

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

ALANNA L. CURRY,)	
MARLENE L. BRENES,)	
and THOMAS O. WHITE)	Case No. 03-10895-DPW
)	
individually and on behalf of all others)	
similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	
)	
FAIRBANKS CAPITAL CORPORATION)	
)	
Defendant.)	
)	

FIRST AMENDED AND CONSOLIDATED CLASS ACTION COMPLAINT

Plaintiffs, by their attorneys, individually, as private attorneys general, and on behalf of all others similarly situated, hereby consolidate the complaints filed in the following actions and make such amendments as are necessary to effectuate said consolidation:

- *Consolidated California Cases I and II*; Proc. Nos. 4282 & 4284, Contra Costa County Superior Court, CA
- *Paul J. Alexander, Jr., et al. v. Fairbanks Capital Corp. et al.*; 03-02790 Contra Costa County Superior Court, CA
- *Delores Alsbrooks v. Fairbanks Capital Corp.*; 2:03-CV-02386(RK), Philadelphia County Court of Common Pleas, PA
- *Mark A. Bradley, et al. v. Fairbanks Capital Corp. et al.*; 02-C-7786, N.D. Ill.
- *Allan R. Brause v. Fairbanks Capital Corp.*; 13 C-03-55637, D. Md.
- *Charles & Bernadette Chatman v. Fairbanks Capital Corp.*; No. 02-665, N.D. Ill.
- *Hobart M. Cline v. Fairbanks Capital Corp.*, 03 CVS 3018 Superior Court Forsyth County, North Carolina
- *Richard Demme v. Fairbanks Capital Corp.*; 03 CV 4000 (DRH) (WDW), E.D.N.Y.
- *Shirley J. Donegan v. Fairbanks Capital Corp. et al.*; CV-03-427, Circuit Court of Russell County, AL

- *Maria Garcia, et al. v. Fairbanks Capital Corp.*; No. 2003-CA-003803, Circuit Court for the 12th Judicial Circuit in and for Manatee County, FL
- *Anethea Horsey v. Fairbanks Capital Corp. et al.*; No. 03-07824, Montgomery County Court of Common Pleas, PA
- *Robert Hutchins v. Fairbanks Capital Corp.*; 02-C-2256, N.D. Ill.; 03-2505, 7th Circuit Court of Appeal.
- *Henrietta Kilgore v. Fairbanks Capital Corp. et al.*; 03CH511, Cook County Circuit Court, IL
- *Sara Koffler, et al. v. Fairbanks Capital Corp.*; 0212557CA01, Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, FL
- *Allen Levin v. Fairbanks Capital Corp. et al.*; 03CH05429, Cook County Circuit Court, IL
- *Dwayne D. & Turlan T. Levine, et al. v. Fairbanks Capital Corp.*; 02-3363, E.D. La.
- *Margaret M. Porter v. Fairbanks Capital Corp.*; 01-C-9106, N.D. Ill.
- *Delanor H. Quinn, et al. v. Fairbanks Capital Corp.*; 03-310544-CP, Wayne County Circuit Court, MI
- *Chad & Frances Schlosser v. Fairbanks Capital Corp.*; 2:01CV02121, C.D. Ill.
- *James E. & Joan L. Scott v. Fairbanks Capital Corp.*; 02-CV-01, S.D. Ohio
- *Manuel Serrano v. Fairbanks Capital Corp. et al.*; CV-S-03-0484-KJD-LRL, D. Nev.
- *Cynthia Slade v. Fairbanks Capital Corp. et al.*; No. 03-CV-3569, N.D. Ill.
- *Donald E. Staples, Jr. v. Fairbanks Capital Corp.*; C-03-1261, Circuit Court, Frederick County, MD.
- *Dorothy Stewart v. Fairbanks Capital Corp. et al.*; March Term, 2003, No. 2075 Court of Common Pleas, Philadelphia County, PA
- *Monica Stewart, et al. v. Fairbanks Capital Corp. et al.*; 03-CV-6995, N.D. Ill.
- *Gilouse Vincent v. Fairbanks Capital Corp.*; C.A. No. C3-0643, Essex County Superior Court, MA
- *Nancy Wagner v. Fairbanks Capital Corp. et al.*; 2003 CA 6697 NC, Circuit Court of the 12th Judicial District in and for Sarasota County, FL
- *Christopher J. & Cynthia L. Zander, et al. v. Fairbanks Capital Corp.*; 03CH02442, Cook County Circuit Court, IL

It is Plaintiffs' intention that by this consolidation, all of the allegations in each of these complaints are preserved as if reasserted and alleged herein. Plaintiffs allege the following upon information and belief based, among other things, upon the investigation made by Plaintiffs by and through their attorneys:

I. INTRODUCTION

1. Plaintiffs bring this class action on behalf of themselves and a nationwide class of similarly situated individuals (the "Class") as described in paragraphs 68 through

70 of this consolidated complaint.

