No. A-

IN THE

Supreme Court of the United States

CORONA REGIONAL MEDICAL CENTER; UHS OF DELAWARE, INC.,

Applicants / Petitioners,

v.

MARLYN SALI AND DEBORAH SPRIGGS, on behalf of themselves and others similarly situated and the general public,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and this Court's Rule 13.5, UHS-Corona, Inc. (d/b/a Corona Regional Medical Center) and UHS of Delaware, Inc. (collectively, "Applicants") respectfully request a 60-day extension of time, to and including April 1, 2019, within which to file a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.*

The Ninth Circuit entered its judgment on May 3, 2018. *Sali v. Corona Reg'l Med. Ctr.*, 889 F.3d 623 (9th Cir. 2018). The Ninth Circuit denied Applicants' timely petition for rehearing and rehearing en banc on November 1, 2018. *Sali v. Corona Reg'l Med. Ctr.*, 907 F.3d 1185 (9th Cir. 2018). The Ninth Circuit issued an amended opinion on November 27, 2018. *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996 (9th Cir. 2018). Copies of the opinion, amended opinion, and order denying Applicants' petition for rehearing and rehearing en banc are attached to this motion. Unless extended, the time in which to file a petition for a writ of certiorari will expire on January 30, 2019. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

1. Plaintiffs Marlyn Sali and Deborah Spriggs, who worked as registered nurses for Defendant UHS-Corona, Inc., brought a putative class action lawsuit against Defendants alleging that they and other nurses were underpaid in various respects as

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* Pursuant to Rule 29.6 of the Rules of this Court, undersigned counsel state that UHS-Corona, Inc. and UHS of Delaware, Inc. are wholly owned subsidiaries of Universal Health Services, Inc.

a result of certain employment policies and practices. *Sali*, 909 F.3d at 1000. Plaintiffs sought certification of seven classes, including a rounding-time class, short-shift class, meal-period class, rest-break class, regular-rate class, wage-statement class, and waiting-time class. *Id.* at 1001.

In an attempt to satisfy Rule 23(a)(3)'s typicality requirement, Plaintiffs offered a declaration from Javier Ruiz, a paralegal at their counsel's law firm, who reviewed "time and payroll records for the named plaintiffs to determine whether they were fully compensated under Corona's rounding-time pay practice." *Id.* at 1003. Defendants objected to the admissibility of Ruiz's declaration on the grounds that it constituted "improper lay opinion testimony"; that Ruiz's opinions were "unreliable"; that the declaration "lacked foundation"; that Ruiz "lacked personal knowledge of the information analyzed"; and that the data underlying Ruiz's analysis was unauthenticated hearsay. *Id.* In response to these objections, Plaintiffs submitted additional evidence on reply "attesting to the authenticity and accuracy of the data and conclusions," but the district court, in its discretion, declined to consider that evidence. *Id.*

The district court denied certification as to all putative classes, including because Plaintiffs did not "offer any admissible evidence of [their] injuries in their motion for class certification," and therefore had not established typicality under Rule 23(a)(3) for any of the classes. *Id.* at 1002–03 (alteration in original). Plaintiffs relied solely on the Ruiz declaration to demonstrate their individual injuries, and it was inadmissible under several different provisions of the Federal Rules of Evidence. *Id.* at 1003. First, Ruiz

could not properly authenticate under Rule 901 "the manipulated Excel Spreadsheets and other data that he relied upon to conduct his analysis because he d[id] not have personal knowledge to attest to the fact that the data accurately represents Plaintiffs' employment records." *Id.* Second, in violation of Rule 701, Ruiz, as a lay witness, "offered improper opinion testimony." *Id.* Third, Ruiz, a paralegal, lacked the qualifications required by Rule 702 to perform the "manipulation and analysis of raw data to reach cumulative conclusions," which "is the technical or specialized work of an expert witness." *Id.* (quotations omitted).

The Ninth Circuit reversed. The court concluded that "[t]he district court's typicality determination was premised on an error of law," *id.* at 1002 (emphasis omitted), because in assessing the requirements of Rule 23, "a district court may not decline to consider evidence solely on the basis that the evidence is inadmissible at trial," *id.* at 1003. "[I]n evaluating a motion for class certification, a district court need only consider 'material sufficient to form a reasonable judgment on each [Rule 23(a)] requirement.'" *Id.* at 1005 (quoting *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975)).

2. The Ninth Circuit's ruling warrants review by this Court. The Ninth Circuit's decision in this case has deepened a split of authority among the federal courts of appeals on the question whether courts may consider only admissible evidence at the class certification stage. As the Ninth Circuit itself acknowledged, the Fifth Circuit "has directly held that admissible evidence is required to support class certification," *id.* at 1005 (citing *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005)), and the Third

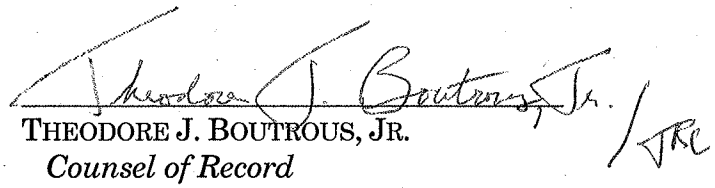
and Seventh circuits have held that "expert evidence submitted in support of class certification must be admissible" under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993), *id.* (citing *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) and *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 812 (7th Cir. 2012)). Only the Eighth Circuit, now joined by the Ninth, has held that courts may consider inadmissible evidence when determining whether Rule 23's requirements are met. *Id.* (citing *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 612–13 (8th Cir. 2011)).

3. The parties recently reached a class action settlement of the class members' claims. A motion for preliminary approval of that settlement was filed in the district court on January 8, 2019, and the motion for preliminary approval is set for a hearing on March 11, 2019. In the settlement agreement, Applicants reserved their rights to file a petition for a writ of certiorari in the event the district court does not grant preliminary approval of the settlement. Applicants therefore seek a 60-day extension of time (to April 1, 2019), which will permit the district court to reach a decision regarding preliminary approval before any petition for a writ of certiorari is filed in this Court. This extension of time would preserve the Court's and the parties' resources, which otherwise would be potentially wasted on a petition that will be rendered moot if the district court grants preliminary approval of the settlement.

CONCLUSION

Accordingly, Applicants respectfully request that the time to file a petition for a writ of certiorari be extended by 60 days, to and including April 1, 2019.

Respectfully submitted,



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Dated: January 11, 2019