



## **I. INTRODUCTION**

Lead Plaintiffs the Public Employees' Retirement System of Mississippi ("MPERS") and Avalon Holdings, Inc. ("Avalon" and, collectively with MPERS, "Lead Plaintiffs") and Defendant Zurich Financial Services ("ZFS") have reached an agreement to partially settle this securities class action litigation (the "Action") for payment of Thirty Million Dollars (\$30,000,000) in cash (the "Settlement"). Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Lead Plaintiffs now seek this Court's preliminary approval of the Settlement.

Approval of a class action settlement entails a three-step process outlined in Rule 23(e) of the Federal Rules of Civil Procedure. The Court first makes a preliminary determination of whether the settlement appears to fall within the range of possible approval. *See* Fed. R. Civ. P. 23(e)(1)(A); *Manual for Complex Litigation* § 230.41. If the settlement meets the minimal requirements for preliminary approval, the Court should "direct notice in a reasonable manner to all class members who would be bound by a proposed settlement." Fed R. Civ. P. 23(e)(1)(B). After the Class is notified of the preliminary settlement, the final step in the approval process requires the Court to hold a formal fairness hearing, where class members have the opportunity to object to any aspect of the settlement. Fed. R. Civ. P. 23(e)(1)(C).

As the Court is aware, the Class here includes persons who purchased shares of Converium Holding AG ("Converium") on both the New York Stock Exchange and the Swiss stock exchange, including persons who reside abroad. Accordingly, appropriate notice of the Settlement must be provided to those Class Members residing abroad, and, to that end, Lead Plaintiffs have retained, subject to Court approval, Hilsoft Notifications, which specializes in creating comprehensive Notice Programs in class actions with foreign members. The proposed Order for approval of the Notice Program will reflect the process being developed by Lead

Plaintiffs and their notification expert, in consultation with ZFS, to disseminate and publish the notices, including specifying the media and languages in which the notices will be disseminated and published, and the timing of such dissemination and publication, designed to comport with the due process requirements under Rule 23 of the Federal Rules of Civil Procedure.<sup>1</sup>

Further, in order to enhance the likelihood that the notice reaches potential Class Members, the Notice Program will be confirmed by Converium's transfer records. Accordingly, the proposed Order Preliminarily Certifying Class for Settlement Purposes and Preliminarily Approving Proposed Settlement with Zurich Financial Services, attached as Exhibit A to the Stipulation of Settlement, requires Converium to provide its transfer records to Lead Counsel within fifteen days of entry of that Order, and requires Lead Plaintiffs to submit the Notice Program to the Court by the later of September 24, 2007 or two weeks after receipt of Converium's transfer records. At that time, Lead Plaintiffs also will request that the Court schedule a hearing for final approval of the Settlement on a date that will afford Class Members sufficient time to receive, consider and respond to the Notices.

At this juncture, Lead Plaintiffs request only that the Court grant preliminary approval of the Settlement so that, upon the Court's approval of the Notice Program or of such other manner of providing notice to Class Members as the Court may approve, notice of the Settlement may be sent to the Class. Thus, the burden is slight during this initial stage, because the purpose of preliminary approval is solely to identify whether the settlement is so invalid on its face that it would make "notice to the class, with its attended expenses, and a hearing . . . futile gestures."

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<sup>1</sup> Lead Counsel are not seeking reimbursement of expenses or an award of attorneys' fees at this time, but will seek such reimbursement and award at a future date. As such, the Notices will not address the amount of the award and reimbursement to be requested, beyond noting that such request will be made in the future and that the fee award to be requested will not exceed 20% of the Settlement fund, net of expenses. Additionally, because Lead Plaintiffs do not contemplate a distribution of the proceeds from this partial settlement to members of the Class at this time, Lead Counsel is not submitting a plan of allocation at this time.

*Newberg on Class Actions* § 11:25 (4<sup>th</sup> Ed. 2002). This Memorandum describes the basis for Lead Plaintiffs' motion for preliminary approval of the Settlement, and sets forth a proposed schedule for the process going forward.

Lead Plaintiffs respectfully request that this Court enter the Preliminary Approval Order, which will preliminarily approve the Settlement on the terms set forth in the Stipulation submitted herewith, and certify the Class solely for settlement purposes.

## **II. DESCRIPTION OF THE LITIGATION**

Beginning in October 2004, seven putative class actions were filed by certain purchasers of Converium securities against Converium, certain of Converium's officers and directors, and ZFS alleging violations of the federal securities laws.

On July 14, 2005, the Court appointed MPERS and Avalon as Lead Plaintiffs, and approved Lead Plaintiffs' selection of Bernstein Litowitz Berger & Grossmann LLP, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., and Spector, Roseman & Kodroff, P.C. as Lead Counsel for the putative class ("Lead Counsel").

