

126. [redacted]

[redacted][93] [redacted]

[redacted]

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[89] LEBANON_023403 at ‘487.

[90] LEBANON_023403 at ‘444.

[91] LEBANON_023403 at ‘485.

[92] LEBANON_023403 at ‘465 [redacted]

[93] *See, e.g.*, LEBANON_014295 at ‘297; LEBANON_023403 at ‘464–66.

[redacted]. [94]

127. The Board next met on August 9, 2012.[95] The Board materials contain no reference to DEA compliance [redacted] [96]

128. On September 13, 2012, after Kentucky passed regulations addressed to pharmacists to try to crack down on abuse of controlled substances, Zimmerman, ABC's senior director in charge of drug diversion wrote: "One of the hillbilly's must have learned how to read :-)."

3. The Board Does Nothing to Question the Efficacy of ABC's Diversion Controls After Learning that ABC was Reporting Very Few Suspicious Orders

129. The Audit Committee met on November 14, 2012.[97] [redacted]

[94] LEBANON_023403 at '461. [redacted] *Id.* [redacted] *See* LEBANON_023403 at '464.

[95] LEBANON_013045.

[96] LEBANON_025020 at '056.

[97] LEBANON_001072.

[redacted][98] [redacted]

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[redacted]	
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

130. [redacted]

[redacted]

[redacted][100] [redacted]

[redacted]

[redacted][101] During the meeting, the Committee reviewed the Company's Diversion Control program, but there is no indication that the Audit Committee took

[98] LEBANON_001072.

[99] Information in Table derived from LEBANON_023558 at '775.

[100] LEBANON_023558 at '737

[101] LEBANON_023558 at '737.

any action or directed action to be taken by management, nor requested any follow-up to evaluate the effectiveness of the Company's diversion controls.

131. At the November 15, 2012 Board meeting, the Audit Committee advised the Board that it had received a report on the Company's diversion control program.

[redacted] There is no indication that the Audit Committee or the Board took any action or directed action to be taken by management, nor requested any follow-up to evaluate the effectiveness of the Company's diversion controls.

132. The Audit Committee met on November 26, 2012 to discuss the Company's Form 10-K.[102] The minutes reference no discussion of DEA compliance or diversion controls.

133. The Audit Committee met next on January 22, 2013. There was no discussion of diversion controls.[103]

134. The Audit Committee next met on February 7, 2013. The Committee reviewed the Company's Form 10-Q for the quarter ended December 31, 2012.[104] The SEC filing includes references to the subpoena by the New Jersey United States

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[102] LEBANON_023815 at '827.

[103] LEBANON_014304.

[104] LEBANON_013064 at '064.

Attorney's Office ("NJ USAO") and the Complaint[105] filed by the West Virginia Attorney General alleging, *inter alia*, that the Company supplied "pill mills," failed to prevent the diversion of opioids, and by its misconduct contributed to the opioid epidemic in West Virginia.

135. There is no indication that the Committee took any action or directed action to be taken by management, nor requested any follow-up to evaluate the effectiveness of the Company's diversion controls.

136. The Board held its next quarterly meeting on February 28, 2013. [redacted]

[redacted][106]

[redacted][107]

[redacted]

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[105] *See* AmerisourceBergen Corp., Form 10-Q (Feb. 8, 2013) at 12, available at: https://www.sec.gov/Archives/edgar/data/0001140859/000110465913008778/a13-4539_110q.htm.

[106] LEBANON_001240 at '358.

[107] LEBANON_001240 at '345.

[redacted][108]

137. During the February 28, 2013 meeting, the Board also received a report from the Audit Committee. The Committee's report on compliance activities did not discuss DEA compliance or drug diversion.

138. The Audit Committee met again on May 6, 2013. The Committee reviewed the Company's Form 10-Q for the quarterly period ended March 30, 2013. That 10-Q references the NJ USAO Subpoena and the West Virginia Complaint.[109] There is no indication that the Audit Committee took any action or directed action to be taken by management, nor requested any follow-up to evaluate the effectiveness of the Company's diversion controls.

139. The Audit Committee met again on May 15, 2013. Internal Audit made a presentation, but nothing in the presentation concerned compliance with the Order Monitoring Program.[110] [redacted]

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[108] LEBANON_013074 at '077 (emphasis added).

[109] *See* AmerisourceBergen Corp., Form 10-Q (May 9, 2013) at 13, available at: https://www.sec.gov/Archives/edgar/data/0001140859/000110465913039347/a13-11730_110q.htm.

[110] LEBANON_021424 at '488–91.

[redacted][111] Absent from the list [redacted] was any mention of the Company's diversion-related risks. [redacted] [redacted][112]

140. The Board held its next quarterly meeting on May 16, 2013. The Board minutes do not include any report on DEA compliance or diversion controls. [redacted][113] [redacted] to the Audit Committee the day prior, on May 15, 2013, which did not mention drug diversion-related risks.[114]

141. The Audit Committee met on August 7, 2013. The Audit Committee did not discuss then-pending governmental investigations into the Company's diversion controls, or the effectiveness of those controls. Internal Audit gave a presentation and none of its findings implicated compliance with the Company's diversion controls.[115]

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[111] LEBANON_021424 at '515–21.

[112] LEBANON_021424 at '521.

[113] LEBANON_013102 at '105.

[114] LEBANON_015399 at '469.

[115] LEBANON_001079 at '083–84.

4. The Board Prioritizes Profits Over Compliance As Red Flags Continue to Mount

142. On August 7, 2013, the Audit Committee also received report [redacted] [116] The DEA's settlement with the nation's largest drugstore chain resolved allegations that Walgreens negligently allowed oxycodone and other pain killers to be diverted for abuse and illegal black market sales.

143. The Board held its next quarterly meeting on August 8, 2013. [redacted] [117] Walgreens's violation leading to its settlement and $80 million fine to the DEA was not mentioned.

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[116] LEBANON_007616 at '740.

[117] LEBANON_000790 at '797.

144. In taking on Walgreens, [redacted] [118] [redacted] at a September 2013 Board meeting, [redacted] [119]

145. [redacted] [120] Simply stated, the tone at the top was to prioritize profit over compliance, as the Board agreed to onboard another company (*i.e.*, Walgreens) with serious DEA compliance issues, and then grossly understaff the DEA compliance and drug diversion functions.

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[118] LEBANON_007616 at '738.

[119] LEBANON_001410 at '560.

[120] LEBANON_013127 at '128 [redacted] *Compare* LEBANON_007616 at '723 *with* LEBANON_001410 at '560.

146. Following this discussion, the Board never followed up with Zimmerman to ensure that ABC's controlled substances distribution network was sufficient for the increased volume or in compliance with the DEA requirements.

147. Reflecting the tone set at the top of the organization, ABC coached its sales team on how to help customers circumvent the Company's threshold requirements and avoid detection by AmerisourceBergen's diversion controls. As alleged in the Opioid MDL:

> [A] July 2013 AmerisourceBergen document entitled "Sales Talking Points" warned an AmerisourceBergen customer that its "overall volume" and "percentage of C2 orders is high and may be deemed suspicious by either our OMP system or regulatory authorities. This puts your account with ABDC at significant risk of closure or exposure to regulatory and enforcement agencies actions. Every day, we read about another independent pharmacy under investigation. I want to make sure that doesn't happen to you." ***AmerisourceBergen then counseled the customer not to order fewer controlled substances, but to strategically format their ordering patterns so that they would not get flagged by SOMs programs or regulators being detected by the system and being the subject of an enforcement action by the DEA***.

148. The Board next met on September 26, 2013. [redacted]

[redacted][121] [redacted][122] The

[121] LEBANON_013127 at '131.

[122] LEBANON_001410 at '560.

Board materials do not indicate any action taken by the Board or directed by the Board to be taken concerning diversion controls.

149. The Audit Committee met on November 13, 2013. The Committee did not receive any update on diversion controls or the governmental investigation and lawsuits surrounding the Company's distribution of prescription opioids.[123]

150. The Board next met on November 14, 2013. During the meeting, [redacted][124] [redacted][125] [redacted] there is no indication that the Board

[123] LEBANON_013134 at '138–39.

[124] LEBANON_001623 at '626 [redacted]

[125] LEBANON_01181 at '197–98.

took any action or required any action by management to ensure the effectiveness of the Company's anti-diversion program.

151. The Audit Committee met on November 25, 2013. The Committee reviewed the draft Form 10-K for the fiscal year ended September 30, 2013.[126] [redacted] [redacted][127] which references the West Virginia Complaint, the NJ USAO subpoena, and additional subpoenas from the USAOs for the District of Kansas and Northern District of Ohio "concerning ABDC's program for controlling and monitoring diversion of controlled substances into channels other than for legitimate medical, scientific and industrial purposes."[128] There is no indication that the Committee took any action or required management to take any action to address the alleged deficiencies in these actions.

152. During the Audit Committee's February 7, 2014 meeting, the Committee reviewed the Form 10-Q for the quarterly period ended December 31, 2013. [redacted]

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[126] LEBANON_013140 at '140–41.

[127] LEBANON_013140 at '143.

[128] *See* AmerisourceBergen Corp., Form 10-K (Nov. 26, 2013) at 60, available at: https://www.sec.gov/Archives/edgar/data/0001140859/000104746913010867/a2217371z10-k.htm.

[redacted][129] Note 7 also references subpoenas from each of the USAOs for the District of Kansas and the Northern District of Ohio.[130] There is no indication that the Committee took any action or required management to take any action to address the alleged deficiencies in these actions.

153. The Audit Committee met on March 5, 2014. Internal Audit's presentation did not mention diversion control. [redacted][131] In addition, the Committee's Legal and Risk Management update did not discuss DEA compliance or drug diversion.[132]

154. The full Board next met on March 5, 2014. The report from the Audit Committee did not discuss DEA compliance nor drug diversion. At the meeting, the Board received a legal update, scheduled for fifteen minutes,[133] during which [redacted]

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[129] LEBANON_001090 at '092.

[130] *See* AmerisourceBergen Corp., Form 10-Q (Feb. 7, 2014) at 11, available at: https://www.sec.gov/Archives/edgar/data/0001140859/000110465914007468/a14-5082_110q.htm.

[131] LEBANON_007984 at '8043, '8046–50.

[132] LEBANON_013145 at '148–49.

[133] LEBANON_001904 at '909.

[redacted][134] [redacted]

[redacted][135] [redacted]

[redacted][136] No materials were provided to the Board to explain how the program functioned or whether it was effective. There is no indication that the Board took any action or directed action to be taken by management, nor requested any follow-up to evaluate the effectiveness of the Company's diversion controls.

155. The Audit Committee met on May 6, 2014. The Committee reviewed the Company's Form 10-Q for the quarterly period ended March 31, 2014.[137] [redacted]

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[134] LEBANON_000801 at '818.

[135] LEBANON_001904 at '084, '089, '2100 (emphasis added).

[136] LEBANON_000801 at '818.

[137] LEBANON_001095. *See also* AmerisourceBergen Corp., Form 10-Q (May 7, 2014) at, available at: https://www.sec.gov/Archives/edgar/data/0001140859/000110465914035570/a14-11897_110q.htm.

[redacted][138]

156. The Audit Committee met on May 14, 2014. The Audit Committee did not discuss DEA compliance or diversion controls.[139]

157. The Board next met on May 15, 2014. The report from the Audit Committee did not discuss DEA compliance nor drug diversion. The Board received a legal update [redacted][140] on the [redacted][142] The meeting minutes do not indicate

[138] LEBANON_001095 at '096.

