S246490

**IN THE SUPREME COURT OF CALIFORNIA**

DIANA NIEVES NOEL, as Personal Representative, etc.
*Plaintiff and Appellant,*

v.

THRIFTY PAYLESS, INC.,
*Defendant and Respondent.*



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

Marin County Superior Court Case No. CV 1304712

# DEFENDANT AND RESPONDENT'S ANSWERING BRIEF

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## I. INTRODUCTION

Establishing that a class is ascertainable is fundamental to the maintenance of a class action. The ascertainability standard requires a plaintiff seeking class certification to define the putative class clearly and to show that there are means available for identifying members of the putative class.

This Court and the Courts of Appeal have required class action plaintiffs to demonstrate the existence of an ascertainable class to protect the integrity of the class action process and to insure the due process rights of absent class members. At its most basic level, due process requires notice and an opportunity to be heard, and the ascertainability element—including its requirement that plaintiffs demonstrate a means of identifying class members—protects and vindicates due process.

This standard, applied by the court below, is neither novel, unreasonable, or inconsistent with California public policy. Far from creating an insurmountable obstacle to the maintenance of class actions, this standard has been applied repeatedly by Courts of Appeal to reverse trial court orders denying class certification.

Faced with this reality, Plaintiff [1] attempts to obscure the importance of the correct ascertainability standard by the unduly narrow framing of the issue presented. The issue presented by this appeal is not whether a plaintiff seeking class certification must demonstrate that records exist permitting the identification of class

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[1] This appeal is being pursued by the widow of Plaintiff James Noel, who passed away in January 2016.

members. Rather, the issue is whether it is appropriate for the trial court at the class certification stage to consider the means of identifying class members, so that the ability to self-identify presented by an appropriately defined class—as well as the absent class members' due process rights to reasonable notice of the pendency of the action and their right to opt out—will have meaning.

Plaintiff presented no evidence in the trial court as to the means of identifying members of the class, and the trial court properly denied class certification on that basis. The trial court's order denying class certification should therefore be affirmed.

Although Plaintiff erroneously contends otherwise, neither Rite Aid,[2] the trial court or the Court of Appeal below asserted that a plaintiff must actually *identify* class members at the certification stage, that plaintiff must demonstrate that records exist, or that notice by publication would never be appropriate where records do not exist. Rather, Rite Aid argued, and the courts below agreed, that the trial court may deny class certification where no evidence is presented from which the court can determine a means of identifying class members. Plaintiff himself acknowledged this standard in his trial court brief in support of his class certification motion, stating that, in addition to a class definition, an ascertainable class is one whose members "can reasonably be identified through discovery and records." (Clerk's Transcript (hereafter "CT") at p. 235:7-11.)

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[2] Respondent Thrifty Payless, Inc. is wholly owned by Rite Aid Corporation and operates under the "Rite Aid" name. Respondent will be referred to throughout as "Rite Aid."

Plaintiff has now abandoned the standard he argued to the trial court in favor of a standard that requires only a class definition that permits individuals to self-identify as members of the class. But the right to opt out of a class, like the ability to self-identify at the remedial stage, is meaningless if one is never aware of the pendency of the action. While personal notice by mail to each class member may not be required in every case, the ascertainability standard requires plaintiffs to provide *some* means of identifying absent class members so that they may be notified of the action and their right to opt out.

The decision below applied the correct standard for ascertainability, one recognized by this Court and by numerous Courts of Appeal. In *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, this Court held that the consumer class in that case was ascertainable because the class was defined as "all those who have signed installment contracts...after January 1, 1966...and are obligated to pay money on the contracts to one of the defendants," and because "the names and addresses of the class members may be ascertained from defendants' books." (*Id.* at p. 810-811.)

Similarly, in *Richmond v. Dart Industries* (1981) 29 Cal.3d 462, this Court rejected defendant's claim that a class of homeowners was not ascertainable, noting that "ascertainability of the class is a relatively simple matter [because] the record owners of the lots at Tahoe Donner are easily identified and located." (*Id.* at p. 478.)

In both of these cases, this Court accepted the principle that the ascertainability standard embodies a means of identifying class members. In denying class certification here, the trial court simply

applied this standard, which has been repeatedly articulated by numerous Courts of Appeal: "In determining whether a class is ascertainable, the trial court examines the class definition, the size of the class and the means of identifying class members." (*E.g., Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal.App.5th 1200, 1212; *Thompson v. Automobile Club of Southern California* (2013) 217 Cal.App.4th 719, 728; *Sotelo v. Medianews Group, Inc.* (2012) 207 Cal.App.4th 639, 648; *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1334; *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1207; *Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) Not surprisingly, the first Court of Appeal to articulate this standard cited *Vasquez, supra*, 4 Cal.3d 800 as authority. (*See Miller, supra*, 148 Cal.App.3d at p. 873.)

In fact, contrary to Plaintiff's view, the case from the Third District principally relied on by Plaintiff in his Opening Brief, *Aguirre v. Amscam Holdings, Inc.* (2015) 234 Cal.App.4th 1290, did not reject the requirement that plaintiff demonstrate a "means for identifying class members." *Aguirre* held that "'[w]hether a class is ascertainable is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members' at the remedial stage." (*Id.* at p. 1300 (citation omitted).) Clearly, the determination of these three elements is made *at the class certification stage*. Where *Aguirre* went wrong was to insist that the determination that is made at the class certification stage is directed at the existence of means *at the remedial stage* of identifying class members. This ignores the due process rights of absent class members, which the *Aguirre* court itself recognized, to notice and an opportunity to opt out

of a class *before the remedial stage*. (*Id.* at p. 1300 ("ascertainability is required in order to give notice to putative class members").)

The standard applied by the court below is therefore not new, as Plaintiff asserts, nor will it inhibit the vigorous prosecution of consumer class actions. The standard is implicit in this Court's decision in *Vasquez, supra*, 4 Cal.3d 800, decided in 1971, was stated explicitly in *Miller, supra*, 148 Cal.App.3d 862, decided in 1983, and has been followed by Courts of Appeal for over three decades. The standard is consistent with California's public policy in favor of consumer class actions; it provides a powerful avenue for redress while satisfying due process concerns and insuring the integrity of the class action process. To insist, as Plaintiff does, that the trial court should be barred from considering the means of identifying class members at the class certification stage, is to insist that the trial court blind itself to these policy goals.

## II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case arose when Plaintiff bought a pool from Rite Aid, failed to properly inflate it, and was dissatisfied with the size of the pool. Plaintiff then brought this class action on the basis that the product packaging was misleading as to the size of the pool. Plaintiff argues that the supposedly new standard for ascertainability used in this case would sound the death knell for consumer class actions in California. Nothing could be further from the truth. The trial court denied class certification here because Plaintiff failed to present any evidence as to the means of identifying class members.

### A. The Alleged Misrepresentation

This appeal arises from the sale of one "Kids Stuff Ready Set Pool 8 FT X 25 IN" from a Rite Aid store in San Rafael. (CT at p. 4.) The pool is sold in a box; the front of which states the dimensions of the pool in large font: "Kids Stuff READY SET POOL 8 FT x 25 IN." (CT at pp. 2, 4.) The diagram on the box also illustrates the length of the pool as 8 feet and the depth as 25 inches. (CT at p. 2.) Plaintiff brought the action below on behalf of himself and a putative class of California consumers who bought the pool at Rite Aid, alleging that the photograph on the box shows a larger pool than the actual product.

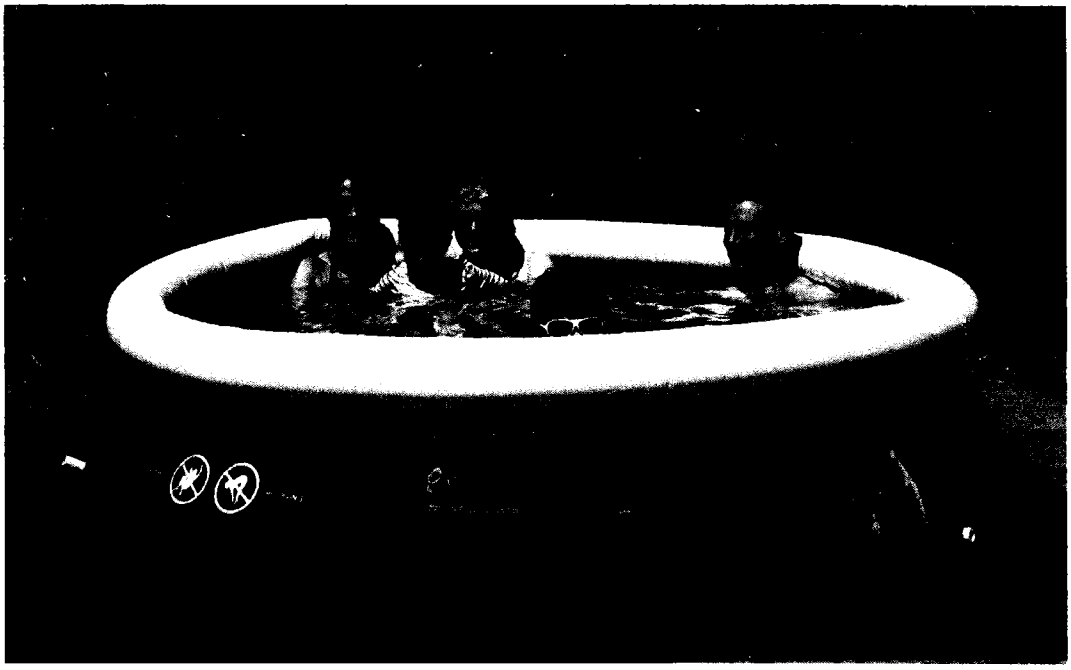
Plaintiff alleges he did not take the stated dimensions into account when he purchased the pool, and relied solely on the photograph of the pool on the front of the box. (CT at pp. 179-180.) Plaintiff purchased the pool using a bank debit card, and expected to receive a pool large enough for three adults and two children to sit in. (CT at pp. 168-169; 183; 189-190.)

Plaintiff set the pool up by himself, failing to follow the instructions to properly inflate and fill the pool to its maximum size. (CT at p. 175.) In order to have a pool of the stated dimensions, the pool must be set up on level ground, and care must be taken in filling the pool. (CT at pp. 175, 219.)

Plaintiff did not follow these instructions, and simply put the pool in the yard where the ground was flattest, and then filled the pool completely with water. (CT at pp. 172-173; 177-178). Plaintiff ignored the instructions informing the consumer not to fill the air ring completely without first partially filling the pool, smoothing out any wrinkles in the floor, and only thereafter filling the pool with water.

(CT at pp. 176, 220-221.) Plaintiff then "discovered" that his pool was smaller than the pool pictured on the box. (CT at pp. 184-185.)

In fact, a properly set up pool is substantially bigger than the photo of Plaintiff's pool, and accommodates 3 adults and two children. (CT at pp. 135 & 142.)



(CT at p. 142.)

When shown the photograph above of a properly set up exemplar pool, with three adults and two children inside, Plaintiff readily admitted that the exemplar pool was larger than his pool. (CT at pp. 192-193 & 226.) More importantly, Plaintiff admitted that the exemplar pool is what he thought he was getting when he purchased his pool. (CT at pp. 189-191 & 215.)

Nearly three months after buying his pool, Plaintiff sent Rite Aid a letter asking for a refund. (CT at p. 163.) Rite Aid Manager Steven Koch called Plaintiff and left him several voice mail messages

after receiving Plaintiff's letter to address Plaintiff's request for a refund. (CT at pp. 131, 164.) Mr. Koch finally reached Plaintiff, explained who he was, that he was calling in response to Plaintiff's letter, and that he wanted to help Plaintiff return his pool. (CT at 131.) Plaintiff told Mr. Koch that he was too busy and would call him back. (*Id.*) After Plaintiff failed to call back, Mr. Koch attempted to call Plaintiff back several more times without success. (*Id.*) Ultimately, Mr. Koch was unable to process a refund for Plaintiff because he was non-responsive and failed to accept Rite Aid's offer to return his pool. (*Id.*)

**A. Evidence Presented with Plaintiff's Certification Motion**

Plaintiff filed his Complaint on November 18, 2013, asserting causes of action for violation of the Unfair Competition Law (UCL), Bus. & Prof. Code, § 17200 et seq., violation of the False Advertising Law (FAL), Bus. & Prof. Code, § 17500 et seq., and violation of the Consumers Legal Remedies Act (CLRA), Civ. Code, § 1750 et seq. (CT 1.)

