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

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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Table Of Contents

Table Of Authorities

Cases

Statutes & Rules

Preliminary Statement

Illinois law commits to a corporation's board of directors the authority to determine what litigation is in the corporation's best interests to pursue. Yet Plaintiffs contend that they—two of many hundreds of thousands of Abbott shareholders—should assume this decision-making authority instead of the Board elected by vote of all Abbott shareholders. Precedent instructs that this can occur only in "extraordinary" circumstances, generally when a board was so closely involved with a situation that a majority of the board faces a substantial likelihood of personal liability. However, Plaintiffs do not allege Abbott's Board played *any* role in the events at the Sturgis manufacturing facility—one of 88 Abbott manufacturing facilities and one of 14 manufacturing facilities just in Abbott's Nutrition division. Indeed, Plaintiffs admit the Board *did not* know of the issues at Sturgis until after the February 2022 recall and temporary production stoppage, after which both Management and the Board were heavily involved as Abbott worked to address the issues. This is not the extraordinary case where two shareholders should decide what litigation is best for Abbott to pursue. For this reason and the others articulated below and in Defendants' opening brief, the Court should dismiss this case.

Argument

I. The Exhibits To Defendants' Motion To Dismiss Are Properly Before The Court And Are Not Used For Improper Purposes.

Plaintiffs first argue the Court cannot consider the exhibits submitted with Defendants' motion to dismiss. (Opp. 11-13) However, the exhibits are properly before the Court, and Defendants are not using them for an improper purpose.

First, most of the exhibits are from Abbott's pre-suit books and records production to Plaintiffs.[1] Plaintiffs do not dispute they have already expressly agreed such documents "shall be considered incorporated by reference into the complaint" and "may be used by either the Shareholder or the

[1] Exhibits 10-13 and 15-76 are from the production. (Dkt. #115 (attesting to the source for each exhibit))

Company for purposes of prosecuting or responding to the complaint, including on a motion to dismiss." (Ex. 14 ¶ 15) Precedent endorses such agreements, to "protect[] the legitimate interests of both [the Company] and the judiciary by ensuring that any complaint that [the shareholder] files will not be based on cherry-picked documents." *Amalg. Bank v. Yahoo!*, 132 A.3d 752, 797 (Del. Ch. 2016).[2]

Moreover, it is proper to consider these documents given that Plaintiffs make claims about what the books and records production supposedly shows or supposedly lacks. [redacted] (Opp. 10; Compl. ¶ 140 (similar)) Defendants use the books and records production in response, to show that Plaintiffs mischaracterize the production. Plaintiffs acknowledge precedent allows that. (Opp. 12 ("the Court can review Books and Records to ensure they were accurately represented by Plaintiffs")); *accord*, *e.g.*, *Pettry v. Smith*, 2021 WL 2644475, *8 n.90 (Del. Ch. June 28, 2021), *aff'd*, 273 A.3d 750 (Del. 2022) (permissible to use books and records to contradict allegation that they "reflect the Board's complete lack of discussion or action"); *City of Detroit Police v. Hamrock*, 2022 WL 2387653, *17 (Del. Ch. June 30, 2022) (permissible "to defend against Plaintiff's cherry-picking" by, for example, refuting the misleading implication "that the Board only discussed pipeline safety laws twice"); *Clem v. Skinner*, 2024 WL 668523, *7 (Del. Ch. Feb. 19, 2024) (considering books and records that showed "oversight of Walgreen's compliance risks"); *Genworth Fin. Deriv. Litig.*, 2021 WL 4452338, *9 (Del. Ch. Sept. 29, 2021) ("Plaintiffs have incorporated by reference in their Complaint Board-level documents that plainly contradict their demand futility allegations."). Citing these documents does not "rewrite" the complaint; it shows the complaint mischaracterizes the documents by showing the Court the actual documents. *Amalg. Bank*, 132 A.3d at 798 ("the plaintiff cannot seize on a document, take it out of context, and insist on an unreasonable

[2] Plaintiffs acknowledge that, in the absence of a contrary Illinois decision, Illinois courts follow Delaware law on corporate law issues. (Opp. 13 n.3; Def. Br. 15)

inference that the court could not draw if it considered related documents").

Second, many of the exhibits to Defendants' motion are discussed in the complaint (including many from the books and records production).[3] "[I]f a plaintiff mentions a document in his complaint, the defendant may then submit the document to the court without converting defendant's 12(b)(6) motion to a motion for summary judgment. The doctrine prevents a plaintiff from 'evad[ing] dismissal under Rule 12(b)(6) simply by failing to attach to his complaint a document that prove[s] his claim has no merit.'" *Brownmark Films v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012). Thus, Defendants use these documents to complete or contradict Plaintiffs' incomplete or inaccurate allegations about them. *In re GoPro Deriv. Litig.*, 2020 WL 2036602, *13 n.167 (Del. Ch. Apr. 28, 2020) (Plaintiffs "may not reference certain documents outside the complaint and at the same time prevent the court from considering those documents' actual terms.").

Finally, the remaining exhibits to Defendants' motion are subject to judicial notice.[4] "The Court may take judicial notice of facts drawn from public records available on a government website under Federal Rule of Evidence 201(b)." *Patel v. Hurd*, 2012 WL 1952845, *4 (N.D. Ill. May 30, 2012). And courts deciding a motion to dismiss must consider "matters of which a court may take judicial notice." *Tellabs v. Makor Issues*, 551 U.S. 308, 322 (2007).

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

A. Plaintiffs Make No Substantive Argument That A Majority Of The Board Faces A Substantial Likelihood Of Liability.

Plaintiffs do not plead with particularity facts showing that a majority of the Board faces a substantial likelihood of personal liability and so could not exercise independent business judgment

[3] Exhibits 1, 10, 13, 15, 18, 19, 25, 27, 29, 30, 31, 40-43, 45, 47, 60-70, and 72-77 are specifically referenced in the complaint. (Dkt. #115 (identifying paragraphs referring to each exhibit)) Exhibits 78-80 are also incorporated by reference because Plaintiffs rely on data from those forms in alleging individuals' stock transactions.

