IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FRIDAY APALISKI, ANGELIQUE FISH, JOHN JOYAL, JAMIE WATERMAN, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	C.A. No. 20-1548-RGA
MOLEKULE, INC.,	)	
Defendant.	)	

OPENING BRIEF IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND FOR CERTIFICATION OF THE CLASS FOR PURPOSES OF SETTLEMENT

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Dated: October 8, 2021

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Plaintiffs Friday Apaliski, Angelique Fish, John Joyal, and Jamie Waterman ("Plaintiffs") respectfully submit this brief in support of their Unopposed Motion for Preliminary Approval of Class Action Settlement and for Certification of the Class for Purposes of Settlement.[1]

NATURE AND STAGE OF THE PROCEEDINGS

In this Consumer Class Action, Plaintiffs allege that Defendant Molekule Inc. falsely advertised its Air Purifiers, including by stating that the Air Purifiers (1) outperform HEPA filters in every category of pollutant; (2) eradicate indoor air pollutants; (3) provide allergy and asthma symptom relief; (4) combat unhealthy levels of wildfire smoke by destroying airborne pollutants; and (5) that the representations were verified by extensive independent testing.

Defendant denies all of these allegations and maintains that its advertising has been accurate at all times and supported by extensive testing conducted by independent laboratories.[2]

Plaintiffs' counsel conducted a thorough examination and investigation of the facts and law relating to the matters in the Litigation, which included extensive formal and informal discovery, commissioning a lengthy report by an environmental engineering expert who specializes in indoor air quality, requesting and receiving documents from Defendant, examining Defendant's documents, and questioning Defendant regarding its documents.

On March 2, 2021, the Parties participated in an all-day mediation conducted by nationally-recognized mediator Antonio Piazza of Mediated Negotiations. The parties were unable to reach an agreement during the mediation. As a result, Mr. Piazza made a settlement proposal

[1] The Settlement Agreement ("Settlement" or "Agreement") and its exhibits are attached as Exhibit 1 to the Declaration of Jason S. Rathod (the "Rathod Decl."), filed herewith. All capitalized terms not otherwise defined shall have the same definitions as in the Agreement. *See* Ex. 1, § 2. Air Purifiers are defined as the Molekule Air, Molekule Air Pro, Molekule Air Mini, Molekule Air Mini+, and the Molekule Air Pro Rx air purifiers. *See* Ex. 1, ¶ 2.3.

[2] Defendant also represents that it is entering into the Agreement solely to eliminate the uncertainties, burden, expense, and delay of further protracted litigation. *See* Ex. 1, ¶ 1.4.

representing his own independent valuation of the case. The parties accepted the proposal and entered into a term sheet. The resulting term sheet and subsequent negotiations over the past several months resulted in the settlement memorialized in the Agreement, which proposes a resolution of class claims asserted by a subset of Molekule purchasers who purchased devices from third-party retailers and did not later consent to Molekule's arbitration agreement and class-action waiver. Under the Agreement, Defendant will provide a non-reversionary common Class Cash Fund in the amount of $1.3 million. Defendant will also provide a Class Coupon Fund of up to $1.4 million in coupons, which can be used toward the purchase of an Air Purifier filter or filter subscription, and which are fully transferrable.

SUMMARY OF THE ARGUMENT

This Court should grant Plaintiffs' Unopposed Motion because:

1. The Agreement meets the standard for preliminary approval since it is a fair and reasonable resolution of the claims of Plaintiffs and the putative class, with no apparent deficiencies, nor grounds to doubt its fairness.

2. There is a presumption of fairness with the Agreement since (a) it resulted from arm's length negotiations with the assistance of a neutral, nationally recognized mediator; (b) Plaintiffs' counsel had a strong grounding in the facts and merits before entering into the Settlement; and (c) counsel for both parties bring substantial experience in consumer class action litigation, and endorse the Agreement's fairness. Standing alone, these considerations compel preliminary approval. If the Court were to also look now at the factors typically reserved for final approval the inquiry would also counsel in favor of preliminary approval. At bottom, the Settlement provides for a meaningful recovery in the short-term with a significant common cash fund, which is non-reversionary, as well as a coupon fund. By contrast, continued litigation carries considerable

risk of no recovery or a lesser recovery years from now.

3. A Settlement Class should be certified because it is necessary for the putative class to receive the benefits of settlement. Moreover, certification is appropriate because all of the Rule 23(a) elements and Rule 23(b)(3) elements are satisfied.

