No. 05-60572

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LEVI BAKER, on behalf of himself and all others similarly situated

Plaintiff-Appellee

v.

WASHINGTON MUTUAL FINANCE GROUP, LLC; WASHINGTON MUTUAL FINANCE, LLC; WASHINGTON MUTUAL FINANCE OF MISSISSIPPI, LLC

Defendants-Appellees

v.

THOMAS SIMMONS; GEORGIA IVY

Intervenors-Appellants

RAYMON HAM; LINDA HAM; SAMMIE WILSON; MARGARET WILSON; CONSUELO MARTIN; ROXIE MCALLISTER; JANICE WARD

Appellants

On Appeal From the United States District Court
for the Southern District of Mississippi
Hon. Walter J. Gex, III, Senior United States District Judge

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellants certifies that the following persons and entities, as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Because important legal rights (the rights of absent class members to opt-out of class action settlements) are at stake in this appeal, appellants believe that oral argument would assist the Court in resolving this appeal.

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INTRODUCTION

This appeal concerns the fundamental protections that Federal Rule of Civil Procedure 23[1] and the U.S. Constitution provide to absent class members in cases involving money damages, including class members' most basic protection: the right to opt out. Appellants ("the Simmons Objectors") are several class members who wish to opt-out all their claims from a class action settlement, but cannot do so because the court below certified a class that permits class members to opt out their claims for compensatory and injunctive relief, but prohibits them from opting out their claims for punitive damages.

The district court's certification of a mandatory punitive damages class was both novel and unlawful. The district court approved the parties' request for a "limited fund" class based entirely on the theory that due process principles may limit the total amount of punitive damages that may be awarded against a particular defendant for harm arising out of a single course of conduct, without any evidentiary showing regarding the specific details of that fund. In so doing, the district court has set itself apart from the otherwise unanimous chorus of courts that have refused to certify "limited fund" mandatory classes covering

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[1] Because Appellants refer repeatedly in this brief to various subdivisions of Federal Rule of Civil Procedure 23. For the Court's convenience, the relevant provisions of that rule are appended at the end of this brief pursuant to Fed. R. App. P. 28(f).

unliquidated tort claims since the U.S. Supreme Court issued its seminal decision in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), which dramatically restricted the ability of courts to certify mandatory limited fund classes. In particular, the district court's ruling directly conflicts with the Second Circuit's recent decision in *In re Simon II Litigation*, 407 F.3d 125 (2d Cir. 2005), rejecting the very same due process limited fund theory at issue here.

If affirmed, the district court's approach would authorize a non-opt-out class in every class action seeking punitive damages, thereby eviscerating the opt-out protections afforded by Rule 23 and the Constitution. This case is a run-of-the-mill consumer-fraud class action, involving an unremarkable amount of punitive damages, that is indistinguishable from any other class action passing through the judicial system. If *this* action could be certified on a no-opt out basis, then so could any class action for punitive damages. Because both Rule 23 and the Constitution prohibit courts from choking off the basic protections afforded class members so easily, the district court's order certifying a mandatory class must be reversed.

STATEMENT OF JURISDICTION

The district court exercised federal question jurisdiction under 28 U.S.C. § 1331 and diversity jurisdiction under 28 U.S.C. § 1332. R. 293. On May 16,

2005, the district court issued a memorandum opinion and order giving final approval to the class action settlement. R. 2106-2131, ER Tabs 3-4. Appellants filed a timely notice of appeal on June 13, 2005. R. 2143 ER Tab 2. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether, in light of the Supreme Court's decision in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the district court erred in certifying a non-opt-out mandatory punitive damages settlement class under the "limited fund" theory of Rule 23(b)(1)(B) where (a) the fund is limited solely by agreement of the parties; (b) the parties provided no evidence identifying either the limit of the fund or the insufficiency of the fund to pay out all claims; and (c) the class certified does not include all persons with claims against the punitive damages fund.

2. Whether the district court erred in certifying a non-opt-out mandatory punitive damages settlement class under Rule 23(b)(2) where (a) the settlement provides no injunctive relief; (b) the settlement permits class members to opt out their claims for injunctive relief; and (c) compensatory and punitive damages comprise the principal relief requested in the complaint.

STATEMENT OF THE CASE AND FACTS

A. The Class Complaint

The underlying litigation is a class action brought on behalf of individuals who took out loans and bought credit or property insurance from defendants Washington Mutual Finance Group, LLC and Washington Mutual Finance of Mississippi, LLC (collectively "Washington Mutual" or "defendants"). The amended class complaint alleges that Washington Mutual used fraudulent and misleading disclosures to induce thousands of borrowers to purchase, in conjunction with loans, worthless or inflated insurance products at unfavorable rates and under unlawful conditions. R. 292-312. The complaint further alleges that Washington Mutual inflated the value of collateral in order to charge higher insurance premiums; failed to disclose charges and commissions to customers; charged unauthorized and unnecessary fees; and engaged in "insurance packing" and "loan flipping." The latter two practices are designed to convince borrowers to refinance or renew the balance due on their loans with a new loan at frequent intervals, in order to pack additional insurance premiums on the new loan and to allow the lender to receive additional interest, or impose added costs, on the same amount of funds loaned. *Id.*

The principal relief sought in the class complaint is money damages. The complaint raises eleven causes of action, including violations of federal statutory law, Mississippi statutory law, and Mississippi common law. R. 299-311. The first ten counts all request relief in the form of compensatory and punitive damages. *Id.* Only after the comprehensive remedies of compensatory and punitive damages were requested in each of the first ten counts did plaintiff tack on an eleventh and final count requesting injunctive relief that would prohibit Washington Mutual from continuing to engage in the challenged practices. R. 310-311.

B. Parallel Litigation

This class action is not the only litigation being pursued against Washington Mutual. In 1998, counsel for the class in this case also filed an action in Mississippi State Court – *Baker v. Washington Mutual Finance Group, LLC F/K/A City Finance Company*, CV-98-0026 (Holmes County Cir. Court) ("the *Blackmon* case") – against Washington Mutual alleging identical claims on behalf of 23 individuals. R. 735-737, ¶¶ 6-11 (affidavit of Class Counsel Richard Freese). On June 12, 2001, the jury in that case returned a verdict in favor of the plaintiffs and awarded them $2.265 million in compensatory damages and $69 million ($3 million per plaintiff) in punitive damages. R. 1684b, Exhibit 8; R. 736-737, ¶ 11.

The punitive award subsequently was reduced to $54 million. R. 736-737, ¶ 11. That case currently is on appeal to the Mississippi Supreme Court. *Id.*

C. The Class Action Settlement Agreement

After the jury verdict was reached in the *Blackmon* case and Washington Mutual appealed, plaintiff Levi Baker filed this class action in federal court on March 23, 2004. R. 1. Two days later, Baker filed a motion for preliminary approval of a class settlement.[2] R. 21. It is undisputed that the complaint was filed solely for purposes of entering into a class action settlement and that the parties never intended to litigate the case.

The settlement defines the class to include everyone in Mississippi who purchased credit insurance products from Washington Mutual or City Finance, the latter being a company that subsequently was purchased by Washington Mutual. R. 405-406, ER Tab 6 at 7-8. The class definition, however, excludes, among others, persons who "obtained a judgment or arbitration award in their favor against City Finance, whether or not such judgment or arbitration has been finally adjudicated to be meritorious." R. 406, ER Tab 6 at 8. The plaintiffs in the *Blackmon* case, who obtained a $54 million punitive damages verdict against

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[2] Both the complaint and the settlement agreement were subsequently amended. All references to the complaint and the settlement agreement refer to the final amended versions.

Washington Mutual and City Finance, fall within this exclusion and are not part of this class action settlement. *See also* Transcript of Fairness Hearing of Oct. 5, 2004 [hereinafter Transcript], at 115 (statement by class counsel confirming that the *Blackmon* plaintiffs are not included in the class).

The proposed class action settlement seeks to resolve the class claims by establishing a $7 million damages fund to be distributed to class members who file claim forms. R. 406-407, § B; ER Tab 6, at 8-9. The only relief the class can receive is money damages. *Id.* The settlement provides no injunctive or declaratory relief whatsoever. In the agreement, the parties designate $3.5 million of the settlement fund as "compensatory damages" and $3.5 million as "punitive damages." R. 407, ER Tab 6, at 9. Although the parties label half the damages in the settlement as "punitive" – *i.e.* damages designed to punish defendants for egregious wrongdoing and to deter them from future misconduct – the settlement agreement also states separately that defendants "deny any and all wrongdoing and liability whatsoever." R. 417, § 4.O.3, ER Tab 6 at 19; *see also* R. 418, § 4.O.3(c), ER Tab 6 at 20 (stating that no part of the settlement agreement may be construed as evidence of "any liability, fault, wrongdoing, or otherwise"). Neither the settlement agreement nor the notice sent to the class offer any explanation on how

the parties decided to cap the punitive damages portion of the settlement at $3.5 million as opposed to some other amount.

