

**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)

**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
IN SUPPORT OF APPELLANTS AND SUPPORTING REVERSAL**

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November 25, 2014

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Public Citizen, Inc. and
Center for Science in the Public Interest

CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 & 29(c)(1), movants 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.

Public Citizen, Inc. and Center for Science in the Public Interest (CSPI) hereby move for leave to file a brief as amicus curiae in support of plaintiffs-appellants Jones, et al., and reversal of the decision below. Appellants have consented to the filing of this brief; appellee refused consent. A copy of the proposed brief is attached to this motion.

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

In this case, movants seek to file an amicus brief to address only one aspect of the decision below with respect to Hunt's tomato products: ascertainability. "Ascertainability" is the term used by the 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, several courts, following the decision in *Carrera v. Bayer*, 727 F.3d 300 (3d Cir. 2013), 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 CSPI move the court for leave to file an amicus brief.

CONCLUSION

The motion for leave to file an amicus brief should be granted.

November 25, 2014

Respectfully submitted,

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