

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

In re )  
COLONIAL BANCGROUP, INC. ) Civil Action  
SECURITIES LITIGATION ) 2:09-CV-00104-RDP-WC  
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**PUBLIC PENSION GROUP'S MEMORANDUM OF LAW IN SUPPORT OF  
PRELIMINARY APPROVAL OF PARTIAL SETTLEMENT AND  
CERTIFICATION OF CLASS FOR SETTLEMENT PURPOSES**

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## I. INTRODUCTION

Lead Plaintiffs Arkansas Teacher Retirement System, State-Boston Retirement System, Norfolk County Retirement System, and City of Brockton Retirement System (collectively, “Lead Plaintiffs” or “Public Pension Group”) respectfully submit this Memorandum of Law in support of their motion for the entry of an order: (i) granting preliminary approval of the Stipulation and Agreement of Settlement with Officer and Director Defendants (“Stipulation” or “Stip.”) submitted herewith as Exhibit 1 to the Declaration of James W. Johnson in Support of Public Pension Group’s Motion for Preliminary Approval of Proposed Class Action Settlement (“Johnson Declaration”); (ii) certifying the Settlement Class for settlement purposes; (iii) approving the form and manner of giving notice of the Settlement to the Settlement Class; and (iv) setting a hearing date for final approval of the Settlement and Plan of Allocation for distribution of the Net Settlement Fund and for consideration of Lead Plaintiffs’ application for attorneys’ fees and expenses (the “Settlement Hearing”).<sup>1</sup> The Settling Parties<sup>2</sup> have agreed

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<sup>1</sup> As part of the Settlement, the Settling Parties agreed to the certification of the Action as a class action, pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3), on behalf of the Settlement Class, defined as all persons or entities who purchased or acquired Colonial Securities during the Settlement Class Period (April 18, 2007 through August 6, 2009, inclusive), and were allegedly damaged thereby. Excluded from the Settlement Class are: the current and former defendants in the Action; the current and former officers and directors of the Company; members of the immediate families of the current and former defendants in the Action; the subsidiaries and affiliates of the Company; any entity in which the current and former defendants in the Action have or had a controlling interest; and the legal representatives, heirs, successors, or assigns of any excluded person. Also excluded from the Settlement Class will be any person who timely and validly seeks exclusion from the Settlement Class.

<sup>2</sup> “Settling Parties” collectively refers to Defendants Robert E. Lowder, Sarah H. Moore, T. Brent Hicks, Lewis E. Beville, William Britton, Jerry J. Chesser, Augustus K. Clements, III, Robert S. Craft, Patrick F. Dye, Hubert L. Harris, Jr., Clinton O. Holdbrooks, Harold O. King, Deborah L. Linden, John Ed Mathison, Milton E. McGregor, John C.H. Miller, Jr., Joseph D. Mussafer, William E. Powell, III, James W. Rane, Simuel Sippial, Jr., Edward V. Welch, Sheila P. Moody and Kamal Hosein (collectively, the “Settling Defendants”) and Lead Plaintiffs, on

upon a form of [Proposed] Preliminary Approval Order (“Preliminary Approval Order” or “PAO”) and exhibits thereto, submitted herewith.

Lead Plaintiffs and Lead Counsel have succeeded in obtaining an excellent recovery for the Settlement Class of \$10.5 million in cash. As set forth in the Stipulation, the Settlement would completely resolve all Released Claims against the Settling Defendants and Released Defendant Parties.<sup>3</sup>

The Settlement represents an outstanding result for Lead Plaintiffs and the Settlement Class, which were facing a significant risk of no or a much smaller recovery after protracted litigation. The Settlement was reached only after extensive litigation, fact discovery, and negotiations – including two lengthy in-person mediation sessions with David Geronemus, Esq., a highly experienced mediator for Judicial Arbitration and Mediation Services, Inc. (“JAMS”). Indeed, by the time the Settlement was reached, Lead Counsel had: (1) filed a comprehensive Consolidated Class Action Complaint for Violations of the Federal Securities Laws (“Complaint”) (ECF. No. 134), after conducting an extensive factual investigation which included, among other things, identifying and interviewing numerous former Colonial employees; (2) overcome Defendants’ motions to dismiss; (3) vigorously opposed Defendants’ motions for reconsideration; (4) filed an extensive First Amended Consolidated Class Action

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behalf of themselves and the Settlement Class Members. All capitalized terms used herein are defined in the Stipulation and have the same meaning as set forth therein.

<sup>3</sup> “Released Defendant Parties” means the Company; the Settling Defendants; the respective attorneys for the Released Defendant Parties; and the present and former principals, agents, insurers, auditors, attorneys, predecessors, successors, parents, subsidiaries, divisions, joint ventures, general or limited partners or partnerships, limited liability companies, directors, officers, general counsels, or employees of the Company; but specifically does not include any Non-Settling Defendant.

