CASE NO. 2001-TS-01911

IN THE SUPREME COURT OF MISSISSIPPI

WASHINGTON MUTUAL FINANCE GROUP, LLC
Appellant – Defendant,

vs.

GRETA BLACKMON, LOUISE BLUE, ET AL.
Appellees – Plaintiffs.

On Appeal from a Judgment
of the Circuit Court of Holmes County, Mississippi (No. 98-0026),
The Honorable Jannie Lewis, Circuit Judge

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Defendant and Appellant: Washington Mutual Finance Group, LLC.

2. Plaintiffs and Appellees: Greta Blackmon, Louise Blue, Glenda Chambers, Annie Clark, Willie Earl Conway, Lillie Harris, Robin Horton, Lindsey Horton, Lorene Jackson, Lizzie Lofton, Jessie McClung, Willie McGee, Lou Waters, Earnest Claiborne, Tina Cross, Alfred Garrett, Percy Mason, Kenneth Hill, Zenester Moore, Mattie Miles, Patrishane Gordon, Janie Mason, and Doris Garrett.

3. Attorneys for Defendant and Appellant Washington Mutual Finance Group, LLC: Jess H. Dickinson, J. Henry Ros, Katharine M. Samson, Johnny Nelms, Angelique White, Dickinson Ros, Wooten & Wamson, PLLC; Jan T. Chilton, Severson & Werson, and Mary Brown; Watkins, Ludlam, Winter & Stennis.

4. Attorneys for Plaintiffs and Appellees: Edward Blackmon, Jr., Trent Walker, Blackmon & Blackmon; Richard A. Freese, Dennis Sweet, Langston Sweet & Freese, P.A.; Tim K. Goss, Mikel J. Bowers, Capshaw, Goss & Bowers; Don Brock, Jr., Whittington, Brock, Swayze & Dale; and Michael Hartung.

5. Circuit Court Judge: Hon. Jannie Lewis.

6. Washington Mutual Finance Group, LLC is a wholly-owned subsidiary of Washington Mutual, Inc., a corporation whose shares are publicly traded.

Richard Freese

Attorney of record for Plaintiffs and Appellees

REQUEST FOR ORAL ARGUMENT

Plaintiffs/Appellees request the opportunity to present oral argument. Oral argument is requested in order to assist the Court in understanding the history of this case and to allow the parties to address the legal and factual issues relevant to the Court's inquiry.

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STATEMENT OF ISSUES

1. Where the evidence shows: 1) that Washington Mutual acted as an agent for Plaintiffs in connection with their insurance transactions, 2) that Washington Mutual explicitly and implicitly assured Plaintiffs they could trust it to handle the details of their loan transactions, 3) Plaintiffs did, in fact, place their trust in Washington Mutual, and 4) Washington Mutual assumed responsibility for selecting insurance products and making refinancing decisions on Plaintiffs' behalf: **Did the trial court err in submitting Plaintiffs' claim for breach of fiduciary duty to the jury and in denying Washington Mutual's motions regarding that claim?**

2. Where the record contains undisputed evidence of affirmative misrepresentations to three plaintiffs and evidence that Washington Mutual failed to disclose material facts necessary to correct false impressions and/or failed to fulfill its fiduciary duty of disclosure: **Did the trial court err in submitting plaintiffs' fraud claim to the jury and in denying Washington Mutual's motions regarding that claim?**

3. Where the evidence establishes that: 1) Washington Mutual deprived Plaintiffs of the benefits of the insurance contracts imposed upon them, 2) Washington Mutual disguised from Plaintiffs their ongoing rights and benefits (if any) under the loan agreements; and 3) Washington Mutual coerced Plaintiffs into refinancing their loans in order to maximize its own profits: **Did the trial court err in submitting Plaintiffs' claim for breach the covenant of good faith and fair dealing to the jury and in denying Washington Mutual's motions regarding that claim?**

4. Where the evidence shows that Washington Mutual assumed responsibility for making decisions regarding insurance selection and loan refinancing on behalf of unknowledgeable and uncounseled customers and where Plaintiffs incurred personal injury as a result of Washington Mutual's undisputed conduct: **Did the trial court err in submitting Plaintiffs' negligence claim to the jury and in denying Washington Mutual's motions regarding that claim?**

5. Where evidence proves Washington Mutual fraudulently concealed from Plaintiffs the existence of their causes of action: **Did the trial court err in finding that the statute of limitations did not bar Plaintiffs' claims?**

6. Where evidence shows Washington Mutual collected interest and insurance premiums on loans it had purchased from Easy Finance and other third parties but failed to inform Plaintiffs about financing and insurance aspects of the loans: **Did the trial court err by not denying the claims of Plaintiffs with third-party loans as a matter of law?**

7. **Is the award of emotional distress damages improper or excessive where it is based on outrageous and revolting conduct by Washington Mutual and falls within ranges previously approved by this Court?**

8. **Is the award of punitive damages improper or excessive in light of the evidence presented in this case?**

9. Where the record shows that Washington Mutual failed to timely object to the jury instructions given below and where the instructions as a whole fully and fairly charged the jury of its duty to consider the evidence and the law: **Did the trial court err in giving Plaintiffs' instructions on their causes of action?**

10. Where the record establishes that: (1) Plaintiffs timely identified Dr. Glover as an expert witness on punitive damages, (2) Plaintiffs made Dr. Glover available for deposition and provided an expert report, (3) Plaintiffs provided supplemental information prior to trial based upon financial figures received from Washington Mutual, and (4) Washington Mutual did not seek any practical remedies at trial for its alleged surprise regarding Dr. Glover's net worth testimony: **Did the trial court err in admitting Dr. Glover's testimony?**

I.

STATEMENT OF THE CASE

The procedural history of this case shows it was far from the unprincipled product of passion and prejudice Washington Mutual attempts to depict through the recitation of irrelevant facts (to which it assigns no error). To the contrary, this was a case where both judge and jury carefully weighed the evidence at every stage of the proceedings. And, where doing so was warranted, the trial court limited Plaintiffs' claims and remitted Plaintiffs' damages. In order to more fairly present the thorough consideration given this case, Plaintiffs submit the following Statement of the Case:

A. The Trial Court Thoroughly Considered the Sufficiency of the Evidence Prior to Trial of This Case.

Fifty-one Plaintiffs initially filed this action alleging numerous wrongful acts by Washington Mutual. [1 CT 13-33]. The trial court considered the claims of each Plaintiff and ordered eleven to arbitration due to the provisions of their contracts. [4 CT 514-15]. At the summary judgment stage, Judge Lewis considered and granted Washington Mutual's request for summary judgment on Plaintiffs' claims for improper late fees and excessive interest. [7 CT 982-983]. She also thoughtfully considered Washington Mutual's request for summary judgment on Plaintiffs' emotional distress claims; and granted the Company's motion as to six of the Plaintiffs. [7 CT 982-983]. Washington Mutual's motions for summary judgment alleging no fiduciary duty and asserting the statute of limitations were considered and denied. [7 CT 982-983].

B. The Trial Court Thoroughly Considered the Sufficiency of the Evidence at the Close of Plaintiffs' Case.

At the close of Plaintiff's case, the trial court thoroughly considered the evidence presented and granted dismissal on ten separate claims that had been asserted by Plaintiffs. [19 RT 1177:2 et

seq.]. The dismissed claims included claims for excessive interest, padding loan amounts, damage to credit, and wrongful collection practices - and the emotional distress claim of one plaintiff. [20 RT 1281:26-1284:10]. Dismissals and directed verdict were denied as to Plaintiffs' claims for punitive damages, fiduciary duty, negligence, fraud, misrepresentations, packing, flipping, emotional distress (for all plaintiffs except the one referenced above) and based on the statute of limitations. [19 RT 1188:23 et seq.]

C. The Jury Thoroughly Considered Plaintiffs' Compensatory Damage Claims.

At the close of the trial, the jury was instructed to determine the economic and emotional distress damages for seventeen plaintiffs. Judge Lewis instructed the jury not to consider emotional distress damages for the six Plaintiffs she determined had presented insufficient evidence to warrant submission of an emotional distress claim. During closing arguments, Plaintiffs' counsel asked the jury to make damage awards for each plaintiff of no less than $200,000.00 and for as much as $1 million in some cases. [23 RT 1673-74].

After deliberation, the jury returned a verdict in support of each Plaintiff. [9 CT 1320]. The verdicts ranged from a low of $5000 for one plaintiff without emotional distress damages to a high of $250,000 for three individuals. [9 CT 1321-1327; 23 RT 1673-74]. Most plaintiffs received roughly one-third of the damages they requested. [9 CT 1321-1327; 23 RT 1673-74].

D. The Jury Was Presented Evidence That Washington Mutual Inexplicably Looted Its Own Coffers Prior to the Trial of This Case.

Following the return of the jury's compensatory damage verdicts, Plaintiffs presented the testimony of just two witnesses on punitive damages. One witness was Washington Mutual Vice President of Operations, David Shelton. [23 RT 1762 et seq]. The other witness, was Dr. Glenda

Glover, who testified on Washington Mutual's net worth. [23 RT 1773 et seq.]. In addition to stating her opinion on Washington Mutual's net worth, she also revealed that Washington Mutual had inexplicably transferred, for no apparent consideration, nearly two-thirds of its assets, or $250 million, to an affiliated company as this trial approached. [23 RT 1783:3-12]. Washington Mutual offered no evidence to refute or explain why it plundered its own coffers. After hearing this evidence, the jury returned a punitive damage verdict for each plaintiff in the full amount requested by their counsel. [10 CT 1347-52].

E. The Trial Court Thoroughly Considered the Sufficiency of the Evidence Following the Return of the Jury's Verdicts and Ordered a Remittitur Where Evidence Was Lacking.

After conclusion of the trial, Judge Lewis again considered the sufficiency of the evidence supporting each of the Plaintiffs' claims in connection with Washington Mutual's motion for new trial and for judgment notwithstanding the verdict. [11 CT 1552]. For over one-fourth of the Plaintiffs, Judge Lewis found insufficient evidence of emotional distress and ordered the actual damages remitted to the amount of the economic loss alone. [11 CT 1552]. In those same six cases, the punitive damage award was correspondingly reduced. [11 CT 1552].

Simply stated, the procedural history of this case demonstrates abundantly that a thorough and measured analysis of the claims and evidence was performed at every step. Try as it might to insinuate that the judgment in this case is the product of flawed judicial rulings or an impassioned jury; in reality, the judgment in this case is the product of reasoned consideration of Washington Mutual's wrongful conduct and the measures necessary to bring such conduct to an end. It is from the trial court's carefully considered judgment, that Washington Mutual takes this appeal.

II.

STATEMENT OF FACTS

This case is not about routine lending practices. This case is about a company that deliberately turns a blind eye (and pockets the profits) while its Mississippi branches use the charade of an ordinary lending relationship to disguise both their true function as an insurance company and their scheme for preying upon the least educated and most vulnerable citizens of this state.

A. Washington Mutual's Scheme to Profit Off Financially Vulnerable Customers.

Washington Mutual Finance Group LLC ("Washington Mutual"or "Company") is a subsidiary of Washington Mutual Inc., the single largest savings institution and ninth largest banking company in the United States.[1] [20 Ct 2942]. Washington Mutual engages in two practices known in the industry as "flipping" and "packing." According to the Federal Trade Commission ("FTC"), "flipping" occurs when a lender induces a borrower to repeatedly refinance a loan, often within a short time frame, charging high points and fees each time. [FTC Testifies on Enforcement and Education Initiatives to Combat Abusive Lending Practices, www.ftc.gov, March 16, 1998]. The FTC defines "packing" as the practice of adding credit insurance or other "extras" to a loan in order to increase the lender's profit. *Id.* Washington Mutual's Mississippi branches incorporate these two predatory techniques into a scheme of deliberate deception, manipulation and misrepresentations in order to make the most money possible off its uneducated and financially troubled customers.[2]

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[1] Approximately one year prior to the trial of this matter, Washington Mutual merged with another lender, City Finance Company ("City Finance") and succeeded to all rights and liabilities of City Finance. [9 RT 1339:19-22]. For simplicity, Plaintiffs will refer to the Defendant as "Washington Mutual" at all times – without distinguishing whether the proper name at the referenced time was, in fact, City Finance or Washington Mutual.

[2] Washington Mutual has multiple branch offices located throughout the State of Mississippi. (continued...)

1. Step 1: Entice financially vulnerable customers.

Washington Mutual takes affirmative steps to entice customers suffering financial hardships to incur further debt. Washington Mutual solicits customers with written assurances that the Company will take care of everything. [12 CT 1676]. Washington Mutual purchases third-party loans of individuals it can then lead to refinance a loan. Washington Mutual even calls borrowers who are behind on payments to offer additional funds. Washington Mutual's Vice President of Operations, David Shelton, admits that these things are done in an attempt to increase the debt load of customers who simply owed Washington Mutual less than the Company would like them to. [13 RT 290:2-7;14 RT 292:6-12; 14 RT 298:23-25]. In fact, once Washington Mutual has made a loan to a borrower, it is the Company's philosophy to increase that customer's debt to the maximum amount possible. [14 RT 299:18-29; 14 RT 300:2-8].

2. Step 2: Gain the trust and reliance of vulnerable customers.

Washington Mutual's policy is to seek the trust and reliance of its less knowledgeable customers. [15 RT 516:25-517:5; 13 RT 233:23-28]. Shelton admits that Washington Mutual goes out of its way to get customers to "rely on" the Company. [21 RT 1342:10-14; 20 RT 1337:21-28]. Washington Mutual also tells its customers "count on us to do everything we can to help." [12 CT 1676]. It sends borrowers solicitation letters promising "when we say we are here to help we mean it." [1 CT 79; 14 RT 298:8-11]. The Greenwood branch manager, Dolly Andrews ("Ms. Andrews"),

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[12](...continued)
One such branch is located in Greenwood, Mississippi. Most of the Plaintiffs in this case were customers of Washington Mutual's Greenwood office. [1 CT 108, 111; 14 CT 2022; 15 CT 2173, 2150, 2087, 2060, 2094; 16 CT 2218-19, 2242-44; 17 CT 2410, 2445; 18 CT 2607].

confirmed that she wants customers to assume she is trustworthy and put their faith in her. [15 RT 517:1-5].

Washington Mutual's scheme to garner customer trust and reliance focused heavily on uneducated, financially vulnerable individuals such as Plaintiffs. One after another, Plaintiffs testified to their limited educations.[3] Several Plaintiffs ceased their formal education in elementary school. [17 RT 828:6-8; 18 RT 902:13-16; 963:10-16; 15 RT 539:19-25]. Only a few had more than a high school education. [16 RT 677:26-29, 16 RT 701:28-702:5 17 RT 765:23-24, 860:19-22; 19 RT 1084:2-5]. Six Plaintiffs testified that they were not able to read. [15 RT 540:27-541:2; 17 RT 854:8; 832:24-833:1; 18 RT 950:10-11; 963:21-23; 19 RT 1166:18-23].

Plaintiffs also testified to their limited financial resources. Most made not more than $14,000 dollars per year. [16 RT 685:21-29; 17 RT 862:18-19; 767:1-2; 18 RT 964:6-7, 10-18; 19 RT 1132:10-19; 1082:6-12; 1162:6-8]. Some made significantly less. [16 RT 733:18-19; 17 RT 826:29-827:5; 852:17-21; 19 RT 1147:16-19; 1099:9-11]. And, Plaintiffs testified that they turned to Washington Mutual under circumstances of financial need. [15 RT 557:16-17; 16 RT 690:19-23, 628:12-20; 18 RT 907:10-13, 16-20; 938:21-939:4; 970:14-20]. Against this backdrop, Plaintiffs testified extensively to the trust they placed in Washington Mutual. [16 RT 642:5-6; 16 RT 652:7-8; 16 RT 688:12; 16 RT 710:15-27; 17 RT 868:12-13; 17 RT 882:28; 18 RT 920:4; 18 RT 920:6; 18 RT 974:7; 18 RT 977:1; 19 RT 1117:12].

That Washington Mutual preys upon those in financial need was further proven by its own evidence. Washington Mutual offered the testimony of five "satisfied" Washington Mutual

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[3] Because of the limitations in time and space, Plaintiffs necessarily describe some evidence in general terms. The specific facts provided by each Plaintiff is set forth in the attached Appendix summarizing the testimony of each Plaintiff. [See Appendix 1 attached hereto].

customers. Unlike Plaintiffs, those individuals included a business owner, a human resource professional and the assistant athletic director at a university. [21 RT 1362:2-5; 1384:23; 1394:19-24]. One had a masters degree. [21 RT 1397:22-24]. When dealing with these more educated and sophisticated customers, Washington Mutual's conduct differed from its treatment of Plaintiffs in several material ways. First, Washington Mutual refrained from drawing up the loan papers of its sophisticated customers in advance. [21 RT 1370:26-1371:5; 1396:5-9; 1410:17-21]. Second, Washington Mutual did discuss insurance. [21 RT 1364:5-6; 1386:26-1387:1]. Washington Mutual even asked if these customers wanted the insurance. [21 RT 1396:27-1397:1]. And, occasionally, Washington Mutual went so far as to advise its sophisticated customers that credit life insurance should be dropped if other life insurance existed. [10 RT 1364:19-22]. Tellingly, none of these things were done for Plaintiffs. [See Argument at II. A. 3; II. A. 4].

3. Step 3: Use the lending transaction to set up packing and flipping.

Washington Mutual uses the charade of a lending transaction as a vehicle to pack and flip loans. All twenty-three Plaintiffs testified that substantially the same deceptive scheme was used by Washington Mutual in connection with their loan closings. In response, Washington Mutual called only a single employee as a witness in its defense. That employee, Vice President of Operations, David Shelton, was not present for a single loan transaction involving Plaintiffs. Washington Mutual called not a single employee to dispute what actually happened at Plaintiffs' loan closings. As a result, Plaintiffs' accounts of the loan transactions are uncontroverted.

First, Washington Mutual uses the loan process as a guise to sell personal property insurance. As part of the loan process, Washington Mutual has its borrowers list personal property as so-called collateral. [2 RT 218:22-28]. Washington Mutual does not value objectively the

collateral listed by its customers. [13 RT 219:8-11]. Indeed, Washington Mutual concedes that the items listed as collateral are rarely worth the values assigned to them. [13 RT 284:4-13; 13 RT 230:1-5]. Instead, the Company views those items not as collateral, but as a basis for imposing personal property insurance in customers' loans. [13 RT 286:2-14; 13 RT 285:12-14].

Washington Mutual admits that its goal is to sell as much personal property insurance as possible on every loan. [13 RT 167:15]. Washington Mutual agrees that it can charge higher premiums when the value of the collateral is higher. [13 RT 285:12-14]. Accordingly, Washington Mutual routinely maximizes the amount of insurance that can be sold by: 1) excessively valuing items listed as collateral [16 RT 647:4-10], and 2) making the listed value of the collateral roughly equal the amount of the customer's loan. [14 RT 410:5-7].

The lending process is also used by Washington Mutual to set up sales of credit life insurance. Ms. Andrews testified that the function of credit life insurance is to pay off the debt to Washington Mutual in the event of the borrower's death. [14 RT 399:4-5]. However, Washington Mutual readily admits that the family of the borrower would have no obligation to pay the Washington Mutual debt if the borrower were to die. [13 RT 178:29-179:1-2]. But, Washington Mutual does not disclose this fact to the borrower. [13 RT 179:3-23]. It is not the practice of Washington Mutual to explain the true functions and benefits of credit life insurance. [14 RT 418:22-419:9]. Instead, Washington Mutual coerces customers to believe that credit life insurance will give their family members "peace of mind." [13 RT 178:19-28].

Nor does Washington Mutual inquire whether its less sophisticated customers already have applicable insurance coverage. [14 RT 422:29-423:9]. Indeed, Ms. Andrews testified that she kept hidden from her customers the fundamental fact that credit life insurance was not required in order

to obtain a loan. [14 RT 419:3-5]. Ms. Andrews admittedly failed to make that disclosure because Washington Mutual told her it was her job to "up sell" the customer. [14 RT 422:26]. Ms. Andrews testified that she could not meet her quotas without selling insurance. [3 RT 388:23-389:9].

4. Step 4: Use a variety of techniques for "packing" insurance premiums into the loans of unknowledgeable borrowers.

In order to procure additional profits, Washington Mutual packed all Plaintiffs' loans with unrequested insurance products. Every single Plaintiff produced evidence that he or she was charged for insurance coverage in connection with a loan made or purchased by Washington Mutual. [15 CT 2097, 2173, 2186-87, 2194-95, 2150, 2087, 2060, 2094; 16 CT 2218-19, 2242-44, 2261, 2298, 2324; 17 CT 2405, 2410, 2423-24, 2445, 2451, 2480, 2489; 18 CT 2597, 2607, 2619, 2637]. Not one Plaintiff testified that he or she requested insurance coverage. To the contrary, Plaintiffs consistently testified that they did not want insurance. [16 RT 685:12-17, 732:10-13, 713:8-15; 17 RT 882:14-19, 775:24-776:4; 864:29-865:1 814:8-15;18 RT 952:9-12, 937:28-938:2, 914:12-14, 972:29-973:2; 19 RT 1119:24-1120:2, 1165:26-28, 1139:29-1140:5, 1090:13-15]. Nevertheless, Washington Mutual used a variety of techniques to extract premiums from Plaintiffs for unwanted and unneeded insurance products.

a. Washington Mutual's efforts to sneak insurance coverage into loan documents without Plaintiffs' knowledge.

Washington Mutual orchestrated the loan transactions so that they would occur in a hurried atmosphere. Some Plaintiffs provided information over the phone before being directed to visit a Washington Mutual office. [14 RT 326:18-23]. Plaintiffs were assured by Washington Mutual that there was no need for them to take off work to close their loans. [16 RT

631:27-632:1; 634:21-24 664:27-665:2; 6 RT 790:24-25; 5 RT 742:2-5]. Some Plaintiffs were encouraged by Washington Mutual to stop by during their lunch break and were told that everything could be taken care of "real quick." [16 RT 631:28-29; 19 RT 1093:8-12]. In fact, most Plaintiffs testified that the entire loan closing process was completed in a matter of minutes. [15 RT 556:19; 16 RT 715:14-15; 632:13-14; 17 RT 742:6-9; 751:10-12; 797:29; 817:1-4; 871:28; 879:8-9; 854:19-21; 18 RT 916:7-9; 19 RT 1093:16-19; 1167:3-4].

The loan transaction was also devised subtly to prevent Plaintiffs from realizing or considering their options. Plaintiffs testified that their loan papers had already been drawn up and pre-printed by the time they arrived at the Washington Mutual branch office. [16 RT 707:20-22 632:19-20; 681:7-8; 731:18-20; 17 RT 872:2-3; 879:3-7; 807:17-19; 774:1-3; 18 RT 936:28-29; 912:16-20; 971:29-972:2]. Ms. Andrews testified that Washington Mutual's practice was to only discuss "certain" aspects of the loan documents with the customers. [15 RT 506:25-507:1]. Then Plaintiffs were directed to "sign here, sign here, and sign here."[4] [14 RT 328:2-3]. Again, the loan closing was completed in a matter of minutes. [15 RT 556:19; 5 RT 715:14-15; 17 RT 742:6-9; 751:10-12; 797:29; 817:1-4; 871:28; 879:8-9; 18 RT 916:7-9; 19 RT 1093:16-19; 1167:3-4].

Unbeknownst to Plaintiffs, however, Washington Mutual employees had selected various and random insurance coverages to be added to each of Plaintiffs' loan. [1 CT 52, 71, 94, 129; 12 CT 1706, 1709; 15 CT 2173, 2186-87, 2194, 2060, 2087, 2094, 2097, 2150; 16 CT

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[4] Washington Mutual policy requires that certain loan closings be witnessed by two persons. [2 RT 215:26-28]. Plaintiffs provided evidence, however, that only one Washington Mutual employee was present at the time they signed their loans. [15 RT 551:19-21; 16 RT 736:4-8, 711:24-26, 685:1-4; 17 RT 808:26-809:4, 853:26-854:3, 834:13-15, 881:19-21; 18 RT 961:5-8, 943:4-8, 916:5-6]. Nevertheless, two witness signatures appear on virtually every loan contract. [15 CR 2120, 2097, 2173, 2186-87, 2194-95, 2150, 2087, 2060, 2094; 16 CR 2218-19, 2242-44, 2261, 2298, 2324; 17 CR 2405, 2267, 2410, 2423-24, 2445, 2451, 2480, 2489; 18 CR 2597, 2607, 2619, 2637]

2298, 2324 2219, 2242-44, 2261; 17 CT 2410, 2423, 2424, 2405, 2451, 2480, 2489; 18 CT 2607, 2619, 2637]. In undisputed violation of Washington Mutual's own policies, those coverage selections and premium charges were included on the pre-printed forms prior to Plaintiffs' arrival at the Washington Mutual offices. [16 RT 707:20-22; 632:19-20; 681:7-8; 731:18-20; 17 RT 872:2-3; 879:5-7; 807:17-19; 774:1-3; 18 RT 936:28-29; 912:16-19; 971:26-972:2]. It is undisputed that Washington Mutual did not discuss the insurance products or charges with Plaintiffs. [15 RT 552:28-553:5; 16 RT 681:17-19; 708:24–709:1; 731:29-732:2; 635:24-27; 17 RT 856:4-6; 864:18-865:1; 835:10-15; 835:29-836:2; 811:23-25; 18 RT 912:25-913:1; 19 RT 1089:26-28; 1125:2-5; 1117:2-4; 1139:16-18; 1153:9-11, 23-27; 1165:23-25]. There was no discussion about whether a charged insurance product was necessary or suitable for a particular Plaintiff. [15 RT 552:28-553:5; 16 RT 681:17-19; 708:24–709:1; 731:29-732:2; 635:24-27; 17 RT 856:4-6; 864:18-865:1; 835:10-15; 835:29-836:2; 811:23-25; 18 RT 912:25-913:1; 19 RT 1089:26-28; 1125:2-5; 1117:2-4; 1139:16-18; 1153:9-11, 23-27; 1165:23-25]. In fact, Plaintiffs were not even asked if they wanted insurance coverage at all. [15 RT 552:28-553:5; 16 RT 681:17-19; 708:24–709:1; 731:29-732:2; 635:24-27; 17 RT 856:4-6; 864:18-865:1; 835:10-15; 835:29-836:2; 811:23-25; 18 RT 912:25-913:1; 19 RT 1089:26-28; 1125:2-5; 1117:2-4; 1139:16-18; 1153:9-11, 23-27; 1165:23-25]. Nor were Plaintiffs asked whether they already had similar coverage in place. [13 RT 222:21-223:4; 14 RT 423:15-17]. As a result, Plaintiffs provided extensive evidence that they were charged for insurance products that duplicated coverage they had already paid for under other insurance policies.[5]

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[5] The following chart sets forth the insurance coverages held by each plaintiff and the duplicative coverages for which they were charged by Washington Mutual:

(continued...)

[15](...continued)

Louise Blue	had life insurance	sold credit life insurance. [19 RT 1089:29-1090:2; 2 CT 152]
Willie Earl Conway	had life insurance	sold credit life, disability and property insurance [2 CT 284, 286, 289; 15 RT 571:18-24].
Glenda Chambers	had homeowners and life insurance	sold credit life insurance [16 RT 623:8-15; 2CT 186]
Earnest Claiborne	had fire and life insurance	sold disability, credit life and property insurance [2 CT 231, 233; 16 RT 709:9-18]
Alfred&Doris Garret	had insurance	sold credit life, disability and property insurance [3 CT 321; 16 RT 732:20-27]
Jessie McClung	had disability and life insurance	sold credit life and disability insurance [5 CT 626, 632, 636; 17 RT 769:6-9]
Lillie Harris	had homeowners and life insurance	sold credit life insurance [3 CT 330, 331, 343, 344, 356, 357, 360, 361; 17 RT 811:18-23]
Janie & Percy Mason	had homeowners insurance	sold credit life, disability and property insurance [5 CT 620; 17 RT 838:27-839:4]
Tina Cross	had homeowners, disability insurance	sold credit life, disability and property insurance [3 CT 298, 310, 313]
Lizzie Lofton	had hospital, disability and life insurance	sold credit life and disability insurance [5 CT 569, 596, 597; 17 RT 882:8-13]
Lorene Jackson	had homeowners insurance	sold credit life and disability insurance [4 CT 510, 544, 545; 18 RT 914:15-18]
Robin & Lindsay Horton	had life insurance	sold credit life, disability and property insurance [4 CT 425, 427; 18 RT 952:3-5]
Lou Waters	had other unspecified insurance	sold credit life, disability and property insurance [6 CT 792, 800, 814, 830, 860; 18 RT 972:20-22]
Patrishane Gordon	had fire and life insurance	sold credit life, disability and property insurance [3 CT 324; 19 RT 1101:14-23]

(continued...)

