

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF DELAWARE**

LIAM KOZMA, derivatively and on behalf )  
of NOVABAY PHARMACEUTICALS, )  
INC. and individually and on behalf of all )  
other similarly situated stockholders of )  
NOVABAY PHARMACEUTICALS, INC., )

Plaintiff, )

v. )

MARK M. SIECZKAREK, et al., )

Defendants, )

And )

NOVABAY PHARMACEUTICALS, INC. )

Nominal Defendant. )

Case No. 16-cv-01254-JFB-SRF

Hon. Joseph F. Bataillon

**NOTICE OF PROPOSED SETTLEMENT OF DERIVATIVE AND CLASS ACTION**

**TO: ALL RECORD AND BENEFICIAL HOLDERS OF THE COMMON STOCK OF NOVABAY PHARMACEUTICALS, INC. ("NOVABAY" OR THE "COMPANY") AT ANY TIME BETWEEN THE CLOSE OF BUSINESS ON APRIL 7, 2016 AND THE CLOSE OF BUSINESS ON APRIL 21, 2017.**

**PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. YOU MAY BE AFFECTED BY A PROPOSED SETTLEMENT IN THIS DERIVATIVE AND CLASS ACTION LITIGATION. IF THE COURT APPROVES THE PROPOSED SETTLEMENT, YOU WILL BE FOREVER BARRED FROM CONTESTING THE FAIRNESS, REASONABLENESS, AND ADEQUACY OF THE PROPOSED SETTLEMENT, OR PURSUING THE CLAIMS DEFINED HEREIN.**

**IF YOU HELD OR HOLD NOVABAY COMMON STOCK FOR THE BENEFIT OF ANOTHER, PLEASE PROMPTLY TRANSMIT THIS DOCUMENT TO SUCH BENEFICIAL OWNER.**

**IF YOU DO NOT OBJECT TO THE PROPOSED SETTLEMENT, THE FEE AND EXPENSE AMOUNT, OR THE INCENTIVE AWARD DESCRIBED IN THIS NOTICE, YOU ARE NOT OBLIGATED TO TAKE ANY ACTION.**

This Notice of Settlement of Class Action and Hearing ("Notice") has been sent to inform you of the settlement of a class action filed on behalf of all persons and entities (whether of record or beneficial) who held NovaBay common stock at any time between the close of business on April 7, 2016 and the close of business on April 21, 2017.<sup>1</sup> The Settlement is subject to the approval of the United States District Court for the District of Delaware (the "Court"). The Court authorized the mailing of this Notice to you. This Notice does not express the Court's opinion about the merits of any claims or defenses in the class action. If the Court approves the proposed Settlement, the case captioned *Kozma v. Sieczkarek*, No. 16-cv-01254-JFB (the "Action"), will end. This Notice is not a solicitation from a lawyer.

On September 26, 2017, the Court preliminarily approved the Settlement between the Parties.

The Settlement provides, in part, for (i) a stockholder vote to ratify a prior stockholder vote approving an amendment (the "Amendment") to NovaBay's 2007 Omnibus Incentive Plan, (ii) NovaBay to continue practicing or to adopt certain corporate governance enhancements, (iii) the release of all claims arising out of or relating to the Amendment and any disclosures made by NovaBay in connection with the Amendment, and (iv) the payment of Plaintiff's attorneys' fees and expenses. In reaching this Settlement, Plaintiff and Defendants have avoided the costs, time, expense, distraction, and risks associated with continued litigation.

Your rights and options are explained in this Notice. A summary of your rights is set forth below. The date of the Final Settlement Hearing, at which the Court will decide whether to approve the Settlement, is subject to change without further notice.

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<sup>1</sup> Except as expressly provided herein, all capitalized terms shall have the same meanings and/or definitions as set forth in the Stipulation of Settlement dated July 28, 2017 (the "Stipulation").

**YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT:**

- OBJECT** You may write to the Court and the Parties' counsel if you do not like any aspect of the Settlement. Objections must be received or postmarked (first-class mail, postage prepaid) by November 24, 2017.
- GO TO THE FINAL SETTLEMENT HEARING** You may ask to attend the Final Settlement Hearing and tell the Court about your concerns relating to the Settlement, but only if you submitted a timely written objection to the Court and counsel.
- DO NOTHING** You may do nothing. You will be bound by the Judgment of the Court.
- DEADLINES** The Final Settlement Hearing will take place on December 15, 2017 at 1:30 p.m. Comments on the proposed Settlement must be filed and served so that they are received or postmarked no later than November 24, 2017 (twenty-one days prior to the date set for the Final Settlement Hearing).
- MORE INFORMATION** More information concerning the Settlement can be obtained by calling or writing to Lead Counsel:

William J. Fields  
LEVI & KORSINKY, LLP  
30 Broad Street, 24<sup>th</sup> Floor  
New York, NY 10004  
(212) 363-7500  
[wfields@zlk.com](mailto:wfields@zlk.com)

*Counsel for Plaintiff and the  
Settlement Class*

**WHAT DOES THIS NOTICE CONTAIN**

BASIC INFORMATION..... 1

1. Why Did I Get This Notice Package?..... 1

2. What Is This Lawsuit About? ..... 1

3. What Is a Class Action?..... 2

4. What Is the Procedural History of the Action?..... 2

5. Why Is There a Settlement?..... 3

6. How Do I Know If I Am Part of the Settlement? ..... 4

7. What Are the Exceptions to Being Included?..... 5

8. I Am Still Not Sure If I Am Included. .... 5

9. What Benefits Were Obtained as Part of the Settlement? ..... 5

THE LAWYERS REPRESENTING YOU ..... 6

10. Do I Have a Lawyer in This Case? ..... 6

11. How Will the Lawyers Be Paid?..... 6

THE SETTLEMENT HEARING ..... 7

12. When and Where Will the Court Decide Whether to Approve the Settlement? ..... 7

13. Do I Have to Come to the Hearing?..... 7

COMMENTING ON THE SETTLEMENT..... 7

14. How Do I Tell the Court If I Do Not Like the Settlement? ..... 7

GETTING MORE INFORMATION..... 8

15. Are There More Details About the Settlement? ..... 8

16. How Do I Get More Information? ..... 9

17. Notice to Persons or Entities Holding Record Ownership on Behalf of Others ..... 9

## BASIC INFORMATION

### **1. Why Did I Get This Notice Package?**

You or someone in your family may have held NovaBay common stock between the close of business on April 7, 2016 and the close of business on April 21, 2017. The Court directed that this Notice be sent to you because, if you are a member of the Settlement Class, you have a right to know about the Settlement of the Class Action and about all of your options before the Court decides whether to approve the Settlement. This package describes the Action, the Settlement, and your legal rights.

### **2. What Is This Lawsuit About?**

The lawsuit is about the Amendment to NovaBay's 2007 Omnibus Shareholder Plan approved by NovaBay stockholders on May 26, 2016, and the disclosures made by NovaBay in connection with the Amendment. The Settlement will resolve Plaintiff's claims about the Amendment and the disclosures made in connection with the Amendment, and all related issues and claims.

The Settlement is the product of: (i) Lead Counsel's independent investigation; (ii) NovaBay's agreement to seek a ratification of the stockholder approval of the Amendment, and to continue practicing or to adopt certain corporate governance enhancements; and (iii) Plaintiff and Lead Counsel's determination that the Settlement of the Action is in the best interests of the Settlement Class.

If the Court approves the Settlement, all members of the Settlement Class will release all claims relating to the Amendment, the disclosures made by NovaBay in connection with the Amendment, and other matters alleged in the Action against the Defendants and certain other parties ("Released Parties"). The exact terms of the release are contained in the Stipulation, which is available electronically on the Court's docket through the PACER system ([www.pacer.gov](http://www.pacer.gov)) and is also available on the following website: [www.zlk.com](http://www.zlk.com).

### **3. What Is a Class Action?**

In a class action, one or more persons sue on behalf of people who have similar claims. These people are collectively referred to in this Notice as the Settlement Class. The Court has appointed Plaintiff to act as the representative of the Settlement Class. The Court will resolve the issues for all the members of the Settlement Class.

