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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JAMES A. NOEL,
Plaintiff, Appellant, and Petitioner,

v.

THRIFTY PAYLESS, INC.
Defendants and Respondent.

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

APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT JAMES A. NOEL; AND BRIEF

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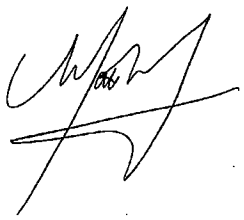
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Cal. Rules of Ct., rule 8.208, the Consumer Attorneys of California certifies that it is a non-profit organization with no shareholders. CAOC and its counsel certify that they know of no other entity or person that has a financial or other interest in the outcome of the proceeding that CAOC and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under Canon 3E of the Code of Judicial Ethics.

Dated: October 1, 2018



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I. APPLICATION FOR PERMISSION TO FILE

Amicus curiae Consumer Attorneys of California (CAOC) seeks permission to file the accompanying brief as a friend of the Court. (Cal. Rules of Court, rule 8.520 subd. (f)(1).)

CAOC, founded in 1962, is a non-profit organization of more than 6,000 consumer attorneys dedicated to preserving and protecting the rights of ordinary consumers, championing the cause of those who deserve redress for injury to person or property, and resisting efforts to curtail the rights of such injured persons. CAOC frequently participates as *amicus curiae* in seminal California class action cases. (See, e.g., *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260; *Laffitte v. Robert Half International Inc.* (2016) 1 Cal.5th 480; *Duran v. U.S. Bank Nat'l Assoc.* (2014) 59 Cal.4th 1; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.)

CAOC is familiar with the issues before this Court and the scope of their presentation in the parties' briefing. CAOC seeks to assist the Court by "broadening its perspective" on the context of the issues presented. (See *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177. CAOC submits that further briefing is necessary to address matters not fully addressed by the parties' briefs, including the negative impact of a heightened, records-based ascertainability requirement on specific subsets of consumer class actions and how that impact compromises the public policy goals of the class action process.

No party or its counsel authored any part of this brief. Except for CAOC and its counsel here, no one made a monetary contribution, or other contribution of any kind, to fund its preparation or submission. (Cal. Rules of Ct., rule 8.520 subd. (f)(4).)

II. INTRODUCTION

This case presents the following question: Must a plaintiff seeking class certification under Code of Civil Procedure section 382 or the Consumer Legal Remedies Act ("CLRA"), Civil Code section 1750, *et seq.* demonstrate that records exist permitting the identification of absent class members? Courts of Appeal in this state dispute whether and how absent class member self-identification is sufficient to permit a class to be ascertainable.

CAOC strongly believes that imposing a new records-based ascertainability requirement at the class certification stage defeats the well-settled purpose of class actions to vindicate consumer rights. The due process justification for this new requirement – protecting unnamed class members by ensuring notice and the right to opt-out – fails upon close, practical inspection. Typically, individual claims are of such low value that no rational person would spend money to litigate them. California law has long recognized notice is imperfect in class cases, hence it allows for methods such as publication. (Cal. Rules of Ct., rule 3.766, subd. (f).) Imposing a records-based requirement to protect these low-value claims means no one recovers, because the class fails and no individual brings a claim. A heightened records-based ascertainability requirement becomes the corporate defendant's "Get Out Of Jail Free" card.

This Court has never held that records must be proven to exist, at the certification stage, for a class to be "ascertainable" under California law. When this Court has referenced the

existence of records in the past – as in, for example, *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 810-811 – it did so only to make the point that *if* records exist identifying the class members, then *certainly* the class is ascertainable. But if not, a reasonably clear and objective class definition that allows for members to self-identify is sufficient. In this case, class members would know from the class definition in the notice if they are in the class - purchased one of the inflatable swimming pools from defendant's Rite-Aid drug stores.

