

A08-816

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.

APPELLANT'S BRIEF

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LEGAL ISSUES

Issue 1: Does the plaintiffs' burden to establish the numerosity, commonality, typicality, and predominance requirements of Minnesota Rule of Civil Procedure 23 require proof by a preponderance of the evidence?

District Court Ruling: The District Court rejected the preponderance of the evidence standard in favor of an apparent *prima facie* evidence standard and certified a class based on allegations in the Complaint and Respondents' showing of evidence "sufficient to establish [class] evidence."

Authorities: In re Initial Pub. Offerings Sec. Litig. ("IPOS"), 471 F.3d 24 (2d Cir. 2006); In re Credit Suisse First Boston Corp. (Lantronix, Inc.) Analyst Sec. Litig., 2008 WL 512779 (S.D.N.Y. Feb. 26, 2008); In re Safety-Kleen Corp. Bondholders Litig., 2004 WL 3115870 (D.S.C. Nov. 1, 2004); Ilhardt v. A.O. Smith Corp., 168 F.R.D. 613 (S.D. Ohio 1996).

Issue 2: Does Minn. R. Civ. P. 23 require a district court to resolve evidentiary disputes and make specific findings that plaintiffs have carried their burden to prove the numerosity, commonality, typicality, and predominance requirements of Rule 23?

District Court Ruling: The District Court held that Respondents had made a showing of evidence "sufficient to establish [class] evidence," but declined to address and resolve 3M's challenge to the validity of Respondents' class evidence.

Authorities: In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6 (1st Cir. 2008); IPOS, 471 F.3d 24 (2d Cir. 2006); Blades v. Monsanto Co., 400 F.3d 562 (8th Cir. 2005); Szabo v. Bridgeport Machines, Inc., 249 F.3d 672 (7th Cir. 2001).

Issue 3: Did the District Court improperly certify the class based on allegations in the Complaint and “class” evidence that cannot satisfy the preponderance of the evidence standard in an age case, as a matter of law?

District Court Ruling: Although 3M demonstrated that Respondents’ statistics and other evidence were not common evidence of age discrimination, because the record showed that Respondents’ evidence was more likely the result of age-neutral decision making than of company-wide age discrimination, the District Court certified the class based on Respondents’ allegations and their *prima facie* showing of “class” evidence.

Authorities: Evers v. Alliant Techsystems, Inc., 241 F.3d 948 (8th Cir. 2001); Tagatz v. Marquette Univ., 861 F.2d 1040 (7th Cir. 1988); Cope v. McPherson, 594 F. Supp. 171 (D.D.C. 1984); Sandstad v. CB Richard Ellis, Inc., 2001 WL 611174 (N.D. Tex. June 4, 2001); Connolly & Peterson, *Use of Statistics in Equal Employment Opportunity Litigation* (2007); United States Department of Labor, Bureau of Labor Statistics, *Number of Jobs Held, Labor Market Activity, and Earnings Growth Among the Youngest Baby Boomers: Results from a Longitudinal Survey* (June 27, 2008).

STATEMENT OF THE CASE

Respondents claim that 3M engaged in a pattern and practice of age discrimination in promotions, compensation, training, and terminations against salaried exempt employees age 46 and older. After extensive class discovery and a hearing at which the parties' contentions and evidence concerning the class issues were presented, on April 11, 2008, the Ramsey County District Court (The Honorable Gregg E. Johnson) certified a class of salaried, exempt 3M employees ages 46 and over, many of whom are in managerial or decision making positions.¹ See Findings and Order Certifying Class and Appointing Class Counsel, April 11, 2008 ("April 11 Order") (A. 62-65).² On May 14, 2008, the District Court issued a 7-page Memorandum Opinion. See Memorandum of Law In Support of Order Certifying Class and Appointing Class Counsel ("May 14 Memorandum") (A. 66-72). On June 26, 2008, this Court granted 3M's Petition for Discretionary Review of the District Court's class certification order. This Court found that "the District Court's class certification order is questionable," and further observed that "this appeal raises important legal issues regarding the minimum quantum and nature of evidence necessary to support findings of commonality and other Rule 23

¹ The class is defined as "[a]ll persons who were age 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." April 11 Order.

² Appendix citations are referenced as "A. ___." Appendix to Appellant's Brief – Volume I has been submitted in redacted and unredacted versions which are identical in content and pagination, except for redactions to protect confidential information filed under seal in the District Court. Cases not published in a formal reporter also are included in the Appendix at A. 336-564.

requirements, and, conversely, the appropriate level of ‘rigor’ to be applied by the district courts in determining whether this burden is met.” See Order (A08-816), June 26, 2008 (“June 26 Order Granting Review”) (A. 73-75).

INTRODUCTION

This case presents important questions concerning the burden of proof and the level of scrutiny applicable to class evidence under Minn. R. Civ. P. 23, in general, and with particular respect to class age discrimination claims under the Minnesota Human Rights Act (“MHRA”).

Respondents bear the burden to establish all elements of Rule 23, including numerosity, commonality, typicality, and predominance. Until this appeal, Respondents did not contest that they must establish those elements by a preponderance of the evidence. In its short Memorandum Opinion, however, the District Court rejected the preponderance of the evidence standard and declined to resolve evidentiary disputes between the parties regarding the elements of Rule 23. Instead, the District Court apparently adopted a *prima facie* evidence standard and certified a class based on allegations in the Complaint and Respondents’ showing of some class evidence.

3M respectfully submits that the District Court erred. A growing majority of federal courts requires plaintiffs seeking class action status to satisfy the preponderance of the evidence standard with respect to each of the elements of Rule 23. A lesser standard would be inconsistent with plaintiffs’ burden to establish the Rule 23 requirements. These courts also agree that a “rigorous analysis” requires a district court to resolve evidentiary disputes concerning the elements of Rule 23, including disputes

regarding the persuasiveness of expert analyses, even if those disputes overlap with “merits” issues. Any other procedure would unfairly permit plaintiffs to present substantive evidence in favor of class certification, no matter how misguided, but avoid rebuttals to that evidence as “merits” arguments.

Respondents’ class evidence fails when it is considered under the correct evidentiary standard. Even standing alone, it would at most show a 3M workplace where the absence of class-wide age discrimination is at least as likely as class-wide age bias. Such evidence cannot establish numerosity, commonality, typicality, or predominance by a preponderance of the evidence.

Respondents rely primarily on “snapshot”³ statistics purporting to show, by job grade and year, that “younger” employees receive more promotions, higher percentage pay raises, and more training than “older” employees.⁴ Respondents characterize those differences as common proof of age discrimination and assert that their characterization is not subject to challenge for purposes of class certification.

Respondents’ arguments from statistics are invalid. They conflict with the undisputed fact that 3M’s older workers are, on average, paid more and occupy the highest positions in the Company. Moreover, the consensus of expert opinion (including

³ As used by both Respondents and 3M in this case, the term “snapshot” refers to Respondents’ cross-sectional analyses which examine employment outcomes at particular points in time (Respondents used an annualized basis) rather than over employees’ careers.

⁴ 3M uses the terms “older” and “younger” to distinguish between salaried, exempt employees under age 46 and those age 46 and over, consistent with the District Court’s class definition.

Respondents' own experts) and thoughtful case law is that statistical differences between older and younger workers in rates of promotions and percentage pay increases, like those observed at 3M, are *expected* in the absence of discrimination. These differences are a function of normal career progress, which naturally correlates with age. Indeed, government data show similar patterns for older employees nationwide, regardless of gender, race, or education. Such "disparities" are not evidence of bias because employees ordinarily receive more promotions earlier in their careers as their skills develop most rapidly. Moreover, when viewed by year and job grade – as in Respondents' snapshots – the best older workers *have already been promoted out of each job grade*, leaving behind less able older workers, who are more likely at or near their peak positions, to compete in each grade against younger employees, who are much less likely to have reached their full potential. Non-discriminatory differences are expected from such competition. Older workers, on average, also earn more compensation but receive lower percentage raises than younger workers because they already enjoy the cumulative effects of larger "percentage" raises received earlier in their own careers.

Because differences are expected, Respondents needed to validate their assertions of discrimination by demonstrating a baseline of expected, non-discriminatory differences. Only with such a baseline could Respondents show that alleged "disparities" at 3M are larger than normal. They did not do so. Instead, 3M showed that its employment patterns are consistent over the last 30 years and consistent with widely-recognized labor market expectations and national data. Contrary to Respondents' claims of discrimination, these patterns have resulted in a workforce in which older workers

occupy nearly all of 3M's senior positions, make most of the employment decisions, and earn much more compensation, on average, than comparable younger workers. If anything, older workers did better during the putative class period than before, and the evidence suggests that older workers are promoted *more* frequently at 3M than in the national workforce as a whole. Thus, Respondents' arguments mischaracterizing facially non-discriminatory statistics are not common evidence of discrimination.

Respondents also allege that, during the putative class period, 3M undertook efforts to identify and develop leadership talent early in its employees' careers. They attempt to characterize 3M's efforts as proof of company-wide age bias and again reject any challenge to their characterization as an improper "merits" argument.

