

No. A08-816

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State of Minnesota  
**In Court of Appeals**

Clifford L. Whitaker, et al. on behalf  
of themselves and all others similarly situated,  
*Plaintiffs/ Respondents,*  
vs.

3M Company,  
*Defendant/ Appellant.*

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**BRIEF OF AMICI CURIAE  
THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION,  
MINNESOTA CHAPTER, AND THE IMPACT FUND**

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**STATEMENT OF INTEREST OF THE *AMICI CURIAE***  
**AND SOURCE OF AUTHORITY TO FILE**

*Amici curiae* the National Employment Lawyers Association, Minnesota Chapter and The Impact Fund (“amici”) file this brief in support of affirmance.

**The National Employment Lawyers Association** (NELA) is a non-profit membership organization founded in 1985, and the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA is headquartered in San Francisco, California and has over 3,000 members nationwide who are committed to working on behalf of employees subject to illegal practices in the workplace. NELA strives to protect the rights of its members’ clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics, and judicial integrity. The Minnesota Chapter of NELA was formed in 1990.

**The Impact Fund** is a nonprofit foundation that provides funding, training, and co-counsel to public interest litigators across the country, assisting in civil rights and employment cases. It offers training programs, advice and counseling, and amicus representation to non-profit organizations regarding class action and related issues. It is also a California State Bar Legal Services Trust Fund Support Center, and provides services to legal services projects across the state. The Impact Fund is currently lead

counsel in certified nation-wide gender discrimination class actions against Wal-Mart and Costco.

Amici are highly knowledgeable about the underlying legal doctrines relevant to class certification in employment discrimination cases, as well as the kinds of corporate practices at issue in this case and the potential impact of the Court's ruling on employees subject to discrimination. Further, amici and their members and clients have substantial interest in maintaining precedents supporting the ability of employees to bring about systemic change through the class action device.

The Minnesota Court of Appeals has granted leave for amici to file this brief. See Minn. R. Civ. App. P. 129.<sup>1</sup>

### INTRODUCTION

This Court acknowledged that Minn. R. Civ. P. 23 closely tracks Fed. R. Civ. P. 23 and is intended to produce consistent results. (A. 75.) Appellant 3M Company ("3M") asks this Court to rewrite Rule 23 to make a determination of liability before class certification, returning to a legal landscape prior to the 1966 amendments to the Rule. The 1966 amendments establish that trial courts must decide whether to certify a class prior to deciding the case on the merits. The Minnesota Court of Appeals should reject 3M's arguments seeking a result contrary to the plain language of Rule 23.

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<sup>1</sup> Pursuant to Minn. R. Civ. App. P. 129.03, amici certify that this brief is written by the undersigned counsel, and no party or counsel for any party authored any part of this brief, and that no monetary contributions were made to the undersigned counsel for authoring this brief.

Amici and 3M agree that federal case law requires the trial court to make a “rigorous inquiry” into the nature of the evidence by which the parties expect to establish or evade liability. Where amici and 3M differ is in 3M’s eagerness to blur this inquiry into a premature determination that one party’s evidence is more convincing. The proper inquiry is whether plaintiffs have met their burden under Rule 23 to show that they have satisfied the class certification prerequisites.

In granting class certification, the trial court made definitive rulings on each of the Rule 23 elements, declined 3M’s invitation to resolve a dispute between the parties’ statistical experts, and properly focused its inquiry on the nature of the evidence rather than its weight. The court applied the “rigorous analysis” standard and ruled consistently with recent federal decisions that permit an examination of the merits only to the extent that they overlap with the court’s inquiry into the Rule 23 prerequisites. However, the focus of this examination should be the common (or individual) nature of the parties’ evidence rather than the persuasiveness of that evidence. Because each of the Rule 23 requisites were met, the Minnesota Court of Appeals should affirm the district court’s order certifying a class of older workers.

### **ARGUMENT**

#### **A. A “RIGOROUS ANALYSIS” UNDER RULE 23 DOES NOT PERMIT COURTS TO UNNECESSARILY REVIEW THE MERITS OF PLAINTIFFS’ CASE.**

In 1974, the United States Supreme Court determined that trial courts are barred from resolving disputed factual issues that go to the merits of the case. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974). Years later, and cognizant of its holding in

Eisen, the Supreme Court established that a trial court at the class certification stage must conduct a “rigorous analysis” in which it “may be necessary for the court to probe beyond the pleadings,” and that “the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” Gen. Tele. Co. of the Southwest v. Falcon, 457 U.S. 147, 160-61 (1982). Between the guideposts of Eisen and Falcon, the Supreme Court has largely left it to the appellate courts to judge whether a particular inquiry into the merits amounts to a “rigorous analysis” of whether the Rule 23 requirements are met or trespasses onto the ground the Court disapproved of in Eisen. See In re Live Concert Antitrust Litig., 247 F.R.D. 98, 106-07 (C.D. Cal. 2007).

