

No. A08-0816

**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

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

LEGAL ISSUE	1
STATEMENT OF THE CASE.....	2
A. Prior Relevant Motions.....	3
B. Plaintiffs’ Motion for Class Certification and Subsequent Proceedings	4
STATEMENT OF FACTS	5
A. Defendant’s Centralized Personnel Policy-Making and Decision-Making.....	6
B. Defendant’s Corporate Bias in Favor of Young Employees.....	7
C. Statistical Evidence of a Consistent Pattern Across Business Units of Disparities Suffered by Older Employees in Each of the Challenged Human Resource Practices	11
1. Performance Evaluations.....	14
2. Selections for Leadership Development Programs	15
3. Promotions.....	16
4. Compensation	17
5. Job Eliminations	19
ARGUMENT.....	19
I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY APPLYING IMPROPER STANDARDS IN DETERMINING THAT PLAINTIFFS SATISFIED THE REQUIREMENTS OF RULE 23.....	21

A.	The District Court Properly Determined that Each of the Rule 23 Requirements Is Satisfied	21
B.	The District Court Rigorously Analyzed the Evidence to Determine Whether the Rule 23 Requirements Were Satisfied	22
C.	The District Court Properly Did Not Apply a Predominance of the Evidence Standard in Determining Whether Commonality and Predominance Standards Were Met	24
II.	THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO RESOLVE CONTESTED MERITS DISPUTES THAT WERE UNNECESSARY TO DETERMINE WHETHER THE REQUIREMENTS OF RULE 23 WERE SATISFIED	29
III.	THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE PLAINTIFFS SATISFIED THE COMMONALITY REQUIREMENT OF RULE 23	32
IV.	THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE PLAINTIFFS SATISFIED THE OTHER REQUIREMENTS OF RULE 23	39
A.	Rule 23.03(a)(2).....	39
B.	Numerosity	41
C.	Typicality	42
D.	Adequacy	42
E.	Rule 23.02.....	45
1.	Rule 23.02(b).....	45
2.	Hybrid Class Under Rule 23.02(b) and (c).....	47

a. Predominance	47
b. Superiority	48
CONCLUSION.....	50

TABLE OF AUTHORITIES

Cases	Page
<i>Ace Elec. Contrs., Inc. v. IBEW, Local Union No. 292</i> , 414 F.3d 896 (8th Cir. 2005)	40
<i>Adams v. Ameritech Servs., Inc.</i> , 231 F.3d 414 (7th Cir. 2000)	35, 37
<i>Ario v. Metropolitan Airports Comm'n</i> , 367 N.W.2d 509 (Minn. 1985)	19, 42, 47
<i>Armstrong v. Powell</i> , 230 F.R.D. 661 (W.D. Okla. 2005)	43
<i>Bazemore v. Friday</i> , 478 U.S. 385 (1986).....	35, 36, 37
<i>Beckmann v. CBS, Inc.</i> , 192 F.R.D. 608 (D. Minn. 2000)	47
<i>Behm v John Nuveen & Co.</i> , 555 N.W.2d 301(Minn. Ct. App. 1996).....	23
<i>Bevan v. Honeywell, Inc.</i> , 118 F.3d 603 (8th Cir. 1997)	34, 35
<i>Blades v. Monsanto Co.</i> , 400 F.3d 562 (8th Cir. 2005)	1, 27, 28, 30
<i>Boykin v. Georgia-Pacific Corp.</i> , 706 F.2d 1384 (5th Cir. 1983)	41
<i>Castaneda v Partida</i> , 430 U.S. 482 (1977)	12, 36, 40
<i>Clayborne v. Omaha Pub. Power Dist.</i> , 211 F.R.D. 573 (D. Neb. 2002)	44
<i>Cooper v. Southern Co.</i> , 390 F.3d 695 (11th Cir. 2004)	20

<i>Donaldson v. Microsoft Corp.</i> , 205 F.R.D. 558 (W.D. Wash. 2001)	44
<i>Dukes v. Wal-Mart Stores, Inc.</i> , 222 F.R.D. 137 (N.D. Cal. 2004), <i>aff'd</i> , 509 F.3d 1168 (9th Cir. 2007).....	43, 44
<i>Eisen v. Carlisle & Jacquelin</i> , 417 U.S. 156 (1974).....	20
<i>Ellis v. Costco Wholesale Corp.</i> , 240 F.R.D. 627 (N.D. Cal. 2007).....	46
<i>Estes v. Dick Smith Ford, Inc.</i> , 856 F.2d 1097 (8th Cir. 1988)	39
<i>Forcier v. State Farm Mut. Auto. Ins. Co.</i> , 310 N.W.2d 124 (Minn. 1981)	2, 21, 47, 49
<i>Gariety v. Grant Thornton, LLP</i> , 368 F.3d 356 (4th Cir. 2004)	29
<i>Glen Lewy 1990 Trust v. Investment Advisors, Inc.</i> , 650 N.W.2d 445 (Minn. Ct. App. 2002).....	<i>passim</i>
<i>Gordon v. Microsoft Corp.</i> , 645 N.W.2d 393 (Minn. 2002)	22
<i>Gradjelick v. Hance</i> , 646 N.W.2d 225 (Minn. 2002)	27
<i>Gudo v. Adm'rs of Tulane Educ. Fund</i> , 966 So. 2d 1069 (La. Ct. App. 2007)	26
<i>Hamblin v. Alliant Techsystems, Inc.</i> , 636 N.W.2d 150 (Minn. Ct. App. 2001).....	33, 35, 36
<i>Hartzell v. Patterson Dental Co.</i> , 1992 Minn. App. LEXIS 108 (Minn. Ct. App. Jan. 30, 1992).....	34

<i>Hazelwood School Dist. v. United States</i> , 433 U.S. 299 (1977)	12, 35, 36
<i>Heerwagen v. Clear Channel Communications</i> , 435 F.3d 219 (2d Cir. 2006)	25
<i>Hnot v. Willis Group Holdings, Ltd.</i> , 228 F.R.D. 476 (S.D.N.Y. 2005)	43
<i>Hnot v. Willis Group Holdings, Ltd.</i> , 241 F.R.D. 204 (S.D.N.Y. 2007)	<i>passim</i>
<i>Hyman v. First Union Corp.</i> , 982 F. Supp. 1 (D.D.C. 1997)	44
<i>In Re GenesisIntermedia Sec. Litig.</i> , 232 F.R.D. 321 (D. Minn. 2005)	28
<i>In re Hartford Sales Practices Litig.</i> , 192 F.R.D. 592 (D. Minn. 1999)	47
<i>In re Initial Pub. Offering Sec. Litig.</i> , 471 F.3d 24 (2d Cir. 2006)	<i>passim</i>
<i>In Re Objections & Defenses to Real Property Taxes for 1980 Assessment</i> , 335 N.W.2d 717 (Minn. 1983)	26
<i>Int'l Bhd. of Teamsters v. United States</i> , 431 U.S. 324 (1977)	4, 32, 41, 45
<i>Kadas v. MCI Systemhose Corp.</i> , 255 F.3d 359 (7th Cir. 2001)	40-41
<i>Karvaly v. eBay, Inc.</i> , 245 F.R.D. 71 (E.D.N.Y. 2007)	25
<i>Kroll v. St. Cloud Hosp.</i> , 2006 U.S. Dist. LEXIS 46633 (D. Minn. June 30, 2006)	40

<i>LaBonte v. TEAM Indus.</i> , 2007 Minn. App. Unpub. LEXIS 737 (Minn. Ct. App. July 24, 2007).....	35, 36
<i>Maddow v. P&G</i> , 107 F.3d 846 (11th Cir. 1997)	35
<i>Mathers v. Northshore Mining Co.</i> , 217 F.R.D. 474 (D. Minn. 2003)	47
<i>McReynolds v. Sodexo Marriott Servs.</i> , 208 F.R.D. 428 (D.D.C. 2002)	44
<i>Millett v. Atlantic Richfield Co.</i> , 2000 WL 359979 (Me. Super. Ct. Mar. 2, 2000).....	25
<i>Moorhead v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 1989 U.S. Dist. LEXIS 9819 (D. Minn. May 24, 1989).....	39-40
<i>Oncale v. Sundowner Offshore Servs.</i> , 523 U.S. 75 (1998).....	40
<i>Ortiz v. Fibreboard Corp.</i> , 527 U.S. 815 (1999).....	47
<i>Paxton v. Union Nat'l Bank</i> , 688 F.2d 552 (8th Cir. 1982)	46
<i>Rathbun v. W.T. Grant Co.</i> , 219 N.W.2d 641 (Minn. 1974)	48, 50
<i>Richardson v. School Bd.</i> , 210 N.W.2d 911 (Minn. 1973)	50-51
<i>Ronconi v. Larkin</i> , 253 F.3d 423 (9th Cir. 2001)	49
<i>Scott v Goodyear Tire & Rubber Co.</i> , 160 F.3d 1121 (6th Cir. 1998)	35

<i>Shores v. Publix Super Mkts</i> , 1996 U.S. Dist. LEXIS 3381 (M.D. Fla. Mar. 12, 1996)	42, 47
<i>Sprint/United Mgmt. Co. v. Mendelsohn</i> , __ U.S. __, 128 S. Ct. 1140 (2008)	39
<i>State v. Ford</i> , 2008 Minn. App. Unpub. LEXIS 317 (Minn. Ct. App. Mar. 25, 2008).....	23
<i>Streich v. American Family Mut. Ins. Co.</i> , 399 N.W.2d 210 (Minn. Ct. App. 1987).....	2, 19, 27, 46
<i>Szabo v. Bridgeport Machines, Inc.</i> , 249 F.3d 672 (7th Cir. 2001)	30
<i>Velez v. Novartis Pharmaceuticals Corp.</i> , 244 F.R.D. 243 (S.D.N.Y. 2007).....	<i>passim</i>

Statutes, Rules and Regulations

Minn. Stat.

§ 363A.02.....	50
§ 363A.03, subd. 2.....	2, 40
§ 363A.08, subd.	34
§ 363A.28, subd. 10.....	3
§ 363A.29, subd. 3.....	41, 46
§ 363A.29, subd. 4.....	46
§363A.33, subd. 6.....	46

Minn. R. Civ. P.

Rule 23	<i>passim</i>
Rule 23.01	19
Rule 23.01(b)	32
Rule 23.01(d)	42
Rule 23.02	19
Rule 23.02(b)	45, 46, 47, 50
Rule 23.02 (c)	45, 47, 50
Rule 23.03(a)(2).....	39
Rule 56.03	27

Fed. R. Civ. P.
Rule 23(b)(2)46

Miscellaneous

1 David F. Herr, *Minnesota Practice Series: Civil Rules Annotated*
(4th ed. 2002)
§§ 23.3-23.2124-25

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LEGAL ISSUES

1. Did the District Court abuse its discretion by applying improper standards in determining that plaintiffs satisfied the requirements of Rule 23?

