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E.D.N.Y.: Class certification evidence must be admissible

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Takeaway: In a prior post, we reported on the Ninth Circuit's decision in *Sali v. Corona Regional Medical Center*, 889 F.3d 623 (9th Cir. 2018) that class certification evidence need not be admissible (*Ninth Circuit deepens Circuit split by holding inadmissible evidence can be considered in resolving class certification,* May 21, 2018), and in a later post we reported on a Ninth Circuit judge's impassioned dissent (joined by four other judges) to the denial of rehearing en banc in that case (*Split Ninth Circuit Cements Circuit Split on Admissibility of Class Certification Evidence*, November 14, 2018). The Eastern District of New York recently added its voice to this debate, ruling – based on persuasive dicta from the U.S. Supreme Court and the Second Circuit – that class certification evidence must be admissible, thereby adopting the majority rule. *Lanqing Lin v. Everyday Beauty Amore Inc*., No. 18-cv-729 (BMC), 2019 WL 3037072 (E.D.N.Y. July 11, 2019).

Lin is an employment case alleging claims under the federal Fair Labor Standards Act and the New York Labor Law.In support of their motion to certify a class for the New York Labor Law claims, the class plaintiffs submitted five affidavits that set out facts supporting the claims of the individual affiants but which otherwise contained hearsay as to the putative class members.Ruling that class certification evidence must be admissible, the district court denied class certification.

The district court based its ruling on persuasive dicta from the Supreme in the *Wal-Mart* and *Comcast* decisions. *Lin*, 2019 WL 3037072, at *1-*2 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (class plaintiffs "must affirmatively demonstrate [their] compliance with the Rule – that is, [they] must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.") (emphasis in original), and *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (a plaintiff seeking class certification must "satisfy through evidentiary proof" that the provisions of Rule 23 have been met). The district court also found support in the Second Circuit's observation in *In re Initial Pub. Offerings Sec. Litig*., 471 F.3d 24, 42 (2d Cir. 2006), that "[a] district judge is to assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit." Lin, 2019 WL 3037072, at *2. Further, the district court cited and relied on the "thorough and well-reasoned opinion" of Magistrate Judge Mann in *Lujan v. Cabana Mgmt., Inc*., 284 F.R.D. 50 (E.D.N.Y. 2012), which collected authorities on the issue. *Lin*, 2019 WL 3037072, at *2.

Having resolved the legal issue of whether class certification evidence must be admissible, the district court easily denied certification: "Plaintiffs cannot certify a class on mere speculation. There is simply no evidence in the record that plaintiffs' allegations are common or typical of all (or any) other Everyday Beauty employees. Neither five nor 23 employees' experiences, standing alone, serves as the basis for certifying a class." *Id*. at *4.