Contrary to 3M’s assertion, In re Initial Pub. Offering Sec. Litig., 471 F.3d 24 (2d Cir. 2006) (“IPO”) has not changed the legal standard and established a “preponderance” standard for the Rule 23 class certification determination.<sup>2</sup> Indeed, the Second Circuit declined to specify plaintiffs’ evidentiary burden except that it was greater than “some showing.” IPO, 471 F.3d at 42. IPO did nothing more than clarify that courts could examine expert analyses to determine commonality.<sup>3</sup> IPO has four key holdings:

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<sup>2</sup> The sentence 3M quoted in opposition to class certification and again in its appeal brief that “[c]omplying with [Rule 23]’s predominance requirement cannot be shown by less than a preponderance of the evidence”—is a passage from Heerwagon v. Clear Channel Communications, 435 F.3d 219, 233 (2d Cir. 2006), a decision that the court in IPO quoted with disapproval. (See Appellant’s Br. at 21.) 471 F.3d at 37, n.9.

<sup>3</sup> IPO cited favorably to the decision in Krueger v. N.Y. Tel. Co., 163 F.R.D. 433, 440 (S.D.N.Y. 1995), in which the court properly noted that the “experts’ disagreement *on the merits*—whether discriminatory impact could be shown—was not a valid basis for denying class certification.” IPO, 471 F.3d at 35. (emphasis added).

(1) a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met; (2) such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met; (3) the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement; (4) in making such determinations, a district judge should not assess any aspects of the merits unrelated to a Rule 23 requirement.

471 F.3d at 41. In IPO, the district court's class certification ruling turned on whether it accepted the conclusions of plaintiffs' experts that the market was efficient or the conclusions of defendants' experts that it was not. Id. at 30-31. If the market was not efficient, individual questions of reliance would predominate over common questions. Id. at 43. The trial court declined to weigh the competing expert reports, which were intertwined with the merits issue of reliance. Id. at 31. Instead, the court determined that plaintiffs had made "some showing" of efficiency and certified the class. Id.

The Second Circuit overturned the certification order, holding that "the use of a 'some showing' standard was error," and that "the requirements of Rule 23 must be met, not just supported by some evidence." Id. at 32-33. IPO rectified what it viewed as a misapplication of the Supreme Court's language in Eisen. Id. at 33 (citing Eisen, 417 U.S. at 177); see Hnot v. Willis Group Holdings Ltd., 241 F.R.D. 204, 208 (S.D.N.Y. 2007) ("IPO did not, nor could it, overrule Eisen—it only clarified the Second Circuit's interpretation of that decision"); Gariety v. Grant Thornton, LLP, 368 F.3d 356, 365 (4th Cir. 2004); Hohider v. United Parcel Serv., Inc., 243 F.R.D. 147, 164 (W.D. Pa. 2007) ("the gravamen of Eisen was... that a district court should not expand the Rule 23

certification analysis to include consideration whether the proposed class is ultimately likely to prevail on the merits); Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 674, 677 (7th Cir. 2001) (“nothing... prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in that rule and exercise the discretion it confers.”) Significantly, IPO determined that while a district court must address the certification requirements, it “should not assess any aspect of the merits unrelated to a Rule 23 requirement.” IPO, 471 F.3d at 41.

**B. BLADES AND DECISIONS INTERPRETING IPO PROVIDE A FRAMEWORK FOR COURTS TO FOLLOW WHEN MERITS ARE RELEVANT TO RULE 23 PREREQUISITES.**

In addition to IPO, the decisions interpreting it, and the Eighth Circuit’s opinion in Blades v. Monsanto Co., 400 F.3d 562 (8th Cir. 2005) provide the proper framing of any merits issues that must be decided at class certification.

3M relies on Blades, incorrectly claiming that the Eighth Circuit requires more than the satisfying the *prima facie* standard for Rule 23 certification. (Appellant’s Br. at 24.) Blades is consistent with IPO’s common sense notion that district courts should not unnecessarily resolve merits disputes in determining whether the Rule 23 requirements have been met. Blades held that merits disputes “may be resolved only insofar as resolution is necessary to determine the nature of the evidence that would be sufficient, if the plaintiff’s general allegations were true, to make out a *prima facie* case for the class.” Id. at 567. Indeed, the Eighth Circuit warned courts to be cautious about ensuring that a dispute must be resolved at the class certification stage. Id. “The closer any dispute at the class certification stage comes to the heart of the claim, the more cautious the court

should be in ensuring that it must be resolved in order to determine the nature of the evidence the plaintiff would require.” Id.

