there is nothing else, thank you, everybody, very much for your submissions up to the last minute.

THE DEPUTY CLERK: All rise.

(Proceedings concluded.)

(The following is Judge Wolfson's oral opinion in full. Footnotes will follow the content of the opinion)

Before the Court are Plaintiffs' motion for final approval of class action settlement, and their motion for attorneys' fees, costs/expenses, and class representatives incentive awards. This settlement will resolve all claims asserted against Defendant NIBCO, Inc. ("NIBCO" or "Defendant"). For the reasons set forth below and on the record at the hearing held on April 8, 2019, the parties' joint motion for final approval of settlement is granted, the Court certifies the proposed settlement class, designates Plaintiffs' counsel as class counsel, and the Court approves the final settlement.

Additionally, I approve for the Coles, Mr. Monica, Ms. Boyd, Mr. McMahon, Mr. Sminkey, the Medders, the Pepernos, Mr. McCoy, the Pliskos, and Mr. McLaughlin, an incentive award of $10,000 each, or for

plaintiff couples, $10,000 for the couple together. Ms. Watts, Mr. Kenny, and the Davises, shall receive an incentive award of $2,500. Finally, the Court approves class counsel's fee request for 29.885% of the gross settlement funds, and they are entitled to reimbursement of their fees in the amount of $1,254,768.94.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

I. The Pleadings and Motion Practice

On December 27, 2013, Plaintiffs Kimberly and Alan Cole, residents of Tennessee, and James Monica, a New Jersey citizen, filed this putative class action. Plaintiffs alleged that NIBCO's cross-linked 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 "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. Thereafter,

Plaintiffs moved for the appointment of interim class counsel and, on September 3, 2014, filed a motion for leave to file an Amended Complaint. In October 2014, upon order of the Magistrate Judge, Plaintiffs filed the Amended Complaint ("Complaint"), That 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). In the same month, this Court appointed attorneys from three law firms as interim co-lead class counsel. (Fn.1)

Subsequently, NIBCO filed a motion to dismiss the Complaint. After extensive motion practice, I issued an Opinion and Order, dated May 20, 2015, that granted NIBCO's motion in part, with leave to amend, and denied it in part. Pursuant to my directions, in June 2015, Plaintiffs then filed a Second Amended Complaint ("SAC"). The SAC added certain additional legal theories to those previously asserted. In response, NIBCO filed a motion to dismiss, in part, the SAC.

In February 2016, I issued another Order and Opinion that, again, granted in part and denied in part NIBCO's motion to dismiss the SAC. In particular, I permitted certain claims to proceed:

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 Plaintiffs Boyd, McMahon, Sminkey, the Medders, the Pepernos, and McCoy.

A separate case, *Meadow v. NIBCO, Inc.*, No. 3:15-1124, alleging the same defects in the same NIBCO Products was filed on October 26, 2015 in the United States District Court for the Middle District of Tennessee. Those 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. Subsequently, plaintiffs' counsel in both cases agreed to coordinate all discovery to avoid duplication of effort and to minimize expense. According to counsel, plaintiffs' firms worked hand-in-hand on all case matters and in negotiating the settlement.

II. The Fact and Expert Discovery

The parties engaged in extensive discovery in the two cases. Plaintiffs served multiple rounds of expansive discovery requests on NIBCO, issued subpoenas to 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 representative plaintiffs. Plaintiffs' discovery efforts also included applications to the Court to obtain documents from third party entities.

NIBCO inspected the homes of each plaintiff in both cases, 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 entity that had assisted NIBCO on certain of the Products at issue.

Expert witnesses were retained by both

parties. Indeed, Plaintiffs offered Ms. Smith as an expert in PEX plumbing and metallurgy, and Ed Slovak of Delta Mechanical, Inc., as their expert on plumbing repair costs. NIBCO, on its part, presented an expert in the filed of metallurgy, 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. The parties' experts prepared written reports, and Ms. Smith prepared a rebuttal report. Moreover, each expert was deposed by the opposing party, resulting in a total of six expert depositions.

III. Motion Practice

In March 2017, the *Cole* Plaintiffs filed a motion for class certification. While NIBCO opposed that motion, it also sought summary judgment as to virtually all of Plaintiffs' remaining claims. In addition, the parties, here, filed *Daubert* motions to exclude or limit each other's expert witnesses. Indeed, extensive briefings were submitted related to those motions. Similarly, *Meadow*, too, proceeded through the filing of a motion for class certification by the plaintiffs there.

IV. Mediation

In the midst of motion practice, the parties,

in both cases, 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 Anderson on three separate occasions, and due to the nature of the negotiations, and certain complex insurance issues, they brought in a second mediator, Ross R. Hart, Esq. Plaintiffs and NIBCO mediated with Judge Andersen and Mr. Hart together on two occasions, and once with Mr. Hart alone. These mediation sessions contributed to the prospect of a settlement; in fact, the negotiations resulted in a 20-page Memorandum of Understanding ("MOU"), that ultimately was signed by the parties on July 20, 2018. The parties then proceeded to negotiate a formal Settlement Agreement, which became fully-executed on October 26, 2018.

V. Terms of Settlement

The Class Settlement will create a common fund of $43.5 million. Settlement Agreement ("SA"), ¶¶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 Products] causing damage," except for leaks resulting from intervening causes, such as improper installation by a plumber,

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

Submitted claims will be sent to a neutral Settlement Administrator, Angeion Group, LLC ("Angeion"). Members can seek compensation from the settlement fund for "Reasonably Proven Property Damage," which is defined to include repair or replacement of the NIBCO 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. In that regard, class members need only submit receipts, invoices, expense records, credit card statements, and other available "verifiable indicia of such costs incurred" as proof. *See* SA, ¶13. Claims can be filed electronically through the settlement website, *see infra*.

The Settlement covers past property damage, that occurred from January 1, 2005 through the Effective Date of the Settlement, and it also covers damages caused by 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, 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 is 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.*

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 compensate all members of the class 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 also

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, are sought by class counsel from the fund for their work. SA, ¶41.a. Finally, a service award up to $10,000 is sought for each proposed class representative or household. *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 operative complaints. Importantly, however, the release does not include personal injury claims. SA, ¶¶ 34, 35. Also excluded are claims alleging that a party — other than NIBCO — is wholly responsible for a leak of one of the Products, such as a leak resulting from the physical penetration by a nail or leaks resulting from the improper installation or attachment of a NIBCO Product. SA, ¶35.

VI. Notice to the Class

To ensure that putative class members receive notice of settlement that complies with Rule 23 and due process, the parties have agreed to a notice plan

that will be implemented by Angeion. SA, ¶25. First, Angeion will send notice and a claim form by first-class mail to all class members for whom contact information exists. SA, ¶25.a, .d; Weisbrot Decl., ¶¶16-18. A short-form notice will also be published, which includes a press release, 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 further target plumbers. 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, which contains, 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; (iii) copies of the

Settlement Agreement, the notice of settlement, the claim form, court orders regarding this Settlement, and other relevant court documents, including 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.* In addition, 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 relevant information regarding deadlines and dates, and locations of court proceedings. SA, ¶25.g; Weisbrot Decl., ¶40. Members 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. According to the parties, these notice procedures are calculated to target an approximate 76.02% of the intended audience, and the class members will see an advertisement concerning the Settlement, on average, 3.03 times.

Weisbrot Decl., ¶¶13-14, 41-43.

VII. Preliminary Approval and Objections

On November 14, 2018, the Court preliminarily approved the parties' settlement and its terms as set forth above, and certified a class for settlement purposes. In that Order, the Court also instructed that class members have the right to either opt out of, or object to, the settlement pursuant to the procedures and schedule set forth in the Settlement Agreement. The Order further indicated that "[a] member of the Settlement Class who submits a timely and valid Request for Exclusion cannot object to the Settlement and is not eligible to receive a Settlement Payment." Order, IV. B.

A total of seven objections were made. The first three objections were lodged by individuals: Earlean Collins; Jessie Andrews; and Forest/Jennifer Wilson. They assert that the Settlement terms should be more favorable to the class. For example, Collins argues that the common fund should be larger. The Wilsons contend that the Settlement does not compensate them in full for their particular losses. Andrews claims that a re-plumb should be available to anyone who has suffered even a single leak, rather than requiring three leaks. Next, a more substantial

objection, was submitted by Jeffrey Palmer. Palmer objects to certain terms of the Settlement, which I will address below. Finally, objectors D.R. Horton, Christianson Air Conditioning & Plumbing LLC, and Dupree Plumbing Co., Inc., have withdrawn their objections prior to the final settlement hearing. It appears that the objections made by Andrews have similarly been withdrawn. I turn first to the issue of class certification.

DISCUSSION

I. Class Certification

In order to approve a class settlement agreement, "a district court must determine that the requirements for class certification under Federal Rule of Civil Procedure 23(a) and (b) are met and must determine that the settlement is fair to the class under Federal Rule of Civil Procedure 23(e)." *In re Insurance Brokerage Antitrust Litigation*, 579 F.3d 241, 257-58 (3d Cir. 2009); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 341 (3d Cir. 2010)("a district court first must determine that the requirements for class certification under Rule 23(a) and (b) are met."). The Third Circuit has consistently observed that "Rule 23 is designed to assure that courts will identify the common interests of class

members and evaluate the named plaintiffs' and counsel's ability to fairly and adequately protect class interests." *In re Comm. Bank of N. Va.*, 622 F.3d 275, 291 (3d Cir. 2010) (quoting *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 799 (3d Cir. 1995) (alterations omitted). "The requirements of [Rule 23] (a) and (b) are designed to insure that a proposed class has 'sufficient unity so that absent class members can fairly be bound by decisions of class representatives.'" *In re Prudential Ins. Co.*, 148 F.3d at 309 (quoting *Amchem*, 521 U.S. at 621).

