

In the
United States Court of Appeals
for the **Seventh Circuit**

MYLA NAUMAN, MICHAEL LOUGHERY and
JANE ROLLER,

Plaintiffs-Appellants,

v.

ABBOTT LABORATORIES and HOSPIRA, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:04-cv-07199.
The Honorable **Robert W. Gettleman**, Judge Presiding.

**BRIEF AND REQUIRED SHORT APPENDIX OF
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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-2272

Short Caption: Nauman, et al. v. Abbott Laboratories and Hospira, Inc.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Plaintiffs Myla Nauman, Michael Loughery, and Jane Roller, and the class and subclass they represent.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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(3) If the party or amicus is a corporation:

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Jurisdictional Statement

The District Court had federal question jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1) because it is an action arising under the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §§ 1001, *et seq.*

The Appellate Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1291 because it is an appeal from a final decision of the District Court. The plaintiffs, on behalf of themselves and the class and subclass they represent, filed their timely notice of appeal on May 21, 2010 seeking reversal of the District Court’s April 22, 2010 judgment in favor of the defendants, Abbott Laboratories (“Abbott”) and Hospira, Inc. (“Hospira”), after a nine-day bench trial. No motion for a new trial or alteration of the judgment or any other motions were filed that are claimed to toll the time within which to appeal.

Issues Presented for Review

1. Is it a violation of ERISA § 510 when two companies adopt a policy prohibiting a spun-off company from hiring retirees of the parent company?
2. Did the District Court err in ruling that the parent company spinning off a division to form a new company owed no fiduciary duty under ERISA § 404 to the spun-off employees regarding their future benefits?
3. Does an employer violate ERISA § 510 when it takes an action based *in part* on a motive to avoid pension and benefits obligations, or is § 510 violated only if such a motive is the *sole* (“but for”) reason for the act?

Statement of the Case

A. The Nature of the Case

On April 30, 2004, Abbott Laboratories (“Abbott”) spun off nearly 15,000 employees in its Hospital Products Division (“HPD”) and related businesses to form a new company called Hospira, Inc. (“Hospira”). SA-81, p. 80, ¶ 226-227.¹ The plaintiffs, on behalf of a class and subclass of similarly-situated employees, filed this case, alleging that the spin-off and the policies associated with it violated ERISA § 510, 29 U.S.C. § 1140. A-001-041 (Amended Complaint). The plaintiffs also alleged that Abbott breached its fiduciary duties to the class under ERISA § 404, 29 U.S.C. § 1104, by failing to inform Abbott employees who moved to Hospira that Hospira would be unlikely to provide a defined benefit pension plan or retiree medical benefits, even though the Abbott executives slated to run Hospira already had determined not to offer such benefits to Hospira employees and had taken steps to protect themselves against the loss of benefits. *Id.*

B. The Course of the Proceedings

On November 8, 2004, three former Abbott employees, Myla Nauman, Michael Loughery and Jane Roller, all of whom had worked for Abbott for most of their careers before being spun off to Hospira, filed a three-count complaint in the U.S. District Court for the Northern District of Illinois. R1 (Complaint). They

¹The abbreviations in this brief refer to the Circuit Rule 30(a) Short Appendix bound with the brief (“SA-__”), the appellants’ separately-bound Appendix filed with the brief (“A-__”), and, for materials not reproduced in the Appendix, the District Court’s original record (“R__”). The “R__” citations include the District Court’s docket number and, if necessary, the document’s page number or other identifying information.

sought relief for themselves and a class of similarly-situated employees under ERISA § 510, 29 U.S.C. § 1140, which prohibits an employer from interfering with the exercise of rights under an employment benefit plan. *Id.* In Count I, against Abbott, the plaintiffs alleged that Abbott terminated the class members' employment by structuring the spin-off of HPD with the specific intent to deprive class members of retirement benefits under Abbott's benefit plans. *Id.* In Count II, also brought against Abbott, they alleged that as part of the same scheme Abbott eliminated the class members' bridging rights under the Abbott plans so that if they were rehired, they would lose prior service credit and be treated as new employees. *Id.* In Count III, the plaintiffs alleged that Hospira participated in and was an essential part of a scheme with Abbott in which both companies agreed that Hospira would refuse to hire any Abbott employee who chose to exercise his or her vested retirement rights by retiring from Abbott prior to the spin-off date before seeking employment with Hospira. *Id.*

In November 2005, on the basis of information obtained in discovery, the plaintiffs amended their complaint to add a claim for breach of fiduciary duty under ERISA § 404, 29 U.S.C. §1104 (A-001-041 (Amended Complaint)), alleging that the future Hospira executives, who were still Abbott employees and fiduciaries at the time, had made a decision prior to the spin-off that the new company would not offer a defined benefit pension plan or retiree medical benefits. The plaintiffs alleged that Abbott withheld this information until after the spin-off and, in fact, materially misrepresented to the class members to their detriment that no decisions

on the pension plan and retiree medical benefits would be made until after the spin-off date.

The District Court, Gettleman, J., issued five written opinions in the case prior to the trial. On April 27, 2005, the District Court denied the defendants' respective motions to dismiss in their entirety. *Nauman v. Abbott Laboratories*, No. 04 C 7199, 2005 WL 1139480 (N.D. Ill. Apr. 27, 2005) (A-042-047). Then, on December 30, 2005, the District Court certified a class as to Counts I and II against Abbott and a subclass as to Count III against Hospira. *Nauman v. Abbott Laboratories*, No. 04 C 7199, 2005 WL 3601696 (N.D. Ill. Dec. 30, 2005) (A-048-052). The class against Abbott numbered approximately 14,000 and was comprised of "[a]ll employees of Abbott who were participants in the Abbott Benefit Plans and whose employment with Abbott terminated between August 22, 2003, and April 30, 2004, as a result of the spin-off of the HPD/creation of Hospira announced by Abbott on August 22, 2003." The subclass numbered approximately 1,300 and consisted of "[1] [a]ll employees of Abbott who were participants in the Abbott Benefit Plans and [2] whose employment with Abbott terminated between August 22, 2003, and April 30, 2004, as a result of the spin-off of the HPD/creation of Hospira announced by Abbott on August 22, 2003, and [3] who were eligible for retirement under the Abbott Benefit Plans on the date of their terminations." *Id.* The subclass also included employees who were eligible to retire on the spin-off date, but chose not go to Hospira and were terminated by Abbott.

On August 14, 2006, the District Court denied Abbott's motion to dismiss the breach of fiduciary duty claim, Count IV, while granting Hospira's motion, holding that because Hospira was not incorporated at the time the alleged breach took place, it could not have been a plan fiduciary. *Nauman v. Abbott Laboratories*, No. 04 C 7199, 2006 WL 2413712 (N.D. Ill. Aug. 14, 2006) (A-053-056). On April 3, 2007, the District Court certified a class against Abbott as to Count IV. *Nauman v. Abbott Laboratories*, No. 04 C 7199, 2007 WL 1052478 (N.D. Ill. Apr. 3, 2007) (A-057-059).

Finally, on July 10, 2008, the District Court denied Abbott's and Hospira's respective motions for summary judgment as to all the remaining claims. *Nauman v. Abbott Laboratories*, No. 04 C 7199, 2008 WL 4773135 (N.D. Ill. July 10, 2008) (A-060-073). On April 22, 2009, a nine-day bench trial commenced in three parts (April 22-24, 2009, July 27-29, 2009, and October 6-8, 2009). The parties called a total of 14 witnesses and submitted 307 exhibits (R427 (list), R461 (exhibits)). In the fall of 2009, the parties submitted post-trial materials, including post-trial briefs (R421, R423, R428), a joint statement of uncontested facts (R424), and separate proposed findings of fact and conclusions of law (R425, R426, R429). In addition, the United States Department of Labor moved to file a brief as *amicus curiae* in support of the plaintiffs regarding remedies available under ERISA § 510 (R434), which the District Court ultimately denied as moot.

C. The Disposition Below

On April 22, 2010, the District Court entered a judgment in favor of Abbott and Hospira and issued findings of fact and conclusions of law that adopted the vast

majority of defendants' joint proposed findings of fact verbatim and adopted none of the plaintiffs' (SA-01-98).

Statement of Facts

I. Introduction

Abbott Laboratories is a large pharmaceutical and medical-equipment company located in the Chicago suburbs. SA-05, p. 4, ¶¶ 1-2. Known for providing excellent employee benefits, Abbott sponsors both a pension plan and a retiree medical insurance plan for retirement-eligible employees. SA-17-18, pp. 16-17, ¶¶ 76, 78. In the winter of 2002, Abbott's CEO, Miles White, and its CFO, Thomas Freyman, evaluated a series of strategic transactions and selected an operating division to be spun off from one of the six that made up Abbott's workforce at the time. SA-20, p. 19, ¶92; SA-06, p. 5, ¶6. At a Board of Directors meeting in June 2003, White recommended to the Board that the largest of Abbott's divisions, HPD, which made up about 25% of the company's domestic workforce at that time, should be spun off. A-092, DX58 at 22. The Board approved the concept of going forward with the spin-off. SA-21, p. 20, ¶ 97.

On August 22, 2003, Abbott announced the spin-off to its employees and the public. SA-21-22, p. 20-21, ¶¶ 100-101. Christopher Begley, who was the president of HPD for Abbott and had been tapped to become Hospira's new CEO, told the employees during a conference call that day that it would probably be possible to retire from Abbott and then join the new company (A-107, PX125 at 18). However, the company later announced in November 2003 that both Abbott and the future

Hospira executives had agreed to – and Hospira had agreed to implement – a **total ban** on hiring HPD employees who were eligible for and took early retirement from Abbott. A-096, PX22 at MN00031. These employees were offered the choice of either foregoing early retirement or losing their jobs with Hospira, and plaintiffs alleged at trial that this “no retiree” policy (Count III of the complaint) discriminated directly against retirees in violation of ERISA § 510. A-001-041 (Amended Complaint).

The spin-off took place on April 30, 2004 (SA-06, p. 5, ¶ 8), and in June 2004, Hospira announced for the first time that effective January 1, 2005, it would not offer a defined benefit pension plan or retiree medical coverage. SA-52, p. 51, ¶ 112.

II. The defendants’ anti-retiree bias and the “no-retiree” policy

At trial, the defendants chose not to challenge plaintiffs’ claim that the no-retiree policy was implemented with the purpose of discriminating against retirees. Rather, they freely admitted that the Abbott executives in charge of the spin-off (who were slated to become the future Hospira management team) did not want retirees at the new company. Indeed, defendants presented their own direct evidence that the executives planning the spin-off believed that Abbott retirees were undesirable employees and that they implemented the no-retiree policy specifically to keep Abbott retirees from being employed at Hospira. A-083, Tr. 365. The District Court, instead of recognizing this as an illegal motive that violates ERISA, credited defendants’ anti-retiree animus as a legitimate business reason. SA-40, p. 39, ¶ 65.

The testimony at trial made clear that the no-retiree rule was specifically intended to prevent Abbott retirees from joining Hospira. First, Hospira's trial counsel, Christopher Liguori, featured the anti-retiree animus in his opening statement, arguing that hiring retirees was a bad idea:

Here is what [defendants' consultant] Hewitt had to say. It chimed in on this subject like it did on a lot of the other subjects, Defendants' Exhibit 118. "Retirements are more disruptive in the short run and could result in somewhat higher turnover in the workforce," exactly the opposite of what Abbott wanted to achieve through having a no-hire policy that obtained stability and productivity. Secondly – that's in Defendants Exhibit 118. In Defendants' Exhibit 127, "Retirements would be more disruptive to NEWCO as employees now feel more like an Abbott retiree than an active NEWCO employee." That's exactly what Abbott didn't want. Abbott wanted these people to feel like they were part of a new organization and to work hard to make that new organization a success.... Abbott and Hospira, and they will tell you the same thing, that this is what they believed, too, that having 20 percent of this new company's workforce, the Abbott retirees did not further these goals of stability and productivity.

A-076-77, Tr. 56-57. Abbott's trial counsel, James Hurst, concurred (A-075, Tr. 38).

This anti-retiree theme was endorsed in the testimony of Hospira's CEO Chris Begley (formerly the president of HPD for Abbott), who elaborated on the reasons why the defendants believed retirees were undesirable employees. Begley testified that although he initially wanted to retire and then go to the new company himself, he eventually became convinced that it would be a "bad idea" for Abbott retirees to work at Hospira because they would sap productivity. R425, PPF ¶ 156. Despite the fact that he had been ready to retire from Abbott himself and take on the top position of CEO at Hospira, Begley espoused a general belief that retirees are less productive, testifying:

Ultimately felt, you know, it would be a bad idea to have that.... Well, you'd have a group of employees who were retired. And the motivation level wouldn't be at the same level as the balance of the workforce. And it would be tough to have someone working side by side with each other where one person is retired and another person, you know, is driving real hard to do the best they can. So I was really concerned about the motivational level and the productivity that we would have.

A-081, Tr. 297.

Relating his beliefs directly to the no-retiree policy, Begley summed up his testimony as follows:

I said it was beneficial from, the two-year no-hire policy was beneficial from a stability standpoint and a productivity standpoint. And that's why it was put in employees that would have retired and be working at Hospira, and would they be motivated to do a good job.

A-083, Tr. 365.

The advice given to Abbott by the consulting firm Hewitt, which assisted both Abbott and Hospira with issues related to the spin, was similar. Karl Arbaugh, a Hewitt actuary advising Abbott on the spin-off, testified that Hewitt cautioned Abbott that retirees would not work as hard as non-retired employees. A-084, Tr. 515. When asked for reports or studies that supported this position, Arbaugh demurred, testifying that this advice stemmed from a "common-sense concept." *Id.* When asked if Hospira's CEO Chris Begley would have been a less productive employee if he were allowed to retire from Abbott prior to the spinoff, Arbaugh stated:

There are certainly many people who would continue to work hard. I don't mean to suggest that everybody would [not want to work hard or stick on the job]. But I think there - - on the other hand, there are a lot of people who would work less hard if they had a guaranteed income.

A-084, Tr. 516. Another Hewitt actuary, Mary Moreland, testified that she advised the defendants that hiring Abbott retirees at Hospira would be harmful for “retention.” A-086, Tr. 965. She went on to explain that:

[Her] worry [about Abbott retirees working at Hospira] was, if you feel more like a retiree than an employee, you have a couple of bad days, you decide you don’t need to work anymore, and that would affect the stability of the work force at Hospira.

A-086, Tr. 965.

The plaintiffs argued that this anti-retiree animus was an illegal motive that violated ERISA § 510. R423, p. 26 (Plaintiffs’ Trial Brief). However, in the District Court’s Findings of Fact and Conclusions of Law, the only mention of the discriminatory motivation is a single finding of fact. The District Court stated that

[The Senior Vice President of Human Resources for Abbott]’s initial draft of the Guiding Principles [a document Abbott created to guide the spin-off] proposed that retirement eligible employees be able to retire and collect their benefits before joining the new company. However, Hewitt advised Abbott that allowing pre-spin retirements would negatively influence the possibility of retaining such employees following a spin, because they may have less incentive to continue working if they are receiving retirement benefits.

SA-40, p. 39, ¶ 65. The District Court did not make any reference to Begley’s or Arbaugh’s stated belief that Abbott retirees would not be productive employees, even though the District Court found them to be “highly credible.” SA-04, p. 3.

III. Decisions regarding Hospira’s pension and medical benefits

A. Abbott’s fiduciary duty to the Abbott plan participants

It was undisputed at trial that Abbott and, in particular, its CEO, Miles White, were in control of and made all decisions regarding the spin-off, including

decisions regarding benefits at the new company, prior to the spin date. SA-17, p. 16, ¶ 71. As of the April 30, 2004 spin-off date, Abbott was the plan sponsor and administrator for the Abbott Laboratories Annuity Retirement Plan and the Abbott Laboratories Retiree Health Care Plan (among others). SA-17-18, p. 16-17, ¶ 76. Furthermore, the individuals who made all of the decisions regarding the spin, including decisions about benefits at the new company, were all Abbott employees until the spin date: Chris Begley, head of Abbott's HPD, became Hospira's CEO; Abbott's Treasurer, Terrence Kearney, became Hospira's CFO; Abbott's senior legal counsel, Brian Smith, became Hospira's General Counsel and Secretary; Abbott's Vice President, Hospital Products, John Arnott, became Hospira's Senior Vice President of Global Communications Operations; and Abbott's Vice President, Hospital Products Research and Development/Medical and Regulatory Affairs, Edward Ogunro, became Hospira's Senior Vice President, Research and Development/Medical and Regulatory Affairs and Chief Scientific Officer. SA-21-23, p. 20-22, ¶¶100, 108.

When the spin-off was announced, one of the employees' primary concerns was the status of their future retirement benefits; during the conference call that Abbott conducted the day it announced the spin, employees asked question after question about their future benefits. A-106-116, PX125, pp. 17-18, 25-27, 32-33, 37-38, 44-45. Abbott responded that compensation and benefits would remain the same through December 31, 2004. After that, Abbott stated that Hospira's senior management and Board of Directors would consider what was best for the company

and employees and then decide on compensation and benefits when the new company began operating in 2004. SA-49, p. 48, ¶ 101. Subsequently, when confronted with employees' questions about future benefits, the Abbott executives planning the spin-off reiterated that no decisions had been made regarding retirement benefits at the new company and that these decisions would be made by the new company after the spin date. A-093-094, PX14; A-096-098, PX22.

B. Abbott's knowledge regarding Hospira's retirement benefits

At trial, plaintiffs presented evidence that prior to the effective date of the spin-off (April 30, 2004), Abbott executives, including those who were slated to become Hospira's management team, knew that Hospira would likely no longer offer a defined benefit pension plan or retiree medical coverage. For example, on September 22, 2003, David Jones, a former Abbot board member who was selected to be Chairman of the Board at Hospira, directed Begley in an email to end the pension plan: "[i]f we are required to accept such liabilities, you need to plan for how to write them off at the earliest allowable time and how to communicate the fact that they are an artifact and not part of NewCo's future." A-141, PX178.

Similarly, in an October 2, 2003 email, Begley told Jones: "If the benefit plan comes over we can and will freeze the plan on 12/31/04.... The asset is being transferred with the assumption that we freeze the plan on 12/31/2004." A-159, PX193; SA-55, p. 54, ¶ 124. By October 2003, Begley's transition team had already informed its consultant Hewitt that Hospira's objective was to "get out of the DB [defined benefit] pension business." A-143, PX186 at A017077. Consistent with this

desire, Hospira's future management team had insisted that Hewitt analyze pension alternatives without a defined benefit plan in the mix. A-082, Tr. 354-56; A-117, PX169 at X002208.

At trial, Begley testified that the spin-off was pursued "in order to take our strong cash flow and reinvest it into R&D to grow the business, and so we didn't want our first investment being topping off this [pension] asset and liability." A-079, Tr. 182. Plaintiffs argued that this evidence that Begley did not want to pay a top-off amount to keep the frozen plan funded at a total liability level equal to Abbott's funding level showed that Begley would not invest in a successor pension plan for Hospira.²

Begley testified that when he was asked by future Hospira HR executives Gail Denham and Henry Weishaar if they were correct to assume that Hospira's primary retirement vehicle would be a 401(k) plan (rather than a pension), he disagreed and told them they should keep an open mind about all options. A-083, Tr. 366. However, Begley's testimony was directly contradicted by Denham's deposition testimony, which was admitted at trial. She stated that, in response to a question from her, Begley indicated that the 401(k) plan would be the primary retirement vehicle for the new company. A-176, Denham Dep. 120:19-121:14; A-162, PX230 at H04440. In fact, that is what occurred, and the defendants knew at all

²Furthermore, plaintiffs showed that on October 1, 2003, Hewitt analyzed the future administrative costs of the plan using *only* a frozen plan assumption. A-080, Tr. 243; A-146-155, PX191. If the new company had been interested in continuing Abbott's defined benefit plan or implementing its own successor plan, it would have been crucial to include an additional analysis of how it would pay for a *continuing* successor plan – but no such analysis was performed. *Id.*

times that the 401(k) plan, though enhanced compared to Abbott's, in no way made up for the loss of the pension plan. R461, PX256 (entire).

In a February 9, 2004 presentation, Hewitt confirmed that the pension decisions already had been made prior to the spin-off date: “[t]he defined benefit plan will be frozen effective December 31, 2004 and there is no interest in exploring any alternative defined benefit designs. Hospira will not provide subsidized retiree health care benefits.” A-171, PX247. Abbott plan participants weighing whether to join Hospira were not informed of any of this until June 2004, when Hospira announced its benefits. SA-52, p. 51, ¶ 112.

C. Make-whole payments to Abbott executives going to Hospira

Plaintiffs also produced evidence at trial that Abbott reimbursed its executives who went to Hospira for their pension and retiree medical benefits losses, providing further evidence that those Abbott executives in charge of the spin-off already knew that Hospira would not provide comparable benefits. In fact, the soon-to-be Hospira executives who were not yet retirement-eligible were awarded “transition bonuses” calculated to reflect the exact monetary value of what they would have earned in pension accruals and retiree health benefits if they had continued to be provided these benefits until their retirement dates with Abbott. A-089-090, Tr. 1364-66. Abbott CEO Miles White characterized these bonuses as “make whole” payments. A-087, Tr. 1072.

In a February 5, 2004 email, Steve Fussell, the Abbott executive responsible for HR matters pertaining to the spin-off (A-088, Tr. 1283), cautioned Terrence

Kearney, Hospira's future COO and one of the recipients of these "transition bonuses," to keep the payments confidential, given their "sensitive nature." A-169, PX246. In spite of this damning evidence, The District Court refused to find that Abbott knew that Hospira would not offer pension or retiree medical benefits to employees generally. Instead, the District Court inexplicably concluded that such payments to former Abbott executives were simply an "extension" of Abbott benefits. SA-70, p. 69, ¶ 179.

D. Harm to the class

The plaintiffs presented evidence of two types of harm to the class resulting from Abbott's withholding of information about the lack of retirement benefits at Hospira. First, they testified that they lost the opportunity to seek compensation for the value of the benefits they would lose as the result of the spin-off, unlike the Abbott executives who went to Hospira and received precisely those benefits. A-085, Tr. 639-40. In denying the defendants' motion for summary judgment, the District Court credited this type of harm, holding that "it is clear ... that each member of the class lost an opportunity to seek some sort of compensation for the loss of benefits that Abbott knew would occur." A-059, *Nauman*, 2007 WL 1052478, *3 fn 1. Yet after trial, the District Court backtracked and held that class members were not harmed because "Abbott could change or terminate its benefits plans at any time." SA-87, p. 86, ¶ 251.

Second, the retirement-eligible plaintiffs also lost the opportunity to make an informed decision relating to a change in Abbott's own retirement benefits. Prior to

the announcement of the spin-off, the plaintiffs had been notified that Abbott was changing its retiree medical coverage and employees would have to pay more in the future if they did not retire before the end of 2003. A-101-102, PX84. For example, if plaintiff Mike Loughery had retired from Abbott prior to January 1, 2004, his premiums for retiree medical coverage would have been capped at 20 percent for the rest of his life. If he retired on or after January 1, 2004, he would have had 16 years of service, so his premium would have been 48 percent. The difference was substantial. A-078, Tr. 81-83. The retirement-eligible class members thus had to decide whether to retire from Abbott and lock in lower retiree medical rates without the material knowledge that Hospira would not provide retiree medical benefits.

Summary of Argument

I. The defendants' policy of refusing to hire retirees violates ERISA § 510.

The defendants admitted that they implemented the no-retiree policy in order to bar retirees from employment at the new company. A-075-077, A-081, A-083-084, A-086, Tr. 38, 56-57, 297, 365, 515-16, 965. Section 510 of ERISA prohibits an employer from acting on this type of stigmatizing stereotype: “[i]t shall be 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 an employee benefit plan.” 29 U.S.C. § 1140. As such, the no-retiree policy violates ERISA § 510, and the District Court erred as a matter of law in recasting the policy as a legitimate business reason.

II. The District Court erred in ruling that Abbott owed no fiduciary duty to the class regarding Hospira's reduction or elimination of future employee benefits.

Abbott had a fiduciary duty to the plaintiffs to disclose material information about the new company's benefits, because its management team was responsible for making those decisions. SA-42, p. 41, ¶ 71; SA-49, SA-51, p. 48, 50, ¶¶ 100, 108. The District Court thus erred as a matter of law by finding that Abbott had no fiduciary duty to the plaintiffs. The District Court also committed clear error in finding that there was no fiduciary breach, because plaintiffs presented evidence that Abbott, instead of informing the employees of the material information that the new company was not planning to offer a defined benefit pension plan or retiree medical coverage, told them only that the decisions would be made after the spin (A-093-094, PX14; A-095-098, PX22), then secretly reimbursed its executives who were going to Hospira for the exact losses they would incur at Hospira (A-089-090, Tr. 1364-66).

III. An employer violates ERISA § 510 when it acts with the intent to interfere with rights that ERISA protects, but such intent need not be the sole reason for (or "but for" cause of) defendants' actions.

When the trial in this case began, the law of this Circuit and others did not require plaintiffs bringing an ERISA § 510 claim to prove that an illegal motive was the only(or "but for") cause for the adverse action; rather, it was sufficient for a plaintiff to prove that a prohibited motive contributed to the employer's action or decision. *Isbell v. Allstate Ins. Co.*, 418 F.3d 788, 796 (7th Cir. 2005). During the trial, however, the United States Supreme Court decided *Gross v. FBL Financial*

Services, Inc., 557 U.S. ___, 129 S. Ct. 2343, 2350 (2009), which held that the Age Discrimination in Employment Act requires plaintiffs to prove that age is the “but for” cause of an employer’s action, based on the ADEA’s language that the discrimination must be “because of” age.

