UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE UNILIFE CORPORATION SECURITIES LITIGATION	Master File No. 16-cv-03976-RA

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the Court-appointed Lead Plaintiffs, Richard Carrazza and Richard Farino (collectively, "Lead Plaintiffs") and plaintiffs Bill Bulcock and Manuel A. Quintero Gomez (together with Lead Plaintiffs, the "Plaintiffs") on behalf of themselves and the Settlement Class, respectfully submit this memorandum of law in support of their motion for final approval of the proposed Settlement resolving all claims asserted in this securities class action (the "Action") and for approval of the proposed plan of allocation of the proceeds of the Settlement (the "Plan of Allocation").[1]

I. INTRODUCTION[2]

Subject to this Court's approval, Plaintiffs have agreed to settle all claims in this Action in exchange for a cash payment of $4,400,000. This is an excellent result for the Settlement Class given the many risks inherent in this litigation and the strained financial condition of the Company.

The Settlement is the product of Plaintiffs' extensive investigation concerning the claims asserted in the Action and vigorous prosecution of the litigation on behalf of the Settlement Class. By the time the agreement to settle had been reached, Lead Counsel had, among other things: (i) conducted an extensive investigation of the claims asserted in the Action, including a

[1] Unless otherwise defined, all capitalized terms used herein have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated March 22, 2017 (the "Stipulation"). *See* ECF No. 53-1.

[2] The Joint Declaration of Jeremy A. Lieberman and Lionel Z. Glancy in Support of (I) Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation, and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Joint Declaration" or "Joint Decl."), filed herewith, is an integral part of this submission. For the sake of brevity, the Court is respectfully referred to it for a detailed description of, among other things: the history of the Action; the nature of the claims asserted; the negotiations leading to the Settlement; the risks and uncertainties of continued litigation; and the terms of the Plan of Allocation for the Settlement proceeds. All citations to "¶ __" and "Ex. __" in this memorandum refer, respectively, to paragraphs in, and exhibits to, the Joint Declaration.

detailed review of SEC filings, court filings, conference call transcripts, press releases, analyst reports, news reports and other public information, interviews with former Unilife employees, and consultation with damages experts; (ii) researched and prepared a detailed 83-page Consolidated Amended Class Action Complaint (the "Amended Complaint") based on this investigation; (iii) researched and prepared a detailed 74-page Second Amended Consolidated Class Action Complaint (the "SAC"); (iv) engaged in a mediation process overseen by a highly experienced third-party mediator, Jed D. Melnick, Esq. of JAMS, which involved written submissions concerning liability and damages, a full-day formal mediation session, consultations with Plaintiffs' damages expert, and weeks of follow-up negotiations; and (v) moved for relief from the automatic stay in the United States Bankruptcy Court for the District of Delaware ("Bankruptcy Court") after Unilife Corporation filed a chapter 11 petition in the Bankruptcy Court, and then requested that the stay in this Action be lifted so that the Settlement could be pursued. Plaintiffs and Lead Counsel believe that the Settlement is in the best interests of the Settlement Class. Plaintiffs and Lead Counsel are informed of the strengths and weaknesses of the claims and defenses in the Action and they believe the Settlement represents a favorable outcome of the Action for the Settlement Class. ¶ 4. As a result, Lead Counsel had a thorough understanding of the defenses to the claims asserted and the risks to establishing liability, damages, and collecting a judgment in this case when they negotiated the Settlement. ¶¶ 4, 39-53.

While Plaintiffs and Lead Counsel believe that the claims asserted are meritorious, they recognize the substantial challenges to establishing that Defendants acted with scienter, demonstrating loss causation, proving class-wide damages, and achieving and collecting a greater recovery. Defendants would have vigorously contested materiality and scienter and

could have argued that Plaintiffs had not alleged any materially misleading financial statements, or alleged facts sufficient to impute Defendants' state of mind to Unilife, as the individual defendants' conduct was arguably not designed to benefit the Company. Defendants could have also made credible damages and loss causation arguments that may have greatly reduced, or even eliminated, any potential recovery. Finally, even if Plaintiffs could have succeeded at trial, there is a significant risk that Unilife could not pay any amount in excess of its insurance coverage, especially in light of the Company's financial condition and bankruptcy.

As explained herein, the Settlement is fair, adequate, and reasonable under the governing standards in this Circuit. The Settlement recovered $4.4 million in insurance coverage from a Company now in bankruptcy proceedings, falls well within the range of settlements in comparable securities fraud cases, and eliminates the significant costs and risks of continuing litigation through trial and appeals. Additionally, to date, no objections and only one request for exclusion have been received from Settlement Class Members. ¶ 60.

For these reasons, and those set forth below, Plaintiffs and Lead Counsel believe that the Settlement is in the best interests of the Settlement Class. In addition, the Plan of Allocation, which ties each investor's recovery to when the securities were acquired and sold, is a fair and reasonable method for distributing the Net Settlement Fund to the Settlement Class and warrants approval.

