

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

IN RE COLONIAL BANCGROUP, INC. ERISA LITIGATION	CIVIL ACTION NOS. 2:09-cv-792-MHT <u>CLASS ACTION</u>
--	--

**AMENDED CONSOLIDATED COMPLAINT FOR BREACHES OF FIDUCIARY DUTY
UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT**

I. INTRODUCTION

1. Plaintiffs Lora McKay, Leonor M. Torregroza, Linda Shockley, and Johnny Pompa (“Plaintiffs”) bring this action against the fiduciaries of the Colonial BancGroup 401(k) Plan (the “Plan”) on behalf of the Plan under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”).

2. ERISA is one of the most important safeguards of personal financial security and planning. Among other things, ERISA protects employer-sponsored private retirement plans, including defined contribution plans, which held almost \$3.6 trillion in 2009 alone.

3. When substantial losses occur at or near retirement, the long-term effect wreaks havoc, financially and emotionally, on individuals and their families since retirement typically occurs at an age where employees do not have time to make up their losses.

4. To protect the interests of employees and their beneficiaries in employer retirement funds, Congress requires companies to appoint fiduciaries who can be held

accountable for the selection and retention of investment options made available to participants. ERISA fiduciaries are not only entrusted with duties of care and loyalty, but also with the duty to provide truthful information to participants in retirement funds and to affirmatively disclose material information that plan participants need to know to adequately protect their investments.

5. This action presents a case study in violation of these fiduciary principles. The Colonial BancGroup, Inc. (“Colonial” or the “Company”) implemented a 401(k) plan for the benefit of its employees that included an option for investing in Company stock. As alleged herein, Colonial’s subsidiary, Colonial Bank (the “Bank”), engaged in aggressive and risky lending, underwriting, and accounting practices, characterized by an increasing lack of loan and underwriting documentation, as well as disregard for market conditions and clients’ ability to repay massive loans. Upper management at Colonial, including Plan fiduciaries, were well aware of these practices, and yet took no action to correct them, and, to the contrary, routinely overrode lower-level decisions denying dubious large residential and commercial loans and ignored employees who questioned the financial viability of lending and underwriting decisions.

6. All the while, Colonial’s upper management—including Defendants—encouraged employees to heavily invest in Company stock as part of their 401(k) portfolios. When the housing market burst in 2007 and Colonial’s finances crumbled and stock price plummeted, the chorus of Company encouragement to buy Colonial stock persisted. Defendants continued to tell employees, including Plan participants, that the fundamentals of the Company were sound and Colonial remained a prudent investment.

7. After the Troubled Asset Relief Program (“TARP”) fund was created in November 2008, Colonial management, including Defendants, told employees and the investing

public that TARP money would become available, even though the government had imposed a monumental precondition of raising \$300 million in private equity.

8. In late January 2009, after the Company disclosed the TARP precondition, Defendants told employees, including Plan participants, that the Company would receive TARP funds soon, and that participants should continue to invest in Colonial stock.

9. Indeed, as numerous confidential witnesses have told Plaintiffs' counsel, Colonial held employee meetings and disseminated internet postings throughout the spring and summer of 2009, telling Plan participants that everything was "hunky dory" at Colonial and that Plan participants should continue to invest in Colonial stock. This message persisted until Friday, August 14, 2009, when the Alabama State Banking Department ("Alabama Banking Dept.") physically took control of the Bank's various offices and locked its doors, appointing the Federal Deposit Insurance Corporation ("FDIC") as receiver. Less than two weeks later, on August 25, 2009, Colonial declared bankruptcy.

10. Colonial's collapse was devastating to the Plan. Colonial common stock—which traded at around \$24 throughout April 2007—now trades for a penny on the pink sheets, a staggering decline of nearly 99.9%. This ERISA action seeks to hold accountable the various individuals at Colonial who were entrusted with determining whether Plan investment in Colonial stock was prudent and disclosing the full risks of that investment to Plan participants and beneficiaries.

II. NATURE OF THE ACTION

11. This is a class action brought on behalf of the Plan, pursuant to ERISA §§ 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a)(2) and (a)(3), against the fiduciaries of the Plan for violations of ERISA.

12. The Plan is a retirement plan sponsored by Colonial.

13. Plaintiffs' claims arise from the failure of Defendants, who are fiduciaries of the Plan, to act solely in the interest of the participants and beneficiaries of the Plan, and to exercise the required skill, care, prudence, and diligence in administering the Plan and the Plan's assets during the period April 18, 2007 to August 25, 2009 (the "Class Period").

14. Defendants allowed the imprudent investment of the Plan's assets in Colonial common stock throughout the Class Period, even though they knew or should have known that the Company was being seriously mismanaged and faced dire financial circumstances as a result. Specifically, Defendants knew or should have known of a variety of improper business practices of the Bank, a wholly owned subsidiary of Colonial. These improper business practices included, among other things, that the Bank: (a) continuously lowered underwriting standards; (b) engaged in highly risky mortgage warehouse lending, which overexposed the Company to the subprime market; (c) invested in unduly risky assets, including securities backed by subprime mortgages; (d) became over-concentrated in bloated housing markets that were particularly susceptible to the housing downturn; (e) lacked adequate internal and financial controls; (f) mismanaged risk and liquidity; (g) engaged in improper accounting practices; (h) failed to maintain sufficient capital; and (i) did not adequately reserve for loan losses, all of which led to an FDIC Cease and Desist Order and the eventual collapse of Colonial and its stock. Furthermore, Defendants failed to provide complete and accurate information regarding the true risks associated with the Bank's mortgage loan origination, mortgage warehouse lending, and investment practices, and issued false, misleading, and incomplete statements regarding the Company's net income and financial results. This improper conduct led to the artificial inflation of the Company's stock price, and the purchase by the Plan of Colonial stock at artificially inflated prices, contrary to Defendants' fiduciary duties.

15. Therefore, Plaintiffs allege in Count I that Defendants who were responsible for the investment of Plan assets breached their fiduciary duties to the Plan's participants in violation of ERISA by failing to prudently and loyally manage the Plan's investment in Colonial stock. In Count II, Plaintiffs allege that Defendants who were responsible for the selection, monitoring, and removal of the Plan's other fiduciaries failed to properly monitor the performance of their fiduciary appointees and remove and replace those whose performance was inadequate, as well as provide them with the necessary information to fulfill their fiduciary duties. In Count III, Plaintiffs allege that Defendants breached their duty to inform the Plan's participants by failing to provide complete and accurate information regarding the soundness of Colonial stock and the prudence of investing and holding retirement contributions in Colonial equity. Finally, in Count IV, Plaintiffs allege that Defendants breached their duties and responsibilities as co-fiduciaries by failing to prevent breaches by other fiduciaries of their duties of prudent and loyal management, adequate monitoring, and complete and accurate communications to co-fiduciaries and Plan participants and beneficiaries.

16. As is more fully explained below, during the Class Period, Defendants with responsibility for the Plan's investments imprudently permitted the Plan to hold and acquire Colonial stock despite the Company's serious mismanagement, improper business practices, and dire financial circumstances. Based on publicly available information for the Plan, Defendants' breaches have caused an estimated principal loss to the Plan of over \$50 million of retirement savings.

17. This action is brought on behalf of the Plan and seeks to recover losses to the Plan for which Defendants are personally liable pursuant to ERISA §§ 409 and 502(a)(2), 29 U.S.C. §§ 1109, and 1132(a)(2). In addition, under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3),

Plaintiffs seek other equitable relief from Defendants, including, without limitation, injunctive relief and, as available under applicable law, constructive trust, restitution, declaratory relief, and other monetary relief.

18. ERISA §§ 409(a) and 502(a)(2) authorize participants such as Plaintiffs to sue in a representative capacity for losses suffered by the Plan as a result of breaches of fiduciary duty. Pursuant to that authority, Plaintiffs bring this action as a class action under Fed. R. Civ. P. 23 on behalf of all participants and beneficiaries of the Plan whose Plan accounts were invested in Colonial stock during the Class Period.

19. In connection with this complaint, Plaintiffs' counsel has reviewed public filings and information pertaining to the allegations of the complaint, including: the annual reports (Form 11-K) filed on behalf of the Plan; a review of the Forms 5500 filed by the Plan with the U.S. Department of Labor (the "DOL"), United States Securities and Exchange Commission ("SEC") filings by Colonial including the Company's proxy statements (Form DEF14A), annual reports (Form 10-K), quarterly reports (Form 10-Q), current reports (Form 8-K); interviews with participants of the Plan; and a review of available documents governing the operations of the Plan, including the limited selection of documents produced by Defendants pursuant to an agreement between the parties.

20. Plaintiffs believe that substantial additional evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery. However, because such additional information is at this juncture solely in the possession of Defendants and third parties, certain of Plaintiffs' allegations are made by necessity on information and belief. At such time as Plaintiffs have had the opportunity to conduct discovery, Plaintiffs will, to the extent

necessary and appropriate, amend this complaint or, if required, will seek leave to amend to add additional facts that further support Plaintiffs' claims.

III. JURISDICTION AND VENUE

21. **Subject Matter Jurisdiction.** This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

22. **Personal Jurisdiction.** ERISA provides for nationwide service of process. ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2). All Defendants are either residents of the United States or subject to service in the United States. Therefore, this Court has personal jurisdiction over them. This Court also has personal jurisdiction over Defendants pursuant to Fed. R. Civ. P. 4(k)(1)(A) because they would all be subject to the jurisdiction of a court of general jurisdiction in the State of Alabama.

23. **Venue.** Venue is proper in this district pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the Plan is administered in this district, some or all of the fiduciary breaches for which relief is sought occurred in this district, and Colonial has its principal place of business in this district.

IV. PARTIES AND THIRD PARTIES

A. Plaintiffs

24. Plaintiff Lora McKay is currently a resident of Zephyr Cove, Nevada and a former employee of the Company. She was a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), held Colonial shares in the Plan during the Class Period, and suffered a loss in her Plan account as a result.

25. Plaintiff Leonor M. Torregroza is currently a resident of West Palm Beach, Florida and a former employee of the Company. She was a participant in the Plan within the

meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), held Colonial shares in the Plan during the Class Period, and suffered a loss in her Plan account as a result.

26. Plaintiff Linda Shockley is currently a resident of Madison County, Alabama and a former employee of the Company. She was a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), held Colonial shares in the Plan during the Class Period, and suffered a loss in her Plan account as a result.

27. Plaintiff Johnny Pompa is currently a resident of Dallas, Texas and a former employee of the Company. He was a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), held Colonial shares in the Plan during the Class Period, and suffered a loss in his Plan account as a result.

B. The Colonial BancGroup, Inc.

28. On August 14, 2009, the Alabama Banking Dept. closed the Bank and appointed the FDIC receiver. Subsequently, the FDIC entered into a purchase and assumption agreement with Branch Banking and Trust Company (“BB&T”) to assume all deposits of the Bank.

29. On August 25, 2009, Colonial filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code. The FDIC and a group of Colonial creditors petitioned the bankruptcy court to convert Colonial’s bankruptcy from a Chapter 11 reorganization to a Chapter 7 liquidation on November 5, 2009, and December 8, 2009, respectively. *See* Motion of the Federal Deposit Insurance Corporation, as Receiver for Colonial Bank, Montgomery, Alabama, for an Order (a) to Require Cure of Deficiencies Under 11 U.S.C. § 365(o) or (b) Converting Debtor’s Bankruptcy Case to a Liquidation Under Chapter 7 of the Bankruptcy Code, *In re The Colonial BancGroup, Inc.*, No. 09-32303 (Bankr. M.D. Ala. Nov. 5, 2009) [Dkt. No. 257]; Motion of the Require [*sic*] Conversion of Case to a Chapter 7 Case and for the Appointment of a Trustee, Filed by Charles Malcolm Holland III, et al., *In re The Colonial BancGroup, Inc.*, No.

09-32303 (Bankr. M.D. Ala. Dec. 8, 2009) [Dkt. No. 330]. Neither Colonial nor the Bank are named defendants in this action, and Plaintiffs are not asserting claims against or seeking relief from Colonial or the Bank through this complaint.

30. Colonial was a financial holding company incorporated in Delaware and headquartered in Montgomery, Alabama. The principal activity of Colonial was to supervise and coordinate the business of its subsidiaries and to provide them with capital and services. Before the Bank failed and the Company filed for Chapter 11 protection, the Company derived the majority of its income from dividends received from the Bank. As of December 31, 2008, the Bank accounted for approximately 99.3% of Colonial's consolidated assets. Colonial Annual Report, Form 10-K, Dec. 31, 2008 ("2008 Form 10-K"), at 1.

31. The Bank conducted a general commercial banking business and offered a variety of demand, savings, and time deposit products as well as extensions of credit through personal, commercial, and mortgage loans within each of its market areas. The Bank also provided wealth management services, electronic banking services, and credit card services. The Bank's subsidiaries, Colonial Investment Services, Inc. and Colonial Investment Services of Florida, Georgia, Nevada and Tennessee, also offered various insurance products and annuities for sale to the public.

C. Defendants

32. Defendants are identified below. All Defendants were fiduciaries of the Plan within the meaning of ERISA, as is explained below in Section V ("Defendants' Fiduciary Status"), and all of them breached their fiduciary duties as set forth in Section X ("Causes of Action").

33. **Director Defendants.** As explained in more detail below, members of the Colonial Board of Directors (the "Board"), some of whom were also members of the Bank's

Board of Directors (the “Bank Board”), had certain responsibilities with respect to the Plan, including appointment and oversight responsibilities. Defendants identified in this paragraph are referred to as the “Director Defendants.” The Director Defendants during the Class Period were as follows:

1. **Defendant Lewis E. Beville** has served as a Director of the Company since 1997. Effective June 3, 2009, Defendant Beville was appointed the Chief Executive Officer and President of the Company and the Bank;
2. **Defendant Augustus K. Clements, III** has served as a Director of the Company since 1997 and is a Director of the Bank;
3. **Defendant Robert S. Craft** has served as a Director of the Company since 1992;
4. **Defendant Patrick F. Dye** has served as a Director of the Company since 1981;
5. **Defendant Hubert L. Harris, Jr.** has served as a Director of the Company since 2004;
6. **Defendant Clinton O. Holdbrooks** has served as a Director of the Company since 1986. Defendant Holdbrooks was also appointed to the Bank Board in June 2009;
7. **Defendant Deborah L. Linden** served as a Director of the Company from 2006 until her resignation from the Board on November 25, 2008. Defendant Linden also serves as member of the Bank’s Regional Board of Directors for the Central Florida Region;
8. **Defendant Robert E. Lowder** served as a Director of the Company from 1981 until his retirement effective June 3, 2009. Defendant Lowder also served as Chairman of the Board and was the Company’s Chief Executive Officer and President until his retirement. Defendant Lowder also served as the Chairman of the Bank Board and was the Bank’s Chief Executive Officer and President until his retirement;
9. **Defendant John Ed Mathison** has served as a Director of the Company since 1987. Defendant Mathison was also appointed to the Bank Board in June 2009;
10. **Defendant Milton E. McGregor** has served as a Director of the Company since 1983;
11. **Defendant Joseph D. Mussafer** has served as a Director of the Company since 1981;

12. **Defendant William E. Powell, III** has served as a Director of the Company since 1987. Defendant Powell also serves as a Director of the Bank;
13. **Defendant James W. Rane** has served as a Director of the Company since 1997;
14. **Defendant Simuel S. Sippial, Jr.** has served as a Director of the Company since 1997 and was appointed as Chairman of the Board effective June 3, 2009. Defendant Sippial also serves as a Director of the Bank and was appointed as Chairman of the Bank's Board effective June 3, 2009; and
15. **Defendant Edward V. Welch** served as a Director of the Company from 1981 until his mandatory retirement from the Board effective April 15, 2009.

34. **Investment Committee Defendants.** As explained in more detail below, the Investment Committee had certain responsibilities with respect to the Plan, including promulgating the Plan's investment policies and directing the Trustee in selecting the underlying investments for the Plan. The Colonial BancGroup 401(k) Plan (as amended and restated effective January 1, 2002), January 2008 (the "Plan Document"), ERISA 0014-0113 at ERISA 0096-0097. The Investment Committee and its members were therefore fiduciaries of the Plan.

35. Based on a review of minutes produced by Defendants and conversations with defense counsel, upon information and belief, during the Class Period the Investment Committee had the same membership as the Administrative Committee and the Benefits Administration and Investment Committee. Accordingly, the persons identified below are also alleged to be members of the Administrative Committee and the Benefits Administration and Investment Committee. In the event that discovery reveals that the membership of these three committees was not the same, Plaintiffs will seek leave to amend accordingly. Defendants identified in this paragraph are referred to as the "Investment Committee Defendants." On information and belief, the Investment Committee Defendants during the Class Period were as follows:

1. **Defendant R. Thomas Burge** served as Executive Vice President and Chief Information Officer at Colonial during the Class Period and was a committee member from the second quarter of 2008 through the end of the Class Period;

2. **Defendant Michelle M. Condon** served as Executive Vice President, Special Projects during the Class Period and was a committee member from the beginning of the Class Period until April 2009;
3. **Defendant Kelli Gant** was a committee member from April 2009 through the end of the Class Period;
4. **Defendant T. Brent Hicks** has served as Chief Accounting Officer and Senior Vice President at Colonial since March 2006 and was a committee member throughout the Class Period;
5. **Defendant Patti G. Hill** served as Senior Executive Vice President and Chief Operating Officer at Colonial and the Bank from 2004 until August 25, 2009, and was a committee member throughout the Class Period;
6. **Defendant Kamal S. Hosein** served as Senior Vice President and Treasurer at Colonial during the Class Period and was a committee member throughout the Class Period;
7. **Defendant Sarah H. Moore** has served as Senior Executive Vice President and Chief Financial Officer at Colonial and the Bank since July 2005 and was a committee member throughout the Class Period;
8. **Defendant Angie S. Parker** has served as Chief Human Resources Officer at Colonial and the Bank since May 19, 2009, and was a committee member from May 2009 through the end of the Class Period;
9. **Defendant Harlan C. Parrish** has served as Senior Executive Vice President - Retail Banking and Lines of Business Director at Colonial and the Bank since February 24, 2009, and was a committee member from April 2009 through the end of the Class Period;
10. **Defendant Rudi Thompson** served as Vice President Human Resources at the Bank during the Class Period and was a committee member from the beginning of the Class Period until May 2009; and
11. **Defendant Andrew Wilson** served as Compensation and Benefits Director during the Class Period and was a committee member from the beginning of the Class Period until April 2009.

36. **Administrative Committee Defendants.** As explained in more detail below, the

Plan assigned certain fiduciary responsibilities and duties to the Administrative Committee.

Until April 15, 2009, the Administrative Committee was the Plan Administrator of the Plan

within the meaning of ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A), and had full authority and

power to administer and construe the Plan. Plan Document at ERISA 0093-0094; *see also* Resolution of the Board of Directors of the Colonial BancGroup, Inc. Delegating Authority to the Benefits Administration and Investment Committee, April 15, 2009 (the “April 2009 Board Resolution”), ERISA 0227-28 (establishing the Benefits Administration and Investment Committee and appointing it Plan Administrator). The Administrative Committee and its members were therefore fiduciaries of the Plan. Defendants identified in this paragraph are referred to as the “Administrative Committee Defendants.”

