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APPENDIX A

The Supreme Court of Ohio

Case No. 2021-0162

[Filed April 27, 2021]

State ex rel. Robert Merrill, Trustee, et al., Homer S. Taft, et al.,	)
v.	)
State of Ohio, Deptartment of Natural Resources, et al., National Wildlife Federation, et al., George Sortino	)

E N T R Y

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Lake County Court of Appeals; No. 2019-L-164)

/s/ Maureen O'Connor
Maureen O'Connor
Chief Justice

APPENDIX B

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

CASE NO. 2019-L-164

[Filed February 4, 2021]

STATE ex rel. ROBERT MERRILL, TRUSTEE, et al.,	)
Plaintiffs-Appellees,	)
HOMER S. TAFT, et al.,	)
Intervening Plaintiffs-Appellees,	)
- vs -	)
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	)
Defendants-Appellees,	)
NATIONAL WILDLIFE FEDERATION, et al.,	)
Intervening Defendants-Appellees,	)

GEORGE SORTINO,)
)
Appellant.)
)

OPINION

Civil Appeal from the Lake County Court of Common Pleas, Case No. 04 CV 001080.

Judgment: Affirmed.

James F. Lang, Fritz E. Berckmueller, and Lindsey E. Sacher, Calfee, Halter & Griswold, L.L.P., The Calfee Building, 1405 East Sixth Street, Cleveland, OH 44114 (For Plaintiffs-Appellees).

Homer S. Taft, 20220 Center Ridge Road, Suite 300, P.O. Box 16216, Rocky River, OH 44116 (Intervening Plaintiff-Appellee).

L. Scot Duncan, 1530 Willow Drive, Sandusky, OH 44870 (Intervening Plaintiff-Appellee and for Intervening Plaintiff-Appellee Darla Duncan).

Dave Yost, Ohio Attorney General, State Office Tower, 30 East Broad Street, 16th Floor, Columbus, OH 43215; *Anne Marie Sferra and Daniel C. Gibson*, Bricker & Eckler, LLP, 100 South Third Street, Columbus, OH 43215 (For Defendants-Appellees).

Neil S. Kagan, 213 West Liberty Street, Suite 200, Ann Arbor, Ml 48104; *Peter A. Precario*, 2 Miranova Place, Suite 500, Columbus, OH 43215 (For Intervening Defendants-Appellees).

Dennis E. Murray, Sr., Margaret M. Murray and Donna J. Evans, Murray & Murray Co., LPA, 111 East Shoreline Drive, Sandusky, OH 44870 (For Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, George Sortino ("Sortino"), appeals from the judgment entry entered in the Lake County Court of Common Pleas granting appellees' motion to enforce a settlement agreement and for civil contempt. Sortino's argument is that the settlement agreement entered into during a class action proceeding, which was not appealed, is defective. Therefore, he argues that he is not bound as a class member by the agreement's prohibition on bringing future actions against appellees related to the class action and that he is free to proceed with a separate class action suit filed in Erie County. We affirm the judgment.

{¶2} The facts and circumstances leading to the present appeal began with the filing of a class action suit in 2004 by a class of plaintiffs comprised of all littoral property owners along Lake Erie's Ohio coast (the "*Merrill* Class"). Sortino was, at all relevant times, a littoral property owner along Lake Erie's Ohio coast; however, the parties dispute whether Sortino was aware of the class action suit prior to settlement. The suit sought mandamus and declaratory relief, as well as the return of funds collected for submerged land lease payments. For a complete factual history of the case, see *State ex rel. Merrill v. Ohio Dept. of Natural Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612.

{¶3} After remand from the Ohio Supreme Court, the trial court issued an order to brief class issues and

ultimately issued an order extending class certification under Civ.R. 23(B)(2). That decision was affirmed by this court in *State ex rel. Merrill v. Ohio Dept. of Natural Resources*, 11th Dist. Lake No. 2012-L-113, 2014-Ohio-1343, *appeal not accepted*, 140 Ohio St.3d 1416, 2014-Ohio-3785.

{¶4} A motion for preliminary approval of the class action settlement, approval of notice to class members, and scheduling of settlement hearing–along with stipulations–was filed on May 27, 2016. Individual notice was given to the 683 class members entitled to refunds. The remaining class members did not receive individual notification, but notice was published in local newspapers in each of the affected counties with instructions on how to file claims–as approved by the trial court. A website was also established to submit claims and receive information on the settlement. At the status hearing conducted on June 14, 2016, the trial court concluded that it had subject matter jurisdiction over the matter and scheduled a settlement hearing.

{¶5} On September 1, 2016, the trial court issued a journal entry reflecting that nearly 100 identical letters had been received objecting to the preliminary approval of the class action settlement. Thereafter, counsel for the putative class filed a motion for final approval of the class action settlement, and the trial court held a settlement approval hearing on October 21, 2016.

{¶6} The order and final judgment approving the settlement in the class action was filed on October 24, 2016, and a notice of final appealable order was issued

on October 26, 2016. The notice was sent by regular mail to all represented parties, including counsel for the *Merrill* Class. The settlement provided for compensatory damages and attorney's fees, but it did not specifically grant any equitable relief. The agreement also stated that the Lake County Court of Common Pleas retained exclusive jurisdiction over the matter. The order and final judgment were not appealed.

{¶7} On January 31, 2018, Sortino brought suit against appellees in the Erie County Court of Common Pleas (the "Erie Action") seeking to separately litigate the claims that were settled in the previous class action in Lake County in 2016. He brought the claim on behalf of "Sortino and the putative members of the *Merrill* class who did not receive individualized notice of the settlement, as required under Civ.R. 23(B)(3)." On May 29, 2018, appellees filed a motion to enforce the settlement and for civil contempt in Lake County. The Erie Action was eventually stayed on September 19, 2018, pending the resolution of appellees' Lake County motion to enforce and for contempt.

{¶8} A hearing on the motion was held on August 17, 2018, and the trial court granted appellees' motion to enforce the settlement and for civil contempt on November 7, 2019, which was stayed pending the present appeal. The trial court considered the merits of Sortino's challenges to the class action and held, in pertinent part, as follows:

> Initially [Sortino] argues that *Merrill* could only be properly filed in the Court of Claims, because it has exclusive jurisdiction over claims seeking

money damages against the state of Ohio. * * * Because this court lacked subject matter jurisdiction to hear the case, its judgment in the matter is void. While acknowledging that judgments rendered by courts lacking either subject matter or personal jurisdiction are void, the court does not believe this is a serious argument. The Merrill parties were not seeking an award of damages. Instead, they were seeking injunctive and declaratory relief, remedies which are clearly within this court's power to grant.
* * *

Second, Sortino claims that because money was awarded, Class Two had to be certified under Civ. R. 23(B)(3) instead of (B)(2). * * * The court believes this assertion is simply not true. The court acknowledges that the Supreme Court has held that "individualized monetary claims belong in Rule 23(b)(3)." * * * And it is also true that "[i]n the context of a class action predominantly for money damages we have held that absence of notice and opt out [rights] violates due process;" * * * But it has not laid down a blanket rule that money can never be awarded to a Civ.R. 23(B)(2) class. * * * To the contrary, "holding that no monetary relief could be recovered in a (B)(2) class flies in the face of long established circuit-court precedent." * * *

The heart of Sortino's argument, however, seems to be that the settlement dramatically changed the claims asserted by, and the relief provided

to, class members. He argues that if the case had not settled, "the *Merrill* court would have been required to issue a declaration on the question of an unconstitutional taking, and ODNR would have been compelled to seek out each property owner to settle or to commence appropriation proceedings * * * ." * * * Instead of approving the settlement under Civ.R. 23(B)(2), the court should have held a hearing to carefully consider whether it should be recertified under Civ.R. 23(B)(3). If it had been so recertified, he claims that individual notification of the settlement and the right to opt out would have been mandatory. * * * The court finds that this argument has some appeal on its face, but ultimately fails. Initially, the court notes that classes certified under Civ.R. 23(B)(2) are mandatory. Members are not afforded a right to opt out, nor even necessarily afforded notice of the action. * * * A (B)(3) class, on the other hand, is not mandatory, and "class members are entitled to receive 'the best notice that is practicable under the circumstances' and to withdraw from the class at their option." * * *

To begin, the court finds that Sortino's entire argument is based on the false assumption that if the Merrill parties had not settled, this court would have found in favor of the plaintiffs on Count Two and issued a mandamus requiring the state to either agree to individual settlements with class members or to initiate land appropriation proceedings with them. While that may have happened, it is far from a

certainty. And if it had not, none of the class members would have received any compensation for their taking claim. In fact, that uncertainty was a major factor driving the parties' decision to settle the case.

As to recertifying the class, the court notes that it addressed and approved both how class members would be notified of the settlement and the fact that they would not have opt-out rights at the hearing it conducted on June 14, 2016. Therefore, contrary to Sortino's claim, it considered and specifically found that certification under Civ.R. 23(B)(2) was appropriate, despite the fact that the settlement included a proposed monetary payment on the Count Two claims.

Furthermore, assuming arguendo that the court had decided to recertify this under Civ.R. 23(B)(3), Sortino's assertion that individualized notice would have been required is wrong. Instead, he would have been entitled to receive only "the best notice that is practicable under the circumstances." * * * Given the fact that the Count Two class was variously estimated to include somewhere between 12,000 to 15,500 members, the expense of individualized notice could have easily fully exhausted any funds remaining after the Count One class members were reimbursed. Under those circumstances, individualized notice would not have been practicable, and it is highly unlikely this court would have ordered it.

Most importantly, however, Sortino argues that certification was improper under Civ.R. 23(B)(2) because the settlement provided Count Two class members with no injunctive relief. Instead, monetary relief not only predominated the settlement, it was the sole relief granted by the court. And that relief was individualized depending on a set of factors unique to each class member. As a result, certification under Civ.R. 23(B)(3) was mandatory.

The court again disagrees. As just noted, certification under Civ.R. (B)(2) is only impermissible when money damages are exclusively or predominantly the final relief sought by the plaintiffs. * * * "[M]oney damages predominate when they are not incidental to declaratory and injunctive relief, i.e., when the damages do not 'flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief.'" * * *

Further, it was not improper to maintain the class under Civ.R. 23(B)(2) even though class members received separate amounts of compensation, because that compensation was not based on circumstances unique to each class member. Instead, it was capable of computation by objective standards, was not dependent on intangible, subjective differences of each class member's circumstances, did not require additional hearings on the merits, neither introduced new or substantial legal or factual

> issues, nor entailed complex individualized determinations. * * * As a result, class certification was appropriate under Civ.R. 23(B)(2), and Sortino's arguments are, again, without merit. * * *
>
> As a class member, he is deemed to have "fully, finally, and forever released, waived, discharged, and dismissed each and every" one of the claims he now brings in his Erie County lawsuit. Therefore, he is forever enjoined from prosecuting those claims, pursuant to this court's final order. And this court has the authority to enforce that order against him.

{¶9} Sortino filed a timely notice of appeal and raises four assignments of error for review. Appellees have raised one cross-assignment of error for review. We begin with the cross-assignment of error, which states:

> The trial court erred in even considering the merits of Sortino's impermissible collateral attack on the Final Judgment approving the Settlement.

{¶10} Appellees' cross-assignment of error challenges the trial court's consideration of the merits of Sortino's arguments for not being bound by the *Merrill* Class settlement agreement. Appellees claim that Sortino's Erie Action is an impermissible collateral attack on the settlement in *Merrill*. Appellees argue that, as a class member in that case, Sortino is precluded by the doctrines of res judicata and waiver from challenging the settlement.

{¶11} When challenged on direct appeal, "'[t]he determination of whether a settlement is fair, adequate and reasonable is committed to the sound discretion of the trial court and will not be disturbed on appeal in the absence of some demonstration that the trial court abused its discretion.'" *West v. Carfax, Inc.*, 11th Dist. Trumbull No. 2008-T-0045, 2009-Ohio-6857, ¶11, quoting *In re Kroger Co. Shareholders Litigation*, 70 Ohio App.3d 52, 68 (1st Dist.1990). However, when the challenge is collateral rather than direct, "the appropriate collateral review involves an examination of *procedural* due process and nothing more. As long as procedural safeguards are established by the law and employed, absent class members' objections to the determinations of the certifying court may be properly remedied on appeal within the forum state's judicial system and to the United States Supreme Court." *Fine v. Am. Online, Inc.*, 139 Ohio App.3d 133, 140 (9th Dist.2000) (emphasis sic), citing *Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir.1999).

{¶12} Civ.R. 23 establishes the procedures and requirements for certifying, litigating, and settling class actions in Ohio. As reflected in the record, the judgment entry subject to appeal, and the procedural history, the trial court in *Merrill* complied with the requirements contained in Civ.R. 23. The trial court ordered briefings and conducted hearings to determine the proper class certification, jurisdiction, and fairness of the settlement. The classification issue was also appealed and affirmed by this court. To the extent Sortino disagrees with the conclusions of the court in *Merrill*, his remedy would have been to appeal those rulings directly.

{¶13} The trial court's judgment entry addressing the merits of Sortino's attacks on the *Merrill* class action proceedings provided a thorough analysis of the process; however, it also addressed the merits of the arguments made by Sortino as discussed below. To the extent the trial court's entry addressed matters outside of an examination of procedural due process, appellees' cross-assignment of error has merit.

{¶14} Sortino's first assignment of error states:

> [1.] The trial court committed prejudicial error in determining that the court had subject matter jurisdiction, as opposed to the Court of Claims, in order to approve a settlement in which the State of Ohio paid monetary funds to a large number of Class Members to settle the claim asserting an unconstitutional taking of their property, based merely upon the fact that the parties were not seeking damages in their Amended Complaint.

{¶15} "'A determination as to whether the trial court has subject-matter jurisdiction * * * is a question of law reviewed de novo.'" *In re Smith*, 11th Dist. Portage No. 2014-P-0056, 2015-Ohio-5522, ¶13, quoting *JP Morgan Chase Banks v. Ritchey*, 11th Dist. Lake No. 2014-L-089, 2015-Ohio-1606, ¶16. "Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time." *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶11 (citations omitted). "If a court possesses subject-matter jurisdiction, any error in the invocation or exercise of jurisdiction over a particular case causes a judgment to

be voidable rather than void." *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, ¶19, citing *Pratts, supra*, at ¶12.

{¶16} A void judgment is considered a legal nullity that can be collaterally attacked. *Larney v. Vlahos*, 11th Dist. Trumbull No. 2015-T-0103, 2016-Ohio-1371, ¶6, citing *Clark v. Wilson*, 11th Dist. Trumbull No. 2000-T-0063, 2000 WL 1050524, *2 (July 28, 2000). In contrast, a voidable judgment must be challenged through a "direct attack on the merits." *Id*.

{¶17} The court of claims has exclusive jurisdiction over civil actions against the state for money damages that sound in law. R.C. 2743.02 and 2743.03. This relationship was discussed in *GLA Water Mgt. Co. v. Univ. of Toledo*, 196 Ohio App.3d 290, 2011-Ohio-5034 (6th Dist.):

> Section 16, Article I of the Ohio Constitution provides that "[s]uits may be brought against the state, in such courts and in such manner, as may be provided by law." In the Court of Claims Act, the General Assembly provided the framework for bringing such suits. R.C. 2743.02(A)(1) provides:
>
> > "The state hereby waives its immunity from liability * * * and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties * * *"
>
> R.C. 2743.03(A) creates the court of claims and defines its jurisdiction, stating:

> "(1) * * * The court of claims is a court of record and has exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in section 2743.02 of the Revised Code***.
>
> "(2) If the claimant in a civil action as described in division (A)(1) of this section also files a claim for a declaratory judgment, injunctive relief, or other equitable relief against the state that arises out of the same circumstances that gave rise to the civil action described in division (A)(1) of this section, the court of claims has exclusive, original jurisdiction to hear and determine that claim in that civil action."

Id. at ¶19-23.

{¶18} R.C. 2743.03(A)(2) proceeds to state: "This division does not affect, and shall not be construed as affecting, the original jurisdiction of another court of this state to hear and determine a civil action in which the sole relief that the claimant *seeks* against the state is a declaratory judgment, injunctive relief, or other equitable relief." (Emphasis added). "'A suit that *seeks* the return of specific funds wrongfully collected or held by the state is brought in equity.'" *Borchers v. Grand Lake St. Marys State Park*, Ct. of Cl. No. 2005-05485-AD, 2005Ohio-6115, ¶10, quoting *Santos v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28, syllabus. (Emphasis added.)

{¶19} In the matter sub judice, Sortino initially argues that because the settlement in *Merrill* contained

an award of damages for an unconstitutional taking of property and attorney fees, it was no longer within the jurisdiction of the common pleas court and was required to be removed to the court of claims. Appellees dispute that the payments made in accordance with the settlement were damages and also dispute that any admission of a taking was part of the settlement. The settlement agreement supports appellees' interpretation.

{¶20} R.C. 2743.03(A)(2) specifically reserves original jurisdiction to the common pleas court for civil suits seeking equitable relief. The statute, as well as all relevant case law submitted by the parties, references the remedies *sought* rather than the ultimate disposition. Sortino states in his brief, "There is no question that the Lake County Court of Common Pleas had jurisdiction over [the] claims. The Merrill Plaintiffs sought (1) a declaratory judgment; (2) an order instructing ODNR to institute appropriation proceedings; and (3) the return of submerged land lease payments that were illegally collected by ODNR." The fact that the parties agreed to enter into a settlement rather than litigate the claims does not change the fact that the suit was brought seeking equitable relief, and Sortino points to no case law establishing that a court is divested of subject-matter jurisdiction after seeking the equitable remedies allowing the common pleas court to exercise jurisdiction.

{¶21} Sortino's first assignment of error is without merit.

{¶22} Sortino's second and third assignments of error state:

> [2.] The trial court committed prejudicial error when it approved the settlement of the parties which provided relief to the class members in the form of monetary damages, but did not provide those class members with any individual notice nor any right to opt out, as required under Civ.R. 23(B)(3) and the overarching protection of jurisdictional due process.
>
> [3.] The trial court committed prejudicial error when it held that class member, Sortino, and all other of his similarly situated class members, who did not receive notice and were not afforded the right to opt out of the settlement, were bound by the terms of the settlement and that they were forever barred from any rights to individually pursue any claim against the State of Ohio for the claims that were settled in favor of the State of Ohio in this action.

{¶23} Sortino's second and third assignments of error challenge the certification of the class under Civ.R. 23(B)(2), the subsequent notification requirements, and the binding nature of the settlement without an opt-out option. He argues that the class should have been recertified under Civ.R. 23(B)(3), which requires additional notice and opt-out alternatives, once a monetary award was included in the settlement. While Sortino argues that the Civ.R. 23(B)(2) certification and binding nature of the settlement violate his right to substantive due process, these challenges relate to the procedures and determinations made by the trial court in the *Merrill* class action settlement, which was not appealed.

Therefore, as discussed above, a review of Sortino's second and third assignments of error are reviewable in the present appeal only to the extent of insuring procedural due process.

{¶24} "Certification under Civ.R. 23(B)(2) depends upon what type of relief is *primarily sought*, so where the injunctive relief is merely incidental to the primary claim for money damages, Civ.R. 23(B)(2) certification is inappropriate." *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, ¶17 (emphasis added). Again, "[a] suit that *seeks* the return of specific funds wrongfully collected or held by the state is brought in equity." *Borchers, supra*, at ¶10, citing *Santos, supra*, at the syllabus (emphasis added).

{¶25} This court, in *Asset Acceptance LLC v. Caszatt*, 11th Dist. Lake No. 2009-L-090, 2010-Ohio-1449, discussed the Ohio Supreme Court's approach where the relief sought is disputed:

> As the Supreme Court of Ohio stated, "[d]isputes over whether the action is primarily for injunctive or declaratory relief rather than a monetary award neither promote the disposition of the case on the merits nor represent a useful expenditure of energy. Therefore, they should be avoided. If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2). * * * The court has the power under subdivision (c)(4)(A), which permits an action to be brought under Rule 23 'with respect to particular issues,' to confine the class action aspects of a case to

> those issues pertaining to the injunction and to allow damage issues to be tried separately."

Id. at ¶71, quoting *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 87 (1998) (quotation omitted).

{¶26} *Hamilton* is analogous to the matter sub judice. There, mortgagors brought a class action against the mortgagee bank, challenging the bank's method for calculating interest on mortgage loans. After the court of common pleas denied certification, the Eighth District Court of Appeals affirmed as to subclasses with retired mortgage loans and reversed as to subclasses with outstanding mortgage loans. The Ohio Supreme Court held that class certification under Civ.R. 23(B)(2) should have been granted with respect to all subclasses, stating:

> [W]e disagree that subclasses two and four seek primarily money damages. Their primary object is to terminate Ohio Savings' alleged practice of overcharging interest and/or misamortizing its loans. Without such relief, they would achieve only the recoupment of overpaid interest to date. The fact that money damages are also sought in addition to injunctive relief does not defeat certification under Civ.R. 23(B)(2).

Hamilton, supra, at 86-87, citing 5 Moore, *Federal Practice*, Section 23.43[3][a], at 23-196 to 23-197 (3d Ed.1997).

{¶27} Sortino admits the initial determination to certify the class under Civ.R. 23(B)(2) was correct. He provides no case law or justification supporting the principal that a trial court must reconsider its

certification for a second time based on the terms of a settlement. Here, the trial court ordered the parties to submit briefs on the issue of class certification. It considered the certification issue and concluded–based oh the relief sought by the *Merrill* Class in their complaint–that certification under Civ.R. 23(B)(2) was appropriate. We find no error or defect in the procedure used by the trial court in reaching that conclusion. Therefore, the alternative means of providing notice and requirement to allow class members to opt-out is inapplicable to the present matter, and the Civ.R. 23(B)(2) certification was procedurally sufficient. Because the certification under Civ.R. 23(B)(2) was sufficient, Sortino is bound by the terms of the settlement and prohibited from bringing future actions against appellees based on the settled claims.

{¶28} Sortino's second and third assignments of error are without merit.

{¶29} Sortino's fourth assignment of error states:

> [4.} The trial court committed prejudicial error when it found Sortino in contempt of court for prosecuting the claims that he asserted in the case filed in Erie County Court of Common Pleas, because Sortino had not released those claims due to the defective notice provisions in the *Merrill* settlement.

{¶30} Sortino's fourth assignment of error challenges the trial court's finding that, as a result of him being included in the *Merrill* class, he was bound by the terms of the settlement agreement and therefore in contempt for filing the Erie Action.

{¶31} Once again, the class certification and determination of class members in the *Merrill* case was not appealed. Further, Sortino admits that he was a member of the class in *Merrill*. His only challenge is to the determination of class designation under Civ.R. 23 for purposes of the appropriate notice requirements, which are not reviewable outside of direct appeal. As discussed above, the trial court correctly determined that Sortino was a member of the Civ.R. 23(B)(2) certified *Merrill* class. Therefore, he was bound by the prohibition against bringing future actions, and he was in contempt of the settlement agreement by filing the Erie Action.

{¶32} Sortino's fourth assignment of error is without merit.

{¶33} The judgment of the Lake County Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, J.,

MATI LYNCH, J.,

concur.

APPENDIX C

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE OF OHIO)
)SS.
COUNTY OF LAKE)

CASE NO. 2019-L-164

[Filed: December 21, 2020]

STATE ex rel. ROBERT MERRILL, TRUSTEE, et al.,	)
Plaintiffs-Appellees,	)
HOMER S. TAFT, et al.,	)
Intervening Plaintiffs-Appellees,	)
- vs -	)
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	)
Defendants-Appellees,	)

NATIONAL WILDLIFE FEDERATION, et al.,

Intervening Defendants-Appellees,

GEORGE SORTINO,

Appellant.

JUDGMENT ENTRY

For the reasons stated in the opinion of this court, appellant's assignments of error are without merit. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

Costs to be taxed against appellant.

/s/ Judge Cannon
PRESIDING JUDGE TIMOTHY P. CANNON

THOMAS R. WRIGHT, J.,

MATT LYNCH, J.,

concur.

APPENDIX D

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

CASE NO. 04CV001080

[Filed November 7, 2019]

STATE OF OHIO EX REL., MERRILL, TRUSTEE, *et al.*	)
	)
Plaintiffs	)
	)
vs.	)
	)
OHIO STATE DEPARTMENT OF NATURAL RESOURCES, *et al.*	)
	)
Defendants	)

JUDGE EUGENE A. LUCCI

ORDER GRANTING MOTION TO ENFORCE SETTLEMENT AGREEMENT AND FOR CIVIL CONTEMPT

{¶1} The court has considered the defendant's motion to enforce settlement and for civil contempt, filed May 29, 2018, George Sortino's response to motion to enforce settlement, filed June 11, 2018, the defendants' reply memorandum in support of its motion to enforce

settlement and for civil contempt, filed June 29, 2018, Plaintiff George Sortino's sur-reply to ODNR's motion to enforce settlement and for civil contempt, filed July 26, 2018, and the oral arguments of the parties at the motion hearing conducted on-the-record on August 17, 2018. For the following reasons, the court finds that the defendants' motion to enforce the settlement and for civil contempt is well-taken and ought to be granted.

{¶2} This matter first came before the court in May, 2004 as a putative class action. An amended complaint seeking declaratory judgment, mandamus, and other relief on behalf of an estimated 15,500 littoral owners of real property abutting Lake Erie's southern shoreline within Lucas, Ottawa, Sandusky, Erie, Lorain, Cuyahoga, Lake, and Ashtabula counties was filed on July 2, 2004. It alleged that the State of Ohio, through the Ohio Department of Natural Resources (ODNR), had asserted trust ownership rights to the area of land along the shoreline up to the ordinary high water mark as determined by the U.S. Army Corps of Engineers in 1985. In fact, ODNR compelled some property owners to enter into submerged land leases based on that claim. The plaintiffs disputed ODNR's authority to assert such rights without first acquiring the land in question through land appropriation proceedings.

{¶3} The complaint contained three counts. Count One requested a declaratory judgment defining the boundary of the southern shore of Lake Erie in Ohio. Counts Two and Three dealt with constitutional

takings issues, and were held in abeyance pending the outcome of Count One.[1]

{¶4} On June 9, 2006, following a joint stipulation by the parties, the court entered an order certifying a class action pursuant to Civ.R. 23(B)(2) upon several issues of law common to Count One. The class was defined as consisting of "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."[2] Class members were informed of the pending complaint primarily by publication of notices in local newspapers. Following extensive briefing, this court determined that the boundary of the lake was not the ordinary high water mark, as asserted by the state. Instead, "the law of Ohio is that the proper definition of the boundary line for the public trust territory of Lake Erie is the water's edge, wherever that moveable boundary may be at any given time ***."[3]

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[1] See *Merrill v. Ohio*, 11th Dist. No. 2008-L-008, 2009-Ohio- 4256, ¶ 9.

[2] Case No. 04CV001080, *State of Ohio ex rel., Merrill Trustee v. Ohio State Department of Natural Resources*, Order Certifying Class Action on Count One of the First Amended Complaint, filed June 9, 2006, p. 2.

[3] *Id.*, Order Granting Plaintiffs' and Intervening Plaintiffs' Motion for Partial Summary Judgment in Part, filed December 11, 2007, ¶ 243.

{¶5} This decision was appealed, and the issue was litigated up to the Ohio Supreme Court. That court held that the landward boundary of Lake Erie "extends to the natural shoreline, the line at which the water usually stands when free from disturbing causes," and the matter was remanded back to this court for further proceedings on the remaining claims.[4] Neither the Eleventh District Court of Appeals nor the Supreme Court took issue with this court's definition of the class, or the appropriateness of the class's certification under Civ.R. 23(B)(2).

{¶6} Following further extensive briefing by the parties, this court filed a judgment clarifying the Supreme Court's definition of the lake's natural shoreline by determining the meaning of "when free from disturbing causes," and granting additional relief on Count One of the amended complaint. Specifically, the court ordered ODNR to return all submerged land lease fees it collected between 1998 and the date of the court's order.[5] The court further noted that Count Two of the amended complaint was a mandamus action for a purported unconstitutional taking of private property. It found that the question could be adjudicated on a class-wide basis with the same

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[4] *The State ex rel. Merrill, Trustee v. Ohio Dept. of Natural Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612, ¶ 65.

[5] Case No. 04CV001080, *State of Ohio ex rel., Merrill, Trustee v. Ohio State Department of Natural Resources*, Order: (1) Establishing the Natural Shoreline; (2) Granting Additional Relief on Count I; (3) Extending Class Certification to Count II; and, (4) Declaring Prevailing Party, filed August 27, 2012, ¶ 112.

members as those named in Count One.[6] And, because a writ of mandamus is in the nature of an injunction, albeit mandatory rather than prohibitory, the count fit within the scope of Civ.R. 23(B)(2). Therefore, the class certification entered by the court in 2006 was amended to include Count Two, and notification was ordered to proceed in the same manner as occurred for purposes of Count One.[7]

{¶7} This order was appealed. The Eleventh District Court of Appeals determined that the appeal was limited to issues related to class certification, and upheld this court's certification of the class under Civ.R. 23(B)(2).[8] The Ohio Supreme Court declined to accept jurisdiction of the matter.

{¶8} The parties again engaged in significant motion practice regarding the issues raised in Count Two. However, on May 27, 2016, they filed a motion for preliminary approval and a stipulation of settlement. The state defendants, while expressly denying any

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[6] *Id.*, ¶ 114.

[7] *Id.*, ¶ 114-118. The court also declared that the plaintiffs were the prevailing parties in the case as to Count One. A hearing on attorney fees was deferred until the remaining issues were ruled on. ¶ 22-123.

[8] *State ex rel. Merrill v. Ohio Dept. of Natural Resources*, 11th Dist. No. 2012-L-113, 2014-Ohio-1343, ¶ 5 and ¶ 20. Civ.R. 23(B)(2) states that "A class action may be maintained if Civ.R. 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 relief is appropriate respecting the class as a whole."

allegations of wrongdoing,[9] agreed to pay $6,100,000 to a third-party claims administrator.[10] Approximately $1,720,000 of that amount was to be allocated to a refund of submerged land lease fees from Count One, with an additional $600,000 to be applied to the plaintiffs' attorney fees from that count.[11] 834 land owners fell into this category, although only 683 were entitled to refunds.[12] They would receive individual notice of the settlement agreement.[13] The balance of the funds, less attorney fees, were to be distributed according to a plan of allocation "for payment of compensation with respect to Count II."[14] Those funds were to be distributed to authorized claimants who submitted acceptable proofs of claim.[15] Property owners in this category would not receive individual notification of the settlement. Instead, the parties agreed to again publish details of the settlement in local newspapers, along with instructions on how to file

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[9] Case No. 04CV001080, *State of Ohio ex rel., Merrill, Trustee v. Ohio State Department of Natural Resources*, Stipulation of Settlement, filed May 27, 2016, p. 3 and p. 15.

[10] *Id.*, p. 8

[11] *Id.*

[12] *Id.*, Exhibit C, Plan of Allocation, p. 2.

[13] *Id.*, Brief in Support of Motion for Preliminary Approval of Class Action Settlement, filed May 27, 2016, p. 6.

[14] *Id.*, Stipulation of Settlement, Exhibit C, Plan of Allocation, p. 1.

[15] *Id.*, p. 4.

a claim.[16] Anyone who failed to submit proofs of claim would nevertheless be bound by the settlement and final judgment.[17] The class would remain certified under Civ.R. 23(B)(2).[18] As a result, although members could file objections, none was given a right to opt out of the settlement and release of claims.[19] The amount of compensation each authorized claimant would receive varied based on several factors, including the amount of frontage of the claimant's property along the lake, whether the claimant's deed was altered to describe the lake's boundary as the OHWM, and whether the claimant's property abutted public land.[20] All class members would be deemed to have fully, finally, and forever released their claims against the defendants, and be forever enjoined from prosecuting any of those claims again.[21]

{¶9} On June 14, 2016, the court conducted a hearing on the motion for preliminary approval. Plaintiffs' class counsel spoke about the extensive efforts made to settle the case. He further stated that the plaintiffs felt the agreement was fair, reasonable, and adequate,

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[16] *Id.*, Brief in Support of Motion for Preliminary Approval of Class Action Settlement, p. 6.

[17] *Id.*, Stipulation of Settlement, Exhibit C, Plan of Allocation, p. 4.

[18] *Id.*, Stipulation of Settlement, p. 8.

[19] *Id.*

[20] *Id.*, Stipulation of Settlement, Exhibit C, Plan of Allocation, p. 3-4.

[21] *Id.*, p. 9.

especially given the likely length, complexity and expense of any further litigation. The court reviewed numerous details of the settlement with the parties, including attorney and class administration fees, the number of class members affected by Count One and Count Two,[22] how those members would be notified about the settlement, the fact that class members could not opt out of the settlement because the class was certified under Civ.R. 23(B)(2), the likelihood of objections to the settlement from dissatisfied class members, and what would happen to any unclaimed funds. Counsel for ODNR agreed that the settlement was fair and reasonable to the citizens of Ohio. Based on this discussion, the court granted preliminary approval to the settlement.

{¶10} At the final settlement/fairness hearing held on October 21, 2016, the parties told the court that notice of the settlement was mailed to all lease holders and published in newspapers located in each of the affected counties on or about July 14, 2016. The parties also set up a website for class members and took other measures to spread word of the settlement to as many class members as possible. Approximately 1500 claims were filed with the class administrator on Count Two. Only about 100 objections were received. On that basis, the court approved the settlement and entered an order and final judgment finding: 1) that notice of the settlement was the best practicable under the circumstances, and was due and sufficient to all class members; 2) that class members were accorded a right

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[22] It was estimated that approximately 12,000 class members were affected by Count Two.

to object to the settlement, and were now bound by its terms; 3) that class members were deemed to have fully, finally, and forever released, waived, discharged, and dismissed each of their claims against the defendants, and were forever enjoined from prosecuting those claims again; and, 4) the court retained exclusive jurisdiction to enforce the terms of the settlement. The order was final and appealable. No appeal was taken.

{¶11} On January 31, 2018, George Sortino filed a putative class action in the Erie County Court of Common Pleas, alleging virtually the same causes of action and seeking the same relief raised in the instant case. In response, ODNR filed its motion to enforce settlement and for civil contempt with this court. Erie County stayed its proceedings pending a ruling on the motion. It states that Sortino was a member of the class established in *Merrill*, and he is enjoined by its settlement from ever raising those claims again. In his complaint, Sortino admits that he was a member of the class established in Count Two of *Merrill*.[23] And he agrees that the class covered by that count was initially properly certified under Civ.R. 23(B)(2).[24] However, he raises several arguments as to why he should now be allowed to bring a new case based on the same claims raised by the *Merrill* plaintiffs.

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[23] Erie County Case No. 2018 CV 0074, *State of Ohio ex rel. George Sortino v. State of Ohio Department of Natural Resources*, copy attached to Defendants' Motion to Enforce Settlement and For Civil Contempt, Frazzini Exhibit A, p. 8.

[24] *Id*,. p. 7.

{¶12} Initially he argues that *Merrill* could only be properly filed in the Court of Claims, because it has exclusive jurisdiction over claims seeking money damages against the state of Ohio. See *GLA Water Mgt. Co. v. Univ. of Toledo*, 196 Ohio App.3d 290, 2011-Ohio-5034, 963 N.E.2d 207, ¶ 19-24. Because this court lacked subject matter jurisdiction to hear the case, its judgment in the matter is void.

{¶13} While acknowledging that judgments rendered by courts lacking either subject matter or personal jurisdiction are void, the court does not believe this is a serious argument. The *Merrill* parties were not seeking an award of damages. Instead, they were seeking injunctive and declaratory relief, remedies which are clearly within this court's power to grant. And Sortino points to no case law showing that the state could not elect to settle those claims by voluntarily entering into an agreement which included compensation to the plaintiffs. Therefore, the court finds this argument lacks merit.

