

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

)  
*In re Abbott Laboratories Infant* ) No. 1:22-cv-05513  
*Formula Shareholder Derivative* )  
*Litigation* ) Hon. Sunil R. Harjani  
)

**MEMORANDUM IN SUPPORT OF MOTION TO STAY PROCEEDINGS**  
**BY SPECIAL LITIGATION COMMITTEE**

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The independent Special Litigation Committee (the “SLC”) of the Board of Directors (the “Board”) of nominal defendant Abbott Laboratories (“Abbott” or the “Company”), respectfully submits this Memorandum of Law in Support of its Motion to Stay all proceedings in the above-captioned derivative action (the “Action”).<sup>1</sup>

### **PRELIMINARY STATEMENT**

Because this is a derivative suit, the claims asserted by the shareholder Plaintiffs belong to Abbott. While this Court has ruled that Plaintiffs have adequately alleged demand futility with respect to certain claims, the Board retains a clear and well-defined role in managing the future course of this litigation. Consistent with well-established law<sup>2</sup>

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<sup>1</sup> The SLC conferred with Lead Plaintiffs International Brotherhood of Teamsters Local 710 Pension Fund and Southeastern Pennsylvania Transportation Authority (“Lead Plaintiffs”) in an effort to seek agreement as to the relief requested herein. Plaintiffs have advised that they will oppose the SLC’s request for a stay.

<sup>2</sup> Abbott was incorporated under the laws of Illinois. Cons. & Am. Compl. ¶¶ 22-23. Illinois corporate law will also look to Delaware law for guidance. *See, e.g., Wieboldt Stores, Inc. v. Schottenstein*, 94 B.R. 488, 510 n.29 (N.D. Ill. 1988), *on reconsideration in part*, No. 87 C 8111, 1989 WL 18112 (N.D. Ill. Mar. 2, 1989) (“Illinois courts have often looked to Delaware law for guidance in deciding previously undecided corporate law issues.”) (citation omitted); *In re Netzel*, 442 B.R. 896, 901 (Bankr. N.D. Ill. 2011) (“The Illinois Supreme Court is also likely to be guided by the decisions of other jurisdictions, particularly the Delaware Supreme Court, on important issues of corporate law.”) (citation omitted); *Treco, Inc. v. Land of Lincoln Sav. & Loan*, 749 F.2d 374, 379 (7th Cir. 1984) (“[T]he Illinois Appellate Court supported its explication of the Illinois business judgment rule by reference to Delaware law[.]”); *see also In re Abbott Labs. Deriv. S’holders Litig.*, 325 F.3d 795, 803 (7th Cir. 2003) (“Illinois case law follows Delaware law in establishing demand futility requirements and uses the test to determine demand futility.”). Accordingly, this memorandum includes reference to pertinent Delaware decisions.

Abbott's Board has appointed an independent special litigation committee to investigate the claims in this Action and determine whether pursuit of such claims is in the best interests of the Company. Accordingly, consistent with well-established legal principles, it is appropriate for the SLC of Abbott to seek a stay of this matter while it conducts its investigation.

The SLC is composed of an independent, outside director—Michael G. O'Grady—who joined the Abbott Board after the events at issue in the Action took place. The SLC recently retained counsel, McGuireWoods LLP ("McGuireWoods"), which will advise the SLC in this matter and has begun its investigation. In order to allow the SLC to fulfill its mandate, the SLC respectfully requests that the Court stay this Action so that it can fully investigate the claims at issue and determine whether pursuit of this litigation is in the best interests of Abbott. The SLC seeks a stay of six months to conduct its investigation, after which time the SLC will report to the Court on its determination or, if the investigation requires further time, detail the reasons why additional time is necessary to complete its investigation.

For the reasons set forth below and in accordance with the law, this Court should stay this Action for six months pending completion of the SLC's work.

