SUPREME COURT
FILED
NOV 7 2018
Jorge Navarrete Clerk
Deputy

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 CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

Michael D. Early, Esq. (SBN 111459)
Email: mearly@khiplaw.com
Mark P. Iezza, Esq. (SBN 239813)
Email: miezza@khiplaw.com
KLEIN, HOCKEL, IEZZA & PATEL P.C.
455 MARKET STREET, SUITE 1480
SAN FRANCISCO, CA 94105
TELEPHONE: (415) 951-0535 | FACSIMILE: (415) 391-7808

Attorneys for Defendant and Respondent

RECEIVED
NOV 07 2018
CLERK SUPREME COURT

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 CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

Michael D. Early, Esq. (SBN 111459)
Email: mearly@khiplaw.com
Mark P. Iezza, Esq. (SBN 239813)
Email: miezza@khiplaw.com
KLEIN, HOCKEL, IEZZA & PATEL P.C.
455 MARKET STREET, SUITE 1480
SAN FRANCISCO, CA 94105
TELEPHONE: (415) 951-0535 | FACSIMILE: (415) 391-7808

Attorneys for Defendant and Respondent

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

A. The Courts Below Did Not Require Official Records and Personal Notice to All Class Members 3

B. The Standard Amici Advance Prevents Trial Courts From Considering Relevant Evidence 4

C. Additional Evidence Which Amici Curiae Ask The Court to Consider Does Not Support Appellant's Position 7

III. CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 405, fn. 14 2

Connerly v. State Personnel Board (2006) 37 Cal.4th 1169, 1177..... 2

Cruz v. Sun World International, LLC (2015) 243 Cal.App.4th 367 7

Hale v. Sharp Helathcare (2014) 232 Cal.App.4th 50 7

Hicks v. Kaufman and Broad Home Corp. (2001) 89 Cal.App.4th 908..
..... 5, 6, 7, 8

Medrazo v. Honda of No. Hollywood (2008) 166 Cal. App. 4th 89..... 7

Noel v. Thrifty Payless, Inc. (2017) 17 Cal.App.5th 1315 ..... 4, 6

Vasquez v. Superior Court (1971) 4 Cal.3d 800 8

Defendant and respondent Thrifty Payless, Inc., doing business as Rite Aid (hereafter "Respondent" or "Rite Aid"),[1] submits this consolidated answer to the four amicus curiae briefs filed in support of Appellant.

I. INTRODUCTION

The central premise of the four amicus briefs filed in support of Appellant is that the courts below held that a class is ascertainable only if "official records" exist which allow "personal notice to all class members." This premise is false. The courts below simply followed the well-established standard for ascertainability that requires the proponent of class certification to establish a means of identifying class members. This standard does not require "official records" or personal notice to all class members. It simply *permits* the trial court to consider the means of identifying class members as a factor in its analysis of ascertainability.

In contrast, the standard advanced in the amicus briefs filed in support of Appellant *precludes* trial courts from considering the means of identifying class members. Under this standard, once a clearly defined class is alleged, trial courts *must* find that a class is ascertainable without having any idea as to the means of identifying class members, the manner of potential notice, or even whether notice is practicable to *any* putative class members.

Amici make the mistake of concluding that the consideration of the means of identifying class members dictates a single result in

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

consumer and other class actions: denial of certification. There is no basis for this assertion. Information regarding the means of identifying class members does not dictate either the granting or the denial of certification, it simply informs the trial court of an important aspect of the class action process-the protection of the due process rights of absent class members, and of defendants.

II. ARGUMENT

Amici curiae are supposed to assist the Court by providing a different perspective on relevant legal issues. *Connerly v. State Personnel Board* (2006) 37 Cal.4th 1169, 1177; *Bily v. Arthur Young & Co.* (1992) 3 Cal. 4th 370, 405, fn. 14. Amici do not assist the Court when they simply create a strawman legal standard and then argue against it, as they have done here.

