

IN THE SUPREME COURT OF OHIO

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

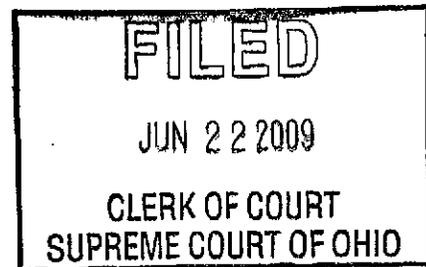
**OPPOSITION OF APPELLANTS UNITED TELEPHONE COMPANY OF OHIO
AND SPRINT NEXTEL CORPORATION TO APPELLEES' MOTION TO
DISMISS APPEAL AS IMPROVIDENTLY GRANTED,
OR IN THE ALTERNATIVE, TO STRIKE PORTIONS OF APPELLANTS'
MERITS BRIEF**

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Faced with the Court's decision to hear this matter and the overwhelming authority that no class should have been certified, plaintiffs-appellees seek to avoid the Court's scrutiny. They have moved to dismiss or limit this appeal on the grounds that certain issues addressed in the appellants' merits brief were either not raised below or are outside the scope of this Court's grant of jurisdiction. The appellees' motion is baseless and should be denied.

The appellees, Stammco, LLC and Kent and Carrie Stamm, first claim that the appellants, United Telephone Company of Ohio and Sprint Nextel Corporation (collectively "United Telephone"), did not argue below that it is improper to define a class as that subset of potential class members who have actually been harmed – sometimes known as a "fail-safe" class.

The appellees' claim directly contradicts what they have previously represented to this Court. In opposing jurisdiction, the appellees told the Court that United Telephone was "raising the exact same arguments" that had all "been made in the Court of Common Pleas, Court of Appeals and this Court." See Appellees' Mem. In Resp. To Jur. 13; Appellees' Mem. In Opp. To Recon. 2. The appellees specifically represented that arguments regarding "fail safe" classes had been raised and decided in the Sixth District. See Appellees' Mem. In Resp. To Jur. 3 ("Contrary to appellants' arguments, the class as certified does not constitute an improper 'fail-safe' class *Appellants unsuccessfully made this argument in the trial court and in the court of appeals.*") (emphasis added).

Indeed, United Telephone set forth before the Sixth District the many reasons that classes defined by merits-based determinations cannot be certified. United Telephone argued below, just as it does in its merits brief before this Court, that actual harm and causation are elements of appellees' claims that cannot be proven on a class-

wide basis, and that the class cannot be redefined to include only those putative class members who were actually harmed. See United Telephone's Sixth Distr. Opening Br. 16-21, 30; United Telephone's Reply Br. 2-5, 9-10. Each of the barriers to certification of such a class was raised below, and nearly every case relating to improper merits-based or "fail-safe" classes cited to this Court was cited to the Sixth District as well.

The appellees next contend that the manageability and superiority requirements of Rule 23 (B)(3) were not raised in United Telephone's memorandum in support of jurisdiction. To be sure, United Telephone's alternate issue on appeal focused upon predominance. Yet United Telephone also raised a broader proposition: "A class action cannot be maintained when only some of the putative class members have been injured." See United Telephone's Mem. in Support of Jur. 5-9. Whether the appellees or any other United Telephone customer requested or used a given service, and whether they actually paid for it, are individualized issues that cannot be resolved for all class members in a single adjudication. These issues render the proposed class action unmanageable and inferior to individual actions.

So, notwithstanding the appellees' claim to the contrary, United Telephone did indeed address manageability and superiority issues in its jurisdictional memorandum. As United Telephone argued:

[T]he impossibility of proving authorization, causation, or payment for all charges to all class members in a single adjudication is compounded by the fact that those charges cover a wide range of services offered by more than 2000 different businesses. And even if a class member could actually prove harm, the class members would still have to demonstrate that United Telephone, as opposed to the third-party business or the class member himself, proximately caused such harm.

United Telephone's Mem. In Supp. Of Jur. 9; see, also, United Telephone's Mot. To Recon. 4-5. United Telephone also argued that should this class be permitted, it would open "the floodgates to unmanageable class actions." Memo in Support of Jur. 9-10; Mot. To Reconsider 5-6.

The appellees do not dispute that manageability and superiority were raised before the Sixth District as well.¹ United Telephone's Sixth District brief contained a section entitled "Certification Under Rule 23(B)(3) Was Improper For The Additional Reasons That The Class Action Certified Would Be Unmanageable And Inferior To Other Methods of Resolving The Disputes Raised Herein." United Telephone's Sixth Distr. Opening Br. 24-27. There, United Telephone emphasized that appellees' proposed class was "utterly unmanageable," requiring "tens of thousands of mini-trials to determine, for each class member, which of the charges that they disputed were in fact unauthorized, which were paid, and what adjustments had been issued." United Telephone's Sixth Distr. Opening Br. 25.

There is thus no basis for the appellees' motion to dismiss or to strike any portion of the United Telephone's merits brief, and the motion should be denied.

¹ Accordingly, even had these particular issues not been raised in the memorandum in support of jurisdiction, the Court could consider them. "A cause properly appealed to this court is here for the proper determination of all questions presented by the record." *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St. 2d 279, 280 fn. 1 (Court may consider question not specifically raised in jurisdictional memorandum).

Respectfully submitted,

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PROOF OF SERVICE

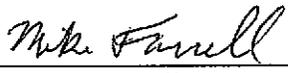
I certify that a copy of the foregoing was sent by ordinary U.S. mail to the following counsel on June 22, 2009:

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