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, *Plaintiffs*, v. NIBCO, Inc., *Defendant*.	:	Civil Action No.: 13-7871-FLW-TJB

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES TO CLASS COUNSEL, REIMBURSEMENT OF CLASS COUNSEL'S EXPENSES, AND SERVICE AWARDS TO PLAINTIFFS

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I. INTRODUCTORY STATEMENT

More than five years after Class Counsel[1] filed this products liability class action, and after investigating and prosecuting this hotly-contested litigation (as well as the parallel *Meadow* case in the Middle District of Tennessee) on a wholly contingent basis, Class Counsel achieved a nationwide settlement of both cases for a common fund of $43.5 million. The settlement resulted from seven full days of mediation that took place between June 2017 and April 2018 and involved two professional mediators, one of whom is a retired United States District Court judge.

Further complicating this already complex matter, there were actually two mediation tracks: one between Plaintiffs and Defendant NIBCO, Inc. ("NIBCO") and the other between NIBCO and a host of insurers. Thus, to resolve these two cases, the Parties needed to deal with not only challenging merits questions but also difficult insurance issues.

On November 14, 2018, this Court granted preliminary approval, finding the Settlement fair, reasonable, and adequate to warrant the dissemination of notice to the Settlement Class. ECF No. 177. The Court also scheduled a final approval hearing for April 8, 2019. *Id*. at 10.

[1] Capitalized terms have the same meaning given to them in the Settlement Agreement, a true copy of which is attached to the accompanying Declaration of Bruce D. Greenberg as Exhibit A.

In accordance with the Settlement Agreement, Class Counsel respectfully submit this motion for attorneys' fees of 29.885% of the Gross Settlement Fund ($12,999,975.00), together with reimbursement of $1,254,768.94 in out-of-pocket expenses. The requested percentage of the Gross Settlement Fund is well within the parameters that the Third Circuit approves in contingent class action cases.

The recommended lodestar cross-check confirms the appropriateness of the fee sought. The lodestar of the three lead firms that led the *Cole* and *Meadow* cases— Lite DePalma Greenberg, LLC, Sauder Schelkopf LLC, and Berger Montague PC— standing alone, already totals $8,220,894.85, as reflected in the accompanying Declarations in support of this motion. That means that the requested fee represents a multiplier of just 1.58, not even counting the time of the other law firms that performed work in these cases. When those firms' time is added, the requested fee represents a multiplier of just 1.33. That multiplier will decrease as Co-Lead Class Counsel necessarily perform further substantial work in achieving final Settlement approval and monitoring and overseeing the claims administration process during the *six-year* Claim Period of the Settlement.

Plaintiffs also request Service Awards for the Class Representatives and named Plaintiffs who filed the operative Third Amended Complaint, ECF No. 175 ("TAC"). Plaintiffs seek $10,000 each for Kimberly and Alan Cole, James Monica, Linda Boyd, Michael McMahon, Ray Sminkey, James and Judy Medders,

Robert and Sarah Peperno, Kelly McCoy, Chad Meadow, John and Susan Plisko, and Kenneth McLaughlin (the $10,000 sum shall also represent a per-household limitation), and $2,500 each for Lesa Watts, Ryan Kenny, and Alexander and Andrea Davis (the $2,500 sum shall also represent a per-household limitation). The Class Representatives include the Plaintiffs who filed and litigated the parallel Meadow class action that is also resolved by the Settlement Agreement.

Most of the Class Representatives participated extensively in discovery, answered interrogatories, produced documents, submitted to deposition, and had their homes inspected by Defendant's experts. They stayed in close contact with Class Counsel throughout the case and carefully evaluated the Settlement before approving it. The requested Service Awards are set at amounts that reflect the various Plaintiffs' respective efforts, and are well in line with service awards that have been approved by the Third Circuit and this District.

