

**IN THE SUPREME COURT OF OHIO**

STAMMCO LLC d/b/a THE POP	:	Case No. 2008-1822
SHOP, <i>et al</i> ,	:	
	:	
Plaintiffs-Appellees,	:	On Appeal From the
	:	Fulton County Court
v.	:	of Appeals, Sixth
	:	Appellate District,
UNITED TELEPHONE COMPANY,	:	Case No. 07-024
OF OHIO AND SPRINT NEXTEL	:	
CORPORATION,	:	
	:	
Defendants-Appellants.	:	

**MERITS BRIEF OF APPELLANTS UNITED TELEPHONE COMPANY OF OHIO AND SPRINT NEXTEL CORPORATION**

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## INTRODUCTION

Aware that a class cannot be certified when only some of its members have been harmed, the plaintiffs obtained certification of a class that they defined as that subset of individuals actually harmed by the defendant's conduct. But such a "fail safe" class – requiring a determination on the ultimate issue of liability for each potential class member at the outset of the case – turns the class action mechanism on its head.

Courts across the country have uniformly rejected "fail safe" class actions. They put the cart before the horse, as the class cannot be determined until after individualized findings of liability. They violate Rule 23's requirement that a class must be clearly defined at the outset of a case. They are unworkable, requiring thousands of mini-trials to determine liability and thus class definition. They make pre-trial notice of opt-out procedures impossible. And they bind plaintiffs only if a judgment is favorable to them, and not if it is adverse.

Fail-safe classes not only violate the core requirements of Rule 23 but they are also profoundly bad policy. They permit class actions to be maintained without an allegation of class-wide fraud or harm. Should this decision stand, any Ohio business accused of a negligent practice will be subject to class action litigation, despite overwhelming individual issues of causation and harm that cannot be determined at the outset of the case – allowing class actions to proceed when most, if not all, of a business' customers have suffered no harm.

Even if the class certified below were not a fail-safe class, the individualized issues at the heart of plaintiffs' claims will always preclude class certification. To recover on any of their claims, the plaintiffs must prove harm—that is, that a class member received and paid a third-party charge for a service that they did not request or

use. Even class members who could prove these things would still have to prove that their payment of the charge was caused by United Telephone and not by their own conduct or the conduct of a third-party service provider. None of these things can be proven on a class wide basis.

Evidence that one class member did, or did not, request or use one third party's service shows nothing about whether that customer used any other third-party services, or whether any other customer used any other third-party service. Causation likewise cannot be established class wide because proof of how and why one unauthorized charge, from one third party, appeared on one class member's bill, would show nothing about how or why any other charge, from any other third party, appeared on any other class member's bill. Likewise, proof that a charge was paid by one class member, would not prove whether that customer or any other customer paid, or did not pay, any other charge. The impossibility of proving these things for all class members in one adjudication is compounded by the fact that third-party charges cover a wide range of services offered by more than 2000 different third-party entities.

The Sixth District is the only appellate court in the country to allow a fail-safe class action to proceed. It is also the only appellate court to allow a class action based on allegations of so-called "cramming" to proceed. The decision below represents an unwarranted and unprecedented expansion of the scope of class actions under Rule 23 and should not stand.

## STATEMENT OF FACTS

### **I. United Telephone Lets Third Parties Bill Customers Using United Telephone's Phone Bills.**

United Telephone Company of Ohio<sup>1</sup> allows certain third-party businesses to place their charges on the monthly billing statements United Telephone sends to its customers. Third parties who use this billing method do not have to create and operate their own billing infrastructure. Customers who choose to do business with these third parties receive consolidated billing rather than multiple bills. United Telephone is not involved in the underlying transactions that lead to the third-party charges that appear on United Telephone's bills. Rather, those transactions are between the third-party businesses and the customers. (Davis Aff. ¶10, Supp. at 115.)

More than 2000 different businesses use United Telephone's third-party billing service. (Davis Aff. ¶16, Supp at 118.) The businesses offer a variety of products, including long distance telephone service, pay-per-call services like weather or sports, website setup and hosting, on-line advertising, and music "downloading." (Davis Aff. ¶16, Supp. at 118.)

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<sup>1</sup> United Telephone is an Ohio corporation that provides local telephone services in parts of Ohio. From January 2000 until May 2006, United Telephone was a wholly owned subsidiary of Sprint Corporation (later Sprint Nextel Corporation), and did business under the trade name "Sprint." Since May 2006, United Telephone has been wholly owned by Embarq Corporation, has done business under the trade name "Embarq," and has been neither owned nor controlled by Sprint. Sprint Corporation, Sprint Nextel Corporation, and Embarq Corporation never provided or billed for local telephone services in Ohio. (Eason Aff. ¶2, 4, 5-6, Supp. at 20-21.) Appellant Sprint Nextel Corporation has maintained throughout this case that it is not a proper defendant, that there was no personal jurisdiction over it, and that no class of plaintiffs can properly be certified as to it. Sprint Nextel Corporation reserves and does not waive these issues and appellants jointly submit this brief solely in the interest of brevity. There is a pending agreement for Embarq Corporation, the parent entity of United Telephone Company of Ohio, to merge with CenturyTel, Inc. CenturyTel's stock is publicly traded under the symbol CTL.

The participating third-party businesses electronically transmit information about the charges associated with their transactions to one of several billing clearinghouses. The clearinghouses identify which of the charges were incurred by United Telephone customers. The clearinghouses then send information about those charges to United Telephone in the form of thousands of electronic “messages,” each of which pertains to a specific charge. United Telephone processes the information and each charge is then placed onto the appropriate bill. When customers receive their monthly bills for local telephone services from United Telephone, those bills include any third-party charges a customer incurred. (Davis Aff. ¶10-13, Supp. at 116-117.)

Third-party charges appear on a separate page of customers’ bills and are conspicuously labeled as such. The name of the third-party initiating the charge, nature of service for which the charge is being made, amount of the charge, and contact information for inquiries about the third-party charge are included (Davis Aff. ¶4, Supp. at 114; Stamm 61-65, Ex. 17, Supp. at 28-29, 49.) Credits or adjustments given to customers in the case of an erroneous or disputed third-party charge are also processed by United Telephone and similarly appear on customer bills. (Stamm Exs. 21-32, 34, Supp. at 60-112.)

When United Telephone receives payments from customers and the payments include amounts for third-party charges, the amounts related to third-party charges are delivered to the clearinghouses, less fees for the billing and collection services provided by United Telephone. (McAtee 22-26, Supp. at 125.)

## **II. United Telephone’s Billing Services Are Not Inherently Harmful.**

United Telephone’s billing service is neutral in nature. Whether a particular charge from a third-party business is legitimate depends upon interactions between that

business and the customer, not on anything that United Telephone does. Indeed, the trial court conceded that certain third-party charges “are transparent, authorized and legitimate.” *Stammco, LLC v. United Telephone Co. of Ohio* (August 1, 2008), 6th Dist. F-07-024, 2008-Ohio-3845, at ¶20.

The record related to the plaintiffs’ third-party charges is illustrative. Plaintiffs-appellees Kent and Carrie Stamm receive local telephone service from defendant-appellant United Telephone Company of Ohio at their home and business, Stammco, LLC, doing business as “The Pop Shop.” (Am. Cmplt. ¶2, Supp. at 2; Stamm 24, 155-57, Supp. at 23, 45; Eason Aff. ¶5-6, Supp. at 20-21.) The plaintiffs alleged that they did not order some items for which they were billed. Yet during discovery, they conceded that certain third-party billings they paid were legitimate. For instance, they were billed for long-distance service from MCI on their United Telephone bill, and they admitted that they purchased long-distance service from MCI. (Stamm 134-36, Supp. at 41.) They do not seek any recovery for the MCI charges. While the plaintiffs complained that they had not purchased website services from a business called Bizopia, there is a factual dispute about these charges. Bizopia in fact spoke to one of the plaintiffs’ employees who it claims authorized the service order, recorded the portion of the call verifying the order, and faxed a written confirmation of the order to The Pop Shop. (Stamm 73-77, Supp. at 31-32; Smith 13-15, Supp. at 154-156.) Except for complaints about other long distance telephone calls they said they did not make or accept the charges for, the plaintiffs do not contest any additional charges from other businesses.

### **III. The Plaintiffs Allege That United Telephone Acted Negligently.**

The plaintiffs assert claims for negligence, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. They allege that United Telephone was

negligent by not ensuring that specific third-party charges were valid, by insufficiently “screening” third-party service providers, and by delivering third-party charges without first obtaining written permission to do so. (Am. Cmplt. ¶53, 58-59, Supp. at 12, 13; Stamm 57-58, Supp. at 27-28.) The plaintiffs do not allege that United Telephone violated any federal or state law or tariff, or that United Telephone engaged in fraud or a common misrepresentation.

The only harm the plaintiffs allege is paying for services they claim they did not request or use, for which they seek money damages. (Am. Cmplt. ¶29-30, Supp. at 7.) Initially, plaintiffs also sought an injunction prohibiting United Telephone “in the future, from billing for products and services that were not authorized” by customers (Am. Cmplt, Prayer, Supp. at 14), but they have since abandoned their request for a class on that claim.

#### **IV. The Court Of Appeals Affirms The Trial Court’s Class Certification.**

The plaintiffs moved to certify the following class:

All individuals, businesses or other entities in the state of Ohio who are or who were within the past four years [local telephone customers of United Telephone and] who were billed for charges on their local telephone bills [by appellants] on behalf of third parties without their permission.

*Stammco, LLC*, 2008-Ohio-3845, at ¶4. On September 28, 2007, the trial court granted the plaintiffs’ motion for class certification and certified a damages class under Rule 23(B)(3) and a class seeking injunctive relief under Rule 23(B)(2). *Id.*

On October 25, 2007, United Telephone timely appealed. On August 1, 2008, the Sixth District Court of Appeals affirmed the trial court’s judgment regarding the Rule 23(B)(3) class, but reversed the trial court’s decision to certify a Rule 23(B)(2) class.

Plaintiffs did not appeal that ruling, thereby abandoning their request for a class as to any injunctive or equitable relief.

United Telephone timely filed notice of its discretionary appeal on September 15, 2008. Upon reconsideration, this Court accepted jurisdiction of United Telephone's appeal on March 25, 2009. On April 1, 2009, the Court filed the record of the Court of Appeals, making United Telephone's merits brief initially due on or before May 11, 2009. See S.Ct.Prac.R. VI(2)(A). Pursuant to S.Ct.Prac.R. XIV(3)(B)(2)(a), United Telephone obtained a stipulated 20-day extension of time, making its merits brief due on or before June 1.

### **ARGUMENT**

A trial court must "carefully apply the class action requirements and conduct a rigorous analysis into whether" a plaintiff has proven all of Rule 23's requirements. *State ex rel. Davis v. Pub. Employees Ret. Bd.*, 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E. 444, at ¶20 (quoting *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70, 1998-Ohio-365, 694 N.E.2d 442). Because class certification was improper as a matter of law, this Court should reverse the decision and enter judgment denying class certification. See *Howland v. Purdue Pharma, L.P.*, 104 Ohio St.3d 584, 2004-Ohio-6552, 821 N.E.2d 141 at ¶26; *Shimola v. Nationwide Ins. Co.* (1986), 25 Ohio St.3d 84, 87, 495 N.E.2d 391.

