S246490

IN THE

SUPREME COURT OF CALIFORNIA

JAMES A. NOEL

PLAINTIFF, APPELLANT, AND PETITIONER,

V.

THRIFTY PAYLESS, INC.

DEFENDANT AND RESPONDENT

Review of a decision of the Court of Appeal,
First Appellate District, Division Four
Case No.: A143026

Marin County Superior Court Case No. CIV 1304712

Opening Brief on the Merits

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INTRODUCTION

This is an archetypal consumer class action involving a product purchased at retail locations by thousands of California consumers. Because the class was defined using "common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description," *Aguirre v. Amscam Holdings, Inc*. (2015) 234 Cal.App.4th 1290, 1300 [citation omitted], the trial court should have had no trouble certifying the class as ascertainable.

No such luck. When the named plaintiff moved to certify the class, the trial court found the proposed class not ascertainable because he had presented "no evidence" to establish "what method or methods will be utilized to identify the class members, what records are available … how those records would be obtained, what those records will show, and how burdensome their production would be…." (App. 4.)[1] The First District affirmed, concluding that the proposed class was not ascertainable because plaintiff "submitted no evidence that the class members could readily be

[1] Citations to "App." are to the Exhibit to the Petition, which contains the panel's decision.

identified—or identified at all—using [defendant's] records." (App 10.)

This ruling is wrong as a matter of law and directly contrary to longstanding public policy of this state. The most basic legal flaw in the lower court's approach is that it confuses ascertainability with identifiability. In its seminal ruling in *Daar v. Yellow Cab Co* (1967) 67 Cal.2d 695, this Court specifically rejected the notion that ascertainability requires "identifying the individual members of such class as a prerequisite to a class suit." (*Id.* at p. 706.) In the wake of *Daar*, numerous California appellate courts have held that ascertainability merely requires a class definition to be sufficiently clear and objective to allow class members to self-identify as members of the class for purposes of obtaining an ultimate recovery. (*See, e.g.*, *Aguirre, supra,* 234 Cal.App.4th at p. 1300 [citing cases].)

The lower court rejected this longstanding formulation of the ascertainability standard in favor of the First District's holding, in an employment class action, that a class is not ascertainable "where the proposed class contains … members who have no recorded relationship with the defendant." (*See* App. 10 -11 [applying *Sotelo v. Medianews Group, Inc.* (2012) 207 Cal.App.4th 639, 649].) *Sotelo* was not a consumer case, has been disavowed by three other appellate districts, and utilized an approach to ascertainability that has been rejected by *five* federal courts of appeals in the past three years (including the Ninth Circuit). Yet the lower court looked to

Sotelo as a basis for rejecting ascertainability here—and, in so doing, embraced a rule that would make it impossible to certify many class actions, particularly in the consumer context.

Not only is this ruling offensive to basic legal principles underlying class actions, it runs directly contrary to the well-established public policy of this state. Consumer class actions are an "essential tool for the protection of consumers against exploitative business practices." (*State of California v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 471 [citing *Vasquez v. Superior Ct.* (1971) 4 Cal.3d 800, 807-809]. *See also Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 473 [California "has a public policy which encourages the use of the class action device …"].) Almost 50 years ago, legal commentators urging the utility of the class action to vindicate the rights of stockholders made the following incisive observation:

> Modern society seems increasingly to expose men to … group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law. The problem of fashioning an effective and inclusive group remedy is thus a major one.

(*Vasquez, supra,* 4 Cal. 3d at p. 807 [quoting Kalven and Rosenfeld, *Function of Class Suit* (1941) 8 U. Chi. Rev. 684, 686].) In many instances, including this case, "[a]bsent a class suit, a wrong-doing defendant [will] retain the benefits of its wrongs." (*Id.* at 810.)

This case involves exactly the sort of wrongdoing that the class action device was designed to address. The plaintiff here purchased an inflatable backyard pool at a store owned by defendant Thrifty Payless Inc. ("Rite Aid") that turned out to be one-half the size depicted on the product's packaging. He brought suit seeking restitution under this state's consumer protection laws on behalf of himself and a class of similar purchasers alleging false advertising and misrepresentation. The class was defined in clear, objective terms that would have made it easy for class members to identify themselves as entitled to relief. Yet the lower court threw it out on the ground that the plaintiff failed to show a means of identifying the class members—an ascertainability standard that makes class actions like all but impossible.

If Rite Aid cannot be held accountable in a class action for its deceptive conduct and false advertising, then it will not be held accountable at all. A rule in Rite Aid's favor would send a clear signal to corporations throughout America that California consumers are fair game for unlawful business practices. This Court should reject that outcome and reverse the decision below.

STATEMENT OF FACTS

I. The Legal Landscape

This case involves three of California's most important consumer protection laws: the Consumer Legal Remedies Act ("CLRA") (California Civil Code §§ 1750 *et seq*), the Unfair Competition Law ("UCL") (Bus. & Prof. Code §§ 17200 *et seq*.), and the False Advertising Law ("FAL") (*id.* §§ 17500 *et seq*.).

The CLRA protects consumers against deceptive business practices in the sale of goods and prohibits a seller from representing that goods have characteristics they do not possess. (Civ. Code, § 1770, subds. (a)(4)–(a)(5) & (a)(7).) The UCL prohibits acts of unfair competition, defined as "any unlawful, unfair or fraudulent business act or practice...." (Bus. & Prof. Code, § 17200.) The FAL is equally comprehensive within the smaller and narrower field of false advertising. (*Id.* § 17500; *see Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320.)

Two class action statutes are at issue here. The first, more widely operative statute is Code of Civil Procedure ("CCP") section 382, which governs class actions generally, including actions under the UCL and FAL. That statute provides:

> when the question is one of common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

As interpreted by this Court, there are two requirements for class certification under CCP section 382: "(1) There must be an ascertainable class; and (2) there must be a well-defined community of interest in the question of law and fact involved affecting the parties to be represented." (*Daar, supra,* 67 Cal. 2d at p. 704 [citations omitted]; *Richmond, supra*, 29 Cal.3d at p. 470.)

The community of interest requirement involves three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. (*See Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435; *Richmond, supra,* 29 Cal.3d at p. 470.)

Furthermore, the CLRA contains its own provision for class actions, similar in many respects to those under CCP section 382. (*See Civil Service Employees Ins. Co. v. Superior Ct.* (1978) 22 Cal.3d 362, 376, fn.7; *Vasquez, supra*, 4 Cal.3d at p. 821.)[2]

Under the CLRA, a court should certify a class when the following circumstances exist:

> (1) It is impracticable to bring all members of the class before the court; (2) The questions of law or fact common to the

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[2] Because CCP section 382 does not establish a procedural framework for class actions, this Court has "looked to the procedures governing class actions under the CLRA and [federal] Rule 23 for guidance on novel certification issues." (*Linder*, *supra*, 23 Cal.4th at p. 437. *See also Civil Service Employees*, *supra*, 22 Cal.3d at p. 376, fn 7.)

> class are substantially similar and predominate over the questions affecting the individual members; (3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class; and (4) The representative plaintiff will fairly and adequately protect the interests of the class.

(Civ. Code, § 1781 [b].)

In addition to those requirements, California courts also consider superiority—whether "substantial benefits from certification … render proceedings as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Superior Ct.* (2012) 53 Cal.4th 1004, 1021.)

II. Consumer Class Actions in California

"California courts have recognized that the consumer class action is an essential tool for the protection of consumers against exploitative business practices." (*Levi Strauss*, *supra*, 41 Cal.3d at p. 471. *See also Vasquez*, *supra,* 4 Cal.3d at pp. 807-809.) By allowing the claims of many individuals to be resolved at the same time, "the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress…." (*Richmond, supra,* 29 Cal.3d at p. 469 [citation and quotation omitted].)

Class actions by consumers produce "several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial

process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial." (*Vasquez*, *supra*, 4 Cal.3d at p. 808.)

This Court quoted much of the above language with approval almost 30 years later in *Linder, supra,* 23 Cal.4th at p. 445, and again in *Discover Bank v. Superior Ct.* (2005) 36 Cal.4th 148, 156, abrogated on other grounds by *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333. In *Linder*, *supra,* this Court recognized that class actions are crucially important in the consumer context to "prevent a failure of justice in our judicial system." (23 Cal.4th at p. 435 [citations omitted].) Likewise, *Discover Bank*, *supra*, emphasized the "important role of class action remedies in California law…" in terms of vindicating the rights of "large groups of persons" and deterring "unscrupulous wrongdoer[s]." (36 Cal.4th at p. 157 [citations and quotations omitted].)