The requested attorneys' fees and expenses, and the Service Awards, all conform to Third Circuit precedent and are justified by the extensive and high-quality work that Class Counsel performed, on pure contingency, and over vigorous opposition, to reach an excellent settlement. This Court should approve those awards.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY[2]

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 their initial Complaint in this matter. ECF No. 1. The Complaint alleged that NIBCO's cross-linked polyethylene plumbing tubes, the yellow brass fittings used to connect the tubing together, and the stainless steel clamps used for joining the tubing and fittings (the Tubing, Fittings, and Clamps are defined in the Settlement Agreement and are collectively referred to as the "Covered Products") "suffer from undisclosed design and/or manufacturing defects that inevitably cause them to fail prematurely." *Id*. at 2, ¶1.

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 then filed on October

[2] The material in this section is drawn from and supported by the accompanying Declarations of the Court-appointed Co-Lead Class Counsel, Shanon J. Carson and Joseph G. Sauder, and the accompanying Declaration of Bruce D. Greenberg, one of the Court-appointed Interim Class Counsel who litigated the *Cole* matter before this Court from its inception.

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.[3]

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.

[3] Those counsel were Bruce D. Greenberg of Lite DePalma Greenberg, LLC, Joseph G. Sauder and Matthew D. Schelkopf of Chimicles & Tikellis LLP (now known as Chimcles Schwartz Kriner & Donaldson-Smith, LLP) ("Chimicles"), and Daniel Hogan and Michael Hopkins of Law Offices of Robert A. Stutman, P.C. ("Stutman"). Messrs. Sauder and Schelkopf left Chimicles for another firm and, later, formed the firm of Sauder Schelkopf LLC. The Court entered Orders designating Steven A. Schwartz of Chimicles as that firm's representative on the Interim Class Counsel team, and continuing Messrs. Sauder and Schelkopf as 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, at the time of the Preliminary Approval Order, when the Court appointed Messrs. Carson and Sauder as Co-Lead Class Counsel, ECF No. 177, at 4, Interim Class Counsel in *Cole*, who had litigated that case from its inception in 2013, consisted of Messrs. Greenberg, Sauder, Schelkopf, and Schwartz, on behalf of their three law firms.

Plaintiffs then filed a Second Amended Complaint ("SAC") on June 19, 2015. ECF No. 50. The SAC added new 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 the SAC. ECF Nos. 84, 85. Specifically, the Court permitted certain strict product liability claims arising from alleged 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 alleged design defects asserted by Plaintiffs Monica, Sminkey, and McCoy, certain claims for alleged negligent formulation, testing, design, manufacture, and failure to warn asserted by 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*. NIBCO filed an Answer to the SAC on March 11, 2016. ECF No. 87.

On October 26, 2015, *Meadow et al. v. NIBCO, Inc*., No. 3:15-1124 (M.D. Tenn.), was filed in the Middle District of Tennessee, alleging that the Covered Products were defective. Plaintiffs in *Meadow* action were Mr. Meadow, a citizen of Tennessee, Mr. and Mrs. Plisko (South Carolina), and Mr. McLaughlin

(Alabama). NIBCO eventually filed a partial motion to dismiss, and on May 24, 2016, the *Meadow* Court granted that motion in part and denied it in part. *Meadow* ECF No. 62.

Class Counsel in *Cole* and *Meadow* subsequently agreed to coordinate all discovery in the two cases to avoid duplication of effort and to minimize expense. Class Counsel in the two cases thereafter cooperated and worked closely together on all case matters in litigating the cases and negotiating the Settlement Agreement to achieve the excellent Settlement of the two matters.

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

The Parties engaged in exhaustive fact and expert discovery in the two coordinated 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 Laboratories, a third party that had worked closely with NIBCO on certain of the Covered Products, which Judge Bongiovanni granted. *See* ECF Nos. 96, 98, 99.

NIBCO inspected the homes of each Plaintiff named in the SAC in this case and in the Complaint in *Meadow*. Class 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, including Alabama, Georgia, New Jersey, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Texas.

