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INTRODUCTION

On April 30, 2004, Abbott Laboratories (“Abbott”) spun off the employees in its Hospital Products Division and related businesses (“HPD”) to create a new company called Hospira, Inc. (“Hospira”). The evidence developed in this case proves that Abbott knew that HPD’s demographics were skewed toward older employees with longer service than Abbott’s average, and that by spinning HPD, Abbott achieved its goal of reducing the number of participants in its Annuity Retirement Plan (“ARP”) plan and cutting out a large percentage of the more-expensive employees who were soon to become eligible for valuable retiree medical and early retirement benefits. Then, in order to preserve these cost savings, Abbott barred the employees from being rehired for two years, after which time they could return only as new hires, thereby cutting off their bridging rights under the ARP. Hospira aided Abbott’s scheme by adopting its own no-hire policy under which it refused to hire any retirement-eligible HPD employees who had chosen to retire from Abbott before the spin date. The impact of the spin, the no-hire policies, and Abbott’s refusal to allow Hospira employees to bridge back into the ARP was devastating to the spun employees, many of whom were retirement-eligible and were forced to give up their rights to begin receiving vested employment benefits under Abbott’s pension plan in order to be hired by Hospira.

The HPD spin depended from the very beginning on the premise that the new company would not offer a pension plan or retiree medical benefits, and that, in fact, it would not be financially capable of doing so. However, in a cynical ploy to ensure that the HPD workers went quietly to Hospira to provide it with a ready-made, trained workforce, Abbott concealed this crucial information and placated the employees by repeatedly telling them that Hospira would consider all the options and decide on its own retirement benefits plans after the spin date.

In the face of overwhelming evidence supporting plaintiffs’ claims, defendants now ask the Court to agree that all of the material facts in this case are undisputed and that they all weigh in Abbott’s and Hospira’s favor. In fact, defendants go so far as to aver that Abbott *never gave the slightest consideration* to the cost of benefits when implementing the HPD spin – a position that defies belief, since the evidence shows that Abbott was intensely concerned with the cost of

benefits company-wide during the time period leading up to the spin. The record developed in discovery reveals that all the major factual issues in the case are heavily in dispute, and, moreover, that plaintiffs can prove that Abbott and Hospira violated section 510 of ERISA and that Abbott breached its fiduciary duties to the class.

STATEMENT OF FACTS

A. Abbott was intensely concerned about the cost of benefits.

At the end of 2002, Abbott's management began to realize that benefits costs were soaring and that the Board of Directors must be informed. On December 12 and 13, 2002, Abbott's top managers met with its Board for two days, at which time Abbott's CFO, Thomas Freyman, presented financial updates for the company, and Abbott's CEO, Miles White, discussed "challenges that the Company faces over the next few years" and presented "strategic options being considered by management to adequately address [them]." Abt Ex. 33 at A023823.¹ Senior management also highlighted the "escalating [pension] costs that the Company faces." *Id.*

Freyman presented a lengthy analysis of the status of the company's pension plan, revealing [REDACTED] to the Board. Abt. Ex. 34 ("Pension Update"). He explained that the combination of "steadily increasing pension obligations" to participants, declining stock market returns, and minimal funding requirements had caused Abbott's plan to go from [REDACTED] [REDACTED]. *Id.* at A023293-99; Abt. Ex. 72 (Freyman Tr.) at 21-22. The bad news continued as Freyman told the Board that Abbott's accumulated benefit obligations ("ABO") to plan participants had risen to such an extent that the company was required to [REDACTED] [REDACTED] Abt. Ex. 34 at A023306. To make matters worse, [REDACTED]

¹Wherever possible, in order to avoid filing duplicate materials, plaintiffs cite to exhibits or statements of fact already on file by Abbott or Hospira. Such citations are designated as follows: "Abt. Ex. ___" (Abbott's exhibits); "Abt SMF ¶ ___" (Abbott's Statement of Material Facts); "Hsp Ex. ___" (Hospira's exhibits); and "Hsp SMF ¶ ___" (Hospira's Statement of Material Facts). Citations to Plaintiffs' Statement of Additional Material Facts are designated as "SAMF ¶ ___," and citations to plaintiffs' exhibits are designated as "Pl. Ex. ___."

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] *Id.* at A023304.

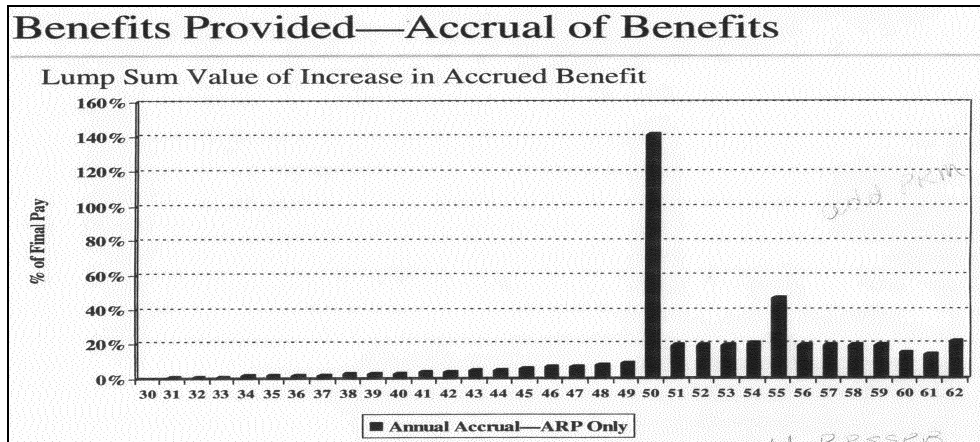
While unveiling Abbott’s benefits woes to the Board of Directors, White and Freyman also assured the Board that Abbott management was considering “strategic options” to address the challenges the company faced. As White testified, he and Freyman had already begun to

[REDACTED]
[REDACTED] Abt. Ex. 87 (White Tr.) at 18-23.

B. Abbott simultaneously launched its efforts to reduce the cost of benefits and to analyze the potential spin-off of a large part of its workforce.

The Board of Directors was not pleased with the [REDACTED]
[REDACTED]. As Judy Whinfrey, who managed the Abbott account for Hewitt Associates (“Hewitt”), explained to her staff, “[REDACTED]
[REDACTED]” Pl. Ex. 1 at X011717. The Board meeting prompted senior management to quickly step up its efforts to look for benefits cost savings. Pl. Ex. 2 (Williams Tr.) at 103-105.

By January 2003, Abbott, with Hewitt’s assistance, had begun a “retirement strategy project” aimed at cutting benefits costs. Pl. Ex. 3 at X002623-26; Pl. Ex. 1 at X011717, 11723-25. In late January 2003, Hewitt reported to Abbott on the current state of its pension plans, noting that demographics revealed an aging workforce. Pl. Ex. 11 at HEW000284. Hewitt warned that the demographics of the workplace and the growing number of participants in the ARP were putting cost pressure on the benefits plans, and it provided Abbott with a graphic depiction of the increase in the value of benefits under Abbott’s pension plan when employees turn 50 and become eligible for early retirement. As the following excerpt from the Hewitt report shows, costs fairly leap off the charts:



Id. at HEW000309.

Abbott’s goal was to reduce benefits to levels that would place Abbott between the 25th and 50th percentile of its competitors. Pl. Ex. 4 at HEW002175; Pl. Ex. 5 at HEW2035. Despite aiming for mediocrity, Miles White intended to convey the message that Abbott had historically emphasized to employees: “[w]e have richer benefits than most” and “[o]ur benefits will continue to be among the best vs. other companies.” Pl. Ex. 6 at HEW001987; *see also* Pl. Ex. 2 (Williams Tr.) at 134-138. Abbott’s efforts culminated in a variety of cost-saving changes to the pension and retiree medical plans, including requiring retirees to contribute more in copayments for retiree medical care and increasing the early retirement age from 50 to 55. Pl. Ex. 7.

At the same time that Abbott was investigating and implementing the reductions to its benefits programs, White and Freyman were analyzing potential spin candidates. Hewitt had identified three major factors contributing to Abbott’s retirement woes: headcount, interest rates, and rate of return on investments. Pl. Ex. 43 at HEW000250. One of those factors – headcount – was within Abbott’s control,² and between December 2002 and June 2003, White and Freyman focused on [REDACTED]. Pl. Ex. 8 at A016317; Pl. Ex. 9 (White Tr.) at 36-37. Abbott analyzed the cost of benefits with respect to these potential spin candidates. *See* Pl. Ex. 32 ([REDACTED]).

²The Hewitt report showed that Abbott’s total headcount had grown from 47,209 in 2000 to 55,179 in 2003. Spinning the 14,000 employees would therefore cut Abbott’s headcount by a quarter.

██████████; see Abt. SMF ¶ 18); Hsp. Ex. 33 (██████████
██████████; see Abt. SMF ¶ 18).

White next met with the Board of Directors between June 18 and June 20, 2003. Abt. Ex. 26. He was armed with information: two weeks earlier, on June 9, 2003, Hewitt had provided management with estimates of the savings Abbott could expect to accrue by spinning off HPD. Pl. Ex. 10. Hewitt calculated that Abbott's 2004 pension and retiree medical expenses would decrease by ██████████, respectively, and that Abbott would experience a one-time gain of ██████████ due to the elimination of retiree medical benefits attributable to the spun-off employees. *Id.* at A003249, 3251-52. The next day, on June 10, 2003, Freyman obtained an estimate of the impact that the spin-off of HPD would have on Abbott's required cash contributions to the ARP. Pl. Ex. 12. As William Preece, Abbott's Director of Retirement Funds at the time of the spin (Pl. Ex. 15 (Preece Tr.) at 8), told Freyman, "[t]he quick answer is that it drops by ██████ in line with payroll." *Id.*

Thus, by the time White presented the Board with an analysis of the "slower-growing" businesses, Abbott management knew that it would achieve substantial benefits savings by spinning HPD. The Board minutes of the June 2003 meetings are telling: White began with a discussion of cost-cutting changes to the company's pension plan and retiree medical benefits, then began "an extensive presentation on strategic issues facing the Company," which concluded with his recommendation to spin off the 14,000 HPD employees. Abt. Ex. 26 at A023825-27. White sought and obtained preliminary Board approval to continue the "initial" phases of a spin-off of HPD, "with the understanding that formal Board approval will be sought at a later date, based on further analysis of the proposal and appropriate opinions from third-party consultants." *Id.* at A023826-27.

C. Abbott embarked on a detailed analysis of how to handle the costs associated with HPD employees' retirement benefits.

After the June 2003 Board of Directors meeting, Abbott closely examined HPD's demographics and analyzed their implications for Abbott's total benefits costs. *See* Pl. Ex. 14 (e-mail from Abbott consultant stating that employees expected to be spun off were "older, long-time employees"); Pl. Ex. 13 (Kompare Tr.) at 10, 12-14, 28-29 (testifying that in spin-off

██████████). As Hewitt explained in a July 31, 2003 analysis: “[d]istribution as of the date of the spin would increase costs under the ParentCo plan as employees retire earlier than expected and terminations receive lump sum payments in the current low interest rate environment.” Pl. Ex. 20 at X001982. Hewitt recommended that transferring employees be restricted from retiring under Abbott’s retiree medical plan. *Id.* at X001982. Explaining a proposed announcement of this restriction, Steve Fussell, Abbott’s Vice President of Total Compensation and Development, bluntly stated:

Re retiree medical, we don’t want to pay for their retiree medical while they are getting medical from Newco. As you know, they can defer their decision to start retiree medical here until later, *so we are trying to avoid being primary when we don’t have to be The savings could be significant.*

Pl. Ex. 21 (emphasis added).