37. Based on conversations with defense counsel, upon information and belief, during the Class Period the Administrative Committee had the same membership as the Investment Committee and the Benefits Administration and Investment Committee. Consequently, the persons identified in paragraph 35 are also alleged to be members of the Administrative Committee. In the event that discovery reveals that the membership of these committees was not the same, Plaintiffs will seek leave to amend accordingly.

38. **Benefits Administration and Investment Committee Defendants.** As explained in more detail below, the Director Defendants delegated certain fiduciary responsibilities and duties to the members of the Benefits Administration and Investment Committee (the “Benefits Committee”). For at least part of the Class Period, the Benefits Committee was the Plan Administrator of the Plan within the meaning of ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A), and had full authority and power to administer and construe the Plan. April 2009 Board Resolution at ERISA 00227-28. On information and belief, the Benefits Committee replaced the Investment Committee and Administrative Committee on April 15, 2009, per the April 2009 Board Resolution. Thus, the Benefits Committee also had certain fiduciary responsibilities and duties with respect to the Plan’s investment policies. The Benefits

Committee and its members were therefore fiduciaries of the Plan. Defendants identified in this paragraph are referred to as the “Benefits Committee Defendants.”

39. Based on conversations with counsel, upon information and belief, during the Class Period the Benefits Committee had the same membership as the Investment Committee and the Administrative Committee. Consequently, the persons identified in paragraph 35 are also alleged to be members of the Benefits Committee. In the event that discovery reveals that the membership of these committees was not the same, Plaintiffs will seek leave to amend accordingly.

V. DEFENDANTS’ FIDUCIARY STATUS

A. Types of ERISA Fiduciary Status

40. **Named Fiduciaries.** ERISA requires every plan to have one or more “named fiduciaries.” ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). The person named as the “administrator” in the plan instrument is automatically a named fiduciary, and in the absence of such a designation, the sponsor is the administrator. ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A).

41. ***De Facto* or Functional Fiduciaries.** ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under § 402(a)(1), but also any other persons who in fact perform fiduciary functions. *See* ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i). Such fiduciaries are referred to herein as “*de facto*” or “functional” fiduciaries. Thus, a person is a fiduciary to the extent “(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or

responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.” *Id.*

42. Each Defendant was a fiduciary with respect to the Plan and owed fiduciary duties to the Plan and the participants in the manner and to the extent set forth in the Plan’s governing instruments, under ERISA, and through their conduct.

43. As fiduciaries, Defendants were required by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), to manage and administer the Plan and the Plan’s investments solely in the interest of the Plan’s participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

44. Plaintiffs do not allege that each Defendant was a fiduciary with respect to all aspects of the Plan’s management and administration. Rather, as set forth below, Defendants were fiduciaries to the extent of the fiduciary discretion and authority assigned to and/or exercised by each of them, and the claims against each Defendant are based on such specific discretion and authority.

45. Instead of delegating all fiduciary responsibility for the Plan to external service providers, on information and belief, Colonial chose to delegate its responsibility regarding the administration of the Plan initially to the Administrative Committee and then to the Benefits Committee. In addition, Colonial chose to assign its duty to appoint and remove fiduciaries to the Board.

46. ERISA permits fiduciary functions to be delegated to insiders without an automatic violation of the rules against prohibited transactions. ERISA § 408(c)(3), 29 U.S.C. §

1108(c)(3). However, insider fiduciaries, like external fiduciaries, must act solely in the interest of participants and beneficiaries, not in the interest of the plan sponsor.

B. The Director Defendants' Fiduciary Status Under the Plan

47. During the Class Period, the Director Defendants were named fiduciaries of the Plan and appointed the members of the Administrative Committee, the Investment Committee, and the Benefits Committee. Plan Document at ERISA 0035, 0093, 0096; April 2009 Board Resolution at ERISA 00227 (appointing members to the Benefits Committee).

48. Pursuant to the Plan Document, the Board had the following duties and responsibilities:

1. to appoint the members of the Administrative and Investment Committees and to monitor each of their performances;
2. to communicate such information to the Administrative and Investment Committees as each needs for the proper performance of its duties;
3. to provide channels and mechanisms through which the Administrative Committee can communicate with Participants and Beneficiaries; and
4. to terminate the Plan.

Plan Document at ERISA 0097-0098.

49. In addition, consistent with its appointment and monitoring authority, the Board had “the right to remove any member of the Administrative Committee at any time.” Plan Document at ERISA 0093. The Board also had the duty to appoint and revoke the appointment of members of the Benefits Committee. April 2009 Board Resolution at ERISA ERISA 00227.

50. Consequently, in light of the foregoing duties, responsibilities, and actions, the Director Defendants were both named fiduciaries of the Plan pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), and *de facto* fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period in that they exercised discretionary authority or

discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

C. The Investment Committee Defendants' Fiduciary Status Under the Plan

51. Under the Plan Document, the Investment Committee Defendants were the "Named Fiduciary to act on behalf of the Controlling Company to establish and carry out a funding policy consistent with the Plan objectives and with the requirements of any applicable law." Plan Document at ERISA 0096; *see also* Plan Document at ERISA 0035 (defining "Named Fiduciary" to include the Investment Committee).

52. The Investment Committee Defendants were responsible for promulgating the Plan's investment policies, selecting the underlying investments for the Plan, and directing the Trustee with regard to the investment of Plan assets. Plan Document at ERISA 0096-0097; *see also* The Colonial BancGroup 401(k) Plan Summary Plan Description 2003, January 1, 2002 ("2003 SPD"), ERISA 0284-0337 at ERISA 0290, 0301; The Colonial BancGroup 401(k) Plan Summary, July 27, 2009 ("2009 SPD"), ERISA 0248-F-0283-F at ERISA 0255-F.

53. In addition to selecting investment options, the Investment Committee was responsible for monitoring the performance of the Plan investment funds, ensuring that the options were prudently managed in keeping with ERISA's fiduciary duties, removing fund options as necessary to protect the Plan, and with regard to all of this activity, directing the Plan Trustee accordingly. Plan Document at ERISA 0065.

54. Consistent with this authority, the Plan expressly states that the Investment Committee was responsible for carrying out the Company's responsibility and authority with respect to the following:

1. to appoint one or more persons to serve as investment manager with respect to all or part of the Plan assets, including assets maintained under separate accounts of an insurance company;
2. to allocate the responsibility and authority being carried out by the Investment Committee among the members of the Committee;
3. to take any action appropriate to ensure that the Plan assets are invested for the exclusive purpose of providing benefits to Participants and their Beneficiaries in accordance with the Plan and defraying reasonable expenses of administering the Plan, subject to the requirements of any applicable law; and
4. to employ one or more persons to render advice with respect to any responsibility or authority being carried out by the Investment Committee. To the extent that the costs for such assistants and advisors are not paid by the Controlling Company, they shall be paid at the direction of the Investment Committee from the Trust Fund as an expense of the Trust Fund.

Plan Document at ERISA 0096-0097.

55. The Plan Investment Policy further details the Investment Committee's duties and responsibilities with respect to the selection, monitoring, evaluation, and removal of Plan investment options. As set forth in the Investment Policy:

The Colonial BancGroup 401(k) Plan Administrative and Investment Committee ("Investment Committee") is responsible for overseeing and monitoring the investment options of the 401(k) Plan. They will generally be responsible for:

- A. Promulgating the 401(k) Plan's Investment Policy ("Policy")
- B. Selection the Funds available under the 401(k) Plan
- C. Reviewing the funds for compliance with the Policy
- D. Making revisions to the Policy to reflect changing conditions within the 401(k) Plan, the investment environment or to make it more effective.

Investment Policy at ERISA 0235.

56. The Investment Policy further provides:

The assets of the 401(k) Plan will be administered in a manner consistent with the generally accepted standards of fiduciary responsibility. The safeguards, which would guide a prudent man, will be observed. All transactions undertaken on behalf of the 401(k) Plan will be for the sole benefit of the participants of the 401(k) Plan.

Id. at ERISA 0239.

57. Accordingly, the Investment Committee had the authority and responsibility to halt further investments in Colonial stock, require that Plan participants transfer their investments held in the Company Stock Fund to another Plan investment option, and the authority and responsibility to liquidate those investments, once it became imprudent to remain invested in Colonial stock or in the Company Stock Fund to the extent that it was comprised of Colonial stock.

58. Consequently, in light of the foregoing duties, responsibilities, and actions, the Investment Committee Defendants were both named fiduciaries of the Plan pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), and *de facto* fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period in that they exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

D. The Administrative Committee Defendants' Fiduciary Status Under the Plan

59. Under the Plan Document, the Administrative Committee Defendants were named fiduciaries of the Plan and served as the Plan Administrator for at least part of the Class Period. Plan Document at ERISA 0022, 0035, 0098. Per the Plan Document, to fulfill its duties as the "administrator," the Administrative Committee has the following duties and responsibilities:

- (a) to construe the Plan and to determine all questions that shall arise thereunder;
- (b) to have all powers elsewhere herein conferred upon it;
- (c) to decide all questions relating to the eligibility of Employees to participate in the benefits of the Plan;
- (d) to determine the benefits of the Plan to which any Participant or Beneficiary may be entitled;

- (e) to maintain and retain records relating to Participants and Beneficiaries;
- (f) to prepare and furnish to Participants all information required under federal law or provisions of the Plan to be furnished to them;
- (g) to prepare and furnish to the Trustee sufficient employee data and the amount of Contributions received from all sources so that the Trustee may maintain separate accounts for Participants and Beneficiaries and make required payments of benefits;
- (h) to prepare and file or publish with the Secretary of Labor, the Secretary of the Treasury, their delegates and all other appropriate government officials all reports and other information required under law to be so filed or published;
- (i) to provide directions to the Trustee with respect to methods of benefit payment, and all other matters where called for in the Plan or requested by the Trustee;
- (j) to engage assistants and professional advisers;
- (k) to arrange for fiduciary bonding;
- (l) to provide procedures for determination of claims for benefits;
- (m) to designate, from time to time, the Trustee;
- (n) to amend the Plan at any time and from time to time as provided for in Article XIII; and
- (o) to delegate any recordkeeping or other administrative duties hereunder to another person or third-party; all as further set forth herein.

Plan Document at ERISA 0093-0094.

60. Therefore, in order to comply with ERISA, the Administrative Committee exercised responsibility for communicating with participants regarding the Plan in a plan-wide, uniform, mandatory manner by providing participants with information and materials required by ERISA. *See, e.g.*, ERISA § 101(a)(1), 29 U.S.C. § 1101(a)(1) (requiring the plan administrator to furnish to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan a summary plan description).

61. Consequently, in light of the foregoing duties, responsibilities, and actions, the Administrative Committee Defendants were both named fiduciaries of the Plan pursuant to

ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), and *de facto* fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period in that they exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

E. The Benefits Committee Defendants' Fiduciary Status Under the Plan

62. Effective April 15, 2009, the Benefits Committee served as the Plan Administrator. April 2009 Board Resolution at ERISA 0227-28. Per the April 2009 Board Resolution, the Benefits Committee was appointed "to serve as the Administrator of all Benefit Plans offered by the Corporation, pursuant to the applicable Sections of each Plan, and having all the powers, duties and responsibilities allocated to the Administrator under the Plan(s)." *Id.* at ERISA 0228.

63. Therefore, on information and belief, the Benefits Committee assumed the "administrator" duties previously held by the Administrative Committee, including those detailed above in paragraph 59.

64. Furthermore, on information and belief, on April 15, 2009, the Benefits Committee assumed certain Plan investment duties held by the Investment Committee. *See generally, id.* at ERISA 0227.

65. Consequently, in light of the foregoing duties, responsibilities, and actions, the Benefits Committee Defendants were *de facto* fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period in that they exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

VI. THE PLAN

A. The Purpose and Operation of the Plan

66. The Plan, sponsored by Colonial, is a defined contribution plan and a purported Employee Stock Ownership Plan (“ESOP”) that is designed to “recognize the contributions made to the Controlling Company and its participating companies by employees and to reward those contributions by providing eligible employees with an opportunity to accumulate savings for their future security.” Plan Document at ERISA 0016. “The objective of the 401(k) Plan is to provide employees with a source of retirement income from accumulated contributions and investment returns.” Investment Policy at ERISA 0235.

67. The Plan is a legal entity that can sue and be sued. ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1). However, in a breach of fiduciary duty action such as this, the Plan is neither a defendant nor a plaintiff. Rather, pursuant to ERISA § 409, 29 U.S.C. § 1109, and the law interpreting it, the relief requested in this action is for the benefit of the Plan and its participants and beneficiaries.

68. The Plan, established effective October 1, 1983, provides retirement benefits for nearly all of Colonial’s employees, barring some limited exclusions. Plan Document at ERISA 0015, 0040-0042. Effective April 1, 2005, an employee who works at least 20 hours per week is eligible to participate in the Plan upon their date of hire. 2008 Form 11-K at 4. Employees who work less than 20 hours a week are eligible to participate upon the completion of one year of service. *Id.*

69. The assets of an employee benefit plan, such as the Plan here, must be “held in trust by one or more trustees.” ERISA § 403(a), 29 U.S.C. § 1103(a). During the Class Period, the assets of the Plan were held in trust by The Charles Schwab Trust Co. 2003 SPD at ERISA

0290; 2009 SPD at ERISA 0265-F. Milliman USA, Inc. serves as the recordkeeper for the Plan. 2009 SPD at ERISA 0265-F.

70. On October 30, 2009, by Resolution of the Board, the Plan was purportedly terminated effective September 30, 2009. The Colonial BancGroup, Inc. Action Taken by the Board of Directors, October 30, 2009 (the “October 2009 Board Resolution”), ERISA 0381-0382. Indeed, Plan participants were notified in December 2009 in the Colonial BancGroup 401(k) Plan Update newsletter that “[d]ue to the bankruptcy filing of Colonial Bank, the 401(k) Plan will eventually be closed.” However, Plaintiffs are not aware that a Plan termination amendment has actually been executed.

B. Participant and Employer Contributions to the Plan

71. Under the Plan, a participant’s before-tax, catch-up, rollover, and matching contributions are allocated to the ESOP portion of the Plan. During the following year the portion of the Plan participant’s account that is not invested in Company stock as of the preceding December 31 will be transferred to the non-ESOP portion of the Plan. Plan Document at ERISA 0049, 0052; 2003 SPD at ERISA 0300.

72. Participants can elect to contribute up to 70% of their annual eligible compensation on a pre-tax basis, up to the maximum allowable by the Internal Revenue Code. 2008 Form 11-K at 4. For 2008, the maximum employee contribution, excluding catch-up contribution provisions, was \$15,500. *Id.* The maximum catch-up contribution for those 50 years or older was \$5,000 for 2008. *Id.*

73. Effective January 1, 2007, the Company made employer matching contributions equal to 100% of the participant’s contribution, limited to a maximum of 6% of the participant’s compensation. Plan Document at ERISA 0045. Effective April 1, 2009, Colonial suspended the employer matching contributions provided under the Plan. 2008 Form 11-K at 10.

74. Participants' before-tax, after-tax, pre-1987 vested, supplemental and rollover accounts are fully vested at all times. Plan Document at ERISA 0071. Participants become vested in the Company matching and discretionary contributions according to the following schedule:

Years of Service	Vested Percentage
Less than 1 year	0%
1 year, but less than 2	20%
2 years, but less than 3	40%
3 years, but less than 4	60%
4 years, but less than 5	80%
5 years or more	100%

Plan Document at ERISA 0071.

75. Plan participants direct the investment of both salary reduction contributions and Company contributions into the various investment options offered by the Plan. 2008 Form 11-K at 4. Thus, it is imperative that Defendants provide complete and accurate information to Plan participants so that they can make informed decisions regarding the investment of their Plan account retirement savings, which was not done in this case.

C. Investment Options in the Plan, Including the Company Stock Fund

76. Investment Options for the Plan are selected by the Investment Committee. Plan Document at ERISA 0065, 0096-0097; 2003 SPD at ERISA 0290, 0301; 2009 SPD at ERISA 0255-F. The Plan does not direct or attempt to require that any particular fund option be offered or maintained by the Plan. As set forth in the Plan:

Such Investment Funds shall be established and modified from time to time without necessity of amendment to the Plan and shall have the investment objectives prescribed by the Investment Committee. Investment Funds also may be established and maintained for any limited purpose(s) the Investment

Committee may properly direct Similarly, at the proper direction of the Investment Committee, the Trustee may eliminate one or more of the then existing Investment Funds.

Plan Document at ERISA 0065.

77. Consistent with the wide discretion afforded to the Investment Committee with regard to the selection or removal of Plan investment options, nothing in the Plan requires the fiduciaries to make or maintain investment in Company stock. To the contrary, the Plan states: “*To the extent that* any cash amounts received by or held in the Trust Fund are to be invested in the Company Stock Fund, the Trustee, as properly directed by the Administrative Committee, shall effect purchases of whole shares of Company Stock pursuant to the procedures established by the Administrative Committee.” Plan Document at ERISA 0067 (emphasis added); *see also id.* (noting procedures for liquidation of Company Stock Plan investment “for purposes of investing in one or more of the other Investment Funds, making distributions and/or otherwise”).

78. The Company Stock Fund holds the Plan’s shares of Colonial common stock and is maintained in the purported ESOP Account within the Plan. Plan Document at ERISA 0025. The ESOP Account is intended to be an ESOP and states that it “shall be invested primarily in Company Stock.” *Id.* at ERISA 0032. Hence, even within the Company Stock Fund, the Investment Committee had discretion with regard to the investment of the Fund’s assets.

D. The Plan’s ESOP Status

79. In addition to being an “employee pension benefit plan,” as defined by ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A), as noted above, the Plan purports to be an ESOP. An ESOP is an ERISA plan that invests primarily in “qualifying employer securities.” 29 U.S.C. § 1107(d)(6)(A). For a plan to qualify as an ESOP, the plan must meet numerous requirements set forth in both ERISA and the Internal Revenue Code. Based on documents reviewed to date, it is not readily apparent that the Plan qualifies as an ESOP. Although the Plan states that the ESOP

is designed to invest “primarily” in Company stock, the Plan also provides that *all* contributions to the Plan, whether invested in Company stock or some other Plan investment option, were initially invested in the ESOP portion of the Plan. Plan Document at ERISA 0049, 0052; 2003 SPD at ERISA 0300. As such, the ESOP portion of the Plan, at any given time, may or may not have been primarily invested in Company stock. Yet, even if the Plan qualifies as an ESOP, plan fiduciaries may not invest in employer securities regardless of the circumstances. On the contrary, ESOP fiduciaries, just like 401(k) plan fiduciaries, are required to act loyally, prudently, and for the exclusive purpose of providing benefits to plan participants, and to override plan terms “requiring” investment in employer securities if prudence so dictates.

E. Losses to the Plan

80. During the Class Period, Colonial stock represented a significant portion of the Plan’s net assets. As a result, the Plan incurred substantial losses when the stock plummeted.

