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

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

**LEAD PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF PROPOSED CLASS SETTLEMENT WITH REMAINING DEFENDANTS, CERTIFICATION OF CLASS, AND APPROVAL OF PLAN OF ALLOCATION**

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the court-appointed Lead Plaintiffs, Arkansas Teacher Retirement System ("ATRS"), State-Boston Retirement System ("State-Boston"), Norfolk County Retirement System ("Norfolk") and City of Brockton Retirement System ("Brockton") (collectively, "Lead Plaintiffs"),[1] on behalf of themselves, Plaintiff The Horace F. Moyer and Joan M. Moyer Living Trust, Plaintiff City of Worcester Retirement System (collectively with Lead Plaintiffs, "Plaintiffs"), and the Settlement Class,[2] respectfully submit this Memorandum of Law in support of their motion for final approval of the proposed $7,900,000 settlement (the "Settlement") of the claims against the Remaining Defendants[3] in the above-titled litigation (the "Action") as set forth in the Stipulation. This Settlement, together with the previously approved

[1] Capitalized terms not defined herein 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, 2015 and filed with the court on February 18, 2015 (ECF No. 550-1).

[2] In its Order of Preliminary Approval of Class Action Settlement, Approving Form and Manner of Notice, and Setting Date for Hearing on Final Approval of Settlement (the "Preliminary Approval Order"), dated March 13, 2015, the court certified for settlement purposes only a Settlement Class of all Persons who purchased or acquired during the period between April 18, 2007 and August 6, 2009, inclusive: (i) the common stock of Colonial BancGroup, Inc. ("Colonial"); (ii) Colonial's common stock traceable to the Company's April 23, 2008 stock offering pursuant to the Registration Statement and Prospectus filed with the Securities and Exchange Commission (the "Stock Offering"); and (iii) the $250 million worth of Subordinated Notes due in 2038, paying 8.875% interest on a quarterly basis, pursuant or traceable to Colonial's Form S-3/A Shelf Registration Statement and Prospectus dated November 12, 2004 and Form 424 (b)(2) Prospectus Supplement dated February 28, 2008 (the "Note Offering" and together with Colonial's common stock and the Stock Offering ("Colonial Securities")), and were allegedly damaged thereby (the "Settlement Class"), other than persons who are excluded from the Settlement Class by definition or who submit requests for exclusion that are accepted by the court. ECF No. 552 at ¶2, annexed as Exhibit 1 to 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."), submitted herewith.

[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.

$10.5 million settlement with the former officer and director defendants (the "Colonial I Settlement"), resolves ***all*** claims remaining in the Action, as set forth in the Stipulation.

Lead Plaintiffs hereby request, *inter alia*: (i) final approval of the Settlement as fair, adequate and reasonable by entry of the proposed Final Order and Judgment as to the Remaining Defendants (the "Judgment"), which was negotiated by the Parties as an Exhibit to the Stipulation; (ii) a finding that notice to the Settlement Class was provided as required and to the satisfaction of due process and the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), 15 U.S.C. §§78u-4 *et seq.* and 77z-1 *et seq.*; (iii) final certification, for settlement purposes only, of the Settlement Class; (iv) appointment of Lead Plaintiffs and additional named plaintiffs The Horace F. Moyer and Joan M. Moyer Living Trust and City of Worcester as Class Representatives and Labaton Sucharow LLP as Class Counsel; and (v) approval of the Plan of Allocation for distributing the Net Settlement Fund.

This 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 and its annexed exhibits, submitted herewith.

## PRELIMINARY STATEMENT

Lead Plaintiffs and Lead Counsel have succeeded in obtaining an excellent recovery for the Settlement Class of $7.9 million in cash. The Settlement represents a very favorable result and provides an immediate and substantial recovery to the Settlement Class, which faced the significant risk of no or a much smaller recovery after protracted litigation. In consideration for this payment, the Settlement will finally resolve all Released Claims against the Remaining Defendants, the Tolled Defendants, and related third-parties.

The Settlement was reached only after extensive litigation and 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. Lead Counsel has significant experience in securities and other complex class action litigation, and has negotiated numerous substantial class action settlements throughout the country. It is Lead Counsel's informed opinion that the Settlement is an excellent result in light of the uncertainty and further substantial expense of pursuing these claims through trial and the appeals that would have followed. Moreover, Lead Plaintiffs, all sophisticated institutional investors, have closely monitored this litigation from the outset and recommend that the Settlement be approved. (*See* Lead Plaintiffs' Declarations, Exs. 2 - 5.)[4] It is respectfully submitted that the Settlement is fair, reasonable and adequate, and is in the best interests of the Settlement Class.