### **4. What Is the Procedural History of the Action?**

**THE FOLLOWING EXPLANATION DOES NOT CONSTITUTE FINDINGS OF THE COURT. IT IS BASED ON STATEMENTS OF THE PARTIES AND SHOULD NOT BE UNDERSTOOD AS AN EXPRESSION OF ANY OPINION OF THE COURT AS TO THE MERITS OF ANY OF THE CLAIMS OR DEFENSES RAISED BY ANY OF THE PARTIES.**

On April 18, 2016, NovaBay filed a Schedule 14A proxy statement (the “Proxy”) with the United States Securities and Exchange Commission (the “SEC”) and on May 7, 2016, NovaBay filed a supplement to the Proxy (the “Proxy Supplement”). In the Proxy, NovaBay requested that its stockholders approve the Amendment to NovaBay’s 2007 Omnibus Incentive Plan (the “2007 Plan”) by which the aggregate number of shares reserved for issuance under the 2007 Plan (the “Aggregate Share Limit”) would be increased.

On May 26, 2016, NovaBay stockholders voted to approve the Amendment and increase the Aggregate Share Limit. The Parties disagree as to the sufficiency of the disclosures upon which that vote was based.

On December 19, 2016, Plaintiff commenced a putative class action and shareholder derivative lawsuit in the United States District Court for the District of Delaware (the “Court”). In the operative complaint (the “Complaint”), Plaintiff alleges that Defendants made certain misrepresentations in the Proxy and the Proxy Supplement relating to the proposed Amendment to the Aggregate Share Limit.

On February 3, 2017, counsel for the Parties spoke by telephone to discuss a potential settlement of the Action.

By letter dated February 14, 2017, Plaintiff's counsel proposed certain terms for a potential settlement of the Action.

On March 6, 2017 and on March 13, 2017, respectively, counsel for the Parties again spoke by telephone to discuss the terms outlined in Plaintiff's counsel's February 14, 2017 letter. The Parties have corresponded by email on various dates.

On March 24, 2017, the Parties reached an agreement in principle regarding the terms of a settlement of the Action. The Parties subsequently agreed to a Stipulation of Settlement (the "Stipulation") to resolve all claims related to or arising out of the Amendment and the disclosures made by NovaBay in connection therewith, and other related claims or issues. The Stipulation reflects the results of the Parties' negotiations and was reached after arm's-length negotiations between the Parties, who were represented by counsel with extensive experience and expertise in shareholder class action and shareholder derivative litigation. During the negotiations, all Parties had a clear view of the strengths and weaknesses of their respective claims and defenses. Plaintiff and Lead Counsel have concluded that the terms of the Stipulation are fair and adequate to the Settlement Class, and that it is reasonable to pursue a settlement of the Action.

## **5. Why Is There a Settlement?**

Plaintiff believes that the claims asserted in the Action have merit. However, Plaintiff and Lead Counsel recognize and acknowledge the expense and length of continued proceedings necessary to prosecute the Action against the Defendants through trial and through appeals. Plaintiff and Lead Counsel also have taken into account the inherent problems of proving their case, the Defendants' possible defenses, and the uncertain outcome and the risk of any litigation,

especially in complex actions such as the Action, as well as the difficulties and delays inherent in such litigation. Plaintiff and Lead Counsel believe that the ratification vote and corporate governance enhancements obtained or acknowledged as a result of the Settlement have conferred substantial benefits upon the Settlement Class. Based on their evaluation, Plaintiff and Lead Counsel have determined that the Settlement set forth in the Stipulation is fair, reasonable, and adequate, and in the best interests of the Settlement Class.

The Defendants have denied and continue to deny the allegations made in the Action and all other purported concerns expressed by Plaintiff about the Amendment and the disclosures made by NovaBay in connection therewith, and all other related issues, and Defendants maintain that they have committed no breach of fiduciary duty or other wrongdoing whatsoever, have committed no disclosure or other violations, and have not been unjustly enriched or engaged in any other alleged wrongdoing. Nonetheless, the Defendants have concluded that further litigation could be protracted and expensive. Defendants also have taken into account the uncertainty and risks inherent in any litigation, especially in complex cases like the Action. The Defendants have, therefore, determined that it is desirable and beneficial for them to settle the Action in the manner and upon the terms and conditions set forth in the Stipulation.

## **6. How Do I Know If I Am Part of the Settlement?**

You are part of the Settlement if you are a Class Member. For purposes of the Settlement, the Court has certified a non-opt-out Settlement Class consisting of all persons and entities (whether of record or beneficial) who held NovaBay common stock at any time between the close of business on April 7, 2016 and the close of business on April 21, 2017, including any and all of their respective successors-in-interest, predecessors, representatives, trustees, executors, administrators, heirs, assigns or transferees, immediate and remote, and any person or



entity acting for or on behalf of, or claiming under, any of them, and each of them, together with their predecessors and successors and assigns.

