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INTRODUCTION

With one titanic heave on April 30, 2004, Abbott Laboratories (“Abbott”) dumped a group of approximately 14,000 employees it had identified as “senior.” Those employees comprised the Hospital Products Division (“HPD”), and Abbott’s top managers had singled them out because between sixty to seventy percent of them were over age 40. Abbott knew that every day, those older employees drew nearer to redeeming the rich pension and retiree medical benefits it had long promised them.

So, rather than make good on its promise – a promise worth hundreds of millions of dollars – Abbott implemented a standardized program that allowed it to renege. The program targeted Abbott’s oldest group of employees and caused (1) the systematic termination of their employment and participation in its benefit plans; (2) formation of a new company called Hospira, Inc. (“Hospira”) that offered them employment with less generous, temporary benefits; and (3) enforcement of a reciprocal no-hire policy that abrogated their pension bridging rights. In hindsight, Abbott’s actions telegraphed Hospira’s. In less than a year, Hospira froze the benefits plan and decided to discontinue future accruals, thus completing Abbott’s program to void its benefits promise.

Plaintiffs now move under Federal Rule of Civil Procedure 23 (“Rule 23”) to maintain this action as a class action because it involves thousands of individuals who share common legal and factual questions. Plaintiffs allege that Abbott, with active and knowing assistance from Hospira, implemented a unitary program to extinguish their pension and retiree medical benefits in violation of § 510 of ERISA. Defendants have answered plaintiffs’ allegations with undifferentiated denials. Evidence of the parties’ common claims and defenses is the same for each plaintiff and proposed class member, as is the relief to which they are entitled. This action, thus, is a paradigm of a certifiable class action.

In short, Abbott’s mass termination program had a single purpose with an identical effect on thousands of individuals. For that reason (and others fully explained in this Memorandum), plaintiffs propose a class comprised of approximately 10,000 former HPD employees living in the United States who were unlawfully terminated by Abbott.

STATEMENT OF RELEVANT FACTS

A. The Parties

Plaintiffs Myla Nauman, Jane Roller, and Michael Loughery were long-term Abbott employees assigned to the HPD. At the time Abbott terminated them, they were all participants in Abbott's benefit plans, within the meaning of 29 U.S.C. §§ 1002(7) and (8). They all were over age forty. (Exs. 1A, 1B, & 1C, ¶ 2.)¹ They all suffered a loss of benefits due to their termination. And they all seek reinstatement to Abbott employment at the appropriate benefits level.

Abbott is a drug-manufacturer doing business throughout the United States. It is plan sponsor and administrator, within the meaning of 29 U.S.C. §§ 1002(16)(A) & (B), of several employee benefit plans, including the Pension Plan and the Retiree Health Plan ("the Abbott Benefit Plans"). (Ex. 2, at pp. 8 & 9.) (See Exs. 3A & B.) These Abbott Benefit Plans are employee benefits plans within the meaning of 29 U.S.C. § 1002(3).

Hospira is a hospital-products manufacturer doing business throughout the United States. (Ex. 4, at p. 9.) It is plan sponsor and administrator, within the meaning of 29 U.S.C. §§ 1002(16)(A) & (B), of several employee benefit plans, including the Abbott/Hospira Transitional Annuity Retirement Plan ("Transitional Plan"). (See Ex. 5.)

B. The Mass Termination

In 2001 and 2002, Abbott enjoyed a reputation of offering superior pension and health benefits. (Exs. 6A & 6B.) But, in June 2003, Abbott forecast the cost of maintaining superior benefits in the United States would rise to \$574 million by 2007. Abbott accompanied its forecast with two benefit reductions. It increased the contribution its retirees were making toward the cost of their health coverage. Then, it increased the discount applied to benefits paid to early retirees. (Ex. 7, at p. MN00269 & MN00271-72.)

Two months after making these reductions, Abbott announced on August 22, 2003, that it planned to spin-off the HPD as a new company. (Ex. 8, at p. MN00022.)

