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IN THE

**SUPREME COURT OF CALIFORNIA**

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**JAMES A. NOEL**

PLAINTIFF, APPELLANT, AND PETITIONER,

**V.**

**THRIFTY PAYLESS, INC.**

DEFENDANT AND RESPONDENT

---

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

Marin County Superior Court Case No. CIV 1304712

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# Plaintiffs' Consolidated Answer Brief In Response To Amici Briefs Filed In Support Of Thrifty Payless Inc. (dba "Rite Aid")

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## INTRODUCTION

Plaintiffs file this answer to the amicus-curiae brief submitted by the Washington Legal Foundation ("WLF") in support of Defendant Thrifty Payless Inc. ("Rite Aid"). WLF fails to provide any persuasive rebuttal to the arguments in Plaintiffs' Opening and Reply Briefs on the Merits ("Opening Br." and "Reply Br."). Instead, WLF offers nothing more than a series of straw-man arguments based on misstatements of the law and mischaracterizations of Plaintiffs' position.

## ARGUMENT

### I. WLF Errs in Arguing that Ascertainability Requires a Showing of Identifiability at Class Certification

WLF's brief begins with an erroneous statement of the law: that ascertainability "requires evidence that there is a means by which the court can identify class members for notification purposes." (WLF Br. at 11.) This is incorrect for all the reasons previously explained. (*See* Opening Br. at pp. 15-18; Reply Br. at pp. 8-20.) The Court has squarely rejected the notion that ascertainability requires a showing of identifiability at the class-certification stage. (*See Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 706.) This conclusion has since been affirmed by five federal courts of appeals, including the Ninth Circuit. (See Opening Br. at pp. 32-44; *Briseno v. Conagra Foods, Inc.* (9th Cir. 2017) 844 F.3d 1121, 1126.)

WLF's main response to *Daar* is to cite subsequent cases where "this Court has cited the ready identifiability of absent class

members as evidence that a class is ascertainable." (WLF Br. at p. 13; *see also id.* at pp. 13-14 [citing *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 810-811; *Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 478.) As Plaintiffs have explained, however, *Vasquez* and *Richmond* merely show that a trial court *may* consider the means of identifying class members at the class-certification stage. (*See* Reply Br. at p. 6.) They do not establish that a court *must* find that such a means exists before a class action can be certified. (*Id.*) Any such requirement would make many class actions involving small-value claims all but impossible—a result directly contrary to this Court's oft-repeated recognition that consumer class actions are an "essential tool for the protection of consumers against exploitative business practices." *State of California v. Levi Strauss & Co* (1971) 4 Cal.3d 800, 807-809 [*"Levi Strauss"*].)[1]

## II. WLF Wrongly Presumes that There is No Way of Identifying Class Members

The rest of WLF's brief rests on an erroneous factual premise:

---

[1] WLF cites *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, for the proposition that "one factor relevant to class certification is 'the probability each member [of the proposed class] will come forward ultimately, identify himself, and prove his separate claim to a portion of the total recovery.'" (WLF Br. at p. 13 [quoting *Blue Chip Stamps, supra*, 18 Cal.3d at p. 386].) But *Blue Chip Stamps* did not even mention ascertainability. Instead, the Court's decision that the proposed class action was inappropriate was grounded in considerations of manageability and superiority. (*Id.* at p. p. 386 [holding that where a "damage action [is] unmanageable and without substantial benefit to class members, it must then be dismissed.") As the concurrence noted, moreover, the case was "an unusual one inasmuch as the class action at issue would neither serve to deter wrongdoing nor result in any added compensation for class members." (*Id.* at p. 389 [Tobriner, J., concurring].) Neither is true here.

that there is no way to identify class members here—a claim that not even Rite Aid makes. (*See* WLF Br. at p. 7 [asserting that "there is no discernable way of identifying class members"].) In so arguing, WLF makes the same mistake as the lower court: it assumes that because class members were not identified prior to certification, they will *never* be identified. As Plaintiffs have explained, class certification and notice are *distinct* inquiries under California law, which allows for full post-certification discovery into class members' identities. (*See* Reply Br. at pp. 16-20. *See also* Brief of Amici Curiae National Consumer Law Center and National Association of Consumer Advocates ["NCLC/NACA Br."] at p. 16.)

