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

MEMORANDUM OF LAW IN SUPPORT OF SECURITIES FRAUD PLAINTIFFS' MOTION TO UNSEAL

Third parties Quoniam Asset Management GmbH and KBC Asset Management NV (the "Securities Fraud Plaintiffs"), co-Lead Plaintiffs in related securities fraud litigation styled *Pembroke Pines Firefighters and Police Officers Pension Fund v. Abbott Laboratories, et al.*, No. 1:22-cv-04661 (N.D. Ill.) (the "Securities Fraud Action"), respectfully request an order unsealing certain documents that have been filed with the Court, specifically the Consolidated Amended Verified Stockholders' Derivative Complaint (the "Complaint" or "Derivative Complaint") (ECF No. 92), the Memorandum In Support of Defendants' Motion to Dismiss and the Exhibits submitted therewith (ECF Nos. 112-13), Lead Plaintiffs' Memorandum of Law In Opposition to Defendants' Motion to Dismiss (ECF No. 125), and Defendants' Reply Memorandum In Support of Motion to Dismiss (ECF No. 132) (together, the "Sealed Documents"). Counsel for Defendants in the Derivative Action have informed the Securities Fraud Plaintiffs that they will oppose this motion, while counsel for Plaintiffs in the Derivative Action take no position.

The Seventh Circuit has long taken the position that "[t]he public's right of access to judicial records . . . [is] fundamental to a democratic state" and that "[w]hat happens in the halls of government is presumptively public business." *Matter of Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000). Specifically, courts have explained that "[s]ecrecy in judicial proceedings is disfavored" because "[a]ny step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification." *Union Oil*, 220 F.3d at 568; *Bank of Am., N.A. v. First Mut. Bancorp of Ill.*, 2010 WL 2921845, at *2 (N.D. Ill. July 22, 2010); *Junker v. Mascoutah Cmty. Sch. Dist. 19 Bd. of Educ.*, 2023 WL 6444027, at *2 (S.D. Ill. Oct. 3, 2023). Likewise, the Seventh Circuit has held that "most portions of discovery that are filed and form the basis of judicial action ***must*** eventually be released." *Union Oil*, 220 F.3d at 568.

Despite these well-established rules, Defendants insist that the Sealed Documents remain concealed from public view, not based on the "compelling justification" that the law requires, but solely on Defendants' unilateral and largely unexplained designation of the documents as "Confidential." These designations, even if made pursuant to an agreement between two parties, is not binding on this Court, *see Spano v. Boeing Co.*, 2009 WL 1220626, at *1 (S.D. Ill. May 5, 2009), and Defendants' preference is insufficient to justify continued protection for the Sealed Documents. *See In re Specht*, 622 F.3d 697, 701 (7th Cir. 2010) ("Documents that affect the disposition of federal litigation ***are presumptively open to public view, even if the litigants strongly prefer secrecy, unless a statute, rule, or privilege justifies confidentiality***.").[1] The Court should order that the Sealed Documents be publicly filed, and restore the public's right of access.

[1] Unless otherwise indicated, all emphasis is added and all internal quotations are removed.

I. FACTUAL BACKGROUND

The litigation pending before this Court stems from Abbott's February 2022 infant formula recall, precipitated by a Food and Drug Administration ("FDA") investigation that uncovered egregious violations of federal manufacturing regulations and dangerously unsanitary conditions at the Company's Sturgis, Michigan plant. Those conditions led to the proliferation of deadly bacteria both at the plant and in the formula prepared there and caused numerous infant deaths and injury. The Plaintiffs in the action pending before this Court (the "Derivative Plaintiffs") allege, among other things, that Abbott's officers and board of directors made or permitted false and misleading statements concerning "Abbott's manufacturing processes, adherence to regulations, and failure to address illicit conduct." *In re Abbott Lab'ys. Infant Formula S'holder Derivative Litig.*, 2024 WL 3694533, at *9 (N.D. Ill. Aug. 7, 2024). The Derivative Plaintiffs further allege that Defendants made false and misleading statements about the infant formula recall itself, failing to disclose that it was not voluntary, but was, in truth, done at the FDA's behest. *See id*. In addition, the Derivative Plaintiffs have averred that these statements and Defendants' course of conduct artificially inflated the price of Abbott's stock, and "while the stock was artificially inflated, the Defendants caused Abbott to repurchase millions of shares." *Id.*

Defendants moved to dismiss the action under Federal Rules of Civil Procedure 23.1 and 12(b)(6). *Id.* at *1. On August 7, 2024, the Court granted the motion in part and denied it in part, specifically finding that Derivative Plaintiffs sufficiently pled a Section 10(b) claim, as well as a breach of fiduciary duty claim against Abbott's directors. *Id*. at *11, *20. Among other arguments, Defendants maintained that the derivative litigation was not in Abbott's best interest "because it could help other plaintiffs in other cases brought against the Company." *Id.* at *23. The Court rejected this "dubious argument," holding that "[i]n essence Defendants are arguing that the Court should dismiss the case because if allowed to proceed, the evidence uncovered could harm Abbott

in future lawsuits brought against the company because of the underlying conduct," an argument that "could be made in any derivative suit." *Id.* at *24.

