

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

ANNABELLE THOMPSON, MARC BASIST,
DENNIS KOEN, PAUL SULLIVAN, and
ROBERT DONAGHUE, individually
and on behalf of those similarly situated,

Civil Action No.

Plaintiffs,

v.

LINVATEC CORPORATION, CONMED
CORPORATION, and CONMED
CORPORATION SEVERANCE PLAN,

**CLASS ACTION
COMPLAINT**

Defendants.

SUMMARY OF THE COMPLAINT

1. This is an ERISA claim for severance benefits, breach of fiduciary duty and violation of ERISA summary plan description requirements arising out of a company's scheme to dodge a promise it made to pay severance benefits to involuntarily terminated employees. In 1997 the defendant ConMed bought a surgical instrument manufacturer called Linvatec from Bristol-Meyers Squibb. Between 1997 and 2003, ConMed laid off and paid severance benefits due under the terms of a severance plan to a small number of Linvatec sales force employees. For others, however, including the plaintiffs, ConMed refused to pay the benefits. As its principal excuse, it offered the laid off employees an essentially illusory new employment opportunity "working" as sales representatives for newly created companies it controlled; the "jobs", however, didn't pay a salary, included no

binding commission rates, no benefits, no sales territory, and required the laid off employees to invest their own money in inventory. When the plaintiffs and others refused to take these empty offers, ConMed refused to pay them severance. The plaintiffs bring this lawsuit on behalf of the class of employees who were denied the severance benefits; they seek severance benefits, an injunction, interest, costs and attorneys' fees.

JURISDICTION, VENUE, AND SERVICE OF PROCESS

2. Plaintiffs invoke the jurisdiction of this Court pursuant to the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001, et seq.

3. Venue in this Court is proper under ERISA Section 502(e)(2), 29 U.S.C. §1132(e)(2), in that defendants may be found in this District and much of the activity associated with breach took place in this District where ConMed has its headquarters.

4. Service of process is authorized in any other district where a defendant resides or may be found. ERISA Section 502(e)(2), 29 U.S.C. §1132(e)(2).

THE PARTIES

Plaintiffs.

5. Plaintiff Annabelle Thompson is a resident of the State of Idaho. She is a former employee and sales representative of Linvatec Corporation and at all relevant times was a participant in the ConMed Corporation Severance Plan as the term "participant" is defined in ERISA Section 3(7), 29 U.S.C. §1002(7).

6. Plaintiff Marc Basist is a resident of the State of Pennsylvania. He is a former employee and sales representative of Linvatec Corporation and at all relevant times was a participant in the ConMed Corporation Severance Plan as the term "participant" is defined in ERISA Section 3(7), 29 U.S.C. §1002(7).

7. Plaintiff Dennis Koen is a resident of the State of Mississippi. He is a former employee and sales representative of Linvatec Corporation and at all relevant times was a participant in the ConMed Corporation Severance Plan as the term "participant" is defined in ERISA Section 3(7), 29 U.S.C. §1002(7).

8. Plaintiff Paul Sullivan is a resident of the Commonwealth of Virginia. He is a former employee and sales representative of Linvatec Corporation and at all relevant times was a participant in the ConMed Corporation Severance Plan as the term "participant" is defined in ERISA Section 3(7), 29 U.S.C. §1002(7).

9. Plaintiff Robert Donaghue is a resident of the State of Maryland. He is a former employee and sales representative of Linvatec Corporation and at all

relevant times was a participant in the ConMed Corporation Severance Plan as the term "participant" is defined in ERISA Section 3(7), 29 U.S.C. §1002(7).

Defendants.

10. Defendant Linvatec Corporation is a Florida corporation which employs more than 900 people. Its headquarters is in Largo, Florida. Linvatec Corporation has been a subsidiary of ConMed Corporation since approximately December 31, 1997. Prior to that time, Linvatec Corporation was a subsidiary of Bristol-Myers Squibb Company. At all relevant times, Linvatec has been an employer within the meaning of 29 USCS §1002(5), a "plan administrator" as defined in Section 3(16)(A) of ERISA, 29 U.S.C. §1002(16)(A), and a fiduciary within the meaning of Section 3(21)(A) of ERISA, 29 USCS § 1002(21)(A).