[139] LEBANON_001095.

[140] *See* LEBANON_002110 at '115, '133 (scheduling "Legal Update" for 30 minutes).

[141] LEBANON_001226 at '239.

[142] LEBANON_001226 at '239.

that the Board took any action or directed action to be taken by management, nor requested any follow-up to evaluate the effectiveness of the Company's diversion controls.

158. The Audit Committee met on July 23, 2014. [redacted] [143] [redacted] [144] [redacted] there is no indication that the Committee reassessed the staffing needs for the Company's diversion controls.

5. The Board Fails to Ensure the Effectiveness of the Company's Diversion Controls, Despite Additional Red Flags of Risks

159. The Audit Committee met on August 6, 2014. [redacted]

[143] LEBANON_014330 at '331.

[144] LEBANON_007616 at '723.

[redacted] did not include the Company's Controlled Substances Order Monitoring Program.[145]

160. The Board next met on August 7, 2014. [redacted] [146] The Board also received a legal update, which was included as part of a broader discussion on corporate matters that was scheduled for fifteen minutes.[147] During that short window, [redacted] discussed, among other things, [redacted] [148] [redacted] [149] The meeting minutes do not indicate that the Board took any action

[145] LEBANON_008269 at '335–43.

[146] LEBANON_000824 at '825.

[147] LEBANON_002265 at '270, '284. In addition to the legal update, the Board's discussion of Corporate Matters also included consideration of 2015 and 2016 Board meeting dates and venues.

[148] LEBANON_000824 at '834.

[149] LEBANON_000824 at '834.

or directed action to be taken by management, nor requested any follow-up to evaluate the effectiveness of the Company's diversion controls.

161. The Board next met on September 24, 2014. During the meeting, the Board received a legal update [redacted] [150] The meeting minutes do not indicate that the Board took any action or directed action to be taken by management, nor requested any follow-up to evaluate the effectiveness of the Company's diversion controls.

162. The Audit Committee met on October 29, 2014. During the meeting, [redacted] [151] The Committee took no action and did not ask management to take any action. [redacted]

[150] LEBANON_000836 at '836–37.

[151] LEBANON_001100 at '103.

163. The Audit Committee met on November 12, 2014. The Committee received a Corporate Compliance Update,[152] but the materials and minutes make no reference to DEA compliance, diversion controls, or the government investigations.

164. The Board held its next quarterly meeting on November 13, 2014. The report from the Audit Committee did not discuss DEA compliance nor drug diversion. During the meeting, however, [redacted] presented a legal update on several items including [redacted][153] The meeting minutes do not indicate that the Board took any action or directed action to be taken by management, nor requested any follow-up to evaluate the effectiveness of the Company's diversion controls.

6. The Company Revises its Controls to Report Fewer Orders

165. The Audit Committee met on November 25, 2014. During the meeting, the Committee reviewed a draft of the Company's Form 10-K for the fiscal year ended September 30, 2014. In connection therewith, [redacted]

[152] LEBANON_008433 at '749.

[153] LEBANON_000843 at '855.

[redacted][154]

166. At its next meeting on March 4, 2015, the Audit Committee received a report on ABC's diversion control program [redacted][155]

167. The presentation did not include the actual number of suspicious orders of controlled substances submitted to the DEA. If it had, or if the Committee members cared enough to ask, they would have learned that the Company continued to report only a small fraction of orders as suspicious.

168. Worse yet, [redacted]

[154] LEBANON_013150 at '150–51.

[155] LEBANON_10630 at '774–77.

169. As evidenced by the sharp decline in suspicious orders ABC reported between 2014 and 2015, upon information and belief, the express and intended purpose of the revisions were to reduce the number of orders being reported as suspicious. In fact, [redacted][156]

170. In any event, at the Audit Committee's March 4, 2015 meeting, the Committee allocated only ***fifteen minutes*** to the diversion control update,[157] which was the first update that the Audit Committee received on diversion controls since the Audit Committee's November 14, 2012 meeting.

171. At the Board's meeting the next day, March 5, 2015, a total of fifteen minutes was allocated to reports from the four Board Committees.[158] During the Audit Committee portion, the Board was told that the Committee had received reports on matters including E&Y's 2015 fiscal year audit plan, financial accounting, internal audit activities, compliance activities and [redacted] During a separate legal update, the Board heard about [redacted]

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[156] *See infra* ¶ 230 & n.238.

[157] *See* LEBANON_001105 at '108; LEBANON_010630 at '768–83.

[158] LEBANON_002788 at '793.

[redacted][159] The Board did not discuss the revisions to the OMP. The Board did not discuss the effectiveness of the Company's diversion controls and did not take any action or direct management to take any action concerning improving DEA compliance.

7. The Board Learns of Additional Allegations of ABC's Unlawful Conduct, But Fails to Take Action

172. On May 8, 2015, the Audit Committee reviewed the Company's Form 10-Q for the period ended March 31, 2015.[160] That 10-Q disclosed that Fulton County, Georgia filed a complaint alleging that ABC and others "failed to maintain effective controls against the diversion of controlled substances, failed to maintain records, and failed to report suspicious orders in violation of the [law,]" and "acted negligently in the marketing, promotion, and distribution of controlled substances by failing to guard against misconduct by physicians, pharmacists, and other parties who diverted controlled substances for illegitimate users."[161]

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[159] LEBANON_00859 at '871.

[160] LEBANON_014355 at '355.

[161] LEBANON_014355 at '356; *See* AmerisourceBergen Corp., Form 10-Q (May 8, 2015) at 13, available at: https://www.sec.gov/Archives/edgar/data/0001140859/000110465915036255/a15-5951_110q.htm.

173. On May 13, 2015, the Audit Committee held a meeting to discuss [redacted] a variety of other matters.[162] [redacted]

174. The Board held its next quarterly meeting on May 14, 2015.[163] [redacted] gave a presentation on Enterprise Risk Management, [redacted][164] [redacted] gave a legal update on the ongoing grand jury proceedings and ongoing investigation into the Company's distribution of controlled substances. The meeting minutes do not indicate that the Board took any action or directed action to be taken by management, nor requested any follow-up to evaluate the effectiveness of the Company's diversion controls.

175. On August 5, 2015, the Audit Committee held a meeting. [redacted]

[162] *See* LEBANON_014355; LEBANON_010841.

[163] *See* LEBANON_000875; LEBANON_004783.

[164] LEBANON_004783 at '870.

[redacted][165] [redacted]

[redacted][166]

176. Zimmerman, who led the CSRA organization, testified at his August 3, 2018 deposition in the Opioid MDL, that although he met with the Audit Committee of the Board once a quarter, he did "[n]ot regularly" provide the committee updates on diversion controls.[167] Additionally, CSRA did not perform periodic, unexpected audits of AISC's independent pharmacy customers, "even among the easily identifiable and relatively small groups of pharmacies that consistently ordered the highest volumes of opioids."[168]

177. Notably, the September 2019 report that ABC issued to shareholders titled *Safe and Secure Distribution of Controlled Substances* touted the Board's supposed oversight of AmerisourceBergen's diversion controls, falsely stating that Internal Audit periodically reviewed the Company's diversion controls. In fact, the

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[165] LEBANON_L010978 at '1108.

[166] *See e.g.*, LEBANON_00875 at '878, LEBANON_001105 at '107–09; LEBANON_004908 at '913.

[167] *See In re: Nat'l Prescription Opiate Litig.*, C.A. No. 1:17-MD-2804-DAP (N.D. Ohio Dec. 19, 2019) (Dkt. No. 3015-22, Ex. 291), Depostion of Christopher Zimmerman, at 252:07-253:06.

[168] *See In re Opioid Litig.*, 4000000/2017 (N.Y. Sup. Ct., Nassau & Suffolk Cty. Mar. 28, 2019), at ¶ 243.

Board delegated that responsibility to management's CSRA division from 2010 to at least 2018. And, as detailed above, Internal Audit did not periodically review the Company's diversion controls with the Board.

178. At the August 6, 2015 Board Meeting, a total of 15 minutes was allocated to the four Committee reports [redacted][169] The Audit Committee report did not discuss DEA compliance or drug diversion. During the legal update, however, [redacted] There is no indication that the Board took any action or directed that any action be taken by management to address or improve the effectiveness of the Company's anti-diversion program.

179. On November 11, 2015, the Audit Committee met. Neither the Internal Audit report nor the compliance report referred to the controlled substances or

[169] *See* LEBANON_013153 at '157–67; LEBANON_004908 at '913.

diversion controls.[170] At the meeting, [redacted] [171] The Committee, however, did not discuss the effectiveness of the Company's anti-diversion program.

180. The Board next met on November 12, 2015. The report from the Audit Committee did not include any discussion of the DEA compliance or anti-diversion programs. Rather, during the legal update, [redacted] [172] There is no indication that the Board took any action or directed management to take any action to address or improve the effectiveness of the Company's anti-diversion program.

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[170] LEBANON_011234 at '512.

[171] LEBANON_011234 at '358 (emphasis added).

[172] LEBANON_000883 at '892.

181. At an Audit Committee meeting on November 24, 2015, [redacted] [173] There is no indication that the Committee discussed how the Company should change or improve its practices to avoid or mitigate these risks.

8. ABC Tries to Change the Law, Rather than Comply With It

182. On August 3, 2016, the Audit Committee held a meeting. [redacted] [174]

183. On November 9, 2016, the Audit Committee held a meeting. The Internal Audit report [redacted] —none of which specifically addressed ABC's diversion controls.[175]

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[173] LEBANON_014385 at '386.

[174] LEBANON_009339 at '420.

[175] LEBANON_009511 at '609, '618–20.

184. The meeting materials included an Integrated Audit Results report by Ernst & Young which again highlighted the increasing threat to the Company posed by controlled substances. [redacted][176]

185. Rather than focusing on improving its diversion controls or increasing staffing its CSRA, the Company directed its resources to lobbying in favor or more lax regulations for distributors of controlled substances. For example, an October 2017 *Washington Post* and *60 Minutes* investigation revealed that AmerisourceBergen spent $3.8 million between 2014 and 2016 lobbying Congress to pass the Ensuring Patient Access and Effective Drug Enforcement Act of 2016.[177] The HDA spent an additional $3.5 million lobbying Congress to pass the law.[178]

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[176] LEBANON_009511 at '663.

[177] Scott Higham & Lenny Bernstein, *The Drug Industry's Triumph Over the DEA*, THE WASH. POST (Oct. 15, 2017), available at https://www.washingtonpost.com/graphics/2017/investigations/dea-drug-industry-congress/.

[178] *Id.*

186. This new law made it virtually impossible for the DEA to freeze suspicious shipments or impose an immediate suspension on distributors like AmerisourceBergen. As explained by the *Washington Post*, "A handful of members of Congress, allied with the nation's major drug distributors, prevailed upon the DEA and the Justice Department to agree to a more industry-friendly law, undermining efforts to stanch the flow of pain pills. The DEA had opposed the effort for years."[179]

187. According to the DEA's chief administrative law judge, John J. Mulrooney II, the statutorily defined term "imminent danger to the public health or safety" makes it "all but logically impossible, due to the obvious attenuation between the distributor or manufacturer registrant and the potential victims, to make the requisite showing up the production chain, in the case of a distributor or manufacture. If it had been the intent of Congress to completely eliminate the DEA's ability to ever impose an immediate suspension on distributors or manufacturers, it would be difficult to conceive of a more effective vehicle for achieving that goal."[180]

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[179] *Id.*

[180] *Id.*

9. The Board Learns of Additional Enforcement Actions, Penalties, and Potential Financial Harms

188. During a Board meeting on August 4, 2016, the Board heard a legal update from [redacted][181]

189. The Board met on November 10, 2016. [redacted] provided a legal update [redacted][182] The Board did not address the efficacy or functioning of ABC's Order Monitoring Program or anti-diversion controls.

