S246490

IN THE

SUPREME COURT OF CALIFORNIA

JAMES A. NOEL

PLAINTIFF, APPELLANT, AND PETITIONER,

V.

THRIFTY PAYLESS, INC.

DEFENDANT AND RESPONDENT

SUPREME COURT
FILED
AUG 30 2018
Jorge Navarrete Clerk
Deputy

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

Reply Brief on the Merits

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INTRODUCTION

The lower court's approach to ascertainability, which requires the representative plaintiff to supply a means of identifying class members based on official records, is devastating to class actions, particularly (although not exclusively) in the consumer context.

Rite Aid does not seriously dispute this fact. Instead, its main response is that ascertainability *must* require a showing of identifiability because, otherwise, class members' opt-out rights would be rendered "meaningless." (Answer Brief on the Merits ["ABOM"] 3)—a result, Rite Aid argues, that would violate due process.

This argument fails on several fronts. First, it wrongly assumes that due process requires "actual notice of the class action so that [class members] do not lose their opt-out rights." (*Mullins v. Direct Digital, LLC* (7th Cir. 2015) 795 F.3d 654, 665.) This, however, is not the law; instead, all that is required is the "best notice practicable under the circumstances"—a standard that allows publication notice in cases where class members cannot be identified by official records. (*Id.* at p. 665 [citations omitted]. See also *Hypertouch, Inc. v. Superior Court* (2005) 128 Cal.App.4th 1527, 1537-1551.)

Second, Rite Aid's argument that due process requires individualized notice would make it impossible to certify class actions in precisely the area where they are needed most—i.e., cases involving relatively small individual damages, where a defendant's

misconduct has harmed many people but the per-person damages are too small to justify individual litigation. (See *Briseno v. ConAgra Foods, Inc.* (9th Cir. 2017) 844 F.3d 1121, 1129 [stringent ascertainability 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."].)[1]

The irony, of course, is that the lower court adopted this approach in order to protect theoretical opt-out rights that the vast majority of class members would never bother to exercise given that their claims are too small to support individualized litigation.[2]

Third, Rite Aid's argument that ascertainability requires identifiability as a matter of due process improperly assumes that, unless class members are shown to be identifiable at class certification, there will *never* be any effort to determine their identities—and thus even those class members that *are* identifiable from official records will not receive the individualized notice that they deserve (and that due process requires).

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[1] For examples of cases that have been deemed uncertifiable under the heightened ascertainability approach advocated by Rite Aid, *see Mullins, supra,* 795 F.3d at p. 657.

[2] (See Bone, *Justifying Class Action Limits: Parsing the Debates Over Ascertainability and Cy Pres* (2016) 65 U. Kan. L. Rev. 913, 930 ["*Justifying Limits*"] ["strict ascertainability creates a Catch 22. It guarantees individual notice by making it impossible for class members to sue, and thus assures individual notice will never be given because no lawsuit will ever be brought"].)

This argument is based on a false premise: that the only time a trial court can assess the adequacy of counsel's plans for identifying and notifying class members is at the certification stage—and, thus (the argument goes), unless a showing of identifiability is a prerequisite to class certification, notice will be inadequate in any class action containing at least *some* identifiable class members.

This premise is false for two reasons: first, under both California and federal law, the notice inquiry is *distinct* from the class-certification inquiry; and second, discovery relating to class notice can take place *after* a class is certified. (*Hypertouch*, *supra*, 128 Cal.App.4th at p. 1549.) Thus, if the trial court in this case had certified the class as ascertainable, Plaintiff would have *then* had a chance to (1) discover the identities of those class members (if any) that could be identified by Rite Aid's records; and (2) submit an appropriate notice plan for the trial court's consideration. (See Cal. Rule of Court 3.766.)

This approach makes sense from an efficiency standpoint: because class certification can be rejected for purely legal reasons—e.g., lack of predominance—requiring full-blown, pre-certification discovery into identifiability can be a waste of time and effort for all concerned. It makes sense to wait to conduct such discovery until *after* class certification, when the parties know that the class is properly defined and that the other minimum legal requirements for certification have been met.

For all these reasons, Rite Aid's argument that ascertainability must require a showing of identifiability at the class certification stage is incorrect. And because that was the only proffered justification for the lower court's approach—an approach that is inconsistent with this Court's prior rulings and has been rejected by the Ninth Circuit (and four other federal courts of appeals in the past five years)—the ruling below should be reversed.

SUPPLEMENTAL STATEMENT OF FACTS

Rite Aid's brief contains a number of errors that obscure the actual issue in this case: whether ascertainability requires a showing, at class certification, that class members are identifiable based on some official records. Two such errors warrant mention at the outset.[3]

A. Plaintiff's Counsel Was Not Dilatory with Respect to Discovery.

First, Rite Aid errs in arguing that the *real* problem in this case is that Plaintiffs' counsel was dilatory in failing to seek discovery of "evidence" as to class members' identities. (ABOM 9-10.) This argument ignores that ascertainability does not require such proof *as a matter of law*. (See Opening Brief on the Merits ["OBOM"] 15-17 [discussing, *inter alia*, *Daar v. Yellow Cab* (1967) 67 Cal.2d 695, 706].) Because a complete *lack* of records does not make a class

[3] Rite Aid's contentions that Plaintiff improperly inflated the pool and improperly failed to respond to a settlement offer (ABOM 6-8) are also incorrect, but they are not germane to this appeal and thus do not require a response.

unascertainable, a plaintiff need not demonstrate that the defendant *has* such records to earn certification.