II. THE PROPOSED SETTLEMENT MERITS FINAL APPROVAL

A court will approve a settlement if it is "fair, adequate, and reasonable, and not a product of collusion." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).[3] Although "[t]he decision to grant or deny such approval lies squarely within the

[3] Unless otherwise noted, citations and quotations are omitted and emphasis is added.

discretion of the trial court, . . . this discretion should be exercised in light of the general judicial policy favoring settlement." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 124 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). Accordingly, public policy considerations strongly favor settlement, particularly in class actions. *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."). Furthermore, "[i]n evaluating the settlement of a securities class action, federal courts, including this [c]ourt, have long recognized that such litigation is notably difficult and notoriously uncertain." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012); *In re Marsh & McLennan Cos., Sec. Litig.*, No. 04 CIV. 8144 (CM), 2009 WL 5178546, at *5 (S.D.N.Y. Dec. 23, 2009) (same).

A. The Settlement is Entitled to a Presumption of Fairness Because it is the Product of Arm's-Length Negotiations Among Experienced Counsel

Courts may apply a presumption of fairness when a class settlement is the product of "arm's-length negotiations between experienced, capable counsel." *In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 155 (S.D.N.Y. 2013) (quoting *Wal-Mart*, 396 F.3d at 116). Because counsel are "most closely acquainted with the facts of the underlying litigation," courts give "great weight" to the recommendations of counsel regarding settlement, especially when negotiations are facilitated by an experienced, third-party mediator. *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008); *see also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (finding that a mediator's involvement in settlement negotiations "helps to ensure that the proceedings were free of collusion and undue pressure").

Here, the Parties' negotiations, with the assistance of a third-party mediator, did not commence until after Lead Counsel engaged in an extensive investigation to understand the strengths and weaknesses of the case. Specifically, Lead Counsel thoroughly reviewed publicly

available information about the Company; interviewed former Unilife employees; consulted damages and loss causation experts and prepared two detailed amended complaints. ¶¶ 4, 12-21. As part of the mediation process facilitated by Jed D. Melnick, Esq. of JAMS, the Parties exchanged written statements and presentations concerning liability, damages, loss causation, and ability to pay, which informed each side as to the strengths and weaknesses of their respective cases. ¶¶ 24-25. The Parties also engaged in an all-day, in-person mediation on January 17, 2017, however, no settlement was reached at the mediation. *Id.* The Parties continued to negotiate for several weeks through Jed D. Melnick, Esq. of JAMS, who ultimately made a mediator's recommendation that the Action be settled for $4.4 million, which the Parties accepted. ¶¶ 25-26.

The extensive and arm's-length nature of the settlement negotiations and the involvement of an experienced and respected mediator like Jed D. Melnick, Esq. of JAMS support the conclusion that the Settlement is presumptively fair, adequate, and reasonable. *Yang v. Focus Media Holding Ltd.*, No. 11 CIV. 9051 CM GWG, 2014 WL 4401280, at *5 (S.D.N.Y. Sept. 4, 2014) (noting that "the participation of this highly qualified mediator [Mr. Melnick] strongly supports a finding that negotiations were conducted at arm's length and without collusion."); *In re Longwei Petroleum Inv. Holding Ltd. Sec. Litig.*, No. 13CIV214RMBRLE, 2017 WL 2559230, at *7 (S.D.N.Y. May 22, 2017) (approving settlement where the settling parties engaged in a mediation process under the auspices of mediator, Jed D. Melnick, Esq., which included participation in an all-day in-person mediation session, and subsequent mediator supervised discussions and arm's-length negotiations that resulted in the settlement of the action).

The conclusion of Plaintiffs and Lead Counsel that the Settlement is fair, adequate, and reasonable and in the best interests of the Settlement Class further supports its approval. Plaintiffs took an active role in supervising this litigation and recommend that the Settlement be approved. *See* Ex. 1 (Declaration of Richard Carrazza) at ¶¶ 4-6; Ex. 2 (Declaration of Richard Farino) at ¶¶ 4-6; Ex. 3 (Declaration of Bill Bulcock) at ¶¶ 3-4; Ex. 4 (Declaration of Manuel A. Quintero Gomez) at ¶¶ 3-4. Lead Counsel, which have extensive experience in prosecuting securities class actions, have also concluded that the Settlement is in the Settlement Class's best interests, and their judgment is entitled to "great weight." *Telik*, 576 F. Supp. 2d at 576; *Focus Media Holding Ltd.*, 2014 WL 4401280, at *5 ("great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation").

These facts strongly weigh in favor of affording the Settlement the presumption of fairness and granting final approval. *See Van Oss v. New York*, No. 10 CIV. 7524 (SAS), 2012 WL 2550959, at *1 (S.D.N.Y. July 2, 2012) (finding "a strong presumption of fairness attaches because the Settlement was reached by experienced counsel after extensive arm's length negotiations.").

B. The Settlement is Substantively Fair, Reasonable and Adequate Under the *Grinnell* Factors

The Settlement is also substantively fair, adequate, and reasonable. It is well-established that "in this Circuit, courts examine the fairness, adequacy, and reasonableness of a class settlement according to the *Grinnell* factors," which are:

> (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.

Wal-Mart, 396 F.3d at 117 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000)); *Deutsche Bank*, 236 F.3d at 86.