Because California law and policy favor the fullest and most flexible use of class actions, any doubts as to the propriety of class treatment must be resolved in favor of certification, subject to later modification. (*Richmond*, *supra*, 29 Cal.3d at pp. 473-475; *see also id.* at p. 474 [holding that "[s]ince the judicial system substantially benefits by the efficient use of its resources, class certification should not be denied so long as the absent class members' rights are adequately protected"].)

III. This Lawsuit

On July 4, 2013, the plaintiff in this case—an ordained Presbyterian minister named James A. Noel ("Noel")—purchased an inflatable pool (the "Ready Set Pool") from a Rite Aid store in San Rafael, California, with his bank debit card for $59.99.[3]

Noel did not retain the receipt of his purchase, but his bank record lists the Rite Aid purchase. (App. 2.) Noel based his decision to purchase the Ready Set Pool on a photograph on the pool's packaging, which depicted a group of three adults and two children sitting and playing in the pool. (*Id.*) Once Noel inflated and filled his pool, he was in for a shock: the pool was "materially smaller" than the Ready Set Pool shown on the packaging. "The photographs in the record and the briefs show a marked difference in size between the pool as set up by Noel and the photo on the box." (*Id.*)

Noel sent Rite Aid a letter requesting restitution for him and all California purchasers. Although Rite Aid claims an employee attempted to contact Noel and offered to reimburse his purchase, Rite Aid never issued Noel any refund payment, and never offered to reimburse other California purchasers, as Noel had demanded. Accordingly, Noel sued Rite Aid on behalf of himself and all other similarly situated individuals, alleging that Rite Aid violated the CLRA, UCL, and FAL by selling the pool with deceptive advertising

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[3] Noel passed away in January 2016, and his widow is pursuing this case as his personal representative.

to consumers in its California retail stores. The class was defined as "[a]ll persons who purchased the Ready Set Pool at a Rite Aid store located in California within the four years preceding the date of the filing of this action [i.e., November 18, 2013]." (App. 7.)

When Noel moved to certify the class, the trial court denied his motion on the UCL and FAL causes of action, finding Noel's proposed class was not ascertainable under CCP section 382. The trial court found Noel had presented "no evidence" to establish "what method or methods will be utilized to identify the class members, what records are available, (either from Defendant, the manufacturer, or other entities such as banks or credit institutions), how those records would be obtained, what those records will show, and how burdensome their production would be…" (App. 4.) The court also found "a class action is not superior to numerous individual actions" and "will be no more efficient than individual actions in light of the individual issues [sic] that must be presented on the issue of reliance and damages." (App. 4.)[4]

IV. The Decision Below

Noel appealed and the First District affirmed the trial court's decision in all respects. (App. 23.) The bulk of the lower court's opinion was devoted to its discussion of the standard to be applied to

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[4] The trial court also denied the class certification motion on the CLRA cause of action on the ground that Noel had not shown the commonality of issues required for the CLRA. (*Id.*) That ruling is not at issue here.

the ascertainability determination. (App. 7-20.) The court of appeal noted that Noel and Rite Aid relied on different standards found in various appellate decisions. Noel advanced the standard adopted by the Second, Third, and Fourth Districts, which provides that a proposed class is ascertainable when it "identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description." (*See Estrada v. FedEx Ground Package Sys., Inc.* (2007) 154 Cal.App.4th 1, 14 [Second District] [citing *Bartold v. Glendale Fed. Bank* (2000) 81 Cal.App.4th 816, 828 [Fourth District]]. *Accord Aguirre*, *supra,* 234 Cal.App.4th at pp. 1299-1300 [Third District].)

Rite Aid, by contrast, contended the proper standard was the three-part test enunciated by the First District's 2012 decision in *Sotelo*, *supra,* 207 Cal.App.4th 639. There, the court held that, in determining whether a class is ascertainable, a trial court must "examine[ ] the class definition, the size of the class and the means of identifying class members." (*Id.* at p. 648 [citation omitted].) The court in *Soleto* went on to hold that a class is not ascertainable "where the proposed class contains an unknown number of members who have no recorded relationship" with the defendant. (*Id.* at pp. 648-649.)

The lower court, while expressly acknowledging that the standard of *Sotelo* was "more demanding" than the Second District's

in *Estrada* (App. 9), and that its holding "may be contrary to that of [the Third District in] *Aguirre*," (App. 17), applied *Sotelo* and upheld the denial of certification on ascertainability grounds. (App. 17.)

In so ruling, the panel emphasized what it saw as "a serious due process question in certifying the class action." (App. 11.) Although the court acknowledged that Noel had presented evidence, based on Rite Aid's interrogatory responses, of the total number of pools sold and Rite Aid's gross revenue from same ("$949,279.34"), it faulted him for failing to offer "a glimmer of insight into who purchased the pools or how one might find that out." *(Ibid.)* Without that information, in the court's opinion, it would be impossible to give class members "personal notice." *(Ibid.)* Notice by "broadcast email or publication in advertising flyers," the court wrote, would be both "overinclusive and underinclusive" (*ibid.*), and the fact that class members could self-identify based on the class definition "does not address the due process notice issue at all." *(Ibid.)*

While it purported to simply apply *Sotelo*, however, the court of appeal actually went a step further and created a special rule for class actions containing between 20,000 and one million members, requiring that plaintiffs in those cases—but not smaller or larger cases—make a showing that personal notice to class members *is* possible:

> The putative class in *Aguirre* numbered about a million. With a class that large,

> perhaps assuming personal notice cannot be given was realistic, but with a class size of 20,000 we are not so quick to make that assumption. In fact, it seems to us that in the context of a proposed class of this size or even larger—as in *Aguirre*—the due process concerns implicated by the ascertainability prong of the class certification test are heightened, and as a result, the issue of whether there are feasible means for giving proposed class members notice deserves even greater scrutiny than it does for smaller putative classes....

(*Id*. at pp. 14-15.) "Thus," the panel concluded, "before a trial court certifies a class, the court should be allowed to inquire into the expected manner of notice, including whether class members can be identified for personal notice:

> The court may insist upon personal notice, depending on the circumstances. We draw no bright lines, and leave much to the discretion of the trial court, but we prefer this more pragmatic and flexible approach to a blanket rule prohibiting trial courts from considering notice issues altogether at class certification proceedings. (*Id*. at p. 15.)

Applying its newly-minted standard to the instant case, the lower court held that Noel had failed to show "how Rite Aid's records might be mined for evidence of customer identity or cross referenced with other available evidence to obtain the identities of the purchasers of the Ready Set Pool or any means of contacting

them[,]" *id.* at p. 17, and so affirmed the trial court's decision denying certification.

STANDARD OF REVIEW

Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification. (*Linder*, *supra,* 23 Cal.4th at p. 435.) However, "an order based upon improper criteria or incorrect assumptions calls for reversal, even though there may be substantial evidence to support the court's order." (*Id.* at p. 436 [internal quotation marks and citations omitted].)

ARGUMENT

I. THE LOWER COURT'S RULING THAT THE CLASS COULD NOT BE ASCERTAINED IS CONTRARY TO LONGSTANDING CALIFORNIA AND FEDERAL LAW AND POLICY

The panel's approach, which confuses ascertainability with identifiability, is inconsistent with long-established law from this Court and the public policy underlying that law, notwithstanding some recent appellate confusion regarding ascertainability. The lower court's ascertainability test is also squarely at odds with recent decisions of five federal courts of appeals, including the Ninth Circuit, notwithstanding a short-lived experiment from one federal appellate court that has been largely abandoned. And despite the lower court's protestations about notice, the opinion below is not

supported by either the statutory requirements on notice or by principles of due process. The decision below should be reversed.

A. The Ascertainability Doctrine in California

A review of the origins of ascertainability in California class action law makes readily apparent the errors in the decision below. Until very recently, California courts understood ascertainability to merely require that a class be defined according to objective criteria that allow absent class members to identify themselves as having a right to recover based on that description.

This Court's watershed opinion in *Daar*, *supra*, 67 Cal.2d at p. 695, held that class members need not be identified—or even identifiable—at the class certification stage. There, the defendant argued that the class was not "ascertainable" because some members of the class had paid cash for their cab rides, and thus could not be identified based on any official records; instead, they would have to identify themselves at the remedial stage of the case to recover damages. (*See id.* at p. 706.) In rejecting that argument, *Daar* stated, "[d]efendant apparently fails to distinguish between the necessity of establishing the existence of an ascertainable class and the necessity of identifying the individual members of such class as a prerequisite to a class suit." (*Id.*)

This Court added: "If the existence of an ascertainable class has been shown, *there is no need to identify its individual members in order to bind all members by the judgment*. The fact that the class members are unidentifiable at this point will not preclude a

complete determination of the issues affecting the class." (*Ibid.* [emphasis added].) Instead, held *Daar*, "whether there is an ascertainable class depends in turn upon the *community of interest* among the class members in the questions of law and fact involved." (*Ibid.* [emphasis added].)

