IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CLAUDIA SMITH and
WILBERT WALKER, on behalf of
themselves and all others similarly situated — PLAINTIFFS

VS. — CIVIL ACTION NO. 1:98cv212BrR

TOWER LOAN OF MISSISSIPPI, INC., ET AL. — DEFENDANTS

STATEMENT IN SUPPORT OF MOTION TO OPT OUT AND OBJECTION TO CLASS ACTION SETTLEMENT OF CLASS MEMBERS REBECCA CRYSTIAN AND MARTHA SHAFFER

INTRODUCTION

Class members Rebecca Crystian and Martha Shaffer (hereafter the "Crystian Objectors") have moved to opt out of this class action and object to its settlement on a non-opt-out basis. They intend to appear, through counsel, at the August 27, 2002 fairness hearing to state their objections, which are set forth in detail below.

Ms. Crystian and Ms. Shaffer have sued the defendants in Mississippi state court and wish to pursue that suit on an individual, non-class basis, but are unable to do so because this Court has stayed that action. The crux of their motion and objection is simple: This class action may not be certified on a non-opt-out basis under Federal Rule of Civil Procedure 23 or under the Due Process Clause. As a result, the proposed class action settlement, this Court's September 9, 1998 Memorandum Opinion certifying the

class, its November 29, 2001 Amended Order of Class Certification, and its April 11, 2002 Order Preliminarily Approving Class Action Settlement Agreement are all erroneous because they certify the class pursuant to the non-opt-out provisions of Rule 23(b)(1)(A) and (b)(2) rather than the opt-out provision of Rule 23(b)(3). In addition, because class members have an absolute right to opt out and maintain their own litigation, this Court should lift its stay of various actions filed by plaintiffs in Mississippi state court.[1]

FACTUAL BACKGROUND

On February 17, 1998, Rebecca Crystian and Martha Shaffer, along with many other individuals who had borrowed money from the defendants, filed suit in the Circuit Court of Jefferson County against First Tower Loan, Tower Loan of Mississippi, and other affiliated companies. The state court complaint centers around allegations of "insurance packing," in which the defendants included in the plaintiffs' consumer loans life and property insurance at exorbitant rates. The complaint contains various counts, including, among others, breach of fiduciary duties, breach of the covenants of good faith and fair dealing, fraudulent representation or omission, negligent misrepresentation and/or omission, civil conspiracy, restitution, unjust enrichment, fraud, and usury. The

[1]There are serious additional problems with the class settlement that require this Court to reject it, not the least of which is the paltry recoveries it provides to class members. The Crystian Objectors' sole concern, however, is to proceed with their state court action and, thus, they seek only to vindicate their opt-out rights. The Crystian Objectors' loan documents showing that they are members of the class are attached to the Crystian Objectors' motion to opt out as Exhibit 1.

principal relief sought in the state court complaint is money damages, including compensation for pain and suffering. *See generally* Complaint in *Barnes, et al. v. First Tower Loan, Inc., et al.*, Civil Action No. 98-0022 (Circuit Ct., Jefferson Cty., Miss. filed Feb. 17, 1998).[2] The state court suit filed by Ms. Crystian, Ms. Shaffer, and others has been stayed by this Court, and remains pending in Jefferson County Circuit Court.

Ms. Crystian's and Ms. Shaffer's situations differ from one another. Ms. Crystian had four loans with Tower Loan of Mississippi from 1992 to 1997, all of which are paid off. These loans included life and property insurance, but Ms. Crystian was not told that the insurance was optional. Ms. Shaffer obtained two loans from Tower Loan of Mississippi in 1997 and 1998, both of which included life and property insurance. Tower Loan told Ms. Shaffer that her loans included life insurance, but not that they included property insurance. She was told that she was required to purchase life insurance to obtain the loan.

ARGUMENT

As the Court is aware, before a class may be certified under Rule 23, it must meet each of Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation, and be maintainable under at least one of the three subdivisions of Rule 23(b). The first two subdivisions of Rule 23(b) describe so-called "mandatory" class actions, because they do not require that class members be allowed to exclude themselves

[2]A copy of the state court complaint is attached to the Crystian Objectors' motion to opt out as Exhibit 2.

from the class. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 n. 13 (1999). By contrast, in class actions certified under Rule 23(b)(3), all class members have the right to opt out and bring their own litigation. *See* Fed. R. Civ. P. 23(c)(2). This Court's earlier certification order, as well as its April 2002 preliminary approval order, held that the Rule 23(a) criteria had been met, and that the class could be maintained as a mandatory class under both Rule 23(b)(2) and (b)(1)(A). Part I below addresses why mandatory certification is improper under Rule 23(b). Part II explains that the Due Process Clause also guarantees the absent class members, such as the Crystian Objectors, a right to opt out.

