No. 09-248 SEP 28 2009

In The Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSION, individually and on behalf of a class,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This is Petitioner Mohawk Industries, Inc.'s third Petition for Certiorari in this case. In plain disregard of this Court's standards for granting certiorari, Mohawk has sought the writ all three times the court of appeals has ruled against it. In this third Petition, the Question Presented is whether a district court abuses its discretion by looking beyond the pleadings to rule on a class certification motion. But the Petition goes on to acknowledge that this Court answered that question in *General Telephone Co. of the Southwest v. Falcon*, by holding that a district court "may . . . probe behind the pleadings before coming to rest on the [class] certification question." 457 U.S. 147, 160-61 (1982), quoted at Pet. at 11. Because the lower courts are all bound to follow *Falcon*, there is no circuit split over whether a district court may look beyond the pleadings in assessing a class certification motion. Accordingly, there is no "compelling reason" for this Court to grant certiorari. Sup. Ct. R. 10.

In addition, Mohawk's third Petition asks this Court to review an appellate decision that is interlocutory in nature and modest in scope. The Eleventh Circuit merely reversed the district court's denial of class certification and remanded for further class certification proceedings. The Eleventh Circuit's Opinion offers no departure from the rule settled in *Falcon* and takes no sides in any supposed circuit split. Instead, the court of appeals held that the district court abused its discretion by erroneously

applying Title VII precedents in a RICO case, not by looking beyond the pleadings. Accordingly, this case simply does not implicate whatever divisions there may be about class certification in the lower courts.

Moreover, because the case has been remanded for further class proceedings, there is not even a certification decision for this Court to review. As a result, this appeal would be a poor vehicle to address any question on which the Petition seeks certiorari.

ADDITIONAL STATEMENT OF THE CASE

The Petition's Statement of the Case hardly does justice to the five-year history of this litigation or even the class certification proceedings. Pursuant to Supreme Court Rule 15.2, Plaintiffs submit this additional statement:

1. Plaintiffs are current and former hourly employees in Mohawk's north Georgia carpet mills. Plaintiffs allege that Mohawk has engaged in the widespread hiring and harboring of illegal workers in violation of the federal and Georgia RICO statutes.[1] Plaintiffs allege that this conduct injured them by depressing the hourly wages Mohawk paid them.

After Plaintiffs filed their Complaint in January 2004, Mohawk moved to dismiss. The parties spent

[1] Pet. App. at 1a-3a.

the next three years litigating that motion. In *Williams v. Mohawk Industries, Inc.*, 411 F.3d 1252 (11th Cir. 2005) (*per curiam*) ("*Williams I*"), the Eleventh Circuit affirmed that plaintiffs had properly stated their federal and Georgia RICO claims.

On December 12, 2005, this Court granted certiorari to review whether a defendant corporation and its agents may constitute an enterprise under the federal RICO statute.[2] After an oral argument in which Mohawk's counsel was forced to concede that Mohawk had waived the enterprise argument it was urging on the Court,[3] however, the Court dismissed certiorari as improvidently granted.[4] In addition, the Court granted certiorari, vacated *Williams I* and remanded for reconsideration in light of *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006). Upon reconsideration, the Eleventh Circuit again held that the plaintiffs had properly pleaded their federal and state RICO claims.[5] The court of appeals denied Mohawk's petition for rehearing,[6] and this Court

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[2] *Mohawk Industries, Inc. v. Williams*, 546 U.S. 1075 (2005).

[3] *See* Transcript Oral Argument, No. 05-465 at 10 (Apr. 26, 2006).

[4] *Mohawk Industries, Inc. v. Williams*, 547 U.S. 516 (2006).

[5] *Williams v. Mohawk Industries, Inc.*, 465 F.3d 1277 (11th Cir. 2006) (*per curiam*) ("*Williams II*"); Pet. 3a-4a.

[6] Pet. App. at 59a.

denied a second Petition for Certiorari on February 26, 2007.[7]

2. Upon remand to the district court, the parties conducted class discovery but no merits discovery. In fact, the district court's March 15, 2004 discovery order prohibited any merits discovery unless and until a class was certified. Mohawk repeatedly invoked that limitation to avoid answering plaintiffs' discovery requests and to avoid producing any documents concerning the employment eligibility of its work force. The temporary employment firms that had provided Mohawk with temporary workers in North Georgia similarly invoked the prohibition on merits discovery to avoid producing documents and answering deposition questions. Accordingly, the Petition's suggestion that plaintiffs have received all the discovery they asked for in this case is not accurate.

3. Despite the prohibition on merits discovery, the available record contradicts the Petition's claim that discovery did not reveal a "shred" of evidence to support plaintiffs' claims or class certification. The district court's class certification order acknowledges significant evidence that Mohawk knowingly hires and harbors illegal workers in violation of the federal and Georgia RICO statutes.[8] For example, Mohawk

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[7] *Mohawk Industries, Inc. v. Williams*, 549 U.S. 1260 (2007); Pet. App. at 59a-60a.

