

ORIGINAL

IN THE SUPREME COURT OF OHIO

JEFFREY FELIX, <i>et al.</i> ,)	Case No. 13-1746
)	
Plaintiffs-Appellees,)	On appeal from the Cuyahoga County Court of
)	Court of Appeals Eighth Appellate District
v.)	Case No. CA 12 098985
)	
GANLEY CHEVROLET, INC., <i>et al.</i>)	
)	
Defendants-Appellants.)	

MERIT BRIEF OF APPELLANTS
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INTRODUCTION

The Cuyahoga County Court of Common Pleas certified a class of customers of over twenty Ganley-related automobile dealerships spanning an indeterminate period of many years whose purchase contracts included a particular arbitration clause. The trial court's theory was that the inclusion of the arbitration clause was a violation of the Ohio Consumer Sales Practices Act ("CSPA"). Although the arbitration clause was earlier determined to be contractually unenforceable with respect to the named plaintiffs in a dispute they have over the interest rate applicable to a vehicle they drove off the dealership lot (but for which they have never paid), there was no evidence that any of the other customers included within the class ever had a dispute relating to their own purchases that might have implicated or invoked the arbitration clause, and clearly the vast majority of the class members have not had such a dispute.

Consequently, the vast majority of the customers included in the class could not show any actual harm or actual damages arising from the mere inclusion of an arbitration clause in their purchase contracts. The trial court, however, not only certified an overbroad and improper class, the court also arbitrarily and improperly awarded so-called "discretionary damages" to each customer in the amount of \$200 despite the clear requirement for class actions under the CSPA that the class members have in fact sustained actual damages.

The Eighth District Court of Appeals affirmed the trial court's class certification order, reasoning that the issue of whether the customers sustained any actual harm or actual damages was a "merits" inquiry and therefore off-limits on class certification. In the process, the Court of Appeals disregarded the decision of this Court in *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, ¶53 (*Stammco II*), which holds that a rigorous analysis under Civ.R. 23 includes determining if a "class is defined too broadly" because it includes many individuals "who for some reason could not have been harmed."

Pursuant to Propositions of Law Nos. 1 and 2, this Court should reverse the decision of the Court of Appeals, and hold that the customers included in the class did not sustain any actual harm or actual damages arising from the mere inclusion of the arbitration clause in their purchase contracts; that the courts below failed to conduct a rigorous analysis of all prerequisites for certifying a class under Civ.R. 23; and therefore that certification of the overbroad class was and is legally erroneous and improper. Absent reversal, the opinion of the Court of Appeals represents a blueprint for certifying no-injury class actions on behalf of consumers who were not harmed by the alleged wrongdoing, as required by *Stammco II*, and who did not sustain any actual damages, as required under R.C. 1345.09(B).

STATEMENT OF FACTS

A. The Felixes Sue Ganley Chevrolet Over the Interest Rate

In March 2001, Plaintiffs-Appellees Jeffrey and Stacy Felix (“Plaintiffs”) drove a new Chevrolet Blazer off the lot of Defendant-Appellant Ganley Chevrolet, Inc. In connection with their purchase, Plaintiffs entered into a Motor Vehicle Purchase Contract with Ganley Chevrolet that contained a separately-signed provision that any purchase-related disputes would be arbitrated. A dispute subsequently arose between the Felixes and Ganley Chevrolet regarding the interest rate applicable to the Felixes’ purchase. (Tr. 239-40.) The Felixes, however, never returned the vehicle and in the past 13 years have never paid a penny for it.

In June 2001, Plaintiffs sued the dealership, Ganley Chevrolet, in Cuyahoga County Common Pleas Court (Case No. CV-01-442143) over the interest rate dispute. Ganley Chevrolet filed a motion to stay proceedings pending arbitration. Although the trial court initially denied that motion, the court subsequently vacated its order and scheduled a hearing for November 26, 2001. On that same date, Plaintiffs sought leave to file a second amended complaint (in Case No. CV-01-442143), alleging that the inclusion of the arbitration clause in the

Purchase Contract was a violation of the CSPA. Prior to the court's ruling on the motion for leave to file the second amended complaint, Plaintiffs sought leave to file a third amended complaint, which was granted on December 11, 2001. Around the same time, Plaintiffs filed a second lawsuit against Ganley Chevrolet in the same court (Case No. CV-01-454238), which was a declaratory judgment action alleging that the inclusion of the arbitration clause in the contract was a violation of the CSPA.

B. The Class Action Claim Over the Arbitration Clause

On May 23, 2003, nearly two years after the first lawsuit had been filed, the complaints in both Case Nos. CV-01-442143 and CV-01-454238 were amended (the fourth and second amended complaints, respectively) to add class action allegations with respect to the inclusion of an arbitration clause in the purchase contracts. Defendant-Appellant Ganley Management Company was first added as a party-defendant in those fourth and second amended complaints. The fourth and second amended complaints sought certification of both plaintiff *and* defendant classes, the defendant class consisting of Ganley-related dealerships (all of which were separate legal entities) with whom the customers included in the plaintiff class entered into purchase contracts that contained an arbitration clause.

The theory behind the class action CSPA claim is that the inclusion of the arbitration clause in the purchase contracts was, in and of itself, an unfair and deceptive act or practice under the CSPA. *See* Fourth Amended Complaint in Case No. CV-01-442143, ¶¶82-84. Neither of the class action complaints, however, alleged how members of the class were purportedly harmed or damaged by the mere inclusion of the arbitration clause.

C. The Enforceability of the Felixes' Arbitration Clause

Defendants moved to stay proceedings pending arbitration in both cases, the trial court consolidated the cases, and there was a hearing on the motion to stay over the course of

three days in 2004. The evidence elicited at the hearing pertained to the circumstances surrounding the Felixes' own purchase of their vehicle and why they allegedly did not understand the effect of the arbitration clause. (Tr. 47-67, 230-42). The trial court also heard limited argument on the issue of class certification, during which counsel for Plaintiffs acknowledged that "there is no common measure of damages." (Tr. at 12). There was no evidence elicited at the hearing as to the existence of any customer dispute relating to an underlying purchase, other than the interest rate dispute between the Felixes and Ganley Chevrolet.

On August 23, 2005, the trial court denied the Defendants' motion to stay pending arbitration. Defendants appealed, and in August 2006 the Eighth District Court of Appeals upheld the denial of the motion to stay on the ground that the arbitration clause, strictly as to the Felixes' own claims, was both "substantively unconscionable" and "procedurally unconscionable." *Felix v. Ganley Chevrolet, Inc.*, 8th Dist. Nos. 86990, 86991, 2006-Ohio-4500, *review denied*, 112 Ohio St.3d 1470, 2007-Ohio 388. In its opinion, the Court of Appeals did not find any violation of the CSPA or make any finding of "illegality" or "lawlessness" concerning the inclusion of the arbitration clause. Instead, the Court of Appeals' reasoning was centered on the contractual enforceability of the arbitration clause: "the essential issue before us is whether the dispute between the parties is governed by a valid, enforceable agreement to arbitrate." *Id.* at ¶13.

As to the issue of "substantive unconscionability," the Court of Appeals' decision in *Felix* adopted the reasoning of the Eighth District Court of Appeals in *Olah v. Ganley Chevrolet, Inc.*, 8th Dist. No. 86132, 2006-Ohio-694, 2006 WL 350204, which addressed substantive unconscionability (but not procedural unconscionability) as to the same arbitration

clause.¹ In *Olah*, the Court of Appeals in part found that the arbitration clause was substantively unconscionable because the rules of evidence might not apply in arbitration, which the Court concluded could make the arbitration process unpredictable. *See Olah, supra* at ¶20. Notably, in *Wallace v. The Ganley Auto Group*, 8th Dist. 95081, 2011-Ohio-2909, the Eighth District upheld a subsequent version of the arbitration clause, relying on *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). The *Wallace* court also criticized (in part) the rationale of the Court of Appeals in *Olah*. *See Wallace, supra* at ¶25 (ruling that “the statement [in the arbitration clause] that ‘arbitration procedures are simpler and more limited than rules applicable in court,’ which [the Court of Appeals] found ‘troublesome’ in *Olah* and *Felix*, is indeed an *accurate statement of the law*”) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 917 (1985) (emphasis added)).²

D. Class Certification Briefing On the CSPA Claim

Upon remand to the trial court from the 2006 arbitration decision, the parties submitted additional class certification briefing in 2007 and 2009. *See* Plaintiffs’ Supplemental Motion for an Order of Class Certification and for Judgment on the Merits (Oct. 5, 2007); Defendants’ Brief in Opposition to Supplemental Motion for an Order of Class Certification (Nov. 14, 2007); Plaintiffs’ Reply to Defendants’ Brief in Opposition to Plaintiffs’ Supplemental Motion (Dec. 14, 2007); Defendants’ Sur-Reply in Further Opposition to Supplemental Motion (Dec. 31, 2007); and Supplemental Brief Opposing Class Certification (Oct. 7, 2009). No discovery of any kind was conducted following the remand from the Court of Appeals’ 2006

¹ In the *Olah* case, the Eighth District Court of Appeals eventually entered judgment on the merits in favor of Ganley Chevrolet. *See Olah v. Ganley Chevrolet*, 191 Ohio App.3d 456, 2010-Ohio-5485, 946 N.E.2d 771 (8th Dist.).

² The arbitration clause that was upheld in *Wallace* encompassed vehicle purchase contracts that were entered by the plaintiffs as early as August 1, 2006, thus reflecting that the arbitration clause at issue in *Olah* and *Felix* had been discontinued even *before* the Court of Appeals’ 2006 decision in *Felix*.

decision, nor did the trial court hold any hearing other than the 2004 hearing that preceded the trial court's arbitration decision as to the Felixes.

In their Supplemental Motion seeking class certification, Plaintiffs noted the "possibility" that customers "may [...] have a future dispute" that could cause Defendants to invoke the arbitration clause. Supp. Mem. at 6. Plaintiffs further proposed "that subclasses be established in the Plaintiff Class to determine *whether* individual members have suffered monetary damages." *Id.* at 14 (emphasis added). Plaintiffs petitioned the Court to certify an "injunctive relief" class under Civ.R. 23(B)(2), and also petitioned for an award of "minimum statutory damages" (also described as "discretionary damages") in the amount of \$200 per transaction under the CSPA. *See id.* at 31; Plaintiffs' Reply at 14. Plaintiffs argued that "[t]here is no requirement [under the CSPA] to prove damages." Plaintiffs Reply at 14. Plaintiffs' Supplemental Memorandum further sought certification of a defendant class consisting of "all car dealerships which operated under the name Ganley." Supp. Mem. at 16.

The evidence presented to the trial court included the following *undisputed* record facts: (i) the overwhelming majority of customers who purchased vehicles at Ganley dealerships were satisfied customers who never had a dispute relating to the purchase; (ii) the arbitration clause at issue was no longer being used; and (iii) Defendant Ganley Management Co. did not sell any automobiles and did not enter any transactions (or arbitration agreements) with customers. Affidavit of Russell Harris ("Affidavit"), ¶¶7, 9 and 12 (Ex. A, Opp. to Supp. Motion). At no point -- from the initial filing in 2001 to the 2012 Order at issue here -- did Plaintiffs present any record evidence that customers other than the Felixes had any kind of dispute with their dealership that might have implicated the arbitration clause. Nor have Plaintiffs at any point submitted any record evidence that any other customers suffered or

sustained any actual harm, injury, damage or loss of any kind arising from the inclusion of an arbitration clause, let alone that harm, injury or damage was sustained by all of the customers on a class-wide, across-the-board basis.

E. The Trial Court Grants Class Certification And Enters Partial Judgment Awarding “Discretionary Damages”

Several years after the parties submitted their respective supplemental memoranda, the trial court entered, on September 10, 2012, a “Proposed Order of Class Certification and For Partial Judgment on the Merits” and identical judgment entries in Case No. CV-01-442143 and Case No. CV-01-454238 (collectively, the “Order”) (App. 5, A-53).³ In the Order, the trial court certified a class of customers of Ganley dealerships under Rules 23(B)(2) and 23(B)(3) comprised of all customers of every Ganley-affiliated dealership from “commencement through the present date” who signed a purchase contract containing an arbitration clause that is “substantially similar” to the one the Felixes signed. *See* Order, p. 3. In granting class certification, the trial court stated that it could not “consider the merits of the case” and that “the complaint allegations are accepted as true.” *Id.* at 2. The trial court concluded that the presence of the arbitration clause “constitutes a threatened harm” concerning the customers’ “recourse [...] against the vehicle merchant, *should they have need for recourse.*” Order, pp. 5, 9 (emphasis added). In certifying a Rule 23(B)(3) class, the trial court stated – but without any further analysis – that “questions of law and fact common to the class predominate over any questions affecting only individual members of the class.” Order, p. 6.⁴

³ The reference in the trial court’s Order to “Proposed” apparently was a carryover from a proposed order that Plaintiffs had submitted to the trial court approximately five years earlier. *See* Plaintiffs’ Supp. Mem., Ex. 11.

⁴ It is unclear when the class period begins, since the class action allegations were not asserted until May 2003, not in 2001 when the lawsuit was commenced. Likewise, it is unclear when the class period ends based on the Order’s reference to “substantially similar” arbitration clauses, an indefinite determination that the trial court left to a later, post-certification process.

The trial court further entered judgment against Defendants on the CSPA claim, concluding that “the use of the arbitration clause” constituted “unlawful conduct.” Order, p. 4. The trial court imposed damages as to each class member in the court’s “discretion” of \$200 per transaction over the entire class period, concluding (but without citation to any paragraph or provision) that the Court of Appeals, in the 2006 decision, adjudicated the “illegality” of the arbitration clause, and thus to allow Defendants “to emerge from this seven-year legal battle [...] without sanction” would “reward lawlessness.” Order, pp. 7, 9; *see also* Order, p. 9 (“The Court will exercise its discretion and grant damages of \$200 per Class Member.”). The Order does not point to any record evidence of “actual damages” or of any evidence or legal authority to support the imposition (or amount) of a damages award for each class member. Instead, the Order rationalizes the award by noting that “[t]he Ohio Legislature set a minimum damage award of \$200 for individual violations of the CSPA” (Order, p. 9), without acknowledging that a different rule requiring actual damages applies to class actions under the CSPA.⁵

F. The Court of Appeals Affirms the Order Certifying the Plaintiff Class

Defendants filed a timely Notice of Appeal of the trial court’s class certification Order. On August 15, 2013, the Court of Appeals issued a Judgment and Journal Entry and Opinion (“Opinion”) that affirmed, in a 2-1 decision, the trial court’s Order certifying the class under Rule 23(B)(2) and 23(B)(3) (App. 4, A-8). In the Opinion, the majority found that the Rule 23 “identifiable class” prerequisite was met because the inquiry was simply whether, for each customer, the purchase contract included an arbitration clause. Opinion at ¶¶18-19. Although the Court of Appeals acknowledged that there was an issue as to whether class

⁵ The trial court also denied certification of the proposed “Defendant Class” consisting of Ganley-owned automobile dealerships. *See* Order at 2. These automobile dealerships – the separate dealership entities that entered into the arbitration agreements with their respective customers – were not ever parties in the case and Plaintiffs did not cross-appeal the denial of the proposed Defendant Class.

certification would be proper if the “all customers’ class’ [...] includes individuals who have no claim and who have sustained no actual damages as a result of Ganley’s inclusion of the arbitration provision” (Opinion, ¶33), the majority never resolved that issue. Nor did the majority follow or even address the rule of law set forth by this Court in *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, Syllabus and ¶53 (*Stammco II*), holding that as part of a “rigorous analysis” of the Rule 23 prerequisites, class certification is improper if the class includes “a great number of members who for some reason could not have been harmed by the defendant’s allegedly unlawful conduct.” Instead, and contrary to this Court’s holding, the majority concluded that on a class certification appeal, issues of harm and damages – including the “actual damages” requirement under R.C. 1345.09(B) – were “outside the scope of our review.” Order, ¶ 44.⁶

The Court of Appeals’ Opinion included a 16-page dissent, which points out that customers who had no underlying dispute “sustained no actual damages” arising from the inclusion of the arbitration clause, and further that “[a] showing of actual damages is [...] required before a CSPA class seeking the recovery of damages can be certified.” Opinion, ¶¶68-69 (citations omitted); *see also* Opinion at ¶¶71-72 (noting that the majority fails to address the actual damages issue, but that the issue “impacts not only the damages that may be ultimately recovered [...] but whether a putative class may be properly certified as a Civ.R. 23(B)(3) CSPA class in the first instance”). The dissent further noted that the Order improperly granted judgment and thus “is proceeding on an improper procedural course” under Civ.R. 23(C)(2). Opinion, ¶73.

⁶ Defendants filed a notice of supplemental authority on July 16, 2013, alerting the Court of Appeals to the decision of this Court in *Stammco II*; the Opinion of the Court of Appeals was issued on August 15, 2013.

Defendants timely sought reconsideration and en banc review of the Opinion pursuant to Ohio R. App. P. 26(A)(1) and (2). Reconsideration was denied on September 13, 2013 (*see* Entry) (App. 3, A-7), and en banc review was denied on September 24, 2013 (*see* Entry) (App. 2, A-5). In denying en banc reconsideration, the Eighth District concluded that “[t]he question whether the class should be limited with respect to the damages claim may be addressed in future proceedings.” Like the Opinion, the Entry denying en banc review failed to cite or address the Rule 23 principle set forth at ¶53 of this Court’s decision in *Stammco II* requiring that such determinations be made by a reviewing court upon appeal from an order certifying a class.

G. The Appeal to the Supreme Court of Ohio

Defendants timely filed a Notice of Appeal and Memorandum in Support of Jurisdiction in this Court. (*See* App. 1, A-1.) In their Memorandum in Opposition to Jurisdiction (re-submitted per the Court’s February 19, 2014 Order), Plaintiffs acknowledged that the Court’s intervening decision in *Cullen v. State Farm Mut. Auto Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, “eliminates the sustainability of Rule 23(B)(2) certification,” and thus Plaintiffs “**abandon Rule 23(B)(2) class certification.**” Opp. Mem. at 3 (emphasis added). In other words, Plaintiffs have already conceded that the Eighth District Court of Appeals’ class certification Opinion was, in part, erroneous.