D. Abbott announced the spin while reassuring employees about their retirement benefits.

Abbott announced the spin publicly on August 22, 2003, identifying Christopher Begley, formerly the President of HPD, as its future CEO. Abt. SMF ¶ 53. In an email to all HPD employees, Abbott assured them that benefits “will remain the same through the end of 2004. For 2005 and beyond, the new management team will assess current and future needs, and make appropriate decisions for you and the company.” Pl. Ex. 22. That same day, shortly after the announcement of the spin-off, Begley and Henry Weishaar, who was the Vice President of Human Resources for HPD and was slated to become Hospira’s Vice President of Global Human Resources (Hsp. Ex. 23 (Weishaar Tr.) at 10-11), placed a conference call to over 600 members of HPD’s sales force to ostensibly provide information about the new company and answer their questions. Begley and Weishaar again informed the employees that all potential benefit plan alternatives would be reviewed by the new company. Pl. Ex. 23 at H01872-73 (“[a]s Chris has said before, we’re going to take a look at the entire benefit program and all the potential opportunities that we have, and decide what is a good program for all our employees”). In the ensuing months leading up to the spin, Abbott issued numerous additional employee

communications with the same message: that Hospira would make its own decisions about benefits after the spin. *See* SAMF ¶¶ 71.

E. Abbott, fearing that the HPD employees would retire *en masse*, pondered its options for reducing benefits costs.

In September 2003, Hewitt continued to feed ominous demographic information to Freyman and members of the spin team. Hewitt estimated that approximately 18% of the HPD employees expected to transfer to Newco were already retirement-eligible. Pl. Ex. 24 at H02282. Hewitt later provided an updated analysis that compared the demographics of the HPD employees who would be part of the spin-off to the demographics of Abbott’s remaining workforce: the average age at HPD was 42, while the average age for the rest of Abbott was 40.1; the average years of service at HPD was 11.2, while the average years of service for the rest of Abbott was 8.6; and the percentage of employees 45 or older at HPD was 41%, while the percentage for the rest of Abbott was only 31%. Pl. Ex. 25 at Z00081. Indeed, the perception that HPD employees were older than the Abbott norm remained ingrained after the spin-off. In a June 2004 meeting of Hospira’s Board of Directors, Gail Denham provided a quick profile of the employees who transferred to the new company: “ [REDACTED] [REDACTED].” Abt. Ex. 41 at H013112.

Throughout the fall of 2003, Hewitt continued to remind Abbott of the benefit costs it would incur if these employees retired before the spin-off. After receiving a draft information sheet from Gail Denham that informed retirement-eligible HPD employees that they could retire on the spin-off date before transferring to the new company (Pl. Ex. 26 at X002095), Mary Moreland, a senior Hewitt actuary who headed the team helping Abbott with the spin, expressed Hewitt’s concern that [REDACTED] Pl. Ex. 27 at X002111. [REDACTED]

Id.

Abbott had initially told the HPD employees that they would likely be able to retire from Abbott and begin drawing their annuities before moving to the new company. Pl. Ex. 34 at

H001853, 1860-2, 1868 (transcript of conference call in which Begley and Weishaar informed HPD employees that they would be able to retire on the spin date, that “it will be to everyone’s advantage who can to retire at the date of the spin,” and that employees retiring the day before the spin were “guaranteed a job”). In fact, Chris Begley, who was to be the new company’s CEO, [REDACTED] before assuming leadership of the new company. Pl. Ex. 40 (Moreland Tr.) at 194; Pl. Ex. 28. But after a September 8, 2003 meeting in which Begley disclosed his plans, Hewitt raised the alarm again:

[REDACTED]

Pl. Ex. 28. The next day, Hewitt quantified the warning: “[i]f all retirement-eligible employees from HPD retire immediately, the Abbott OPEB [retiree medical] liabilities would [REDACTED] [REDACTED] over our expectation following the spin-off. This would translate into an [REDACTED] in annual OPEB expense. Obviously, there would be significant implications on the pension expense as well.” Pl. Ex. 29. In a subsequent analysis, Hewitt raised the estimated increase to [REDACTED] if all eligible HPD employees accessed their benefits at the spin-off date. Pl. Ex. 30 at A004899. So by the early fall of 2003, Abbott knew that it had to take serious steps to preserve the benefits cost savings it expected from the spin.

F. Abbott’s solution was to spin the pension obligation and institute a no-hire policy in conjunction with the new company.

On September 26, 2003, Abbott CEO Miles White met with future Hospira CEO Chris Begley to discuss whether (1) the new company would assume the pension benefit obligation for transferred HPD employees, and (2) whether HPD retirees would be permitted to work for the new company. Abbott was the final decision-maker on both points (Pl. Ex. 9 (White Tr.) at 83-85), and Abbott knew that by spinning the plan and freezing it, it could expect to book a gain of [REDACTED], Hsp. Ex. 41 at A011733, and avoid another [REDACTED] in expenses from joining with the new company to prohibit retirees from going to work for it. Pl. Ex. 30 at A004899. Facing the

prospect of increased pension liabilities, but unable to prevent HPD employees from retiring, Abbott needed a way to deter them from retiring, and it was White's job to convince Begley that Hospira should adopt a policy of refusing to hire HPD employees who retired on or before the spin-off date. Pl. Ex. 41 at A004883 (position paper indicating that Abbott could achieve [REDACTED] [REDACTED] from adopting a policy under which "employees who retire prior to the spin cannot work for Newco for two years.") But Begley opposed adopting the policy against hiring HPD employees who retired on the spin-off date, because [REDACTED] [REDACTED]³ *Id.* at A004880; Pl. Ex. 28. Begley was also concerned about the financial viability of the new company and feared that transferring the pension plan to the new company would reduce its chances for success. Pl. Ex. 41 at A004885.

By the end of his meeting with White, however, Begley changed his mind on both issues. With Begley's commitment that Hospira would adopt the no-hire policy in hand, Abbott made a series of announcements informing the HPE employees that their jobs would be transferred to the new company. *See, e.g.*, Pl. Ex. 55 and 56. Abbott then warned the retirement-eligible employees that if they chose to retire before joining the new company, they would "not be able to join the company for a minimum of two years." Pl. Ex. 57 at MN00031. To drive the point home, Abbott provided the following example:

Judy, 60 years old with 22 years of service retires before the new company becomes separate. Judy decides to retire from Abbott and begin receiving her pension benefit from Abbott's Annuity Retirement Plan. She elects to participate in the Abbott Medical Retirement Plan. Judy cannot go to work with the new company for a period of two years from the date the two companies separate.

Id. Abbott also presented Hospira's policy barring retirees from joining the new company:

Can I retire from Abbott, begin receiving my pension benefit and go on to work for the new company? – No, if you are retirement eligible you may retire from Abbott at any point before the separation date but you will be retiring from both Abbott and the new company. If you choose to retire, you will not be able to join the new company for a two-year period.

³Unlike the class members, Begley needn't have worried about losing his benefits in the spin. Abbott asked Hospira to calculate the value of lost benefits for select Hospira executives, and in early 2004 it arranged to compensate them for these losses, further underscoring the fact that Abbott knew long before announcing the news to its employees that retirement benefits would be cut at the new company. *See* SAMF ¶¶ 75-78.

Pl. Ex. 58 at MN00050.

G. Reducing the cost of benefits at the new company was a prerequisite for the spin-off.

After the announcement of the spin, plans for its execution proceeded on the assumption that the new company could not afford Abbott-level benefits, because the numbers showed early on that providing retirement benefits would nearly consume the company's projected cash flow. In an email from Greg Linder (Abbott's Controller) to Fussell on September 2, 2003, Linder stated that the new company's cash flow projections were \$100-150 million, and that a "likely scenario" was:

Assumptions: Transfer assets and liabilities. Abbott makes pension contributions early in 2004 and also a top-off to NewCo that makes the post-spin Assets/ABO ratio about equal for Abbott and NewCo. Total contribution and top-off is \$300MM. *NewCo freezes DB plan.* Future funding needs to pension plan for NewCo would be xx, xx, xx. Can they afford it from a cash flow perspective?

Pl. Ex. 34 (emphasis added). *See also* Pl. Ex. 35 (e-mail from Preece to Denham on September 10, 2003 stating that a pension freeze "is the most likely case"). The "HR Guiding Principles" prepared by Abbott and Hewitt, which served as a blueprint for all human resources issues related to the spin, made it clear that after some period of mirrored "transition" benefits, the new company would have to "accelerate their migration to a lower-cost HR structure post-spin." Hsp. Ex. 15 at A003357.

As the evaluation of the spin-off continued, it became increasingly apparent to Abbott's managers that in order for the spin to be maximally beneficial to Abbott, it would need shift the employees' pension obligations to Hospira. SAMF ¶¶ 21-24, 27-29, 32-36, 39. The only way to do so without crippling the new company was to drastically reduce future benefits. SAMF ¶¶ 37, 42, 47-50. Fussell's email to Kearney (Abbott's Treasurer who was slated to become Hospira's CFO) on August 1, 2003 congratulated him on his upcoming role in the new company and confirmed that "part of making it a great investment will be fundamentally changing the cost structure, including looking at the market numbers on benefits and comp, as a result *taking somewhere around 12 to 15% off your benefits burden* as well as staff and plant rationalization." Pl. Ex. 36 (emphasis added). Indeed, by early September 2003, Fussell had prepared an analysis

at the request of Miles White that identified both the ARP and retiree medical as “targeted plans” that would provide opportunities for Hospira to save “fringe” costs of [REDACTED]. Pl. Ex. 37 at A007071.

Christopher Begley, Hospira’s future CEO, had serious concerns about the impact of benefits on the company’s financial condition.⁴ While at Abbott, HPD’s sales were flat and the business was losing customers. Pl. Ex. 38 (Begley Tr.) at 84-85. At the same time, Begley and Miles White shared a commitment that in order for the spin to go forward, the new company must be “investment grade.” *Id.* at 40-41, 95. But, as David Jones (who had recently retired from Abbott’s Board of Directors and was hand-picked by Abbott to be the Chairman of the new company’s Board of Directors) warned Begley in late September 2003, the unfunded benefit liabilities resulting from a decision to transfer the pension to the new company would bear on the investment grade status they all hoped to attain. *Id.* at 95. Jones informed Begley that “if 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 that they are an artifact and not part of Newco’s future.” Pl. Ex. 39 at H0012463.

H. By the fall of 2003, Abbott and the new company’s executives had decided to freeze the pension plan and eliminate retiree medical benefits.

After his meeting with White, Begley explained how he would protect the new company from the financial stress of sponsoring a pension plan: by freezing accruals altogether. In an October 2, 2003 email, Begley told Jones, the future Chairman of Hospira’s Board:

If the benefit plan comes over we *can and will freeze the plan* on 12/31/2004 except the age reduction feature cannot be frozen. The asset is being transferred on the assumption that we freeze the plan on 12/31/2004.

Pl. Ex. 39 at H12462 (emphasis added). Knowing the plan would be frozen, Hospira thus minimized any perceived risks of agreeing to sponsor a pension plan. By November 2003, Abbott and Hospira’s future management had confirmed that the new company would not offer retiree medical benefits and had even figured out how the savings from their elimination would be

⁴At a September 19, 2003 meeting, Begley was quoted in notes taken by William Preece, Abbott’s Director of Retirement Funds, as having described the business condition at this point for HPD as “in midst of nasty situation” and in “turn-around survival mode.” Pl. Ex. 15 (Preece Tr.) at 125-126.

divided: Abbott agreed to transfer to Hospira the retirement medical liabilities Abbott had carried on its books for employees who were not yet retirement eligible. Pl. Ex. 42. Doing so would allow Hospira – rather than Abbott – to recognize a curtailment gain when it inevitably announced its decision not to offer retiree medical benefits. Hewitt calculated that Hospira’s gain would be approximately [REDACTED] through this arrangement. *Id.* at X001157. Indeed, Hospira’s future management counted on an earnings boost from the elimination of retiree medical expenses. Pl. Ex. 62.