The Securities Fraud Plaintiffs are institutional investors, Abbott shareholders, and the court-appointed Lead Plaintiffs in a parallel securities fraud class action pending before Judge Seeger, captioned, *Pembroke Pines Fire and Police Officers Pension Fund v. Abbott Labs.*, No. 1:22-cv-04661, ECF No. 35 (N.D. Ill. Apr. 21, 2023), Ex. 1[2] (Securities Fraud Compl.) at p. 1. The Securities Fraud Plaintiffs assert claims under Section 10(b) of the Securities Exchange Act of 1934 on behalf of all persons or "entities who purchased or otherwise acquired Abbott . . . common stock" between February 19, 2021 and October 19, 2022. *Id.*

The Securities Fraud Action turns on the same nucleus of operative facts as the derivative litigation pending before this Court. Like the Derivative Plaintiffs, the Securities Fraud Plaintiffs allege that Abbott made false and misleading statements, and engaged in a deceptive course of conduct, that fraudulently concealed the same violations of federal manufacturing regulations and unsanitary conditions at the Sturgis plant at issue in the derivative case. *Id.* at ¶¶1-23. The Securities Fraud Plaintiffs – as do the Derivative Plaintiffs – also aver that Abbott executives received numerous warnings concerning these concealed facts, including the same whistleblower complaints and FDA inspection reports described in the Derivative Complaint and cited in this Court's MTD Order. *See, e.g.*, *id.* at ¶¶4, 103, 152, 206-20. And like the Derivative Plaintiffs, the Securities Fraud Plaintiffs allege that Abbott made false statements about the recall itself, falsely portraying it as "proactive" and "voluntary," and failing to disclose that, in truth, it was initiated at the FDA's insistence. *See, e.g.*, *id.* at ¶¶360-61, 369-70. The Defendants in the Securities Fraud Action – who are also among the Defendants in this action – filed a motion to dismiss that action,

[2] Citations to "Ex." refer to the Exhibits to the Declaration of Avi Josefson, filed contemporaneously herewith.

which is pending. Following the Court's motion to dismiss decision in this case, the Securities Fraud Plaintiffs determined that materials filed under seal in this Court were relevant to their claims, and moved to intervene on August 15, 2024. ECF 144. Over Defendants' opposition, the Court granted the motion on October 15, 2024, finding that "permissive intervention is procedurally appropriate for bringing a third-party challenge to unseal records in an ongoing litigation." ECF 174.

II. ARGUMENT

A. The Sealed Documents Should Be Publicly Filed.

As courts have repeatedly held, "there is a presumption against sealing documents, because secrecy in judicial proceedings is disfavored" – a principle codified at 28 U.S.C. § 452. *Dou v. Carillon Tower/Chicago LP*, 2019 WL 13260155, at *1 (N.D. Ill. Sept. 11, 2019). "The rights of the public kick in when material produced during discovery is filed with the court." *Zip Top, Inc. v. S.C. Johnson & Son, Inc.*, 2024 WL 989380, at *10 (N.D. Ill. Mar. 7, 2024).

This principle is particularly strong when, as here, the documents have "affect[ed] the disposition of federal litigation . . . even if the litigants strongly prefer secrecy, unless a statute, rule, or privilege justifies confidentiality." *Specht*, 622 F.3d at 701. There are several cognizable reasons why "interested members of the public" may require access to the judicial record, including "to understand judicial decisions." *Goesel v. Boley Int'l (H.K.) Ltd.*, 738 F.3d 831, 833 (7th Cir. 2013). As the Northern District of Illinois recently explained, "[s]ecrecy is fine at the discovery stage, before the material enters the judicial record. But those documents . . . that influence or underpin the judicial decision are open to public inspection unless they meet the definition of trade secrets or other categories of bona fide long-term confidentiality." *Zip Top, Inc.*, 2024 WL 989380, at *10.

The presumption of public access applies in this case. As the Court found in granting the

Securities Fraud Plaintiffs' motion to intervene, "the materials at issue primarily relate to the motion to dismiss briefing," a motion the Court recently decided in favor of the Derivative Plaintiffs in this action. ECF No. 173. The public, including the Securities Fraud Plaintiffs, has a right to know about all of the materials that "influenc[ed] or underpin[ed]" that decision, *Zip Top., Inc.*, 2024 WL 989380, at *10, including the complaint, briefing, and exhibits to the motion to dismiss.

