UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff, v. FAIRBANKS CAPITAL CORPORATION and FAIRBANKS CAPITAL HOLDING CORP., Defendants.	Civil Action No. 03-12219-DPW
ALANNA L. CURRY, *et al.*, individually and on behalf of all others similarly situated, Plaintiffs, v. FAIRBANKS CAPITAL CORPORATION, Defendant.	Civil Action No. 03-10895-DPW

JOINT DECLARATION OF COUNSEL IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT

The undersigned, Gary Klein, John Roddy, Kelly M. Dermody, Niall P. McCarthy and Daniel J. Mulligan, jointly declare as follows:

1. We jointly represent the class in this matter. We have personal knowledge of the facts stated herein and could and would competently testify thereto if called to do so.

2. Each of the undersigned is a partner in their respective law firms. We make this joint declaration in support of the motion for final approval of the class action settlement in these consolidated matters.

3. Each of the undersigned, and their firms, have extensive experience in prosecuting class actions, including wide experience in litigating consumer claims with respect to lenders and servicers of secured loans. The firms' resumes are attached hereto as Exhibit A (Grant, Klein & Roddy, "GKR"), Exhibit B (Cotchett, Pitre, Simon & McCarty, "CPSM"), Exhibit C (Lieff, Cabraser, Heimann & Bernstein, "LCHB") and Exhibit D (Jenkins & Mulligan, "J&M"). These firms were jointly named as co-lead counsel in the Preliminary Approval Order.

4. Each firm filed one or more complaints against defendant Fairbanks Capital Corp. ("Fairbanks"), with some firms naming additional defendants. Copies of each of the operative complaints are attached hereto as Exhibits E through J.

5. In addition to the undersigned, some 42 law firms, having brought 30 class actions suits in numerous states, also have agreed to participate in this process and support approval of the proposed settlement. *See,* Declarations of Counsel In Support of Application for Award of Attorneys' Fees and Costs, filed herewith. In response to virtually every filed case, Fairbanks hired the highest quality defense counsel available.

6. The Federal Trade Commission ("FTC"), although not counsel in these private actions, also supports this settlement and publicly states that it believes it to be fair, adequate and reasonable. *See,* FTC Memorandum Regarding the Fairbanks Settlement and Redress Program, p. 3.

7. In the sections that follow, counsel explain the steps that were taken to prosecute these actions, beginning with early investigations and ending with the settlement now before the Court. This settlement has a quantifiable economic value of at least $ 55.25 million to the class, Declaration of Alba Conte ("Conte Decl."), ¶ 6, and provides significant non-economic relief to

homeowners throughout the country. It is, in the opinion of the undersigned, "fair, adequate and reasonable" and merits approval at this time.

LITIGATION BACKGROUND

8. The actions which are attached hereto as Exhibits E through J were independently initiated by the undersigned firms. GKR filed *Scott, et al. v. Fairbanks Capital Corporation*, C-3-02-001 in the District Court for the Southern District of Ohio on January 2, 2002 ("Scott"); *Vincent v. Fairbanks Capital Corporation*, 3-0643 in Superior Court of Massachusetts (Essex Cty.) on March 28, 2003 ("Vincent"); and *Curry et al, v. Fairbanks Capital Corporation*, 03-10895-DPW in this court on May 16, 2003 ("Curry"). J&M filed *Anders v. Fairbanks Capital Corp.* on October 25, 2002 in the Superior Court of Contra Costa County, California. LCHB filed *Logan v. Fairbanks Capital Corp.* on January 31, 2003 in Los Angeles Superior Court. CPSM filed *Ramalingam v. Fairbanks Capital Corp.* on November 15, 2002 in San Bernardino Superior Court.

9. Each of the cases was initiated after extensive investigation by counsel, as described in the immediately following paragraphs.

10. GKR first began with the *Scott* case, which was filed after a community based organization in Dayton, Ohio referred three client files involving Fairbanks servicing practices to GKR. In each case, Fairbanks appeared to have charged a delinquent borrower hundreds or even thousands of dollars in unexplained, improper or unnecessary fees including "BPOs," "corporate advances," "funds advanced on borrower's behalf," "unpaid other fees," "Escrow/Impound Overdraft," "force placed insurance," and "property inspections."