2. Fairbanks has engaged in a nationwide scheme of illegal, unfair, unlawful, and deceptive business practices that violate both federal and state law in the servicing of home-secured loan transactions and in the provision of certain related services. Said scheme is carried out by means of a centrally controlled set of policies and practices and is implemented with form documents, form notices and uniform accounting mechanisms.

3. Fairbanks routinely seeks to collect and does collect various improper fees, costs and charges, including “recoverable borrower fees,” “corporate advances,” “property preservation fees,” “fees advanced on borrower’s behalf,” inspection fees, broker’s price opinion fees, improper prepayment penalties, unnecessary hazard insurance premiums, unexpended foreclosure related attorney’s fees and foreclosure costs, excess interest charges, escrow account overcharges, fees for using its EZ Pay automated payment systems, release fees, and other fees that are either not legally due under the mortgage contract or applicable law, or that are in excess of amounts legally due.

4. Fairbanks assesses these improper fees, costs and charges (collectively the “improper charges”) to borrowers’ accounts and then demands payment in various contexts including, without limitation, monthly bills, reinstatement demands, payoff statements, court pleadings, collection letters and collection calls. The improper charges are then collected from borrowers’ monthly payments and in other contexts, such as reinstatement agreements, recovery from the proceeds of foreclosure sales and loan payoffs.

5. Fairbanks also mishandles borrowers’ mortgage payments and fails to timely or properly credit payments received, resulting in late charges, delinquencies or default. Fairbanks mishandles borrowers’ escrow accounts, making unauthorized or untimely payments from escrow accounts, and demanding excessive escrow payments.

6. It is also Fairbanks’ practice to force place hazard insurance covering

properties securing loans serviced by Fairbanks, including in instances where the borrower has an existing policy of hazard insurance in force, and then to charge borrowers unnecessary and excessive insurance premiums. The improper insurance charges often result in forcing the consumers into default under the terms of their mortgages, resulting in further improper and unauthorized fees and charges to their escrow accounts, which are controlled by Fairbanks.

7. Fairbanks routinely treats borrowers as in default of their loans even though the borrowers have tendered timely and sufficient payments or have otherwise complied with mortgage requirements. In addition, the Defendant routinely enters into and then breaches uniform reinstatement agreements with borrowers who seek to prevent foreclosure of their homes. When Fairbanks subsequently breaches the reinstatement agreements, it resumes foreclosure activity without notice to the borrowers. It then collects its unlawful charges in the foreclosure process from the borrowers' equity in their homes when the borrower reinstates, pays off the loan or after the foreclosure sale of the home. It is also Fairbanks' regular practice to initiate foreclosure actions without serving required notices, demands or proper complaints.

8. Plaintiffs assert that Fairbanks has engaged in a regular pattern of violations of the federal law requirements imposed by the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601, *et seq.* ("RESPA"), with respect to responding to requests from borrowers for account information, provision of required notices, and application of payments, the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, *et seq.* ("FDCPA"), with respect to unlawful collection practices, collecting or seeking to collect amounts not legally due and owing, failing to provide required disclosures in collection letters, and harassing borrowers, and the Truth in Lending Act, 15 U.S.C. §§ 1601, *et seq.* ("TILA"), with respect to information provided about variable rate loans.

9. Plaintiffs also allege that Fairbanks' practices are misleading, deceptive and unfair under state law including, without limitation, Utah Code Ann. §§ 13-11-1, *et*

seq. (applicable nationwide as the State in which Fairbanks' business practices originated and/or were consummated), 73 Pennsylvania Statutes §§ 201-1, *et seq.* (also applicable nationwide because Fairbanks maintains a facility in Pennsylvania from which its post-collection business practices, including those for foreclosure and bankruptcy activities, originated or were consummated), Fla. Stat. Ann. Chapter 501 (also applicable nationwide because Fairbanks conducts its primary default operations, loan history and complaint investigation unit, and other activities from a facility in Florida), Massachusetts General Laws ch. 93A, § 2, and California's Unfair Business Practices Act, Bus. & Prof. Code §§ 17200, *et seq.*

10. Said practices also violate the contract law and common law in each state where Fairbanks does business.

11. Finally, Plaintiffs seek injunctive relief to prevent recurrence of the challenged conduct, and to assure uniform standards of future servicing of loans and equitable relief and damages for themselves and the class generally, including restitution and disgorgement of funds obtained by the Defendant in violation of state and federal law.

