

Nos. 04-16688 & 04-16720

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER,
KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, AND EDITH ARANA,

Plaintiffs/Appellees/Cross-Appellants,

v.

WAL-MART STORES, INC.,

Defendant/Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS AMICUS CURIAE IN SUPPORT OF APPELLANT
AND SEEKING REVERSAL OF THE ORDER BELOW**

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INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters nationwide. Since its founding in 1977, WLF has engaged in litigation and advocacy to defend and promote individual rights and a balanced civil justice system. Particularly, WLF devotes a substantial proportion of its resources to advocating and litigating against excessive and improperly certified class action litigation. Among the many federal and state court cases in which WLF has appeared to provide expertise on the proper scope of class action litigation are *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996); *Gilchrist v. State Farm Mut. Automobile Ins. Co.*, No. 03-107998-H, 2004 U.S. LEXIS 24088 (11th Cir. Nov. 18, 2004); *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429 (2000); *Diamond v. Multimedia Systems v. Superior Court*, 19 Cal. 4th 1036 (1999), cert. denied, 527 U.S. 1003 (2000).

WLF is submitting this brief because it believes that the district court committed legal error when it failed to apply the requisite rigorous analysis as to whether plaintiffs had met their burden of demonstrating that the prerequisites of Rule 23 had been satisfied, including an evaluation of plaintiffs' proffered expert testimony under the standards articulated by the Supreme Court in *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993). Rather, in an attempt to

shoehorn this case into the class action device, the district court improperly utilized a lower *Daubert* standard to evaluate plaintiffs' proffered expert testimony. WLF is submitting this brief because it is concerned that if the proposed class is certified on such a basis, the result would be to cast aside the carefully crafted balance of plaintiffs' interests, defendants' interests, and judicial efficiency embedded in Rule 23.

All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In setting forth the legal standard for evaluating expert testimony, the district court interpreted *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), as precluding it from examining the merits during its class certification analysis. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 189, 191 (N.D. Cal. 2004) (citing *Eisen*). The court interpreted this restriction on conducting a merits inquiry as equally applicable to its review of expert testimony, and therefore declined to utilize a full *Daubert* analysis to evaluate expert testimony at the class certification stage. *Id.* Rather, for purposes of the class certification analysis, the court employed a lower *Daubert* standard, which it articulated as both “whether the expert’s evidence is sufficiently probative to be useful in evaluating whether class certification requirements have been met” (*Id.* at 191), and “whether the expert’s evidence adds probative value to plaintiffs’ claims.” *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 144, n.5 (N.D. Cal. 2004).

The court first applied this lower *Daubert* standard to the testimony of plaintiffs’ expert sociologist, Dr. Bielby. 222 F.R.D. at 191. As noted in its class certification decision, Dr. Bielby concluded that gender stereotyping was “likely” to exist at Wal-Mart, yet conceded that this opinion had “a built-in degree of conjecture.” 222 F.R.D. at 153 – 154. Nevertheless, based upon its less rigorous standard, the court admitted Dr. Bielby’s testimony for purposes of the class

certification analysis. 222 F.R.D. at 192. Use of this lower *Daubert* standard had serious consequences for the class certification decision the court relied heavily on Dr. Bielby's testimony to find that plaintiffs established Fed. R. Civ. P. 23(a)'s commonality requirement. *Id.* at 153 – 154.

The district court's refusal to apply the full *Daubert* analysis is erroneous for two reasons. First, as explained in Part I, a thorough review of *Eisen*, later Supreme Court decisions, and Ninth Circuit precedent reveals that *Eisen* does not preclude an examination at the class certification stage of evidence that bears directly on the Rule 23 requirements, even though the evidence may also relate to the merits of the case. Moreover, as discussed in Part II, *Daubert* sets the standard for the admissibility of expert testimony in federal court, including federal class certification proceedings. Because Dr. Bielby's testimony was not admitted under the full *Daubert* standard, it may not be relied upon to grant class certification.

ARGUMENT

I. ***EISEN* DOES NOT PRECLUDE AN EXAMINATION AT THE CLASS CERTIFICATION STAGE OF EVIDENCE THAT BEARS ON RULE 23 REQUIREMENTS EVEN THOUGH THE EVIDENCE MAY ALSO RELATE TO THE MERITS OF THE CASE**

Thirty years ago, the United States Supreme Court issued the following statement in *Eisen*:

[N]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.

