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

LEAD PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

This stockholder derivative action seeks to hold certain current and former Abbott directors and officers liable for their role in Abbott's manufacture and sale of contaminated infant formula.[1] Defendants failed to implement reasonable reporting mechanisms and information systems to oversee the mission-critical issue of infant formula safety and compliance; failed to respond to red flags of safety issues and non-compliance; and made false and misleading statements to the investing public about these highly material issues. As a result, the Board was unable to take action to prevent numerous infant sicknesses and deaths linked to Abbott's infant formula, a national formula recall, shutdown of Abbott's primary formula production facility, Abbott's entry into a Consent Order with the Department of Justice, and profound harm to the Company's reputation and bottom line.

Accordingly, Plaintiffs bring the following claims:

- ***Breach of fiduciary duty against the Director Defendants*** for their failure to implement a "reasonable reporting system" for a "mission critical" aspect of Abbott's business, and then failing to respond to "red flags" even after learning of the shutdown of the Sturgis Plant and formula recall, *In re Boeing Co. Deriv. Litig.*, No. 2019-0907-MTZ, 2021 WL 4059934, at *24 (Del. Ch. Sept. 7, 2021);

- ***Breach of fiduciary duty against the Officer Defendants,*** as a "critical part" of their positions was to "identify red flags, report upward, and address them" to ensure Abbott's compliance with the FDCA, *In re McDonald's Corp. S'holder Deriv. Litig.*, 289 A.3d 343, 365-66 (Del. Ch. 2023);

- ***Violations of Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and SEC Rule 10b-5 against the 10(b) Defendants*** for materially misleading statements in Abbott's SEC filings concerning regulatory "compliance" that caused the Company's share repurchase program to take place at inflated stock prices, *Allison v. Oak Street Health, Inc.*, No. 22 C 149, 2023 WL 1928119, at *4 (N.D. Ill. Feb. 10, 2023);

[1] All capitalized terms herein have the same meaning as in Plaintiffs' Consolidated Amended Verified Stockholders' Derivative Complaint (the "Complaint"), ECF 91, unless separately defined. All internal citations and quotations are omitted and emphasis is added unless indicated otherwise. All "¶" citations are to the Complaint unless indicated otherwise. "Defs. Br." citations are to Defendants' Memorandum in Support of Motion to Dismiss (ECF 114) and "Ex." citations are to Defendants' exhibits attached to the Declaration of Joshua Rabinovitz (ECF 115).

- ***Claims for corporate waste against the Director Defendants***, as "no person of ordinary, sound business judgment" would have agreed to the Company's repurchase of shares while the stock was at artificially inflated prices, *In re Nuveen Fund Litig.*, No. 94-cv-360, 1996 WL 328001, at *8-9 (N.D. Ill. June 11, 1996);

- ***Violations of Section 14(a) of the Exchange Act and Rule 14a-9 against the Proxy Defendants*** for securing their election to the Board through the "deceptive or inadequate disclosure in a proxy solicitation," *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964);

- ***Insider trading claims against the Insider Trading Defendants***, as they were each in a "confidential or fiduciary position" and used material non-public information to "make a profit" for themselves by selling Abbott shares in advance of the drop in the Company's stock price, *Brophy v. Cities Serv. Co.*, 70 A.2d 5, 8 (Del. Ch. 1949); and

- ***Claims for unjust enrichment against the Officer Defendants***, as they have "unjustly retained a benefit" through the lavish compensation packages they received while breaching their fiduciary duties and causing significant harm to the Company, *Cline v. FitzMark Chicago, Inc.*, No. 21-cv-04253, 2023 WL 2711615, at *9 (N.D. Ill. Mar. 30, 2023).

The majority of Abbott's directors who served on the Board (the "Demand Board") at the time that Plaintiffs filed this action face a "substantial likelihood of liability" on one or more claims arising under this "nucleus of operative facts." *Ontario Provincial Council of Carpenters' Pension Tr. v. Walton*, No. 2021-0827-JTL, 2023 WL 3093500, at *29 (Del. Ch. Apr. 26, 2023); *In re Abbott Lab. Deriv. S'holders Litig.*, 325 F.3d 795, 807 (7th Cir. 2003) (explaining that Illinois follows Delaware law on demand futility). As a result, the Demand Board is "incapable of making an impartial decision regarding whether to institute" litigation and so any pre-suit demand would have been futile and is excused. *Walton*, 2023 WL 3093500, at *29.

Despite the harm that their egregious misconduct has caused to the Company, Defendants moved to dismiss each of Plaintiffs' causes of action. But rather than adhere to basic legal standards governing a motion to dismiss, Defendants largely disregard Plaintiffs' detailed and particularized allegations, instead directing the Court to eighty individual exhibits totaling 748 pages. Defendants' improper attempt to "rewrite [Plaintiffs'] well-pled complaint in favor of their own version of events" should be rejected. *In re CBS Corp. S'holder Class Action and Deriv. Litig.*, No. 2020-0111-JRS, 2021 WL

268779, at *18 (Del. Jan. 27, 2021); *Abbott*, 325 F.3d at 807 (explaining that the Court must accept "well-pleaded facts as true"). Defendants' substantive arguments are equally unpersuasive, as they misstate the law, fail to reckon with Plaintiffs' key allegations, and, in the end, provide no basis for the Court to dismiss this action in whole or in part.

For these reasons and those set forth herein, Defendants' motion should be denied.

II. STATEMENT OF FACTS

A. Abbott Has a Lengthy History of Regulatory Violations, Including at the Sturgis Plant

As a manufacturer and distributor of infant formula Abbott must comply with the FDCA, which protects consumers from unsafe foods and regulates formula production. ¶¶26, 83, 85-91. Safety and compliance are mission critical for Abbott's Board, as tainted formula can cause infants to become dangerously ill or die, and also result in regulatory violations, fines, recalls, and costly lawsuits. ¶¶3, 16, 82-85. Abbott has a history of product safety issues, including at the Sturgis Plant, and these safety and compliance failures were a well-known risk to Abbott's leadership. ¶4.

For example, in 1999, Abbott entered into a consent decree with the FDA, which required Abbott to pay a $100 million civil fine, destroy inventory, withdraw 125 types of medical diagnostic test kits from the market, and cease manufacturing almost 300 testing devices. ¶98. In a derivative action stemming from that fiasco, the Seventh Circuit observed that Abbott had engaged in "long-term violations" of the FDCA, and "members of the board . . . were aware of the problems." *Abbott*, 325 F.3d at 806. Abbott's directors subsequently settled that action for $27 million to fund a compliance program. ¶99.

In 2010, the FDA discovered a flour beetle infestation at the Sturgis Plant that dated back to 2007. ¶100. Abbott recalled 5 million containers of formula and halted production, costing the

Company around $100 million. *Id.* Abbott replaced the Sturgis Plant manager, but instead of firing him, moved him to another position in the Company. *Id.*[2]

Then, in 2012, Abbott pled guilty to a criminal violation of the FDCA for misbranding the drug Depakote for use in elderly dementia patients, even though the Company lacked evidence the drug was safe for that use. ¶101. Abbott paid a $1.7 billion fine, the second largest penalty paid for such a violation and agreed to a 5-year probationary period. *Id.*

Because Cronobacter thrives in dry environments, it can contaminate infant formula powder and survive in a finished can of formula for up to a year. ¶135. Stringent sanitation measures are necessary to prevent contamination and ensure FDCA compliance. *Id.* Abbott has faced multiple lawsuits alleging that Cronobacter contamination at the Sturgis Plant caused infant injury or death. *Id.* Seeking to avoid public scrutiny, Abbott has used questionable litigation tactics and secret settlements to conceal these lawsuits. ¶¶136-38. Judges have strongly reprimanded Abbott's counsel, as has Senator Elizabeth Warren, who noted that Abbott "appears to have been using abusive legal tactics and non-disclosure agreements to avoid accountability for the health and safety risks from its unsafe products." *Id.*

B. The Board's Failure to Implement a Reasonable Reporting System Allowed Safety and Compliance Violations to Continue Unabated

Despite the harm that could result from safety and compliance failures, Abbott's Board lacked a reporting system to alert directors to such violations in manufacturing infant formula. ¶140.

1. The 2019 Form 483 and EIR

Whistleblowers reported that, for years, conditions at the Sturgis Plant violated the FDCA and created fertile grounds for bacterial contamination. Per Whistleblower #1, during 2019, processing

[2] Nine of the Director Defendants (Alpern, Austin, Blount, Liddy, McKinstry, Osborn, Tilton, Osborn, and White) served on the Board, and two Officer Defendants (Calamari and Randall) were Abbott officers when these earlier FDCA violations occurred.

equipment at the Sturgis Plant was in disrepair, allowing bacteria to collect in pipes used for infant formula production. ¶¶103-06. Abbott's senior management, however, stopped engineers from addressing the problem because that would slow production and make it harder to meet production metrics. *Id.* As a result, "batches of finished formula were contaminated, but Abbott's management had only a portion of the potentially contaminated batches destroyed, while the rest was distributed without additional testing." ¶142.

On September 17, 2019, Abbott voluntarily recalled a single lot of Calcilo XD powder cans "due to an inconsistency in aroma and color" in some cans. ¶149. Per Whistleblower #1, management falsified an appearance of rectifying the problem and manipulated tests to avoid finding or addressing a larger issue. *Id.* [redacted] ¶150.

