



## AlaFile E-Notice

03-CV-2010-900013.00

Judge: HON. JOHNNY HARDWICK

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# NOTICE OF ELECTRONIC FILING

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IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

LISA NIX GREEN ET AL V. KAY IVEY ET AL  
03-CV-2010-900013.00

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MONTGOMERY, AL 36104

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IN THE CIRCUIT COURT OF  
MONTGOMERY COUNTY, ALABAMA

LISA NIX GREEN, individually and as  
next friend of Brent A. Green and  
Blake A. Green, et al.,

Plaintiffs,

v.

CASE NO.: CV-2010-900013.00

YOUNG BOOZER, GWEN APPLING,  
SENATOR ROGER BEDFORD,  
DR. GREG FITCH, REPRESENTATIVE  
CRAIG FORD, KAREN GANDY, DR.  
DAVID BRONNER, GENERAL PAUL  
HANKINS, DR. FREIDA HILL, DR.  
RICHARD HUCKABY, PATTI LAMBERT  
DR. WILLIAM MEEHAN, DAVID  
PERRY, JAMES STUBBS, and  
MARK SULLIVAN,

Defendants.

**FINAL JUDGMENT AND APPROVAL OF CLASS SETTLEMENT**

On May 5, 2011, this Court preliminarily approved a Class Action Settlement Agreement (the "Settlement") in the instant litigation. As part of the preliminary approval order, a fairness hearing was scheduled for June 20, 2011 in order to evaluate the proposed Settlement in greater detail, to entertain any objections by class members, and to determine whether a final judgment should be entered. The Court also reserved the right to rule on all other matters pertaining to the proposed Settlement as appropriate.

The Court further required that approved forms of notice be sent to all class members at the addresses appearing in the records of the PACT Program, in addition to being posted on the PACT Program website. Upon sworn proof submitted by the parties, the Court hereby finds that the subsequent distribution of notice was in compliance with the requirements of the preliminary approval order, the Alabama Rules of Civil Procedure, and due process.

As expressly informed by the notice, class members were given until June 10, 2011 to file written objections to the proposed Settlement. Court records indicate that written objections were received from approximately 55 objectors. The Court further notes that objectors in attendance at the fairness hearing were given an opportunity to participate in the proceedings, including the opportunity to argue their objections and the opportunity to cross-examine witnesses. The concerns of all objectors have been duly taken into consideration.

Having now fully examined the proposed Settlement in light of all pleadings, submissions, discovery, and proceedings to date, along with the testimony, evidence, and objections presented at the June 20, 2011 fairness hearing, the Court hereby finds the proposed Settlement to be fair, adequate, and reasonable.

#### **EVALUATION OF PROPOSED SETTLEMENT**

In reaching its decision, the Court has been mindful of the strong judicial policy favoring settlement, and the Court recognizes that compromise is the essence of any settlement. *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1981). In the absence of fraud, collusion, or the like (of which there is no evidence here), deference should be given to the judgment of experienced counsel. *Cotton v. Hunt*, 559 F.2d 1326, 1330 (5th Cir. 1977). The test is simply whether a proposed settlement is fair, adequate, and reasonable. *Bennett, supra*.

In concluding that the proposed Settlement should be approved, the Court has thoroughly considered the surrounding circumstances as a whole, and special consideration has been given to the following factors espoused by the Alabama Supreme Court: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which the settlement is fair, adequate, and reasonable; (4) the complexity, expense, and duration of the litigation; (5) the substance and amount of opposition to the settlement; (6) the

stage of the proceedings at which the settlement was achieved; and (7) the financial ability of the defendants to withstand a judgment greater than the amount of the settlement. *Adams v. Robertson*, 676 So. 2d 1265 (Ala. 1995).

**A. General fairness, adequacy, and reasonableness.**

The fundamental issue presented in this case involves the manner in which tuition and mandatory fees should be paid under PACT Contracts. There are approximately 40,000 PACT Contracts which are still eligible to receive benefits. The contracts are owned by approximately 30,000 separate individuals. Based upon the evidence, the Court finds (and the parties jointly acknowledge) that the available assets of the PACT Trust Fund are insufficient to pay full tuition and mandatory fees under all contracts. The Court further finds that the PACT Trust Fund constitutes the sole funding source to provide such benefits. The proposed Settlement would serve to address the undisputed funding shortfall by establishing parameters for an equitable distribution of the limited assets of the Trust Fund, along with the legislative appropriations of Act 2010-725, among all class members.

The Court has undertaken to independently evaluate the legal theories in this case, as well as the financial realities that have been presented by expert testimony. Included in the Court's analysis is the undisputed fact that the limited assets of the PACT Trust Fund will continue to be depleted if the proposed Settlement is not approved. It is the view of the Court that it would be unfair and inequitable to permit full benefits to be paid to certain class members such that the remaining class members would ultimately receive less than the sums to be provided under the proposed Settlement, and possibly nothing at all. Considering all of the attendant circumstances, it is therefore the opinion of this Court that the proposed Settlement provides a fair, adequate, and reasonable solution to the class members as a whole.

**B. Specific Factors as to Fairness, Adequacy, and Reasonableness.**

**(1) Likelihood of success at trial.**

The PACT Contracts at issue in this case are contracts with the PACT Board as trustees of the PACT Trust Fund. Indeed, the members of the PACT Board have been sued solely in that official capacity. The Court is aware of no means for the PACT Board to honor PACT Contracts and/or a potential judgment in this case other than through those assets which are currently in the PACT Trust Fund and those which are to arrive by legislative appropriation beginning in 2015.

Given that the PACT Trust Fund is established by law as a statutory trust, the Alabama Uniform Trust Code, § 19-3B-101 et seq., would apply in this case. Indeed, both sides of the case have invoked the Trust Code as a jurisdictional basis. Under the Trust Code, this Court has jurisdiction to either modify or terminate a trust when that trust has become unable to perform its intended purpose. § 19-3B-412, Code of Ala. 1975. Moreover, the interests of all class members must be managed in an equitable manner. § 19-3B-803. Upon its preliminary review of the Trust Code and the arguments favoring modification or termination, the Court cannot say that the class members would likely obtain a more favorable or more equitable result at trial than they would receive under the proposed Settlement.<sup>1</sup>

Moreover, even if the class members were to obtain a more favorable judgment, any such judgment would only be as good as the ability to have it enforced. Obtaining a judgment against an insolvent defendant is of limited value, and a judgment compelling performance of an act which a defendant cannot perform is likewise of no significant value. These are important considerations because the evidence is undisputed that the PACT Trust Fund has limited assets

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<sup>1</sup> It should also be noted that the Defendants have additionally asserted that certain disclosure statements would provide a basis to modify the payment of tuition and mandatory fees if assets were insufficient to provide full benefits. This argument further provides substantial uncertainty as to whether the class members as a whole could obtain greater success at trial.

which, even in the event of a judgment, would be insufficient to pay full benefits to all class members. Accordingly, the Court finds that this factor weighs in favor of approval.

**(2) The range of possible recovery.**

The uncontroverted evidence in this case is that the PACT Trust Fund has a significant actuarial deficit, i.e., its assets are insufficient to pay the projected liability associated with full tuition and mandatory fee payments. The Court therefore believes that the “limited fund” doctrine has application. *Ortiz v Fiberboard Corp.* 527 U.S. 815 (1999); *Ex Parte Holland*, 692 So. 2d 811 (Ala. 1997). Under the limited fund doctrine, the following issues generally must be established: (1) there are multiple claimants against the defendant on the fund; (2) the defendant on the fund has only a limited amount to pay those claims; (3) the limited amount is insufficient to pay all of the claims in full; and (4) all of the claimants are, or can be, brought before the court.

