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

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

I. INTRODUCTION

Defendants' opposition to Securities Fraud Plaintiffs' motion to intervene rehashes widely-rejected legal arguments and offers no factual support for their conclusory assertions of harm flowing from public filing of the Sealed Documents.[1] At bottom, Defendants' argument is that these documents should remain sealed because Defendants prefer them out of public view, including members of that public harmed by their misconduct. But that is not a cognizable ground for sealing the documents, and should not prevent this Court from granting the motion to intervene.

Defendants' principal argument is that Securities Fraud Plaintiffs' motion somehow contravenes the Private Securities Litigation Reform Act. Courts have widely rejected this argument, which is premised on a gross misunderstanding of the PSLRA and its purpose. *See, e.g.*, *Gubricky on behalf of Chipotle Mexican Grill, Inc. v. Ells*, 2018 WL 1558264, at *4 (D. Colo. Mar. 26, 2018) (finding that "unrestricting" the pleadings would not "amount to an end-run around the Southern District of New York's discovery stay"). The PSLRA prohibits litigants from serving discovery requests while a motion to dismiss is pending, with the aim of preventing strike suits that use the threat of costly discovery to extract quick settlements. Securities Fraud Plaintiffs have issued no discovery requests here and, indeed, filing the already-produced documents on the public docket imposes no cost on Defendants whatsoever. The PSLRA does not prevent injured investors from seeking information relevant to their claims outside of the formal discovery process, nor does it provide wrongdoers with a tool for broadly denying them access to such information.

Defendants' timeliness arguments fail on both the facts and the law. Here, the earliest of the Sealed Documents was filed less than a year ago, and the Court only sustained the allegations

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[1] Capitalized terms not otherwise defined have the same meeting as set forth in the Memorandum of Law In Support of Securities Fraud Plaintiffs' Motion to Intervene (ECF No. 144-1) (the "Mot. To Intervene"). Unless otherwise indicated, all emphasis is added and all internal quotations are removed.

therein on August 7, 2024, a mere 37 days ago (8 days before the motion to intervene was filed). Additionally, unlike the cases Defendants cite, Securities Fraud Plaintiffs do not seek to intervene for the purpose of asserting claims in this case, but simply to obtain access to judicial records. In cases where intervention is so limited, courts have found there is no "prejudice" as a result of the delay that would weigh in finding the motion untimely; indeed "'delays measured in ***years*** have been tolerated where an intervenor is pressing the public's right of access to judicial records.'" *State Farm Fire & Cas. Co. v. Hood*, 266 F.R.D. 135, 143 (S.D. Miss. 2010) (quoting *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1101 (9th Cir.1999)) (granting motion to intervene filed 15 months after sealing). In any event, the Court's recent opinion made the salience of the documents sought here clear in a way that the sealed pleadings and briefing simply did not.

Finally, Defendants have not shown that Securities Fraud Plaintiffs' motion to unseal would fail. Defendants offer unsworn, conclusory claims about competitive harm, but do not explain how such harm could flow from documents that are admittedly ***years old***. *City of Greenville, IL v. Syngenta Crop Prot., Inc.*, 2013 WL 1164788, at *4 (S.D. Ill. Mar. 19, 2013) (defendants unable to demonstrate that board minutes as recently as two-and-a-half years prior "reveal[] confidential, nonpublic financial information or that public disclosure would likely create a significant commercial advantage or disadvantage at this point in time."). Defendants' generic, conclusory claims of competitive harm are insufficient as a matter of law. *Doe v. Amar*, 2023 WL 4564404, at *4 (C.D. Ill. July 17, 2023) ("embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records"); *Baxter Int'l, Inc. v. Abbott Lab'ys*, 297 F.3d 544, 547 (7th Cir. 2002) (finding that while "many litigants would like to keep confidential" certain information, "when these things are vital to claims made in litigation they must be revealed").

