IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

JACQUELYN D. AJOSE, KATHY SMITH, SHARON KURTZ, PATRICIA EVETT, & JAMES L. BOYLAND on behalf of themselves and all others similarly situated,	)	**No. 14-cv-01707**
Plaintiffs,	)	**CLASS ACTION**
v.	)	
INTERLINE BRANDS, INC.,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT

Plaintiffs, individually and on behalf of the proposed Settlement Class, hereby submit this Memorandum of Law in support of their Motion for an Order Granting Final Approval of the Class Action Settlement Agreement and Release ("Settlement Agreement"), Certifying Settlement Class, and Dismissing with Prejudice the Claims of the Settlement Class Pursuant to the terms of the Settlement agreement. On May 22, 2018, the Court entered its Order Granting Preliminary Approval of Class Action Settlement, Certifying the Settlement Class, and approving the form and content of the Notice. ECF No. 256. All requirements set by the Court in its Preliminary Approval Order have been satisfied. The Settlement Class now seeks Final Approval of the Class Settlement.

Following Preliminary Approval, and as ordered, the Plaintiffs executed the Notice Plan approved by the Court. The Notice Plan reached approximately 83.2% of adult homeowners in the United States on an average of 3.1 times each. In response, not a single member of the Settlement Class objected to the Settlement Agreement and only four (4) opted-out. This is likely attributable to the substantial recovery for the Settlement Class. Pursuant to the Settlement Agreement, Defendant, Interline Brands, Inc. ("Interline") will pay $16.5 million into a Common Damages Fund to resolve all Released Claims of the Settlement Class; primarily damages caused by the failure of the plastic Coupling Nut affixed to a DuraPro™ Toilet Connector.[1] Going further, if a Settlement Class Member has an operable Toilet Connector, the Settlement Agreement provides for a Replacement Claim, permitting the Settlement Class Member to receive a cash payment to replace the Toilet Connector to prevent future Property Damage.

[1] The Settlement Agreement is attached as Ex. A (ECF No. 245-1) to the Declaration of Simon Bahne Paris, Esq. in Support of Plaintiffs' Memorandum of Law in Support of Their Motion for an Order Preliminarily Approving Settlement Notice, and Scheduling Final Fairness Hearing, ECF No. 245, ("Paris Prelim. App. Decl."), and the capitalized terms used in this Motion are specifically defined therein.

The $16.5 million Total Settlement Amount represents the full extent of the payment obligations of Interline, on behalf of itself and all Released Parties, to the Settlement Class. This Total Settlement Amount includes payment to the Notice Provider to execute the Notice Plan, the Claims Administrator to administer the claims from Claimants for Replacement and Property Damage Remedies and distribute the Common Damages Fund, legal costs/expenses of Class Counsel, and Service Awards. The Parties reached this Settlement Agreement fully apprised of one another's strengths and weaknesses having concluded fact and expert discovery and with Plaintiffs' Motion for Class Certification fully briefed and pending before the Court. *See* ECF No. 168.

The proposed Settlement is "fair, reasonable, and adequate" in accordance with Fed. R. Civ. P. 23(e)(2) and warrants final approval by this Court, including final certification of the Settlement Class and approval of the requested attorneys' fees, expenses, and Service Awards. *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269 (6th Cir. 2016), *cert. denied sub nom.*, *Blackman v. Gascho*, 2017 WL 670215 (U.S. Feb. 21, 2017), *cert. denied sub nom*., and *Zik v. Gascho*, 2017 WL 670216 (U.S. Feb. 21, 2017); *UAW v. Gen. Motors Corp*., 497 F.3d 615, 631 (6th Cir. 2007).

Plaintiffs respectfully request an order: (1) granting final approval of the Settlement; (2) certifying the Settlement Class; (3) finding the Notice Plan satisfied the Due Process rights of the Settlement Class; and (4) dismissing the Action with prejudice.[2] Courts in the Northern District of California and District of Nebraska have both recently granted final approval to similar settlements employing a nearly identical notice plan and claims process using the same Notice

[2] As set forth in the Preliminary Approval Order, Plaintiffs filed their Motion for an Award of Attorneys' Fees, Costs and Service Awards on July 20, 2018. ECF Nos. 257-260. This unopposed Motion is also scheduled to be heard by the Court at 1:00 p.m. on October 19, 2018.

Provider and/or Claims Administrator.[3] Co-Lead Counsel here also served as class counsel in those matters.

I. PROCEDURAL HISTORY AND BACKGROUND[4]

On August 20, 2014, Plaintiff Jacquelyn Ajose filed this action against Interline, on behalf of herself, a Rule 23(b)(3) putative class, and a Rule 23(b)(2) putative class.[5] Plaintiffs filed an Amended Complaint on August 6, 2015, which added additional named Plaintiffs.[6] The central allegation in the Complaint was that the DuraPro™ Toilet Connectors, which connects to the base of a toilet using a Coupling Nut, contains a latent, uniform defect that ultimately causes a circumferential fracture at its base that results in pressurized water flowing unabated into a structure, resulting in flooding and significant water damage.

Over more than three years of litigation, the Parties engaged in extensive fact and expert discovery. The Parties exchanged over one hundred thousand pages of documents, conducted 14 fact depositions, sought third-party documents and testimony from multiple entities, along with extensive written discovery in the form of responses to interrogatories and requests for admission. Additionally, the Parties had completed expert discovery of five experts, including, among others, competing plastic design engineers, Dale Edwards for Interline and Dr. Tim Osswald for Plaintiffs, and a Finite Element Analysis of the Coupling Nut from Dr. Michael Bak.

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[3] *See* Declaration of Simon Bahne Paris in Support of Plaintiffs' Memorandum of Law in Support of their Motion for Final Approval of the Class Action Settlement ("Paris Decl."), Exs. A-C.

