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IN IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

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

Plaintiff,

v.

CIVIL ACTION NO. CC-40-2020-C-132
Hon. Phillip Stowers

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

Defendant.

FIRST AMENDED 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 of opioid prescriptions under the guise of medical treatment. Prescription opioid pill mills and

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[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/2GI9rk2; 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.

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 a substance abuse component according to the statistics from the Centralized Intake Unit of the

[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.

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 Morrisey, 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 2018, 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.

19. At all relevant times, along with retail stores and other business units, Walmart Inc. operated numerous licensed pharmacies with controlled substance permits located in Walmart retail stores in West Virginia. At all relevant times, Walmart Inc.'s licensed pharmacies dispensed prescription opioids in West Virginia.

III. State Court Jurisdiction

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

21. 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.

22. 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).

23. 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).

24. 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. Morrisey v. McKesson Corp.*, No. 16-1773, 2017 WL 357307 (S.D. W. Va. 2017) (remanded).

25. 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

26. 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

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

VI. Factual Allegations

28. 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.

29. 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.

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

[9] DEA ARCOS data 2006-2014.

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

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

33. 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.

34. 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.

35. 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, dispense, 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.

36. 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.

37. Walmart was required by law to prevent oversupply and diversion into the illicit drug market. Distributors of controlled substances possess specialized and sophisticated

[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.

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.

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

39. 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).

40. 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.

41. 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."

42. 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.

43. The DEA previously testified that:

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

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]

44. 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).

45. 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,

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

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]

46. 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.

47. 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.

48. The law also requires Walmart to maintain effective controls and procedures to prevent diversion of controlled substances at its retail pharmacies.

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[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*.

[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).

49. The WVCSA requires that pharmacies be registered to dispense any controlled substances. *See* W. Va. Code § 60A-3-303(c); W. Va. Code § 60A-3-302(a); W. Va. C.S.R. 15-2-4.1.1.

50. Walmart's pharmacies were registered to dispense prescription opioids with the West Virginia Board of Pharmacy from at least 2003 through 2018.

51. The requirements under the WVCSA incorporate the requirements of the CSA. *See* W.Va. C.S.R. 15-2-3.

52. Under the CSA, "[t]he responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription." 21 C.F.R. 1306.04(a). The DEA has recognized that "as dispensers of controlled substances, pharmacists and pharmacy employees are often the last line of defense in preventing diversion."[18]

53. The CSA requires pharmacy registrants to "provide effective controls and procedures to guard against theft and diversion of controlled substances." 21 C.F.R. § 1301.71(a). All dispensers are required to check that prescriptions of controlled substances are issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. *See* 21 C.F.R. § 1306.04(a). The DEA construes these regulations to include the duty not to fill prescriptions until "red flags" indicative of illegitimacy and diversion have been resolved, such as pattern prescriptions like the same types of drugs in the same quantities from the same prescriber. *See*, *e.g.*, *Medic-Aid Pharmacy*, 55 FR 30,043, 30,044, 1990 WL 328750 (DEA July 24, 1990) ("[A] pharmacist is obligated to refuse to fill a prescription if he knows or has reason to know that the prescription was not written for a legitimate medical purpose."); *Holiday*

[18] 2012 Dear Registrant letter to pharmacy registrants, http://ppsconline.com/articles/2012/FL_PDAC.pdf

CVS, L.L.C., d/b/a CVS/Pharmacy Nos. 219 and 5195; Decision and Order, 77 FR 62316-01 (Oct. 12, 2012) (noting that certain red flags, such as "the red flags presented by the circumstances of patients travelling from Kentucky or Tennessee to South Florida to obtain prescriptions, including for a schedule II narcotic, which by definition has the highest potential for abuse of any drug that may be prescribed lawfully, see 21 U.S.C. 812(b)(2), and then travelling to Respondents to fill them, are so obvious that only those who are deliberately ignorant would fill these prescriptions").

54. 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).

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

55. 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.

56. In 2006, the NACDS issued a "Model Compliance Manual" intended to "assist

NACDS members" in developing their own compliance programs.[19] The Model Compliance Manual notes that a retail pharmacy may:

> "[G]enerate and review reports for its own purposes" and refers to the assessment tools identified by CMS in its Prescription Drug Benefit Manual chapter on fraud, waste and abuse, including:
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> - Drug Utilization Reports, which identify the number of prescriptions filled for a particular customer and, in particular, numbers for suspect classes of drugs such as narcotics to identify possible therapeutic abuse or illegal activity by a customer. A customer with an abnormal number of prescriptions or prescription patterns for certain drugs should be identified in reports, and the customer and his or her prescribing providers can be contacted and explanations for use can be received.
>
> - Prescribing Patterns by Physician Reports, which identify the number of prescriptions written by a particular provider and focus on a class or particular type of drug such as narcotics. These reports can be generated to identify possible prescriber or other fraud.
>
> - Geographic Zip Reports, which identify possible "doctor shopping" schemes or "script mills" by comparing the geographic location (zip code) of the patient to the location of the provider who wrote the prescription and should include the location of the dispensing pharmacy.