And here, there is no dispute that the class *is* defined in sufficiently objective terms to meet the appropriate ascertainability test. The class is defined as "all 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." (Clerk's Transcript on Appeal ["CT"] 63.) This definition is unquestionably clear enough to allow class members to identify themselves as belonging within the class. As previously explained (OBOM 25), and in more detail below, nothing more is required.[4]

Rite Aid's attempt to blame Plaintiff's counsel for his allegedly dilatory failure to take appropriate discovery also ignores what actually happened in this case: Plaintiff's counsel *did* seek additional discovery when it became apparent that the trial court regarded identifiability as a prerequisite for class certification, but that request was denied. (Pet. App. 21.)

Plaintiff appealed that holding to the First District, which rejected it on the ground that the trial court had discretion to

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[4] That is particularly true in light of Rite Aid's discovery responses filed in support of Plaintiff's class-certification motion, which show that Rite Aid has already ascertained its maximum liability. (See CT 70 & 80-99.) Rite Aid's interrogatories identified the number of Ready Set Pools sold in California during the class period (20,752); the number of pools returned in California (2,479); and the revenue returned in California from those pools, *down to the penny* ($949,279.34). (CT 70 & 84-85.) Rite Aid even knows the number of Ready Set Pools sold by the store where Plaintiff made his purchase on the day of that purchase (exactly one). (CT 86.)

disallow a continuance. (*Id*. at pp. 20-23.) Plaintiff did not seek review of that decision here, because it is irrelevant to the ultimate legal issue in the case: whether ascertainability requires a showing of identifiability.

B. Rite Aid Misstates the Issue Presented in this Case.

According to Rite Aid, this case is *not* about whether ascertainability requires a showing of identifiability at class certification; rather, the question is whether it was "appropriate for the trial court at the class-certification stage to consider the means of identifying class members..." (ABOM 2.)

Of course the answer to this version of the Issue Presented is "yes." A trial court *may* consider the means of identifying class members at the class-certification stage, just as this Court did in *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 806, and *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 469. If a plaintiff chooses to present such evidence at that time, there is certainly nothing to prevent a court from considering it. But what a court may *not* do is deny certification of a consumer class action on *ascertainability grounds* based on a plaintiff's failure to *prove* identifiability at the class-certification stage. (OBOM 25-30.)

Yet that is exactly what the court of appeals did in this case. It specifically held that "Noel did not satisfy the class ascertainability requirement for certification...[because he] presented 'no evidence' to establish 'what method or methods will be utilized to identify the

class members..." (Pet. App. 4.) This holding mirrors the Issue Presented as stated in the Petition for Review and as granted by this Court.

ARGUMENT

The proper approach to ascertainability is straightforward: a class should be "ascertainable" so long as it is defined in sufficiently objective terms so that class members can identify themselves as belonging in the class. This standard is consistent with this Court's jurisprudence and is the dominant approach in California and federal courts of appeals. (See OBOM 15-17, 32-44.) This is not surprising, because Rite Aid's version of the rule gives companies an incentive to destroy their own records—a disastrous outcome from a policy perspective.

To defend this outcome, Rite Aid mischaracterizes the law, both in terms of ascertainability and the related issues of due process and notice. As explained below, none of the California or federal cases cited by Rite Aid supports its argument that ascertainability requires identifiability at the class-certification stage; rather, all that is required is an objectively defined class.

As for due process and notice, both California and federal law agree that due process does *not* require individualized notice to class members; rather, it merely requires the "best notice practicable." Rite Aid's contrary argument that ascertainability *must* require identifiability lest class members be wrongly deprived of a meaningful right to opt out ignores decades of settled law—and

would make it impossible for a class action to proceed where class members cannot be identified based on official records. This is not, and should not be, the law.[5]

I. RITE AID MISCONSTRUES CALIFORNIA LAW ON ASCERTAINABILITY.

A. This Court Has Never Held that "Ascertainability" Requires a Showing of Identifiability.

Rite Aid argues that, in both *Vasquez, supra,* 4 Cal.3d 800, and *Richmond, supra,* 29 Cal.3d 462, this Court "accepted the principle that the ascertainability standard embodies a means of identifying class members." (ABOM 3.) This *must* be the rule, argues Rite Aid, because unless the plaintiff provides a means for identifying class members at the class-certification stage, the right to opt out will be rendered "meaningless." (*Id.*) Rite Aid is wrong on both counts.

1. ***Vasquez supports Plaintiff, not Rite Aid.***

First, *Vasquez* strongly supports Plaintiff, which makes Rite Aid's reliance on the case puzzling. *Vasquez* involved consumers who purchased frozen food and freezers from defendant Bay Area Meat Company. (4 Cal.3d at p. 799.) Each of the named plaintiffs had executed installment contracts to finance the purchases. (*Id.*)

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[5] Rite Aid also errs regarding the standard of review. (ABOM 11-13.) Where—as here—a trial court applies "improper criteria or incorrect assumptions" in denying class certification, reversal is required "'even though there may be substantial evidence to support the court's order.'" (*Linder v. Thrifty Oil Co.* (2000), 23 Cal.4th 429, 436 [citation omitted].

Alleging fraud, they sought rescission on behalf of themselves and others similarly situated. (*Ibid*.)

The defendant demurred, but *not* on "ascertainability" grounds. Rather, it argued that because "each member of the class must establish his right to recover on the basis of facts peculiar to his own circumstances..., *the action may not be tried as a class suit*." (4 Cal.3d at p. 802 [emphasis added].)

Vasquez rejected this argument, holding that plaintiffs must "at least be given an opportunity to show that they can prove their allegations on a common basis." (*Id*. at p. 803.) The Court devoted only one paragraph to ascertainability, holding that the requirement was met because the class only contained 200 members and "furthermore, it is alleged, the names and addresses of the class members may be ascertained from defendants' books." (*Ibid*.)

Thus, at most, *Vasquez* stands for the proposition that, where class members' identities are known, a finding of ascertainability may be proper. But *Vasquez* does *not* stand for the opposite proposition: that, where class members' identities are *un*known, a class is necessarily *un*ascertainable.

