Exhibit A

"willfully" from § 2778(c). Although § 2778(c) imposes criminal penalties on "[a]ny person who *willfully* violates" the registration and licensing requirements applicable to persons intending to export certain munitions, 22 U.S.C. § 2778(c) (emphasis added), Rivero was not charged with violating § 2778. Rather, Rivero was charged with violating § 554(a) by exporting items contrary to law, which requires the mens rea of *knowingly* exporting such items. The government proved this element of the § 554(a) offense by establishing that Rivero knowingly exported ammunition without a license, in violation of § 2778(b). The government did not have to prove the elements necessary to convict Rivero under § 2778(c), because conviction under § 2778(c) is not an element of the offense of violating § 554(a).

Accordingly, we affirm both Rivero's conviction and his revocation of supervised release.

AFFIRMED.

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

United States Court of Appeals, Ninth Circuit.

Argued and Submitted February 16, 2018—Pasadena, California

Filed May 3, 2018

Background: Workers, who were registered nurses, brought putative class action against their purported employers alleging that they were underpaid as result of certain employment policies and practices. The United States District Court for the Central District of California, No. 5:14-cv-00985-PSG-JPR, Phillip S. Gutierrez, J., 2015 WL 12656937, denied workers' motion for class certification. Workers appealed.

Holdings: The Court of Appeals, Mendoza, J., held that:

(1) District Court abused its discretion by declining to consider declaration concerning plaintiffs' alleged injuries solely on basis of inadmissibility;

(2) District Court abused its discretion in denying class certification on basis that one of two named plaintiffs was not adequate class representative;

(3) District Court abused its discretion by concluding that named plaintiffs' attorneys did not satisfy adequacy of representation prerequisite;

(4) District Court abused its discretion in denying certification of rounding-time pay class on basis that predominance requirement was not satisfied; and

(5) District Court abused its discretion in denying certification of wage-statement class on basis that predominance requirement was not satisfied.

Reversed and remanded.

1. Federal Courts ⚿3585(3)

The Court of Appeals reviews a district court's class certification decision for abuse of discretion.

2. Federal Courts ⚿3565

An error of law is a per se abuse of discretion.

3. Federal Courts ⚿3585(3)

The Court of Appeals first reviews a class certification determination for legal error under a de novo standard, and if no legal error occurred, it will proceed to review the decision for abuse of discretion.

4. Federal Courts ⚿3585(3)

A district court applying the correct legal standard in determining class certification 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.

5. Federal Courts ⚿3585(3)

The Court of Appeals reviews a district court's findings of fact with regard to a class certification determination under the clearly erroneous standard, meaning it will reverse them only if they are (1) illogical; (2) implausible; or (3) without support in inferences that may be drawn from the record.

6. Federal Civil Procedure ⚿172

A representative plaintiff may sue on behalf of a class when the plaintiff affirmatively demonstrates that the proposed class meets the four prerequisites for class certification. Fed. R. Civ. P. 23(a).

7. Federal Civil Procedure ⚿172

A plaintiff seeking class certification bears the burden of affirmatively demonstrating through evidentiary proof that the class meets the prerequisites for class certification. Fed. R. Civ. P. 23(a).

8. Federal Civil Procedure ⚿171

Before certifying a class, a trial court must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites for class certification. Fed. R. Civ. P. 23(a).

9. Federal Civil Procedure ⚿171

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. Fed. R. Civ. P. 23.

10. Federal Civil Procedure ⚿172

Inadmissibility alone is not a proper basis to reject evidence submitted in support of class certification. Fed. R. Civ. P. 23.

11. Federal Civil Procedure ⚿161.1, 174

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 the class certification rule. Fed. R. Civ. P. 23.

12. Federal Civil Procedure ⚿172

In evaluating a motion for class certification, a district court need only consider material sufficient to form a reasonable judgment on each of the prerequisites for class certification. Fed. R. Civ. P. 23(a).

13. Federal Civil Procedure ⚿172

In evaluating a motion for class certification, a district court's consideration should not be limited to only admissible evidence. Fed. R. Civ. P. 23.

14. Federal Civil Procedure ⚿172

Like the elements of standing, the class certification rule presents more than a mere pleading standard. Fed. R. Civ. P. 23.