I. Certification Under Rule 23(b)(2) And Rule 23 (b)(1)(A) Is Improper.

A. The Fifth Circuit's Decisions In *Allison v. Citgo Petroleum* And *Bolin v. Sears, Roebuck* Doom The Rule 23(b)(2) Certification.

The Crystian Objectors urge the Court not to approve a settlement based on certification under Rule 23(b)(2). Such certification is proper only where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as whole." No opt-out right is accorded under Rule 23(b)(2) because where an injunction or declaration of legal rights is sought—for instance, the restructuring of a prison system or abating a public nuisance—such relief necessarily affects all similarly-situated people and can only be achieved on a global basis.

No plausible reading of the Rule's text permits this case to be certified under Rule 23(b)(2). To be sure, much of the relief accorded by the settlement — the defendants' promise to reform some of its conduct for five years, after which they are free to return to their illegal ways — purports to have an effect on defendants' future conduct. However, it is doubtful that these promises constitute *injunctive* relief that would permit certification under Rule 23(b)(2). After all, a court would not issue an injunction that permitted a defendant to return to its old ways after five years absent a finding that the injunction would no longer be necessary after five years; and this Court has not issued an injunction under the criteria required by Federal Rule of Civil Procedure 65(d) nor has it determined that all members of the plaintiff class do not have an adequate remedy at law.

In any event, even making the very generous assumption that the proposed settlement provides genuine injunctive relief, it is improper for the Court to look to a *settlement* in characterizing the relief sought by the class and in determining which, if any, subdivision of Rule 23(b) is applicable to this case. As the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), teaches, this Court may not look to the settlement agreement to determine whether a class may be certified, but rather must examine the claims pled in the complaint and released by the settlement to make that determination. *Id.* at 622-23 & n.18. On that score, it is undisputed that this suit is one principally for money damages resulting from the defendants' past illegal conduct. Indeed, the Second Amended Complaint, filed on July 20, 2001 (Doc. 79), is

overwhelmingly a pleading that seeks money damages from the defendants. That complaint describes how the defendants harmed the plaintiffs financially by engaging in "insurance packing," charging excessive interest rates, providing so-called insurance on personal property with little or no value, charging excessive premiums, and the like. Second Amended Complaint. ¶¶ 14-22; *see also, e.g.*, *id.* ¶¶ 44, 51, 58, 66, 70-71, 74, 80, 85, 89, 92, 95-96, 100-01, 103, 109 (indicating that each of the first 18 counts of the Second Amended Complaint seek compensatory damages). Not until Count XIX of the Second Amended Complaint do the plaintiffs make their boilerplate request for declaratory and injunctive relief, *see id.* ¶ 113-15, and thus the only plausible reading of the complaint is that its request for equitable relief is purely ancillary — an afterthought to the principal claims for damages. *See id.* ¶ 114 (stating that equitable relief is appropriate "because damages can not adequately compensate plaintiffs and the Class for the injuries suffered and threatened.").

Nowhere is the predominance of the class's claims for damages more evident than in the prayer for relief, which asks first to certify the class, *id.* ¶ 121(a), then "for actual and compensatory damages," *id.* ¶ 121(b), then for "treble damages" under federal antitrust law, the Truth in Lending Act ("TILA"), the Fair Debt Collection Practices Act ("FDCPA"), and other statues, ¶ 121(c), then for "punitive damages in a fair and reasonable amount," ¶ 121(d), then for restitution and/or disgorgement, ¶ 121(e), and then for any monetary relief that might be available under M.C.A. 63-19-55. *Id.* ¶ 121(f).

