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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

Plaintiff,

v.

FAIRBANKS CAPITAL CORP.,  
a Utah corporation, FAIRBANKS CAPITAL  
HOLDING CORP., a Delaware corporation,  
and THOMAS D. BASMAJIAN,

Defendants.

03 12219

Civil No.

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**ORDER PRELIMINARILY APPROVING STIPULATED FINAL  
JUDGMENT AND ORDER AS TO FAIRBANKS CAPITAL  
CORP. AND FAIRBANKS CAPITAL HOLDING CORP.**

Plaintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission ("FTC" or "Commission") and the Secretary of the Department of Housing and Urban Development ("HUD"), has filed a complaint for a permanent injunction and other equitable relief, and for monetary civil penalties, pursuant to Sections 5(a), 5(m)(1)(A), and 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a), 45(m)(1)(A), and 53(b); Sections 807, 808 and 809 of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692e, 1692f and 1692g; Section 623 of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681s; and Sections 6 and 16 of the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. §§ 2605 and 2614 ("Complaint").

The Complaint alleges that Defendants Fairbanks Capital Holding Corp., Fairbanks Capital Corp., and Thomas D. Basmajian have violated Section 5(a) of the FTC Act, 15 U.S.C.

§ 45(a); Sections 807, 808 and 809 of the FDCPA, 15 U.S.C. §§ 1692e, 1692f and 1692g; Section 623 of the FCRA, 15 U.S.C. § 1681s; and Section 6 of the RESPA, 12 U.S.C. § 2605.

The Plaintiff and Defendants Fairbanks Capital Holding Corp. and Fairbanks Capital Corp. (the “Parties”), by and through their respective counsel, have agreed to entry of this Order Preliminarily Approving Stipulated Final Judgment and Order (“Order”) by this Court, without trial or adjudication of any issue of fact or law. Further, the Parties have agreed that this Order shall be filed for approval contemporaneously with the filing of a motion for approval of the nationwide class action settlement agreement in *Curry, et al. v. Fairbanks Capital Corporation*, Case No. 03-10895-DPW (D. Mass.) (“Settlement Agreement”). If approved, the Settlement Agreement and this Order, together, will comprise a global settlement among the Parties providing for consumer redress throughout the United States.

The Parties having requested the Court to enter this Order, it is therefore ORDERED, ADJUDGED, AND DECREED as follows:

### FINDINGS

1. This Court has jurisdiction over Defendants and the subject matter of this action. Venue in the District of Massachusetts is proper.
2. The Complaint states a claim upon which relief may be granted against Defendants under Sections 5(a), 5(m)(1)(A), and 13(b) of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), and 53(b); the FDCPA, 15 U.S.C. § 1692 *et seq.*, as amended; the FCRA, 15 U.S.C. § 1681 *et seq.*, as amended; Sections 6 and 16 of the RESPA, 12 U.S.C. §§ 2605 and 2614; and Section 3500.21 of Regulation X, 24 C.F.R. Pt. 3500.21.
3. The activities of Defendants are in or affecting commerce, as “commerce” is

defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

4. Defendants have not admitted any of the allegations of wrongdoing set forth in the Complaint, and entry of this Order is not an admission of any such allegations of wrongdoing or violation of law. Nonetheless, Defendants stipulate and agree to entry of this Order in order to settle and resolve these disputes.

5. Plaintiff and Defendants waive all rights to seek judicial review or otherwise challenge or contest the validity of this Order, and Defendants waive any right that may arise under the Equal Access to Justice Act, 28 U.S.C. § 2412.

6. Entry of this Order is in the public interest.

## **ORDER**

### **DEFINITIONS**

7. For purposes of this Order, the following definitions shall apply:

- a. “broker’s price opinion” shall mean an estimate of the probable sale price of the property securing a loan which is obtained by any Defendant at the consumer’s expense;
- b. “class” shall mean a class or subclass of consumers proposed to be certified as a nationwide “opt out” class or subclass in the Nationwide Class Action that is expected to consist generally of all persons serviced by Fairbanks between January 1, 1999 and the date of preliminary approval of the Settlement Agreement (i) whose loans were in default or treated as being in default and who incurred or were assessed late fees and/or default-related fees including, without limitation, fees denominated

by Fairbanks as “corporate advances,” or who were harmed as a result of default-related conduct; and/or (ii) who incurred or were assessed prepayment penalties in violation of law or contract; ***provided, however,*** that the Nationwide Class Action may include the settlement of additional claims or provision of additional relief to additional persons;

- c. “Class Action Notice” shall mean the Notice of Proposed Class Action Settlement to be negotiated and agreed upon by counsel for the FTC, plaintiffs’ counsel in the Nationwide Class Action, and Defendants, to be submitted to and approved by the United States District Court for the District of Massachusetts in the Nationwide Class Action;
- d. “class member” or “member of the class” shall mean a consumer who falls within the definition of the class, described in sub-paragraph “b” above, who does not validly and timely request exclusion from the class;
- e. “clear and conspicuous” shall mean that the information is displayed in a manner that is readily noticeable, readable, and understandable;
- f. “Defendants” shall mean, collectively, Fairbanks and FCHC;
- g. “document” is defined as provided in Federal Rule of Civil Procedure 34(a), and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from which information can be obtained and translated, if necessary, through detection devices into reasonably usable form. A draft or non-identical copy is a separate document within the meaning of the term;