Under Rule 23(a), the prerequisites to class certification are:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); *see also Amchem Products, Inc. V. Windsor*, 521 U.S. 591, 613 (1997). "Upon finding each of these prerequisites satisfied, a district court must then determine that the proposed class fits within one of the categories of class actions enumerated in Rule 23(b)." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 296 (3d Cir. 2011).

Certification pursuant to Rule 23(b)(3), applicable in cases like the one presently before the Court in which Plaintiffs seek monetary compensation, is permitted where

(1) "questions of law or fact common to class members predominate over any questions affecting only individual members," and

(2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

Fed. R. Civ. P. 23(b)(3); *see Collins v. E.I. DuPont de Nemours & Co.*, 34 F.3d 172, 180 (3d Cir. 1994); *Amchem*, 521 U.S. at 618 ("Among current applications of Rule 23(b)(3), the 'settlement only' class has become a stock device"). The "factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. In other words, to

certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23." *In re Insurance Brokerage*, 552 F.3d at 258 (citations and internal quotations omitted). Accordingly, "[c]lass certification is proper only if the [] court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23 are met." *Id.* (Internal quotation marks omitted).

"Even if it has satisfied the requirements for certification under Rule 23, a class action cannot be settled without the approval of the court and a determination that the proposed settlement is fair, reasonable and adequate." *In re Prudential Ins. Co.*, 148 F.3d at 316 (internal quotation marks omitted); *see Fed. R. Civ. P.* 23(e)(2) (stating that a district court may approve a proposed settlement "only after a hearing and on finding that it is fair, reasonable, and adequate"). In *In re Insurance Brokerage* the Third Circuit affirmed the applicability of nine factors, established in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975), that should be considered when determining the fairness of a proposed settlement. "In cases of settlement classes, where district courts are certifying a class and approving a settlement in

tandem, they should be 'even more scrupulous than usual when examining the fairness of the proposed settlement.'" *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 436 (3d Cir. 2016), *as amended* (May 2, 2016) (quoting *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534 (3d Cir. 2004)). However, "if a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed." *Id.* At 621. Thus, it is important to "apply[] the class certification requirements of Rules 23(a) and (b) separately from [the] fairness determination under Rule 23(e)." *In re Prudential Ins. Co.*, 148 F.3d at 308.

Finally, as the Supreme Court has observed, when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial. But other specifications of [Rule 23] -- those designed to protect absentees by blocking unwarranted or overbroad class definitions -- demand undiluted, even heightened, attention in the

settlement context." *Amchem*, 521 U.S. at 620.

A. Rule 23(a) Factors

Previously, I preliminarily approved the following settlement class in an Order dated November 14, 2018 (the "Preliminary Order"):

> All Persons that own or have owned at any time since January 1, 2005, a residential or commercial structure in the United States that contains or contained NIBCO's Tubing, Fittings, or Clamps, including their spouses, joint owners, heirs, executors, administrators, mortgagees, tenants, creditors, lenders, predecessors, successors, trusts and trustees, and assigns ("Occupant Persons"); as well as all Persons who have standing and are entitled to assert a claim on behalf of any such Occupant Persons, such as but not limited to a builder, contractor, distributor, seller, subrogated insurance carrier, or other Person who has claims for contribution, indemnity or otherwise against NIBCO based on claims for Qualifying Leaks of the Tubing, Fittings, or Clams with respect to such residential or commercial structures. The Settlement Class includes all Persons who subsequently purchase or otherwise

obtain an interest in a property covered by this Settlement without the need of a formal assignment by contract or court order.

Excluded from the Settlement Class are Occupant Persons with respect to residential structures constructed by D.R. Horton, Inc.-Birmingham (including, but not limited to, those for which the plumbing contracting was performed by or on behalf of Dupree Plumbing Co. Inc.) And which are located in the following cities in Alabama: Bella Vista; Bessemer; Birmingham; Calera; Chelsea; Cottondale; Hoover; Kimberly; Leeds; Maylene; McCalla; Montgomery; Northport; Odenville; Pinson; Pratville; Springville; Trussville; and Tuscaloosa. Also excluded from the Settlement Class are Occupant Persons with respect to residential structures constructed by Continental Homes of Texas, L.P. (including, but not limited to, those for which the plumbing contracting was performed by or on behalf of Christianson Air Conditioning and Plumbing, LLC) and which are located in the following cities in Texas: Boerne; Cibolo; Converse; Live Oak; Medina

County; New Braunfels; Royse City; San Antonio; San Marcos; Schertz; Sequin; and Universal City. Also excluded from the Settlement Class are D.R. Horton, Inc.-Birmingham, Dupree Plumbing Co. Inc., Continental Homes of Texas, L.P., and Christianson Air Conditioning and Plumbing, LLC, solely with respect to the structures identified a list provided to the Settlement Administrator.

Also excluded from the Settlement Class are: (I) NIBCO, its officers, directors, affiliates, legal representatives, employees, successors, and assigns, and entities in which NIBCO has a controlling interest; (ii) judges presiding over the Litigation; and (iii) local, municipal, state, and federal governmental entities.

The Preliminary Order, ¶ I(C). None of the remaining objectors oppose class certification, and for the reasons set forth below, I find class certification appropriate, because Plaintiffs have satisfied the prerequisites for maintaining a class action as set forth in Rule 23(a).

1. Numerosity

Fed. R. Civ. P. 23(a)(1) requires the class be

"so numerous that joinder of all members is impracticable." With respect to numerosity, a party need not precisely enumerate the class members to proceed as a class action. *In re Lucent Tech. Inc., Sec. Litig.*, 307 F. Supp. 2d 633, 640 (D.N.J. 2004). "No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001) (citing 5 James Wm. Moore et al., Moore's Federal Practice S 23.22[3][a] (Matthew Bender 3d ed. 1999)). "Impracticability does not mean impossibility, but rather that the difficulty or inconvenience of joining all members of the class calls for class certification." *Weikel v. Tower Semiconductor, Ltd.*, 183 F.R.D. 377, 388 (D.N.J. 1998) (citation omitted).

Here, there is no dispute that based on NIBCO's sales and other records, thousands of persons nationwide own or occupy structures that include the Products at issue in this case. As such, the potential number of class members in this case clearly satisfies the numerosity requirement of Rule 23(a)(1).

2. Commonality

Commonality requires that "there are questions of law or fact common to the class." *Fed. R. Civ. P.* 23(a)(2). The threshold for establishing commonality is straightforward: "[t]he commonality requirement will be satisfied if the named plaintiffs share at least *one* question of fact or law with the grievances of the prospective class." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 596-97 (3d Cir. 2009) (quoting *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994)) (emphasis added). Indeed, as the Third Circuit pointed out, "[i]t is well established that only one question of law or fact in common is necessary to satisfy the commonality requirement, despite the use of the plural 'questions' in the language of Rule 23(a)(2)." *In re Schering Plough*, 589 F.3d at 97 n.10. Thus, there is a low threshold for satisfying this requirement. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183 (3d Cir. 2001); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986) (highlighting that the threshold of commonality is not high (quotations and citations omitted)).

Moreover, this requirement does not mandate that all putative class members share identical claims, *see Hassine v. Jeffes*, 846 F.2d 169, 176-77

(3d Cir. 1988), and that "factual differences among the claims of the putative class members do not defeat certification." *Baby Neal*, 43 F.3d at 56. In that regard, class members can assert a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are subject to the same harm will suffice. *Hassine*, 846 F.2d at 177-78. "Even where individual facts and circumstances do become important to the resolution, class treatment is not precluded." *Baby Neal*, 43 F.3d at 56.

In this case, there are many common questions of law and fact, such as whether: (1) NIBCO's Products are defective; (2) NIBCO knew or should have known of the defect(s); (3) NIBCO breached applicable warranties; (4) NIBCO had a duty to exercise reasonable care in formulating, testing, designing, manufacturing, warranting, and marketing the Products; (5) and whether NIBCO breached that duty. Besides these issues, there are other factual and legal questions common to all class members, and as such, commonality is satisfied.

3. Typicality

Fed. R. Civ. P. 23(a)(3) requires that "the claims or defenses of the representative parties are

typical of the claims or defenses of the class." "The concepts of commonality and typicality are broadly defined and tend to merge, because they focus on similar aspects of the alleged claims." *Newton*, 259 F.3d at 182. "Both criteria seek to assure that the action can be practically and efficiently maintained and that the interests of the absentees will be fairly and adequately represented." *Baby Neal*, 43 F.3d at 56; *see General Tel. Co. Of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Despite their similarity, commonality – like numerosity – evaluates the sufficiency of the class itself, and typicality – like adequacy of representation – evaluates the sufficiency of the named plaintiff. *See Hassine*, 846 F.2d at 177 n.4; *Weiss v. York Hosp.*, 745 F.2d 786, 810 (3d Cir. 1984), *cert. Denied*, 470 U.S. 1060 (1985).

Typicality acts as a bar to class certification only when "the legal theories of the named representatives potentially conflict with those of the absentees." *Georgine v. Amchem Prods.*, 83 F.3d 610, 631 (3d Cir. 1996); *Newton*, 259 F.3d 183. "If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences." *Id.* At 184. In other words, the

typicality requirement is satisfied as long as representatives and the class claims arise from the same event or practice or course of conduct and are based on the same legal theory. *Brosious v. Children's Place Retail Stores*, 189 F.R.D. 138, 146 (D.N.J. 1999); *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 923 (3d Cir. 1992) ("Factual differences will not render a claim atypical if the claim arises from the same event or practice of course of conduct that gives rise to the claims of the class members, and it is based on the same legal theory.").