In applying the *Grinnell* factors, a court "must give comprehensive consideration to all relevant factors," *Hayes v. Harmony Gold Mining Co.*, 509 F. App'x 21, 23 (2d Cir. 2013), but "not every factor must weigh in favor of settlement, rather [a] court should consider the totality of these factors in light of the particular circumstances." *IMAX*, 283 F.R.D. at 189. "[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." *In re Sony Corp. SXRD*, 448 F. App'x 85, 87 (2d Cir. 2011).

As demonstrated below, the Settlement satisfies the criteria for approval under *Grinnell*.

1. Continued Litigation Would be Complex, Expensive, and Protracted

In general, "the more complex, expensive, and time consuming the future litigation, the more beneficial settlement becomes as a matter of efficiency to the parties and to the Court." *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 381-82 (S.D.N.Y. 2013). This is particularly true here, as "securities class actions are by their very nature complicated and district courts in this Circuit have 'long recognized' that securities class actions are 'notably difficult and notoriously uncertain' to litigate." *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132(CM)(GWG), 2014 WL 1883494, at *5 (S.D.N.Y. May 9, 2014) (quoting *In re Bear Stearns Cos. Sec., Deriv. & ERISA Litig.*, 909 F. Supp. 2d 259, 266 (S.D.N.Y. 2012)).

Further litigation would have required substantial additional expenditures of time and money, involving complex issues of law and fact, with a significant risk of a lower recovery. *See In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. 02 CIV. 5575 (SWK), 2006 WL 903236,

at *9 (S.D.N.Y. Apr. 6, 2006) ("In addition to the complex issues of fact involved in this case, the legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss causation and the calculation of damages."). The subject matter of the claims and the Company's bankruptcy proceedings increased the complexity and expense of litigation. Plaintiffs allege that, throughout the Settlement Class Period, Defendants made materially false and misleading statements about Unilife's management, operations, and prospects, and misled investors about Shortall, Bosnjak, and Pyers's involvement in the actions uncovered by the Company's internal investigation regarding violations of Company policies and procedures and potential violations of law and regulations by defendants Shortall and Bosnjak. ¶ 14. Plaintiffs additionally alleged that Defendants materially misstated Unilife's financial results, resulting in, *inter alia*, amended financial results for the fiscal year ended June 30, 2015 and two quarters ended September 30, 2015 and December 31, 2015, in particular, relating to the effectiveness of the Company's internal controls over financial reporting. ¶ 21. The facts underlying these allegations and others at issue would have potentially presented problems in establishing materiality and scienter as required under the federal securities laws. For example, although there were multiple instances where Unilife admitted to the misconduct involving the transfer of money between its former CEO, defendant Shortall, its former Board Chairman, defendant Bosnjak, and other Company executives, at the conclusion of the Company's internal investigation, only a relatively immaterial amount of money had yet to be repaid. ¶¶ 45-47. In addition, although Unilife amended certain of its financial statements, the Company and its independent auditors concluded that the errors and omissions in these financial statements were immaterial. ¶ 45. Additionally, substantial expert testimony would be

necessary regarding the appropriate amount of damages and Defendants' potential negative causation defenses. *See* ¶¶ 48-51.

In the absence of the Settlement, the Action would have likely required resolution of motions to dismiss, extensive fact and expert discovery, a litigated class certification motion, summary judgment motions, litigating *Daubert* motions, proving Plaintiffs' claims at trial, and post-trial motion practice. Given the number of Defendants, including one of whom could not be served, as well as other issues, Plaintiffs anticipated significant discovery and procedural issues at considerable expense. Throughout each litigation phase, Plaintiffs would undoubtedly have faced a robust defense from Defendants' experienced counsel. *See In re Alloy, Inc. Sec. Litig.*, No. 03 Civ. 1597, 2004 WL 2750089, at *2 (S.D.N.Y. Dec. 2, 2004) (securities fraud issues "likely to be litigated aggressively, at substantial expense to all parties"). Thus, it cannot be disputed that continued litigation would have been complex, expensive, and time consuming.

Moreover, even if Plaintiffs could recover an equally large judgment after a trial *and* recover from Defendants – both of which are far from certain given the risks discussed herein – the additional delay through post-trial motions and the appellate process could deny the Settlement Class any recovery for years, further reducing its value. *See Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("[E]ven 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, in light of the time value of money, make future recoveries less valuable than this current recovery").

Significantly, as discussed more fully in Section II.B.6, *infra*, due to Unilife's deteriorating financial condition and bankruptcy, insurance coverage was the only practical source of recovery, and these funds would have been reduced by defense costs if this Action had

continued. Accordingly, there is a very significant risk that further litigation might yield a smaller recovery – or no recovery at all – several years in the future. *See, e.g.*, *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would necessarily involve further costs; justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action."); *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001) (protracted litigation could force a company experiencing financial difficulties into bankruptcy and foreclose significant recovery for the class).

The Settlement eliminates the expense and delay of continued litigation, the depletion of existing insurance coverage, and the risk that the Settlement Class could receive no recovery.