## OVERVIEW OF THE ACTION

Lead Plaintiffs are simultaneously submitting herewith the Johnson Declaration. The Johnson Declaration is an integral part of this submission and, for the sake of brevity, the court is respectfully referred to it for a detailed description of, *inter alia*, the history of the Action through the submission of the Settlement to the court; the nature of the claims asserted against the Remaining Defendants; the investigation 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.

The Settlement was reached at a point in which Lead Plaintiffs and Lead Counsel had a thorough understanding of the facts and challenges posed by the claims and defenses, and the factors that would impact a future recovery. Briefly, the proceedings to date have included:

[4] 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.

- 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.[5]

(Johnson Decl. ¶¶7-9, 27-47.)

In light of the substantial result and the positive reaction by the Settlement Class to date, Lead Plaintiffs respectfully ask this court to grant final approval of the Settlement, approve the Plan of Allocation, and finally certify the proposed Settlement Class.

[5] Mr. Meyer is a Fellow of the American College of Trial Lawyers and represents both plaintiffs and defendants in securities litigation, class actions and derivative suits, intellectual property litigation (including copyright, trademark and right of publicity lawsuits), attorneys' and accountants' professional liability lawsuits and claims involving breach of contract and commercial fraud. Among his distinctions, Mr. Meyer was recognized as the "Los Angeles Litigation – Securities Lawyer of the Year" by Best Lawyers for 2014. (Johnson Decl. ¶9, n.5.)

## ARGUMENT

### I. THE SETTLEMENT MERITS APPROVAL BY THE COURT

Public and judicial policy both strongly favor pretrial settlement of litigation; this policy is particularly compelling in class actions and other complex litigation. *See In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits.") (citation omitted); *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984) ("our judgment is informed by the strong judicial policy favoring settlement…"); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)[6] ("Particularly in class action suits, there is an overriding public interest in favor of settlement.") (citation omitted); *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1314 (S.D. Fla. 2005) ("there exists 'an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex'") (citation omitted). Public policy recognizes that class actions alleging securities violations are particularly well-suited for settlement. *See, e.g., Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 667 (M.D. Ala. 1988) (due to "the notable unpredictability of result…" and the length of such litigation, "securities fraud class actions readily lend themselves to settlement") (citation omitted).

The primary criteria for granting final approval to a class action settlement, under Fed. R. Civ. P. 23(e), is that the settlement be "fair, adequate and reasonable [and] . . . not the product of collusion between the parties." *Bennett*, 737 F.2d at 986-87 (internal quotation marks and citation omitted); *accord Cotton*, 559 F.2d at 1330; *Knight v. Ala.*, 469 F. Supp. 2d 1016, 1031 (N.D. Ala. 2006), *aff'd sub nom., United States v. Ala.*, 271 Fed. App'x. 896 (11th Cir. 2008); *Strube v. Am. Equity Inv. Life Ins. Co.*, 226 F.R.D. 688, 697 (M.D. Fla. 2005).

[6] Opinions of the Fifth Circuit issued prior to October 1, 1981 are binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209-11 (11th Cir. 1981) (en banc).

In *Bennett*, the Court of Appeals held that the following factors should be considered in evaluating a class action settlement:

> (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 litigation; (5) the substance and amount of opposition to the settlement; (6) the stage of proceedings at which the settlement was achieved.

737 F.2d at 986; (citation omitted) *see also In re CP Ships Ltd. Sec. Litig.*, 578 F.3d 1306, 1315 (11th Cir. 2009); *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1329 (S.D. Fla. 2001).