The amount of relief for which each class member is eligible depends on the category of claimant into which the class member falls. Category I class members are eligible to receive $1,000, Category II class members are eligible to receive $642, and the remaining Category III class members are eligible to receive a pro rata share of the remaining funds. R. 407-409, ER Tab 6 at 9-11. Between $1.7 million and $2.1 million of the settlement fund is allocated to attorney's fees. R. 409-410, ER Tab 6 at 11-12.

Although the settlement permits class members to opt out their claims for compensatory and injunctive relief, it precludes them from opting out their claims for punitive damages. Specifically, Section 4.K of the settlement agreement, entitled "**Mandatory Class As To Punitive Damages,**" states:

> In light of the significant portion of the Settlement Fund attributable to punitive damages, to the extent any of the Claims may give rise to a claim or potential claim for punitive or exemplary damages, such Claims are proposed to be certified as mandatory class claims pursuant to Rules 23(b)(1) and 23(b)(2) of the Federal Rules of Civil Procedure. Accordingly, upon final approval of the settlement, all Settlement Class Members will be deemed to irrevocably waive and release forever any and all rights to seek any punitive or exemplary damage award or its equivalent of any kind in any proceeding, court action, arbitration, or otherwise, whether or not any Settlement Class Member purports to opt out of the settlement or this Agreement.

R. 413-414, ER Tab 6 at 15-16. Accordingly, the parties requested that the district court certify the punitive damages class as a non-opt-out class under subdivisions (b)(1) and (b)(2) of Federal Rule of Civil Procedure 23, which do not provide a right to opt out. Other than citing the relevant portions of Rule 23, neither the settlement agreement nor the class notice explains the basis for a non-opt-out class. Nor does the settlement agreement contain any reference to any due process limit on total punitive damages.

On May 4, 2004, the district court preliminarily approved the proposed settlement and directed that notice be sent to the class.[3] R. 133-139. Notably, the district court did not raise the issue of whether the punitive damages portion of the settlement was a "limited fund." The court subsequently amended the preliminary approval in minor ways and set a September 16, 2004 deadline for submitting objections. R. 461-462.

D. Appellants' Objections

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[3] In granting preliminary approval of the proposed settlement, the district court purported to certify the class under Rule 23(b)(1)(A) and Rule 23(b)(2). R. 134. In its order granting final approval, however, the district court certified the class under Rule 23(b)(1)(B) and Rule 23(b)(2). R. 2113-2115. The district court never addressed Rule 23(b)(1)(A) in its final approval order and did not certify the class under Rule 23(b)(1)(A). Certification under Rule 23(b)(1)(A) therefore is not before this Court in this appeal.

On September 16, 2004, appellants Thomas Simmons and Georgia Ivy moved to intervene and filed a statement of objections challenging the parties' attempt to certify a mandatory punitive damages class and the adequacy of the settlement. R. 681-687; R. 702-749. Ms. Ivy also filed a notice excluding herself from the class.[4] R. 1163. The Simmons Objectors argued that certification was improper under Rule 23(b)(1)(A) because the settlement did not provide any injunctive relief and therefore posed no risk of incompatible standards of conduct, and that certification was improper under Rule 23(b)(1)(B) because the parties had failed to satisfy the requirements established by *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), for certification of limited fund mandatory classes. R. 710-718. On that latter point, the Simmons Objectors argued that the parties failed to demonstrate the existence of a limited fund of punitive damages, that the fund was limited only by agreement of the parties, and that a limited fund class could not be justified by resort to the argument that principles of due process place a theoretical limit on total punitive damages because the parties had failed to provide any

[4] On September 21, 2004, several other appellant class members filed notices of exclusion from the class settlement and joined the objections filed by Simmons and Ivy. R. 860-863. The district court found that the class members had opted-out of the settlement in a timely fashion and permitted them to file their objections out-of-time in light of the onset of Hurricane Ivan on the September 16 deadline. R. 1561-1563.

evidence establishing that the $3.5 million cap on punitive damages represented the due process limit. R. 1615-1623.

With respect to Rule 23(b)(2), which bars certification when the predominant form of relief is monetary relief, the Simmons Objectors argued that certification of a mandatory class was improper because the settlement provides exclusively money damages, and because the settlement allows class members to opt-out their claims for injunctive relief.

E. The Parties' Submissions and the Fairness Hearing

On October 5, 2004, the district court held a fairness hearing concerning the proposed settlement. Prior to the hearing, the parties submitted extensive memoranda urging final approval of the settlement. R. 1011-1206 (Defendants' filings); R. 1207-1545 (Plaintiffs' filings). For the first time, in response to the Simmons Objectors' objections, the parties raised the specter of a due process limit on punitive damages as a justification for a mandatory limited fund class. *Id.* Although the parties *argued* that due process justified a limited fund punitive damages class, conspicuously absent from their memoranda and exhibits, however, was any *evidence* concerning that due process limit.

At the hearing, the district court conducted only a cursory examination into the Rule 23 requirements for class certification. The district court did not ask for,

and the parties did not provide, any evidence regarding the alleged limited fund of punitive damages. The parties did not present evidence regarding the nature of Washington Mutual's alleged misconduct, nor the extent of the class member's harm – two factors identified by the Supreme Court in *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408, 418 (2003), as relevant to determining the reasonableness of a punitive damages award. They also never attempted to justify their agreed-upon cap of $3.5 million in punitive damages by putting forth any evidence demonstrating that $3.5 million represents the due process limit on punitive damages. Further, the parties failed to provide evidence showing any likelihood that litigants would breach the asserted due process limit if permitted to opt out and sue individually.[5]

Although Class Counsel presented legal arguments in favor of mandatory class certification at the hearing, like in their pleadings, they failed to provide any evidence showing that the Constitution limited punitive damages to $3.5 million, and their statements either failed to support, or affirmatively undermined, their request for mandatory certification. Class counsel at one point speculated that one

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[5] The only testimony that the parties did present was from Harvard Law Professor David Rosenberg, who did not offer evidentiary support for the settlement, but merely provided his legal opinion regarding the requirements of Rule 23. Transcript at 7-62. The district court ultimately disregarded Professor Rosenberg's legal conclusions in reaching its decision. R. 2116, ER Tab 3 at 11.

of the defendant's "net worth is more like in the fifty to seventy-five million dollar range at most," Transcript at 73, but failed to provide any evidence or financial records to support that statement. Also, while arguing that a non-opt-out class was necessary to forestall a multiplicity of individual lawsuits, class counsel stated that, in actuality, very few class members would opt out if permitted to do so, because of the low chance of success on the merits. *Id.* at 68-70.

F. The District Court's Decision

On May 16, 2005, the district court granted final approval of the class action settlement and certified the mandatory punitive damages class under subdivisions (b)(1)(B) and (b)(2) of Rule 23. R 2106-2131. As to (b)(1)(B), without directly addressing any of the factors laid out by the Supreme Court in *Ortiz* governing certification of (b)(1)(B) classes, the district court held that, because principles of due process place some theoretical limit on the total amount of punitive damages awardable against a defendant, there was a "limited fund" of available punitive damages. R. 2113-2115, 2126-2127; ER Tab 3 at 8-10, 21-22. The district court's decision faithfully reflected the parties' lack of evidence regarding the mandatory class. In its decision, the district court never attempted to discern what sort of limit due process places on punitive damage awards, to explain why $3.5 million constituted the due process limit, or even to determine how the due process limit

on punitive damages could be calculated. The district court also never determined the likelihood that class members would opt out and successfully obtain punitive damages if permitted to do so, nor the likelihood that allowing individual opt outs would breach the due process limit. In lieu of making factual determinations, the court summarily concluded that "there is a high likelihood that the first plaintiffs to litigate their claims to conclusion would deplete any punitive damage pool that might be available to subsequent plaintiffs." R. 2127, ER Tab 3 at 22.

The court also certified the punitive damages class as a mandatory class under Rule 23(b)(2). Confining its analysis of (b)(2) to less than a single paragraph, the district court disregarded the fact that the settlement provides no injunctive relief and concluded that this settlement-only class could be certified under (b)(2) "because the punitive damage claim is ancillary to the injunctive relief *sought in the complaint*." R. 2128 (emphasis added), ER Tab 3 at 23. The court reached this result even though the settlement permits class members to opt-out claims for that very injunctive relief that the court concluded necessitated mandatory class treatment. The district court also neglected to address the factors identified in *Allison v. Citgo Petroleum Co.*, 151 F.3d 402 (5th Cir. 1998) that govern whether claims for money damages can be certified under (b)(2).

SUMMARY OF ARGUMENT

The district court's approval of a mandatory non-opt-out class for punitive damages violates both the provisions of Rule 23 and constitutional guarantees of due process. In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Supreme Court held that because mandatory classes conflict with the overarching due process right of individuals to control their claims for money damages, the mandatory class provisions of Rule 23(b) apply only in very narrow circumstances. Those circumstances are absent here.

First, the district court erred in concluding that principles of due process establish a limited fund of punitive damages justifying mandatory certification under Rule 23(b)(1)(B). In *Ortiz*, the Supreme Court held that a limited fund mandatory class cannot be certified under (b)(1)(B) unless (a) there is a pre-existing fixed and ascertainable limit on available damages; (b) the limit is based on something more than the agreement of the parties; (c) the parties provide specific evidence detailing the limit on the fund and the insufficiency of the fund to pay out all claims; and (d) the class includes all claimants against the fund in order to guarantee that everyone is treated equitably.

