EFiled: May 10 2023 09:44AM EDT
Filing ID 69983669
Case Number 22,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEBANON COUNTY EMPLOYEES' RETIREMENT FUND, and TEAMSTERS LOCAL 443 HEALTH SERVICES & INSURANCE PLAN, Plaintiffs-Below/Appellants, 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-Below, Appellees, -and- AMERISOURCEBERGEN CORPORATION, Nominal Defendant-Below, Appellee.	No. 22, 2023 Court below: Court of Chancery of the State of Delaware C.A. No. 2021-1118-JTL **REDACTED PUBLIC VERSION FILED ON MAY 10, 2023**

APPELLEES' ANSWERING BRIEF

OF COUNSEL:

DECHERT LLP
Michael S. Doluisio, Esquire
Brittany Zoll, Esquire
Christopher J. Merken, Esquire
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
(215) 994-4000

DECHERT LLP
Matthew L. Larrabee, Esquire
Hayoung Park, Esquire
Julia Markham-Cameron, Esquire
Three Bryant Park
1095 Avenue of the Americas
New York, NY 10036-6797
(212) 698-3500

MORGAN, LEWIS & BOCKIUS LLP
Michael D. Blanchard, Esquire
Amelia Pennington, Esquire
One Federal Street
Boston, MA 02110
(617) 341-7700

Dated: April 27, 2023

Stephen C. Norman (No. 2686)
Jennifer C. Wasson (No. 4933)
Tyler J. Leavengood (No. 5506)
Christopher D. Renaud (No. 6457)
POTTER ANDERSON & CORROON LLP
1313 N. Market Street
Hercules Plaza, 6th Floor
Wilmington, DE 19801
(302) 984-6000

Attorneys for Defendants-Below / Appellees 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, and Nominal Defendant-Below / Appellee AmerisourceBergen Corporation

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

NATURE OF PROCEEDINGS

No case has ever held that a stockholder has standing to pursue a *Caremark* claim where, as here, the company has not admitted liability; the company has never been found liable; and a court held, following an extensive trial on the merits, that the company's systems substantially complied with all legal requirements. This case should not be the first.

* * *

This appeal arises from the Chancery Court's December 22, 2022 dismissal of Plaintiffs' Complaint against nine officers and directors ("Defendants") of AmerisourceBergen Corporation ("ABC" or the "Company"). The Chancery Court ruled that the Complaint did not support a reasonable inference that Defendants faced a substantial risk of *Caremark* liability arising from their oversight of the diversion control systems governing the Company's distribution of prescription opioids. Accordingly, Plaintiffs' failure to make a demand on the Company's board was not excused and Plaintiffs' claims were dismissed with prejudice.

Plaintiffs' arguments on appeal are predicated on two illogical and mutually inconsistent assertions. First, Plaintiffs claim that the Chancery Court erred in considering a lengthy, post-trial ruling (the "West Virginia Ruling") by the United States District Court for the Southern District of West Virginia (the "West Virginia Court") holding that the Company had substantially complied with its legal

obligations in connection with its distribution of opioids. Plaintiffs concede that the West Virginia Ruling destroys their theory that Defendants *knowingly* allowed the Company to violate the law; thus, they have no choice but to argue on appeal that the Chancery Court was obligated to ignore it entirely. Second, Plaintiffs simultaneously seek reversal by arguing that the Chancery Court erred by *not* relying on unproven allegations made by the Department of Justice ("DOJ") after this case was dismissed. Plaintiffs make no effort to reconcile their contradictory positions. Because the Chancery Court properly considered the West Virginia Ruling and properly determined that the DOJ's allegations changed nothing, its dismissal of the Complaint should be affirmed.

In addition, dismissal should be affirmed because, even without the West Virginia Ruling, Plaintiffs failed to allege particularized facts showing that Defendants faced a substantial risk of liability. The Company has never been found liable or admitted to liability, and the Board was told many times by management and third-party experts that ABC's systems complied with the law. Moreover, the record of board oversight here dwarfs the level of oversight exhibited in any *Caremark* case that has survived dismissal. Accordingly, for these additional reasons, dismissal of the Complaint should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. To state a claim, Plaintiffs were required to plead particularized facts showing that Defendants acted in bad faith by knowingly allowing the Company to violate the law. The Chancery Court properly concluded that the West Virginia Ruling rendered any such pleading inference unreasonable. Given that Plaintiffs' allegations are virtually identical to the claims pursued by the West Virginia plaintiffs, the Chancery Court properly held that the West Virginia Ruling fatally undermined Plaintiffs' claims.

The Chancery Court's decision should also be affirmed because the Complaint fails to state a claim, even without consideration of the West Virginia Ruling. The Board was consistently told both that the Company denied the allegations in pending litigation and that its systems complied with the law. The Company has never admitted any liability and has not been found liable for wrongdoing. Plaintiffs do not allege facts showing that the Board deliberately disregarded its duties or knowingly caused the Company to violate its legal obligations. As such, Plaintiffs' *Caremark* and *Massey* theories fail.

2. Denied. The DOJ's Complaint is not newly discovered evidence. Moreover, it is cumulative and immaterial in light of the numerous other similar unproven complaints upon which Plaintiffs rely. The Chancery Court properly denied Plaintiffs' Motion under Rule 60(b)(2).

STATEMENT OF FACTS

I. DISTRIBUTORS' REGULATORY OBLIGATIONS

Under the Controlled Substances Act ("CSA"), entities that manufacture, distribute, or dispense controlled substances must be registered by the DEA, and distributors like ABC must annually register each of their distribution facilities, which the DEA has discretion to deny. 21 U.S.C. §§822(a)(1), 822(e)(1), 823(b). In this annual registration process, the DEA considers whether the distributor maintains "effective controls against diversion of . . . controlled substances . . . ." *Id*. §823(b)(1). Plaintiffs nowhere allege that the DEA ever refused to renew the annual registration for any of the Company's numerous distribution centers.

A DEA regulation, 21 C.F.R. §1301.74(b), requires registrants to (i) "design and operate a system to disclose to the registrant suspicious orders of controlled substances," and (ii) notify the DEA of such orders "when discovered by the registrant." *Id*.

As courts recognize, "[t]he regulations do not prescribe any particular form or style of [order] monitoring system." *United States v. $463,497.72 in U.S. Currency from Best Bank Account #XXX2677*, 853 F. Supp. 2d 675, 681 (E.D. Mich. 2012). Nor do DEA regulations provide any objective metrics for what constitutes a "suspicious order." Rather, the DEA's regulation defines "suspicious orders" vaguely and circularly to "include orders of unusual size, orders deviating

substantially from a normal pattern, and orders of unusual frequency." 21 C.F.R. §1301.74(b).

Despite repeated calls for clarity, the DEA has refused to provide guidance that would enable distributors to ascertain with certainty whether their order monitoring systems comply with the law or whether orders are suspicious. In June 2015, for instance, the Government Accountability Office ("GAO") requested that the DEA "develop additional guidance for distributors" regarding "suspicious orders monitoring and reporting."[1] The DEA refused, stating that it "cannot provide more specific suspicious orders guidance, because the variables that indicate a suspicious order differ among distributors and their customers."[2] As recently as January 2023, the DEA refused to provide guidance to distributors about the design of their monitoring systems, explaining that it is up to each distributor whether to set "thresholds [on the amount of controlled substances that customers can order] and at what levels" and that the "DEA does not have a role" with respect to the issue.[3]

---

[1] *Prescription Drugs: More DEA Information About Registrants' Controlled Substances Roles Could Improve Their Understanding and Help Ensure Access* 26, 44 (June 2015), https://www.gao.gov/assets/gao-15-471.pdf.

