

**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.)	Hon. Robert W. Gettleman
)	
ABBOTT LABORATORIES and HOSPIRA,)	Magistrate Geraldine Soat Brown
)	
Defendants.)	

**ABBOTT LABORATORIES' MEMORANDUM IN
SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiffs' case is legally and factually empty. In April 2004, Abbott Laboratories spun off part of a massive division in an attempt to enhance shareholder value. As reams of documents and testimony confirm, the spin was designed to refocus Abbott on high-growth, high-profit, low-asset businesses with a common strategic fit. Through that strategic spin, Abbott created a separate and independent company – Hospira, Inc. – which now has 13,000 employees, competitive benefits, and a market capitalization exceeding \$6 billion.

Without any evidentiary basis, Plaintiffs contend the driving purpose behind Abbott's mammoth spin was to send them to a company with lower benefits in violation of § 510 of ERISA. But § 510 does not generally apply to corporate reorganizations. It applies only to "employment actions" taken with a "specific intent" to deny individual employees their benefits. *Isbell v. Allstate Ins. Co.*, 418 F.3d 788, 796 (7th Cir. 2005).

Undeterred, Plaintiffs attempt to shoehorn their case into a narrow exception proposed by the D.C. Circuit a decade ago in *Andes v. Ford Motor Co.*, 70 F.3d 1332, 1338 (D.C. Cir. 1996). After discussing the hypothetical closure of a 20-employee unit where 19 employees were about to collect a rich pension, the *Andes* court suggested § 510 may apply to a corporate reorganization where "some ERISA-related characteristic special to the unit (such as its having a clearly above-average proportion of employees with pension rights about to vest) was essential for the firm's selecting the unit for closure or sale." *Id.*

But no court has ever applied that proposed exception, and there is no basis for applying it here. The 10,000 (not 20) U.S. employees who formed Hospira did not have any special "ERISA-related characteristic...essential" to the spin decision. They did not have a "clearly above-average" age and, far from being "essential" to the spin, not a single document explaining the spin decision mentions the average age of the affected employees.

Even if Plaintiffs could shoehorn their case into *Andes'* exception (they cannot), their case still fails because they have no evidence Abbott acted with a "specific intent" to reduce their benefits. Like everyone else involved in the decision, Miles White, Abbott's CEO, testified that the spin did not have "anything whatsoever to do with benefits" for Hospira employees. (Ex. 87, M. White Dep. II at 51-52; 55-56). Boxes of documents and many witnesses confirm his testimony. There is no contradictory evidence. Literally nothing.

Because Abbott proffered a legitimate reason for the spin, Plaintiffs' case fails unless they can prove Abbott's proffered reason is "pretextual," meaning it is a "deliberate falsehood" or a "lie." *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 407 (7th Cir. 2007). They cannot. Plaintiffs cannot seriously contend that the huge volume of confirmatory evidence is part of some massive conspiratorial "lie," which would require proof of a vast conspiracy involving dozens of people and thousands of documents – all designed to hide Abbott's "true purpose" of creating a \$6 billion company to save some money on benefits. Wholly unrealistic and baseless theories are not sufficient to avoid summary judgment.

Plaintiffs additionally complain about a "no-hire" policy implemented as part of the spin, which is the subject of separate summary judgment motion filed by Hospira. To avoid repetitive briefing, Abbott adopts Hospira's motion as its own. In addition to the reasons set forth by Hospira, Plaintiffs' challenge to the no-hire policy is moot because the policy already expired.

Finally, Plaintiffs' fiduciary duty count fails because Abbott had no fiduciary duty over *Hospira's* benefit plans, which did not even exist when Abbott made its alleged misstatements. In fact, Abbott is accused of making misleading statements about decisions Hospira would make effective January 2005 – a full eight months after the spin. No authority exists for "imposing fiduciary liability based on an employer's failure to inform employees of the terms of a successor's benefits." *Ames v. American Nat'l Can Co.*, 1997 WL 733893 (N.D. Ill. 1997), *aff'd*, 170 F.3d 751 (7th Cir. 1999). Plaintiffs also have no evidence to overcome Abbott's rebuttal of the presumption of reliance noted in the Court's recent class certification ruling.

For these reasons, the Court should grant summary judgment in Abbott's favor.

STATEMENT OF FACTS

A. Abbott Regularly Analyzes Options To Reshape The Company To Maximize Shareholder Value.

Abbott is a diverse company with a variety of healthcare products, including pharmaceuticals, nutritionals, diagnostic tests, and medical devices. (Ex. 1 at A001078, 88-90). Before the spin, Abbott had six operating divisions, one of which was known as the Hospital Products Division ("HPD"). (Ex. 84, L. Steele Aff., ¶ 9).

At least since Mr. White became CEO in January 1999, Abbott has routinely evaluated opportunities to reshape the company to maximize shareholder value. (Ex. 87, M. White Dep. II at 22-23, 17-22). That process has led to many major acquisitions and divestures over the last

six years, such as the acquisitions of Knoll Pharmaceuticals (\$7.2 billion), Guidant's vascular business (\$4.1 billion), Kos Pharmaceuticals (\$3.8 billion) and the pending sale of its diagnostic division to GE (\$8 billion). (Ex. 2 at A001059, Ex. 3 at 59; Ex. 4; Ex. 72, T. Freyman Dep. II at 34-40). The acquisitions, of course, *increased* the employees enjoying Abbott benefits.

B. In January 2003, Abbott Retained Morgan Stanley To Analyze Options To Reshape The Company.

In January 2003, as part of its regular evaluation of restructuring opportunities, Abbott retained an investment banking company, Morgan Stanley, to "examine restructuring opportunities for [Abbott] to achieve greater shareholder value." (Ex. 8 at A016047-48; Ex. 9 at A015996-606; Ex. 10 at A016008-23; Ex. 72 T. Freyman Dep. II at 53-55; Ex. 87, M. White Dep. II at 30). Morgan Stanley initially evaluated opportunities other than the HPD spin that created Hospira. (Ex. 8 at A016047-57; Ex. 72, T. Freyman Dep. II at 40-41, 168-69, Ex. 21 at A016307-08). For those opportunities, Morgan Stanley evaluated the [REDACTED]

[REDACTED] (Ex. 8 at A016047).

For each alternative, Morgan Stanley focused on several key criteria, including [REDACTED] [REDACTED] (Ex. 8 at A016048, A016054-55, A016061-63, A016069-72, A016077-81, A016085-88, A016107-14). It did not analyze how each alternative would impact the cost of benefits. In fact, Morgan Stanley never mentioned employee benefits. (*Id.*)¹

C. In June 2003, Morgan Stanley Concluded That An HPD Spin Was The Best Way To Maximize Shareholder Value.

As this analysis proceeded through 2003, Morgan Stanley evaluated other opportunities, including acquisitions, which obviously would have *increased* the number of employees enjoying Abbott's benefits plans. (Ex. 11 at A023682-83, A023707, A023712; Ex. 12 at A016525-27, Ex. 21 at A016307-08). Nevertheless, Morgan Stanley focused solely on the business factors outlined above without mentioning benefits. (*Id.*)

In about April 2003, a spin-off of HPD came under serious consideration after meetings between Miles White (CEO), Tom Freyman (CFO), and Rick Gonzalez (President of the

¹ Abbott respectfully requests that any published opinion resolving this motion not reference the strategic options discussed in this motion, some of which have still not been ruled out for the future.