Besides conflicting with the fact that 3M's actual leadership was and is older, Respondents' theory also fails because such training efforts do not show age bias in any employment decision by 3M. Identifying and developing talent early in employees' careers excluded no employees from employment opportunities at 3M, but rather made leadership development and promotion opportunities available to a broader group of employees, including those who had not yet experienced leadership positions. Indeed, human resources experts universally recognize that employees and employers alike benefit from early development of talent. It is a best practice, and simple common sense, to develop employees for greater responsibility as soon in their careers as they are ready, and that is what 3M did. Because Respondents' unsupported characterizations of 3M's practices are not common evidence *of age discrimination* in employment decisions by 3M, this evidence also cannot establish the elements of Rule 23.

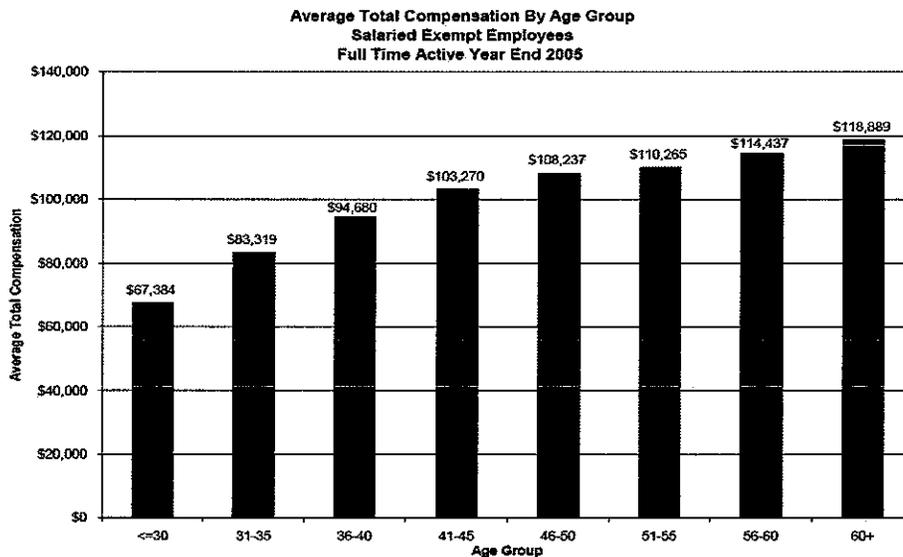
STATEMENT OF FACTS

The record developed by the parties and presented to the District Court in connection with its consideration of the class certification motion showed the following:

A. 3M's Older Employees Are Notably Successful.

Respondents do not contest that older employees occupy the vast majority of senior positions at 3M and are much more highly represented in higher job grades than their representation in the employee population. Although older employees make up roughly half of 3M's total salaried, exempt employees, they hold over 81% of 3M's director and officer level positions. A. 155, 189. Older employees occupy more than 92% of the 105 highest "Executive Conference" positions at the Company. A. 299.

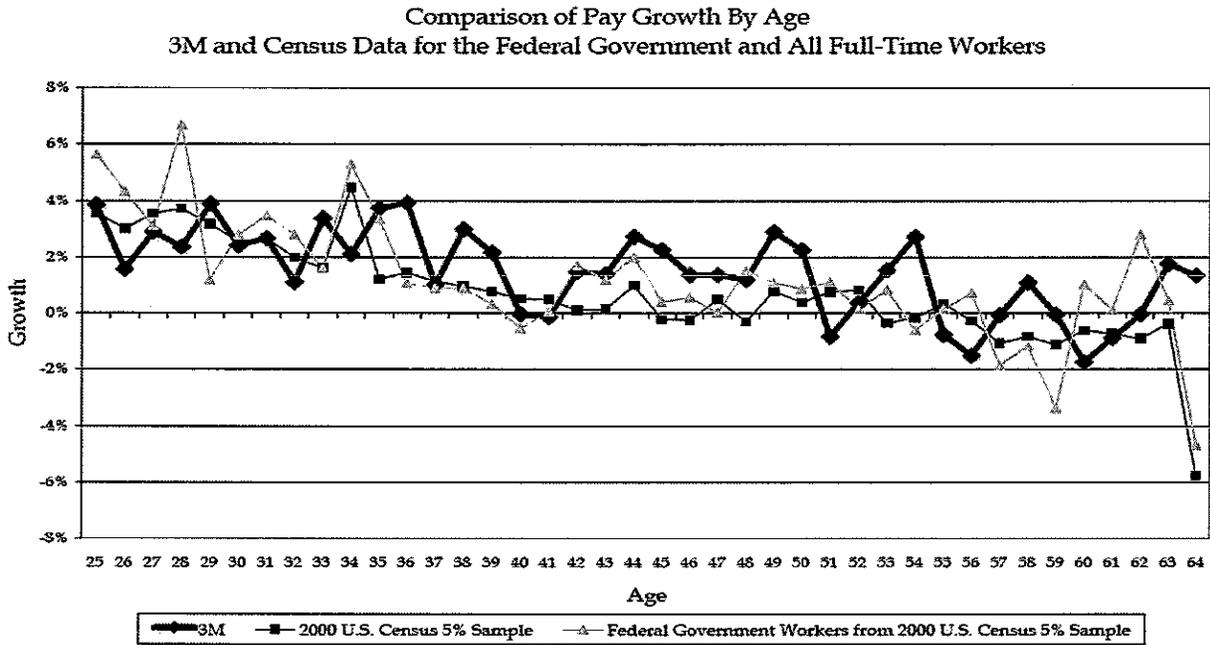
3M's older employees earn more total compensation than younger employees:



A. 152. Older employees also earn more base salary, more discretionary pay, and more total compensation, on average, than younger employees in the same job grade. A. 173-80, 254. This favorable difference increases when performance ratings are considered. A. 174 at n. 44.

B. 3M's Older Employees Are Extremely Successful Compared to External and Internal Comparisons.

Employment patterns at 3M are very similar to expected patterns for older workers in the labor market as a whole. Patterns in pay growth for 3M's older workers are consistent with the national workforce of large employers and the federal government:

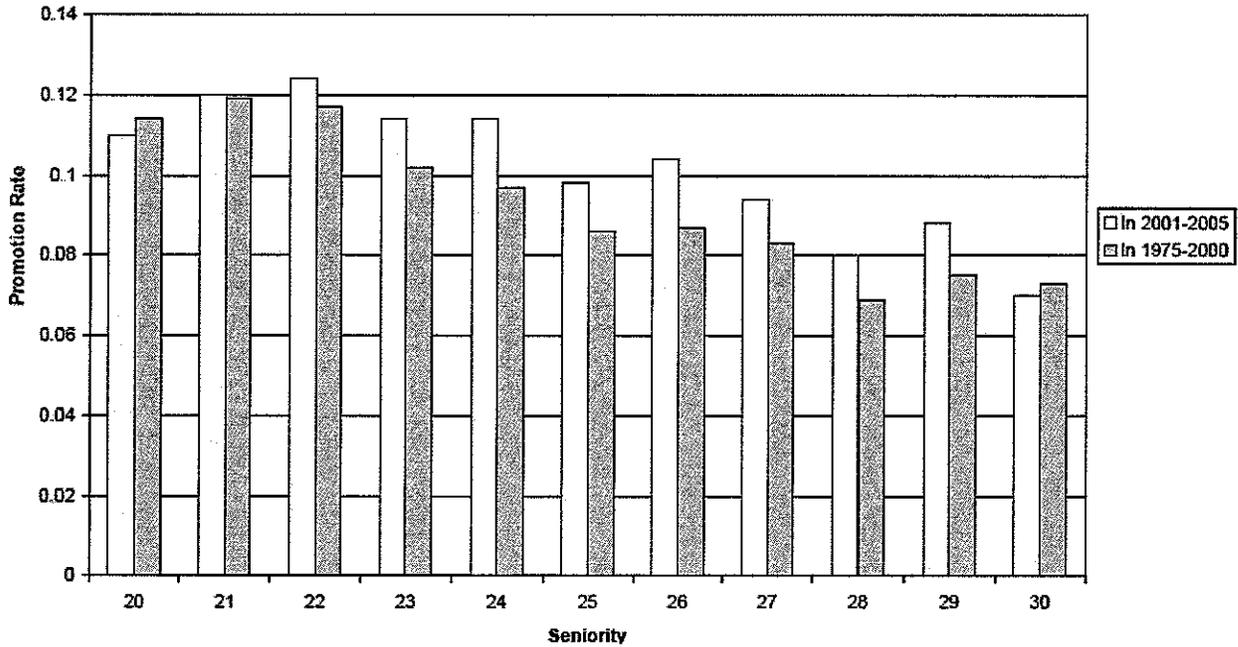


A. 224-26. Tenure at 3M also greatly exceeds national labor market norms. A. 116-17, 129.

Internal comparisons confirm not only the overall success of 3M's older employees over time, but also that older employees, on average, were at least as successful during the putative class period as during prior years. The promotion rate for employees with 20 to 30 years of seniority was slightly higher during the time period of James McNerney's tenure as CEO (2001-2005), which is the time period identified by Respondents in this case, than the promotion rate for employees with the same seniority over the previous 25 years (1975-2000):

