UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KIMBERLY COLE, ALAN COLE, JAMES MONICA, LINDA BOYD, MICHAEL MCMAHON, RAY SMINKEY, JAMES MEDDERS, JUDY MEDDERS, ROBERT PEPERNO, SARAH PEPERNO, KELLY MCCOY, LESA WATTS, CHAD MEADOW, JOHN PLISKO, SUSAN PLISKO, KENNETH McLAUGHLIN, RYAN KENNY, ALEXANDER DAVIS, and ANDREA DAVIS, on behalf of themselves and all others similarly situated,	:	Civil Action No. 3:13-7871-FLW-TJB
Plaintiffs,	:	
v.	:	
NIBCO, Inc.,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY SETTLEMENT APPROVAL AND RELATED RELIEF

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I. INTRODUCTORY STATEMENT

After nearly five years of hotly-contested litigation, seven in-person mediation sessions before one or both of a retired United States District Court Judge and a second experienced private mediator, and numerous additional in-person and telephonic mediation sessions, the parties have reached a classwide settlement that provides for the creation of a $43.5 million fund to satisfy claims based on Plaintiffs' allegations that NIBCO's Tubing, Fittings, and Clamps are defective. This settlement is an excellent result for the Settlement Class and meets the standards for preliminary settlement approval. Accordingly, Plaintiffs respectfully submit that the Court should grant preliminary approval, direct the issuance of notice of settlement to the Class, and schedule a date for a hearing as to final approval.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

A. The Pleadings and NIBCO's Multiple Motions to Dismiss

On December 27, 2013, Plaintiffs Kimberly and Alan Cole, citizens of Tennessee, and James Monica, a New Jersey citizen, filed the Complaint in this matter. ECF No. 1. The Complaint alleged that NIBCO's cross-linked

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[1] The material in this section is drawn from the accompanying Joint Declaration of Bruce D. Greenberg and Joseph G. Sauder ("Joint Decl.") and, as to the parallel Meadow v. NIBCO case, also from the accompanying Declaration of Shanon J. Carson.

polyethylene plumbing tubes, the brass fittings required to connect the tubing together, and the stainless steel clamps required for joining the tubing and fittings (the tubing, fittings, and clamps collectively referred to herein as the "Covered Products") "suffer from undisclosed design and/or manufacturing defects that inevitably cause them to fail prematurely."

On March 17, 2014, NIBCO filed its Answer and Affirmative Defenses to the Complaint. ECF No. 8. Plaintiffs moved for the appointment of Interim Class Counsel and, thereafter, on September 3, 2014, filed a motion for leave to file an Amended Complaint. ECF No. 35. On October 2, 2014, Hon. Tonianne J. Bongiovanni, U.S.M.J., granted leave to file the Amended Complaint, ECF No. 36, which Plaintiffs did file on October 6, 2014, ECF No. 37. The Amended Complaint added Plaintiffs Linda Boyd (an Alabama citizen), Michael McMahon and James and Judy Medders (Texas), Ray Sminkey (Oklahoma), Robert and Sarah Peperno (Pennsylvania), and Kelly McCoy (Georgia). On October 23, 2014, Hon. Freda L. Wolfson, U.S.D.J., entered an Order appointing attorneys from three law firms as Interim Co-Lead Class Counsel. ECF No. 39.[2]

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[2] Those counsel were Bruce D. Greenberg of Lite DePalma Greenberg, LLC, Joseph G. Sauder and Matthew D. Schelkopf of Chimicles & Tikellis LLP ("C&T"), and Daniel Hogan and Michael Hopkins of Law Offices of Robert A. Stutman, P.C. ("Stutman"). Messrs. Sauder and Schelkopf left C&T for another firm and, later, formed the firm of Sauder Schelkopf. The Court entered Orders designating Steven A. Schwartz of C&T as that firm's representative on the Interim Class Counsel team, and continuing Messrs. Sauder and Schelkopf as

Meanwhile, on October 20, 2014, NIBCO filed a motion to dismiss, in substantial part, the Amended Complaint. ECF No. 38. After extensive briefing in response and reply, ECF Nos. 44, 45, 46, Judge Wolfson entered an Order and a 29-page opinion on May 20, 2015 that granted NIBCO's motion in part, with leave to amend, and denied it in part. ECF Nos. 48, 49.

Plaintiffs then filed a Second Amended Complaint ("SAC") on June 19, 2015. ECF No. 50. The SAC added certain additional legal theories to those previously asserted. NIBCO filed a motion to dismiss the SAC, in part, on July 20, 2015, ECF No. 53, and response and reply briefs followed, ECF Nos. 65, 67.