To conduct the typicality inquiry, the court must examine "whether the named plaintiffs' claims are typical, in common-sense terms, of the class, thus suggesting that the incentives of the plaintiffs are aligned with those of the class." *Beck v. Maximus, Inc.*, 457 F.3d 291, 295-96 (3d Cir. 2006).

Here, all of the claims of Plaintiffs and the class members arise out of the same alleged conduct of NIBCO, surrounding the same allegedly defective Products that caused the same types of harm. Indeed, those alleged defects all arise from NIBCO's design, manufacture and sale of the Products. Thus, the typicality requirement of Rule 23(a)(3) is met.

4. Adequacy

A class may not be certified unless the representative class members "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Rule 23(a)'s adequacy of representation requirement 'serves to uncover conflicts of interest between named parties and the class they seek to represent.'" *In re Pet Food Prod. Liab. Litig.*, 629 F.3d 333, 343 (3d Cir. 2010) (quoting *Amchem*, 521 U.S. at 625). Class representatives "must be part of the class and possess the same interest and suffer the same injury as the class members." *Id.* (Citation and internal quotation marks omitted).

This requirement has traditionally entailed a two-pronged inquiry: First, the named plaintiff's interests must be sufficiently aligned with the interests of the absentees; and second the plaintiff's counsel must be qualified to represent the class. *General Motors*, 55 F.3d at 800; *Newton*, 259 F.3d at 187 (same). A named plaintiff is "adequate" if his interests do not conflict with those of the Class. *In re Prudential Ins. Co.*, 148 F.3d at 312. Pursuant to Rule 23(g), adequacy of class counsel is considered separately from the determination of the adequacy of the class representatives. Both prongs of the adequacy

requirement are satisfied here.

(i) Adequacy of the Proposed Class Representative

Here, Plaintiffs have no interests that are antagonistic to those of the members of the class and have no unique defenses from the class. Indeed, they both share a unifying interest in removing and replacing the same defective products installed in their homes. And, Plaintiffs are alleged to have suffered injury in the same manner as other class members as a result of Defendant's alleged conduct. Moreover, Plaintiffs have vigorously pursued both cases in New Jersey and Tennessee; in that regard, each of the plaintiffs who commenced these 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. I find that, therefore, Plaintiffs are adequate representatives of the class.

(ii) Rule 23(g) Adequacy of the Proposed Class Counsel

Rule 23(g) requires a court to assess the adequacy of proposed class counsel. To that end, the court must consider the following: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's

experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. *Nafar v. Hollywood Tanning Sys., Inc.*, No. 06-CV-3826, 2008 WL 3821776, at *7 (D.N.J. Aug. 12, 2008). I will analyze these factors in tandem.

The Court finds that class counsel, Chimicles & Tikellis, LLP; Lite DePalma Greenberg, LLC; and McCune Wright Arevalo LLP, are adequate. Counsel, together, have invested numerous hours and over $1 million in expert and other costs in the prosecution of both cases. Counsel's work in those cases has included investigating the allegations; drafting the Complaints; briefing and defending against multiple motions to dismiss; issuing and responding to extensive written discovery; reviewing voluminous documents produced by Defendant; issuing subpoenas to third parties; taking or defending many 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, which resulted in the parties entering into a MOU, and then the Settlement Agreement.

Looking next to counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action, I find that Plaintiffs' counsel are experienced in handling complex litigation and have served as plaintiffs' counsel for many class actions. Having review the firms' resume and qualifications, the Court has no concern about counsel's knowledge of the applicable law, given their experience in handling previous relevant matters, and has no reason to doubt that they have been, and will continue to be, committed to devoting sufficient resources to represent the class.

B. Rule 23(b)(3) Factors

After meeting the threshold requirements of Rule 23(a), a plaintiff must establish that the proposed class meets the requirements of Rule 23(b)(3). To certify a class under Rule 23(b)(3), the court must find that: "[T]he questions of law or fact common to the members of the class predominate over any question affecting only individual members, and

that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3) requires that "a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy." *Fed. R. Civ. P.* 23(b)(3). In this case, both considerations weigh in favor of class certification.

1. Predominance

Here, Plaintiff satisfies the predominance and superiority criteria of Rule 23(b)(3). In determining whether common questions predominate, courts have focused on the claims of liability against defendants. *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977). When common questions are a significant aspect of a case and they can be resolved in a single action, class certification is appropriate. *See* 7A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d, § 1788, at 528 (1986). Here, there are several common questions of law and fact that predominate over any questions that may affect individual class members. For example, were this case to proceed, the focus would be whether NIBCO is liable to the class under the claims pled in the Complaint, based on the alleged existence of a design and

manufacturing defect and NIBCO's related conduct. Indeed, all these issues are subject to generalized proof, and are questions that are common to all class members. Thus, Rule 23's predominance requirement is satisfied.

2. Superiority

The Rule sets out several factors relevant to the superiority inquiry: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action. Essentially, the superiority requirement "asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *In re Prudential Ins. Co.*, 148 F.3d at 316 (internal citations and quotations omitted); *In re Warfarin*, 392 F.3d at 532-33.

Here, given the large number of individual lawsuits that would be required if a class were not

certified, a class action presents a superior method to fairly and efficiently adjudicate all of the claims of the class members in this case, within the meaning of Rule 23(b)(3). To the extent any members wished to pursue any such individual claim, they were free to exclude themselves from the class under Rule 23(b)(3). In light of the foregoing, Plaintiff has met the superiority element of Rule 23(b)(3). I find that the Settlement Agreement provides class members with prompt, predictable, and certain relief, with well-defined administrative procedures to ensure due process. These include the right of any potential class members who are dissatisfied with the Settlement to object or to exclude themselves.

Having weighed all the factors and considered all the requirements of class certification, the Court finds that it is appropriate to certify the class for settlement purposes.

II. Adequacy of Notice

The Court found, in the Preliminary Order, that the class-notice materials and the proposed method of dissemination, as outlined *supra*, met the requirements of due process, Rule 23 of the Federal Rules of Civil Procedure, and "constitute[d] the best notice practicable under the circumstances, and []

constitute[d] due and sufficient notice to all persons entitled thereto." Now that notice has been provided to the class, the Court reaffirms its earlier findings concerning the adequacy of the notice program.

Where, as here, the parties have sought simultaneously to certify a settlement class and settle a class action, the Court must consider Fed. R. Civ. P. 23(c)(2)'s notice requirements for class certification as well as Rule 23(e)'s notice requirements for settlement or dismissal. *See, e.g., In re Prudential Ins. Co.*, 148 F.3d at 326-27. For classes certified under Fed. R. Civ. P. 23(b)(3), such as the class in this action, Rule 23(c)(2)(B) requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The Rule also prescribes that the notice state "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on class

members under Rule 23(c)(3)." *Id.* Rule 23(e) is less specific, requiring only that notice of a proposed settlement be given "in a reasonable manner." Thus, if the notice satisfies Rule 23(c), it will also satisfy Rule 23(e). *See, e.g., In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 448 (S.D.N.Y. 2004). The Constitution's Due Process Clause also imposes certain minimum notice requirements. As the Supreme Court has observed, however, the "'mandatory notice pursuant to [Rule 23(c)(2)] . . . Is designed to fulfill requirements of due process to which the class action procedure is of course subject.'" *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974) (quoting Fed. R. Civ. P. 23, 1966 Amendment Advisory Comm. Note to Subdiv. (D)(2)). Due process considerations are therefore satisfied if the notice conforms to Rule 23(c)(2).

A. Best Practicable Notice Methodology

Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise. Here, the notice procedure sought to reach the greatest number of class members possible. Indeed, I find that Plaintiffs' notice program was "the best notice practicable under the

circumstances including individual notice to all members who can be identified through reasonable effort," *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974), and meets the requirements of Fed. R. Civ. P. 23(c) and (e) and due process. First, as described, *supra*, and detailed in the Settlement Agreement, the Notice Plan that the Administrator implemented 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 potential class members as reasonably possible. In so doing, the Notice Plan also emphasizes notifying plumbers, while not class members, who often installed the Products in premises of potential class members, and that these plumbers could notify their customers about the Settlement.

B. Sufficient Content of the Notice

The potential class members will have received the "best notice that is practicable under the circumstances" as required by Rule 23(c)(2) if the notice "contain[s] sufficient information to enable class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement or, when relevant, opting out of the class." *In re Nat'l*

Football League Players Concussion Injury Litig., 821 F.3d 410, 435 (3d Cir. 2016) (internal quotations omitted).

Here, the Notice lists the Settlement benefits, information on opting-out and objecting, as well as information on the final approval hearing date. The Notice also summarizes the history of the litigation; describes the parties and the class; discusses the settlement negotiations; describes settlement benefits; informs how to submit a claim; describes class members' right to request exclusion from the Class or appear through personal counsel of their choosing and/or to object to the Settlement; and provides the deadlines for asserting these rights and procedures for doing so. Thus, 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).

I find both the notice methodology and the content of the notice to be adequate.

