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

LEVI BAKER, on behalf of himself and all others similarly situated,	)	
Plaintiffs	)	Case No: 04-CV-0137
v.	)	Judge Walter J. Gex, III
WASHINGTON MUTUAL FINANCE GROUP, LLC; and WASHINGTON MUTUAL FINANCE OF MISSISSIPPI, LLC,	)	
Defendants	)	

REPLY TO OPPOSITION TO MOTIONS TO INTERVENE, CONDUCT LIMITED DISCOVERY, SHORTEN TIME TO ANSWER DISCOVERY, EXTEND TIME FOR FILING OBJECTIONS AND/OR EXCLUSIONS, FOR CONTINUANCE OF THE DATE TO OBJECT TO THE FAIRNESS HEARING AND FOR CONTINUANCE OF FAIRNESS HEARING IF NECESSARY

INTRODUCTION

Objectors Thomas Simmons and Georgia Ivy, by and through counsel, hereby file the following reply to Class Counsel' Opposition to Intervene, Conduct Limited Discovery, Extend Time for Filing Objections And/Or Request for Exclusions, For Continuance of the Date to Object to Fairness Hearing, and For a Continuance of Fairness Hearing, If Necessary. As explained in more detail below, Objectors' Statement of Objections should not be stricken because Objectors have standing to object to the proposed settlement. Moreover, this Court should permit Objectors the opportunity to conduct limited discovery in order gather information relevant to their objections.

ARGUMENT

I. Simmons' Objectors Have Standing to Intervene and Object to the Proposed Settlement

Class counsel's motion to strike the objections has no basis in law or fact and should be denied. Both Simmons Objectors, Thomas Simmons and Georgia Ivy, will be adversely affected if the settlement is approved and therefore have standing to object to the proposed settlement.

A. Objector Thomas Simmons Did Not Exclude Himself from the Class and Therefore Has Standing to Object

The entire basis for Class Counsel's motion to strike the objections is that Objector Georgia Ivy cannot object to the terms of the settlement because she excluded herself from the class. Class counsel ignore, however, that the objections were filed on behalf of two individuals: Georgia Ivy and Thomas Simmons. Unlike Ms. Ivy, Mr. Simmons has not excluded himself from the settlement and Class Counsel never contend that Mr. Simmons does not remain a Settlement Class Member. Therefore, Mr. Simmons has standing to object to the proposed settlement, irrespective of Ms. Ivy's status.

It is axiomatic that as a Settlement Class Member, Mr. Simmons has standing to object to the settlement. *See Devlin v. Scardelletti*, 536 U.S. 1, 6-7 (2002) ("As a member of the . . . class, petitioner has an interest in the settlement that creates a 'case or controversy' sufficient to satisfy the constitutional requirements of injury, causation, and redressability."); *Mayfield v. Barr*, 985 F.2d 1090, 1092 (D.C. Cir. 1993) ("Class members must be given an opportunity to convince the court that the settlement proposed would not be fair, adequate, or reasonable. The fact that *res judicata* would bind them provides class members with an incentive to voice their objections."); 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions*, § 11:55, at 168 (4th ed. 2002) ("Any party to the settlement proceeding has standing to object to the proposed settlement."). Class Counsel themselves affirmed this legal principle in the Class Action Preliminary Approval Order filed with

this Court, which states that "[a]ny Settlement Class Member may appear and be heard at the Settlement Hearing as to any reason why the proposed Agreement should or should not be approved as fair, reasonable and adequate or why a judgment should or should not be entered approving such Agreement or why Class Counsel . . . ." Class Action Preliminary Approval Order, ¶ 11, at 5. Therefore, Mr. Simmons, who has not excluded himself from the class, has standing to challenge the proposed settlement, irrespective of Ms. Ivy's status.

B. Because the Settlement Agreement Precludes Georgia Ivy from Fully Opting Out her Claims, She Has Standing to Challenge the Proposed Settlement.

1. Ms. Ivy Has Standing Because She Remains a Member of the Mandatory Class Regardless of Her Desire to Opt Out.

In addition to Mr. Simmons, Ms. Ivy also has standing to object to the proposed settlement. Class counsel contend that Ms. Ivy lacks standing because she chose to exclude herself from the settlement. The proposed settlement, however, prohibits her from excluding herself from the mandatory punitive damages class, despite her desire to do so. Therefore, she is directly injured by the settlement and has standing to object to it.