Over 175,000 pages of documents were produced in *Cole* and *Meadow*, and were extensively reviewed and analyzed by Class Counsel. Class Counsel defended fourteen plaintiff depositions between *Cole* and *Meadow*, along with the depositions of a number of the plumbers hired by Plaintiffs or who had performed work in Plaintiffs' homes. Plaintiffs took more than ten fact discovery depositions of adverse witnesses, including depositions of nine NIBCO current and former employees, as well as the deposition in Canada of Jana Laboratories and the deposition of NIBCO's main distributor in the southeast United States.

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 Antonio, TX, and two engineers, Donald E. Duvall and Anand R. Shah of ESI. Each of these professionals, on both

sides, prepared written expert reports (Messrs. Duvall and Shah offered a joint report), and Ms. Smith prepared a rebuttal expert report. Moreover, each expert was deposed by the opposing party, as was Joseph Grzetic of ESI.

C. Motion Practice: Plaintiffs' Motions 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 based upon the extensive factual and expert witness record that had been developed as of that date. 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 the *Cole* Plaintiffs' remaining claims. ECF Nos. 118, 119. Plaintiffs filed their opposition to that motion on July 28, 2017. ECF Nos. 131, 132, 133, 134.

Also on July 28, 2017, the Parties in *Cole* 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 Ms. Smith, Plaintiffs' expert on the reasons that the Covered Products failed, 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, based upon the extensive factual and expert witness record developed in that case, 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 fact and expert discovery, and subsequent motion filings, the Parties proceeded to mediation. They retained an experienced and well-respected mediator, Hon. Wayne R. Andersen, U.S.D.J. (Ret., N.D. Ill.), to mediate these cases. 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, and the need to address insurance issues in a parallel mediation track, the Parties brought in a second

[4] To allow the mediation proceedings to mature, in October 2017, Judge Bongiovanni entered Orders in *Cole* administratively terminating all the pending motions, ECF No. 157, and then the entire case, ECF No. 158. In *Meadow*, the Parties filed on October 4, 2017 a joint motion to stay the case to permit the Parties the opportunity to focus on mediation. *Meadow* ECF No. 128. The Meadow court granted that motion on October 6, 2017. *Meadow* ECF No. 129.

mediator, Ross R. Hart, Esq., of Los Angeles, CA, a specialist in both defective construction product cases and insurance coverage issues. 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 full-day mediation sessions with Judge Andersen and/or Mr. Hart, along with the parallel mediation between NIBCO and its insurers that took place on additional days, enabled the Parties to progress toward a settlement and eventually complete negotiations of a detailed, single-spaced 20-page Memorandum of Understanding that ultimately was signed on July 20, 2018, over one year after the first mediation session began.

Through many additional in-person meeting and telephone conferences, the Parties then negotiated and prepared a formal Settlement Agreement, which became fully-executed on October 26, 2018. A true copy of that Settlement Agreement ("SA") was submitted to the Court with Plaintiffs' Motion for Preliminary Settlement Approval, and for the Court's convenience is also attached to the accompanying Declaration of Bruce D. Greenberg as Exhibit A.

On October 25, 2018, Plaintiffs filed an unopposed motion for leave to file the TAC. ECF No. 166. Judge Bongiovanni granted that motion on October 30, 2018. ECF No. 174. Plaintiffs filed the TAC on November 1, 2018. ECF No. 175. Meanwhile, on October 26, 2018, Plaintiffs filed their motion for preliminary settlement approval. ECF No. 173. Judge Wolfson granted preliminary approval

of the Settlement on November 14, 2018 and entered an Order Granting Preliminary Approval to Class Action Settlement, Provisionally Certifying Settlement Class, Directing Notice to the Settlement Class, and Scheduling Final Approval Hearing. ECF No. 177.

E. The Terms of the Settlement

The Settlement creates a Gross Settlement Fund of $43.5 million. SA, ¶¶1.s, 5. Settlement 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 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 are being submitted to a neutral Settlement Administrator, Angeion Group, LLC ("Angeion"), which has significant experience in such a role, as recognized by the Court in appointing Angeion as Settlement Administrator in the Preliminary Approval Order. ECF No. 177, at 6. Settlement Class Members can seek compensation from the Net Settlement Fund for "Reasonably Proven Property Damage," which is defined to include repair or replacement of the 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.

