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

REPLY IN SUPPORT OF MOTION TO RECONSIDER

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Preliminary Statement

Plaintiffs' opposition to Defendants' motion to reconsider seeks to have it both ways: Plaintiffs argue both that Defendants are making new arguments they should have made earlier and that they are just rehashing old arguments the Court already understood and rejected. Neither is accurate. Respectful of the Court's time and that motions to reconsider are generally disfavored, Defendants' motion identifies three concrete, outcome-determinative instances in which the Court misapprehended Defendants' arguments for dismissal of Plaintiffs' *Caremark* and § 10(b) claims. The Court should grant Defendants' motion to reconsider and dismiss the two remaining claims.

Argument

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

The Court's ruling on the motion to dismiss was based on the inaccurate assumption that minutes for any particular Board or Committee meeting would be in the book for that same meeting. (Dkt. #147 at 2-8) This was not an assumption Plaintiffs made in their brief opposing Defendants' motion to dismiss—it was made for the first time in the Court's opinion—and so Defendants had no opportunity to address it before the Court ruled. And because the Court assumed minutes for a Board or Committee meeting would be in the book for that meeting, the Court did not look beyond the meeting books for meeting minutes. As a result, the Court did not recognize that Defendants had submitted the minutes for each meeting separately (as they are kept in the ordinary course of business), in the exhibits to their motion to dismiss.

This inaccurate assumption had explicit effects on the Court's analysis. (*Id.*) As the Court's opinion explained, it understood Defendants to be asking the Court to *infer* what happened at Board and Committee meetings, rather than to read the direct evidence—incorporated into Plaintiffs' complaint—that on its face contradicts Plaintiffs' conclusory allegation of an utter failure of oversight. Plaintiffs do not and cannot dispute the Court's misapprehension, which is explicitly articulated in the

Court's opinion. They instead offer four arguments in opposition to Defendants' motion, none of which is correct.

First, Plaintiffs argue "[t]he Court clearly understood Defendants' argument" and that it "undertook a comprehensive review of the 'voluminous record' submitted by Defendants." (Opp. at 5) But this argument ignores that, while the Court did review the record, it did so under a misimpression about where meeting minutes would be, and so did not look beyond the board and committee books for those minutes, even though they were in the exhibits Defendants had submitted and were cited in Defendants' briefs. [redacted]

Second, Plaintiffs claim that "Defendants ignore a number of factual findings by the Court that independently support its core findings, regardless of whether there were any 'misapprehensions'

[1] Plaintiffs argue that Defendants are improperly "offer[ing] additional information about how board and committee material is prepared and maintained." (Opp. At 11) However, the Court need not accept Defendants' explanation to grant the motion to reconsider: It need only look at the final meeting minutes Defendants have identified, which are clear on their face. Defendants provide the explanation only so the Court can understand why it saw draft minutes for earlier meetings in each board and committee book. (Dkt #147 at 2)

about the Company's recordkeeping practices." (Opp. at 6) Plaintiffs then identify four supposed deficiencies in the directors' oversight and argue that these alleged deficiencies are sufficient to plead an utter failure of oversight. (*Id.*) But "[c]ontentions that the Board did not receive specific types of information do not establish that the Board utterly failed 'to attempt to assure a reasonable information and reporting system exists.'" *In re GM Deriv. Litig.*, 2015 WL 3958724, *14 (Del. Ch. June 26, 2015), *aff'd*, 133 A.3d 971 (Del. 2016). The only allegation Plaintiffs identify that even ostensibly challenges the Board's oversight in a systemic way is the fourth allegation: that "'[t]o 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*." (Opp. at 6) [redacted]

Plaintiffs also argue that nothing in Defendants' exhibits undermines the Court's assessment that the Board had no committee charged with responsibility for product safety. (Opp. at 7) But Plaintiffs do not dispute that the PPC was expressly charged with oversight of "regulatory and healthcare compliance matters." (Dkt. #112 at 9) That *is* product safety, because it is laws and regulations that establish what "safe" means. Indeed, the PPC Charter states that the PPC will receive reports twice a year from the corporate officer responsible for "*quality assurance*," which again is another way of saying product quality or safety. (*Id.*) [redacted]

Third, Plaintiffs argue the Court could not have erred because "the Court reviewed *all* of the PPC meeting minutes and *all* of its materials before finding that none of the exhibits evidence proper oversight." (Opp. at 7) But, again, this just ignores that the Court's opinion expressly explained that

it did not see the meeting minutes corresponding to the PPC presentations—*and* that the Court's opinion explained *why* it did not see the minutes: It expected them to be in the board or committee book for any particular meeting and so did not look beyond any meeting book for the minutes of that meeting. The Court erroneously 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." (Order at 19)

