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

MEMORANDUM IN OPPOSITION TO SECURITIES LITIGATION PLAINTIFFS' MOTION FOR LEAVE TO INTERVENE

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I. Introduction

Proposed Intervenors (the "Securities Litigation Plaintiffs") improperly seek to circumvent federal law to gain access to Abbott's confidential books and records. The Securities Litigation Plaintiffs are pursuing a securities class action that is pending before Judge Seeger. *See Pembroke Pines Fire & Police Officers Pension Fund v. Abbott Labs*, No. 1:22-cv-04661 (N.D. Ill.) (the "Securities Litigation"). That lawsuit is subject to the Private Securities Litigation Reform Act ("PSLRA"), which imposes an automatic stay of discovery during the pendency of a motion to dismiss. The motion to dismiss the Securities Litigation remains pending, and thus, the Securities Litigation Plaintiffs cannot seek discovery. But that is precisely what they are attempting by filing the Motion, hoping to harvest confidential documents from this case to use in their own.

This Court should deny the Motion on three grounds. First, the Securities Litigation Plaintiffs seek to intervene for an improper purpose—to subvert a discovery prohibition in the Securities Litigation. Second, the Securities Litigation Plaintiffs do not meet the standards of permissive intervention, because the Motion for Leave to Intervene is untimely. Finally, because the Securities Litigation Plaintiffs do not meet the standard of permissive intervention, the Court need not reach the issue of whether they will be successful in moving to unseal the confidential materials (a subsequent motion they intend to file if granted intervention)—but regardless, good cause exists because they contain sensitive business information produced by the Company with the expectation of confidentiality.

II. Factual Background

A. Lead Plaintiffs Filed This Action Subject to a Confidentiality Agreement

Lead Plaintiffs in the derivative case before this Court[1] served inspection demands for the Company's books and records on October 11, 2022 and December 14, 2022. Before making any

[1] Lead Plaintiffs are International Brotherhood of Teamsters Local No. 710 Pension Fund and Southeastern Pennsylvania Transportation Authority ("SEPTA").

productions, the Company and Lead Plaintiffs entered into confidentiality agreements allowing the Company to designate as confidential any materials containing or reflecting confidential, proprietary, or commercially sensitive information. *See* Dkt. 115-14 (confidentiality agreement between International Brotherhood of Teamsters Local No. 710 and Abbott Laboratories). The purpose of the agreement was to protect the Company's confidential information, which Lead Plaintiffs acknowledged was necessary to prevent irreparable harm and significant injury to the Company. *Id.* at 4. The Company then produced responsive materials to Lead Plaintiffs.

On June 27, 2023, Lead Plaintiff SEPTA filed a derivative complaint. Because the complaint referred to confidential material subject to the Confidentiality Agreement between SEPTA and the Company, SEPTA filed the complaint under seal. Dkt. 58, 58-1. The Court granted the motion to seal on July 5, 2023. Dkt. 64. On October 16, 2023, Lead Plaintiffs filed the amended derivative complaint against certain current and former members of Abbott's Board of Directors and certain executive officers. Dkt. 91. The amended complaint likewise referred to confidential information, so Lead Plaintiffs moved to seal it as well. Dkt. 93, 95. Similarly, Defendants moved to seal exhibits in conjunction with its motion to dismiss on December 18, 2023 (Dkt. 113), because both the memorandum and certain of the supporting exhibits contained confidential and/or commercially sensitive information subject to the parties' Agreement. Dkt. 116. The parties likewise filed motions to seal with the subsequent briefing on the motion to dismiss, and the Court granted each of the motions. *See* Dkt. 119, 127, 137.

B. The Securities Litigation Plaintiffs Are Subject to the PSLRA Discovery Stay

The Securities Litigation Plaintiffs filed suit against Abbott and certain other defendants on August 31, 2022. *See* Securities Litigation, Dkt. 1. Following the appointment of lead plaintiffs, Securities Litigation Plaintiffs filed an amended complaint on April 21, 2023. *See* Securities Litigation, Dkt. 35. The PSLRA's mandatory discovery stay is in place while Defendants' June 2023 motion to

dismiss remains pending. *See* 15 U.S.C. § 78u-4(b)(3)(B). Despite that stay, the Securities Litigation Plaintiffs moved to intervene in this action so they can access certain records filed under seal in connection with the parties' motion-to-dismiss briefing.