The punitive damages class here fails on all counts. First, the abstract and hypothetical punitive damages cap relied upon by the parties is theoretical and

cannot be defined with precision, making it impossible to determine the upper limit of the fund. Second, the $3.5 million limit is simply a creation of the parties themselves. The parties' decision to cap the punitive damages portion of the settlement fund at $3.5 million, as opposed to some other number, is wholly arbitrary, and reflects nothing other than the parties' own agreement. Third, far from *Ortiz*'s requirement for specific facts, the parties here have not provided a shred of evidence demonstrating the existence of a limited fund. The parties instead relied solely on the fact that a due process limit on punitive damages may exist at some point, without attempting to show that the limit falls exactly at the $3.5 million point they chose, and without attempting to provide any evidence relevant to determining an appropriate amount of punitive damages. Finally, the class is under-inclusive, resulting in inequitable treatment between claimants. Although the 45,000 class members are limited only to the $3.5 million fund of punitive damages, the 23 *Blackmon* plaintiffs, who the parties excluded from settlement, have obtained $54 million in punitive damages.

In the absence of any specific evidence supporting a limited fund, the court below reached its certification decision on the basis of due process, and due process alone. The district court's decision admits of no limiting principle, however, and if affirmed, would justify certification of mandatory classes in every

class action seeking punitive damages, in direct contravention of *Ortiz*'s instruction that opt-out rights must be protected whenever possible.

The district court also erred in certifying a mandatory punitive damages class under Rule 23(b)(2), which, under *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), applies only where the predominant form of relief is injunctive relief and where any damages are incidental and flow directly from a finding of classwide liability. Here, (b)(2) certification clearly was improper because the settlement provides no injunctive relief whatsoever. The district court compounded its error by failing to recognize that the settlement itself permits class members to opt-out their claims for injunctive relief. It makes no sense to ground certification of a non-opt-out class on claims for which an opt-out right is specifically preserved.

Finally, in certifying a (b)(2) class, the district court illogically relied on injunctive relief *requested* in the complaint, even though the parties excluded such relief from the settlement. In any event, regardless of whether the court focuses on the complaint or the settlement, (b)(2) certification is improper because the fact that punitive damages turn on individualized determinations about each class member's specific circumstances demonstrates that punitive damages do not constitute an incidental form of relief.

STANDARD OF REVIEW

A district court's decision to certify a class is reviewed for abuse of discretion. *Stirman v. Exxon Corp.*, 280 F.3d 554, 561 (5th Cir. 2002). This appeal presents questions of law, including whether the district court correctly applied Rule 23 and the Constitution, which are reviewed *de novo*. *Id.*; *see United States v. Delgado-Nunez*, 295 F.3d 494, 496 (5th Cir. 2002) ("abuse of discretion review of purely legal questions . . . is effectively *de novo* because a district court by definition abuses its discretion when it makes an error of law." (internal quotation omitted)). Also, because the constitutionality of a punitive damages award is reviewed *de novo*, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001), the district court's determination that due process principles justify certification of a mandatory punitive damages class is subject to *de novo* review.

ARGUMENT

THE DISTRICT COURT'S CERTIFICATION OF A MANDATORY PUNITIVE DAMAGES SETTLEMENT CLASS VIOLATES BOTH RULE 23 AND THE CONSTITUTION.

A court cannot certify a class action unless it finds that the class meets the requirements of Rule 23(a) and satisfies one of the subdivisions of Rule 23(b). *See Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 620-21 (1997). Before

certifying a class, a court must conduct a "rigorous analysis" of Rule 23's requirements. *Stirman*, 280 F.3d at 561. That scrutiny is heightened when a class action settlement is involved, because of the court's duty to protect the interests of absent class members. *Amchem*, 521 U.S. at 620-21 (directing that the rules designed to protect absent class members "demand undiluted, even heightened, attention in the settlement context," and that these interests must be the court's "dominant concern"). The party seeking certification bears the burden of showing that Rule 23's requirements are satisfied. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir. 1998).

Rule 23(b)(3), which governs class actions for money damages, incorporates the right of class members to opt out of the class and pursue their own claims individually – a right that is also guaranteed as a matter of due process. *See* Fed. R. Civ. P. 23(c)(2); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 & n.3 (1985) ("due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class"). Unlike classes certified under subdivision (b)(3), classes certified under subdivisions (b)(1) and (b)(2) do not guarantee an opt-out right. Here, the court below concluded in summary fashion, without undertaking anything resembling a "rigorous analysis" of Rule 23, that a class could be certified on a non-opt-out basis under subdivisions

(b)(1)(B) and (b)(2). For the reasons explained below, the district court's order must be reversed.

I. THE DISTRICT COURT ERRED IN CERTIFYING A MANDATORY PUNITIVE DAMAGES CLASS UNDER RULE 23(b)(1)(B).

A. *Ortiz* Governs Attempts To Certify Mandatory (b)(1)(B) Classes.

1. *Ortiz* Places Strict Limits on the Use of (b)(1)(B) Classes.

Certification under Rule 23(b)(1)(B) is permitted only when prosecution of separate actions would create a 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 parties to the adjudications or substantially impair or impede the ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B). This subdivision typically has been applied in cases where a pre-existing "limited fund" exists, such that an action by one plaintiff seeking damages threatens to deplete the fund and thereby deprive later claimants of any recovery. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842 (1999).

The Supreme Court exhaustively discussed the requirements for certification of a (b)(1)(B) class in *Ortiz v. Fibreboard*, 527 U.S. 815 (1999). The Court expressed strong reservations about the use of mandatory (b)(1)(B) classes

because of the conflict between mandatory classes and the due process right of absent class members to opt out and control their own litigation:

> The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages 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 . . . are resolved regardless of either 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. . . . [W]e raised the flag on this issue more than a decade ago in *Phillips Petroleum v. Shutts* [472 U.S. 797, 812 (1985)] . . . . [There] we also saw that before an absent class member's right of action was extinguishable, due process required . . . "at a minimum . . . an absent plaintiff [must] be provided with an opportunity to remove himself from the class."

527 U.S. at 846-48.

In order to keep subdivision (b)(1)(B) within the confines of due process, the Court instructed that (b)(1)(B) classes must adhere to the "traditional norm" of a limited fund. *Id.* at 842. The Court found that the traditional "limited fund" situation involved cases in which multiple individuals had liquidated claims against a unitary fixed *res*, such as a trust fund, bank account, or proceeds of a sale. *Id.* at 834. The Court explained that, in those special situations, a mandatory class could be certified without encroaching on the due process rights of class

members because it was the only way to ensure that one claimant's recovery did not come at the expense of all others. *Id.*

Ortiz further cautioned that the Federal Rules Advisory Committee that amended Rule 23 was "consciously retrospective" in its view of the scope of (b)(1)(B) and frowned on creative or adventurous applications of the limited fund doctrine to other contexts, stating that the Advisory Committee intended for Rule 23(b)(3) – which enshrines a full opt-out right – to govern innovative approaches to class certification. *Id.* at 842; *see also id.* ("[T]he Advisory Committee looked cautiously at the potential for creativity under Rule 23(b)(1)(B), at least in comparison with Rule 23(b)(3)."); *In re Simon II Litig.*, 407 F.3d 125, 137 (2d Cir. 2005) (noting that *Ortiz* expressed "extreme hesitation to apply Rule 23 in ways that would have been beyond the contemplation of the drafters of the Advisory Committee Notes").

In order to rein in the opportunities for abuse and to protect absent class members' due process rights, *Ortiz* established three "*presumptively necessary and not merely sufficient*" elements of a limited fund class. *Id.* at 842 (emphasis added). First, there must be a fund with a "definitely ascertained limit" that is insufficient to pay out all claims. *Id.* at 841, 838. Critical to meeting this requirement is demonstrating "the upper limit of the fund itself, without which no

showing of insufficiency is possible." *Id.* at 850. Equally important, that limit cannot be established merely by "agreement of the parties," but must be fixed by a constraint external to the litigation itself. *Id.* at 822 ("the fund [must be] limited by more than the agreement of the parties"); *id.* at 864 ("it would be essential that the fund be shown to be limited independently of the agreement of the parties.").

Second, *Ortiz* requires that "the whole of the inadequate fund [must] be devoted to the overwhelming claims." *Id.* at 839. If this were not the case, then the defendant would be able to use the procedural device of mandatory class certification to retain a windfall, and class members could achieve a better result through individual litigation than through a non-opt-out settlement. *Id.*

Third, the class must include all claimants to the fund, and they all must be treated "equitably among themselves." *Id.* If the class is under-inclusive, then those claimants who are outside the class can still seek the full extent of their claims against the fund, resulting in inequitable treatment between class members and non-class members and creating the very risk of fund depletion that a mandatory class is designed to prevent. *Id.* at 839-41; *see also In re Sch. Asbestos Litig.*, 789 F.2d 996, 1005-07 (3d Cir. 1986) (describing the inclusiveness requirement and de-certifying a mandatory punitive damages class because it did not include all claimants).

