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

Declaration Of Alba Conte In Support Of Stipulation And Agreement Of Settlement And Stipulated Amount Of Attorney's Fees And Expenses

1. I am a graduate of the University of Pennsylvania Law School and am the author of what is regarded as the leading treatise on class actions, Newberg on Class Actions (Shepard's/McGraw-Hill 4th ed. 2002), as well as Attorney Fee Awards (Shepard's/McGraw-

Hill 2d ed. 1993), and other books and articles. I have written and consulted in these areas of law for more than twenty years, and prepare the semi-annual supplements to these treatises.

2. As a result of my writing and work with many attorneys for both plaintiffs and defendants, I have had the opportunity to review and analyze thousands of class action opinions and I have a good working knowledge of the legal and equitable aspects of class action litigation. I have reviewed and analyzed thousands of class action settlements, and am familiar with the major studies and writings on settlements in class action cases. My opinion is a product of such analysis and experience.

3. This declaration is made in support of approval of the parties' Stipulation and Agreement of Settlement (the "Settlement") and the reasonableness of its component fee and expense provision.

Overview

4. I have reviewed and am familiar with the settlement the plaintiffs have reached with Fairbanks Capital Corporation ("Fairbanks"). I have reviewed the settlement agreement, relevant pleadings, the Joint Declaration of Counsel recounting the history of the litigation and the negotiation process which led to the Settlement, and other documents pertinent to the litigation and resolution of this matter. I have also reviewed the negotiated Consent Order Fairbanks reached with the Federal Trade Commission. I have reviewed the preliminary and final approval submissions and other written work of plaintiffs' counsel and find them to be of consistently high caliber, demonstrating a high level of legal skill and expertise. I am aware of the following circumstances surrounding the settlement: that the earliest of the class action lawsuits

now consolidated in this Court for settlement began in late 2001 and early 2002; that there was substantial private litigation before the FTC became officially involved; that the Settlement consolidates more than thirty class actions pending in state and federal courts in more than twenty different jurisdictions; that the Settlement was negotiated simultaneously with the FTC Consent Order filed in this Court on November 12, 2003; that plaintiffs' counsel and the FTC consciously coordinated the negotiation, drafting, and ultimate resolution of their respective public and private actions; that the ensuing tripartite settlement discussions between the parties spanned the course of some six months; that Fairbanks' tenuous financial situation both limited the realistic recovery ceiling the parties' could reach and posed a very real threat of plunging the entire matter into bankruptcy court; and that the implementation of the plaintiffs' Settlement and the FTC order are inextricably intertwined.

5. Based upon my experience and knowledge, this Settlement provides a substantial remedy to the class, and is fair and reasonable. In light of Fairbanks' limited economic strength, and the potential for Fairbanks to have sought bankruptcy protection should the litigation have continued or the settlement negotiators demanded more of Fairbanks than was economically feasible, in my opinion the $55 million settlement reached in this case satisfied all the requirements of Rule 23.

Settlement Benefits

6. This Settlement provides real cash to class members harmed by Fairbanks' unfair and deceptive servicing practices. The Settlement has an objectively quantifiable value of $55.25 million, which includes $40 million for the redress fund, approximately $7 million for the reverse

and reimburse program, and $8.25 million in requested attorney's fees. In addition, the Default Resolution Program ("DRP") provides a formalized, enforceable mechanism to avert foreclosure, avoid the escalation of fees which plaintiffs allege Fairbanks routinely engaged in, and assist borrowers to regain their financial footing. The Operational Practice Changes component ("OPC") is a more purely prophylactic measure, mandating certain targeted business practice changes which address the majority of the concerns which gave rise to plaintiffs' claims in this litigation.

7. Bifurcation of the $40 million redress fund into two components, each designed to address a defined category of harms, is a sensible method for allocating relief to class members with different remedial needs. The bulk of the fund is devoted to the bulk of the class, providing $35 million to approximately 235,000 claimants primarily harmed by Fairbanks' imposition of suspect late fees, default related fees and prepayment penalties. An additional $5 million is devoted to providing some measure of remedial relief for approximately 5,000 homeowners who claim to have suffered wrongful foreclosure at Fairbanks' hands. These figures were provided to me by the settlement administrator in a preliminary report of claims filed by category.

