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

In re COLONIAL BANCGROUP, INC. SECURITIES LITIGATION	)	Civil Action No. 2:09-CV-00104-RDP-WC

LEAD COUNSEL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND PAYMENT OF LITIGATION EXPENSES

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Labaton Sucharow LLP, court-appointed Lead Counsel ("Lead Counsel")[1] for Arkansas Teacher Retirement System, State-Boston Retirement System, Norfolk County Retirement System and City of Brockton Retirement System (collectively, "Lead Plaintiffs") and the Settlement Class, respectfully submits this memorandum of law in support of its motion, pursuant to Rule 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure, for an order approving Lead Counsel's application for attorneys' fees and payment of litigation expenses, to be paid out of the Settlement Fund established by the proposed settlement with the remaining defendants (the "Settlement") in the above-titled litigation (the "Action").

Lead Counsel's motion is also supported by the Declaration of James W. Johnson in Support of Lead Plaintiffs' Motion for Final Approval of Settlement with Remaining Defendants and Lead Counsel's Motion for Award of Attorneys' Fees and Payment of Expenses (the "Johnson Declaration" or "Johnson Decl.") with annexed exhibits, which is incorporated herein by reference.[2]

PRELIMINARY STATEMENT

As set forth in the Stipulation, the Remaining Defendants[3] have agreed to cause to be paid $7.9 million in cash to secure a settlement of the Action and resolve all Released Claims against the Remaining Defendants and the Released Defendant Parties. This substantial recovery

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[1] All capitalized terms used herein, unless otherwise defined, have the same meaning as that set forth in the Stipulation and Agreement of Settlement with Remaining Defendants (the "Stipulation"), dated as of February 3, 2011. (ECF No. 550-1.)

[2] All exhibits referenced herein are annexed to the Johnson Declaration. For clarity, citations to exhibits that themselves have attached exhibits, will be referenced as "Ex. ___ - ___." The first numerical reference refers to the designation of the entire exhibit attached to the Johnson Declaration and the second reference refers to the exhibit designation within the exhibit itself.

[3] The "Remaining Defendants" collectively refers to the Underwriter Defendants and PricewaterhouseCoopers LLP ("PWC") (collectively, "Defendants") and the Tolled Defendants, as defined in the Stipulation.

is the result of the diligent effort, skill and advocacy of Lead Counsel, with the oversight and involvement of Lead Plaintiffs. The Settlement provides an additional immediate and substantial recovery to the Settlement Class, which faced the significant risk of a much smaller recovery or no recovery after protracted litigation. As detailed herein and in the Johnson Declaration, for the past six years, Lead Counsel has vigorously pursued the investigation, development and prosecution of the alleged securities claims in the Action.

In connection with the Settlement, and on behalf of all plaintiffs' counsel[4] who have contributed to the prosecution and/or settlement of the claims at issue ("Plaintiffs' Counsel"), Lead Counsel respectfully seeks an award of attorneys' fees in the amount of 25% of the Settlement Fund, or $1,975,000, and litigation expenses of $208,460.91, which were reasonably and necessarily incurred during the course of the Action, with interest earned on both amounts at a rate equal to the interest earned by the Settlement Fund. This is the same fee percentage that was requested and approved in connection with the $10.5 million settlement with the former officer and director defendants (the "Colonial I Settlement") (ECF No. 483).

Lead Counsel has represented the Settlement Class on a purely contingent-fee basis and has received no compensation for its work since the Colonial I Settlement in 2012, while it has continued to incur the costs of funding the Action.[5] Given the result achieved, the complexity and amount of work involved, the skill and expertise required, and the risks counsel undertook, Lead Counsel respectfully submits the requested award of 25% of the Settlement Fund and

[4] During the prosecution and settlement of the claims, Lead Counsel was assisted by the law firms of Robbins Geller Rudman & Dowd LLP and Chimicles & Tikellis LLP. These firms worked closely with Lead Counsel and under its supervision to avoid duplication of effort and to prosecute the claims efficiently. However, the majority of work was performed by Lead Counsel. (Johnson Decl. ¶72, Exs. 7 to 10.)

[5] In connection with the Colonial I Settlement, Lead Counsel received fees and expenses from inception through September 15, 2011. The instant motion seeks fees and expenses from September 16, 2011 through April 30, 2015.

payment of litigation expenses is fair and reasonable under the circumstances. Indeed, as discussed below, federal courts in this Circuit and throughout the nation, recognizing the risks and effort generally expended by counsel to obtain favorable results, have frequently awarded greater fees in complicated securities cases such as this.