4. The Notice Plan should be approved because Plaintiffs have ensured, through issuance of subpoenas and conferrals with third party retailers, that the vast majority of the Settlement Class will receive direct notice. For those who may not receive direct notice, there is a supplemental publication notice. The Notices and Notice Plan apprise Settlement Class Members of their rights and allow them to decide whether they would like to receive the benefits of the Settlement by remaining in the Settlement Class, exclude themselves, and/or object to the Settlement.

For these reasons, the Court should enter the proposed Preliminary Approval Order.

STATEMENT OF FACTS

I. Procedural History and General Factual Background

Plaintiffs filed their Class Action Complaint against Molekule on November 7, 2020 (D.I. 1) (the "Complaint"). The Complaint alleges claims for fraudulent concealment, breach of express and implied warranty, unjust enrichment, violations of the Magnusson-Moss Warranty Act, as well as violations of various state consumer protection and false advertising statutes. Plaintiffs sought to pursue most claims on behalf of all purchasers of the Air Purifiers in the United States.

After Defendant waived service of the Complaint, Defendant notified Plaintiffs that most purchasers of Molekule devices are subject to a binding arbitration agreement and class-action waiver.[3] *See* Rathod Decl., ¶ 6. Plaintiffs determined, however, that a subset of Molekule

[3] Molekule's Terms and Conditions contain an arbitration agreement with a class action waiver. In order to purchase an Air Purifier from Molekule's website, a consumer would need to accept the Terms and Conditions. *See Lepore v. Molekule, Inc.*, 2:20-cv-2571 (E.D.N.Y.) (D.I. 27)

purchasers who purchased devices from third-party retailers (and did not later consent to the Molekule Terms and Conditions) were not subject to the arbitration agreement. *See id.* Following these discussions, the parties engaged in preliminary settlement negotiations with respect to the subset of purchasers not subject to arbitration. *See id.*, ¶ 7. As part of these discussions, Plaintiffs propounded a number of settlement discovery requests, which Defendant responded to including with the production of documents and data. *See id.* Plaintiffs also commissioned a robust 30-page report by an environmental engineering expert who specializes in indoor air quality about Plaintiffs' allegations regarding the false advertising of the Air Purifiers. *See id.*, ¶ 8. On March 2, 2021, the Parties participated in an all-day virtual mediation conducted by Antonio Piazza. *See id.*, ¶ 10. The parties were unable to reach an agreement during the mediation. As a result, Mr. Piazza made a settlement proposal representing his own independent valuation of the case, which all parties accepted by executing a term sheet late that evening. *See id.*, ¶ 10. Over the next several months, the Parties exchanged drafts of the Agreement and exhibits and regularly held phone conferences to work through areas of disagreement, culminating in execution of the Agreement. *See id.*, ¶¶ 12-13. In July, Plaintiffs also served subpoenas on third-party sellers Amazon, b8ta, and Best Buy, which collectively represent over 99 percent of sales of Air Purifiers to the Settlement Class, to initiate a process of gathering contact information for Settlement Class Members so that they can receive direct notice. *See id.*, ¶ 22. Plaintiffs have reached agreement with these third-party sellers such that purchasers of the Air Purifiers will, in fact, receive timely direct notice if the instant motion is granted. *See id.*

(April 2, 2021) (order granting motion to compel arbitration). The instant settlement therefore encompasses only those purchasers who bought from third-party sellers and who did not agree to Molekule's terms and conditions (such as in setting up an online Molekule account).

II. The Key Terms of the Settlement

A. The Settlement Class

The "Settlement Class" is all persons, other than Excluded Persons[4], who, during the Class Period, (a) purchased in the United States, any of the Air Purifiers from a third-party seller, including but not limited to, Amazon, b8ta, Best Buy, MoMa Design Store NYC, and Sprout as of [Preliminary Approval Date], and (b) as of [Preliminary Approval Date], had not agreed to the arbitration provision in Molekule's Terms & Conditions. *See* Agreement, ¶ 2.50.

B. Relief to Settlement Class Members

1. Monetary and Coupon Relief

Under the Agreement, Defendant will provide a non-reversionary common Class Cash Fund in the amount of $1.3 million. *See* Agreement, ¶ 2.14. Defendant will also provide a Class Coupon Fund of up to $1.4 million in coupons, which can be used toward the purchase of an Air Purifier filter or filter subscription, and which are fully transferrable. *See* Agreement, ¶ 2.15.

