

ORIGINAL

IN THE SUPREME COURT OF OHIO

JEFFREY FELIX, et al.,)	
)	CASE NO. 13-1746
Plaintiffs-Appellees,)	
)	
v.)	
)	On appeal from the Cuyahoga County
GANLEY CHEVROLET, INC., et. al.,)	Court of Appeals Eighth Appellate
)	District . . . Case No. CA12 098985
Defendants-Appellants.)	
)	

APPELLEES' MEMORANDUM IN OPPOSITION TO JURISDICTION
 (Filed pursuant to this Court's February 19, 2014 order)

Zipkin Whiting Co. L.P.A.
 Lewis A. Zipkin (0030688)
 Counsel of Record
 3637 South Green Road
 Beachwood, Ohio 44122
 Telephone: 216-514-6400
 zfwlpa@aol.com

Joseph A. Castrodale (0018494)
 Counsel of Record
 David D. Yeagley (0042433)
 Ulmer & Berne LLP
 Skylight Office Tower
 1660 West 2d Street, Suite 1100
 Cleveland, Ohio 44113

Mark Schlachet (0009881)
 3515 Severn Road
 Cleveland Heights, Ohio 44118
 Telephone: 216-225-7559
 mschlachet@gmail.com

A. Steven Dever (0024982)
 A. Steven Dever Co., LPA
 13363 Madison Avenue
 Lakewood, Ohio 44107

Counsel for Plaintiffs-Appellees

Attorneys for Defendants-Appellants

RECEIVED
 FEB 24 2014
 CLERK OF COURT
 SUPREME COURT OF OHIO

FILED
 FEB 24 2014
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST.....1

**PLAINTIFFS VOLUNTARILY ABANDON RULE 23(B)(2) CLASS
CERTIFICATION3**

COUNTER-PROPOSITION NO. 1:
The Cases Cited By Ganley Do Not Support Jurisdictional Appeal Because In
This Case, Unlike Ganley’s Cited Cases, All Class Members Suffered A Legal
Wrong Susceptible Of Classwide Proof.....3

COUNTER-PROPOSITION NO. 2:
Ganley’s “Actual Damage” Arguments Proceed From Post October 31, 2007 Law
Which Is Not Applicable To Cases, Such As This Case, Brought Prior To
October 31, 2007.....5

COUNTER-PROPOSITION NO. 3:
Ganley Had *Marrone* Notice By Reason Of The Ohio Adm.Code 109:4-3-
16(B)(22) And Cases Posted On The Attorney General’s Public Inspection
File.....8

COUNTER-PROPOSITION NO. 4:
An Arbitration Clause Can Violate CSPA.....10

COUNTER-PROPOSITION NO. 5:
Absent Objection, As Was The Case Here, A Trial Court May Combine A Motion
Seeking Partial Summary Judgment With A Motion For Class Certification; And
A Partial Summary Judgment Is Not A Final Or Otherwise Appealable Order
Absent Rule 54 (B) Certification.....12

CONCLUSION.....14

TABLE OF AUTHORITIES

CASES

<i>Barber v. Meister Protection Services</i> , 8th Dist. No. 81553, 2003-Ohio-1520	4
<i>Berger v. Berger</i> , 3 Ohio App. 3d 125, 130 (Ohio Ct. App., Cuyahoga County 1981).....	1
<i>State ex rel. Carr v. McDonnell</i> , 184 Ohio App. 3d 373, 381 (Ohio Ct. App., Cuyahoga County 2009).....	1
<i>Celebrezze v. Hughes</i> , 18 Ohio St.3d 71, 75, 479 N.E.2d 886 (1985).....	6
<i>Cook v. Newman Motor Sales</i> , 2010-Ohio-2000, (Ohio Ct. App., Erie County May 7, 2010).....	5
<i>Cullen v. State Farm Mut. Auto Ins. Co.</i> , Slip Op. No. 2013-Ohio-4733 (Nov. 5, 2013)	3
<i>Eagle v. Fred Martin Motor Co.</i> , 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1.....	8, 10
<i>Felix v. Ganley Chevrolet, Inc.</i> , 8th Dist. Nos. 86990, 86991, 2006-Ohio-4500.... ..	4-5
<i>Felix v. Ganley Chevrolet, Inc.</i> , 112 Ohio St. 3d 1470 (2007).....	10
<i>Greenspan v. Third Fed. S&L Ass'n</i> , 122 Ohio St. 3d 455, 456, 912 N.E.2d 567, 2009-Ohio-3508	7
<i>Hoang v. E*Trade Group, Inc.</i> , 151 Ohio App.3d 363, 2003-Ohio-301	5
<i>Hooffstetter v. Adams</i> , 67 Ohio App. 21, 32-33 (9 th Dist. 1941).....	3
<i>Jemiola v. XYZ Corporation</i> , (2003), 126 Ohio Misc. 2d 68, 73	6
<i>Kellogg v. Griffiths Health Care Group</i> , 3rd Dist. No. 9-10-59, 2011-Ohio-1733	11

