UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CNOVA N.V. SECURITIES LITIGATION This Document Relates To: All Actions	MASTER FILE 16 CV 444-LTS

LEAD PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS NOTICE, FINAL CERTIFICATION OF THE CLASS FOR PURPOSES OF SETTLEMENT, AND FINAL APPROVAL OF THE PROPOSED PLAN OF ALLOCATION

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Pursuant to the Court's October 11, 2017 Order Granting Preliminary Approval of Proposed Settlement, Granting Conditional Class Certification, and Providing for Notice to the Class ("Preliminary Approval Order"; Dkt. No. 131), Lead Plaintiffs Michael Schwabe and Jaideep Khanna ("Lead Plaintiffs") respectfully submit this memorandum of law in support of their motion for final approval of the notice, final certification of the Class for settlement purposes, and final approval of the Plan of Allocation of the Settlement proceeds.[1]

I. HISTORY AND BACKGROUND OF THE LITIGATION

For a full discussion of the history of the Action, the Court is respectfully referred to the accompanying Declaration of David A.P. Brower In Support Of Lead Plaintiffs' Motion For Final Certification Of The Class, Final Approval Of Class Notice, Final Approval Of The Proposed Settlement, Final Approval Of The Proposed Plan Of Allocation, And Lead Counsel's Motion For An Award Of Attorneys' Fees And Reimbursement Of Litigation Expenses, dated December 22, 2017 ("Brower Declaration" or "Brower Decl."), and the Appendix of Exhibits to the Brower Declaration (the "Appendix"). This memorandum will, instead, focus on the legal and factual matters relevant to the appropriateness of the notice program pursued in connection with the proposed Settlement, Plan of Allocation and motion for an award of attorneys' fees and expenses, and the propriety of granting final certification to the Class to effectuate the proposed Settlement. Lead Plaintiffs and Lead Counsel also submit that the Plan of Allocation, which was developed with the assistance of Lead Plaintiffs' damages consultant, is fair and equitable, and should be approved.

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[1] The Settlement is set forth in the Stipulation and Agreement of Settlement, dated September 20, 2017 ("Stipulation") attached as Exhibit 1 to the Declaration of David A.P. Brower In Support of Motion for: (1) Preliminary Approval of Settlement; (2) Certification of the Class for Purposes of Settlement; (3) Approval of Notice to the Class; and (4) Scheduling of a Final Approval Hearing, dated September 22, 2017. Dkt. No. 127. Unless otherwise indicated, the definitions used in the Stipulation are the same as those used herein.

II. NOTICE TO THE SETTLEMENT CLASS SATISFIED THE REQUIREMENTS OF THE PSLRA, RULE 23, AND DUE PROCESS

A. Relevant Standards

In connection with the settlement of a federal class action, FED. R. CIV. P. 23(e)(1)(B) requires the Court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise. The adequacy of a class action settlement notice is "measured by reasonableness." *Wal-Mart Stores, Inc. v. VISA U.S.A. Inc*., 396 F.3d 96, 113 (2d Cir. 2005); *Charron v. Pinnacle Group NY LLC*, No. 07 Civ. 6316, 2012 U.S. Dist. LEXIS 79550, at *27 (S.D.N.Y. June 6, 2012) (quoting *Wal-Mart*).

As explained below, each of the requirements of FED. R. CIV. P. 23, the Private Securities Litigation Reform Act of 1995 ("PSLRA"), the applicable case law and due process have been followed scrupulously in this case, both as to procedure and content.

B. The Notice Procedure Was Appropriate

The Supreme Court has held that notice must be the best practicable under the circumstances including by first class mail where the names and addresses of the beneficiaries of the settlement are available through reasonable efforts. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 (1974) (citing *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 318 (1950)). In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Supreme Court explained the due process requirements for notice:

> The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the

> court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Id. at 812 (citations omitted); *see also* 7A Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE §1789.1 at 575-84 (3d ed. 2005).

"Notice need not be perfect" or received by every class member, *In re Merrill Lynch Tyco Research Sec. Litig*., 249 F.R.D. 124, 133 (S.D.N.Y. 2008) ("*In re ML Tyco*"), but need only be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," *Girault v. Supersol*, No. 1:11 Civ. 6835 (PAE), 2012 U.S. Dist. LEXIS 89976, at *7 (S.D.N.Y. June 28, 2012) (quoting Rule 23(c)(2)(B)), in order to meet the requirements of FED. R. CIV. P. 23(c), (e) and (h), and due process.[2]

