

No. _____

In the
Supreme Court of the United States

STATE REL. ROBERT MERRILL, TRUSTEE, ET AL.,
Petitioner,
v.

STATE OF OHIO, DEPARTMENT OF NATURAL
RESOURCES, ET AL.,
Respondents.

**On Petition for a Writ of Certiorari to the
Supreme Court of Ohio**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the failure of a state court to provide individual notice to readily identifiable class members in a class action settlement of a case asserting a taking by a State of property owned by Class Members by certifying the class under Ohio's Civil Procedure Rule 23(B)(2), (identical to Federal Rule of Civil Procedure 23(b)(2)) instead of certification under Rule 23(b)(3), when the Class Members are to be given settlement payments of monetary compensatory damages for the taking, thereby depriving those class members who never received notice of the settlement of Ohio's taking of their realty interests of their right to Due Process under the Civil Rules.

Whether the failure of a state court to provide individual notice to readily identifiable class members whose lands were taken in a class action settlement when they were entitled to claim payments of monetary compensatory damages, constitutes an improper deprivation of their properties without Due Process of law, as would be required under the Fifth and Fourteenth Amendments to the United States Constitution and of the Ohio Constitution.

Whether a state court judgment approving a settlement arising out of a state's taking without providing notice to class members who are readily identifiable, which deprives the class members of their property without Due Process of law, would be binding and enforceable against those class members so deprived.

LIST OF ALL PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption of this case, Petitioner George Sortino is a party to this proceeding.

LIST OF ALL RELATED PROCEEDINGS

State ex rel. Robert Merrill, Trustee v. State of Ohio, Department of Natural Resources, et al., Case No. 04CV001080, Lake County, Ohio, Court of Common Pleas.

State ex rel. Robert Merrill, Trustee v. State of Ohio, Department of Natural Resources, et al., Case No. 2019-L-164, Court of Appeals, Eleventh Appellate District, Lake County Ohio.

State ex rel. Robert Merrill, Trustee v. State of Ohio, Department of Natural Resources, et al., Case No 2021-0162, Supreme Court of Ohio.

State of Ohio ex rel. George Sortino v. State of Ohio Department of Natural Resources, et al., Case No. 2018 CV 0074, Court of Common Pleas, Erie County, Ohio.

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State ex rel. Merrill v. State Department of Natural Resources, Case No. 2019-L-164, Court of Appeals, Eleventh Appellate District, Lake County, Ohio, Opinion Affirming Judgment of Lake County Court of Common Pleas, 2020-Ohio-6811, December 21, 2020.

State ex rel. Robert Merrill, Trustee v. State of Ohio Department of Natural Resources, et al., Case No. 2021-0162, Supreme Court of Ohio. Entry declining to accept jurisdiction of appeal, *04/27/2021 Case Announcements*, 2021-Ohio-1399, April 27, 2021.

BASIS FOR JURISDICTION

The Ohio Supreme Court issued its Entry on April 27, 2021 declining to accept jurisdiction of a timely filed Notice of Appeal and Petition for Jurisdiction. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The focus of this matter deals with the propriety of certification of a settlement class under Ohio Rule of Civil Procedure 23(B)(2) when paying money damages

to the class members instead of certification pursuant to Civ.R. 23(B)(3). This matter invokes the Due Process failures by the state in taking of private lands and by the Judiciary in permitting Due Process violations. These are also, of course, protections guaranteed by the Fifth and Fourteenth Amendments to Class members where property ownership rights were taken by the State. These Class Members should have been provided with individualized notice of the settlement, *before being deprived* of their property rights. There is a conflict between the Ohio state court decision and the requirement under Federal Rule of Civil Procedure 23(c)(2)(B) and the cases of this Court mandating that individual notice be provided to all members of a class certified under Federal Rule of Civil Procedure 23(b)(3). Class members were easily identifiable with virtually no effort and could have been provided with individual notice. Yet, the holding of the Ohio Courts interpreting the identical rule in the Ohio Rules of Civil Procedure, arrived at contrary conclusions.¹

Furthermore, this Court in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994), after accepting that case for review, explicitly refused to answer the question of whether a certification of a class for money damages with no right to opt-out under Federal Rule 23(b)(2) would be a deprivation of Due Process. The question of whether a

¹ Ohio's Civil Procedure Rule 23(A) and (B) are identical to the Federal Rule of Civil Procedure 23(a) and (b). The Ohio Supreme Court has recognized that "federal authority is an appropriate aid to interpretation of the Ohio rule." *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200, 201, 31 OBR 398, 509 N.E.2d 1249 (1987).

class for money damages could only be appropriately certified under Fed.R.Civ.P 23(b)(3) was not before this Court in *Ticor* because that issue had not been appealed in the courts below. Therefore, the propriety of certification of the *Ticor* class as a (b)(2) class was *res judicata*. In the context of the *Ticor* case, this Court stated that answering the constitutional question would be entirely hypothetical. Instead of answering a hypothetical question, this Court dismissed the case as improvidently allowed.

