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Case No. 2018-0488-

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ST. PAUL ELECTRICAL CONSTRUCTION PENSION PLAN, ST. PAUL ELECTRICAL CONSTRUCTION WORKERS SUPPLEMENTAL PENSION PLAN (2014 RESTATEMENT), AND RETIREMENT MEDICAL FUNDING PLAN FOR THE ST. PAUL ELECTRICAL WORKERS, Plaintiffs, v. AMERISOURCEBERGEN CORPORATION, Defendant.	C.A. No. _____

VERIFIED COMPLAINT PURSUANT TO 8 *DEL. C.* § 220 TO COMPEL INSPECTION OF BOOKS AND RECORDS

Plaintiffs St. Paul Electrical Construction Pension Plan ("Construction Pension Plan"), St. Paul Electrical Construction Workers Supplemental Pension Plan (2014 Restatement) ("Supplemental Pension Plan"), and Retirement Medical Funding Plan for the St. Paul Electrical Workers ("Retirement Medical Plan," and collectively with Construction Pension Plan and Supplemental Pension Plan, "Plaintiffs"), as and for their Complaint, herein allege, upon knowledge as to themselves and their own actions, and upon information and belief as to all other matters, as follows:

NATURE OF THE ACTION

1. In this action, Plaintiffs seek to enforce their right to inspect certain corporate books and records of defendant AmerisourceBergen Corporation ("Amerisource" or the "Company"), a Delaware corporation, pursuant to 8 *Del. C.* § 220 ("Section 220"). Plaintiffs seek to inspect these documents to investigate mismanagement and possible breaches of fiduciary duty by the directors and officers of the Company and its subsidiaries, and to investigate the independence and disinterest of the board of directors of Amerisource (the "Board") and the directors and managers of the Company's subsidiaries to determine whether pre-suit demand is necessary or would be excused prior to commencing derivative litigation.

2. As explained in Plaintiffs' Section 220 demand—which is attached as Exhibit 1 hereto (the "Demand") and fully incorporated by reference herein—there is a more than a credible basis to infer that senior officers and directors of Amerisource, and senior officers, directors and/or managers of Amerisource's subsidiaries, engaged in possible mismanagement or wrongdoing, and/or that they breached their fiduciary duties by permitting misconduct to persist or by failing to ensure proper oversight and enact adequate internal controls.

3. Indeed, as discussed further herein, there is a credible basis to believe that directors and senior officers at Amerisource and its subsidiaries knew (or, at a

minimum, should have known) of mismanagement and unlawful business practices at Medical Initiatives, Inc. ("MII"), an Amerisource subsidiary. For example, ***Amerisource's Chairman, Steven H. Collis ("Collis"), served as President of MII and CEO of Amerisource for years while the criminal activity occurred***.

4. As this Court has held, "Delaware does not charter lawbreakers. Delaware law allows corporations to pursue diverse means to make a profit, subject to a critical statutory floor, which is the requirement that Delaware corporations only pursue 'lawful business' by 'lawful acts.'"

5. Amerisource has refused Plaintiffs' Demand. Accordingly, Plaintiffs are commencing this proceeding to enforce Plaintiffs' Section 220 rights. Plaintiffs request that the Section 220 Demand be deemed proper and enforceable and that Amerisource be directed to produce immediately copies of all books and records sought by Plaintiffs in the Section 220 Demand.

PARTIES

6. Plaintiffs own shares of Amerisource and have owned Amerisource shares continuously since December 2009.

7. Defendant Amerisource is a Delaware corporation, with its principal offices located in Chesterbrook, Pennsylvania. Amerisource's shares trade on the New York Stock Exchange under ticker symbol "ABC." The Company's disclosures describe Amerisource as "one of the largest global pharmaceutical

sourcing and distribution services companies . . . ." Amerisource has a market capitalization of approximately $20 billion. Amerisource reported net income of $364 million in 2017. Amerisource also reported incurring litigation settlements and accruals of $914.4 million for 2017.