Imposing any greater burden than this tilts the scales too far in favor of corporate defendants who often are the only entities that would have records, particularly in cases involving mass-produced consumer products. Moreover, it completely negates the well-settled class notice procedure for class members to identify themselves as being in the class or not. Class members who purchased the product will likely have records of their purchase or would be willing to declare, under penalty of perjury, as to whether they purchased one of the products or not. All of this is lost if it is truncated, at the certification stage, by requiring the named class member and class counsel to prove the existence of records demonstrating the identity of every class member. The Legislature, under Code of Civil Procedure section 382, has declared the existing class action requirements, and there is no reason for this Court to add records-based ascertainability to them.

III. ARGUMENT

A. The California Legislature Has Not Mandated A Records Requirement, Nor Should This Court.

A records-based ascertainability requirement subverts the consumer-protection public policy of class actions. It does so for ostensibly just reasons: protection of the unnamed class members who would be bound by the judgment, and protection of the class members from fraudulent or erroneous claims. But as the Seventh Circuit observed, it protects "a purely theoretical interest of absent class members at the expense of any recovery for all class members – in precisely those cases that depend most on the class mechanism." (*Mullins v. Direct Digital, LLC* (7th Cir. 2015) 795 F.3d 654, 666.) Under California law, a class is ascertainable where it is objectively defined to allow members to self-identify. The remaining justifications for heightened ascertainability, such as the need for notice, opt-out, and protection from fraudulent claims, fail upon closer inspection.

1. This Court Has Never Held That Certification Requires Identifying Class Members Through Records.

Under Civil Code section 382, "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." California law has long provided 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. [Citations.]" (*Aguirre v. Amscan Holdings, Inc.* (2015) 234 Cal.App.4th 1290, 1299-1300, quoting *Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828.)

"Ascertainability is achieved 'by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary.'" (*Bomersheim v. Los Angeles Gay and Lesbian Center* (2010) 184 Cal.App.4th 1471, 1483, quoting *Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915.)

This Court has never imposed an ascertainability standard that requires identification of class members through books and records. In *Vasquez,* 4 Cal.3d 800, 810-811, a case involving claims arising from installment contracts, the class was objectively defined to include those parties who signed the contracts within the limitations period, resided in two counties, and paid or were obligated to pay money to defendants. (*Ibid.*) On ascertainability, this Court commented: "Furthermore, it is alleged, the names and addresses of the class members may be ascertained from defendant's books." (*Id.* at 811.) This merely stated the obvious: If there are records identifying the class members, the class is ascertainable. (See also *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 478 [holding class

ascertainable because record owners of lots are "easily identified and located"].)

But the Court stopped short of stating the inverse proposition: that unavailability of records means a class is *not* ascertainable. (See *Aguirre, supra,* 234 Cal.App.4th 1290, 1302 ["...in many of the cases ... the defendant's records provided a means for identifying class members; however, the absence of such records does not preclude the finding of an ascertainable class."].) Identification and ascertainability remain two distinct concepts, as they have been for five decades. (See *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 706 [criticizing defendants for not distinguishing between "the existence of an ascertainable class" and "identifying the individual members;" that class members remain unidentified "will not preclude a complete determination of the issues affecting the class"].)

Nor do these cases stand for any "implicit" requirement to identify class members, as Respondent argues here. (Resp. Brief, p. 18.) *Vasquez* and *Richmond* concerned classes whose total membership could be determined from records. But no basis exists to imply a requirement that every class case requires them. Notably, neither *Vasquez* nor *Richmond* was a consumer products case, where identification is often more difficult because complete records are often unavailable. "Implying" a records requirement stretches *Vasquez* and *Richmond* too far.

Cases following *Vasquez* have similarly held that, where available, records *may* be a way to demonstrate ascertainability.

" ' "Class members are 'ascertainable' where they *may be* readily identified without unreasonable expense or time by reference to official records." ' " (*Thompson v. Automobile Club of Southern California* (2013) 217 Cal.App.4th 719, 728, quoting *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1334 (emphasis added); see also *Estrada v. FedEx Ground Package Sys. Inc.* (2007) 154 Cal.App.4th 1, 14.)