As to this case, the Due Process requirements for notice under Rule 23(b)(3) have been clearly established. The question of whether these deprivations of Due Process would bind the absent class members to a judgment which precluded their rights to bring an action in another court asserting the same claims is no longer hypothetical. This important question of federal law should now be settled by this Court to give proper guidance to both federal and state courts when certifying a class in class action proceedings. This is the proper case to resolve that question.

Fifth Amendment – U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment- Section 1 – U.S. Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rule of Civil Procedure 23(b)(2)

A class action may be maintained if Rule 23(a) is satisfied and if the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory judgment is appropriate respecting the class as a whole.

Federal Rule of Civil Procedure 23(b)(3)

A class action may be maintained if Rule 23(a) is satisfied and the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a

class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Federal Rule of Civil Procedure 23(c)(2)(B)

For any class certified under Rule 23(b)(3) – or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3) – the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

STATEMENT OF THE CASE

This appeal is about absent class members' rights to Due Process under the United States Constitution and how the requirements for the provision of notice to class members under Federal Rule of Civil Procedure 23 (and the identical Rule 23 of the Ohio Rules of Civil Procedure) impact those due process rights.

The case that underlies this Petition for Certiorari is *State ex rel. Robert Merrill v. State of Ohio, Department of Natural Resources, et al.*, Case No. 04CV001080 in the Lake County, Ohio Court of Common Pleas. In that case the parties reached a settlement which provided class members with monetary compensation and for agreed upon attorney fees. But it did not provide the class with individualized notice of their right to participate nor to opt-out of the settlement. The terms of the settlement arrangements were in conflict with this Court's requirement that individualized notice of settlement be

provided to all class members who can be identified with reasonable effort. The *Merrill* settlement included a release by all persons whose lands had been taken for all claims against the State of Ohio which was held to be binding on the entire class by the state trial court, even though the vast majority of the class were unaware they had ever had any rights to claim any portion of the settlement proceeds, nor that they would be giving up these rights. The majority of the Class was ignorant of the settlement's existence. Petitioner, George Sortino ("Sortino"), asserts that this result is a deprivation of the class members' constitutional right to Due Process, which rendered the settlement unenforceable against those uninformed class members.

Merrill arose out of the Ohio Department of Natural Resources' ("ODNR") taking of class members' waterfront property on Lake Erie. *Merrill* was settled by agreement of the named parties. However, Petitioner Sortino, a person who met the definition of a class member, as an owner of substantial waterfront property interests on Lake Erie, could not participate in the settlement because the settlement, as approved by the trial court, provided for no individualized notice to Sortino and thousands of other absent class members. This occurred even though the state possessed the actual addresses of these class members through the Ohio counties' tax records. Sortino did not learn about the settlement until long after the deadline to file a claim for the settlement funds and after all of the funds had been distributed to class attorneys and select class members.

The *Merrill* case started out as a declaratory judgment action and a request for mandamus on behalf of approximately 15,500 absent class members/property owners abutting Lake Erie in Ohio. No money damage was sought in the Complaint. (App. 44). The *Merrill* plaintiffs correctly alleged that Ohio had unlawfully asserted ownership rights to the shoreline property up to the ordinary high water mark, and had also actually required some class members to pay monies to lease parts of their own lands back from the State of Ohio. The trial court certified a class for the declaratory judgment count under Ohio Rule of Civil Procedure 23(B)(2) to determine the proper waterfront boundary line. This class was described as “all persons, as defined in R.C. § 1506.01(D), excepting the State of Ohio and any state agency, as defined in R.C. § 1.60, who are owners of littoral property bordering Lake Erie (including Sandusky Bay and other estuaries previously determined to be a part of Lake Erie under Ohio law) within the territorial boundaries of the State of Ohio.” (App. 26). The Ohio Supreme Court eventually held that the landward boundary of Lake Erie was not the ordinary high water mark, which ownership ODNR had laid claim to, but instead was “the natural shoreline, the line at which the water usually stands when free from disturbing causes.” *Merrill v. ODNR*, 130 Ohio St.3d 30, 2011-Ohio-4612, 54. (App. 67-68).

