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

SECOND SUPPLEMENTAL BRIEF IN OPPOSITION

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ARGUMENT

Pursuant to Supreme Court Rule 15, Respondents file this Second Supplemental Brief in Opposition to alert the Court to an important new case, *City Select Auto Sales Inc. v. BMW Bank of North American Inc.*, No. 15-3931, 2017 WL 3496532 (3d Cir. Aug. 16, 2017), that further repudiates Petitioner's claim of an entrenched Circuit conflict.

In seeking review by this Court, Petitioner argued that certiorari review was needed to resolve a conflict with well-settled Third Circuit doctrine. Reply at 2 (the Circuit "will not change its mind"). Rejecting the argument that "the Third Circuit had walked back its position," Petitioner claimed that "[t]his was a bad argument the day it was made, and it has only gotten worse since." Pet. 27. Petitioner has already been shown wrong on the Second Circuit's ascertainability jurisprudence;[1] it is now demonstrably wrong with respect to the Third Circuit as well.

In *City Select Auto Sales Inc.*, the Third Circuit did not simply "walk back its position"; rather, it sprinted as far back as it could (as a panel) in narrowing ascertainability. In that decision, involving a putative class action under the Telephone Consumer Protection Act (the "Act"), 47 U.S.C. § 227, the Third Circuit reversed a district court decision denying class certification on ascertainability grounds. Plaintiff alleged that defendants sent an unsolicited fax to customers in violation of the Act. Defendant Creditsmarts, which was responsible for sending the fax (through the services of a fax broadcaster), had a database of customers, but that database was over-inclusive because

[1] *See* Supplemental Brief in Opposition (filed July 11, 2017).

there was no evidence that a fax was sent to every fax number on the list. Defendants thus argued that the class was not ascertainable because, under Third Circuit law, affidavits could not fill the void. In response, plaintiffs contended that the database, coupled with each class member's "say so," made the class ascertainable.

The district court, in denying class certification, carefully reviewed the Third Circuit's ascertainability and ruled as follows:

> The Court notes that Plaintiff's proposed method of ascertaining the class is not based only on the 'say so' of the prospective class members, in that the Creditsmarts database may provide an additional layer of verification. However, after carefully considering the Third Circuit case law, the Court cannot conclude that Plaintiff has met its burden of demonstrating that the class is ascertainable.

City Select Auto Sales, Inc. v. BMW Bank of N. Am., Inc., Civil Action No. 13-4595, 2015 WL 5769951, at *7 (D.N.J. Sept. 29, 2015).

The Third Circuit unanimously reversed that legal judgment. Judge Scirica's decision for the court reasoned that "our ascertainability precedents do not categorically preclude affidavits from potential class members, in combination with Creditsmarts database, from satisfying the ascertainability standard." 2017 WL 3496532 at *5. More generally, the court stated that "Plaintiff need not, at the class certification stage, demonstrate that a single record, or set of records, conclusively establishes class membership." *Id.* Thus, "[a]ffidavits, in combination with records or other reliable and administratively feasible means, can

meet the ascertainability standard." *Id.* at *6. Even though not every customer on the database had received a fax, "so long as there is a method for determining which customers *did* receive such faxes, which could be by affidavit," ascertainability was satisfied. *Id.* at *6 n.4 (emphasis in original). The court thus remanded for the district court to reconsider ascertainability under the Third Circuit's revised guiding principles. Contrary to the Petition, doctrinal elaboration can lead a court to "change its mind."

Judge Fuentes, in his concurring opinion, joined other Third Circuit judges who have condemned the ascertainability requirement. *See* Opp. to Cert. at 21-23. He noted that "[s]ince our adoption of [the ascertainability] requirement, circuits that have carefully considered whether to adopt our new requirement have declined to do so." *Id.* at *7 and n. 3 (citing supporting circuits and noting that contrary cases were unpublished or contained no analysis). Judge Fuentes comprehensively explained why none of the purported rationales for the ascertainability requirement had merit. *Id.* at *8-*11. He concluded that "our heightened ascertainability requirement creates an unnecessary additional burden for class actions, particularly the low-value consumer class actions that the device was designed to allow." *Id.* at *11. He ended his concurrence by noting that the en banc court could (and should) repudiate the requirement altogether. *Id.* Notably, the majority opinion did not reject the concurrence's invitation to join all other Circuits that have considered seriously the ascertainability issue.

There can be no serious dispute that the district court in *City Select Auto* carefully followed exactly the interpretation of the Third Circuit's early ascertain-

ability decisions urged by Petitioner as cast in stone. Nor can there be any serious dispute that the Third Circuit's vacating of the district court decision in *City Select Auto* represents a clear and significant repudiation of that view. Realistically, the panel did all that it could to reject its early articulation of the ascertainability test without directly overruling prior precedent (which only the en banc court can do).

At bottom, *City Select Auto* provides further evidence that all Circuits are converging on a clear understanding that class composition is an important element of the Rule 23(b)(3)'s predominance, manageability, and superiority elements. All converge on finding that the Rules as promulgated ensure that any putative class action realize the "efficiencies of a class action." *Id.* at *4 (quoting *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013)). In the meantime, there is no need for this Court to intervene.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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