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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SALLY I. CHAABAN et al.,

Plaintiffs and Appellants,

v.

WET SEAL, INC., et al.,

Defendants and Respondents.

G044815

(Super. Ct. No. 07CC01290)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, Nancy  
Wieben Stock, Judge. Affirmed.

Law Offices of Sima Fard and Sima Fard for Plaintiffs and Appellants.

Sheppard, Mullin, Richter & Hampton, Ryan D. McCortney, Matthew M.  
Sonne and Jason M. Guyser for Defendants and Respondents.

## INTRODUCTION

Appellants Sally I. Chaaban, Dana Miller, Lorena Ochoa, and Summer Myers appeal from an order denying their motion to certify a class in an action against their former employer, Wet Seal, for Labor Code violations.<sup>1</sup> They alleged Wet Seal had failed to pay them and members of their class according to the mandates of the Labor Code and the wage orders applicable to their industry. In addition, appellants appeal from a simultaneous order denying their motion to file a second amended complaint.

We affirm the order denying the motion for class certification. The trial court concluded, and we agree, that appellants did not meet their burden to show a class action to be superior to individual lawsuits as a means of resolving the controversy. We also affirm the order denying the motion to file an amended complaint.

## FACTS

Wet Seal operates approximately 75 retail stores in California, selling women's fashions and accessories. In 2007, appellants Chaaban and Miller filed a class action against Wet Seal alleging violations of the Labor Code regarding wages and meal and rest breaks. A few months later, a first amended complaint was filed, adding two named plaintiffs – appellants Ochoa and Myers.

The first amended complaint initially identified seven subclasses of employees as members of the potential class. These were (A) employees who worked “off-the-clock,” (B) employees who worked “off-the-clock” but were not paid wages or overtime,<sup>2</sup> (C) employees who did not get their meal breaks, (D) employees who did not

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<sup>1</sup> The named defendants were Wet Seal, Inc., and Wet Seal Retail, Inc. No differentiation was made between the two corporations during the proceedings below, and we continue to consider the two entities as a single party.

<sup>2</sup> Why subclass A and subclass B were separate subclasses was not explained.

get their rest breaks, (E) employees “who were paid reporting time wages,”<sup>3</sup> (F) employees who were not paid their split-shift premiums,<sup>4</sup> and (G) employees who did not get itemized wage statements. Later in the complaint, however, the subclasses were differently defined. Subclass A was now made up of the employees who did not get paid for “off-the-clock” work, apparently combining the previous Subclasses A and B. Subclass B was now the meal-break employees. Subclass C was the rest- period employees. The split-shift employees were Subclass D, and Subclass E was still the reporting-time employees.<sup>5</sup> Subclass F was the wage-statement employees, and Subclass G had disappeared. Still later, when the complaint discussed the class representatives, more subclasses, undefined, made their appearance: “California Hourly Employee Overtime Class,” “Rest/meal Break Class,” “California Hourly Sales Class,” “California Hourly Employee Meal and Rest Break Class.”

## **I. The Class Certification Motion**

Appellants moved for class certification in June 2010, after extensive discovery. The motion assumed that the simultaneously filed motion for leave to amend the complaint would be granted, and therefore “[t]he operative pleading will be the Second Amended Complaint.” The class certification motion rearranged the subclasses yet again. The subclasses now numbered 11; the basic Labor Code and wage order violations alleged against Wet Seal had not changed: unpaid missed meal and rest

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<sup>3</sup> Industrial Welfare Commission wage order No. 7-2001 (Cal. Code Regs., tit. 8, § 11070), which regulates the mercantile industry, provides: “Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee’s usual or scheduled day’s work, the employee shall be paid for half the usual or scheduled day’s work, but in no event for less than two (2) hours or more than four (4) hours, at the employee’s regular rate of pay, which shall not be less than the minimum wage.” (Cal. Code Regs., tit. 8, § 11070, subd. 5(a).)

If the employees were paid their reporting time wages, why would they sue Wet Seal on that basis? Perhaps the complaint’s drafter omitted the word “not.”

