UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AL'S DISCOUNT PLUMBING; ACCURATE BACKFLOW AND PLUMBING SERVICES, INC.; HOMESTEAD HEATING & PLUMBING, LLC; AIRIC'S HEATING & AIR CONDITIONING, INC.; PRIME SOURCE PLUMBING & HEATING CORP.; RYAN PLUMBING, INC.; MAZZOLA PLUMBING HEATING & GAS FITTING, INC.; SOUTH SHORE HEATING AND PLUMBING, INC.; ALL KNIGHT PLUMBING, HEATING AND AIR CONDITIONING, INC.; PLUMB PERFECTION, LLC, individually and on behalf of all others similarly situated, Plaintiffs, v. VIEGA LLC, Defendant.	Case No: 19-cv-00159 Honorable Christopher C. Conner Electronically Filed

INDIRECT PURCHASER PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Pursuant to Rule 23(c) of the Federal Rules of Civil Procedure, Plaintiffs seek (a) final approval of a class-wide settlement with Viega LLC ("Viega") and final certification of the Settlement Classes; and (b) final approval of the proposed Plan of Distribution of the net settlement proceeds to Multi-State Settlement Class Members.[1]

For the reasons set forth herein, Plaintiffs respectfully submit that the proposed Settlement is an excellent result that is fair, reasonable, and adequate and warrants final approval. Final certification of the Settlement Classes is also appropriate because the class certification requirements of Rule 23(a) and (b) are satisfied.

II. BACKGROUND

A. History of the Litigation

Plaintiffs filed a class action lawsuit alleging that Viega, since 2015, had made wholesaler/distributor access to its carbon steel press fittings contingent upon distributor agreements not to sell Viega's competitors' copper press fittings and charged higher prices to distributors that stocked competitor press fittings. Plaintiffs allege this caused plumbers who purchased indirectly from wholesalers to pay more for Viega ProPress® copper press fittings. Plaintiffs' complaint asserts violations of the Sherman and Clayton Acts, as well as violations of the antitrust and consumer protection laws in 26 states whose laws permit indirect purchasers to bring claims for violation of the antitrust laws.[2] Viega moved to dismiss. The motion had been fully briefed by the parties (ECFs 47, 50, 56), including supplemental briefing (ECFs 77, 78); it has since been deemed moot by the Court. (ECF 100). Pritzker Decl. ¶10.

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[1] All capitalized terms in this Memo. have the same meaning as set forth in the Settlement Agreement; *see* Settlement Agreement, a true and correct copy which is attached as **Exhibit 1** to this brief.

[2] Alabama, Arizona, California, Connecticut, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and the District of Columbia.

The parties exchanged discovery starting in June 2019. Viega produced more than 350,000 pages of documents as well as state-specific transactional sales data for its copper press fitting sales. Pritzker Decl. ¶11. Each Plaintiff responded to written discovery and, together, produced approximately 10,000 documents. *Id*., ¶12. All but three of the Plaintiffs submitted to a physical inventory inspection and were deposed. *Id*. A third-party competitor produced roughly 175,000 documents under subpoena. *Id.*, ¶11. Plaintiffs also consulted with an economist. *Id.*, ¶14.

B. The Settlement and Notice Program

The Settlement is the result of two full days of arms'-length mediation sessions before Robert Meyer Esq. of JAMS, held on May 18 and June 1, 2020, and attended by Interim Co-Lead Class Counsel, Viega's counsel, and a business representative for Viega. Pritzker Decl. ¶15. The Settlement includes: (1) a $10 million Cash Settlement Fund[3] for a cash distribution to eligible Multi-State Settlement Subclass Members and payment of class notice and settlement administration expenses, Class Counsel's attorneys' fees and litigation costs, and service awards to the Named Plaintiffs; (2) a $5 million Rebate Program that provides a 4% rebate to eligible Multi-State Settlement Class Members on future purchases of Viega ProPress® copper press fittings (up to a per claimant maximum of $500); and (3) forward-looking business practice changes in which Viega agrees to revise certain pricing policies for the sale of press fittings to wholesalers/distributors. *See* **Exhibit 1** attached to Plaintiffs' brief, the *Agreement*.