- h. “effective date” shall have the meaning set forth in Section XVII of this Order;
- i. “Fairbanks” shall mean Fairbanks Capital Corp., a Utah corporation, and its successors and assigns, by whatever names they might be known;
- j. “FCHC” shall mean Fairbanks Capital Holding Corp., a Delaware corporation, and its successors and assigns, by whatever names they might be known;
- k. “FCRA” shall mean the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681u, as amended;
- l. “FDCPA” shall mean the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1601-1692, as amended;
- m. “The Federal Trade Commission Act” or “FTC Act” shall mean 15 U.S.C. §§ 41-58, as amended;
- n. “fees” shall mean fees for late payments, property inspections, broker’s price opinions, appraisals, legal services, reinstatement, and any other fees or charges that a consumer is or was assessed by Defendants in connection with the servicing of any loan;
- o. “FHA mortgage loan” shall mean any loan insured by the Federal Housing Administration (FHA) in accordance with Title II of the National Housing Act, 12 U.S.C. § 1707 *et seq.*;
- p. “force placed insurance” shall mean insurance obtained by any Defendant at the consumer’s expense;

- q. “loan instruments” shall mean the mortgage deed and/or promissory note signed by the consumer to consummate his or her loan;
- r. “monthly payment” shall mean a monthly or other periodic payment a consumer must make under the loan instruments to repay the loan principal, pay interest on the principal, and, if necessary, fund escrow accounts for insurance and/or real estate taxes;
- s. “Nationwide Class Action” shall mean *Curry, et al. v. Fairbanks Capital Corporation*, Case No. 03-10895-DPW (D. Mass.), seeking, in part, the same relief sought by the FTC in this action;
- t. “person” shall mean any individual, group, unincorporated association, limited or general partnership, corporation, trust, or other business entity;
- u. “property inspection” shall mean an inspection of the property securing a loan to determine the property’s physical condition and occupancy status;
- v. “The Real Estate Settlement Procedures Act” or “RESPA” shall mean 12 U.S.C. §§ 2601-2617, as amended;
- w. “receipt” shall mean the date that Fairbanks or any agent of Fairbanks (such as an employee or lockbox vendor) receives a payment of good funds (or other item or information, as applicable);
- x. “Redress Program” shall mean a program to be established and administered by the FTC for the purpose of providing consumer redress to class members as set forth in this Order;
- y. “Redress Program Administrator” shall mean the FTC or such agents or

trustees that the FTC in its sole discretion will appoint to establish, maintain, and administer the Redress Program, or such other entity as appointed by the Court at the request of the FTC;

- z. “Redress Sum” shall mean all funds paid by the Defendants pursuant to this Order;
- aa. “Regulation X” shall mean RESPA’s implementing regulations, 24 C.F.R. Pt. 3500, as amended;
- bb. “servicing” shall mean receiving any scheduled monthly payments from a consumer pursuant to the terms of any loan, including amounts for escrow accounts, and making the payments of principal and interest and such other payments with respect to the amounts received from the consumer as may be required pursuant to the terms of the loan. “Servicing” shall also include any related loan servicing activity such as the administration of loan accounts, the collection of loan payments, the foreclosure of real property, the use of consumer reports and the furnishing of information to consumer reporting agencies, and the collection or imposition of fees in relation to any of the foregoing; and
- cc. “total amount due” shall mean the amount that is necessary to pay the loan in full and any associated charges (that is, the total of principal, interest, and unpaid advances, fees and charges).

## INJUNCTIVE RELIEF

### I.

IT IS THEREFORE ORDERED that Defendants, and each of them, their officers, employees, agents, representatives, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, directly or through any corporation, subsidiary, division, or other device, are hereby permanently restrained and enjoined, in connection with the servicing of any loan, from:

- A. Failing to accept as of the date of receipt, or to credit effective as of the date of receipt, all amounts paid in connection with a loan against interest and principal due, and before crediting taxes, insurance or fees, **provided, however**, with respect to loans using uniform loan instruments with a “revision date” prior to March 1999, Defendants may apply payments received in accordance with the provisions thereof;
- B. Failing to accept as of the date of receipt, or to credit effective as of the date of receipt, amounts paid in connection with a loan that are less than the total amount due (*i.e.*, partial payments), **provided, however**, that this requirement shall not apply to loans which have been referred to foreclosure in accordance with the requirements of this Order;
- C. Misrepresenting, expressly or by implication, any amount that a consumer owes;
- D. Misrepresenting, expressly or by implication, that any fee is allowed under the loan instruments, permitted by law, or imposed for services actually rendered;
- E. Misrepresenting, expressly or by implication, the amount, nature, or terms of any

fee or other condition or requirement of any loan; and

- F. Failing to make disbursements of escrow funds for insurance, taxes and other charges with respect to the property in a timely manner.

## II.

IT IS FURTHER ORDERED that Defendants, and each of them, their officers, employees, agents, representatives, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, directly or through any corporation, subsidiary, division, or other device, are hereby permanently restrained and enjoined, in connection with the servicing of any loan, from:

- A. Charging for force placed insurance before mailing, at no cost to the consumer, at least two (2) written notices to the consumer providing clear and conspicuous notice of the procedures by which the consumer may demonstrate that the consumer already has insurance coverage and providing at least thirty (30) calendar days from the mailing (by first-class mail) of the first notice and twenty (20) calendar days from the mailing (by certified mail) of the second notice for the consumer to demonstrate coverage, *provided that*, the second notice shall not be mailed until the first thirty-day period has expired;
- B. Failing to accept any reasonable form of confirmation from a consumer of existing insurance coverage, including verbal confirmation of the existing insurance policy number along with the identity of the insurance company or agent;
- C. Force placing insurance on a consumer's home when Defendants know or fail to take reasonable actions to determine whether such insurance is already in place;

- D. Failing, within fifteen (15) days of receipt of confirmation of a consumer's existing insurance coverage, to refund all force placed insurance premiums paid during the overlapping coverage period and any related fees charged to the consumer's account during the overlapping coverage period; and
- E. Placing a consumer's loan in default, assessing late fees, or initiating foreclosure proceedings solely due to the consumer's nonpayment of insurance premiums, ***provided that*** the insurance charges may become additional debt of the consumer secured by the security instrument and interest may be charged thereon as provided in the loan instruments.