After written discovery and depositions had been taken, Plaintiff filed a Motion for Class Certification on May 12, 2014. (CT at p. 62.) In his class certification motion, Plaintiff sought certification of a class of all consumers who had purchased a Ready Set pool from any Rite Aid store in California in the four years prior to the filing date of this action. (CT at p. 63.) Defendant filed its Opposition to Plaintiff's Motion for Class Certification on June 2, 2014. (CT at p. 105.) Plaintiff filed a Reply Brief in Support of Motion for Class Certification on June 6, 2014. (CT at p. 228.)

In his motion for class certification, Plaintiff submitted his photograph of an improperly set up, partially inflated pool, a self-serving declaration about how he was deceived by the product packaging, and evidence of the number of pools sold by Rite Aid during the class period (roughly 20,000). (CT at pp. 85; 100-104.) Beyond the class definition, Plaintiff provided *no evidence* whatsoever that the proposed class was ascertainable.

Plaintiff's entire argument regarding ascertainability consisted of a single sentence in the middle of a footnote in Plaintiff's Motion for Class Certification, in which Plaintiff asserted that "the class is easily ascertainable because its members are defined by simple and strict criteria – whether they had purchased a Ready Set Pool from Rite Aid in California during the limitations period." (CT at pp. 72:23-24.) [3]

After seeing Rite Aid's arguments regarding ascertainability in its opposition to the class certification motion, Plaintiff refined his legal argument by admitting in his reply brief that, in addition to a class definition, an ascertainable class is one whose members "can reasonably be identified through discovery and records." (CT at p. 235:7-11.) Despite this admission, Plaintiff did not take any discovery or introduce any evidence regarding Rite Aid's records regarding putative class members.

Furthermore, even though the class certification hearing occurred over two months after Plaintiff received Rite Aid's

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[3] Of the 20,752 8 FT X 25 IN Ready Set pools sold, 2,479 pools were returned. (CT 84-85.)

opposition, Plaintiff did not conduct any other discovery as to the means of identifying class members. Plaintiff instead asked the trial court to assume that Rite Aid maintained records from which class members could be identified, and attempted to shift the burden to Rite Aid to prove that it did *not* have such records. (CT 235:17-21.)

On this appeal, the only "evidence" Plaintiff can point to regarding ascertainability is Rite Aid's interrogatory response stating the number of pools sold in California during the class period. (Opening Brief on the Merits ("OBM") at pp. 13-14; CT at p. 85:3-6.) There is no evidence in the record regarding a means of identifying class members.

**B. The Trial Court's Ruling Denying Class Certification**

The hearing on Plaintiff's motion was initially set for June 13, 2014. On June 9, 2014, the parties stipulated to continue the hearing on Plaintiff's Motion based on new information raised in Plaintiff's Reply Brief. (CT at p. 285.) The Trial Court reset the hearing for August 22, 2014. The additional briefing did not relate to the ascertainability of the class.

After extensive oral argument, the Court issued its Decision denying Plaintiff's Motion for Class Certification on August 22, 2014. (CT at pp. 442-447.) In denying Plaintiff's motion, the Court held that Plaintiff failed to establish that there was an ascertainable class as to all three causes of action. (CT at pp. 442-443.) The court also held that individual issues of reliance predominated over common issues with respect to Plaintiff's CLRA claim. (CT at pp. 444-445.) Finally, the Court found that a class action was *not* a superior or more efficient

procedure than individual actions. (CT at p. 446.) The trial court therefore denied Plaintiff's motion for class certification.

### C. The Court of Appeal's Opinion Affirming Denial of Class Certification

Plaintiff timely appealed to the Court of Appeal for the First District. The Court of Appeal issued its opinion affirming the trial court's order on December 4, 2017. The Court of Appeal affirmed the trial court's ruling that the proposed class was not ascertainable as to Plaintiff's Unfair Competition Law and Fair Advertising Law claims, and affirmed the trial court's denial of class certification on Plaintiff's CLRA claim on the ground that individual issues predominated over common issues, because the reliance and causation elements of the CLRA claim were not susceptible to common proof. (Petition for Review, Exhibit A at page 7.)

Plaintiff has not sought review of the trial court's determination that individual issues of reliance and causation predominated with respect to Plaintiff's CLRA claim. The trial court's ruling on that claim will therefore stand irrespective of this Court's ruling with respect to ascertainability.

## III. STANDARD OF REVIEW

A trial court is generally afforded great latitude in granting or denying class certification. "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. . . . [Accordingly,] a trial court ruling supported by substantial evidence generally will not be disturbed 'unless (1) improper criteria were used

[citation]; or (2) erroneous legal assumptions were made [citation]' [citation]. . . .'Any valid pertinent reason stated will be sufficient to uphold the order.' " (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436; see also *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1106; *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326-327.)

As this Court more recently stated, the trial court's decision on class certification is to be afforded "great deference" and will be reversed "only for a manifest abuse of discretion. (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089; *see also Hamwi v. Citinational–Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462, 472 ("So long as [the trial] court applies proper criteria and its action is founded on a rational basis, its ruling must be upheld").) This deferential standard of review is only discarded if the trial court has evaluated class certification using improper criteria or an incorrect legal analysis: '[A] trial court ruling supported by substantial evidence generally will not be disturbed "unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made . . . ."' (*Linder, supra,* 23 Cal.4th at p. 429; *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 575-576; *Sav-On Drug Stores, supra*, 34 Cal.4th at pp. 326-327.)

The order denying certification in this case is based on the criteria for the evaluation of a class certification motion, as set forth in *Brinker Restaurant Corporation v. Superior Court* (2012) 53 Cal.4th 1004:

> The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a

well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives.
(*Id.* at p. 1021.)

As set forth below, the trial court's order denying class certification applied the correct legal standard and is supported by substantial evidence. Accordingly, the order should be affirmed.

## IV. ARGUMENT

Code of Civil Procedure section 382 governs the certification of class actions with respect to Plaintiff's UCL and FAL claims. Plaintiff's CLRA claim, however, is subject to its own statutory framework codified in Civil Code section 1781. As to the CLRA claim, the trial court denied certification based on both ascertainability and on the ground that individual issues predominated over common issues, because the reliance and causation elements of the CLRA claim were not susceptible to common proof. (CT at pp. 442-445.) The latter finding was affirmed by the Court of Appeal. (Petition for Review, Ex. A at pp. 18-20.) Since Plaintiff has not sought review of that decision, Rite Aid will only address ascertainability under Code of Civil Procedure section 382 and the related California Rule of Court, Rule 3.766.[4]

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[4] Plaintiff assumes that there is no difference between the ascertainability standard under Section 382 and the standard under Section 1781 of the CLRA. (OBM, at pp. 5-7.) While the CLRA is a source for tackling procedural issues for class actions generally (*Civil Service Employees v. Superior Court* (1978) 22 Cal.3d 362, 376, fn.7), CLRA class actions are subject to conditions that are not applicable to other class actions. This Court has stated that if a class action filed after the effective date of the CLRA "alleges conduct described in

Code of Civil Procedure Section 382 provides: "If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a 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." While Section 382 does not specifically mention "ascertainability," this Court has long recognized that, to maintain a class action, the plaintiff must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. (*Brinker, supra,* 53 Cal. 4th at p. 1021; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 704.)

### A. The Ascertainability Standard

The ascertainability requirement serves two important functions. First, it insures that the class definition describes a set of individuals so that "the right of each individual to recover may not be based on a separate set of facts applicable only to him." (*Vasquez,*

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section 1770 [of the CLRA], the procedures specified in the act must be utilized." (*Vasquez, supra*, 4 Cal.3d at p. 818.) However, class actions "may [also] be maintained under other provisions of law." (*Id.*) Unless this Court were to conclude that Plaintiff's UCL and FAL claims must be brought under Section 1781 of the CLRA, there is no occasion here to consider whether the CLRA ascertainability standard differs from Section 382.

*supra*, 4 Cal.3d at p. 809.) [5] Second, it insures the integrity of the class action process and provides for a means of identifying class members "in order to give notice to putative class members as to whom the judgment in the action will be res judicata." (*Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal.App.5th 1200, 1212 (quoting *Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 914); *see Aguirre, supra,* 234 Cal.App.4th at p. 1300; *Bufil, supra,* 162 Cal.App.4th at p. 1206; *Aguiar v. Cintas Corp.* (2006) 144 Cal.App.4th 121, 135.) To meet these dual purposes, plaintiff must present evidence at the class certification stage establishing an objective definition of a numerous group of individuals and a means of identifying them.

Plaintiff asserts that a class is ascertainable so long as the plaintiff has articulated a definition that is sufficiently clear to allow individuals to self-identify based on the class definition. (OBM at p. 2.) This assertion misses the mark. As the Court of Appeal noted in *Sotelo v. Medianews Group, Inc.* (2012) 207 Cal.App.4th 639: "The theoretical ability to self-identify as a member of the class is useless if one never receives notice of the action." (*Id.* at p. 649.)

Plaintiff readily acknowledges the due process concerns underlying the ascertainability requirement in his Opening Brief

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[5] While ascertainability is related to the requirement that common issues of law and fact predominate over individual issues, the concepts are different. (*See, e.g., Miller v. Bank of America* (2013) 213 Cal.App.4th 1, 9 (class not ascertainable where class definition included customers with both lawful and unlawful bank setoffs and plaintiff "failed to show that any means exist to identify a class of bank customers who had been subjected to *unlawful* setoffs").)

(OBM at p. 47), but fails to address how the standard he champions meets those due process concerns. The bald statement that members of the class can self-identify is clearly insufficient absent some showing that absent class members will receive notification of the action, thereby allowing them to opt out or to self-identify later at the remedial stage.

Accordingly, the Court of Appeal in *Sotelo* and numerous other courts have held that, in determining whether a class is ascertainable, "the trial court examines the class definition, the size of the class and the means of identifying class members." (*Sotelo, supra*, 207 Cal. App.4th at p. 648 (citing *Miller v. Woods* (1983) 148 Cal.App.3d 862, 873).) This standard insures both the viability and efficacy of class actions, including consumer class actions.

**1. History of The Ascertainability Standard**

As the citation to the 1983 decision of the Fourth District Court of Appeal in *Miller, supra*, 148 Cal.App.3d 862 indicates, the standard articulated in *Sotelo* is neither new nor unique to the First District. In fact, the so-called *Sotelo* standard has been in use for decades, finding its origin in this Court's decisions in *Richmond v. Dart Industries, supra,* 29 Cal.3d 462 and *Vasquez v. Superior Court, supra,* 4 Cal.3d 800.

In *Vasquez, supra,* 4 Cal.3d 800, this Court recognized a consumer fraud class action for the first time. In *Vasquez*, plaintiff asserted a claim on behalf of a class of consumers who had signed installment contracts with the defendants. In overturning the demurrer to the class action claim in plaintiff's complaint, this Court held that the consumer class in that case was ascertainable because it defined

the members of the class as "all those who have signed installment contracts...after January 1, 1966...and are obligated to pay money on the contracts to one of the defendants," and whose "names and addresses ... may be ascertained from defendants' books." (*Id.* at pp. 810-811.) This Court also discussed the need for trial courts to consider the means of notifying absent class members of the pendency of the action and their right to opt out, as well as the content of such notice. (*Id.* at p. 820.) [6]

Similarly, in *Richmond v. Dart Industries, supra,* 29 Cal.3d 462, plaintiff sought to certify a class of home owners in a development in Lake Tahoe. This Court summarily rejected defendant's claim that the class was not ascertainable, noting that "ascertainability of the class is a relatively simple matter [because] the record owners of the lots at Tahoe Donner are easily identified and located." (*Id.* at p. 478.)

Both *Vasquez, supra*, 4 Cal.3d 800 and *Richmond v. Dart Industries, supra,* 29 Cal.3d 462 overturned demurrers to class action

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[6] Plaintiff's discussion of *Vasquez* is misleading. Plaintiff quotes the Court's statement that to be ascertainable, "the right of each individual to recover may not be based on a separate set of facts applicable only to him," and completely omits the Court's discussion of ascertainability at pp. 810-811. (OBM at pp. 16-17.) Plaintiff then quotes part of footnote 5 (OBM at p. 17), omitting the Court's statement that "*Daar* involved the question of identification of class members, an issue which, as we shall see, presents no serious obstacle to the maintenance of [the] class action here" (4 Cal.3d at p. 809, fn. 5), a reference to the Court's later discussion at pp. 810-811. Plaintiff finally incorrectly asserts that "ascertainability was not even an issue in *Vasquez.*" (OBM at p. 21.)

claims. Accordingly, neither case stated directly that plaintiff must establish a means of identifying class members at the class certification stage. Nevertheless, that requirement is implicit in the Court's reference in each case to the presence of records as satisfying the ascertainability requirement. It is also necessary to allow the trial court to fulfill its duty of considering how best to notify absent class members of the pendency of the action and their right to opt out. (*See Vasquez, supra*, 4 Cal.3d at pp. 820-821.)

