

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

MYLA NAUMAN,)	
JANE ROLLER, AND)	
MICHAEL LOUGHERY,)	
)	
<i>Plaintiffs,</i>)	No. 04-C-7199
)	
v.)	Judge Gettleman
)	Magistrate Judge Brown
ABBOTT LABORATORIES AND)	
HOSPIRA, INC.,)	
)	
<i>Defendants.</i>)	

**PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED COMPLAINT
ADDING CLAIM FOR BREACH OF FIDUCIARY DUTY
AND TO EXTEND SCHEDULE FOR RULING ON CLASS CERTIFICATION**

Plaintiffs, by their attorneys, pursuant to FRCP 15(a), hereby move for leave to file an amended complaint (proposed amended complaint filed concurrently) in this matter adding as new Count IV a claim for breach of fiduciary duty in violation of Section 404 of ERISA, 29 U.S.C. § 1104. In addition, plaintiffs ask the Court for leave to file the attached Supplemental Motion and Memorandum in Support of Class Certification on Count IV (filed concurrently). Plaintiffs additionally move the Court to extend the ruling date on class certification so the Court can consider certification of the proposed new count at the same time it reviews the counts in the original complaint, and to set a briefing schedule on the supplemental class motion. Alternatively, if the court deems it more efficient, because class certification briefing on the first three counts has been completed, plaintiffs propose that the Court decide those three counts under the current schedule and set a separate briefing schedule on the supplemental class motion.

In support of this motion, plaintiffs state as follows:

NEW COUNT IV: BREACH OF FIDUCIARY DUTY

1. Under this Court's scheduling order, the plaintiffs filed their motion and memorandum in support of class certification on September 15, 2005. Defendants' responses were filed on October 14, 2005 and plaintiffs' reply was filed October 28, 2005. The Court has set a ruling date on the motion for December 15, 2005.
2. Plaintiffs served their first document requests on December 28, 2004 and served additional requests on May 25, 2005. Defendants produced approximately 1,500 pages of discovery in March 2005, but this production consisted primarily of "on-the-shelf" material, the plan documents, organizational charts, and financial reports on the pension plan. It was not until September 8, 2005 that defendants completed the first wave of substantial discovery. During the period from July 29, 2005 to September 9, 2005, defendants produced approximately 10,000 pages of additional documents and data, and plaintiffs have now completed their initial review of these documents.
3. These 10,000 pages of documents produced by defendants included correspondence, emails, and related documents, which, for the first time, revealed that Abbott, with the concurrence of the Abbott officials who had been designated as the top officers of Hospira, undertook a campaign to actively mislead Abbott plan participants who were subject to being spun off to Hospira effective May 1, 2004. (Complaint, ¶ 105.)
4. At the time of the spin-off, future Hospira employees faced a critical choice of whether to accept the offer of employment with the new company or seek alternative

employment. Abbott and Hospira knew that a key question for these employees was the fate of their retirement benefits if they accepted the offer of employment. (Complaint, ¶ 103.)

5. However, both Abbott and the future Hospira executives were extremely concerned with keeping the future Hospira work force intact. They feared that if they informed future Hospira employees that both companies were targeting retirement benefits for costs savings, the employees would not accept offers of employment with the new company. Moreover, defendants knew if they informed the future workforce that Hospira had no intention of continuing Abbott-level pension benefits for more than nine months and would not offer retiree medical coverage, a substantial number of the future Hospira employees would seek work elsewhere. In addition, those who were retirement-eligible would simply retire from Abbott and not go to work with the new company, resulting in substantial additional costs to Abbott. (Complaint ¶¶ 102-105.)

6. To avoid these results, Abbott and Hospira's future top executives embarked upon a plan to fraudulently conceal the fact that long before the spin-off, they had decided that Hospira would *not* continue any Abbott-like pension plan a day beyond nine months, nor would it continue its retiree health plan at all. Instead of just concealing their decision, they knowingly and significantly falsely represented to the future Hospira employees that Abbott-like benefits would be continued for at least 9 months and that Hospira, after separation from Abbott, would undertake a full review of the benefit situation. (Complaint, ¶¶ 95-105.)

7. Specifically, Abbott announced repeatedly before the spin-off that Hospira would continue Abbott's existing pension plan until at least December 31, 2004, and the written materials provided to future Hospira employees stated that "[o]nce the new company is separate

it will make its own decisions about what pay and benefits programs are most appropriate for its employees and its business.” (Complaint, ¶ 99.) Similarly, the transcript of a conference call to more than 600 future Hospira employees on August 22, 2003 reflects that Christopher Begley, designated to be a director of Hospira and its Chief Executive Officer, and Henry Weishaar, its future Corporate Vice President, Global Human Resources, stated that the Hospira’s continuation of pension and other benefits at Abbott levels would be thoroughly reviewed by Hospira. Thus, Weishaar stated that the company would “take a look at the entire benefit program and all potential opportunities that we have, and decide what is a good program for all of our employees in terms of doing that.” (Complaint, ¶ 100.).

8. The situation here thus is remarkably similar to that faced by the Supreme Court in *Varity Corporation v. Howe*, 516 U.S. 489 (1996), where the company misled participants it sought to have transfer to a newly created, separately incorporated subsidiary by misrepresenting that accepting the offer would not adversely affect the security of their benefits. The Supreme Court held that “[t]o participate knowingly and significantly in deceiving a plan’s beneficiaries in order to save the employer money at the beneficiaries’ expense is not to act ‘solely in the interest of participants.’” 516 U.S. at 506. Here, Abbott and Hospira made repeated intentional misrepresentations that “[o]nce the new company was separate, it will make its own decisions about what pay and benefits programs are most appropriate for its employees and its business.” (Complaint, ¶ 98.) Their statements were made even though prior to the effective date of the spin, both defendants knew that the clone of the Abbott pension plan would be frozen as of December 31, 2004, and retiree medical coverage would not be offered.

9. The proposed Count IV sounds in breach of fiduciary duty. The proposed class in Count IV is the same as the class proposed in Counts I-III. Thus, plaintiffs seek to have the court certify a class consisting of:

All employees of Abbott who were participants in the Abbott Benefit Plans whose employment with Abbott was terminated between August 22, 2003, and April 30, 2004, as a result of the spin-off of the HPD/creation of Hospira announced by Abbott on August 22, 2003.

In its response to plaintiffs' first class motion, Abbott "d[id] not oppose class certification for Count I," although it argues the definition above is overbroad. (October 14, 2005 Abbott Opposition To Class Certificate, p.1) While this Court still has an independent obligation to make the final decision on class certification, it is likely the case will proceed as a class action. In that context, there is even a stronger reason that the breach of fiduciary duty claim should be considered for certification, so that all the claims raised by defendants' actions arising from the spin-off are resolved before one court.

Dated: November 18, 2005

Respectfully submitted,

/s/ Michael M. Mulder

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