In this case there are approximately 40,000 outstanding PACT Contracts owned by approximately 30,000 individuals. The evidence is equally clear that the PACT Trust Fund is a limited fund with finite assets. As of May 2011, the Trust Fund had approximately \$440 million in assets. It also has an income stream, in future dollars, of \$548 million as provided under Act 2010-725. Those annual installments are scheduled to begin in 2015. The present value of the total assets, according to the State Treasurer and the PACT actuary, is approximately \$830 million. On the other hand, the present value of the obligations owed by the Trust Fund under PACT Contracts well exceeds \$1 billion. Because the Court has previously certified this case as a class action under Rules 23(b)(1)(A), 23(b)(1)(B), and Rule 23(b)(2) ARCP, all claimants are before the Court. Therefore, all of the requirements of a “limited fund” case have been sufficiently established.

Given the limited fund doctrine and the aforementioned provisions of the Trust Code, it is likely that the only solution at trial would be the same as that accomplished by the proposed Settlement, i.e., to equitably divide the limited funds among the class members. Because there is no alternative source of funding with which to pay benefits, the expectation of any greater recovery would be entirely speculative. Moreover, because the assets of the PACT Trust Fund would continue to be depleted during ongoing litigation, the range of possible recovery available to the class members would actually be less if an equitable division is delayed until trial. Because of the significant risk that a majority of the class members would recover less (or perhaps nothing) if the proposed Settlement is not approved, the Court concludes that this factor weighs in favor of approval.

**(3) The point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable.**

The uncontroverted evidence is that the PACT Trust Fund does not have sufficient assets to fulfill its intended purpose, which is to pay full tuition and mandatory fees for the designated beneficiaries of PACT Contracts. Under the Alabama Uniform Trust Code, it would be well within this Court's authority to protect the class members' initial investment<sup>2</sup> by terminating the PACT Trust Fund, taking the limited assets that are currently available, and equitably dividing those assets among the PACT Contract owners. If this Court opted for such an approach, the collective value to the class members would only be the current value of the Trust Fund. Under the proposed Settlement, however, the modified tuition and fee payments will extend the viability of the PACT Trust Fund until such time as legislative appropriations begin to be received in 2015.

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<sup>2</sup> The Court is mindful of the undisputed evidence which shows that the assets of the PACT Trust Fund are projected in 2012 to fall below the point where initial investments can be refunded.

The proposed Settlement thus provides a significant benefit to the class members as a whole by taking advantage of the total potential assets (including the legislative appropriations) and, subject to costs of administration and of this case, applying those assets to the benefit of all class members. Such a result greatly exceeds the equally viable alternative of immediate liquidation, and certainly exceeds any alternative remedy that would result in a significant portion of the class members receiving nothing. Because the proposed Settlement provides all of the class members with all of the present and future benefits that reasonably exist to be provided, the Court finds that this factor weighs in favor of approval.

**(4) Complexity, expense, and duration of the litigation.**

Full litigation of this case would be complex, expensive, and time consuming. The case involves rights, obligations, and duties under 40,000 PACT Contracts that will be paid out over a span of two decades. While the Court is informed that enormous amounts of time has been expended on both sides of this case, it is obvious that further litigation of the case will necessitate significantly much more time, effort, and expense. If tried, this case will require extensive and expensive actuarial and financial evidence. Expert testimony on many issues will be necessary. Most importantly, such expenses and delays would continue to erode the limited available funds at the detriment of the class members as a whole.

The Court is of the view that proceeding to trial in this case, with subsequent appeals, would be not only detrimental to the class members, it in all likelihood would be fatal to the PACT Trust Fund. Based upon the evidence of record, by the time this case could be tried, appealed, and finalized, the PACT Trust Fund would be significantly (and perhaps completely) depleted. If that were to occur, a large percentage of the class members would ultimately receive less than the level of benefits to be provided under the proposed Settlement. While the objectors



in this case (who number around 55) apparently are willing to take that risk, the remaining contract owners (who number around 29,945) and this Court are not willing to do so. Rather, the Court is compelled to find in favor of approving the proposed Settlement on the basis that it would protect the interests of all class members as a whole.

**(5) Substance and amount of opposition to the settlement.**

On June 20, 2011, this Court held a lengthy and thorough fairness hearing. Testimony was provided to the Court by several individuals involved in the PACT Program and with the settlement negotiations. Objectors were also given the opportunity to be heard. Written objections were filed by 55 objectors prior to the June 10 deadline<sup>3</sup>, and 12 objectors voiced their opinions at the fairness hearing. It is the duty of this Court to take into account the substance and amount of objections when determining whether the class action settlement is fair, reasonable and adequate. *Adams v. Robertson and Liberty National Life Insurance Company*, 676 So. 2d 1265 (Ala 1995). There are just over 40,000 existing PACT Contracts involved in this case, and just over 30,000 contract owners. The number of written objections amounts to less than 0.18% of the total contract owners. The number of objectors who voiced their objections at the fairness hearing amounts to 0.04% of the total contract owners. Therefore it is obvious to this Court that the objectors represent a very small percentage of the class members. In evaluating approval of a settlement, there is no question that the small number of objections weighs in favor of approval, and a small amount of objectors is an indication of a settlement's fairness. *Hammon v. Barry*, 752 F.Supp. 1087, 1093 (D.D.C.1990).

This Court has closely reviewed objections and the terms of the proposed settlement and finds that the benefits that will be provided collectively to the class members greatly outweigh

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<sup>3</sup> An additional 8 objections were received by the Clerk's office after June 10, 2011.

the undisputed risks and inequities of continuing to make full tuition and mandatory fee payments. The Court further notes that none of the objections have purported to set forth any objective, factually supported alternative basis for reforming PACT Contracts or resolving the deficit facing the PACT Trust Fund in general. The Court thus finds the settlement to be fair, reasonable, adequate, and in the best interests of the class members as a whole.

The substance of the objections essentially involved five main challenges: (1) this Court's jurisdiction; (2) the ripeness or actual existence of a controversy; (3) the failure to enforce PACT Contracts against the State of Alabama; (4) the lack of opt out rights; and (5) excessive attorneys' fees.

**(a) Jurisdiction**

The parties have invoked the jurisdiction of this Court pursuant to § 19-3B-101 et seq. of the Alabama Uniform Trust Code. See § 19-3B-201 & 202, Code of Alabama 1975. Additionally, the parties have invoked the equitable powers of this Court under the Alabama Declaratory Judgment Act in order for this Court to interpret and apply the various statutes, amendments, contracts, rules, regulations, and other authorities pertaining to the establishment and administration of the PACT Trust Fund. § 6-6-200 et seq., Code of Alabama 1975. The parties have thus invoked the jurisdiction of this Court over all matters at issue in this case.

**(b) Ripeness of controversy:**

The Plaintiffs have sought a declaratory judgment which would set forth the proper interpretation and application of the respective rights, duties, and obligations of the parties under PACT Contracts, documents, and related statutes. From the standpoint of the Declaratory Judgment Act, issues are ripe for adjudication when litigation among the parties is inevitable.