Settlement 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), that need to be re-plumbed, 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 Net 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 Net 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*. Co-Lead 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 Gross Settlement Fund includes the reasonable costs of class notice and administration, SA, ¶1.s, .kk, as well Class Counsel's requested attorneys' fees and out-of-pocket expenses, and the requested Service Awards for the Class Representatives.

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. The release preserves Settlement Class Members' right to sue a third party for these kinds of leaks.

F. Notice to the Class

To ensure that Settlement Class Members receive notice of the Settlement that complies with Rule 23 and due process, the Parties agreed to, and the Court's Preliminary Approval Order approved, a comprehensive, multi-pronged Notice Plan to be implemented by Angeion. SA, ¶25; ECF No. 177, at 5-6. Angeion implemented the Notice Plan by December 29, 2018, in accordance with the Preliminary Approval Order. Plaintiffs will submit a Declaration from Angeion as to notice in connection with Plaintiffs' motion for final settlement approval.

Among other things, as required by the Settlement Agreement and the Preliminary Approval Order, Angeion established a Settlement Website at www.pexsystemsettlement.com. SA, ¶25.f. The Settlement Website contains (i) information concerning relevant deadlines, including those for exercising options related to the Settlement, (ii) the dates and locations of relevant Court proceedings, including the Final Approval Hearing; (iii) a toll-free phone number applicable to the Settlement (discussed further *infra*); (iv) copies of key documents, such as the Settlement Agreement, the Notice of Settlement, the Claim Form, Court Orders

regarding this Settlement, and other relevant Court documents (including the papers on this motion, upon their filing with the Court); and (v) information concerning the submission of Claim Forms, including deadlines depending on the timing of the Qualifying Leak(s) and information about the ability to submit Claim Forms electronically using an electronic signature service such as DocuSign through the Settlement Website.

Finally, Angeion has set up and maintained a toll-free telephone number, 855-649-5968, that receives requests for Claim Forms, the Notice of Settlement, and other relevant documents, and provides callers with information about such things as relevant deadlines and dates and locations of Court proceedings. SA, ¶25.g. Callers can also speak with live telephone operators during normal business hours in order to receive answers to their questions about the Settlement.

ARGUMENT

THE COURT SHOULD APPROVE CLASS COUNSEL'S REQUEST FOR AN ATTORNEYS' FEE AND REIMBURSEMENT OF EXPENSES, AND SHOULD APPROVE SERVICE AWARDS FOR THE PLAINTIFFS

POINT I

THE FEE REQUEST SHOULD BE GRANTED

A. The Requested Percentage is Appropriate Under Third Circuit Law

Where counsel have created benefits for a class, they are entitled to seek an award of attorneys' fees and reimbursement of litigation expenses. *See*, *e.g.*,

Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980). Class Counsel respectfully submit that their requested fee is appropriate, given the nature and extent of their efforts in creating a settlement beneficial to Settlement Class Members in these hard-fought litigations and the risks assumed by Class Counsel in handling these complex matters on a fully contingent basis with no guarantee of any recovery.

In awarding attorneys' fees, the Court has discretion to apply either the percentage of the fund method or the lodestar method. *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 329-30 (3d Cir. 2011); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006). The percentage of the fund method is more appropriate where, as here, there is a common fund. *E.g.*, *AT&T*, 455 F.3d at 164 (stating that the percentage method is "generally favored" in common fund cases because "it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure"); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 249 (D.N.J. 2005); *see also Boeing*, 444 U.S. at 479 ("Although the full value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery.").

"[T]he Third Circuit has observed that fee awards generally range from 19% to 45% of the settlement fund" when the percentage of the fund method is used.