Approval, including application of the foregoing factors, "is committed to the sound discretion of the district court." *Oil & Gas Litig.*, 967 F.2d at 493; *accord In re HealthSouth Corp. Sec. Litig.*, 572 F.3d 854, 859 (11th Cir. 2009); *Bennett*, 737 F.2d at 986. Additionally, in evaluating a proposed settlement under these factors, the court "is entitled to rely upon the judgment of experienced counsel for the parties." *Canupp v. Sheldon*, No. 2:04-cv-260-FTM-99 DNF, 2009 WL 4042928, at *5 (M.D. Fla. Nov. 23, 2009) *aff'd, Canupp v. Liberty Behavioral Healthcare Corp*. 447 Fed. App'x. 976 (11th Cir. 2011) (quoting *Cotton*, 559 F.2d at 1330). Indeed, in reviewing a class action settlement under Rule 23(e), "the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Cotton*, 559 F.2d at 1330; *accord Strube*, 226 F.R.D. at 703.

### A. The Settlement Satisfies the Threshold Consideration of Being the Product of Good Faith, Arm's-Length Negotiations

A threshold consideration is whether a proposed settlement is the product of fraud or collusion between the parties. "In determining whether there was fraud or collusion, the court examines whether the settlement was achieved in good faith through arm's-length negotiations, whether it was the product of collusion between the parties and/or their attorneys, and whether there was any evidence of unethical behavior or want of skill or lack of zeal on the part of class counsel."

*Canupp*, 2009 WL 4042928, at *9 (citing *Bennett*, 737 F.2d at 987 n.9). Courts "presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered." William B. Rubenstein, Alba Conte and Herbert B. Newberg, 4 *Newberg on Class Actions* §11:51 (4th ed. 2010).

Here, no claim of fraud or collusion in the negotiation of the Settlement could be credibly asserted. The record demonstrates that the Settlement was the product of extensive, arm's-length negotiations – including several discussions between counsel that culminated in a lengthy in-person mediation session with Robert A. Meyer, a well-respected and highly experienced mediator. During this mediation, counsel for the Parties discussed the merits of the claims, including the evidence adduced to date, Defendants' defenses, and issues relating to damages. (Johnson Decl. ¶¶49-52.)

The settlement negotiation process here demonstrates that there is no issue of collusion. *See Holman v. Student Loan Xpress, Inc.*, No. 8:08-CV-305-t-23 map, 2009 WL 4015573, at *5 (M.D. Fla. Nov. 19, 2009) (finding "no apparent fraud or collusion" where a "settlement [was] the product of . . . arm's-length, 'protracted and contentious' negotiation with a mediator"); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1384 (S.D. Fla. 2007) (parties' use of an "experienced and well-respected mediator" supported the court's finding that the settlement was fair and not the product of collusion); *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga. 2001) (same).

### B. Application of the *Bennett* Factors Supports Approval of the Settlement

#### 1. The Significant Obstacles to Success at Trial Support Approval of the Settlement

The first *Bennett* factor is "the likelihood of success at trial," *Bennett*, 737 F.2d at 986. In assessing plaintiffs' likelihood of success at trial for purposes of reviewing a settlement, the court should not try the merits of the case but should only make a limited inquiry as to "whether the

possible rewards of continued litigation with its risks and costs are outweighed by the benefits of settlement." *Strube*, 226 F.R.D. at 697-98 (internal quotations and citations omitted); *see also Beavers v. Am. Cast Iron Pipe Co.*, 164 F. Supp. 2d 1290, 1298 (N.D. Ala. 2001); *Mashburn*, 684 F. Supp. at 670.

Although Lead Plaintiffs strongly believe that their claims against the Remaining Defendants are meritorious, there were significant obstacles to success at trial in this Action. For example: (i) as they argued at the motion to dismiss stage, Defendants would continue to argue 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 Securities Act claims to be actionable; (ii) with the narrowing of the claims to the Stock and Note Offerings, there are defenses concerning the standing of Plaintiffs, which would need to be rebutted; (iii) both the Underwriter Defendants and PwC would strenuously pursue due diligence defenses, which could immunize them from liability; and (iv) even if Lead Plaintiffs prevailed on liability issues, the Remaining Defendants would vigorously challenge loss causation as well as the impact of the PSLRA contribution bar from the Colonial I Settlement on damages, even if they are established at trial. (Johnson Decl. ¶¶53-61.)

