IN THE SUPREME COURT OF OHIO

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

MEMORANDUM IN SUPPORT OF JURISDICTION OF *AMICI CURIAE* AMERICAN TORT REFORM ASSOCIATION, OHIO ALLIANCE FOR CIVIL JUSTICE, AND OHIO CHAMBER OF COMMERCE

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THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

Amici Curiae American Tort Reform Association, Ohio Alliance for Civil Justice, and Ohio Chamber of Commerce respectfully submit this Memorandum in Support of Jurisdiction.

This case is of public and great general interest because it presents the question of whether the class action mechanism and Ohio's consumer protection law permit windfall awards to individuals who were not impacted in any way by a business's allegedly impermissible practice. It presents an opportunity for this Court to say no to no-injury consumer class actions.

The Court of Common Pleas (hereinafter "trial court") certified a class that includes individuals who experienced no injury and no pecuniary loss simply because they entered automobile purchase agreements that contained arbitration provisions that the court previously found unenforceable. Unlike the class representative, who had a dispute with his dealership over a financing rate, most class members had no issue with their purchases and therefore had no need to resolve a dispute through arbitration or otherwise. Faced with the lack of actual damages, the trial court arbitrarily awarded $200 in "discretionary damages" to thousands of satisfied customers who happened to purchase cars from 25 dealerships during a particular period. The trial court's class certification order and partial ruling on the merits was affirmed by a divided panel of the Eighth Judicial District Court of Appeals (hereinafter "Court of Appeals").

If not corrected, the lower courts' rulings may open the door to a proliferation of consumer class actions in Ohio. A single person affected by a questionable business practice could file a lawsuit on behalf of numerous satisfied customers. The result, in which businesses are at risk of liability for arbitrary "discretionary" amounts that have no tie to consumer loss, multiplied by potentially thousands of unharmed purchasers, will damage the predictability and fairness of Ohio's civil justice system.

INTEREST OF *AMICI CURIAE*

The legal questions presented in this case directly concern *Amici Curiae* and their members because their outcome could result in the proliferation of "no injury" consumer class actions and arbitrary classwide damage awards that have no tie to an actual pecuniary loss. *Amici* are particularly concerned with, and have limited their Memorandum in Support of Jurisdiction to addressing, the initial two Propositions of Law offered by the Defendants-Appellants: (1) a class action may not 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; and (2) a class action brought under the Ohio Consumer Sales Practices Act ("OCSPA"), R.C. 1345.09(B), requires the consumers to have sustained actual damages as a result of the challenged conduct.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues. ATRA has a longstanding interest in addressing unjustified expansions and abuses of private rights of action provided by state consumer protection laws.

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. The OACJ strongly supports laws that provide stability and predictability in the civil justice system, including class action litigation. OACJ members support a balanced civil justice system that not only awards fair compensation to injured persons,

but also imposes safeguards to ensure that defendants are not unjustly penalized and plaintiffs are not unjustly enriched.

Founded in 1893, the Ohio Chamber of Commerce is Ohio's largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its more than 6,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. As an independent and informed point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena. The advocacy efforts of the Ohio Chamber of Commerce are dedicated to the creation of a strong pro-jobs environment – an Ohio business climate responsive to expansion and growth.

STATEMENT OF THE CASE AND FACTS

Amici adopt Defendants-Appellants' Statement of the Case and Facts as relevant to the legal arguments herein.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

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.**

The trial court certified, and the Court of Appeals affirmed, a class consisting of all customers who purchased a car from a group of 25 affiliated car dealerships through an agreement that contained an arbitration clause the same as, or substantially similar to, the one that the Felixes signed. This Court should grant jurisdiction to consider whether the certified class, which includes many satisfied customers who had no dispute with a dealership, satisfies Rule 23. Review of the sufficiency of the trial court's analysis of class certification, and the

Court of Appeal's refusal to address critical matters that it considered "merits issues," are important to the development of sound Ohio class action jurisprudence that protects due process rights of persons subject to Ohio courts.