<sup>4</sup> Industrial Welfare Commission wage order No. 7-2001 provides: “When an employee works a split shift, one (1) hour’s pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment.” (Cal. Code Regs., tit. 8, § 11070, subd. 4(c).) A “split shift” is “a work schedule, which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.” (Cal. Code Regs., tit. 8, § 11070, subd. 2(m).)

<sup>5</sup> In this iteration, Subclass E is comprised of employees who did *not* get their reporting time pay.

breaks, unpaid overtime, unpaid wages for off-the-clock work, unpaid split-shift premiums, unpaid reporting-time premiums, faulty wage statements.

Along with their motion, appellants submitted numerous exhibits, including documents produced in discovery, documents gleaned from the Internet, and portions of deposition transcripts. They had supporting declarations from 33 Wet Seal employees, including the named plaintiffs. They supplied a five-page declaration from an expert explaining how damages could be calculated by statistical sampling methods. Appellants' counsel also submitted a declaration stating her qualifications as class counsel.

Wet Seal's opposition was also lengthy. It included declarations from 115 employees – both managers and nonmanagers – stating, among other things, that Wet Seal had provided them with proper meal and rest breaks, and if they had been skipped it was at the employees' choice. Wet Seal provided a substantial expert report explaining why the sampling process proposed by appellants' expert would not yield reliable results. Wet Seal also provided excerpts of transcripts from the depositions of the named plaintiffs and of some of the other employees whose declarations supported the motion for class certification.<sup>6</sup>

The trial court denied appellant's motion largely for failure to meet the evidentiary burden imposed on those moving for class certification. The court noted that it was appellants' responsibility to provide an adequate "road map" of the evidence, so that the court was not required to burrow through mountains of evidence to try to find support for the statements made in the briefs. The moving parties had not performed this very basic task. The evidence the court could find was largely inadmissible as lacking in foundation, conclusory, or unauthenticated; those bits not suffering from these

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<sup>6</sup> With their reply brief, appellants submitted over 700 additional pages of exhibits, attached to the declaration of their counsel, Sima Fard. All of Wet Seal's objections to this evidence were sustained on at least one ground in the trial court.

deficiencies were inadequate to establish the existence of common and predominant issues of law and fact. Appellants' expert's report was also deemed inadequate.

Based on the admissible evidence before it, the court determined that appellants had not carried their burden to show common and predominant issues of law and fact, largely because the class members' claims would all require individualized proof of liability. The meal and rest break claims would need an inquiry into why the employees had missed their breaks. Individualized proof would also be needed to establish the other wage claims. In addition, the court noted the failure of the named plaintiffs to show their claims were typical of the class claims and the unsuitability of their counsel to be class counsel. In short, plaintiffs had not shown that a class action was a superior means of resolving the controversy.

Appellants subsequently requested rulings on their individual objections to Wet Seal's evidence, which the court provided. It also ruled on Wet Seal's objections to appellants' evidence. When it issued that ruling, the court spelled out in more detail the deficiencies in appellants' evidence.

## **II. Motion for Leave to Amend First Amended Complaint**

Appellants filed the first amended complaint in July 2007. They did not move for leave to amend for another three years. The proposed second amended complaint (1) expanded the class to include all nonexempt hourly employees, (2) split the meal-break subclass in the first amended complaint into three separate subclasses, and (3) added Arden B. employees.<sup>7</sup>

At the hearing encompassing both the class certification motion and the motion for leave to amend, appellants claimed the new complaint would "streamline" the lawsuit, notwithstanding the addition of all nonexempt employees (not just salespeople) to the class, the inclusion of all the Arden B. employees, and the expansion of one

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<sup>7</sup> Arden B. stores also sold women's apparel, but a different line of products.

subclass into three. When the court inquired as to how this would “streamline” things, appellants’ counsel eventually informed the court that the complaint did not need to be amended to include the Arden B. employees. They were already covered by the allegations of the first amended complaint: “[Wet Seal, Inc.] operated a chain of retail stores, selling clothing, accessories and other merchandise in over 60 locations in California, under the name ‘Wet Seal, Inc.’ The plaintiffs and each Class Member worked at a Wet Seal, Inc. store at some time during the past four years as a sales person, sales associate, assistant manager, or co-manager, or similar position.” Counsel maintained that designating the employer as Wet Seal, Inc. was sufficiently broad to include the Arden B. employees in the class.