In this context, the three-part *Sotelo/Miller* test is an aberration purporting, but failing, to find support in *Vasquez*. Under *Sotelo/Miller*, "[i]n 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 v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th 639, 648, citing *Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) *Miller*, in turn, cites to this Court's *Vasquez* opinion as support for the test. (*Miller* at 873, citing *Vasquez,* 4 Cal.3d at 821-822.) But that test appears nowhere in *Vasquez*, either in that citation or in the brief ascertainability discussion that precedes it. (*Vasquez,* 4 Cal.3d at 811-812; see Petitioner's Opening Brief, pp. 21-22.) Nor does *Vasquez* support the extension of that third prong— the means of identifying class members—to *require* records of individual class members in order for a class to be ascertainable.

The court below attempted to harmonize the test by suggesting each might be used in different situations. (*Noel v. Thrifty Payless, Inc.* (2017) 17 Cal.App.5th 1315, 1329 ["...we

see *Sotelo*'s three-factor test as a refinement of the ascertainability prong of the *Estrada* test when that prong of the test requires a closer look"].) But this gives little guidance to a trial court confronted with facts putting the tests in conflict—as they must when a class is defined in a manner that would permit self-identification.

More accurately, the court in *Aguirre* held that, to the extent *Sotelo* states a correct test at all, its third prong (means of identifying class members) permits self-identification, and the identification is only required at the remedial stage, not the notice stage.[1] (*Aguirre, supra,* 234 Cal.App.4th at 1304-1305.) At the remedial stage, class members will present their claims, and individual determinations of claims and recoveries do not prohibit certification. (See *Id.*)

In sum, to the extent the third prong of the *Sotelo/Miller* test requires identification of the class through records, it finds no support in this Court's opinions. *Vasquez* merely held that a

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[1] *Aguirre* cited to California Rules of Court, rule 3.766(f) to support its claim that personal notice was not required. In the present case, the appellate court had difficulty with this, opining that the rule "clearly" set out personal notice as the preferred method. Then, the court distinguished notice requirements on the basis of class size: perhaps in *Aguirre's* case of 1,000,000 class members personal notice was unrealistic, but in the case of the class of 20,000 before it, "we are not so quick to make that assumption." (*Noel,* 17 Cal.App.5th at 1331.) Courts have broad discretion to design notice under the rule. But an inability to provide personal notice—for whatever reason—cannot defeat certification outright, especially if it is simply dependent on the number of class members. This directly conflicts with the permissive notice provisions of California Rules of Court, rule 3.766(f).

class whose total membership happened to be identifiable by records satisfied the ascertainability requirement by definition. Neither it, nor *Daar* before it, nor *Richmond* after it, ever imposed a records-based ascertainability requirement. Doing so now would be a manifest change in the law.

2. Neither The Need For Class Notice, Nor The Ability Of A Class Member To Opt-Out, Justifies A Heightened Ascertainability Requirement.

A class is ascertainable where the definition is sufficient to allow putative members to self-identify themselves. But *Sotelo* and the court below both expressed concern that, "[t]he theoretical ability to self-identify as a member of the class is useless if one never receives notice of the action." (*Noel v. Thrifty Payless, Inc., supra*, 17 Cal.App.5th at 1326-1327, quoting *Sotelo, supra*, 207 Cal.App.4th at p. 649.) In other words, without the records requirement, unnamed class members might not receive notice and might not be able to opt-out to preserve their individual claims. A defendant, like Thrifty Payless, typically knows or should know how many of the offending products were sold in California during the class period. Eliminating self-identification forecloses, without due process, their potential claims even though each class member may have records or proof of purchase.

California law does not require personal notice in a class action; instead, where individualized notice is expensive or individual interest is small, the Rules of Court provide for several

alternative methods of notice, including publication in newspapers, television, radio, Internet, or distribution through trade or public interest groups. (Cal. Rules of Ct., rule 3.766(f).) Such notice may not actually reach all potential class members, and it will almost assuredly reach individuals who are not in the class. But the Rule correctly balances these concerns against both the expense and impossibility of perfect individual notice and the relative value of an individualized claim that no rational person would bring as an individual claim.

