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. 1:22-CV-05513 Hon. Sunil R. Harjani

LEAD PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO STAY PROCEEDINGS BY SPECIAL LITIGATION COMMITTEE

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I. INTRODUCTION

Nearly three years ago, Abbott Laboratories ("Abbott" or the "Company") became the subject of national attention due to the revelation of FDA concerns about contaminated infant formula coming out of Abbott's factories, leading to a formula recall and nationwide formula shortage. Families, the medical community, and members of Congress castigated Abbott's leadership. Soon thereafter, multiple major institutional investors served demands on Abbott for internal books and records, seeking to investigate claims against the Company's officers and directors related to those events. Two years ago, those demands culminated in multiple lawsuits being filed against Abbott's leadership. The Court appointed Plaintiffs Teamsters Local No. 710 Pension Fund and Southeastern Pennsylvania Transportation Authority (together, "Plaintiffs") to lead the litigation seeking to protect Abbott from its faithless leadership.

Meanwhile, for years Abbott's Board of Directors (the "Board") did nothing. As this Court knows, this litigation has survived a motion to dismiss and a motion for reconsideration. Now, long after the crisis and two years into active litigation, the Board is trying to halt the case and prevent Plaintiffs from obtaining discovery by belatedly forming a Special Litigation Committee ("SLC"). The Board appointed Abbott director Michael O'Grady ("O'Grady"), the only current Abbott director not facing personal liability in this action, to serve as the lone member of the SLC, as he was the one and only option facially available. This last-ditch effort to stop Plaintiffs' prosecution of this case does not meet the high standard for obtaining a complete stay of litigation that is well underway, and should be rejected.

For decades, courts have warned about the risks of a single-member SLC, noting that the conflicts of interest such directors may face in investigating claims against their colleagues in the boardroom means they are required, "like Caesar's wife, to be above reproach." *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1146 (Del. Ch. 2006). If there are "doubts as to the SLC's independence" due to

personal or financial ties to the individual defendants, or if the SLC's formation is "belated," plaintiffs are not required to stand down while the SLC conducts its investigation. *Employees Ret. Sys. of City of St. Louis v. Jones*, 2021 WL 4894833, at *2 (S.D. Ohio Oct. 20, 2021) (hereinafter, "*FirstEnergy*") (collecting cases regarding denial of SLCs' requested stays). Moreover, if there are reasons to question whether the SLC is capable of conducting a "good faith investigation," the SLC's work is similarly doomed. *London v. Tyrrell*, 2010 WL 877528, at *17 (Del. Ch. Mar. 11, 2010).

Here, each of these factors dictates that Plaintiffs' prosecution of this action should be allowed to proceed. As to timing, the Board belatedly formed the SLC two years after the first of the consolidated actions was filed and as a transparent effort to prevent Plaintiffs from obtaining the discovery that will help prove their claims at trial. As to substance, O'Grady is incapable of meeting the high standard for independence. O'Grady is Chairman, President and Chief Executive Officer of Northern Trust Corp. ("Northern Trust"), which is a leading wealth management company. Northern Trust holds over ***$10 billion*** in client investments in companies where the Abbott director defendants (the "Director Defendants"), who appointed O'Grady, are currently directors, senior officers, or both.

This creates a clear conflict of interest for O'Grady, who operates as a dual fiduciary with obligations to maximize both the value of Northern Trust clients' investments and the value of the claims at issue in this litigation. If O'Grady were to authorize Abbott (or Plaintiffs acting on Abbott's behalf) to pursue claims against the Director Defendants, which would involve adopting Plaintiffs' allegations of colossal corporate governance failures by Abbott's Board, that could adversely affect the market's view of those directors' ability to prudently manage the business of a public company, particularly at a time of crisis. That negative view of those Director Defendants could negatively impact the value of the investments that Northern Trust holds on its clients' behalf in those director-affiliated companies. O'Grady also has disabling personal ties to various Director Defendants through mutual academic and religious associations. Given these connections, O'Grady cannot disinterestedly

and independently consider this action's merits, and Plaintiffs should not be forced to endure yet another stay of proceedings when the SLC's work is plagued from the start.

