

*Sisley v. Sprint Communications Company, L.P.*, 06-56143

JUL 02 2008

GOULD, Circuit Judge, partially concurring and partially dissenting:

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

I concur in the memorandum disposition in substantial part, joining all of the analysis of the court with the exception of its remand on the class action certification issue. In my view, we may and should at this stage affirm the denial of certification.

I do not disagree with the majority analysis that the district court's concerns that a class action would be unmanageable because of California law applying was not adequately explained, and if this were all that the record presented I would agree with the court's remand of the class certification issue. The district court granted Sprint's motion to dismiss Sisley's class action allegation with very little explanation and did not address either why California law would apply to all claims or the possibility of a viable subclass of persons solely within California, which would have eliminated the concern voiced by the district court. Again, if this were all that was presented, I would join in the remand decision.

However, our law is clear that we may affirm on any ground that is supported by the record. *Valdez v. Rosenbaum*, 302 F.3d 1039, 1043 (9th Cir. 2002) (citing *Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd. of Las Vegas*, 257 F.3d 937, 941 (9th Cir. 2001)). And here, I have concluded that the record conclusively shows that a class should not be certified. To certify a class

under Rule 23 of the Federal Rules of Civil Procedure, all of the requirements of Rule 23(a) must be met. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Rule 23(a)(3), for example, would require that Sisley's claims "are typical of the claims . . . of the class." Here, however, while Sisley wants to assert class action claims for long distance charges wrongfully made, the record shows without dispute that upon calling Sprint to challenge the charges, she received credits and that she has never paid anything for the long distance services that she contests. Her theory of damage is that she used up several hours of her valuable time making calls to get credits, and that she wants to be reimbursed for the value of her lost time. Accordingly, whatever else might be said about Sisley's damage theory, it is clear that her claims are not at all typical of claims of purported class members who were charged and paid alleged overcharges. In that context, even if the amounts paid were individually small, the class action device, if all requirements were met, would permit aggregation of claims. However, Sisley, not having been charged for the service in light of the refunds, cannot make a typical claim for repayment of overcharges. Stated another way, the claims she presents are not typical of those within the purported class, and her position is markedly different from that of persons who paid the challenged charges, making her claims atypical of those within the class for which she seeks restitution of charges and disgorgement of revenues of Sprint. *See generally* Wright, Miller, and

Kane, Federal Practice and Procedure, § 1764.

Accordingly, I respectfully see no need for a remand on class certification, which appears to be futile in light of the nature of the claims asserted.