Freezing the pension plan and eliminating retiree medical benefits also resolved another potential benefit cost issue for Hospira: it eradicated the risk of incurring the unanticipated costs associated with early retirement losses that Abbott had so feared. As Hewitt’s studies showed, employees at the new company would never be able to retire early after their pension plan was frozen and their retiree medical benefits were eliminated, simply because they would never be able to earn enough replacement income to make up for what they would lose by going to the new company. Abt. Ex. 55 at H03173 (“older employees need to save much more or retire much later”); H03177 (“[n]ot enough time to accumulate additional savings needed to retire”).

Following through on Begley’s commitment to White, two weeks before the spin-off, Hospira entered into an Employee Benefits Agreement with Abbott, under which it agreed not to hire HPD employees who retired from Abbott on or before the spin-off. Abt. Ex. 40. Any “offers of employment” by Hospira were subject to the express prohibition on continuing to participate in Abbott’s plans after the transfers. *Id.* at 11-13. The agreement also contained Hospira’s agreement not to hire anyone who terminated from Abbott after August 22, 2003. *Id.* at 14. Thus, any HPD employees on the spin-off list who elected to retire prior to the spin-off date. *Id.*

These restrictions on employees’ choices were by no means routine. Indeed, after this lawsuit was filed, Abbott entered into another transaction involving the sale of ADD (one of the divisions studied earlier as a possible spin candidate) to General Electric. Hsp. Ex. 13. There, unlike the situation here, retirement-eligible ADD employees who retired on or before the sale date were permitted to go to work for GE. *Id.* at 3.⁵

⁵Defendants may try to distinguish the ADD divestiture by noting that the ADD employees’ pensions remained at Abbott, but there is no practical difference, because here, the assets and liabilities of

I. Abbott concealed the truth about benefits to the HPD employees until three months after the spin date.

The spin-off was completed on April 30, 2004. Hsp. SMF ¶ 66. As they had done throughout the spin evaluation process, Abbott and Hospira continued to inform employees that their future retirement benefits would be decided only after the spin by the new company. Indeed, a newsletter distributed to employees on the date of the spin did not even mention retirement benefits. Pl. Ex. 33. It was not until late June of 2004 that the Hospira employees were told what Abbott had known as early as September-October 2003: that their pension plan would be frozen and their retiree medical benefits would be eliminated. Abt. Ex. 60.

ARGUMENT

As this Court stated recently,

[a] movant is entitled to summary judgment under Rule 56 when the moving papers and affidavits show there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Unterreiner v. Volkswagen of America, Inc.*, 8 F.3d 1206, 1209 (7th Cir. 1993). Once a moving party has met its burden, the nonmoving party must go beyond the pleadings and set forth specific facts showing there is a genuine issue for trial. *See* Fed.R.Civ.P. 56(e); *Becker v. Tenenbaum-Hill Associates, Inc.*, 914 F.2d 107, 110 (7th Cir. 1990). The court considers the record as a whole and draws all reasonable inferences in the light most favorable to the party opposing the motion. *See Fisher v. Transco Services-Milwaukee, Inc.*, 979 F.2d 1239, 1242 (7th Cir. 1992).

Baker v. Kingsley, No. 03 C 1750, 2006 WL 2927606, *4, 39 Employee Benefits Cas. 2271 (N.D. Ill. Oct. 10, 2006). Plaintiffs have presented genuine issues of material fact as to each count of their Amended Complaint, and defendants' motions should be denied.

I. ABBOTT IS NOT ENTITLED TO SUMMARY JUDGMENT ON COUNT I.

Section 510 of ERISA, 29 U.S.C. § 1140, prohibits an employer from terminating employees to reduce the cost of employee benefits. *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Sante Fe Ry Co.*, 520 U.S. 510 (1997). It states, *inter alia*:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering

the HPD employees who retired before the spin date also remained at Abbott. Abt. Ex. 40 at 11.

with the attainment of any right to which such participant may become entitled under the plan.

29 U.S.C. § 1140. A business decision violates section 510 if it is motivated, even in part, by a specific intent to interfere with ERISA benefits. A plaintiff need not show that the *sole* reason for the termination is to interfere with benefits, but only that the specific intent to interfere *partly motivated* the defendant's decision. *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1478 (5th Cir. 1992); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988).

Abbott argues that the Court should grant it summary judgment on Count I for two reasons. First, resuscitating an argument this Court has repeatedly rejected in these proceedings, Abbott contends (at 10) that section 510 “generally” does not apply to corporate organizational changes.⁶ To the contrary, courts have long recognized that a decision to initiate a reduction in force may violate this section. *See Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1128-29 (7th Cir. 1990) (termination of employees as part of plant shutdown violated ERISA § 510); *Gavalik v. Continental Can Co.*, 812 F.2d 834, 854-57 (3d Cir. 1987) (RIF that used employee pension status as factor violated ERISA); *Pickering v. USX Corp.*, 809 F. Supp. 1501, 1545-52 (D. Utah 1992) (employer liable for closing plant based on studies showing benefit-related expenses exceeding short-term profit).

Second, Abbott argues (at 11-14) that plaintiffs cannot satisfy an “*Andes* exception” to the general rule that it believes precludes section 510 claims in the context of corporate reorganizations. *Andes v. Ford Motor. Co.*, 70 F.3d 1332 (D.C. Cir. 1995). This Court has already warned defendants against reading into *Andes* a general prohibition against section 510 claims in the context of a sale of a subsidiary. Mem. Op., April 27, 2005, pp. 7-8. Because the Seventh Circuit made no mention of either a general rule or a limited exception in *Deeming*, *Andes* does not require plaintiffs to prove anything more than that they were terminated by Abbott with the

⁶Abbott previously argued in support of its motion to dismiss that no “discharge” occurs for purposes of § 510 when a company sells a division (Mem. at 8), relying, as before, on *Blaw Knox Retirement Income Plan, v. White Consol, Indus., Inc.*, 998 F.2d 1155, 1191 (3rd Cir. 1993). But, as this Court recognized in its order denying Abbott's motion to dismiss (Mem. Op., April 27, 2005 at 7-8), in *Blaw Knox*, while there was a change in employers who sponsored the plan, the employees remained in the same plan after the sale of their division. Here, Abbott cannot dispute either that employees who went to Hospira ceased to actively participate in Abbott's pension plan after the spin-off or that Hospira sponsors a

purpose of interfering with their rights under Abbott’s benefit plans. Moreover, even under *Andes*, plaintiffs who were terminated in a “sale or closure of an entire unit” can satisfy § 510 “by showing some ERISA-related characteristics special to the unit (such as having a clearly above-average proportion of employees with pension rights about to vest) is essential to the firm’s selecting the unit for sale or closure.” *Id.* at 1338. Defendants are not entitled to summary judgment under *Andes* because there is ample evidence that HPD indeed had “ERISA-related characteristics” essential to Abbott’s decision to spin it off. *Id.*

A. Plaintiffs have presented evidence that Abbott intended to interfere with benefits.

In *Isbell v. Allstate Ins. Co.*, 418 F.3d 788,796 (7th Cir. 2005), our Circuit held that a plaintiff can prove claims under the direct method using circumstantial evidence that “points directly to a discriminatory reason for the employer’s action.” To establish intent, courts can look to “circumstantial evidence surrounding the employment decision because there is rarely direct evidence of wrongful intent.” *Phelps v. Field Real Estate Co.*, 991 F.2d 645, 649 (10th Cir. 1993). *See also Salus v. GTE Directories Service Corp.*, 104 F.3d 131, 136 (7th Cir. 1997) (the “plaintiff need not present direct evidence of illegal intent to recover under section 510; circumstantial evidence is sufficient”). As set forth below, the evidentiary record developed in discovery is replete with such direct proof.

i. Evidence that HPD had ERISA-related characteristics that affected Abbott’s decision:

Plaintiffs have shown that HPD was an older division with a higher average service than Abbott as a whole (*see* SAMF ¶¶ 20-23), and that Abbott took this into account when making its decision to spin the division. *Id.* Under *Andes*, this is proof enough to establish a *prima facie* claim under section 510. The inquiry over Abbott’s specific intent properly focuses on Abbott’s belief at the time it made its decision – that is, what motivated it to act. Plaintiffs’ evidence shows that the Abbott managers charged with planning and implementing the spin-off, including Fussell and Denham, repeatedly revealed their perceptions of HPD employees as older and with more years of service than the average Abbott employees (*see Id.*) and that their perceptions were

separate plan that provides different benefits than Abbott’s plan.

repeatedly reinforced during Abbott’s deliberations over the spin-off by demographic information provided by Hewitt, which reported to Abbott that HPD employees, in fact, tended to be older, with more years of service than the rest of Abbott, that over 41% of HPD employees were either at or near (within 5 years) of early retirement age, and that at least 18% had already met both the age and service requirements to retire early. *Id.*

Turning a blind eye to all this, Abbott introduces a brand-new statistical analysis (never disclosed in discovery) that it believes demonstrates HPD was not unique at the company. In doing so, however, Abbott makes a stunning admission about the divisions it was considering spinning off (at 12): “the employees in all of the Abbott divisions that were evaluated for spin-off – HPD, ADD, and Ross – *had essentially the same average credited service (from 9.7 to 10.49 years) and age (41.82 to 42.05 years) as well as the same percentage of employees over 40.*” Abbott thus admits that the *only* divisions it considered spinning off were divisions that had the same high concentrations of older, longer-serviced, employees as HPD. Indeed, Abbott’s admission places its recent sale of ADD into proper context. As Abbott’s head of finance, Frank Loughery, recounted to Hewitt’s Moreland regarding Abbott’s treatment of benefits: [REDACTED]

[REDACTED]

[REDACTED] Pl. Ex. 46 at X004364.

At the time it was planning the spin, Abbott was aware of HPD’s aging demographics, and it knew that a tidal wave of early retirements would cause actuarial losses in its already-deteriorating pension as the approximately 41% of HPD employees reached retirement age. SAMF ¶¶ 20-23. Indeed, given the “scary” numbers Abbott faced already (*see* Pl. Ex. 47), the company planned to avoid these liabilities by transferring HPD employees to Hospira, which would “eat” those losses as they occurred. Pl. Ex. 17 at H03414.

Moreover, Abbott also knew that spinning off HPD would reduce the cash contributions it would be required to make to the plan by approximately 20%. Pl. Ex. 12. Indeed, plaintiffs’ actuarial expert David Feinstein also examined the significance of these demographic characteristics for HPD. Pl. Ex. 49 at 4. Feinstein noted what was obvious to Abbott’s management – benefits are more costly for older workers than for younger workers, as the Hewitt cost savings studies showed. *Id.*; Abt. Ex. 55. Not surprisingly, Feinstein concluded from the

Hewitt demographics that since Hopsira's workforce was older than Abbott's average, the percentage of the rising benefit costs Hewitt projected would have been even higher for the Hopsira work force than Abbott on average. Pl. Ex. 49 at 5.

Abbott fails to mention that during the same time it was considering spinning off the three older divisions discussed in its brief, it considered and rejected the spin-off of █████, which had a "much younger employee base," as noted in the spin-off evaluation documents, which "does not appreciate the benefits of a defined benefit plan." Pl. Ex. 51 at A019010. █████ also had a much smaller workforce than HPD, which, combined with the younger population, did not offer the benefit cost objectives that Abbott sought. That Abbott concentrated only on spinning the older divisions where greater benefit cost savings could be achieved (and, indeed, divested itself of two – HPD and ADD) while retaining █████, the smaller, younger division, is just another material fact that should weigh in plaintiffs' favor at trial.

