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

REPLY BRIEF OF INTERVENORS-APPELLANTS AND APPELLANTS

Richard Frankel
Leslie A. Brueckner
Trial Lawyers For Public Justice
1717 Massachusetts Ave., N.W., Suite 800
Washington, DC 20036
(202) 797-8600

Charles R. Mullins
Coxwell & Associates, PLLC
500 N. State Street
Jackson, MS 39201

Peter T. Martin
Patterson & Patterson, PLLC
P.O. Box 663
304 East Jefferson Street
Aberdeen, MS 39730

Counsel for Intervenors-Appellants and Appellants

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INTRODUCTION

The question before this Court is simple and straightforward: whether the settling parties' proposed non-opt-out punitive damages class is certifiable under Rule 23(b)(1)(B) and Rule 23(b)(2). Instead of focusing on this question, however, Appellees seek to divert this Court's attention from the fundamental issue by arguing about the settlement's fairness, attacking the motivations of Appellants and Intervenors-Appellants (collectively "Objectors"), and their counsel, and digressing into tangential discourses over the non-compensatory nature of punitive damages. These distractions, however, cannot alter the fact that this settlement violates Rule 23 by improperly stripping class members of their right to opt out.

With respect to Rule 23(b)(1)(B), despite the Supreme Court's admonition in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), that (b)(1)(B) classes cannot be used unless a definite limited fund exists, the parties have not shown that punitive damages are limited by anything but their own agreement. Not only did the parties fail to present any evidence in the district court regarding any limits on punitive damages, but their purported justifications for a limited fund class, including reliance on Defendants-Appellees' ("Washington Mutual") alleged net worth, are so broad that they would permit non-opt-out certification in any case seeking punitive damages.

The parties' attempt to manufacture a connection to subdivision 23(b)(2) is

equally specious. The parties seek to certify a mandatory injunctive class even though (a) Washington Mutual ceased doing business in Mississippi two years *before* the filing of the class complaint, (b) the settlement is mandatory as to punitive damages only, and (c) the settlement contains no injunctive relief whatsoever. Given this failure to satisfy Rule 23, the district court's certification of a mandatory punitive damages class was improper and must be reversed.

ARGUMENT

I. OBJECTORS HAVE STANDING TO OBJECT TO THE SETTLEMENT.

A. Objectors Have Constitutional Standing.

Washington Mutual first argues that Objectors lack standing. Defendants' Answering Brief (DAB) 23-29. It is well-established, however, that the *res judicata* effect of being bound by a class settlement constitutes Article III injury for purposes of standing, regardless of the merits of Objectors' underlying claims. *See Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002) ("What is most important to this case is that nonnamed class members are parties to the proceeding in the sense of being bound by the settlement. It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing."); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977). Injury results because approval of the settlement constitutes a final judgment resolving Objectors' rights, and that injury

will be redressed if final approval is reversed because Objectors will no longer be bound by the settlement. *See Devlin*, 536 U.S. at 6-7 (holding that an objecting class member "has an interest in the settlement that creates a 'case or controversy' sufficient to satisfy the constitutional requirement of injury, causation, and redressability."); *In re Navigant Consulting Sec. Litig.*, 275 F.3d, 616, 620 (7th Cir. 2001) ("Class members suffer injury-in-fact if a faulty settlement is approved, and that injury may be redressed if the court of appeals reverses. What more is needed for standing?"), *vacated on other grounds, Grimes v. Navigant Consulting*, 536 U.S. 920 (2002). Thus, Objectors have standing to challenge a non-opt-out settlement regardless of whether they file future claims.

Although Washington Mutual disputes whether Objectors possess "a viable claim for punitive damages," DAB 24, that question concerns the *merits* of Objectors' claims and is irrelevant to standing. *Cook v. Reno*, 74 F.3d 97, 98-99 (5th Cir. 1996); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1385 (5th Cir. 1985). Standing concerns the Court's jurisdiction, while the applicability of affirmative defenses are non-jurisdictional merits questions. *See Ellis v. Amex Life Ins. Co.*, 211 F.3d 935, 937 (5th Cir. 2000) (dismissals for lack of jurisdiction are not merits decisions for *res judicata* purposes while dismissals on statute-of-limitations grounds are merits decisions). How such merits questions would be resolved in a future case is a future question for a future judge, and does not

concern this Court's role here.[1]

Furthermore, Washington Mutual's attempt to limit standing to object to a settlement to those who want to bring individual claims undermines the principal purpose of class actions, which is to aggregate claims that are too small to proceed individually. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Additionally, many class members may want to opt out for reasons having nothing to do with their ability to pursue future claims. Such a class member has the same right as any other to "protect[] himself from being bound by a disposition of his rights he finds unacceptable." *Devlin*, 536 U.S. at 11.[2]

Finally, Intervenor-Appellant Thomas Simmons, who, unlike the other Objectors, did not opt-out of the settlement, R. Vol.9 81:7-82:13 (noting that Objectors include both opting-out and participating class members), will suffer injury whether or not the other Objectors file future punitive damages claims. Under the settlement, each class member receives a pro-rata distribution of punitive damages from the settlement fund, the size of which ultimately depends

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[1] Because class certification is "logically antecedent" to standing, this Court must address class certification *before* it considers standing. *See Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997).