Daar then held that the "community of interest" required for ascertainability need not extend to the remedy. (*Id.* at pp. 707-708.) Looking to Rule 23 of the Federal Rules of Civil Procedure, which in 1966 "was revised so as … to eliminate the requirement of common relief" (*id.* at p. 709), *Daar* ruled that "[t]he fact that each individual ultimately must prove his separate claim to a portion of any recovery by the class is only one factor to be considered in determining whether a class action is proper." (*Id.* at p. 713.) Ultimately, this Court held, "our determination depends upon whether the common questions are sufficiently important to permit adjudication in a class action rather than in a multiplicity of separate suits." (*Id.*)

In the years since *Daar*, this Court has never deviated from its core holding that ascertainability does not require that class members be identified—or even identifiable—as a prerequisite for class certification. In *Vasquez, supra*, 4 Cal.3d at pp. 809-810, for example, a consumer class action decided four years after *Daar* (in 1971), this Court reiterated that ascertainability merely requires that "each individual class member's right to recover may not be based on a separate set of facts applicable only to him." (*Id.* at pp. 809-810.)

But where, as in *Daar*, "a complete determination of the issues affecting the class (i.e., such as whether there was an overcharge in the total amount thereof) could be made without identification and without the appearance of the individual class members," a class is "ascertainable," even though "each class member must come forward" to claim his own damages at the remedial phase. (*Id.* at p. 810, fn. 5.)

Likewise, in *Levi Strauss*, *supra*, 41 Cal.3d 460, this Court approved the settlement of a consumer class action seeking monetary relief "for millions of consumers who were assertedly overcharged on jeans purchased during the early 1970's." (*Id.* at p. 464.) There, the Court did not even see the need to address the ascertainability of the class, even though it consisted of an unknown quantity—several to 7 million—of unnamed class members, many of whom might never come forward to identify themselves even at the remedial phase. (*Id.*)

Instead, this Court reemphasized its prior ruling in *Vasquez, supra*, that "the consumer class action is an essential tool for the protection of consumers against exploitative business practices." (*Id.* at p. 471 [quoting *Vasquez, supra,* 4 Cal.3d at p. 820].) It added that although "[d]amage distribution … poses special problems in consumer class actions, because "[e]ach individual's recovery may be too small to make traditional methods of proof worthwhile [and] consumers are not likely to retain records of small purchases for long

periods of time," these problems can be dealt with via alternative methods of damage distribution, such as a *cy pres* fund. (*See id*. at pp. 472-473.)[5]

B. The Recent Confusion Over Ascertainability.

Until recently, the lower courts of appeals had no difficulty following *Daar*'s teaching that ascertainability does not require identifiability at the class certification stage. (*See, e.g., Reyes v. San Diego County Bd. of Supervisors* (1987) 196 Cal.App.3d 1263, 1274 [Fourth District] [holding that "[i]t is firmly established a plaintiff is not required at this stage of the proceedings to establish the existence and identity of class members"]; *Estrada, supra,* 154 Cal.App.4th at p. 14 [Second District] ["[i]f FedEx's claim is that every member of the class had to be identified from the outset, FedEx is simply wrong"] [citing *Daar*, *supra,* 67 Cal.2d at p. 706].)

Instead, the courts of appeal have held that "[a] class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on that description." (*Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 101 [Second District]

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[5] (*See also Linder, supra,* 23 Cal.4th at p. 446 [holding, in context of consumer class action involving small damages claims, that "defendants should not profit from their wrongdoing simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts."] [internal quotes and citation omitted].)

[citation omitted]. *See also Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915, fn.13 [Second District] [holding that "ascertainability [is] achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary"] [citing 2 *Newberg on Class Actions*, § 6.14, at pp. 6-61].)

In keeping with this standard, California courts of appeal have specifically rejected arguments that a lack of identifying records should defeat class certification on ascertainability grounds. In *Clothesrigger, Inc. v. GTE Corporation* (1987) 191 Cal.App.3d 605, 616-617 [Fourth District], for example, the plaintiff sought certification of a class of phone subscribers who were charged for unanswered long-distance calls. The defendants challenged the motion on ascertainability grounds, arguing that their billing records would not disclose which subscribers were class members. The appellate court reversed the trial court's order denying certification: "The fact defendants' customer lists and monthly billing statements may not disclose which Sprint subscribers were charged for unanswered calls does not make the proposed nationwide class unascertainable," because the subscribers could self-identify: "[i]ndividual subscribers know whether they were charged for unanswered calls and must prove they were so charged." (*Id.*)

Likewise, in *Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 136 [Second District], the court of appeal rejected an argument by a uniform leasing and laundering company that a class of employees asserting wage-and-hour violations on particular contracts with the Los Angeles Department of Water and Power ("DWP") cannot be ascertained because the company's records did not reveal which employees worked on those projects. "[Defendant] cannot defeat class treatment," the court ruled, "because it failed to keep track of the employees who worked on the DWP contracts, as it certified it would do, and commingled DWP items with those of other customers." (*Id.*)

But things started to go awry in 2012, when the First District decided *Sotelo*, *supra*, 207 Cal.App.4th 639, a wage-and-hour class action brought by newspaper carriers against their employers seeking payment of overtime wages. Some of the workers could be identified by the defendant's records, but others could not because they were retained without a contract. (*Id.* at p. 646.)

Rather than following *Daar* and its progeny, the *Sotelo* court held that, in "determining whether a class is ascertainable, [a] trial court [must] examine[ ] the class definition, the size of the class *and the means of identifying class members*." (*Id.* at p. 648 [emphasis added].) As support for this test, *Sotelo* cited *Miller v. Woods* (1983) 148 Cal.App.3d 862, a case where ascertainability was not contested

and the three-part test was merely referenced in passing. (*See id.* at p. 873.)

As it turns out, *Miller*'s only cited authority for the three-part test was this Court's ruling in *Vasquez* (*see id.* at p. 873 [citing *Vasquez*, *supra,* 4 Cal.3d at pp. 821-22]), but *Vasquez* actually contains no such test—indeed, just as in *Miller*, ascertainability was not even an issue in *Vasquez*. (*See* 4 Cal.3d at pp. 821-822.)

Be that as it may, *Sotelo* took *Miller*'s three-part ascertainability test and ran with it, holding that for a class to be certified, the plaintiff must establish "[a] *means of identifying class members*." (207 Cal.App.4th at p. 648 [emphasis added].) *Sotelo* then looked to a 1981 employment case, *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932 [First District], which held that "[c]lass members are 'ascertainable' where they may be readily identified without unreasonable expense or time *by reference to official records*." (*Id.* [emphasis added].)

Taking this reference to "official records" as authoritative, and without acknowledging that *Rose* itself merely held that ascertainability *may* be satisfied by "official records," not that such records *must* be identified as a prerequisite for class certification, *Sotelo* concluded that the class before it was not ascertainable because "the proposed class contains an unknown number of members who have no recorded relationship with respondents." (*Id.* at p. 649.) This lack of a "recorded relationship," in the First

District's view, presented "serious notice issues ...," and thus the class was not "ascertainable." (*Id.*)

Despite its obvious flaws, *Sotelo*'s approach cropped up in a few cases outside the First District. In *Thompson v. Automobile Club of Southern CA* (2013) 217 Cal.App.4th 719 [Fourth District], a consumer class action against the American Automobile Association involving membership benefits, the court held that ascertainability was lacking because class members could not be identified by "official records." In so holding, *Thompson* cited a case—*Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1334 [Second District]—which in turn cited to a case—*Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 135 [Second District]—which in turn cited to the original case—*Rose, supra,* 126 Cal.App.3d at p. 932—that was cited by *Sotelo* as the basis for its erroneous ascertainability ruling. (*See Sotelo*, *supra*, 148 Cal.App.3d at p. 872.) Despite this error at its core, *Thompson* ultimately spread to several other Fourth District cases.[6]

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[6](*See Hale v. Sharp Healthcare* (2014) 232 Cal.App.4th 50, 58 [Fourth District] [affirming decertification, on ascertainability grounds, of a class action on behalf of emergency room patients alleging billing overcharges]; *Kendall v. Scripps Health* (2017) 16 Cal.App.5th 553, 575 [Fourth District] [denying certification, on ascertainability grounds, of class action on behalf of self-pay emergency care patients]; *Hefcyz v. Rady Children's Hospital-San Diego* (2017) 17 Cal.App.5th 518, 539-41 [Fourth District] [denying certification, on ascertainability grounds, of class action on behalf of emergency room patients alleging overcharges].)