[8] *See* Pet. App. 38a-47a.

documents revealed that Mohawk's managers were concerned that an immigration march to protest crackdowns on illegal hiring might interrupt Mohawk's operations. In a March 2006 e-mail, however, Mohawk's managers reported that there was nothing to worry about because a survey of "two to three Hispanic employees in each of [Mohawk's] sites" revealed that Mohawk's employees were too scared to attend the march for fear of being rounded up and deported:

> All areas felt that it [the march] would have little to no impact because: The people live paycheck to paycheck & can't afford the loss. ***There is a rumor in practically every Site that the "march" is really a plot by the INS to assemble a large group of illegals, arrest them, & deport.***[9]

The district court further recounted that the Social Security Administration ("SSA") had notified Mohawk that hundreds of Mohawk employees had presented social security numbers that did not match the names in the SSA's databases.[10]

The district court also noted that Norman Carpenter, a former Mohawk supervisor, had filed a complaint alleging that Mohawk had fired him for reporting that "about 90% of the temporary workers on his Shift did not have proper documentation to

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[9] *Id.* at 45a (emphasis added).

[10] *Id.* at 44a.

work in the United States." Carpenter claims that Mohawk's corporate managers and its outside counsel demanded that he retract his allegation because it would harm Mohawk's defense in this case. When Carpenter refused, he claims Mohawk fired him on the false allegation that he – not Mohawk – was violating the immigration laws.[11]

The district court further noted the declaration of Christina Martinez, a current Mohawk employee, who testified that a member of Mohawk's Human Resources staff admitted "she was aware that many of Defendant's employees were not legally authorized to work in the United States, but if applicants came to Defendant with a social security number and a false identification card, she could and would hire the applicants, and [Mohawk] would employ the applicants."[12] Martinez further confirmed Carpenter's claim that a large number of Mohawk's temporary workers admitted that they did not have work authorization documents. Martinez testified that, rather than address these issues, Mohawk threatened to fire her if she would not stop seeking information concerning the work eligibility of Mohawk's employees.[13]

The district court similarly recounted testimony from the named plaintiffs who claimed that they had

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[11] *See* Pet. App. 46a-47a.

[12] *Id.* at 45a-46a.

[13] *Id.*

personally witnessed Mohawk's illegal conduct. In her deposition, Shirley Williams testified that her Mohawk supervisor repeatedly expressed a preference for hiring illegal workers because they did their work without complaint or distraction. Williams further testified about Mohawk employees boasting about going to the border to pick up loads of illegal workers and obtaining illegal workers from temporary employment firms. The named plaintiffs further testified about Mohawk employees passing out false social security cards and recounted episodes in which employees would work at Mohawk for a time under one name only to return under different names.[14] Similar evidence about Mohawk "recycling" the same workers under different names has come up again and again in this case. For example, Mohawk produced a June 2005 document that shows Mohawk's customer Wal-Mart demanded an investigation after a Mohawk employee telephoned the Wal-Mart Ethics Hotline to complaint that Mohawk was employing illegal workers who came and went under a succession of different names.[15]

Finally, the district court accepted expert testimony from two economists that plaintiffs offered to establish a method of proving impact and damages with common proof.[16] After carefully considering

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[14] *Id.* at 38a-44a.

[15] *Id.* at 44a-45a.

[16] Pet. App. at 47a-50a & 66a.

Mohawk's competing expert testimony, the district court concluded that plaintiffs' expert evidence was "sufficiently probative to be useful to the Court in determining whether Plaintiffs have satisfied the requirements for class certification."[17]

4. Despite this evidence, the district court denied class certification under Fed. R. Civ. P. 23(b)(3) because Mohawk had decentralized its operations and divisions. The district court based these rulings on a series of Title VII cases that hold that an employer's decentralization may defeat class certification of race discrimination claims.[18] Although plaintiffs argued that those Title VII cases did not apply because their RICO claims did not give rise to the same potential class certification problems, the district court rejected that argument in a footnote.[19]

Finally, the district court declined to certify a Fed. R. Civ. P. 23(b)(2) class because plaintiffs' claim for damages was not incidental to their claims for injunctive relief under the Georgia RICO statute. The district court further refused to certify a "hybrid class" for both monetary and injunctive relief on the theory that having one jury decide both types of claims would be overly cumbersome.[20]

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[17] *Id.* at 66a.

[18] *Id.* at 74a-77a.

[19] *Id.* at 75a n.4.

[20] *Id.* at 7a-8a.