**Proposition Of Law No. I: A plaintiff cannot define the class to include only individuals who were actually harmed.**

**A. The class definition includes only those United Telephone customers who were allegedly harmed by the actions of third parties.**

In their motion for class certification, the plaintiffs sought to define their class as including all individuals and businesses who received third-party charges “without their permission.” *Stammco, LLC*, 2008-Ohio-3845, at ¶4. But there is no inherent harm in receiving a bill from United Telephone for something one admittedly purchased from a third party, as opposed to receiving a bill from the third party directly. And plaintiffs concede that only **certain** United Telephone customers who received charges from third parties were actually harmed. See Memo. in Opp. to Juris. at 8 (“There are instances where third-party charges were authorized and hence were genuine.”); *Stammco, LLC*, 2008-Ohio-3845, at ¶20 (same). Indeed, the plaintiffs admit that certain third-party charges on their *own* phone bills were valid.

The problem with this approach – as explained in Proposition of Law II below – is that an unbroken line of Ohio decisions have held that where actual causation and harm, and therefore liability, cannot be determined on a class-wide basis, individual issues predominate and no class can be certified under Rule 23(B)(3) of the Rules of Civil Procedure. *Cicero v. U.S. Four, Inc.* (Dec. 11, 2007), 10th Dist. No. 07AP-310, 2007-Ohio-6600, at ¶41 (where liability depends on differing situations of individual class members, “common issues will not be deemed predominant over individual issues”); *Repede v. Nunes* (August 11, 2006), 8th Dist., Nos. 87277 & 87469, 2006-Ohio-4117, at ¶17 (class certification improper where “individual analysis of each plaintiff’s financial situation” was needed to establish harm); *Hoang v. E\*Trade Group, Inc.* (8th

Dist.), 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151, at ¶24 (class certification improper where existence of harm, and therefore liability, could not be proven without examining facts about each class member); *Linn v. Roto-Rooter, Inc.* (May 20, 2004), 8th Dist., No. 82657, 2004-Ohio-2559, at ¶16, 18, 19, 23 (same).<sup>2</sup>

Attempting to define their way around these cases, the plaintiffs now concede their class only includes those United Telephone customers who were *actually harmed* – i.e., those who received charges for items they did not purchase or use – not all customers who received third-party charges. As the plaintiffs told this Court: “The essence of Sprint’s argument is that some customers approved and paid for some third-party charges. If so, the customers are not class members to the extent they approved the charge – by definition, there was no impermissible cramming.” Memo. in Opp. to Juris. at 8. And again: **“The class consists of Sprint customers, and only of those Sprint customers who were billed for an item or service that they did**

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<sup>2</sup> Federal courts provide “an appropriate aid to interpretation of” Ohio class action jurisprudence; see *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5874, 817 N.E.2d 59, at ¶17 (quotation omitted). And, federal court decisions uniformly refuse to certify classes in which individualized issues of causation and harm predominate. See, e.g., *Faralli v. Hair Today, Gone Tomorrow* (Jan. 10, 2007), N.D. Ohio No. 1:06CV504, 2007 WL 120664, at \*6 (denying certification where harm and liability were individualized issues); *Oshana v. The Coca-Cola Co.* (C.A. 7, 2006), 472 F.3d 506, 513-14 (denying certification due to individualized issues as to causation and actual damages); *Blades v. Monsanto Co.* (C.A.8, 2005), 400 F.3d 562, 571 (“damages to all class members must be shown to justify the class action”); *Sikes v. Teleline, Inc.* (C.A. 11, 2002), 281 F.3d 1350, 1366 (“We cannot condone the use of a presumption as a ‘shortcut’ in resolving issues of injury and damages where such elements are provable by the plaintiffs and are required for recovery.”); *Schwartz v. Dana Corp./Parish Div.* (E.D. Pa. 2000), 196 F.R.D. 275, 282 (denying certification “because each member must prove liability and damages, [and thus] individual issues will predominate over common issues”); cf. *Collins v. Anthem Health Plans, Inc.* (Conn. 2005), 275 Conn. 309, 338-39, 880 A.2d 106 (rejecting plaintiffs’ attempt to “gloss over the injury and causation issues” by “arguing that the mere existence of the financial incentive program caused each class member to suffer harm”; relying on Federal Rule 23 authority).

**not request or authorize.”** Id. at 11 (emphasis added); see also id. at 7 (“The class members were duped into paying for something they **never received or never authorized**” (emphasis added)).

But defining the class in this fashion does not cure the plaintiffs’ problem. Membership in such a class – one that only includes customers who received and paid charges for items they did not request or use – cannot be known until liability determinations are made. This is a classic example of an improper “fail-safe” class.

**B. Fail-safe classes have been uniformly rejected.**

State and federal courts have refused to permit fail-safe classes, for several independent reasons. First, a fail-safe class is improper because the contours of the class cannot be determined until there has been a finding of liability, which turns the class-action mechanism on its head. “[T]he problem with such a ‘fail safe’ definition is that it requires the court to determine the ultimate issue of liability with regard to each potential class member at the outset, thus putting the cart before the horse.” *Mims v. Stewart Title Guaranty Co.* (Dec. 11, 2008), N.D. Tex. No. 3:07-CV-1078-N, 2008 WL 5516486, at \*4. See, also, *Velasquez v. HSBC Finance Corp.* (Jan. 16, 2009), N.D. Calif. No. 08-4592, 2009 WL 112919 (fail-safe classes are improper because they are improperly defined by the merits of their legal claims, and are therefore unascertainable prior to a finding of liability in the plaintiff’s favor); *Merritt v. Wellpoint* (Jan. 16, 2009), E.D. Va. No. 3:08-CV-272, 2009 WL 122756 (same); *Brazil v. Dell, Inc.* (July 7, 2008), N.D. Cal. No. C-07-01700, 2008 WL 2693629, at \*7 (refusing to certify class defined by the primary issue in the action because the members of the class could not “be identified unless [the defendant] is found liable after trial”); *Genenbacher v. Centurytel Fiber Co. II, LLC* (C.D. Ill. 2007), 244 F.R.D. 485, 488 (denying certification

to “fail safe” class because “the class definition precludes the possibility of an adverse judgment against class members; the class members either win or are not in the class”); *Adashunas v. Negley* (C.A. 7, 1980), 626 F.2d 600, 604 (same); *Dunn v. Midwest Buslines, Inc.* (E.D. Ark. 1980), 94 F.R.D. 170, 172 (refusing to certify proposed class of “those who had been actually discriminated against” because a finding of no discrimination on the part of the defendants would mean the class was improperly certified); *Dafforn v. Rousseau Assocs., Inc.* (N.D. Ind. July 27, 1976), N.D. Ind. F-75-74, 1976 WL 1358, at \*1 (denying certification to fail-safe class defined as all persons who paid illegally fixed brokerage fees); *IntraTex Gas Co. v. Beeson* (Tex. 2000), 22 S.W.3d 398, 404-405 (barring certification of a fail-safe class).

Second, because a fail-safe class requires waiting until a finding of liability has been made to determine class membership – which typically happens at or near the end of the case – such classes improperly prevent notice from being given to class members before trial so that they have an opportunity to opt out as required by Rule 23. See Civ.R. 23(B)(3), (C)(2); 5 Moore’s Fed. Prac. (3d ed. 2008), §23.21 [3][d], 23-48-23-49. If class membership cannot be determined until after trial, pre-trial notice is impossible.

Third, because a fail-safe class definition requires inquiry into the peculiar facts of each claim to determine class membership, it runs afoul of Rule 23’s requirement that the class definition be unambiguous, so that class members can be identified with reasonable effort at the time of certification. *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 71-72, 1998-Ohio-365, 694 N.E.2d 442; *Warner v. Waste Mgmt., Inc.* (1998), 36 Ohio St.3d 91, 94, 521 N.E.2d 1091. Here, it is impossible to identify class members without thousands of mini-trials on the merits of the action because determining whether a charge is invalid is inherently individualized.

The named plaintiffs in this case illustrate the individualized nature of these inquiries. The plaintiffs received a charge of \$87.98 on their October 2004 United Telephone bill from a company called Bizopia for website services. The plaintiffs alleged that they did not order these services. But the evidence shows that one of Bizopia's representatives contacted the plaintiffs' business, The Pop Shop, spoke to one of the plaintiffs' employees, recorded the portion of the call verifying the order, and faxed a written confirmation of the order to The Pop Shop. (Stamm 73-75, Supp. at 31-32.) To this day, the plaintiffs contend that their employee did not actually order Bizopia's website services, and that issue is unresolved.<sup>3</sup> (Stamm 76-77, Supp. at 32; Smith 13-15, Supp. at 154-156.) But the level of dispute (and the amount of discovery) surrounding this one \$88 charge highlights the impossibility of identifying members of this class without thousands upon thousands of mini-trials regarding similar disputes between other United Telephone customers and other third parties. Each class member's claim and United Telephone's individual and varying defenses must be considered.

As Mr. Stamm admitted, whether a third-party service was "actually ordered" cannot be determined from class members' bills or from any other information in the possession of United Telephone, with or without computers. Instead, each class member (and its employees or family members) would have to be questioned about each charge. (Stamm 66-71, 128, 136-38, Supp. at 30-31, 39, 41-42.) For the named plaintiffs alone, this would require multiple depositions and a manual review of bills, payment records, account notes and other materials. (Davis Aff. ¶10, 12-15, Supp. at 115, 116-117;

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<sup>3</sup> Although United Telephone did remove the charges from the plaintiffs' bills when they complained, and the plaintiffs never paid them.

McAtee 55-56, Supp. at 130.) To perform this analysis for each United Telephone customer would be a practical impossibility.<sup>4</sup>

The United States District Court for the Southern District of Illinois refused to certify a similar class action for this very reason. In *Brown v. SBC Communications, Inc.*, the plaintiff sued his local telephone provider, claiming that his telephone bill included charges for third-party services that he did not request. Like the plaintiffs here, Brown sought to represent a class of all SBC customers who received the charges. Also like the plaintiffs here, Brown tried to define his way around the individualized issues inherent in such claims by limiting the putative class to people who were “improperly billed.” The district court denied class certification because of the individual inquiries required:

Plaintiff’s claims against Defendants hinge on the fact that Plaintiff did not authorize the services for which he was billed. If the services had been authorized, Defendants’ actions would not violate [the Illinois statute], nor would Defendants be unjustly enriched . . . . Accordingly, the proposed class is: “All persons or entities who were residents of Illinois and who were *improperly billed for cramming charges* . . . . Therefore, a consumer charged for a legitimately authorized service is not a member of the proposed class. Defendants contend that the question of whether each potential class member authorized the services for which he or she was billed requires individualized inquiries that render this case inappropriate for class certification. The Court agrees. \* \* \*

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<sup>4</sup> Moreover, the undisputed evidence is that United Telephone cannot presently identify by name which customers even received third-party charges, or which third-parties initiated those charges, without manually reviewing all of its customer bills. (Davis Aff. ¶13, Supp. at 116.) *Margulies v. Guardian Life Ins. Co. of Am.* (April 5, 2007), 8th Dist. No. 88056, 2007-Ohio-1601, at ¶16-18 (class definition failed “reasonable efforts” test where manual search of thousands of policyholder files was required to identify class members). Accordingly, even if a class were defined as the subset of United Telephone customers that received invalid charges, the class definition would still fail because those members could not be identified with “reasonable effort.” *Hamilton*, 82 Ohio St.3d at 71-72.