The notice procedure here sought to reach the greatest number of Class Members possible. Pursuant to the Preliminary Approval Order, ¶¶8-9, the Notice, along with the Court-approved Proof of Claim form, was mailed by first class U.S. mail to 9,175 potential Class Members and brokers (including ten that were remailed). *See* Affidavit of Jose C. Fraga Regarding Mailing of the Notice and Proof of Claim Form and Publication of the Summary Notice, dated December 13, 2017 ("Fraga Aff." or "Fraga Affidavit"), at ¶7 (Exhibit A to the Appendix). The Notice also advised brokers, banks and other nominees holding Cnova N.V. ("Cnova") ordinary shares for beneficial holders in "street name" to either provide the Claims Administrator with the names and addresses of the beneficial holders of those ordinary shares to

[2] *See also DeJulius v. New England Health Care Employees Pension Fund*, 429 F.3d 935, 945-47 (10th Cir. 2005) (finding notice program similar to the one preliminarily approved by the Court in this case satisfied due process); *Mullane*, 339 U.S. at 314 (notice need only be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

enable the Claims Administrator to mail them the Notice or to obtain sufficient copies themselves to mail to their customers (they would be reimbursed for their reasonable costs associated with delivering copies of the Notice to their customers). In addition, by agreement with the Underwriter Defendants,[3] the Notice Packets were to be given special attention following the mailing by those firms to provide additional assurance that customers of the Underwriter Defendants who held their Cnova ordinary shares in street name would receive notice. Brower Declaration at ¶¶148, 150.

In addition, after the initial mailing of the Notice, the Claims Administrator published the Publication Notice over *PR Newswire* and *Business Wire*, national business-oriented newswire services, on three staggered dates (October 31, November 7, November 14, 2017), advising potential Class Members of the Settlement, the Plan of Allocation and request for attorneys' fees and reimbursement of expenses, and advised potential Class Members of how they could obtain a copy of the full Notice, the Proof of Claim form and additional information through the Claims Administrator's website or the toll-free telephone number. Fraga Aff. at ¶¶8-10. In addition, the Notice was made available on the Garden City Group, LLC's ("GCG") website on October 23, 2017. *See id*. at ¶9.

Further, Lead Counsel's actual application for an award of attorneys' fees (and the Brower Declaration in support thereof) is being filed on December 22, 2017 – over a month before objections are due and almost three months before the scheduled hearing on the fee

[3] The Underwriter Defendants consist of some of the largest investment houses in the world, to wit: Morgan Stanley & Co. LLC, J.P. Morgan Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Credit Suisse Securities (USA) LLC, Deutsche Bank Securities Inc., BNP Paribas Securities Corp., HSBC Securities (USA) Inc., and Natixis Securities Americas LLC, SG Americas Securities, LLC.

motion. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F. 3d 988, 995 (9th Cir. 2010).

C. The Content of the Notice Was Appropriate

1. The Standard Governing the Content of Class Notice

As to content, FED. R. CIV. P. 23(c)(2)(b) requires the notice to state the following: (a) the nature of the action; (b) the definition of the class certified; (c) the class claims, issues, or defenses; (d) that a class member may enter an appearance through an attorney if the member so desires; (e) that the court will exclude from the class any member who requests exclusion; (f) the time and manner for requesting exclusion; and (g) the binding effect of a class judgment on members under Rule 23(c)(3).

Settlement notices under FED. R. CIV. P. 23 do not need to delve into excessive details about the specifics of the settlement and the legal claims of the parties. The case law is generally in accord that settlement notices should be concise and simple, and information can be supplied by incorporation of and/or by reference to accessible settlement-related documents available through other public sources.[4] Indeed, notice is adequate if the average settlement class member understands the terms of the proposed settlement and the options they have. *Charron*, 2012 U.S. Dist. LEXIS 79550, at *27; *Wal-Mart*, 396 F.3d at 114; *In re ML Tyco*, 249 F.R.D. at 133.[5]

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[4] *O'Brien v. National Prop. Analysts Partners*, 739 F. Supp. 896, 901 (S.D.N.Y. 1990) (class notice need only provide "sufficient guidance as to the major terms and areas of agreement to allow class members to make further inquiry, either by examining the full settlement agreement or by appearing at the settlement hearing"); *see also Cannon v. Texas Gulf Sulphur Co.*, 55 F.R.D. 308, 313 n.2 (S.D.N.Y. 1972) (notice was sufficient where it explained what a class member would receive depending on the factors enumerated therein); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977) ("The aggregate amount available to all claimants was specified and the formula for determining one's recovery was given. Nothing more specific is needed.").