[2] Washington Mutual's assertion that Objectors have no interest in future litigation is contradicted by the district court's finding that Objectors and other claimants "still wish to pursue litigation against Washington Mutual in another forum." R.2115, AER Tab 3 at 10.

on the class size. R.2115, AER Tab 3 at 10. Simmons' pro-rata portion therefore will increase if other class members can opt out, and will decrease if they cannot. Certification of a mandatory class causes Simmons a unique injury by reducing his punitive damages payout, and he has standing even if the opt-out Objectors do not. Because only one appellant need have standing, *see Hanson*, 800 F.2d at 1386, this appeal can proceed regardless of the other Objectors' standing.

B. Objectors Have Prudential Standing.

Washington Mutual also argues that Objectors lack prudential standing. This argument is foreclosed by the Supreme Court's decision in *Devlin v. Scardelletti*, which held that objecting class members fall within the zone of interests protected by Rule 23 and have prudential standing to challenge proposed settlements. *Devlin*, 536 U.S. at 7; *see also* Fed. R. Civ. P. 23(e)(4)(A) ("[a]ny class member may object to a proposed settlement"). Although Washington Mutual uses the guise of prudential standing to accuse Objectors' counsel of being "professional objectors," DAB 27, both courts and scholars agree that objectors in general, and public-interest organizations in particular, play a crucial role in policing non-adversarial class action settlements. *See, e.g.*, *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1310 (3d Cir. 1993); Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403 (explaining how public-interest objectors, including Objectors' counsel Trial

Lawyers for Public Justice (TLPJ), can improve class action settlements because they are not motivated by private extortionist impulses). Objectors have prudential standing.[3]

II. CERTIFICATION OF A MANDATORY PUNITIVE DAMAGES CLASS IS IMPROPER.

A. This Court Cannot Certify the Class Unless the Requirements of Rule 23 are Satisfied.

A running theme throughout the parties' briefs is that this Court should affirm the district court's decision simply because, in their view, the settlement is fair and Objectors are unlikely to succeed on any future punitive damages claims. DAB 35-36; Plaintiff's Answering Brief (PAB) 22-27. This argument is both irrelevant and incorrect.

First, the Supreme Court repeatedly has rejected the argument that a class settlement which fails to satisfy the requirements of Rule 23 can be approved if it

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[3] Washington Mutual's attempt to attack Objectors' standing by smearing their counsel's reputation and retainer agreement also fails. DAB 27-29. Aside from the fact that counsel's views and retainer agreement are irrelevant to their *client*'s standing, Washington Mutual mischaracterizes the nature of the retainer agreement between counsel TLPJ and Intervenor-Appellant Georgia Ivy. First, the agreement does not state that counsel will not pursue future punitive damages claims on Ivy's behalf. The agreement, which is only between Ivy and TLPJ because Ivy has a separate retainer agreement with other counsel regarding other aspects of her case, merely reflects that any decision on future litigation must be made between Ivy and her original counsel; it does not preclude any future litigation on her behalf. Second, the retainer agreement does not deprive Ivy of ultimate settlement authority and in fact explicitly recognizes her power to accept settlement offers. DER Tab 2 at 2, R.1160 ¶ 3.

is otherwise fair. *Amchem*, 521 U.S. at 620-22; *Ortiz*, 527 U.S. at 849 ("[A] fairness hearing under Rule 23(e) is no substitute for the rigorous adherence to those provisions of the Rule designed to protect absentees, among them subdivision (b)(1)(B)." (quotation omitted)). The settlement's fairness is irrelevant to the question facing this Court, which is whether the mandatory punitive damages class satisfies the certification prerequisites of Rule 23(b).

Second, as a factual matter, the parties' assertion that Objectors will not prevail on the merits is belied by the $54 million verdict against Washington Mutual obtained by twenty-three plaintiffs in the *Blackmon* case, which involved identical claims as those alleged here. AER Tab 5, R.1684a Ex.8; R.736-737 ¶¶ 9-11. The district court rejected the parties' doomsday prediction, concluding that "punitive damages might be available in this case," R.2115, AER Tab 3 at 10, and this Court should reject it also.

Third, the parties' argument highlights their contradictory positions that (a) opting out class members will not prevail on the merits but that (b) a mandatory class is necessary to prevent depletion of the punitive damages fund. If the chance of success is as low as the parties predict, then there is little risk that opting-out parties will deplete the punitive damages fund, and little reason for locking everyone into a mandatory class. Therefore, the settlement's alleged fairness cannot justify certification of a mandatory punitive damages class.

B. This Court Must Apply Rule 23's Requirements to Punitive Damages Claims.

Washington Mutual argues that punitive damages claims can be certified on a non-opt-out basis without satisfying Rule 23 because plaintiffs lack an absolute right to punitive damages. DAB 29-36. This argument misunderstands both Rule 23 and the nature of punitive damages.

