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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

In re PROVIDIAN FINANCIAL CORP.  
ERISA LITIGATION

Master File No. C-01-5027 CRB

CLASS ACTION

This Document Relates To:

ALL ACTIONS

**SUPPLEMENTAL MEMORANDUM OF  
LAW IN SUPPORT OF ENTRY OF FINAL  
ORDER AND JUDGMENT APPROVING  
SETTLEMENT, CERTIFYING CLASS, AND  
AWARDING ATTORNEYS' FEES AND  
EXPENSES**

Hearing Date: June 27, 2003  
Time: 10:00 a.m.  
Judge: Charles R. Breyer

## I. INTRODUCTION

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2  
3 Plaintiffs respectfully submit this Supplemental Memorandum of Law in Support of  
4 Entry of Final Order and Judgment Approving the Settlement, Certifying Class, and Awarding  
5 Attorneys' Fees and Expenses. The proposed \$8.6 million Settlement is fair, reasonable, and  
6 adequate, and provides substantial monetary and non-monetary benefits to the Settlement  
7 Class. In addition, the legal requirements for certification of the Settlement Class are satisfied  
8 in this case. Finally, the attorneys' fees and expenses sought by Counsel from the common  
9 fund established by the Settlement are reasonable. Therefore, entry of the proposed Final Order  
10 and Judgment is appropriate at this time.  
11

## II. DISCUSSION

12  
13 In their Memorandum of Law in Support of their Motion for Preliminary Approval of  
14 Settlement; Approval of Class Notice; Conditional Class Certification for Settlement Purposes;  
15 and Setting of Final Hearing to Certify Class and Approve Settlement, filed March 4, 2003  
16 ("Prelim. Approval Mem."), Plaintiffs set forth in detail the factual and legal bases for finding  
17 that the \$8.6 million Settlement is fair, reasonable, and adequate.<sup>1</sup> Plaintiffs explained that all  
18 but two of the factors for evaluating a class action settlement as set forth in *Hanlon v. Chrysler*  
19 *Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998), strongly supported approval of the Settlement.  
20 Prelim. Approval Mem. at 9-23. At the time of preliminary approval, Plaintiffs could not yet  
21 assess the final two factors, "the presence of a governmental participant," and "the reaction of  
22 the class members to the proposed settlement," *Hanlon*, 150 F.3d at 1026, because the United  
23 States Department of Labor ("DOL") had not yet reviewed the Settlement, and notice had not  
24 yet been issued to the class. Prelim. Approval Mem. at 9. Plaintiffs can now assess the final  
25 two factors.  
26

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27 <sup>1</sup> Plaintiffs set forth the factual and legal bases for award of Plaintiffs' Counsels' attorneys' fees and expenses  
28 incurred in this case in their Motion for Award of Attorneys' Fees and Reimbursement of Expenses, filed June 6,  
2003 ("Motion for Fees and Expenses").

1           **A.     The DOL Has Reviewed the Settlement and Does Not Object to its Terms.**

2           Although the DOL is not a party to this litigation, the parties agreed to provide the DOL  
3 with the Agreement and accompanying Exhibits for review and comment, and also to inform  
4 the DOL of the time and place of the Fairness Hearing. *See* Stipulation and Agreement of  
5 Settlement (“Agreement”) ¶ 11.3. Accordingly, on April 25, 2003, a copy of the Agreement  
6 and Exhibits were mailed to Elaine Chao, Secretary of the U.S. Department of Labor.  
7 Subsequently, an additional copy was mailed to Leslie Perlman, an attorney in the Plan  
8 Benefits Security Division of the DOL. *See* Declaration of Derek W. Loeser regarding Final  
9 Approval of Settlement (“Loeser Decl.”) ¶¶ 3-4.

10           On June 12, 2003, Ms. Perlman and another DOL attorney, Michael Schloss, discussed  
11 the Agreement with counsel for Plaintiffs, Mr. Loeser, and Defendants, Mr. Braden. The DOL  
12 raised three primary issues regarding the terms of the Agreement. Two were minor drafting  
13 issues that were resolved on the call. The third issue concerned the disposition of unclaimed  
14 Settlement amounts. As the Agreement was originally drafted, such amounts (which were  
15 expected to be small in relation of the Settlement Amount) were to be distributed to a charity.  
16 The DOL asked that the term be changed so that all Settlement amounts were provided solely  
17 to class members. Loeser Decl. at ¶ 5. This change has now been made to the Agreement,  
18 along with the minor drafting changes proposed by the DOL. *See* Amendment to the  
19 Stipulation and Agreement of Settlement (“Amended Agreement”), attached to the Loeser  
20 Decl. as Exhibit 1. Therefore, the Agreement has been amended to address the DOL’s  
21 comments.

