IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-16327

LEVI JONES, et al.,
Plaintiffs-Appellants,

v.

CONAGRA FOODS, INC.,
Appellee.

Appeal from the United States District Court
for the Northern District of California
(The Honorable Charles R. Breyer)

BRIEF AMICUS CURIAE OF PUBLIC CITIZEN, INC. AND CENTER FOR SCIENCE IN THE PUBLIC INTEREST IN SUPPORT OF APPELLANTS AND SUPPORTING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 & 29(c)(1), amici Public Citizen, Inc. and Center for Science in the Public Interest (CSPI) state that they have no parent corporations and issue no stock; therefore, no publicly held corporation owns 10% or more of Public Citizen, Inc. or CSPI.

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INTRODUCTION

Although with respect to Hunt's tomato products the district court refused to certify a class for a combination of reasons, this brief focuses on only one: ascertainability. Until recently, "ascertainability" is the term used by courts to describe the concern that a class definition be clear and stated in objective terms. As explained below, although the term and the concept it has come to embody appear nowhere in Rule 23, following the decision in *Carrera v. Bayer*, 727 F.3d 300 (3d Cir. 2013), several courts have expanded the meaning of ascertainability and elevated it to a requirement for class certification. Concerned about the recent transformation of "ascertainability" and its potential to eliminate consumer class-actions for the small-dollar claims for which the class-action device is most needed, Public Citizen and the Center for Science on the Public Interest file this amicus brief.[1]

INTEREST OF AMICI CURIAE

Founded in 1971, Public Citizen, Inc. is a non-profit consumer advocacy organization with more than 300,000 members and supporters nationwide. Public

[1] A motion for leave to file accompanies this brief. Appellants consented to the filing of this brief but appellees refused consent. No counsel for any party authored this brief in whole or part. Apart from amici curiae, no person or organization, including parties or parties' counsel, contributed money intended to fund the preparation and submission of this brief.

Citizen advocates before Congress, administrative agencies, and the courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen often represents its members' interests in litigation and as amicus curiae.

Public Citizen believes that class actions are an important tool for seeking justice where a defendant's wrongful conduct has harmed many people and resulted in injuries that are large in the aggregate, but not cost-effective to redress individually. In that situation, a class action offers the best means for both individual redress and deterrence, while also serving the defendant's interest in achieving a binding resolution of the claims on a broad basis, consistent with due process. At the same time, Public Citizen has long recognized that class actions may be misused, to the detriment of absent class members. Public Citizen attorneys have, in many cases, represented class members whose rights have been compromised by the improper certification of classes and the approval of settlements that are not in their interests or that have been entered in violation of due process rights, such as the right of absent class members to receive notice and to opt out. *See, e.g.*, *Lane v. Facebook*, 696 F.3d 811 (9th Cir. 2012); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315 (3d Cir. 2001). The interests of both named and absent class members, defendants, the judiciary, and

the public at large are best served by adherence to the principles incorporated in Federal Rule of Civil Procedure 23. Public Citizen has sought to advance this view by participating, either as counsel or amicus curiae, in many significant class actions, including *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), *Devlin v. Scardelletti*, 536 U.S. 1 (2002), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

Founded in 1971, the non-profit organization Center for Science in the Public Interest (CSPI) is a strong advocate for nutrition and health, food safety, and sound science. CSPI has long sought to educate the public about food and nutrition, advocate government policies that are consistent with scientific evidence on health and environmental issues, and counter industry's powerful influence on public opinion and public policies. In 2007, the United States Food and Drug Administration awarded CSPI the Commissioner's Special Citation, the highest award given to outside organizations or individuals.

CSPI has been monitoring deceptive marketing and labeling claims for decades. Ten years ago, CSPI created its Litigation Project, which serves as a non-profit law firm helping individual consumers bring class actions to obtain redress for deceptive, unfair, and abusive practices by food and supplement companies. Lawyers with the Litigation Project have represented consumers in a number of

cases in district courts within this Circuit, and on behalf of CSPI filed an amicus brief in *Williams v. Gerber Products Co*., 552 F.3d 934 (9th Cir. 2008).