[4] The procedural history and factual background supporting this Motion for Final Approval is duplicative of, and largely detailed in the Plaintiffs' Memorandum for an Award of Attorneys' Fees, Costs and Service Awards (ECF No. 258) and the Declaration of Simon Bahne Paris, Esq. in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Costs and Service Awards (ECF No. 259) ("Paris Fee Decl.").

[5] ECF No. 1.

[6] ECF No. 81.

On February 15, 2017, Plaintiffs filed a motion for class certification,[7] which was fully briefed. The Parties also sought to exclude or limit the opinions of each expert offered by their adversary.[8] On August 7, 2017, the Court granted the parties' Joint Motion to Stay Proceedings and Defer Rulings on All Pending Motions Until October 30, 2017.[9] The purpose of the stay was a second scheduled mediation on October 18, 2017, with a third-party neutral mediator, Robert J. Kaplan (the "Mediator").[10] The Mediator is a former litigator of nearly 20 years, who has served as a full time mediator since 2003. The mediation and subsequent negotiations resulted in the Settlement Agreement, which the Settlement Class now seeks approval.

II. MATERIAL TERMS OF THE SETTLEMENT

A. The Settlement Class

On May 22, 2018, the Court certified the Settlement Class in its Preliminary Approval Order.[11] The Settlement will resolve claims of members of a Settlement Class defined as follows:

> All Persons who own or owned, or lease or leased, a residence or other structure located in the United States containing a Toilet Connector, or who otherwise suffer or have suffered Property Damage from the failure of a Coupling Nut on a Toilet Connector.[12]

The Settlement Class excludes (i) any valid exclusion as established by the Court, (ii) any previously resolved claims of Settlement Class Members, (iii) the claims of Settling Subrogation

[7] ECF Nos. 168-69.

[8] ECF Nos. 194, 198, 200.

[9] ECF No. 229.

[10] ECF No. 231 at ¶1.

[11] ECF No. 256 at ¶3.

[12] ECF No. 245-1 (Settlement Agreement) at ¶62.

Carriers with a date of loss prior to February 1, 2017, (iv) Interline, (v) sellers and distributors of Toilet Connectors absent specific circumstances, and (vi) this Court.[13] Otherwise, the claims of all Settlement Class Members, including Settling Subrogation Carriers, remain in the Settlement Class and are eligible for the consideration provided to Settlement Class Members in the Settlement Agreement.

B. Cash Payments to Settlement Class Members

Under the terms of the Settlement Agreement, Interline shall pay a Total Settlement Amount of $16.5 million, which represents the full extent of its and the Released Parties' liability and payment obligations for the Released Claims.[14] After payments to the Notice Provider, Claims Administrator, Service Awards, and Class Counsels' fees and expenses, this Common Damages Fund will be used to fund payments to the Settlement Class Members for the Replacement Remedy and Property Damage Remedy.

The Replacement Remedy provides Settlement Class Members $4 for every Toilet Connector replaced, not to exceed five Toilet Connectors (a maximum total of $20).[15] In order to be eligible for the Replacement Remedy, a Settlement Class Member must establish that they presently have installed or have actually replaced a Toilet Connector in a residence or other structure that they own or lease, by producing some evidence that their property had (or has) a Toilet Connector (*i.e.,* the Toilet Connector itself, a photograph of the Toilet Connector, or other form of proof satisfactory to the Claims Administrator in consultation with Class Counsel Chair and Interline's Counsel).[16] All claims for the Replacement Remedy must be filed within the

[13] *Id*. at 60, 63.

[14] *Id*. at ¶64.

[15] *Id*. at ¶¶39, 117.

[16] *Id*. at ¶117(a).

"Replacement Claims Period," which is two (2) years from the Final Order and Judgment.[17] All Replacement Claims that have been received and verified will be paid within 90 days of the Claim Administrator's approval.[18] All amounts remaining in the Common Damages Fund after payment of all Replacement Claims will be available for payment of Property Damage claims.[19]

The Property Damage Remedy is available to Settlement Class Members whose Coupling Nut failed via circumferential fracture resulting in property damage and provides for the recovery of not less than $4, but not more than 30% of their reasonably proven Property Damages.[20] Property Damage is defined as physical damage to the residence or other structure or to tangible personal property, caused by the failure of a Toilet Connector's Coupling Nut, along with alternative living expenses and similar expenses arising from physical damage to property.[21] To be eligible to receive a Property Damage Remedy, a Settlement Class Member or other Claimant seeking that remedy must establish that they have experienced Property Damages from a failure of a Coupling Nut on a Toilet Connector and must submit a valid claim within the Damage Claims Period.[22] The Damage Claims Period will be four (4) years from the Final Order and Judgment.[23] Claims for Property Damage shall be administered pursuant to the guidelines set forth in the Settlement Agreement at ¶¶118(c)(1)-(10).[24]

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[17] *Id.* at ¶117(b).

[18] *Id.*

[19] *Id.* at ¶117(c).

[20] *Id.* at ¶32.

[21] *Id.* at ¶33.

[22] *Id.* at ¶118(a).

[23] *Id.* at ¶118(b).

[24] *Id.* at ¶118(c)(1)-(6).

The third-party Claims Administrator appointed by the Court, Epiq Class Action & Claims Solutions, Inc. ("Epiq"), is responsible for effectuating the claims process.[25] Epiq estimates the administration costs to be $233,838.00 over the four-year administration period. The reasonable costs/expenses (including any fees) of the Claims Administrator shall be paid from the Common Damages Fund.[26] Epiq served as the Court approved Claims Administrator in nearly identical litigation stemming from defect claims related to water connectors with a virtually identical claims administration processes. *See Trabakoolas v. Watts Water Technologies,* Case No. 12-cv-1172 (N.D. Cal. Aug. 5, 2014); *Klug v. Watts Regulator Co.,* Case No. 15-cv-61 (D. Neb. April 13, 2017), *and Sharp v. Watts Regulator Co.*, Case No. 16-cv-200 (D. Neb. April 13, 2017).