417 U.S. at 177. From this single sentence of dicta the district court accepted the proposition that it could not inquire into the merits of the case for purposes of the class certification analysis. 222 F.R.D. at 144. But the context in which the Supreme Court made the statement demonstrates its limits. *Eisen* presented the question of whether, under Rule 23, it was improper to shift the burden of notice payment from one party to another based on the court's preliminary calculus of which party will ultimately prevail on the merits of the claim. *Id.* at 178. Later Supreme Court decisions clarify *Eisen's* dicta.

A. **Later Supreme Court Decisions Clarify *Eisen***

Later Supreme Court decisions illuminate that *Eisen* does not construct a wall between merits analysis and class certification analysis. First, in

Coopers & Lybrand v. Livesay, the Supreme Court held that “[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims.” 437 U.S. 463, 469 (1978). Next, in *Gen. Tel. Co. of Southwest v. Falcon*, the Supreme Court further clarified the relationship between a merits inquiry and the class certification analysis in the context of Fed. R. Civ. P. 23(a)’s adequacy requirement:

Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff’s claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question. . . [A]ctual, not presumed conformance with Rule 23(a) remains . . . indispensable . . . [A] Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.

457 U.S. 147, 160 (1982). This Court and the majority of other Circuits have confirmed that this reasoning applies with equal force to the other Rule 23 requirements for class certification, particularly commonality.

B. This Court and the Majority of Other Circuits Recognize the Limits of *Eisen*

In *Hanon v. Dataproducts Corp.*, 976 F.2d 497 (9th Cir. 1992), this Court recognized that *Eisen* does not preclude it from considering evidence that relates directly to the Rule 23 requirements even though the evidence may also

relate to the merits of the case. *Id.* at 509. Significantly, the district court here failed to cite or acknowledge this controlling decision. In *Hanon*, the named plaintiff brought a securities fraud class action against a computer manufacturer, alleging that the manufacturer engaged in certain material misrepresentations and omissions. *Id.* at 500. Without explanation, the district court denied the plaintiff's motion for class certification. *Id.* at 508. The Ninth Circuit affirmed this denial, holding that the named plaintiff failed to satisfy Rule 23's typicality requirement because, as a sophisticated investor with extensive experience in securities litigation, he was subject to unique defenses concerning his reliance on the integrity of the market that were atypical to other members of the proposed class. *Id.* While noting that the defense of non-reliance is not in itself a basis for denial of class certification, this Court nonetheless held that "we are at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case." *Id.* at 509 (internal citations omitted).

The majority of other federal appellate courts have also specifically rejected the proposition that *Eisen* precludes an examination of evidence that bears on the Rule 23 requirements during the class certification analysis merely because the evidence may also relate to the merits of the case. For example, in *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001), the Seventh

Circuit rejected the proposition that *Eisen* requires a court to certify a class based solely on the allegations in the pleadings. There, the court reasoned that *Eisen*, *Falcon*, and the 1966 amendments to Rule 23 require that a district court must “probe beyond the pleadings” in order to determine whether the plaintiffs are able to satisfy the Rule 23 certification requirements. *Id.* at 677.

The First, Third, and Fourth Circuit Courts of Appeals, and the United States Court of Federal Claims have adopted *Szabo*'s approach to class certification. See *Gariety v. Grant Thornton LLP*, 368 F.3d 356 (4th Cir. 2004) (holding that the district court erred when it refused to look beyond the named plaintiff's complaint before evaluating Rule 23(b)'s “predominance” requirement); *Tardiff v. Knox County*, 365 F.3d 1 (1st Cir. 2004) (concluding that “the court has the power to test disputed premises early on if and when the class action would be proper on one premise but not another.”); *Christopher Village, LP v. U.S.*, 50 Fed. Cl. 635, 643 (Fed. Cl. 2001) (denying class certification on grounds that the plaintiffs did not present evidence beyond the pleadings sufficient to refute the government's evidence); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166-169 (3d Cir. 2001) (relying on the Supreme Court's apparent rejection of *Eisen*'s dicta in *Coopers* and *Gen. Tel. Co. of Southwest* to hold that it had the discretion to conduct a preliminary inquiry into the merits at the class action stage).