81. On April 18, 2007, the beginning of the Class Period, Colonial stock closed at \$24.85 per share, and, on information and belief, the value of the Company stock held in the Plan as of that date was valued at over \$40 million. *See* 2007 Form 11-K at 9. On the last day of the Class Period, August 25, 2009, Colonial stock was trading under ticker CBCGQ.PK at approximately \$0.09 per share, representing a decline of over 99.6% since the beginning of the Class Period, and signifying huge Plan losses.

82. Despite the Plan’s substantial investment in Colonial stock, Defendants failed to protect the Plan from the risks that the Company’s reckless and improper conduct created. Defendants continued to hold the Plan’s shares of Colonial stock and compounded the problem (and the losses) by continuing to offer Company stock as a Plan investment option and allow participants to purchase additional shares during the Class Period. Plaintiffs estimate, based on

purchaser and holder losses during the Class Period, a principal Plan loss of well over \$50 million, exclusive of any investment return.

VII. FACTS BEARING ON FIDUCIARY BREACH

A. Colonial Stock was an Imprudent Investment for the Plan during the Class Period Because of Serious Mismanagement and Dire Financial Circumstances That Resulted in the Collapse of the Company.

83. During the Class Period, Colonial stock became an imprudent investment for Plan participants' retirement savings. The Bank was financially mismanaged, and it engaged in highly risky and inappropriate lending, securitization, and accounting practices, creating artificial inflation of Colonial's stock price and dire financial circumstances that exposed the Plan to the risk of huge losses.

84. A fiduciary may not ignore circumstances, such as those here, which increase the risk of loss to participants and beneficiaries to an imprudent and unacceptable level.

85. Defendants' incomplete and inaccurate statements contributed to the artificial inflation of the value of the Company stock, creating and increasing the risk of loss. As the DOL, the agency charged with responsibility for enforcing ERISA, has stated, it is never prudent for a retirement plan fiduciary to purchase company stock that he knows or should know is artificially inflated. Brief of the Secretary of Labor as Amicus Curie Supporting Appellants and Requesting Reversal at 15-16, *In re Calpine Corp. ERISA Litig.*, No. 06-15013 (9th Cir. Nov. 16, 2006).

86. A variety of circumstances contributed to the unacceptable level of risk borne by Plan participants as a result of the Plan's investment in Colonial stock, including, but not limited to the failure of Defendants to investigate the improper business practices of the Company's principal operating subsidiary, Colonial Bank. These improper business practices included, among things, that the Bank:

- (a) continuously lowered underwriting standards;
- (b) engaged in highly risky mortgage warehouse lending, which overexposed the Company to the subprime market;
- (c) invested in unduly risky assets, including securities backed by subprime mortgages;
- (d) became over-concentrated in bloated housing markets that were particularly susceptible to the housing downturn;
- (e) lacked adequate internal and financial controls;
- (f) mismanaged risk and liquidity;
- (g) engaged in improper accounting practices;
- (h) failed to maintain sufficient capital; and
- (i) did not adequately reserve for loan losses.

87. Furthermore, Defendants failed to acknowledge, manage, and accurately disclose the risks associated with the Bank's mortgage loan origination, mortgage warehouse lending, and investment practices. In addition, Defendants issued false, misleading, and incomplete statements regarding Colonial's net income and financial results, which served to artificially inflate the Company's stock price.

88. Despite the purpose of the Plan—to allow employees to save for retirement—the Plan's fiduciaries did not undertake any meaningful action to protect the Plan from the losses caused by the Plan holding a significant amount of Colonial stock during the Class Period. The Plan's fiduciaries continued to offer Colonial stock as an investment option and maintain Colonial shares in the Plan even as the stock was collapsing. A prudent fiduciary facing similar circumstances would not have stood idly by as the Plan lost millions of dollars.

1. History Repeats Itself As the Housing Market Balloons and Then Busts, Causing a Credit Crisis and Recession.

89. The current credit crunch is not without precedent. An overheated housing market and imprudent lending in the 1980s and 1990s caused the Savings and Loan Crisis, which resulted in hundreds of bank failures and helped lead the country into a recession. In 1998, the collapse of a single hedge fund, Long-Term Capital Management, temporarily froze credit markets around the world, foreshadowing the current credit market paralysis. Finally, in the late 1990s, the dot-com bubble burst, wiping out trillions of dollars in market value of technology companies and triggering another recession.

90. As early as 2002, the pattern began to emerge again: interest rates were dropping and home prices were rising. This caused another housing bubble: low interest rates led to reduced mortgage rates, which attracted more first-time home buyers and persuaded many to refinance their existing loans. Lenders took advantage of this growing market by originating more loans and introducing nontraditional loan products to appeal to a wider customer base. Lenders also lowered their underwriting standards to capture more market share. For instance, many lenders lowered the minimum credit score borrowers needed to qualify for certain loans and allowed borrowers to finance a greater percentage of their home's value. *See Ruth Simon, Mortgage Lenders Loosen Standards – Despite Growing Concerns, Banks Keep Relaxing Credit-Score, Income and Debt-Load Rules*, Wall St. J., July 26, 2005, at D1.

91. Consequently, in late 2004 and early 2005, industry watchdogs began expressing growing fears that relaxed lending practices had increased “risks for borrowers and lenders in the overheated housing markets.” *Id.*

92. Trouble in the housing market emerged in 2005 when home values began to decline and the Federal Reserve instituted a series of interest rate hikes. In response, “bank

regulators issued their first-ever guidelines for credit-risk management for home-equity lending” in May 2005. *Id.*

93. In October 2005, the FDIC also expressed concern over the housing boom and weakening lending standards. FDIC Chairman Don Powell stated in a press release at the time that “the U.S. has experienced a 5-year housing boom capped by record home-price growth since 2004,” and warned that “we know that housing booms don’t last forever.” FDIC, *Time of Transition to Follow Record-Setting Housing Boom, Powell Cautions 'Non-traditional' Mortgages May Elevate Risks for Some Banks and Homeowners*, Press Release, Oct. 18, 2005.

94. By early 2006, the housing bubble had burst, and housing prices started to decline for the first time in over a decade. Lenders found themselves burdened with vast portfolios of loans made to under-qualified borrowers with little ability to repay.

95. As default rates rose and foreclosures became inevitable, the credit markets froze in the fall of 2007, resulting in a financial crisis and nationwide recession.

96. The mortgage and credit crises are rooted in the lax underwriting standards and improper lending practices that were the basis of the subprime and Alternative-A (“Alt-A”) lending industries.

97. Subprime loans are mortgages extended to borrowers who have a heightened risk of default because they have, among other things, a history of loan delinquency or default, a recorded bankruptcy, and/or limited debt experience.

98. Although subprime mortgages are associated with the highest level of risk and, therefore, the highest risk of default, Alt-A loans have proven to be similarly problematic.

99. Like subprime loans, Alt-A loans are nontraditional or nonconforming loans. Generally, Alt-A borrowers have higher credit scores than subprime borrowers. Nonetheless,

Alt-A loans are laden with risk: borrowers either “provide little documentation of their income or assets, or . . . make smaller than usual down payments or purchase loans that have unusual terms, like interest-only payments for an initial period.” Stephen Labaton, *Lenders Fight Stricter Rules on Mortgages*, N.Y. Times, April 28, 2008, at A1. Thus, they are not considered prime, and borrowers are often able to receive Alt-A loans without providing any evidence of their ability to repay.

100. Subprime and Alt-A loans extended to borrowers based on no documentation of assets or income are often referred to as “liar” loans, due to the propensity of borrowers to overstate income and assets in order to meet already lax lending standards.

101. Not surprisingly, a higher percentage of all of these types of loans have gone into default and foreclosure as borrowers are unable to make their payments.

2. Colonial Grows at a Fast Pace By Acquiring Numerous Banks and Expanding Into New Regions.

102. The story of Colonial is largely the story of Defendant Lowder, the Company’s former chairman and CEO, and the driving force behind Colonial’s creation. Lowder established Colonial in 1981 through the acquisition of Southland Bancorporation, a failed banking institution. Colonial Annual Report, Form 10-K, Dec. 31, 2006 (“2006 Form 10-K”), at 1.

103. Colonial became a publicly traded company in 1995 and was listed on the New York Stock Exchange. *Id.* In 1997, Colonial consolidated the various banking subsidiaries it held into Colonial Bank. 2006 Form 10-K at 1.

104. Lowder built the Company’s deposit base by acquiring community banks in Alabama and using the acquired capital to make real estate loans. Brian O’Keefe, *The Man Behind 2009’s Biggest Bank Bust*, CNNMoney, Oct. 12, 2009. After the passage of the Riegle-Neal Act of 1994, which gave banks greater freedom to operate across state lines, Lowder

expanded Colonial into fast growing markets like central Florida, which it first entered in 1996 with the purchase of Southern Banking Corp. *Id.*

105. From 1996 through 2008, the Company grew from \$4.9 billion in assets to \$26 billion in assets. *Id.*

106. To fuel this tremendous growth, the Company engaged in increasingly risky practices, eventually taking on more risk than a community bank could manage and more risk than Colonial could ever handle. These practices led the FDIC and Alabama Banking Dept. to issue a Cease and Desist Order that the Bank consented to on June 3, 2009. Colonial Current Report, Form 8-K, June 9, 2009, at 2.

107. According to the June 2009 Order to Cease and Desist, the FDIC and the Alabama Banking Dept. “considered the matter and determined that it had reason to believe that the Bank had engaged in unsafe or unsound banking practices,” including the following:

- (a) Operating with inadequate management and Board oversight;
- (b) Operating with inadequate equity capital in relation to the volume and quality of assets held by the Bank;
- (c) Operating with an inadequate methodology for the allowance for loan and lease losses;
- (d) Operating with a liquidity and funds management policy that is insufficient to meet the Bank’s current needs;
- (e) Operating with a business strategy that has resulted in unprofitable operations and poor asset quality; and
- (f) Operating with inadequate policies and procedures to monitor and control risks within concentrations of credit in the Bank’s loan portfolio.

Id.

108. Subsequently, the Board of Governors of the Federal Reserve System and the Alabama Banking Dept. issued a Cease and Desist Order against Colonial that the Company

consented to effective July 22, 2009. Colonial Current Report, Form 8-K, July 27, 2009, at 2.

The Order addressed concerns regarding Colonial's capital positions and financial operations.

Id.

109. In short, Colonial operated an unduly risky business that led to the Bank's failure and the Company's bankruptcy filing just two and a half months after the Cease and Desist Order.

3. Colonial Increased Its Risk Exposure Through Lax Underwriting Standards.

110. During a housing boom, commercial and residential lending can be a highly lucrative business, as a lender collects fees at various points throughout loan origination and servicing. Throughout the Class Period, the Bank decreased its underwriting standards so that it could originate more and more loans to a broader base of customers. Confidential witnesses interviewed by Plaintiffs' counsel told similar stories of lax underwriting standards and a push to move loans quickly through the origination process to increase loan volumes.

111. Confidential Witness No. 1 ("CW#1"), a Colonial employee involved in the underwriting in Orlando, Florida, stated that the underwriting standards were routinely ignored and that documentation for loans was "very questionable." According to CW#1, even as late as 2008, Colonial approved "any loan that came in," without regard to the underwriting guidelines. CW#1 was unaware of a single loan application that was not approved. According to CW#1, even if underwriters questioned loans, branch managers would complain and have the senior underwriters go ahead and approve the loans anyway. According to CW#1, construction loans were approved without regard for underwriting standards: "We had loans 100% debt-to-income and the senior lender would approve them."

112. Necessary documentation was frequently if not routinely missing from loan applications, according to CW#1. CW#1 personally questioned numerous home appraisals,

particularly those with high loan-to-value ratios. CW#1 asked for comparable appraisals and was told to just “go with it.” Some large residential mortgage loan applications suspiciously contained income statements from the same accountant, but those loans were approved anyway.

113. Shoddy documentation was also noted by Confidential Witness No. 2 (“CW#2”) who was involved in the lending operations in Colonial’s Montgomery, Alabama office. According to CW#2, from May 2009 through July 2009, Colonial’s Alabama office worked on reviewing and preparing Colonial’s loans to sell to investors in order to raise the necessary capital for the TARP funds. CW#2 noted that underwriting standards were not being met, as appraisals and other important items were missing from the loan files. As CW#2 noted, “We had million dollar loans with no appraisals, no insurance; it was horrible.” CW#2 routinely flagged files with missing documentation, but nothing was done about it. CW#2 told management that items were missing from the files, but to no avail: “They just didn’t hold their loan officers accountable.”

114. Confidential Witness No. 3 (“CW#3”) was involved in the lending function in an office in Orlando, Florida. CW#3 also stated that files with poor and even missing documentation were “flagged” for management, who told CW#3 not to be concerned with such issues. CW#3 continually advised management that the flagged files were missing proper documentation or original signatures from the borrowers, and was told “that those were none of my concern.”

115. Another troubling practice—one noted by Confidential Witness No. 4 (“CW#4”), a former Colonial employee involved in loans in the Orlando, Florida office—was the failure to audit large commercial loans, even those with flagged problems. CW#4 noted that Colonial provided *additional* funds in the amount of \$200,000 a month to a client, Engineered Homes, so

that the client could meet payroll and *repay Colonial*. Thus, Engineered Homes was borrowing extra money from Colonial in order to repay Colonial. When CW#4 noted this to higher management, CW#4 was dismissed the same day. The Engineered Homes account, according to CW#4, was never audited, either by internal or external auditors.

116. Another employee, Confidential Witness No. 5 (“CW#5”), involved in loans in Colonial’s Orlando, Florida office, noted irresponsible lending to residential clients. As CW#5 stated, “There were million dollar homes that these people couldn’t even afford to pay the property taxes on, but we’ll still do them anyway.” Not surprisingly, most of these loans, according to CW#5, were eventually written off.

117. Similar residential lending practices were noted by Confidential Witness No. 6 (“CW#6”), involved in underwriting at Colonial’s Tampa, Florida office. According to CW#6, Colonial would refinance residential mortgages to owners with “terrible” credits scores simply by extending out the payments for another ten years, even though the files contained no indication that the clients could ever repay the revised amounts.

118. Regardless of the Bank’s lax underwriting, Defendant Lowder touted the Company’s “stringent underwriting standards” and its commitment to “prudent management of credit risks,” throughout the Class Period. Colonial Current Report, Form 8-K, July 18, 2007, at Ex. 99.1. Lowder also assured the market that the Company did not engage in subprime lending. *Id.*

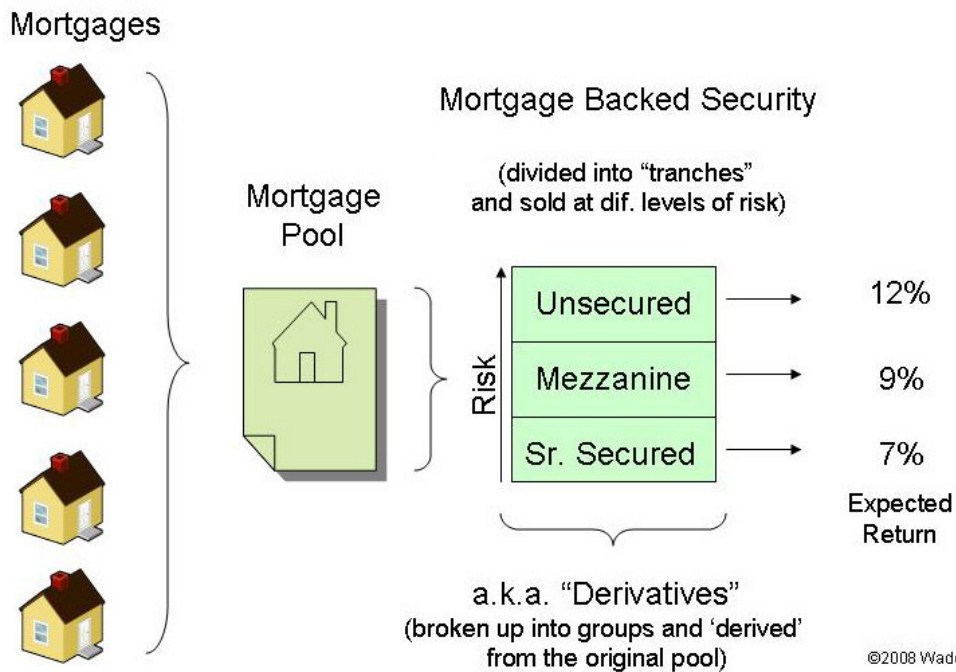
119. Although the Bank may never have directly *originated* subprime loans under the Company’s definition of “subprime,” it is clear through the above witness accounts that the Bank was involved in Alt-A lending and inadequate underwriting practices. Moreover, even if the

Bank were not directly involved in subprime lending under any definition, it was certainly exposed to the subprime market through its massive warehouse lending arm.

4. Colonial's Warehouse Lending Division and Securitization and Investment Practices Put the Company at Even Greater Risk and Exposed Colonial to the Subprime Market.

120. The Bank was one of the nation's largest providers of warehouse lines of credit to mortgage brokers and independent, non-depository mortgage banks. James R. Hagerty & Lingling Wei, *Taylor Bean Suspended from Making FHA Loans*, Wall St. J., Aug. 5, 2009. The Company's warehouse lending division was headquartered in Orlando, Florida, where it extended lines of credit to originators who in turn extended mortgages to homebuyers, primarily in Florida. Typically, a broker or other mortgage originator depended on the eventual sale of the mortgages it originated to repay its warehouse loans. Colonial often bought these mortgages from its warehouse customers and then resold them to the secondary market, while maintaining the servicing rights of the loans. The secondary market included investment banks and other financial institutions that would "securitize" these loans for further sale and investment.

121. "Securitization" is the process of consolidating debt instruments into a pool and then issuing new securities backed by the pool. For example, mortgage-backed securities ("MBS") are created by pooling mortgages and then dividing them into investment layers called "tranches," that are then sold on the secondary market, as demonstrated below:



122. Colonial not only sold mortgages to the secondary market, it also invested in the resultant MBS. In addition, the Company created its own MBS for sale to investors.

123. Although Defendant Lowder repeatedly stated that the Company had no “subprime products,” Colonial was nonetheless exposed to the subprime market. The originators Colonial was funding and receiving mortgages from were engaged in risky lending practices, including subprime and Alt-A lending. Indeed, one of the largest originators the Company funded, Taylor, Bean & Whitaker Mortgage Corp. (“TBW”), targeted subprime borrowers and underwrote loans with exotic payment structures. TBW also extended liar loans, often requiring no documentation from borrowers and instead relying on borrowers’ stated income and assets.

124. CW#3 explained that Colonial would allow TBW complete and unfettered access to Colonial’s Orlando office and its original documentation and computer systems. TBW would usually send over a “car full of employees to Colonial” about once a month to go through

Colonial's vault. Colonial had empty desks available to work on Colonial's original loan documents for loans originated by TBW. TBW employees "work[ed] on those files all day long" and Colonial's staff members would have "no idea what they were doing with them." Furthermore, Colonial surrendered supervisory control of its computerized selling system to TBW representatives, giving TBW ability to override Colonial documents and to approve usernames and passwords for Colonial employees.