## BACKGROUND

### I. Status of the Action

On October 16, 2023, Plaintiffs International Brotherhood of Teamsters Local No. 710 Pension Fund and Southeastern Pennsylvania Transportation Authority (collectively “Plaintiffs”) filed the operative Consolidated and Amended Complaint, ECF No. 91, alleging, *inter alia*, that (1) certain Abbott directors disseminated or caused to be issued false and misleading statements about Abbott which they knew or recklessly disregarded were false or misleading with an intent to deceive, manipulate or defraud in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder; and (2) certain Abbott directors breached their fiduciary duties of loyalty, good faith, candor, trust and care to the shareholders.

Abbott and the individual defendants moved to dismiss the Complaint, including on the ground that Plaintiffs failed to make a pre-suit demand on Abbott’s Board. *See Mot. Dismiss*, ECF No. 111. On August 7, 2024, this Court granted in part and denied in part the Motion to Dismiss. Mem. Op. 1, ECF No. 142. The Court dismissed Counts I, IV, V, VI and VII without prejudice.<sup>3</sup> *Id.* The Court denied the motion to dismiss Counts II and III,

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<sup>3</sup> The Court instructed Plaintiffs to file an amended complaint by August 21, 2024 if they were able to “really cure the deficiencies identified as a result of the Court’s reasoning and decision in this matter.” Mem. Op. 31, ECF No. 142. Plaintiffs filed no such amended complaint, and thus the dismissal “automatically convert[ed] to a dismissal with prejudice on those dismissed counts.” *Id.*

concluding that Plaintiffs had sufficiently carried their burden at the pleading stage of alleging demand futility. *Id.* at 14, 25.

On September 11, 2024, the parties filed a joint initial status report, in which the Defendants explained that the Board intended to consider at an upcoming board meeting the formation of an SLC. Status Report 4-5, ECF No. 156. Defendants proposed delaying the beginning of the discovery accordingly. *Id.* The Court ordered discovery to proceed, noting “there is no SLC or motion to stay currently before this Court.” Minute Entry, Sept. 13, 2024, ECF No. 159.

## **II. Creation and Scope of SLC**

Abbott’s Board, at its September 19, 2024 meeting, unanimously appointed the SLC, consisting of Director Michael G. O’Grady, to “investigate and evaluate the claims asserted in the [Action], and to prepare such reports, arrive at such decisions, and take such other actions in connection with the [Action] as the Special Litigation Committee deems appropriate and in the best interests of the Company and its shareholders[.]” *See* Declaration of Benjamin L. Hatch (“Hatch Decl.”), Ex. A at 12. Mr. O’Grady is an independent and disinterested director who joined Abbott’s Board in April 2023. *See* Hatch Decl., Ex. B. Mr. O’Grady is a highly qualified director. He is Chairman and Chief Executive Officer of Northern Trust, a leading provider of wealth management, asset servicing, asset management and banking services. Previously, Mr. O’Grady worked at Price Waterhouse and served as a Managing Director at Bank of America Merrill Lynch.

Mr. O’Grady earned a bachelor’s degree in business administration from the University of Notre Dame and an MBA from Harvard Graduate School of Business.

Abbott’s Board delegated “sole and exclusive authority” to the SLC “to take any such action(s), including, without limitation, directing the filing and prosecution of litigation on behalf of the Company, as the Special Litigation Committee in its sole discretion deems to be in the best interest of the Company.” *See* Hatch Decl., Ex. A at 12. The Board further resolved to give the SLC the exclusive power and authority to take any and all actions it deemed necessary or appropriate to accomplish its functions, including hiring its own counsel, incurring expenses on behalf of Abbott in connection with its activities, conducting interviews, and accessing Company information. *Id.* The SLC has retained McGuireWoods as its counsel and has begun its investigation. The McGuireWoods team is led by two former federal prosecutors and a former staff attorney in the Division of Enforcement at the Securities and Exchange Commission.

