IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE ABBOTT LABORATORIES INFANT FORMULA SHAREHOLDER DERIVATIVE LITIGATION	))))	Case No. 22 CV 5513 Hon. Manish S. Shah

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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Table Of Contents

Preliminary Statement 1

Background 2

A. Powdered Infant Formula And Cronobacter 2

B. The Alleged Corporate Trauma: The Recall And Consent Decree 3

C. Sturgis's FDA Inspection History 4

D. Plaintiffs' Allegations About "Whistleblowers" 6

E. The Directors' Oversight Of Abbott's Compliance Risk 7

1. The Structure Of The Directors' Oversight Of Compliance. 7

2. The Directors' Scheduled Oversight Of Compliance Risk. 9

3. The Directors' Oversight Of Specific Compliance Issues. 12

Argument 14

I. Plaintiffs Do Not Plead With Particularity Facts Excusing Their Failure To Make A Demand On Abbott's Board Before Filing Suit. 14

A. Plaintiffs Do Not Plead With Particularity Facts Showing That A Majority Of The Board Faces A Substantial Likelihood Of Liability Under § 14(a) For False Or Misleading Statements When Solicitating Shareholder Votes. 16

B. Plaintiffs Do Not Plead With Particularity Facts Showing That A Majority Of The Board Faces A Substantial Likelihood Of Liability Under § 10(b) For Securities Fraud. 21

C. Plaintiffs Do Not Plead With Particularity Facts Showing That A Majority Of The Board Faces A Substantial Likelihood Of Liability For Breach Of Fiduciary Duty 22

1. Plaintiffs Do Not Plead A Substantial Likelihood Of Liability Under *Caremark* Prong 1. 24

2. Plaintiffs Do Not Plead A Substantial Likelihood Of Liability Under *Caremark* Prong 2. 29

D. Plaintiffs Do Not Plead With Particularity Facts Showing That A Majority Of The Board Could Not Disinterestedly Consider A Breach Of Fiduciary Duty Claim Against Abbott Officers. 31

E. Plaintiffs Do Not Plead With Particularity Facts Showing That A Majority Of The Board Faces A Substantial Likelihood Of Liability For Insider Trading. 32

F. Plaintiffs Do Not Plead With Particularity Facts Showing That A Majority Of The Board Faces A Substantial Likelihood Of Liability For Corporate Waste.....35

G. Plaintiffs Do Not Plead With Particularity Facts Showing That A Majority Of The Board Faces A Substantial Likelihood Of Personal Liability For Unjust Enrichment. 36

II. Plaintiffs Are Not Acting In The Best Interest Of Abbott's Shareholders. 37

III. Plaintiffs Do Not State A Claim Against The Officer Defendants. 38

Conclusion 40

Table Of Authorities

Cases

In re AGNC Inv.,
2018 WL 3239476 (D. Md. July 3, 2018) 19

Amalgamated Bank v. Yahoo!,
132 A.3d 752 (Del. Ch. 2016) 7

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 38

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 38

Bhatia v. Vaswani,
2019 WL 4674571 (N.D. Ill. Sept. 25, 2019) 15

Blythe Holdings v. DeAngelis,
750 F.3d 653 (7th Cir. 2014) 37, 39

In re Boeing Deriv. Litig.,
2021 WL 4059934 (Del. Ch. Sept. 7, 2021) 30

Brehm v. Eisner,
746 A.2d 244 (Del. 2000) 35

Brenner v. Albrecht,
2012 WL 252286 (Del. Ch. Jan. 27, 2012) 38

In re Bristol-Myers Squibb Sec. Litig.,
312 F. Supp. 2d 549 (S.D.N.Y. 2004) 34

Bronstein v. Austin,
2008 WL 4735230 (N.D. Ill. May 30, 2008) 22

In re Citigroup Deriv. Litig.,
964 A.2d 106 (Del. Ch. 2009) 24, 35

City of Birmingham Ret. v. Good,
177 A.3d 47 (Del. 2017) 23, 30

City of Detroit Police v. Hamrock,
2022 WL 2387653 (Del. Ch. June 30, 2022) 27

City of Taylor Police v. Zebra Techs.,
8 F.4th 592 (7th Cir. 2021) 18

In re Clovis Oncology Deriv. Litig.,
2019 WL 4850188 (Del. Ch. Oct. 1, 2019) 33, 34

Constr. Indus. Laborers v. Bingle,
2022 WL 4102492 (Del. Ch. Sept. 6, 2022), *aff'd*, 297 A.3d 1083 (Del. 2023) 25, 27, 28

David B. Shaev Profit Sharing Account v. Armstrong,
2006 WL 391931 (Del. Ch. Feb. 13, 2006), *aff'd*, 911 A.2d 802 (Del. 2006) 24

Dorvit v. Winemaster,
950 F.3d 984 (7th Cir. 2020) 15

Dura Pharm. v. Broudo,
544 U.S. 336 (2005) 21

Edward J. Goodman Life Tr. v. Jabil Circuit,
594 F.3d 783 (11th Cir. 2010) 19

Elfers v. Gonzalez,
2020 WL 7264272 (D. Del. Dec. 10, 2020) 21

In re Fifth Third Bancorp Deriv. Litig.,
2022 WL 970569 (N.D. Ill. Mar. 30, 2022) 17, 32

Firemen's Ret. Sys. v. Sorenson,
2021 WL 4593777 (Del. Ch. Oct. 5, 2021) 27, 30

Franklin v. Doheny,
2022 WL 2064972 (D. Del. June 8, 2022) , *report and recommendation adopted*,
2022 WL 3099235 (D. Del. June 23, 2022) 22

Gaines v. Haughton,
645 F.2d 761 (9th Cir. 1981) 19, 20

Garza v. Belton,
2010 WL 3324881 (N.D. Ill. Aug. 13, 2010) 32, 33, 36

General Elec. v. Cathcart,
980 F.2d 927 (3d Cir. 1992) 19

In re GM Deriv. Litig.,
2015 WL 3958724 (Del. Ch. June 26, 2015), *aff'd*, 133 A.3d 971 (Del. 2016) 27, 28

In re Goldman Sachs Litig.,
2011 WL 4826104 (Del. Ch. Oct. 12, 2011) 24

Guttman v. Huang,
823 A.2d 492 (Del. Ch. 2003) 34

Halliburton v. Erica P. John Fund,
573 U.S. 258 (2014) 21

Hastey v. Welch,
449 F. Supp. 3d 1053 (D. Kan. 2020) 19, 20

Horman v. Abney,
2017 WL 242571 (Del. Ch. Jan. 19, 2017) 24

In re Huron Consulting Deriv. Litig.,
971 N.E.2d 1067 (Ill. App. 2012) 15

In re Impax Labs Deriv. Litig.,
2015 WL 5168777 (N.D. Cal. Sept. 3, 2015) 29

Issen v. GSC Enters.,
522 F. Supp. 390 (N.D. Ill. 1981) 19

Kamen v. Kemper Fin.,
500 U.S. 90 (1991) 14, 15

Kococinski v. Collins,
935 F. Supp. 2d 909 (D. Minn. 2013) 36

Koplin v. Labe Fed.,
748 F. Supp. 1336 (N.D. Ill. 1990) 19

In re Kraft Heinz Deriv. Litig.,
2023 WL 2745118 (N.D. Ill. Mar. 31, 2023) 32

Kuebler v. Vectren Corp.,
13 F.4th 631 (7th Cir. 2021) 16, 18, 19, 22

Lavin v. Reed,
2023 WL 7182950 (N.D. Ill. Nov. 1, 2023) 32, 35

In re Lear Corp.,
967 A.2d 640 (Del. Ch. 2008) 23

Leykin v. AT&T,
216 F. App'x 14 (2d Cir. 2007) 18

Lowinger v. Oberhelman,
924 F.3d 360 (7th Cir. 2019) 15

Marchand v. Barnhill,
212 A.3d 805 (Del. 2019) 24, 25, 27, 28

In re Marriott Customer Data Sec. Breach Litig.,
2021 WL 2401641 (D. Md. June 11, 2021) 20

In re Massey Energy Co.,
2011 WL 2176479 (Del. Ch. May 31, 2011) 38

Mayer v. Spanel Int'l,
51 F.3d 670 (7th Cir. 1995) 21

McCauley v. City of Chi.,
671 F.3d 611 (7th Cir. 2011) 38

McElrath v. Kalanick,
2019 WL 1430210 (Del. Ch. Apr. 1, 2019), *aff'd*, 224 A.3d 982 (Del. 2020) 32

McElrath v. Kalanick,
224 A.3d 982 (Del. 2020) 23

Melbourne Mun. Firefighters v. Jacobs,
2016 WL 4076369 (Del. Ch. Aug. 1, 2016), *aff'd*, 158 A.3d 449 (Del. 2017) 31

In re MetLife Deriv. Litig.,
2020 WL 4746635 (Del. Ch. Aug. 17, 2020), *aff'd*, 2021 WL 1091884 (Del. 2021) 27, 29, 31

Miller v. Loucks,
1992 WL 329313 (N.D. Ill. Nov. 5, 1992) 19

In re Novavax Deriv. Litig.,
2023 WL 5353171 (D. Md. Aug. 21, 2023) 27, 28

In re NutriSystem Deriv. Litig.,
666 F. Supp. 2d 501 (E.D. Pa. 2009) 36

Omnicare v. Laborers Dist. Council,
575 U.S. 175 (2015) 18

In re Paypal Deriv. Litig.,
2018 WL 466527 (N.D. Cal. Jan. 18, 2018) 19

Pettry v. Smith,
2021 WL 2644475 (Del. Ch. June 28, 2021), *aff'd*, 273 A.3d 750 (Del. 2022) 30