This is underscored by *Vasquez*'s detailed discussion of *Daar v. Yellow Cab* (1967) 67 Cal.2d 695, which firmly rejected any equivalence between ascertainability and identifiability. (See OBOM 15-30 [discussing *Daar* and progeny].) After describing *Daar* as the "leading case" on consumer class actions, (4 Cal.3d at p. 801),

Vasquez characterized *Daar* as holding,"[a]s to the necessity of an ascertainable class, [that] the right to recover may not be based on a separate set of facts applicable only to [a particular class member]." (*Id*.)

Vasquez then observed that the "question of identification of class members" was not even an issue in *Daar*, "because a complete determination of the issues affecting the class (i.e., such as whether there was an overcharge and the total amount thereof) *could be made without identification and without the appearance of the individual class members*. (*Ibid.* [emphasis added].) Rather, in *Daar*, because "[a]n accounting could determine the total of the overcharges,...each class member could come forward [at the remedial stage] to prove his own separate damages." (*Ibid*.)

This language from *Daar*—and *Vasquez*'s approval of it—fits this case perfectly. Indeed, this case is far easier than *Daar* in terms of ascertainability because the "total amount of overcharge" is already a known quantity; it will not require that "an accounting" be made at the remedial stage. (*Ibid*.) Thus, unlike in *Daar*, no individualized proof is needed *at all* as to liability *or* damages.[6]

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[6] Rite Aid argues that *Daar* "is of limited significance to the ascertainability analysis" because *Daar* merely held that the class members were "unidentifiable at this point," *not* that class counsel had failed to demonstrate any *means* of identifying them. (ABOM 28.) In fact, the *Daar* class was certified even though part of the class (cash-paying taxicab customers) was not identifiable. (See *Daar, supra*, 67 Cal.2d at p. 706.)

2. Richmond *supports Plaintiff, not Rite Aid.*

Rite Aid's reliance on *Richmond* is just as surprising as its embrace of *Vasquez*. *Richmond* barely touches on ascertainability, and—like *Vasquez*—it never says that ascertainability requires a showing of identifiability at the class-certification stage.

There, a class of homeowners alleged that the home developer had failed to provide an adequate water supply. (*Richmond*, *supra*, 29 Cal.3d at p. 466.) The main question was whether antagonism among class members defeated class certification on adequacy-of-representation grounds. The Court held it did not. (See *id*. at pp. 471-476.) Regarding ascertainability, *Richmond* merely held that "[t]he ascertainability of the class is a relatively simple matter [because] the record owners of the lots...are easily identified and located." (*Id.* at p. 477.)

This is a far cry from holding that ascertainability *requires* identifiability; instead, like *Vasquez*, *Richmond* merely suggests that a class *may* be found ascertainable when class members are "easily identified." (*Id*.)

B. Rite Aid's Other California Authority Does Not Help Its Cause Either.

None of Rite Aid's other cases gives reason to deviate from *Daar*'s teaching that ascertainability merely requires an objective class definition that allows class members to "self-identify" as entitled to a remedy.

1. ***Sotelo* was wrongly decided.**

Rite Aid's crown-jewel authority is *Sotelo v. Medianews Group, Inc.* (2012) 207 Cal.App.4th 639 (ABOM 15), an employment class action that was wrongly decided for all the reasons previously explained. (See OBOM 20-22; *Aguirre v. Amscam Holdings, Inc.* (2015) 234 Cal.App.4th 1290 [explaining flaws in *Sotelo*].)

To recap: *Sotelo* utilized a three-part ascertainability test that requires a plaintiff to establish "a means of identifying class members" before a class may be certified. (207 Cal.App.4th at p. 648.) This test, however, was adopted from a prior, wrongly decided case—*Miller v. Woods* (1983) 148 Cal.App.3d 862—that, in turn, cited *Vasquez, supra,* as sole authority for its "means-of-identifying-class-members" ascertainability standard (*id.* at p. 873), even though *Vasquez* itself contains nothing even remotely resembling such a test.

Undeterred, however, *Sotelo* embraced *Miller*'s erroneous standard and used it as a basis for throwing an employment class action out of court, but not before first adding a special "official-records" gloss of its own to *Miller*'s incorrect standard, thereby steering ascertainability right off the doctrinal map into uncharted territory. (OBOM 20-23.)

2. ***Medrazo* and *Bufil* do not support Rite Aid.**

Rite Aid defends *Sotelo* by citing a few cases it claims "articulated a similar standard," such as *Medrazo v. Honda of North*

Hollywood (2008) 166 Cal.App.4th 89, and *Bufil v. Dollar Financial Grp., Inc.* (2008) 162 Cal.App.4th 1193. (ABOM 20-22.)

Rite Aid's reliance on *Medrazo* backfires badly. *Medrazo* actually 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." (166 Cal.App.4th at p. 101.) And the court emphasized that "*Medrazo*'s *inability* to identify the individual class members at this time is *irrelevant* to class certification." (*Id.* [emphases added].)

Rite Aid fares no better with *Bufil*, an employment class action where the court, while mentioning the incorrect "identifiability" standard, actually held 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." (*Bufil*, *supra*, 162 Cal.App.4th at p. 1207. [citation omitted].)[7]

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[7] Notably, *Bufil* relies on *Aguiar v. Cintas Corp. No. 2*. (2006) 144 Cal.App.4th 121, 136, which held that the defendant "*cannot* defeat class treatment because it failed to keep track of the employees who worked on the [relevant] contracts..." (Emphasis added.) *Aguiar* made clear that the absence of identifying records did *not* defeat class certification: "If it is determined later in the litigation that certain employees did not work on [the relevant] contracts, those employees can be eliminated from the class at that time." (*Id.*) Rite Aid's contrary treatment of *Aguiar* (ABOM 24) is inaccurate.