*Brown v. SBC Communications, Inc.* (Feb. 4, 2009), S.D. Ill. No. 05-cv-777-JPG, 2009 WL 260770, \*3 (emphasis in original). The court reasoned that “the Court will need to make individual determinations as to whether each proposed class member authorized the charges for which he was billed by defendants. The result will be multiple mini-trials, each requiring individual proofs. Consequently, there will be no judicial economy realized from certifying this action as a class action.” *Id.* at \*3.

Consistent with *Brown’s* reasoning, lower courts in Ohio have held that a party may not define a class by the merits of the claim to avoid individualized issues. See, e.g., *Bungard v. Ohio Dep’t of Job & Family Servs.*, (Feb. 2, 2006), 10th Dist. 5AP-43, 2006-Ohio-429, at ¶15 (class defined as those who were legally injured by defendant’s action was impermissible because “examination of the merits” of individual members’ claims would be required); *Barber v. Meister Protection Serv.* (March 27, 2003), 8th Dist., 2003-Ohio-1520, ¶34, 36-37 (reversing certification because class definition involved individualized examination of merits of claim for each class member regarding causation and damages); *Petty v. Wal-Mart Stores, Inc.* (2d Dist.), 148 Ohio App.3d 348, 2002-Ohio-1211, 773 N.E.2d 576, at ¶15 (class definition improper because individualized inquiries into the facts of each potential class member’s case to determine membership was required); *Hall v. Jack Walker Pontiac Toyota, Inc.* (2d Dist. 2000), 143 Ohio App.3d 678, 683, 758 N.E.2d 1151 (class definition was “circular and

ambiguous” because class membership could not be determined “until the facts of the individual claim are examined”).<sup>5</sup>

Fourth, courts outside of Ohio have uniformly rejected “fail-safe” classes because the plaintiff “would be bound only by a judgment favorable to plaintiffs but not by an adverse judgment [to plaintiffs].” *Adashunas*, 626 F.2d at 604 (denying certification of such a “fail-safe” class). This is so because if the defendants prevail at trial, there never was a class to begin with and no proposed members of the unsuccessful class would be bound by the judgment.

If a plaintiff can define a putative class only as the subset of customers that allegedly were harmed – then every Ohio business could be subject to a class action, even if a plaintiff had no evidence that a business engaged in class-wide misconduct or caused class-wide harm. This potential exposure to class action lawsuits exists in no other jurisdiction in the country and should not exist here. This Court should reverse the trial court’s order and deny class certification.

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<sup>5</sup> Federal courts concur that a party cannot define a class by the merits of a claim to avoid individualized issues. See *Brazil*, 2008 WL 2693629, at \*7; *Edwards v. McCormick* (S.D. Ohio 2000), 196 F.R.D. 487, 493 (class definition improper “[i]f a court must come to numerous conclusions regarding class membership or adjudicate the underlying issues on behalf of each class member); *Forman v. Data Transfer, Inc.* (E.D.Pa. 1995), 164 F.R.D. 400, 403-404 (class definition improperly subsumed legal and factual issues at heart of case); *Crosby v. Social Sec. Admin. of United States* (C.A.1, 1986), 796 F.2d 576, 580 (class definition improper because “class members impossible to identify prior to individualized fact-finding and litigation”); *Van West v. Midland Nat. Life Ins. Co.* (D.R.I. 2001), 199 F.R.D. 448, 451 (class is improper when it “is defined simply as consisting of all persons who may have been injured by some generically described wrongful conduct allegedly engaged in by a defendant.”); *In re Copper Antitrust Litig.* (W.D. Wis. 2000), 196 F.R.D. 348, 353 (class definition “must not depend on subjective criteria or the merits of the case or require extensive factual inquiry to” decide who is in class); see, also, *Livingston v. U.S. Bank, N.A.* (Colo. App. 2002), 58 P.3d 1088, 1090 (class definition improperly “subsumed the very legal and factual issue” at heart of case).

**Proposition Of Law No. II: A class action cannot be maintained when only some class members have been injured.**

The plaintiffs cannot escape the fail-safe problem by defining their class to include all United Telephone customers who received any third-party charges, because the class would then improperly include people who have no injury and therefore no claim. However the class is defined, the individualized issues inherent in the plaintiffs' claims will always predominate and preclude class certification under Rule 23(B)(3).

**A. No class could ever be properly certified under Rule 23(B)(3) because individualized issues predominate.**

No class can be certified unless common issues relating to plaintiffs' claims "predominate" over individual issues. As this Court has held: "For common questions of law or fact to predominate, it is not sufficient that such questions merely exist; rather, they must present a significant aspect of the case. Furthermore, they must be capable of resolution for all members [of the class] in a single adjudication." *State ex rel. Davis*, 2006-Ohio-5339, at ¶28 (citations omitted). Common issues do not predominate unless the same facts claimed to establish liability in favor of the named plaintiffs also prove liability in favor of all class members. *Id.*; *Schmidt v. Avco Corp.* (1984), 15 Ohio St. 3d 310, 313; see, also, *Vega v. T-Mobile USA, Inc.* (Apr. 7, 2009), C.A. 11, No. 07-13864, 2009 WL 910411, at \*8, \*12 (common issues do not predominate if plaintiffs still must present substantial individualized evidence or legal arguments to prove their claims; "Sorting out and proving the claims, if any, of these class members \* \* \* would require substantial individualized evidence different from and in addition to that which [named plaintiff] would proffer to establish his own claim."); *Sprague v. General Motors Corp.* (C.A. 6, 1988), 133 F.3d 388, 399 (class certification denied where "[a] named plaintiff who proved his own claim would not necessarily have proved anybody

else's claim"); Manual for Complex Litigation (4th ed. 2005) § 21.24 (common issue relevant "only if it permits fair presentation of the claims and defenses and materially advances the disposition as a whole.")

Because the question of whether particular third-party charges were legitimate requires a case-by-case inquiry, liability for the class members' claims cannot be proven in one trial. No matter how the class is defined, questions of causation and harm will always turn on individualized issues (impacting both claims and defenses) and predominate over any common ones.

**1. The plaintiffs cannot prove class-wide harm and causation.**

Harm and causation are elements of liability that every class member must prove for each of the plaintiffs' claims - negligence, breach of the contractual duty of good faith and fair dealing, and unjust enrichment. *Chambers v. St. Mary's Sch.* (1998), 82 Ohio St.3d 563, 565 (negligence); *Ed Schory & Sons, Inc. v. Soc'y Nat'l Bank* (1996), 75 Ohio St.3d 433, 433-44 (breach of the contractual duty of good faith and fair dealing); *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183 (unjust enrichment).

The only harm alleged by the plaintiffs is that they paid for items "that they did not request or authorize." They concede that they were not harmed, and no one was unjustly enriched, when they received and paid charges for third-party services that they did request and use. (Stamm 59, Supp. at 28; Am. Cmplt. ¶44-45, 53, 59, Supp. at 11, 12, 13.) The question of harm must necessarily be resolved at the putative class member level. Indeed, even the plaintiffs here had third-party charges (from MCI) that they concede were legitimate.

Causation questions are also class-member specific. Proof that one United Telephone customer did, or did not, download a song would not show that the individual made or received a long distance call, signed up to place an online advertisement, or even whether the person downloaded other songs on other days. Specific proof as to one customer would show nothing at all about whether any other United Telephone customer requested or used any other third-party service.<sup>6</sup> Thus, these causation issues cannot be proven for all class members in a single adjudication.

These are not idle concerns. The third-party charges in this case cover services offered by more than 2000 different entities over a more than six-year period, and could involve tens of thousands of different United Telephone customers, including businesses with multiple employees, any one of whom may have authorized or requested services.<sup>7</sup> (Davis Aff. ¶12-16, Supp. at 116-117.)

In addition to *Brown*, the impossibility of deciding the validity of charges on a class-wide basis was also the foundation for another district court decision denying class certification in a “cramming” case. In *Stern v. AT&T*, the district court denied certification because there was no plausible class-wide method of proving the plaintiffs’

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<sup>6</sup> Plaintiffs’ decision to sue United Telephone rather than the third parties that initiated the charges they dispute, also places causation squarely at issue. Even if a class member could prove that he had received and paid a charge for a service he did not request or use, he would still have to establish who was responsible for causing that harm. Does the Post Office “cause” a mistake on a bank statement by delivering it? Does a bank “cause” mistaken or fraudulent charges from a restaurant to appear on a credit card bill by printing or mailing it?

<sup>7</sup> United Telephone may also have defenses to plaintiffs’ claims, including, for example, contributory negligence, superseding or intervening causation, waiver, or laches. These issues also raise individualized issues that require inquiry into the specific facts of each class member’s claim. *In re Am. Med. Sys., Inc.* (C.A. 6, 1996), 75 F.3d 1069, 1085 (defenses such as contributory negligence can turn on facts peculiar to each plaintiff’s claim); *Wilson*, 103 Ohio St.3d at 545 (same).

claim that they had been charged for optional cell phone services that they had not requested and because individualized affirmative defenses also rendered the case unfit for class certification. *Stern v. AT&T* (August 22, 2008), C.D. Calif. No. 05-8842, 2008 WL 4382796, reconsideration den'd, (Oct. 6, 2008), 2008 WL 4534048, at \*9.

As the district court succinctly stated in denying a later request to certify a “cramming” class in *Stern*:

The simple fact is that one cannot determine what services were crammed without taking the deposition of each class member to determine what services were authorized.

*Stern v. AT&T* (February 23, 2009), C.D. Calif. No. 05-8842, 2009 WL 481657 at \*21.

The individualized issues in this case are even more pronounced than those in *Stern* because the charges at issue here emanate from thousands of different third parties, whereas in *Stern* only charges for the defendant’s own services were at issue. United Telephone is aware of no case in which a contested class of this nature has been certified.

Two closely analogous federal appellate decisions also rejected class certification. *Sikes v. Teleline, Inc.* (C.A. 11, 2002) 281 F.3d 1350, (overturned on other grounds) arose out of a “Let’s Make a Deal” game in which callers to a 900 number guessed at what might be behind “doors,” and could win cash prizes. The plaintiffs sued AT&T, which was the billing contractor for the third party that operated the game, and others alleging that ads for the program were deceptive and that they were harmed because the 900-number charges they received exceeded their winnings. The district court certified a class of those billed for such calls, but who won prizes less than the charges they paid. *Id.* at 1358. The Eleventh Circuit reversed, holding that the plaintiffs’ claims required individualized proof that they had been “injured by reason of the defendants’ acts,” that

injury could not be presumed or proven class wide, and that litigation of the claims would “involve extensive individualized inquiries on the issues of injury and damages.” *Id.* at 1360-1363, 1366. The Eleventh Circuit reversed certification for the same reasons in *Andrews v. AT&T* (C.A. 11, 1996), 95 F.3d 1014, where similar claims were made based on multiple 900-number programs.

**2. The common issues identified by the courts below are not significant to the plaintiffs’ claims and do not justify class certification.**

The only common issues that matter in determining whether individual or common issues predominate are those that are potentially dispositive of Plaintiffs’ claims. *Marks v. C.P. Chem Co.* (1987), 31 Ohio St.3d 200, 204; *Schmidt*, 15 Ohio St.3d at 313. A class should not be certified where some common issues exist, but resolving them would not materially advance resolution of the plaintiffs’ claims and would leave significant individual issues to be decided. Thus, while the plaintiffs in *Brown*, *Stern*, *Sikes*, and *Andrews* all received the disputed charges in the same “common” way – on their telephone bills – and those charges were all processed the same “common” way by the defendants, these incidental common issues did not overcome the central fact that a determination of liability raised individual issues. These individual issues prevented certification.