On September 23, 2005, Lead Plaintiffs and additional named plaintiff Louisiana State Employees' Retirement System (collectively, "Plaintiffs") filed a Consolidated Amended Class Action Complaint (the "Complaint"), which named as defendants: Converium; certain officers of Converium, namely, Dirk Lohmann, Martin Kauer, and Richard Smith (the "Officer Defendants"); certain directors of Converium, namely, Terry G. Clarke, Peter C. Colombo, George F. Mehl, Jurgen Foerterer, Anton K. Schnyder, Derrell J. Hendrix, and George G.C. Parker (the "Director Defendants"); ZFS; and UBS AG and Merrill Lynch International (the "Underwriter Defendants"), the lead underwriters in the initial public offering of Converium securities that took effect on or about December 11, 2001 and was completed in January 2002

(the “Converium IPO”). The Complaint asserts claims under the Securities Act of 1933 (the “Securities Act”) against all defendants, and claims under the Securities Exchange Act of 1934 (the “Exchange Act”) against Converium, ZFS, and the Officer and Director Defendants (other than Mr. Clarke).

On December 28, 2006, the Court issued Orders (i) dismissing the Securities Act claims against all defendants, (ii) dismissing the Exchange Act claims based on alleged misrepresentations or omissions in connection with the Converium IPO, (iii) denying dismissal of the Exchange Act claims against Converium and the Officer Defendants based on alleged misrepresentations or omissions after the Converium IPO, and (iv) denying Lead Plaintiffs’ motion to amend the Complaint. On January 12, 2007, Lead Plaintiffs moved for reconsideration of the Court’s December 28, 2006 Order to the extent that it had dismissed (i) the Exchange Act § 10(b) claim on behalf of aftermarket purchasers against Converium and the Officer Defendants based on alleged misrepresentations or omissions in connection with the Converium IPO, (ii) the Exchange Act § 20(a) claims against ZFS and the Officer and Director Defendants (other than Mr. Clarke) arising from Converium’s alleged liability to the aftermarket purchasers based on purported misrepresentations or omissions in connection with the Converium IPO, and (iii) the Securities Act claims against all defendants. Lead Plaintiffs also asked the Court to reconsider its denial of leave to amend the Complaint. On April 9, 2007, the Court denied Lead Plaintiffs’ motion for reconsideration of the dismissal of the Securities Act claims against all defendants, but granted reconsideration of the dismissal of the Exchange Act § 10(b) claims against Converium and the Officer Defendants and the Exchange Act § 20(a) claims against ZFS and the Officer and Director Defendants on behalf of aftermarket purchasers alleging misrepresentations or omissions in connection with the Converium IPO. The Court also

declined to reconsider its refusal to allow Lead Plaintiffs to amend the Complaint. Thus, all claims against ZFS under Sections 12(a)(2) and 15 of the Securities Act and under 10(b) of the Exchange Act have been dismissed, and the sole remaining claim against ZFS, under Section 20(a) of the Exchange Act, has not yet been sustained.

Throughout this Action, Lead Counsel have diligently prosecuted this case, from aggressively investigating the allegations, to drafting the Complaint, to fully briefing the opposition to Defendants' motion to dismiss the Complaint, and to swiftly commencing discovery. Specifically, Lead Counsel located and interviewed former Converium and ZFS employees; obtained critical non-public documents and information; reviewed numerous documents, including, among other things, public filings, analysts' reports, transcripts of conference calls, and press releases; and consulted with accounting and damages experts.

Lead Counsel have conducted extensive discussions and arm's-length negotiations with ZFS' counsel with a view to settling the issues in dispute and achieving the best relief possible for the Class. Lead Counsel believes that the investigation, document review, and damages analyses described above provide an adequate basis for entering into the Settlement.

### **III. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL**

“It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.” *In re Prudential Sec. Inc. Ltd. Partnerships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995). As courts in this Circuit have stated:

In considering whether to grant preliminary approval to a class action settlement agreement, courts make a preliminary evaluation of the fairness of the settlement, prior to a hearing on notice. Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval should be granted.

*In re Nasdaq Market-Makers Antitrust Litig.*, 1997 WL 805062, at \*8 (S.D.N.Y. Dec. 31, 1997) (citing *Manual for Complex Litigation* § 30.41, at 237 (West 1995)). Thus, the preliminary approval hearing “is not a fairness hearing; its purpose, rather, is to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing.” *Armstrong v. Board of School Directors*, 616 F.2d 305, 314 (7th Cir. 1980) (footnote omitted).