The evidence shows that HPD – a large, older division with many employees who were soon to meet the age and service requirements for receiving valuable benefits – satisfied Abbott's desire to reduce the "headcount" in the ARP (*see* Pl. Ex. 43 at HEW000250). It also shows that Abbott knew that by selecting HPD, it could achieve a great benefit savings. *See* SAMF ¶¶ 14-17. The instant case therefore meets the *Andes* test: plaintiffs have produced evidence of "ERISA related" characteristics that were essential to Abbott's decision, and they have gone one step beyond *Andes* and the other cases defendant relies upon by presenting additional direct evidence that Abbott acted with discriminatory motivation.⁷

ii. Additional evidence showing that benefits costs were a motivating factor in the decision to spin off HPD:

There is no shortage of disputed material facts concerning whether benefit costs were a factor in Abbott's decision to spin off HPD. As discussed at pp. 2-13 above, the evidence shows that Abbott studied the cost of benefits and searched for ways to reduce them ceaselessly during 2002 and 2003. The same cast of characters – White, Freyman, Fussell, and Hewitt – were

⁷The HPD demographics also show that Abbott's reliance on *Unida v. Levi Strauss & Co.*, 986 F.2d 970 (5th Cir. 1993) is misplaced. At best, the plaintiffs there could show only that "pension and benefit costs were rising on a company-wide basis," not that the plant selected for closure had a particular issue compared to other facilities. *Id.* at 980

involved in both the cost-cutting program and the evaluation of spin candidates. *Id.* Indeed, the documents demonstrate that on every issue – from the decision to require Hospira to take the pension obligations, to the decision to restrict employees from working for Hospira if they retired on the spin-off date – the spin-off was designed, almost exclusively, to reduce, eliminate, or transfer Abbott’s benefits costs. *Id.*

Thus, the elimination of benefits was not merely a consequence of the spin-off; rather, it was an end in itself and an essential component of Abbott’s scheme to reduce its own benefits costs by spinning employees and their benefits to another company. Abbott’s goal was to maximize its own benefits cost savings, but, given the new company’s precarious financial footing, Abbott’s senior managers understood that Abbott’s shell game of shifting benefits liabilities to the new company could only be played out if future benefits were reduced and eliminated by the new company. The “HR Guiding Principles” that Fussell and Hewitt formulated and followed as a blueprint for personnel and human resources decisions assumed from the very beginning that after a transition period, Hospira would rapidly reduce benefits costs. Hsp. Ex. 15 at A003358 (“it is likely that quick changes in traditional programs will be forthcoming”). Communications from managers destined to remain at Abbott (like Fussell, Linder and Preece) to those tapped to lead the new company (like Kearney and Denham) similarly reflect a clear understanding that the new company would have to freeze additional pension and retiree medical benefits in order to remain viable. *See, e.g.*, SAMF ¶¶ 37, 42, 47-50. Hospira’s future managers did not just anticipate the elimination of benefits – they planned for them and counted on them to produce a curtailment gain on the company’s financial statements. SAMF ¶ 51. And Abbott made sure that the liabilities it avoided by spinning HPD would never come back to it by cutting off the employees’ rights to bridge back into the ARP on rehire. The Court’s evaluation of Abbott’s intent to interfere with benefits must be informed by this departure from Abbott’s normal hiring procedures that ensured that HPD participants would be treated differently.

In its moving papers, Abbott ignores all this and focuses intently on a single event – the June 20, 2003 Board of Directors meeting where it contends that HPD was selected as the spin-off candidate. Abbott states (at 6) that “[a]lthough there was a possibility further due diligence

could alter this conclusion, the decision to spin core HPD had effectively been made as of that date.” But this contention is at odds with the timeline for Project Bay, which shows that Abbott’s Board of Directors was not scheduled to approve the spin until the due diligence work was completed in March 2004. Pl. Ex. 52 at H12524. Abbott’s view of the transaction being virtually final in June 2003 is also contradicted by Begley himself, who testified that during the nine-month period from the announcement to the spin, “there were points where it was in question whether or not it would make sense to spin off what was then called NewCo and ultimately the decision was made that it did make sense to move forward.” Pl. Ex. 38 (Begley Tr.) at 14-15.

The evidence of Abbott’s intent to interfere with the HPD employees’ benefits resembles that in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), where the company spun off long term liabilities to a less secure plan. As in *Varity*, Abbott sought to convince HPD employees to make the decision to go to work for the new company without full disclosure, requiring them to give up participation in Abbott’s financially-secure pension plan for membership in a much riskier investment (*See also* plaintiffs’ discussion of *Varity* in Section IV below). And the future Hospira executives who knew the risk that the new company was facing were compensated for the benefits they allowed their employees to lose. SAMF ¶¶ 75-78. In the end, the evidence shows that what mattered to Abbott was achieving benefits cost savings. If the new company went bankrupt, the plan would no longer be Abbott’s responsibility.

B. Abbott’s purported business justification under the *McDonnell Douglas* burden-shifting analysis is not credible.

Abbott urges the Court (at 14-16) to examine this case by the “familiar *McDonnell Douglas/Burdine* burden-shifting analysis“ used in employment discrimination cases. Under the burden-shifting approach, a plaintiff presents a *prima facie* case by showing that he “(1) belongs to the protected class; (2) was qualified for his job position; and (3) was discharged or denied employment under circumstances that provide some basis for believing that the prohibited intent to retaliate was present.” *Salus*, 104 F.3d at 135. If the employer produces evidence of a purported, non-discriminatory reason for its decision, the plaintiff seeking to defeat summary judgment “must point to some evidence, direct or circumstantial, from which a fact finder could either (1) disbelieve the employer’s articulated legitimate reasons; or (2) believe that an

individual's discriminatory reason was more likely than not reason for the discharge.” *Kowalski v. L & F Products*, 82 F.3d 1283, 1289 (3d Cir. 1996). This mirrors our Circuit’s approach to discrimination cases. *Hudson v. Chicago Transit Auth.*, 375 F.3d 552, 561 (7th Cir. 2004).

Employers, knowing that it is illegal to admit that their actions are motivated by the desire to cut employees’ benefits, routinely present one or more business justifications for their decisions, and Abbott is no different. But what is unusual about this case is that Abbott absolutely denies that pension and retiree medical costs played *any role whatsoever* in its decision selecting HPD to be spun off (*e.g.*, pp. 1, 3-7). Having staked out this extreme position, Abbott’s truthfulness about its motivations for spinning HPD are placed directly in question, and its motion for summary must be denied.

As noted above, the class is not required to prove that the interference with its ERISA rights was the *sole* reason for the HPD spin-off. *Salus*, 104 F.3d at 131. There is no fundamental inconsistency, therefore, in finding that Abbott had some legitimate business reason for spinning-off HPD but that a motivating reason was, at least in part, to reduce its pension and benefit liabilities. As seen above, Abbott’s asserted business reasons themselves present genuine issues of material fact, because they are not credible in light of its position that benefit cost savings had absolutely nothing to do with the spin-off. The entire spin-off team, including its leaders White and Freyman, were involved in meeting after meeting about how to maximize benefit cost savings through the spin-off of HPD. Abbott asks the court to take White and Freyman at their word that benefits had no relationship to the spin-off, but their credibility is extremely shaky, given their dual roles in promoting the spin and, in so doing, achieving cost savings for Abbott.

Abbott claims that its business reasons for the spin are reflected in the minutes of the Board meetings and the presentation given by Miles White. According to both the minutes and the presentation, the spin-off was designed to leave Abbott with a higher growth, higher return and less asset-intense business. Abt. Ex. 26 at A023826; Pl. Ex. 8 at A016342. But the underlying data, which came from analyses prepared for Abbott by Morgan Stanley, shows that the divestiture of HPD would not have a significant impact on Abbott over a three year period from 2004 to 2007. Specifically, Abbott’s sales growth rate was expected to increase by only [REDACTED] the net earnings rate by only [REDACTED] and the return on assets by only [REDACTED] Pl. Ex. 8 at

A016342; Pl. Ex. 63 at A016306-07. Moreover, other data not highlighted by White to the Board revealed that of the divisions analyzed, [REDACTED] [REDACTED] *Id.* at A016366. When Morgan Stanley sent Freyman an updated analysis on August 8, 2003, the impact of HPD's divestiture was just as underwhelming, prompting Morgan Stanley to conclude unequivocally: [REDACTED] [REDACTED] Abt. Ex. 24 at A007332. Nevertheless, in his presentation to the Board on August 21, 2003 – the day before the spin was announced – White continued to insist that HPD's divestiture would leave Abbott with a higher growth profile. Abt. Ex. 38 at A013683. A trial is the only proper forum for making the required credibility determinations with respect to Abbott's stated business justifications.⁸

The facts here are similar to those in *Deeming, supra*, where the employer closed a plant and took the step, just before the reduction in force, of abolishing a long-held provision in its pension plan of allowing its employees to elect a layoff (with benefits) in the event of a closure. The district court found after a trial, and the Seventh Circuit affirmed, that elimination of the option violated section 510. *Deeming*, 905 F.2d at 1128-29. In this case, as in *Deeming*, the court, sitting as trier of fact, could find that Abbott's decision to spin off HPD is sensibly explained by a motivation at least in part to avoid burgeoning benefit liabilities that the evidence shows were outstripping Abbott's budget for them in its Long Range Plan. *See also Simpson v. Ernst & Young*, 879 F. Supp. 802, 816-21 (S.D. Ohio 1994), *aff'd*, 100 F.3d 436 (6th Cir. 1996), *cert. denied*, 117 S.Ct. 1862 (1997) (the court found liability against the defendant after a trial where a reduction in force was influenced by reports about the age and length of service of its partners, combined with expert testimony about the resulting savings to the partnership in pension liabilities). Under either the burden shifting approach or the direct method of proof, summary judgment on Count I should be denied.

⁸This determination will also be heavily informed by whether the Court finds that these same executives now proffering Abbott's reasons for the spin lied to their employees by withholding the truth about their benefits (*see* discussion of breach of fiduciary duty claim in Section IV below).

II. ABBOTT IS NOT ENTITLED TO SUMMARY JUDGMENT ON COUNT II.

In Count II, plaintiffs seek a trial on whether Abbott's decision to adopt a policy under which employees could only return to Abbott after two years as "new hires," thereby eviscerating plaintiffs' bridging rights in violation of section 510. Aside from relying on Hospira's motion for summary judgment on Count III, Abbott asserts only two reasons why it should be granted summary judgment on Count II.⁹ First, Abbott argues that the no-hire claim alleged in Count II is moot because Abbott's two-year hiring restriction expired as of May 1, 2006. Second, Abbott attempts to resuscitate the same arguments this Court rejected when it denied Abbott's motion to dismiss – namely, that a "naked failure to rehire" an employee does not constitute a violation of Section 510. Except to the extent it relies on Hospira's arguments, Abbott does not dispute the material facts giving rise to the claim in Count II, as made clear by Abbott's failure to cite to any evidence in its argument. Rather, Abbott suggests that plaintiffs should lose as a matter of law. But as explained below, neither of the two reasons offered by Abbott entitle it to summary judgment.

A. Plaintiffs' claim is not moot.

In Count II, plaintiffs allege that "under Abbott's no-hire policy, any HPD Employees who are rehired after two years are considered new hires . . . and Abbott will not bridge the future service provided by returning HPD Employees with their past service." Am. Comp. at ¶ 80; *see also* ¶ 69 ("[u]nder Abbott's policy, HPD employees who return to Abbott . . . are treated as new hires . . . and Abbott will not bridge [their] future service . . . with their past service.")). Plaintiffs also claim that Abbott adopted the policy to prevent returning HPD employees from accruing additional benefits that they otherwise were entitled to. Am. Comp. at ¶ 81. As discussed above, Abbott's no-hire policy eviscerated plaintiffs' rights under provisions of the ARP that required Abbott to credit them with their time away from Abbott if they return within a year and to bridge their past service at Abbott with any future service they might provide if they return within five years (*see* Pl. Ex. 83 at A000039-40, containing ARP's bridging provisions under which vesting, benefit, and seniority service are reinstated if an employee returns within 5 years). Indeed, this

⁹Abbott adopts Hospira's motion but fails to explain how Hospira's defense against the claim arising from Hospira's no-hire policy in Count III should entitle Abbott to summary judgment in Count II.