[4] Exhibits 2-9, 11, and 77 are from government websites. (Dkt. #115 (specifying location of each))

on a demand. (Def. Br. 14-37) Although this is Defendants' principal argument for dismissal, discussed at length in their opening brief, Plaintiffs respond to it with just two pages, using the remainder of their brief to argue they have stated claims—a point which is *irrelevant* if demand is not excused. (*Compare* Opp. 13-15, *with id.* at 15-40) Of Plaintiffs' two pages about demand, only a single paragraph—just three sentences—addresses whether their allegations show a substantial likelihood of liability for the Board. (*Id.* at 14) And that paragraph makes no substantive argument; instead, it asserts without any support that "nearly all the Demand Board directors face personal liability in this action." (*Id.*) This conclusory assertion does not meet Plaintiffs' burden. Merely being named as a defendant in a derivative action is *not* sufficient to show a director is interested such that they cannot disinterestedly consider a demand. *E.g.*, *Melbourne Mun. Firefighters v. Jacobs*, 2016 WL 4076369, *6 (Del. Ch. Aug. 1, 2016), *aff'd*, 158 A.3d 449 (Del. 2017) ("Demand is not excused solely because the directors would be deciding to sue themselves, and the mere threat of personal liability … is insufficient to challenge either the independence or disinterestedness of directors."); *In re Discover Fin. Deriv. Litig.*, 2015 WL 1399282, *5 (N.D. Ill. Mar. 23, 2015) (similar). If it were, any shareholder could displace the board just by naming the directors as defendants, which would open a gaping loophole in corporate law's designation of the board as the head of the corporation. *Kamen v. Kemper Fin.*, 500 U.S. 90, 101 (1991).

Plaintiffs offer nothing else to refute Defendants' argument that they fail to meet the heightened pleading requirements for showing demand is excused. Because Plaintiffs have not pled with particularity facts showing a majority of the Board faces a substantial likelihood of personal liability, there is no basis to excuse their failure to make a demand. Plaintiffs provide no basis for two shareholders to override the vote of all Abbott shareholders and to insert themselves as the decision-makers for what litigation is in Abbott's best interest. Illinois law commits that decision to Abbott's Board, and Plaintiffs' allegations are insufficient to satisfy the narrow exception. The case should be dismissed in its entirety for this reason alone.

B. Plaintiffs' Arguments That Their Allegations Satisfy F.R.C.P. 8 Do Not Show The Board Faces A Substantial Likelihood Of Liability.

Rather than arguing they have pled with particularity facts showing a majority of the Board faces a substantial likelihood of personal liability, as is required to excuse demand, Plaintiffs instead devote most of their brief to arguing their allegations state a claim sufficient under Rule 8. But that misses the point. To proceed with a derivative action, Plaintiffs must first satisfy the heightened pleading requirements of Rule 23.1(b). (Def. Br. 15) Their arguments and precedent under Rule 8 do not demonstrate their allegations show a substantial likelihood of Board liability under Rule 23.1(b).

1. Plaintiffs Do Not Plead With Particularity That A Majority Of The Board Faces A Substantial Likelihood Of Liability Under § 14(a).

Defendants' opening brief offered three independent reasons why Plaintiffs' allegations do not establish a majority of the Board faces a substantial likelihood of personal liability under § 14(a) of the Exchange Act. (Def. Br. 16-20) Plaintiffs' response, that they have stated a claim under § 14(a), does not show they meet the heightened pleading requirements for excusing demand. (Opp. 32-37)

First, Plaintiffs do not allege with particularity that the Board solicited shareholder votes through false or misleading statements. (Def. Br. 16-18) As an initial matter, Plaintiffs do not even respond to the argument that the complaint is deficient because it fails to "specify each statement alleged to have been misleading" and "the reason or reasons why the statement is misleading," as the statute requires—and instead only quotes lengthy passages from Abbott's annual proxy statements. (*Id.* at 16, quoting 15 U.S.C. § 78u-4(b)(1)(B)) This independently defeats Plaintiffs' § 14(a) claim.

Plaintiffs' brief is no better than their complaint. It merely quotes, again, multiple passages from Abbott's proxy statements and then insists the complaint contains "detailed pleadings showing that Defendants conveyed a picture of a company engaged in safe manufacturing, compliant with the law and regulations, with strong governance to catch and remedy major risks." (Opp. 32-33) This is a mischaracterization. The statements did not guarantee safe manufacturing, legal compliance, or that

corporate oversight would always successfully address issues before they caused significant problems. To the contrary, Abbott's annual SEC Form 10-Ks consistently warned that "[p]roblems may arise during manufacturing for a variety of reasons, including equipment malfunction [or] failure to follow specific protocols and procedures…." (*E.g.*, Ex. 81 at 10) In addition, public records showed the FDA had issued a Warning Letter to Abbott in 2017, asserting certain cardiac devices did not comply with federal regulations. (Ex. 82) The 10-K warning and 2017 Warning Letter are inconsistent with what Plaintiffs contend the proxy statement implicitly conveyed. More broadly, Plaintiffs' argument that the proxy statement made implicit guarantees of safety and compliance is inconsistent with the recognized fact that quality issues occur regularly even in sophisticated manufacturing operations. *Plumbers & Pipefitters v. Zimmer*, 679 F.3d 952, 956 (7th Cir. 2012) ("Quality-control issues at pharmaceutical and medical-device producers are endemic."). No reasonable investor could ever read any statement by a healthcare manufacturer to guarantee that it had no quality issues. *See also In re Fifth Third Bancorp Deriv. Litig.*, 2023 WL 2429009, *21 (N.D. Ill. Mar. 8, 2023) ("No reasonable shareholder would conclude that, by making these disclosures about Fifth Third's risk management practices that Fifth Third promised that its practices ensured that it faced no legal or compliance risks.").