In addition to courts that have explicitly adopted *Szabo*, the Fifth and Eleventh Circuits have held that it is appropriate to consider evidence outside the plaintiffs' pleadings to determine whether the Rule 23 requirements are satisfied. *See Cooper v. Southern Co.*, F.3d , No. 03-12230, 2004 WL 2537436 at *10 (11th Cir. Nov. 10, 2004) (“both the Supreme Court and this Court have noted since *Eisen* that evidence pertaining to the requirements embodied in Rule 23 is often intertwined with the merits, making it impossible to meaningfully address the Rule 23 criteria without at least touching on the ‘merits’ of the litigation.”); *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) (“going beyond the pleadings is necessary, as the court must understand the claims, defenses, relevant facts and applicable substantive law in order to make a meaningful determination of the certification issues.”).

In light of both Supreme Court precedent and *Hanon*, the district court clearly erred in concluding that *Eisen* prevents an examination at the class certification stage of evidence relevant to the requirements of Rule 23 merely because it may also be relevant to the merits.

II. *DAUBERT* APPLIES TO CLASS CERTIFICATION PROCEEDINGS

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court set forth the standard for evaluating expert testimony in federal court. In order to be admissible, the “subject of an expert’s testimony must be ‘scientific . . . knowledge.’ The adjective ‘scientific’ implies a grounding in the methods and procedures of science.” *Id.* at 589-90. The Court also required that “in order to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation, i.e., ‘good grounds,’ based on what is known.” *Id.* at 590. The court explained that “this entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue.” *Id.* at 592-593. Finally, *Daubert* identified several factors to assist courts in determining whether an expert’s opinion is based on valid reasoning or methodology: (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique’s operation; and (5) whether the method is generally accepted. *Id.* at 593-94.

The district court declined to use this full *Daubert* analysis to evaluate Dr. Bielby's testimony. 222 F.R.D. at 191. In fact, the court even refused to conduct a *Daubert* hearing on the admissibility of any expert testimony. Had the court applied the full *Daubert* analysis, Dr. Bielby's proffered testimony would have been excluded. Under the full *Daubert* analysis, Dr. Bielby's testimony is inadmissible because his theory has not been and cannot be tested, he relies on research that has no application to this case, and he failed to use the degree of intellectual rigor in his litigation work that he uses in non-litigation professional endeavors. See Def. Wal-Mart Stores, Inc.'s *Daubert* Motion to Strike Declaration, Opinion, And Testimony Of Plaintiffs' Expert William T. Bielby, Ph.D. Because it is inadmissible under *Daubert*, Dr. Bielby's testimony may not be relied upon to grant class certification.

A. Recent Decisions Utilize a Full *Daubert* Analysis During Class Certification Proceedings

Based upon the requirement that federal district courts conduct a rigorous analysis to determine whether plaintiffs have satisfied the Rule 23 prerequisites, as set forth in *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982), a number of recent federal decisions have applied a full *Daubert* analysis to evaluate expert testimony at the class certification stage. In *West v. Prudential Securities, Inc.*, 282 F.3d 935 (7th Cir. 2002), investors brought a

securities fraud class action against a brokerage firm, alleging that a stockbroker had falsely told several clients that a corporation was about to be acquired. The district court had certified a class of all purchasers of the subject stock during the period of the alleged misrepresentation. The district court had not identified any causal link between nonpublic information and securities prices. Rather, the court had relied upon the plaintiff's expert, who opined that he could establish class-wide causation pursuant to a fraud-on-the-market theory, when the complained of information had not been released to the public, but only to a certain broker's clients. *Id.* at 938. Although not specifically mentioning the *Daubert* standard, the Seventh Circuit held that when faced with proffered expert testimony:

[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.

Id. The court reversed class certification, since the plaintiff's expert's methodology did not provide a reliable basis for proving causation. *Id.* at 940.