190. On November 21, 2016, the Audit Committee held a one-hour-long meeting on ABC's fiscal year 2016 Form 10-K. [redacted]

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[181] LEBANON_000913 at '925–26.

[182] LEBANON_000927 at '930.

[redacted][183] [redacted] also provided [redacted]

[redacted][184]

191. On January 30, 2017, the Audit Committee held a one-hour-long telephonic meeting on a review of the fiscal year 2017 first quarter financial results and the Form 10-Q.[185] [redacted]

[redacted][186]

192. The next Audit Committee meeting was on March 1, 2017.[187] [redacted] provided the Office of Compliance Update. The presentation stated that [redacted]

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[183] *See* LEBANON_014403. There were two risk factors related to these matters, one of which referred to controlled substances and the Company's order monitoring program. *See* AmerisourceBergen Corp., Form 10-K (Nov. 22, 2016) at 10, available at: https://www.sec.gov/Archives/edgar/data/1140859/000114085916000022/abc10-kxseptember302016.htm.

[184] LEBANON_014403 at '404.

[185] *See* LEBANON_014406; LEBANON_010191.

[186] LEBANON_010191 at '261.

[187] *See* LEBANON_013191; LEBANON_010267.

[redacted] The Office of Compliance update took only five minutes of the meeting.[188]

193. There was no mention in any of the Audit Committee's materials or minutes of diversion control or controlled substances, with one exception: Ernst & Young's 2017 integrated audit presentation again identified litigation and loss contingencies as an Area of Audit Emphasis, stating: [redacted][189]

194. On March 2, 2017, the Board held its regular quarterly meeting.[190] The only references to controlled substances were during the legal segment, in which [redacted] reported on [redacted][191]

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[188] LEBANON_010267.

[189] LEBANON_010267 at '353.

[190] *See* LEBANON_000939.

[191] LEBANON_000939 at '953.

195. On May 3, 2017, the Audit Committee met to review the third quarter 2017 financial results and the Form 10-Q for that quarter.[192] [redacted] then provided [redacted][193] Ernst & Young's quarterly review report [redacted][194]

196. The Company's Form 10-Q, filed on May 4, 2017, described the ongoing criminal and civil investigation of the Company related to its PFS Business and bluntly stated that the "[t]he USAO-EDNY has expressed an intention to pursue potential civil and criminal charges based upon the FDCA and the False Claims Act."

197. The Audit Committee next met on May 17, 2017. [redacted] provided a legal update. [redacted]

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[192] *See* LEBANON_013196; LEBANON_010473.

[193] LEBANON_013196 at '197.

[194] LEBANON_010473 at '542.

[redacted][195]

198. The Legal and Regulatory Update Report listed [redacted]

[redacted][196]

199. As evidenced in the Legal and Regulatory Update Report, only two presentations by business personnel concerning diversion control to any Board Committee had taken place between 2010 and 2017. And the one scheduled for August was the first one ever requested by a Board member.

200. Put another way, the Board did nothing to oversee diversion controls until the Company was deep into a labyrinth of litigation and regulatory investigations with criminal implications. And, as further demonstrated below, even

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[195] LEBANON_001110 at '112.

[196] LEBANON_012439 at '511 (emphasis added).

when the Board woke from its long slumber, its actual actions reflect bad faith disregard for the Company's legal obligations.

10. The Board Ignores Shareholder Requests For Accountability and Increased Oversight

201. On May 17, 2017, both the Governance and Nominating Committee and Compensation Committees held a joint meeting including a Committee Governance Update and Environmental and Social Impact Update.[197] During the meeting, [redacted][198]

[redacted][199]

[197] *See* LEBANON_018509; LEBANON_018980.

[198] LEBANON_018511 at '509–10.

[199] LEBANON_018511 at '509.

202. As detailed above, the minutes are recording of a false narrative. In fact, the Board was not regularly apprised about diversion control other than summary updates about opioids litigation and investigations. As noted above, the Audit Committee was the only subset of the Board that had even received statistics about AmerisourceBergen's diversion control efforts, and the Committee received that information in 2012, with the next update to be given to the full Board in August 2017. In the interim, they received a presentation on revisions to the OMP program that would actually reduce flagged and reported suspicious orders.

203. [redacted][200] [redacted][201]

204. [redacted]

[200] LEBANON_018511 at '509–10.

[201] LEBANON_018509 at '510; LEBANON_018980 at '988.

[redacted][202][redacted][203][redacted][204][redacted]

205. On May 18, 2017, the Board held its regular quarterly meeting. [redacted]

[202] LEBANON_018509 at ‘510.

[203] LEBANON_018980 at ‘996.

[204] LEBANON_018980 at ‘996.

[redacted][205] The Legal Update largely focused [redacted][206]

206. On August 9, 2017, the Governance Committee held its regularly-scheduled quarterly meeting. During the meeting, [redacted][207] [redacted][208]

207. Among other things, the accompanying presentation stated [redacted][209]

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[205] LEBANON_000956 at '961.

[206] LEBANON_000956 at '961.

[207] LEBANON_018512.

[208] LEBANON_018512.

[209] LEBANON_019058 at '068.

11. The Board Focuses on Public Relations, Rather than Fix the Defective Diversion Program

208. The Board next met on August 10, 2017. The Legal Update included a [redacted][210]

209. The Legal Update was followed by the Government & Community Affairs Update. Tellingly, [redacted][211] Among other things the presentation described [redacted][212]

210. Those purported (and largely fabricated) efforts included [redacted]

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[210] LEBANON_000963 at '964–65.

[211] LEBANON_007081 at '119.

[212] LEBANON_007081 at '121.

[redacted][213] [redacted]

[redacted]

[redacted]

[redacted]

[redacted][215]

[redacted]

[213] LEBANON_007081 at ‘121.

[214] LEBANON_007114 at ‘121–23.

[215] LEBANON_00963 at ‘966 (emphasis added).

[216] [redacted]

[redacted][217] The plan, however, did not focus on fixing the Company's deficient compliance programs.

211. The Board then heard a one-hour regulatory compliance update.[218] The presentation had three segments: (i) AmerisourceBergen's overall Compliance Program; (ii) AmerisourceBergen's Diversion Control Program; and (iii) a Regulatory Update on AmerisourceBergen's PharMEDium business, at which there were serious compliance issues.[219] Therefore, ***approximately twenty minutes were allocated to diversion control***.[220]

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[217] LEBANON_000963 at '966; LEBANON_007081 at '121.

[218] *See* LEBANON_007081 at '083.

[219] Ultimately, the FDA issued a warning letter in 2018 and filed a complaint against PharMEDIUM in 2019 alleging that PharMEDIUM distributed dugs which were adulterated because the drugs were produced under unsanitary conditions and because PharMEDIUM distributed unapproved new drugs and drugs that had inadequate labeling. AmerisourceBergen also entered into a consent decree regarding PharMEDIUM. *See* FDA News Release, *Federal judge enters consent decree against compounder PharMedium Services for violations at multiple facilities*, U.S. FOOD & DRUG ADMINISTRATION (May 22, 2019), available at: https://www.fda.gov/news-events/press-announcements/federal-judge-enters-consent-decree-against-compounder-pharmedium-services-violations-multiple.

[220] *See* LEBANON_007081 at '126–52. [redacted]

212. [redacted] gave the presentation on the Company's anti-diversion controls. [redacted][221] [redacted][222] There also was a "Diversion Control Advisory Committee" that met quarterly.[223] Given the amount of opioids being distributed, the Board should have recognized that it did not have sufficient human resources dedicated to ensure the effectiveness of its diversion compliance programs.

213. The report described [redacted][224] [redacted]

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[221] LEBANON_007081 at '137.

[222] [redacted] *See* LEBANON_007081 at '137.

[223] LEBANON_007081 at '137.

[224] LEBANON_007081 at '139.

[redacted][225]

214. The presentation also touted program "enhancements" [redacted]

215. Despite all of this, [redacted][226]

[redacted][227]

216. On September 6, 2017, the Board formally approved the guilty plea by ABSG in connection with the DOJ investigation of the Company's PFS Business.

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[225] LEBANON_007081 at '139.

[226] LEBANON_007081 at '140.

[227] LEBANON_007081 at '140. [redacted]

217. The criminal information was filed charging a violation of the United States Food, Drug and Cosmetic Act. Morgan, Lewis & Bockius LLP, counsel for the Company, signed the federal plea agreement on behalf of ABSG. The plea agreement included a guilty plea, the payment of a $208,000,000 criminal fine and criminal forfeiture of $52,000,000. The legacy ABSG programs at ABC (which included ABDC) entered into a three-year compliance program with the DOJ.

218. On September 27, 2017, ABSG pled guilty and was sentenced in accordance with the plea agreement. At the sentencing, counsel for ABSG conceded that neither ABC nor ABSG had taken remedial measures for employees at the entities related to the conduct.

219. On November 17, 2017, the Company issued an 8-K disclosing that it had reached an agreement in principle to settle the civil aspects of the PFS matter with the DOJ for payment of an additional $625 million. Subsequently, on September 26, 2018, the Company entered into a formal settlement agreement with the DOJ, and a corporate integrity agreement with the Office of Inspector General of the United States Department of Health and Human Services.

220. On September 27, 2017, the Board held a meeting on AmerisourceBergen's fiscal year 2018 plan. During the Executive Overview

segment, [redacted] noted, among other issues, [redacted][228]

221. It was not until April 2018 that the Audit Committee discussed [redacted][229]

222. On August 7, 2018, the Corporate Executive Committee held a meeting on risk oversight.[230] This appeared to be the first meeting that the Committee held related to risk management, as no earlier minutes or meeting materials for this Committee were produced by ABC in the Section 220 production.

223. At the start of the meeting, [redacted][231]

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[228] *See* LEBANON_014231 at '232. [redacted]

[229] LEBANON_001121 at '122.

[230] *See* LEBANON_018494; LEBANON_013774. The members of the Executive Committee were Defendant Collis and five directors.

[231] LEBANON_018494.

[redacted][232]

224. In truth, for over a decade, the Board had completely failed in its oversight responsibilities, despite unequivocal red flags that ABC's diversion controls were not effective. Indeed, prior to this time, neither the Board, nor its committees, ever received regular updates on the compliance program's guidelines, training initiatives, monitoring activities and any enforcement or corrective responses. [redacted]

225. The directors' newfound interest, however, did not mean that the Board was actually providing proper oversight or ensuring the Company's compliance with relevant laws. Rather, with even great knowledge of the risks associated with the Company's opioid distribution practices, the Board continued to allow the Company to employ deficient practices to detect, stop and report suspicious opioid orders.

[232] LEBANON_018494.