¹ Documents produced by parties through discovery are self-authenticating. See *Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 889 n.12 (9th Cir. 1996); *United States v. Hubbell*, 167 F.3d 552, 567-68 & n.20 (D.C. Cir. 1999). Abbott produced the documents marked with a unique identifier beginning with "A"; Hospira produced those beginning with "H"; and Myla Nauman produced those beginning with "MN."

Former Abbott executives would manage the new company and would employ approximately 14,000 former HPD employees. Abbott CEO Miles White wrote a company-wide letter representing that “[c]ompensation and benefits for employees of the new company ... will remain the same through the end of 2004.” (Ex. 9, at p. MN00042-43.) In a separate conference call, Abbott’s executive management reiterated White’s representation and Abbott’s Vice President of HR for the HPD, Henry Weishaar, revealed that HPD was Abbott’s “most senior” division with seventy percent of them age 40 or over. Other studies by Hospira showed the over-40 population accounted for nearly sixty percent of its workforce. (Exs. 1A & 1B, ¶ 4; Ex. 15.)

As planned, the spin-off occurred on April 30, 2004. (Ex. 4, at p. 19.) Abbott terminated approximately 14,000 HPD employees on or before that day, and the new company, Hospira, hired them all. Approximately 10,000 of those employees were based in the United States. (*Id.*, at p. 24.) Before the spin-off, defendants had executed an agreement passing the pension assets and liabilities for HPD employees to Hospira, but leaving the assets and liabilities for any HPD employee who retired or was eligible for retirement as of the spin-off date with Abbott. (Ex. 5.)

Abbott had claimed the Transitional Plan would duplicate coverage of the Abbott Benefit Plans through 2004. (Ex. 9, at p. MN00042-43 & Ex. 10, at H001328.) However, two months after the spin-off, Hospira told its new employees that retroactively back to May 1, 2004 (a day after the spin-off), future retirees who were not vested in Abbott’s retiree medical plan at the time of the spin-off no longer would receive retiree medical or dental benefits or be permitted to use accrued years of service to reduce health-expense contributions. (Complt., ¶ 63.) Hospira recognized a “curtailment gain” of \$64 million on its quarterly income statement, which matched the costs saved by eliminating retiree benefits. (Ex. 4, p. 21.) Then, eight months later, on December 31, 2004, Hospira froze the Transitional Plan, prohibiting employees from accruing additional benefits. (Ex. 4, p. 21 & Ex. 11.)

C. The No-Hire Policy

Even though the former HPD employees became Hospira employees, their rights under the Abbott Plan were not extinguished. (Ex. 3A, p. 34-35.) They maintain “bridging rights” that entitle them to accrue plan benefits after termination that, if they

returned to Abbott's employ within a certain period of time, may be added to the benefits they had accrued before termination. Because of those rights, many former HPD employees wish to return to Abbott to restore all or most of the benefits they lost at Hospira. However, on April 16, 2004 (before the spin-off), Abbott and Hospira executed an Employee Benefits Agreement, which included an agreement not to hire each other's former employees for two years. (Ex. 5, at p. 14.) This no-hire policy took effect on April 30, 2004, and requires that if any of those employees return to Abbott, they must do so as new hires with no bridging rights. (Ex. 10, at p. H000257) It thus treats the spun-off HPD employees less generously under the Abbott Plan than employees who left Abbott for other reasons.

Due to the termination, plaintiffs and thousands of other former HPD employees lost hundreds of millions of dollars in benefits. Plaintiffs allege that Abbott, along with Hospira, engineered the spin-off to save these same hundreds of millions of dollars.

THE PROPOSED CLASS

Plaintiffs assert claims under Rule 23 on their own behalf and on behalf of a class of approximately 10,000 former U.S.-based Abbott employees living in the United States. More specifically, the class plaintiffs propose to represent includes:

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

Plaintiffs bring the claims in Counts I, II, and III on behalf of the proposed class. Count I seeks a declaratory judgment that Abbott terminated plaintiffs and the proposed class members to interfere with their attainment of benefits under the Abbott Benefit Plans in violation of § 510 of ERISA. Plaintiffs also seek a mandatory injunction compelling Abbott to offer each plaintiff and proposed class member (1) reinstatement of employment under the same terms and conditions extant prior to termination and (2) restoration of all pension and retiree medical benefits under the Abbott Benefit Plans to the levels they would have accrued but for termination. Accordingly, plaintiffs propose the Court certify Count I under Rules 23(b)(1) and/or 23(b)(2), or, alternatively, 23(b)(3).