2. The Lack of Objections and/or Opt-Outs Support Final Approval

The reaction of the class to a proposed settlement is a significant factor to weigh in considering its fairness and adequacy. *See Bear Stearns*, 909 F. Supp. 2d at 266-67. The absence of valid objections and low number of requests for exclusion provides evidence of Settlement Class members' approval of the terms of the Settlement. *See Wal-Mart*, 396 F.3d at 118 ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."); *Am. Bank Note*, 127 F. Supp. 2d at 425 (noting "the lack of objections may well evidence the fairness of the Settlement").

Pursuant to the Preliminary Approval Order (ECF No. 58), the Court-appointed Claims Administrator, JND Legal Administration ("JND"), began mailing copies of the Notice and the Claim Form (together, the "Notice Packet") on October 20, 2017. *See* Ex. 5 (Declaration of Robert Cormio Regarding: (A) Mailing of the Notice and Proof of Claim Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion Received to Date ("Cormio Decl.")) at ¶ 3. As of December 15, 2017, JND had disseminated a total of 35,766 Notice

Packets to potential members of the Settlement Class and nominees. *See id.*, ¶ 11. In addition, the Summary Notice was published in *Investor's Business Daily* on October 30, 2017 and transmitted over *PR Newswire* on October 20, 2017. *See id.*, ¶ 12. The Notice of (I) Pendency of Class Action and Proposed Settlement; (II) Settlement Fairness Hearing; and (III) Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Notice") contains a description of the Action, the Settlement, and information about Settlement Class Members' rights to participate in the Settlement by submitting a Claim Form; to object to the Settlement, the Plan of Allocation, Lead Counsel's motion for attorneys' fees and expenses; or to request exclusion from the Settlement Class. While the Court's deadline for members of the Settlement Class to object or exclude themselves from the Settlement Class – January 4, 2018 – has not yet passed, to date, no objections and only one request for exclusion have been received. ¶ 60; Cormio Decl. at ¶ 15, Ex. C.

The Settlement Class's favorable reaction supports approving the Settlement. *See Bear Stearns*, 909 F. Supp. 2d at 267 ("Given the absence of significant exclusion or objection—the rate of exclusion is 5.1% and the rate of objection is less than 1%—this factor weighs strongly in favor of approval."); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *15 (S.D.N.Y. Feb. 1, 2007) (finding that 34 requests for exclusion in response to the mailing of nearly 400,000 notices was a "minimal" number that "militates in favor of approving the settlement as be fair, adequate, and reasonable.").

3. Plaintiffs had Sufficient Information to Make Informed Decisions About Settling this Case

The third *Grinnell* factor, which looks to the "stage of the proceedings and the amount of discovery completed," *Wal-mart*, 396 F.3d at 117, examines "whether the parties had adequate information about their claims such that their counsel can intelligently evaluate the merits of

plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement." *Bear Stearns*, 909 F. Supp. 2d at 267. To satisfy this factor, the Parties "need not have engaged in extensive discovery as long as they have engaged in sufficient investigation of the facts to enable the Court to intelligently make . . . an appraisal of the settlement." *AOL Time Warner*, 2006 WL 903236, at *10; *IMAX*, 283 F.R.D. at 190 ("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.").

By the time the Parties agreed to settle, Plaintiffs and Lead Counsel understood the strengths and weaknesses of the claims and defenses asserted, and could make informed appraisals regarding the chances of success. Lead Counsel expended significant time and resources analyzing and litigating the legal and factual issues in the Action. Among other things, Lead Counsel: (i) thoroughly reviewed publicly available information concerning Unilife, including SEC filings, analyst reports, investor presentations, and financial press; (ii) interviewed former Unilife employees with knowledge of its practices; (iii) prepared the detailed 83-page Amended Complaint based on this investigation; and (iv) researched and prepared the detailed 74-page SAC. ¶¶ 4, 12, 19-20. Lead Counsel also engaged in an extensive mediation process under the auspices of Jed D. Melnick, Esq. of JAMS, including *inter alia*, the exchange of detailed statements and presentations addressing liability, expert damage analyses, loss causation, and ability to pay; a full-day mediation; and substantial additional follow-up negotiations to reach a memorandum of understanding setting forth the Parties' agreement to settle and release all claims referenced therein for a cash payment of $4,400,000. ¶¶ 24-28.

In light of these efforts, Plaintiffs and Lead Counsel had a strong understanding of the

claims and defenses asserted and the significant risks to establishing liability, damages, and collecting a judgment in order to intelligently negotiate the Settlement. *See AOL Time Warner*, 2006 WL 903236, at *10; *see also In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 177 (S.D.N.Y. 2014) (where "no merits discovery occurred," counsel that had conducted their own investigation, engaged in detailed briefing, and conducted targeted due diligence discovery were "knowledgeable with respect to possible outcomes and risks in this matter and, thus, able to recommend the Settlement"); *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06 Civ. 5173 (RPP), 2008 WL 1956267, at *7 (S.D.N.Y. May 1, 2008) ("[a]lthough the parties did not engage in extensive formal discovery, such efforts are not required for the Settlement to be adequate, so long as the parties conducted sufficient discovery to understand their claims and negotiate settlement terms").