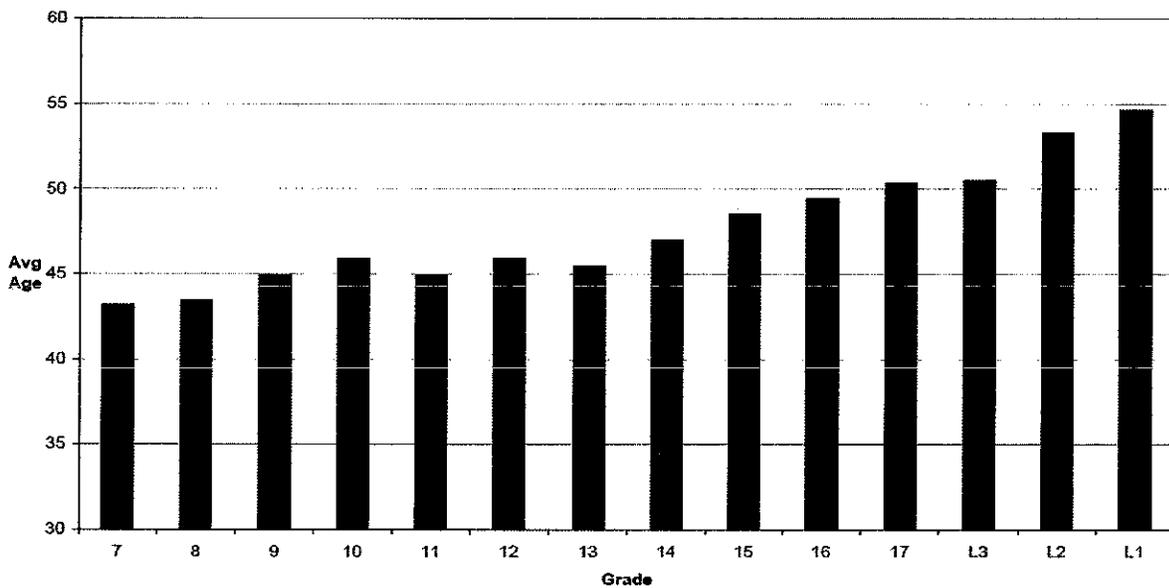
Promotion Rates in 2001 - 2005 Period Compared to Promotion Rates During Earlier Period

Exhibit 10



A. 138. Older workers also increased as a percentage of the 3M workforce; the average age of 3M's workforce rose; and older employees' tenures increased during the putative class period. A. 129, 189-90. Generally, each higher job grade at 3M had an older average employee age than the lower grade:

Average Age By Grade
Salaried Exempt Employees
Full Time Active Year End 2005



A. 154. During the putative class period, the advantage to older employees in total compensation, base salary, and variable pay increased. A. 175-80.

C. 3M's Employment Patterns Have Been Consistent Over the Long Term.

The patterns Respondents claimed to have observed at 3M have existed for as many as 30 years. They are not, as Respondents assert, the result of any policy or practice implemented during CEO McNerney's tenure. As demonstrated by 3M's historical – or “longitudinal” – data,⁵ which showed average promotion rates for 3M's employees from 1975 to 2005, and historical compensation change rates for 1998-2005, there was no adverse change in promotion and pay patterns for older employees starting in 2001, as would be expected if 3M had instituted a centralized policy of age bias as Respondents alleged. A. 161-69. In fact, the historical data confirm the *absence* of class-wide discrimination by demonstrating that the patterns alleged by Respondents, over time, have resulted in 3M's older workers being remarkably successful.

D. Employment Outcomes Naturally Differ by Age.

To state the obvious, workers' training, promotions, and pay depend on where they are in their careers. The experts in this case agree that employees' promotion rates, compensation growth rates, and training experiences generally decrease over time.

Lower promotion rates over time are expected, in the absence of discrimination, because employees generally are promoted more rapidly at the outset of their

⁵ Unlike Respondents' snapshot statistics, the historical information presented by 3M does not depend on any statistical manipulation; it is simply a record of the facts of 30 years of promotion and salary changes for all of 3M's management employees.

employment when their skills are rapidly developing. A. 220-21, 227-28. Moreover, employees eventually reach their peak positions, from which they are not capable of further advancement. A. 140-50, 227-28. As acknowledged by Respondents' experts, older employees are more likely to be at or near their peak positions than younger employees. A. 202 (“[E]mployees who have been in their grade for a substantial period [may] have reached their potential and are not promotable.”); A. 250-51 (“I don’t have a reason to dispute [the consensus that promotion rates decline with age and experience.]”). Respondents point to differing promotion rates by age groups at 3M as support for their commonality argument, but do not demonstrate that 3M’s rates differ from what is expected in the absence of discrimination.

Rates of compensation growth also slow as employees’ total compensation grows over time and relative increases in productivity decline with each incremental increase in experience. A. 151-53, 156-61, 220-26. Again, this fact is acknowledged by Respondents’ experts. A. 249 (“[T]here is, on average, lower wage growth for older workers than younger workers. That’s simply a restatement of the fact there is more wage growth when young.”); A. 253 (agreeing that, on average, one would expect younger employees to have higher-percentage pay increases than older employees). Respondents point to differing rates of pay increases by age groups at 3M as support for their commonality argument, but do not demonstrate that 3M’s rates differ from what is expected in the absence of discrimination.

Rates at which employees take advantage of training opportunities also are expected to decline as employees get older, because older employees have already had

comparable training earlier in their careers and their actual work experiences supplant the need for training that might be required for less senior employees. A. 100-03, 108-09, 114-15. Respondents point to differences in the number of certain formal training experiences between older and younger employees at 3M as support for their commonality argument, but, once again, do not demonstrate that experiences at 3M differ from what is expected in the absence of discrimination.

The patterns alleged by Respondents at 3M are widely recognized in expert literature as natural, non-discriminatory phenomena. See, e.g., Connolly & Peterson, *Use of Statistics in Equal Employment Opportunity Litigation* 10-38.7 – 10-38.8 (2007):

In an organization consisting of many job levels, with each providing the main source of candidates for filling vacancies in the next higher level, there may be a tendency for individuals to rise in the organization to a level at which they are barely able to perform. Limited in promotional opportunities by lackluster job performance, such people may witness the promotion from their job level of people more qualified but less senior than themselves. . . . Because those employees who are stuck in the level continue to accrue seniority, while those just passing through are continually replaced by people with generally less seniority, it is not unreasonable to expect that the more senior employees within a job level tend to be those whose careers have peaked. To the extent that age and seniority are correlated, it is also not unreasonable to expect that within a job level, the older employees will tend to be the less able performers.

In an organization with such a structure, it seems clear that the people promoted from a given level during the course of a year may generally be younger than the people in that level who are not promoted.

A. 315-16; see also A. 161-69, 206-08, 219-28. Respondents' expert, David Neumark, also has confirmed this phenomenon in published works. See, e.g., Johnson & Neumark, *Age Discrimination, Job Separations, and Employment Status of Older Workers: Evidence from Self-Reports*, 32 J. of Hum. Res. 779, 809 (1997) (A. 320) ("The effects of

age discrimination are difficult to measure . . . because of the strong possibility that age itself affects individual productivity.”).⁶

The fact of non-discriminatory statistical differences between older and younger workers is confirmed by government data. A recently-issued analysis from the federal Bureau of Labor Statistics (“BLS”) shows that rates of pay increases generally slow for all employees as they age, regardless of gender, race, or education. See U.S. Department of Labor, Bureau of Labor Statistics, *Number of Jobs Held, Labor Market Activity, and Earnings Growth Among the Youngest Baby Boomers: Results from a Longitudinal Survey*, at Table 5 (June 27, 2008) (A. 330).⁷ Indeed, significant declines occur long before employees reach age 46. Id. Data also show similar expected declines in promotion rates, regardless of race or gender. A. 228. Respondents offer no evidence that the patterns at 3M are different than the well-documented national norms.

E. 3M Expanded Leadership Opportunities for All Employees by Identifying and Developing Leadership Talent Early in Employees’ Careers.

Identifying and developing talent early in employees’ careers is a common “best practice” among globally competitive organizations, and has been for decades. A. 102, 110-14. Nonetheless, in their effort to establish commonality, Respondents insist that

⁶ Even Respondents’ counsel have acknowledged that differences are expected. See Susan Coler et al., *Handling Class Actions Under the ADEA*, 10 Emp. Rts. & Emp. Pol’y J. 553, 598 (2006) (A. 334) (“[L]abor economists typically assume that the size of pay increases and promotion opportunities will decline as employees age.”).

⁷ Although not part of the record below due to its recent issuance, this Court may properly review public reports. See In re Estate of Turner, 391 N.W.2d 767, 771 (Minn. 1986).

statements by 3M management affirming this best practice are proof of a common policy of age discrimination. They allege, for example, that 3M made efforts to develop “young leaders who have courage,” “identify talent earlier in careers,” and “develop the best generation of leaders in 3M’s . . . history.” A. 305-09. None of these statements suggests an effort to exclude any employees from training or promotion opportunities based on their age. Rather, they reflect 3M’s effort to expand leadership opportunities for all employees, regardless of age, by developing leadership talent as early as possible in employees’ careers. A. 102-03, 246-47. Such a strategy reflects state-of-the-art human resource (“HR”) planning and benefits both individual employees and the organization. A. 107, 114-15. In fact, 3M’s talent management function has been singled out as “the single best such program” among 373 companies participating in a widely respected benchmarking survey. A. 102.

That recognition is not surprising. Long before any litigation, 3M retained external experts to develop programs and policies structured to prevent discrimination. A. 114. Respondents do not dispute that 3M’s state-of-the-art HR systems are designed to minimize the risk of bias. A. 94-95. They also do not dispute that 3M’s talent management efforts and performance management systems correspond with HR best practices. A. 102-03, 110-15. Indeed, Respondents put forth no evidence challenging the quality and fairness of 3M’s HR processes, leaving the record devoid of any evidence that 3M’s efforts to identify and develop talent were discriminatory.

