No. 14-577

IN THE

# Supreme Court of the United States

CARPENTER CO., ET AL.,

*Petitioners,*

v.

ACE FOAM, INC., ET AL., individually and on behalf of all others similarly situated,

and

GREG BEASTROM, ET AL., individually and on behalf of all others similarly situated,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## SUPPLEMENTAL BRIEF OF RESPONDENT DIRECT PURCHASER CLASS


WILLIAM A. ISAACSON
BOIES, SCHILLER & FLEXNER, LLP
5301 Wisconsin Ave., N.W.
Washington, DC 20015
(202) 237-5607

SANFORD I. WEISBURST
*Counsel of Record*
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Ave., 22nd Floor
New York, NY 10010-1601
(212) 849-7000
sandyweisburst@quinnemanuel.com

*Counsel for Respondents Ace Foam, Inc., et al. (the "Direct Purchaser Class")*


February 3, 2015


WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## RULE 29.6 STATEMENT

The corporate disclosure statement included in the brief in opposition of Respondent Direct Purchaser Class remains accurate.

## SUPPLEMENTAL BRIEF OF RESPONDENT DIRECT PURCHASER CLASS

Pursuant to this Court's Rule 15.8, Respondent Direct Purchaser Class respectfully submits this supplemental brief to address *In re Nexium Antitrust Litigation*, Nos. 14-1521, 14-1522, — F.3d —, 2015 WL 265548 (1st Cir. Jan. 21, 2015), which Petitioners raised in their supplemental brief filed January 29, 2015.[1]

1. Petitioners ignore that *Nexium* does nothing to solve the glaring vehicle problem in the Petition here. *Nexium* involved the First Circuit's *grant* of a petition for discretionary interlocutory appeal of class certification under Federal Rule of Civil Procedure 23(f), followed by that court's decision on the merits of class certification that such certification was appropriate. 2015 WL 265548, at *2. The instant case, by contrast, involves the Sixth Circuit's discretionary *denial* of a Rule 23(f) petition based, *inter alia*, on three grounds distinct from the merits of class certification. Pet. App. 4a ("whether the cost of continuing the litigation for either the plaintiff or the defendant presents such a barrier that subsequent review is hampered; . . . whether the case presents a novel or unsettled question of law; and . . . the procedural posture of the case before the district

[1] Although Respondent Direct Purchaser Class and Respondent Indirect Purchaser Class are differently situated in certain respects and filed separate briefs in opposition, the two Respondents are aligned concerning *Nexium*'s lack of support for the Petition here. Accordingly, counsel of record for Respondent Indirect Purchaser Class has advised the undersigned that Respondent Indirect Purchaser Class agrees with this Supplemental Brief of Respondent Direct Purchaser Class and will not file its own separate supplemental brief.

court"). Petitioners' supplemental brief, like their reply brief, ignores the second and third of these factors. And their discussion of the first simply asserts that the Sixth Circuit erred regarding the first factor because the supposed "potential for a $9 billion damages award" will force settlement. Supp. Br. 6. Petitioners do not confront the court of appeals' (Pet. App. 10a) and Respondent Direct Purchaser Class's (Br. in Opposition ("BIO") 13, 15-18) explanation that the potential damages are only approximately $2.8 billion, that such damages would be split up among the defendants, and that numerous defendants (here and in other cases) have not inevitably settled following a class-certification order. At bottom, the Sixth Circuit acted within its broad discretion in finding an interlocutory appeal unwarranted, and Petitioners will have ample opportunity for a full appellate review of the class-certification order after final judgment, which will follow the upcoming trial set to begin on March 31, 2015.

2. Even if the merits of class certification were properly presented by the Petition, *Nexium* does not support granting certiorari. Petitioners argue (Supp. Br. 1-2) that *Nexium* deepens a supposed circuit conflict over whether absent class members must have Article III standing for the class to be certified. But the instant case does not implicate any such alleged conflict because Petitioners waived any argument that all members of a class must have an injury (see BIO 19-20), and because the court of appeals' order makes clear that the district court applied the most stringent possible standard by using a "definition of the class [that] is sufficiently narrow to *exclude uninjured parties*" (Pet. App. 5a (emphasis added); see also BIO 21-22).

