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

LEAD PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO RECONSIDER

Carol V. Gilden
COHEN MILSTEIN SELLERS & TOLL, PLLC
190 South LaSalle Street, Suite 1705
Chicago, IL 60603
Telephone: 312-357-0370
cgilden@cohenmilstein.com

Steven J. Toll
Molly Bowen
COHEN MILSTEIN SELLERS & TOLL, PLLC
1100 New York Ave., NW, Fifth Floor
Washington, DC 20005
Telephone: 202-208-2600
stoll@cohenmilstein.com
mbowen@cohenmilstein.com

Richard A. Speirs
Amy Miller
COHEN MILSTEIN SELLERS & TOLL, PLLC
88 Pine Street, 14th Floor
New York, NY 10005
Telephone: 212-828-7797
rspeirs@cohenmilstein.com
amiller@cohenmilstein.com

Co-Lead Counsel for Plaintiffs

Maxwell R. Huffman
Joseph A. Pettigrew
SCOTT+SCOTT ATTORNEYS AT LAW LLP
600 W. Broadway Suite 3300
San Diego, CA 92101
Telephone: 619-233-4565
mhuffman@scott-scott.com
jpettigrew@scott-scott.com

Justin O. Reliford
SCOTT+SCOTT ATTORNEYS AT LAW LLP
222 Delaware Ave., Suite 1050
Wilmington, DE 19801
Telephone: 302-578-7345
jreliford@scott-scott.com

Jing-Li Yu
SCOTT+SCOTT ATTORNEYS AT LAW LLP
The Helmsley Building
230 Park Avenue, 24th Floor
New York, NY 10169
Telephone: 212-223-6444
jyu@scott-scott.com

Co-Lead Counsel for Plaintiffs

[Additional counsel on signature page.]

TABLE OF CONTENTS

I. INTRODUCTION

Defendants' motion for reconsideration is groundless, as Defendants cannot show any manifest error in law or fact.[1] Instead, Defendants re-hash the same doomed arguments they made in their motion to dismiss, while also introducing a new meritless argument that they failed to raise before. As neither tactic is appropriate for a motion for reconsideration, Defendants try to mask their request for a "do-over" by claiming that the Court "misapprehended" the record and their arguments. But the Court did not misapprehend anything warranting reconsideration of its ruling or re-review of the voluminous record Defendants put before the Court.

With respect to the Court's ruling on the breach of fiduciary duty claims against the Director Defendants, Defendants claim that the Court "misapprehended" the record they submitted and argued on the motion to dismiss. Defendants ask the Court to re-review the record from their perspective, including reinterpreting certain meeting minutes in line with certain meeting materials, while urging the Court to reverse its ruling on Defendants' previously failed arguments. Defendants, however, are not entitled to such extraordinary relief when the Court clearly understood Defendants' arguments before undertaking a comprehensive review of all the exhibits Defendants submitted. In addition, Defendants' re-hashed arguments do not even address a number of the Court's findings that independently support its holding, rendering any reconsideration futile. Meanwhile, the specific "misapprehensions" Defendants highlight would not change on a second review of the documents in the manner Defendants request. Moreover, the Court should reject Defendants' attempt to

---

[1] All capitalized terms herein have the same meaning as in Plaintiffs' Consolidated Amended Verified Stockholders' Derivative Complaint (the "Complaint"), ECF No. 91, unless separately defined. All "Compl." citations are to the Complaint, ECF No. 91. All "MTD Op." citations are to the Court's Memorandum Opinion and Order, ECF No. 142. All "Defs. Mot." citations are to Defendants' Motion to Reconsider, ECF No. 147. All "Defs. MTD Br." citations are to Defendants' Memorandum in Support of Motion to Dismiss, ECF No. 112.

supplement the voluminous record already before the Court with new charts, exhibits, interpretations, and "additional information" not submitted with their original motion. As the Court has already acknowledged, its decision on Defendants' motion to dismiss must rise and fall on the allegations within the four corners of Plaintiffs' pleading and the reasonable inferences to be drawn therefrom, not Defendants' inappropriate and belated evidentiary and factual proffers.