#### **7. What Are the Exceptions to Being Included?**

Excluded from the Settlement Class are Defendants, members of the immediate family of any Defendant, any entity in which a Defendant has or had a controlling interest, officers of any Defendant, and the legal representatives, heirs, successors or assigns of any such excluded person.

#### **8. I Am Still Not Sure If I Am Included.**

If you are still not sure whether you are a member of the Settlement Class, you can ask for free help. You can write to or call Lead Counsel at the following address or phone number for more information: William J. Fields, 30 Broad Street, 24<sup>th</sup> Floor, New York, NY 10004; Telephone: (212) 363-7500, email: wfields@zlk.com.

#### **9. What Benefits Were Obtained as Part of the Settlement?**

On April 21, 2017, NovaBay issued a proxy statement in which it sought a ratification of the stockholder vote approving the Amendment and the 1,214,836 share increase in the Aggregate Share Limit that NovaBay believes was approved as part of the Amendment. A copy of the proxy statement is attached to the Stipulation as Exhibit 4 and is also available on the following website: [www.zlk.com](http://www.zlk.com). Had NovaBay stockholders not voted in favor of ratification, then all awards issued using shares allegedly added to the 2007 Plan by the Amendment would have been rendered null and void.

NovaBay has also agreed to adopt or, to the extent already in practice, continue practicing certain corporate governance enhancements, including: (i) ensuring that all future grants of equity compensation are reviewed by the NovaBay Board of Directors (the “Board”) and comply with all applicable laws, committee charters, and/or other governing documents; (ii) retaining adequate documentation of all awards made under any applicable compensation plans and appointing an individual (who may but need not be a member of the Board or an officer or employee of NovaBay) to monitor compliance with the enhancements recognized in the

Stipulation; and (iii) ensuring that the Board, or a designated Board committee, formally review and approve (in writing or otherwise) all disclosures in proxy statements or other public filings.

The Defendants have acknowledged that they have sought the ratification and agreed to adopt or continue to practice the corporate governance enhancements in response to Plaintiff's allegations in the Action and Plaintiff's prosecution and settlement of the Action.

### **THE LAWYERS REPRESENTING YOU**

#### **10. Do I Have a Lawyer in This Case?**

The Court appointed the following law firm to represent Plaintiff and all other members of the Settlement Class:

LEVI & KORSINSKY LLP  
30 Broad Street, 24<sup>th</sup> Floor  
New York, NY  
Telephone: (212) 363-7500

If you want to be represented by your own lawyer, you may hire one at your own expense.

#### **11. How Will the Lawyers Be Paid?**

Lead Counsel has neither received any payment for its services in prosecuting the Action on behalf of Plaintiff and the Settlement Class, nor been paid for its expenses. After resolving the substantive terms of the Settlement, the Parties negotiated an amount of attorneys' fees and expenses to compensate Plaintiff's counsel for their work in achieving the benefits of this Settlement. Subject to Court approval, NovaBay shall pay \$205,000 to Lead Counsel for Plaintiff's attorneys' fees and expenses (the "Fee and Expense Amount"). Neither you nor any other member of the Settlement Class will be personally liable for the Fee and Expense Amount. The agreed-upon Fee and Expense Amount will be the only payment to Lead Counsel for their efforts in achieving this Settlement and for their risk in undertaking this representation on a wholly contingent basis. Lead Counsel may also make a petition for an incentive award for

Plaintiff Liam Kozma to be paid out of the Fee and Expense Amount in an amount not to exceed \$2,000.

## **THE SETTLEMENT HEARING**

### **12. When and Where Will the Court Decide Whether to Approve the Settlement?**

The Court will hold a hearing to decide whether to approve the proposed Settlement. The Final Settlement Hearing will be held at 1:30 p.m., on December 15, 2017, at the J. Caleb Boggs Federal Building, 844 North King St., Courtroom 4B, Wilmington, DE 19801. At the Final Settlement Hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. If there are comments on or objections to the Settlement, the Court will consider them. If the Settlement is approved, the Court will also consider whether to approve the payment of the Fee and Expense Amount pursuant to the Stipulation. The Court may decide these issues at the Final Settlement Hearing or take them under advisement and decide them later. We do not know how long these decisions will take.

