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

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

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

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The Special Litigation Committee (the "SLC") of the Board of Directors (the "Board") of nominal defendant Abbott Laboratories ("Abbott" or the "Company"), respectfully submits this Reply Memorandum of Law in Support of its Motion to Stay all proceedings in the above-captioned derivative action (the "Action").

PRELIMINARY STATEMENT

Following the Court's decision on Defendants' motion to dismiss, the Board formed an independent SLC and delegated its authority over the two remaining claims to the SLC for the purpose of investigation on behalf of the Company, as authorized under Illinois law. Control over this litigation now lies squarely with the SLC, rather than the derivative plaintiffs. The SLC seeks a six-month stay of this litigation in order to perform the investigation Abbott's Board duly appointed it to undertake. Since filing its motion for a stay, the SLC has diligently continued its investigation, gaining access to voluminous documents from Abbott, reviewing and organizing the same, seeking a meeting with Lead Plaintiffs ("Plaintiffs"), and identifying witnesses to interview, among other things.

Plaintiffs oppose the requested stay. Plaintiffs do not contest that under Illinois (or Delaware) law, SLCs are regularly granted stays to perform their work. Plaintiffs do not argue that the Abbott SLC failed to act diligently to seek a stay after being created and retaining counsel. Nor do they challenge that—if a stay is granted—a six-month stay is

an appropriate duration, at least initially, given the scope of the SLC's work. Finally, Plaintiffs do not identify any specific prejudice they would suffer from the requested stay.

Plaintiffs' arguments against the stay fall into two general categories. First, they argue that the stay should be denied because Abbott should have investigated their claims earlier. Plaintiffs have acknowledged, however, that they did not tender any of their claims to the Board in a pre-suit demand. Rather, they brought suit in this court and argued that demand was excused. Defendants contested that argument, with the Court concluding demand was excused on only two claims. Case law recognizes that SLCs are often formed *after* a court concludes that demand is excused because that decision identifies which claims should be referred to an SLC—*and* that SLCs should be given a reasonable stay of proceedings to conduct their work. Consistent with this case law, the Board formed its SLC after this Court's decision on the motion to dismiss, and the SLC promptly sought a stay. Plaintiffs do not claim that document discovery has been exchanged at this point, or that depositions are occurring. A stay is timely and appropriate.

Second, Plaintiffs argue that a stay is not appropriate because the SLC's member, Michael O'Grady, has business and personal connections to certain of the Individual Defendants and has prejudged the outcome of the SLC's investigation. These arguments are premature and unsupported. Before the SLC has had the opportunity to do its work, Plaintiffs seek to cast doubt on its objectivity and conclusions. And they do so based on

attenuated inferences apparently gleaned largely from information Plaintiffs found on the internet. Attenuated inferences are no substitute for record facts, and here there are no established or undisputed record facts that demonstrate an inability of the SLC to carry out its work. Courts regularly reject these types of preemptive challenges to SLCs in favor of granting the stay and assessing such questions if and when they are raised at the conclusion of the SLC's work and on an established record. *See, e.g.*, *In re InfoUSA, Inc. S'holders Litig.*, No. CIV.A. 1956-CC, 2008 WL 762482, at *3 (Del. Ch. Mar. 17, 2008) ("Because at present there are no 'undisputed facts [that] will make it impossible for the court later to accept a decision of the special litigation committee to terminate the derivative litigation,' the Court will defer its evaluation of the SLC's independence until the time the SLC moves to dismiss-should it ever do so." (internal citations omitted)).

This case should move forward in accordance with the "general rule . . . that a stay must be granted when a special litigation committee is formed to consider whether derivative actions should be prosecuted." *Biondi v. Scrushy*, 820 A.2d 1148, 1163 (Del. Ch. 2003).

ARGUMENT

I. The SLC Moved Diligently to Seek a Stay and Is Actively Conducting Its Investigation.

Plaintiffs initially argue that the Court should not grant the motion to stay because of the passage of time from the acts alleged in the complaint to when the SLC was formed and sought a stay. Opp. at 6. They suggest that the Board should have taken the initiative

to investigate their claims upon the filing of this suit (or earlier). This argument ignores the critical distinction between pre-suit demand, on the one hand, and demand being excused in litigation, on the other hand. Here, Plaintiffs elected not to tender their claims to Abbott pre-suit for investigation. *See* Consol. Am. Compl., ECF No. 91, ¶ 410. Rather, they brought suit and claimed that demand was excused.