5. After granting plaintiffs permission to appeal, the Eleventh Circuit reversed the district court's order and remanded for further class certification proceedings. That decision had nothing to do with the district court's review of the available evidence versus the allegations of the Complaint. Instead, the court of appeals reversed because the district court applied the wrong law to the evidence and plaintiffs' claims:

> We agree with the employees that the district court erred when it relied on our precedents about the certification of a class action for a complaint of employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.[21]

The court of appeals held that the district court made a legal error on this point because plaintiffs' RICO claims are "not dependent on proof of individual acts of disparate treatment as often is the case under Title VII."[22] After identifying this error, the Eleventh Circuit held that the district court was wrong to find against the plaintiffs on commonality and typicality.[23] The court of appeals further concluded that these errors prevented the district court from conducting an

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[21] *Id.* at 11a.

[22] *Id.* at 12a.

[23] *Id.* at 12a-13a.

appropriate analysis of predominance and superiority under Rule 23(b)(3).[24]

In that discussion, the Opinion confirms that the district court may have to look beyond the pleadings and examine how the plaintiffs will prove the merits of the case to determine whether a class should be certified:

> Although "a court should not determine the merits of a claim at the class certification stage, it is appropriate to 'consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied.'" [cit] ***A district court must consider, for example, how the class will prove causation and injury*** and whether those elements will be subject to class-wide proof[.][25]

Because the district court's legal error short-circuited that analysis, the court of appeals remanded so that the district court could "conduct a pragmatic assessment" of whether the common questions of enterprise, pattern of racketeering and class-wide proof of the fact of injury predominate over any individual issues.[26] Rather than forbid the district court from examining evidence on remand, the court of appeals instructed the district court to "test and evaluate the

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[24] *Id.* at 17a.

[25] *Id.* at 15(a) (emphasis added) (citations omitted).

[26] *Id.* at 18a.

employees' argument that their injury is subject to common proof."[27]

Finally, the Eleventh Circuit directed the district court to reconsider plaintiffs' request to certify a hybrid class for injunctive relief under Rule 23(b)(2) and (c)(4).[28]

6. Mohawk filed no petition for rehearing in the Eleventh Circuit. When the mandate issued, the district court requested a status report from the parties. In that filing, the parties informed the district court that (a) Mohawk intended to petition this Court for certiorari and (b) the parties intended to pursue private mediation. The district court has stayed all proceedings pending this Court's ruling on Mohawk's Petition.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with any decision of this Court or any court of appeals. Nor does the Eleventh Circuit's decision implicate any important federal question that has not already long been settled by this Court. As a result, Mohawk has not carried its burden to demonstrate "compelling reasons" for granting the Petition as Supreme Court Rule 10 demands.

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[27] *Id.*

[28] *Id.* at 19a-21a.

I. This Court Has Already Answered the Question Presented.

The Petition asks the Court to review "whether a district court abuses its discretion by going beyond the allegations in the complaint and examining the factual record to determine whether the named plaintiffs have satisfied the class certification requirements of Federal Rule of Civil Procedure 23."[29] But the Petition goes on to acknowledge that this Court answered that very question in *General Telephone Co. of the Southwest v. Falcon*, by holding that a district court "may . . . probe behind the pleadings before coming to rest on the [class] certification question."[30] As a result, there is no need for this Court to grant certiorari merely to re-confirm that a district court does not abuse its discretion by looking beyond the pleadings in assessing a class certification motion.

II. The Eleventh Circuit Did Not Address the Question Presented.

The Court should further deny the Petition because the Opinion below does not question the continued vitality of *Falcon* and does not even pass on the question Mohawk urges on the Court. Thus, certiorari should be denied as it is well-settled that

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[29] Pet. at i.

[30] 457 U.S. 147, 160-61 (1982), quoted Pet. at 11.

this Court will not "decide in the first instance issues not decided below."[31]

A. The Eleventh Circuit Corrected A Legal Error That Has No Bearing on the Question Presented.

The crux of Mohawk's Petition is that "[t]he Eleventh Circuit's decision below held in part that the district court erred by looking beyond the pleadings in evaluating class certification."[32] But the Eleventh Circuit made no such holding. Instead, the court of appeals corrected a legal error wholly unrelated to whether the district court was permitted to look beyond the allegations of plaintiffs' complaint.

The district court rejected class certification based on a line of Eleventh Circuit precedent that declines to aggregate individual claims of race discrimination. But the Eleventh Circuit has also held that these precedents do not apply in the federal RICO context, where the plaintiffs must each prove an enterprise and a pattern of racketeering activity as elements of their claim. The court of appeals reversed because the district court applied the wrong line of Eleventh Circuit precedent.[33] The Petition does

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[31] *NCAA v. Smith*, 525 U.S. 459, 470 (1999). *See also Clingman v. Beaver*, 544 U.S. 581, 598 (2005) ("We ordinarily do not consider claims neither raised nor decided below").

[32] Pet. at 4.