3. Moreover, far from deepening any supposed conflict, *Nexium* reconciles the decisions by the various courts of appeals:

> [I]n *In re Hydrogen Peroxide Antitrust Litigation*, the Third Circuit, which cited many of the cases the defendants cite, suggested that . . . , at class certification, plaintiffs must show only that "antitrust impact is *capable* of proof at trial through evidence that is common to the class rather than individual members." [552 F.3d 305, 311 (3d Cir. 2008) (emphasis added).] Similarly, the D.C. Circuit has stated that at the class certification stage, plaintiffs must "show that they can prove"—not that they *have proved*—"through common evidence, that all class members were in fact injured . . . ." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013). . . . [F]rom this it does not follow that the existence of a de minimis number of uninjured class members bars certification if those members can be weeded out at a later stage.

2015 WL 265548, at *11 n.20.[2] Relatedly, Petitioners incorrectly state that this supposed circuit conflict has

[2] See also *Nexium*, 2015 WL 265548, at *17 ("To the extent that it is necessary that each and every member of the class *who secures a recovery* also has standing, the requirement will be satisfied—only injured class members will recover.") (emphasis added) (footnote omitted). The dissenting judge on the First Circuit panel did not dispute the majority's reconciliation of the circuit court decisions. Instead, the dissent disagreed, on the facts of that case, that a method had been identified that would,

"continue[d] to evade this Court's review." Supp. Br. 1. Rather, the asserted conflict was squarely presented to this Court just weeks ago and this Court denied certiorari. *In re Deepwater Horizon*, 739 F.3d 790, 798-802 (5th Cir.), cert. denied, 135 S. Ct. 754 (2014).

4. Finally, Petitioners argue (Supp. Br. 4) that *Nexium* adds to a supposed circuit conflict over whether, after *Comcast Corp*. v. *Behrend*, 133 S. Ct. 1426 (2013), individualized damages issues inevitably preclude class certification. However, the First Circuit explained in *Nexium* why its decision is consistent with *Comcast*. In *Comcast*, because "the plaintiffs relied on 'a methodology that identifies damages that are not the result of the wrong[,]' they did not establish that 'damages are capable of measurement on a classwide basis,' failing to meet the Rule 23(b)(3) requirement." 2015 WL 265548, at *5 (quoting *Comcast*, 133 S. Ct. at 1434, 1433) (bracket in original). In *Nexium*, "in contrast, the plaintiffs' theory of liability is appropriately limited" because "the plaintiffs' theory and model for damages would only require that the defendants pay aggregate damages equivalent to the injury that they caused." *Ibid*. *Nexium* recognized that its application of *Comcast* accords with that of other circuits. *Id*. at *5 n.15. And that approach is likewise consistent with the court of appeals' decision here. Pet. App. 7a ("Because the district court required the classes' damages models to reflect their theories of the case, it did not abuse its discretion or violate *Comcast*."). It is a fact-intensive, case-specific issue whether damages issues can be decided on a classwide basis and

---

post-class certification, weed out uninjured class members. *Id.* at *18 (Kayatta, J., dissenting).

whether, as a result, damages issues do not constitute individualized issues that might defeat a showing of predominance. See BIO 25.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM A. ISAACSON
BOIES, SCHILLER & FLEXNER, LLP
5301 Wisconsin Ave., N.W.
Washington, DC 20015
(202) 237-5607

SANFORD I. WEISBURST
*Counsel of Record*
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Ave., 22nd Floor
New York, NY 10010-1601
(212) 849-7000
sandyweisburst@quinnemanuel.com

*Counsel for Respondents Ace Foam, Inc., et al. (the "Direct Purchaser Class")*

February 3, 2015