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. Sunil R. Harjani

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MOTION TO RECONSIDER

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Preliminary Statement

On August 7, 2024, the Court denied, in part, Defendants' motion to dismiss this action, ruling that Illinois' pre-suit demand requirement is excused for two of Plaintiffs' claims—the first under § 10(b) of the Securities Exchange Act, and the second a *Caremark* claim for breach of fiduciary duty, under Illinois law. (Dkt. #142 ("Order")) This motion does not seek to re-present Defendants' dismissal arguments broadly for a second pass. However, in three concrete respects, Defendants respectfully submit that the Court misapprehended the record or their arguments. First, the Court grounded its *Caremark* analysis on a misapprehension about the board material submitted as exhibits to Defendants' motion to dismiss—specifically by assuming erroneously that the board books and committee books for any particular meeting would include the minutes from that meeting. Second, the Court did not dismiss the *Caremark* claim as to Defendant Claire Babineaux-Fontenot even though she joined the Board after all of the alleged conduct occurred. Third, the Court misunderstood Defendants' argument for dismissal of the § 10(b) claim, leading the Court not to consider a key argument.

Defendants respectfully ask the Court to reconsider its denial of Defendants' motion to dismiss for these discrete reasons.

Legal Standard

Federal Rule of Civil Procedure 54(b) permits a court "to reconsider its interlocutory orders at any time." *Morningware v. Hearthware Home*, 2011 WL 1376920, *2 (N.D. Ill. Apr. 12, 2011). Courts may grant motions to reconsider where "the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." *Saunders v. City of Chi.*, 146 F. Supp. 3d 957, 961 (N.D. Ill. 2015).

Argument

I. The Court Misapprehended The Board Material Submitted As Exhibits To Defendants' Motion To Dismiss.

First, respectfully, the Court misunderstood the board material submitted as exhibits to Defendants' motion to dismiss and so missed the relevant Board and Committee meeting minutes that demonstrate director review of manufacturing quality and safety. Abbott's directors receive a "board book" or "committee book" in advance of each Board or Committee meeting, with an agenda for the upcoming meeting, material to be reviewed with Management at that meeting, and written draft minutes *of the prior meeting*, to be approved at the upcoming meeting. Plaintiffs requested and received these board books and committee books from Abbott through their pre-suit books-and-records examination, and many of these books were submitted as exhibits to Defendants' motion to dismiss.

However, the Court misapprehended the board books and committee books. It assumed the book for any particular meeting would have the minutes from that same meeting. This would have been impossible because the books are prepared and distributed *before* the meeting occurs (so the directors can study and prepare in advance). Instead, each book contains minutes from a different meeting—the draft minutes from the *prior* meeting, which are submitted by the Secretary for the directors' review and approval. This misunderstanding led to concrete errors in the Court's analysis.

For example, the Court reviewed Exhibit 22, the committee book for the December 2017 meeting of the Board's Public Policy Committee ("PPC"). (Order at 19, discussing Dkt. #113-22) One of the presentations provided to the PPC in that committee book was [redacted] After reviewing this committee book, the

Court concluded that "the exhibit provided by Defendants does not describe what was actually discussed at the meeting." (Order at 19) The Court asserted that "[t]he meeting minutes included with the exhibit, which have a different date than the agenda and presentation, do not demonstrate that the Senior Vice President of Quality Assurance was in attendance, let alone that she gave a presentation." (*Id.*) But that is only because minutes from the December 2017 PPC meeting would not be in the committee book for the December 2017 PPC meeting. The minutes from the PPC's December 2017 meeting were prepared and approved after the PPC's meeting, and were submitted with Defendants' motion to dismiss separately, as Exhibit 54 (Dkt. #113-54). [redacted]

(Dkt. #113-54 at 2)

This misapprehension affected the Court's review of *all* the PPC meetings. The Court concluded that "each of the Public Policy Committee reports the Defendants identified in their motion to dismiss do not include the meeting minutes from that meeting, so the Court cannot make an inference about what was discussed at those meetings. Docs [113-22], [113-23], [113-25], [113-27], [113-28], [113-30]." (Order at 19) But, as with Exhibit 22, discussed above, the Court reached that conclusion because it assumed the committee book prepared in advance of a PPC meeting would have minutes from that meeting. But Defendants submitted the minutes from those meetings separately, and [redacted]. (Dkt. #113-56 (minutes corresponding to Dkt. #113-23); Dkt. #113-60 (minutes for Dkt. #113-25); Dkt. #113-64