Plumbers & Pipefitters v. Zimmer,
679 F.3d 952 (7th Cir. 2012) 5, 28

Plumley v. Sempra Energy,
2017 WL 2712297 (S.D. Cal. June 20, 2017) 34

In re Qualcomm FCPA Deriv. Litig.,
2017 WL 2608723 (Del. Ch. June 16, 2017) 30

Ray v. Karris,
780 F.2d 636 (7th Cir. 1985) 22

Resnik v. Woertz,
774 F. Supp. 2d 614 (D. Del. 2011) 20

Richardson v. Clark,
2020 WL 7861335 (Del. Ch. Dec. 31, 2020) 22

Sherman v. Ryan,
911 N.E.2d 378 (Ill. App. 2009) 35

Smykla v. Molinaroli,
85 F.4th 1228 (7th Cir. 2023) 17, 18

South v. Baker,
62 A.3d 1 (Del. Ch. 2012) 24

Staehr v. Mack,
2011 WL 1330856 (S.D.N.Y. Mar. 31, 2011) 36

Stone v. Ritter,
911 A.2d 362 (Del. 2006) 22, 23, 24

Tilden v. Cunningham,
2018 WL 5307706 (Del. Ch. Oct. 26, 2018) 33

TSC Indus. v. Northway,
426 U.S. 438 (1976) 17

United Food & Comm. Workers v. Zuckerberg,
262 A.3d 1034 (Del. 2021) 15

In re Vaxart Litig.,
2021 WL 5858696 (Del. Ch. Nov. 30, 2021) 32

In re Wayfair Sec. Litig.,
471 F. Supp. 3d 332 (D. Mass. 2020) 34

In re Zimmer Biomet Deriv. Litig.,
2021 WL 3779155 (Del. Ch. Aug. 25, 2021), *aff'd*, 279 A.3d 356 (Del. 2022) 27

Statutes & Rules

15 U.S.C. § 78n(a)(1) 16

15 U.S.C. § 78u-4(b)(1)(B) 16

805 ILCS 5/7.75 7

805 ILCS 5/7.80(b) 14-15

Fed. R. Civ. P. Rule 8 38

Fed. R. Civ. P. 12(b)(6) 14

Fed. R. Civ. P. 23.1 ..... 2, 15, 38

Fed. R. Civ. P. 23.1(a) 1, 37

Fed. R. Civ. P. 23.1(b)(3) 1, 15

SEC Rule 14a-9, 17 C.F.R. § 240.14a-9(a) 16-18

79 Fed. Reg. 7934, 7987 (Feb. 10, 2014) 2, 3

Preliminary Statement

In February 2022, Abbott Laboratories temporarily stopped production of powdered infant formula at its facility in Sturgis, Michigan, and recalled certain lots of formula that had been produced there. Civil lawsuits against Abbott followed. Now, two Abbott shareholders pursue this shareholder derivative action on Abbott's behalf, seeking to take from Abbott's Board of Directors the authority to decide what litigation Abbott should file, and to force Abbott to sue current and former Abbott directors, officers, and an employee. Plaintiffs assert claims under § 14(a) and § 10(b) of the Securities Exchange Act of 1934 and additional claims under Illinois law.

However, Plaintiffs bring these claims without first having made a demand on Abbott's Board. To pursue claims on a corporation's behalf without making a pre-suit demand, a shareholder must establish that demand is excused, by pleading "with particularity" facts showing that a majority of the corporation's board could not exercise disinterested business judgment concerning each claim. Fed. R. Civ. P. 23.1(b)(3). Here, despite their voluminous complaint, the sole reason Plaintiffs allege a majority of Abbott's Board could not disinterestedly consider any of Plaintiffs' seven claims is because a majority of the Board supposedly faces a substantial likelihood of *personal* liability on each claim. But Plaintiffs' complaint fails to allege with particularity facts sufficient to excuse demand under Illinois law. As a result, the Court should dismiss each claim for failure to make a pre-suit demand.

Independently, another reason to dismiss is that Rule 23.1(a) prohibits a shareholder from pursuing a derivative action when the shareholder is not acting in the best interest of the corporation's shareholders. Here, Plaintiffs' complaint is founded on allegations that Abbott is currently *contesting* in lawsuits against it—allegations that would, if Plaintiffs were somehow able to prove them, create more liability for Abbott in those other lawsuits than Abbott could likely recoup here. Pursuing claims that, if successful, would cause a net corporate loss is not in Abbott shareholders' best interest and so Rule 23.1(a) bars Plaintiffs from bringing these claims.

Finally, past the independent threshold issues under Rule 23.1, Plaintiffs make no allegations whatsoever of wrongful conduct by certain officer defendants—they simply name them as defendants and allege basic facts about them. Those claims should also be dismissed for failure to state a claim.

Background

Abbott Laboratories is a healthcare company incorporated in Illinois and headquartered in Abbott Park, Illinois. (Dkt. #92 ("Compl.") ¶ 26) Abbott has more than 115,000 employees across more than 160 countries and operates 88 manufacturing facilities worldwide. (Ex. 1 at 4, 15) Its business is divided into four principal divisions: Medical Devices, Diagnostics, Pharmaceuticals, and Nutrition. (*Id.* at 15) The Nutrition division has 14 manufacturing sites and three main product lines: infant formula (both powdered and liquid), adult and pediatric nutrition products (such as Ensure and Pedialyte), and tube-fed products used in healthcare facilities. (*Id.* at 2, 15) U.S. sales of all Nutrition division pediatric products constitute less than 4% of Abbott's revenues. (*Id.* at 50; Compl. ¶ 26)

A. Powdered Infant Formula And Cronobacter

Notwithstanding the breadth of Abbott's businesses and products, Plaintiffs' claims focus narrowly on powdered infant formula made at just one Abbott facility, in Sturgis, Michigan. Powdered infant formula is different from liquid infant formula. Although liquid formula is produced through a process that sterilizes it, powdered formula is not. The FDA has explained that, "based on current technologies, it is not possible to produce a sterile powdered infant formula." 79 Fed. Reg. 7934, 7987 (Feb. 10, 2014). One type of potential contaminant in powdered formula is Cronobacter, which is a naturally occurring bacteria that the FDA describes as "ubiquitous." (Ex. 2) According to the FDA, Cronobacter can live on "kitchen counters, sinks, breast pumps, bottles, and food manufacturing equipment." (*Id.*) "While Cronobacter is generally harmless to adults, in young infants with their underdeveloped immune systems," it can pose serious complications. (Compl. ¶ 135) Even so, be-

cause Cronobacter is naturally ubiquitous and because powdered formula is not sterile, the FDA regulation on infant formula "does not establish a zero tolerance for Cronobacter." 79 Fed. Reg. at 7987.

The ubiquity of Cronobacter in the environment is significant, given Plaintiffs' allegations that infants who consumed Abbott powdered infant formula fell ill with Cronobacter infections. (*E.g.*, Compl. ¶ 13) Even when an infant becomes ill and the formula the infant consumed tests positive for Cronobacter, that does not mean Cronobacter was introduced during the manufacturing process, rather than, for example, in the home after the formula was opened. Powdered formula often does not come in single-serving containers, but in larger cans that may last days or weeks after being opened. Cronobacter may be introduced into the can or the infant's bottles at any point during that time. As the CDC explains, Cronobacter has been "recovered from many … environmental sources in the home, including kitchen sink surfaces, pacifiers, bottles, household utensils, vacuum cleaning bags, and other foods." (Ex. 3 at 224) The CDC further explains that "[i]n the home, Cronobacter could get into powdered formula in these ways," including "[i]f you place formula lids or scoops on contaminated surfaces and later touch the formula" or "[i]f you mix the formula with contaminated water or in a contaminated bottle." (Ex. 4)

B. The Alleged Corporate Trauma: The Recall And Consent Decree

Plaintiffs allege that, on February 15, 2022, Abbott acceded to a request from the FDA to stop production at the Sturgis facility. (Compl. ¶ 208) On February 17, 2022, the FDA announced that it was "investigating consumer complaints of Cronobacter sakazakii and Salmonella Newport infections" that were suspected of being linked to powdered infant formula produced at Abbott's Sturgis facility and simultaneously issued a press release "advising consumers not to use Similac, Alimentum, or EleCare powdered infant formulas" produced there. (*Id.* ¶ 210) The same day, Abbott announced a recall of certain lots of Similac, Alimentum, and EleCare powdered infant formula. (*Id.*)

Although the FDA's initial announcement stated it was investigating potential links to

Cronobacter and Salmonella infections, the FDA and CDC "later determined the Salmonella case to be unrelated to the Abbott Nutrition facility." (Ex. 5 at 13) The CDC also conducted genetic testing on samples from two infants who had fallen ill from Cronobacter—the only samples available—and compared them to bacteria identified at Sturgis. They did not match: The CDC "did not find these samples from patients to be closely genetically related to the multiple strains of Cronobacter found in the environmental samples obtained from Abbott Nutrition's Sturgis, MI facility." (Ex. 6 at 3) The CDC also compared the samples from the two infants against each other to determine whether the infants were infected with the same Cronobacter strain, which might indicate a common cause. Again, they did not match: The bacteria from the two infants "were not closely related to one another." (*Id.*)

On May 16, 2022, Abbott and three Nutrition division employees (including Defendant Lori Randall) signed a civil consent decree with the Department of Justice. (Compl. ¶ 246) The consent decree does not contain any admission of wrongdoing by Abbott. No Abbott director or officer is even mentioned in the consent decree, much less a party to it. The consent decree "sets out what Abbott must do to resume safely manufacturing infant formula at the Sturgis facility." (Ex. 7) On June 4, 2022, just three weeks later, Abbott restarted production at Sturgis. (Compl. ¶ 2)

C. Sturgis's FDA Inspection History

Plaintiffs assert the Sturgis facility "was a repeat violator of federal food safety regulations going back decades, resulting in the issuance of 'Form 483s' by the FDA." (Compl. ¶ 8) This assertion lacks well-pled allegations in support:

First, an FDA Form 483 is not an assertion by the FDA that a facility has violated the law. A Form 483 "does not constitute a final Agency determination of whether any condition is in violation of the FD&C Act or any of its relevant regulations." (Ex. 8) Rather, "[a]n FDA Form 483 is issued to firm management at the conclusion of an inspection when an investigator(s) has observed any conditions that in *their* judgment *may* constitute violations of the Food Drug and Cosmetic (FD&C)

Act." (*Id.* (emphasis added); Compl. ¶ 92) As the Seventh Circuit has explained, "[i]n industry jargon, a '483' is an observation by an inspector, providing information about 'significant objectionable conditions' (not serious enough to merit a warning or any formal action by the agency) that the inspector believes will be useful to the company." *Plumbers & Pipefitters v. Zimmer*, 679 F.3d 952, 955 (7th Cir. 2012). FDA inspectors issue *thousands* of Form 483s each year to a wide variety of companies. (Ex. 9)

Second, Plaintiffs fail to allege facts supporting their assertion that Sturgis was a "repeat violator of federal food safety regulations going back decades, resulting in the issuance of 'Form 483s' by the FDA." (Compl. ¶ 8) To begin, Plaintiffs acknowledge that the FDA typically inspected Sturgis annually (*id.* ¶ 92), but Plaintiffs do not allege that Sturgis ever received a Form 483—or any other type of notice of potential non-compliance—prior to 2019. Indeed, Plaintiffs do not allege *anything* about Sturgis's FDA inspection history prior to 2019.[1]

In September 2019, Plaintiffs allege, FDA inspectors inspected Sturgis and subsequently issued a Form 483. (*Id.* ¶ 151) However, Plaintiffs fail to allege what the Form 483 stated, switching instead to discuss an "Establishment Inspection Report," not the Form 483. (*Id.*) Even so, the Form 483 is incorporated by reference into the complaint (and was part of Abbott's books and records production, *see infra* at 7). The Form 483 stated it "d[id] not represent a final Agency determination." (Ex. 10 at 35) It made a single observation: [redacted] (*Id.*)[2] When FDA inspectors issue a Form 483, the receiving company has 15 days to respond with a root cause analysis and corrective plan. (Compl. ¶ 94) Plaintiffs do not

[1] Plaintiffs do allege a "flour beetle infestation" at Sturgis in 2010—*twelve years* before the 2022 recall. (Compl. ¶ 100) Plaintiffs do not allege the FDA issued any regulatory notice regarding that incident. And they acknowledge Abbott remediated the issue. (*Id.*)

[2] [redacted]

allege the FDA challenged Abbott's response to the Form 483—or issued a Warning Letter[3] or brought an enforcement action after receiving the response. [redacted] (Ex. 12 at 37)

The only other Form 483 that Plaintiffs allege FDA inspectors issued to Sturgis at any point prior to the 2022 recall was in September 2021. (Compl. ¶ 188) Again the Form 483 stated it "d[id] not represent a final Agency determination regarding your compliance." (Ex. 13 at 37) The Form 483 made five observations, most of which were highly technical. (*E.g.*, *id.* at 38 (asserting certain pressure and flow sensors were not properly calibrated))[4] Again, Plaintiffs do not allege the FDA objected to Abbott's response to the Form 483 or that the FDA took any escalated action, such as a Warning Letter or an enforcement action, after receiving the response.

D. Plaintiffs' Allegations About "Whistleblowers"

Plaintiffs also make allegations about two unnamed former Sturgis employees, who they characterize as "whistleblowers." (Compl. ¶ 102) Plaintiffs do not appear to have spoken to either individual, but instead rely on public documents purporting to describe their views. (*Id.* at p. 1 (not indicating Plaintiffs' lawyers' investigation included any witness interviews)) Moreover, although the two anonymous former employees supposedly described several issues with Sturgis, Plaintiffs do not allege the employees described wrongful conduct by any Defendant in this case. (*Id.* ¶¶ 103-18) Nor do Plaintiffs allege the employees reported wrongful conduct *to* any Defendant in this case. (*Id.*) To the

[3] A Warning Letter represents a determination by the FDA "that a manufacturer has significantly violated FDA regulations." (Ex. 11)

[4] Plaintiffs highlight the Form 483's third observation, regarding handwashing, alleging it was "shocking." (Compl. ¶ 188) Although Defendants do not defend the conduct, the Form 483 explains the inspectors were referring to a single instance in which a single employee did not wash his hands. (Ex. 13 at 38 ("on 09/20/2021, in the Mineral Weigh Room, the Processing Operator did not sanitize nor change his gloves after touching non-food contact surfaces," and his "exposed wrists … were observed entering the inside" of an "ingredient bag")) The inspectors did not assert they detected any microbiological contamination associated with this observation, nor did they purport to have observed other instances of such conduct. (*Id.*)

contrary, Employee #1 allegedly said Sturgis employees concealed their wrongful conduct from management at the Division and Corporate levels. (*Id.* ¶ 103; *see also id.* ¶ 123 (alleging individuals "repeatedly misled officials at the division and corporate level"))[5]

E. The Directors' Oversight Of Abbott's Compliance Risk

A key allegation in Plaintiffs' complaint is that Abbott's Board [redacted] (Compl. ¶ 14) This allegation is intended to support Plaintiffs' claim that the Board breached its fiduciary duties to Abbott. *Infra* Part I.C. However, before Plaintiffs filed suit, Abbott produced to them, in response to books and records inspection demands (pursuant to 805 ILCS 5/7.75), non-privileged board material concerning product quality or safety from the period 2017 through June 2022.[6] [redacted]

1. The Structure Of The Directors' Oversight Of Compliance.

As an initial matter, the books and records production establishes [redacted]

[5] Plaintiffs also allege Employee #1 filed a complaint with the Occupational Safety and Health Administration. (*Id.* ¶ 179) Plaintiffs allege [redacted]

[6] Abbott and Plaintiffs agreed that the books and records Abbott produced are part of the record the Court can consider on a motion to dismiss. (Ex. 14, ¶ 15); *see also Amalgamated Bank v. Yahoo!*, 132 A.3d 752, 796-97 (Del. Ch. 2016) (recognizing the propriety of such an agreement).

[redacted]

[redacted]

7 [redacted]

[redacted]

2. The Directors' Scheduled Oversight Of Compliance Risk.

The books and records production also shows that [redacted]

[redacted]

[redacted]

[redacted]

[8] [redacted]

3. The Directors' Oversight Of Specific Compliance Issues.

[redacted]

[redacted]

[redacted]

[redacted]

9 [redacted]

[redacted]

[redacted]

Argument

Plaintiffs' complaint asserts seven claims, for: (1) false or misleading proxy solicitations in violation of § 14(a) of the Securities Exchange Act (Compl. Count I); (2) securities fraud in violation of § 10(b) of the Exchange Act (Count II); (3) breach of the fiduciary duties of directors (Count III); (4) breach of the fiduciary duties of officers (Count IV); (5) insider trading (Count V); (6) corporate waste (Count VI); and (7) unjust enrichment (Count VII). They assert each claim against a changing combination of current and former Abbott directors, officers, and an employee. (*Id.* ¶¶ 27-60)

The Court should grant Defendants' motion to dismiss for three independent reasons. First, as a threshold matter, Plaintiffs did not make a pre-suit demand on Abbott's Board to bring these claims, and Plaintiffs' complaint does not allege facts sufficient to excuse this failure, for any of their claims. Second, Plaintiffs' complaint pursues allegations that, if Plaintiffs prove them, could undermine Abbott's defenses in other pending litigation, which could cause Abbott to incur more in liability there than it could likely recover here—which is not in the best interests of Abbott's shareholders. Finally, Plaintiffs' allegations about some of the officer defendants do not state a claim that they acted wrongfully, even under the relatively lower Rule 12(b)(6) standard.

I. Plaintiffs Do Not Plead With Particularity Facts Excusing Their Failure To Make A Demand On Abbott's Board Before Filing Suit.

It is a fundamental principle of corporate governance that "the decisions of a corporation—including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders." *Kamen v. Kemper Fin.*, 500 U.S. 90, 101 (1991). To protect this role of the board, Illinois law requires that before a shareholder can pursue a claim on behalf of a corporation, it must first make a demand on the corporation's board that it initiate the proposed claim. 805 ILCS

5/7.80(b). This demand requirement allows "the directors an opportunity to exercise their reasonable business judgment" to determine whether litigation is in the best interest of the corporation. *Kamen*, 500 U.S. at 96.

If the shareholder does not make a pre-suit demand, the lawsuit must be dismissed unless the shareholder establishes in its complaint that the demand requirement is "excused by extraordinary conditions." *In re Huron Consulting Deriv. Litig.*, 971 N.E.2d 1067, 1076 (Ill. App. 2012). "The upshot is that derivative plaintiffs must show that a court should usurp the business judgment rule, which normally protects directors' decisions." *Dorvit v. Winemaster*, 950 F.3d 984, 988 (7th Cir. 2020). Federal Rule of Civil Procedure 23.1 creates a heightened pleading standard for a shareholder attempting to plead demand is excused: The complaint must "state *with particularity* … the reasons for … not making the effort" of a demand. Fed. R. Civ. P. 23.1(b)(3) (emphasis added).

Although "federal law determines whether a plaintiff has stated the facts with sufficient detail, state law determines whether a plaintiff's stated reasons are sufficient as a matter of substantive law." *Lowinger v. Oberhelman*, 924 F.3d 360, 366 (7th Cir. 2019). Here, because Abbott is an Illinois corporation, Illinois law governs whether demand is excused. *Kamen*, 500 U.S. at 98-99. Illinois follows Delaware law on this question. *E.g.*, *Bhatia v. Vaswani*, 2019 WL 4674571, *9 (N.D. Ill. Sept. 25, 2019). Consequently, demand is excused for a claim if a majority of directors on the board at the time the complaint was filed (1) "received a material personal benefit from the alleged misconduct" that would be the subject of the claim; (2) "face[s] a substantial likelihood of liability" on the claim; or (3) "lacks independence from someone who received a material personal benefit from the alleged misconduct." *United Food & Comm. Workers v. Zuckerberg*, 262 A.3d 1034, 1058 (Del. 2021).