The District Court erred as a matter of law by extending the *Gross* “but for” requirement to ERISA § 510 claims, in spite of ERISA’s different language, history and purposes. ERISA § 510 claims are legally distinguishable from ADEA and other traditional “civil rights”-type claims. First, the ADEA and the statutes in this Court’s subsequent decisions extending *Gross* require a plaintiff to prove that an employer acted “because of” some prohibited reason or motive, while ERISA § 510 requires proof that an employer acted with intent to “interfer[e] with the attainment of any right to which [the plaintiff] may become entitled” under an ERISA-protected plan: a “specific intent” requirement rather than a causation requirement. *Salus v. GTE Directories Service Corp.*, 104 F.3d 131, 137-38 (7th Cir. 1997). Second, *Gross* applies only to statutes within the ambit of the 1991 Civil Rights Act, not to ERISA § 510.

Argument

Standard of Review

The first and third issues present legal questions, which this Court reviews *de novo*. *Blickenstaff v. R.R. Donnelley & Sons Co. Short Term Disability Plan*, 378 F.3d 669, 677 (7th Cir. 2004). The second issue involves mixed questions of law and fact. This Court has held that the “clear-error standard should govern the review of

a decision that applies a legal standard to particular facts.” *Id.*, citing *United States v. Frederick*, 182 F.3d 496, 499 (7th Cir. 1999); *Hartford Accident & Indemnity Co. v. Sullivan*, 846 F.2d 377, 384 (7th Cir. 1988); *Wright v. United States*, 809 F.2d 425, 428 (7th Cir. 1987).

I. The defendants’ policy of refusing to hire retirees violates ERISA § 510.

At trial, the defendants admitted that they deliberately and purposely barred Abbott retirees from joining the Hospira workforce, despite the fact that the future Hospira CEO, Chris Begley, had considered retiring from Abbott before assuming his Hospira position. Hospira’s trial counsel contended in his opening statement that hiring retirees was a bad idea (A-076-077, Tr. 56-57), Abbott’s counsel agreed (A-075, Tr. 38), and Begley emphasized his opinion that retirees would be undesirable in the Hospira workforce. A-081, A-083, Tr. 297, 365. Other defense witnesses shared his views. A-084, Tr. 515-16 (Arbaugh); A-086, Tr. 965 (Moreland).

Section 510 of ERISA explicitly prohibits an employer from acting on this type of stigmatizing stereotype: “[i]t shall be 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 an employee benefit plan.” 29 U.S.C. § 1140. Thus, an employer may not adopt a hiring policy adverse to a class of retirees based solely on their status as retirees. In the related field of age discrimination, a stereotype of laggardness long has been recognized as an improper motive, even if it superficially appears to be “business”-related. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993) (“[i]t is the very essence of age

discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age”); *Filar v. Bd. of Educ. of City of Chicago*, 526 F.3d 1054, 1065 n.4 (7th Cir. 2008) (“the ADEA aims to curb actions based on an employee’s unfair assumptions about an older worker’s productivity”); *Mistretta v. Sandia Corp.*, 649 F.2d 1383, 1388 (10th Cir. 1981) (“Sandia’s management employees tended to stereotype older employees and to mark them as unproductive and as becoming technically obsolete”).

It is no less pernicious in the context of ERISA § 510 for an employer to rely on such stereotypes. Thus, the District Court committed legal error by refusing to find that defendants’ “no-retiree” policy violated ERISA § 510. Where a proffered reason for an adverse employment decision is itself a stigmatizing stereotype, it is legal error to credit it. *Loyd v. Phillips Bros.*, 25 F.3d 518, 524 (7th Cir. 1994) (“stereotypical attitudes about women are not legitimate ‘reasons’ for treating them differently from men”). Yet, rather than condemn defendants’ anti-retiree motive, the District Court blessed it as a legitimate business concern:

Fussell’s initial draft of the Guiding Principles proposed that retirement eligible employees be able to retire and collect their benefits before joining the new company. Tr. at 1315-17 (Fussell); DTX 76 at A003307. However, Hewitt advised Abbott that allowing pre-spin retirements would negatively influence the possibility of retaining such employees following a spin, because they may have less incentive to continue working if they are receiving their retirement benefits. Tr. at 1317, 1316 (Fussell). This would create more challenging turnover and transitional issues for the new company. *Id.*

SA-40, p. 39, ¶ 65.

As a result, the District Court also failed to make any finding regarding the causal connection between defendants' anti-retiree motive and the adoption of the no-retiree policy. In fact, Begley's testimony ("*[a]nd that's why it was put in place*") (A-083, Tr. 365, emphasis added) confirms that the defendants' illegal motive was *the determining factor* in implementing the no-retiree policy. Ignoring the record, or misapplying it to the relevant legal theory, constitutes reversible error. *See Cerros v. Steel Technologies*, 398 F.3d 944, 950-51 (7th Cir. 2005) (remanding bench verdict in Title VII hostile work environment case where finding of no liability "may have resulted from a misunderstanding about the legal threshold" of proof of the claim); *Kidd v. Illinois State Police*, 167 F.3d 1084, 1102 (7th Cir. 1997) (remanding bench trial in Title VII case where district court misapprehended the legal significance of statistical evidence proffered to show a pattern of discriminatory termination). Thus, the judgment in favor of Hospira with respect to Count III should be vacated and remanded. *Cerros*, 398 F.3d at 950-51.

In *Lessard v. Applied Risk Management*, 307 F.3d 1020, 1024-35 (9th Cir. 2002), 307 F.3d at 1024, the Ninth Circuit acknowledged this Court's decision in *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1134 (7th Cir. 1992), where it stated that the purpose of ERISA's § 510 is to "prevent persons and entities from taking actions ... which punish a participant from exercising his or her rights under an employee benefit plan." *Lessard* involved an asset sale agreement containing a provision, like the anti-retiree policy here, that excluded employees on disability leave from plan benefits. In denying the defendant's motion to dismiss, the *Lessard*

court found that excluding those on disability leave constituted direct and uncontroverted proof of discrimination. *Id.* at 1025.

The discriminatory animus here, which similarly interfered with the collection of benefits, violates § 510 in the same way. Abbott and Hospira jointly participated in an agreement to punish any class member who exercised his or her right to retire early and then go to work for a subsequent employer. A-095-098, PX22. Abbott is liable for this violation of § 510 along with Hospira, because both companies' participation was necessary to effectuate the policy. As the District Court noted in its opinion on the first motion to dismiss, "Abbott and Hospira cannot do jointly what Abbott could not do on its own." A-046, *Nauman*, 2005 WL 1139480 at *5 (*citing Lessard*, 307 F.3d at 1024-35). In other words, if Abbott could not require its retirement-eligible employees to forego their early retirement benefits on pain of being barred from future employment, then it could not enter into an agreement with another entity to do so. This Court, like the Ninth Circuit in *Lessard*, should strike down the defendants' discriminatory agreement.³

II. The District Court erred in ruling that Abbott owed no fiduciary duty to the class regarding Hospira's reduction or elimination of future employee benefits.

The plaintiffs originally alleged that both Abbott and Hospira breached their fiduciary duties to the plaintiff class by failing to disclose that Abbott already had

³ Indeed, this Court just underscored the breadth of ERISA's § 510 in *Feinberg, et al. v. RM Acquisition, LLC*, ___ F.3d ___, 2011 WL 31857 (7th Cir. 2011), rejecting the defendants' suggestion that § 510 only applies to terminations or other alterations in the employment relationship and stating that "[t]here is more to the statute," which prohibits *any* act of "interfering with a participant's rights without terminating or modifying an ERISA plan." *Id.* at *4.

decided that Hospira would not offer its own pension plan or retiree medical coverage after the spin-off. When both Abbott and Hospira moved to dismiss that claim, the District Court granted Hospira's motion, holding that because Hospira was not in existence at the time of the alleged failure, it lacked a fiduciary duty to disclose this information (“[n]o court has held that a corporation can be an ERISA fiduciary prior to its existence”). *Nauman*, 2006 WL 2413712 at *3 (A-055).

By contrast, the District Court denied Abbott's motion, holding that misrepresentations regarding present facts as they bear on future decision are actionable. *Id.* (“plaintiffs have alleged that Abbott stated that certain decisions had not yet been made, when in fact they had. That is a misrepresentation as to a present fact and is clearly actionable”). Nonetheless, following the trial, the District Court surprisingly held that “Hospira alone made the decisions with respect to the retirement and other employee benefits it would offer, and made this decision after Hospira became an independent entity. The only people involved in this decision were, prior to the spin date, future executives and, after the spin date, current Hospira executives.” SA-97, p. 96. Despite plaintiffs' extensive evidence that the decision not to offer benefits at Hospira was made by Abbott executives prior to the spin-off, the District Court ruled that “Abbott simply had no fiduciary duty that it could have breached with respect to the Hospira benefits.” *Id.*

This ruling exalts form over substance and is incorrect as a matter of both fact and law. It ignores that (1) the individuals making the decisions about Hospira's future employee benefits were Abbott executives with fiduciary duties to

the plaintiffs up until the date of the spin-off and (2) they made misrepresentations about such Hospira benefits prior to that date. SA-83, p. 82, ¶239.

A. Abbott had a fiduciary duty to the plan participants at the time the relevant decisions were made.

The future executives of Hospira – such as CEO Chris Begley – were *Abbott executives* up until the actual spin-off date. To underscore this point, Begley signed the Employee Benefits Agreement (on behalf of Hospira) that prohibited the hiring of Abbott retirees while he was still an Abbott employee. SA-80-81, p. 79-80, ¶225. Prior to the date of the spin-off, Abbott had a clear fiduciary duty to its plan participants, as it was acting as one who “exercises any discretionary authority or discretionary control respecting management of such plan,” 29 U.S.C. § 1002(21)(A)), at the time that it affirmatively concealed material information about the plaintiffs’ future retirement benefits. As a fiduciary, Abbott had an obligation to “communicate material facts affecting the interests of the beneficiaries. This duty exists when a beneficiary asks fiduciaries for information, and even when he or she does not.” *Anweiler v. American Elec. Power Service Corp.*, 3 F.3d 986, 991 (7th Cir. 1993). It is this Court’s longstanding position that fiduciary duties under ERISA are to be construed liberally: “[t]he duty of care, diligence, and loyalty imposed by the fiduciary principle is far more exacting than the duty imposed by tort law not to mislead a stranger.” *Harzewski v. Guidant Corporation*, 489 F.3d 799 (7th Cir. 2007).

The District Court found that “[t]he only people involved in [pension plan or retiree medical benefit decisions at Hospira] were, prior to the spin date, future

Hospira executives and, after the spin date, current Hospira executives.” SA-97, p. 96, ¶9. However, the fact that these Abbott employees would later become Hospira executives does not change the fact that they were acting for Abbott at the time that important decisions regarding retirement benefits at Hospira were made. They therefore had a fiduciary duty to the class members, and the District Court erred in holding otherwise. *Varity Corp. v. Howe*, 516 U.S. 498 (1996), requires disclosure when an employer encourages employees to leave one plan for another; under that holding, Abbott’s fiduciary duty of disclosure was triggered by the existence of both the ARP – its own plan that covered the class members until the spin date – and its subsequent creation of the transitional plan that covered the employees at Hospira for eight months after the spin-off. This Court has recognized that “*Varity* shows that candid and complete information is required if two plans are in existence, and the sponsor tries to persuade employees to give up benefits under one in exchange for benefits under the other.” *Commonwealth Edison v. Beach*, 382 F.3d 656, 659 (7th Cir. 2004).

B. Abbott’s breach of fiduciary duty harmed the class.

Hospira’s future CEO Chris Begley was aware of Hospira’s plans with respect to pension and retiree health benefits months prior to the spin-off. The information was material, as demonstrated by Abbott’s efforts to keep secret the so-called “transition bonuses” it agreed to give to Hospira’s future executives – undisclosed payments that were calculated to reflect the exact monetary value of the pension accruals and retiree health benefits those executives would lose when they moved

from Abbott to Hospira. A-089-090, Tr. 1364-66. The future Hospira executives (then still employed by Abbott) used what was essentially inside information – that is, knowledge that Hospira would freeze pension accruals and discontinue retiree health benefits – to enrich themselves. Thus, Abbott, which admitted that these payments were designed to “make whole” its executives who would lose their retirement benefits at Hospira (A-087, Tr. 1072), was fully aware of and complicit in preventing the class members from learning that truth.

The District Court erred as a matter of law by finding that Abbott had no fiduciary duty to the plaintiffs, and it committed clear error in finding that there was no fiduciary breach. The District Court’s entry of judgment in favor of Abbott on Count IV should be reversed and remanded, with instructions to enter judgment in favor of the plaintiff class with respect to liability and to conduct further proceedings with respect to an appropriate remedy.

III. An employer violates ERISA § 510 when it acts with the intent to interfere with rights that ERISA protects, but such intent need not be the sole reason for (or “but for” cause of) defendants’ actions.

When the trial in this case began, the law of this Circuit and others did not require plaintiffs bringing an ERISA § 510 claim to prove that an illegal motive was the only(or “but for”) cause for the adverse action; rather, it was sufficient for a plaintiff to prove that a prohibited motive contributed to the employer’s action or decision. *Isbell*, 418 F.3d at 796; *Lindemann v. Mobil Oil Corp.*, 141 F.3d 290, 295 (7th Cir. 1998) (under ERISA § 510, the employers’ interference with benefits only has to be “a motivating factor,” not “the” motivating factor); *Garratt v. Walker*, 164

F.3d 1249, 1256 (10th Cir. 1998) (*en banc*) (under ERISA § 510 the employee “need only show that [the employer’s interference with benefits] was a motivating factor”, not the sole factor); *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3rd Cir. 1987) (under ERISA § 510, a plaintiff must prove the employer had “specific intent” to interfere with benefits, but not that it was the “sole” motivating factor); *Titsch v. Reliance Group, Inc.*, 548 F. Supp. 983, 985 (S.D.N.Y. 1982) (ERISA § 510 does not require that interference with benefits be the sole motivating factor). *Cf. Inter-Modal Rail Employees Association v. Atchison, Topeka and Santa Fe Ry Co.*, 520 U.S. 510, 516 (1997) (referring to situations in which “an employer acts *with a purpose* that triggers the protection of [ERISA §] 510”) (emphasis added).

On June 18, 2009, between the first and second phases of the trial in this case, the Supreme Court decided *Gross*, which held that the Age Discrimination in Employment Act (“ADEA”) requires plaintiffs to prove that age is the “but for” cause of an employer’s action, based on the ADEA’s language that the discrimination must be “because of” age. *Id.*, 129 S.Ct. at 2350. Subsequently, this Circuit extended the *Gross* rationale to other statutes besides the ADEA. *See Serafinn v. Local 722*, 597 F.3d 909 (7th Cir. 2010) (Labor Management Reporting and Disclosure Act); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010) (Americans with Disabilities Act); *Fairley v. Andrews*, 578 F.3d 518 (7th Cir. 2009) (First Amendment). As a result, defendants argued in their post-trial briefs that ERISA § 510 requires the plaintiffs to prove that interfering with pension benefits was the “but for” cause of defendants’ decision to spin off Hospira. Plaintiffs consistently

argued, including in their post-trial filings, that (1) the “but for” standard does not apply to ERISA § 510 claims and, (2) even if it did, that standard was met here.

R423, R442, R445.

As an initial matter, in its decision, the District Court flatly misstated plaintiffs’ legal position:

[P]laintiffs have apparently withdrawn their theory that defendants could be found liable for ERISA violations if plaintiffs proved an intent to interfere with benefits partially motivated defendants’ implementation of the spin and attendant policies.

SA-03, p.2. Plaintiffs’ post-trial brief clearly argued otherwise: “[i]nterference with benefits does not have to be the sole reason for the adverse action; it is enough that it contributed to it.” R423, p. 19 (citations omitted). The District Court thus erred both in (1) failing to address the plaintiffs’ legal argument that the “but for” standard does not apply to ERISA § 510 claims, and (2) assuming that the *Gross* standard applies to such claims.⁴

In *Gross*, the Supreme Court held that to prevail under the ADEA, a plaintiff must prove that “but for” illegal age discrimination, the employer would not have taken the challenged action. As shown below, in this case, the District Court wrongly extended the *Gross* “but for” requirement to ERISA § 510 claims, in spite of ERISA’s different language, history and purposes. ERISA § 510 claims are legally

⁴As detailed below, plaintiffs believe that ERISA should be distinguished from these other statutes and that the Court is thus free to reach a different conclusion in this appeal; however, if the Court believes that it cannot reach such a conclusion without overruling its own panel, then plaintiffs respectfully request that this appeal be submitted *en banc*.

distinguishable from ADEA and other traditional “civil rights”-type claims in at least two important respects.

A. The *Gross* “negative inference” rationale does not apply to ERISA § 510.

First, there is a marked difference in the language of the ERISA when compared to the ADEA and the statutes in this Court’s subsequent decisions extending *Gross* (*Serafinn*, *Serwatka*, and *Fairley*): those statutes all require a plaintiff to prove that an employer acted “because of” some prohibited reason or motive. ERISA § 510, by contrast, is textually different, and, as the lower courts consistently have held, requires different proof: that an employer acted with intent to “interfer[e] with the attainment of any right to which [the plaintiff] may become entitled” under an ERISA-protected plan. Courts typically have referred to this as a “specific intent” requirement rather than a causation requirement. *Salus*, 104 F.3d at 137-38 (plaintiff “not required to prove that the interference with his ERISA rights was the sole reason for his discharge,” but “only that [manager]’s desire to interfere with his disability benefits contributed to [manager]’s decision to terminate him.”); *Nero v. Industrial Molding Corp.*, 167 F.3d 921, 927 (5th Cir. 1999) (“[a] plaintiff need not show that the sole reason for the termination was to interfere with rights protected by ERISA; he need only prove that a specific intent to violate ERISA partly motivated the employer”). The “but for” causation requirement at issue in *Gross* cannot and should not be mechanically imported to all federal employment statutes, many of which contain different language and serve different purposes than the ADEA or similar statutes.

The principal civil rights statutes of the last fifty years prohibit an employer from engaging in various types of actions “because of such individual’s race, color, religion, sex, or national origin” (Title VII), 42 U.S.C. § 2000e-2(a)(1), (2); “because of such individual’s age” (ADEA), 29 U.S.C. § 623(a)(1), (2); and “on the basis of disability” (ADA), 29 U.S.C. § 12112(a). The operative words – “because of” and “on the basis of” – impose a requirement that a plaintiff prove a strong causal link between the employer’s action and prohibited discrimination, as the Supreme Court concluded in *Gross*.

ERISA § 510 is different; it is violated when an employer acts with the “specific intent” identified – “*for the purpose of interfering with the attainment of any right to which [the plaintiff] may become entitled*” under an ERISA-protected plan. 29 U.S.C. § 1140 (emphasis added). This Court repeatedly has described this provision as a “specific intent” requirement, and not as a “causation” requirement. *See, e.g., Lucas v. PyraMax Bank, FSB*, 539 F.3d 661, 668 (7th Cir. 2008); *Isbell*, 418 F.3d at 796; *Lindemann*, 141 F.3d at 295. Had Congress wished to draft § 510 with the same causation element as the ADA or ADEA, it could have written the statute to prohibit adverse employment actions “because of an employee’s participation in one or more employee benefit plans” or words to similar effect. But it did not. The fact that Congress deliberately chose different language strongly suggests a different meaning for ERISA than the ADA or ADEA.

Furthermore, imposing a “but for” causation requirement on ERISA § 510 claims, given the business settings in which § 510 claims typically arise, would

effectively eliminate § 510 from the statute books, because employers can *always* offer some lawful business reason for their decisions regarding pensions and benefits. But “Congress viewed [§ 510] as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits.” *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990). The courts should not eviscerate this “crucial” protection through mechanical extension of the *Gross* holding to ERISA. “It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (internal quotations and citations omitted).

Recently, the D.C. Circuit held that not even all sections of the ADEA itself are governed by the *Gross* standard. See *Ford v. Mabus*, ___ F.3d ___, 2010 WL 5060998 (D.C. Cir. 2010). In *Mabus*, the court refused to extend the *Gross* holding regarding § 622 of the ADEA to § 633a, which prohibits discrimination by the federal government. *Id.* at *6. The court reasoned that § 622 prohibits decisions made “because of” age, while § 633a is worded differently, requiring that all personnel actions by the federal government “shall be made free from any discrimination based on age.” *Id.* at *7. Thus, the court declined to extend the *Gross* “but for” standard to § 633a, because the differences in statutory language required a different interpretation. *Id.* The same is true under ERISA § 510, as well as other federal statutes barring interference with rights.

For example, in *Hunter v. Valley View Local Schools*, 579 F.3d 688, 691-92 (6th Cir. 2009), the Sixth Circuit held that the *Gross* “but for” causation standard does not apply to the Family and Medical Leave Act. As the Sixth Circuit correctly observed, “[w]e begin by looking at the text of the statute.” *Id.* at 691. Notably, and much like ERISA § 510, the relevant section of the FMLA provides that it is unlawful for an employer to “interfere with ... any right provided” in the FMLA. 29 U.S.C. § 2615(a)(1). As the Sixth Circuit noted, the Department of Labor has interpreted the FMLA prohibition on “interference” to mean that “*employers cannot use the taking of FMLA leave as a negative factor in employment actions.*” *Id.* (quoting 29 C.F.R. § 825.220(c)) (emphasis original). The Sixth Circuit correctly observed that the “phrase ‘negative factor’ envisions that the challenged employment decision might also rest on other, permissible factors.” *Id.* at 692. Thus, the *Hunter* court concluded “that the FMLA, like Title VII, authorizes claims in which an employer bases an employment decision on both permissible and impermissible factors.” *Id.*

Textual differences in statutory language account for the contrary conclusions in *Gross* and *Hunter*, just as they require a different outcome under ERISA § 510. ERISA § 510 prohibits employers from acting “for the purpose of interfering with the attainment of any right” under an ERISA-protected plan. This language tracks closely the FMLA language at issue in *Hunter* but is very different from the “because of” language at issue in *Gross*. Both the FMLA and ERISA § 510 focus an employer “interfering with” statutorily created rights.

The Supreme Court has not infrequently resorted to dictionary definitions of words and phrases when they are not otherwise defined by statute. *See, e.g., Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2721 (2010) (invoking dictionary definitions of “service”); *Krupski v. Costa Crociere, S. p. A.*, 130 S. Ct. 2485, 2494 (2010) (invoking dictionary definitions of “mistake”). Dictionary meanings of key words in ERISA § 510 confirm that “for the purpose of interfering with” rights is closer in meaning to the “interfere with” language of the FMLA than the “because of” language of the ADEA at issue in *Gross*. For instance, Webster’s online dictionary defines “because of” as “[b]y reason of; on account of” (<http://www.websters-online-dictionary.org/definitions/becauseof>), which is most reasonably read as requiring “but for” causation, as the Supreme Court held in *Gross*. “Purpose,” by contrast, focuses on the actor’s intent rather than causation. Black’s Law Dictionary (9th ed. 2009) defines it as “[a]n objective, goal, or end.” This definition suggests that one acting with “purpose” must have the “intent” to engage in activity that ERISA prohibits, but it does not follow that such “intent” need be the *sole or but for cause* of the employer’s action. This point is further emphasized when the “purpose” language is combined with the definition of “interference,” which Black’s defines as “1. The act of meddling in another's affairs. 2. An obstruction or hindrance.” An employer can “interfere” with ERISA rights without such interference being the sole reason for the employer’s action.

Furthermore, the context in which ERISA cases arise often are significantly different than the context of a typical ADEA case, which was at issue in *Gross*. In

an ERISA case like this one, where the plaintiffs are challenging the spin-off of an entire division of a major company, the transaction inevitably will be driven, or at least can and will be justified by the parent company, on other economic and business considerations besides avoiding pension and benefit obligations. To require plaintiffs to prove by a preponderance of the evidence that a spin-off decision would not have been made “but for” the intent to interfere with pensions and benefits is to require the virtually impossible. Indeed, a “but for” standard is a virtually insuperable legal hurdle, especially given that the plaintiffs’ proof almost inevitably must come from hostile witnesses who will do their best to elevate the importance of legitimate business considerations and deny or denigrate any role that avoiding employee-benefit costs played in the employer’s decision. This Court should not render ERISA § 510 a dead letter, and *Gross* does not require it to do so. The *Gross* rationale does not and should not extend to ERISA § 510 and its specific intent requirement.

B. *Gross* applies only to statutes within the ambit of the 1991 CRA, not to ERISA § 510.

Second, *Gross* rests on a bit of reasoning that is not applicable to ERISA claims. In *Gross*, the Supreme Court reasoned that because Congress in the 1991 Civil Rights Act (“1991 CRA”) expressly approved “mixed motive” liability for Title VII claims but did not do so for other “civil rights” statutes such as the ADEA, by negative implication mixed motive liability is not permitted under the ADEA. The Court’s reasoning can be logically extended to other civil rights statutes *within the*

ambit of the 1991 CRA, but it is not logical to extend such reasoning to statutes like ERISA that are not within the purview of the 1991 CRA.

Indeed, there is no indication in the 1991 CRA itself or otherwise that Congress had any intent whatsoever regarding ERISA when it adopted the 1991 CRA. The interests ERISA serves differ substantially from those behind the civil rights statutes that the 1991 CRA addresses. *See Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1265 (5th Cir. 1980). The rights those statutes typically relate to have a basis in the Constitution, while ERISA rights are completely statutory. In addition, ERISA protects solely economic interests, while many civil rights statutes protect bodily integrity, dignitary and other interests as well. *Eddy v. Colonial Life Ins. Co. of Am.*, 59 F.3d 201, 204 (D.C. Cir. 1995) (footnote omitted). Furthermore, Congress expressly indicated that the 1991 CRA should not be interpreted to restrict rights under other statutes. The Act includes a provision that “[e]xcept as expressly provided, no Federal law protecting the civil rights of persons shall be construed to repeal or amend by implication any other Federal law protecting such civil rights.” CRA, § 11 (adding § 1107(b) to the Civil Rights Act of 1964). Thus, the 1991 CRA does not by implication amend statutes not within the contemplation of Congress, including the LMRDA. *See also Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010) (declining to extend *Gross* to Title VII retaliation cases).