In Counts II and III, plaintiffs seek a declaratory judgment that Abbott and Hospira jointly implemented and presently enforce the reciprocal no-hire policy for the

purpose of interfering with plaintiffs' and the proposed class members' attainment of benefits under the Abbott Benefit Plans in violation of § 510 of ERISA. Plaintiffs also seek a mandatory injunction (1) prohibiting defendants from enforcing the no-hire policy and (2) staying the expiration of plaintiffs' and the proposed class members' bridging rights until the final adjudication of this action. Accordingly, plaintiffs propose the Court certify Counts II and III under Rules 23(b)(1) and/or 23(b)(2) or, alternatively, 23(b)(3).

ARGUMENT

Plaintiffs are entitled to class certification if they satisfy Rule 23(a)'s threshold requirements and the proposed class falls within at least one of three categories enumerated in Rule 23(b). Fed. R. Civ. P. 23; *Joncek v. Local 714 Int'l Brotherhood of Teamsters Health and Welfare Fund*, 1999 U.S. Dist. LEXIS 14853, Civ. No. 98-4302, at *5 (N.D. Ill. Aug. 30, 1999) (Gettleman, J.). The Court must accept the substantive allegations of the complaint as true and refrain from evaluating the merits of plaintiffs' claims. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). The Seventh Circuit recognizes the value of class actions and has adopted a policy to interpret Rule 23 liberally. *See King v. Kansas City Southern Indus.*, 519 F.2d 20, 25 (7th Cir. 1975) (citing 3B *Moore's Federal Practice*, ¶ 23.02[4], at 81 (2d ed. 1974)). That policy generally "favor[s] maintenance of class actions." *Id.* at 26.

I. THE PROPOSED CLASS MEETS EACH RULE 23(a) REQUIREMENT.

Before a proposed class can be certified, it must be demonstrated under Rule 23(a) that:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(a). As to Counts I, II, and III of plaintiffs' complaint, the proposed class satisfies each Rule 23(a) threshold requirement.

A. The Proposed Class Members Satisfy The Numerosity Requirement.

"Generally, where class members number at least 40, joinder is considered impracticable and thus the numerosity requirement is satisfied." *Johnson v. Rohr-Ville Motors, Inc.* 189 F.R.D. 363, 368 (N.D. Ill. 1999); *see also Parker v. Risk Management*

Alternatives, Inc., 206 F.R.D. 211, 212 (N.D. Ill. Feb. 2002) (Gettleman, J.) (class certified since there potentially were thirty-nine to ninety-seven class members). By that benchmark, joinder before this Court of all or even a substantial percentage of the approximately 10,000 proposed class members is conclusively impracticable, especially since the proposed class members are dispersed throughout the country.

B. The Proposed Class Members Satisfy The Commonality Requirement.

Rule 23(a)(2) is satisfied if a “common nucleus of operative fact” exists in which the named plaintiffs share at least one question of law or fact with the proposed class. *See Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992); *Adams v. R.R. Donnelley*, 2001 U.S. Dist. LEXIS 4247, Civ. No. 96-7717, at *21 (N.D. Ill., Aug. 10, 1999) (“[O]ne common issue is enough.”); *Joncek*, 1999 U.S. Dist. LEXIS, at *11 (citing *Rosario*). This “‘low hurdle’ [is] ‘easily surmounted,’” *Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 57 (N.D. Ill. 1996) (citations omitted), where plaintiffs demonstrate that defendants “engaged in some standardized conduct toward the proposed class members.” *Daniels v. Federal Reserve Bank of Chicago*, 194 F.R.D. 609, 613 (N.D. Ill. 2000).

The Seventh Circuit favors certification of common questions, even if individual liability or damages issues must be determined later. *Mejdrech v. Met-Coil Systems Corp.*, 319 F.3d 910, 912 (7th Cir. 2003); *see also* Rule 23(c)(4)(A). In this case, a single common question unifies plaintiffs’ claims with those of the proposed class members and three ancillary questions confirm the existence of commonality.