57. 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.[20] 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."[21]

58. Walmart received repeated and detailed guidelines from the DEA concerning, for example, its obligations to know its customers and the communities it serves. Through

[19] CAH_MDL2804_00842870.
[20] HDA_MDL_00213212.
[21] HDA_MDL_000213058.

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. [22]

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

60. The DEA published "Suggested Questions a Distributor Should Ask Prior to Shipping Controlled Substances,"[23] 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.

61. 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.

62. 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,

[22] HDA_MDL_00213212.

[23] 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.deadiversion.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.

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.[24]

63. 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."[25] 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.[26]

64. 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

[24] CAH_MDL2804_01465723.
[25] US-DEA-00025657.
[26] US-DEA-00025659.

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.

65. 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 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."

66. 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."

67. 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.[27]

68. 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.

69. 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 .

[27] CAH_MDL_PRIORPROD_DEA07_00877084; CAH_MDL_PRIORPROD_DEA07_01185382.

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

70. The DEA has also repeatedly emphasized that retail pharmacies, like the Walmart pharmacies, are required to implement systems that detect and prevent diversion and must monitor for red flags of diversion.

71. For example, the DEA has provided guidance in the form of its "Pharmacist's Manual: An Information Outline for the Controlled Substances Act of 1970" which is intended to outline the "requirements set up under the Controlled Substances Act of 1970 [*et seq*.] as they affect pharmacy practice."

72. The DEA's guidance emphasizes: "The role of the pharmacist in the proper dispensing of controlled substances is critical both to the health of patients and to safeguard society against drug abuse and illicit diversion. The pharmacist's adherence to the law, together with voluntary service of its objectives, constitute a powerful resource for protecting the public health and safety. . . . The pharmacist is in a pivotal position because it is the pharmacist who dispenses the prescription medication to the ultimate consumer."

73. However, "[p]harmacists must be aware of the various methods and activities employed to divert controlled substances. The primary method is falsified prescription orders. Other methods for diverting controlled substances are: theft from a pharmacy, theft of prescription blanks, and willful and intentional diversion by pharmacists." The following non-exhaustive list

of red flags as indicators of possible illegal and/or fraudulent prescription orders are provided in the Manual:

- Prescriptions written by a doctor who writes significantly more prescriptions (or in larger quantities or higher doses) for controlled substances compared to other practitioners in the area;
- Prescriptions which should last for a month in legitimate use, but are being refilled on a shorter basis;
- Prescriptions for "cocktail" drugs frequently abused with opioids, like benzodiazepines, muscle relaxers and/or stimulants;
- Patients who present similar prescription orders from the same practitioners;
- People who are not regular patrons presenting prescription orders from the same physician;
- A dramatic increase in the purchases of controlled substances;
- Patients who travel unusual distances to see a prescriber or to fill a prescription; and
- Patients who pay cash for opioid prescriptions even though they have insurance.

74. "The DEA also expects that pharmacists will make a reasonable effort to determine the identity of the prescriber – if the prescriber is not known to the dispensing pharmacist."

75. Finally, if a pharmacy finds evidence of prescription diversion, the Manual indicates that the local Board of Pharmacy and DEA must be contacted.

76. In 2009, the DEA issued a show cause order seeking to revoke the registration of a Walmart pharmacy in California. The order alleged that the pharmacy:

> (1) improperly dispensed controlled substances to individuals based on purported prescriptions issued by physicians who were not licensed to practice medicine in California; (2) dispensed controlled substances . . . based on Internet prescriptions issued by physicians for other than a legitimate medical purpose and/or outside the usual course of professional practice . . . ; and (3) dispensed controlled substances to individuals that [the pharmacy] knew or should have known were diverting the controlled substances.[28]

77. The investigation resulted in a 2011 Memorandum of Agreement ("2011 MOA"). The 2011 MOA states that the DEA also learned that the same pharmacy was allegedly dispensing controlled substances based on prescriptions that lacked valid DEA numbers and allegedly refilling

[28] WMT_MDL_000043490.

controlled-substances prescriptions too early. The DEA action and MOA further demonstrate that Walmart was also well aware of the legal requirements on pharmacies dispensing controlled substances.