Yedlowski v. Roka Bioscience, Inc., 2016 WL 6661336, at *22 (D.N.J. Nov. 10, 2016) (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Litig.*, 55 F.3d 768, 822 (3d Cir. 1995)). The percentage requested here, just under 30%, is well within that range, and comparable percentages have often been awarded in the Third Circuit and in this District. *E.g.*, *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 499-500 (3d Cir. 2017) (affirming award of 28% of common fund); *Hegab v. Family Dollar Stores, Inc.*, 2015 WL 1021130, at *13 (D.N.J. March 9, 2015) (approving award of 30% of fund); *In re Ocean Power Tech., Inc. Sec. Litig.*, 2016 WL 6778218, at *26-29 (D.N.J. Nov. 15, 2016) (awarding 30% of common fund that included cash and stock); *Yedlowski*, 2016 WL 6661336, at *22 (approving 30% award despite "the early stage at which this litigation was resolved").

The Third Circuit has "suggested" that fees awarded under the percentage method be cross-checked against the lodestar. *E.g.*, *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000). The purpose of that cross-check is to ensure that the percentage approach does not result in an "extraordinary" lodestar multiple or a windfall. *See In re Cendant Corp. Sec. Litig.*, 264 F.3d 201, 285 (3d Cir. 2001). The Third Circuit has stated that a lodestar cross-check entails an abridged lodestar analysis that requires neither "mathematical precision nor bean counting." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005). In fact, this Court need not receive or review actual billing records. *Id.* at 307.

Here, a lodestar cross-check, against only the lodestar of the three law firms that led the litigation of these cases (Lite DePalma Greenberg, LLC, Sauder Schelkopf LLC (and its predecessors), and Berger Montague PC), reveals that the multiplier, as of the date of this motion, is 1.58, a figure that will only decrease with the passage of time and the need for Co-Lead Counsel to perform significant additional work over the six-year Claim Period. When the work of the other firms that comprise Class Counsel is included, the current multiplier is just 1.33.

In the Third Circuit, multipliers of up to 4.0 have been permitted. *In re Prudential Ins. Co. of America Sales Practices Litig.*, 148 F.3d 283, 341 (3d Cir. 1998) (quoting 3 Herbert Newberg & Alba Conte, *Newberg on Class Actions*, §14.03 at 14-5 (3d ed. 1992)). Courts in this District have frequently awarded fees where multiplier cross-checks produced figures far higher than the cross-check would result in here. *E.g.*, *Ocean Power*, 2016 WL 6778218, at *26 (cross-check produced 2.51 multiplier); *Mirakay v. Dakota Growers Pasta Co.*, 2014 WL 5358987, at *14 (D.N.J. Oct. 20, 2014) (cross-check resulted in 2.45 multiplier); *Varacallo*, 226 F.R.D. at 256 (cross-check produced 2.83 multiplier).

B. The *Gunter* Factors All Support the Fee Request

The appropriateness of the percentage award sought, and the results of the recommended lodestar cross-check, though favorable in all respects, do not end the fee inquiry. In *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir.

2000), the Third Circuit set out a number of factors for District Courts to consider in evaluating fee requests in class actions. Those factors are:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Each of these factors supports the requested fee.

1. Size of Fund and Number of Persons Benefitted

The $43.5 million Gross Settlement Fund is substantial. It is anticipated to benefit thousands of persons nationwide who have or had the Covered Products in their properties. Not only will persons who have already suffered Qualifying Leaks receive benefits from this Settlement, so too will persons who suffer leaks during the Claim Period that began on the date of the Preliminary Approval Order and continues for six years from the Effective Date of the Settlement. SA, ¶A.1.e. This criterion favors approval of the fee request.

2. The Presence or Absence of Objections to the Fee Request

The deadline for objections and exclusions is February 27, 2019. The Settlement Website and the toll-free number have already been launched, and Angeion implemented the notice program approved by the Court. The various forms and sources of notice indicated the amount of fees and expenses to be sought by Class Counsel. To date, there have been no objections to any aspect of the

Settlement Agreement, including the request for attorneys' fees and expenses, and just one request for exclusion. Class Counsel will address in a subsequent submission any objections that are received after the date of this filing.

