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IN THE
SUPREME COURT OF CALIFORNIA

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

v.

THRIFTY PAYLESS, INC.,
Defendant/Appellee.

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

BRIEF OF *AMICI CURIAE* NATIONAL CONSUMER LAW CENTER AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Amici curiae have no parent corporations, and because they issue no stock, there are no publicly-held corporations that own 10% or more of their stock.

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I. INTERESTS OF AMICI CURIAE

The National Consumer Law Center ("NCLC") is a non-profit research and advocacy organization that focuses on the legal needs of low-income, financially distressed, and elderly consumers. Founded at Boston College Law School in 1969, NCLC is a 501(c)(3) and legal aid organization that employs many attorneys and advocates with twenty or more years of specialized consumer law expertise. NCLC has been a leading source of legal and public policy expertise on consumer issues for Congress, state legislatures, agencies, courts, consumer advocates, journalists, and social service providers for nearly fifty years. NCLC works to defend the rights of consumers, concentrating on advocating for fairness in financial services, wealth building and financial health, a stop to predatory lending and consumer fraud, and protection of basic energy and utility services for low income families. NCLC devotes special attention to vulnerable populations including immigrants, elders, homeowners, former welfare recipients, victims of domestic violence, military personnel, and others, on issues from access to justice, auto fraud, bankruptcy, credit cards, debt collection abuse, predatory lending, mortgage and payday lending, refund anticipation loans, Social Security, and more.

NCLC is committed to preserving and protecting access to justice and established its own litigation practice in 1999. Since then, the organization has brought or co-counseled over 130 consumer cases. NCLC publishes a twenty-volume Consumer Credit and Sales Legal Practices Series including, *inter alia*, Consumer Class Actions (9th Ed. 2016). The organization also has sponsored an annual Consumer Rights Litigation Conference for 27 years and an annual Class Action Symposium for 18 years.

The National Association of Consumer Advocates ("NACA") is a nationwide, nonprofit corporation with over 1,500 members who are

private and public sector attorneys, legal services attorneys, law professors, law students and non-attorney consumer advocates, whose practices or interests primarily involve the protection and representation of consumers. Its mission is to promote justice for all consumers. NACA is dedicated to the furtherance of ethical and professional representation of consumers. Its Standards and Guidelines for Litigating and Settling Consumer Class Actions may be found at 176 F.R.D. 375 (1997), and www.naca.net at the bottom of the main page. About 150 of NACA's members are California consumer attorneys or non-attorney advocates who regularly represent and advocate for consumers residing in California. Included within these cases are numerous cases brought under California's Unfair Competition Law, Business and Professions Code §§ 17200 et seq. ("UCL") and Consumer Legal Remedies Act, Civil Code §§ 1750 et seq. ("CLRA") against entities which market and sell consumer products like those at issue in this case.

NACA frequently participates as an amicus in cases before this Court in cases raising class action issues (*see e.g.*, *In re Tobacco II Cases* (2009) 46 Cal.4th 298) and issues involving California consumer protection statutes. (*See e.g. De La Torre v. CashCall, Inc.* (2018) 5 Cal.4th 966.)

As organizations that represent, and consist of attorneys who represent, consumers throughout California and the United States, *Amici* are vitally interested in the resolution of the issues in this appeal and, based upon their significant experience litigating, advising, and monitoring class action litigation in California state courts, and elsewhere, *Amici* believe they can be of assistance in illuminating the implications on day-to-day class action practice of the policy issues before the Court.

II. INTRODUCTION

Amici National Consumer Law Center ("NCLC") and National Association of Consumer Attorneys ("NACA") (collectively "*Amici*") respectfully file this Brief in support of Petitioner James A. Noel. *Amici*

write, in particular, to address the practical implications of the ruling from the court below, and to discuss how appropriate class-wide adjudication of disputes has long been accomplished without the evidentiary pre-requisite to class certification that the court below imposed with respect to ascertainability.