When plaintiffs seek to excuse demand through litigation, courts recognize that it is appropriate for companies to await the decision as to whether demand is excused and then form a SLC as to those claims for which demand is excused. *See, e.g.*, *Diep on behalf of El Pollo Loco Holdings, Inc. v. Trimaran Pollo Partners, L.L.C.*, 280 A.3d 133, 151 (Del. 2022) ("Unlike a demand review committee formed in response to a stockholder demand, the special litigation committee typically comes into existence after demand is excused."); *In re Baker Hughes, a GE Co., Derivative Litig.*, No. 2019-0201-LWW, 2023 WL 2967780, at *1 (Del. Ch. Apr. 17, 2023), *aff'd sub nom. In re Hughes*, 312 A.3d 1154 (Del. 2024) ("In October 2019, the board of directors of Baker Hughes delegated its authority over the derivative claims in this action to a special litigation committee. It did so after the court made a pleadings stage determination that demand was futile."); *Kahn v. Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d 831, 835 (Del. 2011) (describing SLC's formation following the court's denial of the defendants' motion to dismiss). Here, the SLC was promptly constituted at an Abbott Board meeting occurring after the Court ruled that demand was excused as to Claims II and III.

The SLC here was promptly formed and promptly sought a stay after retaining counsel. Plaintiffs are correct that the Court must ultimately decide whether to grant the stay. But the circumstances in which courts have denied stay requests by an SLC are narrow and different from the facts here. *Grafman v. Century Broad. Corp*., for example, a case cited in the Opposition, ECF No. 203, stated that a stay may be denied where it is a "mere artifice for delay." 743 F. Supp. 544, 548 (N.D. Ill. 1990). Here, Plaintiffs do not even argue that the stay request is a mere artifice for delay. As stated in the SLC's Motion for Stay and the accompanying affidavit, the SLC has been duly formed, has hired independent counsel, and has promptly begun its investigation.

Plaintiffs rely primarily and heavily on the Southern District of Ohio's decision in *FirstEnergy*. There, the court recognized that discovery generally should be stayed for an SLC investigation "in the absence of special circumstances." *Emps. Ret. Sys. of City of St. Louis v. Jones*, No. 2:20-CV-4813, 2021 WL 4894833, at *3 (S.D. Ohio Oct. 20, 2021) [hereinafter, *FirstEnergy*]. In *FirstEnergy*, the court found "numerous" special circumstances, none of which were individually dispositive but "in combination, they reveal that this is not the ordinary case in which the SLC should receive a stay." *Id.* Such combination of circumstances is not present here. The first circumstance the court discussed was the period of delay in establishing the SLC. But, unlike in this case, the company in *FirstEnergy* had initially attempted to investigate "under the auspices of an Independent Review Committee," which the court considered not to be "independent

and disinterested." *Id.* Here, Abbott awaited the Court's ruling on demand excuse, and then established its SLC with an independent and disinterested director. The second circumstance the *FirstEnergy* court identified was the period of prior stays preceding the SLC's request. The court identified that an eight-month stay had already occurred and that the additional six month stay sought by the SLC would be a mere artifice for delay. *Id.* at 4 (quoting *Grafman*). Here, while there was a prior stay mandated by the PSLRA, there is no claim by Plaintiffs that the SLC's request is a mere artifice for delay. The SLC was just created—appropriately—and is in the early stages of its investigation. The third circumstance on which the court relied was the fact that discovery was proceeding in various parallel cases, such that a stay in *FirstEnergy* would not achieve the result the SLC was seeking and that discovery proceeding would not impose any marginal hinderance on the SLC. *Id.* Here, by contrast, Plaintiffs do not identify any overlapping discovery proceeding in some other matter, and thus a stay here would achieve the result the SLC seeks. The *FirstEnergy* court concluded by reiterating that it was the "combination" of "all of these factors" that merited deviating from the usual rule of granting a stay. *Id.* In short, *FirstEnergy* does not diminish the appropriateness of stay under the circumstances present here.

