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The Ninth Circuit Enters the Class Certification Fray: *Sali's* Rejection of Evidentiary Formalism and Its Implications

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THE NINTH CIRCUIT ENTERS THE CLASS CERTIFICATION FRAY: *SALI*'S REJECTION OF EVIDENTIARY FORMALISM AND ITS IMPLICATIONS

Abstract: In 2015, registered nurses brought a putative employment class action against the hospital that employed them, alleging that the hospital underpaid them by rounding their time in violation of California law. The United States District Court for the Central District of California denied class certification because the evidence that the plaintiffs submitted to demonstrate the “typicality requirement” for class certification under Federal Rule of Civil Procedure 23 was inadmissible. On appeal, the U.S. Court of Appeals for the Ninth Circuit held that inadmissibility alone is not a proper basis for denying class certification, adding to the circuit split over the issue of whether evidence submitted at class certification proceedings must be admissible under the Federal Rules of Evidence. This Comment analyzes the Ninth Circuit’s position in the circuit split and argues that, because of the nature of the evidentiary challenges in *Sali v. Corona Regional Medical*, the applicability of its holding remains unclear for cases where evidentiary objections go to the form rather than the substance of the evidence.

INTRODUCTION

Federal Rule of Civil Procedure 23 (“FRCP 23”) governs class action lawsuits and sets forth the prerequisites that plaintiffs must satisfy to obtain class certification and adjudicate their claims on a class-wide basis.¹ Although FRCP 23 clearly lays out the prerequisites that plaintiffs must establish to obtain class certification, it does not articulate the standard that courts should apply to the evidence that plaintiffs submit to demonstrate fulfillment of these requirements.² The Supreme Court has held that courts must undertake a “rigorous analysis” when determining whether FRCP 23’s prerequisites

¹ FED. R. CIV. P. 23; see BEVERLY REID O’CONNELL & KAREN L. STEVENSON, FEDERAL CIVIL PROCEDURE BEFORE TRIAL ¶ 10:250 (National ed. 2019) (discussing class actions generally and Federal Rule of Civil Procedure 23’s (“FRCP 23”) role in governing federal class action proceedings).

² See Linda S. Mullenix, *Putting Proponents to Their Proof: Evidentiary Rules at Class Certification*, 82 GEO. WASH. L. REV. 606, 614 (2014) (explaining that, unlike Federal Rule of Civil Procedure 56 (“FRCP 56”) for summary judgment, FRCP 23 does not specify the evidentiary standards for evidence offered in support of or in opposition to class certification).

have been satisfied, but did not specify what a rigorous analysis entails.³ In light of FRCP 23's omissions and the lack of guidance from the Court, circuit courts have reached varying conclusions about what evidentiary standards should be applied when evaluating whether to certify a class under FRCP 23.⁴

At the heart of their divergence, the circuit courts are conflicted about whether evidence submitted in support of class certification must be admissible under the Federal Rules of Evidence.⁵ Because class certification under FRCP 23 is often outcome-determinative for the case, the evidentiary standards that the courts impose at the class certification stage have critical implications for the way that plaintiffs and defendants approach class actions.⁶ Accordingly, the current circuit split on this issue has far-reaching implications for class litigation.⁷

The Third, Fifth, and Seventh Circuit Courts of Appeals have all held that courts must only consider admissible evidence in deciding whether to certify a class, although the Eighth Circuit Court of Appeals has held that evidence submitted in support of class certification need not be admissible.⁸ The

³ See *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 351 (2011) (holding that courts must undertake a "rigorous analysis" to determine whether plaintiffs have affirmatively demonstrated the FRCP 23's requirements, but not elaborating on what the analysis involves).

⁴ See Libby Jelinek, *The Applicability of the Federal Rules of Evidence at Class Certification*, 65 UCLA L. REV. 280, 286 (2018) (explaining how the federal courts are currently split on whether evidence at the class certification stage must be admissible); Mullenix, *supra* note 2, at 634 (discussing that courts are currently divided on the evidentiary rules governing the materials submitted in support or in opposition to a motion for class certification given FRCP 23's omissions and the lack of explicit guidance in the class certification jurisprudence).

⁵ See Jelinek, *supra* note 4, at 294 (explaining how the federal courts diverge on whether the Federal Rules of Evidence and thus *Daubert v. Merrell Dow Pharmaceuticals, Inc.* apply to evidence submitted at class certification proceedings); Mullenix, *supra* note 2, at 614 (explaining that FRCP 23's failure to clarify an array of critical matters has left courts without much guidance in making class certification determinations).

⁶ See Charles Silver, "*We're Scared to Death*": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1399 (2003) (discussing the charge that defendants are blackmailed into settlement when the court certifies a class due to litigation costs and reputational risks of defending a class action); Amy Dudash, Casebrief, *Hydrogen Peroxide: The Third Circuit Comes Clean About the Rule 23 Class Action Certification Standard*, 55 VILL. L. REV. 985, 986–87 (2010) (explaining how the high risks and costs of defending class litigation usually compel defendants to settle if class certification is granted, although damages will generally not be enough to justify litigation on an individual basis for plaintiffs if class certification is denied).

⁷ See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 753 (2013) (explaining how higher evidentiary burdens under FRCP 23 make it more difficult for plaintiffs to bring class action lawsuits).

⁸ Compare *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 185 (3d Cir. 2015) (holding that challenged expert testimony must satisfy evidentiary standard set out in *Daubert* to satisfy the requirements of FRCP 23), and *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 812 (7th Cir. 2012) (concluding that the district court should make an explicit *Daubert* ruling on expert testimony that is critical to class certification), and *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005) (holding that expert testimony submitted in support of class certification must be admissible under *Daubert*), with *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 612

Ninth Circuit Court of Appeals' 2018 decision in *Sali v. Corona Regional Medical Center (Sali II)* contributed to this circuit split.⁹ In 2015, the plaintiffs brought a putative employment class action against the hospital that employed them.¹⁰ The United States District Court for the Central District of California, in 2015 in *Sali v. Universal Health Services, Inc. (Sali I)*, denied class certification, finding that the plaintiffs failed to meet the typicality requirement of FRCP 23 because the evidence they submitted to demonstrate typicality was inadmissible.¹¹ On appeal, the Ninth Circuit held that inadmissibility alone is an improper basis for denying class certification.¹²

Part I of this Comment discusses *Sali II*'s specific factual background and procedural history, and provides both the procedural standard for class certification under FRCP 23 and the evolution the rule's judicial interpretation.¹³ Part II of this Comment explains the different positions that circuit courts have taken regarding the evidentiary standards governing class certification, and examines the contribution that the Ninth Circuit makes to the circuit split with its decision in *Sali*.¹⁴ Part III of this Comment analyzes the Ninth Circuit's position in the circuit split and argues that *Sali II*'s implications remain unclear for cases where evidentiary objections based on *Daubert v. Merrell Dow Pharmaceuticals, Inc.* go to the form rather than the substance of the evidence.¹⁵

I. HISTORY OF *SALI V. CORONA REGIONAL MEDICAL CENTER*, THE STANDARD FOR CLASS CERTIFICATION UNDER FRCP 23 AND ITS JUDICIAL INTERPRETATION

Section A of this Part discusses *Sali II*'s factual background and procedural history.¹⁶ Section B of this Part discusses the procedure for class certifi-

(8th Cir. 2011) (holding that the district court is not limited to considering only admissible evidence in evaluating whether FRCP 23's requirements are met).