Here the court of appeals identified certain issues that it thought were “opportunities for classwide proof of necessary elements to establish liability” and satisfied the predominance requirement of Rule 23(B)(3). *Stammco, LLC*, 2008-Ohio-3845, at ¶51. But while these things might be “common” as to all class members, they are of no significance to proving whether a particular charge was valid, which is the lynchpin of all of the plaintiff’s claims.

First, the court of appeals noted that United Telephone collects and delivers charges to its customers in similar fashion. *Stammco, LLC*, 2008-Ohio-3845, at ¶16. But this has no bearing on whether particular services were actually requested or used by the customer, or any other fact of consequence to the determination of liability or damages.

Second, the court of appeals noted that United Telephone’s customers do not give written authorization for third-party billing. *Stammco, LLC*, 2008-Ohio-3845, at ¶18. This finding is incorrect, because it is undisputed that some customers directly authorized third-parties to bill them through United Telephone. (Davis Aff. ¶14, 15, Supp. at 117.) And, even where advance authorization was not given, customers who received charges for items they purchased suffered no harm and have no claim. Indeed, the plaintiffs concede that third-party billing is not inherently harmful; whether a class member was harmed is determined by whether he paid a bogus charge, not the *method* by which the customer received the charge. (Stamm at 58-59, Supp. at 28.)

Third, the court of appeals noted that United Telephone did not offer its customers the option to block non-toll third-party charges. *Stammco, LLC*, 2008-Ohio-3845, at ¶18.<sup>8</sup> Yet, United Telephone’s failure to offer blocking for these charges does not prove that any customer received an invalid non-toll charge, that it was paid, or why it appeared on the customer’s bill. Thus, the “common” facts regarding blocking of third-party charges do not foreclose the need for an individual inquiry into causation and harm to resolve each plaintiffs’ claims.

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<sup>8</sup> Contrary to the court of appeals’ statement, the undisputed evidence in the record is that United Telephone did offer blocking of third-party “toll” charges such as for long distance calls, although non-toll charges could not be blocked. (Gillespie 38-39, Supp. at 123.)

Fourth, the court of appeals noted that customer service representatives for United Telephone handle complaints from centralized offices and use a standard series of steps. *Stammco, LLC*, 2008-Ohio-3845, at ¶21. But whether a particular charge was valid does not hinge upon how United Telephone handled an inquiry or complaint to customer service after the charge occurred.

Finally, the court of appeals noted that United Telephone had “common” agreements with the third-party clearinghouses. *Stammco, LLC*, 2008-Ohio-3845, at ¶20. But the plaintiffs are not parties to United Telephone’s agreements with the clearinghouses, and do not base their claims on the terms of those agreements. So, the fact that general terms in those agreements may be similar is meaningless.

Upon analysis, none of the allegedly common issues identified by the court of appeals predominate over the significant, individual determinations that must be made to resolve the plaintiffs’ claims.

**B. This class action is unmanageable.**

Under Rule 23(B)(3), a class action must be a manageable means to effectively resolve the disputes at issue. *J.M. Woodhull, Inc. v. Addressograph-Multigraph Corp.* (S.D. Ohio 1974), 62 F.R.D. 58, 60-61. Yet any attempt to litigate this case as a class action would quickly devolve into a morass of particularized fact finding that would eliminate any efficiency or other benefit that could be gained from class certification.

In this case there is no efficient way of making class-wide inquiries. As the district court stated in *Stern*, the simple fact is that the only way to learn if a third-party charge is valid is to ask the customer and the third party. And to determine if a third-party charge was paid, one must review individual customers’ billing records and records of any calls made to United Telephone about that charge and “match up”

charges with any later adjustments. (Davis Aff. ¶13, Supp. at 116.) This task for the named plaintiffs alone, would require depositions and a manual review of bills, payment records, account notes and other materials. (Davis Aff. ¶¶10, 12-15, Supp. at 115, 116-117; McAtee 55-56, Supp. at 130.) Doing so for all class members would be a gargantuan undertaking.

All this painstaking activity would still not determine liability. Only a list of challenged charges would have been created. Then, evidence about whether each of those specific services were actually purchased or used by those customers would have to be collected. None of that evidence is in United Telephone's possession but would all have to be gathered from non-parties, including more than 2000 businesses that used United Telephone's billing service, and tens of thousands of United Telephone customers. (Davis Aff. ¶10, 12, Supp. at 115, 116.) Subpoenaing records and/or testimony from all of the involved third parties, many of which are outside of Ohio, would be a monumental task.

Even collecting all of this information would not resolve the validity of any charge. As the courts found in *Brown*, *Stern*, *Sikes*, and *Andrews*, a determination of liability would require literally tens of thousands of mini-trials about whether the charges each class member challenged were invalid.<sup>9</sup> Plainly, to defend these claims United Telephone would be unfairly called upon to present individualized and varying

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<sup>9</sup> Given the endless permutations in the number of charges and their varying amounts that might have been received by class members, the difficulties in determining the amount of damages to which prevailing class members would be entitled would also preclude certification. *Hamilton*, 82 Ohio St. 3d at 81 (certification improper where calculation of damages is particularly complex or burdensome).

evidence, all about the validity of charges it did not initiate, for services it did not provide.

**C. A class action is not superior to other methods of resolving the disputes at issue.**

Rule 23(B)(3)'s superiority inquiry requires "a comparative evaluation of other available procedures" to determine whether they are superior to a class action in terms of fairness and efficiency. *Marks*, 31 Ohio St.3d at 204; Civ.R. 23(B)(3). There are multiple procedures superior to a class action available to those customers who do wish to challenge third-party charges.

First among these are the procedures for resolving customer disputes that the clearinghouses and third-party providers maintain under their agreements with United Telephone. These entities possess the most information about the charges and are best able to answer questions and, if appropriate, issue adjustments. For those customers that prefer not to deal with, or are unsatisfied after contacting, a third party, it is United Telephone's policy to issue full adjustments on a "no fault" basis in virtually all cases. (Gillispie 21-24, 35, Supp. at 122, 123; Hill 15-16, Supp. at 139.)

These procedures are viable and effective. They are routinely used by customers with questions or concerns about third-party charges, and only a small fraction of "escalated" complaints – complaints that are not resolved on the first call to customer service – relate to third-party charges. (Gillispie 21-24, 36, Supp. at 122, 123; Hill 17-18, Supp. at 140.) Indeed, when the plaintiffs contacted United Telephone concerning particular charges they disputed – including the Bizopia charge about which the plaintiffs complained, despite ample evidence that their employee actually ordered Bizopia's services – the charges were removed, no questions asked.

These procedures are superior to class action litigation because they are informal, faster, and place no burden of proof on class members. Further, they allow those who do have complaints about third-party charges to have them resolved, but do not force those without complaints to either opt out of this lawsuit or have their interests adjudicated outside of their control. (Davis Aff. ¶15, Supp. at 117.)

Customers with complaints about third-party charges also have the ability to take them to appropriate governmental agencies, including the Public Utilities Commission of Ohio, Attorney General or the Federal Trade Commission, which agencies, where appropriate, will pursue them. These agencies have specialized knowledge of the telecommunications industry and its practices, greater resources than the Fulton County Court, and a wider range of potential remedies at their disposal.

Small claims courts are also available to class members who wish to pursue legal claims about third-party charges and are designed specifically to allow laypeople to pursue claims for small dollar amounts, without counsel, and utilizing streamlined procedures. See *Ostrof v. State Farm Mut. Auto. Ins. Co.* (D. Md. 2001), 200 F.R.D. 521, 532 (recognizing small claims courts as viable alternative to class action).

Given all of these alternatives, there is no reason to think that any efficiency or other benefit will be gained by litigating the claims of class members from all over Ohio in Fulton County, Ohio. Accordingly, because individualized issues predominate over common issues, and a class action would be unmanageable and inferior to other methods to resolve such disputes, this Court should reverse the decision below for these additional reasons.

If left to stand, the decision of the Sixth District will irrevocably alter the requirements of Civil Rule 23 which were established to assure fairness to both plaintiffs

and defendants. It also will permit lower courts to ignore uncommon and individualized issues even when they are critical to the plaintiffs' claims and allow for certification of classes without regard to those factors which might truly prove or disprove defendants' liability. Moreover, the decision would place Ohio at odds with all other state and federal courts. Permitting the certification of "fail safe" classes challenging business practices that are not themselves claimed to be fraudulent or to have caused class-wide harm will serve no useful purpose, but will have a significant negative impact both on Civil Rule 23 jurisprudence as well as on business in Ohio. The Court should not permit this result.

### CONCLUSION

The Court should reverse the decision below and enter an order denying class certification.

Respectfully submitted,



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**PROOF OF SERVICE**

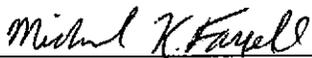
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**IN THE SUPREME COURT OF OHIO**

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

Plaintiffs-Appellees,

v.

UNITED TELEPHONE COMPANY,  
OF OHIO AND SPRINT NEXTEL  
CORPORATION,

Defendants-Appellants.

08-1822

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

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**NOTICE OF APPEAL  
OF APPELLANTS UNITED TELEPHONE COMPANY OF OHIO  
AND SPRINT NEXTEL CORPORATION**

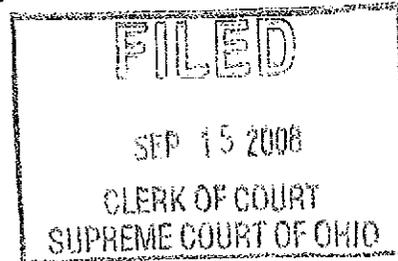
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Appellants United Telephone Company of Ohio and Sprint Nextel Corporation<sup>1</sup> give notice of appeal to the Supreme Court of Ohio from the judgment of the Fulton County Court of Appeals, Sixth District, in Court of Appeals Case No. 07-024 that was journalized on August 1, 2008.

This case raises substantial constitutional questions and is one of public and great general interest.

Date: September 15, 2008

Respectfully submitted,

*Michael Farrell*

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<sup>1</sup> From January 2000 until May 2006, United Telephone was a wholly owned subsidiary of Sprint Corporation, which later became Sprint Nextel Corporation, and did business under the trade name "Sprint." Since May 2006, United Telephone has been a wholly owned subsidiary of Embarq Corporation, has done business under the trade name "Embarq," and there has been no ownership or control of United Telephone by Sprint Nextel Corporation. At no time did Sprint Corporation, Sprint Nextel Corporation or Embarq Corporation provide, or bill for, local telephone services in Ohio. As it has maintained throughout this case, Sprint Nextel Corporation is not a proper defendant herein, there was no personal jurisdiction over it in the court below, and no class of plaintiffs can properly be certified as to it. Sprint Nextel Corporation reserves and does not waive these issues and appellants jointly submit this memorandum solely in the interest of brevity.

**PROOF OF SERVICE**

I certify that a copy of the foregoing was sent by ordinary U.S. mail to the following counsel on this 15th day of September 2008:

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FULTON COUNTY COURT OF APPEALS  
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IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
FULTON COUNTY

Stammco, LLC, et al.

Court of Appeals No. F-07-024

Appellees

Trial Court No. 05CV000150

v.

United Telephone Co. of Ohio, et al.

**DECISION AND JUDGMENT**

Appellants

Decided: **AUG 0 1 2008**

\* \* \* \* \*

Dennis E. Murray, Sr. and Donna J. Evans, for appellees.

Michael K. Farrell and G. Karl Fanter, for appellants.

\* \* \* \* \*

PIETRYKOWSKI, P.J.