On February 26, 2016, Judge Wolfson entered a 47-page opinion and a companion Order that granted in part and denied in part NIBCO's motion to dismiss as to the SAC. ECF Nos. 84, 85. The Court permitted certain strict product liability claims arising from manufacturing defects or failure to warn, the breach of implied warranty of merchantability claims of Plaintiffs McMahon and the Pepernos, certain strict product liability claims arising from design defects that were asserted by Plaintiffs Monica, Sminkey, and McCoy, certain claims for negligent formulation, testing, design, manufacture, and failure to warn asserted by

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Interim Class Counsel following their moves. ECF Nos. 80, 86. Stutman withdrew from the case due to a conflict. *See* ECF Nos. 75, 79. Thus, Interim Class Counsel now consists of Messrs. Greenberg, Sauder, Schelkopf, and Schwartz, on behalf of their three law firms.

Plaintiffs Boyd, McMahon, Sminkey, the Medders, the Pepernos, and McCoy (except, as to the Pepernos and McCoy, their claims relating to negligent testing) to proceed past the pleadings stage. *Id.*[3] NIBCO filed an Answer to the SAC on March 11, 2016. ECF No. 87.

A separate case, *Meadow et al. v. NIBCO, Inc.*, No. 3:15-1124, alleging the same defects in the same NIBCO Covered Products was filed on October 26, 2015 in the United States District Court for the Middle District of Tennessee. Plaintiffs in the *Meadow* action were citizens of Alabama, South Carolina, and Tennessee. As in the present case, NIBCO filed a partial motion to dismiss. On May 24, 2016, the *Meadow* Court granted that motion in part and denied it in part. *Meadow* ECF No. 62. Plaintiffs' counsel in the present case and *Meadow* agreed to coordinate all discovery in the two cases to avoid duplication of effort and to minimize expense. The firms in the two cases worked together closely on all case matters and in negotiating the settlement to achieve the classwide result here.

[3] On November 13, 2015, Frank M. Albrizio and Harriet Albrizio moved to intervene on behalf of themselves and similarly situated citizens of Florida. ECF No. 76. NIBCO opposed that motion in part. ECF No. 77. Judge Bongiovanni granted intervention in an opinion filed on April 4, 2016, which was embodied in an Order entered on April 5, 2016. ECF Nos. 90, 91. One week later, on April 12, 2016, the Albrizios filed a notice of voluntary dismissal, ECF No. 93, which Judge Wolfson signed on the following day, ECF No. 94.

B. The Voluminous Fact and Expert Discovery Taken by the Parties

The Parties engaged in exhaustive discovery in the two cases. Even before receiving the Court's decision on the motion to dismiss the SAC, Plaintiffs in this matter had served multiple rounds of extensive discovery requests on NIBCO, issued subpoenas to a number of third parties, received and analyzed tens of thousands of pages of documents produced by NIBCO and third parties, retained experts, and responded to written discovery served by NIBCO on each of the many Plaintiffs. Plaintiffs' discovery efforts continued thereafter, including an application for letters rogatory to obtain discovery from a Canadian entity, Jana Labs, which Judge Bongiovanni granted. *See* ECF Nos. 96, 98, 99.

NIBCO inspected the homes of each plaintiff in this case and in *Meadow*, and Plaintiffs' counsel and/or their expert, Cynthia Smith of Paragon Polymer Consultants in Mooresville, NC, were present at each such inspection. Those inspections took place at eleven different homes in eight states (Alabama, Georgia, New Jersey, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Texas). NIBCO took fourteen plaintiff depositions between this case and *Meadow*. Plaintiffs took ten fact discovery depositions, including depositions of nine NIBCO employees, as well as the deposition in Canada of Jana Laboratories a third party that had worked closely with NIBCO on certain of the Covered Products at issue in these cases.

The parties also retained expert witnesses. Plaintiffs offered Ms. Smith as an expert in PEX plumbing and metallurgy and Ed Slovak of Delta Mechanical, Inc. in Mesa, AZ, as their expert on plumbing repair costing. NIBCO presented its own metallurgist, Eric Weishaupt of Engineering and Scientific Investigation ("ESI"), Robert Jalnos, a plumber from San Antonia, TX, and two engineers, Donald E. Duvall and Anand R. Shah of ESI. Each of these professionals, on both sides, prepared a written report (Duvall and Shah offered a joint report), and Ms. Smith prepared a rebuttal report. Moreover, each expert was deposed by the opposing party, resulting in a total of six expert depositions.