Addressed at length in Petitioner's opening and reply papers is the fact that the court below conflated two distinct concepts under California law: ascertainability, which requires that a class definition be sufficiently objective such that an individual may determine for herself whether she is a member of the proposed class, and the separate question of how best to accomplish class notice in light of the information that may be available concerning the identification of the class members. The distinction between these two concepts is not the focus of this brief, as it already has been extensively addressed.

Instead, this brief addresses practical considerations regarding the ruling of the court below. As this Court has long recognized, the class action device provides an essential tool for redressing many types of grievances, including grievances by consumers. The evidentiary requirement articulated by the court below is not only unnecessary to ensure that class members' rights are adequately protected, but, as a practical matter if it were to become the law of this State, would prevent California consumers from obtaining relief, prevent courts from ensuring a level, competitive playing field in the State, and allow bad conduct to continue undeterred in a variety of contexts where the class action device has, for decades, been essential to enforcing the State's unfair competition and consumer protection laws. As discussed herein, the California Rules of Court already provide courts with the appropriate tools to fashion class notice and manage the treatment of class member benefits, at the appropriate stage of the litigation, based on the particular information

available and other particular case circumstances. The evidentiary prerequisite imposed by the Court below disregards the tools that are already in place and that have been used flexibly and responsibly by California courts in class actions for decades.

III. ARGUMENT

The evidentiary prerequisite imposed by the court below with respect to the class certification requirement of ascertainability—i.e., that proponents of class actions must present evidence of a means to identify putative class members before a class is certified—is wholly absent from both California's procedural rules and this Court's precedent. Rightfully so. Litigants and courts have ample opportunities for discovery and presentation of evidence, as may be appropriate under the particular circumstances of the case, regarding how best to effectuate class notice and how to distribute benefits to class members, if applicable, *after* a class is certified.

In some cases, the defendant will have sufficient records to identify class members without the need for class members to self-identify themselves. In other cases, class members may need to self-identify (e.g., through a claims process). In some of those cases, the defendant will have records that can be used to verify membership, while in others the defendant may lack records or complete records to verify every individual's membership in the class. In all such scenarios, class certification may very well be appropriate and represent the only practical means to address the conduct that is at issue. In all such scenarios, the court, together with the parties, can craft an appropriate class notice program and, where applicable, an appropriate mechanism for distributing class benefits, based on the particular circumstances of the case and the records and other information available. Indeed, for years courts routinely have done this, after class certification.

The practical effect of the procedural requirement imposed by the court below is to needlessly impair the ability of consumers to pursue legitimate claims on a class basis, thereby harming California consumers and business that play fair and are thereby at a competitive disadvantage vis-à-vis business that engage in unfair competition and practices.

A. California Public Policy Favors a Flexible Approach and Disfavors Procedural Barriers to Class Certification.

It is the express public policy of this State to encourage the fullest and most flexible use of the class action device. (*Sav-On Drugstores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340, quoting *Richmond v. Dart Industries, Inc.* (1981) 34 Cal.4th 462, 473 ("This state has a public policy which encourages the use of the class action device."); *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 ("Courts long have acknowledged the importance of class actions as a means to prevent a failure of justice in our judicial system.") (citations omitted); *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1020 ("[C]lass actions have been statutorily embraced by the Legislature whenever the question in a case 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.") (citation and quotation marks omitted)).

This public policy applies to consumer protection litigation, among various other areas of the law. (*La Sala v. American Sav. & L. Assn.* (1971) 5 Cal.3d 864, 877; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 807-809; *Brinker, supra*, 53 Cal.4th at 1021; *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312; *Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal.App.5th 1200, 1211.) This Court's opinions have consistently reaffirmed and reflected this principle. For example, this Court has noted class actions' many beneficial "salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices,

aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims." (*Vasquez, supra*, 4 Cal.3d at 808; *see also Linder, supra*, 23 Cal.4th at 434 (same)).