{¶14} Second, Sortino claims that because money was awarded, Class Two *had* to be certified under Civ.R. 23(B)(3) instead of (B)(2).[25] See *West v. Carfax, Inc.*,

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[25] Civ.R. 23(B)(3) states that "A class action may be maintained if Civ.R. 23(A) is satisfied, and if: 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. The matters pertinent to these findings include: (a) the class members' interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the

11th Dist. No. 2008-T-0045, 2009-Ohio-6857. The court believes this assertion is simply not true. The court acknowledges that the Supreme Court has held that "individualized monetary claims belong in Rule 23(b)(3)." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362, 131 S.Ct. 2541 (2011). And it is also true that "[i]n the context of a class action predominantly for money damages we have held that absence of notice and opt out [rights] violates due process." *Id.*, 363. But it has not laid down a blanket rule that money can never be awarded to a Civ.R. 23(B)(2) class. *Id*. To the contrary, "holding that no monetary relief could be recovered in a (b)(2) class flies in the face of long established circuit-court precedent." *Nelson v. Wal-Mart Stores, Inc.*, 245 F.R.D. 358, 380 (E.D.Ark.2007), f.n. 126. And in Ohio, the rule seems clear that "[a] demand for monetary damages does not necessarily defeat certification under Civ.R. 23(B)(2)." *Gordon v. Erie Island Resort & Marina*, 6th Dist. No. OT-15-035, 2016-Ohio-7107, ¶ 54. Therefore, this claim also lacks merit.

{¶15} The heart of Sortino's argument, however, seems to be that the settlement dramatically changed the claims asserted by, and the relief provided to, class members. He argues that if the case had not settled, "the *Merrill* court would have been required to issue a declaration on the question of an unconstitutional taking, and ODNR would have been compelled to seek

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controversy already begun by or against class members; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the likely difficulties in managing a class action."

out each property owner to settle or to commence appropriation proceedings ***."[26] Under that scenario, every member of the class would have received actual notice of the resolution of the case. But once the case settled, the plaintiffs entirely abandoned their mandamus claim and resolved the case exclusively for individualized monetary awards. And classes should not be authorized under Civ.R. 23(B)(2) "when each class member would be entitled to an individualized award of monetary damages." *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614,-¶ 21. Instead of approving the settlement under Civ.R. 23(B)(2), the court should have held a hearing to carefully consider whether it should be recertified under Civ.R. 23(B)(3). If it had been so recertified, he claims that individual notification of the settlement and the right to opt out would have been mandatory. Sortino never received notice of the settlement, and this procedural deficiency so violated his due process rights that this court lost personal jurisdiction over him, making its final judgment void as to him and other members of his putative class.[27] As a result, he is not bound by that judgment, is not violating its terms, and cannot be found in contempt of court for filing his action in Erie County.

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[26] Erie County Case No. 2018 CV 0074, Frazzini Exhibit A, p. 7.

[27] *Id.*, p. 8. His putative class is defined as all private littoral owners of parcels of real property abutting Lake Erie within the State of Ohio who were not sent notice of the *Merrill* settlement and who did not file a proof of claim with the settlement administrator.

{¶16} The court finds that this argument has some appeal on its face, but ultimately fails. Initially, the court notes that classes certified under Civ.R. 23(B)(2) are mandatory. Members are not afforded a right to opt out, nor even necessarily afforded notice of the action. *Wal-Mart Stores, Inc. v. Dukes*, p. 362. A (B)(3) class, on the other hand, is not mandatory, and "class members are entitled to receive 'the best notice that is practicable under the circumstances' and to withdraw from the class at their option." *Id.*

{¶17} To begin, the court finds that Sortino's entire argument is based on the false assumption that if the *Merrill* parties had not settled, this court would have found in favor of the plaintiffs on Count Two and issued a mandamus requiring the state to either agree to individual settlements with class members or to initiate land appropriation proceedings with them. While that may have happened, it is far from a certainty. And if it had not, none of the class members would have received any compensation for their taking claim. In fact, that uncertainty was a major factor driving the parties' decision to settle the case.[28]

{¶18} As to recertifying the class, the court notes that it addressed and approved both how class members would be notified of the settlement and the fact that they would not have opt-out rights at the hearing it conducted on June 14, 2016. Therefore, contrary to Sortino's claim, it considered and specifically found

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[28] Case No. 04CV001080, *State of Ohio ex rel., Merrill Trustee v. Ohio State Department of Natural Resources*, Brief in Support of Motion for Preliminary Approval of Class Action Settlement, p. 8.

that certification under Civ.R. 23(B)(2) was appropriate, despite the fact that the settlement included a proposed monetary payment on the Count Two claims.

{¶19} Furthermore, assuming arguendo that the court had decided to recertify this under Civ.R. 23(B)(3), Sortino's assertion that individualized notice would have been required is wrong. Instead, he would have been entitled to receive only "the best notice that is practicable under the circumstances." *Id.* Given the fact that the Count Two class was variously estimated to include somewhere between 12,000 to 15,500 members, the expense of individualized notice could have easily fully exhausted any funds remaining after the Count One class members were reimbursed. Under those circumstances, individualized notice would not have been practicable, and it is highly unlikely this court would have ordered it.[29]

{¶20} Most importantly, however, Sortino argues that certification was improper under Civ.R. 23(B)(2) because the settlement provided Count Two class

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[29] It is true that if Count Two had been recertified under (B)(3), Sortino would have been granted a right to opt out of the settlement. But that right would have been meaningless if he was not notified of it. Furthermore, the issues he raises here have nothing to do with being able to opt out. Rather, his entire case is built around the purported abrogation of his due process right to notification of the settlement.

members with no injunctive relief.[30] Instead, monetary relief not only predominated the settlement, it was the *sole* relief granted by the court.[31] And that relief was individualized depending on a set of factors unique to each class member.[32] As a result, certification under Civ.R. 23(B)(3) was mandatory.

{¶21} The court again disagrees. As just noted, certification under Civ.R. (B)(2) is only impermissible when money damages are exclusively or predominantly the final relief sought by the plaintiffs. *Nelson v. Wal-Mart Stores*, p. 374. "[M]oney damages predominate when they are not incidental to declaratory and injunctive relief, i.e., when the damages do not 'flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief.'" *Id.*, citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir.1998). (Emphasis sic.)

{¶22} Here, the main premise underlying this case, from its initial filing in 2004 through its settlement over 12 years later, was that the state's assertion that Lake Erie's boundary lay at the OHWM constituted an illegal taking of the plaintiffs' property. Although where the lake's boundary lay was largely resolved by

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[30] Case No. 04CV001080, *State of Ohio ex rel., Merrill, Trustee v. Ohio State Department of Natural Resources*, Plaintiff George Sortino's Sur-Reply to ODNR's Motion to Enforce Settlement and For Civil Contempt, filed July 26, 2018, p. 15.

[31] *Id.*, p. 11-12.

[32] *Id.*, p. 13.

the Ohio Supreme Court, the remaining Count One issues were still hotly contested by ODNR.[33] And while the plaintiffs believed that their Count Two takings claim had merit, they realized that the state had possibly viable defenses against it.[34] And the court's defining the meaning of the phrase "when free from disturbing causes" was of first impression in the state of Ohio, and could have been the subject of intense appellate practice. Therefore, settlement was vastly preferable to a protracted and extremely expensive legal battle on those unresolved issues.[35]

{¶23} It is true that this case did not conclude with a formal final judgment ordering the state to commence appropriation proceedings. But that is immaterial to Sortino's claims, because it is undeniable that the state no longer asserts public trust ownership landward of the natural shoreline. And it never will again.[36] Therefore, if there was a taking, it ceased as a direct result of the *Merrill* settlement. Class members received relief equivalent to an injunction through that settlement. And that relief directly benefits all of the *Merrill* class members as a whole, including Sortino. *Nelson*, p. 374. The money awarded as compensation to

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[33] Stipulation of Settlement, filed May 27, 2016, p. 2. The state still contested this court's rulings that it must return the submerged land lease rental payments and that the plaintiffs were the prevailing parties on Count One.

[34] *Id.*

[35] *Id.*

[36] *Id.*, p. 2-3..

Count Two class members was incidental to that outcome, despite Sortino's claims otherwise.

{¶24} Further, it was not improper to maintain the class under Civ.R. 23(B)(2) even though class members received separate amounts of compensation, because that compensation was not based on circumstances unique to each class member. Instead, it was capable of computation by objective standards, was not dependent on intangible, subjective differences of each class member's circumstances, did not require additional hearings on the merits, neither introduced new or substantial legal or factual issues, nor entailed complex individualized determinations. *Id.* As a result, class certification was appropriate under Civ.R. 23(B)(2), and Sortino's arguments are, again, without merit.

{¶25} Finally, this court expressly retained authority to enforce the October 24, 2016 settlement agreement. Specifically, the court's order and final judgment stated that "[t]his Court retains exclusive jurisdiction, without affecting in any way the finality of this Judgment over: (a) implementation and enforcement of the Settlement; (b) ***; (c) enforcing and administering this Judgment; (d) enforcing and administering the Stipulation including the releases granted therein; and (e) other matters arising from or relating to the foregoing."[37] When such language is included in a final judgment, trial courts retain jurisdiction to enforce settlement agreements after a case has been dismissed. *Infinite*

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[37] Case No. 04CV001080, *State of Ohio ex rel., Merrill, Trustee v. Ohio State Department of Natural Resources*, Order and Final Judgment filed October 24, 2016, ¶ 12.

Security Solutions, LLC v. Karam Properties, II, Ltd, 143 Ohio St.3d 346, 354, 2015-Ohio-1101, 37 N.E.3d 1211, ¶ 34.

{¶26} As noted, Sortino never claimed he was not a member of the class certified in the instant case. His claim has been that this court's final judgment entry was void either because it never had subject matter jurisdiction over the *Merrill* case or lost personal jurisdiction over him and other members of the class who did not receive personal notice of its settlement. The court believes it has shown why those claims are mistaken. As a class member, he is deemed to have "fully, finally, and forever released, waived, discharged, and dismissed each and every" one of the claims he now brings in his Erie County lawsuit.[38] Therefore, he is forever enjoined from prosecuting those claims, pursuant to this court's final order. And this court has the authority to enforce that order against him.

{¶27} Wherefore, the court finds that Plaintiff George Sortino is in contempt of court for attempting to prosecute claims he has been forever enjoined from filing. He may purge himself of his contempt by dismissing his Erie County class action lawsuit forthwith. If he refuses to do so, the court shall hold a hearing to determine the amount of reasonable attorney fees and costs incurred by the State of Ohio in defending against the Erie County case and any and all

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[38] 04CV001080, *State ex rel. Robert Merrill, Trustee v. State of Ohio, Department of Natural Resources*, Order and Final Judgment, filed October 24, 2019, p. 2, ¶ 8.

ensuing appeals. The court shall then fine Sortino in an amount equal to those attorney fees and costs.

{¶28} IT IS SO ORDERED.

Filed 11/7/2019

/s/
EUGENE A. LUCCI, JUDGE

c: Dennis E. Murray, Sr., Esq.
Margaret M. Murray, Esq.
Donna J. Evans, Esq.
Murray & Murray Co., LLP
Attorneys for George Sortino
111 East Shoreline Dr.
Sandusky, Ohio 44870

James F. Lang, Esq.
Fritz E. Berckmueller, Esq.
Lindsey E. Sacher, Esq.
Calfee, Halter & Griswold, LLP
Class counsel and attorneys for Plaintiff-Relators
1405 E. Sixth St.
Cleveland, Ohio 44114-1607

Homer S. Taft, Esq.
Intervening Plaintiff-Relator, pro se
20220 Center Ridge Rd., Suite 300
P.O. Box 16216
Rocky River, Ohio 44116

L. Scott Duncan, Esq.
Intervening Plaintiff-Relator, pro se
1530 Willow Dr.
Sandusky, Ohio 44870

Dave Yost, Ohio Attorney General
Ann Marie Sferra, Esq.
Daniel C. Gibson, Esq.
Bricker & Bricker, LLP
Counsel for Defendants State of Ohio, Ohio Department of Natural Resources, and the Director of Ohio Department of Natural Resources
100 South Third St.
Columbus, Ohio 43215

Neil S. Kagan, Esq., Pro Hac Vice
Attorney for intervening defendants, National Wildlife Federation and Ohio Environmental Council
Great Lakes Natural Resource Center
213 W. Liberty St., Suite 200
Ann Arbor, Michigan 48104

Peter A. Precario, Esq.
Attorney for intervening defendants, National Wildlife Federation and Ohio Environmental Council
2 Miranova Place, Suite 500
Columbus, Ohio 43215

Erie County Court of Common Pleas
323 Columbus Avenue
Sandusky, Ohio 44870
Honorable Roger E. Binette

APPENDIX E

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

CASE NO. O4 CV 00 1080

JUDGE EUGENE A. LUCCI

[Filed: July 2, 2004]

STATE OF OHIO EX REL.	)
ROBERT MERRILL, TRUSTEE	)
6111 Lakeshore Drive	)
Madison, Ohio 44057	)
	)
and	)
	)
OHIO LAKEFRONT GROUP, INC.	)
P.O. Box 2084	)
Sheffield Lake, Ohio 44054	)
	)
and	)
	)
ANTHONY J. YANKEL	)
29814 Lake Rd.	)
Bay Village, Ohio 44140	)
	)
and	)
	)
CHARLES S. TILK	)
29101 Cresthaven Dr	)
Willowick, Ohio 44095	)

and)
)
SHEFFIELD LAKE, INC.)
Thomas O. Jordan Pres.)
4301 Lake Road)
Sheffield Lake, Ohio 44054)
)
and)
)
SANDRA L. WADE)
3651 W. Willow Beach Rd.)
Port Clinton, Ohio 43452)
)
and)
)
DAVID A. ZEBER)
2424 Edgewater Dr.)
Vermilion, Ohio 44089)
)
and)
)
ADRIAN F. BETLESKI)
1723 East Erie Avenue)
Lorain, Ohio 44052)
)
and)
)
STEVE NICKEL)
3117 E. Shore Drive)
Port Clinton, Ohio 43452)
)
and)
)

~~JOHN HERRINGTON~~)
~~5055 Providence Dr, #310~~)
~~Sandusky, Ohio 44870~~ dismissed)
)
and)
)
LEMARR L. & PATRICIA J. FRENCH)
30333 Lake Shore Blvd.)
Willowick, Ohio 44095)
)
and)
)
NEAL OSCAR LUOMA)
5605 Lake Road)
West Ashtabula, Ohio 44004)
)
and)
)
TIMOTHY AND KIMBERLY ROSENBERG)
33066 Lake Road)
Avon Lake, Ohio 44012)
)
vs.)
)
STATE OF OHIO, DEPARTMENT OF)
NATURAL RESOURCES)
c/o Sam Speck, Director)
1930 Belcher Dr. Bldg. D3)
Columbus, Ohio 43224)
)
and)
)
SAM SPECK, DIRECTOR)
Ohio Department of Natural Resources)

1930 Belcher Dr. Bldg. D3)
Columbus, Ohio 43224)
)
and)
)
STATE OF OHIO)
c/o Robert Taft, Governor)
77 South High Street, 30th Floor)
Columbus, Ohio 43215-6117)
)
ALSO SERVE:)
JIM PETRO)
ATTORNEY GENERAL)
30 East Broad Street)
Columbus, Ohio 43215-3428)
)

FIRST AMENDED
COMPLAINT FOR DECLARATORY JUDGMENT,
MANDAMUS, AND OTHER RELIEF

PARTIES

1. This action arises from the actions and threats to act of the Ohio Department of Natural Resources ("ODNR"), purporting to act on behalf of the State of Ohio, by which the ODNR has unconstitutionally and unlawfully asserted ownership and possession of the private property of Ohio citizens abutting Lake Erie. Among other things, the ODNR has arbitrarily and abusively forced, and continues to threaten to force, private land owners to lease from ODNR portions of the land owners' own private property. ONDR has intentionally and willfully misrepresented to property owners and to the public that the state of Ohio owns

their property, and ODNR has persisted in this campaign of falsehoods despite knowing that it is in conflict with all Ohio law and with published opinions of the Attorney General of Ohio. This action seeks to affirm the private property rights of Ohio citizens and to terminate ODNR's confiscation and attempted confiscation of private property in violation of Ohio law and the constitutions of Ohio and the United States.

2. Relator/Plaintiff Ohio Lakefront Group, Inc. ("OLG") is a duly formed non-profit corporation, which represents, and most of whose members are, owners of real property abutting Lake Erie. Several of OLG's members reside in Lake County and own property in Lake County that is the subject of this action. A copy of OLG's purposes is attached as Exhibit A hereto and made a part hereof.

3. Robert Merrill and all other named individual plaintiffs are owners of record of real property abutting Lake Erie. Mr. Merrill's property is located in Lake County, and the property of the other individual plaintiffs is located in Lake, Ashtabula, Cuyahoga, Lorain, Ottawa, Erie, Sandusky or Lucas Counties as reflected in the caption.

4. The named relators/plaintiffs and the putative class are collectively identified as "Plaintiffs."

5. Respondents/Defendants are the ODNR, its Director, Sam Speck, and the State of Ohio (collectively "ODNR").

BACKGROUND

6. The first section of the first article of the Bill of Rights of the Ohio Constitution proclaims the inalienable right of people in this state to acquire, possess, and protect property. The Ohio Constitution further prohibits the state from taking private property for a public use without first paying compensation to the property owner. The United States Constitution contains equivalent provisions.

7. Legal title to many parcels of real property abutting Lake Erie have been held in private ownership since before Ohio was admitted into the Union as a state in 1803. Since that time, Ohio law has recognized and protected the inalienable property rights of those holding legal title to these parcels, known as "upland" or "littoral" owners.

8. For over 200 years, Ohio law has recognized the property rights of littoral owners, both with regard to the ownership in fee simple of the upland property as defined by the owner's deed or original patent and also as to the rights — know as littoral rights — these property owners have to access and use the adjoining waters of Lake Erie. Ohio law also has long recognized that the lakeward property line of a littoral owner whose ownership extends to Lake Erie is a "moveable freehold" in that it can move either lakeward or landward by virtue of accretion, erosion, or reliction. The property owned by littoral owners abuts the submerged lands of Lake Erie, title to which, together with the waters of Lake Erie and their contents, is held in trust for the benefit of the people of Ohio for the public uses of navigation, water commerce and fishery.

9. This concept of trust ownership by the state of the waters of Lake Erie and the soil beneath currently is codified in Section 1506.10 of the Ohio Revised Code and is expressly made subject to the property rights of littoral owners. That section also designates ODNR "as the state agency in all matters pertaining to the care, protection, and enforcement of the state's rights designated in this section."

10. Under cover of its "coastal management program," ODNR has abused its authority by willfully ignoring the boundary between private and public ownership fixed by Ohio law.

11. ODNR recently has asserted and continues to assert and maintain that the state of Ohio owns all land lakeward of "ordinary high water mark" or "OHW," which for administrative convenience the ODNR currently defines as wherever the U.S. Army Corps of Engineers defines Ordinary High Water for purposes of federal law (currently, a fixed line running at 573.4 feet above International Great Lakes Datum (1985)). Thus, contrary to established Ohio law, ODNR has sought and continues to seek to exercise all property rights of fee ownership as to all property lakeward of OHW, regardless of whether that property is submerged and regardless of whether that property is privately owned.

12. As a result, ODNR has forced some littoral owners wishing to use their private property located below OHW to lease this land — which is owned in fee by the littoral owners — from the state. Littoral owners are required to pay real estate taxes based upon the whole of their privately owned fee, even the portion

which ODNR has confiscated for its own purposes and "leased back" to the littoral owner. Except pursuant to a lease, the issuance and terms of which are wholly within the power of ODNR, ODNR maintains that no littoral owner may make use of its own property, or exclude others from its property, as long as that property lies below OHW.

13. ODNR's actions have thrown doubt upon the littoral owners' title to their properties and has prevented some of them from obtaining title insurance for their private property located below OHW but landward of the state's actual fee ownership.

CLASS ALLEGATIONS

14. Plaintiffs bring this action as a class action on behalf of themselves and all other members of a Class defined as the approximately 15,500 private littoral owners of parcels of real property abutting Lake Erie within the State of Ohio.

15. The members of the Class are so numerous that the joinder of all individual members is impracticable.

16. The questions of law and fact as to the legal boundary between private property and public trust ownership of the submerged soils of Lake Erie are common to the Plaintiffs constituting the Class in this case.

17. The claims of the Plaintiffs are typical of the claims of the Class, and ODNR's defenses are typical of the defenses pertinent to all of the members of the Class.

18. Plaintiffs will fairly and adequately protect the interests of the Class.

19. The prosecution of separate actions by individual members of the Class would create the risk of adjudications with respect to individual members of the Class which would as a practical matter be dispositive of the interests of the other members not named parties to the adjudication or substantially impair or impede their ability to protect their interests.

20. ODNR has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate declaratory relief and associated injunctive relief with respect to the Class as a whole.

21. Adjudication of this case as a class action will facilitate judicial economy, and will address issues of concern involving multiple jurisdictions, thereby reducing the state's costs in defending the unlawful and improper actions of ODNR described above.

COUNT I
Declaratory Judgment

22. The facts alleged in paragraphs 1 through 21 of this Complaint are realleged and incorporated herein by reference.

23. An actual controversy exists over the respective rights of Plaintiffs and the state of Ohio as trustee of Lake Erie and its submerged lands.

24. In particular, ODNR contends, and Plaintiffs dispute, that the state of Ohio holds title to all lands

located below the administratively arbitrary line of OHW.

25. Plaintiffs contend, and ODNR disputes, that Plaintiffs' private property rights and title are defined by Ohio law, their deeds, and original patents if any.

26. Plaintiffs further contend, and ODNR disputes, that ODNR is unlawfully and unconstitutionally asserting and exercising ownership rights over real property that is not part of the public trust lands.

27. Plaintiffs further contend, and ODNR disputes, that ODNR's policy is directly contrary to Ohio law, including O.R.C. § 1506.10 and 1506.11.

28. ODNR contends, and Plaintiffs dispute, that Plaintiffs are prohibited from using any land located below OHW, regardless of fee ownership of that land, unless and until Plaintiffs agree to pay ODNR to lease that land from ODNR.

29. Each of ODNR's contentions is erroneous and contrary to Ohio law.

30. Each of Plaintiffs' contentions are valid and correct under Ohio law.

31. An actual and justiciable controversy exists as to the invalidity or validity of each of the contentions above, which controversy directly affects OLG, on behalf of and as representative of its members, and the other Plaintiffs, including, without limitation, the ownership, use and enjoyment of their privately owned real property, as protected by Article I, Section 19 of

the Ohio Constitution and the Fifth Amendment to the U. S. Constitution.

32. Pursuant to Ohio Revised Code Chapter 2721, Plaintiffs are entitled to an order of this Court declaring that:

a. Plaintiffs own fee title to the lands located between OHW and the actual legal boundary of their properties, as defined by Ohio law (including the rules of accretion, avulsion, erosion and reliction), their deeds, and their original patent;

b. The interest of the state as trustee over the public trust applies to the waters of Lake Erie and does not apply to or include non-submerged lands;

c. ODNR lacks authority to compel Plaintiffs, or any one of them, to lease back property already owned by them;

d. Any current submerged land lease between ODNR and any of Plaintiffs is declared void and invalid as to any land below OHW but owned by Plaintiffs.

33. Pursuant to R.C. § 2721.09, Plaintiffs request that the Court grant further relief, including injunctive relief, as necessary to carry out its declaratory judgment.

COUNT II
Mandamus/Inverse Takings Compensation

34. The facts in paragraph 1 through 33 of this Complaint are realleged and incorporated herein by reference.

35. ODNR's arbitrary and capricious assertion of ownership and exercise of ownership rights over the lands owned by Plaintiffs at and below OHW constitutes an unconstitutional temporary taking of those lands, and Plaintiffs have a clear right to receive compensation from ODNR for such taking or appropriation pursuant to Article I, Section 19 of the Ohio Constitution and the Fifth Amendment to the U.S. Constitution.

36. Plaintiffs have no plain and adequate remedy in the ordinary course of law to require ODNR to compensate them fairly for the losses they have incurred as a result of ODNR's uncompensated taking of their privately-owned real property.

37. ODNR is under a clear legal duty to commence appropriation proceedings in the Probate Court of the respective counties in which the respective properties owned by Plaintiffs are located to determine the amount of compensation due to each of the Plaintiffs for the real property temporarily taken and for damage to the residue of their respective real properties.

COUNT III
(In the Alternative)
Mandamus/Inverse Takings Compensation

38. The facts in paragraph 1 through 37 of this Complaint are realleged and incorporated herein by reference.

39. In the alternative, if ODNR is entitled to take and appropriate the lands owned by Plaintiffs below OHW, then Plaintiffs have a clear right to receive compensation from the state of Ohio for such takings or

appropriation pursuant to Article I, Section 19 of the Ohio Constitution and the Fifth Amendment to the U.S. Constitution, as a consequence of ODNR's taking of the real property owned by Plaintiffs without any compensation.

40. Plaintiffs have no plain and adequate remedy in the ordinary course of law to require ODNR to compensate them fairly for the losses they have incurred and will incur as a result of ODNR's uncompensated taking of their privately owned real properties.

41. If ODNR is entitled to take and appropriate Plaintiffs' lands owned below OHW, ODNR is under a clear legal duty to commence appropriation proceedings in the Probate Court of the respective counties in which the respective properties owned by Plaintiffs are located to determine the amount of compensation due to each of the Plaintiffs for the real property taken and for damage to the residue of their respective real properties.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court grant the following relief:

1) Pursuant to Ohio Civil Rule 23, certify this case as a class action and certify that the class shall include each and every owner of a parcel of privately owned real property abutting Lake Erie located within the State of Ohio, unless such owner opts out of the class if permitted and to the extent permitted by law;

2) On Count I, a declaratory judgment that:

   i) Plaintiffs own fee title to the lands located between OHW and the actual legal boundary of their properties, as defined by Ohio law (including the rules of accretion, avulsion, erosion and reliction), their deeds, and their original patent;

   ii) The interest of the state as trustee over the public trust applies to the waters of Lake Erie and does not apply to or include non-submerged lands;

   iii) ODNR lacks authority to compel Plaintiffs, or any one of them, to lease back property already owned by them;

   iv) Any current submerged land lease between ODNR and any of Plaintiffs is declared void and invalid as to any land below OHW but owned by Plaintiffs.

3) On Count II, a writ of mandamus compelling and ordering ODNR to commence appropriation proceedings in the Probate Court of the respective counties in which the respective properties owned by Plaintiffs are located to determine the amount of compensation due to each of the Plaintiffs for the real property temporarily taken and for damage to the residue of their respective real properties.

4) In the alternative, on Count III, a writ of mandamus compelling and ordering ODNR to

commence appropriation proceedings in the Probate Court of the respective counties in which the respective properties owned by Plaintiffs are located to determine the amount of compensation due to each of the Plaintiffs for the real property taken and for damage to the residue of their respective real properties.

5) An award of Plaintiffs' attorneys' fees and costs.

6) Any other relief that this Court deems equitable, proper, necessary, or just.

Respectfully submitted,

/s/ James F. Lang
JAMES F. LANG (0059668)
MICHAEL T. MULCAHY (0038270)
HENRY G. GRENDELL (0063414)
CALFEE, HALTER & GRISWOLD LLP
1400 McDonald Investment Center
800 Superior Avenue
Cleveland, Ohio 44114
(216) 622-8200
(216) 241-0816 (fax)

Counsel for Relators/Plaintiffs

CERTIFICATE OF SERVICE

The foregoing First Amended Complaint was served via overnight mail this 2nd day of July, 2004, upon the following:

State Of Ohio, Department Of
Natural Resources
c/o Sam Speck, Director
1930 Belcher Dr. Bldg. D3
Columbus, Ohio 43224

Sam Speck, Director
Ohio Department of Natural Resources
1930 Belcher Dr. Bldg. D3
Columbus, Ohio 43224

State Of Ohio
c/o Robert Taft, Governor
77 South High Street, 30th Floor
Columbus, Ohio 43215-6117

Jim Petro
Attorney General
30 East Broad Street
Columbus, Ohio 43215-3428

/s/
One of the Attorneys for Plaintiffs

APPENDIX F

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

[Filed: June 9, 2006]

CASE NO. 04CV001080

JUDGE EUGENE A. LUCCI

STATE OF OHIO EX REL. ROBERT MERRILL, TRUSTEE, et al.,	)
Plaintiffs-Relators,	)
vs.	)
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	)
Defendants-Respondents.	)

CASE NO. 04CV001081

JUDGE EUGENE A. LUCCI

STATE OF OHIO EX REL. HOMER S. TAFT, et al.,	)
Plaintiffs-Relators,	)
vs.	)

STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,

Defendants-Respondents.

ORDER CERTIFYING CLASS ACTION ON COUNT ONE OF THE FIRST AMENDED COMPLAINT IN CASE NO. 04-CV-001080

{¶1} The court has reviewed and considered the Notice of Joint Stipulation to Class Certification on Count One of the First Amended Complaint filed by the parties in State ex rel. Merrill et al. v. State of Ohio, Department of Natural Resources, et al., Case No. 04-CV-001080 (hereinafter "Merrill") on June 8, 2006. The Stipulation seeks on Order certifying a class in this lawsuit limited to Count I of the First Amended Complaint, which seeks a declaratory judgment from this court. For good cause shown, the Stipulation is well-taken and is granted under the terms set forth herein.

Class Action Definition

{¶2} As stipulated by the parties, the class shall consist of "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[1]

[1] The parties have stipulated that "upland property" is defined as real property bordering a body of water and that, in Ohio, "littoral property" is defined as upland property that borders an ocean, sea, lake, or a bay of any of these water bodies, as opposed to "riparian property" which is defined as upland property that borders a river, stream, or other such watercourse.

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" (hereinafter "the Class"). To the extent that governmental entities are included in the class, they are included solely in their proprietary capacity as property owners and not for any purpose or capacity implicating their governmental authority or jurisdiction.

1. Civ.R.23(A)(1)

{¶3} The court finds that the class is so numerous that joinder of all members is impracticable. As stipulated by the parties, the shore of Lake Erie in the State of Ohio extends approximately 312 miles, eight counties in the State of Ohio abut the shore of Lake Erie (Ashtabula, Lake, Cuyahoga, Lorain, Erie, Sandusky, Ottawa, and Lucas), and approximately 14,000 parcels of littoral property abut Ohio's Lake Erie shore. Owners of littoral parcels of land may be ascertained from available property records.

2. Civ.R.23(A)(2)

{¶4} Pursuant to the stipulation of the parties, the court hereby finds that the following questions of law are common to the class:

(1) What constitutes the furthest landward boundary of the "territory" as that term appears in R.C. 1506.10 and 1506.11, including, but not limited to, interpretation of the terms "southerly shore" in R.C. 1506.10, "waters of Lake Erie" in R.C. 1506.10, "lands presently underlying the

waters of Lake Erie" in R.C. 1506.11, "lands formerly underlying the waters of Lake Erie and now artificially filled" in R.C. 1506.11, and "natural shoreline" in RC. 1506.10 and 1506.11.

(2) If the furthest landward boundary of the "territory" is declared to be the natural location of the ordinary high water mark as a matter of law, may that line be located at the present time using the elevation of 573.4 feet IGLD (1985), and does the State of Ohio hold title to all such "territory" as proprietor in trust for the people of the State.

(3) What are the respective rights and responsibilities of the class members, the State of Ohio, and the people of the State in the "territory."

3. Civ.R.23(A)(3)

{¶5} Pursuant to the stipulation of the parties, the court hereby finds that the claims or defenses of the named Plaintiffs in Merrill are typical of the claims or defenses of that class. Each of the named Plaintiffs in Merrill is either a member of the class or, with respect to Named Plaintiff Ohio Lakefront Group, Inc., a non-profit corporation representing its members who are members of the class. All of the named Plaintiffs in Merrill seek a declaratory judgment that resolves the questions of law common to the class. All members of the class have the same interests in a declaratory judgment that resolves the questions of law common to the class.

4. Civ.R.23(A)(4)

{¶6} Pursuant to the stipulation of the parties, the court hereby finds that the named Plaintiffs in Merrill will fairly and adequately protect the interests of the proposed class. No named Plaintiff in Merrill seeks rights that will prejudice any other member of the class. The named Plaintiffs in Merrill collectively are committed to the vigorous prosecution of this class action litigation. The court further finds that class counsel - Calfee, Halter & Griswold LLP - consists of over 170 lawyers who are members in good standing of the bar of the State of Ohio and have the experience and financial ability to protect the interests of the class.

5. **Civ.R. 23(B)(2)**

{¶7} Pursuant to the stipulation of the parties, the court finds that the allegations contained within the First Amended Complaint and Counterclaim in Merrill have demonstrated that actual and justiciable controversies exist, thereby making appropriate declaratory relief with respect to both the State and to the proposed class as a whole.

Class Action Certification

{¶8} As authorized by Civ.R. 23(C)(1) and 23(C)(4), the court determines that a class action shall be maintained on Count I of Plaintiffs-Relators' First Amended Complaint upon the common questions of law found herein, and hereby certifies that class action under the provisions of Civ.R. 23(B)(2). The two remaining counts of Plaintiffs-Relators' First Amended Complaint – "Count II - Mandamus/Inverse Takings

Compensation" and "Count III - (In the Alternative) Mandamus/Inverse Takings Compensation" – are hereby bifurcated pending final resolution of Count I.

{¶9} The class certification hearing in Merrill, scheduled for June 9, 2006 at 9:00 a.m., is no longer necessary and is cancelled.

{¶10} The parties in Merrill have requested that the consolidated case of State ex rel. Taft et al. v. State of Ohio, Department of Natural Resources, et al., Case No. 04-CV-001081 (hereinafter "Taft"), be stayed pending final resolution of the class action in Merrill, with the consent of counsel in Taft. The court will consult with all counsel in Taft before rendering a decision on this issue.

{¶11} IT IS SO ORDERED.

/s/
EUGENE A. LUCCI, JUDGE

cc: James F. Lang, Esq., Michael T. Mulcahy, Esq., K. James Sullivan, Esq., Attorneys for Plaintiffs/ Relators in Case No. 04CV001080

Cynthia K. Frazzini, Esq. and John P. Bartley, Esq., Assistant Attorneys General for Defendants/ Respondents in Case No. 04CV001080 and Case No. 04CV001081

Homer S. Taft, Esq. Plaintiff/Relator Pro Se in Case No. 04CV001081

L. Scot Duncan, Esq., Plaintiff/Relator Pro Se and Attorney for Plaintiff-Relator Darla J. Duncan in Case No. 04CV001081

APPENDIX G

SUPREME COURT OF OHIO

Nos. 2008-L-007 and 2008-L-008, 2009-Ohio-4256

[Filed: September 14, 2011]

THE STATE EX REL. MERRILL, TRUSTEE, ET AL.,	)
	)
APPELLEES;	)
	)
TAFT,	)
	)
APPELLEE AND CROSS-APPELLANT,	)
	)
V.	)
	)
OHIO DEPARTMENT OF NATURAL RESOURCES ET AL.,	)
	)
APPELLANTS AND CROSS-APPELLEES.	)

[Cite as *State ex rel. Merrill v. Ohio Dept. of Natural Resources,* 130 Ohio St.3d 30, 2011-Ohio-4612.]

Land held in public trust abutting private property—The territory of Lake Erie held in trust by the state of Ohio for the people of the state extends to the natural shoreline, which is the line at which the water usually stands when free from disturbing causes.

(No. 2009-1806—Submitted February 1, 2011—Decided September 14, 2011.)

APPEAL AND CROSS-APPEAL from the Court of Appeals for Lake County, Nos. 2008-L-007 and 2008-L-008, 2009-Ohio-4256.

SYLLABUS OF THE COURT

1. A party to an action has standing to appeal from a judgment when it is an independent party to an action and has been aggrieved by the final order from which it seeks to appeal.

2. When an organization demonstrates that it has a claim or defense that shares a common question of law or fact with the main action and that intervention will not unduly delay or prejudice the adjudication of the rights of the original parties, it meets the requirements of Civ.R. 24(B)(2) for permissive intervention.

3. The territory of Lake Erie held in trust by the state of Ohio for the people of the state extends to the natural shoreline, which is the line at which the water usually stands when free from disturbing causes. (*Sloan v. Biemiller* (1878), 34 Ohio St. 492, and *State v. Cleveland & Pittsburgh RR.*

Co. (1916), 94 Ohio St. 61, 113 N.E. 677, approved and followed; R.C. 1506.10 and 1506.11, construed.)

O'DONNELL, J.

{¶ 1} We are asked to resolve three issues on appeal and cross-appeal: first, whether the state of Ohio, as distinct from the Ohio Department of Natural Resources ("ODNR"), has standing to appeal from the decisions of the trial and appellate courts in this case; second, whether the court of appeals properly held that the trial court did not abuse its discretion in permitting the National Wildlife Federation and the Ohio Environmental Council to intervene in this action; and third, whether the appellate court identified the proper boundary between property abutting Lake Erie owned by private individuals and the territory of Lake Erie held in trust by the state for all Ohioans.

