APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARLYN SALI and DEBORAH SPRIGGS, on behalf of themselves, all others similarly situated and the general public, *Plaintiffs-Appellants,* v. CORONA REGIONAL MEDICAL CENTER; UHS OF DELAWARE INC., *Defendants-Appellees.*	No. 15-56460 D.C. No. 5:14-cv-00985-PSG-JPR ORDER AND AMENDED OPINION

Appeal from the United States District Court for the Central District of California
Phillip S. Gutierrez, District Judge, Presiding

Argued and Submitted February 16, 2018

Pasadena, California

Filed May 3, 2018

Amended November 27, 2018

Before: M. Margaret McKeown and Kim McLane Wardlaw, Circuit Judges, and Salvador Mendoza, Jr.,* District Judge.

ORDER

The opinion filed on May 3, 2018, and appearing at 889 F.3d 623 (9th Cir. 2018), is hereby amended. An amended opinion is filed concurrently with this order.

OPINION

MENDOZA, District Judge

Marlyn Sali and Deborah Spriggs ("Sali and Spriggs") appeal the district court's denial of class certification in this putative class action alleging employment claims against Corona Regional Medical Center and UHS of Delaware, Inc. (collectively "Corona").[1] Sali and Spriggs moved for certification of seven classes of Registered Nurses ("RNs") they allege were underpaid by Corona as a result of certain employment policies and practices. The district court denied certification on the basis that (1) Federal Rule of Civil Procedure 23(a)'s typicality requirement is not satisfied for any of the proposed classes because Sali and

* The Honorable Salvador Mendoza, Jr., District Judge for the U.S. District Court for the Eastern District of Washington, sitting by designation.

[1] We refer to Corona Regional Medical Center and UHS of Delaware, Inc. collectively as the employer or former employer of the named plaintiffs and proposed class members. This does not reflect any judgment about the nature of the relationship between Corona Regional Medical Center and UHS of Delaware, Inc. or their relative share of potential liability, which have not been addressed by the district court and are not at issue on this appeal.

Spriggs failed to submit admissible evidence of their injuries; (2) Plaintiff Spriggs and proposed class counsel have not demonstrated they will adequately represent the proposed classes; and (3) several proposed classes fail to satisfy Rule 23(b)(3)'s predominance requirement. Because the district court abused its discretion by relying on each of these reasons to deny class certification, we reverse.

BACKGROUND

Corona operates a hospital in Southern California that employs hourly-wage RNs. Sali and Spriggs are RNs formerly employed by Corona. They assert that a number of Corona's employment policies and practices with respect to RNs violate California law and have resulted in underpayment of wages. They filed this putative class action in California State Court on behalf of "all RNs employed by Defendants in California at any time during the Proposed Class Period who (a) were not paid all wages at their regular rate of pay; (b) not paid time and a-half and/or double time for all overtime hours worked; and (c) denied uninterrupted, 'off-duty' meal-and-rest periods." They allege Corona violated California law by (1) failing to pay all regular hourly wages; (2) failing to pay time-and-a-half for all overtime; (3) failing to pay double time for all hours worked in excess of twelve hours in a day; (4) not providing compliant meal and rest breaks; (5) failing to timely pay all wages due to separated former employees within seventy-two hours of separation; and (6) failing to provide accurate itemized wage statements. Corona removed the case to the United States District Court for the Central District of California.

Sali and Spriggs moved for certification of the following seven classes:

1. Rounding Time Class:

All current and former nurses who work or worked for Defendants during the Proposed Class Period who were not paid all wages due them, including straight time, overtime, double time, meal premiums, and rest premiums due to Defendants' rounding time policy.

2. Short Shift Class:

All current and former nurses of Defendants who work or worked pursuant to an Alternative Workweek Schedule ("AWS") during the Proposed Class Period who were "flexed" between the 8th and 12th hour of work due to low patient census and not paid daily overtime.

3. Meal Period Class:

All current and former nurses of Defendants who work or worked pursuant to an AWS during the Proposed Class Period who signed an invalid meal period waiver, and (1) not provided a second meal break after 10 hours of work; (2) not provided meal periods before 5 and 10 hours of work; and/or, (3) not provided a second meal period after 12 hours of work.

4. Rest Break Class:

All current and former nurses who work or worked for Defendants during the Proposed

> Class Period who were not relieved of all duty and therefore not authorized and permitted to take 10-minute, uninterrupted rest breaks for every four hours worked.
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> 5. Regular Rate Class:
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> All current and former nurses who work or worked for Defendants during the Proposed Class Period who were not paid at the correct regular rate for overtime, double time, meal premiums, and rest premiums.
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> 6. Wage Statement Class:
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> All current and former nurses who work or worked for Defendants during the Proposed Class Period who were not provided pay stubs that complied with Labor Code § 226.
>
> 7. Waiting Time Class:
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> All former nurses who worked for Defendants from August 23, 2010 who were not paid all wages due at the time of separation from their employment with Defendants.

The district court denied certification of each of the proposed classes on multiple grounds. First, the district court concluded that Sali and Spriggs's proposed rounding-time, short-shift, rest-break, and wage-statement classes failed to satisfy Rule 23(b)(3)'s predominance requirement. Second, the district court held that Rule 23(a)'s typicality requirement was not satisfied for any of the proposed classes because Sali and Spriggs failed to submit admissible evidence of

their injuries. Third, the district court concluded that Spriggs was not an adequate class representative because she is not a member of the proposed class she is attempting to represent. Finally, the district court held the attorneys from the law firm Bisnar Chase had not demonstrated they will adequately serve as class counsel.

Sali and Spriggs appealed the district court's denial of class certification. Upon Sali and Spriggs's motion, we stayed proceedings in this appeal pending resolution in the California State Courts of *Gerard v. Orange Coast Memorial Medical Center*, a case involving issues related to certain of the proposed classes. *See* 381 P.3d 219 (Cal. 2016); 215 Cal. Rptr. 3d 778 (Ct. App. 2017). In light of the *Gerard* decision, Sali and Spriggs chose to appeal only the district court's denial of class certification with respect to the proposed rounding-time, regular-rate, wage-statement, and waiting-time classes.

STANDARD OF REVIEW

We review a district court's class certification decision for abuse of discretion. *Parra v. Bashas', Inc.*, 536 F.3d 975, 977 (9th Cir. 2008). "[A]n error of law is a per se abuse of discretion." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 956 (9th Cir. 2013) (citing *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010)). Accordingly, we first review a class certification determination for legal error under a de novo standard, and "if no legal error occurred, we will proceed to review the . . . decision for abuse of discretion." *Yokoyama*, 594 F.3d at 1091. A district court applying the correct legal standard

abuses its discretion only if "it (1) relies on an improper factor, (2) omits a substantial factor, or (3) commits a clear error of judgment in weighing the correct mix of factors." *Abdullah*, 731 F.3d at 956. Additionally, "we review the district court's findings of fact under the clearly erroneous standard, meaning we will reverse them only if they are (1) illogical, (2) implausible, or (3) without 'support in inferences that may be drawn from the record.'" *Id.* (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009)).

DISCUSSION

A representative plaintiff may sue on behalf of a class when the plaintiff affirmatively demonstrates the proposed class meets the four threshold requirements of Federal Rule of Civil Procedure 23(a): numerosity, commonality, typicality, and adequacy of representation. *In re Hyundai and Kia Fuel Econ. Litig.*, 881 F.3d 679, 690 (9th Cir. 2018) (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013)); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 512 (9th Cir. 2016). Additionally, a plaintiff seeking certification under Rule 23(b)(3) must demonstrate that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *In re Hyundai*, 881 F.3d at 690–91 (quoting Fed. R. Civ. P. 23(b)(3)).

The issues on appeal here concern only Rule 23's typicality, adequacy, and predominance requirements: Sali and Spriggs appeal the district court's determinations that (1) Sali and Spriggs failed to

demonstrate their injuries were typical of the proposed classes; (2) plaintiff Spriggs is not an adequate class representative; (3) attorneys from the firm Bisnar Chase have not demonstrated they will adequately serve as class counsel; and (4) the proposed rounding-time, wage-statement, and waiting-time classes fail Rule 23(b)(3)'s predominance requirement. We conclude that the district court abused its discretion in each of these determinations, excluding its finding that Spriggs was not an adequate class representative. And because plaintiff Sali remains as a representative plaintiff, Spriggs's inadequacy alone is not a basis to deny class certification. Accordingly, the district court abused its discretion by denying certification of the proposed rounding-time, regular-rate, waiting-time, and wage-statement classes.

A. The district court's typicality determination was premised on an error of law.

The district court concluded that Sali and Spriggs "have not carried their burden of demonstrating that the injuries allegedly inflicted by Defendants on Plaintiffs are similar to the injuries of the putative class members because [they] do not offer any admissible evidence of [their] injuries in their motion for class certification." The district court further noted that the "motion does not contain sworn testimony from either of the named Plaintiffs." The district court reached this decision after striking the declaration of Javier Ruiz—upon which Sali and Spriggs relied to demonstrate their individual injuries—on the basis that the declaration contained inadmissible evidence. This was error. At this preliminary stage, a district court may not decline to consider evidence

solely on the basis that the evidence is inadmissible at trial.

1. The district court's decision to strike the Ruiz declaration

In support of their motion for class certification, Sali and Spriggs submitted a declaration by Javier Ruiz to demonstrate their injuries. Ruiz, a paralegal at Bisnar Chase, reviewed time and payroll records for the named plaintiffs to determine whether they were fully compensated under Corona's rounding-time pay practice, as well as to address several other questions that are no longer at issue on this appeal. The rounding-time practice itself is not disputed. Corona paid RNs an hourly wage based on the time they punched in and out, rounded to the nearest quarter hour. For example, if an RN clocked in at 6:53 a.m. or at 7:07 a.m., his or her time was rounded to 7:00 a.m. Sali and Spriggs allege that this policy, over time, resulted in failure to pay RNs for all of their time worked. To determine the policy's effect on Sali and Spriggs individually, Ruiz used Excel spreadsheets to compare Sali and Spriggs's rounded times with their actual clock-in and clock-out times using a random sampling of timesheets. Ruiz's analysis demonstrated that on average over hundreds of shifts, Corona's rounded time policy undercounted Sali's clock-in and clock-out times by eight minutes per shift and Spriggs's times by six minutes per shift.

Corona objected to the Ruiz declaration, arguing that (1) the declaration constituted improper lay opinion testimony and must be excluded under Federal Rules of Evidence 701 and 702; (2) Ruiz's opinions

were unreliable; (3) the declaration lacked foundation and Ruiz lacked personal knowledge of the information analyzed; and (4) the data underlying Ruiz's analysis was unauthenticated hearsay. In reply, Sali and Spriggs submitted declarations attesting to the authenticity and accuracy of the data and conclusions contained in Ruiz's declaration and the attached exhibits.

The district court agreed with Corona's arguments that the Ruiz declaration was inadmissible and struck the declaration on that basis. First, the district court concluded that "Ruiz cannot authenticate the manipulated Excel Spreadsheets and other data that he relied upon to conduct his analysis because he does not have personal knowledge to attest to the fact that the data accurately represents Plaintiffs' employment records." Second, the district court concluded that Ruiz's declaration offered improper opinion testimony. Third, the district court found that Ruiz's "manipulation and analysis of raw data to reach cumulative conclusions is the technical or specialized work of an expert witness," and that Ruiz lacked the qualifications to conduct this analysis. The district court further concluded that the declarations submitted by Sali and Spriggs were new evidence improperly submitted in reply, and the court declined to consider the declarations.

2. The district court erred by striking the Ruiz declaration on the basis of inadmissibility.

A plaintiff seeking class certification bears the burden of affirmatively demonstrating "through evidentiary proof that the class meets the prerequisites of Rule 23(a)." *In re Hyundai*, 881 F.3d at 690 (citing *Comcast Corp.*, 569 U.S. at 33). In other words, the plaintiff "must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Accordingly, "[b]efore certifying a class, the trial court must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites of Rule 23." *In re Hyundai*, 881 F.3d at 690 (quoting *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001)).

For practical reasons, we have never equated a district court's "rigorous analysis" at the class certification stage with conducting a mini-trial. District courts "must determine by order whether to certify the action as a class action" at "an early practicable time after a person sues or is sued as a class representative." Fed. R. Civ. P. 23(c)(1)(A). The district court's class certification order, while important, is also preliminary: "An order that grants or denies class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978) ("[A] district court's order denying or granting class status is inherently tentative."); *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 613 (8th

Cir. 2011) ("[A] court's inquiry on a motion for class certification is 'tentative,' 'preliminary,' and 'limited.'" (quoting *Coopers & Lybrand*, 437 U.S. at 469 n.11)).

Applying the formal strictures of trial to such an early stage of litigation makes little common sense. Because a class certification decision "is far from a conclusive judgment on the merits of the case, it is 'of necessity . . . not accompanied by the traditional rules and procedure applicable to civil trials.'" *Zurn Pex*, 644 F.3d at 613 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974)). Notably, the evidence needed to prove a class's case often lies in a defendant's possession and may be obtained only through discovery. Limiting class-certification-stage proof to admissible evidence risks terminating actions before a putative class may gather crucial admissible evidence. And transforming a preliminary stage into an evidentiary shooting match inhibits an early determination of the best manner to conduct the action.

It follows that we have found an abuse of discretion where a "district court limited its analysis of whether" class plaintiffs satisfied a Rule 23 requirement "to a determination of whether Plaintiffs' evidence on that point was admissible." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). Although we have not squarely addressed the nature of the "evidentiary proof" a plaintiff must submit in support of class certification, we now hold that such proof need not be admissible evidence.

Inadmissibility alone is not a proper basis to reject evidence submitted in support of class certification.[2] "Neither the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies" Rule 23. *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). Therefore, in 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*. The court's consideration should not be limited to only admissible evidence.

Other circuits have reached varying conclusions on the extent to which admissible evidence is required at the class certification stage. Only the Fifth Circuit

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[2] Numerous district courts in this Circuit have long concluded that it is appropriate to consider evidence at the class certification stage that may ultimately be inadmissible. *See, e.g., Garter v. Cty. of San Diego*, 2017 WL 5177028, at *2 (S.D. Cal. Nov. 7, 2017) ("District [c]ourts may consider all material evidence submitted by the parties and need not address the ultimate admissibility of evidence proffered by the parties."); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 965 n.147 (C.D. Cal. 2015) ("[T]he court can consider inadmissible evidence in deciding whether it is appropriate to certify a class."); *Arredondo v. Delano Farms Co.*, 301 F.R.D. 493, 505 (E.D. Cal. 2014); *Keilholtz v. Lennox Hearth Prods., Inc.*, 268 F.R.D. 330, 337 n.3 (N.D. Cal. 2010) ("On a motion for class certification, the Court may consider evidence that may not be admissible at trial."); *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 599 (C.D. Cal. 2008) ("[A] motion for class certification need not be supported by admissible evidence."); *Bell v. Addus Healthcare, Inc.*, 2007 WL 3012507, at *2 (W.D. Wash. Oct. 12, 2007) ("[Rule] 23 does not require admissible evidence in support of a motion for class certification . . . .")

has directly held that admissible evidence is required to support class certification. *See Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005) (holding that the court's "findings must be made based on adequate admissible evidence to justify class certification").

The Seventh Circuit, in holding that a district court erred by giving an expert report "the weight . . . it is due" rather than ruling on the report's admissibility under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993), has suggested that expert evidence submitted in support of class certification must be admissible. *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 812 (7th Cir. 2012) (quoting *In re Evanston Nw. Healthcare Corp. Antitrust Litig.*, 268 F.R.D. 56, 57 (N.D. Ill. 2010)). The Third Circuit has similarly held that a plaintiff may rely on challenged expert testimony to satisfy the requirements of Rule 23 only if that expert testimony satisfies the evidentiary standard set out in *Daubert*. *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015).

We agree with the Eighth Circuit, however, which has held that a district court is not limited to considering only admissible evidence in evaluating whether Rule 23's requirements are met. *Zurn Pex*, 644 F.3d at 612–13. Contrary to other courts' conclusory presumptions that Rule 23 proof must be admissible, the Eighth Circuit probed the differences between Rule 23, summary judgment and trial that warrant greater evidentiary freedom at the class certification stage:

> Because summary judgment ends litigation without a trial, the court must

> review the evidence in light of what would be admissible before either the court or jury.
>
> In contrast, a court's inquiry on a motion for class certification is "tentative," "preliminary," and "limited." The court must determine only if questions of law or fact common to class members predominate over any questions affecting only individual members [and if] a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. As class certification decisions are generally made before the close of merits discovery, the court's analysis is necessarily prospective and subject to change, and there is bound to be some evidentiary uncertainty.