III. Final Approval of Settlement

The law encourages and favors settlement of civil actions in federal courts, particularly in complex class actions. *In re Warfarin*, 391 F.3d at

535; *see In re General Motors*, 55 F.3d 768, 784 (3d Cir. 1995) ("the law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation"). Accordingly, when a settlement is reached on terms agreeable to all parties, it is to be encouraged. *Bell Atlantic Corp. V. Bolger*, 2F.3d 1304, 1314 n.16 (3d Cir. 1993). The Third Circuit applies "an initial presumption of fairness in reviewing a class settlement when: (1) the negotiations occurred at [arm's] length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Nat'l Football League*, 821 F.3d at 436 (internal quotations omitted). This presumption applies even where, as here, "the settlement negotiations preceded the actual certification of the class . . . ." *In re Warfarin*, 391 F.3d at 535.

A class action, pursuant to Federal Rule of Civil Procedure 23(e), cannot be settled without the approval of the court and a determination that the proposed settlement is fair, reasonable, and adequate. *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 488 (3d Cir. 2017) (citing FED. R. CIV. P. 23(e) (providing

that "the claims ... of a certified class may be settled ... only with the court's approval")). The ultimate decision of whether to approve a proposed settlement under this standard is left to the sound discretion of the district court. *Id.* (Citation and quotations omitted). The Third Circuit has on several occasions stressed the importance of Rule 23(e), noting that "the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995); *see also Amchem*, 521 U.S. at 623 (noting that the Rule 23(e) inquiry "protects unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise") (citations omitted). However, in cases such as this, where settlement negotiations precede class certification and approval for settlement and certification are sought simultaneously, the Third Circuit requires district courts to be even "more scrupulous than usual" when examining the fairness of the proposed settlement. *See In re General Motors*, 55 F.3d at 805. This

heightened standard is intended to ensure that class counsel has engaged in sustained advocacy throughout the course of the proceedings, particularly in settlement negotiations, and has protected the interests of all class members. *See In re Prudential Ins. Co.*, 148 F.3d at 317.

The Third Circuit has articulated a set of nine "*Girsh* factors" that courts should consider when determining the fairness of a proposed settlement:

(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.

Halley, 861 F.3d at 488 *(citing Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) (internal quotations omitted)); *see also In re Johnson & Johnson Deriv. Litig.*, 900 F. Supp. 2d 467, 479-85 (D.N.J. 2012) (reciting and applying the *Girsh* factors). "The settling parties bear the burden of proving that the *Girsh* factors weigh in favor of approval of the settlement." *In re Pet Food Prods.*, 629 F.3d at 350. "A district court's findings under the *Girsh* test are those of fact." *In re Nat'l Football League*, 821 F.3d at 437, *as amended* (May 2, 2016).

Since *Girsh*, the Third Circuit has held that, "because of a 'sea-change in the nature of class actions' after *Girsh* was decided thirty-five years ago, it may be helpful to expand the *Girsh* factors to include, when appropriate, the following non-exclusive factors": "[1] [T]he maturity of the underlying substantive issues . . . ; [2] the existence and probable outcome of claims by other classes and subclasses; [3] the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved – or likely to be achieved – for other claimants; [4] whether class or subclass members are accorded the right to

opt out of the settlement; [5] whether any provisions for attorneys' fees are reasonable; and [6] whether the procedure for processing individual claims under the settlement is fair and reasonable." *In re Pet Food Prods.*, 629 F.3d at 350 (quoting *In re Prudential Ins. Co.*, 148 F.3d at 323). Unlike the *Girsh* factors, however, "the *Prudential* considerations are just that, prudential." *In re Nat'l Football League Players*, 821 F.3d at 437 (internal quotations omitted). They are permissive and non-exhaustive, "illustrat[ing] ... [the] additional inquiries that in many instances will be useful." *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013) (citations omitted). As such, I note that while some of the *Prudential* considerations (such as the ability to opt-out) unquestionably favor approval, I am, for the following reasons, satisfied that thorough consideration of the *Girsh* factors alone is sufficient to determine that the Settlement is fair, reasonable, and adequate. *See, e.g., In re New Jersey Tax Sales Certificates Antitrust Litig.*, No. 16-3965, 2018 WL 4232057, at *6 (3d Cir. Sept. 6, 2018) (approving settlement based only on consideration of *Girsh* factors); *see also Haas v. Burlington Cty.*, No. 08-1102, 2019 WL 413530, at *5 n.4 (D.N.J. Jan. 31, 2019) (finding it "unnecessary to

conduct a separate analysis of the *Prudential* factors").

A. Complexity, Expense, and Likely Duration of Litigation

The first *Girsh* factor captures "the probable costs, in both time and money, of continued litigation." *In re Gen. Motors*, 55 F.3d at 812. "By measuring the costs of continuing on the adversarial path, a court can gauge the benefit of settling the claim amicably." *Id.* "Settlement is favored under this factor if litigation is expected to be complex, expensive and time consuming." *In re Royal Dutch/Shell Transp. Sec. Litig.*, 2008 WL 9447623, at *17 (D.N.J. Dec. 9, 2008).

Here, the likelihood of success for the class members if they proceeded to trial is uncertain. The case has been litigated since December 2013, and, absent a settlement, Defendant would likely continue to strongly oppose the facts and allegations contained in Plaintiffs' pleadings; in fact, Defendant was already successful in moving to dismiss certain of the claims and allegations in the SAC. Defendant also opposed class certification, and moved for summary judgment on the merits. Both parties have also briefed, just prior to settlement negotiations, issues

relating to disqualification of certain experts. In that regard, continued litigation would be complex, time consuming, and expensive, with no certainty of a favorable outcome. Settlement eliminates any further risk and expense for the parties. Considering the potential risks and expenses associated with continued prosecution of the case, the probability of appeals, the certainty of delay, and the ultimate uncertainty of recovery through continued litigation, the proposed settlement is fair, reasonable, and adequate. This factor supports approval.

B. Class's Reaction to Settlement

The second *Girsh* factor "gauge[s] whether members of the class support the settlement." *In re Prudential Ins. Co.*, 148 F.3d at 318. A lack of significant objections by class members weighs in favor of approving the settlement. *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 578 (E.D. Pa. 2003). *See also Vasco v. Power Home Remodeling Grp. LLC*, No. 15-4623, 2016 WL 5930876, at *5 (E.D. Pa. Oct. 12, 2016) ("As the opt-outs and objectors account for less than 1% of Class Members, this factor weighs in favor of settlement"). A largely positive reaction from the class is persuasive evidence of the fairness and adequacy of a settlement. *In re Gen. Motors*

Corp., 55 F.3d at 812.

Here, the opt-out and objection deadline has passed. Despite a total settlement class concerning approximately 157,759 to 422,344 buildings, only 112 individuals have timely opted out of the settlement class, and seven have lodged objections to the Settlement. I note that since the filing of their objections, D.R. Horton, Christianson Air Conditioning & Plumbing LLC, \Dupree Plumbing Co., Inc., and Andrews have withdrawn their objections. As such, the total number of objections is 3, *i.e.*, Palmer, Collins and the Andrews. In addition, more than 951 claims have already been filed as of April 4, 2019. A majority of the claims have been submitted by homeowners, and a small portion was filed by entities entitled to assert claims on behalf of, or through a, homeowner, including builders, plumbers, or subrogated insurance companies.

Indeed, a "small number of objections by Class Members to the Settlement weighs in favor of approval." *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 103 (D.N.J. 2012) (citations omitted); *see, e.g., Yaeger v. Subaru of America*, No. 14-4490, 2016 WL 4541861, at *14 (D.N.J. Aug. 31, 2016) (finding favorable class reaction where 28 class members

objected out of 665,730 class notices or 0.005% and 2,328 individuals (or 0.35%) opted out); *Skeen v. BMW of North America*, No. 13-1531-WHW, 2016 WL 4033969, at *8 (D.N.J. July 26, 2016) (finding favorable class reaction when 123 out of 186,031 recipients of class notices opted out, and 23 submitted objections); *Varacallo v. Mass. Mutual Life Ins. Co.*, 226 F.R.D. 207, 237-38 (D.N.J. 2005) (finding opt-out and objection requests of .06% and .003%, respectively, "extremely low" and indicative of class approval of the settlement). Based on the circumstances presented here, I find that the settlement class responded favorably to the settlement terms, and as such, this factor favors approval. Next, I will address the arguments of the objectors.

1. Palmer

At the outset, Plaintiffs have asked that I strike Palmer's objections because of certain alleged false representations that he made in his certification and objections. As such, before I consider Palmer's objections on the merits, I will make some comments about Palmer and his legal representation. Palmer is represented, among others, by proposed *pro hac vice* counsel, Mr. Christopher Bandas and Mr. Robert Clore, and their firm, the

Bandas Law Firm. Palmer is also represented by local counsel, Ms. Janet Gold, and another out-of-state attorney, Eric Steven Stewart. The Magistrate Judge denied the *pro hac vice* admission of Bandas and Clore. During the hearing, Gold represented Palmer. Although attorneys from the Bandas Law Firm have been denied admissions in this Court, I will nevertheless comment on their representation, along with Palmer's conduct. Both Palmer and Bandas are apparently

Both Palmer and Bandas are apparently serial

class-action objectors. (Fn. 2) During Palmer's deposition, and in his Certification, he swore that he has only objected one time before to a class action settlement,which took place in Northern District of California, and that the settlement, there, did not involve the types of claims raised here. According to Plaintiffs, Palmer's representation in that regard is false. (Fn. 3) Rather, there is no dispute that Palmer has objected to at least two other class action settlements, both of which were plumbing cases similar to the present matters. Palmer objected to the settlements in *In re Kitec Plumbing Sys. Prods. Liab. Litig.*, No. 09-2098 (N.D. Tex.) And *In re Uponor, Inc. F1807 Plumbing Fittings Prods. Liab. Litig.*, 2012 WL

3984542 (D. Minn. Sep. 11, 2012). In *Kitec*, Palmer was also represented by the Bandas firm; interestingly, the objections Palmer made in *Kitec* were the same boilerplate objections he made here. In *Uponor*, the court described that Palmer and his brother, Paul Palmer, acting *pro se*, had objected to the settlement. However, the court found that, in fact, Darrell Palmer, Palmer's other brother was behind the objections. Now suspended from practicing law, Darrell Palmer was an attorney who, apparently, worked with the Bandas Firm on prior occasions, and he, too, was a serial objector. Perhaps, more importantly, the *Uponor* court noted that the Palmers never actually had standing to object, because they misrepresented the type of pipe fittings they used, and those used by the Palmers were not the products at issue in *Uponor*. Ultimately, because of the lack of candor, the *Uponor* court found that the Palmers had "evidenced bad faith and vexatious conduct."