{¶ 2} Regarding the standing issue, we conclude that despite ODNR's adoption of a conciliatory lis pendens posture agreeing not to enforce its controversial lease policy pending the court's determination of the boundary issue and its failure to appeal the judgment of the trial court, it remains a party to this case; the state of Ohio, a separately named party, had standing to appeal the trial court judgment entered against it affecting the territory of Lake Erie.

{¶ 3} On the intervention question, we agree with the conclusion of the court of appeals that the National Wildlife Federation and the Ohio Environmental

Council are proper parties to this action and that the trial court did not abuse its discretion in permitting them to intervene.

{¶ 4} Finally, regarding the shoreline issue, Ohio law with respect to the territory of Lake Erie held in trust by the state and the rights of littoral-property owners has been settled for more than a century, and we see no reason to change the existing law. Based on opinions of this court from as early as 1878 and the Ohio General Assembly's statement of public policy enunciated in the Fleming Act in 1917, we conclude that the territor y of Lake Erie held in trust by the state of Ohio for the people of Ohio extends to the "natural shoreline," which is the line at which the water usually stands when free from disturbing causes.

Factual and Procedural History

{¶ 5} The pleadings in this case allege that ODNR instituted a policy prohibiting littoral-property owners from exercising property rights over all land lakeward of the ordinary high-water mark, despite the inclusion of that area of land in their respective deeds, unless the owner entered into a lease agreement with ODNR and paid a fee for its use.

{¶ 6} In May 2004, Robert Merrill, as trustee for the Diane N. Merrill Living Trust, the Ohio Lakefront Group, Inc., a nonprofit corporation representing lakefront-property owners, and several other individually named lakefront-property owners (collectively referred to as "the Merrill plaintiffs") filed a complaint for declaratory judgment and mandamus in the Lake County Common Pleas Court against

ODNR, its director, and the state of Ohio, seeking declarations that owners of property abutting Lake Erie hold title to the land "between [the ordinary high-water mark] and the actual legal boundary of their properties * * * as defined by their deeds" and that the public trust does not include nonsubmerged lands; alternatively, they sought a writ of mandamus to compel ODNR to commence appropriation proceedings or to compel the state of Ohio to compensate them for its alleged taking of their property. They subsequently filed an amended complaint containing the same counts. The individually named lakefront-property owners also filed attachments to the first amended complaint, containing copies of their deeds and identifying the property's lakeward boundary, although those descriptions varied from deed to deed, i.e., "a distance of 374.0 feet to the shore of Lake Erie," "to a point in the low water mark of Lake Erie," "145 feet to a point in the water's edge of Lake Erie," "to Lake Erie," "a distance of 293.04 feet to the shore of Lake Erie," and "to the shore of Lake Erie."

{¶ 7} Separately, Homer S. Taft, L. Scot Duncan, and Darla J. Duncan ("the Taft plaintiffs") filed the next consecutively numbered case in the Lake County Common Pleas Court, claiming ownership of their land to the *ordinary low-water mark* of Lake Erie. The trial court consolidated that action with the suit filed by the Merrill plaintiffs.

{¶ 8} ODNR and the state counterclaimed, seeking a declaration that the state of Ohio holds the lands and waters of Lake Erie to the *ordinary high-water mark*, as set by the United States Army Corps of Engineers in

1985, in trust for the people of Ohio, subject only to the paramount authority retained by the United States for the purposes of commerce, navigation, national defense, and international affairs.

{¶ 9} In June 2006, pursuant to a joint stipulation of all parties in *Merrill*, the trial court certified a class action as to the declaratory-judgment count of the Merrill complaint, with the class consisting of owners of Ohio property bordering Lake Erie. The court stayed the mandamus claims pending resolution of the declaratory-judgment claim.

{¶ 10} Subsequently, the National Wildlife Federation and the Ohio Environmental Council, nonprofit organizations committed to conserving natural resources and whose members make recreational use of the shores and waters of Lake Erie, sought to intervene as defendants and counterclaimants, asserting that the state holds the lands and waters of Lake Erie in trust for the public to the ordinary high-water mark. The trial court permitted them to intervene.

{¶ 11} ODNR and the state then moved for summary judgment on the declaratory-judgment claim, urging, inter alia, that the public-trust territory of Lake Erie extends to the ordinary high-water mark, as identified by the United States Army Corps of Engineers in 1985. The National Wildlife Federation and the Ohio Environmental Council filed a joint motion for summary judgment, concurring in and adopting the bases for summary judgment advanced by ODNR and the state.

{¶ 12} The Merrill and Taft plaintiffs each filed cross-motions for summary judgment. In response to the cross-motions for summary judgment, ODNR advised the court that it welcomed resolution of the controversy and posited that it "must and should honor the apparently valid real property deeds of the plaintiff-relator lakefront owners unless a court determines that the deeds are limited by or subject to the public's interests in those lands or are otherwise defective or unenforceable." ODNR further explained that "acting with the consent and direction of" the governor, it "will discharge its statutory duties and will adopt or enforce administrative rules and regulatory policies with the assumption that the lakefront owners' deeds are presumptively valid." It also represented to the court that while it "will require owners who wish to build structures along the shores of Lake Erie that could impact coastal lands to obtain permits before commencing any such construction[,] * * * it will no longer require property owners to lease land contained within their presumptively valid deeds."

{¶ 13} After review, the trial court granted partial summary judgment to the Merrill and Taft plaintiffs and denied summary judgment to ODNR, the state, the National Wildlife Federation, and the Ohio Environmental Council, concluding that the public trust neither extended to the ordinary high-water mark nor terminated at the low-water mark; rather, the trial court determined that the boundary of the public-trust territory is "a moveable boundary consisting of the water's edge, which means the most landward place where the lake water actually touches the land at any given time." The trial court opinion also reformed the

legal descriptions in deeds held by littoral-property owners containing legal descriptions that extended the propert y into the lake to extend the propert y only to the water's edge.

{¶ 14} The trial court further concluded: "Defendants-Respondents and Intervening Defendants have failed, as a matter of law, to show that the *landward* boundary of the public trust territory in Ohio along the Lake Erie shore is the Ordinary High Water Mark of 573.4 IGLD (1985), and Plaintiffs-Relators and Intervening Plaintiffs have failed to show that the *lakeward* boundary of the public trust territory in Ohio along the Lake Erie shore is the Ordinary Low Water Mark. The court declares that the law of Ohio is that the proper definition of the boundary line for the public trust territory of Lake Erie is the water's edge, wherever that moveable boundary may be at any given time, and that the location of this moveable boundary is a determination that should be made on a case-by-case basis." (Emphasis sic.)

{¶ 15} The trial court order included language from Civ.R. 54(B), "finding that there is no just reason for delay," thereby creating a final, appealable order.

{¶ 16} The state of Ohio, the National Wildlife Federation, and the Ohio Environmental Council appealed to the Eleventh District Court of Appeals, and the Merrill plaintiffs and Taft, individually, cross-appealed, all challenging the trial court's determination that the public-trust territory of Lake Erie is a moveable boundary consistent with the water's edge. Additionally, Taft argued that the court erred in allowing intervention. Notably, ODNR neither

filed a notice of appeal to the court of appeals nor joined in the state's notice of appeal. Its failure to separately appeal prompted the court of appeals, during oral argument, to question whether the state of Ohio had appellate standing before that court.

{¶ 17} The appellate court concluded that the state of Ohio lacked appellate standing without ODNR as an appellant, and it affirmed the trial court's holdings regarding the intervening parties and the boundary of the public trust, but vacated the trial court's reformation of the littoral owners' deeds.

{¶ 18} In holding that the state of Ohio lacked standing, the court of appeals cited R.C. 109.02 for the proposition that the Ohio attorney general could "only act at the behest of the governor, or the General Assembly," and in this case, the "attorney general represented the state due to the activities of ODNR, which department is under the authority of the governor," who no longer supported the position taken by ODNR. *State ex rel. Merrill v. Ohio Dept. of Natural Resources,* 11th Dist. Nos. 2008-L-007 and 2008-L-008, 2009-Ohio-4256, ¶ 44. Thus, because the governor "ordered ODNR to cease those activities that made it a party to the action," the appellate court found "no authority for the attorney general to prosecute this matter on his own behalf" and concluded that the state "no longer has standing in this matter." Id. Thus, the court of appeals ordered the state's assignments of error and briefs stricken.

{¶ 19} Regarding intervention, the appellate court held that the trial court had correctly permitted the National Wildlife Federation and the Ohio

Environmental Council to intervene because they met the requirements for intervention as of right pursuant to Civ.R. 24(A) in that the relief sought by the Merrill and Taft plaintiffs "would extinguish the rights" of their members to "make recreational use of the shore along Lake Erie below the ordinary high water mark." Id. at ¶ 114. The court also concluded that the intervening parties met the requirements for permissive intervention pursuant to Civ.R. 24(B) because they demonstrated that their defense and counterclaim factually and legally related to the claims asserted by the Merrill and Taft plaintiffs.

{¶ 20} The court of appeals also affirmed the trial court's determination regarding the boundary of the public trust, holding that the boundary is the shoreline, which it defined as "the actual water's edge." Id. at ¶ 127.

{¶ 21} In its opinion, the court of appeals erroneously stated that the question regarding the boundary of the public trust is a matter of first impression in Ohio. Id. at ¶ 1. It is not. That question has been a matter of settled law in Ohio for more than a century—since 1878—when this court first announced the law in a case that called for Lake Erie as the boundary in a deed of conveyance, and when it subsequently clarified that decision in 1916, and when the legislature, in response to our request, thereafter codified Ohio law regarding the public trust in Lake Erie by enacting the Fleming Act in 1917.

{¶ 22} Despite this body of law, the court of appeals concluded: "Based upon its decisions, the Supreme Court has identified that the waters, and the lands

under the waters of Lake Erie, when submerged under such waters, are subject to the public trust, while the littoral owner holds title to the natural shoreline. As we have identified, the shoreline is the line of contact with a body of water with the land *between the high and low water mark.* Therefore, the shoreline, that is, the actual water's edge, is the line of demarcation between the waters of Lake Erie and the land when submerged thereunder held in trust by the state of Ohio and those natural or filled in lands privately held by littoral owners." (Emphasis sic.) Id. at ¶ 127.

{¶ 23} ODNR, its director, and the state jointly appealed to this court, as did the National Wildlife Federation and the Ohio Environmental Council; individually, Taft cross-appealed. We accepted jurisdiction over these appeals, which collectively assert six propositions of law and raise the following three issues: whether the state of Ohio has appellate standing, whether the National Wildlife Federation and the Ohio Environmental Council are proper intervening parties, and whether the territory of the public trust extends to the ordinary high-water mark, as claimed by the state and the environmental groups, or the low-water mark, as claimed by Taft.

Standing to Appeal

{¶ 24} The state presents a twofold argument to support its position that it had standing to appeal the decision of the trial court, which declared that the boundary of the public trust is the water's edge, and the decision of the court of appeals, which affirmed the trial court's declaration. First, the state claims that it had standing because it is an independent party to this

action, and the judgment entered against it is adverse to its interests. Second, it maintains that the Ohio attorney general is empowered by the common law and statutes to represent the state when it is a named party.

{¶ 25} The Merrill and Taft plaintiffs collectively argue that the state lacked standing to appeal because R.C. 1506.10 designates ODNR as the agency responsible for the enforcement of the state's public-trust rights in Lake Erie, and here, ODNR complied with a gubernatorial directive to cease its active participation in the matter and did not appeal the trial court's judgment to the court of appeals. Thus, they assert, ODNR's waiver of its appellate rights foreclosed the state from appealing.

{¶ 26} Separately, Taft argues that the court of appeals correctly determined that the state lacked standing because R.C. 109.02 precludes the attorney general from representing the state in the court of appeals absent authorization from the governor or the General Assembly, and the governor's directive to ODNR negates any claim by the attorney general of authorization to represent the state in this matter. Taft further contends that the General Assembly enacted R.C. 109.02 in abrogation of the common law, and therefore, the attorney general lacks nonstatutory authority to act on behalf of the state.

{¶ 27} "Standing is a preliminary inquiry that must be made before a court may consider the merits of a legal claim." *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, ¶ 9, citing *Ohio Pyro, Inc. v. Dept. of Commerce,* 115 Ohio St.3d 375,

2007-Ohio-5024, 875 N.E.2d 550, ¶ 27, and *Cuyahoga Cty. Bd. of Commrs. v. State,* 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330, ¶ 22. Standing is a question of law, so we review the issue de novo. *Kincaid* at ¶ 9.

{¶ 28} To have appellate standing, a party must be "aggrieved by the final order appealed from." *Ohio Contract Carriers Assn., Inc. v. Pub. Util. Comm.* (1942), 140 Ohio St. 160, 23 O.O. 369, 42 N.E.2d 758, syllabus; see also *In re Guardianship of Santrucek* 120 Ohio St.3d 67, 2008-Ohio-4915, 896 N.E.2d 683, ¶ 5; *Willoughby Hills v. C.C. Bar's Sahara, Inc.* (1992), 64 Ohio St.3d 24, 26, 591 N.E.2d 1203. Cf. *Forney v. Apfel* (1998), 524 U.S. 266, 271, 118 S.Ct. 1984, 141 L.Ed.2d 269, quoting *United States* v. *Jose* (1996), 519 U.S. 54, 56, 117 S.Ct. 463, 136 L.Ed.2d 364 ("a party is 'aggrieved' [by] and ordinarily can appeal [from] a decision 'granting in part and denying in part the remedy requested' ").

{¶ 29} In this case, both the Merrill and Taft plaintiffs sued both the state of Ohio and ODNR, seeking a declaration regarding the interest of the state as trustee over the public trust. In addition, count three of Merrill's first amended complaint sought a writ of mandamus to compel the state to pay compensation as a result of ODNR's alleged taking. Thus, the pleadings verify that the state became an independent party to the underlying action. It is also an aggrieved party; the trial court's determination regarding the boundary of the public trust, which the court of appeals affirmed, is adverse to the state's position, and the trial court's ruling denied the relief

sought by the state in its counterclaim for declaratory judgment. Accordingly, we conclude that the state of Ohio had standing to appeal from the judgments of both the trial court and appellate court due to its status as an aggrieved party.

{¶ 30} Nor does R.C. 1506.10 deprive the state of the ability to appeal in this case. That statute designates ODNR as "the state agency in all matters pertaining to the care, protection, and enforcement of the state's rights designated in this section." It also provides that "[a]ny order of the director of [ODNR] in any matter pertaining to the care, protection, and enforcement of the state's rights in that territory is a rule or adjudication within the meaning of sections 119.01 to 119.13 of the Revised Code." Here, however, the state appealed from a decision entered in a declaratory-judgment action, and a matter that seeks a declaration of rights is different from one that pertains to "the care, protection, and enforcement" of those rights. We do not construe R.C. 1506.10 as prohibiting the state from litigating its interests in the public trust, including its right to appeal from a judgment that adversely affects those interests.

{¶ 31} Similarly, the court of appeals erroneously determined that the attorney general lacked standing to appeal on behalf of the state. We recognize that pursuant to a gubernatorial directive, ODNR did not appeal the judgment of the trial court. As a separate party, however, the state did not abandon its independent right to appeal. By appealing from the trial court's judgment, the state preserved its interest in protecting what it perceives to be the public trust.

{¶ 32} Taft also maintains that the attorney general lacked standing to appeal because pursuant to R.C. 109.02, absent direction from the governor, the attorney general had no independent authority to act on behalf of the state.

{¶ 33} In Ohio, the attorney general is a constitutional officer. Section 1, Article III, Ohio Constitution. The General Assembly has also recognized that the attorney general is the chief law officer "for the state and all its departments." R.C. 109.02. That statute sets forth the attorney general's statutory duties: "The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested. When required by the governor or the general assembly, the attorney general shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor, the attorney general shall prosecute any person indicted for a crime."

{¶ 34} The state and federal constitutions "were adopted with a recognition of established contemporaneous common law principles; and * * * they did not repudiate, but cherished, the established common law." *State v. Wing* (1902), 66 Ohio St. 407, 420, 64 N.E. 514. In deference to that principle, "the General Assembly will not be presumed to have intended to abrogate a settled rule of the common law unless the language used in a statute clearly imports such intention." *State ex rel. Hunt v. Fronizer* (1907), 77 Ohio St. 7, 16, 82 N.E. 518.

{¶ 35} This court recently addressed the common-law powers of the attorney general in relation to R.C. 109.02 in *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, 915 N.E.2d 633. In rejecting an argument similar to Taft's position herein, we concluded that nothing in R.C. Chapter 109 abrogated the attorney general's common-law power to commence a prohibition action that sought to compel a common pleas judge to vacate an entry issued in a criminal case. Id. at ¶ 18, 23.

{¶ 36} Guided by that analysis, we reach the same result and hold that nothing in R.C. Chapter 109 appears to abrogate the attorney general's common-law power to appeal on behalf of the state from an adverse judgment. Cf. *Northeast Ohio Coalition for the Homeless & Serv. Emps. Internatl. Union, Local 1199 v. Blackwell* (C.A.6, 2006), 467 F.3d 999, 1008 (attorney general permitted to intervene on behalf of the state in an appeal of a judgment from which the secretary of state did not wish to pursue an appeal). Thus, Taft's position is not well taken.

{¶ 37} Accordingly, we hold that a party to an action has standing to appeal from a judgment when it is an independent party to an action and has been aggrieved by the final order from which it seeks to appeal. Hence, the state of Ohio has standing to appeal in this case, as it is an independent party against which an adverse judgment had been rendered.

Intervention

{¶ 38} The court of appeals concluded that the National Wildlife Federation and the Ohio

Environmental Council could intervene either as of right or with permission. *Merrill*, 2009-Ohio-4256, ¶ 115, 118. On cross-appeal, Taft maintains that the appellate court abused its discretion in affirming the trial court's decision to permit the National Wildlife Federation and the Ohio Environmental Council to intervene, contending that these organizations neither met the requirements of Civ.R. 24(A)(2) for intervention as of right, as they failed to demonstrate an interest relating to the property or transaction that is the subject of the action, nor met the requirements of Civ.R. 24(B) for permissive intervention, in that they failed to demonstrate that they had a claim or defense that shared a common question of law or fact with the main action.

{¶ 39} In response, the National Wildlife Federation and the Ohio Environmental Council claim that they met the requirements for intervention as of right pursuant to Civ.R. 24(A)(2) because some of their members make recreational use of the land that is the subject matter of this action. In addition, some of their members are Ohioans and are thus beneficiaries of the public trust and have a legally protectable interest in public-trust lands. They further contend that the relief requested by the littoral owners would extinguish their members' right to use the shore of Lake Erie for recreational purposes.

{¶ 40} These organizations also maintain that they have demonstrated the existence of common questions of law or fact between their claimed interest in and right to use the shore and the underlying

declaratory-judgment action sufficient to warrant permissive intervention pursuant to Civ.R. 24(B).

{¶ 41} We construe Civ.R. 24 liberally to permit intervention. *State ex rel. SuperAmerica Group v. Licking Cty. Bd. of Elections* (1997), 80 Ohio St.3d 182, 184, 685 N.E.2d 507; see also *Rumpke Sanitary Landfill, Inc. v. State*, 128 Ohio St.3d 41, 2010-Ohio-6037, 941 N.E.2d 1161, ¶ 22, citing *Ohio Dept. of Adm. Servs., Office of Collective Bargaining v. State Emp. Relations Bd.* (1990), 54 Ohio St.3d 48, 51, 562 N.E.2d 125. Whether intervention is granted as of right or by permission, the standard of review is whether the trial court abused its discretion in allowing intervention. See *State ex rel. First New Shiloh Baptist Church v. Meagher* (1998), 82 Ohio St.3d 501, 503, 696 N.E.2d 1058, fn.1; *Rumpke, Inc.*, at ¶ 22. We acknowledge that *State ex rel. First New Shiloh Baptist Church* and *Rumpke* commented only on the standard of review for intervention as of right, but because there is no reason to apply a different standard of review to permissive intervention, we conclude that the same standard applies. Cf. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 17 (abuse-of-discretion standard is applied when reviewing permissive-intervention decisions made by the Public Utilities Commission of Ohio).

{¶ 42} Regarding intervention as of right, Civ.R. 24(A)(2) provides that any applicant shall be allowed to intervene in a cause of action "when the applicant claims an interest relating to the property or transaction that is the subject of the action and the

applicant is so situated that the disposition of the action may * * * impede the applicant's ability to protect that interest." Further, the applicant's interest must be one that is " 'legally protectable,' " *State ex rel. Dispatch Printing Co. v. Columbus* (2000), 90 Ohio St.3d 39, 40, 734 N.E.2d 797, quoting *In re Schmidt* (1986), 25 Ohio St.3d 331, 336, 25 OBR 386, 496 N.E.2d 952, and must not be adequately protected by the existing parties. Civ.R. 24(A)(2); *State ex rel. LTV Steel Co. v. Gwin* (1992), 64 Ohio St.3d 245, 247, 594 N.E.2d 616.

{¶ 43} Regarding permissive intervention, Civ.R. 24(B)(2) provides that a trial court has discretion to permit an applicant to intervene "when [the] applicant's claim or defense and the main action have a question of law or fact in common." However, in exercising its discretion, the court "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Id.

{¶ 44} The defense and counterclaim asserted by the National Wildlife Federation and the Ohio Environmental Council in this case relate both legally and factually to the claims asserted by the Merrill and Taft plaintiffs; thus, they have satisfied the "common question of law or fact" requirement of Civ.R. 24(B)(2). Nor did allowing intervention unduly delay or prejudice the adjudication of the rights of the original parties. The court of appeals, therefore, did not abuse its discretion in determining that these organizations met the requirements for permissive intervention. Based on

this conclusion, we need not analyze intervention as of right.

{¶ 45} Accordingly, when an organization demonstrates that it has a claim or defense that shares a common question of law or fact with the main action and that intervention will not unduly delay or prejudice the adjudication of the rights of the original parties, it meets the requirements of Civ.R. 24(B)(2) for permissive intervention. Hence, the trial court did not abuse its discretion in permitting the National Wildlife Federation and the Ohio Environmental Council to intervene in this action.

The Public Trust

{¶ 46} The substantive issue for our resolution concerns the territory of the public trust, and the parties here disagree as to its boundary. The state, the National Wildlife Federation, and the Ohio Environmental Council all urge us to hold that the court of appeals erred in setting the landward boundary of the public trust at the water's edge, arguing instead that the boundary is the ordinary high-water mark, which they claim that case law has construed to mean the natural shoreline, as well as "the line where the water usually stands when free from disturbing causes."

{¶ 47} The Taft plaintiffs contend that the court of appeals erred by not defining the landward boundary of the public trust as the low-water mark, as modified by accretion, reliction, or erosion.

{¶ 48} The Merrill plaintiffs, as appellees in the Supreme Court, assert that the boundary is the natural

shoreline, which it claims is the line at which the water meets the shore wherever that may be at any given time, and they urge this court to affirm the judgment of the court of appeals.

{¶ 49} More than 130 years ago, in *Sloan v. Biemiller* (1878), 34 Ohio St. 492, we determined that when a real estate conveyance calls for Lake Erie as the boundary, the littoral owner's property interest "extends to the line at which the water usually stands when free from disturbing causes." Id. at paragraph four of the syllabus. In our analysis, we adopted the position taken by the Supreme Court of Illinois in *Seaman v. Smith* (1860), 24 Ill. 521, syllabus ("The line at which the water usually stands when free from disturbing causes, is the boundary of land in a conveyance calling for Lake Michigan as a line").

{¶ 50} Contrary to the position advanced by the state, although *Sloan* quoted language from *Seaman* that referred to "the usual high-water mark," which is synonymous with the ordinary high-water mark, neither *Sloan* nor *Seaman* adopted that as the boundary or defined "the line at which the water usually stands when free from disturbing causes" to mean "the usual high-water mark." As a subsequent case from the Supreme Court of Illinois explained, "[i]t is clear from the reasoning and conclusion in [*Seaman*], in the light of the judgment entered, that it was not the high-water mark that was taken as the true limit of the boundary line, but the line where the water usually stood when unaffected by storms or other disturbing causes." *Brundage v. Knox* (1917), 279 Ill. 450, 471, 117 N.E. 123. In addition to a storm, a drought may

constitute a disturbing cause. See *Appeal of York Haven Water & Power Co.* (1905), 212 Pa. 622, 631, 62 A. 97.

{¶ 51} Subsequent to our decision in *Sloan*, in *State v. Cleveland & Pittsburgh RR. Co.* (1916), 94 Ohio St. 61, 79, 113 N.E. 677, we held that "the state holds the title to the subaqueous land [of Lake Erie within the boundaries of Ohio] as trustee for the protection of public rights." In so holding, we followed our decision in *Sloan*, among other cases, and concluded that "[t]he littoral owner is entitled to access to navigable water on the front of which his land lies, and, subject to regulation and control by the federal and state governments, has, for purposes of navigation, the right to wharf out to navigable water." Id. at paragraph five of the syllabus. In that case, we also urged the General Assembly to pass legislation that would "appropriately provide for the performance by the state of its duty as trustee for the purposes stated; that [would] determine and define what constitutes an interference with public rights, and that [would] likewise, in a spirit of justice and equity, provide for the protection and exercise of the rights of the shore owners." Id. at 84. The General Assembly did so the following year when it enacted the Fleming Act.

{¶ 52} The Fleming Act clarified the public policy of the state of Ohio with respect to the waters of Lake Erie, and its pronouncement conformed to decisions of this court dating from 1878 (*Sloan*). See G.C. 3699-a, Am.H.B. No. 255, 107 Ohio Laws 587, recodified as R.C. 123.03, and now renumbered as R.C. 1506.10. The current version of the statute is substantially similar

to the original statute, and notably, both refer to the "natural shore line."

{¶ 53} At present, R.C. 1506.10 provides: "It is hereby declared that the waters of Lake Erie consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with the soil beneath and their contents, do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state, for the public uses to which they may be adapted, subject to the powers of the United States government, to the public rights of navigation, water commerce, and fishery, and to the property rights of littoral owners, including the right to make reasonable use of the waters in front of or flowing past their lands. Any artificial encroachments by public or private littoral owners, which interfere with the free flow of commerce in navigable channels, whether in the form of wharves, piers, fills, or otherwise, beyond the natural shoreline of those waters, not expressly authorized by the general assembly, acting within its powers, or pursuant to section 1506.11 of the Revised Code, shall not be considered as having prejudiced the rights of the public in such domain. This section does not limit the right of the state to control, improve, or place aids to navigation in the other navigable waters of the state or the territory formerly covered thereby."

{¶ 54} Subsequently, in *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 337, 38 O.O. 161, 82 N.E.2d 709, we held that the Fleming Act did "not

change the concept of the declaration of the state's title as [declared in *Cleveland & Pittsburgh RR. Co.,* 94 Ohio St. 61, 113 N.E. 677]." Instead, the act merely reiterated this court's pronouncement in that case. Thus, we reaffirmed that "littoral owners of the upland have no title beyond the natural shore line; they have only the right of access and wharfing out to navigable waters." *Squire* at 337. From that holding, it follows that the converse is also true: if a littoral owner has no property rights lakeward of the natural shoreline, then the territory of the public trust does not extend landward beyond the natural shoreline. Hence, our review centers on the term "natural shoreline."

{¶ 55} Not long after our opinion in *Squire*, the General Assembly, in 1955, enacted R.C. 123.031 in Am.Sub.S.B. No. 187, 126 Ohio Laws 137, 138, which has since been amended and renumbered as R.C. 1506.11. R.C. 123.031 defined the "territory" of the public trust with reference to the "natural shore line." The current version of the statute also includes that reference point, defining the term "territory" to mean "the waters and the lands presently underlying the waters of Lake Erie and the lands formerly underlying the waters of Lake Erie and now artificially filled, between the natural shoreline and the international boundary line with Canada." R.C. 1506.11.

{¶ 56} As noted previously, the General Assembly enacted the Fleming Act a year after this court urged it to pass legislation defining what constitutes an interference with public rights, and, therefore, we presume it did so mindful of the common law. We likewise presume that the General Assembly acted

with full knowledge of the common law when it subsequently amended and added sections to the Fleming Act. Accordingly, we conclude that when the General Assembly defined the boundary of the "territory" of the public trust as the "natural shoreline," it ascribed a meaning to that term consistent with the meaning set forth in this court's decisions, including *Sloan*.

{¶ 57} The boundary of the public trust does not, however, as the court of appeals concluded in affirming the trial court, change from moment to moment as the water rises and falls; rather, it is at the location where the water usually stands when free from disturbing causes. That is what we stated in *Sloan,* that is what has been understood for more than a century in Ohio, that is what the General Assembly meant by "natural shore line" when it enacted G.C. 3699-a in 1917, and that is what the law was when ODNR began to enforce the leasing policy, which it has since abandoned, having recognized the presumptive validity of the owners' deeds. We see no reason to modify that law now.

{¶ 58} Finally, the decision of the court of appeals erroneously intimated that a littoral-property owner might extend lakefront property with the addition of artificial fill. *Merrill*, 2009-Ohio-4256, ¶ 127. According to representations in their briefs, the parties generally agree that artificial fill cannot extend a littoral owner's property, except where a littoral owner reclaims land stripped away because of sudden changes caused by avulsion. Additionally, the parties acknowledge that while accretion may increase the property of a littoral

owner, erosion may decrease it. Cf. *State ex rel. Duffy v. Lakefront E. Fifty-Fifth St. Corp.* (1940), 137 Ohio St. 8, 11, 17 O.O. 301, 27 N.E.2d 485; *United States v. 461.42 Acres of Land in Lucas Cty., Ohio* (N.D.Ohio 1963), 222 F.Supp. 55, 56. Thus, we need not further comment on or clarify the effect of these processes on the property line because the parties generally have no dispute regarding them.

{¶ 59} Accordingly, the territory of Lake Erie held in trust by the state of Ohio for the people of the state extends to the natural shoreline, which is the line at which the water usually stands when free from disturbing causes.

{¶ 60} This court has a history of protecting property rights, and our decision today continues that long-standing precedent. In *Cleveland & Pittsburgh RR. Co.*, 94 Ohio St. 61, 113 N.E. 677, syllabus, this court acknowledged that a littoral owner has a right to access and wharf out to navigable waters, and in *Squire*, we held that if the state or a municipality improperly destroys or impairs that property right, a littoral owner is entitled to compensation. 150 Ohio St. 303, 38 O.O. 161, 82 N.E.2d 709, paragraph six of the syllabus. We recently reiterated our adherence to the principles that protect property rights in *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 37, where we explained that "the founders of our state expressly incorporated individual property rights into the Ohio Constitution in terms that reinforced the sacrosanct nature of the individual's 'inalienable' property rights, Section 1, Article I [Ohio Constitution], which are to be held forever 'inviolate.'

Section 19, Article I." (Footnote deleted.) Id. We further observed that Ohio has always considered property rights to be fundamental and concluded that "the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces." Id. at ¶ 38.

{¶ 61} During the pendency of this litigation, ODNR announced that it "should honor the apparently valid real property deeds of the plaintiff-relator lakefront owners unless a court determine[d] that the deeds are limited by or subject to the public's interests in those lands or are otherwise defective or unenforceable." It further represented that it "will adopt or enforce administrative rules and regulatory policies with the assumption that the lakefront owners' deeds [are] presumptively valid, and also, will no longer require property owners to lease land contained within their presumptively valid deeds."

{¶ 62} Our decision today reaffirms this court's previous determination that the territory of the public trust in Lake Erie extends to the natural shoreline, which is the line at which the water usually stands when free from disturbing causes, which we first announced in 1878 and clarified in 1916, and which the General Assembly codified in 1917. Nothing contained in our opinion interferes with the presumptively valid deeds of the lakefront owners. Similarly, we reaffirm our statement in *Squire* that "[t]he littoral owners of the upland have no title beyond the natural shoreline; they have only the right of access and wharfing out to navigable waters." Id. at 337.

Conclusion

{¶ 63} The state of Ohio has standing to appeal from a judgment when it is an independent party to an action and has been aggrieved by the final order from which it seeks to appeal. In addition, the National Wildlife Federation and the Ohio Environmental Council are proper intervening parties to this lawsuit pursuant to Civ.R. 24. Further, we conclude that the territory of Lake Erie, held in trust by the state of Ohio for the people of the state, extends to the natural shoreline, which is the line at which the water usually stands when free from disturbing causes.

{¶ 64} Consequently, we reverse the holding of the court of appeals that the state of Ohio lacked appellate standing, but we affirm its holding that upheld the decision to permit the National Wildlife Federation and the Ohio Environmental Council to intervene pursuant to Civ.R. 24(B)(2).

{¶ 65} Having clarified that the territory of Lake Erie is held in trust for the people of Ohio and extends to the natural shoreline, the line at which the water usually stands when free from disturbing causes, we affirm the appellate court to the extent that its judgment is consistent with this pronouncement, but we reverse its decision implying that artificial fill can alter the boundary of the public trust and its decision to affirm the trial court's decision that the boundary of the public trust changes from moment to moment. This matter is remanded to the trial court for further proceedings on pending claims consistent with this opinion.

Judgment accordingly.

PFEIFER, LUNDBERG STRATTON, CUPP, and MCGEE BROWN, JJ., concur.

O'CONNOR, C.J., and LANZINGER, J., concur in syllabus and judgment only.

Homer S. Taft, pro se.

Calfee, Halter & Griswold, L.L.P., James F. Lang, and Fritz E. Berckmueller, for appellee class-action plaintiffs.

L. Scot Duncan, pro se, and for appellee Darla J. Duncan.

Michael DeWine, Attorney General, Alexandra T. Schimmer, Chief Deputy Solicitor General, Stephen P. Carney, Deputy Solicitor, and Cynthia K. Frazzini, Assistant Attorney General, for appellant and cross-appellee state of Ohio.

Porter, Wright, Morris & Arthur, L.L.P., and Kathleen M. Trafford, Special Counsel for appellants and cross-appellees Ohio Department of Natural Resources and Director David Mustine.

Neil S. Kagan and Peter A. Precario, for appellants and cross-appellees National Wildlife Federation and Ohio Environmental Council.

Chester, Willcox & Saxbe, L.L.P., Charles R. Saxbe, and Gerhardt A. Gosnell II, in support of the state's first proposition of law on behalf of amici curiae former

Ohio Attorneys General Betty Montgomery, Jim Petro, and Nancy Rogers.

Michael A. Cox, Attorney General of Michigan, B. Eric Restuccia, Solicitor General, S. Peter Manning, Division Chief, and Robert P. Reichel and Darryl J. Paquette, Assistant Attorneys General; and Thomas W. Corbett Jr., Attorney General of Pennsylvania, in support of the state of Ohio on behalf of amici curiae the states of Michigan and Pennsylvania.

The Law Office of Colin Bennett, L.L.C., and Colin William Bennett, in support of appellants and cross-appellees on behalf of amici curiae Joseph Sommer, Frances Buchholzer, Robert Teater, Ohio Bass Federation, Izaak Walton League of America, Ohio Chapter, and Northeast Ohio Watershed Council.

R. S. Radford and Luke A. Wake; and Michael R. Gareau & Associates Co., L.P.A., and David M. Gareau, in support of appellees on behalf of amicus curiae, Pacific Legal Foundation.

John P. O'Donnell, L.L.C., and John P. O'Donnell; and Baker & Hostetler, L.L.P., and John H. Burtch, urging affirmance on behalf of amici curiae Willow Beach Club, Brookwood-Cresthaven Beach Club, Inc., the Linwood Park Company, and the Ohio Association of Realtors.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Bruce G. Heare y, and LerVal M. Elva, in support of appellees on behalf of amicus curiae National Federation of Independent Business Small Business Legal Center.

Michael E. Gilb, urging affirmance on behalf of amicus curiae Geauga Constitutional Council.

Smith, Martin, Powers & Knier, P.C., and David L. Powers, in support of class-action plaintiffs on behalf of amicus curiae Save Our Shoreline.

Chad A. Endsley, in support of class-action plaintiffs on behalf of amicus curiae Ohio Farm Bureau Federation.

Faulkner, Muskovitz & Phillips and Robert M. Phillips; and Patrick A. D'Angelo, urging affirmance on behalf of amici curiae Ohio Fraternal Order of Police Lodge 8 and Cleveland Police Patrolmen's Association.

Montgomery Consulting Group, L.L.C., Betty Montgomery, opposing the state's second proposition of law on behalf of amicus curiae Betty Montgomery.

Shannon Lee Goessling, in support of class-action plaintiffs on behalf of amicus curiae Southeastern Legal Foundation, Inc.