The settlement aggrieves Ms. Ivy by depriving her of her constitutionally protected due process right to opt out of the settlement and bring her own claims for punitive damages. *See Philips Petroleum v. Shutts*, 472 U.S. 797, 812 & n.3 (1985) (due process requires that class members be an opportunity to opt out). Specifically, the settlement agreement states that

> upon final approval of the settlement, all 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, or purports to reserve the right to seek punitive and exemplary damages.*

Id. (emphasis added); *see also* Class Action Long Form Notice, ¶ 13 (using same language). Moreover, the settlement agreement requests that the court affirm "mandatory certification of the punitive and exemplary damages claims," *id.*, § 4.L.1, and the Class Notice specifically informs each class member that "you will not be allowed to assert claims for punitive damages or exemplary damages even if you opt out." Class Action Long Form Notice, ¶ 6. Thus, both the settlement agreement and the Class Notice make clear that Ms. Ivy must remain a class member with respect to claims for punitive damages, regardless of the fact that she has attempted to exclude herself. Because Ms. Ivy remains in the class with respect to punitive damages, her legal rights regarding her punitive damages claims necessarily will be impacted by the settlement. Thus, Ms. Ivy has standing to object to the settlement. *See Devlin*, 536 U.S. at 6-7; *Mayfield*, 985 F.2d at 1092; Newberg, *supra*, § 11:55.[1]

In contrast to Class Counsel's contention that Ms. Ivy's decision to opt out deprives her of standing, it is Ms. Ivy's status as someone who is seeking to opt out that confers standing upon her to object to the no-opt-out punitive damages class. The proposed settlement causes Ms. Ivy legal injury for the simple reason that it strips her of the right to bring her own claims for punitive

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[1] The fact that Ms. Ivy is precluded from opting out and therefore remains in the class with respect to her claims for punitive damages distinguishes and makes inapposite the cases relied upon by Class Counsel in their opposition. In those cases – *In re Vitamins Antitrust Litig.*, 2000 WL 1737867 (D.D.C. Mar. 31, 2000); *In re Integra Realty Resources, Inc.*, 262 F.3d 1089 (10th Cir. 2001); *Root v. Ames Dep't Stores, Inc.*, 989 F. Supp. 274 (D. Mass. 1997); and *Aguirre v. AT&T Wireless Servs.*, 75 P.2d 603 (Wash. App. 2003) – the opting out plaintiffs lacked standing because they were able to opt out all of their claims, and none of their claims were to be affected by approval of the classwide settlement. Here, by contrast, Ms. Ivy remains in the class, against here will, and approval of the settlement would eliminate her ability to raise any claims for punitive damages. The remaining cases cited by Class Counsel involve situations in which a party did not properly opt out, or sought to act in a representative capacity to opt out other class members. Because Class Counsel do not dispute that Ms. Ivy properly excluded herself from the class, these cases are inapposite.

damages, a right she would otherwise have, but for the existence of the settlement. If not for the settlement, Ms. Ivy would be able to raise her own claims for the punitive damages. Under the settlement, however, she receives zero punitive damages and must forfeit all rights to raise any claims for punitive damages outside the class. Thus, it is precisely because Ms. Ivy wishes to opt out her punitive damages claims that she is legally entitled to challenge the restriction on her opt-out rights. *See Devlin*, 536 U.S. at 10-11 ("Particularly in light of the fact that petitioner had no ability to opt out of the settlement, *see* Fed. R. Civ. P. 23(b)(1), appealing the approval of the settlement is petitioner's only means of protecting from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate."). Regardless of whether Ms. Ivy is considered a class member, the settlement will have *res judicata* effect on her punitive damages claims and therefore adversely affects her legal rights. *See Mayfield*, 985 F.2d at 1092.[2] Thus, Ms. Ivy has standing.

Furthermore, the stance taken by Class Counsel – that opting-out class members lack standing to challenge a no-opt-out class – is untenable because it would render decisions on