Moreover, O'Grady already made his views about this action's merits known before the SLC was ever formed, as evidenced by Abbott's motion to dismiss. When moving to dismiss this action on demand futility grounds, Abbott—which is managed by its Board (including O'Grady at the time)—argued that "Plaintiffs are not acting in Abbott's shareholders' interests," and the Court should dismiss Plaintiffs' claims because discovery uncovered in this action could also be used by the families suing Abbott over its infant formula contamination. *See* ECF No. 112 at 37-38 & n.17. The Delaware Supreme Court has rejected this type of "handwringing" policy argument, concluding that allowing discovery to proceed will not "chill companies' ability to defend lawsuits and attract directors." *Lebanon Cnty. Employees' Ret. Fund v. Collis*, 311 A.3d 773, 805 (Del. 2023). This Court did the same when denying the motion to dismiss. ECF No. 142 at 30. With O'Grady having conceded that his view of this case is influenced by factors other than the claims' merits, Plaintiffs should not be forced to stand idle while the SLC conducts an investigation that may have a biased and predetermined outcome.

For these reasons and those set forth below, Plaintiffs respectfully request that the SLC's motion to stay proceedings (the "Motion") be denied.

II. STATEMENT OF FACTS

As a major U.S. manufacturer and distributor of infant formula, Abbott operates in a closely regulated industry and must abide by strict standards designed to protect infants from unsafe foods and production processes. ¶¶82-95. Compliance and safety are mission critical for Abbott, as tainted formula can cause infants to become dangerously ill or die, leading to regulatory violations, fines, recalls and costly lawsuits. ¶¶82, 127. Although the Director Defendants repeatedly assured consumers, shareholders, and the market that Abbott faithfully adhered to its safety and compliance obligations, Abbott has been a recidivist violator while under their leadership, which culminated in a

Cronobacter contamination of infant formula produced at its Sturgis, Michigan facility in 2021 and 2022. ¶¶97-126. After repeated warnings and requests from the FDA, Abbott finally closed Sturgis and commenced a formula recall on February 15, 2022, but only after multiple babies who had consumed Abbott's infant formula died or were sickened. ¶¶1, 208. Abbott's Board failed to implement a reasonable reporting system to oversee any such issues despite the obvious importance of Abbott's safety and regulatory compliance. ¶¶236, 368, 430, 435. Abbott's Board also approved the repurchase of billions of dollars of Abbott stock at prices artificially inflated by misrepresentations about Abbott's safety and regulatory compliance. ¶¶228, 359-62.[1]

By mid-2022, several major institutional investors had served demands on Abbott for internal books and records to investigate potential claims. ECF No. 74. Beginning in October 2022, Abbott shareholders filed five separate derivative actions that asserted claims arising from these facts. The Court consolidated the cases and appointed Plaintiffs to lead the consolidated action, and Plaintiffs filed the operative consolidated complaint (the "Complaint") on October 16, 2023. ECF No. 86, 92.

On August 7, 2023, following full briefing by the parties, the Court issued a detailed opinion upholding Plaintiffs' state law claims for breach of fiduciary duty against the Director Defendants and federal law claims for violations of §10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 (the "MTD Decision"). ECF No. 142. For the state law claims, the Court explained that Plaintiffs' factual allegations supported that the Board (i) "had no committee charged with direct responsibility to monitor manufacturing or product safety," (ii) "did not monitor, discuss, or address manufacturing or product safety on a regular schedule," (iii) "had no regular process or protocols requiring management to apprise the Board of manufacturing or product safety," and (iv) "Management saw red, or at least yellow, flags, but that information never reached the Board." *Id.* at 17. For the federal law claims, the

[1] Unless otherwise indicated, all ¶ and ¶¶ citations are to ECF No. 93, Verified Shareholder Derivative Complaint.

Court held that "Defendants' argument erroneously hinges on the idea that the Board members are standing in on behalf of the corporation for the purpose of whether Abbott justifiably relied on the misstatements," and Plaintiffs' factual allegations supported that "Defendants knew about the false statements and did nothing to stop them." *Id.* at 11-14. The Director Defendants filed their answer on October 7, 2024. ECF No. 169.

