ORIGINAL

IN THE SUPREME COURT OF OHIO

STAMMCO, LLC d/b/a THE POP SHOP, *et al.* Plaintiffs-Appellees, vs. UNITED TELEPHONE COMPANY OF OHIO, AND SPRINT NEXTEL CORPORATION Defendants-Appellants	Case No.: 2012-0169 On Appeal From the Fulton County Court of Appeals, Sixth Appellate District, Case No. 11FU000003

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INTRODUCTION AND SUMMARY OF ARGUMENT

This Court made only one determination upon review of the trial court's initial certification of this case as a class action - that the class *definition* was ambiguous. *Stammco, LLC v. United Telephone Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292 ¶10. After determining to remand to the trial court, to clarify and complete the class definition, this Court expressly stated that it did not reach any of the other arguments made by appellants [Sprint]. *Id.* at ¶ 13. "We therefore reverse the judgment and remand the cause to the trial court so that it may clarify the class definition in a manner consistent with this opinion." *Id.* at ¶14. Presumably, the Court accepted the late Chief Justice's learned observations: "I would hold that the class in this case was ambiguously defined, but was not otherwise improper." *Id.* at ¶17.

On remand, as directed, the Plaintiffs filed the Motion to Amend Class Definition, proposing the amended definition resolving the deficiencies of the original class definition which this Court identified.

Instead, the trial court issued a lengthy decision, setting forth an inaccurate description of the factual contentions of the parties, along with a sketchy analysis (also inaccurate) of some statutory and common law, all of which was solely relevant to the *merits* of the Plaintiffs' claims. Upon remand, the trial court erroneously determined: 1) that the proposed class definition created a prohibited "fail-safe" class; 2) that the action was not brought against the "culprit" third-party provider; and, 3) that current legislation and case law did not impose a duty or a fiduciary relationship to require Sprint to have an authorization for third-party charges. *Stammco, LLC v. United Telephone Co. of Ohio*, Fulton Co. CP No. 05CV000150, Judgment Entry December 22, 2010 pp. 3, 12. (Appellant Appendix at 20, 29). In addition, without making a single finding as to whether Plaintiffs' proposed amended class definition met any of the

requirements for certification under Civ.R. 23, the trial court held that "the Plaintiffs have not met their burden of establishing, by a preponderance of the evidence, that a 'class certification,' is a proper one." *Id.* at p. 15. (Appellant Appendix at 32).

The Sixth District reversed, holding that the revised definition satisfied the concerns of the Ohio Supreme Court with respect to ambiguity; it also decided that this class is not a "fail-safe" class; and as for the other two reasons given by the trial court to deny class certification, the Sixth District held that the trial court's merits determinations of the Plaintiffs' claims, did not relate to any determination that the requirements of Civ.R. 23 were or were not met. *Stammco LLC v. United Telephone Co. of Ohio*, 2011-Ohio-6503 ¶ 41, 46, 49. (Appellant Appendix at 14-16). Holding that the trial court abused its discretion in denying class certification, the Sixth District remanded for further proceedings. *Id.* at ¶50-51. (Appellant Appendix at 17).

The Sixth District's ruling is *not* at odds with *Wal-Mart v. Dukes*, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). The Sixth District recognized that determinations, with respect to the merits of plaintiffs' claims, were proper as to class certification, whenever they should be examined in order to determine if the requirements of Civ.R. 23 are met. However, where as here, a trial court denies class certification without addressing the requirements of Civ.R. 23, whether or not they touch upon the merits, that *is* an abuse of discretion. [1] The Sixth District's decision should be upheld

[1] Sprint, when appealing the trial court's initial decision to certify the class, made the identical argument in its opening brief filed in the Sixth District Court of Appeals. Sprint noted that "[a]lthough the trial court listed the Rule 23 requirements, it did not make affirmative findings as to a single one. * * * The trial court's failure to carefully apply Rule 23, to do the required rigorous analysis, or to make any of the required findings is, alone, significant grounds for reversal."

STATEMENT OF FACTS

I. SPRINT'S THIRD-PARTY BILLING PRACTICES

The Plaintiffs alleged claims of negligence in Sprint's billing practices; a breach of the duty of good faith and fair dealing implied in contract; unjust enrichment; and a request for declaratory and injunctive relief with respect to the continuing billing practices of Sprint. (Amended Complaint - Supplement to Merits Brief of Appellants pp. 1-16).

Sprint provides local telephone service to more than a million customers throughout Ohio. In addition to billing its local telephone customers for charges related to providing local telephone service, Sprint also contracts with third parties to bill class members for items and services that such third parties may or may not even provide.

Sprint entered into contracts with such third-parties through large "billing clearinghouses". (Davis Depo. pp. 20-22, Appellee's Supplement at 143-145). A billing clearinghouse, also known as a billing aggregator, is a company who consolidates third party bills for a large number of such third parties. (Davis Depo. p. 51, Appellant's Supp. 135) In Sprint's contracts, Sprint agrees to provide to the third parties, all necessary billing and collection services, who "subscribe to" and "purchase" these services from Sprint, in accordance with their contracts. (Davis Depo. p. 14 & Exhibits 39, 42, Appellee's Supp. at 138, 187-251, 253). All of these third party contracts are substantially similar although the length of the contract, as well as Sprint's specific rates; the amount of reserves retained by Sprint (for uncollectible accounts and billing adjustments) and some minimum revenue commitments may vary. Many of those variations are based on Sprint's customer complaints as to that third party. (Davis Depo. 17-19, 29, 43-44 & Exhibit 39, Appellees' Supp. at 140-142, 146, 147-148, 187). The general format and terms had not changed over the prior ten years. ((Davis Depo. p. 58, Appellant's Supp. 137).

Sprint purchased the accounts from those third-party vendors, through Sprint's standardized procedures and Sprint determines the amount it will pay to the third party vendors based on Sprint's mathematical calculation, which Sprint calls "Settlement by Acceptance". (Davis Depo. p. 40, Appellants' Supp. 133). In the settlement process Sprint determines the dollar amount for each purchase, then calculates how much it will charge for billing and collection fees, further reduces the amount by any adjustments credited to customer accounts, as well as a service fee for Sprint for doing so, and then reduced by any estimated bad debt calculations for that third party vendor, ultimately unilaterally determining the amount that Sprint sends to the third party vendor.(McAtee Depo. pp. 22-23, 26, Appellants' Supp. 121-122). Sprint then places the gross amount of each third-party vendor charges on the local telephone bills of Sprint's class members and finally collects the gross amount from the class members.

Sprint's third parties pay a set service-implementation fee to Sprint, agree to a minimum revenue commitment, and are charged a set amount for each transaction processed by Sprint. (Davis Depo. pp. 43-44, Appellants' Supp. 132). These transactions include, not only a charge placed on an end user's telephone bill, but all billing adjustments that are made because of class member complaints. (McAtee Depo. p. 56; Davis Depo pp. 45-46, Appellants' Supp. 126, 134). In addition, Sprint charges the third party additional set amounts per transaction as bill-processing fees, another fee per transaction designated as inquiry support,[2] as well as a flat rate for each individual bill sent to the local telephone customers for which a charge from this third party is continued. (McAtee Depo. pp. 28-33; Davis Depo. pp. 46-47, Appellants' Supp. 122-124, 134). Sprint also charges each third party vendor client an additional fee for each "escalated" complaint received by Sprint regarding that third party. (Davis Depo. pp. 70-71,

[2] The inquiry support fee is charged by Sprint for providing customer service as to customer disputes. See Davis Depo. at pp. 36-37 (Appellants' Supp. 132-133).

Appellees' Supp. at 155-156). An "escalated" complaint has been described as a still unresolved complaint that finds its way to a specialized Sprint center which handles these "escalations" after the customer has gone through all other channels of resolution available in Sprint. (Hill Depo. pp. 7-10, Appellees' Supp. at 158-161). Sprint holds a "reserve" deposit for each third party to protect against uncollectible accounts, which Sprint reviews monthly and adjusts in Sprint's settlement process, as determined by Sprint. (McAtee Depo. pp. 43-44, Appellees' Supp. at 163-164). In addition, when Sprint experiences difficulty in collecting the third party charges from class members and then places the account with a collection agency, all fees for collection efforts are charged to the third party providers. (McAtee Depo. p. 33; Davis Depo. p. 48, Appellants' Supp. 124, 134).

Sprint's role in the third-party billing process is far from "limited". (Appellants' Brief p. 5) In fact, Sprint is the key for the entire scheme and is the only common denominator. While Sprint may not initially have all of the facts at its disposal, in order to determine if a third-party charge was authorized, Sprint always has the ability to require that the third-party provide the information to Sprint. Only Sprint determines whether a third party provider will be allowed to participate in the billing scheme with the class member telephone customer.

II. SPRINT, BY CONTRACT, ALLOWS FOR ITS CUSTOMERS TO BE "CRAMMED" BY UNSCRUPULOUS THIRD-PARTIES.

Sprint's billing practices are inherently harmful to its customers. Sprint never explains why it believes they are not. Unscrupulous third-party billers take advantage of the anonymity created by Sprint's contracts and submit thousand of bogus charges to Sprint to be placed on the telephone bills of Sprint. A tremendous number of those charges are for items or services that the Sprint customer did not order and as well for items or services they never received. The practice of a telephone company causing unauthorized charges to be placed on customers' telephone bills

is recognized in the industry as "cramming". The third-party "crammers" and Sprint take advantage of the fact that small, incidental charges are often overlooked by customers whose bills normally fluctuate monthly. Many customers pay their local telephone bill, never knowing that there are additional charges "crammed" onto the bill. "Cramming" has been acknowledged as a serious problem by the telecommunications industry for a long time.[3] Also, many states protect their telephone consumers from these same practices that have affected members of the proposed class.[4] Sprint is able to take advantage of its Ohio customers, due to the lack of statutory restrictions in this state.

In some states where the legislation requires, Sprint allows customers to "block" third-party charges. However, Sprint refused to allow Stammco to "block" or indicate in any way that it did not want Sprint's third party billings on the account. Significantly and incredibly, Sprint requires no written authorization from its customers before it places third-party charges on its own customer's local telephone bills. Indeed, Sprint requires no prior authorization *of any kind* from class members. The protections that Sprint allows in other states clearly show that: (a) Sprint has always been aware of the significance of the cramming problem created by Sprint; (b)

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[3] See, *e.g.* "Anti-Cramming Best Practices Guidelines" issued jointly on July 22, 1998 by a group of the nation's local phone companies and the FCC, addressing the "serious consumer problem of 'cramming'" at a meeting held over 14 years ago. In these guidelines the local exchange carriers (LEC's) "affirm their responsibility to ensure that consumers are afforded basic billing rights for all billing on their local telephone bill including * * * (3) billing for authorized services only" and recognizing that the telephone companies sending out the bills have this responsibility because of "their direct relationship with the consumer". www.fcc.gov/Bureaus/Common_Carrier/Other/cramming/cramming.html.

[4] For example, California has a rebuttable presumption that any unverified charge was *not* authorized by the user. (California Public Utilities Code §2890, mandating that only authorized charges be placed on telephone bills along with creating specific requirements for written orders for products or services.) Another example is the State of Florida: (Florida Administration Code 25-4.110 (15), (18), (19)) requiring that customers be notified annually by the billing telephone company of their right to have the charges on the customer bill restricted and to provide blocking; and to the same effect.) Another example is the Tennessee Regulatory Authority Rules 1220-4-2-.58.

Sprint has long had the technology to prevent cramming abuses; and (c) Sprint fails to give Ohio customers the same minimal protection which it is able to and does provide for other customers.

Sprint has long had the ability to "block" offending third-party vendor charges. (Gillespie Depo. pp. 25, 30-31, Appellee Supp. at 169, 173-174). In fact, this service is provided to local telephone customers in other states but denied to customers in Ohio. (Gillespie Depo. at pp. 26-27, 29, Appellee Supp. at 170-172). Moreover, in one state, Sprint's representatives are allowed to proactively offer a block when a customer complains about a charge; and in other states, where the third-party blocks are available, Sprint's representative may only reactively offer the block when customers call and indicate that they want a block. (Gillespie Depo. at pp. 26-29, Appellee Supp. at 170-172). Presumably, the only states where Sprint provides third-party billing blocks are those states where it is obligated to do so by legislative mandate. (Gillespie Depo. at p. 30, Appellee Supp. at 173). Plaintiffs in this case seek to require Sprint, in Ohio, to offer such blocks in Ohio.

Every customer receiving local telephone service from Sprint must surrender to the prospect of having these charges appear on their phone bills without any authorization required by Sprint, and are forced to go through Sprint's very protracted "dispute resolution" process to have any unauthorized charges taken off their bills - - - - if those customers even notice the charges in the first place. Many customers simply choose to pay the bills, rather than go through this prolonged process. (See findings by trial court as to the daunting process. "This multi-tiered system is often electronic, and it soon becomes daunting, uneconomical, and ultimately frustrating to the average lay person." *Stammco,* Fulton Co. C.P., Sept. 28, 2007 at p. 7)). (Appellee Appendix at 7). Unlike customers in other states, where Sprint provides third party

blocking as a routine service, to prevent cramming, every telephone customer of Sprint in Ohio is billed for third-party charges without any alternative to avoid cramming.

Sprint's customers should be able to decide whether they want Sprint to place third-party charges on their bills. This decision should not be up to Sprint who contracts with the third-party billing entities.

This case does not concern certain federally-regulated third-party charges, such as the monthly toll charges for long distance service from providers such as MCI which are governed by Federal law and require that such long distance providers secure prior authorization in a regulated manner. There are stiff penalties for long distance companies that do not follow the rules. 47 C.F.R. 64.112. Those long distance toll charges are specifically excluded from this class definition because of those federal regulations. Other third-party charges are not similarly regulated which makes them prime opportunities for cramming.