The FDA inspected the Sturgis Plant and found violations of the FDCA, resulting in the issuance of the 2019 Form 483. ¶¶151, 168. Form 483s are generated by the FDA when its investigators "observe significant deviations from the FDCA," and they are intended to notify company's senior leadership in writing of "significant objectionable conditions." ¶93. The FDA criticized Abbott for its "testing" procedures, noting that Abbott was not abiding by its own protocols. ¶¶151, 154. [redacted] ¶151. The FDA observed that Abbott's own records revealed that it had detected Cronobacter in a batch of formula in August 2019, before distribution. ¶154. The FDA further noted that a baby who consumed Abbott formula tested positive for Cronobacter and was hospitalized for twenty-two days. *Id.*

On March 13, 2020, the FDA sent Abbott an EIR relating to the 2019 Form 483. ¶143. The 2019 EIR noted that a pediatric nurse practitioner complained that five babies were sickened after consuming Abbott infant formula. *Id.* Another complaint involved a baby with confirmed

Cronobacter who had seizures after consuming three types of formula. *Id.* The FDA also noted that several consumer complaints regarding infected babies who had consumed Abbott formula were made to the FDA or to Abbott Nutrition's complaint logging system. ¶168.

[redacted] ¶155. [redacted] *Id.* [redacted] ¶¶159, 163-64, 169.

2. The 2021 Whistleblower Complaints

Problems at the Sturgis Plant persisted into 2020 and 2021, with the continued absence of oversight by the Board. Per a complaint from Whistleblower #1, in July 2020, Abbott management certified the product safety test results even though pages of internal test results for some formula product batches were missing, making the certifications "patently false." ¶173. Abbott management was aware of this problem yet continued certifying missing test results "multiple times." *Id.* Whistleblower #1 emphasized that, "[d]espite the blatant nature of what occurred, and its egregiousness in terms of putting consumer safety at risk, management took no corrective action in terms of discipline" and did not implement measures to "reduce the likelihood of a recurrence." *Id.*

On February 16, 2021, Whistleblower #1 filed an OSHA complaint, detailing many of these facts. ¶¶179, 251. On October 19, 2021, Whistleblower #1 filed a similar complaint with the FDA. ¶191. [redacted] ¶¶179, 191, 213-14.

3. The 2021 Form 483s and 2021 EIR

The FDA conducted another investigation of the Sturgis Plant from September 20 to 24, 2021. ¶187. The "FDA inspectors found widespread quality problems that create risk of contamination,"

including workers reaching into ingredients without clean hands or gloves; pits and cracks where Cronobacter could collect; and pooled water where Cronobacter could multiply. *Id.* Abbott never corrected these practices. *Id.* On September 24, 2021, the FDA issued another Form 483, finding that the Sturgis Plant was not in a "clean and sanitary" condition. ¶188.

[redacted] ¶¶189-91. [redacted] ¶¶189-91, 195, 197, 200. [redacted] ¶¶213-16.

C. Reports of Infant Deaths Emerge and Abbott Shuts Down the Sturgis Plant

In September 2021, the FDA received a report that an infant had developed a Cronobacter infection after drinking Abbott infant formula. ¶187. On December 1, 2021, the FDA received a second complaint of a Cronobacter infection in an infant given Abbott formula; the infant later died. ¶192. At the end of 2021, the FDA demanded that Abbott allow it to conduct a "for-cause" inspection at the Sturgis Plant. ¶9. On January 11, 2022, the FDA received a complaint of a third Cronobacter illness in an infant who drank Abbott's infant formula from the Sturgis plant. ¶199. The FDA's "for-cause" inspection took place from January 31, 2022, through February 2, 2022. ¶201. The FDA found severe compliance failures, such as pits and cracks in dryer towers and standing water, all associated with Cronobacter breeding and contamination risks. *Id.* In fact, Abbott's own records listed 310 problems with water in the prior two years. *Id.* The FDA's testing detected Cronobacter in multiple environmental sites and 20 Cronobacter contaminations at the Sturgis Plant. ¶202.

Given these results, the FDA asked Abbott to voluntarily recall formula produced at the Sturgis Plant, and had to make this request on three occasions in February 2022 before Abbott reluctantly agreed on February 17, 2022. ¶¶208-10. Though nominally "voluntary," the Company issued the recall on the verge of being forced to conduct a mandatory recall. ¶265. [redacted] ¶213. [redacted] *Id.*

D. The Board Finally Learns of Safety and Compliance Violations

[redacted] ¶214. [redacted] *Id.* [redacted] ¶215.

[redacted] ¶¶234, 240-42. [redacted] ¶234. [redacted] *Id.*

Moreover, on February 24, 2022, the FDA received a fourth complaint of Cronobacter infection in an infant who died after consuming formula produced at the Sturgis Plant. ¶221. Later media articles reported nine newborns and infants died between December 1, 2021, and March 3, 2022, after consuming formula produced at the Sturgis Plant. ¶251. On February 28, 2022, Abbott expanded its recall. ¶223. [redacted] ¶223.

E. Revelation of Abbott's Safety and Compliance Failures Leads to a Massive Drop in the Company's Value

The FDA conducted another inspection of the Sturgis Plant on March 18, 2022, and found that Abbott had failed to establish process controls "designed to ensure that infant formula does not become adulterated due to the presence of microorganisms in the formula or in the processing environment." ¶¶224-25. Abbott further failed to "ensure that all surfaces that contacted infant formula were maintained to protect infant formula from being contaminated by any source." *Id.* Directly contradicting Abbott's public representations that no Cronobacter reached production areas in the Sturgis Plant, the 2022 Form 483 noted that Abbott had, in fact, discovered Cronobacter in its production areas and in finished formula on at least two prior occasions. ¶226.

On March 22, 2022, the FDA issued another Form 483 publicly disclosing the initial results of earlier inspections. ¶224. On this disclosure, Abbott's stock price fell $4.97 per share, causing an $8.8 billion loss of market capitalization. ¶228. On April 28, 2022, a redacted version of Whistleblower #1's FDA complaint was released, revealing that Abbott's management knew about the unsanitary and illegal conditions that led to the Sturgis Plant's shutdown much earlier than the Company had acknowledged, and that Abbott took no voluntary actions to correct those conditions. ¶231. Abbott's stock dropped another $4.51 per share—a $7.9 billion loss of market capitalization. *Id.*

F. The DOJ Takes Action

On May 16, 2022, the DOJ, on behalf of the FDA, filed a complaint against Abbott and certain members of the senior management team. ¶246. The DOJ explained that Abbott manufactured infant formula "under conditions and practices that fail to protect the food against the risk of contamination from bacteria, including but not limited to, Cronobacter." *Id.* The DOJ further noted "[o]ngoing inadequacies in manufacturing conditions and practices as Defendants' facilities," which demonstrated that the Company has "been unwilling or unable to implement sustainable corrective actions." *Id.* To resolve this action, the Company agreed to the 2022 Consent Decree, which requires Abbott to retain an outside expert to develop remedial plans and carries hefty potential fines if violated. ¶247.

G. The Board's Oversight Failures Continue

[redacted] ¶253. [redacted] *Id.*

[redacted] ¶254. [redacted] ¶¶254, 427. [redacted] ¶254.

H. Defendants Make False and Misleading Statements Regarding Safety and Compliance

Throughout the relevant period, in addition to failing to implement a reporting system and ignoring red flags, Abbott's leadership also made numerous false and misleading statements regarding safety and compliance. ¶¶294-358, 359-82. Abbott's public statements and SEC filings, including

proxy statements, artificially inflated and/or maintained the price of Abbott stock and induced shareholders to vote in favor of measures that kept Abbott directors in place, rejected an independent Board chair, and approved compensation in an advisory capacity, thus allowing the misconduct and oversight failures to continue. ¶¶295, 316-317, 332, 335, 338-39, 352, 355, 358-60.

As noted above, when the truth about Abbott's safety and compliance failures were revealed, Abbott's stock price crashed. These false and misleading statements harmed, among others, Abbott itself, as the Board had authorized a series of massive repurchases of Abbott stock, which occurred at artificially inflated prices. ¶¶361-62. Defendants also personally benefited from this misconduct, including some selling their own Abbott stock at artificially inflated prices. ¶¶360, 389, 391.

III. LEGAL STANDARDS

"A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the complaint, not its merits." *Constr. Workers Pension Fund-Lake Cnty. & Vicinity v. Navistar Int'l Corp.*, 114 F. Supp. 3d 633, 642 (N.D. Ill. 2015) (citing Fed. R. Civ. P. 12(b)(6); *Gibson v. City of Chi.*, 910 F.2d 1510, 1520 (7th Cir. 1990)). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *AnchorBank, FSB v. Hofer*, 649 F.3d 610, 614 (7th Cir. 2011). Therefore, the Court "construe[s] the complaint in the light most favorable to the plaintiffs, accepting as true all well-ple[d] facts and drawing reasonable inferences in the plaintiffs' favor." *Yeftich v. Navistar, Inc.*, 722 F.3d 911, 915 (7th Cir. 2013). "Generally, in deciding a motion to dismiss, courts look only to matters within the four corners of the complaint." *City of Sterling Heights Gen. Emps. Ret. Sys. v. Hospira, Inc.*, No. 11-cv-8332, 2013 WL 566805, at *10 (N.D. Ill. Feb. 13, 2013).

Here, Plaintiffs filed a highly detailed Complaint. But rather than confine their arguments to Plaintiffs' well-pled factual allegations and the reasonable inferences drawn therefrom, Defendants submitted eighty exhibits totaling 748 pages. These exhibits range from certain Books and Records to CDC flyers and webpage printouts—including documents not referenced or discussed in the

Complaint. *See, e.g.,* Ex. 4 (CDC webpage regarding Cronobacter); Ex. 9 (FDA webpage concerning ORA inspections); Ex. 11 (FDA webpage regarding Warning and Close-Out Letters).