Id. at 613 (internal citations and quotation marks omitted). We find the Eighth Circuit's analysis persuasive.

The Supreme Court's guidance in the analogous field of standing is also instructive. Like standing, Rule 23 presents more than a "mere pleading standard." *Wal-Mart*, 564 U.S. at 350. Because the elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required *at the successive stages of*

the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (emphasis added). Hence, the proof required to establish standing varies at the complaint, summary judgment and trial phases. *Id.* Similarly, the "manner and degree of evidence required" at the preliminary class certification stage is not the same as "at the successive stages of the litigation"—*i.e.*, at trial.

The present case aptly illustrates why we license greater evidentiary freedom at the class certification stage: By relying on formalistic evidentiary objections, the district court unnecessarily excluded proof that tended to support class certification. Corona did not dispute the authenticity of the payroll data underlying Ruiz's analysis, nor did it directly dispute the accuracy of his calculations. Instead, Corona argued that Ruiz's declaration and spreadsheet were inadmissible because Ruiz extracted data without explaining his methods, and the district court agreed. But by relying on admissibility alone as a basis to strike the Ruiz declaration, the district court rejected evidence that likely could have been presented in an admissible form at trial. In fact, when Sali and Spriggs submitted their own sworn declarations to authenticate the payroll data and vouch for its accuracy, the district court again leaned on evidentiary formalism in striking those declarations as "new evidence" submitted in reply. That narrow approach tells us nothing about the satisfaction of the typicality requirement—"whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d

497, 508 (9th Cir. 1992). The district court should have considered the declarations of Ruiz, Sali, and Spriggs in determining whether the typicality prerequisite was satisfied.

When conducting its "rigorous analysis" into whether the Rule 23(a) requirements are met, the district court need not dispense with the standards of admissibility entirely. The court may consider whether the plaintiff's proof is, or will likely lead to, admissible evidence. Indeed, in evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert*. *Ellis*, 657 F.3d at 982. But admissibility must not be dispositive. Instead, an inquiry into the evidence's ultimate admissibility should go to the weight that evidence is given at the class certification stage. This approach accords with our prior guidance that a district court should analyze the "persuasiveness of the evidence presented" at the Rule 23 stage. *Id*. The district court abused its discretion here by declining to consider the Ruiz declaration solely on the basis of inadmissibility. Because the district court applied the wrong standard for evaluating the plaintiffs' evidence, we do not reach whether the plaintiffs have in fact demonstrated typicality and leave it to the district court to resolve in the first instance.

B. Spriggs is not an adequate class representative, but Sali remains as an adequate representative plaintiff.

The district court concluded that plaintiff Spriggs is not an adequate class representative because she is not a member of any class she seeks to represent. The

district court reasoned that Spriggs cannot represent a class including "all current and former [RNs] of Defendants . . . *who were classified by Defendants as either full-time or full-time equivalent employees*," given that she was not classified as a full-time employee. We agree. A named plaintiff must be a member of the class she seeks to represent and Spriggs does not qualify. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982). Nevertheless, because Plaintiff Sali remains as an adequate class representative, Spriggs's inadequacy is not a basis to deny class certification. *See* Fed. R. Civ. P. 23(a) ("*One or more* members of a class may sue or be sued as representative parties on behalf of all members . . . ." (emphasis added)).

C. The district court abused its discretion by concluding that attorneys from Bisnar Chase cannot serve as adequate class counsel.

Determining whether representation is adequate requires the court to consider two questions: "(a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 111, 120 (9th Cir. 1998)). Adequacy of representation also depends on the qualifications of counsel. *In re N. Dist. Cal., Dalkon Shield IUD Prods Liab. Litig.*, 693 F.2d 847, 855 (9th Cir. 1982). "[T]he named representative's attorney [must] be qualified, experienced, and generally capable to conduct the litigation . . . ." *Jordan v. L.A. Cty.*, 669 F.2d 1311, 1323 (9th Cir. 1982), *vacated on other grounds by Cty. of L.A. v. Jordan*, 459

U.S. 810 (1982). It is undisputed that there is no conflict here, so the only questions before the district court were whether proposed class counsel were qualified and would prosecute the action vigorously.

The district court concluded that proposed class counsel failed to demonstrate they would adequately serve as class counsel. The district court noted that "attorneys from Bisnar Chase failed to attend any of the depositions of Plaintiffs' putative class witnesses' (four scheduled depositions), failed to produce Plaintiffs' expert, Falkenhagen, for a deposition despite being ordered to do so by a Magistrate Judge,[3] and, as detailed in the typicality analysis, failed to submit any sworn testimony from Plaintiffs in support of the class certification motion." The court also noted that Bisnar Chase submitted nearly identical declarations from twenty-two putative class members attesting to their personal experiences with Corona's employment practices. The district court found that "Plaintiffs' counsel's 'lax approach' to personalizing declarations, ensuring that declarants knew and understood what they were signing, and verifying the accuracy of the statements is 'unacceptable' conduct."

The district court did not indicate what legal standard it relied on in evaluating the adequacy of class counsel. Moreover, the district court discussed only the apparent errors by counsel with no mention of the evidence in the record demonstrating class

[3] The district court sanctioned Bisnar Chase under Federal Rule of Civil Procedure 37 for failing to produce Falkenhagen at deposition after being ordered to do so. We affirmed the sanctions order. See *Sali v. Corona Reg'l Med. Ctr.*, 884 F.3d 1218, 1225 (9th Cir. 2018).

counsel's substantial and competent work on this case. Bisnar Chase attorneys have incurred thousands of dollars in costs and invested significant time in this matter, including preparing dozens of interrogatories and requests for production, taking numerous depositions, retaining experts, defending the named plaintiffs' depositions and the deposition of the plaintiffs' expert economist, reviewing and analyzing thousands of documents, interviewing hundreds of class members, obtaining signed declarations, and preparing and filing a motion for class certification. Additionally, attorney Jerusalem Beligan has extensive experience litigating class-action cases in state and federal court.

At this early stage of the litigation, the district court's decision that attorneys from Bisnar Chase could not adequately serve as class counsel was premature and an abuse of discretion. However, the district court is not precluded from considering counsel's prior sanctions as evidence of inadequacy if Bisnar Chase attorneys continue to neglect their duties.

D. The district court erred by denying certification of the proposed rounding-time and wage-statement classes on the basis that they failed Rule 23(b)(3)'s predominance requirement.

Rule 23(b)(3)'s predominance inquiry is "far more demanding" than Rule 23(a)'s commonality requirement. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). When evaluating predominance, "a court has a 'duty to take a close look at whether common

questions predominate over individual ones,' and ensure that individual questions do not 'overwhelm questions common to the class.'" *In re Hyundai*, 881 F.3d at 691 (quoting *Comcast Corp.*, 569 U.S. at 34). "The main concern of the predominance inquiry under Rule 23(b)(3) is 'the balance between individual and common issues.'" *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 545–46 (9th Cir. 2013) (quoting *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 935, 959 (9th Cir. 2009)).

Because the district court concluded that the predominance requirement was met by the proposed regular-rate class, and because the parties agree that the waiting-time class is entirely derivative of other proposed classes, we review the district court's predominance analysis with respect to the rounding-time and wage-statement classes only.

1. The district court's determination that individual questions predominated in the claims of the proposed rounding-time class was based on an error of law.

For the purpose of class certification, the parties do not dispute how Corona's rounding-time pay system worked. Corona used an electronic timekeeping system that tracked when employees clocked in and clocked out and rounded the time to the nearest quarter hour. Corona paid RNs an hourly wage calculated based on that rounded time. For example, if an RN clocked in at 6:53 a.m. or 7:07 a.m., his or her time was rounded to 7:00 a.m. Kronos recorded both actual clock-in and rounded times.

Sali and Spriggs allege that Corona's rounding-time policy resulted in systematic underpayment of RNs. They seek certification of a rounding-time class consisting of:

> All current and former nurses who work or worked for Defendants during the Proposed Class Period who were not paid all wages due them, including straight time, overtime, double time, meal premiums, and rest premiums due to Defendants' rounding time policy.

The district court concluded that individualized issues predominate in determining Corona's liability with respect to the proposed rounding-time class because "whether [Corona's] rounding policy resulted in the underpayment of the proposed class members, and was thus against California law, depends on individual findings as to whether RNs were actually working when punched in." In support of this conclusion, the district court cited Corona's explanation that "time records are not a reliable indicator of the time RNs actually spent working because RNs frequently clock-in for work and then perform non-compensable activities, such as waiting in the break room, getting coffee, or chatting with their co-workers, until the start of their scheduled shift." Thus, the court reasoned, "determining whether [Corona] underpaid members of the Rounding Time Class would entail factualized inquiries into whether particular RNs were actually working during the grace period, and whether the rounding of time during this period resulted in the underpayment of hours actually

worked—the only conduct that is prohibited under California law."

Sali and Spriggs first argue that whether RNs were "actually working" is a merits question that should not have been considered at the class certification stage. In the alternative, Sali and Spriggs argue that the district court's analysis was based on an error of California law because compensable time is not measured by time employees spend "actually working." Sali and Spriggs's argument that the district court improperly reached a merits question fails because the district court plainly did not attempt to resolve whether RNs were actually working on the merits. Instead, the court merely concluded that, assuming clock-in times were on average rounded up to the shift-start time, individualized questions would predominate in determining whether RNs were "actually working" during any period between their clock-in time and the start of their shift. But the district court clearly misapplied California law in reaching that conclusion.

A rounding-time policy is permissible under California law if it "is fair and neutral on its face and 'it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have *actually worked*.'" *See's Candy Shops, Inc. v. Super. Ct.*, 148 Cal. Rptr. 3d 690, 704–05 (Ct. App. 2012) (quoting 29 C.F.R. § 785.48) (emphasis added). The district court therefore did not err by concluding that whether RNs were "actually working" during the time between their clock-in and shift-start time is a relevant inquiry in this

case. But by suggesting that "non-compensable activities, such as waiting in the break room, getting coffee, or chatting with their co-workers" are categorically not time "actually worked," the district court incorrectly interpreted "actually worked" to mean only time spent engaged in work-related activities.

Under California law, compensable time is "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so."[4] *Morillion v. Royal Packaging Co.*, 995 P.2d 139, 141 (Cal. 2000) (quoting Cal. Code Regs., tit. 8, § 11140, subd. 2(G)). Both parties correctly interpret the term "actually worked" as used in *See's Candy* as referencing this compensable-time standard. The district court also nominally acknowledged "employer control" as part of the standard, but in doing so the court materially misstated the law. The district court stated that "[t]he punch times are only indicative of time 'actually worked' if RNs are working *and* under the control of their employer whenever they are punched into work." (emphasis added). In fact, under California law, time is compensable when an employee is working *or* under the control of his or her employer. *See Morillion*, 995 P.2d at 141.

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[4] Both parties agreed in the district court and in this court that this standard for compensable time applies to Sali and Spriggs under California law. Corona's new argument in its petition for rehearing that a different standard applies is waived. *See Boardman v. Estelle*, 957 F.2d 1523, 1535 (9th Cir. 1992), *as supplemented on denial of reh'g* (Mar. 11, 1992).

California's compensable-time standard encompasses two categories of time. First, time is compensable if an employee is "under the control" of his or her employer, whether or not he or she is engaging in work activities, such as by being required to remain on the employer's premises or being restricted from engaging in certain personal activities. *See id.* at 145–47 (holding that compulsory travel time on bus from departure point to work site is compensable); *Aguilar v. Assn. of Retarded Citizens*, 285 Cal. Rptr. 515, 519–21 (Ct. App. 1991) (holding that time employees are required to be on premises is included in hours worked). Second, time is compensable if an employee "is suffered or permitted to work, whether or not required to do so." *Morillion*, 995 P.2d at 141 (citing Cal. Code Regs., tit. 8, § 11140, subd. 2(G)). This may include "time an employee is working but *is not* subject to an employer's control," such as "unauthorized overtime, which the employer has not requested or required." *Id.* at 145 (emphasis added).

The district court did not abuse its discretion to the extent it concluded that individualized questions predominate on whether the RNs fall within the second category, which amounts to a question of whether they engaged in work activities even if they were not required to do so. But the district court erred by assuming that was the only question to be decided. Under California law, the RNs were also actually working if they were subject to Corona's control even if they were not engaging in work activities—for example, if they were required to remain on the hospital premises during that time. *See Aguilar*, 234 Cal. Rptr. at 520. The district court failed to consider whether the RNs could establish on a class-wide basis that they were

subject to Corona's control during the grace period even if the RNs were not always engaged in work-related activities during that time.

This "employer control" question necessarily requires an employer-focused inquiry into whether Corona had a policy or practice that restricted RNs in a manner that amounted to employer control during the period between their clock-in and clock-out times and their rounded shift-start and shift-end times. The types of activities RNs generally engaged in during this period are certainly relevant, but the activities of any particular RN are not dispositive of whether he or she was under Corona's control. Determination of this question does not depend on individualized factual questions and is capable of class-wide resolution. Accordingly, the district court abused its discretion by denying certification of the rounding-time class on the basis of predominance.

2. The district court's determination that individual questions predominate in the claims of the proposed wage-statement class was premised on legal error.

Corona issued wage statements to RNs that listed the employer as Corona Regional Medical Center, rather than Corona's corporate name, UHS-Corona, Inc. Sali and Spriggs allege this violated California law and seek certification of a class consisting of "[a]ll current and former nurses who work or worked for Defendants during the Proposed Class Period who were not provided pay stubs that complied with Labor Code § 226." The district court concluded that this proposed

wage-statement class failed Rule 23(b)(3)'s predominance requirement because "demonstrating that each class member was damaged by the claimed inaccuracy in the wage statement is a critical individualized issue in determining liability that is not amenable to common systems of proof." In doing so, the district court noted that it agreed with Corona's argument that "common issues do not predominate 'because, in order to determine liability, each employee must prove for each paystub received during the relevant time period that he/she was damaged by the inadequate pay stub.'"

The California Labor Code requires that a wage statement include, among other things, "the name and address of the legal entity that is the employer." Cal. Lab. Code § 226(a)(8). The Code specifies the amount of damages for violation of this requirement.[5] The Code further provides that "[a]n employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required . . . and the employee cannot promptly determine from the wage statement alone . . . the name and address of the employer." *Id.* § 226(e)(2)(B)(iii).

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[5] California Labor Code § 226(e)(1) provides:

> An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorney's fees.

The district court erred by concluding that damages for members of the wage statement class would require an individualized determination. Because the Code specifies that a violation of § 226 is a per se injury, there is no individualized issue of damages. If Corona knowingly and intentionally failed to provide the name of the legal entity that was the class members' employer, each class member was injured in precisely the same manner by each paystub in which Corona failed to provide that information. *See id.* Moreover, even if there is variation in the amount of each class members' damages, this is an insufficient basis by itself to deny certification. *See Yokoyama*, 594 F.3d at 1094 (the "amount of damages is invariably an individual question and does not defeat class action treatment" (quoting *Blackie*, 524 F.2d at 905)).

The district court abused its discretion by denying certification on the basis that individual questions predominate in the claims of the proposed wage-statement class.

CONCLUSION

For the reasons discussed, the district court's denial of class certification is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARLYN SALI and DEBORAH SPRIGGS, on behalf of themselves, all others similarly situated and the general public, *Plaintiffs-Appellants,* v. CORONA REGIONAL MEDICAL CENTER; UHS OF DELAWARE INC., *Defendants-Appellees.*	No. 15-56460 D.C. No. 5:14-cv-00985-PSG-JPR OPINION

Appeal from the United States District Court
for the Central District of California
Phillip S. Gutierrez, District Judge, Presiding

Argued and Submitted February 16, 2018
Pasadena, California

Filed May 3, 2018

Before: M. Margaret McKeown and Kim McLane Wardlaw, Circuit Judges, and Salvador Mendoza, Jr.,* District Judge.

OPINION

MENDOZA, District Judge

Marlyn Sali and Deborah Spriggs ("Sali and Spriggs") appeal the district court's denial of class certification in this putative class action alleging employment claims against Corona Regional Medical Center and UHS of Delaware, Inc. (collectively "Corona").[1] Sali and Spriggs moved for certification of seven classes of Registered Nurses ("RNs") they allege were underpaid by Corona as a result of certain employment policies and practices. The district court denied certification on the basis that (1) Federal Rule of Civil Procedure 23(a)'s typicality requirement is not satisfied for any of the proposed classes because Sali and Spriggs failed to submit admissible evidence of their injuries; (2) Plaintiff Spriggs and proposed class counsel have not demonstrated they will adequately represent the proposed classes; and (3) several proposed

* The Honorable Salvador Mendoza, Jr., District Judge for the U.S. District Court for the Eastern District of Washington, sitting by designation.

