IN THE SUPREME COURT OF OHIO

MICHAEL E. CULLEN, *Plaintiff-Appellee,* v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY *Defendant-Appellant.*	:	Case No. --- On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. CA-10-095925

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

STATUTES AND RULES

OTHER AUTHORITIES

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

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

Amici urge the Court to grant jurisdiction because this case is of public and great general interest. The Eighth Appellate District's ruling embraces a lax class certification standard that unquestioningly accepts the Plaintiff's assertions as true and broadly rejects consideration of merits issues. In so doing, the Court of Appeals continues to follow a mistaken interpretation of law that the U.S. Supreme Court, and many other courts, have since corrected. The Eighth District's approach, which other Ohio courts have similarly followed, creates a significant risk of certification of meritless and frivolous class actions.

This Court should grant jurisdiction to clarify that, in conducting a rigorous analysis of whether a proposed class meets Rule 23 standards, Ohio courts must resolve factual and legal disputes touching upon the certification determination. This Rule 23 analysis may overlap with the merits of the plaintiff's underlying claim. Where, as here, the Court of Appeals simply accepted the Plaintiff's theory of the case as true, despite unambiguous contractual language that contradicted his assertions, class certification should be reversed.

Consideration of merits issues enmeshed in class certification is critical in deterring class action abuse. Once a court grants class certification, defendants, faced with expensive and risky "bet-the-company" litigation, often feel compelled to settle even the most tenuous claims. Clarifying that Ohio law is consistent with federal class certification jurisprudence would avoid creating an incentive for unwarranted forum shopping that would draw class actions to Ohio state courts.

INTEREST OF *AMICI CURIAE*

The Ohio Chamber of Commerce ("Ohio Chamber"), founded in 1893, is Ohio's largest and most diverse statewide business advocacy organization. The Ohio Chamber works to promote and protect the interests of its 6,000 business members and the thousands of Ohioans they employ while building a more favorable business climate. The advocacy efforts of the Ohio Chamber are dedicated to the creation of a strong pro-jobs environment – an Ohio business climate responsive to expansion and growth.

The Ohio Alliance for Civil Justice ("OACJ") is a group of over 200 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.

The Chamber of Commerce of the United States ("U.S. Chamber") is the world's largest business federation. The U.S. Chamber represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,800 *amicus curiae* briefs in state and federal courts.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 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.

STATEMENT OF THE CASE AND FACTS

Amici adopt Defendant-Appellant's Statement of the Case and Statement of Facts as relevant to the legal arguments herein.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: In Ruling on Class Certification, Courts May and Should Examine Merits Issues that Are Relevant to the Civ. R. 23 Requirements.

I. THIS CASE PRESENTS AN OPPORTUNITY FOR THE COURT TO CORRECT A MISINTERPRETATION OF LAW THAT HAS LED TO CERTIFICATION OF MERITLESS CLASS ACTIONS

A. The Source of the Confusion

Prior to the U.S. Supreme Court's recent ruling in *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011), many courts considering class certification found they could not inquire into the merits of a claim in determining whether a proposed class action met basic requirements of Rule 23. The source of ostrich-like approach to came from language in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), in which the Supreme Court stated, "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* at 177.

The *Eisen* Court, however, was not deciding class certification, but considering which party should bear the cost of notice to the class. Typically, the plaintiff bears the costs of notice, but the trial court in *Eisen* had shifted ninety percent of that cost for notice to the 2.25 million potential claimants to the defendants because the court found the plaintiffs were likely to win on

the merits. *See id.* at 166-67, 177. In this limited context, the Court held that a district court should not conduct an initial inquiry into the merits of the case. *See id.* at 177-78.

Nevertheless, in the years following *Eisen*, some courts took its language out of context, expanding its meaning beyond the cost-of-notice issue, and applying it to Rule 23's core requirements. *See, e.g., Koch v. Stanard*, 962 F.2d 605, 607 (7th Cir. 1992); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982); *Shelter Realty Corp. v. Allied Maint. Corp.*, 574 F.2d 656, 661 n.15 (2d Cir. 1978); *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). These courts found they could not resolve disputes that overlapped with class certification requirements and had to assume that any facts plaintiff alleged were true. They invoked *Eisen* as a justification for decisions either to ignore the evidence or refuse to weigh the evidence when granting class certification. These courts "simply accept[ed] the plaintiff's allegations and evidence no matter how weak, often citing *Eisen* without further explanation." *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1271 (2002). The result was that courts failed to screen out class actions that were without merit. *See* F. Ehren Hartz, *Certify Now, Worry Later: Arkansas's Flawed Approach to Class Certification*, 61 Ark. L. Rev. 707, 712 (2009).