These "presumptively necessary" requirements underscore why *Ortiz* instructed that (b)(1)(B) classes could be certified, if at all, only in a traditional limited fund circumstance. *Ortiz* recognized that in a traditional limited fund situation (such as a trust fund) where the upper limit can be pinpointed with exactness, where every class member has a fixed, liquidated claim against the fund, and where the total number of claims against the fund is known, it is possible to distribute the fund equitably and to all claimants while at the same time ensuring that the defendant does not unfairly keep any assets properly belonging to the class. The Court warned, however, that the mandatory class rationale breaks down the more a limited fund deviates from that traditional model, because the greater the uncertainty regarding the limit of the fund, or the size and extent of the claims against the fund, the harder it is to guarantee that class members will receive their equitable share and get the best possible deal. *See id.* at 842, 850. Thus, the Court concluded, without the assurances of fairness that occur most clearly in a traditional limited fund situation, a court cannot "justify binding absent members of a class under Rule 23(b)(1)(B), from which no one has a right to secede." *Id.* at 838.

2. Since *Ortiz*, Courts Have Refused To Certify Limited Fund Classes For Unliquidated Tort Claims.

Ortiz completely overhauled the framework for (b)(1)(B) classes. Prior to *Ortiz*, although the majority of courts had refused to certify punitive damages classes under Rule 23(b)(1)(B),[6] a few district courts had certified such classes in a small subset of mass disaster cases – such as lawsuits arising out of the use of Agent Orange – that presented unparalleled potential for astronomical punitive damages awards. *See, e.g.*, *In re Agent Orange Prods. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) (certifying a (b)(1)(B) punitive damages class but allowing class members to opt out), *mandamus denied sub. nom In re Diamond Shamrock Chem. Co.*, 725 F.2d 858 (2d Cir. 1984).

In substantially curtailing the scope of (b)(1)(B), however, *Ortiz*, rendered obsolete those few pre-*Ortiz* orders certifying limited fund classes. Lower courts have recognized this sea change and have held that *Ortiz* prohibits (b)(1)(B) classes absent the most compelling circumstances. *See, e.g.*, *Molski v. Gleich*, 318 F.3d 937, 948 (9th Cir. 2003) (holding that, under *Ortiz*, "a stringent interpretation

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[6] *See Sch. Asbestos*, 789 F.2d at 1005-07; *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 305-06 (6th Cir. 1984); *In re N.D. Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 852-53 (9th Cir. 1982); *In re Fed. Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982); *Trautz v. Wiseman*, 846 F. Supp. 1160, 1168-69 (S.D.N.Y. 1994); *Bower v. Bunker Hill Co.*, 114 F.R.D. 587, 595-96 (E.D. Wash. 1986).

of Rule 23(b)(1)(B) is necessary"); *In re Telectronics Pacing Systs.*, 221 F.3d 870, 881 (6th Cir. 2000) ("Certification under subsection (b)(1)(B), which does not include [opt-out] protections, must be carefully scrutinized and sparingly utilized."); *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 899 (7th Cir. 1999) ("*Ortiz* . . . says in no uncertain terms that class members' right to notice and an opportunity to opt out should be preserved whenever possible."). Since *Ortiz*, not a single attempt to certify unliquidated tort claims under the limited fund theory of (b)(1)(B), other than in the settlement below, has survived judicial scrutiny.[7]

Most recently, and of particular importance here, in *In re Simon II Litigation*, 407 F.3d 125 (2d Cir. 2005), the Second Circuit de-certified a mandatory punitive damages class that had been based on the same due process theory relied on by the court below. Just as in the present case, in *Simon II*, in which a putative nationwide class of smokers filed suit against the tobacco

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[7] *See, e.g.*, *Simon II*, 407 F.3d at 137-38 (reversing certification of mandatory punitive damages class), *rev'g* 211 F.R.D. 86 (E.D.N.Y. 2002); *Telectronics*, 221 F.3d at 880-81 (reversing pre-*Ortiz* (b)(1)(B) certification); *Oshana v. Coca-Cola Bottling Co.*, 225 F.R.D. 575, 584 (N.D. Ill. 2005); *In re Paxil Litig.*, 212 F.R.D. 539, 553 (C.D. Cal. 2003) (refusing to certify (b)(1)(B) punitive damages class); *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 347 (N.D. Ill. 2002); *In re Compl. of River City Towing Servs.*, 204 F.R.D. 94, 96 (E.D. La. 2001); *Doe v. Karadzic*, 192 F.R.D. 133 (S.D.N.Y. 2000); *Cullen v. Whitman Med. Corp.*, 188 F.R.D. 226, 236 (E.D. Pa. 1999); *In re Diet Drugs*, 1999 WL 782560 at *10 (E.D. Pa. Sept. 27, 1999).

industry, the district court certified a mandatory punitive damages class under Rule 23(b)(1)(B) on the ground that due process limited the total amount of punitive damages awardable against the defendants. 407 F.3d at 127-28.

The Second Circuit reversed, rejecting the district court's "limited punishment" due process theory as "incompatible with *Ortiz*." *Id.* at 128. The court thoroughly examined the requirements of *Ortiz* and, after emphasizing that *Ortiz* "sounded a number of cautionary notes" concerning the use of (b)(1)(B) classes, *id.* at 137, held that the district court's decision violated *Ortiz* because the parties failed to demonstrate either the upper limit of the fund or the insufficiency of the fund to pay out all claims. The Second Circuit held that, in contrast to "the classic limited funds" described in *Ortiz*, where the limit on the fund was fixed and clear, due process did not provide a basis for a (b)(1)(B) class because the due process limit on punitive damages is "theoretical . . . in essence – postulated, and for that reason is not susceptible to proof, definition or even estimation by any precise figure." *Id.* at 138. The court further held that there was no showing that the fund, even if capable of precise definition, was insufficient to pay out all claims, stating that "the record in this case does not evince a likelihood that any given number of punitive awards to individual claimants would be constitutionally excessive, either individually, or in the aggregate, and thus overwhelm the

available fund." *Id.* (footnote omitted). Thus, the court concluded that the plaintiffs had not shown that individual class members would be prejudiced if permitted to pursue their own separate claims, and held that due process limits on punitive damages did not justify certification of a (b)(1)(B) non-opt-out class.

The "limited punishment" theory rejected in *Simon II* is identical to the theory relied upon by the court below in certifying the mandatory (b)(1)(B) punitive damages class. As explained below, like in *Simon II*, the parties have fallen woefully short of satisfying the requirements of *Ortiz*, and the district court's certification order must be vacated.

B. The Mandatory Punitive Damages Class Fails To Satisfy *Ortiz*.

The district court certified a mandatory class as if *Ortiz* never existed. The decision below contains a single reference to *Ortiz*, and the district court never analyzed or applied any of *Ortiz*'s "presumptively necessary" requirements in certifying a (b)(1)(B) class. Instead, the court below relied on a single district court opinion, one that predates *Ortiz* and in which the court preserved the class members' opt-out rights. R. 2127-2128, ER Tab 3 at 22-23 (citing *Agent Orange*, 100 F.R.D. at 728). Without ever attempting to determine either the due process limit on punitive damages, or the likelihood that the limit would be breached, the court below simply opined that it could certify a mandatory punitive damages

class because principles of due process place some theoretical and undefined limit on the total amount of punitive damages available to the class. Because *Ortiz* requires that courts give greater respect to the opt-out rights of absent class members, the district court's decision cannot stand.

1. The "Punitive Damages" Fund Does Not Have a Definitely Ascertainable Limit as Required by *Ortiz*.

The first reason the district court's "limited punishment" theory runs afoul of *Ortiz* is because that theory is incompatible with *Ortiz*'s requirement that the limited fund have a "definitely ascertained limit." 527 U.S. at 841. Unlike a traditional limited fund, such as a trust fund, where the available assets are both fixed and known, the constitutional cap on punitive damages is theoretical, abstract, and subjective, and therefore cannot be defined with precision. The Supreme Court has stated that, with respect to punitive damages, "the constitutional line is inherently imprecise," *Cooper*, 532 U.S. at 434-35 (quotation omitted), and that there is no "bright line marking the limits of a constitutionally excessive punitive damages award," *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996).[8]

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[8] *See also State Farm*, 538 U.S. at 425 ("there are no rigid benchmarks that a punitive damages award may not surpass"); *Honda Motor Corp. v. Oberg*, 512 U.S. 415, 420 (1994) (holding that there is no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable") (quoting

This lack of a precise constitutional limit on punitive damages renders the district court's order fatally flawed. Under *Ortiz*, it is insufficient simply to assert, as the district court did, that a limit exists as a general matter. *Ortiz* requires that the limit on the fund be readily and objectively identifiable at a fixed dollar amount. Without such a precise definition of the size of the fund, there is no guarantee that class members will receive their maximum pro-rata share from a fund that has been proven inadequate to satisfy their claims, and therefore no justification for restricting a claimant's right to opt-out and pursue his or her claims individually.