78. In a 2016 presentation to the American Pharmacists Association, the DEA reiterated that retail pharmacies must watch for red flags such as: large numbers of customers who: receive the same combination of prescriptions, receive the same strength of controlled substance prescription (often for the strongest dose), have prescriptions from the same prescriber, and have the same diagnosis code.

79. 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.

80. 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).

81. 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.

82. 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.

83. 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.

84. 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.

85. 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 as a Distributor Failed to Maintain Effective Controls Against Diversion and Contributed to the Oversupply of Opioids into West Virginia.

86. 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.

87. 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.

88. 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.

89. 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.

90. 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.

91. 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).

92. 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.

93. 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.

94. 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.

95. 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.

96. 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.[29] 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.

97. 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.

98. 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.[30] There is no evidence that any Walmart employee ever flagged an order as suspicious prior to 2011.

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

100. Walmart's "monitoring program" was insufficient to identify suspicious orders of controlled substances. The program flagged only very large orders of controlled substances.

[29] 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. . . .").
[30] *See, e.g.*, Hilland Dep. at 52:2-13, 170:17-171:6.

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 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.

101. 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.

102. 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.

103. 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.

104. 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 distriburors.

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.

105. 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.[31] 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.[32] 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."[33]

106. 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

107. 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

[31] WMT_MDL_000052997.
[32] WMT_MDL_000048100; WMT_MDL_000048101.
[33] WMT_MDL_000048101.

"maint[taining] 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 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.

108. 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.

E. Walmart Failed to Guard Against Diversion At Walmart Pharmacies.

109. Walmart set policies for its pharmacies at the corporate level.[34] In a recruitment video for pharmacists on Walmart's YouTube channel, the company shows Walmart pharmacists speaking about working at the company: "the safety and the excellence we carry to our patients is phenomenal," adding that "the culture that our company has [is] respect for the individual, service, and excellence, and, of course, we always have integrity."[35] The commercial also states that Walmart's pharmacists "strive for excellence" and are "passionate about providing quality

[34] See, e.g., WMT_IN_AG_00000066 ("Walmart has adopted a uniform national policy that is designed to meet or exceed the federal rules and the laws of all states.").

[35] Walmart, Your Career as a Walmart Pharmacist (Sept. 25, 2014), available at https://www.youtube.com/watch?v=9VD12JXOzfs (last visited May 13, 2020).

healthcare."[36] Through this nationwide advertising, Walmart presented their pharmacists as the ideal for safety and excellence in the field. By contrast, Walmart pressured its pharmacists to fill prescriptions quickly, had too little pharmacy staff, and otherwise impeded its pharmacists' ability to monitor, report, and guard against suspicious activity in West Virginia.

1. Walmart Prioritized Speed, Volume, and Profits over Safety and Compliance.

110. The pressure Walmart imposed on pharmacists to fill more prescriptions quickly was incompatible with a culture and practice of compliance.

111. Between 2006 and 2018, Walmart's pharmacy incentive program, which included controlled substance prescriptions, was largely based on profits, sales, and the number of scripts dispensed.

112. From 2006 to 2012, bonuses for pharmacy managers, co-managers, and assistant managers were determined by two performance-based metrics: profits and number of prescriptions. The first metric was based on the pharmacy's "adjusted net profit."[37] To calculate this metric, 2.5% of the first $30,000 of adjusted net profit was added to 1.5% of the next $170,000 of adjusted net profit, and 0.5% of any remaining adjusted net profit.[38] The second metric was based on "prescription volume."[39] To calculate this metric, $0.10 for each generic prescription dispensed was added to $0.03 for each brand prescription dispensed.[40] The bonus was calculated by adding these two metrics together.[41] A manager would receive 100% of that sum.[42] A co-

[36] *Id*.
[37] WMT_MDL_000056427.
[38] *Id*.
[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] *Id*.

manager would receive two thirds of that sum.[43] An assistant manager would receive one third of that sum.[44]

113. In 2012, Walmart implemented its "Pharmacy Facility Management Incentive Plan."[45] Under this plan, bonuses for pharmacy employees—including managers, area managers, assistant managers, as well as staff pharmacists, grad interns, and relief pharmacists—were entirely performance based. An employee's bonus was calculated using three performance-based metrics, under which the pharmacy's performance would be compared to a previously set "plan" or "goal."[46] The first metric would compare the number of prescriptions filled to a previously set plan.[47] The second metric would compare the pharmacy's profit to a previously set plan.[48] And the third would compare a pharmacy's "customer experience" to a previously set goal.[49]