11. Defendant ConMed Corporation is a New York Corporation with headquarters in Utica, New York. At all relevant times, ConMed was an employer within the meaning of 29 USCS §1002(5), a "plan sponsor" of the ConMed Corporation Severance Plan as defined in Section 3(16)(B) of ERISA, 29 U.S.C. §1002(16)(B), a "plan administrator" as defined in Section 3(16)(A) of ERISA, 29 U.S.C. §1002(16)(A), and a fiduciary within the meaning of Section 3(21)(A) of ERISA, 29 USCS § 1002(21)(A).

12. Defendant ConMed Corporation Severance Plan is an employee benefit plan as defined in Section 3(3) of ERISA, 29 U.S.C. §1002(3), and an “employee welfare benefit plan” as defined in Section 3(1), 29 U.S.C. §1002(1).

CLASS ACTION ALLEGATIONS

13. The plaintiffs bring this action as a class action in accordance with Federal Rule of Civil Procedure 23 to resolve disputes under the Employee Retirement Income Security Act of 1974. Judicial economy dictates that the issues be resolved in a single action.

14. The proposed class is defined as any and all persons who are:

former Linvatec sales representatives whose employment with Linvatec was involuntarily terminated in 2003 and who did not receive severance benefits from the defendants.

15. The proposed class covers all Linvatec employees who were participants in the defendant severance plans and who have been harmed by the ERISA breaches set forth below.

16. On information and belief the proposed class covers approximately 90 individuals. The class is so numerous that joinder of all members is impracticable.

17. There are common questions of law and fact affecting the rights of the members of the class. The claims of the named class representatives are typical of the claims of the class. The named representatives will fairly and adequately protect the interests of the class.

18. This action is maintainable as a class action under Rule 23(b)(1) because the prosecution of separate actions by individual members of the class would create the risk of inconsistent or varying adjudications or adjudications which might substantially impair or impede individual members of the class's ability to protect their interests.

19. This action is maintainable as a class action under Rule 23(b)(2) because defendants have acted and/or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and other equitable relief in favor of the class.

STATEMENT OF FACTS

20. Linvatec Corporation manufactures and markets surgical instruments used in general surgery, otolaryngology (ear, nose and throat) surgeries, OB-Gyn endoscopic surgeries, and orthopedicorthopedicorthopedic arthroscopic surgeries, such as reconstruction of the knee, shoulder, wrist and ankle. Linvatec markets its products throughout the U.S. and around the world.

21. Bristol-Myers Squibb Company bought Linvatec Corporation, which was then known as "Concept, Inc.", in 1989. The company name was changed to Linvatec in approximately 1991.

22. On December 31, 1997, a New York-based company called ConMed Corporation purchased Linvatec from Bristol-Myers Squibb.

23. Approximately 876 employees continued to work for Linvatec after it was acquired by ConMed. Plaintiffs Thompson, Basist, Koen, Donaghue and Sullivan worked for Linvatec before the December 31, 1997 acquisition and continued until March 31, 2003.

24. At the time ConMed acquired Linvatec in 1997, Linvatec marketed its products through an internal sales division which comprised approximately 160 employees, including plaintiffs.

25. At all times relevant hereto, ConMed maintained for its employees, including the plaintiffs an employee welfare benefit plan to pay severance benefits to certain involuntarily terminated employees known as the ConMed Corporation Severance Plan (the "Severance Plan"). Under the terms of the plan, benefits are not paid following the sale of the corporation's business assets if an otherwise eligible employee is offered employment by the acquirer of such assets. The company, however, failed to give covered Linvatec employees summary plan descriptions of the Severance Plan benefits when ConMed bought Linvatec.

26. In early 2000, Linvatec began laying off employees in its sales division, terminating at least 37 employees. According to Linvatec's records, in 2000, at least 31 members of the Linvatec sales division received Severance Plan benefits. According to ConMed's Year 2000 Annual Report to Stockholders and in its disclosures filed with the U.S. Securities and Exchange Commission,

approximately \$1.5 million was disbursed in severance benefits to Linvatec's terminated sales representatives in 2000.

