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 THE PROPOSED SETTLEMENT

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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, pursuant to FED. R. CIV. P. 23(e), for final approval of the proposed Settlement.[1]

I. PRELIMINARY STATEMENT

Given Lead Counsel's informed assessment of the strengths and weaknesses of the claims and defenses asserted, the considerable risks and delays associated with continued litigation and trial of a multinational case, and the extraordinary size of the recovery, Lead Plaintiffs and Lead Counsel believe the $28,500,000 Settlement is more than fair, reasonable, and adequate, and should be approved by the Court based on the Second Circuit's criteria for approval of a class action settlement. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).[2]

II. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. The Law Favors and Encourages Settlements

FED. R. CIV. P. 23(e) requires that a court approve a class action settlement. The Court may approve a settlement that is binding on a class only if it determines that the settlement is "fair, adequate, and reasonable." FED. R. CIV. P. 23(e)(2). This evaluation requires the Court to

[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.

[2] For a full discussion of the Action, including the strengths and weaknesses of Lead Plaintiffs' claims, the amount recovered compared to the best likely recovery at trial, the likely cost and duration of continued litigation, and the negotiations leading to the Settlement, the Court is respectfully referred to the 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 Allocation, and Lead Counsel's Motion For An Award of Attorneys' Fees and

consider "both the settlement's terms" (*i.e.*, *substantive fairness*) "and the negotiating process leading to settlement" (*i.e.*, *procedural fairness*). *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 160 (S.D.N.Y. 2011) (quoting *Wal-Mart*); *In re IMAX Secs. Litig.*, No. 06 Civ. 6128, 2012 U.S. Dist. LEXIS 86513, at *30 (S.D.N.Y. June 20, 2012) (quoting *Giant* and *Wal-Mart*).

While the decision to grant or deny approval of a settlement lies within the broad discretion of the trial court, "federal courts favor settlement, especially in complex and large-scale disputes, so as to encourage compromise and conserve judicial and private resources," and courts "take into consideration such public policy concerns in exercising its discretion." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) (citations omitted); *see also Wal-Mart*, 396 F.3d at 116 ("We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context."); *IMAX*, 2012 U.S. Dist. LEXIS 86513, at *30 ("At the outset, we emphasize that that there is a 'strong judicial policy in favor of settlements, particularly in the class action context.'") (citation omitted).[3] Moreover, "[c]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006); *see also Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982).

Reimbursement of Litigation Expenses ("Brower Declaration").

[3] *See also Giant*, 279 F.R.D. at 159-60 ("'Settlement approval is within the Court's discretion, which should be exercised in light of the general judicial policy favoring settlement.'") (citations omitted); *Taft v. Ackermans*, No. 02 Civ. 7951 (PKL), 2007 U.S. Dist. LEXIS 9144, at *13-*14 (S.D.N.Y. Jan. 31, 2007) (citing *Wal-Mart* and *Global Crossing*); *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173 (S.D.N.Y. 2000) ("the law favors settlements of disputed claims, particularly in the context of complex class actions"), *aff'd sub nom., D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001).

Recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has cautioned that, while a court should not give "rubber stamp approval" to a proposed settlement, it must "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Grinnell*, 495 F.2d at 462; *Hayes v. Harmony Gold Mining Co.*, No. 08 Civ. 03653, 2011 U.S. Dist. LEXIS 138543, at *5 (S.D.N.Y. Nov. 29, 2011) (quoting *Grinnell*); *In re Veeco Instruments, Inc. Sec. Litig.*, No. 05 MDL 0165 (CM), 2007 U.S. Dist. LEXIS 85629, at *17 (S.D.N.Y. Nov. 7, 2007) (same). As stated by the Second Circuit in *Newman v. Stein*, 464 F.2d 689 (2d Cir. 1972):

> the role of a court in passing upon the propriety of the settlement of a derivative or other class action is a delicate one…. [W]e recognized that since "'the very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation,' the court must not turn the settlement hearing 'into a trial or a rehearsal of the trial.'"

Id. at 691-92 (citation omitted); *see also Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 674-75 (S.D.N.Y. 2011) ("[W]hen evaluating a settlement agreement, the court is not to substitute its judgment for that of the parties, nor is it to turn consideration of the adequacy of the settlement 'into a trial or a rehearsal of the trial.'") (quoting *Grinnell*, 495 F.2d at 462).

B. The Settlement is Procedurally Fair

A strong initial presumption of fairness attaches to a proposed settlement if it is reached by experienced counsel after arm's-length negotiations, and great weight is accorded to counsel's recommendation. *Wal-Mart*, 396 F.3d at 116; *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 133 (S.D.N.Y. 2008); *D'Amato*, 236 F.3d at 85; *Veeco*, 2007 U.S. Dist. LEXIS 85629, at *17 ("'A proposed class action settlement enjoys a strong presumption that it is fair, reasonable and adequate if . . . it was the product of arm's-length negotiations conducted by

capable counsel, well-experienced in class action litigation'") (citation omitted).[4] This presumption of fairness and adequacy applies here because the Settlement was reached by highly experienced, fully-informed counsel after extensive arm's-length negotiations with the assistance of a well-regarded mediator. Brower Decl. at ¶¶105-38. "So long as the integrity of the arm's length negotiation process is preserved . . . a strong initial presumption of fairness attaches to the proposed settlement." *PaineWebber*, 171 F.R.D. at 125.

No question exists that Lead Counsel was fully informed of the strengths and weaknesses of the claims by the time the Stipulation was executed. Lead Counsel conducted an extensive factual investigation of Lead Plaintiffs' claims, including reviewing and digesting approximately one million pages of documents that included approximately 175,000 documents produced to Lead Plaintiffs by Defendants that were predominantly in Portuguese, as well as documents in French and English. Those documents included confidential internal emails by and between Defendants and their agents in Brazil and France, the presentations Cnova made to the SEC in connection with the restatement and selected work papers from Cnova's investigator and auditor concerning the restatement. Lead Counsel also had extensive consultations with their economics, financial and damages consultants, consultations with English, Brazilian and French counsel, and discussions between the Parties regarding their respective positions, theories, claims, defenses and responses to those claims and defenses throughout the litigation, including during the mediations. *See* Brower Decl. at ¶¶190-92.