As a result, *if* this class is certified, Plaintiffs will *then* have the opportunity to (1) determine whether any class members can be identified based on Rite Aid's records; and (2) propose an appropriate notice plan that includes some form of direct notice to those class members (if any) whose identities could be determined with reasonable efforts and publication or other forms of notice for the remainder. This procedure is entirely consistent with this Court's own class action rules *and* with due process. (*See* Reply Br. at pp. 16-20; NCLC/NACA Br. at p. 18 [describing how California courts have routinely certified classes, and directed appropriate notice, where there are insufficient records to affirmatively identify some or all individual class members].)

WLF ignores this discussion in Plaintiffs' Reply, rendering its

foundational premise that class members here are "unidentifiable" wholly invalid.

## III. WLF Wrongly Presumes that the Class Will Not Receive Adequate Notice and that Class Members Will Not be Bound By Any Judgment

Building on its initial false factual premise, WLF attacks the use of notice by publication, claiming that (a) class members "cannot benefit because they will never be notified about the lawsuit" (WLF Br. at p. 15); and (b) as a result, "any defense judgment would not be binding on absent class members"—thereby endangering Rite Aid's due-process right "to assurance that the entire plaintiff class is bound by *res judicata*." (*Id.* at p. 30.) These arguments fail at every step.

First, the argument that the only form of notice in this case will be by publication is based on False Premise No. 1: that "there is no discernable means of identifying class members." (*Id.* at p. 7.) As noted above, class members *may* ultimately be identifiable based on post-certification discovery.

Second, WLF's attack on publication notice ignores that both California and federal courts have repeatedly endorsed publication notice as a reasonable, alternative means of notice when individual notice is not possible. (*See* Reply Br. at pp. 23-33 [citing cases]. *See also Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 251 [allowing notice by publication "[w]here the membership of a class is large, such as in this case, and individual damages are

minimal..."] [citation omitted].) WLF does not refute nor even address Plaintiffs' myriad authorities regarding the validity of publication notice.

Third, WLF's argument that certifying this class would violate Rite Aid's due-process rights because class members "will not be bound by [any] judgment" in its favor (WLF Br. at p. 28) presumes that the only "constitutionally adequate form of notice" is direct notice—which is not the law. (*See* Reply Br. at pp. 23-25 [discussing federal cases]; *id.* at 26-28 [discussing California cases]. *See generally Hypertouch Inc. v. Superior Court* (2005) 128 Cal.App.4th 1527, 1539 (holding that actual notice is not "necessitated by due process, conflicts with applicable rules of court, and undermines the purpose of class actions."].) Notably, WLF does not cite a single circumstance where a class action defendant was successfully sued by a class member alleging inadequate notice. This is not surprising, because "few such attacks are successful." (6 *Newberg on Class Actions* (5th ed. June 2018) ["*Newberg*"] § 18:43 at p. 5. *See also id.* at p. 6 [noting that "courts in nearly every circuit have rejected collateral attacks on notice in class actions and very few such attacks have proven successful enough to remove the class member from the binding effect of the class suit."] [footnotes omitted].)

In short, WLF's contention that "[c]lass certification of an unidentifiable class places a class defendant in an untenable

position" (WLF Br. at p. 28) is based on a trifecta of incorrect premises: (1) that the only form of notice in this case will be via publication; (2) that such notice is inherently unconstitutional; and (3) that as a result, no class members will be legally bound by a judgment in this case, leaving Rite Aid vulnerable to collateral attacks by aggrieved class members. None of these premises is even remotely true.

## IV. WLF's Attack on *Cy Pres* is Misplaced and Misguided

WLF's third straw man is that this case will inevitably be settled in such a way that no class member will receive any compensation. Instead, argues WLF, the most this lawsuit could possibly yield is a *cy pres* award and a sizeable fee for Plaintiffs' "well-remunerated lawyers." (WLF Br. at p. 23.) From this, WLF concludes that the lower court's decision *must* be correct because "the possible availability of *cy pres* awards cannot compensate for Noel's failure to demonstrate the existence of an ascertainable class." (*Id.* at p. 24.) These arguments falter at each step.

First, WLF presumes, wrongly, that absent class members will "get nothing" in the form of direct relief. (*Id.* at p. 24.) This argument ignores that this lawsuit may yield direct benefits to absent class members who are identified through post-certification discovery. Moreover, class members who can *self*-identify based on the class definition may ultimately claim a portion of the recovery based on their own proof of purchase or self-identifying affidavit, as often occurs in consumer class actions. (*See* NACA/NCLC Br. at pp.

