ORIGINAL

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	Case No.: 08-1822 On Appeal From the Fulton County Court of Appeals, Sixth Appellate District, Case No. 07-024

BRIEF OF AMICUS CURIAE ADVOCATES FOR BASIC LEGAL EQUALITY, INC. and NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTRODUCTION AND STATEMENT OF INTEREST OF AMICI CURIAE

Advocates for Basic Legal Equality, Inc. ("ABLE") is a regional nonprofit law firm that provides a full range of free, high quality legal services to low-income individuals and groups to help them achieve self-reliance, equal justice, and economic opportunity. ABLE serves clients in thirty-two counties in Northwest and Western Ohio as well as migrant farmworkers and immigrant workers statewide.

Established in 1969, ABLE has a long history of representing low-income clients in all types of complex civil litigation, including numerous class action cases. In addition to consumer protection, ABLE's work covers the areas of housing, public benefits, civil rights, and employment. ABLE's focus since its founding has been on systemic litigation and impact advocacy as a method to achieve greater success for low-income clients with long-term results. A significant tool for achieving these results has been class action lawsuits. Class-action litigation allows ABLE to leverage scarce resources by litigating major systemic issues affecting individuals in poverty and achieving relief for a far greater number than would ever be possible through individually litigated claims. Recently, ABLE's consumer class action work includes a case dealing with fraudulent student loans and a sham truck driving school, *Appleberry v. DDH, Inc.* (Butler Cty. Ct. of Common Pleas 2003), Case No. C-2003-01062 (class certified), and improper debt collection, *Northcoast Financial Services v. Hopson* (Toledo Muni. Ct. 2007), Case No. CVF-05-11143 (consolidated) (case settled prior to class certification).

The National Association of Consumer Advocates ("NACA") is an association of consumer advocates organized to help create and strengthen state and federal laws designed to protect purchasers from unscrupulous business practices in connection with

consumer transactions. NACA's members are private and public sector attorneys, legal services attorneys, law professors and law students, and other advocates whose primary focus is the protection and representation of consumers. In the class action field, the value of its "Standards and Guidelines for Litigating and Settling Consumer Class Actions" (Second Edition, 2006) has been recognized by several courts. See, e.g., *Boyle v. Giral* (D.C.C.A. 2003), 820 A.2d 561, 569 fn. 8; *Figueroa v. Sharper Image Corp.* (S.D. Fla. 2007), 517 F. Supp. 2d 1292, 1308; *In re Compact Disc Minimum Advertised Price Antitrust Litigation* (D.Me. 2003), 216 F.R.D. 197, 204; *In re Educational Testing Service Praxis Principles of Learning and Teaching, Grades 7-12 Litigation* (E.D.La. 2006), 447 F.Supp.2d 612; *State v. Homeside Lending, Inc.* (Vt. 2003), 826 A.2d 997, 1009-1011.

Amici, ABLE and NACA, believe that the decision of the Sixth District Court of Appeals upholding the trial court's certification of Appellees' class was proper and completely in accordance with Rule 23 of the Ohio Rules of Civil Procedure. Appellants' argument is an attempt to obscure the class definition requirements, increase the burden upon plaintiffs in class actions, and restrict access to the courts through class action lawsuits. As recognized by the trial court and court of appeals, the class of consumers defined here is unambiguous. *See Warner v. Waste Mgmt., Inc.* (1988), 36 Ohio St. 3d 91, 521 N.E.2d 1091. The class here – consumers who did not authorize the third-party charges billed by Appellants – can clearly be identified and consists of individuals actually harmed by these "cramming" practices. Cramming practices are not neutral; they are widely recognized as fraudulent practices. In recent years, the Office of the Attorney General in both Florida and New York reached major settlements dealing

with telephone company cramming practices. *See Attorney General Bill McCollum News Release*, July 10, 2007[1] ("Today's agreement is the final step in resolving the issue of how telephone companies with Florida customers will address cramming and steps will be taken to proactively protect telephone consumers from the illegal practice, which occurs when unauthorized charges from third parties appear on phone bills.") and *Verizon Adds New Safeguards Against "Cramming"*[2] ("This agreement with Verizon Communications, Inc. marks the first time a telephone company has been required to take steps to monitor and correct the fraudulent billing practice known as 'cramming.'").

