UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ELLEN CHEPIGA, JACKIE EISENBERG, DEBRA HALL, ROBERT BEDELL, MILCAH HINES, and SUSAN GOODMAN,

on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

CONAIR CORPORATION,

Defendant.

No. 3:17-cv-01090-BRM-LHG

MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT

Hearing Date: April 5, 2018.

I. INTRODUCTION

This case involves claims by named Plaintiffs Ellen Chepiga, Jackie Eisenberg, Debra Hall, Robert Bedell, Milcah Hines, and Susan Goodman, and all others similarly situated (collectively, "Plaintiffs") against Defendant Conair Corporation ("Conair"), arising from the recall of certain blades from Conair's Cuisinart brand food processors. On October 27, 2017, this Court entered an order (the "Order") preliminarily approving the proposed settlement (the "Settlement") between the parties, certifying the settlement class (the "Settlement Class"), approving class notice, and scheduling the final approval hearing. The Order preliminarily approved the terms of the Settlement Agreement[1] (the "Agreement") and conditionally certified the following class for settlement purposes:

> All Conair customers who are eligible to receive replacement blades pursuant to the December 13, 2016 product recall. (ECF No. 19 at ¶5.)
>
> The Settlement Class excludes any and all Settlement Class Members who timely and validly requested exclusion from the Settlement Class. (*Id*. at ¶13.)

In doing so, the Court preliminarily determined that the Settlement was "the product of serious, informed, non-collusive, and good faith negotiations between the parties" that "falls well within the range of reason," "has no obvious deficiencies," and "does not unreasonably favor the Representative Plaintiffs or any segment of the Class." *Id*. at ¶3.

In light of the favorable reaction of the Class, and the significant benefits made available by the Settlement, and in order to avoid the burden, expense, inconvenience, and uncertainty of continued litigation, Plaintiffs now move the Court to grant final approval to the Settlement

[1] The Agreement is attached to the Declaration of John Radice ("Radice Decl.") as Exhibit A, and was previously filed with the Court. (ECF No. 18, Ex. 2, amending ECF No. 17, Ex. 4). To the extent not otherwise defined herein, all capitalized terms have the same meaning as set forth in the Agreement.

("Plaintiffs' Motion"), and submit this memorandum in support of Plaintiffs' Motion. It is in the best interest of the Class to resolve and settle this litigation pursuant to the terms of the Settlement. On December 22, 2017, notice of the Settlement was published on Conair's website, Facebook, and Twitter pages, and emailed to 795,993 class members who requested replacement blades. On December 28 and December 29, 2017, Conair also mailed hard copy notices to 17,975 class members who had registered for replacement blades but did not provide valid email addresses.

As of February 5, 2018, only 73 proposed class members requested to be excluded from the Class.[2] That represents less than 0.001% of the potential 8 million class members, and less than 0.01% of the 813,968 proposed class members who received direct email or mail notice. No proposed class member has requested to remain as part of the Settlement and object to its terms. The vast disparity between the number of class members who received notice of the Settlement and the number of objectors is a clear affirmation of the quality of the settlement. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001). Accordingly, this Court should grant Plaintiffs' Motion for final approval to the Settlement and direct that the benefits therefrom be provided to the Class.

II. BACKGROUND

This subject of this litigation is an alleged defect in a certain blade used in Conair's Cuisinart brand food processing machines. The machines were first introduced in the United States in the 1970's and use a rotating blade to cut food into smaller pieces. Some Cuisinart models include multiple blades with different functions, but the primary blade used for most functions in

[2] Pursuant to this Court's Order, Class Counsel will provide the Court with a final list of all who have timely and validly excluded themselves from the Settlement Class, which Class Counsel shall move to file under seal with the Court no later than 10 days prior to the Final Approval Hearing. *See* ECF No. 19 at ¶13.

the relevant models is known as the "riveted blade," which has four small rivets and two arc-shaped blades with many tiny, sharp metal teeth. On December 13, 2016, Conair announced a recall of the riveted blades due to a risk of breakage of the blade and lacerations from broken blade pieces, and instructed all consumers who owned Cuisinart models containing a riveted blade to stop using that blade immediately.

The recall included twenty-two different Cuisinart models that were sold between 1996 and 2015. Those models were sold with three-year warranties (some models had an additional five or ten-year warranty on motors). Approximately eight million machines were affected by the recall, making it one of the three largest appliance recalls in U.S. history.

The recall notice directed consumers to a website, recall.cuisinart.com, where they were shown how to determine whether their machine was one of the models subject to the recall. The website included a picture of the riveted blade to ensure consumers understood which blade is the riveted blade subject to the recall, and also instructed consumers to stop using the riveted blade immediately. The website allowed customers to register for a replacement blade by calling a customer service hotline or by filling out a form on the website.

This action was filed in the District of New Jersey on February 17, 2017 by Plaintiff Ellen Chepiga [ECF No. 1], and asserted a claim under the New Jersey Consumer Fraud Act. Plaintiff Chepiga claimed that Defendant engaged in fraudulent acts and practices by promoting Cuisinart machines as functional when in fact they were not functional as advertised, and that Plaintiff and other class members suffered ascertainable losses when they had to stop using the machine's only blade or primary blade. On March 31, 2017, Plaintiffs filed the Amended Complaint [ECF No. 10], which included additional class representatives. The Amended Complaint also added claims for breach of express warranty, alleging that Conair knew or reasonably should have known the

machines had a defective blade that would require repair or replacement, thereby violating the express warranty contained with the machines; and for breach of implied warranty, alleging that the food processors were not fit for their ordinary and intended purpose of chopping food. Conair denies all liability.

The Settlement was reached after key informal discovery and extensive negotiations between experienced and informed counsel and easily meets the standard for final approval. The Representative Plaintiffs and Class Counsel – based upon their evaluation of the facts and Class Counsel's evaluation of the applicable law, and their recognition of the substantial risk and expense of continued litigation – believe this Settlement to be fair, adequate and reasonable, and submit that it is in the best interests of the Class.