It is unnecessary for this Court to look to analogous federal procedures to answer the ascertainability question because California law is on-point. (See *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 872 ["trial courts, in the absence of controlling California authority, [may] utilize the class action procedures of the federal rules"].) But here, the federal rules are in accord and effectuate similar public policies. Federal Rules of Civil Procedure, Rule 23(c)(2)(B) requires the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," which specifically contemplates that reasonable effort *might not* result in such notice. (See Geoffrey C. Shaw, Note: Class Ascertainability, 124 Yale L.J. 2354, 2367-2369 (May 2015), emphasis added [noting that Rule drafters considered and rejected stricter individualized notice requirements]; see also *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 318 [notice to unnamed trust beneficiaries must be "reasonably calculated" to reach them and could include

newspaper advertisements], *Mirfasihi v. Fleet Mortg. Corp.* (7th Cir. 2004) 356 F.3d 781, 786 ["When individual notice is infeasible, notice by publication in a newspaper of national circulation ... is an acceptable substitute."].) Thus, under the federal rules, "[a]dequate notice in a class action ... has never required ascertainability. Class members can be notified adequately whether or not the class is ascertainable." (Note, *supra,* 124 Yale L.J. at 2368.)

This leads to practical and public policy reasons that the notice and preclusion arguments fail. Class claims with small individual values are not worthless. To the contrary, their collective value can be enormous. "'A company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit; the class action is often the only effective way to halt and redress such exploitation.'" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 446, quoting *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 387 (conc. opn. of Tobriner, J.).) Low-individual-value class claims are aggregated precisely *because* of the fact that no one would bring them individually. (See, e.g. *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 971-972 [analyzing *Daar,* noting that it "would, doubtless, not have been maintained as an individual action" given the low value of individual claims]; see also *Mullins, supra,*795 F.3d at 666, quoting *Carnegie v. Household Int'l, Inc.* (7th Cir. 2004) 376 F.3d 656, 661 ["The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or fanatic sues for $30." (emphasis in original)].) An

individual class member would almost never opt-out to pursue his or her own claim. So it makes little sense to prohibit certification of otherwise objectively-defined classes in order to protect someone's theoretical interest in spending $1,000 to recover $1.00.

On the other hand, the public policy implications to consumers are enormous. The practical effect is that *no one recovers*. (See *Carnegie,* 376 F.3d at 661.) The class claim fails, though the class is well-defined through objective criteria and composed of individuals with common interest, simply because its members may not all be identifiable from records. The individual class member virtually never brings a claim. (See *id.*; see also *Mullins, supra,* 795 F.3d at 666.) And the defendant escapes liability either because there are no records or, worse, because *defendant's own records* may not allow for identification of class members. This subverts the dual goals of the class action process which are designed to both protect consumers and deter corporate wrongdoing. (See *Linder, supra,* 23 Cal.4th at 446.) Actually, heightened ascertainability does the *opposite*: Corporations will be encouraged to eliminate the very records which a consumer plaintiff would need in order to satisfy the standard or, where possible, never generate them in the first place. Moreover, it would needlessly expand the pre-certification process to include production of class records before a class is certified. Something class action defendants routinely refuse to do.

3. The Class Administration Process Adequately Protects The Class From Fraudulent Claims Dilution.

Respondent's alleged concern about potentially fraudulent claims as justification for a new heightened ascertainability requirement is without merit. According to Respondent, to protect against potentially fraudulent claims diluting the recovery of legitimate claimants, there should be no class and no claims at all. As if it were reasonable to use a nuclear bomb to kill a flea.

First, there is little to no evidence that fraudulent claims dilution exists at such a level as to truly present a risk of compromising qualified claims. (*Mullins, supra,* 795 F.3d 654, 667 ["given the low participation rates actually observed in the real world, this danger is not so great that it justifies denying class certification altogether"], citing Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DePaul L. Rev. 305, 315 (Winter 2010).