The court denied the motion. Appellants had failed to support their assertion that an amended complaint would streamline the action and had failed to account for a lengthy gap between the time appellants’ counsel had broached the subject to opposing counsel and filing the motion for leave to amend. In addition, counsel’s assertion that the Arden B. employees were already part of the class made it unnecessary to amend the complaint to include them.<sup>8</sup>

Appellants have raised both the denial of their motion for class certification and the denial of their motion for leave to amend the complaint as issues in this appeal.

## **DISCUSSION**

### **I. Denial of Class Certification Motion**

Code of Civil Procedure section 382 authorizes class actions if a party can establish the existence of an ascertainable class and a community of interest among class members. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) “The community of interest requirement involves three factors: ‘(1) predominantly common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class

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<sup>8</sup> The court initially denied the motion for leave to amend “without prejudice.” When this aspect of the ruling caused some difficulty, the court changed the ruling to omit these two words.

representatives who can adequately represent the class.’’ (*Ibid.*) The party seeking class certification bears the burden of establishing the existence of an ascertainable class and a well-defined community of interest among class members. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1103-1104.)

Whether to certify a class should be largely a procedural question. The trial court inquires into the merits only to the extent necessary to determine whether the class issues are numerous and substantial enough to make a class action preferable to individual actions for both the court and the parties. (*Sav-On Drug Stores, Inc. v Superior Court* (2004) 34 Cal.4th 319, 326.) The superiority of a class action to individual actions is the ultimate question before the trial court as it ponders a motion to certify a class, and for that reason, an order denying class certification is reviewed for abuse of discretion. (*Linder v. Thrifty Oil Co., supra*, 23 Cal.4th at p. 435.) So long as substantial evidence supports its decision, the ruling will not be disturbed unless the trial court used improper criteria or made erroneous legal assumptions. (*Id.* at pp. 435-436.) Departing from the usual role of the reviewing court – evaluating results rather than reasons – here we examine the trial court’s reasons for denying class certification. (*Id.* at p. 436; see also *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 655.) If any reason for denial, supported by substantial evidence, validates the order, we will affirm. It is not necessary that *all* the reasons be valid. (*Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 844.)

In this case, the court based its ruling that appellants had failed to carry their burden on three issues: (1) the existence of sufficient common and predominant issues of fact and law, specifically on liability for each of the claims; (2) typicality of the proposed class representatives; and (3) adequacy of legal representation.<sup>9</sup> “On a motion

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<sup>9</sup> The court also expressed its doubts about whether appellants had adequately addressed the numerosity requirement. The court does not appear to have based its denial of the class certification motion on the lack of numerosity, so we need not address this issue further.

to certify class status of an action, it is the plaintiff's burden to establish that in fact the requisites for continuation of the litigation in that format are present. [Citations.] . . . [W]hen the court determines the issue of class propriety at hearing on an appropriate motion at which evidence is presented . . . [,] [t]hen the issue of community of interest is determined on the merits and the plaintiff must establish community as a matter of fact.” (*Hamwi v. Citinational-Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462, 471-472. If the plaintiff fails to present the evidence necessary to establish community of interest as a matter of fact, class certification is properly denied. (*Id.* at p. 473.)<sup>10</sup>

We therefore examine the record to see whether it supports the court's determination appellants failed to present evidence that would establish community of interest as a matter of fact.

**A. Common and Predominant Issues of Law and Fact**

To establish a community of interest, the parties moving to certify the class must show, inter alia, that “questions of law or fact common to the class predominate over the questions affecting the individual members.” (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 913. Conversely, “each [class] member must not be required to individually litigate numerous and substantial questions to determine his right to recover following the class judgment.” (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 460.)