Similarly, district court opinions interpreting IPO demonstrate that its holdings are far more narrow than 3M implies. For example, in Hnot v. Willis Group Holdings Ltd., 241 F.R.D. 204, 209 (S.D.N.Y. 2007), the court concluded that “the holdings of IPO are both significant and narrow—a district court judge must consider all of the relevant evidence in determining whether Rule 23 has been satisfied, but a district judge may not go beyond the boundaries of Rule 23 when making such a determination.” “IPO does not stand for the proposition that the court should, or is even authorized to, determine which of the parties’ expert reports is more persuasive,” and correctly noted that such disagreements are “relevant only to the merits of plaintiffs’ claim—whether plaintiffs actually suffered disparate treatment—not to whether plaintiffs have asserted common *questions* of law or fact.” Id. at 210. (emphasis in original).

Hnot acknowledged that IPO represented something like a “perfect storm” in that the issue of predominance was balanced precisely on the dispute between the experts. The court could not logically make a finding on predominance without crediting the claims of one expert or the other. Id. at 211, n.3. Hnot recognized the crucial distinction between an inquiry evaluating the nature of both the parties’ evidence and an inquiry weighing the evidence. The court reasoned that “[c]ommonality requires that plaintiffs present common *questions* of fact or law; plaintiffs’ ultimate success at trial on the merits requires an *answer* to that question, specifically that defendants actually did discriminate against plaintiffs.” Id. at 211 (emphasis in original).

Under Hnot, and in light of IPO, “an accurate statement of the law is that ‘statistical dueling is not relevant to the certification decision *unless such dueling presents ‘a valid basis for denying class certification’*”. Id. at 210 (quoting IPO) (italics in original). Similarly, the court in Velez v. Novartis Pharm. Corp., 244 F.R.D. 243, 258, n.11 (S.D.N.Y. 2007) concluded that “[i]t is particularly unwise for the court to become too deeply involved in an analysis of the mathematical and statistical analysis of an expert report, rather than leaving such an analysis to the factfinder.”

The Velez plaintiffs supported their motion for class certification with an expert report which showed an excessively subjective personnel management system with “potential for discrimination,” and expert statistical reports showing significant disparities in performance evaluations, pay, and promotions between male and female employees. Id. at 258-68. The trial court reasoned that disputes over the reliability of plaintiffs’ statistics were “precisely the sort of ‘statistical dueling’ that should be resolved by a factfinder” rather than by the court at the class certification stage. Id. at 261. Further, the Velez court summarily rejected defendants’ argument that plaintiffs had “fail[ed] to show the existence of any class-wide discriminatory practice in need of injunctive relief.” Id. at 271. “Plaintiff[s] have not yet been asked to prove any such thing. This is a class certification motion, not a trial.” Id.

In short, while IPO held that a district judge must assess all relevant evidence to determine whether each Rule 23 has been met, as demonstrated by these decisions, IPO did not require that all such disputes be resolved. 471 F.3d at 42.

In this case, the district court ruled correctly on each of the Rule 23 prerequisites. It considered IPO and the decisions that followed it and recognized that it should not prematurely resolve the merits dispute between the parties' statistical experts. The district court's finding that "the defendant's argument focuses on the ultimate question of how compelling the statistical evidence is," (A. 70) is consistent with IPO's division of such disputes into two categories: those that merely foreshadow the merits of the suit and should not be resolved, and those that the trial court must resolve in order to rule on one of the class certification criteria. IPO, 471 F.3d at 35; Blades, 400 F. 3d at 567. Relying on Velez and Hnot, the court determined that this was a case where "to decide which expert report was more persuasive would be to decide whether the class was actually discriminated against by defendants." (A. 70.) If the district court had determined that one party's evidence was more persuasive than the other's, it would have engaged in precisely be the kind of inquiry the Supreme Court forbade in Eisen.

Instead, the trial court properly focused its inquiries on the nature of the evidence both parties will rely on in litigating this case, not the relative weight of the evidence. (A. 69-71.) The court cataloged the common issues and determined that they predominate over individual issues. The court determined that plaintiffs had presented "statistical evidence strongly suggesting a consistent pattern across 3M's business units of disparities suffered by older employees in each of the human resource practices challenged." (A. 69.) Further, the court anticipated that 3M will rely on common evidence to establish a class-wide defense. (A. 65.) These class-wide defenses supported the court's findings of commonality and predominance, and the appropriateness of class injunctive relief if 3M's

actions constitute age discrimination. (A. 63, 65, 69.) The court also found that “proving that discrimination is a regular practice requires examination of 3M’s policies, systems, and procedures that apply to all relevant employees,” raising common questions. (A. 70.)

This Court should hold that the trial court was correct to find that the class prerequisites of Rule 23 have been satisfied by focusing its analysis on the common nature of the evidence rather than its relative weight.