After remand, the trial court ordered ODNR to return lease monies improperly collected from 683 class members with submerged land leases, and extended the Civ.R. 23(B)(2) certification for the class for the remaining two counts in the Complaint. (App. 97). The

counts sought declaratory judgment as to whether ODNR's actions constituted a taking of class members' property without just compensation, and a request for a Writ of Mandamus to require ODNR to begin individual appropriation proceedings in separate actions to establish the value of each Class Member's lands taken. These were the appropriate steps which should have been taken.

The trial court held that Civ.R. 23(B)(2) certification continued to be appropriate because the remedies sought were equitable, and "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." This certification determination was affirmed up to the Ohio Supreme Court. *Merrill v. ODNR*, 11th Dist. No. 2012-L-113, 2014-Ohio-1343, 5, 20, *cert denied*, 140 Ohio St.3d 1416, 2014-Ohio-3785.

However, the parties eventually settled the entire case and entered into a Stipulation of Settlement for monetary relief, not the equitable relief sought in the complaint. ODNR paid \$6.1 million to resolve the case for all 15,500 class members. Out of the settlement fund, \$1,720,091.51 was allocated to refunds of improperly collected land leases under Count I of the Amended Complaint. Then only one Named Plaintiff, Ohio Lakefront Group, received reimbursement for some of the attorney fees that had allegedly been paid by that Plaintiff in the amount of \$600,000.

Only then were the rest of the settlement monies distributed to remaining class members who filed a

claim. This distribution was made according to a plan of allocation, provided for in the Settlement Agreement “for payment of compensation with respect to Count II [the claim seeking a declaratory judgment that there had been an unconstitutional taking].” In approving the Settlement, the trial court did not reevaluate the continuing viability of class certification under Civ.R. 23(B)(2), despite the fact that the settlement provided only for monetary compensatory damages to the Count II class members and none of the equitable relief pled. (App. 149).

Only the 683 property owners, who were to receive reimbursement for their lease payments, were sent an individual notice. Because the class had previously been certified under Civ.R. 23(B)(2), which does not require individual notice nor a right to opt-out, the Settlement Agreement *and the Court* did not provide for individual notices to the Class. No individual notice was provided despite the fact that each property owner’s address was known and recorded in each of the eight counties abutting Lake Erie’s real estate tax records. That was the case, despite the fact that the Settlement Agreement stated that each of the class members were to be bound by the Settlement Agreement and the Releases contained in it. The trial court merely ordered publication of the settlement notice in a few local newspapers. No property owners were afforded the right to opt-out. Despite these obvious Due Process deficiencies, the Court unconstitutionally approved the Settlement Agreement which required that all class members would be bound by the releases that would prohibit them from prosecuting any further claims. (App. 149). The lack of

notice deprived Sortino of his Due Process right to receive notice, to file a claim to participate in the settlement distribution and/or to opt-out of the settlement. After becoming aware that the *Merrill* case had been filed and the settlement paid, Sortino sought to enforce his rights to Due Process. Sortino filed a class action in the Erie County, Ohio, Court of Common Pleas. *State of Ohio ex rel. George Sortino v. State of Ohio, Department of Natural Resources, et al.*, Case No. 2018 CV 0074. (App. 245). The putative class in the Erie County action is defined as “all of the approximately 15,500 private littoral owners of parcels of real property abutting Lake Erie within the State of Ohio who were not sent notice of the settlement of the case captioned *State ex rel. Robert Merrill, et al v. State of Ohio Department of Natural Resources, et al*, Case No. 04CV001080, filed in the Court of Common Pleas, Lake County Ohio, and who did not file a Proof of Claim with the Settlement Administrator.” This class included all owners of lakefront property who had been denied their right to Due Process by the *Merrill* settlement. After the *Sortino* case in Erie County was filed, ODNR filed a motion to Enforce the Settlement and for Civil Contempt in the Lake County Court of Common Pleas. On November 7, 2019, after a hearing, the trial court issued a Journal Entry finding that Sortino was bound by the releases in the *Merrill* settlement to which he was unaware, *and*, by merely questioning the validity of the releases in his Erie County case, Sortino was in *contempt*. (App. 60). This

decision further deprived Sortino's constitutional rights to access Ohio Courts.²

