

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
PATRICK MORRISEY, Attorney General,

Plaintiff,

v.

CIVIL ACTION NO. _____
JUDGE: _____

WALMART, INC. f/k/a WAL-MART
STORES, INC., a Delaware corporation,

Defendant.

COMPLAINT

Plaintiff, the State of West Virginia, by its Attorney General, Patrick Morrisey, sues Defendant, Walmart, Inc. f/k/a Wal-Mart Stores, Inc. (“Walmart” or “Defendant”) and alleges as follows:

I. Introduction

1. The State of West Virginia is suffering from a devastating opioid crisis created in part by the Defendant. Opioids may kill as many as 500,000 people in the United States over the next ten years.

2. Opioids are powerful narcotic painkillers that include non-synthetic, partially synthetic, and fully-synthetic derivatives of the opium poppy. Use of prescription opioids can cause addiction, overdose, and deaths.

3. Opioid addiction has destroyed the lives of tens of thousands of West Virginians and caused immense pain and suffering for families throughout West Virginia.

4. The long-term use of opioids is particularly dangerous because patients develop tolerance to the drugs over time, requiring higher doses to achieve any effect. Patients also quickly become dependent on opioids and will experience often-severe withdrawal symptoms if they stop using the drugs. That makes it very hard for patients to discontinue using opioids after even relatively short periods. The risks of addiction and overdose increase with dose and duration of use. At high doses, opioids depress the respiratory system, eventually causing the user to stop breathing, which can make opioids fatal. It is the interaction of tolerance, dependence, and addiction that makes the use of opioids for chronic pain so lethal.

5. Opioid related deaths may be underreported by as much as 20%, the opioid epidemic is deadlier than the AIDS epidemic at its peak, and West Virginia suffered from the highest opioid mortality rate in the country in 2016.¹

6. In 2017, over 1,000 West Virginia citizens died as the result of a drug overdose. Eighty-six percent (86%) of these overdose deaths involved an opioid. This is threefold higher than the national rate of 14.6 deaths per 100,000 people.²

7. In 2017, West Virginia providers wrote 81.3 opioid prescriptions for every 100 people compared to the national average U.S. rate of 58.76 prescriptions.³

8. As millions became addicted to opioids, "pill mills," often styled as "pain clinics," sprouted nationwide and rogue prescribers stepped in to supply prescriptions for non-medical use. These pill mills, typically under the auspices of licensed medical professionals, issue high volumes

¹ Christopher Ingraham, CDC Releases Grim New Opioid Overdose Figures: "We're Talking About More Than an Exponential Increase." Washington Post, Dec. 12, 2017, <https://wapo.st/2POdL3m>.

² See Caity Coyne, Number of Fatal Drug Overdoses in 2017 Surpasses 1,000 Mark in West Virginia, Charleston Gazette-Mail, Aug. 30, 2018, <https://bit.ly/2yLcxim>; see also, Christopher Ingram, Drugs are Killing so Many People in West Virginia that the State Can't Keep Up With the Funerals, The Washington Post, Mar. 7, 2017, <https://wapo.st/2G19rk2>; Christopher Ingram, Fentanyl Use Drive Drug Overdose Deaths to a Record High in 2017, CDC Estimates, The Washington Post, Aug. 15, 2018, <https://wapo.st/2Ozn8b7>; see also West Virginia Opioid Summary, National Institute on Drug Abuse, March 2019. <https://bit.ly/2MzDsGn>.

³ See West Virginia Opioid Summary, National Institute on Drug Abuse, March 2019. <https://bit.ly/2MzDsGn>.

of opioid prescriptions under the guise of medical treatment. Prescription opioid pill mills and rogue prescribers cannot channel opioids for illicit use without at least the tacit support and willful blindness of the Defendant, if not its knowing support.

9. As reported in a special issue of the West Virginia Medical Journal, West Virginia has the third highest non-heroin opioid pain reliever (“OPR”) treatment rate in the United States.⁴

10. In addition to the number of deaths caused by OPRs such as oxycodone and hydromorphone, there has been an increase in overdose deaths caused by heroin, which dealers cut with fentanyl, an opioid 100 times stronger than morphine.⁵

11. Studies show a direct correlation between OPRs and heroin addiction with 4 out of 5 heroin users reporting their opioid use began with OPRs.⁶

12. Children are especially vulnerable to the opioid epidemic. West Virginia’s rate of Neonatal Abstinence Syndrome (“NAS”) is five times the national average and results in thousands of children being placed in foster care.⁷ In 2017, the overall incidence rate of NAS was 50.6 cases per 1,000 live births for West Virginia residents. The highest incidence rate of NAS was 106.6 cases per 1,000 live births (10.66%) in Lincoln County.

13. In 2007, the cost for treating a NAS baby was approximately \$36,000; cost for a healthy baby was approximately \$3,600.⁸

14. Between 2006 and 2016, children entering the West Virginia foster care system due to parental addiction rose 124%. About 70% of referrals to Child Protective Services in 2017 had

⁴ Khalid M. Hasan, MD. & Omar K. Hasan, MD, Opiate Addiction and Prescription Drug Abuse: A Pragmatic Approach, West Virginia Medical Journal, Special Ed., Vol. 106, No. 4, p. 84.

⁵ Dennis Thompson, Drug OD Deaths Nearly Tripled Since 1999, CDC Says, Feb. 24, 2017, CBS News, <https://cbsn.ws/2J4n90u>.

⁶ Andrew Kolodny, et al., The Prescription Opioid and Heroin Crisis: A Public Health Approach to an Epidemic of Addiction, Annu. Rev. Public Health 2015, p. 560 (Jan. 12, 2015), <https://bit.ly/2J5A9Tp>.

⁷ Proposed Opioid Response Plan for the State of West Virginia, Jan. 10, 2018, p. 20, <https://bit.ly/2Oyu48a>.

⁸ Michael L. Stitely, MD, et al., Prevalence of Drug Use in Pregnant West Virginia Patients, West Virginia Medical Journal, Special Ed., Vol. 106, No. 4, p. 48.

a substance abuse component according to the statistics from the Centralized Intake Unit of the West Virginia Bureau for Children and Families. The state court Child Abuse and Neglect (CAN) database indicates that about 80% of referrals from family court and circuit court judges have a substance abuse factor.