Count I raises the overarching common question of *whether Abbott terminated and spun-off the former HPD employees for the purpose of interfering with their benefits*. At least two courts have found similar questions of law and fact raised by a mass termination to satisfy Rule 23(a)(2)’s commonality requirement. *See Feret v. Corestates*, 1998 U.S. Dist. LEXIS 12734, Civ. No. 97-6759, at *25 (E.D. Pa. Aug. 18, 1998) (mass termination); *Vaszlavik, et al., v. Storage Technology*, 183 F.R.D. 264, 270 (D. Colo. 1998) (same).

In *Feret*, the employer had terminated a department of approximately 170 employees who subsequently were hired by an outsourcing firm. The employees alleged the termination caused them a loss of benefits in violation of § 510 of ERISA. The court

identified several common issues raised by the employer's actions in connection with the mass termination and transfer, but found "most important[] whether [the defendant] took these actions for the purpose of interfering with plaintiffs' ability to attain benefits." *Feret*, 1998 U.S. Dist. LEXIS, at *25.

Likewise, the court in *Vaszlavik* was confronted with a mass termination program in which the employer had laid off thousands of employees who worked at one of its plants. The employees presented evidence that their employer had identified them as older employees (over age forty) who had, or would have had, higher health-care costs. The evidence showed the employer attempted to compile a list of employees with high health-care costs and made statements in its strategic plans and through its HR department that suggested a correlation between age and health-care costs. The court found the determination of whether the employer intended to interfere with the benefits of the employees it laid off raised a common question of law and fact, among others. *Vaszlavik*, 183 F.R.D. at 270.

In this case, plaintiffs have presented evidence that Abbott singled out the HPD as the "most senior" division with seventy percent of its employees over age forty. (Ex. 1B, ¶ 4.) They also proffer evidence of Abbott's awareness of the high benefits cost for that segment of its workforce. (Ex. 7.) Finally, plaintiffs present evidence of the nature and timing of the benefits cut by Hospira and of Abbott's apparent knowledge of the likelihood of such cuts before the spin-off. (Ex. 12, at H02276 ("We understand that your objective is to get out of the DB [defined benefits] pension business.")) This combination of evidence strongly suggests, as it did in *Vaszlavik*, that Abbott implemented the mass termination to interfere with the former HPD employees' accrual of benefits. This evidence establishes a common question of law and fact as to Abbott's intent.

Underneath the overarching common question raised by Count I exist three ancillary questions, which the *Feret* and *Vaszlavik* courts found determinative of commonality. They include:

- whether Abbott engaged in a pattern or practice of benefits discrimination by implementing the mass termination, *see Vaszlavik*, 183 F.R.D. at 270;

- whether Abbott based the mass termination on legitimate business reasons that form a cognizable defense under § 510 of ERISA, *see id.*, at 271; and
- whether Hospira cooperated and assisted Abbott in the mass termination, *see Feret*, 1998 U.S. Dist. LEXIS, at *25.

The answers to these common questions of law and fact arise from the same nucleus of operative fact and will be the same for plaintiffs and the proposed class members.

Since only one common question is necessary to satisfy Rule 23(a), *Joncek*, 1999 U.S. Dist. LEXIS, at *11, the overarching common question or any one of the three ancillary questions can establish commonality under Count I.

In Counts II and III, plaintiffs allege that Abbott and Hospira implemented and presently enforce the reciprocal no-hire policy in order to interfere with their benefits. Questions of law and fact common to plaintiffs and the proposed class include:

- whether defendants implemented and presently enforce the no-hire policy to interfere with benefits and
- whether the Abbott Benefit Plans treats the former HPD employees less generously as a result of the no-hire policy than employees who left Abbott for reasons other than the mass termination.

Defendants' joint implementation and enforcement of the policy arise from a common nucleus of operative fact, thus creating a common question. In this Circuit, a company-wide policy that applies uniformly to all employees or to a group of employees raises common questions by virtue of the employer's standardized conduct. *Daniels v. Federal Reserve Bank of Chicago*, 194 F.R.D. 609, 613 (N.D. Ill. 2000) (citing *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998)).