This misapprehension resulted in a fundamentally flawed review of the PPC material, causing concrete errors in the Court's opinion. For example, the opinion concluded that "the pleading stage record does not reflect that the Public Policy Committee had any discussions about Abbott's production or oversight of Abbott's infant formula products." (*Id.* at 18) This conclusion can stand only if the Court believes an inference is necessary to conclude that the presentations actually were delivered to the PPC, *because the presentations themselves undeniably reflect discussions of production and oversight of infant formula products*. *Supra* at 3. But no inference is required, because Defendants submitted the meeting minutes with their motion to dismiss that substantiate the delivery of the PPC presentations to the PPC. (Dkt. #147 at 4 (chart)) Considering that evidence is squarely within the Court's role in assessing demand futility on a motion to dismiss, otherwise it would render the entire body of demand futility case law a nullity. (Order at 6; *Pettry v. Smith*, 2021 WL 2644475, *8 n.90 (Del. Ch. June 28, 2021), *aff'd*, 273 A.3d 750 (Del. 2022) (it is permissible to use books and records to contradict allegation that a pre-suit production "reflect[s] the Board's complete lack of discussion or action"); *Clem v. Skinner*, 2024 WL 668523, *7 (Del. Ch. Feb. 19, 2024) (considering books and records that showed "oversight of Walgreens' compliance risks"); *Genworth Fin. Deriv. Litig.*, 2021 WL 4452338, *9 (Del. Ch. Sept. 29, 2021) ("Plaintiffs have incorporated by reference in their Complaint Board-level documents that plainly contradict their demand futility allegations."))

Fourth, Plaintiffs argue Defendants' motion to reconsider "is premised on new factual proffers

that are not properly before the Court on a motion to dismiss." (Opp. at 10) But Defendants are not offering any "new facts"; they are simply directing the Court to where in the exhibits submitted with their motion to dismiss certain meeting minutes are—minutes that Plaintiffs agreed (and precedent dictates) are incorporated into the complaint by reference. The Court did not notice the minutes because of the Court's expectation that they would be in the board and committee book for each meeting. Defendants are not making any factual representation; the Court can see for itself that each meeting minutes corresponds to a particular presentation, as Defendants' charts show. (Dkt. #147 at 4 & Appx. A)

Plaintiffs argue that the meeting minutes "still do not establish an appropriate oversight system." (Opp. at 9) But that is not the question on a motion to dismiss. The question is not whether the documents establish an *appropriate* oversight system, but whether the documents contradict Plaintiffs' conclusory allegation that the Board "utterly failed" to make even a good faith effort to have an oversight system. Once the Court's misapprehension about where the Board and Committee meeting minutes are located within Defendants' exhibits is corrected, the following becomes clear: The Board created a committee (the PPC) tasked with overseeing manufacturing regulatory compliance and product quality, both of which encompass product safety. The PPC Charter created a regular oversight schedule, which included scheduled oversight of manufacturing compliance and product quality. [redacted]

Defendants will not re-present each of the legal arguments from their motion to dismiss here, but once the Court's assumption about meeting minutes is corrected, the legal arguments in Defendants' motion to dismiss papers demonstrate that Plaintiffs' allegations do not establish that a majority of the directors face a substantial likelihood of liability on Plaintiffs' *Caremark* claim. Accordingly, that claim should be dismissed.

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

Plaintiffs do not dispute that their complaint made no allegation of fact showing that director Claire Babineaux-Fontenot faces potential *Caremark* liability. Nor do they dispute that the Court's opinion did not address whether Plaintiffs made any allegation of fact regarding Babineaux-Fontenot. Instead, Plaintiffs make two alternate arguments, neither of which passes muster.

First, Plaintiffs argue that Defendants did not move to dismiss Babineaux-Fontenot under Rule 12(b)(6). (Opp. at 12) But Defendants *did* move to dismiss Babineaux-Fontenot under Rule 23.1 for failure to plead that demand is excused, and an analysis of that question "proceeds *on a director-by-director basis*, asking *for each director* (i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand, (ii) whether the director would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand, and (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that is the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand." *United Food & Comm. Workers v. Zuckerburg*, 250 A.3d 862, 890 (Del. Ch. 2020) (emphasis added). It is the absence of this analysis regarding Babineaux-Fontenot that Defendants' motion to reconsider identified. Had the Court analyzed the sufficiency of Plaintiffs' allegations about Babineaux-Fontenot, it would have concluded the allegations were insufficient—given that the complaint made *no* allegations

about her actions at all.[2]