II. ARGUMENT

A. The Motion To Intervene In No Way Contravenes The PSLRA

Defendants principally argue that Securities Fraud Plaintiffs "improperly seek to evade the PSLRA discovery stay by asking the Court to unseal documents to which they are otherwise not entitled." Opp'n (ECF No. 151) at 3. Every court to consider this argument has rejected it. *See Walmart Inc. v. Synchrony Bank*, 2019 WL 6291037, at *4 (W.D. Ark. Nov. 25, 2019), *rev'd on other grounds in Walmart Inc., LLC v. Synchrony Bank*, 2020 WL 2950653 (8th Cir. Apr. 24, 2020) ("The Court rejects Synchrony's argument that unsealing the unredacted Walmart Complaint would be tantamount to an end-run around the PSLRA stay in the Connecticut Action."); *In re Marriott*, 2019 WL 4855202, at *2 (D. Md. Aug. 30, 2019) ("I find the pleadings and the PFI report are not 'discovery' as contemplated by the PSLRA and therefore not subject to the discovery stay."); *Gubricky,* 2018 WL 1558264, at *4; *see also Cormier v. Burns*, 2022 WL 20655718, at *1 (Del. Ch. Jan. 24, 2022) (ORDER) (rejecting argument that movant was undermining the PSLRA because "[t]he material he seeks to unseal is not tantamount to discovery, and the policies supporting a PLSRA stay are not undermined by this Court fulfilling its mandate for public access.").

As these courts have explained, Defendants' argument is premised on a grave misunderstanding of the PSLRA: "Congress was concerned about the high cost of discovery pursuant to the Federal Rules of Civil Procedure, not the acquisition by plaintiffs of information relevant to the suit through disclosure of facts already appearing in other sources, such as pleadings." *Marriott*, 2019 WL 4855202, at *2. Accordingly, the PSLRA stays the service and production of discovery pursuant to the Federal Rules while a motion to dismiss a securities fraud case is pending; it does not preclude injured investors from seeking information that may support their case, nor does it provide wrongdoers with the means to evade justice by broadly denying

those they have defrauded access to such information. As the *Marriott* court explained, unsealing documents already produced in parallel litigation does not implicate the PSLRA in any way because no discovery has been served and "unsealing the materials would not cost the Defendants anything." *Id.*

Moreover, as courts have also explained, Defendants' argument entails absurd and unjust consequences. Defendants' proposed holding "would mean that a news organization or a curious member of the public could move to unrestrict documents that, as it turns out, could be helpful in a securities class action, but the law firm actually litigating that securities class action cannot bring the same motion, even though nothing prevents them from drawing on documents made public through someone else's motion." *Gubricky,* 2018 WL 1558264, at *4. Such a rule "makes little sense and can hardly be said to promote the interest of justice." *Id.* Similarly, the court in *Walmart* held that Defendants' "argument leads to absurd results," including that a securities fraud plaintiff "cannot directly unseal the . . . Complaint, but a journalist could . . . and then give [them] a copy of the pleading." 2019 WL 6291037, at *4.

The three cases Defendants cite are wholly inapposite – none concern a motion seeking to unseal judicial records in a parallel derivative action. Two of these cases do not involve a motion to intervene and unseal documents produced in parallel litigation ***at all***; they concern motions seeking to lift the PSLRA discovery stay and serve formal discovery in the pending securities litigation itself. *SG Cowen Sec. Corp. v. U.S. Dist. Ct. for N. Dist. of Calif.*, 189 F.3d 909, 912 (9th Cir. 1999) (plaintiffs sought "leave to conduct discovery"); *Sisk v. Guidant Corp.*, 2007 WL 1035090, at *4 (S.D. Ind. Mar. 30, 2007) (same). Here, unlike those cases, Securities Fraud Plaintiffs do not seek leave to serve any discovery; the PSLRA's stay is simply not implicated in this case. *Smilovits v. First Solar Inc.*, 2016 WL 5682723 (D. Ariz. Sept. 30, 2016), is also inapposite; indeed, that case has nothing whatsoever to do with the PSLRA. In *Smilovits*, derivative

plaintiffs who had pled demand futility sought to unseal filings in a securities class action. The court denied the motion to unseal because, by definition, demand futility allegations assert "that conditions existing ***before they filed suit*** made clear to them that any demand on the board would have been futile" and cannot be supported by post-filing investigation. *Id.* at *4. Demand futility is not an issue in Securities Fraud Plaintiffs' case.