2. Class Notice and Administration Costs

Plaintiffs have retained RG/2 Claims Administration LLC ("RG/2") as the Claim Administrator to effect class notice and administration in consultation with Plaintiffs' counsel. *See* Agreement, ¶ 2.9. RG/2 will execute the Notice Plan agreed to by the Parties and approved by the Court including by disseminating the notices; processing and recording claim forms; processing and recording Settlement Class Member opt-outs and objections; calculating *pro rata* awards; and sending coupons and cash payments. *See* Agreement, § IV. Plaintiffs saved a significant sum in administrative costs that would have been spent on publication notice by

[4] Excluded Persons generally includes: (i) the presiding judge, the mediator and their respective family members; (ii) government entities; (iii) the Defendant and its affiliates; (iv) the principal third-party sellers of Air Purifiers; (v) any persons who timely opt out of the Settlement Class; and (xi) any Person who signed a release regarding their Air Purifier. *See* Agreement, ¶ 2.25.

subpoenaing major retailers, including Amazon and Best Buy. *See* Rathod Decl., ¶ 22. As a result, Plaintiffs estimate that nearly all members of the Settlement Class will be reached by direct notice since Amazon sales alone represent an estimated 80 percent of all sales to the Class. *See id*., ¶ 22. For the small minority of the Settlement Class who may have paid in cash at a retailer or who purchased from a smaller retailer, there is a supplemental publication notice. *See id*..

3. Payment of Settlement Class Members' Claims

Settlement Class Members will be able to claim their share of the Settlement through a Claim Form. *See* Agreement, Ex. A. They can submit a Claim under either Group A or Group B. *See* Agreement, ¶ 3.6. Both groups receive a pro rata amount from the Cash Fund and Coupon Fund, but Group A submissions require certain supporting material demonstrating proof of purchase, while Group B submissions do not. *See id.*, ¶¶ 3.6-3.8. In turn, Group A claimants are entitled to a greater share of the settlement benefits. *See id.* The Claim Form also allows for Claimants to state how many Air Purifiers and which models they purchased, all of which is accounted for in the formula for calculating benefits to each Class Member. *See id.*, Ex. A. Settlement Class Members for whom the Parties have received contact information from a third-party seller are deemed to have submitted a valid claim under Group A without the need to provide a claim form or substantiating proof. *See* Agreement, ¶ 3.13.

4. The Release

In exchange for the foregoing – and subject to approval by the Court – Plaintiffs and Settlement Class Members who do not timely exclude themselves will be bound by a release applicable to all claims arising out of or relating to the claims that were asserted in the Complaint. *See id.*, § VIII. The Released Claims will extend to Defendant and its related entities and persons. The Released Claims will not, however, apply to any claims for personal injury. The

settlement will also result in the dismissal of this case with prejudice.

5. Procedures for Opting Out or Objecting

Settlement Class Members who wish to be excluded from the Agreement may submit an Opt-Out Form available on the Settlement Website or through a request to the Claim Administrator, by the deadline and procedure set forth in the Agreement. *See id.*, ¶¶ 7.2-7.5. The process to opt out is simple and involves completing, signing, and submitting a simple form. Settlement Class Members who wish to object must file and serve a written objection by the deadline and procedure set forth in the Agreement. This, too, is simple, requiring only a submission with a caption identifying the action, noting it is an objection, and that contains information sufficient to contact the objector and counsel, as well as a concise statement of the factual and legal basis for the objection. Additionally, Settlement Class Members may make a claim even if they object.

6. Service Awards and Attorneys' Fees and Expenses

The Parties did not discuss the payment of attorneys' fees and expenses or service awards to the Class Representatives until after the substantive, material terms of the settlement had been agreed on. *See* Rathod Decl. at ¶ 11. The proposed Service Awards for the Plaintiffs is $5,000 each. *See* Agreement, ¶ 6.1. The proposed Attorneys' Fee and Expense Award for Plaintiffs' counsel is $410,000. *See id.* Thirty percent of the Class Cash Fund is $390,000 and Plaintiffs' counsel also have over $20,000 in out of pocket expenses.[5]

[5] If Preliminary Approval is granted, Plaintiffs' counsel will formally move for and brief their request for attorneys' fees and service awards at Final Approval. For now, Plaintiffs' counsel merely notes that these requests are standard. *See Hall v. AT&T Mobility LLC*, Civil Action No. 07-5325 (JLL), 2010 U.S. Dist. LEXIS 109355, at *70 (D.N.J. Oct. 13, 2010) ("The Court is aware that 33 1/3% is a standard figure for recovery in a consumer class action of the contingent-fee variety."); *Batties v. Waste Mgmt. of Pa., Inc.*, No. 14-7013, 2016 U.S. Dist. LEXIS 186335, at *54 (E.D. Pa. May 11, 2016) ("[The class representatives'] efforts made this Settlement possible, and they are thus entitled to the modest [$5,000] service awards sought.").