C. The Notice Provider Disseminated Notice pursuant to the Notice Plan Approved by the Court and In Compliance with Due Process

The Notice Provider, Hilsoft Notifications ("Hilsoft"), a highly qualified third-party Notice Provider,[27] that disseminated the Notice in accordance with the Court approved Notice Plan. This Notice Plan reached approximately 83.2% of adult homeowners in the United States on an average of 3.1 times each.[28] According to the Director Hilsoft Notifications, Mr. Cameron Azari, "the Notice Program fairly and adequately covered and notified the Class without excluding any demographic group or geographic area."[29]

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[25] ECF No. 256 at ¶9.

[26] *Id.*

[27] *See* Paris Decl., Ex. F (Hilsoft C.V.); Ex. A (Settlement Agreement) at ¶75. ("The Settling Parties shall present an agreed-upon Notice Plan to the Court at the Preliminary Approval Hearing, along with a recommendation for the Notice Provider and Claims Administrator.").

[28] Declaration of Cameron R. Azari, Esq. on Implementation and Adequacy of Settlement Notices and Notice Plan ("Azari Decl.") at ¶14.

[29] Azari Decl. at ¶17.

2. Notice Plan

The Notice Plan included an individual notice by direct mail. There were 54,282 Postcard Notices mailed via United States Postal Service to plumbing and remediation companies nationwide.[30] These companies are frequently first responders when a DuraPro™ Toilet Connector fails and causes flooding damage. Additionally, 446 Detailed Notices and Claim Forms were mailed by first class mail to relevant insurance companies and known representatives of Settlement Class Members.[31] These insurers are frequent claimants in such settlements seeking to recover their subrogated losses. A toll free number also was established. As of September 24, 2018, calls to the toll free number led to the mailing of 429 additional Detail Notices and Claim Forms to Settlement Class Members .[32]

Details of the Published Notice and its circulation are set forth in paragraphs 27-30 of the Azari Declaration. This circulation included consumer publications and trade publications. An internet-based published notice campaign was also completed pursuant to the terms of the Preliminary Approval Order.[33] This combined internet and banner ad published notice is estimated to have reached 528.6 million adults.[34] Additionally, internet sponsored search listings were put into place to assist consumers in reaching the case website.[35]

[30] *Id*. at ¶23.

[31] *Id*. at ¶¶23-24.

[32] *Id*. at ¶¶25, 40-41.

[33] *Id*. at ¶¶31-32.

[34] *Id*. at ¶32.

[35] *Id*. at ¶¶33-34.

Hilsoft provided an estimate of $786,348.78 to complete the Notice Plan.[36] Pursuant to the terms of the Settlement Agreement, these costs will be taken out of the Common Damages Fund.

D. Exclusion Provisions and Objections

The Notice Plan sets forth the procedures for Settlement Class Members to exclude themselves or to object to the Settlement, which had a Court ordered deadline of August 20, 2018. No Settlement Class Member objected to the Settlement, and only four (4) Settlement Class Members elected to opt-out.[37] No Settlement Class Member, or their counsel, have expressed an intent to appear at the Final Fairness Hearing.

Additionally, the required notice under Class Action Fairness Act was completed on May 4, 2018.[38] No Attorney General objected to the Settlement.

III. THE SETTLEMENT MERITS FINAL APPROVAL

Pursuant to Rule 23(e), after directing notice to settlement class members in a reasonable manner and prior to granting final approval of a proposed settlement, the Court must conduct a fairness hearing and determine whether the settlement's terms, as a whole, are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *Clark Equipment Co. v. International Union, Allied Industrial Workers*, 803 F.2d 878, 880 (6th Cir. 1986) (stating the court's role is to determine whether the settlement is not collusive and, "taken as a whole, is fair, reasonable and adequate to all concerned"); *Granada Invest., Inc. v. DWG Corp*., 962 F.2d 1203, 1206 (6th Cir. 1992) ("The individual components of an agreement are to be evaluated in light of the settlement as a whole."); *see generally* Manual for Complex Litigation §21.62 (4th ed. 2004) ("Rule 23(e)(1)(C)

[36] Paris Preliminary App. Decl., Ex. F (Hilsoft Summary).

[37] Azari Decl., ¶42.

[38] *Id*. at ¶22.

establishes that the settlement must be fair, reasonable, and adequate."). In making its determination, "[i]t is neither required, nor is it possible for a court to determine the settlement is the fairest possible resolution of the claims of every individual class member; rather, the settlement, taken as a whole, must be fair, adequate, and reasonable." *In re Ford Motor Co. Spark Plug & Three Valve Engine Prod. Liab. Litig.*, 2016 WL 6909078, at *3 (N.D. Ohio Jan. 26, 2016).

Several non-exhaustive factors are recognized as guideposts to the "fair, reasonable and adequate" determination: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery completed; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest in the settlement. *UAW*, 497 F.3d at 631. These factors must all be considered as a whole to determine whether a proposed settlement is fair, adequate, and reasonable. *Bowling v. Pfizer, Inc*., 143 F.R.D. 141, 151 (S.D. Ohio 1992); *Thompson v. Midwest Foundation Independent Physicians Asso*., 124 F.R.D. 154, 157 (S.D. Ohio 1988) ("A class action settlement cannot be measured precisely against any particular set of factors, however, and the court may be guided by other factors, the relevancy of which will vary from case to case."). All of the relevant factors set forth by the Sixth Circuit for evaluating the fairness of a settlement fully support final approval of the Settlement.

A. The Settlement is the Product of Good Faith, Informed, and Arm's-Length Negotiations Conducted Before a Respected Mediator Following Nearly Four Years of Protracted Litigation.

