ORIGINAL

IN THE SUPREME COURT OF OHIO

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

MERITS BRIEF OF AMICUS CURIAE OHIO CHAMBER OF COMMERCE

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TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 3

Proposition Of Law No. I: A plaintiff cannot avoid the obligation to prove class-wide harm by defining the class to include only those class members who were actually harmed 3

Proposition Of Law No. II: A class action cannot be maintained when only some of the putative class members have been injured 5

A. Plaintiffs' Claims All Require Proof Of Actual Harm, Proximate Cause And Other Individualized Facts That Cannot Be Proven Class Wide 7

B. The Evidence About The Named Plaintiffs Has No Class-Wide Probative Value 9

C. The Common Issues Referenced By The Courts Below Are Not Significant To Plaintiffs' Claims and Do Not Justify Class Certification 10

D. This Court Should Adopt The Reasoning Of The Federal Courts That Have Denied Certification In So-Called "Cramming" Cases 13

E. The Class Action Certified And Those That Would Follow If The Decision Below Stands Would Be Unmanageable And Inferior To Other Methods Of Resolving The Disputes At Issue 16

F. A Class Action Is Not Superior To Other Methods Of Resolving Disputes Like Those Raised Here 17

CONCLUSION 20

PROOF OF SERVICE 21

TABLE OF AUTHORITIES

Page

Cases

Adashunas v. Negley (C.A. 7, 1980) 626 F.2d 600 5

Andrews v. AT&T (C.A.11, 1996), 95 F.3d 1014 ..... 10, 15, 17

Barber v. Meister Protection Serv. (8th Dist.), 2003-Ohio-1520 4

Blades v. Monsanto Co. (C.A.8, 2005), 400 F.3d 562 6

Brazil v. Dell, Inc. (July 7, 2008), N.D. Cal. No. C-07-01700, 2008 WL 2693629 4

Brown v. SBC Communications, Inc. (Feb. 4, 2009), S.D. Ill. No. 05-cv-777-JPG, 2009 WL 260770 ..... 10, 14, 17

Bungard v. Ohio Dep't of Job & Family Servs., 10th Dist. 5AP-43, 2006-Ohio-429 4

Chambers v. St. Mary's Sch. (1998), 82 Ohio St.3d 563 7

Cicero v. U.S. Four, Inc., 10th Dist. No. 07AP-310, 2007-Ohio-6600 6

Crosby v. Social Sec. Admin. of United States (C.A.1, 1986), 796 F.2d 576 4

Ed Schory & Sons, Inc. v. Soc'y Nat'l Bank (1996), 75 Ohio St.3d 433 7

Edwards v. McCormick (S.D. Ohio 2000), 196 F.R.D. 487 4

Faralli v. Hair Today, Gone Tomorrow (Jan. 10, 2007), N.D. Ohio No. 1:06CV504, 2007 WL 120664 6

Forman v. Data Transfer, Inc. (E.D.Pa. 1995), 174 F.R.D. 400 4

Hall v. Jack Walker Pontiac Toyota, Inc. (2d Dist. 2000), 143 Ohio App.3d 678, 758 N.E.2d 1151 4

Hambleton v. R.G. Barry Corp. (1984), 12 Ohio St.3d 179 7

Hamilton v. Ohio Sav. Bank, 82 Ohio St.3d 67, 1998-Ohio-365, 694 N.E.2d 442 ..... 5, 6, 17

*Hoang v. E*Trade Group, Inc.* (8th Dist.), 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151 6

TABLE OF AUTHORITIES
(continued)

Page

Howland v. Purdue Pharma, L.P., 104 Ohio St.3d 584, 587-88, 2004-Ohio-6552, 821 N.E.2d 141 6

J.M. Woodhull, Inc. v. Addressograph--Multigraph Corp. (S.D. Ohio 1974), 62 F.R.D. 58 16

Linn v. Roto-Rooter, Inc., 8th Dist. No. 82657, 2004-Ohio-2559 6

Marks v. C.P. Chem Co. (1987), 31 Ohio St.3d 200 ..... 10, 17

Mims v. Stewart Title Guaranty Co. (Dec. 11, 2008), N.D. Tex. No. 3:07-CV-1078-N, 2008 WL 5516486 4