On February 19, 2014, this Court accepted the appeal as to Propositions of Law Nos. 1 and 2, centering on (i) whether a rigorous analysis of the class certification prerequisites requires a court to address, at the class certification stage, whether the class includes individuals who were not harmed or damaged by the challenged conduct (Proposition of Law No. 1), and (ii) whether R.C. 1345.09(B) requires “actual damages” in a CSPA class action brought under Rule 23(B)(3) (Proposition of Law No. 2).

ARGUMENT

Based on the Propositions of Law Nos. 1 and 2 and pursuant to controlling Ohio law, this Court should hold that certification of the class of customers whose purchase contracts merely included a certain arbitration clause was and is legally erroneous and an abuse of discretion under Civ.R. 23 and R.C. 1345.09(B), reverse the class certification decision of the Eighth District Court of Appeals, and remand this case to the Cuyahoga County Court of Common Pleas for proceedings on the individual claims of the Felixes. As shown below, affirming Propositions of Law Nos. 1 and 2 is critical to ensuring fairness and due process under Civ.R. 23 and R.C. 1345.09(B).

Proposition of Law No. 1

A class action cannot be maintained on behalf of a putative class that includes individuals who did not sustain actual harm or damage as a result of the challenged conduct, which is a required part of the rigorous analysis under Ohio R. Civ. P. 23.

Proposition of Law No. 1 combines two principles under Civ.R. 23. First, a court is required to conduct – at the class certification stage of the case – a rigorous analysis of each and every one of the Rule 23 class certification prerequisites, including the prerequisite of an identifiable class. Second, class certification should be denied if, following a rigorous analysis of the underlying merits of the case, the court determines that the class includes individuals who did not sustain actual harm or damage as a result of the challenged conduct.

Applying Proposition of Law No. 1 to the record facts of this case, this Court should hold that the courts below failed to conduct a rigorous analysis of all of the class certification prerequisites, leading to the erroneous certification of a Rule 23(B)(3) class of customers. Specifically, a rigorous analysis of the class certification prerequisites establishes, as a matter of law, that the huge majority of customers to be included within the class did not

sustain any actual harm or damage as a result of the mere inclusion of the arbitration clause in their purchase contracts. This is the only possible conclusion because there was no evidence that any of those customers, other than the Felixes themselves, ever had an underlying dispute that might have implicated the clause, and clearly the vast majority of such customers did not.

Proposition of Law No. 1 thus expressly recognizes that the rigorous analysis under Rule 23 extends to the prerequisite of an identifiable class, and requires a court to deny (or overturn) class certification where the members of the class, as defined, include individuals who have not suffered any harm or legally-cognizable damages. The Opinion below – in which the issue of whether the members of the class suffered any actual harm or damage should have been rigorously analyzed at the class certification stage, but instead was deemed to be a “merits issue” and therefore off-limits on class certification – otherwise represents a poster child for certifying overbroad, no-injury class actions in the State of Ohio.

In the end, this case is a nothing more than a manufactured class action “dispute” over the mere inclusion of a dispute resolution clause that, for virtually every customer in the class other than the Felixes, was never actually in dispute and had no legal relevance whatsoever.

A. Rigorous Analysis of the Class Certification Prerequisites Is Required At the Class Certification Stage

This Court has held that “[a]t the **certification stage** in a class-action lawsuit, courts must determine whether plaintiffs’ putative class complies with the requirements of Civ.R. 23.” *Stammco II*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408 at ¶¶26-30 (citing *Wal-Mart v. Dukes*, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) (emphasis added)). This determination at the certification stage requires “a **rigorous analysis**, which may include probing the underlying merits of the plaintiffs’ claim.” *Id.* at ¶44 (emphasis added). The required rigorous analysis at the class certification stage extends to each and every one of the class certification prerequisites,

and therefore courts must, if necessary, dig into the underlying merits to actually decide issues that bear on the class action prerequisites and, ultimately, on whether a class should be certified. *Cullen*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614 at ¶¶16, 51-52 (citing *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 185 L.Ed.2d 374 (2013)).⁷

Contrary to *Stammco II* and *Cullen*, there was no such rigorous analysis of the Civ.R. 23 class certification prerequisites by the courts below. As a preliminary matter, the trial court stated that it could not “consider the merits of the case” and that “the complaint allegations must be accepted as true.” Order, p. 2. The Court of Appeals summarily concluded that the trial court conducted a rigorous analysis, but that conclusion was, in part, based simply on the length of time the trial court presided over the case. *See* Opinion at ¶50.

With respect to the Rule 23 prerequisite of an identifiable class, both the trial court and the Court of Appeals concluded, but only superficially, that the class was identifiable based merely on the inclusion in a purchase contract of the “arbitration clause at suit or one substantially similar.” Order at 3; Opinion at ¶¶18-19. As shown herein, such a class is not only ambiguous, it is overbroad in that it includes a vast majority of members who suffered no actual harm or damages.

B. Class Certification Is Improper If the Class Includes Individuals Who Did Not Sustain Any Actual Harm or Damage

The existence of an identifiable and unambiguous class is an implied Rule 23 class certification prerequisite. *See Stammco, L.L.C. v. United Tel. Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, ¶7 (“*Stammco I*”). To satisfy the identifiable class prerequisite, the members of the class must be capable of being readily identified or ascertained. *See id.* at ¶7 (citing *Warner v. Waste Management, Inc.*, 36 Ohio St.3d 91, 521 N.E.2d 1091 and

⁷ It should be noted that *Cullen* was decided after the Opinion of the Eighth District Court of Appeals was issued.

7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kine, Federal Practice and Procedure (2d Ed. 1986) 120-21, Section 1760); *see also Miller v. Painters Supply & Equipment Co.*, 8th Dist. No. 95614, 2011-Ohio-3976, 2011 WL 3557018, ¶24 (class is overbroad if it includes individuals who have no claim under theory being advanced or if class extends beyond scope of statute on which claim is based).

In *Stammco I*, the class did not meet the identifiable class prerequisite because the class was defined to include customers who were billed for certain charges “without their permission.” *Id.* at ¶10. As defined, the class was both ambiguous (what was sufficient authorization for the charges) and unidentifiable (whether a charge was authorized required individualized determinations). *Id.* at ¶¶10-11.

On remand from this Court’s decision in *Stammco I*, the plaintiff tried to fix the identifiable class deficiencies by amending the class definition to include only those customers who were billed for charges for which there was no prior written authorization. However, on a subsequent appeal, this Court held that the amended class was impermissibly overbroad because the class included individuals who were properly billed for their charges despite the absence of written authorization. *Stammco II, supra*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408 at ¶56.

This Court held in *Stammco II*:

[i]f *** a class is defined so broadly as to include a great number of **members who for some reason could not have been harmed** by the defendant’s allegedly unlawful conduct, **the class is defined too broadly to permit certification.**

Id. at ¶53 (emphasis added). Thus, consistent with the requirement of a rigorous analysis of all class certification prerequisites at the class certification stage (*see supra*), this Court held – **at the class certification stage and based on a Rule 23 inquiry into the merits** – that the revised

class was overbroad because it included individuals who could not have been harmed by the challenged conduct, and thus class certification was improper. *Id.* at ¶¶53-56.

As shown below, a class composed of all customers whose purchase contracts merely included a certain arbitration clause is overbroad, and therefore class certification should have been denied at the class certification stage of the case. *See Stammco II, supra* at ¶¶53-56; *Cullen, supra* 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614 at ¶¶16, 51-52. In particular, this Court held at Paragraph 53 of *Stammco II* that class certification is improper if the court determines that the class includes individuals who did not sustain actual harm or damages, but the majority below nonetheless erroneously held that the same question of whether the class includes individuals who did not sustain actual harm could not even be addressed at this stage because it was “outside of the scope” of the class certification inquiry. Inexplicably, the majority did not cite or address Paragraph 53 of this Court’s decision in *Stammco II*.

While the Eighth District bypassed the Rule 23 question of whether the class was overbroad because it included class members who were not injured or harmed by the inclusion of an uninvoked arbitration clause in their purchase contracts, in other Rule 23 decisions the Eighth District has denied or overturned certification of “all customers” classes for the very reason that the class was overly-inclusive and therefore impermissibly overbroad. For example, in *Barber v. Meister Protection Services*, 8th Dist. Case No. 81553, 2003-Ohio-1520, 2003 WL 1564320, the court rejected the proposed class, reasoning that “the class as defined includes individuals who have not been affected and may never be affected by the defendants’ alleged illegal actions.” *Id.* at ¶33. In *Repede v. Nunes*, 8th Dist. Nos. 87277, 87469, 2006-Ohio-4117, 2006 WL 2299853 at ¶17, the Eighth District reversed the trial court’s class certification, reasoning that although “some of the other 4,000 plaintiffs may have suffered damages ... others may not have suffered

any damage at all.” In *Maestle v. Best Buy Company*, 197 Ohio App.3d 248, 2011-Ohio-5833, 967 N.E.2d 227, ¶¶21-23 (8th Dist.), the Eighth District held that a class of “all account holders” was “overly broad and ambiguous as a matter of law” because it encompassed a substantial number of individuals who had no claim under the theory being advanced.⁸

C. Certification of a Class of Customers Whose Purchase Contracts Included a Certain Arbitration Clause Was Improper

The Court of Appeals erred and abused its discretion in affirming certification of an overbroad, all-encompassing class of customers whose purchase contracts included a certain arbitration clause. Based on the record evidence, the class overwhelmingly is composed of customers who had no dispute with the dealership relating to the purchase and who therefore could not have sustained any actual harm under *Stammco II* or actual damage under R.C. 1345.09(B) by the mere inclusion of an uninvoked arbitration clause in their purchase contracts.⁹

1. The Mere Inclusion of An Arbitration Clause In a Purchase Contract Does Not Cause Actual Harm Or Actual Damage

Applying this Court’s holding in *Stammco II*, the reason why the customers swept into the class “could not have been harmed by the allegedly unlawful conduct” is that there was and is no record evidence that those customers, other than the Felixes themselves, had disputes about their purchases that might have implicated the arbitration clause. *See Stammco II, supra* at ¶53. For all of these satisfied customers, the mere inclusion of an *unimplicated* arbitration clause

⁸ *See also Faralli v. Hair Today, Gone Tomorrow*, N.D. Ohio Case No. 1:06-cv-504, 2007 WL 120664, *6 (Jan. 10, 2007) (denying class certification because class included “a large but unascertainable number of customers who ... have not suffered any harm or damage.”); *Petty v. Wal-Mart Stores, Inc.*, 148 Ohio App. 3d 348, 2002-Ohio-1211, 773 N.E.2d 576 at ¶¶26-27, *review denied*, 96 Ohio St.3d 1466 (affirming denial of class certification where overbroad class included individuals who were not injured by the challenged conduct).

⁹ As shown below in Proposition of Law No. 2, these class members are not entitled to any recovery under the CSPA unless each of them is able to demonstrate that they suffered actual damages and that such damages can be calculated on a class-wide basis. Since the class members did not and cannot do that here, and therefore have no viable class claim under the CSPA, they cannot satisfy the actual harm requirement of *Stammco II* for this reason as well.

(even if that clause was found to be deficient in one customer's dispute) did not cause any actual, legally-cognizable harm. This is not, therefore, a live class action dispute; rather, this case is and always has been a narrow two-party dispute between the Felixes and their dealership over the interest rate applicable to a vehicle for which the Felixes have never paid (the first phase of which was whether the Felixes were contractually obligated to arbitrate their individual claims). No one else is asserting a purchase-related claim in this lawsuit.¹⁰

Courts have consistently held that an allegedly improper-but-uninvoked arbitration clause does not give rise to any actual injury or harm. In *Lee v. Am. Express Travel Related Servs.*, N.D. Cal. No. C 07-04765 CRB, 2007 WL 4287557, *5 (Dec. 6, 2007), *aff'd*, 348 F. App'x 205 (9th Cir. 2009), the court specifically rejected the notion that customers were harmed by the mere inclusion of an arbitration provision in a contract:

[P]laintiffs' argument is that they were damaged by the mere existence of the allegedly unconscionable [arbitration] terms in their card agreements. But those **terms have not been implicated in any actual dispute between the parties**. The challenged terms have not ... been invoked against plaintiffs and they have not prohibited plaintiffs from asserting their rights. No court, state or federal, has held that a plaintiff has standing in such circumstances and plaintiffs have not convinced this Court that it should be the first.

Id., at *5 (emphasis added); *see also Bowen v. First Family Fin. Servs.*, 233 F.3d 1331, 1341 (11th Cir. 2000) (holding that "[i]n the absence of a substantial likelihood that the arbitration agreement will be enforced against the plaintiffs, they lack standing to challenge its enforceability"). The Opinion of the Court of Appeals makes no mention of these on-point cases.¹¹

¹⁰ The trial court acknowledged that the arbitration clause might come into play only "should [the customers] have need for recourse." *See* Order at 9.

¹¹ *Accord Jones v. Sears Roebuck and Co.*, 301 Fed. Appx. 276, 283 (4th Cir. 2008) (citing *Bowen, supra*, with approval, denying standing based on the absence of an underlying dispute or

In an analogous context, in *Hoang v. E-Trade Group, Inc.*, 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151 (8th Dist.), the Eighth District Court of Appeals reversed class certification on the ground that a class of all customers of an electronic brokerage who had experienced a system outage was overbroad because many of them were not harmed by the system outage. The *Hoang* court reasoned that a class must be composed of individuals who, on a class-wide basis, can show “**proof of actual injury caused by the alleged wrongdoing.**” *Id.* at ¶¶19-21 (emphasis added). As the *Hoang* court held, proof of the existence of actual injury or harm (or “fact of damages”) is a necessary predicate to a class. The court thus rejected the notion that every customer was injured by the mere existence of the system interruption irrespective of whether a particular customer was in fact trading during an interruption, holding that “the law does not provide a recovery for inchoate claims.” *Id.* at ¶27. The *Hoang* Court reasoned that class certification was improper because “liability as to each [class member’s] claims cannot be ascertained on a class-wide basis in a single adjudication.” *Id.* at ¶26.

This concept of requiring a showing of actual harm separate from and in addition to a showing of a CSPA violation was recently highlighted in *Johnson v. Jos. A. Bank Clothiers, Inc.*, S.D. Ohio No. 2:13-CV-756, Slip Copy, 2014 WL 64318 (Jan. 8, 2014), a putative class action brought under the CSPA over the alleged practice of claiming a certain price was the “regular price” of goods which typically were sold “on sale.” The United States District Court for the Southern District of Ohio addressed the requirement of “actual injury” in a CSPA class action:

imminent injury); *Rivera v. Salomon Smith Barney Inc.*, S.D.N.Y. Case No. 01 Civ. 9282, 2002 WL 31106418, *6–7 (Sept. 20, 2002) (plaintiff lacked standing to seek declaratory relief on arbitration provision because there was no indication it would be invoked); *Tamplenizza v. Josephthal & Co.*, 32 F.Supp.2d 702, 704 (S.D.N.Y.1999) (recognizing as nonjusticiable a challenge to arbitration provision absent sufficient indication that it would be invoked).

Under Ohio law, actual injury is independent of an OCSPA violation and both must be adequately alleged in a class action under O.R.C. §1345.09(B). *See* O.R.C. §1345.09(B); *Searles v. Germain Ford of Columbus, L.L.C.*, No. 08AP-28, 2009 WL 756645, at *5 (Ohio Ct. App. Mar. 24, 2009) (declining to certify a class under the OCSPA because the plaintiff did not present any evidence of actual injury incurred as a result of the alleged OCSPA violation).

Id. at 17.¹²

The foregoing authorities establish that a CSPA claim did not, contrary to Plaintiffs' argument, "accrue" upon the mere inclusion of the arbitration clause, nor were customers injured by simply entering into a contract that included the clause. Countless Ohioans may have in their desk drawers sales contracts of various types which contain an arbitration clause (never consulted or relevant to the customer because they had no dispute with the seller) which may have been deemed contractually unenforceable in a proceeding involving a different customer; that does not, however, warrant an award of \$200 or some other amount to that customer whose clause was never implicated. Actual harm or injury is a necessary element of any claim. *See, e.g., Hoang, supra* ¶¶19-21; *Romberio v. Unumprovident Corp.*, 6th Cir. No. 07-6404, 2009 WL 87510, *8 (Jan. 12, 2009) (class certification improper "[w]here a class definition encompasses many individuals who have no claim") (citations omitted); *Oshana v.*

¹² In addressing the issue of actual harm, this Court should further consider that Article IV, Section 5(B) of the Ohio Constitution empowers this Court to create rules of procedure; however, such procedural rules "shall not abridge, enlarge, or modify any substantive right." A class action seeking an award of damages that includes, as here, individuals who were not actually harmed by the challenged conduct abridges a defendant's substantive rights, including due process rights, because "actual injury cannot be presumed" under the substantive law applicable to their claim. *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191-92 (3d Cir. 2001)). Here, a Civ.R. 23 class action is being used, contrary to the CSPA, to create a recovery for customers whose purchase contracts merely included an arbitration clause, thereby altering the rights and liabilities under the applicable substantive law and abridging Defendants' constitutional right to defend, for each transaction, on the grounds that the mere inclusion of that clause does not give rise to a right to damages in the absence of proof of actual harm.