By Order dated September 18, 2020, the Court: (1) preliminarily approved the Settlement; (2) found the proposed Settlement and Plan of Distribution were sufficiently fair, reasonable, and adequate to authorize the dissemination of Notice to the Settlement Classes; (3) preliminarily certified the Settlement Classes; and (4) authorized dissemination of Notice by mail, digital advertising, and publication. (ECF 99).

[3] Viega paid the full $10 million into a Qualified Settlement Account accruing interest on September 30, 2020. Settlement Administrator Decl., ¶36; *see also* Addendum to *Agreement* (ECF 96 and attached to Exhibit 1).

This Court's Preliminary Approval Order found "the dissemination of the Notice and Summary Notice in the manner set forth herein constitutes the best notice practicable under the circumstances and is valid, provides due and sufficient notice to all persons entitled to notice and complies fully with the requirements of Federal Rule of Civil Procedure 23 and due process." (ECF 99 at ¶16). There is no reason to revise that view. Pursuant to that Order, on October 1, 2020, Notice of the Settlement and Proposed Plan of Distribution was mailed, together with a Settlement Fund claim form and Rebate Program claim form, to 88,169 Multi-State Settlement Class Members, and emailed to 9,074 members of that Class for which the Settlement Administrator had email addresses. Settlement Admin Decl., ¶¶13, 19 ("Azari Decl."). Direct notice was supplemented by targeted digital advertising that, as of this date, generated 74,675 displays resulting in 1,138 "clicks". *Id*., ¶25. Summary Notice was published in the November 2020 editions of *Plumber* and *PHC News*, national publications serving residential and commercial plumbers. *Id*., ¶¶20, 22. Notice was also provided on www.pressfittingssettlement.com. *Id*., ¶¶27-28.

Requests to exclude or objections to the Settlement must be postmarked by November 30, 2020. To date, six potential Class Members have requested to be excluded. Azari Decl. ¶32. Only one objection, from a repeat "serial" objector, has been filed. (ECF 102). Plaintiffs will substantively respond to this objection on reply.

III. FINAL CERTIFICATION IS APPROPRIATE

Plaintiffs request this Court finally certify the following Settlement Classes, which were preliminarily certified in the Preliminary Approval Order (ECF 99):

> **Nationwide Injunctive Class:** all indirect purchasers of Viega ProPress® copper press fittings sold by wholesale distributors in the United States during the Class Period (January 29, 2015 to September 19, 2020).
>
> **Multi-State Settlement Subclass:** all indirect purchasers of Viega ProPress® copper press fittings sold by wholesale distributors in, or made from a purchaser's principal place of business located within, the states of Alabama, Arizona, California, Connecticut, Iowa, Kansas, Massachusetts,

> Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin and the District of Columbia during the Class Period. Excluded from the Class are Persons who have settled with, released, or otherwise had claims adjudicated on the merits against Viega arising from the same core allegations or circumstances as the Litigation Claims, occurring after the date of such settlement, release, or adjudication on the merits; Any purchases of ProPress® copper press fittings directly from Viega for the purpose of resale; Employees of Viega; and The Honorable Christopher C. Conner, or any judicial officer presiding over this Litigation, and members of his or her immediate family and any judicial staff or officer assigned to the Litigation.

"The requirements of [Rule 23] (a) and (b) are designed to ensure that a proposed class has 'sufficient unity so that absent class members can fairly be bound by decisions of class representatives." *In re Ins. Brokerage*, 579 F.3d 241, 257 (3d Cir. 2009). 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. *Id.* "If all of the prerequisites of Rule 23(a) are satisfied, a class action may be maintained if the standards set forth in Rule 23(b) are satisfied as well." *Id.*; *See also Sullivan v. DB Investments, Inc*., 667 F.3d 273, 296 (3d Cir. 2011). When faced with a settlement class, "the concern for manageability that is a central tenet in the certification of a litigation class is removed from the equation." *Sullivan,* 667 at 302. There is a "strong presumption in favor of voluntary settlement agreements…especially strong in class actions and other complex cases... because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts." *Id.*, at 311-12 (citations omitted).