[33] *See* Pet. App. at 11a.

not seek the writ to review either line of precedents and makes no claim that the Eleventh Circuit erred by requiring the district court to consider the elements of plaintiffs' actual claims in the class certification analysis.

In any event, the Opinion certainly makes no suggestion that the Eleventh Circuit reversed because the district court looked at the evidence in the record. Although the Petition maintains that the court of appeals held that "the allegations in the complaint itself sufficed [to satisfy the Rule 23 requirements] and that the district court abused its discretion by not relying solely upon those allegations," those words do not appear in the Opinion.[34] To bolster its claim, the Petition quotes the Opinion's references to the complaint. But those references can hardly be read as an instruction to ignore the evidence. As this Court has observed, "the class certification determination generally involves considerations enmeshed in the factual and legal issues comprising the plaintiff's cause of action."[35] And *Falcon* recognizes that analyzing those issues often will require the court to examine evidence and other matters *in addition to the pleadings*.[36] But nothing in *Falcon* – or any other case Mohawk has cited – suggests that the courts are prohibited from

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[34] Pet. at 8.

[35] *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (internal quotations omitted).

[36] *Falcon*, 457 U.S. at 160.

examining the complaint and the plaintiffs' legal theories in addressing class certification.

B. The Eleventh Circuit Remanded for a Pragmatic Assessment of Predominance and Superiority.

In addition to misrepresenting the basis for reversal, the Petition misstates the Opinion's instructions on remand. Rather than confine the district court to the pleadings, the Eleventh Circuit remanded the case with instructions that the district court "conduct a *pragmatic* assessment of whether common issues predominate over individual issues and whether a class action is superior to other forms of relief under Rule 23(b)(3)."[37] The Opinion further directs the district court to "consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied" and to "consider . . . how the class will prove causation and injury and whether those elements will be subject to class-wide proof."[38]

Rather than instruct the district court to ignore the evidence as the Petition argues, therefore, the Opinion remanded for a rigorous and practical review of the Rule 23 requirements. Because that instruction correctly recites the law, there is no basis for this Court to grant certiorari. In fact, Supreme Court Rule

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[37] Pet. App. at 18a (emphasis added).

[38] Pet. App. at 15a.

10 expressly provides that the writ ***will not be granted*** to review the purported misapplication of a properly stated rule of law.[39]

C. This Interlocutory Appeal Is Not Suited for This Court's Review.

The Eleventh Circuit's decision to remand for further class certification proceedings provides yet another reason to deny the Petition in this case. This Court has long preferred to reserve the writ to review final rather than interlocutory orders.[40] Because the review of a non-final order induces inconvenience, litigation costs and delay, the lack of finality may "of itself alone" furnish "sufficient ground for the denial of the application."[41]

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[39] *See also Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) (certiorari "depends on numerous factors ***other than*** the perceived correctness of the judgment we are asked to review") (emphasis added); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

[40] *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (the Court's "normal practice is to deny[ ] interlocutory review") (Stevens, J., dissenting). *See generally* Robert L. Stern & Eugene Grossman, *Supreme Court Practice* § 4.4 at 249 (9th ed. 2007) ("It is often most efficient for the Supreme Court to await a final judgment and a petition for certiorari that presents all issues at a single time rather than reviewing issues on a piecemeal basis").

[41] *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). *See also Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964).

As this Court noted in *Coopers & Lybrand*, a class certification ruling is an "inherently interlocutory" decision that is not ordinarily appealable.[42] Although Fed. R. Civ. P. 23(f) permits the circuit courts to certify those decisions for appeal under appropriate circumstances, that procedure does not render every class certification decision appropriate for this Court's review. Indeed, plaintiffs' research has failed to identify any case in which this Court granted certiorari to review a Rule 23(f) appeal.

By contrast, the Court has denied Petitions similar to this one in many of the cases Mohawk cites as supposed evidence of a circuit split. In *Szabo v. Bridgeport Machines, Inc.*, 534 U.S. 951 (2001), for example, the Court denied a Petition to review whether the court of appeals erred by refusing to accept the allegations of a complaint at class certification. And in *UnitedHealth Group, Inc. v. Klay*, 543 U.S. 1081 (2005), the Court denied a Petition to review whether the district court may presume the truth of plaintiffs' allegations at class certification.[43] Nor has the Court been swayed by the all-too-predictable argument that class rulings must be

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[42] 437 U.S. at 470.

[43] *See also General Elec. Capital Corp. v. Thiessen*, 536 U.S. 934 (2002) (denying petition to review whether district court is prohibited from making factual findings that overlap with merits issues on class certification); *CenturyTel, Inc. v. Beattie*, 129 S. Ct. 608 (2008); *California v. Standard Oil Co.*, 464 U.S. 1068 (1984); *Roberts v. Barrack*, 429 U.S. 816 (1976).

reviewed because they impose an "intense pressure to settle" a particular case.[44] These decisions confirm that there is nothing about the scope of the district court's authority to review evidence to decide class certification that merits this Court's review.