Defendants' motion with respect to Defendant Babineaux-Fontenot fails for different reasons. First, Defendants never asked this Court to dismiss her on a Rule 12(b)(6) motion. Rather, the only argument Defendants made in favor of her dismissal was under Rule 23.1—which argument the Court rejected. Defendants are not entitled to "reconsideration" of a motion they failed to make. Second, the Board's misconduct did not simply end on the date of the recall as Defendants suggest. The Board's misconduct continued until well after Babineaux-Fontenot joined, as the Court found that the Company **never** implemented an appropriate system of oversight – thus reflecting her participation in the ongoing misconduct from the time she joined the Board. These facts and allegations independently satisfy the far less stringent "plausibility" standard for motions under Rule 12(b)(6).

Finally, Defendants' arguments regarding the Court's ruling on Plaintiffs' derivative claims under Section 10(b) of the Exchange Act also fail. The Court found Plaintiffs' allegations sufficient to establish a substantial likelihood of liability against the Section 10(b) Defendants. Though Defendants do not directly claim that the Court committed any error in its legal analysis or reasoning, they claim the Court overlooked one of their arguments below—specifically, that the Section 10(b) Defendants were disinterested because they did not receive a personal financial benefit and, thus, their knowledge could be imputed to the Company. But this argument overlooks the Court's specific findings that the Section 10(b) Defendants' participation in the scheme involving material misrepresentations was sufficient to demonstrate their interest in the stock repurchases. In other words, as the applicable caselaw demonstrates, even if Defendants lacked a personal financial interest,

the Court still cannot impute their knowledge to the Company because of their participation in the scheme.

Accordingly, Defendants' motion for reconsideration should be denied in its entirety.

II. LEGAL STANDARD

Defendants have a high bar to clear. "Motions for reconsideration are extraordinary in nature and are viewed with disfavor." *In re Abbott Depakote S'holder Derivative Litig.*, 2013 WL 4953686, at *1 (N.D. Ill. Sept. 12, 2013). *See also Int'l Union of Operating Eng'rs, Local 150, AFL-CIO v. Barrington Excavating, LLC*, 2024 WL 3888902, at *2 (N.D. Ill. Aug. 21, 2024) (denying motion for reconsideration where defendant "primarily restates arguments made in its motion to dismiss, urges the Court to make determinations of fact, and cites law and attachments to the motion to dismiss that the Court previously considered."). "The Court's Order is not a brief that is subject to refutation and it is inappropriate for the Defendants to file a motion for reconsideration merely because they disagree with the Court." *In re Abbott Depakote S'holder Derivative Litig.*, 2013 WL 4953686, at *4.

As such, motions for reconsideration "serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Conditioned Ocular Enhancement, Inc. v. Bonaventura*, 458 F. Supp. 2d 704, 707 (N.D. Ill. 2006) (quoting *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996). Defendants identify no newly discovered evidence, and so must show a "manifest error" to obtain reconsideration. A party seeking to demonstrate "manifest error" must show that "the Court has patently misunderstood a party, 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." *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990) (quoting *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983); *Rossi v. City of Chicago*, 2013 WL 11322822, at *1 (N.D. Ill. Nov. 14, 2013). "A party asserting such an error bears a heavy burden, and motions for reconsideration 'are not at the disposal of parties who want to 'rehash'

old arguments.'" *Patrick v. City of Chicago*, 103 F. Supp. 3d 907, 912 (quoting *Zurich Capital Mkts. Inc. v. Coglianese*, 383 F. Supp. 2d 1041, 1045 (N.D. Ill. 2005). Even "asserting that a court 'has made an error not of reasoning but of apprehension' is not an avenue to ask the court 'to take a fresh look at a fully briefed, argued and decided issue." *Muczynski v. Lieblick*, 2013 WL 1080613, at *2 (N.D. Ill. March 14, 2013) (denying reconsideration premised on misapprehension where court fully understood defendant's argument). Similarly, such motions cannot serve "to introduce evidence previously available" or "to tender new legal theories." *Easypower Corp. v. Alden Corp.*, 522 F. Supp. 2d 1060, 1063 (N.D. Ill. 2007); *see also WEC 98C-5 LLC v. Saks Inc.*, 2022 WL 22858801, at *1 (N.D. Ill. Sept. 16, 2022).