Under the incorporation-by-reference doctrine, the Court can review Books and Records to ensure they were accurately represented by Plaintiffs, but Defendants may not, as they do here, use those documents to "'rewrite [plaintiffs'] well-pled complaint' in favor of their own version of events" and ask the Court to "weigh evidence." *CBS Corp.*, 2021 WL 268779, at *18; *Voigt v. Metcalf*, No. 2018-0828-JTL, 2020 WL 614999, at *9 (Del. Ch. Feb. 10, 2020). Nor may Defendants attach many exhibits in an attempt to "refute the assertions in [Plaintiffs'] complaint." *Wheeler v. Piazza*, 364 F.Supp.3d 870, 875-76 n.1 (N.D. Ill. 2019) (holding that the court "cannot consider those documents without converting the instant motion to a motion for summary judgment, which it declines to do").

Not only are Defendants' counter-factual arguments improper on a motion to dismiss, but a review of the exhibits shows that Defendants consistently misrepresent them:

- [redacted] Defs. Br. at 11 (citing Exs. 53, 57, 61, 65, 68). [redacted] *See* Exs. 53, 57, 61, 65, 68.
- [redacted] Defs. Br. at 9-10 (citing Exs. 21-31). [redacted] *See* Ex. 21 at '1719; Ex. 22 at '2021; Ex. 23 at '2671; Ex. 24 at '3014; Ex. 25 at '3674; Ex. 26 at '4042; Ex. 27 at '4724; Ex. 28 at '5238; Ex. 29 at '5960; Ex. 30 at '6473.
- [redacted] Defs. Br. at 11 (citing Exs. 51-70). [redacted]

[redacted] *See* Ex. 51 (containing a heavily redacted, one-paragraph summary of a purported "update" from Abbott's compliance officer); Exs. 52-70 (same).

- [redacted] Defs. Br. at 7-9 (citing Ex. 15). [redacted] Ex. 15 at '10605.

- Defendants contend that positive tests for Cronobacter "do[] not mean Cronobacter was introduced during the manufacturing process, rather than, for example, in the home after the formula was opened"—implying contamination was caused by the families of the deceased infants, not by Abbott. Defs. Br. at 3 (citing Ex. 4). Not only did the Form 483s warn of unsanitary conditions at the Sturgis Plant, but Defendants' cited materials from the CDC website identify *two* possible environments of contamination—the home and the "processing facility." Ex. 4 at 1. The CDC explains that processing facility contamination can occur when "the manufacturer uses contaminated ingredients" or "the formula powder touches a contaminated surface." Ex. 4 at 1.

Thus, Defendants' attempt to craft their own version of the facts to dispute Plaintiffs' robust allegations should be rejected.

IV. ARGUMENT

A. Pre-Suit Litigation Demand Would Have Been Futile

For shareholder derivative claims, a plaintiff must make a pre-suit demand to the company's board of directors to initiate the litigation unless that "demand would have been futile." *Abbott*, 325 F.3d at 804.[3] A pre-suit demand is futile if at least half of the board members "face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand." *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1058 (Del. 2021).

[3] While a company's state of incorporation governs substantive law on claims for breach of fiduciary duty, "Illinois case law follows Delaware law in establishing demand futility requirements," and, therefore, "Delaware law controls." *Abbott*, 325 F.3d at 803; *see also Bhatia v. Vaswani*, No. 18-cv-2387, 2019 WL 4674571, at *9 (N.D. Ill. Sept. 25, 2019).

Here, the Demand Board consisted of twelve directors; eleven are Defendants who were Abbott directors at the time of the wrongdoing (Ford, Alpern, Babineuax-Fontenot, Blount, Gonzalez, Kumbier, McDew, McKinstry, Roman, Starks, and Stratton), and only one was not (O'Grady). ¶411. As nearly all the Demand Board directors face personal liability in this action, the Board could not have disinterestedly considered a pre-suit demand "without being influenced by improper considerations." *Boeing*, 2021 WL 4059934, at *22.[4] Demand is therefore excused. *Id.*

Moreover, demand is futile as to Plaintiffs' claims for insider trading, unjust enrichment, and breach of fiduciary duty against the Officer Defendants, even though these three causes of action are not asserted against a majority of the Demand Board. ¶¶444, 446, 448. The facts supporting those causes of action arise from a common "nucleus of operative facts" as the claims for which a majority of the Demand Board is implicated (including breach of fiduciary duty against the Director Defendants); demand is therefore excused for these claims as well. *Walton*, 2023 WL 3093500, at *29; *see also Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou*, No. 2019-0816-SG, 2020 WL 5028065, at *26 (Del. Ch. Aug. 24, 2020) (where an investigation of one claim for which a majority of the demand board is potentially liable "would necessarily implicate the same set of facts" as another claim for which less than a majority of the demand board is liable, demand is futile on the latter claim as well); *In re Clovis Oncology, Inc. Deriv. Litig.*, No. 2017-0222-JRS, 2019 WL 4850188, at *11 (Del. Ch. Oct. 1, 2019) (demand is futile if at least half of the board members "face a substantial likelihood of personal liability with respect to at least one of the alleged claims").[5]

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[4] Additionally, because Ford is both Chair of the Board and Abbott's CEO, there is "reasonable doubt" that he could consider a demand to sue the individuals who control his employment and compensation. *Rales v. Blasband*, 634 A.2d 927, 937 (Del. 1993).

[5] Defendants' reliance on *In re Kraft Heinz S'holder Deriv. Litig.*, No. 20-cv-2259, 2023 WL 2745118, at *9 (N.D. Ill. Mar. 31, 2023), *In re Fifth Third Bancorp Deriv. Litig.*, No. 20-cv-4115, 2022 WL 970569 (N.D. Ill. Mar. 30, 2022), *In re Vaxart, Inc. S'holder Litig.*, No. 2020-0767-PAF, 2021WL 5858696 (Del. Ch. Nov. 30, 2021) and *Garza v. Belton*, No. 08-cv-1387, 2010 WL 3324881 (N.D. Ill. Aug. 13, 2012) is misplaced. Defs. Br. at 32. None of those cases considered the issue here: whether the Demand Board's substantial likelihood of liability as co-

Nonetheless, in an attempt to avoid accountability, Defendants contend that the "Plaintiffs are not acting in Abbott's shareholders' interest[s]," and the Court should dismiss this action on the basis of Rule 23.1 *even if* a pre-suit litigation demand would have been futile. They base this dubious proposition on the factual overlap between this case and private litigation against the Company, noting that facts that may be established in this case would be bad for the Company's litigation position in those pending cases. Defs. Br. at 37-38 & n.17. The Delaware Supreme Court recently rejected this very same argument, stating:

> [W]e are not moved by defendants' handwringing claim that, if the Court of Chancery's analysis of the adequacy of the plaintiffs' pleading is allowed to stand, it will 'chill' companies' ability to defend lawsuits . . . We see no reason why companies with meritorious defenses to lawsuits will not raise them with vigor and directors who heed their fiduciary duties will not continue to serve on the boards of Delaware corporations.

Lebanon Cnty. Emps.' Ret. Fund v. Collis, No. 22, 2023, 2023 WL 8710107, at *20 (Del. Dec. 18, 2023). For the same reasons, this argument should fail here.

B. Plaintiffs State Two Independent Breach of Fiduciary Duty Claims Against the Director Defendants

"A breach of fiduciary duty claim that seeks to hold directors accountable for the consequences of a corporate trauma is known colloquially as a Caremark claim[.]" *La. Mun. Police Emps.' Ret. Sys. v. Pyott*, 46 A.3d 313, 340 (Del. Ch. June 11, 2012). *Caremark* claims "draw[] heavily upon the concept of director failure to act in good faith[,]" *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006), arising when "directors set in motion or allowed a situation to develop and continue which exposed the corporation to enormous legal liability." *Pyott*, 698 A.2d at 340. Such bad faith conduct may occur under two scenarios: (1) the directors fail to implement a "reasonable reporting system" for a "mission critical" aspect of the company; or (2) the directors fail to respond to "red flags" of

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defendants for claims congruent to the insider trading claims creates a disabling conflict that disqualifies those Board members from considering a demand.

illegal conduct. *Boeing*, 2021 WL 4059934, at *24. Directors may be liable under either form of *Caremark* claim—or both. *Id.* at 1 (explaining that "stockholders have pled both sources of board liability").

Here, the Director Defendants utterly failed to implement a reasonable Board-level reporting system to oversee infant formula safety and compliance, and then took no action when confronted with red flags of safety and compliance violations.

1. The Director Defendants Failed to Implement a Reasonable Reporting System for Infant Formula Safety and Compliance

Caremark duties are "designed to ensure reasonable reporting and information systems exist that would allow directors to know about and prevent wrongdoing that could cause losses for the [c]ompany." *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 131 (Del. Ch. 2009). When, as here, regulations governing "health and safety are at issue," a board must "actively exercise its oversight duties." *Chou*, 2020 WL 5028065, at *18. Directors cannot take an "ostrich-like approach to their fiduciary obligations;" they "must make a good faith effort to put in place a reasonable board-level system of monitoring and reporting." *Lebanon Cnty. Emps.' Ret. Fund v. AmerisourceBergen*, No. 2019-0527-JTL, 2020 WL 132752, at *20 (Del. Ch. Jan. 13, 2020). Moreover, directors cannot leave regulatory compliance to management's discretion—deferring to management is not an adequate substitute for "implementing and then overseeing a more structured compliance system." *Clovis*, 2019 WL 4850188, at *12; *see also Boeing*, 2021 WL 4059934, at *31 (finding blind reliance on management's "*ad hoc* reports" insufficient when there is no "regular process or protocols requiring management to apprise the Board" on compliance matters).