At the end of the day, the trial court must make one overriding determination: Is a class action superior to individual lawsuits in this case? Will

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<sup>10</sup> The court tried to explain the process to appellants' counsel: “The court has an independent duty to make sure that on behalf of the class, all the elements are intact. So I approached it from that point of view. The burden is always on the plaintiff in this particular motion.” The court tried again later: “This is a little bit like a motion for summary judgment where the plaintiff carries the burden; that burden never shifts, or if it does shift, then we start to pay attention to the defense evidence. [¶] . . . [¶] So the suggestion by the defense that that evidence belies that, is just that; it's a suggestion. The scrutiny still stays with the petitioner's evidence in this particular type of motion.”

These efforts to explain the burden of proof to counsel in no way demonstrate, as appellants now claim, that the court was improperly considering the merits of the Labor Code claims.

substantial benefits accrue to both the court and the litigants if it goes forward as a class action? (See *Lockheed Martin Corp. v. Superior Court*, *supra*, 29 Cal.4th at pp. 1104-1105; *Caro v. Procter & Gamble Co.*, *supra*, 18 Cal.4th at p. 657.) If the court is going to have to conduct what are in effect a series of mini-trials, one for each class member, then the answer is no, and class certification is properly denied.

The decision whether to certify a class is not made by creating a list, checking off the items on it – ascertainability, numerosity, typicality, etc. – and then totting up the results. The court must look at the whole picture. The absence of one necessary factor may make class treatment inappropriate, even if all the other factors are present.

In this case, the court found, in effect, that even if the class was numerous and ascertainable and even if Wet Seal had uniform policies and practices that resulted in employees not receiving accurate pay, class action was still not appropriate, because appellants had not shown how liability could be established on a class-wide basis. Because of that failure, liability would have to be proved individually, which would obliterate the benefits of a class action. We look to see whether the court abused its discretion in so concluding.

Appellants' class action is predicated on alleged violations of the Labor Code and the applicable wage order<sup>11</sup> for the mercantile industry. Labor Code section 226.7, subdivision (b), provides that if an employer fails to provide a mandated meal or rest break, the employee affected is entitled to an extra hour's worth of pay. Wage order No. 7-2001 (Cal. Code Regs., tit. 8, § 11070), which governs a mercantile employer's obligations to provide meal and rest breaks to hourly employees, echoes the Labor Code provision in requiring one extra hour's pay if the meal break is not provided. (Cal. Code

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<sup>11</sup> Wage orders are quasi-legislative promulgations by the Industrial Welfare Commission that regulate wages, hours and conditions of employment in specific industries. They are construed like statutes. (See *Collins v. Overnite Transportation Co.* (2003) 105 Cal.App.4th 171, 174-175.)

Regs., tit. 8, § 11070, subd. 11(a) & (b).) The wage order also requires employers to provide 10 minutes of rest for each four hours of work and an extra hour's pay if the rest period is not provided. (Cal. Code Regs., tit. 8, § 11070, subd. 12(a) & (b).) Labor Code section 510, subdivision (a), mandates payment of time-and-a-half for the ninth through twelfth hours worked on a workday and double time for hours put in after the twelfth hour. Under wage order 7-2001 section 5.A, an employee who is sent home before completing half his or her usual or scheduled work gets at least 2 hours of "reporting time" pay. (Cal. Code Regs., tit. 8, § 11070, subd. (5)(a).) An employee who works a split shift gets an extra one hour's pay at minimum wage in addition to the minimum wage for that workday. (Cal. Code Regs., tit. 8, § 11010, subd. (4) (c).)

To recover for wages unpaid in violation of Labor Code section 510, subdivision (a) ("off-the-clock" hours or overtime), the class members must show that they worked hours for which they were not paid. How did they propose to do this on a class-wide basis, without getting into discussions about whether each employee worked extra hours and how many extra hours? Presumably Wet Seal's payroll records show the hours the employees worked for which they were paid. But what records show the extra, unpaid hours . . . for the class? Appellants did not answer this question.