A. Procedural History

On February 17, 2017, Plaintiff Ellen Chepiga, represented by the Radice Law Firm, filed Chepiga v. Conair Corporation, No. 17-1090 (D.N.J.) (the "Original Complaint") [ECF No. 1]. The complaint asserted a claim under the New Jersey Consumer Fraud Act, N.J. Stat. § 56:8-1 *et seq.* ("New Jersey CFA Claim"), claiming that Conair engaged in fraudulent acts and practices by promoting Cuisinart machines as functional when in fact they were not functional as claimed, and that class members suffered ascertainable losses when they had to stop using the machine's primary blade. On March 13, 2017, the Court granted a mutually agreed stipulation and order [ECF No. 6] that set forth that Plaintiff shall file an Amended Complaint on or before March 31, 2017, and that Conair shall move or answer by May 15, 2017.

On March 31, 2017, Plaintiffs filed the First Amended Class Action Complaint (the "Amended Complaint", [ECF No. 10]). The Amended Complaint added plaintiffs representing a number of different states and multiple different Cuisinart models. The Amended Complaint

maintained the New Jersey CFA Claim from the Original Complaint and also added claims for breaches of express and implied warranties.

During this time, the parties, through counsel, began to explore settlement discussions. *See* Radice Decl., ¶ 9. Plaintiffs and Conair engaged in numerous rounds of settlement talks beginning in March 2017 and concluding in July 2017. The parties requested, and the Court granted, extensions to the time for Conair to move or answer to June 14, 2017, [ECF No. 12], and then to July 14, 2017, [ECF No. 14], in order to allow time for settlement negotiations, and if a settlement was reached, time to prepare preliminary approval submissions. On July 14, 2017, the Court stayed Conair's time to move or answer in light of the pending settlement [ECF No. 16].

All of the matters referenced above were assigned to the Honorable Brian R. Martinotti, United States District Judge, and the Honorable Lois H. Goodman, United States Magistrate Judge, of the District of New Jersey (together the "Court").

After months of discussions between Plaintiffs' counsel and Conair, including extensive negotiations on the date-certain schedule for receipt of the replacement blades, the value of the compensation to be received by class members who did not receive their replacement blades on time, and the warranty on the replacement blades, the Parties executed a memorandum of understanding on July 10, 2017. Following additional rounds of negotiation, the parties finalized the Settlement Agreement on July 31, 2017. The Settlement Agreement was subsequently amended on October 25, 2017 to clarify certain terms and to provide that class members who did not receive their blades on time would receive checks rather than coupons.

On October 27, 2017, the Court issued an order preliminarily approving the Settlement, certifying the proposed class for settlement purposes only, approving the Class Notice and notice

proposal, appointing the Representative Plaintiffs as class representatives, and appointing John Radice of the Radice Law Firm as class counsel. [ECF No. 19]

B. Discovery

Through counsel, the parties conducted discovery into numerous issues associated with the riveted blades and their replacement blades. Radice Decl. ¶¶ 11-12. The parties were able to conduct this discovery informally during the course of settlement negotiations, which allowed for far more expeditious discovery than had the parties needed to await the standard Rule 16 conference procedure and likely briefing on a motion to dismiss. Among other issues, the parties conducted confidential discovery concerning Conair's notice of the defective blades, Conair's ability to manufacture replacement blades – including difficulties in obtaining sufficient quantities of high-quality steel to manufacture the blades – and a timetable for the same, and data concerning sales figures and blade replacement requests. By conducting early settlement discussions and informal discovery months (or longer) before formal discovery would open, the parties were able to achieve a settlement that satisfied one of the Class's main goals: the quickest possible replacement of the damaged blades. This result – expediting the replacement of the blades – likely would not have been available had the parties engaged in full motion practice. Under the Settlement, replacement blades will be in consumers' hands before a decision on a motion to dismiss (much less a decision on class certification or summary judgment, or trial) likely would have issued.

C. The Settlement

Under the Settlement:

1. Plaintiffs agree to settle all claims against Conair, and release any other potential claims against Conair relating to the subject matter of this action, other than personal injury claims, if any.

2. Conair agrees to send replacement blades on the following schedule:

Date of submission of request for replacement blade.	**Date Conair will fill request.**
On or before April 1, 2017.	By September 30, 2017.
April 2, 2017 to June 30, 2017.	By September 30, 2017 or within 150 days of receipt, whichever is later. (September 30, 2017 to November 27, 2017).
July 1, 2017 to September 30, 2017	By December 1, 2017.
October 1, 2017 to December 13, 2020.	Within 90 days of receipt (December 30, 2017 to March 13, 2021).

Customers who submit replacement blade requests after December 13, 2020 (four years after the recall was announced) are not guaranteed to receive a replacement blade within 90 days of receipt of their request.

3. After May 1, 2017, if Conair receives more than 20,000 new requests for replacement blades in a given month, the respective deadlines will be extended by 45 days for every 20,000 new requests or fraction thereof.

4. Conair will provide a new three-year warranty for each replacement blade.

5. Customers who do not receive their replacement blades by their applicable deadline will receive a $15 check in addition to their replacement blade, and for customers who submitted their requests for replacement blades on or before April 1, 2017, if Conair fails to fill their request by 60 days from the September 30, 2017 deadline (November 29, 2017), they will receive an additional $15 check along with their replacement blade. Customers who submit replacement blade

requests after December 13, 2020 (four years after the recall was announced) will not receive checks.

6. Conair will bear the reasonable costs of notice, which will be distributed (i) on Conair's web site, Facebook, and Twitter pages, (ii) by email to customers who have submitted replacement blade requests, and (iii) as otherwise ordered by the Court.

7. Conair will have the right to withdraw from the Settlement (i) if, following class certification, more than a designated percentage of class members opt out of the Settlement, or (ii) if notice costs are anticipated to exceed $75,000.

8. Either party may withdraw from the Settlement if (i) the Court fails to certify the class, (ii) the Court fails to approve the Settlement Agreement, or (iii) the Court enters final judgment, but an appellate court fails to affirm the final judgment or materially changes the Settlement Agreement without the mutual consent of the parties; with the exception that modification or reversal of any award of attorneys' fees, costs, or expenses to Plaintiffs' counsel or incentive awards to the Representative Plaintiffs will not be deemed to be a failure of affirmance or material change that would allow either party to withdraw from the Settlement.

9. Conair will not take a position on the Representative Plaintiffs' request for incentive awards not to exceed $2,500 for each named Representative Plaintiff.

10. Plaintiffs who experienced actual personal injuries, if any, from the defective blades retain the right to sue Conair independently from the Settlement.

These elements of the Settlement serve as the consideration for dismissal of this action against Conair, and the release by the Plaintiffs of any and all claims resulting from the defects in the blades covered by the recall, any allegedly fraudulent representations made by Conair with

respect to the blades, and the violation of any express or implied warranties regarding the recalled blades, except for those claims arising from personal injuries from the blades.