Notably, most Plaintiffs were wholly unaware of the insurance selections Washington Mutual imposed on them. [15 RT 552:28-553:5; 553:11-19, 24-29; 16 RT 635:24-27; 649:27-650:1; 697:19-22; 681:17-19; 708:24-709:1; 709:11-710:5; 731:29-732:2; 17 RT 774:17-23; 811:8-11; 812:17-19; 835:10-15, 835:29-836:2; 856:4-6; 864:18-865:1; 18 RT 940:27-29; 19 RT 1089:26-28; 1090:21-22; 1153:9-11, 23-27; 1165:23-25; 1169:6; 1124:22-1125:5; 1139:16-18].

That Plaintiffs were not informed or aware of the existence of insurance coverage in their loans is illustrated by the fact that at least two Plaintiffs failed to make claims against the policies despite valid reasons to do so. For instance, Jessie McClung ("McClung") was charged $67.48 for a policy of disability insurance in connection with a $300 loan. [17 RT 773:16-20]. Subsequent to taking out the loan with the disability insurance, McClung suffered a temporary disability. [17 RT 776:24-29]. McClung called Andrews to tell her that he could not bring in a payment because he had been in the hospital and was not working. [17 RT 775:9-15]. Andrews did

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[5](...continued)

Kenneth Hill	had disability and life	sold credit life, disability and property insurance [19 RT 1101:14-23; 3 CT 380, 383]
Zenester Moore	had life insurance	sold credit life, disability and property insurance [6 CT 762, 764, 771]
Mattie Miles	had other unspecified insurance	sold credit life and property insurance[6 CT 710, 711, 713, 744; 19 RT 1138:22-25]
Annie Clark	had life insurance	sold credit life, disability and property insurance [2 CT 251, 252]
Wllie McGee	had disability and life insurance	sold credit life and disability insurance[5 CT 647, 651, 669, 683, 701]

not inform him of the disability coverage at that time. [17 RT 775:16-19]. McClung never made a claim under the disability policy "because I didn't know I had no insurance there." [17 RT 795:23-27]. Similarly, Percy Mason ("Mason") was charged $176.00 for disability insurance. [17 RT 856:7-13]. Mason testified that he did not request disability insurance. Nor was he aware that he had purchased disability insurance; "If I had known I was going to be charged for that insurance, – because I got hurt in '93 I would have called them up for the disability, but I didn't know I had no insurance." [6 RT 856:15-19].

Other evidence also supported the fact that Plaintiffs were not aware they had been charged for insurance coverage. Most tellingly, not a single Plaintiff rejected the insurance coverage pre-packed into their loan papers. Thus, among Plaintiffs, Washington Mutual had a one-hundred percent (100%) penetration rate for its insurance products collectively. Shelton testified that 100% penetration rates would "cause...concern that [Washington Mutual] was not selling the insurance, that [the company] was force placing the insurance." [14 RT 308:15-17]. Nevertheless, the highly-profitable insurance sales out of its Greenwood branch were deemed by the Company to be a "good fact." [14 RT 310:16-22].

b. Washington Mutual affirmatively misrepresented to some Plaintiffs that insurance coverage was required as a condition of their loans.

Despite Washington Mutual's efforts to sneak insurance premiums into Plaintiffs' loans through rushed transactions, a few Plaintiffs did catch the insurance clause. In the case of Lizzie Lofton ("Lofton"), Andrews had misplaced the insurance document and had to present it to her separately from the rest of the loan papers. [17 RT 879:17-22]. When Lofton questioned

Andrews about the insurance, she was told a flat lie - that the insurance was *required* as a condition of the loan. [17 RT 879:24-29; 880:22-24]. Lou Waters and Kenneth Hill also testified that they were told by Andrews that they the insurance was required in order to get the loans. [18 RT 972:18-19; 19 RT 1117:7-9].

Similarly, a few Plaintiffs assumed that the insurance was a requirement of the loan because they were told Washington Mutual would do what was best for them and Washington Mutual did not tell them they had any options regrading the insurance. [16 RT 672:29-673:1-4; 673:10; 18 RT 920:27-921:3]. Glenda Chambers ("Chambers") testified that she knew she was being charged for insurance, but that she "didn't know that [she] didn't have to have the insurance." [16 RT 672:29-673:1-4]. Chambers had been assured by Andrews that Washington Mutual was helping her and did not make an issue of the insurance charge. [16 RT 653:13]. Earnest Claiborne ("Claiborne") testified that he was told one of the sheets was insurance before being instructed to " sign, sign, sign, sign." [16 RT 710:22-29-711:1-5]. Because of the circumstances, Claiborne assumed that the insurance was required for the loan. [16 RT 710:3-5].

5. Step 5: Multiply profits by "flipping" borrowers into more costly loans.

Washington Mutual admits it has an economic incentive to keep its loans young through "flipping." [14 RT 294:8-10; 295:5-19]. In a pre-computed interest loan, the interest anticipated over the life of the loan is included in the initial loan balance. [14 RT 292:27-29; 293:1-13]. Borrowers pay more interest to Washington Mutual in the early months of a loan than is paid as the loan matures. [14 RT 294:3-7, 293:26-294:1]. Consistent with the fact that Washington Mutual makes more money on a "young" loan, [14 RT 301:9-16], Andrews testified that the

Greenwood office rarely made new loans to existing customers. [15 RT 472:7-8]. Instead, the Greenwood office "renews" the customer's old loan because renewals are more profitable. [15 RT 471:22-24]. Thus, anytime a customer fell behind on a loan, sought additional funds, or merely paid the loan down successfully, Washington Mutual would invite the customer back and "flip" them into a new, more profitable loan. [14 RT 301:2-20]. Despite the trusting relationship it seeks from its customers, Washington Mutual does not inform customers being flipped into new loans that they are actually paying more for the new loan or that the old loan is less profitable to the Company because of pre-computed interest. [14 RT 294:8-16].

B. Washington Mutual Ratifies and Contributes to the Schemes Used by its Branch Offices.

Washington Mutual is a company that knows what is right and markets itself to the public on that basis. Washington Mutual professes in writing that it stands for "belief, faith and trust." [13 RT 161:6-13]. Washington Mutual's training manual confirms the Company's self-imposed duty to act in the best interest of its customers:

> Our lending philosophy is to maximize the loanable worth of each and every customer . . . keeping in mind that all transactions must be in the customer's and the company's best interest.

[13 RT 193:26-194:2; 12 CT 1662]. Shelton testified to the existence of shared goals in every loan transaction by saying that no loan would be entered if it were not in the best interests of each party. [13 RT 192:13-27]. Andrews confirmed that Washington Mutual required that all transactions she entered into be in the customer's best interest. [15 RT 492:22-27]. Andrews claimed that Washington Mutual's philosophy was to do "what is right and good for the company and the

customer." [15 RT 487:7-11]. In short, Washington Mutual professes and markets itself as looking out for the best interest of its customers. [15 RT 487:12-15].

Shelton, Washington Mutual's corporate representative provided extensive testimony regarding the policies of Washington Mutual. Shelton admitted that it would be a violation of Washington Mutual policies and assumed duties *if any* if the following happened:

- If Washington Mutual entered into any transaction that was not in the customer's best interest. [23 RT 1666:11-13].
- If Washington Mutual made any oral statement that was inconsistent with the company's written statement. [13 RT 199:23-28].
- If clients were required to sign documents without being given a chance to review them. [23 RT 1661:26-1662:1; 14 RT 327:29-328:22].
- If insurance products were sold to a customer who already had coverage on their own.[13 RT 228:1-7].
- If principal terms of the loan such as the interest rate, amount borrowed and any insurance sold were not discussed with the borrower. [13 RT 167:27-168:19; 14 RT 324:12-327:28; 15 RT 505:23-29].
- If the customer was not shown each loan document and if the loan officer did not orally review each bold-faced provision of the

documents. [14 RT 327:2-28]. Washington Mutual employees are not to simply direct customers to sign without reviewing the loan papers. [14 RT 327:29-328:22].

- If Washington Mutual included insurance on Plaintiffs' preprinted loan forms without first discussing the need, desirability or suitability of the insurance product. [13 RT 167:27-168:2].
- If Washington Mutual determined the values for collateral listed in connection with Plaintiffs loans. [13 RT 268:3-6]
- If Washington Mutual failed to provide its customers with the information they need to determine whether or not purchasing insurance is in their best interests. [13 RT 229:1-5].

Yet, despite the lofty policy statements and knowledge of what was right, Washington Mutual chose to ignore conduct that was wrongful when it generated profits.

1. Washington Mutual ignored excessive rates of insurance penetration on loans arising from its Greenwood office.

Washington Mutual uses a "penetration rate" to assess the level of insurance sales at each of its branch offices. The penetration rate reflects the percentage of eligible borrowers that purchase a given insurance product. [14 RT 301:28-302:1]. At Washington Mutual's office in Greenwood, Mississippi, in 1999, seventy-five percent (75%) of borrowers came away with credit life insurance for a six month period. [14 RT 306:26-307:1; 133; 129; 12 CT 1685]. During the same period of time, only twenty-five percent (25%) of borrowers in the Laurel, Mississippi office

had insurance included in their loans. [14 RT 306:14-18]. Meanwhile, offices in Alabama - which Washington Mutual admits were to be selling insurance in the same manner as Mississippi – had penetration rates around 23% to 31%. [14 RT 317:9-11; 103; 12 CT 1678-81].

Washington Mutual admitted that if too many people were buying insurance it would "send up a red flag" that the so-called purchases were not voluntary ones. [14 RT 308:15-21]. Nevertheless, Washington Mutual did not discipline or reprimand anyone as a result of the high penetration rate at its Greenwood office. [14 RT 308:2-4]. Washington Mutual simply testified that it considered the high rate of penetration a "good fact" as it makes the loans out of Greenwood more profitable to the company. [14 RT 310:16-22].

2. Washington Mutual created incentives for its branch offices to force insurance products upon its customers.

Washington Mutual extended the profit-motive for deceptive conduct to its branch managers. That is, Washington Mutual tells its managers that the more insurance they sell, the more profit is generated for the Company. [13 RT 167:22]. Thus, Washington Mutual expects its branch offices to meet quotas for loan dollars and insurance sales. [14 RT 386: 16-20]. Andrews' bonus was based on her office's ability to meet its insurance and loan quota. [23 RT 1652:17-22; 13 RT 167:17-22]. Thus, branch managers receive bonuses based, in large part, upon the insurance sales at their branch offices. [14 RT 378:5-16; 13 RT 167:23-26].

3. Washington Mutual ignored violations of its own policies when it could profit by doing so.

Extensive evidence was introduced at trial showing Washington Mutual's Greenwood office regularly violated Company policy when it was profitable to do so. For instance, Shelton admitted that selling an individual coverage for an item which was already insured was not in the customer's best interest. [13 RT 227:28-228:7]. In fact, Shelton said that if Washington Mutual was looking out for its customers interest, selling them duplicate insurance would be a violation of Washington Mutual policy. [13 RT 227:28-228:7]. Nevertheless, not a single Plaintiff testified that he or she was asked by Washington Mutual whether other, duplicative coverage existed. Instead, virtually every Plaintiff testified that he or she was charged unknowingly for an insurance product that duplicated coverage the Plaintiff had already procured elsewhere. [See fn. 5].

Similarly, it was a violation of Washington Mutual's policy to have Company employees determined the values for collateral listed in connection with Plaintiffs' loans. [13 RT 268:3-6] Yet, Plaintiffs testified that this happened over and over again. [15 RT 566:23-26; 16 RT 647:23-26; 17 RT 816:6-10; 18 RT 953:27-29].

The result of Washington Mutual's uncontested policy violations was an increase in sales of its insurance products. Plaintiffs offered evidence that charges for unwanted insurance actually function as disguised finance charges. [18 RT 1010:23-27]. That is, where Plaintiffs were not given the opportunity to reject insurance products, the premium for those products was actually a cost of borrowing money. [18 RT 1010:23-25]. When viewed in this light, the evidence showed

Washington Mutual was effectively charging interest rates as high as 82% on Plaintiffs' loans. [18 RT 1011:4-5; 1019:17-19].

Washington Mutual also profited by maintaining secret insurance relationships. The profitability of insurance product sales were derived from *undisclosed* relationships between Washington Mutual lending institutions and insurance entities wholly owned by Washington Mutual. Washington Mutual has commission agreements with American Security, Union Security and American Bankers. [13 RT 175:22-176:16; 14 RT 340:12-20]. The same three insurers also have reinsurance agreements with two of Washington Mutual's affiliated companies. [13 RT 176:20-177:24; 14 RT 342:10-26; 21]. Under those agreements, the Washington Mutual affiliated companies receive 96% of the premiums paid for insurance by American Security, Union Security and American Bankers. [13 RT 177:19-178:1; 14 RT 351:27-352:6]. Plaintiffs were not told of the reinsurance relationship between City Holdings and Aristar (the reinsurance companies doing business at the time the lawsuit was filed). [14 RT 348:19-21]. Nor were Plaintiffs informed that they had the option to procure credit life or property insurance from other companies. [15 RT 552:28-553:5; 16 RT 681:17-19; 708:24–709:1; 731:29-732:2; 635:24-27; 17 RT 856:4-6; 864:18-865:1; 835:10-15; 835:29-836:2; 811:23-25; 18 RT 912:25-913:1; 19 RT 1089:26-28; 1125:2-5; 1117:2-4; 1139:16-18; 1153:9-11, 23-27; 1165:23-25].

C. Washington Mutual Plundered Its Own Coffers In an Attempt to Minimize Its Damage Liability.

According to Washington Mutual's financial statement in 1998, it had a net worth of roughly $382 million. [23 RT 1780:26-1781:2]. Dr. Glenda Glover explained that net worth is the

accumulation of profits from year to year. [23 RT 1780:3-25]. Each years' earnings are added to the retained earnings of prior years and the accumulated sum represents a company's net worth. [23 RT 1780:3-1781:2]. In 1999, Washington Mutual reported profits of $29 million. [23 RT 1781:19-20]. Dr. Glover testified that these should have been added to the Company's net worth. [23 RT 1781:9-22]. Yet, in 1999 Washington Mutual listed its net worth in as $349 million. [23 RT 1781:13]. And in 2000, Washington Mutual reduced its net worth still further to $165 million. [23 RT 1783:3-5]. Dr. Glover explained that Washington Mutual's reduction in net worth (despite multi-million dollar earnings) resulted because Washington Mutual to an affiliated company. [23 RT 1781:23-26; 1783:3-12]. In all, Washington Mutual looted nearly $250 million from Company coffers in the months preceding this trial. [23 RT 1783:9-10]. Washington Mutual offered no testimony to rebut or explain why it pillaged its earnings in anticipation of trial. Thus, the jury was left with uncontroverted evidence Washington Mutual attempted to manipulate its net worth to avoid paying for its admittedly wrongful conduct.

III.

SUMMARY OF THE ARGUMENT

Washington Mutual assumes an interesting posture in this appeal. For the most part, Washington Mutual does not dispute the facts of its wrongful conduct. Despite assurances that it would not take any action contrary to the "best interest of the customer," Washington Mutual agrees that it tries to maximize the debt of financially vulnerable individuals. It does not dispute evidence that it "packs" unrequested insurance products into Plaintiffs' loans. It does not dispute that Plaintiffs were not verbally told of the insurance coverages for which they were charged. It admits

that it "flips" customers into more expensive refinanced loans from which it derives greater profits. It admits to secret reinsurance agreements not disclosed to the Plaintiffs. It even admits to numerous and repeated violation of its own Company policies. In short, Washington Mutual does not dispute that it did all of the things the jury found to be wrong.

Instead, Washington Mutual claims only that it has no duty to do what is right. In effect, Washington Mutual is claiming that Mississippi law expects nothing more of it as a lender/insurance agent than to act negligently, fraudulently, and in violation of the trust and reliance it entices from less knowledgeable customers. Washington Mutual's argument distorts Mississippi law. Under a full depiction of the unusual facts proven in *this* case, Washington Mutual held a duty to Plaintiffs that supports challenged elements of Plaintiffs' claims for negligence, fraud and breach of fiduciary duty. In addition, the repeated and intentional violations of Washington Mutual's duty – deliberately directed at individuals Washington Mutual knew to be particularly vulnerable to such conduct – justify the damage awards given in this case.

Washington Mutual and the *amici* spend a significant amount of their briefing doomsaying the slippery slope which would arise from recognition of a duty to disclose in a contractual setting. Such slippery slope arguments ignore, however, the unusual facts of the insurance transactions at issue in *this* case.[6] These are not routine lending transactions. Nor are these instances where

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[6] The three amicus briefs submitted include: Brief of Amicus Curiae Mississippi Consumer Finance Association, Amicus Curiae Brief of Consumer Credit Insurance Association in Support of Appellant's Opening Brief and Brief of Mississippi Bankers Association As Amicus Curiae In Support of Defendant-Appellant. Although Plaintiffs did not oppose the submission of the briefs, any response to the same are incorporated herein, as the briefs only elaborate on arguments raised by Washington Mutual.

knowledgeable consumers initiated negotiations to purchase a particular product. Instead, Washington Mutual marketed itself to the unsophisticated Plaintiffs as a Company that could be relied upon to "take care of everything" and to act in their best interests. Then, Washington Mutual charged Plaintiffs for refinancing fees or products Washington Mutual had taken upon itself to secretly select. The unknowledgeable Plaintiffs in this case *did not* seek to purchase the insurance products for which they were charged. Nor did they ask to refinance their loans.

Here, unlike in the routine lending transaction, Washington Mutual functioned as an insurance agent. Washington Mutual also exercised complete control over the type and amount of insurance Plaintiffs would purchase. Having voluntarily assumed responsibility for choosing the insurance products to be charged to Plaintiffs (or even the loan format best suited to Plaintiffs), Washington Mutual cannot now claim it had no duty to share the information motivating its choices. Under the facts of this case, overwhelming evidence exists to support the jury's liability findings and damage awards. Accordingly, the rulings of the trial court should be affirmed.

IV.

ARGUMENT AND AUTHORITIES

A. Washington Mutual Breached its Fiduciary Duty to Plaintiffs.

1. This Court has recognized that a fiduciary duty may exist in lender-debtor and agent-insured relationships.

Washington Mutual claims that there was insufficient evidence to prove that it owed any fiduciary duty to Plaintiffs. The facts establish, and the jury found, otherwise. [9 CT 1320-1327]. While a fiduciary relationship does not automatically exist in the ordinary commercial loan

transaction, this Court has held that a debtor may nevertheless prove the existence of a fiduciary relationship based on the circumstances of the case. *American Bankers Ins. Co. of Florida v. Alexander,* 818 So.2d 1073, 1085 (Miss. 2001) (hereinafter *American Bankers)*; *Lowery v. Guar.. Bank & Trust Co.*, 592 So.2d 79, 83-85 (Miss. 1991); *Hopewell Enter., Inc. v. Trustmark Nat'l Bank,* 680 So.2d 812, 816 (Miss. 1996). Moreover, the transactions at issue in this case are truly insurance transactions. As such, a fiduciary duty on Washington Mutual should be implied.

This Court recently affirmed that a fiduciary duty can exist in the context of a lender-debtor relationship. In a factually similar scenario, this Court found that a lender may have a fiduciary duty to disclose the nature of the profit sharing scheme between itself and the insurer that provided coverage force-placed by the lender on the customers' loans. *See American Bankers,* 818 So. 2d at 1085. In addition, this Court observed that the plaintiffs in *American Bankers,* by virtue of having entered into the loan and because of the subsequent force placement of insurance, could expect both the lender and the insurer to deal with them in good faith. *Id.*

In recognizing the viability of a fiduciary duty in a lending context, this Court commented specifically on the breadth of a fiduciary relationship and the role of disparate power and influence between the parties:

> "Fiduciary relationship" is a very broad term embracing both technical fiduciary relations and those informal relations which exist whenever one person trusts in or relies upon another ... A fiduciary relationship may arise in legal, moral, domestic, or personal context where there appears on the one side an overmastering influence or, on the other side, weakness, dependence or trust justifiably reposed.

American Bankers, 818 So.2d at 1085. Thus, a "fiduciary relationship" encompasses both: 1) formal fiduciary relations, and also 2) informal relations which exist wherever one person trusts in or relies upon another. *American Bankers,* 818 So. 2d at 1085; *Hopewell* 680 So.2d at 816; (Miss. 1996); BLACK'S LAW DICTIONARY 564 (5th Ed.1979). A fiduciary relationship may arise wherever there appears "an overmastering influence on one side and weakness, dependence, or trust, justifiably reposed" on the other side. *Miner v. Bertasi,* 530 So.2d 168, 170 (Miss.1988); *Matter of Estate of Haney,* 516 So.2d 1359 (Miss. 1987). Additionally, a confidential relationship, which imposes a duty similar to a fiduciary relationship, may arise when one party justifiably imposes special trust and confidence in another, so that the first party relaxes the care and vigilance that he would normally exercise in entering into a transaction with a stranger. *Nicholson v. Ash*, 800 P.2d 1352, 1355 (Colo. Ct. App.1990).

Courts have regularly found that the circumstances of the transaction can create a fiduciary relationship between a lender and a customer. *E.g., Parnell v. First Savings and Loan Ass'n of Leaksville,* 336 So.2d 764, 768 (Miss.1976) (finding savings and loan institution owed fiduciary duty to debtor from whom it collected premium payments for credit life insurance); *Hutson v. Wenatchee Federal Savings & Loan Ass'n,* 588 P.2d 1192, 1199 (Wash. 1978)(finding a "quasi-fiduciary relationship of trust and confidence" existed between borrower and lender such that jury question existed as to whether lender negligently failed to define insurance terms); *Stone v. Davis,* 419 N.E.2d 1094, 1098 (Ohio 1981)(savings and loan breached fiduciary duty to disclose insurance status to young couple with no previous mortgage experience), *cert denied, Cardinal Federal Savings and Loan v. Davis*, 454 US 1081.

The determination of what constitutes a confidential or fiduciary relationship is a question of fact. *Lowery,* 592 So.2d at 85; *Southern Mortgage Co. v. O'Dom,* 699 F.Supp. 1227, 1231 (S.D. Miss. 1980). Here, the evidence establishes that a fiduciary duty was breached because Washington Mutual went outside the scope of the typical lending transaction to obtain trust and control beyond that ordinarily shared by contracting parties - and then capitalized upon Plaintiffs' justifiable trust for its own profit.

2. The standard of review requires that all evidence and inferences be drawn in Plaintiffs' favor.

The standards of review for the denial of a motion for directed verdict, the motion for judgment notwithstanding the verdict, and the decision to instruct the jury regarding Plaintiffs' fiduciary duty claim are identical. *Steele v. Inn of Vicksburg, Inc.,* 697 So.2d 373, 376 (Miss. 1997). This Court is to consider the evidence in the light most favorable to Plaintiffs, giving Plaintiffs the benefit of all favorable inferences that may be reasonably drawn from the evidence. *M.B.F. Corp. v. Century Bus. Comm., Inc.,* 663 So.2d 595, 598 (Miss. 1995). Only if the facts so considered are so overwhelmingly in favor of Washington Mutual that reasonable jurors could not have arrived at a contrary verdict, may this Court reverse. *Id.* If, on the other hand, there is evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgement might have reached different conclusions, this Court must affirm. *Id; Reese v. Summers*, 792 So.2d 992, 996 (Miss. 2001). Finally, this Court reviews the denial of Washington Mutual's motion for new trial under an abuse of discretion standard. *C & C Trucking Co. v. Smith,* 612 So.2d 1092, 1098 (Miss. 1992).

3. Washington Mutual owed Plaintiffs a fiduciary duty because it was acting as Plaintiffs' agent in connection with insurance transactions.

While Washington Mutual claims to be a lender, the sale of credit life, property and disability insurance is, in actuality, an insurance transaction. In fact, Shelton admits that he would not be surprised if Washington Mutual makes more money from insurance than it does from its lending transactions. [13 RT 231:6-11].

It is well recognized in Mississippi that by offering an insurer's credit insurance policy to a borrower, the lender becomes the borrower's agent for purposes of procuring the coverage so offered and requested. *See, e.g., Estate of Jackson v. Mississippi Life Ins. Co.*, 755 So.2d 15, 21 (Miss. App. 1999) (holding that since credit life insurance was obtained by lender, "a reasonable, fair-minded juror would almost have to find that [the lender's employee] became [the borrower's agent] for the purpose of procuring it"); *Parnell*, 336 So.2d at 768. (holding that where lender financed, collected and retained one year's premium on credit life insurance for borrower, it "stood in a fiduciary capacity toward [the borrower]." In addition, Mississippi courts have recognized the existence of a fiduciary relationship between an insurance agent and an insured. *See Ross-King-Walker, Inc. v. Henson*, 672 So.2d 1188, 1191 (Miss. 1996); *Lowery*, 592 So.2d at 85.

A lender acting as an agent for its borrower in an insurance transaction assumes certain fiduciary duties. First, a lender acting as an agent owes to its borrower a duty to exercise good faith and reasonable diligence to procure insurance on the best terms he can obtain, and any negligence or other breach of duty on his part will subject him to liability. *First United Bank of Poplarville v. Reid*, 612 So.2d 1131, 1138 (Miss. 1992). Second, a lender acting as a credit

insurance agent "must make known to his principal all material facts within his knowledge which may *in any way* affect the transaction and the subject matter of his agency." *Stewart v. Gulf Guar. Life Ins. Co.*, Cause No. 2000-CA-01511-SCT, 2002 WL 1874826, *9 (Miss. Aug. 15 2002) (emphasis added); *Browder v. Hanley Dawson Cadillac, Co.*, 379 N.E.2d 1206, 1211 (1978). This duty requires the disclosure both of information regarding the insurance transaction itself and information regarding the relationship between the agent and any others who may be adverse to the principal. RESTATEMENT (SECOND) OF AGENCY § 381 cmt. a (1954).

Here, it is undisputed that Washington Mutual did not disclose facts such as its relationships with reinsurers, its hidden profits from insurance sales, and its affiliation with the insurance companies. [13 RT 177:9-178:1; 14 RT 347:29-348:1-6; 348:19-21; 342:9-21]. Nor did Washington Mutual disclose the terms, coverages, purposes or limitations of the insurance policies being supplied. [15 RT 552:28-553:5; 16 RT 681:17-19; 708:24–709:1; 731:29-732:2; 635:24-27; 17 RT 856:4-6; 864:18-865:1; 835:10-15; 835:29-836:2; 811:23-25; 18 RT 912:25-913:1; 19 RT 1089:26-28; 1125:2-5; 1117:2-4; 1139:16-18; 1153:9-11, 23-27; 1165:23-25]. Indeed, most Plaintiffs received no oral disclosures about any aspect of the insurance policies for which they were charged - including disclosure of the policies' very existence. [15 RT 552:28-553:5; 553:11-19, 24-29; 16 RT 635:14-27; 649:27-650:1; 697:19-22; 681:17-19; 708:24-709:1; 709:12-710:5; 731:29-732:2; 17 RT 774:17-23; 811:8-11; 812:17-19; 835:10-15, 835:29-836:2; 856:4-6; 864:18-865:1; 18 RT 940:27-29; 19 RT 1089:26-28; 1090:21-22; 1153:9-11, 23-27; 1165:23-25; 1169:3-6; 1124:25-1125.5; 1139:16-23].