"The right to seek classwide redress is more than a mere procedural device in California." (*Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148, 161 n.3 (affixing "procedural" label on class action device understates its importance.)) In California, "[t]he class action is a product of the court of equity—codified in section 382 of the Code of Civil Procedure. It rests on considerations of necessity and convenience, adopted to prevent a failure of justice." (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 458, citing *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695 at 703-04.) Class actions are "an essential tool for the protection of consumers against exploitative business practices." (*State v. Levi Strauss & Co.* (1986) 41 Cal. 3d 460, 471.) To that end, the procedural devices for managing class actions, codified by the California Legislature, should be employed prudently and flexibly. (*So. Cal. Edison Co. v. Superior Court* (1972) 7 Cal.3d 832, 842 ("vital" that procedural hurdles to class certification be sufficiently flexible to avoid an unnecessary "chilling" effect on such litigation).) Along those same lines, in case of doubt about the propriety of class treatment, this Court has instructed that "it is preferable to defer the decision to deny class certification until . . . such future time as the trial court has the most complete information at its disposal." (*Richmond, supra*, 29 Cal.3d at 477.)

B. The Evidentiary Prerequisite Imposed by the Court Below Runs Counter to California Public Policy and Would Have the Practical Effect of Inhibiting the Protection and Enforcement of Important Rights.

The trial court in this litigation denied Noel's motion for class certification because it found that "Noel had presented 'no evidence' to

establish 'what method or methods will be utilized to identify the class members, what records are available, (either from Defendant, the manufacturer, or other entities such as banks or credit institutions), how those records would be obtained, what those records will show, and how burdensome their production would be.'" (*Noel v. Thrifty Payless, Inc.* (Ct. App. 2017) 17 Cal. App. 5th 1315, 1323). The First District affirmed, explaining that in its view, "allowing [trial courts] to inquire into the expected manner of notice, including whether class members can be identified for personal notice" is the more "pragmatic and flexible" approach to the ascertainability inquiry. (*Id.*)

That approach disregarded, among other things, this Court's precedent distinguishing between two separate concepts: ascertainability, and consideration of what evidence is available for purposes of crafting an appropriate class notice program under the circumstances of the particular case at hand. (*See Daar, supra*, 67 Cal.2d at 706.) This distinction is discussed at length in Noel's opening and reply briefs, and so *Amici* will not belabor that point herein.

Amici do wish to address that, as a practical matter, the approach taken by the court below, if it were adopted as the law in this State, would needlessly prevent courts from certifying viable class actions which, consistent with California policy and the state's procedural rules and precedent, provide the best, and in many cases the only, means for members of the public to secure and enforce important legal rights.

While characterized by the court below as "pragmatic and flexible," the approach taken below would appear to actually impose a rigid and inflexible rule or prerequisite, requiring a putative class representative to satisfy an evidentiary standard that is neither necessary to ensure that the claims at issue are appropriate for class treatment, nor consistent with the California public policy discussed above. Such an evidentiary prerequisite

to class certification would have the practical effect, in many cases, of preventing consumers and other harmed individuals from holding accountable, *inter alia*, manufacturers of defective products and companies who widely disseminate false advertisements in order to induce sales throughout the State.

The evidentiary precondition that the court below imposed, if it were to be the law of this State, would make it much more difficult for consumers and others to seek redress for numerous types of serious harms and shield bad actors from liability for their misconduct. Indeed, the vast majority of consumer products are often sold through non-manufacturing retailers that may or may not keep track of individual purchasers. Retailers that do track such information may keep incomplete records, and in cases that involve products distributed through multiple sellers (true about most of the products we buy), there may be significant variations in what records, if any, are maintained. Consumers cannot be expected to retain records of every purchase that they make, let alone to retain those records in perpetuity. (*See Levi Strauss*, *supra*, 41 Cal. 3d at 472 ("[C]onsumers are not likely to retain records of small purchases for long periods of time.")) To condition the ability to pursue classwide claims under California's consumer protection laws on the merits, upon whether or not parties can identify records, prior to class certification, showing which consumers made specific purchases, would seriously thwart the effectiveness of the class action device and directly undermine the public policy interests such device was intended to advance and has advanced for decades.