<i>Konarzewski v. Ganley, Inc.</i> 8th Dist. No. 92623, 2009-Ohio-5829, cert. denied 2010 Ohio 1557, 2010 Ohio LEXIS 892 (Ohio, Apr. 14, 2010).....	9, 11
<i>Lake Erie & W. R. Co. v. Bailey</i> , 61 F. 494, 497 (C.C.D. Ind. 1893)	3
<i>Lucio v. Safe Auto Ins. Co.</i> , 188 Ohio App. 3d 190, 2010-Ohio-2528, 935 N.E.2d 53	14
<i>Maestle v. Best Buy Co.</i> , 197 Ohio App.3d 248, 2011-Ohio-5833, (2011)	4
<i>Marrone v. Philip Morris USA, Inc.</i> , 110 Ohio St.3d 5, 2006-Ohio-2869, 850 N.E.2d 31	8
<i>Middletown Innkeepers, Inc. v. Spectrum Interiors</i> , 12th Dist. No, CA2004-01-020, 2004-Ohio-5649	11
<i>Olah v. Ganley Chevrolet, Inc.</i> , 8th Dist. No. 86132, 2006-Ohio-694	5
<i>Olah v. Ganley Chevrolet, Inc.</i> , 191 Ohio App.3d 456, 459, 2010-Ohio-5485, 946 N.E.2d 771	13-14
<i>Olah v. Ganley Chevrolet, Inc.</i> , 128 Ohio St. 3d 1427 (2011)	8-10
<i>Olden v. Lafarge Corp.</i> , 383 F.3d 495, 498 (6th Cir.2004)	13
<i>Osai v. A&D Furniture Co.</i> , (1981), 68 Ohio St.2d 99, 428 N.E.2d 857	6
<i>Planned Parenthood Ass'n v. Project Jericho</i> , 52 Ohio St. 3d 56, 1990 Ohio LEXIS 254 (Ohio 1990	12-13
<i>Price v. EquiFirst Corp.</i> , 2009 U.S. Dist. LEXIS 28113 (N.D. Ohio Apr. 1, 2009).....	7
<i>Repede v. Nunes</i> , 8th Dist. No. 87277, 87469, 2006-Ohio-4117	4
<i>Renner v. Derin Acquisition Group</i> , PIF 10001587	8

<i>Smith v. Discount Auto Sales</i> , PIF 10001735	8
<i>State v. Campbell (In re Winkler)</i> , 135 Ohio St. 3d 1271, 1273-1274 (2013)	13
<i>State v. Rose Chevrolet, Inc.</i> , (12 th App. Dist. 1993), 1993 Ohio App. LEXIS 3281	6
<i>Town & Country Co-Op, Inc. v. Sabol Farms</i> , 9 th Dist. No. 09CA0072, 2010-Ohio-5300	11
<i>Verkest v. Fulton</i> , RIF 10001085	8
<i>Wallace v. Ganley Auto Group</i> , 8th Dist. No. 95081, 2011-Ohio-2909	11
<i>Weston v. AmeriBank</i> , 265 F.3d 366 (6th Cir. Mich. 2001)	7
<i>Williams v. Spitzer Auto World Canton, LLC</i> , 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E. 410.....	7, 10
<i>Wiseman v. Kirkman</i> , 2d Dist. No. 1575, 2002-Ohio-5384	6
<i>Wolfson, Defendant Class Actions</i> (1977), 38 Ohio St. L.J. 459	2
<i>Zerkle v. Kendall</i> , 170 Ohio App 3d 468, 2007-Ohio-3432 875 NE 2d 652	4
 <u>STATUTES</u>	
R.C. 1302.05	9
R.C. 1345.02	10, 13
R.C. 1345.09(B).....	1, 3, 5-6, 9, 14, 15
 <u>OTHER AUTHORITIES</u>	
Ohio Constitution, Article IV, Section 2(B)(2)(e)	14

2006 S.B. 117	6
Rule 23	6, 11
Rule 23(B)(2)... ..	3
Rule 23(B)(3)... ..	12
Rule 23(C)(1)	11
Rule 23(E)	3
R.C. 2505.02	14
Rule 54(B).....	14
Ohio Adm. Code 109:4-3-16(B)(22).....	8-10, 13
Sup. Ct. Prac. R. 7.01(B)(1)(d)(iii)	2
Sup. Ct. Prac. R. 7.01(D)	3
S. Ct. Prac. R. 7.03(B)	1

THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

The true significance of this case is that our system of civil justice can effectively discipline a business which has abused and terrorized the respectable citizens of Cuyahoga County for too long. This is no ground for this Court's intervention. Judge Sutula and the Court of Appeals declined to allow Ganley to once again escape its wrongdoing unscathed--for so to do, held Judge Sutula, would reward "lawlessness aimed primarily at consumers." In the words of Amicus Curiae Automobile Dealers Associations (Mem. at p.2), the instant facts *do* establish a "nefarious scheme to broadly deceive customers." This Court should decline jurisdictional appeal.¹

