

ORIGINAL

IN THE SUPREME COURT OF OHIO

STAMMCO LLC d/b/a THE POP SHOP, et al.,

Plaintiffs-Appellees,

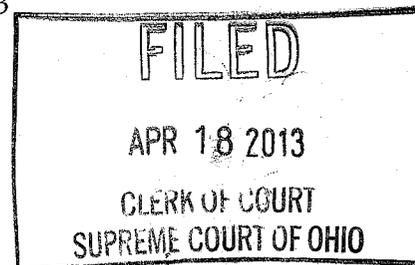
v.

UNITED TELEPHONE COMPANY OF OHIO AND SPRINT NEXTEL CORPORATION,

Defendants-Appellants.

Case No.: 2012-0169

On Appeal From the
Fulton County Court
of Appeals, Sixth
Appellate District,
Case No. F-11-003



RESPONSE TO APPELLEES' MOTION TO STRIKE APPELLANTS UNITED TELEPHONE COMPANY OF OHIO AND SPRINT NEXTEL CORPORATION'S NOTICES OF RECENTLY DECIDED AUTHORITY

Michael K. Farrell (0040941)
Counsel Of Record
John B. Lewis (0013156)
Karl Fanter (0075686)
BAKER & HOSTETLER LLP
PNC Center
1900 East Ninth Street, Suite 3200
Cleveland, OH 44114-3485
Telephone: (216) 861-7528
Facsimile: (216) 696-0740
mfarrell@bakerlaw.com

*Counsel for Appellants
United Telephone Company of Ohio and
Sprint Nextel Corporation*

Dennis E. Murray, Sr. (0008783)
Counsel of Record
Donna J. Evans (0072306)
Murray & Murray Co., L.P.A.
111 E. Shoreline Drive
Sandusky, Ohio 44870
Telephone: (419) 624-3000
Facsimile: (419) 624-0707

*Counsel for Appellees Stammco, LLC d/b/a The
Pop Shop, Kent Stamm, and Carrie Stamm*

Pursuant to this Court's Rules of Practice, United Telephone has twice notified this Court of recently decided relevant authority—namely, *Comcast Corp. v. Behrend*, ___ U.S. ___, 133 S.Ct. 1426, ___ L.Ed.2d ___ (2013), and *The Dominic Corea LP v. ILD Telecommunications, Inc.*, C.D.Cal. No. CV 09-7433-GHK, 2013 WL 821193 (Jan. 23, 2013). The purpose of those rules is to allow this Court to make decisions with the benefit of all persuasive authority. In direct contradiction of this aim, Stammco seeks to strike United Telephone's notices because: (1) a short parenthetical description of each case's holding was included in the case citations in the notices; and (2) Stammco contends that the cases are unrelated to the proposition of law accepted by the Court. Neither of Stammco's reasons is valid, and the motion should be denied.

A. A Short Parenthetical In A Case Citation Is Not Argument.

United Telephone did not submit an "analysis" of each case as Stammco claims. Rather, consistent with the letter and spirit of S.Ct.Prac.R. 17.09(B), United Telephone submitted a citation to each case that included a short parenthetical description of the case's holding. A parenthetical is part of a citation. *See, e.g., The Ohio Supreme Court Writing Manual: A Guide to Citations, Style, and Judicial Opinion Writing* 64-69 (2011) (describing use of explanatory parentheticals); *see also The Bluebook: A Uniform System of Citation*, Rule 1.5, 59-60 (19th ed. 2010) (same).

United Telephone did not set forth the factual or legal analyses in the decisions in any detail, let alone set forth the multiple reasons both decisions show that the trial

court did not abuse its discretion when it denied class certification here. United Telephone's notices could not be reasonably construed as supplemental briefing, which is what Rule 17.09 precludes. For example, United Telephone did not submit a 350-word letter arguing why those decisions are important to the disposition of this case, as would be permitted in federal appellate court.¹ Fed.R.App.P. 28(j).

If this Court determines that the notices were improper, United Telephone will resubmit its notices without any parentheticals. Of course, this Court is free to consider the persuasive and significant recent authority submitted by United Telephone whether or not the notices themselves are stricken.

B. The *Comcast* and *Dominic Corea LP* Decisions Squarely Relate To This Appeal.

Stammco also argues that the notices relating to *Comcast* and *Dominic Corea LP* should be stricken because those cases do not relate to the proposition of law at issue, and "do not deal with the merits of these Plaintiffs' claims." (Appellees' Mot. to Strike at 1-2.) This theory fails. Both cases go to the heart of the issues before this Court.