FACTUAL BACKGROUND

8. Plaintiffs have a reasonable basis to believe that directors and senior officers of Amerisource, and directors, senior officers, or managers of its subsidiaries, may have breached their fiduciary duties by condoning or failing to remedy misconduct in violation of criminal and civil laws and regulatory requirements. The misconduct alleged in the Demand pertains to the below-described scheme of skimming oncology drugs, repacking them, and mislabeling them, thereby violating federal law and risking the health and safety of cancer patients:

Amerisource's Subsidiaries Are Pharmaceutical Distributors

9. As discussed in the Demand, Amerisource's wholly owned subsidiary, AmerisourceBergen Specialty Group ("ABSG"), controls a series of subsidiaries involved in the distribution of pharmaceuticals, including oncology medications and other specialty drugs. ABSG operates an unincorporated subsidiary, Oncology Supply Company ("OSC"), which focuses on the distribution of drugs used in oncology care. OSC, in turn, maintained a wholly owned

subsidiary, MII, with which it partnered in the distribution of pharmaceuticals. Until MII shuttered its doors in 2014, it ran its operations out of a physical facility in Alabama.

10. Collis served as the President of MII every year from 1999-2017, with the potential exception of 2010. Collis also served from September 2007 to September 2009 as the Executive Vice President and President of ABSG. He has served as President and CEO of Amerisource since July 2011 and as the Chairman of its Board since March 2016.

The Pharmaceutical Distribution Field Is Carefully Regulated

11. As discussed in the Demand, the development, manufacture, and distribution of drugs in the United States is carefully regulated by the Food and Drug Administration ("FDA"). Through the Food, Drug, and Cosmetic Act ("FDCA") and other federal laws, Congress authorized the FDA to establish strict standards for the creation and dissemination of pharmaceuticals. One of the mechanisms by which the FDA protects the health and safety of consumers is by precisely regulating the labeling and packaging of drugs. FDA regulations require, among other things, that drug labels are not false or misleading in any way and that they contain accurate statements as to the quantity of drugs. The FDA also prohibits the distribution of adulterated substances, which includes any drugs that have been packaged under unsanitary conditions. To ensure compliance, the

FDCA makes it a federal criminal offense to violate these regulations with respect to drugs distributed in interstate commerce.

Amerisource Shields Its Subsidiary From Regulatory Scrutiny

12. As discussed in the Demand, Amerisource—the second largest drug wholesale company in the United States—was fully aware of the federal regulatory scheme governing the development and distribution of drugs. One of the FDA regulations of which Amerisource was aware requires that entities and facilities involved in the repackaging of pharmaceuticals register with the FDA.[1] Despite this knowledge, ASBG intentionally failed to register MII or its Alabama facility with the FDA. They did so specifically to avoid regulatory oversight of MII's operations.[2]

Amerisource's Subsidiaries Develop And Pursue A Profit-Making Scheme By Skimming Portions Of Oncology Drug Dosages

13. As discussed in the Demand, ASBG's desire to avoid regulatory scrutiny is understandable since it has been revealed that MII existed to operate an unlawful and dangerous scheme of skimming oncology drugs, repacking them, and mislabeling them. According to a criminal information filed by the Department of Justice and the U.S. Attorney's Office in Brooklyn, OSC and MII worked together

[1] 21 U.S.C. § 360.

from 2001-2014 to carry out ASBG's scheme. OSC would take orders from healthcare providers for certain oncology drugs. Instead of simply providing those oncology drugs in their original packaging—glass vials labeled according to federal law—OSC took orders from healthcare providers for pre-filled syringes ("PFS"). OSC then obtained vials of the oncology drugs from FDA-approved manufacturers and transmitted those vials to MII at its Alabama facility.

14. Drug vials, including oncology vials, typically contain 10% more of the drug than is required for the dosage. This "overfill" is essential for—among other things—accounting for human error in withdrawing the drug with a syringe and permitting the medical provider to avoid dangerous air bubbles. MII, though, had a business model centered on eliminating this safety cushion to pad its own pockets. It did so by removing the oncology drugs from the properly labeled and packaged vials in which they were distributed by the manufacturers, and instead filling plastic syringes with the medication. MII's technicians purposefully did not draw the "overfill" into the syringe; instead, they left it to begin to fill the next syringe. In this way, MII used the skimmed excess from the vials to produce more PFS than the vials would otherwise support. MII's technicians did so to maximize Amerisource's profits. Once filled, the PFS were sent by OSC to health care

[2] Criminal Information, *United States of America v. AmerisourceBergen Specialty Group*, Cr. No. 17-507 (E.D.N.Y. Sept. 27, 2017), attached here to as Exhibit D to Exhibit 1 (Demand).

providers. Over the thirteen years OSC and MII operated this scheme, they distributed millions of PFS across the country. Through the PFS scheme, MII—shielded by ABSG from regulatory scrutiny—violated federal drug labeling laws for more than a decade.