12. The Company's Diversion-Related Reporting Thresholds Remain Too High to Be Effective

226. The Audit Committee met on August 7, 2019, with segments including diversion control and an Order Monitoring Program update; the approval of E&Y audit and non-audit services, a financial accounting update, and updates on internal controls, the status of E&Y's audit work, Internal Audit and its 2020 audit plan and risk assessment, IT security and cybersecurity, the Office of Compliance and legal and enterprise risk management.[233]

227. Only thirty minutes were allocated to the diversion control update.[234] The accompanying presentation stated that Diversion Control had instituted a [redacted][235]

228. But all of this was meaningless if, as the statistics in the presentation strongly suggested, the thresholds set for flagging orders were much too high. [redacted]

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[233] *See* LEBANON_021382; LEBANON_017368.

[234] LEBANON_017368.

[235] LEBANON_017368 at '386.

[redacted][236]

229. [redacted]

230. The patent deficiencies with AmerisourceBergen's thresholds continued in 2020. Specifically, the materials from the belatedly formed Compliance Committee's first meeting on March 4, 2020 [redacted]

[236] LEBANON_017368 at '390.

[237] LEBANON_017368 at '390.

[redacted][redacted][redacted][redacted][redacted][redacted][redacted][redacted]

[redacted][238]

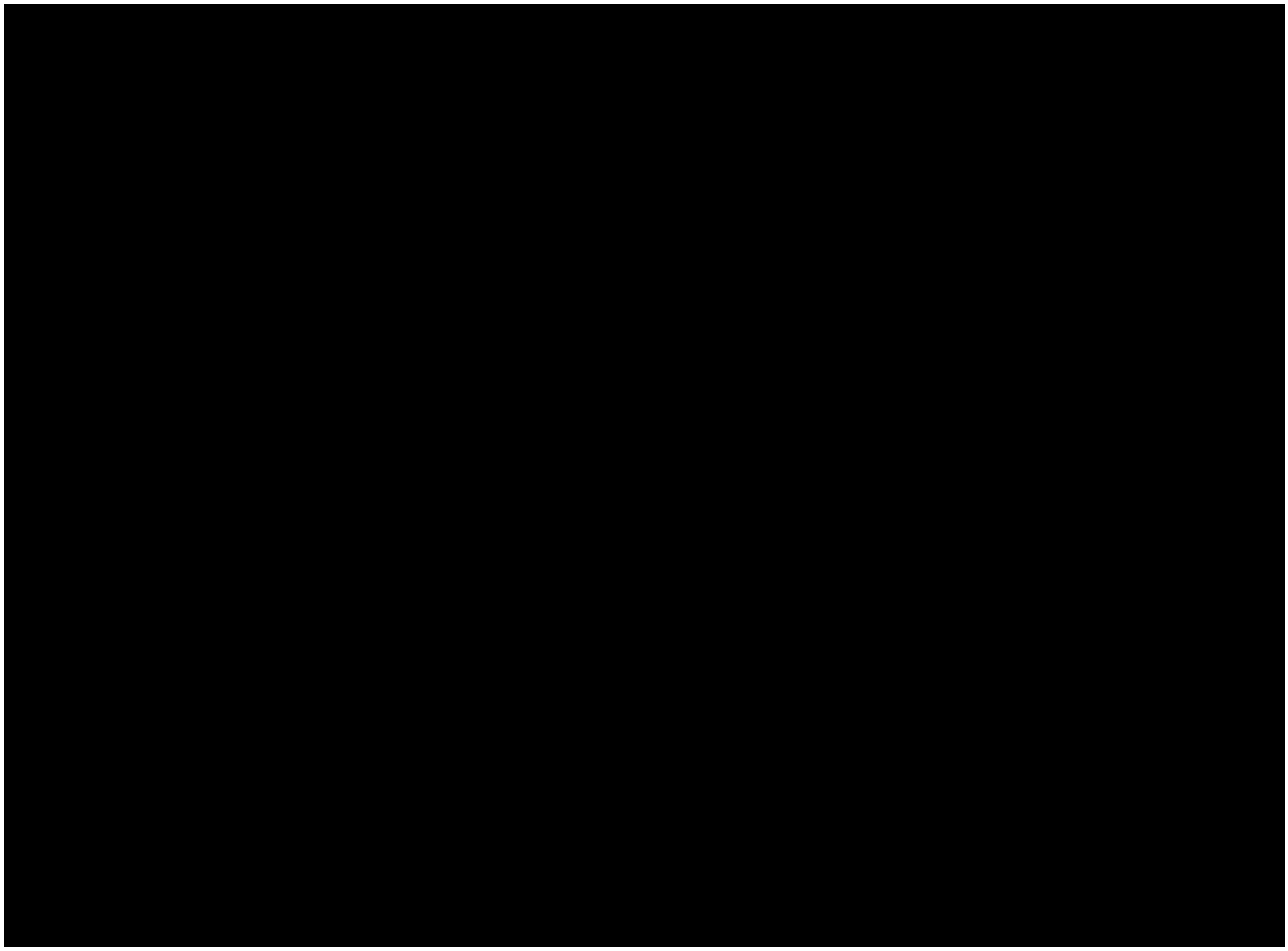
[redacted]							
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

231. [redacted]

[redacted]

[redacted]

[238] LEBANON_018451.



[redacted]

E. The Board's Oversight Failures Result in Substantial Harm to ABC

234. Beginning in 2017, AmerisourceBergen came under increased public scrutiny concerning its opioid distribution practices, which Collis and the Defendant Directors publicly claimed were sufficient and compliant with the law.

235. In 2017, Congress began investigating the causes of the opioid epidemic, including the role AmerisourceBergen and other distributors played in its creation and expansion. On March 6, 2017, U.S. Senator Claire McCaskill, then Ranking

Member of the U.S. Senate Committee on Homeland Security and Government Affairs, sent a letter to the Inspector General of the DOJ spotlighting, among other things, the "alarmingly low rate of Agency Diversion enforcement activity on a national level relative to historical data," which "parallel[ed] an effort by opioid manufacturers, distributors, and their law firms to hire dozens of former top DEA officials, including 31 officials directly involved in diversion control."[239]

236. During the summer of 2017, Congress made further inquiries into the distribution of prescription opioids. First, on May 9, 2017, the U.S. House of Representatives Energy and Commerce Committee (the "E&C Committee") opened a bipartisan investigation specifically focused on large opioid shipments to small-town pharmacies in West Virginia, and requested information from AmerisourceBergen and other distributors. Soon thereafter, on July 26, 2017, Senator McCaskill, issued requests to the Big Three for documents and information related to their efforts to prevent opioid diversion, including "materials and data concerning internal estimates of diversion risk, company compensation policies,

[239] Letter from Senator Claire McCaskill to Michael E. Horowitz, Inspector General of DOJ (Mar. 6, 2017).

suspicious order reporting, on-site investigations of pharmacies and other customers, and total opioid shipments to Missouri between 2012 and 2017."[240]

237. The following year, on July 12, 2018, Senator McCaskill published a report titled *Fueling an Epidemic: A Flood of 1.6 Billion Doses of Opioids Into Missouri and the Need for Stronger DEA Enforcement* (previously defined as the "Missouri Report"). The Missouri Report concluded that AmerisourceBergen and other distributors "consistently failed to meet their reporting obligations over the past ten years." In fact, ***the Missouri Report found that AmerisourceBergen had the most egregious record of underreporting among the major distributors***, noting that while AmerisourceBergen shipped around 650 million dosage units to Missouri between 2012 and 2017, the Company reported only 224 suspicious orders to the DEA in the same period—about 75 times fewer reports than McKesson based on comparable shipment volumes, and 23 times fewer reports than Cardinal which shipped half as many dosage units.[241]

238. On December 19, 2018, the E&C Committee published the West Virginia Report. The E&C Committee's investigation identified myriad compliance issues at AmerisourceBergen, including "inadequate new customer diligence efforts,

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[240] *See* Missouri Report at 3.

[241] *See* Missouri Report at 8.

poor implementation—or lack thereof—of thresholds capping the distribution of controlled substances, and suspicious order reporting, which resulted in continued shipments by the distributors to certain pharmacies despite clear red flags of diversion."[242] These results raised "questions about the effectiveness of [AmerisourceBergen's] anti-diversion efforts outside West Virginia, as the same policies were implemented across the country."[243]

239. In connection with the E&C Committee investigation, Defendant Collis appeared before the Subcommittee on Oversight and Investigation for a hearing on May 8, 2018. Collis admitted that the massive volume of opioids that flooded small towns in West Virginia could have been a symptom of an industry-wide problem—a problem to which AmerisourceBergen contributed substantially.[244] When Collis was asked specifically about AmerisourceBergen's failure to investigate the Beckley Pharmacy in West Virginia until 2015, a pharmacy with 394 suspicious orders reported from 2012 to 2015, Collis testified "I think that we – I have never heard of this pharmacy before . . . And if we made mistakes, hopefully we'll rectify them and

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[242] *See* West Virginia Report, at 105.

[243] *Id.*

[244] House of Representatives, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce (May 8, 2018) (TRANSCRIPT) at 53–54.

they won't happen in the future."[245] Collis, however, denied that ABC contributed at all to the nation's opioid epidemic.

240. Nonetheless, the West Virginia Report revealed that AmerisourceBergen distributed large quantities of opioids into West Virginia, while achieving an objectively low rate of suspicious order during the same period. According to the West Virginia Report, AmerisourceBergen distributed 248 million doses of hydrocodone and oxycodone to West Virginia pharmacies between 2005 and 2016,[246] approximately ***140 dosage units for every West Virginian***. Meanwhile, the number of suspicious order reports AmerisourceBergen submitted to the DEA in West Virginia dropped precipitously from a high of 792 order in 2013 to a low of only three orders in 2016.[247] By comparison, from 2007 to 2017, McKesson reported more than 10,000 suspicious orders to the DEA regarding West Virginia customers, whereas AmerisourceBergen only reported 2,000 suspicious orders regarding West Virginia customers during the same period.[248]

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[245] *Id*. at 107.

[246] *See* West Virginia Report, at 6.

[247] *Id.* at 17.

[248] *Id*. at 61; *see id*. at 106 ("[D]istributors did not always comply with their legal obligation to report suspicious orders.").

241. The West Virginia Report also identified issues regarding AmerisourceBergen's due diligence of new and reinstated customers. It detailed the Company's track record dealing with an independent pharmacy customer called the Westside Pharmacy located in Wyoming County, West Virginia—a county that had one of the highest prescription overdose death rate in the nation from 1999 to 2014.

242. According to the West Virginia Report, in 2011, AmerisourceBergen approved Westside Pharmacy as a new customer based on very little information, and despite the fact that two of the six prescribing "Pain Doctors" were located with substantial distances from the pharmacy and five of the six doctors had either been subsequently convicted of, or indicted on, criminal charges related to controlled substance prescribing or were then-currently under federal investigation. The West Virginia Report found that, although AmerisourceBergen discontinued supplying Westside Pharmacy with opioids in 2012, AmerisourceBergen approved a new customer application for Westside Pharmacy again in January 2016, without any apparent reference to the pharmacy's previous history with the Company.