III. The District Court Should Exercise Its Broad Discretion To Deny the Motion

Whether the district court permits intervention is "a highly discretionary decision." *Bost v. Ill. State Bd. of Elecs.*, 75 F.4th 682, 690 (7th Cir. 2023). The court is "only required" to consider undue delay and prejudice to the rights of the original parties. *Id.* at 691. As a result, there are "many sound reasons to deny a motion for permissive intervention," so reversal of the district court's denial "is a very rare bird indeed." *Id.*

The Court should deny the Motion for at least three reasons. First, through the Motion, the Securities Litigation Plaintiffs improperly seek to evade the PSLRA's discovery stay by asking to unseal the documents that would only be able to available to them if they defeat Abbott's pending motion to dismiss. Second, the Securities Litigation Plaintiffs do not meet the standard for permissive intervention because they did not timely raise their purported concerns (as required by Rule 24). Finally, even if the Securities Litigation Plaintiffs could somehow meet the standard for permissive intervention, good cause exists to keep the documents under seal.

A. The Securities Litigation Plaintiffs Improperly Seek to Circumvent the Discovery Stay

The Court should deny the Motion because the Securities Litigation Plaintiffs improperly seek to evade the PSLRA discovery stay by asking the Court to unseal documents to which they are otherwise not entitled. The Securities Litigation is subject to the PSLRA, which Congress enacted as "a check against abusive litigation by private parties." *Smykla v. Molinaroli*, 85 F.4th 1228, 1234 (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007)). One of those checks prohibits plaintiffs from seeking discovery during the pendency of a motion to dismiss. *See* 15 U.S.C. § 78u-

4(b)(3)(B). The automatic stay is designed to "avoid the situation in which a plaintiff sues without possessing the requisite information to satisfy the PSLRA's heightened pleading requirements, then uses discovery to acquire that information and resuscitate a complaint that would otherwise be dismissed." *Sarantakis v. Gruttaduaria*, 2002 WL 1803750, at *1 (N.D. Ill. Aug. 5, 2002).

The Motion represents the very situation the PSLRA seeks to prevent. Defendants in the Securities Litigation moved to dismiss, and the Securities Litigation Plaintiffs seek information from *this* Court to supplement their pleading—whether immediately or if given the opportunity to replead in the event the Securities Litigation complaint is dismissed. But allowing the Securities Litigation Plaintiffs to access the sealed board materials "would be tantamount to permitting Plaintiffs to conduct discovery in aid" of their case. *Smilovits v. First Solar Inc.*, 2016 WL 5682723, at *5 (D. Ariz. Sept. 30, 2016) (denying motion to intervene that was a "clear attempt" to avoid discovery limitation). *See also, e.g.*, *SG Cowen Sec. Corp. v. U.S. Dist. Ct. for N. Dist. of Calif.*, 189 F.3d 909, 912 (9th Cir. 1999) (district court erred in granting plaintiffs "leave to conduct discovery so they might uncover facts sufficient to satisfy the [PSLRA's] pleading requirements" because that is "not a permissible reason" to lift automatic discovery stay); *Sisk v. Guidant Corp.*, 2007 WL 1035090, at *4 (S.D. Ind. Mar. 30, 2007) (denying securities plaintiffs' motion seeking "documents [defendant] has produced in other investigations and lawsuits" because PSLRA "requires more" than "delay or inconvenience" to lift stay).

Rather than admit that objective, the Securities Litigation Plaintiffs ask the Court to unseal Abbott's confidential records under the guise of promoting the public's "access to judicial records." Mot. at 4. If that were a valid way to avoid the statutory discovery stay, it would be a commonplace step in similar matters, and the Securities Litigation Plaintiffs would have pointed the Court to controlling case law. Nominal Defendant Abbott is not aware of any case in this Circuit that permits what they ask here, and the Securities Litigation Plaintiffs do not cite any. And the cases they do cite are

inapposite. *See* Mot. at 4-5. For example, in *Bond v. Utreras*, 585 F.3d 1061, 1067 (7th Cir. 2009) (Mot. at 4), an independent journalist joined with Chicago aldermen who sought access to the police department's confidential documents to help them decide whether to adopt a proposal to separate the police department's oversight board from the police department. In *Jessup v. Luther*, 227 F.3d 993, 995 (7th Cir. 2000) (Mot. at 5), a newspaper sought to unseal a settlement agreement between a public community college and a former employee alleging the college violated his constitutional rights. And in *United States v. Navistar International Corp.*, 2016 WL 6948378 (N.D. Ill. Nov. 28, 2016) (Mot. at 5), the original-party defendants sought discovery of certain third-party manufacturers' confidential business information from the government, and those manufacturers moved to intervene to prevent disclosure of their sensitive information. At bottom, none of these cases involved an end-run around a mandatory statutory discovery stay.