Plaintiffs seek certification of the Nationwide Injunctive Class under Rule 23(b)(2), which authorizes class actions seeking injunctive relief in instances where the defendant acted or refused to act on grounds that apply generally to the class. Plaintiffs

seek certification of the Indirect Purchaser State Damages Class under Rule 23(b)(3), which requires "the court [to] find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Ins. Brokerage*, 579 F.3d at 257.

A. The Settlement Classes Satisfy the 23(a) Standards

1. The Settlement Classes are So Numerous that Joinder is Impracticable

The Settlement Classes are comprised of indirect purchasers of Viega ProPress® copper press fittings from wholesale distributors during the period January 2015 to September 18, 2020. Notice was sent to roughly 88,169 licensed plumbers. *See* Azari Decl., ¶13. "[G]enerally 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, 226-227 (3d Cir. Pa. 2001). Numerosity is unquestionable.

2. There Are Questions of Fact and Law Common to the Settlement Classes

"Rule 23(a)(2)'s commonality element requires that the proposed class members share at least one question of fact or law in common with each other." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 527-528 (3d. Cir. 2004). Commonality "does not require an identity of claims or facts among class members." *Ins. Brokerage*, 579 F.3d at 264 (citations omitted). This action focuses on Viega's conduct, "common as to all of the class members", so commonality exists. *Sullivan*, 667 F.3d at 299-300. "That is exactly what is presented here, for the answers to questions about [Defendant's] alleged misconduct and the harm it caused would be common as to all of the class members, and would thus inform the resolution of the litigation if it were not being settled." *Id*.

3. The Claims and Defenses of the Settlement Class Representatives Are Typical

"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." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 259 F.3d 154, 183-184 (3d Cir. 2001). Here, "the claims of the representative plaintiffs arise from the same alleged wrongful conduct on the part of" Viega and "from the same general legal theories." *Warfarin*, 391 F.3d at 532. Indeed, "the claims made by Plaintiffs and those made on behalf of the Settlement Class Members are indistinguishable, encompassing identical allegations from the same course of action taken by the . . . Defendants." *Ins. Brokerage*, 579 F.3d at 265. "Consequently, the named Plaintiffs' claims are typical of those brought by the Settlement Class Members at large." *Id*.

4. The Settlement Class Representatives Will Fairly and Adequately Protect the Interests of the Class

The "adequacy" prong of Rule 23(a) is met when "the attorneys representing the named plaintiffs are 'clearly well qualified and experienced class action attorneys', and the interests of the named plaintiffs 'are not antagonistic to those of the absent class members.'" *Ins. Brokerage*, 579 F.3d at 258 (quoting and affirming district court). This Court recognized that Interim Settlement Class Counsel are experienced and qualified by appointing them to serve as interim class counsel in this litigation. ECF 16, 99. Moreover, "the named parties…as well as consumers from the indirect purchaser states, all share[] the same goal of establishing the liability of [Defendants], suffered the same injury resulting from the overpayment for [copper press fittings], and [seek] essentially the same damages by way of compensation for overpayment." *Warfarin*, 391 F.3d at 532. Adequacy is easily satisfied.

B. The Settlement Classes Satisfy the Rule 23(b) Standards

1. The Settlement Classes Satisfy Rule 23(b)(2)

Rule 23(b)(2) authorizes class certification when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Such circumstances exist when the relief

sought will "benefit the entire class", and when "the interests of the class members are so like those of the individual that injustice will not result from their being bound by such judgment in the subsequent application of principles of res judicata." *Sullivan*, 667 F.3d at 317-318. Actions seeking to "define the relationship between the defendant and the 'world at large,' will usually satisfy the requirement." *Id*.

In *Sullivan*, the Court upheld certification of a final settlement for classes similar to this, noting that the defendant's "anticompetitive behavior 'caused the entire membership of all classes to pay artificially inflated prices,' and that, in the absence of injunctive relief, all classes would continue to pay artificial premiums." 667 F.3d at 318. There, as here, the plaintiffs' "claims demonstrate[d] shared interests between the members of the putative class, and, these allegations, if proven, would support injunctive relief respecting the class as a whole." *Id*. Given this, Plaintiffs satisfy Rule 23(b)(2). The Court should certify the Nationwide Injunctive Class.