The statutory provisions that were the Supreme Court’s focus in *Gross* were enacted by Congress in the 1991 CRA in direct reaction by Congress to the Supreme

Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). As this Court explained:

In *Price Waterhouse*, a plurality of the Supreme Court recognized that an employer may violate Title VII ... when it relies upon one of the grounds that the statute forbids (i.e., race, color, religion, sex, or national origin), even if the proscribed criterion was not the sole reason for the employer's decision.... But ... the Court's majority also held that an employer would bear no liability for a mixed-motive employment decision if it would have made the same decision absent the illegal motive.... The Court assigned the burden of persuasion on that point to the employer....

Although *Price Waterhouse* dealt solely with Title VII, lower courts, including our own, have applied its principles to cases brought under other anti-discrimination statutes.

Serwatka, 591 F.3d at 959. The 1991 CRA was adopted largely to “respond” to “a series of recent decisions,” including *Price Waterhouse*, that had “cut back dramatically on the scope and effectiveness of civil rights protections” by “restoring the civil rights protections that were dramatically limited by those decisions.” Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 2(a)(1), 2(b)(1), 105 Stat. 1071 (1991).

With regard to *Price Waterhouse* in particular, the 1991 CRA took two actions “that have particular relevance here,” *Serwatka*, 591 F.3d at 959, specifically the following:

[The 1991 CRA] added a provision to Title VII which expressly deemed unlawful any employment practice motivated by a person's race, color, religion, sex, or national origin, “even though other factors also motivated the practice,” thereby codifying that aspect of *Price Waterhouse*. But whereas the Supreme Court's holding relieved an employer of all liability for a mixed-motive decision once it convinced the factfinder that it would have taken the same adverse employment action in the absence of the illegal motive, Congress amended Title VII to authorize limited relief to the plaintiff in such cases.

Id. at 959-60 (citation omitted).

After adoption of the 1991 CRA, this Court held that *Price Waterhouse* governed civil rights statutes other than Title VII when plaintiffs established that an illegal reason at least partly caused an adverse employment action. *Id.* at 959. But *Gross* altered this Court’s analysis with respect to “civil rights” statutes not within the Act’s purview:

Gross held that because the Age Discrimination in Employment Act lacks the language found in Title VII expressly recognizing mixed-motive claims, such claims are not authorized by the ADEA. Although such language was also missing from the pre-1991 version of Title VII that the Court had applied in *Price Waterhouse*, the Court found it significant that in the wake of its *Price Waterhouse* decision, Congress had amended Title VII to explicitly authorize mixed-motive discrimination claims. Congress had also specified a limited set of remedies for such mixed-motive claims.... But Congress had not similarly amended the ADEA. Its failure to do so suggested to the Court that Congress had decided not to authorize mixed-motive claims in age discrimination cases. Consequently, the burden-shifting framework that the Court had set forth in *Price Waterhouse* did not apply in ADEA cases.

Id. at 961 (citations omitted).

In *Serwatka*, this Court recognized and explained the implications of *Gross* for other anti-discrimination statutes: “Although the *Gross* decision construed the ADEA, the importance that the court attached to the express incorporation of the mixed-motive framework into Title VII suggests that when *another anti-discrimination statute* lacks comparable language, a mixed-motive claim will not be viable under that statute” and a plaintiff will have to prove that the employer would not have taken an adverse action “but for” the illegal cause. *Id.* (emphasis added).

Importantly, *Serwatka* did not hold or suggest that the *Gross* rationale extends beyond anti-discrimination statutes within the purview of the 1991 CRA.

In *Serafinn*, however, the Court ignored *Serwatka*'s careful reasoning and instead mechanically applied *Gross*, opining that “[m]ixed-motive theories of liability are always improper in suits brought under statutes without language comparable to the Civil Rights Act’s authorization of claims that an improper consideration was ‘a motivating factor’ for the contested action.” *Serafinn*, 597 F.3d at 915. The *Serafinn* Court thus ruled that the *Gross* “but for” causation requirement applies to claims under the Labor Management Reporting and Disclosure Act (“LMRDA”), 29 U.S.C. § 401 *et seq.* But in light of the careful reasoning of *Serwatka*, plaintiffs respectfully suggest that the result in *Serafinn* is wrong, because the LMRDA governs labor management relations and is not a “civil rights” statute of the type *Gross* contemplates, *i.e.*, a statute within the purview of the 1991 CRA.

To the best of the plaintiffs’ knowledge, the District Court here is the first and only court to decide that the *Gross* rationale extends to ERISA § 510 claims. In contrast, as explained, other courts (including this one at times) have carefully analyzed *Gross* and declined to extend it when the rationale does not logically fit. *See, e.g., Mabus*, 2010 WL 5060998 at * 7 (“but for” causation does not apply to § 633a of the ADEA); *Hunter*, 579 F.3d at 691-92 (the *Gross* “but for” causation standard does not apply to the Family and Medical Leave Act); *Pierce v. Teachers*

Fed. Credit Union Found., Civ. No. 09-780 (JNE/FLN), 2010 WL 550998, at *6 (D. Minn. Feb. 9, 2010) (same).

Ultimately, the District Court was wrong to impose a “but for” causation requirement to the plaintiffs’ ERISA § 510 claims. For that reason alone, the judgment below must be reversed and the case remanded. The District Court should have found *Gross* inapplicable here and should have applied the ERISA § 510 standard this Court consistently has endorsed: that a plaintiff may establish liability under ERISA by proving that an employer acted with specific intent to interfere with ERISA rights, even if such intent was only “a motivating factor” for or “contributed” to the employer’s action. *Lindemann*, 141 F.3d at 295 (*quoting Teumer v. General Motors Corp.*, 34 F.3d 542, 550 (7th Cir. 1994) and *Meredith v. Navistar Int’l Transp. Corp.*, 935 F.2d 124, 127 (7th Cir. 1991)). This Court should remand this case with respect to Counts I, II and III for the District Court to make findings regarding the defendants’ motives and to apply the proper ERISA § 510 specific intent standard to those findings.

Conclusion

For all the reasons set forth herein, this Court should reverse the judgment of the District Court and remand the case for further proceedings.

Dated: January 7, 2011

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Certificate of Compliance with Circuit Rules 30(a) and 30(b)

The undersigned, an attorney, pursuant to Circuit Rule 30(d), certifies that the Short Appendix bound with the Appellant's Brief includes all of the materials required by Circuit Rule 30(a), and the Appellants' Appendix, separately bound, includes all of the materials required by Circuit Rule 30(b).

Jamie S. Franklin

Certificate of Compliance with Circuit Rule 31(e)

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the brief and all of the appendix items that are available in non-scanned PDF format. The undersigned also certifies the disk/CD is virus free.

Jamie S. Franklin

Certificate of Compliance with F.R.A.P. 32

The undersigned, an attorney, certifies that the Appellant's Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,808 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in twelve point Century Schoolbook.

Jamie S. Franklin

Certificate of Service

The undersigned, being first duly sworn, deposes and states that two copies and one pdf of the Appellants' Brief and Short Appendix and one copy of the Appellants' Separate Appendix were served upon the below-listed counsel of record by messenger on the 7th day of January, 2011:

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Subscribed and sworn to before me
this 7th day of January, 2011.

Notary Public

APPENDIX

Short Appendix

Page

Nauman, et al. v. Abbott Laboratories, et al., No. 04 C 6476,
Apr. 22, 2010 (Judgment)SA-1

Nauman, et al. v. Abbott Laboratories, et al., No. 04 C 6476,
2010 WL 3423132 (N.D.Ill. Apr. 22, 2010)
(Findings of Fact and Conclusions of Law)SA-2

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Robert W. Gettleman	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	04 C 7199	DATE	4/22/2010
CASE TITLE	Myla Nauman, et al vs Abbott Laboratories, et al		

DOCKET ENTRY TEXT:

Findings of Fact and conclusions of law entered. Accordingly, this court enters judgment in favor of defendants Abbott Laboratories and Hospira, Inc. And against plaintiffs on all counts of the complaint.

[For further detail see separate order]
 [Docketing to mail notice]

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SA-01

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.)	
)	Judge Robert W. Gettleman
ABBOTT LABORATORIES and HOSPIRA, INC.,)	
)	
Defendants.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

In this certified, four-count class action,² plaintiffs Myla Nauman, Jane Roller and Michael Loughery, former employees of defendant Abbott Laboratories and current employees of defendant Hospira, Inc., have claimed violations of Sections 510 and 404 of ERISA, 29 U.S.C. §§ 1140, 1104, arising out of a 2004 “spin-off” or “spin” by Abbott of its “core” Hospital Products Division (“HPD”). This court has issued five memorandum opinions and orders in this action, denying defendants’ motions to dismiss and for summary judgment, and certifying the two classes mentioned above.³

The issues in this case and the parties’ respective positions are stated in full in this court’s Memorandum Opinion and Order dated July 10, 2008, 2008 WL 4773135 (N.D. Ill.

¹This order contains both findings of fact (“Findings”) and conclusions of law (“Conclusions”). To the extent that any Findings may be deemed conclusions of law, they shall also be considered Conclusions. To the extent that any Conclusions may be deemed findings of fact, they shall also be considered Findings. See Miller v. Fenton, 474 U.S. 104, 113-14 (1985).

²The definition of the classes was decided in the court’s April 3, 2007, Memorandum Opinion and Order, Nauman v. Abbott Laboratories, 2007 WL 1052478 (N.D. Ill. 2007) and is included in paragraphs 80 and 81 of the “Parties’ Post-Trial Statement of Uncontested Facts” that is set forth in full below.

³The terms of art used in those opinions are also used herein.

2008) (the “Summary Judgment Opinion”), and will not be repeated here. In that opinion, the court denied defendants’ motions for summary judgment and defined the contested issues to be tried. The trial to the bench was conducted over an eight day period in the summer and fall of 2009. Thereafter, the parties filed a brief statement of uncontested facts, and each party submitted voluminous materials, briefs, exhibits, deposition excerpts, and proposed findings of fact and conclusions of law. After careful review of these materials, along with the testimony and exhibits offered at the trial, the court finds that plaintiff has failed to meet its burden under any of the four counts in the complaint, and therefore enters judgment for defendants for the reasons stated below.

As noted in the Summary Judgment Opinion, plaintiffs’ position on a number of issues has changed over the course of this litigation. For example, at one point plaintiffs claimed that HPD was chosen because its employees were the oldest group of any Abbott division, and thus Abbott was motivated to spin HPD in order to reduce retiree benefits. Plaintiffs later altered that position to claim that Abbott examined a number of divisions, but only those with older employees.

More recently, in light of the Supreme Court’s holding in Gross v. FBL Financial Servs., Inc., ___ U.S. ___, 129 S.Ct. 2343, 2350 (2009), and related cases,⁴ plaintiffs have apparently withdrawn their theory that defendants could be found liable for ERISA violations if plaintiffs proved an intent to interfere with benefits partially motivated defendants’ implementation of the spin and attendant policies. The court agrees with defendants that the Gross line of cases stands

⁴Serafin v. Local 722, 597 F.3d 908, (7th Cir. 2010); Serwatka v. Rockwell Automation, Inc., 591 F.3d 957 (7th Cir. 2010); Fairley v. Andrews, 578 F.3d 518 (7th Cir. 2009).

for the proposition that, unless a statute such as Title VII of the Civil Rights Act (42 U.S.C. § 2000e, et seq.) specifically provides for liability in a “mixed motive” case, the prohibited motivation must be the motivating factor, rather than simply a motivating factor.

For plaintiffs to succeed in this case, therefore, the court would have to find that the motivating purpose of the spin by Abbott of HPD was to deprive HPD employees of their retirement or medical benefits as alleged in the complaint. Thus, the court would have to find that the testimony of defendants’ witnesses, including White, Kerney, Begley, Freyman, Fussell, Gonzales, Preece, and Arbaugh, among others, was not credible, and that the board minutes and supporting materials of Abbott, Hospira and their advisors (including Hewitt and Morgan Stanley) were fabricated and inaccurate. The court cannot do so because it finds that the testimony by these witnesses was highly credible, internally consistent, and amply corroborated by the unquestionably authentic documentary evidence.

No only did plaintiffs fail to impeach the testimony of these witnesses, which is accurately summarized in the defendants’ proposed findings of fact and conclusions of law, but plaintiffs have also failed to present any credible evidence to contradict the testimony of these witnesses and support plaintiffs’ claim that Abbott decided to spin HPD for the purpose of depriving the HPD employees of their retirement or retiree medical benefits. Of critical importance, the court credits the testimony of defendants’ witnesses concerning: (a) the motivation behind the decision to spin HPD (which was for legitimate, strategic reasons); (b) the fact that retiree or other employee benefits was not among the factors considered by Abbott in deciding to spin HPD; (c) the legitimate, permissible reasoning behind the no-hire policy (to encourage continuity of employment at Abbott and avoid possible unfavorable consequences if

employees were allowed to retire from Abbott and assume the same jobs at Hospira); (d) the permissible reasons for incentive bonuses for Hospira's key personnel; (e) the transferring of assets to the Hospira plan; and (f) the absence of Abbott input into the Hospira retirement plan, which was developed and instituted solely by Hospira management without input by Abbott.

For these reasons, the court has, with some minor exceptions noted below, adopts the Parties' Post-Trial Statement of Uncontested Facts (Doc. 424) and the following defendants' proposed findings of fact.⁵

PARTIES' POST-TRIAL STATEMENT OF UNCONTESTED FACTS

1. Defendant Abbott Laboratories ("Abbott") is a publicly-traded Illinois corporation with its headquarters at 100 Abbott Park Road, Abbott, Illinois. Docket 84, Amended Compl. ¶16.

2. Abbott is a diverse company that develops, manufactures, and markets a variety of healthcare products, including pharmaceuticals, nutritionals, diagnostic tests, and medical devices, throughout the United States and abroad. DTX 197 (Abbott 2003 Annual Report); DTX 198 (Abbott 2004 Annual Report).

⁵The court is mindful of its obligation to refrain from simply adopting the prevailing parties' findings of fact "wholesale" without thoroughly examining those findings and determining that they are supported by the record and the court's view of the evidence. See, Anderson v. City of Bessemer, 470 U.S. 564, 572 (1985); Doe v. First National Bank, 865 F.2d 864, 875 (7th Cir. 1989). The court's adoption of the selected findings set forth below is the result of such an examination of the entire record, as well as its observations of the witnesses presented at trial. The court therefore finds that the defendants' finding of facts adopted below are fully supported by the record.

3. Abbott is an “employer” and a “person” within the meaning of 29 U.S.C. § 1002(5) and (9), and at all relevant times was and is an employer engaged in commerce or in any industry or activity affecting commerce. Pre-Trial Stip. 3.

4. In August 2003, Abbott had six main operating divisions: (a) Diagnostics (“ADD”); (b) Abbott International (“AI”); (c) Hospital Products (“HPD”); (d) Pharmaceutical Products (“PPD”); (e) Ross Products (“Ross”); and (f) TAP Pharmaceutical Products (“TAP”), a 50/50 joint venture with Takeda Pharmaceutical Company, Ltd. DTX 1 at A013969; Pre-Trial Stip. 4.

5. Defendant, Hospira, Inc. (“Hospira”) is a publicly-traded Delaware corporation with its headquarters at 275 North Field Drive, Lake Forest, Illinois. DTX 202; Pre-Trial Stip. 5.

6. Hospira is a global specialty pharmaceutical and medication delivery company dedicated to developing, marketing, and manufacturing products that help improve the productivity, safety and efficacy of patient care. Pre-Trial Stip. 6.

7. Hospira develops, markets, and manufactures medication delivery devices, specialty injectable pharmaceuticals, and critical care devices throughout the United States and abroad. DTX 202.

8. Hospira was created by Abbott’s April 30, 2004 spin-off of HPD’s core hospital products business. DTX 198 at A01136-37; Pre-Trial Stip. 7. The Hospira spin-off was accomplished through a tax-free distribution of stock, whereby Abbott shareholders received one share of Hospira stock for every ten shares of Abbott common stock held as of April 22, 2004. Pre-Trial Stip. 7.

9. On November 8, 2004, plaintiffs – all current Hospira employees – filed the instant lawsuit. Pre-Trial Stip. 12.

10. Plaintiff, Myla Nauman, was employed as a salesperson by Abbott in its Hospital Products Division (“HPD”) until the Hospira spin-off and is currently employed by Hospira as a salesperson. Docket 84, Amended Compl ¶12.

11. Ms. Nauman is a plaintiff and class representative in this matter as to Counts I, II and IV. Nauman Stip. 1.

12. Ms. Nauman worked for Abbott from 1984 until she became an employee of Hospira after the spin in 2004. Nauman Stip. 2.

13. Ms. Nauman was hired by Sorensen Research in 1983. She was a sales representative for critical care products in Florida. Sorensen became a subsidiary of Abbott within a year of her hire date. Nauman Stip. 3.

14. Prior to her employment at Sorensen, Ms. Nauman completed a nursing degree in critical care nursing. Nauman Stip. 4.

15. Ms. Nauman continued to work for Abbott in HPD until the spin in 2004. At Abbott, she worked as a sales representative for critical care products. Her territories included Florida, Southern California and the Las Vegas, Nevada area. At the time of the spin, Ms. Nauman’s sales territory was Southern California. Nauman Stip. 5.

16. At the time of the spin, Ms. Nauman was selling an Abbott product called Precedex®, which is an anesthesia and critical care drug. Nauman Stip. 6.

17. At the time of the HPD spin on April 30, 2004, Ms. Nauman was 48 years old and had 22 years of service credit with Abbott. Nauman Stip. 8.

18. Based on the terms of the Abbott Laboratories Annuity Retirement Plan and the Abbott Laboratories Retiree Health Care Plan at the time of the spin, Ms. Nauman was two years away from being retirement eligible at the time of the spin and from receiving retiree medical coverage in the event that she elected to retire at age 50. Nauman Stip. 11.

19. Ms. Nauman became a Hospira employee on the spin date and is currently employed by Hospira as a Sr. Anesthesia Critical Care Specialist in the Precedex Sales Department. Nauman Stip. 12.

20. At present, if Ms. Nauman chooses to retire from Hospira, she will not receive subsidized retiree medical coverage from Hospira because Hospira currently does not offer that benefit. Nauman Stip. 13.

21. Jane Roller is a plaintiff and class representative in this matter as to Counts I, II and IV. Roller Stip. 1.

22. Ms. Roller worked for Abbott until she became an employee of Hospira after the spin in 2004. Roller Stip. 2. Ms. Roller was employed as a salesperson by Abbott in HPD until the Hospira spin-off and is currently employed by Hospira as a salesperson. Pre-Trial Stip. 9.

23. Ms. Roller was hired by Abbott in December 1990. Roller Stip. 3.

24. At Abbott, she worked as a sales representative for critical care products. At the time of the spin-off, her territory included Houston, Texas and the surrounding areas. Roller Stip. 4.

25. At the time of the spin, Ms. Roller was a senior sales representative at Abbott. She was promoted to that position in 2000. Roller Stip. 5.

26. At the time of the spin, Ms. Roller was selling an Abbott product called Precedex®. Roller Stip. 6.

27. At the time of the HPD spin on April 30, 2004, Ms. Roller was 46 years old and had 14 years of service credit with Abbott. Roller Stip. 7.

28. Based on the terms of the Abbott Laboratories Annuity Retirement Plan and the Abbott Laboratories Retiree Health Care Plan at the time of the spin, Ms. Roller was four years away from being retirement eligible at the time of the spin and from receiving retiree medical coverage in the event that she elected to retire at age 50. Roller Stip. 10.

29. Ms. Roller became a Hospira employee on the spin date and is currently employed by Hospira as a Field Sales Representative in the Precedex Sales Department. Roller Stip. 11. At present, if Ms. Roller chooses to retire from Hospira, she will not receive subsidized retiree medical coverage from Hospira because Hospira currently does not offer that benefit. Roller Stip. 12.

30. Plaintiff, Michael Loughery, was employed as a salesperson by Abbott in HPD until the Hospira spin and is currently employed by Hospira as a salesperson. Tr. at 145-46 (Loughery); Pre-Trial Stip. 10. At the time of the spin, Loughery was 52 years old and had approximately 17 years of Abbott service. Tr. at 151 (Loughery); PTX 45.

31. Prior to the spin, Loughery was retirement eligible. Accordingly, he was eligible (a) to receive early retirement benefits under the Abbott Laboratories pension plan, called the Annuity Retirement Plan; and (b) for retiree health care benefits under the Abbott Laboratories Retiree Health Care Plan. Tr. at 77-76 (Loughery); PTX 233; PTX 284.

32. When Loughery retires from Hospira, he will be eligible to commence payments under the Abbott-Hospira Transitional Annuity Retirement Plan and he will be eligible for retiree healthcare benefits under the Abbott Laboratories Retiree Health Care Plan. Tr. at 146-46, 151 (Loughery).

33. Judy Derra is a class member in this matter as to Counts I, II and IV who gave testimony at trial. Derra Stip. 1.

34. Ms. Derra was hired by Abbott in 1980 and worked there until the spin date on April 30, 2004. Derra Stip. 3.

35. Ms. Derra worked for HPD at the time of the spin. She is currently employed by Hospira as a manager in the Contract Administration department. Derra Stip. 4.

36. Ms. Derra was 46 years old and had 24 years of service credit with Abbott on the spin date. Derra Stip. 5.

37. Based on the terms of the Abbott Laboratories Annuity Retirement Plan and the Abbott Laboratories Retiree Health Care Plan at the time of the spin, Ms. Derra was four years away from being retirement eligible at the time of the spin and from receiving retiree medical coverage in the event that she elected to retire at age 50. Derra Stip. 8.

38. At present, if Ms. Derra chooses to retire from Hospira, she will not receive subsidized retiree medical coverage from Hospira because Hospira currently does not offer that benefit. Derra Stip. 9.

39. Karl Arbaugh has worked at Hewitt Associates (“Hewitt”) since 1987. Tr. at 378 (Arbaugh). Arbaugh is a Fellow in the American Society of Actuaries. Tr. at 378 (Arbaugh). Arbaugh was part of an actuarial team led by Mary Moreland that worked with Abbott on issues

relating to their pension plans and retiree medical plans in relation to the HPD spin. Tr. at 378-79 (Arbaugh). Arbaugh also helped Hospira design its own benefits plan. Tr. at 467 (Arbaugh).

40. Chris Begley, Chairman and CEO of Hospira, worked for Abbott for 18 or 19 years. Tr. at 267 (Begley). At the time Abbott publicly announced its decision to spin-off HPD, Begley was President of Abbott's Hospital Products Division (HPD). Tr. at 166 (Begley). Begley became the CEO of Hospira on May 1, 2004 (the day after the spin). Tr. at 266 (Begley).

41. Begley received a bachelor of arts degree from Western Illinois University and a master's in business administration from Northern Illinois University. Tr. at 269 (Begley). Begley currently is a member of Sara Lee Corporation's Board of Directors. *Id.*

42. Gail Denham is currently the VP of Compensation, Benefits and Employee Services at Hospira. Denham Dep. at 7. Her duties and responsibilities include the design and administration of all compensation programs, benefits programs, human resource systems and payroll services for the company. *Id.* at 8. Prior to the spin, Denham was the VP of Human Resource Strategy and Business Processes at Abbott. *Id.* at 11.

43. Dr. David Feinstein, Plaintiffs' Expert, is currently employed by Cheiron, where he provides technical actuarial and consulting support to clients, mentoring junior professional staff and peer reviewing projection software. Feinstein Stip., Ex. A. Feinstein has a Ph.D in Mathematics and has various actuarial qualifications, including being a Fellow in the Society of Actuaries, a Member of the American Academy of Actuaries and an Enrolled Actuary. *Id.*

44. Tom Freyman currently serves as Executive Vice President, Finance, and Chief Financial Officer of Abbott. Freyman Stip. 1. Mr. Freyman has held the title of Executive Vice President, Finance since 2004. He has served as Chief Financial Officer since 2001. *Id.* In his current role, Mr. Freyman has overall responsibility for Abbott's financial operations. Freyman Stip. 3.

45. Mr. Freyman joined Abbott on February 1, 1979 and has served in a number of financial planning and analysis positions. In 1984, he was appointed Finance Director of Abbott's European distribution center in the Netherlands. He also has served as Division Controller, Corporate Materials Management (1987-89), International Treasurer (1989-91); Vice President and Treasurer (1991-1999), Vice President and Controller, Hospital Products Division (1999-2001), and Senior Vice President, Finance and Chief Financial Officer (2001-2004). Freyman Stip. 2.

46. Mr. Freyman received a bachelor's degree in accounting from the University of Illinois in 1976. He received a master's degree in management from Kellogg School of Management, Northwestern University in 1983. Freyman Stip. 4.

47. Steve Fussell, at the time of the spin, was Abbott's Vice President of Compensation and Development. He is now Abbott's Senior Vice President of Human Resources. Pre-Trial Stip 23. In his current position, Mr. Fussell has overall responsibility for all human resources functions at Abbott. Fussell Stip. 2.

48. Mr. Fussell began employment at Abbott in 1996, as a Divisional Vice President, Compensation and Benefits. Mr. Fussell currently serves as Senior Vice President, Human

Resources of Abbott. Mr. Fussell has been in the position since 2005. He previously served as Vice President, Compensation and Development from 1999-2005. Fussell Stip. 1.