C. Motion Practice: Plaintiffs' Motion for Class Certification, NIBCO's Motion for Summary Judgment, and Expert Exclusion Motions by Both Sides

On March 21, 2017, the *Cole* Plaintiffs filed a motion for class certification. ECF Nos. 108, 109, 110, 111. NIBCO filed its opposition to that motion on June 9, 2017. ECF No. 120. On that same date, NIBCO filed a motion for summary judgment as to virtually all of Plaintiffs' remaining claims. ECF Nos. 118, 119. Plaintiffs filed an opposition to that motion on July 28, 2017. ECF Nos. 131, 132, 133, 134.

Also on July 28, 2017, the parties in this action filed motions to exclude or limit each other's expert witnesses under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Plaintiffs moved to bar NIBCO's

metallurgist, Dr. Weishaupt, ECF No. 135, its plumber, Mr. Jalnos, ECF No. 137, and the two engineers, Messrs. Duvall and Shah, ECF No. 140. NIBCO, conversely, sought to exclude Plaintiffs' plumbing expert, Mr. Slovak, ECF No. 138, and their metallurgist (and expert on the reasons that the Covered Products failed), Ms. Smith, ECF No. 139. Thereafter, the parties filed responses and replies on the class certification, summary judgment, and *Daubert* motions, with the last of those submissions on September 1, 2017. ECF Nos. 142, 143, 144, 145, 146, 147, 150, 151, 152, 153, 154, 155, 156.

Meadow too proceeded through the filing of a motion for class certification by the Plaintiffs there, and the parties completed briefing on that motion on September 13, 2017. *Meadow* ECF Nos. 125, 126 (Plaintiffs' reply submission).

D. The Lengthy Settlement Mediation Process, With Two Mediators

Meanwhile, having obtained an appreciation of the risks and likelihoods in the two cases after the extensive discovery and motion filings, the parties proceeded to mediation. They retained Hon. Wayne R. Andersen, U.S.D.J. (Ret., N.D. Ill.), to act as a settlement mediator. The parties mediated with Judge Andersen in Chicago, IL on June 12 and December 13, 2017, and January 29 and 30, 2018.[4] Given the complexities of the negotiations, the parties brought in a

[4] To allow the mediation proceedings to mature, in October 2017, Judge Bongiovanni entered Orders in this action administratively terminating all the pending motions, ECF No. 157, and then the entire case, ECF No. 158. In

second mediator, Ross R. Hart, Esq., of Los Angeles, CA. Plaintiffs and NIBCO mediated with Judge Andersen and Mr. Hart together on March 11 and 12, 2018, and with Mr. Hart alone on April 17, 2018. The total of seven mediation sessions with Judge Andersen and/or Mr. Hart enabled the parties to make progress toward a settlement and complete negations of a detailed, single-spaced 20-page Memorandum of Understanding ("MOU"), that ultimately was signed on July 20, 2018.

The parties then proceeded to negotiate a formal Settlement Agreement, which became fully-executed on October 26, 2018. A true copy of that Settlement Agreement is attached to the accompanying Joint Declaration of Bruce D. Greenberg and Joseph G. Sauder ("Joint Decl.") as Exhibit A.

E. The Terms of the Settlement

The Settlement creates a common fund of $43.5 million. Settlement Agreement, ¶¶1.s, 5. Class members will be able to make claims against that fund for water damage caused by Qualifying Leaks. SA, ¶13. A Qualifying Leak is defined as "a physical escape of water from [any of the Covered Products] causing damage," except for leaks resulting from intervening causes, such as improper

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Meadow, the parties filed on October 4, 2017 a joint motion to stay the case to permit the parties to focus on mediation. *Meadow* ECF No. 128. The Meadow court granted that motion on October 6, 2017. *Meadow* ECF No. 129.

installation by a plumber, penetration of a NIBCO PEX Product by a nail, or other specified causes for which the NIBCO product is not at fault. SA, ¶1.ff.

Claims will be submitted to a neutral Settlement Administrator, Angeion Group, LLC ("Angeion"), which has significant experience in such a role. See accompanying Declaration of Steven Weisbrot ("Weisbrot Decl."), ¶¶1-8. Settlement Class Members can seek compensation from the settlement fund for "Reasonably Proven Property Damage," which is defined to include repair or replacement of the NIBCO PEX [Covered] products as a result of a Qualifying Leak, the repair or replacement of other property damaged as a result of a Qualifying Leak, and material and labor costs necessary to restore the affected property or structure to its condition prior to the Qualifying Leak. SA, ¶1.jj.