4. Plaintiffs Faced Major Risks in Establishing Liability and Damages

In assessing the fairness, reasonableness, and adequacy of a settlement, courts should consider the "risks of establishing liability [and] the risks of establishing damages." *Grinnell*, 495 F.2d at 463; *Wal-Mart*, 396 F.3d at 117. Analyzing these risks "does not require the Court to adjudicate the disputed issues or decide unsettled questions; rather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. Nov. 24, 2004); *AOL Time Warner*, 2006 WL 903236, at *11 (same). In other words, "the Court should balance the benefits afforded to members of the Class and the immediacy and certainty of a substantial recovery for them against the continuing risks of litigation." *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 364 (S.D.N.Y. 2002). Courts should, therefore, "approve settlements where plaintiffs would have faced significant legal and factual obstacles to proving their case." *Global Crossing*, 225 F.R.D. at 459.

a. Risks of Establishing Liability

"The difficulty of establishing liability is a common risk of securities litigation," particularly where, as here, Defendants had credible defenses. *AOL Time Warner*, 2006 WL 903236, at *11. While Plaintiffs believe they adequately alleged materiality and scienter, they recognize the difficulties of proving these elements at trial. *See id.* (recognizing that "avoiding dismissal at the pleading stage does not guarantee that scienter will be adequately proven at trial"). Indeed, scienter is often considered "the most difficult and controversial aspect of a securities fraud claim." *Fishoff v. Coty Inc.*, No. 09 Civ. 628 (SAS), 2010 WL 305358, at *2 (S.D.N.Y. Jan. 25, 2010), *aff'd*, 634 F.3d 647 (2d Cir. 2011).

Even though the Company conducted an extensive internal investigation into the violations of Company policies and procedures, and possible violations of law and regulation by individual defendants and other Company executives, and admitted that (a) its financial statements did not correctly reflect and/or did not disclose as related party transactions (i) multiple transfers and transactions between Unilife's former CEO and former Board Chairman (defendants Shortall and Bosnjak, respectively) and (ii) Unilife's payment of withholding taxes for three other executives, and (b) that there were several material weaknesses in Unilife's internal controls over financial reporting, and amended Unilife's financial results as a consequence of the findings of its internal investigation, establishing that this misconduct was made with an intent to defraud investors and/or inflate Unilife's stock price would have been a significant hurdle. *See* ¶¶ 44-47. While Plaintiffs would argue that the nature and magnitude of the misconduct supported materiality and an inference of scienter, there is a substantial risk that the Court or a jury would accept Defendants' arguments. Indeed, although there were numerous instances of misconduct involving the transfer of money between Unilife executives and directors, only $150,000 had yet to be repaid to the Company. In addition, although Unilife

issued amended financial results, Unilife disclosed that the amendments were filed to correct immaterial errors in the Company's financial statements, and Unilife's independent auditor also concluded that Unilife's financials contained only immaterial errors and omissions. ¶ 46.

b. Risks of Establishing Loss Causation and Damages

If the litigation had proceeded, Plaintiffs could have encountered significant causation and damages defenses. Plaintiffs must establish that it was the revelation of Defendants' misrepresentations or omissions which caused Plaintiffs to incur a loss, and not non-fraud related business or macroeconomic factors. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005) (plaintiffs bear "the burden of proving that the defendant's misrepresentations caused the loss for which the plaintiff seeks to recover"). Disentangling the market's reaction to various pieces of news is a "complicated concept, both factually and legally." *Global Crossing*, 225 F.R.D. at 459. Accordingly, the "[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." *Id.*

The Parties held extremely disparate views with respect to damages, and Defendants' challenges to loss causation and damages could pose a serious risk to the Settlement Class at the pleading stage, summary judgment, trial, and on appeal. *See, e.g.*, *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713, 716 (11th Cir. 2012) (reversing plaintiffs' jury verdict for failure to prove loss causation); *In re Scientific Atl., Inc. Sec. Litig.*, 754 F. Supp. 2d 1339, 1379-80 (N.D. Ga. 2010) (granting motion for summary judgment because plaintiffs did not disentangle fraud-related and non-fraud-related portions of stock decline). Specifically, Defendants could credibly argue that two of the four alleged disclosure announcements had been previously disclosed on an earlier alleged disclosure date. *See* ¶¶ 15-17, 49. If Defendants were to prevail on such an argument at any stage, it would significantly reduce potential damages. As to the first and last

alleged corrective disclosures on May 8 and July 28, 2016, Defendants would have likely asserted that a substantial portion of the decline was due to the disclosure of other information, unrelated to the alleged fraud. *See* ¶ 50.

In complex securities cases, it is axiomatic that the Parties would rely on expert testimony to assist the jury in determining damages. *See Global Crossing*, 225 F.R.D. at 459 ("[P]roof of damages in securities cases is always difficult and invariably requires expert testimony which may, or may not be, accepted by a jury."). While Plaintiffs would argue that the stock price declines were attributable to the disclosure and corrections of the alleged misstatements and omissions and present expert testimony addressing loss causation and damages, there is little doubt that Defendants would proffer their own expert to offer contrary testimony with respect to all of the price declines. *See IMAX*, 283 F.R.D. at 193 ("[I]t is well established that damages calculations in securities class actions often descend into a battle of experts."). In such a "battle of experts, it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found" by the jury. *Telik*, 576 F. Supp. 2d at 579-80.