This is not a speculative concern. Federal courts have experimented with similar prerequisites to class certification under Federal Rule of Civil Procedure 23, with exactly this result. For example, in Multi-District proceedings in the District of New Jersey, *In re Tropicana Orange Juice Mktg. & Sales Practices Litig.*, a District Court recently denied class

certification in a case involving allegations that Tropicana had mislabeled Tropicana orange juice in violation of, *inter alia*, California consumer protection laws. ((D.N.J. Jan. 22, 2018) (No. 2:11-07382), 2018 WL 497071.) Tropicana, of course, did not sell orange juice directly to consumers. Instead, the product was distributed through numerous retailers. In an effort to satisfy the Third Circuit's unique, heightened ascertainability standard, which "obligates Plaintiffs to propose a method of ascertaining the class with evidentiary support that the method will be successful," the plaintiffs in *Tropicana* proposed to identify purchasers of Tropicana orange juice by cross-referencing identifying information submitted by putative class members against each retailer's database of sales records and "loyalty" card information or other personally-identifying information. (*Id.*, at *12.) The evidence submitted with the class certification motion included expert testimony, and details about the contents of some, but not all, of the individual retailers' customer databases.

The district court rejected the proposed methodology, finding that the plaintiffs had failed to show that each retailer's database would return reliable information about individual Tropicana orange juice purchasers for many reasons, including that retailers may have outdated contact information for some customers, and because the plaintiffs had not submitted evidence regarding the contents of *every* retailer's database. (*Id.* at *10-12.) The district court reached this conclusion notwithstanding the various mechanisms that would have been available to effectuate class notice and to distribute benefits to class members in a manageable way. *Tropicana* illustrates that imposing this sort of evidentiary prerequisite at the class certification can easily result, as a practical matter, in a free pass for misconduct affecting large numbers of consumers, as would occur here if the ruling below were to stand.

Such an approach and outcome would directly contradict California public policy and is completely avoidable. California courts have, for decades, successfully managed class action litigation with no evidentiary prerequisite such as that imposed in *Tropicana* and by the court below in this litigation. In doing so, California courts have simply applied the procedural rules codified by the California Legislature. As discussed further below, the issues identified by the court below in this litigation regarding notice and distribution of class remedies routinely are addressed later in the litigation, after the class is certified, through a variety of flexible tools that can be applied based on the particular circumstances of the case.

The fundamental purposes of class action litigation and California's consumer protection and unfair competition statutes—i.e., deterring unlawful conduct that harms large groups of people, maintaining a level playing field for businesses that abide by the law, providing an avenue of relief for harmed individuals and consumers, and "preventing a failure of justice" in cases that may not be economically practical to pursue on an individual basis—are achievable under a variety of scenarios regarding the available business records that may be relevant to identifying class members. (*See generally Linder*, *supra*, 23 Cal. 4th at 434; *Aguirre v. Amscan Holdings, Inc.* (2015) 234 Cal.App.4th 1290, 1301–1306.)

C. The Evidentiary Prerequisite Imposed by the Court Below Ignores the Existing Procedural Framework Set Forth in California's Rules of Court.

1. California's Rules Already Provide for the Presentation of Class Identification Evidence When and To the Extent Such Evidence is Necessary and Available

California courts have appropriate case management tools at their disposal to ensure that they receive pertinent evidence, if and when they need it. With respect to class notice, California's procedural rules

expressly provide that a determination of how to issue notice to a certified class may occur post certification—i.e., "[i]f the class is certified." (Cal. Rule of Court 3.766.) California's procedural rules also specifically address the scenario where there are insufficient records to identify each person in the class so as to allow for direct notice to the class. Rule 3.766(f) states that: "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-for example, publication in a newspaper or magazine; broadcasting on television, radio, or the Internet; or posting or distribution through a trade or professional association, union, or public interest group.") (emphasis added). The evidentiary prerequisite imposed by the court below runs afoul of these rules and the timing and flexible approach the rules contemplate.