What is more, an examination of the only statements that Plaintiffs' brief quotes reveals their mischaracterization of the alleged misstatements:

- "*Our leadership covenant includes commitments to multiple environmental, social and governance efforts. Examples include: A sustainable infrastructure to drive quality, environmental, health and safety performance.*" (Compl. ¶ 307 (quoted at Opp. 32)) Plaintiffs do not allege Abbott's leadership lacked such a commitment. Plaintiffs admit that "the Board was unaware of the Company's safety and compliance issues." (Opp. 19)

- "*Our leadership covenant includes commitments to multiple environmental, social and governance efforts. Examples include: … Abbott's Code of Conduct to ensure adequate internal controls for financial reporting and compliance with applicable laws and regulations.*" (Compl. ¶ 307 (quoted at Opp. 32)) Plaintiffs do not allege Abbott's leadership lacked such a commitment. As explained, no investor could reasonably have understood this aspirational statement to guarantee Abbott's internal controls would ensure companywide regulatory compliance.

- "*The Public Policy Committee assists the Board of Directors in fulfilling its oversight responsibility with respect to: Certain areas of legal and regulatory compliance … [and] Government affairs and healthcare compliance issues.*" (Compl. ¶ 304 (quoted at Opp. 32)) Plaintiffs do not allege the PPC failed to assist the Board in fulfilling its oversight of regulatory compliance. [redacted]

Plaintiffs' allegations do not show that the statements were false or misleading.[5]

Second, and independently, many of the alleged misstatements are non-actionable puffery. (Def. Br. 18) Plaintiffs respond that "Defendants cherry-pick phrases out of context" and they then offer a long quote of one alleged misstatement. (Opp. 34)[6] The additional context only confirms the statement's lack of factual content. The Board spending "significant time" with Management to understand "dynamics, issues, and opportunities for Abbott," providing "insights" and asking "probing questions which guide management" are not the type of "concrete assertion[s]" that investors rely on. *City of Taylor Police v. Zebra Techs.*, 8 F.4th 592, 595 (7th Cir. 2021). The language does not "convey[] something specific, measurable, or concrete" and so is "simply too vague to be material." *W. Palm Beach Firefighters v. Conagra*, 495 F. Supp. 3d 622, 653-54 (N.D. Ill. 2020), *aff'd*, 2022 WL 1449184 (7th Cir. May 09, 2022); *see also Fifth Third*, 2023 WL 2429009 at *21 ("Statements about oversight programs designed to mitigate risks are general and aspirational, and therefore not actionable."). Plaintiffs also argue that "statements involv[ing] safety, oversight, and legal compliance" *cannot* be puffery. (Opp. 34) Precedent holds otherwise. *E.g.*, *In re Boeing Aircraft Sec. Litig.*, 2022 WL 3595058, *9 (N.D. Ill.

[5] Defendants' opening brief also explained that statements on Abbott's website were not used to solicit shareholder proxies and therefore cannot be the basis of a § 14(a) claim. (Def. Br. 18 n.11) Plaintiffs respond that such statements are actionable because Abbott's proxy statements "directed shareholders to Abbott's website for 'additional information … regarding Abbott's business activities.'" (Opp. 32 n.16) But the statement Plaintiffs quote was in Abbott's annual report, not its proxy statement. (Ex. 83 at 82) The annual report is not a proxy solicitation. 17 C.F.R. § 240.14a-1(*l*)(1) (defining "solicitation"). Moreover, Abbott's actual proxy statement squarely stated that "The information on Abbott's website … *is not, and shall not be deemed to be, part of this proxy statement.*" (Ex. 84 at 94 (emphasis added)) Finally, Plaintiffs do not allege the directors prepared or approved the annual report, so they would not be liable for it under § 14(a) in any event.

[6] Plaintiffs ignore Defendants' arguments about the other immaterial statements (Def. Br. 18 n.12), saying only that "[t]he other statements challenged as puffery follow suit." (Opp. 34)

Aug. 23, 2022) (statement that "737 MAX is safe and safety is a core value for us at Boeing" was "immaterial puffery and opinion"); *Heavy & Gen. Laborers v. Fifth Third Bancorp*, 2022 WL 1642221, *16 (N.D. Ill. May 24, 2022) (statement that the company would "conduct business in compliance with all applicable laws, rules and regulations" was "non-specific 'puffery'"); *Ong v. Chipotle Mexican Grill*, 294 F. Supp. 3d 199, 219, 232 (S.D.N.Y. 2018) (statements that company was "committed to serving safe, high quality food to our customers" and "food safety programs are also designed to ensure that we comply with applicable … food safety regulations" were "inactionable puffery").

Similarly, several alleged misstatements are opinions for which Plaintiffs' allegations do not satisfy the heightened *Omnicare* standard applicable to opinion statements. (Def. Br. 18 (discussing *Omnicare v. Laborers Dist. Council*, 575 U.S. 175, 188-89 (2015))) Plaintiffs' only argument regarding the statement that "Abbott determined its compensation and benefit programs appropriately align compensation and performance without incentivizing risky behaviors" is that it "is a fact, not an opinion" because "[i]t conveys that Abbott conducted an analysis and made a measurable conclusion." (Opp. 35) The statement says nothing of the sort. In any event, analyses and measurable conclusions do not signify the output is a fact. For example, a fan might analyze the career statistics of two baseball players, and based on that analysis conclude one was the better player. That would still be an opinion, despite it being the product of quantitative analysis. Here, the statement was that Abbott made a determination about the "appropriate" alignment of compensation and performance. What alignment is "appropriate" is plainly an opinion. Next, the second alleged opinion misstatement is that "the Board believes that the current [chairperson] structure is in the best interests of Abbott." Plaintiffs do not dispute the statement is an opinion, but argue it is actionable "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." (Opp. 35) However, as *Omnicare* explained, a plaintiff must plead that the opinion did not "fairly align[] with the information in the

issuer's possession at the time." 575 U.S. at 188-89. Plaintiffs wholly fail to explain how a supposed failure of the Board to oversee a particular risk does not align with the Board's belief that it was best to keep the CEO and Board Chair positions together—much less how the Board's belief did not fairly align with the totality of the information the Board possessed.