Discovery is now well underway. On September 11, 2024, the parties filed a Joint Initial Status Report. ECF No. 156. The parties exchanged Rule 26(a)(1) disclosures on October 10, 2024. Plaintiffs served requests for the production of documents and interrogatories on Abbott and the Individual Defendants; the Individual Defendants have served requests for production and interrogatories on Plaintiffs. In addition, Plaintiffs have served subpoenas on three state regulators, are engaged in negotiations with those third parties, and received an initial production of documents from one regulator. The parties have also been involved in active negotiations over an ESI protocol and confidentiality order, which are close to resolution. On November 21, 2024, the parties appeared at a Status Conference before Magistrate Judge Laura K. McNally to report on the status of discovery. ECF No. 197. Magistrate McNally instructed the parties to file the ESI protocol and confidentiality order by December 9, 2024. ECF No. 197.

While the parties were starting fact discovery, the Individual Defendants filed a motion to reconsider certain aspects of the Court's MTD Decision. ECF No. 147. On November 12, 2024, the Court denied that motion. ECF No. 186.

Defendants first raised the prospect of forming a Special Litigation Committee only after the Court denied the motion to dismiss and sought to stay discovery based on the mere prospect of the Board considering whether to form an SLC. *See* ECF No. 156 at 4 (Joint Initial Status Report with the Defendants advising the Court of "the Board's intention to consider whether to form an SLC" and

arguing that "the most efficient course is to hold the start of discovery" pending that decision). The Court rejected that proposal and ordered that "[d]iscovery shall proceed." ECF No. 159.

On September 19, 2024, the Board formed an SLC. ECF No. 192, Ex. A at 13-14. The SLC has one member: O'Grady. *Id,* at 11. On November 29, 2024, the SLC filed the Motion to Stay. ECF No. 193.

III. ARGUMENT

With the Director Defendants having exhausted their options to thwart the litigation, O'Grady has now taken up the mantle to try to prevent Plaintiffs from obtaining the discovery that will help prove their claims at trial. The SLC's Motion provides no basis to halt this action.

The Court must exercise its discretion to "secure the just, speedy and inexpensive determination of every action." Fed. R. Civ. P. 1. Accordingly, a motion to stay "will not be granted every time a potentially dispositive issue is placed before the court." *Builders Ass'n of Greater Chicago v. City of Chicago*, 170 F.R.D. 435, 437 (N.D. Ill. 1996) (finding that staying discovery was "more likely to slow down the progress of the litigation than to speed it up"). The default is that litigation once commenced should continue; the movant bears the burden of showing that a stay will "*materially* reduce the burden on the parties or the Court." *Witz v. Great Lakes Educ. Loan Servs., Inc.*, 2020 WL 8254382, at *2 (N.D. Ill. July 30, 2020) (emphasis added); *see also New England Carpenters Health & Welfare Fund v. Abbott Labs.*, 2013 WL 690613, at *3 (N.D. Ill. Feb. 20, 2013) (rejecting arguments concerning the "burden or cost" of plaintiff's continuing with discovery).

These principles remain true even when a board of directors forms a special litigation committee. As this Court has explained, "the corporation's power to investigate derivative claims does not translate into an absolute right to halt all related proceedings," and "[i]t is the duty of the courts to insure that the corporation's investigation is not a mere artifice for delay." *Grafman v. Century Broad. Corp.*, 743 F. Supp. 544, 548 (N.D. Ill. 1990). As the SLC's own cited authority explains, motions to

stay are often granted when the subject company timely formed a committee consisting solely of "independent [disinterested] directors," but no such deference is appropriate when there is a "reason to doubt the SLC's independence" in conducting an investigation. *Biondi v. Scrushy,* 820 A.2d 1148, 1166 (Del. Ch. 2003). Rather than an SLC automatically stripping any prosecutorial authority from plaintiffs, there must be "a balancing point where bona fide stockholder power to bring corporate causes or actions cannot be unfairly trampled on by the board of directors," including an SLC. *Zapata Corp. v. Maldonado*, 430 A.2d 779, 786-87 (Del. 1981). *See also Carlton Inv. v. TLC Beatrice Int'l Holdings, Inc.*, 1996 WL 33167168, at *9 (Del. Ch. June 6, 1996) (denying motion to stay and holding that a stay is not automatic as a plaintiff has a "right to bring its suit and to proceed with its suit").

Thus, an SLC's motion to stay litigation should not be granted if there was already "unreasonable delay" in the SLC's formation or when there are "doubts as to the SLC's independence." *FirstEnergy*, 2021 WL 4894833, at *2. As set forth below, a stay is improper here because: (i) the Board delayed forming an SLC for over two years despite having been placed on notice of potential derivative claims, and belatedly formed the SLC during active fact discovery and only after the Court had upheld Plaintiffs' principal claims; (ii) O'Grady lacks independence due to his deep financial and personal connections with the Director Defendants; and (iii) O'Grady further lacks independence because he has already shown that he pre-judged Plaintiffs' claims for reasons unrelated to their merits.