3. The Skill and Efficiency of Class Counsel

Class Counsel demonstrated tremendous skill in prosecuting this matter. NIBCO vigorously opposed Plaintiffs at every turn, and all interactions between Plaintiffs and NIBCO have been at arms'-length. Among other things, Class Counsel (a) overcame multiple motions to dismiss in *Cole* and another motion to dismiss in *Meadow*, (b) pursued substantial discovery, including via voluminous document production, subpoenas of non-parties, and dozens of depositions all over the United States and in Canada, (c) filed compelling motions for class certification in both *Cole* and *Meadow*, (d) moved to exclude each of Defendant's experts, and (e) submitted briefs opposing NIBCO's motions to exclude all of Plaintiffs' experts and for summary judgment.

Though the class certification and expert exclusion motions ultimately were not decided because the Parties reached the Settlement, Class Counsel's work on those motions led to the Parties' decision to engage in mediation overseen by Judge Andersen and Mr. Hart. Class Counsel then skillfully maneuvered through seven difficult mediation sessions, and more negotiations following those sessions (including working through challenging insurance issues) to reach the nationwide

Settlement. In all phases of this case, therefore, Class Counsel performed with a high level of skill. Especially since Class Counsel was faced with excellent defense counsel from two prominent national firms, Morgan Lewis & Bockius and Lathrop Gage, Class Counsel's performance justifies their fee request. *See*, *e.g.*, *McCoy v. HealthNet, Inc.*, 569 F. Supp. 2d 448, 476 (D.N.J. 2008) (listing "the performance and quality of opposing counsel" as a factor in evaluating the quality of class counsel's work).

Class Counsel also worked efficiently. Counsel from *Cole* and *Meadow* coordinated the work in those matters to avoid duplication or overlap. The lodestar reflects the intensity with which these cases were litigated, as expected in matters of this nationwide scope. This factor supports Class Counsel's fee request.

4. The Complexity and Duration of the Litigation

This *Gunter* criterion strongly counsels in favor of the requested fee. *Cole* has been pending for over five years. *Meadow* has been pending for more than three years. Both cases were very complex, involving multiple claims under the laws of many states. Over 175,000 pages of documents were produced in discovery. There were 31 depositions of fact witnesses, 51 subpoenas issued to third parties, an application for letters rogatory to take the Jana Laboratories deposition in Canada, inspections of every original and SAC Plaintiff's home, and detailed, comprehensive work by multiple experts on both sides, all of whom were

then deposed. Furthermore, during the course of these cases, Class Counsel were contacted by numerous additional individuals claiming experience with the Covered Products, and the interviews and follow-up with those individuals was compelling and constituted additional work that contributed to the Settlement that the Parties ultimately reached.

This Court's rulings on the motions to dismiss in *Cole* demonstrated the layers of complexity attendant to the law governing these cases. Ultimately, the Court issued an intricate decision to dismiss some claims by some Plaintiffs under the laws of certain states while sustaining other claims by some of the same or different Plaintiffs from other jurisdictions. ECF No. 84, 85. The motions for class certification, summary judgment, and exclusion of experts on both sides raised challenging legal issues for the Parties and the Court. And a trial, if one were held, would have been complicated, as competing experts gave testimony on difficult scientific issues.

As in *Varacallo*, 226 F.R.D. at 253, these cases saw a "long duration of hotly contested litigation. Liability, damages and class certification were issues that arose in these cases for which Class Counsel had to strategize and overcome. In addition, the settlement negotiations lasted about one year and were tenuous, at best, right up until the end." The length and complexity of these cases amply justify the fee request.

5. The Risk of Non-Payment

Class Counsel handled these matters on a wholly contingent basis. At all times, they faced tremendous risk that they would receive no payment at all. Still, they "paid out [over $1 million] of their own dollars in expenses so they could depose witnesses, obtain experts, and pay for other litigation costs." *Varacallo*, 226 F.R.D. at 253. Even once settlement mediation began, there was significant risk that difficult insurance issues (which required the Parties to bring in Mr. Hart as an additional mediator) might derail efforts to produce funds sufficient to resolve these matters. This factor, like all the others, strongly supports Class Counsel's fee request.