II. JURISDICTION AND VENUE

12. This Court has jurisdiction over Plaintiffs' federal claims under RESPA, the FDCPA and TILA pursuant to 28 U.S.C. §§ 1331, 1343 and 15 U.S.C. §§ 1692k, 2614, 1640(e). The Court has jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367.

13. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

III. THE PARTIES

A. PLAINTIFFS

14. Plaintiff Alanna Curry is a resident of Boston, Massachusetts whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

15. Plaintiffs Marlene Brenes and Thomas White are residents of Everett, Massachusetts whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

16. Plaintiff Gilouse Vincent is a resident of Lynn, Massachusetts whose home-secured loan was originated by Defendant during the period covered by this consolidated action.

17. Plaintiff Leslie Anders is a resident of Bay Point, Contra Costa County, California whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

18. Plaintiff Stephen Brook is a resident of Vallejo, Solano County, California whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

19. Plaintiff Lana Logan is a resident of West Covina, Los Angeles County, California whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

20. Plaintiff Veronica Logan is a resident of Walnut Creek, Contra Costa County, California whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

21. Plaintiff Judith Lopez is a resident of Alta Loma, San Bernadino County, California whose home-secured loan was serviced by Defendant during the period

covered by this consolidated action.

22. Plaintiff Leah Rae Ramalingam is a resident of Upland, San Bernadino County, California whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

23. Plaintiff Dieter Sauer is a resident of Laguna Niguel, Orange County, California whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

24. Plaintiff Christine Vickstrom is a resident of Laguna Niguel, Orange County, California whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

25. Plaintiff Connie Whitson is a resident of San Diego, San Diego County, California whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

26. Plaintiff Gerald Biggins is a resident of Alameda County, California whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

27. Plaintiff Margie Lawson is a resident of Alameda County, California whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

28. Plaintiff Lillian Izralson is a resident of Los Angeles County, California whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

29. Plaintiffs Paul J. and Caroline M. Alexander are residents of Santa Clara

County, California whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

30. Plaintiffs Merle and Regina A. Thompson are residents of Solano County, California whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

31. Plaintiff Delores Alsbrooks is a resident of North Philadelphia, Pennsylvania whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

32. Plaintiffs Mark A. and Jill E. Bradley are residents of Bloomingdale, Illinois whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

33. Plaintiffs Charles and Bernadette Chatman are residents of Chicago, Illinois whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

34. Plaintiff Richard Demme is a resident of East Moriches, New York whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

35. Plaintiff Robert Hutchins is a resident of Chicago, Illinois whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

36. Plaintiff Henrietta Kilgore is a resident of Chicago, Illinois whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

37. Plaintiff Margaret M. Porter is a resident of Chicago, Illinois whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

38. Plaintiffs Chad and Frances Schlosser are residents of Decatur, Illinois whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

39. Plaintiff Anethea Horsey is a resident of Glenside, Pennsylvania whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

40. Plaintiff Cynthia Slade is a resident of Skokie, Illinois whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

41. Plaintiffs Dwayne D. and Turlan T. Levine are residents of New Orleans, Louisiana whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

42. Plaintiff Larry J. McCreary is a resident of St. Tammany Parish, Louisiana whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

43. Plaintiffs Delmas and Mary Bosarge are residents of Jefferson Parish, Louisiana whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

44. Plaintiff Lorraine Houck is a resident of St. Charles Parish, Louisiana whose home-secured loan was serviced by Defendant during the period covered by this

consolidated action.

45. Plaintiff Allen Levin is a resident of Wilmette, Illinois whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

46. Plaintiffs James E. and Joan L. Scott are residents of Huber Heights, Ohio whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

47. Plaintiff Deborah Kline Ellis is a resident of Dayton, Ohio whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

48. Plaintiff Manuel Serrano is a resident of Las Vegas, Nevada whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

49. Plaintiff Delanor H. Quinn is a resident of Detroit, Michigan whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

50. Plaintiffs Karen R. and Steven L. Flansburg are residents of Metamora, Michigan whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

51. Plaintiffs Roger B. and Linda L. Pohlson are residents of Kingsford, Michigan whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

52. Plaintiff Dorothy Stewart is a resident of Philadelphia, Pennsylvania

whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

53. Plaintiff Monica Stewart is a resident of Chicago, Illinois whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

54. Plaintiff Darrick Williams is a resident of Harvey, Illinois whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

55. Plaintiffs Jonathan and Betsy Thompson are residents of Moline, Illinois whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

56. Plaintiffs Christopher J. and Cynthia L. Zander are residents of Crestwood, Illinois whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