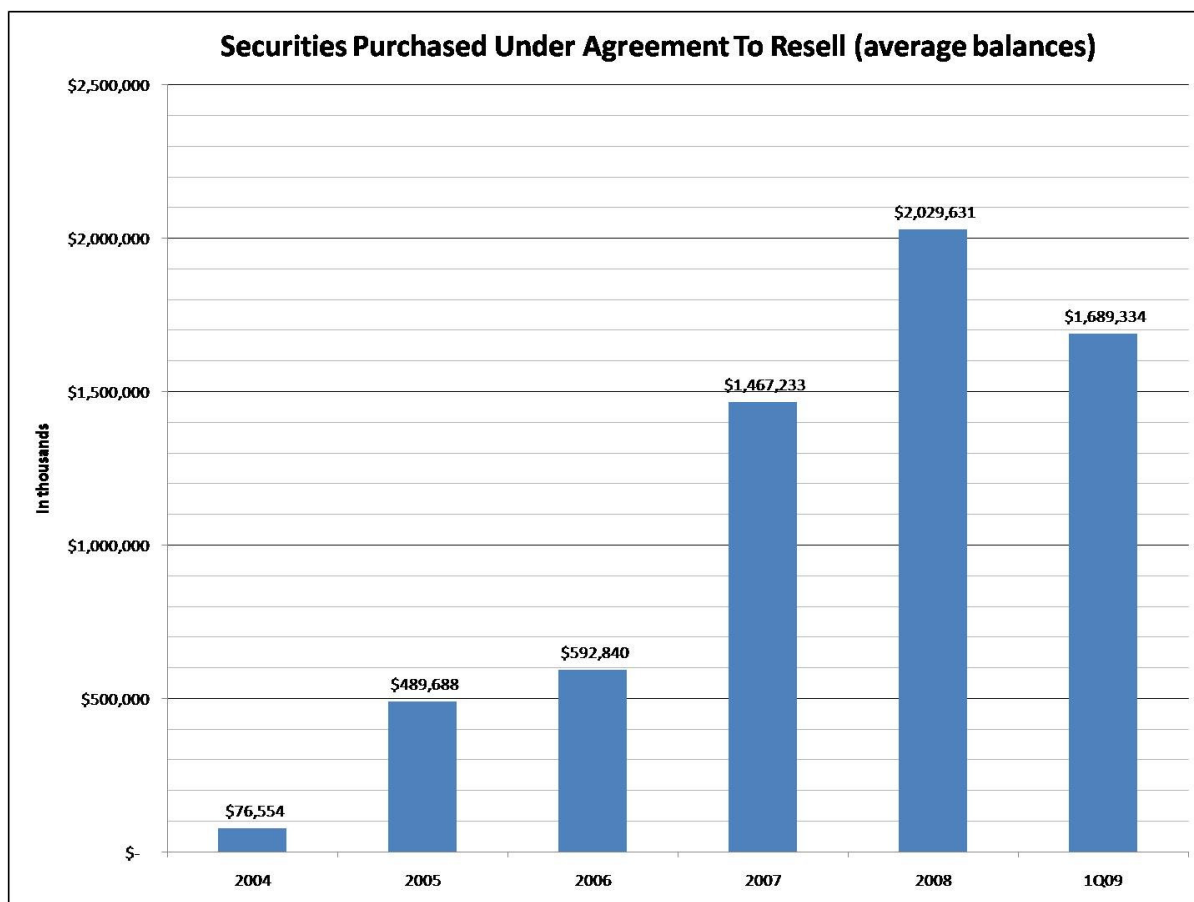
125. TBW's aggressive origination practices were part of a 14 state government investigation. In June 2009, TBW settled the investigation by agreeing to "a detailed review of TBW's nontraditional loan exceptions, the adoption of the federal loan modification program to assist struggling homeowners, and the payment of \$9 million to assist the states in their oversight of mortgage origination practices." *Patrick Administration Announces Multi-State Agreement with Taylor, Bean & Whitaker Mortgage Corporation*, Office of Consumer Affairs & Business Regulation, June 22, 2009.

126. The MBS Colonial invested in and created were laden with risk: not only did they include subprime and Alt-A loans, but they were also reliant on the secondary market for funding. If Colonial were unable to unload its loans and MBS onto the secondary market, it would be left holding the risky investments on its balance sheet. That is precisely what began to happen in 2007 when the secondary market cooled and finally froze later that year. Colonial was forced to carry or write-off those MBS and warehouse loans it was unable to sell. By the first quarter of 2009, Colonial's total warehouse assets on its balance sheet had more than doubled from 2006, rising from \$2.3 billion to \$5 billion.

127. Nonetheless, in July 2007, Defendant Lowder touted Colonial's "strong growth in mortgage warehouse assets," stating that they "continue to be a good source of earning asset

growth without incurring significant duration risks.” *Q2 2007 Earnings Call – Acquisition of Citrus & Chemical Bancorporation, Inc. by Colonial BancGroup Company Participants Transcript*, July 18, 2007, at 6.

128. Colonial also held MBS securitized by other institutions under agreements to be sold to third-party investors. These agreements were intended to be short-term, but in 2007, Colonial’s holdings rapidly increased when third-party investor demand cooled due to concerns arising out of the housing and secondary markets. By the first quarter of 2009, Colonial still held over \$1.6 billion of MBS that it had not yet been able to offload on the secondary market, as illustrated below:



2008 Form 10-K; Colonial Current Report, Form 8-K, May 4, 2009, at Ex. 99.1.

129. In addition, in 2007, Colonial invested an additional \$1.7 billion in a type of non-agency MBS called collateralized mortgage obligations (“CMOs”). Colonial held the CMOs in its securities investment portfolio. In 2008, “the ratings for approximately \$136.6 million of [CMOs] in Colonial’s portfolio were reduced to below investment grade by the rating agencies,” and the Company was forced to write down the value of its CMO portfolio by \$506 million. 2008 Form 10-K at 48, 101.

5. Colonial Became Over-Concentrated in Real Estate Construction, Land, and Development Loans.

130. Throughout the Class Period and long after the housing market had cooled, Defendants continued to grow the Bank’s portfolio of real estate construction, land, and development (“CLD”) loans. While CLD loans constituted, on average, 15% of those loans held by national banks, 41% of the loans held in the Bank’s loan portfolio were CLD loans. Karen Richardson & Valerie Bauerlein, *Shaky Construction Market Expose Midsize Banks – Weakness in Florida May Weigh on Colonial BancGroup’s Loan Portfolio*, Wall St. J., Mar. 22, 2007. In 2006 alone, the Bank’s “[r]eal-estate construction loans grew 61%.” *Id.*

131. Indeed, the Bank “lent far more to construction borrowers as a percentage of its so-called core capital [in 2006] than recommended by the Federal Deposit Insurance Corp. guidelines.” *Id.* “Colonial [Bank]’s construction-lending ratio [was] 413% of core capital . . . compared with the FDIC’s minimum threshold guideline of 100%.” *Id.*

132. By the first quarter of 2008, the Bank was heavily invested in residential real estate and construction loans, many of which were non-performing. *See* Colonial Current Report, Form 8-K, April 21, 2008, at Ex. 99.1. In the related conference call, Defendant Lowder explained that a major developer had recently filed Chapter 11 bankruptcy, resulting in a single

\$21 million nonperforming loan on Colonial's balance sheet. *Q1 2008 Earnings Call Transcript*, April 21, 2008, at 2.

133. Nonetheless, Confidential Witness No. 7 ("CW#7"), a Colonial employee involved in the lending function in the Dunwoody, Georgia office, stated that Colonial continued to extend, indeed, increase commercial loans, even in markets that were known to be declining. Even after the housing market had crashed, according to CW#7, the loan committee that approved loans approved an "astronomical" number of large commercial loans. In addition, CW#7 stated that as the market conditions in Georgia, Florida, and Alabama were declining, Colonial's commercial lending in those markets actually increased.

6. Colonial Was Overexposed to the Florida Housing Market.

134. Although Defendants represented the Company as a conservative, prudent risk-taking business, with its multiple acquisitions in Florida and other troubled real estate markets, Colonial became a significant player in high risk regions, as was evidenced "with 69% of its assets in Florida, Nevada and Texas." Richardson & Bauerlein, *supra*.

135. Indeed, by year-end 2004, Colonial was "primarily a Florida bank with more of its assets in Florida than in any other state." Colonial Annual Report, Form 10-K, Dec. 31, 2004, at 13. Although Colonial's headquarters remained in Montgomery, by 2008, only 90 out of the Bank's 347 branches were located in Alabama. 2008 Form 10-K at 1. Indeed, the majority—197 branches in total—were located in Florida. *Id.* Twelve years after Colonial first entered the Florida market, over 50% of the Bank's loan portfolio and over 60% of its \$26 billion in assets were in that state alone. O'Keefe, *supra*.

136. Colonial's overexpansion and overconcentration in the Florida market was especially risky because Florida was "among the worst hit in the [mortgage] crisis as real estate prices in the state tumbled and defaults soared amidst the housing meltdown." Geoffrey Rogow,

West Coast Bancorp, Wintrust Slide as Small Banks Experience Big-Bank Woes, Wall St. J., Apr. 22, 2008.

137. Yet even after the housing bubble had burst, Colonial continued its expansion in Florida, acquiring Miami-based Commercial Bankshares, the holding company for Commercial Bank of Florida, on January 24, 2007. *Colonial BancGroup to Acquire Commercial Bankshares for 5.94 Times Revenue*, Weekly Corporate Growth Report, Jan. 29, 2007, http://findarticles.com/p/articles/mi_qa3755/is_200701/ai_n17220748/. Commercial Bankshares's loan portfolio focused primarily on real estate mortgages, yet the transaction was reportedly valued at \$317 million—more than four times its \$74.4 million book value. Jane Bussey, *Colonial BancGroup to Purchase Commercial Bankshares; Colonial BancGroup, an Alabama-based Bank, Agreed to Buy Commercial Bankshares in a Deal Worth \$317 Million*, Miami Herald, Jan. 24, 2007. As a result of this acquisition, Colonial became Florida's fifth largest commercial bank. *Id.*

138. Despite Florida's plummeting housing prices and the fact that Commercial Bankshare's president reportedly cited tighter earnings as a for the sale, Defendant Lowder described the acquisition as a success, enabling Colonial to boost the Bank's presence "in one of Florida's wealthiest and most dynamic growth markets." *Id.*

139. Colonial continued to expand into the Florida region even further, announcing in July 2007 that it would acquire Florida based Citrus & Chemical Bancorporation, Inc. Colonial Current Report, Form 8-K, July 18, 2007, at Ex. 99.1. By year-end 2008, 43.6% of residential construction loans, and 61.1% of commercial real estate loans were located in the Florida market. 2008 Form 10-K at 58.

140. Soon after Colonial's Florida bank acquisitions, however, the Company was forced to impair the amount of goodwill it originally recorded for these acquisitions. Goodwill is an intangible asset on a company's balance sheet that represents the difference between the purchase price and perceived overall value of an acquired asset. Goodwill is significant because it is a separate line item on the balance sheet and, therefore, can affect earnings. In the fourth quarter of 2008, Colonial goodwill impairment in fourth quarter 2008 was \$575 million, of which \$559 million was attributed to its Florida segment, suggesting that Colonial overpaid for its acquisitions of Citrus & Chemical and Commercial Bank of Florida. Form 2008 10-K at 118. The impairment was \$22 million more than the total consideration paid for both acquisitions.

7. Colonial Begins Its Descent Into Bankruptcy and Bank Failure as Defendants Tout the Financial Stability of the Company.

141. As the mortgage crisis continued, the rate of delinquencies in the Bank's loan portfolio rose. Heading into 2007, Defendant Moore advised that in an earnings call that there would be no upside to giving 2007 guidance and that Colonial had a "change in policy" in that respect. *Q4 2006 Earnings Call Transcript*, Jan. 17, 2007, at 7. Moore stated that going forward Colonial would evaluate the decision to give guidance on a quarter-to-quarter basis. *Id.*

142. Colonial's earnings deteriorated throughout 2007 and 2008, primarily due to the deterioration in its loan portfolio. One indicator of Colonial's noticeable deterioration was the drastic increase in its provision for loan losses, a crucial barometer of a bank's current and future health, during the third and fourth quarter 2007. During that period the Company's loan loss provision rose from \$4.8 million to \$93.3 million. Colonial Annual Report, Form 10-K, Dec. 31, 2007 ("2007 Form 10-K"), at 17. Provision for loan losses had grown to \$106 million in 2007 from \$22 million in 2006. *Id.* at 63. By year-end 2008, the provision for loan losses had risen to \$729 million. 2008 Form 10-K at 81. These dramatic increases were the result of the seeds that

had been sown during the housing boom when the Bank loosened its lending standards to increase profits in the short run. As a result, the Company's share price began to plummet.

143. Nonetheless, Defendant Lowder brushed off any concerns and reassured the public and Plan participants that "Colonial is well positioned to handle the continued weakness in the housing sector." Colonial Current Report, Form 8-K, Jan. 23, 2008, at Ex. 99.1. Lowder continued to tout Colonial's prudent business practices and again assured the public that the Company had "no subprime exposure." He also stated that Colonial had "tightened [its] underwriting standards considerably" and had "stopped lending in the riskiest condo-building areas well before these sweeping developments." *Id.*

144. In fact, Colonial was poorly positioned to manage the downturn in the housing market. For instance, it became reliant on time deposits. Colonial affirmed the necessity of funding itself in its 2008 Form 10-K filing. Colonial confirmed that time deposits were "compressing net interest margin and reducing net interest income," and "would continue to adversely impact [its] earnings and financial condition." 2008 Form 10-K at 15.

145. Colonial's capital base sourced from time deposits began to increase markedly between the third and fourth quarter 2007, the same time its share price began to decline, increasing 22%, from \$7.2 billion to \$8.8 billion, respectively. 2007 Form 10-K, at 42; Colonial Quarterly Report, Form 10-Q, Sept. 30, 2007, at 4. This was uncharacteristic of Colonial's historical funding pattern. Colonial had an average time deposit base of \$6.6 billion for the prior fifteen quarters. *Average Time Deposits of Colonial BancGroup Inc. from First Quarter 2004 to Third Quarter 2007*, Bloomberg L.P., retrieved Aug. 20, 2009.

146. Colonial continued to increase its reliance on time deposits and from the fourth quarter 2007 it increased them to \$12.1 billion in the first quarter 2009. Colonial Quarterly

Report, Form 10-Q, Mar. 31, 2009, at 3. The Company's reliance on time deposit continued until its bankruptcy filing.

147. On February 2, 2008, Colonial's rating was downgraded to "sell" by a stock analyst at Stifel Nicolaus.

148. Morgan Stanley took note of this in its analyst report on April 1, 2008, holding a "cautious" view of the sector. Ratul Ray Chaudhuri, *Morgan Stanley Cautious on US Mid-Sized Banks*, Reuters, Apr. 1, 2008. Morgan Stanley placed Colonial on its list of "highest conviction 'underweight' stocks," saying it expected "significant near-term credit deterioration in construction," a primary area for Colonial. *Id.*

149. Colonial's first-quarter 2008 performance was well below the stock analyst consensus estimate. Nonetheless, Defendants looked at the Company's earnings as evidence of its strength. Defendant Lowder stated that the Company's "continued profitability is evidence of [its] ability to deal with a difficult credit environment," and emphasized that "to date, [the Company had] not seen significant declining credit quality trends" in its loan portfolios, that it had "systemically identified and isolated problematic credits," and had "dedicated highly experienced, skilled people to the task of resolving individual credit situations," while further strengthening "underwriting criteria." Colonial Current Report, Form 8-K, Apr. 21, 2008, at Ex. 99.1. Lowder stated that Colonial was taking an "opportunistic approach to the current market cycle," by taking "advantage of the disruption in the mortgage banking market." *Id.*

150. On March 5, 2008, in an effort to raise capital, Colonial announced that it had entered into an underwriting agreement for the issuance and sale of \$250 million of its 8.875% subordinated notes. Colonial Current Report, Form 8-K, Mar. 5, 2008. And on April 21, 2008, in its continued effort to bolster its capital position, Colonial announced that it would raise

almost \$300 million in common stock and would to slash its dividend payment. Colonial Current Report, Form 8-K, Apr. 21, 2008, at Ex. 99.1. However, the Company also announced a 32% decrease in first quarter earnings from the same period in 2007.

151. Fitch Ratings affirmed the Company's negative outlook, citing ongoing concerns about the Company's "credit quality and its significant exposure to troubled markets such as Florida," and its "asset quality deterioration . . . in its residential real estate construction portfolio." *Fitch Affirms The Colonial BancGroup Inc.'s Ratings; Outlook Remains Negative*, Business Wire, Apr. 21, 2008, at http://findarticles.com/p/articles/mi_m0EIN/is_2008_April_21/ai_n25338265/.

152. Nonetheless, Defendants continued to mislead investors, including Plan participants, regarding Colonial's increasing deterioration in its loan portfolios. *Q1 2008 Earnings Call Transcript*, Apr. 21, 2008, at 2, 3, 5.

153. The Bank's losses were primarily concentrated in the hardest hit regions of the country—most notably in Florida, where the Bank had more than half its assets. Crystal Jarvis, *It's Official: Colonial BancGroup Fails*, Birmingham Bus. J., Aug. 14, 2009.

154. As Colonial continued to rapidly grow its loan portfolio throughout 2008, its primary regulator, the Office of the Comptroller of the Currency (the "OCC"), became increasingly concerned. Crystal Jarvis, *Colonial: Aggressive Strategy Fueled Company's Growth – and Its Demise*, Birmingham Bus. J., Aug. 21, 2009. "This was likely the reason why the bank switched regulators and returned to the state of Alabama Banking Department" and the FDIC in June 2008. *Id.* At the time, Colonial insisted that it changed charters to "focus more on customers and communities." *Colonial BancGroup Switches to State Charter*, Reuters, June 10, 2008. Nonetheless, the move "was widely interpreted as a move to get federal officials off

Colonial's back." Dan Fitzpatrick, David Enrich, & Damian Paletta, *Moving the Market: Colonial Nears Deal to Convert to Thrift*, Wall St. J., Mar. 31, 2009.

155. On July 16, 2008, Colonial announced its second-quarter 2008 earnings and "surprised the markets with a quarterly loss," mainly attributed to increased provisions for loan losses. Adheesha Sarkar, *Colonial BancGroup Posts Surprise Q2 Loss*, Reuters, July 16, 2008. Defendants continued to mislead the market about the health of the Company's loan portfolio and on the second quarter 2008 earnings call Defendant Lowder again downplayed the increasing deterioration in Colonial's loan portfolios, stating: "I don't think the next couple of quarters in charge-offs will certainly be any worse than this quarter." *Q2 2008 Earnings Call Transcript*, July 16, 2008, at 7.