(minutes for Dkt. #113-27); Dkt. #113-66 (minutes for Dkt. #113-28); Dkt. #113-69 (minutes for Dkt. #113-30)) The below chart reflects dates and docket numbers that correspond with the PPC minutes and materials from eleven meetings that Defendants submitted as exhibits to the motion to dismiss:

Date of PPC Meeting Discussing Regulatory and Quality Issues[1]	**Dkt. Number of Meeting Minutes**	**Dkt. Number of Corresponding Committee Book**
June 8, 2017	Dkt. #113-52	Dkt. #113-21 at 2, 7-17
December 14, 2017	Dkt. #113-54	Dkt. #113-22 at 2, 5-16
June 7, 2018	Dkt. #113-56	Dkt. #113-23 at 2, 9-14
December 13, 2018	Dkt. #113-58	Dkt. #113-24 at 2, 5-16
June 13, 2019	Dkt. #113-60	Dkt. #113-25 at 2, 7-14
December 12, 2019	Dkt. #113-62	Dkt. #113-26 at 2, 5-18
June 11, 2020	Dkt. #113-64	Dkt. #113-27 at 2, 8-15
December 10, 2020	Dkt. #113-66	Dkt. #113-28 at 2, 6-17
June 10, 2021	Dkt. #113-67	Dkt. #113-29 at 2, 8-19
December 9, 2021	Dkt. #113-69	Dkt. #113-30 at 2, 6-24
June 9, 2022	Dkt. #113-76	Dkt. #113-31 at 2, 10-28

Moreover, even if the directors had not discussed material at meetings [redacted] oversight need not be conducted orally or in person, but can be done through written material, and the board material Abbott produced to Plaintiffs was *by definition* material provided to the directors for purposes of their oversight of the Company. This is not seeking an inference of the directors' actions—the board material is direct evidence of the directors' actions.

This additional information about how board and committee material is prepared and maintained shows beyond dispute [redacted]

[1] A chart reflecting each of the board and committee minutes and materials that were submitted as exhibits to Defendants' motion to dismiss is attached hereto as Appendix A. Neither this chart nor the chart in Appendix A comprise the full universe of Board minutes and materials reflecting the Board's discussion of regulatory and/or quality issues.

[redacted]

In another example of the Court's misimpression affecting its conclusions, the Court wrote that "the meeting minutes from the Public Policy Committee meetings do not reflect discussions of Abbott's production or oversight of Abbott's infant formula products." (Order at 19) [redacted]

[redacted]

(Dkt. #113-58 at 2) These minutes correspond to a more detailed presentation that was in the PPC's committee book from that meeting, [redacted] (Dkt. #113-24 at 13-14 [redacted]

[redacted]

(Dkt. #113-67 at 2-3) [redacted] These examples, respectfully, refute the Court's conclusion that the minutes "do not reflect discussions of Abbott's production or oversight of Abbott's infant formula products" and that the material "does not on its own demonstrate that the Board asked any questions or pressed management for any more details." (Order at 19)

Finally, the Court in some instances appears to have reviewed only meeting minutes without accounting for the more detailed accompanying presentation. For example, the Court concluded that "[a]t its June 2022 meeting, the Board's focus was on Abbott's financial performance and how Abbott's nutrition business was impacted by the Sturgis Plant closure and recall, and what its financial status would be assuming the plan restarts production." (Order at 21) [redacted]

[2] [redacted]

(Dkt. #113-54 (minutes corresponding to Dkt. #113-22); (Dkt. #113-56 (minutes for Dkt. #113-23); Dkt. #113-60 (minutes for Dkt. #113-25); Dkt. #113-64 (minutes for Dkt. #113-27); Dkt. #113-66 (minutes for Dkt. #113-28); Dkt. #113-69 (minutes for Dkt. #113-30))

(Dkt. #113-31 at 12-19)[3] [redacted]

[redacted]

(Dkt. #113-76 at 3) [redacted]

[redacted]

[redacted]

(*Id.* at 2) [redacted]

[redacted]