Abbott's Medical Products Group). (Ex. 64 at 2-3, Ex. 72, T. Freyman Dep. II at 135-36, 137-40, 53, Ex. 87, M. White Dep. II at 23). As a result of those meetings, Mr. Freyman asked Morgan Stanley to evaluate a possible divestiture of HPD. (Ex. 13 at A016231-33). Morgan Stanley conducted the requested analysis and, again, focused solely on the same financial factors as outlined above. (Ex. 14 at A016244-45, A016251-56, A016258-61; Ex. 15 at A016268-69; Ex. 16 at A016271-74; Ex. 17 at A016276-78; Ex. 18 at A016288-96, A016298-99; Ex. 19 at A016298-99; 20 at A016301-04; Ex. 21 at A016306-07). It never once analyzed the impact of an HPD spin on the cost of benefits. (*Id.*; Ex. 22-24). In June 2003, of all the options considered, Morgan Stanley concluded spinning HPD would **REDACTED** **REDACTED** (Ex. 14 at A016242).

D. Abbott Management Concluded That Spinning Core HPD Was The Best Way to Maximize Shareholder Value.

Abbott's top officials, including Mr. White and Mr. Freyman, considered Morgan Stanley's conclusion in the context of the company's strategic goals. (Ex. 87, M. White Dep. II at 50-51, 23). They considered Abbott's "investment identity," the company's strategic makeup, and how each business unit fit within its "investment identity." (Ex. 87, M. White Dep. II at 50).

As the analysis progressed, they began to consider spinning off only "core" HPD (*i.e.*, drug delivery systems and injectable pharmaceuticals) and keeping "high-acuity" business (*e.g.*, proprietary pharmaceuticals and medical devices). (Ex. 72, T. Freyman II Dep. at 138-39; Ex. 25 at A014648; Ex. 27 at A013988). They then summarized the key considerations in a chart that Mr. White personally prepared:

REDACTED



(Ex. 27 at A013973; Ex. 87, M. White Dep. II at 53-55; Ex. 72, T. Freyman Dep. II at 174-75).

At his deposition, Mr. White explained the business rationale for the spin decision consistently with his chart showing “core HPD” satisfying only two of nine key factors:

Q. So ultimately why did Abbott Laboratories decide to spin off a portion of HPD?

A. Because after fairly extensive evaluation of the conditions and characteristics of its marketplace and its growth rates and its returns and its strategic fit with the identity we were shaping for Abbott and a variety of criteria that I put together in a chart to evaluate all of our businesses, it did not fit in the same way. And so it had as an investment identity a very different kind of identity and therefore likely different mix of shareholders, and so it made sense to me that they be two different entities with two different currencies, if you will, in the stock market.

(Ex. 87, M. White Dep. II. at 50). Mr. Freyman offered the same rationale for the spin. (Ex. 72, T. Freyman Dep. II at 171-72).

E. On June 20, 2003, Abbott’s Board Of Directors Approved Moving Forward With The Core HPD Spin.

After conducting that analysis, Abbott’s senior officers presented their recommendation to the board of directors on June 19, 2003 using a document entitled “Strategy Review” to summarize their analysis. (Ex. 26 at A023826-27; Ex. 27 at A013968-4003). Mr. White went over the pros and cons of each of the possible divestiture and acquisition scenarios. (Ex. 27 at A013970-996; Ex. 26 at A023826; Ex. 87, M. White Dep. II at 51-55).

Without ever mentioning employee benefits, he discussed each scenario’s impact on Abbott’s sales, growth rates, return on assets, cash flow, and debt rating. (*Id.*). His conclusion for each proposed divestiture is fully documented in the Strategy Review, which never mentions employee benefits. (Ex. 27 at A013986-4003; Ex. 87, M. White Dep. II at 55). Mr. White ultimately concluded there was a “compelling strategic rationale” for spinning core HPD:

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

(Ex. 27 at A013991; Ex. 87, M. White Dep. II at 52-53). Again, this strategic analysis had nothing to do with benefits.

Mr. White further explained that a spin-off would benefit both “core” and “high acuity” HPD. (*Id.*) While “core” HPD would have [REDACTED]

[REDACTED] (Ex. 27 at A013992). At the same time, spinning “core” HPD would give “high acuity” HPD [REDACTED]

[REDACTED]

(*Id.* at A013994).

The following day, June 20, 2003, the Board approved the spin-off. (Ex. 87, M. White Dep. II at 42-44; Ex. 72, T. Freyman Dep. II. at 82-84; Ex. 26 at A023827). The board minutes state [REDACTED]

[REDACTED] (*Id.* at A023827.). Although there was a possibility further due diligence could alter this conclusion, the decision to spin core HPD had effectively been made as of that date. (Ex. 87, M. White Dep. at 42-44; Ex. 72, T. Freyman Dep. at 82-84).

F. Employee Benefits Were Irrelevant To The Spin Decision.

When making its spin decision, Abbott never considered any possible impact on the cost employee benefits. (Ex. 87, M. White Dep. II at 51-52, 55-56; Ex. 71, T. Freyman Dep. I at 37-38). This is confirmed by the board minutes, the Strategy Review, and the numerous Morgan Stanley financial documents. (Ex. 26-27; 8-21). None mention employee benefits.

Plaintiffs nevertheless theorize that Abbott “targeted” HPD for a spin because it had “older” employees, which allegedly were responsible for a disproportionately high percentage of Abbott's employee benefit costs. Not a single document supports that theory, and Abbott's CEO and CFO both denied the theory as preposterous. Mr. White testified that “the decision to spin

HPD” had nothing “whatsoever to do with the benefits for the employees within the HPD division.” (Ex. 87, M. White Dep. II at 55-56). Mr. Freyman similarly confirmed that the decision did not have “anything whatsoever to do in any way, shape or form with the benefits for HPD employees.” (Ex. 71, T. Freyman Dep. I at 37-38).

Furthermore, Abbott never maintained accounting information in the way that Plaintiffs suppose. To allocate employee benefits expenses to its divisions, Abbott simply divides the total cost of benefits by the number of employees within each unit. (Ex. 76, G. Linder Dep. at 90, 109-11, 168-69, 157-58). A uniform cost is allocated to each employee. (*Id.* at 169; Ex. 70 G. Denham Dep. at 180). Abbott does not, as Plaintiffs suggest, refine the analysis further by attempting to account for the tenure and age of each employee within each business unit. (Ex. 76, G. Linder Dep. at 158-59).

Without information on the subject, the spin decision logically could not have been based on HPD’s allegedly higher benefits costs, as Mr. White confirmed:

Q. When making the decision to spin HPD, did you make any effort to compare the average cost of providing employee benefits to HPD employees compared to other employees within Abbott?

A. No. There would be no reason to. They’d all be the same.

Q. To this day do you know whether the cost of providing benefits to the average HPD employee was higher, lower or the same as the employee in the other Abbott divisions?

A. I don’t know, but they all had the same mix of benefits so it stands to reason they’d all be the same.

(Ex. 87, M. White Dep. II at 55-56). Mr. Freyman confirmed the same point, testifying that he never made “any effort to compare the cost of providing benefits to the average HPD employee compared to the employees in other parts of the company” and still does not know if they were “higher, lower, or the same” as other divisions. (Ex. 71, T. Freyman Dep. I at 37-38).

G. Hospira Has Been Incredibly Successful As A Separate And Independent Company.

The spin decision was publicly announced on August 22, 2003. (Ex. 29 at A014923-25). The spin was then executed on April 30, 2004, which is when Hospira became a separate and independent company. (Ex. 41; Ex. 87, M. White Dep. II at 56). Since then, Hospira has been

wildly successful. It now has a market capitalization exceeding \$6 billion and a stock that outperforms the major indices. (Ex. 6-7).