27. Linvatec continued laying off members of its sales division in 2001, terminating at least three sales employees. At least one of these individuals received Severance Plan benefits.

28. Linvatec continued laying off members of its sales division in 2002, terminating at least four employees. All four of these sales force employees received Severance Plan Benefits.

29. In 2003, Linvatec implemented the final segment of its plan to outsource the remaining members of its sales division in a company layoff effective March 31, 2003. As many as 90 sales force members were laid off on that date. According to Linvatec's records, just two members of the sales division received Severance Plan benefits when they were laid off on March 31, 2003: Randall Hawks and Steven Jones.

30. To carry out the 2003 layoff Linvatec gathered the company's nationwide sales force in St. Petersburg, Florida for a training session, and while the sales team was there from around the country, it announced on the second day of training that their employment with Linvatec would be terminated within two weeks.

31. Linvatec Vice President of Sales Michael O'Grady told the plaintiffs and the rest of the sales force they were being terminated. Linvatec gave each sales force member a termination letter which also said that a "new Manufacturer's Representative" would be taking over for them and the other members of the sales force. They were then introduced to one of their own co-workers and told the co-worker was also being laid off but would be the company's "new Manufacturer's Representative".

32. At the same time, this laid-off colleague/"Manufacturer's Representative" handed each sales force member a proposed contract Linvatec prepared between the sales representative being laid off and the new Manufacturer's Representative. While it purported to be a job offer as an independent contractor/sales representative, the contract was essentially illusory: the "job" didn't pay a salary, included no binding commission rates, no benefits, no sales territory, and required the laid off employees to invest their own money in inventory. Nonetheless, the colleague urged the plaintiffs and, upon information and belief, each of the other sales representatives to accept or reject the contract on the spot.

33. When the plaintiffs declined to work for their colleagues' new ventures, and asked O'Grady and other corporate officials for severance benefits

they were told they weren't eligible for severance because they had received immediate job offers.

34. The plaintiffs have exhausted any available administrative remedies for their claims or are excused from doing so.

COUNT ONE: Section 502 (a)(1)(B) of ERISA: Claim for Benefits.

35. Because there was no sale of business assets that preceded the plaintiffs' layoffs and because the job offers were illusory, the plaintiffs are due severance benefits under the terms of the Severance Plan.

36. Accordingly, plaintiffs are entitled to benefits under ERISA §502 (a)(1)(B).

COUNT TWO: Section 404 of ERISA: Breach of Fiduciary Duty.

37. The defendants Linvatec and ConMed breached their ERISA §404 fiduciary duties by falsely denying benefits under the sale of business assets exception and by offering illusory job offers to the plaintiffs so as to wrongfully deprive them of severance benefits under the terms of the Severance Plan.

38. Accordingly, the plaintiffs are entitled to appropriate equitable relief under ERISA §502 (a)(3) and/or additional benefits under ERISA §502 (a)(1)(B).

COUNT THREE: Violation of ERISA §102: Failure to Provide an Adequate Summary Plan Description (SPD).

39. ConMed and Linvatec likely prejudiced the plaintiffs by failing to provide Linvatec employees a summary plan description of the Severance Plan in

violation of the requirements for SPDs set forth in ERISA §102 and its implementing regulations found in 29 C.F.R. 2520.102.

40. Accordingly, the plaintiffs are entitled to appropriate equitable relief under ERISA §502 (a)(3) and/or additional benefits under ERISA §502 (a)(1)(B).

Prayer for Relief.

WHEREFORE, the Plaintiff prays that this Court for:

1. Benefits due under the terms of the Severance Plan.
2. Appropriate equitable relief in the form of an injunction ordering ConMed and/or Linvatec to change the Severance Plan records to show the plaintiffs were entitled to Severance Plan benefits.
3. Other further appropriate equitable and legal relief.
4. Attorney's fees pursuant to ERISA §502 (g);
5. Interest;
6. Costs;
7. Such other relief as the Court deems appropriate.

Respectfully submitted,
THE PLAINTIFFS

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