15. Federal Civil Procedure ⚿103.2

The proof required to establish standing varies at the complaint, summary judgment, and trial phases.

16. Federal Civil Procedure ⚿172

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. Fed. R. Civ. P. 23.

17. Federal Civil Procedure ⚿172

When determining whether workers satisfied typicality prerequisite for class certification, District Court abused its discretion by declining to consider, solely on basis of inadmissibility, declaration of paralegal for workers' class counsel that addressed named plaintiffs' alleged injuries from rounding-time pay practice of their purported employers, since class certification was preliminary stage, workers were not required to submit admissible evidence, and any inquiry into declaration's ultimate admissibility went to weight that it was given at class certification stage. Fed. R. Civ. P. 23(a).

18. Federal Civil Procedure ⚿172

When conducting a rigorous analysis into whether the prerequisites for class certification are met, a district court need not dispense with the standards of admissibility entirely; rather, the court may consider whether the plaintiff's proof is, or will likely lead to, admissible evidence. Fed. R. Civ. P. 23(a).

19. Federal Civil Procedure ⚿172

In evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the *Daubert* standard, but admissibility must not be dispositive.

20. Federal Civil Procedure ⚿172

When conducting a rigorous analysis into whether the prerequisites for class certification are met, a district court's inquiry into the evidence's ultimate admissibility should go to the weight that evidence is given at the class certification stage. Fed. R. Civ. P. 23(a).

21. Federal Civil Procedure ⚿184.5

District Court abused its discretion in denying class certification on basis that one of two named plaintiffs was not adequate class representative, in workers' action against their purported employers alleging that they were underpaid as result of certain employment practices and policies, since other named plaintiff was adequate class representative. Fed. R. Civ. P. 23(a).

22. Federal Civil Procedure ⚿164

A named plaintiff in a putative class action must be a member of the class she seeks to represent.

23. Federal Civil Procedure ⚿164

Determining whether representation is adequate, as a prerequisite for class certification, requires a court to consider whether (a) the named plaintiffs and their counsel have any conflicts of interest with other class members, and (b) the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class. Fed. R. Civ. P. 23(a).

24. Federal Civil Procedure ⚿164

Adequacy of representation, as a prerequisite for class certification, depends on the qualifications of counsel. Fed. R. Civ. P. 23(a).

25. Federal Civil Procedure ⚿164

A named plaintiff's attorney must be qualified, experienced, and generally capable to conduct the litigation to satisfy the adequacy of representation prerequisite for class certification. Fed. R. Civ. P. 23(a).

26. Federal Civil Procedure ⚿184.5

District Court abused its discretion by concluding that named plaintiffs' attorneys did not satisfy adequacy of representation

prerequisite for class certification, in workers' action against their purported employers alleging that they were underpaid as result of certain employment practices and policies, where District Court only discussed apparent errors by attorneys, including failing to produce expert for deposition and failing to submit sworn testimony of named plaintiffs in support of certification motion, without any mention of attorneys' substantial and competent work, including preparing dozens of interrogatories and requests for production, taking numerous depositions, retaining experts, and interviewing hundreds of putative class members. Fed. R. Civ. P. 23(a).

27. Federal Civil Procedure ⚿165

The inquiry for the class certification predominance requirement is far more demanding than for the commonality prerequisite. Fed. R. Civ. P. 23(a), 23(b)(3).

28. Federal Civil Procedure ⚿165

When evaluating the class certification predominance requirement, 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. Fed. R. Civ. P. 23(b)(3).

29. Federal Civil Procedure ⚿165

The main concern of the class certification predominance inquiry is the balance between individual and common issues. Fed. R. Civ. P. 23(b)(3).

30. Federal Civil Procedure ⚿184.5

District Court abused its discretion in denying certification of rounding-time pay class on basis that predominance requirement was not satisfied, in workers' action against their purported employers alleging that they were underpaid as result of certain employment practices and policies, even if individualized questions predominated on whether workers engaged in work activities during grace period between punch-in time and start of shift, since time was compensable under California law when an employee was working or under control of employer, and District Court did not consider whether workers were subject to their purported employers' control during any grace period even if they were not engaged in work-related activities. Fed. R. Civ. P. 23(b)(3); Cal. Code Regs. tit. 8, § 11140(2)(G).