Moreover, the Parties took part in two formal face-to-face mediations supervised by

[4] *Accord In re Sadia S.A. Sec. Litig*., No. 08 Civ. 9528 (SAS), 2011 U.S. Dist. LEXIS 149107, at *1 (S.D.N.Y. Dec. 28, 2011); *In re Canadian Superior Sec. Litig*., No. 09 Civ. 10087 (SAS), 2011 U.S. Dist. LEXIS 132708, at *2 (S.D.N.Y. Nov. 16, 2011); *Hicks v. Morgan Stanley & Co*., No. 01 Civ. 10071, (RJH), 2005 U.S. Dist. LEXIS 24890, at *15 (S.D.N.Y. Oct. 24, 2005); *Malchman v. Davis*, 706 F.2d

former United States District Judge Layn R. Phillips (Ret.), a highly respected and experienced mediator. The Settlement, however, was not reached until after the second mediation and after extensive further communications between the Parties and Judge Phillips. Brower Decl. at ¶¶115-16, 123, 126. The active involvement of an experienced and independent mediator like Judge Phillips in the negotiation of the Settlement is strong evidence of the absence of any collusion and further supports the presumption of fairness. *See D'Amato*, 236 F.3d at 85 (a mediator's involvement in settlement negotiations "helps to ensure that the proceedings were free of collusion and undue pressure"); *Hicks*, 2005 U.S. Dist. LEXIS 24890, at *14-*15 ("The participation of a respected and neutral mediator "gives [the court] confidence that [the negotiations] were conducted in an arms-length, non-collusive manner.") (quoting *In re AMF Bowling Sec. Litig.*, 334 F. Supp. 2d 462, 465 (S.D.N.Y. 2004)); *Giant*, 279 F.R.D. at 160 (with regard to Judge Phillips, the court noted that the settlement negotiations were "facilitated by a respected mediator").[5]

Further, Lead Counsel, who have extensive experience prosecuting complex securities class actions, submit that the Settlement is not only fair, reasonable, and adequate, but an outstanding result. *See* Brower Decl. at ¶207. Lead Counsel's opinion is entitled to "great weight." *IMAX*, 2012 U.S. Dist. LEXIS 86513, at *31 ("Further, great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying

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426, 433 (2d Cir. 1983); *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

[5] *See also In re Bear Stearns Cos., Inc. Sec. Deriv., & ERISA Litig.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (finding a settlement fair where the parties engaged in "arm's length negotiations," including mediation before "retired federal judge Layn R. Phillips, an experienced and well-regarded mediator of complex securities cases"); *In re Cigna Corp. Sec. Litig.*, No. 02-8088, 2007 U.S. Dist. LEXIS 51089, at *12 (E.D. Pa. July 13, 2007) (finding a presumption of fairness where "negotiations for the settlement occurred at arm's length, as the parties were assisted by a retired federal district judge who was privately retained and served as a mediator").

litigation.") (quoting *PaineWebber*, 171 F.R.D. at 125); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) (courts have consistently given "'great weight'. . . to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation") (citation omitted); *accord Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 212 (S.D.N.Y. 1992) ("A substantial factor in determining the fairness of the settlement is the opinion of counsel involved in the settlement.") (citation omitted). Thus, this Settlement is entitled to the presumption of procedural fairness.

C. The Settlement is Substantively Fair

In assessing whether a proposed settlement is "fair, reasonable, and adequate," the Court should not substitute its judgment for that of the parties who negotiated it,[6] nor conduct a mini-trial on the merits of the action. *See, e.g., Weinberger*, 698 F.2d at 74 ("The Supreme Court could not have intended that, in order to avoid a trial, the judge must in effect conduct one."); *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993) ("the Court is not required to engage in a trial of the merits when considering the prospects of success in the litigation."). Thus, a court "should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute one complex, time consuming and expensive litigation for another." *White v. First Am. Registry, Inc.*, No. 04-cv-1611 (LAK), 2007 U.S. Dist. LEXIS 18401, at *7 (S.D.N.Y. Mar. 7, 2007). Furthermore, "in any case there is a range of reasonableness with respect to a settlement." *Newman*, 464 F.2d at 693. The Settlement proposed in this case clearly falls well

[6] *See, e.g., In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240, 2007 U.S. Dist. LEXIS 57918, at *12 (S.D.N.Y. July 27, 2007) ("Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement."); *Clark v. Ecolab Inc.*, No. 07 Civ. 8623 (PAC), 2010 U.S. Dist. LEXIS 47036, at *18 (S.D.N.Y. May 11, 2010) ("The Court gives weight to the parties' judgment that the settlement is fair and reasonable.").

above the typical "range of reasonableness."

In *Grinnell*, the Second Circuit identified nine non-exhaustive factors that courts should consider in deciding whether to approve a proposed settlement of a class action: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *See* 495 F.2d at 463 (citations omitted). All nine factors need not be satisfied. Instead, "the court should consider the totality of these factors in light of the particular circumstances." *Jermyn v. Best Buy Stores, L.P.*, No. 08-214, 2012 U.S. Dist. LEXIS 90289, at *13 (S.D.N.Y. June 27, 2012) (quoting *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) (internal quotation and citation omitted)); *Global Crossing*, 225 F.R.D. at 456.