49. Mr. Fussell received a bachelor's degree in industrial management from the Louisiana State University in 1979. Fussell Stip. 3.

50. Mr. Fussell enlisted the help of Abbott's actuary and benefits consultant, Hewitt, to assist him with his work in connection with the spin-off. Pre-Trial Stip. 24.

51. Ken James is employed by Hewitt Associates in its retirement financial management group. James Dep. at 6. Mr. James is a Fellow in the Society of Actuaries and a member of the American Academy of Actuaries. *Id.* at 9. In late 2003 and 2004, Mr. James helped future Hospira management and, after the spin, Hospira plan the benefits Hospira would offer in 2005 and beyond. *Id.* at 11-13, 49-50.

52. Terrance Kearney is currently the Chief Operating Officer of Hospira. Kearney Stip. 1. He has held that position since 2006. *Id.* Prior to that time, Kearney was Abbott's Treasurer and then at the time of the spin he assumed the position of Chief Financial Officer for Hospira. *Id.* at ¶¶2-3.

53. Dave Kompare is currently a senior consultant and principal with Hewitt Associates. Mr. Kompare joined Hewitt in 1996 and has been with the firm for approximately 13 years. Kompare Stip. 1. At the time of the spin transaction, Mr. Kompare was a senior consultant and then principal at Hewitt. Kompare Stip. 3. In those roles, Mr. Kompare's responsibilities primarily involved consulting with clients regarding transactional matters related to human resource issues. *Id.* Kompare provided such consulting services to Abbott

regarding the HPD spin. Currently, Kompare is the co-leader of Hewitt's North American Corporate Restructuring and Change Group. Kompare Stip. 2.

54. Mary Moreland is employed at Hewitt Associates. Moreland Stip. 1.

55. Ms. Moreland has been performing actuarial services for Abbott since approximately 1996. Ms. Moreland was the lead actuary at Hewitt for the spin-off of core HPD. She has also consulted with Abbott on other corporate restructurings over the course of her career. Moreland Stip. 11.

56. Ms. Moreland is an actuary and currently heads Hewitt's North American retirement consulting practice. Approximately 1,000 employees report directly or indirectly to Ms. Moreland in her current position. Moreland Stip. 2.

57. Before working at Hewitt, Ms. Moreland received a degree in applied mathematics and economics from Harvard University. She received her degree in 1988. Moreland Stip. 3.

58. After graduating from Harvard, and before joining Hewitt, Ms. Moreland worked as an actuary at an insurance company for two years. In general, an actuary analyzes the financial impact of risk and uncertainty. Moreland Stip. 4.

59. In 1990, Ms. Moreland went to work at Hewitt and received a series of promotions until receiving her current position as head of Hewitt's North American retirement consulting practice. The retirement consulting practice provides actuarial services and administration for benefit plans, including pension and retiree medical plans. Moreland Stip. 5. Ms. Moreland has been working at Hewitt for nearly 20 years. During that time, she has

regularly consulted with clients on benefits issues arising from corporate transactions and restructurings. Moreland Stip. 6.

60. Ms. Moreland is a credentialed actuary. This means that she is a Fellow of the Society of Actuaries, a designation which she received after passing a group of ten exams administered over the course of many years. Moreland Stip. 7.

61. Ms. Moreland is also an Enrolled Actuary. This means that she has been licensed by a Joint Board of the U.S. Departments of Treasury and Labor to perform various actuarial tasks required for pension plans governed by ERISA. Moreland Stip. 8.

62. Enrolled Actuaries are licensed to sign filings related to pension plans that must be submitted to the Internal Revenue Service and the Pension Benefit Guaranty Corporation. Moreland Stip. 9.

63. In order to become an enrolled actuary, Ms. Moreland was required to pass a series of examinations administered by the Joint Board. She is also required to fulfill various continuing education requirements in order to maintain her status as an enrolled actuary. Moreland Stip. 10.

64. Ms. Moreland's work for Abbott on the HPD spin-off began in June 2003 and continued for approximately the next ten months, through the transaction's completion. Moreland Stip. 12.

65. William Preece joined Abbott in 1992 and has held the position of Director of Retirement Funds since then. Preece Stip. 1. In this position, he reports to the company's treasurer. *Id.*

66. Stephen Wagner was employed by Hewitt until June 30, 2006 as a retirement strategy and design consultant. Wagner Dep. at 10. Mr. Wagner has been a Fellow in the Society of Actuaries and an enrolled actuary since 1981. *Id.* at 9. Between January and March 2003, Mr. Wagner helped Abbott with a retirement strategy project. *Id.* at 13-17. During that time, Mr. Wagner helped Abbott review its pension and 401(k) plans. *Id.*

67. Thomas Wascoe was Abbott's Senior VP of Human Resources until he retired in May 2005. Wascoe Dep. at 6. In that role, Wascoe's responsibilities included setting HR strategy for the company, executing that strategy, managing all organizational functions relating to compensation, benefits, recruiting and other comparable matters. *Id.* at 8.

68. Henry Weishaar served as Hospira's Corporate VP of Global Human Resources following the spin-off. Weishaar Dep. at 8. In that position, Weishaar was responsible for the company's human resources activities, such as compensation, recruiting, benefits, equal opportunity programs and other such issues. *Id.* Prior to the spin, Weishaar was Divisional VP of Human Resources for HPD. *Id.* at 10.

69. Miles White has served as Abbott's chairman of the board and chief executive officer since 1999. He served as an executive vice president of Abbott from 1998 to 1999, as senior vice president, diagnostics operations from 1994 to 1998, and as vice president, diagnostics systems operations from 1993 to 1994. Mr. White joined Abbott in 1984. White Stip. 1.

70. Mr. White graduated from Stanford University in 1978 with a bachelor's degree in mechanical engineering. He received his M.B.A. degree from Stanford University in 1980. White Stip. 3.

71. Miles White was the ultimate decision maker with respect to all matters related to the HPD spin-off. Pre-Trial Stip. 22.

72. Grice Williams, prior to his retirement from Abbott in 2006, served as Abbott's Divisional Vice President of Benefits. Williams Dep. at 6-7. In that position, Mr. Williams was responsible for the administration and planning of benefit programs offered to domestic Abbott employees. *Id.* at 7.

73. Hewitt Associates is one of the largest human resources services firms in the country. Tr. at 428-29 (Arbaugh). Hewitt consulted Abbott and Hospira on various issues relating to the spin. *See, e.g.*, Tr. at 127-28, 135 (Kompare); Tr. at 467 (Arbaugh).

74. Houlihan Lokey Howard & Zukin is a firm specializing in providing solvency opinions, including analyzing the ability of companies to maintain their financial viability and their ability to meet debt obligations. Tr. at 35 (Freyman). Abbott asked Houlihan to analyze what the financial strength of both companies would be post-spin. Tr. at 35 (Freyman).

75. Morgan Stanley is an investment bank. *See, e.g.*, Tr. at 1025 (White). Morgan Stanley was involved in the spin transaction at two different points. First, in early 2003, Abbott asked Morgan Stanley to analyze various potential reorganization opportunities for the company, including the spin of HPD. SJ Undisputed Facts at ¶¶ 17, 25; Tr. at 10 (White). Second, in April 2004, just before the transaction was completed, Morgan Stanley provided an opinion regarding the fairness of the transaction to shareholders. DTX 166; Tr. at 38 (Freyman); Tr. at 35 (White).

76. As of the April 30, 2004 spin-off, Abbott was the plan sponsor and administrator for the Abbott Laboratories Annuity Retirement Plan, the Abbott Laboratories Retiree Health

Care Plan, the Abbott Laboratories Health Care Plan, the Abbott Laboratories Flexible Benefit Plan, the Abbott Laboratories Extended Disability Plan, the Abbott Laboratories Transitional Pay Plan, and the Abbott Laboratories Life Accident Plan. Pre-Trial Stip. 18.

77. Hospira is the plan sponsor and administrator for the Abbott-Hospira Transitional Annuity Retirement Plan.

78. At the time of the HPD spin on April 30, 2004, among the benefits that Abbott offered to all of its employees was a defined benefit pension plan and retiree medical coverage. Roller Stip. 8.

79. At the time of the spin, all Abbott employees were eligible to participate in the Abbott Laboratories Annuity Retirement Plan. All employees became vested in Abbott's Annuity Retirement Plan upon attaining 5 years of service credit at Abbott. Employees prior to January 1, 2004 were eligible to retire when they reached 50 years of age with at least ten years of service credit. At the time of the HPD spin, employees who were at least 50 years old with ten years of service credit became eligible for the Abbott retiree medical plan upon their retirement. Roller Stip. 9.

80. By Orders dated December 30, 2005 and April 3, 2007, the Court certified the following class for Counts I, II and IV of Plaintiffs' Amended Complaint against Abbott pursuant to Fed. R. Civ. P. 23(b)(2):

All employees of Abbott who were participants in the Abbott Benefit Plans whose employment with Abbott was terminated between August 22, 2003 and April 30, 2004, as a result of the spin-off of the HPD/creation of Hospira announced by Abbott on August 22, 2003.

Docket 101 (12/30/2005); Docket 262 (04/03/2007).

81. By the Order dated December 30, 2005, the Court certified the following subclass for Count III of Plaintiffs' Amended Complaint against Hospira pursuant to Fed. R. Civ.

23(b)(2):

All employees of Abbott who were participants in the Abbott Benefit Plans whose employment with Abbott was terminated between August 22, 2003 and April 30, 2004, as a result of the spin-off of the HPD/creation of Hospira announced by Abbott on August 22, 2003, and who were eligible for retirement under the Abbott Benefit Plans on the date of their terminations.

Docket 101 (12/30/05).

82. As of April 30, 2004, 1286 employees who transferred to Hospira were retirement eligible. Pre-Trial Stip. 32.

83. As of September 9, 2008, 595 of the 1286 employees who were retirement-eligible at the time of the spin-off and went to work for Hospira have left the company. Pre-Trial Stip. 33.

84. As of September 9, 2008, 691 of the 1286 employees who were retirement-eligible at the time of the spin-off and went to work for Hospira continue to work at Hospira. Pre-Trial Stip. 34.

85. This Court has jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). Docket 84, Amended Compl. ¶¶10, 11.

86. Venue is proper before this Court pursuant to 29 U.S.C. § 1132(e)(2). Docket 84, Amended Compl. ¶11.

87. In December of 2002, Abbott had a board meeting in which the funding of Abbott's pension plan was discussed. Tr. at 1023-24 (White); Tr. at 1235 (Freyman); DTX 10.

88. During the December 2002 board of directors meeting, Mr. Freyman made a presentation regarding the funding of Abbott's pension plan. Tr. at 1235-36 (Freyman); DTX 10.

89. Since White became CEO of Abbott in January 1999, Abbott has routinely evaluated opportunities to reshape the company. Tr. at 1022-25 (White).

90. In 2007, Abbott announced the sale of its Diagnostics Division to GE for \$8 billion. Tr. at 1036 (White). This transaction was ultimately not consummated. *Id.*

91. In 2008, Abbott ended its TAP joint venture with Takeda Pharmaceuticals. Tr. at 1223 (Freyman).

92. The decision to recommend to Abbott's board to spin HPD was made by Mr. White and Mr. Freyman. Tr. at 1017-18 (White); Tr. at 1212 (Freyman). In conjunction with the decision to spin HPD, Messrs. White and Freyman received and reviewed analyses performed by Morgan Stanley. Tr. at 1026 (White); Tr. at 1219 (Freyman); DTX 27; DTX 95 at A007299.

93. Morgan Stanley evaluated a variety of possible divestitures and acquisitions in 2003 prior to Mr. White's decision to spin HPD. DTX 27.

94. One of the divestitures that Morgan Stanley evaluated was HPD. DTX 13 at A016231-33. This divestiture was initially code named "Project Hound," and then became "Project Bay." Tr. at 1028-29 (White).

95. Mr. White recommended the HPD spin to Abbott's board of directors during a meeting that took place from June 18 to 20, 2003. Tr. at 1018 (White); DTX 2. The

recommended HPD spin was presented to Abbott's board on June 19, 2003. DTX 1; Tr. at 1033-34 (White).

96. On June 19, 2003, Mr. White asked the Board to consider the proposal to spin HPD and to provide management with some consensus feed back on its advisability. DTX 2 at A023827.

97. On June 20, 2003, Mr. White obtained a consensus from the Board to proceed with the execution of the initial phases of the proposal, with the understanding that formal Board approval would be sought at a later date, based on further analysis of the proposal. DTX 2 at A023827.

98. On August 21, 2003, Abbott's board approved the HPD spin-off. DTX 110, DTX 111, DTX 112.

99. In connection with the August 21 meeting, the board was provided a summary of the proposed spin-off, including its strategic rationale and a summary of the financial bases for the transaction. DTX 111, DTX 112.

100. The spin was publicly announced on August 22, 2003. PTX 7, 10, 11. Chris Begley, the former President of HPD, was identified as Hospira's future CEO. Tr. at 279 (Begley).

101. In announcing the spin-off on August 22, 2003, Abbott advised affected employees that:

- i. their compensation and benefits would remain the same through December 31, 2004;
- ii. for 2005 and beyond, the "new company's board of directors and senior management will be responsible for future employee compensation and benefits...";

- iii. “the new company’s benefits for 2005 and beyond will be announced at a later date”; and
 - iv. the company would assign employees to the new company and that its target for completing that process and notifying employees was November 1, 2003. Pre-Trial Stips. 25-28.
102. Hewitt helped Abbott analyze the alternatives for handling the pension plan assets and liabilities for the HPD employees. Pre-Trial Stip. 30.
103. As part of the transaction, Abbott transferred the pension assets and accrued pension liabilities for all employees going to Hospira. Tr. at 948-50 (Moreland).
104. During an April 8, 2004 meeting of Abbott’s board of directors, Mr. Freyman and Mr. White presented an overview of the spin-off. DTX 164.
105. The board also received a presentation by Morgan Stanley regarding the fairness of the transaction to Abbott shareholders, and a presentation by Houlihan Lokey Howard & Zukin regarding the solvency of both Abbott and Hospira. DTX 164.
106. The board approved the spin through the distribution of a special dividend, whereby Abbott shareholders would receive one share of Hospira common stock for every ten shares of Abbott common stock they held. DTX 164; PTX 37.
107. The spin-off was completed on April 30, 2004. See Pre-Trial Stip. 7.
108. As a result of the spin, Abbott’s Senior Vice President, Hospital Products, Christopher Begley, became Chief Executive Officer and Director of Hospira; Abbott’s Vice President and Treasurer, Terrence Kearney, became Hospira’s Senior Vice President, Finance and Chief Financial Officer; Abbott’s Hospital Products Divisional Vice President, Domestic Legal Operations, Brian Smith, became Hospira’s Senior Vice President, General Counsel and Secretary; Abbott’s Vice President, Hospital Products, John Arnott, became Hospira’s Senior

Vice President, Global Commercial Operations; and Abbott's Vice President, Hospital Products Research and Development, Medical and Regulatory Affairs, Ed Ogunro, became Hospira's Senior Vice President, Research and Development, Medical and Regulatory Affairs and Chief Scientific Officer. Pre-Trial Stip. 36.

109. After the spin-off, Abbott did not have any shared ownership in Hospira, shared no board members with Hospira, and did not appoint any Hospira board members. DTX 170. Hospira was then a free-standing, independent company from Abbott. DTX 170.

110. On June 9, 2004, Hospira's board of directors approved the proposed benefit plan design, to become effective January 1, 2005. Tr. at 344 (Begley); DTX 176.

111. Thereafter, in June 2004, Hospira announced its benefit plans to Hospira employees. DTX 178; *see also* Pre-Trial Stip. 35.

112. The June 2004 announcement outlined the benefits Hospira would offer its employees as of January 1, 2005. In addition, Hospira stated that it would not offer its own pension plan, and would not offer retiree medical coverage. DTX 178.

DEFENDANTS PROPOSED FINDINGS OF FACT ADOPTED BY THE COURT⁶

1. Miles White has been the CEO of Abbott since January 1999. Tr. at 1017 (White). Since that time, Abbott has evaluated opportunities to reshape the company in order to maximize shareholder value. Tr. at 1023-25 (White).

2. During his tenure, Abbott has made six major acquisitions, spun off one division, attempted to sell off another, and ended a joint venture. Tr. at 1022-25 (White); Tr. at

⁶Bracketed language indicates the court's changes or omissions to Defendants Proposed Findings of Fact Adopted by the Court

576-77 (Preece).

3. The acquisitions included Knoll Pharmaceuticals (valued at \$7.2 billion), JOMED's coronary business, ThereSense, i-Stat, Guidant's vascular business (valued at \$3.8 billion), and Kos Pharmaceuticals (valued at \$3.8 billion). Tr. at 1021-25 (White). Just this year, Abbott announced the acquisitions of Advanced Medical Optics and the pharmaceutical division of the Solvay Group (valued at \$7 billion). *Id.*; Tr. at 1222-23 (Freyman).

4. The spin off of Abbott's core Hospital Products Division arose from a review of reorganization opportunities beginning in December 2002. Tr. at 1023-24 (White). As part of that review, in January 2003, Abbott retained Morgan Stanley to "examine restructuring opportunities for [Abbott] to achieve greater shareholder value." DTX 27 at A016047; *see also* Tr. at 1025 (White); Tr. at 1214-15 (Freyman). The two principal Abbott executives involved were White and Tom Freyman, Abbott's CFO. Tr. at 1017-18 (White); Tr. at 1212 (Freyman).

5. Morgan Stanley was tasked with doing a thorough analysis on various potential transactions, including what each would mean to the company, how the market would interpret the transactions and how it would impact the company's value. Tr. at 1025 (White).

6. Morgan Stanley evaluated four possible divestitures and three acquisitions: (a) a dissolution of the TAP joint venture (called Project Apple); (b) a divestiture of ADD (called Project Fox); (c) a divestiture of Ross (called Project Kitchen); (d) a divestiture of core HPD (initially called Project Hound, then called Project Bay); (e) an acquisition of Guidant (called Project Gray); and (f) acquisitions of two pharmaceutical companies (called Projects Blue and Horizon). DTX 27 at A016047; Tr. at 1027-29 (White); Tr. at 1216 (Freyman); DTX 41 at A016231-33; DTX 43.

7. “Core” HPD referred to HPD’s more mature, slower growth, smaller margin businesses, such as IV fluids, generic drugs, and infusion pumps. Tr. 268 (Begley). Core HPD did not include the high-acuity piece of the business. Tr. 1032 (White); DTX 1 A013972.

8. The Morgan Stanley analysis included an extensive review on all of the potential transactions. Tr. at 1027-29 (White). For example, Morgan Stanley analyzed criteria such as strategic logic of business mix, growth profile, profitability, cash generation and overall financial strength. DTX 27 at A016048; Tr. at 1218-19 (Freyman).

9. Based on this analysis, Morgan Stanley concluded that the HPD spin would impact Abbott’s financial future more favorably than any other strategic option under consideration. DTX 43 at A016242; Tr. at 1029 (White). They noted that the HPD spin “has the largest effect on top line growth from 2003-2007, increasing the growth rate by 40 basis points.” *Id.* This is a significant increase for a company the size of Abbott. Tr. at 1029 (White).

10. Abbott never requested that Morgan Stanley look at employee benefits while assessing the viability of the various transactions. Tr. at 1027 (White); Tr. at 1217 (Freyman). Morgan Stanley never analyzed the impact of a proposed HPD spin-off on the cost of Abbott’s employee benefits. Tr. at 1027 (White); Tr. at 1217 (Freyman).

11. The decision to recommend the HPD spin to the board was made by CEO Miles White with input from Freyman and Morgan Stanley. Tr. at 1018, 1033 (White). White recommended the spin to the company’s board in a meeting on June 19, 2003. Tr. at 1018, 1033 (White).

12. At that meeting, White made a presentation prepared by himself and Freyman using information provided by Morgan Stanley and others. DTX 1; Tr. at 1033 (White); Tr. at

1220 (Freyman). White reviewed a half dozen transactions with the board and his conclusions for each. Tr. at 1033-37 (White); Tr. at 1220 (Freyman); DTX 1 at A013974-95; DTX 2 at A023826.

13. For example, the presentation explained that the proposed dissolution of the Abbott's TAP joint venture with Takeda Pharmaceuticals made sense, but the timing was not right. Tr. at 1034 (White); DTX 1 at A013971. Abbott ultimately succeeded in completing that transaction four years later. Tr. at 1034 (White); Tr. at 1223 (Freyman).

14. Similarly, the proposed acquisition of Guidant did not make sense at the time because it would have been highly dilutive to returns, but later Abbott was able to complete the transaction on acceptable terms by buying just a portion of the company. DTX 1 at A013980; Tr. at 1034-35 (White); Tr. at 1221-22 (Freyman).

15. The company ultimately entered into or attempted to enter into the other suggested transactions identified in the presentation. Tr. at 1222-23 (Freyman). For example, in January 2007, Abbott announced the sale of its Diagnostics Division to GE for \$8 billion. Tr. at 1036 (White); Pre-trial Stip., ¶ 37. However, in July 2007, Abbott and GE announced they were unable to reach final terms on the transaction. Pre-trial Stip., ¶ 38.

16. With regards to core HPD, White explained that it appeared ripe for spin off. DTX 1 at A013988-97; Tr. at 1038 (White).

17. The minutes of the Abbott board of directors meeting in which the plan to spin off core HPD was discussed and approved describe the proposed transaction and the rationale for it as follows:

Mr. White discussed with the Board a proposal to spin-off the core global hospital products business comprising \$2.5 billion in sales and 14,000 employees. Materials

submitted at the meeting and discussed with the Board included financial projections for the business subject to the spin-off and for the high acuity hospital business to be retained. It was pointed out that the spin-off would leave Abbott with a higher growth, higher return and less asset intense business. The new company, in turn, would enjoy enhanced strategic, financial and operational flexibility. Both Abbott and the new company would be able to focus in maximizing opportunities in their distinct markets, expected to generate stronger growth for both companies, delivering enhanced shareholder value.

DTX 2 at A023826-27.

18. White's presentation outlined [what he termed] a "compelling strategic rationale" for the spin of core HPD. DTX 1 at A013991; Tr. at 1038 (White).

19. First, Abbott wanted to focus on products with higher levels of science and innovation, which typically have bigger margins, while HPD focused on lower technology, lower growth and lower return products. DTX 1 at A013991; Tr. at 1039 (White); Tr. at 273 (Begley). Ultimately, the spin "would leave Abbott with a higher growth, higher return, and less asset intense business." DTX 2 at A023826; Tr. at 167 (Begley) (Abbott COO Rick Gonzales explained the "strategic rationale for spinning off the core group of products that are now Hospira," specifically that "Abbott was concentrating on higher growth markets, larger gross margin products, and wanted to have more of a proprietary nature doctor-preference type products."); Tr. at 1213 (Freyman) (spin made sense because HPD was a "low-growth, lowreturn business" whereas Abbott's strategy and "target profile" was to be a "high-growth, highreturn business" that was "innovation driven."); Tr. at 1381 (Kearney) (spin made sense because "Abbott wanted to be perceived as an innovative company. And the products that went to [HPD] were generic pharmaceuticals as well as commodity-based devices, so not very innovative.").

20. To demonstrate this point, at the meeting White presented his own summary chart showing how each Abbott division met nine key business criteria, including factors such as “Strategic Fit,” “High Growth,” and “Innovation/Differentiation.” DTX 1 at A013972; Tr. at 1030-31 (White). The majority of Abbott divisions met eight or more of these criteria while HPD met just two. DTX 1 at A013973. HPD had a different profile and different look than other businesses at Abbott. Tr. at 1018, 1032 (White) (core HPD looked a lot different from the company’s other businesses); Tr. at 1284 (Fussell) (HPD did not fit well in the Abbott portfolio).

21. Second, the spin also made sense for HPD. Tr. at 274 (Begley). As part of Abbott, HPD was “competing for resources in a company where higher opportunities exist.” DTX 1 at A013991; Tr. at 1038-39 (White). As HPD President (and future Hospira CEO) Begley explained, the division had previously had various ideas “teed up for investments in the core products [that] just weren’t a priority for Abbott.” Tr. at 273 (Begley). As a separate company, HPD would “be able to take our cash flows and do some of the things that we wanted to get done that we could not get done being part of Abbott Laboratories.” Tr. at 273 (Begley); Tr. at 1213 (Freyman); Tr. at 1381-82 (Kearney).

22. In short, the two companies would be worth more separately than they were together. Tr. at 1019 (White); Tr. at 1380 (Kearney) (spin would result in “increase in shareholder value”); Tr. at 1147-48 (Kompare) (Fussell explained that the purpose of the transaction was to “maximize the value of the business for shareholders” by separating it out); Tr. at 1305 (Fussell) (Abbott wanted “the value of both companies separately [to be] more than the value of them together”); DTX 2 at A023826-27.

23. White “obtained a firm [and unanimous] consensus from the Board to proceed with the execution of the initial phases” of the spin transaction. DTX 2 at A023827; Tr. at 1043-44; 1050 (White).

24. None of the future Hospira executives had any role in the analysis or decision regarding the proposed HPD spin-off before it was approved by Abbott’s board. Tr. at 166 (Begley); Tr. at 1380 (Kearney); DTX 1; DTX 2.

25. White’s decision to recommend the HPD spin was unrelated to employee benefits. Tr. at 1019 (White). White’s board presentation did not mention employee benefits as being relevant to the decisions regarding whether to engage in these various transactions, including the HPD spin. DTX 1; Tr. at 1031, 1037 (White); Tr. at 1222 (Freyman). White never mentioned employee benefits during his discussion with the board. Tr. at 1037, 1041 (White); DTX 1; DTX 2.