Maurice A. Thompson, urging affirmance on behalf of amicus curiae 1851 Center for Constitutional Law.

APPENDIX H

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

CASE NO. 04CV001080

JUDGE EUGENE A. LUCCI

[Filed: October 24, 2016]

STATE EX REL. ROBERT MERRILL, TRUSTEE, *et al.*	)
Plaintiffs	)
vs.	)
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, *et al.*	)
Defendants	)

ORDER AND FINAL JUDGMENT

This matter came for hearing on October 21, 2016 (the "Settlement Hearing"), on the application of the Settling Parties to determine whether the terms and conditions of the Stipulation of Settlement dated May 26, 2016 (the "Stipulation") providing for the settlement (the "Settlement") of all claims asserted by Plaintiffs Ohio Lakefront Group, Inc. ("OLG"), Robert Merrill, Trustee, Anthony J. Yankel, Charles S. Tilk,

Sheffield Lake, Inc., Sandra L. Wade, David A. Zeber, Patricia French, and Neil Luoma, and the Settlement Class (collectively, "Plaintiffs"); against the State of Ohio, the Ohio Department of Natural Resources ("ODNR"), and the Director of ODNR (collectively, "Defendants" and together with Plaintiffs, the "Parties" or the "Settling Parties") in the above-captioned litigation (the "Action") now pending in this Court should be approved; and whether judgment should be entered dismissing the complaint on the merits and with prejudice, and releasing the Released Plaintiffs' Claims as against all Released Defendant Parties.

The Court having considered all matters submitted to it at the Settlement Hearing and otherwise; and it appearing that a notice of the Settlement Hearing substantially in the form approved by the Court was distributed in accordance with the manner of distribution approved by the Court.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. This Order and Final Judgment incorporates by reference the definitions in the Stipulation and all capitalized terms used herein shall have the same meanings as set forth in the Stipulation unless otherwise defined herein.

2. This Court has jurisdiction to enter this Judgment. This Court has jurisdiction over the subject matter of the Action, including all matters necessary to effectuate the Settlement, and over all Settling Parties.

3. This Court hereby finds that notice of the Settlement was provided pursuant to and in the form

and manner directed by the Preliminary Approval Order and that the form and manner of notice given to Settlement Class members are hereby determined to have been the best notice practicable under the circumstances and constituted due and sufficient notice to all persons entitled to receive such notice in compliance with the provisions of Rule 23 of the Ohio Rules of Civil Procedure and the requirements of due process.

4. Pursuant to and in compliance with due process, this Court hereby finds that the notice provided advised persons and entities in interest of the terms of the Settlement, and of their right to object thereto, and a full and fair opportunity was accorded to all persons and entities in interest to be heard with respect to the foregoing matters. Accordingly, it is hereby determined that all members of the Settlement Class are bound by this Judgment entered herein.

5. This Court finds that this action is properly maintained as a class action under Rule 23 of the Ohio Rules of Civil Procedure and that the Class Representatives fairly and adequately represented the interests of Settlement Class members. Class Counsel is authorized to act on behalf of all Settlement Class members with respect to all acts required by the Stipulation or such other acts which are reasonably necessary to consummate the Settlement set forth in the Stipulation.

6. This Court finds that the Settlement is, in all respects, fair, reasonable, and adequate, and in the best interests of the Settlement Class, and hereby approves the Settlement as set forth in the Stipulation.

This Court further finds that the Settlement set forth in the Stipulation is the result of arm's-length negotiations between experienced counsel representing the interests of the Settling Parties. Accordingly, the Settlement embodied in the Stipulation is hereby approved in all respects and shall be consummated in accordance with the terms and provisions of the Stipulation.

7. The claims filed in the Action are hereby dismissed with prejudice and without costs except for the payments expressly provided for in this Judgment, the Stipulation, the Preliminary Approval Order, and/or any order entered by this Court regarding Class Counsel's request for attorneys' fees and expenses.

8. Upon the Effective Date, Plaintiffs, on behalf of themselves, their heirs, executors, administrators, predecessors, successors and assigns, shall be deemed by operation of law to have fully, finally, and forever released, waived, discharged, and dismissed each and every of the Released Plaintiffs' Claims against the Released Defendant Parties, and shall forever be enjoined from prosecuting any Released Plaintiffs' Claims against any of the Released Defendant Parties. Further, Plaintiffs shall be forever enjoined from prosecuting any claims relating in any way to the claims administration process, the Plan of Allocation or any distribution decisions regarding the Settlement Amount against any of the Released Defendant Parties.

9. Upon the Effective Date, each of the Defendants, on behalf of themselves, their heirs, executors, administrators, predecessors, successors, and assigns, shall be deemed by operation of law to have fully,

finally, and forever released, waived, discharged, and dismissed each and every of the Released Defendants' Claims against the Released Plaintiff Parties, and shall forever be enjoined from prosecuting any Released Defendants' Claims against any of the Released Plaintiff Parties.

10. This Judgment, the Stipulation, and any negotiations, proceedings, or agreements relating to them shall not be offered or received against any of the Settling Parties as evidence of or construed as or deemed to be evidence of: (a) any liability, negligence, fault, or wrongdoing of any of the Defendants; (b) a presumption, concession, or admission with respect to any liability, negligence, fault, or wrongdoing, or in any way referred to for any other reason as against any of the Defendants, in any other civil, criminal, or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Settlement; (c) a presumption, concession, or admission by any of the Defendants with respect to the truth of any fact alleged in the Action or the validity of any of the claims or the deficiency of any defense that was or could have been asserted in the Action; (d) a presumption, concession, or admission by Plaintiff of any infirmity in the claims asserted; or (e) an admission or concession that the consideration to be given hereunder represents the consideration which could be or would have been recovered at trial.

11. Nothing herein, however, shall prevent any of the Settling Parties from using this Judgment, the Stipulation, or any document or instrument delivered thereunder: (a) to effect or obtain Court approval of the

Settlement; (b) to enforce the terms of the Settlement; or (c) for purposes of defending, on the grounds of *res judicata,* collateral estoppel, release, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim, any of the Released Plaintiffs' Claims and any Released Defendants' Claims released pursuant to the Settlement.

12. This Court retains exclusive jurisdiction, without affecting in any way the finality of this Judgment over: (a) implementation and enforcement of the Settlement; (b) hearing and determining Class Counsel's award of attorneys' fees and reimbursement of litigation expenses; (c) enforcing and administering this Judgment; (d) enforcing and administering the Stipulation including the releases granted therein; and (e) other matters arising from or relating to the foregoing.

13. This Court finds that throughout the course of the Action the Settling Parties and their respective counsel at all times complied with the requirements of Rule 11 of the Ohio Rules of Civil Procedure and any other applicable laws and rules.

14. This Court finds that the Action has been properly maintained as a class action, and the Court finds that throughout the course of the Action, the Action was not brought by Plaintiffs or defended by Defendants in bad faith or without a reasonable basis, and there have been no violations or reason for sanctions under Rule 11 of the Ohio Rules of Civil Procedure or similar rules or codes relating to the prosecution, defense, or settlement of the Action.

15. This Court hereby approves Class Counsel's application for attorneys' fees and expenses as set forth in the Stipulation as fair and reasonable under the circumstances of this litigation. Accordingly, this Comt grants Class Counsel's fee and expense application in its entirety and awards $1,247,369.80 to Class Counsel for attorneys' fees and expenses, and finds that such award is fair and reasonable. Payment shall be made on behalf of Defendants in accordance with the terms of the Stipulation.

16. This Court hereby approves Class Counsel's selection of Ohio Shoreline Preservation, an Ohio not-for-profit 501(c)(3) organization whose objectives are related as closely as possible to the purposes and remedies sought by the Action, as a reasonable and appropriate *cy pres* designee for the receipt of any remaining funds after full distribution of the Settlement Amount to Authorized Claimants according to the Plan of Allocation. Payment, if any, shall be made to Ohio Shoreline Preservation only at the time and in the manner provided for in the Plan of Allocation.

17. In the event the Settlement is terminated or the Effective Date cannot occur for any reason, then: (a) the Settlement shall be without prejudice, and none of its terms shall be effective or enforceable except as specifically provided in the Stipulation; (b) the Settling Parties shall be deemed to have reverted to their respective positions in the Action immediately prior to February 19, 2016; and, (c) except as otherwise expressly provided, the Settling Parties shall proceed

in all respects as if the Stipulation and any related orders had not been entered.

18. Without further order of the Court, the Settling Parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation. The deadline for Settlement Class members to submit Proofs of Claim, which was set as October 12, 2016, will be extended for thirty (30) days from the entry of this Final Judgment, until November 28, 2016.

19. This Court finds that no just reason exists for delay in the entry of this Judgment and immediate entry by the Clerk of the Court is expressly directed pursuant to Rule 54(B) of the Ohio Rules of Civil Procedure.

IT IS SO ORDERED.

FINAL APPEALABLE ORDER
Clerk to serve pursuant to Civ.R. 58(8)

/s/
JUDGE EUGENE A. LUCCI

Copies:

James F. Lang, Esq.
Fritz E. Berckmueller, Esq.
Lindsey E. Sacher, Esq.
Calfee, Halter & Griswold, LLP
Class counsel and attorneys for Plaintiff-Relators
1405 East Sixth Street
Cleveland, Ohio 44114-1607

Homer S. Taft, Esq.
Intervening Plaintiff-Relator, pro se
20220 Center Ridge Road, Suite 300
P.O. Box 16216
Rocky River, Ohio 44116

L. Scot Duncan, Esq.
Intervening Plaintiff-Relator, pro se
1530 Willow Drive
Sandusky, Ohio 44870

Daniel C. Gibson, Esq.
Anne Marie Sferra, Esq.
Ali I. Haque, Esq.
Bricker & Eckler, LLP
100 South Third Street
Columbus, OH 43215

Neil S. Kagan, Esq., Pro Hae Vice
Attorney for intervening defendants, National Wildlife Federation and Ohio Environmental Council
Great Lakes Natural Resource Center
213 West Liberty Street, Suite 200
Ann Arbor, Michigan 48104

Michael De Wine, Ohio
Attorney General
Michael L. Williams,
Esq., Chief Legal Officer
Ohio Attorney General's
Office
Environmental
Enforcement Section
*Ohio Department of
Natural Resources and
the State of Ohio*
2045 Morse Road,
Building D-2
Columbus, Ohio 43229-
6693

Peter A. Precario, Esq.
*Attorney for intervening
defendants
National Wildlife
Federation and Ohio
Environmental Council*
2 Miranova Place, Suite
500
Columbus, Ohio 43215

APPENDIX I

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

Case No. 04CV001080

Judge Eugene A. Lucci

[Filed: May 29, 2018]

STATE EX REL. ROBERT MERRILL, TRUSTEE *et al.,*	)
Plaintiffs,	)
vs.	)
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, *et al.,*	)
Defendants.	)

ORAL ARGUMENT REQUESTED

DEFENDANTS' MOTION TO ENFORCE SETTLEMENT AND FOR CIVIL CONTEMPT

Respondents/Defendants State of Ohio, Department of Natural Resources, the Director of Ohio Department of Natural Resources, and the State of Ohio, ("Defendants" or the "State Defendants"), hereby move the Court for an Order against Plaintiff George Sortino,

("Sortino"): (1) enforcing the Settlement agreement and Final Judgment that concluded this case in October 2016, and (2) holding Sortino in civil contempt for violating this Court's order enjoining the filing of released claims by members of the class of plaintiffs bound by the Settlement agreement and Final Judgment. The grounds for this Motion are set forth in the Memorandum in Support attached hereto. Pursuant to Local Rule 3.04(G)(1), the State Defendants request oral argument on this Motion.

Respectfully Submitted,

MIKE DEWINE
OHIO ATTORNEY GENERAL

/s/

Anne Marie Sferra (0030855)
Daniel C. Gibson (0080129)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Phone: (614) 227-2300
Fax: (614) 227-2390
asferra@bricker.com
dgibson@bricker.com

Counsel for Defendants State of Ohio, Ohio Department of Natural Resources, and the Director of Ohio Department of Natural Resources

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Plaintiff George Sortino, ("Sortino") is attempting to re-litigate in Erie County the class claims that were fully resolved and finally dismissed in this case. He is trying to reassert claims that Plaintiffs already filed and litigated on behalf of all class members over a period of twelve years, against Respondents/ Defendants State of Ohio, Department of Natural Resources, the Director of Ohio Department of Natural Resources, and the State of Ohio, ("Defendants" or the "State Defendants"), which the parties ultimately settled with this Court's approval at a cost of more than $6 million to Ohio taxpayers. Sortino's effort to re-litigate these claims is in direct breach of the approved class settlement agreement, to which he is a bound party, and in direct violation of this Court's injunction against the filing of released claims, to which he is expressly subject. *See,* Final Judgment entered October 24, 2016, ¶¶ 6, 8 (approving the settlement and enjoining the filing of released claims).

Moreover, although Sortino alleges in his Erie County action that he should not be bound by the class settlement agreement and Final Judgment entered in this case, he has refused to submit to this Court's *exclusive* jurisdiction to decide that very issue, *i.e.,* the enforceability of the settlement agreement—over which this Court expressly retained sole jurisdiction—as well as the enforceability of the injunction—over which this, the issuing Court, has the sole and exclusive power as a matter of law. Instead, rather than seek relief from the settlement and injunction through procedurally

proper means before this Court, Sortino consciously and willfully chose to breach the settlement and to violate the injunction by filing released claims in Erie County, hoping that he could convince another court to find favor in his collateral attack upon this Court's valid and proper Final Judgment disposing of his claims.

This Court should find that Sortino is in breach of the class settlement and specifically enforce it against him by ordering him to dismiss his Erie Complaint with prejudice. This Court also should find Sortino in civil contempt for violating the injunction against prosecuting released claims, order him to dismiss the Erie County action with prejudice, and award Defendants their attorney fees.

II. BRIEF STATEMENT OF FACTS AND PROCEDURAL HISTORY

As this Court is aware, in May 2004, the plaintiffs in this action ("Plaintiffs") commenced the present action against Defendants. Their complaint sought certification of a class of plaintiffs that would include all littoral property owners along Lake Erie's Ohio coast. *See,* Complaint. The Complaint purported to assert claims for a declaratory judgment as to the landward boundary of Lake Erie and for a writ of mandamus based on the alleged unconstitutional taking of the Plaintiffs' property. *Id.* By joint stipulation on June 8, 2006, a class was certified pursuant to Civ. R. 23(B)(2) on June 9, 2006 solely as to the declaratory judgment claim, and that claim was litigated to the Ohio Supreme Court. *See,* Stipulation. In September 2011 the Supreme Court held that the

landward boundary of Lake Erie is the natural shoreline. *See,* Docket.

After further litigation on remand, this Court issued an additional Order on August 27, 2012 establishing the natural shoreline of Lake Erie and also extending the prior Civ. R. 23(B)(2) Count I class certification to the Plaintiffs' Count II claim for a writ of mandamus. *See,* Aug. 27, 2012 Order. Count II sought to require Defendants to commence appropriation proceedings against all Lake Erie littoral owners for the purpose of compensating them for the alleged temporary taking of their lakefront property(ies). *See,* Complaint. Defendants objected to the extension of class certification to the mandamus claim, appealed it to the Eleventh District, and appealed the Eleventh District's decision to the Supreme Court, which declined to exercise jurisdiction over Defendants' discretionary appeal, and returned the case to this Court in October 2014. *See,* Docket.

After the parties conducted discovery and following the filing of a motion for summary judgment by the Plaintiffs in July 2015; the parties reached a class action settlement, memorialized in a Stipulation of Settlement (the "Settlement"). *See,* Stipulation of Settlement, May 27, 2016. A motion seeking preliminary approval of the Settlement was filed on May 27, 2016, and on June 14, 2016 this Court granted preliminary approval of the Settlement and set a fairness hearing for October 2016. *See,* Docket. A true and accurate copy of the Stipulation of Settlement, with voluminous exhibits omitted, is attached hereto as Exhibit A for the Court's convenience. The fairness

hearing ultimately was held on October 21, 2016, where the motion for final approval was heard by this Court, as were the objections of objecting class members. *See,* Docket. On October 24, 2016, this Court entered the Order and Final Judgment approving of the Settlement and dismissing the action (the "Final Judgment"). *See,* October 24, 2016 Order. A true and accurate copy of the Final Judgment is attached hereto as Exhibit B for the Court's convenience.

In accordance with the terms of the Settlement and Final Judgment, Defendants delivered a settlement payment of over $6 million to the Plaintiffs/Settlement Class on December 8, 2016. Affidavit of Cynthia Frazzini (attached hereto as Exhibit C), ¶ 10. As part of the approved Settlement, the Plaintiffs/Settlement Class released all claims "directly or indirectly, relating to or arising out of the claims asserted" in this case, expressly agreed "not to take legal action against [Defendants] based on any Released Plaintiffs' Claims following the [Settlement's] Effective Date," and agreed to be "forever enjoined from prosecuting any Released Plaintiffs' Claims against [Defendants]." Settlement, ¶¶ 18, 28, 30. The Final Judgment then made the injunction binding under the contempt power of the Court by declaring that "Plaintiffs…shall forever be enjoined from prosecuting any Released Plaintiffs' Claims against any of the Released Defendant Parties." Final Judgment at ¶ 8.

Nonetheless, on January 31, 2018, Sortino filed an action in the Erie County Court of Common Pleas (the "Erie Complaint") purporting to assert claims for declaratory judgment that Defendants' alleged

assertion of ownership up to the ordinary high water mark of Lake Erie constituted an unconstitutional temporary taking, and for a writ of mandamus obligating Defendants to commence appropriations proceedings against all putative class members—the very claims that had been asserted and settled with the approval of the Court in this action just over a year earlier. Frazzini Aff., ¶ 4; Erie Complaint. Sortino's Erie Complaint alleges that the Settlement and Final Judgment are not binding upon Sortino or upon the putative class of persons he now seeks to represent, due to alleged procedural flaws relating to the propriety and sufficiency of notice and certification. Erie Complaint, ¶¶ 22-23.

In response to Sortino's Erie Complaint, Defendants first alerted Sortino, through counsel, to this Court's retention of exclusive jurisdiction over questions concerning the enforceability of the Settlement. *See,* Frazzini Aff., ¶ 5; Final Judgment, ¶ 12. After an exchange of correspondence in which Sortino disputed this Court's exclusive jurisdiction, he refused to acquiesce and Defendants were forced to file a motion to dismiss in the Erie action due to lack of jurisdiction. *Id.* at ¶¶ 5-6. On May 3, 2018, Sortino filed his response to Defendants motion to dismiss in Erie County and in it acknowledged that this Court has jurisdiction to decide questions concerning the enforceability of the Settlement, but continued to dispute the propriety of dismissal of his Erie Complaint, even without prejudice, and indicated that Defendants simply needed to file a motion to enforce the Settlement in this Court in order to invoke this Court's continuing jurisdiction. *See,* Frazzini Aff., ¶ 7.

As a result of this acknowledgment, Defendants then proposed to Sortino a stay of the Erie action while a motion to enforce the Settlement would be filed and decided in this Court. *Id.* at ¶ 5. But Sortino, by and through counsel, refused to agree to stay the Erie action pending this Court's determination of the enforceability of the Settlement and Final Judgment against him. *Id.* So, contemporaneously with the present Motion, Defendants have filed their reply in support of their motion to dismiss in the Erie action, as well as a motion to stay the Erie action while this Court decides the present Motion, in the event the Erie Court declines to dismiss Sortino's Erie Complaint for lack of jurisdiction. Id. at ¶¶ 8-9.

Defendants now seek an order from this Court enforcing the Settlement, finding Sortino in contempt for violation of this Court's injunction against the prosecution of Released Claims, and an award of attorney fees as a result of the contempt and breach.

III. APPLICABLE LAW

The Ohio Supreme Court has declared that "[i]t is axiomatic that a settlement agreement is a contract designed to terminate a claim by preventing or ending litigation and that such agreements are valid and enforceable by either party." *Continental W. Condo. Unit Owners Ass'n v. Howard E. Ferguson, Inc.,* 74 Ohio St. 3d 501, 502 (1996). When the agreement is entered into in the presence of the trial court, and especially when reduced to writing and adopted as the court's judgment, there is no question that "the agreement is a binding contract and may be enforced." *Bolen v. Young,* 8 Ohio App. 3d 36, 37 (10th Dist. 1982).

The Supreme Court has also stated unequivocally that "settlements are highly favored in the law." *Ferguson* at 502. *See also, Thirion v. Neumann,* 11 Dist. Ashtabula No. 2004-A-0032, 2005-Ohio-4486, ¶ 17; *State v. Lomaz,* 11 Dist. Portage No. 2002-P-0118, 2006-Ohio-3886, ¶ 32. Factual questions in the enforcement of a settlement agreement are resolved within the sound discretion of the trial court, while legal questions are reviewed, if appealed, *de novo. Thirion* at ¶¶ 14, 18, 21.

In addition, "[a] person guilty of disobedience of, or resistance to, a lawful order or command of a court may be punished for contempt of court." *Lalli v. Lalli,* 11 Dist. Ashtabula No. 98-A-0096, 2001 Ohio App. LEXIS 1231, *7 (Mar. 16, 2001). *See also,* R.C. § 2727.11. "The contempt power is inherent in a court because it is necessary to the exercise of the judicial function." *Id.* (citing *Denovcheck v. Bd. Of Trumbull Cty. Commrs.,* 36 Ohio St. 3d 14, 15 (1988)). Indirect, civil contempt is "an act committed outside the presence of the court but which also tends to obstruct the due and orderly administration of justice" and "is a violation which on the surface is an offense against the party for whose benefit the order was made." *Id.* (citations omitted). "A finding of civil contempt may be made upon clear and convincing evidence...." *ConTex v. Consolidated Tech., Inc.,* 40 Ohio App. 3d 94, 95 (1st Dist. 1988). Moreover, an intentional violation is not required for civil contempt, and "the contemnor may even have acted innocently and still be guilty of civil contempt." *Armco, Inc. v. USW,* 5th Dist. Richland No. 00-CA-95, 2001 Ohio App. LEXIS 2982, *78 (Jun. 21, 2001) (citing *Pugh v. Pugh,* 15 Ohio. St. 3d 136, 140 (1984) and *Windham*

Bank v. Tomaszczyk, 27 Ohio St. 2d 55 (1971), syllabus 3).

IV. ARGUMENT

A. Sortino is a party to the Settlement and Final Judgment

Sortino is a party to the Settlement and Final Judgment. He is a defined "Plaintiff' and member of the "Settlement Class," and this Court expressly held such defined persons to be bound by both the Settlement and the Final Judgment. The Final Judgment specifically "incorporates by reference the definitions in the Stipulation [of Settlement]...," and binds all members of the Settlement Class to its terms. Final Judgment at ¶¶ 1, 4. The Settlement itself defines the "Parties" to it as "Plaintiffs and Defendants," defines Plaintiffs as "OLG [Ohio Lakefront Group] and the Settlement Class," and defines the "Settlement Class" as "all persons, as defined in R.C. 1506.01(D), excepting the State 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." Settlement at ¶¶ 11, 12, 21.

By his own allegations in the Erie Complaint, Sortino is and was at all relevant times "an owner of record of certain real property abutting Lake Erie...in Erie County, Ohio," and he seeks to represent a class of "private littoral owners of parcels of real property abutting Lake Erie within the State of Ohio," though

whom he argues are not subject to the Settlement on various procedural grounds. Erie Complaint at ¶¶ 2, 24. As a result, Sortino clearly falls within the definition of the "Settlement Class" and the definition of "Plaintiffs." As this Court declared in October 2016, "it is hereby determined that *all* members of the Settlement Class are *bound* by this Judgment entered herein," and that "the Settlement embodied in the Stipulation is hereby approved *in all respects*...." Final Judgment at ¶¶ 4, 6 (emphases added).[1]

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[1] Sortino purports to allege in the Erie Complaint various reasons—all of which are expressly precluded by this Court's findings in its Final Judgment—why the Settlement and Final Judgment are purportedly procedurally deficient and thus not binding on him. *See, e.g.,* Erie Complaint, ¶¶ 22-23; Final Judgment at ¶¶ 3-6 and Settlement at ¶¶ 26 (approving the Settlement in all respects, finding certification under Civ. R. 23(B)(2) proper, and finding that the notice given to the class satisfied Rule 23 and constitutional due process). However, Defendants are not required to speculate about the arguments that Sortino might make in response to this Motion, and Sortino is neither bound by nor limited to the allegations in his Erie Complaint in defense of this Motion. As a result, Defendants have established in this Motion the *prima facie* grounds for enforcement of the Settlement and for a finding of civil contempt against Sortino and will respond in their reply brief to any arguments Sortino might make in defense of this Motion. Moreover, to the extent Sortino may assert defenses to this Motion that depend on or relate to factual matter not already in this Court's record, Defendants hereby reserve the right to seek leave to conduct any necessary fact discovery prior to filing their reply brief.

B. Sortino has breached the Settlement by filing Released Claims against Defendants

The Settlement provides that "Plaintiffs agree not to take legal action against the Released Defendant Parties based on any Released Plaintiffs' Claims following the Effective Date [October 24, 2016]." Settlement at ¶ 28. The "Released Plaintiffs' Claims" are defined as all claims "directly or indirectly relating to or arising out of the claims asserted in [this] Action, including any acts taken (such as trespass or taking of real property) by the State or ODNR with regard to claiming public trust ownership of real property landward of the natural shoreline...." Settlement at ¶ 18.

On January 31, 2018, after the Effective Date of the Settlement, Sortino, a defined "Plaintiff" and member of the "Settlement Class" and party to the Settlement and Final Judgment, filed his Complaint commencing the Erie County action. *See,* Frazzini Aff. at ¶ 4; Erie Complaint. The Erie Complaint purports to assert claims seeking a declaratory judgment (Count I) that ODNR asserted ownership over Sortino's littoral property landward of the natural shoreline in a manner that constitutes an unlawful taking of his property and seeking a writ of mandamus (Count II) for inverse takings ordering ODNR to commence appropriations proceedings for the alleged temporary taking of his property. Erie Complaint, ¶¶ 31-37. As this Court is aware, these are the precise claims resolved by the Settlement and Final Judgment in this case and fall

squarely within the Released Plaintiffs' Claims that Plaintiffs/the Settlement Class agreed not to pursue.

By filing Released Claims against Defendants, it is beyond reasonable dispute that Sortino has breached the Settlement.

C. Sortino is violating the Court's injunction by filing and prosecuting Released Claims against Defendants

"In order to show a contempt, it is necessary to establish a valid court order, knowledge of the order, and violation of it. In civil contempt, intent to violate the order need not be proved." *Arthur Young & Co. v. Kelly,* 68 Ohio App. 3d 287, 295 (10th Dist. 1990). The Final Judgment provides that, "[u]pon the Effective Date, Plaintiffs...shall be deemed by operation of law to have fully, finally and forever released, waived, discharged and dismissed each and every one of the Released Plaintiffs' claims against the Released Defendant Parties, and shall forever be enjoined from prosecuting any Released Plaintiffs' Claims against any of the Released Defendant Parties." Final Judgment at ¶ 8.

As noted above, Sortino filed the Erie Complaint asserting Released Claims against Defendants on January 31, 2018, and has been prosecuting those claims against Defendants ever since, in violation of this Court's injunction contained in the Final Judgment. Sortino's actions constitute civil contempt. Specifically, there is no dispute that the Final Judgment constitutes a valid, prior order of this Court. *Arthur Young* at 295. *See also,* discussion *infra* (noting

Sortino's acknowledgment of the validity of the Final Judgment and the law of void versus voidable injunctions). Nor can there be any dispute that Sortino had knowledge of the prior order, since his Erie Complaint contains extensive allegations about the proceedings in this case and the Final Judgment. *Id.*; Erie Complaint at ¶¶ 15-23. And it is beyond dispute that the Final Judgment specifically enjoins Plaintiffs, defined to include Sortino, from prosecuting against Defendants any Released Plaintiffs' Claims, including precisely the claims Sortino has asserted in the Erie Action. Final Judgment at ¶ 8.

By filing Released Claims against Defendants, it is beyond reasonable dispute that Sortino has violated this Court's injunction in the Final Judgment and should, therefore, be held in contempt. Moreover, as noted above, Sortino has not only filed Released Claims in Erie County, but he also has refused to consent to this Court's exclusive jurisdiction over the issues of enforceability of the Settlement and Final Judgment raised in his Erie Complaint (by not first seeking relief in this Court), and he has even refused to stay the Erie case while this Motion is decided. As a result, and even though intent is not an element of civil contempt, Sortino has demonstrated a *conscious* and *willing* disregard for this Court's authority. He has intentionally chosen to force Defendants to incur the costs of defending against Released Claims, and rather than seek relief from the Final Judgment in this Court, he has chosen instead to violate this Court's injunction in the hopes that his collateral attack upon the Final Judgment ultimately prevails in another court.

But even if Sortino somehow establishes procedural infirmity of the Final Judgment, because he expressly alleges that the order itself is not void and argues only that it is procedurally defective and thus cannot validly bind him and the other putative class members he seeks to represent, Sortino is in contempt *regardless* of whether his legal arguments carry the day. *See,* Erie Complaint, ¶¶ 23-24. This is because, in the context of contempt, "the general rule [is] that, unless it is void, an order must be obeyed until it is set aside by orderly and proper proceedings." *Arthur Young* at 295 (citations omitted). *See also, State, ex rel. Beil v. Dota,* 168 Ohio St. 315, 322 (1958) (distinguishing void from voidable injunctions and the difference between asserting that a court had no power at all over the subject matter of the injunction and the claim that it exercised the power it had improperly by issuing an injunction that exceeds its power or in a procedurally improper manner). Simply put, Sortino is consciously and willfully acting in contempt.

D. Defendants are entitled to specific performance, an order of contempt, and an award of attorney fees

Sortino should be ordered to dismiss his Erie Complaint with prejudice immediately. First, Sortino's breach of the Settlement, to which he is a party, entitles Defendants to such an order. Settlement at ¶ 28. In fact, the Settlement specifically acknowledges that the Plaintiffs even agreed to be enjoined, *i.e.,* that they "shall forever be enjoined from prosecuting any Released Plaintiffs' Claims against [Defendants]." *Id.* at ¶ 31. Moreover, *precisely because the claims in*

question have been released and are barred, there is no point in permitting the continuing breach and no adequate relief can be accorded by law, monetary or otherwise, absent an order of specific performance to terminate the Released Claims. *See, e.g., Wells v. Cornelius*, 12 Dist. Butler No. CA89-12-169, 1990 Ohio App. LEXIS 3839, *9 (Sept. 4, 1990)(discussing when specific performance is appropriate on motions to enforce settlement agreements).

Second, even though Sortino's act of contempt may be punishable, in civil contempt, "the contemnor must have the opportunity to purge the contempt." *Lalli* at *7-8. As a result, an order mandating that Sortino dismiss his Erie Complaint also would serve to provide him with the opportunity to purge his contempt, before he is sanctioned for his disobedience. *See also,* R.C. § 2727.12 (setting forth remedies available in cases of violation of an injunction).

Finally, Defendants should be awarded the fees that they have expended in defending against the Released Claims and in enforcing the Settlement and Final Judgment against Sortino. *See, e.g., id.* (noting that a court may order a conternnor to "make immediate restitution to the party injured"); *Planned Parenthood Ass'n of Cincinnati v. Project Jericho,* 52 Ohio St. 3d 56, 67 (1990) ("A trial court may, within its discretion, include attorney fees as part of the costs taxable to a defendant found guilty of civil contempt" (citing *State, ex rel. Fraternal Order of Police* v. *Dayton,* 49 Ohio St. 2d 219 (1977), syllabus)).

Sortino chose to advance a collateral attack against the enforceability of this Court's Final Judgment, not

via a motion for relief from judgment in this Court, where exclusive jurisdiction had been retained, but rather by filing a Released Claim in another court in direct violation of this Court's injunction. He then resisted dismissal (even without prejudice) or even transfer of the improper claim(s) to this Court, while also refusing to agree to stay the Erie action pending a decision from this Court on this threshold legal issue.

In short, Sortino consciously chose to violate this Court's Order and to force Defendants to incur the costs of defending against that violation, rather than first seeking to have the injunction and/or Final Judgment "set aside by orderly and proper proceedings." *Arthur Young* at 295. Especially where the taxpayers of this State have already paid in excess of $6 million to fully resolve the very claims that Sortino is attempting to reassert—in direct violation of this Court's valid Final Judgment—Sortino should be the one to bear the costs of his contempt.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court issue an Order finding Sortino in breach of the Settlement and in contempt of court for violating the injunction in the Final Judgment, and ordering Sortino to dismiss with prejudice his Erie Complaint and to pay Defendants' attorney fees expended to date as a result of his breach of the agreement and contempt of this Court's Order.

Respectfully Submitted,

MIKE DEWINE
OHIO ATTORNEY GENERAL

/s/ Daniel C. Gibson
Anne Marie Sferra (0030855)
Daniel C. Gibson (0080129)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Phone: (614) 227-2300
Fax: (614) 227-2390
asferra@bricker.com
dgibson@bricker.com
Counsel for Defendants State of Ohio, Ohio Department of Natural Resources, and the Director of Ohio Department of Natural Resources

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing DEFENDANTS' MOTION TO ENFORCE SETTLEMENT AND FOR CIVIL CONTEMPT was served upon the following by regular U.S. mail, postage prepaid, this 25th day of May, 2018:

James F. Lang
Fritz E. Berckmueller
Lindsey E. Sacher
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114-1607

Peter A. Precario
2 Miranova Place, Suite 500
Columbus, Ohio 43215

Homer S. Taft
20220 Center Ridge Road, Suite 300
P.O. Box 16216
Rocky River, Ohio 44116

L. Scot Duncan
1530 Willow Drive
Sandusky, Ohio 44870

Neil S. Kagan
National Wildlife Federation
625 South State Street
745 Legal Research
Ann Arbor, Michigan 48109

Margaret M. Murray
111 East Shoreline Drive
Sandusky, OH 44870

/s/ Daniel C. Gibson
Daniel C. Gibson

EXHIBIT A

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

Case No. 04CV001080

Judge Eugene A. Lucci

[Filed: May 27, 2016]

STATE EX REL. ROBERT MERRILL, TRUSTEE *et al.,*	)
Plaintiffs,	)
vs.	)
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, *et al.,*	)
Defendants.	)

STIPULATION OF SETTLEMENT

This Stipulation and Agreement of Settlement (the "Stipulation") is submitted pursuant to Rule 23.1 of the Ohio Rules of Civil Procedure. Subject to the approval of the Court, this Stipulation is entered into between and among Plaintiffs and Defendants, each by and through their respective counsel.

I. WHEREAS:

A. On May 28, 2004, OLG and the Class Representatives filed a Complaint for Declaratory

Judgment, Mandamus and Other Relief against Defendants in the Action.

B. On July 2, 2004, the Class Representatives filed a First Amended Complaint for Declaratory Judgment, Mandamus, and Other Relief (the "First Amended Complaint") against Defendants in the Action.

C. Count I of the First Amended Complaint sought a declaratory judgment regarding the landward boundary of the State's public trust interest in Lake Erie. Count II of the First Amended Complaint requested a writ of mandamus to compel ODNR to commence appropriation proceedings to determine the amount of compensation due for the State's alleged taking of property resulting from its claim that it held title in trust to all lands lakeward of the Ordinary High Water Mark (the "OHWM") of Lake Erie.

D. On or about February 23, 2005, Defendants filed an Answer, Counterclaim and Cross-claim in the Action.

E. The trial court issued an order on June 9, 2006 certifying a class for purposes of Count I of the First Amended Complaint. The court identified the class as:

> [A]ll 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.

F. Count I of the First Amended Complaint was resolved for the most part by the Ohio Supreme Court on September 14, 2011, in *State ex rel. Merrill v. Ohio Dept. of Natural Resources,* 2011-Ohio-4612.

G. On remand, the trial court ordered additional relief related to Count I, including that Defendants return all submerged land lease rental payments between OHWM and the natural shoreline paid between 1998 and the date of the order. The trial court also determined that Class Representatives were prevailing parties on Count I for purposes of obtaining payment of attorneys' fees. The State disputed each of these orders. This Stipulation is intended in part to resolve the Parties' disputes regarding these orders.