H. As A Separate And Independent Company, Hospira Established Its Own Benefit Plans After The Spin.

When announcing the spin on August 22, 2003, Abbott advised affected employees that their compensation and benefits would remain the same until at least December 31, 2004. (Ex. 28 at H001700). For 2005 and beyond, however, Abbott explained that the “new Company’s board of directors and senior management will be responsible for future employee compensation and benefits....” (Ex. 29 at A014923-25).

Pursuant to the transaction, Abbott transferred the accrued pension assets for employees going to Hospira – plus an extra \$45 million – to Hospira. (Ex. 32 at H002145; Ex. 40 at A008854). Abbott then created a transitional pension plan that mirrored Abbott’s plan in all respects. (Ex. 30). After the spin, Hospira continued to work on all elements of their post-2004 benefit plans. (Ex. 85, H. Weishaar Dep. at 134, 142-46, 151, 153-63, 165; Ex. 70, G. Denham Dep. at 10, 26-28, 32, 69-77, 85-88, 92-93, 112-16, 121-23; Ex. 74, K. James Dep. at 50-57, 74-76, 80, 92-94; Ex. 47-58). Once they were finalized, the plan was presented to Hospira’s board of directors for approval on June 9, 2004. (Ex. 59 at H13112-14).

After approval, Hospira’s plans were announced to its employees in June 2004. (Ex. 60 at H08303-H08314). Hospira’s overall plan differed from Abbott’s compensation and benefits package. For example, Hospira did not offer a pension or retiree health benefits. (*Id.* at H08306). But Hospira established a more lucrative 401(k) than Abbott’s plan, which has turned out to be a boon given how well Hospira has performed in the stock market since the spin. (*Id.*).

I. None Of The Plaintiffs’ “Relied” On Abbott’s Purported Misrepresentation That Hospira – Not Abbott – Would Decide On Hospira’s Benefits Plans

Plaintiffs contend that Abbott should have preannounced Hospira’s benefit plans for the post-2004 time period. But, as Hospira’s future CEO, Chris Begley, explained in an August 2003 conference call, Hospira’s benefits plan could not be formed before the company existed:

[The benefits program] can’t be available before the start date of the new company, because benefits plans and employee programs like that have to be approved by the board, and the board won’t be existent until the new company is spun out.

(Ex. 61 at ¶ 99, Ex. 3 at H001872-73). Miles White similarly explained that, regardless of what Abbott thought Hospira might do, it had no control over Hospira's future benefits decisions:

We had no role to play. We did not own the company. We did not have any shared ownership in the company. We had no shared management. We had no shared board members. We did not appoint any board members. They were a free-standing, independent company. We had no position to have any role at all, either in analysis or decision.

(Ex. 87 M. White Dep. II at 55-56; *accord* Ex. 72, T. Freyman Dep. II 39-40 (same); Ex. 73 S. Fussell dep. at 186 (same)).

With respect to their contention that Abbott should have pre-announced Hospira's benefits plan, Plaintiffs' own expert readily agreed Abbott announced that benefits *might* change at the new company after 2004. (Ex. 81, L. Quartana dep at 124-25). Plaintiffs nevertheless contend Abbott was dishonest because it purportedly *knew* Hospira *would* change benefits, even though the Hospira board approval did not occur until June 2004. (Ex. 59 at H13112-14).

Despite this argument, Plaintiffs have never alleged cognizable detrimental reliance based on the difference between "*might*" and "*would*." After Hospira announced its benefits in June 2004, all three named Plaintiffs remained at the company. (Ex. 80, M. Nauman Dep. II at 10-11; Ex. 77, M. Loughery Dep. I at 28; Ex. 82, J. Roller Dep. I. at 107). They did not quit or retire, and still remain at Hospira even today – nearly three years later. (Ex. 80, M. Nauman Dep. II. at 72-76; Ex. 78, M. Loughery Dep. II at 56; Ex. 83, J. Roller Dep. II at 62-63). Indeed, class representative Loughery readily admitted he could not "recall at this time" detrimentally relying on anything Abbott said. (Ex. 78, M. Loughery Dep. II. at 44-45).

Nevertheless, Plaintiffs assert that, if Abbott had pre-announced Hospira's benefits before the company existed, they would have taken more headhunter calls (which they had been doing *before* learning of Hospira's benefit changes) and "potentially taken another job" (which they could *not* identify and for which they did *not* apply). (Ex. 80, M. Nauman Dep. II at 14-19, 80; Ex. 78, M. Loughery Dep. II. at 46-55; Ex. 83, J. Roller Dep. II. at 51, 53-54).

ARGUMENT

Summary judgment is appropriate when the evidence demonstrated the absence of a "genuine issue" of material fact. Fed. R. Civ. Pro. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). To avoid summary judgment, the nonmoving party must do more than raise a "metaphysical doubt" about a material fact and a "scintilla of evidence is insufficient." *Gleason*

v. Mesirov Fin., Inc., 118 F.3d 1134, 1139 (7th Cir. 1997) (citations omitted); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Rather, the nonmoving party must present enough evidence for a jury to reasonably find in its favor. *Id.*; accord *RJB Properties, Inc. v. City of Chicago*, 468 F.3d 1005, 1009 (7th Cir. 2006) (citations omitted).

I. Abbott’s Spin Of Core HPD Did Not Violate § 510.

Plaintiffs have not offered even a “scintilla of evidence” in support of their § 510 claim. Section 510 makes it “unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of any employee benefit plan.” 29 U.S.C. § 1140.

Section 510 only applies, however, to employment actions taken with the “specific intent” to deny individual employees their benefits. *Isbell*, 418 F.3d at 796. Where the benefit loss is “simply the consequence of a decision that had the incidental effect of affecting an employee’s benefits,” there is no § 510 violation. *Id.* Thus, reducing benefits must be the “motivating factor” behind the decision. *Salus v. GTE Directories Serv. Corp.*, 104 F.3d 131, 136 (7th Cir. 1997); accord *Larimer v. International Business Machines Corp.*, 370 F.3d 698, 702-03 (7th Cir. 2005) (plaintiff must “present evidence...that the defendant’s motivation in taking the adverse action...was indeed to thwart his right to benefits.”).

A. Section 510 Is Generally Inapplicable To Corporate Reorganizations

Plaintiffs’ claim initially fails because § 510 does not typically apply to “corporate organizational changes, such as a decision to sell a subsidiary.” *Blaw Knox Retirement Income Plan v. White Consol. Indus., Inc.*, 998 F.2d 1185, 1191 (3d Cir. 1993) (collecting cases). Rather, § 510 relates “...primarily to protect the employment relationship that gives rise to an individual’s pension rights.” *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980) (emphasis added), cited with approval in *McGath v. Auto-Body North Shore, Inc.*, 7 F.3d 665, 667-69 (7th Cir. 1993). It was never intended to hamstring decisions about corporate reorganizations. *Id.*

As a result, many circuits “have addressed the question of whether a corporate organizational change, such as a decision to sell a subsidiary, violated § 510” and “have easily rejected such claims at the summary judgment stage.” *Andes v. Ford Motor Co.*, 70 F.3d 1332, 37 (D.C. Cir. 1995), citing *Daugherty v. Honeywell, Inc.*, 3 F.3d 1488 (11th Cir. 1993); *Unida v. Levi Strauss & Co.*, 986 F.2d 970 (5th Cir. 1993); *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987);

West v. Greyhound Corp., 813 F.2d 951 (9th Cir. 1987); and *Aronson v. Servus Rubber, Div. of Chromalloy*, 730 F.2d 12 (1st Cir. 1984) *cert. denied* 496 U.S. 1017 (1984).