A. THE SLC WAS BELATEDLY FORMED

An SLC is not entitled to a stay of proceedings when there was "unreasonable delay" in seeking such relief, including the SLC's "belated formation," or when shareholders already had to ensure "long prior stays during the motion-to-dismiss stage. *FirstEnergy*, 2021 WL 4894833, at *2. Under such circumstances, when a board of directors has been on notice of serious allegations against it for years but chosen not to investigate and litigation is well underway, "the policy considerations supporting a

stay (such as saving resources) carry little weight" and courts are wisely suspicious that the motion to stay is a "mere artifice for delay." *In re Big Lots, Inc. S'holder Litig.*, 2017 WL 2215461, at *5 (S.D. Ohio May 19, 2017); *Grafman*, 743 F. Supp. at 548.

Here, the SLC's formation is nothing more than a delinquent window-dressing measure. Nearly three years have passed since Abbott's Cronobacter contamination crisis and two years have passed since the first shareholder derivative action was filed, yet the Board only considered forming an SLC after a hard-fought lead plaintiff process (ECF No. 86), a complex and lengthy briefing on the motion to dismiss during which Plaintiffs were subject to the automatic stay under the Private Securities Litigation Reform Act (15 U.S.C. §§77z-1(b)(1), 78u-4(b)(3)(b); *see also* ECF No. 142), the denial of the motion for reconsideration (ECF No. 186), and the parties propounding written discovery and document requests. This delay is almost triple the one that the *FirstEnergy* court faced when denying a similar motion to stay from an SLC. *FirstEnergy*, 2021 WL 4894833, at *3; *see also Miller v. Anderson*, 2021 WL 4220780, at *1 (N.D. Ohio Sept. 16, 2021) ("The SLC makes much of the fact that discovery has not yet commenced in this matter and therefore little prejudice will accrue through a six-month delay. However, the SLC ignores that this matter was filed on August 7, 2020. Before the motion to stay was filed – nearly more than 11 months after the complaint – 95 other filings occurred in the matter. Undoubtedly, hundreds of hours have been devoted to briefing the myriad issues that were raised before even a case management conference could be conducted in this matter.").

Sister federal courts have also denied SLC motions to stay when a case had significantly progressed. For example, in *In re Bank of N.Y. Derivative Litig.*, 2000 WL 1708173, at *3 (S.D.N.Y. Nov. 14, 2000), the court denied the motion to stay the action because "Defendants could have created the SLC a year ago, but waited until [two months ago] to do so. The delay weighs against staying these proceedings now." *Id.* at *3. Similarly, in *Sonkin v. Barker*, 670 F. Supp. 249, 255 (S.D. Ind. 1987), the

court concluded that a stay upon a belated SLC formation would not "serve the economies of time and effort for the court or the litigants."

Therefore, the SLC's "belated formation" should not be permitted to disrupt Plaintiffs' prosecution of an action that has been pending for over two years and is currently in active fact discovery. *FirstEnergy*, 2021 WL 4894833, at *2.

B. O'GRADY IS THE SOLE MEMBER OF THE SLC AND LACKS INDEPENDENCE DUE TO SIGNIFICANT PROFESSIONAL AND PERSONAL TIES

As the SLC's cited authority confirms, "the purpose of forming a special litigation committee is to entrust the fate of the lawsuit to directors whose impartiality cannot reasonably be questioned," which requires its members to be "independent." *Biondi,* 820 A.2d at 1164 (explaining that it would be "futile and wasteful to issue a stay when the undisputed facts will make it impossible for the court later to accept a decision of the special litigation committee to terminate the derivative litigation"). As such, the SLC must make the weighty determination of whether to sue fellow directors or to move to terminate the litigation, and, therefore, "SLC members are not given the benefit of the doubt as to their impartiality and objectivity." *London*, 2010 WL 877528, at *13.