57. Plaintiff Lee and Kristin O'Driscoll are residents of Jacksonville, Oregon whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

58. Plaintiff Allan R. Brause is a resident of Ellicott City, Maryland whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

59. Plaintiff Donald E. Staples is a resident of Pasadena, Maryland whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

60. Plaintiff Shirley J. Donegan is a resident of Phenix City, Alabama whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

61. Plaintiff Sara Koffler is a resident of Miami-Dade County, Florida whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

62. Plaintiff Elaine Fonseca is a resident of Miami-Dade County, Florida whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

63. Plaintiff Maria Garcia is a resident of Ellenton, Florida whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

64. Plaintiff Barney Hall is a resident of Valrico, Florida whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

65. Plaintiff Nancy Wagner is a resident of Sarasota, County, Florida whose home-secured loan was serviced by Defendant during the period covered by this consolidated action.

66. Plaintiffs Hobart and Linda Cline, Carl and Catherine Irby Syphrett, Janie Mosley Autery, and Sally Carson are residents of Forsyth or Yadkin County, North Carolina whose home-secured loans were serviced by Defendant during the period covered by this consolidated action.

B. DEFENDANT

67. Defendant Fairbanks Capital Corporation (“Fairbanks”) is a Utah based corporation, with a principal place of business at 3815 South West Temple Street, Salt Lake City, Utah, 84115.

IV. PLAINTIFFS’ CLASS ACTION ALLEGATIONS

68. The above-named Plaintiffs bring this action on behalf of themselves and all persons whose loans were serviced by Fairbanks on or after January 1, 1999, and

(a) whose loans were (i) in default or treated as being in default by Fairbanks and (A) who incurred or were assessed late fees and/or default-related fees including, without limitation, fees denominated by Fairbanks as “corporate advances,” or (B) who were affected by default-related conduct; *and/or* (ii) who incurred or were assessed prepayment penalties in violation of law or contract; or

(b) who otherwise were affected, or whose loans were otherwise affected, by one of the additional practices that are the subject of this complaint.

69. For the purposes of paragraph 68(b), the term “additional practices that are the subject of this complaint” means:

- a. Assessment of excess or improper force placed hazard insurance premiums;
- b. Payment or assessment of property tax penalties or excess interest on property taxes despite a valid and timely paid escrow account maintained by Fairbanks to cover property tax obligations;
- c. Assessment of broker’s price opinion charges and/or inspection fees for work that was not completed;
- d. Assessment of interest at the time of loan payoffs that was not then due;

- e. Assessment of interest due on corporate advances on the basis of improper rounding.

70. Plaintiffs seek class certification under Federal Rules of Civil Procedure 23(a) and 23(b)(1),(2), and (3).

71. The members of the Class are so numerous that joinder of all members is impracticable. The number of Class members nationwide, ascertainable from records maintained by Defendants and their agents, is approximately 600,000.

72. Common questions of law and fact exist as to all members of the Class. Among the questions of law and fact common to the Class are:

- a. Whether Fairbanks has sought and collected fees and charges not authorized by the loan contract or not legally due and owing;
- b. Whether Fairbanks has sought and collected excessive interest and unlawful prepayment penalties;
- c. Whether Fairbanks systematically failed to properly and/or timely credit customers' payments to their accounts;
- d. Whether Fairbanks improperly administered its customers' "suspense," "corporate advance," and "escrow" accounts;
- e. Whether Fairbanks charged borrowers for unnecessary force placed insurance, and collected excessive amounts for force placed insurance, premiums for which it received an improper payment from the insurer;
- f. Whether Fairbanks issued monthly statements which failed to include accurate and required account information;

- g. Whether Fairbanks has prematurely referred accounts to collections and foreclosure, before legal or contractual grace periods have expired;
- h. Whether Fairbanks has sent collection notices seeking to collect amounts not legally due and owing;
- i. Whether Fairbanks' collection notices threaten action which is not intended to be taken or cannot legally be taken;
- k. Whether Fairbanks has engaged in other systematic improper collection practices in violation of the FDCPA;
- l. Whether Fairbanks coerced borrowers to use EZ Pay, its automated payment system, for which Fairbanks received a kickback;
- m. Whether Fairbanks routinely failed to respond to borrower's qualified written request for account information as required by RESPA;
- n. Whether Fairbanks improperly returned or refused to accept payments in order to generate defaults which allowed it to impose fees;
- o. Whether Fairbanks systematically failed to properly manage borrower's accounts;
- p. Whether Fairbanks improperly imposed bankruptcy-related fees and charges;
and
- q. Whether Fairbanks conduct violated the various laws, contracts and applicable standards of conduct as set forth in this Consolidated Complaint.