ARGUMENT

I. The Court Should Preliminarily Approve the Settlement and the Notice Plan

A. Legal Standard

The Court's review of a class action settlement is a two-step process consisting of preliminary approval and final approval. *Udeen v. Subaru of Am., Inc.*, No. 18-17334(RBK/JS), 2019 WL 4894568, at *2 (D.N.J. Oct. 4, 2019).

At this preliminary approval stage, "the Court is required to determine only whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval." *In re Nat'l Football League Players' Concussion Injury Litig. ("In re NFL")*, 301 F.R.D. 191, 198 (E.D. Pa. 2014) (quoting *Mehling v. New York Life Ins.*, 246 F.R.D. 467, 472 (E.D. Pa. 2007) (citations omitted)).[6] Under Rule 23, a settlement falls within the "range of possible approval," if there is a conceivable basis for presuming that the standard applied for final approval—fairness, adequacy, and reasonableness—will be satisfied. *In re NFL*, 301 F.R.D. at 198.

This approach is consistent with the principle that "settlement of litigation is especially favored by courts in the class action setting." *In re Insurance Brokerage Antitrust Litig.*, 297 F.R.D. 136, 144 (D.N.J. 2013); *see also Udeen*, 2019 WL 4894568, at *2 ("A settlement is

[6] "[A] presumption of fairness exists where a settlement has been negotiated at arm's length, discovery is sufficient, the settlement proponents are experienced in similar matters and there are few objectors." *In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 144 (D.N.J. 2013) (citing *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004)). As the leading commentator on class actions has noted, courts usually adopt "an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval." Newberg on Class Actions § 11:41; *see also Little Rock School Dist.,* 921 F.2d 1371, 1391 (8th Cir. 1990) (stating that class action settlement agreements "are presumptively valid").

presumed fair when it results from arm's-length negotiations between experienced, capable counsel after meaningful discovery.") (quoting *Rudel Corp v. Heartland Payment Sys., Inc.*, No. 16-cv-2229, 2017 WL 4422416, at *2 (D.N.J. Oct. 4, 2017)) (cleaned up); *In re ViroPharma Inc. Sec. Litig.*, No. 12-2714, 2016 WL 312108, at *8 (E.D. Pa. Jan. 25, 2016) ("[T]he participation of an independent mediator in settlement negotiations virtually [e]nsures that the negotiations were conducted at arm's length and without collusion between the parties.") (quoting *Hall v. AT&T Mobility LLC*, No. 07-5325, 2010 WL 4053547, at *7 (D.N.J. Oct. 13, 2010)). Under Rule 23, a settlement falls within the "range of possible approval," if there is a conceivable basis for presuming that the standard applied for final approval—fairness, adequacy, and reasonableness—will be satisfied. *In re NFL*, 301 F.R.D. at 198.

While the foregoing is the established standard to grant preliminary approval, some courts also take a peek at the so-called "*Girsh* factors"[7] evaluated at final approval.

In addition, the benefits of a proposed settlement of a class action can be realized only through the certification of a settlement class. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); *see also Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (9th Cir. 1998); *Udeen*, 2019 WL 4894568, at *4. As such, Plaintiffs seek the conditional certification of the Settlement Class

[7] The factors originated from *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), in which the Third Circuit directed district courts to analyze the following nine factors at the final approval stage:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) stage of the proceedings and the amount of discovery completed; (4) risks of establishing liability; (5) risks of establishing damages; (6) risks of maintaining the class action through the trial; (7) 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.

Id. at 157.

set forth above and in the Settlement Agreement.[8]

"For the Court to certify a class for settlement, the "[s]ettlement [c]lass[] must satisfy the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation, as well as the relevant 23(b) requirement." *In re GMC Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 778 (3d Cir. 1995). Here, Plaintiffs seek certification of the Settlement Class pursuant to Rule 23(b)(3), which provides that certification is appropriate where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members [predominance], and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy [superiority]." Fed. R. Civ. P. 23(b)(3). As discussed below, these requirements are met for settlement in this case.

B. The Settlement is Fair and Reasonable

Plaintiffs respectfully submit that the Agreement has no "obvious deficiencies," nor any "grounds to doubt its fairness," thereby warranting preliminary approval. While this is enough to grant preliminary approval, a peek at the *Girsh* factors evaluated at final approval also confirms the fairness and reasonableness of settlement, counseling in favor of preliminary approval.