Court had little trouble recognizing that “[p]laintiffs do not challenge the policies as a refusal to hire per se” and that “[t]he harm alleged is a loss of bridging rights, thereby capping any accrual of benefits.” Mem. Op. Apr. 27, 2005, at 9.

Abbott does not deny that it continues to treat returning HPD employees as “new hires.” As such, Abbott’s unlawful policy is still in effect. Thus, plaintiffs’ request for an order enjoining Abbott to repeal its no-hire policy – which is clearly appropriate under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3) (a participant can bring suit “to enjoin any act or practice which violates any provision of this title or the terms of the plan”) – is not moot. While the two-year hiring restriction has expired, plaintiffs still seek to enjoin the loss of bridging rights and new hire status for returning employees.

Nor is plaintiffs’ request for an order revoking Abbott’s policy the only remedy that plaintiffs seek or that is available to them, as Abbott mistakenly contends (at 17-18). Plaintiff have also asked the Court to order Abbott to

offer to reinstate all plaintiffs and Class members to employment status under the same terms and conditions that existed prior to the termination of their employment, including participation in the Abbott Benefit Plans.

Am. Comp., Prayer For Relief, ¶ D. Having been deprived by Abbott’s no-hire policy of any opportunity to return to Abbott to exercise bridging rights under the ARP, plaintiffs properly seek the opportunity to be immediately reinstated into available positions at Abbott and into each of Abbott’s employee benefit plans, and to be credited with their prior years of service at Abbott pursuant to the provisions in the Plan that require Abbott to bridge past service with future service when an employee returns within five years. And it is uncontroverted that such jobs are available at Abbott: plaintiffs’ expert, Lawrence J. Quartana, reviewed hiring data produced by Abbott in discovery and concluded that Abbott made 9,802 hires between August 1, 2003 and September 3, 2004. Pl. Ex. 53 at 15. He also found that 12.8% of these positions were for job titles previously held by members of the class. *Id.* He concluded that “class members would have been viable candidates for jobs with the same title at Abbott were it not for the two-year hiring freeze applied to class members by Abbott. *Id.*”

Abbott also ignores plaintiffs' request for reinstatement into Abbott's plans as a standalone remedy, which they seek regardless of whether the Court requires Abbott to offer them employment opportunities. Am. Comp., Prayer For Relief, ¶ E. This remedy is clearly equitable. *Street v. Ingalls Mem. Hosp.*, No. 06 C 2963, 2007 WL 844619, *20 (N.D. Ill. Mar. 15, 2007) (referring to reinstatement as "undisputably equitable relief"); *Fletcher v. ZLB Behring, LLC*, No. 05 C 2695, 2006 WL 218164, * 19 (N.D. Ill. Jan. 27, 2006) (reinstatement is an equitable remedy); *see also Eichorn v. AT&T Corp.*, -- F.3d --, No. 05-5461, 2007 WL 1574869 at *2 (3d Cir. May 31, 2007) (concurrency). Reinstatement is also appropriate relief under section 510, because Abbott's pension plan is already multiple employer plan – that is, Abbott already treats it as a plan with employees other than its own as participants. Pl. Ex. 53.

Lastly, in addition to reinstatement into Abbott's plans, plaintiffs also ask the Court to require Abbott to credit them with service from the time they were terminated until the time they are reinstated into Abbott's plans. Abbott appears to argue that the Third Circuit's decision in *Eichorn v. AT&T, Corp.* ("*Eichorn II*"), 484 F.3d 644 (3rd Cir. 2007), precludes this request, but that decision does not. In *Eichorn II*, plaintiffs alleged that their former employer adopted an 8-month no-hire agreement in order to interfere with bridging rights that allowed past service and future service to be "bridged" as long as participants returned to their employer within six months. The Third Circuit previously found that plaintiffs presented sufficient evidence of a specific intent to interfere with their pension rights to survive summary judgment. *Eichorn v. AT&T Corp.* ("*Eichorn I*"), 248 F.3d 131, 150 (3d Cir. 2001). However, during the subsequent appeal in *Eichorn II*, the Third Circuit dismissed the claim because the only relief plaintiffs requested was not "appropriate equitable relief" under the statute. Unlike the instant case, the *Eichorn* plaintiffs did not seek reinstatement. Instead, they asked the court to create a fiction that plaintiffs had remained with their former employer until retirement and that payment of benefits was "past due," which was, as the Third Circuit stated, "in essence a request for compensatory damages merely framed as an 'equitable' injunction" that was not available under section 502(a)(3) of ERISA. *Id.* at 655. The Third Circuit reasoned that the benefits plaintiffs sought to be paid out for work they never did was "akin to back pay." *Id.* at 656. Here, the remedy sought by the class – reinstatement into the plan – has been affirmed by the Supreme Court in *Varity*,

516 U.S. at 1079. The Ninth Circuit has similarly held that an order to modify the plan records is not an award of monetary damages and upheld an order retroactively reinstating an employee into a plan is “equitable in substance.” *Matthews v. Chevron Corp.*, 362 F.3d 1172, 1186 (9th Cir. 2004).

B. Section 510 applies to no-hire claims.

Abbott next attempts to resurrect its argument that section 510 does not apply to plaintiffs’ claims. The last time Abbott and Hospira asked the Court to dismiss the no-hire claims, defendants implored this Court to follow *Becker v. Mack Trucks, Inc.*, 281 F.3d 372 (3d Cir. 2002). And the Court obliged them. In *Becker*, the Third Circuit ruled that an employer’s decision not to rehire former employees did not violate Section 510. The Third Circuit agreed with the defendants that plaintiffs had failed to establish a claim under Section 510 because they failed to demonstrate a deprivation of “pre-existing ERISA . . . rights arising out of their former employment.” *Id.* at 381 (emphasis added); *see also Id.* at 383 (“[A] failure to hire does not amount to a circumvention of promised benefits because job applicants who have yet to be hired have not been promised any benefits.”) The Third Circuit in *Becker* *did not*, however, issue a blanket ruling “that § 510 does not apply to a policy against re-hiring former employees” as Abbott contends (at 19).

On the contrary, the Third Circuit expressly left undisturbed its earlier decision in *Eichorn I. Id.* (“[o]ur recent decision in [*Eichorn I*] is not to the contrary”). Unlike in *Becker*, the plaintiffs in *Eichorn I* did not allege that the no-hire provision merely prevented them from earning new benefits. Rather, the *Eichorn* plaintiffs alleged that the no-hire provision, which effectively cancelled plaintiffs’ bridging rights, interfered with rights and benefits that plaintiffs were already entitled to. *Becker*, 281 F.3d at 383 (distinguishing *Eichorn I* because in that case the no-hire provision had the effect of eliminating accrued pension benefits.); *see also Eichorn I* at 149 (stating the no-hire policy effectively “cancel[ed] the [] employees’ pension rights.”).

Like the plaintiffs in *Eichorn I*, the plaintiffs here claim that the no-hire policy was intended to deprive them of their preexisting right to bridge their past and future service, thereby interfering with their right to receive accrued benefits. Indeed, this Court recognized that plaintiffs do not claim that Abbott’s policy simply prevented them from becoming hired. Mem.

Op., Apr. 25, 2005 at 9-10. As the Third Circuit did in *Becker*, this Court distinguished the no-hire claims in this case because plaintiffs alleged that the no-hire policies were part of a scheme to “eliminate plaintiff’s benefits.” *Id.*, at 10. Acknowledging that “the harm alleged is [] the loss of bridging rights,” this Court, therefore, correctly ruled “that the instant case is more similar to [*Eichorn I*].” *Id.*

Attempting to put a novel spin on its old argument, Abbott now contends that a section 510 no-hire claim “cannot survive as an independent claim.” Whether Abbott means that ERISA somehow requires multiple Section 510 claims to be simultaneously proven or that Section 510 claims based on a discriminatory failure to rehire require collusion between multiple entities is unclear. Plaintiffs are unaware of any reported court decision in which either requirement has ever been imposed. Plaintiffs have alleged, and the evidence shows, that Abbott designed and implemented a scheme with the specific intent to interfere with benefits and that Abbott adopted its no-hire policy under that scheme. Accordingly, the court could declare Abbott’s scheme unlawful and strike each inchoate component of the scheme, including the no-hire policy, without making a determination that the no-hire policy on its face violates ERISA. *See Gavalik*, 812 F.2d at 856 (concluding that schemes undertaken for the purposes of interfering with benefits may be unlawful under section 510 when an act is taken in furtherance of the scheme even if the act itself does not accomplish goal of interfering with benefits). But as the Third Circuit did concerning a similar policy in *Eichorn*, this Court should also find that Abbott’s no-hire policy itself violates Section 510 of ERISA.

III. HOSPIRA IS NOT ENTITLED TO SUMMARY JUDGMENT ON COUNT III.

In Count III, plaintiffs allege that Hospira refused to hire HPD employees who retired under Abbott’s plans “in order to prevent terminated HPD employees who were retirement eligible on the date of the spin-off but who wished to work for Hospira from applying for and receiving retirement benefits under Abbott’s Plans.” Am. Comp. ¶ 86. By having its policy announced in advance and by subsequently implementing it, Hospira “precluded plaintiffs and other HPD employees from retiring from Abbott and receiving retirement benefits under the Abbott Benefit Plans, while at the same time being employed by Hospira.” *Id.* at ¶ 87.

Nowhere does Hospira contest the essential facts supporting the claim in Count III: (1) HPD retirement-eligible employees were informed of Hospira's policy under which they would not be hired by Hospira if they chose to retire from Abbott prior to the spin in order to begin receiving retirement benefits (Abt. Ex. 32 at H002146; Pl. Ex. 41 at A004883); (2) Hospira's policy was, by its terms, directed against retirement-eligible HPD employees (*Id.*); (3) Hospira's policy was intended to prevent HPD employees from retiring under Abbott's plan prior to the spin-off in order to receive benefits (*Id.*; *see also* Abt. Ex. 40); and (4) the no-hire policy became effective when Hospira entered into an agreement with Abbott under which it would not hire retired HPD employees (Abt. Ex. 40).

A. The existence of a discriminatory policy is undisputed.

Except for attributing the wrongful conduct to Abbott, Hospira admits the discriminatory policy: “[i]n addition, Abbott made the decision that it would not allow Abbott employees going to Hospira to actively retire prior to the spin-off and start drawing pension benefits” (at 11). Notwithstanding its concession, Hospira's attempted misdirection is meant to conceal its role in the wrongful conduct. Abbott, of course, did not prevent retirement-eligible employees from retiring, nor could it without blatantly violating the terms of the Plan and ERISA. Hospira's unsupported suggestion that Abbott's conduct alone prevented HPD employees from retiring before the spin is thus a mischaracterization of plaintiffs' claim in Count III.

No doubt understanding it could not simply “stop” HPD employees from retiring and receiving their benefits before the spin-off (*see* Pl. Ex. 27 at X002111, E-mail from M. Moreland stating “I think they believe that there's no way to stop employees from terminating from ABT, starting to collect their benefits, and then moving to Newco if they are already 50/10”), Abbott sought to accomplish this same result by convincing Hospira's future CEO that any HPD employees who retired by the spin-off dates should not be hired by Hospira. Hospira protests (at 11) that its policy “was not some unique, back room concocted means to interfere with plaintiffs' benefits,” but the evidence shows that, in fact, it was.

Indeed, within two weeks after the meeting between Christopher Begley's and Miles White in which Begley was persuaded that Hospira should adopt the policy, Abbott unveiled Hospira's policy to all HPD employees. The announcements clearly evidence a policy in which

HPD employees who chose to retire would be treated differently as a result: “[i]f you choose to retire from Abbott, you will not be able to join the new company for a minimum of two years” (Pl. Ex. 57); “if you are retirement eligible you may retire from Abbott at any point before the separation date . . . but you will be retiring from Abbott and the new company. If you choose to retire, you will not be able to join the new company for a two-year period (Pl. Ex. 58 at MN00050). As Hospira now freely admits (at 7), “it was in Abbott’s and Hospira’s best interests to restrict retirements “[I]t’s in no one’s best interests to allow employees to access their retirement benefits before terminating employment”” (quoting Mary Moreland).

