UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE ABBOTT LABORATORIES INFANT FORMULA SHAREHOLDER DERIVATIVE LITIGATION This Document Relates To: *Pembroke Pines Firefighters and Police Officers Pension Fund v. Abbott Laboratories, et al.*, No. 1:22-cv-04661 (N.D. Ill.)	Case No. 22 CV 05513 Honorable Sunil R. Harjani

MEMORANDUM OF LAW IN SUPPORT OF SECURITIES FRAUD PLAINTIFFS' MOTION FOR LEAVE TO INTERVENE

Third parties Quoniam Asset Management GmbH and KBC Asset Management NV (the "Securities Fraud Plaintiffs"), co-Lead Plaintiffs in related securities fraud litigation styled *Pembroke Pines Firefighters and Police Officers Pension Fund v. Abbott Laboratories, et al.*, No. 1:22-cv-04661 (N.D. Ill.) (the "Securities Fraud Action"), respectfully move to intervene, pursuant to Federal Rule of Civil Procedure 24(b), for the limited purpose of asserting the right of public access and unsealing certain documents that have been filed with the Court, specifically the Consolidated Amended Verified Stockholders' Derivative Complaint (the "Complaint") (ECF No. 92), Memorandum In Support of Defendants' Motion to Dismiss and the Exhibits submitted therewith (ECF Nos. 112-13), Lead Plaintiffs' Memorandum of Law In Opposition to Defendants' Motion to Dismiss (ECF No. 124), and Defendants' Reply Memorandum In Support of Motion to Dismiss (ECF No. 132) (together, the "Sealed Documents"). Counsel for Defendants have informed the Securities Fraud Plaintiffs that they will oppose this motion, while counsel for Plaintiffs take no position.

The Seventh Circuit has repeatedly held that "[w]hat happens in the halls of government is presumptively public business," and therefore "members of the . . . public may bring third-party challenges to protective orders that shield court records and court proceedings from public view." *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000); *Bond v. Utreras*, 585 F.3d 1061, 1073 (7th Cir. 2009). The Sealed Documents have been kept from public view based solely on Defendants' unilateral and unexplained assertion that the Sealed Documents, or the materials described therein, are "Confidential." That is insufficient to justify their continued sealing. *See In re Specht*, 622 F.3d 697, 701 (7th Cir. 2010) ("Documents that affect the disposition of federal litigation ***are presumptively open to public view, even if the litigants strongly prefer secrecy, unless a statute, rule, or privilege justifies confidentiality***.")[1] (emphasis added).[2] The Securities Fraud Plaintiffs should be granted leave to intervene for the limited purpose of moving to have the Sealed Documents be publicly filed.

I. FACTUAL BACKGROUND

The litigation pending before this Court stems from Abbott's February 2022 infant formula recall, precipitated by a Food and Drug Administration ("FDA") investigation that uncovered egregious violations of federal manufacturing regulations and appallingly unsanitary conditions at Abbott Laboratories' Sturgis, Michigan plant that lead to the proliferation of deadly bacteria both at the plant and in the formula prepared there, causing numerous infant deaths. The Derivative Plaintiffs in the action pending before this Court allege, among other things, that Abbott's officers and board of directors made or permitted false and misleading statements concerning "Abbott's

[1] Unless otherwise indicated, all emphasis is added and all internal quotations are removed.

[2] The Court recognized this principle (and the decision in *In re Specht*) in its recent MTD order in this case. *See In re Abbott Labs. Infant Formula S'holder Derivative Litig.*, 2024 WL 3694533, at *1, n.1 (N.D. Ill. Aug. 7, 2024).

manufacturing processes, adherence to regulations, and failure to address illicit conduct." 2024 WL 3694533, at *9. The Derivative Plaintiffs further allege that Defendants made false and misleading statements about the infant formula recall itself, failing to disclose that it was not voluntary, but was, in truth, done at the FDA's behest. *See Id*. In addition, the Derivative Plaintiffs have averred that these statements and Defendants' course of conduct artificially inflated the price of Abbott's stock, and "while the stock was artificially inflated, the Defendants caused Abbott to repurchase millions of shares." *Id.*

Defendants moved to dismiss the action under Federal Rules of Civil Procedure 23.1 and 12(b)(6). *Id.* at *1. On August 7, 2024, the Court granted the motion in part and denied it in part, specifically finding that Lead Plaintiffs sufficiently pled a Section 10(b) claim, as well as a breach of fiduciary duty claim against Abbott's directors. *Id.* at *11, *20. Among other arguments, Defendants argued that the derivative litigation was not in Abbott's best interest "because it could help other plaintiffs in other cases brought against the Company." *Id.* at *23. The Court rejected this "dubious argument," holding that "[i]n essence Defendants are arguing that the Court should dismiss the case because if allowed to proceed, the evidence uncovered could harm Abbott in future lawsuits brought against the company because of the underlying conduct," an argument that "could be made in any derivative suit." *Id.* at *24.