26. In fact, Abbott assumed that the benefits burden for the new company would be the same as they were for Abbott at that time. When presenting the basic financials of the proposed new company (which showed a profitable business making somewhere between \$350 million to \$460 million a year), Abbott assumed the new company’s benefits would be “exactly the same as Abbott[’s].” Tr. at 1040 (White); DTX 1 at A013992. There was no basis for contrary assumptions at the time. Tr. at 1040 (White).

27. Abbott also determined that the impact of the spin on Abbott’s pension funding was proportional between HPD and the other Abbott divisions, meaning that HPD did not constitute a disproportionate pension burden. Tr. at 1233-34 (Freyman); DTX 53. As a result,

nothing special had to be done with the financial modeling to account for benefit costs. Tr. at 1233-34 (Freyman).

28. Bill Preece, Abbott's Director of Retirement Funds, compiled this pension funding information in early June 2003 for Abbott CFO Tom Freyman after HPD had been identified as the spin candidate. Tr. at 573-74, 577 (Preece). This request for pension funding information was not unusual, as Preece had been asked to compile similar information in connection with proposed transactions after the target of the transaction had been identified. Tr. at 574-577 (Preece).

29. Preece worked with Mary Moreland, the lead actuary for the spin from Abbott's benefit consultant, Hewitt Associates, to provide a "brute force" analysis of the impact of the HPD spin. Tr. at 581-582 (Preece); Moreland Stip., ¶ 11-12; Tr. at 916-17; DTX 45. Preece asked Moreland to figure out whether the drop in headcount, payroll and changes to the pension plan would be "linear" or proportional. Tr. at 583 (Preece); DTX 45. For example, if the HPD spin included 20% of Abbott's employees, would Abbott's pension funding decrease by a proportional 20%? Tr. at 552 (Preece). Moreland concluded that the impact would indeed be "linear." Tr. at 585 (Preece); Tr. at 920-22 (Moreland); DTX 53.

30. Accordingly, shortly before the Abbott board provided a "firm consensus" to move forward with the spin in June 2003, Preece reported to Freyman that the HPD spin would decrease benefits "in line with payroll," meaning that it would be proportional to the number of employees who were moving to Hospira. Tr. at 552 (Preece); DTX 53.

31. In connection with selecting HPD as the spin candidate, Abbott did not conduct, nor did it ask Hewitt to conduct, an analysis comparing the benefit costs of its various divisions.

Tr. at 917-19 (Moreland); Tr. at 583-84 (Preece); Tr. at 433 (Arbaugh); Tr. at 1293-94 (Fussell); Denham Dep. Tr. at 15.

32. In order to conduct such an analysis, Hewitt would have needed census data for employees going to the new company. Tr. at 433-34 (Arbaugh). Hewitt did not even receive this type of information until November 13, 2003 (five months after the spin decision was made). DTX 254C; Tr. at 434-435 (Arbaugh). Even with this information, the first time it would have been possible to provide a reliable comparison of the average cost of benefits for employees who were staying compared to those going to the new company would have been in June of 2004, after the spin was complete and the specific employees going to Hospira could be identified. Tr. at 437 (Arbaugh); Tr. at 919-20 (Moreland).

33. A division by division analysis that was prepared after this litigation commenced, based on information available as of December 2003, shows that HPD was not “older” or “more senior” than other Abbott divisions. DTX 253; Tr. at 1293-1294 (Fussell).

34. Every witness who testified at trial stated that the spin decision had nothing to do with employee benefits. *See* Tr. at 1019 (White) (employee benefits “wasn’t a consideration”); Tr. at 274 (Begley) (stating that “costs never came up in the conversation whatsoever” when discussing the strategic rationale of the transaction with Miles White); Tr. at 276 (Begley) (Gonzales never said that one of the rationales for the spin “was to avoid employee benefits costs”); Tr. at 577 (Preece) (no one ever told him that “the purpose of the transaction was to save money on benefits.”); Tr. at 431 (Arbaugh) (no one at Abbott or Hewitt ever suggested that “the purpose of the transaction was to save money on employee benefits”); Tr. at 586

(Preece) (no one ever told him that “the reason for spinning off the HPD division was to address the [pension] funding issues[.]”); Tr. at 909 (Moreland); Tr. at 1213 (Freyman) (employee benefits played no role at all in spin decision); Tr. at 1284-85 (Fussell) (Wascoe did not mention employee benefits as one of the reasons for spinning HPD); Tr. at 1290 (Fussell) (never told purpose of spin was to save money on benefits and never saw any documents to that effect); Tr. at 1383 (Kearney) (nobody told Kearney that the spin was to save benefits costs); Tr. at 1148 (Kompare) (was never told that the objective of the spin was to reduce benefits cost); Tr. at 120 (Loughery) (company indicated spin was for “strategic business reasons” and “no one said that Abbott was spinning HPD to save money on benefits”).

35. The HPD spin rationale was repeatedly documented and employee benefits was never once mentioned as a factor in the spin decision. DTX 43 (Morgan Stanley analysis); DTX 1 (board documents); DTX 2 (board documents); DTX 107 (board documents); DTX 165 (board documents); DTX 115 (employee communications); DTX 116 (transition team materials); DTX 95 (consultant reports); DTX 166 (consultant reports); DTX 170 (stockholder communications); DTX 198 (SEC filings); DTX 76 (human resources document); DTX 89 (human resources document); Tr. at 1225-29 (Freyman).

36. Among these documents was an independent analysis prepared by Morgan Stanley for submission to the IRS to request a tax free treatment of the spin transaction. DTX 95; Tr. at 1244 (Freyman). The purpose of the Morgan Stanley letter was to demonstrate to the IRS that there was a legitimate business purpose for the spin. *Id.* Prior to providing the letter,

Morgan Stanley conducted an extensive analysis, including interviewing employees and reviewing data. Tr. at 1244-45 (Freyman).

37. Morgan Stanley concluded in the letter that both Abbott and core HPD would benefit strategically from the spin-off:

It is Morgan Stanley's view that because the CHP Business [Core HPD] and the other businesses of Abbott (the "Remaining Businesses") operate in distinct commercial markets and face different opportunities and challenges, the two businesses often have dissimilar and conflicting strategic, financial and operating characteristics and objectives. Accordingly, the complete separation of the CHP Business from Abbott through the Distribution should enhance the strategic, financial and operational flexibility of both of the businesses and enable the respective management teams to focus exclusively on the unique challenges and opportunities facing each business.

DTX 95 at A007299.

38. The strategic rationale for the spin was set as of June 19, 2003, the day the board approved the proposed spin. Tr. at 1030, 1038 (White). The rationale never changed between that date and April 8, 2004, the date on which board gave its final approval to the spin. DTX 107 at A013683; Tr. at 1046-50 (White); Tr. at 278-79 (Begley). In fact, the minutes from the two board meetings (August 2003 and April 2004) that occurred after initial approval both indicate that "*the original strategic rationale remains intact.*" DTX 107 at A013683 (August 2003 board meeting); DTX 165 at A013703 (April 2004 board meeting); *see also*, Tr. at 1048 (White) ("the strategic rationale . . . remained intact").

39. Any decisions relating to implementing the spin and designing the new company's benefits had no bearing on the decision to spin HPD. Tr. at 576-77 (Preece); Tr. at 907-08 (Moreland); Tr. at 1284-85 (Fussell). For example, Hewitt, Abbott's benefits consultant,

played no role in the actual spin decision. Tr. at 907 (Moreland); Tr. at 428 (Arbaugh); Tr. at 582 (Preece).

40. Hewitt's role was to analyze benefits issues, consult on the impact of the spin on Abbott's retirement plans and work with Abbott on a "going forward" basis to implement the spin. Tr. at 908-09 (Moreland); Tr. at 428 (Arbaugh). The primary Hewitt actuaries who worked on the spin were Mary Moreland and Karl Arbaugh. Tr. at 907-08 (Moreland); Tr. 378-79 (Arbaugh).

41. Abbott also asked Hewitt to provide advice regarding how other organizations approach spin transactions and to give it guidance regarding how to handle human resources issues in the context of the spin. Tr. at 907 (Moreland); Tr. at 1146 (Kompare). Hewitt's advisory role was very similar to the type of support it provided to other clients in similar transactions. Tr. at 1153 (Kompare); Tr. at 915-16 (Moreland).

42. Hewitt's David Kompare, leader of the Corporate Restructuring Practice, worked primarily with Abbott's Steve Fussell on this aspect of the spin implementation. *Id.*

43. Hewitt (and Kompare personally) has provided HR assistance to the majority of the largest spin-offs and IPOs over the past several years. Tr. at 1152 (Kompare); DTX 64 at X004188. This includes transactions such as Dun & Bradstreet, Lucent and Palm. DTX 64 at X004189. Hewitt also maintains a special exhaustive database of employment practices in the context of spin-offs that it uses to advise clients. Tr. at 1154 (Kompare).

44. In June 2003, Kompare had an initial meeting with Fussell where he outlined some key success factors for the transaction as it related to retention of key employees, how to manage the movement of employees, including the transition of employees from the parent to spun entity, and how to support the transaction from an HR perspective. Tr. at 114647, 1154 (Kompare); DTX 64.

45. In their initial meeting, Kompare advised Fussell of the importance of developing “guiding principles” to govern the transaction process. Tr. at 1157-58 (Kompare); Tr. at 1298-99 (Fussell); DTX 64 at X004195. Guiding principles are the “rules of the road” from an HR perspective in implementing a transaction. Tr. at 1157 (Kompare); Tr. at 280 (Begley); Tr. at 1298-99 (Fussell). Hewitt told Abbott that establishing guiding principles would be extremely important to ensuring the transaction proceeded efficiently and effectively. Tr. at 1157-1158 (Kompare). Among other reasons, they serve to align all of the different parties that are working on the transaction and accelerate the decision-making process. Tr. at 1158 (Kompare); Tr. at 1298-1299 (Fussell). Hewitt provided Fussell with a “template” for how he might lay out the guiding principles for the HPD spin. Tr. at 1299-1300 (Fussell); DTX 69.

46. Fussell drafted a set of guiding principles for the HPD spin with assistance from Hewitt. Tr. at 1298 (Fussell). Based upon Hewitt’s advice, Fussell set out to draft a set of human resources principles “that would support the company’s business objectives with the transaction.” Tr. at 1299 (Fussell). The business objectives included: enhancing the combined value of Abbott assets; not economically disadvantaging any of the company’s employees; no

job losses; working cooperatively on transition issues; and continuity with customers. DTX 76; Tr. at 1304 (Fussell).

47. Fussell drafted a set of guiding principles for the HPD spin with assistance from Hewitt. Tr. At 1298 (Fussell). Based upon Hewitt's advice, Fussell set out to draft a set of human resources principles "that would support the company's business objectives with the transaction." Tr. At 1299 (Fussell). The business objectives included: enhancing the combined value of Abbott assets; not economically disadvantaging any of the company's employees; no job losses; working cooperatively on transition issues; and continuity with customers. DTX 76; Tr. At 1304 (Fussell).

48. For example, one HR guiding principle was that "[c]ost cutting is not a primary driver" of the spin. DTX 89 at A003914; Tr. at 281 (Begley); Tr. at 1306 (Fussell). This was derived directly from the business objectives guiding the spin and was consistent with the strategic rationale for the spin. Tr. at 1306 (Fussell); Tr. at 281 (Begley); DTX 76 at A003306.

49. The final Guiding Principles were approved by Miles White and others on July 24, 2003. DTX 89. Among other things, the guiding principles addressed the transition of benefits, the movement of employees between Abbott and the new company and the decision-making process. *Id.*

50. None of the future Hospira executives had any input into the development or approval of the Guiding Principles. Tr. at 280, 286-88 (Begley); Tr. at 1396 (Kearney).

51. Abbott's Guiding Principles for the HPD spin set forth various rules concerning the treatment of employees and benefits during the implementation of the spin, as well as the period following the spin. DTX 89.

52. The Principles stated that there would be an eight month transition period following the effective date of the spin until December 31, 2004, during which the employees of the new company would be provided the same level of benefits that Abbott provided to its employees. DTX 89 at A003915. This was consistent with Hewitt's experience in advising other clients in this area. Tr. at 429-30 (Arbaugh); Tr. at 915 (Moreland) (noting that, in a spin transaction, "[g]enerally the benefits of the parent company are retained for some period of time, usually until there is a convenient point to transition to the new company. And then the new company would create their own set of benefits based upon what makes sense for that business.").

53. The purpose of this rule was to give employees a period of time during which they could focus on successfully launching the new company. Tr. at 1311 (Fussell); Tr. at 282 (Begley).

54. The transition period would also provide the new company with the opportunity to make decisions regarding its future benefit offerings. Tr. at 1311 (Fussell); Tr. at 430 (Arbaugh); DTX 114 at H001701. The new company would be able to "do competitive benchmarking in a tremendous amount of detail and then understand the companies that we would be competing against, [and] what they were doing from a benefits standpoint[.]" Tr. at 281-82 (Begley); DTX 89 at A003915. The new company's benefits would become effective after the spin occurred and following the end of the transition period. *Id.*

55. The Guiding Principles also included a no-hire policy, which prohibited employee movement between Abbott and the new company for a period of two years. Tr. at 286 (Begley); DTX 76 at A003306; DTX 89 at A003916; Tr. at 1166-69 (Kompare); Tr. at 1306-07, 1319 (Fussell).

56. Such hiring restrictions are “standard” and a “best practice” in the context of a spin. Tr. at 1164, 1171-72 (Kompare); Tr. at 368 (Begley); Tr. at 1055 (White); Tr. at 1319 1320 (Fussell); Tr. at 1396-97 (Kearney); Tr. at 970-72 (Moreland); DTX 81 at A003316; Denham Dep. at 164.

57. In his discussions and communications with Fussell, Kompare cautioned that relocation between the two companies “can be very disruptive to the business” and identified the issue as a “potential landmine” which, if not handled correctly, “could significantly undermine the success of the transaction.” DTX 68 at A003239; DTX 81 at A003314-16, A003321; Tr. at 1163-1164, 1164-69 (Kompare); Tr. at 1302, 1317-1319 (Fussell).

58. The no-hire policy adopted by Abbott addressed various concerns identified by Hewitt about employment movement between the companies. Tr. at 1163-65, 1170 (Kompare). First, there was a concern that employees staying at Abbott might want to come to the new company because of relationships and familiarity with employees and management. Tr. at 288 (Begley); Tr. at 1054 (White) (employees knew each other “intimately”). Second, there was a concern that several HPD employees would seek to stay at Abbott – Plaintiff Loughery estimated that “90 percent” of HPD employees would seek to return to Abbott in the absence of such a policy, which “would be

devastating to the new company[.]” Tr. at 133-134. In fact, he believed that the new company “wouldn’t be able to operate with all those employees trying to go back to Abbott[.]” *Id.* at 134.

59. These concerns were particularly acute given the close physical proximity the two companies were going to have after the spin. Tr. at 1053 (White); Tr. at 1170 (Kompare). There was also a concern about managers “cherry picking” favorite employees from one another. Tr. at 288 (Begley); Tr. at 1053-1054 (White); Tr. at 1170 (Kompare); Tr. at 1310 (Fussell).

60. Such movement would have created “turmoil,” “chaos,” and created a “big distraction for people while they were trying to get work done.” Tr. at 286-288 (Begley); Tr. at 1173 (Kompare).

61. Thus, the policy was important “because it would guarantee stability for both organizations” and help the new company “from a productivity standpoint.” Tr. at 287, 325 (Begley); *see also*, Tr. at 1053 (White) (policy was important to “make sure that there was stability in the management and employee ranks.”); Tr. at 1396-1397 (Kearney); Tr. at 1306-1307, 1310 (Fussell); Tr. at 971-72 (Moreland); DTX 114; DTX 68.

62. The policy recommended by Hewitt was reciprocal, meaning that it existed for both Abbott and the new company because “both [Abbott and Hospira] had the same interest and issue in the ongoing stability of both their leadership and their talent generally.” Tr. at 1310 (Fussell); Tr. at 1169-1170 (Kompare).

63. The no-hire policy Abbott adopted had a two year duration. Tr. at 130708 (Fussell). Hewitt advised that two years was appropriate under the circumstances, given how

closely many of the HPD employees would associate themselves with Abbott. Tr. at 1174 (Kompare); Tr. at 1307-1308 (Fussell). A two year time period was also deemed necessary because the transaction would not be fully completed outside the U.S. for 18 to 24 months following the effective date of the spin. Tr. at 1307-08 (Fussell).

64. The eight month benefit transition period did not need to mirror the twoyear no-hire policy, because those policies serve separate and different purposes. Tr. at 1177 (Kompare); Tr. at 1312-13 (Fussell). The benefit transition period struck a balance between alleviating concerns of employees about their future benefits and the new company's need to transition to its own benefits plan design. Tr. at 1177 (Kompare). In contrast, the no-hire policy is designed to insure stability and encourage employees to identify with their new employer. Tr. at 1177 (Kompare).

65. Fussell's initial draft of the Guiding Principles proposed that retirementeligible employees be able to retire and collect their benefits before joining the new company. Tr. at 1315-17 (Fussell); DTX 76 at A003307. However, Hewitt advised Abbott that allowing pre-spin retirements would negatively influence the possibility of retaining such employees following a spin, because they may have less incentive to continue working if they are receiving their retirement benefits. Tr. at 1317, 1316 (Fussell). This would create more challenging turnover and transitional issues for the new company. *Id.*

66. Accordingly, the final version of the no-hire policy, as originally set forth in the Guiding Principles approved for the divestiture, applied to all employees. Tr. at 1124-25 (White) (no-hire policy announced in August precluded Hospira from hiring any Abbott

employee who retired prior to the spin-off); Tr. at 1396 (Kearney) (“my understanding and interpretation of the guiding principles that were put forth in July as well as communicated to employees in August is that the . . . two-year no-hire rule applied to all employees.”) Tr. at 1270 (Freyman) (it was pretty clear at the announcement date that the no-hire policy would apply to all employees who left, including retirees, because of the business discontinuity that would otherwise arise); Tr. at 1310-11 (Fussell); Tr. at 1170-71 (Kompere).

67. The no-hire policy was not “motivated by an intention to interfere with any of the employees benefits[.]” Tr. at 288-289 (Begley); Tr. at 1056 (White) (policy had nothing to do with interfering with benefits); Tr. at 1178 (Kompere) (policies were not adopted to interfere with benefits); Tr. at 1319 (Fussell) (policy was “absolutely not” established to interfere with benefits of HPD employees); Tr. at 971 (Moreland) (same).

68. Hewitt further advised Abbott regarding the organization’s structure for the spin-off. Hewitt’s advice was that the parent entity (Abbott) should make all final decisions until the point of the spin-off itself in order to, among other things, bring clarity to the decisionmaking process. Tr. at 1162 (Kompere); DTX 68 at A003233; Tr. at 1300-01 (Fussell). According to Fussell, this was necessary because – contrary to a normal transaction with two parties each representing their own interests – here there was no one else on the other side of the table. Tr. at 1301 (Fussell).

69. Consistent with Hewitt’s advice, the Guiding Principles provided that Abbott representatives would lead all functional teams and that Abbott would control all major decisions prior to the spin-off’s completion. DTX 89 at A003916; DTX 76 at A003306.

70. Accordingly, the organizational structure for the spin-off had Abbott representatives leading all functional teams, had Abbott representatives (Tom Freyman) as the Chair of the Steering and Executive Committees and had Miles White at the top of the decision-making structure. Tr. at 265, 283-85 (Begley); DTX 89 at A003916; DTX 116 at A004546; Pre-Trial Stip., ¶ 22.

71. Even though it was not legally obligated to do so, Abbott voluntarily assumed approximately \$200 million in benefit obligations for employees going to the new company. Tr. at 1331-1332 (Fussell).

72. First, Abbott voluntarily amended its retiree medical benefit plan to extend coverage to retirement-eligible employees going to Hospira. Tr. at 973-975 (Moreland); Tr. at 1314, 1331-21 (Fussell). This cost Abbott \$45 million. *Id.* Abbott kept these medical benefits in place because it did not want employees to retire prior to the spin solely to guarantee their retiree medical benefits. Tr. at 1073 (White).

73. Second, Abbott provided \$45 million to top off the pension assets it transferred to Hospira. Tr. at 973-975 (Moreland); Tr. at 1331 (Fussell).

74. Third, Abbott assumed another \$110 million in benefit expenses associated with equity and restricted stock vesting, incurred-but-not-reported health care claims, and other benefit obligations. Tr. at 1331-1332 (Fussell).

75. Hospira also made benefits-related decisions that increased, rather than decreased, its costs. For example, Hospira provided an enhanced 401(k) benefit to its employees that were 40 and over, which cost Hospira approximately \$49 million. DTX 172; Tr. at 341-43 (Begley).

76. As part of its due diligence in connection with the implementation of the spin, Abbott asked Hewitt to compile information concerning how Abbott's benefits plan compared to various possible competitors in the new company's industry. PTX 161; Tr. at 132425 (Fussell). The purpose of gathering this information was to provide some foundational knowledge that the new company could use to begin planning its future benefits plan. Tr. at 1325 (Fussell); Tr. at 1057-59 (White); Tr. at 208 (Begley).

77. [Omitted as repetitive.]

78. Ultimately, the future Hospira executives had a more detailed comparative analysis prepared, using different possible competitors, after they began planning the new company's future benefits plan in December 2003. Tr. at 332-33 (Begley); DTX 154.

79. Abbott needed board approval to announce the spin. Tr. at 1046 (White).
The board meeting took place via conference call on August 21, 2003. *Id.*

80. Prior to the board meeting, White provided materials that contained a comprehensive summary of the transaction. Tr. at 1046-1047 (White); DTX 107. The board materials noted, and White subsequently explained during the board meeting, that "[t]he original

strategic rationale [for the spin] remains intact.” DTX 107 at A013683; Tr. at 1047 (White).

81. The board materials also included an extensive financial analysis prepared by CFO Tom Freyman. Tr. at 1229 (Freyman); DTX 107. His analysis included a P&L or “earnings statement” based upon his modeling. DTX 107 at A013689.

82. This financial analysis showed that a spin of core HPD would create a \$2.5 billion business with a net income in the range of \$300 million to \$500 million for 2003-2007. *Id.*; Tr. at 1230 (Freyman). From a benefits perspective, the analysis assumed that the new company’s benefit costs would be the same as Abbott’s. Tr. at 1230 (Freyman).

83. The board “unanimously approved the public announcement of the proposed spin-off.” DTX 110 at A013659.

84. Neither the August 2003 board materials nor the board minutes state or imply that employee benefits had anything to do with the decision to proceed with the spin of core HPD. DTX 107; DTX 110; Tr. at 1047-48 (White).

85. The spin was publicly announced on August 22, 2003. DTX 114; PTX 6, Details concerning the impact of the spin on employees’ benefits were communicated (among other times) in a conference call that same day led by Chris Begley and Henry Weishaar, another

future Hospira executive. Tr. at 84 (Loughery); Weishaar Dep. at 7-9. During the call and in subsequent communications three basic ideas were repeatedly communicated to employees.

86. First, consistent with the Guiding Principles, Abbott announced a “transitional” benefits period. Tr. at 1311-12 (Fussell). Employees were advised that their compensation and benefits would remain the same through December 31, 2004 “to allow for a smooth transition while we build the new company.” Pre-trial Stip., ¶ 25; Tr. at 1327 (Fussell); PTX 7 at MN00022; Tr. at 86-87 (Loughery) (employees were told during August 2003 conference call that “benefits would remain the same as Abbott’s through the end of 2004, and that beyond that, that they would look at all programs, develop, you know, what was best for us, and that that would be communicated at a later date.”).

87. Second, employees were advised that for 2005 and beyond, the “new company’s board of directors and senior management will be responsible for future employee compensation and benefits [decisions]” Pre-trial Stip., ¶26; Tr. at 1327 (Fussell); PTX 7 at MN 00022 (for “2005 and beyond, the new management team and the Board of Directors will assess current and future needs, and make appropriate decisions for you and the company”); Tr. at 86-87, 125 (Loughery) (Begley and Weishaar advised employees during August 2003 conference call that the benefits would be decided by the new company and “would have to be approved by the board of directors before they could be announced” or implemented); PTX 125 at H001873 (during the August 2003 conference call, one employee asked, “How far before the actual start date of the new company will that information be available,” to which Begley responded, “It 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 in existence until the new company is spun out.") Tr. at 673-76 (Roller).

88. Third, in addition to being advised that the board of directors of the new company would have to approve its benefits package (implying the announcement would take place on a future date), employees were specifically told that "the new company's benefits for 2005 and beyond will be announced at a later date." PTX 5 at MN0005. As Plaintiff Loughery admitted, the "communications consistently said that those decisions will be made and announced at a later point in time[.]" Tr. at 128 (Loughery); *see also* Tr. at 616 (Roller) (admitting that she was told decisions regarding retiree medical, among other benefits, would be announced at a later date); Tr. at 629-630 (Roller) (decisions regarding pension benefits after December 31, 2004 would be made by the new company); Tr. at 727 (Derra); PTX 32 at MN00222 (explaining in January 2004 that the "design work for Hospira benefits for 2005 and beyond is underway. Because we are at the beginning of the design process, it's not appropriate to set a communication timeframe now. We will update employees as soon as our programs are in place."); Tr. at 130-31 (Loughery).

89. Abbott also consistently communicated the same message throughout the period leading up to the April 2004 spin. For example, in an October 9, 2003 newsletter to HPD employees Chris Begley stated among other things that: "The overall package of the new company's U.S. benefits will take some time. * * * The human resources team has initiated an extensive process to determine the right mix of competitive benefits and services to meet the needs of the new company and its employees" and that those benefits "would be announced

following approval by the new company's board of directors[.]” PTX 14 at MN00075. Tr. at 129-30 (Loughery). This was the “same message” that the company communicated to employees in August of 2003. Tr. at 129-130 (Loughery). *See also*, PTX 32 at MN00222 (employees were told in a January 2004 newsletter that the “design work for Hospira benefits for 2005 and beyond is underway. Because we are at the beginning of the design process, it’s not appropriate to set a communication time frame...We will update employees as soon as our programs are in place.”); Tr. at 130-31 (Begley).