[2] *Id.* at 45. *See also Review of the DEA's Regulatory and Enforcement Efforts to Control the Diversion of Opioids* at 31-32 (Sept. 2019) (calling on the DEA to "establish regulations, policies, and procedures that specifically define what constitutes a suspicious order"), https://oig.justice.gov/reports/2019/e1905.pdf.

[3] *DEA-Registered Manufacturer and Distributor Established Controlled Substance Quantitative Thresholds and the Requirement to Report Suspicious Orders* (Jan. 20,

Given the lack of DEA guidance, distributors are forced to exercise considerable judgment when designing their systems. How distributors exercise this judgment has significant real-world implications. As the West Virginia Court explained, overly aggressive order monitoring systems would result in "supply problems for patients with legitimate needs for controlled substances." *City of Huntington v. AmerisourceBergen Drug Corp.*, 609 F. Supp. 3d 408, 480 (S.D.W. Va. 2022).

2023), https://www.deadiversion.usdoj.gov/GDP/(DEA-DC-065)(EO-DEA258)_Q_A_SOR_and_Thresholds_(Final).pdf.

II. FACTUAL BACKGROUND

ABC distributes a wide range of pharmaceutical products. Distribution of prescription opioids comprises less than 2% of its revenues.[4]

A. The Board's Central Role in Compliance.

At all relevant times, ABC had a company-wide compliance system, including a Chief Compliance Officer ("CCO") and a Chief Compliance Counsel ("CCC") who reported directly to the Board's Audit Committee [redacted] A76-77 ¶118. The Audit Committee, in turn, reported to the full Board.[5]

As demonstrated in Defendants' Motion to Dismiss briefing, the Board actively oversaw compliance at ABC. Considering only Plaintiffs' allegations and the Section 220 documents cited in their Complaint, the Board and Audit Committee: (1) received over 40 compliance reports between 2010 and 2020;[6] and (2) [redacted] Given word limitations, Defendants highlight some of the key events below and respectfully refer

[4] B89.

[5] B21 & n.4.

[6] B22 & n.5.

[7] Plaintiffs' assertion that diversion controls were discussed only once between 2010 and 2015 (Pls. Br. at 15) is false. *See* B24 n.7 ([redacted]); B413; B453-71.

the Court to their Motion to Dismiss briefing for a more complete recitation of the facts.

B. ABC Implemented a DEA-Approved Diversion Control Program.

In 2007, ABC "worked with the DEA to establish an industry standard order monitoring program (the '2007 OMP')." *Lebanon Cnty. Emps.' Ret. Fund v. Collis*, 2022 WL 17841215, at *5 (Del. Ch. Dec. 22, 2022) ("Opinion"). The Company's Corporate Security and Regulatory Affairs ("CSRA") division was responsible for operating the Company's diversion control system [redacted] A69 ¶102. CSRA [redacted][8]

[redacted][9]

[8] B477.

[9] B507.

[redacted][10]

ABC engaged Davis Polk to assess the Company's compliance program.[11] Davis Polk reported to the Audit Committee in August 2010 that the "Compliance Program was functioning effectively . . . ."[12]

C. The Board Actively Monitored Opioid-Related Investigations and Litigation.

In May 2012, ABC received a DOJ subpoena regarding its diversion control systems. A79 ¶121.[13] [redacted] *Id.*

ABC thereafter received additional subpoenas and was sued by various states and municipalities. A91-92 ¶¶150-51, A102 ¶172, A146-47 ¶257. The Audit Committee regularly received updates on this investigative and litigation activity. A37-38 ¶16.

---

[10] *Id.*

[11] B675.

[12] *Id.*

[13] B679.

D. The Board Focused on Diversion Control and Order Monitoring System Improvements.

1. Soon After the First Subpoena, the Board Received an Extensive Presentation on Diversion Controls.

In November 2012, the Audit Committee received a detailed review of the "Company's Diversion Control Program." A82-84 ¶¶129-30. The head of CSRA [redacted][15]

2. ABC Took Proactive Measures Regarding the Integration of Walgreens Pharmacies.

In the spring of 2013, ABC entered into a long-term agreement with Walgreens. *See* A85-86 ¶136. During a May 2013 meeting, the Board [redacted][16]

[14] B496.

[15] B499-515.

[16] B718; B733-34.

On August 7, 2013, the Audit Committee received another report on [redacted] A88 ¶142. Among other things, [redacted][17]

E. The Board Oversaw a Significant Update to ABC's Systems.

During a September 2014 meeting, the Board again discussed [redacted] A98 ¶161. [redacted][18]

On March 4, 2015, the Audit Committee received a report on ABC's diversion control program from Chris Zimmerman, the CCO, and David May, the Senior Director, Diversion Control and Federal Investigations. Mr. May had recently been hired after working at the DEA since 1985, where he "[redacted][19] During the meeting, the Audit Committee received an

[17] B520-23.

[18] B760; B764.

[19] B592.

extensive presentation [redacted][20]

In addition to these enhancements, the Audit Committee was told about specific improvements to the 2007 OMP. As the written materials made clear, [redacted][21]

Under the Revised OMP, the Company flagged for further review orders that tripped two new thresholds. Significantly, [redacted]

[20] B589-604.

[21] B595-96.

[redacted][22] [redacted]

[redacted][23]

Under the Revised OMP's second threshold, the customer's order was compared against that customer's own historical orders. [redacted][24] [redacted] it was impossible to tell whether the Revised OMP or 2007 OMP would flag more or less orders for further review. Plaintiffs do not allege that the Audit Committee or Board were ever told that the Revised OMP was intended to flag fewer orders than the 2007 OMP.

F. The Board Continued to Ensure the Proper Functioning of ABC's Compliance Systems.

In May 2017, "Defendant Henney . . . requested an in-depth review of the Company's compliance program." A113-14 ¶197. On August 10, 2017, the Board

[22] The federal government itself often utilizes IQRs when identifying outliers in statistical data, such as to identify improper Medicare or Medicaid billing. *See, e.g.*, OIG, Prescribers With Questionable Patterns In Medicare Part D (OEI-02-09-00603) (June 2013); OIG, Questionable Billing For Medicaid Pediatric Dental Services In New York (OEI-02-12-00330) (Mar. 2014).

[23] B595-96.

[24] *Id.*

reviewed the Company's systems, including its "Diversion Control Program." A121 ¶211. The written Board materials discussed the Company's "Enhanced Order Monitoring Program" [redacted] A122-23 ¶¶213-14.

During the meeting, the CCC provided an overview of the DHS Inspector General's seven elements of an effective compliance program and the CCO explained how ABC's Compliance Program satisfied each element.[25] The CCC further reported that the Company had engaged Reed Smith to review its compliance program and that "Reed Smith had concluded that the Company's compliance program is effective and meets all seven elements . . . ."[26]

1. The Board Continued to Actively Monitor Diversion Controls and Order Monitoring.

In February 2018, the Board [redacted][27]

In May 2018, the Audit Committee was informed that the Internal Audit department had concluded that [redacted]

[25] B609.

[26] *Id.*

[27] B1468; *see generally* B1466-71.

[redacted][28] This was the Internal Audit department's first audit of the order monitoring program. (This was *not*, as Plaintiffs wrongly claim, Pls. Br. at 20, the Audit Committee's first time reviewing the program.)