The Seventh Circuit has similarly explained that § 510 is “simply not the appropriate vehicle for redressing the unilateral elimination of...benefits accomplished independently of employee termination or harassment.” *Deeming v. American Standard*, 905 F.2d 1124, 1128 (7th Cir. 1990); *see, e.g., Andes*, 70 F.3d at 1338 (§ 510 does not apply to the sale of a subsidiary); *Blaw Knox Retirement Income Plan v. White Consol. Indus.*, 998 F.2d 1185, 1191 (3d Cir. 1993) (same with respect to the sale of a division); *La Fata v. Raytheon Co.*, 302 F.Supp.2d 398, 418-419 (E.D. Pa. 2004) (same with respect to the sale of a company); *Coats v. Kraft Foods*, 12 F.Supp.2d 862, 870 (N.D. Ind. 1998) (same with respect to the sale of facility); *Bass v. Conoco*, 676 F.Supp. 735 (E.D. La. 1988) (same with respect to sale of plant).

For example, when granting summary judgment, the court in *Bass* stated that Plaintiffs “cannot seriously suggest” that the \$600 million sale of a manufacturing plant violated § 510:

The purpose of § 1140 is to prevent discharge...of specific employees to prevent their pension rights from vesting. ... To give the statute the meaning advanced by plaintiffs would mean that an employer could never sell a division unless it ensured that the provisions of the vendee’s plan forever mirrored those of the vendor’s plan. It is settled law that ERISA does not require this.

Bass, 676 F.Supp. at 746 (citations omitted). That same “settled law” precludes the application of § 510 to a multi-billion dollar spin-off involving 10,000 U.S. employees.

B. Plaintiffs Cannot Satisfy The *Andes* Exception To The General Rule Against Applying § 510 To Corporate Reorganizations.

In an effort to keep their case alive, Plaintiffs seize on a hypothetical exception to the general rule against applying § 510 to corporate reorganizations. That possible exception was proposed by the D.C. Circuit in *Andes*, where the court rejected a § 510 claim in the context of the sale of a Ford subsidiary, explaining that it is “unlikely that Ford’s basic decision to sell the operation would have been driven by the benefit package of its employees which, after all, were standard company-wide.” *Andes*, 70 F.3d at 1336.

However, when rejecting that claim, the court proposed a narrow exception to the general rule. Specifically, it stated in dicta that “we think that as applied to sale or closure of an entire unit, the plaintiffs can satisfy § 510 *only* by showing that some *ERISA-related characteristic special to the unit* (such as its having a clearly above-average proportion of employees with

pension rights about to vest) is *essential* to the firm’s selecting the unit for closure or sale.” *Andes*, 70 F.3d at 1337-38 (emphasis added). As an example, the court suggested the proposed exception might hypothetically apply to the closure of a division where 19 of the division’s 20 employees “were soon to become eligible for a rich benefits package.” *Id.*

To Abbott’s knowledge, no case has ever applied the proposed *Andes* exception. Nevertheless, to attempt to shoehorn this case into that exception, Plaintiffs have alleged that HPD’s 10,000 U.S. employees – not merely 20 employees – were the “oldest group of employees” at Abbott and, thus, closer on average to collecting their pension benefits. This argument fails for two reasons: (a) the HPD employees were not the “oldest group” and (b) their average age certainly was not “essential” to the spin decision.

1. The HPD Employees Did Not Have A “Clearly Above Average” Age.

The core HPD employees did not have any “ERISA-related characteristic special to the unit,” such as a “clearly above-average proportion of employees with pension rights about to vest.” When making the spin decision, Abbott did not know which specific employees would go to the new company, particularly for employees who served multiple divisions, such as accounting, legal, and human resources. (Ex. 35 at A004518, Ex. 36 at A005081-51030). Moreover, only HPD’s “core” business would be spun, while the “high acuity” business would stay with Abbott. (Ex. 27 at A013988). Abbott’s computer system did not break down the employees in that manner. (Ex. 84, L. Steele Aff., ¶ 11).

As an approximation for the purposes of this litigation, however, Abbott has calculated comparative statistics. They show the employees in all of the Abbott divisions that were evaluated for spin-off – HPD, **REDACTED** – had essentially the same average credited service (from 9.7 to 10.49 years) and age (from 41.82 to 42.05 years) as well as the same percentage of employees over 40:

Division	Av. Credited Svc.	Average Age	% Over 40
RED ACT	9.7	41.82	61.29
HPD	9.77	42.05	61.64
RED ACT	10.49	41.98	61.45

Id.

This is further corroborated by an email from January 6, 2004 – about six months after the spin decision when Abbott started to identify specifically who would be going to Hospira – which very roughly calculates the average age and service of likely Hospira employees. (Ex. 88,

C. Yurwitz Aff., Exh. A at Z00081). The email was prepared by an outside agency, Hewitt, which used rough assumptions to approximate that Hospira's average employees was only two years older with only two and half years more service. (*Id.*, ¶¶ 11-13).²

Although these approximations are not precisely accurate, they further confirm that Plaintiffs have nothing to invoke the *Andes* exception. The two examples in *Andes* are (1) 19 of 20 employees “soon to become eligible for a rich benefits package” and (2) a business unit with “a clearly above-average proportion of employees with pension rights about to vest.” *Andes*, 70 F.3d at 1337-38 (emphasis added).

Particularly in the context of a multi-billion dollar spin, the slight differences calculated by Hewitt (even if accurate) are hardly sufficient to invoke (for the first time) the *Andes* exception for 10,000 employees. Plaintiffs make no effort to calculate what those slight differences, even if accurate, would mean in terms of higher average benefits costs. No matter what the amount, however, it would be a speck in the context of a multi-billion dollar spin-off.

Instead of relying on actual calculations that might have shown higher benefit costs, Plaintiffs allege that Henry Weishaar, a VP of human resources, held a conference call on September 22, 2003 – months after the spin decision – where he purportedly described HPD as the “most senior” division, with allegedly over 70% of its employees older than 40. (Ex. 61, ¶ 52). Even if he made that statement (he denies it), Mr. Weishaar would have been wrong. HPD was not the “most senior” division and had nowhere near 70% of its employees over 40 under any possible calculation. (Ex. 84, L. Steele Aff., Exh. A).

In the end, Plaintiffs have offered no reliable evidence that the impacted employees had “clearly above average” ERISA-related characteristics compared to the other divisions at Abbott. Thus, Plaintiffs cannot invoke *Andes* exception.

2. The Age Of HPD Employees Was Not “Essential” To The Spin.

Even if they could establish any such “clearly above average” characteristic, Plaintiffs cannot establish that it was “essential” to the spin decision, which is the second element of the *Andes* exception. Abbott has produced numerous documents – including financial analysis,

² As example of the rough assumptions, Hewitt could only account for 8,400 of the 9,500 employees slotted as of November 2003 to go to Hospira and, thus, calculated “averages” that ignored about 1,100 possible employees. (Ex. 88, C. Yurwitz, ¶¶ 12-13, Ex. 2-3). Moreover, to arrive at the “rest of Abbott” numbers, Hewitt subtracted 8,438 from the total number of Abbott employees, which, of course, incorrectly assumed the missing 1,100 missing employees stayed at Abbott. (*Id.*, ¶ 15) Thus, the 1,100 or so employees ended up in the Abbott column rather than the Hospira column. (*Id.*).

board minutes, presentations, and memos – reflecting the analysis leading to the spin decision. Not one such document mentions the average age or service of the impacted employees. That alone proves that those factors were not “essential” to the decision.

