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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RITA MEDELLIN, Plaintiff and Appellant, v. IKEA US RETAIL LLC, Defendant and Respondent.	D074232 (Super. Ct. No. 37-2017-00003513-CU-NP-CTL)

APPEAL from an order of the Superior Court of San Diego County, Richard E. L. Strauss, Judge. Reversed.

Blood Hurst & O'Reardon, Timothy G. Blood, Paula R. Brown; Stonebarger Law, Gene J. Stonebarger, Richard D. Lambert and Crystal L. Matter for Plaintiff and Appellant.

Robins Kaplan, Michael A. Geibelson and Glenn A. Danas for Defendant and Respondent.

I

INTRODUCTION

This is a long-running putative class action brought against IKEA US Retail LLC[1] (Ikea) on behalf of retail customers who allegedly were asked to provide their ZIP codes for unauthorized purposes during in-store credit card purchase transactions. Rita Medellin, on behalf of herself and a putative class of customers, alleges these requests violated the Song-Beverly Credit Card Act of 1971 (the Act), a consumer protection statute that prohibits businesses from requesting and recording cardholders' personal identification information. (Civ. Code, § 1747.08, subd. (a)(2).) After years of litigation, the trial court denied certification of the claim because Medellin did not supply evidence showing how individual class members may be feasibly identified. Medellin appealed.

While Medellin's appeal was pending, our Supreme Court issued a decision in *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955 (*Noel*), which resolved a split among the Courts of Appeal concerning the appropriate ascertainability standard for class certification purposes. The *Noel* court concluded a class is ascertainable so long as it is defined " 'in terms of objective characteristics and common transactional facts' that make 'the ultimate identification of class members possible when that identification becomes necessary,' " and disapproved a "more exacting" standard requiring an examination into whether the party seeking class certification had supplied evidence showing class

1 Respondent informs us it was incorrectly named in the putative class complaint as "IKEA USA West, Inc." and the correct name is "IKEA US Retail LLC." For ease of reference, we refer to respondent as "Ikea."

members could be identified without unreasonable expense or consumption of time. (*Noel*, at pp. 974, 961.)

In view of the ascertainability standard adopted in the *Noel* decision, we conclude the proposed class in this case is ascertainable because it is defined in objective terms that make eventual identification of class members possible. We further conclude the trial court erred in finding the class was not ascertainable based on its concerns regarding the feasibility of identifying individual class members. Therefore, we reverse.

II

BACKGROUND

A

On February 14, 2011, Medellin filed a putative class action against retail operator Ikea in San Diego County Superior Court. She alleged Ikea violated the Act during 2010–2011 when it had in place a standardized policy of collecting and recording customers' ZIP codes at its cashiered point of sale registers during credit card purchase transactions. She requested civil penalties under the Act and sought to represent "[a]ll persons in California from whom [Ikea] requested and recorded personal identification information in conjunction with a credit card transaction …." Ikea removed the case to federal court under the Class Action Fairness Act of 2005 (28 U.S.C. § 1332(d)(2)).

On May 4, 2012, the federal district court certified a class under rule 23(b)(3) of the Federal Rules of Civil Procedure, defined as follows: "[A]ll persons from whom Ikea requested and recorded a ZIP Code in conjunction with a credit card transaction in California from February 16, 2010 through the date of trial in this action (the 'Class'). [¶]

Excluded from the Class [were] (i) transactions wherein personal information was required for a special purpose incidental but related to the individual credit card transaction, including, but not limited to, information relating to shipping, delivery, servicing, or installation of the purchased merchandise, or for special orders; and (ii) transactions wherein a credit card issued to a business was used."

Ikea moved for decertification of the class on grounds that Medellin had failed to establish predominance or superiority under Federal Rules of Civil Procedure, rule 23(b)(3). Ikea argued individual issues predominated over common questions and a class action was not superior to other available methods of adjudication because Ikea's employees did not uniformly comply with the company's policy of requesting customers' ZIP codes and often input false or random ZIP codes (e.g., 12345) into Ikea's computer software; Ikea's business records did not reflect whether customers used credit cards during their transactions or certain other forms of payment (e.g., signature debit cards) not covered under the Act; and class members could not be ascertained from Ikea's business records because they did not reflect customers' names, addresses, or full payment card numbers.