3. ***Aguirre*** **supports Plaintiff, not Rite Aid.**

Rite Aid also misreads *Aguirre v. Amscam Holdings, Inc.* (2015) 234 Cal.App.4th 1290, claiming that the case "is not inconsistent with *Sotelo*..." (ABOM 25.) This is incorrect, on at least three counts.

First, *Aguirre* did *not* hold that a plaintiff is required, at the class-certification stage, to provide a means of identifying class members. *Aguirre* held the precise opposite. After explaining that a plaintiff need not actually identify class members to prove a class is ascertainable, it stated: "Nor must the representative plaintiff establish a *means* for providing personal notice of the action to individual class members." (*Id.* [emphasis added and citing *Evans v. Lasco Bathware, Inc.* (2009) 178 Cal.App.4th 1417, 1422, for proposition that "[a] proponent at the class certification stage is not required to...identify a form of notice to obtain class certification"].)

Rite Aid tries to recruit *Aguirre* to its cause by pointing to the court's observation that, in any event, the plaintiff in that case *had* in fact provided a means for identifying the class—and thus *Aguirre* is actually "not inconsistent with" *Sotelo*. (ABOM 25.) Although *Aguirre* did make such an observation, it was merely an alternative basis for its ruling. To make that clear, *Aguirre* went on to reiterate that a showing of identifiability is *not* required and "respectfully disagree[d]" with *Sotelo*'s suggestion to the contrary. (*Id.* at p. 1305.)

If that were not plain enough, *Aguirre* then stated that it "*likewise disagree[d]* with *Sotelo* to the extent it suggests that a class

is not ascertainable where, as here, prospective class members must come forward and establish they are members of the class." (*Id.* [emphasis added].) To the contrary, "[i]t is well established 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...." (*Ibid.* [emphasis added; quoting *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 333].) Plaintiff could not agree more.

4. Neither *Nicodemus* nor *Estrada* followed Rite Aid's approach.

Rite Aid's attempt to bring Plaintiffs' other cases into its camp (ABOM 30-32) is just as unpersuasive. Although *Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal.App.5th 1200 contains a one-sentence reference to the identifiability test advocated by Rite Aid (*id.* at p. 1212), the court actually *applied* an "objectively-defined-class" test. (See *id.*) The *Nicodemus* court emphasized, moreover, that "[t]he representative plaintiff is *not* obligated...to 'identify, much less locate, individual class members to establish the existence of an ascertainable class..." *(Id.*) [emphasis added and citing *Aguirre, supra*, 234 Cal.App.4th at pp. 1300-1301].) *Nicodemus* went on to certify the class even though some class members could *not* be identified and, as a result, could only be notified by "various forms of publication." (*Id.* at p. 1217.)

Likewise, *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, did not adopt "the very ascertainability

standards that Plaintiff now challenges." (ABOM 31.) Rather, as Rite Aid admits, *Estrada* actually "articulated the ascertainability standard which Plaintiff champions here." (ABOM 32.) Although *Estrada* went on to find that the class *could*, "for the most part," be identified by FedEx's records, it emphasized that not every class member need be identified for a class to be certified: "If FedEx's claim is that every member of the class had to be identified from the outset, FedEx is simply wrong." (*Id*. at p. 14 [citing *Daar*, *supra*, 67 Cal.2d at p. 760].)

In short, Rite Aid's effort to conflate identifiability with ascertainability is contrary to the overwhelming weight of authority in this State. *None* of the cases cited by Rite Aid actually advances its cause, and most of them directly undermine its position.

C. Rite Aid Improperly Conflates the Procedures for Class Certification with those Governing Class Notice.

Case law aside, Rite Aid's approach to ascertainability is based on a false premise: in Rite Aid's view, unless class members are shown to be identifiable at class certification, notice will be inadequate and the right to opt out will be meaningless. For example, Rite Aid argues that *Aguirre* "went wrong by insisting that the determination that is made at the certification stage is directed only at the means at the remedial stage of identifying class members," saying this ignores the due-process rights of class members to opt out *before* the remedial stage. (ABOM 27.)

This argument improperly conflates class certification with the rules governing notice. Rite Aid assumes that, unless a plaintiff presents a means of identifying class members at the certification stage, class members will not receive proper notice. Under California law, however, the two inquiries are *distinct*. (Compare Cal. Rule of Court 3.764 with Cal. Rule of Court 3.766.)

Class certification is governed by California Rule of Court 3.764, which says nothing at all about notice; instead, it describes the procedures for seeking class certification. (*Id.*) And, applying that rule, this Court has made clear that class certification *precedes* any decision as to class notice. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 444 [noting that "[t]he issue of the appropriate form of notice was not before the trial court when it ruled on certification]. See also *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1083 [holding that "to give plaintiffs notice, courts must *first* resolve whether and on what scale a class is appropriate."; emphasis added].)

Thus, for example, in *Hypertouch, supra,* 128 Cal.App.4th 1527, 1549, the court held that "[u]nder California rule 1856 [recodified as Cal. Rule of Ct. 3.766], as under federal rule 23, *notice is not required until after the propriety of the class action has been determined*." (Id. at 1549 [emphasis added and citing 2 *Newberg on Class Actions* (3d ed.1992) § 4.35, p. 4–155, for proposition that "[n]otice provisions come into play only after a Rule 23(b)(3) class is

certified," and Fed. Jud. Center, *Manual for Complex Litigation* (3d ed.1995) § 30.211, p. 224].) Other authorities agree.[8]

Notice, meanwhile, is governed by California Rule of Court 3.766, which provides that "*[i]f* the class is certified, the court *may* require either party to notify the class of the action in the manner specified by the court." (*Id*. subpart [a], emphases added.) This Rule, and other California authorities, confirm that (1) the notice inquiry is separate from the question of whether a class may be certified; and (2) courts have discretion as to *when* to direct the parties to address notice.[9]