The District Court ruled that plaintiffs satisfied each of the requirements of Rule 23.01 and of Rule 23.02 (b) and (c). In doing so, the District Court looked beyond the pleadings, analyzed the evidence submitted by both parties, and determined that the Rule 23 requirements were met. Findings and Order Certifying Class and Appointing Class Counsel, April 11, 2008 ("Order"), A.62-65; Memorandum of Law in Support of Order Certifying Class and Appointing Class Counsel ("Memorandum"), A.66-72. Apposite cases: *Glen Lewy 1990 Trust v. Investment Advisors, Inc.*, 650 N.W.2d 445 (Minn. Ct. App. 2002); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *Velez v. Novartis Pharmaceuticals Corp.*, 244 F.R.D. 243 (S.D.N.Y. 2007); and *Hnot v. Willis Group Holdings, Ltd.*, 241 F.R.D. 204 (S.D.N.Y. 2007).

2. Did the District Court abuse its discretion by declining to resolve factual disputes unnecessary to determine whether the elements of Rule 23 are met?

The District Court ruled that it did not have to resolve factual disputes unnecessary to its Rule 23 decision. A.69-70. Apposite cases: *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *Velez v. Novartis Pharmaceuticals Corp.*, 244 F.R.D. 243 (S.D.N.Y. 2007); *Hnot v. Willis Group Holdings, Ltd.*, 241 F.R.D. 204 (S.D.N.Y. 2007); *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005).

3. Did the District Court abuse its discretion in certifying this class under Rule 23?

The District Court made specific findings and held that plaintiffs satisfied each of the requirements of Rule 23.01 and of Rule 23.02(b) and (c). A.62-65; A.66-72. In doing so, the District Court looked beyond the pleadings, analyzed the evidence submitted by both parties, and determined that the Rule 23 requirements were met. Apposite cases: *Forcier v. State Farm Mut. Auto. Ins. Co.*, 310 N.W.2d 124 (Minn. 1981); *Glen Lewy 1990 Trust v. Investment Advisors, Inc.*, 650 N.W.2d 445 (Minn. App. 2002); *Streich v. American Family Mut. Ins. Co.*, 399 N.W.2d 210 (Minn. Ct. App. 1987); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006).

STATEMENT OF THE CASE

Plaintiffs/Respondents claim that since at least 2001, when then-new CEO James McNerney brought his “vision” of a more youthful company to 3M, the company has engaged in a pattern or practice of age discrimination in performance appraisals, compensation, promotions, leadership development and job eliminations against employees age 46 and older. They allege that defendant/appellant’s pattern or practice of age-conscious decision-making favoring younger employees is manifest across all organizational units of the company and violates the Minnesota Human Rights Act (“MHRA”), which prohibits an employer from “using a person’s age as a basis for a decision.” Minn. Stat. § 363A.03, subd. 2, Add.2. Plaintiffs further allege that five 3M Human Resource (“HR”) practices have a disparate impact on older employees in

violation of the MHRA at Minn. Stat. § 363A.28, subd. 10, Add.11. The case is before Ramsey County District Court Judge Gregg E. Johnson.

A. Prior Relevant Motions

Prior to respondent's Motion for Class Certification, Judge Johnson heard and decided three motions bearing on substantive issues in this appeal:

1. Plaintiffs' Motion to Preclude the Use of Data, Shift Certain Discovery Costs and Modify the Amended Phase One Scheduling Order

By Order dated April 13, 2007, RA.1048,¹ Judge Johnson denied that portion of plaintiffs' motion asking the Court to preclude defendant's use of longitudinal data for employees going back to 1975 that defendant produced to plaintiffs on the last day of discovery. In their briefing and oral argument, the parties presented opposing analyses and arguments on the use and probative value of the longitudinal data that defendant offers as evidence against class certification. *See* Pltfs' Mem. in Supp. of Motion to Preclude Use of Data at 17-19; Def's Mem. in Opp. to Motion to Preclude Use of Data at 9, 11, 19-23; Pltfs' Reply Mem. in Supp. of Motion to Preclude Use of Data at 4-7.

2. Plaintiffs' Motion to Strike or Stay 3M's Motions for Summary Judgment Against the Named Plaintiffs

By Order dated December 10, 2007, RA.1049-51, Judge Johnson granted plaintiffs' motion to strike or stay summary judgment motions against each of the five named plaintiffs. In their briefing and oral argument, the parties presented opposing analyses and arguments on the nature, timing, and factual underpinnings of a court's

¹ Citations to Appendix to Respondents' Brief are referenced as "RA.____." Cases not published in a formal reporter also are included in the Appendix at RA.____.

consideration of pattern or practice claims under the legal framework set out in *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 (1977). See Pltfs' Mem. in Supp. of Motion to Strike or Stay Motions for Summary Judgment at 1, 3-6, 11-14; Def's Mem. in Opp. to Motion to Strike or Stay Motions for Summary Judgment at 5-16; Pltfs' Reply Mem. in Supp. of Motion to Strike or Stay Motions for Summary Judgment at 2-6.

3. 3M's Motion for Summary Judgment on Plaintiffs' Disparate Impact Claims

By Order dated December 10, 2007, R.A.1052-54, Judge Johnson denied defendant's motion for summary judgment and found that genuine issues of fact exist with respect to five disparate impact claims. In their briefing and oral argument, the parties presented opposing analyses and arguments about the claims, including the facts and statistical bases on which plaintiffs asserted that summary judgment should be denied. See Pltfs' Mem. in Opp. to Motion for Summary Judgment on Pltfs' Disparate Impact Claims at 3-32; Def's Reply Mem. in Supp. of Motion for Summary Judgment on Pltfs' Disparate Impact Claims at 2-11.

B. Plaintiffs' Motion for Class Certification and Subsequent Proceedings

On April 11, 2008, Judge Johnson heard three hours of oral argument on plaintiffs' motion to certify the class. RA.712-846. Besides their memoranda of law, the parties provided approximately 5,000 pages of materials to the Judge, including documents, deposition testimony, affidavits, summary exhibits, and expert reports. See, e.g., RA.1019-35 (plaintiffs' affidavit listing materials filed with memorandum);

RA.1041-47 (defendant's affidavit re same). On April 11, 2008, Judge Johnson issued his Order certifying a class defined as:

All persons who were 46 or older when employed by 3M in Minnesota in a salaried exempt position below PS grade 180 at any time on or after May 10, 2003, and who did not sign a document on or about their last day of employment purporting to release claims arising out of their employment with 3M.²

A.62. The class was permitted to prosecute five disparate treatment and five disparate impact claims and other issues for class treatment. *See* A.63-65. On May 14, 2008, Judge Johnson issued a Memorandum in support of his Order. A.66-72. This appeal ensued.

STATEMENT OF FACTS

The facts relevant to this appeal are those the District Court had before it and considered in determining whether this action satisfied the requisites of Minn. R. Civ. P. 23 ("Rule 23"), A.17-23. The District Court made findings on each of those requisites. Central to its determination that class certification was appropriate, and to this appeal, are its findings that the record presented "common questions for a class-wide pattern or practice trial" and that the "five 3M practices alleged raise disparate impact claims common to the class." A.69-70. The District Court's commonality findings are based on its subsidiary findings that: 1) plaintiffs presented evidence of "3M top executive centralized policy and decision-making"; 2) "the policies established by 3M executives suggest strategies that favor younger employees to the detriment of members of the

² Executive (director-level and higher) positions occur at PS grade 180 and above. RA.646; RA.308-09.

proposed class”; 3) “plaintiffs presented statistical evidence that strongly suggests a consistent pattern of disparities across defendant's business units suffered by older employees in each of the human resource practices challenged”; and 4) “[a]lthough 3M disputes the analysis conducted by plaintiffs’ expert ... sufficient statistical evidence has been presented to suggest that the data presents common questions for a class-wide pattern or practice trial.” A.69. The evidence underlying each of these findings and regarding the “human resource practices challenged” is discussed below.³

A. Defendant’s Centralized Personnel Policy-Making and Decision-Making

Substantial evidence supports the District Court’s finding “that 3M top executive centralized policy and decision-making creates company-wide common questions.”

A.69. Defendant’s top executives created “one HR process” tied “to results, pay, promotion and leadership development,” RA.210, with “the center as a driver ... of ideas ... of initiatives ... [and] of values.” RA.220. The evidence shows centralized policy and decision-making through at least four vertical and horizontal structural controls.

First, defendant’s organizational units are run by executive and senior vice presidents who direct the way in which central policies and HR practices are implemented in the units and monitor, review and approve the results. RA.710. Second,

³ Defendant’s Statement of Facts and the text styled “Introduction” that precedes it, do not comply with Rule 128.02, Subd. 1(c). The defendant claims that the evidence does not sustain the District Court’s findings, but fails, as mandated by the rule, to summarize the evidence that “tend[s] directly or by reasonable inference to sustain the verdict, findings or determination.” Accordingly, plaintiffs here state the facts and record evidence that tend to sustain the findings and determinations of the District Court, with record citations.

the CEO meets monthly with those unit leaders as a group to discuss HR policies and make certain high-level personnel placement decisions, RA.631-32; RA.660; RA.663; RA.690, meets semi-annually with each unit leader to conduct a *Health of the Organization* review that focuses on HR issues and decisions, RA.3-29; RA.177-81; RA.182-207; RA.629-30; RA.688-89, and meets annually with unit leaders as a group to plan the development of the company's "top talent." RA.49; RA.637; RA.676; RA.690. Third, at the direction of the CEO and his Operating Committee, the HR staff promulgates policies, published on 3M's intranet, that apply to all salaried employees. RA.632; RA.634; RA.660; RA.661-62; RA.664; RA.672; RA.692-93; RA.707-08. Defendant strives for "consistency across the organizations," RA.639; *see also* RA.673, through a network of HR employees assigned to each of the units to coordinate application of the policies. RA.633; RA.664; RA.667-68. Fourth, leaders of functional groups across units and HR employees conduct "Tier II" meetings each year to, among other things, compile lists of candidates for current and future cross-unit promotions, RA.163; RA.171; RA.658, to bring "uniformity in how we [are] judging the potential . . . of those individuals," and to encourage promotions "broadly across the company." RA.658.

B. Defendant's Corporate Bias in Favor of Young Employees

Substantial evidence supports the District Court's finding that "the policies established by 3M executives suggest strategies that favor younger employees to the detriment of members of the proposed class," that is, evidence demonstrating that these policies excluded or had other adverse effects on older employees. A.69.