Only after these comprehensive claims for compensatory and punitive damages and other forms of monetary relief, does the Second Amended Complaint make its unadorned prayer for declaratory and injunctive relief. *Id.* ¶ 121(g). It is thus pure sophistry to suggest, as does the settlement agreement, that "the primary objective of the litigation" was to obtain prospective relief. *See* Settlement Agreement, at 2.[3]

Equally if not more important than consideration of the claims pled in the Second Amended Complaint is consideration of the release set forth at page 36 of the Settlement Agreement. In that provision, the defendants and their affiliates are released from "all manner of claims, demands, actions, suits, causes of action..., damages whenever incurred, liabilities of any nature whatsoever, ... now or in the future, known or unknown, suspected, in law or equity, that any Class Member has, had or may have, which relate in any way to the allegations against" the defendants in this class action, prior related actions, "or relate in any way to the [defendants'] loan/insurance practices." This release purports to bar any claim by any class member for money damages involving any aspect of the defendants' loan practices. Thus, properly understood — by considering the Second Amended Complaint and the settlement release — this case, if not one exclusively for money damages, is a hybrid action in which the class members' claims for money damages and other forms of monetary relief vastly predominate over the claim for declaratory and injunctive relief.

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[3]The Second Amended Complaint also requests pre- and post-judgment interest, *see id.* ¶ 121(j), which only makes sense as an adjunct to the class members' damages claims.

The circumstances in which a district court may certify a hybrid damages/injunctive relief class action under Rule 23(b)(2) were addressed by the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), which upheld a district court's refusal to certify a class action challenging a defendant's employment practices. The *Allison* plaintiffs sought both injunctive and monetary relief and requested certification under Rule 23(b)(2). The district court refused to certify the class, finding that the plaintiffs' claims for monetary relief predominated over their claims for injunctive relief, making certification of the class inappropriate under subsection (b)(2). *Id.* at 410. The Fifth Circuit agreed, finding that (b)(2) certification is appropriate only when the non-monetary relief predominates, and announcing a test for determining whether injunctive or monetary relief predominates:

> [M]onetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief. By incidental, we mean damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief. Ideally, incidental damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established. That is, the recovery of incidental damages should typically be concomitant with, not merely consequential to, class-wide injunctive or declaratory relief. Moreover, such damages should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances. Incidental damages should not require additional hearings to resolve the disparate merits of each individual's case; they should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations. Thus, incidental damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions.

Id. at 415 (emphasis in original, citations omitted).

As noted above, in determining whether the class may be certified, *Amchem* requires that the court focus not on the substantive terms of the settlement, but "on the legal and factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." 521 U.S. at 623. Thus, in considering the propriety of (b)(2) certification, the Court must focus on the damages claims pled by the plaintiff class, which would be released in the settlement and resolved by the settlement's meager "Compensatory Damages Fund." Settlement Agreement, at 28. As explained in detail above, those claims are certainly more than "incidental" to the injunctive relief. Applying the *Allison* standard, the class members' damages claims are highly "individualized," and cannot be redressed through a "group remedy." Rather, at trial, each plaintiff would be required, among other things, to prove that he or she entered into a loan with one or more of the defendants, and that their particular loan documents violated TILA, the FDCPA, and a wide range of common-law duties. Resolving the class members' common-law claims would require knowing whether the class member was or was not told that insurance was optional (or whether the class member even knew that "packing" had occurred), whether the class member relied on the misrepresentations of the defendants, whether the terms of the particular loan were usurious, and so forth. Moreover, as to both the federal and common-law claims, the court would be required to consider the extent of the individual damages suffered (including questions relating to the

length of each class member's loan, the type or quality of the personal property insured, mitigation, mental suffering and other consequential damages, and the like), and a host of other matters specific to that class member's claims.[4]

In sum, under the *Allison* predominance test, the class members' damages claims predominate over, and are not incidental to, the injunctive relief, and the proposed class cannot be certified as a (b)(2) class. If there were any doubt on that score after *Allison*, it was resolved by the Fifth Circuit in *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000).

In *Bolin*, the plaintiffs challenged Sears' practices in collecting pre-bankruptcy debt from consumers who had purchased merchandise from Sears on credit and later filed for bankruptcy. The class sought injunctive, declaratory, and monetary relief under the Bankruptcy Code, RICO, the FDCPA, and TILA, among other theories. *Id.* at 972-73. The Court acknowledged that some of Sears' practices involved uniform policies, but refused Rule 23(b)(2) certification under *Allison* because the case involved some claims for damages. In so ruling, *Bolin* made several observations and issued several holdings