Indeed, *FirstEnergy* recognized that courts regularly grant SLC stay requests, even when the SLC is formed after the court's decision on demand futility. *See also, e.g.*, Ord., Jun. 30, 2023, *Ontario Provincial Council of Carpenters' Pension Tr. Fund v. Walton*, 294 A.3d

65 (Del. Ch. 2023) (granting the SLC's motion to stay following the court's denial of defendants' motion to dismiss because "plaintiffs' arguments against a stay run contrary to settled precedent"); Ord., Jan. 17, 2018, *Diep on behalf of El Pollo Loco Holdings, Inc. v. Sather*, No. CV 12760-CM (Del. Ch. 2016) (granting the SLC's motion to stay ten months after the court denied the defendants' motion to dismiss); Ord., Feb. 14, 2020, *In re Clovis Oncology, Inc. Derivative Litig.*, No. 2017-0222-JRS (Del. Ch. 2017) (granting the SLC's motion to stay more than four months after the court denied the defendants' motion to dismiss); Ord., Jun. 24, 2018, *In re Oracle Corp. Derivative Litig.*, No. 2017-0337-SG (Del. Ch. 2017) (same).

Under *Grafman*, the relevant question is whether the SLC's stay request is a mere artifice for delay. Plaintiffs did not and could not advance that argument. The SLC promptly began its investigation after its creation and retention of counsel. To date, among other things, the SLC has collected and begun review of volumes of relevant materials. The SCL has engaged with the Company and with Plaintiffs to receive relevant information.[1] The SLC has begun scheduling some interviews, the first of which is expected to occur this week, with more to follow early next year.

II. Plaintiffs' Concerns Regarding the SLC's Objectivity Are Misplaced and Not a Basis for Rejecting a Stay.

[1] Plaintiffs have acknowledged receipt of the SLC's invitation—sent on November 20—soliciting Plaintiffs to have a meeting to discuss facts and legal theories but have thus far not agreed to meet nor provided any information.

Plaintiffs spend much of their Opposition arguing that the SLC lacks independence to investigate and decide the future of this action. Courts have repeatedly rejected such arguments as premature for the purpose of deciding whether to grant a motion to stay at the outset of the SLC's investigation. So long as "there are no 'undisputed facts [that] will make it impossible for the court later to accept a decision of the special litigation committee to terminate the derivative litigation,' the Court will defer its evaluation of the SLC's independence until the [t]ime the SLC moves to dismiss-should it ever do so." *In re InfoUSA, Inc. S'holders Litig.*, 2008 WL 762482, at *3 (internal citations omitted). No such undisputed facts exist here. There has been no discovery of the SLC or its work at this stage. Plaintiffs rely instead on attenuated inferences from materials they seemingly found on the internet, which are not and cannot be undisputed facts in the record of this case.

Plaintiffs rely heavily on *Biondi v. Scrushy*, 820 A.2d 1148, 1165 (Del. Ch. 2003). *Biondi*, however, presented "an odd confluence of unusual and highly troubling facts," where "based on the undisputed facts in the stay motion record, the committee's later decision to terminate the litigation *could not* command respect under *Zapata*." *Id.* (emphasis added). There, the SLC was not "fully empowered to act for the company without approval by the full board." *Id*. Unlike the Abbott Board's clear—and undisputed—delegation of full authority to the SLC here, the SLC's independence in

Biondi was facially deficient, such that it would be "impossible" for the court to accept the SLC's decision. *Compare* Ex. A, ECF No. 192-2, at 13–14, *with Biondi*, 820 A.2d at 1165.

Subsequent courts have rejected arguments about SLC independence at the motion to dismiss stage as "not appropriately considered at this time." *E.g.*, *In re InfoUSA, Inc. S'holders Litig.*, 2008 WL 762482 at *2 (deferring the decision on the SLC's independence until after it issued its report). Even in *Biondi*, the court emphasized that "judicial economy is served by permitting that issue to be addressed after the committee has issued its report, because the court may then consider questions of committee independence at the same time it examines the reasonableness of the bases for the committee's conclusion." *Biondi*, 820 A.2d at 1164. The court further explained, "if there is any litigable doubt about whether a special litigation committee will ultimately be found capable of independently issuing a report recommending the termination of derivative litigation that will command deference under *Zapata*, the *court should stay the litigation* for a reasonable period of time to permit the committee to finish its work." *Id.* (emphasis added).