A. The Trial Court Failed to Conduct a Rigorous Analysis

Granting jurisdiction in this case would provide the opportunity for this Court to emphasize the importance of conducting a rigorous analysis, which requires fully exploring each prerequisite to class certification. *See Cullen v. State Farm Mut. Auto. Ins. Co.*, No. 2012-0535, Slip Op. No. 2013-Ohio-4733, ¶ 16 (Nov. 5, 2013); *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 St.3d 231, 2013-Ohio-3019, ¶ 3. That failure alone is a basis for reversal of the trial court, which conducted a rote examination of the seven prerequisites that this Court requires plaintiffs to establish for class certification. *See Stammco* at ¶ 19.

While the trial court purported to apply a "rigorous analysis," Proposed Order of Class Certification and for Partial Judgment on the Merits, CV-01-454238, CV-01-442143, at 3 (Sept. 10, 2012) (hereinafter "Trial Court Order"), its less than careful review in examining each factor is a dangerous precedent for other Ohio courts. In fact, the trial court's conclusory review of each prerequisite consisted of no more than one to three sentences. *See id.* at 3-4.

For example, the trial court's consideration of whether there is an identifiable class merely restated the class as defined by the plaintiff, *see id.*, overlooking and failing to resolve questions as when the class begins (since class action relief was first asserted two years after commencement of the Felixes' individual claim) and what constitutes an arbitration clause "substantially similar" to that which appeared in the class representatives' purchase agreement. Of even greater concern is the trial court's passing consideration of commonality and typicality. *See id.* at 4. As discussed below, the court did not examine how the claims of customers who

had no dispute with their dealership, and who therefore were not impacted by the arbitration provision, have claims that are common to those who had such disputes. Nor did the trial court address how the Felixes' claim is typical of the claims of other class members, when the Felixes had a dispute over the financing of their vehicle and others did not.

It is essential for trial courts to apply a rigorous analysis because "denying or granting class certification is often the defining moment in class actions (for it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants)." *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001)). Due process considerations underpin the rigorous analysis requirement. Such careful review is important in safeguarding both the rights of absent class members to seek recovery for their injuries and the right of defendants to establish defenses as to individual class members.

B. The Class, Which Includes Many Satisfied Customers, is Overbroad

The trial court certified a class that is fatally overbroad. It disregards the need for a common factual element that is central to each claim: that each class member had a dispute regarding his or her purchase that placed the arbitration provision at issue. The inclusion of individuals for whom the arbitration provision was irrelevant to their purchases, who, in other words, experienced no injury, is particularly problematic and concerning to *amici*. If sustained, this case is likely to encourage others to seek certification on behalf of "all customers" where the actual dispute is limited to just two parties, the plaintiff and the defendant. Ohio law does not permit use of the class action mechanism in this manner, which would pressure defendants to enter unwarranted settlements.

As a matter of sound public policy in this state, Ohio courts have repeatedly found that a class is defined too broadly when it "include[s] a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct." *Stammco,* ¶ 53. For instance, a proposed class cannot include "all individuals, businesses, or other entities" that received a third-party charge on a phone bill when, for some, the charge was proper. *Id.* ¶ 56. Nor can a class definition include "all" credit card holders who were assessed interest or finance charges for any reason, including when the charges were unrelated to the improper practices at issue in the lawsuit. *See Maestle v. Best Buy Co.*, 197 Ohio App.3d 248, 2011-Ohio-5833, ¶ 23. Similarly, when an online investment account experiences occasional technical difficulties, a class cannot consist of every Ohio resident that has an account when some customers did not trade that day and others may have benefited from any delay. *See Hoang v. E-Trade Group, Inc.*, 151 Ohio App.3d 363, 2003-Ohio-151, 784 N.E.2d 151 (8th Dist.), ¶¶ 24-25. Likewise, a person who inadvertently receives unsolicited facsimile advertisements cannot bring a class action on behalf of "all persons and entities" who received such advertisements, including customers who consented. *See Miller v. Painters Supply & Equip. Co.*, 8th Dist. No. 95614, 2011-Ohio-3976, ¶¶ 14, 24. In such situations, common questions do not predominate.

