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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 **PUBLIC INSPECTION VERSION FILED MAY 30, 2023**

APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

AmerisourceBergen is a major wholesale distributor of prescription opioids. As the opioid epidemic raged, the Company reported suspicious orders at incomprehensibly low rates, but Defendants refused to take any meaningful action. That did not change until 2021, when the Company agreed to pay over $6 billion as part of a nationwide settlement to largely resolve the Opioid MDL claims arising out of the Company's alleged CSA violations. The Company has paid hundreds of millions of dollars to settle other similar lawsuits. Litigations concerning the Company's CSA violations are ongoing, most notably the recently filed DOJ action alleging hundreds of thousands of CSA violations and seeking billions of dollars in additional damages.

The trial court correctly determined that the Complaint's well-pled allegations, and the reasonable inferences flowing therefrom, state Red-Flags and *Massey* Claims. To wit, the trial court held that the Complaint's allegations support an inference that Defendants "embarked on a strategy of prioritizing profits over compliance and were sticking to it."[1] But the trial court refused to accept the Complaint's well-pled allegations as true and draw inferences in Plaintiffs' favor in light of the *West Virginia Decision*, which it held rendered it impossible "to infer

[1] Op. at *19 (Exhibit A to Appellants' Opening Brief).

that the Company failed to comply with its anti-diversion obligations."[2] After entering judgment on that basis, the trial court refused to consider the DOJ's subsequently disclosed determination that the Company violated the CSA.

The trial court reversibly erred in three ways:

1) It impermissibly accepted the *West Virginia Decision*'s factual finding that the Company complied with the CSA in Huntington and Cabell, West Virginia for the truth of the matter and then inferred, based on an unsupported syllogism, that the Company therefore complied with the CSA everywhere;
2) It failed to consider the record holistically—*e.g.*, the *West Virginia Decision*, on the one hand, and billions of dollars in settlements and the findings of Congress that the Company failed to meet its reporting obligations, on the other hand—and draw inferences in Plaintiffs' favor; and
3) It refused to consider the DOJ's determination that the Company violated the CSA based on an unduly narrow formulation of the meaning of "newly discovered evidence."

Defendants attempt to defend the trial court's errors by rewriting the Opinion. Although the trial court dismissed based on its holding that the *West Virginia*

[2] Op. at *3.

Decision foreclosed the possibility that the Company violated the CSA, Defendants repeatedly and erroneously state that the Company's CSA compliance is irrelevant. Defendants wrongly contend instead that the *West Virginia Decision* forecloses the possibility that Defendants "knowingly" violated the law. That argument rests on the baseless and false assumption that, like the West Virginia Court, Defendants each performed a factual analysis and concluded that the Company's diversion control program complied with the CSA. Stripped of that foundational assumption, each of Defendants' arguments in support of the Opinion crumbles.

Recognizing the Opinion's infirmity, Defendants make the additional argument that the Complaint fails to state a claim even setting aside the *West Virginia Decision*. Most of their arguments amount to disagreements with inferences drawn by the trial court from the Complaint's well-pled allegations. None of their arguments confront the core facts of the case, namely that (i) the Board adopted the Revised OMP to tank the rate of suspicious order reporting, (ii) the Complaint identified over seventy red flags, (iii) the Board learned that the Company was reporting suspicious orders at incomprehensibly low rates, and (iv) the Board did ***nothing*** to bring the Company into legal compliance until the 2021 Settlement. Under those facts, a straightforward application of established Delaware law

supports the trial court's determination that Defendants face a substantial likelihood of liability.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT, SETTING ASIDE THE *WEST VIRGINIA DECISION*, THE COMPLAINT ADEQUATELY PLEADS RED-FLAGS AND *MASSEY* CLAIMS

As detailed in the Complaint, beginning around 2010, Defendants embarked on a business strategy focused on "maximiz[ing] value" from independent pharmacy customers through a "light touch" model that was incompatible with the Company's CSA obligations.[3] Despite a flood of red flags of CSA non-compliance, including lawsuits and subpoenas,[4] Defendants pursued a business strategy intended to minimize [redacted][5] To that end, in 2015, Defendants approved the Revised OMP that, as depicted by the Venn diagram included in Appellants' (Plaintiffs-below) opening brief, added a second threshold for identifying suspicious orders.[6] The effect of the Revised OMP was to substantially reduce the number of orders the Company blocked from shipment and reported to the DEA.[7]

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[3] A70, A119, ¶¶103, 119.

[4] A81-99, ¶¶126-64.

[5] A80, ¶123.