Sortino appealed to the Ohio Eleventh District Court of Appeals. On appeal, Sortino argued that the trial court was entrusted with the duty, before approving the proposed settlement for money damages, to review the propriety of class certification under Civ.R. 23(B)(2) and the adequacy of the notice provided to class members. Had the trial court done so, it would have been clear to the court that the class was now a Civ.R. 23(B)(3) class and individual notice to the class members, along with the right to opt-out, was necessary. Sortino argued that the lack of proper notice deprived class members of their right to Due Process under the United States and Ohio Constitutions, and a violation of the Due Process protections of Civ.R 23. Sortino argued that the deprivation of his Due Process rights meant that he could not be bound by the *Merrill* settlement.

The Ohio Eleventh District Court of Appeals affirmed the Lake County Common Pleas Court. (App. 2, 22). Sortino appealed to the Supreme Court of Ohio because the Eleventh District's reasoning was also constitutionally flawed and that the Due Process arguments raised by Sortino were not properly considered. Sortino filed a Memorandum in Support of Jurisdiction on February 4, 2021. On April 27, 2021,

² As guaranteed by the Fourteenth Amendment of the United States Constitution, “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]”

the Supreme Court of Ohio declined to accept jurisdiction of the appeal. (App. 1).

REASONS FOR GRANTING THE PETITION

- I. The Ohio Courts Failed to Adhere to this Court’s Precedents, Which Guarantee Class Members’ Rights to Due Process Before They Are Deprived of A Property Interest, When The Eleventh District Court Of Appeals Affirmed the Decision of the Lake County Ohio Court of Common Pleas and Did Not Require that the Trial Court Provide Individual Notice of a Monetary Class Settlement to All Class Members Who Could Be Readily Identified.**
 - A. This Court has clearly established that Class Members have a due process right to individualized notice upon settlement of a class action for monetary relief under Rule 23(b)(3) of the Federal Rules of Civil Procedure.**

“The procedural protections attending the (b)(3) class – predominance, superiority, mandatory notice, and the right to opt out – are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary to a (b)(2) class.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). “When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior

method of adjudicating the dispute. Predominance and superiority are self-evident.” *Ibid.* Plaintiffs who have an individual monetary cause of action *must be able to decide* for themselves “whether to tie their fates to the class representatives’ or go it alone – a choice Rule 23(b)(2) does not ensure that they have.” *Ibid.* at 364.

The express language and the intent of Rule 23 (c)(2) leave no doubt that individual notice must be sent to all class members who can be identified through reasonable effort. *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, syllabus at 2(a), 94 S. Ct. 2140, 40 L.Ed.2d 732 (1974). Rule 23(c)(2) provides that, in any class action maintained under subdivision (b)(3), each class member shall be advised that the class member has the right to exclude himself/herself from the action on request or to enter an appearance through counsel, and further that the judgment, whether favorable or not, will bind all class members not requesting exclusion. To this end, the court is required to direct to class members “the best notice practicable under the circumstances, *including individual notice to all members who can be identified through reasonable effort.*” (Emphasis added). Fed.R.Civ.P. 23(c)(2). “We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.” *Eisen*, 417 U.S. at 173. The Advisory Committee’s Note to Rule 23 describes subdivision (c)(2) as “not merely discretionary” and added that the “mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject.” *Ibid.* citing 28 U.S.C. App., p. 7768.

The Ohio 11th District Court of Appeals' affirmation of the trial court's decision will otherwise mislead litigants and other courts into allowing settlements which include compensatory damages, and attorney fees without any notice to the class members. Class members will be deprived of valuable Due Process rights to notice, which are meant to protect absent class members, if the requirements of Rule 23 can be ignored simply because the parties settle.

B. The constitutional right to due process.

A cause of action is a form of property interest possessed by each of the plaintiffs which is protected by the Due Process Clause. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982). "When notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 94 L.Ed. 865, 70 S.Ct. 652 (1950). The opportunity to be heard, a fundamental requisite of Due Process, is of "little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Ibid.* at 314.

While Rule 23 provides the general process to be followed for notice to absent class members, it does not purport to detail every requirement necessary to satisfy Due Process. *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1104 (5th Cir. 1977). To bind known plaintiffs with claims wholly or predominantly for monetary damages or similar relief at law, plaintiffs must be provided with minimal procedural due process

protection. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). Plaintiffs must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. *Ibid* at 812. The notice must be the best practicable, “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Ibid*, quoting *Mullane*, 339 U.S. at 314-315. Due Process also requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself/herself from the case by executing and returning an optout or request exclusion from the court. *Ibid*.