The Pre-Filled Syringe Scheme Risks The Health of Cancer Patients

15. As set forth in the Demand, the FDA carefully regulates the development, manufacture, and distribution of drugs for the obvious reason that the improper handling of medications can have grave consequences for patients. This is particularly true for oncology patients, who often have suppressed immune systems.

16. Amerisource and its subsidiaries disregarded these imperatives in the pursuit of profit. Their PFS scheme endangered oncology patients in a number of ways. First, MII opened previously sterile vials and exposed them to contamination by filling its syringes. Second, MII failed to provide a clean lab in which to conduct this repacking. Non-sterile items were present in the cleanroom, including iPods, street clothes, open bandaids, chewing gum, skin lotion, and non-sterile mops.

17. Third, MII failed to conduct adequate testing. Despite distributing over 9 million vials over 13 years, MII only subjected PFS to outside testing on three occasions. When the results returned positive for bacteria, MII did not

conduct any follow up tests or make any reports. No wonder, then, that on visual inspection, more than thirty thousand vials over a six-year period were found to have contaminating particulate—what MII technicians referred to as "floaters." The PFSs with floaters were then filtered with cheese cloth but not discarded; instead, they were distributed to healthcare providers. In addition, for most of the existence of the program, there was no environmental testing of the hoods, the technicians' hands, or the air in the cleanroom. When MII did test the lab itself, it found bacteria on the hoods and on technicians' gloved hands—yet, it never attempted to determine the source of the contamination or conduct immediate follow-up testing after remediation. It also never recalled its syringes, notified the FDA, or notified healthcare providers.

18. Fourth, MII provided bonuses for the amount of "overfill" that its technicians could capture and the number of PFSs that its technicians could fill, but MII never offered incentives tied to quality or safety measures. This system provided perverse incentives for technicians to take whatever steps necessary to fill as many syringes as possible, regardless of the health or safety consequences.

19. Fifth, MII often mislabeled syringes by indicating the name of a patient on more syringes (and therefore dosages) than the patient was prescribed, or labeling in the name of healthcare staff workers.

20. Sixth, MII sent the oncology drugs to providers in plastic syringes subject to cracking, and transported them in conditions that subjected them to light and varying temperatures, risking the drugs' degradation, and risking leaks that would affect the dosage amount.

The Unlawful Scheme Leads To A Guilty Plea, A Regulatory Settlement, And Nearly A Billion Dollars Of Harm

21. Since at least 2012, the Board has been aware of an investigation by federal authorities regarding its PFS program. From 2012 through 2017, Amerisource produced documents and witnesses in response to subpoenas from the U.S. Attorney's Office for the Eastern District of New York.

22. This investigation—and the evidence the government obtained from it—led to a charging Information filed on September 27, 2017. As the Information details, MII's PFS Program business model "remained consistent during the entire time of its operation, between 2001 and January 2014. ***It was known to and approved at the highest levels of ABSG and ABC.***"[3] (Emphasis added.)

23. On September 27, 2017—the same day the charging Information was filed—ABSG pleaded guilty to a violation of the FDCA.[4] As part of the plea

[3] Exhibit D to Exhibit 1 (Demand).

[4] Plea Agreement, *United States of America v. AmerisourceBergen Specialty Group*, Cr. No. 17-507 (E.D.N.Y. Sept. 27, 2017), attached here to as Exhibit C to Exhibit 1.

agreement, ABSG agreed to waive an indictment and plead guilty to the Information.[5]

24. As part of the plea agreement, ABSG admitted that it introduced misbranded drugs into interstate commerce in violation of federal law.