1. The Settlement is Entitled to a Presumption of Fairness

The Settlement should be approved because it satisfies the conditions precedent for the presumption of fairness to attach. *First*, the Settlement resulted from arm's length negotiations, including an all-day mediation before a nationally-recognized mediator, Antonio Piazza. *See Harris v. Vector Mktg. Corp.*, No. C-08-5198 EMC, 2011 U.S. Dist. LEXIS 48878, at *25 (N.D. Cal. Apr. 29, 2011) (finding that Mr. Piazza "has significant experience mediating complex civil

[8] Molekule has consented to certification of the class for settlement purposes only, and reserves its rights to challenge the class allegations in the Complaint (including at the class-certification stage) to the extent the Settlement is not approved for any reason.

disputes" and that a negotiated resolution with his assistance "suggests that the parties reached the settlement in a procedurally sound manner and that it was not the result of collusion or bad faith by the parties or counsel."); *In re ViroPharma Inc. Sec. Litig.*, No. 12-2714, 2016 WL 312108, at *8 (E.D. Pa. Jan. 25, 2016) ("[T]he participation of an independent mediator in settlement negotiations virtually [e]nsures that the negotiations were conducted at arm's length and without collusion between the parties.") (quoting *Hall v. AT&T Mobility LLC*, No. 07-5325, 2010 WL 4053547, at *7 (D.N.J. Oct. 13, 2010)). Indeed, the fact that the parties were unable to reach agreement during the mediation, and that Mr. Piazza made a mediator's proposal, is further evidence of the arm's-length nature of the negotiations in this case.

Second, Plaintiffs' counsel had a thorough understanding of the merits before reaching the proposed settlement. Among other things, Plaintiffs and counsel: (i) conducted an extensive investigation prior to filing the Complaint; (ii) served settlement discovery requests on Defendant; (iii) reviewed and analyzed Defendant's settlement production; (iv) consulted extensively with an environmental engineering expert who specializes in indoor air quality and commissioned a report by him; and (v) exchanged mediation statements and participated in mediation with Defendant which set forth the strengths of each side's positions regarding certification, liability, and damages. *See* Rathod Decl., ¶¶ 4-10. This work provided Plaintiffs' counsel with a sound basis to conclude that the settlement was in the best interests of Plaintiffs and the Settlement Class. *See e.g., Schuler v. Medicines Co.,* No. 14-1149 (CCC), 2016 WL 3457218, at *7 (D.N.J. Jun 23, 2016) (noting that "[a]lthough there has been no formal discovery, Lead Counsel had ample information to evaluate the prospects for the Class and to assess the fairness of the Settlement" and had reviewed publicly-available information, conducted an extensive investigation, consulted with an expert, drafted the initial and amended complaints, briefed an opposition

to defendants' motion to dismiss, and engaged in mediation).

Third, the proponents of settlement are experienced in similar litigation. Plaintiffs' counsel has a wealth of experience nationwide in consumer class action litigation. *See id.*, ¶ 14. Molekule's counsel, too, has substantial experience. *See id.*, ¶ 15.

Finally, although the parties do not yet know whether there will be objectors to the Settlement, this is no obstacle to a finding of a presumption of fairness where the foregoing factors are present. *See, e.g., Udeen v. Subaru of Am., Inc*., 2019WL 4894568, at *2 (D.N.J. Oct. 4, 2019) (finding presumption of fairness on motion for preliminary approval because "[a] settlement is presumed fair when it results from arm's-length negotiations between experienced, capable counsel after meaningful discovery.") (internal citations and quotations omitted).

2. The *Girsh* Factors Support Preliminary Approval

Although the foregoing analysis is sufficient for the Court to grant preliminary approval, courts sometimes consider the final approval factors to mitigate any potential issues in the future. *Udeen*, 2019 WL 4894568, at *3.[9] All of the *Girsh* factors that the Court can analyze now support preliminary approval.[10]

The complexity, expense, and likely duration support preliminary approval because, without the Settlement, the parties would be engaged in contested motion practice and adversarial discovery for years. The claims advanced for the Settlement Class Members involve numerous complex legal and technical issues. Continued litigation would be complex, time consuming and expensive, with no certainty of a favorable outcome. The Settlement Agreement secures

[9] Rule 23(e) was amended in December 2018 to specify uniform standards for settlement approval. Courts in this district have continued to apply the same legal standards to preliminary approvals after the 2018 amendments. *See, e.g., Udeen*, 2019 WL 4894568; *Smith v. Merck & Co., Inc.*, 2019 WL 3281609 (D.N.J. July 19, 2019).