Based on newly uncovered information here, the veracity of Palmer's certification is called into question; for example, (i) whether Palmer, in fact, used any NIBCO Products, such that he would have standing to object, particularly since Palmer did not submit photographs of any purported NIBCO Products

that he claims he had used, and it appears that the receipt of sale he presented as evidence shows product numbers that belong to competing products; and (2) whether Palmer has intentionally lied about his past objection-history.

On the standing question, the parties have submitted additional briefing and certifications. Having reviewed them, I am satisfied that Palmer does not have standing to object, because he has failed to show on this record that he did in fact use NIBCO products. Palmer posits that because the claim form only asks certain questions regarding the products he used, so long as he answered them, he should be a class member who has standing to object. I disagree. As an objector, Palmer has the obligation to satisfy the Court that he has standing to object; since the truthfulness of his certification has been called into question, I must address the factual circumstances surrounding Palmer's standing. More specifically, whether Palmer used NIBCO products. On that question, I answer in the negative.

First, to show that he used NIBCO products,Plaintiff submitted a receipt/invoice from

Nocona Building Center, where he purchased the purported NIBCO Products. However, the two product numbers for the tubing on the Nocona receipt relate to Watts products, not NIBCO Products. *See* Greenberg Decl., ¶ 5. At the hearing, Palmer's counsel did not dispute this fact. Moreover, class counsel, Mr. Jacob Polakoff, contacted Nocona Building Center, and spoke to Mr. McMahan, a manager at Nocona. Initially, Mr. McMahan claimed that Nocona never sold NIBCO tubing or fittings; however, when asked by Mr. Polakoff to submit a certification, Mr. McMahan refused, stating that Palmer is a current customer of Nocona. Interestingly, Mr. McMahan did submit a certification, which was filed by Palmer's counsel in his supplemental briefing. In it, Mr. McMahan states that he has "no idea if Nocona Building Center has sold NIBCO Inc. PEX products, and [he] did not tell Mr. Polakoff that [he] knew otherwise." Polakoff Cert., ¶ 3. But, aside from what Mr. McMahan told Mr. Polakoff, Mr. McMahan never stated in his certification that Nocona did in fact sale NIBCO products, or the products that Palmer purchased were made by NIBCO. As such, Mr. McMahan's certification does not help Palmer's position that he has standing to object. Rather, based on the all the information I

have before me, and Palmer's pattern and practices as an objector, I find that Palmer does not have standing to object.

Even assuming, however, that Palmer has standing, his objections, nevertheless, have no merit. In his objections, Palmer first claims that the settlement is likely to pay class counsel more than the class and delays most class recovery more than six years. Essentially, Palmer argues that there will be so few claims submitted by class members which would result in a disproportionate payout to the class and counsel's fee and costs of approximately $13 million. Palmer's argument speculates at best, and I am satisfied that both the claims process and the provisions concerning unclaimed funds are fair and reasonable such that the settlement is likely to properly and adequately compensate the class.

I so conclude because as of March 17, 2019, approximately 758 Claims had already been received, seeking approximately $4,350,038.00 in the aggregate, for an average of approximately $5,739 per claim. (Fn.4) See Angeion Decl. At ¶ 45. That translates to an average claim payout of $1,435 at 25% recovery and $4,017 if the full potential 70% recovery is realized. Claims to date would yield a total payment of between

$1,087,509 (at the initial 25% payment amount), leaving approximately $27,190,247 to satisfy future Claims after payment of attorney's fees and costs of administration. Using the current $5,739 average per claim as an approximation of future claims, the Settlement Fund would support an approximate total of 19,705 Claims at 25% recovery (nearly twenty-six times the Claims received to date). With an uplift to 70%, the fund would be fully distributed with a total of approximately 7,039 Claims. I further note that as of April 4, 2019, 951 claims have been received. Accordingly, I am satisfied that the settlement fund will adequately compensate the class members.

Palmer also takes issue with the reverter provision of the settlement. The Settlement Agreement provides that at the end of the claims period and after all timely claims have been determined and paid, any remaining funds would essentially be returned to NIBCO. However, it is settled law that "the presence of a reverter . . . Provision does not detract from the fairness of the settlement as a whole." *McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 643 (E.D. Pa. 2015); *Landsman & Funk, P.C. v. Skinder-Strauss Assocs.*, 639 Fed. Appx. 880 (3d Cir. Feb. 16, 2016); *see also Boeing v. VanGemert*, 442 U.S. 472 (1980)

(discussing a settlement, as noted in *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 177 (3d Cir. 2013), that involved "a Settlement Fund that will partially revert to the defendant"). Here, the Court's role is to determine whether the terms of the settlement are fair and reasonable to the class, and because I am satisfied that the settlement funds will adequately compensate the class members, the presence of a reverter provision in this case does not render this settlement unfair. In sum, besides his speculation, Palmer has failed to point to any cogent evidence that would tend to show that the settlement funds would not adequately compensate the class members.

Next, Palmer argues that the claims process set forth in the Settlement Agreement is structured to limit class payout. Essentially, Palmer takes issue with the lengthy claim form and that it asks questions that are not necessary to the claim. Palmer also argues that the administrative and appeals process provide NIBCO too much input over claims rejection. I reject these arguments. First, as I indicated earlier, over 950 claims have been filed, and there are no indications that class members are confused when filling out the claim forms, or that the

questions that the form asks raise any privacy concerns. In fact, Palmer was deposed by the parties, and I had the occasion to review Palmer's deposition testimony regarding the claim process. In his deposition, Palmer took issues with certain language of the form and questions that he subjectively believed were unnecessary to process the settlement claim. However, Palmer's own subjective beliefs do not make the claim process onerous. Rather, each of the questions set forth on the claim is reasonably calculated to lead to relevant information, *inter alia*, regarding the claimant and the amount of the claim. In fact, the specific questions posed on the claim form are necessary to (1) enable eligible class members to identify themselves, (2) provide objective information necessary to determine a right to payment, (3) identify the benefit to which they are entitled, (4) select from one or more forms of relief (e.g., reimbursement or replumbing), (5) identify relevant builder/installer and homeowner's insurance information to help identify leaks with multiple potential claimants to reduce potential for double payments, and (6) attest to the facts provided under penalty of perjury as a check on fraudulent claims. *See, e.g., Glaberson v. Comcast Corp.*, No. 03-cv-6604,

2015 WL 5582251, at *10 (E.D. Pa. Sept. 22, 2015) (approving claims process where class members provide contact information, account numbers, and affirmation for former customers); *Milliron v. T-Mobile USA, Inc.*, No. 08-cv-4149, 2009 WL 3345762, at *6 (D.N.J. Sept. 10, 2009), as amended (Sept. 14, 2009), *aff'd*, 423 F. App'x 131 (3d Cir. 2011) (it is "perfectly appropriate to require Class members to submit certain information proving that they are entitled to collect the relief"); *see also Perkins v. LinkedIn Corp.*, No. 13-4303, 2016 WL 613255, at *9 (N.D. Cal. Feb. 16, 2016) (noting propriety of "claim forms [to] require the claimant to attest to some fact under penalty of perjury"). In terms of proof, the claim form requires only that the class members provide reasonable proof that they have or had one or more NIBCO Products in their structures. To the extent a particular claimant has any difficulties in filing out the form, the settlement website has further explanations, and a toll-free number has been provided to assist filers with their questions. According to the parties, many claimants have utilized the website and called the toll-free number for assistance. Finally, if a claim is deemed by Angeion to be lacking in some way, then the claimant will be notified of the deficiency and

provided an opportunity to submit the additional documents and/or information necessary to perfect his or her Claim. Settlement Agreement, ¶ 20. The chance to cure a claim deficiency adequately addresses Palmer's apparent concern that a claimant would be denied of any payout simply because that claimant does not adequately support his/her claim through an initial submission.

I note that Palmer had no difficulty in filing his claim for $2,337 or submitting supporting documentation. *See* Palmer Decl. At 6, 9-25. Moreover, Palmer's answers during his deposition belie his objections made here. For example, while Palmer objects to questions on the claim form regarding insurance information and date of birth, when pressed, Palmer answered that it is reasonable for class members to identify their homeowners' insurer because it helps to avoid double recovery, or even fraud. *See* Palmer Dep., T51-53. Even more compelling, Palmer complains that it is improper to require a claimant's date of birth, but the claim form does not ask such a question. At deposition, Palmer conceded that, and could not explain how his objection came to assert that the date of birth was required. (Fn. 5) Accordingly, I do not find the claim form to be

confusing, or in any way unnecessary or invasive.