The four amicus briefs filed in support of Appellant's position each incorrectly assert that the court below held that a class is ascertainable only if "official records" exist which allow "personal notice to all class members." Public Citizen states in its amicus brief that the lower court held that a class is only ascertainable if the plaintiff "identifies individual class members in a way that permits personal notice to each one...." (Amicus Curiae Brief of Public Citizen, at p. 5.) The amicus brief of National Consumer Law Center and National Association of Consumer Advocates similarly assumes that the court below required plaintiff to "identify records, prior to class certification, showing which consumers made specific purchases...." (Amicus Curiae Brief of National Consumer Law Center and National Association of Consumer Advocates, at p. 13.) The amicus brief of Impact Fund asserts that the court below required

plaintiff to identify members of the class and further that "the identification [must] be based on official records." (Amicus Brief of Impact Fund, et al., at p. 10.) Finally, not to be outdone, the Consumer Attorneys of California state in their brief that the court below required plaintiff to "prove the existence of records demonstrating *the identity* of *every* class member." (Amicus Brief of Consumer Attorneys of California, at p. 11 (emphasis added).)

As discussed below, these assertions are caricatures of the ascertainability standard followed by the courts below. Furthermore, the amicus curiae briefs ask the Court to prevent trial courts from considering relevant evidence in determining whether to certify all or a portion of a proposed class. Finally, the additional evidence that amici curiae ask the Court to consider is either irrelevant or supports the application of the ascertainability standard used by the courts below.

A. The Courts Below Did Not Require Official Records and Personal Notice to All Class Members

The superior court in this case held that the class was not certifiable "Absent some evidence as to what method or methods will be utilized to identify the class members...." (Clerk's Transcript (hereafter "CT") at p. 442). The trial court did not require official records or personal notice to class members, but simply "*some evidence*" as to the means of identifying class members. (*Id.*)

The Court of Appeal similarly did not require that plaintiff establish that "official records" exist, nor did it require that plaintiff prove that personal notice could be given to all class members. On

the contrary, the Court of Appeal specifically rejected such a rigid approach, stating:

> The court may insist upon personal notice, depending on the circumstances. *We draw no bright lines, and leave much to the discretion of the trial court....*

Noel v. Thrifty Payless, Inc. (2017) 17 Cal.App.5th 1315, 1331-1332 (emphasis added).

Far from *requiring* that personal notice be given to all class members in every case, the Court of Appeal noted simply that Appellant had "presented no evidence" as to a means of identifying class members, and had therefore not even established "that personal notice *cannot* be given." *Id.* at p. 1333 (emphasis added). Given the complete lack of evidence, the Court of Appeal held that the trial court did not abuse its discretion in finding that the class was not ascertainable "[based] on the evidentiary showing Noel made...." *Id.*

B. The Standard Amici Advance Prevents Trial Courts From Considering Relevant Evidence

Like Appellant, the amici curiae ask this Court to radically alter California's ascertainability standard to preclude the consideration of the means of identifying class members at the class certification stage. The fact that the standard amici curiae advance is a departure from existing law is discussed extensively in Respondent's initial Answering Brief, and will not be repeated here. (See Respondent's Answering Brief, filed July 13, 2018, at pp. 1-5 and 16-33.) But the briefs of the amici curiae do cite a case not discussed by the parties in their briefing which illustrates how far the rule they are advocating is from settled law.

Three of the briefs of the amici curiae cite *Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908 to support their assertion that all that is needed for an ascertainable class is a clearly defined class. (*See* Amicus Brief of Public Citizen, at p. 4; Amicus Brief of Impact Fund, et al., at p. 14; Amicus Brief of Consumer Attorneys of California, at p. 13.) The fourth amicus brief asks the Court to take judicial notice of a motion for class certification which cites *Hicks* for the same proposition. (Amicus Brief of National Consumer Law Center and National Association of Consumer Advocates, Exhibit 1 to Request for Judicial Notice, p. 29, fn. 70.)