As demonstrated below, the Settlement here satisfies all nine *Grinnell* factors and, in the judgment of Lead Counsel, is an outstanding result in a case where there is serious doubt whether a more favorable result would have been attained if the case were litigated through trial and the inevitable post-trial processes, especially due to the complications related to the foreign aspects of the case. As such, Lead Counsel submits that the Settlement clearly warrants this Court's final approval.

1. The Complexity, Expense, and Likely Duration of the Litigation

"[I]n evaluating the settlement of a securities class action, federal courts, including this Court, 'have long recognized that such litigation is notably difficult and notoriously uncertain.'"

IMAX, 2012 U.S. Dist. LEXIS 86513, at *33 (quoting *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999)).[7] Lead Plaintiffs encountered, and absent the Settlement would have certainly continued to encounter, significant risks in proving the necessary elements to establish violations of the federal securities laws for the entire Class, including overcoming the negative loss causation defense. Brower Decl. at ¶¶194-99.

The foreign aspects of this Action presented unique difficulties that created serious risks to success on the merits as well. Brower Decl. at ¶175. The core of Lead Plaintiffs' claims focus on Cnova's Brazilian subsidiary. Initially, Lead Plaintiffs faced significant challenges with properly effecting service on the Individual Defendants, as described in detail in the Brower Declaration (at ¶176). At the time the Settlement was reached, all of the Individual Defendnats were challenging service and this Court's jurisdiction over them.

Even after the service and jurisdictional issues would have been resolved, it was not clear whether Lead Plaintiffs would have been able to overcome the multinational discovery rules to obtain discovery, how much discovery they could obtain, and how long the process would take. *See* Brower Decl. at ¶¶177-83. As the discovery to date demonstrated, much of the documentation was in Portuguese and French. Most of the key witnesses and Defendants reside in Brazil. Cnova's other operating subsidiary is in France and its parent headquarters is in the Netherlands. Adding further complication, in 2016, Brazil put into effect a new Civil Procedure Code, which allows individuals to refuse to provide discovery if it is related to his/her private life, violates the duty of honor, publicizes confidential facts, or other reasons. *See* "Brazil's New

[7] *See also In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM) (PED), 2010 U.S. Dist. LEXIS 119702, at *43 (S.D.N.Y. Nov. 8, 2010) (same); *Wesley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989) (class actions "are notoriously complex, protracted, and bitterly fought").

Civil Procedure Code," Columbia Journal of Transnational Law[8]; Brazil, Litigation & Dispute Resolution 2017, Global Legal Insights[9]; Brower Decl. at ¶181. Additionally, certain privileges, including the French accounting privilege, which is similar to the U.S. attorney-client privilege, would have proved a major obstacle to obtaining discovery related to the core issue of Cnova's false accounting. *Id*. at ¶184.

Assuming Lead Plaintiffs overcame the obstacles to document discovery in the various subject countries, Lead Plaintiffs would have to pursue depositions in as many as four countries, all of which follow the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention").[10] For each country, Lead Plaintiffs would be required, first, to apply to the Court to execute a Letter of Request for each witness and the documents sought and, then, to submit the executed Letter of Request to the designated Central Authority in each country. Hague Evidence Convention, Articles 1 & 2. The judicial authority in each country that executes the Letter of Request would apply its own local laws to the methods and procedures to be followed. *Id*., Article 9. The Hague Evidence Convention also provides that the person concerned may refuse to give evidence in so far as he has a privilege. *Id*., Article 11. Importantly, as authorized by Article 23 of the Hague Evidence Convention, each of the countries in question has declared "that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." *Id.*, Article 23. Even assuming cooperation from the local authorities, according to Lead Plaintiffs' foreign legal consultant, it would take three to six months after the Letter of

[8] http://jtl.columbia.edu/brazils-new-civil-procedure-co.

[9] https://www.globallegalinsights.com/practice-areas/litigation-and-dispute-resolution/global-legal-insights-litigation-and-dispute-resolution-6th-ed/brazil.de/.

[10] https://assets.hcch.net/docs/ccf77ba4-af95-4e9c-84a3-e94dc8a3c4ec.pdf.

Request is transmitted abroad to obtain the requested discovery. Lead Plaintiffs would also need to find, retain, and work with local litigation counsel in each country. Brower Decl. at ¶181.

Furthermore, many countries will not allow American-style depositions, but only allow depositions on written questions administered by a government official or notary, which makes it extremely difficult to ask follow-up questions, especially when they have to be filtered through a translator (or potentially competing translators at the same deposition). Similarly, at trial, testimony might well have needed to be simultaneously translated into English, which would further complicate the trial. As to key witnesses (including all of the Individual Defendants) located abroad, it would be difficult, if not impossible, to compel most of them to attend the trial. Brower Decl. at ¶183.

Even success on the merits on all claims would not have eliminated the risks of recovery. Defendants raised French legal precedents that they claimed do not permit an opt-out class under French law to recover in France, and enforcing judgments against the Individual Defendants who reside in Brazil, the Netherlands and the United Kingdom presented further risks. *See, e.g.*, Nathalie Meyer Fabre, The International Dispute Resolution News, Recognition and Enforcement of U.S. Judgments in France – Recent Developments, (2012)[11]; Latham & Watkins, Client Alert Commentary, Introduction of Class Actions in France: A Growing Threat to Professionals?, Number 1667 (Mar. 25, 2014)[12]; Ángel R. Oquendo, Justice for All: Certifying Global Class Actions, 16 Wash. U. Global Stud. L. Rev. 071 (2017)[13]; Albert Knigge, *et al.*, Thomson Reuters, Practical Law, Class/Collective Actions in The Netherlands: Overview,

[11] http://www.meyerfabre.fr/uploadok/RDG4ut_pdf2.pdf.

[12] https://www.lw.com/thoughtLeadership/lw-france-class-action-law.

[13] http://openscholarship.wustl.edu/law_globalstudies/vol16/iss1/6.