One offering credit insurance ought to be held to the same fiduciary standards as those dealing in other types of insurance. *First United Bank of Poplarville,* 612 So.2d at 1137. This is the view taken by the Mississippi Supreme Court. *Id.* It is also the expectation of the Federal Reserve Board that a bank holding company that sells credit insurance in a transaction subject to the Board's regulations will exercise a fiduciary responsibility. 36 Fed. Reg. 15,526 (1971). Likewise, the National Association of Insurance Commissioners has suggested that banks be required to meed fiduciary standards in the sale of credit insurance. NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, A BACKGROUND STUDY OF THE REGULATION OF CREDIT LIFE AND DISABILITY INSURANCE, 132-33 (1970).

While the present case differs from the typical cases involving lenders as insurance agents because Plaintiffs did not request Washington Mutual to purchase insurance coverage on their behalf, the general rules should apply even more compellingly. Washington Mutual, by its own choice and volition, opted to act as an agent for Plaintiffs in selecting and securing insurance products. Having chosen to do so, Washington Mutual assumed a fiduciary duty to act in the best interests of its principal and to disclose to its principal all facts relevant to the insurance choices. *Stewart,* 2002 WL 1874826 at *9. Washington Mutual does not dispute that it failed to meet that duty.

4. Washington Mutual owed a fiduciary duty to Plaintiffs based on the dealings between the parties.

Even apart from its *status* as an insurance agent, Washington Mutual's *conduct* supports the imposition of a fiduciary duty in this case. This Court instructs that a fiduciary

relationship exists in a commercial transaction where: (1) the parties have shared goals, (2) one party places justifiable confidence or trust in the other party's fidelity, and (3) the trusted party exercises effective control over the other party. *AmSouth Bank v. Gupta,* 2002 WL 31619063, *7 (Miss. 2002). Here, the unusual facts of the transactions at issue, support the jury's finding of a fiduciary or confidential relationship.

a. The evidence, viewed in the light most favorable to Plaintiffs, establishes that the parties had shared goals in each other's commercial activities.

Washington Mutual's training manual describes its lending philosophy as follows:

> Our lending philosophy is to maximize the loanable worth of each and every customer . . . keeping in mind that *all transactions must be in the customer's and the company's best interest.*

[12 CT 1662; 13 RT 193:26-194:2] (emphasis added)]. This is significant for two reasons. First, it shows that Washington Mutual's very philosophy recognizes that both the customer and the company have a shared interest in the loan transaction that Washington Mutual believes can, and will, be mutually beneficial.[1] Second, Shelton testified that the instruction to "keep in mind," refers to the minds of Washington Mutual employees. [13 RT196:14-19]. Thus, Washington Mutual trains

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[1] This admission also distinguishes the transactions at issue in this case from the "standard contractual relationship between parties with fundamentally different interests." [See Mississippi Bankers Association Brief at 6].

and charges its employees with the duty to determine in their own minds whether or not a transaction is in the customer's best interest.[8]

Shelton further admitted to the existence of shared goals in every loan transaction by saying, in essence, that no loan would be consummated if it were not in the best interests of each party. [23 RT 1666:11-13]. Andrews confirmed that Washington Mutual's philosophy required that all transactions be in the customer's best interest. [15 RT 492:22-27]. Andrews agreed that Washington Mutual's philosophy was to do "what is right and good for the company *and the customer*." [15 RT 487:7-11 (emphasis added)].

b. The evidence, viewed in the light most favorable to Plaintiffs, establishes that the trust Plaintiffs placed in Washington Mutual was justifiable.

It is undisputed that Plaintiffs trusted Washington Mutual to treat them fairly and honestly. The record is replete with testimony from Plaintiffs regarding the trust they placed in Washington Mutual. [16 RT 642:5-6; 652:7-8; 688:12; 710:15-27; 17 RT 868:13; 882:28; 18 RT 920:4; 920:6; 974:7; 977:1; 19 RT 1117:12]. In fact, Washington Mutual does not dispute the trust placed in it by Plaintiffs, rather, the Company disputes only whether such trust was justifiable. The record, however, amply supports a finding of justifiable trust.

Relative to the creation of a confidential relationship, *Lowery* holds that there must be something about the relationship between the parties which would justifiably create an expectation on the part of one party that the other was protecting the first party from the occurrence

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[8] The fact that Dolly Andrews and the other employees of Washington Mutual's Greenwood branch did not attend the training program for which the manual was prepared does not negate the affirmative statement of company policy contained in the manual.

of a particular risk. *Lowery*, 592 So.2d at 85. Justifiable reliance must cause the first party to be lulled into a false sense of security such that he fails to protect his own interest as he might ordinarily have done. *Id.*

Plaintiffs' trust in Washington Mutual was justified for several reasons. First, Washington Mutual represented to Plaintiffs that it was trustworthy. It is the Company's philosophy to encourage customers to put their faith and trust in Washington Mutual. [15 RT 516:25-517:5]. Andrews testified that she wants customers to "have faith" in her and view her as trustworthy. [15 RT 517:1-5]. Andrews' conduct was consistent with Shelton's testimony that Washington Mutual seeks its customers' trust. [13 RT 233:23-28]. Thus, it is Washington Mutual policy to obtain the trust and reliance of its unsophisticated customers.

Second, consistent with its governing policy, Washington Mutual consistently marketed itself as looking out for the Plaintiffs' interests. For instance, Washington Mutual sent out loan checks with a letter saying "when we say we are here to help we mean it." [1 CT 79; 12 CT 1675]. A solicitation letter said "count on us to do everything we can to help." [12 CT 1676]. Washington Mutual also promised in writing that "we'll take care of everything." [12 CT 1676]. In addition, Washington Mutual made verbal assurances to some Plaintiffs that it was looking out for their interests. [16 RT 670:26-671:1].

Washington Mutual continued the ruse that it was "taking care" of everything once Plaintiffs arrived at the Greenwood office. Plaintiffs' loan papers were pre-printed (and pre-loaded with unrequested insurance products). [16 RT 707:20-22; 632:19-20; 681:7-8; 731:18-20; 17 RT 872:2-3; 879:3-7; 807:17-19; 774:1-3; 18 RT 936:28-29; 912:16-20; 971:29-972:2].

Plaintiffs were told they need merely "sign here, sign here, sign here." [14 RT 328:2-3; 16 RT 701:23-25; 631:24-27; 632:26; 681:13; 651:13-14; 666:21-22; 710:23-24; 17 RT 778:4; 798:4-9; 807:29-808:2; 868:2-3; 18 RT 919:15-29; 937:4-5; 19 RT 1166:29-1167:1]. In fact, in some cases, Washington Mutual rushed Plaintiffs through the loan process under the guise of "getting them back to work," - no doubt to further the belief by Plaintiffs that Washington Mutual was looking after their best interests. [16 RT 631:27-632:1; 634:21-24; 664:27-665:2; 17 RT 742:6-9; 790:26-791:2; 19 RT 1093:10-12].

Third, Plaintiffs' trust in Washington Mutual is justified by the facts of their relationships and transactions. It bears repeating that the transactions at issue in this case were not the routine ordinary loan closings Washington Mutual portrays them to be. In an ordinary lending transaction, Plaintiffs would assume there to be an interest charge-and the failure to consider it might be the "blind trust" Washington Mutual refers to in its briefing. But it is not blind trust that leads a consumer to assume they will not be secretly charged for unrequested products not required as part of what Plaintiffs believe to be a loan transaction. Such is particularly true in the case of insurance products - where the personal needs and circumstances of the individual determine the suitability of the products. Simply put, it was reasonable for Plaintiffs to rely on a regular course of honest dealings - that did not exist in these anything-but-ordinary transactions.

This Court has recognized that a fiduciary relationship may derive from the dealings of the parties. *American Bankers,* 818 So.2d at 1085. For instance, in *Lowery,* the bank had a history of dealing with a married couple and offered to placed notes on hold until the husband was available to sign them. *Lowery,* 592 So.2d at 85. As a result, the wife was not as diligent in

determining that the insurance coverages previously purchased with loans were attached to the note on hold. *Id.* Under these facts, this Court determined it was possible that a fiduciary duty existed on the part of the bank. *Id.*

A similar situation was shown in this case. Here, many of the Plaintiffs had multiple loans with Washington Mutual. [12 CT 1706, 1709, 1710, 1711; 15 CT 2094, 2097; 15 CT 2173, 2186, 2187, 2194; 16 CT 2242, 2244, 2261; 16 CT 2298, 2324; 17 CT 2410, 2424; 17 CT 2445, 2451, 2452, 2467, 2480, 2489; 18 CT 2606, 2607, 2618, 2619, 2635]. Prior to ever entering Washington Mutual's office, Plaintiffs were given assurances from Washington Mutual employees that they could get additional funds, lower payments, or cash advances. [16 RT 628:20; 636:9; 19 RT 1086:18; 1 CT 79]. They were told Washington Mutual was there to "help." [1 CT 79; 14 RT 298:8-9]. They were assured Washington Mutual would take care of everything. [12 CT 1675-1676]. They were even told there was no reason for them to take off work because their loan papers would already be prepared, pre-printed, and merely awaiting signature. [16 RT 707:20-22; 632:19-20; 681: 7-8; 731:18-20; 17 RT 872:2; 879:5-7; 807:17-19; 774:1-3; 18 RT 936:28-29; 912:16-19; 971:26-972:2]. Based on this course of dealings, Plaintiffs could reasonably expect that Washington Mutual would honor their promise to look after Plaintiffs' best interests - which did not include adding unwanted and unnecessary insurance to their loans.

5. Washington Mutual exercised effective control over Plaintiffs' choices in the transactions.

Washington Mutual's claim of undisputed evidence that it did not exercise control over Plaintiffs is disingenuous at best. Washington Mutual did not merely *influence* Plaintiffs' insurance choices, Washington Mutual *made* those choices on Plaintiffs' behalf without any authority or input from Plaintiffs. Washington Mutual decided whether or not Plaintiffs would buy insurance in connection with their loans. Washington Mutual controlled what type of insurance each Plaintiff paid for. Washington Mutual controlled which insurer (from among those it had commission agreements with) would provide the coverage. And Washington Mutual controlled whether Plaintiffs could obtain additional loans or would be required to refinance current loans. Washington Mutual even owned the reinsurance companies that funneled 96% of Plaintiffs' insurance premiums back to Washington Mutual. [13 RT 177:9-178:1]. It is difficult to imagine a more complete exercise of control over the choices of another than that exercised by Washington Mutual in this case.[9]

The Mississippi Supreme Court has held that:

> [w]henever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising from either weakness of mind or body, or

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[9] Washington Mutual's overmastering influence is not negated by evidence that Plaintiffs controlled the initial decision to seek a loan. Once Plaintiffs came to Washington Mutual for loans, Washington Mutual effectively controlled Plaintiffs' choices. Furthermore, Washington Mutual's manipulative use of "check loans" and promotional mailings evidences an intent to control even the initial loan decision by making loans to individuals who had not initially sought out such debt by their own affirmative volition.

> through trust, the law does not hesitate to characterize such relationship as fiduciary in character.

Hopewell 680 So.2d at 816, *quoting, Hendricks v. James,* 421 So.2d 1031, 1041 (Miss. 1982).

Here, the evidence establishes not only that both the dominant influence of Washington Mutual, but also the weakness, financial vulnerability and trust of Plaintiffs. [16 RT 642:5-6; 16 RT 652:7-8; 16 RT 688:12; 16 RT 710:15-27; 17 RT 868:12-13; 17 RT 882:28; 18 RT 920:4; 18 RT 920:6; 18 RT 974:7; 18 RT 977:1; 19 RT 1117:12; 15 RT 540:27-541:2, 539:19-25; 17 RT 828:6-8, 765:23-24; 854:8; 832:24-833:1; 18 RT 902:13-16; 950:10-11; 963:21-23; 19 RT 1166:18-23; 16 RT 685:21-29, 733:18-19; 17 RT 862:18-19, 767:1-2, 826:28-827:4, 852:17-21; 18 RT 964:6-7, 10-18; 19 RT 1132:10-19, 1082:7-12; 1147:16-19; 1099:9-11]. Meanwhile, Washington Mutual is a large corporate entity with a net worth of at least $414 million. [23 RT 1783:13-15]. In fact, Washington Mutual concedes (as it must) that it is a superior financial position as compared to its borrowers generally and that it is more sophisticated in lending and insurance practices than the Plaintiffs in this case. [2 RT 197:11-17].

B. Plaintiffs Proved Their Fraud Claim.

A successful claim of fraud involves proof of the following: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that the representation should be acted on by the hearer in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) reliance on its truth; (8) right to rely thereon; and (9) consequent and proximate injury. *General Motors Acceptance Corp. v. Baymon,* 732 So.2d 262, 269-270 (Miss. 1999). Of these elements, Washington Mutual disputes only that it

had any duty of disclosure, that the misrepresented terms were material, and that Plaintiffs had a right to rely on the misrepresentations. Taking all evidence in the light most favorable to Plaintiffs and indulging all inferences in Plaintiffs' favor, the evidence proves, at a minimum, that fair minded jurors could come conclude Washington Mutual was guilty of fraud. Accordingly, the trial court did not err by submitting the fraud issue to the jury or in denying Washington Mutual's post trial motions regarding Plaintiffs' fraud claim.

1. Washington Mutual made affirmative misrepresentations that constituted fraud.

Washington Mutual bases its fraud argument on the mistaken assertion that Plaintiffs are relying solely upon non-disclosures to support their fraud argument. In actuality, the record indicates that Plaintiffs proved affirmative acts of misrepresentation. In particular, Defendant affirmatively misrepresented to Lou Waters, Kenneth Hill and Lizzie Lofton that they were required to buy credit insurance in order to obtain the loans they wanted. [17 RT 879:19-880:4; 880:22-26; 18 RT 972:18-19; 973:12-974:12; 19 RT 1117:8-22]. In addition, Washington Mutual affirmatively told other Plaintiffs it was there to "help them;" that it would "take care of everything;" and that it was looking out for their "best interests." [1 CT 79; 12 CT 1675, 1676; 16 RT 653:12-13; 670:26-671:1]. These affirmative misrepresentations provide independent support for Plaintiffs' fraud claims.

2. Washington Mutual failed to disclose material facts it had a duty to disclose.

In addition to affirmation misstatements, acts of non-disclosure can support a finding of fraud, when there exists a legal duty to disclose. Here, Plaintiffs established multiple sources of a legal duty upon Washington Mutual to disclose relevant information to Plaintiffs.

a. Washington Mutual owed Plaintiffs a duty to disclose based on the fiduciary and/or confidential relationship between the parties.

By virtue of the trust arising out of a confidential or fiduciary relationship, it is the duty of the person in whom confidence is reposed to fully disclose any and all material facts relating to a contemplated transaction. *Memphis Hardwood Flooring Co. v. Daniel,* 771 So.2d 924, 932 (Miss. 2000). Any concealment or failure to disclose such facts is a fraud. *Id.* Thus, if this Court finds that the evidence supports the jury's finding that Washington Mutual owed Plaintiffs a fiduciary duty, it is unnecessary for this Court to address Washington Mutual's claim that it owed no duty to disclose in connection with Plaintiffs' fraud claim. The fiduciary relationship clearly imposes upon Washington Mutual a duty of disclosure.

b. Washington Mutual owed Plaintiffs a duty to disclose based on the need to correct false representations and impressions.

Even in the absence of a fiduciary relationship, Washington Mutual was guilty of fraud because it deliberately fostered mistaken beliefs in Plaintiffs that it had an affirmative duty to correct. A party to a business transaction has a duty to disclose to the other party, prior to consummation of the transaction, any information necessary to correct previous false or misleading

representations. *Guastella v. Wardell*, 198 So.2d 227, 230 (Miss. 1967), *citing*, RESTATEMENT (SECOND) OF TORTS § 551.

> Knowledge that the other party to a contemplated transaction is acting under a mistaken belief as to certain facts is a factor in determining that a duty of disclosure is owing. There is much authority to the effect that if one party to a contract or transaction has superior knowledge, or knowledge which is not within the fair and reasonable reach of the other party and which he could not discover by the exercise of reasonable diligence, or means of knowledge which are not open to both parties alike, he is under a legal obligation to speak, and his silence constitutes fraud, especially when the other party relies upon him to communicate to him the true state of facts to enable him to judge of the expediency of the bargain.

23 Am. Jur. § 80.

The secret insertion of charges for unwanted insurance coverage was a significant addition to the lending transaction. Here, Washington Mutual alone had knowledge it had selected (without instructions from Plaintiffs to do so) insurance products Plaintiff had not requested, may not have needed, and had not been aware they had purchased. [15 RT 552:28-553:5; 553:11-19, 24-29; 16 RT 635:24-27; 649:27-650:1; 697:19-22; 681:17-19; 708:24-709:1; 709:11-710:5; 731:29-732:2; 17 RT 774:17-23; 811:8-11; 812:17-19; 835:10-15, 835:29-836:2; 856:4-6; 864:18-865:1; 18 RT 940:27-29; 19 RT 1089:26-28; 1090:21-22; 1101:8-10; 1153:9-11, 23-27; 1165:23-25; 1169:5-6; 1124:22-1125:5; 1139:16-18]. Washington Mutual does not dispute that Plaintiffs were ignorant of the insurance charges inserted into their preprinted loan documents. Under these circumstances, Washington Mutual's silence amounted to a fraudulent affirmation that a state of things existed which did not, in fact, exist *Guastella* 198 So.2d at 230. Having deliberately fostered Plaintiffs' mistaken beliefs, Washington Mutual had a duty to correct Plaintiffs' beliefs prior

to consummating the transaction. *Guastella,* 198 So 2d 227. In light of Washington Mutual's uncontroverted failure to fairly do so, the negligence finding should be affirmed.

3. Washington Mutual's non-disclosures were material.

The materiality of a representation is determined by the probable and reasonable effect which truthful answers would have had on the injured party. *Sanford v. Federated Guar. Ins. Co.*, 522 So.2d 214, 217 (Miss. 1998). That is, a matter is material if a reasonable person would consider it important to a decision regarding the transaction it relates to. RESTATEMENT (SECOND) TORTS, § 538(2).

The fact that an individual's lender would determine the desirability and suitability of insurance products without consulting the borrower would certainly affect a borrower's decisions regarding the loan. Thus, Washington Mutual does not even address the materiality of this primary omission. Likewise, Washington Mutual does not argue about the materiality of non-disclosures regarding the additional costs of refinancing (as opposed to taking a second loan) or the limited benefits of credit life insurance. Thus, Washington Mutual's claim of immateriality can be denied outright on the basis of these unchallenged omissions.

And while the fact that branch managers receive commissions and branch offices seek to make profits may not be as clearly material - the fact that an entity purporting to be a lender (and whose services were sought as a lender) makes the majority of its profits from insurance sales would affect a reasonable persons' decisions regarding the loan. At the least, it would have alerted Plaintiffs to inquire as to whether and why insurance products were connected to their loans.

4. Plaintiffs were justified in relying on Washington Mutual's misrepresentations and non-disclosures based on the facts of the transaction and Washington Mutual's efforts to conceal contrary terms in the loan documents.

Washington Mutual now contends on appeal that Plaintiffs had no reasonable basis for relying on its misrepresentations and omissions when the loan contracts included contrary language. At trial, however, Washington Mutual stated the exact opposite, saying:

> Q. You want your customers to be able to believe what your employees tell them?
>
> A Yes.
>
> * * *
>
> Q. Because that's important that they can trust and rely on what they're told by your employees, is it not?
>
> A. Yes
>
> Q. And if there is a written document out there that's inconsistent with what they're told, it's fair and reasonable for those customers to rely on what your people tell them, isn't it?
>
> A. I can't testify as to what's fair and reasonable, other than in my own opinion, but I would certainly think that we would want our employees to have customers able to rely on what they tell them is true.
>
> Q. Even if it's inconsistent with a written disclosure, correct?

A. I would think, yes.

[2 RT 234:3-23]. Thus, Washington Mutual itself expected customers to rely on oral representations - even when they conflicted with the written documents. [2 RT 234:3-23].

Furthermore, Plaintiffs would point out that not all the information relevant to their loan decisions was included in their contracts. Moreover, even on those points where contrary contractual language existed, Plaintiffs cannot be imputed knowledge of such language in the face of Washington Mutual's deliberate efforts to dissuade and prevent Plaintiffs from reading the contracts and/or from realizing the contracts' unsuspected written terms.

a. Not every misrepresentation or omission was apparent from fully reviewing the loan documents.

Plaintiffs presented evidence that Washington Mutual hid its reinsurance agreements with affiliates, accepted payment from the sale of insurance products, received undisclosed commissions and failed to inform Plaintiffs of alternative insurance options. The language of the loan documents did not, and would not have, revealed to Plaintiffs any contrary information regarding these omissions. [15 RT 552:28-553:5; 553:11-19, 24-29; 16 RT 635:24-27; 649:27-650:1; 697:19-22; 681:17-19; 708:24-709:1; 709:11-710:5; 731:29-732:2; 17 RT 774:17-23; 811:8-11; 812:17-19; 835:10-15, 835:29-836:2; 856:4-6; 864:18-865:1; 18 RT 940:27-29; 19 RT 1089:26-28; 1090:21-22; 1101:8-10; 1153:9-11, 23-27; 1165:23-25; 1169:5-6; 1124:22-1125:5; 1139:16-18]. Thus, Plaintiffs were justified in relying upon Washington Mutual's non-disclosures as to these issues, even in light of the contract.

b. Washington Mutual used fraud and deceit to prevent Plaintiffs from reading and appreciating the significance of their loan documents.

Where one party is deceived into signing a contract without having read it due to the fraudulent representations of the other party, the terms of the contract will not be imputed so as to preclude legal recourse. *Memphis Hardwood Flooring,* 771 So.2d at 930; *Johnson v. Brewer*, 427 So.2d 118, 120 (Miss. 1983) (fraud found where oil expert misrepresented lease to old man who could not read); *Baggett v. First Corp.*, 357 So.2d 321, 322-23 (Miss. 1978) (fraud found where corporate officer misrepresented that the deed contained the same provisions as the prior agreement); *Hunt Oil Co. v. Berry*, 86 So.2d 7, 10- 11 (1956) (fraud found where oil company agent misrepresented lease to property owner who could not understand lease by reading it); *Mississippi Power Co. v. Bennett*, 161 So. 301, 306 (1935) (fraud found where company promised to refund invested money but never intended to do so). Knowledge of contract terms will not be imputed to a signee who relies on a misrepresentation made prior to the time he or she was even provided with the contract. *American Income Life Ins. Co. v. Hollins*, 830 So.2d 1230, 1239 (Miss. 2002).

The well-recognized rule that acts of misrepresentation and concealment will prevent a party so deceived from being imputed with knowledge of the contract terms is summarized in 37 C.J.S. Fraud § 34(c) (1943)(emphasis added):

> Where the fact misrepresented or the matters which are concealed are peculiarly within the representor's knowledge and the representee is ignorant thereof, it is generally held that, although the real fact appears on the public records, the representee is under no obligation to examine the records, and his failure to do so does not defeat his right of action. *This is especially true where the very representations relied on induced the hearer to refrain from an examination of the*

> *records*. . . In such cases the doctrine of constructive notice is inapplicable.

Similarly *12 Am. Jur., Contracts, Section 145* states:

> The rule that a person who fails to have a contract read to him before signing it can have no redress does not apply in the case of *fraud or false representations by which he is lulled into security* or thrown off his guard and deceived. If a person is ignorant of the contents of a written instrument and signs it under a mistaken belief, induced by misrepresentation, that it is an instrument of a different character, without negligence on his part, the agreement is void.

Am. Jur., Contracts, Section 145 (emphasis added). The principle has been applied by this Court in cases of contract. *Hunt Oil Co. v. Berry*, 86 So.2d at 10-11.

The record is replete with testimony regarding Washington Mutual's efforts to prevent Plaintiffs from appreciating the significance of their written contracts. Virtually every Plaintiff testified that he or she was rushed through the loan process in a matter of minutes. [15 RT 556:19; 16 RT 715:14-15; 17 RT 742:6-9; 632:13-23; 751:10-12; 797:29; 817:1-4; 871:28; 879:8-9; 854:19-21; 18 RT 916:7-9; 19 RT 1093:16-19; 1167:3-4]. Many Plaintiffs testified they were directed to "sign here, sign here, sign here" without discussion of what they were signing. [14 RT 328:2-3; 16 RT 701:23-25; 631:24-27; 632:26; 681:13; 651:13-14; 666:21-22; 710:23-24; 17 RT 778:4; 798:4-9; 807:29-808:2; 868:2-3; 18 RT 919:15-29; 937:4-5; 19 RT 1166:29-1167:1]. Some Plaintiffs even testified that the Washington Mutual agent only lifted the corners of the contract enough to indicate the signature lines. [16 RT 666:21-22; 17 RT 741:13-24; 18 RT 937:4]. Moreover, in this case, the very nature of the fraud also aided in the deception. That is, unlike the

interest rate or the payment schedule – a decision regarding the desirability or suitability of a insurance product is not something a consumer anticipates will be determined unilaterally by his or her lender. Thus, absent a disclosure by Washington Mutual, Plaintiffs would have had little reason to expect unrequested insurance charges would be in inserted into their loans. This evidence, particularly when considered in the light most favorable to Plaintiffs, supports a finding that Plaintiffs' justifiable reliance on Washington Mutual to make relevant disclosures was not negated by disclosures hidden in the written contracts. Accordingly, the Judge Lewis' rulings in connection with Plaintiffs' fraud claim should be affirmed.

5. Plaintiffs are not seeking to impose a fiduciary relationship in every "arms-length" lending transaction.

The amicus briefs submitted in support of Washington Mutual reveal two unjustified concerns: (1) Plaintiffs are seeking to transform every "ordinary" lending transaction into a relationship that involves fiduciary duties; and (2) the verdict in the case below will jeopardize "legitimate lenders" in Mississippi.[10] The "slippery slope" concerns expressed by the amicus briefs reflect generalized worries unfounded by the facts of the instant action. The evidence adduced at trial and summarized in this brief demonstrate that this case is one of the situations contemplated by *Lowery*--the factual circumstances justify the imposition of a fiduciary duty. The verdict and award

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[10] [Miss. Consumer Finance Ass'n Br. at 7-10 (referencing the "typical" transaction and noting that "[c]onsumer finance companies in Mississippi need protection from claims such as those asserted by the plaintiffs); Miss. Bankers Ass'n Br. at 4-5 (arguing that the parties below "simply engaged in typical, ordinary, arms-length transactions"); and Consumer Credit Ass'n Br. at 1, 11 (suggesting that Washington Mutual's practices were "routine" and emphasizing the importance of credit insurance for those consumers "who cannot afford or qualify for traditional insurance or who are under-insured" and "who *expressly request the insurance* to protect their credit and their families" (emphasis added)].

below should only serve to deter Washington Mutual and any other unscrupulous companies who might seek to profit from committing similar frauds upon vulnerable Mississippi citizens. Lenders and insurance companies that operate in a responsible and lawful manner have no reason to be concerned about this verdict. Instead, Mississippi consumers only stand to benefit from this verdict, as "legitimate lenders" not only know what is right but actually *do* what is right. That did not happen in this case.

C. Washington Mutual Breached the Implied Covenant of Good Faith and Fair Dealing.

The evidence, taken in the light most favorable to Plaintiffs, establishes that Washington Mutual breached its duty of good faith and fair dealing. Under Mississippi law, a duty of good faith and fair dealing is implied in every contract. *Morris v. Macione*, 546 So.2d 969, 971 (Miss. 1989); *Baldwin v. Laurel Ford Lincoln-Mercury, Inc.*, 32 F.Supp.2d 894, 898 (S.D. Miss. 1998). The duty of good faith and fair dealing requires all parties to a contract to abstain from wrongful conduct which would injure the right of another to receive the benefits of the agreement. *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172, 1188 (Miss. 1990). The breach of good faith is bad faith characterized by some conduct which violates standards of decency, fairness or reasonableness. RESTATEMENT (2D) OF CONTRACTS § 205, 100 (1979).

In connection with the bad faith claim, Washington Mutual does not dispute the fact of its wrongful conduct; but rather, argues only that its wrongful conduct is not actionable because it did not involve the performance or enforcement of a contract. In so doing, Washington Mutual relies upon Mississippi cases holding that an implied duty of good faith and fair dealing is only applicable

to the performance or enforcement of a contract and is not applicable to negotiation of the contract terms. *Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss. 1992); *Baldwin*, 32 F.Supp.2d at 898.