Third, the proxy solicitations were not an essential link to accomplishing any transaction Plaintiffs allege caused a loss to Abbott. (Def. Br. 18-20) Plaintiffs agree that their theory is that the shareholder votes "to re-elect Board members, decline to demand an independent Board chair, and approve compensation, thus allow[ed] the faithless fiduciaries to remain on the Board and continue causing harm." (Opp. 35) However, this theory runs contrary to the uniform appellate precedent (and many additional district court decisions) holding that "the mere fact that omissions in proxy materials, by [for example] permitting directors to win re-election, *indirectly* lead to financial loss through [alleged] mismanagement will not create a sufficient nexus with the alleged monetary loss." *General Elec. v. Cathcart*, 980 F.2d 927, 933 (3d Cir. 1992); *see also* Def. Br. 19-20 (collecting precedent); *Abbey v. Control Data*, 603 F.2d 724, 732 (8th Cir. 1979) (similar); *Oakland Cnty. Emps v. Massaro*, 736 F. Supp. 2d 1181, 1186 (N.D. Ill. 2010) (similar).[7]

Plaintiffs attempt to distinguish this weight of authority, arguing that it is limited to "purported instances of mismanagement or waste of corporate assets," whereas Plaintiffs argue they instead "allege a systemic, long-term failure." (Opp. 36)[8] Precedent belies this supposed distinction. For example, in *Gaines v. Haughton*, 645 F.2d 761 (9th Cir. 1981), the plaintiff alleged that directors and officers

[7] Plaintiffs' conjecture is also baseless. In 2023—more than a year after the highly publicized recall and Sturgis shutdown—Abbott shareholders voted to keep all of the directors, rejected separating the chair and CEO positions, and approved executive compensation. (Ex. 85)

[8] Plaintiffs also cite five out-of-Circuit district court decisions that depart from the uniform appellate rule. (Opp. 36-37 & n.20) Three are from California district courts, yet none of them even attempts to distinguish *Gaines v. Haughton*, 645 F.2d 761 (9th Cir. 1981), the controlling decision in the Ninth Circuit, much less the other appellate authority. Plaintiffs cite no appellate decisions in their favor and do not deny that the substantial majority of district court decisions follow the appellate authority Defendants cite.

had bribed foreign governments over 14 years and concealed their wrongdoing through false and misleading proxy statements. *Id.* at 765-66. In *General Electric*, the plaintiff alleged five categories of misconduct, including directors' "failure to supervise General Electric's role in nuclear power plant construction," which "permitted construction of nuclear containment vessels with serious design and safety flaws." 980 F.2d at 929. These decisions foreclose Plaintiffs' theory that the appellate precedent does not apply to alleged systemic, long-term failures.

2. Plaintiffs Do Not Plead With Particularity That A Majority Of The Board Faces A Substantial Likelihood Of Liability Under § 10(b).

Plaintiffs' argument that they have stated a § 10(b) claim again sidesteps the threshold issue—that they fail to allege with particularity facts that establish a substantial likelihood of liability for a majority of the Board. (Opp. 28-30) A necessary element of a § 10(b) claim is that the plaintiff justifiably relied on the alleged misstatement in deciding to purchase stock. (Def. Br. 21) As explained in Defendants' opening brief, Plaintiffs' claim fails on this element because the same directors who Plaintiffs say issued the alleged misstatements *also* authorized the stock repurchases—and someone who knows a statement is false cannot justifiably rely on it. (*Id.*); *see also Franklin v. Doheny*, 2022 WL 2064972, *2 (D. Del. June 8, 2022), *R&R adopted*, 2022 WL 3099235 (June 23, 2022); *Elfers v. Gonzalez*, 2020 WL 7264272, *2 (D. Del. Dec. 10, 2020); *Staehr v. Miller*, 2010 WL 11030716, *5 (S.D. Fla. Mar. 31, 2010) (dismissing derivative § 10(b) claim about stock repurchases for failure to allege reliance); *In re Citigroup Deriv. Litig.*, 2009 WL 2610746, *10 (S.D.N.Y. Aug 25, 2009) (dismissing derivative § 10(b) claim about corporate stock repurchases approved by board alleged to have known the truth for failure to allege corporation was deceived); *In re Verisign Deriv. Litig.*, 531 F. Supp. 2d 1173, 1209 (N.D. Cal. 2007) ("Reliance cannot be established when the individual allegedly acting on a misrepresentation already possesses information sufficient to call the representations into question.").

Plaintiffs offer two responses. First, they mischaracterize Defendants' argument as one about imputing directors' knowledge to the corporation, noting that a fiduciary's knowledge is not always

imputed to their corporation. (Opp. 29) But Defendants' argument is not about imputing one person's knowledge to a corporation when a different person later causes the corporation to act; it is that when *the same* people who allegedly know a fact are the ones who cause the corporation to act, the corporation knows that fact because the actual people acting for the corporation know it.[9]

Second, Plaintiffs argue Defendants' authorities concerned instances where the directors had "actual knowledge of the fraud," whereas here Plaintiffs purport to allege only "that the Directors were reckless" in making the statements. (Opp. 30) But recklessness under § 10(b) means conduct "so severe that it is the functional equivalent of intent." *Searls v. Glasser*, 64 F.3d 1061, 1066 (7th Cir. 1995). It would mean, at the least, that the Board knew it had been indifferent to the statements' accuracy, in which case the Board could not have justifiably relied on them. "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." *Mayer v. Spanel Int'l*, 51 F.3d 670, 676 (7th Cir. 1995).