H. Class Representatives and Class Counsel believe, based upon their investigation, their review and assessment of the facts and circumstances, and the documents and information produced by Defendants, that the claims asserted in the Action have merit. However, Plaintiffs are mindful of the inherent problems of proof of, and possible defenses to, the allegations asserted in the Action, and recognize and acknowledge the expense and length of continued proceedings necessary to prosecute the Action through trial and anticipated appeals, as well as any further appropriations proceedings. Class Representatives also have taken into account the uncertain outcome and the risk of any litigation, as well as the difficulties and delays inherent in such litigation.

I. Under the circumstances, Class Representatives and Class Counsel have concluded that the terms and conditions of this Stipulation are fair, reasonable and

adequate to the Settlement Class and have agreed to settle the claims raised in the Action pursuant to the terms and provisions of this Stipulation, after considering (i) the benefits that the Settlement Class will receive from resolution of the Action on the terms set forth herein; (ii) the uncertainty that a trial on the merits could result in a judgment providing members of the Settlement Class the same or substantially the same benefits; (iii) the attendant costs, risks and uncertainty of continued litigation; and (iv) the desirability of permitting the Settlement to be consummated without delay as provided by the terms of this Stipulation.

J. The Defendants expressly have denied and continue to deny all allegations of any wrongdoing or liability against them whatsoever arising out of any of the conduct, statements, acts or omissions alleged in the Action. Defendants do not in any way acknowledge any wrongdoing, fault or liability. This Stipulation and all related documents are not, and shall not in any event be construed or deemed to be, evidence of fault or liability or wrongdoing or damage whatsoever, or any infirmity in either Plaintiffs' claims or any of Defendants' defenses thereto. Nonetheless, the Defendants have concluded that further conduct of the Action would be protracted, time-consuming, expensive and distracting, and that it is desirable that the Action be fully and finally settled. The Defendants also have taken into account the costs, uncertainty and risks inherent in any litigation, especially complex cases like the Action. The Defendants have, therefore, determined that it is desirable and beneficial that the

Action be settled in the manner and upon the terms and conditions set forth in this Stipulation.

K. The Settling Parties and their counsel believe that the proposed Settlement is in the best interests of all of the Settling Parties, and confers substantial benefits upon the Settlement Class.

NOW THEREFORE, IT IS STIPULATED AND AGREED, by and among the Settling Parties, through their respective counsel, subject to approval of the Court, after consideration of the above and in consideration of the benefits flowing to the Settling Parties from the Settlement, that all of the Released Plaintiffs' Claims against the Released Defendant Parties, and all of the Released Defendants' Claims against the Released Plaintiff Parties, shall be compromised, settled, released and dismissed with prejudice, upon and subject to the following terms and conditions:

II. DEFINITIONS

As used in this Stipulation, the following terms shall have the meanings specified below:

1. "Action" means the consolidated action pending in the Court, entitled *State ex rel. Robert Merrill, Trustee, el al. v. State of Ohio, Department of Natural Resources, et al.,* Case Nos. 04 CV 001080 and 04 CV 001081.

2. "Class Representatives" means Robert Merrill, Trustee; OLG; Anthony J. Yankel; Charles S. Tilk; Sheffield Lake, Inc.; Sandra L. Wade; David A. Zeber; Patricia French; and Neil Luoma.

3. "Court" means the Court of Common Pleas for Lake County, Ohio.

4. "Defendants" means, collectively, the State of Ohio ("State"), the Ohio Department of Natural Resources ("ODNR"), and the Director of ODNR.

5. "Defendants' Counsel" means Bricker & Eckler, LLP.

6. "Effective Date" means the first date by which all of the conditions and events specified in paragraph 38 have been met and have occurred.

7. "Final," with respect to the Judgment, means the later of: (i) if there is an appeal from the Judgment, the date of final affirmance on appeal and the expiration of the time for any further judicial review whether by appeal, reconsideration or a petition for a writ of certiorari and, if certiorari is granted, the date of final affirmance of the Judgment following review pursuant to the grant; or (ii) the date of final dismissal of any appeal from the Judgment or the final dismissal of any proceeding on certiorari to review the Judgment; or (iii) the expiration of the time for the filing or noticing of any appeal from the Court's Judgment; or (iv) if the Court enters a judgment substantially different from the form of Judgment set forth in Exhibit A hereto (an "Alternative Judgment") and the Settlement is not terminated, the date that such Alternative Judgment becomes final as defined in parts (i) to (iii) above and no longer subject to appeal or review. However, any appeal or proceeding seeking subsequent judicial review pertaining solely to any award of attorneys' fees or expenses shall not in any way delay or affect the

time set forth above for the Judgment or Alternative Judgment to become Final, or otherwise preclude the Judgment or Alternative Judgment from becoming Final.

8. "Judgment" means the judgment to be entered approving the Settlement, substantially as proposed in the form attached hereto as Exhibit A.

9. "Notice" means (i) the notice of the proposed Settlement, substantially in the form attached hereto as Exhibit B, to be published by Class Counsel to the Settlement Class.

10. "OLG" means Ohio Lakefront Group, Inc.

11. "Parties" or "Settling Parties" means, collectively, Plaintiffs and Defendants.

12. "Plaintiffs" means OLG and the Settlement Class.

13. "Class Counsel" means Calfee, Halter & Griswold, LLP.

14. "Plan of Allocation" means the plan for allocation of the Settlement Amount agreed to by the Parties and attached hereto as Exhibit C.

15. "Preliminary Approval Order" means the order, substantially in the form attached hereto as Exhibit D, to be entered by the Court that, among other things, preliminarily approves the Settlement, schedules the Settlement Hearing, and directs notice of the Settlement.

16. "Released Defendants' Claims" means any and all claims, demands, rights, actions, potential actions, causes of action, liabilities, damages, losses, obligations, judgments, duties, suits, agreements, costs, expenses, debts, interest, penalties, sanctions, fees, attorneys' fees, judgments, decrees, matters, issues, and controversies of any kind, nature or description whatsoever, whether based on federal, state, local, statutory or common law or any other law, rule or regulation, whether fixed or contingent, accrued or un-accrued, liquidated or un-liquidated, at law or in equity, matured or un-matured, disclosed or un-disclosed, apparent or un-apparent, against any of the Released Plaintiff Parties, directly or indirectly relating to or arising out of the claims asserted in the Action, including Defendants' claims of public trust ownership (including claims for lease fees) landward of the natural shoreline, arising from the beginning of time through the date of final approval of the Settlement. Released Defendants' Claims do not include any claims relating to the enforcement of this Settlement.

17. "Released Defendant Parties" means Defendants and their respective employees, directors, agents, divisions, predecessors, successors, administrators, assigns, partners, affiliates and counsel.

18. "Released Plaintiffs' Claims" means any and all claims, demands, rights, actions, potential actions, causes of action, liabilities, damages, losses, obligations, judgments, duties, suits, agreements, costs, expenses, debts, interest, penalties, sanctions, fees, attorneys' fees, judgments, decrees, matters, issues,

and controversies of any kind, nature or description whatsoever, whether based on federal, state, local, statutory or common law or any other law, rule or regulation, whether fixed or contingent, accrued or un-accrued, liquidated or un-liquidated, at law or in equity, matured or un-matured, disclosed or un-disclosed, apparent or un-apparent, against any Released Defendant Party directly or indirectly relating to or arising out of the claims asserted in the Action, including any acts taken (such as a trespass or taking of real property) by the State or ODNR with regard to claiming public trust ownership of real property landward of the natural shoreline, arising from the beginning of time through the date of final approval of the Settlement. Released Plaintiffs' Claims do not include any claims relating to the enforcement of this Settlement.

19. "Released Plaintiff Parties" means all members of the Settlement Class, along with their respective family members including spouses, domestic partners, children and siblings, heirs, executors, administrators, successors, assigns, partners, and entities with which they are currently or were formerly associated having an interest in littoral property bordering Lake Erie. Released Plaintiff Parties includes, without limitation, the Class Representatives and their members, agents, affiliates, owners, officers, directors, attorneys, predecessors, successors, and assigns.

20. "Settlement" means the settlement contemplated by this Stipulation.

21. "Settlement Class" means all persons, as defined in R.C. 1506.01(D), excepting the State 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.

22. "Settlement Hearing" means the hearing to be held by the Court to determine whether to grant final approval of the Settlement.

23. Stipulation" means this Stipulation of Settlement.

III. SETTLEMENT TERMS

A. General Terms

24. As valuable consideration for the Settlement, Defendants shall pay $6,100,000 (the "Settlement Amount") to the Settlement Class within forty-five (45) calendar days of the Court's journalization of the Judgment, regardless of appeals. Payment shall be made to a third party Claims Administrator selected by Class Counsel. Defendants shall make an advance payment of $40,000 into an escrow account to pay for the costs of providing the Notice.

25. Up to $1,720,091.51 of the Settlement Amount will be allocated to the return of submerged lands lease rentals with respect to Count I. $600,000 will be allocated to the repayment of Plaintiffs attorney's fees with respect to Count I. All other portions of the Settlement Amount will be allocated according to the Plan of Allocation attached hereto as Exhibit C. The reasonable costs of administering the plan of allocation

will be paid out of the Settlement Amount to the Claims Administrator selected by Class Counsel.

26. No 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.

27. Defendants will not oppose any request for payment of attorneys' fees made by Class Counsel related to Count II so long as the total attorney fee award does not exceed 33% of the portion of the Settlement Amount allocated to Count II compensation.

28. Plaintiffs agree not to take legal action against the Released Defendant Parties based on any Released Plaintiffs' Claims following the Effective Date. Defendants agree not to take legal action against the Released Plaintiff Parties based on any Released Defendants' Claims following the Effective Date.

29. Defendants agree not to initiate or join any direct challenges or appeals to the rulings and opinions already issued in the Action in the course of further proceedings in the Action.

B. Release Of Claims

30. Pursuant to the Judgment, upon the Effective Date, each of the Plaintiffs and other Released Plaintiff Parties, on behalf of themselves and their respective members, agents, affiliates, owners, officers, directors, attorneys, predecessors, successors, and assigns, family members including spouses, domestic partners, children and siblings, heirs, executors, administrators, assigns, partners, and entities with which they are

currently or were formerly associated, shall be deemed by operation of law to have fully, finally and forever released, waived, discharged, and dismissed each and every of the Released Plaintiffs' Claims against the Released Defendant Parties, and shall forever be enjoined from prosecuting any Released Plaintiffs' Claims against any of the Released Defendant Parties.

31. Pursuant to the Judgment, upon the Effective Date, each of the Defendants and the other Released Defendant Parties, on behalf of themselves, their respective employees, directors agents, divisions, predecessors, successors, administrators, assigns, agents, partners, affiliates and counsel, shall be deemed by operation of law to have fully, finally and forever released, waived, discharged, and dismissed each and every of the Released Defendants' Claims against the Released Plaintiff Parties, and shall forever be enjoined from prosecuting any Released Defendants' Claims against any of the Released Plaintiff Parties.

C. Procedure For Approval

32. Promptly after this Stipulation has been fully executed, the Settling Parties shall submit this Stipulation, together with its exhibits, to the Court and shall apply for entry of a Preliminary Approval Order, substantially in the form attached hereto as Exhibit D.

33. Plaintiffs shall be responsible for: (a) providing Notice in accordance with the Preliminary Approval Order. The costs of such Notice shall be paid out of the Settlement Amount. In no event shall Plaintiffs, Class Counsel or Plaintiffs' agents be individually responsible for any such Notice costs. Within seven (7) calendar

days of entry of the Preliminary Approval Order, Defendants will provide Class Counsel with a list of submerged land leaseholders from May 28, 1998 through the present, which includes their name, address(es) and lease ID number. At least seven (7) calendar days before the Settlement Hearing, Class Counsel shall file with the Court an appropriate proof of compliance with the Notice procedures set forth in the Preliminary Approval Order.

34. If the Settlement contemplated by this Stipulation is approved by the Court, the Settling Parties shall request that the Court enter a Judgment, substantially in the form attached hereto as Exhibit A.

35. The Parties shall cooperate in obtaining prompt approval of the Court for dismissal of the Action with prejudice and in accordance with the terms of this Stipulation and governing law.

36. The Claims Administrator shall process the claims as follows in a timely fashion:

a. The Claims Administrator shall be responsible for disseminating information to the Settlement Class concerning settlement procedures by, among other ways, establishing an Internet home page and a toll-free claims hotline and publishing appropriate notices. The Claims Administrator shall consult with Class Counsel as to the most economical and effective way to establish these devices. The nature and manner of disseminating such information to the Settlement Class shall be subject to approval by the Court.

b. The Claims Administrator shall have the power to implement reasonable procedures designed to detect

and prevent payment of fraudulent claims, and otherwise to assure an acceptable level of reliability and quality control in claims processing.

c. The Claims Administrator shall receive, process, classify, and review all claims.

d. The Claims Administrator shall approve qualifying claims and shall allocate benefits among the Settlement Class, in accordance with this Agreement and the Plan of Allocation, and shall pay all claims in accordance with this Agreement and the Plan of Allocation.

e. If the Claims Administrator determines that a claim is not eligible for payment under the governing criteria, the Claims Administrator shall notify the claimant and Class Counsel as to its determination and the grounds therefore. Such claimants shall have a maximum of thirty (30) days from the date of mailing of the Claims Administrator's notice of ineligibility either to cure deficiencies in their claims submissions or to provide written notice of an intention to appeal, and failure to do so shall result in denial of the claim.

f. Any appeals from the Claims Administrator's determinations on the merits of a Settlement Class member's claim submission shall be made to the Court within thirty (30) days of notification of the Claims Administrator's determination. Appeals may be filed by a Settlement Class member, through counsel, as to the Claim Administrator's determinations on the merits of the claim(s) submitted by that Settlement Class member. The Claims Administrator shall provide notice of all appeals to Class Counsel and to

Defendants' Counsel. At their election, Class Counsel may also file papers in support of or in opposition to any such appeals.

g. No claim for benefits shall be paid while any appeal is pending if resolution of a claimant's appeal would affect the amount of compensation to another claimant. Nor shall that claimant's claim for benefits be paid while its appeal is pending.

h. The Claims Administrator shall provide periodic updates to the Court regarding the status of claims administration and processing, including without limitation the number of claims submitted, processed, reviewed, denied and paid within each classification, as well as the amount paid from the Settlement Amount, at least once every thirty (30) days until the Settlement Amount has been distributed in full.

i. Defendant remains subject to Ohio's public records laws. Accordingly, Defendant may respond to records information requests from Class members. These responses and any other actions taken by Defendant in furtherance of its ongoing regulatory and landholding rights and responsibilities, including providing an internet link from the ODNR website to the claims administration website, shall not be deemed as interference with the administration of this settlement.

j. Plaintiffs assume full responsibility, and hereby acknowledge that Defendant bears no responsibility, for the claims administration process described herein and for adherence to the Plan of Allocation and this Agreement with respect to any distribution of the

Settlement Amount. Plaintiffs further agree to fully indemnify, hold harmless and defend the Released Defendant Parties against any and all claims, demands, rights, actions, potential actions, causes of action, liabilities, damages, losses, obligations, judgments, duties, suits, agreements, costs, expenses, debts, interest, penalties, sanctions, fees, attorneys' fees, judgments, decrees, matters, issues, and controversies of any kind, nature or description whatsoever, whether based on federal, state, local, statutory or common law or any other law, rule or regulation, whether fixed or contingent, accrued or un-accrued, liquidated or un-liquidated, at law or in equity, matured or un-matured, disclosed or un-disclosed, apparent or un-apparent, against any of the Released Defendant Parties, directly or indirectly relating to or arising out of the claims administration process described herein and/or adherence to the Plan of Allocation and this Agreement with respect to any distribution of the Settlement Amount. However, nothing in this paragraph shall be construed to require Plaintiffs to bear the costs incurred by the Released Defendant Parties in invoking the provisions of this Agreement and the Final Judgment barring the assertion and prosecution of any such claims against the Released Defendant Parties.

D. Effective Date Of Settlement, Waiver Or Termination

37. This Settlement shall become effective on the Effective Date, which shall be the date when all of the following shall have occurred:

a. entry of the Preliminary Approval Order, which shall be in all material respects substantially in the form set forth in Exhibit D attached hereto;

b. approval by the Court of the Settlement;

c. entry by the Court of a Judgment, which shall be in all material respects substantially in the form set forth in Exhibit A attached hereto, and which has become Final or, in the event that the Court enters an Alternative Judgment and none of the Settling Parties elects to terminate this Settlement, the date that such Alternative Judgment is entered and becomes Final; and

d. dismissal of the Action with prejudice.

38. Each of the Parties individually shall have the right to terminate the Settlement and this Stipulation by providing written notice of their election to do so ("Termination Notice"), through counsel, to all other Settling Parties hereto within thirty (30) calendar days of: (a) the Court's final refusal to enter the Preliminary Approval Order substantially in the form attached hereto as Exhibit D, in a manner that is materially detrimental to any Party, and without opportunity for resubmission; (b) the Court's final refusal to approve this Stipulation substantially in the form submitted, in a manner that is materially detrimental to any Party; (c) the Court's final refusal to enter the Judgment substantially in the form attached hereto as Exhibit A, in a manner that is materially detrimental to any Party, and without opportunity for resubmission; (d) the date upon which the Judgment substantially in the form attached hereto as Exhibit A is modified or

reversed, in a manner that is materially detrimental to any Party by an appellate court; or (e) in the event that the Court enters an Alternative Judgment and none of the Settling Parties hereto elects to terminate this Settlement, the date upon which such Alternative Judgment is modified or reversed in a manner that is materially detrimental to any Party by an appellate court.

39. Except as otherwise provided herein, in the event the Settlement is terminated or the Effective Date cannot occur for any reason, then: the Settlement shall be without prejudice, and none of its terms, shall be effective or enforceable except as specifically provided herein; the Settling Parties shall be deemed to have reverted to their respective positions in the Action immediately prior to the execution of this Stipulation; and, except as otherwise expressly provided, the Settling Parties shall proceed in all respects as if this Stipulation and any related orders had not been entered. In such event, the fact and terms of this Stipulation, and any aspect of the negotiations leading to this Stipulation, shall not be admissible in the Action and shall not be used by Plaintiffs against the Defendants or by the Defendants against Plaintiffs in any court filings, depositions, at trial or otherwise, and any judgments or orders entered by the Court in accordance with the terms of the Stipulation shall be treated as vacated *nunc pro tunc*.

E. No Admission Of Wrongdoing

40. This Stipulation, whether or not approved by the Court, and any negotiations, proceedings or agreements relating to it shall not be offered or

received against any of the Settling Parties as evidence of or construed as or deemed to be evidence of (a) any liability, negligence, fault, or wrongdoing of any of the Settling Parties, (b) a presumption, concession, or admission with respect to any liability, negligence, fault, or wrongdoing, or in any way referred to for any other reason as against any of the Settling Parties, in any other civil, criminal, or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Settlement, (c) a presumption, concession, or admission by any of the Defendants with respect to the truth of any fact alleged in the Action or the validity of any of the claims or the deficiency of any defense that was or could have been asserted in the Action, (d) a presumption, concession, or admission by Plaintiffs of any infirmity in the claims asserted, or (e) an admission or concession that the consideration to be given hereunder represents the consideration which could be or would have been recovered at trial.

41. Nothing herein, however, shall prevent any of the Settling Parties from using this Stipulation, or any document or instrument delivered hereunder (a) to effect or obtain Court approval of this Stipulation, (b) to enforce the terms of this Stipulation, or (c) for purposes of defending, on the grounds of *res judicata,* collateral estoppel, release, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim, any of the Released Plaintiffs' Claims and any Released Defendants' Claims or any related claims released or precluded pursuant to this Stipulation.

F. Miscellaneous Provisions

42. All of the exhibits attached hereto are hereby incorporated by reference as though fully set forth herein.

43. The Settling Parties intend this Settlement to be a final and complete resolution of all disputes asserted or which could be asserted by Plaintiffs against all Released Defendant Parties with respect to all Released Plaintiffs' Claims, or by Defendants against all Released Plaintiff Parties with Respect to all Released Defendants' Claims. The Settling Parties agree that the terms of this Settlement were negotiated at arm's-length and in good faith by the Settling Parties, and reflect a settlement that was reached voluntarily after consultation with experienced legal counsel.

44. This Stipulation may not be modified or amended, nor may any of its provisions be waived except by a writing signed by all signatories hereto or their successors-in-interest.

45. The headings herein are used for the purpose of convenience only and are not meant to have legal effect.

46. The consummation of this Settlement as embodied in this Stipulation shall be under the authority of the Court, and the Court shall retain jurisdiction for the purpose of enforcing the terms of this Stipulation, including as to any released claims, and entering orders providing for awards of attorneys' fees and litigation expenses to Class Counsel.

47. The waiver by any Settling Party of any breach of this Stipulation by any other Settling Party shall not be deemed a waiver of any other prior or subsequent breach of this Stipulation.

48. This Stipulation and its exhibits constitute the entire agreement among the Settling Parties concerning this Settlement, and no representations, warranties, or inducements have been made by any party hereto concerning this Stipulation and its exhibits other than those contained and memorialized in such documents.

49. This Stipulation may be executed in one or more original and/or faxed and/or pdf'd counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument.

50. This Stipulation shall be binding upon, and inure to the benefit of, the family members including spouses, domestic partners, children and siblings, heirs, executors, administrators, assigns, partners, agents, parents, affiliates, subsidiaries, owners, officers, directors, employees, attorneys, predecessors, and successors of the Parties.

51. The construction, interpretation, validity and enforcement of this Stipulation, other than as set forth in the next sentence, and all documents necessary to effectuate it, shall be governed by the internal laws of the State of Ohio without regard to conflicts of laws or choice of law rules.

52. This Stipulation shall not be construed more strictly against one Settling Party than another merely by virtue of the fact that it, or any part of it, may have

been prepared by counsel for one of the Settling Parties, it being recognized that it is the result of arm's-length negotiations between the Settling Parties and all Settling Parties have contributed substantially and materially to the preparation of this Stipulation.

53. All counsel and any other person executing this Stipulation and any of the exhibits hereto, or any related Settlement documents, warrant and represent that they have the full authority to do so and that they have the authority to take appropriate action required or permitted to be taken pursuant to the Stipulation to effectuate its terms.

54. Class Counsel and Defendants' Counsel agree to cooperate fully with one another in seeking Court approval of the Preliminary Approval Order, the Stipulation and this Settlement, and to use good faith, commercially reasonable efforts to promptly agree upon and execute all such other documentation as may be reasonably required to obtain final approval by the Court of the Settlement.

IN WITNESS WHEREOF, the Settling Parties have caused this Stipulation to be executed by their duly authorized counsel.

/s/_____	/s/_____
Name	Name
Dated: 5/26/2016	Dated: 5/26/2016
Counsel for Defendants	Counsel for Plaintiffs

EXHIBIT B

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

CASE NO. 04CV001080

JUDGE EUGENE A. LUCCI

[Filed: October 24, 2016]

STATE EX REL. ROBERT MERRILL, TRUSTEE, *et al.*	)
Plaintiffs	)
vs.	)
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, *et al.*	)
Defendants	)

ORDER AND FINAL JUDGMENT

This matter came for hearing on October 21, 2016 (the "Settlement Hearing"), on the application of the Settling Parties to determine whether the terms and conditions of the Stipulation of Settlement dated May 26, 2016 (the "Stipulation") providing for the settlement (the "Settlement") of all claims asserted by Plaintiffs Ohio Lakefront Group, Inc. ("OLG"), Robert Merrill, Trustee, Anthony J. Yankel, Charles S. Tilk, Sheffield Lake, Inc., Sandra L. Wade, David A. Zeber, Patricia French, and Neil Luoma, and the Settlement

Class (collectively, "Plaintiffs"); against the State of Ohio, the Ohio Department of Natural Resources ("ODNR"), and the Director of ODNR (collectively, "Defendants" and together with Plaintiffs, the "Parties" or the "Settling Parties") in the above-captioned litigation (the "Action") now pending in this Court should be approved; and whether judgment should be entered dismissing the complaint on the merits and with prejudice, and releasing the Released Plaintiffs' Claims as against all Released Defendant Parties.

The Court having considered all matters submitted to it at the Settlement Hearing and otherwise; and it appearing that a notice of the Settlement Hearing substantially in the form approved by the Court was distributed in accordance with the manner of distribution approved by the Court.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. This Order and Final Judgment incorporates by reference the definitions in the Stipulation and all capitalized terms used herein shall have the same meanings as set forth in the Stipulation unless otherwise defined herein.

2. This Court has jurisdiction to enter this Judgment. This Court has jurisdiction over the subject matter of the Action, including all matters necessary to effectuate the Settlement, and over all Settling Parties.

3. This Court hereby finds that notice of the Settlement was provided pursuant to and in the form and manner directed by the Preliminary Approval Order and that the form and manner of notice given to

Settlement Class members are hereby determined to have been the best notice practicable under the circumstances and constituted due and sufficient notice to all persons entitled to receive such notice in compliance with the provisions of Rule 23 of the Ohio Rules of Civil Procedure and the requirements of due process.

4. Pursuant to and in compliance with due process, this Court hereby finds that the notice provided advised persons and entities in interest of the terms of the Settlement, and of their right to object thereto, and a full and fair opportunity was accorded to all persons and entities in interest to be heard with respect to the foregoing matters. Accordingly, it is hereby determined that all members of the Settlement Class are bound by this Judgment entered herein.

5. This Court finds that this action is properly maintained as a class action under Rule 23 of the Ohio Rules of Civil Procedure and that the Class Representatives fairly and adequately represented the interests of Settlement Class members. Class Counsel is authorized to act on behalf of all Settlement Class members with respect to all acts required by the Stipulation or such other acts which are reasonably necessary to consummate the Settlement set forth in the Stipulation.

6. This Court finds that the Settlement is, in all respects, fair, reasonable, and adequate, and in the best interests of the Settlement Class, and hereby approves the Settlement as set forth in the Stipulation. This Court further finds that the Settlement set forth in the Stipulation is the result of arm's-length

negotiations between experienced counsel representing the interests of the Settling Parties. Accordingly, the Settlement embodied in the Stipulation is hereby approved in all respects and shall be consummated in accordance with the terms and provisions of the Stipulation.

7. The claims filed in the Action are hereby dismissed with prejudice and without costs except for the payments expressly provided for in this Judgment, the Stipulation, the Preliminary Approval Order, and/or any order entered by this Court regarding Class Counsel's request for attorneys' fees and expenses.

8. Upon the Effective Date, Plaintiffs, on behalf of themselves, their heirs, executors, administrators, predecessors, successors and assigns, shall be deemed by operation of law to have fully, finally, and forever released, waived, discharged, and dismissed each and every of the Released Plaintiffs' Claims against the Released Defendant Parties, and shall forever be enjoined from prosecuting any Released Plaintiffs' Claims against any of the Released Defendant Parties. Further, Plaintiffs shall be forever enjoined from prosecuting any claims relating in any way to the claims administration process, the Plan of Allocation or any distribution decisions regarding the Settlement Amount against any of the Released Defendant Parties.

9. Upon the Effective Date, each of the Defendants, on behalf of themselves, their heirs, executors, administrators, predecessors, successors, and assigns, shall be deemed by operation of law to have fully, finally, and forever released, waived, discharged, and dismissed each and every of the Released Defendants'

Claims against the Released Plaintiff Parties, and shall forever be enjoined from prosecuting any Released Defendants' Claims against any of the Released Plaintiff Parties.

10. This Judgment, the Stipulation, and any negotiations, proceedings, or agreements relating to them shall not be offered or received against any of the Settling Parties as evidence of or construed as or deemed to be evidence of: (a) any liability, negligence, fault, or wrongdoing of any of the Defendants; (b) a presumption, concession, or admission with respect to any liability, negligence, fault, or wrongdoing, or in any way referred to for any other reason as against any of the Defendants, in any other civil, criminal, or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Settlement; (c) a presumption, concession, or admission by any of the Defendants with respect to the truth of any fact alleged in the Action or the validity of any of the claims or the deficiency of any defense that was or could have been asserted in the Action; (d) a presumption, concession, or admission by Plaintiff of any infirmity in the claims asserted; or (e) an admission or concession that the consideration to be given hereunder represents the consideration which could be or would have been recovered at trial.

11. Nothing herein, however, shall prevent any of the Settling Parties from using this Judgment, the Stipulation, or any document or instrument delivered thereunder: (a) to effect or obtain Court approval of the Settlement; (b) to enforce the terms of the Settlement; or (c) for purposes of defending, on the grounds of *res*

judicata, collateral estoppel, release, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim, any of the Released Plaintiffs' Claims and any Released Defendants' Claims released pursuant to the Settlement.

12. This Court retains exclusive jurisdiction, without affecting in any way the finality of this Judgment over: (a) implementation and enforcement of the Settlement; (b) hearing and determining Class Counsel's award of attorneys' fees and reimbursement of litigation expenses; (c) enforcing and administering this Judgment; (d) enforcing and administering the Stipulation including the releases granted therein; and (e) other matters arising from or relating to the foregoing.

13. This Court finds that throughout the course of the Action the Settling Parties and their respective counsel at all times complied with the requirements of Rule 11 of the Ohio Rules of Civil Procedure and any other applicable laws and rules.

14. This Court finds that the Action has been properly maintained as a class action, and the Court finds that throughout the course of the Action, the Action was not brought by Plaintiffs or defended by Defendants in bad faith or without a reasonable basis, and there have been no violations or reason for sanctions under Rule 11 of the Ohio Rules of Civil Procedure or similar rules or codes relating to the prosecution, defense, or settlement of the Action.

15. This Court hereby approves Class Counsel's application for attorneys' fees and expenses as set forth

in the Stipulation as fair and reasonable under the circumstances of this litigation. Accordingly, this Court grants Class Counsel's fee and expense application in its entirety and awards $1,247,369.80 to Class Counsel for attorneys' fees and expenses, and finds that such award is fair and reasonable. Payment shall be made on behalf of Defendants in accordance with the tenns of the Stipulation.

16. This Court hereby approves Class Counsel's selection of Ohio Shoreline Preservation, an Ohio not-for-profit 501(c)(3) organization whose, objectives are related as closely as possible to the purposes and remedies sought by the Action, as a reasonable and appropriate *cy pres* designee for the receipt of any remaining funds after full distribution of the Settlement Amount to Authorized Claimants according to the Plan of Allocation. Payment, if any, shall be made to Ohio Shoreline Preservation only at the time and in the manner provided for in the Plan of Allocation.

17. In the event the Settlement is terminated or the Effective Date cannot occur for any reason, then: (a) the Settlement shall be without prejudice, and none of its terms shall be effective or enforceable except as specifically provided in the Stipulation; (b) the Settling Parties shall be deemed to have reverted to their respective positions in the Action immediately prior to February 19, 2016; and, (c) except as otherwise expressly provided, the Settling Parties shall proceed in all respects as if the Stipulation and any related orders had not been entered.

18. Without further order of the Court, the Settling Parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation. The deadline for Settlement Class members to submit Proofs of Claim, which was set as October 12, 2016, will be extended for thirty (30) days from the entry of this Final Judgment, until November 28, 2016.

19. This Court finds that no just reason exists for delay in the entry of this Judgment and immediate entry by the Clerk of the Court is expressly directed pursuant to Rule 54(B) of the Ohio Rules of Civil Procedure.

IT IS SO ORDERED.

FINAL APPEALABLE ORDER
Clerk to serve pursuant
to Civ.R. 58(B)

Copies:

James F. Lang, Esq.
Fritz E. Berckmueller, Esq.
Lindsey E. Sacher, Esq.
Calfee, Halter & Griswold, LLP
Class counsel and attorneys for Plaintiff-Relators
1405 East Sixth Street
Cleveland, Ohio 44114-1607

Homer S. Taft, Esq.
Intervening Plaintiff-Relator, pro se
20220 Center Ridge Road, Suite 300
P.O. Box 16216
Rocky River, Ohio 44116

L. Scot Duncan, Esq.
Intervening Plaintiff-Relator, pro se
1530 Willow Drive
Sandusky, Ohio 44870

Daniel C. Gibson, Esq.
Anne Marie Sferra, Esq.
Ali I. Haque, Esq.
Bricker & Eckler, LLP
100 South Third Street
Columbus, OH 43215

Neil S. Kagan, Esq., Pro Hae Vice
Attorney for intervening defendants, National Wildlife Federation and Ohio Environmental Council
Great Lakes Natural Resource Center
213 West Liberty Street, Suite 200
Ann Arbor, Michigan 48104

Michael DeWine, Ohio
Attorney General
Michael L. Williams,
Esq., Chief Legal Officer
Ohio Attorney General's
Office
Environmental
Enforcement Section
Ohio Department of Natural Resources and the State of Ohio
2045 Morse Road,
Building D-2
Columbus, Ohio 43229-6693

Peter A. Precario, Esq.
Attorney for intervening defendants National Wildlife Federation and Ohio Environmental Council
2 Miranova Place, Suite 500
Columbus, Ohio 43215

MAUREEN G. KELLY
CLERK OF COMMON PLEAS COURT
CLERK OF 11TH DISTRICT COURT OF APPEALS
25 N. PARK PLACE
PAINESVILLE, OHIO 44077

CASE NO. 04CV001080

TO: Daniel C Gibson
100 South Third Street
Columbus, OH 43215-4291

NOTICE OF FINAL APPEALABLE ORDER
OHIO STATE OF EX REL/ROBERT MERRILL/TRUSTEE et al vs. OHIO STATE OF DEPARTMENT OF NATURAL RESOURCES et al

On **OCT 24,2016** a Judgment Entry or Order was signed by a Judge of the Court of Common Pleas and filed in the above captioned case.

This **NOTICE** is being sent by the Clerk of Courts in compliance with state statute.

NOTE: The Clerk of Courts cannot advise you of the amount of time for appeal nor interpret the intent of this Notice. For further information or clarification please contact your attorney.

MAUREEN G. KELLY
LAKE COUNTY CLERK OF COURTS

JAMES F LANG 0059668 1400 MCDONALD INVESTMENT CENTER 800 SUPERIOR AVE Cleveland OH 44114
HOMER S TAFT 0025112 20220 Center Ridge Road

P.O. Box 16216 Rocky River OH 44116
PETER A PRECARlO 0027080 2 MIRANOVA PL STE 500 COLUMBUS OH 43215
Neil S Kagan 625 South State Street 745 Legal Research ANN ARBOR MI 48109
L S DUNCAN 0075158 1530 WILLOW DRIVE SANDUSKY OH 44870

EXHIBIT C

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

Case No. 04CV001080

Judge Eugene A. Lucci

[Filed: May 29, 2018]

STATE EX REL. ROBERT MERRILL, TRUSTEE *et al.,*	)
Plaintiffs,	)
vs.	)
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, *et al.,*	)
Defendants.	)

AFFIDAVIT OF CYNTHIA K. FRAZZINI

STATE OF OHIO)
) SS.
FRANKLIN COUNTY)

Cynthia K. Frazzini, being first duly sworn on oath, deposes and states as follows:

1. I am authorized to execute this affidavit on behalf of the Ohio Department of Natural Resources ("ODNR"). The statements made in this Affidavit are

based on my personal knowledge and my review of ODNR's records, to which I have access.

2. I am over the age of 18 and competent to testify as to the matters contained herein.

3. In my capacity as Deputy Legal Counsel for ODNR, I have access to ODNR's records, maintained in the ordinary course of regularly conducted business activity, including the records for and relating to this case. I make this affidavit based upon my review of those records and from my own personal knowledge.

4. On January 31, 2018, the Complaint attached hereto as Exhibit A (the "Erie Complaint") was filed by George Sortino in the Erie County Court of Common Pleas.

5. Since the filing of the Erie Complaint, ODNR, by and through counsel, has communicated with counsel for George Sortino, which oral and written communications are evidenced by true and accurate copies of certain correspondence documents attached hereto as Exhibit B.

6. On April 3, 2018, ODNR and the other State Defendants to the Erie Complaint filed a Motion to Dismiss for Lack of Jurisdiction, or, In the Alternative, for Transfer of Venue, a true and accurate copy of which is attached hereto as Exhibit C, with exhibits omitted due to size.

7. On May 3, 2018, George Sortino filed a Response to Defendants' Motion to Dismiss for Lack of Jurisdiction, or, In the Alternative, for Transfer of

Venue, a true and accurate copy of which is attached hereto as Exhibit D.

8. On May 25, 2018, ODNR and the other State Defendants to the Erie Complaint submitted for filing a Reply Memorandum in Support of their Motion to Dismiss for Lack of Jurisdiction, or, In the Alternative, for Transfer of Venue, a true and accurate copy of which is attached hereto as Exhibit E.