31. Labor and Employment ⚿2312

Under California law, time is "compensable" when an employee is working or under the control of his or her employer. Cal. Code Regs. tit. 8, § 11140(2)(G).

See publication Words and Phrases for other judicial constructions and definitions.

32. Labor and Employment ⚿2312

Under California law, 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. Cal. Code Regs. tit. 8, § 11140(2)(G).

See publication Words and Phrases for other judicial constructions and definitions.

33. Labor and Employment ⚿2312

Under California law, time is "compensable" if an employee is suffered or permitted to work, whether or not required to do so, including 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. Cal. Code Regs. tit. 8, § 11140(2)(G).

See publication Words and Phrases for other judicial constructions and definitions.

34. Federal Civil Procedure ⚿184.5

District Court abused its discretion in denying certification of wage-statement class on basis that predominance requirement was not satisfied because damages would require individualized determination, in workers' action against their purported employers alleging that they were underpaid as result of certain employment practices and policies, since any violation of California statute that required pay stubs to include name and address of legal entity that was employer was per se injury, and statute specified amount of damages for violation of such requirement. Cal. Lab. Code §§ 226(a)(8), 226(e)(1); Fed. R. Civ. P. 23(b)(3).

Appeal from the United States District Court for the Central District of California, D.C. No. 5:14-cv-00985-PSG-JPR, Phillip S. Gutierrez, District Judge, Presiding

Jerusalem F. Beligan (argued) and Brian D. Chase, Bisnar Chase LLP, Newport Beach, California, for Plaintiffs-Appellants.

Christina H. Hayes (argued), Khatereh Sage Fahimi, and Stacey E. James, Littler Mendelson P.C., San Diego, California, for Defendants-Appellees.

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 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

* 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.

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* 208 Cal.Rptr.3d 271, 381 P.3d 219 (2016); 9 Cal.App.5th 1204, 215 Cal.Rptr.3d 778 (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

[1–5] 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

[6] 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, 133 S.Ct. 1426, 185 L.Ed.2d 515 (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.

[7, 8] 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, 133 S.Ct. 1426). 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, 131 S.Ct. 2541, 180 L.Ed.2d 374 (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, 98 S.Ct. 2454, 57 L.Ed.2d 351 (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, 98 S.Ct. 2454)).

[9] 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, 94 S.Ct. 2140, 40 L.Ed.2d 732 (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.

[10–13] 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 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, 113 S.Ct. 2786, 125 L.Ed.2d 469 (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

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 ....").

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.

[14–16] 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, 131 S.Ct. 2541. 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, 112 S.Ct. 2130, 119 L.Ed.2d 351 (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.

[17] 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.

[18–20] When conducting its "rigorous analysis" into whether the Rule 23(a) requirements are met, the district court need not dispense with the standards of admis-

sibility 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.

[21, 22] 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, 102 S.Ct. 2364, 72 L.Ed.2d 740 (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.

[23–25] 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 1011, 1020 (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, 103 S.Ct. 35, 74 L.Ed.2d 48 (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.

[26] 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 de-

position 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 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.

[27–29] 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, 117 S.Ct. 2231, 138 L.Ed.2d 689 (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, 133 S.Ct. 1426). "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 953, 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.

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).

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.

[30] 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.*, 210 Cal.App.4th 889, 148 Cal.Rptr.3d 690, 704–05 (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 coworkers" are categorically not time "actually worked," the district court incorrectly interpreted "actually worked" to mean only time spent engaged in work-related activities.

[31] 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 Packing Co.*, 22 Cal.4th 575, 94 Cal.Rptr.2d 3, 995 P.2d 139, 141 (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*, 94 Cal.Rptr.2d 3, 995 P.2d at 141.

[32, 33] 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.*, 22 Cal.4th 575, 94 Cal.Rptr.2d 3, 995 P.2d at 145–47 (holding that compulsory travel time on bus from departure point to work site is compensable); *Aguilar v. Assn. of Retarded Citizens*, 234 Cal.App.3d 21, 285 Cal.Rptr. 515, 519–21 (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,* 22 Cal.4th 575, 94 Cal.Rptr.2d 3, 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.*, 22 Cal.4th 575, 94 Cal.Rptr.2d 3, 995 P.2d at 145–47 (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.App.3d 21, 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.