As advocates for consumers, amici are particularly concerned with Appellants' attempt to constrict access to courts in class action suits by creating a heightened class definition requirement beyond what is required by Civ. R. 23. A ruling by this Court in favor of Appellants would have the effect of restricting access to courts for thousands of consumers and particularly for low-income consumers. Low-income consumers have historically been hindered in pursuing their rights through the court system because of the severe shortage of free legal services and *pro bono* counsel. Individual lawsuits are simply not a viable option for low-income consumers in many situations where no legal aid or *pro bono* representation is available and the suit is simply not a business option for a private attorney where no up-front fee is possible by the consumer. Class actions have been and continue to be a valuable tool to broaden access – and thus available relief – for

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[1] Available at http://myfloridalegal.com/newsrel.nsf/newsreleases/D2C4EE152FB21091852573140056 0395; accompanying *Assurance of Voluntary Compliance* is available at http://myfloridalegal.com/webfiles.nsf/WF/MRAY-76KJKD/$file/VerizonAVC.pdf (accessed August 23, 2009).

[2] Available at http://www.oag.state.ny.us/media_center/2005/apr/apr04a_05.html (accessed August 23, 2009).

thousands of low-income Ohioans. Amici oppose this attempt by Appellants to close the courthouse doors to these consumers.

STATEMENT OF THE CASE AND FACTS

Amici adopt the statement of facts set forth in Appellees' Brief on the Merits.

ARGUMENT

Proposition of Law I: Class Actions are a Valuable Tool for Low-Income Consumers to Access Justice through the Court System.

A. The Majority of Low-Income Individuals in Ohio are Unable to Obtain Legal Representation for Consumer Claims.

Although legal service programs statewide provide valuable services to thousands of low-income individuals throughout Ohio, the efforts have fallen short of meeting the vast need for legal representation for poor people. In 1991, the Ohio Legal Assistance Foundation completed a report entitled *An Assessment of the Unmet Civil Legal Needs of Ohio's Poor* (The Spangenburg Report).[3] The report found that only 17 percent of the legal need is being addressed in Ohio, with nearly 83 percent of the legal problems going without legal assistance. At 1991 levels, the ratio of poor persons to legal aid attorneys in Ohio was 7,000 to 1, compared to a general population to attorney ratio of 394 to 1. *Id* at 8. The Spangenburg Report specifically identified systemic litigation as a method to increase the effectiveness of legal service programs and *pro bono* counsel to meet the needs of a greater number of poor individuals. *Id* at 11 ("Recommendation 30:

[3] Available online http://www.olaf.org/aboutolaf/ourpublications/spangenburg/Spangenburg.pdf (accessed August 18, 2009).

Attorneys, including those in major law firms, in house counsel staffs and lawyers in government service, should increase efforts to work with legal services providers as co-counsel seeking systemic change through litigation.").

There has been little improvement since that time. There are currently 1.5 million individuals in Ohio living near or below the poverty level who cannot afford to hire an attorney. *Ohio Legal Assistance Foundation 2008 Annual Report.*[4] Legal services programs and pro bono efforts by private attorneys meet only 25% of the civil legal needs of these 1.5 million individuals, leaving 75% of these needs unmet without the assistance of an attorney. *Id.* With funding cuts of up to 40% in 2008 as a result of the decrease in IOLTA revenues, legal services organizations will have fewer resources and even more low-income individuals in Ohio will either not be able to access the court system to address a legal issue or will be left to proceed on their own without the assistance of counsel.

Nationally, the picture is no brighter. A 2005 report of the Legal Services Corporation ("LSC") found that 50 percent of those actually seeking help from a legal services program are turned away because of lack of resources, and that is without taking into consideration those who never seek help. *Documenting the Justice Gap: The Current Unmet Civil Legal Needs of Low-Income Americans.*[5] "Nationally, there are *more than ten times* the number of private attorneys providing personal civil legal services to the general public as there are legal aid attorneys serving the poor. While there is only one legal aid lawyer (including all sources of funding) per 6,861 low income

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[4] Available online at http://www.olaf.org/aboutolaf/ourpublications/annualreports/2008%20OLAF%20Annual%20Report%20(final).pdf (accessed August 20, 2009).

[5] Available online at http://www.lsc.gov/justicegap.pdf (accessed August 18, 2009).

people in the country, there is one lawyer providing personal civil legal services for every 525 people in the general population." *Id* at 15 (emphasis in original). The LSC report estimates that in 2004 nearly 130,000 low-income individuals with consumer legal problems were unable to obtain legal services assistance. *Id* at 7.