I also reject Palmer's objection that the claim process gives NIBCO too much input. First, Angeion, the independent claims administrator, is responsible for reviewing the claims and making eligibility determinations, not NIBCO. Settlement Agreement at ¶¶ 11-14; Angeion Decl. At ¶ 59. Second, apart from the right to identify for Angeion potentially fraudulent or duplicative Claims (which protects the fund and benefits all Settlement Class Members), NIBCO's rights are limited to challenging whether the claim presented a Qualifying Leak and, even then, the claim would not be denied unless Co-Lead Class Counsel agreed that it did not present a Qualifying Leak. *See* Settlement Agreement at ¶ 14.b. Absent such agreement by Co-Lead Class Counsel, the claim would then be approved. NIBCO's only recourse would be an appeal of the approved claim to the Independent Engineering Consultant jointly chosen by Co-Lead Class Counsel and approved by the Court. *Id.* NIBCO would bear the cost of the consultant's fees for any appeal it initiates. *Id.* In fact, this process was specifically negotiated by class counsel to ensure fairness. The contention that NIBCO can "independently reject any Claim it decides was caused

by improper installation practices" is not supported by the plain language of the Settlement Agreement.

Palmer further contends that the settlement cannot be approved because more information is needed on the number of class members and the value of their claims. Without that information, Palmer contends that the Court cannot make a reasonable comparison between the settlement funds and the class damages and recovery. At the outset, as to individual class members, the Settlement guarantees that a claimant, no matter how many settlement class members there are, can receive up to 70% of his/her individual losses (as well as re-plumbing of his/her property, in specified circumstances). Indeed, a notice need not set forth the exact amount of recovery each class member might receive from a settlement, particularly the type of damages in this case. *See e.g.*, *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999); *Varacallo*, 226 F.R.D. at 227; *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 253 (D. Del. 2002), aff'd, 391 F.3d 516 (3d Cir. 2004). An estimate of what the class might receive is merely the total of all such claimants. Thus, a notice need not address aggregate damages. Rather, "[t]he Rule 23(e) notice is designed to summarize the litigation and the settlement and 'to

apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation.'" *Prudential*, 148 F.3d at 327.

Palmer's objections are rejected in their entirety.

2. Collins and the Wilsons

These individual objectors argue that, generally, the Settlement should be more favorable to the class. Collins complains that the common fund should be larger. The Wilsons contend that the Settlement does not compensate them in full for their particular losses. As a preliminary matter, while the Court appreciates that the Settlement may not fully compensate these class members' actual losses, any settlement, however, is a compromise in exchange for certainty and finality. Indeed, seeking an amount that one might have obtained through a successful judgment and without considering the risks of continued litigation ignores the purpose of a settlement. *Henderson v. Volvo Cars of N. Am.*, No. 09-cv-4146, 2013 WL 1192479, at *9 (D.N.J. Mar. 22, 2013)("Objections based solely on the amount of the award lack merit") (citing cases); *O'Brien v. Brain*

Research Labs, LLC, No. 12-cv-204, 2012 WL 3242365, at *15 (D.N.J. Aug. 9, 2012)("[C]omplaining that a settlement should be 'better' . . . Is not a valid objection.")(citation omitted); *In re Imprelis Herbicide Mktg., Sales Practices & Prod. Liab. Litig.*, 296 F.R.D. 351, 365-66 (E.D. Pa. 2013) (rejecting objections to compensation which "do not sufficiently appreciate the fact that this is a settlement, not an award that will necessarily make all of the claimants whole . . . .") (emphasis in original, citations omitted). Rather, because I find the settlement terms, here, are fair, reasonable and adequate, *see infra*, the fact that the class members will not be compensated in full does not preclude me from approving the Settlement.

I turn next to the specific objections made by these individuals. First, Collins submits that a "mediation committee," acting after "2-3 estimates from qualified plumbers" for each claim, should replace the way claims are approved in the settlement. I disagree. What Collins has proposed would unnecessarily delay any payouts to class members, and indeed, consume more of the settlement funds due to the increased costs of administration. This would undoubtedly be a detriment to the class. For the

reasons already given, I find that the claim process is fair and adequate. Furthermore, Collins speculates that paying only 25% of each claim upfront may be a hardship to some class members. Although I appreciate that some members may be impacted in that regard, in the context of approving the settlement terms, the Court's role is to examine the settlement as a whole. And, in that light, I find that the settlement was structured to ensure that all claimants are given the same opportunity to file their claims. In that regard, paying early claimants a higher percentage would unduly prejudice those who file a claim later in the process.

The Wilsons argue that they did not receive a settlement notice and that they did not learn of the Settlement until shortly before the objection/exclusion deadline. In making that argument, the Wilsons concede that they did receive the notice, albeit towards the later end of the objection deadline, and that they objected timely. But, even if they had not received the notice in time, there is no requirement that notice actually be received by all potential class members. *See In re Prudential Ins. Co. Of America Sales Practices Litig.*, 177 F.R.D. 216, 231 (D.N.J. 1997) ("Courts have

consistently recognized that due process does not require that every class member receive actual notice so long as the court reasonably selected a means likely to apprise interested parties.") (citing cases).

Accordingly, having considered the relatively small number of objections and rejected them, I find that the class's favorable reaction to the settlement tilt in favor of approving the terms of the settlement.

C. Stage of Proceedings and Amount of Discovery Completed

The goal of the third *Girsh* factor is to "capture[] the degree of case development that class counsel accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001) (*citing General Motors*, 55 F.3d at 813). *See also Hegab v. Family Dollar Stores, Inc.*, No. CIV.A. 11-1206 CCC, 2015 WL 1021130, at *13 (D.N.J. Mar. 9, 2015) ("As explained in the discussion of the *Girsh* factors, this case has been litigated for over three years and involves uncertain legal issues. The parties reached the settlement after access to

extensive discovery and arm's length settlement negotiations. Thus, this factor weighs in favor of approval."); *In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 146 (D.N.J. 2013) ("Based upon the amount of time Class Counsel expended in the discovery process, in responding to motions to dismiss, and in negotiations, the Court concludes that Class Counsel had a thorough appreciation of the merits of the case prior to settlement. Accordingly, the Court determines that this factor weighs strongly in favor of settlement.").

Here, the Settlement Agreement was reached through multiple mediation sessions between experienced counsel. By then, in both cases, fact and expert discovery have closed since the inception of these cases. In that regard, an extensive amount of discovery has occurred as the parties spent nearly three years conducting discovery, which adequately informed class counsel of the appreciable risks if the cases went to trial. *Prudential*, 148 F.3d at 319. In *In re National Football League Players Concussion Injury Litig., 821 F.3d 410, 436 (3d Cir. 2016)*, the Third Circuit found this factor satisfied where no formal discovery at all had occurred, based on informal discovery and counsels' investigation. *Id.*

At 438-39. The discovery, here, is more than sufficient, "especially in view of the fact that greater knowledge, gained at the expense of delay in the resolution of these claims, would likely not have led to any substantial change of the legal and factual landscape." *Yaeger*, 2016 WL 4541861, at *9. Consequently, this factor also weighs in favor of approval.

D. Risks of Establishing Liability and Damages

"The fourth and fifth [*Girsh*] factors survey the potential risks and rewards of proceeding to litigation in order to weigh the likelihood of success against the benefits of an immediate settlement." *In re Johnson & Johnson*, 900 F. Supp. 2d at 483 (internal quotations omitted). "By evaluating the risks of establishing liability, the district court can examine what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *General Motors*, 55 F.3d at 814. In making this assessment, however, "a court should not conduct a mini-trial and must, to a certain extent, give credence to the estimation of the probability of success proffered by class counsel." *In re Lucent Techs., Inc. Sec. Litig.*, 307 F. Supp. 2d 633, 644-45 (D.N.J. 2004) (internal quotations

omitted). In complex cases, "[t]he risks surrounding a trial on the merits are always considerable." *Weiss v. MercedesBenz of N. Am.*, 899 F. Supp. 1297, 1301 (D.N.J. 1995).

Here, the likelihood of class members succeeding at trial is uncertain in view of NIBCO's steadfast arguments against liability and class certification. Further litigation entails substantial risks. Indeed, NIBCO has defended these cases vigorously, asserting numerous valid and substantial legal defenses that may have prevailed on summary judgment. For example, NIBCO contended that: (A) Plaintiffs' express warranty claims failed as a matter of law because NIBCO's Limited Warranty covered only manufacturing defects, while Plaintiffs asserted a design defect; (b) the economic loss doctrine defeated the claims; (c) because Plaintiffs themselves did not select the NIBCO Products for their homes, or even know that the Products were present, their failure to warn claims failed as a matter of law; and (d) many other legal defenses, including statutes of limitations. NIBCO also challenged Plaintiffs on the facts, offering potential alternative explanations for the failure of the Products as to each plaintiff. Assuming the cases proceeded past the summary judgment

stage, a trial would likely devolve into a "battle of the experts" on complex causation and other issues. Based on these circumstances, I find that Plaintiffs properly took into account the significant risk of an unfavorable outcome when negotiating the Settlement. Like the previous *Girsh* factors, these two factors also support final settlement approval.