114. For each of these three metrics, a bonus amount was generated where the pharmacy exceeded the "threshold" ratio—*i.e.*, 95% of the plan or goal. And that bonus would increase as the ratio for that metric increased—up to a maximum of 105% of the plan or goal.[50] But no bonus would be generated for any of the three metrics unless the pharmacy reached 80% of its planned profit.[51]

115. The bonus amounts yielded by these three metrics would be added together to calculate the pharmacy employee's bonus. But the employee could also receive an additional bonus—referred to as the "Additional MIP"—if the pharmacy filled 190,000 scripts that year.[52]

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[43] *Id*,
[44] *Id*.
[45] *See* WMT_MDL_000043526–46.
[46] *See* WMT_MDL_000043531, 33.
[47] *See* WMT_MDL_000043533.
[48] *See id.*
[49] *See* WMT_MDL_000043529.
[50] *See* WMT_MDL_000043533 (describing this as the "Super Max" amount).
[51] *See* WMT_MDL_000043533.
[52] *See* WMT_MDL_000043535.

In that case, the Additional MIP would be equal to the bonus the employee received using the three metrics.[53] In other words, the Additional MIP would double the employee's bonus if the pharmacy dispensed 190,000 or more scripts.

116. Walmart briefly changed the script-based threshold to a sales threshold, but it reintroduced scripts as a metric measure in 2015, just a year later. Under the 2015 incentive plan, the amount of the Additional MIP bonus varied depending on the number of scripts the pharmacy dispensed.[54] Where the pharmacy dispensed between 135,000 and 159,999 scripts, the pharmacy employee would receive an Additional MIP bonus equal to 40% of the employee's bonus.[55] Where the pharmacy dispensed between 160,000 and 209,999 scripts, the Additional MIP bonus would equal 75% of the employee's bonus.[56] And where the pharmacy dispensed at least 210,000 scripts, the Additional MIP bonus would equal 100% of the employee's other bonus.[57]

117. To dispense 210,000 prescriptions in a year, a pharmacy would need to dispense and average of 576 prescriptions a day, assuming that the pharmacy is open 365 days a year.

118. As Walmart was aware by early 2013, the DEA had expressed concerns that bonus incentives for dispensing controlled substances could "lead to bad pharmacist decisions because they know they will get something out of filling scripts."[58] Expressing its opinion through an NACDS DEA Compliance Working Group on the issue, Walmart "agree[d] that there should be no special incentives for filling controlled substance prescriptions."[59] But Walmart did not exclude controlled substances from the Additional MIP portion of the bonus formula until 2015, noting

[53] *Id*.
[54] *See* WMT_000043591.
[55] *Id*.
[56] *Id*.
[57] *Id*.
[58] WMT_MDL_000357869.
[59] WMT_MDL_000323910.

that it did so to "remove any possible doubt that [its] pharmacists have a financial incentive to fill a controlled substance prescription."[60] And it does not appear that, even after that point, sales of controlled substances were otherwise excluded from the bonus calculation formulas.

119. In addition to the monetary pressure to fill prescriptions, pharmacists were under constant pressure to increase the number of prescriptions they filled and the overall percentage of pharmacy sales.

120. Pharmacists would be repeatedly told to fill prescriptions as quickly as possible. For example, a December 17, 2014 email to certain pharmacists stated that "shorter wait times keep patients in store." Other emails urged that if prescriptions were not filled quickly, customers would shop elsewhere.

121. Even though Walmart pharmacists had legal requirements to satisfy before they could fill controlled substance prescriptions, Walmart managers told pharmacists to "[h]ustle to the customer, hustle from station to station" because filling prescriptions "is a battle of seconds." Walmart's Health and Wellness Directors set goals to fill all prescriptions within 15 minutes.

122. In a 2014 pharmacy employee survey, discussed further below, Walmart pharmacy employees explained the pressure to fill prescriptions quickly:

- "[B]ecause of the constant harassment from our market manager about us not getting [prescriptions] done in 20 min, we often take shortcuts in filling and counseling rx's that could lead to patient safety issues."

- "Us being critisized [sic] b[y] our Health and Wellness Director about not getting prescriptions out in 20 minutes causes the pharmacy to take short cuts and affects patient safety." (Emphasis omitted.)

[60] WMT_MDL_000385192 at 4:40; *see also* WMT_MDL_000466696 (7/1/13 training script indicating that "We are working to exclude controlled substance prescriptions from our financial incentive calculations in order to remove any possible doubt that company pharmacists are incentivized to fill controlled substance prescriptions).

