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

In re Abbott Laboratories Infant Formula Shareholder Derivative Litigation	Case No. 22 C 5513 District Judge Sunil R. Harjani
MATTHEW STEELE, derivatively on behalf of ABBOTT LABORATORIES, Plaintiff, vs. LORI J. RANDALL, *et al.*, Defendants, - and - ABBOTT LABORATORIES, Nominal Defendant.	Case No. 25 C 3669 District Judge Charles P. Kocoras

Plaintiff Matthew Steele's Response to Teamsters Pension Fund and SEPTA's Motion for Reassignment

In compliance with the Court's April 21, 2025 order, Plaintiff Matthew Steele, a shareholder of record of Nominal Defendant Abbott Laboratories ("Abbott" or the "Company"), respectfully submits this response to the "unopposed" motion of Plaintiffs International Brotherhood of Teamsters Local No. 710 Pension Fund ("Teamsters Pension Fund") and Southeastern Pennsylvania Transportation Authority ("SEPTA") to reassign the *Steele* action (Case No. 25 C 3669) to the calendar of the Honorable Sunil R. Harjani, who is presiding over the consolidated shareholder derivative action (Case No. 22 C 5513) (the "Demand-Futility Action") based on the theory that demand on Abbott's Board of Directors (the "Board") to prosecute this derivative litigation would be futile.

In contrast to the Demand-Futility Action, the *Steele* action (the "Demand-Made Action") relies on the theory that demand on the Board to prosecute this litigation has been made, but wrongfully refused. *See Steele* Compl. ¶¶ 212–224. As the Central District of Illinois recognized in *In re Caterpillar Inc.*, "'demand made' and 'demand futile' cases are 'categorically different.'" 2015 U.S. Dist. LEXIS 188995, at *7 (C.D. Ill. Sept. 21, 2015) (quoting *In re HP Derivative Litig.*, 2011 U.S. Dist. LEXIS 136174, at *13 (N.D. Cal. Nov. 28, 2011)). Consistent with *Caterpillar*'s rationale, Plaintiff Steele's Demand-Made Action must be allowed to proceed independently of, and separately from, the Demand-Futility Action, even though both actions arose from the same events leading up to and following Abbott's 2022 shutdown of its Sturgis, Michigan manufacturing facility, as well as its recall of contaminated infant formula. And, while the actions are related within the meaning of subsection (a) of Local Rule 40.4 and may be subject to reassignment under subsection (b), consolidation would be improper due to the "different threshold questions of law" regarding demand. *See Caterpillar*, 2015 U.S. Dist. LEXIS 188995, at *7 (refusing to consolidate a demand-made case with a demand-futility case).

A decision under Local Rule 40.4 is left to this Court's sound discretion and wise judicial administration. *See Clark v. Insurance Car Rentals, Inc.*, 42 F. Supp. 2d 846, 848 (N.D. Ill. 1999) ("[t]he decision of whether to reassign a case lies within the sound discretion of the trial court"). In deciding whether to reassign the Demand-Made Action, the Court should consider the fact that, as discussed below, Teamsters Pension Fund and SEPTA have made only a barebones showing for reassignment under subsection (b) of Local Rule 40.4 (especially with respect to paragraphs (b)(3) and (b)(4)). Plaintiff Steele explains his position as follows:

I. Pleading Conflicting Demand Theories, the Demand-Made Action and the Demand-Futility Action Are "Categorically Different"

1. As this Court recognized in its August 7, 2024 order, the demand requirement — founded on "'the basic principle of corporate governance'" — is a substantive element in a shareholder derivative action. Dkt. No. 142 at 6–7 (quoting *In re Abbott Labs. Derivative S'holders Litig.*, 325 F.3d 795, 803 (7th Cir. 2003)).[1]

2. To establish the demand requirement, a shareholder plaintiff may rely on two alternative theories by demonstrating that (1) "'the corporation itself had refused to proceed after [a] suitable demand'"; or (2) demand was "'excused by extraordinary conditions.'" *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 (1991) (quotation marks omitted). These two theories are conflicting and irreconcilable because "[b]y electing to make a demand, a shareholder plaintiff tacitly concedes the independence of a majority of the board to respond." *Spiegel v. Buntrock*, 571 A.2d 767, 777 (Del. 1990).