Washington Mutual's argument is misplaced, however, as it ignores substantial evidence of bad faith following the negotiation of Plaintiffs' loans. Washington Mutual's entire practice of "flipping" Plaintiffs into new loans and the compounding of interest undisputedly occurred after the formation of Plaintiffs' loans. A Mississippi court has already held in a substantively similar lending case that the alleged "flipping" and compounding of interest takes place after formation of the contract and can form the basis for a breach of good faith claim. *Allen v. City Finance Co.*, 224 B.R. 347, 351 (S.D. Miss. 1998). Thus, Plaintiffs' evidence regarding the flipping of their loans is alone sufficient to support their bad faith claim.

Washington Mutual has also taken a selective approach to reviewing the insurance - related evidence of bad faith in this case. While Plaintiffs certainly established that Washington Mutual exhibited bad faith in the negotiation of Plaintiffs' loan contracts, Washington Mutual's wrongful conduct did not cease upon the signing of the loan papers. To the contrary, evidence indicates that Washington Mutual acted dishonestly by refusing to disclose its acceptance of commissions, its relationship with reinsurers, its scheme to maximize each Plaintiffs' debt, the fact that branch offices were rewarded with bonuses based upon their insurance sales, the fact that other insurance options were available to Plaintiffs, whether any insurable interest was already otherwise protected or insured, and that other options were available to customers in lieu of credit insurance. [15 RT 552:28-553:5; 553:11-19, 24-29; 16 RT 635:24-27; 649:27-650:1; 697:19-22; 681:17-19; 708:24-709:1; 709:11-710:5; 731:29-732:2; 17 RT 774:17-23; 811:8-11; 812:17-19; 835:10-15, 835:29-

836:2; 856:4-6; 864:18-865:1; 18 RT 940:27-29; 19 RT 1089:26-28; 1090:21-22; 1101:8-10; 1153:9-11, 23-27; 1165:23-25; 1169:5-6; 1124:22-1125:5; 1139:16-18]. These acts served to disguise from Plaintiffs both the existence and the illusory quality, of the insurance products they had unwittingly purchased. As a result, Plaintiffs failed to receive, appreciate, or understand any of the benefits of the insurance coverages for which they were charged. [15 RT 552:28-553:5; 553:11-19, 24-29; 16 RT 635:24-27; 649:27-650:1; 697:19-22; 681:17-19; 708:24-709:1; 709:11-710:5; 731:29-732:2; 17 RT 774:17-23; 811:8-11; 812:17-19; 835:10-15, 835:29-836:2; 856:4-6; 864:18-865:1; 18 RT 940:27-29; 19 RT 1089:26-28; 1090:21-22; 1101:8-10; 1153:9-11, 23-27; 1165:23-25; 1169:5-6; 1124:22-1125:5; 1139:16-18].

Washington Mutual's conduct deprived Plaintiffs of the benefits of the policies for which they were charged. This is particularly telling in the cases of Jesse McClung and Percy Mason who both received disabling injuries during the period of coverage afforded by the disability policies packed in their loans. [17 RT 775:9-15; 17 RT 856:16-20]. Yet, McClung and Mason made no claim against such policies, and received no benefits from such policies, because Washington Mutual deprived them of knowledge of the policies' very existence. [17 RT 795:23-27; 17 RT 856:16-20].

And, while less dramatic, all Plaintiffs were deprived by Washington Mutual of the security, peace of mind, and comfort of knowing insurance exists to cover their debts in the event of injury or death. When an individual purchases an insurance contract in Mississippi, it is well settled that the individual is purchasing such intangibles as peace of mind, risk aversion and assurance of proceeds in addition to the monetary policy benefits. *Williams*, 566 So.2d at 1174-1175. Indeed, this is the point on which Washington Mutual purported to justify the sale of its product. [13 RT

178:19-28]. Although Plaintiffs neither wanted nor needed insurance, Washington Mutual wrongfully charged them for it. And as if that were not enough, Washington Mutual's conduct served to deprive Plaintiffs of the one all but illusionary benefit it claims make credit life insurance desirable.

Washington Mutual's failure to provide the benefits of insurance coverage to the individuals it charges for such coverage goes, not to the formation of the contract, but to the performance and execution of the contract. Accordingly, the trial court did not err in submitting to the jury Plaintiffs' claim for breach of the duty of good faith and fair dealing or in denying Defendant's motions regarding that claim.

D. Plaintiffs Proved Their Negligence Claim.

As with Plaintiffs' claims involving fiduciary duty and good faith, Washington Mutual's attack on the negligence ruling centers solely on its contention that it owed no duty to Plaintiffs to act honestly, candidly and fairly. [Appellant's Br. pp. 41-45]. Whether the defendant owes a duty to the plaintiff is a threshold question in any negligence action. *Diversified, Inc. v. Gibraltar Savs. Ass'n*, 762 S.W.2d 620, 622 (Tex.App.– Houston [14th Dist] 1988, writ denied). Here, the evidence establishes that Washington Mutual owed Plaintiffs a duty of care for several reasons. First, Washington Mutual owed a duty of care because it chose to assume the task of making decisions on Plaintiffs' behalf. Second, Washington Mutual owed a duty of care because unsophisticated costumers relied on its assistance. Third, Washington Mutual owed a general duty to avoid conduct that would cause personal injury to Plaintiffs.

1. Washington Mutual owed Plaintiffs a duty of care because it undertook responsibility for making Plaintiffs' decisions.

The RESTATEMENT (SECOND) OF TORTS § 323 supports the imposition of a duty of care on those who undertake to act for another. Section 323 provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

RESTATEMENT (2d) OF TORTS § 323. As a general rule, the law imposes upon every person who undertakes the performance of an act which may be dangerous to the person or property of another, a duty to exercise his senses and intelligence to avoid injury to the other. *Foster by Foster v. Bass,* 575 So.2d 967, 988 (Miss. 1990). Failing to do so, the actor may be held accountable at law for an injury to person or to property which is directly attributable to the breach of such duty. *Foster,* 575 So.2d at 988. The duty so arising is absolute. *Id.*

The law in Mississippi imposes a common law duty on those who undertake to act to exercise due care. *See e.g., U.R.S. Co., Inc. v. Gulfport-Biloxi Reg. Airport Auth.,* 544 So.2d 824, 827 (Miss. 1989); *Faulkner Concrete Pipe Co. v. Fox,* 157 So.2d 804, 805 (Miss. 1963); *Dr. Pepper Bottling Co. of Miss. v. Bruner,* 148 So.2d 199, 201 (Miss. 1962). The very case upon which Washington Mutual relies holds that a duty of care is owed when a party voluntarily assumes a duty of looking after the financial matters of another. *See, e.g., Century 21 Deep South Properties, Ltd. v. Corson,* 612 So.2d 359, 368 (Miss. 1992). In *Corson,* Century 21 was held to be the gratuitous agent of the

Corsons because it undertook the task of ordering title work for the Corsons. *Id.* As a result, Century 21 was held to owe a duty of care to the Corsons.

The same situation exists here. Washington Mutual seized responsibility for determining which insurance coverages should be purchased by its customers. It assumed responsibility for deciding what information Plaintiffs should receive regarding their loans. It assumed the obligation of deciding whether Plaintiffs would benefit from separate loans or a loan refinance/renewal. Having taken on these, and other, obligations Washington Mutual also assumed the duty to perform these obligations in a manner which would not cause economic or personal injury to Plaintiffs. [*URS. Co*, 544 So 2d 824; *Faulkner*, 157 So 2d at 805. Having failed to satisfy its voluntarily assumed duty, Washington Mutual is liable to Plaintiffs for negligence

2. Washington Mutual owed a duty of care because unsophisticated Plaintiffs were encouraged to, and did, rely upon Washington Mutual's assistance.

Even in cases where the lender-borrower relationship and transaction does not support a finding of a fiduciary duty, courts have observed that a jury question may exist as to whether the lender owed a duty to the borrower under the facts of the particular case. *E.g Hutson v. Wenatchee Federal Sav. and Loan Ass'n*, 588 P.2d at 1192-93 (holding jury question existed as to whether lender owed duty to define loan terms). Such is particularly true in circumstances where unknowledgeable and uncounseled customers are relying upon the lender's advice. *Id.* In those circumstances, the relationship between such parties involves more trust and confidence than is true of ordinary arm's-length dealing, even though the lender intends to profit from the transaction. *Id.*

Here, Washington Mutual knew Plaintiffs were not knowledgeable about lending practices. Washington Mutual knew Plaintiffs, as a group, had limited educations and financial resources. [15 RT 539:19-25, 540:27-541:2, 17 RT 828:6-8; 17 RT 765:23-24; 854:8; 832:24-833:1; 18 RT 902:13-16, 950:10-11; 963:21-23; 19 RT 1166:18-23]. Plus, Washington Mutual wanted Plaintiffs to trust it to handle everything about the loan transaction. [15 RT 516:25-517:5; 21 RT 1342:10-14; 20 RT 1337:21-28]. Accordingly, the parties relationship involved more trust than an ordinary lending transaction - and therefore supports a duty of disclosure and care on Washington Mutual based on the facts of this case.

3. Washington Mutual owes a duty of care because its conduct caused personal injuries to Plaintiffs.

Washington Mutual makes much of the unavailability of a duty when the only loss is an economic one.[11] However, Washington Mutual ignores the personal injury damages proven in this case. That is, Plaintiffs proved, and the jury found, emotional distress arising from the financial hardships and betrayals resulting from Washington Mutual's actions. [9 CT 1320-1327]. Moreover, the evidence established that Plaintiffs were in financial straits and circumstances that made them particularly vulnerable to Washington Mutual's conduct. The evidence also established that Washington Mutual knew of Plaintiffs' vulnerability. And even worse, Washington Mutual

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[11] Although the presence of personal injury damages in the present case make it unnecessary for this Court to consider the issue, some courts have indicated that liability may properly be imposed upon a volunteer actor for failing to use reasonable care where economic damages are the sole result. *See, e.g., Peterson v. Mutual Sav. Inst.*, 646 S.W.2d 327, 329 (Tex.App.Austin 1983, no writ) (explaining that the rule "has been applied to cases involving only economic injury"); *Bernard Johnson, Inc. v. Continental Constructors,* Inc., 630 S.W.2d 365, 375 (Tex.App.Austin 1982,writ refused n.r.e.) (noting that by analogy, "some courts have allowed recovery under the theory of the Restatement in cases involving economic injury and not physical harm").

conceded at trial that emotional distress was a foreseeable result of its conduct. [20 RT 1270:3-7]. There is no authority cited in Defendants brief, nor known to Plaintiffs to exist, that would excuse Washington Mutual from the duty not to intentionally harm another.[12]

E. The Statute of Limitations Does Not Bar Plaintiffs' Claims.

This Court has repeatedly held that fraudulent concealment of a cause of action tolls its statute of limitations. *Robinson v. Cobb*, 763 So.2d 883, 886-87 (Miss. 2000); *Van Zandt v. Van Zandt*, 86 So.2d 466, 470 (Miss. 1956); *Allred v. Fairchild*, 785 So.2d 1064 (Miss. 2001). Mississippi's fraudulent concealment statute reads as follows:

> If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

MISS. CODE ANN. § 15-1-67 (West 2002). Fraudulent concealment is established where evidence proves that: (1) defendants concealed the conduct about which Plaintiffs complain, and (2) plaintiffs could not have discovered the existence of their claim despite the exercise of due diligence. *Cunningham v. Massachusetts Mut. Life Ins. Co.*, 972 F.Supp. 1053, 1054 (N.D. Miss. 1997). As

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[12] Finally, even if we were to ignore the fact that of personal injury damages in this case, Washington Mutual's reliance upon cases applying the economic loss rule is misplaced. *E.g. State Farm Mut. Auto Ins. Co. v. Ford Motor Co.*, 736 So.3d 384, 387 (Miss.App. 1999)(holding that damage to a defective product alone must be pursued under a warranty theory and not under a negligence theory). Mississippi has not applied the economic loss rule outside of a products liability context. *Id.* The case at bar does not involve a claim of product liability.

this Court is well aware, the fact of the defendant's concealment, and the reasonableness of the Plaintiffs due diligence is left to the determination of the jury. 763 So. 2d. at 888.

Here, the evidence shows and the jury found that Washington Mutual acted to fraudulently conceal Plaintiffs' causes of action. [9 CT 1320-1327]. When all credible evidence in Plaintiffs' favor is accepted as true, and all reasonable inferences are drawn in Plaintiffs' favor, the trial court's ruling must be affirmed as there exists sufficient evidence to support the finding that Plaintiffs could not have reasonably discovered their claims at the time of the lending transactions. Thus, the applicable statute of limitations does not bar claims related to loan transactions conducted more than three years prior to the filing of this suit.[13] *See* MISS. CODE ANN. § 15-1-49.

1. The evidence, viewed in the light most favorable to Plaintiffs, establishes that Plaintiffs could not have reasonably discovered their claims at the time of the acts about which they complain.

Washington Mutual ignores entirely the nature of Plaintiffs' claims and the facts of Plaintiffs' loan transactions in order to argue that its wrongdoings were discoverable at the time the loans were consummated. The evidence proves, and the jury found, otherwise. [9 CT 1320-1327]. First, Washington Mutual is alleged to have hidden its reinsurance agreements with its affiliates, accepted undisclosed commissions, accepted payment from the sale of insurance products, and to have failed to inform Plaintiffs of alternative insurance options. Washington Mutual does not allege

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[13] Even if the statute of limitations were not tolled by the Defendant's fraudulent concealment, it would not apply to the claims of Louise Blue, Glenda Chambers, and Tina Cross, none of whom took out a loan more than three years prior to instituting the present action. [1 CT 52, 60; 5 RT 628: 20; 636:8-16; 14 CT 2022; 15 CT 2060, 2120].

that these acts and omissions could have been discovered by Plaintiffs even if they had been given the opportunity to carefully review their contracts at the times that their loans were taken out.

Moreover, the one claim upon which Washington Mutual does focus (the claim that Plaintiffs' loans were wrongfully "packed" with insurance products) was not discoverable simply because the coverages were listed in the loan documents.[14] To the contrary, the facts of the loan transactions support a finding that Washington Mutual's wrongdoing could not have been reasonably discovered at the time of the lending transaction.

Plaintiffs testified that loan closing at Washington Mutual's Greenwood branch lasted only a few minutes. [15 RT 556:19; 16 RT 715:14-15; 742:6-9; 632:13-23; 751:10-12; 797:29;

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[14] Although not argued by Washington Mutual, The Consumer Credit Insurance Association, in its Amicus Curai Brief to this Court, contends that Plaintiffs failed to prove that Washington Mutual concealed the conduct complained of because there was no "affirmative act of concealment." [*Amicus Curia Brief of Consumer Credit Insurance Association p.* 7]. Not so. First, it is unnecessary for Plaintiffs to prove an affirmative act of concealment where a fiduciary duty exists. *Van Zandt v. Van Zandt,* 86 So.2d at 470. The fiduciary duty imposes an obligation upon Washington Mutual to disclose the information at issue. Second, affirmative acts need not be proven when the underlying wrong is self concealing. *State of Texas v. Allan Construction Co., Inc.,* 851 F.2d 1526, 1529 (5th Cir. 1988). A wrong is "self-concealing" for purposes of fraudulent concealment "if the deception, misrepresentation, trick or contrivance is a necessary step to carrying out the act" rather than a mere technique for covering up the wrongful act. *Id.* Here, Washington Mutual could not have carried out its insurance packing fraud absent the deception and misrepresentation attendant to the loan closing process. Third, even if the Court were to find that no fiduciary duty was proven (which it was) or no self-concealing wrong existed (which it did), the record still establishes affirmative acts by Washington Mutual constituting fraudulent concealment. In particular, Washington Mutual told some Plaintiffs insurance coverage was required. Washington Mutual told most Plaintiffs that (for Plaintiff's so-called benefit) the loan transaction was to be "real quick" and that all Plaintiffs needed to do was sign where indicated. [14 RT 328:2-3; 16 RT 701:23-25; 631:24-27; 632:26; 681:13; 651:13-14; 666:21-22; 710:23-24; 17 RT 778:4; 798:4-9; 807:29-808:2; 868:2-3; 18 RT 919:15-29; 937:4-5; 19 RT 1166:29-1167:1]. And finally, Plaintiffs alleged claims based on secret agreements and commissions. The evidence therefore supports the finding that Washington Mutual acted to fraudulently conceal from Plaintiffs the existence of a cause of action.

817:1-4; 871:28; 879:8-9; 854:19-21; 18 RT 916:7-9; 19 RT 1093:16-19; 1167:3-4]. The papers were drafted by Washington Mutual employees prior to Plaintiffs' arrival at the office. [16 RT 707:20-22; 632:19-20; 681:7-8; 731:18-20; 17 RT 872:2-3; 879:3-7; 807:17-19; 774:1-3; 18 RT 936:28-29; 912:16-20; 971:29-972:2]. Insurance premiums were added to Plaintiffs' pre-printed documents and included in the total charges. [15 CT 2097, 2173, 2186-87, 2194-95, 2150, 2087, 2060, 2094; 16 CT 2218-19, 2242-44, 2261, 2298, 2324; 17 CT 2405, 2410, 2423-24, 2445, 2451, 2480, 2489; 18 CT 2597, 2607, 2619, 2637]. Plaintiffs were encouraged to come in over their lunch hours or on breaks from work - i.e. at times when they would be rushed to complete the transaction. [16 RT 631:28-29; 634:21-24; 19 RT 1093:8-12]. Washington Mutual instructed Plaintiffs to hurriedly "sign, sign, sign." [14 RT 328:2-3; 16 RT 701:23-25; 631:24-27; 632:26; 681:13; 651:13-14; 666:21-22; 710:23-24; 17 RT 778:4; 798:4-9; 807:29-808:2; 868:2-3; 18 RT 919:15-29; 937:4-5; 19 RT 1166:29-1167:1] Thus, Washington Mutual capitalized upon the facts that: 1) Plaintiffs would accept their promises to look out for their best interests at face value, 2) Plaintiffs would, by design, be in too big a hurry to review the documents, and 3) unsophisticated Plaintiffs would be ignorant of what to expect of an honest, fair lending transaction.

Plaintiffs concede that, in small type in some loan documents there existed a sentence to the effect that insurance is not required as a condition for obtaining credit. [E.g., 16 RT 2302]. However, a single sentence in small type is not reasonably discoverable by an individual who is being hurried through a loan closing with the assurance that the lending company is looking out for her interests and that she need only sign at the indicated places.

Moreover, Washington Mutual told Plaintiffs, or lead Plaintiffs to believe, that insurance was required in order to obtain the loan. In light of Washington Mutual's admission that customers were to trust oral representations by employees over contradictory written statements - that statement imparted no awareness of a cause of action to Plaintiffs. [13 RT 234:3-23]. Finally, even if Plaintiffs had read the disclaimer that insurance was not required - they would have had no reason to believe it applied to them (or awareness of wrongful conduct by Washington Mutual) because Plaintiffs were unaware they had been charged for insurance in the first place. [15 RT 552:28-553:5; 553:11-19, 24-29; 16 RT 635:24-27; 649:27-650:1; 697:19-22; 681:17-19; 708:24-709:1; 709:11-710:5; 731:29-732:2; 17 RT 774:17-23; 811:8-11; 812:17-19; 835:10-15, 835:29-836:2; 856:4-6; 864:18-865:1; 18 RT 940:27-29; 19 RT 1089:26-28; 1090:21-22; 1101:8-10; 1153:9-11, 23-27; 1165:23-25; 1169:5-6; 1124:22-1125:5; 1139:16-18].

Under the proper standard of review, accepting all evidence and reasonable inferences in Plaintiffs' favor, the evidence is more than sufficient to establish that Washington Mutual deliberately and effectively concealed the fact that insurance coverage was being sold to Plaintiffs by rushing Plaintiffs through the loan process and by indicating that they had looked after Plaintiff's interests such that Plaintiffs need only "sign here, sign here, and sign here." Having acted to conceal its wrongful conduct, Washington Mutual cannot now benefit from having succeeded in that concealment.

2. The evidence, viewed in the light most favorable to Plaintiffs, establishes that Plaintiffs could not have discovered their claims prior to January 1995 despite acting with reasonable diligence.

What constitutes "reasonable diligence" is a question of fact. *Cobb,* 763 So. 2d at 888. Here the jury found, and the evidence supports the finding, that Plaintiffs could not have discovered their claims prior to January 1995 despite acting with reasonable diligence. [9 CT 1320-1327]. An individual cannot have notice of a potential claim unless they know of evidence tending to support it. *Allan Construction*, 851 F.2d at 1533.

The record is devoid of evidence that Plaintiffs knew of facts tending to support a cause of action. The only information even arguably available to Plaintiffs was the fact that their loan documents indicated they had been charged for insurance coverages they had not requested. However, it is not reasonable to expect Plaintiffs to regularly pull out their loan contracts and scour the documents for hidden purchases not ordinarily a part of loan transactions. In fact, Dolly Andrews, a Washington Mutual branch manager who had spent thirty-two years working in Washington Mutual's Greenwood office could not explain the meaning or significance of the terms in the loan documents. [14 RT 367:2; 381:3-7; 413:6-414:4; 414:8-15].

While the interest rate or the payment term are anticipated components of a consumer loan that a borrower could be expected to "discover" even if not expressly revealed – it stretches reason to expect a borrower to anticipate when he goes in for a consumer loan that he will come out with a hidden policy of disability insurance. A consumer who signs a contract for a mobile phone could hardly expect to come away with unrequested dental insurance. Yet, the connection between a contract for a cell phone service and dental coverage is no less tenuous (and in fact provides greater

benefits) than some of the policies at issue here. The jury may well have concluded that the fact Plaintiffs did not regularly pull out their loan contracts to check for coverages they had no reason to expect would be there did not show a lack of diligence.

Furthermore, Plaintiffs have alleged that Washington Mutual is liable for a plethora of wrongful conduct including misrepresenting its affiliate's reinsurance agreements, accepting undisclosed commissions, accepting payment from the sell of insurance products, overvaluing household goods in order to inflate property insurance premiums, failing to inform Plaintiffs of alternative insurance options, and neglecting to inquire into Plaintiffs' insurance needs and current coverages. None of these acts or omissions were apparent from the face of the loan documents provided Plaintiffs. [15 CT 2097, 2173, 2186-87, 2194-95, 2150, 2087, 2060, 2094; 16 CT 2218-19, 2242-44, 2261, 2298, 2324; 17 CT 2405, 2410, 2423-24, 2445, 2451, 2480, 2489; 18 CT 2597, 2607, 2619, 2637]. None of these acts or omissions were disclosed through oral representations of Washington Mutual employees. [16 RT 666:21-22; 17 RT 741:13-24; 18 RT 937:4; 15 RT 552:28-553:5; 553:11-19, 24-29; 16 RT 635:24-27; 649:27-650:1; 697:19-22; 681:17-19; 708:24-709:1; 709:11-710:5; 731:29-732:2; 17 RT 774:17-23; 811:8-11; 812:17-19; 835:10-15, 835:29-836:2; 856:4-6; 864:18-865:1; 18 RT 940:27-29; 19 RT 1089:26-28; 1090:21-22; 1101:8-10; 1153:9-11, 23-27; 1165:23-25; 1169:5-6; 1124:22-1125:5; 1139:16-18]. Indeed, Washington Mutual does not even dispute that this conduct by Washington Mutual was undiscoverable by Plaintiffs.[15] Because

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[15] In a footnote, Washington Mutual cites a California case in support of the proposition that notice of any wrong causes the limitations period to commence on all claims. [Appellant's Br. p. 48, n. 55]. The cited case is factually distinguishable. *Kline v. Turner,* 87 Cal. App.4th 1369, 1374-75 (2001). In *Kline*, an associate of the plaintiff enticed the defendant to pay money due the plaintiff to the associate instead. The defendant did not check with the plaintiff before making the payment (*continued...*)

the evidence establishes that Washington Mutual's wrongdoing could not have been discovered even through reasonable diligence, the statute of limitations does not bar Plaintiffs' claims.

F. Washington Mutual Is Liable for its Own Conduct in Connection with Loans Purchased from Easy Finance.[16]

In 1994, Washington Mutual purchased from Easy Finance of Aberdeen, Inc. ("Easy Finance") a large group of accounts including the loans of some Plaintiffs. [5 CT 590]. After purchasing the Easy Finance loans, Washington Mutual undisputedly collected the monthly payments, interest and premiums for the insurance products sold by Easy Finance. [13 RT 259:2-18; 14 RT 322:15-17]. In effect, Washington Mutual served as the agent of the former-Easy Finance buyers for the purpose of securing insurance coverage.

Now, on appeal, Washington Mutual makes the argument that it cannot be liable for the fact that false representations were made to Plaintiffs by Easy Finance. [Appellant's Br. p. 51]. The conduct of Easy Finance, however, is not the conduct for which Washington Mutual was held liable.

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[15](...continued)
to the associate. In this circumstance, the court held that the plaintiff was "aware of facts that should have led him to suspect wrongdoing on the part of defendants." *Id.* That situation is inapposite. First, it involves a single act; it does not involve entirely separate actions as are involved in the present case. Second, the plaintiff knew of facts indicating the "second" wrongdoing. Here, even the listing of insurance coverages would not make Plaintiffs "aware of facts" suggesting undisclosed commissions, relationships between Washington Mutual and the reinsurers, or the receipt of payments by Washington Mutual for insurance sales. Thus, even if Plaintiffs could have known of Washington Mutual's packing scheme through reasonable diligence (which the evidence indicates they could not), that knowledge does not cause the limitations period to commence on separate claims

[16] For clarity and brevity, Plaintiffs refer throughout this section to Easy Finance as the Assignor of the loans purchased by Washington Mutual. To the extent applicable, however, Plaintiffs' arguments are intended to apply to all third-party loans forming the basis of Washington Mutual's claims at trial and on appeal.

In fact, in most cases, no evidence was introduced regarding the facts surrounding the initial Easy Finance loans or any damages resulting from these loans. Thus, the conduct for which Washington Mutual is being held liable is not the fraud committed by Easy Finance, but rather the ongoing fraud, bad faith, negligence and breach of fiduciary duty that was committed by Washington Mutual after it was assigned Plaintiffs' loans

1. Washington Mutual's fiduciary duty to plaintiffs required it to disclose the wrongful characteristics of the easy finance loans it purchased.

The trial court's ruling on the issue of third party loans was based foremost on the existence of a fiduciary relationship between the parties. [20 RT 1285:4-7].[17] That relationship imposed duties upon Washington Mutual after it was assigned Plaintiffs' loans. Specifically, the trial court stated:

> Trial Court: On the issue of a third-party claim, the court has already found that the defendants [sic] owed a fiduciary duty to the plaintiffs. The Court finds that once City Finance purchased the notes of Easy Finance, that they also stood in the shoes of Easy Finance and that they purchased the benefits from the notes as well as the obligations and the liabilities.

[20 RT 1285:4-17]. The evidence supports the jury's determination that Washington Mutual owed a fiduciary duty to Plaintiffs. [See Discussion at III. A.]. That fiduciary or confidential relationship imposed upon Washington Mutual a duty of disclosure, a duty to deal in good faith, and a duty to

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[17] Washington Mutual inexplicably contends that the trial court's ruling regarding third-party claims was "led astray by a curious inversion of the holder-in-due-course doctrine." [Appellants' Br. P. 52]. Yet, Washington Mutual cites to no place in the record where the holder-in-due course doctrine was relied upon as a basis for the trial court's ruling. [1 RT 109:6-112:26; 20 RT 1285:6-27]. Instead, the record indicates that the trial court's ruling was based on the existence of a fiduciary duty and upon general assignment principals. [20 RT 1285:4-17].

exercise diligence on behalf of Plaintiffs *after* it purchased Plaintiffs' loans. [See Argument at III. A.]. Washington Mutual does not dispute that it accepted the monthly interest and insurance premiums from Plaintiffs on the loans it acquired from Easy Finance. [13 RT 259:2-18; 14 RT 322:15-17]. By so doing, Washington Mutual assumed the fiduciary duties of an insurance agent in connection with those loans. An agent bears a duty of disclosure to its principal. Washington Mutual admits it could have readily determined whether collateral listed on Easy Finance loans was wildly overvalued or whether the insurance premiums initially set by Easy Finance were too high. [13 RT 268:17-21; 13 RT 269:12-18]. But Washington Mutual did not do that. Instead, Washington Mutual simply continued to pocket the unnecessary and excessive insurance premiums. [13 RT 269:6-11]. And Washington Mutual continued to "flip" Plaintiffs out of their Easy Finance loans into their own new loans.