Coca-Cola Co., 472 F.3d 506, 514-15 (7th Cir. 2006) (“a private cause of action [...] requires proof of ‘actual damage’ [and] proof that the damage occurred ‘as a result of’ the deceptive act or practice.”) (citations omitted); *Brown v. American Honda*, 522 F.3d 6, 28-29 (1st Cir. 2008) (“The ability to calculate the aggregate amount of damages,’ as plaintiffs propose to do here, ‘does not absolve plaintiffs from the duty to prove each [class member] was harmed by the defendants’ practice.”) (citations omitted).¹³

In sum, Ohio law should not stand for the novel and untenable proposition that, in the event an arbitration clause is found to be deficient or unenforceable in a dispute involving one customer, the mere inclusion of that provision in other contracts thereby creates a class action for damages for every other customer irrespective of whether the term is ever implicated. If this were permitted, the rule could conceivably and inappropriately expand to cover other types of contractual provisions as well, *e.g.*, liquidated damages clauses, forum selection clauses, and damages limitation clauses.¹⁴

2. The Class Definition Cannot Be Narrowed to Include Only Those Customers Who Were Harmed Or Damaged By the Inclusion of an Arbitration Clause

In *Stammco II*, this Court not only held that the class was overbroad, this Court further held that a class definition that turned on “authorization” interjected the necessity for individualized determinations that precluded class certification:

¹³ Including customers who suffered no actual harm or damage is improper for the additional reason that as to such customers there is no actual controversy and therefore those customers have no standing as to any claim based on the inclusion of an uninvoked arbitration clause in their purchase contracts. *See Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207 (actual controversy does not arise where challenged provision in the insurance policy was never invoked).

¹⁴ In the case of an actual underlying dispute, a customer has a defense to the enforceability of an invalid or unenforceable contractual term. In this case, however, the Felixes’ defense to the enforceability of the arbitration clause was turned into an affirmative class action claim under the CSPA for all customers based merely on the inclusion of the clause.

determining whether [charges] are authorized requires individualized determinations as to each member of the class that make certification of a class inappropriate under Civ.R. 23(B)(3) because common issues do not predominate. [The] failure to offer evidence [...] that is sufficient to prove that third-party charges are unauthorized on a class-wide basis will cause individual questions to overwhelm the questions common to class members.

Id., 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408 at ¶58. Just as in *Stammco II*, the class composed of all customers whose purchase contracts included an arbitration clause is not only overbroad, any attempt to narrow the class, for example to only those who actually had a “dispute,” would render the class unascertainable and would interject class-defeating “individualized questions.” In particular, there is no class-wide evidence of an underlying dispute; instead, evidence that a given customer (if any) had some sort of a dispute relating to his or her particular purchase, and the causal connection between the inclusion of an arbitration clause and actual harm for that particular customer and in that particular dispute, could be established only by peculiar transaction-by-transaction proof that resides, if at all, with only a small (and unascertainable) subset of the broad universe of all customers.

Stammco II thus teaches that an overbroad class cannot be re-defined based on a proximate cause test built into the class definition. Such an approach not only interjects individualized determinations, it also creates an impermissible “fail safe” class. *See Stammco II, supra*, at ¶¶7-8, 58; *see also George v. R. Good Logistics, LLC*, 12 Dist. Nos. 2012-06-008-010, 2013-Ohio-16, ¶¶20-21, *review denied*, 135 Ohio St.3d 1447, 2013-Ohio-2062 (court reversed certification of a class that was defined on the basis of individuals who were harmed by the challenged conduct, which the court noted would interject a proximate cause test necessitating individualized proof).

In *Stammco II*, this Court reasoned that “[r]emanding this case for further consideration of the class action merely to reach an inevitable result would result in an

additional, unnecessary delay in a case that is more than eight years old.” *Stammco II, supra* at ¶52. The same conclusion should be drawn here.

D. The Court of Appeals Erred in Failing to Conduct a Rigorous Analysis of the Identifiable Class Prerequisite

The Court of Appeals specifically recognized on the class certification appeal what is the dispositive *class certification* issue: whether the class “includes individuals who have no claim and who have sustained no actual damages as a result of Ganley’s inclusion of the arbitration provision in its sales agreements.” Opinion, ¶33. However, the Court of Appeals failed to even address (let alone resolve) that issue, reasoning that the issue pertained to the merits and therefore was “outside the scope of our review.” Opinion at ¶44; *see also* Opinion at ¶71 (dissent noting that “[t]he majority does not address this issue”). In the En Banc Entry, the Court of Appeals similarly concluded that “[t]he question whether the class should be limited with respect to the damages claim may be addressed in future proceedings.”

Although *Stammco II* expressly holds that class certification should be denied if, upon a rigorous Rule 23 inquiry into the underlying merits, the court determines that the class includes individuals who could not have been harmed, the Court of Appeals’ Opinion relegates that Rule 23 prerequisite to a post-certification assessment of what, if any, damages could be awarded. *See* Opinion at ¶44. The Court of Appeals thus erred in failing to conduct a rigorous analysis under Civ.R. 23, which required the Court of Appeals to specifically address and actually decide, at the class certification stage of the case, whether the mere inclusion of an uninvoked arbitration clause caused any actual harm or damage.

Rule 23’s rigorous analysis of the class certification prerequisites would be severely truncated if, as the Court of Appeals held, threshold class certification prerequisites – such as an identifiable class composed of individuals who sustained actual harm – are off-limits

on class certification, leading to the serial certification of overbroad class actions. Proposition of Law No. 1 thus establishes, contrary to the Opinion, that if there is a question whether “the class should be limited,” it must be resolved at the class certification stage and not in “future proceedings” that come only *after* the *unlimited* class has been certified. *See* En Banc Entry. Otherwise, everything that transpired in the interim between class certification and the subsequent “proceedings” (presumably an appeal from a final judgment) would be, upon the ultimate determination that the “class should be limited,” all for naught.

In *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013), the United States Supreme Court held that a rigorous analysis at the class certification stage requires a court to determine, as a prerequisite to certifying a Rule 23(B)(3) class, that “damages are capable of measurement on a class wide basis.” *Id.* at 1433. Otherwise, the Court reasoned, the class certification prerequisites would be reduced to a “nullity.” *Id.* In *Cullen*, this Court similarly held that a rigorous analysis of the class certification prerequisites requires a court to determine if the crux of the claim supports class certification. In that case, this Court specifically rejected the notion that such an inquiry is merits-related and thus outside of Rule 23, holding:

[r]eview of the certification of a class action requires the appellate court to determine whether the trial court conducted a rigorous analysis that resolved all relevant factual disputes and found by a preponderance of the evidence that the requirements of Civ.R. 23 have been satisfied.

Cullen, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614 at ¶51. In this case, however, the Court of Appeals (just as it did on a Rule 23 appeal in *Cullen*) deferred consideration of critical class certification issues to later proceedings on the merits, resulting in an erroneous class certification.

Class certification substantially raises the stakes of a case, often poses the risk of bet-the-company liability, requires the investment of enormous amounts of time and resources by

the litigants and their counsel, and imposes extraordinary demands on the court. Courts have recognized the *in terrorem* effect of class certification. *See, e.g., AT&T Mobility LLC*, 131 S.Ct. at 1752, 179 L.Ed.2d 742 (noting that class actions carry the risk of hold-up settlements, where, even if there is a small chance of devastating loss, defendants are effectively pressured into settling questionable claims); *In re Bridgestone/Firestone Tires Products Liability Litigation*, 288 F.3d 1012, 1015-16 (7th Cir. 2002) (analyzing the benefit of early scrutiny of class certification due to the risk that a defendant would be forced to settle and on terms that reflect the risk of a catastrophic judgment more than the actual merits of the claim). These considerations, applied to the record facts of this case, illustrate the importance of Proposition of Law No. 1 and a rigorous analysis of all the class certification prerequisites at the class certification stage of the case. Deferring the class certification prerequisite of an identifiable class to future proceedings would, as here, result in a certified class that would be later – but inevitably – determined to be fatally overbroad because, from the very outset of the case, a large but unascertainable number of individuals included in the class never even had a claim.

Proposition of Law No. 2

In a class action brought under the Ohio Consumer Sales Practices Act, R.C. 1345.09(B) requires the consumers to have sustained actual damages as a result of the challenged conduct.

In a Rule 23(B)(3) damages class action brought under the CSPA, R.C. 1345.09(B) requires consumers to have sustained “actual damages” as a result of the challenged conduct. Applying Proposition of Law No. 2 to the facts and circumstances of this case, this Court should hold that a class of customers did not, as a matter of law, sustain class-wide “actual damages” as a result of the mere inclusion in their purchase contracts of an uninvoked arbitration clause. *See also* Proposition of Law No. 1 at pp. 16 to 20 (the mere inclusion of an arbitration clause, but where there is no underlying dispute that might implicate it, is not the legal cause of

any actual harm). Propositions of Law Nos. 1 and 2 combined further ask this Court to recognize that R.C. 1345.09(B)'s "actual damage" limitation in CSPA-based class actions must be integrated into the Rule 23 rigorous analysis, requiring courts to consider, at the class certification stage, whether the members of the putative class sustained class-wide actual damages arising from the challenged conduct.

Pursuant to Proposition of Law No. 2, the Court of Appeals' Opinion affirming certification of the Rule 23(B)(3) damages class should be reversed, thereby precluding the Opinion below from becoming a precedent for erroneously certifying CSPA class actions for those who could show, contrary to R.C. 1345.09(B)'s requirement of actual damages, only "statutory" or so-called "discretionary" damages. In such a Rule 23(B)(3) damages class action brought under the CSPA, the courts should consider R.C. 1345.09(B)'s actual damages requirement at the class certification stage, to avoid, as here, erroneous certification and the inevitable determination in future proceedings that, from the very outset of the case, the class was improper. As noted above, Plaintiffs already have conceded that certification of a Rule 23(B)(2) injunctive or declaratory relief class was and is improper.

A. R.C. 1345.09(B) Requires "Actual Damages" in a Rule 23(B)(3) Class Action Brought Under the CSPA

The requirement in Ohio law is clear that, in order to pursue a class action for damages under the CSPA, the members of the class must have sustained actual damages. R.C. 1345.09(B) provides (in part):

Where the violation was an act or practice declared to be deceptive or unconscionable [. . .] the consumer may rescind the transaction or recover, but **not in a class action**, three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater. . . .

(Emphasis added). In *Washington v. Spitzer Mgmt., Inc.*, 8th Dist. No. 81612, 2003-Ohio-1735, ¶32, the Eighth District held that R.C. 1345.09(B) “limits damages available in a [CSPA] class action to actual damages.” In *Searles v. Germain Ford of Columbus, LLC*, 10th Dist. No. 08AP-728, 2009-Ohio-1323 at ¶22, the Tenth District held that “proof of **actual damages is required before certification** of a R.C. 1345.09 class action is proper.” (Emphasis added). The majority never addressed these holdings of the Eighth and Tenth Districts in *Washington* and *Searles*.

As discussed above, this rule was recently affirmed in *Johnson*, S.D. Ohio No. 2:13-CV-756, Slip Copy, 2014 WL 64318, where the Southern District of Ohio held:

In order to maintain a class action, however, a plaintiff must allege actual “damages [that] were a proximate result of the defendant’s deceptive act.” *Butler v. Sterline, Inc.*, 210 F.3d 371, at *4 (6th Cir. Mar. 31, 2010). See also *Washington v. Spitzer Mgmt, Inc.*, No. 81612, 2003 WL 1759617, at *5 (Ohio Ct. App. Apr. 3, 2003) (“CSPA limits the damages available in class action to actual damages”); *Konarzewski v. Ganley, Inc.*, No. 92623, 2009 WL 3649787, at *8 (Ohio Ct. App. Nov. 5, 2009) (“[C]lass action plaintiffs must prove actual damages under the CSPA.”).

Id. at 14.

The dissent in the case *sub judice* sets out what are and should be the governing principles of law:

Where classwide relief is sought for a violation of the CSPA, the recoverable damages are limited to actual damages. R.C. 1345.09 (B); *Washington v. Spitzer Mgt.*, 8th Dist. Cuyahoga No. 81612, 2003-Ohio-1735, ¶32 (“CSPA limits the damages available in class actions to actual damages”); *Konarzewski v. Ganley, Inc.*, 8th Dist. Cuyahoga No. 92623, 2009-Ohio-5827, ¶46 (“class action plaintiffs must prove actual damages under the CSPA”). **A showing of actual damages is therefore required before a CSPA class seeking recovery of damages may be properly certified.** See *Searles v. Germain Ford of Columbus, L.L.C.*, 10th Dist. Franklin No. 08AP-728, 2009-Ohio-1323, ¶22 (“The fact that statutory damages are not available in a class action indicates proof of actual damages is required before certification of an R.C. 1345.09 class action is proper.”). **Only those individuals who sustained actual damages as a result of an alleged CSPA**

violation may properly be included within a Civ.R. 23(B)(3) damages class. *See, e.g., Konarzewski, 2009-Ohio-5827 at ¶¶47-48* (observing that to comply with R.C. 1345.09(B), Civ.R. 23(B)(3) class would “need to be narrowed” to include only those individuals who sustained actual damages).

Opinion at ¶69 (emphasis added). The dissent thus concluded: “[b]ecause the Civ.R. 23(B)(3) class certified by the trial court includes individuals who sustained no actual damages, I would find that the trial court abused its discretion in certifying the class under the CSPA.” Opinion, ¶72.

The Court of Appeals was required to conduct a rigorous analysis of the class certification prerequisites, including any necessary merits determinations, which in this case included R.C. 1345.09(B)’s limitation in CSPA damages class actions. In fact, the majority specifically identified the dispositive *class certification* issue of whether “the CSPA limits damages in class actions to actual damages.” Opinion at ¶44. However, the majority did not undertake a rigorous analysis of the actual damages prerequisite for a CSPA class, but instead concluded, erroneously, that the question was “outside the scope of our review on appeal.” *Id.*; *see also* En Banc Entry (stating “[t]he question whether the class should be limited with respect to the damages claim may be addressed in future proceedings”).

B. The Mere Inclusion of an Arbitration Clause in the Purchase Contracts Did Not Cause Any Actual Damages

As a matter of law, the mere inclusion of an uninvoked arbitration clause did not cause any actual harm or damage. *See* Proposition of Law No. 1, *supra*. It therefore follows, again as a matter of law, that the mere inclusion of the clause did not cause any actual damages, either. In *Johnson*, the Southern District held that the absence of a “legally cognizable injury” establishes the failure of the actual damages requirement under R.C. 1345.09(B). *See Johnson*, S.D. Ohio No. 2:13-CV-756, Slip Copy, 2014 WL 64318 at 19.

Plaintiffs have the burden on class certification, but Plaintiffs failed to elicit a shred of evidence of (i) class-wide actual injury or actual damages caused by the inclusion of an arbitration clause in the purchase contracts, or (ii) the existence of customer disputes (other than the Felixes' interest rate dispute) that might implicate the clause. While "actual damages" might be readily determined in the case of an unlawful monetary charge, no money was ever paid by a customer to a dealership for including an arbitration clause.

The Court of Appeals thus erred in failing to specifically address and actually decide whether the mere inclusion of an uninvoked arbitration clause causes actual damages and thus whether certification of a Rule 23(B)(3) CSPA class was proper under R.C. 1345.09(B). *See Marrone v. Phillip Morris USA, Inc.*, 110 Ohio St.3d 5, 13, 2006-Ohio-2869, 850 N.E.2d 31 (certification of CSPA class improper because "plaintiffs do not meet the standard to qualify for class-certification under R.C. 1345.09(B)); *see also* Opinion at ¶72 (dissent pointing out that "the CSPA's damages limitation limits not only the damages that may ultimately be recovered by a properly certified class but whether a putative class may be properly certified as a Civ.R. 23(B)(3) CSPA class in the first instance").

Moreover, the error of the Court of Appeals in failing to decide the dispositive class certification issue of actual damages was and is magnified by the trial court's partial judgment, which awarded \$200 to every customer of over 20 separate dealerships over an indeterminate period of several years. The trial court's award of \$200 per customer was not predicated on "actual damages," but instead reflects the trial court's legally-erroneous decision to "exercise its discretion and grant damages of \$200 per class member" on the basis that "[t]he Ohio Legislature set a minimum damage award of \$200 for individual violations of the CSPA." *See* Order, p. 9. (As noted herein, the majority did not make any determination that any actual

harm or actual damages was caused by the mere inclusion of an uninvoked arbitration clause; instead, the Court of Appeals determined, erroneously, only that the issue was not before the Court at the class certification stage.)

The CSPA, at least in a Rule 23(B)(3) damages class action, does not give a court “discretion” to award statutory or presumed damages by a different name. “Actual damages” are not only required for a class action, by definition they are different than “statutory damages,” which R.C. 1345.09(B) purposefully excludes in a class action. *See Searles, supra*, 10th Dist. No. 08AP-728, 2009-Ohio-1323 at ¶22 (“The fact that statutory damages are not available in a class action indicates proof of actual damages is required before certification of an R.C. 1345.09 class action is proper.”) Actual damages are not “minimum damages,” either. It is no coincidence, however, that the amount of “discretionary damages” awarded by the trial court mirrors the amount of the statutory damages under the CSPA, reflecting that the trial court simply and improperly awarded statutory damages under a new name. Actual damages are, moreover, predicated on evidentiary proof of an actual injury and an ascertainable amount of damage, but the trial court arbitrarily imposed “discretionary damages” in a uniform, across-the-board amount without any evidentiary proof. In fact, there is no provision or rule of Ohio jurisprudence that authorizes a court to impose damages in its “discretion.” *See Opinion* at ¶72 (dissent reasoning that “no provision exists for the recovery of such ‘discretionary damages’ in a CSPA action”).

The trial court’s Order arbitrarily creates, at the stroke of a pen, millions of dollars of liability but without any corresponding loss or damage on the part of the plaintiff customers. R.C. 1345.09(B)’s “actual damages” limitation was intended to avoid this very situation, where ruinous aggregate liability is created without reference to either actual injury or the amount of

actual damages. In *Washington*, the Eighth District reasoned that the CSPA's actual damages requirement "limits damages in class actions to protect defendants from huge damages awards." *Id.*, 8th Dist. No. 81612, 2003-Ohio-1735 at ¶32 (citations and emphasis omitted). In *Johnson*, S.D. Ohio No. 2:13-CV-756, Slip Copy, 2014 WL 64318, the court likewise held:

In class actions [...] actual injury is required "to protect defendants from huge damage awards." *Washington*, 2003 WL 1759617 at *5 (emphasis added). Where, as here, the Complaint fails to allege actual injury or damage as a result of the alleged OCSPA violation, the class claims cannot proceed."

Id. at 20.