Sprint places an average of approximately 200,000 third-party charges and adjustments on Ohio bills every month. (McAtee Depo. at pp. 47-49 & Exhibit 40, Appellee Supp. at 165-167, 252). The actual required adjustments to customers' bills, after customer complaints, are approximately 4,000 per month. Those figures continue to rise, with the total number of necessary account rebates for June, 2005 (the last month for which this data was supplied in discovery) being 5,949. (McAtee Depo at Exhibit 40, Appellee Supp. at 252). These adjustments, driven by actual recorded customer complaints, provide clear evidence of a very significant Ohio cramming problem. (Not for Sprint, since it simply receives more money. Even the adjustments generate another fee for Sprint.) Furthermore, even customers who inquire about the authenticity of a specific charge, often are unable to receive a credit. Many simply pay the bill. (K. Stamm Depo. at pp. 98-99, Appellee Supp. at 176-177). Some customers do not

notice such small charges. Others cannot take the time to inquire. (K. Stamm Depo at pp. 101, Appellee Supp. at 178). Others may not want to go through all of the steps needed to dispute a very small charge.

The breadth of the problem is far beyond the numbers reported by Sprint as adjustments. An action brought by the Federal Trade Commission against billing aggregators OAN, Integretel, Nationwide Connect and Access One, among others, in the United States District Court, Southern District of Florida, notes that despite high rates of billing adjustments issued for fraudulent charges billed to consumers on their local phone bills, the amount of money fraudulently generated exceeded $20 million dollars per year. See *Federal Trade Commission v. Nationwide Connections, Inc., et al.*, Case No. 06-80180-DIV-RYSKAMP/VITUNAC, (S.D. Fla.)

Sprint is well aware of the cramming problem and the real abuse. Express terms in the standard third-party billing and service contracts allow Sprint to hold back reserves from the billing entities, and to even increase the amounts of those reserves, based on the numbers of complaints and adjustments. (Davis Depo. Exhibit 39 at UTO00819, Appellee Supp. at 197).

Even after contracting with the third parties, Sprint still reserves the right to terminate billing for entities whenever Sprint deems them to be too harmful to Sprint's reputation. (Davis Depo. at pp. 51-53, Appellants' Supp. at 135-136). More than fifty third-party billing entities have been terminated by Sprint due to the numbers of recorded complaints. (Davis Depo. at pp. 53-54, Appellants' Supp. at 136). Although the decision to terminate comes after reviewing notorious monthly complaint numbers and Sprint's attempt to verify billing authorizations with the third parties, no further follow-up is conducted by Sprint as to such Sprint customers, even

after the third party is notified that Sprint will no longer allow them to participate in the scheme. (Davis Depo. at pp. 59-64, Appellee Supp. at 149-154).

Whether a particular charge on a customer's bill is a "legitimate" charge, as Sprint calls it, does depend on whether the customer ordered or approved the specific item or service that is being billed. However, the focus of this case is on the harm and damages Sprint causes when it contracts to bill charges and, in turn, blindly bills its customers for charges that Sprint has enabled. Sprint's behavior is especially egregious given the breadth of knowledge in the industry that "cramming" has long been a serious and ongoing problem.

Sprint, many times, has expressed its opinion that it would be difficult to confirm whether each customer provided authorization to the third-party for each third-party charge. Sprint uses the third-party charges from Bizopia, the alleged website servicing company that billed Stammco, as an example. Sprint points out that Bizopia, when challenged by Stammco, had a recording of a Stammco employee, Frank Smith, that Sprint alleges gave Bizopia authorization to provide website services and to bill Stammco through Sprint. This recording, alleging an authorization for web services, was clearly defective in that it failed to include even a minimal verification that the speaker understood the charge and the services he was allegedly ordering.[5] Despite this alleged authorization, Stammco knew nothing about Bizopia, which had

[5] As an example, when authorizing a change in long distance service, the authorization must be clear. 47 C.F.R 64.1120(c)(3)(iii) provides: Requirements for content and format of third party verification. Any description of the carrier change transaction by a third party verifier must not be misleading, and all third party verification methods shall elicit, at a minimum: The date of the verification; the identity of the subscriber; confirmation that the person on the call is authorized to make the carrier change; confirmation that the person on the call wants to make the carrier change; confirmation that the person on the call understands that a carrier change, not an upgrade to existing service, bill consolidation, or any other misleading description of the transaction, is being authorized; the names of the carriers affected by the change (not including the name of the displaced carrier); the telephone numbers to be switched; and the types of service involved

never contacted Stammco for necessary information in order to develop a website. Although Bizopia claimed it had faxed a confirmation to Stammco, no such fax had ever been received. (K. Stamm Depo. pp.73-74, Appellants' Supp. at 27-28). If Sprint had required prior authorization from Mr. Stamm before allowing Bizopia to bill on the telephone account, there would have been no confusion about any perceived authorization from a Stammco employee.

After a long and vexatious process, Sprint eventually removed the Bizopia charges from Stammco's telephone bill. (K. Stamm Depo. p. 74, 90-123, Appellants' Supp. at 29, 33-35). After realizing that Sprint was billing third-party charges on its local telephone bills, Mr. Stamm reviewed the business' prior telephone bills and for his home telephone and located numerous other charges that had not been authorized and were for services that were not received. One of the bogus charges turned out to be an alleged charge for a seven minute collect call to the Stammco fax machine. (K. Stamm Depo. p. 125, Appellants' Supp. at 35). Even one unauthorized charge, brought to Plaintiff's attention by counsel for Sprint during Mr. Stamm's deposition, a year after this case was filed, had not been discovered by Mr. Stamm previously and was simply paid. (K. Stamm Depo., pp. 154-156 & Exhibit 34, Appellants' Supp. at 42, 108).

III. PLAINTIFFS' CAUSES OF ACTION

Class members are harmed by Sprint's refusal to require authorization from customers prior to billing them for Sprint's third parties. Class members seek injunctive relief and the return of the payments made by class members to Sprint for items or services that were not authorized, wanted or received. Named Plaintiffs have alleged three alternative causes of action: 1) negligent billing, on the behalf of Sprint and the third party entities, causing harm to the

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(including a brief description of a service about which the subscriber demonstrates confusion regarding the nature of that service.)

plaintiff class through the misuse of the relationships established by Sprint with those to whom it provides telephone service; 2) a breach of the implied duty of good faith in contract by taking opportunistic advantage of the plaintiff class; and/or 3) that Sprint has been unjustly enriched by its third-party billing practices and it is inequitable for Sprint to retain those monies. Plaintiffs seek injunctive relief to prevent Sprint from continuing such unauthorized billing practices.[6]

Class members, who were harmed, are those who paid for services that were not requested or received. No matter how vehemently Sprint proclaims that it reviews information about third-party providers before agreeing to contract with them to purchase the third-party accounts, "cramming" is a multi-million dollar business, albeit an illegitimate one. Sprint contends that third-party billers must pass a comprehensive pre-billing approval process, but obviously Sprint's process lends itself to cramming. Sprint's contracts with the third-party service providers would shift all of the responsibility onto the third-parties to make sure that each billing item submitted to Sprint is authorized and accurate. (Davis Aff. ¶6-7, Appellants' Supp. at 111). Sprint does nothing to ensure any third-party's compliance.

Sprint continues to bury its head in the sand and ignores the reality that the measures that it has taken to approve third-party billing entities, but then to allow them to police themselves are not sufficient to protect Sprint telephone customers from fraudulent billings.

There are simple precautions taken by other local telephone companies, which should have been taken by Sprint, to prevent cramming. However, Sprint refuses to take any action to resolve the problem. Sprint, in a statement that mirrors, but then misrepresents the language in

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[6] In its Appellant Brief at p. 7, Sprint mistakenly states that plaintiffs have abandoned their request for a class on the claim for injunctive relief, prohibiting future unauthorized billing. This is incorrect. Plaintiffs have expressly requested certification of a class for such relief under Civ.R. 23(B)(2) in their Motion to Amend Class Definition, filed with the trial court on April 19, 2010 pp. 4-7. (Appellee Supp. at 182-185).

Plaintiffs' proposed amended class definition, blithely states that what Sprint does is "acceptable" to Sprint to "verify that its customers who do receive charges for third-party services have agreed to, and are properly receiving, those charges. (Appellant Brief p. 8).

IV. CLASS CERTIFICATION DECISIONS PREVIOUSLY MADE IN THE COURSE OF THIS LITIGATION.

On September, 28, 2007, the trial court initially certified classes under Civil Rules 23(B)(2) and (3). Sprint claimed that the trial court did not carefully apply the requirements of Rule 23 or engage in rigorous analysis of those issues, Sprint appealed to the Sixth District Court of Appeals.

The Sixth District initially carefully reviewed the decision and affirmed the decision of the trial court as to the class certified under Civ.R. 23(B)(3). The appellate court found that an identifiable class exists, with an unambiguous class definition and the means specified to determine whether a particular individual is a member of the class. *Stammco, LLC v. United Telephone Co. of Ohio*, No. F-07-024, 2008-Ohio-3845 ¶31-32. (Appellee Appendix at 25-26) All of the necessary elements for class certification under Civ.R. 23 were held to be present in the class as defined. *Id.* at ¶ 60. However, the Sixth District believed that the action for monetary damages had been the primary focus of the case and then held that therefore class certification under Civ.R. 23(B)(2) would be unavailable. *Id.* at ¶ 66. This judgment was vacated after Sprint further appealed the case to this Court and the Sixth District's decision was reversed.[7]

[7] Despite Plaintiffs' arguments that the decisions made by the Sixth District in that 2008 decision should remain the law of the case after this Court remanded the cause to the trial court only to clarify the class definition, the Sixth District disagreed in its last opinion: "Although the Ohio Supreme Court did not reach most of the matters discussed in this Court's decision, it nonetheless reversed that decision. The effect of that reversal is a vacation of our judgment so that the only decision of a reviewing court remaining is that of the Ohio Supreme Court."

Sprint describes several other cramming cases in which class certification was denied, which were decided in the same time frame. Although they all deal with the practice of "cramming", each cited case has essential elements that easily distinguish it from this case. As the late Chief Justice Moyer stated, when confronted with Sprint's same arguments that other courts had refused to certify cramming classes, "[e]ach class action is different and each trial court will decide issues of predominance based upon the facts present in the case before it. Thus, one court may appropriately certify a class, even if it resembles one that was not certified by another court under Civ.R. 23(B), when the circumstances, claims, issues, and evidence alter the analysis." *Stammco*, 2010-Ohio-1042 ¶ 41. (Appellant Appendix at 45).

A. This Court's Initial Review of the Class Definition.

This Court, in its first review of the class certification decision of the trial court, concluded that the class definition was ambiguous and because of this ambiguity the proposed class "fail[ed] to meet the first the first requirement of Civ.R. 23—that its definition be unambiguous." *Stammco*, 2010-Ohio-1042 at ¶ 10. (Appellant Appendix at 39). This Court declined to rule on Sprint's other objections to the class as it is defined. *Id.* After concluding that a class action could not be maintained under Civ.R. 23 *using the definition provided*, this Court remanded the case to the trial court to redefine the class. *Id.* at ¶ 11-12. (Appellant Appendix at 40).

B. On Remand, the Trial Court Denied Class Certification Without Ever Addressing the Requirements of Civ.R. 23.

This Court remanded the case "for the trial court to redefine the class on remand." *Stammco*, 125 Ohio St.3d 91, 2010-Ohio-1042, ¶12. (Appellant Appendix at 40). With the

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Stammco, LLC v. United Telephone Co. of Ohio, 6th Dist. No. F-11-003, 2011-Ohio-6503 ¶ 34. (Appellant Appendix at 11).

guidance of the opinion of the Ohio Supreme Court, Plaintiffs filed a Motion to Amend Class Definition and submitted the proposed amended class definition to the trial court on April 19, 2010. Plaintiffs proposed that the class, as amended, should now be defined as:

> **All individuals, businesses or other entities in the State of Ohio who are or who were within the period four years prior to the initiation of this lawsuit to the present, subscribers to local telephone service from United Telephone Company of Ohio d.b.a. Sprint and/or any successor company providing that same service, and who were billed for third party charges as to which Sprint had no prior authorization from the customer in writing or by a method acceptable to Sprint sufficient for Sprint to verify that the customer had agreed to such charge. Excluded from the class are those customers who subscribed to and provided authorization for long distance services from a provider of toll services that were billed on the customers' local telephone bills. Also excluded from this class are defendants, their affiliates (including parents, subsidiaries, predecessors, successors, former and future employees, officers, directors, partners, members, indemnities, agents, attorneys and employees and their assigns and successors.**

This new definition resolved the problem previously identified in this Court's March 24, 2010 opinion, as to the ambiguity in the class definition. With this amendment, the trial court could clearly identify the absent class members. The class definition clarified that the class would include Sprint customers who did not provide authorization *to Sprint* in writing, or by another alternate method acceptable to Sprint which gave permission to bill third-party charges to that customer. The new definition also clarified, that monthly recurring charges for long distance toll services, were not included among the third-party charges in the class claims. (*Stammco*, Fulton Co. CP No. 05-CV-000150, Motion to Amend Class Definition, April 19, 2010, p. 4) (Appellee Supp. at 182).

Sprint complains that this proposed amended class is defined by "the core merits issue of their claims—whether customers 'authorized' third-party services." (Appellants' Brief p. 11).

This is simply incorrect. First of all, the class definition does not address authorization *for third-party services*. Instead, it would identify Sprint customers who did not give authorization to Sprint to *bill them for third-party services*. *Secondly*, from the very beginning, Sprint has confused the concepts of: (1) a customer's authorization to allow third-party billing; with (2) the question of Sprint's liability. No matter how often Sprint claims that it is necessary to make a merits determination to find members of the class, it simply is not necessary to do so. As the late Chief Justice Moyer aptly observed: "appellants appear to concede that the lack of permission equates automatically with liability, but this is not the case. Defining the class in this way does not require a determination on the issue of liability or the merits of the underlying causes, because finding a class of customers who were assessed charges that they had not authorized does not require a determination that appellants are liable to the customers." *Stammco*, 2010-Ohio-1042 at ¶43. (Appellant Appendix at 45).