III. ARGUMENT

A. There Was No Manifest Error in The Court's Resolution of the Breach of Fiduciary Duty Claims Against the Defendant Directors

Defendants' motion with respect to Plaintiffs' breach of fiduciary duty claims is meritless. The Court already reviewed the exhibits Defendants highlight in their motion, carefully considered the parties' arguments and briefing, and found that the voluminous record Defendants put before the Court failed to show any reasonable reporting system over infant formula safety. Defendants nonetheless ask for reconsideration, couching their recycled arguments in terms of the Court's supposed "misapprehension" of how certain meeting materials correspond with certain meeting minutes. The Court should reject these arguments for four independent reasons. First, the Court did not misunderstand Defendants' arguments the first time they raised them. Second, Defendants do not address the significant factual findings that independently support the Court's ruling. Third, Defendants' specific "examples" of "misapprehensions" all fail in the face of the Court's express findings about the contents of the documents, regardless of the order in which the Court reviewed them. Finally, the supposed "facts" proffered by defense counsel in support of the motion go well-

beyond the four corners of the Complaint and the documents it incorporates by reference. They are not properly before the Court.

1. The Court Did Not "Misapprehend" Defendants' Arguments

A disappointed litigant cannot just argue "misapprehension," then force a court to fully revisit issues previously raised and decided. *See Muczynski*, 2013 WL 1080613, at *3 (denying reconsideration on misapprehension grounds where defendants "have merely put forth the same arguments in their Motion to Reconsider that they did in their Motions to Dismiss."). "As the Seventh Circuit has noted, the only proper basis for such a motion is when a party's argument has been misunderstood by the court being asked to reconsider." *Burton v. McCormick*, 2011 WL 1792849, at *1 (N.D. Ind. May 11, 2011) (denying reconsideration: "the court has not misunderstood the Defendant's arguments at all.").

Here, Defendants moved for dismissal, arguing "their books and records show, despite Plaintiffs' allegations to the contrary, that the Board conducted a multi-faceted oversight of Abbott's most significant risks, which included manufacturing compliance." MTD Op. at 15; *id.* at 16 ("Defendants ask the Court to infer from the voluminous exhibits attached to their motion that the Board was appropriately fulfilling its oversight obligations."). The Court clearly understood Defendants' argument. It undertook a comprehensive review of the "voluminous record" submitted by Defendants, which contained "85 exhibits totaling 1,155 pages" to ensure that the Plaintiffs have "not misrepresented their contents and that any inferences [Plaintiffs] seek[] are reasonable." *Id.* at 6. Based on the express allegations of the Complaint and the Court's review of the "voluminous record," the Court disagreed with Defendants, concluding: "the presentations and the minutes do not contradict the Plaintiffs allegations. . . ." *Id.* at 16.

Nothing has changed. Rather, Defendants seek to re-argue the same issues based on the same documents that the Court has already reviewed. A second look at those same exhibits (even with the aid of Defendants' additional improper factual proffers about Abbott's corporate recordkeeping

practices) is an unnecessary waste of judicial resources. *See McCormick*, 2011 WL 1792849, at *1 ("Federal district courts have hundreds of civil and criminal cases that require attention, and a re-do of a matter that has already received the court's attention is seldom a productive use of taxpayer resources. . . .").

