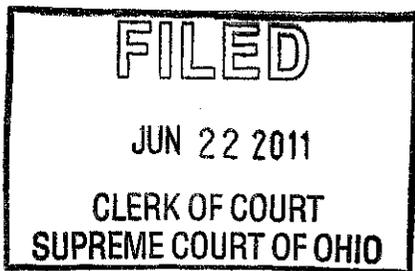


## IN THE SUPREME COURT OF OHIO

ESTATE OF JEROME R. MIKULSKI, <i>et al.</i> ,	)	CASE NO. 2011-0873
	)	
Plaintiffs-Appellees,	)	
	)	
vs.	)	On Appeal from the Cuyahoga County
	)	Court of Appeals, Eighth Appellate District
CENTERIOR ENERGY CORP., <i>et al.</i> ,	)	
	)	
Defendants-Appellants.	)	Court of Appeals Case No. CA-10-94536

**MEMORANDUM IN RESPONSE OF APPELLEES,  
ESTATE OF JEROME R. MIKULSKI, *ET AL.***



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## **THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST**

This is not the case that Appellants describe. In this case, the Court of Appeals has done no more than remand a class certification motion to the trial court for the development of a fuller and clearer factual record. An order remanding a case to obtain a clearer and better record on a key issue of fact is certainly not a case of public or great general interest that justifies the exercise of this Court's jurisdiction. Therefore, the Court should decline jurisdiction to decide the merits of the case at this time and in its current procedural posture.

Specifically, the Cuyahoga County Court of Appeals (Eighth District) remanded the case to the trial court for purposes of developing a clearer factual record, and perhaps for further evidentiary proceedings at the discretion of the trial court, on the key factual question on which the trial court's ruling on the predominance element of class certification turned – whether amending the class definition could eliminate the need for individualized inquiry and establish the existence of injury on a class-wide basis, thereby curing the predominance problem originally found by the trial court and reiterated by the appellate court.

Appellants' argument that this Court should take jurisdiction rests on the false premise that the Eighth District reversed the trial court for “presumably” abusing its discretion by not considering a specific alternative class definition.<sup>1</sup> Appellants misapprehend what the Court of Appeals actually did, and in the process mischaracterize the Eighth District's decision in exaggerated and excessive rhetoric as (i) imposing an “impossible burden for Ohio courts,”<sup>2</sup> (ii)

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<sup>1</sup> Appellants' Memorandum in Support of Jurisdiction (“Mem.”) at 8. But at the same time, Appellants concede that their abuse of discretion argument is based on their own conclusory assumptions because “the Eighth District never explicitly stated that it found Judge Mason had abused his discretion.” *Id.* at 8 n.4.

<sup>2</sup> *Id.* at 1 (the decision “fashions an unprecedented and impossible burden for Ohio's courts”), 3 (“saddled with an almost impossible burden to resolve every possible class definition”), 14 (“the nearly impossible burden that this new standard imposes upon the trial courts of this State”).

“reliev[ing] plaintiffs of their burden of proof,”<sup>3</sup> (iii) “creat[ing] a clear conflict with contrary decisions of this Court”<sup>4</sup> and (iv) “ma[king] it nearly an absolute certainty that plaintiffs (and their attorneys) will obtain class certification even in the most frivolous of actions.”<sup>5</sup> However, the actual appellate decision does nothing of the kind.

The Court of Appeals did *not* reverse the trial court for an abuse of discretion supposedly because the trial court did not consider specific alternatives or modifications to the Class definition, despite Appellants’ insistence to the contrary. Indeed, the Eighth District expressly found that “[t]he trial court *did not abuse its discretion* by finding that, for the class as defined by appellants, individual questions predominate,”<sup>6</sup> and further found that “the court *did not abuse its discretion* when it determined that the process of identifying these persons would predominate over the questions common to the class.”<sup>7</sup> The sole reason the Eighth District on reconsideration remanded this case to the trial court was “[b]ecause the record is unclear regarding appellants’ assertion that the fact of damage can be demonstrated simply by showing that a putative class member filed a tax return in any given year.”<sup>8</sup>

The Court of Appeals actually held, in pertinent part, as follows:

{¶ 18} In *Cope v. Metro. Life Ins. Co.*, 82 Ohio St.3d 426, 1998-Ohio-405, the Ohio Supreme Court noted that “when a common fraud is perpetrated on a class of persons, those persons should be

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<sup>3</sup> *Id.* at 2 (the decision “relieved plaintiffs of their burden of proof”), 1 (“alters the burden of proof applicable to [class certification] motions”).