156. On that same earnings call, Defendant Lowder detailed Colonial's plan to address loan delinquencies, he stated: "We have a great workout and collection staff that we have increased by and we have highly qualified commercial workout [group] of 88% of the staff having over 15 years of workout and banking experience." *Id.* at 2. Lowder also claimed that "past due" loans had been successfully reduced and that a "war room" had been set up in Florida, to sell off "pristine properties." *Id.* at 3, 4. Those properties were located mainly in Florida and were attached to non-performing loans that represented a \$325 million potential charge off to the Company. Defendant Lowder assured the market that Colonial had "an aggressive, very aggressive program going on to attack these credits," and that it was aiming to sell the properties for full value. *Id.*

157. Defendant Lowder stated: "So we feel we have identified our problems. We've isolated them and we're working on them." *Id.* at 4. Defendants misled investors, including Plan participants, into believing that the Company's credit quality issues were isolated to those

nonperforming loans. Defendant Moore referred to the Company's "strong capital position" as providing it with "significant cushion for loss absorption." *Id.* Moore also stated that Colonial's "common stock issuance which we completed in April, in late April of 2008 provided free funding for the Company." *Id.* at 5.

158. In October 2008, the Company once again reported a loss, announcing a \$71 million net loss for the third quarter. Colonial Current Report, Form 8-K, Oct. 22, 2008, at Ex. 99.1. The Company also suspended its quarterly dividend. *Id.* Colonial's stock price plunged as much as 56% in just one day, falling from \$7.11 per share to \$3.13 per share on October 23, 2008.

159. On November 13, 2008, Colonial applied for TARP funds provided by the Emergency Economic Stabilization Act of 2008 that was enacted in response to the extreme financial market panic. Crystal Jarvis, *Colonial Bank Applies for Piece of Federal Bailout Money*, Birmingham Bus. J., Nov. 13, 2008. Colonial's shares had fallen to \$1.40, continuing its downward trend that started in 2007.

160. However, there was a delay in Colonial's TARP funds application as it was not "being processed through the normal channels." Damian Paletta & David Enrich, *Political Interference See in Bank Bailout Decisions – Barney Frank Goes to Bat for Lender, and it Gets an Infusion*, Wall St. J., Jan. 22, 2009. According to the *Wall Street Journal*, Alabama State regulators and the FDIC had given Colonial approval to apply, "[b]ut because Colonial was weighed down by real-estate loans, the Treasury sent the bid to its panel for reviewing controversial applications. . . . Negotiations lasted several weeks." *Id.*

161. Finally, on December 2, 2008, the Company announced that it had received preliminary approval to receive \$550 million in TARP funding. Colonial Current Report, Form

8-K, Dec. 2, 2008, at Ex. 99.1. Defendant Lowder explained that the TARP funds would “enhance [the Company’s] capital cushion,” and enable it to provide “additional lending activity.” *Id.* On this news, Colonial’s share price rose to just over \$3 a share. At that time, Colonial did not discuss any specific conditions or impediments to receiving the TARP funds, including the condition precedent of raising \$300 million in private capital—a fact that Defendants knew and concealed until after the markets closed on January 27, 2009. Colonial Current Report, Form 8-K, Jan. 27, 2009, at Ex. 99.1.

162. Colonial’s troubles were not over, however. Despite the imminent cash infusion from the TARP, an analyst at Morgan Stanley stated that Colonial was “at the most risk among U.S. mid-cap banks from its exposure to states with high levels of delinquent loans.” Anurag Kotoky, *Avoid Banks With Exposure in Problem States*, Reuters, Dec. 8, 2008.

163. According to bankruptcy pleadings filed by the FDIC, on December 15, 2008, the Bank, acting through the Bank Board, agreed to a Memorandum of Understanding with its primary banking regulators, the FDIC and the Alabama Banking Dept., to a number of measures related to the “financial soundness” of the Bank. Emergency Motion of the FDIC, as Receiver for Colonial Bank, for an Order Modifying the Automatic Stay at 7-8, *In re The Colonial BancGroup, Inc.*, No. 09-32303 (Bankr. M.D. Ala. Oct. 5, 2009) [Dkt. No. 156]. First was Colonial’s commitment to utilize its financial and managerial resources to assist the Bank in addressing weaknesses identified by its primary banking supervisors. Colonial also agreed to bring its Tier I Leverage Capital Ratio to a level of not less than 8%, and its Total Risk-Based Capital Ratio to a level of not less than 12% by no later than February 28, 2009. *Id.* According to an additional bankruptcy filing, neither Colonial nor the Bank met its obligations under their respective regulatory agreements. Motion of the Federal Deposit Insurance Corporation, as

Receiver for Colonial Bank, Montgomery, Alabama, for an Order (a) to Require Cure of Deficiencies Under 11 U.S.C. § 365(o) or (b) Converting Debtor's Bankruptcy Case to a Liquidation Under Chapter 7 of the Bankruptcy Code, *In re The Colonial BancGroup, Inc.*, No. 09-32303 (Bankr. M.D. Ala. Nov. 5, 2009) [Dkt. No. 257].

164. Colonial's reporting \$825 million in net losses for the fourth quarter of 2008 and revelation that it was required to raise \$300 million in capital as a pre-condition to receiving TARP funding came "as a big surprise to investors, adding to the negative sentiment toward the stock." Sweta Singh, *Colonial Says No TARP Funds Without Capital Raise, Shares Slump*, Reuters, Jan. 28, 2009. Colonial shares plummeted 20%. *Id.*

165. On March 3, 2009, Colonial disclosed in its Annual Report that it had "entered into informal memorandums of understanding with regulators, agreeing to take capital improvement steps," or else "the banking agencies [would] have the authority to place the institution into receivership." Bhattiprolu Murti, *Colonial BancGroup in Informal MOU With Regulators*, Dow Jones Newswires, Mar. 3, 2009.

166. During that time, Colonial's shares were "trading at a fraction" of what its financial statements said the Company was worth, "largely reflect[ing] the risk that the bank might not meet either the TARP or MoU conditions." Dan Fitzpatrick, David Enrich & Damian Paletta, *Moving the Market: Colonial Nears Deal to Convert to Thrift*, Wall St. J., Mar. 31, 2009. With Colonial's shares "down 91 percent from a year ago," the market was not convinced of the Company's ability to revive itself. *Id.*

167. On May 28, 2009, the Company announced that Defendant Lowder would retire. Colonial Current Report, Form 8-K, May 28, 2009, at Ex. 99.1.

168. On June 5, 2009, the FDIC and Alabama Banking Dept. issued the Cease and Desist Order, and on July 31, 2009, Colonial announced that the Board had retained Promontory Financial Group to advise and assist in satisfying regulatory requirements and expectations in connection with its efforts to comply with the Order. Colonial Current Report, Form 8-K, July 31, 2009, at Ex. 99.1. Colonial also reported a net loss of \$606 million for the second quarter. *Id.*

169. In addition, the Company revealed that nonperforming assets had increased to \$1.7 billion, constituting 12.29% of net loans. *Id.* Not surprisingly, the Company's management "concluded that there [was] substantial doubt about Colonial's ability to continue as a going concern." *Id.* Despite this dire determination, the Plan fiduciaries continued to offer Company stock as a Plan investment option.

170. Colonial also announced that its agreement with investors, led by none other than TBW, for a \$300 million rescue to allow the Company to become eligible for TARP funds had fallen through. *Id.* Defendant Beville concluded that although they were disappointed that the transaction was not completed, "we have shifted our focus to the alternatives described in the Capital Action Plan." *Id.*

171. On this news, the Company's stock price closed at \$0.61 per share.

172. On August 3, 2009, the Special Inspector General for the TARP ("SIGTARP"), in conjunction with the Federal Bureau of Investigation and the inspector general for the U.S. Department of Housing and Urban Development, raided Colonial's mortgage warehouse lending division. James R. Hagerty & Lingling Wei, *Taylor Bean Suspended from Making FHA Loans*, Wall St. J., Aug. 5, 2009. As of October 2009, the SIGTARP's investigation of Colonial was

still ongoing. SIGTARP, Quarterly Report to Congress 6 (Oct. 21, 2009), *available at* http://www.sig tarp.gov/reports/congress/2009/October2009_Quarterly_Report_to_Congress.pdf.

173. On August 5, 2009, the Alabama Banking Dept. notified the Bank that it was meeting to determine whether to close the Bank and appoint the FDIC as receiver. Cosby Woodruff, *Colonial BancGroup Faces State, Federal Investigations*, Montgomery Advertiser, Aug. 8, 2009, <http://www.montgomeryadvertiser.com/article/20090808/BUSINESS/908080341>.

174. The next day, the Company learned it was “the target of a federal criminal investigation relating to the Company’s mortgage warehouse lending division and related alleged accounting irregularities.” Colonial Current Report, Form 8-K, Aug. 7, 2009, at Ex. 99.1. The U.S. Department of Justice explained that “the alleged accounting irregularities relate to more than one year’s audited financial statements and regulatory financial reporting.” *Id.*

175. Colonial also “received subpoenas from the Securities and Exchange Commission related to the capital it set aside for soured loans and its efforts to participate in the [TARP] and from the special inspector general for the TARP program.” Matthias Rieker & Tess Stynes, *Colonial is Target of U.S. Criminal Inquiry*, Wall St. J., Aug. 8, 2009.

176. One week later, on August 14, 2009, the Alabama Banking Dept. closed the Bank, named the FDIC as receiver, “after an agreement was reached to have BB&T Corp. acquire most of its assets and all of its deposits.” Michael Crittenden, *Colonial BancGroup Shut Down by Regulators, Sold to BB&T*, Dow Jones News, Aug. 14, 2009.

177. The Bank is the sixth-largest bank to fail in U.S. history.

178. Colonial subsequently filed for Chapter 11 bankruptcy protection on August 25, 2009. Colonial Current Report, Form 8-K, Aug. 25, 2009.

179. After acquiring the assets of the Bank, BB&T's chief financial officer, Daryl Bible, noted that "[w]hen we looked at Colonial's portfolio versus ours, we saw a lot of borrowers we turned away." Peter Eavis, *Colonial Bank Marks a New Low for Loans*, Wall St. J., Aug. 19, 2009. Indeed, BB&T was forced to mark down "Colonial loans and real-estate collateral by 37%, a number that reflects a large amount of estimated losses. The biggest mark is on construction loans; BB&T is cutting their value by 67%." *Id.*

180. This drastic cut confirmed that Colonial inflated the value of its loan and securities portfolios in its regulatory filings in violation of Generally Accepted Accounting Principals ("GAAP").

8. Colonial Violated Accounting Principles and Standards.

181. GAAP are the conventions, rules, and procedures recognized by the accounting profession as necessary to define accepted accounting practices at a particular time. The SEC has the statutory authority to promulgate GAAP for public companies and has delegated that authority to the Financial Accounting Standards Board ("FASB") and the American Institute of Certified Public Accountants ("AICPA"). SEC Regulation S-X (17 C.F.R. § 210.4-01(a) (1)) provides that financial statements filed with the SEC that are not presented in accordance with GAAP will be presumed to be misleading, despite footnotes or other disclosures.

182. Colonial violated GAAP to keep investors, creditors, and others, including participants and beneficiaries of the Plans, in the dark about the true nature and extent of its concentration of credit risk in its loan portfolio and liquidity and credit risk in its MBS holdings on- and off-balance sheet. Similarly, Colonial violated GAAP by not properly accounting and reporting for adequate allowance for loan losses and reporting inflated, inaccurate valuations of loans and securities. In particular, Colonial violated GAAP in the financial statements through the misuse of:

- Statement of Financial Accounting Standard No. 107 (SFAS 107), *Disclosures about Fair Value of Financial Instruments*, requires that significant amounts of credit risk concentration that may present adverse material effects to the company be disclosed in the body of the financial statements. Colonial provided an inadequate amount of information, withholding pertinent and critical information for an investor to make a sound decision;
- Statement of Financial Accounting Standard No. 114 (SFAS 114), *Accounting by Creditors for Impairment of a Loan*, requires that loans be valued based on the present value of expected discounted future cash flows or its fair value. Colonial materially overstated the value of its loans in its loan portfolio, especially in respect to construction, land and development loans. The violation of this accounting standard by Colonial impaired investors decision making process;
- Statement of Financial Accounting Standard No. 115 (SFAS 115), *Accounting for Certain Investments in Debt and Equity*, by significantly inflating the value of certain securitized assets on its balance sheet;
- Statement of Financial Accounting Standard No. 157 (SFAS 157), *Fair Value Measurements*, which defines fair value, establishes a framework for measuring fair value and requires enhanced disclosures about fair value measurements. The expanded disclosures are intended to allow investors, creditors, and others to understand how Colonial measures recognized assets and liabilities, the inputs used to develop the measurements, and the effect of the measurements on earnings during a period. Colonial significantly inflated the fair value of its MBS and similar financial instruments by using unrealistic valuation models without adequately disclosing the assumptions and valuation models applied. By not adequately using fair value disclosures for those assets under SFAS 157, Colonial misled investors, creditors, and others by withholding critically important facts and assumptions;
- Statement of Financial Accounting Standard No. 140 (SFAS 140), *Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities*, relating to derecognizing off-balance sheet entities and treating the transfer of assets as true sales. Off-balance sheet entities were used by Colonial for at least part of the Class Period to increase sales and revenues during the housing boom, while during the housing bust they were used to hide losses and ignore the substance of the transactions; and
- Statement of Financial Accounting Standard No. 142 (SFAS 142), *Goodwill and Other Intangible Assets*, for not disclosing an impairment of goodwill in a timely manner. The Company's excessive premium paid for Florida commercial banks in 2006 and 2007 was impaired much sooner than disclosed in its financial statements, a violation of SFAS 142.

183. As a result of the above, investors, creditors, and others, including participants and beneficiaries of the Plans, were unable to properly assess the true value of Colonial stock, causing it to become artificially inflated during the Class Period.

B. Defendants Knew or Should Have Known that Colonial Stock Was an Imprudent Investment.

184. Given the facts described above, it is clear that since the beginning of the Class Period, the Company's stock was an imprudent investment for the Plan because, among other things, the Bank: (a) continuously lowered underwriting standards; (b) engaged in highly risky mortgage warehouse lending, which overexposed the Company to the subprime market; (c) invested in unduly risky assets, including securities backed by subprime mortgages; (d) became over-concentrated in bloated housing markets that were particularly susceptible to the housing downturn; (e) lacked adequate internal and financial controls; (f) mismanaged risk and liquidity; (g) engaged in improper accounting practices; (h) failed to maintain sufficient capital; and (i) did not adequately reserve for loan losses, all of which led to an FDIC Cease and Desist Order and the eventual collapse of Colonial and its stock. Furthermore, Defendants failed to acknowledge, manage, and accurately disclose the risks associated with the Bank's mortgage loan origination, mortgage warehouse lending, and investment practices. Defendants also issued false, misleading, and incomplete statements regarding its net income and financial results, which also led to the artificial inflation of the Company's stock price.

185. Defendants had substantial warnings of its risky activities, the contracting housing market, improper underwriting, and impending mortgage crisis. Because Colonial's earnings were completely dependent on the Bank's mortgage-related business, these warnings should have triggered an investigation by the Plan fiduciaries into the prudence of the Plan's investment

in Company stock. Instead, Defendants, the Plan fiduciaries, stood by idly as the Company and the Plan's investment in the Company collapsed.

1. Defendants Knew That the Company Was at Risk and Company Stock Was Imprudent Because of the Company's Improper Business Practices.

186. Due to their positions within the Company, Defendants knew or should have known that Colonial stock was an unduly risky investment option for the 401(k) retirement plan. They knew or should have known that the Company was extending below-standard loans to risky borrowers that were at a high risk of default, the Company lacked and/or failed to adhere to adequate internal controls, and statements regarding the Company's net income and financial results were misleading and inaccurate. While discovery will shed additional light on the extent to which Defendants were aware of and ignored the Company's serious mismanagement and improper practices, certainly Defendants Beville and Lowder, as the current and former CEOs, as well as Defendants Burge, Hicks, Hill, Hosein, Moore, and Parrish, who were all executives and officers of the Company, cannot genuinely contend that they were unaware of this conduct. The fact that the FDIC and the Alabama Banking Dept. were able to identify the egregious misconduct in short order after initiating their investigations strongly suggests that at the very least, those Defendants who were executive officers of the Company knew about the misconduct or could have discovered it had they conducted a reasonable and adequate investigation.

187. Indeed, as Plaintiffs' investigation to date reveals, Defendants were acutely aware that Colonial's lending practices and policies were grossly deficient and dangerous to the Company and its stockholders, including Plan participants.

188. For example, as CW#7 described, all commercial loan applications were sent to and approved by a loan committee headed by Defendant Lowder that approved an "astronomical" number of large commercial loans. In addition, there were instances of higher

management being informed of problematic loan practices, as described by CW#4 at paragraph 114, *supra*.

189. Nonetheless, Defendants took no action to protect the Plan. Instead, the Board approved the registration of 10 million additional shares of Colonial stock to be issued under the Plan as late as April 16, 2008. Amended and Restated Declaration of Sarah H. Moore in Support of Chapter 11 Petition and Certain Motions at 9, *In re The Colonial BancGroup, Inc.*, No. 09-32303 (Bankr. M.D. Ala. Sept. 1, 2009) [Dkt. No. 50].

2. Published Warnings Place Plan Fiduciaries on Notice of the Need to Investigate Risks at Colonial.

190. To the extent that some of Defendants did not have actual knowledge of the degree to which Colonial and the Bank were engaged in highly risky business practices, the steady drumbeat of published warnings and other “red flags” should have put Defendants on notice of the need to investigate Colonial’s risk exposure and the Bank’s business operations and strategies. However, they conducted no such investigation.

191. The red flags included, but certainly were not limited to the following:

- In May 2005, bank regulators issued their first-ever guidelines for credit-risk management for home-equity lending;
- On July 26, 2005, the *Wall Street Journal* warned that “[m]ortgage lenders are continuing to loosen their standards, despite growing fears that relaxed lending practices could increase risks for borrowers and lenders in overheated housing markets”;
- In 2005, it was widely reported that Florida’s housing market was one of the biggest housing bubbles, with prices soaring at unsustainable and unrealistic rates;
- Reuters reported that “rising delinquencies and forecasts of a deepening deterioration in housing have prompted big investors, including hedge funds, to bet against subprime-related securities since late 2005”;
- Throughout 2006, the media reported that nontraditional mortgages were growing even riskier as lenders originated a large number of “liar” loans;

- In 2006, large developers in the southeast region of the United States, such as Beazer Homes USA, Inc., cut earnings forecast, blaming higher cancellation rates and weakening sales;
- Throughout 2006 and 2007, the media reported that many large Florida builders and developers—many of whom may have been the Bank’s clients—filed for bankruptcy as a result of the bubble bursting;
- By May 2006, “Southern Florida [had] shaped up as the epicenter of the looming glut. In Palm Beach County, inventories of unsold homes have more than tripled in the past three years.” Robin Goldwyn Blumenthal, *Trouble in Paradise, The Big Glut*, Dow Jones Factiva, May 29, 2006;
- On September 29, 2006, the Federal Reserve and other banking agencies released the “Interagency Guidance on Nontraditional Mortgage Product Risks”;
- On December 20, 2006, the Center for Responsible Lending issued a report predicting the worst foreclosure crisis in the modern mortgage market;
- On that same day, the *New York Times* reported that several major mortgage lenders disclosed extraordinary rates of loan defaults, triggering inquiries from the SEC and FDIC, and resulting in several bankruptcy filings;
- On December 5, 2006, the *Wall Street Journal* reported that in 2006 alone, roughly 80,000 subprime borrowers had fallen into delinquency, many shortly after loan origination. Ruth Simon and James Hagerty, *More Borrowers With Risky Loans Are Falling Behind—Subprime Mortgages Surged As Housing Market Soared; Now, Delinquencies Mount*, Wall St. J., Dec. 5, 2006, at A1.
- Beginning in 2007, the collapse of the Florida housing market was widely reported;
- In early 2007, investment banks began to pull back from MBS in response to increased delinquencies.
- HSBC Holdings PLC, said in a press release that it would post “a substantial increase in [its] provision for loan losses with respect to the Mortgage Services operations in the fourth quarter,” and that the “loan impairment charges and other credit risk provisions for 2006 [would] exceed the current market consensus estimate of \$8.8 billion by 20 percent.” James Hagerty & Michael Hudson, *Mortgage-Default Risks Rattle Bond Investors*, Wall St. J., Jan. 27, 2007, at B4 *see also* HSBC Feb. 2007 Form 8K, at Ex. 99.
- Throughout 2007, numerous subprime lenders went out of business or filed for bankruptcy, including New Century Financial Corp., American Home Mortgage, and Ameriquest, the largest subprime lender in the United States in 2005;

- In the summer of 2007, the ABX indices, which track the value of credit default swaps on high-risk mortgage bonds and are used to gauge the housing market, began to plummet; and
- On August 31, 2007, former President Bush announced a limited bailout of U.S. homeowners unable to pay the rising costs of their debts.