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[2] Because class members who are being denied the right to opt out are the ones who suffer injury from certification of a mandatory class, courts have routinely permitted objecting and opt-out plaintiffs to appeal or challenge the certification of mandatory damages classes. *See, e.g.*, *Smith v. Tower Loan*, 216 F.R.D. 338, 350 (S.D. Miss. 2003) (Bramlette, J.) (allowing class members to "file[] both objections to the Settlement and a 'motion to opt out of the settlement'"); *In re Telectronics Pacing Systs., Inc.*, 221 F.3d 870, 873 (6th Cir. 2000) (appeal of mandatory class brought by "[m]embers of the class [who] object to the settlement"); *In re Dennis Greenman Securities Litig.*, 829 F.2d 1539, 1542 (11th Cir. 1987) (appeal of certification of a mandatory class brought by class plaintiffs seeking to opt their claims out of the class); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1177 (8th Cir. 1982) (appeal of certification of mandatory punitive damages class brought by "two objecting plaintiffs"); *In re N. Dist. Of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 848, 850 (9th Cir. 1982) (appeal brought by class plaintiffs to certification of a mandatory punitive damages class); *Doe v. Karadzic*, 192 F.R.D. 133, 134 (S.D.N.Y. 2000) (appeal of a mandatory damages class brought by plaintiffs seeking to withdraw from the class).

mandatory class certification virtually unchallengeable. As someone who is seeking to, yet is potentially barred from, opting out her punitive damages claims, Ms. Ivy is the type of class member most directly affected by the certification of a mandatory class. Objecting to the settlement is the only way for Ms. Ivy to protect her interest in seeking punitive damages outside the class. Class Counsel, however, wish to deny Ms. Ivy the ability to opt out while simultaneously taking away her right to challenge that denial. If she cannot object to the no-opt-out class, then no one can. Therefore, Ms. Ivy must be permitted to object to the settlement.

2. Ms. Ivy Has Standing Because The Proposed Settlement Prejudices Her Legal Rights.

Even if this Court decides that Ms. Ivy is not a class member, she still has standing because the settlement prejudices her rights as an opt out litigant. A party who opts out of a settlement has standing to object if that party will suffer prejudice as a result of the settlement. *See Transamerican Refining Corp. v. Dravo Corp.*, 952 F.2d 898, 900 (5th Cir. 1992); *Mayfield*, 985 F.2d at 1093; *Alumax Mill Prods. v. Congress Fin. Corp.*, 912 F.2d 996, 1002 (8th Cir. 1990) (holding that non-settling party can object "where it can demonstrate that will sustain some formal legal prejudice as a result of the settlement"); *Baptist Memorial Hospital – DeSoto, Inc., v. Miss. Health Care Comm'n*, 617 F. Supp. 686, 691 (S.D. Miss. 1985). A non-settling party suffers prejudice if "the settlement strips the party of a legal claim or cause of action, such as a cross-claim, or the right to present relevant evidence at trial." *Agretti v. ANR Freight Systs., Inc.*, 982 F.2d 242, 247 (7th Cir. 1992); *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 582-83 (9th Cir. 1987).

Here, Ms. Ivy is prejudiced and legally injured by the proposed settlement for all of the reasons explained above. If the settlement is approved, Ms. Ivy will be forced to "irrevocably waive

and release" all claims of any kind for punitive damages, despite her desire to raise such claims on her own. Thus, the settlement directly prejudices her as someone who is attempting to, but is potentially prevented from, excluding herself from the class.

A finding that Ms. Ivy is prejudiced by the no-opt-out punitive damages class would align this Court with numerous other courts that have determined that non-settling parties can object to settlements that implicate their rights to bring separate legal claims. *See, e.g.*, *Alumax*, 912 F.2d at 1002 (finding that non-settling party whose cross-claims would be dismissed by a settlement had standing to challenge that settlement); *Eichenholtz v. Brennan*, 52 F.3d 478, 482-83 (3d Cir. 1995) (finding that non-settling parties had standing to challenge a settlement that would have affected their rights to contribution and indemnification); *Phoenix Seadrill/78 Ltd v. Crown Rig Bldg. Servs.*, 749 F.2d 1154, 1165 (5th Cir. 1985) (noting that "a district court may refuse to enforce provisions of a settlement agreement that burden the rights of non-settling parties" (citing *Dunn v. Sears, Roebuck & Co.*, 639 F.2d 1169, 1173 (5th Cir. 1981))); *Baptist Memorial Hosp.*, 617 F. Supp. at 691 (S.D. Miss. 1985) (finding that non-settling party had standing because settlement would prejudice its rights); *In re Granada P'ship Sec. Litig.*, 803 F. Supp. 1236, 1238-39 (S.D. Tex. 1992) (finding that non-settling parties had standing to challenge settlement becuase they "have an interest in the resolution of the request for final approval of the proposed settlements"); *McAllen Med. Center, Inc. v. Cortez*, 66 S.W.3d 227, 235 (Tex. 2001) ("Rather, we hold that a nonsettling defendant has standing to contest certification of a settlement class if the nonsettling defendant can show that the certification would adversely affect it."). Thus, Ms. Ivy clearly is injured and prejudiced by the restriction of her right to fully opt out all of her claims, including her claims for punitive damages. As a result, she has standing to object to the

proposed settlement.[3]