243. The E&C Committee made the following findings regarding Westside Pharmacy:

- "AmerisourceBergen's due diligence documents for Westside Pharmacy included a list of six 'Pain Doctors.' Two of the doctors were located a four-hour and eleven-and-a-half-hour round-trip drive from the pharmacy respectively. Five of the six doctors have either been subsequently convicted of, or indicted

on, criminal charges related to their controlled substance prescribing, or are currently under federal investigation."[249]

"Based on documents provided to the Committee, in 2011, AmerisourceBergen did not investigate why Westside Pharmacy filled prescriptions for physicians located hours away from the pharmacy."[250]

"AmerisourceBergen told the Committee that it placed stricter limits on Westside Pharmacy's purchasing of controlled substances in late 2012. However, ***the Committee received no documents that reference these limitations*** or the pharmacy's apparent decision to subsequently end its business relationship with AmerisourceBergen."[251]

- "AmerisourceBergen began doing business with Westside Pharmacy again in January 2016. ***Documents produced to the Committee give no indication to suggest that AmerisourceBergen implemented, or for that matter even considered the company's [purported] 2012 decision to place stricter limits on the pharmacy's ability to purchase controlled substances***." [252]

- "Prior to onboarding Westside Pharmacy as a customer in January 2016, AmerisourceBergen does not appear to have consulted public news reports that would have alerted the company to red flags related to some of the pharmacy's top prescribing physicians. According to AmerisourceBergen, '[n]ews searches for prescribing physicians are not a standard part of ABDC's new customer review[.]'"[253]

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[249] *See* West Virginia Report, at 160.

[250] *Id.* at 161.

[251] *Id.* at 162 (emphasis added).

[252] *Id.* at 163 (emphasis added).

[253] *Id.* at 166.

244. The West Virginia Report's review of the Company's dealings with Westside Pharmacy concluded that "[d]uring two separate prospective customer reviews, AmerisourceBergen was provided with information regarding some of Westside Pharmacy's prescribing physicians that should have raised serious red flags for the company. Had the company examined these red flags and sought an explanation from the pharmacy in 2011, it may have reached a different conclusion regarding the pharmacy's initial new customer application."[254]

245. The West Virginia Report further found the Company "responded inconsistently when pharmacies triggered repeated suspicious orders."[255] For example, the Company continued to supply Beckley Pharmacy for nearly a year after reporting 109 suspicious orders in five months from 2013 to 2014.[256] AmerisourceBergen "also indicated [to the E&C Committee] that repeated suspicious order reports for a single customer would be considered a problem, yet the E&C Committee identified two instances in which AmerisourceBergen reported more than

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[254] *See* West Virginia Report, at 171.

[255] *Id.* at 17, 253.

[256] *Id.* at 253.

100 suspicious orders but continued to supply the pharmacies for an extended period of time."[257]

246. The West Virginia Report had reason to focus on the Company. ***AmerisourceBergen distributed nearly 250 million of hydrocodone and oxycodone to West Virginia pharmacies between 2005 and 2016***.[258] In 2016, however, ***the Company only reported three suspicious orders for all West Virginia pharmacies, all of which related to orders placed by the same pharmacy on a single day***.[259]

247. The Board, by contrast, never took the time to learn those readily available facts themselves. Indeed, these deficient practices were part and parcel of the "light touch," easy onboarding model that ABC employed with independent pharmacies with the Board's full knowledge and approval.

248. In addition to these Congressional findings, a number of state Attorneys General investigated AmerisourceBergen's practices and independently concluded that it was a recidivist and ongoing violator of the CSA and their state law counterparts. West Virginia, Delaware, New York, and Tennessee, among many others states and localities, brought litigation against AmerisourceBergen and other

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[257] *Id.* at 255.

[258] *Id*. at 16, 249.

[259] *Id*. at 250.

opioid manufacturers and distributors for creating and fueling the opioid crisis in their communities. In addition, the Cherokee Nation brought its own suit against AmerisourceBergen.

249. In 2016, AmerisourceBergen paid $16 million to settle claims brought by the State of West Virginia originally filed in 2012 against AmerisourceBergen and Cardinal Health, in what was considered at the time the largest pharmaceutical settlement in West Virginia's history. The lawsuit, initiated by Darrell McGraw, then-Attorney General of the State of West Virginia, alleged that the more than 100 million opioid pills AmerisourceBergen shipped into West Virginia from 2007 to 2012 was *prima facie* evidence that the Company did not have effective policies and procedures for preventing diversion.

250. On January 19, 2018, the State of Delaware, *ex rel.* Matthew P. Denn, then-Attorney General of the State of Delaware, filed a complaint naming AmerisourceBergen as a defendant.[260] The Delaware Attorney General alleged that AmerisourceBergen, among others, "negligently or recklessly failed to control their supply lines to prevent diversion."[261] Delaware alleged that AmerisourceBergen and

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[260] *See State of Delaware ex rel. Matthew P. Denn v. Purdue Pharma*, C.A. No 1:18-cv-00383, N18C-01-223-MMJ.

[261] *Id.* at ¶ 161.

the other distributor defendants "routinely and continuously violated [Delaware] laws and regulations," which require distributors to refuse to fill suspicious orders, conduct due diligence of customers, and maintain inventory security and control systems to prevent diversion.[262] Delaware further alleged AmerisourceBergen "made little to no effort to visit the pharmacies servicing Delaware to perform due diligence inspections[,]" and that compensation provided to certain of their employees was affected by the volume of their sales of opioids in Delaware.[263] Additionally, Delaware had requested access to records of transactions in five specific opioid drugs pursuant to Title 24 of the Delaware Administrative Code Section 2500-8.0, which requires wholesale distributors of prescription drugs to maintain certain records for a period of three years, but AmerisourceBergen failed to produce such records in response to the State's request.[264] On February 4, 2019, Delaware's negligence and consumer fraud claims against AmerisourceBergen survived a motion to dismiss in Delaware Superior Court. That action is currently stayed.[265]

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[262] *Id.* at ¶ 13.

[263] *Id.* at ¶¶ 162–63.

[264] *See id.* at ¶¶ 164–66.

[265] *See State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382, at *15 (Del. Super. Feb. 4, 2019).

251. On February 26, 2018, the Cherokee Nation filed a complaint against AmerisourceBergen and other major opioid distributors and pharmacies, alleging state law claims for creating and furthering the opioid crisis in Oklahoma.[266] The Cherokee Nation alleged that, between 2006 and 2014, AmerisourceBergen shipped more than 94 million dosage units of prescription opioids into the 14 counties of Cherokee Nation, but failed to control their supply lines to prevent diversion, including by "fail[ing] to maintain effective controls against the diversion of prescription opioids, and to report and take steps to halt suspicious orders of prescription opioids" in contravention of both state and federal law.[267]

252. The Cherokee Nation further alleged AmerisourceBergen made affirmative efforts to conceal its conduct and avoid detection, including by falsely assuring the public, through trade associations or otherwise, that AmerisourceBergen was undertaking efforts to comply with its legal obligations as well as by preventing discovery of statistical data and other information showing the extent of AmerisourceBergen's unlawful activities and its impact on the Cherokee Nation. [268] Later, on March 29, 2021, the United States District Court for the Eastern District of

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[266] *See The Cherokee Nation v. McKesson Corp. et al.*, 6:18-cv-00056-RAW-SPS (E.D. Okla.).

[267] *Id.* at ¶ 213.

[268] *Id.* at ¶¶ 61, 254–55.

Oklahoma sustained the Cherokee Nation's claims and found "there is not only a duty to report suspicious orders once detected, but also a duty to either not fulfill those orders or investigate them to determine that they are not likely to be diverted to illegal channels."[269]

253. Meanwhile, on May 17, 2018, the full Board met and received a legal update describing the status of the opioid litigation, [redacted][270]

254. On November 16, 2018, the State of Florida, through its Attorney General, Ashley Moody, filed an amended complaint suing AmerisourceBergen, among other defendants involved in the unlawful marketing, sale, distribution, and diversion of opioids into Florida.[271] Therein, Florida alleged AmerisourceBergen violated, *inter alia*, state law regulating the trade practices of wholesale drug distributors by continuing to fill suspicious orders of opioids by their customers in

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[269] *Cherokee Nation v. McKesson Corp. et al.*, 529 F.Supp.3d 1225, 1235 (E.D. Okla. 2021).

[270] LEBANON_001018 at '022.

[271] *See State of Florida v. Purdue Pharma L.P., et al.*, Case No. 2018-CA-001438 (Fla. Cir. Ct.).

Florida, in addition to violations of the Florida Racketeer Influenced and Corrupt Organization Act for deliberately failing and refusing to report suspicious ordering behavior and other pharmacy red flags. According to the complaint, "AmerisourceBergen sold and shipped unreasonable quantities of opioids into Florida, including many red-flag pharmacies in Florida, and continued to do so despite extensive and blatant evidence of diversion at many facilities in Florida."[272] Florida further alleged that AmerisourceBergen, among others, engaged in a pattern of racketeering by making false representations concerning the effectiveness of their anti-diversion programs, and that the "conspiracy is continuing, and the overt acts performed in compliance with the conspiracy's objective are ongoing and have occurred within the last year." On April 2, 2019, the court denied defendants' motion to dismiss the state's litigation.[273]

255. On January 3, 2019, the State of Georgia, through its Attorney General, Christopher M. Carr, filed a complaint against AmerisourceBergen and other opioid

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[272] *Id.* at ¶ 346.

[273] *See* New Release, *Judge Denies Defendants' Motion to Dismiss Florida Opioid Litigation*, Office of Attorney General Ashley Moody (Apr. 2, 2019) http://www.myfloridalegal.com/newsrel.nsf/newsreleases/A4E65FD8B9D24F40852583D00055ED9B.

manufacturers and distributors.[274] According to the complaint, AmerisourceBergen and the other distributors have "refused, and continue to refuse, to abide by the duties imposed by state and federal law which are required to legally acquire and maintain a license to distribute prescription opiates."[275] Georgia alleged, *inter alia*, that AmerisourceBergen and others "were negligent in failing to disclose suspicious orders for opioids to the State pursuant to requirements" of state and federal law, and that they "knowingly, intentionally, recklessly, and/or negligently disseminated massive quantities of prescription opioids to suspect physicians and pharmacies and into the black market, including so-called 'pill mills' and other dealers."[276] Georgia further alleged that the "continued tortious and unlawful conduct by Defendants causes a repeated or continuous injury," and that AmerisourceBergen, among others, made fraudulent misrepresentations, suppressions, and concealments of material facts in order to fraudulently conceal the existence of causes of action against them.[277]

256. On January 30, 2019, the Audit Committee met and reviewed ABC's financial results and Form 10-Q for the first quarter of fiscal 2019. E&Y's January

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[274] *See State of Georgia v. Purdue Pharma L.P., et al.*, Civ. No. 19-A-00060-8 (Sup. Ct. Gwinnett. Cty.).

[275] *Id.* at ¶ 181.

[276] *Id.* at ¶ 302.

[277] *Id.* at ¶¶ 244, 246–55.

30, 2019 First Quarter Review [redacted]

[redacted][278]

[redacted]

257. One month later, on February 28, 2019, the full Board met and received an overview of current opioid-related matters, which noted [redacted]

[278] LEBANON_0134199 at ‘266 (emphasis added).

[redacted][279]

258. On March 12, 2019, the State of Washington filed a complaint against AmerisourceBergen and the other major distributors.[280] Washington alleged, *inter alia*, that AmerisourceBergen and the other distributors intentionally, unlawfully, recklessly, unfairly and/or negligently violated federal and state laws requiring them to stop, investigate, and report orders of unusual size, orders deviating substantially from normal industry patterns, and unusually frequent orders. Specifically, Washington alleged they "continuously filled and shipped order that they knew or should have known were suspicious"; "continuously failed to report orders they knew or should have known were suspicious"; and that they "fulfilled these suspicious orders without engaging in adequate due diligence to ensure that these orders were not likely to be diverted into illegitimate channels."[281] To the extent AmerisourceBergen and the other distributors flagged orders as potentially suspicious, they routinely granted waivers and permitted these orders to ship without

[279] LEBANON_001059 at '059-60.