For example, as CEO, James McNerney directed that defendant “should be developing 30 year olds with General Manager potential.” RA.1; RA.974-76. The Accelerated Leadership Development Program (“ALDP”) was designed as he directed, RA.978-81, despite the HR team’s recognition that the program was biased against older employees, in “that age was stated as an explicit criterion for selection,” and would create “a culture in which young high potential people would become the ‘haves,’ and older employees would be the ‘have nots.’” RA.976-77; *see* RA.637-38 (“age was ... one of the factors” for “developmental opportunities”). In response to these observations, the HR team was told not to talk about the issue outside team meetings because it could lead to legal trouble. RA.977-78. McNerney said that the risk that the young age of ALDP participants would give rise to lawsuits was “a cost of doing business.” RA.982-83.⁴

Likewise, McNerney instituted a company-wide management methodology called Six Sigma, RA.683, and told his direct reports that they should “select somebody in the early 40s or less” for that Black Belt and Master Black Belt (“BB/MBB”) training. RA.626. McNerney’s executives and other high-level managers institutionalized his favoring of younger employees. One executive informed a division’s leadership in 2001 that “we should not select any black belts over the age of 40,” RA.47, while a manager in early 2002 told an employee in his late 40s that “they’re generally picking younger

⁴ Between 2002 and 2004, defendant also ran the Pre-Managerial Assessment Program (“PMAP”), a development opportunity for selected lower-grade employees who had been with defendant fewer than five years. The fewer-than-five-year requirement assured that few, if any, older employees would be selected, and PMAP was described as focused on “our young and talented employees.” RA.155.

people” for BB training. RA.625.⁵ And in a speech to 3M executives, a senior vice president described that program as a way to train “your best young leaders” with skills that older employees did not have and then “put them back into the organization in the positions of higher responsibility,” thereby both “beat[ing] the seniority system” and making it easier to terminate older employees who were not given this valuable training. RA.35; RA.656; RA.657; RA.990-92. *See also* RA.847-60.

Regarding employee appraisals and promotions, the same senior vice president reportedly stated during a Tier II review that nobody over 40 should be rated as having the potential to become a director. RA.46. In making “high potential” rankings, RA.139-40; RA.79-80, raters are supposed to take “a *long-term* view of the ability of the employee to grow and take on increased responsibility.” RA.310 (emphasis added). Older employees are disadvantaged in being judged by expected years until retirement, termed “runway.” RA.48. This is particularly true because 3M uses age 55 as its projected retirement age. RA.679. Conversely, younger employees are given a tremendous advantage, RA.46-47, and may be rated “high potential” despite suspect performance. RA.208. McNerney also imposed a system of forced distribution of employee ratings under which many older employees experienced precipitous drops in their “contribution” ratings, *see, e.g.*, RA.945; RA.950; RA.861-903, while most of the recipients of “higher ratings were younger and had less overall responsibility and less

⁵ Defendant also analyzes and categorizes its BB/MBB and ALDP selections by age, including a report on “Stars 40 and Under,” RA.300; RA.280-89; RA.270-79, but tells its HR managers “BE VERY CERTAIN THAT THERE ARE NO REFERENCES OR INFERENCES AROUND AGE BEING A FACTOR IN BEING SELECTED AS A BELT!!!!” RA.50 (emphasis in original).

demanding objectives.” RA.1010; *see also* RA.861-903. And managers complained “about being forced to rate older people with lots of years of seniority as having unacceptable performance.”⁶ RA.959; *see also* RA.1007.

The evidence also shows that defendant’s preference for younger employees excluded older employees in promotion selection decisions. An email exchange among executives regarding a promotion illustrates the exclusionary nature of these policies:

I don’t see [employee name] as being given the opportunity for a G.M. job *given the environment we are operating in today. If he was 45 yrs. old (I am assuming he is about 50).....I think it would still be a challenge.* My sense is he has the ability to do a senior level job and most likely the experience but will he be given the opportunity. If he would not be given the opportunity he would then be in this job a long time which *creates a perceived problem on the part of the strong young talent you have in place today who want to grow.*

RA.157 (emphasis added). Similarly, an interviewer concluded that an applicant “would not be a candidate to succeed me because of being approximately the same age.”

RA.313. Further, many promotions were reserved for the younger employees selected for ALDP or BB/MBB training, discussed above. For example, executives slot BB/MBBs into “re-entry” promotions after the training, RA.173; RA.234, in some instances with approval of the CEO and his Operating Committee. *E.g.*, RA.159; RA.176; RA.305-07; RA.295; RA.315; RA.669-70; RA.705; RA.302; RA.304. Because BBs and MBBs are overwhelmingly under the age of 45, younger employees receive a disproportionate number of re-entry promotions. RA.904-33; RA.986. The relatively

⁶ Annual compensation increases, and for some, receipt of stock options, are largely determined by these performance appraisal ratings. *See* RA.605-06; RA.30; RA.694; RA.695-96; RA.697; RA.698.

few older BBs and MBBs apparently have difficulty obtaining re-entry positions. RA.965-66; RA.174-75; *see also* RA.624; RA.627.

Finally, the record contains evidence that defendant's job elimination programs targeted older employees. *See* RA.970; RA.962; RA.995. This includes evidence that executives manipulated job eliminations to terminate older employees, for example, one stating that he "expect[ed] to move [two persons] into retirement" and that a "shuffle of responsibilities should satisfy the job elimination criteria." RA.314. It also includes older employees' experiences of having their jobs eliminated, only to have similar positions offered to much younger employees. *E.g.*, RA.1014-15; *see also* RA.934-43.

These are examples of the evidence the District Court had before it when it found that "the policies established by 3M executives suggest strategies that favor younger employees to the detriment of members of the proposed class." A69. Plaintiffs' briefs on class certification and summary judgment reference additional information.

C. Statistical Evidence of a Consistent Pattern Across Business Units of Disparities Suffered by Older Employees in Each of the Challenged Human Resource Practices

The record before the District Court included the report of plaintiffs' experienced labor economist Dr. Janet Thornton, containing a series of "cross-sectional" analyses comparing the outcomes of each of the challenged practices for similarly situated older and younger employees. RA.398-400. She used three widely accepted methodologies – pools analyses, logistic regressions, and multiple regressions – and in each controlled for various measurable factors that reasonably might influence the results.

The use of controls permits comparison of employees with like characteristics and allows determination of the amount, if any, by which the results for class members deviate from the “expected” results. The “independent variables” used by Dr. Thornton generally included each employee’s business, division, facility/location, job, and grade, and often the employee’s time-in-grade, other tenure at the company, and one or more relevant performance appraisal ratings. RA.402-14. The average for all employees, after accounting for the controls, is the expected result, or baseline. Dr. Thornton’s analyses found “statistically significant” disparities – exceeding two “standard deviations” – between the actual and expected levels of performance appraisal ratings, compensation increases, leadership training and promotional selections, and job eliminations for class members. A “standard deviation” is a “precise method of measuring” the likelihood that the difference between an observed and an expected set of values could be produced by chance; two standard deviations is recognized as the threshold for statistical significance rendering “suspect” a hypothesis that the decisions were made in a non-discriminatory manner. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 309 n.14 (1977) (citing *Castaneda v. Partida*, 430 U.S. 482, 497 n.17 (1977)). See also § III., below.

Using these methods, Dr. Thornton found disparities that generally far exceeded two standard deviations. For example, age disparities in high “contribution” ratings, “high potential” ratings, and Black Belt selections between 2001 and 2005 were 16.81, 28.07, and 13.74 standard deviations, respectively. RA.428; RA.449. More important to the question of class certification, these analyses found consistent patterns of disparities adverse to older employees across defendant’s businesses and divisions, and over time.

In *every* combination of business unit, year and employment practice in which there was a disparity, except for compensation, the disparities were adverse to older employees. RA.745-59. Awards of pay increases and stock options were adverse to older employees in more than 75% of the business unit-year-practice combinations. RA.431; RA.437; RA.454-55; RA.459-60; RA.473; RA.476-77; RA.484-85; RA.497-500; RA.508; RA.517; RA.520-21.

In response to plaintiffs' statistical evidence, defendant engaged two experts, Dr. Robert Topel, a labor economist, and Dr. Bernard Siskin, a statistician. Most relevant to the issues presented in this appeal, but not mentioned in defendant's brief, is the fact that neither of these experts undertook any analysis that attempted to dispute the showings of consistent disparities across defendant's organizational units. RA.596-97. Thus, Dr. Thornton's findings of the company-wide effect of these policies on the older employees of the class stand uncontradicted in the record.

Instead, defendant's experts attempted to question whether plaintiffs' statistical evidence is probative of age discrimination, offering varying theories to argue that, on average, younger employees have more talent than older employees in the same salary grade and job, and thus, generally, statistical disparities adverse to older employees are to be expected even in the absence of discrimination. RA.608-09; RA.619-21; RA.596; RA.598; RA.599; RA.600.⁷ However, defendant's experts could offer no benchmark or

⁷ Alternatively, Dr. Siskin replicated plaintiffs' expert analyses, to which he improperly added every performance rating as variables, including multiple "tainted" variables, and then reported that the combined results reduced or eliminated the statistical significance of disparities. RA.533-37.

measurable age disparities predicted by these theories. They acknowledge that it is impossible to distinguish disparities resulting from age discrimination from those they claim should be expected. And they admit that the disparities Dr. Thornton found are those one would expect to result from age discrimination. RA.610; RA.611-12; RA.613; RA.614-15; RA.616; RA.622; RA.601-02. Thus, they offered the District Court no judicially established or accepted methodology for accepting their theories or statistics as relevant to evaluate whether age discrimination exists.

As in its brief here, the evidence defendant argued to the District Court was primarily general labor market data, unjustified extensions of labor economics theory, and historical employee data that do not allow comparisons of defendant's decision-making as to older and younger employees on the practices challenged. Plaintiffs' rebuttal expert, labor economist, Dr. David Neumark, *see* RA.547-94, reported each of these deficiencies in defendant's analyses and summarized that "the overall nature of Professor Topel's report ... is to marshal theoretical arguments or conjectures about the data to explain away *any* finding in the data that is potentially consistent with age discrimination." RA.582. Further, defendant's theories and generalized data do not address and do not measure the results of the specific HR practices challenged by plaintiffs, discussed below.

1. Performance Evaluations

Plaintiffs' statistical analysis of performance appraisals demonstrated that the overall disparity between the observed and expected number of high "contribution" ratings for older employees is 16.81 standard deviations. RA.428. There was no

disparity, however, for older sales employees, whose contribution ratings were based primarily on objective factors, evidencing that older employees did not perform worse, they just received lower ratings when those assessments were subjective in nature. RA.433. Similarly, ratings of older employees on “leadership attributes,” RA.149 (7.68 standard deviations) and “high potential” ratings (28.07 standard deviations), were at very high levels of significance. RA.428. And for purposes of class certification this pattern of disparities for older employees on each type of rating cuts across all business units. RA.431; RA.437.