D. Preliminary Approval and Class Notice

On October 27, 2017, the Court granted preliminary approval to the Settlement, certifying the proposed class for settlement purposes only, approving the Class Notice and notice proposal, appointing the Representative Plaintiffs as Class Representatives, and appointing John Radice of the Radice Law Firm as Class Counsel. (ECF. No. 19).

As of December 22, 2017, the Notice was posted on Conair's web site, Facebook and Twitter pages, and sent by email to all customers who have submitted replacement blade requests and provided valid email addresses. On December 28 and December 29, 2017, Conair also sent hard copy notices to 17,975 class members who registered for replacement blades but did not provide valid email addresses. As of January 25, 2018, there were 5,767 hits on the Conair Settlement website, 5,212 impressions on the Notice on Conair's Facebook page for Cuisinart, 590 impressions on the Notice on Conair's Twitter page for Cuisinart, and 13 calls to Conair about the Settlement.[3]

E. Claims, Requests for Exclusion and Objections

The deadline for requests for exclusions and objections is February 26, 2018.

Settlement Class Members receive the benefits of the Settlement automatically when they apply for a replacement blade, either through an online form on the Conair recall website or through a phone call to Conair. There are about eight million machines affected (many of which may no longer be in use), and 875,591 blades have been requested as of January 26, 2018. Yet, as of February 5, 2018, there were only 73 requests to be excluded from the Settlement, which

[3] On August 8, 2017, Conair provided notice of the proposed settlement to state and federal regulators pursuant to the Class Action Fairness Act of 2005, codified at 28 U.S.C. § 1715.

amounts to less than 0.001% of the overall number of machines potentially impacted by the recall, and less than 0.01% of the overall number of proposed class members who requested a replacement blade and received direct email or mail Notice of the Settlement. As of February 5, 2018, no class members have objected to the terms of the Settlement.

III. LEGAL ARGUMENT

A. The Proposed Settlement Should be Approved by the Court

Plaintiffs move under Rule 23 for final approval of the Settlement and certification of a class for settlement purposes only. As discussed in detail below, final approval of a class action settlement involves two fundamental inquiries. First, the Court must determine whether a class can be certified under Rule 23(a) and at least one prong of Rule 23(b). *Tompkins v. Farmers Ins. Exch.*, No. 14-3737, 2017 U.S. Dist. LEXIS 158478, at *8-9 (E.D. Pa. Sep. 27, 2017). The second inquiry is whether the proposed settlement appears "fair, reasonable and adequate." Fed. R. Civ. P. 23(e)(2); *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 534 (3d Cir. 2004). In determining whether to approve a settlement, the Third Circuit has noted that "there is an overriding public interest in settling class action litigation, and it should therefore be encouraged." *Id.* at 535; *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."); *In re Sch. Asbestos Litig.*, 921 F.2d 1330, 1333 (3d Cir. 1990) (noting Third Circuit's policy of "encouraging settlement of complex litigation that otherwise could linger for years"); *In re Community Bank of N. Va.*, 418 F.3d 277, 299 (3d Cir. 2005) ("'all Federal Circuits recognize the utility of … settlement classes' as a means to facilitate the settlement of complex nationwide class actions"). Approval of a proposed class action settlement is a matter within the sound discretion of the court.

Halley v. Honeywell Int'l, Inc., 861 F.3d 481, 488 (3d Cir. 2017); *In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 278, 296 n.17 (E.D. Pa. 2012). While this Court has discretion in determining whether to approve the Settlement, it should be hesitant to substitute its judgment for that of the parties who negotiated the Settlement. *Fisher Bros. v. Phelps Dodge Indus., Inc.*, 604 F.Supp. 446, 452 (E.D. Pa. 1985). "Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement. They do not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88, n.14 (1981) (citation omitted); *Walsh v. Great Atl. & Pac. Tea Co.*, 96 F.R.D. 632, 642-43 (D.N.J.), *aff'd*, 726 F.2d 956 (3d Cir. 1983). There is a strong judicial policy in favor of resolution of litigation before trial particularly in "class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig.*, 269 F.R.D. 468, 484 (E.D. Pa. 2010) (quoting *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010)); *see also GM Trucks*, 55 F.3d 768, 784. ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."). The *Ehrheart* court held:

> This presumption is especially strong in "class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *GMC Truck*, 55 F.3d at 784. The strong judicial policy in favor of class action settlement contemplates a circumscribed role for the district courts in settlement review and approval proceedings. . . . Settlement agreements are to be encouraged because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts [and] the parties may also gain significantly from avoiding the costs and risks of a lengthy and complex trial.

Ehrheart, 609 F.3d at 594-95; *see also Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1314 n.16 (3d Cir. 1993); *Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297, 1300-01 (D.N.J. 1995) ("[W]hen

parties negotiate a settlement they have far greater control of their destiny than when a matter is submitted to a jury. Moreover, the time and expense that precedes the taking of such a risk can be staggering. This is especially true in complex commercial litigation."); *see also* MANUAL FOR COMPLEX LITIGATION, FOURTH § 21.612 (2004): "An early settlement produces certainty for the plaintiffs and defendants and greatly reduces litigation expenses." The Third Circuit Court of Appeals has "directed a district court to apply an initial presumption of fairness when reviewing a proposed settlement where: '(1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'" *In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-2002, 2017 U.S. Dist. LEXIS 191285, at *9 (E.D. Pa. Nov. 17, 2017). Thus, although a court must evaluate a proposed settlement, the court may rely in substantial part on the judgment of experienced counsel in doing so.

A fair, reasonable and adequate settlement is not necessarily an "ideal settlement." A settlement is, after all, "a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 534 (D.N.J. 1997), *aff'd*, 148 F.3d 283 (3d Cir. 1998) (citations omitted). As one court has noted:

> [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned . . . The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.
>
> * * *
>
> Neither the district court nor this court is empowered to rewrite the settlement agreed upon by the parties. We may not delete, modify, or substitute certain provisions of the consent decree. Of course, the district court may suggest modifications, but ultimately, it must consider the proposal as a whole and as

> submitted. Approval must then be given or withheld. . . . In short, the settlement must stand or fall as a whole.

Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 625, 630 (9th Cir. 1982); *see also In re Am. Family Enters.*, 256 B.R. 377, 421 (D.N.J. 2000) ("Significant weight should be attributed 'to the belief of experienced counsel that the settlement is in the best interest of the class.'"); *In re Cendant Corp. Sec. Litig*., 109 F. Supp. 2d 235, 255 (D.N.J. 2000), *aff'd* 264 F.3d 201 (3d Cir. 2001).

In light of this public policy in favor of settlement generally, the presumption of fairness to settlements negotiated at arm's length between experienced counsel with appropriate discovery and no objections, which is the case here, and the fact that this Settlement easily meets the Rule 23 requirements, as will be shown below, the Settlement should be approved and the Settlement Class certified.

B. Class Certification Should be Granted for Settlement Purposes Under Rule 23

Class certification under Rule 23 has two primary components. First, the party seeking class certification must first establish the four requirements of Rule 23(a): "(1) numerosity (a 'class [so large] that joinder of all members is impracticable'); (2) commonality ('questions of law or fact common to the class'); (3) typicality (named parties' claims or defenses 'are typical . . . of the class'); and (4) adequacy of representation (representatives 'will fairly and adequately protect the interests of the class')." *Warfarin Sodium II*, 391 F.3d 516 at 527. Second, the Court must find that the class fits within one of the three categories of class actions set forth in Rule 23(b). *Community Bank*, 418 F.3d 277 at 302.

In the present case, Plaintiffs seek certification under Rule 23(b)(3), "the customary vehicle for damage actions." *Id.* Rule 23(b)(3) requires that common questions "predominate over any questions affecting only individual members" and that class resolution be "superior to other

available methods for the fair and efficient adjudication of the controversy." *Amchem*, 521 U.S. 591 at 615. In the Third Circuit, there is an additional requirement of ascertainability; the class must be currently and readily ascertainable based on objective criteria, meaning that there must be a reliable and administratively feasible way to identify class members. *Coleman v. Commonwealth Land Title Ins. Co.*, 318 F.R.D. 275, 283 (E.D. Pa. 2016).

In making this analysis, the district court may take the proposed settlement into consideration. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 308 (3d Cir. 1998); *Community Bank*, 418 F.3d 277 at 300. In this respect, there is one material difference between the certification of litigation classes and settlement classes:

> Whether trial would present intractable management problems . . . is not a consideration when settlement-only certification is requested, for the proposal is that there be no trial.

Amchem, 521 U.S. 591 at 620; *Community Bank*, 418 F.3d 277 at 309. *Warfarin Sodium II*, 391 F.3d 516 at 529 ("[T]he same concerns with regards to case manageability that arise with litigation classes are not present with settlement classes.")

As discussed in detail below, all the Rule 23 requirements are met here. The Court was correct in preliminarily certifying the Class for settlement purposes pursuant to Rules 23(a) and (b)(3), and nothing has changed to alter the propriety of the Court's certification. Therefore, the Class should now be finally certified.

1. The Rule 23(a) Factors Are Met

As discussed below, in light of the proposed Settlement, Plaintiffs and the Class meet the requirements of Rule 23(a), which are commonly referred to as numerosity, commonality, typicality, and adequacy of representation. *See Warfarin Sodium II*, 391 F.3d 516 at 527.

a. Numerosity

The numerosity requirement under Rule 23(a)(1) is satisfied where the class is so numerous that joinder of all class members is impracticable. *In re Prudential Ins. Co.*, 148 F.3d 283 at 309; *Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 406 (D.N.J. 1990). There is no magic number needed to satisfy numerosity. *See Stewart v. Abraham*, 275 F.3d 220, 226-227 (3d Cir. 2001) ("No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met.").

Here, there are approximately eight million affected machines, notice was emailed to 795,993 Class members and mailed to 17,975 Class members, and 875,591 blades were requested, clearly satisfying the numerosity requirement.

b. Commonality

To satisfy the commonality requirement under Rule 23(a)(2), plaintiffs must demonstrate that "members of a prospective class share at least one question of fact or law common to their claims." *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 376 n.4 (3d Cir. 2013). Commonality does not require an identity of claims or facts among class members. *Miller v. Trans Union, LLC*, No. 12- 1715, 2017 U.S. Dist. LEXIS 7622, at *25 (M.D. Pa. Jan. 18, 2017); *In re Prudential Ins.*, 148 F.3d 283 at 310; *Baby Neal v. Casey*, 43 F.3d. 48, 57 (3d Cir. 1994). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury, though it does not require that they have all suffered a violation of the same provision of law. The focus of the commonality inquiry is not on the strength of each plaintiff's claim but instead is on whether the defendant's conduct was common as to all of the class members. Thus, commonality has been found to be present even when not all members of the plaintiff class suffered an actual injury, when class members did not have identical claims, and when some members claims were arguably not

even viable. In other words, there may be many legal and factual differences among the members of a class, as long as all were subjected to the same harmful conduct by the defendant." *Augustin v. City of Phila.*, 318 F.R.D. 292, 298-99 (E.D. Pa. 2016) (citations omitted).

Here, there are numerous common questions of law and fact, including:

1. Were the blades defective?

2. Did Conair know about the alleged defects in the blades at the time it sold the machines?

3. When did Conair become aware of the alleged defects in the blades?

4. What actions did Conair take after becoming aware of the alleged defects in the blades?

5. What representations did Conair make when selling the machines?

6. Is a machine without the riveted blade usable without a replacement blade?

7. To what extent is the value of a machine diminished without a riveted blade?

8. What loss does a user sustain during the period in which the user has to avoid using the riveted blade?

9. Were Conair's actions a violation of the New Jersey Consumer Fraud Act?

10. Did the alleged flaws in the blades violate the express warranties contained with the machines?

11. Did the alleged flaws in the blades violate the implied warranty of merchantability?

12. How fast can Conair reasonably produce and ship replacement blades?

13. What is fair compensation for a customer who does not receive a replacement blade on schedule?

Further, class members have suffered the same alleged injury (non-use or limited use of a food processor) as a result as the same conduct of Conair (alleged defects in the riveted blade).

Thus, commonality is satisfied.

c. Typicality

In order to satisfy the typicality requirement of Rule 23(a)(3), the claims or defenses of the representative parties must be typical of the claims or defenses of the class. *See Georgine v. Amchem Product, Inc.*, 83 F.3d 610, 631 (3d Cir. 1996). Typicality seeks to ensure that there are no conflicts between the class representative claims and the claims of the class members so that the "named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." *Baby Neal v. Casey*, 43 F.3d 48 at 57.