{¶ 1} This is an appeal of a September 28, 2007 judgment of the Fulton County Court of Common Pleas certifying this action as a class action. The action is brought by appellees Kent and Carrie Stamm ("the Stammers"), who reside in Archbold, Fulton County, Ohio, and by Stammco, LLC d.b.a. The Pop Shop ("Pop Shop"), an Ohio limited

liability company that operates a business located in Archbold. Appellants, United Telephone Company of Ohio, d.b.a. Sprint ("UTO") and Sprint Corporation ("Sprint") provide appellees with local and long distance telephone service.

{¶ 2} Appellees assert that appellants are liable to them and a class of telephone service customers under theories of liability sounding in negligence, breach of the implied duty of good faith and fair dealing, and unjust enrichment due to a practice of causing unauthorized charges to be placed on their telephone bills. Appellees refer to the billing practice as "cramming." In addition to monetary damages, appellees seek declaratory and equitable relief to prevent future billings for products and services that were not authorized by class members and to return sums allegedly obtained by defendants as a result of the billing practice.

{¶ 3} The trial court granted appellees' motion to certify a plaintiff class of telephone subscribers consisting of:

{¶ 4} "All individuals, businesses or other entities in the State of Ohio who are or who were within the past four years, subscribers to telephone service from United Telephone Company of Ohio d.b.a. Sprint and who were billed for charges on their local telephone bills by Sprint on behalf of third parties without their permission. Excluded from this class are defendants, their affiliates (including parents, subsidiaries, predecessors, successors, and any other entity or its affiliate which has a controlling interest), their current, former, and future employees, officers, directors, partners,

members, indemnities, agents, attorneys and employees and their assigns and successors."

{¶ 5} Appellants appeal the class certification to this court. They assert three assignments of error on appeal:

{¶ 6} "Assignment of Error No. 1

{¶ 7} "The trial court erred and abused its discretion by failing to carefully apply the requirements for class certification under Civil Rule 23, by failing to conduct rigorous analysis into whether all of those requirements were or could be met in this case, and by failing to make findings that or how any of those requirements had been met here.

{¶ 8} "Assignment of Error No. 2

{¶ 9} "The trial court erred and abused its discretion by granting plaintiffs' motion for class certification.

{¶ 10} "Assignment of Error No. 3

{¶ 11} "The trial court erred and abused its discretion because, as a matter of law, no class could ever properly be certified based upon the claims of the named plaintiffs here."

{¶ 12} A decision to certify an action as a class action is not a decision on the merits of a claim. "In determining whether to certify a class, the trial court must not consider the merits of the case except as necessary to determine whether the Civ.R. 23 requirements have been met. *Ojalvo v. Bd. of Trustees of Ohio State Univ.* (1984), 12 Ohio St.3d 230, 233." *Williams v. Countrywide Home Loans, Inc.*, 6th Dist. No. L-01-

1473, 2002-Ohio-5499, ¶ 24. Seven requirements under Civ.R. 23 are to be met to certify an action as a class action:

{¶ 13} "Seven prerequisites must be met before a court may certify a case as a classaction pursuant to Civ.R. 23: (1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impractical; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be satisfied. *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91, 96-98, 521 N.E.2d 1091." *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, ¶ 6.

{¶ 14} The standard of review on appeal of decisions on whether to certify an action as a class action is the abuse of discretion standard. *Marks v. C.P. Chemical Co., Inc.* (1987), 31 Ohio St.3d 200, syllabus; *In re Consol. Mtge. Satisfaction Cases*, ¶ 5. An abuse of discretion connotes a judgment that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 15} The trial court found that appellees "did and still do provide local and long distance telephone service to more than one million customers throughout Ohio, including Plaintiffs." Judgment Entry of September 28, 2007. The court also detailed factual findings on billing practices:

{¶ 16} "Billing activities for UTO, and for all of the other local telephone companies that are part of the Sprint network, are processed centrally through a system managed by what is now known as Embarq Management Company. The process of billing for the services provided by these local telephone companies is the same for all subsidiaries of Sprint. This process was and is managed solely through a system of computerized procedures, and they have not changed during the relevant time period.

{¶ 17} "In addition to billing its own customers for the telephone services provided directly by Sprint subsidiaries, including UTO, Sprint has also entered into contracts with a number of other unrelated third parties, for the purpose of providing billing services for sundry items and services rendered by and on behalf of these other contracting third parties, and it bills its own customers on behalf of these unrelated third party entities, per contract. The procedure for the billing of these items and services, on behalf of these unrelated third parties entities, has also remained the same over the requisite time period."

{¶ 18} It is undisputed that appellants do not require any written authorization from its Ohio customers before they place third-party charges on their customers' local telephone bills and that Sprint has the ability to block such charges. It is also undisputed that appellants have refused to permit Ohio customers, including the Stamms, from blocking third-party charges from being placed against their accounts.

{¶ 19} The trial court also summarized the contentions of appellees:

{¶ 20} "Plaintiffs claim that a number of these third party entities, hiding behind tiers of billing agents, electronic billing systems, and billing telephone companies, have become successful in collecting large sums of monies from Defendants' customers, by having or causing unauthorized, misleading, and deceptive charges to be placed on Defendants' customers telephone bills. These unrelated charges are billed and collected by the local telephone company from its own customers, for items or services allegedly provided by these unrelated companies and businesses. Some of these third party billings are transparent, authorized, and legitimate. Some are not. To the extent such services are bogus, or unauthorized, Plaintiffs claim they constitute a fraud upon themselves, the public, and upon the proposed 'Class.'" Id.

{¶ 21} The trial court provided in its opinion a detailed review of appellants' billing procedures and the difficulties encountered by customers who challenge unauthorized third-party charges on their bills. "The manner in which \* \* \* Sprint representatives handle the customers' complaint or request for information is standardized, and the manner in which the call is 'escalated' to other representatives, with more training and experience, when more sophisticated assistance is needed in handling the call to attempt resolution, is uniform. This multi-tiered system is often electronic, and it soon becomes daunting, uneconomical, and ultimately frustrating to the average lay person." Id.

{¶ 22} As to the named appellees, the record discloses that the Stamms own and operate a small business named Stammco, LLC d.b.a The Pop Shop. The Stamms

discovered numerous unauthorized charges on their monthly phone bills. Upon complaint, ultimately some charges were resolved and credits issued to their accounts. The evidence also disclosed that there was at least one unresolved third-party charge, discovered during appellant Kent Stamm's deposition in this case, that had been paid, was claimed to be unauthorized, and for which repayment has not been made by appellants.

{¶ 23} In *Hamilton v. Ohio Savings Bank* (1998), 82 Ohio St.3d 67, the Ohio Supreme Court directed that trial courts, in deciding motions to certify class actions, are "required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied. Id. at 70. Under *Hamilton*, [w]hile there is no explicit requirement in Civ.R. 23 that the trial court make formal findings to support its decision on a motion for class certification, there are compelling policy reasons for doing so." Id.

{¶ 24} Appellants assert under Assignment of Error No. 1, that the judgment certifying this action as a class action should be vacated as the review of class certification issues by the trial court was insufficiently rigorous under *Hamilton*. Additionally, appellants assert that the trial court failed to address a series of issues raised by appellants against class certification and failed to make findings of fact on how the Civ.R. 23 prerequisites were met. Appellants contend that the reversal is required under *Hamilton* and under the decision of this court in *Miller v. Volkswagen of America, Inc.* (Apr. 7, 2006), 6th Dist. No. E-05-005.

{¶ 25} In *Miller v. Volkswagen of America, Inc.*, this court reversed a trial court judgment that, "without explanation," and, in a seven word order, certified an action as a class action. We reversed and remanded the case for further proceedings on the class certification issue. The *Miller v. Volkswagen of America, Inc.* decision does not stand for the broad proposition that an appellate court must find an abuse of discretion whenever a trial court's judgment on class certification lacks findings of fact on each of the seven prerequisites for class certification or where the review of class action issues by the trial court is not deemed sufficiently rigorous.

{¶ 26} In *Ward v. Nationsbank Mtge. Corp.*, 6th Dist. No. E-05-040, 2006-Ohio-2766, this court recognized that "[t]rial courts are permitted to issue class certification decisions without \* \* \* making the requisite findings of fact." *Id.*, at ¶ 35. There nevertheless must be "sufficient factual evidence in the record to have permitted a meaningful class certification determination by a preponderance of the evidence." *Id.*, at ¶ 37. Other appellate districts have also recognized that a trial court's failure to follow preferred procedures under *Hamilton* to specify facts and reasons for conclusions under Civ.R. 23 as to whether class certification is appropriate does not, by itself, require an appellate court to reverse a judgment on class certification. *Brandow v. Washington Mutual Bank*, 8th Dist. No. 88816, 2008-Ohio-1714, ¶ 8; *Pyles v. Johnson*, 143 Ohio App.3d 720, 731, 2001-Ohio-2478.

{¶ 27} Here the trial court issued a lengthy and detailed opinion reviewing relevant facts, particularly the nature of standardized procedures for billings and for response to

customer complaints as to unauthorized third-party charges. Appellees are correct that the trial court failed to provide specific findings of fact as to the seven prerequisites for class certification and its reasons for granting class certification. However, the record contains sufficient evidentiary material upon which to determine whether class certification was appropriate. Accordingly, we find that appellants' Assignment of Error No. 1 is not well-taken.

{¶ 28} Under Assignment of Error No. 2, appellants assert that the trial court abused its discretion by granting appellees' motion for class certification. We consider each class certification requirement in turn.

{¶ 29} Under *Warner v. Waste Management, Inc.*, "Rule 23 requires, albeit implicitly, that an identifiable class must exist before certification is permissible. The definition of the class must be unambiguous." *Warner v. Waste Management, Inc.*, at 96. The definition must permit identification of class members with "reasonable effort." *Id.*

{¶ 30} Appellants contend that identification of class members of the certified class will require individualized review of customer bills or employment of computer programming to identify UTO customers who received third-party charges over a six year period. Appellants do not claim that identification of customers who were billed for third-party charges and paid them could not be accomplished through a computer analysis of Sprint's billing data.

{¶ 31} "The focus at this stage is on how the class is defined. The test is whether the means is specified at the time of certification to determine whether a particular

individual is a member of the class.' *Planned Parenthood Assn. of Cincinnati, Inc. v.*

*Project Jericho* (1990), 52 Ohio St.3d 56, 63, 556 N.E.2d 157, 165. The question as to whether there are differing factual and legal issues 'do[es] not enter into the analysis until the court begins to consider the Civ.R. 23(B)(3) requirement of predominance and superiority.' *Marks, supra*, 31 Ohio St.3d at 202, 31 OBR at 400, 509 N.E.2d at 1253." *Hamilton v. Ohio Savings. Bank*, at 73.

{¶ 32} The class definition here is unambiguous and complies with the requirements under *Warner* and *Hamilton*. Whether the necessary screening of billing records to identify class members creates predominance or superiority issues that preclude class certification will be considered under the Civ.R. 23(B)(3) analysis of predominance and superiority class requirements.

{¶ 33} On appeal appellants have not disputed that appellees are members of the class. They have not disputed that the class is so numerous that joinder of all class members is impractical.

{¶ 34} The commonality requirement to class certification requires that "there are questions of law or fact common to the class." Civ.R. 23(A)(2). "Courts generally have given a permissive application to the commonality requirement in Civ.R. 23(A)(2). See *Marks v. C.P. Chemical Co.* (1987), 31 Ohio St.3d 200, 31 OBR 398, 509 N.E.2d 1249. This prerequisite has been construed to require a "common nucleus of operative facts." *Marks, supra* at 202, 31 OBR at 400, 509 N.E.2d at 1253." *Warner v. Waste Management*, at 97.