In evaluating a proposed class action settlement, the district court must make sure the terms are reasonable and the settlement is not the product of fraud, overreaching, or collusion. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989). "Where the proposed settlement was

preceded by a lengthy period of adversarial litigation involving substantial discovery, a court is likely to conclude that settlement negotiations occurred at arms-length." 5 William Rubenstein, Newberg on Class Actions, §13:14 (5th ed. 2015); *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 359, 380 (N.D. Ohio 2001) ("when a settlement is the result of extensive negotiations by experienced counsel, the Court should presume it is fair.").

1. The Risk of Fraud or Collusion

This Settlement was reached after the Parties completed both class certification and Daubert briefing, which was preceded by more than three years of hard-fought litigation, and numerous complex and contentious arm's-length negotiations—including negotiations facilitated by two different mediators. *See* Declaration of Simon Bahne Paris, Esq. in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Costs and Service Awards, ECF No. 259, ("Paris Fee Decl."), ¶¶17-55.

"The participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties." *Bert v. AK Steel Corp.*, 2008 WL 4693747, at *2 (S.D. Ohio Oct. 23, 2008). The fact that experienced mediators were heavily involved in the negotiations indicates they were not collusive. *Gascho v. Global Fitness Holdings, LLC,* 822 F.3d 269, 277 (6th Cir. 2016) ("parties' two-and-a-half years of litigation, extensive discovery, ongoing settlement negotiations, and formal mediation session all weighed against the possibility of fraud or collusion"). *See also, Crawford v. Lexington-Fayette Urban Cnty. Gov't*, 2008 WL 2885230, at *6 (E.D. Ky. Oct. 23, 2008) (finding no risk of fraud or collusion relative to final approval, where settlement was "the product of arm's length, good-faith settlement negotiations" reached after two days of mediation through "an experienced, third-party neutral mediator"); *In re Zurn Pex Plumbing Products Liab.*

Litig., 2013 WL 716088, at *6 (D. Minn. 2013) ("Settlement agreements are presumptively valid, particularly where a settlement has been negotiated at arm's length, discovery is sufficient, [and] the settlement proponents are experienced in similar matters . . . .") (*citing Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 921 F.2d 1371, 1391 (8th Cir. 1990)) (quotations omitted); *Waggoner v. U.S. Bancorp*, 2016 WL 7474408, at *3 (N.D. Ohio Dec. 29, 2016) (finding no risk of fraud or collusion where "the settlement was the result of arms-length negotiations between parties that were represented by able counsel, after considerable discovery and an involved mediation before an experienced mediator").

There is no indicia or suggestion of collusion in this Settlement. This litigation involved three distinct litigation groups: the Class Action, actions of Settling Subrogation Carriers, and coverage actions between Interline and its insurance carriers. Each action was being litigated separately and each engaged in various separate, independent mediations with multiple different private mediators, all without success. All parties are represented by counsel who have significant experience in class-action litigation and settlements, without any evidence of collusion or bad faith.

In October 2017, all three litigation groups agreed to mediate with the assistance of Robert J. Kaplan, an experienced and well-respected mediator in California. All groups were represented by independent counsel and an agreement in principle was separately reached in the Class Action between Interline and Class Counsel after extensive arms-length negotiations. Other separate, private agreements were reached between Interline and the Settling Subrogation Carriers, as well as Interline and its insurers, through their independent, separate counsel with the assistance of Mr. Kaplan. As such, the circumstances under which this settlement was reached

are entitled to a presumption of fairness. Accordingly, this factor weighs in favor of approving the Settlement.

2. Extensive Discovery Was Conducted by Both Parties and Contributed to this Settlement.

As discussed at length in Plaintiffs' Motions for Preliminary Approval and for Attorneys' Fees, this Settlement was reached after the Parties conducted substantial fact and expert discovery on all relevant issues. *See* ECF No. 244 at 17-18; 258 at 5-7; 259 (Paris Fee Decl.) at ¶¶25-50. Accordingly, the Settlement was conceived from informed negotiations by experienced counsel.

"[W]hen significant discovery has been completed, the Court should defer to the judgment of experienced trial counsel who has evaluated the strength of his case." *Bronson v. Bd. of Educ. of City Sch. Dist. of City of Cincinnati*, 604 F. Supp. 68, 73 (S.D. Ohio 1984); *Gascho*, 822 F.3d at 277 (affirming settlement approval where "[d]iscovery was 'extensive,' including the service of multiple sets of interrogatories, the production of over 400,000 documents, and over ten depositions").

Discovery here was in fact extensive. It was not stayed during the pendency of Interline's Motion to Dismiss, and proceeded from November 12, 2014 through April 29, 2017. The Parties collectively served 24 sets of written discovery. Interline produced over one-hundred thousand pages of documents, and the Parties conducted 13 fact depositions and 5 expert depositions. Each Class Representative responded to two sets of interrogatories, a set of document requests, a request for inspection, and sat for a deposition. Plaintiffs also focused on four third parties for discovery: Interline's two Chinese importers for the Toilet Connectors, Linx Ltd. and MTD (USA) Corp.; one of its large national customers, Aspen Square Management, who experienced recurring failures of the Toilet Connectors; and a standards organization,

IAMPO, relied upon by Interline to support the Coupling Nut's design. Each third party produced documents in response to a subpoena from Plaintiffs, and all produced a corporate designee pursuant to Rule 30(b)(6) for deposition, except for Linx Ltd.

Expert discovery involved five potential experts: two disclosed by Plaintiffs and three disclosed by Interline. The two design experts, Dr. Tim A. Osswald (Plaintiffs) and Mr. Dale Edwards (Interline), offered competing opinions concerning the design of the Coupling Nut, its material, the thread root, and the existence of sharp corners in its design. Interline also intended to offer expert testimony relating to applicable standards (Ronald George) and the regional differentiation of damage calculations (David Pogorilich). Finally, in rebuttal, Plaintiffs offered Dr. Michael Bak, who performed a finite element analysis of the Coupling Nut using Mr. Edwards' assumptions to counter Mr. Edwards' opinions.