192. It is against this backdrop that Colonial originated residential and commercial real estate loans with lax underwriting standards in areas subject to the most dramatic over-inflation of home values, and engaged in mortgage warehouse lending, including purchasing subprime loans and selling them to Wall Street banks. Given these publically available facts about the risks and potential failures of the subprime lending market and Defendants' high-level positions within the Company, Defendants knew or should have known that, by the start of the Class Period, Colonial common stock was an imprudent investment option for the Plans.

3. Credit Downgrades Throughout the Class Period Place Defendants on Further Notice of the Need to Investigate the Bank's Activities.

193. Colonial's credit ratings assigned by the major credit rating agencies were downgraded multiple times throughout the Class Period. The downgrades were warnings of the Company's deteriorating financial condition. Moody's downgraded Colonial and the Bank four times between January 11, 2008 and Colonial's bankruptcy filing in August 2009.

194. Moody's flagged serious concerns regarding the Company. These concerns should have caused the Plan fiduciaries to assess the prudence of Colonial stock as an investment option for Plan participants. For example, on January 11, 2008, Moody's downgraded the Bank's Financial Strength rating to C- from C, and continued coverage with a negative outlook. Moody's Investor Service, *Moody's Downgrades Colonial Bank, supra*.

195. Moody's downgraded the Bank because it had a "sizable concentration in Florida commercial real estate (CRE), residential development in particular," and the portfolio would "worsen significantly beyond the deterioration experienced to date," because of "the oversupply

of Florida housing and the continuing drop in sales and prices of single family homes.” *Id.*

Moody’s was also apprehensive over “[the Bank’s] relatively large exposures to individual real estate developers,” that were concentrated by a few developers in Florida. *Id.*

196. The following year, on January 28, 2009, Moody’s downgraded Colonial’s Senior rating to B2 from Baa2, and the Bank’s Bank Financial Strength rating to D from C-, and kept the ratings on review for further downgrade. Moody’s Investor Service, *Moody’s Downgrades Colonial (senior to B2), ratings are on review*, Newswire, Jan. 28, 2009.

197. Moody’s actions stemmed from Colonial’s \$825 million loss in the fourth quarter 2008 and its new disclosure that its receiving TARP capital was contingent on raising \$300 million of common equity. *Id.* Moody’s found it “uncertain” that Colonial would be able to “raise the required capital.” *Id.* Also, Moody’s saw significant risk in the Bank’s “sizable concentration in Florida CRE, residential development in particular,” that was largely the cause of “a four-fold increase in nonperforming assets from the prior year end.” *Id.* Moody’s stated that the Bank could be at “significant risk of the firm becoming undercapitalized,” due to its high risk loan portfolio. *Id.*

198. On April 1, 2009, Moody’s downgraded Colonial’s Issuer rating to Caa1 from B2, and the Bank’s Bank Financial Strength rating to E+ from D. Moody’s Investor Service, *Moody’s Downgrades Colonial (issuer to Caa1), Ratings Remain On Review*, Newswire, Apr. 1, 2009.

199. Moody’s action stemmed from its concern that Colonial would not be able to find financing to adequately capitalize itself which “would result in the company not meeting the requirements set out in the informal Memorandums of Understanding (MOU),” that it entered into with banking regulators. *Id.* Colonial’s inability to “adequately address the regulatory

concerns could result in further regulatory action, including the eventual appointment of a receiver or conservator of Colonial Bank's net assets." *Id.* Moody's continued to see "substantial risk to the firm," in its "sizable concentration in Florida CRE, residential development in particular." *Id.*

200. On August 4, 2009, Moody's downgraded Colonial's Issuer rating to C from Caa1, and the Bank's Bank Financial Strength rating to E from E+. Moody's Investor Service, *Moody's Downgrades Colonial (senior to C from Caa1)*, Newswire, Aug. 4, 2009. Moody's action was in response to Colonial's failure to access an equity injection from prospective investors and therefore had "insufficient capital to remain a going concern." *Id.* Moody's continued to see "substantial risk to the firm's ability to survive" because of its "sizable concentration in Florida CRE, residential development in particular." *Id.*

201. These downgrades culminated in Moody's withdrawing all ratings of Colonial and its subsidiaries, including the Bank upon "the closing of [the Bank] by the Alabama Banking Dept. on August 14, 2009 and the appointment of the FDIC as receiver." Moody's Investor Service, *Moody's Withdraws Colonial's Ratings*, Newswire, Aug. 18, 2009.

202. In light of the published warnings and the activities detailed by the confidential witnesses described above, Defendants also knew that the housing market was imploding and the mortgage markets were unstable due to decreased demand and increased rates of default. To the extent that some Defendants did not have actual knowledge of the degree to which Colonial stock was inflated due to the Company's undisclosed exposure to losses from the Bank's loan portfolio, securities portfolio, and mortgage warehouse lending, these published warnings and the activities detailed in the statements of the confidential witnesses put those Defendants on

notice and should have caused them to investigate the risks to Plan participants posed by Colonial stock. However, they conducted no such investigation.

203. Defendants had available to them several options for satisfying their fiduciary duties, including: (a) making appropriate public disclosures, as necessary; (b) divesting the Plan of Colonial stock; (c) discontinuing further investment in Colonial stock under the Plan; (d) consulting independent fiduciaries regarding appropriate measures to take in order to prudently and loyally serve the participants of the Plan; and/or (e) resigning as fiduciaries of the Plan to the extent that as a result of their employment by or association with Colonial they were unable to loyally serve the Plan and its participants in connection with the Plan's acquisition and holding of Colonial stock. Defendants took none of these actions, and instead ignored their fiduciary duties under ERISA.

204. In the end, when the severity of the circumstances came to light, the Plan suffered significant losses, all or some of which could have been avoided had the Plan's fiduciaries acted prudently and loyally to protect the interests of Plan participants, as required by ERISA.

205. Plaintiffs allege that the Investment, Administrative Committee and/or Benefits Committee Defendants failed to conduct an appropriate investigation into whether Colonial stock was a prudent investment for the Plan. As detailed above, there were multiple warning signs and red flags sufficient to place Defendants on notice of the need to investigate the Company's improper and unsound banking and accounting practices that occurred during the Class Period and resulted in ultimately the collapse of the Company in order to decide whether Company stock was a prudent investment.

C. Despite Knowledge of the Bank's Improper Business Practices and Colonial's Inadequately Disclosed Stock Risk, Defendants Permitted and Encouraged the Purchase of Colonial Stock.

206. Colonial's seemingly strong financial picture in recent years was based on its strategy to collect deposits from customers and use that money to originate construction, land, and development loans in many of the overheated parts of the real estate boom. It also invested in mortgage securities and funded mortgage originators through its wholesale lending facility. As the housing market faltered, so too did the Company.

207. To assuage fears of the growing problems in the housing market, Defendants repeatedly made false statements regarding its financial condition and false assurances to Plan participants and the public regarding the sufficiency of its risk-management processes and reserves for losses. These false statements caused the price of Colonial stock to be artificially inflated during the Class Period.

208. The high-level positions of the Investment, Administrative, and Benefits Committee Defendants as executives and officers, as well as Defendant Lowder's and subsequently Defendant Beville's position as CEO indicate that they had access to, and should have known about, the adverse undisclosed information about the Company's business, operations, products, operational trends, financial statements, markets, and present and future business prospects via access to internal corporate documents (including the Company's operating plan, budgets and forecasts, and reports of actual operations compared thereto), conversations and connections with other corporate officers and employees, attendance at management and Board meetings, and receipt of reports and other information provided in connection with these meetings. Because of their access to this information, the Benefits Committee Defendants and Defendants Lowder and Beville knew or should have known that

Colonial's common stock was an imprudent investment for the Plan's assets during the Class Period.

209. In light of the steady drumbeat of published warnings of the risks inherent in the residential real estate bubble, as well as their own knowledge of the Company's financial condition, the remaining Defendants should have conducted an investigation of the risks posed by Colonial stock during the Class Period. No prudent fiduciary would allow employees to invest in a company facing (and hiding) the tremendous risks Colonial took on during the Class Period.

210. Nonetheless, the Plan's fiduciaries continued to offer Colonial stock as an investment option and maintained Colonial stock in the Plan. A prudent fiduciary facing similar circumstances would not have stood idly by as the Plan's assets inevitably decreased in value.

D. Defendants Failed to Provide the Plan's Participants, Beneficiaries, and their Co-Fiduciaries with Complete and Accurate Information about the True Risks of Investment in Colonial Stock in the Plan.

211. ERISA mandates that plan fiduciaries have a duty of loyalty to the plan, its participants, and co-fiduciaries, which includes the duty to speak truthfully to the plan, its participants, and co-fiduciaries when communicating with them. A fiduciary's duty of loyalty under ERISA includes an obligation not to materially mislead or knowingly allow others to materially mislead plan participants, beneficiaries, or co-fiduciaries. *Hill v. BellSouth Corp.*, 313 F. Supp. 2d 1361, 1369 (N.D. Ga. 2004) (citing *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996)).

212. During the Class Period, the Company regularly communicated with employees, including participants in the Plan, about the performance, future financial and business prospects of the Company, and Company stock which was the single largest asset of the Plan. They did so knowing that Colonial stock was a Plan investment option, and, thus, that the communications

pertained to Plan assets. These communications included all employee email and presentations, as well as SEC filings and related materials that were incorporated by reference in Plan documents. As such, these communications were acts of Plan administration under ERISA, and the persons responsible for the communications acted as ERISA fiduciaries in this regard.

213. In these communications, despite Defendants' knowledge or what should have been their knowledge of the Bank's risky business practices during the Class Period, Defendants touted Colonial stock as an investment for the Plan's assets. In addition, according to numerous former employees, as late as June or even August 2009, Defendants and Colonial management continued to tell Colonial employees that because the financial problems at Colonial would be resolved, Colonial employees should continue selecting Colonial stock as an investment in their Plan account.

214. For example, according to CW#2, Colonial management strongly influenced employees' decisions to heavily invest in Company stock. Throughout 2008 and 2009, Colonial management assured employees, frequently through email, that the Bank was going to receive TARP funds and would be in great shape. In February 2009, Colonial advised employees that it would receive TARP money in March 2009. The date for receiving the TARP funds was then pushed back to April 2009, and then to May 2009. Thus, according to CW#2, from February 2009 through May 2009, Colonial continued to reassure its employees, and thus Plan participants, that the Bank would receive TARP money.

215. Similarly, CW#5 attested to receiving multiple emails, including some from Defendant Lowder, stating that Colonial stock was safe and that employees should continue to buy Company stock up to April or May 2009.

216. Confidential Witness No. 8 (“CW#8”) was employed in the banking department at Colonial’s Fort Meyers, Florida office. CW#8 stated that Colonial touted its robustness to employees and assured them that there were no accounting issues at the Company: “They were telling us that everything was hunky dory in all the accounting that they were doing.” According to CW#8, Colonial management never stopped encouraging employees to invest their Plan accounts in Company stock, even as late as June or July 2009.

217. Confidential Witness No. 9 (“CW#9”), located in Texas, advised that Company officials continually touted its viability and encouraged people to buy and hold Colonial stock. In approximately March 2009, CW#9 recalls hearing Defendant Lowder make such statements to Colonial’s senior staff and others (approximately a total of 40 persons) at a meeting in Colonial’s Dallas, Texas headquarters. Defendant Lowder presided over the meeting; also present were Defendants Hosein and Hill. Defendants Lowder, Hosein, and Hill advised those present that Colonial was very well capitalized, that this was just a bad situation across the country, that Colonial did not poorly invest in any subprime loans, that it was just being painted with the same brush as every other bank, and that the Company just had to weather the storm as it always had, that all should keep their chins up, and that things were going to be fine. CW#9 also advised that Defendants Lowder, Hosein, and Hill discussed both the Plan and the employee stock purchase plan at this meeting and stated that, even though Colonial stock had fallen from \$24 to \$2 or \$3 a share, Plan participants should stay the course and it would all turn out alright. CW#9 believes that Defendants Lowder, Hosein, and Hill held similar meetings in Nevada, Georgia, Alabama, and Florida with other Colonial employees.

218. Confidential Witness No. 10 (“CW#10”) recalls seeing an email from Defendant Moore, circulated in late May 2009, wherein Moore indicated that Colonial had sufficient capital

to weather the economic storm. Additionally, Defendant Moore blamed Colonial's problems on hedge funds that had shorted the stock and then lied to people about possible charge-offs by Colonial.

219. Confidential Witness No. 11 ("CW#11") recalled a meeting in March 2009 held in Montgomery, Alabama at Colonial's One Court Square location on the second floor. Defendants Moore, Burge, and Hill were there together with approximately 100 additional Colonial employees. CW#11 recalls that employees were told at that meeting that Colonial was financially sound, and the reason the stock price was going down was due to short selling, not Colonial's financial condition. Defendant Moore stated that the Company was going to chase down the short sellers and make them pay for what they had done to the Company. CW#11 was so convinced by the presentation that, right after the meeting, he changed his investment options in his Plan account to invest 100% in Company stock.

220. Confidential Witness No. 12 ("CW#12") recalls that Defendant Moore gave a speech a few months before the bubble burst, telling everybody present that Colonial was well-capitalized and able to withstand the downturn. CW#12 did not attend this meeting but was told about it by someone else. CW#12 also recalls seeing emails touting continued participation in the Plan.

221. Confidential Witness No. 13 ("CW#13"), was involved in Colonial's Florida loan underwriting. CW#13 stated that as late as August 2009, Colonial management continued to encourage employees, to continue contributing to their Plan account. CW#13 stated that "[w]e were very much told that Colonial was doing well and that we had no concerns. We were told that Colonial didn't even need the TARP money, that they would be fine without it, but they felt certain that they were going to get those funds. It was constantly reiterated to us that everything

was going to be fine and I believed them.” Indeed, according to CW#13, Colonial employees were told at departmental meetings and through internet postings not to worry even if Colonial did not receive TARP funds because the Company had adequate reserves to meet loan losses. As a result, CW#13 continued to direct between 30% and 45% of her Plan contributions to purchase Colonial stock. CW#13 is aware that many other long-term Colonial employees also continued to purchase Colonial stock in their Plan accounts, right up until the time when the FDIC assumed control over the Bank in August 2009.

222. Further, Defendants, as the Plan’s fiduciaries, knew or should have known certain basic facts about the characteristics and behavior of the Plan’s participants—well-recognized in the 401(k) literature and the trade press—concerning investment in company stock, including that:

- (a) out of loyalty, employees tend to invest in company stock;
- (b) employees tend to over-extrapolate from recent returns, expecting high returns to continue or increase going forward;
- (c) employees tend not to change their investment option allocations in the plan once made;
- (d) lower income employees tend to invest more heavily in company stock than more affluent workers, though they are at greater risk; and
- (e) even for risk-tolerant investors, the risks inherent in company stock are not commensurate with its rewards.

Bridgitte C. Mandrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q. J. Econ. 4, 1149 (2001), http://mitpress.mit.edu/journals/pdf/qjec_116_04_1149_0.pdf; see also Nellie Liang & Scott Weisbenner, *Investor Behavior and the Purchase Of Company Stock in 401(k) Plans the Importance of Plan Design*, Board of Governors for the Federal Reserve System Finance and Economics Discussion Series, No. 2002 36 (2002), <http://www.federalreserve.gov/pubs/feds/2002/200236/200236pap.pdf>.

223. Even though Defendants knew or should have known these facts, and even though Defendants knew of the high concentration of the Plan's funds in Company stock during the Class Period, Defendants failed to take any meaningful ameliorative action to protect the Plan and its participants from the heavy investment in Colonial stock.

224. In particular, Defendants failed to provide participants, and the market as a whole, with complete and accurate information regarding the true financial condition of the Company, which was affected by the fact that, among other things, the Bank: (a) continuously lowered underwriting standards; (b) engaged in highly risky mortgage warehouse lending, which overexposed the Company to the subprime market; (c) invested in unduly risky assets, including securities backed by subprime mortgages; (d) became over-concentrated in bloated housing markets that were particularly susceptible to the housing downturn; (e) lacked adequate internal and financial controls; (f) mismanaged risk and liquidity; (g) engaged in improper accounting practices; (h) failed to maintain sufficient capital; and (i) did not adequately reserve for loan losses, all of which led to an FDIC Cease and Desist Order and the eventual collapse of Colonial and its stock..

225. As a result, participants in the Plan could not appreciate the true risks presented by investments in Company stock and, therefore, could not make informed decisions regarding their Plan investments in Company stock.

226. Additionally, the Benefits Committee Defendants and Defendants Beville and Lowder knew all or a portion of the truth about the Company's financial condition and in particular about the risks posed to the Company by the Bank's exposure to loans originated under lowered standards, as detailed previously. On information and belief, the Benefits Committee Defendants and Defendants Lowder and Beville and any other Defendant with

knowledge of some or all of the risks posed by the Plan's investment in Company stock failed to disclose this information to their co-fiduciaries.

E. Defendants Suffered from Conflicts of Interest.

227. As ERISA fiduciaries, Defendants were required to manage the Plan's investments, including the investment in Colonial stock, solely in the interest of the participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and their beneficiaries. This duty of loyalty requires fiduciaries to avoid conflicts of interest and to resolve them promptly when they occur.

228. Conflicts of interest arise when a company that invests plan assets in company stock founders. As the situation deteriorates, plan fiduciaries are torn between their duties as officers and directors for the company on the one hand, and to the plan and plan participants on the other. As courts have made clear, "[w]hen a fiduciary has dual loyalties, the prudent person standard requires that he make a careful and impartial investigation of all investment decisions." *Martin v. Feilen*, 965 F.2d 660, 670 (8th Cir.1992) (citation omitted). Fiduciaries must avoid "placing themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees of a pension plan." *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982).

