

FILED  
CHARLES D. SUGANO III  
CLERK  
2019 OCT -3 AM 8:35

IN THE CIRCUIT COURT OF KNOX COUNTY, TENNESSEE  
SIXTH JUDICIAL DISTRICT AT KNOXVILLE

STATE OF TENNESSEE, )  
*ex rel.* HERBERT H. SLATERY III, )  
ATTORNEY GENERAL and REPORTER, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
AMERISOURCEBERGEN DRUG )  
CORPORATION, a foreign corporation, )  
 )  
Defendant. )

JURY DEMAND

Case No. 1-345-19

MOTION FOR LEAVE TO FILE COMPLAINT UNDER SEAL

The State of Tennessee moves for an Order to file its Complaint, which contains references to documents and information that AmerisourceBergen Drug Corporation (Amerisource) and certain third parties<sup>1</sup> assert contain highly confidential, proprietary, or trade secret information, temporarily under seal. The State moves to allow Amerisource and the third parties ten business days from the date of service to seek a protective order concerning documents and information they have classified as containing highly confidential, proprietary, or trade secret information. Under the State's proposed order, the temporary seal will be lifted if none of the parties seek a protective order within ten business days of service of the Complaint.

The State submits that the Complaint should not be kept under seal beyond ten business days from service and only files its motion to allow Amerisource and the third parties the

<sup>1</sup> These parties are Mallinckrodt Pharmaceuticals, Allergan Finance LLC, and the United States Drug Enforcement Administration. Each is being served with a copy of the State's Motion to Seal and supportive filings, as well as letters identifying their respective documents and data that are referenced in the State's Complaint.

days is not justified because the State is a public litigant, the Complaint involves a matter of immense public interest, and the parties are unlikely to show a specific harm as a result of disclosure.

### MOTION

The State moves pursuant to Rule 26.03 for:

- (1) an order temporarily sealing its Complaint for no longer than ten business days from service of the State's Complaint to afford Amerisource and the third parties the opportunity to move for a protective order concerning information and documentation they have previously asserted contains highly confidential, proprietary, or trade secret information;
- (2) an order allowing the State at least two business days to respond to any motion for a protective order filed by Amerisource or the third parties; and
- (3) any other relief the Court deems appropriate.

Respectfully submitted,

**HERBERT H. SLATERY III**  
Attorney General and Reporter



**MARGARET ROWLAND**, B.P.R. No. 33513  
Assistant Attorney General  
**BRANT HARRELL**, B.P.R. No. 24470  
Senior Assistant Attorney General  
**OLHA N.M. RYBAKOFF**, B.P.R. No. 24254  
Senior Assistant Attorney General  
**CAROLYN U. SMITH**, B.P.R. No. 17166  
Senior Assistant Attorney General  
Office of the Attorney General of Tennessee  
Consumer Protection and Advocate Division  
UBS Tower, 20<sup>th</sup> Floor  
315 Deaderick Street

Nashville, TN 37243  
(615) 741-3549  
(615) 532-2910 (fax)  
margaret.rowland@ag.tn.gov  
brant.harrell@ag.tn.gov  
olha.rybakoff@ag.tn.gov  
carolyn.smith@ag.tn.gov

**CERTIFICATE OF SERVICE**

On this the 3<sup>rd</sup> day of October, 2019, I, MARGARET ROWLAND, certify that the above-referenced document was served upon Defendants with original process, and copies were sent to the following parties via email and U.S. Mail as indicated (\*):

*Counsel for AmerisourceBergen Drug Corporation*

Joseph J. Mahady\*  
Reed Smith LLP  
Three Logan Square, Suite 3100  
1717 Arch Street  
Philadelphia, PA 19103  
jmahady@reedsmith.com

David Cookson\*  
Bruning Law Group  
1201 Lincoln Mall, Suite 100  
Lincoln, NE 68508  
david@bruninglawgroup.com