The Audit Committee met in August 2019 and received another extensive "diversion control and . . . Order Monitoring Program update" [redacted] A127 ¶226.[29] Zimmerman [redacted][30] and described various enhancements made to the Company's systems.[31]

2. ABC Evaluated Its Compliance Program Under the CIA.

In September 2018, the Company signed a corporate integrity agreement ("CIA") with the OIG. A124 ¶219. The CIA resulted from an investigation of an ABC subsidiary that had nothing to do with the distribution of controlled substances. A123-24 ¶¶216-19. Nevertheless, the CIA obligated ABC to maintain policies, procedures, and systems "with regard to the distribution and dispensing of controlled substances."[32]

---

[28] B413.

[29] B807-24.

[30] B436.

[31] B807-24.

[32] B830.

The CIA required the Company to retain an "Independent Review Organization" to review the Company's systems.[33] ABC retained Bennett Thrasher to serve in this role.[34] [redacted] "DEA requirements."[35] As part of its review, [redacted][36] In November 2019, [redacted][37]

3. ABC Created a Board-Level Committee Dedicated to Compliance and Risk Management.

In March 2020, the Board's newly created Compliance Committee [redacted][38] [redacted][39]

[33] B836-37.

[34] B1478-80.

[35] B863.

[36] B1487-89.

[37] B1478.

[38] B441-71.

[39] B453-70.

G. Opioid Distributors Settled Claims Without Admitting Wrongdoing.

In July 2021, ABC, Cardinal, and McKesson announced that they had negotiated a settlement of most of the lawsuits filed by state and local government entities. A161 ¶279. Pursuant to the settlement, ABC agreed to pay up to approximately $6.4 billion over 18 years. A162 ¶280. ABC did not admit wrongdoing. [40]

Contrary to Plaintiffs' unsupported argument, Pls. Br. at 21, the Settlement Agreement did *not* obligate ABC to do away with the Revised OMP or report more suspicious orders. Instead, the agreement largely required ABC to maintain features of its systems that were already in place, including a Compliance Committee, a Chief Diversion Control Officer, and various due diligence procedures (such as site visits and questionnaires).[41]

[40] B1122.

[41] *Compare* B1295, B1297, B1299-1305, B1307 *with* A128 ¶230, B595-96, B599, B628, B634.

III. THE WEST VIRGINIA COURT HOLDS THAT ABC'S SYSTEMS COMPLIED WITH THE CSA.

On July 4, 2022, the West Virginia Court issued a 184-page opinion examining ABC's order monitoring program from 1998 through 2022 and holding that ABC's systems substantially complied with the CSA throughout that entire time period. *Huntington*, 609 F. Supp. 3d at 425. Based upon testimony from 70 expert and lay witnesses, the West Virginia Court concluded that ABC "substantially complied with [its] duties under the CSA to design and operate an [order monitoring] system and report suspicious orders." *Id*. at 415-16, 425. Contrary to Plaintiffs' assertions before the Chancery Court and here, the West Virginia Court's "analysis included the Revised OMP and the West Virginia Court expressly found [the Company's] anti-diversion controls were legally compliant." Opinion at *17 (citing *Huntington*, 609 F. Supp. 3d at 428-29).

IV. THE CHANCERY COURT DISMISSES THIS CASE.

A. The Chancery Court Holds That Much of the Case Is Time Barred and That Plaintiffs Failed to State a Claim.

Plaintiffs filed this case in December 2021. Plaintiffs alleged that Defendants breached their fiduciary duties by knowingly allowing the Company to violate the CSA. In March 2022, Defendants moved to dismiss on the grounds that Plaintiffs failed to state a claim and their claims were barred by laches. The West Virginia Ruling was issued in July 2022, before briefing on the Motion was closed.

On December 15, 2022, the Chancery Court denied Defendants' Motion insofar as it was based upon laches. *Lebanon Cnty. Emps.' Ret. Fund v. Collis*, 287 A.3d 1160, 1222 (Del. Ch. 2022) ("Laches Opinion"). The Court held, however, that Plaintiffs' claims were barred to the extent they are based upon conduct occurring before October 20, 2016. *Id.* at 1211. Plaintiffs did not appeal from that ruling.

On December 22, 2022, the Chancery Court granted Defendants' Motion to Dismiss. The Court explained that Plaintiffs' claims "depend on an inference that the officers and directors knowingly failed to cause the Company to comply with its anti-diversion obligations," an inference that was "not possible" in light of the West Virginia Ruling. Opinion at *3. As such, the West Virginia Ruling "knocks the stuffing out of the plaintiffs' claim." *Id.* at *17.

B. The Court Denies Plaintiffs' Rule 60(b) Motion.

On January 9, 2023, Plaintiffs filed a motion under Chancery Court Rule 60(b) based upon a complaint that the DOJ filed in late December 2022. Under Rule 60(b)(2), Plaintiffs were obligated to establish, among other things, that the DOJ Complaint was "newly discovered" evidence that was so material that it would probably change the result and was not cumulative. *Lebanon Cnty. Emps.' Ret. Fund v. Collis*, 2023 WL 2582399, at *6-9 (Del. Ch. Mar. 21, 2023) ("Rule 60(b) Opinion"). The Chancery Court ruled that the DOJ's allegations were not material because (a) the DOJ's Complaint "contains no allegations supporting an inference that the Company's directors knowingly" caused the Company to violate the law (*id.* at *9); and (b) the DOJ's "allegations remain allegations, so they cannot support reasonable inferences in the face of the factual findings made by the West Virginia Court" (*id.*). The Court also found the DOJ's allegations to be cumulative. *Id.* at *9-10.

The Chancery Court also rejected Plaintiffs' alternative argument that it had improperly considered the West Virginia Ruling. *Id.* at *10-11. The Court noted that "other Delaware decisions have considered post-complaint developments" and that it could take judicial notice of the West Virginia Ruling. *Id.* The Court also rejected Plaintiffs' argument that it had evaluated demand futility on a date other than when Plaintiffs filed their Complaint. *Id.* at *10.

ARGUMENT

I. THE CHANCERY COURT PROPERLY DISMISSED THE COMPLAINT BASED UPON THE WEST VIRGINIA RULING.

A. Question Presented

Whether the Chancery Court correctly concluded that the Complaint should be dismissed under Chancery Rule 23.1 in light of the West Virginia Ruling. This issue was preserved. Opinion at *3; B1398-99.

B. Scope of Review

This Court's review of a dismissal under Rule 23.1 is "de novo and plenary." *Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000).

C. Merits of Argument

The West Virginia Court held that ABC complied with the CSA—a conclusion that fatally undermines any reasonable inference that Defendants oversaw systems that they *knew* violated the CSA. The Chancery Court properly considered the West Virginia Ruling, and Plaintiffs' arguments to the contrary fail as a matter of law and would lead to absurd results. Accordingly, dismissal of the Complaint should be affirmed.

1. Plaintiffs Must Plead That the Board Knowingly Allowed the Company to Violate the Law.

Plaintiffs purport to bring a "Red Flags" *Caremark* claim and a *Massey* claim. *Caremark* plaintiffs must plead particularized facts showing that the directors acted in bad faith, meaning that they "knew that they were not discharging their fiduciary

obligations." *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (citation omitted). A Red Flags *Caremark* claim requires particularized factual allegations that directors "having implemented . . . a system or controls, *consciously failed* to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *Id.* (emphasis added).[42] Specifically, a plaintiff must "plead [particularized facts] that the board knew of evidence of corporate misconduct—the proverbial 'red flag'—yet acted in bad faith by *consciously disregarding* its duty to address that misconduct." *Horman v. Abney*, 2017 WL 242571, at *10 (Del. Ch. Jan. 19, 2017) (emphasis added) (citation omitted).