15. The State of West Virginia has sustained and continues to suffer massive losses as a result of this opioid epidemic through loss of lives, babies born addicted to opioids, adults unable to work, treatment costs, emergency personnel costs, law enforcement expenses, naloxone costs, medical examiner expenses, foster care expenses, self-funded state insurance costs, and lost tax revenues, among many other costs.

16. The State of West Virginia brings this civil action to hold Walmart accountable for unconscionably helping to create the State of West Virginia's opioid public health and financial crisis. Walmart reaped billions of dollars in revenues while causing immense harm to the State of West Virginia and its citizens, and now it should pay for its role in the crisis and act to remediate the problem.

II. Parties

A. Plaintiff

17. The Plaintiff, the State of West Virginia ex rel. Patrick Morrissey, Attorney General, is charged with enforcing the West Virginia Consumer Credit and Protection Act, W. Va. Code §§ 46A-1-101, *et seq.* ("WVCCPA"). Pursuant to W. Va. Code § 46A-7-108, the Attorney General is authorized to bring a civil action for violations of the WVCCPA and for other appropriate relief. The Attorney General has all common law powers except restricted by statute. Syl. pt. 3, *State ex rel. Discover Financial Services, Inc., et al. v. Nibert*, 744 S.E.2d 625, 231 W. Va. 227 (2013).

B. Defendant

18. Walmart Inc., formerly known as Wal-Mart Stores, Inc., is a Delaware corporation registered with the West Virginia Secretary of State to business in West Virginia. Its principal place of business is located in Bentonville, Arkansas. Walmart, through its various DEA registered subsidiaries and affiliated entities, conducts business as a licensed wholesale distributor under named business entities including Wal-Mart Pharmacy Warehouse #28 located in Crawfordsville, Indiana, Wal-Mart Pharmacy Warehouse #45, located in Rogers, Arkansas, Walmart Pharmacy Warehouse #46, located in Williamsport, Maryland. Between at least 2006 and 2014, Walmart distributed prescription opioids to its retail pharmacies located in West Virginia. At all relevant times, this Defendant operated as a licensed wholesale distributor in the State of West Virginia.

III. State Court Jurisdiction

19. The causes of action asserted and the remedies sought in this Complaint are based exclusively on West Virginia statutory or common law.

20. In this Complaint, the State references federal statutes, regulations, or actions, but does so only to establish Walmart's knowledge or to explain how Walmart's conduct has not been approved by federal regulatory agencies.

21. The mere reference to federal activities in the State's causes of action is not enough to confer federal jurisdiction. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 813 (1986).

22. The federal Controlled Substances Act ("CSA") does not create a private right of action, *Welch v. Atmore Community Hospital*, 704 Fed. Appx. 813, 817 (11th Cir. 2017), and it does not confer federal question subject matter jurisdiction by the mere regulation of a class of drugs. *Allen v. Endo Pharmaceuticals, Inc.*, 2018 WL 7352753 at *3 (M.D. Ga. 2018).

23. Removal to federal court is not warranted for causes of action sounding in state law concerning drug distribution activities where the claims do not necessarily raise or actually dispute a substantial federal issue that is capable of being resolved in federal court without disrupting the federal-state balance. *Gunn v. Minton*, 568 U.S. 251, 258 (2013). See also, e.g., *Mobile County Bd. of Health v. Richard Sackler*, 1:19-01007-KD-B, 2020 WL 223618 (S.D. Al. 2020) (remanded); *New Mexico ex rel. Balderas v. Purdue Pharma, L.P.*, 323 F. Supp. 3d 1242 (D. Nm. 2018) (remanded); *Delaware ex rel. Denn v. Purdue Pharma, L.P.*, 1:18-383-RGA, 2018 WL 192363 (D. Del. 2018) (remanded); *West Virginia ex rel. Morrissey v. McKesson Corp.*, No. 16-1773, 2017 WL 357307 (S.D. W. Va. 2017) (remanded).

24. This Complaint does not confer diversity jurisdiction upon federal courts pursuant to 28 U.S.C. § 1332, as the State is not a citizen of any state and this action is not subject to the jurisdictional provisions of the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d). Federal question subject matter jurisdiction under 28 U.S.C. § 1331 is not invoked by this Complaint. Nowhere does the State plead, expressly or implicitly, any cause of action or request any remedy that arises under federal law. The issues presented in the allegations of this Complaint do not implicate any substantial federal issues and do not turn on the necessary interpretation of federal law. There is no federal issue important to the federal system, as a whole as set forth in *Gunn v. Minton*, 568 U.S. 251, 258 (2013).

IV. Jurisdiction

25. As a court of general jurisdiction, the circuit court is authorized to hear this matter, based on the WVCCPA and nuisance claims, the amount at issue, and the relief sought pursuant to W. Va. Code § 56-3-33.

V. Venue

26. Venue is proper in Putnam County pursuant to W. Va. Code § 46A-7-114.

VI. Factual Allegations

27. Walmart played a dual role in fostering the opioid epidemic as both a pharmacy dispensing opioids to the public and as a wholesale distributor taking orders from and shipping orders to its own pharmacies, ignoring its crucial role in guarding against diversion. Acting as a distributor, Walmart filled suspicious orders of prescription opioids of unusual size, orders deviating substantially from a normal pattern and orders of unusual frequency from its own pharmacies. Walmart shipped and distributed these drugs in West Virginia and failed to report or stop shipment of suspicious orders. Moreover, Walmart, upon information and belief, failed to report or act to stop diversion that was evident to it and supplied far more opioids to its pharmacies than could have served a legitimate market for these drugs.

28. This Complaint does not assert claims related to Walmart's role in dispensing opioids; however, the dispensing and claims data from its retail pharmacies was readily available to Walmart, as a distributor, to detect suspicious orders and prevent diversion of opioids. Upon information and belief, it failed to use this unique knowledge.

29. Walmart was among the top ten (10) distributors of opioids in West Virginia.⁹

30. Between 2006 and 2014, Walmart distributed opioids equivalent to 838,831,245 milligrams of morphine ("MME") to its retail pharmacies in West Virginia, or, stated another way, the equivalent of 55,922,083 10 mg. oxycodone pills.¹⁰ These numbers are staggering considering

⁹ DEA ARCOS data 2006-2014.