III. The Simmons Objectors are Entitled to Discovery

A. Objectors Generally are Entitled to Limited Discovery Prior to a Fairness Hearing.

Although decisions pertaining to discovery sought by objectors to a class action settlement fall within the discretion of the district court, it is an abuse of that discretion to deny objectors the ability to develop an evidentiary record necessary to evaluate fully the adequacy of the proposed settlement. *See In re Gen'l Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1124 (7th Cir. 1979); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) (refusing to sustain approval of class settlement where the district court did not allow objectors to take discovery, because, "[a]s an objector, Frankman was in an adversary relationship with both plaintiffs and defendants and was entitled to at least a reasonable opportunity to discovery against both"). As explained in a leading treatise on class actions, allowing objectors to take discovery is critically important for ensuring the fairness of a proposed settlement:

> Generally, the objector has neither independent evidence of the fairness or the adequacy of the settlement nor sufficient knowledge or understanding of the grievances involved. Though the proponent's prior discovery and memoranda in support of the settlement may educate the objector as to the issues and problems involved, the evidence most probably will not supply the objector with the material necessary to support an attack on the proposed settlement. Therefore, the objector must secure evidence through independent discovery and presentation of witnesses

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[3] Class Counsel's request that the court deny Objectors' motion to intervene is similarly meritless. Because Ms. Ivy is legally injured by the settlement, despite her efforts to opt out, she easily satisfies the "interest" requirement of Fed. R. Civ. P. 24. Moreover, Class Counsel's opposition to intervention should be denied because it relates solely to Ms. Ivy. The motion to intervene was also raised on behalf of Mr. Simmons, whose status as an appropriate intervenor is not questioned by Class Counsel. In any event, Class Counsel's argument is legally irrelevant, because, under Supreme Court precedent, an individual need not formally intervene in order to object to a class action settlement. *See Devlin v. Scardelletti*, 536 U.S. 1 (2002).

at the settlement hearing.

4 Newberg, § 11:57, at 181-82; *see also In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, 1994 WL 593998 (E.D. La. 1994) (same). Because it is a necessary part of presenting full objections, the right to take discovery can be seen as a corollary of the right to object to the settlement. *See United States ex rel. McCoy v. Cal. Med. Review*, 133 F.R.D. 143, 149 (N.D. Cal. 1990).

B. This Court Should Grant Objectors' Specific Discovery Requests.

Class Counsel inaccurately characterize Objectors' discovery requests as wholly irrelevant because they are unrelated to the constitutionality of the mandatory punitive damages class. The objection to the mandatory punitive damages class, however, is not the Objectors' only objection to the proposed settlement. Objectors also have questioned whether Class Counsel have met their burden of demonstrating the adequacy of the relief of the class, since Class Counsel, in their own sworn affidavits, have valued the claims identical to the class claims at more than $75,000, yet are settling the class claims for $1,000 or less. *See* Simmons Objectors' Statement of Objections, at 20-23 & n.6. In addition, Objectors noted in their Statement of Objections that discovery may be warranted because the fact that Class Counsel also represent other individuals in separate, identical actions, raises at least the appearance of a potential conflict of interest. *See id.* at 21-22 n.6. Simultaneous representation by class counsel of both the class itself and individuals outside the class is a cause for concern because such dual representation can create an incentive to quickly settle the claims of one set of plaintiffs at below value in order to obtain a more beneficial settlement for the other class of plaintiffs.[4] *See Ortiz v. Fibreboard*, 527 U.S. 815, 852-53 (1999) (observing that class

[4] Objectors are not alleging that Class Counsel have been laboring under an actual conflict of interest. At this point, objectors merely point out that Class Counsel's dual representation of the *Blackmon* plaintiffs in state court and the class plaintiffs here raises the

counsel's representation of individual litigants outside the class created a conflict of interest and an incentive to favor known plaintiffs over unknown class members). For the above reasons, discovery inquiring into the *Blackmon* state court cases brought by class counsel is relevant to both the adequacy of the settlement as well as the appearance of any potential for a conflict of interest, and therefore should be approved. In addition, several of the discovery requests are relevant as to the unconstitutionality of the mandatory punitive damages class. The relevance of each interrogatory is explained below.