To the extent a *Massey* claim is an independent claim, it is similar. As articulated by the Chancery Court, a plaintiff asserting a *Massey* claim must plead with specificity facts showing "the knowing use of illegal means to pursue profit for the corporation." Opinion at *18 (quoting *Desimone v. Barrows*, 924 A.2d 908, 934 (Del. Ch. 2007)). Thus, Red Flags *Caremark* claims and *Massey* claims both require allegations that the "officers and directors *knowingly* failed to cause the Company" to comply with the law. Rule 60(b) Opinion at *2 (emphasis in original).

[42] ABC's Certificate of Incorporation provides directors "the benefits of all limitations on the liability of directors . . . available under the DGCL." ABC Cert. of Incorp. Art. VII, § 7.01. Accordingly, Plaintiffs must plead "a meritorious claim for breach of the duty of loyalty." *In re Camping World Holdings, Inc. S'holder Derivative Litig.*, 2022 WL 288152, at *7 (Del. Ch. Jan. 31, 2022) (citation omitted).

2. The Chancery Court Properly Considered the West Virginia Ruling.

a. The Chancery Court Was Authorized by Delaware Law to Consider the West Virginia Ruling.

The Chancery Court properly considered the West Virginia Ruling. As an initial matter, Plaintiffs' Complaint itself discussed the West Virginia allegations as support for an inference the Company had violated the law, specifically citing the case caption and noting the three-month bench trial in the case. A160-61 ¶¶277-78. Having relied on the West Virginia trial to help them, they cannot make it disappear just because "[t]his time, the plaintiffs' ox was gored." Rule 60(b) Opinion at *11.[43] Indeed, allowing litigants to cherry-pick precedent that helps them, while forcing courts to ignore other cases, would create perverse incentives and lead to erroneous results.

Moreover, as the Chancery Court noted, "other Delaware decisions have considered post-complaint developments." *Id.* at *10 (citation omitted). For instance, the Chancery Court cited two *Caremark* cases that considered rulings—like the West Virginia Ruling—that were issued after the derivative complaint was filed. *See Fisher v. Sanborn*, 2021 WL 1197577, *7, *19-21 (Del. Ch. Mar. 30,

[43] *See Lima Delta Co. v. Glob. Aerospace, Inc.*, 2017 WL 4461423, at *4 & n. 31 (Del. Super. Ct. Oct. 5, 2017) (considering record from Georgia state litigation where complaint included "several references to the Georgia Action and portions of the record in that litigation"), *aff'd*, 189 A.3d 185 (Del. 2018).

2021) (dismissing derivative litigation based upon federal ruling); *Rojas v. Ellison*, 2019 WL 3408812, at *6 (Del. Ch. July 29, 2019) (considering consumer protection act ruling by California court). Plaintiffs' appeal brief ignores not only those cases, but other similar precedent. *See, e.g.*, *In re Geron Corp. S'holder Derivative Litig.*, 2022 WL 1836238, at *1-2 (Del. Ch. June 3, 2022) (staying derivative litigation because future ruling in federal litigation could "obviate the need for this action"); *In re Yahoo! Inc. S'holder Derivative Litig.*, 153 F. Supp. 3d 1107, 1120, 1127-28 (N.D. Cal. 2015) (dismissing derivative litigation based upon post-complaint federal ruling).

In fact, in *Pyott v. Louisiana Municipal Police Employees' Retirement System*, 74 A.3d 612, 616-17 (Del. 2013), this Court held that a derivative case should have been dismissed based upon a post-complaint ruling in a related federal case. The Court explained that federal and Delaware law require Delaware "courts to afford the same respect to federal court judgments that the Full Faith and Credit Clause requires them to afford to judgments from other states." *Id.* at 616 (citation omitted).

In sum, Delaware courts do not hesitate to consider, and evaluate the importance of, rulings from other courts. Indeed, it would be absurd to force a court to decide a Rule 23.1 motion without considering precedent directly on point.

b. Plaintiffs' Arguments Fail.

Plaintiffs argue that the Chancery Court's ruling conflicts with judicial notice principles. However, judicial notice is at best marginally relevant. Regardless, Plaintiffs' attacks fail as a matter of law.

Plaintiffs first point to Delaware Rule of Evidence 202 as somehow constraining the court. Pls. Br. at 34-37. But that Rule cuts against them. It provides that Delaware courts "may take judicial notice of the common law [and] case law . . . of the United States . . . ." D.R.E. 202(a)(1). Accordingly, Delaware courts have "repeatedly held federal court decisions, orders, and filings judicially noticeable." *In re Ebix, Inc. S'holder Litig.*, 2016 WL 208402, at *10 (Del. Ch. Jan. 15, 2016) (citations omitted); *see also PVP Aston, LLC v. Fin. Structures Ltd.*, 2023 WL 2728775, at *7 (Del. Super. Ct. Mar. 31, 2023) ("[C]ourts may take judicial notice of other courts' decisions at any stage of the proceedings.") (citations omitted).

To avoid this precedent, Plaintiffs argue that the Chancery Court could not judicially notice the West Virginia Court's conclusion that ABC complied with the law because that conclusion was contained in the West Virginia Court's "Findings of Fact" and not its "Conclusions of Law." This superficial argument adds nothing of substance: the Court's conclusion does not change depending upon where in the ruling it appears. Moreover, Plaintiffs' purported distinction does not comport with

how the West Virginia Court categorized its rulings. *See, e.g.*, *Huntington*, 609 F. Supp. 3d at 421-25 (describing and citing to statutes, regulations, DEA guidance, and case law under "Findings of Fact"). Furthermore, to the extent the label matters, the West Virginia Court stated as "Conclusions of Law" that: (a) "[a]t all relevant times, defendants' [suspicious order monitoring] systems were designed to identify suspicious orders;" (b) "[b]y 2008, each defendant had in place a [suspicious order monitoring] program that blocked all suspicious orders they identified;" and (c) "[n]o culpable act by defendants caused an oversupply of opioids in Cabell/Huntington." *Id*. at 471, 476. Finally, Plaintiffs' proposed distinction between "Findings of Fact" and "Conclusions of Law" finds no support in Rule 202, which provides that courts may judicially notice federal "case law"—not just "conclusions of law"—with the "only limitation" being that notice of the case must be given to all parties. *See* Rule 202 (a)(1) and cmt. (explaining "[i]t is the intention of this rule to encourage the admissibility of evidence of law rather than to discourage it").

Next, Plaintiffs argue that the Chancery Court could not judicially notice the West Virginia Ruling under Delaware Rule of Evidence 201, which authorizes notice of facts "not subject to reasonable dispute" when they (i) are "generally known" within the court's jurisdiction, or (ii) can be "determined from sources whose accuracy cannot reasonably be questioned." D.R.E. 201(b).

Here, it is beyond dispute that the West Virginia Court concluded that ABC did not violate the CSA. While Plaintiffs dispute whether the Company, in fact, complied with the CSA, that is beside the point. For purposes of Rule 201, Defendants rely upon the indisputable fact that, following a lengthy trial involving the same allegations as here, a federal court concluded that the Company complied with the law. It is similarly beyond dispute that the West Virginia Ruling—published in the Federal Supplement and available on Westlaw—is known in Delaware and can be determined from an accurate source.[44] In short, Delaware law governing judicial notice encourages courts to consider relevant federal precedent. Not surprisingly, Plaintiffs do not cite a single case holding that Delaware courts may not consider a post-trial ruling by another court.[45]

[44] To the extent it matters, the ruling received extensive press coverage. *E.g.*, *Judge Clears Distributors of Blame for Opioid Crisis in Hard-Hit County*, N.Y. TIMES (July 5, 2022), http://bit.ly/3Mla0Tu; *US Judge Finds for 3 Drug Distributors in WVa Opioid Lawsuit*, ASSOCIATED PRESS (July 4, 2022), https://bit.ly/40ZFl1W.