Plaintiffs assert demand is excused for each of their seven claims based exclusively on the second *Zuckerberg* prong—that a majority the Board faces a substantial likelihood of personal liability on each claim. Their allegations are not sufficient for any of the claims.

A. Plaintiffs Do Not Plead With Particularity Facts Showing That A Majority Of The Board Faces A Substantial Likelihood Of Liability Under § 14(a) For False Or Misleading Statements When Solicitating Shareholder Votes.

Plaintiffs do not plead facts establishing that a majority of the Board faces a substantial likelihood of personal liability under § 14(a), 15 U.S.C. § 78n(a)(1). Section 14(a) prohibits soliciting a shareholder's vote in violation of SEC rules and regulations. SEC Rule 14a-9, in turn, prohibits soliciting a shareholder's vote through any communication:

> containing any statement which, at the time and in light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.

17 C.F.R. § 240.14a-9(a). The elements of a § 14(a) claim for violation of Rule 14a-9 are: "(i) that the proxy statement contained a material misstatement or omission that (ii) caused the plaintiff's injury, and (iii) that the proxy solicitation was an essential link in accomplishing the transaction." *Kuebler v. Vectren Corp.*, 13 F.4th 631, 637 (7th Cir. 2021). Plaintiffs' allegations do not establish a substantial likelihood of personal liability for the Board members under these elements.

First, Plaintiffs do not plead facts showing any statement made in an Abbott proxy solicitation was false or misleading. 15 U.S.C. § 78u-4(b)(1)(B) (a plaintiff must "specify each statement alleged to have been misleading" and "the reason or reasons why the statement is misleading"). Plaintiffs quote various statements in Abbott's proxy materials from 2021, 2022, and 2023. (Compl. Part VIII) But they do not allege with particularity facts showing these statements were inaccurate or misleading. For example, Plaintiffs allege Abbott stated in its proxy statements that the "Board receives regular updates and has oversight over Abbott's environmental, social and governance practices" (*id.* ¶ 297); that Director McDew "contributes significant experience managing large, complex global operations" (*id.* ¶ 301); that "[t]he Public Policy Committee assists the Board of Directors in fulfilling its oversight responsibility with respect to: Certain areas of legal and regulatory compliance" (*id.* ¶ 304); and that "Abbott's risk assessment is reinforced by Abbott's adherence to a number of industry-leading best

practices" (*id.* ¶ 311). Simply quoting statements made in a proxy statement without alleging particularized facts establishing why these statements were inaccurate or misleading is not enough.[10]

Nor can Plaintiffs establish a substantial likelihood of liability based on a theory that Abbott's proxy statements failed to disclose material information. (*E.g.*, Compl. ¶ 294 (alleging Abbott's proxy statements "failed to disclose, among other things, (1) the Company manufactured and sold its infant formula products in the U.S. in violation of federal health and safety laws and regulations; and (2) the seriously deficient internal risk management and controls that allowed those unsafe and illegal conditions to proliferate")) Plaintiffs do not allege Abbott failed to make any mandatory disclosure. Furthermore, Rule 14a-9 does not prohibit a "failure to disclose," but only false or misleading statements. *Accord TSC Indus. v. Northway*, 426 U.S. 438, 462 (1976) ("Rule 14a-9 is concerned only with whether a proxy statement is misleading with respect to its presentation of material facts"); *Smykla v. Molinaroli*, 85 F.4th 1228, 1235 (7th Cir. 2023) ("Rule 14a-9 bars proxy statements that are false and misleading with respect to a material fact or that omit material facts necessary to make the statements not false or misleading.").

Courts have consistently rejected attempts to state a Rule 14a-9 claim merely by alleging that a proxy statement did not disclose certain information. *E.g.*, *In re Fifth Third Bancorp Deriv. Litig.*, 2022 WL 970569, *18 (N.D. Ill. Mar. 30, 2022) ("Plaintiffs fail to provide any facts to suggest why the failure to include information about the allegedly artificially inflated nature of Fifth Third's stock made

[10] Further underscoring the weakness of Plaintiffs' allegations, they assert their § 14(a) claim against director Claire Babineaux-Fontenot, who did not even join the board until September 2022. (Compl. ¶ 30) Plaintiffs allege Babineaux-Fontenot is liable for signing the March 2023 proxy statement, but by then Abbott had already issued the recall, entered into the consent decree, and stopped *and restarted* production at Sturgis. *Supra* at 3-4. Plaintiffs do not allege with particularity any statement in the 2023 proxy materials that was misleading, given all that public information. Similarly, from the opposite end of the timeline, Plaintiffs also assert their § 14(a) claim against former directors Phebe Novakovic and Edward Liddy, both of whom signed the March 2021 proxy statement and subsequently left the Board in April 2021. (Compl. ¶¶ 34, 37) As of April 2021, [redacted] *Supra* at 5.

the Proxy Statements' representations about how executive compensation was determined misleading."); *Smykla*, 85 F.4th at 1236 ("Plaintiffs' belief that failure to discuss alternative merger structures is a material omission does not square with the requirements imposed by the Exchange Act."); *Leykin v. AT&T*, 216 F. App'x 14, 16-17 (2d Cir. 2007) ("Here, nothing in the SEC regulations required that defendants disclose the AT&T defendants' misappropriation scheme, and that omission did not 'make[ ] other statements in the proxy statement materially false or misleading.'").[11]

Second, and independently, many of the alleged misstatements in the proxy statements are also non-actionable puffery.[12] *City of Taylor Police v. Zebra Techs.*, 8 F.4th 592, 595 (7th Cir. 2021). Still other alleged misstatements are opinions, subject to an even higher pleading standard.[13] A plaintiff alleging a claim based on a purported misstatement of opinion or belief must allege that either (1) the maker of the statement did not sincerely believe the opinion; or (2) the opinion did not "fairly align[] with the information in the issuer's possession at the time." *Omnicare v. Laborers Dist. Council*, 575 U.S. 175, 188-89 (2015). Plaintiffs allege neither.

The third and independent reason Plaintiffs' allegations do not establish a substantial likelihood of § 14(a) liability is that Plaintiffs do not plead the proxy solicitations were an essential link in accomplishing any transaction that they allege caused a corporate loss. *Kuebler*, 13 F.4th at 637. This element of a § 14(a) claim means misstatements in a proxy solicitation are actionable only if the shareholder vote they concerned directly approved the transaction alleged to have injured the

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[11] Plaintiffs also identify certain statements from Abbott's website that were *not* used to solicit shareholder proxies. (*E.g.*, Compl. ¶ 298) Such statements do not fall within § 14(a)'s ambit. 14 C.F.R. § 240.14a-9(a).

[12] For example, Plaintiffs identify statements like the Board "spends significant time with Abbott's senior management," "exhibits ... Commitment to good corporate citizenship," is "highly qualified," and employs a "leadership structure [that] ensures the appropriate level of oversight, independence and responsibility" and provides "flexibility" and "cohesive leadership." (Compl. ¶¶ 296, 300, 306, 314, 318, 336, 340, 348, 356)

[13] For example, "Abbott determined its compensation and benefit programs appropriately align employees' compensation and performance without incentivizing risky behaviors" and "the Board believes that the current [chairperson] structure is in the best interests of Abbott." (Compl. ¶¶ 311, 333, 336, 349, 353, 356)

corporation. *Id.* at 638 (the misstatement in the proxy solicitation must have "caused the plaintiff to engage in the challenged transaction"). Appellate precedent uniformly holds that "the mere fact that omissions in proxy materials, by [for example] permitting directors to win re-election, *indirectly* lead to financial loss through mismanagement will not create a sufficient nexus with the alleged monetary loss." *General Elec. v. Cathcart*, 980 F.2d 927, 933 (3d Cir. 1992) (emphasis in original). "Rather, damages are recoverable under Section 14(a) only when the votes for a specific corporate transaction requiring shareholder authorization, such as a corporate merger, are obtained by a false proxy statement, and that transaction was the direct cause of the pecuniary injury for which recovery is sought." *Id.*; *Edward J. Goodman Life Tr. v. Jabil Circuit*, 594 F.3d 783, 796-97 (11th Cir. 2010) (similar); *Gaines v. Haughton*, 645 F.2d 761, 775 (9th Cir. 1981) (similar); *accord Miller v. Loucks*, 1992 WL 329313, *12 (N.D. Ill. Nov. 5, 1992); *Koplin v. Labe Fed.*, 748 F. Supp. 1336, 1343 (N.D. Ill. 1990); *Issen v. GSC Enters.*, 522 F. Supp. 390, 396 (N.D. Ill. 1981); *Hastey v. Welch*, 449 F. Supp. 3d 1053, 1064-68 (D. Kan. 2020); *In re AGNC Inv.*, 2018 WL 3239476, *4-6 (D. Md. July 3, 2018). In other words, "a Section 14(a) claim requires that the votes solicited by a false proxy statement directly authorize the loss-generating corporate action." *In re Paypal Deriv. Litig.*, 2018 WL 466527, *4 (N.D. Cal. Jan. 18, 2018).

For instance, in *General Electric v. Cathcart*, the plaintiff alleged a § 14(a) claim based on a proxy solicitation that failed to disclose alleged corporate misconduct, including alleged fraudulent billing practices. 980 F.2d at 929. But the proxy statements on which the claim was based solicited votes for reelection of the board of directors; the proxy solicitations did not seek shareholder authorization for any of the conduct or transactions that allegedly harmed the corporation. *Id.* at 930, 933. Thus, the court affirmed dismissal of the § 14(a) claim.

