



and collect retirement benefits under Abbott's benefits plans prior to seeking employment from Hospira. Plaintiffs assert that the conduct alleged in Counts I through III violates § 510 of ERISA. Count IV alleges that Abbott breached the fiduciary duty it owed plaintiffs as the administrator of their benefits plans by making deliberate misrepresentations about the benefits that post-spin-off employees could expect at Hospira, in violation of § 404 of ERISA.<sup>1</sup> Both defendants have now moved for summary judgement on all counts against them. For the reasons discussed below, the motions are denied.

### **BACKGROUND**

Abbott prides itself on offering an employee benefits package that provides incentives for its employees to stay with the company. During the period leading up to the events at issue, however, which took place roughly between late 2002 and late 2004, Abbott—like many other companies—faced economic and demographic pressures that resulted in increased costs to Abbott in providing certain benefits, particularly pension and retiree medical benefits associated with older workers. Abbott sought ways to manage these rising costs, enlisting the help of actuarial and benefits consultant Hewitt Associates to undertake a “retirement strategy project” in early 2003. Later that year, Abbott announced changes to its pension and retiree medical benefits that would increase the age at which newly hired employees would become eligible for retirement and would shift a portion of the burden of retiree health care costs to retirees.

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<sup>1</sup>Plaintiffs' asserted their claim for breach of fiduciary duty against both Abbott and Hospira in Count IV of their amended complaint. By order of August 14, 2006, this court granted Hospira's motion to dismiss Count IV but denied Abbott's motion to dismiss the count. See Nauman v. Abbott Laboratories, 2006 WL 241372 (N.D. Ill. 2006).

At the same time Abbott was deciding upon changes to its benefits plans, it was evaluating opportunities, as it routinely did, to reshape the company through strategic acquisitions and divestitures that would maximize shareholder value. After analyzing a number of restructuring opportunities in or around early 2003, Abbott decided that year to seek the approval of Abbott's Board of Directors to spin off a portion of the HPD business into the new corporate entity that would become Hospira. As part of the transaction, approximately 10,000 of HPD's United States employees were transferred to the new company.

The spin-off was announced on August 22, 2003, and became effective on April 30, 2004. From the effective date of the spin-off through December 31, 2004, the new Hospira employees were entitled to benefits under a "transitional" benefit plan, which mirrored Abbott's plan. A few months later, Hospira announced the benefits package it would offer its employees beginning January 1, 2005. Among other changes, the pension plan Hospira had acquired from Abbott would be frozen when Hospira's plan became effective, and retiree medical benefits would not be offered under the new plan.

As part of the spin-off, Abbott and Hospira signed an agreement entitled Employee Benefits Agreement that, among other provisions, restricted the movement of employees between the two companies. In particular, the parties agreed to implement reciprocal no-hire policies, under which Hospira and Abbott each agreed not to hire, for a two year period following the spin-off, anyone whose employment at Abbott had terminated on or after the date the spin-off was announced. A few days prior to the expiry of that two-year period, Abbott amended its pension plan such that any employee who was subsequently rehired by Abbott would be considered a "new hire" for benefits purposes.

The first essential difference in the parties' respective views of these events is whether Abbott's decision to divest itself of its "core" HPD business was part of its broader strategy to manage rising benefits costs (as plaintiffs contend), or whether the decision to spin off HPD was entirely independent of any consideration of benefits costs to Abbott (as defendants insist). Under plaintiffs' theory of the case, the HPD spin-off was the *coup de grâce* in Abbott's attempt to stave off a looming and serious pension funding crisis. Under defendants' theory, any concerns Abbott may have had about rising costs were manageable in light of the company's generally healthy financial position, and they were adequately addressed by the benefits changes announced in 2003, and the decision to spin off HPD was made without any consideration of Abbott's benefits costs. The first major dispute, then, is over Abbott's intent in deciding to spin off HPD.

The second major dispute focuses on the respective roles of Abbott and Hospira in decisions affecting plaintiffs' benefits under the Hospira benefits plan. Plaintiffs contend that long before the Hospira plan was formally established, its terms were predetermined by Abbott. Defendants disagree.