More than a century ago, the Court advised that it would not "issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."[45] This case cannot meet that standard because the court of appeals merely remanded the case for further class certification proceedings. As a result, Mohawk need only face the inconvenience of re-litigating class certification without reference to the Title VII precedents that led the district court into error. In the unlikely event that the district court concludes it cannot look beyond the pleadings upon remand, Mohawk's argument would squarely be presented for appeal at that time.[46]

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[44] *Compare* Pet. at 25 *with General Motors Corp. v. French*, 516 U.S. 824 (1995) (denying Petition on standards for certifying a settlement class) *and Grady v. Rhone-Poulenc Rorer, Inc.*, 516 U.S. 867 (1995) (denying a Petition to review whether court of appeals erred by decertifying class).

[45] *Am. Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893) (emphasis added). *See also Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950).

[46] As a result, the Petition's claim that the district court only has one opportunity to rule on class certification is wrong on both the law and on the facts of this case. *See* Fed. R. Civ. P.

(Continued on following page)

D. Eleventh Circuit Law Confirms That the District Court Can and Should Look Beyond the Pleadings.

Finally, Mohawk's suggestion that the Eleventh Circuit prohibits a district court from reviewing evidence in addition to the complaint at the class certification stage is not correct. In fact, Mohawk's brief in the court of appeals argued that Eleventh Circuit law *requires* the district court to look beyond the pleadings to ensure the Rule 23 requirements have been met.[47] As Mohawk correctly pointed out in that filing, the Eleventh Circuit repeatedly has affirmed class certification decisions that rely on evidence beyond the pleadings, even when that evidence overlaps with the merits of the plaintiffs' claim. The Petition, by contrast, finds no occasion to

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23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment.").

[47] Brief of Defendant-Appellee Mohawk Indus., Inc., at 36-37 (filed in the Eleventh Circuit on Nov. 10, 2008) ("11th Cir. MHK Br.") (citing and quoting *Heffner v. Blue Cross*, 443 F.3d 1330, 1337 (11th Cir. 2006) ("it is appropriate to 'consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied.'"); *Jones v. Firestone Tire & Rubber Co.*, 977 F.2d 527, 535 (11th Cir. 1992); *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309 (5th Cir. 1978); *Huff v. N.D. Cass Co.*, 485 F.2d 710, 713 (5th Cir. 1973) (*en banc*)).

disclose these – or any other Eleventh Circuit – cases that contradict Mohawk's current position.[48]

The Opinion below offers no hint that the Eleventh Circuit has departed from any of the circuit precedents Mohawk previously cited on this point. To the contrary, the Opinion – like Mohawk's appeals court brief – cites *Heffner v. Blue Cross*, for the proposition that the district court should consider the merits to the degree necessary to conduct a rigorous Rule 23 analysis and must consider how the class will prove its claims with common proof.[49] The Opinion further cites *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, a case in which the Eleventh Circuit held that the district court had a duty to look beyond the pleadings and assess the merits to the extent they

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[48] *See Cooper v. Southern Co.*, 390 F.3d 695, 712 (11th Cir. 2004), *overruled in part on other grounds*, 546 U.S. 454 (2006); *Valley Drug v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1188 n.15 (11th Cir. 2003) (district court can and should examine evidence to determine whether the case is amenable to class treatment); *Telfair v. First Union Mortg. Co.*, 216 F.3d 1333, 1343 (11th Cir. 2000) ("It was within the court's discretion to consider the merits of the claims before their amenability to class certification."); *Morrison v. Booth*, 730 F.2d 642 (11th Cir. 1984) (remanding for an evidentiary hearing on class certification). *See also In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 5 (1st Cir. 2005) (Eleventh Circuit has aligned itself with majority of circuits in holding "a district court is not limited to the allegations raised in the complaint and should instead make whatever legal and factual inquiries are necessary to an informed determination of the certification issues").

[49] *Compare* 11th Cir. MHK Br. at 37 *with* Pet. App. 15a.

overlapped with the Rule 23 requirements.[50] Because the Opinion breaks no new ground on this point, subsequent Eleventh Circuit decisions continue to recite that the district court can and should look beyond the pleadings and consider the merits to evaluate the class certification requirements.[51]

Mohawk also told the court of appeals that "[n]umerous other circuits are in agreement" with the Eleventh Circuit's repeated holdings on this point.[52] In particular, Mohawk argued that Eleventh Circuit law was in accord with decisions that the Petition now casts on the opposite side of a circuit split. For example, Mohawk argued that Eleventh Circuit law conforms to the Second Circuit's decision in *Miles v. Merrill Lynch & Co., Inc. (In re IPO Securities Litigation)*, and the cases collected therein, as well as the law in the Third and Tenth Circuits.[53] By contrast,

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[50] 350 F.3d 1181, 1188 n.15 (11th Cir. 2003) (citing *Falcon*), cited at Pet. App. 15a.

