

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.)	

DECLARATION OF JASON S. RATHOD

I, Jason S. Rathod, declare as follows:

1. I am an attorney at law licensed to practice in the District of Columbia and the State of Illinois. I am also admitted pro hac vice in this matter and a partner at Migliaccio & Rathod LLP (“M&R”), counsel of record for Plaintiffs. I submit this declaration in support of Plaintiffs’ Motion for Preliminary Approval of Class Settlement and for Certification of the Class for Purposes of Settlement. Unless otherwise noted, I have personal knowledge of the facts set forth in this declaration and could and would testify competently to them if called upon to do so.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the Class Action Settlement Agreement.

3. This declaration provides a summary of: (a) the history of this litigation, which includes a summary description of the legal services provided by M&R and co-counsel in this litigation to date as well as the contributions of the Named Plaintiffs; (b) an evaluation of the proposed

settlement; and (c) Class Counsel's continuing obligations in this litigation and under the Settlement Agreement.

A. History of this Litigation

4. M&R began investigating this potential matter in March of 2020. As part of the pre-suit investigation, we extensively researched, analyzed, and compiled publicly available information about the Air Purifiers, including allegations of false advertising. As part of the firm's pre-suit investigation, we communicated with over 100 purchasers of Air Purifiers, documenting a wide range of information related to the marketing they saw, the impressions they formed, the prices they paid, and their experiences with the Air Purifiers.¹

5. On November 7, 2020, Plaintiffs Friday Apaliski, Angelique Fish, Jamie Waterman, and John Joyal, through their counsel M&R and deLeeuw Law LLC, filed their Class Action Complaint (D.I. 1) against Molekule. The Complaint alleges a range of common law, consumer protection, false advertising, and warranty claims. The Plaintiffs sought to pursue most claims on behalf of themselves and all purchasers of the Air Purifiers in the United States. At its core, the Complaint alleges that Defendant Molekule, Inc. falsely advertised the nature and efficacy of its Air Purifiers, including that the Air Purifiers (1) outperform HEPA filters in every category of pollutant; (2) eradicate the full spectrum of 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.

6. After Defendant waived service of the Complaint, Defendant notified Plaintiffs that most

¹ All capitalized terms not otherwise defined herein shall have the same definitions as set out in the Settlement Agreement. *See* Ex. 1, § 2.

purchasers of Molekule devices are subject to a binding arbitration agreement and class-action waiver. Plaintiffs determined, however, that a subset of Molekule purchasers who purchased devices from third-party retailers (and who did not later consent to the Molekule Terms and Conditions) were not subject to the arbitration agreement.

7. Following these discussions, the parties engaged in preliminary settlement negotiations with respect to the subset of purchasers not subject to arbitration. As part of these discussions, Plaintiffs propounded a number of settlement discovery requests, which Defendant responded to – subject to Rule 408 – including with the production of documents and data.

8. In connection with settlement negotiations, Plaintiffs also commissioned a 30-page expert report by an environmental engineer who specializes in indoor air quality. Among other things, the report contextualized the allegations of the Complaint within prevailing academic literature about measuring the efficacy of air purifiers. The report also contained original calculations and analysis to measure the efficacy of the Air Purifiers and compare them to competitor products. Working with the expert on the report required a significant investment of time to provide background information and to discuss the nature and scope of the report.

9. Plaintiffs prepared a lengthy mediation statement that set forth the strengths of the case on the merits and for class certification. Defendant prepared a mediation statement as well, setting forth the strengths of its defenses on the merits and to class certification. The parties shared their respective statements prior to mediation and, in so doing, gained a strong grasp of each side's view as well as the possible paths of where continued litigation could lead.

10. On March 2, 2021, the Parties participated in an all-day virtual mediation conducted by Antonio Piazza. 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.

The parties accepted the proposal and entered into a term sheet at around 9:25 p.m. EST that night.

11. 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.

12. Plaintiffs prepared the initial drafts of the Agreement and exhibits. 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.