In fact, nobody even knew the average age of the likely Hospira employees when the board approved the spin decision in June 2003. Abbott’s decision makers – including both Mr. White and Mr. Freyman – testified without contradiction that they (1) never made any “effort to compare the average cost of providing employee benefits to HPD employees compared to other employees within Abbott,” and (2) still “to this day” do not know “whether the cost of providing benefits to the average HPD employee was higher, lower or the same as the employee in the other Abbott divisions.” (Ex. 87, M. White Dep. II at 87; Ex. 71, T. Freyman Dep. I at 37-38).

In the face of the dispositive evidence, Plaintiffs cannot create a *genuine* issue of material fact through stray comment made by a non-decision-maker, Mr. Weishaar, who allegedly said (incorrectly) that HPD has the “most senior” employees months *after* the spin decision and who *never* said their age had anything to do with the spin decision. (Ex. 85, H. Weishaar Dep. at 32-33) A “stray remark” by a non-decision maker that had nothing to do with the challenged decision is not enough to survive summary judgment. *See, e.g., Isbell*, 418 F.3d at 795, *citing Fuka v. Thomson Consumer Elecs.*, 82 F.3d 1397, 1404-05 (7th Cir. 1996); *Rush v. McDonald’s Corp.*, 966 F.2d 1104, 1116, n.44 (7th Cir. 1992) (“...statements by non-decisionmakers, or statements by decisionmakers unrelated to the decisional process itself, [will not] suffice to satisfy the employee’s burden....”).

C. Even If Plaintiffs Could Satisfy *Andes*’ Exception, §510 Does Not Apply.

Even if Plaintiffs could wedge this case into the *Andes* exception, their case still fails because they cannot establish a traditional § 510 case.

1. Plaintiffs Cannot Establish A *Prima Facie* Case.

Because they have no direct evidence, Plaintiffs must establish their claim indirectly through the *McDonnell Douglas* burden-shifting analysis. *Isbell*, 418 F.3d at 796. To establish a *prima facie* case under § 510, Plaintiffs must show they suffered an adverse employment action “under circumstances that provide some basis for believing that the prohibited intent...to prevent the use of benefits was present.” *Id.*, *citing Grottkau v. Sky Climber, Inc.*, 79 F.3d 70, 73 (7th Cir. 1996) and *Lindemann v. Mobil Oil Corp.*, 141 F.3d 290, 295 (7th Cir. 1998); *accord Kampmier v. Emeritus Corp.*, 472 F.3d 930, 943 (7th Cir. 2007) (citations omitted).

Plaintiffs cannot sustain that burden. Nothing in the record suggests that the motivation for the HPD spin was to reduce benefits. Far from having a “specific intent” to reduce benefits, Abbott’s reasons for the spin decision are definitively documented in the Strategy Review Mr. White presented to the board on June 19, 2003. That presentation is fully consistent with board minutes and the chart Mr. White personally prepared, which shows that core HPD satisfied only two of the nine factors he established for moving the company forward. (Ex. 27 at A013973).

Without contradiction, Mr. White testified he analyzed “a variety of criteria that I put together in a chart to evaluate all of our businesses,” and HPD “did not fit in the same way” as other business. (Ex. 87, M. White Dep. II at 50). Mr. Freyman said the same thing, explaining “HPD did not fit the strategic criteria Abbott had for its business of high growth, high innovation, high margin, high cash flow businesses and we felt as we looked at that business that it was a good business that would perform better as an independent company.” (Ex. 72, T. Freyman Dep. II at 171-72).

Mr. White and Mr. Freyman also specifically denied even considering benefits when making that decision. Mr. White said that the spin did not “have anything whatsoever to do with the benefits for the employees within the HPD division.” (Ex. 87, M. White Dep. II at 55-56). Mr. Freyman similarly testified that the spin decision had nothing “whatsoever to do in any way, shape or form with the benefits for HPD employees” (Ex. 71, T. Freyman Dep. I at 38).

For their part, Plaintiffs have failed to cite a single document even mentioning employee benefits in the context of explaining the spin decision. Instead of citing any such document, Plaintiffs have periodically suggested that Abbott “saved money” on benefits by spinning off 10,000 employees. That is unlikely given the costs of the complex transaction. But even if it were true, the claim is insufficient to establish intent as a matter of law. “The loss of benefits to an employee as a result of an employer’s action is not, by itself, sufficient to prove a violation of § 510.” *Isbell*, 418 F.3d at 796; *Deich-Keibler v. Bank One*, 2005 WL 2428219 *5 (S.D. Ind. Sept. 30, 2005) (granting summary judgment on § 510 claim despite evidence that employer saved millions of dollars in severance payments as a result of sale because those savings were “only the outcome of the sale of which the plaintiffs complain...”); *Schweitzer v. Teamsters Local 100*, 413 F.3d 533, 539 (6th Cir. 2005) (“[t]he mere fact that [an employer’s] termination would save [the employer] money in pension costs...is not sufficient to prove the requisite intent” in making a prima facie case under § 510); *Flickinger v. E.I. DuPoint De Nemours and*

Co., 466 F.Supp.2d 701, 709 (W.D. Va. 2006) (granting summary judgment on § 510 claim despite claimed saving because they were merely “incidental” to overall costs of transaction).

Plaintiffs alternatively point out that Abbott – like virtually every other major U.S. company at the time – was facing increased pension funding costs due to the drop in the stock market beginning in 2000. [REDACTED]

[REDACTED] (Ex. 34 at A023300, A023305-06). As he explained, however, this was not a serious issue for Abbott given [REDACTED] (*Id.* at A023306-07; Ex. 72, T. Freyman Dep. II at 24).

Plaintiffs have failed to point to *any* connection between that completely manageable funding issue and the multi-billion spin of core HPD. This is confirmed by the lack of a single document discussing the purpose of the spin that even mentions pension issues. Moreover, a mere generalized concern about benefits costs is not sufficient to establish the requisite “specific intent.” As the Fifth Circuit has explained, such evidence is “too general” to support a claim:

In an era when benefit costs are ever increasing, if mere evidence of company-wide cost increases in ERISA benefits supported an inference that a plant was close with specific intent to violate ERISA, every plant closure could be challenged under Section 510, and such claims would be immune to summary judgment.

Unida v. Levi Strauss & Co., 986 F.2d 970, 980 (5th Cir. 1993). *See also Regel v. K-Mart Corp.*, 190 F.3d 876, 881 (8th Cir. 1999) (holding that concerns about benefit costs “not sufficient standing alone to prove the requisite intent by the path of pretext.”).

2. Plaintiffs Cannot Show Abbott’s Proffered Reason Is Pretextual.

Finally, even if Plaintiffs could establish a *prima facie* case, their case cannot survive because Abbott has articulated legitimate reasons for creating Hospira. *Isbell*, 418 F.3d at 796. To avoid summary judgment, a plaintiff must demonstrate the employer’s articulated reason is a “pretext,” meaning a “deliberate falsehood” or a “lie.” *Forrester v. Rauland-Borg Corp.*, 453 F.3d 416, 419 (7th Cir. 2006); *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 407 (7th Cir. 2007). As the Seventh Circuit recently explained, “the question is never whether the employer was mistaken, cruel, unethical, out of his head, or downright irrational in taking the action for the stated reason, but simply whether the stated reason *was* his reason; not a good reason, but the true reason.” *Forrester*, 453 F.3d at 417-18 (emphasis in original).

Moreover, to establish pretext, the Plaintiffs must point to concrete evidence tending to show the proffered reason is a lie. “[F]lights of fancy, speculation, hunches, intuitions or rumors” cannot establish pretext. *Rand v. CF Industries, Inc.*, 42 F.3d 1139, 1146 (7th Cir. 1994). If a plaintiff cannot establish pretext, his case “is over.” *Forrester*, 453 F.3d at 417-19.