229. Because the compensation of several Defendants was significantly tied to the price of Colonial stock, Defendants had an incentive to keep the Plan's assets invested in Colonial stock on a regular, ongoing basis. Elimination of Company stock as an investment option for the Plan would have reduced the overall market demand for Colonial stock and sent a negative signal to Wall Street analysts and the market overall. Both results would have adversely affected the price of Colonial stock, resulting in lower compensation for Defendants.

230. Some Defendants may have had no choice in tying their compensation to Colonial stock (because compensation decisions were out of their hands), but Defendants did have the choice of whether to keep the Plan's participants' and beneficiaries' retirement savings invested in Colonial stock or whether to properly inform participants of material negative information concerning the above-outlined Company problems.

231. Finally, any signal to the market that the Company was not a sound, long-term investment, such as the Plan's divestiture of Colonial stock, would have called into question Defendants' job performance as corporate officers. Rather than have anyone question their soundness as leaders of Colonial, Defendants chose to remain silent and let the Plan continue to hold and acquire Colonial stock.

232. These conflicts of interest put Defendants in the position of having to choose between their own interests as directors, executives, and stockholders, and the interests of the Plan's participants and beneficiaries, in whose interests Defendants were obligated to loyally serve with an "eye single."

233. Yet, Defendants did nothing to protect the Plan and the Plan's participants from the inevitable losses the Plan would suffer.

234. While the above Defendants protected themselves, they stood idly by as the Plan lost millions of dollars because of its investment in Colonial stock.

VIII. THE RELEVANT LAW

235. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides, in pertinent part, that a civil action may be brought by a participant for relief under ERISA § 409, 29 U.S.C. § 1109.

236. An individual may be a fiduciary for ERISA purposes either because the plan documents explicitly describe fiduciary responsibilities or because that person functions as a

fiduciary. *See* U.S.C. § 1002(21)(A); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993); *Concha v. London*, 62 F.3d 1493 (9th Cir. 1995).

237. When fiduciaries put the interests of the company or their own interests ahead of the interests of plan participants, they violate ERISA. A fiduciary may, therefore, be personally liable to plan participants for breaching the responsibilities, obligations, or duties imposed under the plan and must restore any losses to the plan with any profits the fiduciary made through use of plan assets. ERISA § 409(a), 29 U.S.C. § 1109(a).

238. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes individual participants to seek equitable relief from fiduciaries, including, without limitation, injunctive relief and, as available under applicable law, constructive trust, restitution, and other monetary relief.

239. ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) & (B), provide, in pertinent part:

A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

240. These fiduciary duties under ERISA §§ 404(a)(1)(A) and (B) are referred to as the duties of loyalty, exclusive purpose, and prudence and are the “highest known to the law.”

Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

241. A fiduciary breaches the duty of loyalty when the fiduciary withholds information that the fiduciary knows or should know a participant would need to make an informed decision. Therefore, the duty of loyalty includes: (a) a negative duty not to misinform; (b) an affirmative duty to inform when the fiduciary knows or should know that silence might be harmful; and (c) a

duty to convey complete and accurate information material to the circumstances of participants and beneficiaries.

242. A fiduciary must avoid conflicts of interest and resolve them promptly when they do occur. As such, a plan fiduciary must always administer a plan with an exclusive purpose or “eye single” to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor. *Bierwirth*, 680 F.2d at 271.

243. A plan fiduciary is also responsible for the investment and monitoring of plan investments, ensuring that only prudent investments are offered as plan options, and monitoring such investments to ensure that they remain prudent and suitable for the plan. *In re ADC Telecomm, ERISA Litig.*, No. 03-2989, 2004 U.S. Dist. LEXIS 14383 (D. Minn. July 26, 2004). This includes the duty to conduct an independent and thorough investigation into, and to continually monitor, the merits of all the investment alternatives of a plan to ensure that each investment is a suitable option for the plan.

244. ERISA § 405(a), 29 U.S.C. § 1105(a), “Liability for Breach by Co-Fiduciary,” provides, in pertinent part:

In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

- (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
- (2) if, by his failure to comply with section 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
- (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

245. Co-fiduciary liability is an important part of ERISA's regulation of fiduciary responsibility. Because ERISA permits the fractionalization of a fiduciary duty, there may be, as in this case, several ERISA fiduciaries involved in a given decision, such as the role of company stock in a plan. In the absence of co-fiduciary liability, fiduciaries would be incentivized to limit their responsibilities as much as possible and to ignore the conduct of other fiduciaries. The result would be a setting in which a major fiduciary breach could occur, but the responsible party could not easily be identified. Co-fiduciary liability obviates this. Even if a fiduciary did not participate in a breach, if he knows of a breach, he must take steps to remedy it.

[I]f a fiduciary knows that another fiduciary of the plan has committed a breach, and the first fiduciary knows that this is a breach, the first fiduciary must take reasonable steps under the circumstances to remedy the breach. . . . [T]he most appropriate steps in the circumstances may be to notify the plan sponsor of the breach, or to proceed to an appropriate Federal court for instructions, or bring the matter to the attention of the Secretary of Labor. The proper remedy is to be determined by the facts and circumstances of the particular case, and it may be affected by the relationship of the fiduciary to the plan and to the co-fiduciary, the duties and responsibilities of the fiduciary in question, and the nature of the breach.

1974 U.S.C.C.A.N. 5038, 1974 WL 11542, at 5080.

246. Plaintiffs bring this action under the authority of ERISA § 502(a)(2) for relief under ERISA § 409(a) to recover losses sustained by the Plan arising out of the breaches of fiduciary duties by Defendants for violations under ERISA § 404(a)(1) and ERISA § 405(a).

IX. PLAINTIFFS HAVE EXHAUSTED ADMINISTRATIVE REMEDIES AND SHOULD BE EXCUSED OF FURTHER EXHAUSTION

A. While Claims for Benefits and Other Contractual Matters Under ERISA Are Subject to an Exhaustion Requirement, Claims for Breach of Fiduciary Duty Are Not.

247. Plaintiffs claim breach of fiduciary duty under ERISA §§ 404 and 405, 29 U.S.C. §§ 1104 & 1105, for which they are entitled to damages under ERISA § 409, 29 U.S.C. § 1109, and may bring a civil action under ERISA § 502(a)(2) and (a)(3), 29 U.S.C. § 1132(a)(2) &

(a)(3). ERISA claims based on statutory rights, such as ERISA §§ 404 and 405, 29 U.S.C. §§ 1104 & 1105, are distinguished from claims based on “benefits due” or other contractual rights under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

248. An ERISA participant may “recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan” under ERISA § 502(a)(1), 29 U.S.C. 1132(a)(1). Subject to some exceptions, a plaintiff wanting to recover benefits due or enforce rights regarding plan benefits must exhaust available administrative remedies before suing under ERISA § 502(a)(1).

249. This is not an ERISA § 502(a)(1) case. Plaintiffs are not seeking to recover benefits due or enforce other rights specific to themselves. Instead, Plaintiffs are petitioning this court to remedy a breach of fiduciary duty owed by Defendants to the Plan. Accordingly, it is not necessary for Plaintiffs to exhaust any purported administrative remedies in this case. Nonetheless, Plaintiffs have fully satisfied any possible exhaustion requirement in this case.

B. Plaintiffs Have Exhausted Administrative Remedies.

250. Plaintiffs McKay, Torregroza, Shockley, and Pompa submitted administrative demand claims to the Administrative Committee prior to or in conjunction with their submission of their initial complaints. *See* Letters from Derek Loeser to Administrative Committee dated August 21, 2009 and September 11, 2009, Letter from Adam Plant to Administrative Committee dated September 22, 2009, and Letter from Robert Harwood to Administrative Committee dated September 1, 2009. (attached hereto as Exhibits A, B, C, and D). Plaintiffs did not receive any Notice of Denial of their claims within 90 days, and in fact, have not received any response at all as of the date of filing this complaint.

251. The Plan provides, “If you don’t receive notice of denial from the plan administrator within 90 days . . . you will be deemed to have exhausted all administrative remedies and may file suit in federal or state court.” 2009 SPD at ERISA 0274-F.

252. Thus, under the plain language of the Plan, the Plan Administrator’s failure to complete the disposition of Plaintiffs’ claims in a timely manner results in a deemed exhaustion of the claimant's administrative remedies. Accordingly, Plaintiffs have exhausted their administrative remedies.

C. Plaintiffs Are Excused from Further Exhausting Administrative Remedies.

253. At any rate, Plaintiffs should be excused from any further effort to exhaust administrative remedies. First, as noted, under the Plan, as a result of the Plan Administrator’s failure to timely respond to Plaintiffs’ demands, Plaintiffs are deemed to have exhausted all administrative remedies and may file suit in federal court—as they have done in this case.

254. Second, according to the October 2009 Board Resolution, the Plan terminated effective September 30, 2009. October 2009 Board Resolution at ERISA 0381. Plaintiffs dispute whether the termination is effective. Nonetheless, because the Board has taken the position that the Plan has been terminated, any effort to further pursue exhaustion obviously would be futile.

255. In addition, while the SPD provides administrative procedures for claims for benefits, the SPD provides no administrative procedure for “fiduciary claims.” Thus, as the SPD provides no administrative procedure by which Plaintiffs may make a claim for fiduciary breach under ERISA § 502(a)(2) and (3), any demand made by Plaintiffs for remedy of such claims would be futile.

256. The futility is further evident given the nature of the relief sought by Plaintiffs, the administrative process itself, and the conduct of Defendants. Under ERISA § 502(a)(2), 29

U.S.C. 1132(a)(2), Plaintiffs seek to enforce, pursuant to ERISA § 409, 29 U.S.C. § 1109, Defendants’ “personal[] liabil[ity] to make good to [a] plan any losses to the plan resulting from [the breach of fiduciary duty].” Under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs can “enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or . . . obtain other appropriate equitable relief.”

257. Plaintiffs allege that Defendants’ breaches of fiduciary duty have caused the Plan to lose millions of dollars. Given the extent of Defendants’ liability, it is certain that the relief Plaintiffs seek will not be provided through the Plan’s administrative process. Moreover, neither the Administrative Committee nor the Benefits Committee is going to order itself or any of the other Defendants to pay millions of dollars to the Plan or seek a declaratory judgment to this effect, so any appeal to it would be futile.

258. Indeed, the procedures set forth in the Plan do not empower the Administrative Committee or the Benefits Committee, or any of the other fiduciaries who are involved in the administrative claims process to order other Plan fiduciaries to pay for the losses they have caused the Plan to incur. Such relief only can be obtained from a federal court, and it would be futile to seek that relief from the Administrative Committee, the Benefits Committee, or any of the other Defendants.

259. Thus, even if Plaintiffs had not exhausted the available administrative remedies, which they surely did, further efforts to exhaust would be futile since plaintiffs have been denied meaningful access to the administrative review scheme and the scheme itself cannot provide an adequate remedy.

260. Nevertheless, should this Court find that Plaintiffs are required to exhaust their administrative remedies under the Plan, Plaintiffs reserve the right to seek permission of the

Court to stay this action pending the resolution of their administrative demand and amend their complaint accordingly.

X. CAUSES OF ACTION

A. **Count I: Failure to Prudently and Loyalily Manage the Plan and Assets of the Plan.**

261. Plaintiffs incorporate by this reference the paragraphs above.

262. This Count alleges fiduciary breach against the following Defendants: the Investment Committee Defendants and the Benefits Committee Defendants (the “Prudence Defendants”).

263. The Plan is governed by the provisions of ERISA, 29 U.S.C. §§ 1001, *et. seq.*, and Plaintiffs are participants of the Plan.

264. Each of the Prudence Defendants, on information and belief, were *de facto* fiduciaries within the meaning of § 3(21)(A), 29 U.S.C. § 1002(21)(A). Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

265. Each of the Prudence Defendants was also a co-fiduciary of the other Defendants, under ERISA § 405, 29 U.S.C. § 1105, with respect to the Plan and its participants. As co-fiduciaries, each Defendant is liable for the others’ conduct under the terms of ERISA § 405(a), 29 U.S.C. § 1005(a).

266. As alleged above, the scope of the fiduciary duties and responsibilities of the Prudence Defendants included managing the assets of the Plan for the sole and exclusive benefit of Plan participants and beneficiaries, and with the care, skill, diligence, and prudence required by ERISA. On information and belief, the Prudence Defendants were directly responsible for, among other things, selecting prudent investment options, eliminating imprudent options, determining how to invest employer contributions to the Plan and directing the Trustee regarding

the same, evaluating the merits of the Plan's investments on an ongoing basis, and taking all necessary steps to ensure that the Plan's assets were invested prudently.

267. Yet, contrary to their duties and obligations under the Plan's documents and ERISA, the Prudence Defendants failed to loyally and prudently manage the assets of the Plan. Specifically, during the Class Period, the Prudence Defendants knew or should have known that Colonial stock no longer was a suitable and appropriate investment for the Plan, but was, instead, a highly speculative and risky investment in light of the Company's fundamental weaknesses. Nonetheless, during the Class Period, the Prudence Defendants continued to offer Colonial stock as an investment option for participant contributions. They did so despite evidence that the Company was engaged in an improper and highly risky business plan and had ignored industry regulations and warnings, as well as sound business practice in order to extend mortgages which were at high risk of default, and otherwise engage in unsound and inappropriate lending and accounting practices.

268. The Prudence Defendants were obliged to prudently and loyally manage all of the Plan's assets. However, their duties of prudence and loyalty were especially significant with respect to Company stock because: (a) company stock is a particularly risky and volatile investment, even in the absence of company misconduct; and (b) participants tend to underestimate the likely risk and overestimate the likely return of investment in company stock. In view of this, Defendants were obliged to have in place a regular, systematic procedure for evaluating the prudence of investment in Company stock.

269. The Prudence Defendants had no such procedure. Moreover, they failed to conduct an appropriate investigation of the merits of continued investment in Colonial stock even in light of the losses, the Bank's highly risky and inappropriate practices, and the particular

dangers that these practices posed to the Plan. Such an investigation would have revealed to a reasonably prudent fiduciary the imprudence of continuing to make and maintain investment in Colonial stock under these circumstances.

270. The Prudence Defendants' decisions respecting the Plan's investment in Colonial stock described above, under the circumstances alleged herein, abused their discretion as ERISA fiduciaries in that a prudent fiduciary acting under similar circumstances would have made different investment decisions. Specifically, based on the above, a prudent fiduciary could not have reasonably believed that further and continued investment of the Plan's contributions and assets in Colonial stock was in keeping with the Plan settlor's expectations of how a prudent fiduciary would operate.

271. The Prudence Defendants were obligated to discharge their duties with respect to the Plan with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

272. According to DOL regulations and case law interpreting this statutory provision, a fiduciary's investment or investment course of action is prudent he "(i) has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and (ii) he has acted accordingly." 29 C.F.R. 2550.404a-1(b)(1).

273. Again, according to DOL regulations, “appropriate consideration” in this context includes, but is not necessarily limited to:

- (i) a determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action; and
- (ii) consideration of the following factors as they relate to such portion of the portfolio:
 - (A) the composition of the portfolio with regard to diversification;
 - (B) the liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and
 - (C) the projected return of the portfolio relative to the funding objectives of the plan.

29 C.F.R. 2550.404a-1(b)(2).

274. Given the conduct of the Company as described above, the Prudence Defendants could not possibly have acted prudently when they continued to invest the Plan’s assets in Colonial stock because, among other reasons, the Prudence Defendants because of their positions at the Company knew or should have known of the Bank’s highly risky and inappropriate business and accounting practices. These improper business practices included, among things, that the Bank: (a) continuously lowered underwriting standards; (b) engaged in highly risky mortgage warehouse lending, which overexposed the Company to the subprime market; (c) invested in unduly risky assets, including securities backed by subprime mortgages; (d) became over-concentrated in bloated housing markets that were particularly susceptible to the housing downturn; (e) lacked adequate internal and financial controls; (f) mismanaged risk and liquidity; (g) engaged in improper accounting practices; (h) failed to maintain sufficient capital; and (i) did not adequately reserve for loan losses, all of which led to an FDIC Cease and Desist Order and

the eventual collapse of Colonial and its stock. Furthermore, Defendants failed to acknowledge, manage, and accurately disclose the risks associated with the Bank's mortgage loan origination, mortgage warehouse lending, and investment practices. And Defendants issued false, misleading, and incomplete statements regarding its net income and financial results, which led to the artificial inflation of the Company's stock price.

275. As such, the risk associated with the investment in Colonial stock during the Class Period was far above the normal, acceptable risk associated with investment in company stock. Yet, Plan participants were unaware of this risk. The Prudence Defendants knew participants were unaware of the risk—as was the market generally—because the Prudence Defendants never disclosed it.

276. Thus, given this inequity, the Prudence Defendants had a duty to avoid permitting the Plan or any participant to invest Plan assets in Colonial stock.

277. Further, knowing that the Colonial common stock investment in the Plan was not a diversified portfolio, the Prudence Defendants had a heightened responsibility to divest the Plan of Company stock if it became or remained imprudent.

278. The fiduciary duty of loyalty entails, among other things, a duty to avoid conflicts of interest and to resolve them promptly when they occur. A fiduciary must always administer a plan with single-minded devotion to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor. Fiduciaries laboring under such conflicts, must, in order to comply with the duty of loyalty, make special efforts to assure that their decision making process is untainted by the conflict and made in a disinterested fashion, typically by seeking independent financial and legal advice obtained only on behalf of the plan.

279. The Prudence Defendants breached their duty to avoid conflicts of interest and to promptly resolve them by: (a) failing to engage independent advisors who could make independent judgments concerning the Plan's investment in Colonial stock; (b) failing to notify appropriate federal agencies, including the DOL, of the facts and circumstances that made Colonial stock an unsuitable investment for the Plan; (c) failing to take such other steps as were necessary to ensure that participants' interests were loyally and prudently served; (d) failing to disregard the impact of their duty to avoid conflicts of interest on their own compensation; and (e) placing their own improper interests above the interests of the participants with respect to the Plan's investment in Colonial stock.

280. Moreover, a fiduciary's duties of loyalty and prudence require it to disregard plan documents or directives that it knows or reasonably should know would lead to an imprudent result or would otherwise harm plan participants or beneficiaries. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). Thus, a fiduciary may not blindly follow plan documents or directives that would lead to an imprudent result or that would harm plan participants or beneficiaries, nor allow others, including those whom they direct or who are directed by the plan, to do so.

281. The Prudence Defendants breached this duty by: (a) continuing to offer Colonial stock as an investment option for participants of the Plan; (b) allowing participants to invest Plan assets in Colonial stock rather than in cash or other short-term investment options; and (c) engaging in this course of conduct when the Prudence Defendants knew or should have known that Colonial stock no longer was a prudent investment for participants' retirement savings.

282. As a consequence of the Prudence Defendants' breaches of fiduciary duty alleged in this Count, the Plan suffered tremendous losses. If the Prudence Defendants had discharged their fiduciary duties to prudently invest the Plan's assets, the losses suffered by the Plan would

have been minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary duty alleged herein, the Plan, and indirectly Plaintiffs and the other Class members, lost millions of dollars of retirement savings.

283. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a), 1132(a)(2) and (a)(3), the Prudence Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

B. Count II: Failure to Monitor Fiduciaries.

284. Plaintiffs incorporate by this reference the allegations above.

285. This Count alleges fiduciary breach against the following Defendants: the Director Defendants (the “Monitoring Defendants”).