13. Over the next several months, the Parties exchanged drafts and regularly held phone conferences to work through areas of disagreement. After several iterations of the drafts, the Parties finally agreed on all terms and executed the Agreement on September 30, 2021.

B. Evaluation of the Proposed Settlement Agreement

14. A true and correct copy of M&R's resume is attached as **Exhibit 2**. M&R has substantial experience in the litigation, certification, and settlement of class action cases. My co-counsel deLeeuw Law LLC also has significant experience in class action cases and its resume is attached as **Exhibit 3**.

15. Based on my experience, Defendant's counsel are also highly experienced in complex civil litigation of this kind. It is my considered opinion that counsel for each side have fully evaluated the strengths, weaknesses, and equities of the parties' respective positions and believe that the proposed settlement fairly resolves their respective differences.

16. This litigation involved sharply opposed positions on several fundamental legal and factual issues. Defendant has argued, among other things, the following: (a) advertising of the Air Purifiers has been accurate at all times and supported by extensive testing conducted by

independent laboratories; (b) the Air Purifiers are, in fact, effective and they capture and destroy pollutants (whereas traditional HEPA filters only capture them); (c) certain Air Purifiers are cleared by the FDA as Class II medical devices as a result of their effectiveness; and (d) there can be no class certification in a litigation context because (1) individual inquiries are required to determine whether Class Members suffered any actual injury and (2) differences in state laws preclude the certification of a nationwide class.

17. Plaintiffs maintain that the claims are meritorious; that the Court would certify the proposed classes; that they would establish liability and recover substantial damages if the case proceeded to trial; and that the final judgment entered for Plaintiffs and the classes would be affirmed on an appeal. But Plaintiffs' ultimate success would require them to clear, in whole or in part, each hurdle. Conversely, Defendant's success at any stage could or would spell defeat for Plaintiffs and the Settlement Class. Thus, continued litigation posed significant risks and countless uncertainties, as well as the time, expense and delays associated with trial and appellate proceedings.

18. The settlement offers substantial and concrete 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.

19. As of June 2021, approximately 18,150 Air Purifiers covered by the Settlement were sold. (Plaintiffs estimate few – less than 500 – Air Purifiers covered under the Settlement were sold since June 2021). Assuming each Settlement Class Member bought one device, and that there is a 100 percent claims rate, 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. Even if Plaintiffs prevailed at each stage with this theory, the damages amount per class member could quite possibly have been less than that provided for under the Agreement. In addition, because claims rates in consumer class actions are often well short of 100 percent, the pro rata amount to Class Members who file a claim, or for whom a claim is deemed filed, is likely to be much greater. In the view of undersigned counsel, the monetary value alone is a superb result that delivers significant value to Class Members.

20. The \$1.4 Class Coupon Fund, too, provides substantial value. Many Class Members likely still own and use their Air Purifiers so will appreciate the ability to buy filters or a filter subscription with a coupon. Even if Class Members do not still use their Air Purifiers, however, they can trade their coupon the secondary market, effectively increasing their cash award.

21. For the Notice Plan, Plaintiffs have retained RG/2 Claims Administration LLC (“RG/2”) as the Claim Administrator to effect class notice and administration in consultation with Class 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 transmitting coupons and cash payments. *See* Agreement, § IV. RG/2 is a highly respected and experienced Claim Administrator, with experience in administering complex litigation matters. The Claim Administrator was selected following a competitive bidding process with three administrators, which involved two detailed

bids from each as well as extensive interviews with each. The other two administrators were also highly reputable: JND Legal Administration and Postlethwaite & Netterville. On the whole, RG/2's bid was the most price competitive. Based on (a) my careful review of RG/2's proposal, which estimated costs at \$75,000 and which is subject to a hard cap of \$100,000, (b) RG/2's qualifications, *see Exhibit 4* (RG/2 Resume), and (c) my past experiences with them as an administrator, I also believe that it will adequately and professionally discharge its duties as the Claim Administrator.