At the time the Settlement was negotiated, the Parties were fully informed of their respective strengths and weaknesses, enabling them to assess the fairness of the compromise memorialized in the Settlement Agreement. As such, this factor favors final approval.

B. The Settlement Provides Substantial Benefits to Settlement Class Members and Serves an Important Public Interest.

The Settlement provides excellent benefits. The Settlement Agreement requires Interline to create a Common Damages Fund of $16.5 million. After payment of all attorney fees, litigation, notice and administration costs, the Common Damages Fund is designed to pay up to 30% of Property Damage Claims for the next four years and replace DuraPro™ Toilet Connectors to avoid future property damage from their failure. A 30% net recovery to Settlement Class Members is an excellent result, representing approximately 40% of the damages that could be proven by the Settlement Class. *See* ECF No. 260 at ¶17; *see Trabakoolas*, Case No. 12-cv-1172 (N.D. Cal. Aug. 5, 2014) (approving payment of a net

recovery of up to 25% to settlement class members); *Klug*, Case No. 15-cv-61 (D. Neb. April 13, 2017) (same), and *Sharp*, Case No. 16-cv-200 (D. Neb. April 13, 2017) (same).

Additionally, the Settlement's public benefit supports final approval. *See Redington v. Goodyear Tire & Rubber Co,* 2008 WL 3981461, at *18 (N.D. Ohio Aug. 22, 2008). The Settlement is in the public's interest because it "would avoid prolonged litigation, resulting in the conservation of both the parties' resources and the Court's resources." *Moore v. Aerotek, Inc.*, 2017 WL 2838148, at *5 (S.D. Ohio June 30, 2017), *report and recommendation adopted*, 2017 WL 3142403 (S.D. Ohio July 25, 2017); *In re Telectronics Pacing Sys., Inc*., 137 F. Supp. 2d 985, 1025 (S.D. Ohio 2001) (finding the settlement was in the public interest because, *inter alia*, "it frees ... the valuable judicial resources of this Court"). A review of the pending motions in this action, prior to the Settlement, would consume tremendous resources with dispositive motion practice and trial to follow. *See* ECF No. 259 (Paris Fee Decl.) at ¶53. This Settlement frees those resources and provides certainty to all.

Based upon the foregoing, these factors weigh in favor of final approval of the proposed Settlement.

C. Complexity, Expense and Duration of the Litigation and Likelihood of Success on the Merits

The risk, expense, complexity and duration of litigation are significant factors considered in evaluating the reasonableness of a settlement. *Lonardo v. Travelers Indem. Co*., 706 F. Supp. 2d 766, 781 (N.D. Ohio 2010) (approving settlement where the case "was a hard-fought legal battle from the filing of the complaint ... to the final settlement conference" and explaining that "[b]ased on the Court's intimate knowledge of these proceedings, there is no reason to believe that either party would litigate the remainder of the case less vigorously"). Although Plaintiffs have a resolute belief in the strength of their claims against Interline, Plaintiffs must balance this

against the considerable risks and duration of continuing litigation. The proposed Settlement guarantees a substantial recovery for the Settlement Class now while obviating the need for a lengthy, complex, and uncertain trial and appeal. *Preston v. Craig Transp. Co.*, 2015 WL 12766499, at *6 (N.D. Ohio Oct. 29, 2015).

This complex class action was filed on August 20, 2014. The case has presented several complex issues not only with respect to class certification, but also as to liability and causation. The parties have devoted a significant amount of time to prepare their respective experts, and the additional expense of taking this case to trial would be significant. In addition to the risk involved in obtaining a ruling on Plaintiffs' class certification motion and the parties' respective *Daubert* motions, and the likelihood of any Rule 23(f) petition, it is likely that additional remaining pretrial briefing, including summary judgment and any hearings, would have exposed all parties to substantial risk. A complete resolution of the case up to and including trial would not have been reached for several more years. And even if Plaintiffs were successful at class certification and at trial, Interline would most likely challenge this Court's rulings on appeal. Thus, any potential benefits to the class would likely be delayed for years, if at all, if the case proceeds in litigation.

As in *Amos v. PPG Indus*, "[t]he amount and form of this relief balanced against the Plaintiffs' likelihood of success on the merits weighs in favor of approving the Settlement Agreement. In contrast to the uncertainty of litigation, the Settlement Agreement provides immediate certainty to Plaintiffs ... [and] [a]fter ten years of litigation, this certainty outweighs the risk of proceeding on the merits of Plaintiffs' claims and receiving nothing." *Amos v. PPG Indus., Inc.*, 2015 WL 4881459, at *3 (S.D. Ohio Aug. 13, 2015); *see also UAW*, 497 F.3d at 631 ("The fairness of each settlement turns in large part on the bona fides of the parties' legal

dispute."). The same is true here given the benefit provided to the Settlement Class through the $16.5 million Common Damages Fund, in place of the risk of receiving nothing.

D. The Experience and Views of Counsel

"The Sixth Circuit has held that, in the context of approving class action settlements, the Court 'should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs.'" *Smith v. Ajax Magnethermic Corp.*, 2007 WL 3355080, at *5 (N.D. Ohio Nov. 7, 2007) (quoting *Williams v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir.1983)). *See also*, *See Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521, 532-33 (E.D. Ky. 2010) *aff'd sub nom. Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235 (6th Cir. 2011) ("in deciding whether a proposed settlement warrants approval, the informed and reasoned judgment of plaintiffs' counsel and their weighing of the relative risks and benefits of protracted litigation are entitled to great deference"); *see, e.g., UAW v. Ford Motor Co.*, 2008 WL 4104329 at *26 (E.D. Mich. Aug. 29, 2008) ("[t]he endorsement of the parties' counsel is entitled to significant weight, and supports the fairness of the class settlement."); *see also Stewart v. Rubin*, 948 F. Supp. 1077, 1087 (D.D.C. 1996) (the trial court "should defer to the judgment of experienced counsel who have competently evaluated the strength of the proof"); *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995).