Finally, the parties dispute the relationship between the reciprocal no-hire agreement and provisions contained in Abbott's pension plan that prevent rehires from Hospira from "bridging" past service at Abbott with any service that began after the expiration of the no-hire period. Plaintiffs contend that these measures were conceived hand-in-hand with each other and with the decision to spin off "core HPD"<sup>2</sup> with the intent of depriving them of their benefits. Defendants

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<sup>2</sup>Defined by Abbott as "drug delivery systems and injectable pharmaceuticals."

argue that the no-hire agreement was a legitimate measure, now expired, whose purpose was to maintain workforce stability at each company.

### **MATERIAL FACTS**

#### **Abbott Amends its Benefits Plans**

Between 1999 and 2001, Abbott's pension plan went from being over-funded by \$849 million to being underfunded by \$349 million. At a meeting of Abbott's Board of Directors in December of 2002, CFO Thomas Freyman presented an analysis entitled "Pension Update" that explained certain factors underlying the change in pension funding status. The presentation showed that for Abbott to meet its accumulated benefit obligations to plan participants, it would, for the first time, have to take a direct charge to equity for year-end financial reporting. The estimated charge would amount to approximately \$200-\$300 million. The "Pension Update" concluded with projections that "cash flow to fund pension obligations and accounting expense related to these plans will likely increase significantly over the "Long Range Plan" ("LRP")<sup>3</sup>, and that "if financial market returns stabilize/normalize, the situation is manageable, given Abbott's strong cash flow."

Following the December board meeting, Abbott investigated ways to slow the rise in benefit costs. Abbott hired Hewitt Associates in January 2003, to undertake a "retirement strategy project." The purpose of the project, as memorialized in a January 24, 2003, memorandum from Hewitt to Abbott, was to "deliver to Miles White a proposed retirement strategy, with an array of alternative approaches and their associated impact on the business, on costs, and on employees." The memorandum identifies Grice Williams, Lois Lourie, Bill Preece,

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<sup>3</sup>Presumably, "Long Range Plan."

John Tebbetts, Ben Kwakye, and Tara Manno as the Abbott work team, and Tom Wascoe, Tom Freyman, Steve Fussell, Greg Linder, Terry Kearney, and John Berry as the Abbott board of review. The Hewitt team comprised Mary Moreland, Steve Wagner, and Judy Whinfrey.

In the summer of 2003, Abbott announced changes to its benefits plans effective January 1, 2004. The changes included reducing its basic pension plan formula for future service, increasing co-payments by retirees for medical care and increasing the age at which newly hired employees would be eligible for early retirement. When Abbott announced the forthcoming changes to its employees later that year, a portion of one of the goals CEO Miles White cited in his message to employees was to “reduce the company’s cost increases to sustain our overall competitiveness.”<sup>4</sup>

Abbott again amended its pension plan after the spin-off. Pursuant to an amendment adopted April 27, 2006, any employee transferred to Hospira who later returned to Abbott would be treated as a new hire for the purposes of Abbott’s pension plan, and would not be eligible to “bridge” past service with future service for the purpose of accruing benefits.

#### The Demographics of HPD

Plaintiffs contend that HPD was a division that had a significantly more “senior” workforce than average, in terms of both employee age and years of service.<sup>5</sup> Plaintiffs base

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<sup>4</sup>The stated goals were summarized as: “Continue to offer a superior benefits package; Support our heritage of long service and provide incentives for employees to work a full career at Abbott; Reduce the company’s cost increases to sustain our overall competitiveness, while maintaining affordability for employees; and Improve the performance of our benefits vendors, along with the programs, tools and services available to our employees.”

<sup>5</sup>Plaintiffs’ theory has evolved over the course of discovery. Plaintiffs’ original contention was that HPD was selected among a handful of proposed spin-off candidates because  
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their assertion on calculations and comments made at different times by Abbott and its consultants. First, in August of 2003, Gail Denham, Abbott's Vice President of Human Resources and a future Hospira executive, performed a demographic analysis of HPD employees in August of 2003 that included, among other elements, "profiling [she] did around retirement eligibility." Denham estimated that retirement-eligible employees comprised 15-16% of HPD's workforce,<sup>6</sup> and that the number of employees who were nearing eligibility for early retirement benefits comprised an additional 10-13% of HPD's workforce. Denham did not compare these statistics against other relevant Abbott populations. The parties agree, however, that HPD's demographics in terms of retirement eligibility are essentially the same as between HPD and the other businesses Abbott was considering for divestiture at that time. Denham concluded that her analysis "put some numbers around what we anecdotally know."