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[8] See *Bomersheim v. Los Angeles Gay & Lesbian Ctr*. (2010) 109 Cal.Rptr.3d 832, 841 (holding 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*." [emphasis added; citation omitted]); *Evans v. Lasco Bathware, Inc*. (2009) 178 Cal.App.4th 1417, 1422 (holding that "[a] proponent at the class-certification stage is not required to...identify a form of notice to obtain class certification" and citing *Linder, supra*, 23 Cal.4th at p. 444].); *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 969 & fn. 14 (noting that "the question whether the Plaintiff is in the proper court would be determined when the action is certified as a class action, a step which *precedes* the determination of proper notice" [emphasis added; citation omitted]. *Accord Mullins, supra,* 795 F.3d at p. 661 (finding that class was "ascertainable" before notice addressed by parties and "assum[ing] for purposes of this decision that Direct Digital will have no records for a large number of retail customers [and] that many consumers of Instaflex are unlikely to have kept receipts since it's a relatively inexpensive consumer good."); *Mauro v. Gen. Motors Corp*. (E.D. Cal. 2008) 2008 WL 2775004 at *4 (holding that "not all class members need to be ascertained prior to class certification," citation omitted.)

[9] The *California Civil Courtroom Hornbook and Desktop Reference*, like the California Rules of Court, treats class certification and notice separately, the latter being listed in a section labeled "Post-Certification Procedures." (*Cal. Civ. Ctrm. Hbook. & Dktop Ref*. [2018 ed.] Chapter 8 (footnote continued)

This is an efficient and economical way to approach the disparate inquiries. Once a class is certified as being appropriately *defined* under Rule 3.765, a plaintiff can *then* take whatever additional discovery is needed to determine the best practicable method of notifying class members—and of apprising the court of a proposed means of identifying the class for that purpose. (See *supra* fn. 9 [citing *Desktop Reference* and cases].)

Where Rite Aid goes wrong is by assuming that notice *must* be addressed at class certification—and, therefore, that unless class counsel provides a "means for identifying class members" at that stage, notice will *necessarily* be inadequate and any opt-out rights will *necessarily* be nullified. That is not what the rules provide; it is not what this Court has ever held; and it would toll the death knell

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§§ 8.45-8.52.) As to notice, the *Desktop Reference* states that "'[t]he class proponents must submit a statement *either* with the motion for certification *or* after the court certifies the class regarding the class notice and a proposed notice to class members." (*Id*. at § 8.45, emphasis added.) It also addresses "post-certification discovery," stating that "[a]fter class certification, discovery may generally proceed as in any other case." (*Id*. at § 8.47.) (See also *Employment Dev. Dep't v. Superior Court* (1981) 30 Cal.3d 256, 266; *Estrada v. FedEx Ground Package Sys., Inc.* (2007) 154 Cal.App.4th 1, 26 ["Estrada's current argument ignores the fact that class certification was granted on the accepted condition that discovery would define the class."]; *Hypertouch, supra,* 128 Cal.App.4th at p. 1535 [allowing post-certification discovery to determine notice].) Similarly, the *California Judges Benchbook on Civil Procedure* says nothing about class notice in the discussion of class certification. (See *Cal. Judges Benchbook Civ. Proc. Before Trial* [2018 ed.] § 11.45.) Notice is addressed separately. (See *id*. at §§ 11-50-11-52.) As to discovery, the *Benchbook* suggests that judges "[l]imit discovery in the precertification phase of the case to issues relevant to the motion to certify the case as a class action and to discovery that will be appropriate even if certification is denied." (*Id*. at § 11.60.)

for precisely the kinds of consumer claims that the class-action device was designed to allow.

II. RITE AID MISCONSTRUES FEDERAL LAW ON ASCERTAINABILITY.

Rite Aid is equally unsuccessful in its treatment of the federal ascertainability rulings cited by Plaintiff. (See ABOM 33-36). Rite Aid first attempts to minimize the parallels between federal and California case law on ascertainability. (*Id*. 33-35.) It then cites misleadingly to several federal opinions that it claims support its position. (*Id*. 35-36). Both efforts fail.

Regarding the former: Rite Aid errs in suggesting that neither *Carrera v. Bayer Corp*. (3d Cir. 2013) 727 F.3d 300, nor the numerous federal appellate opinions that have rejected *Carrera* (discussing in OBOM 32-44) have any bearing on this case. According to Rite Aid, *Carrera* and its critics focused on whether Rule 23 requires a named plaintiff to present an "administratively-feasible" method of identifying class members, whereas the Plaintiff here offered *no* method of identifying class members.

But the concept of administrative feasibility is not what makes the federal ascertainability cases relevant here. Rather, *Carrera* made the same fundamental error as the lower court here: it conflated ascertainability with identifiability and then pushed considerations of identifiability and notice up to the class-certification stage, instead of leaving them to be addressed later, as part of notice and remedy. (See *id*. at p. 308.)

As a result, the various critiques of *Carrera* as antithetical to the purposes behind the class-action device apply with equal force to the decision below, which would have the same class-action-killing consequences as *Carrera* if permitted to stand—and for no good reason. (See *Briseno, supra,* 844 F.3d at p. 1132 (holding that "it is not clear why requiring an administratively feasible way to identify all class members at the certification stage is necessary" when defendant can challenge each class member's entitlement to relief at remedial stage].)[10]

Rite Aid also dramatically overstates the extent of disagreement among the federal circuits as to ascertainability—and thus *under*states the degree to which *Carrera* has been discredited. Aside from the unpublished *Karhu v. Vital Pharmaceuticals, Inc.* (11th Cir. 2015) 621 Fed. Appx. 945, none of Rite Aid's other federal cases adopts the ascertainability-as-identifiability standard.