8. In addition, as the principal problem plaintiffs faced in designing a redress mechanism was the conjoined legal and logistical issue of determining which of Fairbanks' fees, practices, and foreclosures were improper (Joint Decl., ¶58.), the claims-made solution this Settlement provides is a rational and well-accepted method of resolving such a thorny dispute. As all of the default-related fees that Fairbanks imposed upon each class member are aggregated on the claim forms, those class members most aggrieved by Fairbanks' conduct – i.e., those who

perceive a portion of such fees as improperly assessed - are those most likely to file claims. Where plaintiffs' counsel could actually identify improper fees that Fairbanks charged, the Settlement provides for full recompense. The reverse or reimburse program identifies at least $7 million in such improper forced place insurance charges, related fees, tax penalties, inspection fees, and excess interest. Fairbanks is required to credit or reimburse such charges in full. Settlement Agreement, ¶ III.4 (a-e).

9. This case was litigated, and the Settlement negotiated, under the very real threat of Fairbanks' bankruptcy. Joint Decl., ¶¶ 31, 34, 42-43, 47, 61; Declaration of Jeffrey Johnson, CPA, ¶¶5-8; FTC Memorandum, at 3. As such, the resulting recovery for class members must be analyzed in light of the alternative - that class members would have received nothing more than a bankruptcy proof of claim form, which very likely would have no to negligible value. In this regard, the Settlement has distinct parallels to limited fund cases, where a finite pool of money is available to compensate claimants, and there is no possibility that any claimant will be able to recover fully.

10. Taken as a whole, with an appreciation for the delicate balance that was struck between getting as much restitutionary relief as economically possible and pushing too hard and sending Fairbanks over the brink into liquidation proceedings, plaintiffs' counsel did an admirable job here and served the class well. In addition, the business practice changes and additional consumer protections plaintiffs' counsel negotiated as part of the Settlement provide substantial additional benefits to the class. As valuable as the cash compensation elements of the Settlement are, it is especially important in this context to recognize the value of the DRP and OPC. The

Settlement requires Fairbanks to implement these business practice changes upon final approval. These conduct improvement mandates will bestow significant benefits upon those in the class who continue to transact business with Fairbanks, as well as new customers.

11. Although the economic benefits of the business practice changes are difficult to quantify, there is a benefit as well to future Fairbanks' borrowers and perhaps even to customers of Fairbanks' competitors, which should be recognized in the final approval analysis. A minority of class action settlements provide this type of prospective, prophylactic relief and yet, appropriately tailored, such requirements going forward can move an entire industry toward a more equitable business model. Where plaintiffs' counsel add value to the settlement by incorporating such forward-looking provisions, appropriate judicial recognition of the value to the class, and the larger societal value inherent in such work, will encourage more lawyers to seek positive change in addition to remedial relief.

Particular Considerations In Evaluating The Settlement

12. The plaintiffs here allege that Fairbanks' servicing practices created a significant subclass of those for whom foreclosure, either now or in the future, is a significantly enhanced risk. The DRP therefore appropriately focuses on default and foreclosure remedies, both to forestall the downward spiral that can result from falling behind on mortgage payments and to provide tools that homeowners can use to regain their financial footing. Further, there is a significant, essentially unquantifiable but certainly valuable element to the DRP, the anxiety-relieving effect its application must have on homeowners who would lose their homes but for its existence. Consistent with this recognition of the peculiar vulnerabilities of homeowners in this

regard, the Settlement also contains another rarity, an exception to the release for foreclosure defense claims. Settlement Agreement, ¶ V.1. Finally, Fairbanks customers can enforce the DRP and OPC requirements by raising Fairbanks' failure to follow them as a defense in any foreclosure proceedings.

13. The DRP and OPC are to be commended as the type of innovative measures that demonstrate the prophylactic effect that good class action settlements can have when properly structured. These additional non-cash benefits, tailored as they are to the needs of Fairbanks class members, are a valuable addition to the direct cash payments. The court expressly recognized the value such non-cash benefits provide in Duhaime v. John Hancock Mutual Life Ins. Co., 177 F.R.D. 54, 66, 69 (D. Mass. 1997), a class action settlement in a "vanishing premium" case. The Duhaime settlement benefits included cash payments, as well as substantial relief in the form of mandated contributions to existing policies, as well as loans to class members at special interest rates for the purpose of making out-of-pocket premium payments. In addition, the Duhaime settlement provided the opportunity for class members to purchase enhanced value policies, enhanced value annuities, or mutual fund enhancements, as well as an ADR process which, the court noted, "creates opportunities for relief and recovery that may be superior to those which would otherwise be available through litigation outside the ADR process." Duhaime, at 69. In another vanishing premium case, a court approved a settlement which allowed class members to choose from among various forms of relief, including matching premium payments by the defendant, discounts on replacement policies and the opportunity to request a refund of premiums on a policy if premiums increased more than a certain percentage. Milkman v.