2. The Court Made a Number of Factual Findings That Independently Support Its Conclusion and Are Not Impacted by Any Claimed "Misapprehensions"

Defendants' motion is also futile. Defendants ignore a number of factual findings by the Court that independently support its core findings, regardless of whether there were any "misapprehensions" about the Company's recordkeeping practices. Stated otherwise, even if there were "misapprehensions"—which there were not—reconsideration will not change the ultimate result.

For example, the Court made the following factual findings as to Board oversight failures:

- "[S]afety concerns known to management failed to make their way to the Board." MTD Op. at 25.
- The 2019 FDA Form 483 and EIR detailing findings of Cronobacter and Listeria at the Sturgis Plant and reports of bacterial infections in infants consuming Similac formula "were not discussed at any Board or Committee meetings." *Id.* at 22.
- There was "no system to elevate whistleblower reports, consumer complaints, or concerns from the medical community to the Board." *Id.*
- "To the extent the Board or subcommittees received reports related to infant formula products, it was on an ad hoc basis," which falls short of a regular oversight process required under Caremark. *Id.*

Defendants ignore these findings.

Similarly, now abandoning their arguments that more than one committee provided appropriate oversight, Defendants focus on the various meeting minutes and materials from the PPC alone. Re-reviewing the PPC minutes and materials will not disturb the Court's express findings that: (1) "[t]he Board had no committee charged with direct responsibility to monitor manufacturing or product safety"; (2) "the duties listed in the [PPC] charter do not include oversight over maintaining product safety, much less infant formula safety"; and (3) the PPC meetings "lasted for no more than an hour." *Id.* at 17-18. Again, Defendants' motion overlooks these findings.

Particularly fatal for Defendants, the Court reviewed *all* of the PPC meeting minutes and *all* of its materials before finding that none of the exhibits evidence proper oversight. Specifically, the Court found "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," and the "unredacted portions of the presentations provided by the Defendants showed that the Public Policy Committee was discussing 'Metrics' and comparing Abbott to its peers in the healthcare industry on its number of recalls." *Id.* at 19, 23. Re-reviewing the presentations and minutes side-by-side will not change their contents or these conclusions.

Nonetheless, Defendants argue that a re-review will "[show] beyond dispute that the Abbott directors regularly oversaw product quality precisely as they planned," including "twice a year Quality & Regulatory updates, review of all warning letters, and more," as well as "unscheduled oversight of issues as they arose."[2] Defs. Mot. at 4-5. But, again, the Court reviewed *all* of the Quality & Regulatory

[2] Defendants' suggestion that the Board had a "plan" to address "product quality" is a self-serving, revisionist factual assertion that is wholly inconsistent with the Complaint's allegations and the documents upon which Defendants rely. As Plaintiffs allege, there was no plan, and Defendants identify no document detailing, explaining, or supporting the assertion that there ever was a "plan" to oversee product quality of infant formula. *See* MTD Op.at 6 ("So the Court cannot—as the Defendants often request—rely on these documents to draw inferences in Defendants['] favor and in effect rewrite the Plaintiffs' Complaint.")

Updates to the PPC over a six-year period, before concluding: "between 2017 and 2022, none of the 'Quality and Regulatory Update' presentations reflected consideration of safety, Cronobacter, or the Sturgis Plant in connection with the manufacture of infant formula." MTD Op. at 18. Defendants disregard this finding as well.

Thus, whether the Board "discussed" or asked questions about these Quality & Regulatory Updates does not undermine the Court's finding that the updates substantively fail to support Defendants' argument in the first instance. The Court likewise rejected the contention that *ad hoc* or "unscheduled" reports from management were sufficient to demonstrate a reasonable oversight system. *See id.* at 21-23. Accordingly, re-reviewing the same updates and minutes will not suddenly reveal a reasonable reporting system that the Court overlooked the first time around.

3. Defendants' Specific Examples of "Error" Do Not Mandate a Different Outcome

In addition to the specific concerns raised with respect to the Quality & Regulatory updates addressed above, Defendants highlight two additional examples of "errors" they claim resulted from the Court's "misapprehension" of the record. Neither of these examples reflect "manifest error of fact or law" warranting reconsideration.