E. Risks of Maintaining Class Certification

The risk of obtaining and maintaining class certification through trial also supports approval of the Settlement. Plaintiffs had not yet moved for class certification at the time of the settlement. Defendant would oppose class certification if this case proceeded; indeed, it filed opposition to Plaintiffs' motion for class certification prior to the Settlement. "The value of a class action depends largely on the certification of the class because, not only does the aggregation of the claims enlarge the value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 816 (3d Cir. 1995). "The prospects of obtaining and maintaining class certification, therefore, have a great impact on the range of

recovery one can expect to reap from the action." *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 90-91 (D.N.J. 2001) (citations omitted). However, in *Prudential*, "the Circuit stated that '[b]ecause the district court always possesses the authority to decertify or modify a class that proves unmanageable, examination of this factor in the standard class action would appear to be perfunctory.'" *Id.* (Quoting *Prudential*, 148 F.3d at 321). "The Circuit explained that '[t]here will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement.'" *Id.*

Here, I note that Plaintiffs in both cases briefed class certification. NIBCO, however, responded as to why certification of any litigation class would be improper. Thus, the class had yet to be certified before settlement, and there is no guarantee of success; the risks in this regard favor settlement. Moreover, even if the class was certified for other than settlement purposes, "[t]here will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement." *In re Prudential Ins. Co.*, 148 F.3d at 321; *see also In re*

Rent-Way Securities Litigation, 305 F. Supp. 2d 491, 506-07 (W.D. Pa. 2003) ("[A]s in any class action, there remains some risk of decertification in the event the Propose[d] Settlement is not approved. While this may not be a particularly weighty factor, on balance it somewhat favors approval of the proposed Settlement."). Accordingly, this factor, too, favors settlement.

F. Defendants' Ability to Pay

This *Girsh* factor "addresses whether Defendants could withstand a [monetary] judgment for an amount significantly greater than the [proposed] Settlement." *In re Johnson & Johnson*, 900 F. Supp. 2d at 484 (internal quotations omitted); *Cendant*, 264 F.3d at 240 (same). "[I]n any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the existing settlement." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 323 (3d Cir. 2011) (en banc). Rather, a defendant's ability "to withstand a greater judgment is outweighed by the risk that Plaintiffs would not be able to achieve a greater recovery at trial." *See In re Philips/Magnavox Television Litig.*,

No. 09-3072-CCC, 2012 WL 1677244, *13 (D.N.J. May 14, 2012). As such, considering the uncertainties of trial and the possible difficulty in ultimately proving class liability and damages against NIBCO, the factor is, at the very least, neutral.

G. Range of Reasonableness of Settlement

"The last two [*Girsh*] factors evaluate whether the settlement represents a fair and good value for a weak case or a poor value for a strong case." *In re Johnson & Johnson*, 900 F. Supp. 2d at 484 (internal quotations omitted). "In conducting this evaluation, it is recognized that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and [courts should] guard against demanding to[o] large a settlement based on the court's view of the merits of the litigation." *Id.* At 484-85 (internal quotations omitted). These factors inquire "'whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial.'" *Pro v. Hertz Equip. Rental Corp.*, No. 06-3830, 2013 WL 3167736, at *5 (D.N.J. June 20, 2013) (quoting *Prudential*, 148 F.3d at 322).

Here, given the risks on liability, damages, and class certification, and with the opportunity to

receive at least 25% and up to a 70% of claimed damages, "the settlement represents a fair deal for the class." *Haas v. Burlington Cty.*, 2019 WL 413530, at *8 (D.N.J. Jan. 31, 2019) ("Considering the relatively old age of the case and the dispute between Defendants and their insurer, it appears Plaintiffs are correct in asserting this is reasonable in light of the best possible recovery and the attendant litigation risks."); *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 461-62 (D.N.J. 2008)(finding risks to plaintiffs from "difficult questions of law" and "inherent risks" of conflicting expert testimony). I find that the Settlement falls within a range of reasonableness, given the risks to Plaintiffs of achieving a worse outcome and the possibility of a more favorable outcome if the case went to trial. This factor also favors approval of settlement.

In sum, the Settlement Agreement is fair, adequate and reasonable under all of the *Girsh* factors and it is approved.

IV. Representative Plaintiffs' Request for an Incentive Award

"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." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 333 n. 65 (3d Cir. 2011) (quotations omitted); *Benelli v. BCA Fin. Servs., Inc.*, 324 F.R.D. 89, 111 (D.N.J. 2018); *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").

Here, 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, to apply for incentive 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 a later time, are seeking a lesser Service Award of $2,500 (also representing a per-household limit). All Service Awards would be distributed from the

settlement funds. *Id.*

I find that the incentive awards are reasonable and compensable. Plaintiffs who vigorously litigated *Cole* and *Meadow* through discovery, devoted significant time to these matters. They personally participated in discovery on behalf of the class by producing documents, answered interrogatories, had their depositions taken, and had their homes inspected by Defendant's experts. According to counsel, these plaintiffs frequently consulted with them regarding the case, and they personally devoted time to review and approve the Settlement Agreement. I find that these plaintiffs merit the requested $10,000 award. The remaining class representatives, who were added at a later time, deserve the $2,500 award they seek, since they were not subjected to discovery or to inspection of their homes, but were otherwise involved in this lawsuit on behalf of the settlement class by 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").

I note that the amounts requested here are similar to amounts awarded to class representatives in other class action settlements. *See Bredbenner v. Liberty Travel, Inc.*, No. 09-905 (MF), 2011 WL 1344745, at *23- 24 (D.N.J. Apr. 8, 2011) (approving incentive award payments of $10,000 to each of the named plaintiffs); *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. at 125 (approving incentive awards totaling $85,000 – which amounted to $5,000 to each of the class representatives); *Yaeger*, No. 14-04490, ECF No. 109 (approving $3,500 incentive award to each of nine class representatives for a total of $31,500); *see also Henderson v. Volvo Cars of N. Am., LLC*, No. 09-4146, 2013 WL 1192479, at *19 (D.N.J. Mar. 22, 2013) (approving incentive awards between $5,000 to $6,000 each of six class representatives).

V. Attorneys' Fees and Costs

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Attorneys' fees are typically assessed through the percentage-of-recovery method or through the lodestar method. *In re AT&T Corp. Secs. Litig.*, 455 F.3d 160,

164 (3d Cir. 2006). The percentage-of-recovery method applies a certain percentage to the settlement fund. *See Welch & Forbes, Inc. V. Cendant Corp.*, 243 F.3d 722, 732 n.10 (3d Cir. 2001). The lodestar method multiplies the number of hours class counsel worked on a case by a reasonable hourly billing rate for such services. *In re AT&T*, 455 F.3d at 164. A court, when approving a fee award, must first categorize the action it is adjudicating and then "primarily rely on the corresponding method of awarding fees." *In re GM Trucks Litig.*, 55 F.3d 768, 821 (3d Cir. 1995).

Importantly, the percentage of the fund method is more appropriate, where, as here, there is a common fund. *See AT&T*, 455 F.3d at 164 (finding 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*, 226 F.R.D. at 249; *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.").

When analyzing a fee award in a common fund case, courts consider several factors, many of which are similar to the *Girsh* factors as enunciated previously. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d. 294, 301 n. 9 (3d Cir. 2005). These factors were first applied by the Third Circuit in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000). They include:

> (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.

Id. At 301 (citation omitted).

This list is not exhaustive. In *Prudential*,

the Third Circuit noted three other factors that may be relevant and important to consider: (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, *Prudential*, 148 F.3d at 338; (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, *Id.* At 340; and (3) any "innovative" terms of settlement, *Id.* At 339. The fee award reasonableness factors "need not be applied in a formulaic way" because each case is different, "and in certain cases, one factor may outweigh the rest." *Rite Aid*, 396 F.3d at 301 (quoting *Gunter*, 223 F.3d at 195 n.1). A court may give some of these factors less weight in evaluating a fee award. *See In re Cendant*, 264 F.3d at 283; *Prudential*, 148 F.3d at 339. Moreover, the analysis of the *Gunter* factors overlaps with the *Grish* factors used to assess the appropriateness of the settlement. In that regard, the Court will refer to its earlier findings when reviewing this fee application.

I further note the Third Circuit has

recommended that district courts use the lodestar method to cross-check the reasonableness of a percentage-of-recovery fee award. *See Rite Aid*, 396 F.3d at 305. The cross-check is performed by dividing the proposed fee award by the lodestar calculation, resulting in a lodestar multiplier. "[W]hen the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award." *Rite Aid*, 396 F.3d at 306. The lodestar cross-check, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method. In re AT&T, 455 F.3d at 164. The Third Circuit has also stated that a lodestar cross-check entails an abridged lodestar analysis that requires neither "mathematical precision nor bean counting." *Rite Aid*, 396 F.3d at 305. In analyzing the lodestar crosscheck, the court need not review actual billing records. *Id.* At 307.

Here, class counsel request a fee of 29.885% of the gross settlement funds, which amounts to approximately $12.3 million. I note at the outset that the parties have been litigating this matter for over six years, and a substantial discovery process has taken place, wherein experts were consulted and

numerous depositions have been taken. In addition, multiple motions were filed in this case. In light of these efforts, class counsel and their staff represent that they spent over 17,000 hours in prosecuting Plaintiffs' claims in these cases. Indeed, counsel's rates vary between attorneys and paralegals, depending on the position, experience level, and locale of the particular attorney. Having reviewed the attorneys' declarations, the Court is satisfied that the hourly rate charged for each of the attorneys and his/her staff is based upon a reasonable hourly billing rate for such services in the given geographical area, the nature of the services provided and the experience of the lawyer. *Gunter*, 223 F.3d at 195. I will perform the lodestar check with these figures.