*Counsel for Mallinckrodt LLC*  
Brien T. O'Connor\*  
Ropes & Gray LLP  
Prudential Tower  
800 Boylston Street  
Boston, MA 02199-3600  
brien.o'connor@ropesgray.com

*Counsel for Allergan Finance LLC*

Jennifer Levy\*  
Kirkland & Ellis LLP  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005  
jlevy@kirkland.com

*Counsel for the United States Drug Enforcement Administration*

Patrick Forrest\*  
Section Chief  
Administrative Law Section  
U.S. Department of Justice  
8701 Morrisette Drive  
Springfield, VA 22152  
patrick.j.forrest@usdoj.gov

  
MARGARET ROWLAND

FILED  
CHARLES D. SUSANO III  
2019 OCT -3 AM 8:35

IN THE CIRCUIT COURT OF KNOX COUNTY, TENNESSEE  
SIXTH JUDICIAL DISTRICT AT KNOXVILLE

STATE OF TENNESSEE, )  
*ex rel.* HERBERT H. SLATERY III, )  
ATTORNEY GENERAL and REPORTER, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
AMERISOURCEBERGEN DRUG )  
CORPORATION, a foreign corporation, )  
 )  
Defendant. )

JURY DEMAND

Case No. 1-345-A

MEMORANDUM IN SUPPORT OF THAT STATE OF TENNESSEE'S  
MOTION FOR LEAVE TO FILE COMPLAINT UNDER SEAL

The State of Tennessee has moved for an Order allowing the State to file its Complaint, which contains references to documents and information that AmerisourceBergen Drug Corporation (Amerisource) and certain third parties<sup>1</sup> assert contain highly confidential, proprietary, or trade secret information, temporarily under seal. Consistent with the State's existing agreement on the use of documents obtained during its investigation in court, the State has filed its Motion to allow Amerisource and the third parties ten business days from the date of service to seek a protective order concerning documents and information they have classified as containing highly confidential, proprietary, or trade secret information. This mechanism was previously used in the pending *State v. Purdue Pharma L.P.*, Civ. Action No. 1-173-18 (Knox Cty. Cir. Ct.) and *State v. Endo Health Solutions, Inc., and Endo Pharmaceuticals, Inc.*, Civ. Action

<sup>1</sup> These parties are Mallinckrodt Pharmaceuticals, Allergan Finance LLC, and the United States Drug Enforcement Administration. Each is being served with a copy of the State's Motion to Seal and supportive filings, as well as letters identifying their respective documents and data that are referenced in the State's Complaint.

No. 1-174-19 (Knox Cty. Cir. Ct.), which resulted in unredacted versions of the Complaints being released.

The Complaint should not be kept under seal beyond ten business days and the State only files this Motion to allow Amerisource and the third parties the opportunity to secure a protective order. Under the State's Proposed Order, the temporary seal will be automatically lifted if none of the parties seek a protective order within ten business days of service of the Complaint. The State believes its Complaint should be made public because the information contained in it is damning, and there is no compelling reason why any of the information contained in it should be permanently withheld from the public. A time period beyond ten business days is not justified because the State is a public litigant, the Complaint involves a matter of immense public concern, and Amerisource and the third parties are unlikely to show specific harm as a result from disclosure of the Complaint.

### **SUMMARY OF STATE'S COMPLAINT**

The State's civil enforcement action, as detailed in its approximately 230-page Complaint, seeks to hold Amerisource, an opioid distributor whose distribution of opioid products had a disproportionate adverse effect on Tennessee, accountable for its role in the State's ongoing opioid epidemic—one of the most significant public health crises in the State's history.

The State's Complaint alleges that Amerisource knowingly participated in the diversion of opioids in Tennessee by continuing to supply pharmacy customers with opioids even after it knew—often from firsthand accounts—that diversion was occurring from or in those pharmacies. The State brought its civil enforcement action to hold Amerisource accountable for its violations of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101-131 (TCPA), protect the public, preserve the integrity of the marketplace, abate and remedy the public nuisance

created by Amerisource's marketplace interference and endangerment of public health in Tennessee, and to revoke Amerisource's license to distribute controlled substances as authorized as a civil remedy under the Racketeer Influenced and Corrupt Organization Act of 1989.