But *Hicks* does not support that proposition. The Court of Appeal in *Hicks* is quite clear in its analysis as to why the class considered there was ascertainable:

> The class in the case before us is ascertainable. It consists of the owners of homes in specified developments constructed and marketed by [defendant] in which Fibermesh was utilized in the concrete foundation slabs. As such, *the class is precise, objective, and can be determined from public records and [defendant's] own records, at least with respect to the California Marquis development.*

89 Cal.App.4th at p. 916 (emphasis added). The *Hicks* court stated further that:

> If homes with Fibermesh foundations in other developments cannot be determined from existing records, then the trial court should determine *if there are other reasonable methods for determining the class or whether the class should be limited* to homeowners in the California Marquis development.

Id., at fn. 19 (emphasis added).

The Court of Appeal in *Hicks* could not have been clearer in its rejection of the "clear definition" standard advanced by amici curiae (and Appellant). On the contrary, the Court of Appeal in *Hicks* looked at the "means of identifying class members"--the defendant's records of the placement of Fibermesh foundations--to determine the ascertainability of the class. And, it directed the trial court to "determine if there are other reasonable methods" for ascertaining the class if such records were missing for other developments "or whether the class should be limited to homeowners" for which such records existed. 89 Cal.App.4th at p. 916, fn. 19.

Importantly, the Court of Appeal did not direct a result in the event there were no records. Instead, the trial court was directed to consider "other reasonable methods" of ascertaining the class, and to consider limiting the class if, in its discretion, it deemed that appropriate. *Id.* This is exactly the rationale of the Court of Appeal below when it drew "no bright lines" and "[left] much to the discretion of the trial court." *Noel, supra*, 17 Cal.App.5th at pp. 1331-1332.

In the context of the *Hicks* case, amici curiae (and Appellant) would preclude the trial court from considering any means of identifying class members in the other developments, and would require the trial court to certify the class to include them. They would presumably argue that notice by publication could be given, and that flyers or mailings could be sent to every home in the developments, allowing the members of the class to "self-identify." But this assumes

that the homeowners know that they have a Fibermesh foundation, a very dubious assumption, since the homebuilders themselves do not.

Thus, *Hicks* illustrates that even where there are no notice issues, the ability to "self-identify" may be meaningless if the trial court is not permitted to consider the means of identifying class members.[2]

C. Additional Evidence Which Amici Curiae Ask The Court to Consider Does Not Support Appellant's Position

The pleadings which amicus curiae ask the Court to take judicial notice of are largely irrelevant. One of the pleadings, however, actually advances *Respondent's* position on this appeal.

The Court is asked to take judicial notice of the plaintiff's motion for class certification in *Medrazo v. Honda of No. Hollywood (2008) 166 Cal. App. 4th 89*. (*See* Amicus Brief of National Consumer Law Center and National Association of Consumer Advocates, Exhibit 3 to Request for Judicial Notice.) But the plaintiff in that motion set forth the three-part ascertainability standard used by the courts below: "Whether a class is ascertainable is determined by examining the class definition, the size of the class, and the means

---

[2] Amici curiae fare no better with the cases which they claim show the limitations of the three-part standard: *Cruz v. Sun World International, LLC* (2015) 243 Cal.App.4th 367 and *Hale v. Sharp Helathcare* (2014) 232 Cal.App.4th 50. (*See* Amicus Brief of Impact Fund, et al., at p. 16; Amicus Brief of Consumer Attorneys of California, at p. 23.) Plaintiff in *Cruz* used the three-part standard amici curiae would have this Court reject; furthermore, *Cruz* did not consider whether self-identification would be appropriate because plaintiff did not raise the issue in the trial court, and did not address it on appeal until his reply brief. 243 Cal.App.4th at pp. 380-381. In *Hale*, the trial court found on a motion to decertify that an individualized inquiry was needed to determine whether a person was within the class, and the Court of Appeal found no abuse of discretion in this determination. *Hale, supra,* 232 Cal.App.4th at pp. 60-61.

available for identifying class members." (*Id.* at p. 61 (p. 14 of plaintiff Medrazo's memorandum of points and authorities).)