***Liability***. The remaining claims in the case posed significant challenges at summary judgment and trial. For example, Lead Plaintiffs believed that they could establish that the misstatements and omissions concerning core aspects of Colonial's mortgage warehouse lending business ("MWLD") – including that Colonial's underwriting standards had materially deteriorated prior to the Offerings and that, as a result, its non-performing assets were underreported, its goodwill impaired, and additional defaults were looming – were false and material, making it impossible for

investors to adequately evaluate the risks of investing in Colonial's securities. Further, Lead Plaintiffs could have shown that the offering documents failed to disclose that, due to weaknesses in internal controls, Colonial's MWLD held a huge number of loans that were unmarketable because, for example, they were fictitious or foreclosed. However, the Remaining Defendants would undoubtedly continue to contend, as they did in their motions to dismiss, that they subjectively believed, or had a reasonable basis to subjectively believe, that the statements in the Offering Documents concerning the value of Colonial's goodwill and the adequacy of its loan loss reserves were true. How a jury would respond to testimony on this issue, including testimony that the alleged fraud was known only to a small cabal at Colonial and Taylor Bean & Whitaker Mortgage Corp. that took wide-reaching steps to hide it from everyone, was uncertain. This uncertainty is also a factor in connection with the Defendants' due diligence defenses. Both the Underwriters and PwC would likely argue that they conducted thorough, industry standard, investigations prior to the offerings but that others at Colonial and Taylor Bean essentially blocked them from discovering the alleged fraud. Due diligence is a complete defense to liability under Sections 11 and 12 of the Securities Act. Lastly, Defendants would likely pursue arguments challenging the Plaintiffs' standing to pursue claims for misstatements issued in conjunction with the 2008 Offerings on the basis of traceability. They would maintain that only plaintiff the Horace Moyer Living Trust bought directly in the Note Offering and the City of Worcester bought directly in the Stock Offering, however the City of Worcester had no damages and both claims are barred by the three year statute of repose. (Johnson Decl. ¶¶54-58.)

Overall, given the complicated nature of the claims and Defendants' arguments that the alleged fraud was hidden from everyone, there was a real risk that a jury could disregard the testimony of Lead Plaintiffs' witnesses or find for the Remaining Defendants and award no damages.

***Proof of Damages***. Lead Plaintiffs faced risks not only in establishing the liability of the Remaining Defendants, but also with respect to the calculation and proof of damages. The Parties strenuously disputed the amount of potential damages in this Action, as discussed below. As in any securities class action, proof of damages would have been a contested matter subject to conflicting expert testimony at trial and it was not possible to predict with any confidence precisely how a jury would resolve such a dispute. *See, e.g., Zuckerman v. Smart Choice Auto. Grp., Inc.*, No. 6:99-cv-237-ORL 28 KRS, 2001 WL 686879, at *10 (M.D. Fla. May 3, 2001) ("The determination of damages, like the determination of liability, is a complicated and uncertain process, typically involving conflicting expert opinions"); *Ressler v. Jacobson*, 822 F. Supp. 1551, 1554 (M.D. Fla. 1992) ("In the 'battle of experts,' it is impossible to predict with any certainty which arguments would find favor with the jury.").

For instance, although the Remaining Defendants would have the burden of proof, they maintained that most of the alleged stock price drops were unrelated to the alleged misconduct remaining in the case and instead would seek to establish that the stock price drops were caused by other unrelated Company specific information or market and industry factors related to the growing financial crisis. For instance, Defendants would undoubtedly have argued that the initial stock price drops on October 22, 2008 and January 27, 2009, associated with the largest alleged losses during the Class Period, were caused by the turmoil that beset both the banking industry and the broader economy during that time period, not disclosure of allegedly withheld information or a "materialization of the undisclosed risks," as maintained by Lead Plaintiffs. Defendants may argue that the claims are limited, at most, to the alleged disclosures in August 2009, when it was reported that federal agents had raided Colonial's and Taylor Bean's offices. Limiting the alleged disclosures to trading at the end of the Class Period would significantly decrease recoverable

damages. Estimates of recoverable damages on the Securities Act claims ranged from approximately $20 million to $300 million, depending upon the number of corrective disclosures established. Additionally, because of the Colonial I Settlement and the PSLRA contribution bar, any recovery at trial would be reduced either by the amount of the $10.5 million prior settlement, or the proportionate fault of the defendants that settled. The Remaining Defendants would likely argue throughout the trial that it was Colonial's officers and directors (who would in all likelihood not be at the trial to defend themselves) who should shoulder the blame for the alleged wrongdoing – potentially eliminating any additional recovery at trial. (Johnson Decl. ¶¶59-61.)