As the language of the rules contemplates, courts commonly defer the determination of appropriate class notice, under Rule 3.766, until *after* a class is certified. *Fenderson v. Diaz* (Cal. Super., filed Oct. 15, 2007) (No. RIC483005), provides a useful illustration of these procedural rules in practice. *Fenderson* involved allegations that owners of a diet program website, "kimkins.com" had falsely advertised the program and defrauded subscribers. The plaintiffs sought to represent approximately 40,000 individuals who had purchased a kimkins.com subscription between May, 2007 and October 13, 2007. Identifiability of class members was not addressed in connection with the plaintiffs' class certification moving papers, which simply explained that "[t]he class is defined by objective characteristics and common transactional facts, which will make the identification of class members possible when that identification becomes necessary." (Request for Judicial Notice of *Amici Curiae* NCLC and

NACA ("RJN") Ex. 1, Mot. for Cert., *Fenderson* (Cal. Super. Apr. 10, 2009) 2009 WL 8150033.))

The Riverside County Superior Court certified the class in *Fenderson* on May 20, 2009. Notice was addressed thereafter. In late 2009, following adjustments to the plaintiffs' proposed notice plan, the Court ordered that class notice be disseminated by publication on certain webpages including kimkins.com. (Cert. Order, *Fenderson* (Cal. Super. May 20, 2009) 2009 WL 8153694; RJN Ex. 2, Statement re Notice, *Fenderson* (Cal. Super. Nov. 24, 2009) 2009 WL 8150021; *see also* Statement of Decision, *Fenderson* (Cal. Super. Dec. 16, 2010) 2010 WL 6761080.) [1]

Another example is *Martinez v Jatco, Inc.*, where the Alameda County Superior Court, as part of its order granting class certification, scheduled a case management conference for the parties to "address and make specific proposals regarding (1) whether it would be prudent or possible to identify the class members now, (2) the content and distribution of class notice, (3) payment of the cost of class notice, and (4) when class notice should be sent." (*Martinez v Jatco, Inc.* (Cal. Super. July 07, 2010) (No. 08-397316) 2010 WL 5213605 (citing Rule 3.766).) Throughout the *Jatco* litigation (which ultimately settled after trial), the Court addressed class notice issues through case management conferences.

The approaches taken by the courts in *Fenderson* and *Jatco*, addressing appropriate notice to the class, and the consideration of evidence

[1]Following a bench trial in 2010, the class prevailed on claims under Business and Professions Code Sections 17200 and 17500. The court awarded the class members restitution in the amount of $1,824,210.39 (the total amount paid for kimkins.com subscriptions), along with $500,000 in punitive damages, and entered a permanent injunction requiring the defendants to post a warning on their website stating that their advertising had been adjudicated fraudulent and deceptive, among other things. (*Id.*)

pertinent to that issue, *after* class certification, are consistent with California's procedural rules and the State's flexible and prudential approach to managing class actions. *Fenderson* further shows that even where evidence may exist—subscribers to a diet website likely provided their names and contact information to obtain their subscriptions—it may end up being irrelevant to the notice program if other factors favor publication notice over direct communications.

2. Courts Have Options for Fashioning Appropriate Class Notice, Including Where Defendant's Records May Not Permit Direct Notice.