9. On May 25, 2018, ODNR and the other State Defendants to the Erie Complaint submitted for filing a Motion to Stay, In the Alternative, a true and accurate copy of which is attached hereto as Exhibit F, with the exhibit omitted.

10. On December 8, 2016, counsel for Plaintiffs in this action acknowledged receipt of a check from ODNR in the amount of $6,060,000.00. A true and accurate copy of the acknowledgment is attached hereto as Exhibit G.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Cynthia K. Frazzini
Cynthia K. Frazzini
Deputy Legal Counsel
Ohio Department of Natural Resources

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 24th day of May, 2018.

/s/ Jeffrey D. Swick
Notary Public

FRAZZINI EXHIBIT A

IN THE COURT OF COMMON PLEAS
ERIE COUNTY, OHIO

CASE NO. 2018-CV

JUDGE

[Filed: January 31, 2018]

STATE OF OHIO
ex rel. George Sortino
1210 Sycamore Line
Sandusky, OH 44870

Relator/Plaintiff,

v.

STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES
c/o James Zehringer, Director
2045 Morse Road
Columbus, OH 43229

and

JAMES ZEHRINGER, DIRECTOR
Ohio Department of Natural Resources
2045 Morse Road
Columbus, OH 43229

and

STATE OF OHIO)
c/o John Kasich, Governor)
77 South High Street, 30th Floor)
Columbus, OH 43215)
)
ALSO SERVE:)
MIKE DEWINE)
ATTORNEY GENERAL)
30 E. Broad Street, 14th Floor)
Columbus, OH 43215)
)
Respondents/Defendants.)
_____)

COMPLAINT FOR DECLARATORY JUDGMENT, MANDAMUS AND OTHER RELIEF

Dennis E. Murray, Sr., Esq. (0008783)
dms@murrayandmurray.com
Margaret M. Murray, Esq. (0066633)
mmm@murrayandmurray.com
Donna J. Evans, Esq. (0072306)
dae@murrayandmurray.com
MURRAY & MURRAY CO., L.P.A.
111 East Shoreline Drive
Sandusky, OH 44870
Telephone: 419-624-3000
Facsimile: 419-624-0707
Attorneys for Plaintiffs

PARTIES

1. This action arises from the actions and inactions of the Ohio Department of Natural Resources ("ODNR"), acting on behalf of the State of Ohio, by which they have unconstitutionally and unlawfully asserted ownership and possession of the private property of Ohio citizens abutting Lake Erie. In the past ODNR had intentionally and willfully misrepresented to property owners and to the public that the State of Ohio owns a part of their properties, and ODNR had persisted in this campaign of falsehoods despite knowing that it was in conflict with all Ohio laws, with published opinions of the Attorney General of Ohio and the Ohio and U.S. Constitutions.

2. Relator George Sortino ("Relator", "Plaintiff" or "Sortino") is, and at all times pertinent to this cause of action, was an owner of record of certain real property abutting Lake Erie. His property is located in Erie County, Ohio.

3. Relator commences and will maintain this litigation as a named relator/plaintiff on behalf of his putative class hereinafter further set forth.

4. Respondents/Defendants are the ODNR, its Director, James Zehringer and the State of Ohio (collectively "ODNR").

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action on the basis that Relator is a resident of Ohio and the sole relief sought by Relator is a declaratory judgment and other equitable relief.

6. Venue is proper in this Court because the claims of Relator arose in Erie County, Ohio. Relator resides in Erie County, Ohio, and Erie County, Ohio is the county in which the defendant, ODNR, conducted activity that gave rise to the claim for relief

BACKGROUND

7. The first section of the first article of the Bill of Rights of the Ohio Constitution proclaims the inalienable right of people in this state to acquire, possess, and protect property. The Ohio Constitution further prohibits the state from taking private property for a public use without first paying compensation to the property owner. The United States Constitution contains equivalent provisions. As well the 14th Amendment to the United States Constitution prohibits the conduct of ODNR complained of, herein.

8. Legal title to many parcels of real property abutting Lake Erie have been held in private ownership since before Ohio was admitted into the Union as a state in 1803. Since that time, Ohio law has recognized and protected the inalienable property rights of those holding legal title to these parcels, for purposes of this litigation known as "upland" or "littoral" owners.

9. For over 200 years, Ohio law has recognized the property rights of littoral owners, both with regard to the ownership in fee simple of the upland property as defined by the owner's deed or original patent and also as to the rights – known as littoral rights – such property owners have to access and use of the adjoining waters of Lake Erie. Ohio law also has long recognized

that the lakeward property line of a littoral owner whose ownership extends to Lake Erie is a "moveable freehold" in that such property line can move either lakeward or landward by virtue of accretion, erosion, or reliction. The property owned by the littoral Class Owners abuts the submerged lands of Lake Erie, title to which, together with the waters of Lake Erie and their contents, is held in trust for the benefit of the people of Ohio for the public uses of navigation, water commerce, fishing and fisheries.

10. This concept of trust ownership by the State of the waters of Lake Erie and the soil beneath currently is codified in Section 1506.10 of the Ohio Revised Code and is expressly made subject to the property rights of littoral owners. That section also designates ODNR "as the state agency in all matters pertaining to the care, protection, and enforcement of the state's rights designated in this section."

11. Under cover of its "coastal management program," ODNR had abused it authority by willfully ignoring the boundary between private and public ownership fixed by Ohio law.

12. ODNR had asserted that the state of Ohio owned all land lakeward of the "ordinary high water mark," or "OHW," which for administrative convenience the ODNR defined as wherever the U.S. Army Corps of Engineers defined the Ordinary High Water for purposes of federal law. Thus, contrary to established Ohio law, ODNR sought to exercise all property rights of fee ownership as to all property lakeward of OHW, regardless of whether that property

is submerged and regardless of whether that property is privately owned.

13. Littoral owners are required to pay real estate taxes based upon the whole of their privately owned fee. Some littoral owners wishing to use their private property located below OHW had been required by ODNR to lease this land from the state, despite that the land was owned in fee by the littoral owners. ODNR had maintained that no littoral owner might make use of their own property, nor exclude third parties from such property, as long as that property lies below OHW. Such conduct constituted a taking by the State.

14. ODNR's actions threw doubt upon the littoral owners' title to their properties and prevented some of them from obtaining title insurance for their private property located below OHW but landward of the state's actual fee ownership.

15. In response to ODNR's actions, a group of littoral landowners filed a lawsuit in the Court of Common Pleas of Lake County challenging the designation of OHW as the property line for all land abutting Lake Erie. The case, *State ex rel. Merrill v. Ohio Dept. of Natural Resources,* Lake Co. Case No. 04CV001080, was brought on behalf of a class of all littoral property owners bordering Lake Erie. The plaintiffs in *Merrill* sought a declaratory judgment that the class members own fee title to the lands located between OHW and the actual legal boundary of their properties and to declare that the submerged land leases were void and invalid as to any land below OHW owned by the class. The *Merrill* plaintiffs also sought a

writ of mandamus to compel ODNR to commence appropriation proceedings for all class members to determine the amount of compensation due to each of them for the temporary taking of the property by the State.

16. The *Merrill* trial court certified a class under Civ.R. 23(B)(2) for Count I, the declaratory judgment. A class may be maintained under Civ.R. 23(B)(2) when 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. A Civ.R. 23(B)(2), moreover, is a mandatory class with no right to opt out of the certification and no requirement of notice to class members. This class was defined 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."

17. That Court also granted partial summary judgment for the benefit of the Class, concluding that the public trust neither extended to the ordinary high-water mark nor terminated at the low-water mark. The trial court held that the boundary is "a moveable boundary consisting of the water's edge, which means the most landward place where the lake water actually touches the land at any given time."

18. The case eventually made its way to the Ohio Supreme Court. In *State ex rel. Merrill v. Ohio*

Department of Natural Resources, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935, the Supreme Court held that "the territory of Lake Erie held in trust by the state of Ohio for the people of Ohio extends to the 'natural shoreline,' which is the line at which the water usually stands when free from disturbing causes." *Id.* at ¶4. In doing so, the Ohio Supreme Court rejected ODNR's assertion that the proper boundary is OHW. The case was remanded to the trial court for further proceedings on the pending claims consistent with the opinion of the Ohio Supreme Court.

19. On August 27, 2012, on remand, the trial court issued an Order clarifying and defining what constitutes the "natural shoreline," as that concept was not directly addressed by the Ohio Supreme Court. Such Order also granted the relief requested, to declare as void and invalid any submerged land lease as to land below the OHW and above the natural shoreline and for ODNR to return all submerged land lease fees collected between OHW and the natural shoreline which were paid by the Class Members between 1998 and the present.

20. The August 27, 2012 Order also extended the class certification to Count II, the mandamus claim. The trial court reasoned that:

> [t]o the extent Count II of the First Amended Complaint seeks a declaration that the state's assertion of ownership up to the OHWM constitutes an unconstitutional temporary taking against all owners of littoral property bordering Lake Erie, the class that would be certified for resolution of that issue would have

> the exact same members as the class currently certified to Count I, *i.e.,* all littoral property owners bordering Lake Erie. Thus, the class certified for Count I could be maintained through the conclusion of Count II of the First Amended Complaint. The relief sought in Count II does not change the analysis, as a writ of mandamus is in the nature of an injunction, albeit mandatory rather than prohibitory, and thus subject to certification on a class-wide basis under Civil Rule 23(B)(2).

On March 1, 2014, the Eleventh District Court of Appeals affirmed the trial court's Order.

21. On May 27, 2016, the parties to the *Merrill* litigation entered into a proposed settlement agreement, which was filed with the Lake County Court. ODNR agreed to pay a set sum to and/or for a Settlement Class. A certain amount was allocated to the return of submerged land lease rentals and attorneys fees with respect to Count I. The remainder of the settlement fund was to be distributed according to a plan of allocation, to proportionally allocate the funds to any settlement class members, who filed acceptable Proofs of Claims.

22. The *Merrill* Class as initially certified by the trial court for Count II was properly certified under Civ.R. 23(B)(2), because the relief sought in the First Amended Complaint was declaratory and for mandamus relief. Despite the certification of the *Merrill* Class as a Civ.R. 23(B)(2) class, the terms of the Settlement Agreement provided class members with money damages, not the equitable relief that had

originally been sought. If the *Merrill* case had not settled, the *Merrill* court would have been required to issue a declaration on the question of an unconstitutional taking, and ODNR would have been compelled to seek out each property owner to settle or to commence appropriation proceedings, thereby making further actual notice to each class member unnecessary. However, with the addition of monetary damages allocated to property owners that did not have submerged land leases with ODNR, this class action should have been only and appropriately certified under Civ.R 23(B)(3). Payment of money damages triggered the due process requirements that *require* the provision of notice to class members as described in Civ.R. 23(C)(2)(b).

23. However, instead of recognizing the due process requirements, the parties and the trial Court continued to treat the settlement class as certified only under Civ.R 23(B)(2). Notice of the settlement was mailed *only* to those class members with submerged land leases. Because the *Merrill* Class was certified under Civ.R. 23(B)(2), no Class Member was given notice of the right to *opt out* of the settlement and all Class Members were denied any right to opt out. Class members who are owners of littoral property without submerged land leases were, for the most part, unaware of the action and the need to file a Proof of Claim in order to claim the funds due them. The individual named Plaintiff in this Complaint did not receive notice of the *Menill* settlement, but would have filed a Proof of Claim had he been advised of the settlement. He was not aware of his right to object to the settlement. Although the settlement agreement

provides that the class members have released all claims, the class members who did not receive notice are unaware of what they had purportedly surrendered. Because of this due process violation, all settlement class members who were denied their due process rights when they were not provided notice, as required under Civ.R 23(C)(2)(b), continue to be able to seek the remedy that they were denied in the *Merrill* action and which is being sought by the filing of this cause of action.

CLASS ALLEGATIONS

24. Plaintiff brings this action as a class action under Civ.R. 23(B)(2) on behalf of himself and all other members of a Class 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.

25. The members of the Class are so numerous that the joinder of all individual members is impracticable.

26. There are common questions of law and fact as to the unconstitutional taking of private property by ODNR which was owned by the Plaintiff and his Class Members in this case.

27. The claims of the Plaintiff are typical of the claims of the Class, and ODNR's defenses are typical of

the defenses pertinent to all of the members of the Class.

28. Plaintiff will fairly and adequately protect the interests of the Class.

29. ODNR has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate declaratory relief and associated injunctive relief with respect to the Class as a whole.

30. Adjudication of this case as a class action will facilitate judicial economy.

COUNT I
Declaratory Judgment

31. The facts alleged in paragraphs 1 through 30 of this Complaint are realleged and incorporated herein by reference.

32. Prior to the decision of the Ohio Supreme Court in *State ex rel. Merrill v. Ohio Department of Natural Resources,* 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935, ODNR contended that the State of Ohio held title to all lands located below the administratively arbitrary line of OHW.

33. ODNR contended that Plaintiffs were prohibited from using any land located below OHW, regardless of fee ownership of that land.

34. Pursuant to Ohio Revised Code Chapter 2721, Plaintiffs are entitled to an order of this Court declaring that ODNR's arbitrary and capricious assertion of ownership and exercise of ownership rights over the lands owned by Plaintiffs at and below OHW

constituted an unconstitutional temporary taking of those lands; and the Plaintiff and Class Members should be declared to have a clear right to receive compensation from ODNR for such taking and de facto appropriation pursuant to Article I, Section 19 of the Ohio Constitution and the Fifth Amendment to the U.S. Constitution.

COUNT II
Mandamus/Inverse Takings Compensation

35. The facts in paragraph 1 through 34 of this Complaint are realleged and incorporated herein by reference.

36. Plaintiff and the Class Members have no plain and adequate remedy in the ordinary course of law other than to require ODNR to compensate each of them, individually, fairly for the losses and damages that they have incurred as a result of ODNR's uncompensated taking of their privately owned real property.

37. ODNR is under a clear legal duty to commence appropriation proceedings in the Probate Court of the respective counties in which the properties owned by Plaintiff and Class Members are located, to determine the amount of compensation due to each of them for the real property temporarily taken and for damage to the residue of their respective real properties.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, on behalf of himself and the Class Members, requests that this Court grant the following relief:

1) Pursuant to Ohio Civil Rule 23(B)(2), certify this case as a class action and certify that the class shall include each and every owner of a parcel of privately owned real property abutting Lake Erie located within the State of Ohio to whom they received neither actual notice of the settlement of *State ex rel. Merrill v. Ohio Department of Natural Resources,* nor any compensation related to that settlement.

2) A declaratory judgment that that ODNR's arbitrary and capricious assertion of ownership and exercise of ownership rights over the lands owned by Plaintiffs at and below OHW constituted an unconstitutional temporary taking of those lands and the Plaintiff, and each member of his Class, have a clear right to receive compensation from ODNR for such taking by appropriation, pursuant to Article I, Section 19 of the Ohio Constitution and the Fifth Amendment to the U.S. Constitution.

3) A Writ of Mandamus compelling and ordering ODNR to commence appropriation proceedings in the Probate Court of the respective counties in which the properties owned by the Plaintiff and Class Members are located to determine the amount of compensation due to each for the real property taken and for damage to the residue of their real properties.

4) An award of Plaintiffs attorneys' fees and costs.

5) Any other relief that this Court deems equitable, proper, necessary, or just.

Respectfully submitted,

s/ *Margaret M. Murray*
Dennis E. Murray, Sr. (0008783)
dms@murrayandmurray.com
Margaret M. Murray (0066633)
mmm@murrayandmurray.com
Donna J. Evans (0072306)
dae@murrayandmurray.com
MURRAY & MURRAY CO., L.P.A.
111 East Shoreline Drive
Sandusky, Ohio 44870
Telephone: 419-624-3000
Facsimile: 419-624-0707
Attorneys for Plaintiff

INSTRUCTIONS TO THE CLERK:

Please cause to be served upon all Defendants a copy of the Complaint. Said service is requested by certified mail.

s/ *Margaret M. Murray*
Dennis E. Murray, Sr. (0008783)
Margaret M. Murray (0066633)
Donna J. Evans (0072306)
MURRAY & MURRAY CO., L.P.A.
Attorneys for Plaintiff

FRAZZINI EXHIBIT B

MURRAY & MURRAY
EXPERIENCED TRIAL LAWYERS

March 22, 2018

Daniel Gibson
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
VIA ELECTRONIC AND U.S. MAIL

In re: *SER Sortino v. ODNR, et al.*
Erie County Court of Common Pleas
Case No. 2018 CV 0074

Dear Mr. Gibson:

During a recent telephone call, you mentioned language from another case and asked whether we had considered the import of that language. Specifically, you referenced the language from the October 26, 2016 order entered in *SER Merrill v. ODNR, et al.,* Lake County Common Pleas Case No. 04CV001080 which provided that Court with jurisdiction to implement and enforce the settlement. We have reviewed that language and the case law and determined that Lake County Common Pleas Court lacks jurisdiction in this litigation.

As the pleadings establish, Plaintiff and the putative class members are not part of the *Merrill* settlement. Putative class members cannot be bound absent notice and the opportunity to opt out. *Becherer v. Merrill Lynch; Pierce, Fenner & Smith,* 43 F.3d 1054

(6th Cir. 1995), aff'd 131 F.3d 580, 587 (1997) ("In order to be bound by a prior judgment, a nonparty to that judgment must have been represented by a privy"). Plaintiff and the putative class members received neither notice nor the opportunity to opt out of the *Merrill* settlement. By definition, the class members in this litigation are not bound by the *Merrill* settlement agreement.

Moreover, while *res judicata* may prevent absent class members from bringing related claims, a court cannot apply that doctrine to absent class members, as would be the case here, because doing so would violate due process. In this litigation, application of *res judicata* would clearly violate due process under the Ohio Constitution and the United States Constitution. *Kurtz v. Kimberly-Clark Corp.,* 321 F.R.D. 482, 537 (E.D.N.Y. 2017). The stipulation in the settlement does not apply to those who were denied due process.

Even if the Lake County Court of Common Pleas exceeded its authority to approve a settlement containing a provision for monetary damages, this settlement is now final. A trial court lacks the authority to reopen and modify a final judgment. *Wilken v. Wachovia Bank,* 6th Dist. No. H-13-020, 2014-Ohio-2840, ¶26. Further, a trial court lacks authority to reconsider its final judgment, even if such reconsideration is undertaken to correct an error. *U.S. Bank v. Schubert,* 9th Dist. No. 13CA010462, 2014-Ohio-3868, ¶12. The *Merrill* settlement cannot now be modified, despite the fact that the Lake County trial court ostensibly retained jurisdiction for the purposes of enforcing the settlement and the releases. Any

continuing jurisdiction cannot be used to remake a settlement, later discovered to be defective, or to correct other errors found after the judgment has become final.

If Defendants in this matter elect to invoke the jurisdiction of Lake County, Plaintiff will argue that a settlement cannot be enforced against individuals who are not parties, that is, putative class members who were not given notice and did not have the right to opt out of the settlement. The releases are not valid for anyone who did not receive notice and the settlement agreement specifically states that no class member had the right to opt out of the settlement. If Defendants decide to invoke the jurisdiction of Lake County, it is the position of Plaintiff that this action would cause the present matter to be delayed but that nevertheless Erie County Common Pleas is the appropriate venue for this matter. Further, it is our position that there are not good grounds for involving the jurisdiction of Lake County based either on the facts or the law.

Very truly yours,

MURRAY & MURRAY CO., L.P.A.

/s/ Margaret M. Murray

By:
Margaret M. Murray

Bricker&Eckler
ATTORNEYS AT LAW

COLUMBUS | CLEVELAND
CINCINNATI | DAYTON
MARIETTA

BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
MAIN: 614.227.2300
FAX: 614.227.2390

www.bricker.com
info@bricker.com

Daniel C. Gibson
614.227.2324
dgibson@bricker.com

March 27, 2018

VIA ELECTRONIC MAIL

Margaret M. Murray
MURRAY & MURRAY CO., L.P.A.
111 East Shoreline Drive
Sandusky, Ohio 44870-2517

Re: *State ex rel. Sortino v. ODNR, et al.*
Case No. 2018 CV 0074
Erie County Court of Common Pleas

Dear Ms. Murray:

I am writing in response to your letter dated March 22, 2018 concerning the appropriate jurisdiction for the

above-referenced litigation. You have taken the position that, despite the reservation of exclusive jurisdiction contained in the *Merrill* final judgment, proceeding in Judge Lucci's court is not proper, because Mr. Sortino was not a party to the *Merrill* settlement and final judgment. Rather than address all of the various factual and legal propositions in your letter—many of which are inaccurate and unsupported by the authorities you cite—it is sufficient to simply note the fundamental error in your position as it relates to the jurisdictional question.

To wit: There is an obvious and essential distinction between the question of whether the *Merrill* settlement and final judgment are validly enforceable against Mr. Sortino and the question of whether Mr. Sortino was a party to *Merrill* subject to its judgment in the first place. If, as you assert in your Letter, Mr. Sortino was not even a party, then the issues of notice, due process, *etc.,* are utterly immaterial. On the other hand, if Mr. Sortino was a party, then although you may believe that alleged procedural defects render the settlement and final judgment nonbinding as to him, "the settlement is now final" as you acknowledge, and he remains bound by it unless and until a court with proper jurisdiction concludes otherwise.

Contrary to what your letter suggests, your actual position, as clearly and unequivocally stated in your pleading, is—and could in good faith only be—that Mr. Sortino was indeed a party to the *Merrill* settlement and final judgment, *i.e.,* he was a Settlement Class member, but that he should not be bound by it due to alleged procedural defects. *See, e.g.,* Complaint, ¶23

(Sortino "would have filed a Proof of Claim had he been advised of the settlement" and "*the class members who did not receive notice* are unaware of what they had purportedly surrendered" and "*all settlement class members who were denied their due process rights"* (emphases added)). *See also,* Merrill Stipulation of Settlement at (II. Definitions, ¶21, defining the "Settlement Class"); *Merrill* Final Judgment, ¶4 ("all members of the Settlement Class are bound by this Judgment"). These alleged procedural flaws are pled in the Complaint precisely out of the recognition that, unless the *Merrill* settlement and final judgment are deemed unenforceable as to Mr. Sortino, he cannot pursue the claims he has purported to assert in this action. Given that it is clear that Mr. Sortino was a party subject to the *Merrill* judgment, the only question is which court has the power to decide whether it is enforceable against him?

The *Merrill* final judgment is unequivocal in that regard. Indeed, whether Mr. Sortino is bound by the final judgment in the first instance—whether notice was proper, whether the class settlement satisfied due process, whether the entire Settlement Class is bound, whether he even has a right to level such challenges, *etc.*—are precisely the questions that Judge Lucci has retained exclusive jurisdiction to decide. *See, Merrill* Final Judgment, ¶ 12 (retaining exclusive jurisdiction over "enforcement of the Settlement," over "enforcing this Judgment," over "enforcing...the releases," and over "other matters arising from or relating to the foregoing"). In fact, they are questions that Judge Lucci has, in large part, already decided. *See, id.* at ¶¶3-4 (finding notice to be adequate and due process to be

satisfied as to "all members of the Settlement Class," which includes George Sortino). And it is beyond reasonable dispute that such reservations are fully enforceable under Ohio law. *See, e.g., Infinite Sec. Solutions, LLC v. Karam Properties II,* 143 Ohio St.3d 346, 2015-Ohio-1101, 37 N.E.3d 1211, ¶ 25 (holding that reservations of jurisdiction to enforce a settlement are valid) and *State ex rel. Racing Guild, Local 304 v. Morgan,* 17 Ohio St.3d 54, 56, 476 N.E.2d 1060 (1985) (first invoked jurisdiction over an issue is exclusive of all other tribunals).

In short, and as the Complaint implicitly acknowledges, the *Merrill* settlement and final judgment are enforceable against Mr. Sortino and all class members unless and until a court with proper jurisdiction concludes otherwise. Mr. Sortino cannot avoid Judge Lucci's reservation of exclusive jurisdiction to address that preliminary issue, simply by bootstrapping his collateral attack upon the enforceability of the *Merrill* judgment against him, into the very claim for which he seeks relief to pursue in a different court.

Please notify us by close of business on Wednesday, March 28, 2018 whether your position has changed in light of the foregoing. If we are forced to seek dismissal or change of venue by motion with the Court, our clients may seek recovery of the fees expended in having to go through that unnecessary exercise.

Sincerely,

/s/ Daniel C. Gibson
Daniel C. Gibson

MURRAY & MURRAY
EXPERIENCED TRIAL LAWYERS

March 28, 2018

Daniel C. Gibson
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
VIA ELECTRONIC AND U.S. MAIL

In re: *SER Sortino v. ODNR, et al.*
Erie County Court of Common Pleas
Case No. 2018 CV 0074

Dear Mr. Gibson:

When your client settled claims in the Lake County Court of Common Pleas and included monetary damages for individual property owners who did not have submerged land leases with the Ohio Department of Natural Resources, that settlement exceeded the jurisdiction of that court. Had the parties entered a settlement under Civ.R. 23(B)(3), the putative class members, such as George Sortino, would have received notice and the opportunity to object to the settlement based on lack of jurisdiction. Instead, ODNR and the plaintiffs in *Merrill* entered a Civ.R. 23(B)(2) settlement, provided no notice to putative class members aside from those who had entered an appearance in that litigation or had submerged land leases with ODNR, and exceeded the jurisdiction of the state common pleas court by including monetary damages for class members who did not have submerged land leases with ODNR and who filed claims. ODNR was fully aware that the state common

pleas court lacked jurisdiction to effectuate the settlement over putative class members who did not have submerged land leases and for whom it was offering a monetary settlement.

As ODNR stated, ODNR and the other defendants in *Merrill* "would be unfairly prejudiced if their limited stipulation to three issues of law were now somehow to be expanded to an unlimited stipulation that OLG may represent all littoral land owners for all claims whatsoever." State Defendants/Respondents' Response to Plaintiff OLG's Statement of Additional Relief Sought on Count I of the First Amended Complaint, filed June 18, 2013, *Merrill v. ODNR,* Lake County C.P. No. 04-CV-00180. ODNR highlighted the fact that "[w]hen a party seeks money damages against the State the only court with jurisdiction to hear the claim is the Court of Claims." *Id.* citing R.C. Chapter 2743. "Especially where funds are distributed without being specifically identified as being wrongly withheld and traceable and returnable to a particular party, cf. *Santos v. Ohio Bureau of Workers Compensation,* 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, such award is in the nature of a damages award (and perhaps even a award of punitive damages) and is not an equitable remedy within the jurisdiction of this Court." *Id.*

The issues of Civ.R. 23(B)(3) are relevant to the above-captioned case because the settlement in *Merrill* failed to follow the dictates of the law. The statement that such analysis is "utterly immaterial" misses the point of this litigation. As stated in Plaintiff's Complaint herein, the tangled settlement entered by

the parties in *Merrill* ostensibly bound all private littoral owners of parcels of real property abutting Lake Erie within the State of Ohio. Complaint, ¶24. This litigation was commenced precisely to confirm that the Plaintiff and putative class members in this case are not bound by the *Merrill* settlement for the reasons delineated in the Complaint and articulated by your client in the *Merrill* litigation and for equitable relief.

Lastly, your statement that the State of Ohio will seek attorney fees is contrary not only to the law but also to your client's statements within the *Merrill* litigation. As you are aware, Plaintiff herein is seeking equitable relief. The State is ineligible to recover compensation for fees incurred as a prevailing party. R.C. 2335.39. The State includes the ODNR. R.C. 2743.01(A). ODNR noted that "[b]y its terms and structure, R.C. 2335.39 is not designed to cover class actions." State Defendants/Respondents' Initial Brief in Opposition to Plaintiff OLG's Renewed and Supplemental Motion for Fees with Oral Argument Requested, filed June 29, 2012, *Merrill*.

Very truly yours,

MURRAY & MURRAY CO., L.P.A.

/s/ Margaret M. Murray

By:
Margaret M. Murray

Cc: Dennis E. Murray, Sr.
Donna A. Evans

Archived: Thursday, May 24, 2018 1:37:36 PM
From: Margaret M. Murray
Sent: Monday, May 14, 2018 4:29:19 PM
To: Gibson, Daniel
Cc: Dennis E. Murray, Sr.; Donna Evans
Subject: Sortino v. ODNR., et al
Sensitivity: Normal

Dan –

We have reviewed your clients' proposal that Mr. Sortino agree to stay his cause in Erie County and we cannot agreed with your clients' proposal to stay.

Because there are three attorneys staffing this litigation, we would be very appreciative if, in the future, you would make such proposals in email, rather than by telephone.

Margaret

Margaret M. Murray
mmm@murrayandmurray.com
MURRAY & MURRAY CO., L.P.A.
111 East Shoreline Drive
Sandusky OH 44870
Telephone: (419) 624-3000
Direct Dial: (419) 624-3128
Facsimile: (419) 624-0707

FRAZZINI EXHIBIT C

IN THE COURT OF COMMON PLEAS,
ERIE COUNTY, OHIO

Case No. 2018 CV 0074

Judge BINETTE

[Filed: April 3, 2018]

STATE OF OHIO *ex rel.* George Sortino,	)
Relator/Plaintiff,	)
vs.	)
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, *et al.,*	)
Respondents/Defendants.	)

ORAL ARGUMENT REQUESTED

DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION OR, IN THE ALTERNATIVE, FOR TRANSFER OF VENUE

Pursuant to Civ. R. 12(B)(1), Respondents/ Defendants State of Ohio, Department of Natural Resources, James Zehringer, Director of Ohio Department of Natural Resources, and State of Ohio, (the "State Defendants"), hereby move the Court for an Order dismissing the Complaint of Plaintiff/Relator,

State of Ohio *ex rel.* George Sortino, ("Sortino"), without prejudice, for lack of jurisdiction. In the alternative, the State Defendants move the Court for an Order transferring this case to the Hon. Judge Eugene Lucci in the Lake County Court of Common Pleas in light of his prior reservation of exclusive jurisdiction over the matters alleged in the Complaint. The grounds for this Motion are set forth in the Memorandum in Support attached hereto. Pursuant to Local Rule 4.01, the State Defendants request oral argument on this Motion.

Respectfully Submitted,

MIKE DEWINE
OHIO ATTORNEY GENERAL

/s/ Daniel C. Gibson
Anne Marie Sferra (0030855)
Daniel C. Gibson (0080129)
Lindsey A. Roberts (0096979)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Phone: (614) 227-2300
Fax: (614) 227-2390
asferra@bricker.com
dgibson@bricker.com
lroberts.bricker.com

Counsel for Defendants State of Ohio, Ohio Department of Natural Resources, and the Director of Ohio Department of Natural Resources

MEMORANDUM IN SUPPORT

I. INTRODUCTION

This Court lacks jurisdiction over the present action. The Lake County Court of Common Pleas first obtained and has reserved continuing and exclusive jurisdiction over the matters raised in Sortino's Complaint. Specifically, Sortino has purported to assert various, putative class action claims against the State Defendants, which were already adjudicated and resolved *via* a class action settlement and final judgment of dismissal entered in the Lake County Court of Common Pleas in the case of *In re Merrill v. ODNR, et al.,* Erie Case No. 04CV001080.[1]

Despite indisputably being a member of what he concedes was a "properly certified" class, (Complaint, ¶ 22), subject to the settlement and final judgment in *Merrill,* Sortino asserts in his Complaint that he and the other putative class members he now seeks to represent in this action should not be bound by the *Merrill* settlement and final judgment, due to alleged procedural defects, such as lack of adequate notice and/or opportunity to opt out. Complaint, ¶ 23. While Sortino is flatly wrong concerning the procedural validity of the *Merrill* settlement and final judgment as

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[1] True and accurate copies of the *Merrill* stipulation of settlement and final judgment are attached as Exhibits A and B respectively. "'[D]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim.'" *Henkel v. Aschinger,* Franklin C.C.P. No. 11CVH-11-14,234, 167 Ohio Misc. 4 (2012)(quoting *Nieman v. NLO, Inc.,* 108 F.3d 1546, 1555 (6th Cir.1997) (internal citations omitted)). *See,* Complaint, ¶¶ 15-24.

applied to him, the primary problem for Sortino is that the final judgment in *Merrill* contains an express reservation of exclusive jurisdiction over the very challenges to its enforceability that he raises—and must raise—in his effort to reassert claims already adjudicated on his behalf. *See,* Merrill Final Judgment, ¶ 12.

Because the Lake County Court of Common Pleas has retained exclusive jurisdiction to decide the matters raised in Sortino's Complaint, this Court lacks jurisdiction to adjudicate Sortino's claims and to decide the issues it presents. As a result, the Complaint should be dismissed without prejudice, so that Sortino can decide whether to re-file in the only court with proper jurisdiction. In the alternative, this Court should stay the present action and order that it be transferred to the Lake County Court of Common Pleas so that Judge Lucci, possessing the only valid jurisdiction over this matter, has the opportunity to decide—at a minimum—the preliminary issues concerning the propriety and enforceability of the *Merrill* settlement and final judgment with respect to Sortino.[2]

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[2] The State Defendants note that this Court need not presently decide the issue of whether the *Merrill* Court's reservation of exclusive jurisdiction would also extend to Sortino's claims themselves, in the event it concludes that the *Merrill* settlement and final judgment are somehow not binding on Sortino. It is sufficient for purposes of this Motion to note that the *Merrill* Court clearly has exclusive jurisdiction to decide the enforceability issues concerning the *Merrill* settlement and final judgment, which—as Sortino openly acknowledges in his Complaint—are threshold questions that must be decided before he can proceed with the

Simply put: Ohio law does not permit a party to avoid another court's valid reservation of exclusive jurisdiction by bootstrapping into the party's cause of action in a different court a collateral attack on the very judgment reserving that jurisdiction.

II. RULE 12(B)(1) STANDARD

"Under Civ.R. 12(b)(1), lack of subject matter jurisdiction, the question of law is whether the plaintiff has alleged any cause of action *for which the court has authority to decide*." *Rengel v. Valley Forge Ins. Co.,* 6th Dist. Ottowa No. OT-03-045, 2004-Ohio-5248, ¶ 10 (emphasis added) (citing *McHenry v. Indus. Comm.,* 68 Ohio App.3d 56, 62, (4th Dist. 1990)). *See also Washington Mut. Bank v. Beatley,* 10th Dist. Franklin No. 06AP-1189, 2008-Ohio-1679, ¶ 8 ("The standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action *cognizable by the forum* has been raised in the complaint" (emphasis added)).

Moreover, it is well-established in Ohio that "[a]s between courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, *to the exclusion of all other tribunals,* to adjudicate upon the whole issue and to settle the rights of the parties." *State ex rel. Racing Guild, Local 304 v. Morgan,* 17 Ohio St.3d 54, 56 (1985) (emphasis added). And, as the Ohio Supreme Court also has made clear, reservations of continuing jurisdiction over the enforceability of settlements, which otherwise result in a final judgment

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prosecution of his claims in any court. *See,* Complaint, ¶¶ 22-23; *Merrill* Final Judgment, ¶ 12.

of dismissal, are fully enforceable under Ohio law. *See, e.g., Infinite Sec. Solutions, LLC v. Karam Properties II,* 143 Ohio St.3d 346, 2015-Ohio-1101, ¶ 25.

Thus, dismissal is the appropriate result when the "jurisdictional priority rule" applies and it is established that another tribunal possesses exclusive jurisdiction over the "whole issue" of which the plaintiff's claims are at least a part. *Rengel* at ¶ 32. *See also, Ashtabula County Airport Auth. v. Rich,* 11th Dist. Ashtabula No. 2013-A-0069, 2014-Ohio-4288, ¶¶ 22-25. Alternatively, when the jurisdictional priority rule applies, a transfer to the court that has priority may also be appropriate. *See, e.g., State ex rel. Taft v. Franklin Cty. Court of Common Pleas,* 81 Ohio St. 3d 1244, 1246 (1998). However, typically the application of the jurisdictional priority rule requires dismissal rather than a transfer of venue. *See, Langaa v. Pauer,* 11th Dist. Geauga No. 2001-G-2405, 2002-Ohio-5603, ¶ 16.