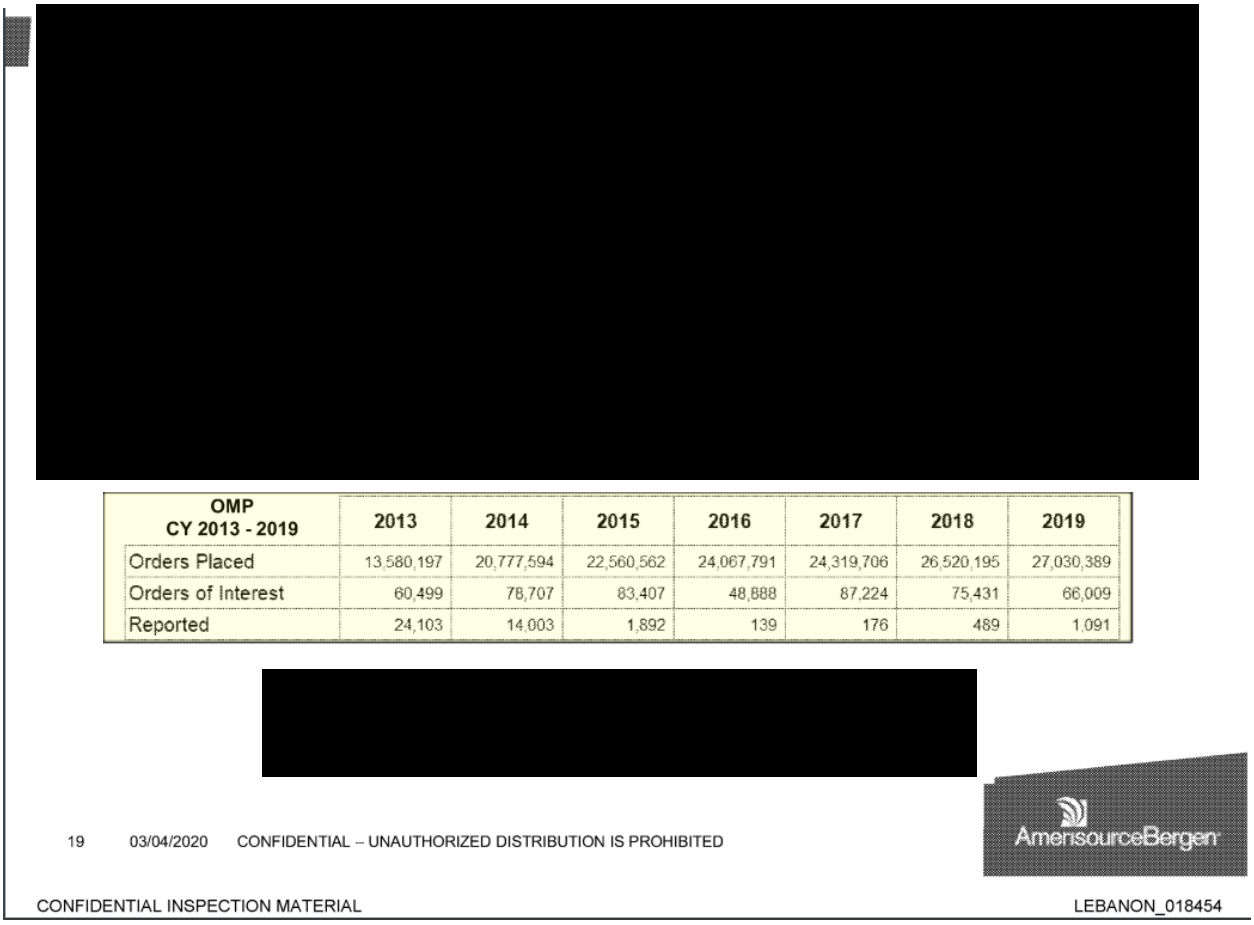
[6] Appellants' Opening Br. ("OB") at 17.

[7] A128-31, ¶¶230-31.

After adopting the Revised OMP, the Board learned of the dramatic drop in the Company's suspicious order reporting rate which, as a matter of common-sense, raised significant doubt regarding the Company's CSA compliance. The contents of the reports to the Board "detail[] the paltry number of suspicious orders that the Company was identifying,"[8] including a ***99.4%*** decline in suspicious orders reported from 2013 (24,103) to 2016 (139):[9]

[8] Op. at *16.

[9] A128-31, ¶¶230-231 (highlighting added).