⁹ See *Sali v. Corona Reg'l Med. Ctr. (Sali II)*, 889 F.3d 623, 632 (9th Cir. 2018) (holding that inadmissibility of evidence alone is not a proper basis for denying class certification), amended by 909 F.3d 996 (9th Cir. 2018). The Ninth Circuit Court of Appeals amended its 2018 opinion in *Sali v. Corona Regional Medical Center* to correct several citations, but left the substance of the opinion unchanged. Compare, e.g., 889 F.3d at 637 (citing "*Morillion*, 22 Cal.4th 575, 94 Cal.Rptr.2d 3, 995 P.2d at 141"), with 909 F.3d at 1010 (citing "*Morillion*, 94 Cal.Rptr.2d 3, 995 P.2d at 141").

¹⁰ *Sali v. Universal Health Servs., Inc. (Sali I)*, No. CV 14-985 PSG (JPRx), 2015 WL 12656937, at *1 (C.D. Cal. June 3, 2015), *rev'd sub nom. Sali II*, 889 F.3d 623.

¹¹ *Id.*

¹² *Sali II*, 889 F.3d at 632.

¹³ See *infra* notes 16–56 and accompanying text.

¹⁴ See *infra* notes 57–79 and accompanying text.

¹⁵ See *infra* notes 59–79 and accompanying text.

¹⁶ See *infra* notes 82–96 and accompanying text.

cation under FRCP 23.¹⁷ Section C of this Part discusses the judicial development of the standards for class certification under FRCP 23 and the Supreme Court's holding that courts must conduct a "rigorous analysis" to determine whether plaintiffs have affirmatively demonstrated FRCP 23's prerequisites.¹⁸ Section D of this Part discusses how FRCP 23's omissions and the lack of explicit guidance from the Supreme Court has created a divergence among circuit courts about what evidentiary standards should be applied when evaluating whether to certify a class.¹⁹

A. Factual Background and Procedural History of *Sali*

In 2015, plaintiffs Marilyn Sali and Deborah Spriggs brought a putative employment class action against Corona Regional Medical Center ("Corona"), an acute care hospital in Southern California that formerly employed them as registered nurses ("RNs").²⁰ The plaintiffs filed the class action on behalf of a general class and seven subclasses of RNs, alleging that Corona's practice of rounding the time at which RNs clocked in and out resulted in underpayment of wages in violation of California law.²¹ In *Sali I*, the district court denied the plaintiffs' motion for class certification of each proposed

¹⁷ See *infra* notes 20–39 and accompanying text.

¹⁸ See *infra* notes 40–51 and accompanying text.

¹⁹ See *infra* notes 52–56 and accompanying text.

²⁰ *Sali I*, 2015 WL 12656937, at *1. The plaintiffs asserted their claims against both Corona and Defendant UHS-Delaware, a healthcare management company that manages and provides administrative support to Corona, under a joint-employer liability theory.

²¹ *Id.*; See *S. Candy Shops v. Super. Ct.*, 148 Cal. Rptr. 3d 690, 704–05 (Ct. App. 2012) (interpreting 29 C.F.R. § 785.48 and holding that, under California law, an employer's use of a rounding policy is permissible if the policy is facially fair and neutral, and is used in such a manner that does not result in failure to adequately compensate employees for the time they have actually worked). Plaintiffs asserted multiple violations of California law, including failure to pay all regular hourly wages for all required work hours, failure to pay all overtime wages for requisite work hours, failure to pay correct overtime rate of pay, failure to pay premium wages for meal and rest periods, failure to pay all wages due upon termination of employment, failure to provide accurate itemized wage statements, and a violation of California's Unfair Competition Law. *Sali I*, 2015 WL 12656937, at *1. The general class was comprised of all full-time or full-time equivalent RNs formerly and currently employed by Defendants in California from the period of August 23, 2009, to the present who were underpaid wages for regular rate of pay, overtime hours, and off-duty and meal-and-rest periods. *Id.* at *2. The seven subclasses possess the aforementioned characteristics, as well as other attributes specific to the nature of their employment by the defendant. *Id.* at *3. Corona did not dispute its rounding-time practices. *Id.* Corona used a system called Kronos to track hours worked by its RNs and paid them an hourly wage based on the time they punched in and out, rounding to the nearest quarter hour. *Id.* at *1. 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. *Id.* at *4. Plaintiffs contended that Corona's rounding policy, despite its facial fairness and neutrality, failed to sufficiently compensate RNs overtime for all hours actually worked due to the fact that RNs lost more minutes than they gained as a result of the policy. *Id.*

class on four grounds.²² Among the four grounds for denial, the court concluded that the named plaintiffs failed to meet the typicality prerequisite of FRCP 23.²³

To establish FRCP 23's typicality requirement, the plaintiffs submitted the declaration of a paralegal at their counsel's office to demonstrate their alleged injuries.²⁴ In the declaration, the paralegal opined that, based on his analysis, Corona's rounding policy undercounted Sali's and Sprigg's actual clocked times.²⁵ The district court struck the declaration on the basis that it was inadmissible evidence and thus found that the plaintiffs failed to meet their burden of demonstrating, as required for class certification, that their proposed class satisfied FRCP 23's typicality prerequisite.²⁶

The plaintiffs appealed the district court's denial of class certification and, specifically, its finding that the typicality requirement was not met.²⁷ On appeal, the Ninth Circuit held that the district court abused its discretion in declining to consider the declaration submitted in support of class certification solely on the grounds that it would be inadmissible at trial.²⁸

²² *Sali I*, 2015 WL12656937, at *1. First, the United States District Court for the Central District of California found that several of the proposed classes were insufficient to establish FRCP 23's predominance requirement. *Id.* at *4–9. Second, the court held that plaintiffs failed to meet FRCP 23's typicality prerequisite for any of the proposed classes. *Id.* at *10. Third, the district court concluded that Spriggs was not an adequate class representative because she was not a member of the proposed class she was attempting to represent. *Id.* at *11. Fourth, the district court held the attorneys from the law firm, Bisnar Chase, had not demonstrated they would adequately serve as class counsel. *Id.* at *12.

²³ FED. R. CIV. P. 23(a); *Sali II*, 889 F.3d at 627. The typicality requirement necessitates that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a).

²⁴ *Sali II*, 889 F.3d at 630. Plaintiffs submitted a declaration from a paralegal, Javier Ruiz, analyzing the effect of Corona's rounding time policy. *Id.*

²⁵ *Id.* Ruiz compared plaintiffs' actual times with the rounded times and found that the rounding policy undercounted the plaintiffs' times by an average of eight minutes for Sali and six minutes for Spriggs per shift. *Id.*

²⁶ *Id.* The district court found that Ruiz was unable to authenticate the Excel sheets and data he used to conduct his analysis because he lacked personal knowledge to attest to the fact that the data accurately represented plaintiffs' employment records. *Id.* The court further concluded that Ruiz's declaration constituted improper opinion testimony under Federal Rule of Evidence 701 ("FRE 701") because his analysis required technical qualifications of an expert that lie outside FRE 701's limitations for opinion testimony by lay witnesses. FED. R. EVID. 701; *Sali II*, 889 F.3d at 630. After determining that the declaration was categorically improper lay testimony, the court held that the declaration did not qualify as admissible expert testimony under Federal Rule of Evidence 702 because Ruiz lacked the technical and specialized qualifications to analyze the pay data. FED. R. EVID. 702; *Sali II*, 889 F.3d at 630.