The Supreme Court revisited the overlap of class certification and merits issues in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), and *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), but its failure to expressly overrule *Eisen* created more confusion. In *Coopers*, seemingly in response to the overbroad application of its language in *Eisen*, the Court noted that "[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims." 437 U.S. at 469 n.12. In *Falcon*, the Court instructed that certification is proper only if "the trial court is satisfied, after a

rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." 457 U.S. at 161. Additionally, the *Falcon* Court explained that such "rigorous analysis" will often entail some overlap with the merits of plaintiffs' underlying claims, an analysis which the lower courts are directed to undertake as part of the class certification determination. *Id.* at 160-61 (finding that "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action") (internal quotations and citation omitted).

The message of *Coopers* and *Falcon* went unheeded by many courts, which continued to view *Eisen* as broadly precluding consideration of merits issues bound with the class certification requirements of numerosity, commonality, typicality, and adequacy. *See, e.g., DG v. Devaughn*, 594 F.3d 1188, 1197 (10th Cir. 2010) (holding that a trial court should accept a plaintiff's allegations as true at the certification stage); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999) ("In deciding a certification motion, district courts must not consider or resolve the merits of the claims of the purported class.").

Many federal courts eventually concluded that the *Eisen* language should not be followed. Several federal circuit courts clarified the plaintiff's burden, and the trial court's duty, to resolve disputed factual issues when necessary to resolve the class certification analysis. *See, e.g., In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321-25 (3d Cir. 2009) (holding that a court may not certify a class action based merely on a "threshold showing," legal and factual disputes relevant to certification "must be resolved" including conflicting expert testimony); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) (holding that the trial court may certify a class only after determining that each of the Rule 23 requirements has been met and, to do so, must resolve factual disputes relevant to each Rule 23 requirement and that the

obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue).

Other federal circuits similarly clarified that *Eisen* did not provide support for refusing to resolve merits issues that are necessary ingredients of the findings required by Rule 23. *See, e.g., Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) ("[A] judge should make whatever factual and legal inquiries are necessary under Rule 23, [even if] the judge must make a preliminary inquiry into the merits"); *Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005) ("The plain text of Rule 23 requires the court to 'find,' not merely assume, the facts favoring class certification."); *Gariety v. Grant Thornton LLP*, 368 F.3d 356, 365 (4th Cir. 2004) (concluding that "by accepting the plaintiffs' allegations for purposes of certifying a class in this case, the district court failed to comply adequately with the procedural requirements of Rule 23"); *see also* Linda S. Mullenix, *Dropping the Spear: The Case for Enhanced Summary Judgment Prior to Class Certification*, 43 Akron L. Rev. 1197, 1224-29 (2010) (finding that several federal appellate circuits had "embraced more stringent merit-based evaluations of class certification requirements" in the five years preceding *Duke*).

The result was a "muddled body of case law" with courts in disagreement over "how closely they can examine the evidence and scrutinize the factual merits at the certification stage." Bone & Evans, 51 Duke L.J. at 1270. For years, commentators had suggested that "[i]t is time to reexamine the *Eisen* rule." *Id.* at 1253.

B. The U.S. Supreme Court Recently Corrected Misapplication of *Eisen* in *Dukes*

In 2011, the U.S. Supreme Court undertook just such a reevaluation of *Eisen* in *Wal-Mart Stores Inc. v. Dukes*, rejecting *Eisen's* overbroad application to preclude consideration of merits issues relating to class certification. The Court found that contrary to the views of some courts,

"Rule 23 does not set forth a mere pleading standard." *Dukes*, 131 S. Ct. at 2551. A party seeking class certification "must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or facts, etc." *Id.* (emphasis in original). Thus, plaintiffs cannot obtain certification simply by relying on the allegations of their complaint or by making a perfunctory evidentiary showing. Instead, courts must examine all the evidence bearing on certification, including expert testimony, and must resolve factual disputes bearing on the Rule 23 requirements.