As the amici point out, the CSPA's actual damages limitation in class actions was and is meant to avoid the case where, as here, a later-determined issue with a form document, even if it does not involve any monetary loss to the consumers and has no bearing on the transactions, results in a certified class action and aggregation of financially crippling damages. *See, e.g.*, Amici Memorandum of The Ohio Automobile Dealers Association and Greater Cleveland Automobile Dealers Association In Support of Jurisdiction, at 2.¹⁵

¹⁵ The trial court commented that customers were "victimized" by the use of the arbitration clause, and that Defendants should not go "without sanction" because it purportedly "would defeat the policies underlying the CSPA" and "reward lawlessness aimed primarily at consumers." *See* Order at 6. However, the trial court's 2012 Order was the *first time* that *any* court had held that the inclusion of the arbitration clause was prohibited by the CSPA, the 2006 decision having been solely based on the clause's contractual enforceability. Moreover, at the time the trial court issued its Order, the clause at issue had not been in use for over five years and a subsequent version of the clause had already been upheld by the Eighth District Court of Appeals. Thus, not only do the trial court's one-sided observations reflect an erroneous view of the facts and the law, those observations also fail to consider that R.C. 1345.09(B)'s actual damages requirement expressly rejects the notion of "sanctions" or "punishment" in a CSPA class action. In addition to the express provisions of the CSPA, there are compelling public policy reasons not to use class actions to impose ad hoc regulation under the CSPA; the CSPA expressly vests such broader enforcement power with the Ohio Attorney General.

C. There Is No Viable Theory of Actual Damages For Including An Arbitration Clause, And Certainly No Theory of Class-Wide Damages

The trial court noted that the “use of the arbitration clause” [. . .] is itself the basis for relief.” Order at p. 4. However, the mere inclusion of an uninvoked arbitration clause was and is not, by itself, the legal cause of any actual harm (Proposition of Law No. 1) or any actual damages under R.C. 1345.09(B) (Proposition of Law No. 2). In *Comcast*, 133 S.Ct. 1426 at 1433, 185 L.Ed.2d 515, the United States Supreme Court held that a Rule 23(b)(3) damages class requires, as a prerequisite to certification, a viable **class-wide** damages theory. In contrast, the trial court erroneously certified the class around a class-wide award of “discretionary damages” in a uniform and unproven amount, and the Court of Appeals in turn determined that the issue of whether there was any viable class-wide actual damages theory was off-limits on class certification.

As these errors highlight, there is no viable theory of class-wide actual damages arising from the inclusion of an uninvoked arbitration clause. Furthermore, as shown below, this Court should reject Plaintiffs’ *post-hoc* attempt to manufacture a class-wide actual damages theory. Pursuant to Propositions of Law Nos. 1 and 2, this Court should hold, as a matter of law, that the absence of any actual harm or actual damages in turn establishes that there is no viable class-wide damages theory upon which a Rule 23(B)(3) class brought under the CSPA could be certified.

1. Plaintiffs Cannot Recover Class-Wide Actual Damages Under the Pre-2007 Version of R.C. 1345.09(B)

R.C. 1345.09(B) was amended in 2007 to limit the relief in CSPA class actions to “actual *economic* damages.” Plaintiffs argue that under the pre-2007 amendment of R.C. 1345.09(B), they were entitled to a class-wide award of what they call “actual [non-economic] damages.” *See* Appellees’ Memorandum in Opposition to Jurisdiction at 6 (brackets in original).

However, prior to the 2007 amendment, R.C. 1345.09(B) still limited the monetary relief in CSPA class actions to “actual damages.” *See Washington*, 8th Dist. No. 81612, 2003-Ohio-1735 at ¶32 (finding CSPA class actions limited to “actual damages”); *Searles*, 10th Dist. No. 08AP-728 at ¶22 (actual damages required in CSPA class action). For the following reasons, this Court should reject Plaintiffs’ argument and therefore need not in the process consider any issue of retroactive application of the 2007 amendment to R.C. 1345.09(B).

In the first place, Plaintiffs argument misses the point that Proposition of Law No. 2 does not turn on the word “economic” in the 2007 amendment to R.C. 1345.09(B). No “actual damages” or “actual economic damages” or “actual non-economic damages” arise from the mere inclusion of an uninvoked arbitration clause. *See supra*, Propositions of Law Nos. 1 and 2.¹⁶

Not surprisingly, Plaintiffs did not (and could not) elicit a shred of record evidence of class-wide “actual damages,” whether “economic” or “non-economic.” The trial court awarded “discretionary damages,” not some newfound theory of “actual [non-economic] damages.” *See Order* at 9 (reasoning that the Legislature “set a minimum damage award of \$200 for individual violations of the CSPA,” and thus the trial court “will exercise its discretion and

¹⁶ Plaintiffs note that R.C. 1345.09(B) also states “that a court can award “damages or other relief in a class action.” *See Appellees’ Memorandum in Opposition to Jurisdiction* at 6. Two points arise: first, the reference to “damages” does not somehow read-out of R.C. 1345.09(B) the express “**actual damages**” limitation in a class action. *See Washington* and *Searles, supra*; second, the actual damages limitation of R.C. 1345.09(B) cannot be circumvented by now recharacterizing the trial court’s award of “discretionary damages” as some form of “other relief” under the last clause of R.C. 1345.09(B). In this regard, Plaintiffs have already acknowledged based on this Court’s decision in *Cullen* that they are not entitled to a class action seeking “other relief” under Civ.R. 23(B)(2), leaving a Civ.R. 23(B)(3) class – and the requirement of actual damages – as the only possible class. In some other case involving an ongoing wrong and actual harm (which are not present here), a court may have the right to award “other relief” (*i.e.*, something other than damages) in the form of injunctive or declaratory relief under R.C. 1345.09(B) and Civ.R. 23(B)(2).

grant damages of \$200 per class member”). In the trial court, Plaintiffs acknowledged that there was “no common measure of damages” and thus the need for “individualized trials on damages” (Tr. at 12), and in the Court of Appeals Plaintiffs suggested only that “Judge Sutula saw enough in over 10 years of litigation to evaluate every class member’s non-economic loss at \$200.” Brief of Appellees, at 42. It is impossible to even guess at what “actual [non-economic] damages” the trial judge might have “saw” solely based on the fact that the customers’ purchase contracts included a never-to-be-consulted arbitration clause.

And, if Plaintiffs are suggesting that the pre-2007 version of R.C. 1345.09(B) theoretically could permit an award of *non-economic* damages such as for harassment, humiliation, or pain and suffering, then class certification is and would be precluded on the ground that such a theory of “actual [non-economic] damages” would necessitate highly individualized proof as to both the existence and amount of such damages. *See Cullen, supra* at ¶30 (discussing requirement of generalized proof applicable to the class as a whole) (citation omitted); *Hoang, supra* at ¶21 (“where proof of fact of damages requires evidence concerning individual class members, the common questions of fact become subordinate to the individual issues, thereby rendering class certification problematic”) (quotation omitted)). In this regard, non-economic damages not only cannot be presumed, non-economic damages do not arise on a class-wide basis from the inclusion of a dispute resolution clause in *dispute-free* transactions.

Plaintiffs cite cases that purportedly support a class-wide damages theory, but those decisions are readily distinguishable. For example, in *State v. Rose Chevrolet, Inc.*, 12th Dist. No. CA91-12-214, 1993 WL 229392 (Jun. 28, 1993), the court awarded damages based on *evidentiary proof* that customers sustained *actual monetary damages* in the form of a price differential between undisclosed prior rental vehicles and “factory official” vehicles. *See*

Opinion at ¶72 (dissent pointing out that *Rose Chevrolet* “does not support the trial court’s damages theory in this case”). The other decisions that Plaintiffs cite are equally inapplicable. *See Celebrezze v. Hughes*, 18 Ohio St.3d 71, 479 N.E.2d 886 (1985) (in Attorney General action for odometer fraud, court affirmed damages award under R.C. 4549.49); *Wiseman v. Kirkman*, 2d Dist. Case No. 1575, 2002-Ohio-5384 (homeowner recovered actual economic damages in the amount of \$150.00 based on lower wholesale cost of substituted water softener); *Jemiola v. XYZ Corp.*, 126 Ohio Misc. 2d 68, 2003-Ohio-7321, 802 N.E.2d 745 (Cuy. Cty.) (court awarded statutory damages under CSPA to *individual* who received unsolicited fax advertisements).

2. Plaintiffs Cannot Recover Class-Wide Actual Damages Under a “Benefit of the Bargain” Theory

Plaintiffs also argue that the trial court’s erroneous across-the-board award of “discretionary damages” can somehow be transformed on appeal into “the reasonable cost of document preparation” under a purported “benefit of the bargain” theory. *See Appellees’ Memorandum in Opposition to Jurisdiction*, at 7-8. Accordingly to Plaintiffs, the trial court could have fixed “non-pecuniary damage” at \$200 per transaction under that theory that each class member “had a right to receive a non-deceptive and viable remedy received.” *Id.* at 8. This Court should reject Plaintiffs’ misplaced and convoluted theory of class-wide damages under Rule 23(B)(3).

First, the benefit of the bargain theory was first raised by Plaintiff on appeal. As such it has been waived. *See, e.g., State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), syllabus; and *Greene v. American Bankers Ins. Co.*, 8th Dist. Case No. 66091, 1994 WL 568395, *9 (Oct. 13, 1994). Indeed, the trial court did not award damages under a benefit of the bargain theory, but instead awarded “discretionary damages” in the same amount as statutory damages under the CSPA, even though statutory damages are specifically excluded in a CSPA class

action. *See supra*; *see also* Order at 9 (reasoning that “[t]he Ohio Legislature set a minimum damage award of \$200 for individual violations of the CSPA”).

Second, R.C. 1345.09(B) requires actual damages in a Rule 23(B)(3) class action brought under the CSPA. *See supra*. Whatever Plaintiffs might mean by coining the phrase “non-pecuniary damages,” no actual harm or actual damages of any kind arises from the mere inclusion of an arbitration clause. As noted above, no monetary charge was assessed or paid for the inclusion of an arbitration clause. How could Plaintiffs establish on a class-wide basis that the customers were deprived of the “benefit of the bargain” by the mere inclusion of an uninvoked arbitration clause where the benefit of the bargain is exemplified by dispute-free purchases?

Third, Plaintiffs did not (and could not) elicit any record evidence of any class-wide actual damages whatsoever, whether “non-pecuniary damages” or some other theory of damages. In fact, Plaintiffs never say whether, in theory, alleged “actual [non-economic] damages” are different than “non-pecuniary damages,” nor do they cite a case in which an award of damages under either theory was permitted on a class-wide basis under R.C. 1345.09(B).

Here, the alleged wrongdoing is alleged to be the inclusion of an arbitration clause. *See* Order at 4 (stating that the “unlawful conduct” was “the use of the arbitration clause”). In this or any other case, the alleged damage must arise as a direct and proximate result of the alleged wrongdoing, *i.e.*, the inclusion of an arbitration clause. *See Comcast*, 133 S.Ct. 1426, 1433, 185 L.Ed.2d 515 (class certification is improper where the class-wide damages theory measures “damages that are not the result of the wrong”). Tellingly, every one of the cases that Plaintiffs cite at page 8 of the Memorandum in Opposition to Jurisdiction addresses damages for alleged wrongdoing in assessing an actual monetary charge, not for merely

including a clause in a contract that, in almost every instance, had no bearing on the transaction and therefore was not the legal cause of any actual harm or damage.¹⁷

As a final matter, courts have consistently rejected this same attempt to manufacture a purported injury by a misplaced benefit of the bargain theory of damages. In *In re Toyota Motor Corp. Hybrid Mktg. Sales Practices and Prod. Liab. Lit.*, 288 F.R.D. 445, 450 (C.D. Cal. Jan. 9, 2013), the court denied class certification under benefit of the bargain damages theory, reasoning that “[p]laintiffs’ benefit-of-the-bargain argument . . . is insufficient as a matter of law” and that “merely offering a creative damages theory does not establish [the required] actual injury.” See also *Rivera v. Wyeth-Ayerst Labs*, 283 F.3d 315, 320-21 (5th Cir. 2002) (rejecting plaintiff’s attempt to use a benefit of the bargain theory as a substitute for showing concrete injury stating that “artful pleading . . . is not enough to create an injury in fact.”); *Wallis v. Ford Motor Co.*, 2008 S.W.3d 153, 159, 362 Ark. 317 (Ark. 2005) (“numerous other jurisdictions have refused to award benefit-of-the-bargain damages when there is no allegation that the product received was not the bargained-for product,” and finding that “common-law fraud claims not resulting in injury are not actionable.”).

¹⁷ See *Greenspan v. Third Fed. S. & L. Assn.*, 122 Ohio St.3d 455, 912 N.E.2d 567 (plaintiff disputed charge for document preparation fee regarding services performed by non-attorneys for loan documents); *Weston v. AmeriBank*, 265 F.3d 366 (6th Cir. 2001) (plaintiff disputed document preparation fee charge and claimed it was not adequately disclosed); *Price v. EquiFirst Corp.*, N.D. Ohio No. 1:08-CV-1860, 2009 WL 917950 at *2 (Apr. 1, 2009) (document preparation fees were not the subject of the court’s opinion; rather, the court briefly noted plaintiff’s allegation that they were charged a document preparation fee that was not disclosed on a Good Faith Estimate).

CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully urge this Court to reverse the Judgment and Opinion of the Eighth District Court of Appeals, hold that certification of the customer class was and is improper under Civ. R. 23, and remand this case to the trial court for proceedings on the individual claims of the Felixes.

Respectfully submitted,



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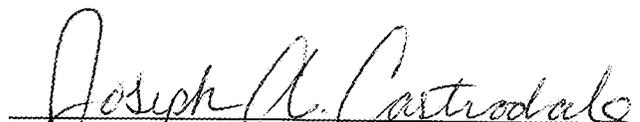
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IN THE SUPREME COURT OF OHIO

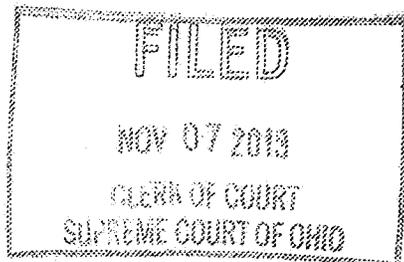
JEFFREY FELIX, *et al.*,) Case No. 13-1746
)
Plaintiffs-Appellees,) On appeal from the Cuyahoga County
) Court of Court of Appeals Eighth
v.) Appellate District
) Case No. CA 12 098985
GANLEY CHEVROLET, INC., *et al.*)
)
Defendants-Appellants.)

**NOTICE OF APPEAL OF DEFENDANTS-APPELLANTS
GANLEY CHEVROLET, INC. AND GANLEY MANAGEMENT COMPANY**

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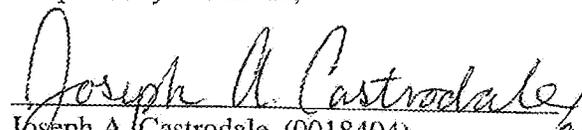
Attorneys for the Plaintiffs-Appellees

**NOTICE OF APPEAL OF
DEFENDANTS-APPELLANTS
GANLEY CHEVROLET, INC. AND GANLEY MANAGEMENT COMPANY**

Pursuant to S.Ct. Prac. R. 2.1(A)(3) and 2.2(A)(5) and (6), Defendants-Appellants Ganley Chevrolet, Inc. and Ganley Management Company hereby appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Common Pleas, Eighth Appellate District, in Court of Appeals Case No. 98985, which was journalized on August 15, 2013. Defendant-Appellants timely filed an application for reconsideration and en banc review on August 23, 2013. The Court of Appeals denied reconsideration by Journal Entry of September 16, 2013, and en banc review was denied by Journal Entry of September 24, 2013.

This case is one of public and great general interest.

Respectfully submitted,


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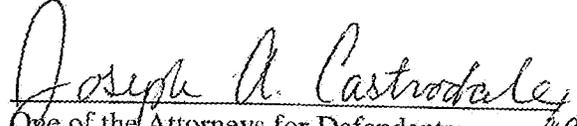
A copy of the foregoing Notice of Appeal of Defendants-Appellants Ganley Chevrolet, Inc. and Ganley Management Company has been served this ^{7th} day of November, 2013, by first-class mail, postage prepaid, addressed to:

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2053245

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

JEFFREY FELIX, ET AL.

Appellee

COA NO.
98985

LOWER COURT NO.
CP CV-442143
CP CV-454238

-vs-

COMMON PLEAS COURT

GANLEY CHEVROLET, INC., ET AL.

Appellant

MOTION NO. 467753

Date 09/24/13

Journal Entry

Application by Appellants for en banc review is denied. See separate journal entry of this same date.

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[Signature]
MELODY J STEWART
Administrative Judge

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

Jeffrey Felix, et al.

Appellees

COA NO.
98985

LOWER COURT NOS.
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Ganley Chevrolet, Inc., et al.

Appellants

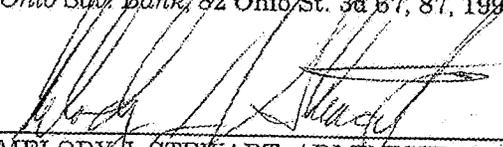
MOTION NO. 467753

Date 09/24/2013

Journal Entry

This matter is before the court on appellants' application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

We find no conflict between the panel majority's decision in this case and *Barber v. Meister Protection Services, Inc.*, 8th Dist. Cuyahoga No. 81553, 2003-Ohio-1520, ¶ 33-34; *Maestle v. Best Buy Co.*, 197 Ohio App.3d 248, 2011-Ohio-5833, ¶ 23; *Hoang v. E*Trade Group, Inc.*, 151 Ohio App.3d 363, 2003-Ohio-301; *Repede v. Nunes*, 8th Dist. Cuyahoga No. 87277 and 87469, 2006-Ohio-4117; and *Washington v. Spitzer Mgmt., Inc.*, 8th Dist. Cuyahoga No. 81612, 2003-Ohio-1735, ¶ 33. The defined class was injured by the inclusion of a deceptive contract provision, and may be entitled to declaratory and injunctive relief. The question whether the class should be limited with respect to the damages claim may be addressed in future proceedings. See Civ.R. 23(C)(1) and (4); *Hamilton v. Ohio Sav. Bank*, 82 Ohio St. 3d 87, 87, 1998-Ohio-365, 694 N.E.2d 442.