90. Employees who contacted Abbott’s benefits hotline or sent an email to Abbott asking questions about the transition period and future Hospira benefits were provided with information consistent with the communications described above. Williams Dep. at 41-59; PTX 100, 206, 207, 316.

91. Finally, Abbott also advised employees when the spin was announced of the two-year no-hire policy. DTX 114 at H001699. In a document titled “The New Hospital Products Company Fact Sheet, employees were told: “[b]eginning August 22, 2003, neither Abbott nor the new company may hire employees from the other. This policy gives the new company time to build a strong team and business model and provides continuity and stability for both organizations’ future success. We expect this policy will continue for two years from the date the new company becomes a separate corporation (anticipated to be March 1, 2004). You may not transfer between companies during this period.” *Id.*

92. Abbott never promised that “benefits would stay the same [at the new company] as at Abbott,” and at “no point” did Abbott say that the new company would have a pension plan

or retiree medical benefits. Tr. at 122-23, 127 (Loughery). Instead, employees received written communications that stated “consistently to the contrary[.]” Tr. at 134 (Loughery).

Employees were instead told and understood the new company’s benefits could be “entirely different.” Tr. at 157 (Loughery); PTX 125 at H001879; Tr. at 728-29 (Derra).

93. This included “the entire benefits program and vacation[.]” and, as a result, Loughery “knew that benefits could be different,” including that they could be “less.” Tr. at 158 (Loughery); PTX 135 at H001879.

94. Only one Plaintiff – Jane Roller – claimed she had been told benefits would stay the same. Tr. at 617-18.

95. Roller claimed such a promise occurred on a conference call with Henry Weishaar. Tr. at 664 (Roller). But there is no dispute that Weishaar made no such promise on the August 22, 2003 conference call during which the spin was announced. To the contrary, Weishaar said during the call, “There are many different kinds of benefits programs that we can put in that are entirely different than what you’re used to from Abbott.” PTX 125 at H001880; Tr. at 667 (Roller). “[S]o it could be entirely different, something entirely new.” PTX 125 at H001880; Tr. at 668 (Roller).

96-98 [Roller’s testimony was inconsistent, impeached in several material respects, and generally unreliable. The court does not credit her testimony with respect to Abbot’s representative about the effect of the spin on HPD/Hospira employee benefits.]

99. Abbott also never promised that employees would be able to retire prior to joining Hospira. Begley expressed the belief that retirement eligible employees would be able to retire and

then work for the new company in the initial August 22, 2003 conference call. Tr. at 295 (Begley); PTX 184 at A004880 (telling employees they could retire before the spin was a “misunderstanding” that needed to be corrected). However, Begley came to understand that employees would be much better off financially if the pension assets were transferred to Hospira, and that allowing pre-spin retirements could impair the motivation and productivity of transferring employees. Tr. at 296-297, 302, 306-08, (Begley). Employees were informed in early November, however, that they would not be able to do so. DTX 148; Tr. at 480 (Arbaugh); PTX 22; Tr. at 96, 140 (Loughery).

100. As part of the spin-off, Abbott transferred to Hospira the pension assets and liabilities for employees going to the new company. Pre-trial Stip., ¶ 29. The decision to spin the pension assets and liabilities was preceded by an extensive amount of analysis and deliberation, culminating in a September 28, 2003 meeting with Miles White, Tom Freyman, Chris Begley and others. Tr. at 939-50 (Moreland); DTX 102, 124, 137; Tr. 298-302, 305-09, 313-16 (Begley); DTX 130, 138, 142; Tr. 1075, 1077-80 (White); Tr. at 1260-69 (Freyman).

101. The decision to transfer the pension assets and liabilities was not made in order to interfere with plaintiffs’ benefits. Tr. at 939, 948 (Moreland); Tr. at 481 (Arbaugh); Tr. at 590 (Preece); Tr. at 1240-41 (Freyman); Tr. at 1397-98 (Kearney); Tr. at 1074-77 (White).

102. Hewitt assisted Abbott in analyzing the alternatives for handling the pension assets and liabilities for the HPD employees. Pre-trial Stip., ¶ 30.

103. Early in the process of implementing the spin, Gail Denham, an Abbott HR employee who transferred to Hospira, asked Hewitt what Abbott could do to protect the pension

benefits for employees who would not yet be retirement-eligible at the time of the spin. Tr. at 940 (Moreland); DTX 98 at X001485.

104. On August 8, 2008, Hewitt responded that the best approach would be for Abbott to transfer the pension assets as opposed to retaining them. DTX 98 at X001486. This is because if Abbott transferred the assets, employees going to the new company would be able to grow in to increased early retirement benefits. DTX 98; Tr. at 447-449, 464 (Arbaugh); Tr. at 590 (Preece); Tr. at 940-941, 949-950 (Moreland).

105. To further demonstrate this point for Abbott, Karl Arbaugh from Hewitt provided several “strawman calculations” which illustrated the impact on employees who were not yet retirement-eligible of transferring the pension assets versus retaining them at Abbott. DTX 102; Tr. at 448-449 (Arbaugh). The “strawman” analysis showed that non-retirementeligible employees would receive as much as double the pension benefit if Abbott chose to transfer the assets and liabilities. DTX 102 at A005827; Tr. at 449-50 (Arbaugh).

106. Non-retirement eligible employees comprised approximately 80-85% of the individuals transferring to Hospira and would be provided a “major advantage” by the asset transfer, because they would be able to receive a larger earlier retirement benefit. Tr. at 450, 482-483 (Arbaugh); *see also* DTX 262; Tr. at 589-590 (Preece); DTX 138; Tr. at 306-07 (Begley) (majority of employees going to new company were under the age of 50 and thus not retirement eligible); Tr. at 1075 (White); *see also*, Tr. at 1241 (Freyman).

107. For example, for a person age 48, with 20 years of service and an average pay of \$100,000, if the person retired at age 55 he or she would receive \$857 a month if Abbott kept

the assets and \$1,865 a month if the assets were spun to the new company. DTX 102 at X005827. *See also*, DTX 138; Tr. at 308 (Begley) (employee who was 48 years old with 20 years of service, a final average pay of \$50,000, who retired at age 50 would receive over \$400 more each month); DTX 102 at X005827 (monthly pension payment would double for a 48-year old with 20 years of service who retired early at 55 – \$882 instead of \$396 based on a \$50,000 salary).

108. Plaintiffs and their expert conceded that the transfer of the pension assets provided employees who were not retirement-eligible with a greater retirement benefit. DTX 147 at A021204 (“While your benefit will be based on your service through December 31, 2004, you will continue to grow into these favorable early retirement treatments under the pension plan.”); Tr. at 691 (Roller) (testifying that when she retires from Hospira she will get credit for retiring at age 50 instead of being stopped cold at 46, which she was at the time of the spin); Tr. at 712-15 (Derra); Tr. at 818-819 (Feinstein).

109. Retirement-eligible employees also received higher benefits as a result of the pension asset transfer, and no employees were worse off. DTX 102 at X005828; Tr. at 450 451 (Arbaugh); DTX 262; Tr. at 589-590 (Preece); Tr. at 1075 (White); Tr. at 117, 152-153 (Loughery) (acknowledging that accrual of additional eight months of service would increase his monthly benefit by over \$100); PTX 45.

110. Hewitt’s strawman analysis caused a sea change in thinking about the pension asset issue. Prior to Arbaugh’s e-mail, at least some people believed it would be best for Abbott to retain the assets. Tr. at 586-87 (Preece). After receiving the strawman calculations, a

consensus began to form around transferring the assets. Tr. at 943-46 (Moreland). The analysis resulted in an “A ha!” moment for the team analyzing the pension asset transfer, and it ultimately carried the day. Tr. at 945-46 (Moreland).

111. In contrast to the huge financial advantage employees would receive from the pension assets transfer, Hewitt’s analyses showed that the “financial implications of keeping and spinning it more or less washed themselves out” from the company’s perspective. Tr. at 590 (Preece).

112. Hewitt provided a robust analysis of the impact of spinning the pension assets that looked at the P&L impact, cash implications, administrative implications, impact on employees and equitable distribution of assets. *See, e.g.*, DTX 137 at X002210.

113. First, most notably, the “cash implications” of spinning the assets versus keeping them did not point strongly in either direction. DTX 137 at X002211; Tr. at 444 (Arbaugh). At the time it was considering the pros and cons of the asset transfer, if Abbott spun the pension assets the cost of “topping off” the new company’s pension fund was projected to be a cash payment of between \$180 and \$100 million (a payment that ultimately turned out to be \$45 million). *See* DTX 137 at X002221-2224; Tr. at 1329-31 (Fussell); Tr. at 594-99 (Preece).

114. In contrast, if Abbott kept the assets and also permitted an *en masse* pre-spin retirement of employees going to Hospira (something that would have violated the existing no-hire policy that had been announced in August 2003), Abbott’s worst case scenario was an accounting loss of \$100 million. *Id.* *See also*, DTX 198 at A001136-37; Tr. at 594-99 (Preece). That accounting loss would have resulted in an annual cash expense of approximately \$5-7

million per year for Abbott over a period of approximately 13 years. Tr. at 250-51 (Begley); Tr. at 1330 (Fussell).

115. Second, the P&L impact did not point strongly one way or the other in terms of spinning the assets because it would have caused a one time cost of \$15.4 million for Abbott's pension plan, which had over \$2 billion in assets. Tr. at 442-443 (Arbaugh).

116. Hewitt provided a number of additional analyses that outlined various pros and cons of spinning the assets. DTX 102, 124, 130, 137, 138, 142. The pros "clearly" outnumbered the cons. DTX 138; Tr. at 307-308 (Begley); *see also*, DTX 262 (Preece analysis showing benefit of spinning assets in increasing the benefits of employees going to the new company); Tr. at 589-590 (Preece); PTX 130 at A016986 ("After careful review and with Hewitt's counsel, the data suggests transferring assets for active employees to the new company. This is true for both companies, from both a financial and employee perspective."); DTX 124 at A011731; Tr. at 438-441 (Arbaugh).

117. Abbott CEO Miles White, HPD President Chris Begley and others had a meeting to discuss the pension asset issue on September 28, 2003. Tr. at 313 (Begley); Tr. at 1078 (White). The purpose of the meeting was to resolve any disagreement regarding whether to transfer the pension assets. Tr. at 1078 (White). Some of the future Hospira executives, including Chris Begley and Terry Kearney, initially believed that it would be best for the assets to stay with Abbott. Tr. at 298 (Begley) (initial position was that it did not make sense to transfer the assets); Tr. at 1391-1393 (Kearney) (same)

118. The purpose of the September 28 meeting was to review all of the relevant

information that had been compiled by Hewitt concerning the pension assets transfer and make a decision on the issue. Tr. at 1078-79 (White); Tr. at 311 (Begley); PTX 187.

119. [The major focus of the meeting was about what was best for most of the employees as it related to benefits. Tr. At 314 (Begley).] [Remainder omitted.]

120. Coming out of the meeting the prevailing view was that transferring the assets was “the best thing for the employees.” Tr. at 314 (Begley); Tr. at 1074-77 (White) (transferring the assets was the “right thing to do for the majority of employees”); Tr. at 939, 948 (Moreland); Tr. at 481 (Arbaugh); Tr. at 590 (Preece); Tr. at 1240-41 (Freyman); Tr. at 1397-98 (Kearney).

121. Begley summarized the meeting to David Jones, the future chairman of Hospira’s board of directors, in an email sent the same day:

The following is a brief summary of the outcome of our meeting: Miles believes it is best to transfer the asset to Newco because transferring the asset to Newco clearly has the most positive impact for the Newco employees, especially employees not retiree eligible.

DTX 142 at H12464; Tr. at 313-314 (Begley); PTX 188.

122. Begley’s email to Jones accurately summarized White’s thinking on the pension asset transfer. Tr. at 1079 (White); Tr. at 1241 (Freyman); Tr. at 1398 (Kearney).

123. There was also some discussion of whether if the assets were spun the funding levels between Abbott and the new company would be equitable. Tr. at 1080-81 (White). White knew that Abbott would have to “top off” the pension assets if they were transferred. Tr.

at 1080-81 (White); PTX 188. At the time, White was willing to spend over \$100 million to facilitate the transfer, if necessary. Tr. at 1081 (White); PTX 188. The top off amount ended up actually being \$45 million. Tr. at 1082 (White).

124. Begley's view at the time was that Hospira would "freeze" the pension plan if the asset was spun, meaning that they "would stop the accruals on the salary portion and the service portion of the Abbott benefit program[,] which would give the new company time to "look at what was appropriate from an overall benefit plan[.]" Tr. at 319 (Begley).

125. Begley did not mean that "Hospira wasn't going to offer its own defined benefit plan . . . That decision had not been made." *Id.* at 320 (Begley); *accord* Tr. 969-970 (Moreland) (stating that the announcement to freeze Abbott pension did not mean that Hospira would not offer its own pension plan because "Hospira could design establish a pension plan on their own"). Rather, they were just bringing an end to the Abbott plan, and then they were going to design their own plan and take it to the board for approval. Tr. at 319-320 (Begley).

126. In the course of discussing the pros and cons of transferring or retaining the pension assets, Begley repeated his belief that (a) retirement eligible employees would be able to retire and then work for the new company; and (b) that he wanted to retire from Abbott prior to the spin. Tr. at 295-96 (Begley); Tr. at 956-57, 959-60 (Moreland); DTX 131; *see also*, PTX 184 at A004880 (telling employees they could retire before the spin was a "misunderstanding" that needed to be corrected).

127. Hewitt advised Abbott, however, that allowing such pre-spin retirements would violate the Internal Revenue Service “Same Desk” rule and have a negative impact on employee retention. DTX 249; Tr. at 954-55 (Moreland).

128. The Same Desk Rule is a tax rule that “generally prohibits people while they’re continuing to be employed to start drawing their pension benefits. Generally it requires that you terminate employment before you start collecting a pension benefit.” Tr. at 397 (Arbaugh).

129. In the case of the HPD spin, if the pension assets were transferred, Hewitt was concerned the IRS would not view Hospira employees as having “terminated” from their prior employment. Tr. at 953-55 (Moreland). This is because employees transferring to the new company were going to continue to perform the same duties at the “same desk” following the spin of core HPD. *Id.* Accordingly, their “retirement” might be viewed by the IRS as “fake”. Tr. at 954 (Moreland).

130. Hewitt’s Karl Arbaugh first identified this “same desk” issue on September 3, 2003 in an email to Moreland. PTX 145; Tr. at 591 (Preece). As he explained at the time: “[E]mployees are not considered – for pension purposes – to have separated from service, unless they really do leave employment with Abbott/NewCo for some period of time. If employees just say they are terminating, but remain in continued employment with NewCo, perhaps the IRS would view it as a sham retirement.” DTX 125 at X003616.

131. By sham retirement, Arbaugh meant that the employee would not really have retired – for example, if an employee says, “I’m retired,” collects pension benefits and then returns to work the next day doing the same job and at the same “desk,” most people would

objectively say the person is still working and “the IRS might view it that way as well.” Tr. at 454 (Arbaugh). This is precisely what would have happened if employees were allowed to retire and then work for Hospira – for example, Plaintiff Loughery admitted that following the spin he did in fact did work the same job and at the “same desk” after the spin-off. Tr. at 74-76, 156 (Loughery).

132. After receiving Arbaugh’s input, Moreland raised the Same Desk rule issue with Abbott: “The IRS will think of this as one continuous plan just sponsored by a different employer . . . [s]o if something would not have been acceptable under the current plan (terminate employment one day, get rehired the next), we shouldn’t be suggesting that it would be acceptable just because of the spin off.” DTX 249 at X002138; Tr. at 954 (Moreland); Tr. at 457-458 (Arbaugh); DTX 131 at X002183 (in an email from Moreland to Fussell and Preece, she explained “I don’t believe that NewCo employees will have the ability to retire at Abbott, collect their benefits under the plan, and then become active employees at NewCo if assets are spun off.”); DTX 132; Tr. at 591-93 (Preece) (relaying Moreland’s concern regarding Same Desk rule to Freyman).

133. Plaintiffs’ expert Dr. Feinstein agreed that the Same Desk Rule prohibited employees from “retiring” from Abbott and then going immediately to work for Hospira. *See* Tr. at 893-894 (Feinstein) (agreeing with Hewitt’s advice that “if we’re going to spin the pension assets, the Same Desk Rule will preclude employees from retiring from Abbott, [and] starting to collect their pension assets while continuing to work over at Hospira.”).

134. Violating the Same Desk Rule could have massive negative consequences for Abbott's pension plan that Abbott's Preece described as the pension plan "death penalty." Tr. at 592; DTX 132. Arbaugh explained that violating the rule created a "real risk" because Abbott's pension plan could be "disqualified." Tr. at 452-454.

135. Plan disqualification has "very, very serious tax consequences," including that "[a]ll of the tax deferrals in the plan would be negated" such that "[e]mployees would have to pay taxes on benefits that they have never received." Tr. at 454 (Arbaugh); Tr. at 950-955 (Moreland). This would be "a disaster," would cause "a severe financial blow" to Abbott and "would be a real horrible mess." *Id.*, Tr. at 485-86 (Arbaugh).

136. Hewitt also identified a series of additional concerns to Abbott about the possibility of allowing pre-spin retirements. DTX 136. *See also* 118 (Arbaugh email to Moreland on the same topic).

137. First, if employees retired as part of the spin, the pension plan would no longer work as a retention incentive for Hospira employees. DTX 118; Tr. at 459-460, 483-484 (Arbaugh). Hewitt told Abbott that "[i]n our experience, most companies feel it's in no one's best interest to allow employees to access their retirement benefits before terminating employment," because it would eliminate the pension plan's "retention incentive," thus increasing turnover. DTX 136 at A004762.

138. Hewitt believed that by allowing the retirements, employees would terminate their employment at the new company "earlier than they otherwise would have." *Id.* *See also*, DTX 137 at X002213 (such an arrangement would be "unusual" because "most companies

would prefer that employees not access retirement benefits until actual retirement.”); Tr. at 463, 484 (Arbaugh); Tr. at 296-97 (Begley) (Begley, who previously supported pre-spin retirements, explaining that he ultimately came to the view that allowing pre-spin retirements would not provide the right incentive for Hospira’s workforce, consistent with the advice Hewitt had outlined).

139. Second, allowing the retirements could hurt company morale and productivity. As Arbaugh explained, “If you’re receiving a pension check each month from Abbott Laboratories, it might make you feel somewhat less connected to your new employer, Hospira.” Tr. at 459 (Arbaugh). In other words, “you might feel more like a retiree than [an] active employee and not feel like you need to work quite so hard or stick at the job so long.” Tr. at 463 (Arbaugh); DTX 118; *see also*, DTX 249 (it “would be disruptive to NewCo as employees now feel more like an Abbott retiree than an active NewCo employee.”); Tr. at 965 (Moreland) (“if you feel more like a retiree than an employee, you have a couple of bad days, you decide you don’t need to work anymore, and that would affect the stability of the work force at Hospira.”). [Remainder of ¶ 139 omitted as repetitious.]

140. DTX 137 at X002213 (Those receiving monthly payments may feel more like retirees than active employees, and therefore may be more willing to stop working.); Tr. at 463 (Arbaugh). Tr. at 484 (Arbaugh); Tr. at 296-97 (Begley) (agreeing that pre-spin retirements could negatively impact the motivational level and productivity of Hospira’s workforce); DTX 249 at X002138 (Moreland email explaining that permitting pre-spin retirements “would be

disruptive to NewCo as employees...[would] feel more like an Abbott retiree than an active NewCo employee.”); DTX 131, 136, 137.

141. Third, employees would have to decide whether or not to take early pension benefits and start over as a new employee at Hospira at a time when Hospira’s benefits had not yet been designed. DTX 136; DTX 137; Tr. at 961-962 (Moreland); Tr. at 118 (Loughery) (admitting he would have had to make the retirement decision in the last four months of 2003, prior to the formation of Hospira).

142. In other words, employees would have to make this important decision regarding whether to “retire” without having complete information about what their future benefits package would be. DTX 136. Arbaugh described such a situation as a “nightmare.” Tr. at 464, 529 (Arbaugh). This was not the only uncertainty, however – to make matters worse, if an employee retired to take advantage of the retirement benefits, “there really wouldn’t be any way to guarantee that, in fact, there would be a job available for [him] four months later[.]” Tr. at 140 (Loughery).

143. Fourth, employees would be treated as “new hires” at Hospira, which carries with it several implications – for example, it impacts vacation accruals. DTX 137 at X002215; Tr. at 463-464 (Arbaugh); DTX 136; Tr. at 962-964 (Moreland).

144. Fifth, employees would be required to pay back loans in their 401(k) plans. DTX 137 at X002215; Tr. at 465 (Arbaugh); Tr. at 963-964 (Moreland).

145. Sixth, for Hospira, having a group of employees who had opted to retire and had begun to receive their pension checks would complicate the design of their employee benefits plan. DTX 137 at X002217; Tr. at 466 (Arbaugh) (“the question would be what benefits do you provide to” people who are currently receiving pension benefits); Tr. at 964-965 (Moreland) (“More difficult to design [benefits] plans.”).

146. In conclusion, the “bottom line” from Hewitt’s perspective was that “it was better for Abbott, it was better for Hospira, and it was probably better for the employees not to permit” employees to retire from Abbott and begin working for Hospira. Tr. at 459-467 (Arbaugh). *See also*, DTX 137; Tr. at 466-467 (Arbaugh) (“Q....Ultimately, regardless of whether Abbott spun the assets or kept the assets, did you at Hewitt think it was a good idea to allow retirements en masse before Hospira began as a company? A. No. And I think it comes across in this material. We didn’t think it was a good idea.”).

147. Abbott followed Hewitt’s advice not to allow pre-spin retirements. Tr. at 960-966 (Moreland).

148. Employees were advised of the decision to transfer the pension assets in early November 2003, shortly after the decision was made. DTX 148; Tr. at 320 (Begley). In a series of communications the company explained why it decided to transfer the pension assets to the new company. PTX 22, 23, 24; Tr. at 321 (Begley). Employees were also advised that they could not retire from Abbott, start collecting their pensions and then continue to work at Hospira. Tr. at 480 (Arbaugh).

149. Employees were additionally notified that the “transitional” pension plan that was going to be set up to facilitate the transfer the pension assets would be “frozen” at the end of the 2004. PTX 22, PTX 23, PTX 24; Tr. at 329-330 (Begley); Tr. at 149-51 (Loughery) (admitting he knew as of November 2003 that his pension benefit would be “frozen.”); Tr. at 692 (Roller) (admitting that she understood “regardless of how long you worked for Hospira your service credits for pensions would stop on 12/31/04.”).

150. First, on November 4, 2003, the company sent employees a document entitled “Information on Retirement Benefits for U.S. Employees Joining the New Company.” PTX 22; DTX 148. The document explained that the pension assets would be “spun” to the new company and placed into a “transitional plan”: “Pension benefits you’ve earned through 12/31/2004 from Abbott will be provided by a plan set up by Abbott and the new company. Abbott will establish a duplicate retirement plan . . . and fund a separate, secure trust to provide the benefits you have earned under the Abbott Annuity Retirement Plan. The Abbott Annuity Retirement Plan will transfer pension assets to the trust that will fund the Abbott/New Company Annuity Retirement Plan. The new company will assume responsibility for the Abbott/New Company Annuity Retirement Plan and the trust when the two companies separate.” PTX 22 at MN00030; Tr. at 478 (Arbaugh).

151. The November 4 document repeatedly emphasized that benefits provided through the transitional plan would be based upon “service and earnings through 12/31/2004”. PTX 22 at MN00031; Tr. at 324 (Begley); Tr. at 682 (Roller). [Remained of ¶ 150 omitted as repetitious.]

152. For example, employees were being told that even if they worked until 2015, their benefit would only be calculated through the end of 2004. Tr. at 370 (Begley); Tr. at 487 (Arbaugh) (employees were told “your benefit would be calculated based on your pay and the service that you had earned through the end of 2004 but not beyond.”). Hewitt personnel testified that this is precisely what a “freeze” is: “Q: What do you mean by freeze? A: Well, freeze typically means no future pay or service credits. So you’re stopping the accrued benefit as of that point in time.” Dep. Tr. at 101 (James); Tr. at 968 (Moreland).

153. The document also explained the rationale behind spinning the pension assets was “in order to maximize your benefit.” PTX 22 at MN00030. It explained: “Applicable laws would limit Abbott’s ability to allow you to age in to the early retirement subsidies provided under the Abbott Annuity Retirement Plan. Ultimately, your future benefits would be negatively impacted.” PTX 22 at MN00030. Employees were told that Abbott had concluded that if it kept the assets it would have negatively impacted the value of the pension benefit to employees. Tr. at 136 (Loughery). Moving the assets to the new company enabled employees “to receive a greater benefit than if Abbott had retained the pension assets[.]” Tr. at 136 (Loughery).

154. The communication provided several examples, similar to the Hewitt “strawman” calculations, which demonstrated the benefit of spinning the pension assets. One example described an individual who was 53 years old with 20 years of experience at the end of 2004 with a final average pay of \$50,000. PTX 22 at MN00031; Tr. at 137 (Loughery). That individual would receive \$928 a month if the company spun the assets to Hospira, whereas if

Abbott kept the pension assets the employee would only receive \$857 a month. *Id.* Other examples were even more dramatic, showing that in some instances employees would receive \$400 less a month if Abbott kept the pension benefits. PTX 22 at MN00032; Tr. at 138 (Loughery).