**C. 3M’S ARGUMENTS ON THE MERITS ARE BASELESS AND, IN ANY EVENT, SUPPORT CLASS CERTIFICATION.**

Several of 3M’s assertions raise troubling policy considerations, give rise to common issues, and underscore the importance of certifying the class.

First, 3M’s defense essentially boils down to its assertion that “age cases are different than other discrimination cases.” (Appellant’s Br. at 31-34.) There is no ambiguity, however, in the Minnesota Legislature’s determination that “[t]he prohibition against unfair employment or education practices based on age prohibits using a person’s age as a basis for a decision.” Minn. Stat. § 363A.03, subd. 2. Unlike federal law, which prohibits discrimination on the basis of age in a separate statute from its prohibitions on discrimination in other protected categories,<sup>4</sup> age is treated exactly the same as race, gender, and other protected classes under the plain language of the Minnesota Human Rights Act, Minn. Stat. § 363A.08. The Minnesota Human Rights Act provides that “it is an unfair employment practice for an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or

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<sup>4</sup> See Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

activity in a local commission, disability, sexual orientation, or age” to refuse to hire, discharge, or “discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.” Minn. Stat. § 363A.08. This statutory language is unambiguous and 3M can cite no Minnesota case creating a higher standard of proof for claims of age discrimination. The fact that no such higher standard exists is common to the class and whether 3M is able to persuade this Court to adopt a higher standard is a class-wide issue of law that supports class certification.

Second, 3M’s “succession planning” argument has broad implications in both class and individual discrimination cases in the State of Minnesota. If accepted by the courts, such a defense would allow companies to discriminate in perpetuity on the basis of age and render the Minnesota Human Rights Act’s prohibition against age discrimination meaningless. A company which prefers younger employees to older employees could always justify its preference with the assertion that it is planning for the perpetuation of the company far into the future. The viability of this class-wide defense is a common issue supporting certification.

Third, 3M attacks on Respondent’s statistical analysis, and its suggestion that Respondent’s expert should control for factors that Respondent identifies as vehicles for discrimination show that 3M plans to rely on a class-wide defense to liability. (Appellant’s Br. At 37-39.) Finally, 3M’s attempt to justify its apparent “glass ceiling” for older workers by arguing that older workers have inherently less potential than similarly situated younger workers also shows a company wide discriminatory attitude

toward older workers, raising common issues. (Id. at 32.) While these merits arguments are misplaced at class certification, they nonetheless support certification by highlighting 3M's reliance on class-wide defenses.

If any of these arguments were accepted by the courts at any stage of litigation, they would drastically undermine the efficacy of the Minnesota Human Rights Act and tacitly legitimize age discrimination in the Minnesota workplace. Given the common issues raised by these arguments and the public values involved, the court correctly found that "questions of law and fact common to members of the proposed class predominate over any question only affecting individual members." (A. 63.)

### CONCLUSION

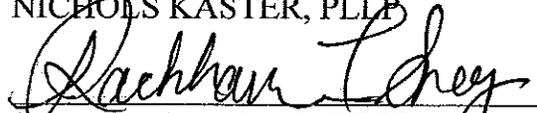
Class certification is not summary judgment. 3M's proposed ruling would effectively conflate these procedural stages, and muddy rather than clarify the standard for class certification in Minnesota. This Court should reject 3M's merits arguments except to the extent that they raise issues pertinent to determining "the nature of the evidence that would be sufficient, if the plaintiff's general allegations were true, to make out a prima facie case for the class." Blades, 400 F.3d at 567. In doing so, the Court should adopt the holdings of IPO as applied by the district courts in Hnot and Velez, and should recognize that this is not a case where the dispute between the parties' statistical experts presents any valid basis for denying class certification. Finally, this Court should hold that at the class certification stage, only an analysis strictly constrained by Rule 23 can accord with the class action values of efficiency and access to justice.

Since the district court's order already conforms with the recent federal decisions on these issues, this Court should affirm that court's order as lying within that court's discretion, and should remand this case for trial on the liability phase of the lower court's trial plan.

Dated: September 15, 2008

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**CERTIFICATE OF COMPLIANCE**

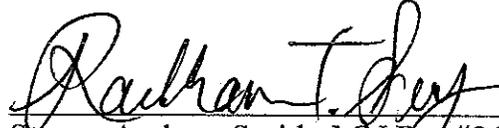
The undersigned Attorneys for *Amicus Curiae* certifies that this brief complies with the following requirements:

1. This brief was drafted using Microsoft Word 2007 word processing software;
2. The brief was drafted using Times New Roman, 13-point font, compliant with the typeface requirements; and
3. There are 3,468 words in this brief.

Dated: *Sept. 15, 2002*

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