In sum, Plaintiffs allege an impossible theory of § 10(b) liability—that the Board made fraudulent statements on Abbott's behalf and then justifiably relied on them. Plaintiffs attempt to maneuver around that legal impossibility by saying the Board did not know it made misstatements but nonetheless is liable for making them. But that theory, too, is not possible under § 10(b), for it would still require the Board to have known it was recklessly indifferent to the accuracy of the alleged

[9] The only exception to this rule is if those individuals were on both sides of the transaction, which Plaintiffs do not allege here. *Ray v. Karris*, 780 F.2d 636, 641 (7th Cir. 1985). This also distinguishes the other decisions Plaintiffs cite. (Opp. 29-30) Those decisions involved directors on both sides of a transaction who were purportedly acting for themselves and not the corporation. *See Ruckle v. Roto Am.*, 339 F.2d 24, 26 (2d Cir. 1964) ("defendant directors sought to perpetuate their control" by not "disclosing the pertinent facts of … transactions to the entire board"); *Estate of Soler v. Rodriguez*, 63 F.3d 45, 55 (1st Cir. 1995) ("interested directors … deliberately omitted to inform CMT's disinterested directors"); *In re Whitehall Jewellers Deriv. Litig.*, 2006 WL 468012, *9 (N.D. Ill. Feb. 27, 2006) (involving the "issuing [of] stock-based compensation back to these same directors and officers"). Where there is no allegation that the directors who approved a corporate share repurchase were personally interested in the transactions (or were themselves deceived by others), courts have repeatedly dismissed derivative claims, as the decisions cited above demonstrate. *Supra* at 10; *Franklin*, 2022 WL 2064972 at *2 n.19 (distinguishing *Whitehall* as "permitt[ing] derivative claims under § 10(b) … where a company's directors engaged in deceptive self-dealing").

misstatements, eliminating its ability to justifiably rely on them.

3. 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' argument that they have stated a *Caremark* claim does not identify particularized allegations of fact showing a substantial likelihood of such liability for a majority of the Board. (Opp. 15-25) It relies on hindsight arguments that the Board could have done things better—could have required Management to elevate different types of information, conducted specific reviews of U.S. infant formula plants, or responded more quickly after the Sturgis production shutdown and recall. These theories are insufficient because "*Caremark* liability centers on a particular type of bad faith: intentional dereliction of duty or conscious disregard for one's responsibilities, which is more culpable than simple inattention or failure to be informed of all facts material to the decision." *Conte v. Greenberg*, 2024 WL 413430, *7 (Del. Ch. Feb. 2, 2024). As explained below, precedent teaches that hindsight allegations about what a board could have done better do not satisfy that high standard.

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

[redacted]

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10 [redacted]

[redacted]

[redacted] They are precisely the types of oversight that defeat assertions of bad faith utter failure of oversight. *E.g.*, *Marchand v. Barnhill*, 212 A.3d 805, 823 (Del. 2019) ("[P]laintiffs usually lose [on prong-one 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."). Defendants' opening brief cited a host of applicable decisions rejecting such *Caremark* prong 1 claims. (Def. Br. 27) Plaintiffs address these authorities only by asserting they are "decisions where robust reporting systems existed." (Opp. 21 n.7) The decisions speak for themselves. They are entirely in line with the oversight shown in Abbott's books and records, and they foreclose Plaintiffs' argument.

Plaintiffs make four arguments in response to Defendants' motion, but each either misstates the law, misstates the contents of Abbott's books and records, or both.

[redacted]

11 [redacted]

First, Plaintiffs misstate the standard for a *Caremark* prong 1 claim. They assert that prong 1 liability exists where "the directors fail to implement a 'reasonable reporting system' for a 'mission critical' aspect of the company." (Opp. 15) This invites the Court to second-guess the reasonableness of the Board's oversight system. Such an assessment is inconsistent with the Delaware Supreme Court's explication of *Caremark* prong 1: "the board must make a good faith effort—*i.e.*, try—to put in place a reasonable board-level system of monitoring and reporting." *Marchand*, 212 A.3d at 821. "[C]ase law 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." *Id.* The test is not the objective reasonableness of the Board's oversight, but whether the plaintiff has pled facts showing the Board's actions did not constitute a good faith effort to try to oversee the company. (Def. Br. 24-25)

Second, Plaintiffs argue that *Marchand* held that the plaintiffs in that case had adequately pled bad faith utter failure of oversight "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." (Opp. 16-17)[12] Plaintiffs then assert "[t]hese same deficiencies exist here." (*Id.*) But the record shows that *none* of these deficiencies apply to Abbott's Board, much less all of them:

(i) [redacted]

[12] Plaintiffs omit a sixth deficiency: that "no board committee that addressed food safety existed." *Marchand*, 212 A.3d at 822. [redacted]

[redacted] Plaintiffs do not dispute this.

(ii) [redacted] Plaintiffs do not dispute this.

(iii) [redacted] Plaintiffs do not dispute this.

(iv) Plaintiffs do not identify any statements in the books and records production that were inaccurate or presented favorable information while withholding negative information.

(v) [redacted] Plaintiffs do not dispute this.

Consequently, *Marchand* is no help to Plaintiffs, because the books and records production demonstrates the Board's oversight here did not exhibit the same deficiencies the court identified there.

[redacted]

These are arguments that the Board "could have, should have, had a *better* reporting system, but not that it had *no* such system." *In re GM Deriv. Litig.*, 2015 WL 3958724, *15 (Del. Ch. June 26, 2015), *aff'd*, 133 A.3d 971 (Del. 2016). "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.'" *Id.* at *14. "The Board was required to exercise good faith oversight—not to employ a system to the plaintiffs' liking." *Clem*, 2024 WL 668523 at *8. Thus, the question is not what types of information the Board *did not* require Management to present, but whether the information the Board *did* require shows a conscious utter failure of oversight. It does not.

For instance, [redacted]

[redacted], because "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." *In re Impax Labs Deriv. Litig.*, 2015 WL 5168777, *6 (N.D. Cal. Sept. 3, 2015). Lastly, Plaintiffs do not dispute that Form 483s are not formal or final FDA findings, but instead only identify issues individual inspectors observe that are "not serious enough to merit a warning or any formal action by the agency." *Plumbers & Pipefitters*, 679 F.3d at 955. Plaintiffs cite no decision holding that a board that does not review each Form 483 is acting in bad faith.[13]

[redacted]

[13] Plaintiffs assert that "the Seventh Circuit held as much in a prior *Caremark* case involving Abbott." (Opp. 20 (citing *In re Abbott Labs Deriv. Litig.*, 325 F.3d 795 (7th Cir. 2003))) That again misstates precedent. The *Abbott* decision held that allegations of many years of noncompliance, notwithstanding the receipt of Form 483s and multiple Warning Letters, showed a deliberate failure to act. 325 F.3d at 809. It does not hold a board acting in good faith must review each Form 483 individually (or at all).