{¶ 35} In *Warner*, the Supreme Court of Ohio agreed that "if there is a common fact question relating to negligence, or the existence of a contract or its breach, or a practice of discrimination, or misrepresentation, or conspiracy, or pollution, or the existence of a particular course of conduct, the Rule is satisfied." *Id.*, quoting Miller, *An Overview of Federal Class Actions: Past, Present and Future* (2 Ed. 1977), at 24 with approval.

{¶ 36} This action concerns a course of conduct applicable to the class involving standardized billing practices of appellants. These practices concern the unauthorized charging of customer accounts with third-party charges and standardized procedures in which appellants respond to customer complaints to such billings. The course of conduct applicable to the class includes a standardized policy of not requiring written authorizations from Ohio telephone customers before placing third-party charges against a customer's account and refusal to permit telephone customers to block such third-party charges. The trial court found that the billing complaint procedure is "multi-tiered," "often electronic," and "daunting, uneconomical, and ultimately frustrating to the average lay person." The record supports a finding that the commonality requirement of Civ.R. 23(A)(2) is met in this case.

{¶ 37} On appeal, appellants have not disputed that the claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class. Nor have they disputed that the representative parties will fairly and adequately represent the interests of the class.

{¶ 38} This leaves the requirement that the action meet the requirements of Civ.R. 23(B)(1), 23(B)(2), or 23(B)(3). Appellees sought certification of the class under both Civ.R. 23(B)(2) and 23(B)(3).

{¶ 39} Civ.R. 23(B)(3) provides:

{¶ 40} "An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

{¶ 41} "\* \* \*

{¶ 42} "(3) the court finds that the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action." (Emphasis added.)

{¶ 43} Appellants contend that neither the predominance or superiority requirements of Civ.R. 23(B)(3) have been met and that proceeding on a class basis to adjudicate claims of third-party cramming of telephone bills will be unmanageable.

{¶ 43} "It is now well established that 'a claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position.' *Lockwood Motors, Inc. v. Gen. Motors Corp.* (D. Minn. 1995), 162 F.R.D. 569, 580." *Cope v. Metro. Life Ins. Co.* (1998), 82 Ohio St.3d 426, 430.

{¶ 44} In *Cope v. Metro. Life Ins. Co.*, the Ohio Supreme Court reversed a decision denying class action status to an action against Metropolitan Life Insurance Company and Metropolitan Life Insurance and Annuity Company to challenge methods used to procure sales of life insurance. The complaint alleged a "wide spread scheme to obtain higher commissions and extra charges" by classifying sales of additional life insurance to existing policyholders as new policies when such sales were to be treated as replacement policies. *Id.*, at 427. The difference in classification was significant in view of MetLife's practice to waive or reduce different policy charges for replacement policies. *Id.*

{¶ 45} The court identified cases involving "involving similar form documents or the use of standardized procedures and practices" as presenting opportunities for "common proof" of claims on a class basis. *Id.*, at 430-431. The court reaffirmed its reasoning in *Hamilton v. Ohio Savings Bank* that "\* \* \* [C]lass action treatment is appropriate where claims arise from standardized forms or routinized procedures,

notwithstanding the need to prove reliance. \* \* \*." *Id.*, at 435, quoting *Hamilton v. Ohio Savings Bank*, at 84.

{¶ 46} The fact that individualized determinations may be necessary, even in cases involving standardized forms and procedures, does not preclude a conclusion that class issues predominate over issues pertinent solely to individual claims:

{¶ 47} "It is conceivable that a significant amount of time may be spent in this case litigating questions affecting only individual members of classes. However, clockwatching is neither helpful nor desirable in determining the propriety of class certification. 7A Wright, Miller & Kane, *supra*, at 527, Section 1778. A court should not "determine predominance by comparing the time that the common issues can be anticipated to consume in the litigation to the time that individual issues will require. Otherwise only the most complex common questions could predominate since such issues tend to require more time to litigate than less complex issues." 5 Moore's Federal Practice, *supra*, at 23-207 to 23-208, Section 23.46[1]. " *Hamilton v. Ohio Savings Bank*, at 85.

{¶ 48} In the decision of *In re Consolidated Mortgage Satisfaction Cases*, the Ohio Supreme Court held that the need for individualized factual determination does not alone preclude class certification:

{¶ 49} "While appellees assert that sifting through these facts in a class action will be arduous, we are not compelled to agree. The mere existence of different facts associated with various members of a proposed class is not by itself a bar to certification

of that class. If it were, then a great majority of motions for class certification would be denied. Civ.R. 23(B)(3) gives leeway in this regard and permits class certification whether there are facts common to the class members." *Id.*, at 468.

{¶ 50} Whether liability in damages is asserted in negligence, for breach of an implied duty of good faith and fair dealing, or unjust enrichment, the standardized practices of appellants present opportunities for class wide proof of necessary elements to establish liability. The claims of all class members arise out of common billing practices of appellants. We agree with appellees that relevant class wide evidence will include evidence regarding the manner in which Sprint purchases, places, and collects unauthorized charges on telephone bills, the extent of Sprint's knowledge of the cramming problem through customer complaints against unauthorized third-party charges on customer accounts, Sprint's actions in response, and the availability of a third-party billing block when a customer seeks to prevent such billing.

{¶ 51} This case does present a need for significant individualized determinations to present the claims of class members. However, appellants' billing system is computer based and appellants' database records will be available to provide detailed factual data both as to individual and class wide issues through computer analysis of the database. Under such circumstances it is reasonable to conclude that questions of law and fact common to the class predominate over questions affecting only individual members. Consideration of Civ.R.23(B)(3) listed factors, *infra*, also supports this conclusion.

{¶ 52} Appellants also dispute that proceeding as a class action is a superior method to adjudicate the dispute over unauthorized third-party charges to telephone accounts. Appellants claim there are multiple procedures superior to class action that are available to challenge third-party charges. Appellants refer to their own internal procedures to question charges to accounts dealing either directly with the third parties that asserted the charge or with UTO to secure full adjustment to the account. Appellants argue that class members could seek assistance with state and federal consumer agencies or litigate their claims in small claims courts.

{¶ 53} This case, however, presents thousands of individual claims for small amounts. This is the type of claim for which the class action procedure is well suited. The Ohio Supreme Court, in *Hamilton v. Ohio Savings Bank*, acknowledged the role of class actions in presenting such claims:

{¶ 54} "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Hamilton v. Ohio Savings Bank*, at 80 quoting *Amchem Products, Inc. v. Windsor* (1997), 521 U.S. 591, 617 and *Mace v. Van Ru Credit Corp.* (C.A. 7 1997), 109 F.3d 338, 344.

{¶ 55} Civ.R. 23(B)(3) lists four factors for consideration to assist in determining whether the requirements of preponderance and superiority have been met. Civ.R.

23(B)(3) supra; *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 314. We address the factors in turn.

{¶ 56} Appellants have not contended that there is evidence that class members have an interest in individually controlling separate actions on their claims. In view of the limited value of individual claims, such an interest is unlikely. There is no other pending litigation against appellees asserting claims of Ohio telephone service customers arising from cramming of third-party charges on their bills. The parties have not argued any advantage to concentrating the claims in a single forum other than advantages gained through use of the class action device itself. The final factor concerns "the difficulties likely to be encountered in the management of a class action." Civ.R. 23(B)(3). Appellants have argued strongly both in the trial court and on appeal that this action is unmanageable as a class action. The manageability issues raised by appellants are based upon the scope of individualized determinations required to adjudicated all claims.

{¶ 57} The Supreme Court of Ohio has recognized that "the trial court is in the best position to consider the feasibility and gathering and analyzing class-wide evidence." *In re Consolidated Mortgage Satisfaction Cases*, at ¶ 12. The trial court exercised its discretion to certify this case as a class action.

{¶ 58} This case presents an effective tool for use in addressing both class wide and individualized factual determinations—appellants' computerized billing database. In our view, the trial court is capable of managing this action as a class action in large part

due to the availability of computer database billing records and the ability to employ computer analysis of those records.

{¶ 59} We find that there exists substantial competent probative evidence in the record demonstrating that both the prerequisites of Civ.R. 23(A) and Civ.R. 23(B)(3) have been met for the trial court to order this action to proceed as a class action. The nature of the dispute and central role played by computerized billing records support a conclusion that class issues predominate over issues concerning only individual claims. The size of the class and limited value of individual claims strongly support a conclusion that the class action is the superior method available for a fair and efficient adjudication of the controversy. Accordingly, we find that the trial court did not abuse its discretion in sustaining the motion to certify under Civ.R. 23(B)(3).

{¶ 60} Appellees argue that this action also meets the requirements to proceed as a class action on the additional ground of Civ.R. 23(B)(2). Civ.R. 23(B)(2) provides:

{¶ 61} "An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

{¶ 62} "\* \* \*

{¶ 63} "(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;"

{¶ 64} In *Warner v. Waste Management, Inc.*, the Ohio Supreme Court recognized that "Civ.R. 23(B)(2) has, as its primary application, a suit seeking injunctive relief."

*Warner v. Waste Management, Inc.*, at 95. "This rule entails two requirements: (1) the action must seek primarily injunctive relief, and (2) the class must be cohesive." *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, at ¶ 13. Class certification under Civ.R. 23(B)(2) is unavailable where injunctive relief is "merely incidental" to a primary claim for monetary damages. *Id.*, at ¶ 17; accord, *Hamilton v. Ohio Savings Bank*, at 86-87; *Marks v. C.P. Chemical Co., Inc.*, at 203-204; *In re Rogers Litigation*, 6th Dist. No. S-02-042, 2003-Ohio-5976, at ¶ ¶ 42-43.

{¶ 66} Appellees seek both monetary damages and injunctive relief in the amended complaint. However, the action for monetary damages has been the primary focus of the case. Accordingly, class certification under Civ.R. 23(B)(2) is unavailable for appellants' claims.

{¶ 67} In view of our determination that the trial court did not abuse its discretion in certifying this action as a class action under Civ.R. 23(B)(3), we find appellants' Assignment of Error No. 2 not well-taken.

{¶ 68} Under Assignment of Error No. 3, appellants argue that "no class could ever properly be certified based upon the claims of the named plaintiffs here." Based upon our ruling under Assignment of Error No. 2, we find Assignment of Error No. 3 is not well-taken.

{¶ 69} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Fulton County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to

App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Fulton County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

Mark L. Pietrykowski, P.J.

William J. Skow, J.  
CONCUR.

*Peter M. Handwork*  
\_\_\_\_\_  
JUDGE  
*Mark L. Pietrykowski*  
\_\_\_\_\_  
JUDGE  
*William J. Skow*  
\_\_\_\_\_  
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

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COMMON PLEAS COURT

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MARY GYDE

**IN THE COURT OF COMMON PLEAS OF FULTON COUNTY, OHIO**

Stammco, LLC, et al, \*  
Plaintiffs, \* Case No. 05CV000150  
-vs- \*  
United Telephone Co. of Ohio, et al, \* **JUDGMENT ENTRY**  
Defendants. \*

\* \* \* \* \*

Coming on before the Court is Plaintiffs' Motion for an Order Certifying a Class, Designating Plaintiffs as the Class Representative, and Appointing Plaintiffs' Counsel, as Class Counsel, for a Proposed Class Action, filed under seal on April 20, 2007; Defendants' Brief in Opposition, filed under seal on June 18, 2007; Plaintiffs' Reply Brief filed under seal on July 2, 2007; Defendants' Surreply Brief filed July 24, 2007; Plaintiffs' Motion to Strike Defendants' Surreply Brief, filed July 27, 2007; Plaintiffs filing of the Supplemental Authority of Ritt v. Billy Blanks Ents, 171 O. App. 3d 204; Defendants' Response to Plaintiffs' Submission of the Supplemental Authority, filed September 5, 2007; and Plaintiffs' Reply to the Response of Sprint, filed September 13, 2007.