Interrogatory No. 1: Provide a descriptive list of all documents presented to U.S. District Court Judge Walter Gex and Magistrate Judge John Roper during any part of the settlement negotiations in this case.

Class Counsel's only response is that they did provide that information to Mr. Frankel when he requested it. Although Mr. Goss did comply with some of Mr. Frankel's informational request, Mr. Goss declined to provide certain documents that Mr. Frankel specifically requested, including (1) a copy of the amended class complaint; (2) this Court's May 4, 2004 order giving preliminary approval to the proposed settlement; and (3) the parties' motions supporting preliminary approval of the proposed settlement. These documents are relevant in order to determine the asserted legal basis for the mandatory punitive damages class. They also are relevant for determining the strength and value of the class claims so that objectors can make an independent assessment into the adequacy of the relief provided.

Interrogatory No. 2: Provide a list of documents produced by Washington Mutual and reviewed by Class Counsel during settlement negotiations pertaining to the settlement of this case.

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appearance of a potential conflict of interest. It is only with the chance to take discovery that Objectors can seek to ascertain if a conflict exists.

These documents are relevant for the reasons stated above: (1) to determine the legal basis for the mandatory punitive damage class; (2) to assess the adequacy of relief; and (3) to investigate the appearance of a potential conflict of interest. It is noteworthy that Class Counsel stated that all documents pertinent to our request for documents produced in relation to the settlement in *this* case are contained in the record of the *Blackmon* appeal in state court. The fact that the connection between the two cases is so close that the record in *Blackmon* contains all the documents used in this case merely reinforces the appearance of a potential conflict of interest created by class counsel's dual representation of the *Blackmon* and the class plaintiffs in separate but identical cases. It also highlights the fact that Class Counsel appeared to conduct no independent discovery in connection with the class action litigation.

Interrogatory Nos. 3 & 4: Class Counsel appears to have answered these interrogatories.

Interrogatory No. 5: Are the claims asserted in the Class Action identical to the claims asserted in the "*Blackmon* Case"? If not, what are the differences?

Class Counsel asserts that this request is irrelevant. In fact it is highly relevant. As described in the Statement of Objections, Class Counsel have estimated the value of his clients claims in the *Blackmon* case at in excess of $75,000, while at the same time has settled the class claims for on average less than $1,000 – a reduction of more than 98%. The fact that the claims asserted may be the same in both cases, but the relief provided is substantially different, casts serious doubt on the adequacy of the relief provided to the class. Objectors want to know if the claims are similar or different in order to determine if the relief provided to the class is adequate, or whether there is some other reason why the class relief is drastically lower than the relief obtained by the *Blackmon* plaintiffs.

Second, the request is relevant in order to investigate the appearance of any potential conflict of interest. The closer the connection between the claims alleged in *Blackmon* and those alleged in this Class Action, the greater chance there is for the appearance of any potential conflict of interest, and there is a greater possibility that Class Counsel may be tempted to settle one set of claims at the expense of the other. *See Ortiz*, 527 U.S. at 852-53.

Interrogatory No. 6: Has Washington Mutual reached settlement with any of the plaintiff's in the "*Blackmon* Case"? If not, have there been any settlement discussions about settling the "*Blackmon* Case" since it was appealed? If so, please provide the date of such settlement discussions and whether they are any agreements to settle the "*Blackmon* Case" and the details of any such settlement.

This request is relevant for the same reasons as described in Interrogatory No. 5. Since the claims in the *Blackmon* Case are identical to the class claims, discussions about settlement in those cases, and in particular, how much each plaintiff in the *Blackmon* Case should receive, is relevant in determining the adequacy of the relief here as well as the appearance of a potential conflict of interest. If there is a discrepancy between the amount that the *Blackmon* plaintiffs may receive in settlement and the amount that the class plaintiffs may receive in settlement, that both casts doubt on the adequacy of the class relief and raises concerns that Class Counsel are agreeing to accept a lower settlement in the class case in order to ensure a higher payout for their state court plaintiffs. *See Ortiz*, 527 U.S. at 852-53.

Interrogatory No. 7: Please identify all other individual cases which Class Counsel Richard Freese referred to in his Affidavit which is attached as Ex. 1 to the Simmons Objectors Statement of Objections to Approval of the Proposed Class Action Settlement.