OMP CY 2013 - 2019	2013	2014	2015	2016	2017	2018	2019
Orders Placed	13,580,197	20,777,594	22,560,562	24,067,791	24,319,706	26,520,195	27,030,389
Orders of Interest	60,499	78,707	83,407	48,888	87,224	75,431	66,009
Reported	24,103	14,003	1,892	139	176	489	1,091

In response, "defendants did nothing" until the 2021 Settlement.[10]

The trial court summarized the Complaint's particularized allegations and the reasonable inferences flowing therefrom as follows:

> as the Company's legal troubles grew, its officers and directors were confronted with a steady stream of red flags indicating that the Company was not complying with its anti-diversion obligations. Those red flags took the form of congressional investigations, subpoenas from prosecutors, lawsuits by state attorneys general, and an eventual torrent of civil lawsuits. Meanwhile, as the opioid epidemic raged, the

[10] Op. at *16.

> Company continued to report suspicious orders at incomprehensibly low rates…. Yet the Company's officers and directors consciously ignored the red flags and did not take any meaningful actions until the 2021 Settlement.[11]

Accordingly, the trial court concluded that, setting aside the *West Virginia Decision*, the Complaint pleads a Red-Flags Claim because the allegations "support a reasonable inference that the defendants knew that some level of corrective action was required, but they did not want to do anything that might imply that the Company's existing systems were inadequate."[12]

The trial court likewise correctly held that, setting aside the *West Virginia Decision*, the Complaint well-pleads a *Massey* Claim. The Complaint pleads that "between 2010 and 2015, management and the directors made a series of conscious decisions which they knew would result in the Company failing to comply with its anti-diversion obligations."[13] "The clearest manifestation of the strategy was the adoption of the Revised OMP [in 2015], which used a double-trigger test to reduce the number of orders of interest that the Company flagged for investigation."[14]

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[11] *Id.* at *1.

[12] *Id.* at *16.

[13] *Id.* at *17.

[14] *Id.* at *18.

"What gets the plaintiffs the inference they need [for a *Massey* Claim] is the Revised OMP and its seemingly apparent purpose of driving down the already low numbers of suspicious orders that AmerisourceBergen was reporting."[15]

A. Defendants' Oversight Failures Are Not Unique

Despite not cross-appealing, Defendants argue that the trial court erred in finding that, setting aside the *West Virginia Decision*, the Complaint states Red-Flags and *Massey* Claims. Defendants' first argument in that regard is that this case is unlike any prior *Caremark* case because the standard for liability is vague, the Company never admitted to liability, and no one informed the Company that it was violating the law.[16] Those argument are all premised on the incorrect assumption that Defendants could not have understood, despite a mountain of red flags and incomprehensibly low suspicious order reporting rates, that the Company was violating the CSA unless they were explicitly told so.

Even assuming *arguendo* that the supposed vagueness of applicable laws prevented Defendants from knowing that the Company was violating the CSA prior

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[15] *Id.*

[16] Appellees' Answering Br. ("DAB") 33-34.

to 2017,[17] that was no longer true after the Board learned of congressional investigations (and reports), subpoenas from prosecutors, lawsuits by state attorneys general, hundreds of civil lawsuits, and the Company's astronomically low suspicious reporting rates. At that point, if not sooner, the most reasonable inference is that "defendants knew the Company was violating its opioid diversion obligations and needed to implement stronger systems of oversight," yet declined to do so until the 2021 Settlement.[18] Indeed, in connection with the 2021 Settlement, the Company tacitly admitted that its systems of oversight were inadequate and agreed to reforms necessary to "actually identify and stop suspicious orders."[19]

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[17] The law is not vague. *See* Op. at *4; *see also* A506-07, DOJ Complaint ¶¶53-56 (for suspicious orders, "a distributor was and always has been required to report the order to DEA, ***unless the distributor investigates the order and dispels all suspicion*** relating to the order.") (emphasis added). Defendants admit awareness of the CSA's requirements, noting that in 2007 the Company "***worked with the DEA*** to establish an ***industry standard [OMP]***." DAB 8. By adopting the revised OMP in 2015, Defendants intentionally deviated from that "industry standard."

[18] Op. at *1; *see also Ontario Provincial Council of Carpenters' Pension Trust Fund v. Walton*, 2023 WL 290496, at *20 (Del. Ch. Apr. 12, 2023) ("A conscious decision not to act is itself a decision that can be the product of bad faith.") (citations omitted); A784-86, Telephonic Ruling on Defendants' Motions to Dismiss, *In re Facebook, Inc. Deriv. Litig.*, C.A. No. 2018-0307-JTL, at 10:22:-12:13 (Del. Ch. May 10, 2023) (TRANSCRIPT) [hereinafter *Facebook Tr.*] (finding demand futile for red flags claim where directors took no action facing "a string of red flags that were readily apparent … that related to Facebook's practices.").