Quoting from its decision in *General Tel. Co. of Southwest v. Falcon*, the Court recognized that "it sometimes may be necessary for the court to probe behind the pleadings" in order to properly evaluate whether class certification is appropriate. *Id.* (quoting *Falcon*, 457 U.S. at 160). Furthermore, the Court reemphasized the need for the trial court to conduct a "rigorous analysis" as part of the class certification determination. *Id.* (quoting *Falcon*, 457 U.S. at 161). As the Court understood, "[f]requently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Id.*

The *Dukes* Court squarely addressed *Eisen*, recognizing that its opinion in that case had led some lower courts to "mistakenly" conclude that they could not inquire into the merits issues impacting the appropriateness of class certification. *Id.* at 2552 n.6. It found that to the extent that the oft quoted language in *Eisen* goes beyond consideration of the merits for any pretrial

purpose outside the shifting of notice costs "it is the purest dictum and is contradicted by our other cases." *Id.*[1]

The Supreme Court's own review of the evidence in *Dukes* exemplifies the type of "rigorous analysis" courts must undertake. The Court carefully examined the statistical, sociological, and anecdotal evidence offered by plaintiffs to try to prove that Wal-Mart operated under a "general policy of discrimination." *See id.* at 2253-57. The Court concluded that, given the absence of evidence of a pattern or practice of discrimination, the proposed class action lacked the commonality – "the glue" – necessary to hold the class together. *Id.* at 2552-54.

C. Ohio Courts Are Among Those That Have Misapplied *Eisen* to Preclude Consideration of Merits Issues in Class Certification

Ohio courts, under the mistaken impression that they were following the same standard as the federal courts, are among those that have applied an overbroad interpretation of *Eisen*. This uncritical approach bears a significant risk of certifying class actions that fail to meet the basic requirements of Rule 23.

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[1] The U.S. Supreme Court's disapproval of the way courts had construed the *Eisen* language mirrors the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly* (a class action) to "retire" the language from a decision that suggested there may be a more lenient pleading standard. *See* 550 U.S. 544, 563 (2007) (repudiating the "no set of facts" language from *Conley v. Gibson*, 355 U.S. 41 (1957), "as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint"); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (finding that the *Twombly* standard applies to "all civil actions"); *see generally* Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of* Twombly *and* Iqbal, 33 Harv. J. of L. & Pub. Pol'y 1107 (2010). Ohio courts have applied the "plausibility" pleading standard of *Twombly* and *Iqbal*. *See, e.g., DiGiorgio v. Cleveland*, 8th Dist. No. 95945, 2011-Ohio-5878, ¶ 41; *Boske v. Massillon City Sch. Dist.*, 5th Dist. No. 2010-CA-00120, 2011-Ohio-580, ¶¶ 14-15. Thus, just as *Twombly* made clear the rigorous pleading requirements of Fed. R. Civ. P. 8 and 12 by laying to rest language from an earlier decision that suggested some leniency, *Dukes* supports more rigorous class certification requirements under Rule 23 than some earlier Court language might have suggested.

In *Ojalvo v. Board of Trustees*, 12 Ohio St. 230, 233, 466 N.E.3d 875, 877-78 (1984), the trial court found that the alleged breach of an employment contract, which formed the basis of the class action, probably did not exist. This Court reversed the trial court's rejection of class certification, finding that the trial court's consideration of whether the plaintiffs experienced a common breach of their employment contracts was "an attempt to merge an improper analysis of the merits of the claim with the proper test of commonality under Civ. R. 23(A)(2)." *Id.* Citing *Eisen*, the Court ruled that "narrow issues of commonality" do not involve consideration of the actual merits of the case. *Id.*