Most recently, the Center for Law and Social Policy completed a July 2009 update to *Civil Legal Aid in the United States.*[6] The report specifically identifies restrictions on class action suits for LSC-funded programs as one of the causes for the significant disparity in the number of low-income individuals going without access to the court system: "A significant gap in the civil legal aid system in the United States, and particularly in the many states with limited non-LSC resources, is the lack of providers that can . . .(2) bring class actions and effectively and strategically use attorneys' fees statutes . . . ." *Id* at 11. The report concludes: "Efforts to expand access through technology and self-help representation activities continued and have expanded, but the fundamental problem remains: there are not enough actual staff lawyers, paralegals and private attorneys available to meet the huge needs of low-income persons for advice, brief service and full representation." *Id* at 28.

Although low-income individuals are frequently faced with the inability to access the court system to address individual legal concerns because of the lack of legal services or pro bono attorneys, class actions allow programs such as ABLE and NACA attorney members in *pro bono* capacity to leverage these scarce resources and bring these cases that can expand access and provide relief for thousands of individuals. Increased access

[6] Available online at http://www.clasp.org/admin/site/publications/files/CIVIL-LEGAL-AID-IN-THE-UNITED-STATES-2.pdf (accessed August 17, 2009).

to the courts is a fundamental principal consistently supported by this Court. *Report and Recommendations of The Supreme Court of Ohio Task Force on Pro Se and Indigent Litigants*[7] April 2006, p.1 ("access to justice is a fundamental right that is not being afforded to all citizens, especially indigent and pro se litigants.").

B. Class Actions May Be the Only Economically Viable Way to Provide Legal Representation to Low-Income Individuals with Relatively Small Claims.

Given the inherent limitations of the Office of the Attorney General protecting all of Ohio's residents from the countless consumer transactions that occur daily, the federal and state governments have turned to consumers themselves to act as private attorneys general and regulate the actions of Ohio's businesses. *See* H. Newberg & A. Conte, NEWBERG ON CLASS ACTIONS § 5.49 (4th ed. 2002) [cited herein as "NEWBERG"], listing cases granting a private right of action to consumers, including *Blum v. Stenson* (1984), 465 U.S. 886 (government benefits); *New York Gaslight Club, Inc. v. Carey* (1980), 447 U.S. 54 (employment discrimination); *Alyeska Pipeline Service Co. v. Wilderness Society* (1975), 421 U.S. 240 (environmental); *Hawaii v. Standard Oil Co. of Cal.* (1972), 405 U.S. 251 (antitrust); and *Newman v. Piggie Park Enterprises, Inc.* (1968), 390 U.S. 400 (civil rights); *see also, e.g.*, R.C. § 1345.09(D) (2009) (consumer protections). As the Supreme Court of the United States has noted, the use of class actions and the development of Civ. R. 23 "is a natural outgrowth of the increasing reliance on the 'private attorney general' for the vindication of legal rights." *Deposit Guar. Nat'l Bank v. Roper* (1980), 445 U.S. 326, 440. Further, federal and state

[7] Available online at http://www.sconet.state.oh.us/Publications/prose/report_april06.pdf (accessed August 23, 2009).

legislatures have shown the importance of the concept of a "private attorney general" by including numerous fee-shifting provisions in consumer protection statutes. *See, e.g. De Jesus v. Banco Popular de Puerto Rico* (C.A. 1, 1990), 918 F.2d 232, 234 (finding that the goal of fee-shifting statutes is to "create a system of 'private attorney generals' to aid in effective enforcement power of the substantive statute"); *Roper*, 445 U.S. at 338, n. 9 (stating that the "central concept" of F. Civ. R. 23 is the ability "to obtain legal redress at an acceptable cost.").

The combination of private attorneys general and class action litigation is important due to the number of potential consumer lawsuits and the relatively small damages suffered by individual consumers. For example, in 2008, the Consumer Assistance Unit of the Ohio Attorney General received more than 24,000 consumer complaints and inquiries. *See Ohio Attorney General, Consumer Protection Section, 2008 Annual Report*, pg. 24.[8] Since consumer complaints normally are for relatively small amounts of money, class actions are usually the only avenue for aggrieved consumers. *See Phillips Petroleum Co. v. Shutts* (1985), 472 U.S. 797, 809 (stating "class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.").