²⁷ *Sali II*, 889 F.3d at 629. The plaintiffs appealed all of the district court's findings. *Id.*

²⁸ *Id.* at 632.

B. Procedure for Class Certification: Federal Rule of Civil Procedure 23

FRCP 23 governs class actions in federal court, serving as the mechanism by which a matter can be adjudicated on a class-wide basis.²⁹ District courts must grant certification under FRCP 23 to plaintiffs seeking to adjudicate their claims through a class action before they may proceed with class litigation.³⁰ To obtain class certification, plaintiffs must affirmatively demonstrate four threshold requirements: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.³¹ Additionally, plaintiffs seeking class certification must show that the class meets at least one of the three provisions for types of class actions set forth under FRCP 23.³² A motion for class certification under FRCP 23 can be initiated at any time by the plaintiff, defendant, or—in the event that neither party moves for certification—the court.³³ Failure

²⁹ FED. R. CIV. P. 23; see O'CONNELL & STEVENSON, *supra* note 1, ¶ 10:250 (discussing class actions generally and FRCP 23's role in governing federal class action proceedings).

³⁰ FED. R. CIV. P. 23; see 7 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1785 (3d ed. 2001, Supp. Nov. 2018) (explaining that courts must make determinations of class certification under FRCP 23 for class actions to proceed).

³¹ See FED. R. CIV. P. 23(a) (establishing that “one or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class”); see also *Wal-Mart Stores*, 564 U.S. at 349–50 (explaining that satisfaction of FRCP 23's commonality element requires that claims invoke a common legal theory that is capable of class-wide resolution); *Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997) (asserting that the adequacy requirement under FRCP 23 serves to ensure that there are no conflicts of interest between named parties and the class they seek to represent and affirming that representative plaintiffs must satisfy the numerosity requirement of FRCP 23 by demonstrating that a joinder would prove impracticable under the circumstances); *Marcus v. BMW of N. Am.*, 687 F.3d 583, 591–92 (3rd Cir. 2012) (asserting that plaintiffs must establish that claims arose from the same event or pattern or practice and are based on the same legal theory to satisfy FRCP 23's typicality requirement); *Jelinek*, *supra* note 4, at 286 (explaining that plaintiffs moving for class certification have the burden of demonstrating that FRCP 23(a)'s prerequisites are met).

³² FED. R. CIV. P. 23(b); O'CONNELL & STEVENSON, *supra* note 1, ¶ 10:385. Plaintiffs must establish that their class satisfies one or more of the following categories to obtain class certification: (1) prejudice class action, wherein there is a risk of prejudice from separate actions such that a class action suit is necessary; (2) injunctive or declaratory relief class action, wherein the actions or omissions on the part of the opposing party are applicable to the class generally, thus justifying injunctive or declaratory relief as the appropriate remedy with regards to the class as a whole; or (3) damages class action, wherein common questions of law and fact predominate over individual differences and, on the aggregate, class litigation is the superior method of adjudicating the claims. O'CONNELL & STEVENSON, *supra* note 1, ¶ 10:385.

³³ See WRIGHT & MILLER, *supra* note 30, § 1785 (explaining that either plaintiff or defendant may move for a class certification, and that, in the event neither party initiates a motion, the court is permitted to make its determination of whether to certify the class under FRCP 23 given its independent obligation to decide whether a claim can be brought on a class-wide basis).

to affirmatively demonstrate the mandatory requirements of Rules 23 will result in denial of class certification.³⁴

Class certification under FRCP 23 is a pivotal stage in class litigation.³⁵ Theoretically, class certification is a tentative and preliminary proceeding, as FRCP 23 establishes that an order granting or denying certification may be altered or amended prior to the final judgment.³⁶ In reality, however, the decision to certify a class is often outcome-determinative.³⁷ Given the high costs and exposure associated with defending class action litigation, an order granting class certification typically compels defendants to settle, whereas an order denying class certification is often the deathblow for plaintiffs who will be unlikely to recover enough individually to justify continued litigation.³⁸ Accordingly, it is common for plaintiffs and defendants to offer evidence—particularly in the form of expert testimony—to support or defeat the demonstration of FRCP 23’s requirements for class certification at this stage.³⁹

C. FRCP 23 in Operation—Judicial Development of the Standards for Class Certification

Although the black letter language of FRCP 23 establishes the threshold requirements that plaintiffs must meet for class certification to be granted, the rule does not specify the standards governing evidence submitted in support of these prerequisites.⁴⁰ Given FRCP 23’s omissions and the lack of explicit

³⁴ See *Wal-Mart Stores*, 564 U.S. at 345 (establishing that class certification is only proper if plaintiffs affirmatively demonstrate FRCP 23’s requirements).

³⁵ See WRIGHT & MILLER, *supra* note 30, § 1785 (asserting that class certification determinations have a significant impact on the named parties, absent parties, and on the court); Dudash, *supra* note 6, at 987 (asserting that a decision to certify a class typically leads to settlement of the case, with eighty-nine percent of certified class actions resulting in settlement, whereas denial of a class certification motion eliminates the mechanism of class adjudication that made the lawsuit viable in the first place thereby signaling the end of litigation for plaintiffs).

³⁶ See FED. R. CIV. P. 23(c)(1)(C) (establishing that an order granting or denying class certification is subject to amendment or alteration); *Zurn*, 644 F.3d at 613 (reasoning that a court’s ruling on a motion for class certification is “inherently tentative” and “preliminary” and may be reevaluated after the completion of discovery).

³⁷ See Dudash, *supra* note 6, at 387 (explaining how class certification rulings generally dictate the fate of the case).

³⁸ See Silver, *supra* note 6, at 1399 (discussing how certification increases the likelihood of settlement).

³⁹ See M. Joseph Winebrenner, *Expert Evidence at Class Certification and the Role of Daubert*, AM. BAR ASS’N (July 16, 2015), <http://apps.americanbar.org/litigation/committees/masstorts/articles/summer2015-0715-expert-evidence-class-certification-stage-role-daubert.html> [<https://perma.cc/MY2X-X4K2>] (explaining that parties will often invest in expert testimony to support or oppose class certification due to the significance of class certification of the outcome of the class action).