The *Simon II* court adopted this exact reasoning in rejecting certification of a non-opt-out punitive damages class under (b)(1)(B), holding that the due process limit on punitive damages is "postulated," and therefore "not easily susceptible to proof, definition, or even estimation by any precise figure." 407 F.3d at 138. Similarly here, the punitive damages fund certified by the court below is vague and imprecise, and thus qualitatively different from the traditional limited fund described in *Ortiz*. The lack of a precise due process limit renders the district

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TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 458 (1993); *Microsoft Corp. v. Bristol Tech., Inc.*, 250 F.3d 152, 155 (2d Cir. 2001) ("punitive damages by their nature do not admit of precise determination").

court's "limited punishment" class "incompatible with *Ortiz*," *Simon II*, 407 F.3d at 128, and mandates reversal.

2. The "Punitive Damages" Fund Is Limited Only by the Agreement of the Parties, in Violation of *Ortiz*.

Even assuming that the inchoate due process limit on punitive damages could ever satisfy the limited fund rationale of *Ortiz* (which it cannot), the district court's certification of a limited fund punitive damages class in this case was error because the fund in this case was established merely by the "agreement of the parties." *Ortiz*, 527 U.S. at 821, 864. Here, the $3.5 million portion of the settlement fund designated "punitive damages" is purely a creature of the settlement agreement. The $3.5 million number was plucked from thin air by the parties themselves, with no explanation for how it was reached. Nor did the parties, at the time they reached settlement, attempt to justify the $3.5 million number by invoking any due process limit. Rather, they resorted to due process principles only *after* the Simmons Objectors intervened to challenge the legality of the class settlement, as an eleventh-hour *post-hoc* rationalization of their previous agreement to limit punitive damages to $3.5 million. In sanctioning this conduct under the guise of due process, the district court essentially permitted the defendants to set their own cap on their overall punitive damages liability by

arbitrarily selecting a portion of the settlement fund (conveniently, a clean fifty percent) and calling it "punitive damages." This is exactly what *Ortiz* forbids – *see* 527 U.S. at 821, 864 – and this alone warrants reversal of the district court's order certifying a mandatory class.

Indeed, the parties' arbitrary agreement, rather than some due process theory, is the only thing possibly driving the settlement's $3.5 million punitive damages cap. The settlement fund's punitive damages limit could not have been derived from the alleged constitutional cap on punitive damages, because no basis exists for computing such a limit. Punitive damages cannot be determined in the abstract, but instead must be tied to the "degree of reprehensibility of the defendant's misconduct" and "the specific harm suffered by the plaintiff." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418, 422 (2003). Thus, whatever theoretical limit exists on the available punitive damages in this case cannot be "definitely ascertained" prior to any determination of the extent of Washington Mutual's wrongdoing and prior to any determination of the harm suffered by the class members. *See Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 281 (2d Cir. 1990) (holding that a court cannot determine the due process cap on punitive damages unless it has a factual basis for determining the full extent of the defendant's wrongdoing). No such determination was ever

made, or even attempted, in the proceedings below, and therefore all that remains is "the agreement of the parties." Indeed, the purpose of reaching a settlement is to avoid a determination of such questions. The district court therefore allowed the parties themselves, including Washington Mutual, to decide how much total punishment Washington Mutual should receive. Plainly, this is inconsistent with *Ortiz*'s unequivocal bar on funds limited "by agreement of the parties," 527 U.S. at 864, and requires reversal of the district court's decision.[9]

3. The Parties Failed To Demonstrate Both the Limit and the Insufficiency of the "Punitive Damages" Fund, as Required by *Ortiz*.

Not only was the limited fund in this case solely the creation of the parties themselves, in direct violation of *Ortiz*, it also was not based on even an iota of the requisite "evidence on which the district court may ascertain the limit and the insufficiency of the fund." *Ortiz*, 527 U.S. at 849. Here, the parties have shown

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[9] It is questionable whether the parties' agreement to limit punitive damages to $3.5 million constitutes the requisite state action necessary to implicate the due process clause. *See Simpson*, 901 F.2d at 282 ("Moreover, it is far from clear that sums paid in private settlements may validly be counted in determining whether state-compelled punitive damages awards exceed the limits of the Fourteenth Amendment."). Nor does judicial approval of the settlement's punitive damages fund transform the parties' private agreement into state action. *See Davis v. Prudential Securities, Inc.*, 59 F.3d 1186, 1191-92 (11th Cir. 1995) (judicial confirmation of private arbitrator's punitive damages award does not constitute state action).

neither (a) the upper limit of the fund, nor (b) that the fund is insufficient to pay out all claims.

a. The Parties Have Failed To Show That $3.5 Million Represents the Constitutional Upper Limit of Permissible Punitive Damages.

With respect to the former, the parties failed to present any evidence at all regarding the due process limit on punitive damages, let alone that the absolute constitutional maximum is $3.5 million. Nor did the district court make any finding that $3.5 million was the upper limit of permissible punitive damages. The parties simply cried "due process," and asserted, without providing any facts specific to this case, that simply because due process places some undefined limit on punitive damages, they could preclude class members from opting-out. This reliance on due process, and due process alone, cannot be enough under *Ortiz* to justify depriving class members of the right to opt out.[10]

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[10] This failure to provide specific evidence showing the exact limit on the fund itself is a commonly cited reason for refusing to certify mandatory limited fund classes. *See, e.g.*, *Sch. Asbestos*, 789 F.2d at 1005 (finding that district court abused its discretion in certifying a mandatory punitive damages class without making specific findings regarding the potential scope of punitive damages); *Bendectin*, 749 F.2d at 306 (holding that the district court erred in certifying mandatory punitive damages class without first showing the limit of the fund); *Dalkon Shield*, 693 F.2d at 852; *Cullen*, 188 F.R.D. at 236 (finding that evidence regarding defendant's total assets was insufficient to justify a limited fund class where there was no evidence that defendants would not be able to pay all claims); *Bower*, 114 F.R.D. at 595-96.

Although it certainly would be convenient for the parties if their agreed-upon cap of $3.5 million coincidentally also happened to fall exactly at the due process limit, the record dispels such a conclusion. In setting a punitive damages cap of $3.5 million, the parties completely ignored the factors described by the Supreme Court for assessing the reasonableness of a punitive damages award: (a) the reprehensibility of the defendants' misconduct; (b) the ratio of punitive to compensatory damages; and (c) the size of similar punitive damage awards. *See State Farm*, 538 U.S. at 418. The parties' disregard for the *State Farm* factors is not surprising, however, as those factors demonstrate that $3.5 million does not even approach the due process limit. As to the first factor, not only do the parties provide no evidence regarding Washington Mutual's misconduct, Washington Mutual explicitly "den[ies] any and all wrongdoing and liability whatsoever" as a condition of settlement. R. 417, § 4.O.3, ER Tab 6 at 19. As to the second factor, the settlement's 1:1 ratio of punitive to compensatory damages is a far cry from the double-digit ratio identified by the Supreme Court as constitutionally suspect. *See State Farm*, 538 U.S. at 425. Finally, as to the third factor, the punitive damages fund here is substantially smaller than the punitive damages award in the *Blackmon* case, which involved identical claims against Washington Mutual as are asserted here. In contrast to the $3.5 million punitive damages fund created in the

settlement, the 23 plaintiffs in the *Blackmon* case obtained a punitive damages verdict of $69 million, which was subsequently reduced to $54 million.[11] R. 1684b Exhibit 8, ER Tab 5; R. 736-737 ¶ 11. If due process permits 23 plaintiffs to collect $54 million in punitive damages ($2.35 million per plaintiff), then it unquestionably permits the 45,000 class members in this case to collect far more than the $3.5 million in punitive damages ($78 per plaintiff) provided in the settlement agreement.[12] Whatever the as-yet-unidentified due process limit on punitive damages may be in this case, it is clear that the $3.5 million cap set by the parties does not even approach it.

The only "evidence" that the district court mentioned in connection with punitive damages was class counsel's offhand and unsworn assertion at the fairness hearing that one of the defendants had a present net worth of $50-75

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[11] That case currently is on appeal. R. 737, ¶ 11.

[12] The parties' failure to provide concrete evidence demonstrating the precise upper limit of the fund distinguishes this case from *Agent Orange*, 100 F.R.D. 718, the one case relied upon by the district court in support of its "limited punishment" class. In *Agent Orange*, unlike in this case, the court made extensive factual findings regarding the actual limits on the amount of awardable punitive damages, and appointed an impartial Special Master who held an evidentiary hearing and examined the balance sheets of defendants to determine if a limited fund existed, before certifying a limited fund class. *Id.* at 727-28. Moreover, even after certifying a punitive damages class under (b)(1)(B), the court, unlike here, *permitted* class members to opt out. *Id.* at 728. In any event, the continuing validity of *Agent Orange* is doubtful in light of *Ortiz*.

million. R. 2114 (citing Transcript at 73), ER Tab 3 at 9. On the basis of that assertion, the district court concluded that $3.5 million was "within the constitutionally permissible range of punitive damages." *Id.* The unsworn statements of class counsel made during oral argument, however, are not evidence and cannot provide a basis upon which the court can determine the existence of a limited fund. *See Flaherty v. Warehousemen, Garage & Serv. Station Employees' Local Union No. 334*, 574 F.3d 484, 486 n.2 (9th Cir. 1978) ("[l]egal memoranda and oral argument, in the summary-judgment context, are not evidence"); *see also Martin v. John W. Stone Oil Distributor, Inc.*, 819 F.2d 547, 549 (5th Cir. 1987) (unsworn documents cannot be considered as evidence).[13] Moreover, all the district court drew from class counsel's assertion was that the "punitive damages" portion of the settlement "is *within* the constitutional limit for punitive damages," R. 2114, ER Tab 3 at 9 (emphasis added), not that it *represents* the upper constitutional limit for punitive damages.[14] Thus, the lack of evidence

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[13] Even if such a statement could be considered evidence in some circumstances, neither the district court nor the parties explained how *class counsel* could possibly be qualified to testify to the net worth of *the defendant*. Significantly, Washington Mutual never provided any evidence concerning its net worth, never submitted any balance sheets or other financial statements, and never made any representation as to its net worth.