[5] *See also Handschu v. Special Servs. Div.*, 787 F.2d 828, 833 (2d Cir. 1986) (class notice is expected only to provide sufficient information to "alert class members" to the pendency of the settlement and to "their options in connection" with that pending settlement); *Weinberger v. Kendrick*, 698 F.2d 61, 70-71 (2d Cir. 1982) (noting that a class notice should alert class members to "the relevant terms of the

As to fee request disclosures, courts in this Circuit have held that, as with the other terms of the settlement, notice need only be "very general" and contain an "an estimation of attorneys' fees and other expenses." *O'Brien*, 739 F. Supp. at 901; *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 210 (S.D.N.Y. 1995) (quoting *O'Brien* with approval). Indeed, "notice of settlement often does not contain detailed information about the amount of fees but simply notifies class members of the fee's outside limit." *Powers v. Eichen*, 229 F.3d 1249, 1255 (9th Cir. 2000); *see also Rosenbaum v. Macallister*, 64 F.3d 1439, 1442-43 (10th Cir. 1995) ("class members notified of a proposed settlement are . . . often only informed of an outside limit for attorneys' fees"). These decisions reflect the "expectation . . . that the fees will be set by the court upon consideration of the evidence, including the objections of nonintervening class members." *Id.* at 1443.[6]

Moreover, FED R. CIV. P. 23(h) provides that:

> In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:
>
> (1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
>
> (2) A class member, or a party from whom payment is sought, may object to the motion.
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> (3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

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proposed settlement," "their options in connection with that case," and offer them enough information "to probe more deeply" if desired).

[6] This is consistent with precedent in the Second Circuit. *See O'Brien*, 739 F. Supp. at 901. There can be no question that the Notice here fulfilled that goal.

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

FED R. CIV. P. 54(d)(2) provides that:

(A) Claim to Be by Motion. A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

In accord with FED. R. CIV. P. 23(h)'s requirements, a fee motion must be filed a reasonable time in advance of the time for class members to object to it or request exclusion from the class. *See Mercury Interactive*, 618 F. 3d at 995 (construing the timing requirement of FED. R. CIV. P. 23(h)).

Further, in its effort to provide more transparency to the fee-awarding process in securities class actions, Congress included in the PSLRA specific requirements for notice to class members in such cases regarding fee applications by successful plaintiffs' counsel. 15 U.S.C § 77z-1(a)(7) requires that the notice of a settlement in a securities fraud action contain the following:

(A) Statement of plaintiff recovery. The amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis.

(B) Statement of potential outcome of case.

(i) Agreement on amount of damages. If the settling parties agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this title [15 U.S.C. §§ 77a *et seq*.], a statement concerning the average amount of such potential damages per share.

(ii) Disagreement on amount of damages. If the parties do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this title [15 U.S.C. §§ 77a *et seq*.], a statement from each settling party concerning the issue or issues on which the parties disagree.

(iii) Inadmissibility for certain purposes. A statement made in accordance with clause (i) or (ii) concerning the amount of damages shall not be admissible in any Federal or State judicial action or administrative proceeding, other than an action or proceeding arising out of such statement.

(C) Statement of attorneys' fees or costs sought. If any of the settling parties or their counsel intend to apply to the court for an award of attorneys' fees or costs from any fund established as part of the settlement, a statement indicating which parties or counsel intend to make such an application, the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought. Such information shall be clearly summarized on the cover page of any notice to a party of any proposed or final settlement agreement.

(D) Identification of lawyers' representatives. The name, telephone number, and address of one or more representatives of counsel for the plaintiff class who will be reasonably available to answer questions from class members concerning any matter contained in any notice of settlement published or otherwise disseminated to the class.

(E) Reasons for settlement. A brief statement explaining the reasons why the parties are proposing the settlement.

(F) Other information. Such other information as may be required by the court.

2. The Content of the Notice Here Was Appropriate

The Notice here, Exhibit 1 to the Fraga Affidavit, clearly meets and exceeds all of the requirements as to content for a class notice.[7] The Notice, *inter alia*: (1) detailed the terms of the Settlement and the releases that would be exchanged; (2) summarized the history of the litigation; (3) described the Parties and the Class; (4) discussed the settlement negotiations; (5) discussed Lead Plaintiffs' expert's estimates of recoverable damages at trial for each segment of the Class; (6) detailed the Plan of Allocation; (7) detailed the percentage and per share recoveries to Class Members based on the dates of their purchases and sales, if any, of Cnova ordinary shares during the Class Period (8) detailed the maximum amount that Lead Counsel would seek in attorneys' fees (33.33%) and in reimbursement of expenses for prosecuting the Action ($300,000); (9) described Class Members' right to request exclusion from the Class or appear through personal counsel of their choosing and/or to object to the Settlement, Plan of Allocation and/or request for attorneys' fees and reimbursement of expenses; (10) specified the deadlines for asserting these rights and procedures for doing so; (11) provided addresses, a toll-free telephone number and a website where Class Members could obtain additional information; and (12) informed Class Members when Lead Plaintiffs' and Lead Counsel's papers in support of the proposed Settlement, Plan of Allocation and request for attorneys' fees and expenses will be filed with the Court and available for their inspection. Brower Decl. at ¶153. In sum, the Notice here provides more detailed information than is required under the federal rules, the PSLRA and

[7] Courts have repeatedly sustained notices in cases where the notice included only very general information. *See, e.g., In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 124 (S.D.N.Y. 1997) ("The notice need not be highly specific, and indeed 'numerous decisions, no doubt recognizing that notices to class members can practicably contain only a limited amount of information, have approved very general description[s] of the proposed settlement.'") (quoting *Weinberger*, 698 F.2d at 70) (internal

due process, and far more information than is typically included in a class action settlement notice in securities cases.