Lead Plaintiffs request only that the Court take the first step in this process, which is to grant preliminary approval of the proposed Settlement, because the Settlement satisfies the standard for preliminary approval. The proposed Settlement provides the sum of \$30,000,000.00 in cash for distribution to eligible Class Members in return for the Class’ release of the claims it has asserted against ZFS, the Director Defendants and the Underwriter Defendants, and for the release of pre-Converium IPO conduct against the Officer Defendants (but not claims arising from the Converium IPO). This Settlement is clearly beneficial to the Class. Given the complexities of this Action, the fact that the majority of the claims asserted against ZFS and the Director Defendants have been dismissed with prejudice, and no claims asserted against them have yet been sustained, the fact that the claims asserted against the Underwriter Defendants have been dismissed with prejudice, and the continued risk if the parties were to proceed to trial in the event that any claim were sustained or reinstated, the Settlement represents an excellent resolution. Indeed, even if the those remaining claims were sustained as to ZFS or the Director Defendants, any future recovery from ZFS or the Director Defendants would have been limited to their role in the alleged fraud, which, as noted above, was based solely on the registration statement filed in connection with the Converium IPO. Thus, any judgment against them would not include damages based on the harm caused to investors by the numerous allegedly false

statements made by Converium and the Officer Defendants in the more than two years following the Converium IPO.<sup>2</sup> See, e.g., *In re Prudential Sec. Litig.*, 163 F.R.D. at 210 (“Instead of the lengthy, costly, and uncertain course of further litigation, the settlement provides a significant and expeditious route to recovery for the Class.”). Moreover, even with respect to the registration statement, the liability of ZFS and the Director Defendants would likely only be proportionate to their respective fault. Further, if not for the proposed Settlement, ZFS would continue to contest this Action and, taking into account the probability of appeal if Lead Plaintiffs prevailed in this Court, the Action would likely continue for years. The proposed Settlement ensures the Class of a substantial benefit, while eliminating further expenses, uncertainty, and delay.

Moreover, the factors described above that courts consider in connection with preliminary approval of class action settlements lend support to the proposition that the Settlement is well within the range of possible approval. First, the terms of the proposed Settlement are the product of extensive arm’s-length negotiations. Lead Counsel engaged in many weeks of settlement negotiations with counsel for ZFS while continuing to prosecute the Action, including successfully litigating Lead Plaintiffs’ motion for reconsideration which sought, *inter alia*, reconsideration of the dismissal of claims against ZFS. Accordingly, there is no evidence here of any collusion between the parties. Nor is there any evidence that Lead Plaintiffs will receive preferential treatment. To the contrary, MPERS and Avalon will be treated exactly the same as any other Class Member. Furthermore, Lead Counsel have

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<sup>2</sup> Indeed, even if Lead Plaintiffs prevail at trial, risk to the Class remains. For example, in *In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW, 1991 U.S. Dist. LEXIS 15608 (N.D. Cal. Sept. 6, 1991), the jury returned a verdict for plaintiffs after trial. However, the court entered judgment notwithstanding the verdict for the individual defendants and ordered a new trial with respect to the corporate defendant. In another case, the class won a jury verdict and a motion for judgment notwithstanding the verdict was denied, but, on appeal, the judgment was reversed and the case dismissed. *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990); see also *Robbins v. Koger Props.*, 116 F.3d 1441 (11th Cir. 1997) (reversing plaintiff’s jury verdict of \$81 million for securities fraud).

significant experience in securities and other complex class action litigation, and have negotiated hundreds of other substantial class action settlements throughout the country. Lead Counsel have performed a comprehensive investigation, and are therefore “well-informed as to the operative facts” and “considerable risks” of the Action. *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 34 (E.D.N.Y. 2006). It is Lead Counsel’s informed opinion that, given the uncertainty and further substantial expense of pursuing this Action through trial and appeals, the proposed Settlement is fair, reasonable and adequate, and in the best interests of the Class.

In any case, at this point the Court need not answer the ultimate question: whether the Settlement is fair, reasonable and adequate. The Court is only being asked to preliminarily approve the Settlement so that, upon submission and approval of the Notice Program, Lead Plaintiffs may be permitted to send to the Class notice of the terms of the Settlement .

#### **IV. CONCLUSION**

For all the foregoing reasons, Lead Plaintiffs respectfully submit that the proposed Settlement should be preliminarily approved by the Court allowing notification of the pendency of the Action, the terms of the Settlement and the date of the Fairness Hearing to be sent to Class Members, pursuant to the terms of the Notice Program to be submitted to the Court as set forth in the Preliminary Approval Order.

Dated: New York, New York  
August 24, 2007

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on August 24, 2007, Lead Plaintiffs' Memorandum in Support of Motion for Preliminary Approval of Proposed Settlement with Zurich Financial Services, was filed with the Clerk of the Court and served by electronic case filing on the ECF system of the Southern District of New York and by hand on the following counsel:

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