Similarly, in *Gaines v. Haughton*, a shareholder brought a derivative action pleading federal securities claims and state law breach of fiduciary duty claims, just like Plaintiffs here. 645 F.2d at 765. The plaintiff alleged that the defendants—directors and officers—had bribed foreign governments

and government officials during a 14-year period and concealed that wrongdoing from shareholders through false and misleading proxy statements. *Id.* at 765-66. The court held that the plaintiff's allegations did not constitute a § 14(a) claim. It reasoned:

> We decline to extend the duty of disclosure under § 14(a) to these situations. While we neither condone nor condemn these and similar types of corporate conduct (including the now-illegal practice of questionable foreign payments), we believe that aggrieved shareholders have sufficient recourse to state law claims against the responsible directors and, if all else fails, can sell or trade their stock in the offending corporation in favor of an enterprise more compatible with their own personal goals and values.

Id. at 778-79. Thus, the court affirmed the dismissal of the plaintiff's § 14(a) claim.

Here, Plaintiffs do not allege a direct connection between their allegations of wrongdoing and any shareholder vote. Plaintiffs challenge the 2021, 2022, and 2023 votes (1) for the election of Abbott directors; (2) for executive compensation (advisory only)[14]; and (3) against a proposal to separate the CEO and Board chair positions. (Compl. ¶¶ 310-16, 332-38, 352-58) In other words, Plaintiffs do not allege the shareholders voted how Abbott should operate the Sturgis facility or what public statements Abbott should make about its manufacturing controls. The corporate actions the shareholders voted on are the same types of actions at issue in the decisions cited above that the courts held did not support a § 14(a) claim.

The final independent reason Plaintiffs' allegations do not establish a substantial likelihood of § 14(a) liability is that Plaintiffs do not allege any economic injury from the supposedly tainted shareholder votes. *E.g.*, *Resnik v. Woertz*, 774 F. Supp. 2d 614, 632 (D. Del. 2011) (allegation of a tainted shareholder vote "is insufficient to meet the loss causation requirement").

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[14] Proxy solicitations for advisory votes on compensation cannot support § 14(a) claims "because the officers' compensation [is] not dependent on a shareholder vote" and thus the proxy statement is obviously "not an 'essential link' in approving the compensation." *In re Marriott Customer Data Sec. Breach Litig.*, 2021 WL 2401641, *17 (D. Md. June 11, 2021); *see also Hastey*, 449 F. Supp. 3d at 1067 ("Since the advisory votes on executive compensation authorized no corporate action, plaintiff cannot rely on this vote to satisfy Section 14(a)'s 'essential link' requirement.").

B. Plaintiffs Do Not Plead With Particularity Facts Showing That A Majority Of The Board Faces A Substantial Likelihood Of Liability Under § 10(b) For Securities Fraud.

Plaintiffs do not plead facts showing that a majority of the Board faces a substantial likelihood of personal liability under § 10(b). Plaintiffs allege the Board "caused the Company to issue" fraudulent statements that "artificially inflated and/or maintained the price of Abbott shares" and "caused Abbott to make share repurchases" at the fraudulently inflated prices. (Compl. ¶¶ 359-60) In other words, Plaintiffs assert that Abbott—through its Board—committed securities fraud *against itself*.

This theory of liability is not viable. A necessary element of a § 10(b) claim is that the plaintiff must have "relied on the defendant's misrepresentation in deciding to buy or sell a company's stock." *Halliburton v. Erica P. John Fund*, 573 U.S. 258, 263 (2014); *see also Dura Pharm. v. Broudo*, 544 U.S. 336, 341 (2005) (justifiable reliance is an element of a § 10(b) claim). Here, Plaintiffs allege Abbott was deceived when it repurchased stock (*e.g.*, Compl. ¶ 395), but Abbott "cannot literally be deceived" because a corporation is "simply a form of organization used by human beings." *Elfers v. Gonzalez*, 2020 WL 7264272, *3 (D. Del. Dec. 10, 2020). Consequently, to plead that Abbott was deceived, Plaintiffs must allege facts demonstrating that the people who made repurchase decisions for Abbott were deceived. Plaintiffs fail to do so. To the contrary, Plaintiffs allege the people who authorized the repurchases of stock were the directors—the same people Plaintiffs claim knowingly made fraudulent statements. (*Compare* Compl. ¶ 361 ("Abbott's Board periodically authorizes the Company to repurchase its own shares"), *with id.* ¶ 359 (alleging the Board "issued, and caused the Company to issue" materially misleading representations that "artificially inflated and/or maintained the price of Abbott shares"))

"A story of deception needs two characters: the liar and the dupe." *Elfers*, 2020 WL 7264272 at *2. Here, Plaintiffs' story "fails because it has only one character." *Id.* at *3. Abbott's Board "could not have both lied about the wrongdoing and yet been tricked by those lies." *Id.*; *see Mayer v. Spanel*

Int'l, 51 F.3d 670, 676 (7th Cir. 1995) ("If the investor possesses information sufficient to call the representation into question, he cannot claim later that he relied on or was deceived by the lie."); *Ray v. Karris*, 780 F.2d 636, 641 (7th Cir. 1985) ("To the extent knowledge can be imputed to the corporation, it is impossible to state that the corporation was deceived by or relied on any misrepresentations or omissions."). Plaintiffs' "theory—that the defendant directors spread misleading information and then the same directors relied on and were deceived by that false information when they approved stock buy backs—is factually impossible and cannot lead to any relief under § 10(b)." *Franklin v. Doheny*, 2022 WL 2064972, *2 (D. Del. June 8, 2022), *report and recommendation adopted*, 2022 WL 3099235 (D. Del. June 23, 2022).

C. Plaintiffs Do Not Plead With Particularity Facts Showing That A Majority Of The Board Faces A Substantial Likelihood Of Liability For Breach Of Fiduciary Duty.

Plaintiffs do not plead with particularity facts showing that a majority of Abbott's Board faces a substantial likelihood of personal liability for breach of fiduciary duty. As a threshold matter, the directors' potential liability on a breach of fiduciary duty claim is limited by Abbott's Articles of Incorporation, which exculpate Abbott directors from liability for breaches of the duty of care. *See Bronstein v. Austin*, 2008 WL 4735230, *4 (N.D. Ill. May 30, 2008) (recognizing the validity of this provision).[15] When a company adopts such a provision, a shareholder can plead a likelihood of director liability only by alleging facts sufficient to establish a breach of the duty of loyalty. *Stone v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006). Doing so requires alleging particularized facts showing that the directors "acted in bad faith—that is 'that the directors acted with scienter.'" *Richardson v. Clark*, 2020

[15] Plaintiffs cite and rely on Abbott's Articles in the complaint, so the Court can consider them on this motion to dismiss. (Compl. ¶ 420); *Kuebler*, 13 F.4th at 636. The provision at issue reads in relevant part: "A director of the corporation shall not be personally liable to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the corporation or its shareholders, (ii) for acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law, (iii) under Section 8.65 of the Illinois Business Corporation Act, or (iv) for any transaction from which the director derived an improper personal benefit." (Ex. 77, Art. R-VI(1))

WL 7861335, *9 (Del. Ch. Dec. 31, 2020). In other words, the complaint must allege "facts that support a fair inference that the directors *consciously* acted in a manner contrary to the interests of [the Company] and its stockholders." *In re Lear Corp.*, 967 A.2d 640, 652 (Del. Ch. 2008) (emphasis added).

Here, Plaintiffs allege the directors breached their duty of loyalty to Abbott "by failing to oversee that the Company manufactured and sold its U.S. infant formulas in a safe manner that complied with federal food safety regulations." (Compl. ¶ 419) This is a "failure of oversight" claim, also called a "*Caremark* claim." Because "of the difficulties in proving bad faith director action," a *Caremark* claim is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *City of Birmingham Ret. v. Good*, 177 A.3d 47, 55 (Del. 2017).

To plead a substantial likelihood of *Caremark* liability, a plaintiff must allege particularized facts showing either that: (1) "the directors *utterly failed* to implement any reporting or information system or controls," called *Caremark* prong 1; or (2) "having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention," called *Caremark* prong 2. *Stone*, 911 A.2d at 370 (emphasis added). Under either prong, the plaintiff must further plead that each director "acted inconsistent with his fiduciary duties and, most importantly, that the director *knew* he was so acting." *McElrath v. Kalanick*, 224 A.3d 982, 991-92 (Del. 2020) (emphasis added).

Importantly, an assertion that the directors' oversight failed to prevent a corporate injury does not satisfy the *Caremark* standard. As the Delaware Supreme Court has explained, such a theory "seeks to equate a bad outcome with bad faith." *Stone*, 911 A.2d at 373. Using hindsight in this manner constitutes a "failure to recognize that the directors' good faith exercise of oversight responsibility may not invariably prevent employees from violating criminal laws, or from causing the corporation to incur significant financial liability, or both." *Id.* Thus, precedent rejects the conclusion "that since the Company suffered large losses, and since a properly functioning risk management system would

have avoided such losses, the directors must have breached their fiduciary duties in allowing such losses." *In re Citigroup Deriv. Litig.*, 964 A.2d 106, 128 (Del. Ch. 2009); *see also In re Goldman Sachs Litig.*, 2011 WL 4826104, *4, *18-23 (Del. Ch. Oct. 12, 2011) (refusing to infer director bad faith from allegations that the company was fined $535 million by a regulator); *South v. Baker*, 62 A.3d 1, 8-9, 16 (Del. Ch. 2012) (allegation that a fatal mine accident resulted from management's failure to implement required safety policies was insufficient to establish director bad faith); *David B. Shaev Profit Sharing Account v. Armstrong*, 2006 WL 391931, *5 (Del. Ch. Feb. 13, 2006), *aff'd*, 911 A.2d 802 (Del. 2006) (rejecting the contention that "only a board violating its fiduciary duties could possibly have remained ignorant of Citigroup's allegedly corrupt relationships with Enron and WorldCom").