Ganley and all six amici curiae (the "Advocates") argue as their primary proposition of law that a class of consumers who sustained no direct out of pocket loss cannot be certified under the required "rigorous analysis."² Ganley and the Advocates, however, predicate their argument on *inapplicable* law. Specifically, while the pre-amendment version R.C. 1345.09(B) governs this case (filed 6/18/01), the Advocates anchor their argument with the post-amendment version of R.C. 1345.09 (B)(eff. 10/31/07); but the latter version has absolutely no relevance to this case or to any class member. *See* pp. 6-8, *infra*. Because this is a 12-year-old case under a repealed remedial provision carrying a two-year statute of limitations, the "damage" issue at bar will never again arise. An outlier decision under long-repealed law has no precedential value and

¹*State ex rel. Carr v. McDonnell*, 184 Ohio App. 3d 373, 381 (Ohio Ct. App., Cuyahoga County 2009); *Berger v. Berger*, 3 Ohio App. 3d 125, 130 (Ohio Ct. App., Cuyahoga County 1981).

² The Advocates' propositions mirror those of Ganley; hence, Appellees will address themselves to Ganley's Memorandum. S. Ct. Prac. R. 7.03(B).

certainly does not qualify as “a matter of public or great general interest.” Sup. Ct. Prac. R. 7.01(B)(1)(d)(iii).

This class action in fact began as an individual case for individual relief. Judge Sutula ruled soon after commencement, on August 10, 2001, that Ganley’s arbitration clause was unlawful and unenforceable. Ganley maneuvered to obtain a consensual vacation of that judgment, thereby delaying proceedings for years on its notice of appeal. **All Ganley dealerships used the unlawful clause for approximately six additional years after Judge Sutula ruled the clause unconscionable.** It was this open defiance that moved Plaintiffs to seek declaratory relief and class status.⁶ It was this “lawlessness aimed primarily at consumers”(Appellants’ Mem. at Exhibit A, p.9) that moved Judge Sutula to award class relief against Ganley more than 11 years after the initial finding of wrongdoing.⁷

Ganley and the Advocates approach this Court as though Ganley’s predicament emanates from an honest, hyper-technical mistake, which any Ohio business could make,

⁶Judge Sutula’s Proposed Order specifically denied Plaintiffs’ request for certification of a defendant class of all Ganley dealerships. See Appellants’ Mem. at, Exhibit A, Decretal Para. 2; see generally Wolfson, Defendant Class Actions (1977), 38 Ohio St. L.J. 459.

⁷The trial court’s “Proposed Order” as to Ganley Chevrolet, Inc. (“GCI”) extended only to direct GCI customers, since GCI is a “supplier” under CSPA only to its contracting customers. The court’s judgment against Ganley Management Company (“GMC”), however, extended to all Ganley customers of all Ganley dealerships because GMC is a “supplier” that drafted, circulated, and instructed the use of the arbitration clause by all such dealerships vis-a-vis their customers.

harming no one and deserving of mercy. However, such is not the case. Ganley's lawlessness, visiting great harm to an actuarial certainty, distinguishes this case from any other in the annals of Ohio Supreme Court class action jurisprudence. To accept jurisdictional appeal here would set a needless and dangerous precedent, and send the wrong message to those who would, with utter abandon, abuse the Ohio consumer.⁸

**PLAINTIFFS VOLUNTARILY ABANDON RULE 23(B)(2) CLASS
CERTIFICATION**

This Court's intervening decision in *Cullen v. State Farm Mut. Auto Ins. Co.*, Slip Op. No. 2013-Ohio-4733 (Nov. 5, 2013) eliminates the sustainability of Rule 23(B)(2) class certification. Accordingly, Plaintiffs hereby withdraw their claims for such class certification and will seek an appropriate order pursuant to Rule 23(E), in the Court of Common Pleas, when that Court resumes jurisdiction of this matter. *See* Sup. Ct. Prac. R. 7.01(D). The issue of Rule 23(B)(2) certification is moot.

COUNTER-PROPOSITION NO. 1: THE CASES CITED BY GANLEY DO NOT SUPPORT JURISDICTIONAL APPEAL BECAUSE IN THIS CASE, UNLIKE GANLEY'S CITED CASES, ALL CLASS MEMBERS SUFFERED A LEGAL WRONG SUSCEPTIBLE OF CLASSWIDE PROOF

Most of the cases cited by Ganley were reversed because, unlike this case, the class definition embraced persons who demonstrably *did not suffer any legal wrong*. This is not such a case. Under the pre-amendment R.C. 1345.09(B), as stated by the Second Appellate District, “[e]very violation of an ascertainable legal right is a legal injury and

⁸ “[T]he man who is given to lawlessness . . . violator of the law, on whom reason and mercy would have no influence, ought to be made to feel the heavy hand of the law, so that if respect for law, and respect for the rights of their neighbors, will have no influence upon them, the power of the law and its judgments may have.” *Lake Erie & W. R. Co. v. Bailey*, 61 F. 494, 497 (C.C.D. Ind. 1893); *see also Hooffstetter v. Adams*, 67 Ohio App. 21, 32-33 (9th Dist. 1941) (“The law should not be a shield and covert for fraudulent and lawless practices. The high aims of justice should not be circumvented by the technicalities of legal procedure.”).

entitles the injured party to at least nominal damages, even when no actual loss of any kind occurred.” *Zerkle v. Kendall*, cited *infra*.