This request is relevant, for the reasons explained above, with respect to both the adequacy of relief and the appearance of a potential conflict of interest. Objectors request information only

about the cases Mr. Freese mentioned in his affidavit. In providing his sworn affidavit, Mr. Freese identified how much his *Blackmon* plaintiffs had received for their claims and assessed the value of his plaintiffs' claims in those cases. Since those claims are identical to the claims here, the information is relevant with respect to both adequacy of relief and the appearance of a potential conflict of interest. Moreover, given that Mr. Freese likely did not spend "hundreds of hours" preparing his affidavit, objectors sincerely doubt that it will require Mr. Freese to spend "hundreds of hours" simply to identify the individual cases to which he referred in his affidavit.

Interrogatory No. 8: Describe how an individual class member could compute, from the notice provided to them in the Class Action, what they would receive under the terms of the settlement.

This information is relevant to determining the adequacy of the relief. In order to determine the adequacy of the relief, the court must first determine how much relief each class member will receive. For class members eligible for a pro rata share of the fund, that amount of relief depends on the number claims filed, and how many "points" are contained in each claim. Objectors request information about how many claims Class Counsel estimate will be filed, as well as the percentage of the class the number of filed claims constitutes in order to assess how much relief each class member entitled to a pro rata distribution will receive.

Interrogatory No. 9: Please state the name, address, and give the qualifications of each and every person whom you expect to call as a witness at the fairness hearing in this case. For each such expert, state the subject matter on which the expert is expected to testify and state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds of each opinion.

Class Counsel have provided objectors only with the name of their intended expert witness. Class counsel provide neither his qualifications and background, his address, nor a

summary of and the basis for his testimony. Objectors are entitled to receive a summary of the expert's opinion, as well as the information the expert relied upon in reaching his or her opinion. Class counsel have not provided this information. This information is relevant and necessary for Objectors so that they may adequately prepare for the impending Fairness Hearing. Moreover, Class Counsel may be considering other experts. If so, their identities must be provided.

Interrogatory No. 10: Indicate the legal and factual basis for certifying the class pursuant to Federal Rules of Civil Procedure 23(b)(1)(A), 23(b)(2), and 23(b)(3).

This information is highly relevant to the legality or illegality of the proposed mandatory punitive damages class. Class Counsel's only response to this request is "[s]ee Complaint, motions, and brief filed herein." The version of Class Counsel's motion received by co-counsel for Objectors Charles R. Mullins, however, does not contain any of the documents mentioned by defendants. (At the time of filing of this reply, co-counsel for objectors Richard Frankel, Leslie A. Brueckner and Michael J. Quirk still had not received Class Counsel's pleading, which was sent via regular U.S. Mail rather than overnight mail.) Moreover, despite Mr. Frankel's original request for the parties motions' and brief in support of preliminary approval of the settlement in his September 3 letter to Mr. Goss, Mr. Goss never provided the requested documents.

Interrogatory No. 11: Give the total number of persons to whom individual notice was mailed. Give the total number of notices that were returned or otherwise undeliverable.

As far as Objectors are aware, the Notice Affidavit filed by the Claims Administrator was not served on Objectors.

Interrogatory No. 12: Identify each individual you intend to call as a witness in the fairness hearing, giving their names, addresses and phone numbers.

The fact that Class Counsel has not made a final decision as to which witnesses to call does

not mean that they have no intention to call certain witnesses, or are not considering calling various witnesses, depending on what occurs at the Fairness Hearing. Objectors are entitled to know the identity, name, address and phone number of each witness Class Counsel is considering calling during the Fairness Hearing. The mere fact that Class Counsel have not made a final decision about who to call cannot excuse their failure to comply with this interrogatory request. Decisions on witnesses are always subject to change, yet parties in a case are entitled to advance knowledge of potential witnesses in order to prepare their case. Thus, class counsel should provide Objectors with a list of all potential witnesses that they may call at the Fairness Hearing, as well as each witness' name, address, and telephone number.

CONCLUSION

For the foregoing reasons, Class Counsel's motion to strike Objector Ivy's statement of objections should be denied; the Objectors' Motion to Intervene should be granted, and the Objectors' Motions to take discovery and continue the fairness hearing should be granted.

Respectfully submitted this 27th day of September, 2004,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Objectors' Statement of Objections to Approval of the Proposed Class Action Settlement was sent via Facsimile Transmission and U.S. Mail this 16th day of September, 2004, to:

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