Plaintiffs do not plead with particularity facts showing a substantial likelihood of personal liability for the Board members with respect to either *Caremark* prong. Indeed, Plaintiffs' allegations and Abbott's books and records production forecloses either claim.

1. Plaintiffs Do Not Plead A Substantial Likelihood Of Liability Under *Caremark* Prong 1.

When overseeing their company, "directors have great discretion to design context- and industry-specific approaches tailored to their companies' businesses and resources." *Marchand v. Barnhill*, 212 A.3d 805, 821 (Del. 2019). "But *Caremark* does have a bottom-line requirement that is important: the board must make a good faith effort—*i.e.*, try—to put in place a reasonable board-level system of monitoring and reporting." *Id.* As a result, to plead a substantial likelihood of liability under *Caremark* prong 1, a plaintiff must allege with particularity facts showing that "the directors utterly failed to implement any reporting or information system or controls." *Stone*, 911 A.2d at 370. The phrase "'[u]tterly failed' is a linguistically extreme formulation." *Horman v. Abney*, 2017 WL 242571, *8 n.46 (Del. Ch. Jan. 19, 2017). It means "carried to the utmost point or highest degree; absolute, total." *Id.* Precedent "gives deference to boards and has dismissed *Caremark* cases even when illegal or harmful company activities escaped detection, when the plaintiffs have been unable to plead that the board

failed to make the required good faith effort to put a reasonable compliance and reporting system in place." *Marchand*, 212 A.3d at 821. In addition, *Caremark* prong 1 also "requires a pleading of scienter, demonstrating bad faith." *Constr. Indus. Laborers v. Bingle*, 2022 WL 4102492, *1 (Del. Ch. Sept. 6, 2022), *aff'd*, 297 A.3d 1083 (Del. 2023).

Here, Plaintiffs assert [redacted] (Compl. ¶ 140) But this assertion is foreclosed by the books and records themselves, which show that, in light of their responsibility to oversee a large company with many employees and products (*supra* at 2), the Board [redacted]. Plaintiffs' allegations focus on additional oversight they suggest—with the benefit of hindsight—the Board could have done, but those are criticisms of the *efficacy* of the oversight, not an allegation of an *utter failure* to oversee, which is the standard *Caremark* prong 1 allegations must meet.

[redacted]

[redacted]

Unlike FDA Form 483s, Warning Letters are formal notices from the FDA, representing the FDA's conclusion "that a manufacturer has significantly violated FDA regulations." (Ex. 11) Abbott's books and records demonstrate that [redacted]

These documents foreclose Plaintiffs' assertion that the Board faces a substantial likelihood of personal liability under *Caremark*'s first prong. As the Delaware Supreme Court has explained, "plaintiffs usually lose [prong 1 claims] because they must concede the existence of board-level systems of monitoring and oversight such as a relevant committee, a regular protocol requiring board-

level reports about the relevant risks, or the board's use of third-party monitors, auditors, or consultants." *Marchand*, 212 A.3d at 823. Here, the oversight shown in Abbott's books and records falls squarely within the legion of decisions refusing to excuse demand for *Caremark* prong 1 claims and accordingly dismissing such claims for failure to make a pre-suit demand. *Accord In re Novavax Deriv. Litig.*, 2023 WL 5353171, *11 (D. Md. Aug. 21, 2023) (no failure of oversight where the directors "regularly received substantial updates from management on the manufacturing and development of the Vaccine"); *In re Zimmer Biomet Deriv. Litig.*, 2021 WL 3779155, *22 (Del. Ch. Aug. 25, 2021), *aff'd*, 279 A.3d 356 (Del. 2022) (no oversight failure where the board oversaw "regulatory compliance at multiple meetings where it received updates on FDA inspections and voluntary internal audits at Zimmer's facilities"); *In re GM Deriv. Litig.*, 2015 WL 3958724, *15 (Del. Ch. June 26, 2015), *aff'd*, 133 A.3d 971 (Del. 2016) (no oversight failure where the directors "reviewed GM's risk management structure regularly … and that the Board was given presentations on safety and quality issues"); *City of Detroit Police v. Hamrock*, 2022 WL 2387653, *15 (Del. Ch. June 30, 2022) (no utter failure of oversight where "the ES&S Committee tried to fulfill its charge—meeting five times a year, receiving extensive reports from senior executives, and regularly reporting on safety risks to the full Board") (internal footnotes omitted); *Constr. Indus. Laborers*, 2022 WL 4102492 at *12 (no utter failure of oversight where "the committee not only met, but [] met and discussed the pertinent issue, cybersecurity"); *Firemen's Ret. Sys. v. Sorenson*, 2021 WL 4593777, *13 (Del. Ch. Oct. 5, 2021) (no failure of oversight where "the Board and Audit Committee were 'routinely apprised' on cybersecurity risks and mitigation, provided with annual reports on the Company's Enterprise Risk Assessment that specifically evaluated cyber risks, and engaged outside consultants to improve and auditors to audit corporate cybersecurity practices"); *MetLife*, 2020 WL 4746635 at *13 n.188 (no failure of oversight where the directors had relevant board committees that "meet regularly" and "receive[] reports from MetLife's internal auditor," and where other specific issues reached the board). The same result—dismissal of Plaintiffs' claim

for failure to make the necessary pre-suit demand—follows here.

Rather than alleging an utter failure to oversee compliance risk, at best Plaintiffs' allegations assert ways Plaintiffs think the Board could have better overseen compliance. This hindsight second-guessing is irrelevant because an allegation that a board's oversight was insufficient does not establish the requisite bad faith/utter failure of oversight. *E.g.*, *Marchand*, 212 A.3d at 821 (boards have "great discretion" to make judgments about how to oversee their companies); *GM*, 2015 WL 3958724 at *14 ("In other words, GM *had* a system for reporting risk to the Board, but in the Plaintiffs' view it should have been a better system.").

For example, Plaintiffs fault the Board for [redacted] Such a theory fails from the outset, for "the lack of a system of controls with respect to a *particular* incarnation of risk does not itself demonstrate bad faith." *Constr. Indus. Laborers*, 2022 WL 4102492 at *9; *see also Novavax*, 2023 WL 5353171 at *11 ("Plaintiffs' allegations that the Board was not supervising specific aspects of the Vaccine development, such as issues relating to CDMOs or compliance with cGMPs at most create questions about the effectiveness of the Board's oversight."); *GM*, 2015 WL 3958724 at *14 ("Contentions that the Board did not receive specific types of information do not establish that the Board utterly failed 'to attempt to assure a reasonable information and reporting system exists.'"). [redacted] Form 483s do not constitute formal or final determinations by the FDA. *Supra* at 4-5. They are only indications of conditions that individual inspectors observed *may* constitute non-compliance. *Id.* They identify issues "not serious enough to merit a warning or any formal action by the agency." *Plumbers & Pipefitters*, 679 F.3d at 955. The Board's judgment that [redacted] is a reasonable judgment

about how to review non-final, informal observations by FDA inspectors. But, regardless, reasonableness is not the question before the Court: The question is whether the Board's judgment indicates *bad faith*. There is no credible argument that it does.

This is all the more true because [redacted] *Supra* at 10. When FDA inspectors issue a Form 483, "[t]he company has an obligation to respond to the FDA's observations within fifteen business days with a root cause analysis, impact assessment, and a set of corrective and preventative actions." (Compl. ¶ 94) "If a company's response is inadequate, the FDA may issue a warning letter to encourage voluntary compliance." (*Id.* ¶ 95) A Warning Letter indicates the FDA has found the manufacturer "has significantly violated FDA regulations." (Ex. 11) Plaintiffs do not allege the Sturgis facility ever received a Warning Letter or was the subject of an FDA enforcement action prior to the 2022 recall. [redacted] *See In re Impax Labs Deriv. Litig.*, 2015 WL 5168777, *6 (N.D. Cal. Sept. 3, 2015) ("the lack of an enforcement action [after receiving a Form 483] implies that the violations were in fact eventually corrected—or, at the very least, that the FDA was satisfied with the actions taken by Impax to correct the noticed violations"). Again, although Plaintiffs criticize the Board's judgment to oversee compliance risk this way, there is no credible argument that the judgment indicates bad faith.

2. Plaintiffs Do Not Plead A Substantial Likelihood Of Liability Under *Caremark* Prong 2.

Under *Caremark*'s second prong, "a plaintiff can establish a board's bad faith by showing that it saw red flags related to compliance with law and consciously disregarded those flags." *MetLife*, 2020 WL 4746635 at *14. Here, Plaintiffs assert the Board faces a substantial likelihood of personal liability under *Caremark* prong 2 because the directors allegedly [redacted]

[redacted] (Compl. ¶ 422) These allegations are insufficient.