For example, Defendants point to the PPC presentation materials in ECF No. 113-24, which "discuss[] two recalls of pediatric products" and presentation materials in ECF No. 113-29, which references a recall of Similac. But Defendants already discussed these documents in their briefing. *See* Def. MTD. Br. at 12. The Court, in turn, directly addressed these exhibits after determining that, "[e]ven when discussing its own recalls, the Board presentations are framed as how Abbott compared to its peers in the industry . . . and not the safety of its own products." MTD Op.at 19. Speaking about ECF Nos.113-24 and 113-29 expressly, the Court found that that the documents only "indicate[d] that the Board received intermittent management-initiated-communications that mentioned safety." *Id.*

Even if the PPC asked questions of the management presenters, the minutes from these meetings still do not establish an appropriate oversight system. There is no evidence that the unspecified "questions" posed by the PPC to management at its June 2021 meeting concerned infant formula production and safety, rather than the other topics addressed in the largely redacted presentation materials. *See* ECF No. 113-67 at 2-3; Defs. Mot. at 5-6. Meanwhile, the only specific reference to "discussions" regarding infant formula at the PPC concern "the disposition of product associated with the Altavista8-oz metal can product action." *Id.* The minutes do not indicate that the Board pressed management for more details regarding the root cause of the product recall. *See* Defs. Mot. at 5-6. Rather, the Director Defendants asked management what Abbott would do with its recalled product, consistent with the Director Defendants' focus on the financial impacts of recalls on Abbott's business. *See* MTD Op. at 21.

Moreover, it is hardly exculpatory that directors may have asked some questions about infant formula recalls months before the shutdown of the Sturgis plant. Even if there was some questioning at this time, it would not mean that the Board appropriately responded to red flags discussed at the meeting. *See In re Boeing*, 2021 WL 4059934, at *34 (Del. Ch. Sept. 7, 2021) ("A classic prong two claim acknowledges the board had a reporting system, but alleges that system brought information to the board that the board then ignored.").

Defendants also take issue with the Court's conclusions concerning the full Board's June 2022 meeting, arguing that the Court ignored the June 2022 PPC meeting presentation materials (ECF No. 113-31 at 12-19) and minutes (ECF No. 113-76 at 2-3). *See* Defs. Mot. at 6-7.[3] Defendants claim the

[3] Defendants previously raised the connection between Exhibit 113-31 and 113-76 in the motion to dismiss, proffering a lengthy narrative description of what the PPC discussed and the contents of its presentation materials. *See* Defs. MTD Br. at 13-14. Thus, Defendants are simply re-hashing an argument that the Court has already considered and rejected. *Compare id.*, *with* Defs. Mot. at 7. This

minutes and materials from this meeting collectively "show[] a detailed review of the issues at Sturgis and the progress the plant was making." Def.s' Mot. at 6. But re-reviewing the June 2022 PPC and Board meeting materials will not change the belated and *ad hoc* nature of the discussions, which occurred years after management learned of the problems at Sturgis and months after the Sturgis Plant shutdown and recall.

4. The Court Should Reject Counsel's Second Attempt to Improperly Introduce Facts Beyond the Pleading

The Court should deny Defendants' motion for reconsideration for another fundamental reason. It is premised on new factual proffers that are not properly before the Court on a motion to dismiss. In a derivative action such as this, the Court must accept Plaintiffs' factual allegations as true, but the Court can also rely (to a limited extent) on documents incorporated by reference to ensure Plaintiffs are not cherry-picking the record. MTD Op. at 6 ("In a derivative suit, the incorporation-by-reference doctrine permits a court to review the actual documents to ensure that the plaintiff has not misrepresented their contents and that any inferences the plaintiff seeks are reasonable.") (citing *Voigt v. Metcalf*, C.A. No. 2018-0828-JTL, 2020 WL 614999, at *9 (Del. Ch. Feb. 10, 2020)). "But the [incorporation by reference] doctrine does not change the pleading standard that governs a motion to dismiss, nor does it permit a defendant to refute the well-pled allegations in a complaint." *In re McDonalds Corp. S'holders Derivative Litig.*, 291 A.3d 652, 695 (Del. Ch. 2023) (discussing limitations of the incorporation by reference doctrine in derivative actions).