To recover for meal- and rest-break penalties, the class members would have to show not only that they worked through lunch but also *why* they worked through lunch – each time. If they chose to work through their meal or rest periods – perhaps to get an extra hour of pay – then they cannot claim another penalty. (See *White v. Starbucks Corp.* (N.D.Cal. 2007) 497 F.Supp.2d 1080, 1088-1089.) How is this to be determined for the class as a whole?

Reporting time presents even more complex problems. For each reporting-time violation, a determination would have to be made as to (1) what the employee's usual or scheduled time was for that day, and (2) whether the employee worked for less than half that time. If the reporting-time violation centers on attendance at a meeting, as it appeared from the declarations submitted in support of the motion, it would have to be determined (1) whether the meeting was scheduled, (2) how long it was supposed to last, and (3) how long it actually lasted. Again, appellants did not inform the court how this liability could be determined for the class, as opposed to individuals.

Finally, to establish liability for split-shift payments, the appellants would have to show not only which members of the class worked split shifts and when they did so, but their regular hourly rate and the minimum wage rate for that day. Employees are entitled only to one hour of extra pay at the minimum wage *in addition to the minimum wage for that workday*. (Cal. Code Regs., tit. 8, § 11070, subd. (4)(c).) If an employee's hourly rate is greater than the prevailing minimum wage rate, he or she may not be entitled to any split-shift payments, even if he or she worked a split shift.<sup>12</sup> It might be possible to pin down all of this information through personnel and time records, but appellants did not explain how this was to be done for a class.

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<sup>12</sup> For example, a plaintiff makes \$10.00 an hour at a time when the minimum wage is \$6.75. A minimum-wage employee would make \$54 for an eight-hour day; if the employee worked a split shift, he or she would get an extra \$6.75, for a total of \$60.75. A plaintiff making \$10.00 per hour would be paid \$80.00 for eight hours' work. His regular pay exceeds what he would have received for a split shift at minimum wage, so he does not get any extra pay for working a split shift.

The key issue is “whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.” (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 327.) The trial court in this case found that appellants had not carried their burden to show how their theories of recovery could prove amenable to class treatment. From the evidence before the court, it appeared that all of the wage claims would have to be individually proved. Appellants presented no class-wide means of proving them.

Our task now is to determine whether substantial evidence supports the court’s conclusions, with due regard for the wide discretion trial courts exercise in this area. Our review is somewhat unusual, because the trial court based its ruling largely on the *lack* of evidence to support the motion.

Along with their moving papers, appellants submitted a declaration from appellants’ counsel holding forth on diverse issues of varying relevance to the motion before the court and attaching 67 exhibits. These exhibits consisted of (1) Wet Seal’s responses to some discovery demands, (2) excerpts from deposition transcripts of some Wet Seal deponents, (3) some Wet Seal documents (evidently produced in discovery), (4) sample pay stubs of the named plaintiffs, (5) a copy of the appellate opinion in another Wet Seal employment case, (6) the plaintiffs’ expert’s report, (7) additional declarations by counsel and by some of her co-counsel regarding her qualifications to be class counsel, and (8) declarations from 33 former Wet Seal and Arden B. employees. Appellants also submitted a request for judicial notice for (1) a screenshot of Wet Seal’s home page, (2) Wet Seal’s 10(k) report, and (3) a copy of wage order No. 7-2001.

The court found the vast bulk of this evidence inadmissible.<sup>13</sup> Disregarding the objectionable portions of appellants’ expert’s report rendered the report essentially

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<sup>13</sup> Appellants’ incorrectly assert in their briefs that the trial court made a “blanket” ruling on Wet Seal’s objections to their evidence. On the contrary, the trial court laboriously ruled on every single objection and issued its rulings to the parties. Although these rulings were issued after the hearing on the motion for class certification, they reveal how the court regarded the evidence when it decided the class certification motion.

worthless. The same was true of counsel's declaration. The majority of the objections to the declarations of the four named plaintiffs were sustained, as were the objections to the declarations of the other Wet Seal and Arden B. employees that supported the motion.