### III.

IT IS FURTHER ORDERED that Defendants, and each of them, their officers, employees, agents, representatives, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, directly or through any corporation, subsidiary, division, or other device, are hereby permanently restrained and enjoined, in connection with the servicing of any loan, from assessing and/or collecting any fee unless it is for services actually rendered and is a) expressly authorized, and clearly and conspicuously disclosed, by the loan instruments and not prohibited by law; b) expressly permitted by law and not prohibited by the loan instruments; or c) a reasonable fee for a specific service requested by a consumer that is assessed and/or collected only after clear and conspicuous disclosure of the fee is provided to the consumer and explicit consent is obtained from the consumer to pay the fee in exchange for the service, and such fee is not otherwise prohibited by law or the loan instruments.

**IV.**

IT IS FURTHER ORDERED that Defendants, and each of them, their officers, employees, agents, representatives, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, directly or through any corporation, subsidiary, division, or other device, are hereby permanently restrained and enjoined, in connection with the servicing of any FHA mortgage loan, from assessing and/or collecting any fees prohibited by FHA statutory, regulatory, or written handbook requirements.

**V.**

IT IS FURTHER ORDERED that, for five (5) years after the date of entry of this Order, Defendants, and each of them, their officers, employees, agents, representatives, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, directly or through any corporation, subsidiary, division, or other device, are hereby permanently restrained and enjoined, in connection with the servicing of any loan, from assessing and/or collecting the following fees:

- A. Fees for demand letters or any other collection letters or notices;
- B. Fees for property inspections, *provided that* Defendants may impose reasonable fees for property inspections actually performed if: (1) the consumer's loan payment has not been received within forty-five (45) calendar days of the due date; and (2) the inspections are limited to the initial inspection and to additional inspections during the period of continued delinquency not more frequent than every thirty (30) calendar days and only if Defendants (a) have been unable to

contact the consumer for the previous thirty (30) calendar days or (b) have been able to contact the consumer but have determined that the mortgaged property is vacant;

- C. Fees for broker's price opinions, *provided that* Defendants may impose reasonable fees for a broker's price opinion ordered and actually performed if: (1) the consumer's loan payment has not been received within sixty-three (63) calendar days of the due date; and (2) the broker's price opinions are limited to the initial broker's price opinion and to additional broker's price opinions during the period of continued delinquency not more frequent than every six (6) months; and
- D. Attorneys' fees, *provided that* defendants may impose reasonable attorneys' fees if: (1) the fees are necessary to process a foreclosure sale of the property or are otherwise permitted fees under Section III of this Order; (2) a law firm has in fact performed the services; and (3) a law firm has in fact charged Defendants for the services.

## VI.

IT IS FURTHER ORDERED that nothing in this Order shall permit the Defendants to impose any fee or take any other action that is prohibited by any state or federal law or regulation and/or prohibited by the loan instruments and/or other contractual agreement with the consumer.

## VII.

IT IS FURTHER ORDERED that Defendants, and each of them, their officers, employees, agents, representatives, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise,

directly or through any corporation, subsidiary, division, or other device, are hereby permanently restrained and enjoined, in connection with the servicing of any loan that was in default at the time it was obtained by Defendants, from:

- A. Using any false, deceptive, or misleading representation or means in connection with the collection of any debt, in violation of Section 807 of the FDCPA, 15 U.S.C. § 1692e, including but not limited to: (1) falsely representing the character, amount, or legal status of a debt, or any services rendered or compensation which may be lawfully received by a debt collector for collection of a debt, in violation of Sections 807(2)(A) and (B) of the FDCPA, 15 U.S.C. §§ 1692e(2)(A) and (B); (2) communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed, in violation of Section 807(8) of the FDCPA, 15 U.S.C. § 1692e(8); and (3) using false representations or deceptive means to collect or attempt to collect a debt or to obtain information concerning a consumer, in violation of Section 807(10) of the FDCPA, 15 U.S.C. § 1692e(10);
- B. Using any unfair means to collect or attempt to collect a debt, including but not limited to collecting amounts (including any interest, fee, charge, or expense incidental to the principal obligation) not authorized by the agreement creating the debt or permitted by law, in violation of Section 808(1) of the FDCPA, 15 U.S.C. § 1692f(1);
- C. Failing to notify consumers of their right to dispute and obtain verification of their

debts and to obtain the name of the original creditor, either in the initial communication with consumers by defendants, or within five days thereafter, in violation of Section 809(a) of the FDCPA, 15 U.S.C. § 1692g(a); and

- D. Failing to comply in any other respect with the FDCPA, as amended, or as it may be amended in the future.

### VIII.

IT IS FURTHER ORDERED that Defendants, and each of them, their officers, employees, agents, representatives, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, directly or through any corporation, subsidiary, division, or other device, are hereby permanently restrained and enjoined, in connection with the servicing of any loan, from:

- A. Furnishing information relating to any consumer to a consumer reporting agency if Defendants know or consciously avoid knowing that the information is inaccurate, as provided in Section 623(a)(1)(A) of the FCRA, 15 U.S.C. § 1681s-2(a)(1)(A);
- B. Failing to promptly notify a consumer reporting agency, as required by Section 623(a)(2) of the FCRA, 15 U.S.C. § 1681s-2(a)(2), when Defendants have determined that information previously furnished about any consumer to the consumer reporting agency is not complete or accurate, and failing to provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided to the agency complete and accurate, and to not thereafter furnish to the agency any of the information that

remains not complete or accurate;

- C. Failing to report accounts as “disputed” to consumer reporting agencies, as required by Section 623(a)(3) of the FCRA, 15 U.S.C. § 1681s-2(a)(3), when consumers dispute accounts either in writing, orally, or by electronic means; and
- D. Failing to comply in any other respect with the FCRA, as amended, or as may be amended in the future.