It therefore comes as no surprise that the Fourth District in *Miller v. Woods*, *supra*, 148 Cal.App.3d 862 cited to *Vasquez* in articulating the three-part test for ascertainability of class definition, class size and "means of identifying class members." (*Id.* at p. 873.) *Miller* was a class action for injunctive relief on behalf of welfare recipients. (*Id.* at p. 867.) The Court of Appeal held that there was a clear means of identifying class members through the records of the Department of Social Services and that the class was therefore ascertainable. (*Id.* at p. 873.) [7]

Four years later, a different panel of the Fourth District applied the same standard in *Reyes v. San Diego County Board of Supervisors* (1987) 196 Cal.App.3d 1263. In *Reyes*, plaintiffs brought a class action to stop the practice of depriving welfare recipients of benefits without distinguishing between willful and non-willful violators of work project rules. (*Id.* at p. 1267.) The trial court denied class certification, ruling that the administrative burden to the County of

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[7] The court clearly held that the means of identifying class members was required at the class certification stage. (*Id.* at 873.)

determining the identity of class members entitled to benefits at the remedy stage rendered the class unascertainable. (*Id.* at p. 1272.)

The Court of Appeal, citing *Vasquez* and *Miller,* held that ascertainability is determined by "the class definition, the size of the class and the means of identifying class members." (*Reyes, supra*, 196 Cal.App.3d at p. 1274.) The Court of Appeal ruled that the trial court had erred in denying class certification based on the administrative burden at the remedy stage, because at the class certification stage the issue is not identifying members of the class, "the issue is whether there exists sufficient *means* for identifying class members at the remedial stage." (*Id.* at pp. 1274-1275 (emphasis in original) (citing *Daar, supra*, 67 Cal.2d at 706).) The Court of Appeal then found that "the means [of identifying class members] are available in that the County does have the records from which to identify those past [welfare] recipients who were sanctioned out of the welfare program." (*Id.* at pp. at 1275.)

Plaintiff misconstrues *Reyes*, confusing the showing the court required at class certification with the actual identification of class members at the remedy stage. (OBM at 26.) The *Reyes* court required plaintiff to demonstrate the *means* of identifying class members at the class certification stage. (*Id.* at p. 1275). The *Reyes* court focused on the remedy stage in its opinion simply because prejudgment notice is not required in welfare class actions where the primary relief sought is non-monetary. (*Id.* at 1274.)

The Fourth District's standard articulated in *Miller, supra*, 148 Cal.App.3d 862, was followed by the Second District in *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325. In *Lee*, the trial court

had denied certification of a class of misclassified employees. The Court of Appeal stated that to determine ascertainability, "the trial court examines the class definition, the size of the class and the means of identifying class members," and held that since "the basic parameters of the class proposed by [plaintiff] can be readily ascertained through company records, the trial court's rejection of the proposed class on this ground [ascertainability] was unjustified." (*Id.* at p. 1334.)

Although it did not use the same language, the Second District articulated a similar standard in *Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89. In *Medrazo*, plaintiff sought to certify a class of purchasers of Honda motorcycles that did not have hangar tags. The trial court denied certification in part because it had improperly held that plaintiff "must be able to identify each individual class member through objective records to satisfy the ascertainability requirement...." (*Id.* at p. 101.)

In reversing the denial of class certification, the Court of Appeal noted that the appropriate standard must keep in mind "the purpose of the ascertainability requirement," which is "to give notice to putative class members as to whom the judgment in the action will be res judicata." (*Medrazo, supra*, 166 Cal.App.4th at 101 (quoting *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 914).) A class is therefore ascertainable, the court held, "*as long as the potential class members may be identified without unreasonable expense or time and given notice of the litigation, and the proposed class definition offers an objective means of identifying those persons who will be bound by the results of the litigation....*" (*Id.* at p. 101

(emphasis added).)

The Court of Appeal noted that all class members were included in Honda's sales records. The fact that a small number of Honda's customers were not members of the class did not mean that the class was not ascertainable; notice could easily be given to all of Honda's customers for the relevant time period, allowing its customers to self-identify based on the simple class definition.

> In the present case, the potential class members may easily be identified by reference to [defendant's] sales records.... Thus, notice may be given to all of [defendant's] customers who bought motorcycles during the relevant period. Because the proposed class definition is sufficient to allow those purchasers of Hondas without hanger tags to identify themselves as members of the class, they will be bound by results of the litigation. [Plaintiff's] inability to identify the individual class members at this time is irrelevant to class certification.

(*Medrazo, supra*, 166 Cal.App.4th at p. 101.)

The First District adopted the three-part ascertainability standard in *Bufil, supra,* 162 Cal.App.4th 1193. In *Bufil*, plaintiff asserted meal and rest break claims and sought certification of a class of employees of Dollar Financial for whom coding in Dollar Financial's records showed a meal period not taken "due to either (1) single employee per work shift or (2) in-store training." (*Id.* at p. 1201.)

Dollar Financial argued that the class was not ascertainable as to the rest break claims because Dollar Financial's records did not indicate whether an employee took a rest break. (*Id.* at p. 1207.) The Court of Appeal held that the lack of records directly identifying which employees did not take rest breaks was irrelevant because the

defendant's records clearly identified employees who matched the class definition as being either "single employee per work shift" or "in-store training," and the class was therefore ascertainable. (*Bufil, supra*, 162 Cal.App.4th at 1208.) *Bufil* illustrates the importance of the class definition and the interplay between the definition and the means of identifying class members.

To be sure, the requirement that the plaintiff demonstrate a means of identifying class members does not require perfection. For example, in *Clothesrigger v. Inc. v. GTE Corporation* (1987) 191 Cal.App.3d 605, plaintiff sought to certify a class of GTE Sprint ("Sprint") phone subscribers who were improperly charged for unanswered long distance calls on a nationwide basis. (*Id.* at p. 610.) The trial court certified a class of all California Sprint customers, but denied plaintiff's request to certify a nationwide class. (*Id.*)

In rejecting defendant's argument that the trial court properly denied certification because the class was not ascertainable, the Court of Appeal stated that while Sprint could not readily segregate in its records those customers who had been charged for unanswered long-distance phone calls, the individual members of the class could easily do so. (*Clothesrigger, supra,* 191 Cal.App.3d at pp. 616-617.) The Court of Appeal therefore held that the fact that notice to all Sprint customers might be overinclusive was not an impediment to ascertainability.[8]

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[8] Plaintiff states that *Clothesrigger* held that a class may be certified without evidence of records. (*See* OBM at p. 19.) But *Clothesrigger* does not support that proposition. It held that certification was

*Aguiar v. Cintas Corp., supra,* 144 Cal.App.4th 121 reached a similar result. In *Aguiar*, plaintiff sought to certify a class of Cintas employees who had not been paid pursuant to the Los Angeles Living Wage Ordinance when they worked under Cintas' contracts with the city's Department of Water and Power ("DWP"). (*Id.* at p. 128.) Cintas maintained that its records did not allow it to identify which employees worked under its DWP contracts, and the trial court held that the class was therefore not ascertainable.

Reversing the trial court's denial of class certification, the Court of Appeal noted that the primary purpose of the ascertainability requirement is "to give notice to putative class members as to whom the judgment in the action will be res judicata." (*Aguiar, supra*, 144 Cal.App.4th at p. 135 (quoting *Hicks v. Kaufman & Broad Home Corp., supra,* 89 Cal.App.4th at 914).) *The court held that a class is ascertainable if class members "may be readily identified without unreasonable expense or time by reference to official records*." (*Id.* (emphasis added).)

The Court of Appeal noted that Cintas' records identified all of its employees, and that the evidence presented at the certification hearing permitted the reasonable inference that all employees worked to some extent on the DWP contracts. (*Aguiar, supra*, 144 Cal.App.4th at p. 136.) Notice to all Cintas employees could clearly

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appropriate since class members could self-identify after being notified of the action from defendant's overinclusive list. (*Id.* at pp. 616-617.) The court's discussion is dicta in any event. (*Id.* at p. 616 ("nothing in the court's findings suggests the court based its ruling upon these [ascertainability] grounds").)

be given, and if it later proved to be overinclusive and included employees who had not worked on DWP contracts, those employees could be identified and excluded from the class at a later time. (*Id.*) The court concluded: "Thus, contrary to the trial court's finding, plaintiffs have provided *a means to identify class members sufficient to satisfy the purpose of the ascertainability requirement to provide notice of the lawsuit.*" (*Id.* (emphasis added).) [9]

The preceding discussion demonstrates that courts have long considered the means of identifying class members at the class certification stage, and that this standard has not led to the unwarranted denial of class actions in general, or consumer class actions in particular.

**2. The Confusion Over *Aguirre***

Plaintiff asserts in his Opening Brief that the ascertainability standard articulated in *Sotelo, supra,* 207 Cal.App.4th 639 was new, and that it stood in contrast to a standard articulated in *Aguirre, supra,* 234 Cal.App.4th 1290 which did not consider the means of identifying class members at the class certification stage. (OBM at pp. 20, 23-24.) Neither assertion is accurate.

As the previous discussion demonstrates, the ascertainability standard articulated in *Sotelo* was not new. More importantly, while

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[9] Here again, Plaintiff's Opening Brief misses the mark. Plaintiff states that *Aguiar* found the class ascertainable even though "the company's records did not reveal which employees worked on those projects." (OBM at p. 20.) But, as noted, the *Aguiar* court found that all Cintas employees had worked on the DWP contracts to some extent. (*Id.* at p. 136.) The *Aguiar* court clearly did require a showing of a means of identifying class members. (*Id.*)

*Aguirre* held that the showing necessary at the class certification stage relates to the means of identifying class members at the remedial stage, it still did require a showing *at class certification* of a means of identifying class members.

In *Aguirre*, *supra*, 234 Cal.App.4th 1290, plaintiff moved to certify a class of consumers alleging defendant's improper collection of zip code information in connection with credit card purchases. In reversing the trial court's order denying class certification, the Court of Appeal addressed defendant's contention that the trial court had "properly concluded there is no ascertainable class because plaintiff failed to show that there is a means for identifying class members." (*Id.* at p. 1301.)

Far from stating that plaintiff did not have to show a means for identifying class members, the Court of Appeal stated that "plaintiff *did* propose a means of identifying class members." *Aguirre, supra*, 234 Cal.App.4th at 1302 (emphasis added).) The court also described plaintiff's demonstration of a means of identifying class members:

> In response to [defendant's] claim that the parties lack an adequate means for identifying class members, plaintiff pointed to sales receipts and credit card statements...and that such records "could [then] be cross-referenced...[to] show a ZIP Code was requested...."

(*Id.* at p. 1301.)

In short, *Aguirre* is not inconsistent with *Sotelo*, which the *Aguirre* court properly distinguished: "Unlike *Sotelo*, here, there exists objective evidence indicating class membership, namely sales receipts and/or credit card statements that can be cross-referenced with Party America's records...." (*Id.* at p. 1304.) The *Aguirre* court

removed any doubt on this score by citing with approval a federal case in which a log book of receipts and credit card information were used to establish an ascertainable class. (*Id.* at p. 1302.)

The *Aguirre* court did take issue with *Sotelo* to the extent that it states that plaintiff must provide a means of providing *personal notice* to prospective class members in every instance. (*Aguirre, supra*, 234 Cal.App.4th at 1305.) However, *Sotelo* did not foreclose or even address the issue of notice by publication. In any event, Plaintiff is incorrect in asserting that the *Aguirre* court dispensed with the requirement that plaintiff establish a means of identifying class members at the class certification hearing. As the *Aguirre* court reiterated in its conclusion:

> Where, as here the class (as currently defined) describes a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description and the plaintiff has proposed an objective method for identifying class members when that identification becomes necessary, there exists an ascertainable class.

(*Id.* at p. 1306.) [10]

In the case before this Court, Plaintiff confuses the showing that *Aguirre* requires at the class certification hearing (a means of identifying class members), with the point in time those means are relevant to ("at the remedial stage"), and conflates these issues with

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[10] Plaintiff also claims that the supposed rejection of *Sotelo* acted as a "powerful tonic" on other courts, pointing to *Nicodemus v. Saint Francis Memorial Hospital*, 3 Cal.App.5th 1200 (2016). (OBM at p. 24.) But *Nicodemus* reiterated the class definition, class size and "means of identifying class members" standard. (*Id.* at p. 1212.) (*See* discussion of *Nicodemus*, *infra* at p. 30.)

the type of notice that might be used to give notice to a class. (OBM at pp. 24, 44-46.) This is a misreading of *Aguirre*.

