IN THE SUPREME COURT OF OHIO

Cindy Satterfield, et al.,	)	
	)	**Case No. 2017-0684**
Plaintiffs-Appellees,	)	
	)	**On Appeal from the**
v.	)	**Eighth Appellate District,**
	)	**Cuyahoga County**
Ameritech Mobile Communications, Inc., et al.,	)	**Case No. 16-104211**
	)	
Defendants,	)	
	)	
and	)	
	)	
Cincinnati SMSA Limited Partnership,	)	
	)	
Defendant-Appellant.	)	

MERIT BRIEF OF AMICI CURIAE,OHIO COUNCIL OF RETAIL MERCHANTS, OHIO INSURANCE INSTITUTE, OHIO ALLIANCE FOR CIVIL JUSTICE, AND OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS, IN SUPPORT OF APPELLANT

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I. AMICI STATEMENT OF INTEREST

Amici curiae, Ohio Council of Retail Merchants, Ohio Insurance Institute, Ohio Alliance for Civil Justice, and Ohio Association of Civil Trial Attorneys, submit this brief in support of Appellant Cincinnati SMSA Limited Partnership. Amici are committed to maintaining a legal environment that supports business and economic development in Ohio. The Eighth District's decision, allowing class actions to be certified without the "rigorous analysis" required under Civ.R. 23, threatens to make Ohio an outlier and haven for class actions. Needless to say, such an environment is not conducive to business or economic development.

The Ohio Council of Retail Merchants ("Council") Founded in 1922, the Ohio Council of Retail Merchants is Ohio's oldest and largest advocate for the retail and wholesale industries, representing more than 7,000 retailers and wholesalers across the state. Ohio's retail industry accounts for $46.5 billion of Ohio's annual Gross Domestic Product and supports 1.5 million jobs, one in four of all Ohio jobs, more than any other industry. The Council promotes the interests of the retail and wholesale distribution industries and helps these enterprises achieve lasting excellence in all areas of their business. The Council is devoted to maintaining a legal environment that supports businesses and creates jobs, and it works closely with legislative and industry leaders to achieve that goal. The Council also monitors important litigation in the courts and participates as an amicus curiae in carefully selected cases that are particularly important to Ohio's businesses and citizens.

The Ohio Insurance Institute ("OII"), with approximately fifty insurance companies and reinsurance companies as members, has been the professional trade association for property and casualty insurance companies in Ohio for over fifty years. The OII has participated as an amicus in many important cases that have come before this Court.

The Ohio Alliance for Civil Justice ("OACJ") is a group of small and large businesses, trade and professional associations, professionals, non-profit organizations, local government associations, and others.[1] OACJ members support a balanced civil justice system that awards fair compensation to injured persons but also imposes sufficient safeguards so that defendants are not unjustly penalized and plaintiffs are not unjustly enriched. OACJ supports laws and policies that promote stability, predictability, and consistency in the civil justice system so that Ohio's businesses and professionals may know what risks they assume as they carry on commerce in this state.

The Ohio Association of Civil Trial Attorneys ("OACTA") is composed of attorneys, corporate executives, and claims professionals dedicated to the defense of civil lawsuits and the management of claims against individuals, corporations, and government entities. For more than fifty years, OACTA's mission has been to provide a forum where dedicated professionals can work together to promote and improve the administration of justice in Ohio.

II. STATEMENT OF FACTS

Amici adopt appellant Cincinnati SMSA Limited Partnership's Statement of Facts. Amici, however, confine their argument and analysis to Proposition of Law III.

III. INTRODUCTION

This Court should reverse the Eighth District's decision in *Satterfield v. Ameritech Mobile Communications, Inc.*, 8th District Cuyahoga No. 104211, 2017-Ohio-928, and adopt the rule set forth in *Comcast Corp. v. Behrend*, 569 U.S. 27, 133 S.Ct. 1426, 185 L.Ed.2d 15 (2013), which requires proof of class-wide injury *at the class certification stage*.

[1] The OACJ leadership includes members from the National Federation of Independent Business Ohio, the Ohio Association of Certified Public Accountants, the Ohio Hospital Association, the Ohio Manufacturers' Association, and other organizations.