The Complaint contains detailed allegations that Amerisource violated the TCPA, engaged in schemes to unlawfully sell and distribute Schedule II substances as prohibited by Tennessee RICO Act of 1989, and created a public nuisance that continues to wreak havoc throughout the State. Specifically, the Complaint asserts that Amerisource engaged in actionable conduct including but not limited to:

1. Oversupplying Tennessee pharmacies with opioids at astounding rates. For example, Amerisource shipped enough opioids for every man, woman, and child to receive approximately 109 pills from Amerisource;
2. Ignoring multiple red flags for abuse and diversion from suspect pharmacies, such as high percentages of patients paying for controlled substance prescriptions in cash, cars in the parking lots with out-of-state license plate tags, patients abusing or selling drugs in the pharmacy parking lot, purchasing disproportionate ratios of controlled substances to noncontrolled substances, purchasing disproportionate amounts of one family or sub-family of controlled substances compared to other families, purchasing controlled substances from multiple distributors at once, a lack of policies or procedures for dispensing controlled substances or vetting patients, and dispensing dangerous combinations of controlled substances, such as concurrent prescriptions for an opioid, a muscle relaxer, and anti-anxiety medications (known as the Holy Trinity);
3. Knowingly supplying two major and clearly defined hot spots for diversion of oxycodone and buprenorphine without naloxone in the Knoxville-area and Tri-Cities-area respectively;
4. Continuing to seek business from select independent pharmacies that it knew were more likely to be sources of opioid diversion and suspicious orders;
5. Helping suspect pharmacies avoid detection by the DEA, and making this a selling point for customer growth and retention;
6. Implementing anti-diversion compliance programs that were designed to minimize the impact on sales of opioids to high volume pharmacies and were also underfunded, fundamentally unsound, applied inconsistently, or completely ignored;

7. Neglecting to provide employees with cohesive and meaningful training on basic topics related to compliance and anti-diversion measures;
8. Making broad exceptions from due diligence investigations for its most lucrative customers;
9. Failing to maintain accurate records and due diligence documents for problematic customer pharmacies despite having reason to believe those pharmacies were involved in diversion;
10. Establishing extremely high thresholds for what would trigger a suspicious order review so that it could avoid identifying suspicious orders placed by certain pharmacies; and
11. Breaking what few protocols were in place and informally assigning different thresholds for different distribution centers based on financial considerations, among many other things.

The Complaint seeks a permanent injunction, civil penalties of \$1,000 for each TCPA violation, disgorgement of ill-gotten gains, restitution, a nuisance abatement order, equitable costs of abating the nuisance on behalf of the State, relief under the Tennessee RICO Act of 1989 including suspension or revocation of Amerisource's registration as an authorized wholesaler and distributor of controlled substances in Tennessee, and costs that the State has incurred.

### **LEGAL STANDARD**

Under Tennessee Rule of Civil Procedure 26.03, any party may move for a protective order for good cause shown. Factors that weigh in favor of a finding of good cause include: (1) the litigation involves private litigants, (2) the litigation concerns matters of private concern or of little legitimate public interest, and (3) disclosure would result in serious embarrassment or other specific harm. *Ballard v. Herzke*, 924 S.W.2d 652, 658–59 (Tenn. 1996) (internal citations omitted). The State asserts that the factors do not justify a protective order lasting longer than ten business days.



## ARGUMENT

Amerisource and the third parties designated many documents produced during the State's investigation, including those referenced in the State's Complaints, as confidential. By doing so, these parties have alleged they have a good faith belief that the documents contain highly confidential, proprietary, or trade secret information.