[19] Op. at *1, *11.

Defendants' ignorance of the law defense thus finds no support in the record or common sense.

Defendants' remaining arguments about why this case is supposedly unique fail for similar reasons. While an admission of liability or a statement from management or a regulator may be dispositive of a board's knowledge of illegality, it is not a prerequisite. Rather, the trial court correctly held, "[a] settlement of litigation or a warning from a regulatory authority—irrespective of any admission or finding of liability—may demonstrate that a corporation's directors knew or should have known that the corporation was violating the law."[20] Here, Defendants' failure to respond to over seventy red flags of illegality supports the requisite inference.[21]

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[20] Op. at *16 (quoting *Rojas v. Ellison*, 2019 WL 3408812, at *11 (Del. Ch. July 29, 2019)).

[21] Defendants misleadingly claim that "numerous experts in law, DEA regulations, and/or diversion control … told the Board that the Company's ***systems*** complied with the law." DAB 34 (emphasis added). "Systems" does not mean "diversion control program." Defendants point to no evidence that the Board was told that the Company's "diversion control program" complied with the law.

B. The Trial Court Correctly Interpreted the Record

1. Defendants' Interpretation of the Revised OMP is Flawed

Defendants argue that the trial court misinterpreted the record by determining 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."[22] That is a red herring. While it is true that the Revised OMP reduced the rate at which suspicious orders were ***flagged***,[23] the real issue is the Revised OMP's impact on the rate at which suspicious orders were ***reported***.

As the trial court correctly observed, in 2015 the "Company already was flagging low levels of orders, and with the adoption of the Revised OMP, the Company's ***rate of suspicious order reporting*** fell to microscopic levels"[24]—*i.e.*, from 14,003 in 2014 to 1,892 in 2015 to *139* in 2016.[25] When the Board learned of the Revised OMP's impact on the rate of suspicious order reporting, it did nothing. Accordingly, the trial court held that the Complaint supported the "plaintiff-friendly inference … that the defendants knew that AmerisourceBergen was reporting

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[22] DAB 35.

[23] DAB at 36.

[24] Op. at *18 (emphasis added).

[25] A128-29, ¶230.

astounding low levels of suspicious orders, understood that was the whole purpose of the Revised OMP, and went through the motions of providing oversight, while consciously deciding not to take any action until the 2021 Settlement."[26] That inference was well-supported and consistent with the DOJ Complaint's allegation that the Company intentionally failed to review suspicious orders.[27]

2. The Board Did Not Meet Ten Times Regarding CSA Compliance After the Revised OMP Was Adopted and, Even if It Had, That Would Not Help Defendants

Defendants argued below that the Complaint failed to state a claim because "the board received a report about the Company's order monitoring system in 2017, and the Audit Committee reviewed the Revised OMP in 2018 and 2019."[28] The trial court rejected that argument because "the directors took no action, despite the Company's minuscule levels of suspicious order reporting" and despite the fact that "the Company was facing a barrage of litigation and investigations," which "supports a pleading-stage inference that the Company's fiduciaries had embarked on a strategy of prioritizing profits over compliance and were sticking to it."[29]

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[26] Op. at *2.

[27] A562-69, ¶¶432-77.

[28] Op. at *19.

[29] *Id.*

Defendants now argue that the trial court erred by determining that there were only three instances of Board involvement in diversion control oversight after the Revised OMP was adopted.[30] Many of the instances of alleged oversight Defendants point to do not relate to diversion control.[31] Yet, even if the Board did discuss diversion control more than three times, that fact would further support the plaintiff-friendly inference that the Board failed to act despite knowledge of illegality. As the trial court explained, the mere fact that the Board discussed diversion controls "would not be enough to warrant dismissal when evaluated against the panoply of allegations in the complaint[, because] … the content of the reports detailed the paltry number of suspicious orders that the Company was identifying, yet the defendants did nothing in response."[32]

C. The Trial Court Did Not Invent a Theory or Impose an Unreasonable Duty on Directors

Defendants' remaining arguments fare no better. First, they state that the trial court "invent[ed]" a theory of liability that Plaintiffs did not plead, *i.e.*, that the

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[30] DAB 37-38.

[31] For instance, Defendants misleadingly cite to oversight of the "compliance program" under the Chief Compliance Counsel—a program separate and distinct from the "diversion control program" under the CSRA. *See* DAB 7-8; B131.

[32] Op. at *16.