2. The Settlement Classes Satisfy Rule 23(b)(3)

Rule 23(b)(3) requires "'the court [to] find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'" *Ins. Brokerage*, 579 F.3d at 257 (quoting Fed. R. Civ. P. 23(b)(3)). This case easily shows both.

The Third Circuit routinely affirms predominance in 23(b)(3) settlement classes in antitrust cases. *See Warfarin*, 391 F.3d at 518; *Sullivan*, 667 F.3d at 299; *Ins. Brokerage*, 579 F.3d at 285. Indeed, in *Warfarin* and *Sullivan*, it affirmed predominance findings in multi-state indirect purchaser antitrust classes similar to the one proposed here (*Warfarin*, 391 F.3d at 529; *Sullivan*, 667 F.3d at 297), observing that, when faced with a settlement class, a court need not be "concerned with formulating some prediction as to how [variances in state law] would play out at trial, for the proposal is that there be no trial." *Sullivan*, 667 F.3d at 303; *see also Warfarin*, 391 F.3d at 529

(variations in state law "are irrelevant to certification of a settlement class").

This case, like *Sullivan*, *Insurance Brokerage*, and *Warfarin*, presents prototypical predominance: "[E]ach class member shares a similar legal question arising from whether [Defendants] engaged in a broad conspiracy" and the "plaintiffs likewise share common factual questions as to whether [Defendants] 'acted in concert to artificially fix, maintain, and stabilize prices'" of copper press fittings. *Id*. (citations omitted). Superiority, in turn, "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." *Warfarin*, 391 F.3d at 533-534. Here, the "alternative available methods" are multiple individual cases, or no case at all for many Class Members, whose purchases were limited. A class action is not just superior, but likely the only alternative, and the final requirement of Rule 23(b) is accordingly satisfied.

IV. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE, AND SHOULD BE APPROVED BY THE COURT

Under Rule 23(e), a proposed settlement of a class action should be approved if it is "fair, adequate and reasonable." *See also In re Prudential co. Amer. Sales Agent Actions*, 148 F.3d 283, 316 (3d Cir. 1998); *Stoetzner v. U.S. Steel Corp*., 897 F.2d 115, 118 (3d Cir. 1990); *Walsh v. Great Atl. & Pac. Tea Co., Inc*., 726 F.2d 956, 965 (3d Cir. 1983). The Settlement satisfies this standard.

A. Public Policy Favors Settlement of Class Actions

Federal courts consistently recognize the longstanding public policy favoring the settlement of class actions. *See, e.g., Carson v. American Brands, Inc.*, 450 U.S. 79, 88, n.14 (1988). Settlements are particularly favored in complex actions such as this one. *See, e.g., Warfarin*, 91 F.3d at 535 ("there is an overriding public interest in settling class action litigation, and it should therefore be encouraged"); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig*., 55 F.3d 768, 784 (3d Cir. 1995) ("*General Motors*") ("the law favors settlement, particularly in class actions and other complex

cases where substantial judicial resources can be conserved by avoiding formal litigation"); *Dickerson v. York Int'l Corp*., No. 1:15-CV-1105-CCC, 2017 WL 3601948, at *6 (M.D. Pa., Aug. 22, 2017) (citing *Gen. Motors*: "[w]ithin the Third Circuit, it is well-established that the 'law favors settlement,' especially in class actions, when considerable resources might be saved by early and amicable resolution of a case.").