Complaint for Violations of the Federal Securities Laws (the “Amended Complaint”) (ECF No. 424); and (5) consulted with experienced accounting, banking and damages experts.

As discussed herein, Lead Plaintiffs obtained an excellent result despite facing significant risks in prosecuting this Action, such as Colonial’s bankruptcy and potential inability to satisfy a judgment, the limited resources of the primary Director and Officer Defendants and the limited insurance policy proceeds available. Moreover, Lead Plaintiffs, all sophisticated institutional investors of the type favored by Congress when passing the Private Securities Litigation Reform Act of 1995 (“PSLRA”), have closely monitored this litigation from the outset, were involved in negotiating the Settlement, and recommend that the Settlement be approved. Further, Lead Counsel, who have extensive experience prosecuting securities class actions, have concluded that the Settlement, by providing an immediate and significant benefit and by eliminating the risks of continued litigation, is clearly in the best interests of the Settlement Class.

By this Motion, Lead Plaintiffs respectfully request that the Court preliminarily approve the Settlement. Lead Plaintiffs and Lead Counsel — based upon their evaluation of the facts and applicable law, and their recognition of the substantial risks and expense of continued litigation — submit that the Settlement is in the best interests of the Settlement Class and provides an excellent recovery for the Settlement Class.

At the Settlement Hearing, the Court will have before it more extensive motion papers submitted in support of the Settlement, and will then make an ultimate determination of whether the Settlement is fair, reasonable and adequate under all of the circumstances surrounding the action. At this juncture, Lead Plaintiffs request only that the Court grant preliminary approval of the Settlement so that Notice of the Settlement may be sent to the Settlement Class and the Settlement Hearing may be scheduled.

## **II. Description of the Litigation**

At all relevant times, Colonial BancGroup, Inc. (“Colonial” or the “Company”) was a financial holding company that derived substantially all of its income from dividends received from its subsidiary Colonial Bank. In addition to conducting a general commercial banking business, Colonial Bank derived a large share of its profits from its commercial mortgage lending business, which was primarily based in Florida and Alabama. Lead Plaintiffs allege that Defendants engaged in a fraudulent scheme to artificially inflate Colonial’s stock price by issuing false and misleading statements to investors during the Settlement Class Period. The Amended Complaint alleges that Defendants falsely represented to investors that it practiced conservative credit risk management that differentiated it from its peers, when in reality, it pursued a high-risk, high-growth lending strategy with respect to its commercial and construction loan portfolios. Lead Plaintiffs allege that as a result of these high-risk practices, among others, Colonial faced cascading loan defaults that caused the Company to teeter on the edge of bankruptcy. The Amended Complaint alleges that Defendants’ fraud began to be revealed through a series of partial revelations beginning on October 22, 2008, when Defendants announced that the Company sustained significant third-quarter losses. Thereafter, on January 27, 2009, the Company announced that it had sustained staggering net losses for the fourth quarter and fiscal year of 2008 and that its receipt of funds from the United States Treasury Department’s Troubled Asset Relief Program (“TARP”) was conditioned upon the Company first successfully raising \$300 million of private equity, which caused the Company’s stock to plummet by 46%. The Amended Complaint further alleges that the full truth regarding Defendants’ fraud was revealed to investors on August 7, 2009, when the Company shocked the market by announcing that it was the target of a federal criminal investigation relating to its

mortgage warehouse lending division and related alleged accounting irregularities. On August 14, 2009, the Alabama State Banking Department closed Colonial Bank, naming the Federal Deposit Insurance Corporation (“FDIC”) as a receiver. In late August 2009, Colonial filed for bankruptcy.

Beginning in February 2009, multiple securities fraud class action complaints were filed against Colonial, certain officers and directors, and other defendants in the United States District Court for the Middle District of Alabama, Northern Division, asserting claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”) and SEC Rule 10b-5 promulgated thereunder.

The Settling Defendants have denied and continue to deny any liability under the U.S. securities laws or otherwise. The Settling Defendants have also denied and continue to deny each of the claims alleged by Lead Plaintiffs on behalf of the Settlement Class, including all claims in the Amended Complaint.

On May 7, 2009, the Court appointed the Lead Plaintiffs and appointed Labaton Sucharow LLP (“Labaton”) as Lead Counsel and Thomas, Means, Gillis & Seay, P.C. as Liaison Counsel to represent the putative class (ECF. No. 121). On May 8, 2009, the Court issued an order consolidating all related cases into the present Action (ECF No. 123).