In *Satterfield*, the Eighth District affirmed certification of a class without requiring the Plaintiffs to prove their ability to establish class-wide injury in fact at the trial on the merits. Instead, the Plaintiffs represented that they would employ a type of damages model that, once created, would be capable of establishing that each class member had, in fact, suffered an injury. That is, Plaintiffs had no damages model, only the intention to later create one. Despite the lack of an existing damages model that could be reviewed and tested by the defendant and the court, the Eighth District affirmed class certification. The Eighth District's ruling, which contravenes decisions of the United States Supreme Court and this Court, harms litigants, the courts, and the public.

- **Improvident class certification hurts plaintiffs and defendants alike.**

Class certification imposes enormous costs on litigants. Rather than deciding at the outset whether plaintiffs can meet the rigorous predominance requirement of Rule 23(B)(3), the Eighth District's decision forces the parties to engage in costly and time-consuming discovery, only to revisit the issue again—often in a hearing to decertify the class. Not only does improvident class certification drive up the cost of settlement and hurt defendants, it hurts plaintiffs who must also incur substantial discovery costs, only to learn later that their class was defective. Worse, if a defective damages model causes a case to fail on the merits, class members are bound by an adverse judgment that could have been avoided at the class-certification stage.

- **Improvident class certification hurts the public and undermines the courts.**

Improvident class certification also hurts the public, who are left to wonder whether the innovation of procedural joinder under Rule 23 benefits anyone but the lawyers. De-certification of an improvidently certified class inevitably undermines the public's confidence in our system

of justice, as they are left to wonder why important legal issues were simply swept under the rug for another day or, worse, whether they are getting a fair shake from our courts.

The Eighth District's decision not to require a damages model prior to class certification sends a signal to class-action plaintiffs that they will not be held to the evidentiary standard necessary to satisfy critical aspects of Rule 23. This diminished standard for class certification, if permitted to stand, threatens to make Ohio a haven for class actions from around the nation.

- ***Comcast* provides a reasonable rule requiring a rigorous analysis of damage models at the class-certification stage that should be adopted in Ohio.**

Courts routinely recognize the coercive power of meritless class-action suits to force even innocent defendants into untenable choices: incur the massive expenses and business disruption of defending the actions—along with potentially ruinous judgments—or settle the matters for amounts untethered to actual liability. In recent decisions applying Fed.R.Civ.P. 23's requirements for class certification, the United States Supreme Court has marched slowly but surely in the direction of restoring balance and predictability to the class-action equation. This Court, interpreting Ohio's analogous Rule 23, has reliably followed. *See Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, ¶ 40 (favorably citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) and *Comcast*, 569 U.S. 27, 133 S.Ct. 1426, 185 L.Ed.2d 515); *Cullen v. State Farm Mut. Auto Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 15–18 (same); *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, ¶ 32–33 (same). That trend should continue.

In *Dukes*, the United States Supreme Court made clear that a trial court needs to conduct a rigorous analysis to ensure that the prerequisites of Civ.R. 23 are satisfied before certifying a class. And, "[a]fter *Dukes* there can be no dispute that a trial court's rigorous analysis of the

evidence often requires looking into enmeshed legal and factual issues that are part of the merits of plaintiff's underlying claims." *Felix* at ¶ 26, citing *Dukes*, 564 U.S. at 351.

Shortly after *Dukes* was decided, the United States Supreme Court issued its decision in *Comcast* mandating a rigorous analysis of a class's proposed damages methodology at the class-certification stage—to ensure that the methodology measures only damages attributable to the class's liability theories. *Comcast*, 569 U.S. at 34. When plaintiffs stray from this premise—that damage calculations must be limited to liability theories—they cannot satisfy Rule 23(b)(3)'s predominance requirement. *Id.* A class cannot be certified under Rule 23(b)(3) unless "questions of law or fact common to class members *predominate* over any questions affecting only individual members." (Emphasis added.) Fed.R.Civ.P. 23(b)(3); Civ.R. 23(B)(3).

