

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-5513

District Judge Manish S. Shah

Magistrate Judge Sheila M. Finnegan

Plaintiff Matthew Steele's Motion for an Order Requiring Lead Plaintiffs to Add Mr. Steele to the Consolidated Amended Complaint or, Alternatively, for Relief From the Order of Consolidation

I. PRELIMINARY STATEMENT

By Order dated September 18, 2023, the Court ordered the related shareholder derivative actions consolidated, appointed two lead plaintiffs and two co-lead counsel, and ordered that a *consolidated complaint* be filed by October 16, 2023. The Lead Plaintiffs (International Brotherhood of Teamsters Local No. 710 Pension Fund and Southeastern Pennsylvania Transportation Authority) have violated the Court's September 18, 2023 order. Rather than filing a consolidated complaint that contained all the plaintiffs, they merely filed an amended complaint in their own action. *See* Dkt. No. 91. Though titled a "Consolidated Amended" complaint, the document only contains the two lead plaintiffs as plaintiffs, effectively dismissing *every single plaintiff except themselves* without the other plaintiffs' consent or approval. The document that lead plaintiffs filed is thus just an *amended complaint* in lead plaintiffs' own action, not a consolidated complaint. With the ink on the Court's leadership order barely dry, the lead plaintiffs' attorneys have already abused their powers and acted contrary to the purely procedural contours of F.R.C.P. 42(a).

Co-Lead Counsel — Cohen Milstein and Scott + Scott — did not even consult with the other plaintiffs or send them a draft of the consolidated complaint before filing it. When Plaintiff Steele, having heard nothing from Co-Lead Counsel a week and a half before the consolidated complaint was due, reached out to Co-Lead Counsel to discuss the filing deadline, Co-Lead Counsel stated that they had made no efforts to reach out to any other plaintiffs. *See* Declaration of Francis A. Bottini, Jr. in Support of Plaintiff Steele's Motion for an Order Requiring Lead Plaintiffs to Add Mr. Steele to the Consolidated Amended Complaint or, Alternatively, for Relief From the Order of Consolidation ("Bottini Decl."), ¶6. Plaintiff Steele's counsel indicated to Co-Lead Counsel that Plaintiff Steele desired to be included in the Consolidated Amended Complaint. Initially, Co-Lead Counsel indicated they would do so. *Id.* at ¶¶5-6. But just one business day

before the CAC was due to be filed, lead plaintiffs abruptly changed their position and stated they would not include Mr. Steele. *Id.* at ¶7. As indicated below, Mr. Steele is a plaintiff in these related proceedings and has a right to be included in the CAC. The United States Supreme Court has explained, “under Rule 42(a) ‘one or many or all of the phases of the several actions may be merged. But merger is never so complete in consolidation as to deprive any party of any substantial rights which he may have possessed had the actions proceeded separately.’” *Hall v. Hall*, 138 S. Ct. 1118, 1130 (2018).

By wrongfully refusing to include Mr. Steele or any of the other plaintiffs in the CAC, Lead Plaintiffs and Co-Lead Counsel have acted improperly and are attempting to abuse the procedural consolidation mechanism. Mr. Steele has not consented to dismissal of his action, defendants have filed no motion to dismiss, and Lead Plaintiffs’ failure to include Mr. Steele or any other plaintiff in the CAC would, if left unrectified, amount to a *de facto* dismissal of Mr. Steele’s and the other plaintiffs’ claims. That is not allowed, since consolidation may not be used to “deprive any party of any substantial rights which he may have possessed had the actions proceeded separately.” *Hall*, 138 S. Ct. at 1130.

Co-Lead Counsel’s conduct also runs afoul of the duties and responsibilities of lead counsel in complex cases. “Counsel in leadership positions should keep the other attorneys in the group advised of the progress of the litigation and consult them about decisions affecting their clients.” *See* MANUAL FOR COMPLEX LITIGATION (4th), Section 10.222, at p. 34. That did not happen here.

The Court should therefore order Lead Plaintiffs to file a revised CAC that includes Mr. Steele as a plaintiff. Alternatively, the Court should amend its consolidation order to state that Mr. Steele’s action shall proceed separately from Lead Plaintiffs’ amended complaint.

II. ARGUMENT

A. **Lead Plaintiffs Violated the Court’s Order by Failing to File a Consolidated Complaint, and Have No Right or Authority to Use the Purely Procedural Mechanism of Consolidation to Dismiss Every Single Plaintiff Except Themselves from the Action by Refusing to Include Them in the So-Called “Consolidated Amended Complaint.”**

As noted *supra*, on September 18, 2023 the Court ordered the related shareholder derivative actions consolidated, appointed two lead plaintiffs and two co-lead counsel, and ordered that a *consolidated complaint* be filed by October 16, 2023. Dkt. No. 86. Lead Plaintiffs failed to do so, instead merely filing an amended complaint in their own action. Dkt. No. 91. The so-called “Consolidated Amended Complaint” is not a consolidated complaint because it does not include any of the *six other plaintiffs* as parties. Those other plaintiffs excluded by Lead Counsel from the CAC are Leon Martin, Ilene Lippman, Larry Huetteman, Matthew Steele, David Hamilton, and Thomas P. DiNapoli, Comptroller of the State of New York as Administrative Head of the New York State and Local Retirement System. The two Lead Plaintiffs (International Brotherhood of Teamsters Local No. 710 Pension Fund and Southeastern Pennsylvania Transportation Authority), who filed their complaint together, *are the only two plaintiffs in the amended complaint*. See Dkt. No. 91 at ¶¶24-25. Thus, Lead Plaintiffs failed to comply with the Court’s September 18, 2023 Order because they failed to file a consolidated complaint.