Class members need not submit any unusual proofs in order to obtain compensation; receipts, invoices, expense records, credit card statements, and other readily available "verifiable indicia of such costs incurred" will suffice. *See* SA, ¶13. Claims can be filed electronically through the settlement website discussed infra, making it easier for Settlement Class Members to realize the benefits of the Settlement. *See* SA, ¶25.f(iv).

The Settlement covers not only claims for past property damage that occurred from January 1, 2005 through the Effective Date of the Settlement, but also enables Settlement Class Members who experience Qualifying Leaks at any

time within the six-year period after the Effective Date (defined as the "Claim Period") to make claims for compensation. *See* SA, ¶9.a, .b.

Moreover, Settlement Class Members who have suffered three or more Qualifying Leaks may exercise the option to obtain a re-plumb of their entire residence or structure. SA, ¶9.c. The re-plumb will be compensated at the sum of $600 per full plumbing fixture (e.g., sink, washing machine, etc.) in the structure and $300 per half fixture (e.g, toilet), up to a maximum re-plumb expense of $16,000. *Id*. The $600 per fixture re-plumb is based on the opinion of Plaintiffs' plumbing expert, Mr. Slovak, from his experience in re-plumbing homes.

Settlement Class Members who claim against the settlement fund will receive up to 70% of their claimed losses from the fund. SA, ¶9.a, .b. However, in order to ensure that the settlement fund is sufficient to treat all Settlement Class Members and their claims equally, Eligible Claimants initially will receive 25% of eligible damages. *Id*. By the end of the Claim Period, when all claims have been submitted, a supplemental disbursement will be made so that each Eligible Claimant receives the same percentage of up to 70%. *Id*. Class Counsel will monitor the claim activity to determine whether it would be appropriate to accelerate the subsequent distribution upon approval by the Court.

The $43.5 million settlement fund will cover the reasonable costs of class notice and administration. SA, ¶1.s, .kk. An attorneys' fee not to exceed 29.885%

of the class fund (approximately $12.9 million), plus costs of approximately $1.1 million, will be sought by Class Counsel from the class fund for their work in achieving this remarkable result for the class. SA, ¶41.a. Finally, a service award up to $10,000 will be sought for each proposed Class Representative commensurate with their efforts to prosecute this case to a successful conclusion. *Id*.

In consideration of the settlement benefits, NIBCO and others in the chain of distribution will receive a general release from claims arising from or related to the claims that were asserted or could have been asserted in the complaints, SA, ¶34; however, the release does not include personal injury claims, SA, ¶35. Also excluded from the Release are claims alleging that a party or parties other than NIBCO are wholly responsible for a leak of one of the Covered Products, such as a leak resulting from the physical penetration by a nail or leaks resulting from the improper attachment of a Covered Product. SA, ¶35.

F. Notice to the Class

To ensure that Settlement Class Members receive notice of pendency and notice of settlement that comply with Rule 23 and due process, the Parties have agreed to a comprehensive, multi-pronged notice plan to be implemented by Angeion. SA, ¶25. Angeion will send notice and a claim form by first-class mail

to all Settlement Class members for whom NIBCO or Plaintiffs' Co-Lead Class Counsel have contact information. SA, ¶25.a, .d; Weisbrot Decl., ¶¶16-18.

There will also be extensive publication notice, which will include a press release, a short-form notice to be published in print and digital/internet media calculated to reach owners of residential and commercial property, as well as plumbers (who are often the direct purchasers of the Covered Products), as well as a summary notice to be published in nationwide plumber trade magazines, in order to target plumbers further. SA, ¶25.b, .c, .e; Weisbrot Decl., ¶¶23-36. Angeion will also disseminate e-mail notices to 31,527 decision-makers at water damage repair companies; 48,168 decision-makers at homeowners' insurance companies; and 162,094 plumbers nationwide. Weisbrot Decl., ¶19.

In addition, Angeion will establish a Settlement Website, www.pexsystemsettlement.com. SA, ¶25.f; Weisbrot Decl., ¶¶37-39. The website will contain, at a minimum, (i) information concerning deadlines for filing a Claim Form, and the dates and locations of relevant Court proceedings, including the Final Approval Hearing; (ii) a toll-free phone number applicable to the Settlement (discussed further *infra*); (iii) copies of the Settlement Agreement, the Notice of Settlement, the Claim Form, Court Orders regarding this Settlement, and other relevant Court documents, including Co-Lead Class Counsel's motion for attorneys' fees; and (iv) information concerning the submission of Claim Forms,

including the ability to submit Claim Forms electronically using an electronic signature service such as DocuSign through the Settlement Website. *Id*. Settlement Class members will also be able to submit questions through the Settlement Website. Weisbrot Decl., ¶38.