SUMMARY OF ARGUMENT

The district court's holding that, with respect to Hunt's tomato products, a class is not "ascertainable" misunderstands the judicially created doctrine of ascertainability. Rule 23 presumes the existence of "a definite or ascertainable class." 1 Rubenstein, *Newberg on Class Actions* § 3:2 (5th ed. 2013). That is, a class must be "susceptible of precise definition." 5 *Moore's Federal Practice* § 23.21[1] (3d ed. 1997). This requirement has always "focus[ed] on the question of whether the class can be ascertained by objective criteria," as opposed to "subjective standards (e.g., a plaintiff's state of mind) or terms that depend on resolution of the merits (e.g., persons who were discriminated against)." 1 *Newberg on Class Actions* § 3:3; *Manual for Complex Litigation, Fourth* § 21.222 (Fed'l Judicial Ctr. 2004).

The tools for ascertaining class membership and distributing recoveries traditionally have been calibrated to the circumstances of each case. Even where class-member identification would be imperfect, the alternative chosen by the court below would make the class-action device effectively unavailable in a case where the value of each class member's claim is small. Thus, under the district court's

view of ascertainability, the alternative to a modicum of rough justice would be no justice at all, because an economically rational individual would not bring an individual suit.

ARGUMENT

I. The District Court's View of Ascertainability May "Spell the End" of Consumers Class-Actions Seeking Redress for Deceptive Marketing of Foods.

"[A]n ascertainability requirement in food litigation would very likely spell the end of such litigation as we know it."[2] As a defense-side lawyer stated in discussing the Third Circuit's decision in *Carrera v. Bayer*, 727 F.3d 300 (2013)—the only appellate court to similarly construe an ascertainability requirement—"*Carrera* is a momentous victory for manufacturers of consumer products, as well as a significant decision for class action defendants in general. ... If *Carrera* is any indication of things to come, the viability of consumer class actions is in question."[3] These cases represent "a significant win for manufacturers of consumer products, particularly disposable items (including food) for which consumers do

[2] Julie Steinberg, *Courts in Ninth Circuit Diverge on Ascertainability in Food Label Suits*, 42 BNA Product Safety & Liab. Rptr. 1160 (2014).

[3] Rhinehart, Faruki Ireland & Cox PLL, *Third Circuit Gives Ascertainability Argument Teeth*, Aug. 22, 2013, at http://bit.ly/1aTtVSI.

not tend to keep receipts."[4] Because the court below rejected self-identification by class members as a means of "ascertaining" the class, D. Ct. op. 19, if consumers' lack of receipts doomed certification, "there would be no such thing as a consumer class action" in cases concerning false or deceptive labeling of foods, beverages, and other small-dollar items. *Ries v. Ariz. Beverages USA LLC*, 287 F.R.D. 523, 535 (N.D. Cal. 2012).

When a company exposes many consumers to the same deceptive practice, a class action is often the only effective way to halt and redress the wrongdoing because, as the Supreme Court has observed, "small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). "The policy at the very core of the class action mechanism is to overcome [this] problem .... A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Id.* (quoting *Mace* v. *Van Ru Credit Corp.*, 109 F. 3d 338, 344 (7th Cir. 1997)). "The smaller the stakes to each victim of unlawful conduct, the greater the economies of class action treatment and the likelier that the class members will receive some money rather

[4] John H. Beisner, et al., Miller, & Schwartz, Skadden Arps, *Third Circuit Rejects Class Without Objective Means of Identifying Members*, Aug. 21, 2013, at http://bit.ly/169FgME.

than (without a class action) probably nothing." *Hughes v. Kore of Indiana Enter., Inc.*, 731 F3d. 672, 675 (7th Cir. 2013). In cases like this one, class actions offer the *only* means for achieving individual redress and deterrence of wrongful conduct. *See* Judith Resnik, *From "Cases" to "Litigation,"* 54 Law & Contemp. Probs. 5, 14 (1991) (explaining that Benjamin Kaplan, a primary drafter of Rule 23, believed the rule "provide[d] means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.") (citation omitted).