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 decrease because Co-Lead Counsel necessarily must perform additional work over the six-year claim period. When the work of the other firms that comprise the sum total of all class counsel is

included, the current multiplier is reduced to 1.33. I find that this lodestar amount is reasonable. Indeed, in the Third Circuit, multipliers of up to 4.0 have been permitted. *Prudential*, 148 F.3d at 341. Following the Third Circuit's lead, district courts have frequently awarded fees where multiplier cross-checks have produced higher figures than the cross-check here. *See 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); *In re AT&T*, 455 F.3d at 172; *Weiss*, 899 F. Supp. At 1304; *Muchnik v. First Fed. Savings & Loan Ass'n*, 1986 WL 10791 (E.D. Pa. 1986). I will now analyze each of the *Gunter* factors.

A. Size of Fund and Number of Persons Benefitted

The first Gunter factor "consider[s] the fee request in comparison to the size of the fund created and the number of class members to be benefitted." *Rowe v. E.I. DuPont de Nemours & Co.*, 2011 WL 3837106, at *18 (D.N.J. Aug. 26, 2011). That is because the sheer magnitude of damages has a heavy impact on the amounts defendants are willing to pay to settle their

liability. Here, as I have already noted, the parties have diligently sent out hundreds and thousands of notices to potential class members and a substantial number of claims have been filed by those members. Indeed, all class members who files a claim will receive up to 70% of their actual losses as a result of NIBCO's alleged consumer-related conduct. As the Court has determined and set forth in detail previously, I reiterate here that the $43.5 million gross settlement fund is substantial, and it provides a fair and reasonable recovery for the members of the class. In that regard, class counsel were able to obtain a sizeable result on behalf of the class despite the substantial risks they faced in pursuing their claims in this forum and ultimately, establishing liability. Moreover, many thousands of people would likely participate in settlement, given that a fair number of notices was sent to class members. Hence, this factor supports the fee application.

B. 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 are only three objections to the Settlement Agreement, including the request for attorneys' fees and expenses. (Fn. 6) As numerous district courts have held, the lack of substantial objections "supports approval of the requested fee." *In re Flonase Antitrust Litig.*, No. 08-cv-3149, 2013 WL 2915606, at *7 (E.D. Pa. June 14, 2013); *see also In re Schering-Plough Corp. Enhance ERISA Litig.*, No. 08-cv-1432, 2012 WL 1964451, at *6 (D.N.J. May 31, 2012); *Moore v. Comcast Corp.*, No. 08-cv-773, 2011 WL 238821, at *5 (E.D. Pa. Jan. 24, 2011). The few objections lodged in this case supports approval of class counsel's requested fee award.

C. The Skill and Efficiency of Class Counsel

To measure the quality of counsel, courts examine the result achieved, the difficulties faced, and the speed and efficiency of the recovery, the experience and expertise of counsel, and the performance and quality of opposing counsel. *Milliron v. T-Mobile USA, Inc.*, 2009 WL 3345762, at *10 (D.N.J. Sept. 10, 2009); *Hall v. AT&T Mobility LLC*, No.

07-5325, 2010 WL 4053547, at *19 (D.N.J. Oct. 13, 2010)(finding that class counsel's skill and efficiency is "measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.").

Here, the Settlement obtained for Plaintiffs and the class would not have been achieved without the skill and experience of class counsel. As I noted earlier, NIBCO vigorously opposed Plaintiffs at every turn; however, 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 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. While pretrial motions were ultimately not decided because the parties reached the

Settlement, counsel's work on those motions ostensibly led to the parties' decision to engage in mediation. In all phases of this case, therefore, class counsel performed with a high degree of skill necessary to produce the favorable results obtained here. Indeed, as this Court has determined earlier, class counsel are skilled and experienced in litigating these types of class action cases. Class counsel have prosecuted this action against prominent national firms with ample resources — Morgan Lewis & Bockius and Lathrop Gage; in that regard, class counsel's performance justifies their fee request. *See, e.g.*, *McCoy*, 569 F. Supp. 2d at 476 (listing "the performance and quality of opposing counsel" as a factor in evaluating the quality of class counsel's work); *Ikon*, 194 F.R.D. at 194; *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985) ("The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work."), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

D. The Complexity and Duration of the Litigation

Cole has been pending for over five years. *Meadow* has been pending for more than three years. As I noted earlier, both cases were complex, involving multiple claims under the laws of many states. The

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 a lengthy 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. The motions for class certification, summary judgment, and exclusion of experts on both sides raised challenging legal issues. Should this case have proceeded to trial, the Court anticipates it being complicated, as competing experts will give testimony on scientific causation issues. In conclusion, the Court finds that by successfully negotiating a settlement, class counsel have provided the class with a substantial benefit at this juncture. *See In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 132 (D.N.J. 2002)("'the single clearest factor reflecting the quality of class counsels' services to the class are the results obtained'")(quoting *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 149 (E.D. Pa. 2000)). Thus, this factor also weighs in favor of approving fee request.

E. The Risk of Nonpayment

Class counsel handled these matters on a contingent basis, taking the risk that the litigation

would yield no or very little recovery, which would leave them uncompensated for their time, as well as for any out-of-pocket expenses. Even in the face of the risks, counsel "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. Courts across the country have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. 08-2177, 2013 WL 5505744, at *28 (D.N.J. Oct. 1, 2013). As such, this factor also weighs in favor of approving the requested fees.

F. Amount of Time Devoted to the Litigation

The sixth *Gunter* factor looks at counsel's time devoted to the litigation. *Gunter*, 223 F.3d at 199. After six years of litigation, needless to say, class counsel have devoted a significant time to this litigation. Having accepted the responsibility of prosecuting this class action on a contingent fee basis and without any guarantee of success or award, counsel nonetheless was able to negotiate a settlement that will benefit the class members. In addition, the hours expended by class counsel thus far does not

include the work counsel will expend overseeing the settlement administration, including the distribution of the Settlement's proceeds. This additional work represents a material portion of time that counsel will spend on this case that is not reflected in the lodestar calculation reflected above. *See, e.g., In re Merck & Co., Inc. Vytorin ERISA Litig.*, No. 08-cv-285, 2010 WL 547613, at *11 (D.N.J. Feb. 9, 2010)(noting "the time dedicated and expenditures incurred do not include costs that will arise immediately in the future, such as the settlement hearing conducted before this Court"). Considering the significant time and effort expended, and will continue to expend, by class counsel, the Court concludes class counsel's efforts also weigh in favor of approval.

G. Awards in Similar Cases

The comparison of the fee sought here with fees awarded in recent class actions militates in favor of approving the fee. Although there is no general rule, the Third Circuit has observed that fee awards in common fund cases range from 19% to 45% of the settlement fund. *In re Lucent Tech.*, 327 F.Supp.2d at 432 (listing more than twenty recent actions where courts have approved fee awards between 22.5% and 33 1/3%); *Yedlowski v. Roka Bioscience*,

Inc., 2016 WL 6661336, at *22 (D.N.J. Nov. 10, 2016)("[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 (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. *See, 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*, 2016 WL 6778218, at *26-29 (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"). Accordingly, this last factor also weighs in favor of approval.

Having analyzed all of the factors, the Court finds that a fee request of 29.885% of total the settlement funds (approximately $12.3 million) is reasonable, and as such, the Court approves the request.

VI. Reimbursement for Class Counsel Expenses

Expenses are compensable in a common fund case if they are of the type typically billed by attorneys to paying clients in the marketplace. *In re Safety Component*, 166 F.Supp.2d at 108. Indeed, "[c]ounsel 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*, 166 F. Supp. 2d at 108). In prosecuting these cases, class counsel have incurred $1,254,768.94 in expenses. The expenses are documented in counsel's certifications by category. Having reviewed these expenses, I find that they were all reasonably necessary to litigate the instant matters, and indeed, they reflect the costs typically associated with litigating these types of claims. As such, the requested expenditures for over six years of litigation is approved.

(The following are the footnotes.)

(Fn. 1) As it stands now, interim class

counsel consists of Messrs. Greenberg, Sauder, Schelkopf, and Schwartz, on behalf of their three law firms.

(Fn. 2) Bandas has been judicially reprimanded for abusive settlement-objection tactics. In fact, a district court judge in Northern District of Illinois has ordered Bandas to include a copy of her opinion concerning his objector conduct in any further *pro hac vice* motion filed in connection with future settlement objections. *Edelson PC v. Bandas Law Firm PC*, No. 16-11057, 2019 U.S. Dist. LEXIS 9319 (N.D. Ill. Jan. 17, 2019)("Seeking admission, *pro hac vice* or otherwise, to practice in any state or federal court without fully and truthfully responding to all questions on the application and without attaching a copy of this judgment"). Bandas has done so in his *pro hac vice* motion filed here.

(Fn. 3) I note that in a supplemental submission, Palmer has indicated that he intends to correct his testimony as to the number of class action settlements wherein he lodged objections.

(Fn. 4) Indeed, prior to the final settlement hearing, more than 150 more claims have been filed since March 2019.

(Fn. 5) It appears the objections made by

Palmer were drafted and raised by his attorneys rather than Palmer himself, and indeed, many have been cut-and-pasted from an objection in an unrelated litigation.

(Fn. 6) As I have indicated earlier, while a total of seven objections were made, prior to the final settlement hearing, four objectors withdrew their objections.

C E R T I F I C A T E

PURSUANT TO TITLE 28, U.S.C., SECTION 753, THE FOLLOWING TRANSCRIPT IS CERTIFIED TO BE AN ACCURATE TRANSCRIPTION OF MY STENOGRAPHIC NOTES IN THE ABOVE-ENTITLED MATTER.

S/Vincent Russoniello
Vincent Russoniello, CCR
Certificate No. 675