B. Defendants Have Failed To Provide A Compelling Rationale For Continued Protection of the Sealed Documents.

Given the presumption of public access, "[o]nce a protective order is entered, a party must continue to show good cause for confidentiality when challenged." *Chicago Mercantile Exch., Inc. v. Tech. Rsch. Grp., LLC*, 276 F.R.D. 237, 241 (N.D. Ill. 2011). To do so, the party must satisfy the "***heavy burden***" of "establishing that it would suffer a clearly defined and serious injury if the filings and documents" sought to be protected are unsealed. *Id.* (emphasis added); *see also In re Aqua Dots Prods. Liab. Litig.*, 2009 WL 1766776, at *4 (N.D. Ill. June 23, 2009) (reiterating the "clearly defined and very serious injury" standard and explaining that this showing requires "specific demonstrations of fact"). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning" are not enough and a "generalized claim of injury is insufficient." *Chicago Merchantile Exch.*, 276 F.R.D. at 241; *see also Zip Top., Inc.*, 2024 WL 989380, at *10 ("Merely [l]abeling . . . information sensitive, . . . is insufficient."). And "[i]f there is any doubt as to whether the material should be sealed, it is resolved in favor of disclosure." *In re Bank One Sec. Litig.*, 222 F.R.D. 582, 586 (N.D. Ill. 2004).

Neither party in this action has made, or even attempted to make, the necessary showing. As "good cause" in support of their motion to seal the complaint and related briefing, the Derivative Plaintiffs cite only the provisions of the confidentiality agreement they entered into

with the Defendants requiring them to file under seal any information that Defendants designate "confidential." ECF No. 93 at 2; ECF No. 126 at 2. But this does not satisfy the good cause standard since "[a]n argument that the confidentiality agreement controls what should be sealed in the record is an indirect request that the Court delegate the authority to determine good cause to the parties." *Spano*, 2009 WL 1220626, at *1. Accordingly, the parties' "confidentiality agreement does not bind the Court," and the fact that "documents are confidential pursuant to [a] confidentiality agreement does not constitute good cause for sealing th[e] documents." *Id. See also Milwaukee Elec. Tool Corp. v. Snap-On Inc.*, 288 F. Supp. 3d 872, 910 (E.D. Wis. 2017) ("The trial judge may not rubber stamp a stipulation to seal the record.") (citation omitted). Simply put, "[t]he determination of good cause cannot be elided by allowing the parties to seal whatever they want." *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999).

In addition to referencing the parties' private confidentiality agreements, Defendants claimed – in seeking to seal their motion to dismiss papers and exhibits – that the documents either contained or described material "marked 'Confidential' in the good-faith belief that the documents therein contain confidential and/or commercially sensitive information." ECF No. 116 at 1; ECF No. 135 at 1. But this too is insufficient. As the Northern District of Illinois has held, "[s]pecific examples or articulated reasoning must be provided" to demonstrate good cause, and a "broad assertion of a competitive injury . . . clearly falls short of this requirement." *Chicago Mercantile Exch., Inc.*, 276 F.R.D. at 241. As the Seventh Circuit has acknowledged, "[m]any a litigant" would prefer that information underlying a lawsuit "be kept from the curious (including its business rivals and customers), but the tradition that litigation is open to the public is of very long standing." *Union Oil*, 220 F.3d at 567. Only a "compelling justification" can justify breaking from that tradition. *Id.* at 568. The motions to seal provided no such justification.

Defendants had another opportunity to provide more detailed explanations when opposing the Securities Fraud Plaintiffs' motion to intervene. For most of the materials, Defendants offered only the conclusory, boilerplate assertion that they should remain sealed because they "reflect confidential Board deliberation over commercially sensitive topics." ECF 151 at 8. Defendants did 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); *City of Greenville, IL v. Syngenta Crop Prot., Inc.*, 2013 WL 1164788, at *4 (S.D. Ill. Mar. 19, 2013) (declining to protect board meeting materials where Defendants' only justification was that they contained "confidential business information regarding financial and strategic planning issues").

Defendants provided 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." ECF 151 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").[3] This is particularly true here, where the "processes" in place at the time the documents at issue were generated violated federal manufacturing regulations and have presumably since been remediated to comply with FDA findings that Abbott broke the law.

Finally, Defendants asserted that the Company's 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." ECF 151 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). As such, this argument is wholly unavailing.

III. CONCLUSION

Defendants cannot justify continued confidential treatment for the Sealed Documents, and the Court should order that these documents be publicly filed.

Dated: November 6, 2024

Respectfully submitted,

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[3] *See also Zip Top., Inc.*, 2024 WL 989380, at *10 ("[A]sserting that a disclosure of the information ***could*** harm a litigant's competitive position is insufficient.")

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