25. At the sentencing hearing, ABSG's counsel acknowledged that the federal government—after its years' long investigation—had charged that "ABSG and . . . even the parent corporation were aware of the misconduct of its subsidiary and supported it." In addition, the criminal fine imposed on ABSG by the DOJ reflected this determination, factoring in the recognition that in "Individual Within High-Level Personnel Participated In, Condoned, or Was Willfully Ignorant of the Offense."

26. Tellingly, it was Amerisource's Board that authorized and directed ABSG to plead guilty.

27. During at least some of the relevant period, moreover, and as noted above, at least one individual has been at the helm of MII, ABSG, and later, Amerisource. Mr. Collis served as MII's President during at least some of the relevant period, while at the same time serving as the Executive Vice President and President of ABSG. Then, in July 2011, he became the President and CEO of

[5] *See* Exhibit C to Exhibit 1 at 1 (reciting that ABSG "will waive indictment and plead guilty to Count One of an Information to be filed in this district . . .").

Amerisource, and was elected to Chair its Board in March 2016. As President of MII and Executive Vice President and President of ABSG, Collis would have been aware of the PFS scheme (which, after all, was MII's business model); and as Chairman, President, and CEO of Amerisource, he would have had an obligation to report to the Board the systemic violations of federal law occurring at MII.

28. As discussed in the Demand, Amerisource has suffered, and may continue to suffer, as the result of this long-lasting, illegal scheme. As a result of its criminal guilty plea, ABSG paid $260 million to the DOJ. That payment consisted of a $208 million criminal fine, and a criminal money forfeiture of $52 million. ABSG was also required to maintain a compliance and ethics program that would be designed to "increase accountability of individuals and corporate board members."

29. Just two months later, on November 22, 2017, ABSG agreed to pay $625 million to settle the government's False Claims Act ("FCA") charges concerning OSC and MII, resulting from an investigation about which the Board had been aware since at least 2012. The $625 million fine exceeded by $50 million what ABSG had set aside for the settlement of the FCA matter.

30. In total, Amerisource has already paid $885 million for operating its unlawful PFS scheme. The Company—which operates other subsidiaries in the pharmaceutical market—has also suffered untold reputational harm.

31. As discussed in the Demand, this conduct provides, at a minimum, a credible basis to infer mismanagement and breaches of fiduciary duty.

A. PLAINTIFFS' JUNE 25, 2018 DEMAND

32. On June 25, 2018, Plaintiffs' counsel delivered to Amerisource's registered agent in Delaware the narrowly tailored Section 220 Demand attached hereto as Exhibit 1 and fully incorporated by reference herein. In summary, the Demand seeks the inspection of Amerisource's books and records relating to the PFS scheme described herein, including the books and records pertaining to Amerisource's subsidiaries. The Demand was accompanied by an affidavit and documents evidencing Plaintiffs' beneficial ownership of Amerisource stock and a Power of Attorney signed under oath as authorized by Plaintiffs, appointing Grant & Eisenhofer P.A. as Plaintiffs' agent and attorney-in-fact to act on Plaintiffs' behalf to make the Demand pursuant to Section 220. A copy of the affidavit of service of the Demand is attached as Exhibit 2 hereto.

33. In the Demand, Plaintiffs requested that the Company produce or allow the inspection of the following documents:

a) Board and Committee Materials[6]; Policies and Procedures[7]; Meeting Preparation Materials,[8] and Director/Officer Communications[9] concerning:

[6] "Board and Committee Materials," was defined in the Demand to mean: (i) All minutes (including all draft minutes and agendas and exhibits to such minutes and agendas), notices, board books, reports, and presentations (whether presented in hard-copy or other format) that were provided or shown at, or in preparation for,

i. Any of the matters discussed in the grounds supporting the Demand set forth in the Demand;

ii. The compliance of Oncology Supply Company ("OSC") and/or Medical Initiatives Inc. ("MII") with any regulations or laws relating to the labeling, re-packaging, or distribution of pharmaceuticals;

iii. Any business plans, strategies, projections, budgets, compensation or incentive plans relating to MII or the Pre-Filled Syringe ("PFS") program;

iv. Any audits or compliance reports relating to MII or PFS;

v. Document or information requests, interview requests, subpoenas, or regulatory reports issued by any regulatory

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any meeting of (a) the Board; (b) any committees of the Board; (c) the Board of Managers of AmerisourceBergen Specialty Group ("ABSG"); (d) any committees of the Board of Managers of ABSG; and (e) any board or committees of directors or managers of MII ("Medical Initiatives Inc.") or Oncology Supply Company ("OSC"); and (ii) all documents reviewed, considered, or produced by (a) the Board of the Company; (b) the Board of Managers of ABSG; or (c) any board or committee of managers or directors of MII or OSC. Such documents to include but not be limited to summaries, presentations, notes, memoranda, meeting packages, transcripts, exhibits, and resolutions.