F. Respondents' Evidence is Consistent with a Non-discriminatory Workplace.

Against this backdrop of undisputed evidence, Respondents nonetheless contend that, with the arrival of James McNerney as 3M's CEO in 2001, 3M instituted a corporate policy of age discrimination, closing the door on promotion and training opportunities for older employees and limiting their pay increases. Respondents submitted snapshot statistics showing differences in high potential designations, performance ratings, percent compensation increases, and training and promotion selection rates between older and younger workers in the same job grades at isolated points in time. But those statistics measured differences between older and younger workers in the same job grade without first identifying the differences already expected in the absence of discrimination. Such statistics are not common evidence of bias because Respondents did not establish that alleged disparities at 3M exceed disparities that are expected absent discrimination.

Respondents also offered documents and testimony which they claim support allegations of centralized HR processes and company-wide bias in favor of younger employees, including statements regarding 3M's leadership development efforts and allegedly discriminatory comments attributed to certain 3M managers or executives. The vast majority of statements proffered by Respondents reflect non-discriminatory HR best practices, and the remaining few are highly individualized allegations not amenable to class treatment. Respondents' anecdotal evidence was minimal and was never mentioned by the District Court.⁸

⁸ Respondents assert that affidavits submitted by other 3M employees independently justify class certification. Respondents submitted affidavits from 55 individuals, out

ARGUMENT

I. Rule 23 and Appellate Review Standards.

A Minnesota court may not certify a class unless that class satisfies the requirements of Minn. R. Civ. P. 23. The court must first find the existence of a precisely defined class. Irvin E. Schermer Trust v. Sun Equities Corp., 116 F.R.D. 332, 335 (D. Minn. 1987). Next, the putative class must satisfy all four requirements of Rule 23.01: numerosity, commonality, typicality, and adequacy of representation. See Lewy 1990 Trust v. Inv. Advisors, Inc., 650 N.W.2d 445, 451-52 (Minn. Ct. App. 2002). Finally, the action must satisfy one of the categories of Rule 23.02. See id. at 455. Under Minn. R. Civ. P. 23.02(c), plaintiffs must establish that common questions “predominate over any questions affecting only individual members” and that class resolution will be “superior to other available methods for the fair and efficient adjudication of the controversy.”

There is no question that plaintiffs bear the burden of proof as to all elements of Rule 23. Cf. Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994).⁹ The issues here, yet to be decided under Minnesota law, are what burden of proof applies under Rule 23, and how should a court consider conflicting evidence offered in support of and in opposition

of a putative class of nearly 6,000, although only 25 affiants (about .5% of the putative class) are actually putative class members. This handful of people described individualized complaints, primarily attributable to individual supervisors or managers. In response, 3M presented evidence from numerous older employees who enjoyed significant successes after age 46. See, e.g., A. 242-44, 272-84.

⁹ Minnesota Rule 23 is intended to produce results consistent with Federal Rule 23 and, therefore, Minnesota courts look to federal decisions for guidance when interpreting Minnesota Rule 23. See, e.g., June 26 Order Granting Review at 3.

to class certification, in general, and in an age discrimination case under the MHRA, in particular?

Class certification is appropriate only “if the trial court is satisfied, *after a rigorous analysis*,” that all of the prerequisites of Rule 23 have been met. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982) (emphasis added); Alba Conte & Herbert Newberg, NEWBERG ON CLASS ACTIONS § 3.7, at 265 (4th ed. 2002) (A. 313). By its terms, Rule 23.02(c) requires that a district court make “findings” that common questions predominate over individualized questions, which necessarily requires a court to weigh class evidence and take a “close look” at all matters relevant to predominance. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997). The district court must make a “definitive assessment” that plaintiffs have carried their burden as to each element of Rule 23. See, e.g., In re Initial Pub. Offerings Sec. Litig. (“IPOS”), 471 F.3d 24, 41 (2d Cir. 2006), and other cases cited in June 26 Order Granting Review at 2-3.

3M asks this Court to determine whether the District Court applied the correct legal standards when it certified Respondents’ proposed class. Questions of law and mixed questions of law and fact are subject to *de novo* review. See State v. Jackson, 749 N.W.2d 353, 357 (Minn. 2008); State v. Kendell, 723 N.W.2d 597, 607 (Minn. 2006). This appeal presents questions of law regarding the burden of proof under Rule 23 and a district court’s obligation to resolve evidentiary disputes regarding class evidence. 3M also asks the Court to determine whether the use of snapshot statistics is a valid method of proof in class age discrimination cases, since age is not an immutable characteristic, and whether class evidence that is at least as probative of a non-discriminatory workplace

as it is of class bias can establish the Rule 23 requirements. See, e.g., City of Lake Elmo v. Metro. Council, 685 N.W.2d 1, 4 (Minn. 2004) (“If evidence of a fact or issue is equally balanced, then that fact or issue has not been established by a preponderance of the evidence.”). These questions concerning the minimum quantum of proof required to establish the requirements of Rule 23 by a preponderance of the evidence also are questions of law or mixed questions of law and fact. These issues are all squarely presented to this Court and, for reasons of efficiency and guidance to Minnesota trial courts, should be resolved in this appeal. Cf. IPOS, 471 F.3d at 42.

In other contexts, a district court’s ultimate determination of whether to certify a class under Rule 23 may be subject to abuse of discretion review, but this Court should not apply that standard to this appeal; the issues noted above are not fact issues and they are not a matter of discretion. Even if some issues could be construed as fact issues, however, the District Court failed to make the requisite factual findings and determinations regarding the Rule 23 requirements. See IPOS, 471 F.3d at 41 (“[A] district judge may certify a class *only after* making determinations that each of the Rule 23 requirements has been met.” (emphasis added)); cf. Gordon v. Microsoft Corp., 645 N.W.2d 393, 402 (Minn. 2002) (observing the difficulty faced by an appellate court when presented with a “short order opinion [that] does not reveal much of th[e lower] court’s analysis”). Moreover, even when the abuse of discretion standard applies, a district court abuses its discretion as a matter of law when its class certification ruling is based on a legal error. See Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005). In either event, the District Court improperly rejected the preponderance of the evidence standard

and declined to resolve conflicts in the class evidence. This Court should not extend deference to the District Court's decision.

II. The District Court Did Not Hold Respondents to the Proper Burden of Proof to Establish the Elements of Rule 23.

The District Court appears to have accepted a *prima facie* evidence standard for Rule 23. As this Court noted in its Order granting 3M's Petition for Discretionary Review, while no Minnesota appellate court has addressed the standard of proof to be applied under Rule 23, or the extent to which district courts must resolve factual disputes in certification proceedings, there is a "growing consensus" among federal courts that plaintiffs bear the burden of proof to establish all of the requirements of Rule 23 by a preponderance of the evidence. June 26 Order Granting Review at 2. Those decisions also make clear that district courts have an affirmative duty to fully resolve evidentiary disputes regarding class evidence – including competing expert evidence – to ensure that plaintiffs actually do establish those requirements. This "rigorous analysis" is required even if the evidentiary disputes overlap with merits issues.

A. Respondents Must Establish the Elements of Rule 23 By a Preponderance of the Evidence.

Until now, the standard of proof applicable to Respondents' burden to establish the elements of Rule 23 has not been contested by Respondents. Respondents did not even address the standard of proof in their motion papers, and they did not reply to 3M's statement of that standard to the District Court: "Plaintiffs bear the burden of establishing that the putative class satisfies each of the Rule 23 requirements by a preponderance of the evidence." A. 61.

Likewise, in its short Memorandum Opinion, the District Court never articulated the standard it applied, but it is clear that the District Court rejected the preponderance of the evidence standard. See May 14 Memorandum at 4. Instead, the District Court relied on Respondents' class *allegations* in the Complaint, see id. at 2-3, and held that Respondents had made a *prima facie* showing of evidence "sufficient to establish evidence of company-wide common questions of discrimination," id. at 5. The District Court never addressed the shortcomings in Respondents' class evidence or the un rebutted proof 3M presented. Instead, it deferred to the "merits" phase any consideration of conflicting evidence.

Federal courts have widely rejected the District Court's approach in favor of the preponderance of the evidence standard. See, e.g., IPOS, 471 F.3d at 37 ("Complying with [Rule 23]'s predominance requirement cannot be shown by less than a preponderance of the evidence." (citation omitted)); Karvaly v. eBay, Inc., 245 F.R.D. 71, 79 (E.D.N.Y. 2007) ("The class may be certified only if the Court determines, by a preponderance of the evidence, that each of the Rule 23(a) and Rule 23(b)(3) factors are met in this case." (citing IPOS)); Ilhardt v. A.O. Smith Corp., 168 F.R.D. 613, 617 (S.D. Ohio 1996) ("[T]he party seeking class certification bears the burden of proving by a preponderance of the legal evidence the four prerequisites of Rule 23(a) and at least one of the subcategories of Rule 23(b).") (citation omitted); see also In re Credit Suisse First Boston Corp. (Lantronix, Inc.) Analyst Sec. Litig., 2008 WL 512779, at *2-3 (S.D.N.Y. Feb. 26, 2008); In re Safety-Kleen Corp. Bondholders Litig., 2004 WL 3115870, at *2 (D.S.C. Nov. 1, 2004); Latson v. GC Servs., Ltd. P'ship; 2000 WL 1292719, at *4 (S.D.