In *Marchand*, for example, the court found that the directors of an ice cream company failed to implement a reasonable reporting system for "central compliance issues" related to food safety because there were (i) no regular processes or protocols requiring management to update directors on product safety and compliance issues; (ii) no schedule for the board to regularly consider product safety risks; (iii) management failed to escalate concerning information to the board; (iv) the board

received favorable information, but was not given important reports presenting a much different picture; and (v) food safety issues were not regularly discussed at board meetings. *Marchand v. Barnhill*, 212 A. 3d 805, 809, 821-22 (Del. 2019). Similarly, in *Boeing*, the board failed to implement "meaningful systems to monitor airplane safety" in advance of a 737 Max passenger plane crash. 2021 WL 4059934, at *7. The board's failure to "rigorously exercise its oversight function with respect to mission critical aspects of the company's business" supported a claim for breach of fiduciary duty. *Id.* at *26.

These same deficiencies exist here. Defendants do not dispute that infant formula safety and FDCA compliance are mission-critical issues that require Board-level oversight. *See* Defs. Br. At 24-29. Nor could they. The FDCA's purpose is to protect consumers from adulterated food, defined as food that "consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit," or if "it has been prepared, packed, or held under insanitary conditions. . . whereby it may have been rendered injurious[.]" ¶83.

[redacted] ¶427; *see also Walton*, 2023 WL 3093500, at *2 ("[I]f the record lacks documentation relating to a particular event, and if it is reasonable to expect that documentation would exist if the event took place, then the plaintiffs are entitled to a reasonable inference that the event did not occur."). Like in *Marchand*, [redacted] ¶267. [redacted] ¶131. [redacted]

[redacted] *See* Exs. 22, 27, 30. [redacted] ¶¶436, 440.

Specifically, despite the voluminous exhibits that Defendants attached to their motion, [redacted] concerning:

- The lawsuits filed against Abbott from 2005 to the present, which allege that Cronobacter contamination at the Sturgis Plant caused infant injury or death (¶¶135-36);
- [redacted] (¶¶144-50);
- The 2019 Form 483, which detailed unsanitary and illegal conditions at the Sturgis Plant, [redacted] and FDA acknowledgment of an infant being sickened and hospitalized with Cronobacter after consuming Similac (¶¶151, 153, 155-57, 159, 161-62, 168);
- [redacted] (¶164);
- [redacted] (¶¶168-77);
- Whistleblower #1's February 16, 2021 OSHA complaint or October 19, 2021 FDA Complaint, which detailed illegal activities occurring at the Sturgis Plant (¶179);
- The 2021 Form 483, which stated that Abbott did not maintain the Sturgis Plant in a "clean and sanitary" condition (¶¶188-89);
- The various complaints the FDA received linking sick or dead infants to the consumption of Abbott formula produced at the Sturgis Plant (¶¶192, 199); or
- The FDA's demand for a "for-cause" inspection of the Sturgis Plant (¶9).

[redacted]

[redacted] ¶214. [redacted] *Id.*

In response to these facts, Defendants nonetheless contend that a reasonable, Board-level reporting system existed, claiming that "the Board implemented multi-faceted oversight of Abbott's most significant risks," and Plaintiffs' allegations are merely "criticisms of the efficacy of the oversight." *See* Defs. Br. at 25; *see also id.* at 24-29. This argument is inconsistent with the actual allegations and ignores the legal principle that "[i]t is reasonable to infer that exculpatory information not reflected in the document production does not exist." *Boeing*, 2021 WL 4059934, at *1 (citing *Chou,* 2020 WL 5028065, at *24 & n.314). Defendants' argument is also legally flawed, as follows:

First, Defendants argue that there were simply no safety or compliance concerns worth reporting to the Board or the Public Policy Committee before the recall and shutdown because "an FDA Form 483 is not an assertion by the FDA that a facility has violated the law." *See* Defs. Br. at 4-5, 26. This argument fails for numerous reasons. Foremost, it ignores the many other warnings that would have been captured in an internal reporting system, including: (1) the numerous lawsuits alleging wrongful infant deaths resulting from Cronobacter; (2) the Whistleblower's OSHA complaint, alleging a system of improper retaliation against employees complaining of health and safety issues; and (3) the Whistleblower's FDA complaint, alleging significant issues at the Sturgis Plant, [redacted]. ¶¶179, 191, 198. [redacted]

Moreover, the Director Defendants should be well aware that a reporting system that does not address the substance of Form 483s is unreasonable because the Seventh Circuit held as much in a prior *Caremark* case involving Abbott:

> We find that six years of noncompliance, inspections, ***483s***, Warnings Letters, and notice in the press, all of which then resulted in the largest civil fine ever imposed by the FDA and the destruction and suspension of products which accounted for approximately $250 million in corporate assets, indicate that the directors' decision to not act was not made in good faith and was contrary to the best interests of the company.

325 F.3d at 809. The critical importance of Form 483s is clear from the allegations here; a plant shutdown and recall occurred without a formal FDA warning letter, and the DOJ Complaint relied heavily on the findings set forth in the Form 483s. ¶95, 246.[6]

Second, the Director Defendants contend that their general oversight of "significant risks" is evidence that they did not "utterly fail" to implement a reasonable information reporting system. *See* Defs. Br. at 24-29. However, none of the Board's purported "risk management efforts" created a system to inform the Board of safety and compliance issues in its U.S. infant formula business, including at the Sturgis Plant. For example [redacted] *See* Defs. Br. at 8; Ex. 15. That is simply not accurate. [redacted] *Id.* [redacted]

[6] The Director Defendants misrepresent the holdings of *Plumbers and Pipefitters Loc. Union 719 Pension Fund v. Zimmer Holdings, Inc.*, 679 F.3d 952 (7th Cir. 2012). As *Zimmer* explains, an FDA Form 483 is based on investigatory findings and provides "information about 'significant objectionable conditions' . . . that the inspector believes will be useful to the company." *Id.* at 955. Rather than holding that the substance of Form 483s can or should be ignored, *Zimmer* only rejected a finding of scienter on the specific facts of the case because it was "not clear how quickly these 483 observations reached Zimmer's CEO." *Id.* at 995-56.

[redacted] Ex. 15 at '10599.

[redacted] *See* Defs. Br. at 9. In fact, its charter did not identify Form 483s as a type of report to monitor. ¶286. [redacted], and the "mere existence" of a Public Policy Committee does not satisfy directors' fiduciary duties to implement such a system. *Hughes v. Xiaoming Hu*, No. 2019-0112-JTL, 2020 WL 1987029, at *14 (Del. Ch. Apr. 27, 2020) (the "mere existence of an audit committee and the hiring of an auditor does not provide universal protection against a *Caremark* claim"); *Rich v. Yu Kwai Chong*, 66 A.3d 963, 983 (Del. Ch. 2013) (defendants had "no meaningful controls in place" despite having an audit committee and outside independent auditor).[7]

Thus, given their utter failure to "assure a reasonable information and reporting system exists," the Director Defendants have each breached their fiduciary duty. *In re Caremark Int'l, Inc. Deriv. Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).

[7] In contrast, Defendants repeatedly rely on decisions where robust reporting systems existed. *See, e.g.*, *In re Novavax Inc. S'holder Deriv. Litig.*, No. 21-cv-2996-TDC, 2023 WL 5353171, at *11 (D. Md. Aug. 21, 2023) ("Board of Directors regularly received substantial updates from management on the manufacturing and development of the Vaccine"); *In re GM Co. Deriv. Litig.*, No. 9627-VCG, 2015 WL 3958724, at *15 (Del. Ch. June 26, 2015) ("Board was given presentations on safety and quality issues"); *City of Detroit Police v. Hamrock*, No. 2021-0370-KSJM, 2022 WL 2387653, at *3 n.11 (Del. Ch. June 30, 2022) (identifying at least fourteen presentations on pipeline safety); *Constr. Indus. Laborers Pension Fund v. Bingle*, No. 2021-0940-SG, 2022 WL 4102492, at *12 (Del. Ch. Sept. 6, 2022) (Nominating and Governance Committee "met and discussed the pertinent issue, cybersecurity, both via receipt of a management presentation and then again in discussion"); *Firemen's Ret. Sys. of St. Louis v. Sorenson*, No. 2019-0965-LWW, 2021 WL 4593777, at *13 (Del. Ch. Oct. 5, 2021) ("the Board and Audit Committee were 'routinely apprised' on cybersecurity risks and mitigation" and "provided with annual reports . . . that specifically evaluated cyber risks").

2. The Director Defendants Failed to Respond to Red Flags of Safety and Compliance Violations

Plaintiffs may also state a *Caremark* claim by showing that "the board knew of evidence of corporate misconduct—the proverbial 'red flag'—yet acted in bad faith by consciously disregarding its duty to address that misconduct." *Chou*, 2020 WL 5028065, at *17. Allegations that directors "had notice of serious misconduct and simply brushed it off or otherwise failed to investigate states a claim for breach of duty." *AmerisourceBergen Corp.*, 2020 WL 132752, at *20. A "warning from a regulatory authority" is a classic red flag, even "irrespective of any admission or finding of liability." *Collis*, 2023 WL 8710107, at *20.