[34] 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 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.

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.

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.

IN RE Adam LEE, Debtor,

Adam Lee, Plaintiff-Appellant,

v.

Dane S. Field, Chapter 7 Trustee, Defendant-Appellee.

No. 15-17451

United States Court of Appeals, Ninth Circuit.

Argued and Submitted February 15, 2018 Honolulu, Hawaii

Filed May 7, 2018

Background: After avoiding, as actually fraudulent transfer, Chapter 7 debtor's gratuitous conveyance of interest that he had in real property to himself and his wife as tenants by the entirety, trustee moved to compel turnover of property to trustee, and debtor resisted on ground that trustee had not objected to entireties exemption claimed by debtor for his interest in this property within time allowed by Bankruptcy Rule. The United States Bankruptcy Court for the District of Hawai'i granted motion and directed turnover of property, and debtor appealed. The District Court, Susan Oki Mollway, J., 2015 WL 7274035, affirmed. Debtor appealed.

Holding: The Court of Appeals, Ikuta, Circuit Judge, held that fraudulent transfer avoidance proceeding put debtor on notice that trustee objected to debtor's claimed entireties exemption, which was inextricably intertwined with challenged transfer, and relieved trustee of need to file formal objection to exemption before deadline ran.

Affirmed.

1. Bankruptcy ⚿2761

Bankruptcy Code allows debtors to exempt certain property from estate in order to avoid having it distributed to estate creditors.

2. Marriage and Cohabitation ⚿471, 598

Under Hawai'i law, tenancy by the entirety is unique form of ownership in which both spouses are jointly seized of property such that neither spouse can convey an interest alone. Haw. Rev. Stat. § 509-2.

3. Marriage and Cohabitation ⚿533

Under Hawai'i law, entireties property is exempt from claims of creditors of individual spouse. Haw. Rev. Stat. § 509-2.

4. Bankruptcy ⚿2801

If time for objecting to debtor's claimed exemption expires without a qualifying objection, the exemption becomes final regardless whether debtor had color-

Exhibit B

909 F.3d 996
United States Court of Appeals, 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
|
Argued and Submitted February 16, 2018 Pasadena, California
|
Filed May 3, 2018
|
Amended November 27, 2018

Synopsis
Background: Workers, who were registered nurses, brought putative class action against their purported employers alleging that they were underpaid as result of certain employment policies and practices. The United States District Court for the Central District of California, No. 5:14-cv-00985-PSG-JPR, Phillip S. Gutierrez, J., 2015 WL 12656937, denied workers' motion for class certification. Workers appealed.

Holdings: The Court of Appeals, Mendoza, J., held that:

District Court abused its discretion by declining to consider declaration concerning plaintiffs' alleged injuries solely on basis of inadmissibility;

District Court abused its discretion in denying class certification on basis that one of two named plaintiffs was not adequate class representative;

District Court abused its discretion by concluding that named plaintiffs' attorneys did not satisfy adequacy of representation prerequisite;

District Court abused its discretion in denying certification of rounding-time pay class on basis that predominance requirement was not satisfied; and

District Court abused its discretion in denying certification of wage-statement class on basis that predominance requirement was not satisfied.

Reversed and remanded.

Opinion, 889 F.3d 623, superseded.

Attorneys and Law Firms

***999** Jerusalem F. Beligan (argued) and Brian D. Chase, Bisnar Chase LLP, Newport Beach, California, for Plaintiffs-Appellants.

Christina H. Hayes (argued), Khatereh Sage Fahimi, and Stacey E. James, Littler Mendelson P.C., San Diego, California, for Defendants-Appellees.

Appeal from the United States District Court for the Central District of California, Phillip S. Gutierrez, District Judge, Presiding, D.C. No. 5:14-cv-00985-PSG-JPR

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

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

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

***1000** 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 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.

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.

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.