III. ARGUMENT

This Court does not have the power to decide the enforceability of the *Merrill* settlement and final judgment, even if alleged procedural defects gave rise to them. There is no dispute that jurisdiction over the matters raised in Sortino's Complaint was first properly invoked in the Lake County Court of Common Pleas in the *Merrill* case.[3] The exercise of that

[3] Sortino does not question whether the Lake County Court of Common Pleas had jurisdiction to decide the *Merrill* case or even to certify the class that included George Sortino himself, as he acknowledges, *e.g.,* the propriety of the original Count II

jurisdiction resulted in the entry of a final judgment of dismissal, which incorporated a court-approved class settlement.[4] And the final judgment expressly reserved continuing jurisdiction over the enforcement of the settlement itself and over the enforcement of the releases contained in the settlement that barred future claims by class members, including the very claims Sortino now purports to bring in this Court—as well as "other matters arising from or relating [thereto]." *See,* Merrill Final Judgment, ¶ 12. Thus, pursuant to the jurisdictional priority rule, Judge Lucci possess exclusive jurisdiction to decide the matters raised in Sortino's Complaint. Dismissal without prejudice is, therefore, appropriate.

Merely alleging that the *Merrill* settlement and final judgment are not valid and binding as to

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certification in *Merrill,* the finality of the *Merrill* settlement and final judgment, and even their validity as to some class members. Rather, Sortino merely asserts that the decision the Lake County Court rendered in approving the class settlement was in error, because it allegedly violated the procedural rights of certain class members. *See, e.g.,* Complaint, ¶¶ 15-24.

[4] Importantly, under the jurisdictional priority rule, the first court retains exclusive jurisdiction until it has "exhausted its jurisdiction," which is accomplished only by a final judgment that "disposes of all issues before that court." *Brooks v. Brooks,* 10th Dist. Franklin No. 87AP-980, 1988 Ohio App. LEXIS 4372, *6-7 (10 Dist.). When a court retains continuing and exclusive jurisdiction over matters, even after final judgment, it has not exhausted its jurisdiction in a manner that defeats the jurisdictional priority rule. *See, Hardesty v. Hardesty,* 16 Ohio App. 3d 56, 56-58 (10 Dist. 1984). *See also, Saslow v. Saslow,* 104 Ohio App. 157, 166 (2d Dist. 1957)(a court exhausts its jurisdiction only by issuing a final decree "without reservation of jurisdiction").

Sortino—e.g., because of inadequate notice, because a (B)(2) class cannot settle for alleged money "damages" without a right of class members to opt out, *etc.*—does not alter the jurisdictional analysis in any way. Those assertions are mistaken on a number of levels, but more importantly for purposes of this Motion, are precisely the questions over which Judge Lucci has reserved exclusive jurisdiction to decide. *See,* Merrill Final Judgment, ¶ 12. If a party could avoid a reservation of exclusive enforcement jurisdiction by merely alleging that the judgment containing the reservation is not enforceable against them, then such reservations would be a superficial nullity in direct contradiction to what the Ohio Supreme Court has declared. Indeed, ignoring the clear dictates of the *Merrill* final judgment requires either defiance of the Supreme Court's holding in *Infinite* or disregard for its decision in *Morgan*. Either way, Sortino's position is flatly contrary to Ohio law.

Moreover, the *Merrill* reservation of exclusive jurisdiction is not merely procedurally proper and legally binding—it also is practically sensible. This is because the very bases for Sortino's challenges to the validity of the *Merrill* settlement and final judgment are matters that Judge Lucci—and not this or any other court—would have decided in the first instance, had they been raised during the *Merrill* proceedings. It cannot reasonably be disputed that, had Sortino asserted his present objections to the *Merrill* settlement *in this Court* while the *Merrill* case was still pending in Lake County, this Court never would have entertained his arguments—because it so obviously would have lacked the jurisdiction to do so. Judge

Lucci's retention of continuing, post-judgment jurisdiction over those very objections makes the present circumstances legally indistinguishable from that obvious case. *See,* fn. 4, *supra.*

In short, the question in this Motion is not whether Sortino is right in his collateral attacks on the *Merrill* settlement and final judgment—although he is not. Rather, the question is which court has the power to decide *whether* he is right. Sortino's position transparently rests on circular reasoning. He asserts that Judge Lucci's reservation of jurisdiction to decide questions concerning enforcement of the *Merrill* settlement and final judgment is not binding, precisely because the settlement and final judgment are procedurally flawed and thus not enforceable against him.[5] In other words, this Court must assume that Sortino is right in order to conclude that it has the power to decide whether he is right in the first place. It should decline his invitation to defy both sound logic and Ohio law.

IV. CONCLUSION

For the foregoing reasons, this Court should dismiss Sortino's Complaint without prejudice for lack of jurisdiction. In the alternative, this Court should stay

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[5] In an effort to avoid the need for filing this Motion, the parties engaged in written correspondence in which Sortino made clear that he believed Judge Lucci's reservation of jurisdiction to be inapplicable, because of the alleged procedural defects in the *Merrill* settlement and final judgment that he claims render them—including the jurisdictional reservation—unenforceable as to him.

this action pending a transfer of venue to Judge Lucci in the Lake County Court of Common Pleas. Pursuant to Local Rule 4.01, the State Defendants respectfully request oral argument on this Motion.

Respectfully Submitted,

MIKE DEWINE
OHIO ATTORNEY GENERAL

/s/ Daniel C. Gibson
Anne Marie Sferra (0030855)
Daniel C. Gibson (0080129)
Lindsey A. Roberts (0096979)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Phone: (614) 227-2300
Fax: (614) 227-2390
asferra@bricker.com
dgibson@bricker.com
lroberts.bricker.com

Counsel for Defendants State of Ohio, Ohio Department of Natural Resources, and the Director of Ohio Department of Natural Resources

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of April, 2018, a copy of the foregoing DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION OR, IN THE ALTERNATIVE, FOR TRANSFER OF VENUE was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Daniel C. Gibson
Daniel C. Gibson

FRAZZINI EXHIBIT D

IN THE COURT OF COMMON PLEAS
ERIE COUNTY, OHIO

Case No. 2018-CV-0074

Honorable Roger E. Binette

[Filed: May 3, 2018]

STATE OF OHIO EX REL. GEORGE SORTINO,	)
Plaintiff,	)
v.	)
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, ET AL.,	)
Defendants.	)

RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION OR, IN THE ALTERNATIVE, FOR TRANSFER OF VENUE

I. Introduction

On January 31, 2018, a Complaint was filed in this Court by Relator/Plaintiff, George Sortino, on behalf of himself and a class of property owners who did not receive proper notice of a settlement entered into by the Defendants in the Court of Common Pleas in Lake

County, Ohio in *In re Merrill v. ODNR, et al.,* Lake County Case No. 04CV001080.

A class in the *Merrill* case had been, initially, properly certified under Civ.R. 23(B)(2) on June 9, 2006. However by 2012, when the parties decided upon the terms of the settlement (how much the plaintiffs' leaders needed to drop the litigation as will be described herein) the parties' settlement unwittingly, or otherwise, had converted the matter to a class such that, by Ohio law, federal laws and virtually every state law, was required to have been certified under Rule 23(B)(3). For whatever reason this fact was never addressed and no actual notice was ever given to the absent class members, except for those few who actually paid monies because of their submerged land leases with the State, or who had intervened into the litigation. In violation of the Ohio Rules of Civil Procedure and in violation of fundamental federal and state constitutions[1], no class member or putative class member was ever given their individual right to opt out and thereby preserve a separate right to continue to pursue such class member's individual cause of action.

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[1] "No person shall be *** deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Fifth Amendment to the U.S. Constitution.
"No state shall *** deprive any person of life, liberty, or property, without due process of law ***." Fourteenth Amendment to the U.S. Constitution.
"All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Ohio Constitution, Article I, Section 16.

This class of individual owners who are the putative class members in *Sortino,* thus, was deprived of their right to fundamental due process under the law.

Putative class members *cannot be bound,* unless they receive notice and the individual opportunity to opt out of the proposed settlement. *Becherer v. Merrill Lynch, Pierce, Fenner & Smith,* 43 F.3d 1054 (6th Cir. 1995), *aff'd* 131 F.3d 580, 587 (1997) ("In order to be bound by a prior judgment, a nonparty to that judgment must have been represented by a privy").

Defendants now attempt to use the obviously defective *Merrill* Settlement to convince this Court to inappropriately dismiss this pending cause, or, in the alternative, to improperly transfer the *Sortino* case to Lake County.

The relief which Defendants seek is not even available to them, nor should it be granted, because it is procedurally improper. Defendents' faulty arguments in support are erroneous as we will demonstrate.

II. Dismissal of this matter pursuant to Civ.R. 12(B)(1) would be inappropriate as being violative of the state and federal constitutions as well as Ohio's rules of civil procedure.

A. Standard of Review.

Civ .R. 12(B)(1) would permit dismissal if this trial court lacked jurisdiction over the subject matter of the litigation. Under Civ.R. 12(B)(1), lack of subject matter jurisdiction, the question of law is whether the plaintiff has alleged any cause of action for which the court has

authority to decide. *Rengel v. Valley Forge Ins. Co.,* 6th Dist. Ottawa No. OT-03-045, 2004-Ohio-5248, ¶ 10. "A trial court is not confined to the allegations of the complaint when determining its subject matter jurisdiction under Civ.R. 12(B)(1), and it may consider pertinent material without converting the motion into one for summary judgment." *Wash. Mut. Bank v. Beatley,* 10th Dist. Franklin No. 06AP-1189, 2008-Ohio-1679, ¶ 9; *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.,* 48 Ohio St.2d 211, 358 N.E.2d 526, paragraph one of the syllabus (1976).

"The standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint." *State ex rel. Bush,* 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989); *Avco Financial Services Loan, Inc. v. Hale,* 36 Ohio App. 3d 65, 67, 520 N.E.2d 1378 (1987). A trial court's decision to dismiss a case pursuant to Civ.R. 12(B)(1) is reviewed *de novo. Sosnoswsky v. Koscianski,* 8th Dist. No. 106147, 2018-Ohio- 1409, ¶ 7. As such, "all factual allegations in the complaint [must be accepted] as true, and all reasonable inferences must be drawn in favor of the nonmoving party." *Phillips v. Deskin,* 5th Dist. No. 12CA119, 2013-Ohio-3025, ¶ 8; *Byrd v. Faber,* 57 Ohio St.3d 56, 565 N.E.2d 584 (1991).

B. This Court Has Subject Matter Jurisdiction Over the Causes of Action Alleged in the Complaint.

The essence of Defendants' assertion is their insistence that Plaintiff Sortino is bound by the *Merrill* settlement, and that the plaintiffs in that matter

released his claims pursuant to their agreement. This alleged release of all claims, along with their argument of retention of continuing jurisdiction in Lake County to enforce the settlement, according to Defendants, renders this Court incapable of exercising jurisdiction over this matter. If Sortino had released the claims he now asserts in his Complaint, he would no longer have the capacity to raise them again. However, capacity to sue does not challenge the subject matter jurisdiction of a court. *State ex rel. Tubbs Jones v. Suster,* 84 Ohio St.3d 70, 77, 70 I N.E.2d 1002 (1998). "Capacity to sue or be sued does not equate with the jurisdiction of a court to adjudicate a matter; it is concerned merely with a party's right to appear in a court in the first instance." *Country Club Townhouses-North Condominium Unit Owners Assoc. v. Slates,* 9th Dist. Summit No. 17299, 1996 Ohio App. LEXIS 234 (Jan. 24, 1996). "Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court." *Tubbs Jones* at 77. Capacity to sue is not jurisdictional.

"Dismissal pursuant to [Civ.R. 12(B)(1)] focuses on a court's subject matter jurisdiction over the claims raised in the complaint, not the standing or capacity of the plaintiff to bring those claims." *Wash. Mut. Bank v. Beatley,* 10th Dist. Franklin No. 06AP-1189, 2008-Ohio-1679, ¶ 11. This Court clearly has the power to hear and decide the type of claims alleged by Plaintiff Sortino. A dismissal for lack of subject matter jurisdiction would be error. See *Wash. Mut. Bank* at ¶ 11 ("Because standing and capacity to sue do not challenge the subject matter jurisdiction of a court, the trial court erred when it dismissed appellant's

complaint on these grounds pursuant to Civ.R. 12(B)(1).").

As stated in the pleadings, this case is not attacking or challenging the validity of the *Merrill* settlement. It simply alleges that the Stipulation of Settlement and Judgment approving that settlement could not and does not apply to Plaintiff and the putative class members, who likewise did not receive notice and were unaware of their rights.

C. The Retention of Exclusive Jurisdiction of the *Merrill* Case by the Lake County Court of Common Pleas does not Deprive this Court of Jurisdiction to Hear the Claims of Class Members who are not Bound by the Terms of that Settlement.

In the Order and Final Judgment approving the *Merrill* settlement in Lake County, Judge Lucci retained exclusive jurisdiction to *enforce* and *administer* the Judgment and the Stipulation of Settlement entered into by the parties. (Defendants' Exhibit B to Motion to Dismiss at ¶ 12). This retention of jurisdiction does not give Judge Lucci the authority to reopen and modify what was and is a final judgment. *Wilken v. Wachovia Bank,* 6th Dist. No. H-13-020, 2014-Ohio-2840, ¶ 26. Further, a trial court lacks authority to reconsider its final judgment, even if such reconsideration is undertaken to correct an error. *U.S. Bank v. Schubert,* 9th Dist. No. 13CA010462, 2014-Ohio-3868, ¶ 12. Any continuing jurisdiction cannot be used to remake a settlement, later discovered to be defective, nor to correct other errors ascertained after

the judgment achieved finality. Despite any intention of that court, the clause regarding continuing jurisdiction over the *Merrill* settlement does not give Judge Lucci jurisdiction to hear this Sortino matter, because it is a separate, independent cause of action, brought by parties who were not bound by the *Merrill* settlement.

The *Merrill* Court has retained continuing exclusive jurisdiction to decide *enforceability* issues pertaining to that settlement. If Defendants believe that the *Sortino* class is bound by the settlement and wish to invoke the continuing jurisdiction of the Lake County Court of Common Pleas to enforce the settlement, Defendants could move that court to enforce the settlement, asking Judge Lucci for a ruling that Sortino and his counsel cannot litigate the claims in this action that Defendants believe they released. That motion could be ruled on by Judge Lucci without disturbing the pending case at bar. If Judge Lucci agrees that the *Sortino* class members are not bound by the settlement agreement, Plaintiff Sortino remains free to pursue his claim in any court with appropriate venue, which includes Erie County.

In support of their arguments, Defendants cite two decisions, both of which are distinguishable.

In *Saslow v. Saslow,* the issue before the Second District was whether the domestic relations court retained jurisdiction over a separation agreement which was incorporated in the divorce decree. 104 Ohio App. 157, 160, 147 N.E.2d 262 (1957). In that case, a mother of two children obtained a divorce from her abusive husband. The separation agreement prohibited

her from remarrying within three years and gave her use of the homestead. If she remarried within three years, she was to execute a warranty deed to the trustee for 1/3 interest to be given to each of the children. *Id.* at 159. The woman sold the home and purchased another. She then remarried within the three-year window. Upon the former husband's motion that she convey the children's interest to the trustee, the domestic relations court found the woman in contempt and ordered her confined to jail until she executed the transfer. *Id.*

The appellate court determined that the domestic relations court lacked jurisdiction over the matter. *Id.* at 166. "The court had not acquired jurisdiction in the contempt proceeding and was not authorized to punish the wife for contempt for her refusal to execute such conveyance. *Id.* at paragraph three of the syllabus. This case turned on the jurisdiction of the domestic relations court pursuant to statute and the nuances of divorce decree and separation agreement case law.

The only other case cited in support is *Hardesty v. Hardesty,* 16 Ohio App.3d 56, 474 N.E.2d 368 (10th Dist. 1984). This case also involves the custody and support of children in Wood County Juvenile Court and an ensuing divorce in Franklin County. The father later attempted to move the Franklin County Domestic Relations Court to assume jurisdiction of the support and custody issues. That court declined. The appellate court affirmed the denial of jurisdiction by the trial court. *Id.* at 58.

The case at bar does not involve a specific provision of the Ohio Revised Code pertaining to the custody of

children and the Lake County Court of Common Pleas could not reserve jurisdiction after ODNR agreed to pay monetary damages to those individuals who did not have a submerged land lease with the State.

D. Appealability of a Decision Regarding a Civ.R. 12(B)(1) Motion to Dismiss.

In the State of Ohio, political subdivisions enjoy immunity under specific circumstances. When a motion is filed by a political subdivision, such as ODNR, for dismissal of a matter pursuant to Civ.R. 12(B)(6) or (C), the trial court reviews such motion under R.C. 2744.01 et seq., *Political Subdivision Tort Liability*. An appeal of denial of immunity is permitted by R.C. 2744.02(C): "An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order." R.C. 2744.02 was enacted in 2003 and was last amended ten years ago in September of 2007.

While denial of a motion to dismiss is not a final appealable order pursuant to R.C. 2501.02, denial of immunity for a political subdivision is immediately appealable.

When, however the motion to dismiss is not based on an assertion of immunity by the political subdivision, as is the case here, any decision overruling the motion is *not* a final appealable order. While there is much case law on the issue of whether a motion based on R.C. 2744.02(C) is final depending on whether it is based on Civ.R. 12 or Civ.R. 56, those cases all review the central issue of whether the political

subdivision is immune from liability. *Hubbell v. City of Xenia,* 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 13-15. The Supreme Court requires a plain reading of R.C. 2744.02(C). *Id.* at ¶ 24.

> Determination of whether a political subdivision is immune from liability is usually pivotal to the ultimate outcome of a lawsuit. Early resolution of the issue of whether a political subdivision is immune from liability pursuant to R.C. Chapter 2744 is beneficial to both of the parties. If the appellate court holds that the political subdivision is immune, the litigation can come to an early end, with the same outcome that otherwise would have been reached only after trial, resulting in a savings to all parties of costs and attorney fees. Alternatively, if the appellate court holds that immunity does *not* apply, that early finding will encourage the political subdivision to settle promptly with the victim rather than pursue a lengthy trial and appeals. Under either scenario, both the plaintiff and the political subdivision may save the time, efforts, and expense of a trial and appeal, which could take years.

Id. at ¶ 25 quoting with approval *Burger v. Cleveland Hts.,* 87 Ohio St.3d 188, 199-200, 1999-Ohio-319, 718 N.E.2d 912 (Lundberg Stratton, J., dissenting).

"Appellate review under R.C. 2744.02(C) is, however, limited to review of alleged errors involving denial of 'the benefit an alleged immunity from liability'; it does not authorize the appellate court to otherwise review the merits of a trial court's decision to

deny a motion to dismiss." *Windsor Realty & Mgmt., Inc. v. Northeast Ohio Reg'l Sewer Dist.,* 8th Dist. Cuyahoga No. 103635, 2016-Ohio-4865, 68 N.E.3d 327, ¶ 15; R.C. 2744.02(C). "Thus, when appealing a denial of a motion to dismiss based on immunity under R.C. 2744.02(C), a party cannot raise other alleged errors concerning the denial of its motion to dismiss that are based upon other alleged defenses or pleading deficiencies." *Id.* Accord *Riscatti v. Prime Props. Ltd. Partnership,* 137 Ohio St.3d 123, 2013-Ohio-4530, 2013-Ohio-4530, 998 N.E.2d 437, ¶ 20.

The issue reviewed by the Ohio Supreme Court in *Riscatti* is germane to this litigation: "whether a denial of a public subdivision's dispositive motion asserting a statute-of-limitations defense pursuant to R.C. 2744.04 is a final, appealable order." *Id.* at ¶ 2. That case involved a Civ.R. 12(C) motion for judgment on the pleadings. The Court noted that an "appellate court can review only final orders, and without a final order, an appellate court has no jurisdiction." *Id.* at ¶ 18 quoting *Supportive Solutions, LLC v. Electronic Classroom of Tomorrow,* 37 Ohio St.3d 23, 2013-Ohio-2410, 997 N.E.2d 490, ¶ 10. "Although our prior decisions have interpreted R.C. 2744.02(C) broadly in favor of early dismissal, they have always been tethered directly to the defense of immunity, not to other defenses." *Riscatti* at ¶ 20. "[T]he fact that a political subdivision is the party that raises a statute-of-limitations defense does not change the general rule that the ruling on that defense is not a final, appealable order." *Id.* at ¶ 21. Accord *Cunningham v. Star Acad. of Toledo,* 6th Dist. Lucas No. L-12-1272, 2014-Ohio-428, ¶ 29 ("Applying *Riscatti,* we conclude that R.C. 2744.02(C) does not

make the order denying summary judgment in this case a final appealable order on the merits of the negligence claims.").

If this Court were to deny Defendant's motion to dismiss, such judgment would not be a final appealable" order. Defendant's sole basis for dismissal is a claim of lack of jurisdiction pursuant to Civ.R. 12(B)(1).

The Court may very well consider setting a strictly enforced order scheduling class certification and deferring a ruling on the within motion until at or after a decision on class certification. That would promote the palliative objective of avoiding piecemeal litigation, with its attendant enormous toll on time and efforts of the courts and the parties.

III. The Jurisdictional Priority Rule Does Not Apply Under the Factual Circumstances of this Cause.

The jurisdictional priority rule provides that "[a]s between courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties." *State ex rel. Racing Guild of Ohio v. Morgan,* 17 Ohio St.3d 54, 56, 476 N.E.2d 1060 (1985). "If the second case is not for the same cause of action, nor between the same parties, the former suit will not prevent the latter." *State ex rel. Judson v. Spahr,* 33 Ohio St.3d 111, 113, 515 N.E.2d 911 (1987).

Though the application of the rule is generally limited to identical actions, the rule may apply where the causes of action and the requested relief are not the same. *State ex rel. Sellers v. Gerken,* 72 Ohio St.3d 115, 117, 647 N.E.2d 807 (1995). That is, if the claims in both cases are such that each of the actions "comprises part of the 'whole issue' that is within the exclusive jurisdiction of the court whose power is legally first invoked" the jurisdictional priority rule may be applicable. *Racing Guild,* 17 Ohio St.3d at 56.

To determine whether two cases involve the "whole issue" requires a two-step analysis: "First, there must be cases pending in two different courts of concurrent jurisdiction involving substantially the same parties. Second, the ruling of the court subsequently acquiring jurisdiction may affect or interfere with the resolution of the issues before the court where suit was originally commenced." *Michaels Bldg. Co. v. Cardinal Fed. S. & L. Bank,* 54 Ohio App.3d 180, 183, 561 N.E.2d 1015 (8th Dist. 1988). "If the second case is not for the same cause of action, nor between the same parties, the former suit will not prevent the latter. *Sellers,* at 117. The jurisdictional priority rule exists to prevent creating a scenario where two courts or juries could review the same evidence and decide the same questions differently. *Langaa v. Pauer,* 11th Dist. Geauga No. 2001-G-2405, 2002-Ohio-5603, ¶ 13. *See also Wellman v. Salt Creek Valley Bank,* 10th Dist. Franklin No. 06AP-177, 2006-Ohio-4718, ¶ 10 ("The purpose behind the rule of priority is to prevent two courts from issuing disparate judgments addressing the same subject matter between the same parties.").

The jurisdictional priority rule does not apply. There are not two cases pending before two courts of concurrent jurisdiction. There is only one case pending in one single jurisdiction, namely, Erie County. The Lake County Common Pleas Court has already issued a final judgment. A court is deemed to have exhausted its jurisdiction once it decrees a final judgment that disposes of all issues before the court. *Wellman,* 2006-Ohio-4718, ¶ 9, citing *Brooks v. Brooks,* 10th Dist. Franklin No. 87AP-980, 1998 Ohio App. LEXIS 4372 (Nov. 1, 1988). Furthermore, the jurisdiction of the Lake County Clerk of Courts extends only to the class members who had a submerged land lease with ODNR and/or who received notice of the settlement terms. By the very terms of Civ.R. 23, in allowing a settlement for monetary damages from the State of Ohio for individuals who did not have submerged land leases with the State, the Lake County Common Pleas Court carved out all of the other putative class members who did not have either a submerged land lease with the State or who received actual notice.[2] The putative class members in *Sortino* could not have been included in a class action settlement for which they received no

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[2] Some individuals were members of a loosely defined group of property owners that contributed money with which to maintain the Merrill litigation. While that was a noble cause and no one begrudges monies repaid to them, nevertheless, they received compensation that should have been also paid to all members of the Sortino class. "Due process requires, however, that courts adopt procedures to protect the interests of absent class members before purporting to bind them and Civ.R. 23 provides the court with the means to do so." *In re Kroger Co. Shareholders Litigation,* 70 Ohio App.3d 52, 66, 590 N.E.2d 391 (1st Dist. 1990)(intemal cites omitted).

actual notice and no opportunity to opt out of the settlement.

When ODNR settled all of the pending claims in the Lake County Court of Common Pleas under Civ.R. 23(B)(2) and included monetary damages for individual property owners who did not have submerged land leases with it, that settlement did not extend to Sortino nor to his putative class members. Had the parties in *Merrill* entered a settlement under Civ.R. 23(B)(3), Plaintiff Sortino and his putative class members, would have received notice and the opportunity to object and the opportunity to opt out to that settlement. Instead, ODNR and the plaintiffs in *Merrill* entered what was a Civ.R. 23(B)(2) settlement and provided no notice to Sortino and his putative class members aside from those who had entered an appearance in that litigation or had submerged land leases with ODNR. ODNR was fully aware that the state common pleas court could not effect a settlement over Sortino and his putative class members without due process.

Regarding the second step of the analysis of *Michaels Building* – whether a ruling of the second court would "affect or interfere with the resolution of the issues before the court where suit was originally commenced – any decision from this Court regarding Plaintiff and the putative class would not affect or interfere with the *Merrill* settlement. Plaintiff and the putative class herein did not have submerged land leases with the State of Ohio, nor did they have notice and the rights to object and opt out.

"The jurisdictional-priority rule exists to promote judicial economy and avoid inconsistent results." *State*

ex rel. Consortium for Economic & Cmty. Dev. for Hough Ward 8 v. Russo, 151 Ohio St.3d 129, 2017-Ohio-8133, 86 N.E.2d 327; *State ex rel. Dunlap v. Sarko,* 135 Ohio St.3d 171, 2013-Ohio-67, 985 N.E.2d 450, ¶ 9. The two cases must in fact be currently pending for the rule to apply. *Consortium for Economic* at ¶ 11, 12. "A court is deemed to have exhausted its jurisdiction once it decrees a final judgment that disposes of all issues before the court." *Wellman v. Salt Creek Valley Bank,* 10th Dist. Franklin No. 06AP-177, 2006-Ohio-4718, ¶ 9; *Brooks v. Brooks,* 10th Dist. Franklin No. 87AP-980 (Nov. 1, 1988).

A trial court may retain jurisdiction to enforce a settlement agreement. *Infinite Sec. Solutions, L.L.C. v. Karam Props., II,* 143 Ohio St.3d 346, 2015-Ohio-1101, 37 N.E.3d 1211, ¶ 2. "A trial court has jurisdiction to enforce a settlement agreement after a case has been dismissed only if the dismissal entry incorporated the terms of the agreement or expressly stated that the court retained jurisdiction to enforce the agreement." *Id.* at the syllabus.

Retaining continuing jurisdiction to enforce a settlement is not the same, however, as having a pending action before a court. In Lake County, there is no further jurisdiction to exercise over the *Merrill* case unless a new complaint or motion is filed with that court. Stated another way, no matter is pending before the court. According to Black's Law Dictionary, "pending" means the following

> Begun, but not yet completed; during; before the conclusion of; prior to the completion of;

> unsettled; undetermined; in process of settlement or adjustment.
>
> Awaiting an occurrence or conclusion of action; period of continuance or indeterminacy. Thus, an action or suit is "pending" from its inception until the rendition of final judgment.
>
> An action is "pending" after it is commenced by either filing a complaint with the court of by the service of a summons.

Blacks' Law Dictionary 1134 (6th Ed. 1990).

Even if Defendants were to attempt to invoke the continuing jurisdiction of the Lake County Court of Common Pleas, by a motion to enforce the *Merrill* settlement, the causes of action would be different. Plaintiff Sortino commenced an action for a declaratory judgment in Erie County as to the unconstitutional taking of his waterfront property by ODNR. Defendants in Lake County would be seeking a ruling from the Lake County Court as to the scope of the releases in the *Merrill* settlement, given the lack of notice to Plaintiff and the members of the class he seeks to represent. Sortino and his putative class members are those land owners who were *not included in the Merrill* case due to lack of proper notice of the settlement, in a blatant action without regard to the state and federal constitutions requirements of due process.. Sortino and his group are a different group of class members than those who are members of the *Merrill* class who are bound by the settlement. Therefore, the causes of action and the parties would not be the same, even if a motion to enforce the settlement would be filed in Lake County..

The Lake County trial court did not resolve the issues raised in the *Sortino* complaint, so Erie County would not be revisiting the same issues. The issue as to whether there was an unconstitutional taking of class members' land by ODNR is not now before the Lake County court. The claims in *Merrill* were resolved by agreement of the parties; however, due to procedural deficiencies and the constitutional violations, the litigation was resolved only for a subgroup of the alleged class.

Even if an action to enforce the *Merrill* settlement were to be commenced in Lake County, it would be an error to dismiss this action based on the jurisdictional priority rule. That rule is clearly inapplicable here. This Court has jurisdiction over the only pending action alleging an unconstitutional taking of lakefront property owned by putative Class Members without submerged land leases. There is nothing pending in Lake County to take jurisdictional preference.

IV. Transfer of venue to Lake County Court of Common Pleas is not permitted by the Civil Rules.

Defendants' suggestion that it would be proper for this Court to transfer this case to Judge Lucci in Lake County is premised on faulty logic. The issue raised by Defendants is not whether venue is proper in Erie County (it is), but whether the claims being asserted in this case were extinguished as part of the *Merrill* settlement in Lake County.

Civ.R 3 deals with the proper venue of an action. Venue is not jurisdictional. Civ.R. 3(C) addresses when

and how to change the venue of a pending action. Civ.R. 3(C)(1) states:

> When an action has been commenced in a county other than stated to be proper in division (B) of this rule, upon timely assertion of the defense of improper venue as provided in Civ.R. 12, the court shall transfer the action to a county stated to be proper in division (B) of this rule.

Venue is proper in "[a] county in which the defendant conducted activity that gave rise to the claim for relief (Civ.R. 3(B)(3)); [a] county in which the property, or any part of the property, is situated if the subject of the action is real property (Civ.R.3(B)(5)); and, [t]he county in which all or part of the claim for relief arose * * * (Civ.R. 3(B)(6)). Erie County is a proper venue for this action.

A transfer of venue is authorized only if the case has been commenced in an improper venue. *Langaa,* 2002-Ohio-5603 at ¶ 16. As alleged in the Complaint, Erie County is a proper venue for this action. Because venue is proper in this county, this case does not meet the first requirement of improper venue to allow for a transfer of venue to a different county.

V. Conclusion

This Court has jurisdiction to hear the claims asserted by Plaintiff Sortino. The jurisdictional priority rule does not apply due to the procedural posture of this action. This case cannot be transferred to Lake County, as venue is appropriate in Erie County, as stated in the Complaint. This matter should remain and be heard in Erie County.

Respectfully submitted by:

/s/ Margaret M Murray
Dennis E. Murray, Sr., Esq. (0008783)
dms@murrayandmurray.com
Margaret M. Murray, Esq. (0066633)
mmm@murrayandmurray.com
Donna J. Evans, Esq. (0072306)
dae@murrayandmurray.com
MURRAY & MURRAY CO., L.P.A .
111 East Shoreline Drive
Sandusky, OH 44870
Telephone: 419-624-3000
Facsimile: 419-624-0707

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3rd day of May, 2018, the foregoing *Response to Defendants' Motion to Dismiss for Lack of Jurisdiction or, in the Alternative, for Transfer of Venue* was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

/s/ Margaret M. Murray
Margaret M. Murray (0066633)
MURRAY & MURRAY CO., L.P.A.

Attorney for Plaintiff

FRAZZINI EXHIBIT E

**IN THE COURT OF COMMON PLEAS,
ERIE COUNTY, OHIO**

Case No. 2018 CV 0074

Judge BINETTE

[Filed: May 25, 2018]

STATE OF OHIO *ex rel.* George Sortino,	)
Relator/Plaintiff,	)
vs.	)
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, *et al.,*	)
Respondents/Defendants.	)

ORAL ARGUMENT REQUESTED

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS FOR LACK OF JURISDICTION OR, IN THE ALTERNATIVE, FOR TRANSFER OF VENUE

I. INTRODUCTION

Plaintiff/Relator, State of Ohio *ex rel.* George Sortino, ("Sortino") expressly acknowledges that "[t]he *Merrill* Court has retained continuing exclusive jurisdiction to decide *enforceability* issues pertaining to

[the *Merrill*] [S]ettlement." Response to Defendants' Motion to Dismiss for Lack of Jurisdiction or, in the Alternative, for Transfer of Venue ("Sortino Resp.") at 5. Thus, it is unclear what issue *material to the present motion to dismiss* remains in dispute in light of this acknowledgment. Sortino's own Complaint explicitly recognizes that the enforceability of *Merrill* against him is an issue that is part and parcel of the claims he has asserted in this Court. Complaint at ¶¶ 22-24. While most of Sortino's brief is dedicated to arguing why the enforceability issues should be decided in his favor, what he fails to provide is any legitimate reason why *this Court* has the power to decide those issues at all.

This Court should dismiss Sortino's Complaint without prejudice, because the enforceability of the *Merrill* Settlement and Final Judgment against him is a central element of Sortino's claims, and because Sortino has acknowledged that Judge Lucci expressly reserved continuing and exclusive jurisdiction to decide that issue. Any other result—any conclusion that Sortino can pursue his claims in this Court, which necessarily entails litigating the issue of the enforceability of *Merrill* against him—would be predicated upon circular reasoning, (deciding the merits of the issue before deciding who has the power to decide the issue), and would have the practical effect of completely nullifying the authority of Ohio courts to retain exclusive jurisdiction to enforce settlement agreements in the future.[1]

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[1] Contemporaneously with this Reply Brief, Defendants have filed a Motion to Stay Proceedings, In the Alternative. That Motion

II. ARGUMENT

A. The enforceability of the *Merrill* Settlement and Final Judgment are not before this Court on Defendants' Motion

The only question that this motion presents to this Court is whether Sortino's Complaint should be dismissed under Civ. R. 12(B)(1) because, pursuant to the jurisdictional priority rule, this Court lacks the power to adjudicate his claims. Defendants unquestionably do not assert that dismissal is required because *Merrill* is, in fact, enforceable against Sortino. *See,* Sortino Resp. at 4 (erroneously describing the "essence of Defendants' assertion" in this motion). That argument could be advanced only in a motion predicated on *res judicata/collateral* estoppel grounds. Instead, Defendants here have simply argued that Sortino cannot pursue his claims in this Court, because they are explicitly predicated on the unenforceability of the *Merrill* Settlement and Final Judgment, and because Judge Lucci has validly and exclusively reserved jurisdiction to decide whether and in what

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requests a stay of this action while the enforceability of *Merrill* against Sortino is decided in Lake County, in the event this Court is not inclined to grant Defendants' Motion to Dismiss. However, the reason that Defendants are entitled to dismissal of Sortino's Complaint, and not merely a stay, is that his claims cannot be adjudicated at all without addressing the enforceability of *Merrill* against him. As a result, it is not merely the discrete issue of enforceability, but the very claims of which the enforceability question is an indispensable element, that must proceed in Judge Lucci's Court. *See,* section II(B), *infra.*

respect the *Merrill* Settlement and Final Judgment are enforceable.

In response to Defendants' simple and straightforward jurisdictional challenge, Sortino advances a number of *non sequiturs*. First, despite Sortino's suggestion, Defendants have not moved to dismiss on the basis of Sortino's lack of "capacity to sue." Sortino Resp. at 4. The present Motion simply asserts that dismissal is required, because only Judge Lucci has the power to decide *whether* Sortino has the capacity to sue for the claims asserted. As a result, Sortino's first argument—asserting that this Court possesses subject matter jurisdiction over his claims generally, as distinct from his capacity to sue—is immaterial.

In fact, Defendants can acknowledge, for the sake of argument, that apart from the jurisdictional priority rule, this Court would have subject matter jurisdiction over Sortino's claims. Indeed, it is only when both courts in question *do* possess subject matter jurisdiction that application of the jurisdictional priority rule even arises. *State ex rel. Racing Guild, Local 304 v. Morgan,* 17 Ohio St.3d 54, 56 (1985) (referring to courts of "concurrent jurisdiction"). The "lack" of subject matter jurisdiction in such cases is solely the product of the competing and prior-invoked jurisdiction of the first court, not a theoretical lack of general jurisdiction over the claims or subject matter in the second court. *Id.* Sortino's first argument is a red herring.