B. The Motion To Intervene Is Timely

Securities Fraud Plaintiffs timely filed their motion. Defendants gloss over the distinction courts have drawn between motions to intervene for purposes of asserting a claim – which Securities Fraud Plaintiffs do ***not*** seek to do – and motions to intervene for purposes of unsealing judicial records. In the latter case, as Securities Fraud Plaintiffs' opening brief made clear, courts "'routinely find motions to intervene to be timely even where a non-party intervenes years after the litigation concluded to challenge a protective order.'" Mot. to Intervene at 5 (citing *Amar,* 2023 WL 4564404, at *3); *see also State Farm*, 266 F.R.D. at 143 (granting motion to intervene where non-parties "waited approximately 15 months to seek leave to intervene" on the grounds that there would be no "prejudice" caused by the delay); *S.E.C. v. AOB Com., Inc.*, 2013 WL 5405697, at *1 (C.D. Cal. Sept. 23, 2013) (granting motion where party sought to "intervene five years after th[e] case was settled"). Defendants have offered no convincing rebuttal to this rule. Defendants' only response is to point out that the intervenor in *Doe* was not a litigant in parallel litigation (Opp'n at 6), but this is a distinction without a difference – it played no role in the court's reasoning. In any event, numerous courts have applied this same rule, where the proposed intervenor sought the documents for use in related litigation. *AOB Com., Inc.*, 2013 WL 5405697, at *1 (plaintiff "[sought] to access sealed records to assist the prosecution of a pending state court action").

Further, while Defendants claim Securities Fraud Plaintiffs should have filed their motion as soon as the sealed documents were filed, the Court's detailed and well-reasoned opinion issued

only 37 days ago made the salience of those documents plain in a way that the previous filings, which were heavily redacted, did not.

Once again, the cases on which Defendants rely are inapposite. None of them concern intervention limited to the unsealing of judicial records, but rather substantive intervention in the pending litigation related to the assertion of claims. *Reid L. v. Illinois State Bd. of Educ.*, 289 F.3d 1009, 1016 (7th Cir. 2002) (motion to intervene alleged that defendant "had violated the IDEA, the 11th and 14th Amendments to the U.S. Constitution, and the Illinois Administrative Procedure Act"); *Shakman v. City of Chicago*, 2007 WL 1468721, at *1 (N.D. Ill. May 18, 2007) (proposed intervenor claimed that plaintiffs were "seeking to represent the same class of persons he has already sought to certify as a class and represent.").

Defendants also argue that Securities Fraud Plaintiffs are not prejudiced because they could gain access to the documents later in the discovery process. Opp'n at 6-7.[2] But, as Defendants repeatedly point out, Securities Fraud Plaintiffs cannot even serve discovery unless and until their complaint is sustained. Meanwhile, the sealed documents likely contain information that would help Securities Fraud Plaintiffs, and the court in the Securities Fraud Action, learn more information concerning their claims – which, of course, is doubtless why Abbott is working so hard to keep those documents out of their hands. Given that Securities Fraud Plaintiffs presently "have no other vehicle by which to seek the unsealing of the documents at issue" they would be prejudiced by denial of their motion. *Wave Length Hair Salons of Fla., Inc. v. CBL & Assocs.*

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[2] Defendants also argue that Securities Fraud Plaintiffs have "waived" the issue of whether they would be prejudiced by denial of the motion to intervene. Opp'n at 7. But they misstate the single case on which they rely, which concerned a failure on the movant's part to demonstrate timeliness. *Chicago Imp., Inc. v. Am. States Ins. Co.*, 2010 WL 3385539, at *3 (N.D. Ill. Aug. 24, 2010). That is not an issue here, since the Motion explains why it is timely. Mot. to Intervene at 5.