In *Jackson v. South Holland Dodge, Inc.*, 197 Ill.2d 39 (2001), the plaintiff entered into a retail installment contract with the dealer in connection with the purchase of a vehicle. The dealer was alleged to have acted in a manner that was deceptive and misleading in connection with the vehicle's warranty. The dealer subsequently assigned the contract to Chrysler Financial Corporation. The plaintiff brought a class action lawsuit against the dealer and Chrysler. Chrysler filed a motion to dismiss arguing it could not be held liable for the misrepresentation of the dealer. While the trial court affirmed, it did so in reliance upon the fact that there was no way to recognize the deception from the contract. Thus, even where an assignee is not otherwise responsible for the misrepresentations of the assignor, it does bear responsibility for reviewing the face of the assigned document for defects. *Jackson v. South Holland Dodge, Inc.*, 197 Ill.2d 39, 49-50 (2001). That

responsibility necessarily applies with even greater force where a fiduciary duty exists (as it does in this case).

Shelton agreed that Washington Mutual ought to at least analyze any misrepresentations or problems with the Easy Finance loans at the time that it "did some business with the customer directly." [13 RT 269:2-5]. Yet, the evidence presented at trial showed even this tardy evaluation did not occur. In fact, Jessie McCung testified that after taking out an Easy Finance loan packed with disability insurance, he became disabled. [17 RT 776:24-27]. He then called Washington Mutual (which had since taken over his loan) to inform it he was injured and could not make his payment. [17 RT 775:9-15]. Despite this direct business with the customer, Dolly Andrews did not review McClung's loan at that time. [17 RT 775:19; 776:24-27]. She did not advise him of the unnecessary charges. She did not even tell him that he might be eligible for disability benefits because of his condition. [17 RT 775:16-19]. Washington Mutual's failure to review the loans for which it was charging fees is wholly separate from any activities of Easy Finance and supports Plaintiff's claims in this case.

Simply stated, the conduct of Easy Finance at the time it issued loans to Plaintiffs was not at issue in this case. Rather, Washington Mutual is liable for its own failure to fulfill its fiduciary and legal duties after purchasing Plaintiffs' loans. Thus, there is no merit to Washington Mutual's creative claim that the trial court erred in permitting the jury to award damages for the wrongful conduct of Easy Finance.

2. Washington Mutual violated the duty of good faith and fair dealing in connection with the loans assigned by third-parties.

In addition to violating its fiduciary duty in connection to the third-party loans, Washington Mutual breached the duty of good faith and fair dealing. A duty of good faith and fair dealing is implied in every contract. *Morris v. Macione*, 546 So.2d 969, 971 (Miss. 1989); *Baldwin*, 32 F.Supp.2d at 894. As the assignee of the third-party contracts it purchased, Washington Mutual stood in the shoes of Easy Finance and other lenders. *Indian Lumbermen's Mut. Ins. Co. v. Curtis Mathes Mfg. Co.*, 456 So.2d 750, 755 (Miss.1984). As such, it had a duty of good faith and fair dealing which required it to abstain from wrongful conduct which would injure the right of another to receive the benefits of the agreement. *MIC Life Ins. Co. v. Hicks*, 825 So.2d 616, 619 (Miss. 2002), *citing Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172, 1188 (Miss. 1990). It is the failure of this duty that forms a basis for Plaintiffs' claims. [See Argument at III. C.].

3. The verdict cannot be presumed to rest on the conduct of third-parties where the jury was charged to consider the conduct of Washington Mutual.

On each of the liability grounds submitted in this case the jury was instructed to consider the conduct of Washington Mutual. On the negligence claim, the jury was asked to find whether or not "the defendant *City Finance [Washington Mutual]* was negligent" [9 CT 1276 (emphasis added)]. With connection to the good faith and fair dealing claim the jury was instructed to determine whether "*Washington Mutual Finance Group*. . . did not act in good faith and deal fairly with a plaintiff. . ." [9 CT 1300 (emphasis added)]. The fraud submission read "If you find defendant *City Finance [Washington Mutual]* made material representations about the financing of loans or insurance products sold. . ."[9 CT 1274 (emphasis added)]. In each case the jury was

instructed to limit its consideration to the conduct of Washington Mutual. As such, Washington Mutual's complaint that the the jury was permitted to levy damages based on the conduct of third parties is not supported by the record and should be denied.

4. Washington Mutual's claims regarding third-party transactions apply, at most, to eight Plaintiffs.

It is important to note that throughout the trial of this case Washington Mutual alleged that only eight Plaintiffs had third party loans.[18] In its motion to exclude evidence and direct verdict, Washington Mutual alleges third-party loans by: Tina Cross, Patrishane Gordon, Lillie Harris, Lindsey and Robin Horton, Lizzie Lofton, Mattie Miles and Zenester Moore.[19] [20 RT 1255-1256]. At the directed verdict stage of the trial, counsel for the parties treated and identified to the court the same eight plaintiffs as those having third-party loans. [20 RT 1232-35]. No additional plaintiffs with third-party loans were identified in Washington Mutual's motions for judgment notwithstanding the verdict or for new trial. [21 RT 1378-1380].

Now for, for the first time, Washington Mutual identifies eleven additional Plaintiffs alleged to have third-party loans. In at least some cases, however, Washington Mutual specifically

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[18] Washington Mutual does not argue on appeal that there is any issue involving third party loans for Earnest Claiborne, Alfred Garret, Dorris Garrett, Greta Blackmon, Lorene Jackson, and Percy Mason. Thus, Defendant's argument as to these parties may be denied outright. [Appellant's Br. P. 53 fn. 671 Appendix 1 pp. 1, 5, 10, 19, 27 to Appellant's Br.].

[19] Of these, only Mattie Miles, Patrishane Gordon and Zenester Moore had no subsequent and additional loans originating with Washington Mutual. [15 CT 2173, 2186, 2187, 2194, 2219; 16 CT 2242, 2244, 2261; 17 CT 2408, 2410, 2424]. Consequently, while all other Plaintiffs may rely on Washington Mutual's own conduct as a basis for liability, Miles, Gordon and Moore's claim of wrongful conduct by Washington Mutual is limited to Washington Mutual's failure to fulfill its fiduciary duty to review and disclose the apparent misrepresentations, overcharges, and flaws in their contracts.

and explicitly disavowed the existence of any third-party issues while before the trial court. That is, counsel for Defendant expressly stated to the trial court: "With respect to Louise Blue, there are no third-party loans," [20 RT 1262:24-1263:5], and, "With respect to Glenda Chambers there are no third-party loans." [20 RT 1272:27-29]. Moreover, Washington Mutual did not seek directed verdict on the basis of its third-party argument against any other Plaintiffs. [20 RT 1229-1285]. Having expressly informed the Court that there were no third-party issues for these two Plaintiffs expressly and for all other Plaintiffs implicitly, Washington Mutual cannot now assign error to the Court's failure to separate out issues it was told did not exist.

G. The Compensatory Damage Awards for Emotional Distress Are Supported by the Evidence and Should be Affirmed.

Mississippi recognizes two separate bases for emotional distress awards. A plaintiff is entitled to damages for emotional distress when: (1) the defendant *intentionally* engages in conduct which evokes outrage or revulsion, or (2) the defendant *negligently* causes demonstrable harm and emotional trauma. *Adams v. U.S. Homecrafters, Inc.*, 744 So.2d 736, 742 (Miss. 1999).

Here, Plaintiffs submitted, the jury found, and Defendant does not dispute, the intentional nature of Washington Mutual's conduct. [9 CT 1320-1327]. Thus, the only issue Washington Mutual truly presents on appeal is whether Washington Mutual's intentional conduct was outrageous and revolting. Try as it might to conjure up a reversible error based on the severity of Plaintiffs' distress or the foreseeability of Plaintiffs' harm – these issues (relevant to negligent infliction of emotional distress claims) are simply not applicable in light of Washington Mutual's intentional conduct.

1. The standard of review requires that all facts and inferences be indulged in Plaintiffs' favor.

When reviewing Washington Mutual's claim of insufficient evidence to support the awards of emotional distress damages, this Court should consider the evidence in the light most favorable to the Plaintiffs and give Plaintiffs the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Leaf River Forest Prods., Inc. v. Ferguson*, 662 So.2d 648, 659 (Miss.1995), *quoting, Munford, Inc. v. Flemming,* 597 So.2d 1282, 1284 (Miss. 1992); *Mississippi Valley Gas Co. v. Estate of Walker*, 725 So.2d 139, 148 (Miss. 1998). Unless the reviewing court can say that the facts so considered would allow no reasonable jury to have made the present damage award, the award must be left undisturbed. *Southwest Mississippi Reg. Med. Center v. Lawrence,* 684 So.2d 1257,1269 (Miss. 1996); *Junior Food Stores, Inc. v. Rice*, 671 So.2d 67, 75 (Miss. 1996). When viewed in the light most favorable to Plaintiffs, the evidence in this case fully supports the award of damages for emotional distress. Washington Mutual's conduct was both intentional and outrageous. Accordingly, the jury's emotional distress award was warranted. Washington Mutual's claim that the trial court erred in refusing a new trial on the issue of emotional distress is reviewed for abuse of discretion. *C&C Trucking Co;* 612 So.2d at 1098.

2. Washington Mutual's conduct was outrageous and revolting.

Washington Mutual likens its conduct in preying upon the financially weak to "mere insults," "petty oppressions," "trivialities" and an instance of "hurt feelings." [Appellee's Br. p. 55]. The record shows otherwise. Washington Mutual's conduct was significantly more extreme than a mere insult.

Mississippi follows the general view that damages for mental anguish are recoverable (without demonstrable physical or mental injury) when the defendant's conduct was malicious, intentional, willful, wanton, grossly careless, indifferent or reckless. *Mississippi Valley Gas,* 725 So.2d at148.; *Morrison v. Means*, 680 So.2d 803, 806 (Miss. 1996). Conduct meets this standard when it is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Pegues v. Emerson Elec. Co.*, 913 F.Supp. 976, 982 (N.D.Miss. 1996), *quoting,* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d. (1965). In these cases, "it is the nature of the act itself-as opposed to the seriousness of the consequences-which gives impetus to legal redress." *Pegues,* 913 F.Supp. at 982, *quoting, Sears, Roebuck & Co. v. Devers*, 405 So.2d 898, 902 (Miss. 1981).

Despite Washington Mutual's efforts to minimize Plaintiffs' claims by characterizing them as a failure to orally explain the written terms of Plaintiffs' loan contracts; in truth, the record reveals that much graver conduct by Washington Mutual is at issue. Washington Mutual engages in a deliberate scheme to lure in unsophisticated, uneducated, and financially weak individuals. [16 RT 685:21-29, 733:18-19; 17 RT 862:18-19, 767:1-2; 826:28-827:4, 852:17-21; 18 RT 964:6-7, 10-18; 19 RT 1132:10-19, 1082:7-12; 1147:16-19; 1099:9-11; 15 RT 539:19-25; 540:27-541:2, 17 RT 828:6-8; 765:23-24; 854:8; 832:24-833:1; 18 RT 902:13-16; 950:10-11; 963:21-23; 19 RT 1166:18-23]. Washington Mutual then entices such individuals to relax their guard by expressly and/or impliedly assuring them that their best interests are being looked after. [15 RT 516:25-517:4; 2 RT 196:14-19; 233:23-28; 21 RT 1342:10-14; 20 RT 1337:22-25; 12 CT 1676, 1683; 1 CT 79; 2 RT 298:7-8]. Washington Mutual capitalizes on Plaintiffs' reliance by sneaking unnecessary and

unwanted insurance products of questionable benefit into the Plaintiffs' loans. Meanwhile, the actual loan transaction is set up to be conducted in a rushed and coercive manner that precludes Plaintiffs from reviewing the loan documents or discovering Washington Mutual's deception. [15 RT 556:19; 16 RT 715:14-15; 17 RT 742:6-10; 16 RT 632:13-14; 17 RT 751:10-12; 797:29; 817:1-4; 871:28; 879:8-9; 854:19-21; 18 RT 916:7-9; 19 RT 1093:16-19; 1167:4]. In this way Washington Mutual's Greenwood branch causes nearly an astounding 80% of its borrowers to come away from their loan transactions having been charged for insurance. [14 RT 306:24-28; PX 133; PX 129; 12 CT 1685]. Washington Mutual then collects over 96 cents on every dollar of insurance premiums from the affiliated reinsurance companies set up to look like separate insurers. [13 RT 177:19-24]. And when the pre-computed fees and premiums begin to diminish, Washington Mutual "flips" Plaintiffs into new loans in order to begin the entire process anew. Washington Mutual does not dispute on appeal that its conduct in any of these regards was intentional. Washington Mutual deliberate, concerted efforts to prey upon individuals of lesser financial means and sophistication is outrageous, indecent and fully intolerable. As such, it supports the jury's damage awards.

The conduct by Washington Mutual in this case is similar to that which was held to support an emotional distress award in *Cherry Bark Builders v. Wagner,* 781 So.2d 919, 923 (Miss.App. 2001). In *Cherry Bark*, a home buyer sued his builder because of failures to comply with building plans and misrepresentations related thereto. *Id.* Although the only evidence of mental anguish was testimony that the plaintiff was "visibly upset," the Court focused on the fact that the defendant's conduct was intentional and evoked outrage or revulsion. *Id.* at 923-24. As a result, the

court held that the mental anguish award was warranted. *Id.* The same result should follow in this case.

3. The severity of Plaintiffs' emotional distress is not relevant to the emotional distress award based on Washington Mutual's intentional conduct.[20]

Mississippi law provides that damages for emotional distress may be recovered when the defendant's conduct evokes outrage or revulsion - even if there is no other injury. *Summers,* 759 So.2d at 1211. The Court has repeatedly reaffirmed:

> In cases of intentional infliction of emotional distress, where the defendant's conduct was 'malicious, intentional or outrageous," the *plaintiff need present no further proof of physical injury.*

Adams, 744 So.2d at 743 (emphasis added). That is, if there is outrageous conduct, no injury is required for the recovery of emotional distress damages. *Means*, 680 So.2d at 806, *citing, Leaf River Forest Prods,* 662 So.2d at 659. Instead, it is the nature of the act itself, rather than the seriousness of the consequences that justifies the award for compensatory damages. *Devers*, 405 So.2d at 902; *Gamble ex rel. Gamble v. Dollar General Corp.*, Cause No. 2000-CA-01545-SCT, 2002 WL 1767536, *4 (Miss. Aug. 1 2002); *Whitten v. Cox*, 799 So.2d 1, 10-11 (Miss. 2000)

Despite the clear language of Mississippi case law, Washington Mutual relies in its briefing upon a string of cases – *none of which involve intentional conduct* – to claim a severe manifestation of injury is required for emotional distress recovery. Not so. Mississippi law holds that where there is outrageous conduct, no injury is required for recovery for intentional infliction

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[20] Although not required by Mississippi law, Plaintiffs did provide testimony regarding the physical and mental effects of Washington Mutual's actions. [See Appendix 1 attached hereto].

of emotional distress or mental anguish. *Cherry Bark Builders,* 781 So.2d at 922-924. Indeed, the very case relied upon by Washington Mutual holds that where there is outrageous conduct, no injury is required for recovery for a finding of intentional infliction of emotional distress or mental anguish. *Morrison,* 680 So.2d 803. Again, in such instances, it is the nature of the act itself – as opposed to the seriousness of the consequences – which gives impetus to legal redress.[21] *Adams,* 744 So.2d 736.

4. The damage awards for emotional distress were not excessive.

When reviewing an award of damages to determine whether or not it is excessive, the following standard of review is used:

> A damage award may be altered or amended only when it is so excessive that it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience. We are not authorized to disturb a jury verdict regarding amount of damages because it "seems too high" or "seems too low." Motions challenging the quantum of damages and seeking a remittitur are by their very nature committed to the sound discretion of the trial judge. Where the trial judge acts upon these matters, we reverse only if he has abused or exceeded his discretion.

C. & C. Trucking Co. 612 So.2d at 1106; *Jesco, Inc. v. Shannon,* 451 So.2d 694, 705 (Miss. 1984).

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[21] While unnecessary to sustain their claims, the evidence shows that the effect of Washington Mutual's conduct on Plaintiffs was anything but "trivial." The emotional distress testimony must be viewed in the light of the Plaintiffs' circumstances. For example, Alfred Garrett makes $700 per month. [16 RT 733:18-19]. In connection with a $611 loan, he was charged nearly $150 for insurance. [1 CT 94]. To Washington Mutual, a multi million dollar company, this may seem trivial. To Garrett, who was living week to week supporting his family, it was "all I could come to in a whole month." [16 RT 733:23-25]. Garret testified that he felt pressure and frustration from his family because he was unable to provide for them. [16 RT 735:5-10]. Thus, the record is clear that the sums taken from them were anything but trivial to Plaintiffs.

This Court has previously approved emotional distress awards significantly larger than these in a similar insurance context. In *Stewart v. Gulf Guar. Life Ins. Co.*, the plaintiff filed a claim against her insurance company for breach of contract, breach of the duty of good faith and fair dealing and fraud arising from the insurers' denial of benefits. 2002 WL 1874826 at *11. The case was tried before a jury, and the jury returned a verdict in favor of Stewart. *Id.* The jury awarded damages of $3,500 for breach of contract and $500,000 for emotional distress. *Id.* The trial court reduced the emotional distress damages to $50,000 claiming they were excessive. *Id.* On appeal, this Court reversed the judgment reducing those damages to $50,000 and reinstated the original judgment on the jury's award of $500,000. *Id.* Obviously, the *Stewart* case shows emotional distress awards more than double the largest award made here (and more than five times the size of the awards given most Plaintiffs) are permissible in case involving similar conduct and similar economic damages. *Id.*

Washington Mutual ignores the precedent of *Stewart v. Gulf Guar.* to concentrate on cases affirming lesser emotional distress awards. As this Court is well aware, however, the affirmance of an emotional distress awards in another case does not support a finding of excessiveness in the case at bar. The Fifth Circuit has observed that reliance upon a decision to affirm a jury award for emotional distress adds nothing to the analysis of excessiveness; it only indicates that the given award was not excessive; it says nothing about the maximum award that could have been awarded under those facts. *Shows v. Jamison Bedding, Inc.*, 671 F.2d at 927, 935 ("In most of these cases ... the jury verdicts were upheld, and they thus shed no light on how high an award must be to be 'excessive.' "). *Id.* at 934. As the Fifth Circuit states, the simple fact that

"certain awards have been affirmed does not indicate that these are the highest, or even near the highest awards which might be allowed." *In re Air Crash Disaster Near New Orleans*, 767 F.2d , 1151, 1156 (5th Cir. 1985). Thus, the cases cited by Washington Mutual provide no precedent for finding the emotional distress damages are excessive in this case.

Nor does Washington Mutual's insinuation that the emotional distress awards are excessive because they exceed the compensatory damage awards hold merit. Washington Mutual understandably wants to shift the focus away from its conduct and toward the Plaintiffs. Yet, such is not the proper analysis under Mississippi law. Under Mississippi law, damages are recoverable for mental anguish caused by a willful, wanton, malicious, or intentional wrong, even if no further injury or pecuniary damage is proven. *Lyons v. Zale Jewelry Co.*, 150 So.2d 154, 159 (Miss. 1963). Washington Mutual's actions were an intentional wrong. The nature of Washington Mutual's actions certainly merit legal redress. To hold otherwise would be to condone intentional, wrongful conduct as long as the financial ramifications are less than the personal, emotional, or human costs. Mississippi law does not support this view. *See Stewart,* 2002 WL 1874826. Accordingly, the trial court's rulings in connection with Plaintiffs' emotional distress award should be affirmed; and Washington Mutual's request for a remittitur of the emotional distress damages should be denied.

H. The Punitive Damage Awards Should Be Affirmed.

1. Washington Mutual engaged in conduct warranting an award of punitive damages.

Punitive damages may be assessed against a defendant when the defendant "acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." MISS. CODE ANN. § 11-1-65(1)(a)(2002).

Washington Mutual continues to ignore evidence of its intentional wrongdoing in order to claim this case is about a mere failure to orally disclose written terms of its loan agreements. [Appellant's Br. p. 70, *see also* Consumer Credit Ins. Ass'n Br. at 10]. Again, the evidence shows that the case is about much more. This is a case about a deliberately executed scheme of predatory lending practices. It is a case about a sophisticated, financially savvy corporation which found a way to profit by capitalizing on the financial struggles of less fortunate individuals. Washington Mutual marketed itself to unsophisticated Plaintiffs as a company that would look out for them. [15 RT 516:25-27; 13 RT 196:14-19; 233:23-28; 21 RT 1342:10-14; 1337:22-26; 12 CT 1676; 1 CT 79; 14 RT 298:8-9; 12 CT 1699]. Washington Mutual charged Plaintiffs for insurance products that Plaintiffs had not requested, did not need, and about which they were given no information. [15 RT 552:28-553:5; 16 RT 681:17-19; 708:24-709:1; 731:29-732:2; 635:24-27; 17 RT 845:4; 856:4; 864:18-865:1; 874:17-875:4; 835:10-15, 835:29-836:2; 811:8-11; 18 RT 912:25-913:1; 937:24-28; 19 RT 1089:26-28; 1101:4-6; 1125:2-5; 1117:2-6; 1139:16-18; 1153:9-11, 23-27; 1165:23-25]. Washington Mutual then pocketed over 96% of every dollar of insurance premiums assessed to Plaintiffs. [2 RT 177:19-24]. And when those profits diminished as the loan matured, Washington

Mutual "flipped" Plaintiffs into new loans and began the process anew. Meanwhile, Plaintiffs struggled under the weight of unnecessary loan obligations Washington Mutual knew they could ill afford. [16 RT 685:21-29; 733:18-19; 17 RT 862:18-19; 767:1-2; 826:28-827:4; 852:17-21; 18 RT 964:6-7, 10-18; 19 RT 1132:10-19; 1082:7-12; 1147:16-19; 1099:9-11]. This conduct not only blatantly violated Washington Mutual's own standards, but was egregious, malicious, and shows gross disregard for the rights of Plaintiffs.

In addition, Washington Mutual's conduct constituted fraud. [See Argument at III. B.]. Three of the plaintiffs testified that they were told credit insurance was mandatory; [17 RT 879:17-22; 880:22-26; 18 RT 972:18-19; 19 RT 1117:7-9], while all other plaintiffs were not informed that an insurance purchase was part of their loan at all. [15 RT 552:8-553:5; 553:11-19, 24-25; 16 RT 635:24-27; 649:27-650:1; 697:19-22; 681:17-19; 708:24-709:1; 709:11-710:5; 731:29-732:2; 17 RT 774:17-23; 811:8-11; 812:17-19; 835:10-15; 835:29-836:2; 856:4-6; 864:18-865.1; 879:24-29; 18 RT 940:27-29; 19 RT 1089:26-28; 1090:21-22; 1101:4-1102:1; 1153:9-11, 23-27; 1165:23-25; 1169:5-6; 1124:22-1125:5; 1139:16-18]. Plaintiffs were then rushed through the loan process so as to be precluded from finding or appreciating any contractual language to the contrary. [15 RT 556:19; 16 RT 715:14-15;17 RT 742:6-10; 16 RT 632:21-23; 17 RT 751:10-12; 797:29; 817:1-4; 871:28; 879:8-9; 854:19-21; 18 RT 916:7-9; 19 RT 1093:16-19; 1167:4]. This evidence supports a finding of fraud and provides an addition basis for the imposition of punitive damages.

2. The punitive damage awards are not excessive under Mississippi law or federal law.

Washington Mutual asserts three different legal theories under which it claims the punitive damage awards are excessive. Each theory uses slightly different standards and considerations. No matter which theory or standard is used, however, the punitive damage award is fully supported under both the evidence and the law.

Under Mississippi common law, the amount of punitive damages is to be determined by reference to four general factors: (1) the amount necessary to punish the wrongdoing of the defendant and deter the defendant from similar conduct in the future, *Standard Life Co. of Indiana v. Veal*, 354 So.2d 239, 248 (Miss.1977); (2) the amount necessary to deter others from committing the same offense, *Reserve Life Insurance Co. v. McGee*, 444 So.2d 803, 808 (Miss.1983); (3) the pecuniary ability or financial worth of the defendant, *Collins v. Black,* 380 So.2d 241, 244 (Miss.1980); *Veal,* 354 So.2d at 249; and (4) such amount as would compensate the plaintiffs for their public service in holding the insurer accountable. *Williams*, 566 So.2d at 1190; *Hollins,* 830 So.2d at 1241.

In determining whether the award is excessive under Mississippi statutory law, the court shall take into consideration the following factors: (1) Whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred; (2) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (3) the financial condition and net worth of the

defendant; and (4) in mitigation, the imposition of criminal sanctions on the defendant for its conduct[22] and the existence of other civil awards against the defendant for the same conduct. MISS. CODE. ANN. § 11-1-65.

Similar factors are used in evaluating whether a punitive damage award violates the federal constitution. In analyzing the excessiveness or punitive damage awards federal courts have focused on the following general criteria: (1) the degree of the defendant's reprehensibility or culpability, (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions, and (3) the sanctions imposed in other cases for comparable misconduct. *BMW of North America v. Gore*, 517 U.S. 559 583-585 (1996).

3. The standard of review requires the punitive damage award to be affirmed absent compelling grounds for reversal - which do not exist in the present case.

This Court has recently considered the issues and standards related to a claim of excessive punitive damage awards. *Hollins*, 830 So.2d at 1241. In so doing, this Court reaffirmed its tradition of affording great deference to juries that have awarded punitive damages. *Id. at 1240-42.* The jury's verdict will not be disturbed absent exceptional circumstances. *Williams,* 566 So.2d at 1190. Such circumstances exist only where the amount is arbitrary or unreasonable, against the overwhelming weight of the evidence or shows passion and prejudice of such magnitude as would "shock the conscience." *Bankers Life & Cas. Co. v. Crenshaw*, 483 So.2d 254, 278 (Miss.1986), *aff'd*, 486 U.S. 71 (1988). Absent a shocking display of unreasonableness or prejudice, the mere

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[22] This fourth factor does not apply in this case as Washington Mutual admits it has not been punished before for the conduct proven here. [Appellant's Br. . 83]

fact that a jury's punitive damage verdict might seem too high or too low is not grounds for disturbing such verdict on appeal. *Crenshaw*, 483 So.2d at 278.

The observations made by this Court in *Hollins* are instructive on the proper standard of review for claims of excessiveness under Mississippi law. Washington Mutual argues for application of a de novo standard on the basis of the federal constitutional approach. However, this Court has already implicitly rejected that position. That is, in *Hollins,* this Court stated:

> We . . . recognize that the U.S. Supreme Court has held that where a constitutional challenge is made to a punitive damage award on the basis of excessiveness, then and only then, are we required to conduct a de novo review of the award.

American Income Life Ins. Co. v. Hollins, 830 So.2d at 1242 (emphasis added). Thus, the proper standard of review under Mississippi statutory and common law requires that the jury's punitive damage award be confirmed absent compelling grounds for reversal. *State Farm Mut. Auto. Ins. Co. v. Grimes*, 722 So.2d 637, 643 (Miss. 1998). As this Court has noted, "once the question of what is a reasonable punitive damage award has been put to the conscience of the community, the civil jury, that decision should stand absent *compelling grounds for reversal."* [23] *Id.* (emphasis added)

4. The punitive damage awards in this case are necessary to punish Washington Mutual and deter Washington Mutual and others from similar conduct.