*Harper v Brown, Stagner, Richardson, Inc.* 873 So2d 220, 224 (Ala. 2003). The Alabama Supreme Court has stated:

... We also recognize that one of the purposes of the Declaratory Judgment Act is to render practical help in ending a controversy that has yet to reach the stage where legal relief is immediately available and to enable parties between whom an actual controversy exists or those between whom litigation is **inevitable** to have the issues speedily determined when a speedy determination would prevent unnecessary injury caused by the delay of ordinary judicial proceedings. *Ex Parte State ex rel Lawson*, 241 Ala 304, 307, 2 So2d 765, 767 (1941). Stated another way, **declaratory judgment actions are designed to set controversies to rest before they lead to repudiation of obligations**, invasion of rights and the commission of wrongs. (emphasis in the original)

See also § 6-6-224, Code of Alabama. \_Based upon the actuarial and other evidence, which the Court accepts as reliable, the PACT Trust Fund will have insufficient assets to pay full tuition and mandatory fees to all class members. If the present issues are not resolved, a significant portion of the class members will not receive any benefits under their PACT Contracts. Thus, it is inevitable that litigation between the parties will occur. Moreover, given the limited funds available in this case, it would impose unnecessary and irreparable injury upon a significant portion of the class members to allow the PACT Trust Fund to be depleted in the interim.

The Court further finds that the issue of mandatory fees has been raised by both parties and has been thoroughly litigated and addressed in the proposed Settlement. A material issue in this lawsuit concerned whether all mandatory fees were being paid under PACT Contracts, i.e., whether the PACT Board was properly construing the definition of such mandatory fees. The proposed Settlement resolves the issue by prescribing the value of payments to be remitted for mandatory fees in the future.

Finally, and in addition to the ripe allegations asserted by the Plaintiffs, the PACT Board has alleged controversies ripe for adjudication in its Counterclaim. More specifically, the PACT Board has sought instructions and guidance as trustees on how to administer the limited assets of

the PACT Trust Fund, which includes clarification on whether the PACT Board is permitted to modify the payment of tuition and mandatory fees based upon existing assets and future liabilities. (See Counterclaim, ¶¶ 10, 11(2) and (5)). The Court observes that the Uniform Trust Code bestows jurisdiction over any matter involving trust administration, including (but not limited to) a request for instructions, a request to interpret or construe the terms of a trust, a request to review the actions or approve proposed actions of a trustee, and to modify or terminate a trust. See § 19-3B-201(d)(1), (3), (4), (8), (14) and (15). In that regard, jurisdiction is invoked even in the absence of an otherwise ripe controversy. See official comment § 19-3B-201 ("Subsection (c) makes clear that the Court's jurisdiction may be invoked even absent an actual dispute.").

**(c) Obligation of State:**

The most common complaint of the individual objections has been that they have a contract with the State of Alabama (or one of its agencies) and that the State should be compelled to honor those contracts in full.

While the Court fully appreciates the argument advanced by these objectors, there are several reasons why their position fails. First and foremost, a simple review of the contract materials discloses that each PACT Contract is with the PACT Board, not with the State itself. This fact is confirmed by the statutory language authorizing the PACT Board to specifically enter into PACT Contracts.

Furthermore, for this Court to hold that PACT Contracts are obligations of the State of Alabama would have the effect of voiding the contracts in their entirety. The State of Alabama, by virtue of § 213, Alabama Constitution 1901, is prohibited from incurring debt. *Eagerton v*

*Second Economic Development Corporation District of Lowndes County*, 909 So. 2d 783 (Ala. 2005). Under § 213, any instrument which would create a debt of the State is “absolutely void”.

**(d) No opt out rights:**

As noted previously, this case has been certified as a class action under Rule 23(b)(1)(a), 23(b)(1)(b) and 23(b)(2). This certification was made well before the parties negotiated the present proposed Settlement.

Courts have consistently held that there is no opt out right in cases certified under Rule 23(b)(1) or (2). Such cases are commonly called “mandatory classes”. *Wal-Mart Stores, Inc. vs Duke*, \_\_\_ U.S. \_\_\_, 2011 W.L. 2437013 (June 20, 2011); *Ex Parte Holland*, 692 So. 2d 811, 814 (Ala. 1997) (citing *Adams vs Robertson*); *Adams v Robertson*, 676 So. 2d 1265, 1270 (Ala. 1995). This is particularly true in a “limited fund” case, because to allow class members to opt out and file individual suits would create a significant risk of a few claimants depleting the fund before others can get to court. Because this case was properly certified under Rules 23(b)(1) and (2), it was proper not to include a right to opt out. Moreover, based upon the evidence of record, the structure of the proposed Settlement is entirely dependent upon its application to all class members. To permit opt outs would therefore be detrimental to the class members as a whole.

**(6) Stage of proceedings.**

The proposed Settlement was reached after this case had been pending in this Court since January 2010. The records and materials filed with the Court disclose that there has been extensive discovery, both formal and informal. These parties, and particularly their counsel, are intimately familiar with the facts, figures, law, risk and complexity of the case. Both sides of this case have had sufficient opportunity to evaluate the strengths and weaknesses of their respective theories and positions, and sufficient evidence has been presented to allow the Court

to fully evaluate the proposed Settlement. The Court, of its own knowledge, knows counsel for both sides to be highly skilled, well equipped, and experienced litigators. The named parties, and their counsel, have after extensive litigation, and negotiations, and after court ordered mediation by a highly qualified and capable mediator brought this proposal to the Court. All of this weighs heavily in favor of approval of this settlement.

**(7) The financial ability of the defendants to withstand a judgment greater than the amount of the settlement.**

This factor is the embodiment of the limited fund doctrine discussed earlier. The evidence is clear that the PACT Board has no assets with which to pay more than is provided in the proposed Settlement.

**C. Incentive Awards to the Named Plaintiffs.**

An additional term of the proposed Settlement is the provision for an award of \$2,500 to each of the designated class representatives. Such awards are commonplace in class action cases. They are, however, to be carefully scrutinized to ensure that they are reasonable and not done as a tradeoff to relief for the class members as a whole. When such awards are proposed, the Court should look to the actions taken by the class representatives to protect the interests of all class members, whether those actions resulted in a substantial benefit to the class, and the amount of time and effort expended in the litigation.

Documents which have previously been filed with the Court sufficiently demonstrate that the class representatives have been fully aware of the issues involved. The Court was informed that these class representatives have been deposed, have participated in preparing and responding to other discovery, have participated in negotiations and mediation of this case, and have otherwise contributed in a significant way to the proposed Settlement. The Court also notes that none of the objections filed in this case have challenged the proposed award to the class

representatives. Accordingly, the Court finds that the awards to the class representatives are fair, are consistent with the efforts undertaken by the class representatives, and have no significant impact on the overall relief available to the class members as a whole.

**D. Effective Date to be Immediate.**

Given the urgency of the circumstances attendant to this case as set forth by undisputed evidence, the Court is of the opinion that the proposed Settlement should be implemented immediately. Paragraph 3D of the proposed Settlement currently reads as follows:

**D. Effective Date.** No action shall be taken to implement the terms of this Settlement unless and until an order approving the Settlement has been entered by the court **and has become final**. Such an order shall be deemed to be final (1) if no objections to the proposed Settlement have been filed within the time specified by the court, (2) if forty-three days have elapsed since the entry of such judgment and no notice of appeal has been filed, or (3) if a notice of appeal is filed, upon the appeal being dismissed or upon the court's judgment being affirmed, whichever shall first occur. In the event that an order approving this Settlement has not become final and non-appealable prior to commencement of the Fall 2011 semester or equivalent term, then the payments to be made by the PACT Program hereunder for Tuition and Fees shall not begin until the semester or equivalent term immediately following the date at which the approval order becomes final and non-appealable. In that event, the PACT Program shall in the interim continue to make payment of tuition and fees pursuant to Act 2010-725. (emphasis added).