73. Plaintiffs' claims are based on form loan documents, standardized servicing practices, form letters, accounting standards and improper fee schedules that were used or implemented by the defendant on a nationwide basis.

74. Fairbanks controlled and implemented the challenged practices on a uniform basis from its central offices.

75. There are no substantial individual questions among the class claims, other than the amount of relief that each Class member is entitled to receive. Common questions thus predominate.

76. Plaintiffs' claims are typical of the claims of the members of the Class, as Plaintiffs and all other members of the Class sustained harm arising out of Defendant's common course of wrongful conduct. Plaintiffs are greatly aggrieved at the damages and unfair and deceptive treatment they have suffered at Defendant's hands.

77. Plaintiffs are adequate representatives of the borrowers whom they seek to represent. There are no conflicts between them and other Class members.

78. Plaintiffs have suffered the same wrongs as Class members generally and are intent on seeing such wrongs remedied. They are fully committed to fairly, adequately, and vigorously representing and protecting the interests of the members of the Class. They have retained counsel competent and experienced in class action and consumer fraud litigation for this purpose.

79. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for Fairbanks within the meaning of Rule 23(b)(1)(A).

80. Fairbanks has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole within the meaning of Rule 23(b)(2).

81. Questions of law or fact common to the members of the Class predominate over any questions affecting only individual members within the meaning of Rule 23(b)(3).

82. A class action is superior to other available methods for the fair and efficient adjudication of this controversy within the meaning of Rule 23(b)(3) because joinder of all members is impracticable, and pursuing class members' claims on an individual basis would be both prohibitively expensive for most class members and inefficient from the standpoint of the judicial system. Plaintiffs know of no serious difficulty likely to be encountered in the management of this action that would preclude its maintenance as a class action.

V. FACTUAL ALLEGATIONS:
DEFENDANT'S WRONGFUL CONDUCT

83. Throughout the time relevant hereto, Fairbanks has engaged in a uniform scheme and course of conduct to inflate its corporate profits by charging and collecting various fees not authorized by the loan documents or applicable law. The components of this scheme involve common tactics, including, but not limited to:

- (a) failing to credit payments received in a timely fashion (including payments received through automated payment mechanisms) thus generating late fees and profitable default related charges;
- (b) failing to provide consumers with timely or clear information about the timing and amount of payments owed;
- (c) prematurely referring accounts to Fairbanks' collection department after loan payments become due, regardless of legal and contractual grace periods;
- (d) failing to accept and credit payments or misapplying payments received;

- (e) mishandling escrow accounts and suspense accounts;
- (f) imposing and collecting unfair and illegal attorneys' fees that have been improperly assessed, and for which proper notice has not been given;
- (g) imposing and collecting property inspection fees, appraisal fees, broker price opinion fees, "corporate advances," late charges, "recoverable borrower fees," late fees, forbearance fees, escrow fees, demand letter fees, bankruptcy fees, foreclosure fees, insurance tracking fees, service release fees and other fees that have been improperly assessed;
- (h) coercing borrowers to remit payments through EZ Pay and/or other expedited payment systems from which it receives a portion of the coerced fee, and making misrepresentations about these systems;
- (i) improper or unauthorized use of suspense accounts in a manner designed to prevent borrowers from resolving loan defaults;
- (j) miscalculation of contractually due interest including, without limitation, miscalculating interest due at payoff and interest due on corporate advances;
- (k) charging interest on corporate advances even when such interest charges are precluded by contract;
- (l) failing to properly manage escrow accounts including failing to make timely payments of taxes and insurance from escrowed funds;
- (m) failing to properly calculate prepayment penalties contractually or legally due;
- (n) reporting and threatening to report inaccurate information about borrowers' credit status and credit history to third parties, including credit reporting agencies;

(o) treating borrowers as in default when they were not actually in default.

84. Fairbanks engages in a uniform scheme and course of conduct to inflate its corporate profits by force-placing hazard insurance on properties which secure the mortgages that it services. If a borrower fails to purchase or maintain hazard insurance on his or her property, according to standard mortgage instruments, the mortgagee can “force place,” or purchase insurance itself to protect the mortgagee's rights in the property, then pass the costs on to the borrower. Fairbanks, however, routinely force places insurance unnecessarily where the borrower actually has insurance in place. Fairbanks also routinely obtains coverage in amounts which far exceed the mortgagor's obligation to maintain coverage to protect the lender's lien interest as provided by the commitment letter, note or mortgage instrument, and imposes unauthorized insurance “tracking” fees on borrowers. Fairbanks receives a kickback from the insurance company from whom it purchases insurance.