[45] The cases Plaintiffs cite are off point. *See Fawcett v. State*, 697 A.2d 385, 388 (Del. 1997) (improper notice of criminal defendant's identity); *Vanderbilt Income & Growth Assocs. LLC v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996) (improper consideration of truth of prospectus); *In re Santa Fe Pacific Corp. S'holder Litig.*, 669 A.2d 59, 70, 72 (Del. 1995) (improper consideration of truth of proxy statement).

3. The West Virginia Ruling "Fatally Undermined" Plaintiffs' Claims.

a. Plaintiffs' Case Cannot Be Squared With the West Virginia Ruling.

In light of the West Virginia Ruling, the Chancery Court correctly concluded that it was not possible to infer that Defendants "knowingly caused" the Company to "fail to comply with its anti-diversion obligations" or to pursue a "business plan that violates the law." Opinion at *3, *17, *19. The West Virginia Court evaluated the development of ABC's OMP from 1998 through 2022, including "events in 2014 and 2015 that led to the Revised OMP," *i.e.*, the same matters and timeframe at issue here. *See Huntington*, 609 F. Supp. 3d at 425-29; Opinion at *12. It then found that ABC complied with its anti-diversion obligations. *Huntington*, 609 F. Supp. 3d at 425.

As Plaintiffs themselves admit, the West Virginia Ruling cannot be squared with their Complaint. *See, e.g.*, Pls. Br. at 4-5, 42 (Complaint and West Virginia Ruling give rise to "opposite," "competing" inferences); A762 ¶4 ("conflicting"). In fact, Plaintiffs' claims are predicated on the same allegations as the West Virginia case, including that the Revised OMP was deficient and that the Company allegedly failed to report sufficient suspicious orders. *See, e.g.*, *Huntington*, 609 F. Supp. 3d at 438. Accordingly, by concluding that ABC complied with the CSA, the West

Virginia Ruling "knocks the stuffing out" of Plaintiffs' theory that Defendants *knowingly* allowed the Company to violate the law. Opinion at *17.

b. Plaintiffs' Attempts to Downplay the West Virginia Ruling Fail.

In the hopes of avoiding dismissal, Plaintiffs offer a grab bag of irrelevant or inaccurate arguments in an effort to diminish the significance of the West Virginia Ruling. Plaintiffs' primary argument is that the West Virginia Ruling "does not foreclose the possibility that the Company violated the CSA." Pls. Br. at 37. But ABC's compliance with the CSA was not the issue decided by the Chancery Court. What *was* before the Chancery Court is whether Plaintiffs' allegations merit a reasonable inference that Defendants *acted in bad faith by knowingly allowing the Company to violate the law*. Given that a federal district court judge in good faith concluded, after an exhaustive trial in a well-reasoned opinion, that the Company complied with the law, it is impossible to infer that Defendants acted in bad faith by reaching the same conclusion. *See, e.g.*, *City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 56 (Del. 2017) ("[I]nferences that are not objectively reasonable cannot be drawn in plaintiff's favor.") (citation omitted).

Similarly, Plaintiffs argue that, even if the Company complied with the CSA in Huntington and Cabell Counties, it does not follow that the Company complied with the CSA everywhere. Pls. Br. at 41. Once again, Plaintiffs miss the point. The West Virginia Court evaluated the same systems that Plaintiffs criticize—including

the Revised OMP—and held that the Company substantially complied with the CSA. Again, it cannot reasonably be inferred that Board members—who do not play a day-to-day role and rely on employee and third-party experts—acted in bad faith by reaching the same conclusion that a federal judge reached following a lengthy trial on the merits.[46]

Plaintiffs also seek to sidestep the West Virginia Ruling because it is being challenged on appeal. Pls. Br. at 39. But the fact that the West Virginia Ruling could be reversed changes nothing. A finding by the federal Court of Appeals that the Company violated the CSA would not establish demand futility.[47] Nor would it undermine the fact that the West Virginia Court engaged in a good faith, thorough application of the law to the facts and concluded that ABC's systems were legal. Whether affirmed on appeal or not, the West Virginia Ruling is fatal to Plaintiffs' claims.

---

[46] Plaintiffs also try to minimize the West Virginia Ruling by noting that it resulted from a bellwether trial. Pls. Br. at 41. Whether arising from a bellwether trial or not, the West Virginia Ruling is a final judgment that binds the parties. *Dunson v. Cordis Corp.*, 854 F.3d 551, 555 (9th Cir. 2017). The fact that it did not resolve every case brought against the Company is irrelevant.

[47] *See Desimone v. Barrows*, 924 A.2d 908, 940 (Del. Ch. 2007) ("Delaware courts routinely reject the conclusory allegation that because illegal behavior occurred, internal controls must have been deficient, and the board must have known so.") (citation omitted).

Lastly, Plaintiffs argue that, at most, the West Virginia Ruling created inferences that the Chancery Court improperly weighed against Plaintiffs' competing inferences. Pls. Br. at 42. But the Court did no such thing. Plaintiffs are only entitled to *reasonable* pleading inferences. The West Virginia Ruling is a final decision from a court of law that ABC is not liable for the very conduct upon which Plaintiffs attempt to predicate Defendants' bad faith liability. That Ruling rendered unreasonable any inference that Defendants knowingly allowed the Company to violate the law and left no reasonable inferences that required consideration. For good reason, no *Caremark* or *Massey* claim has *ever* survived where the company's conduct was found to not violate the law.[48]

4. Consideration of the West Virginia Ruling Does Not Create an Unworkable Regime.

Plaintiffs argue that the Chancery Court created an "unworkable regime" that subjects Rule 23.1 motions to "the timing of the shifting sands of judicial decisions from foreign courts." Pls. Br. at 42-43. That is not true. As the Chancery Court noted, it evaluated demand futility "using the directors in office when the complaint

[48] Towards the end of their brief, Plaintiffs reverse course and argue that Defendants can be liable even if the CSA was not violated. Pls. Br. at 44. However, Plaintiffs' sole case, *Construction Industry Laborers Pension Fund v. Bingle*, 2022 WL 4102492 (Del. Ch. Sept. 6, 2022), dismissed the complaint and merely noted in *dicta* that *Caremark* liability theoretically could exist where positive law was not at issue. *Id.* at *7, *14. Plaintiffs cite no case holding that liability can arise where a company complied with applicable, positive law.

was filed." Rule 60(b) Opinion at *10. In doing so, the Chancery Court simply made use of all available evidence that was relevant to the demand futility assessment—a routine practice by Delaware courts.[49]

[49] *See supra* Section I.C.2.a.

II. EVEN WITHOUT THE WEST VIRGINIA RULING, PLAINTIFFS FAILED TO STATE A CLAIM.

A. Question Presented

Whether Plaintiffs, absent the West Virginia Ruling, had pleaded demand futility. This issue was preserved. B56-71; B1390-98; B1400-12.

B. Scope of Review

This Court's review is *de novo* and plenary. *Brehm*, 746 A.2d at 253.

C. Merits of Argument

The crux of Plaintiffs' *Massey* and Red Flags claims is that the Board learned through various lawsuits that the Company was violating the CSA by reporting too few suspicious orders and that the Board was therefore obligated to cause the Company to change its diversion control systems. The Chancery Court erred as a matter of law by embracing this theory because: (1) the undisputed facts here are unlike any *Caremark* case that has survived dismissal; (2) it misinterpreted the record, including by inventing a theory of intent that was not pleaded; and (3) Delaware law does not impose personal liability upon directors for failing to scrap management-supported compliance systems based solely upon unproven allegations.