[51] *See, e.g., Babineau v. Federal Express Corp.*, 576 F.3d 1183, 1190 (11th Cir. 2009) ("While we avoid merits determinations to the extent practicable, this case does require the Court to look beyond the pleadings and examine the parties' claims, defenses and evidence to ensure that class certification would comport with Rule 23's standards").

[52] 11th Cir. MHK Br. at 37.

[53] *Id.* at 37-38 (arguing that Eleventh Circuit law conforms to *In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006) and the cases collected therein); Letter from Juan P. Morillo to Clerk, Eleventh Circuit (filed Feb. 9, 2009) (Rule 28j letter arguing that *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008) supports the district court's class certification ruling);

(Continued on following page)

the Petition claims that the Eleventh Circuit is in conflict with all those circuits as well as the additional circuit authority cited in *In re IPO Sec. Litig.*[54] Once again, the Opinion is silent on this question and offers no hint of disagreement with any sister circuit on this or any other issue. Because the Opinion does not actually present – or even address – the issue on which Mohawk seeks certiorari, the Petition should be denied.

III. The Eleventh Circuit Opinion Did Not Address Any Claimed Circuit Split.

Despite the Eleventh Circuit's actual decision, the Petition argues that the Opinion takes sides in a circuit split in the courts of appeal. But whatever disagreements the lower courts may have about class certification they do not involve the Question Presented in this Petition: whether district courts may look beyond the pleadings to the factual record to decide class certification. In fact, Mohawk's principal authority for a circuit split confirms that there is no such split over the Question Presented: "[i]t is a ***settled question*** that some inquiry into the merits at the class certification stage is not only

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Supplemental Brief of Defendant-Appellee Mohawk Industries, Inc. at-3-5 (filed in the Eleventh Circuit Mar. 6, 2009) ("MHK 11th Cir. Suppl. Br.") (making similar arguments about *In re IPO Sec. Litig.*, *In re Hydrogen Peroxide* and *Vallario v. Vandehey*, 554 F.3d 1259 (10th Cir. 2009)).

[54] *See* Pet. at 18-23.

permissible but appropriate to the extent that the merits overlap the Rule 23 criteria." *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 24 (1st Cir. 2008). That observation should come as no surprise because it is exactly what this Court held in *Falcon*. And because every circuit in the country is bound to follow *Falcon*, the leading treatises confirm that the "[c]ircuit courts are in substantial agreement with this rule."[55]

A. No Circuit Courts "Require District Courts to Accept Allegations in the Pleadings."

The Petition argues that the Opinion squarely casts the Eleventh Circuit's lot with the Sixth, Eighth, Ninth, Tenth and D.C. Circuits, all of which have supposedly "held that the district courts may not assess issues that are disputed in the pleadings."[56] A review of the law, however, reveals that all of those circuits follow *Falcon*'s admonition that a district

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[55] 1 Alba Conte and Herbert B. Newberg, NEWBERG ON CLASS ACTIONS, § 3:1 (4th ed. 2009); *see also,* 7AA Charles Alan Wright and Arthur R. Miller, et al., FEDERAL PRACTICE AND PROCEDURE, § 1785 (2009) ("The *Eisen* prohibition addresses the concern that the parties should not have to show a probability of success on the merits in order to prove class certification; it does not limit the court's necessary inquiry into the underlying elements of the case in order to evaluate whether Rule 23 has been met").

[56] Pet. at 14.

court can and should look beyond the pleadings to decide class certification.

D.C. Circuit: First, the Petition claims that the D.C. Circuit is a jurisdiction that precludes district courts from looking beyond the pleadings. But in *Wagner v. Taylor*, the D.C. Circuit held that "[i]t is readily apparent that a decision on class certification cannot be made in a vacuum."[57] Instead, *Wagner* explains that an "inspection of the circumstances of the case is essential to determine whether the pre-requisites of Federal Civil Rule 23 have been met" and that the district court must examine both the plaintiff's claims "and the showing in support of class certification" to make that determination.[58] *Wagner* thus makes plain that the D.C. Circuit has not limited district courts to the pleadings on class certification.[59]

Sixth Circuit: The Petition next argues that the Sixth Circuit is a no look jurisdiction, but that court's decision in *Rodney v. Northwest Airlines, Inc.*

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[57] 836 F.2d 578, 587 (D.C. Cir. 1987). *See also Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 531 n.5 (D.C. Cir. 2006) ("the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action") (*quoting Falcon* and *Coopers & Lybrand*).

[58] *Wagner*, 836 F.2d at 587.