Therefore, even if liability were established at trial, "a jury could find that damages were only a fraction of the amount that plaintiffs contend" because "[a] jury could be swayed by experts for the Defendants, who would minimize the amount of Plaintiffs' losses." *Del Global*, 186 F. Supp. 2d at 365. If a jury were to accept Defendants' arguments, damages in this case could be greatly reduced or even eliminated. *Marsh & McLennan*, 2009 WL 5178546, at *6 ("[i]f there is anything in the world that is uncertain when a case like [a securities class action] is taken to trial, it is what the jury will come up with as a number for damages."). As a result, "the risks faced by the securities plaintiffs in establishing damages are substantial, and this factor

favors approving the settlement." *Global Crossing*, 225 F.R.D. at 459.

5. Risks of Maintaining Class Action Status Through Trial

Although class certification had not yet been briefed in this case, Defendants would undoubtedly have raised vigorous challenges to class certification, and such disputes "could well devolve into yet another battle of the experts." *Bear Stearns*, 909 F. Supp. 2d at 268. If a class were to be certified, Defendants could move to decertify the class at any time. *See* Fed. R. Civ. P. 23(c)(2); *Global Crossing*, 225 F.R.D. at 460 ("[E]ven if plaintiffs could obtain class certification, there could be a risk of decertification at a later stage."). Here, "the uncertainty surrounding class certification supports approval of the Settlement," *Marsh & McLennan*, 2009 WL 5178546, at *6, because "even 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." *AOL Time Warner*, 2006 WL 903236, at *12.

6. The Ability of Defendants to Withstand Greater Judgment

Even if Plaintiffs were able to overcome the significant risks described above and prevail at trial, they would still face the very real risk that Defendants would be unable to satisfy any judgment obtained due to Unilife's weak financial condition and subsequent bankruptcy. Unilife's financial condition deteriorated significantly since this Action commenced in August 2016. Indeed, the same day that Plaintiffs filed their Amended Complaint, Unilife filed its Form 10-K/A for the fiscal year ended June 30, 2015 with the U.S. Securities and Exchange Commission ("SEC"), stating in relevant part:

> ***The Company has incurred recurring losses from operations as well as negative cash flows from operating activities in each of the years in the three-year period ended June 30, 2015 and anticipates incurring additional losses and negative cash flows*** until such time that it can generate sufficient revenue from the sale, customization, or exclusive use and licensing of its proprietary range of injectable drug delivery systems to pharmaceutical and biotechnology customers. ***These factors raise substantial doubt about the Company's ability to continue as a***

> ***going concern. In order for the Company to continue operations beyond the next 12 months and be able to discharge its liabilities and commitments in the normal course of business, the Company has taken or will take the following steps delineated below, not all of which are entirely within the Company's control, to address its cash requirements.***

(emphasis supplied); *see also* ¶ 40.

Moreover, by the time the Parties began discussing settlement, Unilife had a market capitalization of only approximately $40 million and constrained cash resources. Unilife continued to face financial difficulties that raised doubt about its ability to continue as a going concern. In Fiscal Year 2016, Unilife incurred a net loss of $100.8 million, up from $90.8 million in Fiscal Year 2015. Unilife had still not turned an overall profit; and on April 12, 2017, Unilife filed a voluntary chapter 11 petition under Title 11 of the United States Code in the United States Bankruptcy Court for the District of Delaware in an action styled *In re: Unilife Corporation, et al.*, Case No. 17-10805 (LSS). *See* ¶¶ 32, 41.

It is clear from Unilife's public filings and Plaintiffs' due diligence, that Unilife's insurance coverage was likely the only realistic source of recovery. *See* ¶¶ 40-43. Significantly, these insurance funds would be heavily reduced by defense costs of this litigation, as well as four shareholder derivative actions, continued. ¶ 43. Courts have recognized that "[t]his factor typically weighs in favor of settlement where a greater judgment would put the defendant at risk of bankruptcy or other severe economic hardship." *AOL Time Warner*, 2006 WL 903236, at *12; *see also Global Crossing*, 225 F.R.D. at 460 (since the companies had filed for bankruptcy, "without the proposed settlement, class members might well receive far less than the settlement would provide to them, even if they could prevail on their claims"); *Del Global*, 186 F. Supp. 2d at 365 (in light of the company's "dire financial condition, it is unlikely that the Company could withstand a substantial judgment," making a greater recovery than the settlement difficult); *Am.*

Bank Note, 127 F. Supp. 2d at 427 (noting the "serious question as to the ability of the Defendants to withstand a greater judgment" because the company's financial condition had substantially weakened at the time of settlement discussions, and its likelihood of filing for bankruptcy increased with the passage of time). The very significant risk here that continued litigation would yield a smaller recovery – or no recovery at all – several years in the future weighs heavily in favor of the Settlement.