Finally, Angeion will set up and maintain a toll-free telephone number that will receive requests for Claim Forms, the Notice of Settlement, and other relevant documents, and provide callers with information about such things as relevant deadlines and dates and locations of Court proceedings. SA, ¶25.g; Weisbrot Decl., ¶40. Callers will also be able to speak with live telephone operators during normal business hours in order to get questions about the Settlement answered. Weisbrot Decl., ¶40.

This extensive notice program is calculated to achieve an approximate 76.02% reach, with an average frequency of 3.03 times. Weisbrot Decl., ¶¶13-14, 41-43. In practice, this means that approximately 76.02% of the target audience will see an advertisement concerning the Settlement, and on average, 3.03 times each. *Id*.

III. ARGUMENT

"Review of a proposed class action settlement is a two-step process: preliminary approval and a subsequent fairness hearing." *Jones v. Commerce Bancorp.*, No. 05-5600(RBK), 2007 WL 2085357, at *2 (D.N.J. July 16, 2007).

"The purpose of having a preliminary stage is to ensure that there are no obvious deficiencies in the settlement that would preclude final approval." *Singleton v. First Student Mgmt*., LLC, No. 13-744(JEI/JS), 2014 WL 3865853, at *5 (D.N.J. Aug. 6, 2014); *Accord,* Fed. Jud. Ctr., *Manual for Complex Litig., Fourth,* § 21.632, at 320-21 n. 976 (2014) (citing *In re Amino Acid Lysine Antitrust Litig.*, MDL No. 1083, 1996 WL 197671, at *4 (N.D. Ill. Apr. 22, 1996), for the proposition that a preliminary review makes a determination as to "whether a proposed settlement is within the range of reasonableness" while also raising potential questions for the fairness hearing). The Court's duty during preliminary review is "'to ascertain whether there is any reason not to notify the class members of the proposed settlement and to proceed with a fairness hearing.'" *In re Prudential Sec. Inc. Ltd. Pshps. Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) (quoting *Armstrong v. Board of School Directors of the City of Milwaukee,* 616 F.2d 305, 314 (7th Cir. 1980)).

"Generally, '[w]here the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted.'" *Shapiro v. Alliance MMA, Inc*., 2018 WL 3158812, at *2 (D.N.J. June 28, 2018) (quoting *In re NASDAQ Market Makers Antitrust Litig*., 176 F.R.D. 99,

102 (S.D.N.Y. 1997)). A proposed class action settlement is entitled to a presumption of fairness. *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010); *McCoy v. HealthNet, Inc*., 569 F. Supp. 2d 448, 458 (D.N.J. 2008). This approach is consistent with the principle that "[c]ompromises of disputed claims are favored by the courts." *Williams v. First Nat'l Bank,* 216 U.S. 582, 595 (1910).

Because, as discussed *infra*, there are no "obvious deficiencies" in the Settlement, the standards for granting preliminary approval are satisfied here. Plaintiffs submit that this Settlement is fair, adequate, and reasonable; that the requirements for final approval will be satisfied; and that the Settlement Class will be provided with notice in a manner that satisfies the requirements of due process and FED. R. CIV. P. 23(e). Therefore, Plaintiffs request that this Court enter the proposed order granting preliminary approval, which will: (i) preliminarily approve the proposed Settlement; (ii) certify the Settlement Class pursuant to the provisions of FED. R. CIV. P. 23; (iii) schedule a Final Approval Hearing to consider final approval; and (iv) direct that notice of the proposed Settlement and hearing be provided to Class members in a manner consistent with the agreed-upon Notice Plan in the Settlement Agreement.

A. The Court Should Preliminarily Approve the Settlement.

There are no "obvious deficiencies" in the Settlement. On the contrary, it is an excellent result for the Class. Every Class member, including those who have

already sustained a leak and those who may suffer a leak during the six-year Claim Period going forward will be able to submit claims for payment of eligible damages from the settlement fund. And those Settlement Class Members who suffer three or more Qualifying Leaks at separate times will be able to choose a complete re-plumb, thus avoiding any future problems from the Covered Products.