(2017)[14]; Quentin Declève, International Litigation Blog, The Netherlands to Introduce Possibility for Damages Claims Under Class Action System (Apr. 20, 2017)[15]; Alexandre Bailly & Xavier Haranger, Thomson Reuters, Practical Law, Class/Collective Actions in France: Overview (2016).[16]

Courts have repeatedly recognized the added difficulty in litigating securities cases involving foreign corporations and defendants. *See, e.g., Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, No. 01-CV-11814(MP), 2004 U.S. Dist. LEXIS 8608, at *6-*7 (S.D.N.Y. May 14, 2004) (approving settlement against foreign company where many of the defendants, witnesses and documents were located abroad, beyond the court's subpoena power); *In re Indep. Energy Holdings PLC Sec. Litig.*, No. 00 Civ. 6689 (SAS), 2003 U.S. Dist. LEXIS 17090, at *5 (S.D.N.Y. Sept. 26, 2003) ("[D]ocument discovery was very difficult as . . . document requests are severely limited in the U.K. as there is no pre-trial discovery."); *In re Arakis Energy Corp. Sec. Litig*., No. 95 CV 3431 (ARR), 2001 U.S. Dist. LEXIS 19873, at *37 (E.D.N.Y. Aug. 17, 2001) ("This case has also proven to be extremely complex, as evidenced by . . . counsel [having] to conduct extensive [international] discovery.").[17]

[14] https://uk.practicallaw.thomsonreuters.com/6-618-0285?transitionType=Default&contextData=(sc.Default).

[15] http://international-litigation-blog.com/the-netherlands-to-introduce-possibility-for-damages-claims-under-class-action-system/.

[16] https://uk.practicallaw.thomsonreuters.com/1-618-0240?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1.

[17] *See also Berlinsky v. Alcatel Alsthom Compagnie Generale D' Electricite*, 964 F. Supp. 754, 755 (S.D.N.Y. 1997) ("Finally, and most importantly, there is the fact that defendant is a foreign entity. This complicates and adds to the expense of discovery, gives defendant a possible defense of lack of personal jurisdiction, and makes plaintiff's ability to enforce a judgment rendered in his favor considerably more difficult."); *Schwartz v. Novo Industri A/S*, 119 F.R.D. 359, 363 (S.D.N.Y. 1988) ("The discovery process would have been complicated by defendant's location in Denmark. Novo's counsel states that relevant documents are located in several countries in four continents. The subpoena power of this court is limited,

These were but a few of the unique hurdles that Lead Plaintiffs would have needed to overcome, and the presence of these unique multinational issues clearly would add considerably to the complexity, expense and duration of the Action. There can be no doubt that because the Action is settling at this time, the litigants have been spared the delay and expense of continued multinational litigation. Conducting further discovery, by itself, would be complex, lengthy and certainly expensive. In addition to the not insubstantial costs of litigating a complex securities class action, Lead Plaintiffs faced compelling testimony from foreign witnesses through foreign judicial proceedings, multiple testimony translators, navigating less liberal foreign discovery rules, international travel, and translating into English masses of additional documents. Many months of the Parties' (and the Court's) time and significant resources have been spared. Moreover, even if the Class could recover a larger judgment after trial, the additional delay through trial, post-trial motions, and the appellate process – not to mention seeking to enforce such a judgment in several foreign countries – could deny the Class any recovery (even assuming victory at every step) for years, which would further reduce its value. *See In re Vivendi Universal, S.A. Sec. Litig.*, No. 02. Civ. 5571 (S.D.N.Y.) (case filed in 2002, trial in October 2009, jury verdict in January 2010, and claims proceedings until 2016); *Glickenhaus & Co. v. Household Int'l, Inc.*, No. 02 C 5893 (N.D. Ill.) (case filed in 2002, trial and verdict in 2009, claims proceedings through 2013, appeal resolved in 2015, which resulted in remand and a new trial on loss causation).[18] By contrast, the proposed Settlement here, at this juncture, results in an

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and may not extend to all possible witnesses. . . . Further, translators would be required for at least some witnesses."). *See also* Fee Memorandum at 9 (citing cases).

[18] *See also Flag*, 2010 U.S. Dist. LEXIS 119702, at *44 ("All of the foregoing would delay the ability of the Class to recover for years – assuming, of course, that Plaintiffs would ultimately be successful in proving their claims."); *Hicks*, 2005 U.S. Dist. LEXIS 24890, at *16 ("Further litigation would necessarily involve further costs [and] justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action."); *Maley v. Del Global Techs. Corp.*, 186 F. Supp.

immediate and very substantial recovery, without the considerable risk, expense, and delay. *See* Declaration of Professor Geoffrey P. Miller, dated December 15, 2017 ("Miller Declaration" or "Miller Decl."), Exhibit C to the Appendix of Exhibits to the Brower Declaration ("Appendix"), at ¶¶41-51 (discussing the magnitude, complexities and risks of the litigation, which goes with this factor). Therefore, this *Grinnell* factor weighs heavily in favor of the proposed Settlement.

2. The Reaction of the Class to the Settlement

The reaction of the class to the settlement is another factor in assessing its fairness and adequacy. The deadline for objecting to the Settlement or seeking exclusion from the Class has not yet passed, and, therefore, it is premature to discuss this factor. Notably, the notice was mailed starting on October 23, 2017, *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."), Exhibit A to the Appendix, at ¶3, and to date, no Class Member has objected to approval of the Settlement or requested exclusion from the Class. If any objections are received, they will be addressed in Lead Plaintiffs' supplemental papers in support of the Settlement that will be filed twenty-one (21) days before the final fairness hearing.