On February 27, 2013, the court denied, in large part, Ikea's motion for class decertification. It concluded the existence of questions regarding whether a customer was actually asked for a ZIP code or actually used a credit card during a transaction did not preclude a finding of predominance because "only credit card-paying customers from whom a ZIP code was requested [met] the requirements for class membership." Further, it found the benefits of the class action were not outweighed by its complexity, even if

potential class members had to submit additional information to identify themselves as class members at a later stage of the proceeding. However, the court granted decertification, in part, by limiting the class to cover only qualifying transactions prior to February 28, 2011, when Ikea halted its corporate policy of requesting customers' ZIP codes. Further, it limited the class to exclude customers who conducted purchase transactions at Ikea's self-checkout kiosks because the kiosks allowed customers to press a " 'No Thanks' " button when asked to enter a ZIP code.

The case was transferred to a different district judge and proceeded to a bifurcated trial on the issue of liability. After a two-day trial, the court found Medellin had proven liability on her individual claim, but did not establish a "policy of requesting and recording ZIP codes that was uniformly applied or followed." It also found Medellin "failed to prove that an ascertainable class of some number of similarly situated persons exist[ed] who were also subjected to violations of the Act." Therefore, on December 4, 2014, it decertified the class based on Medellin's failure to establish predominance or superiority. The court entered judgment in Medellin's favor on her individual claim only.

Medellin appealed the judgment to the United States Court of Appeals for the Ninth Circuit. During the pendency of the appeal, the United States Supreme Court issued its opinion in *Spokeo, Inc. v. Robins* (2016) 136 S.Ct. 1540, which concluded a plaintiff cannot "allege a bare procedural violation [of a federal statute], divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." (*Id.* at p. 1549.) Based on the *Spokeo* decision, Medellin moved the Ninth Circuit to dismiss the appeal, vacate the judgment, and order the federal district court to remand the matter to

state court. On January 13, 2017, the Ninth Circuit vacated the judgment, ordered the federal district court to dismiss the case without prejudice due to Medellin's lack of Article III standing, and denied Medellin's motion as moot. (*Medellin v. Ikea U.S.A. West, Inc.* (9th Cir., Jan. 13, 2017) 672 F.Appx. 782, 782–783 (*Medellin*).)

B

On January 27, 2017, Medellin filed a putative class action against Ikea in San Diego County Superior Court realleging violations of the Act. After additional discovery, Ikea filed a motion to deny class certification and Medellin filed a cross-motion seeking certification of the following class: "All persons from whom Ikea requested and recorded a ZIP Code in conjunction with an in-store cashiered credit card purchase transaction in California from February 16, 2010 through February 28, 2011 …."

Ikea claimed, as it did in federal court, the putative class was not ascertainable. It argued Ikea's business records did not include information showing: (1) whether any given cashier requested and recorded a customer's bona fide ZIP code or instead input a false or random ZIP code into the computer software; (2) customers' names or contact information; (3) whether any given cashier requested the ZIP code for a special purpose incidental but related to the transaction (e.g., shipping, delivery, service, or installation), and therefore whether the request was permissible under the Act (Civ. Code., § 1747.08, subd. (c)(4)); and (4) whether the card used was a personal credit card (covered by the Act) or a corporate credit card or signature credit card (not covered by the Act). For

similar reasons, it argued Medellin could not establish a well-defined community of interest.

In response, Medellin claimed the class was ascertainable because it was defined based on objective criteria that absent class members could use to identify themselves, despite any deficiencies in Ikea's business records. She contended alleged variations arising from employees' noncompliance with Ikea's ZIP code policy did not undercut ascertainability because the proposed class definition was limited only to customers whose ZIP codes were actually requested and recorded. Further, she argued a well-defined community of interest existed because "potential Class members [could] come forward to receive their portion of the aggregate award" based on the class definition.