Overall, these loss causation and damages issues would no doubt be vigorously contested were the litigation to continue; involve a battle of the experts presenting complicated issues; and be decided by a jury, with the attendant risks of a lesser or no recovery.

Certain of these arguments are substantially similar to those raised in support of the Colonial I Settlement that was approved by this court. As it did in approving the Colonial I Settlement, the court should note that in light of these obstacles to recovery at trial, the certain recovery of $7.9 million represents an excellent result for the Settlement Class.

**2. The Settlement Amount Is Clearly Within the Range of Reasonableness**

"The second and third factors in the Eleventh Circuit's *Bennett* analysis call for the Court to determine 'the possible range of recovery' and then ascertain where within that range 'fair, adequate, and reasonable settlements lie.'" *Garst v. Franklin Life Ins. Co.*, No. 97-C-0074-S, 1999 U.S. Dist. LEXIS 22666, at *64 (N.D. Ala. June 25, 1999) (quoting *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 541 (S.D. Fla. 1988) (same), *aff'd*, 899 F.2d 21 (11th Cir. 1990)); *see also Sunbeam*, 176 F. Supp. 2d at 1331 ("[t]he second and third considerations of the *Bennett* test are easily combined") (citation omitted).

When compared to the risks of continued litigation, the proposed $7.9 million cash Settlement is a very favorable recovery under any circumstances and clearly falls within the range of reasonableness. This is especially true when combined with the Colonial I Settlement for a total of $18.4 million in cash. First, 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. Courts have generally approved other settlements in PSLRA cases that recover a comparable or far smaller percentage of maximum damages. *See, e.g., Strube*, 226 F.R.D. at 698 (approving settlement equal to 2% of estimated potential recovery); *In re Merrill Lynch Tyco Research Sec. Litig*., 249 F.R.D. 124, 135 (S.D.N.Y. 2008) (approving $4.9 million settlement equal to 3% of estimated damages and noting that the "estimated recovery of three percent of the total damages estimated by the plaintiffs, does not meaningfully diverge from the range of reasonableness for settlements of similar-sized securities class actions") (citation omitted); *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.") (citation omitted).

In light of these facts, the recovery here of $7.9 million in cash ($18.4 million combined) is well within the reasonable range of recovery and represents a very favorable result for the Settlement Class.

### 3. The Complexity, Expense and Likely Duration of Continued Litigation Support Approval of the Settlement

This Action has been challenging and complex, given the complicated facts and legal issues in the litigation. The Action involves not only the complex issues of law and fact associated with securities class actions generally, but the underlying allegations and defenses are intertwined with facts concerning the Company's credit risk management, its commercial and construction loan policies, its internal controls, accounting practices, and financial results. *See generally* Johnson Decl. Based on the evidence adduced so far and the issues involved, Lead Plaintiffs reasonably expect that continued litigation of the Action would involve a great amount of additional time and resources.

Lead Plaintiffs would need to consider an appeal of the dismissal of the claims to date; complete fact and expert discovery; brief additional motions before the court, including a contested class certification motion, summary judgments directed at numerous elements of the claims, *Daubert* motions, and *in limine* motions; and convince a jury that the Remaining Defendants had violated the securities laws and that this conduct caused their losses. Trial would involve the significant challenge of proving the required elements of the Securities Act claims, including that the alleged misstatements were materially false and misleading, rebutting the Remaining Defendants' due diligence defenses, and establishing loss causation and resulting damages. These efforts would require additional large expenditures of resources over several more years, after which the Settlement Class might obtain a result far less beneficial than the one provided by the Settlement.

Moreover, even if successful at trial, Lead Plaintiffs would face the post-judgment appeals, which were sure to follow and could have taken years to resolve. (Johnson Decl. ¶53.)

In contrast to the substantial expense and risk of litigating the claims through trial and the extended delay that would result from the trial itself, post-trial motions, and appeals, the Settlement provides a certain immediate payment of $7.9 million.

**4. The Reaction of Settlement Class Members to Date Supports Approval of the Settlement**

The reaction of class members to a proposed settlement is a significant factor to be considered and the absence of substantial objections "is excellent evidence of the settlement's fairness and adequacy." *Ressler*, 822 F. Supp. at 1556; *see also Access Now, Inc. v. Claire's Stores, Inc.*, No. 00-14017-CIV, 2002 WL 1162422, at *7 (S.D. Fla. May 7, 2002) ("The fact that no objections have been filed strongly favors approval of the settlement."); *Garst*, 1999 U.S. Dist. LEXIS 22666, at *71-72 ("small amount of opposition strongly supports approving the Settlement").