22. By subpoenaing major retailers, including Amazon and Best Buy, Plaintiffs saved a significant sum (potentially tens of thousands of dollars) in administrative costs that would have been spent on publication notice. As a result, Plaintiffs estimate that nearly all 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 and Best Buy represents about 19 percent of the remainder of sales. 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.

23. With respect to attorneys' fees and expenses, Class Counsel will request at Final Approval, and Molekule has agreed not to oppose, an award of attorneys' fees and expenses in the amount of \$420,000 of the total \$1.3 million Class Cash Fund. The Coupon Fund was not included for purposes of valuing the attorneys' fees. The amount of attorneys' fees requested will be 30 percent of the Class Cash Fund (\$390,000) with the remainder of the request for reimbursement of hard expenses (\$20,000), which have already been incurred. The Parties negotiated and reached agreement regarding fees and costs only after agreeing to all material terms of the Settlement.

24. For a Service Award to the Class Representatives, Plaintiffs will request at Final Approval, and Molekule has agreed to not oppose, an award of \$5,000 to each of the four Class Representatives. The Class Representatives actively participated in the pre-suit investigation and in the litigation of this case. They have been in regular communication with Plaintiffs' counsel about these proceedings.

25. On the basis of the investigation and evaluation by Plaintiffs' counsel, including me, and our experience with and knowledge of the law and procedure governing the claims of Plaintiffs and the Settlement Class, it is our belief that it is in the best interest of the class to enter into this Settlement. Indeed, in light of the risks, uncertainties and delays associated with continued litigation, the Settlement represents a significant achievement by providing guaranteed benefits to Class Members in the form of concrete monetary and coupon relief. In addition, the allocation of benefits under the Settlement treats all Class Members fairly based on the strength of their claims. There was a substantial risk that class members would recover less damages in continued litigation than they are entitled to through the Settlement, or nothing at all. Even in the best case, it could take several years to get a judgment for class members. The Settlement provides substantial relief now.

26. Plaintiffs and Plaintiffs' counsel appropriately determined that the Settlement outweighs the gamble of continued litigation. While I firmly believe in the merits of this litigation and that Plaintiffs would ultimately win at trial, I also believe that recovery is far from guaranteed and that the benefits of settlement in this case outweigh the risks and uncertainties of continued litigation, as well as the attendant time and expenses associated with possible interlocutory appellate review, pretrial motion practice, trial, and final appellate review. Plaintiffs' counsel has litigated many class actions that – despite vigorous advocacy – have taken

several years to conclude. After taking into account the foregoing along with other risks and the costs of further litigation, I am satisfied that the terms and conditions of this Agreement are fair, reasonable, adequate and equitable, and that a settlement of the litigation and the prompt provision of effective relief to the Settlement Class are in the best interest of the Settlement Class Members.

D. Class Counsel's Continuing Obligations to Class Members

27. I am aware of no conflicts between Plaintiffs' Counsel and the Class Members. If this Court grants preliminary approval to the Settlement, Plaintiffs' counsel, including M&R, will establish standardized procedures to ensure that all inquiries from Settlement Class Members are timely and accurately handled. M&R will also work with the Claim Administrator to assure that settlement website functions properly (i.e., is easy to use and properly designed). M&R will also work with the Settlement Administrator to assure that notice is disseminated in accordance with the terms of the Settlement Agreement. M&R will receive updates from the Settlement Administrator regarding the administration of the settlement. M&R will continue in this capacity should the settlement be finally approved. M&R will prepare for and appear at the Final Approval Hearing. If the settlement is approved and fees awarded, M&R also will oppose any appeals that may be filed.

I declare under penalty of perjury of the laws of the United States and the State of Delaware that the foregoing is true and correct. Executed on October 8, 2021 in Washington D.C.

Respectfully submitted,

By: /s/ Jason S. Rathod
Jason S. Rathod

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