Defendant’s experts did not perform any counter-analysis. Plaintiffs’ evidence was undisputed.

2. Selections for Leadership Development Programs

Using pools and logistic regression analyses, plaintiffs’ expert concluded that class members received statistically significantly fewer training opportunities than their baseline, with disparities, by program, ranging from 4.10 to 13.74 standard deviations. RA.445; RA.449-49a. This negative pattern was found in every year, and “when the results were analyzed by Business, a negative pattern was revealed, overall and by time period examined.” RA.460.

Plaintiffs’ evidence was uncontested below because defendant’s experts did not perform any counter-analysis. On appeal, defendant argues a theory that training rates might be expected to decline with age, App. Brf. at 12-13, but offers no evidence to back its argument.

3. Promotions

Although class members represent almost half the relevant population, only a quarter of more than 7,000 promotions went to class members. RA.388; RA.466. Controlling for numerous factors to compare like candidates, RA.468; RA.474, Dr. Thornton “found that employees age 46 and older were statistically significantly less likely to receive promotions than were younger workers,” RA.486, with “pools” analyses disparities over 13 standard deviations. RA.466-71. The analyses that included variables for time-in-grade and performance ratings were designed to measure any effect of the theories proffered by defendant’s experts and still showed statistically significant disparities. RA.468-76. And the analysis showed company-wide effects, as “the vast majority of the Businesses had outcomes that were adverse to employees age 46 and older.” RA.483.

Defendant does not argue on appeal any counter-analysis of the application of its challenged promotional practices to class members. It argues that a substantial majority of executives are 46 and older, but they are not class members. App. Brf. at 10.⁸ The general labor market data that it uses includes persons in all types of jobs and does not measure promotion rates at all. The average age of 3M employees likewise says nothing about promotions at 3M. App. Brf. at 34.

⁸ Defendant also suggests that older decision-makers are unlikely to discriminate against older employees, but that is contradicted by the policies that defendant’s executives implemented, discussed above, and by judicial decisions. See § IV.A., below.

Defendant also relies on historical or “longitudinal” company data tracking promotion rates by years of tenure for its claim that promotion rates for older employees follow a similar pattern over time. App. Br. at 11. But the limited historical data produced does not contain variables necessary to compare similarly situated employees prior to 1999.⁹ All that can be said is that the claimed pattern generally is adverse to more tenured employees and that it varied over time. RA.589-93; RA.318.

Finally, defendant hypothesizes that disparities in promotion rates between older and younger employees are to be expected because, on average, older employees may be more likely to have achieved their maximum potential at a given grade level. It points, however, to no data demonstrating that its theoretical explanation is at work in this or any other company.

4. Compensation

Defendant’s policies provide for annual increases for all salaried employees based on a percentage of annual compensation, within specified ranges, based primarily on contribution ratings. *See* n.6, above. Plaintiffs’ expert therefore analyzed percentage increases in compensation for older and younger employees “us[ing] multiple regression analyses that controlled for both organizational and job-related differences,” which demonstrated that “employees age 46 and older received statistically significantly lower percentage changes in total compensation than employees under age 46.” RA.509.

⁹ The analysis performed by defendant’s own expert suggests that older employees fared better in 1999 and 2000 than in McNerney’s years. RA.593; RA.318; RA.330-31.

Similarly, stock option awards were adverse to older employees to a statistically significant extent. RA.506-08.¹⁰

Defendant's experts do not discuss this evidence reflecting the application of its challenged compensation increase policies on its employees 46 and over. Instead, defendant first argues that, in general, older employees receive higher overall compensation than younger employees. But discussion of overall levels of compensation does not measure defendant's practices during the liability period or inform the Court whether they are fairly administered. Second, defendant points to data indicating that, in the national labor market as a whole, in general, the rate at which compensation increases slows with experience or age. But these data do not measure the right people; the data include people changing employers and jobs, including those who choose to work less or to leave higher paying jobs for lower ones, and reveal nothing about the expected compensation of those who are and remain full-time employees of any given company,¹¹ let alone the defendant. RA.532-33. Not surprisingly, defendant's experts could offer no level of disparity in compensation increases "to be expected" between older and younger persons based on these general labor market data or distinguish between disparities resulting from age discrimination and those they "expected."

¹⁰ When controlling for performance appraisal ratings, disparities remain but are not statistically significant, which is not surprising because they are the principal drivers of stock option awards. RA.505-06.

¹¹ There is little data or analysis in labor economics on compensation increases of those who remain employed with the same company, like members of the class here, but on this question one of defendant's experts has concluded that rates of compensation increases grow with tenure with the same company, rather than decline, as in the general labor market. RA.554-57.

5. Job Eliminations

Plaintiffs' statistical evidence also demonstrated that "employees age 46 and older were statistically significantly more likely to have job eliminations than were younger workers" and that "when the results were analyzed by Business, a negative pattern was also revealed." RA.521. The overall disparities were well above accepted levels of statistical significance, whether for all job eliminations (16.85 standard deviations) or only those defendant coded as "non-voluntary" (10.21 standard deviations). RA.515.

Defendant's statement of facts makes no reference to data on either of these practices.

In sum, the District Court reviewed ample and often undisputed evidence that directly and by reasonable inference sustains its determination that plaintiffs satisfied the requirements of Rule 23.

ARGUMENT

In deciding a class certification motion, a district court's task is to determine whether the prerequisites of Rule 23.01 and at least one of the requirements of Rule 23.02 are met. Minn. R. Civ. P. 23.01, 23.02; *Ario v. Metropolitan Airports Comm'n*, 367 N.W.2d 509, 513 (Minn. 1985). "Trial courts have considerable discretionary power to determine whether class actions may be maintained," *Streich v American Family Mut. Ins. Co.*, 399 N.W.2d 210, 213 (Minn. Ct. App. 1987), and certification decisions are reviewed for an abuse of discretion. "As long as the district court's reasoning stays within the parameters of Rule 23's requirements for the certification of a class, the district court decision will not be disturbed," even if the reviewing court "would have gone the

other way.” *Cooper v. Southern Co.*, 390 F.3d 695, 711-12 (11th Cir. 2004); accord *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 40-41 (2d Cir. 2006) (“*IPO*”).

Although it does its best to dodge, defendant must convince this Court that the District Court abused its discretion. It principally argues that the District Court applied the wrong legal standards to the class certification decision. Defendant asserts that the the preponderance of the evidence standard applies to Rule 23 issues and that courts must make fact determinations that implicate the merits. It then conflates virtually all Rule 23 issues with the ultimate merits question of discrimination. If correct, a court could not certify a class action without determining as a fact that it is more likely than not that the plaintiff class will succeed on the merits. This is precisely the inquiry that *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974), *IPO*, and other recent cases prohibit: courts must “assure that a class certification motion does not become a pretext for a partial trial of the merits.” *IPO*, 471 F.3d at 41.

Pre-judgment of the ultimate liability question is no more appropriate merely because defendant proffered novel theories and general statistics in response to plaintiffs’ statistical evidence. Defendant argues that the District Court erred because it did not reject plaintiffs’ well-established statistical methods of proving discrimination in favor of defendant’s novel theories and irrelevant data. By raising this challenge to established methods of proof, all that defendant accomplished at this stage was to raise another common issue for trial.

The District Court did not abuse its discretion. It did not articulate the Rule 23 standards incorrectly, fail to decide any factual issues that needed decision at this stage, or misapply the standards to the evidence before it. This Court should affirm its decision.

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY APPLYING IMPROPER STANDARDS IN DETERMINING THAT PLAINTIFFS SATISFIED THE REQUIREMENTS OF RULE 23

Relying primarily on *IPO*, defendant argues that the District Court erred by applying improper standards in determining whether the requisites of Rule 23 were satisfied. Defendant's arguments are contradicted by *IPO* and other cases, and mischaracterize the standards actually applied by the District Court.

A. The District Court Properly Determined that Each of the Rule 23 Requirements Is Satisfied

IPO teaches that "a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met," emphasizing that this must include a "definitive assessment of Rule 23 requirements." 471 F.3d at 41. This holding is consistent with the rulings of Minnesota courts that likewise state that a district court must "fully evaluate" the evidence to determine whether each of the Rule 23 requisites is "satisfied" or "met." See *Forcier v. State Farm Mut. Auto. Ins. Co.*, 310 N.W.2d 124, 130 (Minn. 1981); *Glen Lewy 1990 Trust v. Investment Advisors, Inc.*, 650 N.W.2d 445, 451-52 (Minn. Ct. App. 2002).

IPO and other decisions on the application of Rule 23 standards were argued to the District Court. It considered these cases, citing and quoting from decisions applying *IPO* in employment discrimination cases. A.69-70 (citing *Velez v. Novartis Pharmaceuticals*

Corp., 244 F.R.D. 243 (S.D.N.Y. 2007)) and *Hnot v. Willis Group Holdings, Ltd.*, 241 F.R.D. 204 (S.D.N.Y. 2007); see *Gordon v. Microsoft Corp.*, 645 N.W.2d 393, 403 (Minn. 2002) (considerations underlying a lower court's decision can be "gleaned" from cases it cited and what it had before it). In addition, its opinion recognizes that a class could be certified "only if" all of the requisites were met and "plaintiffs satisfied the requirements of Rule 23." A.66-67. It then went on to analyze each of the Rule 23 requirements and determine that each had been satisfied. A.68-72. These specific determinations make clear that the District Court made "definitive assessments" that the requirements were met.

B. The District Court Rigorously Analyzed the Evidence to Determine Whether the Rule 23 Requirements Were Satisfied

IPO makes clear that, to make a definitive assessment that a Rule 23 element has been satisfied, a district court "must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met." 471 F.3d at 41. It cannot rest only on the pleadings or "only 'some showing' of compliance with the[] Rule 23 requirements." *Id.* at 32. A district court must then consider all of the evidence submitted by both parties, not just the plaintiffs, and "resolve[] factual disputes," but only, as discussed in § II., below, insofar as "relevant to each Rule 23 requirement." *Id.* at 41.

Relatedly, *IPO* also rejected the suggestion, developed from imprecise language in earlier cases, "that an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed." *Id.* at 36. Again, the court must

consider both parties' expert evidence in resolving any factual disputes relevant to the Rule 23 requirements. *Id.* at 42.

The District Court followed these standards. Certainly, it referenced the complaint when summarizing the plaintiffs' basic allegations, A.67, but also probed behind the pleadings and assessed the evidentiary record. The District Court refers repeatedly to that record in describing the evidence, A.68-70, including to defendant's evidence. A.69-71.