Had the trial court properly limited the scope of the class definition to customers impacted by the arbitration provision, it would become evident that class treatment is inappropriate. *See, e.g., Repede v. Nunes*, 8th Dist. Nos. 87277, 87469, 2006-Ohio-4117, 2006 WL 2299853, ¶¶ 17, 19 (finding class certification of "all Ohio residents" who were customers of the defendant tax service provider improper where an individual analysis would be needed to distinguish which of the 4,000 class members were injured and those who suffered no harm or damage at all); *Barber v. Meister Protection Servs.*, 8th Dist. No. 81553, 2003-Ohio-1520, ¶ 34

(finding, in a class defined as all persons who entered a security contract with the defendant, that the individualized inquiry necessary to distinguish class members "affected" by the alleged illegal conduct from those "who undoubtedly have no claim whatsoever" would "obviate the purpose of a class action"). Extensive individual inquiries would be needed to determine: (1) did the customer have a dispute with the dealership related to the purchase of a vehicle; (2) was the arbitration provision invoked by the dealership; (3) was the customer injured as a result and, if so, what was his or her financial loss? The trial court short-circuited the need for a case-by-case analysis of each customer's situation by presuming, without factual basis, that every customer who signed a purchase agreement with an arbitration provision was injured and by arbitrarily setting each class member's damages at $200. *See Hoang*, ¶¶ 22, 27 (recognizing that "absent proof of classwide pecuniary loss, class certification is inappropriate" and that "[s]imple loss of services without economic loss does not create a compensable claim").

The trial court used the class action mechanism in a manner that awarded monetary damages to individuals without requiring them to show an injury, causation, or damages. These are required elements of a claim under the OCSPA, R.C. 1345.09. A proposed class is overbroad when it "extends beyond the scope of the statute upon which the claims are based." *Miller*, ¶ 24. In sum, the court's certification of this overbroad class and its award of $200 to each class member violate the core principle that rules of practice and procedure "shall not abridge, enlarge, or modify any substantive right." Ohio Const., Art. IV, § 5(B).

C. The Court of Appeals Gave Lip Service to *Stammco*

The Court of Appeals issued its order affirming class certification and denying consideration of the trial court's award of $200 in damages to each class member on August 15, 2013. *Felix v. Ganley Chevrolet, Inc.*, 8th Dist., 2013-Ohio-3523. One month earlier, this Court

decided *Stammco*, a case that directly addressed, in significant depth, the very issues present in the *Felix* case. *Stammco* spoke directly to the rigorous analysis that was lacking below, the impermissibility of including uninjured people in a class, and the refusal to consider merits issues that were integral to evaluating compliance with class certification prerequisites. The Court of Appeals' ruling nevertheless included just a single gratuitous reference to *Stammco*. *See id.* ¶ 50. Its failure to fully consider this binding precedent, as well as the Court's recent decision in *Cullen*, necessitates review by this Court.

Several aspects of the Court of Appeals' decision are directly contrary to *Stammco*. For example, the *Stammco* Court recognized that "Rule 23 does not set forth a mere pleading standard" and that the party seeking class certification must affirmatively demonstrate compliance with Rule 23. *Stammco*, ¶ 30 (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)). The Court of Appeals, however, did little more than recite the trial court's findings with respect to the Rule 23 prerequisites, which mimicked the plaintiffs' assertions and lacked a rigorous analysis. *See Felix*, ¶¶ 17-27.

Stammco held that a proposed class is overbroad if it is defined in a manner that includes people who were not harmed by the allegedly unlawful conduct. *Stammco*, ¶ 53. The Court of Appeals did not heed this instruction when it affirmed certification of a class that appears to include thousands of satisfied customers who purchased a vehicle from one of the subject automobile dealerships, received the benefit of their bargain, and were not impacted by the mere presence of the arbitration provision in their purchase agreement. *See Felix*, ¶ 36.

In addition, *Stammco* clarified that a rigorous analysis "may include probing the underlying merits of the plaintiff's claim" for the purpose of determining whether the Rule 23 prerequisites are satisfied because there is often overlap between merits and class certification

issues. *Stammco*, ¶ 44. The trial court's award of $200 in "discretionary damages" to all class members is intertwined in its decision on class certification. This innovation circumvented full and careful consideration of commonality and typicality, since many, if not most, class members experienced no injury or loss from an uninvoked arbitration provision in their purchase agreements. Despite *Stammco*, the Court of Appeals declared the trial court's entry of partial judgment off limits on appeal. *See* Slip Op. ¶ 44 ("The propriety of the trial court's award, however, is outside 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."). Its reasoning is very similar to that which this Court firmly rejected in *Cullen*, where the Court of Appeals refused to consider whether the insurance policy at issue supported the plaintiffs' claim, finding this issue went "to the heart of the merits of the case and is inappropriate at this point." *Cullen*, ¶ 33.