American Travellers Life Insurance Company , 61 Pa. D. &C. 4th 502, 509, 2002 WL 32170095 (Pa.Com.Pl.). The court noted that these benefits were of great value to class members because they allowed them access to insurance benefits that were otherwise unavailable but for the settlement, given that some class members were uninsurable. *Id.* at 518.

14. Likewise, in the employment discrimination context, courts have acknowledged the value of practice changes required by a settlement, noting that such benefits directly address the remedies sought by the complaint, often in a more effective manner than cash payments might. *See* Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 628 (9th Cir. 1982) (in responding to an objection that the immediate cash relief for back pay was insufficient, court noted that the primary concern of the plaintiffs was to halt the employer's allegedly discriminatory practices and to assure the future integration of minorities and women into the police department, not simply to obtain back pay, and that the settlement contained a variety of benefits which directly addressed this concern); *see also* Schaefer v. Tannian,1995 WL 871134, *7 (E.D. Mich.) (employment discrimination case, noting that primary relief sought was end to discrimination, not simply obtain monetary relief, and that relief under the settlement which included actual hiring and promotion and adjusted seniority provided significant benefit to class members).

15. The crux of this case is that Fairbanks engaged in predatory servicing practices that put many homeowners at risk of foreclosure and pushed many others closer to the economic margins than would have been the case but for its conduct. As such, the thoughtful allocation of settlement benefits into the component packages of cash relief, the protective requirements of the

DRP, and the forward-looking OPC represent a comprehensive package of benefits that are a complementary but seldom seen package of class remedies.

Risk Factors

16. Another element of settlement analysis involves the consideration of context. This factor not only involves a measure of the likelihood that plaintiffs would achieve success on the merits, but the likelihood that, even if plaintiffs were to succeed at trial, that victory would provide significantly greater benefits to the class than would the proposed settlement. As with all complex litigation, particularly in cases like this with so much at stake, the outcome of a trial is impossible to forecast with any degree of certainty. Fairbanks' tenuous financial situation was an additional risk here that made the outcome of this case even more uncertain, and made navigation of the settlement negotiation process that much more difficult as well.

17. Were Fairbanks to have filed bankruptcy, there was a very real possibility that the class, and plaintiffs' counsel as well, would have received little or nothing. Cases of this sort, with hundreds of thousands of class members and the concomitant obligations of notice and discovery, require an enormous commitment of time, will and resources from plaintiffs' counsel. Courts recognize that the risk of loss in such contingent fee practice is real and potentially devastating.

> The Court is well aware that there are numerous contingent cases such as this where plaintiff's counsel, after investing thousands of hours of time and effort, have received no compensation whatsoever.

Ressler v. Jacobson, 149 F.R.D. 651, 656-657 (M.D. Fla. 1992) (citations omitted).

18. The risk assumed by counsel at the onset of such a case is significant. The fact that plaintiffs' counsel were able to secure a settlement is not relevant to an assessment of the degree of risk assumed in bringing the litigation. See Harman v. Lyphomed, Inc., 945 F.2d 969, 976 (7th Cir. 1991); Skelton v. General Motors Corp., 860 F.2d 250, 258 (7th Cir. 1988) ("The point at which plaintiffs settle with defendants . . . is simply not relevant to determining the risks incurred by their counsel in agreeing to represent them."), cert. denied, 493 U.S. 810 (1989).

Public Policy Considerations

19. This Settlement offers not only substantial benefits to class members, but furthers important public policy goals and provides a model for the class action in which relatively small claimants who likely do not have the resources to initiate litigation are provided with an avenue to relief. The economic realities of an adversarial system are such that the protection of consumer rights, which typically involves litigation on behalf of persons with relatively small individual claims, is advanced by appropriate use of the class action device.

20. In addition, there is a deterrent effect in that creditors are warned that such abuses will not be tolerated. The Michigan Supreme Court commented on these aspects of the class action mechanism more than thirty years ago, and its observations may well reflect the perspective of the class members here, who individually could not get Fairbanks to treat them fairly or play by the recognized rules:

> We live in a world where too many individuals often find their environment confusing, if not hostile. They feel like a number or a bit in a massive impersonal computer. All around them they are confronted by giant powers, big government, big corporations, big unions. They feel they have no control over, or even voice in

what goes on. The law also seems strange and unfriendly. For too many the law seems like a part of the problem instead of part of the solution.