[14] In any event, the Supreme Court has suggested that a defendant's net worth is not a relevant factor in determining whether a punitive damages award

demonstrating that $3.5 million represents the upper limit of the punitive damages fund dooms the parties' efforts to certify a mandatory punitive damages settlement class.

b. The Parties Have Failed To Show that the Punitive Damages Fund is Insufficient To Pay all Claims.

Even if the parties could show the upper limit of the fund (which they cannot), a non-opt-out (b)(1)(B) class still is improper because there is not a shred evidence establishing "the insufficiency of the fund" to pay out all claims. *Ortiz*, 527 U.S. at 838, 849. The district court's bare conclusion, that because of the large class size there is a risk that "at some point" (R. 2127, ER Tab 3 at 22) the available pot of punitive damages could be depleted, amounts to unadorned speculation that directly conflicts with *Ortiz*'s requirement for hard evidence and independent findings of fact. *Ortiz*, 527 U.S. at 849.

The district court's conclusion that the punitive damages fund is insufficient to satisfy all claims lacks any evidentiary basis whatsoever. Despite the court's

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exceeds due process limits. *See State Farm*, 538 U.S. at 427-28; *see also Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677-78 (7th Cir. 2003) (Posner, J.) (explaining why "'net worth' is not the correct measure of a corporation's resources" for punitive damages purposes). Even if it is relevant, it is only one of several factors that courts must take into account, and as explained above, those other factors demonstrate that $3.5 million does not approach the due process limit of punitive damages.

confident prediction that the fund would be depleted "at some point" (R. 2127, ER Tab 3 at 22) if opt outs were permitted, the district court never actually attempted to determine the likelihood that (a) individual class members would opt out their punitive damages claims if permitted to do so; (b) those opting out would file individual claims; (c) if individual class members who did file separate claims, would prevail on the merits; (d) if they prevailed on the merits, the jury would exercise its discretion and award them punitive damages; and (e) if the jury awarded them punitive damages, the size of the awards would exceed the due process limit. The district court made no finding as to a single one of these factors, let alone all five, making it impossible to estimate Washington Mutual's potential punitive damages liability if class members were permitted to opt out.[15] *See Ortiz*, 527 U.S. at 850 (noting that the difficulties inherent in aggregating yet-unrealized claims for unliquidated damages precluded an accurate estimation of the defendant's future liability); *In re Diet Drugs Prods. Liab. Litig.*, 1999 WL

[15] For this reason, the *Agent Orange* decision, the one case relied on by the district court, demonstrates the total lack of justification for taking away the class members' opt-out rights in this case. In *Agent Orange*, although the court did certify a punitive damages class under subdivision (b)(1)(B), the court also decided "*to allow exercise of opt-out powers*," 100 F.R.D. at 728 (emphasis added), because it was unclear how many class members would opt out and therefore unclear whether the punitive damages fund would be insufficient to pay out all claims.

782560 at *7 (E.D. Pa. Sept. 27, 1999) (rejecting (b)(1)(B) class where the limit was based "only [on] the threat of pending litigation and related legal obligations," because there was "no reasonable method by which to calculate, or even estimate, with comfortable certainty, the [defendants'] potential liability"). Accordingly, rather than protecting the interests of absent class members from being prejudiced, a mandatory class here simply will permit Washington Mutual to keep a windfall by artificially capping its punitive damages liability. *See Man v. Raymark Indus.*, 728 F. Supp. 1461, 1467 (D. Haw. 1989) ("[A]lthough it would be unfortunate if a subsequent plaintiff could not obtain relief, this court believes it would be more unfortunate to allow defendants a windfall by permitting them to argue that the *possibility* of future litigation is sufficient to avoid the imposition of punitive damages.").

Moreover, rather than demonstrating the likelihood of repeated punitive damage awards that would exceed the yet-unspecified due process cap, both class counsel and defendants pressed upon the court that anyone opting out of the class would have enormous difficulty prevailing in an individual claim. *See, e.g.*, Transcript at 68-70. They cannot now turn around and argue, to the contrary, that the substantial risk of huge individual punitive damages verdicts requires certification of a mandatory punitive damages class.

Under similar circumstances, the Second Circuit in *Simon II* ordered de-certification of a mandatory punitive damages class in a nationwide tobacco class action, holding that "the record in this case does not evince a likelihood that any given number of punitive awards to individual claimants would be constitutionally excessive either individually, or in the aggregate, and thus overwhelm the available fund." *Simon II*, 407 F.3d at 138. As in *Simon II*, the failure to show the likely number of individual punitive damage claims if an opt-out right were provided, combined with the failure to show the likelihood of repeated punitive damage awards that, in the aggregate, would breach the theoretical due process limit demonstrates that the certification of a mandatory punitive damages class in this case was improper.

4. The Punitive Damages Class Is Fatally Under-Inclusive, in Violation of *Ortiz*.

Finally, the district court's certification order violated *Ortiz* because the class does not "comprise everyone who might state a claim" against Washington Mutual and therefore is under-inclusive. *Ortiz*, 527 U.S. at 839. Although the parties assert that classwide punitive damages must be capped at $3.5 million, the class definition excludes the *Blackmon* plaintiffs, who have obtained $54 million

in punitive damages in their state-court case. R. 406-406, ER Tab 6 at 7-8 (defining the class). Their exclusion dooms (b)(1)(B) certification in two ways.

First, the failure to include the *Blackmon* plaintiffs destroys any basis for a limited fund class. If the fund of punitive damages truly is limited, as the parties assert, then permitting the *Blackmon* plaintiffs to pursue their $54 million judgment on appeal creates a substantial risk that the fund of punitive damages will be depleted, *whether or not a mandatory class is certified*. *See Sch. Asbestos*, 789 F.2d at 1006 (noting that an under-inclusive class gives rise to the same risk of prejudice that a mandatory class is designed to avoid). Since the entire justification for stripping away class members' opt-out rights in a limited fund situation is to ensure that the class claims are not prejudiced by separate individual actions, the failure to include the *Blackmon* plaintiffs' claims, which could deplete the allegedly limited fund and leave the class members with little or no punitive damages recovery at all, requires de-certification of the mandatory class.

Second, far from ensuring that all claimants will be "treated equitably among themselves," *Ortiz*, 527 U.S. at 839, the exclusion of the *Blackmon* plaintiffs guarantees grossly disparate treatment. The parties cannot credibly argue that due process requires limiting the 45,000 class members in this case to $3.5 million in total punitive damages – an average of $78 per person – and at the

same time allow the 23 *Blackmon* plaintiffs to seek $54 million in total punitive damages – an average of $2.35 million per person. The unfairness of this manner of distribution is heightened here because the same lawyers represent both the *Blackmon* plaintiffs and the class. In *Ortiz*, the Court rejected a limited fund class as under-inclusive and non-equitable for this very reason, refusing to certify a limited fund class where outside plaintiffs "appeared to have obtained better terms than the class members." *Ortiz*, 527 U.S. at 855. The Court further held that, even if the class members had been treated comparably, mandatory certification still would have been inappropriate given the potential for conflict created by having the same counsel represent both sets of plaintiffs. *See id.* at 855-59. Just as in *Ortiz*, the gross disparity between the treatment of non-class and class members flies in the face of *Ortiz*'s instruction that all claimants receive equal treatment, and precludes mandatory class certification.

* * *

In short, the district court erred by foregoing any evidentiary requirement whatsoever and instead holding that due process, and due process alone, justifies stripping class members of their right to opt out and certifying a mandatory class. The district court's reasoning, that parties can attain a mandatory class simply by invoking due process, has no logical stopping point. Under the district court's

approach, any class action seeking punitive damages could be certified under (b)(1)(B), because in any case with multiple claimants, there exists a theoretical possibility that due process at some point could limit the ability of future claimants to obtain punitive damages from the defendant. The district court's "limited punishment" theory creates the exception that swallows the rule by dramatically expanding the restrictive scope of Rule 23(b)(1)(B) so as to render Rule 23(b)(3)'s opt-out requirement largely meaningless in every class action seeking punitive damages. This would turn on its head *Ortiz*'s holding that (b)(1)(B) classes should be used only in extremely rare situations and that (b)(3) (which permits a full opt-out right) is the primary vehicle for certification of class actions for money damages. *See Ortiz*, 527 U.S. at 844 ("It is simply implausible that the Advisory Committee, so concerned about the potential difficulties posed by dealing with mass tort cases under Rule 23(b)(3), with its provisions for notice and the right to opt out, would have uncritically assumed that mandatory versions of such class actions, lacking such protections, could be certified under Rule 23(b)(1)(B)." (internal citation omitted)).