On April 13, 2018, the court granted Ikea's motion to deny class certification and denied Medellin's motion for class certification due to lack of ascertainability. The court cited Court of Appeal authority indicating a court must consider the class definition, the size of the class, and the means available for identifying class members when assessing whether a class is ascertainable. It further relied on Court of Appeal authority concluding the ascertainability requirement may be satisfied only if the party seeking class treatment articulates a means by which to identify class members and give them notice of the class litigation without undue expense or consumption of time. Applying these standards, the court found the class definition, though it was "clear enough" and reasonable "on its face," did not establish ascertainability. In support of its finding, the court cited evidence showing Ikea's employees did not uniformly comply with its general policy of requesting and recording ZIP codes. Therefore, the court found there was no way to determine from

Ikea's business records whether a ZIP code recorded in Ikea's computer software was in fact requested and recorded from a customer or the reason why it was collected.

Medellin appeals the order denying class certification.

III

DISCUSSION

A

Medellin sought certification of her putative class claim under section 382 of the Code of Civil Procedure. Under section 382, "[t]he party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. [Citations.] 'In turn, the "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." ' " (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).)

"On review of a class certification order, an appellate court's inquiry is narrowly circumscribed. 'The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it

rests on improper criteria, or (3) it rests on erroneous legal assumptions.' " (*Brinker*, *supra*, 53 Cal.4th at p. 1022.) "Under this standard, an order based upon improper criteria or incorrect assumptions calls for reversal ' "even though there may be substantial evidence to support the court's order." ' " (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436.)

B

1

This appeal requires us to determine whether the trial court erred in finding the class was not ascertainable. After Medellin appealed, the Supreme Court issued its *Noel* decision, which clarified the governing ascertainability standard for purposes of class certification. Because of its importance to the outcome of the case, we begin our analysis with a discussion of the *Noel* decision itself.

In *Noel*, a representative plaintiff filed a putative class action against a drugstore operator for allegedly using misleading advertising to sell inflatable outdoor pools. (*Noel*, *supra*, 7 Cal.5th at p. 962.) He moved to certify a class of " '[a]ll persons who purchased the [inflatable p]ool at [defendant's] store[s] located in California within the four years preceding the date of the filing of [the] action.' " (*Id.* at p. 963.) In opposition, the defendant claimed the plaintiff had not proven the existence of an ascertainable class because he had submitted no evidence establishing a means by which members of the putative class could be identified to ensure they received class notice. (*Id*. at pp. 963–964.) The trial court agreed and denied class certification for lack of ascertainability, the Court of Appeal affirmed, and the Supreme Court granted review. (*Id.* at pp. 964–967.)

On review, the Supreme Court conducted a survey of case law addressing the ascertainability requirement and explained that the lower courts had developed two differing views of the requirement. "One view of ascertainability concentrate[d] on the proposed class definition itself." (*Noel, supra,* 7 Cal.5th at p. 974.) Under this approach, a class was deemed ascertainable so long as " 'it identifie[d] 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.' " (*Ibid.*) "A similar formulation regard[ed] a class as ascertainable when it [was] defined 'in terms of objective characteristics and common transactional facts' that ma[de] 'the ultimate identification of class members possible when that identification [became] necessary.' " (*Ibid.*)

The second view of ascertainability—adopted by our court,[2] among others—was "more exacting," and mandated consideration of the class definition, the size of the class, and the means of identifying class members. (*Noel, supra,* 7 Cal.5th at p. 974.) In accord with this view, a party seeking class certification was required "to make a specific factual or evidentiary showing" (*id.* at p. 975) demonstrating class members could "be readily identified without unreasonable expense or time by reference to official records." (*Id.* at p. 974.) As the *Noel* court explained, some courts applying this standard denied class certification "due to expected complexities in the provision of notice, or in

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2 *Hefczyc v. Rady Children's Hospital-San Diego* (2017) 17 Cal.App.5th 518, 536–540, *Kendall v. Scripps Health* (2017) 16 Cal.App.5th 553, 574–575, *Hale v. Sharp Healthcare* (2014) 232 Cal.App.4th 50, 58–61, *Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.

distinguishing class members from nonmembers—without close consideration necessarily being given to whether these difficulties [were] actual, as opposed to merely hypothetical, or whether they [were] so intransigent and pervasive that they would make a class proceeding unmanageable, or undesirable in light of the plausible alternatives." (*Id.* at pp. 975–976.)