First, Objectors' right to opt out claims predominantly for money damages, including punitive damages, is guaranteed by Rule 23 and due process, neither of which carve out an exception for punitive damages. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 & n.3 (1985). Indeed, this Court treats punitive damages as a form of money damages within the meaning of Rule 23. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 416-18 (5th Cir. 1998) (evaluating punitive damages as non-incidental money damages under Rule 23(b)(2)); *see also Molski v. Gleich*, 318 F.3d 937, 950-51 (9th Cir. 2003) (opt-out right must be provided for punitive treble damages claims). Nor does any basis exist for distinguishing punitive damages claims from other claims, as the right to opt out protects class members from being bound by *res judicata*, *see Ortiz*, 527 U.S. at 846, which applies equally to compensatory and punitive damages claims.

Second, Washington Mutual mistakenly conflates the discretionary nature of punitive damages with the idea that the class members have no right to punitive damages. Although under Mississippi law plaintiffs have no entitlement to

punitive damages in the sense that the decision whether to award punitive damages rests in the jury's discretion, plaintiffs do have a right to have a jury decide whether to award punitive damages, and courts abuse their discretion by failing to submit punitive damages questions to a jury when a triable issue of fact exists. *See, e.g.*, *Stewart v. Gulf Guar. Life Ins. Co.*, 846 So.2d 192, 202, 205 (Miss. 2002); *Wallace v. Thornton*, 672 So.2d 724, 728 (Miss. 1996). That right to have punitive damages claims sent to a jury is precisely what the non-opt-out provision of the settlement strips from class members. The parties cannot use the procedural device of Rule 23 to abridge such rights. *See State of Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978); *see also Ortiz*, 527 U.S. at 845.

Finally, if Rule 23's opt-out protections truly do not apply to punitive damages, then one would expect courts to routinely certify mandatory punitive damages classes. In reality, however, numerous courts have rejected mandatory punitive damages classes for failure to satisfy Rule 23. *See, e.g.*, *In re Simon II Litig.*, 407 F.3d 125 (2d Cir. 2005); Appellants' Opening Brief (AOB) 25 n.6 (citing cases). Thus, Rule 23's procedural protections apply with equal force to punitive damages claims as they do to any other claim.

C. The District Court Erred in Certifying a Mandatory Class Under Rule 23(b)(1)(B).

In *Ortiz v. Fibreboard Corp.*, the Supreme Court held that a limited fund class cannot be certified unless the limit is "set definitely at [its] maximum[]," and

is not set by agreement of the parties. 527 U.S. at 838. Here the settlement fails to satisfy this requirement. The parties set their $3.5 million cap by private agreement, and only afterward attempted to manufacture a justification for it by relying on due process and the district court's offhand reference to Washington Mutual's alleged net worth. However, the parties never demonstrate how these factors establish that their arbitrarily chosen limit also happens to be the maximum limit on punitive damages. For this reason, and because the class is under-inclusive, the parties' post-hoc attempt to justify a limited fund mandatory class cannot stand.

1. *Ortiz* Governs Certification Under Subdivision (b)(1)(B).

Washington Mutual mistakenly argues that this Court need not follow *Ortiz* in evaluating the district court's decision to certify a (b)(1)(B) class. DAB 48-51. Although Washington Mutual contends that *Ortiz* is distinguishable because it concerned compensatory damages claims, the settlement rejected in *Ortiz* resolved claims for both punitive and compensatory damages, 527 U.S. at 827, yet the Court never suggested, let alone held, that punitive damages claims could be separately certified on a mandatory basis. Additionally, other courts addressing mandatory punitive damages classes have faithfully applied *Ortiz*'s strict requirements in rejecting (b)(1)(B) certification. *See Simon II*, 407 F.3d at 136-38; *In re Paxil Litig.*, 212 F.R.D. 539, 553 (C.D. Cal. 2003).

Washington Mutual also draws comfort from the fact that *Ortiz* did not categorically prohibit limited fund classes and described only the "presumptively necessary" characteristics of a limited fund class, but that comfort is unfounded. First, Washington Mutual never provides any reason for deviating from the "presumptively necessary" characteristics in this case. Second, *Ortiz* instructs that limited fund classes are permitted, if ever, only in narrow circumstances that closely adhere to the traditional limited fund model. 527 U.S. at 842-45. Consequently, courts interpreting *Ortiz* have held not that it encourages a flexible interpretation of (b)(1)(B) but just the opposite – that *Ortiz*'s requirements should be strictly followed. *See* AOB 25-26 & n.7.

2. The Parties Have Not Demonstrated that $3.5 Million Represents the Upper Limit of the Punitive Damages Fund.

a. Due Process Does Not Justify the Parties' Agreed-Upon Punitive Damages Fund.