7. The Settlement Amount is in the Range of Reasonableness in Light of the Best Possible Recovery and All the Attendant Risks of Litigation

Courts typically analyze the last two *Grinnell* factors together. *See Grinnell*, 495 F.2d at 463. In so doing, courts "consider[] and weigh[] 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." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM) (PED), 2010 WL 4537550, at *20 (S.D.N.Y. Nov. 8, 2010) (quoting *Grinnell*, 495 F.2d at 462). A court's "determination of whether a given settlement amount is reasonable in light of the best possibl[e] recovery does not involve the use of a mathematical equation yielding a particularized sum." *Bear Stearns*, 909 F. Supp. 2d at 269. Instead, the Second Circuit has held "[t]here is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Wal-Mart*, 396 F.3d at 119.

Plaintiffs submit that the $4.4 million settlement is well within the range of reasonableness in light of the best possible recovery and all the attendant risks of litigation, particularly Defendants' ability to pay. If Plaintiffs overcame all the obstacles noted above to establishing liability, the realistic maximum recoverable damages at trial would be approximately $43.9 million. ¶ 54. Under that scenario, the $4.4 million settlement represents

approximately 10% of the maximum damages. However, Defendants could have argued that Plaintiffs' damages were based on an overly expansive class period (*see* ¶ 51), and, along with other potential loss causation and damages issues discussed herein (*see* Sec. II.B.4(b), *supra*; ¶¶ 48-51), that, if accepted, would have reduced greatly reduced damages. ¶ 54. Under these scenarios, the Settlement represents 31% to 49% of Defendants' potential estimate of maximum damages. This is an extremely favorable outcome. *See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.,* No. 02 MDL 1484 (JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (finding 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 actions securities litigations").

Moreover, weighing "[t]he 'best possible' recovery necessarily assumes Plaintiffs' success on both liability and damages covering the full Class Period alleged in the Complaint as well as the ability of Defendants to pay the judgment." *Del Global*, 186 F. Supp. 2d at 365. This case has been pending for almost two years, and could be expected to last several more years had the Settlement not been reached. "While additional years of litigation might well have resulted in a higher settlement or verdict at trial, continued litigation could also have reduced the amount of insurance coverage available and not necessarily resulted in a greater recovery." *In re Blech Sec. Litig.*, No. 94 CIV. 7696 (RWS), 2000 WL 661680, at *5 (S.D.N.Y. May 19, 2000). Insurance coverage would have been swiftly depleted because, among other reasons, different defense firms were retained to represent the Company and the Individual Defendants. Given that Unilife's insurance was the only likely source of funding to pay any judgment, especially in light of the Company's bankruptcy, and the fact that the available insurance coverage would be further eroded as the litigation continued and would also have to be split between this Action and

the four shareholder derivative actions, the Court should consider that the Settlement provides for payment now without any further risk to the Settlement Class, rather than a speculative and likely lower payment years later.

In sum, the *Grinnell* factors – including Plaintiffs' well-developed understanding of the strengths and weaknesses of the case, and the significant risks, expense, and delay of further litigation – support a finding that the Settlement is fair, adequate, and reasonable.

C. The Plan Of Allocation Should Be Approved

"When formulated by competent and experienced counsel, a plan for allocation of net settlement proceeds need have only a reasonable, rational basis." *IMAX*, 283 F.R.D. at 192; *Bear Stearns*, 909 F. Supp. 2d at 270 (same). In designing a fair and rational plan, counsel may take into account "the relative strength and values of different categories of claims." *Global Crossing*, 225 F.R.D. at 462; *see also Marsh & McLennan*, 2009 WL 5178546, at *13 ("In determining whether a plan of allocation is fair, courts look largely to the opinion of counsel.").

The proposed Plan of Allocation is set forth in the Notice disseminated to the Settlement Class. *See* Ex. 5, at Ex. A (the Notice) at 10-17. Lead Counsel developed the Plan of Allocation in consultation with Plaintiffs' damages expert with the objective of equitably distributing the Net Settlement Fund. The Plan of Allocation was developed based on an event study, which calculated the estimated amount of artificial inflation in the per share closing prices of Unilife common stock on each day of the Settlement Class Period as a result of Defendants' alleged materially false and misleading statements and omissions. In calculating this estimated alleged artificial inflation, the damages expert considered price changes in Unilife common stock in reaction to the alleged corrective disclosures, adjusting for factors attributable to market or industry forces and the strength of the claims, as advised by Lead Counsel. Under the Plan of Allocation, a "Recognized Loss Amount" will be calculated for each purchase of Unilife

common stock ("Unilife Securities"), during the Settlement Class Period for which adequate documentation is provided. The calculation of Recognized Loss Amounts is explained in detail in the Notice and incorporates several factors, including when and for what price the Unilife Securities were purchased and sold, the estimated artificial inflation in the Unilife Securities' respective prices at the time of purchase and sale, as determined by Plaintiffs' damages expert, and the strength of the claims. *See In re Datatec Sys. Inc. Sec. Litig*., No. 04-CV-525 (GEB), 2007 WL 4225828, at *5 (D.N.J. Nov. 28, 2007) ("plans that allocate money depending on the timing of purchases and sales of the securities at issue are common"). The Net Settlement Fund will be allocated to Authorized Claimants on a *pro rata* basis based on the relative size of their total Recognized Loss Amounts.