In the face of these holdings, the Third District stood firm, rejecting the First and Fourth District's reading of ascertainability as inconsistent with long-standing class action practice and with *Daar* itself. Most notably, in *Aguirre*, *supra*, 234 Cal.App.4th 1290, the court of appeal reiterated the long-standing view that "[a] class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description." (*Id*. at p. 1300 [citation omitted.) Citing *Daar, Aguirre* held that "the representative plaintiff need not identify, much less locate, individual class members to establish the existence of an ascertainable class." (*Id*. at p. 1301.)[7]

Aguirre went on to specifically reject *Sotelo*'s stated concern that, unless class members can be identified at the certification stage, "a serious notice issue results." (*Id*. at p. 1305 [quoting *Sotelo*, *supra,* 207 Cal. App. 4th at p. 649.) This view, said *Aguirre*, is

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[7] Other cases cited in *Aguirre*, *supra*, 234 Cal.App.4th at p. 1300, as using the same ascertainability test include *Bartold v. Glendale Fed. Bank* (2000) 81 Cal.App.4th 816, 828 [Fourth District], overturned by legislative action in 2001 Cal. Legis. Serv. Ch. 560; *Sevidal v. Target Corp*. (2010) 189 Cal.App.4th 905, 918-19 [Fourth District]; *Ghazaryan v. Diva Limousine, Ltd*. (2008) 169 Cal.App.4th 1524, 1533 [Second District]; *Harper v. 24 Hour Fitness, Inc*. (2008) 167 Cal.App.4th 966, 977 [Second District]; *Medrazo, supra,* 166 Cal.App.4th at p. 101; *Estrada, supra,* 154 Cal.App.4th at p. 14; *Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 858 [Fourth District]; *Aguiar v. Cintas Corp. No 2.* (2006) 144 Cal.App.4th 121, 136 [Second District].

"inconsistent with the liberal notice provisions of California Rules of Court, rule 3.766," which "is designed to dispense under certain circumstances with actual personal notice." (*Id*. at pp. 1301, 1305 [citation omitted].)

Aguirre also "disagree[d] with *Sotelo* to the extent it suggests a class is not ascertainable where, as here, prospective class members must come forward and establish membership in the class." (*Id*. at p. 1305.) "It is well established," *Aguirre* ruled, "that '"a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages."' (*Id*. [quoting *Sav-On Drug Stores* (2004) 34 Cal.4th 319, 331].)

Aguirre seemed to act as a powerful tonic on other courts—including the First District, home of *Sotelo*. There, in a recent decision, the court of appeal found a class action ascertainable without even citing *Sotelo*. *See Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal.App.5th 1200, 1212 [holding, without mentioning *Sotelo,* that "'[a]scertainability is achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary."] [citation omitted].)

But then came the lower court's ruling in this case, which reverted back to *Sotelo* and held that a consumer class action that would have easily been "ascertainable" under *Daar* and its progeny could not be ascertained simply because the class members could not be identified at the class certification stage using the defendant's records (App. 11)—setting the stage for this appeal.

C. The Lower Court Applied the Wrong Standard to Determine Ascertainability

1. The Lower Court's Holding That Ascertainability Requires Identifiability is Contrary to this Court's Teachings and the Weight of California Authority.

The lower court's most basic error was in confusing ascertainability with a requirement that class members be *identifiable* at the class certification stage. As explained above, that has never been the law in this state. Instead, following this Court's lead in *Daar, supra*, California courts have long held that ascertainability merely requires that the class definition "identif[y] a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description." (*Estrada*, *supra*, 154 Cal.App.4th at p. 14; *see also Aguirre*, *supra*, 234 Cal.App.4th at pp. 1299-1300 [using same definition and collecting cases].)

The lower court nonetheless believed that *Sotelo* provided the correct framework for analyzing ascertainability in the consumer context, stating that "*Sotelo* is not unique in employing the three-

factor test of ascertainability [the third part of which requires a court to "examine… the means of identifying class members" (*Sotelo*, 207 Cal. App.4th at p. 648).]" (App. 8 fn.6.) "In fact," the lower court ruled, "the three-factor test did not originate with *Sotelo*, but rather has been used when appropriate for many years." (*Ibid.* [citing three cases].)

Wrong again. In reality, none of the three cases cited by the lower court supports its literal reading of *Sotelo*'s three-part test. The first cited case, *Reyes*, *supra*, 196 Cal.App.3d at p. 1274, merely holds that "within the context of *manageability*, the issue is whether there exists sufficient *means* for identifying class members *at the remedial stage*." (*Ibid.* [citing *Daar*, *supra*, 67 Cal.2d at p. 706; first and third emphases added].) That holding is true as far as it goes: issues of identifiability *are* an appropriate consideration "within the context of *manageability* … at *the remedial stage*." (*Ibid.* [emphases added].) But *Reyes* goes on to hold, with regard to ascertainability, that "it is firmly established a plaintiff is *not required* at this stage of the proceedings [i.e., class certification] to establish the existence and identity of class members." (*Id.* at p. 1274 [emphasis added].)

The other two cases cited by the lower court are just as off-point. *Bufil v. Dollar Financial Grp., Inc.* (2008) 162 Cal.App.4th 1193, 1207, cites the three-part test, but then, like *Reyes*, actually holds that ascertainability "is better achieved by defining the class in terms of objective characteristics and common transactional facts

making the ultimate identification of class members possible when identification becomes necessary." (*Id.* [quoting *Hicks*, *supra*, 89 Cal.App.4th at 915].)[8]

Likewise, *Nicodemus*, *supra*, 3 Cal.App.5th 1200, cites the three-part test (*id* at p. 1212), but goes on to hold that "[a]scertainability is achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible *when that identification becomes necessary*." (*Ibid.* [internal quotation marks and citations omitted; emphasis added].)

In the context of a consumer case like this one, identification only "becomes necessary" at the remedial stage, when the time comes to divvy up the recovery. Such identification is not necessary at the class certification stage, as California courts have long understood. (*See Estrada*, *supra*, 154 Cal.App.4th at p. 14.)

Despite the foregoing, the lower court insisted that requiring identifiability as part of ascertainability is merely "a refinement of the ascertainability prong of the *Estrada* test when that prong requires a closer look." (App. 12.) It is difficult to understand the court's reasoning, because *Estrada* itself, like *Nicodemus*, *supra,*

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[8] *Bufil* cites *Miller*, *supra,* 148 Cal.App.3d at p. 873, as the source for the three-part test, but—as explained above with reference to *Sotelo*'s reliance on *Miller*—that case (1) merely references ascertainability in passing (*see ibid.*); and (2) incorrectly cites *Vasquez*, *supra*, 4 Cal.3d at pp. 821-822, as the source for the three-part test.

construed ascertainability as simply requiring that the class definition "describe[ ] a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover…" (*Estrada*, *supra*, 154 Cal.App.4th at p. 14). Under the *Estrada* test, a class member only needs to be able to *self*-identify based on a set of common characteristics. This is fundamentally at odds with the lower court's test, which requires that class members be identifiable based on official records. This approach does not "refine" the *Estrada* standard—it obliterates it.

The lower court seemed to recognize that possibility, because it then immediately tried to walk-back its approach, saying that both the *Estrada* and *Sotelo* tests may be used depending on "how the parties have framed the issues …" (*Ibid.*) Thus, said the court:

> When the defendant claims the class definition is overinclusive or ambiguously worded, the *Estrada* test may provide the best analytical framework. When the defendant's opposition to certification is based on the inability to ascertain the identity of class members due to a lack of records, the three-part test used in *Sotelo* may better serve. (*Ibid.*)

This attempt to brush off the distinction between the two standards as merely a difference in emphasis, where one test or another is used depending on how the opposition to class certification is framed, falls apart the minute you poke at it. Under the *Estrada* approach, defendants have only one way of challenging ascertainability: arguing that it lacks a sufficiently objective definition to allow class

members to identify themselves as entitled to relief. But under the lower court's approach, defendants have *two* types of available challenges: the objective-definition challenge, and a separate type of challenge based on lack of records. Any defense counsel worth his or her salt would make both arguments, but the latter is contrary to California law and, as the decision below illustrates, can prove fatal to meritorious consumer class actions.

The panel also tried to soft-pedal the impact of its ruling by stating that, under its approach, "Noel was not required to actually identify the 20,000-plus individuals who bought pools…" (App. 11.) Instead, said the court, "his failure to come up with any *means* of identifying them was a legitimate basis for denying certification." (*Id*. [emphasis in original]. *See also* App. 17 [faulting Noel for "not attempt[ing] to prove or even explain how Rite Aid's records might be mined for evidence of customer identity or cross referenced with other available evidence to obtain the identities of the purchasers of the Ready Set Pool…"].)