Notwithstanding such language, it is now evident to the Court that any delay in implementing the proposed Settlement would work an inequitable and irreparable harm to the PACT Trust Fund and, consequently, to a significant portion of the class members. According to the expert testimony, a loss of approximately \$5 million will occur per each semester delay.

Given the timing of this Order, it is possible that tuition and mandatory fees payments for Fall 2011 will become due before the technical deadlines for finality as defined in the proposed Settlement. Because a delay of even one semester would potentially undermine the viability of the proposed Settlement, the Court is of the opinion that the best interests of the class members

as a whole require that the effective date be made immediate. Accordingly, the proposed Settlement is hereby deemed to be final and directed to be implemented immediately, and in its entirety.

### **AWARD OF ATTORNEYS' FEES AND EXPENSES**

#### **A. Background.**

J. Doyle Fuller, Esq. was appointed as counsel for Class A under the Class Certification Order dated December 13, 2010, and as amended on March 14, 2010. Donald W. Stewart, Esq. and Andrew Campbell, Esq. were appointed as counsel for Class B under the Class Certification Order dated December 13, 2010, and as amended on March 14, 2010. The parties to this case entered into a proposed Settlement on April 15, 2011. As part of the proposed Settlement, it was agreed that class counsel would receive \$4,950,000 in attorneys' fees and up to \$15,000 in costs. The parties further agreed at paragraph 8 of the proposed Settlement that "the award of attorneys fees is fair and reasonable based on the risks to class counsel in undertaking this litigation and the results achieved by class counsel for the benefit of the PACT holders under this Settlement." The proposed Settlement provides that the attorneys' fees and expenses are to be paid from the PACT Trust Fund.

On July 15, 2011, this Court held a hearing on the issue of the award of attorneys' fees and expenses under the proposed Settlement. At that hearing, class counsel offered evidence in support of the attorneys' fees and expenses. Counsel for the Defendants also appeared at the hearing in support of the award of attorneys' fees and expenses under the proposed Settlement. Of the 55 objectors to submit written objections to the proposed Settlement, only a few addressed the issue of attorneys' fees, and several of those asked only that class counsel submit evidence of their time and efforts in this case – which has now been done. Any objector who appeared at the



July 15 hearing was given an opportunity to be heard, and the Court has carefully considered each objection that was raised to the amount of attorneys' fees and expenses being sought.

This Court, following a full evidentiary hearing, and having considered Plaintiffs' Motion for Attorney Fees and all supporting documents, all other submissions, briefs, and evidentiary materials filed, and all of the pleadings, records, proceedings and hearings in this action, and this Court otherwise being fully advised and informed, finds that the efforts of class counsel have provided a significant, meaningful, and valuable benefit to the class members in this case by increasing, preserving and protecting the assets of the PACT Trust Fund and are entitled to the award of reasonable attorneys' fee and expenses. Without this litigation and the proposed Settlement, the evidence strongly suggests that either (1) the PACT Trust Fund would be liquidated such that the original purchase price would be refunded to all PACT contract owners, or (2) the PACT Trust Fund would run out of assets prior to receipt of any appropriations from Act 2010-725. Under either scenario, the PACT Trust Fund would never again have enough assets to pay full tuition and mandatory fee benefits under all PACT Contracts, and a substantial portion of the class would thereby receive significantly less than the benefits provided by the proposed Settlement, and perhaps nothing. The proposed Settlement preserves and protects the PACT Trust Fund and the legislative monies to be received hereafter for the benefit of all class members.

The PACT Trust Fund is a limited fund, and the proposed Settlement in this case results in a preservation and appropriate allocation of that fund to its beneficiaries. The proposed Settlement applies all of the available assets in the PACT Trust Fund, both current assets and those that will be available in the future, to provide the maximum benefit to the class members as a whole. It has long been the law that where a party has made a "substantial contribution" in

conferring a benefit upon a class, counsel for that party is entitled to a reasonable attorney fee. *Mills v. Electric Auto-Lite Co.* 396 U.S. 375 (1970).

**B. Authority for the Award of Attorneys' Fees.**

Alabama has long followed the "American Rule" which provides that each party bears the responsibility of paying its own attorneys' fees. However, there are exceptions to this rule such as when the awarding of an attorneys' fee is authorized by statute, provided by contract, or when justified by special equity. *Ex parte Horn*, 718 So. 2d 694, 702 (Ala. 1998); *James v. Alabama Coalition for Equity, Inc.*, 713 So. 2d 937, 950 (Ala. 1997). The "special equity" exception applies "'in proceedings where the attorney's efforts create [or preserve] a 'common fund' out of which fees may be paid.'" *Jones v. Regions Bank*, 25 So. 3d 427, 441 (Ala. 2009) (quoting *City of Bessemer v. McClain*, 957 So. 2d 1061, 1078, (Ala. 2006) (quoting *Battle v. City of Birmingham*, 656 So. 2d 344, 347 (Ala. 1995).)).

"The 'common fund' doctrine is an equitable principle designed to compensate an attorney whose services on behalf of his client operated **to create, discover, increase, preserve, or protect a fund to which others may also have a claim.**" *Whigham v. Estate of Whigham*, 781 So. 2d 969, 971 (Ala. Civ. App. 2000) (quoting *Henley & Clarke v. Blue Cross-Blue Shield*, 434 So. 2d 274, 276 (Ala. Civ. App. 1983)) (emphasis added). The "common fund" doctrine "embraces a situation where one litigant has proceeded alone at his own expense and has either created, protected, or preserved a fund in which others are entitled to share. In this situation the litigant may clearly recover his costs, including attorneys' fees out of the common fund." *Troy Bank & Trust v. Brantley*, 263 Ala. 428, 435, 82 So. 2d 618 (1955). A party who maintains an action that results in the creation, preservation or increase of a benefit in which others will receive a benefit or have an interest are entitled to an award of attorney fees. *Central R.R. &*

*Banking Co. v. Pettus*, 113 U.S. 116 (1885). “The ‘common fund’ doctrine has traditionally been applied to certain well defined, limited areas; most commonly, in cases for the protection of trusts...” *Henley & Clarke v. Blue Cross-Blue Shield*, 434 So. 2d 274, 276 (Ala. Civ. App. 1983). See also *Reynolds v. First Alabama Bank of Montgomery, N.A.*, 471 So. 2d 1238, (Ala. 1985) (applying common fund in a trust context and holding that a 30% fee is reasonable). In *Kimbrough v. Dickinson*, 39 So. 2d 241, 251 Ala. 677, 682-83 (1949), the Alabama Supreme Court held:

“The fundamental principle on which such allowances are justified is, that a trust estate should bear the expenses of its administration in a court of equity. Where a trustee [or beneficiary], acting with fairness and impartiality, resorts to necessary litigation in order to rescue a trust estate from waste or destruction, and succeeds by his efforts in doing so, he is entitled to reimbursement out of the fund itself, for reasonable expenses incurred in prosecuting such suits, including a proper sum for attorney’s fees. ... The necessary expenses of the original complainant incurred in litigation may very well, under these circumstances, be made payable out of the common fund, or else all, who are permitted to come in and avail themselves of the benefit of his labor, be required to contribute proportionately to such expense, as a condition of receiving such benefit. It would be inequitable for one alone to bear the burden, and others to come in and reap the fruits. The fruits of the litigation incurring equally to the benefit of the whole class concerned, they are equally taxable with the costs and expenses.”