Finally, the *Stammco* Court's approval of the reasoning of *Wal-Mart Stores, Inc. v. Dukes* suggests that this Court would reject judicial shortcuts for determining damages on a classwide basis. In *Dukes,* the U.S. Supreme Court reversed certification of a class consisting of 1.5 million current and former employees of the retailer across the United States. 131 S. Ct. at 2547. The lower courts certified the class and planned to avoid individual issues by evaluating liability and back-pay damages for select claimants, using the results of these trials to establish a percentage of valid claims and an average back pay amount, and then applying these figures to arrive at an amount of recovery for the entire class. *See id.* at 2561. The U.S. Supreme Court rejected this novel approach, which it dubbed "Trial by Formula." *Id.*

The trial court's approach to damages in the case before this Court, which the Court of Appeals refused to consider, is just as problematic as "Trial by Formula" in *Dukes*. Arbitrarily

presuming damages is not a substitute for considering class members' proof of injury, causation, and damages—individual inquiries that depend on whether a particular class member had a dispute with a dealership that resulted in a pecuniary loss.

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.**

A. Ohio Should Not Permit "No Injury" Consumer Class Actions

Perhaps the most fundamental requirement to bringing a lawsuit is that the plaintiff has experienced an injury. This core principle ensures that courts decide only actual disputes and do not use their power in cases based on hypothetical, speculative, or nonexistent harms. This Court should exercise jurisdiction over this case to consider whether individuals who purchased a product, but have not experienced a pecuniary loss caused by the transaction, may recover monetary damages through a class action under the OCSPA.

Amici have observed that "no injury" consumer class actions are proliferating throughout the country. For example, plaintiffs have brought consumer class actions on behalf of uninjured purchasers of allegedly defective products who experienced no physical injury. In these cases, plaintiffs often seek recovery for "economic loss" due to an alleged product defect. They typically claim that the product, as sold, was worth less than the product allegedly promised. A significant number of courts have dismissed such claims, recognizing that plaintiffs have yet to sustain "actual damages."[1] After all, the plaintiffs received the "benefit of their bargain" because

[1] *See, e.g., O'Neil v. Simplicity, Inc.*, 574 F. 3d 501, 504 (8th Cir. 2009) (holding that when the crib plaintiffs purchased had not exhibited a defect, they received the benefit of their bargain and could not support their claim based on the performance of cribs purchased by others); *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 320 (5th Cir. 2002) ("[Plaintiff] paid for an effective pain killer, and she received just that—the benefit of her bargain."); *Briehl v. General*

(Footnote continued on next page)

the product performed as expected. As the U.S. Court of Appeals for the Fifth Circuit recognized in dismissing a certified "no injury" consumer class action, the plaintiff has essentially said: "you sold the product, we bought it, there was a problem with it, *other people* were harmed, and we want our money back, even though the product worked fine for us."[2]

This case presents an opportunity for this Court to indicate that the Ohio system of justice says no to no-injury cases. In this case, consumers received the benefit of their bargain: the car they wanted at a price they negotiated. In fact, the claim in the case before this Court is even more extreme than the product-liability variety of no-injury class actions. The class members

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Motors Corp., 172 F.3d 623, 628 (8th Cir. 1999) ("Where . . . a product performs satisfactorily and never exhibits an alleged defect, no cause of action lies."); *Walker v. Merck Sharp & Dohme Corp.*, No. 2:08-cv-4148, at 11 (E.D. La. June 13, 2012) (Order & Reasons), *available at* http://articles.law360.s3.amazonaws.com/0350000/350100/vioxx.pdf ("There is no obvious, quantifiable pecuniary loss that Plaintiff incurred from purchasing a drug that worked for him and did not cause him any harm."); *Frye v. L'Oréal USA, Inc.*, 583 F. Supp. 2d 954, 958 (N.D. Ill. 2008) (dismissing consumer claim where "there [was] no allegation that the presence of lead in the lipstick had any observable economic consequences"); *In re Canon Cameras*, 237 F.R.D. 357, 360 (S.D.N.Y. 2006) ("A plaintiff who purchases a digital camera that never malfunctions over its ordinary period of use cannot be said to have received less than what he bargained for when he made the purchase."); *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 128 (N.Y. App. Div. 2002) ("[P]laintiffs have not been involved in any accidents and have not suffered any personal injuries or property damage. Moreover, plaintiffs do not allege that any seat has failed, been retrofitted or repaired, nor have plaintiffs attempted to sell, or sold an automobile at a financial loss because of the alleged defect."); *Wilson v. Style Crest Prods., Inc.*, 627 S.E.2d 733, 736 (S.C. 2006) ("There is no evidence that the [mobile home] anchor systems have not, to date, been exactly what the Homeowners bargained for."); *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 240 (Wis. 2004) ("[A]n allegation that a product is diminished in value because of an event or circumstance that might—or might not—occur in the future is inherently conjectural and does not allege actual benefit-of-the-bargain damages. . . .").