For example, in *Boeing*, in addition to the reporting-system failures discussed above, the court found that even after learning of the crash, "the Board treated the crash as an 'anomaly', a public relations problem, and a litigation risk" rather than acting swiftly to investigate and remediate any safety issues. 2021 WL 4059934, at *34. Internal books and records "d[id] not reveal evidence of any director seeking or receiving additional written information" about the safety problems; the Board's focus "was on the continued production of the 737 Max" rather than "remedial steps" or "safety generally." *Id.* Thus, the court found that plaintiff had also pled a second, independent form of liability against the board under a "red flag" theory. *Id.*

[redacted] The FDA urging a recall is a glaring red flag. [redacted] ¶214. [redacted] *Id.* [redacted]

[redacted].[8] *Id.* [redacted] ¶215. [redacted] ¶234. [redacted] *Id.* [redacted] ¶240. [redacted] These failures create a "classic prong two claim." *Boeing*, 2021 WL 4059934, at *33.

In the face of these allegations and well-established law, the Director Defendants make legally and factually unsupported arguments that do not provide a basis to dismiss Plaintiffs' claims.

First, the Director Defendants' claim that they have a robust "reporting system," including "regularly scheduled reports" prepared "multiple times each year" that addressed "compliance and product quality" and "inspections of Abbott facilities" (*see* Defs. Br. at 7-12, 25), totally undermines their defense to the "red flags" claim. [redacted]

[8] [redacted] ¶214.

[redacted] A decision to "flout the law governing [Abbott's] affairs" by ignoring the widespread compliance violations such a system would bring to the Board's attention is no defense. *In re Massey Energy Co.*, No. 5430-VCS, 2011 WL 2176479, at *21 (Del. Ch. May 31, 2011).

Second, the Director Defendants argue that Plaintiffs have failed to identify any "damages" caused by ignoring red flags, and that the Board's agreement to the DOJ Consent Decree supports that regulatory issues were "being addressed." Defs. Br. at 31. The Director Defendants do not identify any examples of a company's entry into a consent order with a regulator that exculpates directors from their prior breaches of fiduciary duty. And, the DOJ Complaint and Consent Decree support the existence of a red flags claim. The DOJ Complaint cites the same Form 483s that the Director Defendants now seek to discount as trivial, leading the DOJ to allege that Abbott manufactured infant formula "under conditions and practices that fail[ed] to protect the food against the risk of contamination from bacteria, including but not limited to, Cronobacter," and that the Company was "unwilling or unable to implement sustainable corrective actions." ¶246. Additionally, the DOJ Consent Decree requires the Board to take remedial action that, to date, the Board had failed to independently take—thus reflecting that "damages" flowed from their dereliction of duty. ¶247.

Third, the Director Defendants postulate that rather than failing to respond to red flags, the Board made a "decision to give Management time to develop a remediation plan" that it had planned to eventually review in detail. *See* Defs. Br. at 30. Not so. Nothing in Defendants' extrinsic record suggests that Abbott's directors made such a decision. Moreover, the "buck stops with the board," and directors may not "opt for the more leisurely role of clam-like passive instrumentalities, awaiting whatever tidbits of information the managerial tides brought their way." *In re McDonald's Corp. S'holder*

Deriv. Litig., 291 A.3d 652, 675 (Del. Ch. 2023); *Boeing*, 2021 WL 4059934, at *29 (shareholders pleading a *Caremark* claim where the board "passively accepted management's assurances and opinions").[9]

Thus, the Director Defendants are liable for failing to take any "remedial steps" in response to red flags of Abbott's safety and compliance violations. *Boeing*, 2021 WL 4059934, at *34.

C. Plaintiffs State a *Caremark* Claim Against the Officer Defendants

In the context of a *Caremark* claim, "the fiduciary duties of officers are the same as those of directors." *McDonald's*, 289 A.3d at 362. Officers' oversight duties "include[] both the Information-Systems Obligation and the Red-Flags Obligation" for any "matters within their areas of responsibility[.]" *Id.* As a result, for their areas of responsibility, officers must both "gather information and provide timely reports to the board" and "identify red flags, report upward, and address them." *Id.* at 366; *AmerisourceBergen*, 2020 WL 132752, at *21 ("Officers also are fiduciaries in their capacities as agents who report to the board of directors").

Here, the Officer Defendants contend that Plaintiffs' claims are based on "threadbare" allegations. *See* Defs. Br. at 38-40. But a plain reading of the Complaint demonstrates otherwise. The Officer Defendants include Abbott's highest members of senior management whose responsibilities encompassed product safety, regulatory compliance, the Sturgis Plant operations, and corresponding reporting to the Board, including, among others:

- ***CEO Robert B. Ford*** who despite his ultimate managerial authority, allowed rampant compliance violations at the Sturgis Plant, and issued a public apology on Abbott's behalf

[9] The Director Defendants rely on decisions involving the type of proactive director response to "red flags" that was lacking here, and therefore are unpersuasive. *See, e.g.*, *Sorenson*, 2021 WL 4593777, at *13 & *16 (discussing "efforts made immediately to remedy" the company's cybersecurity issues, including "recommendations" from an outside auditor); *Pettry v. Smith*, No. 2019-0795-JRS, 2021 WL 2644475, at *11-*12 (Del. Ch. June 28, 2021) (board "actively investigated and monitored the allegations of wrongdoing" and responded "swiftly"); *In re Qualcomm Inc. FCPA S'holder Deriv. Litig.*, No. 11152-VCMR, 2017 WL 2608723, at *4 (Del. Ch. June 16, 2017) (multiple examples of the board's "planned remedial actions"); *Melbourne Mun. Firefighters Pension Trust Fund v. Jacobs*, No. 10872-VCMR, 2016 WL 4076369, at *8 (Del. Ch. Aug. 1, 2016) (board implemented a remediation plan to address regulatory issues); *City of Birmingham Ret. and Relief Sys. v. Good*, 177 A.3d 47, 57 (Del. 2017) (steps taken to mitigate financial and environmental risks).

through a *Washington Post* article (¶¶27, 160, 162, 170, 172, 175, 177, 181, 189, 195, 213-14, 222, 230, 240, 248, 479);[10]

- ***Chief Ethics & Compliance Officer Erica Battagli*** [redacted] (¶¶51, 183-84, 189, 214, 481);
- ***Senior Vice President of U.S. Nutrition Christopher J. Calamari*** who had oversight responsibilities for the Sturgis Plant, knew of the whistleblower allegations in 2021 and took no corrective action, and provided misleading testimony to Congress (¶¶52, 182, 482);
- ***Vice President of Nutrition Quality Assurance Lori J. Randall*** who had oversight responsibilities for the Sturgis Plant, knew of the whistleblower allegations in 2021, received the Form 483s [redacted], and was named as a defendant in the DOJ Complaint (¶¶56, 182, 185, 190, 200, 246, 486);
- ***Executive Vice President and General Counsel Hubert Alle*** [redacted] (¶¶50, 144, 170, 179, 181, 185); and
- ***Chief Ethics & Compliance Officer James E. Youn*** [redacted] (¶¶58, 148, 156-57, 161-62, 488).[11]

The Complaint alleges that the Officer Defendants consistently failed to implement and actively oversee a compliance and safety program for the domestic manufacture and sale of infant formula; disregarded their duty to investigate red flags and to remedy violations; failed to apprise the Board of compliance violations; and sought to cover up safety and regulatory concerns. ¶444. With these failures, the FDA found rampant regulatory violations related to safety and sanitation, violations which led to the distribution of contaminated baby formula and numerous infant deaths. ¶1. These failures culminated in the FDA making multiple recommendations for a recall (and nearly a forced recall), the shutdown of the Sturgis Plant, a regulatory action from the DOJ, scrutiny from the White

[10] Ford was both a director and an officer, and Plaintiffs bring claims against him in both capacities. ¶¶468-490.

[11] The Officer Defendants do not dispute that Plaintiffs have stated actionable claims against Ford, Calamari, Randall, and Funck. *See* Defs. Br. at 38-40.

House and Congress, and significant harm to Abbott. ¶¶243-46. Because the Officer Defendants' misconduct mirrored directors' own oversight failures, the Demand Board could not disinterestedly consider a demand to sue the Officer Defendants for the very same oversight failures "without being influenced by improper considerations" of their own personal liability. *Rales*, 634 A.2d at 934.[12]

The Officer Defendants also raise a counter-factual argument, contending that Abbott was not responsible for the infant deaths caused by Cronobacter. *See* Defs. Br. at 3-4. They point the finger at the deceased children's families, suggesting that the bacteria could have come from "sources in the home," such as "kitchen sink surfaces," "household utensils," or "vacuum cleaning bags." *Id.* Not only are the exhibits cited in support of this evidentiary argument not properly before the Court, but Defendants are raising an improper factual dispute by failing to accept Plaintiffs' "well-pleaded facts as true." *Abbott*, 325 F.3d at 807. For example, the Complaint explains that, during his March 28, 2023 Congressional testimony, FDA Deputy Commissioner Yiannas refuted Abbott's claims that the FDA had exonerated the Company, explaining that Abbott's products were very likely the source of contamination given the pervasive unsanitary conditions in the Sturgis Plant, the poor processes in place, and the old equipment that no longer conformed to best safety practices. ¶264.

Thus, the Officer Defendants were "directly responsible for business units whose conduct was critical to the pervasive misconduct" that "permeated [the company's] way of doing business," and Plaintiffs have therefore stated a claim of breach of fiduciary duty. *In re Am. Int'l Grp., Inc*, 965 A.2d 763, 777 (Del. Ch. 2009).