When an SLC's conflicts of interest suggest that its "later decision to terminate the litigation could not command respect," then a stay of the litigation is inappropriate. *Biondi*, 820 A.2d 1165; *In re Bank of New York Derivative Litig.*, 2000 WL 1708173, at *3 (S.D.N.Y. Nov. 14, 2000) (denying motion to stay when the record did not support that "the members of the SLC are truly independent and disinterested"). Courts find such disabling conflicts of interest when an SLC member has significant "past or current" business or social relationships with a defendant director. *In re Primedia Inc. Derivative Litig.*, 910 A.2d 248, 261 n.45 (Del. Ch. 2006); *London*, 2010 WL 877528, at *12 (explaining that the "sense of obligation need not be of a financial nature").

Here, Abbott took the aggressive step of forming a single-member SLC consisting solely of O'Grady. While single-member SLCs are, at times, permitted, they present a particularly high bar for

the independence of that single member.[2] As a leading case memorably explained:

> The court necessarily places more trust in a multiple-member committee than in a committee where a single member works free of the oversight provided by at least one colleague. But, in those rare circumstances when a special committee is comprised of only one director, Delaware courts have required the sole member, ***like Caesar's wife, to be above reproach***.

Gesoff, 902 A.2d at 1146 (emphasis added); *Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. Ch. 1985) ("[P]otential conflicts of interest or divided loyalties, when considered as a whole, raise a question of fact as to whether [the SLC] could act independently.").[3] Accordingly, O'Grady, "the sole member of a one-person special litigation committee" must "meet unyielding standards of diligence and independence." *Sutherland v. Sutherland*, 2007 WL 1954444, at *3 n.10 (Del. Ch. July 2, 2007).

O'Grady is in no way positioned to independently assess whether to sue his fellow directors, given significant overlapping financial and personal relationships. With respect to financial conflicts of interest, O'Grady is Chairman, President and CEO of Northern Trust, which publicly describes itself as "a leading provider of wealth management, asset servicing, asset management and banking solutions to corporations, institutions, families and individuals."[4] Northern Trust holds client investments collectively worth over ***$10 billion*** in companies where 8 of the 11 Director Defendants—the very same people who appointed him to serve on the SLC and investigate claims against them—are currently directors or officers, including:

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[2] When courts have occasionally upheld the decisions of one-member SLCs, the directors were found to be impartial following close scrutiny of their financial and personal ties to the defendant directors. *See, e.g., In re Baker Hughes, a GE Co., Derivative Litig.*, 2023 WL 2967780, at *11 (Del. Ch. Apr. 17, 2023), *aff'd sub nom. In re Hughes*, 312 A.3d 1154 (Del. 2024) (explaining that "the SLC must prove its independence," the "burden is particularly hefty if a single member SLC is used," and finding there was no "meaningful question" as to the independence of the director appointed to the SLC).

[3] Courts have repeatedly recognized that this standard of independence is not the same as the independence standards applied by stock exchanges. *See, e.g., Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 648 n.26 (Del. 2014) (explaining that "directors' compliance with NYSE independence standards does not mean that they are necessarily independent under our law in particular circumstances") (internal quotations omitted).

[4] https://www.sec.gov/Archives/edgar/data/73124/000007312424000073/ntrs-20231231.htm.

- 315,853 shares of Parson Corporation (Ex. A at p.6) (Northern Trust Co. Schedule 13 F Excerpt) worth approximately $32 million worth, where defendant Darren McDew ("McDew") is a director[5];

- 9,493,763 shares of General Electric Company (Ex. A at p.5) worth approximately $1.8 billion, where McDew is a director;

- 19,524,981 worth approximately $3.9 billion of AbbVie, Inc. (Ex. A at p.1), worth approximately $1.8 billion, where defendant Robert Alpren is a director;

- 409,151 of Ulta Beauty (Ex. A at p.10), worth approximately $190 million, where defendant Sally Blount served as a director from 2017 to 2022;

- 1,264,092 shares of The Clorox Company (Ex. A at p.3), worth approximately $206 million, where defendant Paola Gonzalez is Vice President of Global FP&A and has been with the company since 1997;

- 460,322 shares of Teledyne Technologies Incorporated (Ex. A at p.8), worth approximately $201 million, and where defendant Michele Kumbier ("Kumbier") is a director;

- 289,779 shares of Ryerson Holding Corporation (Ex. A at p.7), worth approximately $5.8 million, and where Kumbier is a director;