Second, Sortino argues that Judge Lucci's continuing jurisdiction cannot be used to reopen and

modify the *Merrill* Final Judgment. Sortino Resp. at 5. But Defendants aren't seeking to reopen or modify the *Merrill* Settlement or Final Judgment. Sortino simply argues that they must do so—and legally cannot—in order to make the outcome in *Merrill* validly apply to him. *Id.* This argument is, once again, predicated entirely on Sortino's assertion that he is not bound by the *Merrill* Settlement and Final Judgment in the first place—which is the very question that Judge Lucci has retained exclusive jurisdiction to decide.

The reason that Judge Lucci's reservation of jurisdiction requires dismissal of Sortino's Complaint is not *because* Sortino is bound by the *Merrill* Settlement and Final Judgment—although he is—but rather, it is because Sortino's claims—as even he has acknowledged—are expressly predicated upon and inextricably intertwined with the *Merrill* enforceability questions that this Court lacks jurisdiction to decide. *See,* Complaint, ¶¶ 22-23. *See also,* section II(B), *infra* (discussing the jurisdictional priority rule and the "whole issue" doctrine). Sortino's inability to avoid making the enforceability argument at every turn, even in response to a limited, jurisdictional motion, simply illustrates the point.

However this Court ultimately decides the present motion, it should not embrace Sortino's mischaracterization of Defendants' position in order to reach its decision. Judgment are meritless—but they are not presently before this Court. And simply declaring that Sortino is *not* bound by *Merrill* would not establish this Court's authority to answer the enforceability question in the first place; it would

simply *beg* the question of which court had the power to decide whether Sortino is right to begin with.

B. The jurisdictional priority rule applies and prevents this Court from adjudicating Sortino's claims

In addition to mischaracterizing Defendants' position and the central issue in this motion, Sortino appears to make three arguments against application of the jurisdictional priority rule in this case. Each is without merit and is addressed in turn below.

First, Sortino argues that the rule does not apply, because the Final Judgment in *Merrill* means that there are *not two cases pending* in different courts. Sortino Resp. at 11, 13. But Sortino's semantically cramped view of a "pending" case ignores Ohio case law and would have the practical effect of eliminating any court's ability to retain jurisdiction over the enforcement of settlement agreements after final judgment. Ohio law is clear that a pending case exists for jurisdictional priority purposes when the first-invoked jurisdiction has not yet been "exhausted," and that such jurisdiction is not exhausted unless a final judgment is rendered that disposes of *all* issues and reserves jurisdiction over *none*.

Indeed, while distinguishing the cases cited by Defendants on factual grounds *(see, e.g.,* Sortino Resp. at 6-7), Sortino offers no response to the clear legal principles that those cases stand for, namely that under the jurisdictional priority rule, the first court retains exclusive jurisdiction until it has "exhausted its jurisdiction," which is accomplished only by a final

judgment that "disposes of all issues before that court," *Brooks v. Brooks,* 10th Dist. Franklin No. 87AP-980, 1988 Ohio App. LEXIS 4372, *6-7 (Nov. 1, 1988), and that a court, therefore, exhausts its jurisdiction only by issuing a final decree "*without reservation* of jurisdiction." *Saslow v. Saslow,* 104 Ohio App. 157, 166 (2d Dist. 1957)(emphasis added). *See also, Hardesty v. Hardesty,* 16 Ohio App. 3d 56, 56-58 (10th Dist. 1984). That these cases involved divorce proceedings or custody disputes does not alter their legal conclusions about the limits of jurisdictional priority and the meaning of jurisdictional exhaustion.

What is more, Sortino offers no response to the practical implications of his theory of jurisdictional priority with respect to enforcement of post-judgment settlement agreements. As Defendants made clear in their motion, reservations of jurisdiction to enforce settlement agreements are utterly meaningless if the jurisdictional priority rule doesn't apply to them, since the only instance in which a reservation matters is when more than one court might possibly exercise jurisdiction over their enforcement. *Morgan* at 56. Declining to apply the jurisdictional priority rule here, because no case is "pending" in Lake County, requires outright defiance of the Ohio Supreme Court's declaration in *Infinite Sec. Solutions, LLC v. Karam Properties II,* 143 Ohio St.3d 346, 2015-Ohio-1101, which holds that reservations of jurisdiction to enforce settlement agreements after final judgment are fully enforceable in Ohio.

Second, Sortino argues that the jurisdictional priority rule does not apply here, because the

competing jurisdictions would not be hearing *the same causes of action.* Sortino Resp. at 13. That is, he argues that his claims are distinct from and would raise different issues than would a motion to enforce settlement filed in Judge Lucci's court. *Id.* But this misconceives the "same claim" requirement and fails to recognize the "whole issue" element of the jurisdictional analysis. As Sortino acknowledges, the very purpose of the jurisdictional priority rule is to "prevent two courts from issuing disparate judgments addressing the same subject matter between the same parties." Sortino Resp. at 11 (quoting *Wellman v. Salt Creek Valley Bank,* 10 Dist. Franklin No. 06AP-177, 2006-Ohio-4718, ¶ 10).

Sortino first assumes that the jurisdiction of Lake County can be invoked only by the filing of a motion to enforce the *Merrill* settlement, when in reality, the law is clear that its jurisdiction was invoked back in 2004 when the *Merrill* complaint was filed. Sortino Resp. at 13. That jurisdiction *continues, i.e.,* has not been "exhausted," because Judge Lucci reserved exclusive jurisdiction over enforcement of the *Merrill* Settlement—and it continues over all of the issues and parties in the *Merrill* case. *See, Brooks* and *Saslow, supra.* Moreover, by misunderstanding the nature of retained jurisdiction, Sortino then misapplies the "whole issue" doctrine as well. As the Ohio Supreme Court articulated just two weeks ago, jurisdictional priority attaches not just when the *claims* are the same, but when "the cases present *part* of the same *whole issue*." *In re Adoption of MG.B.-E.,* 2018-Ohio-1787, ¶ 25 (citing *State ex rel. Otten v. Henderson,* 129

Ohio St.3d 453, 2011-Ohio-4082, ¶ 24, 29)(emphasis added).

In short, no court can exercise jurisdiction over Sortino's claims without making a determination as to whether his claims were released as part of the *Merrill* Settlement and Final Judgment. As a result, "the cases present part of the same whole issue" for adjudication, and Judge Lucci's reservation of exclusive and continuing jurisdiction over that issue makes the jurisdictional priority rule fully applicable here.

Third and finally, Sortino argues that the rule does not apply, because the two actions are *not with respect to the same parties*. Sortino Resp. at 11. But this argument is merely another permutation on the same, circular reasoning discussed above, *i.e.,* that procedural deficiencies mean that Sortino is not bound by the *Merrill* Settlement and Final Judgment, and therefore he could not have been a party at all to *Merrill* for purposes of the jurisdictional priority rule. *Id.* at 11. Not only is the argument circular, it is in direct conflict with the clear and unmistakable record and with Sortino's own acknowledgment that he was, in fact, a properly certified class member and party to the *Merrill* proceedings. Complaint, ¶ 22. Specifically, it is one thing to say that Sortino cannot be legally bound by an allegedly flawed settlement or judgment; it is quite another to say that "the Lake County Court carved out" of the *Merrill* Settlement all class members "who did not have submerged land leases with the State...," even though it plainly did not. Sortino Resp. at 11. Sortino makes a legal argument dressed up as a statement of fact that is transparently false.

Indeed, it is beyond dispute that Sortino *is* a party to the Settlement and Final Judgment. The *Merrill* Final Judgment specifically "incorporates by reference the definitions in the Stipulation [of Settlement]...," and binds all members of the Settlement Class to its terms. FJ at ¶¶ 1, 4. The *Merrill* Settlement itself defines the "Parties" to it as "Plaintiffs and Defendants," defines Plaintiffs as "OLG [Ohio Lakefront Group] and the Settlement Class," and defines the "Settlement Class" as "all persons, as defined in R.C. 1506.01(D), excepting the State 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." It carves out no one.[2]

By his own allegations, Sortino is and was at all relevant times "an owner of record of certain real property abutting Lake Erie...in Erie County, Ohio," and he seeks to represent a class of "private littoral owners of parcels of real property abutting Lake Erie within the State of Ohio," whom he argues are not subject to the Settlement on various procedural grounds. Complaint at ¶¶ 2, 24. As a result, Sortino clearly falls within the definition of the *Merrill*

---

[2] Unlike some class settlements under Civ. R. 23(B)(3), *e.g.,* the Settlement Class in *Merrill* did not define the class according to who received notice and/or did not opt out. While Sortino asserts that such failure was a fatal procedural flaw, it does not alter the reality that, as defined, the class bound by the Settlement and Final Judgment unquestionably includes him.

"Settlement Class" and the definition of "Plaintiffs." And as the *Merrill* Court declared in its Final Judgment, "it is hereby determined that *all* members of the Settlement Class are *bound* by this Judgment entered herein," and that "the Settlement embodied in the Stipulation is hereby approved *in all respects*...." Final Judgment at ¶¶ 4, 6 (emphases added). Whether or not Sortino believes he has legal arguments as to why he should not be bound, it is beyond reasonable dispute that the *Merrill* Settlement and Final Judgment purport to bind him as a party.[3]

This action and *Merrill* are both "pending"; they involve the same claims, or at least, present "part of the same whole issue"; and they involve the same parties. As a result, the jurisdictional priority rule applies, and dismissal of Sortino's claims without prejudice is appropriate.

III. CONCLUSION

As Defendants observed in their motion, the question before the Court is not whether Sortino is right in his collateral attacks on *Merrill,* but rather which court has the power to decide *whether* he is right. Because Sortino acknowledges that Judge Lucci validly retained exclusive jurisdiction over the

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[3] Sortino implicitly recognizes this incoherence in equating what "is" with what "ought to be," (*see, e.g.,* stating the *Merrill* Settlement both "could not apply" and "does not apply"), when he waffles back and forth between asserting that he "is not attacking or challenging the validity of the *Merrill* [S]ettlement" on the one hand (p. 5), and asserting, on the other hand, that the Settlement is "obviously defective" and "deprived [class members] of their right to fundamental due process under the law" (p. 2).

enforceability of the *Merrill* Settlement and Final Judgment, which issue is an indispensable element of his claims in this case, this Court should dismiss Sortino's Complaint without prejudice for lack of jurisdiction. Pursuant to Local Rule 4.01, the State Defendants respectfully request oral argument on this Motion.

Respectfully Submitted,

MIKE DEWINE
OHIO ATTORNEY GENERAL

/s/ Daniel C. Gibson
Anne Marie Sferra (0030855)
Daniel C. Gibson (0080129)
Lindsey A. Roberts (0096979)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Phone: (614) 227-2300
Fax: (614) 227-2390
asferra@bricker.com
dgibson@bricker.com
lroberts.bricker.com

Counsel for Defendants State of Ohio, Ohio Department of Natural Resources, and the Director of Ohio Department of Natural Resources

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th day of May, 2018, a copy of the foregoing DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS FOR LACK OF JURISDICTION OR, IN THE ALTERNATIVE, FOR TRANSFER OF VENUE was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Daniel C. Gibson
Daniel C. Gibson

FRAZZINI EXHIBIT F

**IN THE COURT OF COMMON PLEAS,
ERIE COUNTY, OHIO**

Case No. 2018 CV 0074

Judge BINETTE

[Filed: May 25, 2018]

STATE OF OHIO *ex rel.* George Sortino,	)
Relator/Plaintiff,	)
vs.	)
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, *et al.,*	)
Respondents/Defendants.	)

**DEFENDANTS' MOTION TO STAY,
IN THE ALTERNATIVE**[1]

Now come Respondents/Defendants State of Ohio, Department of Natural Resources, James Zehringer, Director of Ohio Department of Natural Resources, and State of Ohio, (the "Defendants" or "State Defendants"), by and through counsel and hereby move the Court for

[1] Defendants seek a stay of this action only in the event this Court declines to grant Defendants' Motion to Dismiss the Complaint, which motion is now fully briefed and pending a decision.

a stay of all proceedings in this matter, pending final resolution of the Motion to Enforce Settlement and for Civil Contempt contemporaneously filed by the State Defendants against Plaintiff/Relator, State of Ohio *ex rel.* George Sortino, ("Sortino") in Lake County in the case of *In re Merrill v. ODNR, et al.,* Lake Case No. 04CV001080. A Memorandum in Support of this Motion is attached.

Respectfully Submitted,

MIKE DEWINE
OHIO ATTORNEY GENERAL

/s/ Daniel C. Gibson
Anne Marie Sferra (0030855)
Daniel C. Gibson (0080129)
Lindsey A. Roberts (0096979)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Phone: (614) 227-2300
Fax: (614) 227-2390
asferra@bricker.com
dgibson@bricker.com
lroberts.bricker.com

Counsel for Defendants State of Ohio, Ohio Department of Natural Resources, and the Director of Ohio Department of Natural Resources

MEMORANDUM IN SUPPORT

Defendants request a stay of these proceedings, in the event this Court declines to grant Defendants' Motion to Dismiss Sortino's Complaint, because Defendants' Motion to Enforce Settlement and for Civil Contempt contemporaneously filed in Lake County against Sortino may be fully dispositive of the claims asserted in this action. A true and accurate copy of the Motion to Enforce Settlement and for Civil Contempt submitted for filing in Lake County on the same date as this filing is attached hereto as Exhibit A, without the attached exhibits due to size concerns.

While Defendants believe that dismissal without prejudice of Sortino's Complaint is the proper result, at a minimum; a stay is appropriate under the circumstances, particularly in light of Sortino's acknowledgment that the Lake County Court did, indeed, "retain[ ] continuing exclusive jurisdiction to decide *enforceability* issues pertaining to [the *Merrill]* [S]ettlement." *See,* Sortino Brief in Opposition to Defendants' Motion to Dismiss at 5 (emphasis *sic*). In fact, in light of that acknowledgment, on May 14, 2018, Defendants, by and through counsel, proposed withdrawal of their pending Motion to Dismiss in exchange for Sortino's consent to a stay of these proceedings pending final resolution of the Defendants' motion in Lake County. Sortino declined to consent. As a result, Defendants now move this Court for that eminently reasonable relief.

The power to grant stays is "[i]nherent within a court's jurisdiction, and essential to the orderly and efficient administration of justice[.]" *State v.*

Hochhausler, 76 Ohio St. 3d 455, 464 (1996); *see State ex rel. Smith v. Friedman,* 22 Ohio St. 2d 25, 26 (1970). "This authority flows from the inherent power of the courts to control their dockets." *Kovar v. Latosky,* 11th Dist. Lake No. 2002-L-037, 2003-Ohio-1749, ¶ 15 (citing *Hochhausler,* 76 Ohio St. 3d at 464). "The determination of whether to issue a stay of proceedings generally rests within the court's discretion and will not be disturbed absent a showing of an abuse of discretion." *State ex rel. Verhovec v. Mascio,* 81 Ohio St. 3d 334, 336 (1998). "Among the factors that courts have held warrant a stay are the efficiency and judicial economy that results from staying matters pending resolution of potentially dispositive developments." *Id.* (citing *State ex rel. Zellner v. Bd. of Educ. of Cincinnati,* 34 Ohio St. 2d 199, 202, 297 (1973)).

Defendants have moved the Lake County court to enforce the settlement and final judgment entered in *In re Merrill v. ODNR, et al.,* Lake Case No. 04CV001080, as well as for an order of civil contempt, and for an order requiring Sortino to dismiss his claims in this action with prejudice. If Defendants' motion to enforce the settlement is granted, it will be entirely dispositive of this action, and any further proceedings in this action will have been an unnecessary and potentially costly expenditure of the resources of this Court and of the parties. Moreover—and especially because Judge Lucci has the sole and exclusive power to enforce the injunction in the *Merrill* Final Judgment, which expressly prohibits the prosecution of claims released in the *Merrill* Settlement by class members—allowing Sortino to proceed with the prosecution of his claims in this Court while Defendants' Motion is pending in Lake

County would license Sortino's continuing act of contempt while the issuing court determines the scope and applicability of its own injunction. *See,* Exhibit A at 13-14.

Finally, Sortino will not be prejudiced by the issuance of a stay of these proceedings. The claims he asserts are claims that were already litigated for over a decade in the *Merrill* action. Further delay while the threshold question of their legal viability is determined is entirely appropriate, and there is neither immediacy of need for discovery or the substantive relief that he claims to seek. Moreover, whether or not Sortino ultimately prevails in his collateral attacks on the procedural adequacy of the *Merrill* Settlement and Final Judgment, nothing can be gained by permitting him to force this Court and the State Defendants into protracted and costly re-litigation of those claims while his very right to do so in the first place remains pending in the one court that Sortino acknowledges possess the jurisdiction to make that decision. Indeed, if it were this Court, rather than Lake County, that had exclusive jurisdiction to decide the enforceability of *Merrill* against Sortino, that determination still should be made before his claims proceed on the merits.

Defendants respectfully request a stay of this action pending a final decision on their Motion to Enforce Settlement and for Civil Contempt filed in Lake County, although only in the event this Court declines to grant Defendants' pending Motion to Dismiss. Such a stay would be warranted in light of this Court's inherent power to issue stays (*Kovar,* at ¶ 15) and as a result of "the efficiency and judicial economy that

results from staying matters pending resolution of potentially dispositive developments." *State ex rel. Verhovec* at 336.

Respectfully Submitted,

MIKE DEWINE
OHIO ATTORNEY GENERAL

/s/ Daniel C. Gibson
Anne Marie Sferra (0030855)
Daniel C. Gibson (0080129)
Lindsey A. Roberts (0096979)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Phone: (614) 227-2300
Fax: (614) 227-2390
asferra@bricker.com
dgibson@bricker.com
lroberts.bricker.com

Counsel for Defendants State of Ohio, Ohio Department of Natural Resources, and the Director of Ohio Department of Natural Resources

CERTIFICATE OF SERVICE

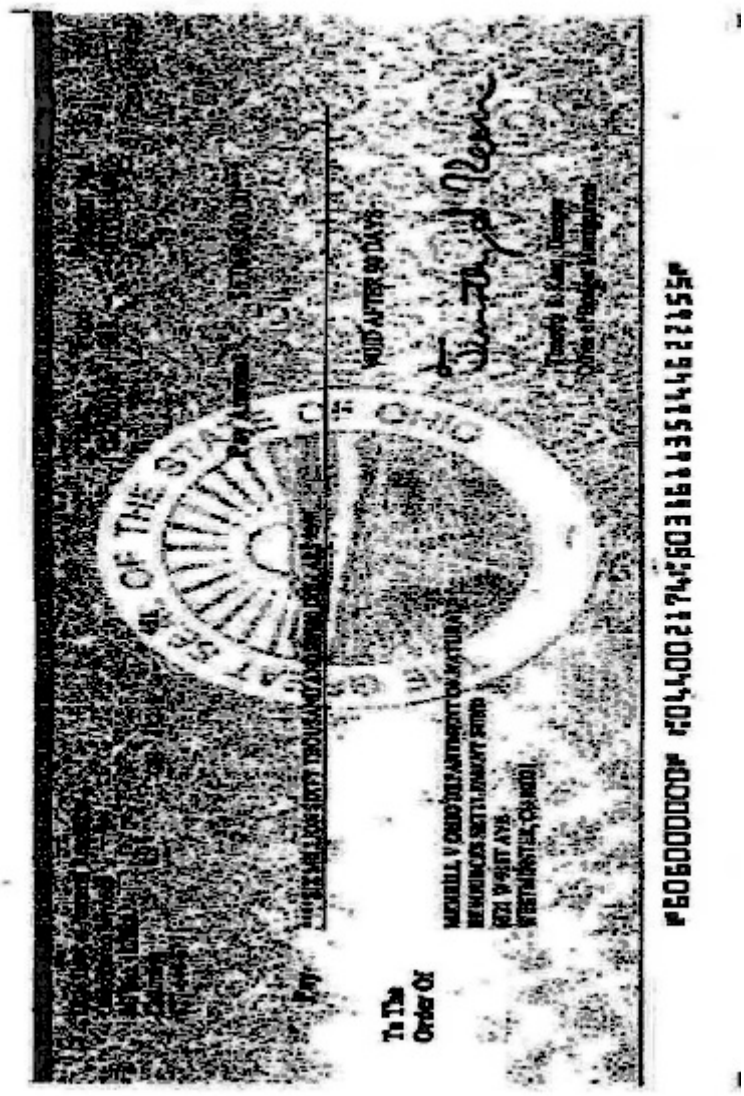
The undersigned hereby certifies that on the 25th day of May, 2018, a copy of the foregoing DEFENDANTS' MOTION TO STAY, IN THE ALTERNATIVE was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Daniel C. Gibson
Daniel C. Gibson

FRAZZINI EXHIBIT G

[Dated: December 8, 2016]

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



AKNOWLEGMENT

I hereby acknowledge receipt of the original check imaged above.

ACCEPTANCE:

/s/

Print Name: /s/

Date: 12.08.16

Calfee, Halter & Griswold LLP
1200 Huntington Center
41 South High Street
Columbus, Ohio 43215-3465

APPENDIX J

IN THE COURT OF COMMON PLEAS
ERIE COUNTY, OHIO

CASE NO. 2018-CV-

JUDGE

[Filed: January 31, 2018]

STATE OF OHIO	)
ex rel. George Sortino	)
1210 Sycamore Line	)
Sandusky, OH 44870	)
	)
Relator/Plaintiff,	)
	)
v.	)
	)
STATE OF OHIO, DEPARTMENT	)
OF NATURAL RESOURCES	)
c/o James Zehringer, Director	)
2045 Morse Road	)
Columbus, OH 43229	)
	)
and	)
	)
JAMES ZEHRINGER, DIRECTOR	)
Ohio Department of Natural Resources	)
2045 Morse Road	)
Columbus, OH 43229	)
	)

and)
)
STATE OF OHIO)
c/o John Kasich, Governor)
77 South High Street, 30th Floor)
Columbus, OH 43215)
)
ALSO SERVE:)
MIKE DEWINE)
ATTORNEY GENERAL)
30 E. Broad Street, 14th Floor)
Columbus, OH 43215)
)
Respondents/Defendants.)
_____)

COMPLAINT FOR DECLARATORY JUDGMENT, MANDAMUS AND OTHER RELIEF

Dennis E. Murray, Sr., Esq. (0008783)
dms@murrayandmurray.com
Margaret M. Murray, Esq. (0066633)
mmm@murrayandmurray.com
Donna J. Evans, Esq. (0072306)
dae@murrayandmurray.com
MURRAY & MURRAY CO., L.P.A.
111 East Shoreline Drive
Sandusky, OH 44870
Telephone: 419-624-3000
Facsimile: 419-624-0707
Attorneys for Plaintiffs

PARTIES

1. This action arises from the actions and inactions of the Ohio Department of Natural Resources ("ODNR"), acting on behalf of the State of Ohio, by which they have unconstitutionally and unlawfully asserted ownership and possession of the private property of Ohio citizens abutting Lake Erie. In the past ODNR had intentionally and willfully misrepresented to property owners and to the public that the State of Ohio owns a part of their properties, and ODNR had persisted in this campaign of falsehoods despite knowing that it was in conflict with all Ohio laws, with published opinions of the Attorney General of Ohio and the Ohio and U.S. Constitutions.

2. Relator George Sortino ("Relator", "Plaintiff" or "Sortino") is, and at all times pertinent to this cause of action, was an owner of record of certain real property abutting Lake Erie. His property is located in Erie County, Ohio.

3. Relator commences and will maintain this litigation as a named relator/plaintiff on behalf of his putative class hereinafter further set forth.

4. Respondents/Defendants are the ODNR, its Director, James Zehringer and the State of Ohio (collectively "ODNR").

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action on the basis that Relator is a resident of Ohio and the sole relief sought by Relator is a declaratory judgment and other equitable relief.

6. Venue is proper in this Court because the claims of Relator arose in Erie County, Ohio. Relator resides in Erie County, Ohio, and Erie County, Ohio is the county in which the defendant, ODNR, conducted activity that gave rise to the claim for relief

BACKGROUND

7. The first section of the first article of the Bill of Rights of the Ohio Constitution proclaims the inalienable right of people in this state to acquire, possess, and protect property. The Ohio Constitution further prohibits the state from taking private property for a public use without first paying compensation to the property owner. The United States Constitution contains equivalent provisions. As well the 14th Amendment to the United States Constitution prohibits the conduct of ODNR complained of, herein.

8. Legal title to many parcels of real property abutting Lake Erie have been held in private ownership since before Ohio was admitted into the Union as a state in 1803. Since that time, Ohio law has recognized and protected the inalienable property rights of those holding legal title to these parcels, for purposes of this litigation known as "upland" or "littoral" owners.

9. For over 200 years, Ohio law has recognized the property rights of littoral owners, both with regard to the ownership in fee simple of the upland property as defined by the owner's deed or original patent and also as to the rights – known as littoral rights – such property owners have to access and use of the adjoining waters of Lake Erie. Ohio law also has long recognized

that the lakeward property line of a littoral owner whose ownership extends to Lake Erie is a "moveable freehold" in that such property line can move either lakeward or landward by virtue of accretion, erosion, or reliction. The property owned by the littoral Class Owners abuts the submerged lands of Lake Erie, title to which, together with the waters of Lake Erie and their contents, is held in trust for the benefit of the people of Ohio for the public uses of navigation, water commerce, fishing and fisheries.

10. This concept of trust ownership by the State of the waters of Lake Erie and the soil beneath currently is codified in Section 1506.10 of the Ohio Revised Code and is expressly made subject to the property rights of littoral owners. That section also designates ODNR "as the state agency in all matters pertaining to the care, protection, and enforcement of the state's rights designated in this section."

11. Under cover of its "coastal management program," ODNR had abused it authority by willfully ignoring the boundary between private and public ownership fixed by Ohio law.

12. ODNR had asserted that the state of Ohio owned all land lakeward of the "ordinary high water mark," or "OHW," which for administrative convenience the ODNR defined as wherever the U.S. Army Corps of Engineers defined the Ordinary High Water for purposes of federal law. Thus, contrary to established Ohio law, ODNR sought to exercise all property rights of fee ownership as to all property lakeward of OHW, regardless of whether that property

is submerged and regardless of whether that property is privately owned.

13. Littoral owners are required to pay real estate taxes based upon the whole of their privately owned fee. Some littoral owners wishing to use their private property located below OHW had been required by ODNR to lease this land from the state, despite that the land was owned in fee by the littoral owners. ODNR had maintained that no littoral owner might make use of their own property, nor exclude third parties from such property, as long as that property lies below OHW. Such conduct constituted a taking by the State.

14. ODNR's actions threw doubt upon the littoral owners' title to their properties and prevented some of them from obtaining title insurance for their private property located below OHW but landward of the state's actual fee ownership.

15. In response to ODNR's actions, a group of littoral landowners filed a lawsuit in the Court of Common Pleas of Lake County challenging the designation of OHW as the property line for all land abutting Lake Erie. The case, *State ex rel. Merrill v. Ohio Dept. of Natural Resources*, Lake Co. Case No. 04CV001080, was brought on behalf of a class of all littoral property owners bordering Lake Erie. The plaintiffs in *Merrill* sought a declaratory judgment that the class members own fee title to the lands located between OHW and the actual legal boundary of their properties and to declare that the submerged land leases were void and invalid as to any land below OHW owned by the class. The *Merrill* plaintiffs also sought a

writ of mandamus to compel ODNR to commence appropriation proceedings for all class members to determine the amount of compensation due to each of them for the temporary taking of the property by the State.

16. The *Merrill* trial court certified a class under Civ.R. 23(B)(2) for Count I, the declaratory judgment. A class may be maintained under Civ.R. 23(B)(2) when 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. A Civ.R. 23(B)(2), moreover, is a mandatory class with no right to opt out of the certification and no requirement of notice to class members. This class was defined 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."

17. That Court also granted partial summary judgment for the benefit of the Class, concluding that the public trust neither extended to the ordinary high-water mark nor terminated at the low-water mark. The trial court held that the boundary is "a moveable boundary consisting of the water's edge, which means the most landward place where the lake water actually touches the land at any given time."

18. The case eventually made its way to the Ohio Supreme Court. In *State ex rel. Merrill v. Ohio*

Department of Natural Resources, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935, the Supreme Court held that "the territory of Lake Erie held in trust by the state of Ohio for the people of Ohio extends to the 'natural shoreline,' which is the line at which the water usually stands when free from disturbing causes." *Id.* at ¶4. In doing so, the Ohio Supreme Court rejected ODNR's assertion that the proper boundary is OHW. The case was remanded to the trial court for further proceedings on the pending claims consistent with the opinion of the Ohio Supreme Court.

19. On August 27, 2012, on remand, the trial court issued an Order clarifying and defining what constitutes the "natural shoreline," as that concept was not directly addressed by the Ohio Supreme Court. Such Order also granted the relief requested, to declare as void and invalid any submerged land lease as to land below the OHW and above the natural shoreline and for ODNR to return all submerged land lease fees collected between OHW and the natural shoreline which were paid by the Class Members between 1998 and the present.

20. The August 27, 2012 Order also extended the class certification to Count II, the mandamus claim. The trial court reasoned that:

> [t]o the extent Count II of the First Amended Complaint seeks a declaration that the state's assertion of ownership up to the OHWM constitutes an unconstitutional temporary taking against all owners of littoral property bordering Lake Erie, the class that would be certified for resolution of that issue would have

> the exact same members as the class currently certified to Count I, *i.e.*, all littoral property owners bordering Lake Erie. Thus, the class certified for Count I could be maintained through the conclusion of Count II of the First Amended Complaint. The relief sought in Count II does not change the analysis, as a writ of mandamus is in the nature of an injunction, albeit mandatory rather than prohibitory, and thus subject to certification on a class-wide basis under Civil Rule 23(B)(2).

On March 1, 2014, the Eleventh District Court of Appeals affirmed the trial court's Order.

21. On May 27, 2016, the parties to the *Merrill* litigation entered into a proposed settlement agreement, which was filed with the Lake County Court. ODNR agreed to pay a set sum to and/or for a Settlement Class. A certain amount was allocated to the return of submerged land lease rentals and attorneys fees with respect to Count I. The remainder of the settlement fund was to be distributed according to a plan of allocation, to proportionally allocate the funds to any settlement class members, who filed acceptable Proofs of Claims.

22. The *Merrill* Class as initially certified by the trial court for Count II was properly certified under Civ.R. 23(B)(2), because the relief sought in the First Amended Complaint was declaratory and for mandamus relief. Despite the certification of the *Merrill* Class as a Civ.R. 23(B)(2) class, the terms of the Settlement Agreement provided class members with money damages, not the equitable relief that had

originally been sought. If the *Merrill* case had not settled, the *Merrill* court would have been required to issue a declaration on the question of an unconstitutional taking, and ODNR would have been compelled to seek out each property owner to settle or to commence appropriation proceedings, thereby making further actual notice to each class member unnecessary. However, with the addition of monetary damages allocated to property owners that did not have submerged land leases with ODNR, this class action should have been only and appropriately certified under Civ.R 23(B)(3). Payment of money damages triggered the due process requirements that *require* the provision of notice to class members as described in Civ.R. 23(C)(2)(b).

23. However, instead of recognizing the due process requirements, the parties and the trial Court continued to treat the settlement class as certified only under Civ.R 23(B)(2). Notice of the settlement was mailed *only* to those class members with submerged land leases. Because the *Merrill* Class was certified under Civ.R. 23(B)(2), no Class Member was given notice of the right to *opt out* of the settlement and all Class Members were denied any right to opt out. Class members who are owners of littoral property without submerged land leases were, for the most part, unaware of the action and the need to file a Proof of Claim in order to claim the funds due them. The individual named Plaintiff in this Complaint did not receive notice of the *Merrill* settlement, but would have filed a Proof of Claim had he been advised of the settlement. He was not aware of his right to object to the settlement. Although the settlement agreement

provides that the class members have released all claims, the class members who did not receive notice are unaware of what they had purportedly surrendered. Because of this due process violation, all settlement class members who were denied their due process rights when they were not provided notice, as required under Civ.R 23(C)(2)(b), continue to be able to seek the remedy that they were denied in the *Merrill* action and which is being sought by the filing of this cause of action.

CLASS ALLEGATIONS

24. Plaintiff brings this action as a class action under Civ.R. 23(B)(2) on behalf of himself and all other members of a Class 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.

25. The members of the Class are so numerous that the joinder of all individual members is impracticable.

26. There are common questions of law and fact as to the unconstitutional taking of private property by ODNR which was owned by the Plaintiff and his Class Members in this case.

27. The claims of the Plaintiff are typical of the claims of the Class, and ODNR's defenses are typical of

the defenses pertinent to all of the members of the Class.

28. Plaintiff will fairly and adequately protect the interests of the Class.

29. ODNR has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate declaratory relief and associated injunctive relief with respect to the Class as a whole.

30. Adjudication of this case as a class action will facilitate judicial economy.

COUNT I
Declaratory Judgment

31. The facts alleged in paragraphs 1 through 30 of this Complaint are realleged and incorporated herein by reference.

32. Prior to the decision of the Ohio Supreme Court in *State ex rel. Merrill v. Ohio Department of Natural Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935, ODNR contended that the State of Ohio held title to all lands located below the administratively arbitrary line of OHW.

33. ODNR contended that Plaintiffs were prohibited from using any land located below OHW, regardless of fee ownership of that land.

34. Pursuant to Ohio Revised Code Chapter 2721, Plaintiffs are entitled to an order of this Court declaring that ODNR's arbitrary and capricious assertion of ownership and exercise of ownership rights over the lands owned by Plaintiffs at and below OHW

constituted an unconstitutional temporary taking of those lands; and the Plaintiff and Class Members should be declared to have a clear right to receive compensation from ODNR for such taking and de facto appropriation pursuant to Article I, Section 19 of the Ohio Constitution and the Fifth Amendment to the U.S. Constitution.

COUNT II
Mandamus/Inverse Takings Compensation

35. The facts in paragraph 1 through 34 of this Complaint are realleged and incorporated herein by reference.

36. Plaintiff and the Class Members have no plain and adequate remedy in the ordinary course of law other than to require ODNR to compensate each of them, individually, fairly for the losses and damages that they have incurred as a result of ODNR's uncompensated taking of their privately owned real property.

37. ODNR is under a clear legal duty to commence appropriation proceedings in the Probate Court of the respective counties in which the properties owned by Plaintiff and Class Members are located, to determine the amount of compensation due to each of them for the real property temporarily taken and for damage to the residue of their respective real properties.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, on behalf of himself and the Class Members, requests that this Court grant the following relief:

1) Pursuant to Ohio Civil Rule 23(B)(2), certify this case as a class action and certify that the class shall include each and every owner of a parcel of privately owned real property abutting Lake Erie located within the State of Ohio to whom they received neither actual notice of the settlement of *State ex rel. Merrill v. Ohio Department of Natural Resources*, nor any compensation related to that settlement.

2) A declaratory judgment that that ODNR's arbitrary and capricious assertion of ownership and exercise of ownership rights over the lands owned by Plaintiffs at and below OHW constituted an unconstitutional temporary taking of those lands and the Plaintiff, and each member of his Class, have a clear right to receive compensation from ODNR for such taking by appropriation, pursuant to Article I, Section 19 of the Ohio Constitution and the Fifth Amendment to the U.S. Constitution.

3) A Writ of Mandamus compelling and ordering ODNR to commence appropriation proceedings in the Probate Court of the respective counties in which the properties owned by the Plaintiff and Class Members are located to determine the amount of compensation due to each for the real property taken and for damage to the residue of their real properties.

4) An award of Plaintiff's attorneys' fees and costs.

5) Any other relief that this Court deems equitable, proper, necessary, or just.

Respectfully submitted,

s/ *Margaret M. Murray*
Dennis E. Murray, Sr. (0008783)
dms@murrayandmurray.com
Margaret M. Murray (0066633)
mmm@murrayandmurray.com
Donna J. Evans (0072306)
dae@murrayandmurray.com
MURRAY & MURRAY CO., L.P.A.
111 East Shoreline Drive
Sandusky, Ohio 44870
Telephone: 419-624-3000
Facsimile: 419-624-0707
Attorneys for Plaintiff

INSTRUCTIONS TO THE CLERK:

Please cause to be served upon all Defendants a copy of the Complaint. Said service is requested by certified mail.

s/ *Margaret M. Murray*
Dennis E. Murray, Sr. (0008783)
Margaret M. Murray (0066633)
Donna Jean Evans (0072306)
MURRAY & MURRAY CO., L.P.A.
Attorneys for Plaintiff