## ARGUMENT

### **III. The Abbott Board Was Entitled to Empower the SLC Under Illinois Law**

Under Illinois law, “[t]he business and affairs of the corporation shall be managed by or under the direction of the board of directors.” 805 Ill. Comp. Stat. 5/8.05; *see also In re Abbott Labs. Deriv. S’holders Litig.*, 325 F.3d at 803 (“In a derivative suit, an individual shareholder seeks to enforce a right that belongs to the corporation . . . . However, given ‘the basic principle of corporate governance that the decisions of a corporation—

including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders.”). Similarly, under Delaware law “directors of a corporation and not its shareholders manage the business and affairs of the corporation, and accordingly, the directors are responsible for deciding whether to engage in [derivative] litigation.” *N. Miami Beach Gen. Emps. Ret. Fund v. Parkinson*, No. 10-CV-6514, 2012 WL 4180566, at \*4 (N.D. Ill. Sept. 19, 2012) (internal quotations omitted), *rev’d on other grounds sub. nom. Westmoreland Cnty. Emp. Ret. Sys. v. Parkinson*, 727 F.3d 719 (7th Cir. 2013); *see also White v. Panic*, 783 A.2d 543, 550 n.18 (Del. 2001). This “managerial decision making power, which encompasses decisions whether to initiate, or refrain from entering, litigation, [derives] from 8 Del. C. § 141(a).”<sup>4</sup> *Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 (Del. 1981). It is the best interests of Abbott—the real party in interest—that are to guide the course of this litigation.<sup>5</sup>

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<sup>4</sup> Section 141(a), substantively similar to Illinois law 805 Ill. Comp. Stat. 5/8.05, provides in pertinent part that “[t]he business and affairs of the corporation . . . shall be managed by or under the direction of a board of directors except as may be otherwise provided in this chapter or in its certificate of incorporation.” 8 Del. C. § 141(a). Following its investigation, a committee may recommend dismissal of the derivative action or may seek “to prosecute it, in the manner of its choosing.” *In re Oracle Corp. Deriv. Litig.*, 808 A.2d 1206, 1210 (Del. Ch. 2002).

<sup>5</sup> See, e.g., *In re M & F Worldwide Corp. S’holders Litig.*, 799 A.2d 1164, 1174 n.31 (Del. Ch. 2002) (noting that in a derivative suit under Delaware law, the “real party in interest” is the corporation, not the suing stockholder).

The landmark decision by the Delaware Supreme Court in *Zapata* provides that when a stockholder pursues a derivative action, the corporation's board of directors may form a committee of one or more disinterested directors and delegate to it full authority to investigate whether continued prosecution of the derivative claim is in the corporation's best interests. *Id.* at 785 (citing 8 Del. C. §141(a)-(c)).

The authority of a board of directors to appoint and empower a special litigation committee is not limited to the inception of the litigation—it applies also where the demand requirement has already been excused. This is important, as “[e]ven when demand is excusable, circumstances may arise when continuation of the litigation would not be in the corporation's best interests.” *Zapata*, 430 A.2d at 785. *See also Grafman v. Century Broad. Corp.*, 743 F. Supp. 544, 547 (N.D. Ill. 1990) (following finding that Plaintiffs' allegations met demand requirements, the court noted “the corporation itself has the initial, preemptive opportunity to investigate derivative claims, and to determine whether the corporation should pursue them”). As explained in *Zapata*, retention of a conflicted board of directors' ability to delegate its full authority to an independent committee is consistent with the statutory authority vested in it under the Delaware General Corporation Law. *Zapata*, 430 A.2d at 785-86 (citing 8 Del. C § 141(a)-(c)); *see also Weiland v. Illinois Power Co.*, No. 89-1088, 1990 WL 267364, at \*13 (C.D. Ill. Sept. 17, 1990) (applying *Zapata* involving a company incorporated under Illinois law that formed a special litigation committee and stating that, among other reasons, “[b]ecause Delaware

is often recognized as an authority for corporate law, this Court believes that Illinois would, in the proper case, apply the rule from *Zapata*”).