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[4]The settling parties seek to adhere to *Allison* not by pointing to the substance of this class action and the claims pled and released by the plaintiff class, but merely by parroting *Allison*'s language. Thus, in a transparent effort to circumvent *Allison*, the Settlement Agreement asserts (at pages 5 and 28), without reference to *any* pleading or to the settlement release, that "the primary relief sought by the Class is injunctive" and that monetary relief was "incidental consideration for this Settlement...." Obviously, mere labels cannot meet *Allison*'s strict demands. Interestingly, the Settlement Agreement establishes a "Compensatory Damages Fund" and acknowledges that the settlement "provide[s] for payment of compensatory damages." *See* Settlement Agreement, at 28. These statements amount to a concession that the class cannot be certified under Rule 23(b)(2) because, under *Allison*, a claim for "compensatory damages" is not amenable to certification under that Rule.

that are directly controlling here:

- "To determine whether damages predominate, a court should certify a class on a claim-by-claim basis, treating each claim individually and certifying the class with respect to only those claims for which certification is appropriate." *Id.* at 976. This statement dooms the (b)(2) certification here, because even if some of the class members' monetary claims are susceptible to "computation by means of objective standards and not dependent in any significant way ... on each class member's circumstances[,]" *id.* (quoting *Allison*, 151 F.3d at 415), that is certainly not true for the class members' compensatory damages under the FDCPA, TILA, and the various common-law claims asserted. Indeed, all forms of consequential damages sought by the class members and released by the proposed settlement depend entirely on the class members' individual circumstances.
- As *Bolin* noted, the FDCPA and TILA "authorize[] the award of actual damages to class members" as well as statutory damages. *Id.* at 977. The Fifth Circuit acknowledged that some of those laws' statutory damages provisions "require no individualized calculation," *id.*, but noted that "computation of some components of actual damages may require individualized treatment. Determining expenditures made by class

members in defending against Sears's actions would require individualized hearings." *Id*. at 978. So, too, here, where all class members who spent time or money defending against collection proceedings would necessarily have individualized claims under the FDCPA and TILA.

! *Bolin* noted that certification under Rule 23(b)(2) was not appropriate for class members "who [did] not face further harm from Sears's actions" because they no longer were subject to Sears' post-bankruptcy collection efforts. *Id*. That aspect of *Bolin* is controlling here, and vitiates the class certification for all class members who no longer have a contractual relationship with the defendants because their loans are paid off. For those class members, including objector Rebecca Crystian, it is money damages or nothing.[5] Moreover, because the so-called equitable relief accorded by the proposed settlement relates almost entirely to the terms of new loans, loan renewals, and the treatment of new loan applicants, *see* Settlement Agreement, 13-27, that relief will not significantly benefit even those class

[5]The Settlement Agreement (at 2) says that "[t]he vast majority of Borrowers continue to do business with the Tower Loan Companies," but does not provide any basis for that assertion. The settling parties should not be allowed to rely on this unverified statement. In any event, as *Bolin* holds, a court must consider who among the class would benefit from each claim, and then certify only with respect to the particular claims and class members that justify class treatment. 231 F.3d at 976. Under, *Bolin*, no arguable basis exists for a (b)(2) certification with respect to class members who no longer have a relationship with the defendants.

members who have outstanding loans with the defendants.[6]

! *Bolin* questioned, but did not decide, whether injunctive relief is available at all under the FDCPA. *Id.* at 977 & n.39 (noting that courts uniformly have concluded that FDCPA does not authorize equitable relief). Because here, as in *Bolin*, (b)(2) certification is unlawful for many other reasons, this Court need not decide that question. However, if the Court is inclined to grant (b)(2) certification it must first determine that injunctive relief *is* available under the FDCPA, because, otherwise, there is no basis for finding that the plaintiffs' injunctive claims under the FDCPA predominate over their damages claims under the FDCPA. Put differently, "[o]f course, the unavailability of injunctive relief under a statute would automatically make (b)(2) certification an abuse of discretion." *Id.* at 977 n.39.[7]

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[6]Recognizing this problem, the Notice of Proposed Settlement (at 4) relies on class counsel's "opinion that the proposed changes in defendants' loan/insurance practices will be equitable and highly beneficial to the Class Members, many of whom can be reasonably expected to do business with the defendants in the future." Class counsel nowhere supports this claim. In any event, this statement means that some (and perhaps many) class members will *not* do business with the defendants in the future, which effectively concedes that the settlement cannot be approved under *Allison* and *Bolin*.