[redacted] And Plaintiffs' argument is irrelevant in any event, because "the lack of a system of controls with respect to a particular incarnation of risk does not itself demonstrate bad faith." *Constr. Indus. Laborers v. Bingle*, 2022 WL 4102492, *9 (Del. Ch. Sept. 6, 2022), *aff'd*, 297 A.3d 1083 (Del. 2023). For example, in *In re Zimmer Biomet Derivative Litigation*, 2021 WL 3779155 (Del. Ch. Aug. 25, 2021), *aff'd*, 279 A.3d 356 (Del. 2022), the court rejected a *Caremark* prong 1 claim alleging manufacturing compliance issues at a single facility by referencing the board's oversight of all the company's facilities generally. *Id.* at *22 ("The Complaint also describes the Board's oversight of regulatory compliance at multiple meetings where it received updates on FDA inspections and voluntary internal audits at Zimmer's facilities.").[15] Thus, the question here is not whether the Board oversaw the Sturgis plant (although it did), but whether the Board made a good faith effort to oversee compliance with manufacturing regulations companywide. [redacted] Plaintiffs essentially argue that the law required the Board to conduct individualized oversight, by name, of each of Abbott's 88 manufacturing facilities across the world. (Def. Br. 2) Plaintiffs cite no decision that requires oversight in that manner.

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

Plaintiffs agree that the only supposed "red flags" they allege in support of their claim against the directors under *Caremark*'s second prong are the Sturgis recall, the Sturgis production shutdown,

[14] [redacted]

[15] Similarly, one of Plaintiffs' primary authorities, *In re Boeing Deriv. Litig.*, 2021 WL 4059934 (Del. Ch. Sept. 7, 2021), held allegations there showed an utter failure of oversight because "[t]he Board did not regularly allocate meeting time or devote discussion to airplane safety and quality control," not because the Board failed to oversee a specific aircraft or a specific facility. *Id.* at *27.

and the DOJ consent decree. (Opp. 22-23) But Plaintiffs offer no meaningful response to the arguments in Defendants' opening brief showing that their allegations are insufficient.

[redacted] However, precedent holds that "[t]o 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*, 2021 WL 2644475 at *9; *see also Conte*, 2024 WL 413430 at *8 (similar); Def. Br. 30 (citing additional authority). Plaintiffs make a flawed analogy to *Boeing*. (Opp. 22-23) But the Boeing board allegedly failed to act despite knowing there was an immediate need to do so—it allegedly knew unsafe planes were still flying. Here, the first supposed red flag was when Abbott Management informed the Board it had issued the recall of infant formula. (Def. Br. 30) Thus, there was no immediate need for Board action. "A failure to undertake immediate remediation of a reported defect, even where immediate action would be wise, is not evidence of bad faith unless it implies a need to act so clear that to ignore it implies a conscious disregard of duty." *Conte*, 2024 WL 413430 at *8.[16]

Second, and relatedly, *Caremark* prong 2 liability requires directors to have consciously ignored the alleged red flag. (Def. Br. 29) [redacted],

[16] Plaintiffs also argue that the recall and production stoppage were red flags of a need for better oversight. (Opp. 23) This erroneously conflates *Caremark*'s two prongs. Plaintiffs cite no authority endorsing a theory that a board saw a red flag of a need to improve its own oversight. In any event, such a claim is not viable here because Plaintiffs do not allege any harm to Abbott caused by the Board's supposed failure to improve its reporting system *after* the recall and production stoppage.

[redacted] Where "the board was not only informed of [] problems, but also the steps being taken to address them," a claim that the board consciously ignored the issue fails. *City of Birmingham Ret. v. Good*, 177 A.3d 47, 57 (Del. 2017). This is another way *Boeing* is inapposite. There, the alleged red flag was a plane crash that allegedly showed the board an existing problem that required action; here, the alleged red flags *are* the very actions taken to address a problem.

Finally, a *Caremark* prong 2 claim requires the plaintiff to allege the board's purported decision to ignore the red flag resulted in harm to the corporation. (Def. Br. 31) Plaintiffs do not allege the Board's supposed failure to act after the recall and production stoppage caused some later injury to Abbott that, had the Board taken some action sooner after the recall, could have been avoided. Instead, they contend that "[t]he 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." (Opp. 24) This again mischaracterizes Defendants' argument, which is that Plaintiffs do not allege Abbott was injured by anything caused by the Board's supposed conscious decision to ignore the recall, production stoppage, and consent decree. (Def. Br. 31) Plaintiffs fail to identify any such allegation, conceding the point.[17]

4. Plaintiffs Do Not Plead With Particularity That A Majority Of The Board Faces A Substantial Likelihood Of Liability For Waste.

As an initial matter, Plaintiffs do not contest Defendants' argument that if demand is not excused on Plaintiffs' § 10(b) claim, it is not excused on their corporate waste claim. (Def. Br. 35) Moreover, regardless of the outcome of the § 10(b) claim, Plaintiffs' argument that they have stated a

[17] Plaintiffs also argue that to the extent the Board had a robust reporting system that defeats their *Caremark* prong 1 claim, "it would mean that for years the Board received red flags of safety and compliance violations but chose to ignore them." (Opp. 23-24) Plaintiffs fail to cite any authority in support of their proposed catch-22, because none exists. Precedent has long recognized that "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." *Stone v. Ritter*, 911 A.2d 362, 373 (Del. 2006).

claim for waste does not show they have pled a substantial likelihood of Board liability for waste.

