

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On August 14, 2006, this Court ruled on defendants' motions to dismiss plaintiffs' Count IV for breach of fiduciary duty, denying Abbott's motion and granting Hospira's. Now, in light of the Court's decision, plaintiffs present this amended motion to certify Count IV as a class claim against Abbott.

Much has happened in this case since plaintiffs originally filed their motion to certify Count IV on November 18, 2005. On December 30, 2005, the Court found that plaintiffs satisfied all the requirements of Rule 23(a) as to Counts I, II and III and certified them as class claims. For Counts I and II against Abbott, the Court certified a class under Rule 23(b)(2) consisting of

[a]ll 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.

For Count III against Hospira, the Court certified a subclass consisting of

[a]ll employees of Abbott who were participants in the Abbott Benefit Plans and 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 and who were eligible for retirement under the Abbott Benefits Plans on the date of their terminations.

Memorandum Opinion and Order, December 30, 2005, p. 8. At the time plaintiffs filed their motion to certify Count IV, they had not yet received this ruling. The Court deferred ruling on the suitability of Count IV as a class action until it had decided defendants' motions to dismiss. Now that the Court has ruled on both the initial class motion and defendants' motions to dismiss Count IV, it is an optimal time to consider whether Count IV should be certified as a class claim against Abbott.

Plaintiffs now have the benefit of the Court's reasoning in these matters and have taken extensive discovery since filing their original motion to certify Count IV in November 2005. As such, plaintiffs present this revised, streamlined and updated motion to certify Count IV and respectfully request that a briefing schedule and ruling date be set so that plaintiffs can prepare their expert reports on schedule (currently, plaintiffs' expert reports are due on October 20, 2006).

II. THE FACTS SUPPORT CLASS CERTIFICATION FOR COUNT IV.

Although the Court does not evaluate the merits of a claim when deciding class certification, *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir.) (“[t]he success of the 1966 amendments (which are still in force) depends on making a definitive class certification decision before deciding the case on the merits, and on judicial willingness to certify classes that have weak claims as well as strong ones”), *cert. denied*, 534 U.S. 951 (2001)), a brief discussion of some of the evidence supporting Count IV shows why this claim is especially appropriate for class treatment.

The evidence shows that Abbott knew long before informing HPD employees that their benefits would be cut when they went to Hospira. The spinoff of HPD to the free-standing company Hospira was announced to employees and the public in August 2003 and was executed on April 30, 2004. During this entire period, Abbott and soon-to-be Hospira executives told HPD employees that the new company would evaluate all the options regarding benefits and formulate its own benefit plan after Hospira became a freestanding company.

In fact, though, Abbott and future Hospira executives had already decided that the plan would be to offer *no* plan. On August 1, 2003, in an email from Abbott executive Steve Fussell to Terrence Kearney, who was to become Hospira's CFO, Mr. Fussell stated that part of making

the new company successful would be to reduce the benefits burden by 12 to 15 percent. He noted that “I do not believe people will be happy at first.” Exhibit 1, H03442. This early email shows that Abbott and the executives who would create the new company had no intention of continuing Abbott-level benefits, and, indeed, that the success of the new company relied upon reducing benefits.

Then, in an email dated October 3, 2003, Christopher Begley, soon to become Hospira’s Chief Executive Officer and a member of its Board of Directors, made it perfectly clear: he stated that “if the benefit plan comes over we can and will freeze the plan on 12/31/04 except the age reduction feature can not be frozen. The asset is being transferred *with the assumption that we freeze the plan on 12/31/04.*” Exhibit 2, H03321 (emphasis added).

In fact, the Hewitt team that worked with Begley, Denham and the rest of the Hospira management team on benefits issues had been directed early on not to consider either defined benefit alternatives or retiree medical benefits for the new company. Exhibit 3, H02621-2648 at 2638 (Report by Hewitt Associates entitled “Hospira, Inc. Benefit Plan Review,” dated February 9, 2004). There, Hewitt noted that “[w]e understand that Hospira has made the following decisions: The defined benefit pension plan will be frozen effective December 31, 2004 and there is no interest in exploring any alternative defined benefit designs” *Id.* Hewitt also confirmed in this report that “Hospira will not provide subsidized retiree health care benefits.” *Id.* The report states that the anticipated cost savings to Hospira from the freeze of the defined benefit plan was \$47.9 million and the Retiree Health Care savings was \$19.1 million. The total cost savings for Hospira from these two benefit reduction measures was estimated to be \$67 million. *Id.* at H02641.

