

courts rarely allow such discovery to be taken. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 n.2 (1985) (“[w]e are convinced that such [discovery] burdens are rarely imposed upon plaintiff class members”). To overcome this significant burden, “defendants must show that the information is necessary to their defense and not designed to take undue advantage of class members or to reduce the number of claimants.” *Organization of Minority Vendors, Inc. v. Illinois Central-Gulf R.R.*, No. 79 C 1512, 1987 WL 8997 (N.D. Ill. Apr. 2, 1987) (Lefkow, M.J.). Depositions require an even higher standard of need:

[T]he party seeking the depositions has the burden of showing necessity and absence of any motive to take undue advantage of the class members. However, in light of the nature of the deposition process -- namely, the passive litigants are required to appear for questioning and are subject to often stiff interrogation by opposing counsel with the concomitant need for counsel of their own -- we are of the view that the burden confronting the party seeking deposition testimony should be more severe than that imposed on the party requesting permission to use interrogatories. The record in this action is devoid of any showing that defendants met that burden.

Clark v. Universal Builders, Inc., 501 F.2d 324, 341 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974).

Abbott has not even attempted to articulate the nature of the information it seeks, much less explain how that information is necessary to its defense. Does it wish to submit interrogatories to and/or depose each of the 8,000 to 10,000 class members? If not, how will it select those it wishes to question? What questions will Abbott ask? Should notice be issued to the class members to inform them of their rights and protect their interests before Abbott is permitted to contact them to take discovery? Because Abbott has failed to even explain what information it seeks, much less establish that the information is necessary to its defense, its proposal to take discovery of the absent class members should be denied.

Regarding named plaintiffs Myla Nauman, Jane Roller and Michael Loughery (who live in Tennessee, Texas, and Indiana, respectively), Abbott is intent upon deposing them again (*see* fn1, p. 4), despite the fact that they have already sat for daylong depositions. All three plaintiffs have testified at length about the documents, emails, website contents, and oral representations that were made about the spin, and they have already provided Abbott with all the documents in their possession related to their claims. What else does Abbott intend to ask if it is granted another chance to depose them? Abbott has given no answer, leading to an obvious question: why can't it simply serve additional interrogatories on the questions it wishes to ask? Again, Abbott has failed to disclose what discovery it seeks; its proposal to re-depose the plaintiffs should be denied.

II. Abbott has failed to show that it needs additional discovery to establish uniformity.

Furthermore, Abbott cannot meet the burden of establishing its need for this additional discovery, because both reasons it gives are faulty. First, Abbott claims that it seeks additional discovery from the named plaintiffs and class members to determine whether the “misrepresentations” were uniform and were received by all class members. But this is a case of misrepresentation *by omission* – a distinction that Abbott ignores. Here, plaintiffs allege that Abbott and Hospira *failed to inform them* that the issue of eliminating retiree medical benefits and freezing pension accruals was seriously considered and the decision to cut benefits had already been made before the date of the spin. Rather than telling the class members the truth about their benefits and allowing them to make fully-informed decisions about retirement and their future careers, Abbott and Hospira elected to keep silent. As such, Abbott's assertion (at 2-3) that it needs classwide discovery to determine whether the misrepresentations were “uniform across the class” makes no sense. Abbott knows, better than any other party, what information it

provided to the plaintiffs and class members. And because defendants deny that they made any misrepresentations by omission or otherwise, Abbott cannot honestly believe that further discovery will show that plaintiffs and class members *did* know before the spin that their benefits would be cut at Hospira. Whatever “variances” Abbott imagines exist among its own documents, defendants surely must admit that they did not disclose the information that forms the basis of plaintiffs’ omission claim.

Abbott insists (at 2) that it should be allowed to quiz the plaintiffs and class members regarding their exposure to documents and communications cited by the plaintiffs in their Amended Complaint as examples of defendants’ omissions. But Abbott cannot and does not deny that it informed the entire class via official company documents that Hospira would decide on benefits *after* the spin, nor does Abbott contend that it issued any communications correcting its omissions. On the contrary, a company witness admitted during her deposition that this misinformation was posted on Abbott’s internal website throughout the time period of the spin in the form of an official communication from Abbott to its employees, and, thereafter, was posted on Hospira’s internal website – in fact, she testified that it is still posted there to this day. **Exhibit 1**, Denham Tr. 142:3-24. Canvassing the class members regarding whether they saw this information would yield nothing of value, because, as explained, the misrepresentation alleged here is the absence of information – that is, what Abbott did *not* tell the class members.

Abbott cites the outcome in *In re Sears Retiree Group Life Ins. Litigation*, No. 97 C 7453, 1999 WL 35312 (N.D. Ill. Jan. 11, 1999) and 198 F.R.D. 487 (N.D.Ill. 2000) at length in its brief (at 3-4), arguing that here, as in *Sears*, plaintiffs cannot show that the misrepresentations were uniform across the class. But here, the omission *is* the misrepresentation, while in *Sears*, the misrepresentation claim was not based on an omission, but rather on a variety of affirmative

statements whose uniformity could be and was challenged by the defendant. The correct analogy is *Joncek v. Local 714 International of Teamsters Health and Welfare Fund*, No. 98 C 4302, 1999 WL 755051 (N.D.Ill. Sept. 3, 1999, Gettleman, J.) (**Exhibit 2**), where this Court evaluated a motion for class certification similarly based on alleged omissions to the class. The Court rejected the defendant's argument that plaintiffs and class members might have relied on different affirmative representations, stating that "whether defendants withheld information from plaintiffs is a question of fact that is common to the class." *Id.* at *4. The Court further noted that typicality was satisfied because, referencing *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225 (7th Cir. 1983), "plaintiffs' claims are likewise directed at the disclosure practices of the defendants." *Id.* at *5. As such, the Court certified the class, finding that defendant's "broad-based intentional omission" alleged by plaintiffs did not require individualized investigation. *Id.* at *7. Here, as in *Joncek*, there is no barrier to commonality or typicality and no discovery that Abbott could take that would defeat them.