What remained after this evidentiary bloodletting? Not very much. Surviving statements included: "I was never given a copy of the employee handbook," "On those days when I took no meal break then I would not clock in/out on the timekeeping system," "I was required to record the start and end times of my meal breaks and I did so faithfully," "I have worked shifts longer than 10 and 12 hours," "I also attended managers' meetings 1 time per month," and "I was never told I could take a second meal break of 30 minutes during such long [10-12 hour] shifts." In other words, as was proper, only factual statements within the employees' personal knowledge were left standing. Appellants' expert was restricted to statements regarding his background, the documents he had reviewed, and some general observations about statistical analysis, because he had established no foundation for any other statements in his declaration.

After clearing away the deadwood, the court ruled that appellants had failed to establish common issues of fact for all the wage subclasses. They had failed to show how they would prove that Wet Seal had not provided meal and rest breaks to its employees on a class-wide basis, when it was possible for employees to choose not to take them or to waive them. Appellants had offered no common and reliable method of distinguishing between instances when employees were not permitted to take breaks and instances when employees chose not to take breaks, perhaps to earn an extra hour of pay. Wet Seal could be liable only for the former instances. (*White v. Starbucks Corp.*, *supra*, 497 F.Supp.2d at pp. 1088-1089.) With respect to the other wage claims – overtime, split shift, and reporting time – appellants had also failed to explain how these could be

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To the extent appellants appeal from individual rulings contained in the court's order of January 26, 2011, appellants have supplied no legal authority in their opening brief to support their contention that any of these rulings was erroneous. The issue is therefore waived. (*Estate of Cairns* (2010) 188 Cal.App.4th 937, 949.)

determined for the class short of individualized proof. They had not, for example, shown the court any documents from which such a determination could be made

Substantial “nonevidence” supports the trial court’s view. “[T]he individual issues here go beyond mere calculation; they involve each member’s entitlement to damages.” (*Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 756.) Appellants did not present evidence that sufficiently supported any class-wide method of determining who was owed what in wages or penalties.

In fine, appellants’ burden was to show the court that a class action is superior to individual actions as a method of resolving the disputes. (*Newell v. State Farm General Ins. Co.* (2004) 118 Cal.App.4th 1094, 1101.) “‘The ultimate question in every case of this type is whether, given an ascertainable class, the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.’ [Citations.]” (*Brown v. Regents of University of California* (1984) 151 Cal.App.3d 982, 989.) “When variations in proof of harm require individualized evidence, the requisite community of interest is missing and class certification is improper.” (*Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1350.) The trial court correctly found that, based on the admissible evidence before it, the individual issues of liability predominated, and therefore a class action would not be superior to separate actions.

## **B. Typicality**

Community of interest among members of the class requires, as one element, that the proposed class representative’s claims be typical of the class. “The plaintiff must be a person . . . whose claims or defenses are typical of the claims or defenses of the class. . . . It is the fact that the class plaintiff’s claims are typical and his representation of the class adequate which gives legitimacy to permitting him to bind

class members who have notice of the action.” (*Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 146.)

In this case, the court found the declarations of the potential class representatives – Chaaban, Miller, Myers, and Ochoa – lacking in the evidence needed to establish typicality. In fact, the class representatives had not even established through admissible evidence that they had claims against Wet Seal. Most of Chaaban’s claims in her declaration that she had not been properly paid lacked foundation in personal knowledge. She simply stated, for example, “I was never paid an additional hour of pay for any missed rest break” without explaining how she determined this. Did she look at some records? Consult someone in payroll? The same formula was used with respect to missed meal-break pay, overtime pay, split-shift pay, and reporting-time pay, with the same result. There was no explanation of how she had determined Wet Seal’s failure to pay her, and therefore no foundation. Ochoa’s and Miller’s declarations were similarly faulty. Myers informed the court that “on average I spent --- hours performing work per week for which I was not paid for [*sic*].”