⁴⁰ See Mullenix, *supra* note 2, at 614 (explaining that, unlike FRCP 56 for summary judgment, FRCP 23 does not specify the evidentiary standards for evidence offered in support of or in opposition to class certification).

guidance surrounding its application, class certification has proved to be somewhat of a gray area for courts.⁴¹

In early class action jurisprudence, federal and state courts, guided by their favorable view of class litigation, generally engaged in lenient class certification proceedings.⁴² Courts applied FRCP 23 with an eye to the rule's conception, which was to ensure that the primary functions of the class mechanism were being served; namely, that the class action suit was promoting judicial economy and fairly protecting the rights of parties who may otherwise lack the means to litigate claims individually.⁴³ Traditionally, this meant that courts did not conduct a searching analysis of a case's merits at the class certification stage, but rather, generally granted class certification when the court determined it to be a fair and efficient means of litigating the claim at hand.⁴⁴ The Supreme Court expressly stated in its 1974 decision in *Eisen v. Carlisle & Jacquelin* that neither the language nor history of FRCP 23 permits courts to delve into the merits of a case when deciding whether to certify a class.⁴⁵

Nearly forty years later in 2011, however, the Supreme Court blurred the apparent clarity *Eisen* established in its ruling in *Wal-Mart Stores, Inc. v. Dukes*, a seminal decision that marked the beginning of a shift in the previously lenient standards that had long characterized class action jurispru-

⁴¹ See *id.* (explaining that FRCP 23's failure to clarify an array of critical matters has left courts without much guidance in making class certification determinations); Jelinek, *supra* note 4, at 294 (explaining how the federal courts are currently split on whether all evidence at class certification be admissible).

⁴² See Klonoff, *supra* note 7, at 752 (explaining that most courts only required minimal evidentiary support for class certification proceedings); Mullinix, *supra* note 2, at 614 (explaining that many courts willingly certified class actions based on plaintiffs' pleadings alone throughout the 1980s and 1990s, with most courts defaulting to a presumption favoring class litigation).

⁴³ See FED. R. CIV. P. 23 advisory committee's note to 1966 amendment (explaining that the amendments to FRCP 23 took into account the rule's purpose of assuring procedural fairness and protecting due process rights of litigants); David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 594 (2013) (explaining that FRCP 23 promotes procedural goals by enabling individuals with similar claims against defendants to litigate those claims together if doing so would obtain efficient and fair class-wide remedy); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 531–37 (2013) (discussing the evolution of the court's application and interpretation of the procedural rules governing class actions).

⁴⁴ See Klonoff, *supra* note 7, at 747 (detailing how plaintiffs were permitted to seek class certification based on the pleadings or on only minimal evidentiary support for most of class action jurisprudence); Linda S. Mullenix, *Ending Class Actions As We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 421 (2014) (explaining the goals of class actions and the role class certification plays in effectuating them).

⁴⁵ See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 158, 177 (1974) (asserting that there is no support found in FRCP 23's language or history authorizing courts to "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action").

dence.⁴⁶ In *Wal-Mart Stores*, the Supreme Court laid the foundation for the modern class certification standard and established that courts must undertake a “rigorous analysis” in determining whether plaintiffs have affirmatively demonstrated FRCP 23’s prerequisites.⁴⁷ Although the decision did not offer a precise guideline for what a “rigorous analysis” entails, it suggested that the standard for class certification under FRCP 23 is more exacting than the pleading standard of Federal Rule of Civil Procedure 8.⁴⁸ The Court fortified this notion in its 2013 decision in *Comcast Corp. v. Behrend*, which departed from its position in *Eisen*.⁴⁹ In *Comcast*, the Court held that a rigorous assessment will often necessitate probing beyond the pleadings and into the underlying merits of the case at hand given that the legal and factual issues of a plaintiffs’ case have direct bearing on FRCP 23’s requirements.⁵⁰ Although the Court’s decisions in *Wal-Mart Stores* and *Comcast* left district courts with much uncertainty regarding the application of the “rigorous analysis” standard in class certification determinations, they made one thing very clear: the bar for class certification had become significantly higher for plaintiffs seeking to adjudicate their claims on a class-wide basis.⁵¹

⁴⁶ See *Wal-Mart Stores*, 564 U.S. at 351 (establishing that class certification requires courts to conduct a “rigorous analysis” to determine whether FRCP 23’s requirements have been met, which often entails some overlap with the underlying merits of the case); see also *Mullinex*, *supra* note 2, at 617 (explaining how Supreme Court declared that a heightened standard for judicial assessment of class certification must govern in *Wal-Mart Stores*).

⁴⁷ *Wal-Mart Stores*, 564 U.S. at 351.

⁴⁸ See FED. R. CIV. P. 8(a)(2) (a pleading that states a claim for relief must “contain a short and plain statement of the claim showing that the pleader is entitled to relief”); *Wal-Mart Stores*, 564 U.S. at 351 (asserting that FRCP 23 does not set forth a “mere pleading standard,” but rather, requires that a plaintiff affirmatively prove compliance with the rule’s prerequisites); *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009) (solidifying that the heightened standard for pleading set forth in *Twombly* applies to all civil actions); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007) (interpreting Federal Rule of Civil Procedure 8 and establishing a heightened pleading standard, requiring that a complaint must contain sufficient factual matter, if accepted as true, to “state a claim to relief that is plausible on its face”).

⁴⁹ Compare *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (holding that a certification assessment often requires courts to probe into the merits of the case given that the factual and legal issues of the plaintiff’s cause of action are often inextricably embedded in determinations of whether a plaintiff has demonstrated the requirements of FRCP 23), with *Eisen*, 417 U.S. at 177 (asserting that court is not permitted to conduct a preliminary inquiry into the merits of the case in ruling on a motion for class certification).

⁵⁰ *Comcast*, 569 U.S. at 33.

⁵¹ See Joseph A. Seiner, *The Issue Class*, 56 B.C. L. REV. 121, 129 (2015) (discussing how scholars argue that the Court’s decision in *Wal-Mart Stores* undercuts plaintiffs’ ability to bring class actions); *Mullinex*, *supra* note 2, at 615 (explaining how federal courts followed the rigorous analysis standard set forth by the Supreme Court despite their various interpretations of it); *Jelinek*, *supra* note 4, at 294 (asserting that *Wal-Mart* marked a departure from previous class certification standards, resulting in a heightened evidentiary burden for plaintiffs at the class certification stage in the wake of this decision).

D. Application of the “Rigorous Analysis” Standard by the Circuit Courts: Admissibility Under the Federal Rules of Evidence, or Not Quite So Rigorous?

Although federal courts have consistently cited the “rigorous analysis” standard in step with Supreme Court precedent, several circuit courts have invoked varying interpretations of what this standard means for evidence submitted in support of class certification.⁵² Most of the circuit courts’ divergence in applying the rigorous analysis standard turns on the question of whether evidence submitted to demonstrate FRCP 23’s prerequisites at class certification proceedings must satisfy the admissibility requirements of the Federal Rules of Evidence.⁵³ With expert testimony comprising a majority of the evidence submitted to establish FRCP 23’s prerequisites, much of the debate around evidentiary sufficiency involves an even more nuanced question: whether expert testimony needs to meet the requirements of Federal Rule of Evidence 702 (“FRE 702”) and therefore the evidentiary standard set forth under *Daubert*.⁵⁴ The Supreme Court has not explicitly answered this question, but suggested in dicta in *Wal-Mart Stores* that expert evidence submitted in support of class certification must be admissible under *Daubert*.⁵⁵ In light of this non-binding dicta, several circuit courts have reached differing conclu-

⁵² See Jelinek, *supra* note 4, at 294 (explaining the disputed application of the rigorous analysis standard for assessment of class certification under FRCP 23).

⁵³ See *id.* at 295 (explaining that the dispute over the admissibility requirements arises because plaintiffs rely on expert evidence to produce social framework analysis and statistical evidence central to class action claims).