3. The Stage of the Proceedings and Discovery Completed

This factor examines the amount of information available about the claims and defenses to ensure that the plaintiff was able to properly evaluate his case and to assess the adequacy of any settlement. *See Weinberger*, 698 F.2d at 74 ("[T]he trial judge must "apprise[] himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success

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2d 358, 362 (S.D.N.Y. 2002) ("Settlement at this juncture results in a substantial and tangible present recovery, without the attendant risk and delay of trial."); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would . . . make future recoveries less valuable than this current recovery").

should the claim be litigated.") (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 424 (1968)); *Chatelain*, 805 F. Supp. at 213-14; *Global Crossing*, 225 F.R.D. at 458 (this requirement "is intended to assure the Court 'that counsel for plaintiffs have weighed their position based on a full consideration of the possibilities facing them'") (citation omitted).

Courts have held that even settlements reached at a very early stage and prior to formal discovery are appropriate if there is no evidence of collusion and the settlement represents substantial concessions by both sides. *See, e.g.*, *IMAX*, 2012 U.S. Dist. LEXIS 86513, at *35 ("The threshold necessary to render the decisions of counsel sufficiently well informed, however, is not an overly burdensome one to achieve – indeed, formal discovery need not have necessarily been undertaken yet by the parties.") (citing *In re Sony SXRD Rear Projection Television Class Action Litig*., No. 06 Civ. 5173 (RPP), 2008 U.S. Dist. LEXIS 36093, at *20 (S.D.N.Y. May 1, 2008)).[19] By contrast here, Lead Counsel conducted an extensive investigation prior to any formal discovery, including the: (i) review and analysis of filings made by, and/or concerning, Defendants with the SEC; and (ii) review and analysis of wire and press releases, public statements, news articles, and other publications disseminated by, and/or concerning, Defendants. *See* Brower Decl. at ¶¶190-93. Lead Plaintiffs also engaged in extensive discovery, including the review and organization of hundreds-of-thousands of pages of internal Cnova documents. In addition, Lead Plaintiffs interviewed the lead investigator and counsel to Cnova who led the internal investigation of events in Brazil. *Id.* at ¶¶85-86.

[19] *See also Global Crossing*, 225 F.R.D. at 458; *Austrian & German Bank*, 80 F. Supp. 2d at 176 (not necessary for court to find parties engaged in extensive discovery; must merely find that they engaged in sufficient investigation to enable court to make intelligent appraisal of case) (citing *Plummer v. Chem. Bank*, 668 F.2d 654 (2d Cir. 1982)). *Accord In re Jiffy Lube Sec. Litig*., 927 F.2d 155, 159 (4th Cir. 1991).

Moreover, to assist with their prosecution and analysis, Lead Counsel consulted with a highly regarded expert concerning the Brazilian economy during the Class Period, and a highly experienced financial expert regarding the calculation of recoverable damages at various points during the Class Period, as well as issues concerning Defendants' potential negative loss causation defenses and arguments that Defendants made or could make regarding Lead Plaintiffs' damages estimates. Furthermore, Lead Counsel consulted with French, Brazilian and English counsel regarding various matters. Brower Decl. at ¶¶87, 99, 192.

Therefore, Lead Counsel had a strong basis to assess the strengths and weaknesses of the claims, the Parties' positions on liability and damages, and to knowledgeably approach the settlement negotiations. The Action had advanced to a stage where Lead Plaintiffs "were able to make an intelligent appraisal of the value of the case,"[20] and the Court should give great weight to this factor in favorably considering the Settlement. *See, e.g., In re Drexel Burnham Lambert Group Inc.*, 130 B.R. 910, 916 (S.D.N.Y. Aug. 20, 1991), *aff'd*, 960 F.2d 285 (2d Cir. 1992).[21]

4. The Substantial Risks of Establishing Liability

In assessing this factor, the Court should consider the benefits afforded the Class, including the immediacy and certainty of a recovery against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463. The Court is not required to "decide the merits of the case or

[20] *Giant*, 279 F.R.D. at 161; *see also IMAX*, 2012 U.S. Dist. LEXIS 86513, at *36 ("Against this history of activity, we find that lead plaintiff's counsel and defendants' counsel are both able to assess the strengths and weaknesses of their respective positions."); *Heyer v. N.Y. City Hous. Auth.*, No. 80 Civ. 1196 (RWS), 2006 U.S. Dist. LEXIS 25089, at *9 (S.D.N.Y. Apr. 28, 2006) (although limited discovery was completed before settlement negotiations began, the familiarity of counsel for all parties with the case justifies settlement).

[21] *See, e.g., Stull v. Baker*, 410 F. Supp. 1326, 1332 (S.D.N.Y. 1976); *See also Slade v. Shearson, Hammill & Co.*, 79 F.R.D. 309, 313-14 (S.D.N.Y. 1978); *Schlusselberg v. Keystone Custodian Funds, Inc.*, No. 67-100, 1973 U.S. Dist. LEXIS 14505, at *6 (S.D.N.Y. Mar. 15, 1973); *Robertson v. National Basketball Ass'n*, 72 F.R.D. 64, 70 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977); *Lessac v. Television-Electronics Fund, Inc.*, No. 67-2219, 1968 U.S. Dist. LEXIS 12096, at *8; *Fox v. Glickman*

resolve unsettled legal questions," *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 (1981), or to "foresee with absolute certainty the outcome of the case," *Austrian & German Bank*, 80 F. Supp. 2d at 177. "[R]ather, the court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *Global Crossing*, 225 F.R.D. at 459; *see also IMAX*, 2012 U.S. Dist. LEXIS 86513, at *36.