Absent class members have a constitutional right to Due Process which includes the right to adequate notice and the right to opt-out of a class action in which monetary damages are paid. “[T]he notice procedures utilized in class actions are of constitutional significance and must themselves be viewed in due process terms.” *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 833-834 (3d Cir. 1973).

II. The Ohio Courts’ Decisions To Enforce As Valid a Judgment of a Court Which Deprived Class Members of their Due Process Rights, Has Created a Conflict Between the State Court’s Decision and those of This Court.

A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment. *Kremer v. Chem*

Constr. Corp., 456 U.S. 461, 482, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982), citing *McDonald v. Mabee*, 243 U.S. 90, 92 (1917) (“[An] ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the State as it is outside of it.”); *Haddock v. Haddock*, 201 U.S. 562, 567, 568 (1906).

The Ohio 11th District Court of Appeals decision, which the Ohio Supreme Court declined to review, conflicts with this Court’s firmly established principles. This Court should grant Sortino’s petition to resolve this conflict.

III. This Court should re-evaluate the dismissal of the *Ticor* certiorari petition.

A. The questions raised in this appeal, which are identical to those the *Ticor* decision labeled hypothetical, are actually of practical importance to these and future litigants.

1. Whether Class Action settlements providing only money damages to class members must be certified under Rule 23(b)(3), which provides them the due process right to notice and to opt-out, is of practical importance to Class Members who assert a collateral attack on the settlements based upon their deprivation of those rights.

Instead of addressing the request for a declaratory judgment and a request for mandamus, the *Merrill*

settlement “recognize[d] and acknowledge[d] the expense and length of continued proceedings necessary to prosecute the Action through trial and anticipated appeals, as well as *any further appropriations proceedings.*” (Emphasis added.) (App. 129). The State, instead, paid money to certain class members, in place of the requested equitable relief. According to the Plan of Allocation, class members were to file Proofs of Claims and a Settlement Administrator was to calculate the amount due each claimant using a negotiated formula, based on certain specified attributes of each property. This aspect of the settlement provided relief that made continuing certification of the class under Civ.R. 23(B)(2) inappropriate.

Instead, Civ.R. 23(B)(3) certification should have been complied with. Civ.R. 23(B)(3) is for cases in which there are money damages. The purpose of class certification under Civ.R. 23(B)(3) is to enable “numerous persons who have small claims that might not be worth litigating in individual actions to combine their resources and bring an action to vindicate their collective rights.” *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 80, 1998-Ohio-365, 694 N.E.2d 442, quoting Wright et al., *Federal Practice and Procedure*, Section 1777, at 518.

When presented with a class action settlement, every presiding court must determine whether the proposed class satisfies all of the requirements of Rule 23, with only one exception: the court does not need to consider whether “the case, if tried, would present intractable management problems[.]” *Amchem Prods.*,

Inc. v. Windsor, 521 U.S. 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). All of the other remaining class certification requirements “demand [of the trial courts] undiluted, even heightened, attention in the settlement context.” *Ibid.* A trial court may only certify a class if, after a “rigorous analysis”, it finds that the moving party has demonstrated that *all the factual and legal prerequisites* to class certification have been satisfied. *Hamilton* at 70, 1998-Ohio-365, 694 N.E.2d 442. (“The trial court is required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied.”) See also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 830 (1999) (“settlement Class actions may not proceed unless the requirements of Rule 23 are met”).

After reviewing the stipulation of settlement in *Merrill*, the trial court performed no independent analysis of the propriety of continuing class certification. The fact that the settlement provided monetary relief for the class members was never even addressed. This, despite the fact that, as the approving court, that Court was obligated to make findings as to predominance and superiority in a Civ.R. 23(B)(3) analysis. Furthermore, the settlement as approved by the court specifically stated that “[n]o member of the Settlement Class, certified pursuant to Civ.R. 23(B)(2) shall have any right to opt out of the settlement and release.” (App. 137). This provision of the settlement simply ignored the reality that certification under Civ.R. 23(B)(2) was *no longer viable* for the class and that the *rights* of class members to be able to *opt-out* of the settlement was a procedural due-process requirement pursuant to Civ.R. 23(B)(3).