[59] *See In re PolyMedica*, 432 F.3d at 6 (citing *Wagner* as evidence that the D.C. Circuit does not limit district courts to the pleadings on class certification).

confirms that "a court is allowed to look beyond the pleadings on a class certification motion to determine what type of evidence will be presented by the parties."[60] In fact, the Sixth Circuit observed more than twenty-five years ago that "ordinarily the [Rule 23] determination should be predicated on ***more information than the pleadings will provide***."[61] The court of appeals repeated the same sentiment more recently in *Reeb v. Ohio Department of Rehabilitations & Corrections*:

> Ordinarily, a district court must determine the permissibility of class certification based upon information other than that which is in the pleadings although it may do so based on the pleadings alone where they set forth sufficient facts. [cit] In making such a determination, a district court may draw reasonable inferences from the facts before it.[62]

In a subsequent *Reeb* decision, the Sixth Circuit reversed a class certification order because the district court had not sufficiently reviewed the

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[60] 146 Fed. Appx. 783, 785 (6th Cir. 2005).

[61] *Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1200 (6th Cir. 1974) (emphasis added).

[62] 81 Fed. Appx. 550, 555 (6th Cir. 2003) (citing *Senter v. General Motors*, 532 F.2d 511, 520-23 (6th Cir. 1976)).

evidence to ensure that the plaintiffs had met Rule 23's requirements, as *Falcon* demands.[63]

Eighth Circuit: The Petition turns next to the Eighth Circuit and argues that *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005) precludes a district court from looking beyond the pleadings at class certification.[64] But *Blades* actually holds that, "a court ***must*** conduct a limited preliminary inquiry, ***looking behind the pleadings***" to determine whether Rule 23's requirements are met.[65] *Blades* further observed that, "[t]he preliminary inquiry at the class certification stage may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case."[66] Of course, *Blades* is not an outlier in this respect because the Eighth Circuit reversed class certification more than 25 years ago in *Bishop v. Committee on Professional Ethics & Conduct*, because the district

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[63] *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 644-45 (6th Cir. 2006).

[64] Pet. at 15.

[65] 400 F.3d at 566 (emphasis added).

[66] *Id.* at 567. In addition to missing this language, the Petition misstates the actual ruling in *Blades*. Rather than reverse the denial of class certification because the district court examined the evidence, the *Blades* court actually confirmed that common evidence of impact could not be assumed and held that "parts of the *extensive evidence* produced in this case demonstrate that not every member of the proposed classes can prove with common evidence that they suffered impact from the alleged conspiracy." *Id.* at 571 (emphasis added).

court failed to "probe behind the pleadings before coming to rest on the certification question."[67]

Ninth Circuit: With respect to the Ninth Circuit, the Petition acknowledges that the court of appeals there recently confirmed that courts "are not only 'at liberty to' ***but must 'consider evidence*** which goes the requirements of Rule 23 [at the class certification stage] even if the evidence may also relate to the underlying merits of the case.'"[68] Mohawk nevertheless argues that the Ninth Circuit precludes district courts from considering this evidence based on a footnote in a 1975 opinion that pre-dates *Falcon*.[69] That conclusion would surprise the Ninth Circuit, which repeatedly has held that district courts are "at liberty to consider evidence which goes to the requirements of Rule 23[.]"[70] In fact, less than two months before Mohawk filed its Petition, the Ninth Circuit reaffirmed that "[o]ur cases stand for the unremarkable proposition that

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[67] 686 F.2d 1278, 1288 (8th Cir. 1982) (quoting *Falcon*).

[68] Pet. at 16 n.7 (quoting *Dukes v. Wal-Mart, Inc.*, 556 F.3d 919 (9th Cir. 2009)) (emphasis added).

[69] *Id.* (citing *Blackie v. Barrack*, 524 F.2d 891, 902 n.17 (9th Cir. 1975)). Even though *Blackie* pre-dates *Falcon*, the opinion in *Blackie* noted that the district court had properly considered additional materials and proof to determine how the plaintiffs would prove their claims in addition to the complaint. *Blackie*, 524 F.2d at 900-01.

[70] *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992).

often the pleadings alone will not resolve the question of class certification[.]"[71]

Tenth Circuit: Finally, the Petition turns to the Tenth Circuit and claims that the court of appeals there requires the district court to accept the complaint's allegations without further inquiry. Although the Petition cites *Vallario v. Vandehey*, 554 F.3d 1259 (10th Cir. 2009) to support that claim,[72] Mohawk told the court of appeals that *Vallario* allows the district court to examine the underlying merits at class certification.[73] And *Vallario* holds that while the district court may not pass on the strength of the plaintiff's claims at class certification, the court must nevertheless conduct a rigorous analysis and make findings that each of the Rule 23 requirements are met.[74]

In addition, the Tenth Circuit long ago rejected the notion that a district court was required blindly to accept a complaint's allegations when passing on class certification: "We note . . . that a class action does not exist merely because it is so designated by the pleadings."[75] Rather than just alleging the case

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[71] *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009) (collecting authority).