Tex. Feb. 15, 2000); cf. Land Grantors in Henderson, Union & Webster Counties, Ky. v. United States, 71 Fed. Cl. 614, 622 (Fed. Cl. 2006).

State courts also require plaintiffs to prove class certification requirements by a preponderance of the evidence. See, e.g., Gudo v. Adm'rs of Tulane Educ. Fund, 966 So.2d 1069, 1074 (La. Ct. App. 2007) (“The burden is on the plaintiff, as the party seeking to utilize the class action procedure, to establish each element by a preponderance of the evidence. . . . The failure to establish any element precludes certification.”); Cicero v. U.S. Four, Inc., 2007 WL 4305720, at *3 (Ohio Ct. App. Dec. 11, 2007); Sav-on Drug Stores, Inc. v. Superior Court, 96 P.3d 194, 203 (Cal. 2004); A & M Supply Co. v. Microsoft Corp., 654 N.W.2d 572, 593 (Mich. Ct. App. 2002); Millett v. Atl. Richfield Co., 2000 WL 359979, at *5 (Me. Super. Ct. Mar. 2, 2000).

Requiring Respondents to establish the requirements of Rule 23 by a preponderance of the evidence reflects sound judicial policy. The preponderance of the evidence standard is not taxing; a “preponderance” simply means the greater weight of the evidence. See, e.g., In re Safety-Kleen, 2004 WL 3115870, at *2 (“[Plaintiffs must] establish the prerequisites of Rule 23 by the same measure of proof that is applicable to their underlying claims, given that the preponderance of the evidence standard merely requires that plaintiffs demonstrate that it is more likely than not that a particular requirement of Rule 23 has been satisfied.”). A lesser standard would be entirely at odds with the requirement that plaintiffs bear the burden of demonstrating that a class should be certified, and would risk improper class certification in many cases in which the elements of Rule 23 are not, in fact, satisfied. See, e.g., Gariety v. Grant Thornton, LLP,

368 F.3d 356, 365 (4th Cir. 2004) (“If it were appropriate for a court simply to accept the allegations of a complaint at face value in making class action findings, every complaint asserting the requirements of [Rule 23] would automatically lead to a certification order, frustrating the district court’s responsibilities for . . . conducting a ‘rigorous analysis’ of such matters.”); Gov’t Employees Ins. Co. v. Bloodworth, 2007 WL 1966022, at *19-20 (Tenn. Ct. App. June 29, 2007) (“There must be a sound basis in fact, not supposition, that the requirements of the class action rule have been satisfied.” (citation omitted)).¹⁰

B. A Court Must Resolve Evidentiary Disputes and Make Specific Determinations That Plaintiffs Have Carried Their Burden to Satisfy Each Requirement of Rule 23.

Consistent with plaintiffs’ burden to establish the elements of Rule 23 by a preponderance of the evidence, federal and state case law reflects a growing consensus that district courts must fully resolve substantive evidentiary disputes as a necessary prerequisite to a “definitive assessment” of the class certification requirements. June 26 Order Granting Review at 2. Yet, while Respondents themselves concede that “evidence in support of class certification can be challenged and is subject to scrutiny,” A. 80, they have always maintained that 3M’s scrutiny of their evidence in this case amounts to improper “merits” arguments. Respondents’ position would impose no more than a

¹⁰ The applicability of the preponderance standard is further confirmed by analogy to other preliminary factual determinations undertaken by district courts. Courts regularly apply the preponderance of the evidence standard when asked to decide threshold factual questions such as personal and subject matter jurisdiction. See IPOS, 471 F.3d at 40; In re Safety-Kleen, 2004 WL 3115870, at *2 n.2; Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 676-77 (7th Cir. 2001); see also Epps v. Stewart Info. Servs. Corp., 327 F.3d 642, 647 (8th Cir. 2003); Jones v. CBE Group, Inc., 215 F.R.D. 558, 562 (D. Minn. 2003).

prima facie standard: If plaintiffs offer any class evidence, no matter how misguided, it must be accepted and the class certified. The District Court apparently agreed with Respondents, holding that it would not resolve a “battle of the experts.”¹¹ June 26 Order Granting Review at 2. Respondents’ position, adopted by the District Court, reflects a fundamental misunderstanding of the nature of “class” issues and Respondents’ evidentiary burden to establish the elements of Rule 23.

The unmistakable weight of authority interpreting Rule 23 is against Respondents’ proposed *prima facie* standard. The clear trend of decisions requires district courts to resolve substantive evidentiary disputes regarding the elements of Rule 23, even if those disputes overlap with “merits” issues. That growing consensus now includes the federal Courts of Appeals for the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits, as well as federal district courts in the Sixth and Tenth Circuits and various state courts. See In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 25-26 (1st Cir. 2008); IPOS, 471 F.3d at 41-42 (2d Cir. 2006); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 166 (3d Cir. 2001); Gariety, 368 F.3d at 366 (4th Cir. 2004); Unger v. Amedisys Inc., 401 F.3d 316, 321 (5th Cir. 2005); Szabo,

¹¹ The District Court relied on two cases to hold that a mere showing of some class evidence is sufficient to certify a class. May 14 Memorandum at 4-5. Neither supports the District Court’s view. Velez v. Novartis Pharmaceuticals Corp., 244 F.R.D. 243 (S.D.N.Y. 2007), acknowledged that courts “may resolve contested factual issues where necessary to decide on class certification.” Id. at 257. The Velez court engaged the expert evidence and concluded that the plaintiffs’ snapshot analysis was “not directly useful in determining” commonality. Id. at 262. In Hnot v. Willis Group Holdings Ltd., 241 F.R.D. 204 (S.D.N.Y. 2007), the court correctly noted that overlap between class and merits issues “does not preclude a court from considering such evidence, or resolving disputes with respect to that evidence,” id. at 211, but held that the particular expert evidence in that case went solely to merits issues, id. at 210.

249 F.3d at 677 (7th Cir. 2001); Blades, 400 F.3d at 569, 575 (8th Cir. 2005); Cooper v. Southern Co., 390 F.3d 695, 713 (11th Cir. 2004); Richard v. Oak Tree Group, Inc., 2007 WL 1238899, at *3 (W.D. Mich. April 27, 2007); Spa Universaire v. Qwest Commc'ns Int'l, Inc., 2007 WL 2694918, at *7 (D. Colo. Sept. 10, 2007); see also Bloodworth, 2007 WL 1966022, at *21 (collecting federal and state court cases); Naftulin v. Sprint Corp., 847 N.Y.S.2d 903, 2007 WL 2429499, at *3 (N.Y. Sup. Aug. 27, 2007); Cantwell v. J & R Properties Unlimited, Inc., 924 A.2d 355, 358-59 (N.H. 2007).

A court is not only *permitted* to examine substantive evidentiary issues bearing on the requirements of Rule 23, but it *must* do so, or it “default[s] on the important responsibility conferred on [it] by Rule 23 of carefully determining the class action issues and supervising the conduct of any class action certified.” Gariety, 368 F.3d at 367; see also West v. Prudential Secs., Inc., 282 F.3d 935, 938 (7th Cir. 2002) (“A district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits. Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives.”); Canadian Export, 522 F.3d at 25-26.

District courts also must resolve disputes regarding the validity of expert evidence. Expert analyses submitted by plaintiffs in support of Rule 23 motions must be examined like any other evidence, even if the expert analyses coincide with the ultimate merits of a claim. See Blades, 400 F.3d at 575 (“[A] court may be required to resolve [fact] disputes,” including “the resolution of expert disputes concerning the import of

evidence.”); Rhodes v. Cracker Barrel Old Country Store, Inc., 2002 WL 32058462, at *63 (N.D. Ga. Dec. 31, 2002) (“Blind acceptance of a plaintiff’s statistical evidence is not warranted.”). The examination of competing expert opinions necessarily requires that courts determine which are more persuasive for purposes of making rulings on the Rule 23 requirements. See IPOS, 471 F.3d at 40 (rejecting prior rule that “an expert’s report will sustain a plaintiff’s burden so long as it is not ‘fatally flawed’”); see also Rhodes, 2002 WL 32058462, at *63; A & M Supply, 654 N.W.2d at 602; Credit Suisse, 2008 WL 512779, at *7-10.

Indeed, contrary to the framework suggested by Respondents and adopted by the District Court, a district judge should resolve evidentiary disputes regarding the Rule 23 requirements even if a merits issue is “identical” to a Rule 23 requirement. IPOS, 471 F.3d at 41; see also Cooper, 390 F.3d at 712-13 (that a district court has made “an informed assessment of the parties’ evidence . . . does not mean that it has erroneously ‘reached the merits’ of the litigation”). A court should decline the substantive evidentiary inquiry only where evidentiary issues are “unrelated to a Rule 23 requirement.” IPOS, 471 F.3d at 41; see also Hohider v. United Parcel Serv., Inc., 243 F.R.D. 147, 157-66 (W.D. Pa. 2007) (reviewing case law).

III. Evidentiary Disputes In This Case Must Be Resolved Because They Relate Directly to the Rule 23 Requirements.

In light of the overwhelming weight of federal and state authority that reinforces a district court’s obligation to resolve evidentiary disputes related to the Rule 23 requirements, Respondents are plainly wrong that the evidentiary disputes in this case should escape scrutiny. Respondents offered the disputed evidence in support of class

certification; they should not be heard to argue that when 3M provides rebuttal evidence in opposition to that same evidence, 3M's rebuttal evidence somehow concerns the "merits." The evidentiary disputes in this case are Rule 23 disputes, and the District Court erred in deferring these issues to the merits phase.