[1] We refer to Corona Regional Medical Center and UHS of Delaware, Inc. collectively as the employer or former employer of the named plaintiffs and proposed class members. This does not reflect any judgment about the nature of the relationship between Corona Regional Medical Center and UHS of Delaware, Inc. or their relative share of potential liability, which have not been addressed by the district court and are not at issue on this appeal.

classes fail to satisfy Rule 23(b)(3)'s predominance requirement. Because the district court abused its discretion by relying on each of these reasons to deny class certification, we reverse.

BACKGROUND

Corona operates a hospital in Southern California that employs hourly-wage RNs. Sali and Spriggs are RNs formerly employed by Corona. They assert that a number of Corona's employment policies and practices with respect to RNs violate California law and have resulted in underpayment of wages. They filed this putative class action in California State Court on behalf of "all RNs employed by Defendants in California at any time during the Proposed Class Period who (a) were not paid all wages at their regular rate of pay; (b) not paid time and a-half and/or double time for all overtime hours worked; and (c) denied uninterrupted, 'off-duty' meal-and-rest periods." They allege Corona violated California law by (1) failing to pay all regular hourly wages; (2) failing to pay time-and-a-half for all overtime; (3) failing to pay double time for all hours worked in excess of twelve hours in a day; (4) not providing compliant meal and rest breaks; (5) failing to timely pay all wages due to separated former employees within seventy-two hours of separation; and (6) failing to provide accurate itemized wage statements. Corona removed the case to the United States District Court for the Central District of California.

Sali and Spriggs moved for certification of the following seven classes:

1. Rounding Time Class:

All current and former nurses who work or worked for Defendants during the Proposed Class Period who were not paid all wages due them, including straight time, overtime, double time, meal premiums, and rest premiums due to Defendants' rounding time policy.

2. Short Shift Class:

All current and former nurses of Defendants who work or worked pursuant to an Alternative Workweek Schedule ("AWS") during the Proposed Class Period who were "flexed" between the 8th and 12th hour of work due to low patient census and not paid daily overtime.

3. Meal Period Class:

All current and former nurses of Defendants who work or worked pursuant to an AWS during the Proposed Class Period who signed an invalid meal period waiver, and (1) not provided a second meal break after 10 hours of work; (2) not provided meal periods before 5 and 10 hours of work; and/or, (3) not provided a second meal period after 12 hours of work.

4. Rest Break Class:

All current and former nurses who work or worked for Defendants during the Proposed Class Period who were not relieved of all duty and therefore not authorized and permitted to

> take 10-minute, uninterrupted rest breaks for every four hours worked.
>
> 5. Regular Rate Class:
>
> All current and former nurses who work or worked for Defendants during the Proposed Class Period who were not paid at the correct regular rate for overtime, double time, meal premiums, and rest premiums.
>
> 6. Wage Statement Class:
>
> All current and former nurses who work or worked for Defendants during the Proposed Class Period who were not provided pay stubs that complied with Labor Code § 226.
>
> 7. Waiting Time Class:
>
> All former nurses who worked for Defendants from August 23, 2010 who were not paid all wages due at the time of separation from their employment with Defendants.

The district court denied certification of each of the proposed classes on multiple grounds. First, the district court concluded that Sali and Spriggs's proposed rounding-time, short-shift, rest-break, and wage-statement classes failed to satisfy Rule 23(b)(3)'s predominance requirement. Second, the district court held that Rule 23(a)'s typicality requirement was not satisfied for any of the proposed classes because Sali and Spriggs failed to submit admissible evidence of their injuries. Third, the district court concluded that

Spriggs was not an adequate class representative because she is not a member of the proposed class she is attempting to represent. Finally, the district court held the attorneys from the law firm Bisnar Chase had not demonstrated they will adequately serve as class counsel.

Sali and Spriggs appealed the district court's denial of class certification. Upon Sali and Spriggs's motion, we stayed proceedings in this appeal pending resolution in the California State Courts of *Gerard v. Orange Coast Memorial Medical Center*, a case involving issues related to certain of the proposed classes. *See* 381 P.3d 219 (Cal. 2016); 215 Cal. Rptr. 3d 778 (Ct. App. 2017). In light of the *Gerard* decision, Sali and Spriggs chose to appeal only the district court's denial of class certification with respect to the proposed rounding-time, regular-rate, wage-statement, and waiting-time classes.

STANDARD OF REVIEW

We review a district court's class certification decision for abuse of discretion. *Parra v. Bashas', Inc.*, 536 F.3d 975, 977 (9th Cir. 2008). "[A]n error of law is a per se abuse of discretion." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 956 (9th Cir. 2013) (citing *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010)). Accordingly, we first review a class certification determination for legal error under a de novo standard, and "if no legal error occurred, we will proceed to review the . . . decision for abuse of discretion." *Yokoyama*, 594 F.3d at 1091. A district court applying the correct legal standard

abuses its discretion only if "it (1) relies on an improper factor, (2) omits a substantial factor, or (3) commits a clear error of judgment in weighing the correct mix of factors." *Abdullah*, 731 F.3d at 956. Additionally, "we review the district court's findings of fact under the clearly erroneous standard, meaning we will reverse them only if they are (1) illogical, (2) implausible, or (3) without 'support in inferences that may be drawn from the record.'" *Id.* (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009)).

DISCUSSION

A representative plaintiff may sue on behalf of a class when the plaintiff affirmatively demonstrates the proposed class meets the four threshold requirements of Federal Rule of Civil Procedure 23(a): numerosity, commonality, typicality, and adequacy of representation. *In re Hyundai and Kia Fuel Econ. Litig.*, 881 F.3d 679, 690 (9th Cir. 2018) (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013)); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 512 (9th Cir. 2016). Additionally, a plaintiff seeking certification under Rule 23(b)(3) must demonstrate that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *In re Hyundai*, 881 F.3d at 690–91 (quoting Fed. R. Civ. P. 23(b)(3)).

The issues on appeal here concern only Rule 23's typicality, adequacy, and predominance requirements: Sali and Spriggs appeal the district court's determinations that (1) Sali and Spriggs failed to

demonstrate their injuries were typical of the proposed classes; (2) plaintiff Spriggs is not an adequate class representative; (3) attorneys from the firm Bisnar Chase have not demonstrated they will adequately serve as class counsel; and (4) the proposed rounding-time, wage-statement, and waiting-time classes fail Rule 23(b)(3)'s predominance requirement. We conclude that the district court abused its discretion in each of these determinations, excluding its finding that Spriggs was not an adequate class representative. And because plaintiff Sali remains as a representative plaintiff, Spriggs's inadequacy alone is not a basis to deny class certification. Accordingly, the district court abused its discretion by denying certification of the proposed rounding-time, regular-rate, waiting-time, and wage-statement classes.

A. The district court's typicality determination was premised on an error of law.

The district court concluded that Sali and Spriggs "have not carried their burden of demonstrating that the injuries allegedly inflicted by Defendants on Plaintiffs are similar to the injuries of the putative class members because [they] do not offer any admissible evidence of [their] injuries in their motion for class certification." The district court further noted that the "motion does not contain sworn testimony from either of the named Plaintiffs." The district court reached this decision after striking the declaration of Javier Ruiz—upon which Sali and Spriggs relied to demonstrate their individual injuries—on the basis that the declaration contained inadmissible evidence. This was error. At this preliminary stage, a district court may not decline to consider evidence

solely on the basis that the evidence is inadmissible at trial.

1. The district court's decision to strike the Ruiz declaration

In support of their motion for class certification, Sali and Spriggs submitted a declaration by Javier Ruiz to demonstrate their injuries. Ruiz, a paralegal at Bisnar Chase, reviewed time and payroll records for the named plaintiffs to determine whether they were fully compensated under Corona's rounding-time pay practice, as well as to address several other questions that are no longer at issue on this appeal. The rounding-time practice itself is not disputed. Corona paid RNs an hourly wage based on the time they punched in and out, rounded to the nearest quarter hour. For example, if an RN clocked in at 6:53 a.m. or at 7:07 a.m., his or her time was rounded to 7:00 a.m. Sali and Spriggs allege that this policy, over time, resulted in failure to pay RNs for all of their time worked. To determine the policy's effect on Sali and Spriggs individually, Ruiz used Excel spreadsheets to compare Sali and Spriggs's rounded times with their actual clock-in and clock-out times using a random sampling of timesheets. Ruiz's analysis demonstrated that on average over hundreds of shifts, Corona's rounded time policy undercounted Sali's clock-in and clock-out times by eight minutes per shift and Spriggs's times by six minutes per shift.

Corona objected to the Ruiz declaration, arguing that (1) the declaration constituted improper lay opinion testimony and must be excluded under Federal Rules of Evidence 701 and 702; (2) Ruiz's opinions

were unreliable; (3) the declaration lacked foundation and Ruiz lacked personal knowledge of the information analyzed; and (4) the data underlying Ruiz's analysis was unauthenticated hearsay. In reply, Sali and Spriggs submitted declarations attesting to the authenticity and accuracy of the data and conclusions contained in Ruiz's declaration and the attached exhibits.

The district court agreed with Corona's arguments that the Ruiz declaration was inadmissible and struck the declaration on that basis. First, the district court concluded that "Ruiz cannot authenticate the manipulated Excel Spreadsheets and other data that he relied upon to conduct his analysis because he does not have personal knowledge to attest to the fact that the data accurately represents Plaintiffs' employment records." Second, the district court concluded that Ruiz's declaration offered improper opinion testimony. Third, the district court found that Ruiz's "manipulation and analysis of raw data to reach cumulative conclusions is the technical or specialized work of an expert witness," and that Ruiz lacked the qualifications to conduct this analysis. The district court further concluded that the declarations submitted by Sali and Spriggs were new evidence improperly submitted in reply, and the court declined to consider the declarations.

2. The district court erred by striking the Ruiz declaration on the basis of inadmissibility.

A plaintiff seeking class certification bears the burden of affirmatively demonstrating "through evidentiary proof that the class meets the prerequisites of Rule 23(a)." *In re Hyundai*, 881 F.3d at 690 (citing *Comcast Corp.*, 569 U.S. at 33). In other words, the plaintiff "must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Accordingly, "[b]efore certifying a class, the trial court must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites of Rule 23." *In re Hyundai*, 881 F.3d at 690 (quoting *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001)).

For practical reasons, we have never equated a district court's "rigorous analysis" at the class certification stage with conducting a mini-trial. District courts "must determine by order whether to certify the action as a class action" at "an early practicable time after a person sues or is sued as a class representative." Fed. R. Civ. P. 23(c)(1)(A). The district court's class certification order, while important, is also preliminary: "An order that grants or denies class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978) ("[A] district court's order denying or granting class status is inherently tentative."); *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 613 (8th

Cir. 2011) ("[A] court's inquiry on a motion for class certification is 'tentative,' 'preliminary,' and 'limited.'" (quoting *Coopers & Lybrand*, 437 U.S. at 469 n.11)).

Applying the formal strictures of trial to such an early stage of litigation makes little common sense. Because a class certification decision "is far from a conclusive judgment on the merits of the case, it is 'of necessity . . . not accompanied by the traditional rules and procedure applicable to civil trials.'" *Zurn Pex*, 644 F.3d at 613 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974)). Notably, the evidence needed to prove a class's case often lies in a defendant's possession and may be obtained only through discovery. Limiting class-certification-stage proof to admissible evidence risks terminating actions before a putative class may gather crucial admissible evidence. And transforming a preliminary stage into an evidentiary shooting match inhibits an early determination of the best manner to conduct the action.

It follows that we have found an abuse of discretion where a "district court limited its analysis of whether" class plaintiffs satisfied a Rule 23 requirement "to a determination of whether Plaintiffs' evidence on that point was admissible." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). Although we have not squarely addressed the nature of the "evidentiary proof" a plaintiff must submit in support of class certification, we now hold that such proof need not be admissible evidence.

Inadmissibility alone is not a proper basis to reject evidence submitted in support of class certification.[2] "Neither the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies" Rule 23. *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). Therefore, in 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.* The court's consideration should not be limited to only admissible evidence.

Other circuits have reached varying conclusions on the extent to which admissible evidence is required at the class certification stage. Only the Fifth Circuit

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[2] Numerous district courts in this Circuit have long concluded that it is appropriate to consider evidence at the class certification stage that may ultimately be inadmissible. *See, e.g., Garter v. Cty. of San Diego*, 2017 WL 5177028, at *2 (S.D. Cal. Nov. 7, 2017) ("District [c]ourts may consider all material evidence submitted by the parties and need not address the ultimate admissibility of evidence proffered by the parties."); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 965 n.147 (C.D. Cal. 2015) ("[T]he court can consider inadmissible evidence in deciding whether it is appropriate to certify a class."); *Arredondo v. Delano Farms* Co., 301 F.R.D. 493, 505 (E.D. Cal. 2014); *Keilholtz v. Lennox Hearth Prods., Inc*., 268 F.R.D. 330, 337 n.3 (N.D. Cal. 2010) ("On a motion for class certification, the Court may consider evidence that may not be admissible at trial."); *Parkinson v. Hyundai Motor Am*., 258 F.R.D. 580, 599 (C.D. Cal. 2008) ("[A] motion for class certification need not be supported by admissible evidence."); *Bell v. Addus Healthcare, Inc*., 2007 WL 3012507, at *2 (W.D. Wash. Oct. 12, 2007) ("[Rule] 23 does not require admissible evidence in support of a motion for class certification . . . .").

has directly held that admissible evidence is required to support class certification. *See Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005) (holding that the court's "findings must be made based on adequate admissible evidence to justify class certification").

The Seventh Circuit, in holding that a district court erred by giving an expert report "the weight . . . it is due" rather than ruling on the report's admissibility under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993), has suggested that expert evidence submitted in support of class certification must be admissible. *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 812 (7th Cir. 2012) (quoting *In re Evanston Nw. Healthcare Corp. Antitrust Litig.*, 268 F.R.D. 56, 57 (N.D. Ill. 2010)). The Third Circuit has similarly held that a plaintiff may rely on challenged expert testimony to satisfy the requirements of Rule 23 only if that expert testimony satisfies the evidentiary standard set out in *Daubert*. *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015).

We agree with the Eighth Circuit, however, which has held that a district court is not limited to considering only admissible evidence in evaluating whether Rule 23's requirements are met. *Zurn Pex*, 644 F.3d at 612–13. Contrary to other courts' conclusory presumptions that Rule 23 proof must be admissible, the Eighth Circuit probed the differences between Rule 23, summary judgment and trial that warrant greater evidentiary freedom at the class certification stage:

> Because summary judgment ends litigation without a trial, the court must

> review the evidence in light of what would be admissible before either the court or jury.
>
> In contrast, a court's inquiry on a motion for class certification is "tentative," "preliminary," and "limited." The court must determine only if questions of law or fact common to class members predominate over any questions affecting only individual members [and if] a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. As class certification decisions are generally made before the close of merits discovery, the court's analysis is necessarily prospective and subject to change, and there is bound to be some evidentiary uncertainty.

Id. at 613 (internal citations and quotation marks omitted). We find the Eighth Circuit's analysis persuasive.

The Supreme Court's guidance in the analogous field of standing is also instructive. Like standing, Rule 23 presents more than a "mere pleading standard." *Wal-Mart*, 564 U.S. at 350. Because the elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required *at the successive stages of*

the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (emphasis added). Hence, the proof required to establish standing varies at the complaint, summary judgment and trial phases. *Id.* Similarly, the "manner and degree of evidence required" at the preliminary class certification stage is not the same as "at the successive stages of the litigation"—*i.e.*, at trial.

The present case aptly illustrates why we license greater evidentiary freedom at the class certification stage: By relying on formalistic evidentiary objections, the district court unnecessarily excluded proof that tended to support class certification. Corona did not dispute the authenticity of the payroll data underlying Ruiz's analysis, nor did it directly dispute the accuracy of his calculations. Instead, Corona argued that Ruiz's declaration and spreadsheet were inadmissible because Ruiz extracted data without explaining his methods, and the district court agreed. But by relying on admissibility alone as a basis to strike the Ruiz declaration, the district court rejected evidence that likely could have been presented in an admissible form at trial. In fact, when Sali and Spriggs submitted their own sworn declarations to authenticate the payroll data and vouch for its accuracy, the district court again leaned on evidentiary formalism in striking those declarations as "new evidence" submitted in reply. That narrow approach tells us nothing about the satisfaction of the typicality requirement—"whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d

497, 508 (9th Cir. 1992). The district court should have considered the declarations of Ruiz, Sali, and Spriggs in determining whether the typicality prerequisite was satisfied.