The Notice also complies with the settlement notice disclosure requirements of the PSLRA regarding the "statement of plaintiffs' recovery," which states that Class Members' average per share recovery will be $1.13 per share; it identifies the attorneys and provides their addresses, it provides information on how to contact Lead Counsel's representatives to obtain additional information, and it contains a brief description of the reasons why the Parties are proposing the Settlement. *See* § 77z-1(a)(7)(A)-(B) and (D)-(E); Brower Decl. at ¶154. The Notice, however, also points out that the "average per share recovery" is not necessarily reflective of Class Members' actual likely recoveries from the Settlement and provides more accurate per share figures in the Plan of Allocation detailed in the Notice based on the various scenarios that Class Members' transactions in Cnova ordinary shares purchased during the Class Period may fall within. Indeed, Lead Counsel, with the assistance of their damages expert, provided step-by-step formulas for Class Members to calculate their own, individual Recognized Loss by reference to the Plan of Allocation. Brower Decl. at ¶154.

The Notice also complies with the attorneys' fee disclosure requirements of § 77z-1(a)(7)(C) by: (a) identifying which counsel intend to make an application for attorneys' fees and costs from the fund established by the settlement for the class; (b) stating the maximum amount of fees and costs that will be sought both as a percentage of the whole and on an average per share basis; and (c) providing a brief explanation supporting the attorneys' fees and costs sought. That information is both clearly summarized in the summary section at the beginning of the

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quotation omitted); *see also In re Michael Milken & Assoc. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (relying on *Handschu*, 787 F.2d at 833).

Notice and set forth in more detail in Section XII of the Notice ("Application For Attorneys' Fees And Expenses"). Brower Decl. at ¶¶153-54.

Regarding the requested award of attorneys' fees and expenses, the Notice recites the factors, as required by the plain language of the PSLRA, "supporting the fees and costs sought":

> At the Final Approval Hearing, Lead Counsel will request an award of a reasonable percentage of the Settlement Fund not to exceed, in the aggregate, thirty-three and one third percent (33 1/3%) of the Settlement Fund as attorneys' fees, plus reimbursement of Lead Counsel's reasonable out-of-pocket litigation and Notice and settlement administration expenses. Lead Counsel's fee application will be filed with the Court on or before December 22, 2017. All such sums as may be approved by the Court will be paid from the Settlement Fund. Class Members are not personally liable for any such fees, costs, or expenses.
>
> Lead Counsel have committed a substantial amount of time prosecuting claims on behalf of Lead Plaintiffs and the Class. In addition, they have not been reimbursed for any of their costs and expenses. The amounts requested by Lead Counsel will compensate counsel for their efforts in achieving the Settlement for the benefit of the Class, and for their risk in undertaking this representation on a wholly contingent basis. The amount to be requested is within the range of fees awarded to plaintiffs' counsel under similar circumstances in other litigations of this type. Lead Counsel may thereafter from time to time apply to the Court, without further notice to the Class, for an additional award of attorneys' fees and costs incurred in connection with administering the Settlement, provided, in the aggregate, all fees awarded to Lead Counsel will not exceed thirty-three and one third percent (33 1/3%) of the Settlement Fund. All such awards shall be subject to the approval of the Court.
>
> In addition to Lead Counsel's fees and litigation expenses, expenses will be incurred in connection with providing notice to the Class, processing Proofs of Claims, and distributing the Net Settlement Fund, and those amounts approved by the Court will be deducted from the Settlement Fund. The Claims Administrator estimates that the cost of administration of this Settlement will be approximately $400,000. That amount is a good faith estimate and may be higher or lower depending on numerous factors, including, but not limited to the number of claims submitted and the efforts necessary to cure deficient claims and/or obtain necessary documentation from claiming Class Members to calculate their claims. The Claims Administrator may apply, from time to time, without further notice to the Class for payment of its fees and expenses incurred in providing notice to the Class, administering the Settlement and distributing the proceeds of the Settlement and any such applications will require the approval of Lead Counsel and the Court.

See Section XII of the Notice.