### IX.

IT IS FURTHER ORDERED that Defendants, and each of them, their officers, employees, agents, representatives, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, directly or through any corporation, subsidiary, division, or other device, are hereby permanently restrained and enjoined, in connection with the servicing of any loan, from failing to comply with RESPA, 12 U.S.C. §§ 2601-2617, as amended, or its implementing Regulation X, 24 C.F.R. Pt. 3500, as amended, including, without limitation:

- A. Failing to respond, in a timely manner, to consumers’ qualified written requests in accordance with 12 U.S.C. § 2605(e);
- B. Failing to notify, in a timely manner, the consumer in writing of any assignment, sale, or transfer of the servicing of the loan to any other person not less than fifteen (15) days before the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made) in accordance with 12 U.S.C. § 2605(b);
- C. Failing to notify, in a timely manner, the consumer in writing of any assignment,

sale, or transfer of servicing of the loan to any Defendant not more than fifteen (15) days after the effective date of transfer of the servicing of the mortgage loan in accordance with 12 U.S.C. § 2605(c);

- D. Imposing late fees during the 60-day period beginning on the effective date of the transfer of the servicing of the mortgage loan in violation of 12 U.S.C. § 2605(d);
- E. Failing to protect any consumer's credit rating in accordance with 12 U.S.C. § 2605(e)(3);
- F. Failing to make timely payments from consumers' escrow accounts for casualty insurance, property taxes and other charges with respect to the property as such payments become due in accordance with 12 U.S.C. § 2605(g); and
- G. Failing to provide annual escrow statements that clearly itemize payments for taxes, insurance premiums, and other separately identified charges in accordance with 12 U.S.C. § 2609(c)(2).

**X.**

IT IS FURTHER ORDERED that Defendants, and each of them, their officers, employees, agents, representatives, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, directly or through any corporation, subsidiary, division, or other device, are hereby permanently restrained and enjoined, in connection with the servicing of any loan, from:

- A. Failing to maintain and provide adequate staffing for a toll-free phone number and an address that are specifically dedicated to handling consumers' disputes or questions. The toll-free telephone number shall be staffed at least every Monday

through Friday between the hours of 7 a.m. to 8 p.m., Eastern Time, national holidays excluded. Defendants' obligation to maintain the toll-free number shall expire ten (10) years from the date of entry of this Order;

- B. Failing to acknowledge in writing any consumer's dispute within twenty (20) calendar days after receiving it, unless it is an oral dispute that has been investigated and resolved with the consumer within twenty (20) calendar days after receiving it, ***provided that*** Defendants maintain written or electronic records of the handling of such oral disputes for the time period required under Section XXIX of this Order;
- C. Failing to complete an investigation of any consumer's dispute within sixty (60) calendar days after receiving it, unless through the use of reasonable procedures Defendants are unable to resolve the dispute in that time period, in which event Defendants may take an additional thirty (30) calendar days to resolve the dispute if they so notify the consumer in writing;
- D. Failing to advise the consumer promptly and in writing of the results of the investigation of the consumer's dispute, unless it is an oral dispute that has been investigated and resolved with the consumer within twenty (20) calendar days after receiving it, ***provided that*** Defendants maintain written or electronic records of the handling of such oral disputes for the time period required under Section XXIX of this Order;;
- E. Taking any legal or other action to collect the disputed amount and any related charges until the dispute has been investigated and the consumer has been

informed of the results of the investigation; and

- F. Threatening the consumer's credit rating or reporting the consumer as delinquent based on the disputed amount until the consumer's dispute has been investigated and the consumer has been informed of the results of the investigation.

**XI.**

IT IS FURTHER ORDERED that, for ten (10) years after the date of entry of this Order, Defendants, and each of them, their officers, employees, agents, representatives, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, directly or through any corporation, subsidiary, division, or other device, are hereby permanently restrained and enjoined, in connection with servicing any loan except loans in bankruptcy or subject to forbearance agreements, from failing timely to inform the consumer prior to the due date of each monthly payment (by means of a monthly statement or, with the consumer's prior consent, by electronic notification, sent at least twelve (12) calendar days before the payment due date, or by means of a coupon book) for each loan it is servicing, at no cost to the consumer, of the following information in a clear and conspicuous manner:

- A. the unpaid principal balance;
- B. the monthly payment due as of the next due date and the due date;
- C. if there are change(s) in the monthly payment amount and/or other amounts due, the reason for the change(s), except that, when using a coupon book, Defendants shall have the right to notify consumers of such change(s) by a separate clear and conspicuous notice sent by first-class mail to the consumer at least twelve (12)

- calendar days before the payment due date;
- D. a complete itemization of each and every fee assessed during the statement period;
  - E. the toll-free telephone number and address for the consumer to use if s/he disputes any of the information provided; and
  - F. within six (6) months after the date of entry of this Order, the total amount due.

## **XII.**

IT IS FURTHER ORDERED that Defendants, and each of them, their officers, employees, agents, representatives, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, directly or through any corporation, subsidiary, division, or other device, are hereby permanently restrained and enjoined, in connection with the servicing of any loan, from taking any action toward foreclosure until the Defendants have: a) reviewed any records pertaining to the consumer's loan to verify that the consumer has failed to make three full monthly payments; b) confirmed that the consumer has not been subject to any of the acts or practices prohibited by this Order, the loan instruments, or law, or if such acts or practices have occurred, that Defendants have remedied them; and c) investigated any disputes by the consumer and informed the consumer of the results of the investigation. Defendants shall maintain records sufficient to document the steps they take to investigate and conclude each dispute.