<sup>4</sup> *Id.* at 3 (the decision “creates a clear conflict with contrary decisions of this Court, other Ohio courts of appeals, and federal courts as well”), 11 (“creates an unprecedented and irreconcilable conflict among the courts of this state”).

<sup>5</sup> *Id.* at 2-3.

<sup>6</sup> *Estate of Mikulski v. Centerior Energy Corp.* (8<sup>th</sup> Dist.), 2011-Ohio-696 (the “Decision”), at ¶ 15, *citing Hoang v. E\*Trade Group, Inc.*, 151 Ohio App.3d 363, 2003-Ohio-301 (emphasis supplied).

<sup>7</sup> *Id.* at ¶ 16 (emphasis supplied).

<sup>8</sup> *Id.* at ¶ 21.

able to pursue an avenue of proof that does not focus on questions affecting only individual members. If a fraud was accomplished on a common basis, there is no valid reason why those affected should be foreclosed from proving it on that basis.” *Id.* at 430.

{¶ 19} Here, if [Plaintiffs’] allegations are true, there is the kind of generalized fraud the *Cope* [*v. Metro. Life Ins. Co.*, 82 Ohio St.3d 426, 1998-Ohio-405] and *Ritt* [*v. Billy Blanks Ents.*, 171 Ohio App.3d 204, 2007-Ohio-1695] courts found to warrant class certification. Further, in *Hoang* [*v. E\*Trade Group, Inc.*, 151 Ohio App.3d 363, 2003-Ohio-301, the Eighth District] recognized that it is not the amount of damages that must be shown on a class-wide basis, but rather the fact that members of the class were damaged. *Id.* at ¶ 21.

{¶ 20} *It is unclear from the record in this case whether redefining the class to include only those individuals who filed tax returns for any of the years in question would cure the predominance defect and preserve Centerior’s due process rights.* However, “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.” *Carder Buick-Olds [Co., Inc. v. Reynolds & Reynolds, Inc.]*, 148 Ohio App.3d 635, 2002-Ohio-2912] at ¶ 17. [Plaintiffs] argue that any individuals who filed a return in any of the included years would suffer some damages. Based on this argument, *a redefinition of the class could resolve the predominance problem because the fact of damage could be shown on a class-wide basis, leaving only the amount of damages to be determined.* As previously noted, difficulty incurred in calculating damages will not bar class certification. *Id.* at ¶ 62.

{¶ 21} The trial court has already determined that the class is readily identifiable, and *defining the class to include only those individuals who filed a tax return in any of the given years would appear to solve the predominance problem if this was indicative of injury.* *Because the record is unclear regarding appellants’ assertion that the fact of damage can be demonstrated simply by showing that a putative class member filed a tax return in any given year*, this cause must be remanded to the trial court for further consideration.

Decision at ¶¶ 18-21 (emphasis added).