Furthermore, consistent with this Court's approval of the form and content of the Notice, the Notice contained all other information that the Court required in its Preliminary Approval Order in compliance with 15 U.S.C. § 77z-1(a)(7)(F).

Finally, the Notice sets forth the full Plan of Allocation to enable Class Members to preliminarily calculate the value of their claims (subject to the caveat in the Notice that claims will be reduced *pro rata* by the amount that all claims in the aggregate exceed the amount of the Net Settlement Fund). *See Holiday Magic*, 550 F.2d at 1178 (overruling objection to class notice that did not provide description of class members' recoveries where the notice contained the plan of distribution of the settlement proceeds).

Accordingly, the notice to the Class met all requirements of FED. R. CIV. P. 23 (c), (e), and (h), 15 U.S.C. § 77z-1(a)(7) of the PSLRA, the applicable case law and due process.

III. FINAL CERTIFICATION OF THE CLASS IS APPROPRIATE

In presenting the Settlement to the Court for preliminary approval, Lead Plaintiffs requested that the Court preliminarily certify the Class so that notice of the proposed Settlement could be issued. *See* Dkt. Nos. 125-27 (Lead Plaintiffs' Preliminary Approval Motion with accompanying declaration and memorandum of law). In its Preliminary Approval Order, the Court did so. *See id.* at ¶3. Nothing has changed to alter the propriety of the Court's certification and, for all the reasons set forth below and in Lead Plaintiffs' Preliminary Approval Motion (Dkt. No. 126 at 11-19), Lead Plaintiffs now request that the Court grant final certification of the Class pursuant to FED. R. CIV. P. 23(a) and (b)(3) for purposes of effectuating the Settlement, appoint Lead Plaintiffs as Class Representatives, and appoint Lead Counsel as Class Counsel.

The Parties have stipulated to certification of a Class, which is described in the Notice (at 1-2). The proposed Class is defined as:

> The "Class" means all persons and entities that purchased Cnova N.V. ordinary shares from November 19, 2014 through February 23, 2016, inclusive (the "Class Period"), issued pursuant and/or traceable to Cnova's Registration Statement, which incorporated the Prospectus that was filed pursuant to Rule 424(b)(4) on November 21, 2014, in connection with Cnova N.V's initial public offering on or about November 19, 2014. Excluded from the Class are (i) Defendants; (ii) the officers and directors of Defendants; (iii) Casino Guichard Perrachon SA; (iv) the officers and directors of any excluded person or entity; (v) members of the immediate family of any excluded person; the legal representatives, agents, heirs, successors, subsidiaries, affiliates or assigns of any excluded person or entity; and (vi) any other person or entity in which any excluded person or entity has a beneficial ownership interest and had contractual control over the operations and/or management of such other person or entity during the Class Period to the extent of the excluded person or entity's beneficial ownership interest in such person or entity.

Stipulation at §2(b).

The Second Circuit has long acknowledged the propriety of certifying a class solely for purposes of a class action settlement. *See Weinberger*, 698 F.2d at 73; *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 U.S. Dist. LEXIS 120953, at *5 (S.D.N.Y. Dec. 23, 2009); *see also In re Prudential*, 163 F.R.D. at 205 (certification of a settlement class "has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants"). *Accord Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620 (1997). The proposed Class meets all the requirements of Rule 23(a) and Rule 23(b)(3).

A. Numerosity

The numerosity requirement of FED. R. CIV. P. 23(a)(1) requires that the proposed class be "so numerous that joinder of all Settlement Class Members is impracticable." No minimum number is required for class certification. "Numerosity is presumed when a class consists of

forty members or more." *In re IMAX Sec. Litig.*, 272 F.R.D. 138, 146 (S.D.N.Y. 2010) (citation omitted); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 246 F.R.D. 156, 164 (S.D.N.Y. 2007) ("*ML Research*") (quoting *DeMarco v. National Collector's Mint, Inc.*, 229 F.R.D. 73, 80 (S.D.N.Y. 2005)); *see also Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 175 (S.D.N.Y. 2008) (class of shareholders numbering in hundreds or thousands satisfied the numerosity requirement). Here, to date, the Notice has been mailed to 9,175 potential Class Members (including ten that were remailed). *See* Fraga Decl. at ¶7.

The numerosity requirement is satisfied because the number of Class Members is in the thousands. In connection with Cnova's initial public offering, 25,157,327 shares were offered to the public. Notice at 2. Further, as the Complaint alleged, during the Class Period, Cnova's ordinary shares were actively traded on the NASDAQ Global Select Market. Complaint at ¶47. Thus, the members of the Class are sufficiently numerous that joinder of all members would be impracticable. *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 84 (S.D.N.Y. 2007 (citations omitted); *see also In re Deutsche Telekom AG Sec. Litig.*, 229 F. Supp. 2d 277, 280 (S.D.N.Y. 2002) ("Class certification is frequently appropriate in securities fraud cases involving a large number of shares traded publicly in an established market.").