Both parties discussed the extensive competing evidence and arguments in their oral argument and briefs, which in turn cited to hundreds of exhibits, scores of affidavits, and several expert reports. During the three hours of oral argument, Judge Johnson probed the evidence and arguments offered by both sides. *See, e.g.*, RA.738; RA.752; RA.754-55; RA.779-81; RA.793-94; RA.803-04. *See State v. Ford*, 2008 Minn. App. Unpub. LEXIS 317, at *5 (Minn. Ct. App. Mar. 25, 2008) (observing that a reviewing court assumes that the district court "examined the filed materials and took them under consideration in issuing its order") (citing *Behm v. John Nuveen & Co.*, 555 N.W.2d 301, 305 (Minn. Ct. App. 1996)), RA.1065-67. And the briefing and hearing on plaintiffs' motion for class certification were not the first time the evidence was discussed and argued to the District Court. Prior to the class determination, it heard and decided three substantive motions involving this same evidence, including a motion for summary judgment. *See* Statement of the Case, above. The District Court did not, as had the lower court in *IPO*, simply accept that certification was appropriate because plaintiffs had offered "some evidence" in support and it did not apply the standard defendant argues it

did, that if plaintiffs “offer any class evidence, no matter how misguided, it must be accepted and the class certified.” App. Brf. at 24.

The District Court also did not apply a “not fatally flawed” standard to plaintiffs’ expert reports. It cited *Velez* and *Hnot*, A.69-70, which contain a thorough application of *IPO*’s teachings to expert testimony in employment discrimination cases. It did not consider just plaintiffs’ expert evidence, but “the statistical evidence presented by the parties,” A.70, and it expressly considered that the defendant “dispute[d] the analysis conducted by plaintiffs’ expert [but] f[ound] that sufficient statistical evidence ha[d] been presented” to satisfy the commonality requirement. A.69. And the fact that the District Court reserved any “battle of the experts” for trial, A.70, does not reflect the application of an improper standard, but its proper conclusion that, once it determined that the evidence was sufficient to satisfy commonality, the “battle” as to the persuasiveness of that evidence was reserved for trial. *See* § II., below.

C. The District Court Properly Did Not Apply a Predominance of the Evidence Standard in Determining Whether Commonality and Predominance Standards Were Met

Defendant claims that “the District Court rejected *the* preponderance of the evidence standard” (emphasis added), App. Brf. at 1, as though that were the standard under Rule 23 in Minnesota. It is not. Neither Rule 23 nor any Minnesota court has adopted this standard for a Rule 23 certification decision, and such a standard is inconsistent with recent judicial decisions.¹²

¹² To the extent the *Amici Curiae* suggest otherwise, there is no suggestion of a preponderance standard in either 1 David F. Herr, *Minnesota Practice Series: Civil Rules*

Nor do the federal cases this Court cited in granting review mandate application of the standard. Indeed, none mentions it, other than *IPO*. And *IPO* not only declined to adopt that standard, but observed that an earlier decision referring to the preponderance of the evidence standard did so “without determining what standard had been used” and “may well have been dictum.” *IPO*, 471 F.3d at 37 (discussing *Heerwagen v. Clear Channel Communications*, 435 F.3d 219 (2d Cir. 2006)). It further indicated that the rationale in *Heerwagen* supporting the statement “is not necessarily so” and then discusses “a standard lower than preponderance.” *IPO*, 471 F.3d at 37 n.8. Also, in its “conclusions” and “observations” about the proper legal standard, *IPO* neither mentions nor mandates a preponderance standard. See *IPO*, 471 F.3d at 52-55. Thus, notwithstanding defendant’s claim of a “growing consensus,” no federal court of appeals decisions apply that standard.”¹³ In the end, defendant can cite only a smattering of federal district court and state cases that state a preponderance standard in connection with Rule 23. See App Brf. at 21-22. But most of them simply recite the standard in a formulaic manner at the beginning or end of their analyses. See, e.g., *Karvaly v. eBay, Inc.*, 245 F.R.D. 71, 79 (E.D.N.Y. 2007); *Millett v. Atlantic Richfield Co.*, 2000 WL 359979 (Me. Super. Ct. Mar. 2, 2000). And the analyses in other cited opinions cast

Annotated §§ 23.3-23.21 (4th ed. 2002) or David F. Herr, *Ann. Manual for Complex Litigation (Fourth)* §§ 21.13-21.28 (2008).

¹³ The *Amici Curiae* similarly misstate the record. The brief of *Amici Curiae* Employers asserts on p. 4 that “multiple federal circuits” have established a preponderance standard, but provides no citations. On pp. 6-7, it discusses use of the standard but cites only a few district courts and *Heerwagen*, the Second Circuit opinion that pre-dates and is rejected by *IPO*. The brief of *Amicus Curiae* Minnesota Chamber of Commerce at p. 4 argues the proposition but relies solely on the references in defendant’s brief.

doubt on whether the standard actually was applied. *See, e.g., Gudo v. Adm'rs of Tulane Educ. Fund*, 966 So. 2d 1069, 1074, 1076, 1078 (La. Ct. App. 2007) (finding commonality met where there was “a plausible basis for the plaintiffs’ allegations sufficient to support a prima facie case against the defendants”).

The factual disputes in this case are associated almost exclusively with the commonality requirement of Rule 23.01(b) and, to a lesser extent, the predominance element of Rule 23.02(c). Concerning both components, Rule 23 requires not that plaintiffs prove a “fact” but establish the existence of one or more “*questions* of law or fact common to the class.” Rule 23.01(b) (emphasis added). This means that “behavior causing a common effect must be subject to some dispute,” *Glen Lewy*, 650 N.W.2d at 453 (citing *In Re Objections & Defenses to Real Property Taxes for 1980 Assessment*, 335 N.W.2d 717, 719 (Minn. 1983)), and that “the resolution of the common questions affect all or a substantial number of class members.” *Glen Lewy*, 650 N.W.2d at 453. The existence of a question, issue, or dispute is not established by a preponderance of the evidence. It is established by the parties taking different positions as to that element of fact or law.

That commonality requires a determination of an issue or a question, rather than a fact, was aptly stated by the court in *Hnot*: “Commonality 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.... Thus, the ‘fact at issue’ [in class certification] is whether plaintiffs have presented common questions of fact or law.” 241 F.R.D. at 211 & n.3. To require

plaintiffs to show that they are going to win the issue by a preponderance of the evidence, as defendant argues, would be to overturn the earlier guidance of this Court that “[t]he threshold for commonality is not high.” *Streich*, 399 N.W.2d at 214.¹⁴

Determining the question of predominance, under both Minnesota and federal law, similarly does not require the court to decide any issues by a preponderance of the evidence. Rather, the court is required to decide whether the factual and legal issues that can be determined based on common evidence or legal argumentation outweigh the factual and legal issues that can be decided only on individualized evidence or considerations. The identification of those issues is subject to the same standards set forth above.

In some cases a single issue is critical to that determination. In those instances, predominance boils down to whether “generalized evidence will prove or disprove an element on a simultaneous, class-wide basis that would not require examining each class member’s individual position.” *Glen Lewy*, 650 N.W.2d at 455. *See also Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005) (“whether, given the factual setting of the case, if the plaintiff’s general allegations are true, common evidence could suffice to make out a prima facie case for the class”). Classes have failed on predominance grounds because the common evidence could not establish an essential element of the

¹⁴ In this regard, the burden for establishing the existence of an issue for commonality purposes is akin to but less than the burden for establishing the existence of a genuine issue in opposing a summary judgment motion. Minn. R. Civ. P. 56.03, Add.24. A factual issue is genuine if the evidence would “permit reasonable persons to draw different conclusions.” *Gradjelic v. Hance*, 646 N.W.2d 225, 234 (Minn. 2002). Of course, the standard must be lower than for summary judgment because “the threshold for commonality is not high,” *Streich*. 399 N.W.2d at 214, among other reasons.

analytically-distinct claims involved. For example, in *IPO*, 471 F.3d at 42-43, and, *In Re GenesisIntermedia Sec. Litig.*, 232 F.R.D. 321, 333-34 (D. Minn. 2005), the courts found presumptions of class reliance in securities claims inapplicable, and in *Blades*, 400 F.3d at 572-75, an antitrust suit could not proceed where the element of injury resulting from a price-fixing conspiracy could not be proven on a classwide basis with common proof.

This case, and employment class actions generally, do not give rise to such a critical single issue. If plaintiffs prove their pattern or practice or disparate impact claims at the first stage of trial, they will have prevailed, without any consideration of individual issues. Thus, defendant's resort to securities or antitrust cases to argue about predominance is misguided.

In sum, far from adopting "preponderance of the evidence," the federal courts have properly refrained from trying to identify a precise evidentiary standard to apply to Rule 23 determinations generally, and to commonality determinations in particular. These determinations involve complex applications of fact to law. As *IPO* states:

Although there are often factual disputes in connection with Rule 23 requirements, and such disputes must be resolved with findings, the ultimate issue as to each requirement is really a mixed question of fact and law. A legal standard, e.g., numerosity, commonality, or predominance, is being applied to a set of facts, some of which might be in dispute. The Rule 23 requirements are threshold issues

471 F.3d at 40.¹⁵

¹⁵ The court went on to note that "Rule 23 requirements differ from other threshold issues in that, once a district court has ruled, the standard for appellate review is whether discretion has been exceeded (or abused) [which] implies that a district judge has some leeway as to Rule 23 requirements, and, unlike rulings as to jurisdiction, may be affirmed

This Court should exhibit similar restraint. It should conclude that the District Court did not depart from the appropriate standards in making Rule 23 determinations and therefore did not abuse its discretion.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO RESOLVE CONTESTED MERITS DISPUTES THAT WERE UNNECESSARY TO DETERMINE WHETHER THE REQUIREMENTS OF RULE 23 WERE SATISFIED

The direction in *IPO* that the court “assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met,” *IPO*, 471 F.3d at 42, does not mean, as defendant suggests, that a court must resolve all evidentiary disputes offered in connection with a class certification motion. App. Brf. at 1. Defendant incorrectly argues that courts “*must* resolve disputes regarding the validity of expert evidence,” and that this “examination of competing expert opinions *necessarily* requires that courts determine which are more persuasive for purposes of making rulings on the Rule 23 requirements.” App. Brf. at 25-26 (emphasis added). Neither of these assertions is a correct statement of the law. Instead, the cases defendant cites emphatically limit resolution of evidentiary disputes, including expert disputes, to only those matters essential to determine whether a Rule 23 requirement is met. *See, e.g., IPO*, 471 F.3d at 41 (court “should not assess any aspect of the merits unrelated to a Rule 23 requirement” and has “ample discretion . . . to assure that a class certification motion does not become a pretext for a partial trial of the merits”); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) (court may consider facts “necessary” to Rule 23 in some circumstances for ruling either that a particular Rule 23 requirement is met or is not met.” *Id.*

determination); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) (same); *Blades*, 400 F.3d at 567 (“[t]he 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”).