The Securities Fraud Plaintiffs are institutional investors, Abbott shareholders, and the court-appointed co-Lead Plaintiffs in a parallel securities fraud class action pending before Judge Seeger, captioned, *Pembroke Pines Fire and Police Officers Pension Fund v. Abbott Labs.*, No. 1:22-cv-04661, ECF No. 35 (N.D. Ill. Apr. 21, 2023). Ex. 1[3] (Securities Fraud Compl.) at p. 1. The Securities Fraud Plaintiffs assert claims under Section 10(b) of the Securities Exchange Act

[3] Citations to "Ex." refer to the Exhibits to the Declaration of Avi Josefson, filed contemporaneously herewith.

of 1934 on behalf of all persons or "entities who purchased or otherwise acquired Abbott . . . common stock" between February 19, 2021 and October 19, 2022. *Id.*

The securities fraud litigation turns on the same nucleus of operative facts as the derivative litigation pending before this Court. Like the Derivative Plaintiffs, the Securities Fraud Plaintiffs allege that Abbott made false and misleading statements, and engaged in a deceptive course of conduct, that fraudulently concealed the same violations of federal manufacturing regulations and unsanitary conditions at the Sturgis plant at issue in the derivative case. *Id.* at ¶¶1-23. Like the Derivative Plaintiffs, the Securities Fraud Plaintiffs allege that Abbott executives received numerous warnings concerning these concealed facts, including the same whistleblower complaints and FDA inspection reports described in the derivative complaint and cited in this Court's MTD Order. *See, e.g.*, *id.* at ¶¶4, 103, 152, 206-20. And like the Derivative Plaintiffs, the Securities Fraud Plaintiffs allege that Abbott made false statements about the recall itself, falsely portraying it as "proactive" and "voluntary," failing to disclose that, in truth, it was initiated at the FDA's insistence. *See, e.g.*, *id.* at ¶¶360-61, 369-70. The Defendants in the Securities Fraud Action – who are also among the Defendants in this action – filed a motion to dismiss that action, which is pending.

II. ARGUMENT

A. The Securities Fraud Plaintiffs Should Be Permitted To Intervene In This Action.

Under Federal Rule of Civil Procedure 24(b)(1)(B), "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." The Seventh Circuit has repeatedly held that this rule is "a procedurally appropriate device for bringing a third-party challenge to a protective order . . . in the context of requests for access to sealed records in the court file." *Bond*, 585 F.3d at 1068; *see also*

Jessup v. Luther, 227 F.3d 993, 997 (7th Cir. 2000) ("[W]e have recognized intervention as the logical and appropriate vehicle by which the public and the press may challenge a closure order."); *United States v. Navistar Int'l Corp.*, 2016 WL 6948378, at *1 (N.D. Ill. Nov. 28, 2016) (recognizing that "every court of appeals to have considered the matter has held that Rule 24 is sufficiently broad-gauged to support a request of intervention for the purposes of challenging confidentiality orders"). The presumptive right of public access to judicial records "give[s] members of the public standing to attack a protective order that seals [judicial documents] from public inspection." *Bond*, 585 F.3d at 1074. "[W]hen a district court enters a closure order, the public's interest in open access is at issue and that interest serves as the necessary legal predicate for intervention." *Jessup*, 227 F.3d at 998.