If a class is certified, "the court may require either party to notify the class of the action." (Rule of Court 3.766(a).) Rule of Court 3.766(e)&(f) governs the manner of providing notice and the considerations that courts are to consider in determining same. As noted above, the Rules expressly allow for publication notice, as opposed to direct notice, under certain circumstances, one of which is where "it appears that all members of the class cannot be notified personally." As the Courts of Appeals have observed, Rule 3.766 "leaves substantial room for the 'creativity' often needed in the design of an effective means of notifying class members." (*Hypertouch, Inc. v. Superior Court* (2005) 128 Cal. App. 4th 1527, 1551.) Accordingly, California courts have routinely certified classes, and directed appropriate notice, where there are insufficient records to affirmatively identify the individual members, or all individual members, of the class.

For example, in *Medrazo v. Honda of North Hollywood* (filed June 30, 2006) (No. BC354744), the plaintiffs filed a putative class action against a motorcycle dealership that allegedly failed to disclose "destination," "assembly" and other fees on "hanger tags" on motorcycles in its showroom, in violation of the California Vehicle code and consumer protection statutes. The plaintiffs sought certification of a class of "[a]ll

purchasers of new motorcycles who were charged for "destination", "assembly" or other DEALER added "accessories" that were not disclosed on a hanger tag since August 1, 2002." (RJN Ex. 3, Mot. for Cert., *Medrazo*, *supra* (Cal. Super. July 5, 2007) 2007 WL 5097819.)

Similar to the trial court in the present litigation, the Los Angeles Superior Court in *Medrazo* denied class certification on ascertainability grounds, finding that the evidentiary record before it did not indicate which motorcycles had hanger tags attached to them such that class members who bought motorcycles without the required hanger tags could be ascertained from the evidence presented with the plaintiffs' class certification motion. (*See Medrazo v. Honda of North Hollywood* (2008) 166 Cal. App. 4th 89, 95.)

The Second District Court of Appeal reversed. (*See id.*, at 101.) In reversing the trial court's order, the Court of Appeal explained that "[b]ecause 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. Medrazo's inability to identify the individual class members at this time is irrelevant to class certification." (*Id.* at 101.) The Court of Appeal suggested a simple approach: send notice to *all* of the defendant's customers; those customers who had purchased motorcycles without hanger tags would then have enough information to determine whether they were affected by the litigation. (*Id.*) Following remand, the class was certified. (Order re Cert., *Medrazo* (Cal. Super. Dec. 12, 2008) 2008 WL 8962890.)

Another example is a class action case recently tried to judgment in Santa Clara County Superior Court, *Plata v City of San Jose* (Cal. Super., filed Jan. 10, 2014) (No. 14-cv-258879). In *Plata*, plaintiffs alleged that San Jose's billing practices for water services violated a ballot measure known as "Proposition 218" which, in 1997, amended California

Constitution Article XIII D. Under Proposition 218, a municipality may not charge more for certain services, such as water services, than the municipality requires to provide the service, and must adhere to certain restrictions on the use of revenues from those services. The plaintiffs alleged that the City had been charging municipal water customers more than the cost of providing water services since July 1, 1997, and that it had improperly transferred excess charges amounting to over $30 million from the City's Municipal Water Fund to its General Fund, in violation of Proposition 218. Plaintiffs sought refunds of overcharges for San Jose Municipal Water customers, or alternatively, an injunction requiring that the allegedly excess revenues be transferred from the City's General Fund to the Municipal Water Fund. (RJN Ex. 4, Compl. at *9, *Plata* (Cal. Super. Jan. 10, 2014.))