This case exemplifies the risks posed by the district court's approach. The few previous cases in which courts have considered efforts to certify mandatory punitive damages classes involved broad mass tort claims that presented

unparalleled potential for astronomical punitive damages awards. *See, e.g., Simon II*, 407 F.3d at 137-38 (decertifying mandatory punitive damages class in nationwide tobacco litigation); *Sch. Asbestos*, 789 F.2d at 1005-06 (de-certifying mandatory punitive damages class for asbestos victims). By contrast, this case is a run-of-the-mill class action alleging traditional statutory and common law claims and involving an unremarkable sum of punitive damages. There is nothing in the record to distinguish this case from any other class action seeking punitive damages. To allow this action to be certified on a non-opt-out basis would make mandatory class actions routine. *Ortiz* prohibits such an outcome.

II. THE DISTRICT COURT ERRED IN CERTIFYING A MANDATORY PUNITIVE DAMAGES CLASS UNDER RULE 23(b)(2).

In addition to improperly certifying a mandatory punitive damages class under Rule 23(b)(1)(B), the district court also improperly certified a mandatory class under Rule 23(b)(2). Certification under (b)(2) 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 a whole." Rule 23(b)(2), unlike Rule 23(b)(3), does not mandate an opt-out right, because where an injunction or declaration of legal rights is obtained – for instance to restructure

a prison system or abate a public nuisance – such relief necessarily affects all similarly-situated people and can only be achieved on a classwide basis. *See, e.g.*, *In re Allstate Ins. Co.*, 400 F.3d 505, 507 (7th Cir. 2005).

Because subdivision (b)(2) is concerned with injunctive relief, (b)(2) certification is inappropriate "when the 'final relief relates exclusively or predominantly to money damages.'" *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000) (quoting Fed. R. Civ. P. 23(b)(2) Advisory Committee Notes). In *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), this Court explained that the opt-out protections of Rule 23(b)(3) are necessary where monetary relief predominates. *Id.* at 413. The Court determined that final monetary relief predominates unless it is "incidental" to the injunctive relief. *Id.* at 415. The Court held that damages are only incidental if they "flow directly from liability to the class as a whole," if class members would be automatically entitled to such damages upon a finding of liability, and if the damages are "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." *Id.* at 414. Moreover, in determining whether or not damages predominate, a court must proceed on a "claim-by-claim" basis and must look only

at the individual claims for which (b)(2) certification is sought. *See Bolin*, 231 F.3d at 976.

Far from conducting a "rigorous analysis of the Rule 23 prerequisites," *Stirman*, 280 F.3d at 561, the district court devoted only two sentences to deciding that the class satisfied Rule 23(b)(2). R. 2128, ER Tab 3 at 23. As explained below, the district court's cursory review lacks any legal basis and requires reversal.

A. The District Court Erred In Certifying a (b)(2) Mandatory Class Because The Settlement Provides Exclusively Monetary Relief.

The district court erred in certifying the punitive damages class under subdivision (b)(2), because monetary relief comprises the exclusive form of relief in the settlement. The settlement contains no injunctive relief whatsoever. The only relief for which class members are eligible is a monetary payment from a common settlement fund. Because "the final relief relates exclusively or predominantly to money damages," *Bolin*, 231 F.3d at 976, certification of a mandatory class under (b)(2) was improper.

Ignoring the fact that the settlement provides exclusively monetary relief, the district court certified the punitive damages class under (b)(2) on the ground that money damages were "ancillary to the injunctive relief *sought in the*

complaint." R. 2128, ER Tab 3 at 23 (emphasis added). The court's reliance on relief sought in the complaint – but never actually obtained in the settlement – as justification for certification of a (b)(2) settlement class defies both law and logic and cannot be sustained.

First, the district court's reliance on injunctive relief sought, but not actually provided in the final settlement, flies in the face of the Advisory Committee's command that (b)(2) certification is not appropriate where "*final relief* relates exclusively or predominantly for money damages." Rule 23(b)(2) Advisory Committee Notes (emphasis added); *see also Bolin*, 231 F.3d at 976 (quoting Advisory Committee Notes). Given the Advisory Committee's focus on final relief, and the fact that the relief contained in the settlement, rather than the relief sought in the complaint, will determine Washington Mutual's duties and obligations, the relief provided in the settlement must govern any certification decision. *Cf. Bolin*, 231 F.3d at 978 ("The mere recitation of a request for declaratory relief cannot transform damages claims into a Rule 23(b)(2) class action.").

Second, it makes no sense for certification of a *settlement only* class to depend on relief not actually contained in the settlement. This is especially true where, as here, the plaintiff filed this class complaint solely as a vehicle for

gaining approval of a settlement that already had been reached – a settlement that is devoid of injunctive relief. The parties clearly knew at the time the complaint was filed that the class would receive no injunctive relief. They cannot now rely on that phantom injunctive relief to justify (b)(2) certification.

Third, and perhaps most obviously, the injunctive relief sought in the complaint cannot possibly justify a non-opt-out class because the settlement permits class members to *opt out* those very claims for injunctive relief. The settlement provides for a mandatory class as to *punitive damages only*. It defies logic to base certification of a non-opt-out class on claims for which an opt-out right is explicitly preserved. If the injunctive relief sought in the complaint does not even give rise to a mandatory class *as to those precise claims*, then it surely it cannot permit certification of a mandatory class with respect to the class' other claims, including claims for punitive damages.

Fourth, as a policy matter, allowing certification of a mandatory class on the basis of injunctive relief sought in the complaint, even if the relief never inures to the class' benefit, would invite abusive tactics by parties seeking to limit the right of absent class members to opt out. Under such a rule, class counsel would be able to transform damages class actions properly brought under (b)(3) into mandatory (b)(2) class actions simply by tossing injunctive claims into the

complaint and then jettisoning those claims during settlement negotiations. This would improperly permit the parties 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)." *Bolin*, 231 F.3d at 976. This Court should not allow parties to a class action to so easily avoid the basic constitutional principle that "class members' rights to notice and opt out must be preserved whenever possible." *Jefferson*, 195 F.3d at 899.

Finally, the district court failed to understand that decisions on class certification are not indelibly cast in stone at the time the complaint is filed, but instead that the propriety of class certification, and the form that certification should take, changes as the case develops from the time of filing, to discovery, to class certification, to trial. The court has the duty to amend, grant, or deny certification orders in accordance with changed circumstances. *See, e.g.*, *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir. 1983) ("Under Rule 23 the district court is charged with the duty of monitoring its class decisions in light of the evidentiary development of the case. The district judge must define, redefine, subclass, and decertify as appropriate in response to the progression of the case

from assertion to facts."). Thus, where injunctive relief sought in the complaint ultimately becomes unavailable, either by statute or other reason, (b)(2) certification is improper. *See Bolin*, 231 F.3d at 977 n.39 ("Of course, the unavailability of injunctive relief under a statute would automatically make (b)(2) certification an abuse of discretion."); *Washington v. CSC Credit Servs., Inc.*, 199 F.3d 263, 267-69 (5th Cir. 2000) (refusing to certify a Fair Credit Reporting Act (FCRA) claim under (b)(2) because FCRA does not permit injunctive relief).[16] Here, whether or not injunctive relief was available at the time the complaint was filed, unquestionably it is no longer available now because the parties have excised it from the settlement. As a result, the district court erred in relying on injunctive relief requested in the complaint to justify mandatory certification of a settlement that provides no injunctive relief at all.

B. The District Court Erred In Certifying a (b)(2) Punitive Damages Class On The Basis Of Non-Punitive Claims.

Not only did the district court err in relying on injunctive relief sought in the complaint, but it further erred by relying on the "non-punitive financial portion of the claims in this case" as a basis for certification of a (b)(2) mandatory class for

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[16] *See also Petrolito v. Arrow Fin. Servs., LLC*, 221 F.R.D. 303, 312 (D. Conn. 2004) (refusing to certify (b)(2) class where Fair Debt Collection Practices Act did not authorize injunctive relief); *Trans Union*, 211 F.R.D. at 347 (refusing to certify (b)(2) class because injunctive relief was unavailable).

punitive damages. R. 2128, ER Tab 3 at 23. In *Bolin*, this Court held that "[t]o determine whether damages predominate, a court should certify a class on a claim-by-claim basis, treating each claim individually and certifying the class only with respect to those claims for which certification is appropriate." 231 F.3d at 976. The Court specifically emphasized that certifying only those specific claims for which money damages do not predominate "is necessary to preserve the efficiencies of the class device without sacrificing the procedural protections it affords to unnamed class members." *Id.*

Here, the district court disregarded the claim-by-claim approach and instead erroneously certified a punitive damages class on the basis of non-punitive claims. R. 2128, ER Tab 3 at 23. The district court never examined the peculiar characteristics of the punitive damages claims themselves, and never purported to determine whether those claims, on their own, warranted certification under (b)(2).

