

CLASS ACTION BLOG

# Ninth Circuit Holds That Plaintiffs Are Not Required to Support Class Certification Motions by Admissible Evidence

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**Summary:** Nurses Sali and Spriggs moved to certify seven classes of registered nurses allegedly underpaid by Corona Regional Medical Center (“Corona”) as a result of its employment policies and practices. The district court denied class certification for all of the proposed classes on multiple grounds including some of the classes failed to meet Federal Rule 23(b)(3)’s predominance requirement, none of the classes satisfied Rule 23(a)’s typicality requirement, Spriggs was not an adequate class representative because not a member of any of the proposed classes, and the attorneys were inadequate because they “had not demonstrated they [would] adequately serve as class counsel.” After Sali and Spriggs appealed, they moved to stay the appeal while the California courts ruled on some state law substantive issues. After the state courts ruled, Sali and Spriggs limited their appeal to four of the seven original classes. The 9th Circuit reversed and remanded for further proceedings.

*Sali v. Corona Regional Medical Center*

This post does not discuss all of the issues addressed by the 9th Circuit in *Sali*. Rather, it addresses some issues of general importance.

The most important ruling in *Sali* may be its consideration and discussion of the nature of the evidence a district court should consider at the class certification stage. The evidence under consideration was the admissibility of a declaration on the typicality issue. A paralegal had analyzed the time and payroll records of the named plaintiffs to determine whether they were properly compensated and, after evaluating “the policy’s effect on Sali and Spriggs individually, [the paralegal] used Excel spreadsheets to compare Sali and Spriggs’ rounded times with the actual clock-in and clock-out times using a random sampling of timesheets. That analysis “demonstrated that on average over hundreds of shifts, Corona’s rounded time policy undercounted [plaintiffs] clock-in and clock-out times.” Corona objected to the declaration on several grounds leading the district court to strike the declaration as inadmissible.

It is the burden of the party seeking class certification to affirmatively demonstrate that the class meets the prerequisites of Rule 23(a) and must do so using evidentiary proof. Further, trial courts “must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites of Rule 23.”

However, district courts are not required to conduct mini-trials while conducting the required rigorous analysis. Furthermore, a class certification order is both preliminary and interlocutory. Citing *In re: Zurn Pex Plumbing Prod. Liab. Litig.*, 655 F.3d 604, 613 (8th Cir. 2011), the 9th Circuit noted that class certification motion inquiries are “tentative,” “preliminary,” and “limited.” Accordingly, “[l]imiting class-certification-stage proof to admissible evidence risks terminating actions before a putative class may gather crucial admissible evidence. In transforming a preliminary stage into an evidentiary shooting match inhibits an early determination for the best manner to conduct the action.” For that reason, the 9th Circuit had earlier ruled a district court abused its discretion by limiting its analysis of evidence meeting Rule 23 requirements “to a determination of whether plaintiff’s evidence on that point was admissible.” Citing *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). The 9th Circuit in *Sali* held that the evidentiary proof submitted in support of class certification, “need not be admissible evidence.”

District courts in the 9th Circuit are entitled to evaluate motions for class certification based on “material sufficient to form a reasonable judgment on each [Rule 23(a)] requirement.” (*Citing Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975).) The 9th Circuit pointed out that there is a circuit split on this issue and proceeded to discuss the nature of the split. The court stated that, “[o]nly 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).” The 7th Circuit “has suggested that expert evidence submitted in support of class certification must be admissible” under the *Daubert* standard. See *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 812 (7th Cir. 2012). Likewise, the 3rd Circuit 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*.” See *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3rd Cir. 2015). However, the 8th Circuit had “held that a district court is not limited to considering only admissible evidence in evaluating whether Rule 23’s requirements are met.” (Citing *Zurn Pex*, 644 F.3d at 612-13.) The 8th Circuit reasoned that there are differences between Rule 23, summary judgment and trial stages that warrant “greater evidentiary freedom at the class certification stage,” reasoning the 9th Circuit found the “persuasive.” Similar to standing issues which have varying proof requirements depending upon the stage of the case, so too, different proof requirements exist depending upon whether the court is considering class certification, summary judgment, or trial issues.

Dealing specifically with the proof submitted in the paralegal’s affidavit, the 9th Circuit noted that Corona did not “dispute the authenticity of the payroll data underlying [the paralegal’s] analysis, nor did it directly dispute the accuracy of his calculations.” Rather Corona focused on the inadmissibility of the evidence. According to the 9th Circuit, “the district court rejected evidence that likely could have been presented in an admissible form at trial,” noted that after the paralegal’s declaration was challenged that Spriggs and Sali submitted their own supporting sworn declarations, and held that the “district court should have considered the declarations... in determining whether the typicality prerequisite was satisfied.”

Notwithstanding that holding, the 9th Circuit’s guidance for the district court was that it “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*. ... 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.”

In *Sali* it seems the 9th Circuit has adopted a “persuasiveness of the evidence” test when determining whether a Rule 23 requirement has been satisfied. How workable that test is will be determined in subsequent cases over the next several years. Furthermore, it will be interesting to see whether other circuits adopt that test. In addition, it will be interesting to see whether the 8th Circuit agrees that its 9th Circuit brethren correctly adopted and applied the “persuasiveness of the evidence” test from *In re Zurn*.

*Sali* teaches that the district courts in the 9th Circuit must engage in a rigorous analysis to determine whether Rule 23's requirements are met. Furthermore, the evidence sufficient to withstand such a rigorous analysis does not have to be admissible; rather, it has to be "persuasive" to the district court. In addition, if expert testimony is challenged, it has to be evaluated "under the standard set forth in Daubert." It will be interesting to see how other circuits deal with this rigorous analysis evidentiary issue.

It is also noteworthy that Spriggs and Sali conceded that Spriggs was not a member of any of the classes and, for that reason, she was inadequate. Nevertheless, Spriggs' inadequacy was insufficient to deny class certification because Sali was an adequate representative. And even though the district judge properly found that the attorneys made "apparent errors", the district court made "no mention of the evidence in the record demonstrating class counsel's substantial competent work on this case." For that reason, the 9th Circuit concluded that the ruling that that law firm "could not adequately serve as class counsel" was premature and an abuse of discretion. However, on remand the district court was not precluded from considering prior sanctions imposed against counsel as evidence of inadequacy if [those] attorneys continue to neglect their duties." The 9th Circuit's warning to those attorneys should be heard, understood, and heeded by all class action litigators.