Lead Counsel believes that the proposed Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Settlement Class Members who suffered losses as result of the conduct alleged in the Action, and their opinion as to allocation is entitled to "considerable weight" by the Court in deciding whether to approve the plan. *Am. Bank Note*, 127 F. Supp. 2d at 430. To date, no objections to the Plan of Allocation have been received, suggesting that the Settlement Class also finds the Plan of Allocation to be fair and reasonable. *See* ¶ 69; *In re Nasdaq Mkt.-Makers Antitrust Litig*., No. 94 Civ. 3996 RWS, 2000 WL 37992, at *2 (S.D.N.Y. Jan. 18, 2000) (holding that the "small number of objections to the Proposed Plan" was entitled to "substantial weight" in approving the plan). Moreover, similar plans have repeatedly been approved by courts in this District. *See, e.g.*, *Global Crossing*, 225 F.R.D. at 462 ("Pro-rata distribution of settlement funds based on investment loss is clearly a reasonable approach.").

For each of the forgoing reasons, Plaintiffs respectfully submit that the proposed Plan of

Allocation is fair and reasonable, and merits final approval from the Court.

D. Notice to the Settlement Class Satisfied all the Requirements of Rule 23 and Due Process

"The adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015). The Notice satisfied Fed. R. Civ. P. 23(e)(1), which requires that notice of a settlement be "reasonable" – *i.e.*, it must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Pierson*, 607 F. App'x at 73-74. The Notice also satisfies Fed. R. Civ. P. 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

Both the substance of the Notice and the method of dissemination to potential members of the Settlement Class satisfies these standards. The Notice program was carried out by JND, a nationally-recognized claims administrator. The Notice contains the information required by Fed. R. Civ. P. 23(c)(2)(B) and the PSLRA, 15 U.S.C. § 78u-4(a)(7), including: (i) an explanation of the nature of the Action and claims asserted; (ii) the definition of the Settlement Class; (iii) a description of the key terms of the Settlement, including the consideration amount and the releases to be given; (iv) the Plan of Allocation; (v) the Parties' reasons for proposing the Settlement; (vi) a description of the attorneys' fees and expenses that will be sought; (vii) an explanation of Settlement Class Members' right to request exclusion from the Settlement Class and to object to the Settlement, the Plan of Allocation or the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment on Settlement Class Members. The Notice also provides instructions for submitting a Claim Form in order to be eligible to receive a distribution from the Net Settlement Fund, relevant deadlines, and contact information.

As discussed above, in accordance with the Preliminary Approval Order, as of December 15, 2017, JND had mailed 35,766 copies of the Notice Packet by first-class mail to potential members of the Settlement Class and nominees. *See* Cormio Decl. at ¶ 11. JND also caused the Summary Notice to be published in *Investor's Business Daily* on October 30, 2017 and transmitted over the *PR Newswire* on October 20, 2017. *See id.*, ¶ 12. The Notice Packet listed a telephone hotline and contact information for Lead Counsel and JND. *See id.*, ¶ 13 & Ex. A (Notice) at 20. JND also established a website to provide members of the Settlement Class with information concerning the Settlement, all applicable deadlines, and copies of the Notice containing the Plan of Allocation, Preliminary Approval Order, the Claim Form and the Stipulation. *See* Cormio Decl., ¶ 14.

Notice via first-class mail to all members of the Settlement Class who could be identified with reasonable effort, supplemented with notice in widely-circulated publications and over a newswire, and a dedicated website, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g.*, *Advanced Battery*, 298 F.R.D. at 182-83 (individually mailed postcards and publishing through *Investor's Business Daily* and *PR Newswire* met the notice standard); *City of Providence*, 2014 WL 1883494, at *2.

E. Final Certification of the Settlement Class

The Court's September 22, 2017 Preliminary Approval Order certified the Settlement Class for settlement purposes only under Fed. R. Civ. P. 23(a) and (b)(3). *See* ECF No. 58 at ¶ 1. There have been no changes to alter the propriety of class certification for settlement purposes. Thus, for the reasons stated in Plaintiffs' Preliminary Approval Brief (*see* ECF No. 52 at 17-22), Plaintiffs respectfully request that the Court affirm its determinations in the Preliminary Approval Order certifying the Settlement Class under Rules 23(a) and (b)(3).

III. CONCLUSION

For all the forgoing reasons, Plaintiffs respectfully request that the Court grant their motion.

Dated: December 21, 2017

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PROOF OF SERVICE

I, the undersigned say:

I am not a party to the above case and am over eighteen years old.

On December 21, 2017, I served true and correct copies of the foregoing document, by posting the document electronically to the ECF website of the United States District Court for the Southern District of New York, for receipt electronically by the parties listed on the Court's Service List.

I affirm under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 21, 2017.

s/ Brenda Szydlo
Brenda Szydlo

Mailing Information for a Case 1:16-cv-03976-RA Bulcock v. Unilife Corporation et al

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Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

- (No manual recipients)