- 6,849,575 shares of Accenture Plc (Ex. A at p.2), worth approximately $2.4 billion, and where defendant Nancy McKinstry is a director;

- 5,997,789 shares of 3M Company, worth approximately $820 million (Ex. A at p.9), where defendant Michael Roman is Chairman, President and CEO;

- 2,502,267 shares of General Dynamics Corporation (Ex. A at p.5), worth approximately $756 million, and where defendant John Stratton ("Stratton") is a director; and

- 1,665,142 shares of Frontier Communications Parent, Inc. (Ex. A at p.4), worth approximately $59 million, and where Stratton is Executive Chairman.[6]

This creates a clear conflict of interest for O'Grady, a "dual fiduciary" obliged to maximize the value of investments of Northern Trust clients and the value of the claims at issue in this litigation. *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 46 (Del. Ch. 2013). If O'Grady were to authorize the

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[5] Abbott director biographies, including their affiliations with other companies, can be found at pages 10 to 15 of the Abbott Annual Proxy Statement available at https://www.sec.gov/Archives/edgar/data/1800/000130817923000247/abt_courtesy-pdf.pdf.

[6] Stock prices fluctuate, and current stock prices may be obtained at http://finance.yahoo.com.

prosecution of Plaintiffs' claims against the Director Defendants, he would effectively be accusing directors and officers of companies where his clients collectively hold significant investments of eye-popping corporate governance failures in Abbott that had catastrophic consequences, which, in turn, could impact the market's view of those directors' competence and the stock prices of the companies with which they are involved. *See* ECF No. 142 at 11-14, 17 (explaining that the Director Defendants utterly failed to "monitor, discuss, or address manufacturing or product safety," "knew about false statements" in public filings regarding the same," and "did nothing to stop them"). Put simply, O'Grady's decision to pursue litigation against his fellow Abbott directors could harm Northern Trust's clients. As a result, O'Grady "faces an inherent conflict of interest". *See Chen v. Howard-Anderson*, 87 A.3d 648, 670 (Del. Ch. 2014) ("If the interests of the beneficiaries to whom the dual fiduciary owes duties diverge, the fiduciary faces an inherent conflict of interest.").

O'Grady also has personal conflicts of interest that render him non-independent. He is on the Board of Directors of the Economic Club of Chicago, a members-only group of business executives where Defendants Blount and Babineaux-Fontenot are also directors.[7,8] O'Grady is on the Board of Directors of the University of Notre Dame[9], which awarded Babineaux-Fontenot with its Laetare Medal—known as the "oldest and most prestigious honor given to American Catholics."[10] O'Grady is actively involved in the Archdiocese of Chicago, along with certain of his fellow Abbott directors.[11] O'Grady and Blout have both been members of the Finance Council of the Archdiocese of

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7 https://projects.propublica.org/nonprofits/organizations/300748997/202400589349300320/full, at 9.

8 https://econclubchi.org/leadership/?_sft_leader_category=executive-committee.

9 https://projects.propublica.org/nonprofits/organizations/350868188/202411349349301721/full.

10 https://www.ncronline.org/news/ceo-feeding-america-named-recipient-notre-dames-2024-laetare-medal.

11 https://www.catholiccharities.net/wp-content/uploads/2022/11/CC-SNB-Invitation-2022.pdf.

Chicago.[12,13] O'Grady is on the Board of Advisors of Catholic Charities[12], and Blout is the CEO.[14, 11] As the Delaware Supreme Court has explained when discussing non-financial ties, "these relationships can give rise to human motivations compromising the participants' ability to act impartially toward each other on a matter of material importance." *Sandys v. Pincus*, 152 A.3d 125 (Del. 2016).

O'Grady's conflicts mean he is not "above reproach," and this action cannot be stalled while he conducts an investigation plagued by his extraneous influences. *Gesoff*, 902 A.2d at 1146.

C. THE SLC DOES NOT IDENTIFY ANY BENEFIT TO THE STAY, AND THERE IS NONE

The SLC has also not articulated with particularity any procedural benefits that come from staying the litigation. *See* Motion at 11-12. As part of a two-sentence discussion concerning prejudice, the SLC only gestures at "case mangaement" and the "conservation of resources." *Id.* However, if the SLC were going to undertake an earnest investigation of Plaintiffs' claims, it would presumably seek discovery similar to what Plaintiffs are already actively pursuing, such as document productions from the individual defendants and the Company related to problems in the infant formula production processes at the Sturgis plant, whistleblower complaints, responses to the dissemination of FDA Form 483s, the Board's information reporting systems, responses to red flags regarding potential contamination, public statements to investors, and regulatory findings.