Had the district court undertaken any investigation of the punitive damages claims themselves, it would have recognized that they cannot be certified under (b)(2). Punitive damages claims are particularly ill-suited to (b)(2) treatment because they require individualized determinations into the nature and extent of the harm suffered by each plaintiff. In *Allison*, this Court had "little trouble" in determining that class claims for punitive damages were not sufficiently incidental

to warrant (b)(2) certification. *Allison*, 151 F.3d at 416. The Court determined that punitive damages claims could not be certified under (b)(2) because they did not flow directly from a finding of liability and turned on individual questions specific to each plaintiff, and therefore did not relate to the class as a whole:

> And because punitive damages must be reasonably related to the reprehensibility of the defendant's conduct and the compensatory damages awarded to the plaintiffs, recovery of punitive damages must necessarily turn on the recovery of compensatory damages. Thus, punitive damages must be determined after proof of liability to individual plaintiffs at the second stage of a pattern or practice case, not upon the mere finding of general liability to the class. Moreover, being dependent on non-incidental compensatory damages, punitive damages are also non-incidental – requiring proof of how discrimination was inflicted on each plaintiff, introducing new and substantial legal and factual issues, and not being capable of computation by reference to objective standards.
>
> Given the degree to which recovery of compensatory and punitive damages requires individualized proof and determinations, they clearly do not qualify as incidental damages in this case. Such damages, awarded on the basis of intangible injuries and interests, are uniquely dependent on the subjective and intangible differences of each class member's individual circumstances.

151 F.3d at 417-18.[17]

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[17] It appears to be well settled that punitive damages claims, both because of their large size and their individualized nature, are not incidental damages and therefore are not properly certified under (b)(2). *See Molski*, 318 F.3d at 950-51 (treating treble damages claim as non-incidental under (b)(2)); *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 581 (7th Cir. 2000) (rejecting (b)(2) certification in part because punitive damages claims required fact-specific inquiries for each class member); *Corley v. Entergy Corp.*, 222 F.R.D. 316, 323 (E.D. Tex. 2004) (denying (b)(2) certification for punitive damages claims); *In re*

The circumstances here are no different than they were in *Allison*. Like in *Allison*, punitive damages here cannot be determined simply from a classwide finding of liability. Rather, there would have to be individual determinations of the extent of harm suffered by each plaintiff as well as each plaintiff's level of non-incidental compensatory damages. Additionally, the reprehensibility of Washington Mutual's misconduct cannot be evaluated by reference to its actions alone without examination of the individualized circumstances of each plaintiff. For example, fraudulent misconduct directed toward a highly-educated and business-savvy plaintiff may be considered less reprehensible than identical conduct directed toward a poorly-educated and highly vulnerable plaintiff. The district court, however, other than offering a conclusory assertion that the punitive

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Baycol Prods. Litig., 218 F.R.D. 197, 215 (D. Minn. 2003); *Adler v. Wallace Computer Servs.*, 202 F.R.D. 666, 671 (N.D. Ga. 2001) ("An award of punitive damages also would require a fact-specific inquiry into the circumstances of each individual plaintiff"); *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 681 (N.D. Ga. 2001) (punitive damages are non-incidental); *Street v. Diamond Offshore Drilling*, 2001 WL 568111 at *9 (E.D. La. May 25, 2001) ("punitive damages are likewise non-incidental and outside the realm of Rule 23(b)(2) certification"); *Augustin v. Jablonsky*, 2001 WL 770839 at *9 (E.D.N.Y. Mar. 8, 2001) (questioning whether "punitive damages *can* ever be an incidental form of relief under Rule 23(b)(2)"); *Burrell v. Crown Central Petroleum, Inc.*, 197 F.R.D. 284, 290 (E.D. Tex. 2000); *Robertson v. Sikorsky Aircraft, Inc.*, 2000 WL 33381019 at *9 (D. Conn. July 5, 2000) (punitive damages claims not certifiable because they require "individualized proof of harm by each class member"); *In re Copley Pharm., Inc.*, 161 F.R.D. 456, 467-68 (D. Wyo. 1995).

damages claims were "ancillary," never purported to explain how the punitive damages claims could properly be considered incidental to injunctive relief. The punitive damages claims here simply do not fit within the (b)(2) framework and the district court's certification order must be reversed.

C. The District Court Erred In Concluding That The Relief Requested In the Complaint Justified (b)(2) Certification.

Even if the district court properly considered (which it did not) the relief sought in the complaint rather than the relief obtained in the settlement, the class cannot be certified under (b)(2) because it is clear from the face of the complaint that money damages predominate. The complaint raises eleven separate causes of action. The first ten all seek compensatory and punitive damages, and it is only the final count that seeks injunctive relief. R. 299-311. For the claims alleged here – such as fraud and misrepresentation – the ordinary and adequate remedy is monetary relief, making injunctive relief inappropriate. *See McManus v. Fleetwood Enterp., Inc.*, 320 F.3d 545, 553 (5th Cir. 2003); *see also Kaczmarek v. IBM Corp.*, 186 F.R.D. 307, 313 (S.D.N.Y. 2001) ((b)(2) certification improper for deceptive trade practice and misrepresentation claims because money damages provide an adequate remedy). The primary purpose of this class action is to provide compensation for those individuals who have been harmed by Washington

Mutual's predatory transactions, not to stop the conduct from occurring in the future.[18] This complaint, plain and simple, concerns money damages.

Moreover, the fact that the parties willingly sacrificed the injunctive component of the relief sought in reaching a settlement belies the district court's conclusion that the injunctive relief predominates. If injunctive relief truly predominates, then the fact that the settlement contains no injunctive relief at all raises serious questions about the overall fairness of the settlement.

It is apparent that the money damages in this case do not flow from a general finding of liability, but require individualized factual inquiries specific to each class member. The language of the complaint itself reveals the individualized nature of the compensatory damages sought: seven of the ten damages counts (counts I, II, IV, V, VI, VIII, IX) seek damages "in an amount to be proven at trial," separate and apart from any liability determination. R. 300 ¶ 27; 302 ¶ 36; 306 ¶¶ 49, 54; 307 ¶ 57; 308 ¶ 64; 309 ¶ 70. Additionally, the

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[18] The parties have made no showing that Washington Mutual's alleged misconduct is still ongoing and therefore that any injunctive relief would provide a tangible benefit to the class. In fact, the parties conceded at the fairness hearing that the corporate entity responsible for the conduct alleged in the complaint is no longer in business. Transcript at 61-62 (statement by counsel for Washington Mutual confirming that Washington Mutual has ceased doing business in Mississippi). It is well-settled that (b)(2) certification is improper if the class does not stand to benefit substantially from an award of injunctive relief. *See Bolin*, 231 F.3d at 978.

damages in this case did not result from a single act on the part of Washington Mutual. Rather, each class member allegedly was victimized by a separate predatory transaction. Therefore, any determination of the appropriate relief would depend on the particular circumstances of each class member and would require individualized investigations into the separate facts of each challenged transaction. Indeed, the elements of several of the claims in the complaint, including claims of fraud and misrepresentation, require a showing of reliance on the part of the class member. Thus, even if Washington Mutual had a common practice of making false and misleading representations, individual inquiries would still be required to determine the existence and extent of each class member's reliance. *See, e.g.*, *McManus*, 320 F.3d at 549-50 (holding that fraud and misrepresentation claims are poor candidates for class treatment because of the reliance requirement). Because individualized damages issues predominate, class certification is inappropriate, even when examining the complaint as a whole.[19]

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[19] This Court's decision in *In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004) is not to the contrary. There, although the claims involved insurance, the parties alleged statutory anti-discrimination claims, which are much more susceptible to certification under (b)(2) than are consumer fraud claims. Because the parties raised discrimination claims, the Court equated the restitutionary relief sought to backpay under Title VII, which is easily capable of objective computation. 365 F.3d at 418-20. Moreover, the Court specifically

CONCLUSION

For the foregoing reasons, the Simmons Objectors respectfully request that the district court's order granting final approval to the class action settlement be vacated, and that the case be remanded for further proceedings.

Respectfully submitted,

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Dated: October 25, 2005

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directed the district court to consider whether class members should be given an opt-out right. *See id.* at 417.

ADDENDUM OF RELEVANT RULES

Federal Rule of Civil Procedure 23

Rule 23. Class Actions

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) 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, or

(B) adjudications with respect to the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) 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 a whole; or

(3) the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commence by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of the class.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in the Class; Judgment; Multiple Classes and Subclasses

. . . .

(2)(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

. . . .

- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded . . .

CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of October, 2005, I served an original and eight hard copies and one electronic copy pursuant to Fifth Circuit Rule 31.1 of the foregoing Opening Brief of Appellants, via overnight delivery to the Clerk of Court for

The United States Court of Appeals for the Fifth Circuit
Room 1216, 515 Rusk Street
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I also hereby certify that I served two hard copies, and one electronic copy pursuant to Fifth Circuit Rule 31.1, of the foregoing Opening Brief of Appellants on the following counsel by first-class mail, postage prepaid:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fifth Circuit Rules 32.2 and 32.3, I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief contains 13,893 words, excluding exempted portions, and it was prepared in WordPerfect using proportionally spaced Times New Roman 14-point type.

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Dated: October 25, 2005