Equally meritless is the parties' attempt to justify (b)(1)(B) certification based on a due process limit on total punitive damages. As previously explained, the parties' attempted application of due process to this settlement is invented from whole cloth, as the parties first agreed to label half the settlement fund as punitive damages, and only later, after Objectors challenged the mandatory class, did they resort to due process to justify their agreed-upon fund. AOB 28-41. Now, in an eleventh-hour effort to manufacture a limited fund class, the parties

latch onto the district court's reference to Washington Mutual's net worth as a basis for arguing that $3.5 million represents the constitutional limit. This argument fails.

Initially, Washington Mutual's net worth does not, standing alone, establish any constitutional limit on punitive damages, let alone the parties' agreed-upon $3.5 million cap. The district court never purported to find, and the parties never asserted, that $3.5 million represented the total limit on punitive damages. Rather, the district court merely held that it was "within" the limit. R.2114, AER Tab 3 at 9. This finding cannot establish $3.5 million as the maximum limit on punitive damages, for $3.5 million is "within" the constitutional limit just as $1 million or $500,000 is "within" the limit. The court never identified a limit on the fund, and the parties cannot now rewrite the court's decision to post-hoc rationalize their agreed-upon fund.[4]

The absence of findings on this point is unsurprising, since the parties presented no evidence pertaining to the Supreme Court's three guideposts for

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[4] Although the parties argue that Washington Mutual's $50-75 million net worth creates a limited fund independently of due process, DAB 36-39, that argument fails because the settlement does not cap punitive damages at $50-75 million, but at $3.5 million. *See Ortiz*, 527 U.S. at 838 (holding that the fund must be set at its maximum). Moreover, the contention that Washington Mutual's net worth creates a limited fund is belied by the class' right to opt-out claims for compensatory damages, which would impinge on Washington Mutual's net worth just as would punitive damages.

evaluating punitive damage awards (without which no due process limit can be determined): the reprehensibility of the defendant's conduct, the ratio of compensatory to punitive damages, and the range of punitive damages verdicts in similar cases. *See* AOB 34-38 (citing *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418-25 (2003)). Instead, the parties plucked the $3.5 million limit from thin air, without reference to anything relevant to the constitutional constraints on punitive damages. The district court's "uncritical adoption . . . of figures agreed upon by the parties," *Ortiz*, 527 U.S. at 848 (footnote omitted) provides no foundation for determining the due process limit. *See also Simon II*, 407 F.3d at 136-38 (rejecting "limited punishment" class because due process limit is "postulated" and not definable).

Given this lack of evidence relating to the constitutional limit on punitive damages, the parties cling to the district court's isolated reference to Washington Mutual's net worth to justify a (b)(1)(B) class. This attempt fails, however, because a defendant's net worth, in isolation, says nothing about the due process limit on punitive damages. Initially, the relevance of net worth is questionable, as it is not one of the three *State Farm* guideposts. Even it were, however, just as the constitutional limit on punitive damages is "inherently imprecise," *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434-35 (2001), and "theoretical," *Simon II*, 407 F.3d at 138, the maximum percentage of a defendant's

net worth that can be devoted to punitive damages is equally theoretical and unsusceptible of precise definition. *See, e.g.*, *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 706 (1st Cir. 1995) (holding that "there is no general rule defining the maximum proportion of net worth" that may be devoted to punitive damages and finding that award constituting 55% of defendant's net worth was not constitutionally excessive). The proper percentage, if one exists, cannot be determined in the abstract, but turns on consideration of the three *State Farm* guideposts, which both the parties and the district court failed to analyze. Thus, no basis exists for concluding that $3.5 million possibly represents that limit.

The importance of *State Farm*'s three guideposts demonstrates why the Second Circuit's decision in *Simon II* applies with full force here. *Simon II* held that due process could not justify a (b)(1)(B) class because the *State Farm* factors do not establish an objective limit on punitive damages. 407 F.3d at 138. Although Washington Mutual contends that *Simon II* is distinguishable because it involved a litigation class, DAB 54-56, the Second Circuit's holding that the due process limit escapes precise definition is more salient in the settlement context. Seeking certification of a mandatory punitive damages *settlement* class puts the cart before the horse by assigning the court an impossible task: determining the constitutional limit on punitive damages without the benefit of a trial as to the defendant's reprehensibility or the individual harm suffered by class members. In

litigation, by contrast, the jury can first determine the defendant's wrongdoing and compensatory damages liability to provide a basis for determining the due process limit on punitive damages. Thus, although the Second Circuit recognized that mandatory certification might present a closer question if there first were a "*verdict* for compensatory damages for the class in one stage of a trial" that could establish a baseline for assessing punitive damages liability, *Simon II*, 407 F.3d at 138 n.9 (emphasis added), in the context of this settlement, where neither the court nor the parties have attempted to analyze *State Farm*'s guideposts, certification of a mandatory punitive damages class is improper.

To allow parties to deprive class members of the ability to opt out punitive damages claims simply by mentioning a defendant's net worth, as the parties do here, would lead to mandatory punitive damages classes in *all* cases, as every defendant's net worth is limited at some point. *See In re Telectronics Pacing Systs.*, 221 F.3d 870, 880 (6th Cir. 2000) (rejecting limited fund class because "[p]resumably *all* companies have limited funds at some point" (emphasis in original)). Such a broad reading of (b)(1)(B) runs afoul of *Ortiz*'s warning that limited fund classes should be used only in rare situations. 527 U.S. at 842.