B. The Settlement is Entitled to a Presumption of Fairness

Recognizing that settlement represents an exercise of judgment by the negotiating parties, courts "apply an initial presumption of fairness when reviewing a proposed settlement where: '(1) the settlement negotiations occurred at arms' 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.'" *Warfarin*, 391 F.3d at 535 (quoting *In re Cendant Corp. Litig*., 264 F.3d 201, 232, n.18 (3d Cir. 2001)). Courts find "it is appropriate to give substantial weight to the recommendations of experienced attorneys, who have engaged in arms-length settlement negotiations, in making this determination." *In re Auto. Refinishing Paint Antitrust Litig*., MDL 426, 2003 WL 23316645, at *2 (E.D. Pa. Sept. 5, 2003); *see also Petruzzi's, Inc. v. Darling-Delaware Co., Inc.*, 880 F. Supp. 292, 301 (M.D. Pa. 1995) ("[t]he opinions and recommendation of such experienced counsel are indeed entitled to considerable weight").

All of the presumption of fairness factors apply here:

- The Settlement was reached after arms'-length negotiations and discussions conducted through an experienced mediator;
- Prior to negotiating the Settlement, Interim Settlement Class Counsel reviewed and analyzed hundreds of thousands of pages of documents produced by Viega and a third-party competitor, including relevant transactional data in the 26 states in the Multi-State Settlement Class during the Class Period, and exchanged written discovery; as well, the majority of Plaintiffs submitted to depositions and inventory inspections;
- Interim Settlement Class Counsel and Viega's counsel have significant experience in antitrust, class action, and other complex litigation; and
- To date, only one "objector" – a serial, repeat objector who has been disbarred

for misconduct with prior class action objections – has objected to the Settlement. The deadline for objecting is November 30, 2020.

Therefore, the Settlement warrants the presumption of fairness. *See Warfarin*, 391 F.3d at 535; *Dickerson*, 2017 WL 3601946 at *7.

C. The *Girsh* Factors Strongly Support Approval of the Settlement

The Third Circuit has established a multi-factor test that courts "must still explore" when examining a settlement's terms, "even after finding the presumption [of fairness] applies." *Dickerson*, 2017 WL 3601946 at *7; *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). The primary so-called *Girsh* factors are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and 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 trial; (7) the ability of 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 in light of all the attendant risks of litigation. *Cendant*, 264 F.3d at 232 (citing *Girsh*, 521 F.2d at 157). These factors are satisfied here; the Settlement is fair, reasonable, and adequate.

1. Complexity, Expense and Likely Duration of the Litigation

The first *Girsh* factor considers "probable costs in both time and money, of continued litigation." *Dickerson*, 2017 WL 3601946 at *7 (internal citation omitted). This factor weighs strongly in favor of approval of the Settlement.

As an initial matter, "[a]n antitrust class action is arguably the most complex action to prosecute…. The legal and factual issues involved are always numerous and uncertain in outcome." *In re Linerboard Antitrust Litig.*, 296 F.Supp.2d 568, 577 (E.D. Pa. 2003) (internal quotation and citation omitted)).

In the absence of settlement, significant costs in terms of both time and money would result from continued litigation. While substantial written discovery had been exchanged and several Plaintiffs' depositions were taken, at the time the Settlement was

reached a motion to dismiss remained pending, depositions of Viega's executives had been scheduled, and class certification briefing was looming. In addition to discovery costs, continued litigation almost certainly would have entailed procurement and submission of expert reports, class certification briefing and expense, a potential Rule 23(f) appeal, dispositive motions, and a substantial trial. And, whatever the disposition of the case, litigation likely would have continued for some time through post-trial motions and appeal. *See Warfarin*, 391 F.3d at 536 ("[I]t was inevitable that post-trial motions and appeals would not only further prolong the litigation but also reduce the value of recovery to the class."). By settling the claims instead of continuing to litigate, Plaintiffs avoid the expense and the attendant uncertainty of further motion practice, trial, and appeal. In addition, eligible members of the Multi-State Settlement Class will receive the monetary benefits of the Settlement much sooner.

In sum, the Settlement guarantees significant recovery while avoiding the delay and uncertainty of continuing the litigation. The complexity, expense, and duration of the litigation favor approval of the Settlement.