¹⁰ Morphine milligram equivalence or MME is the standard value given to an opioid based on its potency in comparison to morphine. For example, a 10 mg. oxycodone tablet is the equivalent of 15 mg. of morphine.

that Walmart only distributed opioids to itself. Walmart also ordered even more opioids from third party distributors.

31. Walmart knew that the number of opioid prescriptions filled by its retail pharmacies was unreasonable and indicative of diversion.

32. Although Walmart was among the top ten distributors to West Virginia, its “self-distribution” was not enough to fulfill the opioid demand at its retail pharmacies.

33. Walmart knew exactly how many opioids it was distributing to its West Virginia retail pharmacies and how many opioids each of those pharmacies were ordering from other distributors.

34. The information available to Walmart through its distribution centers and retail stores put Walmart on notice that it was exceeding legitimate market demand. Rather than report suspicious orders and stop the diversion, Walmart continued to sell, ship and profit from these highly dangerous drugs.

A. Walmart Was Required To Monitor For And Report Suspicious Orders, And Not To Ship Those Orders Unless Due Diligence Disproves The Suspicions.

35. Walmart was required by law to monitor, report and refuse to ship suspicious orders of controlled substances, unless and until due diligence dispelled the suspicion.

36. Walmart was required by law to prevent oversupply and diversion into the illicit drug market. Distributors of controlled substances possess specialized and sophisticated knowledge, skills, information, and understanding of both the market for scheduled prescription narcotics and of the risks and dangers of the diversion of prescription narcotics when the distribution chain is not properly controlled.

37. Walmart was registered as a wholesale distributor with the West Virginia Board of Pharmacy from at least 2003 through 2018.

38. The West Virginia Uniform Controlled Substances Act (WVCSA) requires that distributors' operations be consistent with the public interest and also requires registrants to have established and maintained effective controls against diversion of controlled substances into other than legitimate medical, scientific, or industrial channels. W. Va. Code § 60A-3-303(a).

39. The requirements under WVCSA independently parallel and incorporate the requirements of the federal Controlled Substances Act (CSA). *See* W. Va. C.S.R. 15-2-3. Walmart was required to “maint[ain] . . . effective controls against diversion” and to “design and operate a system to disclose . . . suspicious orders of controlled substances.” 21 U.S.C § 823(a)-(b); 21 C.F.R. § 1301.74; W. Va. Code § 60A-3-303(a)(1); W. Va. C.S.R. § 15-2-5.3. This includes the requirements to monitor, detect, report, investigate and refuse to fill suspicious orders. *See* 21 U.S.C. § 823; 21 C.F.R. § 1301.74; W. Va. C.S.R. § 15-2-5.3.

40. Distributors are not entitled to be passive observers, but rather “shall inform the Field Division Office of the Administration in his area of suspicious orders *when discovered* by the registrant.” 21 C.F.R. § 1301.74(b) (emphasis added). Suspicious orders include orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency. *Id.* Other red flags may include, for example, “[o]rdering the same controlled substance from multiple distributors.”

41. Distributors are required to know their customer and the communities they serve. Walmart was in a unique position to comply with this requirement as it, essentially, distributed narcotics to itself.

42. The DEA previously testified that:

- a. DEA registrants are required to block all suspicious orders of prescription opioids.¹¹

¹¹ Prevosnick Dep. Vol. II, 770:6 to &&1:20, April 18, 2019 (DEA 30(b)(6) designee).

- b. Shipping a suspicious order is a per se violation of federal law.¹²
- c. If a wholesale distributor blocks a suspicious order, they should terminate all future sales to that same customer until they can rule out that diversion is occurring.¹³
- d. After the fact reporting of suspicious orders has never been in compliance with federal law.¹⁴

43. To comply with the law, companies that distribute opioids must know their customers and the communities they serve. Each distributor must “perform due diligence on its customers” on an “ongoing [basis] throughout the course of distributor’s relations with its customer.” *Masters Pharms., Inc.*, 80 Fed. Reg. 55,418, 55,477 (DEA Sept. 15, 2015), *petition for review denied*, 861 F.3d 206 (D.C. Cir. 2017). The distributor cannot ignore information that raises serious doubt as to the legality of a potential or existing customer’s business practices. *Southwood Pharms., Inc.*, 72 Fed. Reg. 36,487, 36,498 (DEA July 3, 2007).

44. Due diligence efforts must be thorough: “the investigation must dispel all red flags indicative that a customer is engaged in diversion to render the order non-suspicious and exempt it from the requirement that the distributor ‘inform’ the [DEA] about the order. Put another way, if, even after investigating the order, there is any remaining basis to suspect that a customer is engaged in diversion, the order must be deemed suspicious and the Agency must be informed.”¹⁵ Indeed, the DEA may revoke a distributor’s certificate of registration as a vendor of controlled substances if the distributor identifies orders as suspicious and then ships them “without performing adequate due diligence.”¹⁶

¹² *Id.* at 632:7 to 633:2.

¹³ *Id.* at 628:24 to 629:15.

¹⁴ *Id.* at 673:7 to 674:13, 679:20 to 680.8.

¹⁵ *Masters Pharmaceuticals, Inc.*, Decision and Order, 80 Fed. Reg. 55418-01 at *55477 (DEA Sept. 15, 2015).

¹⁶ *Masters Pharmaceuticals*, 861 F.3d at 212. The *Decision and Order* was a final order entered by the DEA revoking Masters Pharmaceutical’s certificate of registration, without which Masters Pharmaceutical could not sell controlled substances. In *Masters Pharmaceutical*, the D.C. Circuit Court of Appeals denied a petition for review, leaving intact the DEA’s analysis and conclusion in the *Decision and Order*.

45. In sum, Walmart had several requirements with respect to preventing diversion. Walmart was required to set up a system designed to detect and reject suspicious orders. Walmart was required to recognize red flags signaling illegal conduct and to use the information available to it to identify, report, and not fill suspicious orders. This included reviewing its own data, relying on its observations of its own pharmacies, and following up on reports or concerns of potential diversion.

46. The law requires that all suspicious conduct must be reported to appropriate enforcement authorities. It also prohibits the fulfillment or shipment of any suspicious order unless the distributor has conducted an adequate investigation and determined that the order is not likely to be diverted into illegal channels.¹⁷ Reasonably prudent distributors would not fail to meet these requirements, and Walmart's failure to exercise appropriate controls foreseeably harms the public health and welfare.