Thus far, the reaction of the Settlement Class to the Settlement has been very positive and supports approval of the proposed Settlement. The court-approved Claims Administrator began mailing copies of the Notice of Proposed Settlement with Remaining Defendants and Motion for Attorneys' Fees and Expenses ("Notice") to potential Settlement Class Members or their nominees on March 27, 2015. (*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 ¶8.) To date, the Notice has been mailed to 162,773 potential members of the Settlement Class. (*Id.* ¶¶5-9.) A Summary Notice of Proposed Settlement ("Summary Notice") was also published once in *Investor's Business Daily* and disseminated over *PR Newswire* on April 10, 2015, and the Notice and other related documents were

posted on the Claims Administrator's website, www.strategicclaims.net, and on the website of Lead Counsel, www.labaton.com. (Mailing Decl. ¶¶12-13, Johnson Decl. ¶13.)

The Notice informed Settlement Class Members of their right to exclude themselves from the Settlement Class and their right to object to any aspect of the Settlement, the Plan of Allocation and/or Lead Counsel's application for an award of attorneys' fees and expenses. (*See* Ex. A to Mailing Decl. ) The deadline for submitting objections and exclusion requests is May 28, 2015. As of the date of this Memorandum, ***no*** objection to the Settlement has been received. (Johnson Decl. ¶15.) Moreover, ***only one*** exclusion request has been received. (Mailing Decl. ¶14, Ex. C).

Should any objections and/or additional exclusion requests be received, they will be reported to the court and addressed by Lead Plaintiffs in their reply papers that will be filed on or before June 11, 2015.

**5. The Stage of the Proceedings Supports Approval of the Settlement**

The Settlement was reached only after Lead Plaintiffs filed a detailed consolidated complaint, and amended complaint, based on their comprehensive investigation and identification of more than 700 potential witnesses and contact with 80 potential witnesses with knowledge of the issues in this case. The Action also involved briefing two rounds of contentious motions to dismiss, vigorously opposing Defendants' motions for reconsideration, seeking to amend the consolidated complaint, negotiating the Colonial I Settlement, and participating in an in-person mediation with the Remaining Defendants before an experienced mediator. (Johnson Decl. ¶¶26-40.) At the time the Settlement was reached, the PSLRA discovery stay had been lifted and a scheduling order had been approved by the court. The parties agreed to commence discovery following the mediation held before Robert A. Meyer. *Id*. ¶39.

In weighing this *Bennett* factor, a court should focus on whether "Class Counsel had sufficient information to adequately evaluate the merits of the case and weigh the benefits against further litigation," and not the extent to which formal discovery was conducted. *Francisco v. Numismatic Guar. Corp.*, No. 06-61677-CIV, 2008 WL 649124, at *11 (S.D. Fla., Jan. 31, 2008). "[F]ormal discovery [is not] a necessary ticket to the bargaining table," *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981), and courts have rejected the notion that such discovery must take place. *See, e.g., Cotton*, 559 F.2d at 1332 (The fact that "very little *formal* discovery was conducted and that there is no voluminous record in the case . . . does not compel the conclusion that insufficient discovery was conducted.").

After the litigation efforts here, there can be no question that the Parties had sufficient information to assess the strengths and weaknesses of their claims and that each side "was well aware of the other side's position and the merits thereof." *Sunbeam*, 176 F. Supp. 2d at 1332. Accordingly, this factor supports the fairness and reasonableness of the Settlement.

### C. The Recommendations of Experienced Counsel and Court-Appointed Institutional Lead Plaintiffs Heavily Favor Approval of the Settlement

In determining whether the proposed Settlement is fair, adequate and reasonable, the court may rely on the judgment of counsel and, indeed, "should be hesitant to substitute its own judgment for that of counsel." *Cotton*, 559 F.2d at 1330; *accord Perez*, 501 F. Supp. 2d at 1380; *Strube*, 226 F.R.D. at 703.

Lead Counsel, which is highly experienced in class action litigation of this type and is very well informed about the strengths and weaknesses of the case, strongly endorses the Settlement and believes that it represents an excellent recovery on behalf of the Settlement Class. (Johnson Decl. ¶71.)