2. Reaction of the Class to the Settlement

"The second *Girsh* factor gauges whether class members generally support the settlement." *Dickerson*, 2017 WL 3601946 at *7 (internal citations omitted). Direct notice was directed to 88,169 potential Multi-State Class Members, supplemented with digital notice, publication notice in relevant trade magazines, and an informational website, www.pressfittingssettlement.com. As of November 12, 2020, only one individual, a serial repeat objector to class litigation (and disbarred attorney, *see* Pritzker Decl., Ex. J) whose Class "membership" is suspect, filed an objection. The deadline for objecting to or opting out of the Settlement is November 30, 2020. On December 10, 2020, Plaintiffs will respond to any objections filed by Settlement Class Members.

To date, the reaction of the Settlement Class has been highly favorable, which supports final approval of the Settlement.

3. Stage of the Proceeding and Amount of Discovery Completed

The third *Girsh* factor is the stage of the proceedings and the amount of discovery completed. This factor "captures the degree of case development that class counsel has accomplished prior to settlement. Through this lens, courts can determine whether counsel has an adequate appreciation of the merits of the case before negotiating." *Cendant*, 264 F.3d at 235 (quoting *Gen. Motors*, 55 F.3d at 813).

Here, Plaintiffs received and analyzed 350,000 pages of documents produced by Viega and another 175,000 pages of documents provided by a third-party competitor; examined Viega's transactional sales data for the 26 Multi-State Subclasses; retained an expert economist to further Plaintiffs' understanding of the class commerce at issue; and produced over 10,000 documents of their own. Six Plaintiffs submitted to a deposition and an inventory inspection. Interim Settlement Class Counsel, all of whom are experienced in antitrust class actions, began the litigation with a firm understanding of its legal and factual foundations, including all attendant risks. Pritzker Decl., ¶¶10-14. *See, e.g., Rivera v. Lebanon Sch. Dist.*, No. 1:11-CV-00147, 2013 WL 4498817 at *2 (M.D. Pa. Aug. 20, 2013) (after discovery "both parties had an adequate appreciation of the merits of the case before entering settlement negotiations"); *In re Lucent Techs., Inc. Sec. Litig*., 207 F. Supp.2d 633, 644 (D.N.J. 2004) (discovery, outside investigation, and settlement negotiations shed light "on the strengths and weaknesses of the case, the risk of litigation, and the issues the Class would face at trial. The parties had more than a sufficient basis for assessing the strengths and weaknesses of the claims when they submitted the Settlement to the Court for approval. This factor thus weighs in favor of the Settlement."). Additionally, Viega's motion to dismiss, fully briefed by the parties, allowed each side to consider the strengths and weaknesses of their respective claims and defenses. This factor too favors settlement.

4. Risks of Establishing Liability and Damages

The fourth and fifth *Girsh* factors examine the dual risks of litigation –

establishing liability and damages – and balance the likelihood of success on both components with the benefits of the negotiated settlement. *In re NFL Players Concussion Litig*., 821 F.3d 410, 439 (3d Cir. 2016) (quoting *Prudential*, 148 F.3d at 319). In other words, these factors attempt to measure "'what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them.'" *Cendant*, 264 F.3d at 237 (quoting *Gen. Motors*, 55 F.3d at 814). The fifth *Girsh* Factor – the risk of establishing damages – also looks at the "expected value of litigating the action rather than settling it at the current time." *Id.,* at 238 (quoting *Gen. Motors*, 55 F.3d at 816).

While Plaintiffs believe their case against Viega is strong, they recognize that antitrust cases require substantial resources to litigate and carry inherent risks. Antitrust class actions are especially complex, requiring expert economic analysis and an estimation of class-wide damages, all of which greatly increase the cost and complexity of such litigation. *See McDonough v. Toys R Us, Inc*., 80 F.Supp.3d 626, 646 (E.D. Pa. 2015), *appeal dismissed*, No. 15-1455 (3d Cir. Nov. 2, 2015) ("Antitrust class actions are particularly complex to litigate and therefor quite expensive"). These uncertainties, together with the prospect of protracted litigation and accumulating expense, in both time and money, militate in favor of settlement. *See Dickerson*, 2017 WL 3601946 at *7-8; *Wallace v. Powell*, Nos. 3:09–cv–286, 3:09–cv–0291, 3:09–cv–0357, 3:09-cv-06302015 WL 9268445, at *15 (M.D. Pa., Dec. 21, 2015).