This Court has stressed the importance of the availability of class relief to Ohio consumers because individual claims are cost-prohibitive and because class relief discourages unscrupulous behavior. In *In re Consol. Mortgage Satisfaction Cases*, the

[8] Available online at http://www.ohioattorneygeneral.gov/files/Publications/Publications-for-Consumers/2008-Consumer-Annual-Report (accessed August 19, 2009).

representative plaintiffs argued that their damages of $250 were too small to pursue with individual claims. *In re Consol. Mortgage Satisfaction Cases* (2002), 97 Ohio St. 3d 465, ¶14. The plaintiff also contended that a certified class made it possible to "more readily attack" the defendants' practices. *Id.* This Court, in upholding the trial court's certification of the class, found this argument to be "persuasive and . . . a factor to be weighted in favor of class certification." *Id.*

The opinion in *In re Consol. Mortgage Satisfaction Cases* was consistent with this Court's previous decisions on the importance of plaintiff classes. In *Cope v. Metro. Life Ins. Co.*, this Court extensively quoted a California appellate case, which found: "Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct." *Cope v. Metro. Life Ins. Co.* (1998), 82 Ohio St. 3d 426, 429, quoting *Vasquez v. Superior Court of San Joaquin Cty.* (1971), 4 Cal. 3d 800, 808. In concluding that "we cannot imagine a case more suited for class action treatment," this Court held that class relief brought a "benefit to the parties and the courts [that] would, in many circumstances, be substantial." *Cope*, 82 Ohio St. 3d at 437; 429.

Further, this Court has addressed the issue of class certification under Civ. R. 23(b)(3) –the grounds under which the appellate court upheld certification – for cases involving small sums of alleged damages. In *Hamilton v. Ohio Sav. Bank*, this Court held,

> The purpose of Civ. R. 23(B)(3) was to bring within the fold of maintainable class actions cases in which the efficiency and economy of common adjudication outweigh the interests of individual autonomy. Thus, 'this portion of the rule also was expected to be particularly helpful

> in enabling numerous persons who have small claims that might not be worth litigating in individual actions to combine their resources and bring an action to vindicate their collective rights.'

Hamilton v. Ohio Sav. Bank (1994), 82 Ohio St. 3d 67, 80, quoting Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure (2 Ed.1986) 518, Section 1777 (other internal citations omitted). This is consistent with the Supreme Court of the United States, which stated,

> '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.'

Amchem Products, Inc. v. Windsor (1997), 521 U.S. 591, 617, quoting *Mace v. Van Ru Credit Corp.* (C.A. 7, 1996), 109 F.3d 338, 344. This Court should continue its policy of ruling in favor of class certification when other legal remedies are impractical or unavailable.

Judge Richard Posner succinctly summed up this need for the availability of private relief for consumers via class actions when, in writing for the majority that permitted a class action to proceed, he stated,

> The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative – no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied – to no litigation at all.

Carnegie v. Household Intern., Inc. (C.A. 7, 2004), 376 F.3d 656, 661.

Based on these cases from the Supreme Court of the United States and this Court, the clearly established rule is that class actions exist, in part, to provide private relief

from improper business practices and when individual claims prevent adequate access to the legal system.

<u>Proposition of Law II</u>: A Ruling in Support of Appellants' Position Will Place a Higher Burden on Plaintiffs for Class Certification and Constrict Access to Courts for Low-Income Consumers.

A ruling by this Court denying class certification to Appellees would have an enormously detrimental effect on Ohio's consumers. Class actions have received favorable rulings by Ohio courts in a broad range of consumer protection situations: car purchase and financing,[9] funeral services,[10] debt collection,[11] vacation packages,[12] health clubs,[13] dietary supplements,[14] rent to own sales,[15] propane sales,[16] charges for medical records,[17] and telemarketing abuses.[18] These situations are important to the consumers affected, many of whom cannot afford to pay attorneys, and relief may not be available if access to class actions is restricted further than by what is required under Civ. R. 23.