At the class certification stage, the court rejected the defendant's demand to impose a records-based standard for ascertainability. On April 24, 2015, the *Plata* plaintiffs sought certification of the following class: "All past and current customers of the San Jose Municipal Water System who have paid for water service from the San Jose Municipal Water System since January 1, 1997." (Order re Cert., *Plata* (Cal. Super. June 19, 2015) 2015 WL 12732303, at *1; *see also* RJN Ex. 5, Mot. for Cert., *Plata* (Cal. Super. Apr. 24, 2015) 2015 WL 12732872.) In arguing that the class was ascertainable although they had submitted no evidence of a means to identify class members with their motion, the plaintiffs explained that "individual members will be able to ascertain the class," and that on a class certification motion "[i]t is not necessary to identify individual class members themselves." (*Id.*) The City opposed certification, arguing that the plaintiffs had failed to clear an evidentiary hurdle: "Plaintiffs have failed to meet their burden of providing substantial evidence that the proposed class is ascertainable. In fact, they have proffered absolutely no

evidence on this point." (RJN Ex. 6, Opp. to Mot. for Cert., *Plata* (Cal Super. May 15, 2015) 2015 WL 12732869.) On June 19, 2015 the Court granted the plaintiffs' motion, holding that "[t]he class definition simply needs to be 'sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description.' [citation] Plaintiffs' proposed class meets that requirement. Accordingly, the Court finds that there is an ascertainable class." (Order re Cert., *Plata*, *supra*, at *2, quoting *Aguirre*, *supra* 234 Cal.App.4th at 1301.)

The trial court later addressed class notice under Rule 3.766 and evaluated evidence regarding any potential means of directly contacting class members, including that the City served approximately 24,800 water customers annually, with a nine percent yearly turnover rate, and did not maintain forwarding addresses for former customers or keep track of their whereabouts. (Order re Notice at *2, *Plata* (Cal. Super. Oct. 20, 2016) 2016 WL 6567853.) Applying the flexible and practical approach to class action notice procedures reflected in the California Rules of Court and endorsed by this Court's precedent, the trial court ordered direct mailed notice to the City's current customers, and publication notice to reach former customers. (*Id.*, at *4.)

The ability of courts and litigants to fashion sensible and creative solutions to the challenges of providing classwide notice is shown throughout the case law, including in the settlement context (where the Rule 3.766 factors also apply). (*See, e.g.*, *Flannery v. McCormick & Schmick's Seafood Rests., Inc.* (2015) (No. B257450) 2015 WL 1937444, at *5 (in case about allegedly false statements on menus at a restaurant chain, notice of settlement was posted at host/hostess desks of restaurant for 90 days, and on tent cards at the restaurant tables); *Anaya v. Quicktrim, LLC*, (2015) (No. D067432) 2015 WL 4040421, at *4 (in case about alleged misleading labeling and packaging on diet products, notice was published

through press releases, print, television, social media, and e-mail advertisements—the same avenues the defendant used to market its products in the first instance).)

As the above examples illustrate, while evidence regarding the identification of class members (which can be presented post-class certification) is pertinent to determining what form(s) and manner(s) of class notice make the most sense under the particular circumstances of a class case, even where the evidence reflects the lack of records or complete records to identify and/or contact each class member affirmatively, that does not impact the ability to provide appropriate class notice—an objective class definition and notice program that is appropriately tailored to the situation and information available (which may or may not be able to include elements of direct notice) suffices under applicable rules and due process standards.

3. Courts Likewise Have Flexible Solutions for Managing Treatment of Class Relief, Including Where Defendant's Records May Be Incomplete or Missing.

Just as courts are empowered to employ creativity and consider post-certification evidence to fashion appropriate notice programs, courts "have the full range of alternatives at their disposal" to administer class relief. (*Levi Strauss*, *supra*, 41 Cal. 3d at 479.)

In many cases, evidence that was not available at class certification or at the notice stage will have become available by the time judgment is entered, enabling, in whole or in part, direct notice and distribution of relief to class members covered by the judgment. Thus, for example, in *Medrazo*, discussed above, the Los Angeles Superior Court entered judgment on April 19, 2016, ordering that $2,590.813.82 be paid in restitution to class members. (*See* RJN Ex. 7, Stipulation and Order re Dist. Plan, *Medrazo*, *supra* (June 27, 2016).) By that stage of the case, individual class members

had, in fact, been identified. (*See id.* & Ex. B.) In the end, distribution was not even a contested issue; the parties stipulated to (and the Court approved) a plan of distribution, assigning the task of calculating appropriate awards and contacting class members to a professional administrator previously appointed by the Court. (*Id.*, at 3.)

