STATE OF MINNESOTA
COUNTY OF RAMSEY

EMPLOYMENT
DISTRICT COURT
SECOND JUDICIAL DISTRICT

Clifford L. Whitaker, et al., on behalf of themselves and all others similarly situated, Plaintiffs, vs. 3M Company, Defendant.	)	Court File No. 62-C4-04-012239 [G. Johnson] [Class Action]

SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

[FILED PARTIALLY UNDER SEAL]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

In its appeal of the class certification decision, 3M flagged numerous legal and factual errors that this Court supposedly committed. The Court of Appeals, however, limited itself to holding that this Court erred by not expressly using a preponderance of the evidence standard to resolve factual disputes relevant to class certification. The Court identified only four open disputes relevant to class certification, each concerned with the parties' statistical analyses.

Regardless whether it was clear from this Court's decision two years ago, Plaintiffs presented more than sufficient evidence for this Court to have resolved each of these four issues in favor of class certification by a preponderance of the evidence. After considering the evidence anew as well as any additional evidence presented May 5-6, the Court should again certify the proposed class while expressly resolving any factual disputes under the preponderance standard.

ARGUMENT

I. THE COURT OF APPEALS REQUIRED THIS COURT TO DETERMINE WHETHER PLAINTIFFS PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT THEIR STATISTICAL ANALYSES ARE VALID.

Upon remand, the Court of Appeals directed this Court to apply a preponderance of the evidence standard "to resolve factual disputes relevant to rule 23 certification requirements, including relevant expert disputes." *Whitaker v. 3M Company*, 764 N.W.2d 631, 638 (Minn. Ct. App. 2009). It instructed the Court to "address and decide all of the alleged defects in [Plaintiffs'] expert-witness testimony relating to rule 23 requirements of numerosity, commonality, typicality, and predominance," *id.* at 639, but to do so in a manner that "does not become a pretext for a partial trial of the merits." *Id.* at 640 (quoting *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006)).

The Court of Appeals also identified the alleged defects in Plaintiffs' expert-witness testimony that this Court must resolve, namely "the validity and weight of 3M's concerns" with

respect to: "demonstrating a baseline of expected, non-discriminating differences; bridging the gap between individual claims of discrimination and the existence of a class of similarly situated employees; selected problems with doing a 'snap-shot' analysis; and the alleged inappropriate use of certain statistical controls for the predicted non-discriminatory correlation between age and employment outcomes." *Id.* These four interrelated issues apply primarily to the "commonality" requirement of Rule 23, that "there are questions of law or fact common to the class." Minn. R. Civ. P. 23.01(b); *see Whitaker*, 764 N.W.2d at 638-39 (discussing statistical disputes in the context of whether Plaintiffs have shown that their claims can be proved through common evidence). Thus, Plaintiffs must show by a preponderance of the evidence that 3M's four concerns are either not valid with respect to the commonality requirement or lack the weight to undermine Plaintiffs' evidence in support of commonality.

The analyses in the federal court decisions on which the Court of Appeals relied, *Whitaker*, 764 N.W.2d at 638, illuminate the difference between analyzing the viability or weight of a defendant's concerns about the proposed methodology of a plaintiff's expert and engaging in a merits inquiry. At the class certification stage, courts should conduct a "searching inquiry into the viability" of a statistical or economics theory and "the existence of the facts necessary for the theory to succeed." *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 26 (1st Cir. 2008). A district court should not seek "hard factual proof," but "a more thorough explanation of *how* the pivotal evidence behind plaintiffs' theory can be established." *Id.* at 29 (emphasis in original). *See also In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 314 (3d Cir. 2008) (court should determine at class certification whether statistical methods are "feasible" or "impossible"); *Blades v. Monsanto*, 400 F.3d 562, 575 & n.9 (8th Cir. 2005) (at class certification stage, plaintiffs' must show that expert evidence "could work" to prove claims

with common evidence, and it was a mistake to intermingle "opinions on the actual merits of the injury element with opinions on the nature of the evidence that would be required to prove injury"). The federal appellate courts in all of these cases did not concern themselves with whether plaintiffs' expert's analysis ultimately would prove victorious on the merits.

Plaintiffs met this burden of proving by a preponderance of the evidence that their expert's method of analysis was viable in connection with their original motion for class certification. They will provide further support at the hearing scheduled to begin May 5, 2010.

II. PLAINTIFFS HAVE SHOWN BY A PREPONDERANCE OF THE EVIDENCE THAT THEIR STATISTICAL ANALYSES ARE VALID AND THAT 3M'S FOUR CONCERNS DO NOT UNDERMINE PLAINTIFFS' RULE 23 PROOF.