3. In light of these irreconcilable differences, courts have refused to consolidate derivative actions pleading a demand-made theory with related actions pleading a demand-futility theory, in order to avoid confusion over and complication of the threshold issue of demand. *E.g.*, *Caterpillar*, 2015 U.S. Dist. LEXIS 188995, at **6–7; *HP*, 2011 U.S. Dist. LEXIS 136174, at **14–15; *cf. Wells v. Smith*, 2014 U.S. Dist. LEXIS 109693, at **9–10 (D. Colo. Aug. 7, 2014) (refusing to direct the filing of a consolidated complaint and deferring decision on whether to hold "a joint trial or separate trials").

[1] A shareholder plaintiff bears the burden of satisfying the demand requirement at all stages, including pleading, summary judgment, and trial. *See In re Franklin Wireless Corp. Derivative Litig.*, 2024 U.S. Dist. LEXIS 47516, at *13 (S.D. Cal. Mar. 18, 2024) (summary judgment); *Good v. Getty Oil Co.*, 518 A.2d 973, 974 (Del. Ch. 1986) (rejecting "the assumption that the only means of resolving the issue of demand futility is through a motion to dismiss").

II. The Demand-Made Action Raises Issues Regarding the Formation of the SLC That Are Absent in the Demand-Futility Action

4. As this Court noted in its February 14, 2025 order imposing a partial stay of the Demand-Futility Action, Abbott's Board appointed Michael O'Grady as the special litigation committee ("SLC") "to investigate the [underlying] claims, prepare a report, and take other such actions in the best interests of the Company and its shareholders." Dkt. No. 223 at 2. Allowing the SLC eight months (until May 19, 2025) to complete its investigation and report, the Court cited Teamsters Pension Fund and SEPTA's failure to "raise[] ... egregious evidence to argue that O'Grady lacks independence[.]" *Id*. at 6.

5. Plaintiff Steele raises serious issues regarding the SLC's formation. *See Steele* Compl. ¶¶ 214–218. Unlike the Delaware General Corporation Law,[2] the Business Corporation Act of Illinois — Abbott's state of incorporation — contains no provision authorizing the formation of a committee that has *plenary* authority to investigate alleged derivative claims. While Section 5/8.40 authorizes the formation of board committees, such committees lack *plenary* authority or independence from the board because, by law, their "members shall serve at the pleasure of the board." 805 ILL. COMP. STAT. 5/8.40(a); *see also id.* 5/8.05(a) ("each corporation shall have a board of directors and the business and affairs of the corporation shall be managed by or under the direction of the board of directors").

6. Likewise, Article IV, Section 1 of Abbott's Bylaws requires that "committee ... members ... serve at the pleasure of the Board of Directors." In fact, Abbott's Bylaws (Article IV, Section 3) permit only the Board's "Executive Committee" — not a SLC — to exercise plenary authority on behalf of the Board. Because neither Illinois statutes nor

[2] 8 DEL. CODE § 141(c).

Abbott's Bylaws authorize the formation of an independent special litigation committee with plenary authority to investigate and prosecute derivative claims, Abbott's SLC is improperly constituted. *See Steele* Compl. ¶¶ 214–218.