As one federal district court summarized:

In re IPO makes clear that courts may resolve contested factual issues where necessary to decide on class certification, and when a claim cannot succeed as a matter of law, the Court should not certify a class on that issue.... However, “[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.”

Velez, 244 F.R.D. at 257 (quoting *Hnot*, 241 F.R.D. at 211) (emphasis in original).

The same principle applies to expert evidence. The District Court properly considered both parties’ expert evidence in deciding the Rule 23 issues, but properly refrained from further fact-finding. Once it determined that plaintiffs had presented sufficient evidence to establish “company-wide common questions of discrimination,” the District Court declined to resolve a “battle of the experts” and concluded that a decision on whose expert’s statistical evidence is more compelling is “more appropriately left for trial.” This conclusion is consistent with *IPO* and its progeny, *Velez* and *Hnot*.

In *Velez*, the defendants, as here, were “arguing that plaintiffs’ expert and anecdotal evidence fails to show bias or disparate impact.” 244 F.R.D. at 258. The *Velez* court repeatedly found that, because plaintiffs’ expert analyses offered sufficient evidence of common questions, disagreements about methodologies and conclusions were not appropriate for resolution at the class certification stage. *See, e.g., id.* at 260

(disagreements about statistical controls “go to the merits of the expert analysis; they do not bear on whether the question of discrimination in performance evaluations is common across the class”). In response to the same arguments by defendant here, the District Court followed *Velez*, quoting it for the proposition that “to determine commonality, it is not necessary to decide whether plaintiffs’ evidence is ultimately compelling.” A.70.

Then the District Court turned to *Hnot* in addressing the “battle of the experts.” A.70. The *Hnot* court stated that it had considered defendant’s “countervailing evidence” before making its commonality determination, but reserved any remaining disputes for trial:

In re 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. Defendants ignore the fact that *In re IPO* specifically rejected this interpretation of Rule 23. Instead, *In re IPO* reiterated that “experts’ disagreement on the merits -- whether a discriminatory impact [can] be shown -- [is] not a valid basis for denying class certification.” Thus, the Court may only examine the expert reports as far as they bear on the Rule 23 determination.

241 F.R.D. at 210 (quoting *IPO*, 471 F.3d at 35). The District Court similarly concluded that “to decide which expert report was more persuasive would be to decide whether the class was actually discriminated against by defendants,” A.70 (quoting *Hnot*, 241 F.R.D. at 211), and that no further “battle” was necessary. A.70.

Thus the District Court did not improperly refuse to decide any merits issues. No such decisions were needed once the District Court found commonality satisfied.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE PLAINTIFFS SATISFIED THE COMMONALITY REQUIREMENT OF RULE 23

Defendant focuses its appeal on the issue of commonality. No abuse of discretion occurred because the District Court properly recognized that plaintiffs' class pattern or practice and disparate impact discrimination claims raise common questions and that the resolution of these questions affects all or a substantial number of class members, thereby satisfying the commonality requirement of Rule 23.01(b). A.69-71.

By their very nature, viable pattern or practice claims raise questions common to all persons subject to the pattern or practice. These claims are litigated under the two-step method of proof articulated by the United States Supreme Court in *Teamsters*, 431 U.S. at 358-62. In the first "liability" phase, the plaintiffs must show that "unlawful discrimination has been a regular procedure or policy followed by an employer." *Id.* at 360. If plaintiffs prevail, the class is entitled to injunctive relief. *Id.* at 361. In the second stage, class members may seek individual relief through individual proceedings in which the proof of a pattern or practice of discrimination creates a presumption that the employer has discriminated against class members. *Id.* at 361-62.

Disparate impact claims also raise common questions for all persons subject to the challenged practice. To prove disparate impact under Minnesota law, an age discrimination plaintiff must first show that a facially neutral practice adversely affects employees of a defined age group to a statistically significant extent. The burden then shifts to the employer to show that it had a business necessity for adopting the practice. If the defendant meets that burden, the plaintiff still can prevail by proving that the

employer can meet its business needs through a less discriminatory alternative. *Hamblin v. Alliant Techsystems, Inc.*, 636 N.W.2d 150, 155 (Minn. Ct. App. 2001). By definition, then, both pattern or practice and disparate impact claims, if viable, necessarily involve *questions* common to the class and the District Court did not abuse its discretion in so finding.

The District Court found that plaintiffs had offered sufficient pattern or practice evidence. This included evidence of “centralized policy and decision-making,” “strategies that favor younger employees to the detriment of members of the proposed class,” and statistics “that strongly suggests a consistent pattern across 3M’s business units of disparities suffered by older employees in each of the human resource practices challenged.” A.69. Defendant does not seriously dispute plaintiffs’ evidence that the challenged policies and practices are centralized and apply in all business units, or contest the District Court’s conclusion that it engaged in “centralized policy and decision-making.” This finding establishes the foundation of commonality because the policies and practices apply to most or all class members.

Further, the District Court found that plaintiffs had presented substantial evidence that defendant’s centralized policies implemented “strategies that favor younger employees to the detriment of members of the proposed class.” Defendant does not contest the express focus of its executives on age. Rather, it proffers an alternative interpretation, that the policies and practices were merely talent development or succession planning. It attacks the District Court’s Rule 23 commonality finding because, supposedly, its practices are “at least as consistent with age-neutral decision

making as with age discrimination.” App. Brf. at 41. But in making this very argument, defendant illustrates the existence of questions common to all class members: whether defendant’s policies represented age discrimination or age-neutral decision making.

Defendant’s attempts to characterize its practices as “talent development,” “succession planning,” or “best practices,” do not eliminate the question whether their implementation was discriminatory. Although the MHRA does not prohibit leadership training or succession planning, it does prohibit using age as a basis for decision-making in the implementation of those processes.¹⁶ See *Hartzell v. Patterson Dental Co.*, 1992 Minn. App. LEXIS 108 (Minn. Ct. App. Jan. 30, 1992) (unpublished) (finding that termination lists including employee names and ages were probative of discrimination), RA.1055-58; see also *Bevan v. Honeywell, Inc.*, 118 F.3d 603, 610 (8th Cir. 1997) (holding that a reasonable jury could conclude from evidence including succession planning documents referencing employee ages “that the company’s revitalization campaign . . . consisted of a new company policy to weed out the older leaders and replace them with talented young ones”). The District Court therefore did not abuse its discretion in concluding that plaintiffs had offered sufficient evidence about the application of defendant’s HR policies, systems and procedures to find “questions common to the class.” A.70.

¹⁶ Defendant claims that “age is different.” App. Brf. at 31. However, unlike the federal statutes, which treat age differently and in a separate statute than race and gender, the MHRA includes age in the same statute and accords age the same employment protections as race, gender and other protected characteristics. See Minn. Stat. § 363A.08, subd. 2, Add.6. Accordingly, no basis exists for defendant to claim it can favor younger employees in training, just as it cannot favor male employees in training.

Defendant devotes the greatest energy to statistical issues. All it succeeds in doing is highlighting the existence of additional issues to be resolved at the merits stage.

As discussed in the Statement of Facts, § C., above, plaintiffs presented cross-sectional statistical analyses prepared in accordance with methods long accepted by federal courts in discrimination cases. *See Hazelwood*, 433 U.S. at 307-08, 312; *Bazemore v Friday*, 478 U.S. 385, 400-01 (1986). Despite defendant's suggestions to the contrary, these methods are used in age discrimination cases. *See, e.g., Adams v. Ameritech Servs., Inc.*, 231 F.3d 414 (7th Cir. 2000) (reversing district court for refusing to consider statistical analysis comparing older and younger employees as proof of age discrimination); *Maddow v. P&G*, 107 F.3d 846, 852 (11th Cir. 1997) (reversing summary judgment for employer in part on basis of statistical evidence of age discrimination); *Scott v. Goodyear Tire & Rubber Co.*, 160 F.3d 1121, 1129 (6th Cir. 1998) (same); *Bevan*, 118 F.3d at 611-12 (statistical evidence properly admitted as proof in intentional age discrimination case).

Consistent with federal precedent, this Court has recognized and relied on cross-sectional statistical analyses as proof of age discrimination on more than one occasion. *See LaBonte v. TEAM Indus.*, 2007 Minn. App. Unpub. LEXIS 737 (Minn. Ct. App. July 24, 2007), RA.1059-64; *Hamblin*, 636 N.W.2d 150.¹⁷ In fact, the analyses of plaintiffs'

¹⁷ Defendant wrongly argued below that *LaBonte* and *Hamblin* are distinguishable because they are individual, not class cases, and because the theories it presents here were not presented in those cases. An analysis of whether there was a pattern of age disparities does not turn in any way on whether a class has been sought or certified. If defendant's theories were not presented in those cases, this only highlights how novel they are. Finally, because plaintiffs' expert here controlled for tainted variables whereas

expert here included more controls and were, therefore, even more probative than those on which this Court relied. Dr. Thornton even introduced “tainted” variables, like “time-in-grade” and performance ratings that controlled for the defendant’s theory that older employees tend to be inferior to younger employees in the same job and grade level.

Notwithstanding defendant’s argument that plaintiffs’ expert established no “baseline,” cross-sectional analyses are grounded in a “baseline,” the “expected” rate of selections taking into account all controls used in the analyses. Deviations from the baseline are measured in standard deviations. *See Hazelwood*, 433 U.S. at 308 n.14 (“standard deviation” is a measure of “predicted fluctuations from the expected value of a sample,” such that “if the difference between the expected value and the observed number is greater than two or three standard deviations,’ then the hypothesis that [decisions were non-discriminatory] would be suspect”) (quoting *Castaneda*, 430 U.S. at 497 n.17); *Bazemore*, 478 U.S. at 400-01 (court “erred in stating that petitioners’ regression analyses were ‘unacceptable as evidence of discrimination,’ because they did not include ‘all measurable variables thought to have an effect on salary level’”; challenge to variables goes to weight, not admissibility of statistical evidence). Because plaintiffs’ expert introduced “tainted” variables, the “baseline” in her analyses accounted even for the defendant’s theoretical defense. *See, e.g.*, RA.573-83; RA.317-18.