B. *McDonnell Douglas* does not apply.

Despite its admissions, Hospira apparently believes it should escape liability merely by asserting “legitimate, nondiscriminatory” reasons for its policy that it believes are not pretextual. If the only evidence of Hospira’s discriminatory interference were circumstantial, the *McDonnell Douglas* burden-switching framework might apply. But here, the proof of discrimination is both direct and uncontroverted, so the burden-shifting mechanism does not come into play. *Lessard v. Applied Risk Mgmt.*, 307 F.3d 1020, 1025-26 (9th Cir. 2002).

The information sheets distributed to HPD’s employees announcing Hospira’s intent to treat retiring HPD employees differently are direct evidence of discrimination. The presentations to HPD employees likewise describe a clear and direct connection between loss of employment opportunity at Hospira and receipt of benefits under Abbott’s pension plan. (Pl. Exs. 55-58) The documents could not be clearer that HPD employees who retired would be treated differently from other HPD employees by Hospira simply because they elected to begin receiving their benefits under Abbott’s pension and retiree medical plans. Even in the absence of written materials describing the policy, the defendants’ testimonial admissions, including the testimony relied on by Hospira in support of its motion, also constitute direct evidence that HPD employees who retired in order to collect retirement benefits would be treated differently than HPD employees who chose not to retire. *See* Pl. Ex. 59 (Weishaar Tr.) at 172-173; Pl. Ex. 60 (Denham Tr.) at 172-173; Pl. Ex. 38 (Begley Tr.) at 102; Pl. Ex. 62 (Fussell Tr.) at 182-183 (admitting Abbott did not want to be the primary insurer of retiree medical benefits).

Lastly, the Employee Benefits Agreement (Abt. Ex. 40) that embodies Hospira's assent not to hire HPD retirees is also direct proof of discrimination. That agreement, dated April 16, 2004, contained a list of HPD employees who were to be offered the opportunity to "continue" employment with Hospira as of the distribution date – *i.e.*, the spin-of date. *See Id.* at 6, ¶ Z (containing definition of "Employee"), p. 9-14 (Article 2), p. 11 (§ 2.2 and Schedule 2.2). Any "offers of employment" by Hospira, however, were subject to another provision in the agreement that expressly prohibited transferred employees from continuing to participate in Abbott's plans after their transfers. *Id.* at 11-12 (Section 2.2(b)). Thus, any HPD employees on the list who elected to retire in order to remain in the Abbott plans and begin collecting their benefits would not be hired. The provisions containing Abbott's and Hospira's two-year hiring restrictions similarly included Hospira's agreement not to hire anyone who terminated from Abbott after August 22, 2003. *Id.* at 14 (Section 2.4).

In *Lessard v. Applied Risk Mgmt.*, 307 F.3d 1020, 1025-26 (9th Cir. 2002), which this Court relied on in its ruling denying defendants' motion to dismiss, the 9th Circuit concluded that an asset sale agreement containing strikingly similar provisions that excluded employees who were on disability leave from the group of "transferred employees" constituted direct and uncontroverted proof of discrimination. *Id.* (vacating order and remanding to the district court for entry of summary judgment in favor of plaintiff on no-hire claim). This court should likewise find that the Employee Benefits Agreement, as well as defendants admissions and the documents explaining Hospira's policy, are direct evidence of discrimination.

C. Hospira fails to provide legitimate, nondiscriminatory reasons.

Even if *McDonnell Douglas* somehow applies here, Hospira has not offered a legitimate nondiscriminatory reason for refusing to hire HPD employees who retired from Abbott on or before the spin-off date. Hospira claims that the no-hire policy was intended to "ensure the newly-created company would have a stable and talented workforce with no employment gaps from the first day of its operation" (at 11); *see also Id.* at 13 (the policy was intended to ensure that Hospira would have a "talented workforce from day one").

i. Hospira's policy had nothing to do with maintaining stability.

In support, Hospira relies solely on testimony from its executives Thomas Freyman, Stephen Fussell, and Christopher Begley. The cited testimony, however, reveals nothing about why Hospira adopted a policy that prevented HPD employees who had already been informed that they would be transferred to the new company from being hired by Hospira simply because they elected to retire first from Abbott in order to receive retirement benefits under the ARP. The testimony Hospira relies on only purports to explain the two-year hiring restriction adopted by Abbott – not Hospira's restriction on hiring HPD employees who retired on or before the spin-date. The portion of Begley's testimony in which he refers to "stability," likewise, only explains the purpose for Abbott and Hospira's two-year hiring restriction preventing the subsequent movement of employees between the companies after the spin-off:

One is it was very important to make sure that Hospira had stability, the new company, NewCo, had stability and that Abbott had stability and we didn't have people moving back and forth between the two organizations.

Pl. Ex. 38 (Begley Tr.) at 102.

In fact, Hospira's policy against hiring HPD employees wishing to retire before the spin-off date could not have been expected to maintain the "stability" of either Abbott's or Hospira's workforce. Hospira's policy could do nothing to maintain Abbott's workforce, because HPD employees did not have the option to become part of Abbott's workforce, whether they retired from Abbott in order to collect their benefits or chose to work for Hospira. Abt. Ex. 28 at H001699 (informing HPD employees that beginning on August 22, 2003, they would not be able to transfer to Abbott). Nor could Hospira's policy have been expected to maintain the integrity of the HPD workforce transferring to Hospira. On the contrary, since all employees of Abbott's "core hospital products business" were expected to "become part of the new company" from the outset, *see Id.*, Hospira's policy restricting the transfer of HPD employees wishing to retire first from Abbott could only reduce the number of HPD employees who would come to the new company. Not surprisingly, therefore, the record is devoid of any documents discussing Hospira's restriction on hiring HPD employees who retired on the spin date in connection with Hospira's

assertion (at 11) that the restriction was the result of a desire to ensure that all of HPD's workforce transferred on "day one."

Finally, the "advice" from Hewitt that Hospira relies on to advance the argument that its no-hire policy had a legitimate nondiscriminatory purpose only purports to explain the purposes behind the two-year restrictions on movement of employees after the initial transfer of HPD employees. It makes no mention of any restraint on transfers of HPD employees who *retired* on the spin date. Indeed, David Kompare, the Hewitt consultant who, with Stephen Fussell, helped draft the "Guiding Principles" under which Abbott and Hospira's two-year hiring restrictions were purportedly developed, could not recall *any discussion* involving employees retiring prior to the spin and then working for the new company. Hsp. Ex. 8 (Kompare Tr.) at 61-63.¹⁰

In sum, the Court should reject Hospira's repeated attempts to juxtapose the rationale for the two-year hiring restrictions with the discriminatory reasons behind the decision by Hospira to announce and implement its policy against permitting retired HPD employees to work for the new company; the rationale is simply pretextual artifice.

ii. Hospira's policy was intended to prevent employees from receiving benefits.

In its factual summary, Hospira suggests another justification for its no-hire policy – namely, that Hospira assumed that HPD employees receiving Abbott retirement benefits would have less incentive to continue working for Hospira. This explanation is reflected not only in the testimony from Steven Fussell (at 5) (referring to incentives to make sure new employees continue on their employment), but also in Begley's blunt testimony on the issue:

[I]t wouldn't make sense to have people retire from Abbott in non-NewCo positions and then coming, looking for a job at NewCo and us hiring people who are retired who potentially would not be motivated to work and make NewCo a success.

Pl. Ex. 38 (Begley Tr.) at 102.¹¹

¹⁰Kompare only recalled discussing ways to minimize retirements creating "gaps" or "disruptions" to the new company – *i.e.*, retirement-eligible employees wishing to leave Abbott and Hospira altogether. Kompare Tr. at 61-63, 130-131.

¹¹Although Begley carefully limited his testimony to employees retiring from "non-Newco

But this explanation merely describes why Hospira believed HPD retirement-eligible employees who receive retirement benefits *should* be treated differently – it is no less discriminatory than the explanation overwhelmingly reflected in the evidence (namely, that if HPD employees retired before transferring to Hospira, the retirements would substantially increase Abbott’s pension liabilities (which was no small matter – *see* Sections C and E in the Statement of Facts, above). Finally, even if this explanation that retired employees would lack motivation and loyalty was not implicitly discriminatory, Hospira fails to offer any legitimate basis for its assumptions, other than mere conjecture or bias.¹² Furthermore, the idea that employees who had retired from Abbott would be less loyal to Hospira conflicts with CEO Begley’s own insistence, earlier in the spin process, that HPD employees be allowed to retire from Abbott before going to work for the new company. SAMF ¶¶ 30-31.

D. The Court should ignore Hospira’s belated affirmative defense.

Hospira’s final two arguments in support of its motion (at 14-15) are based on a misconstruction of plaintiffs’ claim and a confused application of pension tax qualification rules under the Internal Revenue Code. First, Hospira claims (at 14) that “plaintiffs are prevented from doing what they seek to do through this lawsuit” because Abbott decided to transfer “the HPD portion of the pension assets and liabilities to Hospira.” However, Hospira fails to explain how any decision by Abbott to transfer pension assets could possibly have eliminated the right of HPD employees to retire under Abbott’s plans on or before the date of the spin-off. Indeed, Abbott’s decision to transfer a portion of its pension plan to the Hospira’s plan after the spin-off date makes no difference to plaintiffs’ claim in Count III, because Hospira’s policy was intended specifically to interfere with plaintiffs’ right to retire under *Abbott’s plans on or before the date of Hospira’s spin-off* – not with any rights to retire under Hospira’s plans after any asset transfer

positions,” the line of questioning and discussion were clearly directed at the policy restricting movement of HPD employees, as reflected in his immediately succeeding testimony concerning his own intentions to retire and move to Hospira before the policy was implemented. Pl. Ex. 38 (Begley Tr.) at 102-103.

¹²Indeed, notwithstanding Hospira’s after-the-fact attempts to manufacture a reasonable basis for such assumptions by eliciting Mr. Kompare’s lay personal opinion at his deposition, Mr. Kompare refused to go so far as to say that such assumptions are a reasonable basis for making hiring decisions. Pl. Ex. 13 (Kompare Tr.) at 163-166.

to Hospira's plan. *See* Am. Comp. ¶¶ 70, 86; *see also* Sections C, E and F in the Statement of Facts above (discussing Abbott's wish to prevent retirements before assets were transferred).

Hospira also suggests that even if the facts are as plaintiffs allege, it should not be held liable because IRS rules concerning the tax qualification status of a pension plan purportedly prohibit an employee from retiring before a pension asset transfer, receiving benefits, and then becoming employed by the sponsor of the plan into which pension assets were transferred. Hospira apparently believes that its policy against hiring HPD employees who wished to retire before joining Hospira was either required or permitted under the Internal Revenue Code. As an initial matter, however, to the extent Hospira mistakenly believes Internal Revenue Code provisions on the transfer of pension assets preempt plaintiffs' claims, or that its no-hire policy was somehow required under the Internal Revenue Code, it failed to plead either such preemption or a compliance with the Internal Revenue Code as an affirmative defense to plaintiffs' claim. *See* Hsp. Answer to Am. Compl. Thus, it has, by now, waived any affirmative defense based on its mistaken belief, or any advice given to it, about Internal Revenue Code requirements.