A. "Snapshot," or Cross-Sectional Analyses, Are Not *Per Se* Invalid in Age Discrimination Cases

Plaintiffs' labor economist and statistical expert, Dr. Janet Thornton, performed a series of "snapshot," or cross-sectional, analyses examining whether 3M's decisions at particular points in time, e.g., by year for compensation decisions or at the time promotions were made, were adverse to class members as compared to employees under the age of 46. (Thornton Rep. 15-17.) She used three widely accepted methodologies controlling for various measurable factors that reasonably might influence the results. Pools and logistic regression analyses were used to analyze performance rating, promotion, leadership training opportunity, and job elimination decisions. Multiple regression analyses were used to analyze compensation change and stock option grant decisions. (Thornton Rep. 19-31.) She treated any disparity in the treatment of "older" and "younger" employees revealed by these analyses to be "statistically significant" if the disparity was measured by two or more "standard deviations." (Thornton Rep. 17-19.) Standard deviations are 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)).

3M cannot challenge that cross-sectional analyses have been the primary means used by experts to analyze whether there is statistical evidence that an employer-defendant has engaged in a pattern of discrimination for the past forty years. Indeed, 3M's statistical expert, Dr. Bernard Siskin, repeatedly used cross-sectional analyses in age discrimination cases until approximately the year 2000, when he first became aware of supposed problems in analyzing the effect of age on employment decisions. (Siskin Dep. 19:9-21:24.)

3M also cannot challenge that Dr. Siskin testified that cross-sectional analyses, while assertedly more difficult in age discrimination cases, could be conducted with the proper controls. (Siskin Rep. 46-47, 77; Siskin Dep. 22:6-15.) He could hardly testify otherwise because he himself conducted a series of cross-sectional analyses in this case. (Siskin Rep. 50-61.)

Finally, 3M cannot challenge that in two other age discrimination cases the Court of Appeals relied on the results of cross-sectional analyses conducted by plaintiffs' experts. *See LaBonte v. TEAM Indus.*, 2007 Minn. App. Unpub. LEXIS 737 (Minn. Ct. App. July 24, 2007); *Hamblin v. Alliant Techsystems, Inc.,*, 636 N.W.2d 150 (Minn. Ct. App. 2001). Indeed, the experts in those cases did not, as did Dr. Thornton and Dr. Siskin, control for potentially tainted variables such as time-in-grade and performance. *See* section II.B below. This makes the analyses and results in this case less susceptible to the types of possible distortions identified by

3M and its experts than those on which the Court of Appeals relied in *Hamblin* and *LaBonte*.[1] 3M has not identified any decision of any Minnesota or other court that has rejected either at the class certification stage or on the merits a cross-sectional analysis with the types of controls used by Dr. Thornton in this case as incapable of constituting class-wide evidence of age discrimination.

Despite all of this evidence and authorities that cross-sectional analyses are not inherently invalid in age discrimination cases, 3M suggests that cross-sectional analyses cannot be conducted in age cases. 3M bases its suggestion in part on the theories proffered by its labor economics expert Dr. Robert Topel and in part on calculations performed by Dr. Siskin that supposedly show that for the past thirty years the relationship between promotions and tenure at 3M has been relatively constant.

Following Dr. Topel, 3M contends that age disparities should be expected in cross-sectional analyses even "in the absence of discrimination" for reasons similar to those popularized under the phrase "The Peter Principle." (Def.'s Class Cert. Mem. 14, 22-28.) To the extent that older and younger employees are in the same grade and job at the same time, 3M's experts assert, the older employees on average will have taken longer to achieve that position, generally because they have been poorer performers in their jobs or have had less potential for higher-level jobs than their counterparts. (Topel Dep. 33:4-35:12, 228:24-236:2; Siskin Dep. 11:5-12:5, 18:16-22, 22:6-15, 62:3-10.) 3M summarizes, "age is negatively correlated with performance and potential in any job grade." (Def.'s Class Cert. Mem. 26.) Put alternatively, older employees tend to be in higher grades than younger employees with similar skills and

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[1] That *LaBonte* and *Hamblin* are individual cases does not make them inapposite here. 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.

abilities, so that analyzing only persons in the same grade and job results in "censorship of the data." (Siskin Rep. 37-43; Def.'s Mem. 24-26.)

Dr. Topel bases his report partly upon data indicating that, in the national labor market as a whole and among federal employees, in general, the rate of compensation increases slows with experience or age. (Topel Rep. 9-12, fig. 2.) But these data, called the "age earnings profile," 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 include people in jobs requiring manual labor in which, undoubtedly, workers' productivity declines over time. The data reveal nothing about the expected compensation of those who are and remain full-time employees of any given company, let alone a company in which physical strength and dexterity are not significant. (Thornton Rebuttal Rep. 5-6.) The profile also lacks any of the controls used in the cross-sectional analyses of the 3M data performed by both Dr. Thornton and Dr. Siskin. (Thornton Rebuttal Rep. 5-7.) Not surprisingly given the limitations of this data, 3M'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." (Topel Dep. 139:7-140:6, 146:11-150:22, 178:14-180:24, 189:11-191:19, 201:8-24, 280:17-281:6; Siskin Dep. 89:24-92:15.)