B. Commonality

FED. R. CIV. P. 23(a)(2) requires that there be some question of law ***or*** fact common to the class. The commonality requirement is "not demanding." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 451 (S.D.N.Y. 2004). "So long as the class shares at least one question of fact or law, the commonality requirement is met." *People United for Children, Inc.*

v. City of New York, 214 F.R.D. 252, 257-58 (S.D.N.Y. 2003); *Global Crossing*, 225 F.R.D. at 451 (quoting *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 184 (3d Cir. 2001)). The rule is satisfied where, as here, "all class members are in a substantially identical factual situation and the questions of law raised by the plaintiff are applicable to each class member." *ML Research*, 246 F.R.D. at 164 (quoting *In re Playmobil Antitrust Litig*., 35 F. Supp. 2d 231, 240 (E.D.N.Y. 1998)). "The commonality requirement has been applied permissively in the context of securities fraud litigation. *In re Veeco Instruments, Inc. Sec. Litig*., 235 F.R.D. 220, 238 (S.D.N.Y. 2006).

Numerous questions of law and fact common to each Class Member exist here, including, but not limited to: (i) whether the federal securities laws were violated by Defendants' acts and omissions as alleged in the Action; (ii) whether statements made by Defendants to the investing public during the relevant period misrepresented material facts about Cnova; (iii) whether and to what extent the decline in the price of Cnova's ordinary shares was caused by the misrepresentations and omissions in the Registration Statement for Cnova's initial public offering; and (iv) the extent to which the members of the Class have sustained damages and the proper measure of damages. *See In re Take Two Interactive Secs. Litig.*, No. 06 Civ. 803, 2010 U.S. Dist. LEXIS 143837, at *19-*20 (S.D.N.Y. June 29, 2010) ("[W]here putative class members have been injured by similar material misrepresentations and omissions, the commonality requirement is satisfied.") (citing *Fogarazzo v. Lehman Bros.*, 232 F.R.D. 176, 180 (S.D.N.Y. 2005)); *In re Initial Pub. Offering Sec. Litig*., 243 F.R.D. 79, 85 (S.D.N.Y. 2007) (commonality requirement satisfied where "putative class members have been injured by similar material misrepresentations and omissions"); *In re Oxford Health Plans, Inc*., 191 F.R.D. 369,

374 (S.D.N.Y. 2000) ("Where the facts as alleged show that Defendants' course of conduct concealed material information from an entire putative class, the commonality requirement is met.").

C. Typicality

FED. R. CIV. P. 23(a)(3) typicality "'does not require that the situations of the named representatives and the class members be identical.'" *In re Take Two*, 2010 U.S. Dist. LEXIS 143837, at *20 (quoting *Oxford*, 199 F.R.D. at 119). Rather, the typicality requirement is met where, as here, "the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." *Id.* (quoting *In re Flag Telecom Holdings, Ltd. Sec. Litig*., 574 F.3d 29, 35 (2d Cir. 2009)); *In re Vivendi Universal*, 242 F.R.D. at 85 (same); *see also Robinson v. Metro North Commuter R.R. Co*., 267 F.3d 147, 155 (2d Cir. 2001) (typicality exists if "each member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability") (citation omitted). "Put another way, typicality has been demonstrated where the 'injuries derive from a unitary course of conduct by a single system.'" *In re Take Two*, 2010 U.S. Dist. LEXIS 143837, at *20-*21 (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 379 (2d Cir. 1997) (per curiam)).

Here, as the list of common questions above demonstrates, the focus of Lead Plaintiffs' claims is on the same omissions and misrepresentations as the other Class Members. More importantly for the purpose of typicality, Lead Plaintiffs do not allege any claims unique to themselves, but only claims that they have in common with every other member of the Class. Thus, the typicality requirement is satisfied.

D. Adequacy

Rules 23(a)(4) and 23(g) require that the plaintiff demonstrate that it will fairly and adequately protect the interests of the class. "Adequacy 'entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation.'" *In re Flag Telecom*, 574 F.3d at 35 (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000)).[8] "The adequacy-of-representation requirement 'tends to merge' with the commonality and typicality criteria of Rule 23(a) to 'serve as guideposts for determining whether . . . the named plaintiffs' claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Amchem*, 521 U.S. at 625 n.20 (quoting *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157, n.13 (1982)).

As discussed above, Lead Plaintiffs' claims arise from the same course of conduct as the claims of the Class. Far from conflicting in any way, the interests of Lead Plaintiffs and the Class are the same: to maximize their recoveries. Lead Plaintiffs have asserted the same federal securities law claims that Class Members have.