22           **B.     No Class Member Has Filed an Objection to the Settlement or the Attorneys’ Fees  
23           and Expenses Sought by Plaintiffs’ Counsel.**

24           As required by the Settlement (¶ 10.1) and the Court’s April 18, 2003, Order  
25 Preliminarily Approving Settlement (¶ 4), Plaintiffs mailed notice in the form approved by the  
26 Court to the last known address of all known class members by first class mail, and also  
27 published an abbreviated form of notice also approved by the Court in USA today on May 1,  
28

1 2003. *See* Affidavit of Mailing; Verification of Publication, attached to the Loeser Decl. as  
2 Exhibits 2, and 3, respectively. Among other details, the mailed Notice informed class  
3 members of the amount of the Settlement, the Plan of Allocation of the Settlement, the  
4 maximum amount of attorneys' fees and costs that would be sought by Plaintiffs' Counsel (1/3  
5 of the Settlement amount), the process for objecting to the Settlement, the time and place of the  
6 Fairness Hearing, and the date upon which objections must be filed. *See* Agreement, Exhibit  
7 A.

8 Over 11,000 notices were mailed. Not a single class member filed an objection. In  
9 addition, Plaintiffs' Counsel discussed the Settlement with each Class Representative. All  
10 support the Settlement. Loeser Decl. ¶ 2. Therefore, the final *Hanlon* factor, the reaction of  
11 class members to the proposed settlement, also strongly supports approval of the Settlement.

### 12 **III. CONCLUSION**

13 As reflected by the class representatives' unanimous support of the Settlement, and for  
14 the reasons set forth herein, and in the Preliminary Approval Memorandum, the Settlement is  
15 fair, adequate, and reasonable. In addition, for the reasons set forth in Plaintiffs' Fees and  
16 Expenses Motion, the attorneys' fees and expenses sought by Plaintiffs' Counsel are  
17 reasonable. Accordingly, the Court should grant final approval at this time and enter the  
18 proposed Final Order and Judgment. A form of proposed order (as previously submitted on  
19 April 23, 2003) is attached hereto as Exhibit 1.  
20

21 Respectfully submitted this 20th day of June 2003.

22  
23 /s/

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25 NORTHERN DISTRICT OF CALIFORNIA  
26 SAN FRANCISCO DIVISION**

27 In re PROVIDIAN FINANCIAL CORP. ERISA  
28 LITIGATION

29 Master File No. C-01-5027 CRB

30 CLASS ACTION

31 This Document Relates To: ALL ACTIONS

32 **ORDER AND FINAL JUDGMENT**

33 **ORDER AND FINAL JUDGMENT**

34 This action came on for a final hearing on a proposed settlement (the “Settlement”) of  
35 this conditionally certified class action (the “Action”) and the issues having been duly heard and  
36 a decision having been duly rendered,

**IT IS HEREBY ORDERED AND ADJUDGED:**

1           1.       To the extent not otherwise defined herein, all terms shall have the same meaning  
2 as used in the Stipulation and Agreement of Settlement dated March 4, 2003 (the “Agreement”).

3           2.       The Court has jurisdiction over the subject matter of this Action and over all  
4 parties to this Action, including all members of the Plaintiff Class.

5           3.       The Court hereby approves and confirms the Settlement embodied in the  
6 Agreement as being a fair, reasonable, and adequate settlement and compromise of this Action,  
7 adopts the Agreement as its judgment, and orders that the Agreement shall be herewith effective,  
8 binding, and enforced according to its terms and conditions.

9           4.       The Court determines that the Plaintiffs are asserting, among others, claims on  
10 behalf of the Plan to recover losses alleged to have occurred as a result of a breach of fiduciary  
11 duty pursuant to ERISA § 502(a)(2). Because the Plan cannot assert such claims in its own right,  
12 the Plaintiffs are the holders of the Plan’s claims against the Defendants under ERISA  
13 § 502(a)(2). *See Bowles v. Reade*, 198 F.3d 752 (9th Cir. 1999).

14           5.       The Court determines that the Settlement has been negotiated vigorously and at  
15 arm’s length by the Plaintiffs and their counsel on behalf of the Plan and the Plaintiff Class and  
16 further finds that, at all times, the Plaintiffs have acted independently and that their interests are  
17 identical to the interests of the Plan and the Plaintiff Class. The Court further finds that the  
18 Settlement arises from a genuine controversy between the Parties and is not the result of  
19 collusion, nor was the Settlement procured by fraud or misrepresentation.