- "Our [District Manager] continually sends our pharmacy nasty emails and chastises us for not having a [sic] high enough numbers in our input and fill accuracy and times. We are therefore instructed to cheat the system …."

123. Further, a Walmart pharmacist commented that she typically filled 200 prescriptions in her daily nine-hour shift, and an even higher volume when working at a different store, equating to at least one prescription every 2.7 minutes.[61]

124. Walmart managers sent the pharmacists data showing the previous day's prescription volumes and wait times, and the managers used this data to create competition among pharmacies. Managers ranked stores for the volumes of prescriptions filled and congratulated pharmacists when the pharmacy dispensed high volumes.

125. According to a 2016 investigation by the Chicago Tribune, as chain pharmacies increasingly promote quick service, "pharmacists frequently race through legally required drug safety reviews — or skip them altogether," missing dangerous drug combinations in the process.[62] A pharmacist too rushed to check for a potentially deadly drug interaction is also likely to be too rushed to check for red flags of diversion, such as prescription "cocktails" or other combinations of highly abused drugs. As noted, Walmart pharmacy employees responding to an internal survey explained that Walmart's focus on speed and volume "causes the pharmacy to take short cuts and affects patient safety."

126. Certain combinations of different types of medications present red flags. As trained pharmacists were aware, and as Walmart itself recognized in Pharmacy Operations Manual ("POM") 1311 (2015), discussed below, red flags include prescriptions "that represent a 'cocktail' of commonly abused drugs." A compliance unit director explained in an internal email in February

[61] *Id*.
[62] Sam Roe, Ray Long, and Karisa King, Contract Reporters, *Pharmacies Miss Half of Dangerous Drug Combinations*, Dec. 15, 2016, http://www.chicagotribune.com/news/watchdog/druginteractions/ct-drug-interactions-pharmacy-met-20161214-story.html.

2016 that "[a] cocktail is a red flag that should alert the [pharmacist] to use their professional judgment to refuse to fill the [prescription]."

127. POM 1311 (2015) was titled "Practitioner/Patient Relationship." It was created to provide guidance to the pharmacist to ensure a prescription was issued for a valid purpose. It had a non-exhaustive list of red flags that pharmacists should be aware of. It specifically addressed pharmacists' obligation with respect to controlled substance prescriptions and corresponding responsibility.

128. At least one Walmart pharmacist concluded that prescriptions for cocktail combination presented an unresolvable red flag. In January 2014, a Walmart pharmacist in Bradenton, Florida, refused to fill a prescription for oxycodone and methadone because "[m]ethadone should not be taken with other opioids or with benzodiazepines per pain management guidelines and per gold standard [due to] high risk of respiratory depression." The same pharmacist, working in a pharmacy in Sarasota, Florida, refused to fill a prescription for Dilaudid (a brand name of hydromorphone) and methadone written in March 2014 for the same reason: "Inappropriate therapy per pain management guidelines, it is not recommended to take methadone with other opioids [due to] high risk of respiratory depression."

129. Yet, according to the Tribune's coverage, "Wal-Mart, operator of 4,500 U.S. pharmacies, failed 43 percent of its tests" to see how often pharmacists would dispense dangerous drug pairings without warnings to patients.[63]

130. As demonstrated through Walmart's compensation programs and internal pressure, pharmacy employees were constantly incentivized to fill as many prescriptions as possible to increase their respective bonuses and keep customers—to the detriment of patient safety.

2. Walmart Had Too Few Pharmacy Staff to Ensure Safety and Compliance.

[63] *Id*.

131. With this emphasis on prescription-based metrics and speed, Walmart set dangerously high prescription goals for its pharmacies. At the same time, Walmart failed to adequately staff its pharmacies.

132. Walmart conducted surveys of its pharmacy employees in June 2012, July 2014, and October 2014. In responding to these surveys, many pharmacy employees reported their pharmacy lacked adequate staff to properly and safely handle the workload.

133. For example, in June 2012, only 59% of the employees reported having sufficient staff to handle the workload. By October 2014, only 43% reported having sufficient staff. In both the June 2012 and October 2014 surveys, a substantial proportion of pharmacy employees reported they felt rushed with processing prescriptions.

134. Many of the surveys contained specific statements from pharmacy employees asking for more staff and time to competently carrying out their duties when filling prescriptions. These survey results and the comments were compiled and reviewed at Walmart's Health and Wellness Division.