As State Farm's Memorandum observes, long after *Falcon*, many Ohio courts have continued to follow *Eisen* and *Ojalvo*. *See* Memorandum in Support of Jurisdiction (citing *Lucio v. Safe Auto Ins. Co.*, 183 Ohio App.3d 849, 2009-Ohio-4816, 919 N.E.2d 260, 265, ¶ 15 (7th Dist.)). There are other examples. *See, e.g., Hill v. Moneytree of Ohio Inc.*, 9th Dist. No. 08CA009410, 2009-Ohio-4614, ¶¶ 12-13 (quoting at length from *Eisen* to conclude that "[c]onsideration of the merits of the dispute is inappropriate in determining class certification" and finding "it was an abuse of discretion for the trial court to make any merit findings"); *Setliff v. Morris Pontiac, Inc.,* 9th Dist. No. 08CA009364, 2009-Ohio-400, ¶ 6 (citing *Ojalvo* to find that "[w]hen a trial court considers a motion to certify a class, it accepts as true the allegations in the complaint, without considering the merits of those allegations and claims"); *Nagel v. Huntington Nat'l Bank,* 179 Ohio App.3d 126, 131-32, 2008-Ohio-5741, ¶ 10 (8th Dist.) (citing *Ojalvo* to find that "[w]hen a trial court considers a motion to certify a class, it must assume the truth of the allegations in the complaint, without considering the merits of those allegations and claims" and stating that "[a]ny doubts a trial court may have as to whether the elements of [the] class certification have been met should be resolved in favor of upholding the class . . . .").

The case before this Court demonstrates precisely what is at stake if Ohio courts continue to preclude consideration of merits issues that bear upon determining whether a class satisfies the fundamental requirements of Rule 23, in contravention of mainstream federal class action jurisprudence. Here, the Eighth District Court of Appeals affirmed a class of 100,000 State Farm policyholders who had windshield repairs under their insurance policies over a period of twenty years. The foundation of the common issue defined by the plaintiff is his assertion that State Farm's policies provided insureds with a right to obtain a cash payment for the entire value of the windshield (less the applicable deductible), to have the windshield repaired, and to keep the remaining money.

Although State Farm argued that the plain language of the policies in place during the relevant time period contradicted these assertions and did not extend a "pay-out" option to policyholders, the Eighth District simply "believed" the Plaintiff's "theory of the case" for purposes of class certification. Op. at ¶ 21. The Plaintiff also asserted that the insurance policies required any windshield repair to restore the windshield to its pre-loss condition, without analysis of the language of those policies. The Eighth Circuit found this claim "dubious," Op. at ¶ 56, but avoided ruling on the meaning of the policy language. The Eighth District admonished State Farm for contending that that the trial court did not conduct a "rigorous analysis" when it adopted wholesale the Plaintiff's proposed findings of fact and conclusions of law. Op. at ¶ 53. Yet, the Court of Appeals then recognized that the trial court "used much of the language in Cullen's proposed findings of facts and conclusions of law," only its opinion was more concise. Op. at ¶ 54. The Eighth District found that the trial court waded "too far into the merits of the case" when it found the case pay-out option was available. Op. at ¶ 55. The Court of Appeals refused, however, to consider whether the unambiguous policy language said otherwise. "This

goes to the heart of the merits of the case and is inappropriate at this point. Class certification does not address the merits of the claim." *Id.*

This language in the Eighth District's opinion, and its general approach to class certification, while not citing *Eisen* or *Ojalvo*, takes the "no consideration of the merits approach" that many courts, including the U.S. Supreme Court, have subsequently rejected or abandoned. Curiously, the Court of Appeals relies on *Dukes* for its basic recitation of the predominance standard, ¶ 18, cites to *Falcon* in discussing the commonality requirement, ¶ 26, and again invokes *Dukes* on the inappropriateness of class certification when there is a need for individual monetary damage awards, ¶ 48. Yet, the Court of Appeals sidesteps a core holding of *Falcon* and *Dukes* – that a rigorous analysis of class certification may require the court to "probe behind the pleadings" and will "frequently . . . entail some overlap with the merits of the plaintiff's underlying claim" to ensure the prerequisites of Rule 23 have been satisfied. *Dukes*, 131 S. Ct. at 2551 (citing *Falcon*, 457 U.S. at 160-61).

II. WHETHER COURTS MAY LOOK BEYOND THE PLEADINGS WHEN DECIDING THE CRUCIAL ISSUE OF CLASS CERTIFICATION HAS SIGNIFICANT PUBLIC POLICY IMPLICATIONS

Class certification transforms one case into a lawsuit involving thousands, a hundred thousand, as in the case before this Court, or, as in *Dukes*, millions of potential claimants. Classwide damages can reach into the billion-dollar range. As the U.S. Supreme Court has observed, "Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may feel it economically prudent to settle and to abandon a meritorious defense." *Livesay*, 437 U.S. at 476. "The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996).

