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

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

Plaintiffs' Response to Abbott's Supplemental Submission
Regarding Count IV and Class Certification Discovery

Plaintiffs are seeking class certification of their Count IV for breach of fiduciary duty against Abbott. In response, Abbott has asked the Court to extend the discovery schedule and to permit it to re-depose the named plaintiffs, depose 10 absent class members, and serve interrogatories on an additional 50 absent class members. As shown below, Abbott's request should be denied, Count IV should be certified on behalf of the same class already certified for Counts I and II, and this case should proceed on its current schedule.

I. Abbott has not shown that the discovery it seeks is necessary to its defense against plaintiffs' motion for class certification.

To overcome the significant presumption against taking discovery of absent class members (and, especially, deposing them), Abbott "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.). Although Abbott claims it

needs additional discovery to oppose class certification of Count IV, the questions it proposes to ask the plaintiffs (along with unspecified "follow-up questions") will reveal no information to advance any argument against certification of Count IV as a class claim. The basis of Count IV is simple: plaintiffs allege that Abbott knew before the spin that the new company would freeze the pension plan and eliminate retiree medical benefits but hid this information from its employees until after the spin. The common questions are as follows:

- Did Abbott decide before the spin-off that retiree medical benefits would be eliminated and the Hospira pension plan would be frozen?

The answer will be the same with respect to every plaintiff and class member – no amount of class discovery by Abbott will produce variances. And, in fact, none of the questions that Abbott has propounded even address this question.

- Did Abbott conceal from future Hospira employees the fact that it had already decided that Hospira would eliminate retiree medical and that pension benefits would be frozen after 12/31/04?

Again, the answer will be the same with respect to every plaintiff and class member. Abbott knows that it did not inform any of the future Hospira employees before the spin that their benefits would be cut, so it cannot and does not suggest that it expects to uncover any communications with the plaintiffs or class members revealing such a disclosure.

- Did Abbott tell future Hospira employees that their benefits would be decided only after the spin-off and by Hospira management?

This question is already answered by Abbott's own company communications. Abbott does not even suggest that there were variances in the message it communicated to the plaintiffs and class members. Thus, Abbott's plan to question plaintiffs and absent class members about which of its own documents they received cannot possibly yield information necessary to its defense against class certification. The four documents appended to plaintiffs' Amended Complaint were

company-wide publications prepared by the defendants (Ex. 1, MN00022-23, is an email from Chris Begley to all HPD exchange server users; Ex. 2, H001304, is a page of a handout given to those employees who were targeted for the spin; Ex. 3, H001872-3, is an excerpt of a transcript of a conference call with Chris Begley and HPD employees slated to be spun, and Ex. 4, H000471 is a page from a benefits brochure prepared and distributed by Hospira). Abbott surely knows to whom it sent the Begley's email, who participated in the conference call, and to whom it distributed the handouts. Moreover, these documents are not appended to plaintiffs' Amended Complaint to show what Abbott did say, but, rather, to show what it didn't say. Abbott does not and cannot dispute that these companywide documents did not tell the Hospira workforce the truth – that the decision had already been made to freeze the pension plan and eliminate retiree medical benefits.

Abbott's proposed questions 5-7 deal with what actions the plaintiffs and class members would have taken had they known the truth. But as plaintiffs have pointed out on numerous occasions, there is no requirement that the plaintiffs and class members prove detrimental reliance in this circuit – a point that Abbott ignores in every brief. *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"). Furthermore, such discovery should not delay class certification: at this stage, the Court does not even look at the merits of the case. *Rutan v. Republican Party of Illinois*, 868 F.2d 943, 947 (7th Cir. 1989) (*en banc*), *rev'd on other grounds*, 497 U.S. 62 (1990). Because plaintiffs have already alleged that they have been harmed (see Plaintiffs' Motion for Class Certification of

Count IV), there is no basis for taking discovery of individual reliance issues for the purposes of class certification. Abbott is, of course, free at any time during this litigation to pursue discovery as it sees fit, but there is no need here to delay class certification or the rest of the schedule that is already in place in this case.

As for Abbott's plan to depose 10 absent class members and serve interrogatories on 50 others, Abbott has singularly failed, for the reasons discussed above, to demonstrate why it needs any of this discovery. The questions Abbott intends to ask or propound do not lead to answers necessary to its defense against class certification and certainly do establish the "special circumstances" necessary for the Court to permit 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").

II. Abbott has already questioned the named plaintiffs extensively about the subject matter of each of its proposed questions.