Thus, the Eighth District clearly expressed doubts that redefining the Class to limit it to tax-return filers would alone suffice, and just as clearly the Court of Appeals did not obligate the trial court to shoulder the burden of considering this particular (or any other) alternative or

modified Class definition. Indeed, the appellate court observed that “redefining the class to include only those individuals who filed tax returns for any of the years in question would cure the predominance defect” if – but only if – any shareholder “who filed a return in any of the included years would suffer some damages.”<sup>9</sup> As the Eighth District concluded, “[i]t is unclear from the record in this case whether redefining the class to include only those individuals who filed tax returns for any of the years in question would cure the predominance defect.”<sup>10</sup>

In the instructions it actually did give the trial court, the appellate court spoke clearly. In the first place, the Court of Appeals wrote, a class may not be certified in this case so long as there is a group within the putative class that was not “actually damaged by Centerior’s misstatements,”<sup>11</sup> “[e]ven if this group is very small, ... [because] the process of identifying these persons would predominate over the questions common to the class” and thus render the class not certifiable.<sup>12</sup> The Court of Appeals further observed that, although the requisite actual damage could not have been suffered without the filing of a tax return, the filing of a tax return is only a necessary, but in itself insufficient, element for proving actual damage, and thus for satisfying the predominance criterion for class certification.<sup>13</sup> “In order to prevail,” the appellate court instructed, “the plaintiffs would have to show that they were actually damaged by Centerior’s misstatements” and “Centerior’s misstatements could only have been harmful if they affected the plaintiffs’ tax liability.”<sup>14</sup>

The Eighth District thus held that the putative class must be limited to shareholders

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<sup>9</sup> *Id.* at ¶ 20.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at ¶ 14.

<sup>12</sup> *Id.* at ¶ 16.

<sup>13</sup> *Id.* at ¶ 15 (“class members who did not pay taxes in any relevant year in which they received a 1099-DIV from Centerior could not have suffered any actual damage from the misstatement”).

whose tax liability was affected by a Centerior misstatement in order to satisfy the predominance criterion for class certification.<sup>15</sup>

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(continued...)

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at ¶¶ 14-16. Shareholders whose tax liabilities were adversely affected can be identified by a number of well-accepted methods, such as claims forms. Indeed, claims forms are an approved fixture in the agglomeration of tools available to a court to efficiently administer a class action. *E.g.*, *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 317 (W.D. Tex. 2007) (approving claims forms to obtain “data, such as policy information ... needed to identify specific class members”); *Sorenson v. Concannon*, 893 F. Supp. 1469, 1479-80 (D. Ore. 1994) (“[o]ften the actual members of the class will not be known until the final claims process”). The use of claims forms in the administration of class actions is well-recognized by Ohio courts. *E.g.*, *Schmidt v. AT&T, Inc.*, 8<sup>th</sup> Dist. No. 94856, 2010-Ohio-5491, at ¶¶ 3-4 (taking note that the class members had the option to submit claims forms). *E.g.*, *In re Miamisburg Train Derailment Litig.* (1999), 132 Ohio App.3d 571, 577 (“[c]laim forms were prepared and distributed to claimants”); *Toledo Fair Housing Center v. Nationwide Mut. Ins. Co.* (C.P. 1998), 94 Ohio Misc.2d 186, 206 (“the Proof of Claim form shall provide for the submission of documentary materials, if any, supporting each claim and shall contain sufficient detail to permit the Claim Administrator to make reasonable determinations of a claimant’s eligibility to recover from the Claim Fund”). Claims forms are used to enable class members to self-identify whether their claims are compensable. *E.g.*, *Macarz v. Transworld Systems, Inc.*, 193 F.R.D. 46, 57-58 (D. Conn. 2000) (in an action against a debt collector where only consumer debt is actionable, “whether a particular class member’s debt is consumer or commercial can be remedied through proper drafting of the claim form”); *Newman v. Avco Corp.*, 1975 U.S. Dist. LEXIS 13099, at \*7 (D. Tenn. 1975) (district court “approved a claim form to be filed by class members ... [for referral] to a master for the development of the proper evidence to determine entitlement”); *In re Insurance Brokerage Antitrust Litigation*, 2007 U.S. Dist. LEXIS 11163, at \*69 (D.N.J. Feb. 16, 2007) (approving claim forms to identify class members “who purchased insurance through a non-Zurich insurer though a broker” where “only those Class Members ... are required to provide policy information in order to submit a claim”). *See Laffey v. Northwest Airlines, Inc.*, 1982 U.S. Dist. LEXIS 17138, at \*34 (D.D.C. Nov. 30, 1982) (“[t]he court has ruled that members of the class represented by the plaintiffs are entitled to awards of back pay to compensate them for these violations. In order to receive her back pay, however, a class member must file the proper claim form”). In the instant action, the adversely affected shareholders can be identified by the simple expedient of having the class member complete a brief claims form, attesting under penalty of perjury the fact of having included the misstated Centerior income on her or his tax return for the particular year in question. *See, e.g.*, *St. Peter v. United Staff Nurses’ Union Local 141*, 2009 U.S. Dist. LEXIS 12643, at \*29 (W.D. Wash. Feb. 19, 2009) (citation omitted) (“[t]he hospital’s argument that compensation based on estimates would result in a windfall (and accordingly operates as punitive damages) is premised on the notion that union nurses will sign claim forms, under the penalty of perjury, that are false. The hospital complains that under this award, it is without a way in which to challenge false claims. The hospital’s argument is not well taken”).