Moreover, Lead Plaintiffs, who are sophisticated institutional investors, closely supervised this litigation and have endorsed the Settlement as fair, reasonable and adequate to the Settlement Class. (*See* Lead Plaintiffs' Declarations, Exs. 2 – 5.) The endorsement of a settlement by a PSLRA lead plaintiff that has played an active role in the case provides additional support for the fairness of the settlement. *See, e.g., In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004).

## II. THE COURT SHOULD FINALLY CERTIFY THE SETTLEMENT CLASS

In presenting the proposed Settlement to the court for preliminary approval, Lead Plaintiffs requested that the court preliminarily certify the Settlement Class so that notice of the proposed Settlement, the final approval hearing and the rights of Settlement Class Members to request exclusion, object or submit proofs of claim could be issued. In its Preliminary Approval Order, entered on March 13, 2015, this court preliminarily certified the Settlement Class, which is the same as the class certified in the Colonial I Settlement. Nothing has changed to alter the propriety of the court's certification and, for all the reasons stated in Lead Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Approval of Settlement with Remaining Defendants (ECF No. 549) incorporated herein by reference, Lead Plaintiffs now request that the court grant final certification of the Settlement Class for purposes of carrying out the Settlement pursuant to Fed. R. Civ. P. 23(a) and (b)(3), appoint Lead Plaintiffs and additional named plaintiffs The Horace F. Moyer and Joan M. Moyer Living Trust and City of Worcester as Class Representatives and appoint Lead Counsel as Class Counsel for the Settlement Class.

## III. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

The standard for approval of a plan of allocation is the same as the standard for approving a settlement: whether it is "fair, adequate and reasonable and is not the product of collusion between

the parties." *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982) (citation omitted). Here, the Plan of Allocation, fully described in the Notice, should be approved as it provides a fair and equitable method of dividing the Net Settlement Fund among Settlement Class Members who submit timely and valid Proof of Claim forms ("Authorized Claimants"). (Johnson Decl. ¶¶64-67.) Settlement Class Members were informed that they have an opportunity to object to the Plan of Allocation no later than May 28, 2015, and to date, no objections have been filed. (*Id*. ¶66.)

The objective of a plan of allocation is to provide an equitable basis upon which to distribute a settlement fund among eligible class members. Here, the Plan of Allocation was formulated with the assistance of Lead Plaintiffs' consulting damages expert, and was developed with a focus on providing a fair and reasonable allocation of the Net Settlement Fund based upon the type of security purchased, information that was in the market at the time of a claimant's purchase, statutory methods for calculating damages, and the strengths and weaknesses of the various claims. For instance, given the dismissal of the Exchange Act claims, the recovery for purchases of common stock not in connection with the Stock Offering have been discounted. The analysis underlying the Plan also included studying the market reaction to the disclosures by the Company and calculating the amount of artificial inflation present in Colonial Securities throughout the Class Period that was allegedly attributable to the wrongdoing. (Johnson Decl. ¶65.)

As explained in the Notice, each Authorized Claimant is entitled to recover his or her Recognized Loss calculated in accordance with the Plan of Allocation. If the total Recognized Losses exceed the Net Settlement Fund, as is typical, Authorized Claimants will be entitled to receive a *pro rata* share of the Net Settlement Fund, *i.e*. the percentage of their Recognized Loss determined by the ratio of the total Recognized Losses of all Authorized Claimants to the value of

the Net Settlement Fund. Calculation of a Recognized Loss will depend upon several factors, including what type and quantity of securities were purchased, when they were purchased during the Class Period, and/or when they were sold. (Ex. 6-A at 13-19.)

Accordingly, Lead Plaintiffs and Lead Counsel submit that the Plan of Allocation is fair, adequate and reasonable and should be approved by the court.

## CONCLUSION

For all the foregoing reasons, Lead Plaintiffs respectfully request that the court, *inter alia*: (i) approve the proposed Settlement as fair, reasonable and adequate and enter the proposed Judgment; (ii) grant final certification of the Settlement Class, and (iii) enter the proposed Order Approving the Plan of Allocation.[7]

DATED: May 14, 2015

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[7] Proposed orders will be submitted with Lead Plaintiffs' reply papers, after the deadlines for seeking exclusion and objecting have 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*
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