As the alleged flaws with the riveted blade were the same across all affected models, the Representative Plaintiffs experienced the same problems as did other Class members, and experienced the same period of non-use or limited use of their machines as other Class members from the period from the announcement of the recall to the receipt of their replacement blades. The Representative Plaintiffs are asserting the same rights and making the same claims as other members of the Class, and the Representative Plaintiffs are seeking the same relief for themselves and all other members of the Class. As there is no conflict between the Representative Plaintiffs' claims and those of the class, the typicality requirement is satisfied.

d. Adequacy

Adequacy of representation is a two-part inquiry that applies to both plaintiffs' counsel and plaintiffs. First, adequacy of representation asks whether plaintiffs' attorneys are qualified, experienced, and able to conduct the litigation. *In re Prudential*, 148 F.3d 283 at 312 (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 800 (3d Cir. 1995)).

Second, "it serves to uncover conflicts of interest between named parties and the class they seek to represent." *In re Prudential*, 148 F.3d 283 at 312 (citing *Amchem Products v. Windsor*, 521 U.S. 591, 594 (1997)).

In this case, Plaintiffs' Counsel is highly qualified, experienced, and able to conduct this litigation. *See* Radice Decl., ¶¶ 3-6 for a summary of Plaintiffs' Counsel's qualifications and experience. The Representative Plaintiffs share the interest of the Class in seeking relief related to the riveted blades, representations made by Conair that encouraged them to purchase the machines in the first place, and alleged breached warranties resulting from the recall of the riveted blades. There is therefore no conflict between the interests of the Representative Parties in this litigation and the interests of the Class.

2. The Rule 23(b)(3) Factors Are Met

The proposed class also meets the requirements of Rule 23(b)(3). Rule 23(b)(3) allows class certification of settlement classes where common questions of law and fact predominate over individual questions, and class treatment is superior to individual litigation. When assessing predominance and superiority, the court may consider that the class will be certified for settlement purposes only, and need not consider whether the case would be manageable if actually brought to trial. When assessing predominance, as well as superiority, in the settlement class context, a showing of the manageability of a class trial is not required, for the proposal is that there be no trial. *Yaeger v. Subaru of Am., Inc.*, No. 14-4490, 2016 U.S. Dist. LEXIS 117193, at *19 (D.N.J. Aug. 31, 2016), and *Krimes v. JPMorgan Chase Bank, N.A.*, No. 15-5087, 2017 U.S. Dist. LEXIS 79434, at *14-15 (E.D. Pa. May 24, 2017), citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

In discussing predominance, the Third Circuit has reiterated that the focus of the "inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 298 (3d Cir. 2011) (en banc); *see also In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 187 (D.N.J. 2003). As indicated by the Supreme Court in *Amchem*, "predominance is a test readily met in certain cases alleging consumer or securities fraud. . ." 521 U.S. at 625. This is such a case.

Here, the core questions relate to the issues of law and fact and injuries that are common to all class members, and those predominate over any other issues: alleged defects in the riveted blade, Conair's alleged deceptive advertising and marketing in violation of consumer protection laws, class members' inability to use the machines in the period between having to stop using the riveted blade and receiving a replacement blade, and the alleged injuries experienced by all owners of those machines as a result of those matters. Accordingly, the predominance prong of Rule 23(b)(3) is satisfied.

The second prong of Rule 23(b)(3) is also readily satisfied. Here, class resolution is superior to other available methods for the fair and efficient adjudication of the controversy. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 533 (3d Cir. 2004). The superiority requirement "asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those alternative available methods of adjudication." *Id*. at 534.

Rule 23(b)(3) sets forth certain factors that may be pertinent in considering whether a class action is a superior method by which to adjudicate a controversy. *See In re Mercedes-Benz*, 213 F.R.D 180 at 186 ("The Rule sets forth a non-exhaustive list of factors to be weighed.") The factors include:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigations of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action.

The settlement class would satisfy the superiority requirements because of the large number of class members (8 million potential members, 875,591 of whom have requested replacement blades), the sameness of the alleged injury (loss of use), and the relatively small value of each claim in relation to the expenses of prosecuting a lawsuit. The alternative to class treatment would likely be very few lawsuits in light of the low amount of damages as compared to potential litigation costs. In that case, the vast majority of class members would not obtain any relief, the potential benefits of the Settlement to the Class would be lost (an expedited and date-certain schedule for the receipt of replacement blades, warranties on the replacement blades, and checks for individuals who do not get their blades on time), and Conair would not be held accountable for its alleged wrongful acts. While litigation would be uneconomical for most potential plaintiffs because litigation costs would dwarf any potential recovery, the class action vehicle "facilitates spreading of the litigation costs among the numerous injured parties and encourages private enforcement of the statutes." *Warfarin*, 391 F.3d 516, 534.

In the Third Circuit, there is an additional requirement of ascertainability; the class must be currently and readily ascertainable based on objective criteria, meaning that there must be a reliable and administratively feasible way to identify class members. *Coleman v. Commonwealth Land Title Ins. Co.*, 318 F.R.D. 275, 283 (E.D. Pa. 2016).

In this action, Conair has records from Cuisinart purchasers who ordered their food processor directly from the Cuisinart website, or who purchased a machine elsewhere and submitted a warranty form to Conair at the time of purchase. The incentive for fraud is extremely

small because an individual who does not actually have a Cuisinart machine with a flawed riveted blade would have no use for a replacement blade and no reason to request one. Conair would retain the right to dispute a claim or require additional information or documentation. The class is therefore ascertainable under the Third Circuit's requirements.

In sum, certification of the proposed Settlement Class is appropriate under Federal Rules of Civil Procedure 23(a) and 23(b)(3). This Court should certify the proposed class for settlement purposes.

C. The Settlement is Fair, Reasonable and Adequate

Rule 23(e) requires a determination by the district court that the proposed settlement is "'fair, reasonable and adequate.'" *GM Trucks*, 55 F.3d 768 at 785. The Third Circuit has adopted a nine-factor test to determine whether a settlement is "fair, reasonable, and adequate." The elements of this test – known as the "*Girsh* factors" – are:

> (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation.

GM Trucks, 55 F.3d 768 at 785 (citing *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)). "These factors are a guide and the absence of one or more does not automatically render the settlement unfair." *Am. Family*, 256 B.R. 377 at 418. The Settlement meets each of these factors, and thus, should be approved.