85. Fairbanks routinely enters into and then breaches reinstatement agreements with borrowers who enter into the agreement in an effort to save their homes.

86. Fairbanks routinely files foreclosure actions without proper notices, and files defective foreclosure complaints.

87. Fairbanks routinely proceeds with wrongful foreclosures including, without limitation, in cases in which the borrower was not legitimately in default and where the borrower has a contractually binding plan in place to reinstate the delinquent amount.

88. Fairbanks regularly attempts to collect debts alleged to be due another and is a debt collector as defined by 15 U.S.C. § 1692a(6).

89. Fairbanks routinely engages in unlawful collection practices, including but not limited to: contacting borrowers directly despite notice that a borrower is represented by counsel, harassing borrowers, misrepresenting actions intended to be taken, attempting to collect amounts not legally owed, failing to state the amount of the debt, failing to include required notices and disclosures in collection calls and letters, and provision of inaccurate notices about borrowers' verification rights.

90. Fairbanks routinely fails to respond to borrowers' written disputes or requests for information made pursuant to RESPA and other laws; fails to notify borrowers that it has force placed insurance, that it has imposed fees and charges, and that it will collect attorney's fees and other charges in connection with collection and foreclosure activities; fails to provide accurate variable rate disclosures because its imposition of improper fees renders its disclosures inaccurate; and otherwise fails to provide accurate or timely information to borrowers concerning their accounts.

91. Fairbanks engages in these acts and omissions alone and in concert with or through others, including without limitation its attorneys, agents, investors, vendors, shareholders, and other persons and entities.

FEDERAL CLAIMS

Count I: Violations of the FDCPA

92. Plaintiffs reallege and incorporate by reference all preceding allegations of law and fact.

93. Fairbanks violated the FDCPA by its conduct, including but not limited to:
- a. attempting to collect amounts not permitted by law (15 U.S.C. § 1692f(1));
 - b. using unfair and unconscionable collection methods (15 U.S.C. § 1692f);

- c. giving a false impression of the character, amount, or legal status of the alleged debt (15 U.S.C. § 1692e(2));
- d. using false or deceptive collection methods (15 U.S.C. § 1692e(5));
- e. failing to state “the amount of the debt” as required by 15 U.S.C. § 1692g(a)(1);
- f. engaging in conduct the natural consequence of which is to harass, oppress or abuse borrowers (15 U.S.C. § 1692d);
- g. contacting directly a borrower it knows is represented by counsel (15 U.S.C. § 1692c);
- h. failing to provide disclosures required by 15 U.S.C. § 1692e(11), including when sending monthly statements to borrowers; and
- i. sending notices or making communications that do not comply with the FDCPA.

94. The same conduct violates coextensive laws and regulations in various states.

95. Plaintiffs and members of the Class are entitled to relief under the FDCPA and under state debt collection laws and regulations, including damages and a declaratory judgment that Fairbanks’ conduct violates the FDCPA.

Count II: Violations of RESPA

96. Plaintiffs reallege and incorporate by reference all preceding allegations of law and fact.

97. Fairbanks violated RESPA by the following conduct:

- a. failing to meet the requirements of 12 U.S.C. § 2605 regarding transfer of servicing and responding to qualified written requests;
- b. failing to meet the requirements of 12 U.S.C. § 2609 regarding escrow account statements, collection of escrow and notification of shortage in escrow account.

98. Plaintiffs and members of the Class are entitled to relief under the RESPA, including damages and a declaratory judgment that Fairbanks’ conduct violates RESPA.

Count III: Violations of TILA

99. Plaintiffs reallege and incorporate by reference all preceding allegations of law and fact.

100. Thousands of notes and mortgages serviced by Fairbanks are adjustable rate mortgages, subject to the disclosure requirements of Reg. Z, 12 C.F.R. § 226.20(c) for variable rate adjustments.

101. Pursuant to 12 C.F.R. § 226.20(c), Fairbanks is required to include in its variable rate adjustment disclosure a statement of the loan balance. 12 C.F.R. § 226.20(c)(4).

102. As a result of the imposition of unauthorized or inflated charges, Fairbanks failed to accurately disclose the loan balance. Fairbanks' disclosures state a loan balance that is higher than it would have been but for Fairbanks' intentional improper charges.

103. Plaintiffs and members of the Class have been damaged by such violations, in that they have been charged improper fees, and in that they have either paid such fees or had their property encumbered by such fees.

104. Plaintiffs and members of the Class are entitled to relief under TILA, including damages and a declaratory judgment that Fairbanks' conduct violates TILA.