When conducting its "rigorous analysis" into whether the Rule 23(a) requirements are met, the district court need not dispense with the standards of admissibility entirely. The court may consider whether the plaintiff's proof is, or will likely lead to, admissible evidence. Indeed, in evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert*. *Ellis*, 657 F.3d at 982. But admissibility must not be dispositive. Instead, an inquiry into the evidence's ultimate admissibility should go to the weight that evidence is given at the class certification stage. This approach accords with our prior guidance that a district court should analyze the "persuasiveness of the evidence presented" at the Rule 23 stage. *Id*. The district court abused its discretion here by declining to consider the Ruiz declaration solely on the basis of inadmissibility. Because the district court applied the wrong standard for evaluating the plaintiffs' evidence, we do not reach whether the plaintiffs have in fact demonstrated typicality and leave it to the district court to resolve in the first instance.

B. Spriggs is not an adequate class representative, but Sali remains as an adequate representative plaintiff.

The district court concluded that plaintiff Spriggs is not an adequate class representative because she is not a member of any class she seeks to represent. The

district court reasoned that Spriggs cannot represent a class including "all current and former [RNs] of Defendants . . . *who were classified by Defendants as either full-time or full-time equivalent employees*," given that she was not classified as a full-time employee. We agree. A named plaintiff must be a member of the class she seeks to represent and Spriggs does not qualify. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982). Nevertheless, because Plaintiff Sali remains as an adequate class representative, Spriggs's inadequacy is not a basis to deny class certification. *See* Fed. R. Civ. P. 23(a) ("*One or more* members of a class may sue or be sued as representative parties on behalf of all members . . . ." (emphasis added)).

C. The district court abused its discretion by concluding that attorneys from Bisnar Chase cannot serve as adequate class counsel.

Determining whether representation is adequate requires the court to consider two questions: "(a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 111, 120 (9th Cir. 1998)). Adequacy of representation also depends on the qualifications of counsel. *In re N. Dist. Cal., Dalkon Shield IUD Prods Liab. Litig.*, 693 F.2d 847, 855 (9th Cir. 1982). "[T]he named representative's attorney [must] be qualified, experienced, and generally capable to conduct the litigation . . . ." *Jordan v. L.A. Cty.*, 669 F.2d 1311, 1323 (9th Cir. 1982), *vacated on other grounds by Cty. of L.A. v. Jordan*, 459

U.S. 810 (1982). It is undisputed that there is no conflict here, so the only questions before the district court were whether proposed class counsel were qualified and would prosecute the action vigorously.

The district court concluded that proposed class counsel failed to demonstrate they would adequately serve as class counsel. The district court noted that "attorneys from Bisnar Chase failed to attend any of the depositions of Plaintiffs' putative class witnesses' (four scheduled depositions), failed to produce Plaintiffs' expert, Falkenhagen, for a deposition despite being ordered to do so by a Magistrate Judge,[3] and, as detailed in the typicality analysis, failed to submit any sworn testimony from Plaintiffs in support of the class certification motion." The court also noted that Bisnar Chase submitted nearly identical declarations from twenty-two putative class members attesting to their personal experiences with Corona's employment practices. The district court found that "Plaintiffs' counsel's 'lax approach' to personalizing declarations, ensuring that declarants knew and understood what they were signing, and verifying the accuracy of the statements is 'unacceptable' conduct."

The district court did not indicate what legal standard it relied on in evaluating the adequacy of class counsel. Moreover, the district court discussed only the apparent errors by counsel with no mention of the evidence in the record demonstrating class

[3] The district court sanctioned Bisnar Chase under Federal Rule of Civil Procedure 37 for failing to produce Falkenhagen at deposition after being ordered to do so. We affirmed the sanctions order. *See Sali v. Corona Reg'l Med. Ctr.*, 884 F.3d 1218, 1225 (9th Cir. 2018).

counsel's substantial and competent work on this case. Bisnar Chase attorneys have incurred thousands of dollars in costs and invested significant time in this matter, including preparing dozens of interrogatories and requests for production, taking numerous depositions, retaining experts, defending the named plaintiffs' depositions and the deposition of the plaintiffs' expert economist, reviewing and analyzing thousands of documents, interviewing hundreds of class members, obtaining signed declarations, and preparing and filing a motion for class certification. Additionally, attorney Jerusalem Beligan has extensive experience litigating class-action cases in state and federal court.

At this early stage of the litigation, the district court's decision that attorneys from Bisnar Chase could not adequately serve as class counsel was premature and an abuse of discretion. However, the district court is not precluded from considering counsel's prior sanctions as evidence of inadequacy if Bisnar Chase attorneys continue to neglect their duties.

D. The district court erred by denying certification of the proposed rounding-time and wage-statement classes on the basis that they failed Rule 23(b)(3)'s predominance requirement.

Rule 23(b)(3)'s predominance inquiry is "far more demanding" than Rule 23(a)'s commonality requirement. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). When evaluating predominance, "a court has a 'duty to take a close look at whether common

questions predominate over individual ones,' and ensure that individual questions do not 'overwhelm questions common to the class.'" *In re Hyundai*, 881 F.3d at 691 (quoting *Comcast Corp.*, 569 U.S. at 34). "The main concern of the predominance inquiry under Rule 23(b)(3) is 'the balance between individual and common issues.'" *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 545–46 (9th Cir. 2013) (quoting *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 935, 959 (9th Cir. 2009)).

Because the district court concluded that the predominance requirement was met by the proposed regular-rate class, and because the parties agree that the waiting-time class is entirely derivative of other proposed classes, we review the district court's predominance analysis with respect to the rounding-time and wage-statement classes only.

1. The district court's determination that individual questions predominated in the claims of the proposed rounding-time class was based on an error of law.

For the purpose of class certification, the parties do not dispute how Corona's rounding-time pay system worked. Corona used an electronic timekeeping system that tracked when employees clocked in and clocked out and rounded the time to the nearest quarter hour. Corona paid RNs an hourly wage calculated based on that rounded time. For example, if an RN clocked in at 6:53 a.m. or 7:07 a.m., his or her time was rounded to 7:00 a.m. Kronos recorded both actual clock-in and rounded times.

Sali and Spriggs allege that Corona's rounding-time policy resulted in systematic underpayment of RNs. They seek certification of a rounding-time class consisting of:

> All current and former nurses who work or worked for Defendants during the Proposed Class Period who were not paid all wages due them, including straight time, overtime, double time, meal premiums, and rest premiums due to Defendants' rounding time policy.

The district court concluded that individualized issues predominate in determining Corona's liability with respect to the proposed rounding-time class because "whether [Corona's] rounding policy resulted in the underpayment of the proposed class members, and was thus against California law, depends on individual findings as to whether RNs were actually working when punched in." In support of this conclusion, the district court cited Corona's explanation that "time records are not a reliable indicator of the time RNs actually spent working because RNs frequently clock-in for work and then perform non-compensable activities, such as waiting in the break room, getting coffee, or chatting with their co-workers, until the start of their scheduled shift." Thus, the court reasoned, "determining whether [Corona] underpaid members of the Rounding Time Class would entail factualized inquiries into whether particular RNs were actually working during the grace period, and whether the rounding of time during this period resulted in the underpayment of hours actually

worked—the only conduct that is prohibited under California law."

Sali and Spriggs first argue that whether RNs were "actually working" is a merits question that should not have been considered at the class certification stage. In the alternative, Sali and Spriggs argue that the district court's analysis was based on an error of California law because compensable time is not measured by time employees spend "actually working." Sali and Spriggs's argument that the district court improperly reached a merits question fails because the district court plainly did not attempt to resolve whether RNs were actually working on the merits. Instead, the court merely concluded that, assuming clock-in times were on average rounded up to the shift-start time, individualized questions would predominate in determining whether RNs were "actually working" during any period between their clock-in time and the start of their shift. But the district court clearly misapplied California law in reaching that conclusion.

A rounding-time policy is permissible under California law if it "is fair and neutral on its face and 'it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have *actually worked*.'" *See's Candy Shops, Inc. v. Super. Ct.*, 148 Cal. Rptr. 3d 690, 704–05 (Ct. App. 2012) (quoting 29 C.F.R. § 785.48) (emphasis added). The district court therefore did not err by concluding that whether RNs were "actually working" during the time between their clock-in and shift-start time is a relevant inquiry in this

case. But by suggesting that "non-compensable activities, such as waiting in the break room, getting coffee, or chatting with their co-workers" are categorically not time "actually worked," the district court incorrectly interpreted "actually worked" to mean only time spent engaged in work-related activities.

Under California law, compensable time is "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." *Morillion v. Royal Packaging Co.*, 995 P.2d 139, 141 (Cal. 2000) (quoting Cal. Code Regs., tit. 8, § 11140, subd. 2(G)). Both parties correctly interpret the term "actually worked" as used in *See's Candy* as referencing this compensable-time standard. The district court also nominally acknowledged "employer control" as part of the standard, but in doing so the court materially misstated the law. The district court stated that "[t]he punch times are only indicative of time 'actually worked' if RNs are working *and* under the control of their employer whenever they are punched into work." (emphasis added). In fact, under California law, time is compensable when an employee is working *or* under the control of his or her employer. *See Morillion*, 995 P.2d at 141.

California's compensable-time standard encompasses two categories of time. First, time is compensable if an employee is "under the control" of his or her employer, whether or not he or she is engaging in work activities, such as by being required to remain on the employer's premises or being restricted from engaging in certain personal activities. *See id.* at 145–

47 (holding that compulsory travel time on bus from departure point to work site is compensable); *Aguilar v. Assn. of Retarded Citizens*, 285 Cal. Rptr. 515, 519–21 (Ct. App. 1991) (holding that time employees are required to be on premises is included in hours worked). Second, time is compensable if an employee "is suffered or permitted to work, whether or not required to do so." *Morillion*, 995 P.2d at 141 (citing Cal. Code Regs., tit. 8, § 11140, subd. 2(G)). This may include "time an employee is working but *is not* subject to an employer's control," such as "unauthorized overtime, which the employer has not requested or required." *Id.* at 145 (emphasis added).

The district court did not abuse its discretion to the extent it concluded that individualized questions predominate on whether the RNs fall within the second category, which amounts to a question of whether they engaged in work activities even if they were not required to do so. But the district court erred by assuming that was the only question to be decided. Under California law, the RNs were also actually working if they were subject to Corona's control even if they were not engaging in work activities—for example, if they were required to remain on the hospital premises during that time. *See Aguilar*, 234 Cal. Rptr. at 520. The district court failed to consider whether the RNs could establish on a class-wide basis that they were subject to Corona's control during the grace period even if the RNs were not always engaged in work-related activities during that time.

This "employer control" question necessarily requires an employer-focused inquiry into whether Corona had a policy or practice that restricted RNs in a

manner that amounted to employer control during the period between their clock-in and clock-out times and their rounded shift-start and shift-end times. The types of activities RNs generally engaged in during this period are certainly relevant, but the activities of any particular RN are not dispositive of whether he or she was under Corona's control. Determination of this question does not depend on individualized factual questions and is capable of class-wide resolution. Accordingly, the district court abused its discretion by denying certification of the rounding-time class on the basis of predominance.

2. The district court's determination that individual questions predominate in the claims of the proposed wage-statement class was premised on legal error.

Corona issued wage statements to RNs that listed the employer as Corona Regional Medical Center, rather than Corona's corporate name, UHS-Corona, Inc. Sali and Spriggs allege this violated California law and seek certification of a class consisting of "[a]ll current and former nurses who work or worked for Defendants during the Proposed Class Period who were not provided pay stubs that complied with Labor Code § 226." The district court concluded that this proposed wage-statement class failed Rule 23(b)(3)'s predominance requirement because "demonstrating that each class member was damaged by the claimed inaccuracy in the wage statement is a critical individualized issue in determining liability that is not amenable to common systems of proof." In doing so, the district court noted that it agreed with Corona's argument that "common issues do not predominate 'because, in order

to determine liability, each employee must prove for each paystub received during the relevant time period that he/she was damaged by the inadequate pay stub.'"

The California Labor Code requires that a wage statement include, among other things, "the name and address of the legal entity that is the employer." Cal. Lab. Code § 226(a)(8). The Code specifies the amount of damages for violation of this requirement.[4] The Code further provides that "[a]n employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required . . . and the employee cannot promptly determine from the wage statement alone . . . the name and address of the employer." *Id.* § 226(e)(2)(B)(iii).

The district court erred by concluding that damages for members of the wage statement class would require an individualized determination. Because the Code specifies that a violation of § 226 is a per se injury, there is no individualized issue of damages. If Corona knowingly and intentionally failed to provide the name of the legal entity that was the class mem-

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[4] California Labor Code § 226(e)(1) provides:

> An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorney's fees.

bers' employer, each class member was injured in precisely the same manner by each paystub in which Corona failed to provide that information. *See id.* Moreover, even if there is variation in the amount of each class members' damages, this is an insufficient basis by itself to deny certification. *See Yokoyama*, 594 F.3d at 1094 (the "amount of damages is invariably an individual question and does not defeat class action treatment" (quoting *Blackie*, 524 F.2d at 905)).

The district court abused its discretion by denying certification on the basis that individual questions predominate in the claims of the proposed wage-statement class.

CONCLUSION

For the reasons discussed, the district court's denial of class certification is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

MARILYN SALI, *ET AL*. V. UNIVERSAL HEALTH SERVICES OF RANCHO SPRINGS, INC., *ET AL*.	Case No. CV 14-985 PSG (JPRx) Date: June 3, 2015

Proceedings (In Chambers): Order DENYING Plaintiffs' Motion for Class Certification

Before the Court is Plaintiffs Marilyn Sali ("Sali") and Deborah Spriggs' ("Spriggs") (collectively, "Plaintiffs") motion for class certification. Dkt. # 69. The Court finds this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. After considering the arguments in the moving, opposing, and reply papers, the Court DENIES the motion for class certification and appointment of class representatives and class counsel.

I. Background

Plaintiffs in this case attempt to bring class action claims on behalf of various subclasses of registered nurses ("RNs") against an acute care hospital and a healthcare management company for wage and hour violations.

Defendant UHS-Corona, Inc. dba Corona Medical Regional Center ("CMRC") is an acute care hospital that employs or has employed the proposed class members in this case. *See Mot.* 2:10-14; *Not.* 3:2-6. CMRC has eight nursing units and hires RNs to work Alternative Workweek Schedules ("AWSs") – three 12-hour shifts per week. *Mot.* 4:13-17. RNs are paid an hourly wage, rather than salaries. *Id.* 4:18-20. To track hours worked by its RNs, CMRC uses a system called Kronos. *Id.* 4:22.

Defendant UHS-Delaware is a healthcare management company that manages and provides administrative support to CMRC and other acute care hospitals in the Universal Health Services, Inc. ("UHS") network in California. *See id.* 2:10-24. Plaintiffs assert their claims against both CMRC and UHS-Delaware under the theory that, due to UHS-Delaware's extensive control over the operations of CMRC, UHS-Delaware is a "joint employer" of the proposed class members. *See id.* 3:4-12. Defendants maintain that Plaintiffs' joint employer arguments are more appropriately addressed through a forthcoming motion for summary judgment and limit their opposition to this motion to Plaintiffs' failure to satisfy the certification requirements of Federal Rule of Civil Procedure 23 ("Rule 23"). *See Opp.* 1:1 n.1. Accordingly, the Court characterizes the current allegations as claims against "Defendants" without evaluating the employer status of UHS-Delaware at this point in the litigation.

Plaintiffs assert the following causes of action against Defendants in their First Amended Complaint ("FAC"): (1) Failure to pay all Regular Hourly Wages

for all requisite work hours (Cal. Lab. Code §§ 201-202, 218); (2) Failure to pay all Overtime Wages based on all requisite work hours (Cal. Lab. Code §§ 510, 1194); (3) Failure to pay correct Overtime Rate of Pay (Cal. Lab. Code §§ 510, 1194); (4) Failure to pay Premium Wages for denial of Meal and Rest Periods (Cal. Lab. Code §§ 226.7, 512); (5) Failure to pay all Wages due upon Termination of Employment (Cal. Lab. Code § 203); (6) Failure to provide Accurate Itemized Wage Statements (Cal. Lab. Code § 226); and (7) Violation of California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code § 17200). *See* Dkt. # 1; *Not.* 2:5-19.[1]

Plaintiffs propose a general class and seven subclasses to track their specific allegations of Defendants' wrongdoing. The general class is comprised of the following: "all current and former [RNs] of Defendants [] who were classified by Defendants as either full-time or full-time equivalent employees, who were not paid for all wages due from August 23, 2009 through the present ('Proposed Class Period')." *Not.* 3:2-6. The seven subclasses share those characteristics, as well as additional narrowing attributes:

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[1] Plaintiffs also assert an eighth cause of action for violation of the Private Attorneys General Act of 2004 ("PAGA") (Cal. Lab. Code §§ 2699-2699.5). Plaintiffs cite to a string of California district court cases holding that PAGA actions need not satisfy Rule 23 to proceed on a class representative basis and do not seek to certify the claim under Rule 23. *See Mot*. 2:19 n.1 (citing, e.g., *Ochoa-Hernandez v. Cjaders Foods, Inc.,* No. C 08-2073 MHP, 2010 WL 1340777, at *4-5 (N.D. Cal. Apr. 2, 2010)). Defendants appear to agree with this approach, as they do not address the PAGA claim in their opposition brief and have filed a separate motion for summary judgment as to the claim, set for hearing on July 6, 2015. *See* Dkt. # 110.