Even if Hospira had timely asserted its affirmative defense, it would fail for at least two reasons. First, Hospira knew or should have known that IRS rules did not prohibit HPD employees from retiring before the spin-off in order to receive benefits under Abbott's pension then working for Hospira. Indeed, the IRS General Council Memorandum GCM 39824, 1990 WL 698027 (IRS GCM), which Hospira presents (at 14-15) as the basis for its expert's opinion that such a situation "could have adversely affected the tax-qualified status of Abbott's pension plan and the transitional plan maintained by Hospira," contemplates precisely this sequence of events. As the IRS explained in the memorandum, rules under the Internal Revenue Code prevent a tax-qualified pension plan from paying out benefits before an employee has had a "severance from employment" from the employer sponsoring the pension plan. Hsp. Ex. 40 at 2. In a situation in which the employer is substituted as sponsor, or all of the assets and liabilities of a pension plan are transferred to a plan sponsored by a new employer, the IRS General Counsel Memorandum applied the so-called "same-desk rule," which generally provided that "the new employer steps into the shoes of the old employer" and no severance of employment has

occurred. *Id.* at 5. However, the IRS took pains to distinguish situations in which only part of the assets of a pension plan were transferred to the plan of a new employer:

However, in some cases, there may be a transfer of assets and liabilities to a plan of the new employer that are attributable to the benefits of only some of the former employer's employees who become employed by the new employer. . . .
For those employees with respect to whom the assets or liabilities attributable to their benefits were not transferred to a plan of the new employer, the new employer is not treated as maintaining the plan of the former employer.

Id. (emphasis added). The IRS General Council Memorandum made clear that the IRS had no intention of applying the “same desk rule” to employees whose pension assets and liabilities did not follow them to a new plan sponsored by a new employer, even if the pension assets and liabilities of other employees were transferred to the new plan. *Id.* at 5-6. Here, Abbott and Hospira agreed that the pension assets and liabilities of employees who retired as of the spin-off date would remain in Abbott's pension plan. *See* Abt. Ex. 40 (Employee Benefits Agreement) at 9, 15 (§§ 2.1, 4.1). Thus, by the time Hospira incorporated its no-hire policy into the Employee Benefits Agreement, the company knew or should have known that the IRS would not apply the “same desk rule” to retiring HPD employees who received pension benefits under Abbott's pension plan.¹³ The decision by the 9th Circuit in *Rowe v. Allied Chemical Hourly Employees' Pension Plan*, 915 F.2d 266 (9th Cir. 1990) is not to the contrary. Indeed, the 9th Circuit recognized that employees who had attained eligibility to begin receiving pension benefits prior to the sale of their plant “could have retired from [their former employer] and then sought employment with [their new employer].” *Id.* at 269.

Second, even if Hospira mistakenly understood that hiring retired HPD employees would result in a violation of the same desk rule, the company could not have reasonably believed that the Internal Revenue Code required it to violate ERISA by announcing a policy of refusing to

¹³The suggestion by Hospira and its expert that the IRS would apply the same-desk rule to retired HPD employees joining Hospira simply because the benefits of other employees were transferred to Hospira's plan is belied by the IRS discussion of the treatment of “those employees” whose benefits were not transferred to the new employer's plan, and flies in the face of the rule of thumb that the IRS applies the same desk rule on a person-by-person basis. *See* “Nor Rhyme Nor Reason: Simplifying Defined Contribution Plans,” 49 BUFFALO L. REV. 741, 825 (2001) (“[I]n the case of a pension plan, General Counsel, Memorandum 39,824 applies the no transfer rule on a person by person basis”).

hire the retired employees. Plaintiffs are aware of no IRS ruling, regulation, or memorandum that instructs employers to refuse to hire, or to terminate, employees in order to avoid or correct a “same desk rule” violation. If it truly believed the same desk rule were implicated, Hospira easily could have chosen to avoid any violation by simply excluding retired HPD employees from participation in the Hospira transition plan. There is no evidence that Hospira seriously considered this or any other alternative. Hospira may believe it should not be liable because “Abbott conceived of and implemented the no-hire restriction . . . and [] Hospira acquiesced to its implementation” (at 10), but Hospira cannot avoid liability by complaining that it allowed itself to be cajoled by Abbott or Abbott’s consultants into adopting illegal policies intended solely to minimize Abbott’s benefit costs. The evidence shows otherwise: the Court should view Hospira’s conduct as “too clever by half.” Indeed, as Judge Kozinski explained in his concurrence in *Lessard*:

The lawyers who papered this transaction should have advised against it, and the clients should have heeded the warning. One hopes, perhaps in vain, that future lawyers and clients will know better.

Lessard, 307 F.3d at 1028.

IV. ABBOTT IS NOT ENTITLED TO SUMMARY JUDGMENT ON COUNT IV.

Abbott lastly seeks (at 19-25) for summary judgment on plaintiffs’ claim for breach of fiduciary duty, which is based on Abbott’s concealment of the decisions that it made in the fall of 2003 to freeze the pension plan and eliminate retiree medical benefits for the HPD employees. Abbott’s arguments as to Count IV run afoul of the Court’s instruction that the parties avoid “plowing old ground” on summary judgment (Tr. April 4, 2007, pp. 5-6). Abbott repeats arguments here that it raised unsuccessfully on two other occasions – first in its Motion to Dismiss Count IV, and again in its opposition to Plaintiffs’ Motion for Class Certification as to Count IV – and they have not grown more persuasive with the passage of time.

As this Court has noted “[t]he Seventh Circuit has repeatedly described the elements of such a claim as (1) defendants are plan fiduciaries; (2) defendants breached their fiduciary duty; and (3) the breach caused harm to the plaintiff. *Kamler v. H/N Telecommunication Services*, 305 F.3d 672, 681 (7th Cir. 2002); *Brosted v. Unum Life Insurance Co. of America*, 421 F.3d 459, 465

(7th Cir. 2005).” Mem. Op., April 3, 2007, p. 4. As shown, plaintiffs have presented triable facts establishing each element of their claim.

A. Abbott had a fiduciary duty to inform the HPD employees of the decisions it made regarding their retirement benefits.

Abbott first denies that it had any fiduciary duty to its employees with respect to the class members’ future benefits, asserting that Hospira made its own benefits decisions after the spin date, and, as a result, Abbott had no duty to disclose any information to HPD employees. But Abbott’s position is belied by clear evidence that:

- Abbott was in control of all decisions regarding the spin prior to the spin date. SAMF ¶¶ 1.
- Abbott and Hewitt’s analysis of whether and how to spin the HPD employees’ pension plan assets and liabilities, conducted in the summer and fall of 2003, made it clear that Hospira could not afford to clone Abbott’s defined benefits pension plan nor provide its own retiree medical benefits. SAMF ¶¶ 37, 41-42, 47-50.
- It was Abbott – not Hospira – that made the decision to freeze the pension plan as of December 31, 2004 and eliminate retiree medical benefits at Hospira. SAMF ¶¶ 45-46, 5-, 66-70.
- Abbott thus knew prior to the spin date that the HPD employees would not have a pension plan or retiree medical benefits at Hospira, and, in fact, the spin-off of HPD was premised on these assumptions. *Id.*; *see also* SAMF ¶¶ 47-50.
- Knowing that the Abbott executives slated to run the new company would not have a pension plan or retiree medical coverage at Hospira, Abbott calculated the value of these lost benefits, and then reimbursed them. SAMF ¶¶ 75-78.
- Instead of informing the HPD employees about the freeze of their retirement benefits, Abbott concealed the truth and stated, repeatedly and untruthfully, that Hospira would be making its own benefits decisions after the spin date. SAMF ¶¶ 71, 74.

Abbott was therefore acting as a plan fiduciary under ERISA (that is, 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 freeze of the plaintiffs’ 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). Indeed, our Circuit has just reiterated its longstanding position that fiduciary duties under ERISA are to be construed liberally: “The 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*, – F.3d –, No. 06-3752, 2007 WL 1598097 (7th Cir. June 5, 2007).

Issues of material fact remain to be tried regarding whether Abbott knew Hospira would freeze the retirement benefits: Abbott’s own documents explicitly state that it was in control of all decisions regarding the spin (SAMF ¶ 1), so any decisions made before the spin date fall squarely on Abbott’s shoulders. This means that the entire sequence of events – from Abbott’s decision to spin HPD into a new company (SAMF ¶ 19), to its decision to create a transitional pension plan to secure a docile and ready-made workforce for Hospira, (SAMF ¶ 25), to its decision transfer the HPD employees’ pension assets and liabilities to the new company (SAMF ¶¶ 35-39), to its decision to freeze the pension plan as of December 31, 2004 and eliminate retiree medical benefits (SAMF ¶¶ 45-46, 50, 66-70) – was orchestrated by Abbott and implemented by Hospira executives who were employed and controlled by Abbott when the decisions were made. Abbott was a fiduciary when it misled the class about what their benefits would be at the new company that it created. *Anweiler*, 3 F.3d at 991.

In fact, this Court has already stated that the class can establish a breach of fiduciary duty in this case if it presents evidence that Abbott told the class members that benefits decisions had not been made when, in fact, they had. Mem. Op., Aug. 14, 2006, p. 5 (“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”). A triable issue of material fact exists whether Abbott had already made the decisions before the spin date, and whether Abbott concealed them from the class members.

Abbott attempts to distinguish this situation from the one in *Commonwealth Edison v. Beach*, 382 F.3d 656 (7th Cir. 2004) (where the Seventh Circuit recognized *Varity’s* holding that if two plans are in existence, the fiduciary must give “candid and complete information” on both) by disavowing any responsibility for the decisions about the HPD employees’ retirement

benefits.” *Id.* at 659. Abbott (at 8) cites deposition testimony of its own executives, who claimed that only Hospira itself could decide to freeze the pension plan and end retiree medical coverage after a vote by its Board of Directors. But the testimony of Abbott’s agents cannot outweigh the trove of documents that, one after another, show that the decision to cut benefits was made very early on – long before the spin date, and long before the company called Hospira came into existence – by Abbott itself.

Abbott then argues (at pp. 20-21) that *Beach* is also inapposite because the changes at issue in this case relate to a new plan, rather than amendments to an old plan, and that the establishment of a new plan is a settlor, not a fiduciary, function. But the *Beach* court left open the question of whether disclosure was required in the case of a new plan, finding that *Varity Corp. v. Howe*, 516 U.S. 498 (1996) already requires disclosure when an employer encourages employees to leave one plan for another. *Beach*, 382 F.3d at 659. Under *Varity*, Abbott’s fiduciary duty of disclosure is triggered by the existence of both the ARP – its own plan that covered the class members until the spin date – and its subsequent creation and founding of the Abbott-Hospira Transitional Annuity Retirement Plan (“Transitional Plan”). The Seventh Circuit 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.” *Beach*, 382 F.3d at 659.¹⁴

Here, Abbott’s own documents show that Abbott created the Transitional Plan in order to convince employees to leave Abbott and go to work for the new company, thereby ending their participation in Abbott’s existing ARP, where they would have remained if they had retired or pursued other employment opportunities. For example, the July, 2003 document entitled “HR Guiding Principles,” the blueprint for the transaction, acknowledged early on that Abbott knew that benefits would weigh heavily on the HPD employees’ minds and that the creation of a

¹⁴Abbott argues (at 22) that *Varity* is different because the plaintiffs there had a choice regarding whether to give up their benefits at the old company for those at the new subsidiary, while here, Abbott left the class members no choice. But *Varity*’s outcome did not turn on the whether the plaintiffs had a voluntary choice; rather, it turned on the proof of misrepresentation itself. *Id.* at 505 (“[I]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA”). And, in any event, the HPD employees were misled into both giving up their right to make an informed choice, just as the court found in *Varity, Id.*, and in losing their right to participate in Abbott’s

transitional period would “allow[s] employees to focus primarily on the business instead of their pocketbooks.” The class members here were faced with a blind choice between (a) going to Hospira and (b) retiring from Abbott (if retirement-eligible) or leaving Abbott and remaining plan participants in Abbott’s ARP. But they were denied the information they needed to make an informed decision, because Abbott concealed the crucial fact that early on in the spin-off process, everyone involved in the deal knew that the only way Hospira could afford the Transitional Plan was to freeze it on 12/31/034. SAMF ¶¶ 45-46, 50, 66-70.