Ganley relies upon *Maestle v. Best Buy Co.*, 197 Ohio App.3d 248, 2011-Ohio-5833, ¶ 23 (2011), where the court stated that the proposed class definition included “card holders who were **justifiably** assessed interest or finance charges and consequently suffered no injury as alleged in the complaint.” (Emphasis added). However, there is no justification for Ganley providing a deceptive arbitration clause to a single class member. Unlike *Maestle*, all class members in this case suffered a legal wrong.

In *Barber v. Meister Protection Services*, 8th Dist. No. 81553, 2003-Ohio-1520 the class was defined to include “all persons . . . *have or will* purchase security services from Meister * * *.” (Emphasis sic). As the Eighth District panel understood, *Barber* is distinguishable from the damage class certified in this case, as the definition of the *Felix* class includes only those persons who signed a purchase agreement with the illegal arbitration clause . . . not those who may in the future sign an agreement containing the clause.

In *Repede v. Nunes*, 8th Dist. No. 87277, 87469, 2006-Ohio-4117, ¶ 3 the trial court certified a class of “all Ohio residents who were/are customers of JK Harris & Company, LLC from 1998 to date.” The Court of Appeals reversed because “Repede has offered no evidence that all class members have suffered some harm to which common questions of law or fact apply.” *Id.* at ¶ 19. By contrast, Ganley utilized a standard deceptive contract provision as to all class members who, therefore, suffered the same legal wrong. See *Felix v. Ganley Chevrolet, Inc.* 8th Dist. Nos. 86990, 86991, 2006-

Ohio-4500, ¶ 22 citing *Olah v. Ganley Chevrolet, Inc.*, 8th Dist. No. 86132, 2006-Ohio-694, ¶ 26.

Ganley cites *Hoang v. E*Trade Group, Inc.*, 151 Ohio App.3d 363, 2003-Ohio-301, where “the issues relating to liability with respect to each individual plaintiff’s claim make it impossible to prove or disprove the claims of all the members of the class on a simultaneous, classwide basis.” *Id.* at ¶ 28. The dissemination of the subject arbitration provision, impacting every class member identically by definition, has already been declared illegal by the Court of Appeals (cert. denied) and, thus, no individualized liability determinations are necessary as to any class member. *See Felix and Olah, supra.*

COUNTER-PROPOSITION NO. 2: GANLEY’S “ACTUAL DAMAGE” ARGUMENTS PROCEED FROM POST OCTOBER 31, 2007 LAW WHICH IS NOT APPLICABLE TO CASES, SUCH AS THIS CASE, BROUGHT PRIOR TO OCTOBER 31, 2007

Jeffrey and Stacy Felix commenced suit on June 18, 2001. Their certified class extends to mid-2007 at the outside, according to the Affidavit of Ganley counsel Russell Harris, November 8, 2007 ¶9,⁹ Ganley relies heavily, and confusingly, upon a notion of “actual economic damages” as required by the *current* version of R.C. 1345.09(B), effective October 31, 2007. Until October 31, 2007, however, R.C. 1345.09(B) required only “actual damages,”¹⁰ **which included non-economic damages.** Only the pre-amendment provision applies here. *Cook v. Newman Motor Sales*, 2010-Ohio-2000, ¶ 5

⁹Annexed as Exhibit A to Ganley Brief in Opposition filed November 14, 2007 in Case No. 454238.

¹⁰*See* Statutory History following ORC Ann. 1345.09 of Page’s Revised Code Annotated, at Section Notes: “151 v S 117, effective October 31, 2007, in (A) and (B), added "plus an amount not exceeding five thousand dollars in noneconomic damages"; in (A), inserted "actual economic"; in (B), inserted "economic" following "consumer's actual"; added (G) and (H).”

(Ohio Ct. App., Erie County May 7, 2010) (“R.C. 1345.09 was amended by 2006 S.B. 117 (effective October 31, 2007). The amendments, however, are not applicable to this case. *See Osai v. A&D Furniture Co.* (1981), 68 Ohio St.2d 99, 428 N.E.2d 857. Moreover, R.C. 1345.09(B) has always contained a provision permitting recovery of “damages or other appropriate relief in a class action under Civil Rule 23, as amended.” *See* Page’s, cited *supra* n.11.