A. Respondents Cannot Establish Commonality or Typicality.

As observed in this Court's June 26 Order Granting Review, "[Respondents'] statistical analyses, which purportedly show a pattern of differential treatment of older workers, are relevant to commonality because, in order to proceed as a class, respondents must bridge the gap between their individual claims of discrimination and the existence of a class of similarly situated employees." *Id.* at 2; see also Gutierrez v. Johnson & Johnson, 2007 WL 1101437, at *2 (D.N.J. Apr. 10, 2007) ("[T]he issue of commonality is intimately involved with whether or not Plaintiffs were subject to a discriminatory employment policy."). Respondents must "bridge the gap" between personal and class claims with facts, even if those facts coincide with ultimate liability issues. See IPOS, 471 F.3d at 41. Likewise, in order to establish typicality, Respondents must show that they can establish liability for the other class members using the same evidence they plan to use to prove liability for their individual claims. See Sprague v. Gen. Motors Corp., 133 F.3d 388, 399 (6th Cir. 1998) ("The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class."); Bacon v. Honda of Am. Mfg., Inc., 205 F.R.D. 466, 479 (S.D. Ohio 2001) (typicality is not satisfied when "a named plaintiff who proved his own claim would not necessarily have proved anybody else's claim").

As described below, however, Respondents cannot support their argument that “disparities” observed in their snapshot statistics are more likely than not the result of class-wide age bias, because the same differences are expected in the absence of discrimination. Nor can Respondents bridge the gap based on evidence that 3M identified and developed talent early in employees’ careers, because such evidence also is at least as probative of a bias-free workplace as it is of a discriminatory one. See City of Lake Elmo, 685 N.W.2d at 4 (equally balanced evidence cannot satisfy the preponderance of the evidence standard). When 3M’s historical evidence is considered, demonstrating remarkable success for older employees over time, it becomes apparent that none of Respondents’ evidence is evidence *of discrimination* that can establish commonality by a preponderance of the evidence.

B. Respondents Cannot Establish Numerosity.

Respondents’ numerosity argument is premised on their assertion that there are hundreds of alleged victims of discrimination. Because Respondents’ statistics are at least equally probative of the fact that 3M did not discriminate against its older employees, the statistics do not support an argument that *any* of 3M’s older employees have claims, much less establish numerosity by a preponderance of the evidence. Because the named Plaintiffs themselves are not so numerous that joinder would be impracticable, Respondents cannot establish numerosity.

C. Respondents Cannot Establish Predominance or Superiority Under Minn. R. Civ. P. 23.02(c).

Respondents’ burden to establish the predominance of common issues over individualized issues under Minn. R. Civ. P. 23.02(c) is “far more demanding” than the

commonality requirement. Amchem, 521 U.S. at 624. Even if Respondents could establish commonality, evidence that is not more probative of a discriminatory work environment than a non-discriminatory one is not “generalized evidence” sufficient to prove the elements of Respondents’ class claims “on a simultaneous, class-wide basis that would not require examining each class member’s individual position,” as required to establish predominance. Lewy, 650 N.W.2d at 455. To the contrary, given 3M’s un rebutted historical evidence demonstrating consistent, long-term patterns of success for 3M’s older employees, individualized issues will predominate because evidence unique to each potential claimant “will be the object of most of the efforts of the litigants and the court,” as Respondents attempt to prove that their individual circumstances are different from the vast majority of older employees at 3M over the last 30 years. Southwestern Refining Co. v. Bernal, 22 S.W.3d 425, 434 (Tex. 2000).

Class treatment also would not be the superior method of adjudication, given the necessity of individualized liability analyses. See Shelley v. AmSouth Bank, 2000 WL 1121778, at *16 (S.D. Ala. July 24, 2000) (class treatment “must affirmatively be preferable in a legally significant sense” for superiority to be satisfied). Rather, the superior method of adjudication is to let those few 3M employees who actually believe that they have claims against 3M litigate those claims in the forum of their choosing. See Burrell v. Crown Cent. Petroleum, Inc., 197 F.R.D. 284, 291 (E.D. Tex. 2000) (superiority not satisfied when court would be forced “to engage in a highly individualized inquiry into the specific circumstances of each plaintiff’s claims”).

Consequently, Respondents cannot establish the predominance and superiority requirements of Minn. R. Civ. P. 23.02(c).¹²

Examining the validity of Respondents' evidence offered in support of class certification is necessary to fairly decide whether the elements of Rule 23 have been met in this case. Respondents' "class evidence" fails because their *characterizations* of basic facts and documents – which do not themselves suggest class-wide age bias – are not common or typical *evidence* of class wide discrimination. That is, Respondents' *arguments* are not *evidence* that can link their individual allegations and class claims, much less establish such a link by a preponderance of the evidence, as they must to satisfy Rule 23.

IV. Respondents' Evidence Cannot Establish the Rule 23 Requirements, As A Matter of Law, Because It Is Not Evidence of Class-Wide Age Discrimination.

A. "Snapshot" Statistics Showing Expected, Non-discriminatory Differences Between Older and Younger Employees Cannot Establish the Requirements of Rule 23.

Respondents' class motion relies primarily on their argument that statistical differences at 3M are common proof of class-wide age discrimination. That argument is not supported by the evidence. To the contrary, it is undisputed that differences between

¹² The District Court also held that class certification was appropriate under Minn. R. Civ. P. 23.02(b), which permits certification of a class seeking injunctive relief if "the party opposing the class has acted or refused to act on grounds generally applicable to the class." This also was error. Although "[n]o case involving money damages falls under [Rule 23.02(b)]," Minn. R. Civ. P. 23.02(b), *Advisory Committee Note – 1968*, Respondents seek millions of dollars in damages, including compensatory damages, front pay, and punitive damages. In any event, class evidence that is not more probative of a discriminatory workplace than a non-discriminatory workplace is not sufficient to show that 3M acted in a discriminatory manner "generally applicable to the class" as required by Rule 23.02(b).

older and younger workers relative to promotion, compensation, training and other job-related experiences (collectively termed “outcomes”), including differences described as highly statistically significant, are expected *in the absence of discrimination* when measured in “snapshot” analyses. Thus, on their face, the “disparities” alleged by Respondents are not common evidence of age discrimination.

To establish commonality, Respondents needed to demonstrate that alleged disparities at 3M exceeded the threshold of expected, non-discriminatory differences by establishing a baseline of expected differences. Respondents failed to do so.

1. Age Is Different.

While no one changes race, and very few change gender, everyone ages. Unlike the “immutable” characteristics of race and gender, the constant process of aging has natural, non-discriminatory implications in the workplace. See A. 140-50, 220-35; cf. Smith v. City of Jackson, 544 U.S. 228, 240-41 (2005); Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, 1320-21 (E.D. Mich. 1976). But Respondents’ snapshot analyses ignored the changes all employees naturally experience over the course of their careers by examining employment outcomes at isolated points in time. This approach biased the statistics to find alleged “disparities” that Respondents claim are proof of a common pattern of age discrimination. Such analyses are not common evidence of age discrimination because the premise upon which they are based – that one should expect to find no disparities in age cases when applying statistical controls used in race or gender cases – does not account for normal, non-discriminatory differences correlated with age.

All of the experts in this case agree that differences between older and younger workers are expected *in the absence of discrimination* when those comparisons are made within job grades, as in Respondents' snapshot analyses. A. 145, 170-72, 231-32, 249, 257-58. For example, it is undisputed that the best employees generally develop most rapidly and, thus, are promoted most quickly. A. 141-43. Over time, the best employees are promoted out of any given job grade, leaving relatively less able (and likely older) workers to compete against the best incoming (and likely younger) workers as they, in turn, rise through the ranks, just as the best employees did in prior years. A. 145, 170-72, 231-32, 255, 257-58. In the complete absence of discrimination, therefore, this competition will naturally result in snapshot statistics showing that older workers generally receive fewer promotions, lower performance ratings, and fewer training selections than younger employees at any given point in time. A. 150, 219.

Viewed differently, and as acknowledged by Respondents' experts, because older workers have spent more time in the work force, they are more likely to have reached their maximum potential in their current job and, thus, are less likely to be promoted in any given year (although not when viewed over their entire careers, as shown at 3M). A. 202 (“[E]mployees who have been in their grade for a substantial period [may] have reached their potential and are not promotable.”); A. 257-58 (older employees, on average, are more likely to have reached their potential than younger employees); see also Evers v. Alliant Techsystems, Inc., 241 F.3d 948, 958-59 (8th Cir. 2001) (“[B]ecause successful employees tend to be promoted, low performers at any level will tend to be older than others at the same level.”); Cope v. McPherson, 594 F. Supp. 171, 175 (D.D.C.

1984) (“Among older workers . . . those on the average less qualified will remain in the pool, and as a result the pool can be expected to be ‘weighted’ with more relatively older, less qualified employees. One would thus expect to see some disparity by simply comparing age levels within the pool with the promotion rates.”); cf. Beers v. NYNEX Enters. Co., 1992 WL 8299, at *8 (S.D.N.Y. Jan. 13, 1992). These expected differences in performance and potential also affect other employment outcomes, as measured in a snapshot analysis, because employees’ performance and potential affect selection for promotions and training, as well as compensation. A. 86-87, 97-99, 150, 221, 230-32.