47. Each failure by Walmart to abide by requirements of laws or rules enacted to protect the consuming public or to promote a public interest constitutes an unfair or deceptive act or practice and violates the WVCCPA, W. Va. Code § 46A-6-104, *see also Final Order, State of West Virginia, ex rel. Darrell V. McGraw, Jr., Attorney General vs. David McCuskey et al.*, Kanawha County Circuit Court, Civil Action No. 01-C-3041, Mar. 13, 2003. *See also Pabon v. Recko*, 122 F. Supp.2d 311, 314 (D. Conn 2000); *Lemelledo v. Beneficial Management Corp. of America*, 674 A.2d 582 (N.J. Super. Ct., App. Div. 1996); *Winston Realty Co., Inc. v. G.H.G., Inc.*, 331 S.E.2d 677 (N.C. 1985).

¹⁷ *See Southwood Pharm., Inc.*, 72 Fed. Reg. 36,487, 36,501 (Drug Enf't Admin. July 3, 2007) (applying federal requirements no less stringent than those of Ohio); *Masters Pharmaceutical, Inc. v. Drug Enforcement Administration*, 861 F.3d 206 (D.C. Cir. 2017) (same).

B. Walmart Knew Its Obligations To Prevent Diversion And To Report And Take Steps To Halt Suspicious Orders From Their Retail Stores.

48. Walmart, in its capacity as a wholesale drug distributor and as a mass merchant with pharmacies, has been active in various trade organizations for decades. The National Association of Chain Drug Stores (“NACDS”) is one such organization. Walmart, among other distributors, served on its board. The Healthcare Distribution Management Association (“HDMA”) now known as Healthcare Distribution Alliance (“HDA”), is a national trade association representing distributors that have partnered with NACDS.

49. In 2007 and 2008, the HDA began developing “industry compliance guidelines” (“ICG”) that aimed to outline certain best practices for the distributors. As part of its development of the ICG, the HDA met with the DEA on at least three occasions.¹⁸ The HDA also sought extensive input from its membership. The HDA released the ICG in 2008 and emphasized that distributors were “[a]t the center of a sophisticated supply chain” and “uniquely situated to perform due diligence in order to help support the security of the controlled substances they deliver to their customers.”¹⁹

50. Walmart received repeated and detailed guidelines from the DEA concerning, for example, its obligations to know its customers and the communities it serves. Through presentations at industry conferences and on its website, the DEA provided detailed guidance to distributors on what to look for in assessing their customers’ trustworthiness. As part of its development of the ICG, the HDA met with the DEA on at least three occasions.²⁰

51. The guidelines, input, and communications from the DEA put Walmart on notice of its requirements and obligations.

¹⁸ HDA_MDL_00213212.

¹⁹ HDA_MDL_000213058.

²⁰ HDA_MDL_00213212.

52. The DEA published “Suggested Questions a Distributor Should Ask Prior to Shipping Controlled Substances,”²¹ which suggests that distributors examine, among other things, the ratio of controlled vs. non-controlled orders placed by the pharmacy; the methods of payment accepted; whether, why, and to what extent the pharmacy also orders from other distributors; and the ratio of controlled substances the distributor will be shipping relative to other suppliers.

53. The DEA has repeatedly informed distributors and dispensers, including Walmart, about their legal obligations, including obligations that were so obvious that they required no clarification. For example, it is not an effective control against diversion to identify a suspicious order, ship it, and wait weeks to report it to law enforcement, potentially allowing those pills to be diverted and abused in the meantime.

54. The requirement to report suspicious orders at the time—not after the fact—has always been clear. As early as 1984, correspondence between the National Wholesale Druggists’ Association (“NWDA”), now the HDA, and the DEA illustrates that the DEA provided clear guidance well before the opioid crisis was unleashed. For example, in one letter to the NWDA, DEA Section Chief Thomas Gitchel emphasized that “the submission of a monthly printout of after-the-fact sales will not relieve a registrant from the responsibility of reporting excessive or suspicious orders,” noting “**DEA has interpreted ‘orders’ to mean prior to shipment.**” Consistent with that understanding, the NWDA’s 1984 Guidelines repeated the same directive.²²

²¹ U.S. Dept. of Justice DEA, Diversion Control Division website, Pharmaceutical Industry Conference (Oct 14 & 15, 2009), *Suggested Questions a Distributor should ask prior to shipping controlled substances*, Drug Enforcement Administration available at https://www.dea/diversion.usdoj.gov/mtgs/pharm_industry/14th_pharm/levinl_ques.pdf; Richard Widup, Jr., Kathleen H. Dooley, Esq., *Pharmaceutical Production Diversion: Beyond the PDMA*, Purdue Pharma and McGuireWoods LLC, available at https://www.mcguirewoods.com/news-resources/publications/lifesciences/product_diversion_beyond_pdma.pdf.

²² CAH_MDL2804_01465723.

55. In addition, the DEA, for example, in April 1987, sponsored a three-day “Controlled Substances Manufacturers and Wholesalers Seminar” that was attended by “over fifty security and regulatory compliance professionals representing forty-three major pharmaceutical manufacturers and wholesalers.”²³ According to the executive summary of the event, Ronald Buzzeo held a session on “excessive order monitoring programs,” wherein he explained:

[A]ny system must be capable of both detecting individual orders which are suspicious, or orders which become suspicious over time due to frequency, quantity, or pattern. The NWDA system, for example, provides an excellent lookback, or trend system, but the ability to identify one time suspicious orders should not be overlooked as an element of the program.” Another area at issue was whether DEA would take action against a registrant which reported an order and then shipped it. DEA pointed out that the company is still responsible under their registrations for acting in the public interest. Reporting the order does not in any way relieve the firm from the responsibility for the shipment.²⁴

56. The DEA also repeatedly reminded distributors, including Walmart, of their obligations to report and decline to fill suspicious orders. Responding to the proliferation of pharmacies operating on the internet that arranged illicit sales of enormous volumes of opioids to drug dealers and customers, the DEA began a major push to remind distributors of their obligations to prevent these kinds of abuses and educate them on how to meet these obligations. Since 2007, the DEA has hosted at least five conferences that provided registrants with updated information about diversion trends and regulatory changes. The DEA has also briefed wholesalers regarding legal, regulatory, and due diligence responsibilities since 2006. During these briefings, the DEA pointed out the red flags wholesale distributors should look for to identify potential diversion.