1. The *Girsh* Factors Are Satisfied

a. The Complexity, Expense and Duration of Continued Litigation Weigh in Favor of Final Approval

The first *Girsh* factor is whether the settlement avoids a lengthy, complex and expensive continuation of litigation. This factor "captures the probable costs, in both time and money, of continued litigation." *Cendant II*, 264 F.3d 201 at 233-34 (internal quotation marks omitted). "Where the complexity, expense, and duration of litigation are significant, the Court will view this factor as favoring settlement." *Bredbenner v. Liberty Travel, Inc.*, No. 09-905 (MF), 2011 U.S. Dist. LEXIS 38663, at *33 (D.N.J. Apr. 8, 2011). Courts consistently have held that the expense and possible duration of litigation are factors to be considered in evaluating the reasonableness of a settlement. *Lake v. First Nationwide Bank*, 900 F. Supp. 726, 732 (E.D. Pa. 1995); *Slade v. Shearson, Hammill & Co.*, 79 F.R.D. 309, 313-4 (S.D.N.Y. 1978). *See also GM Trucks*, 55 F.3d 768 at 812 (concluding that lengthy discovery and ardent opposition from the defendant with "a plethora of pretrial motions" were facts favoring settlements, which offer immediate benefits and avoid delay and expense). Under this analysis, courts consider the vagaries of litigation and "compare the significance of immediate recovery by way of compromise," *Bullock v. Administrator of Kircher's Estate*, 84 F.R.D. 1, 10-11 (D.N.J. 1979), to "the mere possibility of relief in the future, after protracted and expensive litigation." *Careccio v. BMW of N. Am. LLC*, No. 08-2619, 2010 U.S. Dist. LEXIS 42063, at *11 (D.N.J. Apr. 29, 2010). "It has been held proper 'to take the bird in hand instead of a prospective flock in the bush.'" *Bullock*, 84 F.R.D. 1 at 11 (citation omitted). This factor undoubtedly weighs in favor of settlement.

One of the main priorities of Class members was to obtain their replacement blades as quickly as possible. Accordingly, Class Counsel proceeded rapidly with discovery and settlement negotiations without engaging in formal motion practice, in order to obtain the fastest possible replacement of the Class members' blades. Continuing this litigation would require a motion to dismiss briefing that would be costly and time-consuming for both parties, let alone the time and

expense that would be involved in further discovery, class certification, summary judgment, and trial should the litigation proceed through those stages. Finally, Class Counsel secured significant results for the Class: a date certain for the receipt of replacement blades, checks for Class members who do not receive their blades on schedule, and a warranty on the replacement blades. If litigation had continued, it would not be certain that the Class would receive that recovery or a comparable or greater one, and there would be a risk of the case being dismissed at multiple different stages of the litigation.

Under all of the circumstances, a certain and significant result now, rather than an uncertain and possibly zero result that could come years in the future, weighs in favor of approval of the Settlement. For these reasons, the first *Girsh* factor weighs in favor of final approval of the Settlement

b. The Reaction of the Class to the Settlement Favors Final Approval

The second *Girsh* factor "attempts to gauge whether members of the class support the Settlement." *Prudential II*, 148 F.3d 283 at 318. In order to properly evaluate it, "the number and vociferousness of the objectors" must be examined. *GM Trucks*, 55 F.3d 768 at 812. Generally, "silence constitutes tacit consent to the agreement." *Id.* (quotation omitted).

Given the size of the proposed class and the overall effectiveness of the notice program, the fact that there were no objections and 73 opt-outs is a strong indicator that the Settlement is fair, reasonable and adequate. *See, e.g.*, *Cendant*, 264 F.3d 201 at 234-35 (affirming trial court decision that class reaction was "extremely favorable," where 478,000 notices were sent, four objections were made, and 234 class members opted out).

Under *Girsh*, such a small number of exclusions (and no objections) favors approval of a class action settlement agreement. "The Third Circuit has looked to the number of objectors from

the class as an indication of the reaction of the class." *CertainTeed*, 269 F.R.D. at 485 (*citing Cendant II*, 264 F.3d at 234-35). A "paucity of protestors . . . militates in favor of the settlement," *In re Mercedes-Benz Tele Aid Contract Litig.*, No. 07-2720, 2011 U.S. Dist. LEXIS 101995, at *12 (D.N.J. Sep. 9, 2011); *see also Stoetzner v. U. S. Steel Corp.*, 897 F.2d 115, 118-20 (3d Cir. 1990) (objections by 29 members of a class comprised of 281 "strongly favors settlement"); *Prudential I*, 962 F. Supp. 450 at 537-8 (small number of negative responses to settlement favors approval); *Weiss*, 899 F. Supp. 1297 at 1301 (100 objections out of 30,000 class members weighs in favor of settlement). The percentage of class members that object to the settlement is an appropriate gauge of the reaction of the class as a whole. *See Bell Atlantic*. 2 F.3d 1304 at 1313-14 (factor favors settlement where less than 30 of approximately 1.1 million shareholders objected); *McGee v. Cont'l Tire N. Am., Inc.*, No. 06-6234, 2009 U.S. Dist. LEXIS 17199, at *40 (D.N.J. Mar. 4, 2009).

Here, the lack of any meaningful negative response to the Settlement reflects overwhelming support from the Class and demonstrates the quality and value of the Settlement.

c. The Stage of Proceedings and Amount of Discovery Weigh in Favor of Final Approval.

The stage of the proceedings and the amount of discovery completed is another factor that courts consider in determining the fairness, reasonableness and adequacy of a settlement. *Harshbarger v. Penn Mut. Life Ins. Co.*, No. 12-6172, 2017 U.S. Dist. LEXIS 209645, at *17-18 (E.D. Pa. Dec. 20, 2017). "This factor considers the degree of case development accomplished by counsel prior to settlement." *Bredbenner v. Liberty Travel, Inc.*, No. 09-905, 2011 U.S. Dist. LEXIS 38663, at *35-36 (D.N.J. Apr. 8, 2011). "Through this lens," the Court of Appeals for the Third Circuit has written, "courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *GM Trucks*, 55 F.3d 768 at 813.