Recognizing the limited nature of the incorporation-by-reference doctrine, the Court has already "decline[d] Defendants' attempts to introduce their version of events and draw inferences in

---

is not the purpose of a motion for reconsideration. *Patrick*, 103 F. Supp. 3d at 915 ("[T]he Seventh Circuit's voluminous case law on the exceptional nature of motions for reconsideration is intended to prevent litigants from arguing 'please take a closer look at what we argued the first time.'") (citation omitted).

their favor based on exhibits attached to Defendants' Motion." MTD Op. at 16. Despite this clear admonition, Defendants' counsel now offers "additional information about how board and committee material is prepared and maintained" in yet a second attempt to win dismissal. Defs. Mot. at 4.[4] "The court strongly discourages such a practice." *Holmes v. Razo*, 1995 WL 444407, at *4, n.3 (N.D. Ill. July 18, 1995) (rejecting counsel's repeated efforts to supplement the complaint with factual proffers on a motion to dismiss).

Defendants' assertions about Abbott's corporate recordkeeping practices may prove true. But Plaintiffs have not taken discovery into Defendants' additional factual proffers regarding the assembly of meeting packets and minutes, which go well beyond the four corners of the Complaint and the documents it incorporates by reference.[5] To the extent that Defendants' factual proffers create issues of fact about what the Board and its committees "discussed" and the sufficiency of those discussions, the Court cannot resolve those disputes in Defendants' favor on a motion to dismiss. *See In re McDonald's*, 291 A.3d at 695 ("By relying affirmatively on Section 220 materials in an effort to refute the plaintiffs' allegations, the Director Defendants went beyond what the incorporation-by-reference doctrine permits and invited conversion" to a motion for summary judgment).

Accordingly, Defendants' motion must fail for this reason alone.

---

[4] *See also id.* at 2 (proffering that: (1) "Abbott's directors receive a 'board book' or 'committee book' in advance of each Board or Committee meeting" and describing the purported contents of each and every such "book"; (2) Board and committee "books are prepared and distributed before the meeting occurs (so the directors can study and prepare in advance)"; and (3) "draft minutes from the prior meeting . . . are submitted by the Secretary for the directors' review and approval").

[5] To this end, Defendants failed to submit an affidavit supporting this "additional information." This is improper. *See Martini v. Gluth Bros Roofing Co., Inc.*, , 2005 WL 1799543, at *2 (rejecting motion to dismiss arguments where defendant "introduce[d] facts -without affidavit or other support"). Had Defendants submitted such an affidavit, the sworn statement would necessarily raise the specter of converting their motion to dismiss to a motion for summary judgment, entitling Plaintiffs to discovery on Defendants' proffered facts. *See Wilkow v. Forbes, Inc.*, 241 F.3d 552, 555 (7th Cir. 2005). The Court should not indulge Defendants' gamesmanship.

B. Defendants Are Not Entitled To Reconsideration Regarding Babineaux-Fontenot

For the first time, Defendants argue for a Rule 12(b)(6) dismissal of the breach of fiduciary duty claims against Director Defendant Babineaux-Fontenot based on the date that she joined the Board. Defs. Mot. at 8-9. But "[r]econsideration is not an appropriate forum for . . . arguing matters that could have been heard during the pendency of the previous motion." *Caisse Nationale de Credit Agricole*, 90 F.3d at 1270 (citations omitted).