11. GKR affiliated with a local lawyer in Southern Ohio, Matthew Brownfield, and continued its pre-filing investigation, including review of various Fairbanks loan servicing files and

examination of other pending litigation against Fairbanks in Ohio. Because Ohio is a judicial foreclosure state, GKR and Brownfield also reviewed various foreclosure cases filed on behalf of Fairbanks to determine the types of fees and costs being routinely charged by Fairbanks in foreclosure. Plaintiffs' counsel concluded that the practices at issue affected not just their clients, but a group of similarly situated individuals. The plaintiffs in Scott alleged various claims including, *inter alia*, that Fairbanks routinely demanded amounts that were not legally due and misrepresented the amount of the alleged debt, in violation of the federal Fair Debt Collection Practices Act.

12. Fairbanks defended the case aggressively and plaintiffs responded to various motions and pleadings, including a motion to dismiss, a motion for a protective order, opposition to the plaintiffs' amended complaint and a summary judgment motion.

13. Plaintiffs served discovery requests, reviewed various documents produced formally and informally by the defendant and won the right to additional discovery under Rule 56(f). The proceedings related to the motion to dismiss and defendant's opposition to the plaintiffs' first amended complaint resulted in a published opinion favorable to the plaintiffs: *Scott v. Fairbanks Capital Corp.*, 284 F.Supp.2d 880 (S.D.Ohio, 2003).

14. GKR continued to receive referrals of clients with Fairbanks servicing problems from Ohio, Massachusetts and across the country. Following publicity concerning the published opinion in *Scott*, GKR and its phone number was listed prominently on a website designed to collect and report on complaints about Fairbanks' servicing problems.

15. Following that listing, GKR started to receive approximately 6-10 telephone calls a week from aggrieved consumers. GKR responded to various requests for information, made appropriate referrals where possible, counseled borrowers, and reviewed borrower files in order to continue to learn about Fairbanks' business practices. During 2002, GKR reviewed some 75-

100 loan files and interviewed a like number of borrowers. The resulting information provided invaluable insights into Fairbanks' servicing problems and informed counsel throughout the settlement negotiations described below.

16. After being contacted by several Massachusetts borrowers, GKR filed *Vincent* and *Curry*.

17. *Vincent* alleges various types of misconduct by Fairbanks, including improper charging of prepayment penalties on Massachusetts loans.

18. *Curry* alleges claims under state and federal law for a variety of servicing problems including overcharge of default-related fees and costs and improper foreclosure in light of dishonored forbearance agreements.

19. At about the same time as GKR was initiating its work, J&M was investigating Fairbanks' conduct in servicing loans throughout the country. J&M was already familiar with much of Fairbanks' conduct through *Fairbanks v. Kenney*, which J&M undertook beginning in mid-2002.

20. The *Kenney* matter involved the defense of claims by Fairbanks with respect to a website that was operated by J&M's clients. The website was essentially a complaint forum for homeowners whose loans were being serviced by Fairbanks, and Fairbanks was attempting to shut the site down.

21. J&M interviewed dozens of borrowers who had written to complain about Fairbanks' practices. In addition, the owners of the website began publicizing their efforts heavily, focusing on presentations to the news media and to members of the U.S. Senate. J&M also assisted the media with interviews and reviews of the servicing practices.

22. The publicity generated resulted in numerous referrals to J&M of borrowers throughout the country. J&M reviewed the materials produced by more than 100 borrowers, giving a detailed overview of the Fairbanks business model. In addition, J&M interviewed former Fairbanks employees and vendors, getting an inside view of Fairbanks' practices that was invaluable in the following negotiations.

23. J&M finally filed *Anders* on October 25, 2002. Immediately before and after that date, other class actions were filed throughout California. J&M began consultation with CPSM and LCHB to coordinate all of the California actions, which were eventually coordinated in the Contra Costa County Superior Court, with the three firms appointed Co-Lead Counsel.