The Securities Fraud Plaintiffs' motion is timely and, as such, their motion meets the requirements for permissive intervention for the limited purpose of moving to unseal the Sealed Documents. "[C]ourts routinely find motions to intervene to be timely even where a non-party intervenes years after the litigation concluded to challenge a protective order." *Doe v. Amar*, 2023 WL 4564404, at *3 (C.D. Ill. July 17, 2023). Here, the earliest of the Sealed Documents was filed less than a year ago, and the Court only sustained the allegations therein on August 7, 2024, a mere 8 days ago. This case is still "early in the litigation process, and allowing intervention will not derail a proceeding with an end in sight." *J.C. Wilson & Co., Inc. v. Forest Lawn Mem'l Chapel, Inc.*, 2006 WL 8446430, at *2 (S.D. Ind. Oct. 23, 2006). This is particularly so because the Securities Fraud Plaintiffs do not seek to be involved in the substantive proceedings here; they merely request the unsealing of a narrow set of documents. "[I]n the absence of any indication of prejudice [the motions to intervene] cannot be judged untimely as a matter of law." *Id.*

B. The Securities Fraud Plaintiffs Will Be Successful In Moving To Have The Sealed Documents Be Publicly Filed.

The Seventh Circuit has held that "most documents filed in court are presumptively open to the public"; a principle that is derived from the common-law precept that courts are public institutions that must operate openly—a principle codified at 28 U.S.C. § 452. *Bond*, 585 F.3d at 1073. The Seventh Circuit has also explained that "[d]ocuments that affect the disposition of federal litigation are presumptively open to public view, even if the litigants strongly prefer secrecy, unless a statute, rule, or privilege justifies confidentiality." *Specht*, 622 F.3d at 701; *United States v. Foster*, 564 F.3d 852, 853 (7th Cir. 2009) ("[T]hose documents . . . that influence or underpin the judicial decision are open to public inspection unless they meet the definition of trade secrets or other categories of bona fide long-term confidentiality.").

For this reason, "[o]nce a protective order is entered, a party must continue to show good cause for confidentiality when challenged." *Chicago Mercantile Exch., Inc. v. Tech. Rsch. Grp., LLC*, 276 F.R.D. 237, 241 (N.D. Ill. 2011). To do so, the party must satisfy the "***heavy burden***" of "establishing that it would suffer a clearly defined and serious injury if the filings and documents" sought to be protected are unsealed. *Id.* (emphasis added). "'Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning'" are not enough and a "generalized claim of injury is insufficient." *Id.* (citation omitted).

Neither party in the derivative action has made, or even attempted to make, such a showing. As "good cause" in support of their motion to seal the complaint and related briefing, the Derivative Plaintiffs cite only the provisions of the confidentiality agreement they entered into with the Defendants requiring them to file under seal any information that Defendants designate "confidential." ECF No. 93 at 2; ECF No. 126 at 2. But this does not satisfy the good cause standard since "[a]n argument that the confidentiality agreement controls what should be sealed in

the record is an indirect request that the Court delegate the authority to determine good cause to the parties." *Spano v. Boeing Co.*, 2009 WL 1220626, at *1 (S.D. Ill. May 5, 2009). Accordingly, the parties' "confidentiality agreement does not bind the Court," and the fact that "documents are confidential pursuant to [a] confidentiality agreement does not constitute good cause for sealing th[e] documents." *Id. See also Milwaukee Elec. Tool Corp. v. Snap-On Inc.*, 288 F. Supp. 3d 872, 910 (E.D. Wis. 2017) ("The trial judge may not 'rubber stamp a stipulation to seal the record.'") (citation omitted). Simply put, "[t]he determination of good cause cannot be elided by allowing the parties to seal whatever they want." *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999).

In addition to referencing the parties' private confidentiality agreements, Defendants claimed – in seeking to seal their motion to dismiss papers and exhibits – that the documents either contained or described material "marked 'Confidential' in the good-faith belief that the documents therein contain confidential and/or commercially sensitive information." ECF No. 116 at 1; ECF No. 135 at 1. But this too is insufficient. As the Northern District of Illinois has held, "[s]pecific examples or articulated reasoning must be provided" to demonstrate good cause, and a "broad assertion of a competitive injury . . . clearly falls short of this requirement." *Chicago Mercantile Exch., Inc.*, 276 F.R.D. at 241. The same holds true in this case.

III. CONCLUSION

Permissive intervention is the appropriate mechanism for a third party to seek access to materials filed under seal, and the Securities Fraud Plaintiffs advance a meritorious argument. For this reason, the Securities Fraud Plaintiffs should be granted leave to intervene for the limited purpose of seeking to have the Sealed Documents be publicly filed.

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Respectfully submitted,

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