Furthermore, the requested fee and expense amounts here are supported by Lead Plaintiffs State-Boston, Norfolk County, and the City of Brockton, sophisticated institutions that have been heavily involved in the prosecution of the Action. (*See* Lead Plaintiffs' Declarations, Exs. 3 - 5.) Lead Plaintiff Arkansas Teacher believes that Lead Counsel should be awarded a fair and reasonable attorneys' fee and payment of expenses in light of the amount and quality of the work performed and considering the substantial recovery obtained for the Settlement Class. However, it is their practice in securities class actions to defer to the court with respect to the amount of attorneys' fees and expenses that should be awarded. (Ex. 2 ¶7.) In addition, although Notices have been mailed to more than 162,773 potential Settlement Class Members stating that Lead Counsel would seek fees of up to 25% of the Settlement Fund and payment of expenses in an amount not to exceed $500,000 plus interest, not a single Settlement Class Member has filed an objection to these requests as of the date of this motion.[6] (Johnson Decl. ¶79, Ex. 6 ¶¶11, 15.)

In sum, the requested fee is fair and reasonable, and the expenses requested are reasonable in their amount and were necessarily incurred for the successful prosecution of this Action. Accordingly, it is respectfully submitted that Lead Counsel's motion should be granted in full by the court.

[6] The deadline for filing objections is May 28, 2015. Should any be received, they will be addressed in Lead Counsel's reply papers that will be filed with the court on or before June 11, 2015.

OVERVIEW OF THE ACTION

For the sake of brevity, the court is respectfully referred to the Johnson Declaration, simultaneously submitted herewith, for, *inter alia*: a detailed history of the Action through the submission of the Settlement to the court; the nature of the claims asserted in the Action; the prosecutorial efforts undertaken; the negotiations leading to the Settlement; the value of the Settlement compared to the risks and uncertainties of continued litigation; and a description of the services provided by Lead Counsel.

ARGUMENT

I. A REASONABLE PERCENTAGE OF THE FUND RECOVERED IS THE APPROPRIATE METHOD TO USE IN AWARDING ATTORNEYS' FEES IN THE ELEVENTH CIRCUIT

Courts have long recognized that attorneys who represent a class and achieve a benefit for class members are entitled to be compensated for their services, and that where a class plaintiff successfully recovers a settlement fund, the costs of litigation should be spread among the fund's beneficiaries. Thus, attorneys who obtain a recovery for a class in the form of a common fund are entitled to an award of fees and expenses from that fund as compensation for their work. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970); *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991).

Courts have also recognized that, in addition to providing just compensation, awards of attorneys' fees from a common fund serve to "encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and therefore discourage future misconduct of a similar nature." *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 356 (E.D.N.Y. 2010). Indeed, the Supreme Court has emphasized that private securities cases such

as this one are "an essential supplement to criminal prosecutions and civil enforcement actions…," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007), and "'an indispensable tool with which defrauded investors can recover their losses' – a matter crucial to the integrity of domestic capital markets." *Id*. at 320 n.4 (quoting *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 81 (2006)).

In *Camden*, the Eleventh Circuit announced the rule that "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." *Camden I*, 946 F.2d at 774; *see Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1294 (11th Cir. 1999) (same). A percentage-based fee award accomplishes several objectives:

> First, it is consistent with the private market place where contingent fee attorneys are regularly compensated on a percentage of recovery method. Second, it provides a strong incentive to plaintiffs' counsel to obtain the maximum possible recovery in the shortest time possible under the circumstances. Finally, the percentage approach reduces the burden of the Court to review and calculate individual attorney hours and rates and expedites getting the appropriate relief to class members.

Garst v. Franklin Life Ins. Co., No. 97-C-0074-S, 1999 U.S. Dist. LEXIS 22666, at *83-84 (N.D. Ala. June 25, 1999) (citations omitted). Each of these objectives applies here.

A. The 25% Fee Request Is Fair and Reasonable

A review of common fund cases confirms that the 25% fee sought by Lead Counsel is fair and reasonable and within the range of fee awards approved by courts within the Eleventh Circuit. In fact, the Eleventh Circuit has found that "the majority of common fund fee awards fall between 20% to 30% of the fund," and has directed district courts to consider the 20% to 30% range a "benchmark" for percentage fee awards, which "may be adjusted in accordance with the individual circumstances of each case." *Waters*, 190 F.3d at 1294 (quoting *Camden I*,

946 F.2d at 774); *see also Flournoy v. Honeywell Int'l., Inc.*, No. 205-184, 2007 WL 1087279, at *1 (S.D. Ga. Apr. 6, 2007) ("In this Circuit, the appropriate standard for fee awards in common fund cases is a percentage of the fund established for the benefit of the class, with the benchmark award being twenty-five percent of the fund.")