*Aguirre* held that "'[w]hether a class is ascertainable is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members' at the remedial stage." *Aguirre, supra*, 234 Cal.App.4th at 1300. Clearly, the determination of these three elements is made *at the class certification stage*. Indeed, the *Aguirre* court accepted the principle that the plaintiff must show a means of identifying class members. (*Id.* at 1302 ("plaintiff did propose a means of identifying class members").)

Where *Aguirre* went wrong was to insist that the determination that is made at the class certification stage is directed only at the *means at the remedial stage* of identifying class members. This ignores the due process rights of absent class members to notice and an opportunity to opt out of a class *before* the remedial stage. In this respect *Aguirre* is both wrong and internally inconsistent. *Aguirre* recognized that the primary purpose of the ascertainability requirement is to apprise class members of the pendency of the action and their right to opt out. (*Id.* at p. 1300 ("ascertainability is required in order to give notice to putative class members").) This purpose is not served if the only consideration at the class certification stage is the means of identifying class members at the remedial stage after a judgment has been entered. (*See* discussion of *Aguirre*, *infra* at p. 49.)

**3. The Significance of *Daar v. Yellow Cab***

Plaintiff attaches great significance to *Daar v. Yellow Cab Company, supra,* 67 Cal.2d 695. *Daar* is undoubtedly an important

case, but it is of limited significance to the ascertainability analysis at issue here.

In *Daar*, this Court reversed a trial court order sustaining a demurrer to a class action complaint. The complaint alleged small overcharges by the defendant taxi cab company affecting thousands of passengers. The class contained two counts, one on behalf of customers who paid in coupons (for whom records existed), and a second count for those who paid in cash. (*Id.* at 700.)

In rejecting the trial court's determination that the class was not ascertainable as a matter of law, the Court stated:

> 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. ...However, no one may recover his separate damages until he comes forward, identifies himself and proves the amount thereof.

(*Daar, supra*, 67 Cal.2d at 706.)

This Court's statement that "the class members are unidentifiable at this point" clearly refers to the *actual identification* of class members, and not to the *means* of identifying class members. Furthermore, since plaintiff had not had an opportunity to conduct discovery or admit evidence, *Daar* understandably said nothing about the evidentiary showing required at the class certification stage. In short, Plaintiff misstates the holding in *Daar* to the extent Plaintiff claims that *Daar* made any statement about the means of identifying class members at the class certification stage.

### 4. The Clarity of Class Definition Standard In Tandem with the "Means of Identifying Class Members" Standard At Issue Here

Plaintiff's Opening Brief extensively discusses appellate cases which articulate a more limited standard for ascertainability set forth in *Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816 (superseded on other grounds by statute). Those cases do not support a departure from the *Miller* three-part ascertainability standard.

In *Bartold, supra*, 81 Cal.App.4th 816, plaintiff sought to certify a class of homeowners who alleged that the bank had failed to properly reconvey their deeds of trust. In its very brief discussion of the elements of a class action, the Court of Appeal stated that a class is ascertainable "if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description." (*Id.* at p. 828.) The court did not cite to any authority for this standard, and instead quoted the following sentence from *Daar*: "Thus, 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." (*Id.* at p. 828 (quoting *Daar, supra*, 67 Cal.2d 695, 706).)

Properly construed in its factual context, *Bartold* does not support a departure from the three-part standard articulated in *Miller*. In *Bartold*, the court was addressing a class of homeowners who claimed that the defendant had improperly reconveyed their deeds of trust. The existence of records (the deeds of trust) identifying the members of the class was obvious, and the fact that the court failed to

state the obvious in its brief discussion of ascertainability should not be read to constitute a rejection of the numerous other cases which have followed the *Miller* standard.

In fact, as the Court of Appeal below noted, the two standards work together and are often cited in the same case. As previously noted, *Aguirre* itself cites both to *Bartold, supra,* 81 Cal.App.4th 816 for the class definition standard and to *Reyes, supra,* 196 Cal.App.3d 1263 for the "means of identifying class members" standard. (*Aguirre, supra,* 234 Cal.App.4th at pp. 1299-1300.) *Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal.App.5th 1200, a First District case, cites both standards as well.[11] In *Nicodemus,* the court reversed an order denying certification of a class of patients alleging the defendants (a hospital and medical records company) violated a California statue governing the price for copies of patient records. (*Id.* at p. 1205.)

The *Nicodemus* court quoted *Bufil, supra*, 162 Cal.App.4th 1193, for the class definition, size and "means of identifying class members" test. (*Nicodemus, supra*, 3 Cal.App.5th at p. 1212.) While the *Nicodemus* court also later cited to *Aguirre, supra,* 234 Cal.App.4th 1290 for the more limited definitional standard (*see Nicodemus, supra*, 3 Cal.App.4th at 1217), the context in which it did so makes it clear it was not rejecting the requirement that plaintiff show a means of identifying class members. On the contrary, immediately prior to quoting *Aguirre*, the *Nicodemus* court engaged in

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[11] *Nicodemus* was decided by two of same judges who decided the case below. Indeed, the *Nicodemus* opinion was written by one of the concurring justices (Rivera, J.) in the case below.

a lengthy discussion of the fact that defendant's records provided a means for identifying members of the various subclasses proposed by plaintiff. (*Id.* at pp. 1216-1217.)

Furthermore, in addition to the lengthy discussion of the existence of records that provided a means for identifying class members, the *Nicodemus* court stated:

> As noted, "[a]scertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata.... As long as the potential class members may be identified without unreasonable expense or time and given notice of the litigation, and the proposed class definition offers an objective means of identifying those persons who we bound by the results of the litigation, the ascertainability requirement is met."

(*Id.* at p. 1214 (quoting *Medrazco, supra,* 166 Cal.App.4th at p. 101).) As this passage makes clear, the *Nicodemus* court accepted the principle that a means of identifying class members is a necessary part of the ascertainability analysis, consistent with the need to provide notice to members of the proposed class.

Plaintiff also cites *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, for the proposition that the class definition need only "describe[] a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover...." (OBM at p. 28.) Plaintiff's reliance on *Estrada* is disingenuous at best. In his reply brief in the trial court, Plaintiff cited to the same page of the *Estrada* opinion to support the very ascertainability standard that Plaintiff now challenges.

> For a class to be ascertainable, a plaintiff need only identify a group of unnamed plaintiffs by describing a set of

> common characteristics sufficient to allow a member of a group to identify himself as having a right to recover based upon that description. *Estrada v. FedEx Ground Package System, Inc.,* 154 Cal. App. 4th 1, 14 (2007). As long as members can reasonably be identified through discovery and records, that burden is met. *Id.*

(CT at p. 235:7-11 (emphasis added).)

In any event, *Estrada, supra*, 154 Cal.App.4th 1 does not support Plaintiff's position. In *Estrada*, plaintiff sought to certify a class of FedEx drivers who, it was alleged, were employees (not independent contractors) entitled to reimbursement of certain business expenses. In its opinion, the court articulated the ascertainability standard which Plaintiff champions here: "The 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 as having a right to recover base on the description." (*Id.* at p. 14 (citing *Bartold v. Glendale Federal Bank, supra,* (2000) 81 Cal.App.4th 816).)

However, *when it came to addressing FedEx's contention that the class was not ascertainable, the Estrada court* noted that the trial court had refined and limited the scope of the class "after much effort and briefing" and *held that the trial court properly found "that the members of this class could reasonably be identified from FedEx's records...."* (*Estrada, supra,* 154 Cal.App.4th at p. 14 (emphasis added).) *Estrada* is therefore in accord with the requirement that plaintiff demonstrate a means of identifying class members.

The *Sotelo* court also rejected the argument that *Estrada* had adopted the limited standard urged by Plaintiff, noting that the

*Estrada* court confronted a class with pre-existing contractual relationships with the defendant which provided a means of identifying class members. (*Sotelo, supra*, 207 Cal.App.4th at p. 649.) This distinction was critical for the *Sotelo* court:

> Here, however, where the proposed class contains an unknown number of members who have no recorded relationship with respondents, a serious notice issue results. *The theoretical ability to self-identify as a member of the class is useless if one never receives notice of the action.*

(207 Cal.App.4th at p. 649 (emphasis added).)

**5. Federal Rule 23 Decisions**

Plaintiff devotes a substantial portion of his Opening Brief to a discussion of federal appellate decisions under Rule 23. (OBM at pp. 32-44.) For the most part, Plaintiff uses these decisions to respond to straw-man arguments that Rite Aid does not advance and that are not at issue here.

These arguments begin with Plaintiff's discussion of the Third Circuit's opinion in *Carrera v. Bayer Corp.* (3d Cir. 2013) 727 F.3d 300. *Carrera* was a consumer class action brought on behalf of purchasers of a weight-loss supplement. The trial court, noting the lack of objective proof of purported class members' purchase of the product, expressed concern about the possibility of fraudulent claims, and the inability of the defendant to establish the invalidity of such claims. In affirming the trial court's denial of class certification, the Third Circuit stated that plaintiff "must demonstrate his purported method for ascertaining class members is reliable and administratively feasible, and permits a defendant to challenge the evidence used to prove class membership." (*Id.* at p. 308.)

There is no occasion here for this Court to address *Carrera*. The case before the Court does not present any administrative feasibility issues or potential fraudulent claims *because no evidence was presented for the trial court to consider*. There is therefore no reason to speculate here as to whether it would ever be appropriate to consider such issues at the class certification stage.

After discussing *Carrera*, Plaintiff discusses the five federal circuit court opinions that have criticized and/or distinguished *Carrera,* beginning with the Seventh Circuit decision in *Mullins v. Direct Digital, LLC* (7th Cir. 2015) 795 F.3d 654. *Mullins*, another dietary supplement case, rejected what it called *Carrera's* heightened scrutiny of administrative feasibility. In so doing, however, it noted that "[w]hen class members' names and addresses are known or knowable with reasonable effort, notice can be accomplished with first-class mail." (*Id.* at p. 665.) That is precisely Rite Aid's position here, and precisely the type of information that plaintiff failed to even attempt to present to the trial court.[12]

In fact, as is discussed further below (at p. 39, *infra*), Rule 23 of the Federal Rules *requires* personal notice when class member names and addresses are known. (*Eisen v. Carlisle & Jacquelin* (1974) 417

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[12] *Briseno v. ConAgra Foods, Inc.* (9th Cir. 2017) 844 F.3d 1121, a consumer class action brought on behalf of purchasers of Wesson-brand cooking oil, which Plaintiff also discusses (OBM at p. 39-41), is inapposite. *Briseno* rejected a separate "administrative feasibility" requirement because Rule 23 already contains a manageability requirement. (*Id.* at p. 1127.) *Briseno* also rejected the argument that every class member must be provided with personal notice (*Id.* at p. 1129), but that issue is irrelevant, because there is no evidence here as to whether personal notice is or is not possible.

U. S. 156, 176.) So, on the one hand, *Mullins* is consistent with the California standard requiring a demonstration by plaintiff of a means of identifying class members. On the other hand, since Rule 23 *requires* personal notice in instances where the class members' addresses are known, neither *Mullins*, the other federal cases Plaintiff discusses, nor Rule 23 support Plaintiff's argument that the means of identifying class members should not be considered at the class certification stage.

Finally, Plaintiff omits entirely the split within the Circuits on this issue. In *Brecher v. Republic of Argentina* (2d Cir. 2015) 806 F.3d 22, for example, the Second Circuit held that "the touchstone" of ascertainability "is whether the class is 'sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.'" (*Id.* at p. 24 (quoting 7A Wright & Miller, *Federal Practice & Procedure* § 1760 (3d ed. 1998).) The Second Circuit specifically rejected the ascertainability standard championed by Plaintiff here, holding that objective criteria are necessary but are not alone sufficient to establish an ascertainable class.[13]

Similarly, the Eleventh Circuit in *Karhu v. Vital Pharmaceuticals, Inc.* (11th Cir. 2015) 2015 WL 3560722, held that "plaintiff must propose an administratively feasible method by which class members can be identified." (*Id.* at p. 2.) The Eleventh Circuit

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[13] The Second Circuit noted that a class defined as "those wearing blue shirts" is objective, but not ascertainable, since the ever-changing composition of those wearing blue shirts makes "determining the identity of those wearing blue shirts impossible." (*Id.* at p. 25.)

also held that this burden cannot be met "simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible." (*Id.* at p. 3.) [14]

In short, the Rule 23 cases in this area are either not relevant or at a minimum support the standard applied by California courts and advanced by Rite Aid on this appeal.