Finally, the parties' reliance on Washington Mutual's net worth is wrong as a factual matter, as $50-75 million does not represent the total assets payable to the class, *but only Washington Mutual's assets from Mississippi*. The district

court found that $50-75 million represented the net worth only of the "Mississippi Defendant," R.2114, AER Tab 3 at 9 – even though both Washington Mutual's Mississippi entity and its parent company, Washington Mutual Finance Group, are named defendants – and Washington Mutual's own net worth estimate is limited to the company's "prior Mississippi activities."[5] DER Tab 3 at 1, R.1663. A limited fund, however, must include all sources of recovery, and no basis exists for arbitrarily excluding either the parent company's assets, or assets generated from non-Mississippi activities. *See Telectronics*, 221 F.3d at 874, 878-79 (finding no limited fund where parent company's assets were excluded and instructing that (b)(1)(B) classes cannot be certified "unless all potential sources of recovery are shown to have limited funds"). Thus, even if the parties' attempt to construct a limited fund based on Washington Mutual's net worth were defensible as a legal matter (which it is not), it is wrong as a factual matter.[6]

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[5] By contrast, in 2004, the parent defendant, Washington Mutual Finance, was valued at $1.25 billion. *See http://www.sec.gov/Archives/edgar/data/7214/000094787104000082/f8k_011204.txt* (visited Feb. 8, 2006).

[6] Although the parties argue that the district court correctly found that, simply because of the large class size, there was a risk that the punitive damages fund would be depleted, DAB 38-39, the district court's finding was inadequate because the court never analyzed the plaintiff's likelihood of success, nor the likely size of any future punitive damage awards. *See* AOB 38-41; *see also In re Dalkon Shield Litig.*, 693 F.2d 847, 851 (9th Cir. 1982) (rejecting argument that alleged fund was insufficient to pay all claims because "not every plaintiff will prevail and not every plaintiff will receive a jury award in the amount requested").

b. Mississippi Law Does Not Justify the Parties' Agreed-Upon Punitive Damages Fund.

The parties also argue that (b)(1)(B) certification is proper because Miss. Stat. § 11-1-65(3)(a) – which places limits on the amount of an individual punitive damages "award" in "any civil action" – creates an aggregate punitive damages fund of $2.5 million. DAB 41-43; PAB 9-10. This argument is incorrect both because it misreads the statute and because the statute is inapplicable to this case.

Initially, reliance on this statute is improper because the parties did not raise this argument below and the district court never addressed it. R.1011-1051; R.1207-1545. "Arguments not raised in the district court cannot be asserted for the first time on appeal." *Greenberg v. Crossroads Systs., Inc.*, 364 F.3d 657, 669 (5th Cir. 2004).

Moreover, the statute does not create a total punitive damages limit. The parties neglect to mention that the statute regulates only *individual* awards of punitive damages in *individual* actions; it does not purport to establish an aggregate amount of punitive damages awardable against a defendant. The statute's language refers to a singular "award" of punitive damages in a single "civil action," thus limiting only the amount of punitive damages awardable in a particular case, not the total sum of awardable punitive damages across numerous cases. Miss. Stat. § 11-1-65(3)(a). Nothing in the statutory language evinces an

intent to derogate Mississippi's longstanding common-law rule "that previous [punitive damage] awards are not a limiting factor on subsequent awards." *See Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326, 1334 (5th Cir. 1995) *abrogated on other grounds, H&D Tire & Automotive-Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 329-30 (5th Cir. 2000); *Jackson v. Johns-Mansville Sales Corp.*, 781 F.2d 394, 403-07 (5th Cir. 1986) (interpreting Mississippi law). Thus, even if class members could opt out and pursue individual claims, their individual awards in their individual cases, as a matter of law, would not prejudice the potential award of any other class member.

Finally, the provision of the statute relied upon by the parties applies only to actions filed on or after September 1, 2004. *See* Note on Date Effective and Application Accompanying Statute. Because this action was filed in March 23, 2004, the statute is inapplicable and cannot provide a basis for certification of a mandatory punitive damages class here.

3. The Class is Fatally Under-Inclusive.

Regardless of whether the parties can establish that a limited fund exists as either a factual or legal matter, (b)(1)(B) certification is improper because the class is under-inclusive and forces 45,000 class members to accept $78 each in punitive damages while leaving the twenty-three *Blackmon* plaintiffs out of the class and free to seek $2.3 million each in punitive damages. AOB 41-43. Although

Washington Mutual asserts that the exclusion of the *Blackmon* plaintiffs does not render the class under-inclusive because they, unlike the class, already litigated their claims to judgment, DAB 51-54, this distinction does not provide a valid basis for excluding them from the mandatory class.