This is the fourth nearly identical class action settlement presented by Class Counsel in a case involving allegedly defective plumbing products. *See* Paris Decl. Exhs. A-C Each of the prior three settlements was granted final approval by the respective District Courts. Class Counsel's experience with these settlements and the claims processes involved (which have made the settlement amounts fully available to members of those settlement classes) inform Class Counsel's judgment with regard to the Settlement in this case. As a result, Class Counsel

fully endorses the proposed Settlement as fair, reasonable, and adequate. This opinion is based on Class Counsel's substantial experience litigating and serving as class counsel in dozens of class actions. *See* ECF No. 259, Exhs. A-L (Class Counsel Resumes). Class Counsel's endorsement is entitled to the deference provided under Sixth Circuit law.

E. The Reaction of Absent Class Members

The Notice Plan as approved by the Court is complete, and the August 20, 2018 deadline for objections or opt-outs has passed. No Settlement Class Members have objected to the Settlement. *See* Azari Decl. at ¶42. Additionally, only four (4) members of the Settlement Class chose to exclude themselves from the Settlement's benefits. *Id*., Ex. 12. The case website established as part of the Notice Plan has seen 182,753 unique visitors by potential Settlement Class Members who can review all the important documents relating to this Settlement, including all Notices, the Settlement Agreement and Motion for Attorneys' Fees. *Id*. At ¶39; www.DuraProToiletConnectorSettlement.com. With no objections and only four (4) opt-outs, the Settlement Class that could include up to three million owners of DuraPro™ Toilet Connector responded to the Settlement with an overwhelmingly positive reaction. This factor also weighs in favor of approval of the Settlement.

IV. THE CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

The Court's Preliminary Approval Order reviewed the requirements of Fed. R. Civ. P. 23(a) and 23(b)(3), and found the requirements satisfied, and certified the Settlement Class for settlement purposes only. *See* ECF No. 256 at ¶¶3-6. Nothing has changed that would affect the Court's ruling on class certification. For the reasons stated in the preliminary approval motion and the Preliminary Approval Order, the Court's certification of the Settlement Class for settlement purposes only should be affirmed.

When presented with a proposed settlement, a court must determine whether the proposed settlement class satisfies the requirements for class certification under Rule 23. *UAW*, 497 F.3d at 625. The predominance inquiry under Rule 23(b)(3) simply tests whether questions to the class "are more prevalent or important" than individual ones, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016), a standard which is "readily met" in consumer class actions, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

The briefing on class certification was completed and pending before the Court at the time this Settlement was reached. *See* ECF No168. The litigated class sought was narrower than the Settlement Class, which is defined as: All Persons who own or owned, or lease or leased, a residence or other structure located in the United States containing a Toilet Connector, or who otherwise suffer or have suffered Property Damage from the failure of a Coupling Nut on a Toilet Connector. ECF No. 256, ¶3. However, expansion of the class definition from a litigated to Settlement Class does not create an issue for finalizing certification of the Settlement Class. *See Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems ... for the proposal is that there be no trial."); *In re Mex. Money Transfer Litig.*, 267 F.3d 743, 747 (7th Cir. 2001) ("Given the settlement, no one need draw fine lines among state-law theories of relief."); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 310 (3d Cir. 2011) ("[I]n the settlement context, variations in state antitrust, consumer protection and unjust enrichment laws d[o] not present the types of insuperable obstacles that could render class litigation unmanageable"); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 2016 WL 5338012, at *8 (N.D. Ohio Sept. 23, 2016) (citing *Amchem*, and approving the settlement of a consumer class action previously certified in the litigation context (Ohio-only), which was

expanded nationwide for settlement purposes). All of the requirements of Fed. R. Civ. P. 23 are met, and the Settlement Class remains certifiable.

A. The Numerosity Requirement Is Met

Fed. R. Civ. P. 23(a)(1) requires a proposed class be "so numerous that joinder of all members is impracticable." When class size reaches substantial proportions, however, the impracticability requirement is usually satisfied by the numbers alone." *Rosiles-Perez v. Superior Forestry Serv., Inc.*, 250 F.R.D. 332, 338 (M.D. Tenn. 2008) (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996) (internal quotations and citations omitted)). Here, discovery established that Interline distributed more than 2.9 million Toilet Connectors in the United States. The numerosity requirement is easily satisfied.

B. The Commonality and Typicality Requirements Are Met

Federal Rule of Civil Procedure 23(a)(2) allows a class action to be maintained if "there are questions of law or fact common to the class." A proposed class satisfies the "commonality" requirement when "it is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue." *Bacon v. Honda of America Mfg., Inc.*, 370 F.3d 565, 570 (6th Cir. 2004). Plaintiffs do not have to show that there are multiple legal or factual issues common to the class; rather, the existence of one common issue is sufficient. *Rosiles-Perez*, 250 F.R.D. at 339. Here, the commonality requirement is easily satisfied because the Plaintiffs' allegations involve the same alleged defect found in each Coupling Nut of the Toilet Connectors.

The typicality requirement is also met in this case. Rule 23(a)(3) requires that "the claims or defenses of the representative parties [must be] ... typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3). A claim is typical if "it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims

are based on the same legal theory." *Rosiles-Perez*, 250 F.R.D. at 341 (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d at 1082); *see Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007). The Sixth Circuit has described the typicality requirement in the following manner: "as goes the claim of the named plaintiff, so go the claims of the class." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998). In this case, the Class Representatives have claims similar to and typical of the rest of the Settlement Class because they all own or owned, or lease or leased, a property or other structure that contained a Toilet Connector. Each named Plaintiff has the same interest in redressing injuries similar to other members of the Class. Accordingly, the typicality requirement is satisfied.