Under *Zapata* and its progeny, following the appointment of a special litigation committee, control of the course of the derivative action necessarily lies with the committee, rather than with the derivative plaintiff. *See Kaplan v. Wyatt*, 484 A.2d 501, 509 (Del. Ch. 1984) (“[T]he *Zapata* procedure takes the case away from the plaintiff [and] turns his allegations over to special agents appointed on behalf of the corporation for the purpose of making an informal, internal investigation of his charges[.]”), *aff’d* 499 A.2d 1184 (Del. 1985).<sup>6</sup> Because Abbott’s Board has appointed the SLC with full authority to decide how best to proceed, control of the Action now lies with the SLC. *See In re InfoUSA, Inc., S’holders Litig.*, No. 1956-CC, 2008 WL 762482, at \*2 (Del. Ch. Mar. 17, 2008) (“The fact that I have already determined demand is excused demonstrates why the board *must* act by means of a committee; it does not in any way explain why it cannot act through an SLC.”). These precedents, though interpreting Delaware law, would be treated as guidance for Illinois law. *See, e.g., Wieboldt Stores, Inc. v. Schottenstein*, 94 B.R. 488, 510 (N.D. Ill. 1988), *on reconsideration in part*, No. 87 C 8111, 1989 WL 18112 (N.D. Ill. Mar. 2,

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<sup>6</sup> The Delaware Supreme Court affirmed the Court of Chancery’s holding, noting that “[t]he Court of Chancery’s opinion in the case provides an excellent, detailed analysis of the *Zapata* procedure which we accept as accurate[.]” *Kaplan v. Wyatt*, 499 A.2d 1184, 1188 (Del. 1985). *See also Abbey v. Computer & Commc’ns Tech. Corp.*, Civ. A. No. 6941, 1983 WL 18005, at \*3 (Del. Ch. Apr. 13, 1983) (“Under *Zapata* the board of directors, through its litigation committee, is still in control to the exclusion of the derivative plaintiff[.]”).

1989) (“Illinois courts have often looked to Delaware law for guidance in deciding previously undecided corporate law issues.”) (citations omitted).

#### **IV. The Derivative Action Should Be Stayed Pending the SLC Investigation**

##### **A. A Stay Allows the SLC to Investigate and Decide a Course of Action**

Once a special litigation committee is formed, Delaware law, which, again, Illinois follows as guidance, affords substantial deference to the investigation process. *See, e.g.*, *In re Oracle Corp. Derivative Litig.*, 808 A.2d 1206, 1207 (Del. Ch. 2002) (“During the time period reasonably needed for the [special litigation committee] to perform its investigation and decide on its course of action, [it] has primacy in controlling this litigation on behalf of Oracle.”). As explained by the Court of Chancery in *Abbey v. Computer & Commc’ns Tech. Corp.*, 457 A.2d 368 (Del. Ch. 1983), litigation activity is to be stayed pending the committee’s investigation:

If *Zapata* is to be meaningful, then it would seem that such an independent committee, once appointed, should be afforded a reasonable time to carry out its function. It would likewise seem reasonable to hold normal discovery and other matters in abeyance during this interval. If a derivative plaintiff were to be permitted to depose corporate officers and directors and to demand the production of corporate documents, etc. at the same time that a duly authorized litigation committee was investigating whether or not it would be in the best interests of the corporation to permit the suit to go forward, the very justification for the creating of the litigation committee in the first place might well be subverted.