57. The DEA also advised in a September 27, 2006 letter to every commercial entity registered to distribute controlled substances that they are “one of the key components of the

²³ US-DEA-00025657.

²⁴ US-DEA-00025659.

distribution chain. If the closed system is to function properly. . . distributors must be vigilant in deciding whether a prospective customer can be trusted to deliver controlled substances only for lawful purposes. This responsibility is critical, as. . . the illegal distribution of controlled substances has a substantial and detrimental effect on the health and general welfare of the American people.” The DEA’s September 27, 2006 letter also expressly reminded registrants that, in addition to reporting suspicious orders, they have a “statutory responsibility to exercise due diligence to avoid filling suspicious orders that might be diverted into other than legitimate medical, scientific, and industrial channels.” The same letter reminds distributors of the importance of their obligation to “be vigilant in deciding whether a prospective customer can be trusted to deliver controlled substances only for lawful purposes,” and warns that “even just one distributor that uses its DEA registration to facilitate diversion can cause enormous harm.”

58. The DEA sent another letter to distributors alike on December 27, 2007, reminding them that, as registered distributors of controlled substances, they share, and must each abide by, statutory and regulatory duties to “maintain effective controls against diversion” and “design and operate a system to disclose to the registrant suspicious orders of controlled substances.” The DEA’s December 27, 2007 letter reiterated the obligation to detect, report, and not fill suspicious orders and provided detailed guidance on what constitutes a suspicious order and how to report (e.g., by specifically identifying an order as suspicious, not merely transmitting data to the DEA). Finally, the letter references the Revocation of Registration issued in *Southwood Pharmaceuticals, Inc.*, 72 Fed. Reg. 36,487-01 (July 3, 2007), which discusses the obligation to report suspicious orders and “some criteria to use when determining whether an order is suspicious.”

59. In September 2007, the NACDS, among others, attended a DEA conference at which the DEA reminded registrants that not only were they required to report suspicious orders, but also to halt shipments of suspicious orders.²⁵

60. The DEA's regulatory actions against the three largest wholesale distributors further underscore the fact that distributors, such as Walmart were well aware of the legal requirements. There is a long history of enforcement actions against registrants for their compliance failures. For example, in 2007, the DEA issued an Order to Show Cause and Immediate Suspension Order against three of Cardinal Health's distribution centers and on December 23, 2016, Cardinal Health agreed to pay the United States \$44 million to resolve allegations that it violated the CSA. Similarly, on May 2, 2008, McKesson entered into an Administrative Memorandum of Agreement ("AMA") with the DEA related to its failures in maintaining an adequate compliance program. Most recently, in January 2017, McKesson entered into an Administrative Memorandum Agreement ("AMA") with the DEA wherein it agreed to pay a \$150 million civil penalty for, *inter alia*, failure to identify and report suspicious orders at several of its facilities.

61. During a 30(b)(6) deposition, the DEA's Unit Chief of Liaison was asked whether the DEA made it "clear to industry that the failure to prevent diversion was a threat to public safety and the public interest." In response, he testified:

Yes, I think it's established in 823 [the Controlled Substances Act] where it's part of our -- part of the registrant that is applying to be a registrant understands that they have to maintain effective controls . . . they also know that these drugs themselves are scheduled controlled substances for a particular reason, because they're addictive, psychologically and physically they're addictive, so they know that these drugs have these properties within themselves. **So they would understand that these drugs are categorized or**

²⁵ CAH_MDL_PRIORPROD_DEA07_00877084; CAH_MDL_PRIORPROD_DEA07_01185382.

scheduled in that manner because they have the potential to hurt.

62. Upon information and belief, Walmart failed to adhere to the guidance documents, communications, and other statements issued by the DEA that would have ensured compliance with the law.

63. Violations of statutes enacted to protect the consuming public or to promote a public interest are unfair or deceptive acts or practices. *See Final Order, State of West Virginia, ex rel. Darrell V. McGraw, Jr., Attorney General vs. David McCuskey et al.*, Kanawha County Circuit Court, Civil Action No. 01-C-3041, Mar. 13, 2003. *See also Pabon v. Recko*, 122 F. Supp.2d 311, 314 (D. Conn 2000); *Lemelledo v. Beneficial Management Corp. of America*, 674 A.2d 582 (N.J. Super. Ct., App. Div. 1996); *Winston Realty Co., Inc. v. G.H.G., Inc.*, 331 S.E.2d 677 (N.C. 1985).

64. Walmart's failure to abide by laws enacted to protect the consuming public or to promote a public interest constitutes an unfair or deceptive act or practice and violates the WVCCPA, W. Va. Code § 46A-6-104.

C. Walmart was Uniquely Positioned to Prevent Diversion.

65. As vertically-integrated pharmacies and distributors, Walmart had access to additional information that would allow them to identify and prevent diversion, unlike third-party wholesale distributors. Walmart possessed such detailed and valuable information regarding their retail stores' orders, prescriptions, prescribers, and customers that companies known as "data vendors" were willing to pay for it.

66. At the pharmacy level, Walmart had information on customers with insurance coverage making cash payments. It could also identify customers filling prescriptions at multiple

pharmacy branches or from different doctors, or patterns of unusual or suspicious prescribing from a particular medical provider.

67. Further, a customer's order data and the data of other similar customers provide detailed insight into the volume, frequency, dose, and type of controlled and non-controlled substances a pharmacy typically orders. This includes non-controlled substances and Schedule IV controlled substances (such as benzodiazepines), which are not reported to the DEA, but whose use with opioids can be a red flag of diversion. As with the other wholesalers, these data points gives Walmart insight into prescribing and dispensing conduct that enabled it to play a valuable role in preventing diversion and fulfilling its obligations to guard against diversion.

68. Walmart had complete access to all prescription opioid dispensing data related to its pharmacies in West Virginia, complete access to information revealing the doctors who prescribed the opioids dispensed in their pharmacies in and around the state, and complete access to information revealing the customers who filled or sought to fill prescriptions for opioids in its pharmacies in and around the state. It likewise had complete access to information revealing the opioid prescriptions dispensed by their pharmacies in and around the state. Further, Walmart had complete access to information revealing the geographic location of out-of-state doctors whose prescriptions for opioids were being filled by their pharmacies in and around the State and complete access to information revealing the size, frequency, dose, and combinations of prescriptions written by specific doctors and filled by its pharmacies in and around the state.