- **Plaintiffs' expert did not even develop a damages model.**

Here, the class of cell phone retail customers chose to use a damages model to demonstrate class-wide injury. The Plaintiffs' damages expert promised that a damages model would be forthcoming, but no such model existed at the time the class was certified. In the absence of an existing, applicable damages model, the trial court could not perform a rigorous analysis to ensure the model calculated only damages flowing from the class's liability theory. Yet, it certified the class. Similarly, the Eighth District affirmed the certification even though a rigorous analysis of the damages model was not and could not be performed.

This Court is asked to: (1) adopt *Comcast's* rule requiring a rigorous analysis of damage models at the class-certification stage—to promote stability and predictability in class actions filed in Ohio and to minimize the risk that Ohio becomes a haven for class actions; and (2) reverse the Eighth District's decision because the required rigorous analysis could not be performed on a non-existent or incomplete damages model.

IV. ARGUMENT

Proposition of Law No. 3: Where a plaintiff relies upon a damages model to establish that common issues would predominate, the model must demonstrate that injury-in-fact and damages can be proven on a class-wide basis.

A. Even meritless class actions present an unreasonable threat of liability for Ohio's businesses.

Courts have long recognized that the potential liability attendant to class actions—particularly those with weak merits but massive potential judgments—creates unreasonable pressure to settle. *In re Rhone-Poulenc Rohrer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.1995) (referring to settlements induced by a small probability of an immense judgment as "blackmail settlements"). That unreasonable pressure goes by other names, too. *Parker v. Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 22 (2d Cir.2003) (observing that the aggregation of large numbers of claims potentially creates an enormous aggregate recovery, "and thus an *in terrorem* effect on defendants").

- **The costs to defend coerce settlement of meritless claims.**

Of course, pressures to settle low-merit or meritless claims arise from factors other than massive potential liability, such as burdensome discovery, enormous business interruption, and significant defense costs. *See Stoneridge Invest. Partners, LLC v. Scientific-Atlantic, Inc.*, 552 U.S. 148, 163, 128 S.Ct. 761, 169 L.Ed.2d 627 (2007), citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 742–743, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975) (recognizing in *Stoneridge* that extensive discovery obligations and the potential uncertainty and disruption generated by a lawsuit may allow plaintiffs with low-probability claims "to extort settlements from innocent companies"). Ohio is no different. *Amato v. Gen. Motors Corp.*, 67 Ohio St.2d 253, 259, 423 N.E.2d 452 (1981), *overruled on other grounds* (recognizing that "[c]ertification of a class action

can so increase a defendant's potential liability and the costs of litigation that the defendant would be forced to settle the action * * * .") Yet, a release valve for these pressures already exists.

- **Damages models should be analyzed before the burdensome costs of litigation are incurred.**

This case provides the Court an opportunity to limit the coercive nature of low- or no-merit class-action claims by adopting the United States Supreme Court's decision and rationale in *Comcast* requiring a rigorous analysis of the plaintiffs' damages model at the class-certification stage. With this Court's instruction, Ohio's lower courts will no longer be able to avoid or postpone this rigorous analysis until after a class is certified, thereby minimizing the undue pressure to settle low- or no-merit class actions.

B. Adopting *Comcast's* holding and rationale is appropriate because Ohio's rule is nearly identical to its federal counterpart.

Ohio habitually looks to federal case law interpreting Fed.R.Civ.P. 23 because Civ.R. 23 is modeled after and nearly identical to Fed.R.Civ.P. 23. *See Marks v. C.P Chem. Co., Inc.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (1987). Hence, this Court often relies on United States Supreme Court class-action decisions as persuasive authority in interpreting Civ.R. 23. *See, e.g.*, *Stammco*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, at ¶ 18.

- **This Court has already begun clarifying the requirements for class certification.**

In this regard, this Court has adopted *Dukes'* rigorous analysis requirement—reiterated in *Comcast*—which often requires a trial court to look into legal and factual issues that are part of the merits of plaintiff's underlying claims, at the class-certification stage. *Cullen*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, at ¶ 18; *Felix*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, at ¶ 26, citing *Dukes*, 564 U.S. at 350, 131 S.Ct. 2541, 180 L.Ed.2d 374.