### **13. Do I Have to Come to the Hearing?**

No. Lead Counsel will answer questions the Court may have. But you are welcome to come at your own expense. If you send a comment or objection (as described below), you do not have to come to Court to talk about it. As long as you mail your written correspondence on time, the Court will consider it. You may also pay your own lawyer to attend, but it is not necessary.

## **COMMENTING ON THE SETTLEMENT**

### **14. How Do I Tell the Court If I Do Not Like the Settlement?**

If you are a Class Member, you can tell the Court that you do not agree with the Settlement, or some part of it, in two ways: (1) you can submit written objections, and (2) you can appear at the Final Settlement Hearing either on your own or through counsel hired at your own expense if you previously filed and delivered a timely written objection. If you want to submit a written objection to the Settlement (or any part of it), you must serve and file a written statement of your specific objections to any matter before the Court and the grounds for your objection. You must also include all documents and other writings that you wish the Court to

consider. Your objection must include your name, address, telephone number, signature, the number of shares of NovaBay common stock you held between the close of business on April 7, 2016 and the close of business on April 21, 2017, and the reasons why you think the Court should not approve the Settlement and/or the Fee and Expense Amount. A Class Member who has filed and served written objections – and only such persons – may also request permission to speak at the Final Settlement Hearing, either in person or through an attorney hired at his or her expense, by filing and serving a Notice of Intention to Appear. The Notice of Intention to Appear must be addressed to the Court and must be called a “Notice of Intention to Appear at Settlement Hearing in *Kozma v. Sieczkarek, et al.*, Case No. 16-cv-01254-JFB.” The Notice of Intention to Appear must include the objecting Class Member’s name, address, telephone number, and signature. If you wish to appear through an attorney, the Notice of Intention to Appear must also include your attorney’s name, address, telephone number, and signature. Any written objections and Notices of Intention to Appear must be filed with the Court, and served on the Parties’ counsel listed below, so that the objections and Notices of Intention to Appear are received or postmarked (first-class mail, postage prepaid) at least twenty-one (21) calendar days prior to the Final Settlement Hearing (*i.e.*, by no later than November 24, 2017):

William J. Fields  
LEVI & KORSINSKY, LLP  
30 Broad Street, 24<sup>th</sup> Floor  
New York, NY 10004

*Counsel for Plaintiff and the Settlement Class*

Joseph C. Weinstein  
SQUIRE PATTON BOGGS (US) LLP  
4900 Key Tower, 127 Public Square  
Cleveland, Ohio 44114

*Counsel for Defendants*

## GETTING MORE INFORMATION

### **15. Are There More Details About the Settlement?**

This Notice summarizes the Settlement. This summary is qualified by, and subject to, the detailed terms of the Stipulation together with the exhibits attached thereto.

**16. How Do I Get More Information?**

Additional information concerning the Settlement is available in the Stipulation and its exhibits, which is available through the PACER system ([www.pacer.gov](http://www.pacer.gov)) and is also available on the following website: [www.zlk.com](http://www.zlk.com).

For more information concerning the Settlement or to obtain a copy of the Stipulation and/or its exhibits, you may contact: William J. Fields, Levi & Korsinsky, LLP, 30 Broad Street, 24<sup>th</sup> Floor, New York, NY 10004, Tel: (212) 363-7500, [wfields@zlk.com](mailto:wfields@zlk.com).

**17. Notice to Persons or Entities Holding Record Ownership on Behalf of Others**

If you held any NovaBay common stock between the close of business on April 7, 2016 and the close of business on April 21, 2017, as nominee for the beneficial owner, in “street name,” or in your name as trustee or fiduciary, please within ten (10) calendar days of receipt of this Notice either: (a) promptly request from the NovaBay Settlement Notice Administrator (c/o KCC Class Action Services, P.O. Box 404020, Louisville, KY 40233-4020, [SecuritiesClassAction@kccllc.com](mailto:SecuritiesClassAction@kccllc.com)) sufficient copies of this Notice to forward to all beneficial owners of the stock and after receipt of the requested copies promptly forward such Notices to all such beneficial owners; or (b) promptly provide a list of names and addresses of all beneficial owners of the stock to the NovaBay Settlement Notice Administrator (c/o KCC Class Action Services, P.O. Box 404020, Louisville, KY 40233-4020, [SecuritiesClassAction@kccllc.com](mailto:SecuritiesClassAction@kccllc.com)).

**PLEASE DO NOT TELEPHONE THE COURT REGARDING THIS NOTICE**