Defendants did not move for dismissal of claims against Babineaux-Fontenot under Rule 12(b)(6). Defendants moved to dismiss claims against the Director Defendants, including Babineaux-Fontenot only under the heightened pleading requirements of Rule 23.1; and they moved for Rule 12(b)(6) dismissal only on the claims against the Officer Defendants. *See* Defs. MTD Br. at 14. The only argument Defendants made regarding Babineaux-Fontenot specifically was that she was not substantially likely to be liable for misstatements in the 2023 Proxy Statement, given public disclosures that occurred before the 2023 Proxy Statement issued. *See* Defs. Mot. at 8 (citing Defs. MTD Br. at 17 n.10.) Defendants did not request dismissal of the breach of fiduciary duty claim against Babineaux-Fontenot (or any other individual Director Defendant) under Rule 12(b)(6).

Even if Defendants' request was procedurally proper, it is substantively deficient. Rule 12(b)(6) dismissals are appropriate only where the plaintiff fails to plead a "plausible" claim against a defendant. *Carlson v. CSX Trans., Inc.*, 758 F.3d 819, 826-27 (7th Cir. 2014) (overruling district court that dismissed a claim because of a lack of "evidence"). Here, Plaintiffs allege that each of the Director Defendants, including Babineaux-Fontenot, breached their fiduciary duties by failing to implement a reasonable reporting system. *See* Compl. ¶¶ 422, 428. The Complaint does not allege that the Board implemented such a reporting system at any point in time, including after Babineaux-Fontenot joined the Company. In addition, the Court expressly opined: "The Complaint's allegations support a pleading-stage inference that ***the board never established its own system of monitoring and***

reporting. . . ." MTD Op. at 21 (emphasis added). In other words, this action challenges oversight failures that extended beyond the date of the shutdown of Sturgis and continued through the time of filing—i.e., even after Babineaux-Fontenont joined the Board. Thus, the ongoing nature of the wrongdoing bars any kind of finding that Babineaux-Fontenot should have been dismissed from the action automatically because of the date she joined the Board. Rather, the claims against Defendant Babineaux-Fontenot are plausible and would have survived a 12(b)(6) motion, even had Defendants properly asserted such a motion.

C. There Is No Reason to Reconsider the Section 10(b) Rulings

The Court correctly decided that Plaintiffs have stated a claim against the Section 10(b) Defendants, and Defendants identify no "manifest error" of law or fact that warrants reconsideration.

The Court carefully analyzed applicable precedent cited by both parties and concluded that a director is interested in a transaction "[i]f a director participated in the alleged scheme *or* had a stake in the outcome of the transaction." MTD Op. at 12 (emphasis added). In contrast, "a disinterested director does not have *any* involvement in the alleged scheme." *Id.* (emphasis added). Applying that standard to the facts at hand, the Court held that the 10(b) Defendants were "interested" because they "knew about the false statements and did nothing to stop them." *Id.* at 13.

Defendants do not directly claim that the Court committed any manifest error of law in its analysis. Nor could they. *See City of Livonia Emps.' Ret. Sys. v. Boeing Co.*, 2012 WL 13393033, at *2 (N.D. Ill. Mar. 16, 2012) (quoting *Oto v. Metro Life. Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000)) (holding that a movant claiming manifest error of law "must bring to the court's attention not just an error, but rather the 'wholesale disregard, misapplication, or failure to recognize controlling precedent.'").

Rather, Defendants argue that the Court somehow overlooked their argument that the Section 10(b) Defendants did not stand on both sides of the transaction and, thus, were not "interested" in the stock repurchases. This, in turn, would allow the Court to impute their knowledge to Abbott,

according to Defendants. *See* Defs. Mot. at 10. But the question of whether the Section 10(b) Defendants stood on both sides of the stock repurchases is not dispositive, because that is not the only way a director can be liable in this context. As the Court held, a director can be "interested" either because they "participated in the alleged scheme *or* had a stake in the outcome of the transaction." MTD Op. at 12 (emphasis added); *see also In re Whitehall Jewellers, Inc. S'holder Derivative, Litig.*, 2006 WL 468012, at *12 (N.D. Ill. Feb. 27, 2006). Defendants do not claim any error of law in this regard.