The possibility of being held liable for punitive damages acts primarily to punish and deter. *See Blue Cross and Blue Shield v. Maas*, 516 So.2d 495, 497 (Miss. 1987); *Reserve Life Ins. Co.*, 444 So.2d at 808 ("If an insur[er] ... could not be subjected to punitive damages it could act

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[23] Meanwhile, this Court applies a de novo review of a punitive damage award in the limited circumstance where a federal constitutional challenge has been raised. *Hollins,* 830 So.2d at 1242.

intentionally and unreasonably with veritable impunity"); *Standard Life Ins. Co. of Ind.*, 354 So.2d at 247); *accord, Snowden v. Osborne,* 269 So.2d 858, 860 (Miss.1972), *overruled on other grounds, C & C Trucking*, 612 So.2d at 1105-06 ("[Punitive damages serve as] punishment for the wrongdoing ... and as an example so that others may be deterred from the commission of similar offenses.").

In this case, the evidence supports the jury's decision that only a significant punitive damage award would suffice to punish and deter Washington Mutual from similar conduct. Washington Mutual's corporate representative, David Shelton, testified that he and his superiors were both aware of the Plaintiffs' lawsuit. [23 RT 1762:14-22]. They were also aware that Plaintiffs had requested punitive damages. [23 RT 1762:14-22]. But never once did Shelton and his supervisors discuss the lawsuit together. [23 RT 1763:9]. Likewise, Shelton was present each day of the approximately three week trial. His superiors knew he was attending the trial. [23 RT 1764:15-16]. And Shelton spoke with his supervisors by phone during the trial. [23 RT 1764:19-23]. Yet, at no time in the three weeks that Shelton was present at the trial did he discuss with his superiors the Plaintiffs' allegations, the evidence presented of Washington Mutual's wrongdoing or whether any changes should be made to Washington Mutual's business practices. [23 RT 1765:4-7]. Washington Mutual's leadership discussed only operational issues - presumably related to profit-making. [23 RT 1765:4-7].

Washington Mutual's glib treatment of the trial in this case is in accordance with the treatment given Plaintiffs' allegations prior to trial. That is, Shelton testified that he did not personally make any investigation into the Plaintiffs' allegations. [13 RT 203:26-204:3]. Indeed,

after Plaintiffs' case had been on file for approximately one year, Shelton stated in deposition testimony that he was unaware of anything Washington Mutual had done to investigate the Plaintiffs' allegations. [13 RT 279:26-29]. Similarly, Shelton testified that excessive insurance penetration rates would send a "red flag" that insurance products were being forced on customers. [14 RT 308:15-21]. Yet, despite penetration rates indicating an astounding four out of every five customers of the Greenwood Branch came away from their loan transaction with insurance products – Washington Mutual took no disciplinary action against any employee of its Greenwood office. [14 RT 308:2-4].

From the evidence presented at trial, the jury may well have determined that Washington Mutual was not inclined to change its wrongful practices unless forced to do so. The jury reasonably determined that a significant punitive damage award was necessary to deter Defendant from continuing its conduct. Accordingly, the need to render a damage award that would be heeded by Washington Mutual (and other lenders) favors a finding that the punitive damage awards were reasonable.

5. The reprehensibility of Washington Mutual's conduct favors a finding that the punitive damage awards were reasonable.

Plaintiffs agree with Washington Mutual that it is important for a punitive damage award to reflect the enormity of a defendant's offense. Yet, physical violence causing injury to another's health or safety is not the only extenuating factor favoring a substantial award of punitive damages. Washington Mutual omits from its quotations of *Gore* the following passages that impact its own liability for punitive damages:

> "Infliction of economic injury, especially when done intentionally through affirmative acts of misconduct. . . or when the target is financially vulnerable, can warrant a substantial penalty."

Gore, 517 U.S. at 576 (emphasis added). Here there is no dispute over the financially vulnerability of the Plaintiffs. [16 RT 685:21-29, 733:18-19; 7 RT 862:18-19; 767:1-2; 826:28-827:4; 852:17-21; 18 RT 964:6-7, 10-18; 19 RT 1132:10-19; 1082:7-12; 1147:16-19; 1099:9-11]. Indeed, it was the financial need of the Plaintiffs that Washington Mutual preyed upon. Washington Mutual's own evidence demonstrated that it used different (and more fair) techniques and a greater level of disclosure when dealing with educated and knowledgeable customers than were used with Plaintiffs. [21 RT 1397:22-24; 1364:5-6; 1362:2-4; 1384:18; 1394:19-24; 1386:26-1387:1; 1396:27-1397:1; 1370:26-1371:5; 1396:5-9; 1410:25-29]. In addition, Washington Mutual was able to capitalize on the fact Plaintiffs were in great financial need. For example; Jessie McClung testified that he made approximately $275 dollars per week. [17 RT 767:1-2]. He asked Washington Mutual for a $500 loan. [17 RT 773:7-9]. Washington Mutual refused to make the $500 loan saying "it would be too much payment." [17 RT 773:16-20]. Yet, Washington Mutual charged McClung $87.48 (nearly 1/3 of the loan amount) for unrequested credit life and disability insurance. [17 RT 773:24-27; 17 CT 2410].

Likewise, *Gore* noted that a defendant that engages in repeated instances of misconduct is more deserving of a punitive damage verdict than one that commits a single act of wrongdoing.

> "Repeated misconduct is more reprehensible than an individual instance of malfeasance" and, "Evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting it was unlawful would provide relevant support for an

> argument that strong medicine is required to cure the defendant's disrespect for the law. "

Gore, 517 U.S. at 577. As the record makes clear, Washington Mutual repeated the same schemes, the same acts of deception and the same frauds over and over again. Indeed, each Plaintiff testified to virtually the identical course of conduct by Washington Mutual. [See Summaries of Plaintiffs Testimony attached as Appendix1]. Moreover, Washington Mutual admitted that its conduct when imposing insurance products on customers and withhold information relating to the insurance decisions was entirely deliberate and intentional.

Finally, the *Gore* court observed that "Trickery and deceit . . are more reprehensible than negligence" and that "the flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages." *Gore,* 517 U.S. at 577. Here, Washington Mutual's entire scheme is based upon trickery and deceit. Plaintiffs were tricked into trusting and relying upon Washington Mutual. Plaintiffs were deceived about numerous material facts including: the true costs of refinancing, the secret affiliate relationships held by Washington Mutual, which allowed 96% of Plaintiffs' insurance premiums to be funneled back to the Company, the fact they were charged for insurance products and the illusory benefits of those products. Plaintiffs were also coerced into closing their loans under circumstances that insured they would not discover Washington Mutual's wrongdoing. Even worse, Washington Mutual boldly admits it did all of these things for profit without making any effort to insure its conduct was lawful - or even in compliance with its own stated policies.

Finally, Washington Mutual argues no liability for punitive damages should attach because its conduct did not involve "deliberate false statements, acts of affirmative misconduct or

concealment of evidence of improper motive." [Appellant's Br. p. 72]. As an initial point, Washington Mutual's contention is misplaced as there is no requirement under Mississippi law that conduct be affirmative in order to support a punitive damage award. But even if false statements, affirmative misconduct or concealment were required – the record supports a finding of each of these types of conduct. First, Washington Mutual made deliberate false statements. Plaintiffs Lizzie Lofton, Lou Waters and Kenneth Hill testified without contradiction that they were falsely told credit protection insurance was a requirement for obtaining their loans. [17 RT 879:24-29; 17 RT 880:22-26; 18 RT 972:5-10, 18-19; 18 RT 973:24-974:3; 18 RT 974:23-26; 19 RT 1117:2-9]. Washington Mutual also engaged in acts of affirmative misconduct. Washington Mutual employees signed as witnesses to transactions they did not, in fact, witness. [15 RT 556:19; 16 RT 715:14-15; 17 RT 742:6-10; 16 RT 632:13-14; 17 RT 751:10-12; 797:29; 817:1-4; 871:28; 879:8-9; 854:19-21; 18 RT 916:7-9; 19 RT 1093:16-19; 1167:4]. In some cases, Washington Mutual physically precluded Plaintiffs from reading the terms of the loan documents. [16 RT 666:21-25; 17 RT 741:13-24; 18 RT 937:4]. In every case, Washington Mutual affirmatively charged Plaintiffs for products Plaintiff did not request or even know they had purchased. [15 RT 552:28-553:5; 553:11-19, 24-29; 16 RT 635:24-27; 649:27-650:1; 697:19-22; 681:17-19; 708:24-709:1; 709:11-710:5; 731:29-732:2; 17 RT 774:17-23; 811:8-11; 812:17-19; 835:10-15, 835:29-836:2; 856:4-16; 864:18-865:1; 879:24-29; 18 RT 972:5-10, 18-19; 973:24-974:3; 912:25-913:1; 940:27-29; 19 RT 1089:26-28; 1090:21-22; 1101:4-6; 1153:9-11, 23-27; 1165:23-25; 1169:5-6; 1124:22-1125:5; 1139:16-18]. Third, Washington Mutual concealed its improper motives in myriad ways. Washington Mutual purported to sell insurance coverage from an independent insurer when in fact the insurance it peddled was from an affiliated company at inflated rates. Washington Mutual rushed Plaintiffs through loan

transactions under the guise of helping Plaintiffs not to miss work – but for the true purpose of preventing them Plaintiffs from noticing the improper charges. [16 RT 631:27-29; 634:21-24; 664:27-665:1;17 RT 790:28; 17 RT 742:6-9; 19 RT 1093:10-12]. In short, the evidence shows Washington Mutual has engaged in all of the conduct it inexplicably claims is lacking.

Washington Mutual's conduct was intentional, fraudulent, marked by trickery and deceit and purposefully targeted at financially vulnerable Mississippi citizens. Moreover, it was flagrant and repeated. Each of these factors support the finding that Washington Mutual's conduct was reprehensible under Mississippi and federal law.

6. The net worth of Washington Mutual favors a finding that the punitive damage awards were reasonable.

Of particular importance to the Court in *Hollins* was the net worth of the defendant corporation.[24] 230 So.2d at 1243. This Court confirmed that "the purpose of a punitive damages award is not to compensate the plaintiff for actual damages, but rather to punish and deter the defendant from further behavior, to deter similar behavior by other potential defendants, and to compensate the plaintiff for her public service in holding the insurer accountable." *Id., citing, Williams*, 566 So.2d at 1190. The Court also reiterated that:

> [The amount of the award should account for the insurer's financial worth. Juries are asked not to go so far as to bankrupt a defendant, but

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[24]One of the amicus briefs erroneously contends that net worth is not a legitimate factor of consideration and creatively argues that Plaintiffs seek to "increase" the award based upon Washington Mutual's net worth. [Consumer Credit Ins. Ass'n Br. at 14]. As implicitly recognized by this Court in *Hollins*, net worth is not a factor to *increase* a punitive damage award but rather a factor to *determine* what sort of award is required to punish and deter a defendant. *Hollins*, 230 So.2d at 1243 (Miss. 2002)(emphasis added).

> to make sure that it renders a decision that will cause the defendant to think before engaging in the same intolerable conduct. The measure of punitive damages, therefore, is not relative to actual damages, but rather, to the defendant's worth.

Id. at 1243 (emphasis added).

Dr. Glover testified that the net worth of Washington Mutual was $414,668,423.00. [23 RT 1783:13-15]. Dr. Glover further testified that she determined Washington Mutual's net worth to be $414 million dollars using the lowest and most conservative evaluation technique. [23 RT 1783:16-29]. Had Dr. Glover used the equally accepted market value approach (rather than book value) the net worth of Washington Mutual was likely to be higher. [23 RT 1783:23-29]. The fact that Plaintiff used a conservative valuation of Washington Mutual's net worth is supported by the fact that Defendant offered no evidence of its own net worth. Had Plaintiff's net worth valuation been high, Defendant surely would have introduced contrary testimony. In any case, Dr. Glover's testimony as to the net worth of Washington Mutual is undisputed.

Other courts have noted that net worth is subject to easy manipulation. *Lara v. Madag.*, 13 Cal.App.4th 1061, 1064-65 (Cal App. 2 Dist. 1993). Also undisputed is the fact that Washington Mutual drained the assets of the Company in anticipation of trial. Dr. Glover testified that Washington Mutual's financial statements indicated a net worth of $382 million in 1998. [23 RT 1780:26-1781:2]. That amount would normally be expected to grow each year as new earnings are added. [23 RT 1781:9-22]. Yet, Washington Mutual managed to shrink its net worth by plundering over 60% of the Company's (nearly $250 million) earnings through unexplained transfers to its affiliates. [23 RT 1782:23-26; 1783:3-12]. From that evidence, the jury may well have inferred

Washington Mutual's net worth was greater than what Glover was able to determine from its financial statements.

Washington Mutual also fails to show that it will be bankrupted or even hindered by the punitive damage award entered in this case. *In Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal.App.3d 381, 391 (Cal.App. 4Dist., 1984), the court affirmed a punitive damages award against a corporate car dealer for over seventeen percent (17.5%) of the dealer's net worth. Despite the fact that this fraction exceeded the net worth percentages commonly found, the court affirmed the award noting "[t]here is nothing in the financial data presented which suggests the award will unduly interfere with or hamper [the dealers] future operations." *Id.* The same analysis is proper in this case.

Courts commonly cite ten percent (10%) or less of a defendants' net worth as an indicator of reasonable. *See e.g., Storage Services v. Oosterbaan* , 214 Cal.App.3d 498, 515 (Cal.App. 1. Dist., 1989); *Weeks v. Baker & McKenzie,* 63 Cal.App.4th 1128, (Cal.App. 4th 1998). Yet, "case law has not established any specific numerical percentage of net worth as constituting the upper permissible limit for the amount of a punitive damages award. *Vallbona v. Springer*, 43 Cal.App.4th 1525, 1537 (Cal. App. 1996). While Washington Mutual would like to make ten percent an automatic sign of excessiveness, courts have expressly cautioned otherwise. Instead, each case must be decided on its own facts, considering all three factors and various indicators of wealth. *Andrew Jackson Life Ins. Co. v. Williams,* 566 So.2d 1172 (Miss. 1990). The fundamental guiding principle is that punitive damages must not be so large that they destroy the defendant. *Rufo v. Simpson,* 86 Cal.App.4th 573 (Cal.App. 2 Dist. 2001).

Each Plaintiffs' punitive damage award is less than one-percent of Washington Mutual's net worth. Collectively, the $51 million punitive damage award represents approximately 12% of Washington Mutual's net worth. As such, the individual awards are well under accepted ratios while the collective figure only slightly exceeds the commonly referenced percentage. Moreover, the minor increase is justified based on the reprehensibility of Washington Mutual's conduct, the evidence Washington Mutual attempted to manipulate its net worth, and the need for a punitive damage award that will be felt by Washington Mutual. Awards representing larger percentages of a defendant's net worth have been affirmed in other cases. *E.g., Vallbona*, 43 Cal.App.4th at 1537 (affirming punitive damage award representing 23.1 percent of defendants' net worth).

While this Court has previously affirmed a punitive damage award totaling 5.25% of the defendant's net worth; it is important to note that this Court held only that the punitive damage award was reasonable. This Court did not hold that anything higher would be excessive. *Williams,* 566 So.2d at 1191. Accordingly, when all the facts of Washington Mutual's net worth are considered, the jury's punitive damage award is not excessive and the trial courts rulings in regard thereto should be affirmed.

7. The relationship between the penalty and the harm to victims favors a finding that the punitive damage awards were reasonable.

The relationship between the harm to the Plaintiffs and the size of the punitive damage award is a factor that may be considered under Mississippi statutory law and federal law. While the ratio of compensatory damages to punitive damages may indicate that the latter award is

reasonable; there is no simple mathematical formula to validate or invalidate an award. Indeed, several circumstances have been held to justify a higher than normal ratio of compensatory to punitive damages. For example: a higher ratio is appropriate in cases where the compensatory damages are low. *Paracelsus Health Care Corp. v. Willard,* 754 So.2d 437, 445. (Miss. 1990), *cert denied,* 530 US 1215 (2002). Likewise, a higher ratio may be appropriate if a particularly egregious act produces only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect. *Id.* A higher ration may be proper if the monetary value of noneconomic harm is difficult to determine. *Id.; Grimes,* 722 So.2d at 647.

Inexplicably, Washington Mutual contends that the ratio of punitive damages to compensatory damages in this case "are well above anything the United States Supreme Court has ever approved." [Appellants' Br. p. 75]. Not so. The United States Supreme Court has implicitly approved a punitive damage award that was 150 times the amount of compensatory damages. *Paracelsus Health Care Corp.*, 754 So.2d at 445. The ratio of punitive damages to compensatory damages in this case are as low as 12 to 1 for two of the plaintiffs. Fourteen additional plaintiffs had ratios no higher than 40 to 1. Indeed, with the exception of the six plaintiffs who voluntarily accepted significant remittiturs to their compensatory damage awards,[25] only one plaintiff had a ratio exceeding 40 to 1.

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[25] The remaining six plaintiffs voluntarily accepted a remittitur of their compensatory damages to amounts ranging from $22 to $437 and punitive damage awards at 250 times their actual damages. [11 CT 1551-52].

The ratio of punitive damages to compensatory damages in this case are well within ranges previously determined to be reasonable by Mississippi Courts. In *Paracelsus,* the Mississippi Supreme Court has approved a punitive damage award that was 150 times the amount of compensatory damages. *Paracelsus Health Care Corp.*, 754 So.2d at 445. In the same case, the Court also approved a separate punitive damage award that was 43 times the amount of the compensatory damage award. *Id.* In fact, this Court affirmed an award of punitive damages that exceeded the compensatory damage award by 600 times in *Independent Life & Accident Ins. Co. v. Peavy,* 528 So.2d 1112, 1120 (Miss. 1988). That Washington Mutual ignores this precedent to declare a bright line constitutional maximum ratio of 10 to 1 simply does not make it so. [Appellants Br. p. 76].

Mississippi courts have also affirmed punitive damage awards involving ratios significantly higher than those at issue here. In the most recent case involving allegations of excessive punitive damages decided by the Mississippi Supreme Court, this Court upheld a jury verdict awarding $400 in compensatory damages and $100,000.00 in punitive damages. *Hollins,* 230 So.2d at 1242-43. In so doing, this Court held that a punitive/compensatory damage ratio as high as 250 to 1 does not violate federal constitutional protections. *Id.* In *Stewart v. Gulf Guar.*, this court reinstated a punitive damage award that was 142 times the amount of actual damages. 2002 WL 1874826. In addition, there are several other Mississippi cases affirming awards punitive damage awards significantly larger than the actual damages. In *Grimes*, the Court upheld a punitive damage award of $1,250,000 when the compensatory award was $1,900, in spite of the insurer's arguable basis for denying the claim. *Grimes*, 722 So.2d at 640(approving a ratio of 657 to 1). In

Peavy, the Court affirmed a punitive damage award of $250,000 when the compensatory damages were $412.20 because insurer's agent induced the insured to refrain from timely filing a claim. *Peavy,* 528 So.2d 1120(approving a ratio of 606 to 1). And in *Nat'l Life & Acc. Ins. Co. v. Miller,* the Court upheld a punitive award of $350,000 and actual damages of $2,500, where an agent did not disclose on the policy application information given to him by an insured. *Nat'l Life & Acc. Ins. Co. v. Miller,* 484 So.2d 329, 338 (Miss.1985)(approving a ratio of 140 to 1).

The ratio of punitive damages for each and every Plaintiff in the present case is less than that approved by the Mississippi Supreme Court in *Stuart, Hollins, Grimes, Peavy* and the United States Supreme Court in *Paracelsus* and *Peavy*. Accordingly, the ratio of damage awards favors a finding of reasonableness.

8. The sanctions imposed in comparable cases favor a finding that the punitive damage awards in this case are reasonable.

Washington Mutual reliance on a variety of monetary sanction provided by the Mississippi Legislature to govern a range of conduct – much of which is significantly less egregious than the conduct at issue in this case – is misplaced. Those statutory penalties in no way limit Washington Mutual's civil liability. Even Washington Mutual acknowledges, as it must, that the primary relevance of such penalties is to afford notice of potential liability. Here, there can be no dispute that Washington Mutual had knowledge of its own potential liability as (1) its own arbitration agreements contemplated large awards and (2) its actions in stripping the Company of its assets reveal its awareness that a meaningful damage award was likely.

Washington Mutual feigns surprise at the size of the punitive damage award and claims to lack notice that it could be held liable for its conduct in such an amount. [Appellants Br. pp. 76-78]. That is not true. Washington Mutual's own arbitration agreement contemplates substantial punitive damages saying:

> If applicable law permits the award of punitive damages and the Arbitrator authorizes such an award, the parties acknowledge and agree that any punitive damages awarded to either Lender or Borrower shall not exceed the greater of $250,000 or ten (10) times the actual damages awarded by the Arbitrator.

[4 CT 469]. The fact that Washington Mutual *limited* its damages to ten (10) times the actual damages when in excess of $250,000.00 demonstrates their expectation of an even *greater* punitive damage award. [4 CT 469]. Similarly, Washington Mutual's undisputed plundering of Company assets is an implicit admission by the Company that its understood its conduct was likely to subject it to significant liability. Having acknowledged that its liability was likely to be significant, Washington Mutual cannot now claim it had no notice that its conduct could subject it to a meaningful financial penalty.

Furthermore, the sanctions cited by Washington Mutual are intended to cover a range of conduct much less predatory and injurious than Defendant's actions and omissions here. When considering conduct similar to the conduct in this case, the liability has been much greater. Household Finance recently agreed to settle claims against it for deceptive lending practices for $484 million dollars. *Granholm v. Household International, Inc.*, Consent Judgment, No. 02-1969-CH (Michigan Circuit Court, 30th Judicial District, December 16, 2002). Citigroup Inc. agreed to repay customers $215 million to settle federal charges that First Family and its parent, the Associates,

manipulated people into buying credit insurance and other products. In the face of such high-profile FTC investigations and multi-million dollar settlements of cases involving similar conduct, it is clear that predatory lending practices akin to those of Washington Mutual are viewed as unacceptable

Finally, the existence of other penalties may reveal whether lesser sanctions could achieve the goal of deterring the defendant's wrongful conduct. Here, the evidence does not support a finding that lesser penalties could have deterred Washington Mutual's wrongful conduct. As previously discussed, Washington Mutual knew how to do what is right. Shelton admitted as much. Yet, it failed to investigate what it admits were "red flags" of wrongful conduct in its Greenwood Branch. Washington Mutual did not investigate Plaintiffs' allegations prior to trial, and Washington Mutual did not even inquire about (or report on) the proceedings in the trial of this matter. [See Argument at III. F]. There is no basis for concluding a lesser penalty might have caused Washington Mutual to take heed, where violations of its own policies, multiple claims filed against it, and even a trial seeking punitive damages could not divert the company's attention from the profits available through deceptive conduct..

I. The Trial Court Fully and Fairly Charged the Jury.

1. Washington Mutual's objections are untimely.

Washington Mutual failed to preserve for appeal the challenges to the jury instructions it now seeks to raise. Mississippi Rule of Civil Procedure 51(b)(3) provides that all objections to jury instructions must be stated into the record and note distinctly the matter to which objection is made and the grounds for the objection. *See* MISS.R.CIV.P. 51(b)(3)(West 2003). Likewise, under the Uniform Court Practice Rules, attorneys must dictate into the record their

specific objections to the proposed instructions, stating the grounds for each objection. MISS.UNIF.CIR.CT.RULES, RULE 3.07. Accordingly, objections to instructions cannot be raised for the first time in an appellate court. *Shelton v. State*, 445 So.2d 844, 846 (Miss. 1984).

At trial, Judge Lewis thoroughly reviewed the proposed jury instructions and modified, granted and/or denied instructions submitted by both Washington Mutual and Plaintiffs. [11 RT 1536-1613]. Because Washington Mutual did not object generally or specifically that the instructions granted included improper comments upon the weight of the evidence or material conflicts that would confuse the jury (the "two separate reasons" delineated on appeal), Washington Mutual's present assertion that the trial court committed prejudicial procedural errors is untimely.[26] [11 RT 1536-1613].

2. This Court should afford great weight to the instructions below, reviewing the challenged instructions in light of all other instructions given.

Even assuming that Washington Mutual timely preserved its point for appeal, (which it did not) this Court should summarily reject Washington Mutual's dissection of the jury instructions as an attempt to create error in contravention to Mississippi law. The jury instructions given below, as well as the jury verdict in favor of Plaintiffs, are afforded great weight under Mississippi law. *Fielder v. Magnolia Beverage Co.*, 757 So.2d 925, 928-29 (Miss. 1999). As this Court has noted "a party has the right to embody his theory of the case in his instruction if there is testimony to support it" and "if made conditional upon the jury's finding that such facts existed." *Murphy v. Burney*, 27

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[26] It is noteworthy that Washington Mutual's briefing relative to the jury instructions contains not one reference to the charge conferences held by Judge Lewis, as the record confirms that the objections now raised by Washington Mutual were not timely raised before Judge Lewis. [11 RT 1536-1613].

So.2d 773, 774 (Miss. 1946). Finally, in reviewing the propriety of the jury instructions given at trial, this Court is to consider the instructions challenged by Washington Mutual in light of *all* other instructions given. *See, e.g., Reese v. Summers,* 792 So.2d at 996.

In the case at hand, both Plaintiffs and Washington Mutual submitted jury instructions embodying their respective theories of the case. Although the instructions as a whole fairly and adequately apprised the jury of the applicable rules of law, Washington Mutual now seeks to isolate and challenge specific instructions upon the basis that such instructions improperly commented upon the weight of the evidence.

a. Upon reviewing instructions as a whole, this Court has rejected similar challenges to specific instructions.

This Court recently rejected a similar challenge to jury instructions in *Rials v. Duckworth*, 822 So.2d 283 (Miss. 2002). In *Rials*, the plaintiff contended that the trial court improperly suggested to the jury that any negligence by a truck driver who had settled with the plaintiff prior to trial was the "sole proximate cause of the accident" as opposed to a contributing or concurring cause. 822 So. 2d at 285. In response, the defendants emphasized the qualifying language in the instructions: "[the defendants] specifically note that both D-8 and D-10 instruct the jurors that *if* the jury found Maggio [the settling truck driver] was negligent *and* that Maggio's negligence was the *sole proximate cause* of the accident, then their verdict must be for the [remaining defendants]." *Id.* This Court found no error in the instructions and instead determined that the instructions, whether read alone *or* in light of other instructions, were not confusing but rather properly instructed the jury. *Id.*

Likewise, in *Sumrall v. Mississippi Power Co.*, 693 So.2d 359, 364 (Miss. 1997), the plaintiff argued that one instruction "amounted to a peremptory instruction . . . effectively removing from the jury's consideration all theories of liability under which the jury could find for Sumrall [the plaintiff]." On review, this Court recognized that "when read alone this instruction *might* seem to mandate a jury verdict in favor of Mississippi Power, [but] the trial court also granted Plaintiff's Instructions P-2 to P-4 which set forth the rule's corollary . . ." *Id.* (emphasis added).

b. Plaintiffs' instructions in this action are not analogous to the instructions in *Baymon*.

Not only does Washington Mutual seek to mislead this Court in stating that Plaintiffs' instructions "follow *exactly* the form this Court found to be improper in *Baymon*," but Washington Mutual fails to note the *differences* between the instructions in *Baymon* and the instant action.[27] Significantly, the instructions in the instant action (1) separate the factual allegations from the jury's consideration of liability, (2) address the preponderance of the evidence standard and (3) contemplate that the jury may *not* find any breach or injury. In *Baymon*, the Court rejected the jury instructions upon a finding that the instructions "failed to convey to the jury its duty to determine the facts and drove home the impression that the court believed all of Baymon's allegations to be true."

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[27] For example, Appellant's Opening Br. at 87-89 reproduces the jury instruction on good faith and fair dealing in *Baymon* with the jury instruction in the instant action, but ignores the distinction between the two. In continuation with the statement of the law and a rendition of the factual allegations, the instruction in *Baymon* reads " . . . or offering other available options, and if you *further* find that by such acts GMA did not act in good faith and deal fairly with Plaintiff, you must return a verdict in favor of Plaintiff" (emphasis added). In contrast, Plaintiffs' instruction recites the law and the factual allegations and *then* provides as follows: "*If* you find *by a preponderance of the evidence* that by such acts Washington Mutual Finance Group, LLC, formerly known as City Finance Company, did not act in good faith and fair dealing with a plaintiff *and* such acts *caused* injury *if any*, you must return a verdict in favor of that plaintiff" (emphasis added).