7. These issues regarding the defective formation of the SLC have not been raised in the Demand-Futility Action.

III. Teamsters Pension Fund and SEPTA Have Made Only a Barebones Showing of the "Conditions for Reassignment" Under Local Rule 40.4

8. Under subsection (b) of Local Rule 40.4, reassignment is permitted only if four "[c]onditions for [r]eassignment" are satisfied:

> **(b) Conditions for Reassignment.** A case may be reassigned to the calendar of another judge if it is found to be related to an earlier-numbered case assigned to that judge and *each of the following criteria is met*:
>
> (1) both cases are pending in this Court;
>
> (2) the handling of both cases by the same judge is likely to result in a substantial saving of judicial time and effort;
>
> (3) *the earlier case has not progressed to the point where designating a later filed case as related would be likely to delay the proceedings in the earlier case substantially*; and
>
> (4) *the cases are susceptible of disposition in a single proceeding*.

N.D. ILL. LR 40.4(b) (emphases added).

9. Failure to make a sufficient showing that all four conditions are satisfied is fatal to a motion for reassignment. *See Clark*, 42 F. Supp. 2d at 848 (refusing reassignment for failure to satisfy paragraphs (b)(2) and (b)(4)).

A. The Two Actions Are in Different Stages

10. Teamsters Pension Fund and SEPTA gloss over the fact that, while their Demand-Futility Action has advanced deep into the discovery stage (for eight months), Plaintiff Steele's Demand-Made Action remains in its infancy.

11. Courts in this District have declined reassignment where the related cases were in different stages. *See, e.g.*, *Sunstar, Inc. v. Alberto-Culver Co.*, 2003 U.S. Dist. LEXIS 13492, at *8 (N.D. Ill. July 31, 2003) (Guzman, J.) (refusing reassignment of a related case that was "at the pleadings stage" because the earlier-filed cases have progressed past the discovery stage); *Research Res., Inc. v. Dawn Food Prods.*, 2001 U.S. Dist. LEXIS 25326, at *28 (N.D. Ill. Oct. 9, 2001) (Lefkow, J.) (refusing reassignment because "an answer has already been filed [in the related case] and reassigning it to this court would delay that case").

B. The Demand-Made Action and the Demand-Futility Action Plead Conflicting Legal Theories with Respect to Demand and Present Serious Issues for Satisfying Paragraph (b)(4)'s Condition

12. In light of the "categorical differen[ce]" between the Demand-Made Action and Demand-Futility Action, serious doubts exist as to whether these actions are "susceptible of disposition in a single proceeding." *See* N.D. ILL. LR 40.4(b)(4); *see also Clark*, 42 F. Supp. 2d at 849 (denying reassignment for failure to satisfy paragraph (b)(4)). In fact, under similar circumstances, the courts have allowed demand-made actions to proceed in separate proceedings. For example, the court in *Caterpillar* and the court in *HP* refused to consolidate the proceedings between the demand-made actions and demand-futility actions. *See Caterpillar*, 2015 U.S. Dist. LEXIS 188995, at **6–7; *see also HP*, 2011 U.S. Dist. LEXIS 136174, at **14–15. And the court in *Wells*, while allowing pretrial proceedings to be consolidated, refused to consolidate the separate complaints and left open the question of whether to conduct "separate trials." *See* 2014 U.S. Dist. LEXIS 109693, at **9–10.

13. In seeking reassignment, Teamsters Pension Fund and SEPTA have done little more than asserting — *in a conclusory fashion* — that subsection (b)'s conditions

are met. *See* Dkt. No. 229 at 7–8. This is especially so with respect to paragraph (b)(4)'s condition — that "the cases are susceptible of disposition in a single proceeding." *See id.* at 8 (citing N.D. ILL. LR 40.4(b)(4) and *Portis v. McKinney*, 2021 U.S. Dist. LEXIS 171091 (N.D. Ill. Sept. 9, 2021)).