There are no established facts in the record here that undermine Mr. O'Grady's independence, much less *conclusively foreclose* any possibility of the SLC's work later being found capable and deserving of deference. The operative Consolidated and Amended Verified Complaint, ECF No. 91—which itself constitutes allegations and not established facts nor evidence—does not mention Mr. O'Grady, and Plaintiffs have not

submitted with the Opposition any documentary evidence or sworn testimony in support of their stated concerns about Mr. O'Grady. The independence of the SLC is, if necessary, usually litigated following the release of the SLC's report because the report and subsequent briefing include a substantial factual record, which the parties and ultimately the Court can use to evaluate the SLC's independence. *See Moradi v. Adelson*, No. 2:11-CV-00490-MMD, 2012 WL 3687576, at *4 (D. Nev. Aug. 27, 2012) (rejecting Plaintiffs' challenge to the SLC's motion to stay, in one instance because "the typical course of action is to attack the independence of the SLC after the committee has issued its report"). No such record exists at this time, and, thus, the Court should wait to address any dispute over the independence of the SLC until factually ripe.

Even assuming the SLC's independence were appropriate to question as this stage, Plaintiffs' stated concerns fail to establish any disqualifying bias. Plaintiffs rely on attenuated inferences in the absence of established facts. For example, Plaintiffs claim that Mr. O'Grady, as the CEO and President of a financial services company holding client investments in other publicly traded corporations, would be so conflicted by these investment activities that he could not recommend pursuit of the Plaintiffs' claims against some Defendants. Plaintiffs claim Mr. O'Grady is a "dual fiduciary" who must maximize "the value of Northern Trust clients' investments" in companies where certain Defendants serve as directors or officers. Opp. at 10. But Plaintiffs' supposed evidence of this conflict is deficient. Plaintiffs fail to note that the SEC Form 13F they attach does not

specify the extent, if any, to which Northern Trust is responsible for the investment decisions resulting in the asserted independence impairing holdings reported therein, much less that Mr. O'Grady personally has investment discretion over any such securities. Further, there is no evidence in the record that a finding in this case as to an Individual Defendant would have a material impact, if any, on the securities of the other companies referenced, each of which has multi-member boards. *Cf. Kaplan v. Wyatt*, 484 A.2d 501, 513, 517 (Del. Ch. 1984), *aff'd*, 499 A.2d 1184 (Del. 1985) (holding an SLC was independent, despite having a member who was a significant shareholder and director of companies that had extensive business dealings with the company at issue); *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 822 (Del. Ch. 2005), *aff'd*, 906 A.2d 766 (Del. 2006) (rejecting the plaintiffs' "inference that because a former executive of a major corporation owns a small percentage of the corporation's outstanding shares and that corporation does business with a national bank, somehow that former executive could not act independently.").

Plaintiffs also raise shared religious affiliation and personal membership in certain clubs as potential personal connections. Again, these are not established, and are in any event not a basis for disqualification of the SLC's work. The *Biondi* court rejected the notion that a defendant's and an SLC member's shared affiliation with an organization is sufficient to deny a motion to stay. 820 A.2d at 1165 (denying plaintiffs' challenge to SLC independence because of his "service as Chairman of the National Football Foundation

and College Hall of Fame, Inc. alongside [Defendant], a fellow director and benefactor of that institution"). *See also Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1051–52 (Del. 2004) ("Mere allegations that [an SLC member and a defendant] move in the same business and social circles, or a characterization that they are close friends, is not enough to negate independence for demand excusal purposes."); *Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou*, No. 2019-0816-SG, 2023 WL 7986729, at *31–32 (Del. Ch. Nov. 17, 2023), *aff'd sub nom. Teamsters Loc. 443 Health Servs. & Ins. Plan v. Cencora, Inc.*, No. 5, 2024, 2024 WL 4249773 (Del. Sept. 20, 2024) (finding "service on the board of [a] golf club, in and of itself, insufficient to compromise [the SLC's] independence").

III. A Stay Would Respect the SLC's Substantive Role in the Litigation and Benefit the Proceedings by Ensuring the Most Efficient Use of Resources.

Plaintiffs claim that there is no benefit to a stay of discovery in the pendency of the SLC's investigation. Courts have disagreed both as a matter of judicial economy and because allowing Plaintiffs to continue discovery during the SLC's investigation subverts "the very justification for the creating of the litigation committee in the first place." *Abbey v. Computer & Commc'ns Tech. Corp.*, 457 A.2d 368, 375 (Del. Ch. 1983). *See also, e.g., In re InfoUSA, Inc. S'holders Litig.*, 2008 WL 762482, at *2 ("[T]his Court has routinely granted reasonable stays to allow SLCs to complete their investigations.").