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[10] Since *Briseno* was decided, a number of district courts in California have also held that issues with class-member identifiability or individualized damage determinations do not defeat superiority or create "manageability concerns that weigh against certification." (*Etter v. Allstate Insurance Company* (N.D. Cal. 2017) 323 F.R.D. 308, 314. See also *Farar v. Bayer AG* (N.D. Cal. 2017) 2017 WL 5952876 at *14 [rejecting manageability argument and holding "Defendants' arguments regarding the difficulty of obtaining retail receipts to verify customers are also unconvincing and have been repeatedly rejected in this district," citing cases]; *Aldapa v. Fowler Packing Company, Inc.* (E.D. Cal. 2018) 323 F.R.D. 316, 341; *Meyer v. Bebe Stores, Inc.* (N.D. Cal. 2017) 2017 WL 55807 at *4; *West v. California Services Bureau, Inc.* (N.D. Cal. 2017) 323 F.R.D. 295, 306; *Bowerman v. Field Asset Services, Inc.* (N.D. Cal. 2017) 242 F.Supp.3d 910, 935-936; *Korean Ramen Antitrust Litigation* (N.D. Cal. 2017) 2017 WL 235052 at *21.
(footnote continued)

Brecher v. Republic of Argentina (2d Cir. 2015) 806 F.3d 22 (ABOM 35), for example, said nothing about identifiability; it simply reiterated that a class definition must both be objective and have definite boundaries in order to ensure an administratively feasible way of determining who is in the class. (*Id.* at p. 25].)[11]

EQT Products Co. v. Adair (4th Cir. 2014) 764 F.3d 347 (ABOM 36 fn. 14), was similarly concerned with an inadequate class definition rather than how, or when, particular class members need be identified. (*Id.* at p. 360 ["Lacking even a rough outline of the classes' size and composition, we cannot conclude that they are sufficiently ascertainable."].)

And *In re Nexium Antitrust Litig.* (1st Cir. 2015) 777 F.3d 9 (ABOM 36 & fn. 14), supports Plaintiff's position, not that of Rite Aid. Defendants in *Nexium* challenged class certification because the class definition might include more than a de minimus number of uninjured people. But the First Circuit held that any over-inclusiveness in the class definition could be resolved later in the litigation by class members submitting declarations to substantiate their injury at the liability or damages phases, (*id.* at pp. 20-21), essentially echoing this Court's approach in *Daar, supra*.

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[11] The Second Circuit reinforced this reading of *Brecher* two years later in *In re Petrobras Sec.* (2d Cir. 2017) 862 F.3d 250, explaining that "[t]he ascertainability doctrine that governs in this Circuit requires only that a class be defined using objective criteria that establish a membership with definite boundaries" and that "the reasoning underlying our decision in *Brecher* does not support" the heightened standard for ascertainability established in *Carrera*. (*Id.* at pp. 264-265.)

In short, Rite Aid's attempt to minimize the overwhelming federal authority supporting Plaintiff's position falls flat. Since *Carrera* was decided in 2013, *five* federal appellate courts, including the Ninth Circuit in *Briseno*, have rejected the Third Circuit's approach as contrary to the basic purposes of class actions. (See OBOM 35-41 [citing cases].) Nothing Rite Aid says discredits this near-consensus of federal authority.

III. RITE AID MISCONSTRUES FEDERAL LAW ON DUE PROCESS AND NOTICE.

Nor does federal case law support Rite Aid's argument that due process requires a means of identifying class members at the certification stage. *Mullins* merely held that "[w]hen class members' names and addresses are known or knowable with reasonable effort, notice can be accomplished by first-class mail." (795 F.3d at p. 665) (emphasis added), not that the plaintiff must show, at the certification stage, that notice can be accomplished in this manner. In fact, *Mullins* said precisely the opposite: "Due process simply does not require the ability to identify all members of the class at the certification stage." (*Id.*)

Moreover, federal law has never required individualized notice to every class member. To the contrary, as Rite Aid admits (ABOM 38), courts have repeatedly allowed "the best notice practicable." (*E.g.*, *Briseno*, *supra,* 844 F.3d at p. 1128.)[12]

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[12] In fact, the Civil Rules Advisory Committee has amended Rule 23, (footnote continued)

In keeping with this standard, and particularly where individual stakes are small, federal courts have approved notice by publication or other indirect means reasonably calculated to reach many class members. (*Mullins, supra*, 795 F.3d at pp. 665-666 [describing case where court approved notice in form of stickers on ATMs and publication on website, "even though the notice plan likely would not reach everyone in the class," because each class member's damages were valued at $1000 or less].)[13]

These rulings are consistent with the teachings of the U.S. Supreme Court regarding due process in the class-action context. The Court has recognized, for example, that class members' due-process rights do not require the same level of protection as the due-process rights of defendants because the entire class-action mechanism is designed to protect unnamed class members: "Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation

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effective December 2018, to explicitly allow for electronic notice or "other appropriate means," acknowledging that the "best-notice-practicable" standard does not even require direct mail notice to class members that *are* identifiable.
(See https://www.supremecourt.gov/orders/courtorders/frcv18_5924.pdf [last visited August 28, 2018].)

[13] See, e.g., *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 314 F.R.D. 312, 330-332 (approving combination of email, post-card and publication notice estimated t0 reach "75% of targeted class members, on average, 2.3 times"); *In re Toys R Us-Delaware, Inc.--Fair and Accurate Credit Transactions Act (FACTA) Litig.* (C.D. Cal. 2014) 295 F.R.D. 438, 449 (approving notice by publication in *USA Today* and on website); *In re Tableware Antitrust Litig.* (N.D. Cal. 2007) 484 F.Supp.2d 1078, 1080 (same).)

to run its course, content in knowing that there are safeguards provided for his protection. (*Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 810 [citations omitted].)