The facts in this case are as follows:

The Defendants, United Telephone Company of Ohio (hereafter "UTO"), and Sprint Corporation (hereafter "Sprint"), did and still do provide local and long distance telephone service

9/28

to more than one million customers throughout Ohio, including Plaintiffs. In 2004 UTO was a wholly owned subsidiary corporation of Defendant "Sprint." It then reorganized and became "Sprint-Nextel Corporation," and now is reorganized as "Embarq." For identification purposes Defendants will be referred to as "UTO" or "Sprint."

Billing activities for UTO, and for all of the other local telephone companies that are part of the Sprint network, are processed centrally through a system managed by what is now known as Embarq Management Company. The process of billing for the services provided by these local telephone companies is the same for all subsidiaries of Sprint. This process was and is managed solely through a system of computerized procedures, and they have not changed during the relevant time period.

In addition to billing its own customers for the telephone services provided directly by Sprint subsidiaries, including UTO, Sprint has also entered into contracts with a number of other unrelated third parties, for the purpose of providing billing services for sundry items and services rendered by and on behalf of these other contracting third parties, and it bills its own customers on behalf of these unrelated third party entities, per contract. The procedure for the billing of these items and services, on behalf of these unrelated third parties entities, has also remained the same over the requisite time period.

Plaintiffs claim that a number of these third party entities, hiding behind tiers of billing agents, electronic billing systems, and billing telephone companies, have become successful in collecting large sums of monies from Defendants' customers, by having or causing unauthorized, misleading, and deceptive charges to be placed on Defendants' customers' telephone bills. These unrelated charges are billed and collected by the local telephone company from its own customers,

for items or services allegedly provided by these unrelated companies and businesses. Some of these third party billings are transparent, authorized, and legitimate. Some are not. To the extent such services are bogus, or unauthorized, Plaintiffs claim they constitute a fraud upon themselves, the public, and upon the proposed "Class."

The practice of causing these unauthorized charges to be placed on a customer's telephone bill is recognized in the industry as "cramming." "Cramming" has been recognized and acknowledged to be a serious problem by other States, and by the telecommunications industry itself. As and for remedy, a number of these other States have enacted remedial legislation, thereby protecting their own citizens from these same types of predatory practices, known to have affected Ohio's citizens and the proposed Class Members in this case, or they have referred the matter over to litigation. (The Court notes an action was recently brought by the Federal Trade Commission against OAN, Integretel, Nationwide Connect, and Access One, in the U.S. District Court for the Southern District of Florida, which addresses the issue facing this Court in this proceeding.) These other jurisdictional actions and protections clearly demonstrate: (a) that Sprint is aware of the significance of the problem; (b) that Sprint has the technology to prevent cramming abuses; and (c) that Sprint has failed to give its Ohio customers the same minimal protections it has been able to provide, and does provide, to its customers in other States or jurisdictions.

To describe the structure of the scheme, as best can be determined, Sprint enters into various contracts with numerous third-party toll service providers, and with large billing clearinghouses. A billing clearinghouse, or "billing aggregator," is a company which will bill on behalf of a large number of other entities. Again, various tiers and insulators are built into the system. In these contracts, Sprint agrees to perform billing and collection services for these various clients, who

“subscribe to” and “purchase” these services from Sprint, in accordance with the terms of their various agreements with Sprint. All of these third party agreements are substantially similar in general terms, procedures, and execution, although a number of variables, including the length of contract, the specific rate to be charged by Sprint for these services, the amount of reserves to be held by Sprint for uncollectible accounts and billing adjustments, and the minimum revenue commitments, will vary with each third party entity, based upon the anticipated billing volume, and the collection history of each client. The general format umbrella and terms included in these agreements, however, have not changed over the past ten years, and it is the “general nature” of the format, affecting all of Sprint’s customers, sans the “variables,” that constitutes the basis for the proposed “class action.”

With respect to the instant lawsuit, Plaintiffs Kent and Carrie Stamm own and operate a small business in Archbold, Ohio, named Stammco, LLC, d/b/a/ “The Pop Shop.” They provide small-town retail services for a limited number of customers in semi-rural Fulton County, Northwest Ohio. They are not “well-heeled” by any means, but they do know how to use a computer, and the telephone is a necessary component of their business. In the course of a review of their business records, Plaintiffs discovered there were numerous unauthorized charges being billed by Sprint, on behalf of several third parties, which were included on their monthly phone bills. At least one of these charges was not even discovered, nor recognized by Plaintiffs, as an unauthorized charge, until long after payment had been made by them to Sprint. It is of further note that another unauthorized charge, brought to Mr. Stamm’s attention by counsel for Sprint during Plaintiff Stamm’s deposition, was never discovered by Mr. Stamm until he was in the process of reviewing his records in preparation for his deposition, the day before. Mr. Stamm is also acutely aware of a large number

of other Sprint customers, from his locality, who were and are being billed for unauthorized charges, by the Defendants, on behalf of third party entities. Defendants have since "reversed" these charges out, and they now claim that since Plaintiffs have not actually had to pay the "unauthorized" charges, they have not been actually damaged. There being no damages, Defendants now assert Plaintiffs have no "standing" to bring the instant suit. Plaintiffs deny this claim, and they assert some of the unauthorized charges were never reimbursed nor recovered, all to their damage and standing, and that they suffered other damages in the form of time and effort.

Plaintiff, The Pop Shop, received a Sprint telephone bill in October of 2004, which included unauthorized charges of \$87.98, billed by OAN Services, Inc., "billed on behalf of Bizopia." Plaintiff Kent Stamm had no knowledge of any services provided by Bizopia for the Pop Shop. After making a number of phone calls, and after sending a number of e-mails to Bizopia, Mr. Stamm was finally able to discover that Bizopia was alleged to be a web site building and hosting service. He also learned it had a most unsatisfactory record with the Better Business Bureau. In addition, when The Pop Shop did not make immediate payment to Sprint, after disputing the unauthorized charge on the monthly telephone bill, Sprint added a \$10.00 late fee to its next month's bill. Mr. Stamm was not pleased with the charge, nor with the penalty charge, and he was not especially pleased with the inordinate amount of time and energy he had to devote to running down the facts, which finally led to the filing of the instant lawsuit.

Mr. Stamm had not been aware that Sprint would be billing him on behalf of other third party entities. This prospect was never conveyed to him by Sprint when he entered into his telephone service agreement with Sprint. In fact, Plaintiffs specifically requested, on several occasions, that no third-party billing be placed on The Pop Shop's local telephone bill. Nevertheless, and in total

disregard to Plaintiffs' instructions, the third-party billings by Sprint continued. Mr. Stamm eventually learned that Sprint would not allow him to "block," or indicate in any way, that he did not want any third party billings on his account. Significantly Sprint does not require any written authorization from its customers before it places third-party charges on its own customer's local telephone bills.

Plaintiffs assert that Defendants, being regulated public utilities, are required to provide and bill for telephone services which are actually rendered, that Sprint has a duty to ensure that the bills it sends to its customers are accurate, and that the funds collected in payment of those bills are for products and services actually authorized and received by its customers. Plaintiffs assert Sprint has effectively entered into a "de facto" partnership or agency relationship with its third party vendors, and that it has failed to properly utilize effective methods to screen these third party vendors, and the practices of these third party vendor billing entities, all to Plaintiffs' damage. Plaintiffs allege Sprint has and continues to engage in negligent and/or fraudulent conduct by negligently and/or fraudulently including charges for unauthorized products and services on the bills it sends to its customers, and that this negligence/fraud has caused Sprint's customers to be billed for, and in many instances, to pay for, services and merchandise they did not want, authorize, or even receive. Plaintiffs assert that those particular items which would generate a large amount of money, placed on a customer's phone bill, would probably be spotted by the customer, and maybe challenged, but that many of these unauthorized charges are for only a few dollars, and being so small, they either go unnoticed, as happened to Mr. Stamm for a long time, or they constitute such a small amount of fraud, that it is and would be hugely uneconomical to attempt to track them down, challenge them, and seek redress. It's a lot cheaper for the customer to just pay and shut up.

A challenge to any "unauthorized" charge is not easy, and it's time consuming. Customer service is handled by Sprint representatives in centralized offices. These customer service representatives deal with all Sprint local telephone customers, including subscribers served by the United Telephone Company of Ohio. Information pertaining to any proposed change to a customer's bill is relayed to the Defendants' customer service representatives, through project program managers, who are employees of Embarq [formerly Sprint], and they deal with all of the local telephone companies that provide services under the Embarq name. The manner in which these Sprint representatives handle the customers' complaint or request for information is standardized, and the manner in which the call is "escalated" to other representatives, with more training and experience, when more sophisticated assistance is needed in handling the call to attempt a resolution, is uniform. This multi-tiered system is often electronic, and it soon becomes daunting, uneconomical, and ultimately frustrating to the average lay person. Once the unresolved issue comes to the "service recovery center" where customer escalations are handled, there is also a standardized procedure for dealing with complaints regarding billing problems. However, if the complaint remains unresolved at that level, there is no further step in the process for the customer to take, short of litigation.

Guidelines on how to handle customer inquiries, and how to arrange for "credits," are made available to Sprint's representatives in an online "job handbook." This handbook describes a uniform call handling process and provides instructions on how and/or when to issue credits. In every instance, Sprint representatives who handle customer complaints, pertaining to third party charges, are instructed to inform all such customers that they need to contact the third party vendor to resolve the issue, and that Sprint will not handle the complaint.

Thus, if a customer does notice he has an unauthorized third party charge on his telephone bill, he must first contact the third party vendor to dispute the charge. As a standardized term in every billing agreement, a customer's call to Sprint with a complaint pertaining to a third party charge results in the customer being referred back to the third party who originated the charges. If that third party is a billing clearinghouse, the customer will then be required to take another step in the process, and he will be referred on to the vendor who actually placed the original charge with the clearinghouse. It is only after a customer refuses to deal with the third party, or calls Sprint back after having been unsuccessful in resolving the dispute with the third party clearinghouse, or with the third party vendor, that Sprint might authorized a credit on the customer's bill. Although a credit adjustment on the phone bill can be authorized by a customer service representative, in actual practice the outcome is variable, and it depends upon what the customer has expressed to the Sprint representative, and which Sprint representative happens to take the call. There is an actual adjustment code in the account representative handbook which deals specifically with making credit adjustments resulting from complaints of third party "cramming."

If the third party vendor authorizes a credit on the customer's local telephone bill, or if a Sprint representative decides to give the customer a credit for the charges, Sprint is paid for the inclusion of this additional line item, the credit, on the customer's bill, just as they were paid for the original charge on the account. This is in addition to other set fees paid by the third party to Sprint for the various billing and collection services that Sprint provides. In actuality the billing disputes have the effect of generating additional revenues for Sprint, and additional headaches for its customers.