135. In the October 2014 survey, pharmacy employees reported:

- "We are not adequately staffed for safely filling the volume of prescriptions that are brought to this pharmacy. We are spread too thin…."

- "[W]e do not have enough pharmacist help. I feel overwhelmed and like we are being asked to do more and more…. We are being forced to not focus on the patients in front of us…."

- "[Staffing] is too low for a pharmacy and is dangerous for patients if the staff always feels overwhelmed or rushed while working on patients [sic] prescriptions."

- "Since … new Control Class II Change for Hydrocodone we have been added more responsibility and time consuming tasks, but our allotted hours for pharmacy staff has not changed…. [T]his can add to pharmacy staff being more rushed to fill Rx, therefore more chance of mistakes happening in the pharmacy." (Emphasis omitted.)

- "I think that someone should come in on a busy day when we do the most scripts and immunizations and just see how we really need man power to ensure safety and accuracy as opposed to not having enough technicians and feeling rushed and behind all the time to save money. One mistake could potentially cost more than it would to have an extra body to keep everything safer and feel less overwhelmed."

3. Walmart Made It A Point Not to Spot, Share, or Address Red Flags for Diversion at Walmart Pharmacies.

136. In March 2020, journalists also revealed that Walmart not only ignored reports of suspicious activity from pharmacists concerned that they were filling prescriptions for pill mills, but the company considered these pharmacists' focus misdirected. One internal email, reviewed by ProPublica, showed that in response to a question from a regional manager in 2015 about documenting pharmacists' concerns about doctors believed to be operating pill mills, Walmart's director of Health and Wellness Practice Compliance, Brad Nelson, wrote: "We have not invested a great amount of effort in doing analysis on the data since the [2011 MOA requiring such reporting] is virtually over. *Driving sales and patient awareness is a far better use of our Market Directors and Market manager's time.*"[64]

137. Walmart refused to allow pharmacies to flag and block all prescriptions from prescribers whose prescriptions raised red flags that they were running pill mills. Not only did pharmacists have to refuse each prescription individually, but, to do so, "a pharmacist had to fill out a form that could take 20 minutes, a bureaucratic hurdle that pharmacists sought to avoid because they were under pressure to fill prescriptions quickly."[65]

[64] Jesse Eisinger and James Bandler, *Walmart Was Almost Charged Criminally Over Opioids. Trump Appointees Killed the Indictment.*, ProPublica, (March 25, 2020), https://www.propublica.org/article/walmart-was-almost-charged-criminally-over-opioids-trump-appointees-killed-the-indictment

[65] *Id.*

138. For many years, Walmart did not allow its pharmacists to request blanket refusals to fill, even when Walmart pharmacists suspected diversion for years based on an individual prescriber's prescribing practices. Walmart, however, always had the ability to do so. Finally, in 2017, Walmart implemented a policy whereby individual pharmacists could request such blanket refusals, which would permit the pharmacist to refuse to fill future prescriptions from that prescriber without evaluating each prescription individually. But even then, refusals to fill were pharmacist-specific, meaning that prescriptions from a blocked prescriber could be filled at the same pharmacy by a different pharmacist.

139. Walmart also always had the ability to "centrally block" problematic prescribers across all its pharmacies but did not establish a procedure to do so until 2017. In the "Practice Compliance" document describing this policy, Walmart admitted that it may, "in certain situations," have information about prescribing practices that is not available to individual pharmacists:

> While pharmacists are in the best position to determine whether individual prescriptions are appropriate, *additional information may be obtained that is not available to our pharmacists*. Therefore, in certain situations, a prescriber may be identified whose prescribing practices raise concerns about prescribing controlled substances for legitimate medical purposes. After a thorough review, these additional insights may lead Walmart to place a block in Connexus on controlled substance prescriptions from these prescribers.

140. Even the policies Walmart did have in place, such as refusal-to-fill forms, did little to curb the diversion of controlled substances. Refusal-to-fill forms contained various types of information, such as the name of the prescriber and patient, the prescriber's address and DEA registration number, the controlled substances that had been refused, and the reasons for the refusal.

141. Walmart pharmacists determined in many instances that a prescription was invalid based solely on the identity of the prescriber. Pharmacists emailed the completed refusal-to-fill forms to Walmart's compliance unit. The emails went to a central email address, which was monitored by a senior compliance manager in the Health and Wellness Division.

142. From 2011 to 2015, during the period when Walmart was under the 2011 MOA with the DEA and had committed to report refusals to fill, Walmart's compliance unit gathered the information it received from the refusal-to-fill forms. Walmart provided some of this information to the DEA, but only after removing comments from the refusal-to-fill forms. Oftentimes, this meant that the DEA did not see the reason from pharmacists regarding the decision to refuse to fill the prescription.