The procedural history of this matter demonstrates that the parties had an ample understanding of the case, their own arguments, and those of the opposing side. Having completed discovery, and having fully briefed two motions to dismiss, class certification, summary judgment, and *Daubert* motions in the present case (and, in *Meadow*, motions to dismiss and for class certification), and with the aid of two experienced mediators, the parties reached a settlement that is fair, reasonable, and adequate, and within the range that justifies entry of the preliminary approval order and the dissemination of notice to the Settlement Class.

The criteria for granting preliminary approval of these complex class action lawsuits are met. The settlement was reached as a result of extensive, arduous, arms-length negotiations between experienced counsel facilitated through two experienced private mediators. Moreover, Class Counsel, as well as counsel for NIBCO, believe the Settlement is in the best interests of their respective clients. The Settlement will also remove the uncertainties and material risks to both parties

from proceeding further in this and the *Meadow* lawsuit. For these reasons, preliminary approval should be granted.

B. Certification of the Proposed Class for Purposes of Settlement Only is Appropriate.

Both the Supreme Court and the Third Circuit have recognized that the benefits of a proposed settlement of a class action can be realized only through the certification of a settlement class. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); *In re GMC Pick-up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 782-800 (3d Cir. 1995). As such, Plaintiffs seek preliminary certification of the Settlement Class set forth above and in the Settlement Agreement, for settlement purposes only.

For the Court to certify a class for settlement, the "[s]ettlement [c]lass[] must satisfy the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation, as well as the relevant 23(b) requirement." *In re GMC*, 55 F.3d at 778. In addition, Plaintiffs seek certification of the Settlement Class pursuant to Rule 23(b)(3), which provides that certification is appropriate where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members [predominance], and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy [superiority]." FED. R. CIV. P.

23(b)(3). As discussed *infra*, these requirements are met for purposes of settlement here.

1. Numerosity Under Rule 23(a)(1).

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). "[G]enerally, if the named plaintiff demonstrates that the potential number of Plaintiffs exceeds 40, the [numerosity requirement] of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-227 (3d Cir. 2001). Plaintiffs have shown that thousands of persons nationwide own or occupy structures that include the Covered Products. *See*, *e.g*., ECF No. 108-1, at 16-17 (Plaintiffs' brief in support of motion for class certification, citing NIBCO's sales and other records that demonstrate numerosity). Numerosity is therefore easily satisfied.

2. Commonality Under Rule 23(a)(2).

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). "Commonality does not require perfect identity of questions of law or fact among all class members." *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 486 (3d Cir. 2015). Instead, "even a single common question will do." *Id*. (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011)). "[F]actual differences among the claims of the putative class members do not

defeat certification." *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 310 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999).

The test for commonality is "easily met." *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). "Again, th[e] bar is not a high one," *Reyes*, 802 F.3d at 486 (citation omitted), especially in the context of a settlement class.

In this case, many common questions of law and fact exist. These include whether NIBCO's Covered Products are defective, whether NIBCO knew or should have known of the defect(s), whether NIBCO breached applicable warranties, whether NIBCO had a duty to exercise reasonable care in formulating, testing, designing, manufacturing, warranting, and marketing the Covered Products, and whether NIBCO breached that duty, as well as many other common questions set forth in the SAC, ECF No. 50, at 31-33. Commonality is therefore satisfied.

3. Typicality Under Rule 23(a)(3).

Rule 23(a)(3) requires that a representative plaintiff's claims be "typical" of those of other class members. FED. R. CIV. P. 23(a)(3). "As with numerosity, the Third Circuit has 'set a low threshold' for satisfying typicality, holding that '[i]f the claims of the named Plaintiffs and class members involve the same conduct by the defendant, typicality is established….'" *In re Ins. Brokerage Antitrust Litig.*,

282 F.R.D. 92, 107 (D.N.J. 2012) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 259 F.3d 154, 183-84 (3d Cir. 2001)).

Here, all of the claims of Plaintiffs and Settlement Class members arise out of the same alleged conduct of NIBCO, surrounding the same allegedly defective Covered Products that caused the same types of harm. Typicality has been established. *See* ECF No. 108-1, at 20-21 (detailing basis for typicality).