Here, there is no evidence of pretext. Even if Plaintiffs were correct that HPD was the “most senior” division or that Abbott was concerned about rising pension costs, they have identified no evidence that either issue had anything to do with the spin decision. In fact, summary judgment is appropriate because there is no evidence Mr. White and Mr. Freyman even knew what benefit costs were attributable to HPD when they made their decision. *Hudson v. International Computer Negotiations, Inc.*, 2005 WL 3087865, at *4 (M.D. Fla. Nov. 16, 2005) (granting summary judgment in Section 510 claim; plaintiff failed to show that employer was aware of any benefits-related activity prior to adverse employment action).

Plaintiffs also rely on the coincidental temporal proximity between the spin decision and Abbott’s alleged concern about rising pension costs. But “[t]emporal proximity, alone, is not enough to establish discriminatory intent.” *Kampmier v. Emeritus Corp.*, 472 F.3d 930, 939 (7th Cir. 2007). A plaintiff “needs more than a coincidence of timing” and, indeed, must also present evidence to “reasonably suggest that the two events are somehow related to one another.” *Bilow v. Much Shelist Freed Denenberg Ament*, 277 F.3d 882, 895 (7th Cir. 2001).

Because none of Plaintiffs’ theories establish pretext, they are left with nothing but empty speculation and innuendo. That is insufficient to avoid summary judgment.

II. The Two-Year No-Hire Policy Did Not Violate § 510.

Plaintiffs alternatively allege that Abbott and Hospira violated § 510 by adopting a two-year “no hire” policy as part of the HPD spin. (Ex. 61, Amend. Comp., ¶¶ 67-70, 78-88). According to Plaintiffs, the supposed purpose of that policy was to “prevent HPD employees from becoming eligible for benefits” under Abbott’s benefits plans. *Id.*, ¶ 68. Abbott hereby adopts Hospira’s motion for summary judgment on the no-hire issue. Abbott also highlights two additional reasons that summary judgment is appropriate on the issue.

A. Plaintiffs’ No-Hire Claim Is Moot.

Plaintiffs’ no-hire claim is now moot. The only relevant relief they seek is an order enjoining Abbott from continuing to enforce the no-hire policy. (Ex. 61, Amend. Comp., Prayer for Relief, ¶ C). But the policy expired over a year ago in May 1, 2006.

There is no alternative relief available under the law, as the Third Circuit recently explained when dealing with a no-hire policy in *Eichorn v. AT&T Corp.*, --- F.3d ---; 2007 WL 1266133 (3d Cir. 2007). There are two possible remedy provisions for a private plaintiff – subsection (a)(1)(B) and subsection (a)(3). *Eichorn* correctly held, however, that subsection (a)(1)(B) “provides remedies only against a defendant who has failed to comply with the terms of a benefits plan” and, thus, does not apply to no-hire claims, like here, where the allegation is that defendants “interfered with their ability to become eligible for further benefits, not that the defendants have breached the terms of the plan itself. *Id.* at *6 (expressly following Seventh Circuit’s decision in *Tolle v. Carroll Touch*, 977 F.2d 1129, 1134 (7th Cir. 1992)).

With respect to 502(a)(3), the Third Circuit noted that the Supreme Court has limited to “those categories of relief that were *typically* available in equity’ in the days of the divided bench.” *Eichorn*, 2007 WL 1266133, *8 (quoting *Great-West Liv & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (original emphasis)). The purported “equitable relief” sought by the *Eichorn* plaintiffs was – just like the Plaintiffs here – “a decree from the District Court . . . to adjust its pension records retroactively to create an obligation to pay the plaintiffs more money, both in the past and going forward.” *Eichorn*, 2007 WL 1266133, *9. The Third Circuit rejected that request, explaining that it was “in essence, a request for compensatory damages merely framed as an ‘equitable’ injunction” and, thus, “not available under § 502(a)(3).” *Id.* at *9.

Thus, the only potentially applicable remedy in this case is an order precluding Abbott and Hospira from enforcing their no-hire policy. Because the no-hire policy expired over a year ago on May 1, 2006, however, claims regarding the no-hire policy are moot and should be dismissed. *See Brandt v. Board of Educ. of City of Chicago*, 480 F.3d 460 (7th Cir. Feb. 20, 2007) (claim moot where applicable giving rise to claim has been rescinded); *Worth v. Jackson*, 451 F.3d 854 (D.C. Cir. 2006) (dismissing as moot discrimination claim based on policy that had expired by its own terms, where Plaintiffs failed to provide evidence that Defendants would seek to reenact expired policy against plaintiffs).

B. Section 510 By Its Terms Does Not Apply To “Failure To Hire” Claims.

The claim also fails on its merits as an independent claim pursuant to the Court’s opinion when denying Abbott’s motion to dismiss. Plaintiffs’ challenge to the no-hire policy is a hypothetical failure to re-hire claim – hypothetical, because no Plaintiff claimed to be both qualified for and interested in any available Abbott job during the two-year policy.

It is well-established that such claims cannot survive as an independent claim. Section 510's text is clear. It applies to purposeful interference with obtaining benefits through a "discharge, fine, suspend, expel, discipline, or discriminate against a participant." 29 U.S.C. § 1140. The statute conspicuously omits the words "hire" or "rehire," which was intentional because § 510 was modeled on a statute that actually includes "hire." *Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1483 (4th Cir. 1996); 29 U.S.C. 158(a)(3).

This intentional omission led the Third Circuit to hold that § 510 does not apply to a policy against re-hiring former employees. *Becker v. Mack Trucks, Inc.*, 281 F.3d 372 (3d Cir. 2002). *Id.* The Court explained that "if Congress intended Section 510 to apply to hiring practices, it would have included the word 'hire' in the string of denominated employment practices." *Id.* at 381. The Third Circuit also stated that "ERISA is designed to protect benefits promised to an employee arising from a pre-existing employment relationship" and, therefore, did not apply to recently terminated employees seeking protection as job applicants. *Id.* Many other courts have reached the same conclusion.³

When denying Abbott's earlier motion to dismiss on this issue, the Court noted Plaintiffs' argument that the "no-rehire policies were not separately adopted, but rather were created and adopted as part of the overall scheme to terminate plaintiffs...to prevent accrual of benefits under the Abbott plans." Ex. 68 at 10. This Court therefore declined to dismiss Count II, "because plaintiffs allege that the no-hire policies were an integral part of the overall scheme to eliminate plaintiffs' benefits...". *Id.* Thus, Counts I and II rise and fall together. If the spin did not violate § 510, Plaintiffs are reduced to complaining about a naked failure to rehire, which cannot survive as an independent cause of action. The Court should also enter summary judgment on Count II.

III. Abbott Did Not Breach A Fiduciary Duty By Failing To Pre-Announce Another Company's Benefits Plan

The Court should also grant summary judgment on Count IV. When it made the disputed statements in August 2003 giving rise to the breach of fiduciary duty claim, Abbott did not "know" what benefits Hopsira would eventually offer to its employees. The fact that individuals

³ *Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1483 (4th Cir. 1996) (holding that § 510 does not apply to hiring decisions); *Romana v. Verizon Communications, Inc.*, 2005 WL 39916, at *3 (S.D.N.Y. Jan. 7, 2005) (same); *Edes v. Verizon Communications, Inc.*, 288 F. Supp. 2d 55 (D. Mass. 2003) (same); *Williams v. American Int'l Group, Inc.*, 2002 WL 31115184, at *2 (S.D.N.Y. Sep. 23, 2002) (noting that "Section 510 protects against the *disruption* of employment privileges," not to the "decision to hire"); *Schwartz v. Independence Blue Cross*, 299 F. Supp. 2d 441, 450 (E.D. Pa. 2003) (same).

may have speculated about what that benefit package might be, prior to that June 2004 announcement, does not prove the contrary. But the Court need not resolve that issue. Summary judgment also is warranted on Count IV because (1) Abbott had no fiduciary duty over Hospira's benefits plan and (2) Abbott can defeat, as a matter of law, any presumption that Plaintiff's detrimentally relied on Abbott's purported misstatements.