Plaintiffs concede that allowing discovery to proceed here would "amount to simultaneous discovery of the same persons and materials by two separate sources, both allegedly acting on behalf of the corporation." *Abbey*, 457 A.2d at 375; Opp. at 13 ("[I]f 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."). The SLC's investigation serves little purpose "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." *Abbey*, 457 A.2d at 375. The discovery process is also a drain on the time and financial resources of the Defendants by having to respond to simultaneous and overlapping document requests and witness meetings (the Plaintiffs' and the SLC's) when *only* the SLC is authorized to investigate the claims and make the ultimate decision on behalf of the company whether to continue litigation.

Plaintiffs further argue that their ability to conduct nonparty discovery and compel sworn testimony provides them superior access to the discovery process. Even assuming that the SLC does not possess the power to conduct such discovery (which the SLC does not concede),[2] Plaintiffs continue to miss the purpose of the SLC's investigation, which "is not who could do the better job" in discovery, but rather whether the claims "brought

[2] *See, e.g., In re Oracle Corp. Derivative Litig.*, No. 2017-0337-SG, 2023 WL 3408772, at *16 (Del. Ch. May 12, 2023) (describing the court's lifting of the stay to "allow the SLC to seek non-party discovery").

on behalf of the corporation should be maintained when measured against the overall best interests of the corporation." *Abbey*, 457 A.2d at 375–76.

Lastly, there is no practical reason why a stay should not be granted. Plaintiffs have just begun discovery; whereas, the SLC has already collected volumes of documents relating to, as Plaintiffs suggest, infant formula production at the Sturgis plant, whistleblower complaints, FDA Form 483s and responses, and more. Plaintiffs admit that they would "presumably seek discovery similar" to the SLC. Opp. at 13. Thus, a stay of discovery would "avoid duplicative efforts to conserve limited judicial resources." *Harbor Fin. Partners v. Sunshine Mining & Ref. Co.*, No. 14159, 1996 WL 74728, at *2 (Del. Ch. Feb. 16, 1996). If the Court enters the stay, it can timely and appropriately allow the SLC to perform its work before the parties' expend resources on document productions in discovery or depositions. And while Plaintiffs oppose a stay *vel non*, they do not contest that if a stay is granted, six months is a reasonable duration to conduct the SLC's investigation, in light of complexity of matter.

IV. Plaintiffs Fail to Establish that the SLC Has Prejudged the Outcome of Its Investigation.

Plaintiffs argue that Mr. O'Grady has prejudged the outcome of the investigation due to one short section in a 41-page brief in support of the Motion to Dismiss filed at the time Mr. O'Grady was on the Abbott Board. There is no evidence in the record to support the Plaintiffs' concern that Mr. O'Grady was involved in any review or approval of the verbiage in the motion to dismiss with which they take issue. Delaware courts have

previously considered—and rejected—the argument "that the mere fact that [SLC members] sat on the board when the [company's] motion [to dismiss] was filed, standing alone, automatically disqualifies them." *El Pollo Loco*, 2021 WL 3236322, at *16 ("The prior motion to dismiss, therefore, does not create a material question of fact as to Floyd's or Lynton's independence."). The same attack on an SLC's independence was revived—and rejected—following the SLC's decision to terminate an action. *In re Carvana Co. S'holders Litig.*, No. 2020-0415-KSJM, 2024 WL 1300199, at *9–10 (Del. Ch. Mar. 27, 2024) (summarizing the facts of *El Pollo Loco*, where the SLC members "attended the board meeting and discussed the motion," and yet the court still found that it did not "create a disabling conflict"). Both *Carvana* and *El Pollo Loco* examined the independence of the SLC from a developed record—which does not yet exist here—yet still rejected the argument Plaintiffs make here from an *undeveloped* record.

CONCLUSION

For the foregoing reasons and for those reasons set forth in our Memorandum in Support, the Abbott SLC respectfully asks the Court to enter a six-month stay to allow the SLC to diligently pursue its investigation.

Dated: December 16, 2024

Respectfully submitted,

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