Plaintiffs first argue that "Defendants ignore Illinois law and cite cases applying the laws of other states" and that "Illinois courts do not focus on state of mind and, instead, consider objectively whether the plaintiff pled that the corporate transaction was wasteful." (Opp. 31) Remarkably, Plaintiffs then cite just a single decision, and *it does not apply Illinois law*—*In re Nuveen Fund Litig.*, 1996 WL 328001, *1 (N.D. Ill. June 11, 1996) (applying Minnesota law). (*Id.*) Plaintiffs cite no decision applying Illinois law, much less holding that Illinois treats waste claims differently than Delaware. *E.g.*, *In re McDonald's Deriv. Litig.*, 291 A.3d 652, 693 (Del. Ch. 2023) ("Contemporary Delaware decisions have brought waste within the fiduciary framework of the business judgment rule by reconceiving waste as a means of pleading that the directors acted in bad faith.").

Second, Plaintiffs argue that a waste claim is "ill-suited for resolution at [a] motion to dismiss" because it is "largely a question of fact." (Opp. 31) But a motion to dismiss can always "test[] the sufficiency of the complaint," as Plaintiffs themselves acknowledge. (*Id.* at 32) And waste claims are frequently dismissed on this basis. *E.g.*, *McDonald's*, 291 A.3d at 693-94; *Lavin v. Reed*, 2023 WL 7182950, *11 (N.D. Ill. Nov. 1, 2023). That is Defendants' argument—that the complaint's allegations fail to plead with particularity facts showing a substantial likelihood of liability for waste because Plaintiffs fail to plead facts showing the Board knew at the times it approved stock repurchases that Abbott's stock price was fraudulently inflated by supposed misstatements about Sturgis. (Def. Br. 35) Rather, Plaintiffs affirmatively allege the Board *did not* know. (*Id.*) Plaintiffs' brief neither identifies any allegations of Board knowledge nor addresses the (many) allegations that the Board lacked such knowledge.[18] Plaintiffs' allegations do not satisfied Rule 23.1(b)'s heightened pleading requirements.

[18] Plaintiffs also cite *Flanagan v. Bernstein*, 1996 WL 84184 (N.D. Ill. Feb. 22, 1996), which held a "conclusory statement[]" that "the Directors' conduct constitute[d] waste of Lexington assets" was sufficient to state a claim. *Id.* at *3. But *Flanagan* pre-dated *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009), which held that "bare assertions" and "conclusory" allegations are insufficient to state a claim.

C. Plaintiffs Do Not Show That Demand Is Excused For Their Claims Against The Officers Or A Minority Of The Board.

Plaintiffs do not dispute that a majority of the Board faces no likelihood of liability on their three claims that are not asserted against a majority of the Board—the officer *Caremark*, insider trading, and unjust enrichment claims. Nonetheless, Plaintiffs contend that demand is excused on these claims because they supposedly overlap with Plaintiffs' claims lodged against the Board, which, Plaintiffs argue, means the Board cannot disinterestedly consider them. (Opp. 14) As an initial matter, this argument concedes that if demand is not excused on the Board claims, it is not excused on these non-Board claims. The Court should also reject the argument on its own terms, for two reasons.

First, to establish sufficient overlap between two claims such that excusing demand on one also excuses demand on the other, Plaintiffs must plead with particularity how the claims are so similar that a Board that does not face liability on the second claim still could not consider it. Fed. R. Civ. P. 23.1(b). But Plaintiffs do not. The complaint does not allege overlap at all, and Plaintiffs' brief merely asserts the claims "arise from a common nucleus of operative facts" without offering *any* explanation why, and without responding to the arguments in Defendants' opening brief explaining why they do not. (Def. Br. 31, 36-37) This failure is dispositive under Rule 23.1(b)'s heightened pleading standard. *See Boeing*, 2021 WL 4059934 at *36 ("Plaintiffs' theory under Rule 23.1 presumably turns on the assumption that the Officer Defendants can face *Caremark* liability, and that therefore demand was futile as to all Defendants facing the same claim. But Plaintiffs have not pled this with the requisite particularity…. Accordingly, Count II is dismissed.").

Second, there is not sufficient overlap between Plaintiffs' Board claims and the non-Board claims such that the Board could not consider a demand on the non-Board claims even if demand were excused on the Board claims. Such overlap exists only where an investigation of the non-Board claims "would necessarily implicate the same set of facts" as the Board claims and thus require the Board to risk supporting a claim against itself in order to pursue the other claim. *Teamsters Local 443*

v. Chou, 2020 WL 5028065, *26 (Del. Ch. Aug. 24, 2020). That is not the case here.

Officer Caremark. Plaintiffs' *Caremark* claim against Abbott officers does not implicate the same facts as their claims against the Board. The officer *Caremark* claim alleges officers did not fulfill their oversight duties—to make a good faith effort to put in place reasonable information systems within their area of oversight and to report red flags the Board. *In re McDonald's Deriv. Litig.*, 289 A.3d 343, 350 (Del. Ch. 2023). The claims asserted against the Board do not concern the officers' oversight. Alleging that an Abbott officer failed to oversee that officer's area of responsibility or failed to report required information to the Board would not establish the Board failed in its separate oversight duties. Similarly, the claims for securities fraud and waste rely on distinct facts and legal elements irrelevant to the officer *Caremark* claim, such as whether the Board (i) made false or misleading statements in proxy materials based on what the *directors*, not officers, knew; or (ii) knowingly or recklessly made misrepresentations that then deceived themselves into authorizing overpriced stock repurchases.[19]

Insider Trading. Plaintiffs cite no decision excusing demand on an insider trading claim based on overlap with claims against a board. Plaintiffs' insider trading claim does not overlap with the Board claims such that the Board could not consider it. The insider trading claim turns on whether various officers and a *minority* of directors possessed and traded on material non-public information about "Abbott's business operations." (Compl. ¶ 493)[20] The Board claims do not; Plaintiffs admit

[19] The decisions Plaintiffs cite demonstrate the close nexus required to find overlapping claims sufficient to excuse demand. In both *Teamsters Local 443* and *Ontario Provincial Council v. Walton*, 2023 WL 3093500 (Del. Ch. Apr. 26, 2023), the directors were held to face a substantial likelihood of liability for having known about and ignored red flags indicating their companies were engaging in illegal practices—and because the claims against the officers alleged that the officers had allowed the same illegal conduct the board had allegedly knowingly ignored, the Board could not pursue the officer claims without risking substantiating that the conduct at issue was in fact wrongful and thereby proving a central predicate of the claim against the board. *See Teamsters Local 443*, 2020 WL 5028065 at *26; *Ontario Prov.*, 2023 WL 3093500 at *35, 51. Here, Plaintiffs' allegations do not show the required overlap because, among other reasons, they allege the Board was unaware of the Sturgis problems prior to the recall and shutdown.