Defendants' standardized conduct regarding the no-hire policy is illustrated by the uniform application and impact of the no-hire policy on plaintiffs and proposed class members alike. The policy operates to the detriment of both plaintiffs and proposed class members (irrespective of job title or description) by preventing all of them from returning to Abbott employment *solely* because Abbott terminated them. And, if they later return to Abbott employment, they return only as new hires with no benefits accrued.

Accordingly, as to the three counts of the complaint, the proposed class satisfies the commonality requirement of Rule 23(a).

C. The Named Plaintiffs' Claims Satisfy The Typicality Requirement.

“Because commonality and typicality are closely related, a finding of one often results in a finding of the other.” *Joncek*, 1999 U.S. Dist. LEXIS, at *11 (citing *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983)). The Seventh Circuit has concluded that a “plaintiff’s claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of the other class members and his or her claims are based on the same legal theory.” *De La Fuente*, 713 F.2d at 232 (quoting H. Newberg, *Class Actions* § 1115(b) at 185 (1977)). “Typical does not mean identical.” *Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 57 (N.D. Ill. 1996). Rather, typicality exists if the “essential characteristics” of the claims are “identical.” *Joncek*, 1999 U.S. Dist. LEXIS, at *11 (quoting *Gilbert v. First Alert, Inc.*, 904 F. Supp. 714, 719 (N.D. Ill. 1995)). Like commonality, typicality “should be determined with reference to the company’s actions.” *Wagner v. Nutrasweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996).

Plaintiffs’ claims satisfy the typicality requirement because they challenge the same course of conduct giving rise to the claims of the proposed class members. Through two company-wide directives made at the most senior management level, Abbott terminated the employment of each HPD employee, whether a class representative or a proposed class member, and defendants erected a barrier to guarantee a loss of benefits. Plaintiffs and the proposed class members’ interests, therefore, are aligned.

In Count I, plaintiffs and proposed class members allege they all suffered the same injury since they lost their employment at Abbott and, thus, no longer can participate in the Abbott Benefit Plans. *See Feret*, 1998 U.S. Dist. LEXIS at *37 (typicality established where all claims arose from the employer’s practice or conduct). As to Counts II and III, all plaintiffs and proposed class members challenge the lawfulness of the no-hire policy. They all will lose their bridging rights under the Abbott Benefit Plans and, if later re-hired by Abbott, will be treated as new hires.

An employer’s implementation of a corporate policy that altered employee benefits was at issue in *Berger v. AXA Network, LLC*, 220 F.R.D. 316, 318 (N.D. Ill. 2004). The court, there, found typicality where plaintiffs and proposed class members

were vulnerable to losing benefits as a result of change in company policy. *Id.* Similarly, typicality exists in this action as to Counts II and III because plaintiffs presently experience the same harm from the no-hire policy as the proposed class members.

D. The Named Plaintiffs And Their Counsel Will Adequately Represent The Interests Of The Proposed Class Members.

The inquiry into plaintiffs' adequacy as representatives of the proposed class has three components designed to ensure absent class members' interests are pursued fully:

- (1) the chosen class representative cannot have antagonistic or conflicting claims with other members of the class;
- (2) the named representative must have a sufficient interest in the outcome to ensure vigorous advocacy; and
- (3) counsel for the named plaintiff must be competent, experienced, qualified, and generally able to conduct the proposed litigation vigorously.

Joncek, 1999 U.S. Dist. LEXIS, at *11 (citing *Gammon v. GC Services Ltd. Partnership*, 162 F.R.D. 313, 317 (N.D. Ill. 1995); see also *Uhl v. Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978, 985 (7th Cir. 2002).