II. Detrimental reliance is not an element of plaintiffs' claim.

Abbott's second basis for seeking discovery (at 5) is that it needs information on the question of detrimental reliance. But, as it did in its motion to dismiss Count IV (which was denied by the Court on August 14, 2006), Abbott misstates law of this Circuit: detrimental reliance is not an element of a claim for breach of fiduciary duty under ERISA. Rather, the Seventh Circuit requires only a showing of harm or loss resulting from a defendant's actions. *Herdrich v. Pegram*, 154 F.3d 362, 369 (7th Cir. 1998), *rev'd on other grounds*, *Pegram v. Herdrich*, 530 U.S. 211 (2000) (plaintiff must allege only "that a cognizable loss resulted." *See also Kamler v. H/N Telecommunications Service, Inc.*, 305 F.3d 672, 681 (7th Cir. 2002)

(plaintiffs must allege only “the breach of fiduciary duty caused some harm to him or her that can be remedied”).

The harm itself can take various forms, including unjust enrichment from the misuse of plan assets (*see Wsol v. Fiduciary Mgt. Assoc., Inc.*, 266 F.3d 654, 656 (7th Cir. 2001) (fiduciary duty may be violated by loss to plan or by unjust enrichment of fiduciary) and the loss of opportunity to make an informed decision about benefits (*see Hensley v. P.H. Glatfelter Co.*, No. 1:04-CV-200, 2005 WL 3158033 *5 (W.D.N.C. November 28, 2005) (defendant’s omissions “deprived the plaintiffs of the opportunity to make further inquiry regarding the possible effects this relationship could have had on their benefits. Further, a reasonable jury could determine that plaintiffs relied on this omission or misrepresentation to their detriment, for they had no way of knowing further inquiry was necessary”).

Interestingly, documents produced by Abbott in this case establish the very type of harm that class members experienced in *Hensley*. In December 2003 and January 2004, well before the spin, emails indicate that two former Abbott executives who were slated to go to Hospira, Terrence Kearney and John Arnott,

Exhibit 3, A022169,

A022197

The documents show that Abbott’s actuary, Hewitt Associates,

(Exhibit 4, A022179-

84),

Exhibit 5,

A022193-4, A022198. These documents graphically illustrate the point noted by the *Hensley*

court: if the class members had known that the decision to cut retiree medical and freeze pension

benefits at Hospira had already been made, they would have had the same concerns that the executives had. However, because of the misrepresentation by omission here, they lost the chance to do anything about it, including the opportunities to negotiate with Hospira before agreeing to become its new work force, to make fully-informed retirement decisions, and to seek alternative employment at the time most appropriate to their careers and financial interests.

Abbott, knowing the law of our Circuit cannot help it in its bid to seek discovery on detrimental reliance, cites only cases from circuits that do view detrimental reliance as an element of a claim for breach of fiduciary duty: the Eleventh (*Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451 (11th Cir. 1996)); the Third (*In re Unisys Corp. Retiree Medical Benefits Litigation*, 2003 WL 252106 (E.D.Pa. Feb. 4, 2003)), and the Fourth (*Wiseman v. First Citizen Bank & Trust Co.*, 215 F.R.D. 507 (W.D.N.C. 2003)). Abbott's claim, then, that it needs discovery from the plaintiffs and absent class members to "demonstrate that there are differences across the class with respect to the issue of detrimental reliance" (at 5) is wrong and should be rejected.

IV. Count IV should be certified at this time.

Notwithstanding the additional discovery that Abbott believes it needs, plaintiffs' claim for breach of fiduciary duty should be certified now. The requirements of Rule 23 have been met (*see* Plaintiffs' Motion for Class Certification of Count IV), and this Court has already certified Counts I and II against Abbott and III against Hospira. The common issues in Count IV and corresponding relief belong in one case. 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).

V. Conclusion

For all the reasons presented above, plaintiffs respectfully request that the Court certify plaintiffs' Count IV on behalf of the same class that it certified as to Counts I and II:

[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.

Plaintiffs further request that the Court deny Abbott's proposed discovery plan and request for an extension of the discovery schedule.

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Respectfully submitted,

/s/ Jamie S. Franklin

Steven M. Sprenger
Mark A. Amadeo
SPRENGER & LANG, PLLC
1400 Eye Street, N.W., Suite 500
Washington, DC 20005
(202) 265-8010

Michael M. Mulder
Jamie S. Franklin
MEITES MULDER MOLLICA & GLINK
20 S. Clark Street, Suite 1500
Chicago, IL 60603
(312) 263-0272