1) **Rounding Time Class**: RNs "who were not paid all wages due them, including straight time, overtime, double time, meal premiums, and rest premiums *due to Defendants' rounding time policy*." *Id.* 3:9-4:2 (emphasis added).

2) **Short Shift Class**: RNs "who work or worked pursuant to an [AWS] . . . who were 'flexed' between the 8th and 12th hour of work due to low patient census and not paid daily overtime." *Id*. 4:4-7.

3) **Meal Period Class**: RNs "who work or worked pursuant to an AWS . . . who signed an invalid meal period waiver, and [were] (1) not provided a second meal break after 10 hours; (2) not provided meal periods before 5 and 10 hours of work; and/or (3) not provided a second meal period after 12 hours of work." *Id.* 4:8-14.

4) **Rest Break Class**: RNs "who were not relieved of all duty and therefore not authorized and permitted to take 10-minute uninterrupted rest breaks for every four hours worked." *Id.* 4:15-18.

5) **Regular Rate Class**: RNs "who were not paid at the correct regular rate for overtime, double time, meal premiums, and rest premiums." *Id.* 4:20-23.

6) **Wage Statement Class**: RNs "who were not provided pay stubs that complied with Labor Code § 226." *Id.* 4:24-27.

7) **Waiting Time Class**: "All former [RNs] who worked for Defendants from August 23, 2010 who were not paid all wages due at the time of separation from their employment with Defendants." *Id.* 4:28-5:2.

Plaintiffs move to certify these seven subclasses, appoint themselves as class representatives, and appoint Bisnar Chase LLP ("Bisnar Chase") as class counsel. *See* Dkt. # 69.

II. Legal Standard

A plaintiff seeking class certification must affirmatively demonstrate that it meets the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-14 (1997). To satisfy Rule 23(a), the plaintiff must show that: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). To certify a class under Rule 23(b)(3), as Plaintiffs seek to do here, *see Mot.* 14:12-25:6, the plaintiff must also show that: (5) "questions of law or fact common to class members predominate over any questions affecting only individual class members," and (6) "that a class action is superior to other available methods for fairly and efficiently adjudicating the

controversy." Fed. R. Civ. P. 23(b)(3).[2] These requirements are often referred to, respectively, as numerosity, commonality, typicality, adequacy, predominance, and superiority.

The Court must conduct a "rigorous analysis" to confirm that the Rule 23 standard is met. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982); *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). As the Supreme Court has explained: "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (emphasis in original).

"While some evaluation of the merits frequently 'cannot be helped' in evaluating commonality, [*Wal-Mart*, 131 S. Ct. at 2551], that likelihood of overlap is 'no license to engage in free-ranging merits inquiries at the certification stage.'" *Stockwell v. City and Cnty. of San Francisco*, 749 F.3d 1107, 1111 (9th Cir. 2014) (quoting *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013)). "Merits questions may be considered to the extent – but

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[2] Plaintiffs' cursory reference asserting satisfaction of Rule 23(b)(1)(A) is not persuasive. *See Mot*. 13:14-14:11. In large part, the proposed class seeks damages, and "individualized monetary claims belong instead in Rule 23(b)(3)." *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011); *see also Adoma v. Univ. of Phoenix, Inc*., 270 F.R.D. 543, 547-48 (E.D. Cal. 2010) (certification of a state wage and hour claim under Rule 23(b)(1) is inappropriate).

only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 133 S. Ct. at 1195.

III. Discussion

Defendants oppose class certification on multiple grounds, but focus most heavily on Plaintiffs' failure to satisfy Rule 23(b)'s predominance requirement by demonstrating that "questions of law and fact common to the class members predominate over any questions affecting only individual members[.]" Fed. R. Civ. P. 23(b); *see Opp*. 10:4-22:12. The Court addresses these arguments first because class certification is largely precluded on this basis. The Court additionally addresses Defendants' arguments regarding typicality and adequacy because the Court concludes that Plaintiffs also fail to satisfy these requirements of Rule 23(a).

A. Predominance

The predominance test gauges "whether proposed classes are sufficiently cohesive to warrant adjudication by representation . . . [and] focuses on the relationship between the common and individual issues. 'When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis.'" *Hanlon v. Chrystler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (citation omitted). "[P]redominance does not require plaintiffs to prove that every element of a claim is sub-

ject to class wide proof: they need only show that common questions predominate over questions affecting only individual class members." *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944-SC, 2013 WL 5391159, at *2 (N.D. Cal. Sept. 24, 2013) (citing *Amgen*, 133 S. Ct. at 1196).

Defendants attack the predominance of common questions of law and fact on a class-by-class basis, and the Court's analysis tracks that framework.

i. Rounding Time Class

The Rounding Time Class includes RNs who work or worked for Defendants during the Proposed Class Period "who were not paid all wages due them, including straight time, overtime, double time, meal premiums, and rest premiums *due to Defendants' rounding time policy*." *Not.* 3:9-4:2 (emphasis added).

The parties do not dispute how CRMC's rounding practice operates. *Compare Mot.* 5:12-19, *with Opp.* 2:11-13, 10:10-15. CRMC uses an electronic timekeeping system called Kronos. *See Merriman Decl.* ¶ 3. Kronos automatically rounds clock-in and clock-out punch times to the nearest quarter hour. *Id.* This practice operates to give RNs a seven-minute "grace period" on either side of an hour – if an RN clocks in at 6:53 a.m. or 7:07 a.m., her time is rounded to 7:00 a.m. *Beligan Decl.*, Ex. 11 ["Merriman Depo."] at 149:18-150:19. Defendants pay RNs based on rounded time, not actual time, and Kronos time records display both the actual punch and rounded times. *See id.* 172:24-173:7.

Plaintiffs challenge the legality of Defendants' rounding time practice, arguing that, over time, the practice results in the failure of Defendants to compensate RNs for all of their time worked. *See Mot.* 16:1-19.

Under California law, an employer is entitled to use a rounding policy "if the rounding policy is fair and neutral on its face and 'it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.'" *See's Candy Shops, Inc. v. Super. Ct.*, 210 Cal. App. 4th 889, 907 (2012) (quoting 29 C.F.R. § 785.48). Plaintiffs do not contend that Defendants' policy is not fair and neutral on its face (*i.e.*, it only rounds up); rather, their theory of liability is that, over time, the policy fails to compensate RNs for all hours actually worked because RNs lose more minutes than they gain as a result of the policy. The issue for class certification analysis is not whether or not that theory of liability is correct, but how Plaintiffs intend to prove it.

Plaintiffs assert that they can prove liability for the Rounding Time Class by comparing punched time to rounded time using existing Kronos records and analyzing whether the punched times reflect longer hours than the recorded times for which the proposed class members were actually paid. *See Mot.* 5:19-20 ("Kronos time records display the actual punch and rounded time; thus determining liability and damages is straightforward."). Defendants counter that reliance on the punched times to determine time "actually worked" by RNs, the legally significant concept, is incorrect. *See Opp.* 10:19-12:27. The punch times are

only indicative of time "actually worked" if RNs are working and under the control of their employer whenever they are punched into work. *See See's Candy*, 210 Cal. App. 4th at 909. But "[w]hile clocking in and clocking out are relevant to and probative of whether an employee is under an employer's control, they are far from dispositive . . ." *Forrand v. Fed. Express Corp.*, No. CV 08-1360 DSF (PJWx), 2013 WL 1793951, at *3 (C.D. Cal. Apr. 25, 2013).

Defendants explain that "Kronos time records are not a reliable indicator of the time RNs actually spent working because RNs frequently clock-in for work and then perform non-compensable activities, such as waiting in the break room, getting coffee, or chatting with their co-workers, until the start of their scheduled shift." *Opp.* 11:5-10 (citing, e.g., *Gumamit Decl.* ¶ 5; *Stanford Decl.* ¶ 4; *Wunderlich Decl.* ¶ 4; *Hayes Decl.*, Ex. H ["Hayde Depo."] at 36:14-37:9). Thus, determining whether Defendants underpaid members of the Rounding Time Class would entail factualized inquiries into whether particular RNs were actually working during the grace period, and whether the rounding of time during this period resulted in the underpayment of hours actually worked – the only conduct that is prohibited under California law.

Plaintiffs' response to this argument is off-point. Plaintiffs accuse Defendants of attacking the Rounding Time Class by "making a merits-based argument" that is not appropriate for class certification analysis. *See Reply* 2:3-27. But Defendants do not argue that their rounding policy is neutral in effect and thus lawful; rather, they argue that the determination of whether or not it is neutral in effect requires analysis

of evidence particular to each RN's punch practices rather than rote comparison of punch times to rounded times. Plaintiffs do not refute Defendants' exemplary showing that RNs do not always start working immediately after punching in. *See id.* 1:14-4:10. Instead, Plaintiffs point out that Defendants' expert observed a net gain to Defendants in minutes worked per shift when analyzing punch data versus rounding data and cite to cases in which courts certified rounding questions. *See id.* 3:2 n.1 (citing *Alonzo v. Maximus, Inc.*, 275 F.R.D. 513, 522 (C.D. Cal. 2011); *Mendez v. R+L Carriers, Inc.*, No. C 11-2478 CW, 2012 WL 5868973, at *16-18 (N.D. Cal. Nov. 19, 2012); *Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 516 (9th Cir. 2013)).

Although the courts in *Alonzo* and *Mendez* certified classes challenging employers' rounding practices, neither court specifically raised or discussed the possibility of individualized inquiries that necessarily arise when evidence suggests that proposed class members' punch times do not accurately reflect hours actually worked. *See Alonzo*, 275 F.R.D. at 521-22, 525-26; *Mendez*, 2012 WL 5868973, at *9, 16-18. Thus, the Court is not persuaded by the predominance reasoning in those cases. The Ninth Circuit in *Leyva* did not conduct any analysis of individualized versus common issues in a rounding policy class; rather, it analyzed whether the district court abused its discretion by denying certification based solely on its finding that determining damages for each class member would be individualized. *See Leyva*, 716 F.3d at 513-16. Accordingly, *Leyva* is not persuasive authority for analyzing predominance of common issues when determining liability for a rounding policy class like the presently proposed class.

Because determining whether Defendants' rounding policy resulted in the underpayment of the proposed class members, and thus was against California law, depends on individual findings as to whether RNs were actually working when punched in, the Court concludes that individualized issues predominate in determining Defendants' liability as to the proposed Rounding Time Class members.

ii. Short Shift Class

The Short Shift Class includes RNs "who work or worked pursuant to an [AWS] . . . who were 'flexed' between the 8th and 12th hour of work due to low patient census and not paid daily overtime." *Not.* 4:4-7. The RNs in this class are hired to work 12-hour AWS shifts; however, during "low census" (when there are more nurses than patients), Defendants sometimes "flex" RNs after their eighth hour of work and instruct them to go home. *Thompson Depo.* 118:3-10.

Under California law, "[i]f an employer . . . requires an [AWS] employee to work fewer hours than those that are regularly scheduled by the agreement, the employer shall pay the employee overtime compensation at a rate of one and one-half (1 1/2) times the employee's regular rate of pay for all hours worked in excess of (8) hours . . . for the day the employee is required to work the reduced hours." *Seckler v. Kindred Healthcare Operating Group, Inc.*, No. SACV 10-01188 DDP (RZx), 2013 WL 812656, at *2 (C.D. Cal. Mar. 5, 2013) (citing Cal. Code Regs. tit. 8, § 11050(3)(B)(2)). "In essence, the employer must pay a 'short shift penalty' if AWS employees are required to

work fewer hours than scheduled." *Id.* (quoting *Huntington Memorial Hosp. v. Super. Ct.*, 131 Cal. App. 4th 893, 909 (2005)). "The short-shift penalty is intended to give employers the benefit of an AWS while protecting employees by requiring regular shifts." *Id.*

Plaintiffs assert that Defendants have a "policy of 'flexing' nurses and not compensating them at the overtime rate for hours worked between the 8th and 12th hour of work," as required by law. *See Mot.* 17:21-22. Defendants counter, with evidence, that their formal policy is in line with the law and that its RNs are aware of the availability of short shift penalties. *See Opp.* 3:21-4:9, 13:4-16. Defendants' short shift policy is set forth in CRMC's "Meal Period, Rest Break, and Short Shift" policy provided in the Policy and Procedures Manual ("PPM"):

> Employees working an Alternative work week (10-12 hour shift employees) schedule and are requested to leave earlier than the 10 or 12 hours by the hospital the employee [sic] will be paid at time and a half for the hours worked after eight hours in a day to the 12th hour. The employee must log the short shift on the Alternate Work Week log and have the supervisor confirm the entry.

Thompson Decl. ¶ 5, Ex. C, D. During the new hire process, RNs are provided with this section of the PPM in a new hire packet. *Id.* ¶ 5. The PPM is also available to RNs via CRMC's intranet. *Id.* ¶ 7.

Moreover, putative class members have confirmed that they received this policy and understood that they were entitled to a short shift premium if they were involuntarily flexed off after eight hours. *See Gumamit Decl.* ¶ 10; *Oyler Decl.* ¶ 8; *Leonardo Decl.* ¶ 8; *Spriggs Depo.* 147:8-15; *Noriega Depo.* 91:10-92:9; *Hayde Depo.* 68:12-70:8; *Def. Compendium of Evid.* ["Def. CE"], Ex. 21 at 20-21 (excerpt from Steyers-Lucen Depo. indicating that CRMC made her aware of the entitlement to short shift penalties "at one point during a staff meeting"). Some RNs have also verified that they received these penalty payments in the appropriate circumstances. *Oyler Decl.* ¶ 8; *Hayde Depo.* 68:12-70:8. However, other RNs indicate that they did not know about the short shift policy. *See Plaintiffs' Compendium of Evid.* ["Pl. CE"], Ex. 1 at 3, 31.

Thus, to the extent that Plaintiffs' theory of liability is based on the premise that Defendants do not have a lawful short shift policy in place, the evidence does not support these premises. As indicated in the formal policy, Defendants do require RNs to make an entry in the Alternative Work Week Log if they are involuntarily flexed off after the eighth hour but before the last scheduled hour of their shift in order to obtain a short shift premium. *See Merrimen Decl.* ¶ 6; *id.*, Ex. B (copy of Alternative Work Week Log). However, Plaintiffs do not appear to take issue with this aspect of the policy. *See Mot.* 17:8-18:13; *Reply* 9-21.

At class certification, the Court does not evaluate the merits of a claim, it considers whether evaluating the merits of a claim raises common questions with common answers. *See Stockwell*, 749 F.3d at 1112. Plaintiffs assert that Defendants do not have a lawful

short shift policy and so do not pay the putative class members short shift penalties when appropriate. Given that Defendants have a facially compliant policy and Plaintiffs do not claim that Defendants fail to pay premiums when short shifts are recorded in the Alternate Work Week Log, Plaintiffs' core argument is that "class members were not informed about their entitlement to short-shift penalties." *Mot.* 18:3-8. This argument is subject to both common and individual proof – evidence regarding Defendants' process of informing RNs about the policy as well as individual testimony from RNs as to their understanding and awareness of the policy, and the latter form of proof generates different answers, as already demonstrated in this motion.