143. Often, the information contained in the refusal-to-fill forms was not shared, even at the pharmacy level among co-workers. Walmart lacked any effective process to share red-flag information between pharmacists at the same store who did not have overlapping shifts or with "floating" pharmacists who worked only sporadically at any particular pharmacy.

144. For years, Walmart's compliance unit chose not to disseminate this information to alert pharmacists to the significant volume of red flag information associated with many of the prescriptions they were being asked to fill. Moreover, Walmart pharmacists knew that Walmart did not have a system that alerted them to red flags regarding particular prescribers or patients reported to the compliance unit.

145. Walmart's compliance unit could have chosen some method to alert pharmacists to the red flag information when a related prescription was presented. For example, Walmart's system notified a pharmacist when a medical doctor's license had expired by placing an "edit" in its computer system and by sending out "e-alerts" to its pharmacies to alert them not to fill a

doctor's prescriptions. In addition, Walmart's system alerted pharmacists to certain dangerous or deadly drug combinations. But pharmacists were not similarly notified in any way of high-risk prescribers who represented a danger to patients' health.

146. Walmart's compliance unit failed to take necessary steps to ensure that the information from refusal-to-fill forms in its possession actually alerted Walmart pharmacists to any red flags they needed to consider. Walmart's compliance unit did not even disseminate such information to pharmacists at Walmart pharmacies that were near the problem prescribers' medical practices or near Walmart pharmacies that had previously refused to fill prescriptions written by problem prescribers.

147. Walmart recognized that individuals presenting prescriptions that were refused by one Walmart pharmacy might try to get them filled at another, nearby Walmart pharmacy. A Walmart Market Health and Wellness Director observed in May 2014 that "these patients and prescriptions will simply move to another location and I was hoping we had a process for flagging doctors that are under investigation so all locations are aware?" A senior manager in Walmart's compliance unit responded that "[t]here is no communication we can put out" and failed to identify any process Walmart had adopted to ensure pharmacists learned of any red flags related to such prescribers.

148. Until mid-2015, Walmart did not even have a system that enabled its pharmacists to search for refusal-to-fill information completed by other pharmacists. The only ways a Walmart pharmacist could learn about previous refusals to fill were through word of mouth or by requesting the information from Walmart's compliance unit before filling a prescription.

149. Pharmacists who refused to fill suspicious controlled substance prescriptions were reported to management. For example, one internal document from 2015 notes concerns from a

Walmart pharmacist that "his leadership would not support his refusing to fill any 'legitimate' (written by a Dr) prescriptions and he stated that his current volume/staffing structure doesn't allow time for individual evaluation of prescriptions[.]" When this pharmacist refused to fill a customer's controlled substance prescription because the customer was attempting to fill it too soon, the Market Health & Wellness Director for that store complained to management that the pharmacist "sent a customer to a competitor" and "expressed significant concern about how 'sending customers away' would impact the sales figures for the store," and insisted that "the store needs to fill every available prescription."

150. Even after Walmart pharmacists identified a West Virginia prescriber who was issuing invalid prescriptions, Walmart kept filling the prescriptions.

151. In two refusal-to-fill forms submitted in July 2015, Walmart pharmacists reported that non-Walmart pharmacies near Walmart Store 2036 in South Charleston, West Virginia, had stopped filling a West Virginia doctor's prescriptions. One of those refusal-to-fill forms also reported many other red flags raised that doctor's prescriptions: "There were many DEA red flags present which led us to turning the script away such as patient traveling a long distance to the pharmacy, duplication of prescribing habits from physician, patient trying to force the pharmacy to fill the prescription and acting in an [un]usual manner." One of the customers told the Walmart pharmacist that "Rite Aid, Kroger and Larry's Pharmacy" would not fill her prescription. A Rite-Aid pharmacist also spoke directly with a pharmacist at the South Charleston store and reported that Rite-Aid had stopped filling for the doctor.

152. One of the refusals by a Walmart pharmacist in July 2015 was for a Norco 10/325mg (a brand name of hydrocodone-acetaminophen 10/325mg) prescription for a patient. Despite the red flags noted by Store 2036, another Walmart pharmacy in South Charleston, Store

6457, filled the doctor's prescriptions for that patient for hydrocodone-acetaminophen 10/325mg every month from August 2015 through May 2016.

153. By February 2017, a Walmart pharmacist at Store 4278 in Quincy, West Virginia, reported to Walmart's compliance unit, including a director in the compliance unit, that she had decided that all of the doctor's prescriptions should be refused.