The class action certainly is not the solution to all things. But in some areas, at least, it is a breath of hope – a chance to cope. It gives scattered individuals with a common problem an instrument to try and deal with their problem. It has been particularly helpful for one of today's most beleaguered and disaffected groups – the consumer. It is a kind of better slingshot for the modern David to tackle Goliath with.

Paley v. Coca Cola Co., 389 Mich. 583, 595, 209 N.W.2d 232, 236-237 (1973).

21. The societal benefit provided by attorneys who bring private attorney general actions on behalf of financially vulnerable consumers should be acknowledged, especially when, as here, they succeed in stopping broad-based illegal practices. The Settlement in this case will prohibit Fairbanks from continuing to engage in the servicing travesties alleged in this matter. In addition to the quantifiable class benefits, the potential savings to consumers nationwide and benefit to the public as a result of this settlement is significant.

The Attorney's Fees And Expenses Which Plaintiffs' Counsel Request In This Matter Are Reasonable

22. Finally, there remains the manner in which attorneys' fees were negotiated and the determination whether the amount of fees Fairbanks has agreed to pay, subject to court approval, is reasonable. Here, plaintiffs' counsel completely divorced the discussion of attorneys' fees from the negotiation of the relief provided to the class, turning to this aspect of the Settlement only after all material terms of the settlement had been reached. Joint Decl. ¶¶ 59, 61. This is the preferred procedure, as it "obviate[s] the danger of an actual or apparent conflict of interest on the part of class counsel." In re The Prudential Ins. Co. of America Sales Practices Litig., 962 F. Supp. 572, 577 (D.N.J. 1997). *Accord*, *Manual for Complex Litigation 4th*, § 21.7, Federal Judicial

Center (2004)("Separate negotiation of the class settlement before an agreement on fees is generally preferable"); *Court Awarded Attorneys' Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237 (Oct. 8, 1985)(same). *See also* In re Manufacturers Life Insurance Company Premium Litigation, 1998 WL 1993385, at *6, *10 (S.D. Cal.) ("...the Court is impressed that plaintiffs have in principle secured attorneys' fees and expenses without dipping into the class's recovery.... with respect to possible collusion on fees, it is difficult to see how any could have occurred. As already documented, negotiations were at arm's length on all subjects. The parties carefully avoided the discouraged practice of simultaneous negotiation of fees and the merits.")

23. In addition, the $8.25 million fee request represents less than fifteen percent of the quantifiable cash value of the settlement ($8.25M+$47M=$55.25M) $8.25M/$55.25M = 14.9%. *Manual for Complex Litigation 4th*, § 21.7 (proper calculation of settlement benefits includes all fee amounts paid by defendant in addition to class relief). In applying common fund principles, Fairbanks' payment of the attorneys' fees in addition to and separate from the class recovery is properly measured as if the total benefits to the class equaled $55.25 million, and the attorneys are seeking a fee award of 15% of that fund. "The rationale behind the percentage of recovery method also applies in situations where, as here, although the fee and settlement are separately negotiated and paid, both come from the same source [the defendant]." In re The Prudential Ins. Co. of America Sales Practices Litig., 962 F. Supp. 572, 579 (D.N.J. 1997). *See also* In re Montgomery County Real Estate Antitrust Litig., 83 F.R.D. 305 (D. Md. 1979); Arenson v. Board of Trade of Chicago, 372 F. Supp. 1349 (N.D. Ill. 1974); Colson v. Hilton Hotels Corp., 59 F.R.D. 324 (N.D. Ill. 1972). The fifteen percent fee sought here is far below the widely accepted benchmark of 25%, In re Fleet/Norstar Sec. Litig., 935 F. Supp. 99, 109-110 (D.R.I.

1996), and closer to half of the median fee percentage found in cases studied by the Federal Judicial Center. *See* Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996)*(hereinafter "FJC Study"). This 15% figure is also conservative, it would be even lower were the non-cash benefits of the Settlement included. Plaintiffs' counsel have conservatively chosen not to quantify the value of the non-monetary relief components of the Settlement nor the fact that the substantial costs of notice and administration are entirely borne by Fairbanks as well. As such, the $55 million number understates the true value of the Settlement.