Ostrof v. State Farm Mut. Auto. Ins. Co. (D. Md. 2001), 200 F.R.D. 521 19

Petty v. Wal-Mart Stores, Inc. (2d Dist.), 148 Ohio App.3d 348, 2002-Ohio-1211, 773 N.E.2d 576 4

Repede v. Nunes (8th Dist.), 2006-Ohio-4117 6

Schwartz v. Dana Corp./Parish Div. (E.D. Pa. 2000), 196 F.R.D. 275 6

Sikes v. Teleline, Inc. (C.A.11, 2002) 281 F.3d 1350 ..... 10, 15, 17

State ex rel. Davis v. Pub. Emp. Ret. Bd. (2006), 111 Ohio St. 3d 118 6

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

Van West v. Midland Nat. Life Ins. Co. (D.R.I. 2001), 199 F.R.D. 448 4

Warner v. Waste Mgmt., Inc. (1998), 36 Ohio St.3d 91, 521 N.E.2d 1091 5

Wilson v. Brush Wellman, Inc., 103 Ohio St.3d 538, 2004-Ohio-5874, 817 N.E.2d 59 6

Rules

Ohio Civil Rule 23(C)(2) 4

Ohio Civil Rule 23(B)(3) 4, 11, 16, 17

Ohio Civil Rule 23 ..... 1, 4

INTRODUCTION

Amicus curiae the Ohio Chamber of Commerce, which includes the Ohio Small Business Council (the "Chamber"), was founded in 1893 and is a trade association of businesses and professional organizations. As Ohio's largest and most diverse statewide business advocacy organization, the Chamber represents 4000 businesses, ranging from small owner-operators to large multi-national corporations, in all business sectors including manufacturing, construction, insurance, finance, retail, transportation and health care.

The Chamber's members are often targets of class action litigation. Although class actions can be useful devices, when improperly applied the class action mechanism is susceptible to abuse and poses significant risks to the Chamber's members and Ohio's economy. Class certification greatly increases the cost and burden of litigation, magnifies the risk posed by an adverse verdict, and thus often forces defendants to settle even cases that lack merit. Settlements coerced by inappropriately certified classes impose substantial costs on businesses that are most often passed on to consumers and that can deter innovation. For these reasons, the Chamber has a strong interest in ensuring that the requirements of Ohio Civil Rule 23 are properly applied and not improperly diluted so as to prejudice the due process rights of its members or allow for abuse of the class action mechanism.

The decision below represents a serious and unwarranted expansion of permissible class actions. Permitting Ohio courts to certify "failsafe" classes like that certified here, or class actions based on allegedly negligent business practices that are not themselves fraudulent or harmful, would have a negative effect on businesses in Ohio and create a disincentive for doing business here. If the decision below is allowed

to stand, any business with multiple customers in Ohio could be subjected to the cost of defending, the pressure to settle, and huge potential liability in, such class actions. A credit card company could be forced to defend a class action by all of its customers with any kind of dispute about any kind of charge on their credit card bill. A builder alleged to have improperly installed a toilet in a house could be forced to defend a class action by all customers with any complaint about their houses, whether about the basement floor, the roof, or the electrical system. A manufacturer alleged to have sold one defective product could be forced to defend a class action by all purchasers of any of its products, alleging disparate claims about those products. The potential for abuse of the class-action procedure is endless and the implications for Ohio businesses are obvious.

This kind of exposure to class actions exists nowhere else in the country and should not exist here. The Chamber urges this Court to join the other courts around the country that have rejected class certification in cases like this one.

STATEMENT OF THE CASE AND FACTS

The Chamber adopts the Statement of the Case and Facts in the Merits Brief of Appellants United Telephone Company of Ohio and Sprint Nextel Corporation.