“[A] litigant or lawyer who recovers [or preserves] a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). “[A]ttorney’s fees may be awarded where the plaintiff’s efforts are successful in creating a fund out of which the fees may be paid, or when the efforts of the plaintiff’s attorneys render a public service or result in a benefit to the general public in addition to serving the interests of the plaintiff.” *Horn, supra*, 718 at 702. See also P. Davis, *Tilley’s Alabama Equity*, §19:3 (2011).

Further, the PACT Trust Fund is a statutory trust subject to the Alabama Trust Code, §19-3B-100 et seq., Code of Alabama (1975). Section 34-3-60, Code of Alabama (1975), provides that in actions involving the administration of a trust, a court having jurisdiction of such action may ascertain and award a reasonable attorneys' fee to the representing parties to the action.

The Alabama Supreme Court has for many years held that where plaintiff's counsel have taken action to benefit, preserve or protect the common estate of a trust, plaintiff's counsel is entitled to a fee to be awarded from the trust. *Graddick v First Farmers and Merchants National Bank of Troy*, 453 So. 2d 1305 (Ala. 1984); *Zimmerman v First National Bank of Birmingham*, 348 So.2d 1359 (Ala. 1977); *Clark v Clark*, 287 Ala. 42, 247, So. 2d 361 (1971).

The solicitors' fees that may be allowed on final hearing, for services that inured to the benefit of the trust fund or common estate, and not to that of the individuals (*De Ramus v. De Ramus*, 205 Ala. 219, 87 So. 354; *Butler v. Fuller*, 204 Ala. 272, 85 So. 539), are not necessarily limited to the solicitors for the complainants. In a proper case the statute may be extended to other counsel. Sections 6261, 9319 Code of 1923; *Bidwell v. Johnson*, 191 Ala. 195, 67 So. 985; *Dent v. Foy*, 214 Ala. 243, 107 So. 210; *Brake v. Graham*, 214 Ala. 10, 106 So. 188.

*Moody v. Moody*, 216 Ala. 156, 158, 112 So. 752 (1927).

In this case, the undisputed evidence at the fairness hearing regarding approval of the proposed Settlement and at the hearing on the issue of attorneys' fees and expenses established that class counsel, through this action and the proposed Settlement, not only served the common estate but protected and preserved the trust assets, i.e., the "common fund".

### **C. Appropriateness of the Fee.**

"Whether to award attorney fees is within the sound discretion of the trial court, and the ruling on that question will not be reversed on appeal absent an abuse of discretion". *Ex parte Horn*, 718 So. 2d 694, 702 (Ala. 1998) citing *Battle v. City of Birmingham*, 656 So. 2d 344 (Ala.

1965) and *Tuscaloosa County Comm'n v. Deputy Sheriffs' Ass'n of Tuscaloosa County*, 632 So. 2d 442 (Ala.1993).

It is important to note that the proposed Settlement is the product of vigorous and arms-length negotiations between the parties, and that the proposed Settlement resulted from court ordered mediation. In *Graddick*, 453 So. 2d at 1312, the Alabama Supreme Court offered guidance on the wisdom and preference for the settlement of attorneys' fees in trust litigation:

"Finally, all attorneys should remember our admonition in *Peebles [v. Miley]*, 429 So. 2d 1305 (Ala. 1983): Because of the sensitive nature of the problem of attorney's fees, the litigants and the public would be better served if both attorneys in this case, and their clients, attempted to settle these differences without further resort to the courts." (citing *Peebles v Miley*, 439 So.2d 137 at 144 (Ala. 1983)).

The PACT Trust Fund constitutes a limited fund, and the proposed Settlement results in a preservation and appropriate allocation of that fund for its beneficiaries. The attorneys for the class members are entitled to a reasonable attorneys' fee for having taken the necessary action to benefit, preserve and protect the "common estate" of the PACT Trust Fund. There is no question in the Court's mind that class counsel are entitled to attorneys' fees under the common fund doctrine and § 34-3-60, Code of Alabama 1975. The question then becomes "What is a reasonable fee?"

#### **D. The Reasonableness of the Fee.**

With regard to determining the reasonableness of the amount of attorneys' fees, a "court is not bound by the agreement of the parties." *Strong v BellSouth Telecomms., Inc.*, 137 F.2d 844, 849 (5th Cir. 1998) (quoting *Piambino v. Baily*, 610 F.2d 1306, 1328 (5th Cir. 1980); *Foster v Boise-Cascade, Inc.*, 577 F.2d 335, 336 (5th Cir. 1978)).

The Court also finds guidance on the question of determining whether an agreed upon, negotiated fee is fair and reasonable from the Fifth Circuit<sup>4</sup> in the case of *Piambino vs. Baily*, 610 F.2d 1306, 1328 (5th Cir. 1980):

“The court must scrutinize the agreed-to fees under the standards set forth in *Johnson v Georgia Highway Express*, 488 F.2d 714 (5<sup>th</sup> Cir. 1974)<sup>5</sup>, and not merely ‘ratify a pre-arranged compact. Even when the district court finds the settlement agreement to be untainted by collusion, fraud, and other irregularities, the court must thoroughly review the attorneys’ fees agreed to by the parties in the proposed settlement agreement” (quoting *Strong v. BellSouth Telecomms, Inc.*, 137 F.3d 844 at 850.)

This is not to say, however, that the Court should ignore or give “small shrift” to the negotiated amount of attorneys’ fees. Quite to the contrary, the Court should and has, given weight to and drawn guidance from such an agreement, particularly one which has been negotiated at arms-length by the parties through competent and experienced counsel and through mediation. See *Graddick v. First Farmers and Merchants National Bank of Troy*, *supra*. Citing *Peebles v Miley*, *supra*. The Eleventh Circuit in *Waters v. International Precious Metals Corp.*, 190 F.3d 1291, 1293, made the following observation respecting clear sailing agreements relating to legal fees:

“In *Malchman v. Davis*, 761 F.2d 893 (2d Cir.1985), abrogated on other grounds, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), the court upheld an attorneys’ fee award from a settlement agreement that contained a clear sailing clause. The writing judge noted that while the district court judge should always be the ultimate determiner of the fee award, ‘where the amount of the fees is important to the party paying them, as well as to the attorney recipient, it seems... that an agreement ‘not to oppose’ an application for fees up to a point is essential to the completion of the settlement, because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged.”

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<sup>4</sup> The Eleventh Circuit, in the *en banc* decision of *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir.1981), adopted as precedent the decisions of the former Fifth Circuit decided prior to October 1, 1981.

<sup>5</sup> The factors in *Johnson* are the same factors considered by this Court as set forth below.

In this case, the parties have recognized that it is important, and indeed vital, to the success of the proposed Settlement that the amount of attorneys' fees and expenses be fixed and not fluid. In fact, the amount of attorneys' fee and expenses is an indispensable and integral component of the proposed Settlement itself. From both an actuarial and practical view, it is imperative that the amount of attorneys' fees and expenses be known and established in order to effectuate the terms of the proposed Settlement. Consequently, the amount to which the parties have agreed has been included in the calculations and projections in order to make the proposed Settlement viable and workable.

