

STATE OF MINNESOTA  
IN COURT OF APPEALS

No. A08-0816

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3M Company,	)	Trial Court Case No. 62-C4-04-012239
	)	[G. Johnson]
Petitioner,	)	
	)	
vs.	)	
	)	
Clifford L. Whitaker, et al., on behalf of	)	
themselves and all others similarly	)	
situated	)	
	)	
Respondents.	)	

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REQUEST FOR LEAVE TO FILE  
BRIEF OF AN AMICUS CURIAE

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TO: THE COURT OF APPEALS OF THE STATE OF MINNESOTA:

Pursuant to Rules 117 and 129 of the Minnesota Rules of Civil Appellate Procedure, the Minnesota Chapter of the National Employers Lawyers Association and the Impact Fund request leave of this Court to file an *amicus curiae* brief in this case. Our interest is public in nature.

I. Parties Requesting Opportunity to File an Amicus Curiae Brief

A. National Employment Lawyers Association, Minnesota Chapter

The National Employment Lawyers Association (“NELA”) is a non-profit membership organization founded in 1985. Its Minnesota Affiliate Chapter has appeared as *amicus curiae* in many significant employment cases before the Minnesota Supreme Court, among which are the following: Patricia Ludowese Ray v. Miller Meester Advertising, Inc., 684 N.W.2d 404 (Minn. 2004); Abraham v. County of Hennepin, 639 N.W.2d 342 (Minn. 2002); Anderson-Johanningmeier v. Mid-Minnesota Women’s Ctr., 637 N.W.2d 270 (Minn. 2002); Lake v. Wal-

Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998); Williams v. St. Paul Ramsey Med. Ctr., 551 N.W.2d 483 (Minn. 1996); Hasnudeen v. Onan Corp., 552 N.W.2d 555 (Minn. 1996); and Nordling v. Northern States Power Co., 478 N.W.2d 498 (Minn. 1991). MN NELA affirms that the views it expresses in this petition have not been previously reviewed or approved by the parties or their attorneys in this case.

#### **B. The Impact Fund**

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

#### **II. Legal Issue Upon Which MN NELA and The Impact Fund Wishes To Be Heard**

As the Court of Appeals recognized neither appellate level courts in the State of Minnesota have addressed the standard of proof to be applied under Rule 23, or the extent to which the district courts must resolve fact disputes, including expert disputes in certification proceedings. (Order at 2.) Given this, MN NELA and the Impact Fund believe that a broad range of perspective will assist with resolution of this issue.

In determining the propriety of class certification, the question is not whether Plaintiffs have stated a cause of action or will ultimately prevail on the merits, but rather whether the requirements of Minn. R. Civ. P. 23.01 and 23.02 are met. Holding plaintiffs to a heightened standard for Rule 23 class certification would undermine the public policy behind class action

lawsuits. Rule 23 requires, among other things, a finding that there are questions of law or fact that are common to the class. Although the court enjoys discretion in certifying a class, the Minnesota Court of Appeals has cautioned that it is an abuse of discretion not to certify where the “case presents no unusual management problems and will provide representation to an otherwise unrepresented class.” Glen Lewy 1990 Trust v. Inv. Advisors, Inc., 650 N.W.2d 445, 457 (Minn. Ct. App. 2002).

While the class certification analysis mandates a vigorous analysis of whether the Rule 23 factors have been met, it does not require the Plaintiffs to establish their claims by a preponderance of the evidence as the Petitioner seeks this Court to do. Instead, in making a “definitive assessment” of whether Rule 23 is met, courts should only examine the merits of the case to the extent that it is necessary to determine whether the Rule 23 factors are satisfied. See In re Initial Pub. Offering Sec. Litig., 471 F. 3d 24, 41 (2d Cir. 2006) (clarifying that courts deciding whether to certify a class action must determine that each Rule 23 requirement has been met, and that the “obligation is not lessened by overlap between a Rule 23 requirements and a merits issue.”) In other words, IPO does not impose a heightened standard for class certification than what is outlined in Rule 23. It simply holds the that the Rule 23 factors must be met even when the merits are reviewed.

In this case, the District Court correctly granted Plaintiffs’ motion for class certification. In doing so, the court applied the appropriate “rigor” in analyzing the evidence Plaintiffs set forth regarding the commonality of the Plaintiffs’ claims. The court properly assessed the validity of Plaintiffs’ statistical evidence and found that it was “sufficient to establish evidence of company-wide questions of discrimination.” (Mem. of Law in Supp. Of Order Certifying Class and

Appointing Counsel at 5.) The Court correctly declined to determine whether the parties' evidence established or refuted Plaintiffs' discrimination claim.

MN NELA and the Impact Fund believe that the District Court applied the correct standard for Rule 23 class certification when it granted Respondents' motion for class certification. Accordingly, Minnesota NELA and the Impact Fund would request that the Court affirm the District Court's grant of class certification.

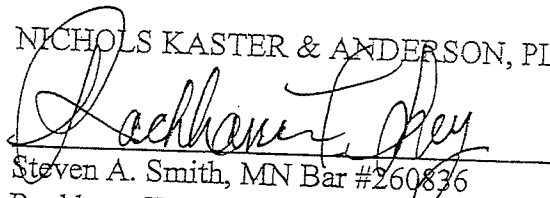
### III. Conclusion

For the foregoing reasons, Minnesota NELA and The Impact Fund respectfully request that the Minnesota Court of Appeals grant their petition to file an *amicus curiae* brief.

Dated: July 11, 2008.

Respectfully submitted,

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