[7]Although the availability of injunctive relief under the FDCPA is technically an open question in the Fifth Circuit, that court's decision in *Washington v. CSC Credit Services, Inc.,* 199 F.3d 263 (5th Cir. 2000), puts the question in grave doubt. *Washington* reversed a (b)(2) certification on the ground that injunctive relief is unavailable under the Fair Credit Reporting Act. *Washington* relied in part on courts that had held that injunctive relief is not available under "analogous provisions" of the FDCPA. *Id.* at 268 & n.4.

! Finally, in a passage that could have been written with this case in mind,

Bolin reflected on the importance of opt-out rights:

> *Allison* reflects our concern that plaintiffs may attempt to shoehorn damages actions into the Rule 23(b)(2) framework, depriving class members of notice and opt-out protections. The incentives to do so are large. Plaintiffs' counsel effectively gathers clients—often thousands of clients—by a certification under (b)(2). *Defendants attempting to purchase res judicata may prefer certification under (b)(2) over (b)(3). Allison* speaks to these realities.

Id. at 976 (emphasis added).

This Court should "speak to these realities" as well by decertifying the (b)(2) class, rejecting the non-opt-out settlement, and permitting class members to pursue their own litigation against the defendants.

B. Certification Under Rule 23(b)(1)(A) Is Also Unlawful.

This Court also certified the class on a non-opt-out basis under Rule 23(b)(1)(A). That certification should be vacated because it has no basis in the text or purpose of the Rule.

Subdivision (b)(1)(A) permits certification where prosecution of separate actions would create a risk of

> inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.

This section does not apply to damages class actions because one jury's decision to award damages and another jury's decision not to award damages (or to award damages

in a different amount) do not "establish incompatible standards of conduct for the party opposing the class."

Class certification under Rule 23(b)(1)(A) was intended to eliminate the risk that a defendant would be required to take an action demanded by one court but be prohibited from taking that same action by another court. Thus, as the 1966 Rules Advisory Committee explained, "[s]eparate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations." Advisory Committee Notes to Rule 23, 39 F.R.D. 69, 100 (1966). Mandatory treatment is necessary in those circumstances because a municipality may either issue a bond or not, or it may appropriate money or not; it cannot do both.[8]

With all respect, this Court's prior certification order seems to have overlooked the purpose of (b)(1)(A) certification, holding that the Rule's requirements were met because, without mandatory treatment of all claims, some plaintiffs might impose liability on the defendants in other cases. That rationale might be relevant to certain kinds of claims for injunctive relief, where "incompatible standards of conduct" could indeed be established. However, the Court's reasoning does not support mandatory certification of damages claims because such reasoning would apply to *any* situation in

[8] The other examples given by the Rules Advisory Committee—suits concerning the rights and duties of riparian owners or to abate a nuisance—fall into the same category. *Id.* (citing cases).

which more than one plaintiff sued a defendant for damages arising from the same event, thus destroying the carefully constructed differences among the subdivisions of Rule 23(b). It is therefore not surprising that (b)(1)(A) certification here is at odds with the unanimous holdings of the courts of appeals recognizing that sweeping interpretations of subdivision (b)(1)(A) would negate the important protections, including the right to opt out, for individual class members under Rule 23(b)(3). *See In re Dennis Greenman Securities Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987) ("[I]f compensatory damages actions can be certified under Rule 23(b)(1)(A), then all actions could be certified under the section, thereby making the other sub-sections of Rule 23 meaningless, particularly Rule 23(b)(3)."); *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984) ("The fact that some plaintiffs may be successful in their suits against a defendant while others may not is clearly not a ground for invoking Rule 23(b)(1)(A)"); *McDonnell Douglas Corp. v. United States District Court*, 523 F.2d 1083, 1086 (9th Cir. 1975) (expansive interpretation of Rule 23(b)(1)(A) would render Rule 23(b)(3) "superfluous").

The Fifth Circuit in *Allison* addressed this very question — whether a hybrid action involving both damages and injunctive claims could be certified under subdivision (b)(1)(A). Without resolving whether that Rule could have served as a basis for certifying the injunctive aspects of the case, the court of appeals resoundingly rejected (b)(1)(A) certification as to the damages claims:

> The plaintiffs briefly raise the possibility that this case could be certified as a class action under Rule 23(b)(1) because the prosecution of separate

> actions would create the risk of inconsistent adjudications with respect to individual class members and incompatible standards of conduct for Citgo. See Fed.R.Civ.P. 23(b)(1)(A). Given the individual-specific nature of the plaintiffs' claims for compensatory and punitive damages, we perceive no risk of inconsistent adjudications or incompatible standards of conduct in having those claims adjudicated separately.