The proposed class representatives had to show the court that they had claims against Wet Seal that were typical of the class they proposed to represent. They failed to carry this burden, because they failed to demonstrate to the court’s satisfaction that they had claims against Wet Seal.<sup>14</sup> The court did not abuse its discretion in making this determination.

### **C. Adequacy of Legal Representation**

Appellants have contested the trial court’s ruling that their counsel, Ms. Fard, could not adequately represent the class as its counsel. But the state of the moving papers, which the trial court correctly found did not even get appellants past first base,

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<sup>14</sup> The court was also troubled by the contradictions between the class representatives’ declarations and their deposition testimony, which Wet Seal furnished as part of its opposition to the motion. These were, however, mere “red flags” or “markers of concern”; because appellants had failed to carry their initial burden, the court never weighed Wet Seal’s evidence against appellants.

supports the trial court's evaluation of counsel's inability to handle a large class action properly. The trial court gave more detailed explanations of why the bulk of plaintiffs' evidence was inadmissible when it issued its rulings on the evidentiary objections. It also explained why appellants' "scores of objections" to the declaration of Wet Seal's experts were unfounded. Its rulings seem appropriate and do not instill confidence in appellants' counsel's qualifications to be class counsel.

The reasons the court gave for finding counsel inadequate to represent the class were her lack of experience and the uncertainty about her firm's ability to handle a case with potentially 10,000 class members, especially in light of the fact that other, more experienced plaintiff class action lawyers had dissociated themselves from the case.<sup>15</sup> The court's inquiry into adequacy of representation includes determining whether the plaintiffs' attorney is qualified to conduct the proposed litigation. (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) Counsel's lack of sufficient resources is particularly troubling, because "[i]f the certified class is not represented vigorously, the plaintiffs may lose a meritorious case and suffer the consequences of an adverse judgment, since all class members are bound by the results." (*Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1, 12.)

In this case, the court was not satisfied that counsel could handle a large class, in light of her lack of experience and her expressed inability to handle the investigation and discovery involved in preparing the reply brief for this motion, despite the fact that she had more than a month to do so.<sup>16</sup> The court's ruling regarding inadequacy of class counsel had ample evidentiary support.

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<sup>15</sup> "I have to find that you have the experience and the internal firm resources to cover a case of this magnitude. I have noted that at times in the past, you have associated in on the case highly-qualified, experienced, well-known class counsel and employment lawyers whose firms have the resources to pursue such a case. [¶] For reasons unknown to myself for which I will not speculate, one by one these firms have left the case. Mr. Milman was the only one who put in any evidence in the record at all as to the capability of the law firm to resource this kind of case, and he's no longer on the case. So that left no evidence in the record as to that critical feature."

<sup>16</sup> Counsel twice applied ex parte for an extension of time to file the reply brief. Both applications were denied. She finally obtained a week's extension.

The trial court used no improper criteria and made no erroneous legal assumptions in ruling on this motion. The record supports its conclusion that appellants had failed to meet their burden to show a class action superior to individual proceedings. The motion for class certification was properly denied.

**II. Denial of Motion for Leave to Amend First Amended Complaint**

Appellants also appeal from the trial court's order denying leave to file their second amended complaint. We review the court's order for abuse of discretion. (*McGuan v. Endovascular Technologies, Inc.* (2010) 182 Cal.App.4th 974, 987.)

The court properly exercised its discretion in this case. In addition to the unexplained delay in filing the motion for leave to amend (see Cal. Rule of Court, rule 3.1324(b)), the court noted that the second amended complaint was, for all practical purposes, indistinguishable from the first amended complaint. It simply rearranged subclasses already present and made explicit what counsel insisted had been present implicitly in the first amended complaint: the inclusion of Arden B. employees in the subclasses. The court properly assessed the situation and ruled correctly.

**DISPOSITION**

The order denying the motion for class certification is affirmed. The order denying leave to amend is affirmed. Appellants are to bear all costs on appeal.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.