155. At the end of the document, Abbott explained the objectives it had in mind in arriving at these decisions: “[o]btain the best possible benefit results for the greatest number of employees,” and “[e]ncourage you to continue your employment with the new company[.]” among other reasons. PTX 22 at MN00033. As explained above, this stemmed from the fact that many more employees would qualify for much larger benefits if the assets were spun. Tr. at 482 (Arbaugh). This would encourage employees to continue working, at least until they became eligible for early retirement, because they could get better benefits than if they terminated immediately. Tr. at 482-483 (Arbaugh).

156. Abbott also prepared a slide deck presentation for employees entitled, “Abbott & The New Company, Retirement Benefit Transition, U.S. Employees Joining the New Company” that was used by HR personnel to describe the benefits of transferring the pension assets. PTX 23; Tr. at 321-322 (Begley). The presentation emphasized that Abbott was setting up a trust designed to make retirement eligible employees feel “secure about where [their] money was going[.]” Tr. at 150 (Loughery); PTX 23 at MN00047. The presentation included the same basic information as the November 4 communication. Tr. at 328 (Begley).

157. For example, the presentation also explained that the pension was going to be frozen. It stated: “Your benefit will be based on your service and earnings through 12/31/04 or your actual

retirement date if it is earlier.” PTX 23 at MN00047; Tr. at 150 (Loughery). What this indicated was that employees’ pension benefits would be based upon service and earnings through the end of 2004. As Plaintiff Loughery admitted: “Q: In other words, they were telling you that they were going to be frozen, right? A: That’s correct. * * * Q: And that’s why you looked for another job, right, because you understood in November of 2003 that your benefits were going to be frozen, correct? A: That was my understanding, yes.” Tr. at 151 (Loughery).

158. On November 5, 2003, employees also received an HTT newsletter. PTX 24. This document covered the same basic information as the earlier communications concerning the pension asset transfer. Tr. at 322 (Begley). Again, the company communicated that employees would “continue to earn service credit and benefits through December 31, 2004[.]” Tr. at 329-330 (Begley); PTX 24 at MN00065.

159. None of these communications addressed what benefits Hospira would offer its employees. Tr. at 330 (Begley). *See also* PTX 32 at MN00222 (January 2004 newsletter advising employees going to the new company that the “design work for Hospira benefits for 2005 and beyond is underway. Because we are at the beginning of the design process, it’s not appropriate to set a communication time frame...We will update employees as soon as our programs are in place.”).

160. Transferring the pension assets was “an elegant solution” to the issue of how to ensure that the non-retirement eligible employees could grow into enhanced benefits. Tr. at 943 (Moreland). Moreland mentioned, but did not recommend, other alternatives to solve the problem, such as “creating a mirror plan,” because they were “more complicated and

cumbersome,” “confusing to employees,” and “rarely done.” Tr. at 942-943 (Moreland). There was no evidence at trial that Abbott even considered such alternatives.

161. Plaintiffs’ expert, Dr. Feinstein, suggested that the asset transfer could have been handled through the establishment of a “mirror plan,” which would have supposedly avoided the effect of the Same Desk Rule. Tr. at 778-780 (Feinstein).

162. However, Hewitt’s understanding was that a “mirror plan” would only be viable in the short term, and after a one or two year period there are rules that preclude that solution. Tr. at 990 (Moreland). Setting up a “mirror plan” would also have required an overly complicated, multi-payment system that required the company to split up pension assets on an employee-by-employee basis. Tr. at 942-943 (Moreland).

163. Hewitt also did not recommend that Abbott retain the assets and liabilities for some employees while transferring the assets and liabilities for others. Tr. at 528-530 (Arbaugh). Hewitt raised the concern that such a practice might violate “nondiscrimination rules” of pension plans that prevent an employer from discriminating in favor of highly compensated employees and testified that “[i]t would be unusual and administratively kind of a nightmare.” Tr. at 529-530 (Arbaugh); PTX 145.

164. According to Arbaugh, “there were many reasons [why] it was a bad idea to permit that [transferring only some of the pension assets]” and “Abbott certainly understood that and concluded it would be bad for business and actually bad for employees.” Tr. at 530 (Arbaugh). Arbaugh had never seen a company handle pension assets in this manner. Tr. at 529 (Arbaugh)

165. In describing the no-hire policy announced in August 2003, Abbott explained that, after the expiration of the two-year no-hire period, employees “may resign from one company and join the other,” but will “be treated as a new hire, with no special provisions for bridging past service.” DTX 114 at H001699.

166. “Bridging past service” refers to the circumstances in which a benefit plan will recognize the prior service of an employee who leaves a company and then returns. Tr. at 1321-22 (Fussell). Abbott’s pension plan spells out certain “bridging” rights for employees who leave the Abbott and then return. PX 223 at A000039-40 (Section 9).

167. In general, if an employee returns to Abbott within five years of leaving the company, [his or her] prior service is recognized in varying ways for purposes of [] continued participation in the Abbott pension plan. *Id.* This allows a returning employee, subject to the rules of the pension plan, to accrue additional pension benefits that take into account the employee’s prior service, unlike a newly-hired employee who has no prior service with Abbott. *Id.*

168. However, if the employee had begun drawing [] retirement benefits prior to returning to Abbott, any amounts they have been paid are deducted from the pension assets [] may have accumulated under the Abbott pension plan and/or the employee must repay the benefits [he or she] received in order to receive credit for their prior service. *Id.* at A000040 (Section 9-1(e)).

169. When Abbott made the decision to transfer the accumulated pension benefits of employees going to the new company, there were no longer any pension assets for employees who might return to Abbott to “bridge” back into. Tr. at 1322 (Fussell).

170. As a consequence, Abbott amended its pension plan shortly before May 2006 to confirm that returning HPD employees would be treated as new hires for purposes of their future participation in Abbott's pension plan. DTX 180; Tr. at 1323-1324 (Fussell).

171. Abbott implemented this amendment to avoid providing employees who might return to Abbott from Hospira the inequitable financial windfall of receiving two pension payments for the same service; one from Hospira and one from Abbott. Tr. at 1322-24 (Fussell); Weishaar Dep. at 169-70.

172. This amendment was not adopted to interfere with or save money on benefits. Tr. at 1324 (Fussell). Plaintiffs did not lose any accumulated pension benefits as a result of this amendment. Class member Judy Derra admitted that if she returned to Abbott she understood that she "would still have [her] pension secure in the [Hospira] transitional plan . . . until [she] elected to receive it[.]" Tr. at 716 (Derra). She further admitted that if she returned to Abbott she would be eligible to participate in Abbott's benefit plans, including the pension and retiree medical plans, and accumulate additional benefits. Tr. at 717-18 (Derra).

173. Abbott paid transition bonuses to five key executives as part of the spin. Tr. at 1069-1070 (White). Providing such bonuses in connection with this type of transaction is customary. Tr. at 1159-1160 (Kompare); Tr. at 1368-1369 (Fussell). In fact, in their initial meeting, Hewitt's Dave Kompare advised Steve Fussell about the importance of maintaining a stable workforce and that it may be worthwhile to consider providing different types of retention incentives or approaches to retain key employees and key leaders for both entities. Tr. at 1159-1160 (Kompare). "The identification of a strong, effective leadership team for the spun-off entity is

paramount to the investor views of the entity and the ultimate success of the business.” DTX 68 at A003234 (July 7, 2003).

174. This need is exemplified by the decision to pay a transition bonus to Hospira’s future CFO, Terry Kearney. Tr. at 1069-1070 (White).

175. Unlike most other employees going to Hospira, Kearney was not an HPD employee. Tr. at 1069 (White). Kearney was Abbott’s treasurer and was slated to become Abbott’s CFO after Freyman. Tr. at 1069-1070 (White). But White viewed the CFO role at the new company as crucial and, thus, he told Kearney that he needed him to take the position. Tr. at 1069-1070 (White).

176. Kearney knew he would not receive Abbott’s retiree medical benefits because Abbott had already announced that it would provide retiree medical benefits only to those transferring employees who were retirement eligible on the date of the spin. DTX 114 at H 001701.

177. Because he was not yet retirement eligible, Kearney knew that he would not receive that benefit from Abbott and he was concerned about the risk of not receiving these benefits after the spin. Tr. at 1384-85 (Kearney); Tr. at 1072 (White). Kearney’s concern did not mean that he knew that Hospira would not offer retiree medical benefits in 2005. Tr. at 1385 (Kearney); Tr. at 1073-1074 (White).

178. When Kearney expressed concerns about this risk, White told him that in some fashion Abbott would make him whole. Tr. at 1072 (White); PTX 240. This was because Abbott

viewed Kearney as critical to the success of the spin and the new company. Tr. at 1074 (White).

179. The value of the bonus paid to Kearney, and the other four executives, was equal to the estimate present value of Kearney's future retiree medical claims. PTX 220 at A022166; DTX 273. Effectively, the bonuses merely extended a benefit Abbott made available to 20 percent of HPD employees to an extra five individuals who were key to establishing and sustaining the new business. In August 2003, Abbott had announced that retiree medical would be extended to all future Hospira employees who were retiree eligible on the date of the spin. DTX 114 at H001701. That was 20 percent of the workforce. Tr. at 1111 (White). The five individuals who received the disputed bonuses were not yet retiree eligible and, thus, did not qualify for retiree medical under the August 2003 announcement. *See* Tr. at 1070-74 (White); DTX 273 at H13025. Thus, by paying net present value of the very same benefit in the form of a bonus, Abbott merely extended its previously-announced retiree medical benefit to an extra five individuals. *See* Tr. at 1070-74 (White).

180. These transition bonuses were modest compared to incentives Abbott and other companies have paid in other transactions. Tr. at 1369 (Fussell).

181. Abbott generally keeps such payments confidential, along with other aspects of employee and executive compensation, unless it is required by law to report the amounts. Tr. 1367-68 (Fussell).

182. Future Hospira executives began to consider the plan design of the new company's future benefits in December 2003. Tr. at 332 (Begley).

183. The design of a benefits plan is an “involved process” that generally takes several months. Tr. at 331-332 (Begley); Tr. at 490 (Arbaugh). The process requires the collection of data, benchmarking against competitors and setting overall strategic objectives. Tr. at 331 (Begley). For Hospira, the overall goal and objective was to retain employees coming to the new company and also having the ability to attract new talent. Tr. at 331-332 (Begley).

184. Abbott asked Hewitt to perform some benchmarking analysis of benefits in September 2003 in order to give the new company an idea of what their expenses would look like moving forward. PTX 176, 161, Tr. at 1061 (White); Tr. at 1325-26 (Fussell). This was part of normal due diligence performed as part of a transaction. Tr. at 1325 (Fussell).

185. Hewitt’s analysis looked at a “comparator group” of companies thought to be peer competitors of the new company. PTX 160 at A017017; Tr. at 1061-1062 (White); Tr. at 1325-1326 (Fussell); Tr. at 502-506 (Arbaugh). The analysis showed that Hospira’s expected competitors generally did not offer pension plans or retiree medical. DTX 133 at A007071 (“Competitors do not offer a DB [pension]” and retiree medical “[n]ot offered by competitors.”).

186. This conclusion was not terribly surprising, since fewer and fewer companies are offering pensions these days. Tr. at 494 (Arbaugh) (“Most companies these days, especially newer companies, if they’re putting in new plans, they would not choose to put in a pension plan.”)

187. This analysis was forwarded to Hospira’s future executives. PTX 161; Tr. at 210 (Begley). However, they did not rely upon this initial benefits analysis because they “wanted to have data that was more broadly representative of the companies that we would compete against for hiring people. And so we wanted to go out and do a broader search, you know, throw the net

out farther, get more data, more information of what was happening in the marketplace as it relates to all benefits, not just retirement.” Tr. at 333 (Begley). *See also*, K. James Dep. at 105 (James) (no decisions were made in this timeframe as design project had yet to start).

188. Only future Hospira executives were involved in the process of making decisions regarding benefits for 2005 and beyond. Tr. at 1067-1068 (White); Tr. at 1231 (Freyman); Tr. at 1325 (Fussell).

189. The benefit design project for the new company began in December 2003. Tr. at 332 (Begley); DTX 154. Future Hospira executives Chris Begley, Henry Weishaar and Gail Denham formed Hospira’s benefits design team. Tr. at 334 (Begley); DTX 157; Weishaar Dep. at 7-9; Denham Dep. at 7.

190. The design team had a kickoff meeting on January 7, 2004. DTX 157; Tr. at 334 (Begley). Their initial timetable projected the design of the new company’s benefits program would be finalized by April 15, although the eventual schedule slipped by a month or two. DTX 157 at H04437; Tr. at 335 (Begley).

191. The project had a short time frame so that the new company could communicate its approved benefits plan to employees “as soon as possible.” Tr. at 335 (Begley). The project was ultimately completed in May 2004, taking about four months, which was typical for a project of this magnitude. Tr. at 490 (Arbaugh).

192. Begley had an open mind about all of the different options during the benefits design process. Tr. at 335-336. He instructed Weishaar and Denham that there were no “sacred cows” or

things they would not consider from a benefits perspective – the team was to look at everything that was being done out in the marketplace before designing their own plan. Tr. at 336-337 (Begley).

193. The benefits package was designed to be competitive in Hospira’s market and ensure that it could attract and retain employees. Tr. at 1399-1400 (Kearney). However, the company’s expected cash flow was sufficient to give it flexibility concerning the potential plan design it could adopt, including continued benefits at the level provided by Abbott to its employees. Tr. at 548-549 (Preece); Tr. at 1230 (Freyman).

194. Even assuming that Hospira maintained Abbott-level benefits into the future, Abbott projected that the new company would have net income of between \$350 and \$460 million. *See* Tr. at 1039-40 (White); Tr. at 1230-31 (Freyman); DTX 1 at A013992; DTX 107 at A013689. That level of net income gave Hospira the necessary flexibility to maintain Abbott-level benefits because “[t]hey have a nice, stable business generating profit growth” and “positive cash flow.” Tr. at 1039-40 (White).

195. The benefits design team engaged Hewitt to assist with the design of the new benefits program. Tr. at 467 (Arbaugh). This team from Hewitt was independent of the Hewitt team that was working on the spin for Abbott. Tr. at 988 (Moreland). Part of the design process involved helping Hospira to understand the objectives of its benefits plan and also to perform a competitive benefits analysis. K. James Dep. at 51-52 (James).

196. Hewitt gave its first major presentation to the Hospira design team on the proposed new benefits on February 9, 2004. DTX 160. The presentation assumed that the Abbott pension

plan would be frozen as of December 31, 2004 (as had already been announced to employees in November). Tr. at 491-492 (Arbaugh).

197. This assumption by Hewitt did not mean that Hospira would not offer an alternative pension plan. Tr. at 493 (Arbaugh). During the benefits design process Hospira considered that possibility but ultimately rejected it. *Id.* This was not surprising because newer companies usually do not implement pension plans. Tr. at 494 (Arbaugh). This is due to the volatility and expense of pension plans – with a pension, the company ultimately does not know how much money it will need to put in to provide the benefits promised to employees, whereas with something like a 401(k), match cost is more predictable (i.e., X% of employee salaries). *Id.* Even after Hospira made this decision, Hewitt did not see it as final – the final decision would not be made until board approval. Tr. at 495 (Arbaugh).

198. Hewitt's work on the design process continued through March 2004. Tr. at 495-496 (Arbaugh). On March 18, 2004, Hewitt and the future Hospira executives had a meeting to discuss various retirement income alternatives. DTX 163. At the meeting they discussed various alternatives to pension and savings plans Abbott previously sponsored, including the possibility of a 401(k) plan with an enhanced matching contribution. Tr. at 496.

199. After working on the project for three and a half months, Weishaar and Denham outlined a recommended benefits program to Begley on April 23, 2004. DTX 172; Tr. at 338 (Begley). The plan reviewed all the different components of the benefit program, including vacation, short-term disability, tuition reimbursement, 401(k) and active healthcare. DTX 172; Tr. at 338-339 (Begley).

200. The proposed plan design included an enhanced 401(k) program with a transitional benefit designed to offset the impact on employees of Hospira not having a pension plan. Tr. at 338-43 (Begley). The 401(k) enhancement was a late addition to the benefits package and added an additional \$49 million to the cost of the overall package. Tr. at 347, 343 (Begley). According to Hewitt's Arbaugh, Hospira's enhanced 401(k) was extremely generous and unique in the industry. Tr. at 497-99 (Arbaugh).

201. The proposed plan design did not include employer-subsidized retiree medical benefits. DTX 172 at H02577. However, the design team continued looking at other alternatives regarding retiree medical benefits as late as May of 2004. DTX 174; Tr. at 1445-47 (Kearney).

202. Abbott's representatives, including CEO Miles White, did not know what the new company's benefits programs would be until they were announced after the spin. Tr. at 1059-60, 1065-1067 (White); Tr. at 1231 (Freyman); Tr. at 1326-1327 (Fussell). "There was no way to know at the time what that would be, because those were going to be Hospira's decisions. And that wasn't going to happen until they were a free standing independent company, because they didn't have a board or management in place to approve those things." Tr. at 1057-58 (White).

203. Abbott's executives were certainly aware that the new company's benefits package could be different from Abbott's. For example, White was aware that it was possible, given market trends, that the new company would not offer a defined benefit pension plan. Tr. at 1064-1066 (White). Similarly, Fussell personally believed that HPD would have to reduce its

benefits obligations, but did not know whether the new company would do so and, if so, how they would do so. Tr. at 1326-1327 (Fussell); PTX 104. In addition, just because Abbott's benefits package was generally more generous than that offered by Hospira's peer group, that did not necessarily mean Hospira was going to take action to reduce costs such as pension and retiree medical. Tr. at 1062-1063 (White). This was especially true given that the new company would have the financial strength to continue Abbott's benefits levels if it chose to do so. Tr. at 12301231 (Freyman).

204. Even if White knew or strongly suspected that Hospira was going to take some action to reduce pension costs, he could not have possibly known the details in advance of the announcement of their plan. Tr. at 1064-1066 (White). For example, the particular mix of benefits Hospira would offer, the timing in which they would offer them, if they gave different benefits, whether they would "grandfather" existing employees, whether they would extend the length of the transition period, whether they would change the formula for the pension plan or replace it all together, and other such details. Tr. at 1065-1067 (White).

205. Even if White had expectations, those expectations could easily have been ill-founded. For example, White believed the new company would pay a dividend but they ultimately did not. Tr. at 1059-60 (White).

206. Hospira's later decisions not to offer a defined pension benefit or retiree medical benefits did not have any financial impact on Abbott. Tr. at 1068-1069 (White); Tr. at 1231 (Freyman).

207. Hospira ultimately decided not to offer retiree medical. Tr. at 1401-02 (Kearney). As a result, Hospira recognized a non-cash accounting “gain” of just under \$65 million. *Id.* Such a gain arises when a decision is made either to terminate or suspend a plan such that employees no longer accrue benefits over their future years of service. Tr. at 1402. When Hospira decided not to offer retiree medical, it had to restate (and lower) its liabilities which showed a non-cash accounting “gain” on the other side of the income statement. *Id.* Because this was a non-cash event, there was not “one red cent” added to Hospira’s bank account. *Id.* (Kearney).

208. In April 2004, just before the transaction was completed, Abbott again sought and received the advice of its investment banker, Morgan Stanley. This time, Abbott asked Morgan Stanley to give an opinion regarding the fairness of the transaction to shareholders. DTX 166; Tr. at 1248-1249 (Freyman); Tr. at 1049-50 (White).

209. Morgan Stanley concluded that the transaction would be fair to Abbott stockholders and reaffirmed its support for Abbott’s strategic rationale for the spin. DTX 166 at A013881-83, A013893-95.

210. Morgan Stanley also noted in its fairness opinion that several other independent analysts predicted the spin-off would be successful, including Deutsche Bank, Merrill Lynch, RBC Capital Markets, and others. DTX 166 at A013883; Tr. at 1248-1250 (Freyman).

211. Abbott also sought the opinion of Houlihan Lokey, a firm specializing in providing solvency opinions, including analyzing the ability of companies to maintain their financial viability and their ability to meet debt obligations. Tr. at 1245-1246 (Freyman).

212. Houlihan was asked to determine what the financial strength of both companies would be post spin. Tr. at 1245-46 (Freyman). They concluded that both companies were viable and would be able to meet their debt obligations as of the spin-off date. Tr. at 1245-46 (Freyman). Houlihan submitted this opinion to Abbott's board. Tr. at 1245-46 (Freyman).

213. Credit rating agencies, which evaluate the viability of the spin from an investment standpoint, also rendered opinions concerning the investment value of the proposed spin. Tr. at 1246-1247 (Freyman); Tr. at 1386-1387 (Kearney).

214. A rating agency is a firm that effectively advocates for the bond holder. Tr. at 1386 (Kearney). Their job is to assess the capital structure and debt of companies to assess the risk of that debt and the ability of the company to effectively service (and pay off) the debt. *Id.*

215. While Kearney was slated to go to the new company, he retained his role as corporate treasurer for Abbott through the spin-off. Tr. at 1385-1387 (Kearney). As part of that role, Kearney was tasked with approaching the rating agencies to inform them about the spin-off. Tr. at 1386 (Kearney).

216. Kearney initially met with Moody's and Standard and Poor's in July 2003 to describe Abbott's intention to spin off HPD and provide them with some of the details of the transaction, including pro forma financial statements that used Abbott's fringe rate as the basis for its benefit-related cost projections. Tr. at 1386-1388 (Kearney); Tr. at 1230-31 (Freyman). After they looked at the strength of the cash flows and the future prospects for business, the agencies indicated they were comfortable with Hospira's projected debt level. Tr. at 1388-89 (Kearney). The rating agencies preliminarily indicated that Hospira would receive an investment grade rating.

Id. The agencies also acknowledged their understanding of the business rationale for the spin, and were comfortable that both companies could be successful post-spin. *Id.*

217. Ultimately, they provided Hospira with investment grade credit ratings comparable to companies such as Starbucks, Amazon.com and Heinz Ketchup. Tr. at 1248 (Freyman). This was important to ensure Hospira was strong and able to meet its financial obligations. Tr. at 1247-1248 (Freyman).

218. The spin rationale also received a favorable reaction from stock analysts. Tr. at 1248 (Freyman); DTX 166 at A013883. For example, Deutsche Bank stated that the “clear catalyst for the decision is management’s intent to accelerate growth at Abbott, and this transaction should do that.” DTX 166 at A013883. They estimated the transaction would add 50 to 100 basis points to Abbott’s top and bottom line. *Id.*; Tr. at 1248-49 (Freyman). Other analysts had comparable views. *Id.*

219. These favorable assessments proved accurate, as Hospira’s stock opened at a significantly higher level than both Abbott and Morgan Stanley estimated. Tr. at 1250 (Freyman).

220. None of the analysts identified employee benefits costs as a relevant consideration in analyzing the spin of HPD. Tr. at 1249-50 (Freyman).

221. White sought final board approval for the spin on April 8, 2004. DTX 165. Prior to that time, Abbott provided board materials that again provided a summary of the transaction. DTX 165; Tr. at 1046-1047 (White). The materials stated, as previously, that “[t]he strategic rationale remains intact.” DTX 165 at A013703; Tr. at 1047 (White).

222. At the board meeting, Freyman and White presented an overview of the spin, including the principle reasons that management recommended the spin. DTX 164 at A023836-A023837; Tr. at 1225-1226 (Freyman). Consistent with prior statements about the rationale for the transaction, Freyman told the board that the transaction would set Abbott up as a higher growth, higher profile, higher return business and allow Hospira to be more focused on its business and have better access to capital to enable them to grow and succeed. Tr. at 1226 (Freyman).

223. The board also received a presentation by Morgan Stanley regarding the fairness of the transaction to Abbott shareholders, and a presentation by Houlihan Lokey Howard & Zukin regarding the solvency of both Abbott and Hospira. DTX 166; DTX 164 at A023837; Tr. at 1244-45 (Freyman).

224. The board unanimously approved the spin. Tr. at 1243 (Freyman). Employee benefits was not a factor in the board's decision. *See, e.g.*, Tr. at 1019 (White) (employee benefits not even "a consideration as part of making the decision to spin [HPD]"); Tr. at 1213 (Freyman). As part of the spin approval, the Abbott board of directors approved the distribution of a special dividend, whereby Abbott shareholders would receive one share of Hospira common stock for every 10 shares of Abbott common stock they held. Pre-trial Stip., ¶ 7; DTX 164 at A023841-42; PTX 37 at ML01244.

225. After the Abbott Board gave the final approval for the spin-off, a series of transaction documents were executed by Abbott and Hospira, including the Employee Benefits Agreement ("EBA"). DTX 171 at H07751 (§ 2.4). At the time the EBA was executed (April 16, 2004) Hospira

was still an Abbott subsidiary and Begley, who signed the document on behalf of Hospira, was still an Abbott employee. Tr. at 1277-78 (Freyman); Tr. at 264-65 (Begley).

226. Hospira became a separate and independent company upon completion of the spin on April 30, 2004. Pre-trial Stip., ¶ 7. Abbott did not have any shared ownership in Hospira, shared no board members with Hospira, and did not appoint any Hospira board members. PTX 37 at ML01248, ML01313-16; DTX 198 at A001153.

227. Chris Begley became the CEO of Hospira on May 1, 2004. Tr. at 266 (Begley). At that time, the company had approximately 14,000 employees (9,200 in the U.S.), sales of \$2.5 billion and net income of \$300 million. PTX 124 at A016949; Tr. at 170-71 (Begley). The products transferred to Hospira were the “core” HPD products, such as IV fluids, generic drugs, and infusion pumps. Tr. at 268 (Begley).

228. As described above, Hospira’s benefits plan design project was still ongoing in May 2004, after Hospira became a separate company. DTX 174; Tr. at 1445-47 (Kearney); Tr. at 501 (Arbaugh).