D. Walmart Failed to Maintain Effective Controls Against Diversion and Contributed to the Oversupply of Opioids into West Virginia.

69. Walmart is the largest private employer in the United States. It employs more than 1.5 million people. However, for years, Walmart chose not to assign a single employee to design

or operate a system to detect suspicious orders of controlled substances. Walmart chose to do nothing and waited until 2014 to begin to take any meaningful action as required by law.

70. According to data from the ARCOS database, between 2006 and 2014, Walmart distributed the equivalent of over 55 million 10mg Oxycodone pills to their retail pharmacy locations in West Virginia, a state with a population of less than 2 million people. This volume of opioids should have raised a red flag with Walmart that not all of the prescriptions being ordered could be for legitimate medical uses, and, as such, that many of the opioids Walmart distributed to their retail stores were being diverted.

71. For years, per capita opioid prescriptions in West Virginia far exceeded the national average and increased in ways that should have alerted Walmart to potential diversion. Indeed, as a vertically-integrated national retail pharmacy chain, Walmart had the ability to detect diversion in ways third-party wholesale distributors could not by examining the dispensing data from its own retail pharmacy locations.

72. Given the volume and pattern of opioids it distributed in West Virginia, and its knowledge of the opioid orders its retail pharmacies placed with other distributors, Walmart knew, or should have known that opioids were being oversupplied into the state and should have detected, reported, and rejected suspicious orders. Upon information and belief, it did not.

73. Despite Walmart's compliance obligations and requirements, Walmart shipped far more opioids into West Virginia than could have been expected to serve legitimate uses. Upon information and belief, Walmart ignored red flags of diversion, failed to investigate its customers, failed to detect suspicious orders, and chose not to report or reject suspicious orders in violation of statutory requirements enacted to protect the public.

74. Violations of statutes enacted to protect the consuming public or to promote a public interest are unfair or deceptive acts or practices. *See Final Order, State of West Virginia, ex rel. Darrell V. McGraw, Jr., Attorney General vs. David McCuskey et al.*, Kanawha County Circuit Court, Civil Action No. 01-C-3041, Mar. 13, 2003. *See also Pabon v. Recko*, 122 F. Supp.2d 311, 314 (D. Conn 2000); *Lemelledo v. Beneficial Management Corp. of America*, 674 A.2d 582 (N.J. Super. Ct., App. Div. 1996); *Winston Realty Co., Inc. v. G.H.G., Inc.*, 331 S.E.2d 677 (N.C. 1985).

75. Walmart's failure to abide by laws enacted to protect the consuming public or to promote a public interest constitutes an unfair or deceptive act or practice and violates the WVCCPA, W. Va. Code § 46A-6-104.

76. Walmart significantly contributed to the oversupply of opioids into the State in violation of West Virginia law and shares in the responsibility for the current epidemic of opioid addiction and death.

1. Walmart Lacked a Suspicious Order Monitoring System.

77. Walmart "self-distributed" opioids to its retail stores. Specifically, Walmart operated licensed distribution centers to supply its own pharmacies with controlled substances from the early 2000s until 2018 when it ceased self-distributing controlled substances.

78. Prior to 2011, Walmart had not designed any formal system to identify suspicious orders of controlled substances and, therefore, utterly failed to meet its statutory obligations.

79. Walmart has claimed that its hourly employees and associates – who were also responsible for filling orders at Walmart Distribution Centers – monitored the orders they were filling for unusual size, pattern, and frequency. This involved review of approximately 40,000 line

items of controlled substances per day.²⁶ Walmart has also claimed that these hourly associates were instructed to alert a supervisor if an order appeared unusual based on their experience and memory.

80. Upon information and belief, Walmart can produce no written evidence of any such instructions to Walmart associates, no evidence of any training that would be required to implement such a procedure, or anyone actually being alerted about an unusual order or performing any follow up inquiry.

81. Walmart failed to provide any guidance to the associates as to what constitutes a “suspicious” order. Instead, Walmart emphasized its associates’ subjective judgment based on their “knowledge and experience” as distribution center employees.²⁷ There is no evidence that any Walmart employee ever flagged an order as suspicious prior to 2011.

82. Walmart purportedly implemented a “monitoring program” that would identify suspicious orders of controlled substances in 2011. This system purportedly was in place until 2015.

83. Walmart’s “monitoring program” was insufficient to identify suspicious orders of controlled substances. The program flagged only very large orders of controlled substances. Specifically, it flagged weekly orders for controlled substances of 50 bottles (5000 dosage units) or more and orders or more than 20 bottles (2000 dosage units) that were 30% higher than a rolling four-week average for that item. Orders under 2000 units per week were never flagged, meaning that a pharmacy could order 8000 units per month without ever being flagged. Moreover, that

²⁶ WMT_MDL_000006511; *see also* Sullins Dep. at 56:6-57:5, Jan. 1, 2019 Abernathy Dep. at 25:1-4, July 23, 2019 (“[T]he ladies who were physically printing those forms, they looked at those orders. . .”).

²⁷ *See, e.g.*, Hilland Dep. at 52:2-13, 170:17-171:6.

meant that even if an order was more than 30% greater than the four-week average, it could not draw an alert unless it was also more than 20 bottles.

84. Under this system, an alert did not mean Walmart would report the order and halt it pending necessary due diligence. To the contrary, upon information and belief, Walmart *never* reported an order flagged by its monitoring program to the DEA as suspicious. In addition, rather than halting the order, Walmart simply cut the order to the amount of the 50 bottles threshold and shipped it. Walmart never reported cut orders to the DEA. Although information regarding flagged orders was available and sent daily to Walmart's headquarters in Arkansas (the "Home Office"), no one from the Home Office ever reviewed or took *any action* regarding flagged orders.

85. This practice continued until mid-2012, when Walmart implemented "hard limits" on opioid orders. Under this approach, weekly orders of Oxycodone 30mg ("Oxy 30") were automatically reduced to 20 bottles. Still, Walmart failed to report the orders to the DEA.