The trial court clung to the belief that, because a class *seeking* only equitable relief was properly certified under Civ.R. 23(B)(2), certification of the class under Civ.R. 23(B)(3) was unnecessary even after the parties settled the case by solely providing money damages for *all* class members, instead of the equitable relief *sought*. Civ.R. 23 criteria must be strictly applied in order to assure that the interests of absent members who otherwise will be bound by a legal proceeding are protected. “But with respect to each class member’s individualized claim for money, that is not so – which is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the class.” *Dukes*, 564 U.S. at 362. Plaintiffs who have an individual monetary cause of action *must be able to decide* for themselves “whether to tie their fates to the class representatives’ or go it alone – a choice Rule 23(b)(2) does not ensure that they have.” *Ibid.* at 363. When a class action is certified under Civ.R. 23(B)(3), class members must be afforded the opportunity to opt-out of the class upon request. *In re Kroger Co. Shareholders Litigation*, 70 Ohio App.3d 52, 60, 590 N.E.2d 391 (1st Dist. 1990).

In the context of the settlement which allocated the payment of funds to each class member who filed a Proof of Claim as required, the nature of the class changed dramatically. The settlement transformed the class from one which was appropriately certified under Civ.R. 23(B)(2), seeking “final injunctive or declaratory relief,” to a class which would receive a money judgment, requiring the members receive “notice plus an opportunity to be heard and participate in the

litigation” pursuant to Civ.R. 23(B)(3). *Shutts*, 472 U.S. at 812.

The trial court erred by concluding that, even if it had recognized that the class should have been certified under Civ.R. 23(B)(3), individualized notice was still not required. However, pursuant to Civ.R. 23(E)(1), upon settlement, the court is required to “direct notice in a reasonable manner to all class members who would be bound by the proposal.” That does not absolve the court from the directive of Civ.R. 23 (C)(2)(b), that “[f]or any class certified under Civ.R. 23(B)(3), the court *shall* direct to class members the best notice that is practicable under the circumstances, *including* individual notice to all members who can be identified through reasonable effort.” (Emphasis added.) Here, each individual landowner could easily have been given direct notice by the State of Ohio.

If, as the trial court stated, sending individual notice to a class of 12,000 to 15,500 individual members would not have been financially practicable, the appropriate remedy would not be to refuse to give the individualized notice. If individual notice of a settlement cannot be provided to those members of a (B)(3) class that can be identified, the appropriate decision of the court would be to *refuse to approve* the settlement. “Individual notice to identifiable class members is not a discretionary consideration that can be waived in a particular case”; rather it is “an unambiguous requirement of Rule 23.” *Eisen*, 417 U.S. at 176 (order from the Supreme Court instructing the trial court to dismiss the class action on remand because the plaintiff argued that individually mailed

notice to the entire class would be prohibitively expensive). “There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs.” *Ibid.*

All of the *Merrill* class members were identifiable. They owned property which was recorded by the Auditors in the eight Ohio counties in which land abuts Lake Erie. However, the overwhelming majority of Class Members did not receive any individualized notice. (App. 5, 29). “In the context of a class action predominantly for money damages we have held that absence of notice and opt out violates due process.” *Dukes*, 564 U.S. at 398, citing *Shutts*, 472 U.S. at 812. The notice deficiency is reason enough for the *Merrill* settlement approval Order to have no preclusive effect on Sortino and his putative class members.

2. Determining whether certification under Rule 23(b)(3) is mandated for classes receiving monetary damages will provide clarity to the question of whether or not this Court need address the constitutional question of due process.

Civ.R. 23 contains special notice requirements triggering constitutional due process concerns. Those requirements were not followed here. “[D]ue process requires that an absent class member’s rights are protected by the adoption and utilization of appropriate procedures in the certifying court.” *Hospitality Mgmt. Assocs. v. Shell Oil Co.*, 356 S.C. 644, 660, 591 S.E.2d 611 (S.C. 2004). “A procedure such as the class action, which has a formidable, if not irretrievable, effect on

substantive rights, can comport with constitutional standards of due process only if there is a maximum opportunity for notice to the absentee class member.” *Greenfield*, 483 F.2d at 831. “Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the case.” *Mullane*, 339 U.S. at 313. “Constructive notice by publication may be sufficient to satisfy due process ‘as to persons whose whereabouts or interests c[an] not be determined through due diligence.’” *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 224 (2d Cir. 2012), quoting *In re “Agent Orange” Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145, 168 (2d Cir. 1987). Notice by publication only would be justified if the identities of all unnamed class members were unascertainable. *Ibid.* However, the *Merrill* class members were identifiable and actual notice was required.