[12] The Officer Defendants' reliance on In re *MetLife Inc. Deriv. Litig.*, No. 2019-0452-SG, 2020 WL 4746635, at *18 n.229, and *McElrath v. Kalanick*, No. 2017-0888-SG, 2019 WL 1430210, at *17 n.188 (Del. Ch. Apr. 1, 2019), is misplaced. In neither action did a majority of the board face a substantial likelihood of liability based on the same wrongdoing alleged against the officer defendants.

D. Plaintiffs State a Section 10(b) Claim Against the 10(b) Defendants[13]

The Complaint alleges that the 10(b) Defendants' false and misleading statements caused Abbott harm when it re-purchased its stock at artificially inflated or maintained prices. A claim under §10(b) and Rule 10b-5 requires: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Oak Street Health, Inc.*, 2023 WL 1928119, at *4.

Plaintiffs satisfy the required elements. Plaintiffs allege in detail that Defendants made numerous false and misleading statements about Abbott's safety and compliance that artificially inflated Abbott's stock price. ¶¶363-82.

Plaintiffs also demonstrate an inference of scienter, meaning the 10(b) Defendants had "knowledge of the statement's falsity or reckless disregard of a substantial risk that the statement is false" which is simply "reckless disregard for the truth." *Lowry v. RTI Surgical Holdings, Inc.*, 532 F. Supp. 3d 652, 661-62 (N.D. Il. 2021). An inference of scienter is met by the numerous government investigations, DOJ Consent Decree, whistleblower complaints, testimony of former FDA Deputy Commissioner Yiannis, and the subject matter of the misstatements involving a core operation. ¶¶384-89. Additionally, as officers, Calamari, Ford, and Funck had knowledge of or access to information showing the falsity of the statements, such as the whistleblower complaint. The remaining 10(b) Defendants are outside directors, who were severely reckless in signing off on statements regarding Abbott's safety and compliance while failing to oversee those very issues in this highly regulated area. ¶¶363-85. Finally, the personal financial benefit that inured from the false and misleading statements supports an inference of scienter. Certain 10(b) Defendants (Calamari, Ford, Funck, McKinstry, and

[13] The 10(b) Defendants are outside directors Alpern, Austin, Blount, Gonzalez, Kumbier, Liddy, McDew, McKinstry, Novakovic, Osborn, Starks, Stratton, Tilton, and White, and officers Calamari, Ford, and Funck.

Starks) sold Abbott stock at a price higher than it would have been had the truth about Abbott's safety and compliance issues been revealed. ¶389. Additionally, the stock repurchases benefited Calamari, Ford, and Funck because when the Company repurchases stock, there are fewer total shares outstanding and earnings per share increase – a key metric in determining their compensation. ¶360.

In repurchasing stock, Abbott relied on the 10(b) Defendants' false or misleading statements and/or integrity of the market price. ¶¶363-82, 392-395. Additionally, Abbott is entitled to a presumption of reliance as to material omissions. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 152 (1972); *see also ABN AMRO, Inc. v. Cap. Int'l Ltd.*, 595 F. Supp. 2d 805, 840 (N.D. Ill. 2008) ("Reliance in an omissions case is presumed.").

Finally, the false and misleading statements caused Abbott's losses by causing the stock price to be artificially high and for Abbott to spend more on the stock than it was worth. ¶¶396-99.

Defendants concede virtually every one of these elements, arguing *only* that Plaintiffs fail to plead reliance because the Director Defendants who authorized the stock repurchases also had knowledge of the fraud, and therefore, Abbott (the corporation) could not have been deceived. *See* Defs. Br. at 21-22. Defendants argue that finding that Abbott was deceived by its officers would violate the principle that corporate leadership's knowledge is imputed to the corporation. But that rigid approach is inconsistent with the law, which recognizes imputation is a policy, not a fact: "When it is practical as well as just to do so, courts have experienced no difficulty in rejecting such clichés as the directors constitute the corporation and a corporation, like any other person, cannot defraud itself." *Ruckle v. Roto Am. Corp.*, 339 F.2d 24, 29 (2d Cir. 1964). *See also Est. of Soler v. Rodriguez*, 63 F.3d 45, 54 (1st Cir. 1995) ("It is by now well established that a corporation has a claim under §10(b) if the corporation was defrauded to the sale of its own securities by some or even all of its directors."); *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449, 456 (7th Cir. 1982).

Further, Defendants' cases can be distinguished because they involve directors authorizing stock repurchases when they have *actual knowledge* of the fraud, which was then imputed to the company. For example, in *Ray v. Karris*, 780 F.2d 636, 643 (7th Cir. 1985), the court rejected a §10(b) claim because "the alleged fraud was known to all" relevant parties.[14] Here, though, Plaintiffs allege that the Directors were reckless in making the alleged false and misleading statements due to their failure of oversight, but that they did *not* have actual knowledge of the underlying safety and compliance failures. In distinguishing *Ray* on this basis, a court explained that the "general rule" is that "the knowledge of the allegedly defrauding directors will *not* be imputed to the corporation to negate reliance without disclosure by the allegedly defrauding directors and ratification by the remaining directors or shareholders." *In re Whitehall Jewellers. Inc. S'holder Derivative Litig.*, No. 05-cv-1050, 2006 WL 468012, at *12 (N.D. Ill. Feb. 27, 2006) (distinguishing *Ray*).

That "general rule" applies here, as it has in numerous cases finding reliance. In *Shaev v. Baker*, the court rejected a similar imputation defense because it "'exalts form over substance' and 'restricts the application of 10(b) liability in a way which is at odds with its basic purpose.'" No. 16-cv-05541-JST, 2017 WL 1735573, at *18 (N.D. Cal. May 4, 2017); *see also In re Countrywide Fin. Corp. Deriv. Litig.*, 554 F. Supp. 2d 1044, 1073 (C.D. Cal. 2008) ("modern courts have permitted such [10(b)] claims to proceed"). Similarly, *In re Finisar Corp. Deriv. Litig.* held that the plaintiff sufficiently pled reliance because if a company purchases stock while its fiduciaries are engaging in fraud or breaching their fiduciary duties, "it does not do so recklessly—it is a puppet whose strings are pulled by the very directors and officers responsible for the fraud." No. 06-cv-7660, 2012 WL 2873844, at *17 (N.D. Cal. July 12, 2012). Accordingly, Plaintiffs' 10(b) claim should be sustained.

[14] *See also Elfers v. Gonzalez*, No. 20-cv-213-SB, 2020 WL 7264272, at *3 (D. Del. Dec. 10, 2020) (directors had actual knowledge of the fraud, which was imputed to the Company); *Franklin v. Doheny*, 2022 WL 2064972, at *2, n.19 (D. Del. June 8, 2022), *report and recommendation adopted*, 2022 WL 3099235 (D. Del. June 23, 2022) (same).

E. Plaintiffs State a Claim for Corporate Waste Against the Director Defendants

With respect to Plaintiffs' claim for corporate waste stemming from the stock repurchases, Defendants ignore Illinois law and cite cases applying the laws of other states, with a narrow focus on whether directors knew the stock price was artificially inflated.[15] But Illinois courts do not focus on state of mind and, instead, consider objectively whether the plaintiff pled that the corporate transaction was wasteful:

> [C]orporate waste arises if what the corporation has received is so inadequate in value that no person of ordinary, sound business judgment would deem it worth that which the corporation has paid . . . where the substantive terms of the transaction are so unsound as to undermine the presumption that the approval of the transaction was a product of valid business judgment.

Nuveen Fund Litig., 1996 WL 328001, at *8-9.

"[T]he determination of whether waste has occurred is largely a question of fact, and the court must examine the facts surrounding the situation." *Fournie v. Belleville Concrete-Contract Co.*, 2021 IL App (5th) 190158-U, at *11 (Il. App. Ct. 2021). This issue is thus ill-suited for resolution at motion to dismiss. Even where it is "doubtful" that a plaintiff can ultimately establish that a transaction was not attributable to a valid business purpose, it should proceed to discovery. *Nuveen Fund Litig.*, 1996 WL 328001, at *8-9 (rejecting summary judgment on waste claim); *see also Flanagan v. Bernstein*, No. 93-cv-1498, 1996 WL 84184, at *3 (N.D. Ill. Feb. 22, 1996) (a motion to dismiss simply "tests the sufficiency of the complaint, not the evidence" so simply alleging that conduct constituted corporate waste is sufficient). Plaintiffs' allegations that the stock repurchases were made at prices artificially inflated by fraud, which no reasonable person would have paid under the circumstances and which allowed

[15] *See Kococinski v. Collins*, 935 F. Supp. 2d 909, 916 (D. Minn. 2013) (applying Delaware law); *Staehr v. Mack*, No. 06-cv-10368, 2011 WL 1330856, at *4 n. 4 (S.D.N.Y. Mar. 31, 2011) (same); *In re NutriSystem, Inc. Deriv. Litig.*, 666 F. Supp. 2d 501, 511 (E.D. Pa. 2009) (same).

certain Defendants to benefit from insider trading and performance-based compensation, are therefore sufficient to state a claim. ¶498; *see also* Compl., §IX.