Indeed, in many viable consumer protection class actions, only the class members themselves will be certain of their own identities, even after final judgment. If the class definition is objective and thus sufficient to allow a member of the class to self-identify, then class members can come forward on their own to claim their share of any award. Class members may possess evidence sufficient to verify their claims, such as proof of purchase in the form of a receipt, bank statement, credit card statement, product packaging, or other document appropriate for consideration under the circumstances of a given case. Or, they may not. In many cases, verification can be accomplished, instead, by requiring class members to complete an attestation or claim form, which can be required under penalty of perjury if the court deems it necessary to safeguard against potential fraudulent or erroneous claims. (*See generally Levi Strauss*, *supra*, 41 Cal. 3d at 473 (recognizing that notarization or other sworn verification could operate to safeguard against fraudulent claims in settlement context).)

Court-ordered plans of distribution typically incorporate precautions against mistakes and fraud, whether by requiring some indicia of membership in the class, empowering professional claims administrators to exercise their judgment and discretion to challenge or deny suspect claims, or through some other means that make sense under the circumstances of a particular case. (*See, e.g. Bell v. Farmers Ins. Exch.* (2004) 115 Cal. App. 4th 715, 762, as modified (Mar. 9, 2004) (identifying precautions taken by a lower court).)

Rule 3.766 and the case management tools available to the courts allow the parties, and the courts, to avoid production and analysis of potentially voluminous business records, until and unless those expenses actually, practically, required. [2]

Plata, *Fenderson*, *Medrazo*, and countless other class action cases successfully litigated to conclusion in California courts without any need for evidence of identifiability at the class certification stage demonstrate that California's existing procedural and prudential rules are appropriately flexible, and they work. By contrast, the inflexible, evidentiary prerequisite imposed by the court below is unnecessary, inconsistent with California public policy, and inconsistent with the pertinent California Rules of Court.

IV. CONCLUSION

The unbalanced and rigid evidentiary prerequisite to class certification imposed by the court below is anomalous and unnecessary in the context of class action litigation. It contravenes firmly established procedural rules and ignores and undermines the strong public policy favoring class actions in consumer protection cases which this Court has repeatedly recognized over the past several decades.

Accordingly, the decision below should be reversed.

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[2] This practical approach also serves to prevent needless waste of resources by parties and the judiciary in case a proposed class is not certified. Courts have widely recognized that "notice" to putative members of a non-certified class is not permitted under California law, rendering any resource-intensive review of evidence to identify a means of contacting class members prior to certification not only unnecessary, but potentially wasteful. (*See Experian Info. Sols., Inc. v. Superior Court* (2006) 138 Cal. App. 4th 122, 132 ([A]fter class certification has been denied by a trial court, court-ordered notifications to former, potential class members that they might have legal claims against a defendant are impermissible."))

Dated: October 2, 2018

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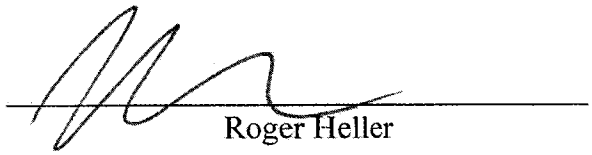
CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.520(c), I certify that this Brief of Amici Curiae National Consumer Law Center and National Association of Consumer Advocates in Support of Plaintiff-Appellant contains 5,739 words, not including the Table of Contents, Table of Authorities, this Certificate, the caption page, signature blocks, or attachments.

Dated: October 2, 2018



Roger Heller

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 275 Battery Street, 29th Floor, San Francisco, California 94111. On October 1, 2018, I served true copies of the following document(s) described as:

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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 October 1, 2018, at San Francisco, California.

Dated: October 2, 2018

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