In this instance, the utilization of class certification under Civ.R. 23(B)(2) as a means to forego the provision of notice to the vast majority of the class, was not an appropriate procedure. “[C]ertification of a class under (b)(2) does not excuse the due process requirement that unnamed class members in a class action predominantly for money damages receive the “best practicable” notice.” *Hecht*, 691 F.3d at 225. The lack of notice deprived Sortino and the vast majority of class members of their due process rights to receive notice and to opt-out. Because of the procedural deficiencies in the notice plan approved by the trial court, Sortino and the members of his class have been

denied their right to due process. The *Merrill* settlement deprived absent class members of their property right to an adjudication of the amount of compensation they were entitled to receive from ODNR. Without proper notification of this potential outcome, along with the lack of information of the class members' rights to object or opt-out, the *Merrill* notice plan did not satisfy Due Process. The key element of Due Process is that class members have a full and fair opportunity to litigate all class issues. Sortino did not because there was inadequate notice provided. Once this Court defines the appropriate parameters of Rule 23(b)(2) and (b)(3) certification, it will be established with certainty whether or not it is necessary to reach the question whether a lack of notice is a constitutional violation of class members' rights.

- 3. In this Court's dismissal of the *Ticor* certiorari petition as improvidently allowed, the surviving decision of the Ninth Circuit regarding the *res judicata* effect of an analogous settlement arrangement supports Petitioner's (and all similarly situated class members') ability to collaterally attack the *Merrill* settlement.**

A Due Process challenge to the constitutional legitimacy of a final judgment should be seriously considered by every court. Traditionally, a court's judgment is binding on a party only if given a constitutionally sufficient notice, and if the court had both personal and subject matter jurisdiction. In the

class action context, this Court has added the requirement of adequate representation and in actions “predominately” for money damages, an “opt-out” right. *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 305, 134 L.Ed.2d 6, 116 S.Ct. 873 (1996). Courts evaluating Due Process collateral challenges *must* inquire into Due Process compliance underlying the prior judgment. *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 85 L.Ed. 22 (1940). This Court has stated “there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly ensures the protection of the interests of absent parties who are bound by it.” *Ibid.* at 42.

Collateral review has always been available to test whether the prior litigation’s procedures provided a “full and fair opportunity” to litigate the claims. *Kremer*, 456 U.S. at 480. “[C]ertain fundamental defects – lack of subject matter jurisdiction, personal jurisdiction, or due process – in a prior litigation will render the judgment void and without legal effect ***.” Note, Collateral Attack on the Binding Effect of Class Action Judgment, 87 Harv. L.Rev. 589, 593-94 (1974).

“Absent class members can collaterally challenge the *res judicata* effect of a prior class judgment *either* because they were not *adequately represented* or because there was *not adequate notice*. In addition, absent class members have successfully attacked a class action court’s ability to bind them by arguing that they were denied the *ability to opt out* or exclude themselves from the class.” *Juris v. Inamed Corp.*, 685 F.3d 1294, 1314 (11th Cir. 2012) (internal citations omitted) (Emphasis added). “[T]he mere fact that the

relief initially demanded was largely equitable should not permit a court to bind litigants to a settlement that eliminated constitutionally protected property interests without due process.” *Jiannaras v. Alfant*, 124 A.D.3d 582, 585, 1 N.Y.S.3d 332 (2015).

“[W]here it is clear that the trial court and the parties *** failed to comply with Rule 23(c)(2)’s mandate that notice be provided to absent class members, it would defy logic and law to hold that such putative class members are bound by res judicata.” *Besinga v. United States*, 923 F.2d 133, 137 (9th Cir. 1991). A class member’s individual suit will not be barred by res judicata if notice of the prior judgment in the class action is inadequate. *Penson v. Terminal Transport Co.*, 634 F.2d 989, 995 (5th Cir. 1981).

The Ninth Circuit correctly held that it would violate Due Process to accord res judicata effect to a judgment involving money damages claims where a plaintiff to the previous suit had not been afforded a right to opt-out. *Ticor*, 511 U.S. at syllabus 1. And, this Court, after accepting that case for review, explicitly refused to answer the question of whether a certification under Federal Rule 23 (b)(2) of a class for money damages with no right to opt-out would be a violation of Due Process. The reasoning was that answering the constitutional question would be entirely hypothetical. Instead, the case was dismissed as improvidently allowed, thereby leaving intact the ruling of the 9th Circuit Court of Appeals.