### B. The Trial Court's Ascertainability Finding is Consistent With California Public Policy

As the discussion in subparts 1 through 4 above indicates, California courts have not always used the same language to describe the ascertainability standard embodied in California Code of Civil Procedure section 382. Nevertheless, it is clear that ascertainability requires a class definition that objectively defines a group of individuals so that "the right of each individual to recover may not be based on a separate set of facts applicable only to him." (*Vasquez, supra*, 800 Cal.3d at p. 809.) It is equally clear that the ascertainability requirement serves to protect the integrity of the class action process and to satisfy due process concerns by ensuring that notice is provided to those who may be bound by the action. (*E.g.*, *Nicodemus, supra*, 3 Cal.App.5th at p. 1212; *Aguirre, supra*, 234 Cal.App.4th at p. 1300; *Medrazo, supra*, 166 Cal.App.4th at p. 101;

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[14] The First and Fourth Circuits also require more than objective criteria in the class definition to establish an ascertainable class. (*In re Nexium Antitrust Litigation* (1st Cir. 2015) 777 F.3d 9, 19; *EQT Products Co. v. Adair* (4th Cir. 2014) 764 F.3d 347, 358-359.)

*Aguiar, supra*, 144 Cal.App.4th at p. 136; *Hicks, supra*, 89 Cal.App.4th at p. 914.) The requirement that plaintiff demonstrate a means of identifying class members serves this latter purpose and is thus mandated by due process and by California public policy.

**1. Due Process Concerns Favor the Decision Below**

Requiring a showing of a means of identifying class members at the class certification stage is not simply consistent with the goal of providing notice to class members, it is a necessary part of it. While Plaintiff acknowledges the importance of due process concerns, he fails to address them, glossing over the problem with the assumption that notice by publication will always suffice in any case in which personal notice is impossible or impractical. (OBM at pp. 47-51.) Of course, the result of this approach in the instant case would be to require the trial court to certify the class without having any information as to the means of identifying class members, and whether personal notice was possible as to all, some or none of the members of the class.

Plaintiff's counsel tries to obscure their failure to present evidence of a means of identifying class members by asserting, that this case "is the paradigmatic example of an instance where...class members 'cannot be notified personally.'" (OBM at p. 46.) *There is no evidence in the record to support that assertion.* Since Plaintiff presented no evidence to the trial court on this issue, whether Rite Aid has records for some, all or none of the class members is only a matter of conjecture. Due process requires more than conjecture.

Due process concerns arise from federal and state constitutional protections. Neither guarantees a particular type of

notice or hearing. As the United States Supreme Court held in *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797:

> The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

(*Id.* at p. 812 (quoting *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314-315).)

Nevertheless, the U.S. Supreme Court has also stated that personal notice must be given to class members whose names and addresses are known. *Eisen v. Carlisle & Jacquelin, supra,* 417 U.S. 156, 176. Whether that is a due process requirement or merely a requirement under Federal Rule 23 remains an open question. The Court stated in *Eisen* that personal notice to class members whose names and addresses are known was required by Rule 23 (regardless of the cost), but also noted that the Advisory Committee that drafted the rule "intended to insure that the judgment [in a class action], whether favorable or not, would bind all class members who did not request exclusion." (*Id.* at p. 176.) Satisfying constitutional due process requirements, not just Rule 23, would seem to be a prerequisite to such res judicata effect.

This Court has not decided whether notice by mail is required to satisfy due process where the names and addresses of class

members are known.[15] It has in the past however, addressed notice issues in the context of specific class actions.

In *Chance v. Superior Court* (1962) 58 Cal.2d 275, the Court was faced with a foreclosure action to recover money due on notes secured by deeds of trust on behalf of a class of over two thousand trust deed owners. This Court rejected the argument that the existence of a competing federal class action brought by different class representatives which sought rescission of the notes barred the plaintiffs' state court action. The Court concluded that no due process violation could or would occur because "*all of the members of the instant class are ascertainable, and it is 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 (emphasis added).) This Court's requirement that personal notice of the action would be provided to class members resolved petitioners' claim that the interests of the class representatives conflicted with theirs, and that the res judicata effect of the action might prevent class members from pursuing other remedies (such as rescission). (*Id.* at pp. 288-290.)

Similarly, in *Vasquez,* there can have been no doubt that the clearly ascertainable members of the class, numbering roughly 200 and identified in defendant's records, would be given personal notice. (*Vasquez, supra,* 4 Cal.3d at p. 821; *see Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 972-73.) On the other hand, notice by

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[15] In *Linder v. Thrifty Oil Co., supra*, 23 Cal.4th 429, this Court declined to decide whether personal notice by mail was required for class members with known names and addresses. (*Id.* at p. 444, fn. 9.)

publication would presumably be necessary in *Daar* as to the class of customers who paid in cash. (*Daar, supra,* 67 Cal.2d at p. 706.) [16]

In addition to constitutional due process concerns, notice is designed to protect the integrity of the class action process and avoid burdening the courts with a multiplicity of actions. (*Cartt, supra,* 50 Cal.App.3d at p. 970; s*ee La Sala v. American Savings & Loan Association* (1971) 5 Cal.3d 864, 873 (supersede on other grounds by statute) (notice to class of individual settlement by class representatives required where potential existed that defendant would settle with class representatives seriatim).)

*Cartt, supra,* 50 Cal.App.3d 960, took a pragmatic approach to the notice problem. In *Cartt*, the court considered a consumer class action with hundreds of thousands of class members. The defendant's records were overinclusive, in that they contained names and addresses of thousands of individuals who were not class members, and underinclusive, because they did not contain any information on thousands of actual class members. (*Id.* at p. 965.) The trial court, believing that *Eisen, supra*, 417 U.S. 156 required individual notice to class members, ordered plaintiff to pay the $70,000 cost of mailing personal notice to the overinclusive and underinclusive list of 700,000 current card holders of the defendant.

The Court of Appeal in *Cartt* first distinguished *Eisen* on the basis that the list of over two million individuals in that case was undisputedly a list of members of the class, and was not overinclusive;

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[16] *Daar* was resolved by a fluid recovery settlement to the class in the form of reduced fares. (*See Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 395, fn. 1 to dissent of Mosk, J.)

any mailing based on the list would therefore provide notice to actual class members. (*Cartt, supra,* 50 Cal.App.3d at p. 967.) More importantly, the court held that even if *Eisen* did establish a due process standard applicable to the states under the Fourteenth Amendment, it did not preclude a state court from certifying a class action, providing what it determined was reasonable notice under the circumstances, and accepting the possibility that absent class members might effectively argue later that they were not bound by the result. (*Id.* at pp. 968-969.) The Court of Appeal accordingly remanded the case back to the trial court to exercise its discretion in determining the manner of notice. (*Id.* at p. 973.)

While *Cartt* is illustrative of an innovative approach to an unusual notice problem, it highlights the need of the trial court to consider the means of identifying class members at the certification stage to ensure that benefits accrue both to litigants and the courts. (*See City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 459; *Vasquez, supra*, 4 Cal.3d 800, 810.) As this Court stated in *City of San Jose, supra*: "The class action may deprive an absent class member of the opportunity to independently press his claim, preclude a defendant from defending each individual claim to its fullest, and even deprive a litigant of a constitutional right." (*Id.* at p. 458 (citations omitted).)

This Court has already confronted in *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381 a case in which a trial court certified a class without giving proper consideration to notice and the means of identifying class members. In that case, plaintiff challenged the charging of excess sales tax in connection with the redemption of

blue chip stamps. (*Id.* at pp. 383-384.) The trial court dispensed with notice to the class following class certification, thereby depriving class members of the opportunity to opt out, because of a lack of records identifying members of the class, and because the trial court determined that notice by publication would have little practical effect. (*Id.* at pp. 384-385.)

This Court first reviewed the fundamental principle that class actions attempt to further justice, and stated:

> "[D]espite this court's general support of class actions, it has not been unmindful of the accompanying dangers of injustice or of the limited scope within which these suits serve beneficial purposes. Instead, it has consistently admonished trial courts to carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts. [Citations.] It has also urged that the same procedures facilitating proper class actions be used to prevent class suits where they prove nonbeneficial."

(*Blue Chip Stamps, supra*, 18 Cal.3d at 385 (quoting *City of San Jose, supra*, 12 Cal.3d at 459).)

*Blue Chip Stamps* presented an unusual factual situation: it was not possible to identify class members; the challenged practice (charging excess sales tax) had ended before suit was filed; the damage to each class member was small; and the defendant was not the recipient of the alleged overcharge (so there was no opportunity for a "fluid recovery" remedy). These factors led this Court to conclude that maintenance of the action was not feasible. (*Id.* at pp. 386-387. In reaching this conclusion, this Court held that for every

class action, trial courts are to consider "the probability each member will come forward ultimately, identify himself and prove his separate claim to a portion of the total recovery." (*Id.* at p. 386 (citation omitted).)

*Blue Chip Stamps* is a further illustration of the importance of providing trial courts with discretion to assess the means of identifying class members. It is only when they do so at the class certification stage that a trial court can assess "the probability each member will come forward ultimately, identify himself and prove his separate claim to a portion of the total recovery." (*Id.*)

In short, due process concerns require trial courts at the class certification stage to consider the means of identifying class members. These concerns of course do not dictate the form of notice. While personal notice by mail is required by California courts in appropriate circumstances, publication is a potential means of providing notice to class members. This is reflected in Rule 3.766 of the California Rules of Court, which requires the trial court to approve a form of notice in connection with certification of the class, and authorizes notice by publication in certain circumstances.[17]

The fact that publication is available as a potential means of notifying class members does not relieve plaintiffs of the modest

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[17] Rule 3.766 (f) provides: "If personal notification is unreasonably expensive or the stake of individual class members is insubstantial, or if it appears that all members of the class cannot be notified personally, the court may order a means of notice reasonably calculated to apprise the class members of the pendency of the action [by publication]...."

burden of demonstrating that there is a means of identifying those class members. Not only would publication be inappropriate in many cases, but when publication is used, it needs to be tailored to the circumstances presented by the evidence before the trial court.

Trial courts are given discretion to consider issues such as these at the class certification stage to protect the integrity of the class action process and satisfy due process concerns. Requiring a plaintiff seeking class certification to shoulder the modest burden of demonstrating a means of identifying class members is necessary and appropriate to ensure that such trial court discretion has a practical meaning.

**2. Public Policy Considerations Favor the Decision Below**

The foregoing discussion illustrates that the means of identifying class members, and the manner of providing notice, are intertwined, as are the policy goals of insuring the integrity of the class action process and meeting minimum due process requirements. To insist, as Plaintiff does, that the trial court should be barred from considering the means of identifying class members at the class certification stage, is to insist that the trial court blind itself to these policy goals and due process requirements.

This Court has frequently emphasized that trial courts must be given "the flexibility 'to adopt innovative procedures, which will be fair to the litigants and expedient in serving the judicial process.'" (*Linder, supra*, 23 Cal.4th at 440 (quoting *Vasquez, supra*, 4 Cal.3d at p. 821).) Precluding trial courts from assessing the means of

identifying and providing notice to class members at the class certification stage is antithetical to that policy.

This Court has also recognized the value of providing trial courts with discretion in the determination of class certification questions. (*Sav-On Drug Stores, supra*, 34 Cal.4th at pp. 326-327.) As the discussion in the preceding section indicates, trial courts that fail to consider a means of identifying class members at the class certification stage may end up denying class certification outright or find themselves unprepared for the consequences of a certification order.

Nor is there any reason to believe, as Plaintiff contends, that requiring a showing of the means of identifying class members at the class certification stage is inimical to consumer or other class actions. In fact, the opposite is true. Most of the reported appellate cases applying the standard have reversed trial court orders *denying* class certification. (*E.g.*, *Nicodemus, supra,* 3 Cal.App.5th 1200; *Lee, supra,* 166 Cal.App.4th 1325; *Bufil, supra,* 162 Cal.App.4th 1193; *Aguiar, supra*, 144 Cal.App.4th 121; *Reyes, supra,* 196 Cal.App.3d 1263, 1271; *Miller, supra,* 148 Cal.App.3d 862.) By requiring plaintiffs to carefully refine their class definitions, the standard makes it more likely that a properly defined class will be certified. It also avoids the gamesmanship in which a plaintiff attempts to cast too wide a net by intentionally crafting an overbroad class definition in

the hope that certification of a larger class will lead to a quick settlement.[18]

### C. The Trial Court's Finding that the Putative Class is Not Ascertainable is Supported by Substantial Evidence

Both the trial court and the Court of Appeal applied the well-established ascertainability principles discussed above in denying class certification, and the Court of Appeal's decision should therefore be upheld. In the trial court, Plaintiff here presented *no* evidence as to the means of identifying class members, nor any evidence as to what records Rite Aid has, much less whether those records included information (e.g., residential or e-mail addresses, etc.) that would make personal notice to some or all class members feasible.