More fundamental, the argument ignores the realities of certified class actions, namely that fraudulent or erroneous claims are resolved through the claims administration process. (See *Mullins, supra,* 795 F.3d at 667-668.) Courts "can rely, as they have for decades, on claim administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques ...." (*Id.* at 667.)

The consequence of not relying on the claims administration process to detect fraud, and instead imposing a new heightened ascertainability requirement at the certification stage, is that no one gets anything because someone *might* wrongfully have claimed something. "If the class is certified and fraudulent or inaccurate claims actually cause dilution, then deserving class members still receive something. But if class certification is denied, they will receive nothing, for they would not have brought suit individually in the first place." (*Mullins* at 668.)

This is the central public policy problem inherent in a heightened ascertainability requirement: In "protecting" unnamed class members or class members from fraudulent claims and dilution, the ascertainability requirement turns a purely theoretical harm to individuals into a sword that cuts through *all claims* by prohibiting class certification in a case no individual would bring solo. This Court should not take the suggestion to deny valid class claims but for the mere theoretical possibility that someone may attempt to submit a fraudulent claim.

B. A Heightened Ascertainability Requirement Requiring Records To Identify Class Members Yields Unfair Results.

Cases from other courts and from the federal courts reveal the unjust results that occur from a heightened ascertainability standard in the presence of properly-defined classes, particularly where members could have self-identified. Such results can be

avoided by relying on existing class action protocols, instead of inventing a wholly new records-based hurdle to certification.

Hale v. Sharp Healthcare (2014) 232 Cal.App.4th 50, is an example of a case where overreliance on a records requirement improperly led to rejection of the class on ascertainability grounds. Plaintiff objectively defined the class to include individuals who, from August 11, 2003 to December 16, 2011: "...(a) received emergent-care medical treatment at a Sharp Hospital and signed the defendant Sharp Healthcare standard form Admission Agreement; and (b) were not covered by insurance or governmental healthcare programs at the time of treatment...." (*Sharp,* 232 Cal.App.4th at 54.) There was nothing confusing about this objective definition, and nothing that would prohibit individuals from identifying themselves as potential class members: "I received this care, and I was not insured when I did."

But Sharp claimed it could not ascertain class members based on its own records. State law prohibited discussion of financial issues at the time of admission, at least until a patient could be stabilized. So Sharp had no way of knowing if a patient was insured at that time. And a patient might not know all of the insurance options available, including government assistance, meaning a patient who was uninsured at intake, might become insured later. Since Sharp did not update records to reflect this, there was no way to search its records to ascertain who in fact was truly "self-pay." (*Id.* at 55.) The appellate court affirmed

decertification of the class, in part, because "a computer program searching for a 'self-pay' code necessarily includes patients who applied for and received benefits from another source, resulting in an overbroad class." (*Id.* at 60.)

The error occurs right here. The court conflated class membership and class notice and as a result got it wrong. Searching for a "self-pay" code, and finding people who may have received benefits from another source, would not result in an overbroad class; the class had been defined to *require* lack of insurance or governmental programs. Rather, it might result in *notice* being sent to many individuals who in fact were not overcharged because they later obtained insurance.

But overbroad records do not present an ascertainability problem. In *Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal.App.5th 1200, 1213-1215, the court confronted a class action concerning improper charging for medical records under Evidence Code section 1158, which requires medical providers to timely produce records to patients' attorneys prior to litigation. The hospital claimed that it could not segregate its records for those received prior to litigation or after litigation had commenced based on its internal coding. Thus, the records (and ostensibly the notice) would be overbroad. Nevertheless, the court rejected the ascertainability challenge:

> Health Port argued, and the trial court concluded, that a class is not ascertainable if the class members who are entitled to recover from the defendants cannot be identified with individualized inquiry.

> That, is not, however, the standard for determining whether a class is *ascertainable* . . . Plaintiff here has identified the class in terms of objective characteristics, tracking the provisions of section 1158; if it is determined later in the litigation that the "07"data set includes requests not made pursuant to section 1158, "those [persons] can be eliminated from the class at that time."