[7] "Policies and Procedures," was defined in the Demand to mean any policies, procedures, guidelines or mandates of Amerisource, ABSG, OSC, or MII in effect at any point from January 1, 2001, through the present.

[8] "Meeting Preparation Materials," was defined in the Demand to mean memoranda, outlines, scripts, notes, and talking points prepared for or used at a meeting of (i) the Amerisource Board; (ii) the ABSG Board of Managers; or (iii) any board or committee of directors or managers of MII or OSC.

[9] "Director/Officer Communications," was defined in the Demand to mean any communications from or to (a) officers of the Company; (b) directors of the Company; (c) members of the Board of Managers of ABSG; (d) officers of ABSG; (e) officers of OSC; and (f) officers of MII.

agencies, and any response thereto, relating to MII, PFS, or allegations concerning mislabeling of drugs; and

vi. Any investigation, regulatory proceeding, or litigation by any U.S. or Mexican federal, state or local governmental or regulatory body, or any civil investigation, proceeding or litigation, relating to any of the matters discussed in the grounds supporting the Demand.

b) Reports to or from Steven H. Collis regarding the matters described herein, whether in his capacity as a director or as an officer of Amerisource, ABSG, MII, or OSC.

c) Documents memorializing or used in the nomination process for directors of the Amerisource Board or members of the ABSG Board of Managers.

d) Without regard to time period, documents (including disclosure questionnaire files and director search- or nomination-process documents) that provide information concerning personal, familial, financial, or business relationships (a) between or among: (i) members of the Amerisource Board; (ii) members of the ABSG Board of Managers; (iii) directors or members of any governing board of MII or OSC; or (iv) senior officers of Amerisource, ABSG, MII, or OSC; as well as (b) between, on the one hand, any of the individuals listed in clause (a), and on the other, the following entities: Amerisource, ABSG, MII, or OSC.

e) Documents sufficient to identify the members of the Board of Managers of ABSG from 2001 to 2015.

f) Documents sufficient to identify the person or persons described in the ABSG's plea agreement[10] as the "Individual Within High-Level Personnel [who] Participated In, Condoned, or Was Willfully Ignorant of the Offense."

g) Documents sufficient to identify any directors or senior officers or managers of Amerisource, ABSG, OSC, and MII from 2001-2015.

h) All versions of any operating agreement in existence for ABSG from 2001 to the date of production.

[10] Exhibit C to Exhibit 1 at 4.

i) Documents sufficient to reflect the organizational structures of Amerisource, ABSG, OSC, and MII.

j) All communications between the Company and any federal, state, or local government or agency pertaining to Request 1(f).

k) Complete versions of each document, report, e-mail, memorandum, or other communication referenced in the grounds supporting this demand set forth below.

l) All documents produced in response to any books-and-records demand served on the Company by any other stockholder pursuant to 8 *Del. C.* § 220 relating to the grounds set forth below supporting this demand.

34. The Demand enumerated the following legitimate and proper purposes for the inspection of the books and records:

a) [to investigate] whether and to what extent directors and/or officers of Amerisource, ABSG, OSC, or MII engaged in mismanagement or wrongdoing in connection with the matters addressed herein;

b) [to investigate] whether and to what extent directors and/or officers of Amerisource, ABSG, OSC, or MII engaged in breaches of fiduciary duty in connection with the matters addressed herein, including, without limitation, by permitting the misconduct to continue or by failing to ensure proper oversight and enact adequate internal controls; [and]

c) [to investigate] the independence and disinterest of the Board, and to determine whether a presuit demand is necessary or would be excused prior to commencing any derivative (including any double derivative) action on behalf of the Company, ABSG, OSC or MII.