Both the analyses controlling for “tainted” variables and those limited to “untainted” variables demonstrated statistically significant disparities as to each of

the plaintiffs’ experts in *LaBonte* and *Hamblin* did not, her analyses and results are more conservative than those on which this Court relied in *Hamblin* and *LaBonte*.

defendant's practices challenged in the case, throughout defendant's organizational units and across time. Indeed, the evidence of a consistent pattern across the company was so strong that defendant's experts did not even undertake alternative analyses to challenge it. Defendant tried only to convince the District Court that this type of methodology was not appropriate in age discrimination cases, despite the decisions of numerous courts, including this one, relying on similar, often less rigorous analyses in other age discrimination cases. Based on defendant's theory that older employees tend to be inferior to younger employees in the same grade and job,¹⁸ it made two arguments below: cross-sectional analyses are inappropriate in age discrimination cases, and even more "tainted" variables were necessary to perform a cross-sectional analysis in this case.

Defendant has largely abandoned the second argument here, for good reason. "[D]isagree[ments] on the propriety of various [statistical] controls ... go to the merits of the expert analysis; they do not bear on whether the question of discrimination ... is common across the class." *Velez*, 244 F.R.D. at 260; see *Bazemore*, 478 U.S. at 400-01.

Defendant should fare no better in arguing that the District Court abused its discretion in not rejecting as a matter of law well-established and long-accepted methods of statistical proof in age cases. Defendant principally offers longitudinal studies for the period 1976 through 2005 as an alternative to cross-sectional analyses. Defendant points

¹⁸ The age-based theories and generalizations that defendant suggests as the basis for its attack on plaintiffs' statistical evidence can be viewed as age stereotypes that the trier of fact may view as evidence of discrimination in determining the merits. See, e.g., *Adams*, 231 F.3d at 427-28 (observing that "assumption that people over 40 are already working in the highest job they will ever reach could be viewed by a trier of fact as just such a[n age] stereotype").

to no case holding that its longitudinal analyses are appropriate or the most appropriate, let alone the only viable analysis, in age discrimination cases. Defendant also points to no published professional literature to this effect. It has cited to no case rejecting cross-sectional analyses like those performed by plaintiffs' expert that control for performance appraisal ratings and time-in-grade. Indeed, the cross-sectional analyses performed by its own statistical expert that differ from plaintiffs' expert only in the number of controls undermines its argument that cross-sectional analyses cannot be used. Finally, defendant makes no mention of the extensive refutation of defendant's longitudinal analysis offered by plaintiffs' rebuttal labor economics expert Dr. Neumark, *see, e.g.*, RA.589-93; RA.318; RA.531-35, as well as Dr. Neumark's extensive refutation of its theories regarding the assumed inferiority of older employees in a given grade level. *See, e.g.*, RA.561-64; RA.573-85; RA.318-19.¹⁹ Like its arguments regarding the intent of its policies, defendant's novel statistical arguments highlight common questions for trial, *i.e.*, whether the statistical evidence and interpretations of that evidence are probative of discrimination.

For all these reasons, the District Court did not abuse its discretion by deciding – indeed, it properly concluded – that defendant's statistical arguments went to the merits. Determining that Rule 23 requirements were met here did not call for the District Court to decide which of the parties' competing analyses was more persuasive.

¹⁹ Defendant also argues that Dr. Neumark's writings somehow undermine plaintiffs' statistical analysis, without citing to his refutation of those interpretations as "selectively cho[sen] quotes ... that clearly distort[] their meaning" and explains that, in context, his writings support Dr. Thornton's analysis. RA.321-23.

Moreover, *per se* evidentiary exclusions like those suggested by the defendant readily lead to error. See *Sprint/United Mgmt. Co. v. Mendelsohn*, ___ U.S. ___, 128 S. Ct. 1140, 1147 (2008) (commenting that a *per se* rule excluding a particular type of anecdotal evidence of discrimination would have constituted an abuse of discretion); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988) (blanket evidentiary exclusions constituted reversible error). This is especially true when the type of evidence defendant seeks to exclude is so well accepted.

Despite defendant's rhetoric, the evidence presented by plaintiffs is sufficient to establish the existence of common questions as to the class. The District Court did not abuse its discretion in so holding.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE PLAINTIFFS SATISFIED THE OTHER REQUIREMENTS OF RULE 23

The District Court fully evaluated the remaining Rule 23 requirements in light of Minnesota and relevant federal law. It did not abuse its discretion in finding them satisfied.

A. Rule 23.03(a)(2)

Rule 23.03(a)(2) requires the District Court to define the class in its certification order, which it did. See Statement of the Case, above. No abuse occurred in fashioning this definition. Contrary to defendant's criticisms, it is neither imprecise, arbitrary nor overbroad. This class is precise because it is defined by age, job grade and employment dates, thereby providing "an 'objective standard by which potential class members can be readily identified.'" *Moorhead v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1989 U.S.

Dist. LEXIS 9819, at *4-5 (D. Minn. May 24, 1989) (citation omitted). It has some fluidity (e.g., people enter when they become 46, and may exit if they are promoted to a position outside the class) but this situation occurs in any class discrimination case when employees enter or leave the class by being hired, promoted or demoted.

Nor is the class definition arbitrary. It includes persons age 46 and older because that is the reasonable measure of the point at which the defendant actually treats employees as “older” in the five areas challenged. See RA.721-23. The definition is appropriate as the MHRA prohibits employers from “using a person’s age as a basis for a decision if the person is over the age of majority” Minn. Stat. § 363A.03, subd. 2, Add.2. See *Ace Elec. Contrs., Inc. v. IBEW, Local Union No. 292*, 414 F.3d 896, 898, 901 (8th Cir. 2005) (permitting claim based on age 50 and below because under MHRA’s “broad language ... any decision made with reference to a person’s age, be it old or young, is impermissible”); *Kroll v. St. Cloud Hosp.*, 2006 U.S. Dist. LEXIS 46633, at *7 (D. Minn. June 30, 2006) (permitting claim on behalf of those younger than age 45). The job grades of the class are not arbitrary as they exclude decision-making executives at PS grade 180 and above from the employees affected by their decisions. That many executives are age 46 or older does not disprove discrimination: “Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.” *Castaneda*, 430 U.S. at 499 (cited with approval in *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78-79 (1998)). See also *Kadas v. MCI Systemhose Corp.*,

255 F.3d 359, 361-62 (7th Cir. 2001) (explaining why older decision makers may discriminate against other older employees).

Defendant criticizes the class definition as overbroad because it may include persons not entitled to relief and it may not be clear now who has claims. App. Brf. at 43. However, if discrimination is found, all proposed class members will be entitled to injunctive and other relief under the MHRA Minn. Stat. § 363A.29, subd. 3, Add.12. Then, under the *Teamsters* bifurcated process of determining pattern or practice claims, “potential victim[s] of the proved discrimination” will identify themselves by coming forward in phase two to claim individual relief. *Teamsters*, 431 U.S. at 362.

Accordingly, the District Court did not abuse its discretion in defining the class.

B. Numerosity

The District Court properly held that the record supports a finding that a proposed class in excess of 4,900 current and former employees satisfies the numerosity requirement under Minnesota law where a plaintiff “need not show the exact number in the putative class,” and where classes numbering in the hundreds are “almost always impracticable.” *Glen Lewy* 650 N.W.2d at 452. Because numerosity is based on the size of the “putative class,” *id.*, this Court should reject defendant’s merits argument that this element fails because no employees have experienced discrimination.²⁰

²⁰ Defendant argues that the class size is limited to the statistical deviations from the expected values, or shortfalls, in Dr. Thornton’s analyses. App. Brf. at 42. But “pools” analyses are evidence, not accurate counts of victims, RA.831-33, and all members of the class are entitled to injunctive relief. These types of arguments have been firmly rejected by federal courts. *See, e.g., Boykin v. Georgia-Pacific Corp.*, 706 F.2d 1384, 1386-87 (5th Cir. 1983).

C. Typicality

The District Court correctly found the typicality requirement of Rule 23.01(c) met because “the plaintiffs assert the same claims as those asserted on behalf of the class” and they “also assert the same legal theories as the class in pursuing the claims.” A.71. This is precisely the circumstance that satisfies typicality. *Glen Lewy*, 650 N.W.2d at 453 (“A ‘strong similarity of legal theories’ satisfies the typicality requirement even if substantial factual differences exist.”) (citation omitted).

The District Court also properly concluded that “3M’s argument that some older workers have been successful is not a sufficient basis for the court to find a lack of typicality.” A.71. This element does not require every older employee to claim adverse treatment. *See Ario*, 367 N.W.2d at 513 (holding that typicality was not defeated because some class members may prefer not to seek damages). *See also Shores v. Publix Super Mkts.*, 1996 U.S. Dist. LEXIS 3381, at *9-10 (M.D. Fla. Mar. 12, 1996) (affidavits from hundreds of potential class members who were satisfied with their treatment cannot defeat class certification because “plaintiffs cannot be precluded from asserting their right to be free from discrimination merely because other employees chose not to assert those rights”).

D. Adequacy

The adequacy requirement of Rule 23.01(d) means that “plaintiffs’ interests must coincide with the interests of other class members and that plaintiffs . . . will competently and vigorously prosecute the lawsuit.” *Ario*, 367 N.W.2d at 513. The District Court

properly concluded that these elements are met here when it found that plaintiffs “will fairly and adequately protect the interests of the class.” A.71.

It also properly rejected defendant’s claim that a conflict arises from the inclusion of supervisors and non-supervisors in the class. *Id.* Defendant mischaracterized the class claims as alleging discrimination by class members who make employment decisions about other class members. App. Brf. at 44. The District Court recognized this as incorrect because the relevant human resources decisions “were directed by policies established and enforced at the highest levels of the corporation,” and because the plaintiffs “adequately challenge the alleged discriminatory policies that impact both supervisory and non-supervisory employees.”²¹ A.71. Where, as here, “the alleged discriminatory policies affect supervisory and non-supervisory employees alike” and the relief applies across the class, there is no showing of “substantive conflicts between supervisory and non-supervisory employees that would preclude certification.” *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 168 (N.D. Cal. 2004), *aff’d*, 509 F.3d 1168, 1185 (9th Cir. 2007); *Hnot v. Willis Group Holdings, Ltd.*, 228 F.R.D. 476, 485-86 (S.D.N.Y. 2005) (“If supervisory employees and supervisees all are subject to discrimination, all have an equal interest in remedying the discrimination”). Moreover “[t]he mere fact that some putative class members were involved in the supervision and rating of other class members does not mean that the supervising class members perpetuated or contributed to

²¹ In their brief at p. 18, *Amici Curiae* Employers question the District Court’s adequacy determination based on *Armstrong v. Powell*, 230 F.R.D. 661 (W.D. Okla. 2005). However, unlike the *Whitaker* plaintiffs, the plaintiffs in *Armstrong* never “identified a company-wide practice of discrimination.” *Id.* at 675.

any of [defendant's] alleged discriminatory policies.” *McReynolds v. Sodexo Marriott Servs.*, 208 F.R.D. 428, 447 (D.D.C. 2002) (citing *Hyman v. First Union Corp.*, 982 F. Supp. 1, 5 (D.D.C. 1997)).²²

The two cases that defendant cites do not point to any abuse of discretion in finding adequacy. In *Clayborne v. Omaha Pub Power Dist.*, 211 F.R.D. 573 (D. Neb. 2002), the plaintiffs failed to show that the same policies applied to the entire class, which is not the case here. *Id.* at 587-88. The second case, *Donaldson v. Microsoft Corp.*, 205 F.R.D. 558, 568-69 (W.D. Wash. 2001), rested on no more than a “potential conflict” and it has been criticized for failing to “provide a persuasive analysis of how this conflict would cause a problem in actuality.” *Dukes*, 222 F.R.D. at 169 n.44.