MELODY J. STEWART, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.,
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
MARY EILEEN KILBANE, J.,
TIM MCCORMACK, J., and
KENNETH A. ROCCO, J.

Dissenting:

SEAN C. GALLAGHER, J.
EILEEN T. GALLAGHER, J.,
EILEEN A. GALLAGHER, J., abstains

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

JEFFREY FELIX, ET AL.

Appellee

COA NO.
98985

LOWER COURT NO.
CP CV-442143
CP CV-454238

COMMON PLEAS COURT

-vs-

GANLEY CHEVROLET, INC., ET AL.

Appellant

MOTION NO. 467752

Date 09/16/13

Journal Entry

Motion by Appellants for reconsideration is denied.

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Presiding Judge LARRY A. JONES, SR.,
Concurs

Judge KENNETH A. ROCCO, Dissents

Mary Eileen Kilbane
MARY EILEEN KILBANE
Judge

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 98985

JEFFREY FELIX, ET AL.

PLAINTIFFS-APPELLEES

vs.

GANLEY CHEVROLET, INC., ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CV-442143 and CV-454238

BEFORE: Kilbane, J., Jones, P.J., and Rocco, J.

RELEASED AND JOURNALIZED: August 15, 2013

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FILED AND JOURNALIZED
PER APP.R. 22(C)

AUG 15 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By Deputy

MARY EILEEN KILBANE, J.:

{¶1} Defendants-appellants, Ganley Chevrolet, Inc. ("Ganley Chevrolet") and Ganley Management Company ("Ganley Management") (collectively referred to as "Ganley"), appeal from the trial court's order certifying a class action brought by plaintiffs-appellees, Jeffrey and Stacy Felix (collectively referred to as "the Felixes"), under the Ohio Consumer Sales Practices Act ("CSPA"). For the reasons set forth below, we affirm.

{¶2} The facts giving rise to the instant appeal were set forth by this court in Ganley's previous appeal, *Felix v. Ganley Chevrolet, Inc.*, 8th Dist. Cuyahoga Nos. 86990 and 86991, 2006-Ohio-4500, *discretionary appeal not allowed*, 112 Ohio St.3d 1470, 2007-Ohio-388, 861 N.E.2d 144.

[The Felixes] brought two actions against Ganley.¹ In both actions, the appellees filed class action complaints alleging consumer sales practices violations and seeking declaratory and injunctive relief.

The Felixes allege in the first action that on March 24, 2001, they went to Ganley to purchase a 2000 Chevy Blazer. The Felixes claim that as an incentive to sign the contract to purchase the vehicle, Ganley informed them that they were approved for 0.0% financing but that the offer would expire that evening. The purchase contract contained an arbitration clause that required "any dispute between you and dealer (seller) will be resolved by binding arbitration."²

¹The first action, Cuyahoga C.P. No. CV-442143 and 8th Dist. Cuyahoga No. 86991, was brought against Ganley Chevrolet, Inc., as representative of various Ganley dealerships, and against Ganley Management Co. The second action, Cuyahoga C.P. No. CV-454238 and 8th Dist. Cuyahoga No. 86990, was brought against Ganley Chevrolet, Inc., and all Ganley companies.

²The arbitration provision at issue, which appeared in the sales agreement states:

Jeffrey Felix signed under the arbitration clause and at the foot of the purchase contract, relying on Ganley's representation of 0.0% financing. The purchase contract provided that it was "not binding unless accepted by seller and credit is approved, if applicable, by financial institution." Jeffrey Felix also signed a conditional delivery agreement that specified that "the agreement for the sale/lease of the vehicle described above is not complete pending financing approval * * * and that the consummation of the transaction is specifically contingent on my credit worthiness and ability to be financed."

The Felixes traded in their van as part of the purchase. They allege Ganley insisted the Felixes take the Chevy Blazer home for the weekend. The Felixes claim that when they returned the following Monday to sign the promissory note and security agreement, they were told that GMAC (the financing institution) would only approve their financing at 1.9%, not at the 0.0% that was originally represented. The Felixes agreed to the 1.9% rate and signed the promissory note. More than a month later, the Felixes were informed that GMAC decided not to approve the 1.9% financing. Ganley then informed the Felixes that they could obtain 9.44% financing with Huntington Bank. The Felixes refused to execute a new agreement at the higher interest rate. The Felixes retained the vehicle and have been placing money into escrow for the purchase of the vehicle.

ARBITRATION — ANY DISPUTE BETWEEN YOU AND DEALER (SELLER) WILL BE RESOLVED BY BINDING ARBITRATION. YOU GIVE UP YOUR RIGHT TO GO TO COURT TO ASSERT YOUR RIGHTS IN THIS SALES TRANSACTION (EXCEPT FOR ANY CLAIM IN SMALL CLAIMS COURT). YOUR RIGHTS WILL BE DETERMINED BY A NEUTRAL ARBITRATOR, NOT A JUDGE OR JURY. YOU ARE ENTITLED TO A FAIR HEARING, BUT ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN RULES APPLICABLE IN COURT. ARBITRATOR DECISIONS ARE AS ENFORCEABLE AS ANY COURT ORDER AND ARE SUBJECT TO A VERY LIMITED REVIEW BY A COURT. SEE GENERAL MANAGER FOR INFORMATION REGARDING ARBITRATION PROCESS.

In the first action, under the fourth amended complaint, [the Felixes claim] that the arbitration clause utilized by Ganley was unconscionable and that various practices of Ganley pertaining to the clause violated the Ohio Consumer Sales Practices Act ("the Ohio CSPA"). The first three causes of action were raised as to the representative class. Count one alleges unconscionability of the arbitration clause; counts two and three allege unfair and deceptive consumer sales practices.

Counts four through six were the Felixes' individual claims. Counts four and five allege unfair and deceptive consumer sales practices concerning Ganley's "bait and switch tactics." Under count four, the Felixes claim that Ganley misrepresented to the Felixes that they were approved for financing, when no such approval was given, in order to get the Felixes to agree to purchase the vehicle later at higher interest rates. They further claim Ganley submitted a credit application to Huntington without authorization from the Felixes and in complete disregard of their privacy. Under count five, the Felixes allege that Ganley deceived Jeffrey Felix with respect to the conditional delivery agreement, and failed to incorporate into the security agreement that the Felixes were not, in fact, approved for financing with GMAC. Count six is a claim for intentional infliction of emotional distress with respect to the alleged misrepresentations Ganley made to the Felixes regarding the financing of the vehicle.

In the second action, the second amended complaint focuses entirely on the arbitration clause itself. Count one is a claim that the clause is unconscionable. Counts two through four claim unfair and deceptive consumer sales practices by Ganley with respect to the arbitration clause. Count five claims Ganley made false statements, representations, and disclosures of fact and defrauded customers as to the arbitration clause. In the second action, there are no direct allegations pertaining to the interest-rate representations made to the Felixes as were alleged in the first action.

In both cases, Ganley filed a motion for stay of proceedings, requesting that the matters be stayed pending arbitration in accordance with the arbitration agreement contained within the parties' purchase contract.

Following a consolidated hearing on the motions, the trial court denied the motions without opinion.

Id. at ¶ 2-10.

{¶3} Ganley appealed the trial court's denial of its motion to stay pending arbitration, arguing the trial court had erred in determining that the arbitration provision was unenforceable. The issue before us at that time was "whether the dispute between the parties is governed by a valid, enforceable agreement to arbitrate." *Id.* at ¶ 13. We affirmed the trial court's ruling, concluding that the arbitration provision included in the purchase agreement was substantively and procedurally unconscionable and was, therefore, unenforceable against appellees. *Id.* at ¶ 28.

{¶4} Following our decision, the Felixes filed a "Supplemental Motion for an Order of Class Certification and for Judgment on the Merits" at the trial court, requesting that the trial court certify a class under both Civ.R. 23(B)(2) and (B)(3) in October 2007. They argued that our ruling that the arbitration provision was unconscionable established "CSPA violations which apply to each and every class member." As to its class claim in the first action, the Felixes sought judgment in favor of the purported class on the CSPA claim and requested that each class member be awarded \$200 in damages. They also requested that the court issue injunctive relief, enjoining the continued use of the arbitration provision and any substantially similar provisions. With respect

to the second action, appellees sought a “final judgment on the merits for the entire case” in the form of a declaratory judgment stating that Ganley’s inclusion of the unconscionable arbitration clause in its automobile sales agreements violated the CSPA.

{¶5} Ganley filed a brief in opposition, arguing the Felixes could not maintain a class action under R.C. 1345.09(B) and establish certain prerequisites to class certification under Civ.R. 23, and that due to the public policy favoring arbitration, inclusion of an arbitration provision in a sales agreement could not violate the CSPA. After several years of extensive litigation, the trial court issued judgment entries in both cases in September 2012. In its “Proposed Order of Class Certification and for Partial Judgment on the Merits,” the trial court certified the following plaintiff class under Civ.R. 23(B)(2) and (B)(3):

All consumers of Vehicles from any of the 25 Ganley Companies (see Plaintiff’s Chart, Exhibit A, filed August 18, 2003) within the two-year period preceding commencement through the present date (the Class Period), who signed a purchase agreement containing the arbitration clause at suit or one substantially similar thereto.

{¶6} In addition to certifying the class, the trial court held that Ganley’s inclusion of the subject arbitration provision in its purchase agreements with consumers violated the CSPA and established a basis for classwide relief under Civ.R. 23(B)(2) and (B)(3). In its rigorous opinion granting class certification, the trial court wrote:

The Court finds that the Ganley defendants have acted on grounds applicable to the class as a whole, thereby making appropriate final injunctive relief and corresponding declaratory relief. * * * [I]t is the use and enforcement of the arbitration clause which is at issue in this matter. The use of the said clause constitutes a threatened harm to class members as evidenced in the instant case by the litigation of the Defendant[s'] Motion to Stay and Motion to Compel Arbitration. The class is cohesive in that each class member executed the same or substantially same Purchase Agreement which failed to satisfy the requirements of the [CSPA], by failing to provide certain material information at the time it was due; and the Court will issue relief to protect those class members from prejudice thereby.

* * *

Specifically, it was Defendants' common course of conduct under the direction of defendant Ganley Management Co. and its General Counsel * * * which brought forth and regulated the use of the arbitration clause. The use of the arbitration clause, i.e., the Defendants' conduct, is itself the basis for relief. Re-litigating a class member's right to relief over and over again would be a drain on the judiciary and serve no valid purpose. Few if any class members would likely be able to effectively challenge the Defendants due to the cost of litigation. If they could challenge Defendants, those costs would be improvident, since the illegality of the clause has been decided and affirmed by the Court of Appeals, and the cost of further litigation would be wasteful of judicial and party resources.

{¶7} The trial court also ruled that, based on Ganley's conduct, a classwide award of damages was warranted under the CSPA:

The Court finds that CSPA permits, if it does not require, the Court to award monetary damages to consumers victimized by Defendants' violation of law. To allow Defendants to emerge from this seven-year legal battle, during which time they continued to use the offending clause, without sanction, would defeat the policies underlying CSPA and the rule of law. It would reward lawlessness aimed primarily at consumers.

Concluding that the case “presents a significant violation of law,” the court “exercise[d] its discretion” and awarded \$200 in damages per transaction to each class member.

{¶8} It is from this order that Ganley now appeals, raising the following single assignment of error for review.

Assignment of Error

[T]he trial court erred as a matter of law and abused its discretion in certifying, for purposes of a claim under the [CSPA], a class of customers who signed purchase agreements that included an arbitration provision.

Standard of Review

{¶9} A trial court has broad discretion in determining whether to certify a class action, and an appellate court should not disturb that determination absent an abuse of discretion. *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 509 N.E.2d 1249 (1987), syllabus. “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” (Citations omitted.) *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980). In *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 694 N.E.2d 442 (1998), the Ohio Supreme Court noted that “the appropriateness of applying the abuse-of-discretion standard in reviewing class action determinations is grounded * * * in the trial court’s

special expertise and familiarity with case-management problems and its inherent power to manage its own docket.” *Id.* at 70, citing *Marks; In re NLO, Inc.*, 5 F.3d 154 (6th Cir.1993). “A finding of abuse of discretion * * * should be made cautiously.” *Marks* at 201.

{¶10} The *Hamilton* court further noted that the trial court’s discretion in deciding whether to certify a class must be exercised within the framework of Civ.R. 23. *Id.* The trial court is required to “carefully apply the class action requirements” and to conduct a “rigorous analysis” into whether the prerequisites for class certification under Civ.R. 23 have been satisfied. *Id.*

Requirements for Class Action Certification

{¶11} In determining whether a class action is properly certified, the first step is to ascertain whether the threshold requirements of Civ.R. 23(A) have been met. Once those requirements are established, the trial court must turn to Civ.R. 23(B) to discern whether the purported class comports with the factors specified therein. Accordingly, before a class may be properly certified as a class action, the following seven prerequisites must be met: (1) an identifiable class must exist, and the definition of the class must be unambiguous; (2) the named plaintiff representatives must be members of the class; (3) the class must be so numerous that joinder of all the members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representatives 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 requirements under Civ.R. 23(B) must be met. *Hamilton* at 71, citing Civ.R. 23(A) and (B); *Warner v. Waste Mgt. Inc.*, 36 Ohio St.3d 91, 96, 521 N.E.2d 1091 (1988).

Application of Class Action Requirements

{¶12} Ganley argues that the trial court erred in certifying the class because the class definition and time period are overbroad and ambiguous. Ganley further argues that the commonality, predominance, and typicality prerequisites to class certification under Civ.R. 23(A) and (B)(3) were not established and that there was no showing that “final injunctive relief or corresponding declaratory relief” was appropriate “with respect to the class as a whole” for class certification under Civ.R. 23(B)(2). We disagree.

{¶13} As an initial matter, we note that a recurring theme in Ganley’s argument is the notion that, due to the public policy favoring arbitration of disputes, “there is and can be no [CSPA] violation based upon the inclusion of an arbitration provision in a contract.” Ganley, however, misconstrues the Felixes’ theory of liability under the CSPA. The Felixes do not contend that Ganley’s inclusion of any arbitration clause in a consumer sales contract violates the CSPA. Rather, they contend that Ganley’s inclusion of this particular arbitration provision, which this court found to be misleading, confusing, and substantively unconscionable, or a substantially similar provision, in its

automobile sales agreements constitutes an unfair and deceptive practice under the CSPA. We agree that such allegations constitute an unfair or deceptive practice giving rise to a claim under the CSPA. *See also Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶ 28 (9th Dist.) (stating that “it is conceivable that a complainant may allege that an arbitration clause itself may violate R.C. Chapter 1345[.]”)

{¶ 14} Ganley further argues that the individualized assessment necessary for a determination of procedural unconscionability must, in and of itself, preclude any form of classwide relief. However, there is a difference between the proof required to establish an unfair and deceptive practice under the CSPA and the proof required to establish the contractual defense of unconscionability. The fact that an arbitration provision is generally “presumed valid” or that the contractual defense of unconscionability requires both substantive unconscionability and an individualized, case-by-case assessment of procedural unconscionability before a contract provision is determined to be unenforceable does not preclude a finding that inclusion of a misleading, confusing, and substantively unconscionable arbitration provision in a consumer sales contract constitutes an unfair and deceptive practice under the CSPA. As it relates to the claims of the putative class, the issue in the instant case is not whether the arbitration provision was substantively and procedurally unconscionable, and thus unenforceable, under contract law principles, but rather, whether the

provision violated the CSPA for reasons that apply classwide, irrespective of procedural unconscionability.

{¶15} Therefore, Ganley's arguments based on the public policy favoring arbitration and the requirements for establishing procedural unconscionability as a matter of contract law do not preclude class certification in this case.

{¶16} We now review the detailed findings made by the trial court.

(1) Identifiable Class

{¶17} Civ.R. 23 requires that an identifiable class must exist and the definition of the class must be unambiguous. This requirement "will not be deemed satisfied unless the description of [the class] is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member. Thus, the class definition must be precise enough to permit identification within a reasonable effort." (Internal quotations and citations omitted.) *Hamilton*, 82 Ohio St.3d at 71-72, 694 N.E.2d 442.

{¶18} In the instant case, the trial court found that the Felixes' proposed class was identifiable, consisting of:

All consumers of Vehicles from any of the 25 Ganley Companies (see plaintiff's chart, Exhibit A, filed August 18, 2003) within the two-year period preceding commencement through the present date (the Class Period), who signed a purchase agreement containing the arbitration clause at suit or one substantially similar thereto.

We are mindful that "[t]he 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.” (Citation omitted.)
Hamilton at 73.

{¶19} A plain reading of the class definition dictates that the class is limited to consumers who purchased vehicles from any of the 25 Ganley companies within the two-year period preceding commencement of the Felixes’ original complaint filed on June 18, 2001. Based on this definition, it would be administratively feasible to determine whether a particular person is a member of the class. Therefore, the identifiable class requirement is satisfied.

(2) Class Membership

{¶20} The class membership prerequisite requires only that “the representative have proper standing. In order to have standing to sue as a class representative, the plaintiff must possess the same interest and suffer the same injury shared by all members of the class that he or she seeks to represent.” (Citation omitted.) *Hamilton*, 82 Ohio St.3d at 74, 694 N.E.2d 442.

{¶21} Here, the trial court found that Ganley

instituted the arbitration clause on or about 1998 and the Court need only look at the pre-printed form agreements which Ganley utilized and executed to identify the class and determine whether a given individual is a class member. Plaintiff is a member of the class so defined, having purchased a vehicle from Ganley Chevrolet, Inc., and signed a Purchase Agreement on or about March 2000, containing the subject arbitration clause.

The Felixes and the class members possess the same interest and suffer the same injury — individuals who purchased a vehicle from Ganley Chevrolet, Inc.,

and signed a purchase agreement containing the subject arbitration clause.

Thus, the class membership requirement is satisfied.