1. Plaintiffs are fair and adequate representatives of the proposed class.

The first element of the adequacy requirement is that the proposed class representatives' interests not conflict with those of the proposed class members. This element "is largely an alternative manner of stating" the typicality requirement. 3B *Moore's Federal Practice* ¶ 23.071[1] at 23-185 (1972). Plaintiffs already have demonstrated that they and the proposed class members "rely on the same legal theory." *Miller v. Material Science Corp.*, 1999 U.S. Dist. LEXIS 10628, Civ. No. 97-2450, at *11 (N.D. Ill. June 25, 1999) (Gettleman, J.) (reliance by class representative on same legal theory as proposed class members satisfied adequacy requirement). The claims they lodged, and the relief they seek, are typical of the proposed class members. Thus, no conflict exists between plaintiffs and the proposed class members. See *Feret*, 1998 U.S. Dist. LEXIS 12734, at *39-40 (adequacy of representation requirement satisfied because named plaintiffs challenged same unlawful conduct as other class members).

Plaintiffs also satisfy the second component of the adequacy requirement since "class representative[s] [] need[] to have only a limited understanding of and a minimal interest in the litigation." *Miller*, 1999 U.S. Dist. LEXIS at *11 (citation omitted). They

each have pursued this action with diligence. They engaged competent and experienced counsel and timely filed this lawsuit. They have aided their counsel in investigating their claims and have cooperated in discovery. They have pledged to see this action to successful conclusion. (Exs. 1A & 1B, ¶ 6; Ex. 1C, ¶ 5.)

2. Plaintiffs' counsel are fair and adequate representatives of the proposed class and the Court should appoint them Joint Class Counsel under Rule 23(g)(1)(A).

Under Rule 23(g)(1)(C), the Court must determine whether plaintiffs' counsel, Sprenger & Lang, PLLC, and Meites, Mulder, Burger & Mollica, fairly and adequately represent the interests of the proposed class for purposes of appointing class counsel under Rule 23(g)(1)(A). The relevant part of Rule 23(g)(1)(C) reads as follows:

[T]he court (i) must consider the work counsel has done in identifying or investigating potential claims in the action, counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, counsel's knowledge of the applicable law, and the resources counsel will commit to representing the class.

Plaintiffs discuss each consideration in turn.

First, plaintiffs' counsel have performed considerable work in identifying and investigating the claims in this action. After an initial contact with a former HPD employee, plaintiffs' counsel began identifying and researching potential legal claims and investigating facts through an informal investigation. That effort included, among other things, conferring with plaintiffs, reviewing public filings with the Securities Exchange Commission and other agencies, and analyzing the underlying corporate actions of both defendants. (Ex. 13 & 13B, ¶ 8.) As a result of that effort, plaintiffs filed a three-count class complaint, which this Court ruled stated a claim for relief. (Order of April 27, 2004.)

Plaintiffs' counsel have furthered their investigation through formal discovery. They have drafted and negotiated a stipulated protective order, reviewed electronic data and thousands of pages of documents, negotiated with defendants' counsel to complete the production of responsive information, appeared in court to resolve discovery and case management issues, and gathered information on behalf of plaintiffs for production in the near future. (Exs. 13A & 13B, ¶ 9.)

Second, plaintiffs' counsel have extensive experience in handling class actions in general and handling claims of the type asserted in this action in particular. (Exs. 13A & 13B, ¶¶ 4 & 6.) Co-lead counsel from Sprenger & Lang has served as class counsel in four certified plaintiff classes, all concerning employment discrimination. Meites, Mulder, Burger & Mollica recently litigated and settled an ERISA class action that involved a corporate reorganization similar to the one involved here. *See Millsap v. McDonnell Douglas Corp.*, 162 F. Supp. 2d 1262 (N.D. Okla. 2001).

Third, plaintiffs' counsel's success in past class actions, which include ERISA claims, and their successful opposition of defendants' motions to dismiss and motions for reconsideration in this case, indicate a command of the relevant law.

Fourth, plaintiffs' counsel have devoted significant human and financial resources to representing the interests of the proposed class. At present, plaintiffs' counsel have committed the necessary number of lawyers to litigating this action to final resolution, including any appeals. To date, they have expended hundreds of hours and thousands of dollars to advance the claims of proposed class. (Exs. 13A & 13B, ¶ 9.)