[72] *See* Pet. at 17-18.

[73] MHK 11th Cir. Suppl. Br. at 3 (quoting *Vallario*).

[74] 554 F.3d at 1266-67 (collecting much of the same authority cited in the Petition).

[75] *Rossin v. Southern Union Gas Co.*, 472 F.2d 707, 712 (10th Cir. 1973) (*quoting Cash v. Swifton Land Corp.*, 434 F.2d 569, 571 (6th Cir. 1970)).

should go forward as a class, "[t]he plaintiff has the burden of proving that the action is appropriately a class action."[76] The case Mohawk cites for the contrary proposition, *Shook v. Board of County Commissioners*, actually turns on the legal question of whether the Prison Litigation Reform Act supplanted the Rule 23 requirements for certifying class actions in the prison context.[77] When the Tenth Circuit revisited *Shook* in 2008, it affirmed that the district court was permitted to reject class certification if "the plaintiffs' ***showing*** under Rule 23(b)(2)" was deficient, even in the face of allegations that suggested the plaintiffs were likely to succeed on their individual claims.[78]

Remaining Circuits: In addition to wrongly suggesting that these six circuits have ignored *Falcon*'s admonition to look beyond the pleadings, the Petition argues that six other circuit courts allow the district court "far more latitude" to "make class determinations based upon the facts adduced during class discovery."[79] To the extent Mohawk's argument is

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[76] *Id.* (citing additional authority).

[77] 386 F.3d 963, 974 (10th Cir. 2004) ("*Shook I*") (district court erred by not applying the Rule 23 requirements based on the PLRA). *See also Shook v. Bd. of County Comm'rs*, 543 F.3d 597, 601-02 (10th Cir. 2008) ("*Shook II*") (*Shook I* held that the PLRA does not alter Rule 23's requirements).

[78] *Shook II,* 543 F.3d 597, 613 (10th Cir. 2008) (emphasis added). *See also Vallario*, 554 F.3d at 1266-67 (discussing *Shook I and II*).

[79] Pet. at 18.

that these circuits also follow *Falcon*, that only confirms that there is no question for this Court to review. Moreover, every circuit – and most of the cases – the Petition cites as giving the district court "more latitude" to look beyond the pleadings acknowledges the prohibition on deciding whether the plaintiff will prevail on the merits, as this Court decided in *Eisen v. Carlisle & Jacquelin*, 417 U.S 156, 177 (1974).[80] Accordingly, there is simply no merit to the Petition's suggestion that the circuits have divided over whether a district court may look beyond the pleadings at class certification.

B. Neither the Petition Nor the Opinion Below Presents Any *Other* Disagreement Over Class Certification.

To be sure, the lower courts have come to varying conclusions over ***other*** questions of class certification

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[80] *See In re IPO Sec. Litig.*, 471 F.3d at 32-41 (extensive discussion of *Eisen*, which is "properly understood to preclude consideration of the merits only when a merits issue is unrelated to a Rule 23 requirement"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166-68 (3d Cir. 2001) (discussing *Eisen*); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) (*Eisen* prevents court "from expanding the Rule 23 certification analysis to include consideration of whether the proposed class is likely to prevail ultimately on the merits"); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 268 (5th Cir. 2007) ("*Eisen* . . . stands for the unremarkable proposition that the strength of a plaintiff's claim should not affect the certification decision"); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) (*Eisen* and Rule 23 preclude court from saying "I'm not going to certify a class unless I think that the plaintiffs will prevail").

mechanics. For example, *In re IPO Securities Litigation*, 471 F.3d at 32-37, resolves an internal Second Circuit disagreement over what standard of proof applies at the Rule 23 stage. But even Mohawk does not argue that the Eleventh Circuit's decision in this case turned on that question. Although the Court "decides questions of public importance, it decides them in the context of meaningful litigation," and not in cases where the decision would be abstract or supervisory.[81] As a result, the Court should not grant certiorari to address this or any other class certification that is not fairly presented in this appeal.

CONCLUSION

The Petition concedes that this Court has already answered the Question Presented. As a result, there is no circuit split over whether a district court may probe beyond the pleadings to decide class certification. Because the Eleventh Circuit's decision in this case does not fairly present any important or contested question of federal law, the Petition cannot

[81] *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959), *quoted in* Grossman, *Supreme Court Practice* at 248. *See also Rogers v. United States*, 522 U.S. 252 (1998) (dismissing writ as improvidently granted after concluding the case did not fairly present the issue on which certiorari was granted).

provide compelling reasons for this Court's review. Accordingly, the Petition should be denied.

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