6. The Amount of Time Devoted to the Case by Class Counsel

As reflected in the accompanying Greenberg, Sauder, and Carson Declarations, Class Counsel devoted an enormous amount of time and energy to these two cases, totaling over 17,000 hours. The lengthy and extensive procedural history of these matters, discussed *supra*, their nationwide scope, and the high stakes involved (as reflected in the $43.5 million settlement amount) all justifiably contributed to the need for that sort of expenditure of time. Once again, this *Gunter* factor weighs in favor of approving Class Counsel's fee request.

7. Awards in Similar Cases

The 29.885% fee sought here "is appropriate and comfortably within the range of fees typically awarded." *Yedlowski*, 2016 WL 6661336, at *22 (awarding 30% fee). As discussed *supra*, *Yedlowski* recognized that fee awards have ranged from 19% to 45%. *Id*.

In *Rite Aid*, the Third Circuit found no abuse of discretion in a District Court's reliance on three studies of percentage awards in various types of class action settlements that had found the average for such awards to be 31%, 27-30%, and 25-30%, respectively. 396 F.3d at 303; *see also Sullivan*, 667 F.3d at 333 (noting those same studies and citing *Rite Aid*). The requested percentage here is in keeping with awards in similar cases.

C. The Discretionary *Prudential* Factors Also Support the Fee Request

In *Prudential*, 148 F.3d at 338-40, the Third Circuit identified three other considerations that may bear on the appropriateness of a fee award. Those factors are "(1) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations, (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained, and (3) any "innovative" terms of settlement." *AT&T*, 455 F.3d at 165 (quoting *Prudential*, 148 F.3d at 338-40) (citations omitted)). Like

the *Gunter* criteria, each of the *Prudential* factors weighs in favor of approval of the requested fee.

1. The Settlement Benefits All Resulted From Class Counsel's Efforts

No government agency filed suit against NIBCO. Nor, to Class Counsel's knowledge, has there been any governmental investigation. All the benefits of this Settlement are solely the result of the efforts of Class Counsel in the *Cole* and *Meadow* cases. The first *Prudential* factor thus supports the fee request.

2. The Percentage Fee Approximates, or is Less Than, the Fee That Would Have Been Negotiated in the Private Market

Private contingent fee agreements routinely provide for percentage fees of at least 30%. *See*, *e.g.*, *Venegas v. Mitchell*, 495 U.S. 82, 90 (1990) (approving private contingent fee agreement for 40% in civil rights case); *Ocean Power*, 2016 WL 6778218, at *29 ("If this were an individual action, the customary contingent fee would likely range between 30 and 40 percent of the recovery."). Class Counsel's requested percentage of 29.885% is commensurate with customary percentages in private contingent fee agreements. Consequently, this factor also supports the requested fee.

3. The Settlement Includes Innovative Terms

The Settlement Agreement contains a number of innovative and creative terms. For example, Class Counsel were able to negotiate a provision under which

Settlement Class Members who have suffered three or more Qualifying Leaks will be able to claim "a complete re-plumb" of their properties. SA, ¶9.c. It was unclear whether the law would have afforded a re-plumb remedy had the case gone to trial. *See*, *e.g.*, ECF No. 152, at 2-3, 5-6 (NIBCO's contention that re-plumb remedy was not available under any of Plaintiffs' legal theories). This final factor provides yet more support for Class Counsel's fee request.

The percentage fee sought by Class Counsel is reasonable and in keeping with Third Circuit precedent. The lodestar cross-check confirms that. The *Gunter* and *Prudential* factors only reaffirm the appropriateness of Class Counsel's requested fee for their contingent work in these risky cases for many years. The Court should approve the requested fee.