## COUNTERSTATEMENT OF THE CASE

This case arose out of fraudulent and misleading accounting practices committed by Defendant, FirstEnergy Corporation (formerly known as “Centerior Energy”). Beginning in 1987 and continuing through 1997, FirstEnergy paid its shareholder “dividends” and provided them with a 1099-DIV federal tax form. Shareholders later discovered that the dividends for which they paid taxes were actually returns of their own paid-in capital, a non-taxable event. Thus, every shareholder who received a “dividend” and a 1099-DIV form was subjected to FirstEnergy’s wrongful conduct.

Plaintiffs filed suit, proposing class certification of approximately 250,000 members consisting of:

All common shareholders of ... Centerior, and all beneficial owners of Centerior common shares, who in any year beginning in 1988 and continuing through 1998, inclusive, were issued a Form 1099-DIV or substitute therefore by Centerior or its agents reporting the tax status of distributions made by Centerior during any of the calendar years from 1987 through 1997.

The trial court held a hearing on the issue of class certification in January 2009. In denying certification by order entered on December 22, 2009, the trial court found that an unambiguous class was identified, that the named Plaintiffs are members of that class, and that the requirements of Civil Rule 23(A) had been satisfied. The trial court nonetheless found that, under Rule 23(B)(3), “questions of law or fact common to the members of the class do not predominate over individual questions” because up to 25% of the putative class members may not have paid taxes during the relevant years and therefore would have been uninjured by FirstEnergy’s misconduct.<sup>16</sup>

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<sup>16</sup> Plaintiffs’ expert testified that the percentage of members who may not have owed taxes during the relevant period was likely to be closer to 3% than to 25%. Elimination of the non-tax-paying members would be a relatively simple matter of submitting claims forms to FirstEnergy’s

On December 16, 2010, the Court of Appeals released its original announcement of decision in this case, *Estate of Mikulski v. Centerior Energy Corp.*, 8<sup>th</sup> Dist. No. 94536, 2010-Ohio-6167, affirming the trial court's ruling in all respects. On Plaintiffs' application to the appellate panel to reconsider its decision with respect the Class definition, supported by *amici* briefs from numerous lawyers and law professors experienced in class litigation, the panel vacated its original opinion on February 17, 2011 and entered the opinion of the Court of Appeals. *Estate of Mikulski v. Centerior Energy Corp.*, 8<sup>th</sup> Dist. No. 94536, 2011-Ohio-696.

In response to the Court of Appeals decision, Appellants filed an application for *en banc* review by the entire Eighth District, alleging a conflict between two or more decisions of that court on a dispositive issue. On April 8, 2011, eleven judges of the Eighth District Court of Appeals (with one judge recused) unanimously found no conflict between the panel's decision in this case and other decisions of the Court, and unanimously denied Appellants' application for *en banc* consideration. This appeal ensued.