After the parties again briefed the issue of class certification, the trial court ignored Rule 23 and instead determined that the class should not be certified for three reasons: (1) that the class was a "fail-safe" class where the "merits" of the individual's claim "defines" the proposed class; (2) that the Plaintiffs' action was brought against the local telephone company rather than the "culprit" third-party provider; and (3) that the law does not require Sprint to have an authorization for third-party charges, nor impose any "fiduciary relationship" such that Sprint would owe any duty to its customers to do so. *Stammco*, Fulton Co. CP No. 05CV000150, Dec. 22, 2010 pp. 3-4, 12, 14. After listing the seven requirements for class certification, the trial court's Judgment Entry did not address a single one. The question of whether this case is a "fail-safe" class was briefed, but the exercise of identifying the "culprit" and whether there would be

any duty on the part of Sprint under existing law in the causes of action asserted, i.e. establishing liability, were never broached in the class certification briefing.

The trial court also made many factual and other legal errors in its December 22, 2010 Judgment Entry. Plaintiffs appealed the decision to the Sixth District Court of Appeals on January 14, 2011.

C. The Sixth District Court of Appeals Properly Recognized the Omissions of the Trial Court and Remanded the Case With Appropriate Instructions.

Sprint made many baseless contentions about the inability to identify class members and the need to conduct mini-trials to ascertain whether the class members had agreed to third-party charges. The Sixth District did not get bogged down with those groundless arguments. It determined that:

> The amended class now defines to whom permission is to be granted: [Sprint], whose permission was required: the customer, and the manner the permission was to be granted: in writing or an alternative method by which [Sprint] could verify agreement. The amended definition deletes any reference to customers who received unauthorized charges. In our view, the amended language satisfies the specific concerns of the court in its mandate for remand.

Stammco, 2011-Ohio-6503 at ¶39. (Appellant Appendix at 13). The Sixth District again properly held that the definition did not create a "fail-safe" class. *Id.* at ¶46. (Appellant Appendix at 15). The additional two reasons listed by the trial court for denying class certification: (1) the conclusion that the plaintiffs had sued the wrong party and; (2) the conclusion that Sprint had no duty to the customers by "current legislation and case law"; were correctly ruled to be "improper incursions into the merits of the case." *Id.* at ¶47. (Appellant Appendix at 15-16).

While the last appeal was pending, *Wal-Mart v. Dukes*, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) was issued. Sprint would have this Court believe that *Dukes* should have a great influence and that the Sixth District *somehow* ignored *Dukes,* yet there is little relevance to this argument, other than the temporal relationship.

The Sixth District's opinion was well-reasoned and it is correct. *Dukes* again recognized that it may well be appropriate for trial courts to review some merits of the plaintiffs' claims when determining class certification. *Dukes*, 131 S.Ct. at 2552. It does *not* hold that a court may ignore all of the requirements of Civ.R. 23 and simply decide the cases on the merits, even before any evidence or argument as to liability are provided by the litigants. Here, the trial court below, made such a decision and abused its discretion. The Sixth District Court of Appeals correctly reversed and remanded this matter to the Fulton County Court of Common Pleas.

Sprint, by pointing to several "cramming" cases wherein class certification was denied, alleges that the Sixth District is "the only court in the country to sanction a cramming class action." Sprint would somehow ignore all of the other cases that have addressed cramming, which have been brought against the nation's other telephone companies, wherein telephone companies had the wisdom to settle and in which each trial court approved the class maintainability and the fairness of nationwide settlement agreements See, for example, *McFerren v. AT & T Mobility LLC*, Case No. 08-CV-151322, (Fulton Co. Georgia)[8] (a case that consolidated 16 related class actions); See also *Moore v. Verizon Communications, Inc.*, Case

[8] The class included all customers during a specified time period who were billed by third parties. The telephone company is to provide disclosures regarding the third-party billing to educate customers who would receive refunds of past unauthorized charges as to those customers who filed a Claim Form, reviewed by a Claims Administrator and which could be denied if there was evidence of customer authorization.

No. CV 09-1823 (N.D. Cal.)[9]. The plaintiffs and the telephone companies have easily found ways quite acceptable to them and the courts, to identify class members, to ascertain and redress damages, and to provide appropriate injunctive relief to help alleviate the endemic problems of cramming. Sprint certainly has the same information available to it. See also, the Assurance of Voluntary Compliance entered in *In re: BellSouth Telecommunications, Inc.*, AG Case #L06-3-1185 in the State of Florida. May 10, 2007, as another example of how changes can be made by telephone companies in their billing practices to protect customers from cramming.[10]

This Court has accepted Sprint's appeal, as to one proposition of law: "A Trial Court does not abuse its discretion by evaluating the merits of the plaintiffs' claims when considering class certification." Regardless, Sprint still attempts to interject all of its additional arguments into this appeal. Plaintiffs address these simply in the event that this Court feels some need to review these additional issues.

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[9] This class includes all telephone customers during a specified time period who were billed for Third Party Charges. Settlement Class members had the opportunity to submit a claim which could be challenged if there was evidence that the charge was not paid; the charge was previously refunded; or there was verification of authorization. Injunctive relief provided for notification of the availability of a billing block with the application of complaint thresholds, combined with fines whenever complaints exceed a specified level.

[10] This agreement mandates that the telephone company rewrite its contracts with third-party billers to require that the third party mail prior written notice, in certain circumstances, to notify the customers of the charges that will be appearing on their local telephone bills and to require each billing aggregator to submit monthly reports of the number of cramming complaints received. If 50 complaints are received for the same company the telephone company must take action to protect the customers.

ARGUMENT

I. Proposition of Law No. 1: A Trial Court does not abuse its discretion by evaluating the merits of the plaintiff's claims when considering class certification.

As an initial matter, Plaintiffs-Appellees concur with the accuracy of that statement. But they disagree with Sprint's interpretation of what was actually decided by the trial court, and by the Sixth District Court of Appeals, when the later court found that the two reasons articulated by the trial court, for denying class certification, were *improper* considerations of the merits.

A. The Appellate Court Applied the Appropriate Standard of Review in Conducting Its Analysis of the Trial Court's Decision.

A trial court enjoys broad discretion in determining class certification issues. However, the trial court must not abuse this discretion. *Baughman v. State Farm Mut. Auto. Inc. Co*, 88 Ohio St.3d 480, 483 (2000). An abuse of discretion implies that the trial court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). A court which premises its legal analysis on an erroneous interpretation of the governing law has abused its discretion. *U.S. v. Insaulgarat*, 378 F.3d 456, 464 (5th Cir. 2004). Thus, a trial court that ignores or completely misconstrues the law under Civ.R. 23 has abused its discretion. *Howland v. Purdue Pharma, L.P.*, 104 Ohio St.3d 584, 587-88.

Understandably, a trial court must recognize the claims, defenses, relevant facts and the applicable substantive law "in order to make a meaningful determination of the certification issues." *Amchem Prods., Inc. v. Windsor* (1997), 521 U.S. 591, 615. In its most recent December 22, 2010 Judgment Entry, the trial court *listed* the class certification requirements of predominance, manageability, superiority and typicality. However, it failed to make any application of any findings of those requirements, nor can it be inferred from the opinion that these were even considered.

Sprint faults the Court of Appeals for not making its own independent determination as to each aspect of class certification. Yet, the trial court failed to address them and the appellate court is limited to a review of those matters included in the trial court's decision. The Sixth District held that the proposed amended class definition did what it was suppose to do: it satisfied the concerns of the Ohio Supreme Court with respect to ambiguity. *Stammco*, 2011-Ohio-6503 at ¶41. The Sixth District determined that the class definition did not create an improper fail-safe class. *Id.* at ¶46. The appellate court also reviewed the few findings actually made by the trial court and found that the trial court did not articulate how these findings related to the requirements of Civ.R. 23. *Id.* at ¶49. Finding an abuse of discretion in not addressing the requirements of Civ.R.23 at the class certification phase of the litigation, the appellate court properly remanded the case to the trial court "for further proceedings consistent with this decision." *Id.* at ¶51. This decision was not made because the trial court had erroneously considered the merits. It was remanded because the trial court *failed to consider* the requirements for class certification under Civ.R. 23. There was no error in the Sixth District's decision.

B. The Trial Court's Denial of Class Certification Was An Abuse of Discretion Under the Standards Elucidated in *Eisen* and *Dukes*.

The Sixth District Court held that: "The trial court does not articulate how its forays into misplaced blame or questionable duty relate to its determination that the requirements of Civ.R. 23, which it once had determined were satisfied, which this court concluded were satisfied, and which the two justices of the Ohio Supreme Court who addressed the issue concluded were satisfied, are now found wanting." *Stammco*, 2011-Ohio-6503 at ¶49. (Appellant Appendix at 16). Sprint alleges that the appellate court was "relying on *Ojalvo* and its erroneous reading of *Eisen*. (Appellate Brief at p. 16). Regardless of Sprint's labels, the Sixth District's holding is in

complete harmony with the opinions of this Court which instruct that the merits be considered, whenever they are necessary to determine whether the requirements of Civ.R. 23 are met.

The Court of Appeals did not misconstrue the holding of *Eisen v. Carlisle & Jacqueline,* nor of *Wal-Mart v. Dukes* by citing to *Ojalvo*. While the court of appeals below found that the trial court's decision on class certification was, in part, improperly based upon the trial court's opinion of the merits, those merit considerations by the trial court were *sua sponte* determinations, only *as to the total merits* of the case and they had no connection to class certification issues. When review of the merits is required for class certification, it is only such review which is *necessary to determine whether a class exists*. The trial court's review did not review the merits for class certification purposes. Rather the trial court reviewed the merits to determine the underlying merits of the causes themselves, which was and is an inappropriate process at the class certification stage. A court abuses its discretion in denying class certification "where under the totality of the circumstances Civ.R. 23 is narrowly construed to substantially hinder the remedial purpose of the rule." *Ojalvo,* 12 Ohio St.3d at 236.

1. Eisen v. Carlisle & Jacquelin

There is a difference between considering some merits issues as they would impact class determination from deciding a case on the merits, as to issues that do not impact the viability of the case as a class action. Here the trial court decided the merits and then used those merits decisions as reasons to deny class certification. The Sixth District observed that "[w]hen enmeshed in the sometimes deliberate complexity of litigation, it is frequently difficult to sort out the immediate task at hand." *Stammco*, 2011-Ohio-6503 ¶ 48. (Appellant Appendix at 16). While there is often some overlap in the inquiries, the thorough review of the merits, and the elements of each asserted cause of action must only be undertaken by a court, under the procedures for summary judgment stated in Civ.R. 56. To address class certification, a trial

court must carefully and rigorously determine if each of the class certification requirements have been met. The immediate task for the trial court was only to determine class certification. Neither party had filed any summary judgment motions, presented any arguments, or provided the trial court with any evidence, pursuant to Civ.R. 56. Nevertheless, the trial court undertook that task under the guise of deciding class certification.

As led by this Court, Ohio courts do not take the position that merits issues have nothing to do with class certification. This Court in *Ojalvo v. Board of Trustees of Ohio State University*, 12 Ohio St.3d 230, 466 N.E.2d 875 (1984) did not misunderstand *Eisen v. Carlisle & Jacquelin.* Taken in context, the *Ojalvo* decision clearly supports the principle that a merits inquiry may be made for certification purposes. *Ojalvo*, 12 Ohio St.3d at 233. ("The court's resolution of the narrow issue of commonality by the conclusion that the breach probably does not exist is unreasonable *since no arguments were made*, nor need have been made, with respect to the actual merits of the case *beyond the necessity of establishing the validity of certification under Civ.R.23.*") (emphasis added). *Ojalvo* is wholly consistent with the Sixth District decision and with *Wal-Mart v. Dukes.* In contrast, the trial court resolved the class certification issue by erroneously deciding the merits: that Sprint owed no duty to its customers to verify charges on their bills, when no arguments on the merits were made by the parties. The only issue before the trial court at the time of the trial court's decision was the issue of class certification.

The law requires that the Plaintiffs' proof of their causes of action be for all class members in one stroke. This is a normal part of all class certification inquiries and is satisfied when all the class certification requirements are met. However, for Sprint's suggestion to be adopted, merits inquiries would be required at the class certification stage, even when that would not address the elements of class certification. That would constitute an essential change to the

nature of class certification and instead would mandate that class actions can only be maintained *after* the defendants are found to be *liable* to the putative class members, on the merits of the case. This, however, would be contrary to the mandate of Civ.R. 23(C)(1) that class certification decisions be made "[a]s soon as practicable after the commencement of an action". It would also legitimize all fail-safe classes, because the class would only be certified when the plaintiffs had already been determined to be the prevailing parties. If a class could only be certified *after* the merits of the claims are determined in favor of the plaintiffs, there would be no possibility for any class to be bound whenever there is a decision favorable to the defendants. If Sprint believes it has no liability, class certification should be welcomed. If Sprint would win the case on the merits, it would have no possibility of any class member raising the same causes of action in another litigation. Without class certification, Sprint would have no immunization against future suits filed by those customers who would be class members who wish to complaint about the same practice.

2. Wal-Mart v. Dukes

Certification of a class is appropriate only when all seven of the stated requirements are met. It is not disputed that some consideration of the merits of the causes of action may be necessary to establish the propriety of class certification. The elements of the causes of action will impact a court's inquiries into commonality, typicality, predominance and manageability, all factors necessary to class certification.

The decision in *Wal-Mart v. Dukes*, 131 S.Ct. 2541, 2551-52 (2011) was an important decision primarily because it demonstrated that the class certification decisions made by courts below were wrong by extending individual discrimination issues into a nationwide class. *Dukes* rejected an attempt to expand Rule 23 to encompass a class that was simply too large and with members whose claims had no common connection with those of the named plaintiffs. *Dukes* is

consistent with Ohio decisions. In *Dukes*, the Supreme Court again recognized that "sometimes it *may be necessary* for the court to probe behind the pleadings before coming to rest on the certification question." *Dukes*, 131 S.Ct. at 2551 (emphasis added) (citation omitted). Contrary to Sprint's contention, this is not a new concept. Explaining any *seeming* conflict with *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177 (1974), the Court observed that "in that case, the judge had conducted a preliminary inquiry into the merits of a suit, *not in order to determine the propriety of certification under Rules 23(a) and (b)* * * *, but in order to shift the cost of notice required by Rule 23(C)(2) from the plaintiff to the defendants." *Id.* at fn.6 (emphasis added). As further explained by another court, "*Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement." *Newton v. Merrill Lynch, Pierch, Fenner & Smith, Inc.*, 259 F.3d 154, 169 (3rd Cir. 2001). Accordingly, at the class certification stage, courts have always been "precluded from addressing any merits inquiry unnecessary to making a Rule 23 determination." *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 316-317 (3rd Cir. 2008).