In short, there was no evidence in the trial court as to whether Rite Aid had records that would provide a means of identifying all, some or even any member of the class. Having failed to present such evidence, Plaintiff argued in the trial court that it was Rite Aid's burden to prove the negative: that it did not have records that would allow the identification of class members. (CT at p. 235:17-21.) This argument was properly rejected by the trial court. (*Sav-On Drugs,*

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[18] For example, plaintiffs in *Sotelo* attempted to certify a much larger class than was ascertainable. Faced with the prospect of denial at the class certification hearing, plaintiffs attempted a last minute "cure" by proposing a limitation on the class definition to exclude unascertainable class members. The *Sotelo* court held that the trial court had properly rejected this proposal because it "deprives defendants of a fair opportunity to respond and the court of a record, including admissible evidence, to determine whether it is a sound solution." (*Sotelo, supra*, 207 Cal.App.4th at p. 649.) A more refined class definition would have avoided this result.

*supra*, 34 Cal.4th at p. 326 ("the party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members").)

In a carefully reasoned opinion, the Court of Appeal affirmed the trial court's denial of class certification of Plaintiff's Unfair Competition and Fair Advertising Law claims on ascertainability grounds, applying the well-established ascertainability standards discussed above.[19] The Court of Appeal first noted that it was Plaintiff's burden to produce evidence that the class was ascertainable. (Petition for Review, Exhibit A (hereafter "PFR, Ex. A"), at p. 7.) The Court of Appeal then explained that Plaintiff's "emphasis on precision of drafting is not incorrect, but it is somewhat beside the point. Precision of definition chiefly comes into play if the defendant claims the class definition is overbroad or otherwise flawed.... [Plaintiff] failed to articulate and support with evidence any *means of identifying* potential class members, as required by case law." (PFR, Ex. A at p. 8 (emphasis by the court).

The Court of Appeal correctly distinguished *Estrada, supra*, and other cases which focused solely on the class definition and the ability to self-identify, noting *Sotelo's* injunction: "The theoretical ability to self-identify as a member of the class is useless if one never

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[19] As previously noted, the Court of Appeal affirmed the trial court's denial of class certification of plaintiff's CLRA claim, agreeing that individual issues predominated over common issues because the reliance and causation elements of the CLRA claim were not susceptible to common proof. (Petition for Review, Exhibit A, at pp. 18-20.)

receives notice of the action." (PFR, Ex. A at pp. 8-9 (quoting *Sotelo, supra*, 207 Cal.App.4th at p. 649).)

The Court of Appeal also correctly held that Plaintiff "was not required to actually identify the 20,000-plus individuals who bought pools, [but] his failure to come up with any *means* of identifying them was a legitimate basis for denying class certification." (PFR, Ex. A at p. 11 (emphasis in original).) The Court of Appeal noted that Plaintiff conjectured that class members could be notified through Rite Aid's records, without explaining, much less proving, how that would be done. (*Id.*) The Court of Appeal also observed that Plaintiff might have assumed notice would be by publication, which would be both overinclusive and underinclusive, "but it is not clear the trial court shared that assumption." (*Id.*) The Court of Appeal thus properly considered the lack of evidence before the trial court, and gave due deference to the trial court's exercise of its discretion in denying certification.[20]

The Court of Appeal also correctly distinguished *Aguirre, supra*, 234 Cal.App.4th 1290. First, the Court of Appeal noted that "*Aguirre* itself recited the same three-factor test used in *Sotelo*...." (PFR, Ex. A at p. 13.) The Court of Appeal took issue, however, with the condition *Aguirre* added that the means of identifying class members was only relevant to the remedial stage. (*Id.*) Indeed, that

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[20] Plaintiff argues that there *was* evidence of an ascertainable class before the trial court, pointing to an interrogatory answer that established the number of 8 FT X 25 IN Ready Set pools sold by Rite Aid in California. (CT at p. 85.) But evidence of the number of a particular item sold is not relevant to the issue of whether there is a means of identifying class members.

suggestion in *Aguirre* is inconsistent with its recognition that plaintiff needed to demonstrate, and had demonstrated, a means of identifying class members. (*Aguirre, supra*, 234 Cal.App.4th at pp. 1301-1302.) More fundamentally, that part of *Aguirre* is erroneous, because considering only the means of identifying class members at the remedial stage would deprive absent class members of any opportunity to be notified of the pendency of the action and to exercise their right to opt out.

The Court of Appeal was also correct to take issue with the apparent assumption of the *Aguirre* court that personal notice could be, or even should be, disregarded completely at the class certification stage. (PFR, Ex. A at p. 14.) The Court of Appeal pointed to California Rules of Court, Rule 3.766 (c)(3), which provides that the trial court must issue an order regarding class notice, including the time and manner of notice, "upon certification of a class, or as soon thereafter as practicable." (PFR, Ex. A at p. 15.)

The Court of Appeal correctly reasoned that requiring plaintiff to demonstrate a means of identifying class members at the certification stage carries with it the very minor burden of indicating the manner of such notice. (PFR, Ex. A at p. 16.) Since Rule 3.766 (c)(3) requires the trial court to make an order with respect to such notice at the class certification hearing, or immediately thereafter, the trial court must consider this most basic aspect of notice at the class certification stage. (*Id.*) The subject can hardly be avoided as a practical matter, since in many cases the means of identifying class members will carry with it the manner of such notice.

Based on the lack of evidence regarding ascertainability before the trial court, the Court of Appeal correctly held that: "The trial court made no finding that the proposed class was unascertainable on any conceivable set of facts; rather, what the court concluded was that the class cannot be ascertained on the evidentiary showing [Plaintiff] made, which lacked any level of assurance that there is an available means to notify putative class members of the pendency of the action...." (PFR, Ex. A at p. 17.)

Giving proper deference to the trial court's discretion, the Court of Appeal therefore properly concluded that "[w]e cannot say the court's call denying certification in these circumstances was an abuse of discretion." (*Id.*) In short, the trial court applied the proper standard and correctly concluded that Plaintiff had not demonstrated a means of identifying class members, as was his burden at the class certification stage. Since the trial court applied the proper legal standard, and its ruling is supported by substantial evidence, that decision should not be overturned.

## V. CONCLUSION

Requiring that plaintiffs in consumer and other class actions demonstrate a means of identifying class members at the class certification stage is neither novel, unreasonable, overly burdensome, or inconsistent with California public policy. The standard is necessary to ensure the integrity of the class action process and to guarantee that proper notice is provided to absent class members consistent with due process. Far from creating an insurmountable obstacle to the maintenance of consumer class actions, Courts of

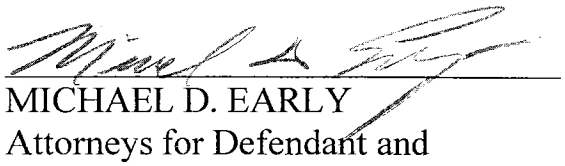
Appeal utilizing this standard have repeatedly reversed trial court orders denying class certification.

The trial court below properly considered Plaintiff's inadequate showing regarding the class definition and the means available for identifying class members. Its conclusion that the class was not ascertainable is supported by substantial evidence and should be affirmed.

Respectfully submitted,

DATED: July 12, 2018

KLEIN, HOCKEL, IEZZA & PATEL



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## CERTIFICATE OF WORD COUNT

**(Cal. Rules of Court 8.520)**

This Answering Brief consists of 13,674 words, including footnotes, but excluding any content identified in Rule 8.520(c)(3), as counted by the Microsoft Word word-processing program used to generate this Answering Brief.

Dated: July 12, 2018

MICHAEL D. EARLY

# Rule 8.1115 (c) Authority

KeyCite Yellow Flag - Negative Treatment
Disagreed With by Mullins v. Direct Digital, LLC, 7th Cir.(Ill.), July 28, 2015

621 Fed.Appx. 945
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

Adam KARHU, Plaintiff–Appellant,
v.
VITAL PHARMACEUTICALS, INC., d.b.a. VPX Sports, Defendant–Appellee.

No. 14–11648.
|
June 9, 2015.

**Synopsis**

**Background:** Consumer commenced action against dietary supplement marketer, alleging false advertising. The United States District Court for the Southern District of Florida, James I. Cohn, J., 2014 WL 815253 and 2014 WL 1274119, denied motion to certify class, and denied motion to alter or amend order denying class certification, 2014 WL 3540811. Consumer appealed.

**Holdings:** The Court of Appeals, Richard W. Goldberg, United States Court of International Trade Judge, sitting by designation, held that:

[1] district court acted within its discretion in its ascertainability holding, and

[2] consumer forfeited argument that he could identify purchasers of dietary product through third-party sales records.

Affirmed.

Martin, Circuit Judge, filed concurring opinion.

West Headnotes (2)

**[1] Federal Civil Procedure**
Consumers, purchasers, borrowers, and debtors

District court acted within its discretion in its class action ascertainability holding when it rejected consumer's proposal to identify class members via marketer's "sales data," in action against marketer alleging false advertising, where consumer's proposal was incomplete, insofar as he did not explain how the data would aid class-member identification, and potential identification procedure was not obvious because marketer's sales data identified mostly third-party retailers, not class members. U.S.C.A. Const.Amend. 5; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

61 Cases that cite this headnote

**[2] Federal Courts**
Mode and sufficiency of presentation

In action against marketer alleging false advertising, consumer forfeited class action ascertainability argument that he could identify purchasers of dietary product through third-party sales records, after using marketer's sales data to identify third-party retailers, since he raised that argument for first time in his motion for reconsideration of motion denying certification of class. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

18 Cases that cite this headnote

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Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 0:13–cv–60768–JIC.

Before MARTIN and FAY, Circuit Judges, and GOLDBERG,* Judge.

**Opinion**

*946 GOLDBERG, Judge:

**1 Vital Pharmaceuticals, Inc. ("VPX") markets a dietary supplement called VPX Meltdown Fat Incinerator ("Meltdown"), which it advertises for fat loss. Adam Karhu purchased the supplement in reliance on Meltdown's advertising. Karhu brought class-action suit, alleging that Meltdown's advertising is false, insofar as Meltdown does not aid fat loss.

Karhu moved to certify class of nationwide Meltdown purchasers as well as a subclass of New York purchasers. Certification is governed by Federal Rule of Civil Procedure 23. Under Rule 23, certification is proper where the proposed classes satisfy an implicit ascertainability requirement, the four requirements listed in Rule 23(a), and the requirements listed in any of Rule 23(b)(1), (2), or (3). *Little v. T–Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir.2012). The district court denied Karhu's motion, holding that the proposed classes satisfied neither Rule 23's implicit ascertainability requirement, nor the requirements listed in either Rule 23(b)(2) or (3).[1] Karhu moved to alter or amend the order denying class certification, which the district court also denied.

Karhu appeals. He claims that the district court erred to hold that (1) neither proposed class satisfied the ascertainability requirement, and (2) the New York subclass failed to satisfy Rule 23(b)(3)'s requirements. We hold that the district court's ascertainability decision was proper. We therefore affirm without reaching the district court's Rule 23(b)(3) decision.

## I. BACKGROUND

### A. Legal Framework for the Ascertainability Requirement

"The burden of establishing the[ requirements of certification under Rule 23] is on the plaintiff who seeks to certify the suit as a class action." *Heaven v. Trust Co. Bank*, 118 F.3d 735, 737 (11th Cir.1997). Rule 23 implicitly requires that the "proposed class is adequately defined and clearly ascertainable." *Little*, 691 F.3d at 1304 (internal quotation marks omitted).

In the past, this court has stated that a class is not ascertainable unless the class definition contains objective criteria that allow for class members to be identified in an administratively feasible way. *Bussey v. Macon Cnty. Greyhound Park, Inc.*, 562 Fed.Appx. 782, 787 (11th Cir.2014). Identifying class members is administratively feasible when it is a "manageable process that does not require much, if any, individual inquiry." *Id.* (internal quotation marks omitted).

### B. The District Court's Order Denying Karhu's Motion for Class Certification

Invoking these rules, the district court denied Karhu's motion for class certification, holding that Karhu had failed to establish that his proposed classes were ascertainable. Although Karhu's class definitions contained objective criteria, Karhu "ha[d] failed to propose a realistic method of identifying the individuals who purchased Meltdown." Karhu had proposed that the court use VPX's "sales data," but VPX sold primarily to "distributors and retailers," such that VPX's records could not be used to determine "the identities of most [class] members."