24. CPSM had independently been investigating Fairbanks beginning in early 2002. In the course of this investigation, CPSM contacted eighteen (18) district offices of the State of California Division of Labor Standards Enforcement and obtained copies of complaints filed by former employees of Fairbanks and its affiliates. After reviewing all of the complaint files, CPSM contacted and interviewed seventeen (17) former employees of Fairbanks and inquired about the company's business practices.

25. CPSM also interviewed numerous class members about their experiences with Fairbanks and its affiliates. Many of the borrowers were referred to CPSM. In addition to interviewing borrowers, CPSM attempted to confirm their descriptions of treatment by reviewing borrower files wherever possible. CPSM also investigated news reports, press releases, internet sites and court filings related to Fairbanks' business practices.

26. As a result of the interviews with former employees and borrowers, and its other investigations, CPSM became convinced that Fairbanks consistently mishandled the loans it was servicing and eventually filed the Ramalingam matter in November, 2002.

27. Similarly, LCHB began its investigation in late 2001. LCHB has successfully prosecuted other predatory lending cases, and information about this experience may be found on the LCHB website, www.lchb.com. Fairbanks' customers started contacting LCHB in or around August 2001, complaining of an array of problems with Fairbanks' servicing. Between August 17, 2001 and January 24, 2003, when LCHB filed the Logan action, a team of LCHB attorneys and paralegals interviewed approximately 100 individuals whose loans were serviced by Fairbanks, and who had experienced problems with Fairbanks' servicing.

28. As part of this investigation, LCHB attorneys and paralegals also reviewed extensive loan documentation provided by numerous individuals who complained about Fairbanks' practices. Starting in July 2002, and continuing through the Fall of 2002, LCHB attorneys, accompanied by law clerks and/or paralegals, conducted comprehensive in-person interviews of individuals throughout California whose loans were serviced by Fairbanks.

29. Over the same period, LCHB attorneys conducted substantial research into possible state and federal claims applicable to the common Fairbanks' practices identified through interviews and contacts with borrowers. LCHB also investigated the structure of Fairbanks' business and spoke with numerous consumer groups and others with information about Fairbanks. As of January 31, 2003, between the investigation and the filing of the Logan action, LCHB attorneys and other staff had dedicated more than 700 hours to the Fairbanks matter, and had acquired substantial knowledge about the practices alleged in the Logan action.

30. Counsel in the three California cases went through the coordination process used in California courts, eventually being consolidated in the Contra Costa County Superior Court along with all other known California cases. J&M, LCHB and CPSM jointly agreed to prosecute

the actions, and were appointed co-lead counsel. On April 18, 2003, counsel filed a joint consolidated complaint.

31. In the months leading up to the consolidated complaint, counsel continued to investigate Fairbanks. Counsel made numerous contacts with industry insiders, who advised that Fairbanks was being crippled by the numerous class action complaints and the publicity and resulting investigations by government entities, including the FTC. Counsel concluded that Fairbanks might not survive. As a result, counsel began investigating the owners of Fairbanks, including PMI. We concluded that PMI could legitimately be named as a controlling entity, liable for Fairbanks' misconduct. PMI was added as a defendant to the consolidated amended complaint in California.

32. Defendants in the California cases responded by demurring and moving to strike. Those motions were partially granted and a Second Amended Consolidated Complaint was filed on July 24, 2003. Fairbanks answered that complaint on August 11, 2003. PMI argued in its demurrers that, as it was only an owner of stock, it could not be held liable for any of the conduct of Fairbanks. While the Court agreed with this premise, it held that plaintiffs had plead additional sufficient facts of control to hold PMI in as a defendant. At the time negotiations began, PMI had indicated it would demur again.

33. While the pleadings were being finalized, counsel served discovery requests on Fairbanks, seeking documents and responses to interrogatories. Fairbanks responded to those requests over a period of months.

34. However, by this time, it became clear that a coordinated, nation-wide effort was required to resolve all claims against Fairbanks. The undersigned agreed to coordinate their efforts, resolving to handle the litigation as a team. They were approached by counsel for

Fairbanks who indicated a willingness and need to settle all actions, so that Fairbanks could survive as a going concern.