Second, Plaintiffs argue their allegations are "plausible" and so defeat a Rule 12(b)(6) dismissal. (Opp. at 12) However, the standard for alleging a director is disqualified from considering a demand is not whether the claim is plausible, but whether the plaintiff alleged with particularity facts showing a substantial likelihood of personal liability for that director. (Dkt. #112 at 15) Regardless, Plaintiffs' opposition to the motion to reconsider identifies *no* allegation of fact about Babineaux-Fontenot whatsoever, so their allegations are insufficient under *any* standard. Indeed, Plaintiffs' complaint *could not* make any allegations about the Board's oversight after June 2022, because Plaintiffs do not know anything about the Board's oversight after that point: Abbott's books and records production stopped after June 2022, three months before Babineaux-Fontenot joined the Board. (Dkt. #147 at 8-9) It is unfair to keep Babineaux-Fontenot in the case, and, respectfully, she should be dismissed.

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

Plaintiffs' response regarding their § 10(b) claim ignores what the Court's opinion states. The Court explained its understanding that "Defendants do not argue that Plaintiffs insufficiently alleged that the Section 10(b) Defendants were not independent or disinterested." (Order at 13) But Defendants *did* make that argument. (Dkt. #132 at 11 n.9 ("The only exception to this rule is if those individuals were on both sides of the transaction, *which Plaintiffs do not allege here*.") (emphasis added)) Thus, the Court misapprehended Defendants' argument.

Plaintiffs do not dispute that the Court erred. Instead, they argue the error was harmless because their allegations were sufficient nonetheless, because they alleged the directors "knew about the false statements and did nothing to stop them." (Opp. at 13) Plaintiffs argue that approving

[2] Plaintiffs argue Defendants' argument is new. (Opp. at 12) But Defendants argued in their motion to dismiss that Plaintiffs' allegations were deficient because Babineaux-Fontenot "did not even join the Board until September 2022," long after Plaintiffs' final allegations of director misconduct. (Dkt. #112 at 17 n.10)

Abbott's stock repurchases with supposed knowledge of false statements renders the directors "interested" in the stock repurchases, and therefore their supposed knowledge of the allegedly false statements is not imputed to Abbott. (*Id.*) However, Plaintiffs' argument is contradicted by binding precedent: *Ray v. Karris*, 780 F.2d 636 (7th Cir. 1985), expressly contemplates that a director can both have knowledge of an alleged fraud *and* still be disinterested for imputation purposes. In *Ray*, the Seventh Circuit held that a board member who had brought a shareholder derivative action alleging a fraudulent conspiracy "was aware of the 'fraud'" and the Court imputed his presumptive knowledge to the corporation. *Id.* at 643. This holding directly forecloses Plaintiffs' contention that knowledge of a fraud renders a director "interested" and so his knowledge is not imputed to the corporation. Indeed, *Ray* demonstrates that knowledge of a fraud by *disinterested* directors is the standard for determining whether imputing knowledge is appropriate. As *Ray* explains: "Generally the 'knowledge' of the corporate entity will turn on whether a disinterested majority of the shareholders or directors, depending on the state law requirements for the particular transaction, ratified the securities transference after full disclosure." *Id.* at 641. Thus, Plaintiffs' argument that directors are interested any time they know of a fraud is directly contrary to *Ray* (and to the decisions imputing knowledge and dismissing derivative actions cited in Defendants' briefs). (Dkt. #112 at 21-22; Dkt. #132 at 10)

At base, Plaintiffs' opposition loses sight of the issue presented by Defendants' motion to dismiss: a challenge to Plaintiffs' allegations about the reliance element of their § 10(b) claim. Defendants' argument was that if the Abbott Board—the entirety of it—knowingly made or approved allegedly fraudulent statements, then the fictional entity Abbott—*acting through that same Board*—could not then have relied on those statements when causing Abbott to repurchase stock. That the Board allegedly knew about the fraud is the very thing that makes its later supposed reliance on the fraudulent statements unjustifiable and illogical, as precedent holds. If the directors were alleged to have abused the stock repurchases for their own personal benefit, the law would give way and protect Abbott

nonetheless. But that is not Plaintiffs' allegation. As a result, Plaintiffs' allegation that the Board supposedly knew about the fraudulent statements is not sufficient to render them "interested" in the stock repurchases such that their knowledge is not imputed to Abbott. Accordingly, the Court should dismiss Plaintiffs' § 10(b) claim.

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Respectfully submitted,

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