Here, there were substantial risks with respect to Lead Plaintiffs' ability to recover more than the amount of the Settlement. *See* Brower Decl. at ¶¶196-98. For instance, for the entire Class to recover, Lead Plaintiffs would need to defeat a negative loss causation defense by linking the false and misleading statements in the Registration Statement issued in connection with Cnova's initial public offering and the information disclosed on December 18, 2015, January 28, 2015 and February 24, 2016. *See* Exhibit B to the Appendix (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.")), at ¶9 & pp. 6-8 (detailing the various disclosures). In particular, Lead Plaintiffs' theory was that the poor results reported on January 28, 2015 were the partial materialization of the risk concealed by the misrepresentations contained in the Registration Statement. *See Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 173 (2d Cir. 2005). Defendants hotly contested that the information disclosed on January 28, 2015 was partially curative because it did not directly address the accuracy of the financial information contained in Cnova's Registration Statement, nor did it indicate any suspicions of financial misdeeds by Defendants. Rather, the January 28, 2015 disclosures reported disappointing operating results for the Company for its fourth quarter of 2014, which were attributed, among other operational factors, primarily to deteriorating business conditions in Brazil. *See* Brower

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Corp., 253 F. Supp. 1005, 1012-13 (S.D.N.Y. 1966).

Decl. at ¶95 (detailing the January 28, 2015 disclosures). If the ultimate trier of fact did not accept the January 28, 2015 disclosures as partially curative, all of the losses suffered in response to those disclosures would have been lost. *See id.* (detailing the loss causation issues).

Lead Plaintiffs also faced hurdles in establishing personal jurisdiction over the Individual Defendants, each of whom are foreign residents with limited contacts with the United States; properly effecting service of process on such Defendants in accordance with international conventions and treaties; prevailing on motions to dismiss on procedural grounds and a motion for class certification; amassing sufficient evidence through discovery to defeat Defendants' inevitable motions for summary judgment; demonstrating, by a preponderance of the evidence to the trier of fact, that Defendants made misrepresentations of fact; sustaining a judgment at trial through the inevitable appellate process; and enforcing a class action judgment in the foreign jurisdictions in which the Defendants reside. Brower Decl. at ¶6.

While Lead Plaintiffs were confident in their arguments, they nonetheless recognized the very real risk that the Court or a jury might have accepted some or all of Defendants' arguments, and that uncertainty presented a real risk to recovery. And while Lead Plaintiffs believe they could rebut Defendants' arguments with expert testimony, a very lengthy and complex battle of the Parties' experts at trial was inevitable and such battles are notoriously unpredictable. *See In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. Aug. 21, 1985) ("In this 'battle of experts,' it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions."). Thus, this substantial Settlement, when viewed in light of the risks of proving liability, is undoubtedly fair,

adequate, and reasonable.[22]

5. The Substantial Risks of Proving Damages

Lead Plaintiffs also faced substantial risk in proving the existence and amount of damages. Lead Plaintiffs would have to prove that "each class member's damages (if any) resulted from defendants' alleged misconduct, and the amount of any such damages." *Global Crossing*, 225 F.R.D. at 459. Again, assuming this case survived pre-trial motions and Lead Plaintiffs proved liability, the economic and securities law issues concerning damages would have been both complex and hotly contested, requiring expert testimony on sophisticated methodologies, with uncertain results. "The reaction of a jury to such complex expert testimony is highly unpredictable. Expert testimony about damages could rest on many subjective assumptions, any one of which could be rejected by a jury as speculative or unreliable. Conceivably, a jury could find that damages were only a fraction of the amount that Plaintiffs contended." *In re Lloyd's Am. Trust Fund Litig.*, No. 96-cv-1262 (RWS), 2002 U.S. Dist. LEXIS 22663, at *61-*62 (S.D.N.Y. Nov. 26, 2002.[23] Here, as described in great detail in the Brower Declaration (at ¶¶196-98), Defendants vigorously argued that Class Members' damages were, at best, a fraction of those proffered by Lead Plaintiffs and that, under Defendants' rendition of what had occurred during the Class Period, Class Members suffered no compensable

[22] *See Milken*, 150 F.R.D. at 53 (when evaluating securities class action settlements, courts have long recognized such litigation to be "'notably difficult and notoriously uncertain'") (quoting *Lewis v. Newman*, 59 F.R.D. 525, 528 (S.D.N.Y. 1973)); *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971) ("Stockholder litigation is notably difficult and unpredictable.").

[23] *See also IMAX*, 2012 U.S. Dist. LEXIS 86513, at *37 ("In the context of securities class actions, '[c]alculation of damages is a complicated and uncertain process, typically involving conflicting expert opinion' about the difference between the purchase price and the stock's 'true' value absent the alleged fraud.'") (quoting *Global Crossing*, 225 F.R.D. at 459); *In re Blech Sec. Litig.*, No. 94 Civ. 7696 (RWS), 2002 U.S. Dist. LEXIS 23170, at *5 (S.D.N.Y. Dec. 4, 2002) ("Establishing damages from the drop in the relevant stock price, would, Plaintiffs claim, have degenerated into a 'battle of the experts' and thus posed a risk to Plaintiffs.").

damages in January 2015, and the amount of damages suffered in December 2015 and February 2016 were substantially less than Lead Plaintiffs' damages expert's estimates.[24]

The jury could have been swayed by these arguments, and found that Class Members' losses were caused by factors other than Defendants' wrongdoing or, alternatively, that the amount of recoverable damages suffered by them was minimal. *In re American Bank Note Holographics,* 127 F. Supp. 2d 418, 427 (S.D.N.Y. 2001). *But see* Nye Decl. at pp. 6-8 (detailing the corrective disclosures)

6. The Risks of Maintaining the Class Action Through Trial

The risks of maintaining the Action as a class action through trial also support approval of the Settlement. While Lead Plaintiffs are confident that the claims against Defendants are appropriate for class treatment, at the time the Settlement was reached, no class had been certified. Absent the Settlement, Defendants would almost certainly have opposed certification of the entire Class based on arguments that their defenses to claims differed for different periods within the Class Period. Although Lead Counsel believe that argument would fail under the facts and the law, a prudent attorney recognizes there are always risks.