Respondents’ experts further agree that rates of compensation growth slow for older employees as their total compensation grows over time, and relative increases in productivity decline from year to year. A. 249 (“[T]here is, on average, lower wage growth for older workers than younger workers. That’s simply a restatement of the fact there is more wage growth when young.”); A. 253 (on average, one would expect younger employees to have higher-percentage pay increases than older employees); A. 156-61, 220-28. Thus, older workers generally receive lower “percentage” raises than when they were younger, although they earn more total compensation than younger workers.¹³ Cf. Tagatz v. Marquette Univ., 861 F.2d 1040, 1045 (7th Cir. 1988)

¹³ Indeed, older employees with higher base pay receive smaller percentage raises even if they receive the same (or larger) actual raises compared to younger employees. For example, if an older employee with a base salary of \$100,000 and a younger employee with a base salary of \$90,000 each receive a \$5,000 raise, the older employee receives a smaller percentage raise (5% vs. 5.55%). Because 3M’s older employees generally earn more base and total annual compensation than younger employees, A. 152, this fact further illustrates the misleading nature of Respondents’ arguments from “percentage” pay raises.

(“[S]alaries tend to rise rapidly in the early stages of their career and to reach a plateau The phenomenon of diminishing returns to years of experience is well documented.”). Again, the fact that older employees receive lower percentage pay increases than younger employees is expected and not evidence of discrimination, particularly in an environment where older workers receive higher overall pay.¹⁴

2. Because Respondents Offer No Baseline of Expected Differences, Their Snapshot Disparities Are Not Common Evidence of Age Discrimination.

There are any number of straightforward statistical methods that could be used to examine the issue of age discrimination, but none were used by Respondents. For instance, one could determine whether the average age of management has significantly declined. At 3M, the average age of management increased during the putative class period. A. 155, 169, 195. One might also consider whether the average age of senior management declined while junior management got older. At 3M, the reverse is true. The most senior managers have the highest average age. A. 154. One could examine the defendant’s historical pattern of promotions and pay and determine whether the pattern in the contested period departs from that historical pattern. At 3M, the pattern during the putative class period is consistent with historical patterns. A. 161-69. Alternatively, one might compare statistics on general workplace patterns (national or otherwise) with

¹⁴ As conceded by Respondents’ expert, the fact that employees’ compensation ordinarily increases most rapidly early in their careers is advantageous to all employees, regardless of their seniority at any particular point in time, by increasing total lifetime earnings. Employees earn more compensation over their entire careers when they are able to maximize their potential earlier in their careers, for the simple reason that they can take advantage of higher annual pay rates for more years than they would under the system advocated by Respondents, in which pay raises must be spread equally over an employee’s entire career. A. 267-71.

statistics from the defendant. Such statistics are available and, if anything, 3M's patterns are more favorable to older workers. A. 129, 224-26.

Respondents instead attempted a complex snapshot analysis that showed statistical "disparities," but did not indicate what disparities are natural, legal, and inevitable. To make any comparative claim – greater than, less than – it is essential to provide a "baseline," that is, to define what is normal. Otherwise, the alleged comparison means nothing. With respect to the interaction between age and career progression, differences in employment outcomes (Respondents' alleged "disparities") are expected in a snapshot analysis in the absence of discrimination. A. 145, 170-72, 231-32, 257-58. Such differences are not "common" or "typical" evidence of illegal age discrimination. Rather, to make these statistics probative of the Rule 23 requirements, Respondents needed to identify a generally accepted baseline of differences expected to be found in an age-neutral environment, against which to distinguish disparities they attribute to bias. A. 207-08. Respondents provided no such baseline. Because Respondents bore the burden to establish the requirements of Rule 23 by a preponderance of the evidence, their failure to establish the necessary baseline should preclude class certification as a matter of law.

3. Although 3M Bore No Burden of Proof, It Demonstrated That the Actual Statistics Are Consistent With, If Not Better Than, Outcomes Expected In A Bias-Free Workplace.

Although the burden of proof rests squarely on Respondents, see Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 321 (4th Cir. 2006), 3M presented extensive evidence confirming that Respondents' statistics were not common evidence of age discrimination. 3M's historical data demonstrated consistent patterns over the last 30

years, resulting in a workforce in which older employees occupy the vast majority of senior management positions; earn more compensation, on average, than comparable younger employees; and make the vast majority of the employment-related decisions at 3M. A. 155, 175-77, 180, 189, 254, 299. 3M further established that rates of promotions and pay increases for 3M's older workers were often *more* favorable during the putative class period than during earlier periods, A. 138, 175-80, and when compared to national workforce data, A. 224-26. Respondents rejected this baseline data, and their failure to offer any other baseline evidence renders their snapshot evidence meaningless.

4. Respondents' Censorship of the Data Further Renders It Invalid.

Respondents' statistics also fail as common evidence of age discrimination because they exclude – “censor” – from the data those older employees who disproportionately occupy the highest positions at 3M.

By comparing employees at the same point in time (rather than at the same point in their careers), Respondents systematically excluded hundreds of older employees who had already been promoted out of a given job grade. A. 182-85. Moreover, by limiting their analyses to only certain intermediate job grades, Respondents excluded entirely the best-performing, highest-potential “older” employees at 3M. By limiting their snapshot analyses to employees below 3M's Director level, Respondents excluded hundreds of employees in Director level positions (over 80% of whom are over the age of 46) and Executive Conference level positions (over 92% of whom are over the age of 46). A. 155, 299. These older employees are the most successful in the Company in terms of performance, promotions, and pay. Statistical analyses which purport to capture an

accurate “cross-section” of 3M’s workforce, but which ignore the most successful older employees at the Company, render those statistics facially biased and invalid. See Cooper, 390 F.3d at 716 (flawed statistical analysis provides no common evidence of discrimination); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 860 n.17 (D. Minn. 1993) (“If the factual bases of the statistical conclusions are faulty or suspect, the conclusions themselves are of little utility.”).

5. Respondents’ Statistical Controls Cannot Replace A Baseline.

Rather than provide a baseline of expected differences to validate their assertion that “disparities” at 3M are common proof of age discrimination, Respondents insist that their analyses are valid as a matter of law because their expert, Dr. Janet Thornton, used certain statistical “controls.”¹⁵ But Dr. Thornton’s controls for year and job grade actually cause the problem. Dividing groups of employees by year and job grade causes disparities by incorrectly treating age as an immutable characteristic and censoring the data. A. 140-48, 182-85.

Theoretically, it is possible to eliminate these flaws by fully controlling for performance, abilities, and potential, but it is difficult to do so in the real world because

¹⁵ Respondents rely on two cases, LaBonte v. TEAM Indus., Inc., 2007 Minn. App. Unpub. LEXIS 737 (Minn. Ct. App. July 24, 2007), and Hamblin v. Alliant Techsystems, Inc., 636 N.W.2d 150 (Minn. Ct. App. 2001), to claim that their statistics are valid as a matter of law because they used “controls.” Neither LaBonte nor Hamblin was a class case, and in neither case was this Court provided all of the current expert consensus that age is different than race or gender, rendering controls that may be adequate in a race or gender case inadequate in an age case. See, e.g., Connolly & Peterson, supra, (A. 314-18); Johnson & Neumark, supra (A. 319-20); Neumark & Adams, Age discrimination in US labor markets: a review of the evidence, from HANDBOOK ON THE ECONOMICS OF DISCRIMINATION at 201 (2006) (A. 331-32).

performance and potential ratings that are useful for employee review and development purposes simply are not designed to make distinctions between employees detailed enough for statistical analyses. A. 148-50. Thus, even Dr. Thornton concedes that her controls may not account for the entirety of the expected, non-discriminatory correlation between age and outcomes. A. 265-66. In this case, however, it was impossible for Respondents to account for expected differences in outcomes because Dr. Thornton refused to use all of the controls that were available to her. In none of her analyses did she control for all available performance measures, including 3M contribution and leadership ratings and high potential and placement designations, or for pre-3M labor market experience or initial job grades. See, e.g., A. 182, 196-99, 201-04, 214-17, 262.

Dr. Thornton refused to control for relevant performance factors because she claimed that 3M's performance ratings could be "tainted." A. 197, 256. That is, although one would expect non-discriminatory differences in performance evaluations correlated with age and job grade, A. 170-72, 315-16, Respondents did not control for all performance factors based on the speculation that expected disparities in performance evaluations could also reflect age bias, A. 263. The circularity of Respondents' logic is apparent: They assert that the performance factors are tainted with discrimination when they correlate with age. While admitting the correlation may result from appropriate factors, they simply assume that they are correlated with age because of discrimination. Such flawed logic renders their statistics invalid. See, e.g., Morgan v. United Parcel Serv. of Am., Inc., 380 F.3d 459, 470 (8th Cir. 2004) (rejecting similar "bootstrapping" to create inference of discrimination in order to exclude relevant explanatory factors).

Moreover, by failing to control for all relevant performance factors, simply because expected differences in performance ratings appear, Respondents also guaranteed that their statistics would demonstrate other disparities, since promotion, pay, and training are tied in large part to performance evaluations. This further renders their statistics meaningless. A. 183-85.