Company "used system changes as 'settlement currency.'"[33] The trial court's conclusion was not a "theory of liability," it was a factual inference that flowed from the Complaint's well-pled allegations that Defendants refused to make any changes until the 2021 Settlement.[34] Plaintiffs were not required to plead all inferences flowing from the Complaint's well-pled allegations.

Second, Defendants suggest that this case is premised on the Board's "insufficient" response to red flags.[35] Not so. As the trial court correctly held, the Board adopted the Revised OMP that was designed to tank the rate of suspicious order reporting, faced a mountain of red flags, learned that the Revised OMP was operating as intended, *i.e.*, that the Company was reporting suspicious orders at incomprehensibly low rates, and did ***nothing***.[36] Against that backdrop, Defendants' claim that finding personal liability here would chill companies from defending

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[33] DAB 38-39.

[34] *See* A193, A223-24, A236, A252.

[35] DAB 40.

[36] *See* Op. at *1-2, OB at 16-21, 44-46.

"litigation with which they disagree"[37] is meritless. A board does not have the legal right to withhold compliance with the law after learning of illegality.[38]

Finally, Defendants assert that the Board satisfied its oversight duties by "addressing [the] issue three times."[39] Defendants did not "address" anything three times. They received presentations and conducted reviews.[40] But despite being "wrapped" in over seventy red flags,[41] and despite being aware of "the paltry number of suspicious orders that the Company was identifying,"[42] Defendants declined to take any action after receiving those presentations and conducting those reviews.

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[37] DAB 41-42.

[38] *Melbourne Mun. Firefighters' Pension Tr. Fund v. Jacobs*, 2016 WL 4076369, at *12 (Del. Ch. Aug. 1, 2016) (recognizing a board's "immediate duty" to change course when it learns of illegality). Defendants' reliance on *Melbourne*, DAB 41, demonstrates the weakness of their position. In *Melbourne*, the ***only*** inference supported by the complaint was that "the Board, at all times, was under the impression that its conduct did *not* violate applicable antitrust laws." *Id.* at *12; *see also* A798, *Facebook Tr.* at 24:16-20 (Delaware directors "cannot take legal risk on the theory that we are violating the law, but it's not likely to come back to haunt us because, A, the regulatory agencies are understaffed and, B, we can likely settle with them if they ever do come after us.").

[39] DAB 42-43.

[40] Op. at *16.

[41] *Id.*

[42] *Id.*

That lack of action distinguishes this case from the cases Defendants rely on, in which boards took corrective actions in response to red flags.[43]

[43] DAB 43 (citing *City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 56-59 (Del. 2017) (board took steps to address environmental problems brought to its attention); *City of Detroit Fire and Police Ret. Sys. v. Hamrock*, 2022 WL 2387653, at *16 (Del. Ch. June 30, 2022) (board "voluntarily took several concrete steps" to *improve* compliance)).

II. THE *WEST VIRGINIA DECISION* DOES NOT CHANGE THE OUTCOME

After correctly determining that the Complaint states *Massey* and Red-Flags Claims, the trial court determined that Plaintiffs were not entitled to pleading-stage inferences because the *West Virginia Decision* foreclosed the possibility that the Company violated the CSA.[44] That was legal error for two reasons, both of which independently require reversal: (i) the trial court impermissibly credited the *West Virginia Decision* for the truth of the matter, and (ii) even if the trial court was correct to credit the *West Virginia Decision* for the truth of the matter, the *West Virginia Decision* does not foreclose the possibility that the Company violated the CSA when assessed in full context.

A. The Trial Court Was Not Permitted to Accept the *West Virginia Decision* for the Truth of the Matter

The trial court improperly credited the *West Virginia Decision* for the truth of matter under the guise of judicial notice pursuant to D.R.E. 202.[45] The trial court was permitted to take judicial notice of the fact that the West Virginia Court found that the plaintiffs in that case failed to prove that the Company was liable for creating

[44] Op. at *2-3, 17, 19.

[45] Rule 60(b) Op. at *10 (Exhibit B to Appellants' Opening Brief).

a public nuisance,[46] and that the *West Virginia Decision* said what it said. The trial court was not permitted to accept as true the West Virginia Court's finding that the Company complied with the CSA and use it to deny Plaintiffs the pleading-stage inferences to which they are entitled.

D.R.E. 202 does not permit Delaware courts to take judicial notice of *any* findings of fact, much less findings of fact subject to reasonable dispute.[47] D.R.E. 202(a)(1) only permits courts to "take judicial notice of the common law, case law and statutes of the United States and every state, territory and jurisdiction of the United States."[48] The comments to the rule make clear that D.R.E. 202(a)(1) is directed solely to "the admissibility of evidence of law,"[49] not fact.