[10] The reaction of the Settlement Class cannot be evaluated until after notice is issued.

substantial benefits for the Class with none of the delay, risk and uncertainty of continued litigation.

The third factor, the stage of the proceedings and the amount of discovery completed, also supports preliminary approval. Plaintiffs' counsel has conducted settlement discovery and completed an expert report following a thorough independent investigation into alleged false advertising of the Air Purifiers. This work has allowed Plaintiffs' counsel to understand the strengths and weaknesses of their case, and has allowed them to analyze the risk of future litigation in comparison to the relief offered by the Settlement. *Udeen*, 2019 WL 4894568, at *3.

The fourth, fifth, and sixth factors all analyze the risk of continued litigation. If the parties had been unable to resolve this case through the Settlement, the litigation would likely have been protracted and costly. Plaintiffs' counsel have litigated many consumer protection class actions that have taken several years to conclude. *See* Rathod Decl. ¶ 26. Before ever approaching a trial in this case, the parties likely would have briefed at least one motion to dismiss, class certification (along with a potential Rule 23(f) appeal), and summary judgment – in addition to expending considerable resources on electronic discovery, depositions, and expert witnesses. It is therefore unlikely that the case would have reached trial before 2023, with post-trial activity to follow. *See Haas v. Burlington Cty*., No. 08-1102-NHL-JS, 2019 WL 413530, at *6 (D.N.J. Jan. 31, 2019) (granting approval where plaintiffs estimate the time to judgment, including trial, would take another three years).

Courts routinely find the seventh factor – the defendant's ability to withstand greater judgement – to be neutral. Such a factor is typically only relevant when "the defendant's professed inability to pay is used to justify the amount of the settlement." *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 440 (3d Cir. 2016). This not a factor here.

Finally, the remaining *Girsh* factors – the range of reasonableness of the settlement both independently and weighed against the risk of further litigation – support preliminary approval. The settlement must be judged "against the realistic, rather than theoretical potential for recovery after trial." *Sullivan v. DB Invs., Inc*., 667 F.3d 273, 323 (3d Cir. 2011). And in conducting the analysis, the court must "guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *In re GMC Truck Fuel Tank Prods. Litig.*, 55 F.3d 768, 806 (3d Cir. 1995); *see also In re Shop-Vac Mktg. & Sales Practices Litig*., No. 4:12-MD-2380, 2016 WL 3015219, at *2 (M.D. Pa. May 26, 2016) ("The proposed settlement amount does not have to be dollar-for-dollar the equivalent of the claim…. and a satisfactory settlement may only amount to a hundredth or even a thousandth part of a single percent of the potential recovery.") (internal citations and quotations omitted).

Here, the settlement contains a significant non-reversionary cash common fund. Assuming each Settlement Class Member bought one device, and that there is a 100 percent claims rate[11], the gross pro rata share per Settlement Class Member is about $70, a substantial sum. In litigation, Plaintiffs would have principally proceeded on a "benefit of the bargain" theory of damages under which they would have attempted to isolate a price premium attributable to the alleged false advertising. Prevailing at class certification and on the merits on such a theory would be far from certain. *See, e.g., Thorne v. Pep Boys Manny Moe & Jack Inc.,* 980 F.3d 879, 889 (3d Cir. 2020) (rejecting benefit of the bargain measure of damages based on facts pled). Even if they did, the damages amount per class member could quite possibly have been less than

[11] Claims rates in consumer class actions tend to be more modest. *See, e.g., Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (citing evidence suggesting that "consumer claim filing rates rarely exceed seven percent, even with the most extensive notice campaigns").

that provided for under the Agreement. Even without considering the $1.4 million coupon fund, then, the Agreement is a more than fair outcome for Settlement Class Members.

C. The Settlement Class Should be Certified

1. The Rule 23(a) Elements are Satisfied

a. Numerosity is Satisfied

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Forty class members is generally considered sufficient to satisfy this element. *See Stewart v. Abraham*, 275 F.3d 220, 226-227 (3d Cir. 2001). Here, approximately 18,150 Air Purifiers covered by the Settlement were sold. *See* Rathod Decl., ¶ __. Numerosity is therefore easily satisfied.

b. Commonality is Satisfied

The second prong of Rule 23(a)—commonality—requires "consideration of whether there are 'questions of law or fact common to the class[.]'" *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 482 (3d Cir. 2015) (citing Fed. R. Civ. P. 23(a)(2)). The commonality requirement is satisfied if the claims have even one significant issue common to the class. *See In re NFL Players Concussion Injury Litig*., 821 F.3d 410, 427 (3d Cir. 2016). The court's focus must be "on whether the defendant's conduct [is] common as to all class members[.]" *Sullivan v. DB Invs., Inc*., 667 F.3d 273, 298 (3d Cir. 2011). And that "bar is not a high one." *Reyes*, 802 F.3d at 486 (quoting *Rodriguez v. Nat'l City Bank*, 726 F.3d at 382 (3rd Cir. 2013)).