In September 2003, Hewitt estimated that approximately 18% of the HPD employees were eligible for retirement. According to calculations Hewitt reported to Denham in January of 2004, HPD employees were reported to have an average age of 42, while the "rest" of Abbott had an average age of 40.1, and that HPD employees had, on average, 11.2 years of service, while employees of the rest of Abbott had 8.6. Hewitt concluded that, "this is a significant population that will be sensitive to a retirement change." Abbott disputes the accuracy (and also

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<sup>5</sup>(...continued)

it was the most senior of the group. Presumably in light of discovery that revealed similar demographics among all of the divisions considered for spin-off, plaintiffs now compare all of the possible spin-off candidates against Abbott as a whole and argue that Abbott considered those divisions based on their older-than-average workforce.

<sup>6</sup>The court notes that the cited chart states that some, but not all, HPD segments were included in these calculations. Neither party has explained the significance, if any, of the selection of segments considered.

the relevance) of these figures, however, and has submitted the affidavit and supporting exhibits of a Hewitt consultant involved in making the calculations as evidence of their “rough” nature (the “Yurwitz Affidavit”). Abbott has also submitted a second affidavit with demographics it asserts are accurate (the “Steele Affidavit”). According to the Steele Affidavit and its supporting exhibit, the average age/service of HPD employees as of December 2003 was 42.5/9.77, while the averages for two other divisions considered for spin-off were 41.82/9.7 and 41.98/10.49. Plaintiffs do not substantively contradict the facts set forth in the Yurwitz or Steele Affidavits.

#### The Spin-Off of “Core” HPD

In January of 2003, Abbott hired Morgan Stanley to assist in analyzing three potential divestitures (not including HPD) and one potential acquisition. A few months later, at the request of Abbott’s management, Morgan Stanley also analyzed the possible divestiture of HPD. Morgan Stanley evaluated the impact of each potential reorganization with reference to a number of defined business criteria, which did not include the cost to Abbott of employee benefits.

The Abbott executives primarily responsible for analyzing restructuring opportunities were Miles White and Tom Freyman. They considered Morgan Stanley’s materials in the context of Abbott’s strategic goals. They also considered Abbott’s “investment identity,” the company’s strategic makeup, and how each business unit fit within the company’s investment identity. Mr. White prepared a chart summarizing the key considerations for evaluating strategic opportunities, which he presented to Abbott’s Board of Directors at a meeting on June 19, 2003 as part of a “strategy review.” The presentation discussed the pros and cons of each potential restructuring and concluded with the recommendation that Abbott spin off “core” HPD, while retaining “high acuity” HPD. Employee benefits were not discussed in the strategy review

presentation. The board gave its approval to begin the initial phases of the HPD spin-off, with the understanding that final approval would be sought at a later date based upon further analysis.

By the time Abbott made its recommendation to the board to spin off "core" HPD, it had also begun to consult with Hewitt on the financial implications of the proposed transaction, including on Abbott's benefits obligations. On June 9, 2003, Hewitt provided Abbott's William Preece and Steve Fussell with projections relating to the HPD spin-off, which calculated the financial impact of the spin-off on Abbott, based on certain assumptions. Among other figures, the document references a one-time credit to Abbott of \$77.8 million and an annual reduction of \$67 million in benefits costs. Abbott contends that these gains are insignificant in light of the costs Abbott incurred as a result of the spin-off, but does not dispute that Abbott realized the projected gains.

Over the next several months, Hewitt continued to advise Abbott with respect to potential financial consequences of the transaction. Hewitt analyzed alternative approaches for handling the HPD employees pension plans and discussed their potential impact on various aspects of Abbott's business, including its benefits-related costs. Whether Abbott would retain the assets and liabilities associated with HPD employees or transfer them to Hospira was one of the factors Hewitt and Abbott considered. An analysis that Hewitt provided Gail Denham in August 2003 compares the benefits payable to HPD employees under different sets of assumptions. In every scenario, Hewitt assumed that Hospira would freeze benefit accruals as of December 31, 2004. Hewitt compared the value of monthly benefits to employees: (1) if Abbott spun off assets and liabilities, (2) if Abbott retained the assets and liabilities, and (3) if the employee had remained at Abbott. In each of the 6 "strawman" scenarios, the projected

pension benefit to the employee is lowest in the “if Abbott retains assets/liabilities” and greatest in the column “if remain at Abbott.”<sup>7</sup> Ultimately, Hewitt advised, and Abbott decided, to transfer accrued pension liabilities for the transferring employees, plus a \$45 million “top off” that would leave the funded ratio for the Hospira pension assets equal to the funded ratio for the pension assets that Abbott retained.