Judges have recognized that "the sheer size and complexity of the action, the added time, expense and effort needed to defend it as a class suit may force the defendant, despite the doubtful merit of the claims, to settle rather than to pursue the long and costly litigation route required for review of the class action certification." *General Motors Corp. v. City of New York*, 501 F.2d 639, 657-58 (2d Cir.1974) (Mansfield, J., concurring in granting of interlocutory appeal of grant of class certification); *see also* Bruce Hoffman, *Remarks, Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo. 17 J. Legal Ethics 1311, 1329 (2005) ("Following certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . .") (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition). Indeed, Judge Friendly called settlements induced by a small probability of an immense judgment in a class action "blackmail settlements." Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973). Defendants have settled even the most tenuous claims as a result of class certification. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 151 (2d Cir. 1987) (affirming $180 million class settlement even though it was clear that the trial court "viewed the plaintiffs' case as so weak as to be virtually baseless" and granted summary judgment against the plaintiffs who opted out of the class action).

Given the high probability of post-certification settlement, overbroad application of *Eisen* to preclude consideration of the merits creates a substantial risk of erroneous class certification that will rarely be corrected and invites frivolous and weak class action suits. *See* Bone & Evans, 51 Duke L.J. at 1252. Therefore, clarity from this Court as to whether trial courts must assume the facts as stated in the plaintiff's complaint when ruling on class certification, or are

required to consider the factual and legal merit of assertions that are directly relevant to the Rule 23 determination, is of the upmost importance. *See* Bartlett H. McGuire, *The Death Knell for* Eisen*: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366 (1996).

The need to consider aspects of the merits of a claim in assessing class certification is illustrated by *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), where Judge Richard Posner granted a writ of mandamus ordering a trial court to decertify a nationwide class action brought on behalf of hemophiliacs who alleged that drug companies that manufactured blood solids were responsible for their infection with the AIDS virus. Prior to certification, the defendants had prevailed in twelve of thirteen individual cases. Through class certification, the court recognized that the defendants might suddenly face 5,000 claims, $25 billion or more in potential liability, and bankruptcy. *See id.* at 1298. In this situation, "[t]hey may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." *Id.* The court found that the defendants should not be required to "stake their companies on the outcome of a single jury trial" where there was a "demonstrated great likelihood that the plaintiff's claims, despite their human appeal, lack legal merit." *Id.* at 1299.

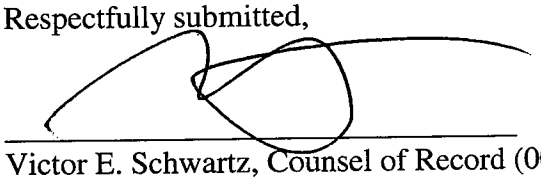
In sum, the U.S. Supreme Court has now clarified in *Dukes* that it is not only permissible, but necessary, for trial courts to decide disputed issues that are enmeshed in evaluating whether a proposed class meets Rule 23's due process safeguards. Civ. R. 23(A) and (B) and Fed. R. Civ. P. 23(a) and (b), the federal rule governing class actions, are virtually identical. Ohio courts consider federal authority to be an "appropriate aid" to interpreting the Ohio rule. *See State ex rel. Davis v. Public Employees Ret. Bd.*, 111 Ohio St.3d 118, ¶ 28, 855 N.E.2d 444, 452 (2006). Clarifying that Ohio courts no longer follow the mistaken view stemming from *Eisen* that

broadly precludes consideration of merits issues would ensure consistency with federal class certification jurisprudence. If such key questions are off the table, and the plaintiff's assertions are unquestionably accepted as true for purposes of class certification, Ohio courts may become known to businesses for placing inordinate pressure to settle weak or frivolous claims filed as putative class actions. Following the sound principles set forth in *Dukes* would deter class action abuse by removing an incentive for unwarranted forum shopping that would draw spurious class actions to Ohio state courts.

CONCLUSION

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

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing Brief 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 March 29, 2012, addressed to the following:

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