(3) Numerosity

{¶22} Civ.R. 23(A) provides that “one or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable[.]” Here, the trial court found that “the class as * * * defined contains thousands of members and is thus so numerous that joinder of all members is impracticable.” In *Hamilton*, the Ohio Supreme Court found that a class with at least 2,700 possible class members satisfies the numerosity requirement. *Id.* at 75. The court stated, “[t]his number alone is sufficient to establish that the class is so numerous that joinder of all members is impracticable.” (Citations omitted.) *Id.* Similarly, the instant class consists of “thousands of members.” Thus, the numerosity requirement is satisfied.

(4) Commonality

{¶23} Civ.R. 23(A)(2) requires the presence of “questions of law or fact common to the class.” “Courts generally give this requirement a permissive application. It is not necessary that all the questions of law or fact raised in the dispute be common to all the parties. If there is a common nucleus of operative facts, or a common liability issue, the rule is satisfied.” (Citations omitted.)

Hamilton, 82 Ohio St.3d at 77, 694 N.E.2d 442. In the instant case, the trial court found that:

this matter concerns a common nucleus of operative facts such that there are questions of fact and law common to all members of the class. These questions include 1) whether a given individual purchased a vehicle from a Ganley dealership during the Class Period, 2) whether she signed a Purchase Agreement identical or substantially identical to that at issue, 3) whether the arbitration clause is violative of the [CSPA], 4) and is so, whether the Court should award a classwide damage remedy predicated upon such violation(s) of law.

{¶24} Ganley's alleged violation of the CSPA, based on inclusion of the incomplete and misleading arbitration provision in its consumer sales agreements creates such a common, class-wide contention. Accordingly, the commonality prerequisite is satisfied.

(5) Typicality

{¶25} "The requirement for typicality is met where there is no express conflict between the class representatives and the class." *Hamilton* at 77. Here, the trial court found that:

the claims of the representative parties are typical of the claims of the class. There is no express conflict between the representatives and the absent class members. The same unlawful conduct, i.e., the use of the arbitration clause, was directed at the representatives and the class members; and that conduct is the crux of class member claims.

{¶26} This same conduct gives rise to the claims of the other putative class members, and the claims are governed by the same legal theory — that Ganley's

inclusion of such a provision in their sales agreements violated the CSPA. Thus, the typicality prerequisite is satisfied.

(6) Adequate Representation

{¶27} A class representative is “deemed adequate so long as his or her interest is not antagonistic to that of other class members.” (Citations omitted.) *Id.* at 78. In the instant case, the trial court found that “the representative parties will fairly and adequately represent the interests of the class. Plaintiff representatives have no interest which antagonistic to the interest of the class as a whole. Indeed, they are seeking to obtain relief for the class members prior to turning attention to their individual claims.” Accordingly, the Felixes are adequate class representatives.

(7) Civ.R. 23(B) Requirements

{¶28} Having determined that the requirements of Civ.R. 23(A) have been met, we now look to Civ.R. 23(B). Here, the trial court found that the class action could be maintained under both Civ.R. 23(B)(2) and (3), which provide that a class action may be maintained if the prerequisites of Civ.R. 23(A) are satisfied, and

(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; or

(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.

{¶29} Ganley argues that the trial court's class certification under Civ.R. 23(B)(2) was improper because there is no relief that would be appropriate for the class as a whole since relief could only be awarded on the basis of individualized proof of procedural unconscionability, and Civ.R. 23(B)(2) is inapplicable when the primary relief requested is damages.

{¶30} In the instant case, the trial court determined that Ganley "acted on grounds applicable to the class as a whole, thereby making appropriate final injunctive relief and corresponding declaratory relief." The court reasoned that the use and enforcement of the arbitration clause "constitutes a threatened harm to class members as evidenced * * * by the litigation of the Defendants' Motion to Stay and Motion to Compel Arbitration." The court further stated that

[t]he class is cohesive in that each class member executed the same or substantially same Purchase Agreement which failed to satisfy the requirements of the [CSPA], by failing to provide certain material information at the time it was due; and the Court will issue relief to protect those class members from prejudice thereby.

{¶31} Under Civ.R. 23(B)(2), the plaintiff must show that the defendant's actions impact the entire class and that final injunctive or declaratory relief is appropriate. "Certification under Civ.R. 23(B)(2) depends upon what type of relief is primarily sought, so where the injunctive relief is merely incidental to the primary claim for money damages, Civ.R. 23(B)(2) certification is inappropriate." *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶17, citing *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180 (9th Cir.2001).

{¶32} As discussed above, the use of the arbitration clause is at issue, not procedural unconscionability as Ganley contends. The use of the arbitration clause constitutes a threat to the class as a whole. The Ohio Supreme Court has stated:

"Disputes over whether the action is primarily for injunctive or declaratory relief rather than a monetary award neither promote the disposition of the case on the merits nor represent a useful expenditure of energy. Therefore, they should be avoided. If [Civ.R. 23(A)] prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under [Civ.R. 23(B)(2)]."

Hamilton, 82 Ohio St.3d at 87, 694 N.E.2d 442, quoting Wright, Miller & Kane, *Federal Practice and Procedure*, Section 1775, at 470 (2d Ed.1986). Accordingly, the class is maintainable under Civ.R. 23(B)(2).

{¶33} With respect to Civ.R. 23(B)(3), Ganley argues the trial court erred in certifying an "all customers" class because it "extends beyond the scope of the

statute" and includes individuals who have no claim and who have sustained no actual damages as a result of Ganley's inclusion of the arbitration provision in its sales agreements.

{¶34} Civ.R. 23(B)(3) provides that in order to certify a class in an action for damages, the trial court must make two findings. First, it must find that questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and second, the court must find that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. In its analysis under Civ.R. 23(B)(3), the trial court found that:

questions of law and fact common to the class predominate over any questions affecting efficient adjudication of this controversy.

Specifically, it was Defendants' common course of conduct under the direction of defendant Ganley Management Co. and its General Counsel * * * which brought forth and regulated the use of the arbitration clause. The use of the arbitration clause, i.e., the Defendants' conduct, is itself the basis for relief. Re-litigating a class member's right to relief over and over again would be a drain on the judiciary and serve no valid purpose. Few if any class members would likely be able to effectively challenge the Defendants due to the cost of litigation. If they could challenge Defendants, those costs would be improvident, since the illegality of the clause has been decided and affirmed by the Court of Appeals, and the cost of further litigation would be wasteful of judicial and party resources.

{¶35} The Ohio Supreme Court has stated that:

the common questions must represent a significant aspect of the case and they must be able to be resolved for all members of the

class in a single adjudication. And, in determining whether a class action is a superior method of adjudication, the court must make a comparative evaluation of the other procedures available to determine whether a class action is sufficiently effective to justify the expenditure of judicial time and energy involved therein.

Schmidt v. Avco Corp., 15 Ohio St.3d 310, 313, 473 N.E.2d 822 (1984), citing Wright & Miller, *Federal Practice and Procedure*, Section 1779, at 59 (1972) .

{¶36} Here, as the trial court found, the common questions of law and fact arise from Ganley's common course of conduct, which brought forth and regulated the use of the arbitration clause. Furthermore, the claims of the putative class members arise from the arbitration clause. The trial court noted that the costs of individual litigation would be improvident, since the illegality of the clause has been affirmed by this court, and the cost of further litigation would be wasteful of judicial and party resources. The Ohio Supreme Court has found that

the trial court is in the best position to consider the feasibility of gathering and analyzing class-wide evidence. Since the trial court's ruling did not exceed the bounds of reasonableness, we find that it acted within its discretion in resolving that there are common questions of fact among class members that can be presented in an efficient fashion.

In re Consol. Mtge. Satisfaction Cases, 97 Ohio St.3d 465, 2002-Ohio-6720, 780 N.E.2d 556, ¶ 12. Likewise, we find that the trial court in the instant case properly concluded that the Felixes satisfied Civ.R. 23(B)(3).

Class Actions and the CSPA

{¶37} Although the Felixes have satisfied the Civ.R. 23 requirements for certifying a class action, we must now turn to the requirements of R.C. 1345.09(B), because classwide relief is sought for an alleged violation of the CSPA.

{¶38} “R.C. 1345.09(B) provides that a consumer may qualify for class-action status only when a supplier acted in the face of prior notice that its conduct was deceptive or unconscionable. The prior notice may be in the form of (1) a rule adopted by the Attorney General under R.C. 1345.05(B)(2) or (2) a court decision made available for public inspection by the Attorney General under R.C. 1345.05(A)(3).” *Marrone v. Philip Morris USA, Inc.*, 110 Ohio St.3d 5, 2006-Ohio-2869, 850 N.E.2d 31, ¶ 9. Cases that “involve industries and conduct very different from the defendant’s do not provide meaningful notice of specific acts or practices that violate the CSPA.” *Id.* at ¶ 21. Likewise, general administrative rules are “not sufficient to put a reasonable person on notice” that a specific act or practice is prohibited. *Id.* at ¶ 23. Rather,

[p]rior notice may * * * be in the form of “an act or practice declared to be deceptive or unconscionable by rule adopted under [R.C. 1345.05(B)(2)].” R.C. 1345.09(B). R.C. 1345.05(B)(2) authorizes the Attorney General to “[a]dopt, amend, and repeal substantive rules defining with reasonable specificity acts or practices that violate sections [R.C. 1345.02 and 1345.03].”

Id. at ¶ 22.

{¶39} Ganley argues that the trial court abused its discretion in certifying the class because the prior notice requirement in R.C. 1345.09(B) for maintaining a CSPA class action was not met. Ganley contends that the class “extends beyond the scope” of the CSPA. We disagree.

{¶40} In the instant case, the trial court held that the prior notice requirement set forth in R.C. 1345.09(B) and *Marrone* was met by Ohio Adm.Code 109:4-3-16(22) and two prior court decisions contained in the Attorney General’s public inspection file involving unfair and deceptive practices in connection with motor vehicle sales. The trial court concluded that Ohio Adm.Code 109:4-3-16(22) and the acts and practices contained within the prior decisions gave the required notice to Ganley under R.C. 1345.09 — that all material terms must be included in a written contract for the sale of an automobile in Ohio.

{¶41} Ohio Adm.Code 109:4-3-16(22) provides that

It shall be a deceptive and unfair act or practice for a dealer, manufacturer, advertising association, or advertising group, in connection with the advertisement or sale of a motor vehicle, to:
* * * [f]ail to integrate into any written sales contract, all material statements, representations or promises, oral or written, made prior to obtaining the consumer’s signature on the written contract with the dealer[.]³ (Emphasis added.)

³It is not entirely clear, following the Ohio Supreme Court’s decision in *Williams v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410, whether Ohio Adm.Code 109:4-3-16(B)(22) remains a viable basis upon which to base a CSPA violation at least “absent proof of fraud, mistake, or other invalidating cause.” *Id.* at ¶ 20. In *Williams*, the Ohio Supreme Court held that “[t]o the extent

{¶42} The trial court held that Ganley “fail[ed] to integrate all material statements upon [its] use of the arbitration clause” and “violated [Ohio Adm.Code 109:4-3-16(B)(22)] when [it] failed to advise consumers as to the rules of the American Arbitration Association and the fees associated therewith.” We agree. The arbitration clause at issue was found to be incomplete and misleading because did not include important and material information. By failing to integrate “all material statements” in the purchase agreement, the arbitration clause violates Ohio Adm.Code 109:4-3-16(B)(22).

{¶43} The trial court also found that two decisions in the public inspection file, *Smith v. Discount Auto Sales*, Lorain C.P. No. 97 CV 120022 (Mar. 19, 1998), PIF No. 10001735, and *Renner v. Derin Acquisition Corp.*, 111 Ohio App.3d 326, 676 N.E.2d 151 (8th Dist.1996), PIF No. 10001587, gave the required notice under R.C. 1345.09. Both decisions involve the same industry — automobile sales — automobile sales agreements, and the dealer’s omission of allegedly material information from an automobile sales agreement. Both

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.” *Id.* at paragraph one of the syllabus. The court further held that Ohio Adm.Code 109:4-3-16(B)(22) was “not enforceable” due to its conflict with R.C. 1302.05. *Id.* at ¶ 22. In addressing the impact of *Williams*, the trial court stated that “in the instant case[,] the [parol] evidence rule was not an issue regarding [Ganley’s] failure to integrate all material statements upon their use of the arbitration. This Court and the Eighth Judicial District Court of Appeals have decided that [Ganley] violated that regulation when [it] failed to advise consumers as to the rules of the American Arbitration Association and the fees associated therewith.”

Smith and *Renner* involved the failure to integrate material terms of the parties' agreement, to which the parties had allegedly previously agreed, in the sales contract. The conduct and practices at issue in those cases were similar to the conduct at issue here, i.e., Ganley's inclusion of an incomplete and misleading arbitration provision in its sales agreement. Therefore, these decisions provided "meaningful notice" to Ganley that its conduct was unfair and deceptive under *Marrone* and R.C. 1345.09(B). Accordingly, the Felixes satisfied the prior notice requirement and the trial court did not abuse its discretion in certifying the class under the CSPA.

Notice Requirements for a Civ.R. 23(B)(3) Class
& Damages Award under the CSPA

{¶44} Lastly, Ganley argues the trial court's class certification order was procedurally deficient because the trial court proceeded to grant judgment in favor of the class without complying with any of the prejudgment notice requirements set forth in Civ.R. 23(C)(2). Ganley further argues that the CSPA limits damages in class actions to actual damages, and the trial court erred by awarding each class member \$200 in damages for individual violations of the CSPA. The propriety of the trial court's award, however, is outside of the scope of our review on appeal because Ganley has only assigned as error the trial court's certification of the class, not the court's entry of partial judgment on the merits, and the partial judgment on the merits is not a final appealable order.

{¶45} Appellate courts have jurisdiction to review the final orders or judgments of lower courts within their appellate districts. Ohio Constitution, Article IV, Section 3(B)(2). An order must be final before it can be reviewed by an appellate court. "If an order is not final, then an appellate court has no jurisdiction." *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989).

{¶46} "An order of a court is a final appealable order only if the requirements of both R.C. 2505.02 and, if applicable, Civ.R. 54(B), are met." *State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 2002-Ohio-5315, 776 N.E.2d 101, ¶ 5, citing *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 541 N.E.2d 64 (1989), syllabus.

{¶47} R.C. 2505.02(B)(4) provides that an order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when that order

grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

{¶48} Civ.R. 54(B) requires that a court make an express determination that there is no just reason for delay in order to make appealable an order adjudicating fewer than all the claims or the rights of fewer than all the parties, and must be followed when a case involves multiple claims or multiple parties. *State ex rel. A & D Ltd. Partnership v. Keefe*, 77 Ohio St.3d 50, 56, 671 N.E.2d 13 (1996).

{¶49} The trial court's order giving rise to the instant appeal was both a ruling on class certification and an entry of partial judgment on the merits. Because the partial judgment does not dispose of all claims of all parties to this litigation, we agree with the Felixes' contention that the judgment is not a final appealable order under R.C. 2505.02 and is not subject to review at this time.

Conclusion

{¶50} We are mindful that "due deference must be given to the trial court's decision. A trial court which routinely handles case-management problems is in the best position to analyze the difficulties which can be anticipated in litigation of class actions. * * * A finding of abuse of discretion * * * should be made cautiously." *Marks*, 31 Ohio St.3d at 201, 509 N.E.2d 1249. Here, the trial court conducted a rigorous analysis into whether the prerequisites for class certification under Civ.R. 23 have been satisfied. *See Stammco, L.L.C. v. United Tel. Co. of Ohio*, Slip Opinion No. 2013-Ohio-3019, syllabus (where the Ohio Supreme Court held that

[a]t the certification stage in a class-action lawsuit, a trial court must undertake a rigorous analysis, which may include probing the underlying merits of the plaintiff's claim, but only for the purpose of determining whether the plaintiff has satisfied the prerequisites of Civ.R. 23.

The court presided over the instant case for over eleven years, heard witness testimony and extensive oral argument, and concluded that the Felixes established the requirements to maintain a class action under Civ.R. 23, and the prior notice required to maintain a CSPA class action under R.C. 1345.09(B). The trial court deemed class certification appropriate.

{¶51} Based on the foregoing, we find that the trial court did not abuse its discretion in certifying the class in this case.

{¶52} Accordingly, the sole assignment of error is overruled.

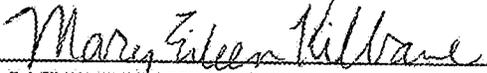
{¶53} Judgment is affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


MARY EILEEN KILBANE, JUDGE

LARRY A. JONES, SR., P.J., CONCURS;
KENNETH A. ROCCO, J., DISSENTS (WITH SEPARATE DISSENTING
OPINION ATTACHED)

KENNETH A. ROCCO, J., DISSENTING:

{¶54} I respectfully dissent from the majority's disposition of this appeal.

Although I agree that Ganley's inclusion of the subject arbitration provision in its consumer automobile sales agreements could constitute an unfair or deceptive practice giving rise to an individual claim on behalf of the Felixes under the CSPA, in my view, the Felixes failed to establish certain threshold requirements under Civ.R. 23(A) and R.C. 1345.09(B) necessary to maintain a CSPA class action based on these allegations.

Ambiguous Class Definition

{¶55} In this case, the trial court certified a Civ.R. 23(B)(2) and (B)(3) class consisting of

[a]ll consumers of Vehicles from any of the 25 Ganley Companies (see Plaintiff's Chart, Exhibit A, filed August 18, 2003) within the two-year period preceding commencement through the present date (the Class Period), who signed a purchase agreement containing the arbitration clause at suit or one substantially similar thereto.

The majority's opinion summarily concludes, based on what it represents to be "[a] plain reading" of the class definition, that "it would be administratively feasible to determine whether a particular person is a member of the class," and that, "[t]herefore, the identifiable class requirement is satisfied."