These and other documents show that Abbott and the future Hewitt management never intended to have a defined benefit plan or retiree medical benefits at Hospira. They worked with Hewitt on compiling a file on “evaluating options,” but the only options they considered seriously were those involving a freeze and/or elimination of benefits. Abbott and the future Hospira executives robbed the HPD employees of the opportunity to make a fully-informed decision about their best career move at the time of the spin by withholding the truth about future benefits until it was too late to take action. This, in a nutshell, is the basis for plaintiffs’ claim that Abbott breached its fiduciary duty to them. As shown below, this claim is ideal for class certification, as it involves the same companywide actions that disadvantaged all of the class members.

III. THE PROPOSED CLASS MEETS THE REQUIREMENTS OF RULE 23.

The Court already found that the plaintiffs have satisfied Rule 23(a)’s requirements of numerosity, commonality, typicality and adequacy of representation when it certified classes for Counts I, II and III. Now, for Count IV, plaintiffs seek certification of the very same class of individuals who now comprise the class in Counts I and II:

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.

The analysis for Count IV is no different: the claim presents a quintessential class issue of whether Abbott violated its fiduciary duty to the plan participants when it omitted the material information that the pension would be frozen and retiree health benefits would be eliminated at the new company. *See Joneck v. Local 714 International of Teamsters Health and Welfare Fund*, No. 98 C 4302, 1999 WL 755051, *7 (N.D. Ill. Sept. 3, 1999, Gettleman, J.)

(“broad-based intentional omission” alleged by plaintiffs did not require individualized investigation). *See also* *Bublitz v. E.I. du Pont de Nemours & Co.*, 202 F.R.D. 251, 256-57 (S.D. Iowa 2001) (whether defendants breached fiduciary duty in paying benefits after change in control presented a common issue); *Thomas v. Amithklein Beecham Corp.*, 201 F.R.D. 386, 391-92 (E.D. Pa. 2001) (letter to class that contained common, alleged misrepresentation and thus breached fiduciary duty presented common issue).

The common issues and corresponding relief belong in one case. Moreover, the Seventh Circuit has noted a preference to certify common questions, even if individual liability or damages issues must be determined later. *See, e.g., In re Allstate*, 400 F.3d 505, 508 (7th Cir. 2005); *Allen v. Int’l Truck and Engine Corp.*, 358 F.3d 469, 470 (7th Cir. 2004); *Mejdrech v. Met-Coil Systems Corp.*, 319 F.3d 910, 912 (7th Cir. 2003); *see also* Rule 23(c)(4)(A). And here, there are no individual issues of reliance, because Abbott made common statements to and withheld the same information from all the class members. It makes sense to certify Count IV as a class claim, and, as shown below, plaintiffs have established the requirements of Rule 23(1).

A. The class meets the numerosity requirement.

This Court has already found numerosity in its prior order of December 30, 2005. With over 10,000 employees affected by the spinoff, numerosity has been met for Count IV.

B. The class meets the commonality requirement.

A common nucleus of operative fact satisfies the commonality requirement. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). This Court has noted that one common issue is enough. *Dunn v. City of Chicago*, No. 04-6804, Memorandum and Order, slip op. at 6 (N.D. Ill. Oct. 5, 2005). Here, as with the other claims, the plan amendments and implementation of the spin-off present a common issue for Count IV. Judge Moran so found under comparable

circumstances the remand of *Flanagan v. Allstate Ins. Co.*, 228 F.R.D. 617, 619-20 (N.D. Ill. 2005) (employers' alteration of relationship with a class of employees from salaried to independent contractor creates common issue), *superceded on other grounds*, 400 F.3d 505 (7th Cir. 2005). For Count IV, another common question is clear: whether Abbott breached its fiduciary duty to the plan participants by omitting the material information that the pension would be frozen and retiree health benefits would be eliminated at the new company. *Joncek*, No. 1999 WL 755051 at *7; *Baker v. Comprehensive Employee Solutions*, 227 F.R.D. 354, 359 (D. Utah 2005) (common fiduciary duty owed to the class); *Mulder v. PCS Health Systems, Inc.*, 216 F.R.D. 307, 319-20 (D.N.J. 2003) (alleged breaches of fiduciary duty were part of common course of conduct). Accordingly, for Count IV, the proposed class satisfies commonality.