Just as in *Varity*, Abbott’s role as a fiduciary in the ARP and in the creation and funding of the Transitional Plan necessitated that Abbott disclose the decision to freeze the pension plan and eliminate retiree medical benefits, both of which were made while the ARP and the Transitional Plan were in place. Abbott’s failure to do so constitutes the same type of deception that the *Varity* Court found violated ERISA-imposed fiduciary obligations (recall that, like here, *Varity* was also a divestiture in which the parent company was in complete control of the benefits decisions in question). *Id.* at 505. Such schemes are at odds with the duty of loyalty that the Supreme Court held is required of fiduciaries: “[t]o participate knowingly and significantly in deceiving a plan’s beneficiaries in order to save the employer money at the beneficiaries’ expense is not to act ‘solely in the interest of the participants and beneficiaries.’” *Varity*, 516 U.S. at 490.

The other cases cited by Abbott at pp. 21-22 are unavailing, because they uniformly address situations where the benefits decision at issue was made by a *different* entity than the one being sued for breach of fiduciary duty. Abbott first cites Judge Conlon’s decision in *Ames v. American National Can Co.*, 1997 WL 733893, No. 96 C 8276 (N.D.Ill., Nov. 7, 1997), arguing that it, like the defendant in *Ames*, had no duty to inform the plan participants about the terms of a successor’s benefits. But Abbott fails to note that the Seventh Circuit, reviewing the district court’s decision, held that an employer who knows, but withholds, a material fact about benefits is liable for breach of fiduciary duty:

In [*Varity*, the] representatives had *affirmatively misled employees* into believing that a transfer to a new company would have no effect on their benefits. *Varity* *knew at the time* that the new entity was likely to be a loser. Critically, the district court found as a fact that the employer’s representatives were acting in their

ARP, where they would have remained if they retired or pursued other employment opportunities.

capacity as fiduciaries when they falsely assured the employees that their benefits would not be threatened by the transfer. [Citations omitted.] Under those circumstances, the Supreme Court found that Varity's conduct was governed by ERISA, and that it violated ERISA.

Ames v. American National Can Co., 170 F.3d 751, 757-758 (7th Cir. 1999) (emphasis added). The Seventh Circuit found it significant that, in contrast to *Varity* (where the parent company was responsible for the benefits decisions being miscommunicated), the *Ames* record contained “not a shred of evidence that Silgan would not be able to provide its own benefits to the employees . . . who made the switch.” *Id.* at 758. Contrast that scenario with the evidence here: Abbott was in charge at all times. SAMF ¶ 1. It knew in advance that the new company would be weak – that it would begin its corporate life in “turn-around survival mode,” as future CEO Christopher Begley put it (Pl. Ex. 15 (Preece Tr.) at 125-126) – and that the pension plan would be frozen and retiree medical benefits eliminated. SAMF ¶ 42. Yet, instead of timely disclosing the information, Abbott withheld the truth and pacified the employees with the falsehood that Hospira would consider all the options and decide on retirement benefits later. SAMF ¶ 71.¹⁵

Abbott then attempts to analogize its actions to the employer's in the unpublished opinion *Adams v. Lockheed Martin*, No. 04-6204, 2006 WL 2430047 (6th Cir. Aug. 21, 2006). But in *Adams*, as in *Ames*, the court found that the parent company was merely “parroting” information about benefits that new company had provided to it. *Id.* at *3. The *Adams* court found that unlike the situation *Varity*, the defendant had no control over the new company's benefits and thus was not exercising a fiduciary duty when describing those benefits to the plaintiffs. *Id.* The plaintiffs here have already shown that as in *Varity*, Abbott made the decisions and therefore had the duty to disclose the information.¹⁶

¹⁵The evidence here fits squarely with *Varity* as the Seventh Circuit described it in the *Ames* decision. Abbott's concealment of the truth removes this case from the realm of *Ames* and the other divestiture cases cited by Abbott (*Coleman v. General Electric Co.*, 643 F.Supp. 1229 (E.D. Tenn. 1986) and *Plummer v. Consolidated City of Indianapolis, Marion Co., In.*, 2004 WL 2278740 (S.D. Ind. Aug. 17, 2004)) where benefits at the new company were already set by a third party or were truly the result of an arms-length negotiation where the decisions were out of the hands of the original company.

¹⁶For example, a series of documents from Hewitt consultants tasked with designing Hospira's employee benefits plans clearly indicate that their marching orders as early as September 2003 were that the pension would be frozen and retiree medical eliminated. See Pl. Ex. 64 at A017077 (September 23,

B. The class members were harmed by the omissions and misrepresentations.

Abbott also revisits the argument, previously rejected by the Court, that even if plaintiffs can show that it misled its employees, they have failed to establish the “detrimental reliance” and so cannot support their claim for breach of fiduciary duty under ERISA (pp. 23-25). *See* Mem. Op., April 3, 2007, p. 4 (explaining that a claim for breach of fiduciary duty under ERISA in our circuit consists of evidence that a breach occurred that caused harm to the plaintiffs).¹⁷

Contrary to Abbott’s contention, plaintiffs have presented extensive evidence that Abbott’s breach caused them harm, as required in our Circuit. *See Kamler* 305 F.3d at 681. First, as the Court has noted before, “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.” Mem. Op., April 3, 2007, p. 5 fn 1. For example, if the class members had known the truth about their future benefits, they could have complained to Abbott and demanded appropriate benefits in exchange for their agreement to become the new company’s ready-made, pre-trained workforce. After all, the Abbott executives slated to run the new company were reimbursed by Abbott for the value of their lost benefits. SAMF ¶¶ 75-78. Had class members known that their pension plan was to be frozen and retiree medical benefits were to be eliminated, they could have demanded similar accommodations.

Instead, the class members were lulled into inactivity by the constant refrain that nothing had yet been decided and that Hospira would consider all the options and decide on appropriate benefits after the spin date. SAMF ¶ 71. As the Court held when it granted class certification of Count IV, the loss of this right to protest and make further inquiry is an actionable harm. *See also Hensley v. P.H. Glatfelter Co.*, No. 1:04-CV-200, 2005 WL 3158033 (W.D.N.C. November 28, 2005) (in denying defendant’s motion for summary judgment, the court found that harm had been

2003 email stating “we understand that your objective is to get out of the DB pension business”); Pl. Ex. 65 at X003932 (November 14, 2003 email stating “Frank asked that we assume that NewCo will not provide any retiree medical. The liability for these employees will decrease to \$0 as of 4/1/2004); Pl. Ex. 66 at X003937 (November 17, 2003 email stating “when we discussed this previously with Abbott, we were thinking . . . there would just be a curtailment as of the time of the spinoff. NewCo would never take on any of the liability [for OPEB]”).

¹⁷Abbott’s petition for leave to appeal this Court’s decision certifying Count IV on the same grounds was denied by the Seventh Circuit.

done to the plaintiffs, in that the omissions “deprived the plaintiffs of the opportunity to make further inquiry regarding the possible effects this relationship could have had on their benefits. Further, a reasonable jury could determine that plaintiffs relied on this omission or misrepresentation to their detriment, for they had no way of knowing further inquiry was necessary.” *Id.* at *5).

And such a loss goes beyond any mere speculation, because, as seen above, Abbott and future Hospira executives were actively negotiating these issues throughout the course of planning the spin. The documents are full of evidence that the HPD employees, desperate for information about their future retirement benefits at the new company, peppered Abbott management with questions in the months leading up to the spin. SAMF ¶ 74. Plaintiff Jane Roller, unaware that the crucial decisions had already been made, sought to meet with future Hospira CEO Chris Begley to help negotiate the new company’s retirement benefits. SAMF ¶ 82. Grice Williams, a divisional Vice President of Benefits at Abbott, testified that he tried to be as vague as possible in his responses. SAMF ¶ 84. At any point along the way, had they been informed, the class members and future Hospira workforce could have participated in the decision-making process regarding the termination of benefits, or the two-year no-hire policy, or the elimination of bridging rights. And, of course, all class members lacked accurate information upon which to base their decisions to seek alternative employment with better benefits.

Furthermore, those who were retirement-eligible at the time of the spin, like plaintiff Mike Loughery, needed accurate information about their future retirement benefits in order to make an informed decision regarding whether to retire from Abbott and take their retiree medical benefits at the 2003 contribution rate, or go to Hospira and lose the chance to lock in the lower rate (which will ultimately cost those who went to Hospira thousands of dollars per year in higher premiums). SAMF ¶¶ 73, 79. Similarly, those who were retirement-eligible also lost the chance to make an informed decision regarding the valuable option of returning to Abbott and bridging back into the pension plan after the two-year freeze period expired. Those who went to Hospira

and seek to return to Abbott now will be treated as new hires and will not be allowed to bridge back into the Abbott plan. SAMF ¶¶ 54.¹⁸

CONCLUSION

Major factual issues remain in dispute, including, but not limited to, the following:

- Timing of the spin decision: plaintiffs have shown that the decision to spin-off HPD was made only after Abbott fully analyzed the cost savings from eliminating benefits during the spin-off. Abbott contends that the cost of benefits played no role whatsoever in the spin, even going so far as to stake out the untenable position that the cost of benefits was “irrelevant” (at 6) and was “never once analyzed” (at 4).
- ERISA characteristics of the HPD employees: plaintiffs have shown that Abbott knew that HPD employees were, on average, closer to reaching eligibility for early retirement benefits than Abbott as a whole, and that they were one of the three divisions with the oldest employees with the longest service. Abbott denies that HPD had any special ERISA-related characteristics.
- Decision-making process: plaintiffs have shown that the same decision-makers were responsible both for reducing and eliminating benefit costs at Abbott company-wide and for designing and implementing the spin-off. Abbott, by contrast, contends that the decision to spin off HPD involved only two “top officials” who, in self-serving testimony that defies logic, claim that they gave absolutely no consideration to the cost of benefits.
- No-hire policy: plaintiffs have shown that Abbott’s decision to permit HPD employees to return only after two years as “new hires” was a departure from its normal personnel procedures and was intended to eliminate plaintiffs’ bridging rights under Abbott’s pension plan. Abbott and Hospira ignore the foundation of Counts II and III by focusing only on the two-year no-hire policy without explaining the anti-bridging provision, and they fail to rebut plaintiffs’ evidence or support their pretext arguments.
- Concealment of Abbott’s decision to cut benefits: plaintiffs have shown that it was Abbott – not Hospira – that made the decision to freeze the pension plan as of December 31, 2004 and eliminate retiree medical benefits for future Hospira

¹⁸Abbott also argues (at 23-24) that the Court incorrectly adopted a “presumption of reliance,” noting that in its opinion granting plaintiffs’ motion for class certification on Count IV, the Court noted that reliance on undisclosed information can be presumed in securities cases. Abbott then states that it can rebut any such presumption, and, without presenting a shred of evidence, goes on to make the extraordinary claim (at 24) that plaintiffs “did nothing.” This assertion is both baseless and wrong; plaintiffs all testified at their depositions that they would have variously searched for alternative employment, bargained for better benefits, and/or taken early retirement. SAMF ¶¶ 79-83. In fact, plaintiffs took the appropriate action available to them after the spin – they filed this case seeking the relief that they are entitled to under ERISA.

employees prior to the spin date, and that Abbott affirmatively concealed the truth and stated repeatedly and untruthfully, that Hospira would make its own benefits decisions after the spin date. Abbott claims, in spite of the multitudes of emails and reports showing otherwise, that all decisions were made by Hospira after the spin date.

Because these and other disputed material facts abound, defendants' motions for summary judgment should be denied, and this matter should proceed to trial.

Dated: June 27, 2007

Respectfully submitted,

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Certificate of Service

I, the undersigned, certify that on June 27, 2007, I had the following document filed electronically with the Clerk of the Court for the United States District Court for the Northern District of Illinois through ECF: **Plaintiffs' Response to Defendants' Motions for Summary Judgment**. ECF will send an e-notice on the following parties:

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