Defendant does not claim in this appeal that any class members are harmed by any alleged conflict, but claims instead that the company is unhappy that it “must manage a business with managers who are now told they are adverse to the Company.” App. Brf. at 44. This situation occurs in every class action involving current employees who are managers. It also is not germane to adequacy because that element is designed to protect the interests not of the company, but of the absent class members.

²² This type of supervision is no barrier to adequacy “given that the liability phase of the trial properly focuses on the existence of a general pattern or practice of discrimination, not individual employment decisions,” *Dukes*, 222 F.R.D. at 168-69, and any such conflicts can be handled in the remedial phase of the case, where “[s]upervisors and non-supervisors alike will be able to come forward with evidence of their specific injuries and appropriate relief.” *McReynolds*, 208 F.R.D. at 447 (citation omitted).

E. Rule 23.02

Rule 23.02 requires a court to find that at least one of its three subsections are met. The District Court acted within its discretion when it found that the proposed class was maintainable under both Rule 23.02(b) and (c) and ordered the class certified under Rule 23.02(b), with provision of notice and “opt-out” procedures prior to the award of any monetary relief. A.63. Nor is there abuse in its alternative determination certifying the class “as to all issues related to injunctive relief under Rule 23.02(b) and as to all other issues under Rule 23.02(c).” *Id.* The propriety of these determinations is reinforced by its finding that the two-stage trial procedure for litigating employment class actions approved by the United States Supreme Court in *Teamsters* is “a reasonable approach to this litigation.” A.72.

1. Rule 23.02(b)

Judge Johnson properly found Rule 23.02(b) satisfied because “3M’s actions that are the subject of the complaint apply generally to class members such that, if those actions constitute age discrimination, injunctive relief would be appropriate for the class as a whole.” A.63. Defendant relegates its disagreement with this finding to a single footnote conflating the Rule 23 issue with the merits question determination. App. Brf. at 30 n.12. However, Rule 23.02(b) requires only a showing that the conduct of the defendant is a type for which injunctive relief would be a proper remedy if liability is found. Judge Johnson cannot have committed error in finding this is true because the MHRA views discrimination by its nature as conduct that makes injunctive relief

appropriate and, in fact, mandates that relief any time discrimination is found. Minn. Stat. § 363A.29, subd. 3, Add.12.

Defendant also wrongly claims error based on out-of-date text from the 1968 Advisory Committee Note for Rule 23.02(b) stating that cases seeking money damages do not fall under this subsection. However, Rule 23 was revamped in 2006 to conform with federal Rule 23, which allows monetary as well as injunctive relief in the context of Fed. R. Civ. P. 23(b)(2), the equivalent to Rule 23.02(b). *See, e.g., Paxton v. Union Nat'l Bank*, 688 F.2d 552, 563 (8th Cir. 1982) (certifying a (b)(2) class seeking back pay in addition to injunctive relief); *Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 642-44 (N.D. Cal. 2007) (certifying a (b)(2) class seeking compensatory and punitive damages and backpay in addition to injunctive relief).

The 1968 note also is inconsistent with this Court's statement that Rule 23.02(b) "is used where civil rights violations are alleged ..., cases which make injunctive or declaratory relief appropriate." *Streich*, 399 N.W.2d at 216. And the MHRA mandates that the court enter injunctive relief and award money damages in "all cases" where liability is found. Minn. Stat. §§ 363A.29, subds. 3-4, Add.12-13, 363A.33, subd. 6, Add.15. It would contradict *Streich* and the MHRA's remedial purpose and statutory scheme to exclude all employment class actions from certification under Rule 23.02(b) simply because they seek both the injunctive and monetary relief mandated under the statute.

2. Hybrid Class Under Rule 23.02(b) and (c)

Alternatively, the district certified the class as a hybrid to pursue injunctive relief under Minn. R. Civ. P. 23.02(b) and monetary relief under Rule 23.02(c), including notice and opt-out procedures to satisfy any due process concerns. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-47 (1999). Defendant does not contest that courts have certified hybrid classes like this one, seeking both injunctive and monetary relief. *See, e.g., Mathers v. Northshore Mining Co.*, 217 F.R.D. 474, 487 (D. Minn. 2003); *Beckmann v. CBS, Inc.*, 192 F.R.D. 608, 615 (D. Minn. 2000); *Shores*, 1996 U.S. Dist. LEXIS 3381, at *9.

Under Rule 23.02(c), a district court must find that common questions predominate over individual issues and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The decision whether to find predominance and superiority is highly discretionary. It “approaches a grant of discretionary power to allow class actions whenever the court sees fit.” *Ario*, 367 N.W.2d at 514 (citation omitted). *See also Forcier*, 310 N.W.2d at 130 (rule grants trial judge “considerable discretion,” thereby creating flexibility “both to determine whether the suit may be maintained and, during the trial, to alleviate any procedural problems that may arise”).

a. Predominance

“Predominance will be found where generalized evidence may prove or disprove elements of a claim.” *Glen Lewy*, 650 N.W.2d at 455 (citing *In re Hartford Sales Practices Litig.*, 192 F.R.D. 592, 604 (D. Minn. 1999)). The District Court acted well

within its discretion in finding the predominance requirement met here. As discussed in § III., above, the pattern or practice and disparate impact employment claims necessarily rise or fall on “generalized evidence” that will prove or disprove the elements of plaintiffs’ substantive claims, thereby making it possible to resolve in a single action a “significant aspect” of their case. *Id.* Nor does the need for individualized relief proceedings defeat predominance. In *Rathbun v. W.T. Grant Co.*, 219 N.W.2d 641 (Minn. 1974), the Minnesota Supreme Court held that it had “no difficulty” in affirming a class action requiring multiple proceedings to determine class members’ individual damages. *Id.* at 652; *see also Glen Lewy*, 650 N.W.2d at 457 (same).

b. Superiority

With respect to superiority, defendant did not even reference *Teamsters* in its appeal, let alone challenge the District Court’s adoption of its “reasonable” two-stage trial plan. A.72. Defendant also ignores the District Court’s denial of its motion for summary judgment on the disparate impact claims. Those claims will go to trial, and defendant has presented no reason why litigating these challenges to company-wide practices on a class basis is not superior to individual lawsuits. If these disparate impact claims proceed on a class basis, defendant has not argued why trying the pattern or practice claims along with them would be significantly more difficult to manage or would not be efficient.

Defendant challenges Judge Johnson's exercise of discretion only through *in terrorem* arguments that the class is unmanageable.²³ But the District Court weighed and rejected defendant's manageability arguments. It agreed that "phase two individual damage proceedings are not without complexity." A.72. But it also properly weighed other Rule 23.02(c) factors such as whether class members would file their own actions and the desirability of litigating the case in a single forum. It had before it evidence that over two hundred current and former employees had contacted plaintiffs' counsel with respect to this action, many of whom prepared affidavits. R.1039. And it concluded that the two-stage mechanism beginning with pattern or practice and disparate impact determinations "is preferable to the alternative of employees having to file individual actions involving the same issue." A.72. *See Forcier*, 310 N.W.2d at 130 (observing that the "'difficulties [that] will be encountered in the management of [a] class action ... are insignificant when compared to the difficulties and inconsistencies that may result from a number of actions brought . . . involving the same issue'" (citation omitted)). The District Court further concluded that the complexities of mounting a pattern or practice or disparate impact lawsuit "could easily result in few of the proposed class members

²³ *Amicus Curiae* Minnesota Chamber of Commerce makes dramatic assertions, claiming for example that "[t]his Court should be aghast"; and "[c]lass litigation like this strikes terror in the eyes of" its members. Chamber's brief at 7. Then it charges that this case is "wasteful and extortionate" like *Ronconi v. Larkin*, 253 F.3d 423 (9th Cir. 2001). That case did not even survive a motion to dismiss. This case has survived a motion for summary judgment and a challenge to its pattern or practice claims. Plaintiffs have presented strong policy, anecdotal and statistical evidence in support of their claims. Such unfounded, overblown rhetoric has no place in appellate briefs, especially in those of *amici* that are supposedly writing to enlighten the Court.

seeking relief and being justly compensated, if appropriate.” A.72. This decision, too, is consistent with decisions emphasizing the importance of class actions in providing relief to individuals when the balance of cost and potential return does not justify the cost of individual remedial litigation. *See, e.g., Rathbun*, 219 N.W.2d at 653; *Forcier*, 310 N.W.2d at 130; *Glen Lewy*, 650 N.W.2d at 457. Indeed, the cost of litigating an individual pattern or practice or disparate impact suit against an employer of 3M’s size and resources would dwarf the damages associated with an individual’s lost pay or promotion claim, rendering such a suit foolhardy.

In sum, the defendant has offered no basis for this court to find that the District Court abused its discretion in certifying this class as a hybrid under Rule 23.02(b) and (c), particularly given the discretion and flexibility available to the District Court under Minnesota law.

CONCLUSION

For the foregoing reasons, this Court should affirm the ruling of the District Court and remand the case for a class-wide pattern or practice and disparate impact trial on the merits. It should not, as the arguments of defendant and *Amici Curiae* invite, transform class certification into a trial on the merits. Class litigation is not a threat to the well-being of businesses in Minnesota. On the other hand, requiring plaintiffs to prove prematurely, before merits discovery is complete, that they will prevail on their claims at trial, would deter employees from filing class suits. This would vitiate a vital tool for employees to protect their livelihoods and achieve the state’s public policy of securing for its citizens freedom from discrimination in employment. Minn. Stat. § 363A.02, Add.1. *See Richardson v. School Bd.*, 210 N.W.2d 911, 914 (Minn. 1973) (the

elimination of discriminatory practices cannot “be accomplished without the aid of class suits”).

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RULE 132.01 CERTIFICATE OF COMPLIANCE

I, Susan M. Coler, certify that Respondents' Brief complies with Rule 132.01.

I further certify that, in preparation of this memorandum, I used Microsoft ® Office Word 2003 Version 11.8134.8132 SP2, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced brief contains 13,623 words.

DATED: September 8, 2008

SPRENGER & LANG, PLLC



Susan M. Coler