1. The Undisputed Facts Are Unlike Any *Caremark* Case to Survive a Rule 23.1 Motion.

In three ways, the undisputed facts here are unlike any *Caremark* case that has survived a Rule 23.1 motion.

First, the underlying liability standard is impossibly vague. Plaintiffs do not cite a single case, statute, or regulation stating that a distributor must report a certain number or percentage of orders. The DEA refuses to define the term "suspicious orders" using objective measures, let alone tell distributors how many, or what percentage, of orders to report. Given the vagueness of the standard, ABC's reporting of a very low percentage of suspicious orders does not equate to Board knowledge that the Company was violating the law.

Second, the Company has never been found liable or admitted to any liability. To the contrary, it consistently denied liability and defended its systems. As such, it is unreasonable to infer Board knowledge of unlawful conduct.

Third, no management or third-party expert ever informed the Board that the Company was violating the law. To the contrary, numerous experts in law, DEA regulations, and/or diversion control—the General Counsel, CCOs, CCCs, Head of CSRA, Director of Diversion Control, Davis Polk, Reed Smith, FTI, and Bennett Thrasher—told the Board that the Company's systems complied with the law. The Board was entitled to rely upon these subject matter experts and is protected from liability for doing so.[50] *See* 8 *Del. C.* §141(e). These undisputed facts are unlike any *Caremark* case to survive a Rule 23.1 motion.

[50] A345.

2. The Chancery Court Misinterpreted the Record.

a. The Chancery Court Misinterpreted the Revised OMP.

The Chancery Court repeatedly pointed to the Revised OMP as the centerpiece of Plaintiffs' claims. Opinion at *15, *18. However, the Chancery Court erred by embracing Plaintiffs' misinterpretation of the Revised OMP. Plaintiffs simplistically argue that, because the 2007 OMP utilized one threshold, while the Revised OMP utilized two, it was a foregone conclusion that fewer orders would be flagged. This misinterpretation of the Board materials should be rejected.[51] *Good*, 177 A.3d at 56-57 (court is not required to accept on motion to dismiss inaccurate description of board presentation).

As discussed above, [redacted] The thresholds in the Revised OMP: [redacted] and (4) flagged orders that exceeded a threshold that was [redacted] While the presentation to the Audit Committee does include a Venn diagram

[51] *See* A283; A343 (arguing that the Revised OMP had "new thresholds, risk adjustments" and that it was not apparent from presentation "which way the [flagged order] numbers are going to go").

demonstrating how the thresholds in the Revised OMP interact, neither of the circles on that diagram represents the 2007 OMP's threshold. Not surprisingly, [redacted]

Plaintiffs' Complaint itself demonstrates that the Revised OMP did *not* have a material impact on the number of flagged orders. The 2007 OMP—the "industry-standard" system designed by the Company working "with the DEA," Opinion at *5—flagged [redacted] 60,499 orders in 2013; and 78,707 orders in 2014. A129 ¶230.[52] The Revised OMP was implemented during 2015. In 2015, 83,407 orders were flagged. In subsequent years, the Revised OMP flagged 48,588 orders in 2016; 87,224 orders in 2017; 75,431 orders in 2018; and 66,609 orders in 2019. *Id*. Thus, Plaintiffs' own allegations demonstrate that the number of flagged orders did not materially fall.[53] And once again, the Board was repeatedly assured, even *after* the Revised OMP's implementation, that the systems complied with the law. *See City*

[52] B508.

[53] While the number of suspicious orders declined shortly after the implementation of the Revised OMP, the decline did not result from the flagging of fewer orders and was not apparent to the Board when it reviewed the Revised OMP.

of Detroit Police & Fire Ret. Sys. v. Hamrock, 2022 WL 2387653, at *19 (Del. Ch. June 30, 2022) (rejecting *Massey* claim where committees focused on compliance).

b. The Chancery Court Erroneously Determined That the Board Only Addressed Diversion Controls Three Times After the Revised OMP.

The Chancery Court based its ruling in part on its conclusion that there were only "three instances of board involvement" after the Revised OMP went into effect. Opinion at *16. The Chancery Court's conclusion is contrary to Plaintiffs' allegations and the Section 220 documents upon which Plaintiffs rely:

- In **March 2015**, the Audit Committee received a detailed report on ABC's systems.[54]
- In **August 2016**, following an investigation by Fried Frank addressing a stockholder demand regarding diversion controls, the Audit Committee determined that the claims were not meritorious.[55]
- In **August 2017**, the Board received a report about ABC's order monitoring framework. A122-23 ¶213.[56]
- In the **Summer of 2017**, ABC undertook an extensive, two-phase review of its compliance program with Reed Smith. A113-14 ¶197.[57] Reed Smith "concluded that the Company's compliance program is effective."[58]

[54] B300.

[55] B796; B802.

[56] B609-10.

[57] B609.

[58] *Id.*

- In **November 2017**, [redacted]"[59]
- In **February 2018**, [redacted][60]
- In **May 2018**, the internal audit department reported that [redacted][61] (This was the first audit by the *internal audit* department not, as the Chancery Court inaccurately stated, Opinion at *2, *10, the Audit Committee's first review).
- In **August 2019**, the Audit Committee received an extensive update on the diversion control systems. A127 ¶226.[62]
- In **November 2019**, [redacted][63]
- In **March 2020**, [redacted][64]

The Chancery Court erred by not crediting the foregoing.

c. The Chancery Court Erred by Inventing an Unpled Theory.

The Chancery Court also improperly invented a theory that Plaintiffs had not even pleaded. Specifically, the Chancery Court stated that the Board was unwilling

[59] B1441.

[60] B1466-72.

[61] B413.

[62] B807-24.

[63] B1478-79.

[64] B441-70.

to change the diversion control systems unless the changes were part of a settlement, *i.e.*, that the Board used system changes as "settlement currency." Opinion at *12, *16. But Plaintiffs nowhere pleaded or argued this theory and there is nothing in the Complaint or record to support it. While the Chancery Court cited Plaintiffs' briefing (*see* Laches Opinion at 1192 (citing A224 n.118)), Plaintiffs' brief merely discussed the cost of the MDL settlement and cited a paragraph of the Complaint regarding the settlement's financial impact. Thus, the Chancery Court created out of whole cloth one of the key justifications for its conclusion that, but for the West Virginia Ruling, Plaintiffs would have stated a claim.

3. The Chancery Court Imposed Unreasonable Duties on Directors.

The Chancery Court held that, in light of unproven allegations made in a number of lawsuits, the Board was under a duty to force the Company to replace the Revised OMP with a different system. Opinion at *15 (Board failed to "fix" the Revised OMP). For three reasons, the Chancery Court's conclusion is at odds with Delaware law: First, under Delaware law, directors do not face personal liability for failing to insist upon specific changes to management-supported and evolving compliance systems—even if the directors act negligently. Rather, directors face oversight liability only by consciously disregarding their duties, *i.e.*, by doing nothing in response to alleged red flags. Second, the Chancery Court's holding would chill companies' ability to defend litigation with which they disagree. Finally,

the Chancery Court's holding would undermine the policies underlying *Caremark* by making it difficult for companies facing significant traumas to recruit and retain qualified board members.