24. The 1996 FJC Study focused on class actions in four district courts that have had significant experience with and a high volume of class actions: the Eastern District of Pennsylvania, the Northern District of California, the Southern District of Florida, and the Northern District of Illinois. This study concluded that with respect to attorney fee awards as a percentage of recovery, median rates ranged from 27% to 30%. *FJC Study*, at 73. Most fee awards in the study were between 20% and 40% of the gross monetary settlement. *Id.,* at 69. The Center found little variation among these geographically and demographically diverse districts.

25. Therefore, from the standpoints of procedural correctness, substantive results, and conformity with fee jurisprudence, as well as the type and caliber of work performed by plaintiffs' counsel, it is my opinion that $8.25 million for fees, costs and expenses, a sum negotiated between the parties after reaching agreement on all material aspects of the settlement, is a fair and reasonable amount. Further, my opinion is that the reasonableness of the requested

fee is most appropriately measured by the percentage of fund analysis. Nevertheless, even were the Court to use the lodestar as a cross-check on the reasonableness of the fees requested, the approximately 1.15 multiplier sought here, particularly in light of the substantial value the Settlement bestows upon class members, is manifestly reasonable.

The Percentage of Common Fund Method Should Be Applied In This Case

26. There are two basic methods by which courts calculate the amount of attorneys fees to be awarded to class counsel. These are the percentage of the fund method and the "lodestar" method. Under the percentage of the fund method, the court applies a percentage to the total recovery to determine an appropriate fee. Under the lodestar method, the fee is based on an hourly measure, adjusted by a multiplier or enhancement for contingency and quality factors.

27. The clear trend among the federal courts is toward the use of the percentage of the recovery method in cases in which a common fund has been created. Even those Circuits that have not formally adopted the percentage approach have upheld percentage awards by lower courts.

28. The percentage of the fund method has its modern origins in Central Railroad & Banking Co. v. Pettus, 113 U.S. 116 (1885), and has since been the prevailing rule used by the federal courts in common fund fee decisions. As recently as 1984, the Supreme Court reaffirmed its support of this approach in a common fund case, stating that "a reasonable fee is based on a percentage of the fund bestowed on the class." Blum v. Stenson, 465 U.S. 886, 900 n. 16 (1984).

That this comment appears in a footnote emphasizes that the Court considers application of the percentage of fund analysis almost a fait accompli.

29. Though some courts in the 1970's began to shift toward the use of a "lodestar with a multiplier" formula in common fund cases, these cases were decided prior to the Supreme Court's opinion in Blum v. Stenson. Since Blum, the overwhelming majority of courts have embraced the percentage of fund approach in common fund cases. *See, e.g.,* In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig., 55 F.3d 768, 821 (3d Cir.), cert. denied, 116 S.Ct. 88 (1995); Swedish Hospital Corp. v. Shalala, 1 F.3d 1261 (D.C. Cir. 1993); In re Continental Illinois Sec. Litig., 962 F.2d 566 (7th Cir. 1992); Camden I Condominium Ass'n v. Dunkle, 946 F.2d 768 (11th Cir. 1991). In general, the lodestar approach appears to be used primarily in "no distribution" cases in which there is no common fund. *FJC Study*, 69-74.

30. In 1985, the percentage approach received further support in the report issued by a special task force appointed by the United States Court of Appeals for the Third Circuit. Court Awarded Attorney Fees, Report of the Third Circuit Task Force, 108 F.R.D. 237 (1985) (Prof. Arthur R. Miller, Reporter). The Task Force was formed to address practical difficulties in applying the lodestar method. 108 F.R.D. at 238. It undertook an intensive analysis of the lodestar and percentage of the fund methods in various contexts. Identifying nine major deficiencies in the lodestar process, 108 F.R.D. at 246-249, the Task Force concluded that, in common fund cases, the courts should award fees on a percentage basis. 108 F.R.D. at 255.

31. The percentage approach approximates contingent fee formulas that individuals and corporations negotiate with their attorneys. The Supreme Court has recognized that it has

"consistently looked to the marketplace" as the guide to what is reasonable. Missouri v. Jenkins, 491 U.S. 274, 285 (1989). In the First Circuit decision In re Thirteen Appeals Arising Out Of The San Juan DuPont Plaza Hotel Fire Litig., 56 F.3d 295, 307 (1st Cir. 1995), the Court followed this direction and adopted a market-based perspective:

> Another point is worth making: because the POF [percentage of fund] technique is result-oriented rather than process-oriented, it better approximates the workings of the marketplace. We think that Judge Posner captured the essence of this point when he wrote that "the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character." In re Continental Ill. Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992). In fine, the market pays for the result achieved.