4. Adequacy of Representation Under Rule 23(a)(4).

The final requirement of Rule 23(a) is that "the representative part[y] will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). In determining the adequacy of representation, the court should "'evaluate [both] the named Plaintiffs' and … counsel's ability to fairly and adequately represent class interests.'" *Gotthelf v. Toyota Motor Sales, U.S.A., Inc.*, 525 Fed. Appx. 94, 100-101 (3d Cir. 2013) (alterations in original) (quoting *In re Comty. Bank of N. Va. & Guaranty Nat'l Bank of Tallahassee Second Mortg. Loan Litig*., 622 F.3d 275, 291 (3d Cir. 2010)). In doing so, "the district court ensures that no conflict of interest exists between the named Plaintiffs' claims and those asserted on behalf of the class, and inquires whether the named Plaintiffs have the ability and incentive to vigorously represent the interests of the class." *Gotthelf*, 525 Fed. Appx. at 101 (citing *In re Comty. Bank*, 622 F.3d at 291). There is a "relatively low threshold"

for adequacy of representation. *Hoxworth v. Blinder, Robinson & Co*., 980 F.2d 912, 923 (3d Cir. 1992).

Plaintiffs have shown themselves to be adequate representatives. The *Cole* action was initiated in 2013, and the *Meadow* case in 2014. Plaintiffs have vigorously pursued both cases ever since. Each of the Plaintiffs who commenced those cases was required to, and did produce documents, answer interrogatories, have his or her deposition taken, and submit his or her home for inspection by NIBCO. Plaintiffs have the same claims and same interests as the Settlement Class Members do.

Class Counsel are similarly adequate. They have invested thousands of hours and over $1 million in expert and other costs in the prosecution of this and the companion *Meadow* case in Tennessee. The lawyers' work in those cases has included investigating the allegations, drafting the Complaints, briefing multiple motions to dismiss, issuing and responding to extensive written discovery, reviewing over 160,000 pages of documents produced by NIBCO and 51 subpoenaed third parties, taking or defending over 30 depositions, conducting expert discovery, briefing class certification in this case and in *Meadow*, defending against NIBCO's motion for summary judgment in the *Cole* matter, moving to strike NIBCO's proffered experts, and opposing NIBCO's motions to strike Plaintiffs' own proffered experts.

Plaintiffs' counsel also engaged in lengthy, difficult arms-length settlement negotiations. Those negotiations occurred under the aegis of Judge Andersen and Mr. Hart, who mediated with the parties for seven days (not counting the extensive in-person and other negotiations between and after the mediation sessions). Plaintiffs' counsel then negotiated and drafted a detailed MOU, and then the Settlement Agreement. Plaintiffs' counsel are highly experienced, as reflected in the firm resumes attached to the Joint Decl. as Exhibit B and the accompanying Declaration of Shanon J. Carson. The adequacy requirement is, accordingly, met here.

5. The Requirements of Rule 23(b)(3) Are Met.

Plaintiffs seek to certify the Settlement Class under Rule 23(b)(3), which has two components: predominance and superiority. *See* FED. R. CIV. P. 23(b)(3). "Parallel with Rule 23(a)(2)'s commonality element, which provides that a proposed class must share a common question of law or fact, Rule 23(b)(3)'s predominance requirement imposes a more rigorous obligation upon a reviewing court to ensure that issues common to the class predominate over those affecting only individual class members." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 297 (3d Cir. 2011) (en banc) (citing *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 266 (3d Cir. 2009)). When assessing predominance and superiority, the Court may consider that the class will be certified for settlement purposes only, and that a

showing of manageability at trial is not required. *See Amchem*, 521 U.S. at 618 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see FED. R. CIV. P. 23(b)(3)(D), for the proposal is that there be no trial.").

The Third Circuit has reiterated that the focus of the predominance "inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct." *Sullivan,* 667 F.3d at 298. "To determine whether common issues predominate over questions affecting only individual members, the Court must look at each claim upon which the [p]laintiff seeks recovery and … determine whether generalized evidence exists to prove the elements of the plaintiff's claims on a simultaneous, class-wide basis, or whether proof will be overwhelmed by individual issues." *O'Brien v. Brian Research Labs, LLC,* 2012 WL 3242365, at *8 (D.N.J. Aug. 9, 2012) (citations omitted). Predominance "does not require the absence of all variations in a defendant's conduct or the elimination of all individual circumstances." *Reyes*, 802 F.3d at 489.

Superiority requires the Court to consider whether "a class action is a superior method of fairly and efficiently adjudicating the controversy." *Sullivan,* 667 F.3d at 296. Rule 23(b)(3) provides a non-exhaustive list of factors to be

considered when making this determination. *McCoy*, 569 F. Supp. 2d at 457. Since manageability is not a consideration in a settlement class context, these factors include: "(i) the class members' interests in individually controlling the prosecution or defense of separate actions; (ii) the extent and nature of any litigation concerning the controversy already begun by or against class members; [and] (iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum." *Id.* (quoting FED. R. CIV. P. 23(b)(3)).