⁵⁴ FED. R. EVID. 702; see *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 597 (1993) (establishing a set of criteria for federal courts to determine the admissibility of expert testimony under FRE 702); Jelinek, *supra* note 4, at 289 (noting how issue of admissibility under FRE 702 is the central debate regarding evidentiary sufficiency required for class certification given prevalence of expert testimony). In interpreting FRE 702 in its 1993 opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court set forth a new evidentiary standard governing the admissibility of expert testimony in federal courts, which requires federal courts to determine whether an expert’s testimony is reliably based on scientifically valid methods and relevant to the facts of the case. 509 U.S. at 591. The Court provided a list of non-exhaustive factors that should guide a federal court’s assessment of the admissibility, including: (1) whether an expert’s opinion has been peer reviewed; (2) whether an expert’s theory can be and has been tested; (3) known or potential error rate of an expert’s theory; and (4) general acceptance of an expert’s theory in the relevant scientific community in which it is based. *Id.* at 595–99. FRE 702 states that

a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702.

⁵⁵ See *Wal-Mart Stores*, 564 U.S. at 351 (asserting, in dicta, the Court’s doubt regarding the United States District Court for the Northern District of California’s conclusion that expert evidence submitted in support of class certification need not be admissible under *Daubert*).

sions about the applicability of the Federal Rules of Evidence when deciding whether to certify a class.⁵⁶

II. THE CIRCUIT SPLIT AND THE NINTH CIRCUIT'S CONTRIBUTION

Section A of this Part discusses the circuit split about whether evidence submitted in support of class certification needs to be admissible.⁵⁷ Section B of this Part discusses the contribution that the Ninth Circuit Court of Appeals' 2018 decision in *Sali v. Corona Regional Medical Center (Sali II)* makes to this circuit split.⁵⁸

A. *The Circuit Split: Evidentiary Standards for Class Certification*

The Fifth Circuit Court of Appeals has directly held that evidence offered in support of class certification must be admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁵⁹ In 2005, in *Unger v. Amedisys Inc.*, the Fifth Circuit reversed the United States District Court for the Middle District of Alabama's decision to certify the class, finding that the plaintiffs failed to demonstrate FRCP 23's predominance requirement because the expert testimony offered to support plaintiffs' fraud-on-the-market theory did not satisfy *Daubert*.⁶⁰

The Third Circuit Court of Appeals has reached a similar conclusion, holding that evidence submitted to establish the prerequisites of FRCP 23 is

⁵⁶ See *Blood Reagents*, 783 F.3d at 185 (holding that challenged expert testimony must satisfy evidentiary standard set out in *Daubert* to satisfy the requirements of FRCP 23); *Messner*, 669 F.3d at 812 (concluding that the United States District Court for the Northern District of Illinois should make an explicit *Daubert* ruling on expert testimony that is critical to class certification); *Zurn*, 644 F.3d at 612 (holding that the United States District Court for the District of Minnesota was not limited to considering only admissible evidence in evaluating whether FRCP 23's requirements are met); *Unger*, 401 F.3d at 319 (holding that expert testimony submitted in support of class certification must be admissible under *Daubert*).

⁵⁷ See *infra* notes 59–72 and accompanying text.

⁵⁸ See *infra* notes 73–79 and accompanying text.

⁵⁹ *Unger v. Amedisys Inc.*, 401 F.3d 316, 325 (5th Cir. 2005).

⁶⁰ *Id.* Purchasers of common stock in Amedisys Inc. filed a securities fraud action alleging that the company increased its stock price by overestimating costs for certain health services to inflate the company's earnings. *Id.* at 319. To sufficiently satisfy FRCP 23's predominance requirement, the plaintiffs needed to demonstrate that the circumstances surrounding each class member's alleged reliance on the fraudulent misrepresentation were the same. *Id.* at 322. The plaintiffs submitted evidence supporting a fraud-on-the-market theory to establish such consistent circumstances, which consisted of an Internet printout and affidavits from plaintiffs' witnesses that were admitted without opportunity for cross-examination. *Id.* The United States District Court for the Middle District of Louisiana certified the class, finding that plaintiffs had sufficiently demonstrated the fraud-on-the-market theory needed to satisfy FRCP 23's predominance requirement. *Id.* at 324. On appeal, the Fifth Circuit Court of Appeals vacated and remanded the district court's decision, holding that class certification was improper because evidence submitted to establish predominance requirement was inadmissible. *Id.* at 325.

subject to the *Daubert* standard.⁶¹ In its decision in 2015, in *In re Blood Reagents Antitrust Litigation*, the Third Circuit held that the district court erred in finding that FRCP 23's predominance requirement had been satisfied by expert testimony the plaintiffs offered to prove class-wide antitrust impact over the defendants' objections to its admissibility.⁶² The Third Circuit vacated the United States District Court for the Eastern District of Pennsylvania's class certification order and instructed the district court to conduct a *Daubert* inquiry on remand if it determined that defendants' evidentiary challenges are relevant to aspects of plaintiffs' expert testimony offered to satisfy FRCP 23.⁶³

Though not an explicit holding, the Seventh Circuit Court of Appeals has also suggested that expert evidence submitted in support of class certification must satisfy the *Daubert* standard of admissibility.⁶⁴ Unlike *Unger* and *Blood Reagents*, which focused on the standard applied to expert evidence submitted by plaintiffs in support of class certification, the central question in 2012, in *Messner v. Northshore University HealthSystem*, was whether *Daubert* applied to the defendant's expert testimony submitted in opposition to class certification.⁶⁵ The Seventh Circuit in *Messner* ultimately held that a

⁶¹ *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015).

⁶² *Id.* Direct purchasers of traditional blood reagents alleged that defendants, two pharmaceutical companies, violated the Sherman Antitrust Act by conspiring to raise and horizontally fix prices. *Id.* at 185. To establish FRCP 23's predominance requirement, plaintiffs submitted expert testimony to prove class-wide antitrust impact and damages. *Id.* at 186. Defendants challenged this expert testimony on the basis that it was unreliable under the *Daubert* standard. *Id.* Despite defendants' evidentiary challenges, the United States District Court for the Eastern District of Pennsylvania concluded that the plaintiffs satisfied the predominance requirement and certified the class on the basis that the evidence could evolve to be admissible at trial. *Id.* at 187. On appeal, the Third Circuit Court of Appeals held that the district court erred in certifying the class without conducting a *Daubert* inquiry to determine if plaintiffs' challenged testimony in support of FRCP 23's predominance requirement was reliable, citing the Supreme Court's dictum in *Wal-Mart Stores, Inc. v. Dukes* to support their conclusion. *Id.*

⁶³ *Id.* at 187.