F. Plaintiffs State a Section 14(a) Claim Against the Proxy Defendants

"[U]nder Section 14(a), a plaintiff must allege that (i) the proxy statement contained a material misstatement or omission, which (ii) caused plaintiff's injury, and (iii) that the proxy solicitation itself, rather than the particular defect in the solicitation, was an essential link in the accomplishment of the transaction." *Seafarers Pension Plan on behalf of the Boeing Co. v. Bradway*, 23 F.4th 714, 719 (7th Cir. 2022). Plaintiffs' allegations readily satisfy these elements.[16]

1. Abbott's Proxy Statements Contained Material Misstatements and Omitted Information that Made the Statements False and Misleading

Plaintiffs allege material misstatements in Abbott's proxy statements for 2021, 2022, and 2023, including that Abbott had "sustainable infrastructure to drive quality, environment, health and safety performance" (¶¶307, 311, 329); "adequate internal controls for financial reporting and compliance with applicable laws and regulations" (¶¶307, 311, 329); a Public Policy Committee to help "the Board of Directors [ ] fulfill[ ] its oversight responsibility with respect to . . . legal and regulatory compliance," and "Government affairs and healthcare compliance issues" (¶¶304, 326, 346); and "review[ed] its leadership structure to ensure the appropriate level of oversight, independence, and responsibility" (¶314). Defendants argue that Plaintiffs provide insufficient particularity (Defs. Br. at 16) but that argument ignores the detailed pleadings showing that Defendants conveyed a picture of a company

[16] Rule 14a-9 covers solicitations through the "means of any *proxy statement*, form of *proxy*, notice of meeting *or other communication*, written or oral . . ." 14 C.F.R. §240.14a-9(a). In addition to claims in the proxy statements, the 2021 and 2022 Proxy Statements directed shareholders to Abbott's website for "additional information . . . regarding Abbott's business activities" (¶¶298, 320) including egregious misstatements, claiming Abbott was "dedicated to improving healthcare by providing high-quality, safe and effective products," "the continuing effectiveness of our quality management system to meet . . . regulatory requirements," and that Abbott "maintain[ed] compliance with all laws, rules and regulations." *Id.* Abbott's repeated and explicit direction of shareholders to these websites renders them "other communications" under Rule 14a-9, and argument to the contrary should be rejected. *See* Defs. Br. at 18 n.11.

engaged in safe manufacturing, compliant with the law and regulations, with strong governance to catch and remedy major risks. *See, e.g.*, ¶¶298-300, 303, 310-12, 318, 320, 327-29, 332, 336. It also ignores detailed pleadings that these statements were false and misleading because at the same time Defendants boasted about "safety" and "regulatory compliance," they concealed years of unsafe manufacturing at the Sturgis Plant, and that Abbott failed to take seriously numerous Form 483s, EIRs detailing violations of the FDA regulations, whistleblower complaints, and more.[17] *See* ¶¶308-09, 312, 315, 330-31, 334, 337, 350-51, 354, 356, 368, 452-55.

"Information is material if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information available." *United States S.E.C. v. Ustian*, No. 16-cv-3885, 2019 WL 7486835, at *35 (N.D. Ill. Dec. 13, 2019). Statements are immaterial only if "they are so obviously unimportant to a reasonable investor that reasonable minds could not differ." *Hedick v. Kraft Heinz Co.*, 2021 WL 3566602, at *7 (N.D. Ill. Aug. 11, 2021); *see also FirstEnergy*, 2021 WL 1890490, at *7 (same). The omitted information created a misleading image of Abbott's safety, competency of leadership, and compliance, which goes to the core of Abbott's value as a company and is material. ¶¶295-312. This is analogous to *Bricklayers and Masons Loc. Union No. 5 Ohio Pension Fund v. Transocean Ltd.*, in which the court found misstatements and materiality when defendants claimed to have "conducted 'extensive' training and safety programs," but omitted that the company's federal regulator had written a report

[17] Defendants also mischaracterize Plaintiffs' claim, arguing that the Complaint merely alleges a failure to disclose and that they did not omit "any mandatory disclosure." Defs. Br. at 17-18. But Plaintiffs alleged that the proxies made affirmative statements touting safety and compliance while concealing that the opposite was true, including notifications of non-compliance and violation of federal law, the omission of which renders their disclosures misleading. *See* ¶¶307-09, 311-12, 315, 329-31, 334, 337, 350-51, 354, 356, 368, 452-55. *Employees Retirement System of City of St. Louis v. Jones*, 2021 WL 1890490, at *7 (S.D. Ohio May 11, 2021) ("*FirstEnergy*"), No. 20-cv-4813, 2021 WL 1890490, at *9 (S.D. Ohio May 11, 2021) (the question is "whether misstatements or omissions 'are sufficiently connected to Defendants' existing disclosures to make those public statements misleading'"). This case is therefore unlike *Fifth Third Bancorp Deriv. Litig.*, 2022 WL 970569, at *18 or *Leykin v. AT&T Corp.*, 216 F. App'x 14, 16-17 (2d Cir. 2007), where courts found that the alleged omissions did not render other statements misleading.

detailing hazardous behavior and high risk of legal exposure. 866 F. Supp. 2d 223, 233, 240, 243 (S.D.N.Y. 2012). Similarly, here, Abbott's proxies touted safety and compliance while omitting key information regarding regulatory findings of contamination, whistleblower complaints, and more. *See* ¶¶308-15, 330-37, 350-56, 452-55.

Moreover, the statements are not mere puffery (Defs. Br. at 18 & n.12), which refers to "vague optimism" that "cannot be called false." *Phoenix Ins. Co. v. ATI Physical Therapy, Inc.*, No. 1:21-cv-04349, 2023 WL5748359, at *6 (N.D. Ill. Sept. 6, 2023). Defendants cherry-pick phrases out of context and argue the isolated words are puffery. As an example, Defendants argue that the phrase "spends significant time with Abbott's senior management" is puffery—but they ignore that that phrase is part of a long, detailed description of what purportedly takes place when the Board meets with senior management:

> Abbott is committed to strong corporate governance that is aligned with shareholder interests. Our Board spends significant time with Abbott's senior management to understand the dynamics, issues, and opportunities for Abbott. During these interactions, directors provide insights and ask probing questions which guide management decision-making. This collaborative approach to risk oversight and emphasis on long term sustainability begins with our leaders and is engrained in the culture of Abbott.

Defs. Br. at 18 n.12 (citing ¶296). Read fully and in context, this is not a statement of "vague optimism" but rather of historical fact that can be proven false.[18] The other statements challenged as puffery follow suit. Because the challenged statements involve safety, oversight, and legal compliance, all of which are measurable attributes of central concern to investors, they are not puffery. *See Bricklayers*, 866 F. Supp. 2d at 244 (training and safety are core investor concerns and are not puffery); *see also*

[18] [redacted] Def. Ex. 72.

Phoenix Ins. Co., 2023 WL5748359, at *6 ("high retention" and "low turnover" are "concrete" terms that are "capable of reasonable measurement").

Nor are the statements non-actionable opinions. Defs. Br. at 18 & n.13. Defendants identify with specificity just two statements in this category. The first, "Abbott determined its compensation and benefit programs appropriately align employees' compensation and performance without incentivizing risky behaviors," is a fact, not an opinion. It conveys that Abbott conducted an analysis and made a measurable conclusion regarding the relationship between compensation and performance and risk-taking. The second, "the Board believes that the current [chairperson] structure is in the best interests of Abbott," is actionable even if it is an opinion because it "omits material facts about the issuer's inquiry into or knowledge concerning," the statement—that the Board conducting this analysis was wholly derelict in its duty to oversee a major risk. *See Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 189 (2015). As *Omnicare* recognizes, "[a]n issuer must . . . desist from misleading investors by saying one thing and holding back another." *Id.* at 192.

2. The Proxy Statements Caused Plaintiffs' Injury and Were an Essential Link

To allege loss causation under Section 14(a), a plaintiff must satisfy "Rule 8 notice pleading standards," which requires just "some indication of the loss and the causal connection that the plaintiff has in mind." *Enzo Biochem, Inc. v. Harbert Discovery Fund, LP*, No. 20-cv-9992, 2021 WL 4443258, at *9 (S.D.N.Y. Sept. 27, 2021). Plaintiffs allege that the misrepresentations and omissions of material information regarding safety and compliance induced shareholders to re-elect Board members, decline to demand an independent Board chair, and approve compensation, thus allowing the faithless fiduciaries to remain on the Board and continue causing harm. ¶¶17, 295, 310, 313, 316-17, 332, 335, 338-39, 352, 355, 358. This mirrors claims upheld in *FirstEnergy*, where causation was satisfied through misstatements involving effective "governance practices" and active "oversight," including the company's "regulatory requirements," that caused shareholders to approve executive compensation

and re-elect the defendant directors, thus allowing them to continue breaching their fiduciary duties. 2021 WL 1890490, at *15-17. Here, too, Plaintiffs alleged that the false statements were "designed to influence how shareholders voted," and but-for the false statements, shareholders would have voted incumbent board members out, required an independent Board chair, and rejected executive compensation, thereby cutting off continued breaches of fiduciary duty.

Defendants attempt to narrow the "essential link" analysis, suggesting it is met only when the proxy solicits votes for a transaction directly related to the corporate trauma, citing to *Gen. Elec. Co, v. Cathcart*, 980 F.2d 927, 933 (3d Cir. 1992). But *Cathcart* took issue with the "broad allegations of [a] complaint" that alleged "only purported instances of mismanagement or waste of corporate assets[.]" 980 F.2d at 930-31. Here, in contrast, Plaintiffs allege a systemic, long-term failure of oversight that exposed Abbott to significant legal, regulatory, and reputational risks as well as economic harm, and the proxies induced shareholders to keep the faithless fiduciaries in a position to continue breaching their duties.[19] ¶¶1, 11, 234, 237, 257, 263, 309, 376-81, 455. These allegations are more analogous to the many post-*Cathcart* cases finding causation is met.[20] For example, in *In re Wells Fargo & Co. S'holder Deriv. Litig.*, the corporate trauma stemmed from a "fraudulent business practice" including opening unauthorized bank accounts, but the solicited votes had nothing to do with consumer fraud—as here,

[19] Defendants argue that Plaintiffs do not establish any economic injuries as in *Resnik v. Woertz*, 774 F.Supp.2d 614, 632 (D. Del. 2011). But *Resnik* requested only equitable relief, not damages; here Plaintiffs allege significant economic injury and request monetary damages as relief. ¶¶1, 11, 234, 237, 257, 263, 309, 376-81, 455.