(*Id.* at 1214, quoting *Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 136; see also *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1207 [holding class of employees alleging meal and rest break claims ascertainable from records even though those who missed rest breaks only were not identified in records]; *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 743 [class including those who might not be entitled to recovery still ascertainable].)

If we play that out in *Sharp*, the notice goes out to a set of individuals, some of whom were in fact uninsured, some of whom may have been insured, and some of whom may have had their insurance situation change. Those individuals can self-identify by researching their own records to determine if they received insurance benefits or payment from government healthcare programs. Under the objective class definition, those that did not receive benefits are class members and could make a claim.

And what if someone – either maliciously, or through a simple misunderstanding – submits a claim even though they were covered by insurance or a governmental healthcare program at the time of treatment? Simply put, they are not in the class, so their claims would be rejected in the administration process.

(See *Mullins, supra,* 795 F.3d at 667-668.) The claims form may inquire whether a potential claimant had insurance at arrival and whether their insurance situation changed during the admission period. Claimants could answer under penalty of perjury and possibly have to provide documentation proving their out-of-pocket payments or charges. In the event Sharp disputed a claim, it need not search all of its records for all putative class members, but only the records for a *particular* claimants about whom it has doubt. These kinds of individual challenges to claims and proof of entitlement to recovery do not defeat class certification. (See *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 333.)

CAOC believes that this is exactly how the process should work. Had *Sharp* contained a class definition that only required emergent care and made no reference to insurance, the potential overbreadth might have presented an ascertainability concern specifically because individuals lacked knowledge sufficient to self-identify. But since the class was properly and objectively defined, the far better method of handling the *Sharp* facts would have been to certify, send notice to the potentially-affected patients, and allow claims to proceed to judgment or settlement and then have the claims reviewed by the administrator. If someone who had insurance made a claim, it would be denied because he or she was not a member of the class.

Instead, *Sharp* resulted in no class certification and a low likelihood that any individuals would bring their own cases. (See

Carnegie, supra, 376 F.3d at 661.) So the ruling essentially exculpated Sharp from liability because Sharp itself chose not to update payment data in its systems. That type of result does violence to the public policy underpinning California's consumer protection statutes and unfairly tips the scale heavily in favor of a corporate defendant who often has sole control of records. So it gives life to the warning of other judges: "If class actions could be defeated because membership was difficult to ascertain at the class certification stage, 'there would be no such thing as a consumer class action.'" (*Astiana v. Kashi Co.* (S.D.Cal. 2013) 291 F.R.D. 493, 500, quoting *Ries v. Arizona Beverages USA LLC* (2012) 287 F.R.D. 523, 536.)

The ascertainability problem arises, if at all, only where the class definition lacks sufficient objective standards to allow for self-identification *absent* records. For example, in *Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 911, the plaintiff proposed a class of "any California consumer who purchased any product from Target.com on or after November 21, 2003 which was identified on Target.com as 'Made in USA,' when such product was actually not manufactured or assembled in the United States." For a period of time, certain products were incorrectly labeled as having been made in the U. S.—a representation visible by clicking on an "Additional Info" tab for the product. The trial court found that the class members could not be "readily identified" because Target did not have records identifying the individuals who purchased during the period where the error occurred and/or clicked on the "Additional Info"

tab. (*Id.* at 919.) Plaintiff argued that the class members could self-identify.

The court agreed with the principle of self-identification, but not its application to the facts. "We agree that a class is ascertainable for purposes of class certification 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 920, internal citations and quotations omitted.) But the Court found that no class member could do so. The branding misidentification only occurred for a certain period of time, and was visible only if the individual clicked on the "Additional Info" tab. (*Id.* at 920-921.) "These consumers would, by definition, have no way of knowing whether he or she purchased an item *when* it was misidentified, and thus would have no way of knowing whether he or she is a member of the class." (*Id.* at 921.)

The additional steps for an individual to be able to self-identify as a potential class member in *Sevidal* were not present in *Sharp*. Who would remember what tab they clicked on when they purchased? More importantly, how would an individual class member be able to "self-identify" as a victim of misrepresentation without knowing *when* the misrepresentation was made? In other words, how could an individual know he or she was class member? In contrast, the narrow definition in *Sharp* required only receipt of emergency services and lack of

insurance, both within individual's ability to determine. Thus, this is where *Sharp* went wrong.