Defendants additionally argue that individual issues predominate in this liability analysis for a different reason, claiming that "determining liability requires a case-by-case analysis as to whether any given employee voluntarily chose to leave early on a particular day or was requested to do so by the hospital." *Opp.* 13:21-14:1. Defendants assert that staffing sheets, time records, and payroll records do not indicate whether RNs' leaving before the end of their shift was voluntary, and so whether or not the short shift penalty is triggered depends on an RN-by-RN inquiry. *Id.* 14:1-7 (citing *Kemp. Depo.* 45:22-46:17 (the administrator for the online-scheduling system explaining that the master scheduling system does not maintain whether an RN was sent home voluntarily or not)). However, Plaintiffs report that time records do contain notes indicating when nurses left "voluntarily" or "involuntarily." *Reply* 9:13-14. Plaintiffs cite to an updated expert report submitted on reply stating that

"there are notes for shifts in the Punch Data that include verbiage indicating whether flexes were voluntary or involuntary." *See Falkenhagen Decl.*, Ex. 2 at p.5 n.2. First, it is generally improper for the moving party to introduce new facts or different legal arguments in the reply brief beyond those that were presented in the moving papers. *See Ojo v. Farmers Group, Inc.*, 565 F.3d 1175, 1185 n.13 (9th Cir. 2009). Moreover, Plaintiffs' damages expert cites to "Example Punch Data" indicating that examples of the data with the voluntary/involuntary notations are contained at "Exhibit A," but the Court was unable to locate those documents in the record. The Court is not convinced that whether or not an RN flexed off voluntarily or involuntarily after his or her eighth hour of work is information available in Defendants' records.

On the basis of the foregoing, the Court perceives that, in order to prove liability for a Short Shift Class member, Plaintiffs must demonstrate the member was involuntarily flexed off on a particular day and did not make a short shift entry in the Alternate Work Week Log because the member was unaware of the policy that doing so would enable the member to receive a pay premium. Because both of these inquiries rely on evidentiary showings specific to the class members, the Court concludes that individual questions predominate over common questions for this class.

iii. Meal Period Class

The Meal Period Class includes RNs "who work or worked pursuant to an AWS. . . who signed an invalid

meal period waiver, and [were] (1) not provided a second meal break after 10 hours; (2) not provided meal periods before 5 and 10 hours of work; and/or (3) not provided a second meal period after 12 hours of work." *Id.* 4:8-14. Plaintiffs explain that they are challenging the validity of Defendants' Meal Period Waiver on two grounds: (1) Defendants have a blanket policy requiring waiver of a meal period as a condition of employment; and (2) even if the waivers are voluntarily signed, they illegally prohibit RNs who work more than 12 hours in a shift from taking a second meal break. *See Mot.* 18:14-19:22.

Plaintiffs cannot certify this class because they have not demonstrated with credible evidence that Defendants have these purported "policies." Plaintiffs' actual arguments are that, contrary to the documentary evidence and Defendants' stated policies, RNs were pressured into waiving meal breaks or were unaware that they could take a second meal break on shifts that exceeded twelve hours. As demonstrated by the evidence before the Court, resolution of these contentions are not subject to common proof or answers because putative class members would answer these individualized questions differently.

Defendants' meal policy, contained in the section of the PPM that also covers the short shift policy, outlines the following lawful terms:

> Employees who work a shift longer than five hours are provided with an unpaid 30 minutes meal period by the end of the fifth hour of work . . . Employees working 10-12 hours in a day

> are entitled to two unpaid meal periods, but have the option of waiving one of the two meal periods by entering into a Meal Waiver agreement. This waiver is voluntary and is not a condition of employment.

Thompson Decl. ¶ 5, Ex. C, D. This policy is also set forth in the Employee Handbook and in a "Meal and Rest Break Update" that was distributed to RNs in May 2010 and signed by Plaintiffs. *See id.* ¶¶ 4, 7, Ex. A, B, F, G.

The Meal Waiver itself is clear that RNs can select to waive or not waive a meal period because the waiver describes itself as "voluntary" and offers both waiver and no-waiver options, instructing the RN to select whichever they prefer:

MEAL PERIOD WAIVER
12 HOUR SHIFT

This will acknowledge that I regularly work a shift in excess of eight (8) hours and wish to waive one of the two meal periods I would otherwise be entitled to receive under state law. In accordance with the requirements of Wage Order 5, this certifies my voluntary waiver of a meal period each day of work. I also understand that the Hospital or I may revoke this "Meal Period Waiver" at any time by providing at last one day's advance notice in writing of the decision to do so. This waiver will remain in effect until I exercise, or the Hospital exercises, the option to revoke the waiver.

I acknowledge that I have read this waiver, understand it and voluntarily agree to it provisions.

☐ I acknowledge that I have read this waiver, understand it and voluntarily waive one of my meal periods.

☐ I acknowledge that I have read this waiver, understand it and do not wish to waive one of my meal periods.

_____	_____
Employee Signature	Date
_____	_____
Print Name	Department
_____	_____
Authorized Signature	Date

See Def. CE, Ex. 1 ("Thompson Decl."), Ex. E. CRMC's Senior Human Resource Specialist avers that while, as Plaintiffs repeatedly emphasized, signing the waiver form is a condition of employment, selecting waiver as opposed to no-waiver is not. *Thompson Decl.* ¶ 6. The content of the decision is "entirely voluntary." *Id.* Moreover, as stated in the Meal Waiver, the waiver is revocable at any time and CRMC occasionally asks RNs to "reconfirm" their waiver selection. *See id.* ¶ 8, Ex. H, I (providing evidence that the named Plaintiffs have reconfirmed their waivers during the class period).

Plaintiffs also argue that the Meal Waiver is invalid because it prohibits RNs who work more than 12 hours from taking a second meal break, but nothing

in the Meal Waiver prohibits meal breaks in that situation.[3] Defendants present evidence that putative class members and department heads understand that RNs who work over their regular 12 hour shift are entitled to take a second meal period. *See Huntley Decl.* ¶ 7; *Hayes Decl.*, Ex. F ["Steyer-Lucens Depo."] 74:4-7.

In light of the formal lawful policies that Defendants have in place for meal periods, Plaintiffs' theories of liability depend on individualized showings that the putative class members signed their waivers involuntarily or were unaware of their entitlement to a second meal period after 12 hours such that Defendants effectively did not provide one. Records alone showing that RNs missed or cut short meal breaks on certain days is not enough to demonstrate meal break violations by Defendants in the absence of a uniform unlawful policy. *See Washington v. Joe's Crab Shack*, 271 F.R.D. 629, 641 (N.D. Cal. 2010) ("a plaintiff must do more than show that a meal break was not taken to establish a violation . . . he must show that the employer impeded, discouraged, or prohibited him from taking a proper break"); *Ordonez v. Radio Shack, Inc.*, No. CV 10-7060-CAS (JCGx), 2013 WL 210223, at *7 (C.D. Cal. Jan. 17, 2013) ("As to the statistical evidence . . . [of] late, short, or missed meal periods . . .

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[3] This argument is based on a recent California Court of Appeals ruling that held that healthcare workers cannot waive their second meal periods on shifts longer than 12 hours; this ruling is currently on appeal to the California Supreme Court. *See Gerard v. Orange Coast Memorial Med. Ctr.,* 234 Cal. App. 4th 285, 183 Cal. Rptr. 3d 721, 730 (2015), review granted and opinion superseded by No. S225205, 2015 WL 2405215 (Cal. May 20, 2015).

there is no way of determining on a classwide basis whether these were violations, a legal conclusion, or whether individual class members voluntarily opted to start their meal break late, cut it short, or not take a break at all . . . [I]n the absence of a uniform corporate policy, there is no common issue capable of resolution on a classwide basis."). Thus, the Court concludes that common issues do not predominate over these individual issues at the heart of Plaintiffs' theories of liability.

iv. Rest Break Class

The Rest Break Class consists of RNs "who were not relieved of all duty and therefore not authorized and permitted to take 10-minute uninterrupted rest breaks for every four hours worked." *Not.* 4:15-18. Again, Defendants' formal policy is legal. *Mot.* 20:9-10 n.12; *Thompson Decl.* ¶ 5, Ex. C, D. As employers are only required to "authorize and permit" rest periods, rather than ensure that they are taken, liability for missed breaks is not determined by whether they were taken but by whether and *why* breaks were missed. *See White v. Starbucks Corp.*, 497 F.Supp.2d 1080, 1085-86 (N.D. Cal. 2007). Certification of a rest break class is not appropriate if the thrust of the liability argument is that the class members were "too busy" to take breaks because the argument is not subject to common proof and requires individualized inquiry into each RN's break decisions each shift. *See Kenny v. Supercuts, Inc.*, 252 F.R.D. 641, 646 (N.D. Cal. 2008) (The "theory – that the stores were too busy to give employees a meaningful opportunity to take breaks – requires an individual inquiry into each store, each shift, each employee.").

Recognizing the necessity of providing a common policy to survive predominance analysis, Plaintiffs claim that their theory of rest break liability is that Defendants' "policy of failing to provide 'relief' or 'break' nurses denied RNs the opportunity to take 10-minute uninterrupted rest breaks." *See Mot.* 20:12-18; *Reply* 9:22-11:9. However, the existence of this policy is not amenable to class-wide proof due to the variation in relief or break nurse availability across the proposed class. The RNs included in this class are employed to work in different units, such as the Emergency Room ("ER"), Intensive Care Unit ("ICU"), Progressive Care Unit ("PCU"), Medical Surgery, Labor and Delivery, Pediatrics, Postpartum, Nursery, and the Operating Room ("OR"). *Opp.* 1:17-2:7; *Kemp. Depo.* 19:13-20:8; *Cho Decl.* ¶ 2. Defendants present evidence supporting that, "because each unit functions differently, there is no universal practice or policy regarding whether 'relief' or 'break' nurses are provided." *Opp.* 6:20-21 (*Wunderlich Decl.* ¶ 3 (a Charge Nurse is available in PCU to cover breaks if a relief nurse is not available); *Lell Decl.* ¶ 7 (there is a break nurse assigned to the Surgical Services Department); *Cho Decl* ¶ 6 (explaining how rest breaks are scheduled by the Charge Nurse in the OR unit); *Dick Decl.* ¶ 7 (relief nurse staffing changes depending on the time of day in the ER)). Because the relief nurse policy is not uniform across the proposed class, the Court cannot certify a Rest Break Class in which the answer to the question at the heart of liability is not common to the class members.

v. Regular Rate Class

Plaintiffs' Regular Rate Class consists of RNs "who were not paid at the correct regular rate for overtime, double time, meal premiums, and rest premiums." *Not.* 4:20-23. Plaintiffs' argument is that the way that Defendants calculate the regular rate of pay for all RNs is illegal because, for a given week, Defendants divide total compensation by the "number of hours worked" instead of by a fixed "legal maximum regular hours." *See Mot.* 21:1-27; *Reply* 4:11-5:4. Defendants admit that they calculate an RN's regular rate by dividing total compensation for the week by the hours worked, but argue that the method is entirely proper. *Opp.* 20:12-21:2. The Court cannot evaluate the merits of Plaintiffs' claim at the class certification stage of the litigation. Because Defendants agree that they calculate the regular rate of pay for all proposed class members by the same method, and Plaintiffs' argument is that the selected method is incorrect, the Regular Rate Class does present a common question with a common answer for all class members. Thus, it satisfies the predominance requirement.

vi. Wage Statement Class

The Wage Statement Class includes RNs "who were not provided pay stubs that complied with Labor Code § 226." *Not.* 4:24-27. Under this statute, an employer must provide its employees with accurate itemized statements showing total hours worked, "the name and address of the legal entity that is the employer," and all applicable hourly rates and the corresponding hours worked at each rate. *See* Cal. Lab. Code § 226(a); *Mot.* 22:15-18. Plaintiffs explain that

this proposed class will allege a violation of this statute because Defendants falsely identified the employer as "Corona Regional Medical Center" on paystubs, but CRMC is only the hospital's "dba"; "Corona-UHS" was the actual "legal entity that is the employer" that should have been listed. *See id.* 22:18-28.

Defendants first oppose certification of this class based on case law in which "minor technical variations" in the entity name and paystub name do not amount to liability under the statute. *See Opp.* 21:7-19. The Court does not consider this argument on the current motion because merits analysis is not a proper basis for declining class certification. *See Amgen*, 133 S. Ct. at 1195. However, Defendants further argue that, "regardless of the validity of Plaintiffs' theory of liability," common issues do not predominate "because, in order to determine liability, each employee must prove for each paystub received during the relevant time period that he/she was damaged by the inadequate paystub." *Opp.* 21:20-27; *see Elliot v. Spherion Pac. Work, LLC*, 572 F.Supp.2d 1169, 1180-81 (2008) ("an employee is not eligible to recover for violations of section 226(a) *unless* he or she demonstrates some injury from the employer's violation") (emphasis in original). The Court agrees that demonstrating that each class member was damaged by the claimed inaccuracy in the wage statement is a critical individualized issue in determining liability that it not amenable to common systems of proof. Although the other critical issue – whether or not using the dba violates § 226(a) – is common to the class members, the Court concludes, due to the entirely individualized nature of the existence of injury for each member,

common issues do not predominate for the proposed Wage Statement Class.

vii. Waiting Time Class

Lastly, the Waiting Time Class consists of "[a]ll former [RNs] who worked for Defendants from August 23, 2010 who were not paid all wages due at the time of separation from their employment with Defendants." *Not.* 4:28-5:2. Defendants assert that this class is composed of members with claims derivative of the claims of the other proposed classes, *see Opp.* 22:4-7, and Plaintiffs confirm that the class is derivative, *see Reply* 11:9-11, 11:24-27. Thus, it only survives predominance analysis to the extent that it is premised on Regular Rate Class' common legal claim.

In summary, only the Regular Rate Class and the Waiting Time Class (to the extent it is premised on the regular rate claim only) satisfy Rule 23(b)'s predominance requirement.

B. Typicality

Rule 23(a)(3) requires a named plaintiff's claims to be typical of the claims of the class. Fed. R. Civ. P. 23(a)(3). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; [but] they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. To meet the typicality requirement, plaintiffs must establish that other class members have the same or similar injury as them; the action is based on conduct that is not unique to them as the named plaintiffs; and other class members have been injured by the same course of conduct. *See Ellis v.*

Costco Wholesale Corp., 657 F.3d 970, 984 (9th Cir. 2011); *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010).

Plaintiffs have not carried their burden of demonstrating that the injuries allegedly inflicted by Defendants on Plaintiffs are similar to the injuries of the putative class members because Plaintiffs do not offer any admissible evidence of Plaintiffs' injuries in their motion for class certification. *See Opp.* 9:19-22. Plaintiffs' motion does not contain sworn testimony from either of the named Plaintiffs. *See generally Mot.* Instead, Plaintiffs rely on the declaration of Javier R. Ruiz ("Ruiz"), a paralegal for Plaintiffs' counsel, to demonstrate Plaintiffs' various injuries. *See Mot.* 12:4-20.

In the Ruiz Declaration, Ruiz explains that he was given the assignment of reviewing and analyzing Plaintiffs' iSeries Timekeeper Report and Payment Detail Report for the purpose of determining whether Plaintiffs were fully compensated under Defendants' rounding practice and short-shift penalty policy and were provided appropriate meal periods and rest breaks. *See Ruiz Decl.* Part I ¶ 3. Ruiz prepared an Excel Spreadsheet for Plaintiffs Sali and Spriggs by inputting the data from the reports "to derive answers to the above questions." *Id.* There are three documents attached to the Ruiz Declaration: (1) the "Data Recap Spreadsheet" (Ex. 1) that Ruiz prepared based on data from the reports; (2) Sali's Timekeeper Report Data (Ex. 2); and (3) Spriggs' Timekeeper Report (Ex. 3). *Ruiz Decl.* Part I ¶ 4-5, Part II ¶ 4. Ruiz personally prepared all three documents and his declaration does not attach the raw data from the iSeries Timekeeper

Report and Payment Detail Reports from which he extracted data to input into his new documents. Without explanation as to his methods, Ruiz concludes that the data reveals that Sali and Spriggs were not paid for all hours worked as a result of the rounding policy, were not paid all short-shift penalties for being flexed before completing their AWS shifts, and were not provided adequate meal periods or rest breaks. *Id.* Part I ¶¶ 5-11, Part II ¶¶ 3-10.

There are multiple evidentiary issues with the Ruiz Declaration that Defendants highlight in their "Objections to the Declaration (Parts I and II) of Javier R. Ruiz in Support of Plaintiffs' Motion for Class Certification." *See* Dkt. # 91 ["Ruiz Objections"]. First, Ruiz cannot authenticate the manipulated Excel Spreadsheets and other data that he relied upon to conduct his analysis because he does not have personal knowledge to attest to the fact that the data accurately represents Plaintiffs' employment records and he failed to include the data reports that he received from Defendants. *See Ruiz Objections* 5:1-11; Fed. R. Evid. 901(a)-(b)(1).