14. Where, as here, movants for reassignment provide only conclusory assertions or fail to address paragraph (b)(4)'s "single proceeding" condition, courts in this District have consistently denied reassignment. *See Davis v. Quebecor World*, 2002 U.S. Dist. LEXIS 267, at *3 (N.D. Ill. Jan. 10, 2002) (Conlon, J.) ("[b]ecause [defendant] fails to comply with Local Rule 40.4(c), the court may deny [defendants'] motion for reassignment on that basis alone").[3]

15. Moreover, multiple courts in this District, including this Court, have determined that reassignment is improper based upon the movants' inability to satisfy paragraph (b)(4)'s "single proceeding" condition. *See Republic Techs. (NA), LLC v. BBK Tobacco & Foods, LLP*, 2020 U.S. Dist. LEXIS 6236, at *18 (N.D. Ill. Jan. 14, 2020) (Harjani, M.J.) ("the separate ... action and this one would not be 'susceptible of disposition in a single proceeding'").[4]

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[3] *See also, e.g., Mach. Movers, Riggers & Mach. Erectors, Local 136 Defined Contribution Ret. Fund v. Joseph/Anthony, Inc.*, 2004 U.S. Dist. LEXIS 13631, at *9 (N.D. Ill. July 15, 2004) (Aspen, J.); *Daniels v. Pipefitters' Ass'n Local Union No. 597*, 174 F.R.D. 408, 412 (N.D. Ill. 1997) (Alesia, J.).

[4] *See also, e.g., Brieger v. Tellabs, Inc.*, 434 F. Supp. 2d 567, 569 (N.D. Ill. 2006) (Kennelly, J.); *In re Broiler Chicken Antitrust Litig.*, 2023 U.S. Dist. LEXIS 155271, at *50 (N.D. Ill. Apr. 13, 2023) (Durkin, J.); *Olean Wholesale Grocery Coop. v. Agri Stats, Inc.*, 2020 U.S. Dist. LEXIS 229640, at *5 (N.D. Ill. Nov. 3, 2020) (Kendall, J.); *Mitchell v. City of Chicago*, 2012 U.S. Dist. LEXIS 89249, at *5 (N.D. Ill. June 28, 2012) (Dow, J.); *Rosati's Franchise Sys. v. Rosati*, 2006 U.S. Dist. LEXIS 1837, at *32 (N.D. Ill. Jan. 17, 2006) (Grady, J.); *Donahue v. Elgin Riverboat Resort*, 2004 U.S. Dist. LEXIS 19362, at *9 (N.D. Ill. Sept. 27, 2004) (Guzman, J.); *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 2003 U.S. Dist. LEXIS 7466, at **10-11 (N.D. Ill. May 2, 2003) (Guzman, J.).

16. In light of ample case law strictly enforcing the requirement of paragraph (b)(4) of Local Rule 40.4, the facts here present a close call. On the one hand, efficiency and judicial economy can be gained from reassignment in light of the overlapping events and transactions giving rise to the two actions. *See* N.D. ILL. LR 40.4(b)(2). On the other hand, paragraph (b)(4)'s "single proceeding" requirement is difficult to satisfy here because the threshold demand issue requires separate analysis of two conflicting, irreconcilable theories. *But see Urban 8 Fox Lake Corp. v. Nationwide Affordable Hous. Fund 4, LLC*, 2019 U.S. Dist. LEXIS 101145, at *11 (N.D. Ill. June 18, 2019) (focusing on the word "susceptible" and requiring only that "the two actions are *susceptible* to be disposed of together, *not that they will be*") (emphases added).

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Accordingly, Plaintiff Steele believes that the requirements of Local Rule 40.4(b)(1) are satisfied, but that Teamsters Pension Fund and SEPTA have not sufficiently demonstrated that the requirements of Local Rule 40.4(b)(3) and (b)(4) are satisfied. The Court should exercise its sound discretion to determine whether the requirements of the remaining condition under Local Rule 40.4(b)(2) are satisfied, in light of the need to "secure the just, speedy, and inexpensive determination of every action[,]" FED. R. CIV. P. 1, and in keeping with this District's general policy of assigning cases by lot. *See Brieger*, 434 F. Supp. 2d at 570 ("[t]he fact that there is a good deal of common discovery in the cases would not ... call for departing from the norm in this District — assignment of cases by lot").

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Respectfully submitted,

PLAINTIFF MATTHEW STEELE

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