This argument misses the basic point that, under *Daar*, ascertainability does not require identifiability *at all*. Rather, a plaintiff is only required to show that a class is defined in sufficiently objective terms to allow members to identify *themselves*. The lower court's statement that a named plaintiff must identify a "means" by which class members can later be identified, separate and apart from

self-identification, is fundamentally incompatible with this basic concept.

The panel recognized that its approach is inconsistent with *Daar*, where the plaintiff had not proffered any means of "identifying the cash users of cabs…" (App. 16.) But the court attempted to brush this off by stating that "*Daar* was addressed on demurrer, when the plaintiffs' allegations must be accepted as true…" and the plaintiffs "had obtained no discovery and so could not be expected to identify class members or designate a means of notice." (*Id.* [citing *Daar*, *supra*, 67 Cal.2d at p. 713].)

This argument illogically assumes that the *Daar* plaintiffs *would* be required, at some unspecified later point in the litigation, to "identify [the cash-paying] class members" so as to allow them some form of personal notice—and that, barring such a showing, the class would be decertified. (*Id.*) *Daar* never says (or even suggests) any such thing, and the very idea is belied by fact that identifying cash-paying cab riders by any form of official records would likely be impossible, no matter how much discovery was allotted plaintiffs.

2. <u>The Lower Court's Approach is Contrary to the Public Policy Underlying Consumer Class Actions.</u>

The lower court's approach also undermines the most basic public policy rationale underlying consumer class actions, both in the federal courts and in this state. As the U.S. Supreme Court emphasized in *Amchem Prods, Inc. v. Windsor* (1997) 521 U.S. 591, "[t]he policy at the very core of the class action mechanism is to

overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (*Id.* at p. 617 [quotations omitted].) "A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." (*Id.* [citation omitted].)[9]

These sentiments have been mirrored by this Court in numerous cases since *Daar* was decided back in 1967. "Since the pathbreaking case of *Vasquez v. Superior Court* (1971) 4 Cal.3d 800[,] the California courts have recognized that the consumer class action is an essential tool for the protection of consumers against exploitative business practices." (*Levi Strauss*, *supra,* 41 Cal. 3d at p. 471.)

As Justice Mosk stated in his oft-quoted majority opinion in *Vasquez*, *supra*, "protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society." (4 Cal.3d at p. 808.) Justice Mosk explained that "[f]requently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all." (*Id.*)

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[9] (*See generally* Judith Resnick, *From "Cases" to "Litigation"* (1991) 54 Law & Contemp. Probs. 5, 14 [explaining that Benjamin Kaplan, primary drafter of federal Rule 23, intended to "provide a means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all"] [citation omitted].)

When that occurs, "[i]ndividual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus unscrupulous seller retains the benefits of its wrongful conduct." (*Id.*)

The lower court's approach to ascertainability cannot be reconciled with these sentiments. A rule that limits class actions to cases where absent class members can be identified by the defendant's records cuts a wide swath of consumer cases off at the knees, thereby allowing "unscrupulous seller[s] [to] retain the benefits of [their] wrongful conduct." (*See Vasquez*, *supra*, 4 Cal.3d at p. 801.) It is no surprise that companies like Rite Aid want this result, but it cannot be reconciled with the longstanding public policy of this state favoring class actions.[10]

3. The Lower Court's Approach is Contrary to the Weight of Federal Authority on Ascertainability.

The lower court's approach is also contrary to the weight of federal authority construing Federal Rule of Civil Procedure 23. This Court often looks to Rule 23, and federal cases interpreting that rule, as an aid in analyzing California's class action mechanisms. (*See Vasquez*, *supra*, 4 Cal.3d at p. 821 [describing Rule 23 caselaw as "useful"]; *Daar*, *supra*, 67 Cal.2d at pp. 708-709 and fn.13

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[10] For a more recent discussion of this state's public policy favoring class actions, *see Linder,* supra, 23 Cal.4th at p. 435 and *Discover Bank*, *supra*, 36 Cal.4th at p. 157.
(footnote continued)

[collecting federal cases and noting that "the additional criteria prescribed by Rule 23 … are in substantial coincidence with our views" as to the applicable criteria under CCP section 382].)[11]

The arc of federal law on ascertainability is strikingly similar to that described in parts I(A)-(B) above: a fairly consistent and uniform definition of the concept thrown into disarray by a 2012 opinion confusing ascertainability with identifiability. Except that in the federal law version of this story, the mutation of the ascertainability standard was largely confined to a single circuit and has been emphatically rejected by appellate opinions from five other circuits who have written at length about its pernicious effects.

Federal courts interpreting Rule 23, like California courts interpreting CCP section 382, have long read an implicit ascertainability requirement into the rule.[12] And like their California counterparts, until recently all federal courts imposing this requirement have focused on the need to define the class in a precise

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[11] (*See also Washington Mutual Bank, FA v. Superior Ct.* (2001) 24 Cal.4th 906, 922 [looking to federal law for guidance when construing California class action rules]; *Linder*, *supra*, 23 Cal.4th at p. 437 [noting that "[i]n the past … we have looked to the procedures governing class actions under the CLRA and Rule 23 for guidance on novel certification issues"].)

[12] (*See generally* William B. Rubenstein, et al., *Newberg on Class Actions* (5th ed. 2011 & Supp. 2013) ("Newberg") §3:1-3:2; Daniel Luks (2014) *Ascertainability in the Third Circuit: Name that Class Member*, 82 Fordham L.Rev. 2359 [discussing origins of ascertainability].)
(footnote continued)

and objective manner so that both the court and potential class members can determine who is and is not included.[13]

But in 2012, the same year the First District decided *Sotelo*, the Third Circuit introduced chaos into this straightforward legal framework by suggesting ascertainability requires that class members be identifiable at the certification stage. The trouble started with *Marcus v. BMW of N. Am., LLC* (3d Cir. 2012) 687 F.3d 583, where the district court certified a class of purchasers or lessees

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[13] In the federal realm, as in this state, ascertainability has always "focus[ed] on the question of whether the class can be ascertained by objective criteria," as opposed to "subjective criteria (such as class members' state of mind) …" (Newberg § 3:3; *see also* Manual for Complex Litig., Fourth (Fed. Judicial Ctr. 2004) § 21.222. Federal courts have long "held that the class does not have to be so ascertainable that every potential member can be identified at the commencement of the action." 7A Wright & Miller (3d ed. 2005) Federal Practice & Procedure § 1760; *see also Newberg* § 3:3 ["the court need not know the identity of each class member before certification; ascertainability requires only that the court be able to identify class members at some stage of the proceeding] [footnote omitted]; Manual for Complex Litig. § 21.222; *Matamoros v. Starbucks Corp*. (1st Cir. 2012) 699 F.3d 129, 139 [holding that class in employment case was ascertainable because its definition used job titles as an objective criterion, citing Moore's Federal Practice (3d ed. 2012) § 23.21[3][a] for the proposition that "the court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria"]; *Fitzpatrick v. General Mills, Inc*. (11th Cir. 2011) 635 F.3d 1279, 1283 fn.1 [holding that class defined as "all persons who purchased [the defendant's product] in the State of Florida" is adequately ascertainable for class certification purposes]; *cf. DeBremaecker v. Short* (5th Cir. 1970) 433 F.2d 733, 734 [holding that proposed class of residents of Texas "active in the peace movement" did not "constitute an adequately defined or clearly ascertainable class" due to "the patent uncertainty of the meaning of 'peace movement'"].)

of vehicles equipped with certain tires that had gone flat and been replaced. (*Id.* at p. 588.) The Third Circuit rejected this definition, dictating that, on remand, the district court "must resolve the critical issue of whether the defendants' records can ascertain class members and, if not, whether there is a reliable, administratively feasible alternative." (*Id.* at p. 594.)

The next year, another Third Circuit panel built on the cracked foundation laid by *Marcus* when it decided *Carrera v. Bayer Corp.* (3d Cir. 2013) 727 F.3d 300, a small-claims consumer class action brought by purchasers of a weight-loss supplement. In affirming the trial court's ruling denying class certification, *Carrera* held:

> to satisfy ascertainability as it relates to proof of class membership, the plaintiff must demonstrate his purported method for ascertaining class members *is reliable and administratively feasible, and permits a defendant to challenge the evidence used to prove class membership*." (*Id.* at p. 308 [emphasis added].)

Carrera went on to reject the plaintiffs' suggestion that class members self-identify by affidavit on the ground that plaintiffs could not show how "fraudulent" affidavits would be prevented. (*Id.* at pp. 309-310.)