Thereafter, on June 22, 2009, following an extensive investigation, including reviewing and analyzing Colonial’s public disclosures and financial statements and locating and interviewing confidential witnesses, Lead Plaintiffs filed the Complaint, asserting claims under the Exchange Act and the Securities Act of 1933 (the “Securities Act”) (ECF No. 134). The Exchange Act claims allege violations of the anti-fraud provisions of the securities laws arising from alleged misstatements and omissions made in connection with Colonial’s publicly-filed

financials and other alleged misstatements made by Colonial's senior officers. The Securities Act claims arise from a subordinated Note Offering and a Stock Offering conducted by the Company in March and April of 2008, respectively.

On August 25, 2009, Colonial declared bankruptcy, and the Court invited comment as to whether the Action should be stayed as a result. On September 18, 2009, Defendants began filing motions to dismiss the Complaint (ECF Nos. 234 and 236). Thereafter, the Court suspended further briefing on motions to dismiss pending its decision as to whether the automatic bankruptcy stay should serve to stay the Action (ECF No. 278). On January 7, 2010, the Court ruled that the bankruptcy stay should not be extended to the Action, and the stay was lifted (ECF No. 279). The Settling Parties completed briefing the motions to dismiss in February 2010 (ECF Nos. 280-284, 291-298, 300, 304).

On May 14, 2010, the Court issued orders denying all Defendants' motions to dismiss and sustaining the Complaint in its entirety (ECF Nos. 314-318). On May 28, 2010, shortly after denying all Defendants' motions to dismiss, Judge Myron F. Thompson recused himself (ECF Nos. 363-364). The Action was stayed pending reassignment, and all Defendants moved for reconsideration of the denial of their motions to dismiss (ECF Nos. 360-361, 365, 368-369, 373, 391). On August 27, 2010, the Action was assigned to this Court (ECF No. 399).

A status conference was held before the Court on December 15, 2010 in which the Court deemed the motions to reconsider moot and instructed Lead Plaintiffs to file an amended complaint. On April 29, 2011, Lead Plaintiffs filed the Amended Complaint, the operative complaint in the Action. The Settling Defendants would have moved to dismiss the Amended Complaint were it not for this settlement.

### III. The Settlement Warrants Preliminary Approval

The public has a strong interest in resolving class action litigation. The Eleventh Circuit has held that “[p]ublic policy strongly favors the pretrial settlement of class action lawsuits.” *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992).<sup>4</sup> Moreover, courts in this Circuit have found that this policy consideration applies specifically to class actions alleging securities fraud. *See Mashburn v. Nat’l Healthcare, Inc.*, 684 F. Supp. 660, 667 (M.D. Ala. 1988) (holding “securities fraud class actions readily lend themselves to settlement”).

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval for the compromise of class claims. Judicial review of a proposed class action settlement consists of a two-step process: preliminary approval, and a subsequent settlement fairness hearing. *See, e.g., Smith v. Wm. Wrigley Jr. Co.*, No. 09-60646, 2010 WL 2401149, at \*2 (S.D. Fla. June 15, 2010). In the first step, the Court makes a preliminary evaluation of the fairness of the settlement before directing that notice be given to the class. *Id.*

At this preliminary approval stage, the standards are more relaxed than those applied upon a motion for final approval. *In re OCA, Inc. Sec. and Derivative Litig.*, No. 05-2165, 2008 WL 4681369, at \*11 (E.D. La. Oct. 17, 2008) (“As this motion is for *preliminary* approval of a class action settlement, the standards are not as stringent as those applied to a motion for final approval.”) (citing, *inter alia*, *Karvaly v. eBay, Inc.*, 245 F.R.D. 71, 86 (E.D.N.Y. 2007)); *see also Manual for Complex Litigation* §21.63 (4th ed. 2009) (“At the stage of preliminary approval, the questions are simpler, and the court is not expected to, and probably should not, engage in analysis as rigorous as is appropriate for final approval.”). Instead, “[a] proposed

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<sup>4</sup> Internal citations and quotations are omitted, and emphasis is added, unless otherwise noted.

settlement should be preliminarily approved if it is within the range of possible approval or in other words, [if] there is probable cause to notify the class of the proposed settlement.” *See Fresco v. Auto Data Direct, Inc.*, No. 03-61063, 2007 WL 2330895, at \*4 (S.D. Fla. May 14, 2007).

Thus, at this point, the Court need not answer the ultimate question: whether the Settlement is fair, reasonable, and adequate. When the Court makes that ultimate determination at a later point, the Court will be asked to consider the “*Bennett* factors,” which include: (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 a settlement is fair, adequate and reasonable; (4) the complexity, expense, and duration of the litigation; (5) the substance and amount of opposition, if any, to the settlement; and (6) the stage of the proceedings at which the settlement was reached. *See Smith*, 2010 WL 2401149, at \*2 (citing *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)); *see also In re Winn- Dixie Stores, Inc. ERISA Litig.*, No. 04-194, 2008 WL 815724, at \*6 (M.D. Fla. Mar. 20, 2008).