Ortiz makes clear a (b)(1)(B) class must "comprise everyone who might state a claim on a single or repeated set of facts, invoking a common theory of recovery," and that "there [is] no question of omitting anyone whose claim shared the common theory of liability and would contribute to the calculated shortfall of recovery." 527 U.S. 839-40; *accord In re Sch. Asbestos Litig.*, 789 F.2d 996, 1006 (3d Cir. 1986). Thus, whether claimants must be included in a limited fund class depends on the nature of the claims they assert, not, as Washington Mutual suggests, on the claims' procedural posture.

Here, the *Blackmon* plaintiffs' claims are identical to the class claims, and therefore no basis exists for excluding them from the class simply because they filed first. In fact, the Third Circuit in *School Asbestos* rejected the precise distinction proposed by Washington Mutual here, finding that omitting claimants who already had obtained a $2 million punitive damages verdict from the class was a "critical flaw" in the district court's decision to certify a (b)(1)(B) class. 789 F.2d at 1005.

The class' under-inclusiveness is conclusively demonstrated by the parties'

own argument that the *Blackmon* judgment will reduce the available pot of damages for the class and therefore necessitates a limited fund. DAB 36 ("The Blackmon judgment thus left the class at peril of a worthless recovery."); PAB 13. Rather than justifying a limited fund class, however, this shows precisely why omitting the *Blackmon* plaintiffs from the class "would contribute to the calculated shortfall of recovery" for the class. *Ortiz*, 527 U.S. at 840. The parties cannot simultaneously use the *Blackmon* judgment both as the basis for the limited fund and as a reason for excluding the *Blackmon* plaintiffs from that fund.

Finally, permitting the omission from a mandatory class of those claimants who have already obtained a judgment would create the very race to the courthouse that subdivision (b)(1)(B) is designed to prevent. Faced with the prospect of mandatory class certification, individual claimants would have an incentive to file suit early to get their full amount of damages before a mandatory class could be certified, effectively allowing first-filing individuals to deplete the very fund that a (b)(1)(B) class is supposed to protect. Therefore, exclusion of the *Blackmon* plaintiffs precludes certification of a (b)(1)(B) class.

D. The District Court Erred in Certifying a Mandatory Class Under Rule 23(b)(2).

Just as the district court's decision violates subdivision (b)(1)(B), the court's cursory decision to certify the class under Rule 23(b)(2) distorts the Rule to such a degree so as to deprive it of any meaning. The district court certified a

mandatory punitive damages class under Rule 23(b)(2) even though (a) Washington Mutual ceased doing business in Mississippi two years *before* the filing of the class complaint, (b) the settlement is mandatory as to punitive damages only, (c) the settlement contains no injunctive relief whatsoever, and (d) punitive damages claims require individualized determinations. Rather than tackle these defects head on, the parties attempt to contort subdivision (b)(2)'s requirements to fit this settlement by relying on the fact that the complaint requests injunctive relief, and on an argument already rejected in this Circuit – that punitive damages are incidental to injunctive relief. DAB 43-46; PAB 14-21. These arguments, if adopted, would move subdivision (b)(2) so far from its intended purpose as to deprive the rule of any meaning.

1. (b)(2) Certification is Improper Because Injunctive Relief is not "Appropriate."

The parties' and the district court's reliance on the injunctive relief requested in the complaint fails to establish that final injunctive relief is "appropriate" under Rule 23(b)(2). Aside from the various reasons why it is improper to focus on the complaint, rather than the settlement, in evaluating (b)(2) certification, *see* AOB 47-51, the glaring error in the parties' and the district court's position is the fact that injunctive relief is indisputably inappropriate, because as the district court recognized (and as the parties agree), "there is no need for prospective injunctive relief in these cases because Washington Mutual ceased

making new loans in Mississippi in 2002." R.2125, AER Tab 3 at 20; *accord* DAB 11; PAB 3, 6.

The fact that injunctive relief was never a legitimate possibility is fatal to (b)(2) certification. *See* AOB 56 n.18. At the time the complaint was filed, the parties' request for injunctive relief was meaningless because by then there was nothing left to enjoin, there was no risk of future harm, and the class could not benefit from any injunctive relief. This Court has held repeatedly that (b)(2) certification is improper where injunctive relief would not benefit the class. *See Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000) (reversing (b)(2) certification where "plaintiffs have nothing to gain from an injunction" because they "do not face further harm from Sears's actions"); *McManus v. Fleetwood Enterpr., Inc.*, 320 F.3d 545, 554 (5th Cir. 2003) (reversing (b)(2) certification where many class members had no use for the proposed injunctive relief and emphasizing that "otherwise inappropriate injunctive relief does not become appropriate for class treatment merely because the more permissive Rule 23(b)(2), as opposed to (b)(3), contemplates injunctive relief"); *see* AOB 51 & n.16. That Plaintiff filed this complaint solely to facilitate an already agreed-upon settlement that contains no injunctive relief illustrates how the request for injunctive relief works solely to disguise what is in reality a lawsuit for money damages. This "attempt to shoehorn damages actions into the Rule 23(b)(2) framework,

depriving class members of notice and opt-out protections," undermines the purposes of Rule 23 and must be rejected. *Bolin*, 231 F.3d at 976; *see also Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147, 164 (2d Cir. 2001) ("Insignificant or sham requests for injunctive relief should not provide cover for (b)(2) certification of claims that are brought essentially for monetary recovery.").

