

**IN THE SUPREME COURT OF OHIO**

STAMMCO LLC d/b/a THE POP SHOP, <i>et al.</i> ,	:	Case No.: 2012-0169
	:	
	:	
Plaintiffs-Appellees,	:	On Appeal From the
	:	Fulton County Court
v.	:	of Appeals, Sixth
	:	Appellate District,
UNITED TELEPHONE COMPANY, OF OHIO AND SPRINT NEXTEL CORPORATION,	:	Case No. F-11-003
	:	
	:	
Defendants-Appellants.	:	

**APPELLANTS' MEMORANDUM IN OPPOSITION TO THE MOTION TO STRIKE THEIR MOTION FOR RECONSIDERATION**

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 SUPREME COURT OF OHIO

Contrary to plaintiffs' argument, appellants United Telephone Company of Ohio and Sprint Nextel Corporation's ("United Telephone") motion for reconsideration is expressly authorized by Supreme Court Practice Rule 11.2(B)(1), which permits such motions after the Court's "refusal to grant jurisdiction to hear a discretionary appeal." By a 4-3 vote, this Court declined jurisdiction. United Telephone's motion for reconsideration is proper, and this Court should accept jurisdiction.

A motion for reconsideration permits the Court to "correct decisions, which, upon further reflection, are deemed to have been made in error." *Buckeye Comm. Hope Foundation v. City of Cuyahoga Falls*, 82 Ohio St.3d 539, 541 (1998). Tellingly, plaintiffs' motion to strike "or in the alternative, to overrule" does not dispute any of the substantive legal or factual points in United Telephone's motion for reconsideration.

United Telephone's motion does not merely reargue the case. First, as United Telephone pointed out, just since it filed its notice of appeal, the Supreme Court's landmark decision in *Wal-Mart v. Dukes*, 131 S.Ct. 2541, 189 L.Ed.2d 374 (2011), had then been cited no less than 137 times; it has now been cited 171 times since this appeal was filed. On the basis of *Wal-Mart*, federal and state courts have re-visited their Rule 23 jurisprudence. Many state and federal courts continue to clarify their law, and some courts have even de-certified classes they had previously approved. (Motion for Reconsideration 1-3.)

Despite the reexamination that *Wal-Mart* has caused in courts elsewhere, Ohio courts have refused to consider *Wal-Mart's* holding that Rule 23's rigorous analysis requirement may involve an inquiry into the merits at the class certification stage. *Wal-Mart*, 131 S.Ct. at 2552. Instead, Ohio courts—including the Sixth District—still incorrectly invoke *Eisen v. Carlisle*, 417 U.S. 156, 94 S.Ct. 2140 (1974), as barring any

consideration of merits issues whatsoever. *Stammco, LLC.*, 6th Dist. No. F-11-003, 2011-Ohio-6503, ¶¶ 26, 48-50. If the Sixth District’s decision stands, Ohio courts will continue to improperly embrace a reading of *Eisen* that the U.S. Supreme Court has dismissed as “the purest dictum.” *Wal-Mart*, 131 S. Ct. at 2552, fn.6.

Second, the Ohio Chamber of Commerce has now filed an amicus brief in support of reconsideration. The Chamber has over 4,000 members, and represents all types of businesses, from small family-owned businesses to large multi-national corporations. The Chamber argues that “the Sixth District’s unwarranted expansion of class action jurisprudence is more harmful to Ohio businesses (and the thousands of Ohioans they employ) now than it was in 2010” when this Court accepted jurisdiction and reversed class certification. (Chamber Memo. 2.)

Third, United Telephone’s motion for reconsideration raised the fact that in the short time since United Telephone filed its notice of appeal to this Court, this Court’s review has been sought in at least three other cases that present Rule 23 issues nearly identical to those raised here. At least nine amici, representing thousands of business and organizations, have filed memoranda urging this Court to accept jurisdiction and address these issues.

Finally, plaintiffs’ own admissions show that the trial court correctly denied certification. Plaintiffs admit that fail-safe classes are improper and that every other court in the country, except the Sixth District, has rejected fail-safe classes. (Appellees’ Memorandum In Opposition To Jurisdiction (“Opp Jur.”) 8-9.) Plaintiffs also concede that the class definition in *Dafforn v. Rousseau, Assc. Inc.*, S.D. Ind. No. F 75-74, 1976 U.S. Dist. LEXIS 13910 (1976) –all persons who paid an “illegal brokerage fee”—was “a

fail-safe class because membership in the class could not be determined until after it was determined that the contested fees were illegal.” (Opp. Jur. 9.)

But plaintiffs’ own class definition contains the same fatal flaw—membership cannot be determined until after a court decides whether its proposed members authorized certain third-party charges: “[A] class member is a [United Telephone] customer who did not authorize [United Telephone] to put third-party charges on its bill.” (Opp. Jur. 9). As in *Dafforn*, plaintiffs’ class definition requires determination of a core merits issue—whether the transactions at issue were authorized. There is no difference between defining a class as those who paid “illegal” brokerage fees and those who may have received “unauthorized” third-party charges. In both definitions, the merits of the individual claim improperly define the proposed class.

Plaintiffs’ motion to strike should be denied, and, consistent with Supreme Court Practice Rule 11.2(B)(1), this Court should reconsider its April 30, 2012 announcement declining jurisdiction and accept this appeal for review.

Respectfully submitted,



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## PROOF OF SERVICE

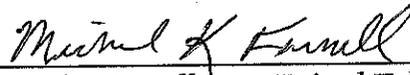
I certify that a copy of the foregoing was sent by ordinary U.S. mail to the following counsel on this 17th day of May, 2012:

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