35. By that time, the members of the plaintiff negotiations team had interviewed or reviewed files of hundreds of class members. Counsel thus entered into settlement negotiations with this substantial background and with a clear picture of Fairbanks' business practices and the strengths and weaknesses of their case.

THE FTC INVESTIGATION

36. At some point in early 2003, the FTC began its own investigation of Fairbanks.

37. Although the FTC investigation was independent of the private actions, the undersigned were asked by the FTC to cooperate and provide information gathered from our investigations and discovery efforts. Counsel did so, although the FTC, of course, was not required to reciprocate.

38. Eventually, the FTC filed its consent order in this Court. Although the actions were not consolidated, counsel informally coordinated with the FTC so as to save duplication of efforts wherever possible.

39. Each of the undersigned has a good working relationship with the FTC, based upon prior coordinated litigation, including the recently resolved *Citigroup* cases in which CPSM, LCHB and J&M were class counsel.

40. After the FTC filed the current action, class counsel continued to consult regularly with the FTC, both by telephone conference and in formal meetings in Washington, D.C.

41. Initially, the FTC had greater direct access to Fairbanks' records, including its financial information, than class counsel did during the course of the negotiations.

42. Over time, however, both class counsel and the FTC were able to come to agreement on basic, underlying assumptions. Significantly, in terms of the negotiations that followed, both the FTC and class counsel were provided with sufficient information to form the conclusions that Fairbanks was close to catastrophic business failure and that, absent settlement of the claims in both the government and private cases, the company would be out of business near the beginning of 2004. *See,* Declaration of Jeffrey A. Johnson, CPA, filed separately.

43. Further, both the FTC and class counsel agreed on the general areas of harm to consumers from the business practices of Fairbanks. Ultimately, the level and detail of financial harm was confirmed by both the FTC and class counsel.

44. The actual negotiations with Fairbanks proceeded separately, with the FTC and class counsel meeting with Fairbanks at different times. However, both the FTC and class counsel stayed abreast of each others' discussions and conferred on all aspects of the final settlement.

45. The FTC, for example, required control of the actual redress portion of the settlement, having the final say on setting the amounts to be provided to each class member. However, it has consulted regularly with class counsel and substantially adopted or agreed with the comments from class counsel as to the ultimate fund distribution.

46. Class counsel and the FTC worked on separate, but well coordinated paths to fashion settlements complementing one another, so that the maximum refunds could be obtained and the best possible business practice changes could be developed.

47. During negotiations, Class counsel and the FTC were operating under the flat statement from Fairbanks that all cases needed to be resolved in order for the company to survive. Both the undersigned and the FTC researched and completed discovery extensive

enough to determine that this was, in fact, true. It is partly for this reason that both the FTC and class counsel recommend the proposed settlements.

SETTLEMENT NEGOTIATIONS

48. In mid-2003, the undersigned began a series of negotiations with Fairbanks regarding potential settlement. These negotiations continued over a period of approximately six months. Counsel met five times in various locations, including Washington, D.C. and Chicago for face to face meetings, engaged in numerous conference calls, and substantial written communication by email and fax. The negotiations were protracted, often acrimonious and unquestionably at arm's length.

49. From the beginning, Fairbanks insisted it had very little cash to put forward in any settlement given its grave financial condition. While counsel, along with the FTC, confirmed that this was true, the undersigned insisted that the owners of Fairbanks had the wherewithal to make significant contributions and that PMI, still a defendant in the California actions, needed to contribute to any eventual settlement.

50. Negotiations broke down on several occasions over the issue of the amount of money that would be provided to class members. Class counsel eventually made a demand to Fairbanks, which was then negotiated to the final settlement amount.

51. As noted above, counsel continued to consult with the FTC throughout these negotiations so that Fairbanks could not settle more cheaply by using either the FTC claims or the private action to undermine the other. In the course of these consultations, class counsel became very familiar with the practice changes that the FTC intended to insist on as part of any eventual consent decree. While these were extensive and addressed many problems in

Fairbanks' business practices, counsel believed additional relief would be necessary to protect the most at-risk members of the class, those facing the loss of their homes.