The right of class members to “actual [non-economic] damages” and/or “damages or other appropriate relief in a class action” under the applicable, now-repealed R.C. 1345.09(B) is well established.¹¹ *State v. Rose Chevrolet, Inc.* (12th App. Dist. 1993), 1993 Ohio App. LEXIS 3281 (\$500 per class member sustained on appeal, even though “Rose point[ed] to the observation *made by the court* that the members probably made a better deal at Rose than they would have received at a different dealership.”) (Emphasis added). The discretionary (not statutory) \$200 award in this case is no less authorized than the \$500 award in *Rose Chevrolet*. *See also, Wiseman v. Kirkman*, 2d Dist. No. 1575, 2002-Ohio-5384, where the court held that the CSPA was violated and the supplier was liable for damages for installing a different brand of water heater than buyer ordered *even though both were of equivalent quality; Jemiola v. XYZ Corporation* (2003), 126 Ohio Misc. 2d 68, 73, ¶ 24 (Class damages of \$200 were not awarded only because of a failure to prove that fax advertisements were sent to other class members.) *Cf. Celebrezze v. Hughes*, 18 Ohio St.3d 71, 75, 479 N.E.2d 886 (1985), (“The legislature’s objective

¹¹In short, we believe that when the Attorney General demonstrates that consumers have been harmed by the deceptive tactics of a supplier, these consumer protection acts must be interpreted in a manner calculated to provide the courts with **flexibility in fashioning remedies** intended by the General Assembly to redress the wrong committed and reimburse the loss occasioned.” *Celebrezze v. Hughes*, 18 Ohio St. 3d 71, 75, 479 N.E.2d 886, 890 (1985) (Emphasis added).

was to allow Ohio's courts to grant appropriate relief . . . regardless of whether one or many consumers were harmed. . . . Accordingly, the trial court's award of \$1,500 for each of the injured consumers was not an abuse of discretion.”). Tellingly, Ganley and Advocates have made no effort to address this pre-amendment line of authority on which the trial court expressly relied.

Further, Plaintiff-Felix was entitled to recover a sum attributable to reasonable, big-ticket document preparation fees. Such fees in the range of \$250-\$350 have been subject of litigation in connection with loan transactions on many occasions. *See, e.g. Greenspan v. Third Fed. S&L Ass'n*, 122 Ohio St. 3d 455, 456, 912 N.E.2d 567, 2009-Ohio-3508 (\$300); *Price v. EquiFirst Corp.*, 2009 U.S. Dist. LEXIS 28113 (N.D. Ohio Apr. 1, 2009)(\$250); *Weston v. AmeriBank*, 265 F.3d 366 (6th Cir. Mich. 2001)(\$350). Using the “benefit of the bargain” approach, Felix and the other class members were entitled to recover the reasonable cost of document preparation. In light of the cited authorities it cannot be concluded that Judge Sutula abused his discretion in fixing each class member’s non-pecuniary damage at \$200. Each class member who paid for and had a right to receive a non-deceptive and viable remedy received, instead, a remedy with undisclosed and questionable procedures, costs, and limitations. Ganley and the Advocates’ fixation on whether a quantifiable dispute arose *after* class members’ purchases skirts the fact that the damage-causing injury occurred *during* the transaction. *See Williams v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St. 3d 546, 549 (Ohio 2009) (“The CSPA prohibits unfair or deceptive acts and unconscionable acts or practices by suppliers in consumer transactions whether they occur before, during, or after the transaction.”).

COUNTER-PROPOSITION NO. 3: GANLEY HAD *MARRONE* NOTICE BY REASON OF THE OHIO ADM.CODE 109:4-3-16(B)(22) AND CASES POSTED ON THE ATTORNEY GENERAL’S PUBLIC INSPECTION FILE

This Court held in *Marrone v. Philip Morris USA, Inc.*, 110 Ohio St.3d 5, 2006-Ohio-2869, 850 N.E.2d 31, at ¶ 2, that class actions for damages may only be maintained if “the defendant’s alleged violation of the Act is substantially similar to an act or practice previously declared to be deceptive by one of the methods identified in R.C. 1345.09(B).” This notice requirement can be satisfied by either (i) a court decision made available in the Attorney General’s Public Inspection File (“PIF”) or (ii) a rule adopted by the attorney general, which would be set out in the Ohio Administrative Code. *Id.* at ¶ 21.

Ganley argues that the Ohio Adm. Code 109:4-3-16(B)(22) (“OAC Provision”) cited by the trial court does not apply to illegal arbitration clauses, and that Ganley had no notice from PIF that its conduct was illegal. First, the argument that no decision in the Attorney General’s Public Inspection File (“PIF”) has applied specifically to arbitration is refuted by *Eagle v. Fred Martin Motor Co.* (PIF 10002222), 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶ 28; “a complainant may allege that an arbitration clause itself may violate R.C. Chapter 1345.” Second, Ohio courts have repeatedly held that automobile contracts violate the CSPA when, by their incompleteness, they are misleading.¹²

¹²The Ohio Attorney General’s Public Inspection File contains these substantially similar cases: *Smith v. Discount Auto Sales*, PIF 10001735 (4/7/1998 . . . failure to include trade-in information); *Renner v. Derin Acquisition Group*, PIF 10001587 (7/1/96 . . . failure to incorporate redemption terms); *Verkest v. Fulton*, RIF 10001085 (5/8/90 . . . failure to include a warranty). In the clause at issue, key information was not in the contract, but available only through the dealership manager. *Olah, supra* at *P17-*P26.