35. These purposes are reasonably related to Plaintiffs' interest as stockholders of the Company.

36. The books and records sought are narrowly tailored to serve Plaintiffs' purposes in sending the Demand.

B. AMERISOURCE REFUSES PLAINTIFFS' DEMAND

37. On June 29, 2018—four business days after Plaintiffs' Demand was delivered to Amerisource—Plaintiffs received Amerisource's reply to the Demand. A copy of Amerisource's reply is attached as Exhibit 3 hereto. In its reply, Amerisource flatly refused Plaintiffs' Demand, asserting that the Demand lacked a proper purpose and scope.

38. Amerisource's reply constitutes a refusal of Plaintiffs' Demand on proper purpose and scope grounds.

39. Accordingly, in light of Amerisource's refusal, Plaintiffs are commencing this litigation for the prompt enforcement of Plaintiffs' Section 220 rights.

C. PLAINTIFFS' DEMAND SETS FORTH PROPER PURPOSES FOR THE REQUESTED INSPECTION

40. The matters described in the Demand provide a credible basis from which possible mismanagement and breaches of fiduciary duty at Amerisource can be inferred.

41. Investigations of possible mismanagement and potential breaches of fiduciary duties, of possible *Caremark* violations and related wrongdoing, and of the independence and disinterest of Amerisource's board of directors, are entirely proper purposes for Section 220 demands, and this Court encourages the use of such demands by concerned stockholders.

42. Plaintiffs' purposes for seeking books and records of Amerisource are proper, and the Court should find that Plaintiffs are entitled to inspect the books and records set forth in the Demand.

D. THE DOCUMENTS SOUGHT BY THE DEMAND ARE ESSENTIAL TO THE ACCOMPLISHMENT OF PLAINTIFFS' PROPER PURPOSES

43. Each of the requests set forth in Plaintiffs' Demand is tailored to an investigation of the books and records of Amerisource for Plaintiffs' stated purposes.

44. Amerisource has failed to fulfill its obligation to permit Plaintiffs to inspect the books and records identified in the Demand. As a result, Plaintiffs now apply to this Court for an Order compelling Amerisource's compliance with the Demand.

E. THE DEMAND SATISFIES THE FORM AND MANNER REQUIREMENTS OF SECTION 220

45. On June 25, 2018, Plaintiffs served a copy of the Demand on Amerisource through its registered agent.[11]

46. The Demand included a notarized affidavit stating that Plaintiffs are beneficial owners of Amerisource stock and attaching documentary evidence of such beneficial ownership, with a statement that such documentary evidence are true and correct copies thereof, and a notarized power of attorney authorizing

[11] Exhibit 1.

Plaintiffs' counsel to act in Plaintiffs' stead "in all matters regarding the examination of books and records of AMERISOURCEBERGEN CORPORATION."

47. Plaintiffs have satisfied the form and manner requirements of Section 220.

COUNT I
(Demand for Inspection Pursuant to 8 *Del. C.* § 220)

48. Plaintiffs repeat and re-allege all of the preceding allegations as if fully set forth herein.

49. On June 25, 2018, Plaintiffs served a written demand upon Amerisource for the inspection of the books and records set forth in the Demand.

50. Plaintiffs have fully complied with all requirements under Section 220 of the Delaware General Corporation Law respecting the form and manner of making a demand for inspection of the books and records set forth in the Demand.

51. Plaintiffs' demand for inspection is made for proper purposes. The documents identified in the Demand are essential to those proper purposes.

52. The Company has failed to permit the inspection sought by Plaintiffs in the Demand.

53. Amerisource's reply to the Demand constitutes a refusal of the Demand on proper purpose and scope grounds.

54. By reason of the foregoing and pursuant to 8 *Del. C.* § 220, Plaintiffs are entitled to an Order permitting Plaintiffs to inspect and make copies of the books and records set forth in the Demand.

55. Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs pray for the following relief:

A. An Order requiring Amerisource to permit the inspection and copying of each and every book and record requested by Plaintiffs' Demand immediately;

B. An Order directing Amerisource to pay reasonable attorneys' fees and expenses in connection with Plaintiffs' Demand and any related litigation; and

C. Such other relief as this Court deems just and appropriate.

DATED: July 3, 2018

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