Sprint is well aware of the "cramming" problem, and of the potential for abuse in these

billing arrangements. Terms are typically inserted in the standard billing and service agreements which allow Sprint to hold back reserves from the billing entities, such as billing clearinghouses, known as "CICs." These terms further allow Sprint to increase the amounts of those deposits, and/or to increase the transaction processing rates, all based upon the number of complaints received, and the number of adjustments made to its customer accounts. Sprint also reserves the right to deny billing and collection services to any entities billing through a billing clearinghouse, referred to as "subCICs," that Sprint deems to be harmful to its end user customers, or to Sprint's reputation. There have been over fifty of these subCIC billing entities terminated by Sprint in the last ten years due to the number of complaints received, or in response to potential State and Federal litigation. Although the decision to terminate the billing for a subCIC, by the team tasked to manage the third party billing, may actually come after a review of the monthly complaint reports, and after attempting to verify the billing authorizations with the billing clearinghouse, even then no further followup will be conducted by Sprint, even after the CIC entity has been notified by Sprint that it will no longer be processing its bills.

Sprint does have the ability to "block" such third party vendor charges. In fact, this service is currently being provided to local telephone customers in some other states, but it is being denied to customers in Ohio. Presumably, these only states, where Sprint does provide "third party billing blocks," are those states where it has been obligated to do so by legislative mandate or court rule.

Sprint does not allow its local telephone customer in Ohio to initiate a "third party block." Although Mr. Stamm was told at one time that Sprint would block these charges for him, he was later informed that this option would not be available to Plaintiffs or any of its Ohio customers. Thus every customer of United Telephone Company of Ohio, similarly situated, must submit to the

prospect of having these charges appear on his or her phone bill without the necessity of any authorization being required, and he or she is forced to endure Sprint's protracted dispute resolution process before any unauthorized charges may be taken off his or her bill, assuming the customer were to even notice the charge in the first place. Many customers simply choose to pay these bills, rather than go through an exhaustive and time consuming process. Unlike customers in those other states where Sprint provides "third party blocking" as a service to prevent this type of billing, every telephone customer of Sprint in Ohio is subject to being billed for third party charges without any alternative to avoid it. This "universality of un-avoidance" is in essence the basis for Plaintiffs' assertion that class action certification is the only realistic remedy, for what Plaintiffs' assert is a fraud upon then the public, and upon the prospective "class."

Plaintiffs have alleged three alternative causes of action: (1) Sprint's "negligent billing," on behalf of third party entities, has caused harm to the Plaintiff class, through the disregard and misuse of the relationships established by Sprint, and with those to whom it provides telephone service; (2) A breach of the "implied duty of good faith in contract," by Sprint's taking opportunistic advantage of the Plaintiff class; and/or (3) That Sprint has been "unjustly enriched" by its third party billing practices, and it is inequitable for Sprint to retain these profits. Plaintiffs seek to have this action certified as a class action on behalf of all Sprint customers similarly situated, and Plaintiffs have asked this Court for injunctive relief to prevent Sprint from continuing these unauthorized billing practices.

Plaintiffs further claim that Defendants have been, and continue to be, either directly, or as agents, negligent in violating their duty to provide accurate billings to their customers, and in the facilitating of a fraud upon their customers. Plaintiffs further assert that the amounts involved are

so small, that they usually avoid detection by most customers, and if noticed, the costs and red tape associated with getting a charge reversed, are so overbearing and ponderous, that in actuality, the customer, on an individual basis, has no realistic alternative avenue of redress.

Defendants assert Plaintiffs do not meet the criteria for class certification.

First, Defendants assert that most "third party service" contracts are a result of transactions negotiated by and between the service provider and the end-user, and not by or with the Defendants. The third party services for which UTO delivers charges cover a wide range of products and services, including long-distance telephone service, pay-per-call information services, such as weather, sports, website setup and hosting, on-line advertising, and music "downloading." In Ohio, UTO receives charges for delivery by and from multiple clearinghouses, and those charges could be for services provided by any one or more of more than 2000 different third party service providers. Defendants claim the delivery of such services, and the concomitant billings for those services, are so widespread and diversified, that they cannot be considered as a "class" for any particular service or purpose. Moreover, while the services provided by the third party vendors may in and of themselves be widespread and diverse, the transportation services provided by Defendant itself is very limited, and in actuality is merely a "flow-through."

Because of this very limited role, Defendants claim they are not the source of, and they do not routinely receive, maintain, or have on file records or information that would or could demonstrate whether a specific third-party service was ordered or used by a customer, or any other information that could answer the question of whether or not a specific third-party charge was valid and/or authorized. For this same reason Defendants claim that, were UTO to be called upon to investigate the circumstances of how any specific third-party charge occurred, it would be necessary

for UTO to somehow obtain such information from the clearinghouse and/or the third-party at issue, which Defendants claim is too onerous a job and not their responsibility.

Second, Defendants assert that most of the charges associated with its third party billing practices were "authorized" by its customers, and Plaintiffs are attempting to lump this "authorized" billing procedure in with some putative "unauthorized" billing procedures. Thus Defendants assert there are two distinct, unequal, and unrelated billing actions Plaintiffs are seeking to equate as being in the same class, when they are not.

Thirdly, Plaintiffs assert that the underlying third party contracts are all stand-alone and individual, and they vary so greatly in their individual terms, and conditions, to include specified amounts, reserves, compensations, and lengths of time, that they cannot possibly constitute one class. Defendants assert that the proposed class would include: (1) UTO customers who authorized, requested, and received the third party services for which they were charged; (2) customers who did not authorize, and who did not pay the third party charges they received; and (3) customers who have no objection to UTO delivering third-party charges to them as part of their bill for local telephone service, three different and distinct classes.

Fourth, Defendants assert Plaintiffs have not met their burden of proof, and they cannot demonstrate by a preponderance of the evidence, that such a class can be certified. Defendants claim Plaintiffs have ignored or misstated significant requirements under Civil Rule 23, that they have ignored the individual factual and legal issues inherent in their claims, and that they have not cited any pertinent case in which a class like the one they propose was able to be certified. Defendants take the position that Plaintiffs' claims cannot be resolved on a class wide basis because countless individualized inquiries, and mini-trials, as to each class member, would be required before the

Defendants' liability could be proven, and because any such attempt to litigate all class members' potential claims, at one time, would be unmanageable.

Lastly Defendants argue that the named Plaintiffs have suffered no monetary harm because they did not end up having to pay any of the disputed charges, no legal effort was ever made to collect them, and Plaintiffs have suffered no service interruptions or harm to their credit. Defendants assert Plaintiffs have suffered no physical, mental, or emotional injury, and no property damage from the charges which briefly appeared on their bills, but are now reversed out. No harm-no foul.

Defendants assert that the only alleged harm Plaintiffs could possibly identify was that where Mr. Stamm stated he had had to spend "time away" from other Pop Shop business to make telephone calls and send e-mails anent the disputed charges. Defendants further assert Plaintiffs can not identify or quantify any monetary or other harm associated with this "time away" from Pop Shop business.

Defendants assert the burden to show a "class" exists, and that it should be certified, "rests squarely on" Plaintiffs. To meet this burden, Defendants assert Plaintiffs must demonstrate, by a preponderance of the evidence, that all of the requirements of both Rule 23(A) and Rule 23(B) are satisfied.

Rule 23(A) requires Plaintiffs to prove that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and/or fact common to the class; (3) the claims or defenses of the named party are typical of the claims of the entire class; and (4) the named Plaintiffs would fairly and adequately protect the interests of the class.

Rule 23(B)(2) requires Plaintiffs to prove that:

(i) Plaintiffs are entitled to predominantly injunctive, as opposed to monetary, relief; and (ii)

the class is sufficiently “cohesive” to justify class certification. Rule 23(B)(3) requires Plaintiffs to prove that: (i) common issues of fact and law “predominate” over any individual issues; and (ii) a class action would be superior to all other methods of resolving the disputes raised in their complaint and “manageable.”

Defendants claim Plaintiffs will never be able to carry their burden of proof, under Rule 23, because of the variability of the interest of each potential member of the proposed class.

Plaintiffs in Reply claim that Defendants have either misstated or misunderstood the nature of the class they are seeking to certify. Plaintiffs’ claim that the proposed class should be defined as: “All individuals, business or other entities in the State of Ohio who are or who were within the past four years [local telephone customers of UTO and] who were billed for charges on their local telephone bills on behalf of third parties without their permission.”

Plaintiffs further point out that a Judge has “broad discretion,” and that in this case that discretion should mitigate in favor of class certification. In support of this position Plaintiffs argue:

1. There are “common questions of Law and Fact;”
2. Specific defenses would, “not preclude resolution of the case on a class-wide basis;”
3. Defendants’ attempt to “manufacture individualized issues,” is not compelling nor a bar to class certification;
4. Resolution of the underlying wrong by class certification is the only realistic manner in which it can be done;
5. The “claims” of the proposed, “class” are cohesive and suitable for injunctive relief;
6. All proposed Plaintiffs, “have suffered identical injuries as those suffered by the members of the class.”

Plaintiffs have also sought to introduce as recently decided “supplemental authority,” the case of Ritt v. Billy Blanks Ents., 171 O.App. 3d 204 (2007). Defendants have sought an Order to strike the introduction of this additional authority.

The Court has reviewed the Ritt case, and the Memorandums. The Ritt case appears to be authoritative and enlightening. Defendants’ Motion to Strike does not appear to be in the interest of justice, and it is overruled.

IT IS SO ORDERED.

The Ritt case appears to deal with the issue of whether each member of the potential class “authorized” the charges challenged, and with so many members being involved, any attempt of a resolution would kick off a number of “mini-trials” and procedures. As stated by the Court in Ritt,

“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.

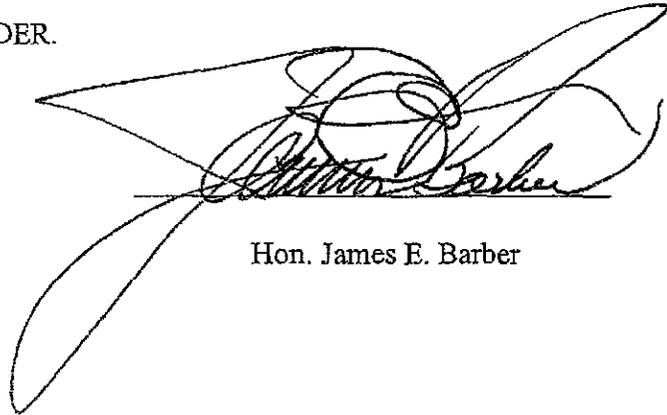
A Plaintiff must prove by a preponderance of the evidence that class certification is appropriate. Any doubts a trial court may have as to whether the elements of class certification have been met should be resolved in favor of upholding the class.”

That language appears to address the situation presently before the Court.

In considering the facts, the law, and the arguments of counsel, it appears to the Court that Plaintiffs’ various Motions for Class Certification, and for the right to be the Class Representative, and for Plaintiffs’ counsel to be designated as counsel for the Class, are in the interest of justice, and they should and ought to be GRANTED. Now therefore,

IT IS SO ORDERED. Defendants' EXCEPTION IS NOTED.

THIS IS AN APPEALABLE ORDER.

A large, stylized handwritten signature in black ink, appearing to read "James E. Barber". The signature is written over a horizontal line and has several long, sweeping loops extending upwards and to the left.

Hon. James E. Barber

cc: Dennis Murray, Sr., Esq.  
Donna Jean Evans, Esq.  
Michael Farrell, Esq.  
Karl Fanter, Esq.