Second, Ganley's treatment of the OAC Provision ignores its plain text, declaring it deceptive and unfair to:

[f]ail to integrate into any written sales contract, *all material statements*, representation or promises, oral or written, made prior to obtaining the consumer's signature on the written contract with the dealer. (Emphasis added).

Ganley ignores that, as determined in *Olah* and *Felix, supra*, the Court of Appeals held the arbitration clause in question to be missing "important and material information" and thus incomplete and misleading. *Olah supra* at ¶ 26; *Felix supra* at ¶ 22. The clause thereby violates the OAC provision by failing to integrate "all material statements" in the purchase agreement, which is a deceptive act under R.C. 1345.02. In *Konarzewski v. Ganley, Inc.*, 8th Dist. No. 92623, 2009-Ohio-5829, cert. denied 2010 Ohio 1557, 2010 Ohio LEXIS 892 (Ohio, Apr. 14, 2010), the Court of Appeals held that a Ganley customer satisfies the notice requirement of R.C. 1345.09(B) when, as is the case here, a class representative alleges an automobile dealer's violations of CSPA and Ohio Adm.Code 109:4-3-16(B)(22).

In n.8 of its brief Ganley suggests that OAC 109:4-3-16(B)(22) no longer serves as predicate notice of violative conduct, citing *Williams v. Spitzer Auto World Canton, LLC*, 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E. 410. However, in *Williams* this Court issued a narrow ruling on OAC 109:4-3-16(B)(22) to the extent that it was inconsistent with Ohio's parol evidence rule:

To the extent that Ohio Adm. Code 109:4-3-16(B)(22) conflicts with the parol evidence rule as codified by R.C. 1302.05 and allows parol evidence contradicting the final written contract, Ohio Adm.Code 109:4-3-16(B)(22) constitutes an unconstitutional usurpation of the General Assembly's legislative function and is therefore invalid.

Williams, cited *supra* at 551. The parol evidence rule is not implicated here. Accordingly, OAC 109:4-3-16(B)(22) is fully applicable, gives ample notice in plain language, and, as held by the lower courts, mandated disclosure of the essential terms of arbitration. Ganley did not disclose the essential terms of the arbitration to its customers, which is exactly the conduct Ohio Adm. Code 109:4-3-16(B)(22) was designed to prevent.

COUNTER-PROPOSITION NO. 4: AN ARBITRATION CLAUSE CAN VIOLATE CSPA

Mr. and Mrs. Felix have objected throughout these proceedings to the specific arbitration provision adjudicated unenforceable in *Olah* and *Felix*, because it withholds “crucial information,” and is “not only confusing, but misleading * * * [and] violates principles of equity.” The Ninth Appellate District long ago stated that “a complainant may allege that an arbitration clause itself may violate R.C. Chapter 1345.” *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶ 28. As indicated below *en banc* . . . an illegal arbitration clause is no different from any other contract provision found illegal under R.C. 1345.02. *See* Appellant’s Mem., Exhibit D at p.2.

Ganley argues that until an arbitration clause is held contractually unenforceable, its illegality under CSPA is somehow in a legal twilight zone . . . a “safe harbor.” In essence, Ganley argues circularly that until declared to violate CSPA, an arbitration clause cannot violate CSPA. Ganley is using this circular argument to confuse the issue and ameliorate the consequences of their untenable and waived procedural unconscionability argument. Their attempt to classify illegality under the CSPA as a safe harbor is an implicit admission that the illegality of the clause is the operative issue in this case.

Ganley attempts to transmogrify the predominant legal and factual issues *away from* CSPA¹³ (which is the class-wide issue underlying the judgment below), and supplant that primary issue with the irrelevant and waived issue of procedural unconscionability.¹⁴ As Judge Sutula and the Court of Appeals understood, the question was not whether the provision is unconscionable, invalid and thus unenforceable . . . but rather, whether the provision is illegal under CSPA for reasons which apply class wide and irrespective of procedural unconscionability or the decisional forum.