A protective order lasting longer than ten business days is not justified based on the public character of this action. First, the State's civil law enforcement action is brought by the Attorney General, a public litigant. Second, the civil law enforcement action detailed in the State's approximately 230-page Complaint is against Amerisource, a distributor of opioids that had a disproportionate adverse impact on Tennessee, and constitutes one of the ways the State seeks to address the opioid epidemic, one of the most significant public health crises in the State's history. Third, the documents flagged by Amerisource and the third parties are used to establish context for Amerisource's bad conduct with respect to specific Tennessee pharmacies. Disclosure of this information is unlikely to result in specific harm or serious embarrassment for the third parties, and any harm or embarrassment experienced by Amerisource is the direct consequence of its own violations of the law, which lay the foundation for the entire Complaint. As such, no party can proffer a legitimate justification to maintain the confidentiality of this information.

Amerisource and the third parties should have ten business days in which to seek a protective order if they determine that any of the documents referenced in the State's Complaint contain information that would result in specific harm. If any party does seek a protective order, the State will respond in opposition and that party will have the burden of justifying the confidentiality of each and every document sought to be covered by a protective order. *Ballard*, 924 S.W.2d at 658.

## CONCLUSION

The State respectfully requests that the Court enter the proposed order to seal the State's Complaint for a maximum of ten business days from the date of service and allow Amerisource and the third parties the ability to seek a new protective order for information they have designated as containing highly confidential, proprietary, or trade secret information.

Respectfully submitted,

**HERBERT H. SLATERY III**  
Attorney General and Reporter



**MARGARET ROWLAND**, B.P.R. No. 33513

Assistant Attorney General

**BRANT HARRELL**, B.P.R. No. 24470

Senior Assistant Attorney General

**OLHA N.M. RYBAKOFF**, B.P.R. No. 24254

Senior Assistant Attorney General

**CAROLYN U. SMITH**, B.P.R. No. 17166

Senior Assistant Attorney General

Office of the Attorney General of Tennessee

Consumer Protection and Advocate Division

UBS Tower, 20<sup>th</sup> Floor

315 Deaderick Street

Nashville, TN 37243

(615) 741-3549

(615) 532-2910 (fax)

[margaret.rowland@ag.tn.gov](mailto:margaret.rowland@ag.tn.gov)

[brant.harrell@ag.tn.gov](mailto:brant.harrell@ag.tn.gov)

[carolyn.smith@ag.tn.gov](mailto:carolyn.smith@ag.tn.gov)

**CERTIFICATE OF SERVICE**

On this the 3<sup>rd</sup> day of October, 2019, I, MARGARET ROWLAND, certify that the above-referenced document was served upon Defendants with original process, and copies were sent to the following parties via email and U.S. Mail as indicated (\*):

*Counsel for AmerisourceBergen Drug Corporation*  
Joseph J. Mahady\*  
Reed Smith LLP  
Three Logan Square, Suite 3100  
1717 Arch Street  
Philadelphia, PA 19103  
jmahady@reedsmith.com

David Cookson\*  
Bruning Law Group  
1201 Lincoln Mall, Suite 100  
Lincoln, NE 68508  
david@bruninglawgroup.com

*Counsel for Mallinckrodt LLC*  
Brien T. O'Connor\*  
Ropes & Gray LLP  
Prudential Tower  
800 Boylston Street  
Boston, MA 02199-3600  
brien.o'connor@ropesgray.com

*Counsel for Allergan Finance LLC*  
Jennifer Levy\*  
Kirkland & Ellis LLP  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005  
jlevy@kirkland.com

*Counsel for the United States Drug Enforcement Administration*  
Patrick Forrest\*  
Section Chief  
Administrative Law Section  
U.S. Department of Justice  
8701 Morrisette Drive  
Springfield, VA 22152  
patrick.j.forrest@usdoj.gov

  
MARGARET ROWLAND

IN THE CIRCUIT COURT OF KNOX COUNTY, TENNESSEE  
SIXTH JUDICIAL DISTRICT AT KNOXVILLE

2019 OCT -3 AM 10:10

STATE OF TENNESSEE, )  
*ex rel.* HERBERT H. SLATERY III, )  
ATTORNEY GENERAL and REPORTER, )  
  