Several federal district courts have also utilized a full *Daubert* analysis to exclude expert testimony during class certification proceedings. *See Yapp v. Union Pacific R.R. Co.*, 301 F. Supp. 2d 1030 (E.D. Mo. 2004) (using a full *Daubert* analysis to strike expert testimony at the class certification stage)

(cited with approval by the district court here on different grounds); *Corley v. Entergy Corp.*, 220 F.R.D. 478 (E.D. Tex. 2004) (precluding expert testimony regarding class-wide damages during certification proceedings because it was inadmissible under *Daubert* analysis); *Bell v. Ascendant Solutions, Inc.*, No. 301CV0166N, 2004 WL 1490009, *1-2 (N.D. Tex. July 1, 2004) (employing *Daubert* analysis to determine whether expert testimony was reliable for purposes of class certification).

B. The District Court's Decisions Illustrate That Use of the Vaguely Defined Lower *Daubert* Standard May Lead to Inconsistent Results

Use of the vaguely defined lower *Daubert* standard may lead to inconsistent results, as evidenced by the district court's decisions below. After admitting plaintiffs' expert testimony under the lower *Daubert* standard, the district court analyzed plaintiffs' motion to strike a collection of store manager declarations and the portions of defendant's expert's testimony relying on those declarations. 222 F.R.D. at 196. The declarations at issue set forth store managers' answers to a series of identical questions about a number of issues, including the factors they use to set pay rates and make job placement decisions. *Id.* Defendant's statistical expert, Dr. Haworth, relied on these declarations for a portion of her opinion to disaggregate and analyze employment data on a store sub-unit by sub-unit basis. *Id.* at 197.

The district court criticized the declarations because they were designed and administered by counsel during litigation, the interviewer knew the survey was related to litigation, and the questions were not open-ended. *Id.* Although the court declined to strike the store managers' declarations themselves, it relied on *Yapp v. Union Pacific R.R. Co.*, 301 F. Supp. 2d 1030, 1037 (E.D. Mo. 2004), a case in which the court utilized a full *Daubert* analysis in precluding expert's testimony during class certification proceedings, to strike references to the

declarations from Dr. Haworth's testimony. *Id.* at 198. It is curious that the court struck these portions of Dr. Haworth's testimony based, in part, on the involvement of defendant's counsel in the preparation of the declarations. The court had earlier relied upon *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives and Composites, Inc.*, 209 F.R.D. 159 (C.D. Cal. 2002), as precedent for use of a lower *Daubert* standard. In *Thomas*, the court admitted the testimony of plaintiff's expert who had assumed that the plaintiffs' counsel's allegations in the complaint were true in rendering his opinion, rather than relying upon actual data. *Id.* at 161. Under the *Thomas* court's reasoning, the district court should arguably have admitted the defense expert's testimony.

The district court's varying rulings demonstrate the potential for inconsistent results from the use of the vaguely defined lower *Daubert* standard during class certification proceedings.

C. Little Support Exists to Preclude Use of a Full *Daubert* Analysis During Class Certification Proceedings

In light of the decline of *Eisen's* dicta, the district court below and similar decisions do not offer a satisfactory explanation as to why a full *Daubert* analysis should not apply at the class certification stage. Moreover, nothing in the Federal Rules of Evidence or Rules of Civil Procedure prohibits use of a full *Daubert* analysis for purposes of class certification. To the contrary, Rule 1101 of the Federal Rules of Evidence governs the applicability of the Rules and states that they “apply generally to civil actions and proceedings.” Fed. R. Evid. 1101(b). Similarly, nothing in Rule 23 or the Advisory Committee Notes that accompany it suggest that any portion of the rules of evidence do not apply in class certification proceedings.

Utilization of a full *Daubert* analysis at the class certification stage is consistent with, if not mandated by, the rigorous Rule 23 analysis that federal district courts are required to employ under *Gen. Tel. Co. of Southwest*. Judicial economy suggests that the evaluation of an expert witness’ testimony be conducted only once rather than first during the class certification proceedings and later during proceedings on the merits. As evidenced by the district court’s decisions, use of the vaguely defined lower *Daubert* standard may lead to inconsistent results. Finally, nothing in *Daubert* exempts class certification proceedings from the

standard for admissibility it sets for federal courts. Accordingly, the district court's refusal to apply a full *Daubert* analysis during the class certification proceedings is grounds for reversal.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urge the Court to reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a) and 9th Circuit Rule 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14-point Times New Roman and, according to Microsoft Word 2000, contains 4,288 words.

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