*Id.* at 375.<sup>7</sup> A stay is generally considered mandatory in order to allow the special litigation committee to do its work. *See Kaplan*, 484 A.2d at 510 (“It is a foregone conclusion that such a stay must be granted. Otherwise, the entire rationale of *Zapata*, *i.e.*, the inherent right of the board of directors to control and look to the well-being of the corporation in the first instance collapses.”); *Katell v. Morgan Stanley Group, Inc.*, CIV. A. No. 12343, 1993 WL 390525, at \*4 (Del. Ch. Sept. 27, 1993) (“Delaware law requires that all proceedings in this action be stayed pending the [c]ommittee’s investigation.”).<sup>8</sup> Illinois law would follow Delaware. *See, e.g., Wieboldt Stores, Inc.* 94 B.R. at 510 n.29 (N.D. Ill. 1988), *on reconsideration in part*, No. 87 C 8111, 1989 WL 18112 (N.D. Ill. Mar. 2, 1989) (“Illinois

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<sup>7</sup> In the SLC context, federal courts apply the law of the state of incorporation in deciding whether a derivative case should be stayed in deference to an SLC investigation. *See, e.g., St. Clair Shores Gen. Emps. Ret. Sys. v. Eibeler*, No. 06 Civ. 688 (SWK), 2006 WL 2849783, at \*2 (S.D.N.Y. Oct. 4, 2006) (“[T]he appropriateness of the SLC’s motion to stay is a question to be resolved under the law of [the corporation’s] state of incorporation, Delaware.”); *see also In re Oracle Corp. Deriv. Litig.*, 808 A.2d at 1215-16 (noting with disapproval efforts by plaintiffs to convince a court to “ignore the *substantive law* of this state regarding the appropriate deference due to a special litigation committee of a Delaware corporation” (emphasis added)).

<sup>8</sup> *St. Clair Shores Gen. Emps. Ret. Sys.*, 2006 WL 2849783, at \*2 (“Under Delaware law, a properly formed special litigation committee of the board of directors is generally entitled to a stay of derivative litigation for the reasonable period of time necessary to complete its investigation.”); *Moradi v. Adelson*, No. 2:11-cv-00490-MMD-RJJ, 2012 WL 3687576, at \*2-3 (D. Nev. Aug. 27, 2012) (staying action pursuant to Delaware law, noting that “courts routinely grant reasonable stays to allow special litigation committees to complete their investigations.”).

courts have often looked to Delaware law for guidance in deciding previously undecided corporate law issues.”).

**B. A Limited Stay Pending SLC Investigation Will Not Prejudice Any Party**

Here, there is no reason why a stay should not be granted. Discovery has just begun. The SLC is properly constituted; it is comprised of an outside director, Michael G. O’Grady, who joined the Board after the events at issue in the Action. The SLC is independent, qualified, and fully prepared to undertake a thorough and impartial investigation. The SLC has also retained counsel led by two former federal prosecutors and a former staff attorney at the Securities and Exchange Commission. *See Background, Section II, supra.*

A stay will not prejudice any party to this Action. A stay during the SLC investigation would avoid duplicative discovery activity by Plaintiffs that would not only be unnecessarily wasteful of Abbott’s resources, but also likely to hinder the progress of the SLC investigation itself. *See, e.g., Pompeo v. Hefner*, CIV. A. Nos. 6806, 6872, 1983 WL 20284, at \*3 (Del. Ch. Mar. 23, 1983) (“[T]he derivative plaintiff should not be permitted to intermeddle or act coextensively with the independent arm of the board of directors along the way.”); *Abbey*, 457 A.2d at 375 (discussing subversion of special litigation committee process under *Zapata* if plaintiffs are allowed to simultaneously pursue

discovery).<sup>9</sup> The interests of efficient and effective case management and conservation of judicial and litigant resources would best be served by temporarily staying all proceedings and deadlines in this Action until the SLC completes its investigation.