**2 The court also considered, apparently of its own accord, whether allowing class members to come forward and identify themselves through sales receipts or affidavits *947 would render the classes ascertainable. The court rejected the receipts-based method on grounds that Meltdown's low cost meant most class members would not retain their proof of purchase.

The district court also rejected the affidavit-based method. The court had several concerns. If, on the one hand, "affidavits of Meltdown purchases [were accepted] without verification," VPX would be deprived "of its due process rights to challenge the claims of each putative class member." "On the other hand, allowing VPX to contest each affidavit would require a series of mini-trials" to determine class membership, which would not be administratively feasible. Moreover, "[u]sing affidavits to

 

determine class membership would also invite fraudulent submissions and could dilute the recovery of genuine class members."

C. Karhu's Motion to Alter or Amend the Order Denying Class Certification, and the District Court's Order Denying Karhu's Motion

Karhu moved to alter or amend the order denying certification pursuant to Rule 23(c)(1)(C). Karhu argued, *inter alia,* that new evidence showed that VPX sold Meltdown primarily to third-party retailers, such that class members could be identified by subpoenaing records from retailers. According to Karhu, proposing that class members could be identified using the records of third-party retailers was sufficient to satisfy the ascertainability requirement.

The district court denied Karhu's motion for reconsideration. The court reasoned that Karhu's subpoena-based method was not predicated on new evidence at all: Karhu had come up with the method by examining VPX's sales data, which had been available to Karhu well before he moved for class certification. Therefore, the district court would not accept such a description as grounds for reconsideration.

## II. DISCUSSION

[1] Karhu appeals, claiming, *inter alia,* that the district court abused its discretion in the order denying class certification by holding that Karhu had failed to establish that his proposed classes were ascertainable.[2] We affirm the district court's ascertainability decision.

As noted, the plaintiff seeking certification bears the burden of establishing the requirements of Rule 23, including ascertainability. *Heaven,* 118 F.3d at 737. In order to establish ascertainability, the plaintiff must propose an administratively feasible method by which class members can be identified. *See Stalley v. ADS Alliance Data Syst., Inc.,* 296 F.R.D. 670, 679–80 (M.D.Fla.2013) (denying certification because "the Court ha[d] not been presented with reasonable methods for ascertaining the identity of the [class members, that is] individuals who answered [the defendant's] collection calls"); *Hill v. T–Mobile, USA, Inc.,* No. 2:09–cv–1827–VEM, 2011 WL 10958888, at *10–11 (N.D.Ala. May 16, 2011) (holding ascertainability not established where plaintiffs had proposed "creating a class list using T[–]Mobile's databases," because plaintiffs "ha[d] not addressed how to effectively back out from such a list" the identities of persons *not* eligible for class-action relief); *see also Bussey,* 562 Fed.Appx. at 788 (revising ***948** class definition to cover only loyalty-card-using gamblers who lost money during a gaming session—rather than during a specific game—because plaintiffs "ha[d] not provided *any* indication that they have, or even that they can obtain, data about losses at the game level"); *cf. Carrera v. Bayer Corp.,* 727 F.3d 300, 306–07 (3d Cir.2013) ("A plaintiff may not merely propose a method of ascertaining a class without any evidentiary support that the method will be successful.").

**3 A plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible. *See Stalley,* 296 F.R.D. at 679–80 (holding ascertainability not established where plaintiffs proposed that "members of the class [of *actual* recipients of defendant's calls] ... be identified and notified based on [the defendant's] own records," because the defendant's records indicated "merely the *intended* recipients" (internal quotation marks omitted)); *Hill,* 2011 WL 10958888, at *10–11; *see also Bussey,* 562 Fed.Appx. at 788 (revising class definition to encompass only persons who could, in fact, be identified using the defendant's records).

Similarly, a plaintiff cannot satisfy the ascertainability requirement by proposing that class members self-identify (such as through affidavits) without first establishing that self-identification is administratively feasible and not otherwise problematic. *See Fisher v. Ciba Specialty Chems. Corp.,* 238 F.R.D. 273, 301–02 (S.D.Ala.2006) (rejecting "plaintiffs' optimistic argument that prospective class members could be counted on to self-select"); *LaBauve v. Olin Corp.,* 231 F.R.D. 632, 684 (S.D.Ala.2005) (holding possibility of publication notice does not establish ascertainability in part because "certain people may respond to publication notice even though they were not [part of the class]"); *Perez v. Metabolife Int'l, Inc.,* 218 F.R.D. 262, 269 (S.D.Fla.2003) (holding ascertainability not established when "the only evidence likely to be offered in many instances will be the putative

  

class member's uncorroborated claim that he or she used the product"). The potential problems with self-identification-based ascertainment are intertwined. On the one hand, allowing class members to self-identify without affording defendants the opportunity to challenge class membership "provide[s] inadequate procedural protection to ... [d]efendant[s]" and "implicate[s their] due process rights." *Perez,* 218 F.R.D. at 269; *see also LaBauve,* 231 F.R.D. at 684 (citing *Perez*); *cf. Marcus v. BMW of N. Am., LLC,* 687 F.3d 583, 594 (3d Cir.2012) ("Forcing BMW and Bridgestone to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications."). [3] On ***949** the other hand, protecting defendants' due-process rights by allowing them to challenge each claimant's class membership is administratively infeasible, because it requires a "series of mini-trials just to evaluate the threshold issue of which [persons] are class members." *Fisher,* 238 F.R.D. at 302; *see also Perez,* 218 F.R.D. at 269 ("[I]ndividualized mini-trials would be required even on the limited issue of class membership."). [4] A plaintiff proposing ascertainment via self-identification, then, must establish how the self-identification method proposed will avoid the potential problems just described. [5]

****4** In light of these standards, the district court's ascertainability holding was not an abuse of discretion. Karhu's proposal to identify class members using VPX's "sales data" was incomplete, insofar as Karhu did not explain how the data would aid class-member identification. Nor was any potential identification procedure obvious: VPX's sales data identified mostly third-party retailers, not class members. Karhu did not explain to the court that it envisioned a three-step identification process: (1) Use the sales data to identify third-party retailers, (2) subpoena the retailers for *their* records, and (3) use those records to identify class members. Therefore, the district court acted within its discretion when it rejected Karhu's proposal to identify class members via VPX's "sales data."

The district court likewise acted within its discretion when it rejected identification via affidavit. Because Karhu had not himself proposed an affidavit-based method, he necessarily had not established how the potential problems with such a method would be avoided. Without a specific proposal as to how identification via affidavit would successfully operate, the district court had no basis to accept the method. We therefore uphold the district court's ascertainability holding in full.

Karhu's arguments that we construe the ascertainability requirement too strictly do not convince. For example, Karhu is incorrect that a strict ascertainability requirement conflicts with *Klay v. Humana, Inc.,* 382 F.3d 1241, 1271–72 (11th Cir.2004). In *Klay,* we held that the district court did not abuse its discretion by finding that class-action resolution was superior under Rule 23(b)(3), even though individualized issues of reliance, causation, and damages would have to be resolved as to particular class members. *Id.* Although these individualized issues implicated the manageability of the case—a consideration ***950** under Rule 23(b)(3)—we reasoned that manageability concerns "will rarely, if ever, be in [themselves] sufficient to prevent certification of a class." *Id.* at 1272. Karhu argues that a strict ascertainability requirement violates the *Klay* principle that a concern about case manageability should not stand in the way of certification.

Not so. *Klay* addressed manageability concerns that a court might face *after* class members have already been identified—for example, concerns about whether particular class members are entitled to relief in light of individualized reliance, causation, and damages issues. *Id.* at 1273. Ascertainability, by contrast, addresses whether class members can be identified at all, at least in any administratively feasible (or manageable) way. Put differently, the manageability concern at the heart of the ascertainability requirement is prior to, hence more fundamental than, the manageability concern addressed in *Klay. Klay* therefore presents no bar to our holding.

Karhu is also incorrect that a strict ascertainability requirement will eradicate small-dollar class-action claims. Karhu argues that small-dollar plaintiffs will not be able to propose an administratively feasible method by which class members can be identified. Karhu's own briefing illustrates why his fear is unfounded. According to Karhu, his counsel has before succeeded in proposing administratively feasible identification methods. For example, in *In re Scotts EZ Seed Litig.,* No. 12–cv–4727 (S.D.N.Y. Jun. 15, 2012), plaintiffs established that many purchasers of EZ Seed could be identified by subpoenaing third-party retailor Wal–Mart for its customer records (and in fact did so subpoena Wal–Mart). The district court

later held that Karhu had satisfied the ascertainability requirement. *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 406–08 (S.D.N.Y.2015).

**5 [2] Relatedly, Karhu might have satisfied the ascertainability requirement in this very case. In his motion to alter or amend the order denying class certification, Karhu explained that VPX sold Meltdown primarily to third-party retailers, and proposed identifying class members by subpoenaing the retailers for their records. The district court took no issue with the abstract principle that a plaintiff could satisfy the ascertainability requirement by proposing a subpoena-based method for identifying class members. Rather, the district court held only that Karhu should have proposed the method in his class-certification papers, instead of only upon moving to alter or amend. Had Karhu done so, he might well have satisfied the ascertainability requirement before the district court.[6]

In sum, a plaintiff establishes Rule 23's implicit ascertainability requirement by proposing an administratively feasible method by which class members can be identified. In this case, Karhu's bare proposal that the district court ascertain class members through VPX's "sales data" was insufficient to satisfy the ascertainability requirement.

*951 III. Conclusion

Because we uphold the district court's ascertainability decision, we affirm without reaching the district court's Rule 23(b)(3) decision.

**AFFIRMED.**

MARTIN, Circuit Judge, concurring:

The vehicle of the class action was intended to "vindicat[e] ... the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617, 117 S.Ct. 2231, 2246, 138 L.Ed.2d 689 (1997) (citations omitted). Today's majority denies relief based on the court-created doctrine of ascertainability, which, as a principle, could erode this purpose. Some courts have held that a prospective class of consumers of a small-dollar product is not ascertainable if the only way they can be identified is through self-identification. Though the facts of this case present this court with no opportunity to join those, I write separately to address the problems with such a holding. Specifically, self-identification can and should be a sufficient means of ascertaining a class, particularly for a class of consumers of a cheap and unique product like the one at issue here. I therefore reject the District Court's reasoning and its potential implications. However, because I agree with the majority that Mr. Karhu failed to sufficiently make a self-identification argument at the class-certification stage, I concur in the judgment.

I.

Vital Pharmaceuticals, Inc. (VPX) is a Florida corporation that manufactures, advertises, and sells a dietary supplement, modestly named "VPX Meltdown Fat Incinerator" (Meltdown). VPX advertises, also modestly, that Meltdown "burns fat for 6+ hours" by causing a "29% thermogenic increase" and a "56% increase in fat utilization." Adam Karhu, a New York resident who purchased Meltdown, sued VPX, claiming that Meltdown is not effective for this advertised purpose.

**6 Mr. Karhu filed his suit as a class action. He moved pursuant to Federal Rule of Civil Procedure 23(b)(3) for certification of a class defined as "all persons in the United States who purchased Meltdown from April 4, 2008 to date" as well as a subclass of "all Class members who purchased the product in New York." He asserted claims on behalf of the nationwide class for (1) violation of the Magnuson–Moss Warranty Act, 15 U.S.C. §§ 2301–12; (2) breach of express warranty; (3) unjust enrichment; and (4) violation of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201–13. He also asserted a claim on behalf of only the New York subclass for violations of New York General Business Law § 349.

The District Court denied Mr. Karhu's request for class certification primarily because it concluded that the members of Mr. Karhu's proposed classes were not ascertainable. First, although Mr. Karhu suggested that VPX's "sales data would allow the Court to identify members," the District Court found that "VPX ... makes the bulk of its sales to distributors and retailers and sells directly to consumers relatively infrequently." Thus, VPX would not have a record of most class members. Further,

because a bottle of Meltdown is "a relatively small purchase, ... purchasers are less likely to retain receipts or other records" to show they have purchased Meltdown. Finally, the Court refused to "trust individuals to identify themselves as class members through the submission of affidavits." Doing so would "deprive VPX of its due process rights to challenge the claims of each putative class *952 member." "On the other hand, allowing VPX to contest each affidavit would require a series of mini-trials and defeat the purpose of class-action treatment."

II.

A plaintiff seeking class certification must demonstrate that his claim meets the express requirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. *See* Fed.R.Civ.P. 23(a)(1)–(4). However, courts have also read Rule 23 to contain an implicit, unwritten requirement: that a proposed class be "adequately defined and clearly ascertainable." *Little v. T–Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir.2012) (quotation omitted).

