

ORIGINAL

IN THE SUPREME COURT OF OHIO

STAMMCO L.L.C., et al.,	:	Case No.: 2012-0169
	:	
	:	
Plaintiffs-Appellees,	:	On Appeal From the
	:	Fulton County Court
v.	:	of Appeals, Sixth
	:	Appellate District,
UNITED TELEPHONE COMPANY	:	Case No. 11-F-003
OF OHIO, et al.,	:	
	:	
Defendants-Appellants.	:	

APPELLANTS UNITED TELEPHONE COMPANY OF OHIO AND SPRINT NEXTEL CORPORATION'S MEMORANDUM IN RESPONSE TO APPELLEES' MOTION FOR RECONSIDERATION

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Stripped of its unwarranted but colorful rhetoric, Stammco's motion for reconsideration is little more than a request for yet another chance to seek class certification in the trial court. But, as this Court correctly concluded, "the need for individualized determinations to ascertain whether third-party charges to UTO customers were authorized" will always make this case "inappropriate for resolution through a class-action complaint." *Stammco, L.L.C. v. United Tel. Co. of Ohio*, ___ Ohio St. 3d ___, 2013-Ohio-3019, ___ N.E.2d ___, ¶ 64 ("Stammco II"). Remanding this case for another consideration of class certification would "inevitabl[y] result" in a third denial of certification. *Id.* at ¶ 52.

Stammco does not argue that *Stammco II* is inconsistent with the Court's other decisions or with United States Supreme Court precedent. Stammco does not argue that the unbroken line of decisions barring certification in cases exactly like this one are somehow flawed. And Stammco does not even argue that this Court wrongly interpreted a specific rule, case, or statute. Rather, it appears that Stammco seeks reconsideration of this Court's decision because it is unhappy with it. But dissatisfaction with a decision is no reason to reconsider it. *Stammco II* was well-reasoned, practical, consistent with existing law, and supported by undisputed record evidence. Stammco's motion should be denied.

A. Stammco Ignores All Relevant Precedent.

While quoting from *Bush v. Gore*, Stammco does not even mention *Dukes* or *Amgen*, two recent, landmark United States Supreme Court decisions on class certification that this Court relied upon. *Stammco II* at ¶¶ 16, 29-40, citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) and *Amgen v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. ___, 133 S.Ct. 1184, 185 L.Ed.2d 308 (2013).

Stammco also fails to mention the unbroken line of decisions relied upon by this Court that barred certification in so-called “cramming” cases like *Stammco II*. *Stammco II* at ¶¶ 57-58. See, e.g., *The Dominic Corea LP v. ILD Telecommunications, Inc.*, C.D.Cal. No. CV 09-7433-GHK, 2013 WL 821193 (Jan. 23, 2013); *Midland Pizza, LLC v. Southwestern Bell Tel. Co.*, 277 F.R.D. 637 (D.Kan.2011); *Lady Di’s, Inc. v. Enhanced Servs. Billing, Inc.*, S.D.Ind. No. 1:09-CV-34-SED-DML, 2010 WL 4751659 (Nov. 16, 2010); *Brown v. SBC Communications, Inc.*, S.D. Ill. No. 05-cv-777-JPG, 2009 WL 260770 (Feb. 4, 2009); *Stern v. AT&T Mobility Corp.*, C.D. Cal. No. 05-8842, 2008 WL 4382796 (Aug. 22, 2008), *reconsideration denied*, 2008 WL 4534048 (Oct. 6, 2008).

Seeking reconsideration while ignoring an entire line of substantially contrary authority is unreasonable. Especially when those opinions demonstrate that this Court’s decision is correct because there is no “plausible class-wide method to prove cramming.” *Stern*, 2008 WL 4382796, at *10.

B. Stammco’s Arguments Lack Merit.

Unable to identify any error in *Stammco II*’s application of the relevant precedent, Stammco instead makes a hodge-podge of convoluted, meritless arguments. First, Stammco argues this Court’s conclusion that individual issues predominate was incorrect because Stammco also sought certification under Civ.R. 23(B)(2). (Mot. for Reconsideration 2.) This argument fails because the Sixth District held that “class certification under Civ.R. 23(B)(2) is unavailable for [Stammco’s] claims,” and Stammco never appealed. *Stammco, LLC v. United Tel. Co. of Ohio*, 6th Dist. No. F-07-024, 2008-Ohio-3845, ¶ 66. That ruling is binding law of the case. See *State v. Saxon*, 109 Ohio St.3d 176,

2006-Ohio-1245, 846 N.E.2d 824, ¶ 16 (“any issue that could have been raised on direct appeal and was not is res judicata and not subject to review in subsequent proceedings”).