Further, the Court agrees that Ruiz, as a lay witness, offers improper opinion testimony by purporting to extract relevant information from extensive amounts of pay data and analyzing that data to reach conclusions about injuries via an undisclosed method, using undisclosed assumptions, when Ruiz has not demonstrated that he is technically qualified to conduct this analysis. *See Ruiz Objections* 1:12-2:24. A non-expert declarant is prohibited from offering opinion testimony unless it is: (1) rationally based on the

witness' personal perception; (2) helpful to understanding the testimony; and (3) not based on scientific, technical, or other specialized knowledge. Fed. R. Evid. 702. Ruiz's testimony fails the third requirement because his manipulation and analysis of raw data to reach cumulative conclusions is the technical or specialized work of an expert witness. *See Capital Records, LLC v. Escape Media Group, Inc.*, No. 12-CV-6646 (AJN), 2015 WL 1402049, at *29-30 (Mar. 25, 2015) (an employee's declaration drawing conclusions after running analyses and processes using data produced in discovery was based on specialized knowledge and was inadmissible under Rule 701). Additionally, Ruiz, a paralegal, lacks special qualifications in computer manipulation and analysis of time and pay data and does not even identify the qualifications that he has to conduct the subject analysis such that the testimony may be admissible under Rule 702. On the basis of the foregoing deficiencies, the Court STRIKES the Ruiz Declaration, thus, Plaintiffs cannot rely on it to demonstrate their injuries.

Recognizing the insufficiency of their motion on this point, Plaintiffs submit declarations by the named Plaintiffs with their reply brief in which Sali and Spriggs attest to the truth and accuracy of the conclusions and exhibits contained in the Ruiz Declaration. *See Sali Decl.* ¶¶ 3-7, Ex. 1; *Spriggs Decl.* ¶¶ 3-7, Ex. 1. The Court declines to consider this new evidence submitted on reply. *See Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (where new evidence is submitted on reply, it is improper to consider it unless the court chooses to give the non-moving party a chance to reply) (citation omitted); *Contratto v. Ethicon, Inc.*, 227 F.R.D. 304, 308 n.5 (N.D. Cal.

2005) ("Exercising my discretion . . . [t]o the extent that the declaration introduces new evidence not presented in either the motion or opposition, I did not consider the declaration in making this ruling."); *see also Def. Ex Parte App.* 7:4-8:12.

By failing to present admissible evidence of their alleged injuries in the motion for class certification, Plaintiffs failed to carry their burden of demonstrating that Plaintiffs suffered injuries similar to those of the putative class members. Accordingly, the Court holds that Plaintiffs have not established their typicality.

C. Adequacy

Rule 23(a)(4) requires plaintiffs to show that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Representation is adequate when the class representative and counsel do not have any conflicts of interest with other class members, and the representative plaintiff and counsel will prosecute the action vigorously on behalf of the class. *See, e.g.*, *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1031 (9th Cir. 2012). Defendants challenge the adequacy of Plaintiff Spriggs as a class representative and Bisnar Chase as class counsel.

i. Plaintiff Spriggs

First, Spriggs is not an adequate representative because she is not a member of any of the classes that she attempts to represent. *See Opp.* 23:4-8. The general class that Plaintiffs attempt to certify in this case

comprises: "all current and former [RNs] of Defendants [] *who were classified by Defendants as either full-time or full-time equivalent employees*, who were not paid for all wages due from August 23, 2009 through the present ('Proposed Class Period')." *Not.* 3:2-6 (emphasis added). In her deposition, Spriggs admits that Defendants classified her as a part-time employee throughout her employment:

> Q: Were you designated as part time?
> A: Yes, that was what it was called.
> Q: And was that during your entire employment at Corona?
> A: Uh-huh.
> ...
> Q: -- do you know if you were ever designated as full time?
> A: No. I was never full time, although I worked sometimes a full schedule once in a while.

Spriggs Depo. 81:2-15.

Plaintiffs respond that Spriggs remains an adequate representative because she worked hours that would have qualified her as a full-time employee according to Defendants' Employee Handbook. *See Reply* 12:14-19 ("Defendants' employee handbook states that full-time employees are those who are scheduled to work 64 hours per pay period. Ms. Spriggs worked, on average, 11.26 hours per shift, three days per week, which equates to 67.56 hours per pay period[.]"). Setting aside the significant issue that this evidence of hours worked by Spriggs is not properly before the Court because Plaintiffs presented it only on reply, Plaintiffs mischaracterize the handbook. According to

the Employee Handbook, "[r]egular full-time employees are those who are normally scheduled to work and who do work a schedule 64 hours or more per pay period." *Thompson Decl.*, Ex. A, B. Plaintiffs do not argue, and based on Spriggs' testimony it does not appear that they can argue, that Spriggs was "normally scheduled to work" at least 64 hours per pay period. Because Defendants did not designate her as a full-time or full-time equivalent employee during the class period, Spriggs is not an adequate class representative because she is not a member of the class.

ii. Bisnar Chase

Defendants also contest the adequacy of proposed class counsel – Bisnar Chase – on the grounds that it has not "vigorously prosecuted" the action on behalf of the proposed class thus far. As highlighted by Defendants, attorneys from Bisnar Chase failed to attend any of the depositions of Plaintiffs' putative class witnesses (four scheduled depositions), failed to produce Plaintiffs' expert, Falkenhagen, for a deposition despite being ordered to do so by a Magistrate Judge, and, as detailed in the typicality analysis, failed to submit any sworn testimony from Plaintiffs in support of the class certification motion. *See Opp.* 23:9-15 (*Hayes Decl.* ¶¶ 8-13, Ex. G-M). Plaintiffs do not respond to these arguments in the body of their reply brief, *see Reply* 12:1-19, and the Court considers these lapses indicative of an inability to adequately represent the putative class. Plaintiffs' counsel attests that they are experienced wage and hour litigators who have been certified as class counsel in other wage and hour class actions. *See Mot.* 13:7-12; *Beligan Decl.*

Part I ¶¶ 5-10. "While counsel ha[s] apparently performed adequately and successfully in other actions, they cannot simply rest on their laurels. They must establish adequacy in each case in which they seek to represent a class." *Evans v. IAC/Interactive Corp.*, 244 F.R.D. 568, 580 (C.D. Cal. 2007).

Conduct similar to Bisnar Chase's conduct in this case persuaded a court in this district to conclude that counsel's representation of the class would be inadequate. *See id.* at 577-80. In *Evans*, counsel submitted putative class member declarations that were largely "copy-and-paste" jobs and sometimes contradicted by the same members' deposition testimony, failed to timely reveal the identities of declarants then did not comply with a Court order to produce them for deposition, and failed to adequately support some new theories of liability. *Id.* at 578-79.

Plaintiffs submitted declarations of 22 putative class members in support of their motion for class certification. *See* Dkt. # 77. These declarations are nearly identical in their attesting to personal experiences with Defendants' employment practices. For example, each of the 22 declarations contains the following paragraph:

In addition, Corona characterized second meal breaks in a negative and false light to deter me from wanting to take a second meal break. I was told that for me to be entitled to a second meal I would have to work 13 hours. I did not know that if I had not signed the Meal Period Wavier, I would be actually working only 12 ours with two 30-minute meal breaks. To put further pressure on me, I was told that all the nurses

have signed the Meal Period waiver and that I should sign it as well. I did not take a second meal during my employment with Corona.

Id. Defendants describe the declarations as "cookie-cutter," and the Court agrees. *Opp.* 7:15-8:3.

After receiving Plaintiffs' motion, Defendants noticed depositions for five of the declarants: Lynette Okada ("Okada"), Jessica Steyers-Lucens ("Steyers-Lucens"), Kimberly R. Hayde ("Hayde"), Eric Dane L. Noriega ("Noriega"), and Traci Rancier ("Rancier"). *Hayes Decl.* ¶¶ 7-11. Okada did not appear for her deposition, but the deposition testimony of the other four declarants contradicted significant points in their cookie-cutter declarations. For example, in addition to the "coercion" paragraph restated above, these four declarants had attested: "I do not believe I signed the Meal Period Wavier voluntarily." *Steyers-Lucens Decl.* ¶ 8; *Hayde Decl.* ¶ 8; *Noriega Decl.* ¶ 8; *Rancier Decl.* ¶ 8. In their depositions, Hayde, Noriega, and Rancier explicitly clarified that they voluntarily selected to waive their second meal period and were not coerced to do so:

Deponent	**Testimony**
Hayde	Q: And, Ms. Hayde, did anyone pressure you to elect to waive one of your meal periods? A: I don't believe I was pressured no. Q: And it was your voluntary choice to choose to waive the meal period and leave a half hour early; is that correct?

Deponent	**Testimony**
	A: That's correct. Q: And to the extent [your declaration] implies that you were forced to waive the meal period, would you agree that's incorrect? A: That's incorrect. Q: So you did voluntarily waive your meal period? A: Yes. *Def. CE*, Ex. 21 at 6-7.
Noriega	Q: What else do you believe is inaccurate in this declaration? A: The meal waiver. Q: And what's inaccurate about that? A: That we had the option to elect to have a secondary meal but to stay for 13 hours. That I chose to – I wasn't forced to basically waive my second meal. It was an option. Q: Okay. So you would agree now that you did have the option to not waive your meal period; correct? A: That is correct, yes. Q: And you would agree that you voluntarily chose to waive one of your meal periods? A: Yes. Q: So to the extent this says that you did not believe you signed the meal

Deponent	Testimony
	period waiver voluntarily, would you agree that that's inaccurate? A: It is inaccurate. *Id.*, Ex. 21 at 12-13.
Rancier	Q: Okay. I'm going to now mark as Exhibit 8 this is a copy of the declaration that you submitted to plaintiffs in support of this lawsuit which was then submitted to the court. I'm going to give you just a chance to look through this again. And then you can let me know when you're ready. A: You know I don't know like this here – I'm not sure where they're getting all this information. Because I do remember this meal period waiver. I signed it voluntarily. So I'm not quite sure how they're determining this information. *** Q: And you were never pressured or coerced to waive one of your meal periods; correct? A: No. No. Q: Would you agree that paragraph nine is inaccurate to the extent that to implied that you were coerced or pressured to waive on of your meal periods?

Deponent	Testimony
	A: Let's see that. Yeah, this is not correct. Q: Okay. A: I was never – it never came into question about that second meal because I never wanted it. I never asked for it. We never discussed it. I knew that I didn't want it. So number nine is – Q: Paragraph nine? A: Yeah. Q: Inaccurate? A: Totally inaccurate. *Id.*, Ex. 21 at 16-18.

Defendants submitted a "Summary of Deposition Testimony Contradicting Plaintiffs' Witness Declarations" highlighting other perceived discrepancies for the four deposed putative class members. *Def. CE*, Ex. 21. In response, Plaintiffs filed a "Rebuttal to Defendants' 'Cherry-Picked' Testimony and Summary of Omitted Testimony." *See Pl. CE*, Ex. 1. The Court reviewed these documents and maintains that Plaintiffs have not rebutted many of the contradictions identified by Defendants, including the meal waiver discrepancies detailed above.

As in *Evans*, the Court finds that Plaintiffs' counsel's "lax approach" to personalizing declarations, ensuring that declarants knew and understood what they were signing, and verifying the accuracy of the

statements is "unacceptable" conduct. *See Evans*, 244 F.R.D. at 578-79 (observing that "counsel apparently made no effort to impress upon Plaintiffs the importance of making only truthful statements when signing declarations" and noting that – "in class actions especially – it is critical that the Court be able to rely on the accuracy of evidentiary submissions obviously and necessarily drafted by counsel"). It also troubles the Court that, despite being noticed for five depositions of putative class members, Plaintiffs' counsel failed to appear to defend any of the depositions. *See Hayes Decl.* ¶¶ 7-11. Counsel's failure to perform this duty was prejudicial to the putative class members at a crucial point in the case.

Other conduct by counsel thus far also indicates to the Court that counsel is not vigorously litigating this case as it should. On April 7, 2015, Magistrate Judge Rosenbluth issued an Order instructing Plaintiffs to produce their expert witness, Falkenhagen, for deposition the following week on April 13, 2015. *See id.* ¶ 13; Dkt. # 86. Despite this Order, neither Falkenhagen nor Plaintiffs' counsel appeared for the deposition. *See Hayes Decl.* ¶ 13, Ex. M. Defendants filed their opposition to the class certification motion on April 16, 2015 and Plaintiffs' counsel did not make Falkenhagen available for deposition until three weeks later, on May 7, 2015. *See Opp.*; Dkt. # 108 at 1. Additionally, as discussed above, Plaintiffs' counsel failed to submit sworn testimony by the named Plaintiffs in support of the class certification motion, an error with significant consequences for the disposition of the motion.

Due to these perceived deficiencies in representation surrounding the class certification motion, the

Court concludes that Bisnar Chase has not demonstrated that it will adequately serve as class counsel in this case.

IV. Conclusion

For the foregoing reasons, the Court DENIES the motion for class certification and appointment of class representatives and class counsel.

IT IS SO ORDERED.

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARLYN SALI and DEBORAH SPRIGGS, on behalf of themselves, all others similarly situated and the general public, *Plaintiffs-Appellants,* v. CORONA REGIONAL MEDICAL CENTER; UHS OF DELAWARE INC., *Defendants-Appellees.*	No. 15-56460 D.C. No. 5:14-cv-00985-PSG-JPR ORDER

Filed November 1, 2018

Before: M. Margaret McKeown and Kim McLane Wardlaw, Circuit Judges, and Salvador Mendoza, Jr.,* District Judge.

Order;
Dissent by Judge Bea

* The Honorable Salvador Mendoza, Jr., District Judge for the U.S. District Court for the Eastern District of Washington, sitting by designation.

ORDER

The panel has voted to deny the petition for panel rehearing.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

BEA, Circuit Judge, joined by BYBEE, CALLAHAN, IKUTA, and BENNETT, Circuit Judges, dissenting from the denial of rehearing en banc:

I regret that we decided not to rehear this case en banc because we could have corrected our own errors. Rather than do that, we have established a rule that undermines the purpose of the class certification proceeding. We have been instructed by the Court that facts necessary to establish the elements of a class cannot simply be those that meet a pleading standard.[1] But the panel has reduced the requirements of class certification *below* even a pleading standard. It has accepted the undisputedly inadmissible opinion of plaintiffs' *paralegal*—not even that of an attorney who is subject to certain pleading standards[2]—that the

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[1] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) ("Rule 23 does not set forth a mere pleading standard.").

[2] *See* Fed. R. Civ. P. 11.

plaintiffs have damages typical of the class sought to be certified.

This doesn't pass the straight-face test.

It is no surprise the panel's holding that expert opinion testimony need not be admissible at the class certification stage is contrary to our own precedent, but also contrary to decisions of four other circuits and clear Supreme Court guidance.

I

This case arises out of a wage and hour class action under California law. *Sali v. Corona Reg'l Med. Ctr.*, 889 F.3d 623 (9th Cir. 2018). The two named plaintiffs, Marlyn Sali and Deborah Spriggs ("Plaintiffs"), are Registered Nurses ("RNs") who were formerly employed by Corona Regional Medical Center ("Corona"). *Id.* at 627. Plaintiffs brought a putative class action alleging that, during their employment by Corona, they and other nurses were subject to a number of policies and practices that violated California's wage and hour laws. *Id.* Based on each of their claims, Plaintiffs moved to certify seven classes. *Id.* at 628.

The district court denied the motion to certify as to all of the proposed sub-classes, holding, in relevant part, that Sali and Spriggs had failed to satisfy Rule 23(a)'s typicality requirement because they failed to submit admissible evidence that they had suffered any of the damages suffered by the putative class. *Id.* In reaching this decision, the district court refused to consider the only piece of evidence offered to establish Plaintiffs' injuries—the declaration of Javier Ruiz, a paralegal employed by the law firm representing

Plaintiffs—because it contained inadmissible evidence. *Id.* at 630. The panel explains that the paralegal took a "random sampling" of Plaintiffs' timesheets to determine how Corona's policy of "rounding" clock-in and clock-out times to the nearest quarter hour had affected each plaintiff's pay individually. *Id.* Based on this "random sampling," Ruiz concluded that "on average over hundreds of shifts, Corona's rounded time policy undercounted Sali's clock-in and clock-out times by eight minutes per shift and Spriggs's times by six minutes per shift." *Id.*

The district court found the Ruiz declaration was inadmissible for three reasons. First, Ruiz lacked personal knowledge of the data in the spreadsheets, and thus could not authenticate the data. *Id.* at 630-31. Second, Ruiz offered opinion testimony, improper unless he qualified as an expert witness. *Id.* at 631. Third, Ruiz lacked the qualifications necessary for the "cumulative conclusions" he reached via "manipulation and analysis of raw data" to be admissible under Federal Rule of Evidence 702.[3] *Id*. Because the Ruiz

[3] Notably, the panel's decision does not question the district court's determination that the Ruiz declaration is deficient under Federal Rule of Evidence 702, likely because the conclusion is inescapable. Ruiz offered his opinion based on an analysis and interpretation of data—not one rationally based on his own perception or personal knowledge—and thus he offered an expert opinion, not a lay opinion. *See* Fed. R. Evid. 701, 702. The familiar *Daubert* standard requires courts to assess "whether the reasoning or methodology underlying the testimony is scientifically valid." *See Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579, 592–93 (1993). But here, Ruiz offers no explanation of his reasoning or methodology.