In the present case, the class is comprised of those who bought a Ready Set Pool from defendant's stores in California within the limitations period. (CT at pp. 72:23-24.) That definition relies entirely on the objective fact of a purchase. It does not require clicking on a particular tab, or viewing a particular statement, or doing all of this within specific periods of time. Class members are perfectly capable of identifying themselves. They should know if they purchased a Ready Set Pool as it is either in their yard or in their garage, in storage for next year's summer activities. A new requirement that requires records at the certification process unnecessarily excludes the possibility of class members assisting in the prosecution of the consumer fraud class. Simply put, it should not matter whether or not the defendant has records of the purchases, nor should it require the named plaintiff and putative class counsel to demonstrate the existence of any such records exist for purposes of certification.

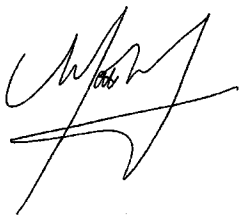
IV. CONCLUSION

The Court of Appeal sought to solve a non-existent problem. The concerns underlying its records-based ascertainability requirement do not justify the harm to consumers that results. CAOC encourages this Court to recognize that in small-value class actions, individuals will not realistically opt-out for the expensive proposition of individual

litigation. Existing law recognizes that individual notice is unworkable in some cases, but permits other forms of notice which are still compliant with due process and designed to reach as many class members as possible. The practical protections afforded in the class administration process reduce the risk of class members becoming victims of fraudulent claims diluting their recovery. In short, the process works without imposing upon consumers an identification requirement that is all-but impossible to meet precisely in those cases that depend on the class mechanism most. Because the opinion of the court of appeal imposes this unjustified requirement, which finds no support in this Court's precedent, the decision should be reversed.

Dated: October 1, 2018

Respectfully submitted,



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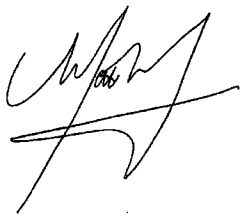
CERTIFICATE OF COMPLIANCE

Pursuant to Cal. Rules of Ct., rule 8.204, subd. (c)(1), counsel of record certifies that this Application to File and Amicus Brief of Consumer Attorneys of California is produced using 13-point Times New Roman type, including footnotes, and contains 5,238 words. Counsel relies on the word count provided by Microsoft Word word processing software.

DATED: October 1, 2018



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DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is, and was at the time of service, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to, or interested in, this legal action; and that declarant's business address is 707 Wilshire Blvd., Suite 3600, Los Angeles, CA 90017.

2. That on October 1, 2018, declarant served this **APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT JAMES A. NOEL; AND BRIEF** by depositing a true copy as shown below with GSO Priority Overnight for delivery overnight on the next business day or by placing with the U.S. Post Office as to those so designated. The copies were placed in sealed envelopes with postage fully prepaid, addressed to the following interested parties and courts:

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Clerks Office
350 McAllister Street
San Francisco, CA 94102-4797

By U.S. Mail
California Court of Appeal
First Appellate District
Division Four
350 McAllister Street
San Francisco, CA 94102-7421

By U.S. Mail
Superior Court of Marin County
Honorable Paul M. Haakenson
Courtroom E
3501 Civic Center Drive
San Rafael, California 94903

By Overnight Delivery
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Oakland, CA 94612

By Overnight Delivery
Michael D. Early
Klein Hockel Iezza & Patel P.C.
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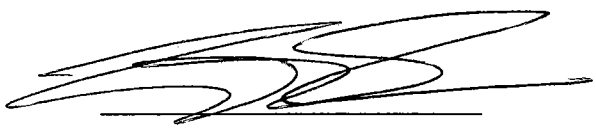
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 1st day of October, 2018, at Los Angeles, California.



Gretchen M. Nelson