B. **Lead Plaintiffs Wrongfully Excluded Plaintiff Steele From the Consolidated Complaint and Did Not Even Consult With the Other Plaintiffs Before Filing the Consolidated Complaint.**

Co-Lead Counsel never contacted Plaintiff Steele about the filing of the consolidated complaint. As a result, approximately a week and a half before the CAC was due, Plaintiff Steele reached out to Carol Gilden of Cohen Milstein to discuss the CAC. That call occurred on October 4, 2023. Bottini Decl., ¶3. During that initial call, Mr. Steele requested to be included in the Consolidated Amended Complaint. *Id.* Mr. Steele explained that he had recently been successful

in defeating Abbott's motion to dismiss in his Lake County, Illinois *mandamus* action, where he was seeking a broader scope of document production than what Lead Plaintiffs had obtained. Mr. Steele's counsel also sent a copy of that favorable ruling to Ms. Gilden. *See* Bottini Decl., ¶4 and Ex. A. On that call, Ms. Gilden expressed willingness to include Mr. Steele in the CAC and agreed that Mr. Steele's efforts in the Lake County action could provide a significant benefit to the case by providing the opportunity to obtain a broader scope of documents than what other stockholders had obtained. Bottini Decl., ¶5. Mr. Steele later had a call with both Ms. Gilden and Mr. Johnson on or about October 10, 2023, during which the same topic was discussed and both agreed that they were in favor of adding Mr. Steele to the CAC. Mr. Steele's counsel also inquired as to whether Co-Lead Counsel intended to add the other plaintiffs. Ms. Gilden and Mr. Johnson responded that they had not spoken to the other plaintiffs or asked them if they wanted to be included in the CAC. Bottini Decl., ¶6.

But just one business day before the CAC was due to be filed, on October 13, 2023, Co-Lead Counsel abruptly changed their position and stated they would not include Mr. Steele and also did not plan on including any of the other plaintiffs. *Id.* at ¶7. In other words, the Lead Plaintiffs, both of whom filed one complaint together, simply intended to amend their own complaint rather than filing a consolidated complaint. Mr. Steele objected, but Co-Lead Counsel disregarded Mr. Steele. The only justification offered by Co-Lead Counsel was that they did not believe Mr. Steele could verify the CAC unless he had full access to the "inspection demand" documents Lead Plaintiffs had obtained. During the lead counsel proceedings, lead plaintiffs represented to the Court that these documents would be a benefit to all plaintiffs in the case. After being appointed lead plaintiffs, however, they took the position that all other plaintiffs should be shut out of any involvement in the case and that only they could have access to the documents or

be included in the operative pleading.

Mr. Steele offered to sign and be bound by the same confidentiality order that the Lead Plaintiffs had signed. Bottini Decl., ¶7. Notwithstanding such offer by Mr. Steele, Lead Plaintiffs objected to Mr. Steele reviewing such documents. *Id.* Mr. Steele’s counsel responded, indicating that if Lead Plaintiffs or Defendants objected to Mr. Steele reviewing the documents themselves or an unredacted version of the complaint, then Co-Lead Counsel could send him a *public, redacted version* of the CAC and Mr. Steele would provide a verification to such. Bottini Decl., ¶8. Even after making this concession, however, Ms. Gilden and Mr. Johnson refused to send Mr. Steele or his counsel any draft of the CAC and stated they would not include him or any other plaintiff in the CAC. Bottini Decl., ¶9.

Co-Lead Counsel’s purported rationale for not including Mr. Steele in the CAC is baseless. Parties always have the right to access the pleadings in a case.¹ In addition, Mr. Steele offered to review and provide a verification to a redacted version of the CAC that did not contain information from the “inspection demand” documents. Lead Plaintiffs refused. In addition, Lead Plaintiffs’ articulated justification holds no water because, in addition to wrongfully omitting Mr. Steele from the CAC, Lead Plaintiffs also excluded every other plaintiff from the CAC, including those plaintiffs who had done “inspection demands” themselves, signed confidentiality orders, and undeniably had a right to see the full unredacted draft complaint. For example, Plaintiffs Hamilton and the New York State and Local Retirement System had both received confidential documents in response to their own inspection demands, yet both of them were also excluded from the CAC. This fact amply demonstrates that Lead Plaintiffs’ purported rationale for excluding Mr. Steele

¹ Tellingly, the Individual Defendants, who never requested or obtained the allegedly confidential documents, were served with an unredacted copy of the CAC, despite never signing a copy of the confidentiality order.

from the CAC was and is pure pretext.