After setting forth these divergent standards, the *Noel* court adopted the more relaxed, definitionally-focused standard, and concluded a class is "ascertainable when it is defined 'in terms of objective characteristics and common transactional facts' that make 'the ultimate identification of class members possible when that identification becomes necessary.' " (*Noel*, *supra*, 7 Cal.5th at p. 980.) This encompasses "class definitions that are 'sufficient to allow a member of [the class] to identify himself or herself as having a right to recover based on the [class] description.' " (*Ibid.*) The *Noel* court reasoned this ascertainability standard—unlike one permitting a class to be defined by vague or subjective criteria—promotes due process by putting class members on notice their rights may be adjudicated in the proceeding and "supplying a concrete basis for determining who will and will not be bound by (or benefit from) any judgment." (*Ibid.*)

The *Noel* court also considered and rejected the justifications some courts had invoked for a heightened ascertainability standard—(1) ensuring class members receive class notice; and (2) minimizing the costs and challenges of identifying class members. (*Noel*, *supra*, 7 Cal.5th at pp. 980–986.) As to the former, the court reasoned that due process does not require "all absent class members be[] sent (much less receiv[e]) individual notice of the action." (*Id.* at p. 981.) "It follows that a construction of the

ascertainability requirement that presumes such notice *is* necessary to satisfy due process, and demands that the plaintiff show how it can be accomplished, threatens to demand too much, too soon." (*Id.* at p. 984.) As to the latter, the *Noel* court opined that an ascertainability standard requiring contemplation of the costs and challenges of identifying class members would prematurely "train[] the court's attention, at a threshold juncture, exclusively toward the side of the ledger where costs and challenges are compiled," without full consideration being given to the benefits the class action may deliver or means by which costs and challenges may be managed. (*Id.* at pp. 985–986.)

Applying the more relaxed ascertainability standard to the class definition before it, the *Noel* court concluded the class was ascertainable. (*Noel*, *supra*, 7 Cal.5th at p. 987.) The class definition was neither vague nor subjective, meaning there was "no ambiguity as to who [would] and [would] not be bound by the outcome. (*Ibid*.) Further, "[a] member of the class could appreciate from [the] definition whether he or she is included within it, and thus be in a position to take appropriate steps to protect his or her interests." (*Ibid*.)

2

As noted *ante*, the trial court denied class certification based on then-extant authority requiring a party seeking class treatment to supply a means by which to identify class members so notice of the class litigation may be provided without undue expense or consumption of time. Ikea relies on this same authority and argues the class is not ascertainable because Ikea's business records do not record customers' names or contact information, nor whether cashiers in fact requested ZIP codes from customers (rather

than inputting false or random ZIP codes without requesting them from customers). Therefore, it claims a "transaction-by-transaction analysis would be required" to determine class membership and ensure class members receive notice of the litigation.

These are precisely the types of considerations the *Noel* court repudiated as inappropriate for purposes of determining whether a class is ascertainable. (*Noel*, *supra*, 7 Cal.5th at pp. 980–986 & fn. 15.) The ascertainability standard endorsed by the *Noel* court does not permit consideration of whether the defendant's business records provide a feasible means for identifying and providing class notice to individual class members. (*Ibid.*; see *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 706 ["If the existence of an ascertainable class has been shown, there is no need to identify its individual members in order to bind all members by the judgment."].) Instead, a class is ascertainable so long as it is defined " 'in terms of objective characteristics and common transactional facts' that make 'the ultimate identification of class members possible when that identification becomes necessary.' " (*Noel*, at p. 967.)

The class definition in this case appears to satisfy this standard. Medellin sought to represent "[a]ll persons from whom Ikea requested and recorded a ZIP Code in conjunction with an in-store cashiered credit card purchase transaction in California from February 16, 2010 through February 28, 2011 …." Like the class definition approved in the *Noel* decision, the class definition in this case is based on objective criteria and is neither vague nor subjective. It will also allow potential absent class members to determine whether they are included within the class when such determination becomes

necessary.[3] (*Noel*, *supra*, 7 Cal.5th at pp. 977–978.) Because the class is defined in terms of objective characteristics and common transactional facts, we conclude it is ascertainable.