C. The Named Plaintiffs and Class Counsel Will Fairly and Adequately Protect the Interests of the Settlement Class

Federal Rule 23(a)(4) requires that the named Plaintiffs and proposed Class Counsel be able to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Courts in the Sixth Circuit consider two criteria for determining adequacy of a class representative: (1) the representative must share common interests with unnamed class members, and (2) it must be apparent that the class representative will vigorously represent those common interests through qualified counsel. *See Rosiles-Perez*, 250 F.R.D. at 342; *In re Am. Med. Sys.*, 75 F.3d at 1083. This requirement "tests the experience and ability of counsel for plaintiffs and whether there is any antagonism between the interests of the plaintiffs and other members of the class they seek to represent." *Id.*; *Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976). Both requirements are met in this case.

In this case, no conflicts of interest exist between the named Plaintiffs and the absent Class Members from the standpoint of assessing the fairness of the proposed Settlement. The record shows that Plaintiffs and Class Counsel have vigorously prosecuted this action on behalf

of the Class. *See generally*, ECF No. 259 (Paris Fee Decl.) The attorneys who represent the proposed Class Representatives are well-qualified to serve as Co-Lead Counsel. *See* ECF No. 259 (Paris Fee Decl.) at Exhs. A, F, and L; Paris Decl., Exhs. A-C. Accordingly, Rule 23(a)(4) is satisfied as the Named Plaintiffs and Class Counsel will fairly and adequately protect the interests of the Settlement Class.

D. Certification Under Federal Rule 23(b)(3) is Appropriate for Settlement Purposes

The claims of the Settlement Class also meet the predominance and superiority prerequisites of Fed. R. Civ. P. 23(b)(3). In evaluating this prong, the Court may consider class members' interests in prosecuting their claims individually, the extent and nature of litigation thus far, and the desirability of concentrating the litigation in the particular forum. Fed. R. Civ. P. 23(b)(3)(A)-(C).[39] Those requirements are met in this case.

When considering predominance, the core issue is "whether the proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. The Sixth Circuit has affirmed findings of predominance when "plaintiffs have raised common allegations which would likely allow the court to determine liability ... for the class as a whole." *Olden v. LaFarge Corp.*, 383 F.3d 495, 508 (6th Cir. 2004). Here, there are common, class-wide issues as to the alleged design defect with Interline's Toilet Connectors. Nearly identical claims and classes have been certified for settlement purposes in *Trabakoolas*, *Klug* and *Sharp*. Paris Decl., Exhs. A-C. The predominance requirement is met.

[39] In the context of a class-wide settlement, the Court need not consider whether the case, if tried, would present difficult management problems. *See Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

V. CLASS NOTICE SATISFED THE REQUIREMENT OF DUE PROCESS

The Notice Plan approved by the Court to deliver notice to the Settlement Class was adequate and satisfies Rule 23 and all other due process requirements. Rule 23 requires that "the court ... direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Due process requires the class notice to be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Pelzer v. Vassalle*, 655 F. App'x 352, 368 (6th Cir. 2016) (citing *UAW v. Gen. Motors Corp.*, 497 F.3d 615, 629 (6th Cir. 2007)). This does not require "notice to set forth every ground on which class members might object to the settlement." *Id.* at 630. This just means that the notice must "'fairly apprise the prospective members of the class of the terms of the proposed settlement' so that class members may come to their own conclusions about whether the settlement serves their interests." *Id.* (quoting *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 122 (8th Cir. 1975)).

Here, Class Notice was reasonably calculated to apprise Settlement Class Members of the pendency of the Action and their right to object or exclude themselves from the Settlement. This nearly identical Notice Plan has been held to satisfy the Due Process rights of nearly identical settlement classes in *Trabakoolas*, *Klug* and *Sharp*. Paris Decl., Exhs. A-C.

As detailed in the concurrently filed Azari Notice Implementation Declaration, the Class Notice Program was executed as previously detailed, and resulted in reaching approximately 83.2% of all adult homeowners in the United States an average of 3.1 times each. *See* Azari Decl., ¶14. The ability to notify over 8 out of 10 adult homeowners in the United States over three times each reflects the comprehensive nature of the Notice Plan.

For example, 221,929,650 impressions were generated by paid media Internet banner ads widely disseminated over the Google Display Network (GDN), the Yahoo! Bing ad network, and Facebook. *Id*., ¶¶8, 10. In addition, Class Notice was published in four magazines read heavily by the target audience, appeared via paid placement on Top Class Actions' website and its opt-in email newsletter to over 610,000 subscribers, was publicized through paid Internet search efforts using keywords that linked consumers to the Settlement Website, and utilized sophisticated "lookalike audience" advertising efforts to target individuals whose online behaviors and interests mimicked those who clicked through to the Settlement Website via the Internet banner ads. Id., ¶¶5, 7, 13-15. The Settlement Website and toll-free hotline have been established and visited by Settlement Class Members. Id., ¶¶17-18. The Class Notice has also resulted in individuals in the Settlement Class directly contacting Class Counsel. Class Notice was also provided to regulators as required by 28 U.S.C. §1715.

Thus, as detailed above, the Class Notice readily satisfies the best practice standard and due process requirements.

VI. CLASS COUNSEL'S REQUESTED FEE OF ONE-THIRD OF THE $16.5 MILLION COMMON FUND SHOULD BE GRANTED

Class Counsel filed their Motion for Attorneys' Fees, Costs, and Service Awards on July 20, 2018, as the Court directed in its Preliminary Approval Order. ECF No. 257. No Settlement Class Member objected to the Court awarding the requested fee of one-third (1/3) of the $16.5 million Common Damages Fund, or $5.5 million, an award of expense reimbursement not to exceed $500,000, and a $5,000 Service Award for each of the five Class Representatives. As directed in the Preliminary Approval Order, this Motion for Attorneys' Fees is to be updated on or before October 9, 2018. ECF No. 256, ¶11.