It is indisputable that the trial court cited and relied primarily on the *West Virginia Decision*'s findings of fact for the truth of the matter, *e.g.*, its finding that the Company complied with its anti-diversion and order monitoring requirements under the CSA. Regardless of whether it also cited or relied on some of the *West Virginia Decision*'s "conclusions of law" that repeated its findings of fact, the trial

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[46] OB 23.

[47] OB 35-36.

[48] OB 35 (quoting D.R.E. 202(a)(1)).

[49] OB 35 (quoting D.R.E. 202 cmts).

court plainly did not take judicial notice of the *West Virginia Decision* as "evidence of law." By its terms, D.R.E. 202 did not permit the trial court to take judicial notice of "case law" to rebut the factual inference that the Company violated the CSA. Defendants appear to concede as much in arguing that "[w]hile Plaintiffs dispute whether the Company, in fact, complied with the CSA, that is beside the point."[50]

To the extent, however, that Defendants argue that the trial court was permitted to take judicial notice of the *West Virginia Decision* for the truth of the matter, they cite no authority for that proposition because there is none. Defendants' citations to *In re Ebix, Inc. Stockholder Litig.*, 2016 WL 208402 (Del. Ch. Jan. 15, 2016) and *PVP Aston, LLC v. Fin. Structures Ltd.*, 2023 WL 2728775 (Del. Super. Ct. Mar. 31, 2023) are irrelevant. In the former, the Court of Chancery relied on D.R.E. 201 and D.R.E. 202 to take judicial notice of federal court *filings*, not findings of fact; in the latter, the Superior Court relied solely on D.R.E. 201(b)(2) and did not even mention D.R.E. 202.[51]

Although the trial court purported to take judicial notice of the *West Virginia Decision* solely pursuant to D.R.E. 202,[52] Defendants contend that D.R.E. 201 also

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[50] DAB 27.

[51] *Ebix*, 2016 WL 208402, at * 10; *PVP Aston*, 2023 WL 2728775, at *12-13.

[52] *See* Rule 60(b) Op. at *10.

permitted the trial court to accept the truth of the West Virginia Court's findings of fact[53] Not so. D.R.E. 201 authorizes a court to take judicial notice of an "adjudicative fact" only if it is "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[54] The *West Virginia Decision*'s finding of fact that the Company complied with the CSA does not satisfy either prong.[55]

Finally, Defendants argue that other Delaware decisions have considered post-complaint developments.[56] Defendants' citations to "tag-along" derivative actions such as *Rojas v. Ellison*, *Fisher v. Sanborn*, *In re Geron Corporation Stockholder Derivative Litigation*, and *In re Yahoo! Inc. Shareholder Derivative Litig*., are inapposite. None of those cases accepted a sister court's finding of fact for the truth of the matter. Rather, in those cases, liability and damages in the derivative action depended entirely on the outcome of the federal action. Here,

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[53] *See* DAB 26-27.

[54] D.R.E. 201(b).

[55] OB 36-37.

[56] DAB 23-24.

regardless of the *West Virginia Decision*, the Complaint well-pleads liability that caused more than $7 billion in harm to the Company.

B. Even Accepting the *West Virginia Decision* for the Truth of the Matter, the Totality of the Record Supports a Pleading-Stage Inference that Defendants Knowingly Caused the Company to Violate the CSA

Plaintiffs' Opening Brief established that the *West Virginia Decision* does not support the inescapable conclusion that the Company complied with the CSA in Huntington and Cabell, West Virginia.[57] The decision was the product of a "test case" bellwether trial.[58] It was based solely on the evidence presented by the plaintiffs in that case. It is being appealed as being premised on an overly narrow interpretation of the CSA with "no basis in law," and for excluding significant evidence demonstrating the Company's CSA violations.[59] It is subject to reversal.

Even accepting the *West Virginia Decision*'s finding that the Company complied with the CSA in Huntington and Cabell, West Virginia, it does not follow that the Company complied with the CSA elsewhere.[60] The Company agreed to pay

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[57] OB 37-42.

[58] OB 41.

[59] OB 39-40.

[60] OB 37-38.

over $7 billion to resolve lawsuits premised on the Company's CSA violations.[61] The U.S. Senate concluded that, ***in Missouri*****,** AmerisourceBergen "consistently failed to meet [its] reporting obligations" under the CSA.[62] The DOJ and DEA concluded ***after*** the *West Virginia Decision* that the Company violated the CSA.[63] Thus, even (impermissibly) accepting the *West Virginia Decision* for the truth of the matter, the totality of the facts support, at best, that the Company's CSA compliance was limited to two cities in West Virginia, so that the question of the Company's CSA compliance broadly must be resolved in Plaintiffs' favor at the pleading stage.[64]

Defendants do not meaningfully dispute any of these points. Instead, they attempt to rewrite the trial court's opinion by arguing that whether the *West Virginia Decision* forecloses a pleading stage inference that the Company violated the CSA is irrelevant.[65] In fact, that is precisely the issue on which the Opinion turned.[66]

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[61] OB 38-39.