[20] *See In re Zoran Corp. Deriv. Litig.*, 511 F. Supp. 2d 986, 1016 (N.D. Cal. 2007) (false proxy solicitations caused shareholders to re-elect board members "in blissful ignorance" of their scheme instead of voting out board members and cutting off their means to continue the fraud); *In re Fossil, Inc.*, 713 F. Supp. 2d 644, 655 (N.D. Tex. 2010) ("but for the false proxy statements, the [fraud] would have been discovered and stopped, thereby preventing harm to Fossil"); *In re Countrywide Fin. Corp. Deriv. Litig.*, 554 F. Supp. 2d 1044, 1075 (C.D. Cal. 2008) ("had [shareholders] been told the truth about the Company, they would have never voted (1) to reelect the current directors in those three years; or (2) to approve two compensation plans for executives and directors[.]").

they involved director elections and executive compensation. 282 F.Supp.3d 1074, 1103 (N.D. Cal. 2017).[21]

G. Plaintiffs State Insider Trading Claims Against Defendants Allen, Calamari, Ford, Funck, Manning, McKinstry, Salvadori, and Starks

When "a person in a confidential or fiduciary position, in breach of his duty, uses his knowledge to make a profit for himself, he is accountable for such profit." *Brophy*, 70 A.2d at 8. Insider trading requires only that a plaintiff allege facts leading to an inference that "1) the corporate fiduciary possessed material, nonpublic company information; and 2) the corporate fiduciary used that information improperly by making trades because she was motivated, in whole or in part, by the substance of that information." *Kahn v. Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d 831, 838 (Del. 2011). Plaintiffs need not plead a "smoking scienter gun." *In re Fitbit, Inc. S'holder Deriv. Litig.*, No. 2017-0402-JRS, 2018 WL 6587159, at *15 (Del. Ch. Dec. 14, 2018). Rather, "it is enough that they plead a series of particularized facts that would support a reasonable inference of knowledge, and resulting scienter, on the part of the insider traders." *Id.*

Plaintiffs meet that standard by alleging that the Insider Selling Defendants (¶389) sold Abbott stock at inflated prices while in possession of material, non-public information (the "MNPI"). Defendants Allen, Calamari, Ford, Funck, Manning, McKinstry, Salvadori, and Starks were in possession of MNPI that Abbott failed to oversee the infant formula division and lacked requisite risk controls that would have ensured safe manufacturing and legal compliance. ¶¶389-91. [redacted] *See e.g.*, ¶¶383, 445-56, 458, 493. In addition, they made material misrepresentations regarding those same matters. *Id.*

[21] Plaintiffs agree that liability against named board members attaches for the time periods such board members were at Abbott, including as to the proxy statements which they signed. Defs. Br. at 17 n.10.

Defendants ignore that *the underlying facts supporting the Insider Selling Defendants' possession of MNPI* are pled throughout the Complaint.[22] Defs. Br. at 32-33. A complaint that alleges "directly and by imputation" that directors knew of the material information, and made trades on that basis, satisfies the scienter standard. *Zimmerman v. Braddock*, No. 1843-NC, 2005 WL 2266566, at *8 (Del. Ch. Sept. 8, 2005).

Defendants argue that the percentage of trades is small relative to their holdings, but that defense is routinely rejected at this stage, particularly where defendants have actual knowledge of the fraud (here, the safety and compliance problems or the absence of oversight).[23] *Am. Int'l Grp.*, 965 A.2d at 801 (insiders' sales constituting only small percentages of holdings were sufficient to plead scienter); *see also In re Upstart Holdings, Inc. Sec. Litig.*, No. 2:22-CV-02935, 2023 WL 6379810, at *20 (S.D. Ohio Sept. 29, 2023) (rejecting "minimum percentage of stock sales" defense). Further, the massive size of the insider transactions (over $115 million) is itself probative of scienter.[24] *See Grabski v. Andreessen,* C.A. No. 2023-04640-KSJM, 2024 WL 390890, at *11 (Del. Ch. Feb. 1, 2024) (rejecting quibbles over amount of holdings because "Director Defendants made a lot of money from the trades. Maximum overindulgence is not a necessary element."); *In re Primedia, Inc. S'holders Litig.*, No. 6511-VCL, 2013 WL 6797114, at *1 (Del. Ch. Dec. 20, 2013) ($30.5 million in transactions sufficient to support an insider trading claim).

The Insider Selling Defendants also argue that they did not know certain purportedly contradictory facts related to the Sturgis Plant prior to February 2022 (Defs. Br. at 33), and

[22] *See, e.g.*, ¶¶127-268 (breach of fiduciary duty claim); ¶¶294-358 (Section 14(a) claim); and ¶¶359-88 (Section 10(b) claim).

[23] Defendants' cases are easily distinguishable because neither *Clovis*, 2019 WL 4850188, at *16 (Del. Ch. Oct. 1, 2019) nor *Guttman v. Huang*, 823 A. 2d 492, 502 n.20 (Del. Ch. 2003) alleged defendants' actual knowledge of MNPI—just inferences from the sale's size and timing.

[24] *See, e.g.,* ¶391; Ford - $21.18mm; Funck - $16.82mm; Salvadori - $25.20mm; Starks - $11.11mm; Manning - $13.33mm; and Allen - $29.04mm.

consequently could not possess MNPI. But even if they did not know those facts, that does not outweigh the overwhelming weight of the allegations regarding Abbott's manufacturing safety and compliance failures and their knowledge of lack of oversight—allegations which support their possession of MNPI during the relevant period. At this stage, nothing more needs to be pled regarding their scienter.[25]

H. Plaintiffs State Unjust Enrichment Claims Against the Officer Defendants[26]

Plaintiffs satisfy the elements of an unjust enrichment claim: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification and (5) the absence of a remedy provided by law." *PharMerica Chicago, Inc. v. Meisels*, 772 F. Supp. 2d 938, 965 (N.D. Ill. 2011). Plaintiffs detail that the Officer Defendants were unjustly enriched by failing to ensure safe and legally compliant production of infant formula, leading to the Company's violations of the FDCA and allegedly causing the death of numerous infants, along with a nationwide formula shortage. Despite and because of their misconduct, the Officer Defendants were rewarded with lavish and undeserved compensation, while exposing Abbott to numerous lawsuits and damages of billions of dollars. *See* ¶¶500-02. Accordingly, the Officer Defendants should be ordered to disgorge all profits, benefits, and other compensation received.

Defendants' only opposition is that the fact the Officer Defendants were compensated is not sufficient to state a claim. Defs. Br. 38-40. Such conclusory statements ignore the Complaint's detail regarding each officers' participation in the wrongdoing. *See, e.g.*, ¶¶121, 170, 197-98, 252. The unjust enrichment claims are adequately alleged and should be sustained.

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[25] Defendants McKinstry and Stark argue that they only sold stock after the recall (Defs. Br. at 34), but even then, the MPNI was not fully public. *See, e.g.*, ¶415. Additionally, that some transactions were "Code F" sales does not negate their benefit to the seller as these were "payments" for a liability or obligation; nor does it eliminate the inference that the seller possessed MPNI. Defs. Br. at 34.

[26] Allen, Battaglia, Calamari, Ford, Funck, House, Manning, Randall, Salvadori, and Young.

I. The Court Should Retain Supplemental Jurisdiction over Plaintiffs' State Law Claims in the Event the Federal Claims are Dismissed

Plaintiffs have more than sufficiently alleged federal Sections 14(a) and 10(b) claims. But in the event the federal claims are dismissed, the Court should exercise supplemental jurisdiction over the state law claims. No question exists that this Court has the power to do so. *See Anderson v. Aon Corp.*, 614 F.3d 361, 365 (7th Cir. 2010) (affirming district court's retention of state securities claim following dismissal of federal claim).

When determining whether to retain supplemental jurisdiction, courts consider "judicial economy, convenience, fairness, and comity." *In re Repository Techs., Inc.*, 601 F.3d 710, 724-27 (7th Cir. 2010). Those factors are met here. The state law claims are straightforward; they involve the same key facts as the federal claims; retention of jurisdiction does not create fairness issues;[27] and this case has been pending in this Court for over a year so the Court has developed familiarity with the case and parties and resolved numerous disputes, so judicial efficiency weighs strongly in favor of retaining jurisdiction. *See, e.g.*, ECF 15, 31, 37, 43, 49, 54, 57, 76, 85, 86, 95, 99, 103, 106; *Repository Techs.*, 601 F.3d at 727 (retaining jurisdiction where the court had "parsed" the record and evaluated numerous claims).

V. CONCLUSION

For these reasons, Plaintiffs respectfully request that Defendants' motion be denied. If the Court grants the motion in any part, Plaintiffs respectfully request leave to amend the complaint, which is freely given and would not cause undue delay or prejudice at this early stage of the litigation. *See Macovski v. Groupon, Inc.*, 553 F. Supp. 3d 460, 473 (N.D. Ill. 2021).

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[27] And notably, Defendants sought and obtained dismissal of state lawsuits in favor of this federal suit.

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