The Supreme Court of Alabama, as well as the federal courts, has held that "attorney fees in common fund cases are usually determined as a percentage of the fund." *Edelman & Combs v. Law*, 663 So. 2d 957, 959 (Ala. 1995) (quoting *Mashburn v. National Healthcare, Inc.*, 684 F.Supp. 679 (M.D. Ala. 1988)). See also *Blum v. Stenson*, 465 U.S. 886, 900, n.16 (1984) (a reasonable fee is based on a percentage of the fund bestowed on the class"); *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991); *Adams v. Robertson*, 676 So. 2d 1265 (Ala. 1995). It is also the experience of this Court that the customary range for awards of attorneys' fee, computed under the "percent of recovery" method in common fund cases is between 20% and 30% of the amount of benefit to the class.

In determining the reasonableness of attorneys' fees and what constitutes an appropriate percentage of the fund, the Alabama Supreme Court and the federal courts have delineated certain guidelines for the courts to consider. *Peebles v. Miley*, 439 So. 2d 137 (Ala. 1983); *Brown v. State*, 565 So. 2d 585 (Ala. 1991); *Johnson v. Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974), abrogated on other grounds, *Blanchard v. Bergeron*, 489 U.S. 87 (1989). These factors are (1) the nature and value of the subject matter of the employment; (2) the

learning, skill, and labor requisite to its proper discharge; (3) the time consumed; (4) the professional experience and reputation of the attorney; (5) the weight of his responsibilities; (6) the measure of success achieved; (7) the reasonable expenses incurred; (8) whether a fee is fixed or contingent; (9) the nature of any professional relationship; (10) the fee customarily charged in the locality for similar legal services; (11) the likelihood that this particular employment may preclude other employment; (12) the time limitations imposed by the client or by the circumstances; and (13) any non-monetary benefits conferred upon the class in this class action.

1. The measure of success achieved: Plaintiffs, by filing this litigation, sought to fully enforce the PACT Contracts as written. However, Plaintiffs learned that the PACT Trust Fund was a limited fund in that it was actuarially determined that it was impossible for the PACT Board to fulfill its obligations under PACT Contracts and that there was no other source of funding available to the PACT Board. Under the Alabama Uniform Trust Code, the PACT Board could have simply asked the Court to terminate the Trust Fund and order all moneys to be distributed to the PACT contract owners proportionately. Ala. Code, § 19-3B-410(a), -412(b) and -413(b). The Court finds that the creative proposed Settlement reached by the Plaintiffs' Counsel and Counsel for the Defendants is not only successful in saving the Pact Trust Fund, but it is likely the only feasible means available for achieving that result. The PACT Trust Fund is insolvent and does not have the assets to pay its future liabilities. Through the proposed Settlement, class members will receive over a billion dollars in benefits under PACT Contracts. This result is significant under the unique circumstances of this case, particularly in light of the fact that a viable alternative would have been merely to return to the PACT contract owners their initial investment.



2. The nature and value of the subject matter: This was an extremely difficult case which included very complex questions of law, which makes the result even more exemplary. It involved the interpretation of § 16-33C-1 et seq. (and its various amendments over time), the contracts authorized by those statutes, and the PACT Board's rules, regulations, and other documents. There was almost no authority interpreting the provisions of these controlling documents. In addition, the provisions of the Alabama Uniform Trust Fund also applied in this case and had to be considered. This is the type of case that requires skilled counsel capable of handling complex cases and issues.

At the present time, the PACT Trust Fund is insolvent. Even with the appropriation of some \$548 million by the legislature in Act 2010-725, the PACT Trust Fund will still be underfunded by approximately \$338 million. Over 30,000 persons still have PACT Contracts and are depending on their PACT Contracts to assist with the costs of a college education for their designated beneficiaries. Without the proposed Settlement, the best that most of these contract owners could expect would be a return of their initial investment, and the worst case scenario would be that the PACT Trust Fund would run out of money before their designated beneficiaries were able to receive any benefits at all. Thus, the collective value to the class members of this proposed Settlement is enormous.

The responsibilities of Plaintiffs' lawyers were substantial and the Court finds that they carried out these responsibilities in the best interests of the class members as a whole. There were extreme risks including issues of sovereign immunity as well as defenses with respect to disclosures made to members of the class. Even if the Plaintiffs could have succeeded in holding the PACT Trust Fund responsible for the entire obligations

embodied in the PACT Contracts, there are serious doubts as to whether the Plaintiffs could have enforced such a result. In short, this was a high risk case which required the substantial skills of the excellent and capable attorneys involved in this case.

3. The learning, skill, and labor requisite to perform the legal service properly: As stated above, this Court finds that the complexity of this case required lawyers with a high degree of legal skill that had considerable experience in class action litigation with issues involving statutory construction of unique statutes against governmental entities. The Court takes judicial notice of the substantial years of experience by Plaintiffs' counsel which represents a total of well over 110 years of experience. The evidence presented to this Court in support of the Motion for Attorneys' Fees, as well as the Court's familiarity with Plaintiffs' Counsel, demonstrates that counsel has substantial experience in class actions and complex civil litigation. Moreover, Plaintiffs' counsel enjoy excellent reputations and have successfully handled these types of cases in the past. It is without question from the evidence presented to this Court that Plaintiffs' counsel spent enormous amounts of time litigating this case which was required to bring this case to a conclusion that provided huge benefits to the class members they represent.
4. The time consumed and reasonable expenses incurred by the attorneys: Counsel for the Plaintiffs have expended over 4000 hours in the prosecution of these claims. This Court cannot ignore the substantial amount of time required of these attorneys and the beneficial result obtained by their time and effort. This fact weighs heavily in favor of the reasonableness of the fee in this case based on the risk involved, the time devoted to the litigation and the issues involved therein, and the results achieved for the class members.
5. Professional experience, reputation, and the ability of the attorneys: This factor has been

addressed previously in this Order and the Court is satisfied that the Plaintiffs' counsel clearly carried out their responsibilities to the class members in accordance with their experience, reputation and ability. This is clearly evidenced by the affidavits provided to this Court and this Court's observations during, not only the course of this litigation, but in other litigation of which this Court has knowledge that involved Counsel for the Plaintiffs.

6. Weight of responsibility: The responsibility of Plaintiffs' counsel to the class members, as well as the public responsibility of Plaintiffs' counsel, was enormous in this case. Moreover, the novel settlement reached in order to save the PACT Trust Fund required the assumption of a great deal of responsibility, risk, expenditure of time and expense. During this Court's consideration of the proposed Settlement and the fairness hearing held in this case, this Court had the opportunity to hear from many of the class members, which is indicative of the interest in the outcome of this case. The evidence presented to this Court demonstrates that Plaintiffs' counsel have spent a great deal of time in communication with significant numbers of interested class members in explaining the reasons for the litigation and the benefits of the proposed Settlement.

Without any assurance of getting paid, Plaintiffs' counsel took on this case on a contingent basis. There was a very real possibility that they might not succeed in this litigation or even if successful, not get paid for their efforts. The weight of this risk was huge. However, in spite of this risk, Plaintiffs' counsel undertook this case in order to benefit the class members and in the end, achieved the best solution to an enormous problem facing the class members as a whole.