Plaintiff, )  
  
v. )  
  
AMERISOURCEBERGEN DRUG )  
CORPORATION, a foreign corporation, )  
  
Defendant. )

JURY DEMAND

Case No. 1-345-19


ORDER GRANTING LEAVE TO FILE COMPLAINT UNDER SEAL

The State of Tennessee has moved for an Order requesting that its Complaint be filed under temporary seal and remain sealed for a period of ten business days after service of the Complaint. As grounds for its Motion, the State asserted that AmerisourceBergen Drug Corporation (Amerisource) and certain third parties claim that documents and information produced to the State and referenced in the Complaint contain highly confidential, proprietary, or trade secret information.

The State's Motion is **GRANTED**. Amerisource and the third parties shall have ten business days from the date of service to seek a protective order concerning the documents and information referenced in the State's Complaint that Amerisource or any third party previously designated as confidential. If any of the parties does file a request for a protective order, the State shall have at least two business days thereafter during which to respond and the Complaint shall remain under temporary seal until the Court renders a decision. If no party seeks and obtains a

protective order within ten business days of service, the seal on the State's Complaint will automatically expire and the Complaint may be publicly disclosed.

**IT IS SO ORDERED.** *October 3, 2019.*

  
\_\_\_\_\_  
**JUDGE**  
Circuit Court Judge  
Sixth Judicial District

Respectfully submitted,

**HERBERT H. SLATERY III**  
Attorney General and Reporter



**MARGARET ROWLAND**, B.P.R. No. 33513  
Assistant Attorney General

**BRANT HARRELL**, B.P.R. No. 24470  
Senior Assistant Attorney General

**OLHA N.M. RYBAKOFF**, B.P.R. No. 24254  
Senior Assistant Attorney General

**CAROLYN U. SMITH**, B.P.R. No. 17166  
Senior Assistant Attorney General

Office of the Attorney General of Tennessee  
Consumer Protection and Advocate Division  
UBS Tower, 20<sup>th</sup> Floor

315 Deaderick Street

Nashville, TN 37243

(615) 741-3549

(615) 532-2910 (fax)

[margaret.rowland@ag.tn.gov](mailto:margaret.rowland@ag.tn.gov)

[brant.harrell@ag.tn.gov](mailto:brant.harrell@ag.tn.gov)

[olha.rybakoff@ag.tn.gov](mailto:olha.rybakoff@ag.tn.gov)

[carolyn.smith@ag.tn.gov](mailto:carolyn.smith@ag.tn.gov)

## CERTIFICATE OF SERVICE

On this the 3<sup>rd</sup> day of October, 2019, I, MARGARET ROWLAND, certify that the above-referenced document was served upon Defendants with original process, and copies were sent to the following parties via email and U.S. Mail as indicated (\*):

*Counsel for AmerisourceBergen Drug Corporation*

Joseph J. Mahady\*  
Reed Smith LLP  
Three Logan Square, Suite 3100  
1717 Arch Street  
Philadelphia, PA 19103  
jmahady@reedsmith.com

David Cookson\*  
Bruning Law Group  
1201 Lincoln Mall, Suite 100  
Lincoln, NE 68508  
david@bruninglawgroup.com

*Counsel for Mallinckrodt LLC*

Brien T. O'Connor\*  
Ropes & Gray LLP  
Prudential Tower  
800 Boylston Street  
Boston, MA 02199-3600  
brien.o'connor@ropesgray.com

*Counsel for Allergan Finance LLC*

Jennifer Levy\*  
Kirkland & Ellis LLP  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005  
jlevy@kirkland.com

*Counsel for the United States Drug Enforcement Administration*

Patrick Forrest\*  
Section Chief  
Administrative Law Section  
U.S. Department of Justice  
8701 Morrisette Drive  
Springfield, VA 22152  
patrick.j.forrest@usdoj.gov

If signed, above counsel we also be sent signed order as indicated above.

  
MARGARET ROWLAND