The Third Circuit's crabbed approach to ascertainability was immediately criticized because it makes consumer class actions all but impossible to certify, thereby undermining one of Rule 23's core purposes. As one academic commentator observed, "[t]he historic

mission of Rule 23" was to "enhance the litigation opportunity of hitherto powerless groups." (Note, *Class Ascertainability* (2015) 124 Yale L.J. 2354, at p. 2388.) But *Carrera*'s strict ascertainability standard frustrated this mission by "push[ing] out of court the very classes that Rule 23 was designed to bring in to court." (*Id.* at p. 2392. *See also* Daniel Luks (2014) *Ascertainability in the Third Circuit: Name That Class Member,* 82 Fordham L.Rev. 2359, at p. 2393 ["[a]scertainability as applied by the Third Circuit presents a potent tool for defendants to defeat many if not all small-claims consumer class actions"].)

As it turns out, however, the Third Circuit's ascertainability standard had a remarkably short lifespan. Not only has it been specifically rejected by *five* other circuits, including the Ninth, but it has since been criticized and largely disavowed within the Third Circuit itself.

Carrera's demise began in 2015, when the Seventh Circuit became the first federal appellate court to explicitly reject the Third Circuit's heightened ascertainability burden in *Mullins v. Direct Digital, LLC* (7th Cir. 2015) 795 F.3d 654, a case that, like *Carrera*, involved a dietary supplement. In a resounding rejection of *Carrera*, *Mullins* held that a class definition consisting of all purchasers of the defendant's product within a specified time period was neither vague nor subjective and thus met that Circuit's traditional test for ascertainability. (*Id.* at pp. 660-661.)

As to the Third Circuit's rejection of self-identifying affidavits to prove class membership, *Mullins* concluded that "imposing this stringent version of ascertainability does not further any interest of Rule 23 that is not already adequately protected by the Rule's explicit requirements," while it "effectively bars low-value consumer class actions, at least where plaintiffs do not have documentary proof of purchases, and sometimes even when they do." (*Id.* at p. 662.)

Turning to the issue of notice to absent class members—a concern that motivated both the Third Circuit and the lower court in this case—the Seventh Circuit explained that neither due process nor Rule 23 itself requires actual notice to every potential class member; instead, they merely require "the best notice that is practicable under the circumstances." (*Id.* at p. 665 [citing Fed. R. Civ. Proc. 23(c)(2)].) Although "actual individual notice may be the ideal, due process does not always require it." (*Id.* [citing cases].) Thus, "[w]hen class members' names and addresses are known or knowable with reasonable effort, notice can be accomplished with first-class mail." (*Ibid.* [citing *Eisen v. Carlisle & Jacqueline* (1974) 417 U.S. 156, 174-75].) But "[w]hen that is not possible, courts can use alternative means such as notice through third parties, paid advertising, and/or posting in places frequented by class members, all without offending due process." (*Ibid.* [citation omitted].)

Moreover, said the Seventh Circuit, "the stringent version of ascertainability loses sight of a critical feature of class actions for

low-value claims like this one." (*Ibid.*) In such cases, "only a lunatic or a fanatic would litigate the claim individually" and "so opt-out rights are not likely to be exercised by anyone planning a separate individual lawsuit." (*Ibid.* [citation omitted].) "The heightened ascertainability approach," the *Mullins* court warned, "comes close to insisting on actual notice to protect the interests of absent class members, yet overlooks the reality that without certification, putative class members with valid claims would not recover anything at all." (*Id.* at p. 666.) "When it comes to protecting the interests of absent class members," the Seventh Circuit concluded, "courts should not let the perfect become the enemy of the good." (*Ibid.*)

Mullins was just the beginning. In short order, the Sixth, Eighth, and Second Circuits joined the Seventh in rejecting the Third Circuit's approach to ascertainability. (*See Rikos v. Procter & Gamble Co.* (6th Cir. 2015) 799 F.3d 497, 525 ["We see no reason to follow *Carrera*, particularly given the strong criticism it has attracted from other courts"]; *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.* (8th Cir. 2016) 821 F.3d 992, 996 [declining to address "ascertainability as a separate, preliminary requirement"]; *In re Petrobras Sec.* (2d Cir. 2017) 862 F.3d 250, 265 ["With all due respect to our colleagues on the Third Circuit, we decline to adopt a heightened ascertainability theory that requires a showing of administrative feasibility at the class certification stage"].)

Most relevant here, the Ninth Circuit recently joined this growing anti-*Carrera* consensus in *Briseno v. ConAgra Foods, Inc.* (9th Cir. 2017) 844 F.3d 1121, declaring that "Rule 23's enumerated criteria already address the policy concerns" that led the Third Circuit "to adopt a separate administrative feasibility requirement, and do so without undermining the balance of interests struck by the Supreme Court, Congress, and the other contributors to the Rule." (*Id.* at p. 1123.)

Briseno, like this case, was a consumer class action brought on behalf of purchasers of a consumer product (Wesson-brand cooking oil labeled "100% natural") alleging fraudulent and misleading advertising. The defendant challenged the district court's certification decision on the ground that the named plaintiffs had failed to proffer "an administratively feasible way to identify members of the proposed class because consumers would not be able to reliably identify themselves as class members." (*Id.* at p. 1124.) Defendant "called this a failure of ascertainability.'" (*Id.* at p. 1124, fn.3.)

Rejecting that argument, the Ninth Circuit first observed that Rule 23 itself does not contain any "administrative feasibility" requirement, and that imposing such a requirement would render

Rule 23(b)(3)'s "manageability" criterion "superfluous." (*Id.* at p. 1126.)[14]

Then, regarding the Third Circuit's view that an administrative feasibility requirement is necessary to protect absent class members' due process rights, *Briseno* noted that the Due Process Clause does not necessitate actual, individual notice to every class member. (*Id.* at p. 1129 [noting that "[c]ourts have routinely held that notice by publication in a periodical, on a website, or even at an appropriate physical location is sufficient to satisfy due process"].) And echoing the Seventh Circuit's admonition that "the perfect not become the enemy of the good" in terms of providing notice in consumer class actions (*Mullins, supra*, 795 F.3d at p. 666), the Ninth Circuit reasoned:

> Practically speaking, a separate administrative feasibility requirement would protect a purely theoretical interest of absent class members at the expense of any possible recovery for all class members—in precisely those cases that depend most on the class mechanism. (*Ibid.*)

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[14] (*See also id.* at p. 1127 [holding that, to the extent administrative feasibility is a concern, "Rule 23(b)(3) already contains a specific, enumerated mechanism to achieve that goal: the manageability criterion of the superiority requirement."] *Accord Mullins, supra*, 795 F.3d at p. 663 [holding that requiring "class proponents to satisfy an administrative feasibility requirement 'conflicts with well-settled presumption that courts should not refuse to certify a class merely on the basis of manageability concerns"].)

"Justifying an administrative feasibility requirement as a means of ensuring perfect recovery at the expense of any recovery," the *Briseno* court concluded, "would undermine the very purpose of Rule 23(b)(3)—"vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" (*Ibid*. [citing *Amchem*, *supra*, 521 U.S. at p. 617 (quoting Benjamin Kaplan, A Prefatory Note, 10 B.C. Indus. & Com. L.Rev. 497, 497 (1969)].)[15]

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[15] In so holding, *Briseno* affirmed the rulings of myriad California federal courts that a lack of identifying records does not defeat certification in consumer class actions. (*See Ries v. Arizona Beverages USA LLC* (N.D. Cal. 2012) 287 F.R.D. 523, 535 [class certifiable despite lack of identifying records]; *Astiana v. Kashi Co.* (S.D. Cal. 2013) 291 F.R.D. 493, 500 [identities of class members need not be known at the time of certification: "As long as the class definition is sufficiently definite to identify putative class members," certification was appropriate].) These are not outliers. (*See, e.g., McCrary v. Elations* Co*., LLC,* No. EDCV 13-00242 JGB OP, (C.D. Cal. Jan. 13, 2014) 2014 WL 1779243, at *7 [rejecting argument that "the class is not ascertainable because there is no objective way to identify the individual members of the class, as [defendant] does not have any records identifying consumers of Elations—an over-the-counter supplement sold in retailers throughout the state"]; *Lanovaz v. Twinings N. Am., Inc.,* No. C-12-02646-RMW (N.D. Cal. Apr. 24, 2014) 2014 WL 1652338, at *2 [rejecting argument that class of tea purchasers "lacks ascertainability because few, if any, company records exist to identify purchasers or which products they bought, and consumers did not keep receipts or product containers"]; *Werdebaugh v. Blue Diamond Growers*, No.: 12-CV-2724-LHK (N.D. Cal. May 23, 2014) 2014 WL 2191901 at *10 [rejecting argument that class is not ascertainable because defendant did not have records of consumer purchasers], class decertified on other grounds, 2014 WL 7148923 (Dec. 15, 2014); *Lilly v. Jamba Juice Co.* (N.D. Cal. 2014) 308 F.R.D. 231, 237 [rejecting argument that class is not ascertainable due to a lack of "records demonstrating which (footnote continued)