The U.S. Supreme Court confirmed these interpretations of the Rule 23 inquiry in *Dukes*, stating that "[f]requently [the Rule 23] 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Dukes,* 131 S.Ct. at 2551. In this case, the Sixth District also recognized this same *Dukes* distinction when it stressed that this case "is now in the class certification phase" and "the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Stammco*, 2011-Ohio-6503 at ¶ 48, citing *Eisen*, 417 U.S. at 178. (Appellant Appendix at 16).

It is important to note that the trial court below, in a fifteen page opinion, merely recited, and then only once, the seven requirements that must be satisfied to maintain a class action. However, the trial court thereafter never bothered to even discuss the class certification requirements nor to state how the class definition proposed by Appellees did, or did not, meet any of the recited requirements. The trial court recognized that "a trial court may consider any evidence before it at that stage of the proceedings *which bears on the issue of class certification*" (Fulton Co. Dec. 22, 2010 decision at p. 11, quoting *Senter v. General Motors Corp.*, 532 F.2d 511, 523 (6th Cir. 1976) (emphasis added)). (Appellant Appendix at 28). But it never explained how the evidence that it considered related to the certification requirements.

The trial court never concluded that class members could not readily be identified, as alleged by Sprint. Likewise, Sprint's rationale for the accuracy of its conclusion is in error. The proposed class definition requires prior authorization for third-party billing be given by the customer to Sprint. Sprint's illustration about the need to review the alleged authorization given by the Stammco employee to a third-party biller, Bizopia, simply demonstrates Sprint's supposed misunderstanding of the class definition. Although the illustration could arise in determining damages, it has no impact on the identification of class members.

Clearly, the Sixth District's decision was not based upon any misplaced reliance on *Ojalvo* for Sprint's proposition that the court held that all consideration of the merits is impermissible at the class certification stage. The Sixth District made no such decision in this matter, nor has it ever so held in that Court's illustrious past with respect to class certification decisions. Rather, the decision was plainly based upon that court's correct conclusion that considerations of the merits while addressing class certification, must relate to the determination that the requirements of Civ.R. 23 are, or are not, met. This is wholly consistent with the U.S.

Supreme Court's position that the class certification inquiry frequently "will entail some overlap with the merits of the plaintiff's underlying claim." *Dukes*, 131 S.Ct. at 2551. The Sixth District properly concluded that, by examining the merits of the case as to "misplaced blame or questionable duty", and not the requirements of Civ.R. 23, the determination of the trial court was an abuse of the trial court's discretion. *Stammco*, 2011-Ohio 6503 ¶49. (Appellant Appendix at 16).

C. Sprint's Further Analysis of the Rule 23 Factors Is Flawed.

The major flaw in Sprint's arguments is that the trial court never considered how plaintiffs might prove the merits of their claims on a class-wide basis. While "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising plaintiff's cause of action", *Dukes*, 131 S.Ct. at 2552 quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982), that was *not* what the trial court did. It decided the merits, instead.

Sprint states that "Rule 23 requires 'a sophisticated and necessarily judgmental appraisal of the future course of litigation.'" (Appellant's Brief p. 23, citing *Augustus v. Progressive Corp.*, 8th Dist. No. 81308, 2003-Ohio-296 ¶21). That has always been correct. The *Augustus* court was discussing what was needed to satisfy the predominance requirement, which clearly requires an understanding of how the litigation will proceed. This is, and has been the standard used by Ohio courts in class certification decisions.

When proof necessary to establish any element of Rule 23 overlaps with the merits, the merits should be considered. However, here, the merits issues considered by the trial court were based on inaccurate assumptions about the evidence in the record (as well as evidence that was not in the record). They also had *no connection* with any of the seven requirements for class certification. Civ.R. 23 still mandates that the trial court determine if these requirements are met

when considering class certification. A court "that premises its legal analysis on an erroneous understanding of the governing law has abused its discretion." *Unger v. Amerisys, Inc.*, 401 F.3d 316, 320 (5th Cir. 2005) (citations omitted).

The trial court appears to have started to look at whether an identifiable class exited. Yet from the trial court's further discussion it is not clear that the court even reached a decision on that question. *Stammco*, Fulton Co. CP No. 05CV000150, December 22, 2010 pp. 11-12 (Appellant Appendix at 28-29). And, if any of the other six requirements for class certification were considered, they certainly were not discussed in the court's opinion. The reasons articulated by the trial court to dismiss the case; the belief that Plaintiffs should have sued the "crammers" instead of Sprint and the conclusion that current legislation and case law does not create a fiduciary duty on the part of Sprint, are *not related* to *any* of the requirements of Civ.R. 23. The Sixth District Court of Appeals properly held that the trial court's decision constituted an abuse of discretion. Upon reaching that conclusion, the Sixth District remanded the case. Resolving the appeal, there was no need for the Sixth District to make additional findings about the propriety of class certification. Yet, Sprint continues to bring them up in these arguments.

1. Common Issues of Law and Fact Abound

In asserting that there is no "glue" holding the claims of all class members together, Sprint asks the wrong question. The question is *not* "Is there a valid reason for this charge?", but "Did Sprint's failure to procure authorization from the customer before billing such third-party charge breach any duty, express or implied in contract, quasi-contract, or established under common-law?"

The proposed class as presently defined, and approved by the Sixth District Court, as being those customers "billed for third party charges as to which Sprint had no prior authorization in writing or by a method acceptable to Sprint sufficient for Sprint to verify that the

customer had agreed to such charge." (Motion to Amend Class Definition p. 4) (Appellee Supp. at 182). Sprint continues to allege that it is confused by this language, stating that Sprint doesn't have such authorization and that it relies on the third parties to obtain verification. Accordingly, Sprint simply assumes, contrary to the interests of its customers, that if a customer pays the bill, the charge was authorized. Sprint then claims that because such reliance on those "methods" are acceptable to Sprint, that therefore there is no common way to verify authorization. By doing so, Sprint fails to acknowledge that the predicate for the class definition is to identify those Sprint customers for whom *Sprint* did not obtain any customer authorization *in writing* or by any *alternate method* of Sprint's choosing, as long as that method sufficiently established a customer's agreement, to allow the third-party charges to be billed. Regardless, the fact that Sprint allegedly cannot grasp the meaning of the proposed class definition does not suggest a reason to deny class certification. The plaintiffs used simple language and it was easily understood by the Sixth District.

Dukes made it clear that class claims must depend upon a common contention. *Dukes*, 131 S.Ct. at 2551. "That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each on of the claims in one stroke." *Id.* "What matters to class certification . . . [is] the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (internal quotation marks omitted) (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 48 N.Y.U. L. Rev. 97, 132 (2009)). Resolving a dispute over a uniform billing practice governed by a common contract does that. All of Plaintiffs' claims *ultimately* hinge on the merits as to whether Sprint has an obligation to educate its customers about its third-party billing practices and obtain authorization

to place third-party charges on their telephone bills. This is a question that is capable of classwide proof. Answering the question as to whether Sprint's billing practices are negligent and/or result in a breach of the duty of good faith and fair dealing in their contractual relationship with their telephone customers and/or unjust enrichment will, after class certification, resolve an issue common to all class members.

Not every class member may have a claim for damages, since evidence of some authorization for some of the third-party charges possibly exists within the records of the third-party billers, with whom Sprint has a contract. Those contracts provide for Sprint to recover from them, regardless of whether *Sprint* did or did not secure customer authorization before the billing. (See Section C(4) below for a discussion on the manageability of this inquiry). The determination of the amount of each class member's damages need not entail any such tedious individualized exercise as described by Sprint. Furthermore, "[i]t is fundamental here that each member of the class [ ] may not be awarded the same amount of damages in the event [Defendants] are found liable. Nevertheless, the key fact is that the injuries sustained by the class flow from identical operative facts." *Vinci v. American Can Co.,* 9 Ohio St. 3d 98, 102 (1984). Indeed, even if some effort is required, this Court has expressly discounted such efforts in favor of the recovery for actual damages. *Hamilton v. Ohio Savings Bank,* 82 Ohio St.3d 67, 82 (1998).

> It is conceivable that a significant amount of time may be spent in this case litigating questions affecting only individual members of the classes. However, clockwatching is neither helpful nor desirable in determining the propriety of class certification. A class should not "determine predominance by comparing the time that the common issues can be anticipated to consume in the litigation to the time that individual issues will require. Otherwise, only the most complex common questions could predominate since such issues tend to require more time to litigate than less complex issues."
> *Id.* at 85 (internal citations omitted)

Stammco still seeks injunctive relief for the future reform of Sprint's practices which will be of benefit to the class as a whole. "Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate." *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 428 (6th Cir. 2011) quoting *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). The Sixth District correctly determined that the trial court did not address how its merits-related decisions related to commonality.

2. The Class Claims Predominate Over Individualized Issues

Although Plaintiffs also sought certification under Civ.R. 23(B)(2), Sprint discusses only the requirements of Civ.R. 23(B)(3). To satisfy Civ.R.23(B)(3), "[c]ommon questions must predominate over any questions affecting only individual members, . . . [such that] a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (internal quotation marks omitted). It is Sprint's uniform billing practice which distinguishes this case from *Dukes*. In *Dukes*, the putative class sought to prove that Wal-Mart had a nationwide and general policy of discrimination that guided millions of allegedly individual discriminatory employment decisions. In *Dukes* a key issue was whether a general policy existed concerning such nationwide and individual decisions and whether that general policy could somehow apply to all of Wal-Mart's hiring decisions. Here, unlike *Dukes*, there is no dispute: a uniform billing methodology exists and that those uniform billing practices apply to all putative class members.

The common question, regarding Sprint's obligation to its customers concerning its third-party billing practices, predominates over any individual issues. The putative class members are all equally affected by Sprint's actions and the simple, single determination of whether Sprint

breached its obligation to its customers, will resolve in one stroke, an issue that is central to the validity of each class member's claim. Sprint would prefer that, instead we should look to Sprint's third-party billers. While it cannot be disputed that the third-party service providers should also have liability for their cramming, this case is about Sprint, and determining what liability Sprint has for its overall control of the scheme. At Sprint's option, it may, of course, seek recoveries from the third-party billers.

A court must "examine the nature of the underlying claims for the purpose of determining whether common questions predominate." *Petty v. Wal-Mart Stores, Inc.*, 148 Ohio App.3d 348, 355, 773 N.E.2d 576 (2nd Dist. 2002). At least one issue must be capable of determination on a classwide basis. *Id.* at 357. Sprint asserts that causation questions are class-member specific. In a certain sense they are, because there would often be a reason for Sprint to look to the third party records, if a particular charge is challenged. However, this routine inquiry is no different than, for example, a search of Sprint's records to see if a customer contracted for its local telephone services and if so, the record of bills, payments and credits for each such account. These are all ministerial tasks that are commonly conducted in daily business matters, as well as in litigation, on a routine basis.

Moreover, Sprint's claim: that the defenses that it may raise to the claims of class members are inherently individualized - - - is without merit. Defenses, such as waiver or the voluntary payment doctrine, are applicable to the class as a whole. A common defense asserted against some readily defined members of a class will not defeat class certification. See *Gawry v. Countrywide Home Loans, Inc.*, 640 F.Supp.2d 942, 949 (N.D.Ohio 2009) ("With the Court's assistance, the parties settled the claims of certain Class I members by dividing the class into two subclasses: (a) those individuals against whom Countrywide did not possess a preemption

defense ("Class I(a)"); and (b) those individuals against whom Countrywide intends to present a preemption defense ("Class I(b)".)

"The fact a defense may arise against and affect class members differently does not *require* a finding that individual issues predominate. *Gawry*, 640 F.Supp.2d at 949 (emphasis in original), citing *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 563 (6th Cir. 2007). Furthermore, the defenses that Sprint intends to raise are not unique to only a few class members. Resolving the applicability of these defenses, for what will undoubtedly be a large portion of all class members, will be an efficient and economical way for the court to handle what could possibly be thousands of claims. This factor argues in favor of class certification.

The plaintiffs will presumably be able to establish, as a matter of law, that Sprint is liable for billing unauthorized charges under any of the three causes of action asserted. If and when liability is established, appropriate injunctive relief can be granted, as has been the case throughout the United States. See *Dukes,* 131 S.Ct. at 2557; *Gooch v. Life Investors Ins. Co. of Am.,* 672 F.3d 402, 427-28 (6th Cir. 2012). Common issues predominate because by next verifying the existence or lack of authorization from the third party providers, the amount of class members' damages can be calculated.

3. The Proposed Revised Class Definition Resolves the Concerns Previously Expressed by this Court.

Sprint asserts that the trial court determined that the newly revised class definition still fails to address the Supreme Court's concern for consent and authorization. (Appellant Brief at p. 29). This is incorrect. Instead, what the trial court actually said was "Plaintiffs have proffered a new definition that attempts to address the Supreme Court's concern for 'consent' and 'authorization'". (*Stammco*, Fulton Co. CP No. 05CV000150, Judgment Entry Dec. 22, 2010 at

p. 11). However, what followed in the trial court's analysis was an admittedly convoluted discussion about unrelated issues, such as FCC regulations and fiduciary duty. *Id.* at pp. 11-12.