[20] Plaintiffs never identify what non-public information any Defendant supposedly knew at the time that Defendant allegedly sold stock. The failure to plead with particularity what their claim even is prevents Plaintiffs from arguing the claim is so similar to the Board claims that demand is excused.

"the Board was unaware of the Company's safety and compliance issues" before the recall. (Opp. 19)

Unjust Enrichment. Plaintiffs' unjust enrichment claim does not overlap with the Board claims because Plaintiffs' theory of unjust enrichment—that the officers' compensation was excessive given *the officers'* supposed failure "to ensure safe and legally compliant production of infant formula" (Opp. 39)—does not implicate the Board. *See In re Clovis Oncology Deriv. Litig.*, 2019 WL 4850188, *17 (Del. Ch. Oct. 1, 2019) (While "an unjust enrichment claim that is duplicative of a breach of fiduciary duty claim can survive a motion to dismiss if the fiduciary duty claim survives" where "[t]here was a clear enrichment tied to an alleged breach of the fiduciary duty of loyalty[,] [w]here, as here, the underlying breach arises from a *Caremark* violation, it is difficult to discern how that breach would give rise to an enrichment, and Plaintiffs have not well-pled that connection here.").

In sum, Plaintiffs do not plead with particularity sufficient overlap between the Board claims and the non-Board claims to excuse demand on the non-Board claims.

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

As Defendants' opening brief explains, an independent ground for dismissal is that "the plaintiff[s] do[] not fairly and adequately represent the interests of shareholders." Fed. R. Civ. 23.1(a); Def. Br. 37-38. Plaintiffs fail to contest that their actions are adverse to the interests of Abbott's shareholders. They do not deny that their allegations are the same as allegations being pursued in cases *against* Abbott regarding Sturgis, nor that it is not in Abbott shareholders' interests to prove such allegations, given Plaintiffs' theory that Abbott is facing "billions of dollars" of potential exposure in those cases. (*Id.* at 37) Instead, Plaintiffs' only response is a quotation from a decision they claim "rejected th[e] very same argument" Defendants make. (Opp. 15 (citing *Lebanon Cnty. Emps. v. Collis*, 2023 WL 8710107, *20 (Del. Dec. 18, 2023))) But that decision did not even address this argument, let alone reject it. Instead, the court considered an argument that a lower court's analysis of a particular *Caremark* allegation would "'chill' companies' ability to defend lawsuits and attract directors." *Id.* at

*22. That is not Defendants' argument here.

Federal Rule 23.1(a) is clear: A shareholder cannot pursue an action on a company's behalf if "plaintiff's interests are antagonistic to those plaintiff is seeking to represent." Wright & Miller, 7C Fed. Prac. & Proc. § 1833 (3d Ed.). Here, not only is Plaintiffs' pursuit of this suit against Abbott shareholders' interests, but Plaintiffs offer no argument to the contrary.

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

Independent of the demand requirement, Plaintiffs allege *no* facts about certain officer defendants that states a claim for wrongdoing under Rule 8. (Def. Br. 38-40)

Erica Battaglia. Plaintiffs' brief mentions Battaglia only four times. First, it argues Battaglia [redacted])[21] Finally, it says Battaglia is a defendant in the unjust enrichment claim. (*Id.* at 39 n.26) These allegations do not state a claim for wrongdoing by Battaglia. Plaintiffs fail to allege Battaglia knew any specific information about Sturgis, much less any information she was required to report to the Board.

Daniel Salvadori. Plaintiffs' brief mentions Salvadori only twice. First, it says he had non-public information and sold stock. (*Id.* at 37 & 38 n.24) Second, it notes he is a defendant in the unjust enrichment claim. (*Id.* at 39 n.26) Plaintiffs identify no allegation of fact about what Salvadori knew at the time he sold stock or that his sales were motivated by such knowledge. And they fail to identify any allegations at all that state a claim for unjust enrichment.

Hubert Allen. Plaintiffs' citations to allegations about Allen merely confirm he was Abbott's

[21] [redacted]

General Counsel, was compensated, attended meetings where Sturgis-related matters were not discussed, supposedly received a whistleblower complaint, was "on notice" of Abbott's safety and compliance violations, and sold stock. (*Id.* at 6, 26, 37, 38 n.24) Plaintiffs ignore entirely the arguments in Defendants' opening brief demonstrating that these allegations are insufficient. (Def. Br. 39)

J. Scott House. Plaintiffs' brief mentions House only once, and even then merely to note he is a defendant in the unjust enrichment claim. (Opp. 39 n. 26) Plaintiffs identify no allegation regarding House that states a claim that he acted wrongfully.

Joseph Manning. Plaintiffs' brief mentions Manning only twice. First, it says he had non-public information and sold stock. (*Id.* at 37 & 38 n.24) Second, it notes he is a defendant in the unjust enrichment claim. (*Id.* at 39 n.26) Plaintiffs identify no allegation of fact about what Manning knew when he sold stock or that his sales were motivated by such knowledge. And they fail to identify any allegations that state a claim for unjust enrichment.

James Young. Other than saying he is a defendant in the unjust enrichment claim, Plaintiffs' only mention of Young is that he "attended meetings of and was responsible for updating the Public Policy Committee and the Board but, during his tenure, Abbott produced and sold contaminated infant formula and received whistleblower complaints detailing disregard for regulatory compliance." (*Id.* at 26) Plaintiffs do not argue Young was aware that Abbott allegedly produced or sold any contaminated product, that he was aware of the supposed whistleblower complaints, or that he was aware of any issue he concluded warranted Board level attention but failed to tell the Board.

Consequently, the Court should dismiss Plaintiffs' claims against these Officer Defendants.

Conclusion

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

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Respectfully submitted,

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