Delaware courts have repeatedly recognized that *Caremark* claims cannot proceed where plaintiffs "d[id] not allege that the directors did nothing but that what they did was insufficient." *Richardson v. Clark*, 2020 WL 7861335, at *11 (Del. Ch. Dec. 31, 2020); *see also Okla. Firefighters Pension & Ret. Sys. v. Corbat*, 2017 WL 6452240, at *17 (Del. Ch. Dec. 18, 2017) (allegations that directors "could have done a better job addressing the issues . . . is not enough to state a *Caremark* claim"). Indeed, negligence or even "gross negligence . . . is insufficient to establish director liability." *Bingle*, 2022 WL 4102492, at *8; *see also In re Chemed Corp., S'holder Derivative Litig.*, 2019 WL 3215852, at *24 (D. Del. Feb. 26, 2019) ("[S]howing that a board took insufficient remedial action—or remedial action that, in hindsight, could have been better or more robust—is not the standard"). Here, Plaintiffs concede that the Board learned of numerous revisions to the Company's systems over time. While Plaintiffs believe that the Company should have done more, that is not the stuff of *Massey* or *Caremark* claims. *See, e.g.*, *Good*, 177 A.3d at 59 (board exercised oversight by receiving presentations regarding actions taken by management to address regulatory concerns); *Firemen's Ret. Sys. of St. Louis v.*

Sorenson, 2021 WL 4593777, at *16 (Del. Ch. Oct. 5, 2021) (claim dismissed where board told that management was addressing the issues).

Moreover, allowing for personal liability in these circumstances would chill companies' ability to defend litigation with which they disagree. In *Melbourne Municipal Firefighters' Pension Trust Fund v. Jacobs*, for instance, Qualcomm sustained three antitrust-related corporate traumas in 2009, including paying out nearly $1 billion to settle litigation. 2016 WL 4076369, at *3-4 (Del. Ch. Aug. 1, 2016). In 2013, China's regulator imposed a $975 million antitrust fine. *Id.* at *5. Qualcomm stockholders then filed a derivative action, alleging that company directors violated *Caremark* and *Massey* by failing to change the company's practices following the purported 2009 red flags. *Id.* at *8, *10.

The Chancery Court dismissed the action. The Court explained that the board consistently expressed "its view that its business practices were not violative of international antitrust laws and elected to address the relevant legal actions by . . . pursuing appeals." *Id*. at *12. The Court went on to distinguish *Massey* because it involved guilty pleas for willful violations of safety standards. *Id*. It distinguished *Pyott* because, in that case, the board "was advised by [the company's] general counsel that its business plan included potentially illegal conduct." *Id*.

Here, as in *Melbourne*, the Company has consistently denied liability—a position that was indisputably reasonable in light of the West Virginia Ruling.

Moreover, the Board was repeatedly told that the Company's systems satisfied all legal obligations. Accordingly, the Company had good grounds for defending the litigation and the Board should not be subjected to personal liability because the Company did so. *See Pettry v. Smith*, 2021 WL 2644475, at *10 (Del. Ch. June 28, 2021) ("The reasonable inference to draw, then, is . . . that the Board was engaged on this issue, allowing the New York litigation to play out prior to making any determinations regarding the remediation of the underlying alleged illegal conduct.") *aff'd*, 273 A.3d 750 (Del. 2022).

Finally, imposing liability on directors who rely upon management and third parties would undermine the policies underlying *Caremark*. As Chancellor Allen explained, "a demanding test of liability in the oversight context" benefits stockholders "since it makes board service by qualified persons more likely. . . ." *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996). Here, Plaintiffs' theory would chill board service by qualified individuals, especially for corporations that are facing significant traumas. It also may chill a company's willingness to reach civil settlements. Accordingly, it should be rejected.

4. The Red Flags Claim Also Fails in Light of the Level of Board Oversight.

Plaintiffs' *Caremark* claim also fails because Plaintiffs do not allege that the Board "*consciously disregard[ed]* its duty" to address red flags, *i.e.*, that it "ignored red flags." *Horman*, 2017 WL 242571, at *10 (emphasis added). Even if the

Chancery Court had correctly concluded that Board members only considered diversion controls three times beginning in 2015—and it did not—the Chancery Court still erred as a matter of law by concluding that addressing an issue three times is the same thing as ignoring it. *Pettry*, 2021 WL 2644475, at *8 n.91 (*Caremark* claims fail when they "second-guess the timing and manner of the board's response to red flags") (citation omitted).

In fact, the level of Board activity dwarfs the activity in any case that has survived dismissal and in many that have not. As detailed above, the Board or Audit Committee specifically addressed the ongoing litigation and the workings of the diversion control systems *many* times before and after the adoption of the Revised OMP. Accordingly, the Chancery Court's conclusion that Defendants ignored the purported red flags is flawed. *See, e.g.*, *Good*, 177 A.3d at 58-59 (board exercised oversight by "receiving [two] management presentation[s] on the status of environmental problems"); *Hamrock*, 2022 WL 2387653, at *16 (single meeting about mission critical risk); *In re GoPro, Inc.*, 2020 WL 2036602, at *13 (Del. Ch. Apr. 28, 2020) (explaining that a "*Caremark* claim cannot be squared with an allegation that the Board responded to red flags" where board met to discuss proposed recall plans).

III. THE CHANCERY COURT'S DENIAL OF PLAINTIFFS' RULE 60(B) MOTION WAS PROPER.

A. Question Presented

Whether the Chancery Court abused its discretion in denying Plaintiffs' motion for relief under Rule 60(b)(2). This issue was preserved. Rule 60(b) Opinion at *2; B1698-703.

B. Scope of Review

Contrary to Plaintiffs' assertion (Pls. Br. at 47), a Rule 60(b) motion is reviewed for "abuse of discretion." *MCA, Inc. v. Matsushita Elec. Indus. Co.*, 785 A.2d 625, 633 (Del. 2001) (citations omitted). Such an abuse occurs when a court "exceed[s] the bounds of reason in view of the circumstances" or "so ignore[s] recognized rules of law or practice so as to produce injustice." *Id.* at 633-34 (citation omitted).

C. Merits of Argument

Plaintiffs seek reversal of the Chancery Court's denial of their motion under Rule 60(b)(2); they do not contest the denial of relief under Rule 60(b)(6). Plaintiffs' appeal should be denied, first, because they do not even try to meet the applicable standard of review. Second, regardless of the standard of review, the Chancery Court correctly denied Plaintiffs' Rule 60(b)(2) motion.

1. Legal Standard

A movant under Rule 60(b) must satisfy a "heavy burden," *P.C. Connection, Inc. v. Synygy Ltd.*, 268 A.3d 1224, 1232 (Del. Ch. 2022), and can obtain relief "only on a *powerful showing* that a *substantial risk of injustice* is present." *Vianix Del. LLC v. Nuance Commc'ns, Inc.*, 2011 WL 487588, at *4 (Del. Ch. Feb. 9, 2011) (emphasis added). Specifically, a movant under Rule 60(b)(2) must show, among other things, that the evidence at issue constitutes "newly discovered evidence" and that the evidence is "so material and relevant that it will probably change the result" and is not "merely cumulative or impeaching in character." *Levine v. Smith*, 591 A.2d 194, 202 (Del. 1991) (citations omitted), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

2. Plaintiffs Do Not Even Attempt to Satisfy the Standard of Appellate Review.

Plaintiffs' appeal fails for the simple reason that Plaintiffs do not even try to establish that the Chancery Court abused its discretion. Plaintiffs never argue that it was "beyond the bounds of reason" for the Chancery Court to conclude that the DOJ Complaint—the latest in a line of more than 1,800 lawsuits upon which Plaintiffs rely—was cumulative and immaterial under Rule 60(b)(2)'s standards. Nor do Plaintiffs argue that the Chancery Court "so ignore[d] recognized rules of law" such that an injustice resulted when it refused to credit Plaintiffs' unsupported speculation about when the DOJ decided to file its Complaint.