In this case, there are numerous common questions of law and fact, such as whether Molekule falsely advertised the Air Purifiers and whether Settlement Class Members overpaid for their Air Purifiers. Commonality is, therefore, satisfied. *See Henderson v. Volvo Cars of N. Am., LLC*, No. 09-4146 (CCC), 2013 WL 1192479, at *4 (D.N.J. Mar. 22, 2013) ("Several

common questions of law and fact exist in this case, including whether the … Class Vehicles suffered from a design defect … and whether Plaintiffs have actionable claims.").

c. Typicality is Satisfied

Rule 23(a)(3) requires that a representative plaintiff's claims be "typical" of those of other class members. Fed. R. Civ. P. 23(a)(3). "The typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." *Barnes v. Am. Tobacco Co*., 161 F.3d 127, 141 (3d Cir. 1998). "As with numerosity, the Third Circuit has 'set a low threshold' for satisfying typicality, holding that '[i]f the claims of the named plaintiffs and class members involve the same conduct by the defendant, typicality is established….'" *In re Ins. Brokerage Antitrust Litig*., 297 F.R.D. at 149 (alternations in original) (citation omitted). Moreover, the typicality analysis focuses on the conduct of the defendants, not that of the class representatives. *In re IGI Secs. Litig*., 122 F.R.D. 451, 456 (D.N.J. 1988). Thus, "[f]actual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." *Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994) (internal citation omitted).

Here, all of Plaintiffs' claims arise out of the same alleged conduct by Molekule related to their design, manufacture, sale, and advertising of the Air Purifiers. *See Henderson,* 2013 WL 1192479, at *5 (typicality satisfied where "the claims made by the named Plaintiffs and those made on behalf of Settlement Class Members arise out of the same alleged conduct by Volvo – namely, Volvo's design, manufacture and sale of the allegedly defective Class Vehicles and Volvo's alleged failure to disclose the defect."). This requirement is, likewise, met here.

d. Adequacy is Satisfied

The final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In determining the adequacy of representation, the court should "'evaluate [both] the named plaintiffs' and … counsel's ability to fairly and adequately represent class interests.'" *Gotthelf v. Toyota Motor Sales, U.S.A., Inc*., 525 Fed. Appx. 94, 100-101 (3d Cir. 2013) (alterations in original; citation omitted)). In doing so, "the district court ensures that no conflict of interest exists between the named plaintiffs' claims and those asserted on behalf of the class, and inquires whether the named plaintiffs have the ability and incentive to vigorously represent the interests of the class." *Id.* at 101 (citing *In re Cmty. Bank of N. Virginia*, 622 F.3d 275, 291 (3d Cir. 2010)).

In addressing the adequacy of the proposed class representative, district courts examine whether he or she "has the ability and incentive to represent the claims of the class vigorously, that he or she has obtained adequate counsel, and that there is no conflict between the individual's claims and those asserted on behalf of the class." *Ritti v. U-Haul Int'l, Inc.*, 05-4182, 2006 WL 1117878, at *5 (E.D. Pa. Apr. 26, 2006) (quoting *Hassine v. Jeffres*, 846 F.2d 169, 179 (3d Cir. 1988)). Here, all of the Class Representatives are adequate because they purchased one of the Air Purifiers subject to the Settlement Agreement and were allegedly injured in the same manner based on the alleged false advertising. *See* Compl., ¶¶ 23-56. They have also actively participated in the litigation of this case, and have been in regular communication with their attorneys regarding these proceedings. *See* Rathod Decl., ¶ 24.

The Agreement designates, subject to Court approval, Migliaccio & Rathod LLP and deLeeuw Law LLC as Class Counsel. With respect to their adequacy, they have a wealth of experience in litigating complex class action lawsuits, *see* Rathod Decl., ¶ 14, and were able to

negotiate a favorable settlement for the Settlement Class. Based on the result achieved here, the Court should appoint these attorneys as Plaintiffs' counsel for the Settlement Class, and determine that Rule 23(a)'s adequacy requirement is satisfied.