7. The fee arrangement between attorney and client, including whether the fee was contingent or fixed: The fee arrangement of Plaintiffs' counsel was entirely contingent on the results obtained in this case. "Despite the most vigorous and competent of efforts, success is never guaranteed." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974). This Court is "well aware that there are numerous contingent cases ... where plaintiffs' counsel, after investing thousands of hours of time and effort, have received no compensation whatsoever. Numerous cases recognize that the attorney's contingent fee risk is an important factor in determining the fee award." *Ressler v. Jacobson*, 149 F.R.D. 651, 656 (M.D. Fla. 1992). Indeed, this Court is aware of cases in which plaintiff's counsel have never been compensated under the special equity exception to the American Rule for cases they won because of a change in the law. "No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance has agreed to pay for his services, regardless of success." *City of Detroit*, 495 F.2d at 470. This factor, in light of the benefits achieved for the class members in this case, weighs heavily in favor of the attorneys' fee requested in this case.
8. The fee customarily charged in the locality for similar legal services and the awards in similar cases: A customary fee in a common fund case is generally anywhere from 20% to 30% of the fund. *Reynolds*, 471 So. 2d at 1245. However, the courts of this State and the federal courts have routinely allowed fees that exceed 30%. *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) (35% fee); *Waters v. Intern. Precious Metals*, 190 F.3d 1291 (11th Cir. 1999) (1/3 fee); *Whigham, supra* (1/3 fee). The Court finds that the fee in this case clearly falls below this amount in that the PACT Trust Fund will pay out a total

exceeding \$1 billion dollars during the life of the PACT Program. According to the actuarial expert testimony and report, this litigation has provided the class members with a benefit of approximately \$400 million (present value) over what they would have received had refunds been given or if the PACT Trust Fund had been allowed to hit zero. The fee request in this case is roughly 1.25% of that amount. This Court finds this fee request is more than reasonable in light of the typical fee in a case of this type because it is substantially lower than fees customarily charged in complex litigation in which representation is undertaken on a contingent fee basis. Indeed, the Alabama Supreme Court held in *Edelman* that a 3% fee was unreasonable because it was too low. Without the proposed Settlement, the PACT Trust Fund most likely would have collapsed or been liquidated and, if so, the class members could possibly have been denied approximately \$400 million plus in benefits. Therefore, it would not be unreasonable to argue that the real benefit here was a value of \$830 million, being the present value of the future pay out under the proposed Settlement. This more than justifies a fee of \$4,950,000, or 1.25% of the common fund in this case since it is far less than the customary fee in a similar case in this State and in Montgomery County.

9. Time limitations imposed by the Client of by the Circumstances: The time limitation of this case was critical. The State Treasurer testified that if the proposed Settlement had not been negotiated, the PACT Trust Fund would not have had sufficient funds to return the contract holders initial investments by approximately the Fall of 2012. This was identified as the "point of no return" and this date loomed large during the course of this litigation. Class counsel was also aware that if a solution could not be reached in this case, the PACT Trust Fund would not be able to meet its current obligations prior to the

first receipt of legislative appropriations under Act 2010-725. The State Treasurer also testified that with each semester's tuition payments at current levels, each additional semester of full tuition and fee payments would adversely impact the proposed Settlement by \$5 million. Time was and remains a critical factor in this case. Moreover, by the affidavits and evidence submitted by counsel, it is clear that this case occupied a substantial amount of their time and caused them to limit their time in other cases. This was a politically-charged case with tremendous risks but was undertaken by Plaintiffs' counsel to assist thousands in getting the most they could get out of the investments they made in their designated beneficiaries' future education. Plaintiffs' counsel should be commended for bringing such a case and should be paid for their success in benefiting the class members in this case. The Court finds that this factor weighs in favor of the attorneys' fee awarded.

10. The likelihood that attorney's employment precluded other employment: The evidence and affidavits of Plaintiffs' attorneys as well as their time records reflect that their practice and work on other cases were limited by the nature of the issues involved in this case and the responsibilities of handling it. At least one attorney was conflicted out of another case because of the representation of his class in this case. The Court finds that the time devoted by the attorneys was necessary to the successful prosecution and settlement of this case and the limitations placed on them favor the fee agreed upon and its reasonableness.
11. The nature and professional relationship with the client: The Plaintiffs' attorneys represented numerous PACT Contract owners and their designated beneficiaries. There is no evidence that any of the attorneys had represented these class representatives in other

matters. Indeed, one of the class representatives testified in her deposition that she hired counsel because other attorneys she respected told her counsel would be the best person to handle the complex issues involved in this case.

12. The undesirability of the case: The PACT Trust Fund and PACT Board are constituted by law as agencies of the State. This Court is well aware of the difficulties imposed by litigation against state entities or officials. It is clear that Plaintiffs' counsel faced many obstacles to a successful result in this case if litigated and, even if counsel was ultimately successful, there would be an impenetrable obstacle in that there was no way to enforce any judgment because the PACT Trust Fund is a limited fund. There simply would not have been enough money in the PACT Trust Fund to force the PACT Board to fulfill all of its obligations. The Court finds that there is no question that the high risk nature of this case and the willingness of Plaintiffs' counsel to take it on support the award of this fee along with the other factors.

13. Any non-monetary benefits to the class: The proposed Settlement results in a complete restructuring of benefits payable under PACT Contracts, without which the PACT Trust Fund would likely have been dissolved or would have run out of assets long before many of the class members could receive any benefits whatsoever. Without this settlement, the ability of many designated beneficiaries to attend college would have been severely damaged. The proposed Settlement has taken an insolvent fund, restructured it, and made it viable again so that the class members will get the best return on their investment under the circumstances from the limited fund. This has resulted in a benefit not only to the class members but also to the State of Alabama and its citizens.

Most class members in this case will receive greater benefits than if they had

invested their initial investment in the open market. Because the PACT Trust Fund has now been placed in fixed income investments, the class members' risk of loss is much lower and almost nonexistent. The Class members will now have an Order which is binding on the PACT Board to fulfill its obligations under the proposed Settlement and this Court will retain jurisdiction of this case in order to enforce its judgment in this future. The class members now know with certainty what the PACT Trust Fund will pay out each semester and the contract holders and their designated beneficiaries can make financial decisions based on this knowledge. Further, the proposed Settlement has ensured that the legislature will appropriate the monies set forth in Act 2010-725.

The Court also is aware that without this litigation and without class certification, most, if not all, class members would be unable to afford to hire a lawyer to pursue relief. "Class actions ... permit plaintiffs to pool claims which would be uneconomical to litigate individually." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980). In this case, the fee requested by class counsel amounts to \$165 per contract holder and less than \$125 per beneficiary. Conversely, it would have cost many times that amount for each class member to have brought suit on an individual basis. Most, if not all, class members would be denied a remedy under similar circumstances if the fee award to class counsel did not provide fair compensation to counsel for the time and effort and the risks undertaken by the representation. Indeed, of the 30,000 contract holders in this case, only a miniscule number objected to the fee request.

#### **E. Conclusion.**

In conclusion, this Court has thoroughly reviewed the factors set forth above in its consideration of the attorneys' fee award agreed to by the parties in this case and finds that each



of the above factors supports the award of attorneys' fee in the amount of \$4,950,000.00. See *Reynolds, supra*. The Court would also note that a relevant factor in awarding attorneys' fees is the number and percentage of objections by class members. See *Mashburn, supra*. And, in this case only, a handful of objectors out of a total of over 30,000 contract owners have challenged the attorneys' fees as being excessive. The Court finds that this factor supports the award, as the vast majority of class members believe the attorneys' fees to be fair and reasonable. This Court not only finds that the agreed upon attorneys' fees are fair and reasonable, but are significantly lower than a typical fee awarded in such a complex and difficult case as shown by the chart Plaintiffs' counsel presented during the hearing on attorneys' fees. Class counsel should be commended for agreeing to such a reasonable fee in order to maximize the benefits to the class members in this case.