32. The percentage method more accurately reflects the results achieved, encourages attorneys to gain the most benefit for their clients by rewarding efficiency and a larger class recovery, and allows for predictability and consistency in fee awards. It allows plaintiffs' attorneys to develop reasonable expectations about the likely fee recovery so that the attorney is more willing to invest time, money and reputation in the action, economizes on judicial time in reviewing the application, ends the incentive for delay, and removes the penalty on early settlements which the lodestar imposes.

> Compensation of class counsel in common fund cases on a percentage of the recovery method makes eminently good sense. First, it is consistent with practice in the private marketplace where contingent fee attorneys are customarily compensated on a percentage of the recovery method. Second, it provides plaintiffs' counsel with a strong incentive to effectuate the maximum possible recovery in the shortest amount of time. Third, use of the percentage method decreases the burden imposed upon the court by other fee award procedures, especially the lodestar method, and assures that class members do not experience undue delay in receiving their share of the proceeds of the settlement due to protracted fee proceedings.

In re M.D.C. Holdings Sec. Litig., [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,474 at 97,490 (S.D. Cal. Aug. 30, 1990).

33. Given the uncertainties, hazards and high costs of litigation, plaintiffs' litigation practice must be results-oriented. It is to the advantage of injured litigants, the courts and society in general for litigation to be concluded as swiftly as possible.

> The percentage method clearly has a number of advantages, including that it is relatively objective, can be easily administered by the courts, will simplify the fee setting process, and will not place a possible premium on running the hourly meter. It better aligns the financial interests of the client with that of the lawyer. It uses economic based *incentives,* rather than court-imposed, after-the-fact *controls* to regulate fees.

Michael P. Malakoff, Third Circuit Judicial Conference, "Update on Third Circuit Fee Task Force Report on Court Awarded Attorneys' Fees," at 10 (Sept. 13, 1991).

> The contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains... The unscrupulous lawyer paid by the hour may be willing to settle for a lower recovery coupled with a payment for more hours. Contingent fees eliminate this incentive and also ensure a reasonable proportion between the recovery and the fees assessed to defendants . . . At the same time as it automatically aligns interests of lawyer and client, rewards exceptional success, and penalizes failure, the contingent fee automatically handles compensation for the uncertainty of litigation.

Kirchoff v. Flynn, 786 F.2d 320, 325-26 (7th Cir. 1986).

34. The level of contingent fee that has been generally established in the marketplace for legal services is approximately one-third of the recovery for traditional commercial or personal injury claims. In this case, the cash recovery for the class is a common fund exceeding $55 million. The benefits obtained for the class are obvious and quantified. The case was initiated on a contingency basis, and the risk involved in pursuing the litigation, as previously discussed, was real and significant.

The Fee Sought Here is Well Below The Accepted 25% Benchmark, For A Result Which Is Well Above The Norm

35. There is no hard and fast rule as to what percentage of the fund the fee award should be in a given case. In complex class actions and shareholder derivative suits, fees normally range from 20 to 30% of class recovery. The median of this range is 25%, and this figure has been used as a benchmark, or starting point by courts considering fee awards in common fund cases. In addition, it is important to bear in mind that typically – but not in this case – attorney fees are deducted from the recovery to the class, reducing each class member's share.

36. In 1996, the National Economic Research Associates, an economic consulting firm, conducted a study of class action fee awards. Frederick C. Dunbar, Todd S. Foster, Vinita M. Juneja, Denise N. Martin, Recent Trends IV: What Explains Filing And Settlements in Shareholder Class Actions (NERA Nov., 1996) ("Dunbar Study"). Using data from shareholder class actions between 1991 and 1996, the Dunbar Study reached a number of relevant findings, including that regardless of class size, fees consistently fell between 30 and 33 percent of the common fund, irrespective of settlement size. *Dunbar Study*, at 12-13.