Even after Lead Plaintiffs had succeeded in obtaining certification of a litigation class, Defendants would have certainly sought a FED. R. CIV. P. 23(f) interlocutory appeal of that certification. Again, while Lead Plaintiffs believe the Class would have ultimately remained certified throughout the litigation, the cost to the Class in terms of further delay that such

[24] *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (plaintiffs need to provide defendants with "some indication of the loss and the causal connection that the plaintiff has in mind."); *In re Openwave Sys. Sec. Litig*., 528 F. Supp. 2d 236, 253 (S.D.N.Y. 2007) ("whether the decline was attributable to some other cause . . . is a matter for proof at trial."); *In re LDK Solar Sec. Litig*., 584 F. Supp. 2d 1230, 1251 (N.D. Cal. 2008) ("A plaintiff is not required to show 'that a misrepresentation was the sole reason for the investment's decline in value' in order to establish loss causation. '[A]s long as the misrepresentation is

proceedings would entail further support Settlement of the Action.

The more problematic class issue was, as Defendants argued, that some of the foreign jurisdictions in which Defendnats reside may not recognize a FED. R. CIV. P. 23(b)(3) opt-out class judgment, which, in turn, would make enforcing a class judgment in those countries, even were Lead Plaintiffs to succeed for the entire Class at every stage of the proceedings, difficult, if not impossible. *See* Brower Decl. at ¶202. Thus, this factor also supports approval of the Settlement. *E.g.*, *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, MDL. No. 1500, 2006 U.S. Dist. LEXIS 17588, at *41 (S.D.N.Y. Apr. 6, 2006) ("[E]ven the process of class certification would have subjected Plaintiffs to considerably more risk than the unopposed certification that was ordered for the sole purpose of the Settlement."); *Global Crossing*, 225 F.R.D. at 460 ("Were these cases not to settle, Defendants might contest class certification on various grounds, thereby creating appreciable risk to . . . recovery.").

7. The Ability of the Defendants to Withstand a Greater Judgment

As detailed in the Brower Declaration, the Settlement is an extraordinarily high percentage recovery of Class Members' most likely recoverable damages at trial. However, Lead Counsel understood that, because the Settlement is being paid from multiple layers of insurance, all of them needed to agree to the Settlement. If a trial occurred here, depending on the jury's findings, the insurance carriers might have disclaimed coverage, limiting any potential recovery. Brower Decl. at ¶¶203-04. Moreover, "the ability of defendants to pay more, on its own, does not render the settlement unfair." *McBean v. City of New York*, 233 F.R.D. 377, 388

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one substantial cause of the investment's decline in value, other contributing forces will not bar recovery under the loss causation requirement'") (citation omitted).

(S.D.N.Y. 2006).[25] Rather, the reasonableness of the Settlement is better analyzed in light of the amount of the Settlement compared to the substantial risks Lead Plaintiffs faced in proving liability and damages, and not on whether Defendants could have paid more.

8. The Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation

The last inquiries under *Grinnell* are whether the Settlement is reasonable in view of (1) the best possible recovery, and (2) the risks of litigating the case on the merits.[26] In analyzing these two factors, the adequacy of the amount offered in settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987); *IMAX*, 2012 U.S. Dist. LEXIS 86513, at *40 (same) (quoting *Giant*, 279 F.R.D. at 162). Therefore, the Court "must examine whether the settlement amount lies within a 'range of reasonableness,' which range reflects 'the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *IMAX*, 2012 U.S. Dist. LEXIS 86513, at *40 (quoting *Wal-Mart*, 396 F.3d at 119); *Newman*, 464 F.2d at 696 (same); *Flag*, 2010 U.S. Dist. LEXIS 119702, at *42; *PaineWebber*, 171 F.R.D. at 125 ("Fundamental to

[25] *See also D'Amato*, 236 F.3d at 86; *In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 339-40 (E.D.N.Y. 2010) ("'[T]he fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate.'") (quoting *Global Crossing*, 225 F.R.D. at 460); *Parker v. Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242, 261 (E.D.N.Y. 2009) ("'[t]he fact that a defendant is able to pay more [than] it offers in settlement does not, standing alone, indicate the settlement is unreasonable or inadequate'") (citation omitted); *AOL Time Warner*, 2006 U.S. Dist. LEXIS 17588, at *42 ("the mere ability to withstand greater judgment does not suggest that the Settlement is unfair").

[26] Courts typically collapse into this inquiry the final two *Grinnell* factors: "the range of reasonableness of the settlement fund in light of the best possible recovery" and "the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Grinnell*, 495 F.2d at 463. *Accord Global Crossing*, 225 F.R.D. at 460.

analyzing a settlement's fairness is 'the need to compare the terms of the compromise with the likely rewards of litigation.'. . . This determination 'is not susceptible of a mathematical equation yielding a particularized sum,' but turns on whether the settlement falls within 'a range of reasonableness.'") (citations omitted); *see also Indep. Energy*, 2003 U.S. Dist. LEXIS 17090, at *13 (noting few cases tried before a jury result in full amount of damages claimed). In making this determination, a reviewing court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462.

There are numerous risks involved in litigation – especially litigation involving the extremely complex issues inherent in securities class actions in general, as well as in multinational litigation – and they have already been discussed above and are discussed in further detail in the Brower and the Miller Declarations. In light of these difficulties and risks specific to this Action, as well as the more typical risks associated with the types of complex legal and factual issues present in securities class actions, the unpredictability of a lengthy and complex trial, and the appellate process that would most likely follow, the fairness of the Settlement is clearly apparent. *Maley*, 186 F. Supp. 2d at 366 (noting the many obstacles to plaintiff's ability to prevail on the merits).