## **XIII.**

IT IS FURTHER ORDERED that Defendants, and each of them, their officers, employees, agents, representatives, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise,

directly or through any corporation, subsidiary, division, or other device, are hereby permanently restrained and enjoined, in connection with the servicing of any loan, from:

- A. Assessing or collecting any late fee or similar delinquency charge on a monthly payment, which payment is otherwise a full payment for the applicable period and is paid on or before its due date or within an applicable grace period, when the only delinquency is attributable to late fee(s) or delinquency charge(s) assessed on earlier monthly payments (*i.e.*, pyramiding of late charges); and
- B. Assessing or collecting any late fee or similar delinquency charge once a loan account has been accelerated into foreclosure status.

### **CONSUMER REMEDIES**

#### **XIV.**

IT IS FURTHER ORDERED that, within fifteen (15) calendar days after the date of entry of this Order, for all loans being serviced by Defendants as of the date of the entry of this Order, for which Defendants' records show that (1) the loan is delinquent; (2) the consumer has tendered prior loan payments sufficient to cover the scheduled monthly payment (principal and interest); and (3) the delinquency is attributable to the non-payment of taxes, insurance, or fees, Defendants shall re-classify the consumer's loan status as current and change their records to remove the prior record of delinquency. For such loans, within twenty (20) calendar days after entry of this Order, Defendants shall report to any consumer reporting agency to which they have previously provided information about each such consumer's account that (1) the account is considered current, and (2) the prior record of delinquency is considered inaccurate and should be removed from the consumer's consumer report. Within forty-five (45) calendar days after the

date of entry of this Order, Defendants shall send by first-class mail, at no cost to the consumer, a notice to all consumers whose loans are re-classified pursuant to this Section, stating: (a) that the consumer's loan account is considered current and the consumer reporting agency[ies] has [have] been notified of the current status of the loan account; and (b) the address and toll-free telephone number for the consumer to use in the event of disputes, as set forth in Appendix A. All costs incurred in performing the acts and providing the notices required in this Section shall be paid by the Defendants and shall not be credited against the Redress Sum.

**XV.**

IT IS FURTHER ORDERED that Defendants, and each of them, their officers, employees, agents, representatives, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, directly or through any corporation, subsidiary, division, or other device, are hereby permanently restrained and enjoined from enforcing any clause in any forbearance agreement, entered into by any Defendant and any consumer between January 1, 1999 and the date of entry of this Order, that required the consumer to acknowledge his/her lack of claims or defenses; waive access to court; or otherwise waive or release any rights or claims. Such nonenforceability shall not otherwise affect the legality of the forbearance agreement.

**MONETARY RELIEF**

**XVI.**

IT IS FURTHER ORDERED that Defendants, jointly and severally, shall pay the amount of forty million dollars (\$40,000,000.00) to remedy the violations of law alleged by the FTC and HUD. This amount constitutes redress paid for the benefit of consumers, and does not constitute

a civil penalty. On or before five (5) business days after the date of entry of this Order, Defendants shall wire transfer an initial sum of ten million dollars (\$10,000,000.00) to the Commission or such agent as the Commission may direct, pursuant to instructions provided by the Commission. The remaining sum of thirty million dollars (\$30,000,000.00) shall be payable upon the effective date of this Order as follows: On or before five (5) business days after the date of entry of this Order, Defendants shall obtain and deliver to the FTC an irrevocable letter of credit in the amount of thirty million dollars (\$30,000,000.00) issued by a financial institution for the benefit of the FTC. The letter of credit shall be structured so that the thirty million dollars (\$30,000,000.00) accrues interest, from December 31, 2003 to the effective date of this Order, at the rate established for six month Treasury Bonds. For the letter of credit, both the financial institution that issues the letter of credit and the form of the letter of credit must be acceptable to the FTC prior to filing of this Order for the Court's approval. Upon the effective date of this Order, the FTC may draw upon the letter of credit, together with interest. All funds paid pursuant to this Order ("Redress Sum") shall be deposited into a fund administered by the Commission or its agent to be used for equitable relief, including but not limited to consumer redress and any attendant expenses for the administration of the Redress Program. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after redress is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to the Defendants' practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited as equitable disgorgement into the United States Treasury. Defendants shall have no right to challenge the FTC's choice of remedies under this Section.

## **EFFECTIVE DATE AND CONDITIONS**

### **XVII.**

IT IS FURTHER ORDERED that, except as provided in Section XVIII below, this Order shall become effective five (5) calendar days after all of the following events have occurred:

1. Entry of this Order by the United States District Court for the District of Massachusetts;
2. Entry of an Order of the United States District Court for the District of Massachusetts preliminarily approving the nationwide class action settlement and certifying the proposed class, and approving the form, content, and method of dissemination of the Class Action Notice; and
3. Entry of a final judgment by the United States District Court for the District of Massachusetts, after a notice to members of the class and all other persons the Court determines are entitled to notice, and after conducting the fairness hearing, approving a nationwide class action settlement consistent with this Order.

### **XVIII.**

IT IS FURTHER ORDERED that if the effective date of this Order does not occur within ten (10) months of the filing of the motion to approve this Order, the Plaintiff may, at any time thereafter, until the date this Order becomes effective, at its sole discretion and upon five (5) days advance written notice to the Defendants, terminate this Order in its entirety. In such event, this Order shall be null and void and of no force and effect. In addition, the Parties shall be returned to their respective positions as of the date of this Order, and this Order shall not be deemed to prejudice in any way the positions of the Plaintiff, FTC, and HUD, and the Defendants, including

but not limited to their positions with respect to the allegations in this action nor shall the Order be deemed to entitle any Party to the recovery of costs and expenses incurred to implement this Order, except for the costs and expenses of the Redress Program as set forth below. Further, should the above termination occur or if the effective date otherwise can not occur due to denial of the Settlement Agreement, the Commission shall return to the Defendants any amounts already paid by the Defendants and the letter of credit provided pursuant to Section XVI of this Order, less any costs and expenses incurred by the Commission for administration of the Redress Program pursuant to its contract with the Redress Program Administrator.