A review of recent fee awards in common fund securities class actions within this Circuit with settlements in the range of this one indicates that the requested 25% fee is very comparable to typical fees awarded. *See, e.g., Fraught v. Am. Home Shield Corp.*, No. 07-1928, 2010 WL 10959222 (N.D. Ala. Apr. 27, 2010) *aff'd in part*, 668 F.3d 1233 (11th Cir. 2011) (awarding 25% of $6 million settlement, plus a $1.5 million payment by defendants); *AAL High Yield Bond Fund, et al. v. Ruttenberg, et al.*, No. 00-1404, slip op. (N.D. Ala. Dec. 14, 2005) (awarding 30% of $17.75 million settlement fund) (submitted herewith as part of compendium of unreported cases, Johnson Decl. Ex. 12); *Waters*, 190 F.3d at 1293-98 (affirming award of 30% of $40 million settlement fund); *In re Carter's, Inc. Sec. Litig.*, No. 08-2940, slip op. (N.D. Ga. Oct. 13, 2013) (awarding 30% of $3.3 million settlement) (Ex. 12); *In re Friedman's, Inc. Sec. Litig.*, No. 03-cv-3475, 2009 WL 1456698, at *2-4 (N.D. Ga. May 22, 2009) (awarding 30% of $14.9 million settlement fund); *City of St. Clair Shores Gen. Emp. Ret. Sys. v. Lender Processing Servs., Inc.*, No. 10-1073, slip op. (M.D. Fla. Mar. 4, 2014) (awarding 25% of $13.1 million settlement) (Ex. 12); *LaGrasta v. Wachovia Capital Markets, LLC*, No. 01-CV-251, 2006 WL 4824480 (M.D. Fla. Nov. 6, 2006) (awarding 30% of $9 million settlement fund); *In re Cryolife, Inc. Sec. Litig.*, No. 02-cv-1868, slip op. (N.D. Ga. Nov. 9, 2005) (awarding 30% of $23.25 million settlement) (Ex. 12); *In re Profit Recovery Group Int'l, Inc. Sec. Litig.*, No. 00-cv-1416, slip op. (N.D. Ga. May 26, 2005) (awarding 33 1/3% of $6.75 million settlement fund) (Ex. 12); *cf. Pinto v. Princess Cruise Lines, Ltd.*, 513 F. Supp. 2d 1334 (S.D. Fla. 2007) ("In private

litigation, attorneys' regularly contract for contingent fees between 30% and 40% directly with their clients.")

Thus, when compared to fees awarded in this Circuit in class action settlements of similar magnitude, Lead Counsel's fee request of 25% is fair and reasonable.

B. A Fee Approved by Lead Plaintiffs Is Entitled to a Presumption of Reasonableness

In enacting the PSLRA, Congress intended to encourage sophisticated institutional investors with substantial financial stakes in the litigation to serve as lead plaintiffs and play an active role in supervising and directing the litigation, including selecting and monitoring class counsel. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 261-62, 282 (3d Cir. 2001). Fees negotiated between a properly selected PSLRA lead plaintiff and its counsel should be accorded great weight. *See, e.g., Mills Corp.*, 265 F.R.D. at 261 ("in a PSLRA case in which a fee request that has been approved and endorsed by properly-appointed lead plaintiffs . . . enjoys a presumption of reasonableness").

Here, Lead Plaintiffs State-Boston, Norfolk County and the City of Brockton are three sophisticated institutions with extensive experience in negotiating fees with counsel and in evaluating the results of securities class action settlements. Lead Plaintiffs negotiated the 25% fee with Lead Counsel and approve and endorse the requested fee as fair and reasonable in light of, among other things, the substantial work Lead Counsel has done in the Action, the risks of continuing the claims against the Remaining Defendants and the very favorable result obtained on behalf of the Settlement Class. (Exs. 3 – 5.) Accordingly, the requested fee is entitled to a presumption of reasonableness.