POINT II

CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF THEIR EXPENSES SHOULD BE GRANTED

"Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *Careccio v. BMW of N. Am. LLC*, 2010 U.S. Dist. LEXIS 42063, at *22 (D.N.J. April 29, 2010) (quoting *In re Safety Components Int'l Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 108 (D.N.J. 2001)). Class Counsel have scrupulously documented their expenses, by category, in their respective accompanying Declarations. *See Ocean Power*, 2016 WL 6778218, at *29

(approving class counsel's expenses where they were "summarized by category" and were "the type of expenses routinely charged to hourly paying clients and, therefore, should be reimbursed out of the common fund"). Those expenses were all reasonably necessary to the proper litigation of these vigorously contested cases. The Court should approve reimbursement of those expenses.

POINT III

THE COURT SHOULD APPROVE THE SERVICE AWARDS SOUGHT

The Settlement Agreement permits the Coles, Mr. Monica, Ms. Boyd, Mr. McMahon, Mr. Sminkey, the Medders, the Pepernos, and Mr. McCoy, who litigated the *Cole* case, and Mr. Meadow, the Pliskos, and Mr. McLaughlin, who litigated *Meadow* before joining the present case with the filing of the TAC, to apply for Service Awards of $10,000 each (or, for plaintiff couples, $10,000 for the couple together). SA, ¶G.41.a. Ms. Watts, Mr. Kenny, and the Davises, who became involved at the time of the TAC, are seeking a lesser Service Award of $2,500 (also representing a per-household limit). *Id*. All Service Awards would come from the Gross Settlement Fund. *Id*.

"Incentive awards are not uncommon in class action litigation and particularly where ... a common fund has been created for the benefit of the entire class. The purpose of these payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action

litigation, and to reward the public service of contributing to the enforcement of mandatory laws." *Benelli v. BCA Fin. Servs., Inc.*, 324 F.R.D. 89, 111 (D.N.J. 2018) (quoting *Sullivan*, 667 F.3d at 333 n.65); *see also Varacallo*, 226 F.R.D. at 257 (stating that service awards are appropriate to compensate for "any personal risk incurred by the individual and or any additional effort expended by the individual for the benefit of the lawsuit").

Other cases in this District have approved service awards of $10,000, or even more. *E.g.*, *Talone v. American Osteopathic Ass'n*, 2018 WL 6318371, at *17 (D.N.J. Dec. 3, 2018) ($15,000 to each plaintiff); *Halley v. Honeywell Int'l, Inc.*, 2016 WL 1682943, at *28 (D.N.J. April 26, 2016) ($10,000 to each plaintiff, payable from common fund), *aff'd in part, rev'd in part on other grounds*, 861 F.3d 481 (3d Cir. 2017); *Bredbenner v. Liberty Travel, Inc.*, 2011 WL 1344745, at *22-23 (D.N.J. April 8, 2011) ($10,000 to each plaintiff, payable from common fund).

The Plaintiffs who litigated *Cole* and *Meadow* through discovery devoted significant time to those matters. They all produced documents, answered interrogatories, had their depositions taken, and had their homes inspected by Defendant's experts. They frequently consulted with Class Counsel about the status of the case, and they reviewed and approved the Settlement Agreement. Those Plaintiffs merit the requested $10,000 award. The remaining Class

Representatives, who were added to the TAC, deserve a lesser, $2,500 award, since they were not subjected to discovery or to inspection of their homes, but they still risked their reputations by putting their names on a public lawsuit on behalf of the Settlement Class in addition to reviewing and approving the Settlement Agreement. *See Varacallo*, 226 F.R.D. at 257 (awarding $10,000 to plaintiffs who had produced documents, been deposed, and commented on the settlement, and $1,000 and $3,000, respectively, to plaintiffs who played lesser roles but who were still "necessary in obtaining this Settlement").

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Court should grant Plaintiffs' motion for an award of attorneys' fees and reimbursement of expenses to Class Counsel, and for Service Awards to Plaintiffs in accordance with the Settlement Agreement.

LITE DEPALMA GREENBERG, LLC

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/s/ Bruce D. Greenberg

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