

IN THE SUPREME COURT OF OHIO

STAMMCO, LLC  
d/b/a THE POP SHOP, *et al.*

Plaintiffs-Appellees,

vs.

UNITED TELEPHONE COMPANY  
OF OHIO, AND SPRINT NEXTEL  
CORPORATION

Defendants-Appellants

Case No.: 08-1822

On Appeal From the Fulton County Court of  
Appeals, Sixth Appellate District,  
Case No. 07-024

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APPELLEES' MEMORANDUM IN OPPOSITION TO MOTION FOR  
RECONSIDERATION

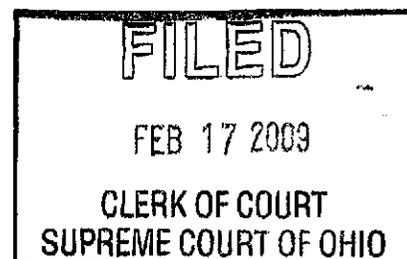
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Sprint, United Telephone and Amicus Curiae Ohio Chamber of Commerce (Amicus) shamelessly reargue the exact same contentions, in violation of S.Ct. R. XI § 2(B). The arguments that Sprint, United Telephone and Amicus make in their Memorandum in Support of the Motion to Reconsider are the same rejected arguments which previously had been made in the Court of Common Pleas, the Court of Appeals and in this Court.

Sprint, United Telephone and Amicus, moreover, are wrong with respect to the reconsideration arguments, just as they were wrong with respect to the arguments in the courts below. As the Plaintiff-Appellees previously established, there is not and never has been a so-called fail-safe class in these proceedings and the Plaintiff-Appellees have never “conceded” anything to that effect. Plaintiff-Appellees have successfully demonstrated to the courts below that this class definition is not dependent on the merits of the claims. The class will exist, and all members will be bound, by any decision on the merits – favorable or unfavorable to Plaintiff-Appellees.

Sprint asserts a second reason for this Court to reconsider its decision to refuse a discretionary appeal. It argues that “court decisions published after United Telephone filed its memorandum in support of jurisdiction set forth, in unequivocal terms, the impropriety and unworkability of fail-safe classes”. This assertion is a blatant attempt to manufacture legitimacy for Sprint’s reconsideration motion by citing to cases that contain nothing new. The only thing these three cases have in common are passing references to the definition of a fail-safe class in the discussions by the respective courts. All of the cases cited by Sprint are fully supportive of the Plaintiffs’ arguments previously accepted by the courts below which have reviewed this very

issue.<sup>1</sup> Sprint's arguments dispute the findings of fact that were made by the trial court and which were re-argued on appeal. Amicus argues that the Defendants-Appellants were "not involved" and had simply engaged in some "neutral practice." However, this argument was expressly rejected by the findings in the trial court, as to which there was no contrary evidence and from which no appeal was taken. Sprint and United Telephone, as the Court determined, created an entire profitable industry out of the cramming practice, which it had perfected.

The spectre of "floodgate" litigation, by Sprint, United Telephone and Amicus is nothing other than another re-argument. But, as well, it is untrue. There are no floodgates to be opened. Customers who are not harmed, obviously, have no cause of action. Customers who suffer harm should have the traditional recourse to class maintainability. The attempt to create judicial fear by misrepresenting the class definition should be rejected. There is no unwarranted expansion of class action jurisprudence. The trial court and the reviewing court recognized this case for what it is – a run-of-the-mill consumer class action.

The Motion to Reconsider, premised solely on re-arguments, which have been expressly and properly rejected by the Court of Common Pleas, the Court of Appeals, and this Court, should be denied.

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<sup>1</sup> In *Mims v. Stewart Title Guaranty Co.* (Dec. 11, 2008) N.D.Tex. No. 3:07-CV-1078, 2008 WL 5516486 at \*4, the court certified the plaintiffs' class, finding the "proposed class is not defined in a fail safe, liability-based manner" and rejecting the same arguments that have been made by Sprint in the Court of Common Pleas, the Court of Appeals and this Court.

The Court in *Velasquez v. HSBC Finance Corp.* (Jan. 16, 2009), N.D.Cal. No. 08-4592, 2009 WL 112919 at \*5, simply denied a defendant's motion to strike class allegations in a Complaint that were alleged to improperly create a fail-safe class, as premature at that stage of the litigation.

*Merrit v. Wellpoint, Inc.* (Jan. 16, 2009) ED.Vir. No. 3:08-CV-272, 2009 WL 122756 at \*3, likewise denied a defendant's motion to strike a class definition, while allowing plaintiffs the opportunity to amend their complaint to define the class in a manner that would not be dependent on a legal inquiry of liability. Because the class definition in this case does not depend on a determination of the merits of plaintiffs' claims, this case supports the certification order utilized in the courts below and affirmed by this Court.

Respectfully submitted,



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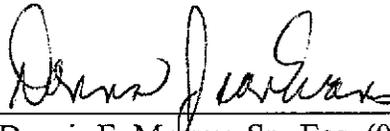
**CERTIFICATE OF SERVICE**

A copy of the foregoing **Appellees' Memorandum in Opposition to Motion to Reconsider** was forwarded by First-Class mail to the following:

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on this 16<sup>th</sup> day of February, 2009.



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