732 So.2d at 274. Further, as more fully explained below, Washington Mutual's contention is outlandish in light of the charge discussions and the other instructions given, which negate any argument that Judge Lewis removed consideration of the evidence from the jury.

c. Plaintiffs' instructions in this action were proper, without proper objection, and approved by Washington Mutual.

The record is void of any objection by Washington Mutual that the jury instructions granted by Judge Lewis reflected an improper comment upon the weight of the evidence. In fact, Judge Lewis carefully monitored the charge discussions and specifically modified Plaintiffs' proposed instructions to include "conditional" or "qualifying" language: "THE COURT: The problem I have with P-10 is that it doesn't make--although it states the basis for their findings should be the allegations made by the plaintiff, it doesn't make it conditional. So we need to add that language in there . . ." [11 CT 1601:19-25]. The court even questioned Washington Mutual's counsel whether "Defense had something on that?" and Washington Mutual's counsel responded "*Your Honor just covered it.* It was the causation." [22 RT 1603:27-1604:13] (emphasis added).

Judge Lewis required the same "conditional" language in the remainder of Plaintiffs' cause of action instructions with the approval of Washington Mutual. [22 RT 1604:26-1605:22; 1606:20-22; 1606:23-1607:12]. Excerpts from other instructions given by Judge Lewis further illustrate the absence of any judicial opinion regarding the merits of the case and the jury's role in assessing the evidence, with such language as "you must decide what the facts are in this case," "you should not think that because of the way I ruled on any of these objections that the court has any opinion about how this case should be decided," "the fact that Defendant is a corporation should not

enter into your deliberations in any way whatsoever *either as to the question of liability or* as to the question of damages," "each plaintiff bears the burden of proving," "if you find . . . if you do not find," and "the Court does not indicate in any way that it believes that one or more plaintiffs should, or should not, win this case." [9 CT 1274,1276, 1293-1294, 1297-1305, 1308, (emphasis added)].

3. The instructions are not in irreconcilable conflict.

Again seeking to isolate specific instructions, Washington Mutual asserts that the instructions given below "conflicted in numerous material respects." [Appellant's Br. at 90-91]. In support of its contention, Washington Mutual cites various cases noting the general principle that instructions should not mislead or confuse the jury, but none of the cases are factually analogous to the instant action.[28] In this case, both Plaintiffs and Washington Mutual offered jury instructions presenting their theories of the case. Although it would be a rarity for parties to agree exactly upon the form and substance of instructions, Washington Mutual's second argument suggests that Plaintiffs' instructions are erroneous and/or conflicting because they do not present the theory of the case exactly like Washington Mutual's instructions. As this Court well knows, the standard is

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[28] *See Griffin v. Fletcher*, 362 So.2d 594, 595-96 (Miss. 1978) (the trial court granted a peremptory instruction on liability to the plaintiff at the conclusion of all the evidence, but then submitted the issue of liability to the jury); *Elam v. Pilcher*, 552 So.2d 814, 816-817 (Miss. 1989) (instructing the jury that the plaintiffs were required to prove that the defendant was negligent by a preponderance of the evidence after the court had determined that the defendant was negligent as a matter of law); *Moak v. Black*, 92 So.2d 845, 851 (Miss. 1957) (imposing an adult standard of care upon a minor child in the absence of any proof removing the presumption that infants are incapable of exercising discretion); *Mississippi State Highway Com'n v. Thomas*, 202 So.2d 925, 927 (Miss. 1967) (the trial court granted an instruction proposed by the plaintiffs that provided for special damages in the absence of any contention or proof regarding special damages); *Bridges v. Crapps*, 58 So.2d 364, 366-367 (Miss. 1952) (the term "immediately prior to the collision" imposed a duty "humanly impossible" and conflicted with another instruction "within 30 or 35 feet from his truck").

whether the jury was fairly charged as to the applicable law when all the instructions are considered together, *not* whether there are arguable inaccuracies in one particular instruction. *See, e.g., Lamar Hardwood Co. v. Case*, 107 So. 868, 870 (Miss.1926) (stating that "if the instructions taken as a whole correctly announce the law applicable to the case, we will not reverse the judgment because of an imperfect single instruction"). Here, the differences in the instructions given on behalf of both parties are not significant and certainly do not demonstrate irreconcilable conflict. Judge Lewis granted instructions proposed by both parties. The instructions fairly and fully charged the jury regarding its duty to consider the evidence and the applicable rules of law. Counsel for both Plaintiffs and Washington Mutual were afforded an opportunity to argue the instructions and/or place emphasis upon various elements. There is no indication that the jury failed to fully understand the issues submitted to them. Washington Mutual's *post facto* aim to create error within the charge is nothing more than an unsupported effort to reject the jury's verdict in favor of Plaintiffs.

J. The Trial Court Properly Admitted Dr. Glover's Expert Testimony.

1. Judge Lewis exercised her discretion not to exclude evidence.

Judge Lewis enjoyed "wide" and "considerable" discretion in allowing for the admission of Dr. Glover's supplemental expert testimony regarding Washington Mutual's ultimate net worth. *Dawkins v. Redd Pest Control Co.*, 607 So.2d 1232, 1235 (Miss. 1992) (noting the abuse of discretion standard for discovery orders). The seasonableness of discovery supplementation "must be determined on a case by case basis looking at the totality of the circumstances surrounding the supplemental information the offering party seeks to admit." *Blanton v. Board of Supervisors of Copiah County*, 720 So.2d 190, 196 (Miss. 1998).

In the instant action, Judge Lewis followed this Court's guidelines in determining that Washington Mutual would not suffer surprise or prejudice from the admission of Dr. Glover's testimony, as Dr. Glover had simply incorporated new information from Washington Mutual in arriving at her ultimate net worth figure. [24 RT 1796:8-27].

K. Washington Mutual Was Fully Aware That Dr. Glover Intended To Testify About Net Worth.

Washington Mutual's contention that "[The *first* time plaintiffs disclosed that Ms. Glover would render an opinion regarding City's net worth . . . was in response to City's oral motion, *at the beginning of the punitive damages phase of the trial*" is plainly unsupported by the record.[29] [Appellant's Br. at 96 (emphasis added]. And, unlike the authority heavily relied upon by Washington Mutual or other cases finding error in the admission of testimony,[30] the Company can

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[29] In a footnote, Washington Mutual admits that Plaintiffs provided Dr. Glover's supplemental opinion prior to trial but suggests that Plaintiffs submitted their exhibits "carefully constructed to conceal" Dr. Glover's new opinion. [*See* Appellant's Br. at 96, n. 99]. Washington Mutual denies that Plaintiffs had previously produced Exhibit 160 to Washington Mutual. [*See* Appellant's Br. at 96]. Aside from the fact that the pre-trial materials demonstrate Washington Mutual's receipt of Dr. Glover's supplemental report, any disputed fact regarding discovery should be weighed in favor of Plaintiffs. *See Dawkins*, 607 So.2d at 1236.

[30] In *Smith v. Ford Motor Co.*, 626 F.2d 784, 796-97 (10th Cir. 1980), *cert denied,* 450 U.S. 918 (1981), a medical expert for the plaintiff was allowed to testify with respect to proximate causation of an automobile injury when the expert had only been identified shortly before trial as testifying only as to the medical *treatment* and *prognosis* of the plaintiff. This case does not involve Plaintiffs' failure to timely identify Dr. Glover or their failure to provide the anticipated subject matter of Dr. Glover's expert testimony. *See, e.g., Jones v. Hatchett*, 504 So.2d 198 (Miss. 1978) (finding error in the trial court's allowance of an expert doctor's testimony when the doctor's name had been revealed four days before trial without any information provided on the subject mater of his testimony); *Harris v. General Host Corp.*, 503 So.2d 795 (Miss. 1986) (finding error in the trial court's allowance of an expert doctor's testimony as a rebuttal witness when his name had not previously been identified).

establish neither surprise nor prejudice by Dr. Glover's testimony. In fact, Washington Mutual concedes that it was on notice from at least May 1, 2000 of Dr. Glover's identity and her area of testimony, including punitive damages. [*See* 4 CT 482-486; 10 CT 1409:23-25; 1410:1-2; Appellant's Br. at 94].

Plaintiffs provided Washington Mutual with a report prepared by Dr. Glover entitled "Net Worth Analysis" and made Dr. Glover available for deposition, wherein she offered net worth testimony and explained the various methods that may be employed to analyze net worth. [10 CT 1409-1410; 1436-1437:2-8; 1440:11-22; 1441:5-9; 1467-1470]. At her deposition, however, Dr. Glover qualified her opinion as being based upon her understanding of the financial information she had received at that point. [10 CT 1421:18-25; 1424:10-12; 1427:13-15; 1433:21-23]. Following her deposition, Dr. Glover made only slight modifications to her analysis based upon the information she received from Washington Mutual, which enabled her to refine her opinion regarding Washington Mutual's net worth. Nevertheless, Washington Mutual attempts to elevate form over substance by suggesting that Dr. Glover's testimony should have been limited to the literal content of her deposition testimony and/or her initial report and that they were "unaware" that Dr. Glover intended to render an opinion regarding Washington Mutual's net worth.

At a pre-trial hearing on May 23, 2001, the following exchange occurred between counsel for the parties regarding the subject of net worth testimony:

> MR. DICKINSON: . . . We think it's very important that the record be absolutely clear with respect to what evidence the jury would be allowed to look at with respect to net worth, and *we have presented defendants with the net worth of City Finance Company, and we have presented them with the net worth of the entity into which it merged.*

* * *

> MR. GOSS: . . . We will not speak to the net worth of any company *other* that [*sic*] City Finance Company of Mississippi, Inc., or Washington Mutual Finance Group---).
>
> * * *
>
> MR. DICKINSON: *That's acceptable.*

[12 RT 116:7-29, 117:1-24 (emphasis added]. On May 25, 2001, Washington Mutual submitted its objections to Plaintiffs' exhibits, including its objection to Plaintiffs' Exhibit 160, which included a financial analysis of Washington Mutual. [8 CT 1062-1070]. Washington Mutual objected to Plaintiffs' Exhibit 150 (a letter from defense counsel regarding net worth) on the basis that it was mediation material and to Plaintiffs' Exhibit 160 on the basis that it was "[n]ot admissible as an exhibit" and "[s]hould be testimony of witness." [8 CT 1069-1070]. The issue of net worth testimony was again addressed in the pretrial order of May 29, 2001. [9 CT 1195-1233]. Judge Lewis noted Washington Mutual's objection to the following (among others): (1) Plaintiffs' Exhibit 150: "Letter from Johnny Nelms regarding net worth of Washington Mutual. Defendant objects to any such document as incompetent, irrelevant, immaterial, prejudicial and hearsay"; (2) Plaintiffs' Exhibit 157: "Deposition of Glenda Glover: Defendant objects to any such document as incompetent, irrelevant, immaterial, prejudicial and hearsay"; and (3) Plaintiffs' Exhibit 160: "*Reports* of Glenda Glover: Defendant objects to any such document as incompetent, irrelevant, immaterial, prejudicial and hearsay." [9 CT 1221-1222 (emphasis added)]. The trial court also noted Plaintiffs' objection to Washington Mutual's Exhibit 28: "Financial Statement of City Finance Company of Mississippi as of June 30, 2002. (punitive damage exhibit only). Plaintiffs object to this document to the extent it is inconsistent with the financial statement produced by Johnny Nelms for

Defendant in August, 2000." [9 CT 1223]. Nowhere did Washington Mutual object that Dr. Glover's proposed testimony regarding net worth was untimely or a surprise.

During argument *before* the punitive damages phase of the trial, Plaintiffs' counsel again reiterated their intention with respect to Dr. Glover's net worth testimony: "We intend to have Dr. Glover testify as to the net worth of Washington Mutual Finance Group, LLC, the defendant in this case . . .We are going to put in what we believe is the net worth of the main defendant in this case, Washington Mutual Finance Group, LLC." [23 RT 1746-1748]. Despite prior pretrial discussions and the exchange of pretrial exhibits (including Plaintiffs' Exhibit 160), Washington Mutual's counsel claimed that he was unaware that Dr. Glover intended to give an opinion regarding Washington Mutual and he sought the exclusion of her testimony: [23 RT 1749: 7-27]. In response, Washington Mutual's counsel showed Judge Lewis Plaintiffs' Exhibit 160 and indicated that he was "at a loss what Mr. Dickinson is even talking about." [23 RT 1750: 22-26]. Judge Lewis rejected Washington Mutual's request to exclude Dr. Glover's testimony and instead indicated that "the things that the defense raised is something that can be taken up in cross-examination of Ms. Glover." [23 RT 1793: 14-29].

At trial, Dr. Glover testified that she based her net worth evaluation upon a review of financial statements, the balance sheet and the income statement. [23 RT 1779]. She admitted that her opinion was based upon assumptions regarding the payment to the affiliate, information contained within the documents provided by Washington Mutual: "So those numbers were not adjusted and gone to this affiliate, then the revised net worth *would have been* $414, 668, 423, and that's my opinion of what their net worth is at this point . . . [t]his number is based on the book value

of the company . . . the most conservative value possible of the company." [23 RT 1783:17-29; 1784: 1-7; 1785:9-16].

L. Washington Mutual's Trial Conduct Further Establishes Its Claim Of Surprise and Prejudice By Dr. Glover's Testimony Is Disingenuous.

Washington Mutual failed to make a timely objection to Dr. Glover's testimony orto request a practical remedy to address its alleged surprise and prejudice. *Nichols, v. Tubb*, 609 So.2d 377, 386-87 (Miss. 1992), cert denied, 510 U.S. 814 (1993) ("[a]ny insufficiency in pretrial discovery was clearly and manifestly waived by the Nichols"); *Gupta*, 2002 WL 31619063 at *10-11 (noting that "[The supplementation which AmSouth claims to be untimely and prejudicial appears, on AmSouth's own account, to differ only in changing the report to fit the 15.25 acre figure that Gupta's counsel had lately realized was accurate" and emphasizing that AmSouth rejected any practical remedies for its alleged unfair surprise). Washington Mutual's conduct in this action similarly demonstrates a lack of surprise and/or prejudice.

Nowhere in its objections to Plaintiffs' Exhibit 160 did Washington Mutual claim unfair surprise nor did Washington Mutual request a continuance before the punitive damages phase or even a recess during Dr. Glover's testimony. Washington Mutual's cross-examination of Dr. Glover was perfunctory, as Washington Mutual's counsel made little (if any) effort to ascertain the details or methodology of Dr. Glover's allegedly new testimony (despite Judge Lewis' prior admonition that any objection to Dr. Glover's testimony could be addressed in cross-examination). [23 RT 1786-1787].

Finally, at the same time that Washington Mutual's own counsel advised the jurors to listen carefully to the evidence regarding net worth ("I want you to pay close attention to what the net worth of this company is, what City Finance is, because that's important"), Washington Mutual declined to put any testimony on, rebuttal or otherwise,[31] regarding its net worth. [23 RT 1761:25-27]. Washington Mutual now complains that Dr. Glover's net worth testimony was prejudicial because "it was the only evidence offered on an issue." [Appellant's Br. at 98].

From Plaintiffs' designation of expert witnesses to Dr. Glover's deposition to Dr. Glover's reports to pre-trial submissions and conferences to trial, Washington Mutual was keenly aware of net worth as an issue in this action. Surely it is not insignificant that Washington Mutual took no measures as an adversary party to assert its position regarding net worth other than object to Dr. Glover's testimony Judge Lewis was in the best position to make a finding regarding the circumstances of this case and she aptly determined to allow the admission of Dr. Glover's testimony. Her decision should not be disturbed by this Court.

CONCLUSION

For the reasons stated herein, Plaintiffs/Appellees respectfully request that the judgment of the trial court be in all ways affirmed.

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[31] In fact, when Plaintiffs' counsel questioned Washington Mutual's corporate representative during the punitive damages phase of the trial regarding Washington Mutual's corporate structure, net worth and financial statements (especially the note payable "to affiliate"), the representative could answer none of Plaintiffs' inquiries: [23 RT 1767: 18-29; 1769: 24-29; 1770: 1-9; 1771: 10-29].

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered to all counsel of record on the 10th day of April, 2003, as follows:

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Jan T. Chilton Severson & Werson One Embarcadero Center, 26th Floor San Francisco, CA 94111-3600	☑ Via Certified Mail, return Receipt Requested ☐ Via Fax ☐ Via First-Class, U.S. Mail ☐ Via Overnight Delivery ☐ Via Hand-Delivery
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Richard A. Freese

CASE NO. 2001-TS-01911

IN THE SUPREME COURT OF MISSISSIPPI

WASHINGTON MUTUAL FINANCE GROUP, LLC
Appellant – Defendant,

vs.

GRETA BLACKMON, LOUISE BLUE, ET AL.
Appellees – Plaintiffs.

On Appeal from a Judgment
of the Circuit Court of Holmes County, Mississippi (No. 98-0026),
The Honorable Jannie Lewis, Circuit Judge

APPENDIX TO BRIEF OF APPELLEES

Summary of Testimony from Plaintiff Greta Blackmon

Plaintiff's Name:	Greta Blackmon
Age, education, and income:	Ms. Blackmon is 34 years old. [16 RT 676:28-29]. She is a high school graduate. [16 RT 677:26-28]. Ms. Blackmon earns $800 to $1,000 each month. [16 RT 685:21-29].
Reason for taking out a loan:	Ms. Blackmon took out a loan from Washington Mutual to help her children and to pay for her bills. [16 RT 690:19-23].
Washington Mutual loans and insurance charges:	(1) In 1994, Ms. Blackmon took out a loan with Washington Mutual for $1,325.84. She was charged $71.19 for credit life insurance; $155.84 for disability insurance and $138.75 for property insurance. [12 CT 1709]. (2) In 1996, Ms. Blackmon took out a loan with Washington Mutual for $2,059.24. She was charged $98.50 for credit life insurance; $188.78 for disability insurance and $135.90 for property insurance. [12 CT 1706].
Facts of the loan transaction:	Ms. Blackmon trusted Washington Mutual. [16 RT 688:12-13; 699:8-11]. Her loan papers were drawn up in advance. [16 RT 681:6-10]. She had no discussions with Washington Mutual regarding the insurance that was included in her loans. [16 RT 681:17-19; 697:19-22]. Ms. Blackmon states that only one Washington Mutual employee was present in the room at the time of the loan closings. [16 RT 685:1-4]. Both the 1994 and 1996 loan documents were signed by two witnesses. [12 CT 1706, 1709].
Other preexisting insurance:	Blackmon already had insurance with her employer. [16 RT 684:9-11]. She could not afford the insurance. [16 RT 685:12-17].
Effect of Washington Mutual's conduct:	Blackmon now feels duped by the Company she had trusted. She feels distrust. She stayed awake at night worrying about where to get money to provide for her children. [16 RT 687:7-9, 16-19].
Damages:	The jury awarded $85,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352].

Summary of Testimony from Plaintiff Louise Blue

Plaintiff's Name:	Louise Blue
Age, Education and Income:	Ms. Blue is 38 years old. [19 RT 1081:3]. She is a high school graduate. [19 RT 1084:4-5]. She works at Freshwater Farms earning $800 to $1,200 per month. [19 RT 1082:2-12].
Reason for taking out a loan	Unspecified.
Washington Mutual loans and insurance charges:	(1) Ms. Blue received and cashed a "check-in-the-mail" from City Finance. [19 RT 1086:24-28]. (2) Ms. Blue took out a loan from Washington Mutual for $1230.56 in 1996. In connection with that loan, Ms. Blue was charged $52.70 for a policy of credit life insurance. [14 CT 2022; 1 CT 52].
Facts of the loan transaction:	Ms. Blue dealt with Washington Mutual's Greenwood office. [14 CT 2022; 1 CT 52]. The papers were ready to be signed when Ms. Blue arrived at the office. [19 RT 1088:7-10]. Ms. Blue did not know that she was being charged insurance on her loans because no discussions were made concerning this matter. [19 RT 1089:25-28; 1090:21-22]. The process of taking out the loan took only one or 2 or 3 minutes. [19 RT 1093:18-19].
Other preexisting insurance	Ms. Blue had life insurance at the time. [19 RT 1089:29-1090:2]. If given the option, Ms. Blue would not have taken the insurance. [19 RT 1090:13-15].
Effects of Washington Mutual's conduct:	Ms. Blue feels bad about what was done to her. [19 RT 1091:25-26].
Damages:	The jury awarded $80,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352].

Summary of Testimony from Plaintiff Glenda Chambers

Plaintiff's Name:	Glenda Chambers
Age, education, income:	Ms. Chambers is 39 years old. [16 RT 620:25-26]. She is a high school graduate. [16 RT 621:11-14]. She made $7,000 to $12,000 per year at the time she took out the loans. [16 RT 630:14-21].
Reason for taking out a loan:	Ms. Chambers took out a loan for her daughter's graduation. [16 RT 628:15-20].
Washington Mutual loans and insurance charges:	(1) Ms. Chambers received and cashed checks in the mail from Washington Mutual in 1991 and 1995. [1 CT 60; 16 RT 628:20; 636:8-16]. (2) In 1997, Ms. Chambers took out refinance loan with Washington Mutual for $1,231.50. She was charged $52.70 for credit life insurance. [15 CT 2060].
Facts of the loan transaction:	Washington Mutual told Chambers that it was helping her out. [16 RT 653:9-15]. Ms. Chambers trusted that the Company was helping with her finances. [16 RT 633:8-9; 642:5-6]. When she went to the Washington Mutual office her loan papers were already drawn up. [16 RT 631:13-15; 632:19-20; 651:7-8]. There was no discussions regarding insurance. [16 RT 635:24-27; 649:27-29-650:1; 650:8-10]. Ms. Chambers saw the insurance on the papers, but assumed it was required since no discussions were held about insurance. [16 RT 653:18-24; 673:7-10]. Only one person was present in the room during the loan transaction. [16 RT 648:21-649:1]. But, the 1997 loan document was signed by two witnesses. [15 CT 2060]. The whole process of took about 10 to 15 minutes. [16 RT 632:11-14].
Other preexisting insurance:	Ms. Chambers has fire, life and home insurance. [16 RT 623:8-15; 624:2-3; 635:19-23; 650:4; 671:16-22].
Effect of Washington Mutual's conduct:	Ms. Chambers feels "terrible" and "taken advantage of"by Washington Mutual She needed the money for other things. [16 RT 653:12-654:13]
Damages:	The jury awarded $160,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352].

Summary of Testimony from Plaintiff Earnest Claiborne

Plaintiff's Name:	Earnest Claiborne
Age, education, income:	Mr. Claiborne is 32 years old. [16 RT 701:26-27]. At the time of the loans, Claiborne worked for the Mississippi Department of Corrections making $14,000 per year. [16 RT 704:19-20]. Mr. Claiborne has a degree in biblical studies from LOGO's Christian College. [16 RT 702:3-9].
Reason for taking out a loan:	Unspecified
Washington Mutual loans and insurance charges:	(1) In 1991, Claiborne borrowed $461.46 from Washington Mutual. [15 CT 2087]. He was charged $13.06 for credit life insurance, $31.01 for disability insurance and $48.96 for property insurance. [15 CT 2087]. (2) Claiborne may have renewed the loan several times. [16 RT 705:20-707:1].
Facts of the loan transaction:	Mr. Claiborne dealt with Washington Mutual's Greenwood office. [15 CT 2087]. Mr. Claiborne had trust in the company. [16 RT 710:15-18; 712:6-10]. His loan papers were pre-prepared and ready to be signed when he arrived at the office. [16 RT 707:20-22]. Mr. Claiborne did not know what type of insurance he had purchased. There were no discussions about insurance. [16 RT 708:24-709:1; 710:1-5]. Claiborne claims only one witness was present at the loan closing. [16 RT 711:27-29]. Two witnesses signed the loan papers. [15 CT 2087]. The whole process took about 15 minutes. [16 RT 715:14-15].
Other preexisting insurance:	Mr. Claiborne already had fire and life insurance. [16 RT 709:9-18]. He is upset that the option not to purchase insurance was not given to him. [16 RT 713:10-15].
Effect of Washington Mutual's conduct:	Mr. Claiborne feels anger as a result of what Washington Mutual did to him. He feels betrayed and taken advantage of by Washington Mutual. [16 RT 712:16-715:13].
Damages:	The jury awarded $75,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352].

Summary of Testimony from Plaintiff Annie Clark

Plaintiff's Name:	Annie Clark
Age, education, and income:	Ms. Clark is 48 years old. [19 RT 1144:27-29]. She makes approximately $800 to $900 per month. [19 RT 1145:27-1146:1] [19 RT 1147:16-19].
Reason for taking out a loan:	Ms. Clark purchased an automobile. [19 RT 1149:7-12].
Washington Mutual loans and insurance charges:	(1) Ms. Clark's auto loan was assigned to Washington Mutual. (2) Ms. Clark took out a refinance loan from Washington Mutual for $511.42 in 1992. In connection with that loan, Ms. Clark was charged $44.07 for a policy of credit life and disability insurance. [15 CT 2094]. (3) In 1993, Ms. Clark took out a refinance loan with Washington Mutual for $665.12. She was charged $83.03 for credit life and disability insurance and $31.25 for property insurance. [15 CT 2097].
Facts of the loan transaction:	Ms. Clark had no conversations regarding insurance. [19 RT 1153:9-11, 23-27]. Ms. Clark had a lot of faith and trust in the company. [19 RT 1150:14-15; 1151:18-19].
Other preexisting insurance:	Ms. Clark testified she could not afford the insurance she was charged for. [19 RT 1153:24-25].
Effect of Washington Mutual's conduct:	Ms. Clark felt angry and "real bad." [19 RT 1150:19-1151:6].
Damages:	The jury awarded $100,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352].

Summary of Testimony from Plaintiff Willie Earl Conway

Plaintiff's Name:	Willie Earl Conway
Age, education, income	Mr. Conway is 54 years old. [15 RT 538:19-21]. He dropped out of school in the 3rd grade. [15 RT 539:19-25]. Mr. Conway works as a shop foreman earning $5.65 per hour, which is approximately $18,000 per year. [15 RT 541:17-20]. Mr. Conway can not read. [15 RT 540:27-541:2; 555:1-6; 559:24-28].
Reason for taking out a loan:	Mr. Conway took out loans to buy a car, pay for mechanical work, and pay bills. [15 RT 549:10-13; 552:7-8; 557:16-17].
Washington Mutual loans and insurance charges:	(1) Mr. Conway took out a loan from Washington Mutual for $514.44 in 1989. In connection with that loan, Mr. Conway was charged $5.38 for a policy of credit life insurance. [15 RT 551:29-552:1; 552:9-26]. (2) Mr. Conway borrowed $5.06 in 1990. [15 RT 557:6-28]. (3) Mr. Conway received and cashed a "check-in-the-mail" from Washington Mutual in 1992. [15 RT 562:14-563:3]. (4) In 1996, Mr. Conway took out a loan with Washington Mutual for $1,507.85. He was charged $75.17 for credit life insurance; $144.07 for disability insurance and $135.00 for property insurance. [1 CT 71].
Facts of the loan transaction:	Mr. Conway did business with the Washington Mutual office in Greenwood. [15 RT 552:1-2; 565:14;569:7-9]. Mr. Conway had no discussions regarding insurance with Washington Mutual. [15 RT 552:28-553:5; 553:11-19; 553:24-554:16; 555:7-15; 559:2-12, 21-23]. He did not say he wanted to purchase insurance. He was not asked if he had insurance. He did not provided valuations for his collateral. Mr. Conway claims that only one witness was present when he was signing the loan documents. [15 RT 551:19-21; 554:24-29]. Two employees signed as witnesses to the loan in 1996. [1 CT 71]. The process of taking out a loan took approximately 30 minutes. [15 RT 556:16-19; 561:5-6].
Other preexisting	Mr. Conway had life insurance. [15 RT 571:18-24; 572:14-

Plaintiff's Name:	Willie Earl Conway
insurance:	26].
Effect of Washington Mutual's conduct:	Mr. Conway feels "ripped off" and cheated. Washington Mutual's conduct has made him feel bad. He needed the money for other purposes. He has high blood pressure, which causes dizziness and headaches. [15 RT 548:7-23].
Damages:	The jury awarded $150,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352].