For the same reasons, class actions are inextricably linked to the vindication of substantive rights. The decision below and the approach to ascertainability set forth in *Carrera* offer companies (often the sole source of information for identifying class members) a way to avoid accountability for deceptive practices and unsafe products and threaten consumers' ability to vindicate their rights. Protecting due process rights of individual class members and of defendants and facilitating collective remedies are all important goals. If the right balance is struck, neither need be sacrificed to the other. In its approach to ascertainability, the decision below does not strike that balance.

II. If Allowed to Stand, The Decision Below Would Negate the Rights of Class Members Without Advancing Any Legitimate Countervailing Interest.

The decision below is one in a string of district court decisions, many in this Circuit, *see* Dist Ct. op. 18-19, to have addressed ascertainability since the Third Circuit's opinion last year in *Carrera v. Bayer*. In *Carrera*, the plaintiffs sued Bayer for deceptively advertising One-A-Day WeightSmart vitamins. The district court certified a class of all people who purchased the product in Florida, but the Third Circuit reversed, holding that the certification order violated Bayer's "due process right to challenge the proof used to demonstrate class membership"—a combination of retailer records and consumer affidavits—even though "Bayer's total liability [would] not increase or decrease based on the affidavits submitted." 727 F.3d at 309.

The reasoning of *Carrera* and of a few district courts that recently denied class certification based on ascertainability, *see* D. Ct. op. 18, including the decision below, would make it impossible for many people injured by deceptive marketing or defective products to obtain relief, would eliminate an important deterrent of illegal conduct, and yet do nothing to protect the legitimate interests of absent class members or defendants. The concerns identified in these decisions do not warrant an expanded notion of ascertainability.

A. Ascertainability has, until recently, been used to mean that a class is capable of a clear definition based on objective criteria. 1 *Newberg on Class Actions* § 3:2. "[A] class must exist," and it must "be susceptible of precise definition."' 5 *Moore's Federal Practice* § 23.21[1]. Here, however, the court was not concerned with the class definition—people in California who purchased certain Hunt's canned tomato products during the class period—but that people might not accurately identify themselves as class members because they might not accurately remember whether they purchased one of the products. D. Ct. op. 19-20. The opinion in *Carrera* expressed a similar concern. 727 F.3d at 309. The consequences of inaccuracy posed by those courts, however, do not support denial of class certification for lack of acertainability.

In *Carrera*, for example, the Third Circuit stated that the difficulty locating members and verifying class membership (other than through sworn declarations, which both it and the district court here thought was inadequate) posed a threat to absent class members. 727 F.3d at 310. Due process is satisfied, however, when notice is "reasonably calculated" to reach the defined class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *see* Fed. R. Civ. P. 23(c)(2)(B)(vi). And once that "reasonably calculated" notice is given, class members may be bound to any judgment. *Shutts*, 472 U.S. at 811-12.

Thus, the question is not whether every class member will actually receive notice, but whether class members can be notified of their opt-out rights consistent with due process. *See generally Dusenbery v. United States*, 534 U.S. 161 (2002) (due process requires attempt reasonably calculated to provide notice, not actual receipt of notice). They plainly can. When class members' names and addresses are known, or are knowable with reasonable effort, notice generally is accomplished by first-class mail. *See, e.g.*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174–75 (1974). When that is not the case, courts use alternative means, such as notification through third parties, paid advertising, or posting in places frequented by class members. *See, e.g.*, *Hughes*, 731 F.3d at 677. The constitutional propriety of these alternative notice methods has been settled law for more than 60 years. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-19 (1950); *see also Manual for Complex Litigation* § 21.311, at 292 (discussing forms of non-first-class-mail notice regularly approved by courts "when individual names or addresses cannot be obtained through reasonable efforts" and citing representative cases). Therefore, this case does not present any genuine concern about providing lawful notice to class members of their opt-out rights. Nor does it put into question that, once proper notice has been issued, the

defendant can benefit from the res judicata effect of a class-action judgment against the entire class as defined.