37. As noted, the *FJC Study* concluded that with respect to attorney fee awards as a percentage of recovery, median rates ranged from 27% to 30%. *FJC Study*, at 69, 73. *See also Manual for Complex Litigation 3rd*, Federal Judicial Center (1995), § 24.14, at 189 (pointing out that courts that use the percentage method in class actions typically award fees ranging from 25% to 30%). The Dunbar Study, however, also contained the interesting data that ordinarily, class settlements recover amounts ranging from 4 to 12.25 cents on the dollar of estimated actual loss. *See* Denise N. Martin, Vinita M. Juneja, Todd S. Foster, and Frederick C. Dunbar, *Recent Trends*

IV: What Explains Filings and Settlements in Shareholder Class Actions? (National Economic Research Associates 1996) (study of securities class actions). Here, even if, as suggested before, fully ten percent of all Fairbanks' charges were improper, class members are still recovering a significant amount of their actual damages, and obtaining the benefits of the innovative DRP, as well as the injunctive benefits of the OPC. A fee of 15% of the objectively measureable economic benefits obtained is therefore well below the norm, for a result demonstrably better than those observed in the Dunbar study.

Percentage Awards in the First Circuit

38. I have reviewed decisions of the United States Court of Appeals for the First Circuit and of the United States District Court for the District of Massachusetts on percentage of fund recoveries and have found consistent and appropriate use of the percentage of fund method to award fees. In recent years these awards have encompassed a range of from 20% to 35%.

39. The First Circuit has expressly approved the percentage method of awarding attorney's fees in a common fund case. In re Thirteen Appeals Arising Out Of The San Juan DuPont Plaza Hotel Fire Litig., 56 F.3d 295, 307 (1st Cir. 1995). The District Courts within the First Circuit have repeatedly used the percentage method. A representative sampling follows: In re Gillette Sec. Litig., C.A. No. 88-1858-K (D. Mass. March 30, 1994) (fee of 35% of fund); Malanka v. de Castro, [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,657 at 98,080 (D. Mass. Nov. 20, 1990) (fee of 33% of fund); Wells v. Dartmouth Bancorp, Inc., 813 F. Supp. 126, 130 (D.N.H. 1993) (fee of 33% of $1 million common fund after deducting costs); In re Copley Pharmaceutical, Inc. Sec. Litig., C.A. No. 94-11897-WGY (D. Mass. Feb. 8, 1996) (fee

equal to 33% of fund); In re Cambridge Biotech Corp. Sec. Litig., C.A. No. 93-12486-REK (D. Mass. Apr. 4, 1996) (fee of 30% of the cash and common stock in the fund); Morton v. Kurzweil Applied Intelligence, Inc., C.A. No. 94-10829-REK (D. Mass. Apr. 26, 1995) (fee of 30% of common fund); In re Ferrofluidics Corp. Sec. Litig., C.A. No. 93-11976-PBS (D. Mass. Aug. 19, 1994) (fee of 30% of the cash and stock in the fund): In re Kendall Square Research Corp. Sec. Litig., C.A. No. 93-12352-EFH (D. Mass. July 28, 1994) (fee of 30% of cash, stock and warrants in the fund); In re Bank of Boston Corp. Sec. Litig., Master File No., 89-2269-H (D. Mass. Feb. 24, 1993) (fee of 30% of fund); Modell v. Eliot Savings Bank, C.A. No. 90-10622-H (D. Mass. Nov. 18, 1992) (fee of 30% of fund); Buonanno v. People's Savings Bank of Brockton, C.A. No. 91-11226-H (D. Mass. Nov. 18, 1992) (fee of 30% of fund); Randle v. SpecTran Corp., C.A. No. 86-2970-K (D. Mass. May 20, 1993) (fee of 30% of fund); Wells v. Monarch Capital Corp., C.A. No. 91-10575-MA (D. Mass. June 15, 1992) (fee of 28% of fund); Wechsler v. Comfed Bancorp, Inc., C.A. No. 89-2224-MLW (D. Mass. June 21, 1996) (fee of 27% of the cash in the fund); Fulco v. Continental Cablevision Inc., C.A. No. 89-1342-WGY (D. Mass. Mar. 30, 1994) (fee of 27% of the cash and stock comprising the fund); Pavlidis v. New England Patriots Football Club, 675 F. Supp. 707, 709 (D. Mass. 1987) (fee of 26% of fund); and In re Fleet/Norstar Sec. Litig., 935 F. Supp. 99, 109-110 (D.R.I. 1996) (fee of 20% of common fund awarded "in the low end" of the accepted range because settlement produced less than optimal result).

40. In a typical common fund case, 25% of the fund would be awarded to attorneys who obtained substantial, but often significantly less than full damages, for the class. Even if the

award in this case were offset for risk or under an economies of scale doctrine, the excellent recovery obtained for the class would in turn more than offset any such reduction.