When counterclaiming on March 1, 2002, and not moving to stay class certification proceedings, **Ganley sought affirmative relief against the Felixes and thereby waived any right** it had to challenge absent class members' right to proceed in the trial court under Civ. R. 23. *Kellogg v. Griffiths Health Care Group*, 3rd Dist. No. 9-10-59, 2011-Ohio-1733, ¶ 17. Further, GCI's vigorous litigation of class certification in the trial court was an implicit waiver of arbitration. *Town & Country Co-Op, Inc. v. Sabol Farms*, 9th Dist. No. 09CA0072, 2010-Ohio-5300, ¶ 7; *Middletown Innkeepers, Inc. v. Spectrum Interiors*, 12th Dist. No. CA2004-01-020, 2004-Ohio-5649, ¶ 14. Ganley made a strategic decision to not file a motion to stay Rule 23 (C)(1) proceedings

¹³A similar Ganley effort at "issue reformation" in *Konarzewski* was rebuffed by the Court of Appeals: "Ganley attempts to direct attention to irrelevant issues * * * . However, these issues are not germane to the identification and definition of the proposed class. Accordingly, a putative class member's understanding of the documents and the details of each sales transaction is, once again, irrelevant to claims in which liability has already been determined." *Konarzewski v. Ganley, Inc.*, 8th Dist. No. 92623, 2009-Ohio-5827, ¶ 22-23, cert. denied 2010 Ohio 1557, 2010 Ohio LEXIS 892 (2010).

¹⁴ The effect, if not the purpose of Ganley's overall strategy, is to steer this case to the individualized findings requisite to procedural unconscionability. This would effectively insert a class action ban in Ganley's arbitration provision which Ganley could have, but did not elect to insert. See, *Wallace v. Ganley Auto Group*, 8th Dist. No. 95081, 2011-Ohio-2909. Accordingly, Ganley's argument brings irrelevant issues to the fore and seeks a gratuity at odds with accepted policy considerations underlying the CSPA.

in the trial court because they knew GMC, a CSPA “supplier” to each class member, had no right to enforce the arbitration clause because GMC did not have privity of contract with Ganley customers; therefore, even if Ganley were correct as to GCI (which it is not), class members would not have to demonstrate procedural unconscionability to prevail against GMC and proceed in the common pleas court. Because GMC stands on entirely different footing than GCI, Ganley decided take a gamble and not raise the issue in an answer or by filing a motion to stay. They lost and now seek to have it both ways. It is not surprising that the Advocates chose not to join Ganley in Proposition No. 4.

COUNTER-PROPOSITION NO. 5: ABSENT OBJECTION, AS WAS THE CASE HERE, A TRIAL COURT MAY COMBINE A MOTION SEEKING PARTIAL SUMMARY JUDGMENT WITH A MOTION FOR CLASS CERTIFICATION; AND A PARTIAL SUMMARY JUDGMENT IS NOT A FINAL OR OTHERWISE APPEALABLE ORDER ABSENT RULE 54 (B) CERTIFICATION

Assuming *arguendo* that a court may not combine class certification and a partial ruling on the merits into a single proceeding over objection, there is no authority for the proposition that a court may not do so where parties, as here, do not object but, rather, voluntarily and vigorously litigate the issues in combination.¹⁵ *E.g., Planned Parenthood Ass'n v. Project Jericho*, 52 Ohio St. 3d 56, 1990 Ohio LEXIS 254 (Ohio 1990).¹⁶ On July 23, 2003, Judge Sutula issued an order combining the motions for class certification

¹⁵ The level of waiver in this case, in the pleadings alone, is staggering. GCI, but not GMC, filed an Answer to the Complaint in 454238 on June 13, 2002. Neither GMC nor GCI filed a responsive pleading to the Second Amended Complaint in 454238, filed February 10, 2003. GCI, but not GMC, filed an Answer and Counterclaim to the Third Amended Complaint in 442143 on March 1, 2002. GMC and GCI never filed a responsive pleading to the Fourth Amended Complaint in 442143, filed May 23, 2003. **GMC never filed an answer as to any complaint filed in 442143, which is the damage class action certified under Rule 23(B)(3).**

¹⁶ “Intervenors sought certification of the action as a defendant class action and an injunction preventing defendants and those acting in concert with them from creating a nuisance.” *Planned Parenthood, supra* at 1990 Ohio LEXIS 254*3.

and stay of proceedings (due to arbitration), setting both for a combined hearing which commenced on February 6, 2004 and spanned four days of hearings over several months. Ganley never filed an opposition or objection to the Court's order combining the matters of class certification and validity of the arbitration clause into a single hearing.

On February 21, 2007, following this Court's denial of Ganley's request for jurisdictional appeal herein, both Appellants substituted-in their present law firm. Given the findings in *Olah* that the arbitration clause withheld "crucial information" and was "misleading", unconscionable and "violates of principles of equity," Plaintiffs filed their Supplemental Motion For An Order Of Class Certification And For Judgment On The Merits on October 5, 2007. As its title indicates, the motion sought class certification together with judgment for damages under Count II of the Fourth Amended Complaint (R.C. 1345.02(A)-(B)(2), and Ohio Adm.Code 109:4-3-16(B)(22)) (sometimes the "Combined Motion").¹⁷ Ganley opposed the Combined Motion with extensive briefing on all issues in November 2007, October 2009, and September 2012. Ganley did not object at any time to proceeding simultaneously on all issues in the Combined Motion. Having willingly and vigorously participated without objection for five years and at every stage of proceedings as combined, Ganley waived any objection to the trial court's Rule 56 consideration of the CSPA issues concurrently with class certification.¹⁸

¹⁷Combined motions are not unusual. *See, e.g. Planned Parenthood, supra* and n.18; *Olden v. Lafarge Corp.*, 383 F.3d 495, 498 (6th Cir.2004)(combined motion to dismiss and deny class certification).