52. Class counsel became convinced that if Fairbanks was to continue servicing loans, it had to agree to a broader, and more detailed, range of practice changes addressing delinquencies. Thus, while still negotiating over the amount of cash payments to be made, counsel proposed the Default Resolution Program ("DRP") covering all aspects of Fairbanks' handling of loans where borrowers were in difficult circumstances and the Operational Practice Changes ("OPC").

53. The DRP and OPC went through many drafts and were also hotly contested in the course of the settlement negotiations. Almost every aspect of both programs was the subject of negotiation and lengthy discussion, including the need to consider Fairbanks' contracts with the trusts holding the notes it was servicing.

54. After several months of negotiation, by early Fall, 2003, the final principles of the DRP and OPC were in place. However, even after that, several months of drafting were required before the final version was accepted by all sides. The final versions of the DRP and OPC are attached as appendices to the settlement agreement.

55. While negotiating the details of the DRP and OPC, counsel continued to search for agreement on funding of the settlement. Finally, simultaneously and in coordination with the FTC, counsel reached agreement on the sum of $40 million as an acceptable cash payment, given the benefit this sum would provide to the class and the weak financial condition of Fairbanks. Significantly, a large amount of this funding was provided by PMI, as class counsel had insisted.

56. Although counsel accepted the $40 Million amount, they continued to insist that other relief be provided, especially with respect to certain clearly improper charges, such as

unnecessary hazard insurance placement. Eventually, Fairbanks agreed to counsel's proposal on a "reverse or reimburse" program, by which Fairbanks agreed to reimburse or reverse certain charges that had been improperly imposed. This amounted to at least seven million dollars in additional direct benefits to class members. See Declaration of Kim A. Stevenson, ("Stevenson Decl."), ¶ 6; Declaration of Michael Donovan ("Donovan Decl."), ¶ 7.

57. As noted, the class negotiations were run parallel with the FTC negotiations, and in consultation with the FTC. However, an additional issue was presented by Fairbanks that further complicated discussions. Fairbanks insisted that any final deal would have to involve all, or almost all, outstanding lawsuits. For this reason, class counsel also began contacting counsel throughout the country and advising them of the status of negotiations. These discussions continued throughout the course of the negotiations with Fairbanks.

58. Finally, in approximately October, 2003, all of the settlement terms had been agreed to in principle. Counsel again consulted with the FTC to ensure that the DRP program did not conflict in any way with the proposed consent decree. Counsel also began discussion with the FTC regarding the exact method of distribution to the class. These discussions were protracted particularly because the amount of funding was not adequate to pay all borrowers 100% of the amounts that we believed they had been improperly charged. Class counsel and the FTC agreed that affirmations on the claims forms were necessary because in many instances Fairbanks' records are insufficient to distinguish between proper and improper fees. Similarly the distinction between proper and improper prepayment penalties and between proper and improper foreclosures are not always apparent, even from a close inspection of Fairbanks' account records. Finally, counsel was aware that Fairbanks' records did not include up to date address information for many former borrowers.

59. During the course of these lengthy discussions, no party raised the issue of attorneys' fees until all aspects of class relief had been agreed to and after agreement had been reached between the FTC and Fairbanks. Only once the total amounts to be funded for the class had been reached did the parties attempt to resolve the issue of fees and costs. Further, class counsel continued to confer with other counsel for the various suits around the country, advising them of the settlement terms and receiving approval of those terms before fees were discussed.

60. In addition, at no time during the discussions did any party offer to trade any class relief for any other form of consideration. Other than as expressly stated in the settlement agreement, no consideration of any kind has been offered to class members, class representatives or class counsel.

61. The negotiations as to fees were also difficult because of Fairbanks' financial instability and the existence of so many other lawsuits. Fairbanks eventually agreed to a single payment of $8.25 million in fees, plus a small amount of costs, but insisted that this had to cover all counsel in all pending cases. We then began negotiating amounts for all counsel across the country. Eventually agreement was reached among counsel in connection with some 30 class cases, all of which support this settlement. Counsel in each of those cases did not make their support conditional on the amount of fees distributed. The issue of fees, as in the negotiations with Fairbanks, was handled separately and after agreement had been reached to support the settlement.