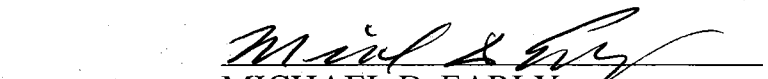
Furthermore, in that motion, plaintiff Medrazo cites to *Vasquez v. Superior Court* (1971) 4 Cal.3d 800 as support for that standard. In short, *even the plaintiff's bar recognizes the three-part standard, and cites the Court's opinion in Vasquez in support of it.*

III. CONCLUSION

Amici curiae use a strawman argument to argue for a radical departure from the California ascertainability standard in use for decades. In reality, the plaintiff's bar itself has advanced the three-part standard used by the courts below. More importantly, as *Hicks, supra,* illustrates, the "clear definition" standard, with its reliance on self-identification, is not sufficient to safeguard the rights of absent class members. This Court should reject this standard and confirm that a class is ascertainable based on the class definition, the size of the class, and the means available for identifying class members.

Respectfully submitted,

DATED: November 6, 2018 KLEIN, HOCKEL, IEZZA & PATEL



MICHAEL D. EARLY
Attorneys for Defendant and
Respondent Thrifty Payless, Inc.

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court 8.520)

This Answering Brief consists of 2,064 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 Consolidated Answer to Amicus Curiae Briefs.

DATED: November 6, 2018

MICHAEL D. EARLY

PROOF OF SERVICE

I, EZRA M. DENMAN, 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 ***November 7, 2018,*** I served the following Document on the interested parties in said action:

- **DEFENDANT AND RESPONDENT'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS**

Peter Roldan, Esq.
Emergent LLP
535 Mission Street, 14th Floor
San Francisco, CA 94105
Attorney for Plaintiff/Appellant

Leslie Brueckner
Public Justice, PC
475 14th Street, Suite 610
Oakland, CA 94612
Attorney for Plaintiff/Appellant

Karla Gilbride
Public Justice, PC
1620 L Street, NW, Ste. 630
Washington DC, 20036
Attorney for Plaintiff/Appellant

Matt J. Malone
Rock Law LLP
101 Montgomery St., Ste. 1800
San Francisco, CA 94104
Attorney for Consumer Attys of CA

Gretchen M. Nelson
Nelson & Fraenkel LLP
707 Wilshire Blvd., Ste. 3600
Los Angeles, CA 90017
Attorney for Consumer Attys of CA

David M. Arbogast
Arbogast Law
933 Woodland Ave.
San Carlos, CA 94070
Attorney for Consumer Attys of CA

Jocelyn D. Larkin
Daniel Nesbit
Impact Fund
125 University Ave., Ste. 102
Berkeley, CA 94710
Attorneys for Impact Fund, CA Employment Lawyers Assn., Centro Legal De La Raza, Legal Aid at Work, and Worksafe

Robert J. Nelson
Roger N. Heller
Lieff Cabraser Heimann & Bernstein
275 Battery Street, 29th Floor
San Francisco, CA 94111
Attorneys for Natl. Consumer Law Center and Natl. Assoc. of Consumer Advocates

Mark A. Chavez
Chavez & Gertler LLP
42 Miller Avenue
Mill Valley, CA 94925
Attorney for Public Citizen

Paul F. Utrecht
Utrecht & Lenvin LLP
109 Stevenson St., 5th Floor
San Francisco, CA 99105
Attorney for CA Retailers Association

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 ***November 7, 2018*** at San Francisco, California.

EZRA M. DENMAN