A. Abbott Had No Fiduciary Duty Over Hospira's Benefits Plan.

Count IV fails because Abbott had no fiduciary duty over *Hospira's* future benefit plans and, thus, cannot breach any fiduciary duty by discussing those plans. As the Seventh Circuit has held, "[a] claim for breach of fiduciary duty...is only valid against a fiduciary." *Baker v. Kingsley*, 387 F.3d 649, 660 (7th Cir. 2004) (citations omitted). Under ERISA, a person is a fiduciary "to the extent [] he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting the management or disposition of its assets." 29 U.S.C. § 1002(21)(A); *see also Lockheed Corp. v. Spink*, 517 U.S. 882, 889 (1996) ("The Court of Appeals erred by not asking whether fiduciary status existed in this case before it found a violation").

Here, there is no dispute that Abbott had no control over Hospira's future benefits plans – Abbott owns no Hospira stock, has no Hospira management control, and has no Hospira board seat. (Ex. 87, M. White Dep. II at 87). Hospira is a separate and independent company.

Plaintiffs suggest that Abbott nevertheless had a duty to pre-announce Hospira's benefits. They rely on *Commonwealth Edison Co. v. Beach*, 382 F.3d 656, 658 (7th Cir. 2004), which demonstrates why Plaintiffs' claim cannot stand for two reasons. First, *Beach* held that "an employer is not a fiduciary when considering whether to establish a plan in the first place, or what specific benefits to offer when creating or amending a plan." *Id.* at 658. Here, Abbott's purported misstatement related to a future plan that did not yet exist.

Second, *Beach* recognized a possible exception relating to amending an *existing* plan (as opposed to *creatng* a new one) that applies only when the plan amendment is under "serious consideration" in the sense that "(1) a specific proposal (2) is being discussed for purposes of implementation (3) *by senior management with the authority to implement the change.*" *Id.* at 659-660 (quoting *Fischer v. Philadelphia*, 96 F.3d 1553, 1539 (3d Cir. 1996) (emphasis added)). Even if the creation of Hospira's new plan could somehow be characterized as an "amendment" to Abbott's plan (which it obviously was not), Plaintiffs still fail to establish a claim under *Beach*

because, before Hospira's creation, there was no "senior management with the authority to implement the change" to its benefits plans. Ex. 61, Amend. Comp., Ex. 3 at H001872-73; Ex. 87 M. White Dep. II at 55-56; *accord* Ex. 72, T. Freyman Dep. II 39-40 (same); Ex. 73, S. Fussell dep. at 186 (same).

Moreover, the Seventh Circuit previously rejected almost identical allegations in a fiduciary breach case involving the sale of a company division in *Ames v. American Nat'l Can Co.*, 1997 WL 733893 (N.D. Ill. 1997), *aff'd*, 170 F.3d 751 (7th Cir. 1999). In *Ames*, the plaintiffs filed a breach of fiduciary duty claim in connection with the sale of the division to a third-party company called "Silgan." The alleged breach was based on a company advising its employees about the "comparable" nature of Silgan's future benefits programs. The district court rejected that given the absence of a fiduciary duty over another company's benefit plans:

No authority has been cited for imposing fiduciary liability based on an employer's failure to inform employees of the terms of a successor's benefits. In a fundamental sense, defendants had no fiduciary duties of disclosure relating to Silgan's benefit plans because they had no discretionary authority or control of the plans. 29 U.S.C. §1002(21)(A). For similar reasons, ***courts have declined to ascribe a fiduciary duty with respect to another company's benefit plans...*** Although defendants had access to materials explaining Silgan's benefits, Silgan never authorized defendants to disclose any detailed benefits information prior to the closing date.... ***Even if disclosure was authorized, there is no legal authority requiring defendants to come forward.***

Ames, 1997 WL 733893, *15 (emphasis added) (citations omitted). The district court concluded that because there was no fiduciary duty, the employer could not breach a fiduciary duty: "[D]efendants here are not plan administrators of Silgan's benefit plans. Nor can defendants be considered Silgan fiduciaries by virtue of any discretionary authority or control." *Id.*

The Seventh Circuit affirmed. Like the district court, the Seventh Circuit rejected the claim of fiduciary breach based on the employer's "comparable benefits" statement, noting that – just as in the present case – "[e]very employee knew that he or she was not going to continue to receive [the seller's] benefits for the future." *Ames*, 170 F.3d at 757. *Id.* at 758. Because the original employer had no fiduciary duty, the Court noted that, "[t]o the extent they had specific questions about Silgan benefits, they had to rely on Silgan literature and Silgan fiduciaries." *Id.*

Other courts considering similar fact patterns have reached the same conclusion. *Coleman v. General Elec. Co.*, 643 F.Supp. 1229, 1238-39 (E.D. Tenn. 1986) (seller cannot breach fiduciary duty by alleged misrepresentation concerning buyer's benefits); *Plummer v.*

Consol. City of Indianapolis, Marion Co., In., 2004 WL 2278740, *8-9 (S.D. Ind. Aug. 17, 2004) (potential buyer did not breach duty by misrepresenting benefits it intended to provide post-closing because, at the time, it owed no fiduciary duty to employees).

Plaintiffs have tried to analogize their case to *Varity Corp. v. Howe*, 516 U.S. 489 (1996), where the parent corporation, Varity, deceived its plan participants about the benefits of a newly-created subsidiary – *not a separate and independent company* – in order to convince the participants to “voluntarily” exchange their *existing* benefits plan for the benefits plan of the new subsidiary. *Varity Corp.*, 516 U.S. at 499-503. This case, in contrast, is not about employees who had a choice about continued participation, and Plaintiffs do not allege that Abbott made any misstatements about its *own* benefits plan, only Hospira’s. See *Ames*, 1997 WL 733893, *15 (“Varity Corporation was both the employer and the plan administrator”).

After citing and relying on *Ames*, the Sixth Circuit recently distinguished *Varity* on the very same ground in a case involving an outsourcing where – exactly as in this case – all the company’s employees would be performing the same jobs for a separate and independent employer. *Adams v. Lockheed Martin Energy Systems, Inc.*, 2006 WL 2430047 (6th Cir. Aug. 21, 2006). Before the outsourcing, Lockheed incorrectly stated that the new employer would accept “rollovers” of their 401(k) plan. The new employer later declined to do so. In addition to rejecting the claim due to a lack of detrimental reliance, the Sixth Circuit rejected the claim due to a lack of fiduciary duty and distinguished *Varity* in the same way as Abbott:

Plaintiffs try, but fail, to analogize themselves to the plaintiffs in *Varity*. In that case, Varity, the plaintiffs’ employer and benefits-plan administrator, created a ***wholly-owned subsidiary***, planning to transfer several of its less-profitable divisions to the newly-formed subsidiary. *Varity*, 516 U.S. at 493. To entice employees to transfer to the subsidiary, Varity affirmatively misled them about the likely effect on their benefits. *Id.* at 493-94. When, as Varity expected, the new company failed, the transferred employees sued, alleging Varity breached its fiduciary duty under ERISA. *Id.* The Supreme Court agreed, holding that “[c]onveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice ***about continued participation***, would seem to be an exercise of a power ‘appropriate’ to carrying out an important plan purpose,” *id.* at 502. (emphasis added), and thus was “an act of plan administration”-that is, a fiduciary act. *Id.* at 505.