II. THE RELEVANT ELEVENTH CIRCUIT FACTORS CONFIRM THAT THE REQUESTED FEE IS FAIR AND REASONABLE

In *Camden I*, the Eleventh Circuit recognized that there "is no hard and fast rule mandating a certain percentage of a common fund which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case." 946 F.2d at 774. However, the *Camden I* court recommended that district courts consider several factors to determine what constitutes a reasonable percentage award. *Id*. These factors include:

> (1) the time and labor required; (2) the novelty and the difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; (12) awards in similar cases.

Camden I, 946 F.2d at 772 n.3 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)). *Camden I* also recognized additional factors that a court may consider in awarding a percentage fee award, including "the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel . . . and the economics involved in prosecuting a class action." *Id*. at 775.

"The factors which will impact upon the appropriate percentage to be awarded as a fee in any particular case will undoubtedly vary." *Id*. Here, an analysis of the most relevant factors confirms that the fee requested by Lead Counsel is fair and reasonable.

A. The Time and Labor Required

A review of the effort and time expended by Plaintiffs' Counsel establishes that the requested fee is justified. The Johnson Declaration details the myriad efforts undertaken by Lead

Counsel to prosecute the claims against the Remaining Defendants, the time and labor expended, and the diligence of those efforts. Over the course of the prosecution and settlement of the claims, Lead Counsel was provided with the assistance of the law firms of Robbins Geller Rudman & Dowd LLP and Chimicles & Tikellis LLP. They worked closely with Lead Counsel and under its supervision. (Johnson Decl. ¶72, Exs. 7 to 9.)

The Settlement was reached at a point in which Lead Counsel had committed extensive resources to understanding the facts and challenges posed by the claims and defenses, and the factors that would impact a future recovery. As set forth in greater detail in the Johnson Declaration, the proceedings to date have included:

- Extensive investigation and analysis of the claims at issue, including review and analysis of: (i) investigative findings by the Federal Deposit Insurance Corporation ("FDIC") Office of the Inspector General and transcripts from the trial of Lee B. Farkas; (ii) Colonial's filings with the Securities and Exchange Commission; (iii) publicly available information concerning Colonial and the Defendants, including newspaper articles, online publications, stock price movement data, statements at analyst conferences, transcripts of quarterly earnings calls and Bloomberg reports; (iv) securities analyst reports; (v) press releases and media reports issued about Colonial; and (vi) the applicable law and accounting rules governing the claims and potential defenses.

- Identifying more than 700 potential witnesses and contacting 80 potential witnesses with knowledge of the relevant issues to the Action. These interviews were instrumental in enabling Lead Plaintiffs to overcome Defendants' initial motions to dismiss.

- The filing of a comprehensive complaint, successfully responding to Defendants' initial motions to dismiss, vigorously opposing Defendants' motions for reconsideration, filing an amended complaint, responding to a second round of motions to dismiss, briefing the impact of *Fait v. Regions Financial Corp.*, 655 F.3d 105, 109 (2d Cir. 2011), and its progeny concerning "subjective falsity," moving to amend the complaint, and analyzing the orders on the motions to dismiss.

- Consulting with experienced accounting, banking and damages experts.

- Extended negotiations, including a lengthy in-person mediation session with Robert A. Meyer, a well-respected and highly experienced mediator and partner at Loeb & Loeb in Los Angeles.

(Johnson Decl. ¶¶7-9, 27-47.) The number of hours Plaintiffs' Counsel have expended on this litigation since the Colonial I Settlement (more than 3,800 hours with a resulting lodestar of $2,299,207.25) attests to their extensive efforts. (Exs. 7-A to 9-A, 10.) The time and labor here amply supports the requested fees.

While it is not required in the Eleventh Circuit, an analysis of the requested fee under the "lodestar/multiplier" approach further supports the reasonableness of a 25% award. *See, e.g.*, *Waters*, 190 F.3d at 1298 ("while we have decided in this circuit that a lodestar calculation is not proper in common fund cases, we may refer to that figure for comparison"). Here, based on the $7.9 million Settlement Fund, the requested 25% award results in a *negative* multiplier of 0.86, *i.e.* less than Plaintiffs' Counsel's lodestar.[7] If Plaintiffs' Counsel's lodestar in connection with the Colonial I Settlement is factored in, and the lodestars are combined to total $7,225,000, overall the requested combined fees would result in a negative "multiplier" of 0.64 – about half of the legal fees incurred by Plaintiffs' Counsel in prosecuting the case. (Ex. 10; ECF No. 472-8.)