C. The class meets the typicality requirement.

“Typicality is satisfied if a plaintiff’s claim arises from the same event, practice, or course of conduct that gives rise to the claims of the other class members, and the claims are based on the same legal theory.” *Dunn v. City of Chicago*, No. 04-6804, slip op. at 6 (N.D. Ill. Oct. 5, 2005). “Similarity of legal theory is more important than factual similarity.” *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). Typicality is “determined with reference to the company’s actions.” *Wagner v. Nutrasweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996). Here, the same representations were broadcast and the same omissions were made to the entire class. Plaintiffs’ claims are based upon the same legal theory as the class. As such, the typicality requirement has been met for Count IV.

D. Plaintiffs and their counsel have already been found to be adequate representatives.

The Court already found that the plaintiffs and their counsel are adequate representatives of the class and appointed plaintiffs' counsel, Sprenger & Lang, PLLC and Meites, Mulder, Mollica & Glink, as class counsel in its order of December 30, 2005. Plaintiffs incorporate by reference their prior September 15, 2005 memorandum and October 28, 2005 reply memorandum filed in support of their earlier class motion. The plaintiffs and their counsel should be found to be adequate representatives with respect to Count IV as well.

E. The Court can certify Count IV under Rule 23(b)(2), as it did Counts I-III.

Plaintiffs seek equitable injunctive relief in Count IV, rendering this a classic Rule 23(b)(2) case. *See, e.g., Zhu v. Fujitsu Group 401(k) Plan*, No. C-03-1148RMW, 2004 WL 3252573 *7, (N.D. Calif. Mar. 3, 2004) (class seeks declaration that plan was illegal); *Mulder v. PCS Health Systems, Inc.*, 216 F.R.D. 307, 319-20 (D.N.J. 2003) (relief was substantially injunctive); *Kennedy v. United Healthcare of Ohio*, 206 F.R.D. 191, 199 (S.D. Ohio 2002) (Rule 23(b)(2) class certified in ERISA breach of fiduciary duty case). Monetary relief in this case would flow from the injunctive relief – reinsertion of the class in the benefit plans or other such injunctive relief. *See, e.g., Flanagan*, 228 F.R.D. at 619. Rule 23(b)(2) permits an action to be maintained as a class action where plaintiffs can establish that (1) their complaint seeks relief that is predominantly injunctive or declaratory and (2) the defendant “acted or refused to act on grounds generally applicable to the class.” Rule 23 (b)(2). Thus, as the Court decided with respect to Counts I-III, Count IV is suited to treatment under Rule 23(b)(2).¹

¹Certification would also be proper under Rule 23(b)(1), because individual litigation would create a risk of inconsistent rulings that would establish incompatible standards of conduct for the defendants. Separate actions could easily result in conflicting outcomes. *Baker*,

V. CONCLUSION

For all the reasons set forth above, plaintiffs respectfully request the Court to grant their motion for class certification as to Count IV and establish the class as proposed.

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Respectfully submitted,

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227 F.R.D. at 360; *McDaniel v. North American Indemnity*, No. IP-02-C-0422 M/S/, 2003 WL 260704 at *5-6 (S.D. Ind. Jan. 27, 2003); *Kennedy*, 206 F.R.D. at 198.

CERTIFICATE OF SERVICE

I, the undersigned, certify that on August 28, 2006, I had the following documents filed electronically with the Clerk of the Court for the United States District Court for the Northern District of Illinois through ECF: **Plaintiffs' Amended Motion and Memorandum in Support of Motion for Class Certification of Count IV**. CCF will send an e-notice on the following parties:

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