The Settling Parties here request only that the Court take the first step in the settlement approval process and grant preliminary approval of the Settlement such that Notice of the Settlement can be given to the Settlement Class. As summarized below, and as will be detailed further in a subsequent motion for final approval of the Settlement, a preview of the factors considered by courts in granting final approval of class action settlements demonstrates that this Settlement is well within the range of possible approval.

**A. The Settlement Is the Result of Good Faith, Arm’s-Length Negotiations by Well-Informed and Experienced Counsel**

Courts presume that a proposed settlement is fair and reasonable when it is the result of arm’s-length negotiations between counsel.<sup>5</sup> Indeed, “the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.” *In re Heritage Bond Litig.*, No. 02-1475, 2005 WL 1594403, at \*9 (C.D. Cal. June 10, 2005).

Here, the Settlement was achieved only after protracted arm’s-length negotiations – including two lengthy in-person mediation sessions. These settlement discussions were conducted under the auspices of a highly respected and experienced mediator, David Geronemus, Esq.,<sup>6</sup> and included the active participation of the Court-appointed Lead Plaintiffs. These mediations occurred on November 22, and December 2-3, 2010. During these mediations, Lead Counsel and counsel for the Settling Defendants presented, among other things, their respective views regarding the merits of the Action, including the evidence adduced, Defendants’ defenses, and issues relating to damages. Ultimately, following the two separate in-person mediation sessions, Lead Plaintiffs and the Settling Defendants reached an agreement in principle to settle the Action. The Settling Parties and their counsel were thus well-informed prior to reaching the agreement to settle the case.

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<sup>5</sup> See *City P’ship Co. v. Atl. Acquisition Ltd. P’ship*, 100 F.3d 1041, 1043 (1st Cir. 1996) (“When sufficient discovery has been provided and the Settling Parties have bargained at arms-length, there is a presumption in favor of the [class] settlement”); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (noting strong “presumption of fairness” where settlement is product of arm’s-length negotiations conducted by experienced, capable counsel after meaningful discovery).

<sup>6</sup> David Geronemus is a former law clerk to Supreme Court Justice Potter Stewart and has taught negotiation and alternative dispute resolution on an adjunct basis at Yale and Columbia law schools. He was also recognized as a Best Lawyer in the ADR Category in 2007 and a New York Super Lawyer by Law & Politics since 2007.

Moreover, in determining the good faith of this settlement proposal, the Court should consider the judgment of Lead Counsel.<sup>7</sup> Here, Lead Counsel is among the nation's leading class action litigation firms.<sup>8</sup> Accordingly, their judgment that this Settlement is in the best interests of the Settlement Class should be given considerable weight. Consequently, the Court has ample evidence that this Settlement was negotiated in good faith and was not the product of collusion.

**B. The Substantial Benefits for the Settlement Class, Weighed Against Litigation Risks, Supports Preliminary Approval**

The Settling Defendants have authorized their insurance carriers to create a Settlement Fund of \$10.5 million in cash. This recovery is excellent in light of the risks posed by continued litigation. As will be explained in further detail in advance of the Settlement Hearing, the Lead Plaintiffs faced two significant impediments to recovery from the Settling Defendants.

First, the amount of insurance available for purposes of settlement was limited. The Director and Officer Defendants had a total of \$35 million in liability insurance. These were wasting insurance policies, and at the time of the mediation, less than \$32 million in funds remained available to satisfy all claims – including but not limited to derivative claims on behalf of the Company, claims of the FDIC-Receiver and claims under the Employee Retirement

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<sup>7</sup> See *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1384 (S.D. Fla. 2007) (holding that “[a] district court properly considers the judgment of experienced counsel when asked to approve a class action settlement.”); *Smith*, 2010 WL 2401149, at \*2 n.1 (citing *Elkins v. Equitable Life Ins. of Iowa*, No. 96-296, 1998 WL 133741, at \*28 (M.D. Fla. Jan. 27, 1998)); *Warren v. City of Tampa*, 693 F. Supp. 1051, 1055 (M.D. Fla. 1988); *aff’d*, 893 F.2d 347 (11th Cir. 1989) *see also In re PaineWebber Ltd. P’ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) (“‘Great weight’ is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.”).

<sup>8</sup> The firm’s resume will be submitted for the Court’s review in connection with the papers supporting final approval of the Settlement.