First, Plaintiffs do not allege the Board ignored the production stoppage, recall, or consent decree. [redacted] "To the extent the focus is on the manner and timing of the Board's response, that focus misses the mark for a *Caremark* claim." *Pettry v. Smith*, 2021 WL 2644475, *9 (Del. Ch. June 28, 2021), *aff'd*, 273 A.3d 750 (Del. 2022); *see also In re Qualcomm FCPA Deriv. Litig.*, 2017 WL 2608723, *4 (Del. Ch. June 16, 2017) ("Plaintiffs here simply seek to second-guess the timing and manner of the board's response to the red flags, which fails to state a *Caremark* claim."). That is particularly true here, where the production stoppage and recall meant there was no ongoing danger of potentially non-compliant product in the market, and no danger of new product from Sturgis being distributed unless and until Abbott obtained federal regulatory approval. In other words, unlike in the recent Boeing case, where allegedly unsafe airplanes were still in use (*In re Boeing Deriv. Litig.*, 2021 WL 4059934, *20 (Del. Ch. Sept. 7, 2021)), here the production stoppage and recall meant there was no potentially ongoing safety issue. [redacted]

Second, a "red flag" must convey to the board information about unlawful conduct *that is not being addressed*. Where "the board was not only informed of [] problems, but also the steps being taken to address them," such information does not support a claim that the board consciously ignored or intentionally violated positive law. *City of Birmingham Ret.*, 177 A.3d at 57; *see also Firemen's Ret. Sys.*,

2021 WL 4593777 at *16 ("[N]o 'red flags' were deliberately disregarded. Rather, management told the Board that it was addressing or would address the issues presented.") (internal footnote omitted). Here, the production stoppage, recall, and consent decree did not convey that regulatory issues were not being addressed; each was part of how Abbott's management *was addressing* issues asserted by the FDA. More than that, Plaintiffs themselves admit that production at Sturgis restarted on June 4, 2022 (Compl. ¶ 2)—an implicit acknowledgement of the accuracy of [redacted]

Finally, to plead a red flag claim, Plaintiffs must not only allege the Board ignored the supposed red flag, but also that the Board's failure "resulted in damage to the corporation." *Melbourne Mun. Firefighters v. Jacobs*, 2016 WL 4076369, *8 (Del. Ch. Aug. 1, 2016), *aff'd*, 158 A.3d 449 (Del. 2017). But, here, Plaintiffs do not allege the production stoppage, recall, and consent decree were warnings that, when ignored, caused later damage; Plaintiffs allege those three events were themselves the damage that *earlier* conduct supposedly caused. Thus, Plaintiffs' allegations do not establish a substantial likelihood of liability under *Caremark* prong 2.

D. Plaintiffs Do Not Plead With Particularity Facts Showing That A Majority Of The Board Could Not Disinterestedly Consider A Breach Of Fiduciary Duty Claim Against Abbott Officers.

In addition to failing to plead sufficient facts to excuse demand for their *Caremark* claim against the directors (Count III), Plaintiffs also fail to plead sufficient facts to excuse demand for their *Caremark* claim against the officers (Count IV). Whether the officers fulfilled their oversight duties to Abbott is a question entirely unrelated to whether the directors did so. Thus, Plaintiffs have no basis to allege the Board could not impartially consider a demand that Abbott sue officers for oversight failure. *E.g.*, *MetLife*, 2020 WL 4746635 at *18 n.229 ("Plaintiffs do not allege that any Director Defendant lacked independence from management, and so the Board could have brought its business judgment to bear in review of the allegations of bad faith brought against MetLife officers[.]");

McElrath v. Kalanick, 2019 WL 1430210, *17 n.188 (Del. Ch. Apr. 1, 2019), *aff'd*, 224 A.3d 982 (Del. 2020) (dismissing claim because plaintiff made "no argument that any of the members of the Demand Board lack independence from [the officer-defendant]").

E. Plaintiffs Do Not Plead With Particularity Facts Showing That A Majority Of The Board Faces A Substantial Likelihood Of Liability For Insider Trading.

Plaintiffs also allege the Board cannot impartially consider their insider trading claim (also called a *Brophy* claim) "[f]or the same reasons that a majority of the Demand Board cannot impartially consider a demand to pursue Counts III and IV [Plaintiffs' *Caremark* claims]." (Compl. ¶ 446) Consequently, demand is not excused on Plaintiffs' insider trading claim because it is not excused on their *Caremark* claims. *Supra*, Part I.C.

In addition, and independently, Plaintiffs do not allege facts showing that a majority of the Board faces a substantial likelihood of liability for insider trading *even if* demand is excused on their *Caremark* claims. At the threshold, demand is not excused for this claim because Plaintiffs do not allege a majority of the Board sold stock; they allege only three out of twelve Board members did so. (Compl. ¶ 389 (alleging sales by directors Ford, McKinstry, and Starks)) "[E]ven if plaintiffs are correct as to all [] of these directors, that would not suffice to establish that demand was futile as to a majority of the [] Board." *In re Kraft Heinz Deriv. Litig.*, 2023 WL 2745118, *9 (N.D. Ill. Mar. 31, 2023); *see also Fifth Third Bancorp*, 2022 WL 970569 at *13 ("Three board members does not constitute a majority, however, meaning Plaintiffs have failed to sufficiently allege demand futility as to this claim."); *In re Vaxart Litig.*, 2021 WL 5858696, *22 (Del. Ch. Nov. 30, 2021) (similar); *Garza v. Belton*, 2010 WL 3324881, *7 (N.D. Ill. Aug. 13, 2010) (similar).

Moreover, Plaintiffs do not plead facts showing a substantial likelihood of personal liability even for the three directors who sold stock. "[A] director does not become 'interested' for demand futility purposes merely because he has sold shares of the company's stock." *Lavin v. Reed*, 2023 WL 7182950, *6 (N.D. Ill. Nov. 1, 2023). Rather, the plaintiff must allege with particularity facts showing

that at the time of their sale, the director (1) "possessed material, nonpublic information" ("MNPI"); and (2) "used that information improperly by making trades because she was motivated, in whole or in part, by the substance of that information." *Tilden v. Cunningham*, 2018 WL 5307706, *19 (Del. Ch. Oct. 26, 2018). Plaintiffs allege neither.

First, Plaintiffs do not allege with particularity that each selling director possessed MNPI at the time they sold stock. *See Garza*, 2010 WL 3324881 at *7 ("Garza's allegations of insider trading are as conclusory as his other demand futility allegations, and fail for the same reason: there are no particularized facts from which these defendants' knowledge of Navistar's improper accounting practices can be inferred."). Although Plaintiffs *assert* all three directors were aware of negative information relating to Abbott's infant formula business at the time of their sales, they fail to allege particularized facts supporting the assertion. [redacted] In addition, they allege a former Sturgis employee stated Sturgis personnel concealed wrongful conduct from more senior managers. *Supra* at 7.

Second, Plaintiffs do not allege facts permitting an inference that the directors' sales were motivated by MNPI—that is, Plaintiffs do not allege facts supporting an inference of scienter. To plead scienter without direct evidence, a plaintiff must rely "on circumstantial facts," and that "typically [means] allegations of unusually large, suspiciously timed trades that allow a reasonable inference of scienter." *In re Clovis Oncology Deriv. Litig.*, 2019 WL 4850188, *15 (Del. Ch. Oct. 1, 2019). "If a

defendant sells only a small portion of her holdings and retains a huge stake in the company, then it is difficult to reasonably infer she was fleeing disaster or seeking to make an unfair buck." *Id.* Plaintiffs' allegations here are insufficient. On Plaintiffs' telling, McKinstry and Starks only sold stock *after* the recall and shutdown. (Compl. ¶ 391)[16] And Plaintiffs do not allege anything about the size of the sales relative to these individuals' holdings. Nonetheless, public records provide that information, showing that the McKinstry sale Plaintiffs identify represented less than 5% of her Abbott stock (1,614 of 33,419 shares) and the Starks sales Plaintiffs identify represented less than 1.5% of his Abbott stock (100,000 of 7,023,500 shares). (Exs. 78-80); *see also Clovis*, 2019 WL 4850188 at *16 (declining to infer scienter where defendants "sold only a sliver of their holdings"); *Guttman v. Huang*, 823 A.2d 492, 502 n.20 (Del. Ch. 2003) (declining to infer scienter based on large sales where the selling director retained "as strong a stake in [the company's] long-term credibility and prospects as anyone").

For Ford's supposed sales, Plaintiffs acknowledge that all of his pre-recall transactions were "Code F." (Compl. ¶ 391) Such transactions are not sales, but are "[p]ayment of exercise price or tax liability by delivering or withholding securities incident to the receipt, exercise or vesting of a security issued in accordance with Rule 16b-3." www.sec.gov/edgar/searchedgar/ownershipformcodes.html. Therefore, they are *not* indicative of scienter. *E.g.*, *Plumley v. Sempra Energy*, 2017 WL 2712297, *12 (S.D. Cal. June 20, 2017) ("Code F" transactions did not support scienter); *In re Bristol-Myers Squibb Sec. Litig.*, 312 F. Supp. 2d 549, 561 (S.D.N.Y. 2004) (sales to meet tax obligations not suggestive of fraud); *In re Wayfair Sec. Litig.*, 471 F. Supp. 3d 332, 348-49 (D. Mass. 2020) ("the Forms 4 report the defendants' sales ... were required to be sold to cover tax withholding obligations"). The only actual Ford stock sale Plaintiffs identify occurred in August 2022, *after* the public disclosure of the recall, temporary production stoppage, and consent decree. (Compl. ¶¶ 227-28, 231, 251)

[16] The complaint includes a typographical error regarding McKinstry's sole sale. It reads "2/4/2022" when it should be "2/**2**4/2022." Defendants have conferred with Plaintiffs' counsel, who confirmed the error was typographical and do not object to this correction.

F. Plaintiffs Do Not Plead With Particularity Facts Showing That A Majority Of The Board Faces A Substantial Likelihood Of Liability For Corporate Waste.

Plaintiffs do not assert an independent argument that demand is excused for their corporate waste claim, alleging only that "[f]or the same reasons that a majority of the Demand Board cannot impartially consider a demand to pursue Count II [Plaintiffs' § 10(b) claim], neither can they consider a demand to pursue Count VI." (Compl. ¶ 447) Consequently, demand is not excused on Plaintiffs' waste claim because it is not excused on their § 10(b) claim. *Supra*, Part I.B.