STATE LAW CLAIMS

Count IV: Unfair and Deceptive Acts and Practices In Violation Of State Laws

105. Plaintiffs hereby incorporate by reference all preceding allegations of law and fact.

106. Fairbanks has engaged in unfair and/or deceptive acts and practices with respect to each Class member that includes one or more of the following:

- a. Imposing and collecting unnecessary and excessive fees and charges not authorized by the loan documents or by applicable law;
- b. Imposing and collecting excessive interest and unlawful prepayment penalties;
- c. Failing to properly and/or timely credit customers' payments to their accounts;
- d. Improperly administering "suspense" and "corporate advance" accounts;
- e. Assessing the escrow accounts of Class members for amounts not authorized by the uniform contractual documents;
- f. Charging borrowers for unnecessary force placed insurance, and collecting excessive amounts for forced place insurance premiums for which it received a kickback;
- g. Charging borrowers improper late fees;
- h. Misleading or otherwise misinforming customers about the amounts properly due and owing;
- i. Failing to properly administer customer accounts, including, without limitation, escrow accounts, suspense accounts, corporate advance accounts, and principal and interest obligations
- j. Engaging in conduct that violates state and federal consumer protection laws; and
- k. Harassing or otherwise treating customers unfairly and without regard to obligations of good faith and fair dealing.

107. Each state or Commonwealth where Fairbanks does business has a law that prohibits Unfair and Deceptive Acts and Practices ("UDAP laws").

108. The conduct described in the previous paragraph of this complaint violates these UDAP laws including, without limitation, Utah Code Ann. §§ 13-11-1, *et seq.* (applicable nationwide as the State in which Fairbanks' business practices originated and/or were consummated); 73 Pennsylvania Statutes §§ 201-1, *et seq.* (also applicable nationwide because Fairbanks maintains a facility in Pennsylvania from which its post-

collection business practices, including those for foreclosure and bankruptcy activities, originated or were consummated); Fla. Stat. Ann. Chapter 501 (also applicable nationwide because Fairbanks conducts its primary default operations, loan history and complaint investigation unit, and other activities from a facility in Florida); Massachusetts General Laws ch. 93A, §2; and California's Unfair Business Practices Act, Bus. & Prof. Code §§ 17200, *et seq.*

109. Plaintiffs and members of the Class have suffered damage by virtue of one or more of these unfair and/or deceptive practices.

110. Plaintiffs and the Class are entitled to relief for Fairbanks' unfair and/or deceptive practices.

Count V: Breach of Reinstatement Agreements

111. Plaintiffs reallege and incorporate by reference all preceding allegations of law and fact.

112. Fairbanks entered into valid reinstatement agreements, the relevant provisions of which are uniform, with Class members seeking to cure their loan defaults and to save their homes.

113. Fairbanks then failed to honor those agreements by continuing the foreclosure process while the consumers were making payments under the agreements.

114. Fairbanks has breached its uniform contracts with the affected members of the Class.

115. Plaintiffs and Class members are entitled to relief for breach of reinstatement agreements.

Count VI: Breach of Contract

116. Plaintiffs reallege and incorporate by reference all preceding allegations of law and fact.

117. Fairbanks services loans evidenced by standard form notes and mortgages, the relevant provisions of which are uniform.

118. Fairbanks has imposed or collected amounts that are not due and owing by contract including, without limitation, interest, prepayment penalties, and default-related fees, costs and charges.

119. Fairbanks had misapplied or failed to apply payments, or imposed late fees and other charges not due, all in breach of its contracts with Plaintiffs and members of the Class.

120. Fairbanks has breached its contracts with the Plaintiffs and members of the Class.

121. Plaintiffs and Class members are entitled to relief for breach of contract.

Count VII: Intentional Misrepresentation

122. Plaintiffs reallege and incorporate by reference all preceding allegations of law and fact.

123. Fairbanks has represented to the Plaintiffs that Fairbanks is entitled to collect various loan charges that were not legally due and owing.

124. Fairbanks' representations concerning the right to collect such fees and charges were false.

125. Fairbanks knew or should have known that such representations were false.

126. Plaintiffs relied on Fairbanks' false representations concerning its entitlement to collect such fees and charges and Plaintiffs did pay such fees and charges to their detriment.

127. Plaintiffs' reliance was reasonable or justifiable in the circumstances.

128. Plaintiffs have suffered damages.

129. Plaintiffs and Class members are entitled to relief for misrepresentation.

Count VIII: Breach of State Statutes And Contracts Governing Collection of Prepayment Penalties

130. Plaintiffs reallege and incorporate by reference all preceding allegations of law and fact.

131. Fairbanks has violated M.G.L. c. 183, § 56 by charging prepayment penalties to members of the Class that exceed the amount allowable by said statute.