2. The Rule 23(b)(3) Elements are Satisfied

a. Predominance is Satisfied

Plaintiffs seek certification under Rule 23(b)(3), which has two components: predominance and superiority. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 594 (1997). Predominance is generally more demanding than commonality; however, the Third Circuit is "more inclined to find the predominance test met in the settlement context." *NFL Players*, 821 F.3d at 434 (citations omitted). This is because, "for purposes of inquiring into the predominance of questions of law and fact relevant to a settlement class, manageability issues that are of obvious concern for anticipated litigation consideration are not similarly relevant." *In re Processed Egg Prod. Antitrust Litig*., 2016 WL 3584632, at *8 (E.D. Pa. June 30, 2016).

Here, there are several common questions of law and fact that predominate over any questions that may affect individual Settlement Class Members. For example, were this case to proceed, the primary issue would be whether Defendant is liable for false advertising. This is an issue subject to generalized proof, and one common to all class members. *See Yarger v. ING Bank, Fsb*, 285 F.R.D. 308, 319 (D. Del. 2012) (finding predominance over defendant's objection that different class members received different communications and advertisements because "it is the common content of these advertisements that drives resolution."). Accordingly, the predominance prong of Rule 23(b)(3) is satisfied. *Udeen*, 2019 WL 4894568, at *5 (finding predominance satisfied in case where there were "numerous common questions regarding whether

the class vehicles are defective, whether Defendants should have disclosed the alleged defect, whether the allegedly concealed information was material to consumers, and whether class members were harmed by Defendant's actions").

b. Superiority is Satisfied

Rule 23(b)(3)'s 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." *NFL Players*, 821 F.3d at 434 (citations omitted). The Third Circuit "consider[s] the class members' interests in individually controlling litigation, the extent and nature of any litigation, the desirability or undesirability of concentrating the litigation, and the likely difficulties in managing a class action." *Id.* at 434-35; Fed. R. Civ. P. 23(b)(3)(A)–(D).

The Settlement Agreement provides the Settlement Class with prompt, predictable, and certain relief, and contains well-defined administrative procedures to ensure due process. This includes the right of any Settlement Class Members who are dissatisfied with the settlement to object to it or to exclude themselves. The Settlement also would relieve the substantial judicial burdens that would be caused by repeated adjudication of the same issues in thousands of individualized trials against Defendant. To litigate the claims of the Settlement Class on an individual basis would not be economically feasible and result in "needless duplication of effort." *See Henderson*, 2013 WL 1192479, at *6. And because the parties seek to resolve this case through a settlement, any manageability issues that could have arisen at trial are marginalized. *Sullivan*, 667 F.3d at 302-03. Therefore, "class status here is not only the superior means, but probably the only feasible [way] . . . to establish liability and perhaps damages." *Augustin v. Jablonsky,* 461 F.3d 219, 229 (2d Cir. 2006) (quoting *Tardiff v. Knox County*, 365 F.3d 1, 7 (1st Cir. 2004)).

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

3. The Notices and Notice Plan Should be Approved

The Notice Plan (*see generally* Rathod Decl.) is the best notice practicable, see Fed. R. Civ. P. 23(c)(2)(B), because it will reach nearly all Settlement Class Members through direct notice and provide those remaining with the opportunity to learn of the Settlement's benefits through publication notice. The notices are designed to inform the Settlement Class about the Settlement, are presented in plain language, are designed to be noticed by members of the Settlement Class, and conform to the standards set forth in the Federal Judicial Center's 2010 *Judges Class Action Notice and Claim Process Checklist and Plain Language Guide*. *See* Agreement, Exs. A, B1-B4. The proposed notices are proper because they contain "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 Baby Prods. Antitrust Litig*., 708 F.3d 163, 180 (3d Cir. 2013).

4. A Final Approval Hearing Should be Scheduled

Attached to the Agreement as Exhibit D is a proposed schedule of events based on the terms of the Settlement Agreement. The timing of events is determined by the date the Preliminary Approval Order is entered and the date the Final Approval Hearing is scheduled. If the Court agrees with the proposed schedule, Plaintiffs respectfully request that the Court schedule the Final Approval Hearing for a date 100 calendar days after the entry of the Preliminary Approval Order, or at the Court's earliest convenience thereafter.[12]

CONCLUSION

Based on the foregoing, Plaintiffs and Plaintiffs' counsel respectfully request that the Court grant the instant motion and enter the enclosed proposed Preliminary Approval Order.

[12] Given the current COVID-19 pandemic, the Parties do not oppose conducting a Final Approval Hearing remotely. The draft notices reference this possibility.

Dated: October 8, 2021

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