In addition, Lead Plaintiffs have retained counsel highly experienced in securities litigation, who have ably represented the interests of the Class. *See* Exhibit F to the Appendix (Lead Counsel's firm resume); *cf. Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 375 (S.D.N.Y. 2007) (finding adequacy of counsel under Rule 23(g) where "[counsel] has diligently identified and pursued the claims in this action to date").

Thus, the requirements of Rule 23(a)(4) and 23(g) have been met.

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[8] *See also In re Drexel Burnham Lambert Group*, 960 F.2d 285, 291 (2d Cir. 1992); *In re Marsh & McLennan*, 2009 U.S. Dist. LEXIS 120953, at *33; *Oxford Health*, 191 F.R.D. at 376.

E. Predominance and Superiority

FED. R. CIV. P. 23(b)(3) requires "'[1] that common questions of law or fact predominate over individual questions and [2] that a class action is superior to other methods of adjudication.'" *ML Research*, 246 F.R.D. at 164 (quoting *Veeco*, 235 F.R.D. at 240). "Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem*, 521 U.S. at 625; *In re Take Two*, 2010 U.S. Dist. LEXIS 143837, at *26 (quoting *Amchem*, 521 U.S. at 625). Common questions predominate where, as here, the issue of a defendant's liability is common among Class Members. *In re Blech Sec. Litig.*, 187 F.R.D. 97, 107 (S.D.N.Y. 1999); *In re Take Two*, 2010 U.S. Dist. LEXIS 143837, at *27.

Furthermore, unlike the requirements of FED. R. CIV. P. 23(a), which seek to test whether representative prosecution of the action is proper, FED. R. CIV. P. 23(b)(3) tests whether the prosecution of claims on a class basis is practical. The Supreme Court has noted that, "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620. Therefore, in the context of a settlement class, the question is not whether individual issues will predominate, but whether the administration of the settlement is manageable and whether a class action is superior to individual adjudications.

Here, administration of the Settlement presents no unusual issues or problems. The administration is planned and will be executed like hundreds (if not thousands) before it in similar federal securities cases. Lead Counsel is highly experienced in the administration of

securities class action settlements. Lead Counsel has also retained one of the leading claims administration firms in the country (GCG), already approved by the Court, which has decades of experience administering and processing claims in settlements of cases of this type as well as far more complex settlements. Further, few, if any, individual determinations will be made. Claims will be processed based on reliable documentary evidence submitted, and calculated in accordance with the Plan of Allocation. Therefore, administering this Settlement will not prove to be an obstacle to certification of the Class. *See generall*y Fraga Decl.; Brower Decl. at ¶¶143, 151, 157-58.

Further, even if certification of a litigation class was sought, the claims of Class Members would overwhelmingly predominate over any potential individual questions affecting individual Class Members. This is a prototypical securities fraud class involving a publicly traded security and public statements to the market.[9]

Finally, given the number of Class Members and their relative damages, it is also unlikely that they would want to endure the expense of litigation by bringing their claims individually. *See Marsh & McLennan*, 2009 U.S. Dist. LEXIS 120953, at *37 (recognizing that the "class action is uniquely suited to resolving securities claims," because "the prohibitive cost of instituting individual actions" in such cases gives class members "limited interest in individually controlling the prosecution or defense of separate actions"); *In re Monster Worldwide, Inc. Sec.*

[9] Only the calculation of the amount of individual Class Members' damages would differ depending on when each acquired, sold, and/or held their Cnova ordinary shares, and such differences have been held not to predominate, because, like the administration of claims in the Settlement, those calculations require only mechanically applying a common formula to all Class Members' claims based on reliable documentation (brokerage records). *See Padilla v. Maersk Line, Ltd.*, 271 F.R.D. 444, 451 (S.D.N.Y. 2010) ("the fact of injury and damages breaks down in what may be characterized as virtually a mechanical task, capable of mathematical or formula calculation, the existence of individualized claims for damages seems to offer no barrier to class certification on grounds of manageability").

Litig., 251 F.R.D. 132, 139 (S.D.N.Y. 2008) ("as a general rule, securities fraud cases 'easily satisfy the superiority requirement [as] [m]ost violations of the federal securities laws . . . inflict economic injury on large numbers of geographically dispersed persons such that the cost of pursuing individual litigation to seek recovery is often not feasible'"); *In re Blech*, 187 F.R.D. at 107. Thus, class action treatment is superior to any other method.

*** * ***

In sum, all of the requirements of FED. R. CIV. P. 23(a) and (b)(3) are satisfied. Thus, the Court should grant final certification to the Class for the purposes of effectuating the Settlement.