154. From July 2015 through July 2018, despite Walmart's knowledge of red flags indicating a very high probability that the West Virginia doctor regularly issued invalid prescriptions for controlled substances, Walmart filled nearly 3,000 controlled-substance prescriptions written by the doctor.

155. The West Virginia doctor lost his medical license and was criminally convicted as a result of his unlawful prescriptions. The West Virginia Board of Medicine began investigating the doctor after 11 of his patients died of drug overdoses. In January 2018, the doctor resolved that matter by agreeing to limitations on his prescriptions of opioids, benzodiazepines, and Xanax and agreeing to terminate his pain management practice. Thereafter, in July 2018, the doctor was indicted on federal drug trafficking charges. That case was resolved when the doctor pleaded guilty to prescribing Schedule II controlled substances without a legitimate medical purpose. In his plea agreement, the doctor agreed to permanently surrender his West Virginia medical license. M.N-A. and the West Virginia Board of Medicine effectuated the surrender of his license in an amended consent order filed in August 2020.

156. Investigations reveal other examples where Walmart continued to dispense prescription opioids despite red flags for diversion. In October 2018, the U.S. Department of Justice ("DOJ") had evidence that Walmart pharmacies in Texas dispensed opioids that killed customers who overdosed on the drugs. "The pharmacists who dispensed those opioids had told

the company they didn't want to fill the prescriptions because they were coming from doctors who were running pill mills," but their pleas "for help and guidance from Walmart's corporate office" fell on deaf ears.[66] Likewise, another federal investigation reportedly revealed that, between 2011 and 2017, "Walmart pharmacists repeatedly filled prescriptions that they worried were not for legitimate medical purposes, including large doses of opioids and mixtures of drugs the DEA considered red flags for abuse.[67] Walmart pharmacists in Texas, Maine, North Carolina, Massachusetts, Kansas and Washington all "raised alarms to the company's national compliance department about doctors."[68] Regarding one Texas doctor who was later convicted of illegal distribution of opioids, a Walmart pharmacist wrote: "*We are all concerned about our jobs and about filling for a pill mill doctor. . . Please help us.*"[69] Another described the same doctor as a "problem," a "liability for us," and a "risk that keeps [him] up at night," cautioning "[t]his is a serious situation."[70]

157. Upon information and belief, Walmart also failed to adequately use data available to it to identify doctors who were writing suspicious numbers of prescriptions and/or prescriptions of suspicious amounts or doses of opioids, or to adequately use data available to it to prevent the filling of prescriptions that were illegally diverted or otherwise contributed to the opioid crisis.

158. Upon information and belief, Walmart also failed to adequately analyze and address its opioid sales to identify patterns regarding prescribers and patients that are engaged in diversion.

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

[66] Jesse Eisinger and James Bandler, Walmart Was Almost Charged Criminally Over Opioids. Trump Appointees Killed the Indictment., ProPublica, (March 25, 2020), https://www.propublica.org/article/walmart-was-almost-charged-criminally-over-opioids-trumpappointees- killed-the-indictment
[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] *Id*.

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

160. 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 and dispensed from its retail pharmacies were for a legitimate purpose.

161. 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.

162. 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 and dispensers such as Walmart (especially with its pharmacy dispensing data), would have alerted Walmart to potential diversion of opioids.

163. Walmart, therefore, was aware of the suspicious orders and prescriptions that flowed from its distribution facilities and retail pharmacies. 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 and dispensed from Walmart pharmacies.

164. 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.

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

165. 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.

166. 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.

167. 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.[71]

168. 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.

[71] *See* https://www.aarp.org/health/drugs-supplements/info-2017/opioid-drug-addiction-pain-pills.html.

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.

169. 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

170. Plaintiff State of West Virginia adopts, realleges, and incorporates by reference paragraphs 1 through 169 of this Complaint as if fully set forth herein.

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

172. Walmart's distribution and dispensing of opioid products in the State of West Virginia involves trade or commerce within the meaning of the WVCCPA.

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

174. 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).

175. 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.

176. 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.

177. 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.

178. 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

179. Plaintiff State of West Virginia adopts, realleges, and incorporates by reference paragraphs 1 through 169 of this Complaint as if fully set forth herein.

180. 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.

181. 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.

182. 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.

183. 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, shipping orders it knew were suspicious, and failing to protect against diversion at Walmart pharmacies.

184. 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.

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

186. 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.

187. 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.

188. 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.

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

190. 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.

191. 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.
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