Appellant United Telephone Company of Ohio sometimes delivers charges from third-party businesses to its customers along with their bills for local telephone service. Plaintiffs claim that United Telephone was negligent because some invalid charges – that is, charges for services plaintiffs did not request or use – appeared on their telephone bills and were paid by them. Plaintiffs admit, however, that other third-party charges they received and paid were valid because they did request and use those services and make no claim about such valid charges. Plaintiffs do not allege that

United Telephone engaged in fraud, made any common misrepresentation to its customers, or violated any federal or state law or tariff.

United Telephone is not involved in the transactions that can result in third-party charges and nothing that it does in later delivering those charges to its customers determines whether a charge is valid; that depends solely on whether or not that specific customer in fact requested or used that specific service. Neither plaintiffs, nor either court below, has yet identified any plausible way in which the validity of third-party charges could be resolved for all class members in a single adjudication.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

The Chamber also adopts the Argument in Support of Propositions of Law in the Merits Brief of Appellants United Telephone Company of Ohio and Sprint Nextel Corporation.

Proposition Of Law No. I: A plaintiff cannot avoid the obligation to prove class-wide harm by defining the class to include only those class members who were actually harmed.

Trying to avoid the individualized issues inherent in their claims, plaintiffs have now conceded that only those United Telephone customers who actually paid invalid charges are class members. As plaintiffs told this Court: "The class consists . . . *only of those Sprint customers who were billed for an item or service that they did not request or authorize.*" Memo. in Opp. to Juris. at 11 (emphasis added).[1] Thus, plaintiffs' class definition turns on the core liability issue within their claims -- whether a customer paid

[1] Plaintiffs also 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 (emphasis added); see also id. at 7 ("The class members were duped into paying for something they never received or never authorized").

a charge for a third-party service they did not request or use – and only those who paid such invalid charges are class members. For the multiple reasons detailed below, lower courts in Ohio and federal courts have consistently rejected attempts like plaintiffs' to avoid individualized issues by defining "failsafe" classes and have denied or reversed the certification of such classes.[2]

First, fail-safe class definitions like plaintiffs' are improper because the bounds of the class cannot be determined until there has been a determination as to liability. "[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 additional cases cited at p. 16 of the Merits Brief of Appellants.

Second, fail-safe classes like the one certified here require liability determinations just to determine class membership and make it impossible to give notice to class members before trial as required by Rule 23. See Civ.R. 23(B)(3), (C)(2).

Third, because such class definitions require inquiry into individualized facts about individual claims to determine class membership, they violate the Rule 23 requirement that class members must be identifiable with a reasonable amount of effort

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[2] See, e.g., *Bungard v. Ohio Dep't of Job & Family Servs.*, 10th Dist. 5AP-43, 2006-Ohio-429, at ¶15; *Barber v. Meister Protection Serv.* (8th Dist.), 2003-Ohio-1520, ¶34, 36-37; *Petty v. Wal-Mart Stores, Inc.* (2d Dist.), 148 Ohio App.3d 348, 2002-Ohio-1211, 773 N.E.2d 576, at ¶15; *Hall v. Jack Walker Pontiac Toyota, Inc.* (2d Dist. 2000), 143 Ohio App.3d 678, 683, 758 N.E.2d 1151; *Brazil v. Dell, Inc.* (July 7, 2008), N.D. Cal. No. C-07-01700, 2008 WL 2693629, at *7; *Edwards v. McCormick* (S.D. Ohio 2000), 196 F.R.D. 487, 493; *Forman v. Data Transfer, Inc.* (E.D.Pa. 1995), 174 F.R.D. 400, 403-404; *Crosby v. Social Sec. Admin. of United States* (C.A.1, 1986), 796 F.2d 576, 580; *Van West v. Midland Nat. Life Ins. Co.* (D.R.I. 2001), 199 F.R.D. 448, 451.

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. As set out below, thousands of expensive, time consuming mini-trials would be needed here just to identify class members because determining whether charges are valid or invalid requires inherently individualized inquiries.

Fourth, courts outside of Ohio have uniformly rejected "fail-safe" classes because the plaintiffs "would be bound only by a judgment favorable to plaintiffs but not by an adverse judgment." *Adashunas v. Negley* (C.A. 7, 1980) 626 F.2d 600 at 604 (denying certification of such a "fail-safe" class).