Sprint further asserts that the trial court recognized that Sprint's records are inadequate to show which customers received charges which were unauthorized, or whether certain charges were, in fact, unauthorized. (Appellate Brief p. 29). This statement is shamelessly taken out of context. The trial court, in agreeing with this Court that the words "their permission" in the previous class definition were ambiguous, said "[s]imply put the 'their' of 'their permission' refers to customers who received bills from United Telephone, where the bills contain third-party charges, and they were/are either fraudulent charges for services not received, or charges arising from deceptive business practices, and United Telephone is not able to produce a satisfactory record indicating that there charges were ever 'authorized' by the customer." (*Stammco*, Fulton Co. CP No. 05CV000150, Judgment Entry Dec. 22, 2010 at pp. 9-10). (Appellant Appendix at 26-27). The trial court made neither of the express findings, pertaining to the class definition, that Sprint claims.

On the other hand, the Sixth District carefully reviewed Stammco's proposed class definition and concluded that the new definition does satisfy all concerns of the Ohio Supreme Court with respect to ambiguity. *Stammco*, 2011-Ohio-6503 at ¶41. (Appellant Appendix at 14). The revised class definition (1) specified to whom customers were to give their permission for third-party charges on their bills, (2) defined who was to give permission, and (3) specified the manner in which the permission was to be given. *Id.* at ¶37. (Appellant Appendix at 12).

Furthermore, Sprint has never adequately explained why its records are insufficient to identify those customers whose bills contained charges from third parties, or those for whom Sprint does not have a documented authorization in its records. The amended class definition

clarifies that the authorization be given *to Sprint*, not the third parties. Sprint's argument unnecessarily muddies the waters by shifting the focus to its third-party billing providers. The question for class membership is whether Sprint acquired an authorization from the customer, not the third party provider. Class membership will easily be ascertained through a simple ministerial review process of Sprint's records. The easy pathway for doing so has been vividly demonstrated by the national settlements for cramming damages of AT&T and Verizon. See *Moore v. Verizon Communications, Inc.,* Case No. CV09-1823, (N.D. Cal.) Doc #94-1, Feb. 27, 2012 p. 4 (defining "Customer List Search Methodology" to be used by Verizon to conduct a search of its electronic billing records to identify Persons who fall within the definition of the Settlement Class) and *McFerren v. AT&T Mobility,* No. 2008-EV-004400F (Fulton Co., GA) Settlement Agreement (defining Settlement Class as all current and former customers who were billed for third party content.)

Sprint further attempts to create confusion because the amended class definition does not include Sprint customers' toll bills from long distance service providers. Sprint is correct in stating the obvious, that such charges will not be included. These monthly long distance toll charges are highly regulated, with strict federal guidelines for authorization and stringent penalties for non-compliance. These are not cramming matters and they are not included within the class definition. Sprint can most certainly ascertain from its own billing records which third-party bills are for monthly long distance toll service. All customers who received any other third-party billing, if Sprint did not have prior authorization from the customer, will be class members. This is easily understood when the class definition is read carefully.

The class definition is not similar to that found in *Maestle v. Best Buy Company*, 197 Ohio App.3d 248, 20100-Ohio-5833, 967 N.E.2d 227, ¶23 (8th Dist.), upon which Sprint relies.

(Appellate Brief pp. 30-31). The proposed class in *Maestle* was to include all customers with a Best Buy credit card that were charged interest or finance charges during a specific time period, when the allegations in the complaint dealt with the improper calculation of interest and fees for certain promotional programs by only one of several card issuers, Bank One. The *Maestle* court correctly determined that the class is "overbroad as it includes all account holders who were 'assessed interest or finance charges' from 1985 to present, without regard to whether said account holders were subject to the account related practices alleged in the complaint." *Id.* at ¶21. The class members in this case are all Sprint customers who have been subject to Sprint's practice – the billing of third-party charges when the customer did not authorize Sprint to do so. All class members have claims under the causes advanced by Stammco in the Complaint.

Although it is doubtlessly correct that Sprint's third parties may have relevant information about alleged transactions with Sprint customers, (Davis Aff. ¶10, Appellants' Supp. 112-113), that fact does not lead to the conclusion that Sprint "cannot even identify by name which customers received third-party charges, or what third parties initiated those charges." (Appellants' Brief at p. 31). There has been *no evidence* presented to support Sprint's contention or that the only way for such information to be discovered, would be through a manual review of all Sprint customers' bills. The billing information was provided to Sprint electronically upon Sprint's purchase of those accounts; it was utilized by Sprint to generate the bills, and like all such data, it can easily be accessed to yield the same information that the other telephone companies now routinely use in the settlements to satisfy customer damages resulting from cramming.

This case can also be easily distinguished from *Margulies v. Guardian Life Insurance Co.*, 8th Dist. No. 88056, 2007-Ohio-1601 at ¶17, where a manual review of policy files would

have been necessary to identify class members because the defendant "does not maintain an electronic database of which policyholders purchased temporary coverage." Sprint has not demonstrated that the information necessary to identify the class, as it is now defined, is not in its possession and the telephone companies entering nationwide cramming settlements have certainly been able to identify class members.

It is erroneous for Sprint to state that the trial court determined that class members could not be identified without individualized analysis and thousands of mini-trials "after analyzing how plaintiffs would try to prove the merits of their claims." (Appellant Brief p. 31). The only discussion of the named plaintiffs' merits by the trial court was a legal discussion as to whether the telephone provider had a fiduciary relationship with its customers. (*Stammco*, Fulton Co. CP Case No. 05CV000150, Judgment Entry, December 22, 2010 p. 12) (Appellant Appendix at 29). That legal issue did not impact on the elements of class certification and it was beyond the scope of the necessary inquiry and without benefit of adversarial briefings.

4. The Class is Manageable.

Appellants' concerns about manageability are merely another smokescreen and a re-hashing of the same issues addressed elsewhere in their brief. Class members can easily be identified. For the most part, the factual inquiry described by Sprint will be a part of the class member identification process. It is a clerical and ministerial process that will locate those Sprint customers who have third-party charges on their bills which have not been reversed.

The liability issues can be addressed on a class-wide basis. Sprint will not be called upon to defend the validity of every charge, just the validity of its billing practices. As soon as class certification is concluded, the Plaintiffs will move on to the issue of liability. Once that is concluded, the mechanical process of providing a remedy to class members, *who have been damaged,* will be efficiently handled, and with ease.

Evidence has been presented that it is Sprint's standard billing process for Sprint to not allow customers to exclude, or block third-party charges from their Sprint bills. Although actual damage amounts will vary, depending on payment histories, such damages will be calculated with certainty, which would not preclude class certification. *Estate of Reed v. Hadley*, 4th Dist., 2005-Ohio-5016 at ¶¶ 1, 36. As part of the billing contract between Sprint and the third-party providers, those third parties agreed to fully cooperate with Sprint regarding any "judicial, governing or regulatory agency" inquiries regarding customer complaints which would include "securing and providing documentation or answering interrogatories". (Davis Depo. Exhibit 39 p. 51 at UTO 000862, Appellee's Supp. at 240). Those third-party records can be obtained which establish the adequacy of authorization, if any was given, and the amount of damages, with certainty. This is a ministerial function that can be accomplished merely by electronically reviewing the records. Furthermore, Plaintiffs also seek injunctive relief which will benefit all members of the class as defined. Sprint's business practice affects all class members equally and the propriety of the injunctive relief sought will benefit all.

5. The Plaintiffs are Members of the Class They Seek to Represent and Have Claims that are Typical of All Class Members.

Sprint argues that the Stamms have no standing to represent the class members because they did not "receive" any charges, designated by Sprint as "miscellaneous" charges or pay for any such "miscellaneous" charges, such as those billed by Sprint on behalf of Bizopia. To the contrary, Kent Stamm has testified that the Sprint telephone bills received for the business and for his home, contained *numerous* other charges for fictional collect and operator assisted calls, in addition to the bogus charges billed on behalf of Bizopia. At least one of these charges was not recognized by Mr. Stamm as a bogus charge until the time that he was cross examined by

Sprint. (K. Stamm Depo. pp. 154-156, Appellant Supp. at 42). Sprint reversed some contested charges, but not all. Appellees have standing to sue in their own right, and their claims are typical of the class of persons they seek to represent, of which they are members.

There appears to be a misunderstanding by Sprint of the terms used in the class definition. Sprint discusses "miscellaneous" charges without specifically defining what those might be. The proposed class definition excludes specific charges billed for long distance toll service providers, such as the MCI charges billed to the Stamms (designated as Customer 1+ Billing Services by Sprint) that appear on the customers' bills as reoccurring monthly charges. These charges are regulated by Federal law, which provides adequate remedies for consumers. *All* other third-party charges are included within the class definition, despite Sprint's attempt to limit the class definition to some undefined "miscellaneous" charges. If perchance, there could be some significance in the industry, to the term "miscellaneous" charge, this peculiarity does not impact the class definition and regardless is not a reason that the Stamms' claims would not be typical.

"[A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When, as here, it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims." *Baughman*, 88 Ohio St.3d at 484, quoting 1 Newberg on Class Actions (3 Ed. 1992) 3-74 to 3-77, Section 3.13. However, typicality is not present where a "named plaintiff who proved his own claim would not necessarily have proved anybody else's claim." *Sprague v. GMC*, 133 F.3d 388, 399 (6th Cir.1998). These claims can be proven on behalf of a class. The

question of Sprint's liability can be resolved for the entire class. It can be determined on a class-wide basis whether Sprint, when it billed customers for third-party charges without seeking authorization from its customers to do so, breached the terms of the customer contracts, or whether Sprint was unjustly enriched by collecting third-party charges from its customers that were "crammed" onto their telephone bills.

The Stamms' claims are typical, arising from the "same unlawful conduct" of Sprint and based on "the same legal theory." They are adequate class representatives and have standing to bring their claims.

CONCLUSION

Plaintiffs seek the opportunity for their claims to be proven on behalf of a class and on the merits, but *after* class certification. Sprint should welcome this opportunity, as well. Resolution for all class members will give finality to this litigation, that Sprint has now dragged out for seven years.

The Sixth District Court of Appeals correctly held that the trial court abused its discretion when that court made an incorrect determination of law when it held that the class, defined by Plaintiffs, was an improper "fail-safe" class. The Sixth District also found an abuse of discretion when the trial court did not provide any rationale as to why the requirements of Civ.R. 23 were not met, when it denied class certification.

The Sixth District's opinion is not at odds with the recent U.S. Supreme Court decision in *Wal-Mart v. Dukes*, and it does not prohibit any merits consideration, when considering class certification. The Sixth District did not fault the trial court for looking at the merits, but found the abuse of discretion because the merits inquiry was an *improper* incursion that did not relate to the determination that the requirements of Civ.R. 23 were met.

The Sixth District's correct decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing *Merit Brief of Appellees Stammco, LLC d/b/a The Pop Shop, Kent Stamm and Carrie Stamm* was forwarded by First-Class mail to the following:

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IN THE COURT OF COMMON PLEAS OF FULTON COUNTY, OHIO

Stammco, LLC, et al,	*	
Plaintiffs,	*	Case No. 05CV000150
-vs-	*	
United Telephone Co. of Ohio, et al,	*	**JUDGMENT ENTRY**
Defendants.	*	

* * * * *

Coming on before the Court is Plaintiffs' Motion for an Order Certifying a Class, Designating Plaintiffs as the Class Representative, and Appointing Plaintiffs' Counsel, as Class Counsel, for a Proposed Class Action, filed under seal on April 20, 2007; Defendants' Brief in Opposition, filed under seal on June 18, 2007; Plaintiffs' Reply Brief filed under seal on July 2, 2007; Defendants' Surreply Brief filed July 24, 2007; Plaintiffs' Motion to Strike Defendants' Surreply Brief, filed July 27, 2007; Plaintiffs filing of the Supplemental Authority of Ritt v. Billy Blanks Ents, 171 O. App. 3d 204; Defendants' Response to Plaintiffs' Submission of the Supplemental Authority, filed September 5, 2007; and Plaintiffs' Reply to the Response of Sprint, filed September 13, 2007.

The facts in this case are as follows:

The Defendants, United Telephone Company of Ohio (hereafter "UTO"), and Sprint Corporation (hereafter "Sprint"), did and still do provide local and long distance telephone service

to more than one million customers throughout Ohio, including Plaintiffs. In 2004 UTO was a wholly owned subsidiary corporation of Defendant "Sprint." It then reorganized and became "Sprint-Nextel Corporation," and now is reorganized as "Embarq." For identification purposes Defendants will be referred to as "UTO" or "Sprint."

Billing activities for UTO, and for all of the other local telephone companies that are part of the Sprint network, are processed centrally through a system managed by what is now known as Embarq Management Company. The process of billing for the services provided by these local telephone companies is the same for all subsidiaries of Sprint. This process was and is managed solely through a system of computerized procedures, and they have not changed during the relevant time period.

In addition to billing its own customers for the telephone services provided directly by Sprint subsidiaries, including UTO, Sprint has also entered into contracts with a number of other unrelated third parties, for the purpose of providing billing services for sundry items and services rendered by and on behalf of these other contracting third parties, and it bills its own customers on behalf of these unrelated third party entities, per contract. The procedure for the billing of these items and services, on behalf of these unrelated third parties entities, has also remained the same over the requisite time period.

Plaintiffs claim that a number of these third party entities, hiding behind tiers of billing agents, electronic billing systems, and billing telephone companies, have become successful in collecting large sums of monies from Defendants' customers, by having or causing unauthorized, misleading, and deceptive charges to be placed on Defendants' customers' telephone bills. These unrelated charges are billed and collected by the local telephone company from its own customers,

for items or services allegedly provided by these unrelated companies and businesses. Some of these third party billings are transparent, authorized, and legitimate. Some are not. To the extent such services are bogus, or unauthorized, Plaintiffs claim they constitute a fraud upon themselves, the public, and upon the proposed "Class."