Respondents maintained that this flawed evidence was enough for class certification and insisted that further examination must be left for the “merits” phase of the case. But Respondents’ failure to control for the predicted, non-discriminatory correlations between age and employment outcomes renders the snapshot statistics invalid for purposes of class certification. Despite having the burden to establish the Rule 23 elements with common evidence *of class-wide age discrimination*, Respondents do not show that 3M’s outcomes are different from what would be expected in the absence of discrimination. *Speculation* that such outcomes are nonetheless proof of pervasive age bias is not common or typical *evidence* of class discrimination and, therefore, is insufficient to carry Respondents’ burden to establish the requirements of Rule 23 by a preponderance of the evidence. The District Court erred in adopting Respondents’ approach.

B. Evidence that 3M Developed Talent Early In Employees’ Careers Is At Least As Consistent With Age Neutral Decision Making As With Age Bias and Cannot Establish the Elements of Rule 23.

Respondents also argue that 3M executives admitted a corporate policy of age bias in statements reflecting 3M’s effort to identify and develop leadership talent early in employees’ careers. Such statements are consistent with universally recognized HR best

practices, and they do not show that 3M excluded older employees from employment opportunities. In fact, the statistical evidence demonstrates that the promotion rate of more senior employees was slightly higher during the putative class period than the promotion rate for equally senior employees in the previous 25 years. A. 138. There is no common pattern of excluding older employees from training or promotions.

Respondents attribute numerous statements to 3M executives suggesting efforts to develop “young leaders,” “identify talent earlier in careers,” and “develop the best generation of leaders in 3M’s . . . history.” A. 305-09. They assert that 3M wanted to develop “30 year olds with General Manager potential,” and prevent the loss of “young and talented employees.”¹⁶ A. 301-303. All of these statements reflect 3M’s effort to expand leadership opportunities for all employees, regardless of age or prior leadership experience. A. 311 (“Other initiatives have also opened up leadership opportunities, often very early in people’s careers.”).

Importantly, none of these statements show that 3M tried to exclude any older employees from training or promotion opportunities based on their age, A. 102-03, 240-41, 246-47, and as courts have recognized, a company’s efforts to develop junior

¹⁶ 3M, like other companies, is addressing the dual challenge of retaining valuable older leaders and preparing future leaders as the baby boomer generation ages toward retirement. In the next five or six years, many 3M divisions – like other employers across the country – will have as much as 50% of their workforce at or near retirement age. A. 237. This fact portends significant organizational changes for businesses, particularly in upper-level management, where older employees generally hold a high percentage of positions. A. 155. To survive, employers must develop the next generation of leaders. As a fundamental policy matter, 3M submits that such investments in identification and training of talented employees, by any employer, simply are not evidence of class-wide age discrimination.

employees is not evidence of discrimination, see, e.g., Sandstad v. CB Richard Ellis, Inc., 2001 WL 611174, at *2, *5-6 (N.D. Tex. June 4, 2001) (leadership program designed to “identify and orient promising and committed young managers for long-term leadership roles” was not evidence of age discrimination); cf. Wittenburg v. Am. Express Fin. Advisors, Inc., 464 F.3d 831, 836-37 (8th Cir. 2006) (executive’s statement regarding “hiring younger [employees] and growing them” does not “evinced a discriminatory policy or practice”); EEOC v. Clay Printing Co., 955 F.2d 936, 942 (4th Cir. 1992) (developing junior employees as part of succession planning efforts is not discriminatory).

Indeed, 3M presented unrebutted evidence that identifying and developing leadership talent early in employees’ careers is a well-established, legal HR best practice, widely accepted as beneficial to employees and employers alike. A. 102, 114-15. Respondents also did not contest 3M’s extensive evidence that its talent management efforts reflect this and other best practices. In the ordinary course of business, 3M retained external experts to develop programs and policies structured to prevent discrimination, A. 114, and it is undisputed that 3M’s state-of-the-art HR systems are designed to minimize the risk of bias, A. 94-95. In fact, 3M’s talent management function has been recognized as one of the best in the country by HR experts. A. 102.

Since evidence that 3M developed talent early in employees’ careers is at least as consistent with age-neutral decision making as with age discrimination, that evidence also cannot satisfy Respondents’ burden of proving commonality and numerosity by a preponderance of the evidence. In light of the uncontested evidence that such efforts are

consistent with non-discriminatory HR best practices, such evidence, if anything, is strongly probative evidence against class certification.

C. Respondents' Arbitrary Class Definition and Significant Intra-Class Conflicts Further Preclude Class Certification.

In addition to demonstrating the fundamental flaws in Respondents' arguments based on their snapshot statistics and 3M's efforts to develop employee talent, 3M presented significant additional evidence to the District Court which should have been considered as part of a "definitive assessment" of the class certification requirements. This evidence further precludes Respondents from establishing the elements of Rule 23 by a preponderance of the evidence.

Respondents' putative class promises hopelessly inefficient litigation. Out of nearly 6,000 older 3M employees, for example, Dr. Thornton identified only 173 *hypothetical* older employees who she argued could have claims for promotion discrimination, based on what are, in reality, flawed statistical analyses. A. 204. For other claims, Dr. Thornton identified fewer than 10 hypothetical claimants. A. 199-200. The class management problem is created by Respondents' class definition, which includes almost every middle level management employee over the arbitrary age of 46.¹⁷

¹⁷ The flaws in the class definition are further reflected by the fact that the class is continually expanding as employees celebrate birthdays. An employee who was 45 years old and one of the allegedly "favored" employees becomes a class member on his or her next birthday, now asserting that his or her career has been impeded based on age. Likewise, employees older than 46 who receive promotions to Minnesota from outside the state, and even those hired after they turn 46, also are suddenly members of a "class" claiming that their careers were hampered by age bias. As also illustrated by the number of older employees who were promoted into director- and executive-level positions during the pendency of the case, A. 242-44, 272-79, such a class is senselessly overbroad.

Respondents' putative class is patently overbroad. See, e.g., Oshana v. Coca-Cola Bottling Co., 225 F.R.D. 575, 580 (N.D. Ill. 2005) (“[P]roper class identification insures that those individuals actually harmed by defendant’s wrongful conduct will be the recipients of the awarded relief.”); see also Williams v. Ford Motor Co., 192 F.R.D. 580, 586 (N.D. Ill. 2000) (“Courts faced with an overbroad class definition may deny certification for want of typicality.”). In order to determine which of the hypothetical handful of 3M’s older employees, if any, actually were injured by alleged discrimination, the District Court would have to conduct an endless series of mini-trials to determine which class members might have claims and which do not. See Brancheau v. Residential Mortg. Group, 177 F.R.D. 655, 663-64 (D. Minn. 1997) (denying certification where litigation “would devolve into an unmanageable thicket of individualized claims”); Keating v. Philip Morris, Inc., 417 N.W.2d 132, 137 (Minn. Ct. App. 1987) (denying certification where litigation would require “thousands of mini-trials”).

Moreover, because Respondents have not organized their class by type of claim, but present numerous types of claims, those mini-trials would involve employees with entirely different types of claims, relying on completely different evidence. An employee’s promotion claim would require a review of the promotion mechanism at issue, his qualifications, and the qualifications of other candidates. An employee’s termination complaint would require analysis of various independent job eliminations, and, perhaps, the employee’s own qualifications and performance. Employees’ training or compensation claims would involve entirely different evidentiary issues. In addition, every employee’s claim is likely to involve different business units, different time

periods, and different decision makers. See A. 288-98 (noting the number of decision makers implicated just by the named Plaintiffs' personal claims). The procedural quagmire that would be caused by this class definition makes the class unworkable.

Respondents' class definition also includes older employees who made the employment decisions about other putative class members. Approximately 83% of all class members were rated at least once by another class member during the putative class period, and, in total, older employees gave 67% of all the contribution ratings received by putative class members during the putative class period. A. 186-87.

This situation, also caused by Respondents' overly broad class definition, leads to numerous problems that should have resulted in denial of class certification. First, a very large portion of 3M's management group is in the position of suing the Company, even though it cannot be disputed that the vast majority have no claims at all. Nonetheless, 3M must manage a business with managers who are now told they are adverse to the Company. Moreover, because most of the contested decisions have been made by class members, and Respondents' counsel takes the position that 3M may not talk with class members about this case, 3M is prohibited from effectively mounting its defense. Finally, the conflicts among class members, with some complaining about an employment decision and others defending that decision, puts class members and class counsel at odds, as demonstrated by the claims and defenses of the named Plaintiffs. A. 288-98.

Such extensive conflicts within Respondents' putative class renders class treatment unmanageable and manifestly inferior to permitting the handful of individual

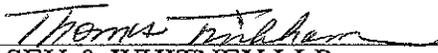
employees who actually believe they have claims to pursue those claims on their individual merits. See, e.g., Donaldson v. Microsoft Corp., 205 F.R.D. 558, 568 (W.D. Wash. 2001) (“Since plaintiffs allegations about disparate treatment and disparate impact arise directly from the evaluation system . . . the Court is unable to envision a class which would include both those who implemented the ratings system and those who allegedly suffered under it. This conflict appears insurmountable.”); see also Clayborne, 211 F.R.D. at 587 (citing cases). A definitive analysis of the Rule 23 requirements that considers this evidence should result in the denial of class certification.

CONCLUSION

For the reasons set forth above, class certification was improvidently granted, and this Court should reverse the April 11, 2008, Order of the District Court.

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