The impropriety of (b)(2) certification here is forcefully underscored by Plaintiff's misplaced reliance on *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir. 1975). PAB 15-20. There, the court held that the fact that a defendant stopped engaging in unlawful conduct *after the class had been certified* under (b)(2) did not require de-certification. *Id.* at 250-52. Here, by contrast, injunctive relief became unavailable not only before certification was sought, but before the complaint was ever filed. *See Miller v. Hygrade Food Prods. Corp.*, 198 F.R.D. 638, 642 n.8 (E.D. Pa. 2001) (distinguishing *Wetzel* on this ground and labeling *Wetzel* "outdated"). *Wetzel* itself recognized this distinction, stating that "[i]t is at the (c)(1) [class certification] hearing that the class must be shown to possess the characteristics required by (b)(2)." 508 F.2d at 252. Moreover, *Wetzel* does not comport with this Circuit's holdings that injunctive relief must benefit the class to justify (b)(2) certification. Thus, (b)(2) certification must be rejected.

2. (b)(2) Certification is Improper Because Punitive Damages Are Not "Incidental" Damages.

Relying primarily on *Allen v. R&H Oil & Gas Co.*, Washington Mutual argues that punitive damages are "fundamentally collective" and therefore constitute "incidental" damages within the meaning of subdivision (b)(2). DAB 44. As a threshold matter, it is irrelevant whether punitive damages are "incidental" because, given the inappropriateness of injunctive relief, there is no injunctive relief for the punitive damages to be incidental to. In *Bolin*, this Court found that, because the requested injunctive relief would not benefit the class, "whether the monetary relief is incidental to the injunctive relief sought is not an issue, since monetary relief is effectively the sole remedy sought." 231 F.3d at 978. Also, whether punitive damages are "incidental" to injunctive relief is immaterial because injunctive relief is excluded from the mandatory portion of the class, as the settlement allows class members to opt out their non-punitive claims. AOB 49. Because the mandatory class is for damages only, due process requires that class members have an opportunity to opt out their punitive damages claims. *Shutts*, 472 U.S. at 811-12 & n.3. Because the requested injunctive relief both serves no purpose and is not part of the mandatory class, (b)(2) certification is improper whether or not punitive damages are "incidental."

Additionally, Washington Mutual's reliance on *Allen* is misplaced. *Allen* did not concern class certification but whether punitive damages claims could be

aggregated among plaintiffs for purposes of determining federal diversity jurisdiction. It has no bearing on how punitive damages are treated under Rule 23(b)(2). Moreover, Washington Mutual neglects to mention that *Allen* is no longer good law; this Circuit has rejected *Allen* and now prohibits aggregation of punitive damages claims. *See Pitney Bowes, Inc.*, 227 F.3d at 330.

Rather, the test for whether damages are "incidental" within the meaning of subdivision (b)(2) is set forth in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998). There the Court held that only damages which 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" are "incidental." *Id.* at 415. Here, the district court never even applied the *Allison* test to the class' punitive damages claims in its conclusory discussion of subdivision (b)(2). This is unsurprising, because the punitive damages claims here fall far short of that test, *see* AOB 52-55 & n.17, just as the punitive damages claims did in *Allison*, 151 F.3d at 417-18.

First, punitive damages awards are not susceptible to objective computation because a jury's punitive damages award is a subjective rather than objective determination. The Supreme Court, speaking as if it had the *Allison* test in mind, explained that punitive damage "awards are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award must

make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it." *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993). Because punitive damages reflect the jury's subjective value judgment about how much punishment to inflict, they cannot be computed with the type of objective precision required under Rule 23(b)(2). *See, e.g.*, *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003) (noting the lack of objective standards for punitive damages awards); *Microsoft Corp. v. Bristol Tech., Inc.*, 250 F.3d 152, 155 (2d Cir. 2001) (punitive damages elude precise definition).[7]

Second, because the proper amount of punitive damages depends on the proper amount of compensatory damages, punitive damages depend on the disparate merits of the individual class member's claims and therefore cannot be certified under Rule 23(b)(2). *See Allison*, 151 F.3d at 417-18 (rejecting (b)(2)

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[7] Washington Mutual also argues that the complaint's request for restitutionary damages constitutes an equitable remedy and justifies (b)(2) certification. DAB 45. Aside from the fact that the non-punitive claims have no bearing on whether punitive claims can be certified under (b)(2), *see Bolin*, 231 F.3d at 976 (holding that a court must evaluate class certification "on a claim-by-claim basis"), it is well-settled that because the primary purpose of restitution is to provide compensation, restitution is treated as damages, not injunctive relief, for purposes of (b)(2) certification. *See Sch. Asbestos*, 789 F.2d at 1008; *In re Paxil Litig.*, 218 F.R.D. 242, 247 (C.D. Cal. 2003); *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 193 F.R.D. 505, 509 (W.D. Mich. 2000); *see also Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210-11 (2002) (characterizing restitution as primarily a legal, rather than equitable remedy).