62. The total fees of legal teams across the country in the various lawsuits amounts to $7,189,755.40. *See,* Memorandum In Support of Award of Attorneys' Fees and Costs, and Declarations In Support of Approval of Award of Fees and Costs, filed herewith.

63. Once agreement had been reached with these numerous cases, the settlement was presented to this Court, which granted preliminary approval on December 10, 2003.

POST SETTLEMENT EFFORTS

64. In connection with preliminary approval, and in consultation with the FTC, Gilardi & Co. was selected as the settlement administrator. Gilardi arranged for mailing of notices and claim forms to some 751,637 class members, as well as published notice in USA Today. *See,* Affidavit of Ron Heard, ¶ 4 [Docket No. 46]; Notice of Publication of Summary Notice [Docket No. 39].

65. After the mailings were sent, class counsel began receiving calls and letters from an extraordinary number of class members. Jointly, the undersigned firms received, on average, over one hundred phone calls per day, continuing up to the date of this declaration. Counsel responded to the calls from class members, explaining the terms of the settlement and advising class members that among other choices, they had the right to opt out of the settlement in order to avoid the release.

66. In addition to responding to class members, counsel engaged in confirmatory discovery, traveling to Utah to take the depositions of Brent Rasmussen and Matthew Hollingsworth. These depositions confirmed the financial condition of Fairbanks, the size of the class and the amounts of claims. *See also,* Declaration of Brent Rasmussen, ¶ 24, attached as Exhibit 1 to Plaintiffs' Memorandum in Support of Motion for Final Approval of Settlement. Additional declarations confirm that Fairbanks has begun implementing required practices changes. *See,* Declaration of Matthew Hollingsworth, ¶¶ 3 – 5, attached as Exhibit 2 to Plaintiffs' Memorandum in Support of Motion for Final Approval of Settlement.

67. Counsel also retained an independent expert, Alba Conte, author of the leading treatises on class actions and attorneys' fees, A. Conte, H. Newberg, *Newberg On Class Actions* (4th ed. 2002); and A. Conte, *Attorney Fee Awards* (2d ed. 1993) to review the terms of the settlement and render opinions as to the value and fairness of the settlements as well as the requested fee award. Her declaration is filed herewith.

CONCLUSION

68. Each of the undersigned has years of experience representing consumers in mortgage lending cases and in prosecuting class claims. This experience contributed, during settlement negotiations, to an awareness both of the extent of counsel's settlement leverage and of the needs of our clients and the class. Counsel believed, and continue to believe, that our clients had claims that would have ultimately prevailed in much of the litigation and, in some cases, on a class-wide basis. However, counsel are aware that the outcome in each of our cases was uncertain and that such outcome would have been achieved, if at all, only after many years of arduous litigation with the attendant risk of drawn-out appeals and the possibility that Fairbanks may have ended as a going concern in the interim. Furthermore, Counsel are aware that, during the likely period of litigation, due to the nature of the loans at issue, many thousands and perhaps tens of thousands of the class members in the consolidated cases would have lost their homes due to their inability to make payments. Having lost their homes, many of these individuals would be difficult or impossible to locate.

69. Counsel determined to enter into the settlement only after consultation with each of the named plaintiffs in this matter. These individuals reviewed the settlement agreement in all of its details, asked detailed questions about its terms, and ultimately endorsed the agreement without reservation.

70. Counsel believe that the settlement is in the best interests of the class in the circumstances of the case, especially in light of Fairbanks various defenses related to class certification, its precarious financial condition, the uncertainty of the claims against PMI and others, and the merits of the underlying claims, together with Fairbanks' practice of aggressively defending these cases, including by employment of highly-qualified defense counsel.

71. Counsel believe that the settlement is fair and reasonable to every member of the class and that it provides excellent benefits. The settlement was carefully explained in a form of notice, approved by the Court, that is highly readable and more than adequate for class members to understand the nature of the benefits they will receive in exchange for their releases.

72. For all of these reasons, the undersigned recommend this settlement to the class and to this Court. Our joint opinion is that the settlement is fair, adequate and reasonable and merits approval at this time.

Respectfully submitted,
Plaintiffs' Co-Lead Counsel

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