[2] *See Rivera*, 283 F.3d at 321 ("Rivera's claim to injury runs something like this: Wyeth sold Duract; Rivera purchased and used Duract; Wyeth did not list enough warnings on Duract, and/or Duract was defective; other patients were injured by Duract; Rivera would like her money back. The plaintiffs do not claim Duract caused them physical or emotional injury, was ineffective as a pain killer, or has any future health consequences to users. Instead, they assert that their loss of cash is an 'economic injury.'").

here do not and cannot allege even a purely economic loss, *e.g.* that their cars were worth less or that they paid too high a price for the vehicle due to inclusion of an arbitration provision in the sales contract. Rather, the trial court awarded the class monetary damages without a showing that its members experienced an injury of any kind.

Such "consumer protection" litigation provides no benefit to consumers. It will provide an unexpected and unearned rebate to those who happened to purchase cars from particular dealerships during a specific time period. If such "no injury" litigation is permitted, and its "discretionary" damages sustained, the principal beneficiaries will be attorneys who bring such claims. Ohio courts will experience more of such litigation. The cost of doling out money to individuals who did not experience a loss will impact ordinary consumers, who will likely experience higher prices to account for this type of unnecessary, excessive liability.

While the statutory language of consumer protection acts varies from state to state, the text of the OCSPA supports the basic principle that an individual who has not experienced an injury caused by an impermissible business practice does not have a claim for damages. *See* R.C. 1345.09(A), (B), (G) (repeatedly referring to a "consumer's actual economic damages," defined as "damages for direct, incidental, or consequential pecuniary losses resulting from a violation of Chapter 1345"). Since there was no harm resulting from the mere inclusion of arbitration provisions in purchase agreements of class members, the Court should grant jurisdiction to consider whether a class action seeking damages was permissible. *See Hoang*, ¶ 20 (holding that nominal damages are not a substitute for proof of actual injury and causation, which are required liability elements of a claim).

B. Stretching Ohio Law is Unnecessary to Protect Consumers

Due to the lack of actual economic damages, the trial court awarded "discretionary damages" of $200 per class member who were not injured. The trial court imposed these damages on the Defendants as a fine for including unconscionable provisions in their sales contracts. *See* Trial Court Order at 9 (imposing such damages because allowing Defendants "to emerge from this seven-year legal battle . . . without sanction" would "reward lawlessness"). This Court should exercise jurisdiction to consider whether the OCSPA authorizes damages of this kind and such ad hoc regulation from the bench.

The OCSPA provides a variety of means to protect the public from illegal business practices. For example, in the case before this Court, any consumer who had an actual dispute in which the arbitration clause became a factor may bring an individual action to rescind the transaction, or recover the greater of treble damages or $200 plus as much as $5,000 in noneconomic damages. *See* R.C. 1345.09(B). A consumer may also seek a declaratory judgment, an injunction, or other appropriate relief to challenge a dealership's use of an arbitration clause. R.C. 1345.09(D). Where a business knowingly violated the law, the OCSPA also authorizes the court to award a prevailing consumer a reasonable attorney's fee for the work performed. R.C. 1345.09(F).

In addition, the OCSPA provides a means to stop illegal business practices before they harm consumers. In such instances, the Attorney General can seek a declaratory judgment, or a temporary restraining order or injunction, to stop the act or practice. *See* R.C. 1345.07(A). Violation of such an order is punishable by a civil penalty of up to $5,000 for each day of violation. R.C. 1345.07(A)(2)(b). The Attorney General can also bring a class action on behalf

of the state's consumers, but, like private individuals, this remedy must be "for damage caused by" a violation. *See* R.C. 1345.07(A)(3).