⁶⁴ See *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 812 (7th Cir. 2012) (holding that the United States District Court for the Northern District of Illinois erred by giving an expert report "the weight . . . it is due" rather than ruling on the report's admissibility under the *Daubert* standard). In 2012, in *Messner v. Northshore University Health Systems*, the Seventh Circuit Court of Appeals identified as one of the central issues whether the defendant's merger had an antitrust impact on the plaintiffs. *Id.* at 808. Thus, to fulfill the predominance requirement of FRCP 23, the plaintiffs were required to establish that the merger had a class-wide and consistent impact on them. *Id.* at 810. Northshore offered expert testimony that concluded that the plaintiffs' proposed class included a number of members who the alleged price increase did not impact and that the plaintiffs had failed to present a methodology for identifying class members. *Id.* The plaintiffs moved to strike the defendant's expert testimony prior to the district court's hearing on class certification, arguing that the expert's analyses were defective and inadmissible. *Id.* The district court refused to conduct a *Daubert* analysis in response to the plaintiffs' challenge and proceeded to deny class certification. *Id.*

⁶⁵ Compare *id.* at 812 (determining on appeal whether the district court erred in refusing to conduct a *Daubert* analysis in response to evidentiary challenges to the defendant's expert's quali-

district court must make a conclusive *Daubert* ruling in response to evidentiary challenges when the expert testimony is critical to class certification.⁶⁶ In reaching this conclusion, the court invoked the logic that expert testimony the defendant offers must be assessed under the same standard applied to the plaintiff's expert testimony.⁶⁷ Thus, by assuming the applicability of *Daubert* to plaintiffs' expert evidence in arriving at its ultimate holding, the Seventh Circuit's decision in *Messner* implicitly reinforced the notion that expert testimony offered in support of class certification must be admissible under *Daubert*.⁶⁸

Diverging from the holdings of the other circuits and the dicta in *Wal-Mart Stores, Inc. v. Dukes*, the Eighth Circuit Court of Appeals held in 2011, in *In re Zurn Pex Plumbing*, that a district court is not required to make a full and definitive determination of admissibility under *Daubert* at the class certification stage.⁶⁹ In its decision, the Eighth Circuit held that the United States District Court for the District of Minnesota acted within its discretion in finding that the plaintiffs had satisfied FRCP 23's predominance requirement without applying a conclusive *Daubert* analysis to expert testimony offered to

fications and testimony prior to ruling on a motion for class certification), *with Blood Reagents*, 783 F.3d at 187 (deciding whether *Daubert* applies to plaintiffs' expert evidence submitted in support of class certification), and *Unger*, 401 F.3d at 319 (determining whether expert testimony offered by plaintiff in support of class certification must be admissible under *Daubert*).

⁶⁶ See *Messner*, 669 F.3d at 812. The court explained that expert testimony is critical when it is significant to resolving an issue that is central to a determination of class certification. *Id.*

⁶⁷ *Id.*

⁶⁸ See *id.* (clarifying that denials of class certification are not exempt from the requirements of *Daubert* and FRE 702 and holding that FRE 702 applies to defendants and plaintiffs alike). The Seventh Circuit affirmed that a district court must make a conclusive *Daubert* ruling on a challenge to expert testimony from either party before making a ruling on a class certification motion if such testimony is deemed critical to class certification. *Id.*

⁶⁹ See *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 351 (2011) (asserting, in dicta, its doubt regarding district court's conclusion that expert evidence submitted in support of class certification need not be admissible under *Daubert*); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 612 (8th Cir. 2011) (holding the United States District Court for the District of Minnesota was not limited to considering only admissible evidence in evaluating whether FRCP 23's requirements are met). In *In re Zurn Pex Plumbing Products Liability Litigation*, homeowners alleged that the defendants, manufacturers of plumbing systems, used defective brass fittings in their systems. 644 F.3d at 609. To establish FRCP 23's predominance requirement, plaintiffs offered expert testimony to prove that Zurn's fittings were caused by inherent defects rather than unusually corrosive water or improper installations and to demonstrate the consistently high failure rate of Zurn PEX plumbing systems with brass fittings. *Id.* at 610. The defendants did not challenge the methodology or qualifications of the plaintiffs' experts, but argued that the district court should conduct a full *Daubert* of the analysis before certifying the class. *Id.* The district court rejected defendants' argument that a full and conclusive *Daubert* inquiry was required at the class certification stage and instead conducted a focused *Daubert* inquiry which sought to answer the question of whether common evidence could suffice to show classwide injury if plaintiffs' basic allegations were true. *Id.* The district court found that the plaintiffs' expert testimony passed muster under this focused *Daubert* analysis and proceeded to certify the class. *Id.* at 613.

prove that the defendants' product defect caused class-wide injury.⁷⁰ The Eighth Circuit concluded that a rigorous analysis of expert testimony under FRCP 23 requires a limited assessment that resolves disputes surrounding expert testimony only to the extent necessary to determine whether evidence, if proven to be true, would be sufficient for plaintiffs to establish a prima facie case for the class.⁷¹ In rejecting *Daubert's* applicability at the class certification stage, the Eighth Circuit reasoned that an application of the "formal strictures" of trial to such an early phase of litigation is improper given that class certification orders, unlike summary judgment motions, are "inherently tentative" and usually made before the close of discovery.⁷²

B. The Ninth Circuit's Decision in *Sali*: Deepening the Circuit Split

The *Sali II* decision deepens the circuit split regarding the evidentiary sufficiency required for class certification.⁷³ The Ninth Circuit's holding in *Sali II* is consistent with the Eighth Circuit's position that evidence need not be admissible at the class certification stage, and stands in apparent contrast with the Third, Fifth, and Seventh Circuits' holdings that evidence submitted at the class certification stage must be admissible under *Daubert*.⁷⁴

⁷⁰ *Id.* at 612. The Eighth Circuit reasoned that defendants' evidentiary objections did not challenge the experts' methodology or qualifications, and thus such evidence was sufficient to establish class-wide injury and make out a prima facie case for plaintiffs. *Id.*

⁷¹ *Id.* The Eighth Circuit, in its 2011 decision in *Zurn*, held that a full and conclusive *Daubert* analysis would have been both impractical and unfair given the current stage of the evidence, as the full merits of discovery were not yet completed. *Id.* The Eighth Circuit further reasoned that a conclusive *Daubert* analysis is categorically inappropriate at the class certification stage given that *Daubert's* gatekeeping function in preventing unreliable evidence from swaying juries is not implicated. *Id.*

⁷² *Id.* In justifying the appropriate evidentiary standard for the class certification stage, the Eighth Circuit differentiated class certification stage from summary judgment, explaining that admissible evidence is required at summary judgment because summary judgment ends trial without litigation. *Id.* at 613.

⁷³ See *Sali v. Corona Reg'l Med. Ctr. (Sali II)*, 889 F.3d 623, 632 (9th Cir. 2018) (concluding that inadmissibility alone is not a proper basis for declining to consider evidence in support of class certification), *amended by* 909 F.3d 996 (9th Cir. 2018); *Blood Reagents*, 783 F.3d at 183 (holding that challenged expert testimony must satisfy evidentiary standard set out in *Daubert* to satisfy the requirements of FRCP 23); *Messner*, 669 F.3d at 812 (concluding that the district court should make an explicit *Daubert* ruling on expert testimony that is critical to class certification); *Zurn*, 644 F.3d at 612 (holding that the district court is not limited to considering only admissible evidence in evaluating whether FRCP 23's requirements are met); *Unger*, 401 F.3d at 319 (holding that expert testimony submitted in support of class certification must be admissible under *Daubert*).