During the Preliminary Approval Hearing, the Court expressed concern over awarding a one-third (1/3) fee of the $16.5 million Common Damages Fund if that money is not actually paid by Interline. As agreed during the Preliminary Approval Hearing and set forth in the Motion for Attorneys' Fees, no party anticipates the Common Damages Fund ever being anything less than $16.5 million. *See* ECF No. 258 at 21-23. Nonetheless, even if the final payment in year four of the Damage Claims Period as set forth in paragraph 66(d)(i) of the Settlement Agreement was to yield something less than $16.5 million (which the Parties do not anticipate), the Sixth Circuit recently made clear that it is the $16.5 million fund made available to the Settlement Class that dictates the award of attorneys' fees regardless of whether that full amount is ultimately claimed.

In *Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 279 (6th Cir. 2016), the most recent, precedential decision on this issue, the Sixth Circuit affirmed an award of attorneys' fees in claims-made settlement where the attorneys' fee awarded was greater than the amount class members ultimately claimed and the defendant paid. The Court's decision makes clear that fee awards should be based on the fund created by the Settlement, rather than the amount class members are actually paid. The Sixth Circuit embraced the Supreme Court's rationale in *Boeing v. Van Gemert*, 444 U.S. 472, 480 (1980) to hold that it is the amount made available to the class that is the basis for the fee award, even if it that amount is not ultimately claimed, when calculating fees pursuant to the percentage of the fund method. *Gascho*, 822 F.3d at 279. Additionally, the *Gascho* Court observed that this same rationale had been embraced by the Second, Third, Ninth and Eleventh Circuits. *Id*. at 283-284 (citing *Masters v. Wilhelmina Model Agency, Inc*., 473 F.3d 423, 437 (2d Cir. 2007); *Waters v. Int'l Precious Metals Corp*., 190 F.3d

1291, 1296-97 (11th Cir. 1999); *Williams v. MGM-Pathe Comm. Co*., 129 F.3d 1026, 1026-27 (9th Cir. 1997); *In re Baby Prods. Antitrust Litig*., 708 F.3d 163, 178 (3d Cir. 2013)).

Gascho is all the more noteworthy because the net settlement at issue there was a claims-made settlement, unlike the Settlement at issue here where the entire net Common Damages Fund will be paid to class members who submit valid claims. *In re Auto. Parts Antitrust Litig.*, 2017 WL 3525415, at *4 (E.D. Mich. July 10, 2017), *appeal dismissed sub nom. In re: Wire Harnesses*, 2017 WL 5664917 (6th Cir. Sept. 15, 2017). While the *Gascho* Court embraced a case by case analysis on this issue, the Settlement here strongly favors awarding a fee of one-third of (1/3) the $16.5 million benefit Class Counsel obtained for – and that is readily available to - the Settlement Class after payment of attorneys' fees and expenses as set forth in the Settlement Agreement.[40]

No indicia or danger of collusion exists in this Settlement. The Settlement was negotiated with a private mediator, and involved Settling Subrogation Carriers represented by separate independent counsel. ECF No. 245-1 (Settlement Agreement) at ¶¶ 59-60. Settling Subrogation Carriers resolved their remaining historical claims valued at over $22 million; their future subrogation claims during the Damage Claims Period are submitted for the Property Damage Remedy. Yet the Settling Subrogation Carriers have not objected to the requested attorneys' fee award. Moreover, there are many insurers other than the Settling Subrogation Carriers who, along with their insureds, may submit their subrogation claims for the Property

[40] In addition, under the terms of the Settlement Agreement, in the event there is money remaining in the Common Damages Fund after all valid Settlement Claims have been paid, "the Parties shall make a written recommendation to the Court regarding the disposition of the remaining funds, if any. The Court shall direct the remaining funds shall be paid, or apportioned to, the following: (1) Interline; (2) the Claimants as additional compensation for Property Damages Claims; (3) a *cy pres* distribution to a charitable cause identified by the Settling Parties and approved by the Court; and/or (4) any other use consistent with the Agreement as approved by the Court." Settlement Agreement at ¶66(f).

Damage Remedy as expressly contemplated by the Settlement Agreement. Direct mail notice was provided to 446 insurance companies and known representatives of individual Settlement Class who pursue subrogation and other property damage claims for these failures, and will now be submitting these claims for the Property Damage Remedy provided by the Settlement. Yet none of these hundreds of insurers or Settlement Class Members objected to any portion of this Settlement, including the award of $5.5 million in attorneys' fees calculated as one-third of the $16.5 million Common Damages Fund.

Further, as described above, the claims process for obtaining the Property Damage Remedy and Replacement Remedy are both simple and proven. These same claim procedures were first put into place in 2014 in a nearly identical settlement in *Trabakoolas* and have worked seamlessly now for four years. Through these same claim procedures with the same Claim Administrator, class members in *Trabakoolas* submitted 3,565 claims for over $103 million. ECF No. 259 at ¶59. The importance of a claim process that is "transparent and not burdensome" was highlighted by the Sixth Circuit when measuring the assessability of the benefit obtained for the class in determining appropriate attorneys' fees. *Gascho*, 822 F.3d at 286-88. This analysis here strongly favors the attorneys' fee requested by Class Counsel.

VII. CONCLUSION

For all the reasons stated above, Plaintiffs respectfully request that this Court Grant Final Approval to the Class Action Settlement, finally Certify the Settlement Class for purposes of the Settlement, find the Notice Plan satisfied the Due Process rights of the Settlement Class, and then dismiss the Action with prejudice.

Dated: September 28, 2018

Respectfully submitted,

By: /s/J. Gerard Stranch, IV

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CERTIFICATE OF SERVICE

I, J. Gerard Stranch, IV, hereby certify that I caused a copy of the foregoing to be filed electronically via the Court's electronic filing system to the parties listed below. Those attorneys who are registered with the Court's electronic filing system may access these filings through the Court's system, and notice of these filings will be sent to these parties by operation of the Court's electronic filing system.

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