22-24.)

Second, WLF overlooks two key legal protections for class members. The class representatives and counsel are subject to "strict fiduciary responsibilities" to act "in the best interests of all unnamed class members." (*Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 289 [citations omitted].). Moreover, a court must scrutinize any settlement, including attorneys' fees, to determine if it is "fair, adequate, and reasonable" to absent class members. (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 93 [citation omitted]. *See also* Cal. Rules of Ct. 3.769.) "The purpose of [this fairness] requirement is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." (*Luckey, supra*, 228 Cal.App.4th at p. 93 [internal quotations and citation omitted].)

Third, WLF ignores that California has long recognized the use of *cy pres*, also called "fluid recovery," as a valid way of distributing class action proceeds in cases where unnamed class members cannot be identified with reasonable efforts. (*See Levi Strauss, supra*, 41 Cal.3d at p. 472.) *Cy pres* awards benefit class members by putting the proceeds of a class action to their "next best use." (*Id.* at p. 472.) In the wake of *Levi Strauss*, the California Legislature "authorized employment of a fluid recovery remedy in class actions by the 1993 enactment of what is now Code of Civil Procedure section 384." (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116,

129 [citations omitted]). Section 384 provides, *inter alia*, that

> [i]t is the policy of the State of California to ensure that the unpaid cash residue and unclaimed or abandoned funds in class action litigation are distributed, to the fullest extent possible, in a manner designed either to further the purposes of the underlying class action or causes of action, or to promote justice for all Californians." (Cal. Code Civ. Proc. 384.)

In enacting this provision, the Legislature declared that "the use of funds for these purposes is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes." (*Id.* at [a].)

There is nothing in Section 384 to suggest that a *cy-pres* award would be inconsistent with the policies of this State. If anything, Section 384's statement of legislative purpose suggests the opposite. (*See id. See also In re Vitamin Cases* (2003) 107 Cal.App.4th 820, 832 [approving as consistent with Section 384 class action settlement that did not allow class members to make individual claims, instead awarding entire settlement to charitable and non-profit organizations].)

Fourth, WLF's contention that a *cy-pres* award cannot "be justified as a means of disgorging a defendant's ill-gotten gains" (WLF Br. at p. 24) is based on yet another false premise: that, because a *cy-pres* remedy does not *directly* benefit the class, the only justification for a *cy-pres* award is to deter wrongdoing. This premise is false because *cy-pres* awards *do* benefit class members,

albeit indirectly. (*See, e.g., Levi Strauss, supra*, 41 Cal.3d at p. 472. *See also Klier v. Elf Atochem N. Am., Inc.* (5th Cir. 2011) 658 F.3d 468, 475 ["A *cy pres* distribution puts settlement funds to their next-best use by providing an indirect benefit to the class].)

The fact that *cy-pres* distributions *also* have a deterrent effect on wrongdoers does not "alter the substantive law." (WLF Br. at p. 25.) To the contrary, class actions are widely recognized as a vehicle for deterrence of wrongdoing. (*See Vasquez, supra*, 4 Cal.3d at p. 808 [noting that "[a] class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices..."]. *Accord Newberg, supra*, § 1:8 ("In addition to their compensatory function, class actions deter misconduct by harnessing private attorneys general to assist in the enforcement of important public policies.)[2]

## V. WLF's Attack on Federal Case Law Lacks Merit

Finally, WLF errs in challenging the federal case law on ascertainability cited by Plaintiffs. WLF first argues that Plaintiffs' reliance on federal authority "compares apples to oranges" because Rule 23, unlike California's class-action law, does not "contain an ascertainability requirement." (WLF Br. at 20.) This is just wrong.

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[2] WLF challenges the deterrent value of this lawsuit by arguing that Rite Aid no longer sells the Ready Set Pool. (*See* WLF Br. at p. 15.) Even if true, this argument ignores that lawsuits like this one deter defendants like Rite Aid from committing fraud with regard to *other* consumer products. Whether or not the specific product at issue is still on the market is irrelevant.