[62] OB 38.

[63] OB 26-28.

[64] OB 42.

[65] DAB 29.

[66] Op. at *17 ("In light of the *West Virginia Decision*, it is not possible to infer that the Company failed to comply with its anti-diversion obligations."); *see also id.* at *3.

Recognizing the fatal flaw in the trial court's reasoning, Defendants pivot to arguing that the *West Virginia Decision* forecloses the possibility that the Board "knowingly" allowed the Company to violate the law.[67] Even if that decision is ***reversed***, Defendants say, the trial court decision must be upheld because—and here is the linchpin of their argument—the Board members "reach[ed] the same conclusion that a federal judge reached following a lengthy trial on the merits."[68]

The linchpin of Defendants' argument has no support in the record. It is not a fact of record that the Board believed that the Company was complying with the CSA. On the contrary, and as discussed *supra*, the trial court determined that the Complaint's well-pled allegations support "a pleading-stage inference that the Company's fiduciaries had embarked on a strategy of prioritizing profits over compliance and were sticking to it."[69] The *West Virginia Decision* says nothing about the Board's knowledge or beliefs.[70]

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[67] DAB 29.

[68] DAB 30; *see also id.* at 29.

[69] Op. at *19; *see also id.* at *16. Indeed, the Board opted to pursue *less* regulatory compliance facing seventy-plus red flags. OB 44-46.

[70] Defendants' argument that the *West Virginia Decision* is fatal to Plaintiffs' claims even if reversed on appeal fails for the same reasons. DAB 30. The Board did not have the same record as the West Virginia Court, did not undergo the same analysis, and did not reach the same conclusions.

What the Board knew and believed is an issue to be determined following discovery. What is at issue now is whether the Complaint supports a pleading-stage inference that the Company violated the CSA. The trial court's determination that the Complaint does not, based solely on the *West Virginia Decision*, was legal error. Defendants offer no defense for the trial court's erroneous conclusions.

C. Defendants Have No Answer for the Injustice Caused by the Timing of the Trial Court's Ruling

The outcome of the motion to dismiss turned on when it was decided.[71] The trial court's motion to dismiss and Rule 60(b) opinions make clear that if the motion to dismiss had been decided before the *West Virginia Decision* was issued, or after the DOJ Complaint was filed, the decision would have been different.[72] The same is true if the *West Virginia Decision* is reversed.[73] The idea that a party can benefit from the timing of a foreign decision as Defendants did here is antithetical to the administration of justice. Defendants' only response is that the trial court simply "made use of all available evidence that was relevant to the demand futility

[71] OB 42-43.

[72] OB 43.

[73] *Id.*

assessment."[74] False. The trial court refused to consider the DOJ's determination that the Company violated the CSA.[75] The trial court's decision to give dispositive weight to the *West Virginia Decision* and no weight to the DOJ's determination constitutes reversible error.

[74] DAB 32.

[75] Rule 60(b) Op. at *7-8.

III. THE TRIAL COURT ERRED BY REFUSING TO CONSIDER THE DOJ'S DETERMINATION THAT THE COMPANY VIOLATED THE CSA HUNDREDS OF THOUSANDS OF TIMES

Plaintiffs' appeal of the trial court's Rule 60(b) decision turns on whether the DOJ's and DEA's determination that the Company violated the CSA was "newly discovered evidence." The trial court's determination as a matter of law that it was not is subject to *de novo* review under *Lenois v. Sommers*, 268 A.3d 220, 232 (Del. 2021).[76] Yet, even if Defendants are correct that the standard of review is abuse of discretion, the trial court's decision to blind itself to the DOJ's and DEA's determination, after citing the *West Virginia Decision* to deny Plaintiffs the inferences to which they are entitled, "exceeded the bounds of reason in view of the circumstances."[77]

[76] OB 47; *see also MCA, Inc. v. Matsushita Elec. Indus. Co.*, 785 A.2d 625, 638 (Del. 2011) (claims that a ruling on a Rule 60(b) motion "employed an incorrect legal standard" are reviewed *de novo*).

[77] *MCA*, 785 A.2d at 634.