#### **APPEALS**

##### **XIX.**

IT IS FURTHER ORDERED that the FTC may provide redress to class members through the Redress Program at any time after the effective date of this Order. The effective date of this Order and the provision of redress by the FTC shall not be delayed or affected in any manner by: (i) any appeal of the final judgment of the United States District Court for the District of Massachusetts approving the Settlement Agreement; or (ii) any unresolved dispute over fees to be paid to attorneys for the Nationwide Class Action or to any other attorneys, which dispute is distinct from the final judgment described in Section XVII.

#### **EFFECT OF NATIONWIDE CLASS ACTION SETTLEMENT**

##### **XX.**

IT IS FURTHER ORDERED that the claims settled in this Order shall be distinct and severable from any additional claims advanced by the parties in the Nationwide Class Action and settled with the Defendants. If the United States District Court for the District of Massachusetts

or any appeals court should decline to certify, decertify, or refuse to approve the settlement of any such additional claims, that decision shall not affect either the implementation of the Redress Program or the terms of this Order.

### **CLASS ACTION NOTICE**

#### **XXI.**

IT IS FURTHER ORDERED that the FTC, Defendants, and counsel for the plaintiffs in the Nationwide Class Action shall negotiate and agree upon the content and manner of dissemination of the Class Action Notice to be submitted to and approved by the United States District Court for the District of Massachusetts. The manner of dissemination of the Class Action Notice shall include individual mailed notice to all class members who can be identified through reasonable effort, and, prior to such notice, Defendants shall at a minimum update class members' last known address through the National Change of Address (NCOA) database or comparable program. The Class Action Notice may include, at the FTC's option, a claim form and related documents for class members to submit to make a claim through the Redress Program. The Defendants shall bear all costs associated with dissemination of the Notice, including but not limited to the cost of dissemination of any claim form and related documents with the Notice and the cost of updating class members' addresses as specified herein. In addition, the Defendants or plaintiffs' counsel in the Nationwide Class Action shall bear all costs associated with receiving and processing consumers' requests for exclusion ("opt outs") from the class.

## **REDRESS PROGRAM ADMINISTRATION**

### **XXII.**

IT IS FURTHER ORDERED that the Redress Program shall be established and administered by the FTC in its sole discretion for the purpose of providing consumer redress to class members. The FTC, in consultation with HUD, the Defendants, and plaintiffs' counsel in the Nationwide Class Action, shall determine the form, content, and manner of distribution of any claim form, and the plan for the disbursement of the funds to class members. The FTC, in its sole discretion, shall assign the administration of the Redress Program to one of its approved contractors (Redress Program Administrator), or such other entity as ordered by the Court upon the FTC's request. The Defendants shall have no right to contest the substance or manner of distribution of redress, nor the FTC's selection of the Redress Program Administrator.

## **ATTORNEYS' FEES AND LITIGATION EXPENSES**

### **XXIII.**

IT IS FURTHER ORDERED that any and all attorneys' fees or litigation expenses in connection with this action, whether or not ordered by any Court, shall be paid by the party incurring the expense and shall not be credited against the Redress Sum. Any and all attorneys' fees, litigation expenses, or incentive awards to class representatives in connection with the Nationwide Class Action or any other action, whether or not ordered by any Court, shall not be credited against the Redress Sum.

## **DATA**

### **XXIV.**

IT IS FURTHER ORDERED that Defendants shall provide the Commission and/or its

designated agent, within thirty (30) calendar days after receiving a written request by the Commission or its designated agent, with all information required to administer the Redress Program, including loan servicing data concerning class members. Such loan servicing data shall include, but not be limited to, for any borrower (and co-borrower, if applicable) for which Defendants have serviced a loan since January 1, 1999: name of borrower; last known address; any telephone number(s) in Defendants' possession; social security number; date of foreclosure (if applicable); copy of forbearance agreement (if applicable); information about any other loan resolution (such as a deed-in-lieu of foreclosure or a short sale); date of loan consummation; date that Defendants began servicing the loan; unpaid principal balance (as of the date of submission); an itemization of all fees imposed on the borrower (and any refunds of such fees to the borrower) from the date that Defendants began servicing the loan to the date of the submission; date of any bankruptcy filing by the borrower; and date of transfer to another servicer (if applicable). Defendants shall provide a complete electronically stored data set in a compatible format (as determined by the FTC and/or its agent). Any costs incurred by the Redress Program Administrator in matching loan servicing data with class members, or otherwise incurred in correcting material deficiencies in the data set, shall be paid by the Defendants and shall not be credited against the Redress Sum.

## **DEFAULT**

### **XXV.**

IT IS FURTHER ORDERED that in the event that Defendants default on any obligation to make any payment set forth in this Order, which default continues for ten (10) calendar days beyond the due date of the payment, the entire unpaid amount together with interest, computed

pursuant to 28 U.S.C. § 1961(a) from the date of default to the date of payment, shall immediately become due and payable. Notwithstanding any other provision of this Order, Defendants agree that if they fail to meet any payment obligations set forth in this Order, Defendants shall pay the costs and attorneys' fees incurred by Plaintiff, the Commission, HUD, or their agents in any attempts to collect amounts due pursuant to this Order. Defendants further agree that the facts as alleged in the Complaint filed in this action shall be taken as true in any subsequent litigation filed by Plaintiff, the Commission, or HUD to enforce their rights pursuant to this Order, including, but not limited to, a nondischargeability complaint in any subsequent bankruptcy case.