If plaintiffs are permitted to pursue class actions on the grounds that a business has an allegedly negligent practice that results in harm to some, but not all, of its customers by defining the class as only those customers that were actually harmed – then every Ohio business with any standardized practice could be subject to a class action, even if the plaintiffs had no evidence of class-wide fraud or that the practice harmed all of its customers.

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

Even if plaintiffs had not defined an improper fail-safe class, their claims raise inherently individualized issues – chiefly, what services were requested or used by what United Telephone customers – that could never be resolved for all class members in a single adjudication.

This Court has repeatedly held that a class cannot properly be certified unless common issues relating to plaintiffs' claims "predominate" over individual issues:

> *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 v. Pub. Emp. Ret. Bd. (2006), 111 Ohio St. 3d 118, 124 (emphasis added, citations omitted). Where actual harm and causation, and therefore liability, cannot be determined on a class wide basis, individual issues predominate and no class can be certified.[3] Federal authority, which is "an appropriate aid to interpretation of" Ohio class action jurisprudence, is in accord.[4]

Despite expressly finding that "this case does present a need for significant individualized determinations," the court of appeals concluded that the existence of "common issues" that have little or no real bearing on plaintiffs' causes of action predominated over the individualized issues. Neither court below analyzed, or even considered whether, or how, the actual harm and other specific elements of plaintiffs' causes of action could be proven for all class members in a single adjudication. This was error.[5]

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[3] *Cicero v. U.S. Four, Inc.*, 10th Dist. No. 07AP-310, 2007-Ohio-6600, at ¶41; *Repede v. Nunes* (8th Dist.), 2006-Ohio-4117, at ¶17; *Hoang v. E*Trade Group, Inc.* (8th Dist.), 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151, at ¶24; *Linn v. Roto-Rooter, Inc.*, 8th Dist. No. 82657, 2004-Ohio-2559, at ¶16, 18, 19, 23.

[4] *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5874, 817 N.E.2d 59, at ¶17. *Faralli v. Hair Today, Gone Tomorrow* (Jan. 10, 2007), N.D. Ohio No. 1:06CV504, 2007 WL 120664, at *6; *Oshana v. The Coca-Cola Co.* (C.A. 7, 2006), 472 F.3d 506, 513-14; *Blades v. Monsanto Co.* (C.A.8, 2005), 400 F.3d 562, 571; *Schwartz v. Dana Corp./Parish Div.* (E.D. Pa. 2000), 196 F.R.D. 275, 282.

[5] The decision below should also be reversed because the lower courts did not "carefully apply" the Rule 23 requirements or "conduct a rigorous analysis" into whether they were met and failed at all to address several arguments made by United Telephone. *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70, 1998-Ohio-365, 694 N.E.2d 442; *Howland v. Purdue Pharma, L.P.*, 104 Ohio St.3d 584, 587-88, 2004-Ohio-6552, 821 N.E.2d 141, at ¶21-26. These requirements exist to protect businesses and other

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Because each cause of action pleaded in this case requires proof that each class member suffered injury as a proximate result of actionable conduct by United Telephone, every class member must prove that they paid an invalid charge as a proximate result of something United Telephone did. These things cannot be proven on a class-wide basis.

A. Plaintiffs' Claims All Require Proof Of Actual Harm, Proximate Cause And Other Individualized Facts That Cannot Be Proven Class Wide.

Actual harm and causation are elements of liability that every class member must prove to as to all of plaintiffs' claims.[6] Plaintiffs do not allege that they were harmed by the manner in which the charges were delivered to them, or by the manner in which their later complaints to United Telephone were handled. Plaintiffs allege that they were harmed because they paid some charges that were for particular services that they did not request or use. Conversely, plaintiffs admit that they were not harmed by paying charges for services that they did use, and that United Telephone delivered both valid and invalid charges in exactly the same way.

Both courts below recognized that not all third-party charges are invalid: "Some of these third party billings are transparent, authorized and legitimate." (Op. 6.) Given this, plaintiffs can only prove "actual harm" and "unjust benefit" with individualized

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defendants from improperly certified classes and to protect their due process rights and as such are of great importance to the Chamber's members.