A. The DOJ's Determination That the Company Violated the CSA Is Newly Discovered Evidence

Under Rule 60(b)(2), a court may relieve a party from a final judgment based on newly discovered evidence.[78] Newly discovered evidence is evidence that was "in existence and hidden at the time of judgment . . . ."[79]

The DOJ's determination that the Company violated the CSA was in existence and hidden at the time of judgment. The 506-paragraph DOJ Complaint was filed following a five-year investigation by multiple agencies.[80] It was the product of three grand jury investigations and the DOJ's and DEA's review of substantial Company materials.[81] And it was filed months ***after*** the Company acknowledged in public filings that it was in discussions with the DOJ and DEA to resolve matters relating to the Company's alleged CSA violations.[82] Against that backdrop, it is inconceivable that the DOJ and DEA determined that the Company violated the CSA

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[78] *Id.*

[79] *Bachtle v. Bachtle*, 494 A.2d 1253, 1255-56 (Del. 1985).

[80] OB 48-49; *see* A493-576 (the "DOJ Complaint").

[81] OB 49.

[82] *Id.*

in the one-week period between entry of judgment in this action and the filing of the DOJ Complaint.[83]

Defendants argue that the DOJ lawsuit cannot be "newly discovered" evidence because it is "mere speculation" that the decision to bring the lawsuit was made before the judgment. Embracing Defendants' argument would require accepting ***Defendants'*** mere speculation that the DOJ (i) had not determined that the Company violated the CSA by December 22, 2022, (ii) determined over the Christmas holiday that the Company violated the CSA hundreds of thousands of times, (iii) wrote a 506-paragraph complaint during that holiday week, and (iv) coordinated a joint statement with two U.S. Attorneys Offices and the DEA during that holiday week. This Court need not set aside common sense.[84]

Defendants' other newly discovered evidence argument—that the trial court erred by holding that the DOJ Complaint's allegations regarding actions that pre-dated the judgment were newly discovered evidence because it "would create an

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[83] OB 48-50.

[84] Defendants' (and the trial court's) reliance on *Bachtle* is misplaced. In *Bachtle*, there was a nine-month period between when the Family Court valued the relevant property and when the husband sold it at a higher price. *Bachtle*, 494 A.2d at 1255. No party argued, for example, that the husband agreed to sell the property before the judgment, but did not disclose it until later.

exception that swallows the rule"—is equally meritless and illogical.[85] If facts in existence before the judgment but not disclosed until after the judgment are not "newly discovered evidence," nothing is.[86]

B. The DOJ's Determination That the Company Violated the CSA Is Material and Not Cumulative

The trial court correctly determined that the DOJ's conclusion that the Company violated the CSA was not cumulative, but declined to address whether it was material after erroneously holding that it was not newly discovered evidence.[87] The DOJ and DEA's determination that the Company violated the CSA was material because it directly contradicts the trial court's determination that "it is not possible to infer that the Company failed to comply with its anti-diversion obligations."[88] After and despite the *West Virginia Decision*, the DOJ Complaint alleges that the Company "violat[ed] the CSA on a massive scale" and that the Company "***intentionally*** designed" the Revised OMP to reduce compliance with the CSA.[89]

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[85] DAB 47-48.

[86] *See Grobow v. Perot*, 1988 WL 127094, at *1061 (Del. Ch. Nov. 25, 1998), *aff'd sub. nom. Levine v. Smith*, 591 A.2d 194 (Del. 1991) (depositions taken after dismissal provided material basis to reconsider demand futility).

[87] Rule 60(b) Opinion at *9.

[88] Op. at *17.

[89] A514, ¶104, A524, ¶170 (emphasis added); *see also* A497-99, A573-74.

The DOJ and DEA's conclusion that the Company violated the CSA fatally undermines the trial court's reliance on the *West Virginia Decision*.

Defendants assert that the DOJ Complaint is immaterial because it "does not mention any Defendant, let alone allege that Defendants knowingly caused the company to violate the law."[90] In fact, neither the DOJ Complaint nor the *West Virginia Decision* examined the Board's actions or inactions. Rather, both addressed the Company's compliance or non-compliance with the CSA. If, as the trial court held, the West Virginia Court's determination that the Company complied with the CSA in Huntington and Cabell, West Virginia is material to Defendants' substantial likelihood of liability, then the DOJ and DEA's determination the Company violated the CSA is at least as material, if not more so.

* * *

The DOJ and DEA's conclusion that the Company violated the CSA was newly discovered, non-cumulative, material evidence that supported relief under Rule 60(b)(2).

[90] DAB 49.

CONCLUSION

The Opinion should be reversed and remanded.

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CERTIFICATE OF SERVICE

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