{¶56} I disagree. To satisfy Civ.R. 23(A)'s requirement of an identifiable class, the class definition must unambiguously specify the criteria by which to determine whether a particular individual is a member of the class. It is not the role of this court to "formulate the class" for the parties. *Stammco, L.L.C. v. United Tel. Co.*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, ¶ 12, quoting *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (1987). Although, in many cases, class membership may be readily determined where the term "commencement" is used to identify the class period, where, as here, the trial court certified the class in two different cases "commenced" at two different times, the class action allegations were not added until long after the first action was filed, and one of the defendants, Ganley Management, was not added as a defendant until nearly two years after the commencement of the first action, the meaning of the phrase "within the two-year period preceding commencement" is unclear.⁴ Does the class consist of (1) individuals who signed

⁴As the majority's opinion suggests, this appeal involves two cases with a complex procedural history. The Felixes filed their first action against Ganley Chevrolet, CV-442143, on June 18, 2001, asserting various individual claims relating to the interest rate and financing arrangements applicable to a vehicle the Felixes had purchased from Ganley Chevrolet in March 2001. On November 26, 2001, after Ganley

a purchase agreement within two years of the Felixes' filing of their original complaint in the first action, (2) individuals who signed a purchase agreement within two years of the Felixes' filing of their original complaint in the second action, (3) individuals who signed a purchase agreement within two years of the amendments adding the class allegations, or (4) as it relates to the claims against Ganley Management, individuals who signed a purchase agreement within two years after Ganley Management was added as a defendant?⁵ Because I believe the phrase "within the two-year period preceding commencement" is ambiguous as applied in this case, I do not believe the class definition provides the requisite "means * * * specified at the time of certification to determine whether a particular individual is a member of the class." *Hamilton*, 82 Ohio St.3d at 74, 694 N.E.2d 442; *see also Stammco* at ¶ 11 (trial court abused its discretion in certifying class where class definition was ambiguous, "prevent[ing]

sought to enforce the arbitration provision at issue, the Felixes filed their second action, CV-454238, a declaratory judgment action against Ganley Chevrolet, in which they alleged that Ganley's inclusion of the arbitration provision in their purchase agreement violated the CSPA. Neither of the actions originally included class allegations. Amendments were made to the complaints in both cases, ultimately resulting in the Felixes filing a fourth amended complaint in the first action and a second amended complaint in the second action, both of which included class action allegations seeking declaratory and injunctive relief and/or monetary damages under the CSPA. The amendments to the complaints also affected the named defendants. Ganley Management was added as a defendant to the first action in 2003.

⁵The distinction between Ganley Chevrolet and Ganley Management in this case is not insignificant. For example, with respect to who is liable for the damages awarded, the trial court's order states that Ganley Management "shall be liable in full, while [Ganley Chevrolet] shall be liable only to those class members to whom it sold vehicles."

the class members from being identified without expending more than a reasonable effort”). Accordingly, I would find that the Felixes have failed to satisfy Civ.R. 23(A)’s requirement of an identifiable, unambiguous class.

CSPA’s “Meaningful Notice” Requirement

{¶57} I also take issue with the majority’s determination that Ohio Adm.Code 109:4-3-16(22) and the two prior court decisions from the Attorney General’s public inspection file relied upon by the trial court, *Smith v. Discount Auto Sales*, Lorain C.P. No. 97 CV 120022 (Mar. 19, 1998), PIF No. 10001735, and *Renner v. Derin Acquisition Corp.*, 111 Ohio App.3d 326, 676 N.E.2d 151 (8th Dist.1996), PIF No. 10001587, provided “meaningful notice” to Ganley, as required under R.C. 1345.09(B) and *Marrone v. Philip Morris USA, Inc.*, 110 Ohio St.3d 5, 2006-Ohio-2869, 850 N.E.2d 31, that its inclusion of the subject arbitration provision in its automobile sales agreements constituted an unfair or deceptive practice under the CSPA.

{¶58} Ohio Adm.Code 109:4-3-16(22) provides that

It shall be a deceptive and unfair act or practice for a dealer, manufacturer, advertising association, or advertising group, in connection with the advertisement or sale of a motor vehicle, to: * * * [f]ail to integrate into any written sales contract, all material statements, representations or promises, oral or written, made prior to obtaining the consumer’s signature on the written contract with the dealer[.]⁶

⁶I agree with the majority that “[i]t is not entirely clear, following the Ohio Supreme Court’s decision in *Williams v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410, whether Ohio Adm.Code 109:4-3-16(B)(22)

{¶59} There has been no claim in this case that arbitration was ever the subject of any “statements, representations[,] or promises * * * made prior to obtaining the customer’s signature on the written contract with the dealer,” other than, of course, the arbitration provision itself. To the contrary, the Felixes complained that “no part of the arbitration clause was explained” and that Jeffrey Felix “wasn’t told anything” regarding arbitration before he signed the sales agreement. In other words, the Felixes’ CSPA claim is not premised on allegations that Ganley failed to properly integrate prior “statements, representations[,] or promises” made to induce the Felixes and other class members to purchase vehicles — the conduct regulated by Ohio Adm.Code 109:4-3-16(B)(22) — rather, the Felixes contend that inclusion of the arbitration provision in the sales agreement violated the CSPA because (1) the language of the arbitration provision was ambiguous, confusing, and misleading, (2) the provision failed to provide accurate and complete information about the arbitration process, and (3) as a result, consumers signing the agreement could not have known what being bound to arbitrate any disputes really meant. As such, I would find that Ohio Adm.Code 109:4-3-16(B)(22) is not applicable here

remains a viable basis upon which to base a CSPA violation at least ‘absent proof of fraud, mistake, or other invalidating cause.’ *Id.* at ¶ 20.” Moreover, the trial court’s determination (in considering the impact of *Williams*) that the parol evidence rule “was not an issue” in this case, in my view, further explains why Ohio Adm.Code 109:4-3-16(B)(22) does not apply to the facts here, i.e., because there was no alleged prior statement or representation made regarding arbitration that Ganley failed to integrate into its sales agreements.

and did not provide meaningful notice to Ganley that its inclusion of the subject arbitration provision in its sales agreements was an unfair or deceptive act under the CSPA. *See Williams*, 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410, at ¶ 19 (“Ohio Adm.Code 109:4-3-16(B)(22) provides that an automobile dealer violates the CSPA if it fails to integrate all oral representations and promises made prior to obtaining the consumer’s signature on the written contract into that contract.”); *Gonzalez v. Spofford*, 8th Dist. Cuyahoga No. 85231, 2005-Ohio-3415, ¶ 26 (dealer violated Ohio Adm.Code 109:4-3-16(B)(22) by failing to integrate promise to assume debt on old plaintiffs’ car, which dealer made to induce plaintiffs to purchase a new vehicle, into the written sales contract); *cf. Shumaker v. Hamilton Chevrolet, Inc.*, 184 Ohio App.3d 326, 2009-Ohio-5263, 920 N.E.2d 1023, ¶ 24-30 (4th Dist.) (trial court erred in finding that dealer violated Ohio Adm.Code 109:4-3-16(B)(22) by omitting a description of exterior paint damage from the written contract where the supplier’s disclosure of damage to the vehicle, without more, would not induce a reasonable consumer to purchase the vehicle).⁷

⁷There may also be an issue as to whether Ohio Adm.Code 109:4-3-16(B)(22) applies to Ganley Management. Ganley Management is not a dealer, but provides management-related services to all the Ganley auto dealerships. Under Ohio Adm.Code 109:4-3-16(B)(22), the prohibited conduct is limited to actions by “dealers, manufacturers, advertising associations, or advertising groups.” Under Ohio Adm.Code 109:4-3-16(A)(1), a “dealer” is “any person engaged in the business of selling, offering for sale or negotiating the sale of five or more motor vehicles during a twelve-month period, commencing with the day of the month in which the first such sale is made, or leasing any motor vehicles, including the officers, agents, salespersons, or

{¶60} Nor would I find that the two decisions relied upon by the trial court from the public inspection file, *Smith, supra*, and *Renner, supra*, provided “meaningful notice” to Ganley that its conduct was unfair and deceptive under *Marrone, supra*, and R.C. 1345.09(B). Although, as the majority points out, these decisions involve the same industry — automobile sales — an analysis of the facts of those cases shows that the conduct at issue in those cases was not “substantially similar” to the conduct at issue here.

{¶61} *Smith* involved a defendant’s failure to honor an express oral warranty that the plaintiff could obtain an unconditional refund if the vehicle at issue did not pass an E-Check or if other mechanical problems arose with the vehicle. Notwithstanding the defendant’s statements to the plaintiff regarding the existence of an express warranty, the defendant marked the contract that the vehicle had been sold “as is” and ultimately refused to honor the warranty in full.

{¶62} In *Renner*, the plaintiff had purchased a vehicle using a GM employee discount certificate she had obtained from her son, a former GM employee. *Renner*, 111 Ohio App.3d at 328-329, 676 N.E.2d 151. At the time she signed the purchase agreement, no one at the dealership told the plaintiff

employees of such a person; or any person licensed as a motor vehicle dealer or salesperson under Chapter 4517. of the Revised Code.” An “authorized agent” is defined in Ohio Adm. Code 109:4-3-16(A)(4) as “any person within the dealership with designated authority to contractually bind the dealership.”

about the requirements for the GM employee discount certificate program, and the dealership had taken no action to determine the validity of the certificate, which it was required to do. *Id.* at 330. After the plaintiff drove away with the vehicle, the dealer learned that the plaintiff's certificate was invalid and would not be honored by GM. *Id.* The dealer then contacted the plaintiff, informed her that GM would not honor the certificate, and demanded that she pay an additional sum for the purchase of the vehicle. *Id.* When the plaintiff refused to pay the additional sum requested, the dealer refused to deliver the vehicle title to her. *Id.* at 330-331.

{¶63} The dealer argued that the validity of the certificate was a condition precedent to the plaintiff obtaining a discounted price on the vehicle. *Id.* at 333. The purchase agreement, however, made no reference to the GM employee discount and did not state that the vehicle sales price was contingent upon meeting requirements for the GM discount. *Id.* at 330, 333. Having failed to reference the plaintiff's redemption of the employee discount certificate in the written sales contract, the court held that the dealer was estopped to assert an oral condition precedent as an excuse for withholding the certificate of title it was otherwise required to deliver. *Id.* at 336.

{¶64} While certain aspects of the conduct in *Smith* or *Renner* may bear some similarity to the conduct at issue in this case, in my view, the defendants' actions in *Smith* and *Renner* are not "substantially similar" to Ganley's alleged

unfair and deceptive conduct in this case, i.e., the inclusion of an incomplete and misleading arbitration provision in its sales agreements.

{¶65} “Substantial similarity” requires a level of “specificity as to the wrongful conduct.” *Gascho v. Global Fitness Holdings, LLC*, 863 F.Supp.2d 677, 695-696 (S.D. Ohio 2012) (applying substantial similarity requirement to various decisions). It means “a similarity not in every detail, but in essential circumstances or conditions.” *Marrone*, 110 Ohio St.3d 5, 2006-Ohio-2869, 850 N.E.2d 31, at ¶ 24. “While this specificity requirement does not mandate identical facts (which would be virtually impossible to show because every situation has distinguishable facts), the level of specificity must go beyond the general prohibitions of the CSPA.” *Gascho* at 695-696; see also *In re Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prods. Liab. Litigation*, 880 F.Supp.2d 801, 870 (S.D. Ohio 2012) (concluding decision in which the defendant placed a vehicle in the stream of commerce that was afflicted with a “multitude of different problems” that “required [the plaintiff] to have the car in for repairs twenty times over a two-year period” was unlike conduct at issue in which defendant allegedly placed a vehicle into the stream of commerce with one defect that required repair on one occasion); *Kline v. Mtge. Elec. Sec. Sys.*, S.D. Ohio No. 3:08cv408, 2010 U.S. Dist. LEXIS 143391 (Dec. 30, 2010) (attorney’s attempts to collect on a stale, defective, and discharged judgment as to an automobile lease was not substantially similar to a mortgage service company’s attempts to

collect attorney fees that could not properly be imposed in connection with a defaulted residential mortgage).

{¶66} Although *Smith*, *Renner*, and this case all arguably involved, in very general terms, a dealer's omission of information from an automobile sales agreement, the type of information omitted, the way in which the information was omitted, and the surrounding circumstances are very different. Both *Smith* and *Renner* involved (along with other conduct that is not applicable here), the failure to integrate specific, material terms to which the parties had allegedly previously agreed into the sales contract. As explained above, this case does not.

{¶67} Further, although in *Renner*, there is some discussion of the dealer's obligation "to integrate in[to] the final contract 'all material statements, representations, or promises,'" including any agreed terms relating to the redemption of the employee discount certificate, the CSPA violations at issue centered primarily on the dealer's attempt to increase the purchase price and failure to deliver the certificate of title for the vehicle after the plaintiff had refused to pay the increased price demanded by the dealer. In *Smith*, the CSPA violations centered around the defendant's failure to honor the terms of the express warranty that had been given to the plaintiff. Because, in my view, *Smith* and *Renner* do not "share the essential characteristics or conditions" alleged in this case, I do not agree with the majority's conclusion that they

provided “meaningful notice” to Ganley that its actions constituted a deceptive act or practice under R.C. 1345.09(B).

CSPA Limitation of Damages

{¶68} Further, even if *Smith, Renner*, or Ohio Adm.Code 109:4-3-16(B)(22), provided Ganley with the meaningful notice required by R.C. 1345.09(B), I would still find that the trial court abused its discretion in certifying the putative class as a Civ.R. 23(B)(3) damages class under the CSPA because the class is overly broad and includes individuals who sustained no actual damages as a result of the conduct at issue.

{¶69} Where classwide relief is sought for a violation of the CSPA, the recoverable damages are limited to actual damages. R.C. 1345.09(B); *Washington v. Spitzer Mgt.*, 8th Dist. Cuyahoga No. 81612, 2003-Ohio-1735, ¶ 32 (“CSPA limits the damages available in class actions to actual damages”); *Konarzewski v. Ganley, Inc.*, 8th Dist. Cuyahoga No. 92623, 2009-Ohio-5827, ¶ 46 (“class action plaintiffs must prove actual damages under the CSPA”). A showing of actual damages is therefore required before a CSPA class seeking the recovery of damages may be properly certified. *See Searles v. Germain Ford of Columbus, L.L.C.*, 10th Dist. Franklin No. 08AP-728, 2009-Ohio-1323, ¶ 22 (“The fact that statutory damages are not available in a class action indicates proof of actual damages is required before certification of an R.C. 1345.09 class action is proper.”). Only those individuals who sustained actual damages as a result of

an alleged CSPA violation may properly be included within a Civ.R. 23(B)(3) damages class. *See, e.g., Konarzewski*, 2009-Ohio-5827 at ¶ 47-48 (observing that to comply with R.C. 1345.09(B), Civ.R. 23(B)(3) class would “need to be narrowed” to include only those individuals who sustained actual damages).

{¶70} Although I can certainly envision scenarios in which customers may have sustained actual damages as a result of Ganley’s inclusion of the arbitration provision in their sales agreements, e.g., attorney fees incurred in opposing efforts to enforce the arbitration provision (as the Felixes have incurred in this case), damages resulting from a customer’s decision to forgo recourse it might otherwise have pursued due to confusion regarding what arbitration of the dispute under the sales agreement entailed, I can also envision scenarios in which customers sustained no actual damages at all, such as where a customer had no dispute with Ganley. There is certainly nothing in the record that suggests that all Ganley customers sustained actual damages as a result of Ganley’s use of the arbitration provision, such that a class of “[a]ll consumers of Vehicles from any of the 25 Ganley Companies * * * who signed a purchase agreement containing the arbitration clause at suit or one substantially similar thereto” could be properly certified as a Civ.R. 23(B)(3) damages class under the CSPA.

{¶71} The majority does not address this issue. Instead, the majority concludes that because the trial court’s “partial judgment on the merits” is not

a final appealable order and “not subject to review at this time,” the court need not consider the CSPA’s limitation on damages or whether the trial court erred in “exercis[ing] its discretion” and awarding each class member \$200 in damages for violations of the CSPA.

{¶72} However, the CSPA’s damages limitation impacts not only the damages that may ultimately be recovered by a properly certified class but whether a putative class may be properly certified as a Civ.R. 23(B)(3) CSPA class in the first instance. *See, e.g., Searles*, 2009-Ohio-1323 at ¶ 22; *Konarzewski*, 2009-Ohio-5827, at ¶ 47-48. Because the Civ.R. 23(B)(3) class certified by the trial court includes individuals who sustained no actual damages, I would find that the trial court abused its discretion in certifying the class under the CSPA.⁸

⁸The trial court’s certification of the Civ.R. 23(B)(3) damages class under the CSPA (and its classwide damages award) was based on the theory that the trial court could, in “its discretion,” award each class member \$200 in damages for violations of the CSPA because class members “were denied material information concerning their recourse * * * against the vehicle merchant, should they have the need for recourse.” However, no provision exists for the recovery of such “discretionary” damages in a CSPA class action. In support of its damages theory, the trial court cites *State v. Rose Chevrolet, Inc.*, 12th Dist. Butler No. CA910120214, 1993 Ohio App. LEXIS 3281 (June 28, 1993), involving a dealer’s practice of selling used rental car vehicles as “factory official” vehicles. The trial court determined that the practice was an unfair and deceptive act under the CSPA and, based on testimony from a manager of a used car dealership regarding the difference in value between a used rental car and a “factory official” car, awarded each class member who had purchased such a vehicle \$500 in damages. *Id.* at *2, *4. The appellate court affirmed. *Id.* at *6. *Rose Chevrolet*, unlike this case, involved an award of actual damages to class members based on the “benefit of the bargain” theory, i.e., “the difference between the value of property as it was represented to be and its actual value at the time it was received or purchased.” *Id.* at *5. It does not support the trial court’s damages theory in this case.