The Court also finds that the \$15,000.00 request for expenses in this case is fair and reasonable. From the evidence presented to this Court, it appears that each and every expense was necessarily incurred and appropriate under the circumstances of this case.

Based on this Court's findings of fact and conclusions of law, Plaintiffs' Motion for Attorneys Fee is hereby GRANTED. Accordingly, Class Counsel are hereby awarded attorneys' fees in the amount of four million, nine hundred fifty thousand and 00/100 dollars (\$4,950,000.00) and expenses in the amount of fifteen thousand and 00/100 dollars (\$15,000.00).

#### **SUMMARY OF FINDINGS AND CONCLUSIONS**

Based on the totality of the record evidence, including (but not limited to) the matters summarized above, the Court hereby makes the following findings and conclusions.

- a. The proposed Settlement is fair, adequate, and reasonable.

b. The risks of continued litigation and ongoing depletion of the PACT Trust Fund demonstrate that a timely solution is essential.

c. The parties have aggressively litigated this case. There has been extensive formal and informal discovery. The Court is satisfied that all parties and their counsel have had ample evidence before them to assess the strengths and weaknesses of their respective positions.

d. The expert testimony and actuarial reports are uncontroverted in the record, and the calculations, projections, and factual data contained therein concerning assets and liabilities are deemed accurate and reliable. The Court has given particular consideration to the demeanor and credibility of the witnesses (Young Boozer and Daniel Sherman) who provided testimony, and who were subjected to cross-examination, on the financial status of the PACT Trust Fund.

e. The PACT Trust Fund is a "limited fund" in that it has assets which are significantly less than those necessary to pay full tuition and mandatory fees under all outstanding PACT Contracts.

f. There is no evidence that the proposed Settlement is the product of fraud, duress, or collusion. That conclusion is demonstrated by a number of factors, including (but not limited to) the length and complexity of the proposed Settlement itself, and the context in which the proposed Settlement was reached (i.e., following formal and informal discovery, extensive actuarial studies, arms-length negotiations concluded by experienced and capable lawyers, and an experienced neutral mediator).

g. The relief provided in the proposed Settlement is consistent with this Court's powers under principles of equity, under the common law, under the Declaratory Judgment Act, under the Alabama Uniform Trust Code, and all of the other authorities invoked in this case.

h. All applicable requirements of Alabama Rule of Civil Procedure 23 have been satisfied.

i. The notice afforded to class members was the best notice practicable under the circumstances and fully complies with (and exceeds) all constitutional requirements of due process in this type of case.

j. The limited number of objections filed in this case strongly indicates that the vast majority of class members view the proposed Settlement as fair, adequate, and reasonable under the circumstances.

k. The proposed Settlement provides a financially viable solution that would distribute all available assets of the PACT Trust Fund, including future receipts from Act 2010-725, among all class members in an equitable manner.

l. No evidence has been presented, nor is the Court aware, of any methodology that would provide a more fair, reasonable, and adequate result than that contained in the proposed Settlement for allocating the limited available assets of the PACT Trust Fund in an equitable manner among all class members. This conclusion is strengthened by the fact that the proposed Settlement permits class members to cancel their PACT Contracts if they believe that more beneficial options exist. The Court has further considered that the proposed Settlement provides for increased payment of benefits in the event that the financial condition of the PACT Trust Fund were to improve.

m. The terms of the release, dismissal, and other remedies contemplated by the proposed Settlement are fair, reasonable, and adequate under the circumstances and are necessary to prevent future claims from depleting the PACT Trust Fund to the detriment of the class members as a whole.

n. The provision of the proposed Settlement pertaining to the payment of attorneys' fees and expenses to class counsel was the product of good faith, and arms-length negotiations which, importantly, was subject to ultimate approval by this Court. The Court finds the attorney's fees and expenses to be reasonable and appropriate.

o. All parties, including all class members, have been adequately represented by able and experienced counsel.

p. The proposed Settlement is due to be and is hereby approved by this Court.

### **ORDER, JUDGMENT, AND DECREE**

Consistent with the foregoing, it is ORDERED, ADJUDGED and DECREED as follows:

1. The proposed Settlement filed with this Court on May 5, 2011 is hereby approved.
2. The terms of said Settlement are expressly incorporated and made a part hereof.
3. For the purposes of the Settlement, Lisa Green, Kim Franklin, and their counsel remain adequate representatives of Class A (including subclasses A1 and A2) as certified by this Court in its December 13, 2010 Order and as amended on March 4, 2011; Brian A. McVeigh, Nina McGinnis, Allen R. Hudson, and their counsel remain adequate representatives of Class B as certified by this Court in its December 13, 2010 Order and as amended on March 4, 2011; and all requirements of Ala. R. Civ. P. 23(a), 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2) continue to be met as to the claims and counterclaims asserted by the parties.
4. The Settlement shall be equally binding upon all members of those classes certified in this Court's Order of December 13, 2010 and as amended on March 4, 2011, which are expressly incorporated and made a part hereof.

**Class A** – All persons who purchased a PACT contract before May 9, 2001 and all designated beneficiaries of those contracts.

**Subclass A1** – All those members of Class A whose PACT contracts were purchased before September 1, 1996.

**Subclass A2** – All those members of Class A whose PACT contracts were purchased on or after September 1, 1996.

**Class B** – All persons who purchased a PACT contract after May 9, 2001 and all designated beneficiaries of those contracts.

5. Each and every provision of the Settlement is an integral part of this Order and enforceable as such. All parties to this action, including the members of all classes in this case, are enjoined to obey and are bound by all provisions of this Order and the Settlement.
6. The provisions of paragraph 3D of the Settlement notwithstanding, the terms of the Settlement, in its entirety, shall be deemed final and effective immediately upon entry of this order.
7. The dispositive and administrative provisions of the PACT Trust Fund, all PACT Contracts, all PACT Program Rules, all PACT by-laws, and all other relevant documents (past or present), are hereby modified to conform to the provisions of this Order and the Settlement.
8. All those claims, causes of action, and other matters specified as being released by the Settlement are hereby released and forever discharged.
9. The claims asserted in this case are hereby dismissed with prejudice.
10. The named Plaintiffs and all class members are hereby enjoined, precluded, and barred from filing, initiating, asserting, maintaining, pursuing, continuing, or participating as a litigant (by intervention or otherwise) in any action, whether an individual or class action, in any court asserting any of the released claims as defined in this Order or in the Settlement.
11. Class counsel are hereby specifically awarded as attorneys fees in the amount of \$4,950,000 and case related expenses of \$15,000, and judgment therefor is hereby entered. Judgment is also entered awarding each named plaintiff in this case the sum of \$2,500.00.
12. The Court reserves and retains continuing jurisdiction over all matters relating to the Settlement and this Order, including (but not limited to) the validity, construction, and enforcement thereof. In the event of a reversal, vacation, or modification of this Order, this Court reserves and retains jurisdiction to reinstate all claims and other matters pertaining to the Settlement or this Order.
13. The Clerk of this Court is directed to enter this as a final judgment.

DATED this the 26<sup>th</sup> day of July, 2011.

  
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HON. JOHNNY HARDWICK  
CIRCUIT JUDGE