The few published studies of the impact of age on compensation within a single company have yielded mixed results. (Neumark Rep. 7-10.) One of those few studies was conducted by 3M's expert Dr. Topel.[2] He found that from years 10-15 to years 15-20, wage increases tended to rise on a percentage basis rather than decline. (Neumark Rep. 9.) And Dr. Thornton testified

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[2] *Specific Capital, Mobility, and Wages: Wages Rise with Job Seniority*, 99 J. POL. ECON. 145 (Feb. 1991), reprinted in OUTSTANDING CONTRIBUTIONS IN LABOR ECONOMICS 162 (Orley Ashenfelter ed.).

that in the audits she regularly performs for companies, the rates of increase in compensation do not generally decline as employees get older. (Thornton Dep. 133:2-135:20.) Dr. Topel's analysis and Dr. Thornton's experience with other companies do not suggest that, at 3M, one should expect the rate of percentage increases in compensation to decline as class members age. (Class Certification Hearing, Dec. 12, 2007, Tr. 109:6-111:8.)

There have been even fewer published studies of the relationship between age and HR decisions other than compensation. (Neumark Rep. 11.) One of them,[3] by Kristen McCue, which Dr. Topel cited as authoritative (Topel Rep. 14-15), indicated that the promotion rate of white men started to climb between 15 and 20 years of tenure, which would be in the mid-40s at 3M. (Class Certification Hearing, Tr. 111:9-113:6.) Thus, neither the Topel nor the McCue article supports 3M's position in this case.

As Dr. Neumark summarized, "the Peter Principle [is] a largely untested and unconfirmed theory, and therefore not a basis on which to rule out discriminatory explanations of lower promotion rates for older workers." (Neumark Rep. 16.) The theory also is not universally accepted by labor economists. (Neumark Rep. 16.)

3M fares no better when relying on Dr. Siskin. For each year from 1976 through 2005, he calculated the percentage of salaried exempt employees with a given number of years of tenure who received a promotion. The calculations showed that throughout the period, the rate of promotions increased during the first few years of 3M employment and then declined steadily throughout the remainder of employees' careers. (Siskin Rep. 24-32.) 3M argues that this means that older employees were treated no worse at 3M during the period from 2001 through 2005 than they had been in prior years.

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[3] Kristen McCue, *Promotions and Wage Growth*, 14 J. LABOR ECON. 175 (1996).

Dr. Siskin's study is simply of average promotion rates and does "not control for employee performance, job, job grade, or organizational factors." (Thornton Rebuttal Rep. 6.) Dr. Siskin was able to control for several organizational factors for only two years prior to Mr. McNerney's arrival, 1999 and 2000. (Thornton Rebuttal Rep. 7; Siskin 1-29-08 Dep. 84:14-85:13.) Older employees' promotion rates relative to younger employees dropped in 2001 and 2002 from the rates that preceded Mr. McNerney's arrival as CEO. (Siskin 1-29-08 Dep. 86:6-87:6; Thornton Aff. ¶¶ 13-14; *see also* Thornton Aff. ¶ 16 (comparing promotion rates for employees with 20-30 years of tenure in 1996-2000 with rates for employees with identical years of tenure in 2001-05).)

Even if some credence were given to Dr. Siskin's calculations of average rates without any controls, his generalization that the numbers show a consistent pattern of promotions declining with tenure glosses over considerable variation. (Neumark Rep. 44.) For example, the figures show increased promotions for older employees from 1993-1997, followed by a period of fluctuation, and after 2000 "quite sharp declines in promotion rates with age." (Neumark Rep. 44.) The variations "belie[] the notion that the relationship between promotion and age (or seniority) necessarily proceeds according to some fixed law." (Neumark Rep. 44.-45.)

Dr. Topel's theories and Dr. Siskin's calculations of historical promotion rates do not come close to undermining the use of cross-sectional analyses in age discrimination cases generally or in this case in particular. Indeed, Dr. Siskin's own testimony and use of cross-sectional analyses refute 3M's arguments. Class certification should not be denied on this basis.

B. The Types of Controls Used by Dr. Thornton Are Appropriate, and Whether Her Analyses or Dr. Siskin's Analyses Are More Persuasive Is a Merits Issue

As mentioned above, Dr. Thornton used controls in each of her analyses to permit comparison of employees with like characteristics and allows determination of the amount, if