Allison, 151 F.3d at 421 n.16.

For all of these reasons, the certification under Rule 23(b)(1)(A) should be vacated and the class settlement rejected.

II. Mandatory Class Certification Is Unconstitutional Because Due Process Requires That Class Members Who Possess Individualized Damages Claims Be Provided With An Opportunity To Exclude Themselves From The Class .

In class actions seeking to bind plaintiffs with respect to "claims wholly or predominantly for money damages," "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 & n.3 (1985). "In [*Shutts*], th[e Supreme] Court listed minimal procedural due process requirements a class action money judgment must meet if it is to bind absentees; those requirements include notice, an opportunity to be heard, a right to opt out, and adequate representation." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 395 (1996) (Ginsburg, J., concurring in part and dissenting in part); *see also* 3 *Newberg on Class Actions* § 17.16, at 17-45 (3d ed. 1992) ("when unliquidated damages are involved, the exclusion right must be afforded as a constitutional matter."). Those minimal rights are preserved because all members of a class have constitutionally-

protected property rights in their claims for damages, and those rights "implicate the due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Ortiz*, 527 U.S. at 846 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). *Ortiz* further explained the need for providing class members a right to opt out with respect to their individual damages claims:

> The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damage claims gathered in a mandatory class. Unlike Rule 23(b)(3) class members, objectors to the collectivism of a mandatory subdivision (b)(1)(B) action have no inherent right to abstain. The legal rights of absent class members (which in a class like this one would include claimants who by definition may be unidentifiable when the class is certified) are resolved regardless either of their consent, or, in a class with objectors, their express wish to the contrary. And in settlement-only class actions the procedural protections built into the Rule to protect the rights of absent class members during litigation are never invoked in an adversarial setting. Thus, if certification of this class were appropriate in any form (and Appellants believe that it is not), such certification would have to proceed under Fed. R. Civ. P. 23(b)(3), which preserves the right of class members to exclude themselves from the class.

Id. at 846-47 (internal quotations and citations omitted)[9]; *see also Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992) (due process requires that class members be provided right to opt out with regard to any substantial damages claim), *writ dismissed as*

[9]Although this Court's earlier certifications were not "settlement-only" certifications, the defendants did not resist certification, but rather urged the Court to certify the class under Rule 23(b)(1) and (b)(2) in an unabashed effort to "purchase *res judicata*" on the broadest, cheapest scale possible. *See Bolin*, 231 F.3d at 976. Thus, as in *Ortiz*, the mandatory certification was not entered "in an adversarial setting," 527 U.S. at 847, but rather in a setting in which class counsel and defendants were in full agreement that mandatory certification was appropriate.

improvidently granted, 511 U.S. 117 (1994).

In essence, Rule 23 codified the constitutional right to opt out for class members with damages claims. The Civil Rules Advisory Committee explained that subdivision (b)(3) was drafted to accommodate the compelling due process interests of such class members:

> [T]he interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of class certification altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. *Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request.*

39 F.R.D. at 104-05 (emphasis added). As in *Ortiz*, the mandatory class established by the settlement agreement, and earlier by this Court's certification orders, undermines the "deep-rooted historic tradition that everyone should have his own day in court." *Ortiz*, 527 U.S. at 846 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)). Without an opportunity to opt out, due process does not permit binding absentees to a judgment with respect to their individual claims for money damages. For this reason as well, the Court's mandatory certification order should be vacated and the settlement should not be approved.[10]

CONCLUSION

For the reasons stated above, the Court should not approve the proposed non-opt-

[10] *Ortiz* also noted that mandatory class treatment of individual claims for damages raises serious Seventh Amendment issues by effectively denying class members their right to trial by jury. *Ortiz*, 527 U.S. at 845-46 & n.22. This Court should reject mandatory certification for that reason as well.

out settlement. For the same reasons, the Crystian Objectors' motion to opt out should be granted and they should be permitted to proceed with their action pending in the Circuit Court of Jefferson County.

Respectfully submitted,

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June 14, 2002

CERTIFICATE OF SERVICE

I hereby certify that, on June 14, 2002, I caused to served a copy of the foregoing Statement on the following counsel by first-class mail, postage prepaid:

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