certification of punitive damages claims because "recovery of punitive damages must necessarily turn on the recovery of compensatory damages."). Here, as previously argued, AOB 54-57, determination of the proper amount of both compensatory and punitive damages depends on the individual circumstances of each plaintiff's case, the nature of their individual transactions, and proof of individualized injury over a ten-year period. Underscoring the individualized nature of this inquiry is the Supreme Court's instruction that punitive damages cannot punish a defendant's misconduct generally, but must bear a nexus to the specific harm suffered by each individual plaintiff. *State Farm*, 538 U.S. at 422-23. For this reason, numerous courts have rejected attempts to certify punitive damages claims under Rule 23(b)(2). *See* AOB 53 & n.17 (listing cases). Thus, just as compensatory damages require individualized inquiries, so too do punitive damages, undermining the parties' unsupported and illogical allegation that punitive damages are "incidental."[8]

E. Certification is Improper Under Rule 23(b)(1)(A).

Plaintiff contends that this case also can be certified under Rule 23(b)(1)(A)

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[8] Washington Mutual's argument that the need for such individual inquiries implicates only the manageability of a class under Rule 23(b)(3)(D) misses the mark. DAB 46-47. The individualized nature of the class' claims for compensatory and punitive damages does not implicate manageability – indeed this class may be suitable for certification on an opt-out basis under subdivision (b)(3) – but pertain directly to whether the level of class cohesiveness is sufficient to satisfy subdivision (b)(2).

because allowing individual lawsuits creates a risk of exposing Washington Mutual to incompatible standards of conduct. PAB 21-22. As Objectors previously explained, however, the district court certified the class pursuant to subdivisions(b)(1)(B) and (b)(2) only, and therefore certification under subdivision (b)(1)(A) is not before this Court on appeal. AOB 9 n.3. Even if it were before this Court, however, certification is improper because Washington Mutual does not face any risk of incompatible standards of conduct, as it ceased doing business in Mississippi in 2002. Therefore, claims for prospective injunctive relief would not be a part of any future lawsuits. Additionally, the parties sought (b)(1)(A) certification for the punitive damages class only. It is well-settled that (b)(1)(A) does not apply to damages claims. *See, e.g.*, *Allison*, 151 F.3d at 421 n.16; *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987). Moreover, certification of a mandatory punitive damages class under subdivision (b)(1)(A) would make little sense here, since the settlement permits class members to opt-out their claims for injunctive relief. To the extent any risk of incompatible standards of conduct exists, it exists independently of whether the punitive damages class is certified on a non-opt-out basis. Plaintiff's thirteenth-hour attempt to certify the class under Rule 23(b)(1)(A) warrants rejection.

CONCLUSION

For the foregoing reasons, the district court's decision certifying a non-opt-out punitive damages class should be vacated and remanded.

Respectfully submitted,

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Richard Frankel
Leslie A. Brueckner
Trial Lawyers for Public Justice
1717 Massachusetts Ave., N.W., Suite 800
Washington, DC 20036

Charles R. Mullins
Coxwell & Associates, PLLC
500 N. State Street
Jackson, MS 39201

Peter T. Martin
Patterson & Patterson, PLLC
P.O. Box 663
304 East Jefferson Street
Aberdeen, MS 39730

Counsel for Intervenors-Appellants and Appellants

Dated: February 9, 2006

CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of February, 2006, I served an original and seven hard copies and one electronic copy pursuant to Fifth Circuit Rule 31.1, of the foregoing Reply Brief of Intervenors-Appellants and Appellants, via overnight delivery, to the Clerk of Court for

The United States Court of Appeals for the Fifth Circuit
600 Camp Street
New Orleans, LA 70130

I also hereby certify that, on this 9th day of February, 2006, I served two hard copies, and one electronic copy pursuant to Fifth Circuit Rule 31.1, of the foregoing Reply Brief of Intervenors-Appellants and Appellants on the following counsel by first-class mail, postage prepaid:

Tim K. Goss
Capshaw, Goss & Bowers, LLP
3031 Allen St., Suite 200
Dallas, TX 75202

Richard A. Freese
Sweet & Freese
Suite 240, Morgan Keegan Center
2900 Highway 280
Birmingham, AL 35223

Stephen J. Newman
Julia Strickland
Keith Andrew Custis
David W. Moon
Strook, Strook & Lavan, LLP
2029 Century Park East
Los Angeles, CA 90067-3004

Katherine M. Samson
Johnny L. Nelms
Watkins, Ludlam, Winter & Stennis, P.A.
P.O. Drawer 160
Gulfport, MS 39502-0160

_____
Richard Frankel

Counsel for Intervenors-Appellants and Appellants

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 6,974 words, excluding exempted portions, and it was prepared in WordPerfect using proportionally spaced Times New Roman 14-point type.

_____

Richard Frankel

Counsel for Intervenors-Appellants and Appellants

Dated: February 9, 2006