In sum, the board material—properly considered because it is incorporated by reference into the complaint (Order at 6)—shows [redacted]. Because a *Caremark* claim turns on what the plaintiff alleges the directors did or did not do, and is subject to the Court's "review [of] the actual documents to ensure that the plaintiff has not misrepresented their contents" (*id.*), misunderstanding the board material's contents necessarily impacted the Court's *Caremark* analysis. And because the board material reflects consistent discussions about the relevant topics, Defendants respectfully submit that reconsideration will lead the Court to conclude Defendants made the "good

[3] That this occurred at the PPC level rather than the full Board is not a *Caremark* issue. Plaintiffs cite no precedent holding that which set of directors conducted oversight affects whether the directors fulfilled their fiduciary duties.

faith effort to ensure the company had in place *any* system of controls," as *Caremark* requires. *Marchand v. Barnhill*, 212 A.3d 805, 822 (Del. 2019) (emphasis added); *see also id.* at 823 ("[P]laintiffs usually lose [prong 1 claims] because they must concede the existence of board-level systems of monitoring and oversight such as a relevant committee, a regular protocol requiring board-level reports about relevant risks, or the board's use of third-party monitors, auditors, or consultants."); *Clem v. Skinner*, 2024 WL 668523, *8 (Del. Ch. Feb. 19, 2024) ("The Board was required to exercise good faith oversight—not to employ a system to the plaintiffs' liking.").

Accordingly, Defendants respectfully ask the Court to revisit its analysis of the board material and to conclude that Plaintiffs' allegations do not plead with particularity that a majority of the Board faces a substantial likelihood of liability for "utter failure" to fulfill their duty to oversee Abbott. As a result, the Court should dismiss the *Caremark* claim (Count III) against all Defendants.

II. The Court Erred By Not Dismissing Plaintiffs' *Caremark* Claim Against Claire Babineaux-Fontenot.

Independent of Defendants' *Caremark* argument in Part I above, Defendant Claire Babineaux-Fontenot respectfully submits that the Court's decision not to dismiss the *Caremark* claim against her personally overlooked a key dispositive fact: She did not join the Board until September 2022—seven months after the Sturgis recall and three months after Sturgis restarted production with approval of the FDA. (Order at 3; *see also* Dkt. #112 at 17 n.10 (Defendants noting that Babineaux-Fontenot "did not even join the board until September 2022")) Because Plaintiffs' *Caremark* allegations concern conduct from before Babineaux-Fontenot joined the Board, she cannot face *Caremark* liability for that conduct.

The allegations the Court considered in its *Caremark* analysis all predate Babineaux-Fontenot's time on the Board. Similarly, the complaint does not allege any failure of oversight during Babineaux-Fontenot's tenure. Indeed, Plaintiffs could not have made allegations regarding the period during which Babineaux-Fontenot served because Abbott's books-and-records production only went *through*

June 2022, three months before she joined the Board. (Dkt. #112 at 7)[4]

A board member's fiduciary duties to shareholders do not begin until she joins the board. *See Neil v. Zell*, 677 F. Supp. 2d 1010, 1023 (N.D. Ill. 2009) ("Defendants who joined the board of directors [after the alleged conduct] … ha[ve] no fiduciary duty to remedy the alleged fiduciary breach committed before their tenure on the board."); *In re Walt Disney Deriv. Litig.*, 907 A.2d 693, 758 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006) ("Delaware law does not require directors-to-be to comply with their fiduciary duties"); *In re Bank of Am. Sec. Litig.*, 2013 WL 1777766, *11 (S.D.N.Y. Apr. 25, 2013) (dismissing claims against directors who "appear to be named as defendants based on their status as [] directors, and not any purported misconduct that occurred since they joined the board."). Respectfully, the Court should dismiss Plaintiffs' *Caremark* claim against Babineaux-Fontenot.