Here, Class Counsel engaged in key discovery before entering into the Settlement. Among other issues, the parties conducted confidential discovery concerning Conair's notice of the defective blades, ability to manufacture replacement blades – including difficulties in obtaining sufficient quantities of high-quality steel to manufacture the blades – and timetable for the same, and data concerning sales figures and blade replacement requests. The results of this discovery made Class Counsel confident that the Settlement was in the best interests of the Class. In sum, the stage of proceedings and amount of discovery weigh in favor of final approval.

d. The Risks of Establishing Liability Weigh in Favor of Final Approval.

This factor should be considered to "examine what potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them." *Cendant II*, 264 F.3d 201 at 237, (quoting *GM Trucks*, 55 F.3d 768 at 814). "By evaluating the risks of establishing liability, the district court can examine what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *GM Trucks*, 55 F.3d 768 at 814. "The inquiry requires a balancing of the likelihood of success if the case were taken to trial against the benefits of immediate settlement." *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 89 (D.N.J. 2001).

Although Class Counsel believe that the claims presented in this litigation are meritorious, they are experienced counsel who understand that the "the risks surrounding a trial on the merits are always considerable." *Weiss*, 899 F. Supp. 1297 at 1301. If the case proceeded, Conair would vigorously defend against these claims, and would surely continue to do so if the case proceeds to trial. The Settlement here presents the Class with real relief now. Indeed, because the Settlement provides the Class with all or almost all of the relief to which they would likely be entitled if they proceeded to trial, there can be no justification for exposing the Class's recovery to the risks of

trial. Such a consideration is not to be taken lightly, for as one court aptly noted, "no contested lawsuit is ever a 'sure thing.'" *Clark v. Lomas & Nettleton Fin. Corp.*, 79 F.R.D. 641, 651 (N.D. Tex. 1978), *vacated on other grounds*, 625 F.2d 49 (5th Cir. 1980).

The risks and delays inherent in proceeding with this case, viewed against the certainty of and benefits from the proposed Settlement, weigh in favor of Settlement. Further, although Plaintiffs are confident that their claims are legally sound, there is always the possibility that the Court may disagree. These risks include the risk of dismissal, denial of class certification, or the granting of summary judgment. The Settlement provides substantial benefits without the inherent risk of establishing liability at trial. Thus, these inherently unpredictable risks in establishing liability weigh in favor of settlement, particularly here, where the Settlement provides the Class with a recovery that is not only fair, reasonable, and adequate, but an excellent result.

e. The Risks of Establishing Damages Weigh in Favor of Final Approval.

"Like the fourth factor, 'this inquiry attempts to measure the expected value of litigating the action rather than settling it at the current time.'" *Cendant II*, 264 F.3d 201 at 238. The court looks at the potential damage award if the case were taken to trial against the benefits of immediate settlement. *Prudential II*, 148 F.3d 283 at 319. In *Warfarin Sodium I*, the trial court found that the risk of establishing damages strongly favored settlement, observing that "[d]amages would likely be established at trial through 'a "battle of experts," with each side presenting its figures to the jury and with no guarantee whom the jury would believe.'" *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 256 (D. Del. 2002), *aff'd* 391 F.3d 516, 537 (3d Cir. 2004). Similarly, in *Cendant II*, the Third Circuit reasoned that there was no compelling reason to think that "a jury confronted with competing expert opinions" would accept the plaintiff's damages theory rather than that of the defendant, and thus the risk in establishing damages weighed in favor of approval of the

settlement. 264 F.3d 201 at 239. In this case, the Settlement has obtained real benefits for the Class. If the case is litigated, there is no guarantee that a jury would award compensation comparable to value of the relief currently obtained for the Class. Thus, this factor weighs in favor of final approval.

f. The Risks of Maintaining the Class Action through Trial Weigh in Favor of Final Approval.

Since the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the class action, *GM* Trucks, 55 F.3d 768 at 817, the Court must measure the likelihood of obtaining and maintaining a certified class if the action were to proceed to trial. *Girsh*, 521 F.2d 153 at 157. Class Counsel believes that this case is wholly appropriate for class certification in the litigation context. However, there is always a risk that a Court would not find this action suitable for certification as a litigated class, or not find that it was suitable for litigation on a multi-state basis. Further, even if class certification were granted in the litigation context, class certification can always be reviewed or modified before trial, so "the specter of decertification makes settlement an appealing alternative." *Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546, 585 (D.N.J. 2010), *overturned on other grounds*, *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170 (3d Cir. 2012); *see also Eggleston v. Chi. Journeyman Plumbers Local Union No. 130 U.A.*, 657 F.2d 890, 896 (7th Cir. 1981) ("a favorable class determination by the court is not cast in stone."). In other words, class litigation is inherently uncertain. Consequently, this factor weighs in favor of final approval.

g. Reasonableness of the Settlement in Light of Defendant's Ability to Withstand Greater Judgment, the Best Possible Recovery, and All Attendant Risks of Litigation.

The last three *Girsh* factors are the reasonableness of the settlement in light of (i) defendant's ability to withstand a greater judgment, (ii) the best possible recovery, and (iii) all the

attendant risks of litigation. These factors, too, support approval of this Settlement and its significant benefits.

While there is no dispute that Defendant has ample resources, countless settlements have been approved where a settling defendant has had the ability to pay greater amounts, and the Third Circuit has noted that this fact alone does not weigh against settlement approval. *See, e.g.*, *Warfarin Sodium II*, 391 F.3d 516 at 538. This factor is generally neutral when the defendant's ability to pay greatly exceeds the potential liability, and was not a factor in settlement negotiations, both of which are the case here. *CertainTeed*, 269 F.R.D. 468 at 488-9 ("because ability to pay was not an issue in the settlement negotiations, this factor is neutral"); *Warfarin Sodium II*, 391 F.3d 516 at 538 ("fact that [defendant] could afford to pay more does not mean that it is obligated to pay any more than what the . . . class members are entitled to under the theories of liability that existed at the time the settlement was reached"); *Bredbenner v. Liberty Travel, Inc.*, No. 09-905, 2011 U.S. Dist. LEXIS 38663 (D.N.J. Apr. 8, 2011), at *42 ("courts in this district regularly find a settlement to be fair even though the defendant has the practical ability to pay greater amounts").