### **C. Proposed Duration of Stay**

The remaining question—the appropriate duration of a stay—is a matter of discretion for the Court. *See Abbey*, 457 A.2d at 376 (duration of stay is discretionary). As a general rule, a special litigation committee “should be afforded a reasonable time to carry out its function.” *Id.* at 375; *see also In re Oracle Corp. Deriv. Litig.*, 808 A.2d at 1212 (“If *Zapata* is to be meaningful, then it would seem that such an independent committee, once appointed, should be afforded a reasonable time to carry out its function.”). What constitutes “reasonable” depends on the context and complexity of the investigation. *See Katell v. Morgan Stanley Grp., Inc.*, CIV. A. No. 12343, 1993 WL 390525, at \*4 (Del. Ch. Sept. 27, 1993) (granting five-month stay) (citing *Abbey*, 457 A.2d at 376). One federal court has observed that “[a] review of cases reveals that courts generally allow SLCs between six

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<sup>9</sup> Undersigned counsel has not identified any derivative action in this district where the court denied a special litigation committee’s motion to stay. Such motions are generally granted in Delaware as well, and the small number of cases in which such motions were denied in Delaware are distinguishable. *See, e.g., Carlton Invs. v. TLC Beatrice Int’l Holdings, Inc.*, No. CIV. A. 13950, 1996 WL 33167168 (Del. Ch. June 6, 1996) (denying the motion to stay as untimely after the parties had already undertaken extensive document and deposition testimony); *Biondi v. Scrushy*, 820 A.2d 1148 (Del. Ch. 2003) (denying motion to stay where the special committee had demonstrated it was not independent). Here, discovery has just commenced, the SLC is timely seeking the stay after being constituted and retaining counsel, and the SLC is appropriately constituted and empowered.

and ten months to investigate and report on pending derivative actions.” *Silverstein v. Larson*, No. CIV.04-3450 ADM/AJB, 2005 WL 435241, at \*3 (D. Minn. Feb. 25, 2005).<sup>10</sup>

Here, the SLC was recently appointed. The SLC will work diligently and without delay, but the investigation stands to be complex.<sup>11</sup> The Complaint names numerous current and former officers and directors of Abbott as relevant personnel to the claims. Investigation is likely to require numerous interviews, including potentially of personnel no longer affiliated with Abbott, and corresponding travel, as well as review and analysis of a significant volume of documents and communications.<sup>12</sup> In order to make its determinations in a considered and thorough manner, the SLC requires sufficient time to: 1) analyze what stands to be a voluminous and complex factual record; 2) assess whether

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<sup>10</sup> See also *In re InfoUSA, Inc., S'holders Litig.*, 2008 WL 762482, at \*3 (granting 150-day stay); *Kaplan v. Wyatt*, No. 6361, 1984 WL 8274, at \*3 (Del. Ch. Jan. 18, 1984) (noting a seven-month investigation by a special litigation committee).

<sup>11</sup> Fact investigation alone will be complex, as the SLC is charged with investigating not only the accuracy of various statements described in Count II but also the respective defendants’ state of mind. Likewise, Count III will require investigation into the respective defendants’ exercise of their fiduciary duties. This will entail examination of Plaintiffs’ allegations that Defendants “had no committee charged with direct responsibility to monitor manufacturing or product safety”; Defendants did not regularly “monitor, discuss, or address manufacturing or product safety”; Defendants irregularly received management reports of manufacturing or product safety”; and that management failed to relay “red, or at least yellow, flags” to the Board, as well as the import of such allegations, if any, determined to be true. Mem. Op. 11-25, ECF No. 142.

<sup>12</sup> Count II alone claims 17 defendants issued nearly a dozen allegedly false and misleading statements over the course of more than two years. Cons. & Am. Compl. 126-34, ECF No. 91.

Plaintiffs' claims have a factual basis and whether culpability exists; and 3) determine the course of action that is in the best interests of Abbott. The SLC respectfully submits that a stay of six months should afford sufficient time to conduct its investigation. If more time is needed, the SLC will return to the Court as appropriate and request the additional time.

## CONCLUSION

For the foregoing reasons, the SLC respectfully requests that this Court enter an order staying all proceedings in this Action for a period of six months. The SLC proposes to report back to the Court at the end of the six-month period with respect to its progress.

Dated: November 19, 2024

Respectfully submitted,

/s/ Benjamin L. Hatch

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