5. Risks of Maintaining the Class through Trial

The sixth *Girsh* factor receives only "minimal consideration" in the settlement class context. *NFL Players Concussion Litig*., 821, F.3d at 440. Plaintiffs detail above why the Settlement satisfies the class requirements of Rule 23. The risk the Settlement Classes may be decertified at any time were this matter to proceed to trial, however, weighs in favor of settlement. *See Dickerson*, 2017 WL 3601946 at *8.

The seventh *Girsh* factor "is concerned with whether the defendant[] could

withstand a judgment for an amount significantly greater than the Settlement." *Cendant*, 264 F.3d at 240. Courts afford this factor little weight in assessing fairness, reasonableness, and adequacy of a proposed settlement. *See Lazy Oil Co. v. Witco Corp*., 95 F.Supp.2d 290, 318 (W.D.Pa.1997) (defendant's potential ability to pay a larger judgment did not weigh against settlement "in light of the risks that Plaintiffs would not be able to achieve any greater recovery at trial[.]"). Here, even if Viega could withstand a greater judgment, there is still a risk that its financial condition could deteriorate by the end of potential lengthy litigation (including all appeals) which could render a large damages award uncollectable. Accordingly, to the extent considered, the seventh *Girsh* factor is neutral.

6. Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and All Attendant Risks of Litigation

The eighth and ninth *Girsh* factors assess "the settlement's overall reasonableness: they task the court to determine whether a settlement represents 'a good value for a weak case or a poor value for a strong case.'" *Dickerson*, 2017 WL 3601946 at *8 (citing *NFL Players Concussion Litig*., 821 F.3d at 440 (quoting *Warfarin*, 391 F.3d at 538)). As this Court observed in *Dickerson*:

> There is no mathematical formula for measuring reasonableness. The Third Circuit describes the test as follows: '[T]he present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement.'

Id., at *8 (citing *Prudential*, 148 F.3d at 322 (quoting *General Motors*, 55 F.3d at 806)).

Here, the Settlement relief provides significant benefits to members of the Multi-State Settlement Class, and eliminates the uncertainty of recovery available to such Class members under the antitrust laws of their respective states. Whether viewed in terms of a percentage of single damages based on Viega's Multi-State Settlement Class sales or a percentage of those sales, the Settlement, in light of the risks of litigation, is reasonable. The $15 million settlement, which includes a $10 million Settlement Fund

and a $5 million Refund Program, based on Viega ProPress® copper press fitting sales in the 26 states that make up the Multi-State Settlement Class, represents approximately 22.6% of estimated single damages for the period January 2015 through February 2020 (the class commerce period known at the time of mediation). Pritzker Decl., ¶52. The $15 million settlement also represents approximately 2.26% of Viega's ProPress® copper press fitting sales in these 26 states during the same period. *Id.*

Taking into consideration all of the benefits of the Settlement and the risks of continued litigation, the Settlement is well within the range of reasonableness. *See, e.g., Lazy Oil*, 95 F.Supp.2d at 290 (collecting Third Circuit cases where approved settlements ranged from 2% to 28% of estimated damages); *Nichols v. SmithKline Beecham Corp*., 2005 WL 950616 at *16 (E.D. Pa. Apr. 22, 2005) (approving settlement amounting to approximately 9-13% of damages); *Linerboard*, 321 F.Supp.2d 619, 627 (E.D. Pa. 2004) (approving final settlements amounting to less than 1.62% of defendants' total sales); *Fisher Bros., Inc. v. Mueller Brass Co*., 630 F. Supp. 493, 499 (E.D. Pa. 1985) (approving settlement representing 0.2% of the defendant's sales and noting that earlier approved settlements represented 2.4%, 0.88%, 0.65%, 0.3%, 0.2% and 0.1% of other settling defendants' sales). Accordingly, the *Girsh* factors support approval.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval for the proposed Settlement and final certification of the Settlement Classes. A proposed Final Judgment Order is submitted herewith.

Dated: November 13, 2020

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2020, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which sent notification of such filing to all counsel of record.

/s/ *Walter W. Cohen*