III. The Court Misapprehended Defendants' Argument For Dismissal Of Plaintiffs' § 10(b) Securities Fraud Claim.

Defendants respectfully submit that the Court's decision on Plaintiffs' § 10(b) claim misapprehended Defendants' argument in an important respect. As the Court correctly explained, "Plaintiffs allege the Section 10(b) Defendants disseminated or caused to be issued false or misleading statements about Abbott which they knew or recklessly disregarded were false or misleading with an intent to deceive, manipulate or default." (Order at 11 (footnote omitted)) The Court also correctly explained that Plaintiffs allege Abbott—as the plaintiff-in-interest in this suit—was damaged by the supposedly fraudulent statements when the Board approved stock repurchases in 2019 and 2021. (*Id.*) Thus, the Court correctly understood Plaintiffs' theory of liability to be one of self-deception: that the directors

[4] The only conduct alleged about Babineaux-Fontenot relates to Plaintiffs' § 14(a) claim about Abbott's 2023 proxy statement, which the Court dismissed (and Plaintiffs have not re-pled). (Order at 3, n.3 & 7-11) Even the post-recall *Caremark* red-flag theories that Plaintiffs asserted do not concern Babineaux-Fontenot because she did not join the Board until after they had occurred. (Dkt. #92 ¶ 208 (February 2022 Sturgis shutdown), ¶ 210 (February 2022 recall), ¶ 246 (May 2022 Consent Decree)) Babineaux-Fontenot is not a defendant in the § 10(b) claim. (Order at 14 n.10)

knowingly made misrepresentations and those same directors then relied on their own misrepresentations when approving Abbott's repurchases of stock.

The Court then correctly held that precedent rejects such a self-deception theory of § 10(b) liability when the directors' knowledge is imputed to the corporation, because "[t]o the extent knowledge can be imputed to the corporation it is impossible to state that the corporation was deceived by or relied on any misrepresentations or omissions." *Ray v. Karris*, 780 F.2d 636, 641 (7th Cir. 1985). However, the Court held, here the Abbott directors' knowledge is *not* imputed to Abbott because Defendants failed to challenge Plaintiffs' allegation that the directors were "interested" in the stock repurchases. (Order at 13 ("Defendants do not argue that Plaintiffs insufficiently alleged that the Section 10(b) Defendants were not independent or disinterested.")).[5] Consequently, the Court's belief that Defendants did not challenge the sufficiency of Plaintiffs' allegations was outcome determinative.

But the Court's belief about Defendants' argument was inaccurate: Defendants expressly argued that directors are interested only when they "'were on both sides of the transaction,' *which Plaintiffs do not allege here*." (Dkt. #132 at 11 n.9 (citing *Ray*, 780 F.2d at 641) (emphasis added)) Thus, Defendants did challenge the sufficiency of Plaintiffs' allegations that a majority of the Abbott directors were interested. Defendants explained: "Where there is no allegation that the directors who approved a corporate share repurchase were personally interested in the transactions (or were themselves deceived

[5] "Interested," for purposes of imputation, means the individual received a personal financial benefit from the transaction. *Ray*, 780 F.2d. at 641 (addressing "the esoteric issue of when the legal fiction that is a corporation is deemed to 'know' of the *fraudulent and self-interested schemes* of the controlling shareholders or board of directors") (emphasis added); *Chester Cty. Employees' Ret. Fund v. New Residential Inv. Corp.*, 186 A.3d 798 (Del. 2018) ("A director is interested in a transaction if he or she will receive *a personal financial benefit* from a transaction that is not equally shared by the stockholders.") (emphasis added). An individual is not interested simply because they had knowledge of wrongful conduct; *Ray* makes this clear. *Ray*, 780 F.2d at 642 ("in none of the other cases was there any indication that the relevant disinterested parties actually had knowledge of the alleged fraud prior to the actual transaction").

by others), courts have repeatedly dismissed derivative claims, as the decisions cited above demonstrate." (*Id.*) Plaintiffs did not (and cannot) allege with particularity facts showing a majority of the Abbott Board had a personal financial stake in the stock repurchases the Board approved. Plaintiffs do not allege a majority of the directors sold any of their personal stock or gained any other personal benefit from Abbott's stock repurchases. As a result, a majority of the directors were disinterested—and their supposed knowledge of the fraudulent misrepresentations is imputed to Abbott, barring Plaintiffs' § 10(b) theory of reliance.

Because the Court overlooked Defendants' argument about the insufficiency of Plaintiffs' allegations, it did not consider that argument, leading it to deny Defendants' motion to dismiss. Consequently, Defendants' respectfully ask the Court to reconsider its decision and dismiss Plaintiffs' § 10(b) claim.

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Respectfully submitted,

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