*Neither* Rule 23 nor the California class action rules contain an express "ascertainability" requirement. (See Cal. Code Civ. Pro. § 382; Geoffrey C. Shaw, *Class Ascertainability* (2015) 124 Yale L. J. 2354, 2357-2358 [noting that "'implied requirement of ascertainability'...does not appear in the text of Rule 23 and is 'judicially created'"] [footnotes omitted].) Rather, under both federal and California law, ascertainability is a judge-made requirement.[3]

WLF also tries to defuse the federal ascertainability cases by arguing that they leave room for considering identifiability of absent class members within the context of federal Rule 23's "manageability" requirement." (*See* WLF Br. at p. 21.)

This argument ignores that "all the federal cases cited by Plaintiffs *reject* the principal at the core of the lower court's ruling here: that ascertainability requires identifiability." (*See* Opening Br. at p. 43.) These cases, moreover, emphasize that "refusing to certify on manageability grounds alone should be the last resort," even in

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[3] California's ascertainability requirement is rooted in early cases requiring a "'community of interest' in the questions of law and fact involved as affecting the parties to be represented.'" (*Weaver v. Pasadena Tournament of Roses* (1948) 32 Cal.2d 833, 837. *See also Daar, supra*, 67 Cal.2d at p. 705 [citing early ascertainability cases]; Allen Goldhammer, *The Consumer Class Action in California* (1970) 45 L.A. Bar Bull. 235 [same] [cited in *Vasquez, supra*, 4 Cal.3d at p. 808].) This Court later separated ascertainability from the community-of-interest requirement, holding that, "[a]s to the necessity of an ascertainable class, the right of each individual to recover may not be based on a separate set of facts applicable only to him." (*Vasquez, supra*, 4 Cal.3d at p. 809. *See also Daar, supra*, 67 Cal.2d at p. 704 [discussing community-of-interest and ascertainability as distinct requirements].)

cases presenting "unusually difficult manageability problems." (*Mullins v. Direct Digital, LLC* (7th Cir. 2015) 795 F.3d 654, 664; *see also Briseno v. ConAgra Foods, Inc.* (9th Cir. 2017) 844 F.3d 1121, 1128 [holding that "requiring class proponents to satisfy an administrative feasibility prerequisite 'conflicts with the well-settled presumption that courts should not refuse to certify a class merely on the basis of manageability concerns.'"] [citation omitted].)

Both of these decisions emphasize that a "heightened ascertainability approach"—i.e., one that requires identifiability as a condition of class certification—"overlooks the reality that without certification, putative class members would not recover anything at all." (*Mullins, supra*, 795 F.3d at p. 666. *See also Briseno, supra*, 844 F.3d at p. 1129.) As *Briseno* put it, "[p]ractically speaking, a separate administrative feasibility requirement would protect a purely theoretical interest of absent class members at the expense of any possible recovery for all class members—in precisely those cases that depend most on the class action mechanism." This result, the Court concluded, "would undermine the very purpose of Rule 23(b)(3)—vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." (*Id.*)

That observation cuts to the heart of this case. If the lower court's ascertainability ruling is upheld, consumer class actions would be rendered uncertifiable in precisely those cases where

consumers need them most. Nothing in WLF's brief provides any reason to abandon this Court's prior rulings and adopt this draconian approach. Its arguments should be rejected.

## CONCLUSION

For the foregoing reasons, the lower court's ruling should be reversed.

Dated: November 9, 2018

Respectfully submitted,

By: _____

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## CERTIFICATE OF COMPLIANCE

As required by California Rules of Court, rule 8.520(c)(1), I certify that, according to the word-count feature in Microsoft Word, this "Plaintiffs' Consolidated Answer Brief In Response To Amici Briefs Filed In Support Of Thrifty Payless Inc. (dba 'Rite Aid')" contains 2,842 words, including footnotes, but excluding any content identified in rule 8.520(c)(3).

Dated: November 9, 2018

By: _____
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## PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 535 Mission Street, 14th Floor, San Francisco, California 94105.

On November 9, 2018, I served true copies of the following document(s) described as:

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on the interested parties in this action as follows:

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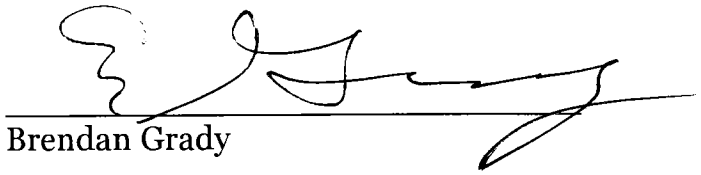
I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on November 9, 2018, at San Francisco, California.



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