Income Security Act (“ERISA”) – as well as provide continuing litigation defense costs to certain of the Director and Officer Defendants.

Second, the primary Director and Officer Defendants have limited financial resources and could not contribute to the settlement. Specifically, during the mediation process, the plaintiffs acquired certain confidential financial information from certain Settling Defendants that reflected an inability to contribute in any meaningful way to the settlement.

Moreover, further litigation of this Action presented additional significant risks for Lead Plaintiffs. Although Lead Plaintiffs and their counsel believe their case to be strong, their ability to construct a case would be hampered by the fact that Colonial was in bankruptcy. In addition, Lead Plaintiffs also expected that the Settling Defendants would continue to argue a number of legal and factual defenses, including arguing that Lead Plaintiffs cannot establish scienter and that the Company’s stock price drop on January 27, 2009 was caused by the disclosure of the previously unknown magnitude of the Company’s losses combined with market and industry factors rather than a revelation of their fraud.

### **C. The Stage of the Proceedings Supports Preliminary Approval**

The stage of the proceedings also supports preliminary approval of the Settlement. As will be set forth in further detail prior to the Settlement Hearing in Lead Counsel’s declaration supporting the Settlement, Lead Plaintiffs’ decision to enter into the Settlement was based on their thorough understanding of the strengths and weaknesses of their claims against the Settling Defendants. This understanding is based on Lead Counsel’s diligent prosecution of this Action, which included, among other things: (i) drafting the detailed Complaint after review and analysis of Colonial’s public disclosures and financial statements; (ii) identifying more than 700 potential witnesses and contacting almost 80 potential witnesses with knowledge of the issues in this case;

(iii) extensively briefing multiple motions, including a motion to dismiss and motion for reconsideration; (iv) drafting the Amended Complaint; (v) consulting with experienced accounting, banking and damages experts; (vi) monitoring Colonial's bankruptcy proceeding and filings; and (vii) drafting a mediation statement and preparing for and participating in two in-person mediation sessions and related negotiations. There can be no question that at the time the Settlement was reached, Lead Counsel had a clear view of the strengths and weaknesses of the Settlement Class's claims against the Settling Defendants.

Additionally, Lead Plaintiffs, sophisticated institutional investors, monitored this Action throughout the course of the litigation and participated in the negotiations of the Settlement. Thus, the Settlement is the product of serious, informed, non-collusive negotiations, is well within the range of possible approval, and does not have any obvious deficiencies. For these and all of the foregoing reasons, the Court should grant preliminary approval of the Settlement and direct that Notice of the Settlement be given to members of the Settlement Class.

#### **IV. Proposed Schedule of Events**

As outlined in the agreed-upon proposed Preliminary Approval Order, Lead Plaintiffs will notify Settlement Class Members of the Settlement by mailing the Notice and Proof of Claim form to Settlement Class Members<sup>9</sup> no later than ten (10) business days after both the following two conditions have been satisfied: (1) the entry of the Preliminary Approval Order by this Court; and (2) the Bankruptcy Court (as defined in the Stipulation) enters the Bankruptcy

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<sup>9</sup> See Exhibits 1 and 2 to the PAO. This will be accomplished principally by using record holder data obtained from Colonial's [transfer agent] and by reaching out to broker-dealers for the last-known names and addresses of potential Settlement Class Members.

Court Approval Order (as defined in the Stipulation). The Settling Parties may seek leave of the Court to extend this deadline if appropriate under the circumstances.

The Notice will advise Settlement Class Members of the essential terms of the Settlement, of information regarding Lead Counsel's fee application, and of the proposed Plan of Allocation for distributing the Settlement proceeds among Settlement Class Members. It also will set forth the procedure for objecting to the Settlement, the Plan of Allocation or the request for an award of attorneys' fees and reimbursement of litigation expenses, or opting out of the Settlement Class, and will provide specifics on the date, time and place of the Settlement Hearing. The proposed Preliminary Approval Order further requires Lead Plaintiffs to cause the Summary Notice (Ex. A-3 to the PAO) to be published once in *Investor's Business Daily* and disseminated over PR Newswire. Lead Counsel believe that, because the Notice and Summary Notice fairly apprise Settlement Class Members of their rights with respect to the Settlement, they represent the best notice practicable under the circumstances and should be approved by the Court. *See Sands Point Partners, L.P. v. Pediatrix Med. Group, Inc.*, No. 99-6181, 2002 WL 34343944, at \*2 (S.D. Fla. May 3, 2002) (approving similar notice program).