That fact that the issue presented in this case has now been thoroughly considered by the Court of Appeals on three separate occasions – twice by the three-judge panel and once by the entire Court on Appellants' application for *en banc* review – augurs ill for Appellants' argument to this Court that somehow the Eighth District significantly deviated from established precedent and horribly erred in the judgment it exercised and in the findings and conclusions it reached in this case. To the contrary, the exhaustive procedural history of this case reveals that the Court of Appeals acted within well-established case authority from this Court and from its own prior

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(continued...)

list of shareholders, and the size of the remaining Class (after eliminating the non-taxpayers) would still number almost 200,000 members. In post-hearing briefs, Plaintiffs sought an opportunity to modify the Class definition to conform to hearing testimony and to exclude those members who paid no income taxes during the relevant years. However, the trial court did not grant Plaintiffs leave to amend the Class definition as they had requested.

decisions in determining that a better and more complete factual record was necessary to resolve the key predominance issue on which, it concluded, class certification turns.

### **ARGUMENT IN RESPONSE TO APPELLANTS' PROPOSITION OF LAW**

**Proposition of Law No. 1:** *The Named Plaintiff in a Class Action solely bears the burden of defining the class upon which she seeks certification. The Trial Court has no obligation to consider modifications or alternate class definitions not proposed by the Named Plaintiff and does not abuse its discretion when it denies a motion for class certification, without considering such alternatives, where the Plaintiff has failed to propose a certifiable class definition to the Trial Court.*

**Where the Movant for Class Certification Has Requested Redefinition and Where Redefinition Is Feasible, the Court Should Modify the Class Definition, If Doing So Cures an Otherwise Uncertifiable Class Definition, Rather than Deny Certification. The Court of Appeals Decision Is Merely a Mainstream Application of Existing Class Certification Jurisprudence and Broke No New Ground.**

As noted above, this case does not actually reflect the Proposition of Law advanced by Appellants. The Eighth District did not in fact rule as Appellants claim. Appellants who oppose class certification are asking this Court to take jurisdiction to review a remand order to a trial court to develop a fuller factual record on one of the Rule 23(B) elements of class certification. There is no other order in this case at present. However, S. Ct. Prac. R. 3.2(B)(2) requires Appellees to respond to “each proposition of law raised in the memorandum in support of jurisdiction” as though it had any present application to the case before the Court.

It is well-established that the failure of a trial court to modify the class definition, or to allow the plaintiffs to modify it, to cure deficiencies the court has identified in the original class definition, constitutes an abuse of the court’s discretion and thus reversible error. *Ritt v. Billy Blanks Enterprises*, 8<sup>th</sup> Dist. No. 80983, 2003-Ohio-3645, ¶¶ 20-21, *discretionary appeal not allowed*, 100 Ohio St.3d 1486, 2003-Ohio-5992 (“*Ritt I*”),<sup>17</sup> *citing Warner v. Waste*

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<sup>17</sup> In *Ritt I*, the trial court had denied class certification because of problems with the proposed class definition. *Ritt I, supra*, 2003-Ohio-3645, at ¶ 10. In reversing, the Eighth District held that, rather than deny certification outright, “the trial court *should have modified the class description*” to cure the defect. *Id.* at ¶ 21 (emphasis supplied). Under such circumstances,

*Management, Inc.* (1988), 36 Ohio St.3d 91, and *Baughman v. State Farm Mut. Auto Ins. Co.* (2000), 88 Ohio St.3d 480, 484; *Konarzewski v. Ganley, Inc.*, 8<sup>th</sup> Dist. No. 92623, 2009-Ohio-5827, ¶¶ 47-48.

As the Eighth District has emphasized:

[A]ny claimed defect in a proposed class definition is ***not grounds to deny class certification***. If there is a problem with the proposed class, ***the class can be redefined by the court***.

*Brandow v. Washington Mutual Bank*, 8<sup>th</sup> Dist. No. 88816, 2008-Ohio-1714, ¶ 18 (footnote omitted) (emphasis supplied), *citing Baughman, supra*, 88 Ohio St.3d at 484. The Eighth District has also held:

*Warner* not only permits but ***encourages the trial court to modify*** what is otherwise an [uncertifiable] class.