This Court accepted for review the following proposition of law: "A trial court does not abuse its discretion by evaluating the merits of the plaintiffs' claims when considering class certification." Thus, a key issue here is whether Ohio should follow the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S.Ct. 2541,

¹ Curiously, Stammco did not seek to strike any of the supplemental authority that United Telephone noticed in the exact same manner in *Stammco, LLC v. United Tel. Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292 (No. 2008-1822).

180 L.Ed. 374 (2011), and hold that the Sixth District erred by ruling that the trial court should not have considered any merits issues when denying class certification, and abused its discretion merely by doing so.

Comcast is directly relevant to this appeal.² There, the U.S. Supreme Court reiterated the core holding of *Dukes* that is reflected in the proposition of law accepted here—namely, that class certification “analysis will frequently entail ‘overlap with the merits of the plaintiff’s underlying claim.’” *Comcast*, 133 S.Ct. at 1432, quoting *Dukes*, 131 S.Ct. at 2551. The Supreme Court went on to explain that such overlap is entirely proper—and sometimes required—“because the ‘class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.’” *Id.*, quoting *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160-161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).

Just as the Sixth District did in this case, the lower court in *Comcast* had ruled that it is improper to analyze merits issues that related to class certification. In words equally applicable here, the Supreme Court ruled in *Comcast* that “[b]y refusing to entertain arguments * * * *simply because those arguments would also be pertinent to the merits determination*, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry.” (Emphasis added.) *Comcast* at 1432.

² United Telephone’s opening brief specifically mentioned *Comcast* had been recently accepted for review by the U.S. Supreme Court. (United Telephone Br. at 3, n.2.)

Dominic Corea LP is also directly on point here. There, the district court continued the unbroken line of cases holding that so-called “cramming” cases could never be certified. After analyzing *Dukes* at length, the court held that even if every class member was given an authorization voice script, the “Plaintiff’s assertion that the Authorization Question can generate common answers as to the class does not withstand the ‘rigorous analysis’ required under *Dukes*.” *Dominic Corea LP*, 2013 WL 821193, at *3.

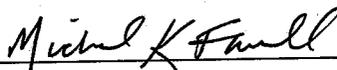
Again quoting *Dukes*, the district court went on to hold—as United Telephone has repeatedly argued—that a class could not be certified because a court would have to analyze each individual interaction and alleged authorization between the third parties and the customers. “Because we must look at each individual conversation, the potential ‘dissimilarities in the proposed class’ will likely ‘impede the generation of common answers.’” *Id.* at *4, quoting *Dukes*, 131 S.Ct. at 2551. Accordingly, the district court denied certification because, like here, “whether valid authorization was provided in a given call is not susceptible to classwide resolution.” *Id.* at *5.

Stammco’s contention that these decisions are irrelevant is unreasonable. To the contrary, these cases constitute additional authority showing that, for the exact reasons set out in United Telephone’s briefing, a class could never be certified here, and that the trial court’s denial of class certification should be reinstated.

CONCLUSION

Stammco's motion to strike should be denied.

Respectfully submitted,



Michael K. Farrell (0040941)

John B. Lewis (0013156)

Karl Fanter (0075686)

BAKER & HOSTETLER LLP

1900 East Ninth Street, Suite 3200

Cleveland, OH 44114-3485

Telephone: (216) 861-7528

Facsimile: (216) 696-0740

*Counsel for Appellants United Telephone Company
of Ohio and Sprint Nextel Corporation*

PROOF OF SERVICE

I certify that a copy of the foregoing was sent by ordinary U.S. mail to the following counsel on this 18th of April, 2013:

Dennis E. Murray, Sr.
Donna J. Evans
Murray & Murray Co., L.P.A.
111 E. Shoreline Drive
Sandusky, Ohio 44870

*Counsel for Appellees Stammco, LLC d/b/a The
Pop Shop, Kent Stamm, and Carrie Stamm*

Linda S. Woggon
Vice President, Governmental Affairs
Ohio Chamber of Commerce
230 East Town Street
Columbus, Ohio 43215-0159

*Counsel for Amicus Curiae Ohio
Chamber of Commerce*



*Counsel for Appellants United Telephone Company
of Ohio and Sprint Nextel Corporation*