Reaffirming the due-process holding of *Hansberry v. Lee* (1940) 311 U.S. 32—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' " (*Shutts*, 472 U.S. at p. 812 [citation omitted])—*Shutts* established the constitutionality of the "opt-out" procedure prescribed by the 1966 amendments to Rule 23. (*See* Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I) (1967) 81 Harv. L. Rev. 356, 397–398.)

Citing this history, numerous courts and commentators have affirmed that due process does not require individualized notice in the class-context—and thus that requiring identifiability of class members at class certification is not necessary to protect opt-out rights of absent class members.[14]

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[14] See, e.g., *Justifying Limits*, *supra*, 65 U. Kan. L. Rev. at pp. 921-922, 930-931 (discussing history of Rule 23 and opining that "[the] notice argument [for a heightened ascertainability requirement] does not work"); Shaw, *Class Ascertainability* (2015) 124 Yale L. J. 2354, 2367 ("*Class Ascertainability*") ("[a]dequate notice...has never required" the ability to identify all class members, because the text of Rule 23(c)(2) "specifically envisions that some class members might not be able to be identified through reasonable effort."); *id*. at pp. 2389-2390 (arguing that strict ascertainability "pushes *out* of court the very classes that Rule 23 was designed to bring *in* to court...") (emphases in original).

And while class members who do not receive notice may lose their ability to opt out and file a separate claim, the "vanishingly small" chance that class members would choose to file a separate individual action in a case like this over a $60 pool makes Rite Aid's purported concern over due process "purely theoretical" at best, and self-serving at worst. (See *Justifying Limits*, *supra*, 65 U. Kan. L. Rev. at p. 931 [noting that "[t]he opt-out rate in small-claim class actions is vanishingly small, and absent class members virtually never intervene."] [footnote omitted]; *Briseno*, *supra*, 844 F.3d at p. 1129 ["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."].)[15]

IV. RITE AID MISCONSTRUES CALIFORNIA NOTICE LAW.

Rite Aid also errs with regard to California law on notice. As Rite Aid concedes, California does not require personal notice to absent class members—even identifiable ones. Rather, "the

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[15] Rite Aid's reliance on *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156 (ABOM 34-35, 38-39), is unavailing. There, the Court held that individual notice must be sent to all class members who can be identified "through reasonable effort." (*Id*. at p. 173.) This does *not* mean that individual notice is required in *all* cases, as Rite Aid contends. Any such conclusion would be contrary to *Amchem Products, Inc., v. Windsor* (1997) 521 U.S. 591, 617, which held that "[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*. [citation omitted].)

representative plaintiff... 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 [emphasis added] [quoting *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974].) None of Rite Aid's arguments provides any basis for deviating from this clear holding.

A. *Hypertouch* Definitively Rebuts the Lower Court's Due-Process Concerns.

Discussed extensively in Plaintiff's Opening Brief but ignored by Rite Aid, the exhaustive decision in *Hypertouch* dispenses with the lower court's due process and fairness concerns. (See *Hypertouch*, *supra*, 128 Cal.App.4th at p. 1534, 1536 [reversing order finding actual notice was "constitutionally necessary."].)

More than a year before the notice order at issue in *Hypertouch*, the trial court certified a class of consumers who received unsolicited advertisements from the defendant via facsimile, finding that the plaintiff had established an ascertainable class with a well-defined community of interest. (*Id*. at p. 1534.) Prior to certification, the trial court ruled, on trade-secret grounds, that the defendant did not have to produce its database containing telephone numbers identifying class members. (*Id*.) Through post-certification discovery, the plaintiff determined it could identify approximately 45,500 to 68,200 of the 142,049 persons who received the unwanted advertisements, and so proposed notice by

mail to identifiable class members and notice by publication to remaining members. (*Id*. at p. 1535.)

Because the stake of individual members was substantial, the trial court found that actual notice to all class members was necessary to satisfy due process. (*Id*. at pp. 1535-1536.) But because the certified class contained members who could not be identified, the trial court ordered "that notice be given by publication and [that] class members who wish to be included in the action must 'opt-in" to confirm "receipt of the 'actual notice' the court believed was constitutionally necessary." (*Id*.)

The court of appeal reversed, holding that actual notice was not "necessitated by due process, conflicts with the applicable rules of court, and undermines the purpose of class actions." (*Id*. at p. 1536; *see also id*. at p. 1539 [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'"] [quoting *Shutts, supra,* 472 U.S. at p. 797].)

Hypertouch also held that requiring class members to opt-in conflicts with California statutory law, which requires only the best notice practicable under the circumstances. (*Id*. at pp. 1548-1549 [citing former California Trial Court Rule 1856(e), currently codified as Rule 3.766]; *see also* Civ. Code § 1781(d) ["if personal notification is unreasonably expensive *or* it appears that all members of the class

cannot be notified personally" the court may allow notice by publication "in a newspaper of general circulation," emphasis added].)

This holding, and the extensive reasoning underlying it, is devastating to Rite Aid's position—yet Rite Aid does not mention *Hypertouch* once in its 50-page answer brief to this Court.

B. Rite Aid's Notice Cases are Inapposite.

None of the California cases cited by Rite Aid undermines *Hypertouch* or remotely suggests that due process requires a plaintiff to demonstrate a means of identifying class members at the certification stage. In *Chance v. Superior Court of Los Angeles Cty.* (1962) 58 Cal.2d 275, 278-279 (cited in ABOM 39), there was no question class members were readily identifiable, and at least two potential members had already come forward and objected to class treatment. (*Id.* at p. 278.) The *Chance* class members were thus unlikely to abandon their claims, and it was textbook for the Court to have "assumed that they will be given notice of the pending class foreclosure action by registered mail or other like reliable method." (*Id.* at p. 290.) This ruling did not establish, however, that such notice would have been *required* if the class members could *not* be identified—and nothing cited by Rite Aid suggests a contrary interpretation.