The practice of causing these unauthorized charges to be placed on a customer's telephone bill is recognized in the industry as "cramming." "Cramming" has been recognized and acknowledged to be a serious problem by other States, and by the telecommunications industry itself. As and for remedy, a number of these other States have enacted remedial legislation, thereby protecting their own citizens from these same types of predatory practices, known to have affected Ohio's citizens and the proposed Class Members in this case, or they have referred the matter over to litigation. (The Court notes an action was recently brought by the Federal Trade Commission against OAN, Integretel, Nationwide Connect, and Access One, in the U.S. District Court for the Southern District of Florida, which addresses the issue facing this Court in this proceeding.) These other jurisdictional actions and protections clearly demonstrate: (a) that Sprint is aware of the significance of the problem; (b) that Sprint has the technology to prevent cramming abuses; and (c) that Sprint has failed to give its Ohio customers the same minimal protections it has been able to provide, and does provide, to its customers in other States or jurisdictions.

To describe the structure of the scheme, as best can be determined, Sprint enters into various contracts with numerous third-party toll service providers, and with large billing clearinghouses. A billing clearinghouse, or "billing aggregator," is a company which will bill on behalf of a large number of other entities. Again, various tiers and insulators are built into the system. In these contracts, Sprint agrees to perform billing and collection services for these various clients, who

"subscribe to" and "purchase" these services from Sprint, in accordance with the terms of their various agreements with Sprint. All of these third party agreements are substantially similar in general terms, procedures, and execution, although a number of variables, including the length of contract, the specific rate to be charged by Sprint for these services, the amount of reserves to be held by Sprint for uncollectible accounts and billing adjustments, and the minimum revenue commitments, will vary with each third party entity, based upon the anticipated billing volume, and the collection history of each client. The general format umbrella and terms included in these agreements, however, have not changed over the past ten years, and it is the "general nature" of the format, affecting all of Sprint's customers, sans the "variables," that constitutes the basis for the proposed "class action."

With respect to the instant lawsuit, Plaintiffs Kent and Carrie Stamm own and operate a small business in Archbold, Ohio, named Stammco, LLC, d/b/a/ "The Pop Shop." They provide small-town retail services for a limited number of customers in semi-rural Fulton County, Northwest Ohio. They are not "well-heeled" by any means, but they do know how to use a computer, and the telephone is a necessary component of their business. In the course of a review of their business records, Plaintiffs discovered there were numerous unauthorized charges being billed by Sprint, on behalf of several third parties, which were included on their monthly phone bills. At least one of these charges was not even discovered, nor recognized by Plaintiffs, as an unauthorized charge, until long after payment had been made by them to Sprint. It is of further note that another unauthorized charge, brought to Mr. Stamm's attention by counsel for Sprint during Plaintiff Stamm's deposition, was never discovered by Mr. Stamm until he was in the process of reviewing his records in preparation for his deposition, the day before. Mr. Stamm is also acutely aware of a large number

of other Sprint customers, from his locality, who were and are being billed for unauthorized charges, by the Defendants, on behalf of third party entities. Defendants have since "reversed" these charges out, and they now claim that since Plaintiffs have not actually had to pay the "unauthorized" charges, they have not been actually damaged. There being no damages, Defendants now assert Plaintiffs have no "standing" to bring the instant suit. Plaintiffs deny this claim, and they assert some of the unauthorized charges were never reimbursed nor recovered, all to their damage and standing, and that they suffered other damages in the form of time and effort.

Plaintiff, The Pop Shop, received a Sprint telephone bill in October of 2004, which included unauthorized charges of $87.98, billed by OAN Services, Inc., "billed on behalf of Bizopia." Plaintiff Kent Stamm had no knowledge of any services provided by Bizopia for the Pop Shop. After making a number of phone calls, and after sending a number of e-mails to Bizopia, Mr. Stamm was finally able to discover that Bizopia was alleged to be a web site building and hosting service. He also learned it had a most unsatisfactory record with the Better Business Bureau. In addition, when The Pop Shop did not make immediate payment to Sprint, after disputing the unauthorized charge on the monthly telephone bill, Sprint added a $10.00 late fee to its next month's bill. Mr. Stamm was not pleased with the charge, nor with the penalty charge, and he was not especially pleased with the inordinate amount of time and energy he had to devote to running down the facts, which finally led to the filing of the instant lawsuit.

Mr. Stamm had not been aware that Sprint would be billing him on behalf of other third party entities. This prospect was never conveyed to him by Sprint when he entered into his telephone service agreement with Sprint. In fact, Plaintiffs specifically requested, on several occasions, that no third-party billing be placed on The Pop Shop's local telephone bill. Nevertheless, and in total

disregard to Plaintiffs' instructions, the third–party billings by Sprint continued. Mr. Stamm eventually learned that Sprint would not allow him to "block," or indicate in any way, that he did not want any third party billings on his account. Significantly Sprint does not require any written authorization from its customers before it places third-party charges on its own customer's local telephone bills.

Plaintiffs assert that Defendants, being regulated public utilities, are required to provide and bill for telephone services which are actually rendered, that Sprint has a duty to ensure that the bills it sends to its customers are accurate, and that the funds collected in payment of those bills are for products and services actually authorized and received by its customers. Plaintiffs assert Sprint has effectively entered into a "de facto" partnership or agency relationship with its third party vendors, and that it has failed to properly utilize effective methods to screen these third party vendors, and the practices of these third party vendor billing entities, all to Plaintiffs' damage. Plaintiffs allege Sprint has and continues to engage in negligent and/or fraudulent conduct by negligently and/or fraudulently including charges for unauthorized products and services on the bills it sends to its customers, and that this negligence/fraud has caused Sprint's customers to be billed for, and in many instances, to pay for, services and merchandise they did not want, authorize, or even receive. Plaintiffs assert that those particular items which would generate a large amount of money, placed on a customer's phone bill, would probably be spotted by the customer, and maybe challenged, but that many of these unauthorized charges are for only a few dollars, and being so small, they either go unnoticed, as happened to Mr. Stamm for a long time, or they constitute such a small amount of fraud, that it is and would be hugely uneconomical to attempt to track them down, challenge them, and seek redress. It's a lot cheaper for the customer to just pay and shut up.

A challenge to any "unauthorized" charge is not easy, and it's time consuming. Customer service is handled by Sprint representatives in centralized offices. These customer service representatives deal with all Sprint local telephone customers, including subscribers served by the United Telephone Company of Ohio. Information pertaining to any proposed change to a customer's bill is relayed to the Defendants' customer service representatives, through project program managers, who are employees of Embarq [formerly Sprint], and they deal with all of the local telephone companies that provide services under the Embarq name. The manner is which these Sprint representatives handle the customers' complaint or request for information is standardized, and the manner in which the call is "escalated" to other representatives, with more training and experience, when more sophisticated assistance is needed in handling the call to attempt a resolution, is uniform. This multi-tiered system is often electronic, and it soon becomes daunting, uneconomical, and ultimately frustrating to the average lay person. Once the unresolved issue comes to the "service recovery center" where customer escalations are handled, there is also a standardized procedure for dealing with complaints regarding billing problems. However, if the complaint remains unresolved at that level, there is no further step in the process for the customer to take, short of litigation.

Guidelines on how to handle customer inquiries, and how to arrange for "credits," are made available to Sprint's representatives in an online "job handbook." This handbook describes a uniform call handling process and provides instructions on how and/or when to issue credits. In every instance, Sprint representatives who handle customer complaints, pertaining to third party charges, are instructed to inform all such customers that they need to contact the third party vendor to resolve the issue, and that Sprint will not handle the complaint.

Thus, if a customer does notice he has an unauthorized third party charge on his telephone bill, he must first contact the third party vendor to dispute the charge. As a standardized term in every billing agreement, a customer's call to Sprint with a complaint pertaining to a third party charge results in the customer being referred back to the third party who originated the charges. If that third party is a billing clearinghouse, the customer will then be required to take another step in the process, and he will be referred on to the vendor who actually placed the original charge with the clearinghouse. It is only after a customer refuses to deal with the third party, or calls Sprint back after having been unsuccessful in resolving the dispute with the third party clearinghouse, or with the third party vendor, that Sprint might authorized a credit on the customer's bill. Although a credit adjustment on the phone bill can be authorized by a customer service representative, in actual practice the outcome is variable, and it depends upon what the customer has expressed to the Sprint representative, and which Sprint representative happens to take the call. There is an actual adjustment code in the account representative handbook which deals specifically with making credit adjustments resulting from complaints of third party "cramming."

If the third party vendor authorizes a credit on the customer's local telephone bill, or if a Sprint representative decides to give the customer a credit for the charges, Sprint is paid for the inclusion of this additional line item, the credit, on the customer's bill, just as they were paid for the original charge on the account. This is in addition to other set fees paid by the third party to Sprint for the various billing and collection services that Sprint provides. In actuality the billing disputes have the effect of generating additional revenues for Sprint, and additional headaches for its customers.

Sprint is well aware of the "cramming" problem, and of the potential for abuse in these

billing arrangements. Terms are typically inserted in the standard billing and service agreements which allow Sprint to hold back reserves from the billing entities, such as billing clearinghouses, known as "CICs." These terms further allow Sprint to increase the amounts of those deposits, and/or to increase the transaction processing rates, all based upon the number of complaints received, and the number of adjustments made to its customer accounts. Sprint also reserves the right to deny billing and collection services to any entities billing through a billing clearinghouse, referred to as "subCICs," that Sprint deems to be harmful to its end user customers, or to Sprint's reputation. There have been over fifty of these subCIC billing entities terminated by Sprint in the last ten years due to the number of complaints received, or in response to potential State and Federal litigation. Although the decision to terminate the billing for a subCIC, by the team tasked to manage the third party billing, may actually come after a review of the monthly complaint reports, and after attempting to verify the billing authorizations with the billing clearinghouse, even then no further followup will be conducted by Sprint, even after the CIC entity has been notified by Sprint that it will no longer be processing its bills.

Sprint does have the ability to "block" such third party vendor charges. In fact, this service is currently being provided to local telephone customers in some other states, but it is being denied to customers in Ohio. Presumably, these only states, where Sprint does provide "third party billing blocks," are those states where it has been obligated to do so by legislative mandate or court rule.

Sprint does not allow its local telephone customer in Ohio to initiate a "third party block." Although Mr. Stamm was told at one time that Sprint would block these charges for him, he was later informed that this option would not be available to Plaintiffs or any of its Ohio customers. Thus every customer of United Telephone Company of Ohio, similarly situated, must submit to the

prospect of having these charges appear on his or her phone bill without the necessity of any authorization being required, and he or she is forced to endure Sprint's protracted dispute resolution process before any unauthorized charges may be taken off his or her bill, assuming the customer were to even notice the charge in the first place. Many customers simply choose to pay these bills, rather than go through an exhaustive and time consuming process. Unlike customers in those other states where Sprint provides "third party blocking" as a service to prevent this type of billing, every telephone customer of Sprint in Ohio is subject to being billed for third party charges without any alternative to avoid it. This "universality of un-avoidance" is in essence the basis for Plaintiffs' assertion that class action certification is the only realistic remedy, for what Plaintiffs' assert is a fraud upon then the public, and upon the prospective "class."

Plaintiffs have alleged three alternative causes of action: (1) Sprint's "negligent billing," on behalf of third party entities, has caused harm to the Plaintiff class, through the disregard and misuse of the relationships established by Sprint, and with those to whom it provides telephone service; (2) A breach of the "implied duty of good faith in contract," by Sprint's taking opportunistic advantage of the Plaintiff class; and/or (3) That Sprint has been "unjustly enriched" by its third party billing practices, and it is inequitable for Sprint to retain these profits. Plaintiffs seek to have this action certified as a class action on behalf of all Sprint customers similarly situated, and Plaintiffs have asked this Court for injunctive relief to prevent Sprint from continuing these unauthorized billing practices.

Plaintiffs further claim that Defendants have been, and continue to be, either directly, or as agents, negligent in violating their duty to provide accurate billings to their customers, and in the facilitating of a fraud upon their customers. Plaintiffs further assert that the amounts involved are

so small, that they usually avoid detection by most customers, and if noticed, the costs and red tape associated with getting a charge reversed, are so overbearing and ponderous, that in actuality, the customer, on an individual basis, has no realistic alternative avenue of redress.

Defendants assert Plaintiffs do not meet the criteria for class certification.

First, Defendants assert that most "third party service" contracts are a result of transactions negotiated by and between the service provider and the end-user, and not by or with the Defendants. The third party services for which UTO delivers charges cover a wide range of products and services, including long-distance telephone service, pay-per-call information services, such as weather, sports, website setup and hosting, on-line advertising, and music "downloading." In Ohio, UTO receives charges for delivery by and from multiple clearinghouses, and those charges could be for services provided by any one or more of more than 2000 different third party service providers. Defendants claim the delivery of such services, and the concomitant billings for those services, are so wide-spread and diversified, that they cannot be considered as a "class" for any particular service or purpose. Moreover, while the services provided by the third party vendors may in and of themselves be widespread and diverse, the transportation services provided by Defendant itself is very limited, and in actuality is merely a "flow-through."

Because of this very limited role, Defendants claim they are not the source of, and they do not routinely receive, maintain, or have on file records or information that would or could demonstrate whether a specific third-party service was ordered or used by a customer, or any other information that could answer the question of whether or not a specific third-party charge was valid and/or authorized. For this same reason Defendants claim that, were UTO to be called upon to investigate the circumstances of how any specific third-party charge occurred, it would be necessary

for UTO to somehow obtain such information from the clearinghouse and/or the third-party at issue, which Defendants claim is too onerous a job and not their responsibility.

Second, Defendants assert that most of the charges associated with its third party billing practices were "authorized" by its customers, and Plaintiffs are attempting to lump this "authorized" billing procedure in with some putative "unauthorized" billing procedures. Thus Defendants assert there are two distinct, unequal, and unrelated billing actions Plaintiffs are seeking to equate as being in the same class, when they are not.

Thirdly, Plaintiffs assert that the underlying third party contracts are all stand-alone and individual, and they vary so greatly in their individual terms, and conditions, to include specified amounts, reserves, compensations, and lengths of time, that they cannot possibly constitute one class. Defendants assert that the proposed class would include: (1) UTO customers who authorized, requested, and received the third party services for which they were charged; (2) customers who did not authorize, and who did not pay the third party charges they received; and (3) customers who have no objection to UTO delivering third-party charges to them as part of their bill for local telephone service, three different and distinct classes.

