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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

Peter Roldan
Cal. Bar. No. 263275
EMERGENT LLP
535 Mission Street, 14th Floor
San Francisco CA 94105
Ph: 415-894-9284
Fax: 415-276-8929
peter@emergent.law

Leslie Brueckner
Cal. Bar No. 140968
PUBLIC JUSTICE, P.C.
475 14th Street, Ste. 610
Oakland CA 94612
Ph. 510-622-8205
Fax: 510-622-8155
lbrueckner@publicjustice.net

Karla Gilbride
Cal. Bar No. 264118
PUBLIC JUSTICE, P.C.
1620 L Street, N.W., Ste. 630
Washington DC 20036
Ph: 202-797-8600
Fax: 202-232-7203
kgilbride@publicjustice.net

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"Must a plaintiff seeking class certification under Code of Civil Procedure section 382 or the Consumer Legal Remedies Act ("CLRA") demonstrate records exist permitting the identification of absent class members?"

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

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[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.)