IV. THE PLAN OF ALLOCATION OF THE NET SETTLEMENT FUND IS FAIR AND REASONABLE AND SHOULD BE APPROVED BY THE COURT

The objective of the proposed Plan of Allocation is to distribute equitably the Settlement proceeds to the Class Members who suffered economic losses as a result of Defendants' alleged misrepresentations and omissions. Brower Decl. at ¶208; Declaration of Zachary Nye, Ph.D. In Support of the Proposed Settlement and Plan of Allocation, dated December 14, 2017 ("Nye Declaration" or "Nye Decl.") (Exhibit B to the Appendix) at ¶¶22-27 (explaining why it is equitable and reasonable). "To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized – namely, it must be fair and adequate." *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 163 (S.D.N.Y. 2011) (quoting *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005)); *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, MDL. No. 1500, 2006 U.S. Dist. LEXIS 17588, at *58 (S.D.N.Y. Apr. 6, 2006).

A plan of allocation is fair and reasonable as long as it has a "reasonable, rational basis." *Flag*, 2010 U.S. Dist. LEXIS 119702, at *61 (quotation omitted); *see also WorldCom*, 388 F.

Supp. 2d at 344. In general, courts have recognized that "the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." *PaineWebber*, 171 F.R.D. at 133; *see also Taft*, 2007 U.S. Dist. LEXIS 9144, *26 ("If the plan of allocation is formulated by ''competent and experienced class counsel, an allocation plan need only have a 'reasonable, rational basis.'"). Moreover, as with the Settlement, courts give great weight to the opinion of experienced and informed counsel when assessing a proposed plan of allocation. *See, e.g.*, *Flag*, 2010 U.S. Dist. LEXIS 119702, at *61; *EVCI*, 2007 U.S. Dist. LEXIS 57918, at *33 ("In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel.").

The proposed Plan of Allocation was developed by Lead Counsel after consultation with their financial and damages expert, based on his work for Lead Plaintiffs in this Action and his calculations of compensable damages. *See* Nye Decl., *passim*. The Plan allocates the Net Settlement Fund among Class Members who submit timely and completed Proofs of Claims. *See* Fraga Aff., Exhibit 1 (Notice), at 9. The Recognized Loss calculations under the Plan of Allocation are based on the same per share damages calculations that Lead Plaintiffs' financial expert determined for the purposes of estimating the maximum amounts of recoverable damages under Section 11 at trial in response to the alleged corrective disclosures that occurred after market close on January 28, 2015; and after market close December 18, 2015; and February 23, 2016. *See* Nye Decl. at ¶23. The Plan of Allocation, thus, reflects the formulas that Lead Plaintiffs would most likely have offered at trial to prove Class Members' damages, *see id.* at ¶26; Brower Decl. at ¶¶209-13, and, as such, is fair and equitable to the respective Class.

Additionally, because Lead Counsel has concluded that, in weighing the strengths and weaknesses of the claims of Class Members against the Defendants during the Class Period, claims for Cnova ordinary shares purchased during the Class Period and held on January 28, 2015 face difficulties of proof and a potential negative causation defense, an adjustment under this Plan of Allocation of the per share Recognized Losses resulting from the disclosures on that date of 50% is appropriate. *See* Nye Decl. at ¶23 (explaining the 50% adjustment). A plan that allocates settlement funds to class members based on the extent of their injuries or the strengths of their claims is fair and reasonable. *See In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 580 (S.D.N.Y. 2008) ("A reasonable plan may consider the relative strengths and values of different categories of claims."); *see also Curtiss-Wright Corp. v. Helfand*, 687 F. 2d 171, 173-75 (7th Cir. 1982) (permitting an unequal allocation of a class action settlement fund based on different defenses available against different class members) (relying, in part, on *Beecher v. Able, Inc*., 575 F. 2d 1010 (2d Cir. 1978)).

Finally, in response to the 9,175 Notices that have been mailed to potential Class Members to date, no objections have been received to the Plan of Allocation. Brower Decl. at ¶214.

Accordingly, for all of the reasons set forth herein and in the Brower Declaration and the Nye Declaration, the Plan of Allocation is fair and reasonable, and should be approved.

V. CONCLUSION

For all the foregoing reasons, Lead Plaintiffs and Lead Counsel respectfully request that the Court (1) grant final approval to the forms and methods for providing notice to the Class; (2) grant final certification to the Class for the purposes of the Settlement; and (3) approve the proposed Plan of Allocation as fair and reasonable.

Dated: December 22, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2017, I served true and correct copies of the foregoing Lead Plaintiffs' Memorandum of Law in Support of Motion for Final Approval of Class Notice, Final Certification of the Class for Purposes of Settlement, and Final Approval of the Proposed Plan of Allocation on all counsel by causing copies to be sent by the ECF system.

/s/ David A.P. Brower
David A.P. Brower