In connection with preliminary approval of the Settlement, the Court must set a final approval hearing date, dates for mailing and publication of the Notice and Summary Notice, and deadlines for submitting claims, for opting out of the Class or for objecting to the Settlement. The Settling Parties respectfully propose the following schedule for the Court's consideration, as set forth in the proposed Preliminary Approval Order:

<b>Event</b>	<b>Time for Compliance</b>
Deadline for mailing the Notice and Proof of Claim (Exs. 1 and 2 to Preliminary Approval Order) to Settlement Class Members ("Notice Date")	10 business days after entry of both the Preliminary Approval Order and the Bankruptcy Court Approval Order
Deadline for publishing Summary Notice (Ex. 3 to PAO)	14 calendar days following the

	Notice Date
Filing of briefs in support of final approval of Settlement, Plan of Allocation, and Lead Counsel's fee and expense request	28 calendar days before the Settlement Hearing
Receipt deadline for Requests for Exclusions and Objections	21 calendar days before the Settlement Hearing
Filing of reply memorandum on response to any objections	7 calendar days before the Settlement Hearing
Settlement Hearing	85 days following the deadline for mailing the Notice
Deadline for submitting Proofs of Claim	120 days following the deadline for mailing the Notice

#### V. The Settlement Class Should Be Certified for Settlement Purposes

For purposes of the Settlement, the Settling Parties have stipulated that the Court may certify this Action as a class action on behalf of the Settlement Class, certify Lead Plaintiffs as the Class Representatives for the Settlement Class, and appoint Lead Counsel as Class Counsel for the Settlement Class. *See* Stip. ¶3.

This Court may choose to certify a class “solely for purposes of settlement [if] a settlement is reached before a litigated determination of the class certification issue.” *Borcea v. Carnival Corp.*, 238 F.R.D. 664, 671 (S.D. Fla. 2006) (quoting *Woodward v. Nor-Am Chem. Co.*, 1996 WL 1063670, at \*14 (S.D. Ala. May 23, 1996)). In making this determination, the Court “need not inquire whether the case, if tried, would present intractable management problems, under Rule 23(b)(3),” because “a settlement class action obviates a trial.” *Borcea*, 238 F.R.D. at 671-672 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). Rather, the Court need only find that the class meets the four prerequisites set forth in Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation, and that the class meets one of the three requirements in Rule 23(b). *See Borcea*, 238 F.R.D. at 672. In assessing whether to certify a class pursuant to Rule 23, “[t]he Court resolves any doubt in favor of class certification.” *In re Carbon Dioxide Antitrust Litig.*, 149 F.R.D. 229, 232 (M.D. Fla. 1993).

Courts have generally found securities claims to be particularly well-suited for class action status because they allow for the policies behind the securities laws to be enforced in circumstances where there are numerous investors with small individual claims that otherwise would effectively be barred from litigation. *See, e.g., Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975). This action is no exception and, the Settling Parties agree that, for purposes of the Settlement, the Settlement Class should be certified as satisfying each of the requirements set forth in Rule 23.

**A. Numerosity**

Rule 23(a)(1) requires that the class be so numerous that joinder of all members is impracticable. For purposes of Rule 23(a)(1), however, “[i]mpracticable does not mean impossible; plaintiffs need only show that it would be extremely difficult or inconvenient to join all members of the class.” *In re HealthSouth Corp. Sec. Litig.*, 213 F.R.D. 447, 457 (N.D. Ala. 2003); *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) (same). In order to satisfy Rule 23(a)(1), “[p]laintiffs must show some evidence of or reasonably estimate the number of class members.” *Barlow v. Marion Cnty. Hosp. Dist.*, 88 F.R.D. 619, 625 (M.D. Fla. 1980). It is not necessary that the precise number of class members be known. *See id.* at 625. “[N]umerosity is generally assumed to have been met in class actions involving nationally traded securities.” *In re Physician Corp. of Am. Sec. Litig.*, No. 97-3678, 2003 WL 25820056, at \*4 (S.D. Fla. May 21, 2003) (citing *In re AmeriFirst Sec. Litig.*, 139 F.R.D. 423, 427 (S.D. Fla. 1992)).

Here, more than 152 million shares of common stock were outstanding during the Class Period. Amended Complaint at ¶831. In addition, beneficial holders of Colonial Securities are believed to number in the thousands and are geographically located throughout the United States, thus making joinder impracticable. *Id.* Colonial’s common stock was also listed and actively

traded on the New York Stock Exchange, an open and efficient market. Thus, the numerosity element is satisfied.<sup>10</sup>

### **B. Commonality**

The commonality requirement is satisfied where, as here, there are “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Courts in this Circuit have held that “[c]ommonality is not a high threshold to meet.” *Physician Corp.*, 2003 WL 25820056, at \*4. Commonality does not mean that all class members must make identical claims and arguments. *See Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986). Rather, “[c]ommonality may be established where there are allegations of common conduct or standardized conduct by the defendant directed toward members of the proposed class.” *Strube v. Am. Equity Inv. Life Ins. Co.*, 226 F.R.D. 688, 695 (M.D. Fla. 2005). “If there is at least one issue affecting all or a significant number of proposed class members, then the requirement of commonality is met.” *Physician Corp.*, 2003 WL 25820056, at \*4.