20           6.       The Court finds that the Plan’s participation in the Settlement is on terms no less  
21 favorable than the Plaintiffs and the Plaintiff Class and that the Plan does not have any additional  
22 claims above and beyond those asserted by the Plaintiffs that are released as a result of the  
23 Settlement.

24           7.       The Court determines that the Settlement is not part of an agreement,  
25 arrangement, or understanding designed to benefit a party in interest, but rather is designed and  
26 intended to benefit the Plan and its participants.

1           8.       Accordingly, the Court determines that the negotiation and consummation of the  
2 Settlement by the Plaintiffs on behalf of the Plan and the Plaintiff Class do not constitute  
3 “prohibited transactions” as defined ERISA §§ 406(a) or (b), 29 U.S.C. 1106(a) or (b).

4           9.       The Court determines that the Notice transmitted to the Plaintiff Class, pursuant  
5 to the Preliminary Approval Order concerning the Settlement and the other matters set forth  
6 therein, is the best notice practicable under the circumstances and included individual notice to  
7 all members of the Plaintiff Class who could be identified through reasonable efforts. Such  
8 Notice provides valid, due, and sufficient notice of these proceedings and of the matters set forth  
9 therein, including the Settlement described in the Agreement to all persons entitled to such  
10 notice, and such Notice has fully satisfied the requirements of Rule 23 Fed. R. Civ. P. and the  
11 requirements of due process.

12           10.      The Court hereby approves the maintenance of the Action as a class action  
13 pursuant to Fed. R. Civ. P. Rule 23(a) and 23(b)(1) with the class being defined as follows:

14                   All Persons who were participants or beneficiaries under the Plan between  
15                   September 30, 2000, and January 1, 2002, who had stock allocated to their  
16                   account under the Plan at any time during that period, other than persons  
17                   individually named as Defendants in the Complaint and their immediate  
18                   family members.

19           11.      The Court hereby dismisses the Complaint and the Action against the Defendants  
20 with prejudice on the merits.

21           12.      As of the date of Final Approval of Settlement (as defined in the Agreement), the  
22 Plaintiffs, the Plan, and each member of the Class on their own behalf and on behalf of their  
23 respective heirs, executors, administrators, past and present partners, officers, directors, agents,  
24 attorneys, predecessors, and assigns, shall have released each and all of the Released Persons  
25 from the Released Claims and the Defendants shall have released the Plaintiffs and each member  
26 of the Class from all claims associated with the Action.

          13.      All members of the Plaintiff Class and the Plan (through any party authorized to  
sue under 29 U.S.C. 1132(a)(2)) are hereby barred and enjoined from the institution and

1 prosecution, either directly or indirectly, of any other actions in any court asserting any and all  
2 Released Claims against any and all Released Persons.

3 14. Defendants are hereby barred and enjoined from the institution and prosecution,  
4 either directly or indirectly, of any other actions in any court asserting any and all Released  
5 Claims against Plaintiffs, members of the Plaintiff Class, the Plan, or Class Counsel; and all  
6 parties are hereby barred and enjoined from the institution and prosecution, either directly or  
7 indirectly, of any actions against Defendants, any member of the Settlement Class, the Plan, or  
8 Class Counsel based on the amount of any Settlement Claim issued pursuant to the Plan of  
9 Allocation approved in the Final Approval of the Settlement.

10 15. The Court awards attorneys' fees and expenses to Plaintiffs, to be paid from the  
11 Settlement Fund pursuant to the common fund doctrine in the amount of \$\_\_\_\_\_, and  
12 awards compensation in the amount of \$2000 to each of the Class Representative Plaintiffs, such  
13 amounts to be paid as set forth in the Agreement. Except as otherwise provided herein, each  
14 party shall bear its own fees, expenses, and costs.

15 16. Without affecting the finality of this Judgment, the Court retains jurisdiction for  
16 purposes of implementing the Agreement and reserves the power to enter additional orders to  
17 effectuate the fair and orderly administration and consummation of the Agreement and  
18 Settlement, as may from time to time be appropriate, and resolution of any and all disputes  
19 arising thereunder.

20 **SO ORDERED** this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

21  
22  
23 \_\_\_\_\_  
24 HON. CHARLES R. BREYER  
25 UNITED STATES DISTRICT COURT  
26 NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

1 Submitted April 23, 2003, by:

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