Historically, courts analyzing ascertainability have required something quite narrow. "Ascertainability has traditionally been defined as the existence of a class whose members can be identified by reference to objective criteria in the class definition." Daniel Luks, *Ascertainability in the Third Circuit: Name That Class Member*, 82 Fordham L. Rev. 2359, 2369 (2014). The leading class action treatise similarly notes that "courts essentially focus on the question of whether the class can be ascertained by objective criteria." Newberg on Class Actions § 3.3 (5th ed.); *see also McBean v. City of New York*, 260 F.R.D. 120, 133 (S.D.N.Y.2009) ("A class is ascertainable when defined by objective criteria that are administratively feasible, without a subjective determination."). What is more, that treatise cautions that a "court need not know the identity of each class member before certification; ascertainability requires only that the court be able to identify class members at some stage of the proceeding." Newberg on Class Actions § 3.3 (5th ed.).

**7 Our Court's approval of the class in *Fitzpatrick v. General Mills, Inc.*, 635 F.3d 1279 (11th Cir.2011), exemplifies this approach. There, we approved of a district court's certification of a class of all purchasers of YoPlus, a probiotic yogurt, in the State of Florida. *Id.* at 1282–83 (noting that the district court order "conducted a detailed analysis," was a "scholarly work reflecting careful attention to the requirements of" Rule 23, and "is sound and in accord with federal and state law"). The district court in *Fitzpatrick* approved of the class despite the "likely difficulties" of "identifying those consumers that bought Yo–Plus, and of that group, who paid a premium for it," and "calculating the appropriate compensation for each plaintiff." *Fitzpatrick v. General Mills, Inc.*, 263 F.R.D. 687, 702 (S.D.Fla.2010). Yogurt consumers, after all, are unlikely to retain receipts proving their purchases. But the District Court insisted that "this difficulty [was] not in itself a sufficient basis to prevent certification of the class." *Id.* (quotation marks omitted). We easily allowed certification of that class without questioning its ascertainability.

III.

The record here indicates that Mr. Karhu could have made a good case for the ascertainably of his proposed class based on consumer affidavits. [1] Many courts have grappled with whether affidavits can be a reliable way to identify class membership. I see these courts looking to at least two factors. First, courts look to the value of the product being challenged in the class action to determine the likelihood that fraudulent claims will be filed. "A *953 simple statement or affidavit may be sufficient where claims are small." Newberg on Class Actions § 18:54 (4th ed.). Thus, while courts have certified classes of purchasers of low-value items, such as supplements or bottled beverages, based solely on consumer self-identification, *see, e.g., McCrary v. Elations Co., LLC*, No. EDCV 13–00242 JGB, 2014 WL 1779243, at *7–9 (C.D.Cal. Jan. 13, 2014) (allowing "class members to self-identify" that they purchased "an over-the-counter supplement sold in retailers throughout [a] state"), they have been more reluctant to certify classes when the per-class-member claim is larger, *see, e.g., In re Hulu Privacy Litig.*, No. C 11–03764 LB, 2014 WL 2758598, at *16 (N.D.Cal. June 17, 2014) (finding no ascertainability because "at $2,500 per class member, [the claims] are not small").

Second, courts have evaluated the "the likelihood of a potential class member being able to accurately identify themselves as a purchaser of the allegedly deceptive product." *Randolph v. J.M. Smucker Co.*, 303 F.R.D. 679,

689 (S.D.Fla.2014). Where a challenged product is similar to other unchallenged products on the market, consumers may find it hard to know whether they purchased the challenged product. For instance, in *Randolph,* the Southern District of Florida declined to certify a class of purchasers of certain Crisco oils. The court noted that there were at least nine different Crisco oils on the market, only four of which were the subject of that case. *Id.* at 687. Beyond that, even among those four oils, the allegedly deceptive label being challenged "was not placed on all four oils uniformly throughout the class period." *Id.* The court concluded that "the likelihood that an individual would recall not only which specific kind of oil, but also, when that oil was purchased, complicates identification of the putative class." *Id.; see also Jones v. ConAgra Foods, Inc.,* No. C 12-01633 CRB, 2014 WL 2702726, at *10 (N.D.Cal. June 13, 2014) (noting a "subjective memory problem" because "there were literally dozens of varieties with different can sizes, ingredients, and labeling over time and some Hunt's cans included the challenged language, while others included no such language at all" (quotation marks omitted)).

**8 I would combine the reasoning of these courts. Looking to the two factors—(1) the value of each class member's claim, and (2) the likelihood that potential class members could accurately identify themselves—I conclude that Mr. Karhu likely could have shown ascertainability. First, a bottle of Meltdown costs around $23, a small amount not likely to invite fraudulent claims. Second, Mr. Karhu notes that "Meltdown is a unique product in name, function, and appearance." This is in contrast to *Randolph,* where there were a number of versions of Crisco on the market, and only some were being challenged. This record includes no evidence that consumers would be unable to recall whether they are class members. A class composed of purchasers of Meltdown for a certain period of time could therefore be ascertainable. [2]

*954 IV.

Unfortunately for the putative class, Mr. Karhu failed to argue this point in his class-certification motion. As the majority notes, Mr. Karhu, did "not established how the usual problems with [affidavits] would be avoided." Panel Op. 10. Mr. Karhu, it says, failed to offer a "specific proposal as to how identification via affidavit would successfully operate." *Id.* In fact, the District Court apparently considered the self-identification argument "of its own accord" below. *Id.* at 4. As I've said, I believe that self-identification would probably be a sufficient means of ascertaining a class of purchasers of a product like Meltdown. In any event, I read today's majority opinion narrowly. Mr. Karhu simply did not adequately argue his class was ascertainable before the District Court. Class representatives in future cases may more clearly explain to district courts how affidavits will reliably show class membership based on the two factors I noted above, and I expect that district courts will closely consider those arguments.

To hold otherwise—rejecting affidavits as a legitimate means of class identification in every case—would make it considerably more difficult for consumers to bring class-action claims on small-dollar products where consumers and companies are unlikely to keep or retain records of purchases. These include most low-cost products typically sold in corner stores or vending machines—products like chewing gum, bottled soft drinks, or cigarettes—all of which are routinely bought with cash. But claims like these are precisely the ones that the mechanism of the class-action device was designed to foster. *See Ebin v. Kangadis Food Inc.,* 297 F.R.D. 561, 567 (S.D.N.Y.2014) ("[T]he class action device, at its very core, is designed for cases like this where a large number of consumers have been defrauded but no one consumer has suffered an injury sufficiently large as to justify bringing an individual lawsuit."). I would like to see our courts continue to clarify the ascertainability doctrine so as not to eradicate the small-dollar consumer class action.

VI.

The record here has led me to conclude that although Mr. Karhu failed to properly argue that affidavits were sufficient to show ascertainability in his class-certification motions to the District Court, he had a strong case to make. When timely presented, I would hold that affidavits are a sufficient means of identification for purchasers of a cheap, unique product like Meltdown. I concur in the judgment.

**All Citations**

621 Fed.Appx. 945, 2015 WL 3560722

Footnotes

* The Honorable Richard W. Goldberg, United States Court of International Trade Judge, sitting by designation.

1 Karhu had not argued for certification pursuant to Rule 23(b)(1).

2 A district court's denial of class certification is reviewed for an abuse of discretion. *Little,* 691 F.3d at 1305. Under the abuse of discretion standard, factual determinations are reviewed for clear error, and legal determinations are reviewed *de novo. Vega v. T–Mobile,* 564 F.3d 1256, 1264–65 (11th Cir.2009).

3 Karhu argues that defendants have no due-process right against unverified self-identification when total liability will be established at trial, and will not change depending on the number of claims actually made. Because defendants' total liability will not be affected, it should not matter to them whether or not they are defrauded.

This argument has no force. As the *Carrera* court explained, a defendant's due-process right against unverified self-identification is not only about total liability: It is also about ensuring finality of judgment. *Carrera,* 727 F.3d at 310 ("If fraudulent or inaccurate claims materially reduce true class members' relief, these class members could argue the named plaintiff did not adequately represent them.... When class members are not adequately represented ... they are not bound by the judgment."). Nor is *Allapattah Servs., inc. v. Exxon Corp.,* 333 F.3d 1248, 1258–59 (11th Cir.2003), the only case Karhu cites in support of his argument, to the contrary. In *Allapattah,* we held that defendants *do* have a due-process right to contest individual class members' claims *during postverdict claim distribution,* at least when total liability has not already been established and the defendants' defenses might affect such liability. *Id.* The case was not a class-certification (much less ascertainability) case, and did not foreclose the possibility that defendants' due-process right against unverified self-identification might arise from some other concern besides total liability.

4 We do not address whether self-identification-based ascertainment might also implicate the interests of absent class members in cases where total liability will be established at trial. *See Carrera,* 727 F.3d at 310 ("It is unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims.").

5 A plaintiff might establish that self-identification-based ascertainment is administratively feasible and otherwise unproblematic by proposing a case-specific and demonstrably reliable method for screening each self-identification. *See Carrera,* 727 F.3d at 311 (rejecting affidavit screening model for lack of case-specificity and reliability, and remanding to "afford [the plaintiff] the opportunity to submit a[n affidavit] screening model specific to this case and prove how the model will be reliable and how it would allow [the defendant] to challenge the affidavits.").

6 We do not address the question of what, precisely, Karhu would need to produce in order to establish that the records of third-party retailers could be used to identify class members in an administratively feasible manner. In this regard, we express no opinion as to whether the *Carrera* court set an appropriate bar for subpoena- or third-party-retailer based ascertainment. *See Carrera,* 727 F.3d at 308–09 ("Carrera argues he will be able to show class membership using retailer[s'] records of sales made with loyalty cards, e.g., CVS ExtraCare cards, and records of online sales.... But there is no evidence that a single purchaser of WeightSmart could be identified using records of ... online sales. There is no evidence that retailers even have records for the relevant period.")

1 I agree with the majority that Mr. Karhu forfeited his argument that he could identify purchasers of Meltdown through third-party sales records, since he raised this argument for the first time in his motion for reconsideration.

2 The cases the majority cites rule on facts different from those here. In *Fisher v. Ciba Specialty Chemicals Corp.,* 238 F.R.D. 273 (S.D.Ala.2006), the court held that a class of landowners was not adequately defined because the class definition included a requirement that each parcel of land not be "income-producing." *Id.* at 301. The court rejected the argument that "prospective class members could be counted on to self-select" because the question of whether a parcel of land is "income-producing" cannot be reduced to a simple yes-or-no question. *Id.* at 302. "Depositions would need to be taken, documents would have to be produced, and argument would need to be heard, ... to assess whether [any lot] was or was not 'income-producing.' " *Id.* Likewise, in *LaBauve v. Olin Corp.,* 231 F.R.D. 632 (S.D.Ala.2005), the court declined to certify a certain class of fishermen because it thought that "people may respond to publication notice even though they were not fishing in the particular area of concern during the particular temporal interval of concern" since the geographic and temporal scope of the class of fishermen was "so amorphous." *Id.* at 683–84. Finally, in *Perez v. Metabolife International, Inc.,* 218 F.R.D. 262 (S.D.Fla.2003), the court was wary of certifying a class of purchasers of an over-the-counter weight loss supplement because the supplement was "only one of several producing containing ephedra, at least two others of which have very similar names." *Id.* at 269. Here, the class is clearly defined, and there was little risk of confusion since there was no similar product on the market.

 

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## PROOF OF SERVICE

I, LUTHER W. CAMP, JR., declare:

I work in the City and County of San Francisco, State of California. My business address is 455 Market Street, Suite 1480, San Francisco, California 94105. I am over the age of 18 years and not a party to the foregoing action.

On ***July 13, 2018*** served the following Document on the interested parties in said action:

- **DEFENDANT AND RESPONDENT'S ANSWERING BRIEF**

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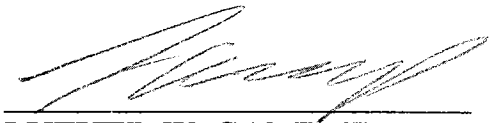
_x_ **(by mail)** by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth above. At Klein, Hockel, Iezza & Patel P.C., mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of San Francisco, California.

____ **(by electronic transmission)** by electronically mailing a true and correct copy through Klein, Hockel, Iezza & Patel PC's electronic mail system to the email address(es) per the agreement of the parties.

I declare under penalty of perjury and the laws of the United States that the foregoing is true and correct and that this declaration was executed on ***July 13, 2018*** at San Francisco, California.



LUTHER W. CAMP, JR.