[7] The multiplier is calculated by dividing the $1,975,000 fee request by the $2,299,207.25 in lodestar that Plaintiffs' Counsel incurred. As supported by Plaintiffs' Counsel's sworn declarations, their hourly rates are the same as their regular rates charged for services and those that have been accepted in other securities or shareholder litigation. (Exs. 7 - 9.) The rates used by these firms are also commensurate with rates used by peer defense-side law firms litigating matters of a similar magnitude. (*See* sample of defense firm billing rates gathered by Labaton Sucharow from bankruptcy court filings nationwide in 2014, Johnson Decl. Ex. 11.) *See also In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383, 386 n.6 (D. Md. 2006) (approving fees in securities class action and holding that class counsel's hourly rates "are within a reasonable range for the national firms that prosecuted the case"); *In re MicroStrategy, Inc. Sec. Litig.*, 172 F. Supp. 2d 778, 788 (E.D. Va. 2001) (hourly rates were "within the range of reasonableness for PSLRA cases, where the market for class action attorneys is nationwide and populated by very experienced attorneys with excellent credentials").

This is well below the range of multipliers frequently awarded in class action settlements of similar magnitude in this and other circuits. *See, e.g., Pinto*, 513 F. Supp. 2d at 1344 (noting that lodestar multipliers "in large and complicated class actions" [tend to] range from 2.26 to 4.5, [and that] while "three appears to be the average" many cases have awarded higher multipliers) (citing *Behrens v. Womentco Enters., Inc.*, 118 F.R.D. 534, 549 (S.D. Fla. 1998), *aff'd*, 899 F.2d 21 (11th Cir. 1990)); *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694-96 (N.D. Ga. 2001) (awarding fee representing a multiplier between 2.5 and 4); *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 679, 702 (M.D. Ala. 1988) ("A multiplier of approximately 3.1 in a national class action securities case is not unusual or unreasonable.")

Moreover, courts have recognized that the reasonableness of a fee request under the percentage method "is reinforced by evidence that the percentage fee would represent a negative multiplier of the lodestar." *In re Blech Sec. Litig.*, No. 94-CV-7696, 2000 WL 661680, at *5 (S.D.N.Y. May 19, 2000); *see also In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138, 2007 WL 4171201, at *16 (N.D. Cal. Nov. 26, 2007) (explaining that a negative multiplier suggests a percentage-based award is fair and reasonable based on the time and effort expended by class counsel); *In re Sterling, Foster & Co., Inc. Sec. Litig.*, 238 F. Supp. 2d 480, 490 (E.D.N.Y. 2002) ("the fact that any reasonable fee would necessarily represent a negative multiplier of the lodestar supports an award at the higher end of the spectrum") (citations omitted).

Accordingly, the time and labor required amply supports the attorneys' fee request.

B. The Novelty and Difficulty of the Issues

As courts have recognized, "multi-faceted and complex" issues are "endemic" to cases based on alleged violations of federal securities law, *Sunbeam*, 176 F. Supp. 2d at 1334; *see Ressler v. Jacobson*, 149 F.R.D. 651, 654 (M.D. Fla. 1992), and "securities actions have become more difficult from a plaintiff's perspective in the wake of the PLSRA." *In re Sterling Fin.*

Corp. Sec. Class Action, No. 07-2171, 2009 WL 2914363, at *4 (E.D. Pa. Sept. 10, 2009) (citation omitted). This Action was no exception, as attested to by the volume of briefing submitted to the court.

Lead Plaintiffs and Lead Counsel faced several novel and difficult issues in prosecuting the claims against the Remaining Defendants, including two rounds of vigorously contested motions to dismiss involving complicated facts and difficult legal issues that challenged the establishment of all of the elements of Lead Plaintiffs' claims against these defendants. (Johnson Decl. ¶¶21-24, 54-61.) Lead Counsel worked creatively to overcome these obstacles in order to bring together the resolution now before the court.

For instance, there were nuanced legal and factual issues concerning whether Lead Plaintiffs could establish that the misstatements and omissions regarding Colonial's commercial and construction loan portfolios, underwriting policies, warehouse lending business segment and the financial condition of the Company were false. Defendants argued that to establish falsity of the alleged misstatements, Lead Plaintiffs would have to satisfy the standards set forth in *Fait v. Regions Fin. Corp.*, 655 F.3d 105 (2d Cir. 2011) and *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015) and demonstrate "subjective" falsity for the claims to be actionable (Johnson Decl. ¶55.) With the narrowing of the claims to the Stock and Note Offerings, Lead Counsel also had to work to rebut defenses concerning the standing of Plaintiffs. Both the Underwriter Defendants and PwC strenuously pursued complex due diligence defenses, which could immunize them from liability. (Johnson Decl. ¶¶56-57.)