The Rule 23(g)(1)(C) considerations militate in favor of the Court finding that plaintiffs' counsel will fairly and adequately represent the interests of the proposed class. In fact, the Court already has commented indirectly on the adequacy of plaintiffs' counsel by noting at the hearing on February 7, 2005, that there are "good lawyers on both sides of the case." (Ex. 14.) In light of these considerations, the Court should appoint Sprenger & Lang, PLLC, and Mietes, Mulder, Burger & Mollica as joint class counsel.

II. THE PROPOSED CLASS FALLS WITHIN RULE 23(b)(1) AND (2) OR, ALTERNATIVELY, RULE 23(b)(3).

A proposed class that meets the four requirements of Rule 23(a) should be approved if it complies with any one of the three subparagraphs of Rule 23(b).

A. The Proposed Class Satisfies Rule 23(b)(1) Because A Risk Of Inconsistent Adjudications Exists.

Rule 23(b)(1) defines two related types of class actions. Both authorize class certification to avoid prejudice to the parties from multiple suits arising from the same matter. The first type occurs when multiple lawsuits would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would

establish incompatible standards of conduct for the party opposing the class,” Rule 23(b)(1)(A); the second, when multiple lawsuits would create the risk that the judgment with respect to some members of the proposed class would dispose of the interests of other members or otherwise impair or impede their ability to protect their interests. Rule 23(b)(1)(B). “Certifications under both of these clauses are common ... because defendants often provide ‘unitary treatment to all members of [a] putative class [in this] ... area’ and thus the rights of absent ‘class members [are often] implicated by litigation brought by other class members’.” *Feret*, 1998 U.S. Dist. LEXIS 12734 at *42 (quoting 5 *Moore’s Federal Practice* §§ 23.41(4), 23.42[3][c] (3d ed. 1998)). To avoid inconsistent adjudications, certification under either clause of Rule 23(b)(1) creates a mandatory class, meaning that class members may not opt out of the litigation to pursue separate litigation that might prejudice other class members or defendants. *Id.* at *41.

In this action, both subparts of Rule 23(b)(1) are applicable. In the absence of class certification, numerous separate actions almost certainly would be brought against Abbott and Hospira challenging the legality of the mass termination and no-hire policy. If the Court denies class certification in this action, more individual actions would follow. The plaintiffs in the individual actions, like plaintiffs here, would seek a declaration that their termination was unlawful as well as injunctive relief compelling their reinstatement as employees and participants under the Abbott Benefit Plans.

If relief is granted in some actions but denied in others, the conflicting adjudications could make compliance virtually impossible for Abbott, the very risk that Rule 23(b)(1)(A) was designed to prevent. Abbott could be faced with judgments declaring that its mass termination was unlawful and judgments declaring otherwise. Abbott potentially could have to reinstate some employees and not others. This also would lead to considerable confusion as to whom the no-hire policy could be applied.

Similarly, the requirements of Rule 23(b)(1)(B) are met because the inconsistent adjudications discussed above regarding Abbott’s conduct and remedial relief would adversely affect the interests of the absent class members by creating uncertainty. Rule 23(b)(1)(B) is used when separate actions might lead to adjudications that could dispose of nonparty class members’ interests or substantially impair their ability to adequately protect their interests. *Wyman v. Connecticut General Life Ins. Co.*, 1990 U.S. Dist.

LEXIS 18762, Civ. No. 86-9595, at *56 (N.D. Ill. Sept. 25, 1990) (“Certification under [Rule 23(b)(1)(B)] is appropriate if an individual action will inescapably alter the substance of the rights of others having similar claims.”)

Since Abbott terminated the employment and benefit plan participation of all proposed class members, conflicting decisions on the legality of Abbott’s actions and any available relief would affect the interests of them all. *See Feret*, 1998 U.S. Dist. LEXIS 12734, at *44 (ERISA § 510 claim certified under Rule 23(b)(1) & (2)); *Vaszlavik*, 183 F.R.D. at 270 (ERISA § 510 claim certified under Rule 23(b)(1)).