Fourth, Defendants assert Plaintiffs have not met their burden of proof, and they cannot demonstrate by a preponderance of the evidence, that such a class can be certified. Defendants claim Plaintiffs have ignored or misstated significant requirements under Civil Rule 23, that they have ignored the individual factual and legal issues inherent in their claims, and that they have not cited any pertinent case in which a class like the one they propose was able to be certified. Defendants take the position that Plaintiffs' claims cannot be resolved on a class wide basis because countless individualized inquiries, and mini-trials, as to each class member, would be required before the

Defendants' liability could be proven, and because any such attempt to litigate all class members' potential claims, at one time, would be unmanageable.

Lastly Defendants argue that the named Plaintiffs have suffered no monetary harm because they did not end up having to pay any of the disputed charges, no legal effort was ever made to collect them, and Plaintiffs have suffered no service interruptions or harm to their credit. Defendants assert Plaintiffs have suffered no physical, mental, or emotional injury, and no property damage from the charges which briefly appeared on their bills, but are now reversed out. No harm-no foul.

Defendants assert that the only alleged harm Plaintiffs could possibly identify was that where Mr. Stamm stated he had had to spend "time away" from other Pop Shop business to make telephone calls and send e-mails anent the disputed charges. Defendants further assert Plaintiffs can not identify or quantify any monetary or other harm associated with this "time away" from Pop Shop business.

Defendants assert the burden to show a "class" exists, and that it should be certified, "rests squarely on" Plaintiffs. To meet this burden, Defendants assert Plaintiffs must demonstrate, by a preponderance of the evidence, that all of the requirements of both Rule 23(A) and Rule 23(B) are satisfied.

Rule 23(A) requires Plaintiffs to prove that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and/or fact common to the class; (3) the claims or defenses of the named party are typical of the claims of the entire class; and (4) the named Plaintiffs would fairly and adequately protect the interests of the class.

Rule 23(B)(2) requires Plaintiffs to prove that:

(i) Plaintiffs are entitled to predominantly injunctive, as opposed to monetary, relief; and (ii)

the class is sufficiently "cohesive" to justify class certification. Rule 23(B)(3) requires Plaintiffs to prove that: (i) common issues of fact and law "predominate" over any individual issues; and (ii) a class action would be superior to all other methods of resolving the disputes raised in their complaint and "manageable."

Defendants claim Plaintiffs will never be able to carry their burden of proof, under Rule 23, because of the variability of the interest of each potential member of the proposed class.

Plaintiffs in Reply claim that Defendants have either misstated or misunderstood the nature of the class they are seeking to certify. Plaintiffs' claim that the proposed class should be defined as: "All individuals, business or other entities in the State of Ohio who are or who were within the past four years [local telephone customers of UTO and] who were billed for charges on their local telephone bills on behalf of third parties without their permission."

Plaintiffs further point out that a Judge has "broad discretion," and that in this case that discretion should mitigate in favor of class certification. In support of this position Plaintiffs argue:

1. There are "common questions of Law and Fact;"

2. Specific defenses would, "not preclude resolution of the case on a class-wide basis;"

3. Defendants' attempt to "manufacture individualized issues," is not compelling nor a bar to class certification;

4. Resolution of the underlying wrong by class certification is the only realistic manner in which it can be done;

5. The "claims" of the proposed, "class" are cohesive and suitable for injunctive relief;

6. All proposed Plaintiffs, "have suffered identical injuries as those suffered by the members of the class."

Plaintiffs have also sought to introduce as recently decided "supplemental authority," the case of Ritt v. Billy Blanks Ents., 171 O.App. 3d 204 (2007). Defendants have sought an Order to strike the introduction of this additional authority.

The Court has reviewed the Ritt case, and the Memorandums. The Ritt case appears to be authoritative and enlightening. Defendants' Motion to Strike does not appear to be in the interest of justice, and it is overruled.

IT IS SO ORDERED.

The Ritt case appears to deal with the issue of whether each member of the potential class "authorized" the charges challenged, and with so many members being involved, any attempt of a resolution would kick off a number of "mini-trials" and procedures. As stated by the Court in Ritt,

"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.

A Plaintiff must prove by a preponderance of the evidence that class certification is appropriate. 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."

That language appears to address the situation presently before the Court.

In considering the facts, the law, and the arguments of counsel, it appears to the Court that Plaintiffs' various Motions for Class Certification, and for the right to be the Class Representative, and for Plaintiffs' counsel to be designated as counsel for the Class, are in the interest of justice, and they should and ought to be GRANTED. Now therefore,

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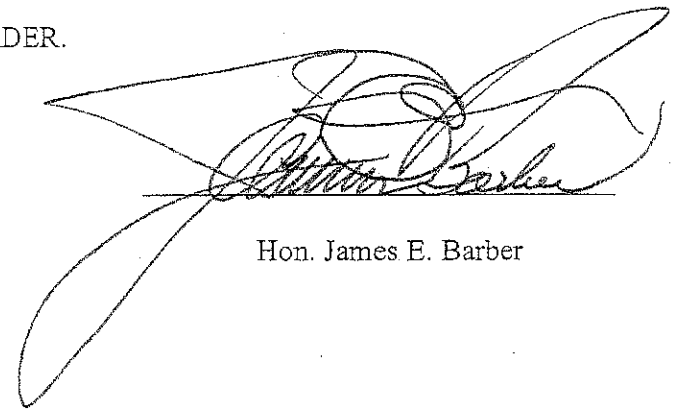
IT IS SO ORDERED. Defendants' EXCEPTION IS NOTED.

THIS IS AN APPEALABLE ORDER.



Hon. James E. Barber

cc: Dennis Murray, Sr., Esq.
Donna Jean Evans, Esq.
Michael Farrell, Esq.
Karl Fanter, Esq.

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FILED
FULTON COUNTY COURT OF APPEALS
AUG - 1 2008
Mary Hogan CLERK

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

Stammco, LLC, et al.

Appellees

v.

United Telephone Co. of Ohio, et al.

Appellants

Court of Appeals No. F-07-024

Trial Court No. 05CV000150

DECISION AND JUDGMENT

Decided: AUG 0 1 2008

* * * * *

Dennis E. Murray, Sr. and Donna J. Evans, for appellees.

Michael K. Farrell and G. Karl Fanter, for appellants.

* * * * *

PIETRYKOWSKI, P.J.

{¶ 1} This is an appeal of a September 28, 2007 judgment of the Fulton County Court of Common Pleas certifying this action as a class action. The action is brought by appellees Kent and Carrie Stamm ("the Stamms"), who reside in Archbold, Fulton County, Ohio, and by Stammco, LLC d.b.a. The Pop Shop ("Pop Shop"), an Ohio limited

liability company that operates a business located in Archbold. Appellants, United Telephone Company of Ohio, d.b.a. Sprint ("UTO") and Sprint Corporation ("Sprint") provide appellees with local and long distance telephone service.

{¶ 2} Appellees assert that appellants are liable to them and a class of telephone service customers under theories of liability sounding in negligence, breach of the implied duty of good faith and fair dealing, and unjust enrichment due to a practice of causing unauthorized charges to be placed on their telephone bills. Appellees refer to the billing practice as "cramming." In addition to monetary damages, appellees seek declaratory and equitable relief to prevent future billings for products and services that were not authorized by class members and to return sums allegedly obtained by defendants as a result of the billing practice.

{¶ 3} The trial court granted appellees' motion to certify a plaintiff class of telephone subscribers consisting of:

{¶ 4} "All individuals, businesses or other entities in the State of Ohio who are or who were within the past four years, subscribers to telephone service from United Telephone Company of Ohio d.b.a. Sprint and who were billed for charges on their local telephone bills by Sprint on behalf of third parties without their permission. Excluded from this class are defendants, their affiliates (including parents, subsidiaries, predecessors, successors, and any other entity or its affiliate which has a controlling interest), their current, former, and future employees, officers, directors, partners,

members, indemnities, agents, attorneys and employees and their assigns and successors."

{¶ 5} Appellants appeal the class certification to this court. They assert three assignments of error on appeal:

{¶ 6} "Assignment of Error No. 1

{¶ 7} "The trial court erred and abused its discretion by failing to carefully apply the requirements for class certification under Civil Rule 23, by failing to conduct rigorous analysis into whether all of those requirements were or could be met in this case, and by failing to make findings that or how any of those requirements had been met here.

{¶ 8} "Assignment of Error No. 2

{¶ 9} "The trial court erred and abused its discretion by granting plaintiffs' motion for class certification.

{¶ 10} "Assignment of Error No. 3

{¶ 11} "The trial court erred and abused its discretion because, as a matter of law, no class could ever properly be certified based upon the claims of the named plaintiffs here."

{¶ 12} A decision to certify an action as a class action is not a decision on the merits of a claim. "In determining whether to certify a class, the trial court must not consider the merits of the case except as necessary to determine whether the Civ.R. 23 requirements have been met. *Ojalvo v. Bd. of Trustees of Ohio State Univ.* (1984), 12 Ohio St.3d 230, 233." *Williams v. Countrywide Home Loans, Inc.*, 6th Dist. No. L-01-

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1473, 2002-Ohio-5499, ¶ 24. Seven requirements under Civ.R. 23 are to be met to certify an action as a class action:

{¶ 13} "Seven prerequisites must be met before a court may certify a case as a classaction pursuant to Civ.R. 23: (1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impractical; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be satisfied. *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91, 96-98, 521 N.E.2d 1091." *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, ¶ 6.

{¶ 14} The standard of review on appeal of decisions on whether to certify an action as a class action is the abuse of discretion standard. *Marks v. C.P. Chemical Co., Inc.* (1987), 31 Ohio St.3d 200, syllabus; *In re Consol. Mtge. Satisfaction Cases*, ¶ 5. An abuse of discretion connotes a judgment that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 15} The trial court found that appellees "did and still do provide local and long distance telephone service to more than one million customers throughout Ohio, including Plaintiffs." Judgment Entry of September 28, 2007. The court also detailed factual findings on billing practices:

{¶ 16} "Billing activities for UTO, and for all of the other local telephone companies that are part of the Sprint network, are processed centrally through a system managed by what is now known as Embarq Management Company. The process of billing for the services provided by these local telephone companies is the same for all subsidiaries of Sprint. This process was and is managed solely through a system of computerized procedures, and they have not changed during the relevant time period.

{¶ 17} "In addition to billing its own customers for the telephone services provided directly by Sprint subsidiaries, including UTO, Sprint has also entered into contracts with a number of other unrelated third parties, for the purpose of providing billing services for sundry items and services rendered by and on behalf of these other contracting third parties, and it bills its own customers on behalf of these unrelated third party entities, per contract. The procedure for the billing of these items and services, on behalf of these unrelated third parties entities, has also remained the same over the requisite time period."

{¶ 18} It is undisputed that appellants do not require any written authorization from its Ohio customers before they place third-party charges on their customers' local telephone bills and that Sprint has the ability to block such charges. It is also undisputed that appellants have refused to permit Ohio customers, including the Stamms, from blocking third-party charges from being placed against their accounts.

{¶ 19} The trial court also summarized the contentions of appellees:

{¶ 20} "Plaintiffs claim that a number of these third party entities, hiding behind tiers of billing agents, electronic billing systems, and billing telephone companies, have become successful in collecting large sums of monies from Defendants' customers, by having or causing unauthorized, misleading, and deceptive charges to be placed on Defendants' customers telephone bills. These unrelated charges are billed and collected by the local telephone company from its own customers, for items or services allegedly provided by these unrelated companies and businesses. Some of these third party billings are transparent, authorized, and legitimate. Some are not. To the extent such services are bogus, or unauthorized, Plaintiffs claim they constitute a fraud upon themselves, the public, and upon the proposed 'Class.'" Id.

{¶ 21} The trial court provided in its opinion a detailed review of appellants' billing procedures and the difficulties encountered by customers who challenge unauthorized third-party charges on their bills. "The manner in which * * * Sprint representatives handle the customers' complaint or request for information is standardized, and the manner in which the call is 'escalated' to other representatives, with more training and experience, when more sophisticated assistance is needed in handling the call to attempt resolution, is uniform. This multi-tiered system is often electronic, and it soon becomes daunting, uneconomical, and ultimately frustrating to the average lay person." Id.

{¶ 22} As to the named appellees, the record discloses that the Stamms own and operate a small business named Stammco, LLC d.b.a The Pop Shop. The Stamms

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discovered numerous unauthorized charges on their monthly phone bills. Upon complaint, ultimately some charges were resolved and credits issued to their accounts. The evidence also disclosed that there was at least one unresolved third-party charge, discovered during appellant Kent Stamm's deposition in this case, that had been paid, was claimed to be unauthorized, and for which repayment has not been made by appellants.

{¶ 23} In *Hamilton v. Ohio Savings Bank* (1998), 82 Ohio St.3d 67, the Ohio Supreme Court directed that trial courts, in deciding motions to certify class actions, are "required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied. Id. at 70. Under *Hamilton*, [w]hile there is no explicit requirement in Civ.R. 23 that the trial court make formal findings to support its decision on a motion for class certification, there are compelling policy reasons for doing so." Id.

{¶ 24} Appellants assert under Assignment of Error No. 1, that the judgment certifying this action as a class action should be vacated as the review of class certification issues by the trial court was insufficiently rigorous under *Hamilton.* Additionally, appellants assert that the trial court failed to address a series of issues raised by appellants against class certification and failed to make findings of fact on how the Civ.R. 23 prerequisites were met. Appellants contend that the reversal is required under *Hamilton* and under the decision of this court in *Miller v. Volkswagen of America, Inc.* (Apr. 7, 2006), 6th Dist. No. E-05-005.

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{¶ 25} In *Miller v. Volkswagen of America, Inc.*, this court reversed a trial court judgment that, "without explanation," and, in a seven word order, certified an action as a class action. We reversed and remanded the case for further proceedings on the class certification issue. The *Miller v. Volkswagen of America, Inc.* decision does not stand for the broad proposition that an appellate court must find an abuse of discretion whenever a trial court's judgment on class certification lacks findings of fact on each of the seven prerequisites for class certification or where the review of class action issues by the trial court is not deemed sufficiently rigorous.