According to his declaration, Ruiz, a paralegal hired by Plaintiffs' attorney, compiled Plaintiffs' clock-in and clock-out times and generated spreadsheets which purportedly analyzed how often and to what extent Plaintiffs were underpaid by Corona's allegedly unlawful policies. For example, Corona had a policy whereby clock-in and clock-out times would be rounded up to fifteen minutes if they were eight or more minutes past the quarter-hour mark and rounded down to zero minutes if they were seven or fewer minutes past the quarter-hour mark. According to the panel opinion, Ruiz used a "random sampling" of the timesheets and concluded that, "on average," the "rounded time policy undercounted Sali's clock-in and clock-out times by eight minutes per shift and Spriggs's times by six minutes per shift." *Sali*, 889 F.3d at 630. From what evidence the panel deduced Ruiz's choice of clock-ins and clock-outs was "random" escapes me. His declaration says only that he "review[ed] and analyze[d] time and payroll records" and "input[ted] such information into Excel Spreadsheets in order to determine the violation rate and damages." Not once does he mention "random sampling." Although Ruiz attaches to his declaration spreadsheets purporting to show various wage and hour violations, he does not describe how he created the spreadsheets, whether the spreadsheets represent all or only a portion of the time records, or what methods he used to identify alleged violations of the relevant laws and regulations. For all we know from his declaration, Ruiz could have "sampled" only times that were favorable to his employer's case and disregarded those that were unfavorable. His methodology is simply unexplained.

In fact, when one sits back and thinks about it, to have a party's paralegal opine on the extent to what the plaintiff was underpaid by allowing the paralegal to choose various time-entries without explaining his methods is no different than a lawyer interviewing a client and choosing only favorable information to include in the client's pleading. And the Supreme Court has repeatedly recognized that Rule 23 requires more than a mere pleading standard. *See, e.g., Dukes*, 564 U.S. at 350.

Because the Ruiz declaration is so obviously deficient, it makes sense that the panel opinion does not contest the district court's ruling that it would be inadmissible under the Federal Rules of Evidence.

declaration was inadmissible, the district court did not consider it. Left with no other evidence from which to conclude Plaintiffs had been injured (much less that their injuries were typical of class injuries), the district court found that Plaintiffs had failed to satisfy Rule 23(a)'s typicality requirement.[4] Plaintiffs challenged this ruling on appeal.

The panel held that the district court's typicality determination was premised on an error of law. *Id.* at 630. Specifically, the panel concluded that, because the class certification order is "preliminary" and can be entered at an early stage of the litigation, but changed later, a motion for class certification need not be supported by admissible evidence.[5] *Id.* at 631. Noting that the Supreme Court has previously stated that

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[4] The district court refused to consider Sali's and Spriggs's declarations submitted with their reply brief after it struck Ruiz's declaration. Although Plaintiffs' declarations might have made up for the infirmity of Ruiz's opinion, the district court acted within its discretion when it refused to consider their late submissions. *See Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1202 (9th Cir. 2001) ("The district court had discretion to consider the . . . issue even if it was raised in a reply brief.").

[5] The panel attempts to bolster its reasoning for holding that evidence need not be admissible at the class certification stage by stating that "the evidence needed to prove a class's case often lies in a defendant's possession and may be obtained only through discovery." *Sali*, 889 F.3d at 631. Further, "[l]imiting class-certification-stage proof to admissible evidence risks terminating actions before a putative class may gather crucial admissible evidence." Id.

The panel's reasoning is flawed. First, Plaintiffs here *had* their wage records; the paralegal's spreadsheet shows the wage information he chose from Sali's and Spriggs's records. Second, it is well known that discovery is not limited to the merits stage

class certification proceedings are "not accompanied by the traditional rules and procedure applicable to civil trials," the panel held that the district court abused its discretion by limiting its Rule 23 analysis to admissible evidence. *Id.* (citing *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974))).[6] "Inadmissibility alone," said

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of a case. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Indeed, "discovery often has been used to illuminate issues upon which a district court must pass in deciding whether a suit should proceed as a class action under Rule 23." *Id*. at 351 n.13.

[6] To the extent the panel relies on language from the Supreme Court's more than 40-year-old opinion in *Eisen*, its reliance is misplaced. In *Eisen*, the plaintiff filed a putative class action on behalf of himself and all other "odd-lot" traders on the New York Stock Exchange, alleging violations of antitrust and securities laws. 417 U.S. at 159. After bouncing back and forth between the district court and the court of appeals for over six years on various preliminary issues, the case finally made its way to the Supreme Court on, among other issues, whether the notice requirement of Rule 23 requires the plaintiff to bear the cost of notice to members of his class. *Id.* at 177. In reasoning that it did, the Court held that the district court was wrong to reach its contrary conclusion by making a preliminary determination on the merits of the case: that defendants were "more than likely" to lose. *Id*. Such a determination, the Court held, could result in "substantial prejudice to a defendant" because the proceedings involved at the class certification stage are not governed by "the traditional rules and procedures applicable to civil trials." *Id*. at 178.

It is this language that the *Zurn Pex* court and the panel here deploy for the proposition that class certification proceedings are "preliminary" and thus do not require admissible evidence. 644 F.3d at 613–14. Both misread the language. First, *Eisen* did not

the panel, "is not a proper basis to reject evidence submitted in support of class certification." *Id.* at 632. On this basis, the panel reversed the district court's denial of class certification and remanded for the district court to reconsider the typicality issue without excluding the Ruiz declaration.

II

The class certification stage cannot be disdained as the panel has done here. We have held a district court's determination on class certification often "sounds the death knell of the litigation," whether by dismissal, if class certification is denied, or by settlement, if class certification is granted. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957 (9th Cir. 2005) (quoting *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999)). It is for this reason that federal courts in the past—including the U.S. Supreme

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involve the issue here: whether a plaintiff must proffer admissible evidence of damages typical of those claimed for the putative class(es) for a court to grant class certification. As noted, *Eisen* involved the issue of who bore the cost of giving notice. In *Dukes*, the Supreme Court made it very clear that the passage cited by the *Zurn* Pex court and the panel dealt not with the propriety of class certification (as the class had already been certified), but instead only with shifting the cost of Rule 23(c)(2) notice from plaintiff to defendants. 564 U.S. at 351 n.6. And the Court went on: "To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose [beside the cost of notice issue], it is the purest dictum and is contradicted by our other cases." *Id*. Thus, *Eisen* is inapplicable to Rule 23 class certification determinations, and we should follow the more recent applicable cases, *Dukes* and *Comcast Corporation v. Behrend*, 569 U.S. 27 (2013), which are clearly at odds with the panel's decision.

Court—have treated the class certification stage not as a "preliminary" step in the litigation, but as an oftentimes dispositive step demanding a more stringent evidentiary standard.

Besides the fact that the panel's decision is contrary to our own precedent,[7] I take issue with the

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[7] Although the panel opinion cites *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011), as if it were to lend support to the panel's holding, quite the contrary is the case. In *Costco*, we reversed a district court's grant of class certification to a group of female employees who alleged that Costco Wholesale Corporation ("Costco") had discriminated against them on the basis of gender. *Id.* at 974. After first finding that the plaintiffs' expert report would be admissible under *Daubert*, the district court refused to engage in any analysis of the validity or persuasiveness of the expert report and, instead, held that the mere fact that the opinion was admissible was sufficient to support class certification. *Id.* at 982. We held that, although the district court had "correctly applied the evidentiary standard set forth in *Daubert*," it abused its discretion by certifying a class based *only* on the admissibility of the expert report, without consideration of the report's persuasiveness. *Id.* In other words, we said that admissibility of the proffered evidence is not *sufficient* to demonstrate that such evidence provided the proof required under Rule 23. Rather, admissibility is a threshold issue to determine before considering the evidence's persuasiveness.

The panel selectively quotes *Costco* to support a contrary ruling. First, it totally omits *Costco*'s holding that the district court was correct to apply *Daubert*, and thus correct to consider admissibility at the first step of the Rule 23 analysis. *See Sali*, 889 F.3d at 631–32 (failing to mention Costco's holding that the district court had "correctly applied" *Daubert*). Next, the panel cites *Costco's* holding that a district court abuses its discretion when it limits its Rule 23 analysis "to a determination of whether Plaintiffs' evidence on the point was admissible" (where the evidence *was* admissible). *Id.* at 631 (quoting *Costco*, 657 F.3d at 982). Ignoring *Costco's* contrary language, the panel deprecates

panel's decision for two important reasons. First, it puts our court on the wrong side of a lopsided circuit split. And second, it defies clear Supreme Court guidance on this issue.

A. Four of five other circuits to consider this issue disagree with the panel.

The panel's opinion also puts us on the short side of a lopsided circuit split—the Second, Third, Fifth, and Seventh Circuits all require expert testimony to be admissible to be considered at the class certification stage. *See In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) ("We join certain of our sister courts to hold that a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial

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what the Costco court stated as to the importance of admissibility in evaluating compliance with Rule 23: "[A] district court *should* evaluate admissibility," the panel says, "[b]ut admissibility must not be dispositive." *Id*. at 634 (emphasis added).

The panel's interpretation of *Costco* distorts its basic holding. To the extent *Costco* held that admissibility is not sufficient to demonstrate a plaintiff's compliance with Rule 23, the panel is correct: mere admissibility does not establish compliance. *Costco* thus stands for the proposition that class certification cannot be granted on the basis of admissibility *alone*.

But the panel takes that holding a step further by concluding that neither is admissibility *necessary*. *Costco* did *not* say that. *Costco* supports the opposite conclusion that evidence must be admissible for it to be considered at the class certification stage. Far from supporting the panel's opinion, *Costco* is inconsistent with it. But rather than rehearing this case en banc to correct the conflict, we have left district courts and litigants in an impossible position.

court finds, that the expert testimony satisfies the standard set out in *Daubert*."); *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 129 (2d Cir. 2013) (holding that the district court properly "considered the *admissibility* of the expert testimony" at the class certification stage, but declining to decide exactly "when a *Daubert* analysis forms a necessary component of a district court's rigorous analysis") (emphasis added); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 817 (7th Cir. 2010) (vacating the district court's class certification order because it "fail[ed] to [resolve clearly] the issue of . . . admissibility before certifying the class" and the expert testimony in question failed to satisfy *Daubert*); *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005) (holding that "findings [at the class certification stage] must be made based on adequate admissible evidence to justify class certification"). Two other circuits have so held in unpublished rulings. *See In re Carpenter Co.*, No. 14-0302, 2014 WL 12809636, at *3 (6th Cir. Sept. 29, 2014) (holding that, in light of *Comcast* and *Dukes*, the district court properly applied *Daubert* at the class certification stage); *Sher v. Raytheon Co.*, 419 F. App'x 887, 890 (11th Cir. 2011) (holding that "the district court erred as a matter of law" by failing to conduct a *Daubert* analysis at the class certification stage).

The panel acknowledges its conflict with the Third, Fifth, and Seventh Circuits, but emphasizes its agreement with the Eighth—the only circuit to come out the other way. *Sali*, 889 F.3d at 632 (citing *Zurn Pex*, 644 F.3d at 612–13). But even that case does not fully support the panel's decision. In *Zurn Pex*, homeowners brought a class action against a plumbing company, claiming that the systems installed by the company

were defective. 644 F.3d at 608. At the class certification stage, the plaintiffs proffered evidence from two experts regarding the failure of the plumbing systems. *Id.* at 609. The defendant attempted to exclude the testimony under *Daubert*, and the plaintiffs argued *Daubert* did not apply. *Id.* at 610. The district court conducted a "focused" *Daubert* analysis, declining to rule on whether the testimony was admissible, but also taking the *Daubert* factors into consideration in determining whether the expert testimony supported class certification. *Id.* at 610–11. The district court found that the expert testimony supported class certification and certified the class. *Id.* The Eighth Circuit affirmed, holding that the district court's "focused" *Daubert* analysis was correct and stating that expert testimony need not be admissible at the class certification stage, although the *Daubert* factors should be considered. *Id.* at 613.

Zurn Pex is consistent with the panel's position that inadmissible expert testimony can be used to support a class certification motion, though as noted above, the *Zurn Pex* court, like the panel here, misreads *Eisen*. But *Zurn Pex*'s requirement that district courts undertake a "focused" *Daubert* analysis is more specific and rigorous than the panel's analysis and holding was here. The panel states that the district court "may" consider admissibility and "should" evaluate evidence in light of *Daubert*, but provides no further guidance as to what standard district courts should apply.

Overall, the great weight of persuasive authority counsels against the panel's decision. In total, six circuits have held in published or unpublished decisions

that expert testimony must be admissible to be considered at the class certification stage. Before the panel's decision in this case, only one circuit had reached the opposite conclusion—and even that circuit created a more stringent evidentiary standard than the one applied by the panel here.

B. The Supreme Court's precedent counsels against the panel's holding.

It is no wonder the overwhelming majority of circuits to address this question have come down on the side opposite the panel. Although the Supreme Court has not directly addressed whether expert testimony must be admissible to be considered on a motion for class certification, its guidance in this area heavily favors the circuit majority rule. Indeed, the last time our court issued an opinion loosening the requirements for class certification, the Court reversed us and offered guidance that we would have been wise to heed here.

In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 342 (2011), the Supreme Court reversed an en banc panel of this court that had approved an order certifying an expansive, 1.5-million-person class. The class comprised "current and former female employees of petitioner Wal-Mart who allege[d] that the discretion exercised by their local supervisors over pay and promotion matters violate[d] Title VII by discriminating against women." *Id.* Before analyzing whether the plaintiffs had satisfied the various elements of Rule 23, the Court discussed in some detail the evidentiary standard appropriate at the class certification stage. *Id.* at 350–51. The Court noted that "Rule 23 does not

set forth a mere pleading standard"; rather, the moving party must "*affirmatively demonstrate* his compliance with the Rule." *Id.* at 350 (emphasis added). The plaintiff "must be prepared to *prove* that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* (first emphasis added). The Court thus reemphasized the point, made in a previous case, that the district court must engage in a "rigorous analysis" to determine whether Rule 23 has been satisfied. *Id.* at 351 (quoting *Falcon*, 457 U.S. at 161). And, relevant here, the Court expressly "doubt[ed]" the idea, advanced by the district court in *Dukes* and adopted by the panel here, that "*Daubert* [does] not apply to expert testimony at the certification stage of class-action proceedings." *Id.* at 354.

At least one other Supreme Court case counsels against the panel's holding here. In *Comcast Corporation v. Behrend*, 569 U.S. 27 (2013), the Supreme Court discussed again the evidentiary standard at the class certification stage when it reversed the Third Circuit's opinion affirming a grant of class certification. The Court reaffirmed the principles emphasized in *Dukes* that Rule 23 demands more than a "mere pleading standard" and that a plaintiff must "affirmatively demonstrate"—that is, "prove"—that he "*in fact*" has complied with Rule 23. *Comcast*, 569 U.S. at 33 (citing *Dukes*, 564 U.S. at 350–51) (emphasis in original). Although it failed to address directly whether evidence must be admissible at the class certification stage, the Court held that "satisfy[ing] *through evidentiary proof* at least one of the provisions of Rule 23(b)" is a prerequisite to class certification. *Id.* (emphasis added). Once again, the Court's guidance strongly suggests that it favors the rule of the

majority of circuits, which the panel in this case rejected.

III

The panel's decision in this case involves a question of exceptional importance and is plainly wrong. It goes against our own binding precedent, the law of four other circuits, and the Supreme Court's clear guidance on this issue. Our court should have reheard this case en banc to reverse the panel's decision on our own.

APPENDIX E

Federal Rule of Civil Procedure Rule 23

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other

members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) ***Certification Order***.

(A) *Time to Issue*. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel*. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order*. An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice***.

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes*. For any class certified under Rule 23(b)(3)--or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)--the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii)the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment***. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) ***Particular Issues***. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***Subclasses***. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) ***In General***. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require--to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) ***Combining and Amending Orders***. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class--or a class proposed to be certified for purposes of settlement--may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) ***Notice to the Class.***

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) ***Approval of the Proposal***. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) ***Identifying Agreements***. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) ***New Opportunity to be Excluded***. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) ***Class-Member Objections.***

(A) *In General*. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection*. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) ***Appointing Class Counsel***. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) ***Standard for Appointing Class Counsel***. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) ***Interim Counsel***. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) ***Duty of Class Counsel***. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable

attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).