In addition, and independently, Plaintiffs do not allege with particularity facts showing a substantial likelihood of personal liability for the Board members for waste *even if* demand were excused on their § 10(b) claim. Waste is "an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade." *Sherman v. Ryan*, 911 N.E.2d 378, 398 (Ill. App. 2009). To "overcome the general presumption of good faith," a plaintiff must plead facts showing "an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration." *Citigroup*, 964 A.2d at 136. Liability is "confined to unconscionable cases where directors irrationally squander or give away corporate assets." *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000). By contrast, if "any reasonable person might conclude that the deal made sense, then the judicial inquiry ends." *Lavin*, 2023 WL 7182950 at *11; *see also Brehm*, 746 A.2d at 263 (similar).

Here, Plaintiffs allege the Board authorized stock repurchases in October 2019 and December 2021, when it supposedly knew the market price for Abbott stock was fraudulently inflated by supposed public misstatements about Sturgis. But Plaintiffs do not allege with particularity facts showing the Board's supposed knowledge. [redacted]

[redacted] Indeed, they allege Sturgis personnel concealed wrongful conduct from more senior managers. *Supra* at 7. [redacted]

See also Kococinski v. Collins, 935 F. Supp. 2d 909, 925 (D. Minn. 2013) (demand not excused on waste claim given "insufficient evidence that the outside directors actually knew the underlying information that rendered the stock artificially inflated"); *Staehr v. Mack*, 2011 WL 1330856, *9 (S.D.N.Y. Mar. 31, 2011) ("Plaintiff has not alleged with particularity that any Director was in possession of adverse non-public information that would have suggested that the Company's share price was inflated."); *In re NutriSystem Deriv. Litig.*, 666 F. Supp. 2d 501, 512 (E.D. Pa. 2009) (similar).

G. Plaintiffs Do Not Plead With Particularity Facts Showing That A Majority Of The Board Faces A Substantial Likelihood Of Personal Liability For Unjust Enrichment.

Plaintiffs name only one director in their unjust enrichment claim: Robert Ford. (Compl. ¶ 448) Because Ford is just one of twelve directors, Plaintiffs have no argument that a majority of the Board faces a substantial likelihood of personal liability on this claim. *Garza*, 2010 WL 3324881 at *7. In tacit recognition of that deficiency, Plaintiffs attempt to tie unjust enrichment to their other claims, alleging that demand is excused on this claim because "[m]any of the factual allegations and legal arguments underlying Count VII also underlie other Counts." (Compl. ¶ 449) But Plaintiffs make no allegations of particularized fact showing that a majority of the Board cannot impartially consider whether Abbott should sue *its officers* for unjust enrichment. Whether *the directors* made inaccurate

statements, failed to oversee Abbott, or engaged in insider trading says nothing about whether the officers "unjustly retained" their compensation in a way that "violates the fundamental principles of justice, equity, and good conscience." *Blythe Holdings v. DeAngelis*, 750 F.3d 653, 658 (7th Cir. 2014).

II. Plaintiffs Are Not Acting In The Best Interest Of Abbott's Shareholders.

An independent reason to dismiss this action is that Plaintiffs are not acting in Abbott's shareholders' best interest. Rule 23.1(a) requires dismissal of a derivative action "if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders." Here, Plaintiffs' allegations demonstrate they are not appropriate representatives of Abbott's shareholders.

The complaint abounds with evidence that "plaintiff's interests are antagonistic to those plaintiff is seeking to represent." Wright & Miller, 7C Fed. Prac. & Proc. § 1833 (3d. ed.). Although they purport to bring this claim *on Abbott's behalf*, Plaintiffs repeatedly allege that *Abbott* acted wrongfully—directly parroting allegations made *against* Abbott in pending personal injury cases. (*E.g.*, Compl. ¶ 230 ("Abbott continued to downplay its role, denying that any Cronobacter found at the Sturgis Plant was connected to any of the ill babies"), ¶ 257 (similar), ¶ 258 ("Abbott also takes every opportunity it can to slant the public record its way"), ¶ 258 ("Abbott spun that finding to claim that the FDA had concluded that Abbott's formula did not cause those illnesses"). Plaintiffs do so even though, to hear them tell it, these pending lawsuits expose Abbott to "damages of billions of dollars."[17] (*Id.* ¶ 501)

There is no situation in which it would be in Abbott's shareholders' interest to prove facts that would help the plaintiffs in other recall-related litigation against Abbott. In that scenario, Abbott would likely pay more in the other cases than it could recover in this action. It cannot be in the interest

[17] Plaintiffs' animus against Abbott is even more obvious in their decision to side against the Company in totally unrelated litigation. Plaintiffs assert that an MDL proceeding concerning necrotizing enterocolitis ("NEC") claims, which are unrelated to the Sturgis recall, could subject Abbott to significant damages, yet their complaint at times resembles a brief for the NEC plaintiffs, accusing Abbott of "failure to warn about the risk of preterm infants developing NEC from consuming Abbott's cow-milk based formula." (Compl. ¶ 62) Even more inexplicably, Plaintiffs repeatedly level irrelevant accusations of "anticompetitive conduct to secure contracts." (*Id.*)

of Abbott and its shareholders to pursue a claim that would make a net corporate loss likely. *See Brenner v. Albrecht*, 2012 WL 252286, *6 (Del. Ch. Jan. 27, 2012) ("Brenner's derivative action would involve taking actions designed to refute the merits of the Company's defense of the Securities Class Action, and vice versa."); *In re Massey Energy Co.*, 2011 WL 2176479, *27 (Del. Ch. May 31, 2011) ("[T]he plaintiffs, as fiduciaries for other Massey stockholders, [should] be reluctant to prosecute the Derivative Claims they claim are so valuable until the direct claims against Massey are resolved.").

III. Plaintiffs Do Not State A Claim Against The Officer Defendants.

Even if Plaintiffs meet the heightened pleading standard discussed above against Abbott's Board to excuse their failure to make a board demand (and they do not), they must still comply with Rule 8 and allege facts sufficient to state a claim. To do so, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plaintiff must offer more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint "must give enough details about the subject-matter of the case to present a story that holds together." *McCauley v. City of Chi.*, 671 F.3d 611, 616 (7th Cir. 2011). Here, independent of and in addition to the Rule 23.1 arguments above, Plaintiffs' allegations about many of the officers are so threadbare that they do not clear this bar.

Daniel Salvadori. Plaintiffs allege only that Salvadori "served as the Executive Vice President and Group President, Established Pharmaceuticals and Nutritional Products" and then "as the Executive Vice President of Nutritional Products"; that he was "responsible for defining the strategic vision ... and leading efforts to conduct innovative research"; that he sold stock (four of which are "Code F" transactions, not sales); and that he received compensation. (Compl. ¶¶ 57, 268, 313, 335, 355, 391) These allegations fail to state a claim that Salvadori acted wrongfully. That Salvadori held various positions and was responsible for certain areas within Abbott says nothing about his execution of his

responsibilities. That he sold stock does not indicate he possessed or was motivated by material non-public information. And that he was paid does not suffice to allege his compensation was unjust.

Erica Battaglia. Plaintiffs' only allegations about Battaglia are that she "has served as Abbott's Chief Ethics and Compliance Officer since June 2021"; [redacted]; and she received compensation (the amount of which is not alleged). (*Id.* ¶¶ 59, 183, 184, 189, 214, 268) These allegations do not state a claim that Battaglia acted wrongfully. They say nothing about her execution of her responsibilities. They also say nothing about how much Battaglia was paid, making it impossible to conclude any such payments were so absurd as to "violate[] the fundamental principles of justice, equity, and good conscience." *Blythe Holdings*, 750 F.3d at 658.

Hubert Allen. Plaintiffs allege only that Allen is Abbott's "Executive Vice President, General Counsel and Secretary"; [redacted]; that a preservation request from a so-called "whistleblower" was addressed to him; that he received compensation; and that he sold stock. (Compl. ¶¶ 50, 170, 179, 181, 195, 250, 268, 313, 335, 355, 391) These allegations do not state a claim for wrongful conduct. They do not describe how Allen executed his responsibilities. They do not show suspicious trading, either in timing or size. They also do not allege facts showing Allen's compensation was unjust. Plaintiffs also allege Allen "would have been involved in" responding to the "whistleblower's" complaint "by virtue of [his] role," and yet did not inform the Board of the complaint. (*Id.* ¶ 182) However, Plaintiffs do not allege any facts showing Abbott's General Counsel is involved in Abbott's responses to individual OSHA complaints. And, in any event, not informing the Board of one particular OSHA complaint from a former employee does not constitute wrongful conduct.

James Young. Plaintiffs allege only that Young was Abbott's Chief Ethics and Compliance Officer; [redacted];

and that he received compensation (the amount of which is not pled). (*Id.* ¶¶ 58, 147, 156, 161, 166, 171, 175, 176, 268) These allegations do not state a claim for wrongful execution of his responsibilities or for unjust enrichment.

Joseph Manning. Plaintiffs' only allegations about Manning are that he "served as the Executive Vice President of Nutritional Products" as well as in "various [other] positions"; he received compensation (the amount of which is not pled); and that he sold stock. (*Id.* ¶¶ 55, 268, 391) These allegations do not state a claim for wrongful execution of his responsibilities, for insider trading, or for unjust enrichment.

Scott House. Plaintiffs allege only that House joined Abbott in 1990; "has served as Abbott's Senior Vice President of Quality Assurance, Regulatory and Engineering Services since March 2020"; is responsible for "ensuring that Abbott's quality, regulatory and engineering values are consistently applied across the corporation, helping ensure the highest quality pro[redacted] o[redacted]r customers, strict compliance with global regulatory requirements, and a safe environment"; [redacted]; and received compensation (the amount of which is not pled). (*Id.* ¶¶ 54, 171, 172, 176, 183, 195, 268) These allegations do not state a claim for wrongful conduct. That House held various positions within Abbott or has certain responsibilities does not establish anything about how he executed his responsibilities. Similarly, that House was paid for his services does not state a claim that his compensation was unjust.

Conclusion

For the foregoing reasons, the Court should dismiss Plaintiffs' complaint.

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Respectfully submitted,

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