However the Securities Litigation Plaintiffs frame their request, the Motion is "not a First Amendment inquiry from a generally interested citizen, but a clear attempt to avoid" the PSLRA stay. *Smilovits*, 2016 WL 5682723, at *5. This Court should deny the Motion on this ground alone. *See Bost*, 75 F.4th at 691 (district court has broad discretion to deny permissive intervention).

B. The Securities Litigation Plaintiffs Do Not Satisfy the Standard for Permissive Intervention

Intentions aside, the Securities Litigation Plaintiffs have not met the standard for permissive intervention because their Motion is untimely. *See* Fed. R. Civ. P. 24(b)(1)(B). Courts consider the following factors in assessing timeliness: (1) the length of time the intervenor knew or should have known of their interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; and (4) any other unusual circumstances that excuse delay. *Sokaogon Chippewa Cmm'ty Coll. v. Babbit*, 214 F.3d 941, 949 (7th Cir. 2000). Applying these factors underscores that the Securities Litigation Plaintiffs' motion is untimely.

As to the **first factor**, the Securities Litigation Plaintiffs knew of their supposed interest in this case over a year ago, when Lead Plaintiff SEPTA filed a complaint under seal on June 27, 2023. *See* Dkt. 58, 58-1, 64. The Securities Litigation Plaintiffs offer no explanation why they waited over a year to challenge the parties' protective order, because there is none—the only thing that has happened since then is this Court granting in part and denying in part Defendants' motion to dismiss (which Defendants have moved to reconsider). Nevertheless, the ruling did not change the confidential nature or status quo of the sealed documents. *See, e.g.*, *Reid v. Ill. State Bd. of Educ.*, 289 F.3d 1009, 1018 (7th Cir. 2002) (district court had discretion to deny permissive intervention after ten-month delay); *Shakman v. City of Chi.*, 2007 WL 1468721, at *2 (N.D. Ill. May 18, 2007) (denying permissive intervention where proposed intervenor waited over a year). Nor does the Securities Litigation Plaintiffs' purported authority help them: the proposed intervenor in *Doe v. Amar*, 2023 WL 4564404 (C.D. Ill. July 17, 2023) (Mot. at 5) was a First Amendment scholar and legal commentator seeking to unseal the plaintiff's name in a constitutional lawsuit against a public university; he moved to unseal the court record within a week after the court sealed it. *Id.* at *2; *see also* Text Order (Apr. 28, 2023), Case No. 2:22-cv-02252 (N.D. Ill.); Dkt. 34, Case No. 2:22-cv-02252 (N.D. Ill.). As to *J.C. Wilson & Co., Inc. v. Forest Lawn Memorial Chapel, Inc.*, 2006 WL 8446430 (S.D. Ind. Oct. 23, 2006), the Securities Litigation Plaintiffs' reliance is misleading. Mot. at 5. They assert intervention is appropriate when the case is "early in the litigation process" (*id.*), but that fact mattered in *J.C. Wilson* because the proposed intervenors there each sought to join the case as a party—not as a third party asking to unseal confidential records for their own self-interested litigation a year after they were filed under seal.

As to the **second factor**, the parties, and especially Nominal Defendant Abbott, have relied on the expectation that the pleadings would remain confidential in this matter. As discussed further below, the documents consist of highly confidential books and records reflecting the Board's strategic,

commercial, and operational decision-making that would negatively impact the Company if made public. The Securities Litigation Plaintiffs barely mention the **third factor**—prejudice if the Motion is denied—and have thus waived any argument to support this factor. *See Chi. Import, Inc. v. Am. States Ins. Co.*, 2010 WL 3385539, at * 3 (N.D. Ill. Aug. 24, 2010) (proposed intervenor failed to argue prejudice, thus waiving the point). In any event, the Securities Litigation Plaintiffs could not possibly be prejudiced if the Motion is denied because they will be in the same position as they are now—subject to a statutorily mandated discovery stay. Moreover, if their lawsuit survives the motion to dismiss and the statutorily mandated PSLRA discovery stay is no longer in effect, the Securities Litigation Plaintiffs will have access to relevant Abbott documents in the normal course of their litigation before Judge Seeger, subject to an appropriate protective order in that case. Finally, there are no unusual circumstances that excuse the Securities Litigation Plaintiffs' delay (the **fourth factor**), and they do not argue otherwise. As a result, the Motion is untimely and should be denied.