[280] *See Washington v. McKesson Corp., et al.*, Case No. 19-2-06975-9 SEA (Wash. Super. Ct.).

[281] *Id.* at ¶¶ 31, 33.

adequate due diligence or reports to the DEA.[282] Moreover, according to the complaint, from 2014 to at least 2019, AmerisourceBergen and the other distributors "have continued their well-established patterns of shipping thousands of suspicious orders annually into Washington, without conducting due diligence and without reporting the vast majority of these suspicious orders to the DEA resulting in substantial diversion of prescription opioids into illegitimate channels, and fueling Washington's opioid epidemic."[283] The court sustained Washington's claims on July 26, 2019, and subsequently held AmerisourceBergen in contempt of court on November 17, 2020, for the Company's discovery misconduct.[284]

259. On March 28, 2019, the State of New York, through its Attorney General, Letitia James, filed a 269-page complaint against AmerisourceBergen and

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[282] *Id.* at ¶ 33.

[283] *Id.*

[284] *See* News Release, *Judge rejects opioid distributors' request to dismiss AG Ferguson's lawsuit*, Office of the Attorney General of the Washington State (July 26, 2019), available at: https://www.atg.wa.gov/news/news-releases/judge-rejects-opioid-distributors-request-dismiss-ag-ferguson-s-lawsuit. *See also* News Release, *AG Ferguson: Judge finds opioid distributor in contempt of court for refusing to disclose documents and make key witnesses available for testimony*, Office of the Attorney General of the Washington State (Nov. 18, 2020), available at: https://www.atg.wa.gov/news/news-releases/ag-ferguson-judge-finds-opioid-distributor-contempt-court-refusing-disclose.

other opioid manufacturers and distributors.[285] New York alleged that AmerisourceBergen violated state law by failing to maintain effective anti-diversion policies from 2007 until at least 2019. According to the complaint, ***AmerisourceBergen "has consistently stood out as compared to its major competitors [because of] its unwillingness to identify suspicious orders, even among customers that regularly exceeded their thresholds and presented multiple red flags of diversion."***

260. New York further observed that, between 2007 and 2015, AmerisourceBergen's written policies for compliance with state law were scattered and lacked uniformity across AmerisourceBergen and Bellco. Specifically, New York alleged "[p]rior to 2015, the company had a regular practice of releasing and not reporting orders, even for customers that repeatedly and significantly exceeded its established parameters."[286] And "[t]oday, [AmerisourceBergen] still lacks an internal rule or policy that requires investigation of a customer based on a specific number of suspicious order reports."[287]

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[285] *See In re Opioid Litig.*, 4000000/2017 (N.Y. Sup. Ct., Nassau & Suffolk Cty. Mar. 28, 2019).

[286] *Id.* at ¶ 723.

[287] *Id.; see also id.* at ¶ 724 (detailing AmerisourceBergen's failure to investigate or restrict purchasing of suspicious pharmacy).

261. Echoing allegations of other states, New York further explained that AmerisourceBergen's compliance violations resulted, in part, from its faulty new customer policies, which failed to reliably produce baseline screenings of customers. Additionally, AmerisourceBergen (including Bellco) failed to appropriately staff its anti-diversion program. From 2007 to 2015, Bellco only had two employees dedicated to performing due diligence for thousands of new customers, and the diversion staff at Bellco was unable to directly access customer history for existing AmerisourceBergen customers due to a lack of system integration.

262. According to New York, even after revising the policies in 2016, AmerisourceBergen's policies "have allowed for frequent threshold manipulation to avoid orders being held for review, rejected from shipment, or reported as suspicious."[288] Simply stated, AmerisourceBergen created a complex, automated approach that "increases ordering flexibility for its customers rather than limits it."[289] This approach failed to fulfill AmerisourceBergen's obligations under state law to identify, stop, and report suspicious orders.[290]

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[288] *Id.* at ¶ 705.

[289] *Id.* at ¶ 706.

[290] *Id.* at ¶ 707.

263. New York further alleged that AmerisourceBergen has a "high tolerance" for noncompliance before it will terminate a customer, and that, until at least 2019, AmerisourceBergen "lack[ed] an internal rule or policy that requires investigation of a customer based on a specific number of suspicious order reports."[291]

264. Specifically, AmerisourceBergen's procedures failed to ensure that accounts for blocked or terminated customers were deactivated, which enabled pharmacies on the "Do Not Ship List" to continue ordering and receiving opioids.[292] For example, New York alleged that "[e]ven when customers were restricted, blocked, or terminated, Amerisource's system failed to ensure their accounts were de-activated."[293] According to New York, a compliance staff member identified numerous New York pharmacies that appeared on the Company's "Do Not Ship" list but were nonetheless listed as active and in good standing in AmerisourceBergen's system, and had been ordering and receiving shipments since being placed on the list.[294] Months later, AmerisourceBergen determined that the "Do Not Ship" list was

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[291] *Id.* at ¶ 723.

[292] *Id.* at ¶ 726.

[293] *Id.* at ¶ 726.

[294] *Id.*

erroneous and fully reinstated the customers "without any additional due diligence review."[295]

265. New York also alleged ***numerous*** AmerisourceBergen opioid customers in New York exhibited several common indicators of fraud, and described three pharmacy customers as examples:

> - **Amerisource Exemplar Pharmacy 1**, located in Orange County (about 300,000 people), was consistently at or above both the 99th percentile in the State in terms of both number of opioid orders and total opioid weight. Between 2014 and 2016, more than 10% of its prescriptions were written by prescribers who were later indicted or convicted of opioid-related prescribing and distribution charges. And while Amerisource reported 105 [Suspicious Order Reports] for this pharmacy in 2013 and 83 in 2014, that number dwindled to nearly zero over the next three years, and as of 2018, Amerisource was still serving as this pharmacy's primary opioid distributor.
>
> - **Amerisource Exemplar Pharmacy 2**, located in Queens County, is a customer of Amerisource's Bellco Drug subdivision. Between 2013 and 2017, 77% of its prescriptions, on average, were written by prescribers who were later indicted or convicted, including Rogelio Lucas and Moshe Mirilashvili. In 2014 specifically, 90% of prescriptions filled by this pharmacy were made

[295] *Id.* This practice was pervasive within the Company and not limited to New York. Indeed, the Tennessee Complaint alleges that Jabo's Pharmacy in Newport, Tennessee was placed on AmerisourceBergen's Do Not Ship list for opioids in late 2011. In contravention of their own policy, AmerisourceBergen nonetheless shipped hundreds of thousands of doses of opioids per year to Jabo's Pharmacy through 2017.

> by prescribers who were later indicted or convicted. Amerisource appears to have only stopped shipping in 2017—Amerisource itself only identified four [Suspicious Order Reports] for this pharmacy between 2013 and 2017.
>
> **Amerisource Exemplar Pharmacy 3**, located in Bronx County, exceeded the 95th percentile for the percentage of oxycodone volume shipped for five years straight (2012 to 2016). On average, 58% of its opioid prescriptions were paid in cash (99th percentile in the State). For three consecutive years (2013 to 2015), approximately half of all opioid scripts were filled by prescribers who were later convicted, including Robert Terdiman and Rogelio Lucas. Amerisource reported two [Suspicious Order Reports] in 2010 and did not report any more as of September 2017. As of 2018, this pharmacy was still a customer of Amerisource.[296]

266. On October 3, 2019, the State of Tennessee, *ex rel.* Herbert H. Slatery III, filed a 230-page complaint against AmerisourceBergen as the sole defendant.[297] Tennessee alleged AmerisourceBergen violated state law from 2006 until at least 2019, and "knowingly shipped hundreds of millions of opioids to pharmacies in Tennessee despite knowledge based on its own data that diversion was occurring at these locations."[298] It also alleged AmerisourceBergen, which was the largest

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[296] *Id.* at ¶ 730 (emphasis in original).

[297] *See State of Tennessee ex rel. Slaterly v. AmerisourceBergen Drug Corp.*, No. 1-345-10 (Tenn. Cir. Ct.).

[298] *Id.* at ¶ 17.

distributor of opioids into Tennessee between 2006 and 2014, treated due diligence as "an afterthought[,]" including with respect to its Retail Pharmacy Questionnaire (Form 590), which AmerisourceBergen used as "a baseline to measure the pharmacy's ordering habits and to determine any deviation from expected purchasing practices."[299]

267. Tennessee observed that, in May 2016, AmerisourceBergen determined it was missing due diligence information for approximately 3,000 of its customers, and that, as of May 2018, AmerisourceBergen had neither compiled all of the missing data nor identified these deficiencies to regulators.[300] Tennessee further observed that, until at least 2019, it was AmerisourceBergen's policy to "not require new customers to provide usage reports or dispensing data as part of the onboarding process."[301]

268. According to Tennessee, AmerisourceBergen "avoided identifying suspicious orders by establishing extremely high thresholds to determine what triggered a suspicious order review[,]" and the Company allowed its most lucrative

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[299] *Id.* at ¶¶ 18, 60–66.

[300] *Id.* at ¶¶ 77–78.

[301] *Id.* at ¶ 79.

customers to exceed their thresholds.[302] Tennessee further alleged AmerisourceBergen continued to distribute opioids to pharmacies with known red flags through at least 2019, including shipping opioids pharmacies that exhibited significant signs of likely diversion and invalid prescriptions being dispensed from the pharmacies, citing numerous examples based upon internal documents produced by ABC.

269. As one example, Tennessee alleged that Jabo's Pharmacy in Newport, Tennessee was placed on AmerisourceBergen's Do Not Ship list for opioids in late 2011. In contravention of their own policy, AmerisourceBergen nonetheless shipped hundreds of thousands of doses of opioids per year to Jabo's Pharmacy through 2017.[303] Another example was P & S Pharmacy, which ABC continued to supply with opioids as late as June 2019 despite "knowing it was Amerisource's highest dispensing pharmacy for buprenorphine monoproduct in the country; sending a termination letter [in 2016] stating Amerisource would be cutting the pharmacy off from controlled substances; knowing incredibly high percentages of individuals were paying for their opioids in cash at the pharmacy; being told by the PIC at P & S that he did not use the State's Controlled Substances Monitoring Database; being told by

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[302] *Id.* at ¶¶ 81–87.

[303] *See id.* at ¶¶ 446–49.

a pharmacy technician that the pharmacy receives at least '50 plus' phone calls per day from new patients looking to see if the pharmacy could fill their buprenorphine monoproduct prescriptions; and its investigator witnessing approximately 20 to 30 younger customers paying cash for buprenorphine during the limited time he conducted a site visit, among many other things."[304]

270. Tennessee also observed that AmerisourceBergen hired FTI Consulting, Inc. in August 2015 to conduct a review of the Company's Ordering Monitoring Process. FTI Consulting "found the same glaring deficiencies that had plagued Amerisource's programs from the start, including a lack of resources, lack of formal training, employees who felt overburdened by their workload and administrative demands, inconsistent policies, and breakdowns in communications. Even though 'regulatory obligations related to diversion control' were among the 'Gaps & Risks' identified in the audit, Amerisource took no action and made no changes in response to the report."[305]

271. On December 17, 2019, the State of Michigan, by and through its Attorney General, Dana Nessel, filed a complaint against AmerisourceBergen,

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[304] *Id.* at ¶ 295.