The calculation and proof of the damages suffered by the Settlement Class here also presented intricate and difficult issues that had to be navigated by Lead Counsel. The Remaining Defendants argued, among other things, that Lead Plaintiffs could not establish that the alleged

price drops were causally related to the alleged misconduct, both before and after the narrowing of the claims to the warehouse lending fraud, and instead maintained that the price drops were caused by other unrelated Company specific information or market and industry factors. Therefore, there was no loss causation. For instance, they argued that the large stock price drop on January 27, 2009 was caused by the turmoil that beset both the banking industry and the broader economy during that time period, not disclosure of allegedly withheld information. (Johnson Decl. ¶59.)

In light of all of the above, it is submitted that the novelty and difficulty of the issues presented support the reasonableness of the requested attorneys' fee.

C. The Skill Required to Perform the Legal Services Properly, and the Experience, Reputation and Ability of the Attorneys

Under this factor, the court should consider "the skill and acumen required to successfully investigate, file, litigate, and settle a complicated class action lawsuit such as this one," *David v. Am. Suzuki Motor Corp.*, No. 08-CV-22278, 2010 WL 1628362, at *8 n.15 (S.D. Fla. Apr. 15, 2010), and "the experience, reputation and ability of the attorneys"[involved]. *Camden I*, 946 F.2d at 772 n.3. As the court in *Edmonds v. United States* recognized, the "prosecution and management of a complex national class action requires unique legal skills and abilities." 658 F. Supp. 1126, 1137 (D.S.C. 1987).

Those unique skills were called upon here. As noted above, this is a highly complex case involving difficult factual and legal issues. Given this and the presence of numerous contested issues, it took highly skilled counsel to represent the Settlement Class and bring about this excellent recovery. The resumes of Labaton Sucharow and Plaintiffs' Counsel attest to their national reputations and extensive experience in the area of complex securities class action cases and other complex litigation. (*See* Plaintiffs' Counsel's firm resumes, Exs. 7-C, 8-C, 9-C.)

This court should also consider the "quality of the opposition the plaintiffs' attorneys faced" in awarding Lead Counsel a fee. *See Sunbeam*, 176 F. Supp. 2d at 1334; *Ressler*, 149 F.R.D. at 654. The Remaining Defendants have been represented by very able and prestigious law firms. Hence, the ability of Lead Counsel to obtain such a favorable Settlement for the Settlement Class in light of such qualified legal opposition confirms the quality of the representation.

D. The Customary and Contingent Nature of the Fee

Customary fees in class action lawsuits of this nature are contingent because virtually no individual possesses a sufficiently large stake in the litigation to justify paying his attorneys on an hourly basis. *See Ressler*, 149 F.R.D. at 654; *see also Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988). The contingent nature of Lead Counsel's fees here should be given substantial weight in assessing the requested fee award. Courts have consistently recognized that the risk that class counsel could receive little or no recovery is a major factor in determining the award of attorneys' fees:

> A determination of a fair fee for Class Counsel must include consideration of the contingent nature of the fee ... and the fact that the risks of failure and nonpayment in a class action are extremely high. Cases recognize that attorneys' risk is "'perhaps the foremost' factor" in determining an appropriate fee award.

Pinto, 513 F. Supp. 2d at 1339; *see also Ressler*, 149 F.R.D. at 654-55; *Behrens*, 118 F.R.D at 548 (S.D. Fla. 1988) ("A contingency fee arrangement often justifies an increase in the award of attorneys' fees."). "Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result." *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981). This is so because of the risk that after investing thousands of hours, plaintiffs' counsel may receive no compensation whatsoever. *See Ressler*, 149 F.R.D. at 656-57.

As the court in *Behrens* noted:

> In a securities fraud action, a contingency fee arrangement has added significance. The federal securities laws are remedial in nature and, in order to effectuate their statutory purpose of protecting investors and consumers, private lawsuits should be encouraged. If the ultimate effectiveness of these remedies is to be preserved, the efficacy of class actions and of contingency fee arrangements — often the only means of legal representation available given the incredible expense associated with these actions — must be promoted.