Here, the Amended Complaint alleges a unified scheme to defraud investors, with numerous questions of law and fact common to all Settlement Class Members. In cases alleging a unified scheme to defraud investors, courts in this District have concluded that the commonality requirement of Rule 23(a)(2) is readily satisfied. *See Avery v. Uniroyal Tech. Corp.*, No. 02-2238, 2005 WL 1205607, at \*3 (M.D. Fla. May 20, 2005); *see also Cheney*, 213 F.R.D. at 490 (“[w]here a common scheme is alleged, common questions of law or fact will exist.”).

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<sup>10</sup> *See Cheney v. Cyberguard Corp.*, 213 F.R.D. 484, 490 (S.D. Fla. 2003) (finding numerosity prong satisfied without a precise or estimated number of class members in a securities class action where there are thousands of record holders of a common stock and millions of outstanding shares); *HealthSouth*, 213 F.R.D. at 457.

The questions common to the Settlement Class include whether: (a) the federal securities laws were violated by Settling Defendants' alleged acts; (b) Colonial's publicly disseminated statements during the Class Period omitted and/or misrepresented material facts; (c) Settling Defendants breached any duty to disclose material facts or to correct material facts previously disseminated; (d) Settling Defendants participated in and pursued the fraudulent course of business complained of; (e) Settling Defendants acted willfully, with knowledge or recklessly, in omitting and/or misrepresenting material facts; (f) Colonial Securities' prices during the Settlement Class Period were artificially inflated due to the alleged material omissions and/or misrepresentations; (g) Colonial's financial statements were not presented in conformity with Generally Accepted Accounting Principles ("GAAP") during the Settlement Class Period; and (h) the members of the Settlement Class have sustained damages and, if so, what is the appropriate measure of damages.

Because the core contention of all Settlement Class Members is that they purchased and/or acquired Colonial Securities at inflated prices, and suffered damages as a result of the alleged securities violations, the commonality requirement of Rule 23(a)(2) is satisfied. *See Cheney*, 213 F.R.D. at 491 ("the commonality requirement of 23(a)(2) is met here because there are a substantial number of questions of fact and law noted above that are common to the class.").

### **C. Typicality**

Rule 23(a)(3), the typicality requirement, is satisfied when the plaintiff shows that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Sher v. Raytheon Co.*, 261 F.R.D. 651, 664 (M.D. Fla. 2009) *vacated*, 419 Fed App'x 887 (11th Cir. 2011). "Typicality may be presumed when the plaintiff's claim 'arises from the same event

or practice or course of conduct that gives rise to the claims of other class members.” *Id.* (quoting *Snow v. Atofina Chems., Inc.*, No. 01-72648, 2006 WL 1008002, at \*5 (E.D. Mich. Mar. 31, 2006)); *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) (finding that typicality is established “if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory”).

Here, Lead Plaintiffs’ claims are identical to those of other members of the Settlement Class. They, like all members of the Settlement Class, purchased Colonial Securities at artificially inflated prices during the Settlement Class Period and suffered damages because of Settling Defendants’ alleged material misstatements and omissions. Accordingly, the legal theories and evidence Lead Plaintiffs will advance to prove their claims will simultaneously advance the claims of all Settlement Class Members. Since Lead Plaintiffs seek to prove that Settling Defendants “committed the same unlawful acts in the same method against an entire class . . . all members of this class have identical claims,” the typicality requirement is satisfied. *Kennedy v. Tallant*, 710 F.2d 711, 717 (11th Cir. 1983).

#### **D. Adequacy**

Rule 23(a)(4), the adequacy of representation requirement, involves “two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action.” *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1323 (11th Cir. 2008). The Rule 23(a)(4) requirement is met where, as here: (1) the proposed representatives have interests in common with, and not antagonistic to, the interests of the class; and (2) plaintiffs’ attorneys are qualified, experienced, and generally able to conduct the litigation. *See Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d

718, 726 (11th Cir. 1987); *Tapken v. Brown*, No. 90-691, 1992 WL 178984, at \*29 (S.D. Fla. Mar. 13, 1992).