Props., Inc., 2020 WL 10897933, at *2 (M.D. Fla. May 7, 2020). By contrast, granting the motion to intervene itself would not prejudice Defendants, since "it is the unsealing of documents that [Defendants seek] to prevent." *Id.* Defendants have not rebutted Securities Fraud Plaintiffs' showing that the motion to intervene was timely filed.

C. Defendants Have Not Put Forth Good Cause For The Documents To Remain Sealed

Finally, Defendants argue that Securities Fraud Plaintiffs' motion to unseal will be denied, but Defendants do not meet their heavy burden to show that these judicial records should remain sealed. Defendants rely heavily on the fact that the sealed documents were produced pursuant to a confidentiality agreement, but do not even address the copious authority Securities Fraud Plaintiffs cited holding that the existence of such agreements is not "good cause" for ***judicial records*** to remain sealed because it "'is an indirect request that the Court delegate the authority to determine good cause to the parties.'" Mot. to Intervene at 6-7 (quoting *Spano v. Boeing Co.,* 2009 WL 1220626, at *1 (S.D. Ill. May 5, 2009)).

For most of the materials, Defendants offer only the conclusory, boilerplate assertion that they should remain sealed because they "reflect confidential Board deliberation over commercially sensitive topics." Opp'n at 8. Defendants do not explain why ***years-old*** deliberations concerning ***years-old*** events are commercially sensitive or how disclosure could harm the company. *See, e.g.*, *Marine Travelift, Inc. v. Marine Lift Sys.*, 2014 WL 631669, at *2 (E.D. Wis. Feb. 18, 2014) (pricing information that was "now more than two years old" was not competitively sensitive); *Syngenta*, 2013 WL 1164788, at *4 (declining to protect board meeting materials where Defendants' only justification was that they contained "confidential business information regarding financial and strategic planning issues").

Defendants offer only slightly more information about four exhibits, claiming that they

include information such as risk assessments that "in Abbott's competitors['] hands could harm the Company," including "the proprietary processes the Company uses to make its products," and "specific Company data and comparisons to its peers." Opp'n at 8. But courts do not credit such "general conclusory assertions about future competitive harm." *Tinman v. Blue Cross & Blue Shield of Mich.*, 176 F. Supp. 2d 743, 745-46 (E.D. Mich. 2001) (rejecting affidavit claiming that sealed materials "reveal BCBSM's 'policies and procedures relating to its claims processing procedures' and that 'BCBSM would be harmed if its competitors were able to have access to those documents.'"); *Syngenta*, 2013 WL 1164788, at *3 (rejecting argument that document "[c]ontains confidential business information regarding financial processes and strategies" on the grounds that defendants did not "point to any specific information in the exhibit warranting protection from public disclosure."). This is particularly true here, where the "processes" in place at the time the documents at issue were generated egregiously violated federal manufacturing regulations and have presumably since been remediated to comply with FDA findings that Abbott broke the law.

Finally, Defendants also argue that their interests would be harmed by disclosure because, as a result of the confidentiality of meeting minutes, the board members "can be comfortable speaking candidly about matters that affect the company." Opp'n at 8. But board members have "ethical, professional, and fiduciary obligations" to speak candidly, and the Northern District of Illinois has "decline[d] to accept that the Board would not carry out its responsibilities because minutes from a meeting many years ago are publicly available on a court docket." *Acosta v. Bd. of Trs. of Unite Here Health*, 2024 WL 3757124, at *3 (N.D. Ill. Aug. 12, 2024). This argument is similarly unavailing.

III. CONCLUSION

For the reasons set forth above and in their Motion, Securities Fraud Plaintiffs' Motion to Intervene should be granted.

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