118 F.R.D at 548 (citations omitted).

Success in contingent litigation such as this is never guaranteed. In other cases, plaintiffs' counsel in shareholder litigation have suffered major defeats after years of litigation in which they expended millions of dollars of time and received no compensation at all. Even a victory at the trial stage is not a guarantee of success. *See, e.g., Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (reversing jury verdict for $81.3 million in securities class action). As noted above, and in the Johnson Declaration, Lead Plaintiffs claims against the Remaining Defendants were contentiously prosecuted and subjected to a number of hurdles that, in the end, could have resulted in no recovery or substantially limited the recovery. Indeed, because the fee in this matter was entirely contingent, the only certainties were that there would be no fee without a successful result, and that such a result would be realized only after considerable and difficult effort. Thus, the substantial risks of the claims justify the requested fee.

E. The Amount Involved and Results Achieved

"It is well-settled that one of the primary determinants of the quality of the work performed is the result obtained." *Ressler*, 149 F.R.D. at 655; *see also Friedman's*, 2009 WL 1456698, at *3 (same). When compared to the risks of continued litigation, the proposed $7.9 million cash Settlement is a very favorable recovery. This is especially true when combined with

the Colonial I Settlement for a total of $18.4 million in cash. Estimated damages in connection with the remaining claims ranged from approximately $20 million to, at most, $300 million, depending upon, among other things, the number of corrective disclosures at issue and the percentage of the alleged artificial inflation attributable to the alleged fraud. (Johnson Decl. ¶59.) Accordingly, the proposed settlement represents between almost 3% and 40% of potential damages – before the application of any offsets for the Colonial I Settlement. With a straight offset of the $10.5 million prior settlement, the proposed settlement recovers between approximately 3% and 83% of potential damages. Such a recovery is extremely favorable. *See, e.g., In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484, 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) ("The settlement thus represents a recovery of approximately 6.25% of estimated damages. This is at the higher end of the range of reasonableness of recovery in class actions securities litigations.").

By virtue of the consistent and diligent efforts of Lead Counsel in preparing two detailed complaints following a comprehensive investigation, vigorously opposing Defendants' multiple motions to dismiss (and motions for reconsideration), and developing the case through interviews and expert analysis, Lead Plaintiffs were able to achieve the Settlement.

In light of these facts, the recovery here of $7.9 million in cash is an excellent result for the Settlement Class.

F. The Undesirability of the Case

In certain instances, the "undesirability" of a case can be a factor in justifying the award of a requested fee. There are risks inherent in financing and prosecuting complex litigation of this type. When Lead Counsel undertook representation of Lead Plaintiffs in this Action, it was with the knowledge that it would have to spend substantial time and money and face significant risks without any assurance of being compensated for their efforts. Only the most experienced

plaintiffs' litigation firms would risk the time and the expense involved, in light of the possibility of a recovery at an uncertain date, or of no recovery at all. Apart from the risk of no recovery, the deferral of fees in such an undertaking, while at the same time advancing hundreds of thousands of dollars in expenses, would deter most firms. Thus, the "undesirability" of the case also weighs in favor of the requested fee.

G. Awards in Similar Cases

As discussed above, Lead Counsel's requested fee of 25% of the Settlement Fund is well within the range of fee typically awarded in class action cases in this Circuit. *See Camden I*, 946 F.2d at 774-75 (noting a benchmark range of between 20%-30% of the common fund). Moreover, in comparable class action settlements, judges in this and other Circuits have awarded fees well in excess of the requested 25% fee. Thus, this factor strongly supports the reasonableness of the fees requested.

H. The Time Required to Reach Settlement

A substantial amount of time was required to resolve the claims against the Remaining Defendants. Plaintiffs' Counsel dedicated more than 3,800 hours to the case between September 16, 2011 and April 30, 2015, and incurred more than $208,460.91 in litigation-related expenses on a wholly-contingent basis. (Johnson Decl. ¶¶73-77; Ex. 10.) In consideration of the significant amount of time expended on the prosecution of the claims and the negotiation of the Settlement, and investment of resources, the requested fee should be awarded in full.

I. Reaction of the Settlement Class to Date

In further confirmation of the reasonableness of the requested fee, no member of the Settlement Class has, to date, filed an objection to it. More than 162,773 copies of the Notice were mailed by the claims administrator Strategic Claims Services to potential Settlement Class Members and the Summary Notice was published in *Investor's Business Daily* and transmitted

over the *PR Newswire*. (*See* Declaration of Josephine Bravata Concerning Mailing of the Notice of Proposed Settlement with Remaining Defendants and Proof of Claim and Release Form, dated May 13, 2015 ("Mailing Decl."), attached to Johnson Decl. as Ex. 6 at ¶11.) The Notice stated that Lead Counsel would apply for fees of up to 25% of the Settlement Fund and payment of expenses in an amount not to exceed $500,000 plus interest, and that the deadline for filing objections to the fee application is May 28, 2015. (Ex. 6-A.) The lack of any objection is itself important evidence that the requested fee is fair. *See Pinto*, 513 F. Supp. 2d at 1343 ("That this sizeable class did not give rise to a single objection on the fees request further justifies the full award."); *Ressler*, 149 F.R.D. at 656 (noting that the lack of objections is "strong evidence of the propriety and acceptability" of the fee request).[8]