86. During this time period, Walmart also monitored weekly orders of other controlled substances in quantities of more than 20 bottles. Specifically, an "Over 20 Report" was provided to the Home Office in the morning and if nothing was done by mid-afternoon, the orders were filled and shipped. Upon information and belief, there is no evidence of any order in fact being reviewed or held pursuant to this practice.

87. Further, cutting the order did not mean that the Walmart pharmacy would not receive the full supply. Walmart pharmacies also purchased opioids from third party distributors. Pharmacies could place another order with these outside vendors to make up the difference, or in some cases, have orders fulfilled by both Walmart and a third party distributor at the same time. Thus, even though Walmart had the ability to monitor such orders, it chose not to, which allowed its pharmacies to surpass its already high thresholds by simply ordering drugs from a third party.

88. Walmart knew that its monitoring program was insufficient to fulfill its obligations to prevent diversion. For example, in 2013, Walmart acknowledged in an internal presentation that it had not yet designed a compliant system for suspicious order identification, monitoring, and reporting.²⁸ It also stated that it was “TBD” when Walmart could develop such a system. In June 2014, Walmart again acknowledged that it lacked a compliant monitoring program.²⁹ Moreover, Walmart acknowledged in 2014 that it had “no process in place” to comply with government regulations and that this created the “severe” risk of “financial or reputational impact to the company.”³⁰

89. It was not until late 2014 that Walmart’s written policies and procedures required a suspicious order to be held until it was verified as appropriate.

2. Walmart’s “Enhanced” Monitoring Program Fails to Remedy Deficiencies in its Monitoring Program

90. In 2015, Walmart enhanced its suspicious order monitoring policy by implementing store-specific thresholds. Upon information and belief, it based these thresholds on the standard deviation of a specific pharmacy’s order history for each controlled substance. The thresholds also included minimum amounts, below which no orders were flagged under any circumstance, regardless of pattern or frequency. Yet, Walmart’s corporate designee, testifying on its behalf in the MDL, conceded that thresholds were set for business purposes, not for the purpose of “maint[aining] of effective controls against diversion . . . into other than legitimate . . . channels . . .” 21 U.S.C.A. § 823(a)(1), (b)(1). Further, for almost all Walmart pharmacies, this minimum was set at 2,000 dosage units per week (or 8,000 dosage units per month). Accordingly, even when Walmart implemented a store specific policy that took into consideration a pharmacy’s order

²⁸ WMT_MDL_000052997.

²⁹ WMT_MDL_000048100; WMT_MDL_000048101.

³⁰ WMT_MDL_000048101.

history, the program was still woefully deficient because it did not account for changes in ordering patterns. A pharmacy could, for example, go from ordering 10 dosage units of Oxycodone 10 mg per month to 7,999 per month without any order being flagged or reviewed.

91. With respect to Walmart's suspicious order monitoring system for its wholesale distribution, the MDL Court has denied a motion for summary judgment contesting the evidence regarding the inadequacy of Walmart's suspicious order monitoring efforts in that litigation. *See* Opinion and Order Denying Walmart's Motion for Summary Judgment, MDL No. 2804, Doc. 3102 (N.D. Ohio Jan. 27, 2020). In doing so, it "noted[d] the record evidence suggests obvious deficiencies that a layperson could plainly recognize." *Id.* at 4 n. 12.

3. Walmart Failed to Monitor for, Report, and Halt Suspicious Orders in West Virginia.

92. Walmart failed to: (a) control the supply chain; (b) prevent diversion; (c) report suspicious orders; and (d) halt shipments of opioids in quantities it knew or should have known could not be justified and signaled potential diversion.

93. The volume of opioids Walmart shipped into West Virginia and dispensed from its retail pharmacies was so high that it should have recognized that not all of the opioid prescriptions distributed to its retail pharmacies were for a legitimate purpose.

94. Yet, according to information from the DEA, Walmart failed to report a single suspicious order in West Virginia between 2007 and 2014 – the period in which the DEA provided data.

95. Walmart funneled far more opioids into West Virginia than could have been expected to serve legitimate medical use and ignored other red flags of suspicious orders. This information, along with the information known only to distributors such as Walmart (especially with its pharmacy dispensing data), would have alerted Walmart to potential diversion of opioids.

96. Walmart, therefore, was aware of the suspicious orders that flowed from its distribution facilities. Walmart refused to identify, investigate, and report suspicious orders despite its actual knowledge of drug diversion. Rather, Walmart failed to report suspicious orders, prevent diversion, or otherwise control the supply of opioids flowing into West Virginia.

97. Upon information and belief, Walmart failed to analyze: (a) the number of opioid prescriptions filled by its pharmacies relative to the population of the pharmacy's community; (b) the increase in opioid sale relative to past years; and (c) the number of opioid prescriptions filled relative to other drugs.

E. Walmart's Conduct Has Injured the State of West Virginia and Its Citizens.

98. Between 1999 and 2014, sales of opioids nearly quadrupled, according to the CDC. Nearly 259 million opioid prescriptions were written in the United States in 2012 alone. This equates to more than one opioid prescription for every American adult. Many tens of thousands of West Virginians are currently addicted to opioids.

99. Deaths from opioid overdoses do not fully capture the breadth of the harm suffered by West Virginia citizens. Opioid use results in thousands of hospitalizations and emergency room visits as well. The State of West Virginia often bears the cost of treatment.

100. The opioid crisis also has impacted some of West Virginia's most vulnerable demographics, such as the elderly. The AARP reports that elderly Americans have faced a 500% increase in hospitalization rates related to opioids over the last twenty years. In 2015, "physicians prescribed opioid painkillers to almost one-third of all Medicare patients, or nearly 12 million people. In the same year, 2.7 million Americans over age 50 took painkillers in amounts—or for

reasons—beyond what their physicians prescribed.” Hospitalization rates due to opioid abuse has quintupled for those 65 and older in the past two decades.³¹

101. Walmart’s actions alleged in this Complaint have caused numerous societal injuries to the State of West Virginia. Walmart’s conduct has contributed to deaths, drug addiction, personal injuries, child neglect, children placed in foster care, babies born addicted to opioids, criminal behavior, poverty, property damage, unemployment, and lost productivity, among others. The State of West Virginia is expending its resources to address these and other social problems resulting from the opioid crisis and will continue to expend resources addressing these problems.