Hewitt also studied the potential impact of an *en masse* retirement at the time of the spin-off of all retirement-eligible HPD employees. Hewitt’s Mary Moreland cautioned that if all retirement-eligible employees opted for retirement, Abbott would face increased one-time and annual OPEB<sup>8</sup> expenses and that the impact on pension expenses would also be “significant.” Steve Fussell observed that Abbott could realize savings by transferring a portion of the burden for providing retiree medical benefits to the new company.

On August 21, 2003, Abbott’s Board of Directors approved the public announcement of the HPD spin-off, which was made the following day. Hospira’s CEO, Chris Begley, testified during this litigation that between August 22, 2003, and the date the spin-off became effective in April 2004, “there were points where it was in question whether or not it would make sense to spin off what was then called NewCo and ultimately the decision was made that it did make sense to move forward.”

Shortly before the spin-off became effective, Abbott and the new Hospira entered into an agreement – the Employee Benefits Agreement – that included the mutual no-hire provisions.

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<sup>7</sup>Where a 53 year old employee is assumed, the figures are equal in all scenarios as of the “commencement” date, but as the employee ages, the benefits are again lowest in the “if Abbott retains assets/liabilities” and greatest in the “if remain at Abbott” scenario.

<sup>8</sup>Presumably, “other postemployment benefits.”

Hospira promised not to hire any HPD employees whose employment with Abbott terminated anytime between the announcement of the spin-off on August 22, 2003, and the end of the two-year period beginning on the effective spin-off date.<sup>9</sup> One effect of this provision was that anyone who elected to retire from Abbott after the spin-off was announced would be ineligible for employment at Hospira. Abbott, for its part, agreed not to hire any employees transferred to Hospira in the spin-off for a period of two years from the effective date. The two year no-hire provision expired on May 1, 2006.

In late 2003 and early 2004, Abbott asked Hewitt to calculate the present value of the retiree medical and pension benefits for two senior Abbott executives who were slated to transition to Hospira. Emails among Abbott executives reflected that Abbott's CEO had made a commitment to those executives to "keep them whole" and wanted to know "what we can do for them about: retiree health, retirement, trusts/SRP... ." Abbott made confidential "accommodation[s]" with these and several other "key" Abbott executives, which included lump sum payments associated with their transition to Hospira.

After the spin-off, Abbott and Hospira became independent companies, and Abbott did not have any shared ownership in Hospira, shared no board members with Hospira, and did not appoint any Hospira board members.

#### The Transition to Hospira's Benefits Plans

A number of communications between Abbott and future Hospira executives discuss the expectation that Hospira would reduce its "benefits burden" after the spin-off. Plaintiffs cite, for example, to the "HR Guiding Principles" circulated by Steve Fussell to other Abbott executives,

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<sup>9</sup>The limited exceptions to this provision are not relevant here.

which states that because the future Hospira would bear its own benefits and other HR costs, Hospira had an incentive to “accelerate their migration to a lower-cost HR structure post-spin.”

After the spin-off was announced, Abbott gave its employees conflicting messages about whether or not they would be entitled to retire from Abbott and begin working at Hospira. During a question-and-answer session with employees held on the day the spin-off was announced, Chris Begley, Hospira’s future CEO, said that employees would be able to retire from Abbott and collect retiree benefits while working for Hospira. By the time the spin-off became effective, however, Abbott had signed the Employee Benefits Agreement, which, as noted above, precluded Abbott retirees from working at Hospira.

During the period immediately following the spin-off, and through December 31, 2004, the new Hospira employees continued to accrue benefits under the “transitional plan” that mirrored Abbott’s pension plan. Two months after the spin-off became effective, Hospira’s board of directors approved Hospira’s benefit plan, which was to become effective at the expiry of the transitional plan. Among other changes, the Hospira plan froze the Annuity Retirement Plan (“ARP”) and eliminated retiree medical benefits. Hospira realized an immediate accounting gain as a result of the write-off the expenses associated with the reduction in benefits.

## **DISCUSSION**

### **Legal Standard**

Summary judgment is appropriate where the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(e). It is not the court’s function, at the summary judgment stage, to