[6] See *Chambers v. St. Mary's Sch.* (1998), 82 Ohio St.3d 563, 565 (negligence claim requires proof of actual injury and causation); *Ed Schory & Sons, Inc. v. Soc'y Nat'l Bank* (1996), 75 Ohio St.3d 433, 443-444 (same as to claim for breach of implied duty of good faith and fair dealing); *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183 (unjust enrichment claim requires proof of fraud, misrepresentation or bad faith by defendant, that causes plaintiff to confer a benefit upon defendant that it would be unjust for it to keep).

evidence that a class member received, and paid, a third-party charge that was for a service that they did not request or use. Even class members who could prove this would still have to prove that that happened as the proximate result of something actionable done by United Telephone and not, for example, by deliberate conduct of a third-party provider or the inadvertence of the customer themselves.

Whether a third-party charge is valid depends entirely on whether *that United Telephone customer* requested or used *that service* on *that day*. There is no debate that different United Telephone customers request and use different services at different times. Thus, proof as to which third-party services one United Telephone customer did, or did not, request or use could not show what services any other United Telephone customer did, or did not, request or use.

Whether a customer was actually harmed as a result of an invalid charge depends not only on whether they used the service in question, but also on whether that charge was actually paid. Proof that one customer paid one allegedly invalid charge would prove nothing about that customer's payment of other charges, let alone prove anything about payments made by (or credits later given to) any other customer.

Causation also cannot be proven class wide. Proof showing why one invalid charge, from one third party, ended up on a customer's bill, will not show why any other charge, from any other third party, appeared on any other customer's bill. The fact that causation is a significant issue is highlighted by the named plaintiffs' admissions that

United Telephone was not at fault regarding the initiation of the invalid charges they claim to have received.[7]

The impossibility of proving the receipt of invalid charges, their payment, and causation for all charges to all class members in a single adjudication is compounded by the fact that those charges cover services ranging from website hosting to long distance calling, offered by more than 2000 different third-party entities using a variety of marketing methods, over a more than six-year period. It is further compounded by the fact that the putative class includes businesses and entities with multiple employees (any of whom may have authorized or requested services), as well as families and individuals, all over Ohio who handle their affairs with varying degrees of attention and care.

B. The Evidence About The Named Plaintiffs Has No Class-Wide Probative Value.

The named plaintiffs in this case received some third-party charges that they admit were valid and some they claim were not. They never paid the vast majority of the allegedly invalid charges, but did pay one such charge. Alone, these undisputed facts show that the validity of such charges cannot be established, even for one class member, without inquiry into the specific facts relating to each charge, what it is for, and how it occurred. As a district court recently put it in denying a request to certify a class in a "cramming" case:

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[7] Plaintiffs' decision to sue United Telephone rather than the third parties that initiated the charges they dispute, also places causation squarely at issue. 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?

> 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 *8.

The evidence about the charges from Bizopia received by the named plaintiffs was never mentioned by either court below, but it demonstrates the individualized issues that arise just in trying to determine whether those charges were valid and the impossibility of deciding the validity of all charges challenged by all class members in a single adjudication.

The Bizopia charges arose from a telephone call between a telemarketer for Bizopia and an employee of plaintiff Stammco. It is unclear what was said during this call, and Bizopia and the named plaintiffs disagree about whether Bizopia's services were actually requested during it. Even if the charges were not requested, that would not show what was said on any other telephone call involving a class member and Bizopia, or in the thousands of calls between other class members and other third parties. And it would not show anything about third-party charges that stem from transactions other than telephone calls either.

The long-distance charges challenged by plaintiffs also illustrate the predominance of individual issues. The evidence offered by plaintiffs to show that these charges were invalid consists solely of their own testimony that they did not remember calling, or accepting calls from, those specific telephone numbers and that they were not at home on a particular day that a collect call occurred. Even if such evidence were somehow conclusive, it would show nothing about any other long-distance charge to or from any other class member and, of course, would show nothing about any other kind of charge to any other class member.

C. The Common Issues Referenced By The Courts Below Are Not Significant To Plaintiffs' Claims and Do Not Justify Class Certification.