That review of legal and factual merits issues is not the only context in which this Court has relied on *Comcast.*

Citing *Comcast*, this Court has also held that plaintiffs, at the class-certification stage, "must demonstrate that they can prove, through common evidence, that all class members were in fact injured by the defendant's actions." *Felix* at ¶ 33, citing *In re Rail Freight Fuel Surcharge Antitrust Litigation—MDL No. 1869*, 725 F.3d 244, 252 (D.C.Cir.2013). Further, "[i]f the class plaintiff fails to establish that all of the class members were damaged * * * there is no showing of predominance under Civ.R. 23(B)(3)."). *Felix* at ¶ 35.

No reason exists here to deviate from this practice. Thus, this Court should adopt *Comcast* in full.

C. <u>This Court should adopt the rule of *Comcast*: Predominance under Rule 23(B)(3) requires use of a working damages model as a condition of class certification.</u>

- **Plaintiffs have the burden of satisfying Civ.R. 23's requirements.**

It is well-established in Ohio that a party seeking class certification under Civ.R. 23 bears the burden of demonstrating by a preponderance of the evidence that the proposed class meets each of the requirements set forth in the rule. *See, e.g.*, *Cullen*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, at ¶ 15. In addition to the requirements set forth in Civ.R. 23(A), one of the three requirements under Civ.R. 23(B) must be met.

Here, Plaintiffs sought monetary damages and certification under Civ.R. 23(B)(3), which permits certification only if the trial court finds that the questions of law or fact common to the class members predominate over any questions affecting only individual members. Civ.R 23(B); *see also* Fed.R.Civ.P. 23(b). The only way to demonstrate predominance is for plaintiffs to show that "they can prove through common evidence, that all class members were in fact injured by the defendant's actions." *Felix*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, at ¶ 33,

citing *In re Rail Freight*, 725 F.3d at 252. Further, "[i]f the class plaintiff fails to establish that all of the class members were damaged * * * there is no showing of predominance under Civ.R. 23(B)(3)" because a "key purpose of the predominance requirement is to test whether the proposed class is sufficiently cohesive to warrant adjudication by representation." (Citations omitted.) *Felix* at ¶ 35. A trial court's review of a motion to certify a class must be rigorous.

- **Trial courts must conduct a rigorous analysis before certifying a class.**

Consistent with *Marks*, 31 Ohio St.3d at 201, 509 N.E.2d 1249, this Court adopted the United States Supreme Court's ruling that courts evaluating class-certification issues must conduct "rigorous" analyses to determine whether the class satisfies Civ.R. 23's requirements. *Cullen*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, at ¶ 17, citing *Dukes*, 564 U.S. 338, 350–351, 131 S.Ct. 2541, 180 L.Ed.2d 374. When a trial court conducting such an analysis faces the overlap of a Civ.R. 23 class-certification requirement and a merits issue, the court "is permitted to examine the underlying merits of the claim" to the extent necessary to decide whether to certify the class. *Cullen* at paragraph two of the syllabus. In this case, the Eighth District did not require the trial court to conduct that rigorous analysis, nor did it do so itself. That review is no less rigorous when a purported class relies on a damages model to demonstrate predominance—and that damages model must exist.

- **Plaintiffs have no working damages model.**

Plaintiffs chose to rely on a damages model to establish that all members of the class suffered an injury based on the alleged offensive conduct. But the damages model upon which they relied did not exist and had not yet been developed. To this end, Plaintiffs' expert testified in conclusory terms, "It is my opinion that * * * there are feasible and widely-used

methodologies" for showing damages "through common proof." *Satterfield*, Cuyahoga C.P. No. CV-03-517318, *12 (Class Certification Order, Feb. 9, 2016).