B. The Proposed Class Satisfies Rule 23(b)(2) Because Injunctive And Declaratory Relief Are Appropriate.

Rule 23(b)(2) permits an action to be maintained as a class action where plaintiffs can establish that (1) their complaint seeks relief that is predominantly injunctive or declaratory and (2) the defendant “acted or refused to act on grounds generally applicable to the class.” Rule 23 (b)(2). Certification under Rule 23(b)(2) also creates a mandatory class. *Feret*, 1998 U.S. Dist. LEXIS 12734 at *41.

The proposed class easily satisfies the language of Rule 23(b)(2). For the violation alleged in Count I, plaintiffs seek declaratory relief stating that their termination was unlawful. As their primary relief, plaintiffs seek an injunction compelling Abbott to offer all plaintiffs and proposed class members the opportunity to be reinstated as employees under the same terms and conditions that existed prior to their termination and as participants under the Abbott Benefit Plans. Thus, Count I is highly suited to treatment under Rule 23(b)(2). *Berger*, 220 F.R.D. at 317 (certifying a Rule 23(b)(2) class in an ERISA § 510 action); *Feret*, 1998 U.S. Dist. LEXIS, at *24 (same).

In Counts II and III, plaintiffs seek a declaratory judgment stating that the joint policy is unlawful. They also seek an injunction preventing defendants from enforcing the no-hire policy. These Counts also are suitable for Rule 23(b)(2) treatment.

C. Alternatively, Certification Is Appropriate Under Rule 23(b)(3).

Alternatively, plaintiffs seek certification for all counts under Rule 23(b)(3), which allows certification if “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and

efficient adjudication of the controversy.” Because this action concerns defendants’ decision to spin off Hospira, and appropriate relief can be awarded to the class as a whole without determining individual issues with respect to absent class members (e.g., mitigation and set-off), questions concerning defendants’ liability and relief predominate over individual questions. Moreover, the superiority of a class action in adjudicating these claims is supported by, *inter alia*, (1) the similarities among each class member’s allegations; (2) the desirability of concentrating the litigation of these claims in one forum; and (3) the ability to distribute relief without individually assessing each class member’s injury.

The Seventh Circuit recently held that an ERISA Section 510 claim may be certified under this subsection in *In re Allstate*, 400 F.3d 505, 508 (7th Cir. 2005) (“[a] single hearing may be all that’s necessary to determine which of the members of the class were actually affected by the policy rather than having decided to quit for their own reasons. Fed.R.Civ.P 23(c)(4)(A). That would be a more efficient procedure than litigating the class-wide issue of Allstate’s policy anew in more than a thousand separate lawsuits.”) *See also Owner-Operator Independent Drivers Ass’n, Inc. v. Allied Van Lines, Inc.*, No. 04 C 3207, 2005 WL 1269904, *4-6 (N.D. Ill. 2005) (Shadur, J.) (certifying monetary relief under Section 23(b)(3)). All counts are thus appropriately certified under Rule 23(b)(3).

CONCLUSION

For all the reasons set forth above, plaintiffs respectfully request the Court to grant their motion, establish the class as proposed, and appoint Sprenger & Lang, PLLC, and Mietes, Mulder, Burger & Mollica as joint class counsel.

Respectfully submitted,

/s/ Jamie S. Franklin

Steven M. Sprenger
Latif Doman
Mark Amadeo
SPRENGER & LANG, PLLC
1614 Twentieth Street
Washington, DC 20005
(202) 265-8010

Paul W. Mollica
Michael M. Mulder
Jamie S. Franklin
**MEITES MULDER BURGER
& MOLLICA**
208 S. LaSalle Street, Suite 1410
Chicago, IL 60604
(312) 263-0272

CERTIFICATE OF SERVICE

I, the undersigned, certify that on September 15, 2005, I had the following documents filed electronically with the Clerk of the Court for the United States District Court for the Northern District of Illinois through ECF: Plaintiffs' Motion and Memorandum in Support of Motion for Class Certification with Exhibits. CCF will send an e-notice on the following parties:

Joseph J. Torres
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601

Christopher D. Ligouri
JENNER & BLOCK LLP
One IBM Plaza
Chicago, IL 60601

/s/ Jamie S. Franklin
Jamie S. Franklin