{¶ 26} In *Ward v. Nationsbanc Mtge. Corp.*, 6th Dist. No. E-05-040, 2006-Ohio-2766, this court recognized that "[t]rial courts are permitted to issue class certification decisions without * * * making the requisite findings of fact." Id., at ¶ 35. There nevertheless must be "sufficient factual evidence in the record to have permitted a meaningful class certification determination by a preponderance of the evidence." Id., at ¶ 37. Other appellate districts have also recognized that a trial court's failure to follow preferred procedures under *Hamilton* to specify facts and reasons for conclusions under Civ.R. 23 as to whether class certification is appropriate does not, by itself, require an appellate court to reverse a judgment on class certification. *Brandow v. Washington Mutual Bank*, 8th Dist. No. 88816, 2008-Ohio-1714, ¶ 8; *Pyles v. Johnson*, 143 Ohio App.3d 720, 731, 2001-Ohio-2478.

{¶ 27} Here the trial court issued a lengthy and detailed opinion reviewing relevant facts, particularly the nature of standardized procedures for billings and for response to

customer complaints as to unauthorized third-party charges. Appellees are correct that the trial court failed to provide specific findings of fact as to the seven prerequisites for class certification and its reasons for granting class certification. However, the record contains sufficient evidentiary material upon which to determine whether class certification was appropriate. Accordingly, we find that appellants' Assignment of Error No. 1 is not well-taken.

{¶ 28} Under Assignment of Error No. 2, appellants assert that the trial court abused its discretion by granting appellees' motion for class certification. We consider each class certification requirement in turn.

{¶ 29} Under *Warner v. Waste Management, Inc.*, "Rule 23 requires, albeit implicitly, that an identifiable class must exist before certification is permissible. The definition of the class must be unambiguous." *Warner v. Waste Management, Inc.*, at 96. The definition must permit identification of class members with "reasonable effort." Id.

{¶ 30} Appellants contend that identification of class members of the certified class will require individualized review of customer bills or employment of computer programming to identify UTO customers who received third-party charges over a six year period. Appellants do not claim that identification of customers who were billed for third-party charges and paid them could not be accomplished through a computer analysis of Sprint's billing data.

{¶ 31} "The focus at this stage is on how the class is defined. 'The test is whether the means is specified at the time of certification to determine whether a particular

individual is a member of the class.' *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St.3d 56, 63, 556 N.E.2d 157, 165. The question as to whether there are differing factual and legal issues 'do[es] not enter into the analysis until the court begins to consider the Civ.R. 23(B)(3) requirement of predominance and superiority.' *Marks, supra,* 31 Ohio St.3d at 202,31 OBR at 400, 509 N.E.2d at 1253." *Hamilton v. Ohio Savings. Bank,* at 73.

{¶ 32} The class definition here is unambiguous and complies with the requirements under *Warner* and *Hamilton.* Whether the necessary screening of billing records to identify class members creates predominance or superiority issues that preclude class certification will be considered under the Civ.R. 23(B)(3) analysis of predominance and superiority class requirements.

{¶ 33} On appeal appellants have not disputed that appellees are members of the class. They have not disputed that the class is so numerous that joinder of all class members is impractical.

{¶ 34} The commonality requirement to class certification requires that "there are questions of law or fact common to the class." Civ.R. 23(A)(2). "Courts generally have given a permissive application to the commonality requirement in Civ.R. 23(A)(2). See *Marks v. C.P. Chemical Co.* (1987), 31 Ohio St.3d 200, 31 OBR 398, 509 N.E.2d 1249. This prerequisite has been construed to require a '"common nucleus of operative facts."' *Marks, supra* at 202, 31 OBR at 400, 509 N.E.2d at 1253." *Warner v. Waste Management*, at 97.

{¶ 35} In *Warner*, the Supreme Court of Ohio agreed that "if there is a common fact question relating to negligence, or the existence of a contract or its breach, or a practice of discrimination, or misrepresentation, or conspiracy, or pollution, or the existence of a particular course of conduct, the Rule is satisfied." Id., quoting Miller, An Overview of Federal Class Actions: Past, Present and Future (2 Ed. 1977), at 24 with approval.

{¶ 36} This action concerns a course of conduct applicable to the class involving standardized billing practices of appellants. These practices concern the unauthorized charging of customer accounts with third-party charges and standardized procedures in which appellants respond to customer complaints to such billings. The course of conduct applicable to the class includes a standardized policy of not requiring written authorizations from Ohio telephone customers before placing third-party charges against a customer's account and refusal to permit telephone customers to block such third-party charges. The trial court found that the billing complaint procedure is "multi-tiered," "often electronic," and "daunting, uneconomical, and ultimately frustrating to the average lay person." The record supports a finding that the commonality requirement of Civ.R. 23(A)(2) is met in this case.

{¶ 37} On appeal, appellants have not disputed that the claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class. Nor have they disputed that the representative parties will fairly and adequately represent the interests of the class.

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{¶ 38} This leaves the requirement that the action meet the requirements of Civ.R. 23(B)(1), 23(B)(2), or 23(B)(3). Appellees sought certification of the class under both Civ.R. 23(B)(2) and 23(B)(3).

{¶ 39} Civ.R. 23(B)(3) provides:

{¶ 40} "An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

{¶ 41} "* * *

{¶ 42} "(3) the court finds that the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action." (Emphasis added.)

{¶ 43} Appellants contend that neither the predominance or superiority requirements of Civ.R. 23(B)(3) have been met and that proceeding on a class basis to adjudicate claims of third-party cramming of telephone bills will be unmanageable.

{¶ 43} "It is now well established that 'a claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position.' *Lockwood Motors, Inc. v. Gen. Motors Corp.* (D. Minn. 1995), 162 F.R.D. 569, 580." *Cope v. Metro. Life Ins. Co.* (1998), 82 Ohio St.3d 426, 430.

{¶ 44} In *Cope v. Metro. Life Ins. Co.*, the Ohio Supreme Court reversed a decision denying class action status to an action against Metropolitan Life Insurance Company and Metropolitan Life Insurance and Annuity Company to challenge methods used to procure sales of life insurance. The complaint alleged a "wide spread scheme to obtain higher commissions and extra charges" by classifying sales of additional life insurance to existing policyholders as new policies when such sales were to be treated as replacement policies. Id., at 427. The difference in classification was significant in view of MetLife's practice to waive or reduce different policy charges for replacement policies. Id.

{¶ 45} The court identified cases involving "involving similar form documents or the use of standardized procedures and practices" as presenting opportunities for "common proof" of claims on a class basis. Id., at 430-431. The court reaffirmed its reasoning in *Hamilton v. Ohio Savings Bank* that "* * * [C]lass action treatment is appropriate where claims arise from standardized forms or routinized procedures,

notwithstanding the need to prove reliance. * * *." Id., at 435, quoting *Hamilton v. Ohio Savings Bank*, at 84.

{¶ 46} The fact that individualized determinations may be necessary, even in cases involving standardized forms and procedures, does not preclude a conclusion that class issues predominate over issues pertinent solely to individual claims:

{¶ 47} "It is conceivable that a significant amount of time may be spent in this case litigating questions affecting only individual members of classes. However, clockwatching is neither helpful nor desirable in determining the propriety of class certification. 7A Wright, Miller & Kane, *supra*, at 527, Section 1778. A court should not "determine predominance by comparing the time that the common issues can be anticipated to consume in the litigation to the time that individual issues will require. Otherwise only the most complex common questions could predominate since such issues tend to require more time to litigate than less complex issues." 5 Moore's Federal Practice, *supra*, at 23-207 to 23-208, Section 23.46[1]. " *Hamilton v. Ohio Savings Bank*, at 85.

{¶ 48} In the decision of *In re Consolidated Mortgage Satisfaction Cases*, the Ohio Supreme Court held that the need for individualized factual determination does not alone preclude class certification:

{¶ 49} "While appellees assert that sifting through these facts in a class action will be arduous, we are not compelled to agree. The mere existence of different facts associated with various members of a proposed class is not by itself a bar to certification

of that class. If it were, then a great majority of motions for class certification would be denied. Civ.R. 23(B)(3) gives leeway in this regard and permits class certification whether there are facts common to the class members." Id., at 468.

{¶ 50} Whether liability in damages is asserted in negligence, for breach of an implied duty of good faith and fair dealing, or unjust enrichment, the standardized practices of appellants present opportunities for class wide proof of necessary elements to establish liability. The claims of all class members arise out of common billing practices of appellants. We agree with appellees that relevant class wide evidence will include evidence regarding the manner in which Sprint purchases, places, and collects unauthorized charges on telephone bills, the extent of Sprint's knowledge of the cramming problem through customer complaints against unauthorized third-party charges on customer accounts, Sprint's actions in response, and the availability of a third-party billing block when a customer seeks to prevent such billing.

{¶ 51} This case does present a need for significant individualized determinations to present the claims of class members. However, appellants' billing system is computer based and appellants' database records will be available to provide detailed factual data both as to individual and class wide issues through computer analysis of the database. Under such circumstances it is reasonable to conclude that questions of law and fact common to the class predominate over questions affecting only individual members. Consideration of Civ.R.23(B)(3) listed factors, infra, also supports this conclusion.

{¶ 52} Appellants also dispute that proceeding as a class action is a superior method to adjudicate the dispute over unauthorized third-party charges to telephone accounts. Appellants claim there are multiple procedures superior to class action that are available to challenge third-party charges. Appellants refer to their own internal procedures to question charges to accounts dealing either directly with the third parties that asserted the charge or with UTO to secure full adjustment to the account. Appellants argue that class members could seek assistance with state and federal consumer agencies or litigate their claims in small claims courts.

{¶ 53} This case, however, presents thousands of individual claims for small amounts. This is the type of claim for which the class action procedure is well suited. The Ohio Supreme Court, in *Hamilton v. Ohio Savings Bank,* acknowledged the role of class actions in presenting such claims:

{¶ 54} "'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.'" *Hamilton v. Ohio Savings Bank,* at 80 quoting *Amchem Products, Inc. v. Windsor* (1997), 521 U.S. 591, 617 and *Mace v. Van Ru Credit Corp.* (C.A. 7 1997), 109 F.3d 338, 344.

{¶ 55} Civ.R. 23(B)(3) lists four factors for consideration to assist in determining whether the requirements of preponderance and superiority have been met. Civ.R.

23(B)(3) supra; *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 314. We address the factors in turn.

{¶ 56} Appellants have not contended that there is evidence that class members have an interest in individually controlling separate actions on their claims. In view of the limited value of individual claims, such an interest is unlikely. There is no other pending litigation against appellees asserting claims of Ohio telephone service customers arising from cramming of third-party charges on their bills. The parties have not argued any advantage to concentrating the claims in a single forum other than advantages gained through use of the class action device itself. The final factor concerns "the difficulties likely to be encountered in the management of a class action." Civ.R. 23(B)(3). Appellants have argued strongly both in the trial court and on appeal that this action is unmanageable as a class action. The manageability issues raised by appellants are based upon the scope of individualized determinations required to adjudicated all claims.

{¶ 57} The Supreme Court of Ohio has recognized that "the trial court is in the best position to consider the feasibility and gathering and analyzing class-wide evidence." *In re Consolidated Mortgage Satisfaction Cases*, at ¶ 12. The trial court exercised its discretion to certify this case as a class action.

{¶ 58} This case presents an effective tool for use in addressing both class wide and individualized factual determinations—appellants' computerized billing database. In our view, the trial court is capable of managing this action as a class action in large part

due to the availability of computer database billing records and the ability to employ computer analysis of those records.

{¶ 59} We find that there exists substantial competent probative evidence in the record demonstrating that both the prerequisites of Civ.R. 23(A) and Civ.R. 23(B)(3) have been met for the trial court to order this action to proceed as a class action. The nature of the dispute and central role played by computerized billing records support a conclusion that class issues predominate over issues concerning only individual claims. The size of the class and limited value of individual claims strongly support a conclusion that the class action is the superior method available for a fair and efficient adjudication of the controversy. Accordingly, we find that the trial court did not abuse its discretion in sustaining the motion to certify under Civ.R. 23(B)(3).

{¶ 60} Appellees argue that this action also meets the requirements to proceed as a class action on the additional ground of Civ.R. 23(B)(2). Civ.R. 23(B)(2) provides:

{¶ 61} "An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

{¶ 62} "* * *

{¶ 63} "(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;"

{¶ 64} In *Warner v. Waste Management, Inc.*, the Ohio Supreme Court recognized that "Civ.R. 23(B)(2) has, as its primary application, a suit seeking injunctive relief."

Warner v. Waste Management, Inc., at 95. "This rule entails two requirements: (1) the action must seek primarily injunctive relief, and (2) the class must be cohesive." *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, at ¶ 13. Class certification under Civ.R. 23(B)(2) is unavailable where injunctive relief is "merely incidental" to a primary claim for monetary damages. Id., at ¶ 17; accord, *Hamilton v. Ohio Savings Bank*, at 86-87; *Marks v. C.P. Chemical Co., Inc.*, at 203-204; *In re Rogers Litigation*, 6th Dist. No. S-02-042, 2003-Ohio-5976, at ¶ ¶ 42-43.

{¶ 66} Appellees seek both monetary damages and injunctive relief in the amended complaint. However, the action for monetary damages has been the primary focus of the case. Accordingly, class certification under Civ.R. 23(B)(2) is unavailable for appellants' claims.

{¶ 67} In view of our determination that the trial court did not abuse its discretion in certifying this action as a class action under Civ.R. 23(B)(3), we find appellants' Assignment of Error No. 2 not well-taken.

{¶ 68} Under Assignment of Error No. 3, appellants argue that "no class could ever properly be certified based upon the claims of the named plaintiffs here." Based upon our ruling under Assignment of Error No. 2, we find Assignment of Error No. 3 is not well-taken.

{¶ 69} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Fulton County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to

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App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Fulton County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____ JUDGE

Mark L. Pietrykowski, P.J. _____ JUDGE

William J. Skow, J. _____ JUDGE
CONCUR.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.