C. Minimum Damages, However Labeled, Are Not Authorized in Class Actions

While the OCSPA provides several means to address deceptive business practices, what it expressly does not permit are consumer class actions that award minimum damages as a substitute for showing an actual injury and a pecuniary loss caused by a prohibited act. *See* R.C. 1345.09(B). Section 1345.09(B) "limits damages available in a class action to actual damages." *Washington v. Spitzer Mgmt., Inc.*, 8th Dist., No. 81612, 2003-Ohio-1735, ¶ 33.

The Ohio legislature incorporated the "but not in a class action" language, restricting the availability of statutory damages in class actions, into R.C. 1345.09(B) for a reason. While the courts below referred to the $200 per class member as "discretionary damages," such awards are simply minimum statutory damages in disguise.

The legislature recognized that, as a matter of public policy. statutory damages serve little purpose in class actions. Statutory damages are intended to provide an incentive to bring an *individual* lawsuit when the anticipated damages are otherwise low. *See* Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 Ohio St. L.J. 437, 462 (1991) ("Consumer cases are typically for small stakes; that is why it is necessary to offer statutory, multiple, and punitive damages, and attorney's fees—because otherwise few consumers would sue."). Class actions serve a similar purpose, but provide an incentive through aggregation of claims. Thus, the incentive-creating effect of statutory damages is rendered duplicative when these minimum amounts are available in a class action.

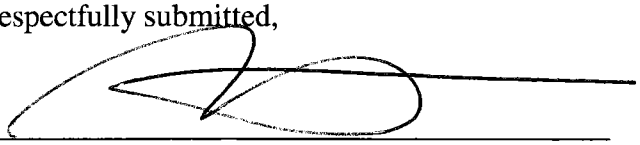
As the OCSPA recognizes, the combination of statutory damages, aggregation of thousands of claims through a class action, and the potential for an award of attorneys' fees

provides a likelihood of windfall recovery that over-incentives such lawsuits. *See Washington*, at ¶ 33 ("Ohio's CSPA specifically authorized class actions and limits damages in class actions to *protect defendants* from huge damage awards in class actions.") (emphasis in original); *see also* Victor E. Schwartz & Cary Silverman, *Common Sense Construction of Consumer Protection Acts*, 54 Kan. L. Rev. 1, 61 (2005). For this reason, the OCSPA, as well as many other state consumer protection laws, limit relief in class actions to actual damages.[3] Granting jurisdiction would provide the Court with an opportunity to confirm that damages recoverable under the OCSPA are established by the statutory text. The Court should clarify that minimum damages, whether labeled "statutory" or "discretionary," are not permitted.

CONCLUSION

For the foregoing reasons, *amici curiae* urge this Court to grant jurisdiction and reverse the decision below.

Respectfully submitted,



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[3] *See, e.g.*, Colo. Rev. Stat. § 6-1-113(2); N.Y. C.P.L.R. § 901(b); Utah Code Ann. § 13-11-19(2); *see also* N.M. Stat. Ann. § 57-12-10(E) (limiting treble damages to class representatives while allowing class members to recover only actual damages); Or. Rev. Stat. § 646.638(8)(a) (permitting statutory damages in class actions only when the members sustained an ascertainable loss of money or property as a result of a reckless or knowing violation of certain prohibitions). Several states eliminate the potential for excessive awards by precluding class actions under their consumer protection acts entirely. *See, e.g.*, Ala. Code § 8-19-10(f); Ga. Code Ann. § 10-1-399(a); La. Rev. Stat. Ann. § 51:1409(A); Miss. Code Ann. § 75-24-15(4); Mont. Code Ann. § 30.14-133(1); S.C. Code Ann. § 37-5-202(1), (3).

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Dated: November 8, 2013

CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing Memorandum in Support of Jurisdiction of *Amici Curiae* upon counsel by depositing a copy in a first-class postage-prepaid envelope into a depository under the exclusive care and custody of the U.S. Postal Service on November 8, 2013, addressed to the following:

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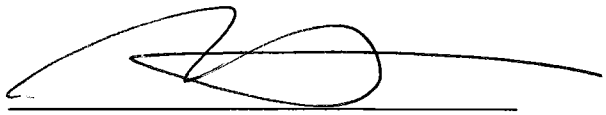

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