¹⁸*See State v. Campbell (In re Winkler)*, 135 Ohio St. 3d 1271, 1273-1274 (2013): "[A] party may be considered to have waived its objection . . . when 'the objection is not raised in a timely fashion and the facts underlying the objection have been known to the party for some time.'"

On September 10, 2012, Judge Sutula granted both prongs of the Combined Motion, ordering (1) class certification and (2) partial judgment under CSPA with monetary relief of \$200 per class member. The partial judgment is subject to the Final Order Rule.¹⁹ See *Lucio v. Safe Auto Ins. Co.*, 188 Ohio App. 3d 190, 2010-Ohio-2528, 935 N.E.2d 53 (class certification appealable, but partial summary judgment not appealable). The partial judgment does not dispose of all claims of all parties to the litigation and is therefore not a final order under R.C. 2505.02, i.e. it was not subject to appellate review and the Court of Appeals so held.²⁰ Ganley did not seek Rule 54(B) certification. Ganley may not appeal the partial summary judgment at this time.

CONCLUSION

This case is a matter of great corporate and personal interest to Ganley and the Advocates; but it does not meet this court's jurisdictional requirement of a case "of **public or great general interest.**" Ohio Constitution, Article IV, Section 2(B)(2)(e). Rather, this outlier case aimed at disciplining Ganley's lawlessness that has terrorized citizens of Cuyahoga County was brought under long-repealed law and therefore has no precedential value. Informing Judge Sutula's rigorous analysis was Ganley's waiver during class certification of procedural unconscionability arguments, the applicable pre-amendment R.C. 1345.09(B) to evaluate damages, and the arbitration clause's illegality under the CSPA. Ganley can neither raise merit issues nor objections for the first time on appeal;

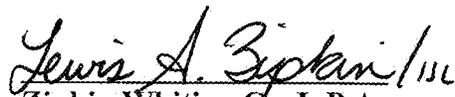
¹⁹"We sua sponte dismissed the appeal for a lack of a final appealable order because the judgment did not fully specify the amount of all of the damages awarded." *Olah v. Ganley Chevrolet, Inc.*, 191 Ohio App.3d 456, 459, 2010-Ohio-5485, 946 N.E.2d 771,773.

²⁰ Judge Sutula issued supplemental relief below calling for further proceedings bearing on a number of issues affecting class composition, the amount of the judgment, attorney fees, individual damages to the class representative and many more matters still to be addressed. Appellants' Mem., Exhibit A at 9-10.

nor can Ganley re-frame the issues as it attempts to do. The Amicus Civil Trial Lawyers (Mem. at p.1) need not concern themselves that this outlier opinion will create uncertainty or “make it easier for plaintiffs to maintain questionable causes of action,” as the injury and right to damages under pre-amendment R.C. 1345.09(B) is well established, nothing new, and will never again arise. Judge Sutula, the two duly assigned Panel judges and the nine (of 11) judges that voted against *en banc* consideration got it right. There was no abuse of discretion here.

For the above reasons, this Court should *deny* jurisdictional appeal.

Respectfully submitted,


Zipkin Whiting Co. L.P.A.
Lewis A. Zipkin (0030688)
Counsel of Record
3637 South Green Road
Beachwood, Ohio 44122
Telephone: 216-514-6400
zfwlpa@aol.com

Mark Schlachet (0009881)
3515 Severn Road
Cleveland Heights, Ohio 44118
Telephone: 216-225-7559
mschlachet@gmail.com

Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

A copy of the foregoing Appellees' Jurisdictional Memorandum In Response has been served this 21st day of February, 2014, by first-class mail, postage prepaid, addressed to:

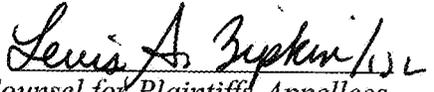
Joseph A. Castrodale (0018494)
David D. Yeagley (0042433)
Ulmer & Berne LLP
Skylight Office Tower
1660 West 2d Street, Suite 1100
Cleveland, Ohio 44113

A. Steven Dever (0024982)
A. Steven Dever Co., LPA
13363 Madison Avenue
Lakewood, Ohio 44107

Victor Elliot Schwartz
Shook, Hardy & Bacon, LLP
1155 F St., NW, Ste 200
Washington, DC 20004

David Alan Brown
Stockamp & Brown LLC
6017 Post Road
Dublin, OH 43017

Drew Harrison Campbell
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215


Counsel for Plaintiffs-Appellees