As the foregoing demonstrates, under Eleventh Circuit law, Lead Counsel should receive a reasonable percentage of the recovery received by the Settlement Class. An examination of other fee awards demonstrates that the fee requested by Lead Counsel is consistent with fee awards in the Eleventh Circuit and elsewhere. Lead Counsel's fee application also should be presumed to be reasonable as it is being made pursuant to negotiations with sophisticated institutional Lead Plaintiffs. Finally, the fee requested is reasonable in light of the factors the Eleventh Circuit has recommended for consideration in evaluating a fee, including the time and effort expended by counsel, the difficulty of the issues presented, the result obtained, and the contingent risk of the litigation. It is respectfully submitted that the requested fee of 25% of the Settlement Fund is reasonable under all these circumstances and should be awarded.

[8] Should any objections be filed, they will be addressed in Lead Counsel's reply papers to be filed on or before June 11, 2015.

III. LITIGATION EXPENSES SHOULD BE AWARDED

Litigation expenses should be paid if they are "reasonable and necessary to obtain the settlement." *Ressler*, 149 F.R.D. at 657; *see also Behrens*, 118 F.R.D. at 549; 1 Alba Conte, *Attorney Fee Awards*, § 2.19, at 73-74 (3d ed. 2006) ("an attorney who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive reimbursement of reasonable fees and expenses involved").

Plaintiffs' Counsel have incurred litigation expenses through April 30, 2015 totaling $208,460.91. (Ex. 10.) These expenses are in addition to those paid in connection with the Colonial I Settlement, which totaled $448,229. Each firm requesting expenses has submitted a declaration, attached as Exhibits 7-B through 9-B to the Johnson Declaration, that itemizes the various categories of expenses incurred. Lead Counsel submits that these expenses, which include costs such as expert and consultant fees, mediation fees, electronic legal research, photocopying, postage, meals and transportation, were reasonably and necessarily incurred in prosecuting the claims and achieving the proposed Settlement. Because counsel were aware that they might not recover any of these expenses unless and until the litigation was successfully resolved against the Remaining Defendants, they took steps to minimize expenses whenever practical to do so without jeopardizing the vigorous and efficient prosecution of the case. (Johnson Decl. ¶¶77-78.)

The expenses for which Lead Counsel seeks payment were necessary for the successful prosecution and settlement of the Action and are of the type routinely charged to clients billed by the hour. Approximately 70% of these expenses relate to the cost of Lead Plaintiffs' consulting bankruptcy expert, whose advice was crucial to the prosecution and settlement of the Action.

(Ex. 7-B.)[9] Lead Plaintiffs State-Boston, Norfolk County and City of Brockton have approved Lead Counsel's request for expenses, while Arkansas Teacher defers to the court, as is its practice in such cases. (Exs. 2 - 5.) In addition, the Notice apprised potential Settlement Class Members that Lead Counsel would seek expenses in an amount not to exceed $500,000. The amount now sought – $208,460.91 – is below the amount stated in the Notice. To date, there have been no objections to Lead Counsel's application for litigation expenses. (Johnson Decl. ¶79.)

Because the litigation expenses incurred by Lead Counsel are of the type for which payment is routinely ordered in class actions and other common fund cases and were essential to the successful prosecution and resolution of the Action with respect to the Remaining Defendants, the requested expenses should be granted.

[9] The bulk of these expert costs were incurred in connection with the Colonial I Settlement however, as explained in Lead Counsel's prior motion for fees and expenses, they were deferred because their payment would have exceeded the $450,000 expense cap reported in the notice of the Colonial I Settlement.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this court approve as fair and reasonable Lead Counsel's application for attorneys' fees and payment of litigation expenses.[10]

DATED: May 14, 2015

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[10] A proposed order will be submitted with Lead Counsel's reply papers, after the deadline for objecting has passed.

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2015, I caused a copy of the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record who are registered on the CM/ECF system.

/s/ James W. Johnson
JAMES W. JOHNSON