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[9] *Daffin v. Ford Motor Co.* (C.A. 6, 2006), 458 F.3d 549; *Phillips v. Andy Buick, Inc.* (11th Dist.), 2006-Ohio-5832; *Washington v. Spitzer Mgmt.* (8th Dist.), 2003-Ohio-1735; *Amato v. General Motors Corp.* (8th Dist. 1982), 11 Ohio App. 3d 124, 463 N.E.2d 625.
[10] *Reed Estate v. Hadley* (4th Dist.), 2007-Ohio-5462; *Pyles v. Johnson* (4th Dist.), 143 Ohio App. 3d 720, 2001-Ohio-2478.
[11] *Stewart v. Cheek & Zeehandelar, LLP* (S.D. Ohio 2008), 252 F.R.D. 387; *Mann v. Acclaim Fin. Servs.* (S.D. Ohio 2003), 232 F.R.D. 278.
[12] *Limberios v. Vermilion River Resort, Inc.* (9th Dist. 1990), Case Nos. 89-CA-004581 and 89-CA-004596; *Hanson v. Titan Tiger, Inc.* (8th Dist. 1988), Case No. 53250.
[13] *State ex rel. Fisher v. American Courts, Inc.* (8th Dist. 1994), 96 Ohio App. 3d 297, 644 N.E.2d 1112.
[14] *Parker v. Berkeley Premium Nutraceuticals, Inc.* (Montgomery Cty. 2005), Case No. 04CV1903.
[15] *Taylor and Dye v. Rentovision* (Hamilton Cty. 1980), Case No. 8006737, available in Attorney General Public Inspection File (PIF) Case No. 1000350.
[16] *Mick v. Level Propane Gases, Inc.* (S.D. Ohio 2001), 203 F.R.D. 324.
[17] *Deegan & McGarry v. Med-Cor* (8th Dist. 1998), 125 Ohio App. 3d 449, 708 N.E.2d 1029.
[18] *Ritt v. Billy Blanks Enters.* (8th Dist.), 171 Ohio App. 3d 204, 2007-Ohio-1695.

A ruling by this Court denying class certification would also have a detrimental effect on the public goal of promoting legitimate business practices in this state. If Ohio consumers are unable to challenge the legality of small damages as a part of a properly-defined plaintiff's class, such as the one at issue, Ohio's legitimate business practices will be at a severe competitive disadvantage. Appellants' challenge to the trial court's certification of the class and the corresponding opposition by the business community is particularly troublesome because consumer class actions are largely beneficial to legitimate businesses. Judgments in class actions have the effect of either tempering business practices that are outside the norm of most businesses or proclaiming that a particular business practice is legal for a large swath of consumers.

Further, since businesses can benefit from collateral estoppel and prevent the plaintiff class from bringing future claims, class actions are a beneficial way for businesses to dispense of claims with little merit. NEWBERG, § 5.38 (4th ed. 2002); Civ. R. 23(c). This Court has previously addressed this issue, stating that

> A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.

Cope, 82 Ohio St. 3d at 429, quoting *Vasquez*, 4 Cal. 3d at 808.

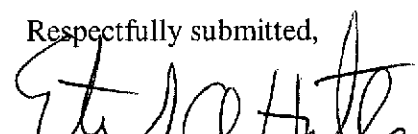
The opinions of the trial court and appellate court below are not aberrations. They are completely consistent with rulings by this Court and the United Stated Supreme Court and the class defined here squarely meets the requirements of Civ. R. 23. Far from opening the floodgates, this case represents nothing more than a class of plaintiffs accessing the court through the open door already established by class certification

jurisprudence of this Court. Appellants are attempting here to close this door and deny these consumers access contrary to the principles established by this Court; such an attempt should be rejected.

CONCLUSION

This Court should uphold the decision below finding in favor of Plaintiffs-Appellees and certifying the plaintiff class pursuant to Civ. R. 23.

Respectfully submitted,



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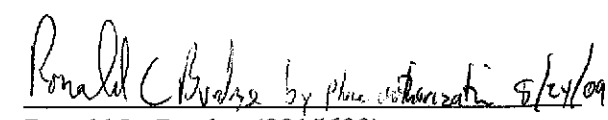

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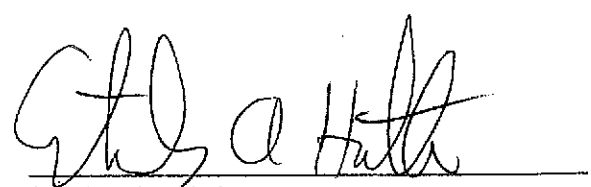

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