BLB&G Bernstein Litowitz Berger & Grossmann LLP

Teamsters Local 443 Health Services & Insurance Plan v. CHOU (AmerisourceBergen)

COURT: Delaware Court of Chancery
CASE NUMBER: 2019-0816-SG
CASE LEADERS: Christopher J. Orrico

On October 11, 2019, BLB&G filed a stockholder derivative complaint (the "Complaint") in the Delaware Court of Chancery on behalf of nominal defendant AmerisourceBergen Corporation ("ABC" or the "Company"), and Plaintiffs Teamsters Local 443 Health Services & Insurance Plan, St. Paul Electrical Construction Pension Plan, St. Paul Electrical Construction Workers Supplemental Pension Plan (2014 Restatement), Retirement Medical Funding Plan for the St. Paul Electrical Workers, and San Antonio Fire & Police Pension Fund (collectively, "Plaintiffs"), against (i) the Company's Chairman, President, and Chief Executive Officer ("CEO"), Steven H. Collis ("Collis"); (ii) the Company's Executive Vice President ("EVP") and Chief Legal & Business Officer, John G. Chou ("Chou"); (iii) the Company's former EVP and Chief Financial Officer ("CFO"), Tim G. Guttman ("Guttman," and together with Collis and Chou, the "Officer Defendants"); and against members of the Board of Directors of ABC (the "Board") including: (iv) Richard W. Gochnauer ("Gochnauer"); (v) Lon R. Greenberg ("Greenberg"); (vi) Jane E. Henney, M.D. ("Henney"); (vii) Kathleen W. Hyle ("Hyle"); (viii) Michael J. Long ("Long"); and (ix) Henry W. McGee ("McGee," and together with Collis, Gochnauer, Greenberg, Henney, Hyle, and Long, the "Director Defendants") (collectively, the "Defendants" and each a "Defendant"), for breaches of fiduciary duty and unjust enrichment.

This stockholder derivative action arises out of a guilty plea for violations of the Federal Food Drug and Cosmetic Act ("FDCA") for conduct which exposed vulnerable cancer patients to potential harm and caused the Company's subsidiary to pay a $208 million criminal fine and $52 million criminal forfeiture. The detailed allegations of the Complaint are based, in part, on documents produced in response to Plaintiffs' Section 220 demands.

Through a subsidiary headed by the Company's current Chairman, President, and Chief Executive Officer ("CEO"), Steven H. Collis, ABC operated a Pre-Filled Syringe Program ("PFS Program") which created, packaged, and shipped millions of unsterile syringes containing oncology medications. ABC profited from the PFS Program through an illegal scheme by which the Company pooled overfill left over after drugs were drawn from their FDA-approved, sterile glass vials to fill single-dose plastic syringes. The United States Attorney stated that "ABC placed corporate profits over patients' needs, endangering the health of vulnerable cancer patients." Indeed, as the Criminal Information charged, the PFS Program posed serious safety and compliance issues including:

- Non-aseptic conditions in cleanrooms which tested positive for fungal and bacterial contaminations.
- The creation and packaging of over 32,000 pre-filled syringes of cancer treatment drugs that contained bacteria and particulates or foreign matters called "floaters." Despite FDA labels stating not to use these drugs if they contained particulates, PFS Program technicians simply attempted to remove the floaters when they saw them, and no steps were taken to determine the cause or composition of the floaters, or sterility of the drugs.
- ABC failed to ensure that the cancer drugs used in the PFS Program were handled in accordance with the FDA label requirements and exposed them to temperature, light, and shaking contamination.

There was no Board-level reporting system at ABC to oversee the PFS Program, and what information the Board did haphazardly receive gave the directors notice that they lacked an adequate oversight program and that the PFS Program had serious compliance issues. The PFS Program's legal and compliance issues continued unaddressed for years even though the PFS Program was "known to and approved at the highest levels of ABSG and ABC." Indeed, as the FDA later found, "ABC excluded the entire PFS Program from its standard regulatory audit and pedigree compliance programs."

On August 24, 2020, Vice Chancellor Glasscock issued a decision denying the defendants' motion to dismiss in all respects. A copy of the decision is available under Case Documents at the left-hand side of the page. BLB&G continues to vigorously prosecute this action.

Case Documents

- August 24, 2020 - Memorandum Opinion
- February 28, 2020 - Plaintiff's Answering Brief in Opposition to Defendants' Motion to Dismiss
- October 16, 2019 - Verified Stockholder Derivative Complaint