In any event, Abbott's questions have already been asked and answered by the named plaintiffs. All three named plaintiffs were quizzed at length during their depositions about the subject matter of each of the questions proposed by Abbott. The following list shows the extent to which Abbott's counsel had the opportunity to cover the topics addressed in the proposed questions, and that he did, indeed, cover those topics thoroughly: there are lengthy passages in each deposition covering which documents the plaintiffs saw, the representations they heard or read, their understanding of those representations, and their ideas concerning what they would have done differently if they had known the truth, as follows:

A. **Michael Loughery** (See Exhibit A, deposition transcript excerpts):

- Pp. 41-52: questions regarding the conference call that was the subject of Ex. 3 to plaintiffs' Amended Complaint

- Pp. 53-56: questions about the email that is Ex. 1 to plaintiffs' Amended Complaint

- Pp. 52-53, 61-65: questions about other communications, documents received, conversations, meetings, etc. regarding the change in benefits

- Pp. 57-60, 65-70: questions regarding what Mr. Loughery did in response to the spin and what he would have done differently if he had known the truth about his future benefits

- Pp. 79-86: questions about how Mr. Loughery learned the truth about Hospira's benefits

B. **Jane Roller** (See Exhibit B, deposition transcript excerpts):

- Pp. 15-23, 72-74, 108-114: questions regarding how she learned the truth about Hospira's benefits and what she did in response

- Pp. 30-44, 115-116, 129-138: questions regarding the conference call that was the subject of Ex. 3 to plaintiffs' Amended Complaint

- Pp. 73- 80, 91-93, 102-105, 138-144: questions about other communications, documents received, conversations, meetings, etc. regarding the change in benefits

- Pp. 99-102, 120-126: questions about her understanding of the messages received from Abbott regarding Hospira benefits

- Pp. 116-120: questions about the email that is Ex. 1 to plaintiffs' Amended Complaint

- Pp. 241- 248: questions regarding what Ms. Roller did in response to the spin and what she would have done differently if she had known the truth about her future benefits

C. **Myla Nauman** (See Exhibit C, deposition transcript excerpts):

- Pp. 41-44: questions about representations made to her by Abbott regarding her future benefits at Hospira

- Pp. 49-52, 58-59, 70-85, 142-145, 196-223: questions about questions about other communications, documents received, conversations, meetings, etc. regarding the change in benefits

- Pp. 55-56: questions regarding how Ms. Nauman learned about the spin

- Pp. 69-70, 246-253: questions regarding how Ms. Nauman learned that her benefits would be cut at Hospira

- Pp. 86-100: questions regarding the conference call that was the subject of Ex. 3 to plaintiffs' Amended Complaint

- Pp. 114-122, 127-142: questions regarding what Ms. Nauman did in response to the spin and what she would have done differently if she had known the truth about her future benefits

III. If additional discovery is allowed, Abbott can get the information it seeks through interrogatories.

Any additional discovery regarding the uniformity of Abbott's representations to the class should be taken by the plaintiffs of Abbott itself – not by Abbott. Abbott alone possesses the information on whether it disclosed to HPD employees that it had already decided – before the spin – to cut benefits. Nevertheless, if Abbott wishes to ask new questions of the named plaintiffs – and, as shown, the seven questions it proposes are not new, nor are they necessary for the Court to rule on class certification – it can easily do so by interrogatory. There is absolutely no reason to recall the plaintiffs to Chicago for another round of depositions. There is even less reason to allow Abbott to depose absent class members. The Seventh Circuit has stated that the burden on the party seeking such depositions should be "severe," given the inequities involved in interrogating "passive litigants." *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 341 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974). Again, Abbott has fallen far short of meeting this burden, as it has not even attempted to explain why the depositions of the named plaintiffs will not suffice. Furthermore, Abbott gives no reason why it needs to depose some absent class members while serving interrogatories on others. Abbott should not be allowed to depose any absent class members, when a less-burdensome and equally effective method of discovery – interrogatories – will suffice.

IV. Conclusion

For all the reasons discussed above, the plaintiffs respectfully request that the Court deny Abbott's discovery plan, certify Count IV as a class claim, and order that this case proceed under the existing discovery schedule.

Dated: October 6, 2006

Respectfully submitted,

/s/ Jamie S. Franklin

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on October 6, 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' Response to Abbott's Supplemental Submission Regarding Count IV and Class Certification Discovery.** CCF will send an e-notice on the following parties:

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/s/ Jamie S. Franklin__________________
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