That feasibility conclusion was as far as Plaintiffs' expert could go. He did not prepare a model to use to show retail customer damages through common proof. In fact, he admitted that no such damages model actually existed. *Id*. at *13. He further testified that he believed one "could be adapted" from a wholesale damages model—the McFadden/Woroch model—developed in a separate R.C. 4905.61 action to estimate the damages of one cellular reseller. *Id.* at *12, 16. Even on that point, however, the expert admitted that he had not yet tried to use or adapt the McFadden/Woroch model in this case. *Id.* at *13. Despite this complete lack of an evidentiary foundation to establish class-wide damage, the trial court certified the class, finding that the expert's testimony had established the predominance of common questions as to damages.

The Eighth District affirmed, with almost no independent analysis. *Satterfield*, 2017-Ohio-928, 86 N.E.3d 830, at ¶ 26–27. In doing so, it set a dangerous precedent—certify the class now and wait to see if a proper damages model materializes later. The certify-now-and-worry-later approach to Civ.R. 23 certification is contrary to the United States Supreme Court's decision in *Comcast* (discussed below), and completely ignores the reality that class certification often creates undue pressure for defendants to accept exorbitant settlement demands (discussed above).

Blind reliance on an expert's belief that a model *could* be developed in the future puts defendants in the impossible position of having to challenge something that does not exist. One expert's opinion that a model *could be* developed falls woefully short of an actual model that exists and, thus, can be tested by other experts and challenged by litigation adversaries. In short,

without an actual damages model in place, the parties and the court have nothing to test. Hence, the rigorous analysis required by this Court's and the United States Supreme Court's decisions was not and could not be performed. And the Plaintiffs' nonexistent model failed in another way.

- **Plaintiffs cannot satisfy the predominance requirement without a working damages model—and the damages model must track the plaintiffs' theory of liability.**

In addition to instructing that plaintiffs must provide a working damages model prior to class certification, *Comcast* holds that, in order to satisfy Rule 23(b)(3)'s predominance requirement, plaintiffs must present a reliable damages calculation model that is consistent with their theory of liability:

> [A] model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to that theory. ***If the model does not even attempt to do that***, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3). (Emphasis added.)

Comcast, 569 U.S. at 35, 133 S.Ct. 1426, 185 L.Ed.2d 515.

The Eighth District was not without warning. The principle underlying *Marks* (because of the similarities between the state and federal rule, Ohio looks to United States Supreme Court class-action precedents), and this Court's adherence to recent United States Supreme Court decisions (including *Comcast*) in *Cullen*, *Stammco* and *Felix*, put the Eighth District on notice that *Comcast* applied here.

- **Neither the Eighth District nor the trial court analyzed the "model" as it did not exist.**

Yet, the Eighth District neither ensured that the trial court conducted the rigorous class-certification analysis required by *Dukes* nor verified that the class's damages model tracked its theory of liability as required by *Comcast*. In fact, the trial court and the Eighth District brushed *Comcast* aside. *Satterfield*, 2017-Ohio-928, 86 N.E.3d 830, at ¶ 26 (rejecting the argument that

the class had to provide a damages model "susceptible to measurement across the entire class * * *" because "[t]his reading of the *Comcast* holding is unduly broad.").

In addressing this predominance requirement, the Eighth District quoted liberally from the trial court's entry:

> [A]s [the class's damages expert,] Dr. Gale[,] *admits, he has never used* the McFadden/Woroch *model* to determine class-wide impact and damages in this case. In fact, the model would have to be adapted to show class-wide impact across the retail market. (Emphasis added.)

Id., quoting Class Certification Order at *13.

- **No model existed to even track Plaintiffs' theory of liability.**

Instead of merely not conforming to the class's theory of liability, Dr. Gale never applied the model to the class at all—" 'the model would have to be adapted.' " *Id*. "If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Comcast*, 569 U.S. at 35, 133 S.Ct. 1426, 185 L.Ed.2d 515. Thus, there is no way to conclude that the nonexistent damages model measures only damages attributable to Plaintiffs' theory of liability.

The Eighth District's attempt to circumvent *Comcast* by stating that "whether [a] mathematical formula could be used to calculate individual damages is irrelevant because the need to calculate damages individually, by itself, is not reason to deny class certification," *Satterfield* at ¶ 26, quoting Class Certification Order at *15, misses the mark. It is the failure to create the model and apply the model that makes it impossible to satisfy Civ.R. 23(B)(3)'s predominance requirement, not the mathematical imprecision of the model.