Moreover, in small-claims class actions like this one, where "only a lunatic or a fanatic" would litigate the claim individually, *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004), and opt-out rights are thus unlikely to be exercised, it is particularly important that the types of notice employed be calibrated to ensure that the value of the plaintiffs' protected interests is not overwhelmed by the cost of safeguarding those interests. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *see also, e.g., Hughes*, 731 F3d. at 676 (in a case involving the claims of ATM users individually valued at $1,000 or less, the court explained that the notice "effort [should be] commensurate with the stakes" and approved a notice plan consisting of "sticker notices on [the defendant's] two ATMs and publication of a notice in the principal Indianapolis newspaper and on a website" as "adequate in the circumstances").

In sum, the newly expanded approach to ascertainability adopted by the court below would destroy class members' property interests in many cases, such as this one, by making it impossible to pursue a class action in situations where a class action is the only practical means for vindicating the class members' rights.

B. Reflecting *Carrera*'s concern with the due process rights of defendants, the court below also expressed concern that trusting individuals' "subjective memory" to identify themselves as class members would be unfair to defendants, who "would be forced to accept [class members'] estimates without the benefit of cross examination." D. Ct. op. 21 (internal quotation marks omitted); *see also id.* at 23 (stating that "there is no way to know that the answers consumers give will be accurate."). Again, this concern does not go to ascertainability—which looks to whether the class is clearly defined. And issues concerning the accuracy of claims are properly addressed during the remedy portion of the case, not at the certification stage.

Stating a related point, the district court, like the court in *Carrera*, was concerned about "how to enforce the res judicata effect of final judgment" against the class. *Id*. at 21 n.21; *see Carrera*, 727 F.3d at 310. On this point, the courts have no cause for concern. Our research has revealed that, since the creation of Rule 23, there have been only ten successful collateral attacks on class-action

judgments in the federal courts.[5] Only two of these—*Stephenson* and *Twigg*—involved collateral attacks on class actions certified under Rule 23(b)(3). *None* of these successful collateral attacks involved a problem in "ascertaining" who was in the class or an assertion that some class members' interests had been "diluted by fraudulent or inaccurate claims," a concern of the court in *Carrera*, 727 F.3d at 310, and suggested by the court below. D. Ct. op. 21. For these reasons, class-action defendants have no legitimate concern that, absent an extension of the ascertainability requirement, they will face collateral attacks on class-action judgments to which they are parties.

The vanishingly small number of successful collateral attacks that have imposed costs on class-action defendants shows that the risk of future successful collateral attacks is itself vanishingly small. This number appears even smaller in light of the number of class-action judgments potentially subject to collateral

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[5] *See Hansberry v. Lee*, 311 U.S. 32 (1940); *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218 (2d Cir. 2012); *Beer v. United States*, 671 F.3d 1299 (Fed. Cir. 2012); *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2nd Cir. 2001), *aff'd by equally divided court*, 539 U.S. 111 (2003); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1223-24 (11th Cir. 1998); *Johnson v. General Motors Corp.*, 598 F.2d 432 (5th Cir. 1979); *Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978); *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973); *Pate v. United States*, 328 F. Supp. 2d 62 (D.D.C. 2004); *Cf. In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760 (3d Cir. 1989) (reversing anti-suit injunction against collateral attack on class judgment but not ruling on the propriety of the attack).

attack. That number is comparatively large, and many of those judgments, as would be the case here if the class action were settled or litigated to judgment, involve small "negative-value" claims arising under consumer protection, securities, and similar statutes that depend on the class-action device for their survival.[6] Given this large number of cases, if the concern about application of res judicata were correct, the courts would have been entertaining collateral attacks on class-action judgments for decades. Instead, there have been almost none.