[305] *Id.* at ¶ 141.

among others.[306] Therein, Michigan alleged, *inter alia*, that AmerisourceBergen and the other defendants "have breached, and continue to breach, their statutory and common law duties to the State of Michigan[,] including by: "[d]istributing and selling opioids in ways that facilitated and encouraged their flow into the illegal, secondary market"; "[d]istributing and selling opioids without maintaining effective controls against the diversion of opioids"; "[c]hoosing not to effectively monitor for suspicious orders"; "[c]hoosing not to report suspicious orders"; "[c]hoosing not to stop or suspend shipments of suspicious orders"; and "[d]istributing and selling opioids prescribed by 'pill mills' when Defendants knew or should have known the opioids were being prescribed by 'pill mills.'"[307] According to the complaint, "[t]his ongoing course of conduct knowingly, deliberately, and repeatedly threatened and accomplished harm to public health and safety, and large-scale economic loss to communities and government liabilities across the country."[308]

272. These states were not the only aggrieved parties challenging AmerisourceBergen's anti-diversion practices. Smaller municipalities, healthcare systems, institutions, and individuals all filed claims against AmerisourceBergen. By

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[306] *See State of Michigan ex rel. Dana Nessel v. Cardinal Health, Inc., et al.*, Case No. 19-016896-NZ (Mich. Cir. Ct.).

[307] *Id.* at ¶ 288.

[308] *Id.* at ¶ 227.

May 2019, the Opioid MDL was coordinating over 1,800 federal cases against AmerisourceBergen and other opioid manufacturers and distributors.

273. The claims in the MDL allege, *inter alia*, that AmerisourceBergen failed to monitor, detect, investigate, refuse and report suspicious orders of prescription opiates, as it was required to do under federal and state Controlled Substances Acts.

274. On May 1, 2020, the State of Oklahoma filed a complaint naming AmerisourceBergen and an affiliate as the sole defendants.[309] Oklahoma alleged, *inter alia*, that AmerisourceBergen violated state law by negligently or reckless failing to control its supply lines to prevent diversion. According to the complaint, "AmerisourceBergen has supplied and continues to supply quantities of prescription opioids in and around Oklahoma with the actual or constructive knowledge that many of the opioids were ultimately consumed by Oklahoma citizens for illicit and/or non-medical purposes[,]" and that "[m]any of these shipments should have been stopped or investigated as suspicious orders, but AmerisourceBergen negligently or recklessly failed to do so."[310] Oklahoma further alleged that "AmerisourceBergen worked with pharmacies to help them avoid their duties and to evade detection,"

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[309] *See State of Oklahoma, ex rel., Mike Hunter v. AmerisourceBergen Corp., et al.*, Case No. CJ-2020-85 (Okla. Dist. Ct.).

[310] *Id.* at ¶ 80.

including by "provid[ing] early warnings to its chain pharmacy customers that they were approaching thresholds so that the chains could avoid triggering warnings and adjust ordering patterns" by "delaying orders or obtaining a threshold increase."[311]

275. On May 16, 2019, the full Board met and received a legal update, including an overview of current opioid related matters [redacted][312]

[311] *Id.* at ¶ 87.

[312] LEBANON_003895 at '927.

276. On October 21, 2019, on the eve of trial for the Track One MDL, AmerisourceBergen, Cardinal Health, and McKesson settled a bellwether case and paid $215 million.[313]

277. During the summer of 2021, AmerisourceBergen and the other distributors faced another two significant trials—the West Virginia bench trial, and the New York jury trial. These two trials marked a watershed moment. Before the New York jury trial concluded, AmerisourceBergen and the other distributors offered a global settlement worth $21 billion to resolve all claims by the states and localities.

278. On May 3, 2021, trial in the "Track Two" cases in the Opioid MDL commenced in the Southern District of West Virginia, where the plaintiffs proceeded against AmerisourceBergen on a public nuisance theory. Two years earlier, Cabell County Commission and the City of Huntington had filed their joint complaint on July 19, 2019, in the action styled *Cabell County Commission v. AmerisourceBergen Drug Corp., et al.*, 3:17-cv-01665 (S.D. W.V.), alleging, among other things, that AmerisourceBergen failed to perform required due diligence and advised its customers on how to avoid suspicious order detection by providing customers with

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[313] Jan Hoffman, *$260 Million Opioid Settlement Reached at Last Minute with Big Drug Companies*, N.Y. TIMES (Oct. 21, 2019), available at: https://www.nytimes.com/2019/10/21/health/opioid-settlement.html.

advanced warnings and recommending strategic ordering patterns. In late July 2021, after almost three months in the courtroom, the Cabell County trial ended with plaintiffs' expert estimating that it would cost local officials $2.5 billion over 15 years to abate the opioid crisis in the community.[314]

279. Soon thereafter, on June 30, 2021, a jury trial against AmerisourceBergen, Cardinal Health, and McKesson commenced in state court in New York by the New York Attorney General based on the allegations detailed above. On July 20, 2021, it was publicly announced that New York had reached an agreement with AmerisourceBergen, Cardinal Health, McKesson, and Johnson & Johnson to settle the New York action for $1.18 billion and that the states had reached a global agreement to settle the various litigations in a global settlement worth $26 billion.[315]

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[314] Courtney Hessler, *Opioid abatement plan will cost $2.54 billion for Huntington, Cabell experts say*, THE HERALD-DISPATCH (Jun. 29, 2021), available at: https://www.herald-dispatch.com/news/opioid-abatement-plan-will-cost-2-54-billion-for-huntington-cabell-experts-say/article_54a80bd9-69b2-5367-a14b-2a1017a1d639.html.

[315] *See* Michael Dabaie, *Distributors Reach Opioid Settlement Agreement with New York State*, MARKETWATCH (Jul. 20, 2021), available at: https://www.marketwatch.com/story/distributors-reach-opioid-settlement-agreement-with-new-york-state-271626788647. *See also* Jan Hoffman, *Drug Distributors and J.&J. Reach $26 Billion Deal to End Opioid Lawsuits*, N.Y. TIMES (Jul. 21, 2021), available at: https://www.nytimes.com/2021/07/21/health/opioids-distributors-settlement.html.

280. Of that $26 billion global settlement, AmerisourceBergen, Cardinal Health, and McKesson agreed to collectively pay up to $21 billion over the next 18 years, with AmerisourceBergen responsible for paying $6.4 billion.[316]

281. Additionally, AmerisourceBergen and the other distributors agreed to injunctive relief terms, which require the Company to: (i) help establish a centralized independent clearinghouse to provide all three distributors and state regulators with aggregated data and analytics about where drugs are going and how often, eliminating blind spots in the current systems used by the distributors, (ii) use data-driven systems to detect suspicious opioid orders from customer pharmacies, (iii) terminate customer pharmacies' ability to receive shipments, and report those companies to state regulators, when they show certain signs of diversion, (iv) prohibit shipping of and report suspicious opioid orders, (v) prohibit sales staff from influencing decisions related to identifying suspicious opioid orders, and (vi) require senior corporate officials, including the Board, to engage in regular oversight of anti-diversion efforts and the Company's compliance with the settlement and applicable law. The existence of the significant injunctive relief terms evidences the pre-existing

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316 *See* Distributor Settlement Agreement (Jul. 21, 2021), available at https://www.attorneygeneral.gov/wp-content/uploads/2021/07/2021-07-21-Final-Distributor-Settlement-Agreement.pdf.

deficiencies in ABC opioid related compliance programs, as well as the Board's deficient oversight of the same.[317]

282. The multi-billion settlement of the opioid actions lead by the State Attorney Generals had an extremely negative impact on ABC's financials. The Company suffered a loss of $3.4 billion in 2020 alone.

283. On November 15, 2021, trial commenced against AmerisourceBergen, McKesson, and Cardinal in the state court of Washington, with Washington demanding more than $95 billion in damages.[318]

F. The Board Refuses to Hold Management Accountable

284. The Company compensates it officers, including Defendant Collis, its long serving CEO, president and Board member, with compensation that is supposed to be tied to the performance of the Company. Yet, when it filed its 2021 Proxy Statement, the Company disclosed that the Board had determined to exclude the multi-billion dollar opioid settlement from the determination of Collis' compensation.

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[317] *See Id*. at Exhibit P.

[318] Jef Freely, *McKesson Opioid Trial Begins With $95 Billion Potentially at Stake*, BLOOMBERG (Nov. 15, 2021), available at: https://www.bloomberg.com/news/articles/2021-11-15/mckesson-opioid-trial-begins-with-95-billion-possibly-at-stake.

285. As the reflected in the Exhibit A to the Company's 2021 Proxy statement, under Generally Accepted Accounting Principles ("GAAP"), the opioid settlement caused the Company to suffer an operating income loss of $5.135 billion, representing a loss of $16.65 per share. Yet, under the Board's "adjusted Non-GAAP" metric, this operating income loss of $5.135 billion was adjusted to an operating income profit of $2.204 billion, representing a profit of $7.90 per share. Based on this, the Board determined that Collis met or exceeded his performance thresholds and the Board awarded Collis a hefty raise to $14.3 million, a 26 percent increase from the prior year.[319]

286. The Board asked shareholders to approve Collis' compensation under the "say-on-pay" proposal.[320] The shareholder reaction to the Board's exclusion of the opioid settlement from Collis' compensation was harsh.

287. For example, the Treasurers of the States of Connecticut and Rhode Island submitted a letter to the SEC urging shareholders to reject the say-on-pay vote, writing in part:

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[319] *See* AmerisourceBergen Corp., Form DEF 14A (Proxy Statement) (Jan. 28, 2021) at 46, available at: https://www.sec.gov/Archives/edgar/data/1140859/000110465921008422/tm2039342-1_def14a.htm.

[320] *Id.* at 57.

We urge fellow investors to vote against AmerisourceBergen's "say on pay" proposal, which appears as Item #3 on the company's 2021 proxy statement, at the March 11th meeting of shareholders.

In recommending these compensation arrangements, the Compensation and Succession Planning Committee inexplicably chose to insulate named executive officers' long-term incentive awards and annual incentive payouts from the fallout from the company's $6.6 billion charge tied to its role in the nation's opioid crisis, leading to significantly above target payouts. Incredibly, despite the opioid charge triggering the company's largest-ever loss and exceeding the cumulative earnings generated during CEO Steven Collis' decade-long leadership, his reported compensation rose 26 percent to $14.3 million in fiscal 2020.

*. *. *.

Despite earlier warnings and enforcement action by government agencies, AmerisourceBergen appears to have persistently failed to discharge its responsibilities to ensure the safe and secure distribution of controlled substances through a process of "knowing your customer" and implementing a robust "suspicious orders" monitoring program. As a result, communities across our nation were flooded with massive amounts of highly addictive prescription painkillers. . . .

*. *. *

One way or another, we believe it is critical that long-tenured executives share responsibility for the billions in costs the company has incurred as a result of its opioid distribution practices, not to mention the societal damage associated with the company's business practices. Failure to do so suggests a startling sense of entitlement and a worrying lack of self-awareness and

> accountability at AmerisourceBergen. Accountability starts at the top.[321]

288. Proxy advisors ISS and Glass Lewis both were critical of the Company's "say on pay" proposal, since the multi-billion dollar settlement was excluded from Collis' executive compensation. Glass Lewis stated, "[w]e question whether the incentive outcomes reflect a fair assessment of performance resulting from actions of [AmerisourceBergen's] executives."[322]

289. The "say on pay" vote barely passed, with 48 percent of the stockholders voting against it. Excluding the approximately 28 percent of the shares of the Company owned by the Walgreens Boots Alliance (and who have a board representative), the vast majority of the independent shareholders voted against the compensation.