In addition, in considering the reasonableness of the Settlement, the Court should consider that the Settlement provides for payment to the Class now, rather than a speculative payment potentially many years down the road. *See Global Crossing*, 225 F.R.D. at 461 ("The prompt, guaranteed payment of the settlement money increases the settlement's value in comparison to some speculative payment of a hypothetically larger amount years down the road.") (quotation omitted); *AOL Time Warner*, 2006 U.S. Dist. LEXIS 17588, at *44 (where a

settlement fund is in escrow and earning interest for the class, "the benefit of the Settlement will . . . be realized far earlier than a hypothetical post-trial recovery").

Furthermore, the Second Circuit has held that "the fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455; *see also Global Crossing*, 225 F.R.D at 455 (same). Here, by contrast, the Settlement represents a very large percentage recovery for the Class that is well above any range of reasonableness, without even taking into consideration the substantial risks of proceeding entailed. Brower Decl. at ¶¶205-06. As Professor Miller explains, for securities cases where estimated damages were under $50 million (like this one), the median settlement as a percentage of estimated damages was 7.3% for 2016 and 10.8% for 2006-2015. *See* Miller Decl. at ¶ 29 (citing L. Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, Securities Class Action Settlements – 2016 Review and Analysis (Cornerstone Research, 2017)); *see also id*. at ¶¶24-30 (detailing various studies that analyze percentage recoveries and opining that the percentage recovery here is well above the norm).

In stark contrast, the Settlement here (before attorneys' fees and expenses) represents approximately a 62.5% recovery of the Class's aggregate maximum Section 11 compensable damages based on Lead Plaintiffs' expert's estimates that Lead Plaintiffs would have used at trial, which assume complete success on all aspects of the merits of the claims, enforceability of the judgment, and that all Class Members would make and prove their claims. *See* Brower Decl. at ¶¶7, 162; *see* Nye Decl. at ¶20. Moreover, based on certain assumptions related to the claims-rate, the Settlement, before attorneys' fees and expenses, is projected to represent an almost 91% recovery with respect to all Class Members' maximum recoverable damages, and potentially

more than 100% of Class Members' Recognized Losses under the Plan of Allocation. *See* Brower Decl. at ¶¶170-73.[27]

Courts have frequently found percentage recoveries far lower than the recovery here to be within the range of reasonableness for a settlement. *See, e.g., In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895 (DAB), 2011 U.S. Dist. LEXIS 53007, at *15 (S.D.N.Y. May 13, 2011) ("the average settlement amounts in securities fraud class actions where investors sustained losses over the past decade . . . have ranged from 3% to 7% of the class members' estimated losses").[28] Under these circumstances, where the proposed Settlement represents at a minimum a 62.5% recovery of Class Members' best possible damages (before attorneys' fees and expenses), the proposed Settlement is not only fair, reasonable, and adequate, but a stupendous, potentially unprecedented, result, and may alone suffice to demonstrate it is fair, reasonable and adequate.

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[27] The Class common fund approximates the maximum recovery possible if all eligible Class Members make claims. Importantly, in any federal securities action, after a verdict in favor of the plaintiffs at trial, a claims process must be conducted in which class members must submit claims and prove the amount of their claims. Defendants do not pay on any judgment until that process is complete and then they are only required to pay on the amount of claims that are actually submitted and proven. Likewise, in settlements of class actions, only those class members who file claims can recover. In any class action, all eligible class members who can claim do not. This "take rate" varies from case to case depending on the notoriety of the case, the age of the case and the demographics of the class. Based on Lead Counsel's extensive experience involving innumerable settlements and consultations with experts in claims administration, as a general rule of thumb, the take rate in federal securities class actions is approximately 30% of individuals and 90% of institutions that can make a claim do so. *See* Brower Decl. at ¶169. During the Class Period, the percentage of shares held by institutions/individuals was an average of 65% and 35%, respectively, which implies a projected claims rate of approximately 69% in the aggregate. *Id.* Thus, the Settlement in the aggregate represents an already extremely high recovery of approximately 62.5% of the Class Members' maximum compensable damages (before fees and expenses), assuming a 100% claims rate. Based on the projected 69% claims rate, the recovery will likely be a significantly higher percentage. *See id.*

[28] *See also Hicks*, 2005 U.S. Dist. LEXIS 24890, *19 (settlement representing 3.8% of plaintiffs' damage estimate was "within the range of reasonableness"); *Blech*, 2000 U.S. Dist. LEXIS 6920, at *11 (approving settlement representing as much as 5% of estimated damages); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484, 2007 U.S. Dist. LEXIS 9450, at *13 (S.D.N.Y. Feb. 1,

In sum, each of the *Grinnell* factors strongly support a finding that the Settlement is fair, reasonable and adequate. In this context, one must always be mindful that "[a] very large bird in the hand in this litigation is surely worth more than whatever birds are lurking in the bushes." *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 838 (W.D. Pa. 1995). As the court noted in *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971):

> It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced. Merely by way of example, two instances in this Court may be cited where offers of settlement were rejected by some plaintiffs and were disapproved by this Court. The trial in each case then resulted unfavorably for plaintiffs; in one case they recovered nothing and in the other they recovered less than the amount which had been offered in settlement.

See also Milken, 150 F.R.D. at 65 ("[I]t must also be recognized that victory even at the trial stage is not a guarantee of ultimate success"; citing case where a "multimillion dollar judgment was reversed."). Lead Plaintiffs and Lead Counsel, based on their intimate knowledge of the issues presented in this Action, and after careful consideration of the relevant factors, strongly recommend approval of the proposed Settlement.

III. CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully request that the Court approve the proposed Settlement as fair, reasonable, and adequate.

2007) (finding a settlement representing recovery of approximately 6.25% of estimated damages to be "at the higher end of the range of reasonableness of recovery in class action securities litigations").

Dated: December 22, 2017

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Lead Counsel for Plaintiffs and the Class

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 the Proposed Settlement on all counsel by causing copies to be sent by the ECF system.

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