229. On May 5, 2004, Hewitt presented an analysis of Hospira’s “proposed” benefits plan that compared it [to] Hospira’s expected competitors. DTX 260 at H07814; Tr. at 50002 (Arbaugh). The purpose of the Hewitt analysis was to assist Hospira in reaching a final decision on its benefits plan design. Tr. at 502 (Arbaugh).

230. Hospira’s proposed plan design was not final until Hospira management received board approval. Tr. at 371 (Begley). Begley explained, “we needed board approval, because

this is a key piece around succession planning and being able to bring the right people into the organization and retaining the right people. And so we needed to get their input, their wisdom before we would move forward, and we needed their approval, quite candidly, because the scope of it was above my authorization level.” Tr. 371-372 (Begley); Tr. at 499-500 (Arbaugh).

231. On June 9, 2004, Hospira had a board meeting in which Gail Denham presented a recommended comprehensive benefits program for the board’s input, review, suggestions and approval. DTX 176; Tr. at 343-344 (Begley).

232. The recommended plan did not include retiree healthcare or a defined benefit plan, which was consistent with the trend in the industry away from offering these types of benefits. Tr. at 344-345 (Begley). The recommendation therefore furthered Hospira’s goal to have a competitive benefits package that would retain existing employees and attract new talent. Tr. at 346-48 (Begley); Tr. at 1399-1400 (Kearney).

233. In addition, while some early analysis showed possible Hospira competitors offered less generous “active medical insurance” than Abbott, Hospira adopted Abbott-level active medical benefits. Tr. at 1067 (White); PTX 160 at A017018.

234. At the meeting, Hospira’s board of directors approved the proposed benefit plan design, to become effective January 1, 2005. Pre-trial Stip., ¶ 35; DTX 176, 178.

235. On June 22, 2004, shortly after board approval, Hospira announced its benefit plans to Hospira employees. Tr. 102-03 (Loughery); DTX 178. The plan was communicated to

employees quickly so that they knew what the benefits program would be starting January 1, 2005, in part to make sure that the company could retain and attract employees. Tr. at 345-346 (Begley).

236. The benefits were set to take effect January 1, 2005. Tr. at 142 (Loughery). Employees therefore had six months before those benefits became effective to decide if they wanted to leave Hospira. Tr. at 142 (Loughery); Tr. at 643 (Roller). Six months advance notice was sufficient for any planning or action the employees would want to take. Tr. at 374 (Begley).

237. Six months advance notice is a “generous” period of time, as some companies give as little as three months notice. Tr. at 506 (Arbaugh). When Abbott announced changes to its pension and retiree medical plans in June 2003, it gave employees six months notice of when then changes would become effective. DTX 65.

238. There was never “any thought” given to announcing Hospira’s 2005 benefits plan before the company existed. Tr. at 499-500 (Arbaugh). And nobody at Hewitt ever suggested announcing parts of the plan before it was finalized. Tr. at 469 (Arbaugh).

239. Consistent with Hewitt’s counsel, Hospira did not make piecemeal announcements for several reasons. First, as noted above, board approval was required before the plan could be implemented and announced. Tr. at 371-372 (Begley); Tr. at 499-500 (Arbaugh); Weishaar Dep. Tr. at 165. When board approval is required, no announcement should be made until the approval is actually received because there is always a risk the plan may not be approved, making pre-announcement of the plan very problematic. K. James Dep. Tr. at 107-108, 109-110.

240. Second, even if some elements of the plan were seemingly finalized early in the process, pre-announcement would not make sense because “there always is an evolution of design . . . early answers can be risky, since reversing course requires a fair amount of damage control.” DTX 68 at A003240. “[I]t wouldn’t have been advisable to communicate a decision . . . even if a decision were made about some elements of the plan, as you go through the process, until you have the formal approval, it’s always possible you might -- you might change your mind about something.” Tr. at 499-500 (Arbaugh). According to Begley, he did not want to announce benefits decisions “piecemeal” because he wanted certainty and did not want to create any confusion. Tr. at 346-347 (Begley).

241. Third, even if some decisions were definitively made (and never changed) piecemeal announcements are still inadvisable. Hewitt advised that if you are making a lot of changes, you want to package them and communicate them all at once. K. James Dep. Tr. at 107. Interim announcements give employees an “incomplete picture” because the employees do not have information about the entire program. Tr. at 469 (Arbaugh); K. James Dep. Tr. at 107-108; Tr. at 500 (Arbaugh) (employees would be making decisions with “incomplete information” even though they would have the entire plan in just a few months); Tr. at 1184 (Kompare) (noting he advised Abbott not to “communicate too early to the extent decisions aren’t made”); Tr. at 1195 (Kompare).

242. Hospira’s decisions regarding the 401(k) matching program indicate why interim announcements are inadvisable. While Hospira ultimately decided against offering a pension plan, Hospira also decided after the spin to substantially increase matching 401(k) contributions

to help “offset” the elimination of a pension. Tr. at 468 (Arbaugh). Thus, Arbaugh testified that pre-announcing a possible decision on the pension issue without being able to announce the offsetting 401(k) increases would have unfairly misled employees:

Q . . . Would it have been sensible, in your view as a person who has been in this industry for a while, to announce that in February of 2004, Hospira seemed to not have any interest in a pension plan for ‘05? Would it have been sensible to announce that piece before the 401(k) plan had been finalized?

A I don’t think so, because you’d be telling them just one part of the story. They wouldn’t know the total picture with respect to the retirement income. You know, to the extent they make decisions regarding information, they’d be making decisions based on incomplete information, whereas a couple months later they’d have the whole story and could make better decisions.

Tr. at 500 (Arbaugh).

243. Hospira distributed “An Introduction to Your New Benefits” booklet to its employees on June 22, 2004. PTX 40; Tr. at 102-103 (Loughery).

244. The company announced “a litany of benefits,” including dental, active health plan, vision, vacation and holidays, flexible spending accounts, life insurance, adoption assistance, short and long-term disability plans, tuition reimbursement, optional long term care insurance, and employee assistance plan. Tr. at 124-125 (Loughery).

245. Among the benefits described in the booklet was a 401(k) supplement being offered by Hospira. PTX 40 at MN00231; Tr. at 107 (Loughery). For employees who participated in the 401(k) plan and were at least 40 as of December 31, 2004, Hospira would contribute an additional 3% to their 401(k) plan. PTX 40 at MN00231.

246. The financial implications of this supplemental match were significant. For example, an employee making just \$600 a week who contributes 2% of their pay (or \$12), would get a match from Hospira of 8% (or \$48). PTX 40 at MN00231. Therefore, after one year, for the employee's \$936 contribution, Hospira will have contributed \$2,808. PTX 40 at MN00231; Tr. at 154-155 (Loughery).

247. Plaintiffs took "advantage of the supplemental contribution." Tr. at 107108 (Loughery); *see also*, Tr. at 695-696 (Roller). Plaintiff Loughery acknowledged this match was "another benefit" he received as a Hospira employee. Tr. at 155-156 (Loughery).

248. Hospira's 401(k) plan was more generous than Abbott's. DTX 172 at H02573; DTX 163 at H003166. While Abbott's program matched 5% of an employee's 401(k) contribution, the new Hospira plan matched 6%, a 20% increase. *Id.*; Tr. at 340-341 (Begley); Tr. at 497-498 (Arbaugh). In addition, while the Abbott plan did not have any additional benefit for employees over 40 years old, Hospira's plan contributed an additional 3%, for a total of 9% matching. *Id.*; Tr. at 341-342 (Begley); Tr. at 498 (Arbaugh).

249. This 3 to 1 match was "extremely generous." Tr. at 498 (Arbaugh); Tr. at 155 (Loughery). Hewitt's Karl Arbaugh did not know of any other companies that offered such a generous matching program. Tr. at 499 (Arbaugh).

250. This decision increased Hospira's benefit costs by approximately \$49 million. DTX 172; Tr. at 341-43 (Begley).

251. While the Hospira benefits plan did not include certain benefits that the Plaintiffs had at Abbott, they did not “lose” any benefits to which they were entitled.

252. First, all of the named plaintiffs understood Abbott could change or terminate its benefits plans at any time. Tr. at 719-720 (Derra); Tr. at 120 (Loughery); Tr. at 649-50 (Roller). Abbott issued an employee handbook every year in which it stated “Abbott reserves the right to change or end its benefit plans or programs at any time.” DTX 212 at A000203; Tr. at 645-646 (Roller); *see also*, Tr. at 141-142 (Loughery) (Abbott also included a disclaimer that benefits could change). The same statement showed up in various other important benefits communications. DTX 65A at MN00273.

253. Because Abbott could have changed or eliminated these benefits at any time, “Abbott didn’t have to spin off the Hospital Products Division to terminate [] pension and retiree medical benefits[.]” Tr. at 120 (Loughery); Tr. at 650 (Roller). *See also* Tr. at 912-13 (Moreland). Indeed, if Abbott was concerned with the benefit costs of a particular division, it could have simply established a different benefits plan for that division. Tr. at 913-14 (Moreland).

254. Second, all of the pension benefits that Plaintiffs accumulated while working at Abbott and during the transition period have been preserved in a separate trust securely maintained by Hospira. DTX 148 at H002145 (advising employees that the new trust “will be secure and will have all of the protections applicable to tax-qualified retirement plan trusts” and that their “vested accrued benefit earned as of any date cannot be reduced by Abbott or the new company.”); Tr. at 714-15 (Derra). Hospira employees’ pension benefits have increased in

value since the spin-off. Tr. at 153 (Loughery) (Loughery obtained an additional eight months of service credits due to the plan transfer; that was a benefit to him); Tr. at 857-58 (Feinstein) (acknowledging that employees received an additional eight months of service credit but conceding that he did not take those benefits into account in his calculations); DTX 148.

255. In fact, because of the asset transfer, employees' monthly annuity will also be higher when they retire from Hospira, regardless of whether they were retirement eligible at the time of the spin-off. *Supra* at § V.A.1. In addition, many employees who were not eligible for retirement at the time of the spin have grown into early retirement benefits and will be eligible for a monthly pension annuity upon their retirement from Hospira. *See supra* § *Id.*

256. Third, none of the Plaintiffs who were retirement eligible at the time of the spin lost their right to retire at any time of their choosing, either before or after the spin occurred. Tr. at 116-17, 141-42, 151 (Loughery); Tr. at 827-29 (Feinstein) (no-hire did not prevent any employee from retiring; "In the ERISA definition, they [subclass members] did not lose a vested benefit."). Since the spin-off, over 500 members of the subclass have retired and many elected to begin collecting their retirement benefits. Pre-trial Stip., ¶ 33; Tr. at 865-66 (Feinstein). The retirement eligible subclass will also receive retiree medical benefits upon their retirement from Hospira. Tr. at 146 (Loughery); Tr. at 846 (Feinstein).

257. Abbott and Hospira are different companies in different industries; Abbott is a diversified pharmaceutical company while Hospira focuses on hospital products. Tr. at 504506 (Arbaugh). Companies in different industries with different competitive environments often have different benefits plans. Tr. at 502-506 (Arbaugh).

258. Hospira's benefits program was comparable to and perhaps even better than that of its competition. DTX 260; Tr. at 505 (Arbaugh). Hewitt's benefits index analysis – which compared the benefits plan of a company to that of its competitors – showed that Hospira's benefits program scored about 101, while 100 is average. *Id.* The program has enabled Hospira to recruit “top notch talent” and “retain employees.” Tr. at 347-348 (Begley).

259. Hospira did not, and to date has not, achieved any significant reductions in its benefits “fringe rate.” Tr. at 312 (Begley). Hospira did not have a target fringe rate, and fringe rates did not factor into how Hospira designed its benefits plans. Tr. at 1399 (Kearney).

260. Hospira's fringe rate (its cost of benefits as percentage of payroll) started off and remains very high – approximately 40% for non-exempt employees and 30% for exempt employees. Tr. at 1400-01 (Kearney). As such, Hospira's fringe rates have stayed very similar to Abbott's 39% fringe rate. Tr. at 1401 (Kearney).

261. Plaintiffs' financial expert did not do any analysis of Hospira's overall plan and, thus, he could not offer an opinion about whether there was a “net gain or loss” for the Plaintiffs in terms of the value of their benefits. Tr. at 864 (Feinstein).

262. The spin achieved its stated goals for both Abbott and Hospira. First, Hospira has thrived as a separate entity. Tr. at 270-272 (Begley). Since the spin, Hospira has made two major acquisitions to position the company for the future and ensure its “long-term success.” Tr. at 270 (Begley). The first was the acquisition of BresaGen, a biotechnology company, and the second was of Mayne Pharmaceuticals, which broadened the company's international footprint and gave it an oncology capability. Tr. at 270-271 (Begley); Tr. at 41 (Freyman).

263. Hospira would not have achieved this same level of success had it remained a part of Abbott. Tr. at 172 (Begley); Tr. at 1251-52 (Freyman). In the five years since the spin, “we’ve repositioned the business. We’ve become more global. We’ve accelerated our sales growth rates. We’ve expanded our margins. We’ve brought a tremendous amount of talent into the organization that wasn’t there before, and we’re succeeding.” Tr. at 271 (Begley); *see also* Tr. at 1083 (White) (Hospira is an independent, successful company that has changed the mix of their business and made acquisitions to add value).

264. Hospira’s success is supported by objective financial data. Since the spin, Hospira’s revenues have increased by roughly \$1 billion, its market capitalization has increased by \$3 billion and its stock price has increased by 50%, outperforming the three major stock indices. DTX 202 at 34-35; Tr. at 1250-52 (Freyman); Tr. at 1382 (Kearney); Tr. at 1083 (White).

265. Second, Abbott has achieved the goals it sought through the spin as well. Since the spin, Abbott has focused on high growth, high return opportunities in different markets, including the acquisition of Kos Pharmaceuticals, Advanced Medical Optics, Guidant’s drug eluting stent business and Solvay’s pharmaceutical business. DTX 271; DTX 272. Abbott’s growth profile has increased during this time. Tr. at 1252 (Freyman).

266. Overall, the HPD spin was one the most successful transactions Abbott has done. Tr. at 1082-83 (White); Tr. at 1251-52 (Freyman).

267. Plaintiffs offered no evidence that Hospira has discharged, fined, suspended, expelled, disciplined, or discriminated against them since they became Hospira employees. Tr. at 156-57 (Loughery).

268. None of the Plaintiffs left Hospira after the benefits announcement. Tr. at 74 (Loughery) (still with Hospira in 2008); Tr. at 679 (Roller); Tr. at 709 (Derra) (still with company in 2007).

269. First, Plaintiff Loughery claimed that he would have been more active in his job search if he had known that Hospira was not going to offer pension and retiree medical benefits. But he could not “point to any specific opportunities” he passed up, did not know whether any of the “supposed lost opportunities were with companies that offered a pension or retiree medical benefits” and could not quantify how much more active he would have been if he had known how the benefits were going to change. Tr. at 144-45 (Loughery). And, by 2005 and 2006, Loughery was not applying for any new jobs and was not conducting any type of job search. Tr. at 145 (Loughery). Loughery still has the pension benefits he accrued while at Abbott and he can access those benefits when he retires from Hospira. Tr. at 146 (Loughery).

270. Second, Roller also remains at Hospira. Tr. at 679 (Roller). After the benefits announcement, Roller knew she could search for a new job if she was not happy with the benefits and salary Hospira provided her, but she chose not to do so. Tr. at 678 (Roller). She never applied for another job, including any job at Abbott. Tr. at 641-642, 680 (Roller).

271. Third, Derra did apply for a job at Abbott, but not because she was dissatisfied with anything about her job at Hospira. Tr. at 722 (Derra). Rather, Derra was ready for a career change.

Tr. at 721 (Derra). Derra admitted there were no conclusions that could be drawn about the conduct of the class in this case based on her personal decision to pursue a job at Abbott following expiration of the no-hire policy. Tr. at 725 (Derra).

272. Plaintiff and class representative Myla Nauman was present throughout the trial but did not testify.

273. The HPD spin did not result in benefits “savings” for Abbott. First, at the time of the spin, HPD had annual expenses of \$2.24 billion. Tr. at 796-797 (Feinstein). Of this amount, salaries accounted for \$580 million, and manufacturing, real estate and infrastructure costs accounted for \$1.8 billion. Retiree medical accounted for less than 1% of the total costs (\$17.4 million) and pension only 1.3% (\$28.4 million). Tr. at 798-799 (Feinstein); *see also* Tr. at 211 (Begley) (in September 2003, payroll was \$550 million).

274. Taken together, retiree medical and pension costs accounted for only about 2% of the overall \$2.24 billion in annual costs for HPD. These were very small costs in terms of the overall cost of running HPD. Tr. at 799 (Feinstein).

275. Second, the “costs” of the spin transaction were far greater than any alleged savings. Feinstein admitted that he “only looked at one side of the ledger. [He] didn’t look at the other side of the ledger in terms of what it cost Abbott to achieve these savings[.]” Tr. at 787 (Feinstein).

276. The other side of the ledger shows transaction costs of \$48 million, net assets transferred of \$767 million and a cash payment to HPD of \$45 million, for a total of \$860 million. Tr. at 788-94 (Feinstein); Tr. at 1051-52 (White). No rational business – let alone a Fortune 100

company like Abbott – would pay \$860 million to save \$250 million (Feinstein’s alleged “savings” number). Tr. 792-94 (Feinstein); Tr. at 1052 (White); Tr. at 1232 (Freyman). Feinstein admitted that any such theory did not make sense based on “straight math.” Tr. at 79294 (Feinstein).

277. Third, HPD was a profitable division. At the time of the spin, HPD had a market capitalization of \$4.25 billion and generated profits for Abbott of more than \$300 million a year. Tr. at 793 (Feinstein); Tr. at 1232 (Freyman); Tr. at 1383 (Kearney). Any potential benefit savings would be dwarfed by giving up a business with those financial characteristics. Tr. at 1383 (Kearney). Feinstein admittedly never considered these facts. Tr. at 793-794 (Feinstein). He did agree, however, that mathematically it did not make sense for Abbott “to give that business away [with this kind of profit stream] to avoid paying out \$245 million[.]” Tr. at 793-794 (Feinstein).

278. Fourth, none of the benefits decisions made in connection with implementing the spin saved Abbott money on benefits. Tr. at 1332-33 (Fussell). For example, in connection with the decision to spin the pension assets, if Abbott retained the assets, it might have incurred a one time actuarial loss of \$100 million. DTX 143 at X003753; PTX 360; Tr. at 554 (Preece).

279. On the other hand, at the time the decision was made to spin the assets, the assumption was that if Abbott spun the assets it would “top off” the assets with at least a \$100 million payment. Tr. at 393-394 (Arbaugh); Tr. at 595-596 (Preece); Tr. at 1330 (Fussell). These financial issues were something of a “wash” – “[t]here were costs whether we kept assets and incurred actuarial losses or whether we sent assets and had to top them up.” Tr. at 588 (Preece).

280. In fact, arguably the decision to keep the assets would have “saved” Abbott money because it would have only suffered an “accounting” or “actuarial” loss, whereas the top off

required an actual cash payment. Tr. at 594-595 (Preece); Tr. at 1330-31 (Fussell). Actuarial losses like this one do not always end up being realized by the company. Tr. at 594-95 (Preece); Tr. at 1330-31 (Fussell). Here, the actual impact to P&L would have been just \$5 to \$7 million a year. Tr. at 1330 (Fussell).

CONCLUSIONS OF LAW

1. Based upon the findings of fact summarized in the introductory paragraphs above and as stated by defendants and adopted by the court, the court concludes that plaintiffs have failed to present any credible evidence to support their claims that defendants violated § 510 of ERISA by discriminating against the plaintiff classes “for the purpose of interfering with the attainment of any right to which such participant may become entitled under the [Abbott] plan.” Specifically, plaintiffs have failed to demonstrate that Abbott conceived or executed the spin of HPD for the purpose of interfering with employee benefits. Based on the credibility determinations by the court as stated above, the evidence clearly shows that Abbott decided to spin off HPD for legitimate business reasons, including determinations about the type of business Abbott wished to pursue as a whole and that HPD was best suited to pursue on its own. These are strategic considerations that Abbott’s management was entitled to make, and employee benefits simply had no part of that decision. Certainly, it was not the motivating factor.

2. The court further finds that the evidence presented at trial demonstrated that Abbott’s witnesses were truthful in describing their motivations, that the documents presented by the parties corroborate that testimony, and that those documents were not fabricated or altered to avoid ERISA liability.

3. The evidence presented at trial convinces this court that Abbott had no rational reason to reduce employee benefit costs by spinning off a profitable division such as HPD. Abbott could have simply terminated the plan or amended it on a going forward basis, McGrath v. Auto Body North Shore, Inc., 7 F.3d at 665-670 (7th Cir. 1992); Brunk v. Mountain States Telephone and Telegraph, Inc., 140 F.3d 1335, 1338 (10th Cir. 1998), and in any event Abbott incurred significant costs in the HPD spin. Moreover, the benefit costs associated with HPD were a tiny fraction of Abbott's income and expenses totals; HPD retiree medical benefits were less than 1% and its pension costs were approximately 1.35% of Abbott's overall costs of \$2.25 billion.

4. Moreover, plaintiffs' original theory, that Abbott singled out HPD because its workforce was significantly older than Abbott's generally, evaporated both before and during trial. The factual underpinning of plaintiffs' theory that HPD's workforce was composed of older employees whose higher pension and retiree benefit costs caused Abbott to spin off this division is simply unsupported by the record.

5. In addition, plaintiffs were unable to connect the HPD spin decision to discussions by Abbott management about concerns over the performance of its pension plan assets after the market declined following the September 11, 2001, attacks. To reach such a conclusion, the court would have to find that the entire Abbott and Hospira senior management committed repeated perjury and falsified important corporate documents to defend this case - - a conclusion that the court refuses to make based on the credibility findings stated above.

6. Although the court relied on plaintiffs' claims regarding the no-hire policy and the incentive bonuses to key Hospira personnel in denying summary judgment, plaintiffs were unable

to convince the court that these decisions were made as part of a plan to deny employee benefits in violation of ERISA. The court credits defendants' many witnesses whose testimony established the legitimate business reasons for discouraging Hospira's employees from retiring or leaving Hospira's employ, and encouraging Hospira's new management to continue with the new company.⁷ The evidence establishes that Abbott continued to provide medical benefits to approximately 20% of the employees who went to Hospira, and compensated Hospira's management to put them in an equal position to keep them in the Hospira camp. History has proven the wisdom and legitimacy of Abbott's decisions in this regard: Hospira has been a successful, profitable enterprise in the years since the spin, no doubt in large part because it retained the talent it had at the time it became independent of Abbott.

7. Abbott, on the advice of Hewitt, made the decision to transfer the HPD pension assets to Hospira after it decided to spin Hospira and in what Abbott management believed was in the best interest of Hospira's employees. The decision to transfer these assets had nothing to do with the decision to spin Hospira, and had the effect of precluding retirement-eligible Abbott employees (the sub-class) from retiring from Abbott and continuing their same jobs with Hospira while receiving Abbott pension benefits. Rev. Rul. 56-693 at *3 (the "Same Desk Rule"). Under that Rule, a company is not permitted to pay pension benefits to employees of a divested division unless the company keeps control of the assets, administration and liabilities of the plan. See Rowe v. Allied Chem. Hourly Employees' Pension Plan, 915 F.3d 266 (10th Cir. 1990). Although plaintiffs have identified other steps Abbott might have been able to take (e.g., a "mirror plan"), Abbott was not

⁷In addition, the court credits Abbott's and Hospira's explanation for the no-hire policy based on the "Same Desk Rule" and avoiding unacceptable turnover of employees.

required to do so, and its decision to transfer the plan assets to Hospira did not violate § 510 of ERISA.

8. Plaintiffs have further failed to prove that anyone but Hospira management made decisions regarding the benefit plans to be offered to its employees. Hospira's decision not to offer a pension plan is consistent with current trends, and its enhanced 401(k) plan indicates a commitment to providing benefits superior to that of its competitors.

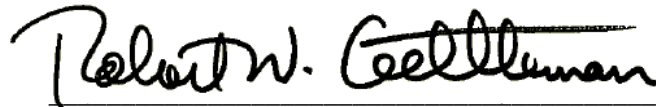
9. Finally, the court finds that plaintiffs have failed to prove the allegations in Count IV of the amended complaint that Abbott breached a fiduciary duty to plaintiffs by failing to advise them that Hospira would not offer its employees a pension plan or retiree medical benefits. As discussed above, the court has found that Hospira alone made the decisions with respect to the retirement and other employee benefits that it would offer, and made this decision after Hospira became an independent entity. The only people involved in this decision were, prior to the spin date, future Hospira executives and, after the spin date, current Hospira executives. Abbott simply had no fiduciary duty that it could have breached with respect to the Hospira benefits. The only representations Abbott made concerning those benefits was its repeated statements that the new company would be responsible for and announce the benefit plans to take effect in 2005 after that company was spun off. These statements were truthful and reinforced the fact that the new company (Hospira), not Abbott, would be making the decisions concerning the benefits it would offer to its employees.

10. Because these findings and conclusions are dispositive, and compel the entry of judgment in favor of defendants on all counts, the court need not address the numerous other liability issues or the issues regarding the appropriate remedies should plaintiffs have been successful.⁸

CONCLUSION

For the reasons stated above the court enters judgment in favor of defendants Abbott Laboratories and Hospira, Inc. and against plaintiffs on all counts of the complaint.

ENTER: April 22, 2010



Robert W. Gettleman
United States District Judge

⁸The United States Secretary of Labor's motion for leave to file an amicus curiae post-trial brief directed solely to the remedy issue (Doc 433) is therefore denied as moot.