Rite Aid's reliance on *Vasquez, supra* (ABOM 39-40) is similarly ill-founded. *Vasquez* did not address whether individualized notice should be required if the class was certified on

remand, but even if there "can have been no doubt" such notice would be necessary, as Rite Aid suggests (ABOM 39), that too would be unremarkable because the class members there were readily identifiable. (See *Vasquez, supra,* 4 Cal.3d at 811, 815 & fn.11 [class consisted of approximately 200 members who were identifiable from defendant's records and the individual stakes were significant—around $1,000].)[16]

Rite Aid's treatment of *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960 (ABOM 39-41) is similarly unavailing. Rite Aid contends that *Cartt* "highlights the need of the trial court to consider the means of identifying class members at the certification stage" (ABOM 41) but the only issue on appeal was the trial court's order requiring individualized notice to 700,000 persons at the plaintiff's sole expense ($70,000). (*Cartt, supra,* 50 Cal.App.3d at pp. 963-964.)

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[16] *City of San Jose, La Sala,* and *Blue Chip Stamps* do not help Rite Aid, either. (See *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447; *La Sala v. Am. Sav. & Loan Assn.* (1971) 5 Cal.3d 864; *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381 (cited in ABOM 40-42.) *City of San Jose* simply noted the constitutional importance of giving notice to absent class members in affirming a trial court's discretion to require notice on its own motion. (See 12 Cal.3d at p. 454.) *La Sala* simply held that absent class members must be notified before dismissal of a class action upon settlement with the named plaintiffs in order to prevent a multiplicity of actions. (See 5 Cal.3d at p. 873.) And *Blue Chip Stamps* simply found that the class was not certifiable for reasons unrelated to notice; in particular, the lack of substantial benefit to class members. (See 18 Cal.3d at pp. 386-387.) Plaintiff does not disagree with any of these holdings, but they do nothing for Rite Aid.

Regarding notice, *Cartt* distinguished *Eisen*, *supra*, 417 U.S. 156, and held that neither "due process nor the integrity of the class action process demands" the individualized notice ordered by the trial court. (*Id*. at p. 967.) Then, relying heavily on *Daar*, *Cartt* noted that California cases provide "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." (*Id*. at p. 971.) That holding applies with full force here, where a requirement of individualized notice would deprive many class members of any remedy at all.

C. Rite Aid Improperly Assumes that Direct Notice is the Only Fair Way of Apprising Class Members of their Opt-Out Rights.

Finally, Rite Aid fails to acknowledge that there are myriad ways of providing notice consistent with due process and fairness principles without identifying class members even post-certification. *Rule 3.766(f) lists several of them*. (See Rule 3.766(f) ["means of notice reasonably calculated to apprise the class members of the pendency of the action" may include "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."].) And discovery may yet reveal

that Rite Aid's own records afford a means of identifying and notifying the class members in this case in more direct fashion.[17]

Ignoring the potential for alternative forms of notice, Rite Aid instead offers a homily to the importance of trial courts' discretion to "protect the integrity of the class action process." (ABOM 44.) But here too, Rite Aid misses the point. *Of course* trial courts have broad discretion to ensure that class-action procedures "meet[ ] minimum due-process requirements." (ABOM 44.) And *of course* publication notice, where required, "needs to be tailored to the circumstances presented by the evidence before the trial court." (*Id.*)

But part of a trial court's overall discretion is the discretion to fashion reasonable, alternative means of notice when individual notice is not possible. (See, e.g., *Mullins*, *supra,* 795 F.3d at p. 665 [when individual notice is not possible, courts may order "alternative means such as notice through third parties, paid advertising, and/or posting in places frequented by class members, all without offending due process"]; *Briseno, supra,* 844 F.3d at p. 1129 [listing cases utilizing notice methods such as posting on a website and placing stickers at physical locations].)

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[17] Rite Aid notably avoids disclosing in its brief whether it actually does have information about the identity of some or all of the class members, such as through its loyalty program or other marketing mechanisms. (See ABOM 37.) Instead, it assigns error to Plaintiff's failure to "present evidence to the trial court on this issue," saying this means that "whether Rite Aid has records for some, all or none of the class members is only a matter of conjecture." (*Id.*) Here again, Rite Aid fails to appreciate that there will be time to explore this question at the notice phase of the case.

What a trial court may *not* do is what the trial court did here: refuse to certify a class as "ascertainable" on the grounds that class counsel has failed to prove a means of identifying individual class members. Rite Aid's contention that "[r]equiring a plaintiff seeking class certification" to make such a showing is "necessary and appropriate to ensure that such trial court discretion has practical meaning" (ABOM 44) is nonsensical. To the contrary, California law "leaves substantial room for the 'creativity' often needed in the design of an effective means of notifying class members" *after* certification. (See *Hypertouch*, *supra*, 128 Cal.App.4th at p. 1551.) The court of appeal's refusal to recognize that fact is a clear abuse of discretion requiring reversal of the decision below.

CONCLUSION

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

Dated: August 30, 2018

Respectfully submitted,

By: _____

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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 "Reply Brief on the Merits" contains 8,305 words, including footnotes, but excluding any content identified in rule 8.520(c)(3).

Dated: August 30, 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 August 30, 2018, I served true copies of the following document(s) described as:

Reply Brief on the Merits

on the interested parties in this action as follows:

☒ **BY HAND DELIVERY:** I caused the document(s) to be hand-delivered to the persons at the address below.

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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 August 30, 2018, at San Francisco, California.

_____
Brendan Grady