Only common issues that are significant to plaintiffs' claims matter in determining whether individual or common issues predominate. *Marks v. C.P. Chem Co.* (1987), 31 Ohio St.3d 200, 204; *Schmidt,* 15 Ohio St.3d at 313.

Where common issues exist, but resolving them would still leave significant individual issues to be decided, they do not warrant certification. Thus, although the plaintiffs in the *Brown, Stern, Sikes* and *Andrews* cases discussed below all received the disputed charges in a "common" way on their telephone bills, that did not outweigh the myriad individual issues raised by their claims and it did not warrant certification of a class.

The court of appeals identified certain issues that it believed "presented opportunities for classwide proof" and therefore satisfied the predominance requirement of Rule 23(B)(3). (Op. 15.) The court of appeals did not, however, explain how any of these issues would resolve any significant element of plaintiffs' claims. In truth, while these things might be "common" to all class members, they are of no or little significance to whether or not United Telephone can be found liable on plaintiffs' claims. As such, they do not predominate over the "significant individualized determinations" which the lower court conceded must be made to resolve any of plaintiffs' claims as to any class member. (Op. at 15.)

Plaintiffs' claims stem from the validity or invalidity of the charges themselves, not the method by which United Telephone delivered them. United Telephone's delivery of third-party charges does not make them valid or invalid – that is determined by whether the customer, in fact, requested or authorized the service at issue.

Such requests or authorizations occur in transactions that do not involve United Telephone. These transactions happen before a charge is initiated by the third-party, sent to a clearinghouse, and then finally sent to United Telephone. Thus, third-party charges are valid or invalid before United Telephone gets them. "Common" proof as to how United Telephone thereafter delivers those charges has no bearing on whether the customer requested or used a service in the first place, whether the charge was paid, or any other fact of consequence.

That United Telephone's delivery of these charges is all but irrelevant to plaintiffs' claims is shown by the fact that plaintiffs make claims based on allegedly invalid charges they paid, but make no claims about valid charges that were delivered to them in exactly the same way. Plaintiffs dispute the Bizopia charges because they claim they never requested or used Bizopia's services. Would plaintiffs change their mind and agree that the Bizopia charges were valid if they had appeared on their credit card bill, been mailed to them by Bizopia, or sent to them by email rather than being on their telephone bill? Of course not.

The conclusion of the court below that United Telephone's failure to obtain written authorization before delivering third-party charges is a significant common issue is incorrect for several reasons. (Op. 11.) First, whether such authorization was given is an individualized issue. It is undisputed that some customers give express authorization directly to third-parties to deliver their charges with the customer's telephone bills, that some customers are aware that that is how they are going to be billed and do not object, and that some customers choose to be billed that way. None of these customers, who could only be identified through customer-by-customer, charge-by-charge inquiries, can complain about being billed in the manner to which they

agreed. Thus, in all of these situations, whether United Telephone itself obtained written authorization is irrelevant.

Even where advance authorization is not given, customers who received charges for services that they did in fact request or use have suffered no harm and have no claims, regardless of how they received the charges. For example, even though they gave no authorization to United Telephone, plaintiffs requested and used MCI's services and do not dispute that they can make no claim about those charges.

Also insignificant to the predominance inquiry are the "common" facts regarding blocking of third-party charges. The fact that United Telephone did not offer blocking as to non-toll third-party charges does not prove whether any customer received an invalid non-toll charge, whether it was paid, or what proximately caused it to appear on that customer's bill. The fact that blocking for toll charges was available, but was chosen only by some class members, only adds to the individualized issues already identified.

Because such facts could be found as to almost any large or mid-sized business, the reliance of the courts below on the unremarkable fact that customer service representatives for United Telephone handle complaints from centralized offices, or handle those calls through standardized series of steps, is particularly troubling to the Chamber. These facts do not go toward proving any significant part of plaintiffs' claims.

While plaintiffs may have been frustrated by their experience with United Telephone's customer service, the entire customer service process occurred *after* they received the charges at issue, which were either valid or invalid from the moment they left the third parties. Plaintiffs do not claim that that they received, or paid, any invalid charge as a result of the way that United Telephone's customer service group is organized or how it processes the inquiries it receives.

