No. 16-1221

IN THE

Supreme Court of the United States

CONAGRA BRANDS, INC.,

Petitioner,

v.

ROBERT BRISEÑO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

PETITIONER'S SUPPLEMENTAL BRIEF

Twice in the past week—once before Plaintiffs filed their Supplemental Brief in Opposition, once after—circuits have issued decisions squarely addressing the problems surrounding hard-to-identify class members. *See Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, __ F.3d __, 2017 WL 2953039 (6th Cir. July 11, 2017); *In re Petrobras Secs.*, __ F.3d __, 2017 WL 2883874 (2d Cir. July 7, 2017). Plaintiffs understandably trumpet *Petrobras*. Conagra had argued (Reply 2-3) that the Second Circuit took the Third Circuit's view of ascertainability. After all, *Brecher v. Republic of Argentina*, 806 F.3d 22, 26 (2d Cir. 2015), rejected class certification in part because "determining class membership would require the kind of individualized mini-hearings that run contrary to the principle of ascertainability," as did *Leyse v. Lifetime Entertainment Services, LLC*, __ F. App'x __, 2017 WL 659894, at *2 (2d Cir. Feb. 15, 2017), *pet. for reh'g en banc denied*, Dkt. 90 (Apr. 11, 2017). *Petrobras* "clarif[ied]," however, that, while a proposed class must be "defined using objective criteria," there is no "freestanding administrative feasibility requirement." *Id.* at *1, *8.

But Plaintiffs take *Petrobras* too far, arguing (Supp. BIO 3) that *Petrobras* proves that the disagreement over certifying classes with hard-to-identify class members will go away. The split remains, and as a matter of substance—not labels—neither *Petrobras* itself nor *ASD Specialty Healthcare* can be squared with the Ninth Circuit's decision below.

1. There is still a split about whether would-be class plaintiffs must proffer a feasible method for identifying absent class members before a class may be certified. *Petrobras* recognized as much, noting that the Third Circuit has "formally adopted a 'heightened' two-part ascertainability test" that demands both objective membership criteria and a "'reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" 2017 WL 2883874, at *9 (quoting *Byrd v. Aaron's, Inc.*, 784 F.3d 154, 166 (3d Cir. 2015)). Two other circuits (the Fourth and the Eleventh) have also taken the Third Circuit's side. *See* Reply 3-4. Indeed, Plaintiffs *admit* as much. They acknowledge (BIO 21, 24) that the Third Circuit and "a few other[s]" have required proof of a feasible means of identifying absent class members.

Any split in the all-important area of class certification deserves this Court's attention, let alone one as deep as Plaintiffs themselves recognize. In the last two years alone, dozens of district courts in many circuits have reached inconsistent results in identical cases. Pet. 21-23 & nn.6-7 (collecting cases). Indeed, between the filing of Conagra's Petition and its Reply, five courts—the Ninth Circuit, three district courts in the Eleventh Circuit, and one district court in the Third Circuit—came to different conclusions. Reply 1 n.1 (collecting cases). Every day, the "most significant decision rendered in … class-action proceedings," *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980), continues to turn on venue—whatever *Petrobras* says about the issue in New York.

2. Plaintiffs also argue (Supp. BIO 3) that *Petrobras* reflects a "growing consensus" about ascertainability, one that will lead the Third, Fourth, and Eleventh Circuits to reconsider. But *Petrobras* and the Sixth Circuit's decision in *ASD Specialty Healthcare* prove just the opposite: any supposed "consensus" is at most skin deep, and courts remain deeply divided about the problem of unidentifiable class members.

To be sure, *Petrobras* rejected a "freestanding administrative feasibility requirement," reasoning that ascertainability requires only an "objective[ly]" defined class. 2017 WL 2883874, at *8. But it nonetheless *vacated* class certification because of the difficulty of identifying class members. Specifically, the classes were defined to include everyone who acquired the relevant securities "in domestic transactions." *Id.* at *4. The district court, however, had not assessed whether the plaintiffs could provide "common *answers*" to the question inherent in that definition: whether "each putative class member" actually belonged in the class, as a result of acquiring his or her securities through domestic transactions. *Id.* at *15. Per the Second Circuit, the likelihood of "variation across putative class members—who sold them the relevant securities, how those transactions were effectuated, and what forms of documentation might be offered in support of domesticity—appear[ed] to generate a set of individualized inquiries that *must* be considered" under Rule 23 *before* the class could be certified. *Id.* (emphasis added).

The "individualized inquiries" that prompted the *Petrobras* court to vacate class certification mirror

precisely the individualized questions that must be posed to determine class membership here: whether "each putative class member" actually bought Wesson Oil and, if so, when. Unlike the Second Circuit, however, the Ninth Circuit held that Plaintiffs' inability to answer these questions with common or ready proof was no bar to certification; they could be resolved through "claim administrators," "various auditing processes," and "other techniques" later in the proceedings. Pet.App.18a. These decisions cannot be reconciled.

The Sixth Circuit's recent decision in *ASD Specialty Healthcare* reveals the same disagreement. There, the class covered only those who had received a certain fax, but the available records—a list of 53,502 persons to whom the fax was supposed to be sent—included roughly 13,000 people who had not actually received it. *Id.* at *8. To identify class members, the district court would have had to sift through affidavits from those who supposedly recalled receiving a fax in 2010. *Id.* Although the Sixth Circuit had previously refused to recognize a freestanding ascertainability requirement, *see Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 524-26 (6th Cir. 2015), it nonetheless affirmed the district court's denial of class certification. As the Sixth Circuit put it, Sandusky "proposed no method for weeding out" those who did not belong in the class, and the district court's hypothetical alternative—myriad mini-trials about getting a fax seven years ago—"would undoubtedly be a difficult undertaking." 2017 WL 2953039, at *10. It goes without saying that the challenges held sufficient to defeat class certification in *ASD Specialty Healthcare* pale in comparison to

the daunting task of identifying *millions* of people who bought a bottle of Wesson Oil sometime in the past decade here.

Petrobras and *ASD Specialty Healthcare* thus make clear that, whatever the circuits may say about the ascertainability label, they fundamentally disagree where it counts: whether a class may be certified without any clue as to how to efficiently identify absent class members. This Court should put an end to this persistent, important dispute.

CONCLUSION

The petition should be granted.

JULY 13, 2017

Respectfully submitted,

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