Here, Lead Plaintiffs' interests are coextensive with those of other Settlement Class Members and, like all members of the Settlement Class, possess claims under the federal securities laws against the Settling Defendants in connection with their purchase or acquisition of Colonial Securities during the Settlement Class Period and Offerings. Lead Plaintiffs, like all Settlement Class Members, were also injured by Settling Defendants' alleged wrongful acts, including Settling Defendants' alleged misrepresentations in connection with the sale of Colonial Securities. Proof of Lead Plaintiffs' claims would necessarily involve adjudicating the same issues of law and fact as the claims of the Class as a whole. Thus, Lead Plaintiffs and the Settlement Class they seek to represent have the same interests in recovering damages caused by Settling Defendants' wrongful conduct. *See Carbon Dioxide*, 149 F.R.D. at 233 (certifying class where there was no indication that "the interests of the representative parties differ in any way from the other class members").

Lead Plaintiffs also respectfully submit that they have retained counsel who are qualified, experienced and fully capable of prosecuting this litigation on behalf of the Settlement Class. Labaton Sucharow has a proven track record in the prosecution of complex class actions, both in this judicial district and nationwide, and through their efforts in this litigation have obtained a settlement of \$10.5 million for the benefit of the Settlement Class. Lead Plaintiffs, therefore, satisfy the Rule 23(a) adequacy requirements.<sup>11</sup>

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<sup>11</sup> Lead Plaintiffs also respectfully request that the Court-appointed Lead Counsel, Labaton Sucharow, be appointed Class Counsel pursuant to Fed. R. Civ. P. 23(g)(1)(A).

### **E. Predominance and Superiority**

In addition to the four requirements of Rule 23(a) addressed above, a class must also satisfy one of the three subparts of Rule 23(b). Here, Lead Plaintiffs have demonstrated that questions of law or fact common to Settlement Class Members predominate over any questions affecting only individual Settlement Class Members and a class action is superior to other available methods. *See* Fed. R. Civ. P. 23(b)(3). The predominance inquiry “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). The Supreme Court expressly recognized that “[p]redominance is a test readily met in certain cases alleging . . . securities fraud[.]” *Id.* at 625.

In order to satisfy the predominance requirement, “[i]t is not necessary that all questions of fact or law be common, but only that some questions are common and that they predominate over individual questions.” *Busby*, 513 F.3d at 1324. Here, the common questions of law and fact described above predominate over any individual questions. The same set of operative facts applies to each Settlement Class Member (*i.e.*, each Settlement Class Member purchased and/or acquired Colonial Securities during the Settlement Class Period at prices alleged to be artificially inflated as a result of Settling Defendants’ false and misleading statements and/or omissions) and each Settlement Class Member was allegedly harmed when the undisclosed facts came to light.<sup>12</sup>

Accordingly, the “predominance” requirement is satisfied.

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<sup>12</sup> *See Physician Corp.*, 2003 WL 25820056, at \*9 (“[E]ven if class members purchase stock based upon different misrepresentations within the relevant class period, so long as the misrepresentations were part of one continuous scheme to defraud, typicality is not eliminated.”); *Kreuzfeld A.G. v. Carnehammar*, 138 F.R.D. 594, 603 (S.D. Fla. 1991) (finding in an action alleging Rule 10b-5 violations that common questions of law and fact, including issues of reliance and intent, predominate over any individual questions); *Powers v. The Stuart-James Co.*, 707 F. Supp. 499, 504 (M.D. Fla. 1989) (finding predominance because “[t]he core of this case is

With respect to the superiority of a class action to other methods, “[s]ecurities fraud actions are considered especially appropriate for class action treatment because they often involve a large number of Plaintiffs with relatively small claims.” *Kreuzfeld*, 138 F.R.D. at 603 (citing *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980)). In light of the number of potential claimants against the Settling Defendants and the size of their claims, class action treatment is particularly suitable here.

Further, certification of the Settlement Class for the purpose of effecting the Settlement is the superior method to facilitate the resolution of the Settlement Class’s claims against the Settling Defendants. Without the settlement class device, the Settling Defendants could not obtain a class-wide release, and therefore would have had little, if any, incentive to enter into the Settlement. Moreover, certification of a class for settlement purposes will allow the Settlement to be administered in an organized and efficient manner. *See In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 584 (S.D.N.Y. 2008). Resolution of the Settlement Class’s claims against the Settling Defendants through the Settlement is superior to any other available method of resolution. For all of the foregoing reasons, the Settlement Class meets the class certification requirements of both 23(a) and 23(b).

## **VI. Conclusion**

For all the foregoing reasons, Lead Plaintiffs respectfully request that the Court grant preliminary approval of the proposed Settlement; certify the proposed Settlement Class for settlement purposes; and enter the accompanying proposed Preliminary Approval Order.

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the alleged scheme carried on by Defendants to manipulate the value of securities in various companies resulting in the artificial inflation of market value.”).

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