Even the Third Circuit, where the administrative feasibility concept originated within the federal courts, has cabined that doctrine in significant ways. First, in *Byrd v. Aaron's Inc.* (3d Cir. 2015) 784 F.3d 154, a case involving computer spyware, the Third Circuit reversed the denial of class certification on ascertainability grounds, clarifying that *Carrera* does not impose a "records requirement." (*Id.* at p. 164.) Nor, the *Byrd* court held, must plaintiffs show that they can identify class members at the certification stage; instead, determining whether each putative class member meets the class definition can be handled at the claims administration stage and such verification "indeed must be done in most successful class actions." (*Id.* at pp. 170-171.)[16]

Then, in *City Select Auto Sales Inc. v. BMW Bank of N. Am.* (3d Cir. 2017) 867 F.3d 434, the Third Circuit retreated even further, rejecting any categorical rule against allowing class members to identify themselves through affidavits, as long as those affidavits could be cross-checked against other objective information sources. (*Id.* at p. 441-42 [citing *Byrd*, 784 F.3d at 163 for the proposition

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specific individuals … purchased the challenged smoothie kits from the retail outlets to which Defendants distributed them"].)

[16] As the *Byrd* concurrence observed, "[t]he chances that someone would, under penalty of perjury, sign a false affidavit stating that he or she bought Bayer aspirin for the sake of receiving a windfall of $1.59 are far-fetched at best." (*Id.* at p. 175 [Rendell, J., concurring].)

that "Rule 23 does not require an objective way of determining class membership at the certification stage"].)

* * *

These federal decisions offer several obvious lessons for this case. First, and most fundamentally, these cases all reject the principle at the core of the lower court's ruling here: that ascertainability requires identifiability. That alone is a powerful indictment of the decision below.

Second, *Briseno*'s teaching that any concerns about the "administrative feasibility" of identifying absent class members can be addressed as part of the "superiority" prong of Rule 23(b)(3), *Briseno*, *supra*, 844 F.3d at p. 1128, is directly relevant here, because California class action procedures include a parallel "superiority" requirement that, like the federal rule, includes consideration of manageability.[17]

Thus, to the extent issues relating to identifiability of class members or damages calculations *do* pose serious manageability

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[17] (*See Brinker Restaurant Corp. v. Superior Ct.* (2012) 53 Cal.4th 1004, 1021 ["drawing on the language of Code of Civil Procedure section 382 and federal precedent, we have articulated clear requirements for the certification of a class, … [including a showing that] substantial benefits from certification … render proceeding as a class *superior* to the alternatives"] [citing cases]; *Duran v. U.S. Bank Nat. Ass'n* (2014) 59 Cal.4th 1, 29 ["In considering whether a class action is a superior device …, the manageability of individual issues is just as important as the existence of common questions…"]; *Sav-on Drug Stores, supra*, 34 Cal.4th at p. 334 [holding that "individual issues do not render class certification inappropriate so long as they may be effectively managed"] [citing cases].)

issues—an unlikely event in a case, like this one, involving a single product and uniform damages—this concern can and should be addressed as part of the superiority inquiry. It should not be folded into, and made a mandatory requirement of, "ascertainability," lest consumer class actions become an endangered species in this state.

Third, the federal ascertainability cases—*Mullins* and *Briseno* in particular—also discredit the lower court's idea that identifiability of class members at the certification stage is essential to protect the due process rights of absent class members to adequate notice. (*See* App. 11.) Because this idea was so central to the panel's ruling, it warrants a separate discussion—to which we now turn.

4. The Lower Court's Approach Cannot Be Justified by Concerns Relating to Notice.

The lower court's holding that identifiability of class members at the certification stage is essential to protect the due process rights of absent class members (*see* App. 11) is contrary to the California class action rules and the teachings of both this Court and the federal courts on due process in the class action context.

Regarding the former, the lower court's view that, in cases with a class size of 20,000 ("or even larger" [App. 8]), class members must be identifiable at the class certification stage so that they can be provided effective notice, is contrary to California class action procedure. As the Third District held in *Aguirre*, *supra,* 234 Cal.App.4th at p. 1301, representative plaintiffs are not required to "establish a means for providing personal notice of the action to

individual class members." (*See also Evans v. Lasco Bathware, Inc.* (2009) 178 Cal.App.4th 1417, 1422 ["A proponent at the class certification stage is not required to ... identify a form of notice to obtain class certification"].)

"Indeed," the *Aguirre* court went on to observe, "such a requirement would conflict with the liberal notice provisions contained in California Rules of Court, rule 3.766(f), which 'is designed to dispense under certain circumstances with actual personal notice.'" (234 Cal.App.4th at p. 1301 [quoting *Haro v. City of Rosemead* (2009) 174 Cal.App.4th 1067, 1076].)[18]

As one court observed, Rule 3.766(f) "follows federal [R]ule 23, which mandates the provision of individual notice only 'to all

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[18] Rule 3.766(f) states: "If personal notification is unreasonably expensive or the stake of individual class members is insubstantial, *or if it appears that all members of the class cannot be notified personally,* the court may order a means of notice reasonably calculated to apprise the class members of the pendency of the action-for example, publication in a newspaper or magazine; broadcasting on television, radio, or the Internet; or posting or distribution through a trade or professional association, union, or public interest group"] [emphasis added].)

Notice by publication is also expressly authorized under the CLRA. Section 1781(d) of the Act specifically provides that "[i]f the action is permitted as a class action, the court may direct either party to notify each member of the class of the action. The party required to serve notice may, with the consent of the court, *if personal notification is unreasonably expensive or it appears that all members of the class cannot be notified personally, give notice as prescribed herein by publication* in accordance with Section 6064 of the Government Code in a newspaper of general circulation in the county in which the transaction occurred." (*Id.* [emphasis added].)

members *who can be notified through reasonable effort*' (federal [R]ule 23(c)(2), italics added), and entitles all other class members only to "the best notice practicable under the circumstances" (*ibid.*) or, in the language of rule 1856(e) [recodified as 3.766(f)] of California Rules of Court, 'a means of notice reasonably calculated to apprise the class members of the pendency of the action.'" (*Hypertouch, Inc. v. Superior Ct.* (2005) 128 Cal.App.4th 1527, 1539, as modified on denial of reh'g (June 6, 2005.)

This case is the paradigmatic example of an instance where, to use the language of Rule 3.766(f), the class members "cannot be notified personally." (*Id.*) Where, as here, a class consists of defrauded purchasers of small-value products, it is often difficult to identify individual class members in advance. Publication notice is tailor-made for precisely this situation. The lower court's decision that publication notice is not good enough for large classes of 20,000 of more members reads this requirement right out of the Rule. That cannot be the law.

The lower court's idea that publication notice is particularly suspect "in a proposed class of this size or even larger," (App. 14), gets things exactly backward. Under this approach, it is precisely those cases where class action treatment is most needed—that is, cases where large numbers of consumers have been injured by a corporate seller's wrongful conduct—that would be *least* likely to be certified because of the impossibility of providing individual notice

to tens of thousands—or, as in *Levi Strauss*, *supra,* 41 Cal.3d at p. 460, even untold millions—of absent class members. That topsy-turvy approach finds no support in law or logic.

Second, the lower court's approach is contrary to well-settled notions of due process. To be sure, California has long recognized the constitutional importance of notifying absent class members of the action. As this Court noted long ago, the "essentials of due process of law in class suits would appear to be afforded by fair representation in the assertion of claims of class members against the opposing parties in any lawsuit, and notice of the pending suit." (*Chance v. Superior Ct.* (1962) 58 Cal.2d 274, 278 [citations omitted].) Notice implicates due process because of the res judicata effect of a class judgment on absent class members. (*San Jose v. Superior Ct.* (1974) 12 Cal.3d 447, 454 ["Because of the constitutional importance of notifying absent class members—who are suddenly before the court—such notice should not be left to the whim of litigants"].)