C. The Securities Litigation Plaintiffs Are Unlikely to Succeed on a Motion to Unseal

Even if the Court finds the Securities Litigation Plaintiffs have otherwise met their burden for permissive intervention, the Court should deny the motion because the Securities Litigation Plaintiffs are unlikely to succeed on a subsequently filed motion to unseal. The Securities Litigation Plaintiffs argue that they "will be successful in moving to have the sealed documents be publicly filed," generally arguing that litigation documents are presumptively public. Mot. at 6. But good cause exists to keep the pleadings and related documents under seal. *See* L.R. 26.2 ("The court may for good cause shown enter an order directing that one or more documents be filed under seal."). First, only a small portion of the briefing papers and certain exhibits that relate to confidential information are under seal, leaving the remainder open to the public. Second, the sealed excerpts and exhibits refer to or are documents

protected by a confidentiality agreement between the litigants here, through which Abbott has a legitimate expectation of confidentiality. *See, e.g.*, *Griffith v. Univ. Hosp. LLC*, 249 F.3d 658, 663 (7th Cir. 2001) (modifying protective order "would undermine the parties' reliance" on confidentiality of agreement); *see also, e.g.*, *In re Bofl Holding, Inc. S'holder Litig.*, 2017 WL 784118, at *20-21 (S.D. Cal. Mar. 1, 2017) (granting motion to seal documents produced in response to inspection demand and pursuant to confidentiality agreement).

That expectation of confidentiality is especially important for the Board minutes and materials, which reflect confidential Board deliberation over commercially sensitive topics. For instance, Exhibits 15 and 16 reflect detailed discussion of the Company's Enterprise Risk Management process, which includes the directors' assessment of the top risks facing the Company and how the Company approaches those risks. That information in Abbott's competitors hands could harm the Company. *See, e.g.*, *Advanced Magnesium Alloys Corp. v. Dery*, 2022 WL 20515875, at *1-2 (S.D. Ind. July 21, 2022) (granting motion to seal documents containing "confidential information that could lead to competitive harm if disclosed"). Exhibit 75 similarly comprises Board materials that include specific descriptions about the Company's facilities, including FDA inspections and detailed actions taken in response, as well as the proprietary processes the Company uses to make its products. *See, e.g.*, *Philips Med. Sys. (Cleveland), Inc. v. Buan*, 2021 WL 1536173, at *1 n.2 (N.D. Ill. Apr. 19, 2021) (granting motion to seal where materials related to confidentiality agreement's designated materials of "business or strategic plans," "sales and financial data," and "other information of a competitive, financial or commercial significance"). And Exhibit 24 likewise represents Board materials reflecting specific Company data and comparisons to its peers. *See also, e.g.*, Ex. 58 (Public Policy Committee meeting materials).

Third, in addition to protecting commercially sensitive information, directors understand those meetings—and the records recounting what happened at them—are confidential. As a result, they can be comfortable speaking candidly about matters that affect the company. That is why courts

routinely grant motions to seal confidential board meeting minutes and materials. *See, e.g.*, *In re Zillow Grp., Inc. S'holder Deriv. Litig.*, 2019 WL 3428664, at *2 (W.D. Wash. July 30, 2019) (sealing "confidential information provided to Zillow's board of directors during a non-public meeting" because their disclosure "could adversely affect future deliberations by the board"); *Palempalli v. Patsalos-Fox*, 2023 WL 3260396, at *2 (D.N.J. May 4, 2023) (granting motion to seal confidential board minutes and materials because public disclosure of "internal deliberations . . . would adversely affect future deliberations by the Board"); *In re Bofl Holding*, 2017 WL 784118, at *20. Because good cause exists, the Securities Litigation Plaintiffs will not be successful in moving to unseal the materials.

IV. Conclusion

For these reasons, Abbott respectfully requests that the Court deny the Securities Litigation Plaintiffs' Motion to Intervene.

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Respectfully submitted,

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