⁷⁴ Compare *Sali II*, 889 F.3d at 632 (concluding that inadmissibility alone is not a proper basis for declining to consider evidence in support of class certification), and *Zurn*, 644 F.3d at 612 (holding that the district court is not limited to considering only admissible evidence in evaluating whether FRCP 23's requirements are met), with *Blood Reagents*, 783 F.3d at 183 (holding that challenged expert testimony must satisfy evidentiary standard set out in *Daubert* to satisfy the requirements of FRCP 23), and *Messner*, 669 F.3d at 812 (concluding that the district court

In *Sali II*, the Ninth Circuit found that the United States District Court for the Central District of California abused its discretion in striking the paralegal's declaration and finding that the plaintiffs failed to demonstrate FRCP 23's typicality requirement.⁷⁵ The court held that *Daubert* should still be applied to evidence submitted in support of FRCP 23's requirements, but that inadmissibility alone is an improper basis for denying class certification.⁷⁶ The Ninth Circuit also held that the district court must at least consider whether the plaintiffs' proof is, or will likely lead to, admissible evidence when deciding whether plaintiffs have met their burden under FRCP 23.⁷⁷ In reaching this conclusion, the Ninth Circuit espoused logic from the Eighth Circuit's decision in *Zurn*, reasoning that it is inappropriate to apply the formal rules of trial to such an early and preliminary stage in litigation.⁷⁸ The Ninth Circuit further held that the plaintiffs only needed to supply evidence sufficient to form a reasonable judgment about each requirement of FRCP 23 in order to justify class certification.⁷⁹

III. THE NINTH CIRCUIT'S POSITION IN THE CIRCUIT SPLIT & *SALI*'S POTENTIALLY LIMITED APPLICATION

Section A of this Part examines the Ninth Circuit Court of Appeals' position in the circuit split and concludes that the its holding in 2018 in *Sali v. Corona Regional Medical Center (Sali II)* stands in direct conflict with the holdings of the Third, Fifth, and Seventh Circuit Courts of Appeals, but does not go as far as the Eighth Circuit Court of Appeals in doing so.⁸⁰ Section B of this Part argues that *Sali II* may only be limited to cases where evidentiary objections go to the form rather than the substance of the evidence.⁸¹

A. *The Ninth Circuit's Position in the Circuit Split*

On its face, the Ninth Circuit's decision, in *Sali II*, seems to signal that the Ninth Circuit has aligned itself with the Eighth Circuit in the debate over the evidentiary standards that govern class certification proceedings, and in

should make an explicit *Daubert* ruling on expert testimony that is critical to class certification), and *Unger*, 401 F.3d at 319 (holding that expert testimony submitted in support of class certification must be admissible under *Daubert*).

⁷⁵ *Sali II*, 889 F.3d at 631.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *See id.* at 632 (finding the Eighth Circuit's reasoning in *Zurn* persuasive and endorsing its conclusion that different evidentiary standards should govern summary judgment and class certification given the inherent differences in these procedural stages in litigation).

⁷⁹ *Id.* at 631.

⁸⁰ *See infra* notes 81–86 and accompanying text.

⁸¹ *See infra* notes 87–97 and accompanying text.

the most general sense, it has.⁸¹ The Ninth Circuit, like the Eighth Circuit, has made it easier for plaintiffs to succeed on a motion for class certification by holding that evidence submitted at that stage is not *required* to be admissible.⁸² To this effect, *Sali II* manifests the same plaintiff-friendly posture as the Eighth Circuit's decision in 2011 in *In re Zurn Pex Plumbing Products*, even borrowing the Eighth Circuit's logic in arriving at its conclusion that inadmissibility alone is not a proper grounds for denying class certification.⁸³ Although the Ninth Circuit relied on the Eighth Circuit's reasoning in reaching its decision in *Sali II*, it did not go as far as the Eighth Circuit had in permitting a less stringent *Daubert* to be applied at the class certification stage.⁸⁴

Unlike the Eighth Circuit in *Zurn*, where the court held that only a limited *Daubert* analysis should be applied to evidence submitted in support of class certification, the Ninth Circuit held that a full *Daubert* analysis applies but inadmissibility under *Daubert* should be not dispositive.⁸⁵ This position stands in contrast to the Third, Fifth, and Seventh Circuits, where successful *Daubert*-based evidentiary challenges are sufficient for defendants to defeat a motion for class certification, yet does not go as far as the Eighth Circuit in permitting a lenient *Daubert* standard.⁸⁶

⁸¹ See *Sali v. Corona Reg'l Med. Ctr. (Sali II)*, 889 F.3d 623, 632 (9th Cir. 2018) (holding that admissibility is not required for evidence submitted in support of class certification), *amended by* 909 F.3d 996 (9th Cir. 2018); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011) (concluding that a full and definitive determination of admissibility under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* is not required at the class certification stage).

⁸² See *Sali II*, 889 F.3d at 632 (reasoning that requiring evidence to be admissible at the class certification stage risks ending class action suits before plaintiffs have the opportunity to obtain all crucial evidence from defendants given that class certification decisions often take place before the close of discovery); *Zurn*, 644 F.3d at 613 (reasoning that it would be unfair to require plaintiffs to submit admissible evidence in support of class certification because discovery is often not completed before class certification decisions are made); DAMIAN D. CAPOZZOLA, EXPERT WITNESSES IN CIVIL TRIALS, EFFECTIVE PREPARATION AND PRESENTATION § 2:45 (2018–2019 ed.) (explaining how requiring expert testimony to satisfy *Daubert* increases the court's level of scrutiny at an earlier stage of class action litigation and therefore heightens standards for plaintiffs trying to obtain certification).

⁸³ See *Sali II*, 889 F.3d at 633 (agreeing with the Eighth Circuit Court of Appeals that requiring admissible evidence at the class certification stage is unfair given that class certification decisions are usually made before discovery has been completed).

⁸⁴ Compare *id.* at 632 (holding that inadmissibility of evidence under *Daubert* does not merit conclusion that the plaintiffs have failed to meet the requirements of FRCP 23), with *Zurn*, 644 F.3d at 613 (asserting that *Daubert* should be applied less stringently at class certifications stage).

⁸⁵ Compare *Sali II*, 889 F.3d at 633 (holding that district court should consider admissibility under *Daubert* when evaluating contested expert evidence, but that admissibility alone is not dispositive at class certification stage), with *Zurn*, 644 F.3d at 612 (holding that districts courts should apply a focused *Daubert* analysis in assessing challenged expert evidence submitted in support of class certification).

⁸⁶ Compare *Sali II*, 889 F.3d at 633 (holding that district court should consider admissibility under *Daubert* when evaluating contested expert evidence, but that admissibility alone is not dispositive at class certification stage), with *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) (holding that challenged expert testimony must satisfy evidentiary standard set out

B. *Sali II's Rejection of Evidentiary Formalism and Its Implications*

Given the specific nature of the evidentiary objections raised in *Sali II*, the Ninth Circuit's holding might be limited to cases where evidentiary challenges go strictly to the form rather than the substance of the evidence.⁸⁷ In reaching its conclusion that inadmissibility of evidence offered in support of FRCP 23 is not dispositive, the Ninth Circuit upheld *Daubert's* applicability to class certification proceedings but rejected evidentiary formalism.⁸⁸ In *Sali v. Universal Health Services, Inc. (Sali I)*, the district court rejected the paralegal's declaration summarizing and testifying on the time records because the paralegal did not have personal knowledge of the pay data he used in his analysis and did not reveal his methodology.⁸⁹ The defendants did not challenge the validity of the data or the paralegal's methodology, but instead, objected to the evidence on the grounds that it failed to meet the formal admissibility requirements under FRE 702 and *Daubert*.⁹⁰ The plaintiffs offered sworn declarations to authenticate the data and fill in the evidentiary gaps, but the district court refused to accept the declarations and therefore ruled that plaintiffs had failed to meet their evidentiary burden of demonstrating that their claims were typical of the proposed class.⁹¹ The Ninth Circuit asserted

in *Daubert* to satisfy the requirements of FRCP 23), and *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 812 (7th Cir. 2012) (holding that expert evidence submitted in support of class certification must meet the *Daubert* standard of admissibility), and *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005) (concluding that evidence submitted in support of class certification must be admissible), and *Zurn*, 644 F.3d at 612 (holding that the United States District Court for the District of Minnesota was not limited to considering only admissible evidence in evaluating whether FRCP 23's requirements are met).