Notwithstanding the *Noel* decision, Ikea argues we should affirm the denial of class certification for an independent reason relating to the class definition. In particular, Ikea contends the class is an impermissible fail-safe class. A fail-safe class "includes *only* those who are *entitled* to relief" and "cannot be defined until the case is resolved on the merits." (*Young v. Nationwide Mut. Ins. Co.* (6th Cir. 2012) 693 F.3d 532, 538.) However, as just discussed, customers can *presently* determine whether they are class members. Therefore, their membership in the class does not depend on any determination of ultimate liability, as Ikea contends.

Further underscoring that class membership does not turn on class members' entitlement to relief is the fact that Ikea asserts it is not liable to at least some members of the class. For instance, it claims it is not liable to some class members because they used corporate credit cards, which Ikea contends are not covered by the Act. Ikea further contends its cashiers requested some class members' ZIP codes for special purposes incidental but related to the transaction (e.g., shipping, delivery, service, or installation),

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[3] Ikea contends customers cannot determine whether they are members of the class because they cannot know whether the ZIP code requested of them "was accurately recorded" by an Ikea cashier. Ikea misstates the class definition, which encompasses customers from whom "Ikea requested and recorded a ZIP Code," not customers from whom Ikea requested and *accurately* recorded a ZIP Code.

which does not violate the Act. (Civ. Code, § 1747.08, subd. (c)(4).) For all these reasons, we conclude this is not an impermissible fail-safe class.

Ikea also contends we should affirm the class certification denial order because the concerns raised by the trial court remain relevant considerations in deciding whether a class should be certified, even after the *Noel* decision. We agree class notice and the burdens of identifying class members may be relevant factors in assessing the propriety of class certification. "Arguments and evidence relating to the provision of notice to the class conceivably could counsel against class certification insofar as they may show that *another* requirement for a proper class proceeding, aside from ascertainability, has not been met—e.g., that a class action would be unmanageable, even after due consideration is given to how manageability concerns could be resolved; or that a class proceeding would not be superior to the alternatives." (*Noel*, *supra*, 7 Cal.5th at p. 986.)

However, it is not our duty to conduct this fact-intensive assessment on appeal where, as here, the trial court denied class certification exclusively on ascertainability grounds. "[R]egardless of whether plaintiff's failure to supply evidence associated with the identification of class members might have supported a refusal to certify a class on some other ground [citation], it manifestly did not justify a failure to find an ascertainable class. *Our review ends there*." (*Noel*, *supra*, 7 Cal.5th at p. 987, italics added.)

C

Ikea urges us to affirm the class certification denial order on an additional basis not addressed by the trial court. Relying on *China Agritech, Inc. v. Resh* (2018) 584 U.S. __ [138 S.Ct. 1800] and *Fierro v. Landry's Restaurant Inc.* (2019) 32 Cal.App.5th 276,

Ikea contends the federal district court's partial decertification of the class on February 27, 2013, as well as its complete decertification of the class on December 4, 2014, halted any tolling of the statutes of limitations applicable to some or all absent class members' claims. Thus, Ikea claims all absent class members' claims are time-barred or, at minimum, individual issues concerning the timeliness of each class member's claim predominate over common questions. Medellin responds that the federal district court's orders decertifying the class, in whole or part, did not halt the tolling of absent class members' claims because the Ninth Circuit later vacated the federal district court judgment. (*Medellin*, *supra*, 672 F.Appx. at pp. 782–783.)

Because the trial court did not rely on the purported untimeliness of class members' claims as a basis for denying class certification, we decline to reach the merits of Ikea's timeliness arguments on appeal. (*Lubin v. The Wackenhut Corp.* (2016) 5 Cal.App.5th 926, 935 [" 'An appeal from an order denying class certification presents an exception to customary appellate practice by which we review only the trial court's ruling, not its rationale…. [Citation.] In short, we … " 'consider only the reasons cited by the trial court for the denial, and ignore other reasons that might support denial.' " ' "].)

IV

DISPOSITION

The order is reversed. Medellin is awarded costs on appeal.

McCONNELL, P.J.

WE CONCUR:

O'ROURKE, J.

GUERRERO, J.