286. As alleged above, during the Class Period the Monitoring Defendants were *de facto* fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

287. As alleged above, the scope of the fiduciary responsibilities of the Monitoring Defendants included the responsibility to appoint, and remove, and thus, monitor the performance of other fiduciaries, including monitoring (a) the Investment Committee Defendants, (b) the Administrative Committee Defendants; and (c) the Benefits Committee Defendants.

288. Under ERISA, a monitoring fiduciary must ensure that the monitored fiduciaries are performing their fiduciary obligations, including those with respect to the investment and holding of plan assets, and must take prompt and effective action to protect the plan and participants when they are not.

289. The monitoring duty further requires that appointing fiduciaries have procedures in place so that on an ongoing basis they may review and evaluate whether the “hands-on” fiduciaries are doing an adequate job (for example, by requiring periodic reports on their work and the plan’s performance, and by ensuring that they have a prudent process for obtaining the information and resources they need). In the absence of a sensible process for monitoring their appointees, the appointing fiduciaries would have no basis for prudently concluding that their appointees were faithfully and effectively performing their obligations to plan participants or for deciding whether to retain or remove them.

290. Furthermore, a monitoring fiduciary must provide the monitored fiduciaries with complete and accurate information in their possession that they know or reasonably should know that the monitored fiduciaries must have in order to prudently manage the plan and the plan assets, or that may have an extreme impact on the plan and the fiduciaries’ investment decisions regarding the plan.

291. On information and belief, the Monitoring Defendants breached their fiduciary monitoring duties by, among other things: (a) failing, at least with respect to the Plan’s investment in Company stock, to monitor their appointees, to evaluate their performance, or to have any system in place for doing so, and standing idly by as the Plan suffered enormous losses as a result of their appointees’ imprudent actions and inaction with respect to Company stock; (b) failing to ensure that the monitored fiduciaries appreciated the true extent of the Bank’s highly risky and inappropriate business and accounting practices, and the likely impact of such practices on the value of the Plan’s investment in Colonial stock; (c) to the extent any appointee lacked such information, failing to provide complete and accurate information to all of their appointees such that they could make sufficiently informed fiduciary decisions with respect to the Plan’s

assets; and (d) failing to remove appointees whose performance was inadequate in that they continued to make and maintain investments in Colonial stock despite their knowledge of practices that rendered Colonial stock an imprudent investment during the Class Period for participants' retirement savings in the Plan, and who breached their fiduciary duties under ERISA.

292. As a consequence of the Monitoring Defendants' breaches of fiduciary duty, the Plan suffered tremendous losses. If the Monitoring Defendants had discharged their fiduciary monitoring duties as described above, the losses suffered by the Plan would have been minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary duty alleged herein, the Plan, and indirectly Plaintiffs and the other Class members, lost millions of dollars of retirement savings.

293. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a), 1132(a)(2) and (a)(3), the Monitoring Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

C. Count III: Failure to Provide Complete and Accurate Information to the Plan's Participants and Beneficiaries.

294. Plaintiffs incorporate by this reference the allegations above.

295. This Count alleges fiduciary breach against the following Defendants: the Administrative Committee Defendants and Benefits Committee Defendants (the "Communications Defendants").

296. As previously alleged, the Communications Defendants were both named fiduciaries of the Plan pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), and *de facto*

fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21). Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

297. At all relevant times, the scope of the fiduciary responsibility of the Communications Defendants included the communications and material disclosures to the Plan participants and beneficiaries.

298. The duty of loyalty under ERISA requires fiduciaries to speak truthfully to participants, not to mislead them regarding the plan or plan assets, and to disclose information that participants need in order to exercise their rights and interests under the plan. This duty to inform participants includes an obligation to provide participants and beneficiaries of the plan with complete and accurate information, and to refrain from providing false information or concealing material information, regarding plan investment options such that participants can make informed decisions with regard to the prudence of investing in such options made available under the plan. This duty applies to all of the Plan's investment options, including investment in Colonial stock.

299. Because investments in the Plan were not diversified (*i.e.*, Defendants chose to or allow Plan assets to be invested so heavily in Colonial stock), such investment carried with it an inherently high degree of risk. This inherent risk made the Communications Defendants' duty to provide complete and accurate information particularly important with respect to Colonial stock.

300. The Communications Defendants breached their duty to inform participants by failing to provide complete and accurate information regarding the Bank's serious mismanagement and improper business practices and the Company's public misrepresentations, and the consequential artificial inflation of the value of Colonial stock, and, generally, by conveying incomplete information regarding the soundness of Colonial stock and the prudence

of investing and holding retirement contributions in Colonial equity. These failures were particularly devastating to the Plan and its participants because Plan assets were invested in Colonial stock during the Class Period, and when the value of Colonial stock collapsed, the Plan participants' retirement savings plummeted.

301. The Communications Defendants' omissions clearly were material to participants' ability to exercise informed control over their Plan accounts, as in the absence of the information, participants did not know the true risks presented by the Plan's investment in Colonial stock.

302. The Communications Defendants' omissions and incomplete statements alleged herein were Plan-wide and uniform in that the Communications Defendants failed to provide complete and accurate information to any of the Plan's participants.

303. The Communications Defendants in this Count were unjustly enriched by the fiduciary breaches described in this Count.

304. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plan, and indirectly Plaintiffs and the Plan's other participants and beneficiaries, lost a significant portion of their retirement investment.

305. Pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) and ERISA § 409(a), 29 U.S.C. § 1109(a), the Communications Defendants in the Count are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count.

D. Count IV: Co-Fiduciary Liability.

306. Plaintiffs incorporate by this reference the allegations above.

307. This Count alleges co-fiduciary liability against all Defendants.

308. As alleged above, during the Class Period Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or *de facto* fiduciaries within the

meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

309. As alleged above, ERISA § 405(a), 29 U.S.C. § 1105, imposes liability on a fiduciary, in addition to any liability which he may have under any other provision, for a breach of fiduciary responsibility of another fiduciary with respect to the same plan if knows of a breach and fails to remedy it, knowingly participates in a breach, or enables a breach. Defendants breached all three provisions.

310. **Knowledge of a Breach and Failure to Remedy.** ERISA § 405(a)(3), 29 U.S.C. § 1105, imposes co-fiduciary liability on a fiduciary for a fiduciary breach by another fiduciary if, he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach. Each Defendant knew of the breaches by the other fiduciaries and made no efforts, much less reasonable ones, to remedy those breaches. In particular, they did not communicate their knowledge of the Bank's improper business practices to the other fiduciaries.

311. Colonial and the Bank, through their officers and employees, were unable to meet their business goals, engaged in highly risky and inappropriate business practices, withheld material information from the market, and profited from such practices. Because Defendants knew of the Company's failures and inappropriate business practices, they also knew that Defendants were breaching their duties by continuing to invest the Plan's assets in Company stock. Yet, they failed to undertake any effort to remedy these breaches. Instead, they compounded them by downplaying the significance of Colonial's failed and inappropriate business practices, and obfuscating the risk that the practices posed to the Company, and, thus, to the Plan.

312. **Knowing Participation in a Breach.** ERISA § 405(a)(1), 29 U.S.C. § 1105(1), imposes liability on a fiduciary for a breach of fiduciary responsibility of another fiduciary with respect to the same plan if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach. The Monitoring Defendants knowingly participated in the breaches of Defendants because, as alleged above, they had actual knowledge of the facts that rendered Colonial stock an imprudent retirement investment and yet, ignoring their oversight responsibilities, permitted Defendants to breach their duties.

313. **Enabling a Breach.** ERISA § 405(a)(2), 29 U.S.C. § 1105(2), imposes liability on a fiduciary if by failing to comply with ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled another fiduciary to commit a breach.

314. The Monitoring Defendants' failure to monitor Defendants, particularly the Investment Committee Defendants, Administrative Committee Defendants, and Benefits Committee Defendants, enabled those Defendants to breach their duties.

315. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plan, and indirectly Plaintiffs and the Plan's other participants and beneficiaries, lost millions of dollars of retirement savings.

316. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a), 1132(a)(2) and (a)(3), Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

XI. CAUSATION

317. The Plan suffered millions of dollars in losses because substantial assets of the Plan were imprudently invested or allowed to be invested by Defendants in Colonial stock during the Class Period, in breach of Defendants' fiduciary duties.

318. Defendants are liable for the Plan's losses in this case because the Plan's investment in Colonial stock was the result of Defendants' decision to imprudently maintain the assets of the Plan in Colonial stock. Thus, Defendants are liable for these losses because they failed to take the necessary and required steps to ensure effective and informed independent participant control over the investment decision-making process.

319. Alternatively, Plan participants continued to invest in Colonial stock as part of their 401(k) plans as a direct result of Defendants' active encouragement to purchase Company stock.

320. Had Defendants properly discharged their fiduciary and co-fiduciary duties, including the monitoring and removal of fiduciaries who failed to satisfy their ERISA-mandated duties of prudence and loyalty, eliminating Colonial stock as an investment alternative when it became imprudent, and divesting the Plan of Colonial stock when maintaining such an investment became imprudent, the Plan would have avoided some or all of the losses that they, and indirectly, the participants suffered.

XII. REMEDY FOR BREACHES OF FIDUCIARY DUTY

321. Defendants breached their fiduciary duties in that they knew or should have known the facts as alleged above, and therefore knew or should have known that the Plan's assets should not have been invested in Colonial stock during the Class Period.

322. As a consequence of Defendants' breaches, the Plan suffered significant losses.

323. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) authorizes a plan participant to bring a civil action for appropriate relief under ERISA § 409, 29 U.S.C. § 1109. Section 409 requires “any person who is a fiduciary . . . who breaches any of the . . . duties imposed upon fiduciaries . . . to make good to such plan any losses to the plan.” Section 409 also authorizes “such other equitable or remedial relief as the court may deem appropriate.”

324. With respect to calculation of the losses to the Plan, breaches of fiduciary duty result in a presumption that, but for the breaches of fiduciary duty, the Plan would not have made or maintained their investments in the challenged investment and, instead, prudent fiduciaries would have invested the Plan’s assets in the most profitable alternative investment available to them. Alternatively, losses may be measured not only with reference to the decline in stock price relative to alternative investments, but also by calculating the additional shares of Colonial stock that the Plan would have acquired had the Plan fiduciaries taken appropriate steps to protect the Plan. The Court should adopt the measure of loss most advantageous to the Plan. In this way, the remedy restores the Plan’s lost value and puts the participants in the position they would have been in if the Plan had been properly administered.

325. Plaintiffs and the Class are therefore entitled to relief from Defendants in the form of: (a) a monetary payment to the Plan to make good to the Plan the losses to the Plan resulting from the breaches of fiduciary duties alleged above in an amount to be proven at trial based on the principles described above, as provided by ERISA § 409(a), 29 U.S.C. § 1109(a); (b) injunctive and other appropriate equitable relief to remedy the breaches alleged above, as provided by ERISA §§ 409(a), 502(a)(2) and (3), 29 U.S.C. §§ 1109(a), 1132(a)(2) and (3); (c) injunctive and other appropriate equitable relief pursuant to ERISA § 502(a)(3), 29 U.S.C. 1132(a)(3), for knowing participation by a non-fiduciary in a fiduciary breach; (d) reasonable

attorney fees and expenses, as provided by ERISA § 502(g), 29 U.S.C. § 1132(g), the common fund doctrine, and other applicable law; (e) taxable costs and interest on these amounts, as provided by law; and (f) such other legal or equitable relief as may be just and proper.

326. Under ERISA, each Defendant is jointly and severally liable for the losses suffered by the Plan in this case.

XIII. CLASS ACTION ALLEGATIONS

327. **Class Definition.** Plaintiffs bring this action as a class action pursuant to Rules 23(a), (b)(1), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure on behalf of Plaintiffs and the following class of persons similarly situated (the “Class”):

All persons, other than Defendants, who were participants in or beneficiaries of the Plan at any time between April 18, 2007 and August 25, 2009, and whose accounts included investments in Colonial stock.

328. **Class Period.** The fiduciaries of the Plan knew or should have known at least by April 18, 2007 and through the present that the Company’s material weaknesses were so pervasive that Colonial stock could no longer be offered as a prudent investment for retirement Plan.

329. **Numerosity.** The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiffs at this time, and can only be ascertained through appropriate discovery, Plaintiffs believe there are, based on the Plan’s Form 5500 for Plan year 2007, approximately 6,300 members of the Class who participated in, or were beneficiaries of, the Plan during the Class Period.

330. **Commonality.** Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are:

- (i) whether Defendants each owed a fiduciary duty to Plaintiffs and members of the Class;
- (ii) whether Defendants breached their fiduciary duties to Plaintiffs and members of the Class by failing to act prudently and solely in the interests of the Plan's participants and beneficiaries;
- (iii) whether Defendants violated ERISA; and
- (iv) whether the Plan has suffered losses and, if so, what is the proper measure of damages.

331. **Typicality.** Plaintiffs' claims are typical of the claims of the members of the Class because: (a) to the extent Plaintiffs seek relief on behalf of the Plan pursuant to ERISA § 502(a)(2), their claims on behalf of the Plan are not only typical to, but identical to a claim under this section brought by any Class member; and (b) to the extent Plaintiffs seek relief under ERISA § 502(a)(3) on behalf of themselves for equitable relief, that relief would affect all Class members equally.

332. **Adequacy.** Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel competent and experienced in class action, complex, and ERISA litigation. Plaintiffs have no interests antagonistic to or in conflict with those of the Class.

333. **Rule 23(b)(1)(B) Requirements.** Class action status in this ERISA action is warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the actions, or substantially impair or impede their ability to protect their interests.

334. **Other Rule 23(b) Requirements.** Class action status is also warranted under the other subsections of Rule 23(b) because: (a) prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for Defendants;

(b) Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole; and (c) questions of law or fact common to members of the Class predominate over any questions affecting only individual members and a class action is superior to the other available methods for the fair and efficient adjudication of this controversy.

XIV. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for:

- A. A Declaration that each Defendant breached his or her ERISA fiduciary duty to the Plan participants;
- B. An Order compelling Defendants to make good to the Plan all losses to the Plan resulting from Defendants' breaches of their fiduciary duties, including losses to the Plan resulting from imprudent investment of the Plan's assets, and to restore to the Plan all profits Defendants made through use of the Plan's assets, and to restore to the Plan all profits which the participants would have made if Defendants had fulfilled their fiduciary obligations;
- C. Imposition of a Constructive Trust on any amounts by which any Defendant was unjustly enriched at the expense of the Plan as the result of breaches of fiduciary duty;
- D. An Order requiring Defendants to appoint one or more independent fiduciaries to participate in the management of the Plan's investment in Colonial stock;
- E. Actual damages in the amount of any losses the Plan suffered, to be allocated among the participants' individual accounts in proportion to the accounts' losses;
- F. An Order awarding costs pursuant to 29 U.S.C. § 1132(g);
- G. An Order awarding attorneys' fees pursuant to the common fund doctrine, 29 U.S.C. § 1132(g), and other applicable law; and

H. An Order for equitable restitution and other appropriate equitable and injunctive relief against Defendants.

DATED January 11, 2010.

/s/ Derek W. Loeser

Lynn L. Sarko
Derek W. Loeser
Karin B. Swope
Sarah H. Kimberly
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
Telephone: (206) 623-1900
Facsimile: (206) 623-3384

Joe R. Whatley, Jr.
Glen M. Connor
Richard P. Rouco
Thomas J. Butler
Adam P. Plant
WHATLEY, DRAKE & KALLAS, LLC
2001 Park Place North, Suite 1000
Birmingham, AL 35203
Telephone: (205) 328-9576
Facsimile: (205) 328-9669

Robert I. Harwood
Samuel K. Rosen
James G. Flynn
HARWOOD FEFFER LLP
488 Madison Avenue, 8th Floor
New York, NY 10022
Telephone: (212) 935-7400
Facsimile: (212) 753-3630

*Interim Co-Lead Counsel for Interim Lead
Plaintiffs and the Class*

John C. Goldfarb
Daniel Arciniegas
Dennis G. Pantazis
WIGGINS, CHILDS, QUINN & PANTAZIS, LLC
The Kress Building
301 - 19th Street North
Birmingham, AL 35203
Telephone: (205) 314-0500
Facsimile: (205) 254-1500

***Interim Liaison Counsel for Interim Lead
Plaintiffs and the Class***

Herman Austin Watson, Jr.
Rebekah Keith McKinney
WATSON, MCKINNEY & ARTRIP, LLP
PO Box 18368
Huntsville, AL 35804-8368
256-536-7423
256-536-2689 (fax)

Lori G. Feldman
Arvind Khurana
Jennifer J. Sosa
MILBERG LLP
One Penn Plaza, 48th Floor
New York, NY 10119
212-594-5300

Lee David Winston
Roderick Twain Cooks
WINSTON COOKS, LLC
319 17th Street North
Birmingham, AL 35203
205-502-0970
205-251-0231 (fax)

Lionel Z. Glancy
Michael M. Goldberg
GLANCY BINKOW & GOLDBERG LLP
1801 Avenue of the Stars, Suite 311
Los Angeles, CA 90067
310-201-9150
310-201-9160 (fax)

David Jonathan Guin
Tammy McClendon Stokes
DONALDSON & GUIN LLC
505 N 20th Street, Ste 1000
Birmingham, AL 35203
205-226-2282
205-226-2357 (fax)

Junius Foy Guin, III
Brooke M. Nixon
TANNER & GUIN, LLC
PO Box 3206
Tuscaloosa, AL 35403-3206
205-633-0205
205-633-0305 (fax)

Craig Philip Niedenthal
NIEDENTHAL LAW FIRM, PC
2015 Stonegate Trail
Suite 101
Birmingham, AL 35242
205-977-8999
205-977-5990 (fax)

Edward W. Ciolko
**BARROWAY TOPAZ KESSLER MELTZER &
CHECK, LLP**
280 King of Prussia Road
Radnor, PA 19087
610-667-7706
610-667-7056 (fax)

Richard Rockwell Rosenthal
**LAW OFFICES OF RICHARD R
ROSENTHAL PC**
200 Title Building
300 Richard Arrington Jr. Blvd. North
Birmingham, AL 35203
205-252-1146
205-252-4907 (fax)

Olimpio Lee Squitieri
SQUITIERI & FEARON LLP
32 East 57th Street
12th Floor
New York, NY 10022
212-421-6492
212-421-6553 (fax)

Charles R Watkins
**FUTTERMAN HOWARD ASHLEY WATKINS
AND WELTMAN, CHARTERED**
122 S. Michigan Ave. Suite 1850
Chicago, IL 60603
312-427-3600
312-427-1850 (fax)

John R. Wylie
A PAUL HUNT PC
134 N Broadnax Street
Dadeville, AL 36853
312-878-8391

Other Plaintiffs Counsel

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2010, I electronically filed PLAINTIFF'S AMENDED CONSOLIDATED COMPLAINT FOR BREACHES OF FIDUCIARY DUTY UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all known counsel of record.

Executed on January 11, 2010, at Seattle, Washington.

\s\ Derek W. Loeser
Derek W. Loeser
Counsel for Interim Lead Plaintiffs