Prejudgment Notice Requirement for Civ.R. 23(B)(3) Class Actions

{¶73} In my view, the trial court's class certification order is also procedurally deficient. I believe that the trial court, in purporting to adjudicate the merits and to award damages as part of its class certification order — without providing the prejudgment notice required under Civ.R. 23(C)(2) — is proceeding on an improper procedural course. See *Stammco, L.L.C. v. United Tel. Co. of Ohio*, Slip Opinion No. 2012-0169, 2013-Ohio-3019, ¶ 33 (July 16, 2013) (“[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the ‘metho[d]’ best suited to adjudication of the controversy ‘fairly and efficiently.’”), quoting *Amgen v. Connecticut Retirement Plans & Trust Funds*, ___ U.S. ___, 133 S.Ct. 1184, 1191, 185 L.Ed.2d 308 (2013); *Cullen*, 2011-Ohio-6621 at ¶ 55 (statement in trial court's findings of fact and conclusions of law in class certification order that went “to the heart of the

The Felixes contend that the trial court's “discretionary damages” theory is nothing more than a “creative approach” to damages, and that such approaches to damages have been expressly authorized in CSPA cases. In the cases cited by the Felixes in support of this proposition, however, there was either a specific statute governing the amount of damages to be awarded, *Celebrezze v. Hughes*, 18 Ohio St.3d 71, 479 N.E.2d 886 (1985) (odometer fraud), or a clear method by which actual damages were calculated, supported by the evidence in the record. See *Rose Chevrolet, supra*; *Wiseman v. Kirkman*, 2d Dist. Darke No. 1575, 2002-Ohio-5384. In this case, there was neither. Accordingly, I would find that the trial court abused its discretion in determining that \$200 in “discretionary damages” could be awarded to all class members based on Ganley's violation of the CSPA and in certifying a Civ.R. 23(B)(3) class under the CSPA based on this “creative” damages theory which is contrary to applicable law.

merits of the case” and was “possibly outcome determinative” was “inappropriate” at the class certification stage).

{¶74} Civ.R. 23 requires that prejudgment notice be provided to members of a (B)(3) class. Civ.R. 23(C)(2) provides:

In any class action maintained under subdivision (B)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (a) the court will exclude him from the class if he so requests by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

It is clear from the language of the rule that the notice required by Civ.R. 23(C)(2) is to be provided before judgment is entered on any claims of a Civ.R. 23(B)(3) class.

{¶75} Civ.R. 23(C) contains significant procedural protections required for due process. See *Dukes*, 131 S.Ct. at 2558-2559, 180 L.Ed.2d 374, citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). Without the requisite prejudgment notice, due process may be impaired.

Conclusion

{¶76} Like the majority, I am mindful that “due deference must be given” to a trial court’s decision regarding class certification. *Marks*, 31 Ohio St.3d at 201, 509 N.E.2d 1249. However, a trial court’s discretion in deciding whether to certify a class must be exercised within the framework of Civ.R. 23, and in the

case of a putative class action under the CSPA, the requirements of R.C. 1345.09(B). *Hamilton*, 82 Ohio St.3d at 70, 694 N.E.2d 442; R.C. 1345.09(B). It is our job to ensure that the trial court “carefully appl[ies] the class action requirements” and conducts a “rigorous analysis” into whether the prerequisites for class certification have been satisfied. *Hamilton* at 70. Where classwide relief is sought for an alleged violation of the CSPA, the requirements of R.C. 1345.09(B), as well as the requirements of Civ.R. 23, must be met.

{¶77} “A determination by a trial court regarding class certification that is clearly outside the boundaries established by Civ.R. 23, or that suggests that the trial court did not conduct a rigorous analysis into whether or not the prerequisites of Civ.R. 23 are satisfied, will constitute an abuse of discretion.” *Mozingo v. 2007 Gaslight Ohio, LLC*, 9th Dist. Summit Nos. 26164 and 26172, 2012-Ohio-5157, ¶ 8, quoting *Hill v. Moneytree of Ohio, Inc.*, 9th Dist. Lorain No. 08CA009410, 2009-Ohio-4614, ¶ 9. Likewise, “[w]here the trial court completely misconstrues the letter and spirit of the law, it is clear that the court has been unreasonable and has abused its discretion.” *Howland v. Purdue Pharma L.P.*, 104 Ohio St.3d 584, 2004-Ohio-6552, 821 N.E.2d 141, ¶ 26, quoting *Warner v. Waste Mgt.*, 36 Ohio St.3d 91, 99, 521 N.E.2d 1091 (1988), fn. 10.

{¶78} Based upon my analysis, for the reasons set forth above, I believe those circumstances exist here. I do not believe that prerequisites to class certification under Civ.R. 23(A) and R.C. 1345.09(B) were met in this case. I

would, therefore, find that the trial court abused its discretion in certifying the Civ.R. 23(B)(2) and (B)(3) CSPA class in this case and would reverse the trial court's order granting class certification.

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JEFFREY FELIX, *et al.*,

Plaintiffs,

vs.

GANLEY CHEVROLET, INC., *et al.*,

Defendants.

CASE NOS: CV-01-454238
CV-01-442143

On Remand from: CA-05-086990
-and-
CA-05-086991

JUDGE JOHN D. SUTULA

PROPOSED ORDER OF CLASS
CERTIFICATION AND FOR
PARTIAL JUDGMENT ON THE
MERITS

The Court having held an evidentiary hearing in these matters (hereinafter referred to in the singular absent language to the contrary) on February 6, April 2, and May 7, 2004 for the purpose of determining 1) whether this matter may be certified as a class action pursuant to Civil Rule 23, and 2) whether the arbitration clause at the center of the class aspects of this case was violative of Ohio law and therefore unenforceable; and the Court having received extensive written submissions on all issues dealt with herein; and the Court having denied Defendants' Motions for Stay Pending Arbitration on August 23, 2005 for the reason that the arbitration clause at issue was unconscionable and therefore unenforceable; and Defendants having appealed that ruling to the Eighth Judicial District Court of Appeals, which Court of Appeals affirmed this Court's ruling on the ground that the arbitration clause is unconscionable and therefore unenforceable, in material measure because the arbitration clause omits material information which Ohio law requires be included therein; and Defendants having petitioned for discretionary review in the Supreme Court of Ohio, which Court denied

said petition on February 7, 2007; and it appearing to the Court that this matter is ripe for class certification and judgment on the merits of certain class claims (as opposed to Plaintiff's individual claims, which are left for later determination), the Court grants class certification as to a Plaintiff Class, denies class certification as to a Defendant Class, and enters partial judgment on the merits in accordance with the findings hereinafter set forth.

Civ.R. 23 sets forth the requirements that plaintiff must meet for the court to certify its proposed class. Courts use a two-step process in analyzing Civ.R. 23. *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91; *Hamilton v. Ohio Savings Bank* (1998), 82 Ohio St. 3d 67. First, the court determines whether the prerequisites of Civ.R. 23(A) are satisfied. *Warner, supra*, at 96-98; *Hamilton, supra*, at 71-79. Second, the court determines whether one of the categories described in Civ.R. 23(B) applies. *Warner, supra*, at 94-96; *Hamilton, supra*, at 79-87. When considering class certification, the trial court may not consider the merits of the case. *Ojalvo v. Bd. of Trustees* (1984), 12 Ohio St.3d 230, 233. Instead, the complaint allegations are accepted as true. *Pyles v. Johnson* (2001), 143 Ohio App.3d 720, 731. Plaintiff bears the burden of proving by the preponderance of evidence that all the prerequisites of Civ.R. 23 are satisfied. *Warner*, 36 Ohio St.3d at 94. *Hoang v. E*Trade Grp., Inc.* (2003), 151 Ohio App.3d 363, 368.

In Civ.R. 23(A), courts recognize two implicit requirements: (1) the identification of an unambiguous class; and (2) membership in the class by the representative plaintiff; and four explicit requirements: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *Warner, supra*, at 96-98; *Hamilton, supra*, at 71-79.

ANALYSIS

Upon rigorous analysis under Civil Rule 23 of the Ohio Rules of Civil Procedure, the Court has determined that the prerequisites of Rule 23 have been satisfied. **Civil Rule 23(A) requirements**

I. Identifiable Class:

Clearly, there is an identifiable class, consisting as follows:

All consumers of Vehicles from any of the 25 Ganley Companies (see Plaintiff's Chart, Exhibit A, filed August 18, 2003) within the two-year period preceding commencement through the present date (the Class Period), who signed a purchase agreement containing the arbitration clause at suit or one substantially similar thereto. See *Lisa Washington v. Spitzer Management, Inc. et al (2003)*, Case No. 81612, 8th Dist.

II. Class Membership:

Defendants instituted the arbitration clause on or about 1998 and the Court need only look at the pre-printed form agreements which Ganley utilized and executed to identify the class and determine whether a given individual is a class member. Plaintiff is a member of the class so defined, having purchased a vehicle from Ganley Chevrolet, Inc., and signed a Purchase Agreement on or about March 2000, containing the subject arbitration clause.

III. Numerosity:

The Court finds that the class as above defined contains thousands of members and is thus so numerous that joinder of all members is impracticable.

IV. Commonality:

The Court finds that this matter concerns a common nucleus of operative facts such that there are questions of fact and law common to all members of the class. These questions include 1) whether a given individual purchased a vehicle from a Ganley dealership during the Class Period, 2) whether she signed a Purchase Agreement identical or substantially identical to that at issue, 3) whether the arbitration clause is violative of the Ohio Consumer Sales Practices Act, 4) and if so, whether the Court should award a classwide damage remedy predicated upon such violation(s) of law.

V. Typicality:

The Court finds that the claims of the representative parties are typical of the claims of the class. There is no express conflict between the representatives and the absent class members. The same unlawful conduct, i.e. the use of the arbitration clause, was directed at the representatives and the class members; and that conduct is the crux of class member claims.

VI. Adequate Representation:

a. Adequacy of the representatives:

The Court finds that the representative parties will fairly and adequately represent the interests of the class. Plaintiff representatives have no interest which is antagonistic to the interests of the class as a whole. Indeed, they are seeking to obtain relief for the class members prior to turning attention to their individual claims.

b. Adequacy of counsel:

Moreover, counsel to the class is experienced and qualified, as evidenced in the hearings before this Court and the reviewing courts wherein such counsel have ably prosecuted the claims of the class.

Civil Rule 23(B) requirements

I. Civil Rule 23(B)(2):

This action must satisfy one of the three elements in Civ.R. 23(B). Plaintiff argues that both subsections (2) and (3) are applicable herein. Civ.R. 23(B)(2) states "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[.]"

The Court finds that the Ganley defendants have acted on grounds applicable to the class as a whole, thereby making appropriate final injunctive relief and corresponding declaratory relief. As above stated it is the use and enforcement of the arbitration clause which is at issue in this matter. The use of the said clause constitutes a threatened harm to class members as evidenced in the instant case by the litigation of the Defendants Motion to Stay and Motion to Compel Arbitration. The class is cohesive in that each class member executed the same or substantially same Purchase Agreement which failed to satisfy the requirements of the Ohio Consumer Sales Practices Act, by failing to provide certain material information at the time it was due; and the Court will issue relief to protect those class members from prejudice thereby.

II. Civil Rule 23(B)(3):

Civ.R. 23(B)(3) states "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. . . ." Four factors must be taken into consideration:

(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.

a. Predominance of law and fact:

The Court finds that questions of law and fact common to the class predominate over any questions affecting only individual members of the class.

b. Superiority of Class Action:

The Court finds that the class action is superior to other methods for the fair and efficient adjudication of this controversy.

Specifically, it was Defendants' common course of conduct under the direction of defendant Ganley Management Co. and its General Counsel, Russell Harris, which brought forth and regulated the use of the arbitration clause. The use of the arbitration clause, i.e. the Defendants' conduct, is itself the basis for relief. Re-litigating a class member's right to relief over and over again would be a drain on the judiciary and serve no valid purpose. Few if any class members would likely be able to effectively challenge

the Defendants due to the cost of litigation. If they could challenge Defendants, those costs would be improvident, since the illegality of the clause has been decided and affirmed by the Court of Appeals, and the cost of further litigation would be wasteful of judicial and party resources.

Ohio Consumer Sales Practices Act, O.R.C. 1345.

The Court finds that since the hearings of 2004 the Supreme Court of Ohio rendered its decision in *Marrone v. Phillip Morris USA, Inc.* (2006), 110 Ohio St.3d 5, 2006-Ohio-2869, 850 N.E.2d 31, clarifying the circumstances under which a class action may be maintained under the Ohio Consumer Sales Practices Act, Section 1345.09 of the Ohio Revised Code ("CSPA"). Within the context of a class action against the tobacco companies for false advertising of so-called "light" cigarettes, the Supreme Court held that the challenged conduct must have been determined to be deceptive or unconscionable, for example, under regulations in the Ohio Administrative Code or in prior court decisions made available for public inspection by the Ohio Attorney General in the Public Inspection File.

Since *Marrone* was not decided at the time this case was commenced, the Plaintiffs did not plead satisfaction of its requirements. The Court shall treat portions of Plaintiffs' Supplemental Motion for an Order of Class Certification as a motion to amend the Complaint herein so as to conform to the *Marrone* pleading requirements. To the extent that *Marrone* requires that its unique requirements be pled (as opposed to set forth in other filings), the Court orders the Fifth Amended Complaint amended accordingly.

The Court finds that the *Marrone* requirements are met in this case. Plaintiff has alleged that the arbitration clause is in violation of Ohio Administrative Code 109:4-3-

16(B)(22), which prohibited the failure, in the business of selling automobiles, to integrate all material statements. However, the legislature has since then repealed said section under the ruling in *Williams v. Spitzer Autoworld Canton, L.L.C.* (2009), 122 Ohio St. 3d 546, 551. Nevertheless, in keeping with the Ohio Consumer Sales Practices Act's prohibition on unfair or deceptive and unconscionable acts and practices, the Supreme Court in *Williams v. Spitzer Autoworld Canton, L.L.C.* made it clear that only "To the extent that Ohio Adm. Code 109:4-3-16(B)(22) conflicts with the parole evidence rule as codified by R.C. 1302.05 and allows parole evidence contradicting the final written contract, Ohio Adm. Code 109:4-3-12(B)(22) constitutes an unconstitutional usurpation of the General Assembly's legislative function and is therefore invalid." *Id.* at 551-552. This court finds that in the instant case the parole evidence rule was not an issue regarding the Defendants failure to integrate all material statements upon their use of the arbitration clause. This Court and The Eighth Judicial District Court of Appeals have decided that Defendants violated that regulation when they failed to advise consumers as to the rules of the American Arbitration Association and the fees associated therewith. The OAC provision has been the subject of numerous court decisions which have been filed in the Attorney General's Public Information File. See *Smith v. Discount Auto Sales*, 97 CV 120022 (Lorain Cty. 1999), PIF No. 10001735; *Renner v. Derin Acquisition Corp.*, No. 69181 (Cuy. Cty. 1996), PIF No. 10001587. Therefore, the acts and practices contained within these decisions gave the required notice to the Defendants under 1345.09. These and other CSPA decisions gave ample notice to Defendants, as required by *Marrone*, that all material terms must be included in a written contract for the sale an automobile in Ohio.

Unlike *Marrone*, where the Supreme Court was persuaded that the aggregate of regulatory agencies impacting tobacco advertising rendered analogous situations *not* substantially similar to tobacco, Defendants here did not produce a sound reason why they failed to integrate material statements into their pre-printed Purchase Agreements. The OAC regulation which they violated is industry specific, and suggests a strong public policy of full disclosure in automobile sales.

The Court finds that CSPA permits, if it does not require, the Court to award monetary damages to consumers victimized by Defendants' violation of law. To allow Defendants to emerge from this seven-year legal battle, during which time they continued to use the offending clause, without sanction, would defeat the policies underlying CSPA and the rule of law. It would reward lawlessness aimed primarily at consumers.

The Ohio Legislature set a minimum damage award of \$200 for individual violations of the CSPA. In *State v. Rose Chevrolet, Inc.* (1993), CA91-12-214, 1993 Ohio App. LEXIS 3281, PIF 10001321, the Court set class member damages at \$500 for classwide misrepresentations as to vehicle history. This case, though not as severe as *Rose Chevrolet*, presents a significant violation of law. Consumers were denied material information concerning their recourse and against the vehicle merchant, should they have need for recourse. The Court will exercise its discretion and grant damages of \$200 per class member.

IT IS THEREFORE ORDERED:

1. Plaintiffs' Motion for Class Certification of a Plaintiff Class is granted under Civil Rules 23(B)(2)-(3) in accordance with the above findings;
2. Plaintiffs' Motion for Class Certification, to the extent it seeks certification of a Defendant Class is denied;

3. Plaintiffs and Plaintiff Class are awarded judgment, without prejudice to Representative Plaintiffs' individual claims, for violations of CSPA, Section 1345.02(B);
4. Representative Plaintiffs are, and each member of Plaintiff Class is, awarded damages in the amount of \$200 (not to exceed one award per vehicle), for which Defendant Ganley Management Co. shall be liable in full, while Defendant Ganley Chevrolet, Inc. shall be liable to only those class members to whom it sold vehicles;
5. Within 30 days hereof, pursuant to Rule 23(C), the parties shall jointly propose a plan for notice to class members, and distribution of judgment proceeds to those class members who do not request exclusion under Rule 23(C)(2). Defendants shall provide Plaintiffs' counsel with a full disclosure as to the means by which class members may be contacted at their last known address;
6. Defendant shall file a list of the names and addresses of all class members or potential class members within said time, consisting of all natural-person vehicle purchases from the Ganley Companies during the Class Period;
7. To the extent Defendants cannot determine whether an iteration of the arbitration clause is substantially similar to that which Plaintiffs signed (and, therefore, whether the consumer is within the class), Defendants shall present the clause to the Court, in an appropriate filing, and to Plaintiffs' counsel, within 15 days hereof, in writing. Defendant Ganley Management Co. shall also file within said time copies of any Purchase Agreements used during the Class Period in the sale of vehicles, by any Ganley Company, containing an arbitration clause which said Defendant believes is not substantially similar to that received by Representative Plaintiffs;
8. Within 30 days hereof, Defendant shall file a proposed claim form for use in instances where Defendant questions whether a given car purchaser bought his or her vehicle primarily for personal, family or household purposes;
9. Plaintiffs shall be entitled to costs herein, including the cost of notice and distribution of judgment proceeds, together with a reasonable attorneys fee to be determined by the Court upon notice; and
10. The Court shall conduct a status meeting with counsel to discuss the above and such other matters as shall be appropriate on the 10 day of September, 2012.

IT IS SO ORDERED.



 JOHN E. SUTULA

RECEIVED FOR FILING

SEP 10 2012

GERALD E. QUERST, CLERK
 By [Signature] Deputy

Order filed Sept 10, 2012
Sept 12 18th