***1001** 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* 208 Cal.Rptr.3d 271, 381 P.3d 219 (2016); 9 Cal.App.5th 1204, 215 Cal.Rptr.3d 778 (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 ***1002** 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, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013)); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 512 (9th Cir. 2013). 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 ***1003** 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 ***1004** "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, 133 S.Ct. 1426). 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, 131 S.Ct. 2541, 180 L.Ed.2d 374 (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, 98 S.Ct. 2454, 57 L.Ed.2d 351 (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, 98 S.Ct. 2454)).

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, 94 S.Ct. 2140, 40 L.Ed.2d 732 (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 ***1005** 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.

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....").

Other circuits have reached varying conclusions on the extent to which admissible evidence is required at the class certification stage. Only the Fifth Circuit 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, 113 S.Ct. 2786, 125 L.Ed.2d 469 (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 ***1006** 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, 131 S.Ct. 2541. 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, 112 S.Ct. 2130, 119 L.Ed.2d 351 (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 ***1007** 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, 102 S.Ct. 2364, 72 L.Ed.2d 740 (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 1011, 1020 (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, 103 S.Ct. 35, 74 L.Ed.2d 48 (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, ***1008** and verifying the accuracy of the statements is 'unacceptable' conduct."

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).

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 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, 117 S.Ct. 2231, 138 L.Ed.2d 689 (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, 133 S.Ct. 1426). "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 953, 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 ***1009** 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.*, 210 Cal.App.4th 889, 148 Cal.Rptr.3d 690, 704–05 (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, ***1010** whether or not required to do so."[4] *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 94 Cal.Rptr.2d 3, 995 P.2d 139, 141 (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*, 94 Cal.Rptr.2d 3, 995 P.2d at 141.

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.*, 94 Cal.Rptr.2d 3, 995 P.2d at 145–47 (holding that compulsory travel time on bus from departure point to work site is compensable); *Aguilar v. Assn. of Retarded Citizens*, 234 Cal.App.3d 21, 285 Cal.Rptr. 515, 519–21 (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*, 94 Cal.Rptr.2d 3, 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.*, 94 Cal.Rptr.2d 3, 995 P.2d 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*, 285 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 ***1011** 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).

[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)).

***1012** 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.

All Citations

909 F.3d 996, 2018 Wage & Hour Cas.2d (BNA) 434,888, 18 Cal. Daily Op. Serv. 11,086, 2018 Daily Journal D.A.R. 11,159

Exhibit C

907 F.3d 1185
United States Court of Appeals, 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
|
Filed November 1, 2018

D.C. No. 5:14-cv-00985-PSG-JPR

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

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

Dissent by Judge Bea

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

1 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) ("Rule 23 does not set forth a mere pleading standard.").

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

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 ***1186** 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 declaration ***1187** 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.

[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, 113 S.Ct. 2786, 125 L.Ed.2d 469 (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, 131 S.Ct. 2541.

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.

[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.").

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 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, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974))). [6] "Inadmissibility ***1188** alone," said 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.

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 of a case. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (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, 98 S.Ct. 2380.

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, 94 S.Ct. 2140. 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, 94 S.Ct. 2140. 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, 94 S.Ct. 2140.

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 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, 131 S.Ct. 2541. 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, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013), which are clearly at odds with the panel's decision.

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 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 panel's decision for two ***1189** 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.

[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 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.

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 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. ***1190** 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, 131 S.Ct. 2541, 180 L.Ed.2d 374 (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, 131 S.Ct. 2541. 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, 131 S.Ct. 2541 (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, 131 S.Ct. 2541 (quoting *Falcon*, 457

U.S. at 161, 102 S.Ct. 2364). And, relevant here, the Court expressly "doubt[ed]" the idea, advanced by the district court in *Dukes* and adopted ***1191** by the panel here, that "*Daubert* [does] not apply to expert testimony at the certification stage of class-action proceedings." *Id.* at 354, 131 S.Ct. 2541.

At least one other Supreme Court case counsels against the panel's holding here. In *Comcast Corporation v. Behrend*, 569 U.S. 27, 133 S.Ct. 1426, 185 L.Ed.2d 515 (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, 133 S.Ct. 1426 (citing *Dukes*, 564 U.S. at 350–51, 131 S.Ct. 2541) (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.

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