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[321] *See* Press Release, *Treasurer Magaziner, CT Treasurer Wooden Urge Shareholders to Reject Payout for CEO of Opioid Distributor*, Rhode Island, Office of General Treasurer Seth Magaziner (Feb. 11, 2021), available at: https://www.ri.gov/press/view/40457.

[322] Ed Silverman, *'Deeply problematic': AmerisourceBergen rewards its CEO despite the ravages of the opioid crisis*, STETNEWS (Mar. 11, 2021), available at: https://www.statnews.com/2021/03/11/amerisourcebergen-ceo-opioid-crisis-shareholder/.

290. One publication explained:[323]

> In a rebuke to AmerisourceBergen (ABC), nearly half of its shareholders voted against a "say-on-pay" proposal after criticism erupted over the hefty compensation package given its chief executive officer and the role the company played in the opioid crisis.
>
> Specifically, 48% of the stockholders rejected the compensation given to CEO Steve Collis and his management team, an outcome that suggests the company misjudged investor sentiment about the pay packages. However, when excluding shares held by Walgreen Boots Alliance, which owns 27.7% of AmerisourceBergen stock, ***72% of independent shareholders rejected executive pay.***
>
> *. *. *
>
> The poor showing followed an outcry over an accounting maneuver the pharmaceutical wholesaler used to reward Collis, who was given compensation worth $14.3 million, a 26% hike. In calculating his package, the company did not include a $6.6 billion settlement expected to be made to settle lawsuits filed by communities around the U.S. seeking compensation for costs associated with the opioid crisis.
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> *. *. *
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> The mathematical sleight of hand prompted criticism, though, because Collis was chief executive during a decade in which the wholesaler repeatedly ran afoul of authorities for failing to properly monitor opioid shipments. . . .

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[323] Ed Silverman, *AmerisourceBergen say-on-pay proposal squeaks by amid outrage over CEO compensation*, STETNEWS (Mar. 18, 2012) (emphasis added), available at: https://www.statnews.com/pharmalot/2021/03/18/amerisourcebergen-ceo-compensation-shareholders/.

291. The Board's determination to exclude the multi-billion dollar settlement from Collis' compensation reflects the complete lack of responsibility being taken by the Board for the Company's role in the opioid crisis. The tone from the top to reward lavish CEO compensation in the face of an enormous opioid settlement as a result of serious misconduct sends a strong message to management that there will be no one held responsible and that a demand on this Board would be futile.

V. DEMAND IS FUTILE

292. Demand is futile because a majority of the directors here face a substantial likelihood of liability for failing in their oversight responsibilities, or otherwise permitting the Company to engage in unlawful conduct. There are currently ten individuals serving on the Board. Nine of the current directors have been in place during the period of oversight failures described above. This includes Defendant Collis, who has served since 2011. In fact, only one director, non-Defendant Dennis McNally, has joined the Board since the 2017 Congressional investigations, and he did not join the Board until 2020. Through their service on the Board and/or the Audit Committee, a majority of the Board was aware of red flags of AmerisourceBergen's non-compliance with federal and state laws, but took no action to ensure that the Company was adhering to the law. To the contrary, the Defendant Directors serving on the Audit Committee were presented with evidence that the

Company was intentionally reporting very few suspicious orders, and had been for some time. Meanwhile, each of the nine long-standing members of the Board actively agreed to pursue a business strategy that was most likely to result in the diversion of opioids through small, independent pharmacies.

293. Demand is also futile because each of the directors serving on the Board in 2021 participated in the decision to exclude the Company's accrued liabilities relating to opioid litigation for purposes of evaluating the CEO's performance and compensation, including because they were also involved in the malfeasance that would come to light if they held Collis accountable. There is no reason to presume the directors would act otherwise when faced with a litigation demand.

294. As an inside director whose compensation is set by other members of the Board, Collis is incapable of considering a demand to sue the outside directors.

295. Demand is futile because the Board has consistently denied any wrongdoing in connection with the Company's anti-diversion controls or the Board's oversight of the same. Collis denied, under oath, at Congressional hearings, that AmerisourceBergen has contributed at all to the nation's opioid epidemic. The Company has similarly denied any wrongdoing in connection with the numerous legal actions currently pending against it. The Company has likewise stated in its Forms 10-K filed with the SEC for the years 2017–2020 that:

> [W]e are deeply committed to diversion control efforts, have sophisticated systems in place to identify orders placed warranting further review to determine if they are suspicious (including through the use of data analytics), and engage in significant due diligence and ongoing monitoring of customers.[324]

Moreover, in 2015, the Company disclosed that it was "vigorously defending itself" in an action by the Attorney General of West Virginia alleging deficiencies in the Company's diversion controls.[325] Meanwhile, the Company even argued at trial and on appeal to the Supreme Court of Delaware that Plaintiffs lacked a proper purpose for pursuing the Company's books and records because they would not be able to

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[324] *See*, *e.g.*, AmerisourceBergen Corp., Form 10-K (Nov. 19, 2020) at 14, available at: https://www.sec.gov/ix?doc=/Archives/edgar/data/1140859/000114085920000050/abc-20200930.htm; AmerisourceBergen Corp., Form 10-K (Nov. 19, 2019) at 10–11, available at: https://www.sec.gov/ix?doc=/Archives/edgar/data/1140859/000114085919000040/a10-kx9302019.htm; AmerisourceBergen Corp., Form 10-K (Nov. 20, 2018) at 11, available at: https://www.sec.gov/Archives/edgar/data/1140859/000114085918000053/a10-kx9302018.htm. The 2017 Form 10-K contained substantively identical language. *See* AmerisourceBergen Corp., Form 10-K (Nov. 21, 2017) at 11 ("We have sophisticated systems in place to detect and report suspicious orders (including through the use of data analytics), engage in significant due diligence of customers, and are committed to diversion control efforts."), available at: https://www.sec.gov/Archives/edgar/data/1140859/000114085917000047/abc10-kxseptember302017.htm.

[325] *See* AmerisourceBergen Corp., Form 10-K (Nov. 24, 2015) at 71, available at: https://www.sec.gov/Archives/edgar/data/1140859/000104746915008939/a2226704z10-k.htm.

maintain oversight claims against the Defendant Directors. In all events, the Company's response to the numerous allegations of wrongdoing, shareholder requests for greater oversight of the company's opioid related business, and Plaintiffs' attempt to investigate the same demonstrate that it would be futile to make a demand here.

VI. DAMAGES

296. As a result of the foregoing breaches of fiduciary duty, AmerisourceBergen has incurred significant expenses, and will continue to expend significant sums, including but not limited to:

a. The over $6.6 billion in damages already incurred by the Company as a result of litigation alleging pervasive (and in some instances on-going) failures of the Company's diversion controls attendant to prescription opioids;

b. The costs incurred to carry out internal investigations, including the costs of legal and other fees paid to outside counsel, auditors, and other experts;

c. The costs incurred to rectify the Company's corporate governance failures, including any mandatory reporting measures instituted by the DEA;

d. Compensation improperly paid to Collis and the other Individual Defendants throughout the relevant period;

e. Damage to AmerisourceBergen's reputation and goodwill; and

f. Legal fees, costs, and amounts payable in settlement or satisfaction of lawsuits brought against the Company related to the foregoing wrongdoing.

297. AmerisourceBergen has been directly and substantially injured by reason of the Individual Defendants' intentional breach and/or reckless disregard of their fiduciary duties of loyalty to the Company. Plaintiffs, as stockholders and representatives of AmerisourceBergen, seek damages and other relief for the Company.

COUNT I

Breach of Fiduciary Duty (Against the Director Defendants)

298. Plaintiffs repeat and reallege each and every allegations above as if set forth fully herein.

299. The Director Defendants owed fiduciary duties to AmerisourceBergen and its stockholders, including, without limitation, implementing and overseeing the Company's diversion controls and legal compliance. Given the nature of the drug distribution business, the Director Defendants had a fundamental duty to ensure the opioids distributed by the Company were not endangering the public, including through the diversion of drugs to improper channels.

300. The Director Defendants consciously breached their fiduciary duties in myriad ways, including:

a. Failing to properly oversee the Company's diversion controls, including failing to investigate red flags of the Company's potential unlawful conduct and failing to remedy any misconduct uncovered through such investigations; and

b. Excluding entirely the Company's $6.6 billion accrued liability for opioid litigation from the evaluation of the CEO's performance in connection with awarding Collis a stretch bonus in March 2021.

301. As a direct and proximate result of the Director Defendants' conscious failure to perform their fiduciary duties, AmerisourceBergen has sustained significant damage. The damages to AmerisourceBergen caused by the Director Defendants' misconduct include, and will include, substantial penalties, fines, damages awards, settlements, expenses, increased regulatory scrutiny, and other liabilities.

302. As a result of the conscious and bad faith misconduct alleged herein, the Director Defendants are liable to the Company.

303. Plaintiffs have no adequate remedy at law.

COUNT II

Breach of Fiduciary Duty (Against the Executive Defendants)

304. Plaintiffs repeat and reallege each and every allegations above as if set forth fully herein.

305. The Executive Defendants owed AmerisourceBergen and its stockholders the highest obligations of due care and loyalty in the administration of the affairs of the Company, including, without limitation, operating the Company in compliance with laws and without undue risk to public safety, implementing and overseeing programs to comply with laws and regulations governing the distribution of prescription opioids, and reporting significant risks to the Board and stockholders.

306. The Executive Defendants consciously breached their fiduciary duties and/or acted with gross negligence in myriad ways, including:

a. Consciously and repeatedly failing to implement effective diversion controls and actively monitor or oversee the Company's legal compliance; and

b. Consciously disregarding their duty to investigate red flags and remedy any misconduct uncovered.

307. As officers of the Company, the Executive Defendants are not entitled to exculpation under 8 *Del. C.* § 102(b)(7).

308. As a direct and proximate result of the Executive Defendants' conscious and/or grossly negligent failure to perform their fiduciary duties AmerisourceBergen has sustained significant damage. The damages to AmerisourceBergen caused by the Executive Defendants' misconduct include, and will include, substantial penalties, fines, damages awards, settlements, expenses, increased regulatory scrutiny, and other liabilities.

309. Plaintiffs have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request the following relief:

A. An order declaring that Plaintiffs may maintain this action on behalf of AmerisourceBergen, and that Plaintiffs are adequate representatives of the Company;

B. An order declaring that Defendants have breached their fiduciary duties to AmerisourceBergen;

C. An order determining and awarding to AmerisourceBergen the damages sustained by it as a result of the violations set forth above by Defendants, jointly and severally, together with pre-judgment and post-judgment interest thereon;

D. Awarding Plaintiffs their costs and disbursements for this action, including reasonable attorneys' fees and expenses; and

E. Granting such other compensatory or equitable relief as this Court deems just and appropriate.

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Dated: December 30, 2021

CERTIFICATE OF SERVICE

I, Samuel L. Closic, do hereby certify on this 5th day of January, 2022, I caused a copy of the foregoing be served via File & Serve*Xpres*s on the following counsel of record:

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