Here, common questions of law and fact predominate over any questions that may affect individual Class members. *See*, *e.g*., ECF No. 108-1, at 24-34 (demonstrating predominance as to each legal theory). The issues are subject to generalized proof, and are questions that are common to all class members. *See Sullivan*, 667 F.3d at 299. Therefore, the predominance prong of Rule 23(b)(3) is satisfied.

The second prong of Rule 23(b)(3)—that a class action must be superior to other available methods for the fair and efficient adjudication of the controversy—is also readily satisfied. *See* FED. R. CIV. P. 23(b)(3). The Settlement Agreement provides Settlement Class members with the ability to obtain prompt, predictable, and certain relief, and contains well-defined administrative procedures to assure due process. This includes the right of any Settlement Class members who are dissatisfied with the Settlement to object to, or to exclude themselves from, the

Settlement. The Settlement also would relieve the substantial judicial burdens that would be caused by repeated adjudication of the same issues in thousands of individualized trials against NIBCO, by going forward with this case as a class action.

Given the comparatively small damages to each Settlement Class member, especially in comparison to the vast sums that would be required to provide appropriate expert testimony in any individual action, few if any Settlement Class members have much interest in pursuing separate actions for relief. Thus, a class action is superior.

In sum, all requirements of Rule 23(a) and Rule 23(b)(3) are satisfied. Certification of the proposed Settlement Class is appropriate.

C. The Court Should Approve the Notice Plan.

Under FED. R. CIV. P. 23(e), Settlement Class members who would be bound by a settlement are entitled to reasonable notice of it before the settlement is ultimately approved by the Court. *See* Fed. Jud. Ctr., *Manual for Complex Litig.* Fourth, § 30.212. And because Plaintiffs seek certification of the Settlement Class under Rule 23(b)(3), "the Court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable efforts." FED. R. CIV. P. 23(c)(2)(B)). In order to satisfy these standards and comply with the requirements of due process,

notice must be "reasonably calculated to reach interested parties." *Chemetron Corp. v. Jones,* 72 F.3d 341, 346 (3d Cir. 1995) (citations omitted). *See also DeBoer v. Mellon Mortgage Co.,* 64 F.3d 1171, 1176 (8th Cir. 1995) ("Notice of a settlement proposal need only be as directed by the district court... and reasonable enough to satisfy due process.").

The notice plan in this case is the best notice practicable under the circumstances to reach the Settlement Class. As described *supra*, and as detailed in the Settlement Agreement, ¶25, and the Weisbrot Decl., the Notice Plan that Angeion will implement uses first-class mail, email, print and digital/internet publication, a settlement website, and a toll-free telephone number to ensure that notice reaches as many Settlement Class members as reasonably possible. To do that, the Notice Plan also emphasizes notifying plumbers, who (though not in the Class) often play a role in the installation of Covered Products in premises of Settlement Class members and could notify their customers about the Settlement.

Finally, the substance of the proposed Notice Plan meets all necessary legal requirements and provides a comprehensive explanation of the Settlement in simple, non-legalistic terms. *See* FED. R. CIV. P. 23(c)(2)(B). Accordingly, it is respectfully requested that the Court approve the Notice Plan.

D. A Final Approval Hearing Should be Scheduled.

Lastly, the Court should schedule a Final Approval Hearing to decide whether to grant final approval to the Settlement; to address Class Counsel's request for attorneys' fees and expenses, and to determine whether to dismiss this action with prejudice and enter judgment in favor of NIBCO. *See* Fed. Jud. Ctr., *Manual for Complex Litig*. Fourth, § 30.44; *Ehrheart*, 609 F.3d at 600. To permit a reasonable period of time to complete the Notice Plan and to afford Settlement Class Members to consider and exercise their rights under the Settlement to object or opt out, Plaintiffs respectfully request that the Court set the final hearing for a date no less than 135 days from the date of the Preliminary Approval Order, as the accompanying proposed form of Preliminary Approval Order provides.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an Order: (1) preliminarily certifying a Settlement Class pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3); (2) preliminarily approving the Settlement Agreement; (3) directing notice to Class members consistent with the Notice Plan in the Settlement Agreement; and (4) scheduling a Final Approval Hearing.

LITE DEPALMA GREENBERG, LLC

Dated: October 26, 2018

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