But due process does not require individualized, personal notice in all cases. Instead, this Court has acknowledged that "the representative plaintiff in a California class action is not required to notify individually every readily ascertainable member of his class without regard to the feasibility of such notice; he need only provide meaningful notice in a form that 'should have a reasonable chance of reaching a substantial percentage of the class members.'" (*Archibald*

v. Cinerama Hotels (1976) 15 Cal.3d 853, 861 [quoting *Cartt v. Superior Ct.* (1975) 50 Cal.App.3d 960, 974].)[19]

Cartt, cited with approval by this Court in *Archibald*, confirms that due process does not require personal notice in a consumer class action. In *Cartt*, the trial court certified a class of Southern California residents who used credit cards issued by the defendant to purchase a particular gasoline at a premium in reliance on advertisements falsely touting the gasoline's environmental benefits. (*Cartt*, *supra*, 50 Cal.App.3d at pp. 962-964.) The defendant no longer had records of its credit card holders during the nearly six-month class period, so the trial court ordered the representative plaintiff to instead provide, at substantial expense, individualized notice of the action by mail to about 700,000 class members. (*Id.* at pp. 964-965.) The list of current credit card holders was both too long and too short: it did not contain class members who no longer held the defendant's credit cards or members who had left Southern California; and it contained "many thousands who are not members" because they did not purchase the particular gasoline at issue during the class period. (*Id.* at p. 965.)

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[19] (*See also* Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates Over Ascertainability and Cy Pres* (2017) 65 U. Kan. L. Rev. 913, 930 [arguing that "the notice argument [for strict ascertainability] does not work. One can concede the need for (b)(3) notice and still reject strict ascertainability. There is no Rule 23 or due process requirement that notice actually reach each and every class member or even that it be personally directed toward each individually"] [footnote omitted].)

Balancing the defendant's interests in ensuring the res judicata effect of any judgment in the action with the importance of encouraging California consumer class actions, the *Cartt* court vacated the order, holding that "[n]either due process nor the integrity of the class action process demands" the specified notice. (*Id.* at p. 967.) Citing this Court's precedent, *Cartt* concluded that "our cases have indicated that class actions should be permitted to proceed, where the economic realities involved in giving 'adequate' notice, compared to the small individual losses of class members, would effectively negate any class action." (*Ibid.* at p. 971.)[20]

More recent case law affirms the principle that "due process does not require actual notice to parties who cannot reasonably be identified." (*Hypertouch*, *supra,* 128 Cal.App.4th at p. 1538.) After class certification, the class representative in *Hypertouch* proposed that personal notice be given to those customers who could be identified by defendant's records, and publication notice be given to those customers who could not be identified because certain of defendant's records had been destroyed. (*Id.* at p. 1535.)[21] Because individual damages were significant ($500 per statutory violation and up to three times that amount for each willful violation), the trial

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[20] In subsequent proceedings in that action, the trial court ordered notice by publication. (*Standard Oil Co. v. Superior Ct.* (1976) 61 Cal.App.3d 852, 854.)

[21] Notably, that a significant number of absent class members could not be identified through the defendant's records did not defeat ascertainability for purposes of class certification.

court imposed an "opt-in requirement on the theory that members of the class holding a substantial stake could not constitutionally be bound by the judgment unless they had affirmatively agreed to be bound." (*Id.* at p. 1537.) According to the trial court, the right to simply "'opt out" satisfied due process only in situations in which most class members had been identified and could therefore be personally notified, or where members who could not be personally notified had an insubstantial stake in the issue to be litigated." (*Ibid.*) "Since this was not the case, the court reasoned, 'personal notification'—i.e., 'actual notice'—was required." (*Id.* at p. 1538.)

The court of appeal reversed, pointing to U.S. Supreme Court precedent holding due process requires only that notice "must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" (*Id.* at p. 1539 [quoting *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797 (*Shutts*)].)

Hypertouch noted that *Shutts* is consistent with the "'large body of case law reflecting the view that the whole concept of a large class-action might easily be stultified by insistence upon perfection in actual notice to class-members; and ... courts should not be deterred from Rule 23 economies in litigation by exaggerating the presumed requirements of due process, or by the specter of an occasional successful collateral attack on the basis of due process.'"

(*Id*. at p. 1540 [quoting *Philadelphia Electric Co. v. Anaconda American Brass Co.* (E.D. Pa.1968) 43 F.R.D. 452, 459].)

This is precisely so here. The proposed class consists of approximately 20,000 persons who purchased the Ready Set Pool for $59.99—a price large enough to be remembered by purchasers but too small to justify individually bringing suit. Requiring a class plaintiff to show that the identities of putative class members can be established by records for purposes of providing personal notice "would protect a purely theoretical interest of absent class members at the expense of any possible recovery for all class members—in precisely those cases that depend most on the class mechanism." (*Briseno*, *supra*, 844 F.3d at p. 1129.)

Finally, the lower court's insistence that Noel demonstrate at the class certification stage a means of identifying absent class members so that they might be given personal notice is incompatible with several of this Court's most important class action decisions. Though not involving a notice issue, *Daar* proceeded as a class action even though there was no feasible method of assuring that all class members would receive notice. (*Daar*, *supra*, 67 Cal.2d at p. 695.) And although the Court in *Linder* declined to "speculate whether or not notice by first class mail" may have been "constitutionally required" in that case, the Court expressly assumed other forms of notice would be considered on remand. (*Linder*, *supra*, 23 Cal. 4th at pp. 444, 446 ["The issue of the appropriate

form of notice to class members was not before the trial court when it ruled on certification. Hence, that court has yet to determine whether individual notice by mail, or notice by publication, or some other type of notice, is proper in this case"].) Due process does not require individualized, personal notice of a pending class action to absent members, and the lower court erred in holding otherwise.

II. THIS CLASS IS ASCERTAINABLE UNDER THE PROPER LEGAL STANDARD

Against this backdrop, it should be apparent that Noel met his burden of establishing an ascertainable class. As explained above, California courts typically hold that a class is ascertainable when it "identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description." (*Aguirre*, *supra*, 234 Cal.App.4th at pp. 1299-1300 [collecting cases]. *See also Hicks*, *supra*, 89 Cal. App. 4th at p. 915 [a class is ascertainable when it is defined "in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary"].)

This case fits that standard like a glove. This is a direct purchase consumer class action with a simple class definition—everyone who purchased the Ready Set Pool from Rite Aid within the class period. From this definition, class members will be able to

identify themselves as having a right to recover, thereby allowing them to access relief during the remedial phase of the case.

In addition, Rite Aid knows exactly how many pools it sold during the class period in California, exactly how many were returned, and how much it earned from those pools down to the penny. (*See* App. 2.) Rite Aid does not dispute that Noel made the purchase. The size of the class and Rite Aid's maximum liability are thus precisely known, and there is no possibility that Rite Aid will be forced to pay excessive damages due to fraudulent claims.

The claims process will also be straightforward, whether or not Rite Aid has records of which consumers purchased a pool. Consumers who paid with a credit card, debit card, or check will have a record of their purchases in their credit card or bank statements. Consumers who paid with cash may have their receipts. Consumers who have no records documenting their purchase may yet have the pool, and so can submit a photograph of it along with their claim form. And those who do not still have their pools can self-identify by submitting a declaration attesting to their purchase.

In short, Noel's class definition describes "a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description." (*Estrada*, *supra*, 154 Cal.App.4th at p. 14). Unlike *Sotelo*, *supra*, 207 Cal. App. 4th at p. 650, where the absence of defendant's records as to some class members created "serious manageability problems,"

Noel is not reliant on Rite Aid's records to define his class and the case presents *no* "manageability problems," let alone "serious" ones. (*Id.* at p. 650.) All consumers who purchased the pool will be entitled to recover if Noel demonstrates to a jury that the packaging is misleading. They need not present individualized proof at all under the UCL and FAL, *see In re Tobacco II Cases* (2009) 46 Cal.4th 298, 320; and need not present it under the CLRA if the jury finds the packaging materially misleading. (*See Mass. Mut. Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1292, as modified on denial of reh'g May 29, 2002 ["plaintiffs satisfy their burden of showing causation as to each by showing materiality as to all"].) Thus, if the lower court had applied the proper ascertainability standard, the class would have been certified.

CONCLUSION

For the foregoing reasons, the lower court's ruling on ascertainability should be reversed.

Dated: May 14, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by California Rules of Court, rule 8.520(c)(1), I certify that, according to the word-count feature in Microsoft Word, this "Opening Brief on the Merits" contains 13,255 words, including footnotes, but excluding any content identified in rule 8.520(c)(3).

Dated: May 14, 2018 By: 

Peter Roldan

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 535 Mission Street, 14th Floor, San Francisco, California 94105.

On May 14, 2018, I served true copies of the following document(s) described as:

Opening Brief on the Merits

on the interested parties in this action as follows:

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I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on May 14, 2018, at San Francisco, California.

Brendan Grady