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April 9, 2009

Ms. M. Karinne McCullough
Clerk, First Court of Appeals
1307 San Jacinto, 10th Floor
Houston, Texas 77002

Via Hand Delivery

Re: No. 01-06-00798-CV, *FCLT Loans Asset Corp., et al., Appellants v. First City Fin. Corp., et al., Appellees*, in the First Court of Appeals – Supplemental Authorities.

Dear Ms. McCullough,

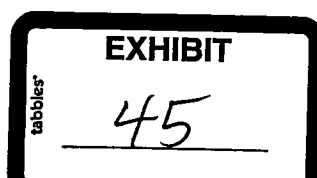
I send this original letter brief and five copies on behalf of Appellant Timothy J. Blair, the Representative of the Class of Former First City Bancorporation Employees in this Case (“Blair”), to provide Justices Bland, Jennings, and Hanks with supplemental authorities that support the Agreed Motion to Abate Appeal and Remand for Class-Action Approval of Mediated Settlement filed on December 31, 2008.

Appellate Courts Have Routinely Approved Contingent, Appellate High-Low Settlement Agreement Similar to this One. In *Durham v. Marberry*, 156 S.W.3d 242 (Ark. 2004), the Arkansas Supreme Court expressly approved of an appellate high-low settlement agreement similar to the one mediator Michael Wilk crafted here:

[B]oth the appellants and the appellees have provided notice to this court that they have arrived at a contingent high-low settlement agreement. The settlement amount is contingent upon our decision in this appeal; therefore, we agree with both parties that the contingent agreement does not moot this appeal....

Id. at 243. In *Perdue Farms, Inc. v. National Union Fire Ins. Co. of Pittsburgh*, 197 F. Supp. 370 (D. Md. 2002), the court referenced another appellate high-low agreement:

Perdue appealed to the District Court of Appeal of Florida, Second District. See *Perdue Farms, Inc. v. Hook*, 777 So.2d 1047 (Fla. Dist. Ct. App. 2001) While the case was on appeal, Hook and Perdue entered into a “high-low” settlement agreement. Win or lose on appeal, the agreement provided



that Perdue would pay Hook at least \$10 million, but no more than \$30 million.

Id. at 374. And in *Ins. of Am. Agency, Inc. v. Wendland*, No. 03-00432-CV, 2004 Tex. App. LEXIS 2038 (Tex. App.—Austin March 31, 2004), the court abated an appeal to “allow the parties to send notice of their proposed class-action settlement and for the trial court to hold a hearing on the fairness and adequacy of the settlement.” The parties never resolved their issues, so the court dismissed the case, but *Wendland* demonstrates that other courts have abated appeals pending trial court consideration of motions for approval of a class action settlement. Here, all parties have presented this Court with an appellate high-low settlement agreement similar to ones used to settle other appellate cases.

Courts Approve High/Low, No-Appeal Settlements for Sound Public Policy Reasons. In *Kelly v. Pocono Recreation, Inc.*, 2 Phila. 297, 1979 Phila. Cty. Rptr. LEXIS 25 (Common Pleas Phil. Cty. April 9, 1979), the court approved one of the first high-low, no-appeal settlements. The court made pertinent observations that apply equally well to the parties’ agreed motion in this case:

What is certain, at this point, is that the waiver of appeals ingredient, and the use of the “high-low contract,” generally, will at least, under careful application, serve to shorten drastically unnecessarily protracted litigation.

The kind of settlement effectuated did, in this case, and could in a wide range of similar situations, achieve the practical and equitable result of both insuring the financial security of a plaintiff and insulating a defendant from an excessive jury award. In so doing, it would serve the total public interest with its residual benefits, including shorter trials, and a reduction in the cost of liability insurance.

Id., 2 Phila. at 300.

In *Cunha v. Shapiro*, 837 N.Y.S.2d 160 (N.Y. App. Div. 2007), *app. disp’d sub nom. Cunha v. Shapiro*, 874 N.E.2d 728 (N.Y. 2007), the Supreme Court of New York, Appellate Division discussed the manner in which a high-low agreement works and the reasons that such an agreement accords with the public policy favoring settlement:

New York has “long favored and encouraged the fashioning of stipulations as a means of expediting and simplifying the resolution of disputes” [citations omitted]. In this regard, high-low settlements are generally favored by courts, attorneys, and litigants as they assure a minimally-acceptable recovery to plaintiffs in the event of an unexpectedly small

verdict or a defense verdict, while protecting defendants against runaway verdicts . . . [citations omitted].

Id., 837 N.Y.S.2d at 163-64. See also *Tauer v. Secura Ins.*, 2001 U.S. Dist. LEXIS 19846 at *5 (D. Minn. Nov. 26, 2001). High-low agreements, now common in trial courts, are becoming more common on appeal. See generally Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STANFORD L. REV. 1339, 1370 (1994); John L. Shanahan, *The High-Low Agreement, FOR THE DEFENSE* (July 1991), at 25; Robert Coulson, *Negotiating Control Contracts: Trial Counsel Reduce their Need for Appeals*, 52 JUDICATURE 190, 193 (1968).

These authorities supplement two cases cited in the Agreed Motion: *Lui v. Int'l Bus. Mach. Corp.*, No. 01-05-00742-CV, 2005 WL 2850332 (Tex. App.—Houston [1st Dist.] 2005) (memo. op.) (granting an agreed motion and remanding in accord with a settlement); *Franz v. Klein Indep. Sch. Dist.*, No. 01-97-01423-CV, 1999 WL 430053 (Tex. App.—Houston [1st Dist.] 1999) (memo. op.) (abating appeal and remanding).

Courts Approve Class Action Settlements that Resolve Complex Retirement Benefit Cases. The mediated settlement Michael Wilk negotiated here is similar to the arm's length, class-action settlement of a retirement-benefit dispute involving an appeal that a federal district court recently approved in *UAW v. General Motors Corp.*, No. 05-CV-73991-DT, 2006 U.S. Dist. LEXIS 14890 (E.D. Mich. March 31, 2006). In the *UAW* case, the district court entered findings of fact and conclusions of law some 113 pages long that will serve these parties as a guide when seeking approval of this settlement in the trial court. See also *Weiss v. Regal Collections and Lancer Investments, LLC*, No. 01-cv-881, 2006 U.S. Dist. LEXIS 48995 (D. N.J. July 18, 2006) (class-action settlement of a class action Fair Debt Collection Practices Act lawsuit).

By copy of this letter, I am forwarding a copy of the enclosed to opposing counsel of record. Thank you for your assistance in this matter.

Sincerely,



David A. Furlow
Matthew Reed

CERTIFICATE OF SERVICE


I hereby certify that I am serving a true copy of this supplemental letter briefing to all counsel of record below, today, at the numbers below via fax.

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