Unlike in Varity, the information conveyed by [defendant] to Plaintiffs did not concern a plan administered by [defendant], and nothing suggests that [defendant] affirmatively or intentionally misled its employees. Plaintiffs did not

have a choice "about continued participation" in [defendant's] plan – as in Ames, the business decision to outsource Plaintiffs foreclosed that option.

Id., 2006 WL 2430047 at *2-3 (emphasis added).

Ames and *Adams* compel the same conclusion in this case. As in those cases, Plaintiffs “did not have a choice ‘about continued participation,’” and Abbott’s alleged misstatements concern the benefits plan of a separate and independent company.

B. The Plaintiffs Cannot Establish Detrimental Reliance.

Plaintiffs’ claim also fails due to a lack of detrimental reliance. When granting class certification for Count IV, this Court stated that “the Seventh Circuit has never expressly held that detrimental reliance is an element of an ERISA breach of fiduciary duty claim.” Ex. 67 at 4. It also stated that because “plaintiffs have characterized their claims as being based on omissions, there is precedent to support the notion that reliance could be presumed.” *Id.*

Although it respectfully disagrees, Abbott fully accepts the Court’s legal rulings. Summary judgment nevertheless remains warranted. First, the Court correctly noted that the Seventh Court never “expressly” adopted a detrimental reliance standard. The case law firmly establishes, however, that detrimental reliance is, indeed, a claim element both in the Seventh Circuit and across the nation. *See, e.g., Kamler v. H/N Telecommunications Services*, 305 F.3d 672 (7th Cir. 2002) (rejecting claimed ERISA fiduciary breach due to a lack of detrimental reliance); *Lively v. Dynergy, Inc.*, 2007 WL 685861 (S.D. Ill. Mar. 2, 2007) (“...the Seventh Circuit...has emphasized that reliance on a fiduciary’s misrepresentations is a necessary element of a claim for breach of fiduciary duty based on such misrepresentations, going as it does to the issue of causation”); *Hammond v. Reynolds Metals Co.*, 2007 WL 675652, at *5 (11th Cir. Mar. 7, 2007) (detrimental reliance is a element of *Varity*-type claim).⁴

Second, the Court may have adopted a presumption of reliance for this case when noting that precedent exists for doing so. Ex. 67 at 4.⁵ Again, Abbott respectfully disagrees that a

⁴ *See also Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 122, 126 (2d Cir. 1997) (detrimental reliance is a element of *Varity*-type claim); *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 73 (3d Cir. 2001) (same); *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 449 (6th Cir. 2002) (same); *Brant v. Principal Life and Dis. Ins. Co.*, 50 Fed. Appx. 330, 332 (8th Cir. 2002) (same).

⁵ *But see Peachin v. Aetna Life Ins.*, 1996 WL 22968, at *5 (N.D. Ill. 1996) (Williams, J.) (noting “subjective reliance is not a distinct element of proof in securities fraud cases” because “courts presume an investor’s reliance since publicly available information is reflected in the market price under a fraud on

presumption applies, but even if so, the presumption should at least be rebuttable. The presumption is rebuttable even in the stock-trading context, which was the subject of the case cited in the Court's class certification ruling. In that context, the presumption may be rebutted by "showing that an individual plaintiff would have purchased anyway had he known of the falsity of the representation." *Lawrence Jaffe Pension Plan v. Household International Inc.*, 2005 WL 3801463 *3 (N.D. Ill. April 18, 2005); accord *Spicer v. Chicago Board Options Exchange, Inc.* 1990 WL 172712 *12 (N.D. Ill. Oct. 30, 1990) (noting that defendant "will, of course, have an opportunity to rebut the presumption of reliance by showing...that plaintiffs would have placed their orders even if they had known the facts they allege were concealed.")

In the same way, Abbott can rebut any presumption that exists here. Indeed, there is no conceivable dispute that the Plaintiffs would have gone to Hospira "anyway" even if they had known that their benefits *would* change at the end of 2004 (as opposed to *might* change). After all, Hospira announced its benefits plan nearly three years ago in June 2004. Ex. 61, Amend. Comp., ¶ 104. That was over six months before the changes went into effect. Yet, the named Plaintiffs all stayed. They did not leave the company or retire. They did not switch jobs. They did nothing. In fact, they are still with Hospira. Thus, there is no genuine dispute that a pre-announcement by Abbott – only a few months earlier – would have made any difference.

Under the law, Plaintiffs must show "reliance on [the] adversary's conduct in such a manner as to change his or her position for the worse," *Kennedy v. U.S.*, 965 F.2d 413, 418 (7th Cir. 1992), which means a plaintiff must show "*economic harm*" from the misstatement. *Bock v. Computer Associates Int'l Inc.*, 257 F.3d 700, 711 (7th Cir. 2001) (emphasis added). But, instead, they merely allege they would have searched harder for jobs if Abbott had pre-announced Hospira's benefits.

That is insufficient as a matter of law. It is well settled that "[f]orbearance from seeking job opportunities is not sufficient to show detrimental reliance..." *Croslan v. Hous. Auth. for the City of New Britain*, 974 F. Supp. 161, 168-69 (D. Conn. 1997) (citing cases). Summary judgment is thus appropriate when, like here, a plaintiff merely alleges he "would have applied for other jobs" when "he can't specify where he might have applied and he doesn't know whether other jobs were available in any event." *Panzino v. Scott Paper Co.*, 685 F. Supp. 458, 462

the market theory" and, thus, rejecting application of presumption in ERISA and common law estoppel cases where "courts require plaintiffs to show that they reasonably relied on some misrepresentation.").

(D.N.J. 1988); see also *Bock*, 257 F.3d at 711 (rejecting ERISA estoppel claim given the lack of detrimental harm where “there has been no showing, for example, that Bock refused alternative employment on account of his belief in a generous severance provision.”); *Andersen v. Chrysler Corp.*, 99 F.3d 846, 859 n.11 (7th Cir. 1996) (affirming summary judgment; “This case raises no serious question of whether” plaintiffs can establish “detrimental reliance based upon opportunities they forwent” because only one plaintiff “obliquely suggest[ed] that he forwent any opportunities or benefits.”); *Beasley v Conopco*, 273 F. Supp.2d 1239, 1250 (M.D. Ala. 2003) (granting summary judgment; plaintiff’s “affidavit states that had he looked for and found similar employment, he would have accepted it,” but provided no “evidence of any jobs with similar pay and benefits which would have been available at the time of his termination”).⁶

CONCLUSION

For the foregoing reasons, Defendant Abbott Laboratories requests that this Court grant summary judgment in its favor.

Respectfully submitted,

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⁶ See also *Kattke v. Ind.. Ord. of Foresters*, 2001 WL 557599, *4 (D. Minn. 2001) (alleging reliance requires “more than mere speculation; an actual change in the employee’s position is required” such as “quitting his current job” or “decline[ing]...concrete job offers”); *Abdullah v. Skandinaviska Enskilda Banken Corp.*, 1999 WL 945238, *9 (S.D.N.Y. Oct. 19, 1999) (“plaintiff’s claim of detrimental reliance amounts to nothing more than the speculative assertion that he might have declined a job offer that he in fact accepted, had the offer been made earlier,” which is “patently insufficient”).

CERTIFICATE OF SERVICE

Joseph J. Torres, one of the attorneys for Defendant, ABBOTT LABORATORIES, hereby certifies that he has caused a true and correct copy of its MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT to be served upon:

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