## RELEASE

### XXVI.

IT IS FURTHER ORDERED that, upon the effective date, this Order shall end all litigation between the plaintiff, FTC and HUD, and the Defendants and, except for defendant Thomas D. Basmajian, their predecessors, successors, shareholders, officers, directors, subsidiaries, and their affiliates, relating to the claims and conduct alleged or that could have been alleged in this action with respect to the Defendants' loan servicing practices. In addition, any class member who obtains any redress from the Redress Program shall release any claim, known or unknown, against the Defendants, and, except for defendant Thomas D. Basmajian, their predecessors, successors, shareholders, officers, directors, subsidiaries, and their affiliates, with respect to the Defendants' loan servicing practices between January 1, 1999 and the date of preliminary approval of the Settlement Agreement ("Release"); *provided, however*, that any claims or defenses that class members affirmatively or defensively assert with respect to

Defendants' loan servicing in an effort to defeat any pending or future real estate foreclosure action (whether judicial or nonjudicial), including those related to the servicing practices covered by this Release, shall be unaffected by this Release in connection with such action. Counsel for the FTC, Defendants, and the Nationwide Class Action shall negotiate and agree upon the language of the release to be submitted to and approved by the United States District Court of the District of Massachusetts in connection with the Nationwide Class Action.

### **COMPLIANCE REPORTING**

#### **XXVII.**

IT IS FURTHER ORDERED that, in order that compliance with the provisions of this Order may be monitored:

- A. For a period of eight (8) years from the date of entry of this Order, Defendants shall notify the Commission of any changes in corporate structure that may affect compliance obligations arising under this Order, including but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the filing of a bankruptcy petition; or a change in the corporate name or address, at least thirty (30) calendar days prior to such change, *provided that*, with respect to any proposed change in the corporation about which the defendant learns less than thirty (30) days prior to the date such action is to take place, defendant shall notify the Commission as soon as is practicable after obtaining such knowledge.
- B. One hundred eighty (180) calendar days after the date of entry of this Order,

Defendants each shall provide a written report to the FTC, sworn to under penalty of perjury, setting forth in detail the manner and form in which they have complied and are complying with this Order. This report shall include, but not be limited to:

- (1) Any changes required to be reported pursuant to subparagraph (A) above;  
and
- (2) A copy of each acknowledgment of receipt of this Order obtained by each defendant pursuant to Section XXXI;

C. For the purposes of this Order, Defendants shall, unless otherwise directed by the Commission's authorized representatives, mail all written notifications to the Commission to:

Associate Director for Financial Practices  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Mail Stop NJ-3158  
Washington, D.C. 20580  
Re: *FTC v. Fairbanks Capital Corp. et al*

D. For the purposes of this Order, Defendants shall, unless otherwise directed by HUD's authorized representatives, mail all written notifications to HUD to:

Director of the Office of RESPA and Interstate Land Sales  
Department of Housing and Urban Development  
451 Seventh Street, S.W., Room 9146  
Washington, DC 20410

## **COMPLIANCE MONITORING**

### **XXVIII.**

IT IS FURTHER ORDERED that, for the purposes of monitoring and investigating

compliance with any provision of this Order,

- A. Within twenty (20) calendar days of receipt of written notice from a representative of the Commission or HUD, any Defendant shall submit additional written reports, sworn to under penalty of perjury; produce documents for inspection and copying; appear for deposition; and/or provide entry during normal business hours to any business location in such defendant's possession or direct or indirect control to inspect the business operation, *provided that* (1) the Defendants, after attempting to resolve a dispute without court action and for good cause shown, may file a motion with this Court seeking an order including one or more of the protections set forth in Fed. R. Civ. P. 26(c); and (2) nothing in this Order shall limit the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49 and 57b-1, to obtain any documentary material, tangible things, testimony, or information.
- B. Defendants shall permit representatives of the Commission or HUD to interview any employer, consultant, independent contractor, representative, agent or employee who has agreed to such an interview, relating in any way to any conduct subject to this Order. The person interviewed may have counsel present.
- C. Defendants shall take reasonable steps sufficient to monitor and ensure that all of their employees and independent contractors engaged in loan servicing or customer service functions comply with this Order. Such steps shall include adequate monitoring of calls with consumers.
- D. Defendants shall take appropriate corrective action with respect to any of their

employees whom Defendants determine is not complying with this Order, which may include training, disciplining, and/or terminating such individual.

### **RECORD KEEPING PROVISIONS**

#### **XXIX.**

IT IS FURTHER ORDERED that, for a period of eight (8) years from the date of entry of this Order, Defendants, and each of them, and their agents, employees, officers, corporations, successors, and assigns, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby permanently restrained and enjoined, in connection with the servicing of any loan, from failing to create and retain, for a period of three (3) years after the date of preparation of the record, the following records:

- A. Accounting records that reflect the cost of loans acquired and/or sold; revenues generated from servicing fees and/or fees paid by and/or imposed on consumers; and the disbursement of such revenues;
- B. Personnel records accurately reflecting: the name, address, and telephone number of each person employed in any capacity by such business, including as an independent contractor; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable;
- C. Customer files containing the names, addresses, telephone numbers, dollar amounts paid, and description of fees or other charges imposed;
- D. Complaints, disputes, and requests from consumers (whether received directly,

indirectly or through any third party) and any responses to those complaints, disputes, or requests;

- E. Copies of all training materials and policy manuals; and
- F. All documentation generated pursuant to Section XII.

### **DISTRIBUTION OF ORDER BY DEFENDANTS**

#### **XXX.**

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Order, Defendants shall deliver a copy of this Order to all principals, officers, directors, managers, employees, agents, and representatives having supervisory responsibility with respect to the subject matter of this Order, and shall secure from each such person a signed and dated statement acknowledging receipt of the Order. Defendants shall deliver this Order to current personnel within the scope of the preceding sentence within thirty (30) calendar days after the date of service of this Order, and to new personnel in the same group within thirty (30) calendar days after the person assumes such responsibility.