132. Fairbanks has violated Alabama Code § 5-19-4(c) by charging prepayment penalties to members of the Class that exceed the amount allowable by said statute.

133. Fairbanks has violated West Virginia Code, 46A-3-110 by charging prepayment penalties to members of the Class that exceed the amount allowable by said statute.

134. Fairbanks has violated other states' laws and contracts by charging prepayment penalties that exceed the amount allowable by state statute or by contract.

135. Plaintiffs and the Class members affected by this practice are entitled to relief under said statutes and contracts.

Count IX: Negligence/Negligent Servicing

136. Plaintiffs reallege and incorporate by reference all preceding allegations of law and fact.

137. Fairbanks owed Plaintiffs and Class members a duty of care with respect to servicing their mortgage loans for reasons including, without limitation, that those loans were secured by an interest in each homeowners' family residence and that lack of care would result in overpayments causing great economic hardship.

138. The duty of care required reasonable diligence, *inter alia*,
- a. to avoid incurring unnecessary charges for property insurance;
 - b. to make payments due from funds being held in the borrowers' escrow accounts in a timely fashion; and

c. to correctly calculate prepayment penalties due under applicable law.

139. Fairbanks' conduct with respect to Plaintiffs and Class members was far below applicable standards for mortgage loan servicing.

140. Fairbanks' conduct was negligent with respect to Plaintiffs and Class members.

141. Fairbanks' conduct was the proximate cause of damages to Plaintiffs and Class members.

142. Plaintiffs and the Class members are entitled to relief for Fairbanks' negligence.

Count X: Breach of Fiduciary Duty

143. Plaintiffs reallege and incorporate by reference all preceding allegations of law and fact.

144. Fairbanks assumed fiduciary duties with respect to monies it held in escrow for Plaintiffs and each Class member.

145. Fairbanks breached its fiduciary duties by failing to make timely tax payments from escrowed funds.

146. Fairbanks breached its fiduciary duties by failing to timely process or account for escrowed funds.

147. Plaintiffs and each member of the Class were damaged by Fairbanks' breach of fiduciary duties.

148. Plaintiffs and the members of the Class are entitled to relief for Fairbanks' breach.

Count XI: Breach of Duty of Good Faith and Fair Dealing

149. Plaintiffs reallege and incorporate by reference all preceding allegations of law and fact.

150. Each State or Commonwealth where Fairbanks does business recognizes a duty of good faith and fair dealing with respect to conduct encompassed by contractual relations.

151. Fairbanks' conduct as aforesaid breaches said duty.

152. Plaintiffs and members of the Class are entitled to relief for Fairbanks' breach.

Count XII: Unjust Enrichment

153. Plaintiffs reallege and incorporate by reference all preceding allegations of law and fact.

154. Fairbanks has engaged in unlawful collection activities.

155. Fairbanks has collected monies that are not due and owing under applicable contract law, because the contract or other applicable law does not permit Fairbanks to collect such fees and charges.

156. Said conduct sounds in equity under the common law of unjust enrichment or money had and received and constructive trust.

157. Fairbanks has been unjustly enriched by its conduct.

158. Plaintiffs and Class members have suffered loss by virtue of Fairbanks' conduct.

159. Plaintiffs and members of the Class are entitled to relief for unjust enrichment.

Count XIII: Declaratory and Injunctive Relief

160. Plaintiffs reallege and incorporate by reference all preceding allegations of law and fact.

161. Fairbanks has engaged in and continues to engage in conduct that has a great probability of causing substantial and irreparable harm.

162. Members of the Class are entitled to declaratory relief that Fairbanks' conduct is unlawful.

163. Members of the Class are entitled to injunctive relief necessary to insure that such conduct will not continue into the future, and to provide uniform standards of conduct for servicing Class members' loans.

PRAYER FOR RELIEF

Wherefore Plaintiffs request that this court certify a class pursuant to Fed. R. Civ. P. 23(b)(1),(2) and/or (3) and award:

1. Actual, special, and general damages according to proof;
2. Statutory damages and penalties;
3. Restitution and disgorgement according to proof;
4. Injunctive relief against Defendant to ensure uniform standards of servicing conduct towards all class members and to prevent future wrongful conduct;
5. Prejudgment interest at the maximum legal rate;
6. Punitive, exemplary and enhanced damages according to proof;
7. An accounting;
8. Declaratory Judgment as necessary to correct the wrongs inflicted on them;
9. Litigation Expenses and Costs of the proceedings herein;
10. Reasonable attorneys' fees; and

11. All such other and further relief as the Court deems just.

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JURY DEMAND

Plaintiffs demand trial by jury on all issues so triable.

Gary Klein