S246490

IN THE

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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

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

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[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