*Ritt I, supra*, 2003-Ohio-3645, ¶ 20 (emphasis supplied), *citing Warner, supra*, and *Baughman, supra*. See also *Carder Buick-Olds Co. v. Reynolds & Reynolds, Inc.* (Mont. Cty. 2002), 148 Ohio App.3d 635, 642 (a trial court commits reversible error in denying class certification “without considering alternative means to certify the class” such as redefining the class); *Shaver v. Standard Oil Co.* (Huron Cty. 1990), 68 Ohio App.3d 783, *jurisdictional motion overruled* (1991), 58 Ohio St.3d 711 (same).

Appellees do not contend, nor did the Court of Appeals even suggest, that a trial court must *sua sponte* identify alternative class definitions, and test each one to determine whether an alternative definition might suffice for certification. In this case, Appellees had requested on no

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(continued...)

“[t]he failure of the trial court to modify the class itself or to allow plaintiffs to modify it constitutes an abuse of its discretion and thus a reversible error.” *Id.* at 22. When *Ritt* returned to the Eighth District in 2007 after remand, the appellate court again modified the trial court’s class definition “in the spirit of *Ritt I*” rather than remand or deny certification. *Ritt v. Billy Blanks Enterprises*, 171 Ohio App.3d 204, 223, 2007-Ohio-1695 (“*Ritt II*”).

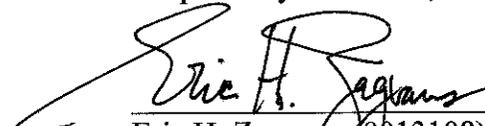
fewer than six separate occasions that the trial court redefine the class.<sup>18</sup> Thus, any suggestion or inference that Appellees did not request redefinition of the class in the trial court is simply incorrect.

### CONCLUSION

For these reasons, this case does not present any issue of public or great general interest, and given the current posture of the case – a remand to the trial court for further proceedings to clarify and amplify the factual record – the Court’s jurisdiction should not be exercised to review this case at this time. The Court should decline jurisdiction to review the case at this point and decide the merits of the issue presented prior to the completion of a fuller factual record on remand to the trial court.

Dated: June 22, 2011

Respectfully submitted,



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and

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<sup>18</sup> Plaintiffs requested redefinition of the class to cure any perceived deficiencies once in their reply brief on class certification filed in the trial court on Jan. 14, 2009 (at pages 18-20), three more times during the evidentiary hearing on class certification (during Plaintiffs’ opening statement on Jan. 15, 2009, at Tr. 13:6-14:1, Plaintiffs’ closing argument on Jan. 21, 2009, at Tr. 493:16-494:16, and Plaintiffs’ rebuttal closing argument on Jan. 21, 2009, at Tr. 533:11-22), a fifth time in Plaintiffs’ post-hearing brief filed in the trial court on March 23, 2009 (at pages 8-11), and a sixth time in submitting the decision in *Konarzewski v. Ganley* to the trial court on Nov. 16, 2009 as newly-decided supplemental authority (at pages 1-4).

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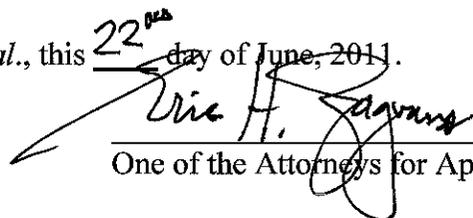
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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum in Response of Appellees, Estate of Jerome R. Mikulski, *et al.*, was served by ordinary U.S. mail, postage prepaid, upon Mitchell G. Blair, Tracy S. Johnson and Jeffrey J. Lauderdale, CALFEE HALTER & GRISWOLD, LLP, 1400 KeyBank Center, 800 Superior Avenue, Cleveland, Ohio 44114-2688, counsel for Appellants, Centerior Energy Corp., *et al.*, this 22<sup>nd</sup> day of June, 2011.

  
\_\_\_\_\_  
One of the Attorneys for Appellees