102. Walmart’s actions alleged in this Complaint have caused numerous economic injuries to the State of West Virginia. Walmart’s conduct has caused economic losses for medical treatment, rehabilitation costs, hospital stays, emergency room visits, emergency personnel costs, law enforcement costs, substance abuse prevention costs, costs for displaced children, naloxone costs, medical examiner expenses, self-funded state insurance costs, and lost tax revenues, among others.

COUNT I
Violation of the West Virginia Consumer Credit and Protection Act

103. Plaintiff State of West Virginia adopts, realleges, and incorporates by reference paragraphs 1 through 102 of this Complaint as if fully set forth herein.

104. Walmart distributed opioid products to the State of West Virginia and its governmental entities, businesses, and consumers within West Virginia.

105. Walmart’s distribution of opioid products in the State of West Virginia involves trade or commerce within the meaning of the WVCCPA.

³¹ See <https://www.aarp.org/health/drugs-supplements/info-2017/opioid-drug-addiction-pain-pills.html>.

106. Walmart's actions, as detailed above, constitute unfair or deceptive acts or practices that are prohibited by the WVCCPA.

107. Violations of statutes enacted to protect the consuming public or to promote a public interest are unfair or deceptive acts or practices. *See Final Order, State of West Virginia, ex rel. Darrell V. McGraw, Jr., Attorney General vs. David McCuskey et al.*, Kanawha County Circuit Court, Civil Action No. 01-C-3041, Mar. 13, 2003. *See also Pabon v. Recko*, 122 F. Supp.2d 311, 314 (D. Conn 2000); *Lemelledo v. Beneficial Management Corp. of America*, 674 A.2d 582 (N.J. Super. Ct., App. Div. 1996); *Winston Realty Co., Inc. v. G.H.G., Inc.*, 331 S.E.2d 677 (N.C. 1985).

108. Each occurrence of a failure to abide by laws and rules enacted to protect the consuming public or to promote a public interest constitutes an unfair or deceptive act or practice in violation of the WVCCPA, W. Va. Code § 46A-6-104.

109. Walmart's unfair, deceptive, and unconscionable acts or practices, or the effects thereof, will continue and are likely to recur unless permanently restrained and enjoined.

110. Consequently, the State of West Virginia seeks all available relief under the WVCCPA, including but not limited to disgorgement, restitution, civil penalties, equitable relief, injunctive relief, and attorneys' fees and costs.

111. As part of its WVCCPA action, the State expressly does not raise claims nor seek any damages attributable to the Medicaid or Medicare programs or any other federal programs. Additionally, as part of its WVCCPA action, the State expressly does not raise claims or seek any damages for the State's workers' compensation program, nor does it raise claims or seek damages on behalf of any state agencies.

COUNT II
Common Law Public Nuisance

112. Plaintiff State of West Virginia adopts, realleges, and incorporates by reference paragraphs 1 through 102 of this Complaint as if fully set forth herein.

113. Through the actions described above, Walmart has contributed to and/or assisted in creating and maintaining a condition that has interfered with the operation of the commercial market, interfered with public health, and endangered the lives and health of West Virginia residents.

114. While Walmart's degree of care is not relevant in a common law nuisance suit brought by the sovereign State, it behaved negligently, recklessly, or intentionally as set forth above.

115. Through the actions described above, Walmart contributed to and/or assisted in creating and maintaining a condition that causes enormous public harm, endangers the life or health of West Virginia residents, and unreasonably interferes with or obstructs rights common to the public.

116. Walmart expanded the market for prescription opioids by failing to implement effective controls and procedures to guard against diversion, including but not limited to failing to report their knowledge of suspicious orders to relevant authorities and shipping orders it knew were suspicious.

117. Opioid use, abuse, addiction, and overdose deaths increased dramatically in West Virginia as a result of Walmart's conduct. The greater demand for emergency services, law enforcement, addiction treatment, and other social services places an unreasonable burden on governmental resources.

118. Walmart's actions described above were a substantial factor in opioids becoming widely available, used, and abused.

119. Walmart's actions, significantly contributed to the widespread use of opioids and to the enormous public health hazards of opioid overuse, abuse, addiction, and death that now exists. Walmart's actions have and will continue to injure and harm the citizens and the State of West Virginia for many years to come.

120. While tort-based standards are not applicable to a public nuisance suit brought by the State, the public nuisance and associated financial and economic losses were foreseeable to Walmart, which knew or should have known that its unfair and deceptive business practices as described herein were creating a public nuisance.

121. While tort-based standards are not applicable to a public nuisance suit brought by the State, a reasonable person in Walmart's position would foresee the widespread problems of opioid addiction and abuse that resulted from the drastic oversupply of opioids in this state.

122. Walmart was on notice and aware of the broader use of opioids were causing the kinds of harm described in this Complaint.

123. The health and safety of West Virginia residents, including those who use, have used, or will use opioids, as well as those affected by users of opioids, is a matter of great public interest and of legitimate concern to the State. West Virginians have a right to be free from conduct that endangers their health and safety and that interferes with the commercial marketplace. Walmart's conduct interfered in the enjoyment of these public rights.

124. As part of its nuisance action, the State expressly does not raise any claim nor seek any damages attributable to the Medicaid or Medicare programs or any other federal programs. Additionally, as part of its nuisance action, the State expressly does not raise claims or seek any

damages for the State's workers' compensation program, nor does it raise claims or seek damages on behalf of any state agencies.

Prayer for Relief

WHEREFORE, Plaintiff State of West Virginia prays for the following relief:

- a. Judgment against the Defendant in favor of the State;
- b. Temporary relief, a preliminary injunction and permanent injunction ordering the Defendant to comply with W. Va. Code § 46A-6-104 and to cease the unlawful conduct;
- c. Equitable relief, including, but not limited to, restitution and disgorgement;
- d. Civil penalties of up to \$5,000.00 for each repeated and willful violation of W. Va. Code § 46A-6-104, pursuant to W. Va. Code § 46A-7-111(2);
- e. Pre- and post-judgment interest;
- f. Costs and reasonable attorneys' fees; and,
- g. Such other relief, fees and costs as shall be available under the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-101, *et seq.*;
- h. An order abating the public nuisance and ordering any injunctive relief that the Court finds appropriate under law; and
- i. An order awarding such other and further relief as the Court deems appropriate.

STATE OF WEST VIRGINIA ex rel.
PATRICK MORRISEY,
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