Lead Plaintiffs and their counsel have taken action that is fundamentally inconsistent with the purely procedural aspects of consolidation. Mr. Steele is a plaintiff in these related proceedings and has a right to be included in the CAC, as do the other plaintiffs. The United States Supreme Court has explained, under Rule 42(a) “one or many or all of the phases of the several actions may be merged. But merger is never so complete in consolidation as to deprive any party of any substantial rights which he may have possessed had the actions proceeded separately.” *Hall*, 138 S. Ct. at 1130.

C. The Court Should Order Lead Plaintiffs to File a New Consolidated Complaint That Includes Mr. Steele and the Other Plaintiffs.

The record is clear: Lead Counsel wrongfully excluded *all other plaintiffs* from the operative pleading. Dkt. No. 91. Lead Counsel are acting in a manner fundamentally inconsistent with their fiduciary duties and leadership roles. The appointment of lead counsel is designed to provide experienced counsel who will work cooperatively with all plaintiffs’ counsel, foster an inclusive environment, and make assignments among counsel so as to avoid duplication of effort and expense. It is not a fiat for counsel to exclude all other plaintiffs and counsel from the action. “Counsel in leadership positions should keep the other attorneys in the group advised of the progress of the litigation and consult them about decisions affecting their clients.” *See* MANUAL FOR COMPLEX LITIGATION (4th), Section 10.222, at p. 34. That did not happen here. As a result, the Court should order Lead Plaintiffs and Co-Lead Counsel to file a corrected, inclusive CAC after conferring with all other plaintiffs’ counsel.

D. Alternatively, the Court Should Provide Relief From the Consolidation Order and Allow Mr. Steele’s Complaint to Proceed on a Separate Track.

If for any reason the Court declines to order the Lead Plaintiffs to file a corrected CAC, then the Court should grant other relief. Consolidation may not be used to prejudice the rights of

any party or “deprive any party of any substantial rights which he may have possessed had the actions proceeded separately.” *Halczenko v. Ascension Health, Inc.*, 2023 U.S. Dist. LEXIS 88734, at *11 (S.D. Ind. May 19, 2023) (quoting *Hall*, 138 S. Ct. at 1130); *see also Midwest Community Council, Inc. v. Chicago Park Dist.*, 98 F.R.D. 491, 499 (N.D. Ill. 1983) (“[C]onsolidation does not merge the two suits into a single cause or change the rights of the parties, or make those who are parties in one suit parties in another.”). If Plaintiff believes that his substantive rights will be prejudiced due to consolidation, he has the right to move to separate his case from the consolidated action. *See Magnavox Co. v. APF Elecs., Inc.*, 496 F. Supp. 29, 32 (N.D. Ill. 1980). Plaintiff Steele believes that the most expedient remedy to Lead Plaintiffs’ wrongful refusal to include the other plaintiffs in the CAC is for the Court to order Lead Plaintiffs to file a corrected CAC that includes the other plaintiffs, including an admonition that Lead Counsel shall first consult with counsel for the other plaintiffs and allow them input into the content of the CAC. Alternatively, the Court should reconsider the leadership order.

Should the Court refuse to do so for any reason, then Mr. Steele’s rights would be prejudiced due to his exclusion from the operative pleading. The rights of the parties remain unaffected by the procedural device of consolidation. One of the most fundamental of those rights is the right to maintain one’s action as a plaintiff. Denying that right would be tantamount to dismissal of Mr. Steele’s action. Therefore, if the Court declines to order Lead Plaintiffs to file a corrected CAC, then the Court should modify the consolidation order to allow Mr. Steele to maintain his action separately from Lead Plaintiffs’ action pursuant to F.R.C.P. 42(b), or grant such other relief as is just and proper.

III. CONCLUSION

For the reasons stated herein, Plaintiff Steele respectfully requests that the Court issue an order requiring Lead Plaintiffs to file a corrected version of the CAC that includes Mr. Steele and any other plaintiff who wishes to be included in the CAC. Alternatively, the Court should reconsider the leadership order or modify the consolidation order to allow Mr. Steele to maintain his action separately from Lead Plaintiffs' action pursuant to F.R.C.P. 42(b).

Dated: October 19, 2023

Respectfully submitted,
MATTHEW STEELE,

By: /s/ Rowena T. Parma
One of his attorneys.

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CERTIFICATE OF SERVICE

I, Rowena T. Parma, an attorney, hereby certify that the foregoing **Plaintiff Matthew Steele's Motion for an Order Requiring Lead Plaintiffs to Add Mr. Steele to the Consolidated Amended Complaint or, Alternatively, for Relief From the Order of Consolidation** was filed electronically via the ECF filing system and served upon counsel for all parties via the same.

Dated: October 19, 2023

/s/ Rowena T. Parma