3. Plaintiffs Do Not Satisfy Rule 60(b)(2).

Plaintiffs' appeal also fails because, no matter the standard of review, they fail to satisfy Rule 60(b)(2). Plaintiffs do not argue on appeal that the DOJ Complaint's allegations constitute newly discovered evidence that satisfies Rule 60(b)(2). Rather, they assert that the DOJ's *filing* of its lawsuit was newly discovered evidence that satisfies Rule 60(b)(2) and that the Chancery Court erred by failing to consider that evidence. As discussed below, Plaintiffs' argument fails.

a. Plaintiffs Identify No Newly Discovered Evidence.

"[F]or evidence to qualify as 'newly discovered evidence,' it must have been 'in existence and hidden at the time of judgment . . . .'" *Bachtle v. Bachtle*, 494 A.2d 1253, 1255-56 (Del. 1985) (citation omitted). Here, the Chancery Court held that the DOJ's *filing* of the lawsuit was new evidence, but that the DOJ Complaint's allegations constituted "newly discovered evidence . . . that can be considered." Rule 60(b) Opinion at *8. As discussed below, neither the filing nor the allegations of the DOJ Complaint constitutes newly discovered evidence.

(1) The Filing of the DOJ Complaint Is New Evidence.

The DOJ's filing of the lawsuit was new evidence that cannot be considered under Rule 60(b)(2). The DOJ filed suit on December 29, 2022, after the entry of judgment in Defendants' favor. As such, the DOJ's filing of the lawsuit is new evidence, not newly discovered evidence.

Unable to escape this obvious conclusion, Plaintiffs argue that the DOJ's "decision to file the DOJ Complaint was extant before the trial court dismissed the action." Pls. Br. at 48. This argument exalts form over substance and, in any event, is baseless speculation. There is no basis in law or logic for distinguishing the filing of the DOJ Complaint from the "decision" to file it. Moreover, Plaintiffs offer no facts establishing the DOJ's state of mind prior to the dismissal of Plaintiffs' Complaint. Instead, Plaintiffs note that the DOJ has been investigating the Company for years. However, the length of the investigation says nothing about when the DOJ decided to file suit. This Court should not accept Plaintiffs' invitation to consider speculation as "newly discovered evidence."[65]

(2) The DOJ's Allegations Are New Evidence.

The allegations of the DOJ Complaint are also new—not newly discovered—evidence. The Chancery Court held that the DOJ's allegations are newly discovered evidence because they look backwards at historical events. Rule 60(b) Opinion at *8. However, acceptance of the Chancery Court's position would create an exception that swallows the rule. Almost all evidence that a party would want to bring forward after judgment would be evidence that relates to historical events.

[65] *Grobow v. Perot*, 1988 WL 127094 (Del. Ch. Nov. 25, 1988), does not help Plaintiffs. *Grobow* did not consider *Bachtle.* Nor did it address whether the evidence at issue was "newly discovered evidence," as opposed to "new evidence."

Indeed, if the evidence did not relate to the events involved in the already completed lawsuit, no party would claim that it warrants relief. By allowing evidence that is created after judgment to constitute "newly discovered evidence," the Chancery Court improperly disregarded the controlling rule in *Bachtle*.

b. The DOJ Complaint Is Immaterial and Cumulative.

Plaintiffs' appeal also fails because they cannot show that either the DOJ's decision to sue or its allegations are of "such a material nature that . . . [they] would probably change its decision" and were not "cumulative." *Credit Lyonnais Bank Nederland, N.V. v. Pathe Comm's Corp.*, 1996 WL 757274, at *1 (Del. Ch. Dec. 20, 1996); *Wollner v. PearPop, Inc.*, 2022 WL 2205359, at *5 (Del. Ch. June 21, 2022) (newly discovered evidence "must change the result of the court order").

In the hopes of establishing materiality, Plaintiffs focus on the wrong issue. Specifically, Plaintiffs claim that the DOJ Complaint would have changed the Chancery Court's determination that "the *West Virginia Decision* renders it impossible 'to infer that the Company failed to comply with its anti-diversion obligations.'" Pls. Br. at 50 (quoting Opinion at *17). But this issue is beside the point. The material issue is not, as Plaintiffs inaccurately assert, "whether the DOJ Complaint supports the inference that the Company violated the CSA." Instead, the issue is precisely what Plaintiffs claim it is not, *i.e.*, "whether [the Complaint] supports the inference that . . . Defendant[s] breached their duties" by knowingly

taking action that caused the Company to violate the law. *See* Pls. Br. at 50-51. The DOJ Complaint does not mention any Defendant, let alone allege that Defendants knowingly caused the Company to violate the law. Accordingly, the Chancery Court did not abuse its discretion in holding that the DOJ Complaint would not change its earlier ruling.

Lastly, both the DOJ's decision to sue and its allegations are cumulative. *See, e.g.*, *Pope Invs. LLC v. Benda Pharm., Inc.*, 2010 WL 3075296, at *3 (Del. Ch. July 26, 2010) (cumulative information "reiterates" what is "already in the record"); *Vianix*, 2011 WL 487588, at *7 (information is cumulative where it "shed[s] no additional light on the issue"). Hundreds of other governmental entities filed suit against the Company, asserting the same theories as the DOJ. Therefore, the DOJ's decision to sue adds nothing to the mix and Plaintiffs fail to show that the Chancery Court abused its discretion in ruling that the DOJ's allegations are cumulative. Indeed, as Plaintiffs concede, the DOJ Complaint alleges that the Company's Revised OMP was deficient and that the Company reported fewer suspicious orders than its major competitors. Pls. Br. at 27-28. Thus, the DOJ asserts the same theories that are alleged by Plaintiffs here and in the numerous other lawsuits upon which Plaintiffs' Complaint relies. As such, the Chancery Court was well within its discretion to find that the DOJ Complaint is cumulative.

CONCLUSION

The dismissal of the Complaint should be affirmed.

POTTER ANDERSON & CORROON LLP

By: */s/ Stephen C. Norman*
Stephen C. Norman (No. 2686)
Jennifer C. Wasson (No. 4933)
Tyler J. Leavengood (No. 5506)
Christopher D. Renaud (No. 6457)
1313 N. Market Street
Hercules Plaza, 6th Floor
Wilmington, DE 19801
(302) 984-6000

Attorneys for Defendants-Below / Appellees 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, and Nominal Defendant-Below / Appellee AmerisourceBergen Corporation

OF COUNSEL:

DECHERT LLP
Michael S. Doluisio, Esquire
Brittany Zoll, Esquire
Christopher J. Merken, Esquire
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
(215) 994-4000

DECHERT LLP
Matthew L. Larrabee, Esquire
Hayoung Park, Esquire
Julia Markham-Cameron, Esquire
Three Bryant Park
1095 Avenue of the Americas
New York, NY 10036-6797
(212) 698-3500

MORGAN, LEWIS & BOCKIUS LLP
Michael D. Blanchard, Esquire
Amelia Pennington, Esquire
One Federal Street
Boston, MA 02110
(617) 341-7700

Dated: April 27, 2023

CERTIFICATE OF SERVICE

I hereby certify on this 10th day of May, 2023, that a true and correct copy of the *Redacted Public Version of Appellees' Answering Brief* was served via File & Serve*Xpress* to the following counsel of record:

Samuel L. Closic, Esquire
Eric J. Juray, Esquire
Robert B. Lackey, Esquire
PRICKETT, JONES & ELLIOTT, P.A.
1310 King Street
Wilmington, DE 19801

Gregory V. Varallo, Esquire
Andrew E. Blumberg, Esquire
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
500 Delaware Avenue, Suite 901
Wilmington, DE 19801

/s/ Tyler J. Leavengood
Tyler J. Leavengood (No. 5506)