### **ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANT**

#### **XXXI.**

IT IS FURTHER ORDERED that each defendant, within five (5) business days of receipt of this Order as entered by the Court, must submit to the Commission a truthful sworn statement acknowledging receipt of this order.

**CONTINUING JURISDICTION OF COURT**

**XXXII.**

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes, including but not limited to enabling any of the Parties to apply to the Court at any time for such further orders or directives as may be necessary or appropriate for the interpretation or modification of this Order, the enforcement of compliance therewith, or as justice may require.

**FINAL JUDGMENT AND ORDER**

**XXXIII.**

The Parties hereby consent to entry of the foregoing Order, which, upon the effective date, shall constitute a final judgment and order, each Party to bear its own costs and attorneys' fees in connection with this action.

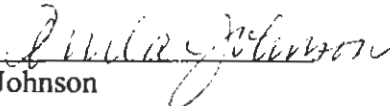
SO ORDERED this 21<sup>st</sup> day of November, 2003.

  
UNITED STATES DISTRICT JUDGE

The parties hereby stipulate and agree to the terms and conditions set forth above and consent to entry of this Order Preliminarily Approving Stipulated Final Judgment and Order.

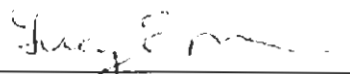
FOR THE UNITED STATES OF AMERICA:

Michael J. Sullivan  
United States Attorney  
District of Massachusetts

  
\_\_\_\_\_  
Anita Johnson  
Assistant United States Attorney  
Suite 9200 Moakley Courthouse  
Boston, MA 02210  
(617) 748-3100

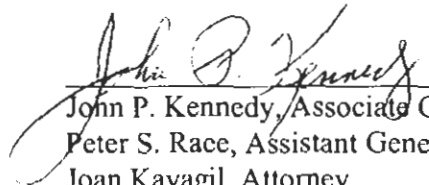
FOR THE FEDERAL TRADE COMMISSION:

WILLIAM E. KOVACIC  
General Counsel

  
\_\_\_\_\_  
Lucy E. Morris, Attorney  
Eric Imperial, Attorney  
Allison I. Brown, Attorney  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580  
(202) 326-3224 (telephone)  
(202) 326-3768 (facsimile)

FOR THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT:

RICHARD A. HAUSER  
General Counsel



John P. Kennedy, Associate General Counsel

Peter S. Race, Assistant General Counsel

Joan Kayagil, Attorney

Barton Shapiro, Attorney

Program Compliance Division

Department of Housing and Urban Development

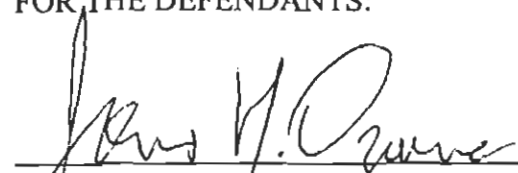
451 Seventh Street, S.W.

Washington, DC 20410


(202) 708-4184 (telephone)

(202) 401-8949 (facsimile)

FOR THE DEFENDANTS:

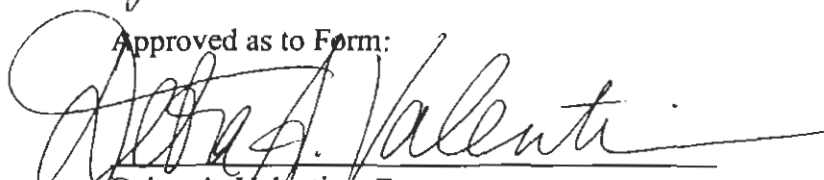
  
\_\_\_\_\_  
FAIRBANKS CAPITAL HOLDING CORP.  
By James Ozanne, Chief Executive Officer

DATED: 10.6.2003

  
\_\_\_\_\_  
FAIRBANKS CAPITAL CORP.  
By James Ozanne, Chief Executive Officer

DATED: 10.6.2003

Approved as to Form:

  
\_\_\_\_\_  
Debra A. Valentine, Esq.  
O'Melveny & Myers LLP  
Attorney for Defendants Fairbanks Capital  
Holding Corp. and Fairbanks Capital Corp.

DATED: 10.6.2003

## APPENDIX A

### IMPORTANT INFORMATION

Dear Consumer,

Our records indicate that you hold a mortgage loan that is serviced by Fairbanks Capital Corp. The Federal Trade Commission (FTC) and the U.S. Department of Housing and Urban Development (HUD) recently settled a case against Fairbanks concerning our mortgage servicing practices. This settlement may affect your loan, so please read this letter carefully. In the future, you may receive additional important notices regarding this settlement.

According to our records, we previously classified your loan as delinquent, even though the payments you submitted were enough to cover the scheduled monthly payments. As a result of the settlement, we have re-classified your loan as current and corrected the prior record of delinquency.

In the past, Fairbanks may have informed credit bureaus that your loan was delinquent. Credit bureaus are companies that maintain and sell consumer credit reports, which contain information about your credit payment history. We have informed the credit bureaus that your loan is now considered current.

You do not need to take any action, other than continuing to make your regular loan payments. Should you have questions about this matter or about the servicing of your loan, please contact us at:

Fairbanks Capital Corp.

[Address]

1-800-XXX-XXXX

Sincerely,

Fairbanks Capital Corp.

You have the right to receive a copy of your credit report. For a copy of your credit report from the major credit bureaus, contact:

Equifax – [www.equifax.com](http://www.equifax.com); 1-800-685-1111

Experian – [www.experian.com](http://www.experian.com); 1-888-EXPERIAN (397-3742)

TransUnion – [www.transunion.com](http://www.transunion.com); 1-800-916-8800

For more information, please see the Federal Trade Commission's web site at [www.ftc.gov](http://www.ftc.gov).