Although any conclusions that the one-person SLC reaches are already tainted, as set forth below, Plaintiffs' action will not impede the SLC's efforts, and the SLC has articulated no reason why its own investigation should take primacy over Plaintiffs' fact discovery, rather than taking place simultaneously – particularly given that the Plaintiffs have more expansive discovery capabilities,

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[12] https://www.cct.org/our-community/profile/michael-ogrady/.

[13] https://www.archchicago.org/news-release/-/article/2020/04/23/cardinal-blase-j-cupich-announces-the-appointment-of-sally-blount.

[14] https://www.kellogg.northwestern.edu/faculty/directory/blount_sally/.

including the ability to conduct third-party discovery and obtain sworn testimony. In *Sonkin v. Barker*, 670 F. Supp. 249, 255 (S.D. Ind. 1987), the court concluded that allowing fact discovery—which would create a full record of documents and sworn deposition testimony—to continue "could benefit the committee in conducting its investigation." Under similar circumstances in *Carlton*, the court explained that plaintiffs' "discovery program will have meaning" because it targeted important evidence and ordered plaintiffs to continue with merits litigation simultaneously with the SLC investigation. 1996 WL 33167168, at *10. The Court should reach the same result here.

Further, staying this action while O'Grady conducts an investigation would substantially prejudice Plaintiffs. A stay would require an extension of the current pre-trial schedule and require a hiatus in the midst of Plaintiffs' discovery efforts which have already commenced and are well underway. A stay will also affect witness recollections as more time passes since the events in question.

D. THE ONE-MEMBER SLC'S OWN REPRESENTATIONS TO THE COURT SUPPORT THAT HE HAS PREJUDGED PLAINTIFFS' CLAIMS FOR REASONS UNRELATED TO THEIR MERITS

In determining whether to authorize litigation against fellow directors, an SLC is required to assess "the merits of the issue rather than being governed by extraneous considerations or influences." *Kaplan v. Wyatt*, 499 A.2d 1184, 1189 (Del. 1985). An SLC must be capable of conducting a "good faith investigation" when assessing the merits of a plaintiff's derivative action. *London*, 2010 WL 877528, at *17; *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 948 (Del. Ch. 2003). When an investigation is biased such that it "does not inspire confidence that the SLC conducted a good faith investigation," the court can reject the SLC's findings and recommendations about whether the action may proceed. *London*, 2010 WL 877528, at *20.

Here, Abbott—acting through the Board, including O'Grady—has already stated its position that this case should not proceed, including for reasons unrelated to its merits. In moving to dismiss this action, Abbott argued that "Plaintiffs are not acting in Abbott's shareholders' interests," and the

Court should dismiss this action even if there are actionable claims because there is factual overlap with consumer litigation against the Company, and the facts that may be established in this case would be bad for the Company's litigation position in those other pending cases. *See* Defs. MTD Br. at 37-38 & n.17. The Court swiftly rejected this argument, explaining that such a position "would in effect nullify all derivative litigation because the directors could always argue that allowing shareholders to bring a derivative litigation that could uncover illicit conduct is not in the best interest of the company." ECF No. 142 at 30.

Now, the Director Defendants—who comprise 11 of the 12 members of the Board—have sought to halt Plaintiffs' prosecution of this action by forming the SLC. Motion at 1-2. The Director Defendants appointed O'Grady, who has substantial financial and personal ties to those facing liability here, to purportedly "investigate the claims in this Action and determine whether pursuit of such claims is in the best interests of the Company." *Id.* O'Grady was a member of the Board when Abbott, which the Board controls, expressed its improper views towards derivative litigation generally and this action specifically on the motion to dismiss. *Compare* ECF No. 112 (MTD memorandum filed on December 18, 2023) *with* n.5 (O'Grady beginning Board service following the April 28, 2023 annual meeting per Abbott's Annual Proxy Statement). Although Abbott and the Board are permitted to form an SLC, the Court should not stay this litigation to await any similarly flawed or slanted conclusions.

IV. CONCLUSION

For the reasons set forth herein, the Court should deny the Motion to Stay.

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