If the courts need to employ additional tools to police fraudulent and inaccurate class-action claims in particular cases—and nothing in the district court's decision suggests that they do—those tools should not include an expanded ascertainability requirement at the class-certification stage, which would derail legitimate cases before the court has any idea whether fraud or inaccuracy is likely to be a problem. Rather, concerns about claims processing in consumer class actions should be addressed in case management orders, *see* Fed. R. Civ. P. 23(d), as they have been for decades, with the judicious use of claims administrators,

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[6] *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, J. Emp. L. Stud. 811, 813 (2010) (study showing that "that district court judges approved 688 class action settlements" in 2006 and 2007); NERA Economic Consulting Releases Semiannual Securities Class Action Trends Report, July 24, 2012, at http://www.nera.com/83_7801.htm (among federal securities class actions alone, federal district courts approved 128 and 123 class-action settlements in 2010 and 2011, respectively).

various ADR processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques tailored by the parties and the district court to take into account the size of the claims, the cost of the techniques, and an on-the-ground empirical assessment of the likelihood of fraud or inaccuracy.[7]

C. In *Carrera*, the court explained that ascertainability "ensures that the parties can identify class members in a manner consistent with the efficiencies of a class action." 727 F.3d at 307. In this regard, the opinion focused on the interests of absent plaintiffs, maintaining that the method proposed there for "ascertaining the class"—class member affidavits—would create "a significant likelihood their recovery will be diluted by fraudulent and inaccurate claims." *Id*. at 310.

This concern is unwarranted for two related reasons. First, there is no evidence that, in small-claims class actions, inaccurate claims impose significant harm on deserving class members. The notion that non-class-members will submit fraudulent or otherwise faulty affidavits, under penalty of perjury (*see* 28 U.S.C. § 1746), in the hope of collecting less than $1.49 per can of tomato product purchased (D. Ct. op. 39-40), is far-fetched.

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[7] *See generally Manual for Complex Litigation* §§ 21.66-.661, at 331-33; *Newberg on Class Actions* § 11:33.

Second, *Carrera*'s concern for possible dilution of class member recoveries ignores the realities of modern class-action practice. The *Manual for Complex Litigation* recognizes that, in some cases, "increasing one claimant's benefits will reduce another's recovery." *Manual for Complex Litigation* § 21.66, at 331. Submission of "claim forms by oath or affirmation" may be required in some circumstances, while in other situations additional "substantiation of claims," such as invoices or other records, is appropriate. *Id.* In all cases, "documentation ... should be no more burdensome than necessary." *Id.*

Accordingly, the appropriate "[a]udit and review procedures ... depend on the nature of the case." *Id.* at 332. Large-claim cases "might warrant a field audit to check for inaccuracies or fraud," *id.* (case citation omitted), medium-sized claims may be subjected to "random sampling" audit inquiries, and small claims may be accepted on the basis of the sworn claim forms alone, *id.* The *Manual for Complex Litigation*'s endorsement of these varying procedures to verify class membership and to distribute class benefits represents the collective judgment of the federal judiciary and should have been deferred to below.

The *Manual for Complex Litigation*'s endorsement of these varying claims procedures comes in a discussion of implementation of class-action settlements, not in conjunction with "ascertaining" class members at the certification stage.

This point underscores that, where the class definition is clear (as it was here and in *Carrera*), concerns about claims processing should not be used to scuttle class actions in their infancy but, rather, should be considered in case-management orders or during the settlement process, when the court and the parties are best equipped to address potential fraud or inaccuracy.

CONCLUSION

The decision below should be reversed.

November 25, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 25, 2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ .
Allison M. Zieve

CERTIFICATE OF COMPLIANCE

The brief's type size and type face comply with Fed. R. App. P. 32(a)(5)and (6). This brief is 3,643 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

/s/ .
Allison M. Zieve