Likewise, plaintiffs are not parties to, and do not base their claims on the terms of, the agreements between United Telephone and the clearinghouses. Nothing in those agreements determines, or changes, whether a charge is valid or invalid. Thus, the fact that the general terms of those agreements with the various clearinghouses are similar is also irrelevant to the crux of plaintiffs' claims.

D. This Court Should Adopt The Reasoning Of The Federal Courts That Have Denied Certification In So-Called "Cramming" Cases.

Federal courts that have considered class certification in cases involving claims of "cramming" and similar claims have rejected certification because of the myriad individualized issues inextricably tied up in those claims. The Chamber urges this Court to consider and adopt this reasoning and result.

In *Brown v. SBC Communications, Inc.* (Feb. 4, 2009), S.D. Ill. No. 05-cv-777-JPG, 2009 WL 260770, the plaintiff sued his local telephone provider claiming that charges for third-party services that he did not request or use appeared on his telephone bill. Like plaintiffs here, Brown sought certification of a class of all SBC customers who received such charges. Also like plaintiffs, Brown tried to avoid the individualized issues inherent in his claims by defining the putative class as those who were "improperly billed." The district court denied class certification:

> 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. ***

> [T]he 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 (emphasis in original).

Similarly, in *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, the district court denied certification because the plaintiffs' claim that they were charged for optional cell phone services that they had not requested could not be decided on a class-wide basis and because individualized affirmative defenses rendered the case unfit for class certification. Id. at *9. The individualized issues in *Stern* were actually simpler than those here because this case involves charges initiated by thousands of different entities, whereas *Stern* involved only charges from the defendant for its own services.

Two federal appellate decisions are also on point. *Sikes v. Teleline, Inc.* (C.A.11, 2002) 281 F.3d 1350, 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 ATT, 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.[8] The district court certified a class of those billed for such calls who won prizes less than the charges they paid. Id. at 1358. The Eleventh Circuit reversed, holding that the plaintiffs' claims required individualized proof, inter alia, that the plaintiffs had been

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[8] Plaintiffs also sued the operator of the program and a TV network that advertised it asserting a civil RICO claim, a third-party beneficiary contract claim, claims for violations of the Federal Communications Act and related state law claims. Id. at 1355-56.

"injured by reason of the defendants' acts," that such 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 1360-63, 66. For the same reasons, the Eleventh Circuit reversed certification in *Andrews v. AT&T* (C.A.11, 1996), 95 F.3d 1014, in which similar claims were made based on multiple 900-number programs.

E. The Class Action Certified And Those That Would Follow If The Decision Below Stands Would Be Unmanageable And Inferior To Other Methods Of Resolving The Disputes At Issue.

Under Rule 23(B)(3), a class action must be both "superior" to all other methods of resolving the disputes at hand and "manageable." *J.M. Woodhull, Inc. v. Addressograph--Multigraph Corp.* (S.D. Ohio 1974), 62 F.R.D. 58, 60-61.

As set out above, whether the class includes just those who received invalid charges, or all customers who received any third-party charge, simply *identifying* class members will require significant inquiry into facts unique to thousands of individual class members. Where such tasks must be done merely to give notice, the class is hardly manageable.

Beyond that fact, resolving any of plaintiffs' claims would first require identifying, for every class member, the charges that person or entity claims to be invalid and which of those were paid. This alone would require: (i) reviewing six-year's worth of each class member's bills to identify all third-party charges and which third parties they came from; (ii) then somehow identifying which of those charges each customer claimed were invalid, which could only be done by contacting all of them in some way; and (iii) determining which of those specific charges had been paid and whether adjustments were later given as to any of them.

The Chamber can conceive of no efficient way to conduct such inquiries class wide. The record reflects that United Telephone's computer system does not allow it to identify by name which of its customers received third-party charges, or what third parties they got charges from. The record also shows that the only way to determine if a third-party charge was paid, or an adjustment was later made, is to manually review individual customers' billing records and then to "match up" charges with later adjustments, if any.[9] Performing these actions for a single plaintiff, for the six years at issue, would itself be a significant amount of effort. Doing so for all class members, or any significant number of them, would be a monumental task.