The Court then concluded that the 10(b) Defendants were "interested" under the first prong because they were participants in the alleged scheme: "Defendants knew about the false statements and did nothing to stop them" and so " violated their own fiduciary duties and were not independent or disinterested." MTD Op. at 13. Thus, Defendants' assumption that the Court mistakenly overlooked their non-dispositive argument ignores what the Court actually held and decided.

Ostensibly recognizing the same, in a footnote, Defendants argue that mere knowledge of a fraudulent scheme is insufficient. *See* Defs. Mot. at 10 n.5. But the Section 10(b) Defendants were not mere bystanders with knowledge. As Plaintiff allege and the Court found, the Section 10(b) Defendants were direct participants in the scheme. *See* Compl. ¶¶ 361-382. To the extent that Defendants' arguments are premised on the idea that there is only one way to prove "interest"—specifically, a personal financial benefit—then they are not complaining that the Court misapprehended their argument, but rather, that the Court made an error of law. The argument fails, as Defendants point to no controlling legal authority that the Court disregarded, misapplied, or failed to recognize, when ruling otherwise. *See City of Livonia*, 2012 13393033 at *2.

Accordingly, the Court's well-reasoned opinion regarding the Section 10(b) Defendants should stand.

IV. CONCLUSION

For these reasons, the reasons explained in Plaintiffs' opposition to Defendants' motion to dismiss, and the reasons stated in the Court's MTD Opinion, the Court should deny Defendants' motion for reconsideration.

DATED: September 18, 2024 Respectfully submitted,

/s/Carol V. Gilden
Carol V. Gilden
COHEN MILSTEIN SELLERS & TOLL, PLLC
190 South LaSalle Street, Suite 1705
Chicago, IL 60603
Telephone: 312-357-0370
cgilden@cohenmilstein.com

Steven J. Toll
Molly Bowen
COHEN MILSTEIN SELLERS & TOLL, PLLC
1100 New York Ave., NW, Fifth Floor
Washington, DC 20005
Telephone: 202-208-2600
stoll@cohenmilstein.com
mbowen@cohenmilstein.com

Richard Speirs
Amy Miller
COHEN MILSTEIN SELLERS & TOLL, PLLC
88 Pine Street, 14th Floor
New York, NY 10005
Telephone: 212-828-7797
rspeirs@cohenmilstein.com
amiller@cohenmilstein.com

/s/Justin O. Reliford
Maxwell R. Huffman
Joseph A. Pettigrew
SCOTT+SCOTT ATTORNEYS AT LAW LLP
600 W. Broadway Suite 3300
San Diego, CA 92101
Telephone: 619-233-4565
mhuffman@scott-scott.com
jpettigrew@scott-scott.com

Justin O. Reliford
SCOTT+SCOTT ATTORNEYS AT LAW LLP
222 Delaware Ave., Suite 1050
Wilmington, DE 19801
Telephone: 302-578-7345
jreliford@scott-scott.com

Jing-Li Yu
SCOTT+SCOTT ATTORNEYS AT LAW LLP
The Helmsley Building
230 Park Avenue, 24th Floor
New York, NY 10169
Telephone: 212-223-6444
jyu@scott-scott.com

Geoffrey M. Johnson
SCOTT+SCOTT ATTORNEYS AT LAW LLP
12434 Cedar Road, Suite 12
Cleveland Heights, OH 44106
Telephone: 216-229-6088
gjohnson@scott-scott.com

Co-Lead Counsel for Plaintiffs

John A. Kehoe
KEHOE LAW FIRM, P.C.
2001 Market Street, Suite 2500
Philadelphia, PA 19103
Telephone: 215-792-6676
jkehoe@kehoelawfirm.com

Additional Counsel for Plaintiff SEPTA