Summary of Testimony from Plaintiff Tina Cross

Plaintiff's Name:	Tina Cross
Age, education, and income:	Ms. Cross is 33 years old. [17 RT 860:13-14]. She has a degree in business administration. [17 RT 860:19-22]. Back in 1995, Ms. Cross was earning $13,779 per year. [17 RT 862:18-19].
Reason for taking out a loan:	Ms. Cross purchased some furniture. [17 RT 863:4-5].
Washington Mutual loans and insurance charges:	(1) In 1995, Ms. Cross took out a loan with Unclaimed Freight for $1,253.00. She was charged $24.47 for credit life insurance; $45.89 for disability insurance and $45.84 for property insurance. [15 CT 2120]. (2) Ms. Cross received and cashed checks-in-the-mail.
Facts of the loan transaction:	Ms. Cross had no idea that she was purchasing insurance when she was taking out loans. There was no discussion of insurance. [17 RT 864:18-23; 864:25-865:1; 868:4-6]. Ms. Cross put her trust in the company. [17 RT 868:12-18].
Other preexisting insurance:	Ms. Cross already had several different insurance policies. [17 RT 861:29-8623; 862:6-11; 864:25-29]. Ms. Cross would not have purchased insurance if she knew about it. [17 RT 864:25-865:1].
Effect of Washington Mutual's conduct:	Ms. Cross felt mental anguish and disappointment. [17 RT 867:14-868:28]. She feels distrust and anger. [17 RT 867:14-868:28].
Damages:	The jury awarded $40,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352].

Summary of Testimony from Plaintiff Alfred L. Garrett

Plaintiff's Name:	Alfred L. Garrett
Age, education, and income:	Mr. Garrett is 40 years old. [16 RT 726:16-17]. He is a high school graduate. [16 RT 728:5-9]. Mr. Garrett earns $700 per month. [16 RT 733:18-19].
Reason for taking out a loan:	Unspecified.
Washington Mutual loans and insurance charges:	(1) Mr. Garrett took out a loan from City Finance in 1993 for 611.08. He was charged $30.69 for credit life insurance, $41.95 for disability insurance and $66.24 for property insurance. [15 CT 2150; 1 CT 94].
Facts of the loan transaction:	Mr. Garrett dealt with the office in Greenwood. [16 RT 731:13-14]. [15 CT 2150; 1 CT 94]. The loan papers were already drawn up and ready to be signed when Mr. Garrett arrived at the Washington Mutual office. [16 RT 731:18-19]. He believed Washington Mutual was acting in his best interest. [16 RT 737:17-21] [16 RT 742:12]. Insurance was not discussed or explained to Mr. Garrett. [16 RT 731:29-732:2]. There was only one Washington Mutual employee present at Garrett's loan closing. [16 RT 736:4-8]. Two employees signed as witnesses to the loan. [15 CT 2150; 1 CT 94].
Other preexisting insurance:	Mr. Garrett already had insurance. [16 RT 732:6-8] [16 RT 732:20-27]. Mr. Garrett did not want the insurance that was on the loan documents. [16 RT 732:10-12].
Effect of Washington Mutual's conduct:	Mr. Garrett felt pressure and frustration trying to provide for his family. [16 RT 735:5-10].
Damages:	The jury awarded $80,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352].

Summary of Testimony from Plaintiff Doris Garrett

Plaintiff's Name:	Doris Garrett
Age, education, and income:	NOTE: Ms. Garrett did not testify. Evidence relating to the Washington Mutual loan she took out together with her husband, Alfred Garrett, was provided by Mr. Garrett.
Reason for taking out a loan:	
Washington Mutual loans and insurance charges:	
Facts of the loan transaction:	
Other preexisting insurance:	
Effect of Washington Mutual's conduct:	
Damages:	The jury awarded $10,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352]. The award was remitted to $130.77 in compensatory damages and $32,500 in punitive damages.

Summary of Testimony from Plaintiff Patrishane A. Gordon

Plaintiff's Name:	Patrishane A. Gordon
Age, education, and income:	Ms. Gordon worked at Yazoo Uniform in 1994 for two months earning $150 per week. [19 RT 1099:9-11].
Reason for taking out a loan:	Unspecified.
Washington Mutual loans and insurance charges:	(1) In 1994, Ms. Gordon took out a loan with Easy Finance for $405.49 that was assigned to WM. She was charged $10.14 for credit life insurance; $22.23 for disability insurance and $19.01 for property insurance. [15 CT 2152; 1 CT 95].
Facts of the loan transaction:	Ms. Gordon had no knowledge of insurance being included in her loan. [19 RT 1101:4-13]. Ms. Gordon went to the Greenwood office to make her payments. [19 RT 1102:13-19].
Other preexisting insurance:	Ms. Gordon already had life and fire insurance coverage. [19 RT 1101:14-23].
Emotional Distress:	No evidence of emotional distress.
Damages:	The jury awarded $5,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352]. The award was remitted to $130.77 in compensatory damages and $16,000 in punitive damages. [11 CT 1559-1560].

Summary of Testimony from Plaintiff Lillie Hartis

Plaintiff's Name:	Lillie Harris
Age, education, income:	Ms. Harris is 68 years old. [17 RT 799:16-17]. Ms. Harris has a hard time seeing fine print. [17 RT 805:11-20]. [17 RT 807:27-29]. She has been on Social Security since 1981 [17 RT 801:13-14].
Reason for taking out a loan:	Unspecified.
Washington Mutual loans and insurance charges:	(1) In 1992, Ms. Harris took out a loan with Easy Finance for $500.41. She was charged $12.94 for credit life insurance; $27.66 for disability insurance and $24.27 for property insurance. [15 CT 2155]. (2) In 1993, Ms. Harris took out a loan with Easy Finance for $617.57. She was charged $23.41 for credit life insurance; $36.94 for disability insurance and $43.90 for property insurance. [15 CT 2159]. (3) In 1995, Ms. Harris took out a loan with Washington Mutual for $427.11. She was charged $4.61 for credit life insurance; $17.28 for disability insurance and 17.28 for property insurance. [15 CT 2173]. (4) In 1995, Ms. Harris took out another loan with Washington Mutual for $96.16. She was charged $3.26 for credit life insurance and $12.24 for disability insurance. [15 CT 2186-87]. (5) In 1996, Ms. Harris took out a loan with Washington Mutual for $409.60. She was charged $11.02 for credit life insurance. [15 CT 2194-95].
Facts of the loan transaction:	Ms. Harris went to the office in Greenwood. [17 RT 803:6-8]. Ms. Harris believed and trusted the company. [17 RT 810:7-13] . The papers were drawn up and ready to be signed when she went to the office. [17 RT 807:17-19].
	Ms. Harris received no information regarding insurance on her loans. [17 RT 811:9-11; 812:17-19, 27-29]. Ms. Harris refinanced her loans. [17 RT 802:25-26; 807:16-17]. Ms. Harris claims that only one witness was present at the loan closings. [17 RT 808:26-29; 809:2-4]. Her

Plaintiff's Name:	Lillie Harris
	loan documents were witnessed by two signatures. [15 CT 2173, 2186-87]. The loan process took about 5 minutes to complete. [17 RT 817:1-4].
Other Preexisting Insurance:	Ms. Harris already had pre-existing insurance. [17 RT 811:18-812:1]. Ms. Harris could not afford to have the insurance. [17 RT 814:8-15].
Effect of Washington Mutual's conduct:	Ms. Harris feels used by WM. [17 RT 814:26-815:6].
Damages:	The jury awarded $185,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352].

Summary of Testimony from Plaintiff Kenneth Hill

Plaintiff's Name:	Kenneth Hill
Age, education, and income:	Unspecified.
Reason for taking out a loan:	Mr. Hill took out a loan to finance an air conditioner that he purchased. [19 RT 1108:27-1109:4].
Washington Mutual loans and insurance charges:	(1) In 1986, Mr. Hill took out a loan with Washington Mutual for $775.58. In connection with this loan, Mr. Hill was charged $21.60 for credit life insurance and $45.60 for disability insurance. [16 CT 2218-19].
Facts of the loan transaction:	Mr. Hill had was told that the insurance on his loan was required to get the loan. [19 RT 1117:2-9]. Mr. Hill had trust in Washington Mutual because they have been in the business for so long. [19 RT 1117:9-12].
Other preexisting insurance:	Mr. Hill had insurance coverage with his employer. [19 RT 1116:16-21]. Mr. Hill did not want the insurance that was on the loan documents. [19 RT 1119:27-1120:2].
Effect of Washington Mutual's conduct:	No evidence of emotional distress.
Damages:	The jury awarded $185,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352]. The award was remitted to $95.23 in compensatory damages and $23,750 in punitive damages.

Summary of Testimony from Plaintiff Robin Horton

Plaintiff's Name:	Robin Horton
Age, education, and income:	Ms. Horton is 55 years old. [18 RT 932:11-12]. She is a high school graduate. [18 RT 934:2-4]. Ms. Horton works as a teaching assistant and earns $502 dollars. [18 RT 943:22-24].
Reason for taking out a loan:	Ms. Horton took out a loan to help pay for bills around the house and also help with the doctor bills when her husband was sick. [18 RT 938:21-939:6].
Washington Mutual loans and insurance charges:	(1) In 1992, Ms. Horton took out a loan with Easy Finance for $1,510.19. She was charged $103.01 for credit life insurance; $93.02 for disability insurance and $11.36 for property insurance. [16 CT 2233]. (2) In 1993, Ms. Horton took out a loan with Easy Finance for $301.52. She was charged $38.35 for credit life insurance; $47.92 for disability insurance and $41.09 for property insurance. [16 CT 2237]. (3) In 1994, Ms. Horton took out a loan with Washington Mutual for $695.55. In connection with this loan, Ms. Horton was charged $95.34 for credit life insurance. [16 CT 2242-44]. (4) In 1995, Ms. Horton took out a loan with Washington Mutual for $1,007.54. She was charged $103.58 for credit life insurance; $114.26 for disability insurance and $223.56 for property insurance. [16 CT 2261].
Facts of the loan transaction:	The loan applications were prepared in advance. [18 RT 936:28-29]. Ms. Horton did not know about the insurance and was not given the option to have the insurance put on the loan documents. [18 RT 937:6-8; 940:26-29; 946:8-10]. There was only one person present in the room at the time of the loan closing. [18 RT 943:4-8]. Both the 1994 and 1996 loan documents were signed by two witnesses. [16 CT 2242-44, 2261].

Plaintiff's Name:	Robin Horton
Other preexisting insurance:	Ms. Horton's husband already had life and house insurance through his employer. [18 RT 937:12-14. 23-27; 944:7-10]. If given the option, Ms. Horton would not have taken the insurance in the loan. [18 RT 937:28-938:2; 944:11-14].
Effects of Washington Mutual's conduct:	Ms. Horton stated that this was a really stressful time for her husband and herself. She also had high blood pressure at the time. [18 RT 941:13-21; 941:27-942:5] [18 RT 942:12-17]. She was worried. She couldn't pay her bills.
Damages:	The jury awarded $100,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352].

Summary of Testimony from Plaintiff Lindsey Horton

Plaintiff's Name:	Lindsey Horton
Age, education, and income:	Unspecified.
Reason for taking out a loan:	Unspecified.
Washington Mutual loans and insurance charges:	(1) In 1992, Mr. Horton took out a loan with Easy Finance for $1,510.19. He was charged $103.01 for credit life insurance; $93.02 for disability insurance and $11.36 for property insurance. [16 CT 2233]. (2) In 1993, Mr. Horton took out a loan with Easy Finance for $301.52. He was charged $38.35 for credit life insurance; $47.92 for disability insurance and $41.09 for property insurance. [16 CT 2237]. (3) In 1994, Mr. Horton took out a loan with Washington Mutual for $695.55. In connection with this loan, Mr. Horton was charged $95.34 for credit life insurance. [16 CT 2242-44]. (4) In 1995, Mr. Horton took out a loan with Washington Mutual for $1,007.54. He was charged $103.58 for credit life insurance; $114.26 for disability insurance and $223.56 for property insurance. [16 CT 2261].
Facts of the loan transaction:	Mr. Horton did not want the insurance that was on the loan documents. [18 RT 952:9-12]. Mr. Horton claims that only one witness was in the room. [18 RT 961:6-8]. Both the 1994 and 1996 loan documents were signed by two witnesses. [16 CT 2242-44, 2261].
Other preexisting insurance:	Mr. Horton had life insurance coverage through his employer. [18 RT 952:3-8].
Effect of Washington Mutual's conduct:	Mr. Horton felt sad, stressed, worried and awful that he could not pay off the bills and support his family. [18 RT 950:19-23; 951:13-16].
Damages:	The jury awarded $250,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352].

Summary of Testimony from Plaintiff Lorene Jackson

Plaintiff's Name:	Lorene Jackson
Age, education, and income:	Ms. Jackson is 68 years old. [18 RT 901:14]. She dropped out of school in the 10th grade. [18 RT 902: 13]. Ms. Jackson earns $16,000 per year. [18 RT 903:28].
Reason for taking out a loan:	Ms. Jackson took out a loan to help pay for doctor and hospital bills due to her husband being sick. [18 RT 907:16; 908:4; 917:28-29]. Ms. Jackson also took out a loan for Christmas shopping. [18 RT 909:1].
Washington Mutual loans and insurance charges:	(1) Ms. Jackson had a loan with Washington Mutual in the 1970's. [18 RT 904:7-17]. (2) In 1995, Ms. Jackson took out a loan with Washington Mutual. She was charged $14.21 for credit life insurance; $33.74 for disability insurance and $53.28 for property insurance. [1 CT 108; 16 CT 2298]. (3) In 1996, Ms. Jackson took out a loan with Washington Mutual for $600.51. She was charged $18.05 for credit life insurance and $42.86 for disability insurance. [16 CT 2324]. (4) Ms. Jackson had another loan with Washington Mutual in 1997. [18 RT 917:26-918:7].
Facts of the loan transaction:	Ms. Jackson dealt with the office in Greenwood. [18 RT 911:21]. The papers were already filled out and ready when Ms. Jackson arrived. [18 RT 912:15-17]. Ms. Jackson had no conversations regarding insurance being included in the loan documents. [18 RT 912:21-26; 914:7-9, 26-28; 915:9-11; 918:25-919:6]. Ms. Jackson later saw the insurance on the papers and assumed it was required it was not explained. [18 RT 920:27-921:3]. Ms. Jackson did not want the insurance that was put on her loans. [18 RT 914:10-14; 920:12-14, 21-25; 920:27-29].Ms. Jackson put her trust in the company. [18 RT 920:4-14]. There was only one witness at the time of the loan closing. [18 RT 916:5-6; 918:15-19]. Both the

Plaintiff's Name:	Lorene Jackson
	1995 and 1996 loan documents were signed by two witnesses. [16 CT 2298, 2324]. The whole process took about 5 to 6 minutes. [18 RT 916:7-9].
Other preexisting insurance	Ms. Jackson had life and fire insurance coverage. [18 RT 914:15-21; 915:26-27].
Effects of Washington Mutual's conduct:	Ms. Jackson has felt angry and unfairly treated. [18 RT 921:18-22].
Damages:	The jury awarded $80,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352].

Summary of Testimony from Plaintiff Lizzie Lofton

Plaintiff's Name:	Lizzie Lofton
Age, education, and income:	Ms. Lofton is 51 years old. [17 RT 875:20-21].
Reason for taking out a loan:	
Washington Mutual loans and insurance charges:	(1) Ms. Lofton took out a car loan from Mims Auto Sales in 1989. [17 RT 877:5-878:6] (2) Ms. Lofton had a loan from Washington Mutual in 1990. [17 RT 881:6-14]. (3) In 1995, Lofton took out a loan for Washington Mutual for 885.02. In connection with that loan, Lofton was charged $21.50 for credit life insurance. [1 CT 111; 17 CT 2267]. (4) Ms. Lofton received and cashed checks in the mail in 1994 and 1997. [17 RT 887:20-888:13].
Facts of the loan transaction:	Ms. Lofton went to the office in Greenwood. [17 RT 878:3-4]. Ms. Lofton was told that the insurance was required on the loan documents. [17 RT 879:24-29; 880:22-24]. Ms. Lofton put her trust in the company. [17 RT 882:28]. Ms. Lofton claims that there was only one person present at the loan closing. [17 RT 881:19-21]. The process took no more than 5 minutes. [17 RT 879:8-9].
Other preexisting insurance:	Ms. Lofton had hospitalization, disability and life insurance with her employer. [17 RT 882:8-13]. Ms. Lofton did not want the insurance she was charged for. [17 RT 882:14-19].
Effect of Washington Mutual's conduct:	Ms. Lofton has had sleepless nights and a nervous feeling. She has found it hard to trust people. [17 RT 884:9-10; 884:2-23].
Damages:	The jury awarded $75,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352].

Summary of Testimony from Plaintiff Jessie McClung

Plaintiff's Name:	Jessie McClung
Age, education, and income:	Mr. McClung is 42 years old. [17 RT 765:14]. He dropped out of school in the 11th grade. [17 RT 765:23-24]. He earns $14,000 to $16,000 a year. [17 RT 767:1-2].
Reason for taking out a loan:	Unspecified.
Washington Mutual loans and insurance charges:	(1) In 1994, Mr. McClung took out a loan with Easy Finance for $707.75. He was charged $18.27 for credit life insurance; $39.65 for disability insurance and $34.26 for property insurance. [17 CT 2408]. (2) In 1995, Mr. McClung took out a loan with Washington Mutual for $964.21. He was charged $20.43 for credit life insurance and $67.49 for disability insurance. [17 CT 2410]. (3) In 1996, Mr. McClung took out a loan with Washington Mutual for $500.79. He was charged $63.07 for credit life insurance and $120.89 for disability insurance. [17 CT 2423-24].
Facts of the Loan Transactions:	Mr. McClung took out a loan with Easy Finance. [17 RT 772:6-8]. He was told by Washington Mutual he should refinance his loans. [17 RT 783:13-15; 777:15-16]. Mr. McClung trusted that the company would be fair and just in their dealings. [17 RT 776:17-19]. He called the company on the phone and the paperwork was ready when he went to the office. [17 RT 774:1-3; 778:2-4]. Mr. McClung had no conversation about insurance. [17 RT 774:17-775:4]. Mr. McClung was not working due to a disability and had disability insurance which he was unaware he had. [17 RT 775:16-22; 776:24-29; 777:22-28; 778:14-18; 793:12-14]. The loan closing took about 5 minutes. [17 RT 797:29]
Other preexisting insurance:	Mr. McClung had several other insurance policies. [17 RT 769:6-8; 769:29-770:2; 770:5-7, 11]. If given the option, Mr. McClung would not have purchased the insurance. [17 RT 775:24-776:4; 798:16-18].

Plaintiff's Name:	Jessie McClung
Effect of Washington Mutual's conduct:	McClung feels angry. He feels used and that he was wronged. [17 RT 793:8-14; 795:28; 797:9].
Damages:	The jury awarded $75,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352].

Summary of Testimony from Plaintiff Willie McGee

Plaintiff's Name:	Willie McGee
Age, education, and income:	Mr. McGee works at a grocery store and makes $260 per week, which is approximately $1,000 per month. [19 RT 1161:7-11; 1162:5-8]. He has a difficult time reading. [19 RT 1166:18-23].
Reason for taking out a loan:	Mr. McGee took out a loan for furniture. [19 RT 1163:9-11]. He also had a loan on a couple of cars. [19 RT 1163:17-18; 1168:9-11].
Washington Mutual loans and insurance charges:	(1) Mr. McGee borrowed $310.78 from Washington Mutual in 1989. [17 CT 2445]. (2) In 1992, Mr. McGee took out a loan with Washington Mutual for $509.68. He was charged $10.80 for credit life insurance and $34.20 for disability insurance. [17 CT 2451]. (3) In 1993, Mr. McGee took out a loan with Washington Mutual for $253.51. He was charged $49.50 for credit life and disability insurance. [17 CT 2480] (4) In 1994, Mr. McGee took out a loan with Washington Mutual for $257.25. He was charged $49.50 for credit life and disability insurance. [17 CT 2489]
Facts of the loan transaction:	Mr. McGee dealt with the office in Greenwood. [19 RT 1164:24-1165:1]. The papers were already filled out and completed. [19 RT 1166:27-28; 1170:1-2]. Mr. McGee did not know that insurance was included in the document because there was no discussions made regarding this matter. [19 RT 1165:23-25; 1169:3-9; 1171:24-1172:2]. If given a choice, he would not have purchased the insurance. [19 RT 1165:26-28]. He claims that the whole process took approximately 5 minutes. [19 RT 1167:2-4].
Other preexisting insurance:	Mr. McGee was covered with life and disability insurance through his employer. [19 RT 1165:13-19].
Effect of Washington Mutual's conduct:	Mr. McGee feels bad about the way they treated him. [19 RT 1173:3-6].
Damages	The jury awarded $80,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352].

Summary of Testimony from Plaintiff Janie Mason

Plaintiff's Name:	Janie Mason
Age, education, income:	Ms. Mason is 47 years old. [17 RT 825:7-8]. She dropped out of school in the 4th grade. [17 RT 828:6-8]. Ms. Mason earned $2.50 per hour. [17 RT 827:1-5]. She can not read. [17 RT 832:24-833:1; 833:11-14].
Reason for taking out a loan:	Unspecified
Washington Mutual loans and insurance charges:	(1) In 1990, Ms. Mason took out a loan with Washington Mutual for $1,300.29. She was charged $34.56 for credit life insurance; $82.08 for disability insurance and $60.00 for property insurance. [17 CT 2405].
Facts of the loan transaction:	Ms. Mason had no explanation of the insurance that was on the loan papers. [17 RT 835:10-15; 835-29-836:2]. Ms. Mason only dealt with one person when taking out the loan. [17 RT 834:13-15].
Other preexisting insurance:	Ms. Mason already had insurance coverage with Farm Bureau. [17 RT 838:27-839:4; 839:5-10, 16-18].
Effect of Washington Mutual's conduct:	No evidence of emotional distress
Damages	The jury awarded $250,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352]. The award was remitted to $256.43 in compensatory damages and $64,000 in punitive damages.

Summary of Testimony from Plaintiff Percy Mason

Plaintiff's Name:	Percy Mason
Age, education, and income:	Mr. Mason is a mechanic and earns $10,000 per year. [17 RT 852:17-21].
Reason for taking out a loan:	Unspecified.
Washington Mutual loans and insurance charges:	(1) In 1990, Mr. Mason took out a loan with Washington Mutual for $1,300.29. He was charged $34.56 for credit life insurance; $82.08 for disability insurance and $60.00 for property insurance. [17 CT 2405].
Facts of the loan transaction:	Mr. Mason did not know that he was being charged for insurance and no explanation was made. [17 RT 856:4-6, 14-20]. He thought that the company would be fair with him. [17 RT 858:29-859:4]. Mr. Mason states that only his wife and one other witness were present in the room. [17 RT 853:28-854:3]. The whole process took between 5 and 10 minutes. [17 RT 854:19-21].
Other preexisting insurance:	Unspecified.
Effect of Washington Mutual's conduct:	Mr. Mason has high blood pressure, which makes him feel nervous and upset. He feels bad that he can not support his family. [17 RT 857:25-858:13].
Damages:	The jury awarded $100,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352].

Summary of Testimony from Plaintiff Mattie Miles

Plaintiff's Name:	Mattie Miles
Age, education, and income:	Ms. Miles earns $520 every two weeks, which is $1040 every month. She is a teacher's assistant. [19 RT 1132:10-19].
Reason for taking out a loan:	Ms. Miles took out a loan to purchase some furniture. [19 RT 1134:1-3].
Washington Mutual loans and insurance charges:	(1) In 1992, Ms. Miles took out a loan with Easy Finance for $801.40. She was charged $13.55 for credit life insurance and $25.41 for property insurance. [18 CT 2526]. (2) In 1993, Ms. Miles took out a loan with Easy Finance for $1,003.99. She was charged $29.37 for credit life insurance and $55.06 for property insurance. [18 CT 2532]. (3) In 1994, Ms. Miles took out a loan with Easy Finance for $300.82. She was charged $24.62 for credit life insurance and $46.17 for property insurance. [18 CT 2533].
Facts of the loan transaction:	Ms. Miles had some loans with Easy Finance. [19 RT 1137:17-19]. She did not know that insurance was included in the loans that she had. [19 RT 1139:16-23]. If the option was given, Ms. Miles would not have purchased insurance. [19 RT 1139:29-1140:5].
Other preexisting insurance:	Ms. Miles already had life and property insurance. [19 RT 1138:22-25; 1139:3-6, 24-28].
Effect of Washington Mutual's conduct:	No emotional distress not related to collection practices.
Damages:	The jury awarded $10,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352]. The award was remitted to $22.80 in compensatory damages and $5,700 in punitive damages.

Summary of Testimony from Plaintiff Zenester Moore

Plaintiff's Name:	Zenester Moore
Age, education, and income:	Ms. Moore is 38 years old. [19 RT 1121:15-16].
Reason for taking out a loan:	
Washington Mutual loans and insurance charges:	(1) In 1992, Mr. Moore took out a loan with Easy Finance for $204.62. He was charged $5.32 for credit life insurance; $11.36 for disability insurance and $4.98 for property insurance. [18 CT 2537]. (2) In 1993, Mr. Moore took out a loan with Easy Finance for $401.14. He was charged $29.21 for credit life insurance and $54.76 for property insurance. [18 CT 2540]. (3) In 1994, Mr. Moore took out a loan with Easy Finance for $314.06. He was charged $21.03 for credit life insurance and $28.81 for property insurance. [18 CT 2546; 1 CT 129].
Facts of the loan transaction:	Ms. Moore was unaware of the insurance charges that were included in the documents. [19 RT 1125:2-5]. She did business with Easy Finance. [19 RT 1123:14-25].
Other preexisting insurance:	Unspecified.
Effects of Washington Mutual's conduct:	No evidence of emotional distress.
Damages:	The jury awarded $10,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352]. The award was remitted to $22.80 in compensatory damages and $5,700 in punitive damages.

Summary of Testimony from Plaintiff Lou Waters

Plaintiff's Name:	Lou Waters
Age, education, and income:	Mr. Waters is 50 years old. [18 RT 963:3-4]. He dropped out of school after the 5th grade to help his mother. [18 RT 963:10-16]. Waters is a part-time tractor making approximately $200 per week. [18 RT 964:6-7, 10-18; 979:21-22]. He did not learn how to read. [18 RT 963:21-23; 986:2-3].
Reason for taking out a loan:	Mr. Waters took out a loan because his house burned down. [18 RT 970:14-20].
Washington Mutual loans and insurance charges:	(1) In 1991, Mr. Waters took out a loan with Washington Mutual for $1,207.58. He was charged $30.72 for credit life insurance and $72.96 for disability insurance. [18 CT 2597]. (2) In 1992, Mr. Waters took out a loan with Washington Mutual for $6.06. He was charged $116.86 for credit life and disability insurance. [18 CT 2607]. (3) In 1993, Mr. Waters took out a loan with Washington Mutual for $214.41. He was charged $116.86 for credit life and disability insurance and $60.00 for property insurance. [18 CT 2619]. (4) In 1994, Mr. Waters took out a loan with Washington Mutual for $280.81. He was charged $95.19 for credit life and disability insurance and $72.00 for property insurance. [18 CT 2637].
Facts of the loan transaction:	Mr. Waters went to the office located in Greenwood. [18 RT 970:24-26]. The papers were filled out and ready when Mr. Waters went to the office. [18 RT 972:1-2]. Mr. Waters put trust in the company because he had been doing business with them for awhile. [18 RT 974:27-975:1; 977:1-3]. He had refinanced several times. [18 RT 975:14-19]. Mr. Waters was told that insurance was required in order to take out a loan. [18 RT 972:5-10, 18-19; 973:24-974:3; 974:23-28; 976:16-23].
Other preexisting insurance:	Waters already had insurance. [18 RT 972:20-22].

Plaintiff's Name:	Lou Waters
	He did not want the insurance. [18 RT 972:29-973:2; 978:29-979:3].
Effect of Washington Mutual's conduct:	Mr. Waters had to go to the hospital in 1994-1995 due to high blood pressure. [18 RT 980:5-8].
Damages:	The jury awarded $250,000 in compensatory damages, [9 CT 1321-1327], and $3 million in punitive damages. [10 CT 1347-1352].