Even after doing all of this, the parties would still have to gather and review all of the evidence pertaining to which specific services were actually requested or used by which specific customers. Because none of that evidence is in United Telephone's possession, it would all have to be gathered from non-parties, chiefly whatever subset of the more than 2000 potential third parties are claimed to have initiated invalid charges, and thousands of individual customers themselves. Again, this would be a monumental task and a significant burden on United Telephone or any other business subjected to a similar suit.

Finally, even all of the foregoing would still not actually decide the validity of any charge. As the courts found in *Brown*, *Stern*, *Sikes* and *Andrews*, that would require thousands and thousands of separate adjudications to determine, for each class

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[9] This is particularly daunting since adjustments can be given months or years after a charge.

member, which of the charges that that entity or person challenged were in fact invalid.[10]

F. A Class Action Is Not Superior To Other Methods Of Resolving Disputes Like Those Raised Here.

The superiority inquiry requires comparing "other available procedures" with a class action 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).

The Chamber believes that multiple available procedures would be superior to a class action not only in this case, but in all cases where only some customers of a business dispute only some of the charges at issue.

First among these are the dispute resolution procedures voluntarily maintained by United Telephone and the parallel procedures that United Telephone requires the clearinghouses and third-party providers to maintain. The third parties possess the most information about these charges—after all, they initiated them—and are best able to address issues raised by those charges. Likewise, United Telephone's own policy of issuing full adjustments on a "no fault" basis in virtually all cases is a quick, inexpensive and effective way of dealing with such issues. Indeed, when the named plaintiffs contacted United Telephone about the charges they disputed, all of the charges they identified were removed, no questions asked. Businesses that maintain such effective procedures for resolving customer disputes should not be subjected to class-action suits

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[10] 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 itself preclude certification. *Hamilton*, 82 Ohio St. 3d at 81 (certification improper where calculation of damages is particularly complex or burdensome).

because one or a few of their customers decide, or are persuaded, that they are unsatisfied after their personal experience with those procedures.

Customers with complaints also have the option of raising such issues with appropriate governmental agencies, which in this case could include the Public Utilities Commission of Ohio, Attorney General or the Federal Trade Commission. Such agencies have specialized knowledge of the industries they regulate, greater resources than any common pleas court, and a wider range of potential resolutions at their disposal.

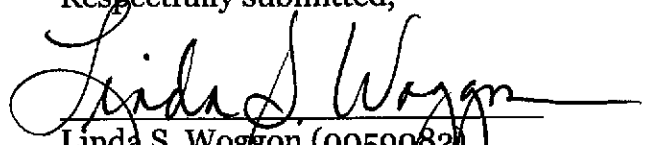
Small-claims courts are also available to class members who wish to pursue legal claims about third-party charges and are designed specifically to allow laypeople to pursue claims for small dollar amounts, without counsel, and utilizing streamlined procedures. *Ostrof v. State Farm Mut. Auto. Ins. Co.*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

To sum up, the Chamber fears that the adverse impact on Ohio businesses of permitting class actions such as the one certified below would be enormous. Even if a plaintiff had no evidence that a business engaged in class-wide fraud, or that all of its customers had been harmed by a challenged business practice, he could still maintain a class action on the grounds that practice resulted in harm to some, but not all, of the that business's customers. These things, of course, could be alleged about almost every practice of almost every business.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,



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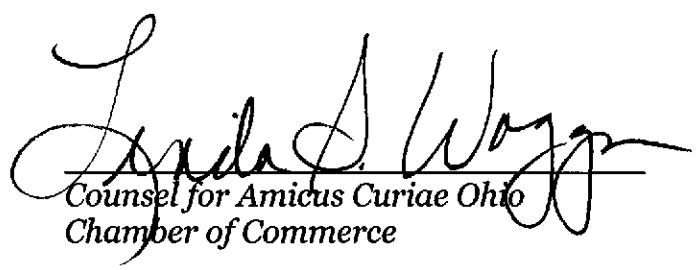

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