Even the Ninth Circuit Court of Appeals, which "has emphasized that 'the need for individualized findings as to the amount of damages does not defeat class certification,' " (citation omitted) *Doyle v. Chrysler Group., LLC*, 663 Fed. Appx. 576, 579 (9th Cir.2016), has

refused to apply this rationale where there is no damages model available to test whether it measures damages solely attributable to the theory of liability. *Id*. (holding that Doyle failed to satisfy *Comcast* where "[Plaintiff] has not offered a model for determining what percentage of the purchase price the reimbursement should be. There is thus no way to determine whether the proposed damages model measures damages that are solely attributable to the theory of liability.")

At bottom, the Eighth District did exactly what *Comcast* forbids: It failed to rigorously analyze Plaintiffs' damages model to see whether it could connect specific damages to the Plaintiffs' theory of liability, and, by extension, it failed to determine whether the class could satisfy the predominance requirement of Rule 23(B)(3). Had it applied the *Comcast* analysis, it would have understood that there are other factors that may motivate class members to choose or leave a cell phone provider, unrelated to the Plaintiffs' theory of liability, and that would prevent them from experiencing the alleged injury at all.

D. The Eighth District introduced uncertainty into Ohio law where none should exist—this Court should clarify the law by adopting *Comcast's* commonsense holding regarding damages models.

Since *Comcast*, courts have required class plaintiffs to demonstrate a damages methodology that is capable of determining damages across the class as a prerequisite to certification. And with good reason.

Without assurance that class-wide damages can be established through a body of common evidence, "questions of individual damage calculations will inevitably overwhelm questions common to the class." *Comcast* 569 U.S. at 34, 133 S.Ct. 1426, 185 L.Ed.2d 515. Moreover, critical issues of causation—and even liability—may fail at trial if the plaintiffs are unable to connect their damages to the defendant's alleged conduct. This risk is not mere speculation.

If plaintiffs cannot show, prior to class certification, that their model isolates damages tied only to the relevant theory of liability (and not from some other theory or source), then defendants are left to guess at critical issues of causation, and courts are given no guidance to evaluate the merits of the plaintiffs' claims. Through this lens, the entire litigation process looks more like a game of chance than an adversarial proceeding.[2]

As members of the business community and, in the case of OII, the insurers who service the business community, the amici seek clarity regarding the requirements for certifying class actions. Without clarity, members of the amici groups will have greater difficulty pricing and evaluating risk. Unless this Court clarifies the law, Ohio businesses facing class actions under Civ.R. 23(B)(3) may be coerced into a settlement by the specter of massive liability on a claim like the one in this case. A claim not supported by a damages model that is properly tethered to its theory of liability—or any damages model at all. That uncertainty does not benefit Ohio businesses or litigants.

V. CONCLUSION

This Court should take the next logical step in the development of Ohio's class-action jurisprudence under Civ.R. 23(B) and adopt the United States Supreme Court's holding in *Comcast*. That is, to satisfy the Civ.R. 23(B)(3) predominance requirement, a class representative must demonstrate that its damages model fits its theory of liability and is available prior to class certification to undergo the rigorous analysis that trial courts are required to perform. And unlike

[2] *See, e.g., In re Dial Complete Mkting. & Sales Practices Litigation*, 312 F.R.D. 36, *78–79 (D.NH.2015) (holding that a damages model was insufficient where it did not attempt to isolate damages arising from the challenged conduct); *In re POM Wonderful, LLC*, No. ML 10-02199 DDP (RZx), 2014 U.S. Dist. LEXIS 40415, *21–22 (C.D.Cal. Mar. 25, 2014) (holding that it was not enough for a damages model to show that defendant's product was more expensive than other products, where that price difference could be related to things other than wrongful conduct).

the class representative here, the party seeking certification must *actually have* a damages model—not just an intention to adapt one later.

Respectfully submitted,

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I hereby certify that I served a copy of the foregoing was served upon counsel as follows by U.S. Mail on April 2, 2018:

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