The trial court’s and the Ohio 11th District Court of Appeals’ conclusion that there was no error or defect in the procedure used in the trial court ignores the Due

Process violations of lack of notice and the absence of opt-out rights. The Ohio Court of Appeals erred in concluding that the procedures were sufficient, simply because the trial court held a hearing and allowed the parties to brief the merits of the settlement. A settlement approved with no notice to those class members who are stripped of their property rights cannot bind the class members.

B. The well-reasoned opinion of the *Ticor* Dissent should be adopted by this Court, allowing review of this case.

In dismissing *Ticor*, this Court was concerned that a non-constitutional question should have first been answered. The question in the *Ticor* appeal, as seen by this Court, was whether “in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not.” *Ibid* at 121. If a money damages class settlement can only be certified under Rule 23(b)(3), the class members must always have a right to opt-out (and a right to individualized notice), and, if so, the question of a constitutional right to Due Process would never be triggered. However, because the question of whether proper certification of a class for money damages could only occur under Rule 23(b)(3) was not a part of the *Ticor* appeal, this Court concluded that that question could not be addressed, leaving only the constitutional question, which it declined to review.

Justice O’Connor, joined by Chief Justice Rehnquist and Justice Kennedy, in her dissent, summed up the dilemma: “In other words, the Court declines to

answer the constitutional question because the [previous action] might not have been properly certified. * * * The constitutional ground on which the Court of Appeals relied, the one we granted certiorari to review and the parties have briefed and argued, was necessary to the decision in this case. Our prudential rule of avoiding constitutional questions has no application in these circumstances, and the Court errs in relying on it." *Ticor*, 511 U.S. at 123-124.

The actual question in *Ticor*, as well as that asserted in *Merrill*, should focus on when a judgment may be collaterally attacked in a separate proceeding, not on the propriety of class certification under a specific subsection of Rule 23(b). Whether or not the certification under Rule 23(b)(2) of the classes in a settlement providing for money damages was proper, this Court is now being asked to review a different question. Were the *Ticor* plaintiffs, as well as the putative class members in the case filed by Sortino in the Ohio State Court case, deprived of property without Due Process of law, either because there was a Due Process right to notice and to opt-out included in Rule 23(b)(3), which should have been provided, or in the alternative, a constitutional right under the Fifth and Fourteenth Amendments to the U.S. Constitution? If this Court establishes that there is such a right to Due Process, it can then proceed to determine if a deprivation of that due process right will allow for a collateral attack on the judgment entered.

Courts cannot operate in the dark and issue judgments, purporting to bind large groups of people, without ever notifying those who would be bound by

the judgment of the ramifications of that judgment when it affects their important property rights, here a taking of their individual lands by the State. When a party has been denied Due Process of law, they should have every right to collaterally attack a judgment in which they were given no opportunity to participate. Despite the undisputed fact that the identities of all of the members of the *Merrill* class could be ascertained by the State with reasonable effort, no attempt was made to provide the thousands of Ohio waterfront landowners on Lake Erie with *any notice* of the pending settlement.

The certified question to this Court in *Ticor* dealt only with whether “absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf.” *Ticor*, 511 U.S. at 121. Sortino’s petition seeks to have this Court review the propriety of class certification under Rule 23(b)(2) or (b)(3), which is a necessary inquiry when determining if the Due Process rights of class members to receive notice, along with a right to opt-out, are necessary for a judgment to be binding and enforceable against those class members not provided with notice. Sortino recognizes that the certification of the *Merrill* class under Rule 23(b)(2) cannot now be reversed, but the question as to these class members’ rights to *bring a separate action* because the prior judgment is not enforceable as to them, is the same question that drove the *Ticor* plaintiffs. This is not a hypothetical scenario and the answers to the questions presented are of great practical consequence to these Class Members, as well as other Class Members in

future actions. This is especially true here, because the State itself conducted the taking.

CONCLUSION

Courts should not be allowed to erode the Due Process rights of class members, when, after a taking, they do not strictly adhere to the requirements of Rule 23 and Due Process. The requirements for notice under the Civil Rules arise from the Constitutions of Ohio and of the United States, as well as the Rules themselves. The Ohio State Court of Appeals' decision is in conflict with the decisions of this Court and implicates an important Federal Question. The petition for a Writ of Certiorari is meritorious, and should be granted.

Respectfully submitted,

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