Even If The Lodestar Analysis Were Applied The Negotiated Fee Is Reasonable

41. The lodestar method best applies to cases in which relief is injunctive, prospective, prophylactic or otherwise difficult to quantify, while the percentage of fund method more accurately reflects the results achieved, which are present in the form of an easily quantifiable economic benefit to the class. Given the objectively quantified nature of this settlement, I believe that the lodestar comparison is neither necessary nor advisable. The *Manual for Complex Litigation* also indicates that a lodestar comparison is not required here: "[u]nlike in a statutory fee analysis, where the lodestar is generally determinative, in a percentage fee award [from a common fund] *the amount of time may not be considered at all*." *Manual For Complex Litigation 3rd*, §24.121, at 191 (emphasis added). Nevertheless, even were the Court to give the hours invested by plaintiffs' counsel in this matter some weight in evaluating the reasonableness of the fee request, "the factor given the greatest emphasis is the size of the fund created, because 'a common fund is itself the measure of success . . . [and] represents the benchmark from which a reasonable fee will be awarded.'" *Id.*, §24.121, p. 191, n.580 (*quoting* 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 14-4 (3d ed. 1992)). In my opinion the better practice is to use the lodestar in exceptional circumstances to justify small deviations from an established benchmark percentage of 25 or 30 percent.[1]

---

[1] *See Manual*, §24.121, p. 191 n.576 ("[T]he Ninth Circuit established a 25% benchmark for [common fund fee] awards, subject to upward or downward adjustment 'to account for any unusual circumstances involved in this case.' Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d

42. The use of the lodestar analysis as simply a cross-check against a percentage of fund award is more appropriate in class cases and gives courts additional justification for the determination that a fee is reasonable. Where exceptional results are obtained, courts have consistently used high multipliers of the lodestar in awards compensating the attorneys who achieved those results. *See, e.g.,* Weiss v. Mercedes-Benz of North America, Inc., 899 F. Supp. 1297, 1304 (D.N.J. 1995) (lodestar multiplier of 9); In re RJR Nabisco, Inc., Sec. Litig, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,984 at 94,267 (S.D.N.Y. 1992) (lodestar multiplier of 6); Cosgrove v. Sullivan, 759 F. Supp. 166, 169 (S.D.N.Y. 1991) (lodestar multiplier of 8.74); Donald R. Szydlik v. Associates National Bank, No. 92-1025, slip op. at 8 (W.D. Pa. Sept. 19, 1997) (lodestar multiplier of 8.5); Glendora Community Redevelopment Agency v. Demeter, 155 Cal. App. 3d 465, 479, 203 Cal. Rptr. 389, 398 (Cal. Ct. App. 1984) (lodestar multiplier of 12). The excellent benefits achieved for the class in this case fully warrant the negotiated fee using the lodestar cross-check as well. Here, the current lodestar multiplier is approximately 1.15. The lodestar closely approximates the fee request in part because plaintiffs' counsel consolidated some thirty other cases by agreement with counsel in those related matters, involving some forty-two law firms in all. As indicated by the preliminary approval hearing transcript, the Court specifically directed counsel to make diligent efforts to include all operative cases within this national Settlement. This cooperative resolution of all affiliated matters is

---

at 268, 272 (9th Cir. 1989)]. *See also* In re Activision Sec. Litig., 723 F. Supp. 1373, 1378 (N.D. Cal. 1989) ('absent extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%'); RJR Nabisco, Inc. Sec. Litig., [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,984 at 94,268 (S.D.N.Y. 1992) ('What should govern such awards is not the essentially whimsical view of a judge, or even a panel of judges, as to how much is enough in a particular case, but what the market pays in similar cases . . . .'.").

another positive factor to be considered in the Court's evaluation of the fee request. In addition, counsel's ongoing obligation to administer the Settlement and resolve the inevitable disputes of some class members will require work on this case through at least July, 2004. This additional work will reduce the already minimal lodestar multiplier even further.

43. In comparison with prevailing rates, the fee requested here is low. This is true whether the Court considers the fee as a percentage of the most conservative, objective value of the Settlement or as a lodestar with a multiplier of 1.15. By comparison with other class action settlements, the result obtained in this lawsuit is excellent. Normally, an excellent recovery justifies an above average fee. Because the fee requested here is below average, it clearly should be approved.

44. For all of these reasons, it is my opinion this Settlement is unquestionably fair, reasonable and adequate and otherwise meets the requirements of Rule 23 for a settlement class, and that the fee requested is manifestly reasonable.

/s/ Alba Conte
Alba Conte
321 Por La Mar Circle
Santa Barbara, Calif. 93103