Under the eighth and ninth factors, the court must "measure [] the value of the settlement itself to determine whether the decision to settle represents a good value for a relatively weak case or a sell-out of an otherwise strong case." *GM Trucks*, 55 F.3d 768 at 806. However, when the value of a settlement and potential recovery at trial would be difficult to quantify, a different analysis applies. The Third Circuit stated in *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 493 (3d Cir. 2017): "But in a case such as this, where valuation of plaintiffs' claims is difficult or impossible without expert testimony, and expert reports have not been exchanged or depositions taken, the District Court need not delay approval of an otherwise fair and adequate settlement if it has sufficient other information to judge the fairness of the settlement." The same logic would

apply here. While the benefits here would be difficult to quantify in pure monetary terms prior to expert discovery, it is clear that the Settlement does offer significant benefits to the Class, and that the other available information indicates that the Settlement is fair, reasonable, and adequate.

Defendant has the resources to vigorously litigate the claims in this case, and could potentially present considered positions to oppose the theories of liability and class certification. Indeed, at both junctures – at class certification and at trial – the Class would face what may amount to an all-or-nothing proposition. The Settlement, however, provides immediate and substantial benefits to the Class, as the class recovery represents an expedited and certain schedule for the receipt of replacement blades, checks for individuals who do not receive their blades on time, and a warranty on the replacement blades, none of which were provided prior to the Settlement.

Overall, the *Girsh* factors indicate strongly in favor of approving the proposed Settlement. The Settlement allows a real recovery for all Settlement Class Members now, rather than waiting for years for a recovery which would be unlikely to provide greater value than the Settlement, and in which there would be a substantial risk of recovering nothing. Class Counsel has made a full evaluation of the relevant facts and law and believes that, under all of the facts and circumstances, the Settlement is not only fair and reasonable, but represents a significant victory for the Class.

2. The Relevant *Prudential* and *Baby Products* Factors Also Support Settlement.

The Third Circuit has articulated other factors that can be relevant to the evaluation of some, but not all, class settlements. In *Prudential*, the Third Circuit identified several additional factors that "are illustrative of additional inquiries that in many instances will be useful for a thoroughgoing analysis of a settlement's terms." *In re Pet Food,* 629 F.3d 333 at 350. Those factors are the following (numbers added for clarity):

> [1] [T]he maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; [2] the existence and probable outcome of claims by other classes and subclasses; [3] the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; [4] whether class or subclass members are accorded the right to opt out of the settlement; [5] whether any provisions for attorneys' fees are reasonable; and [6] whether the procedure for processing individual claims under the settlement is fair and reasonable.

Prudential, 148 F.3d 283 at 323. Although not all of the *Prudential* factors are relevant to approval of the proposed Settlement, those that are weigh in favor of final approval. First, the underlying substantive issues in this case are mature. As discussed above, there has been significant discovery on the merits, and Class Counsel is aware of the complexity and risks inherent in a trial on the merits. Second, all individual Settlement Class Members are being treated fairly, as the terms for replacement blades, checks, and warranties are the same for all Settlement Class Members. Third, as discussed above, Settlement Class Members were provided with robust notice and were provided with the opportunity to opt-out. Fourth, the fees requested are reasonable, as more fully discussed in Class Counsel's motion for attorneys' fees filed concurrently herewith.[4] Finally, the claims process is simple and straight-forward – in fact, Settlement Class Members who have requested a blade would not need to do anything, and other Settlement Class Members would only need to complete a basic form or make a phone call, as was required to participate in the recall before the Settlement.

Finally, the Third Circuit added an additional factor in *In re Baby Prods. Antitrust Litig.*, in which it examined the degree to which a proposed settlement provided a "direct benefit" to the

[4] Because Class Counsel is not aware of other individuals, classes, or subclasses asserting similar claims against Conair, Plaintiffs submit that the *Prudential* factor calling for comparison to other such claimants is not relevant to the analysis of the proposed Settlement in this matter.

class. 708 F.3d 163 at 174; *see also Vasco v. Power Home Remodeling Grp. LLC*, No. 15-4623, 2016 U.S. Dist. LEXIS 141044, at *22-23 (E.D. Pa. Oct. 12, 2016) (discussing *Baby Products* factors used to determine the degree of direct benefit to the class). Here, Settlement Class Members who do not request exclusion receive a direct benefit in the form of getting their blades faster and before a definite deadline, getting warranties on their blades, and getting checks if their blades are not sent on time; as mentioned, these are benefits that did not exist prior to the settlement. For all the foregoing reasons, the proposed Settlement satisfies the factors articulated by the Third Circuit and should be approved as fair, reasonable, and adequate.

IV. THE NOTICE PROGRAM IS CONSTITUTIONALLY SOUND AND FULLY IMPLEMENTED.

To protect the rights of absent members of a class, the court must ensure that all class members who would be bound by a class settlement are provided the best practicable notice. *See* Fed. Rule Civ. P. 23(e)(1); *Phillips*, 472 U.S. 797 at 811-12. The best practicable notice is that which is "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." *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950). Both the content and the means of dissemination of the notice must satisfy the "best practicable notice" standard.

The Manual for Complex Litigation provides that notice of a class settlement should: define the class; describe clearly the options open to the class members and the deadlines for taking action; describe the essential terms of the proposed settlement; disclose any special benefits provided to the class representatives; provide information regarding attorneys' fees; indicate the time and place of the hearing to consider approval of the settlement, and the method for objecting to or opting out of the settlement; explain the procedures for allocating and distributing settlement funds, and, if the settlement provides different kinds of relief for different categories of class

members, clearly set out those variations; provide information that will enable class members to calculate or at least estimate their individual recoveries; and prominently display the address and phone number of class counsel and the procedure for making inquiries. MANUAL FOR COMPLEX LITIGATION, FOURTH § 21.312 (2004); *see also Cendant I*, 109 F. Supp. 235 at 254.

The form and manner of Notice was negotiated and agreed upon by the Parties, and approved by this Court, and met all of these requirements: defining the class, clearly setting forth the options open to class members and the corresponding deadlines for pursuing those options, describing the terms of the settlement, providing information about the requests for attorneys' fees and litigation costs and incentive awards, providing information about the final approval hearing, detailing the methods for objecting to or opting out of the settlement, and provided contact information for class counsel.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an Order granting final approval of the Settlement.

Dated: February 5, 2018

Respectfully submitted,

/s/ John D. Radice

John D. Radice
RADICE LAW FIRM, P.C.
301 North Harrison St, Suite 9F-429
Princeton, NJ 08540
Tel: (646) 245-8502
Fax: (609) 385-0745
jradice@radicelawfirm.com

Attorney for Plaintiffs and the Proposed Class