⁸⁷ See *Sali II*, 889 F.3d at 633 (holding that the defendants' evidentiary challenges did not contest the validity of the evidence and thus were formalistic in nature).

⁸⁸ FED. R. EVID. 701, 702; see *Sali II*, 889 F.3d at 633 (holding that the United States District Court for the Central District of California relied on "evidentiary formalism" in refusing to consider the sworn declarations that Sali and Spriggs submitted to attest to the accuracy of the payroll data and vouch for its accuracy). The paralegal's sworn declaration opining about the effects of Corona's rounding policy did not constitute lay opinion under FRE 701 because it was based on "technical or other specialized knowledge within the scope of [FRE] 702." FED. R. EVID. 701. Yet, because the paralegal did not qualify as an expert and did not reveal the methodology he used to make his computations, his opinion did not satisfy the admissibility standards under FRE 702 and *Daubert*. FED. R. EVID. 702; *Sali II*, 889 F.3d at 633; see *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 592–93 (1993) (detailing the seminal test for admissibility of expert scientific testimony). Because the validity and accuracy of the computations themselves were not contested, the court believed that this evidence likely could have been presented by a qualified expert at trial in compliance with the standards of FRE 702. FED. R. EVID. 702; *Sali II*, 889 F.3d at 633.

⁸⁹ See *Sali II*, 889 F.3d at 633 (explaining that the district court found that Ruiz's declaration and spreadsheet were inadmissible because Ruiz did not explain his methods for data extraction and lacked personal knowledge of the payroll data's accuracy).

⁹⁰ See *id.* (explaining that neither the authenticity of the data nor the accuracy of Ruiz's calculations were disputed).

⁹¹ See *id.* (discussing how the district court refused to consider the sworn declarations that Sali and Spriggs submitted to attest to the accuracy of the payroll data and vouch for its accuracy).

that striking the declaration on inadmissibility alone was inappropriate, reasoning that the evidence likely could have been presented in an admissible form at trial.⁹² In effect, because the validity of the evidence was not contested and the plaintiffs likely could have cured its deficiencies at trial, the Ninth Circuit seemingly wanted to avoid delivering a deathblow to plaintiffs' ability to bring class action lawsuits on such formalistic grounds with a bright-line categorical holding that admissibility is dispositive at the class certification stage.⁹³

After *Sali II*, it is still unclear how the Ninth Circuit would handle *Daubert*-based objections that challenge the validity or methodology of the evidence.⁹⁴ In reaching its conclusion in *Sali II*, the Ninth Circuit reasoned that formalistic objections to admissibility are not probative of whether the requirement of typicality was established and thus should not be dispositive.⁹⁵ Under this logic, however, *Daubert* objections that succeed in challenging the substance of the evidence submitted in support of class certification may still be appropriately dispositive in the Ninth Circuit, as fundamentally invalid or unreliable evidence would clearly constitute a failure to affirmatively demonstrate a particular substantive requirement of FRCP 23.⁹⁶ Thus, although *Sali*

⁹² FED. R. EVID. 702; see *Sali II*, 889 F.3d at 633 (asserting that the district court's decision to strike the evidence due to its formalistic deficiencies approach did not answer the question of whether the evidence satisfies the typicality requirement). Because there was no dispute about the validity of the data, the evidentiary deficiencies could likely be resolved by plaintiffs hiring an expert to opine on the effects of Corona's rounding time policy and the methodology used rather than a paralegal. FED. R. EVID. 702; *Sali II*, 889 F.3d at 633.

⁹³ See *Sali II*, 889 F.3d at 633 (asserting that the district court "relied on formalistic evidentiary objections" and "unnecessarily excluded proof that tended to support class certification"); JOSEPH M. McLAUGHLIN, *McLAUGHLIN ON CLASS ACTIONS* § 3:12 (15th ed. 2018) (asserting that "an inflexible exclusion of all inadmissible evidence might lead to absurd results by barring consideration of, for example, pleadings, where a matter is undisputed"); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) (explaining the descriptive concept of formalism as decision-making according to a rule, often involving filtering out factors that a sensitive decision-maker would otherwise consider in the decision-making process); Mullinex, *supra* note 2, at 256 (discussing how a higher evidentiary bar for class certification front-loads the burden on plaintiffs in class litigation and makes certification more difficult to obtain). Because the Ninth Circuit Court of Appeals believed that the plaintiffs could offer the evidence in an admissible form at trial, denying class certification on the basis of the black letter standards of FRE 702 alone would have been formalistic. *Sali II*, 889 F.3d at 633.

⁹⁴ See *Sali II*, 889 F.3d at 634 (finding it significant that evidentiary objections did not contest validity or reliability of evidence).

⁹⁵ See *id.* (asserting that the district court's "narrow" and formalistic approach to evaluating the evidence was not probative of whether the plaintiffs demonstrated that their injuries were typical of the proposed class and arose out of the same court of conduct).

⁹⁶ See *Sali II*, 889 F.3d at 632; *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592 (3rd Cir. 2012) (holding that demonstration of FRCP 23's typicality prerequisite requires plaintiffs to establish that claims arose from the same event, pattern or practice). For example, flawed conclusions as a result of incorrect calculations about the effect of Corona's rounding time on plaintiffs' compensation would constitute a substantive failure to demonstrate that the underpayment of wages to the proposed class of RNs arose out of Corona's rounding time policy. *Sali II*, 889 F.3d at 632.

II clearly establishes that disposing of evidence submitted in support of class certification on formalistic grounds alone is *too rigorous* in the Ninth Circuit, it remains to be seen whether a sufficiently rigorous analysis requires admissibility under *Daubert* when the substance of the evidence is challenged.⁹⁷

CONCLUSION

The Ninth Circuit's decision in *Sali II* conflicts with the Third, Fifth, and Seventh Circuits, where successful *Daubert*-based evidentiary challenges are sufficient for defendants to defeat a motion for class certification, yet does not go as far as the Eighth Circuit in permitting a less stringent *Daubert* standard to be applied to evidence submitted in support of class certification. The particular nature of the evidentiary objections at issue in *Sali II* may also limit the decision's applicability. Although formalistic objections to admissibility will not be enough to defeat class certification after *Sali II*, it is unclear how the Ninth Circuit will rule when evidentiary challenges go substance rather than the form of the evidence.

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⁹⁷ *Sali II*, 889 F.3d at 633.