And in any event, this Court addressed Civ.R. 23(B)(2) and determined that the proposed class could not satisfy Civ.R. 23, which necessarily means that it also could not satisfy Civ.R. 23(B)(2). *Stammco II*, at ¶¶ 22, 56. Moreover, no Civ.R. 23(B)(2) class could be certified here, not only because individualized issues predominate, but also because Stammco primarily seeks monetary relief. *See Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶¶ 13, 29-31 (where individualized issues predominate, cohesiveness requirement of Rule 23 (B)(2) cannot be met; where relief sought is primarily monetary, class cannot be certified under Rule 23(B)(2)); *Dukes*, 131 S.Ct. at 2557-59 (same).

Second, Stammco suggests that this Court was somehow prohibited from acknowledging the predominance of individualized issues because that proposition was not argued below or related to the question of law accepted for review. (Mot. for Reconsideration 2-3.) These notions are both factually and legally incorrect.

Predominance issues were repeatedly briefed and argued by both parties in the trial and appellate courts below. (*E.g.*, United Telephone Opp. to Certification 29-34; Stammco Reply Br. 17-20; United Telephone Appellee Br. 22-23; Stammco Reply Br. 6-7.) After eight years of class-related discovery and multiple rounds of extensive class certification briefing, Stammco cannot seriously claim that predominance-related issues were raised for the first time when this Court heard *Stammco II*.

Whether predominance-related issues about how customers could prove the merits of their claims falls squarely within the proposition of law accepted by the Court: “A trial

court does not abuse its discretion by evaluating the merits of the plaintiffs' claims when considering class certification." Indeed, predominance issues were briefed by both sides in *Stammco II*. Stammco's own merits brief included sections titled: "**Common Issues of Law and Fact Abound**" and "**The Class Claims Predominate Over Individualized Issues.**" (United Telephone 2013 Merits Br. 22-29; Stammco Merits Br. 28-33; United Telephone Reply Br. 11-13, 15-18 (emphasis in original).)

Even if predominance issues were not explicitly before this Court, "[w]hen an issue of law that was not argued below is implicit in another issue that was argued and is presented by an appeal, we may consider and resolve that implicit issue." *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 279, 617 N.E.2d 1075 (1993).

Third, Stammco also argues that *Stammco II* violated the Ohio Constitution by failing to "administer justice 'without denial or delay'" because the Court twice granted motions for reconsideration in this case. (Mot. for Reconsideration 2, quoting Ohio Constitution § 16.) Yet, the Court's decision is entirely consistent with that duty. This case has been pending for over eight years, and as *Stammco II* and every other court in so-called "cramming" cases have concluded, Stammco's claims cannot be certified. Recognizing this, *Stammco II* held that a class could not be certified and that the action should be remanded "for proceedings not precluded by the denial of class certification." *Stammco II*, at ¶ 67.

Fourth, Stammco claims that this Court's reliance on the undisputed evidence that United Telephone does not have any information that could show whether a third-party charge was authorized also was error. This "error" was premised on the claim of Stammco's counsel during oral argument that it would be possible to use statistical

modeling to prove liability, and thus the Court improperly made factual findings. (Mot. for Reconsideration 3-4.) This, too, is incorrect.

Stammco II did not engage in “fact finding.” Instead, it relied on the record showing that United Telephone does not have information showing whether charges were authorized. And, despite years of wide-ranging class discovery, Stammco cannot point to any contrary evidence and admits that these undisputed facts “were before the courts below.” (*Id.* at 4.) Acknowledging such undisputed evidence is not an improper exercise of original jurisdiction, as Stammco suggests.

Plainly, the eleventh-hour “sampling” argument made by Stammco’s counsel during oral argument is not evidence, and is unsupported by any evidence. The only evidence in the record shows just the opposite. United Telephone does not “receive, maintain or have any records of the end-user customer’s actual request, authorization, receipt or use of specific third-party services.” United Telephone does not track the reason for adjustments, and it is “unable to identify by name which of UTO’s local telephone customers received third-party charges or to identify the specific third-party service providers from which a given customer received such charges.” (Affidavit of Dennis Davis ¶¶ 10, 13, Supp. 112-13; Database Summary Spreadsheet; McAtee 55-56, Supp. 120.)

Finally, *Dukes* and other federal decisions have expressly rejected the trial-by-statistical formula approach advocated by Stammco’s counsel during oral argument. 131 S.Ct. at 2561; *Davis v. Cintas Corp.*, 717 F.3d 476, 490-91 (6th Cir. 2013) (same).

Stammco II already considered and rejected Stammco’s argument that anything could be gained by the trial court again considering class certification. Only further delay would result. This case has been pending for eight years, the parties have engaged in

voluminous discovery about class certification, the issue of certification has been briefed multiple times in the courts below, and this Court has twice decided that certification is improper. For all of these reasons, *Stammco II* properly concluded that “[r]emanding this case for further consideration * * * merely to reach an inevitable result would accomplish nothing other than additional, unnecessary delay.” *Stammco II*, at ¶ 52, citing *Apel v. Katz*, 83 Ohio St.3d 11, 697 N.E.2d 600 (1998).

CONCLUSION

Stammco’s motion for reconsideration should be denied.

Respectfully submitted,



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