UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF NOTICE PLAN

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Plaintiffs James Filardi, Courtney Andersen, Lisa Burmeister, Kenneth Leonard, Dorothy Petersen, Stephanie Raney, Irene Nunez, Conrado Moreira, Kiara Reed, Nacole Houston, Monika Bennett, Jason Jarrell, Alison Barnhill, Kimberlee Ferris, Jeffrey Gould, Melissa Swaringen-Orton, Michelle Rubiano, and Coleman Stephens, respectfully submit this memorandum of law in support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, Preliminary Certification of Settlement Class, and Approval of Notice Plan.[1]

INTRODUCTION

After nearly one year of litigation,[2] Plaintiffs are proud to report that the Parties have reached an agreement on a proposed nationwide class action settlement, which will provide extraordinary relief to Plaintiffs and the Class (the "Settlement"). The Settlement will resolve the claims of purchasers of certain pet food products (the "Mid America Pet Food Products") manufactured by Defendant Mid America Pet Food, LLC ("Mid America" or "Defendant") which were recalled due to potential *salmonella* contamination.[3]

As part of the proposed Settlement, Defendant will pay or cause to be paid $5.5 million in cash into a non-reversionary Settlement Fund that will provide compensation to Class members

[1] Unless otherwise indicated, capitalized terms shall have the same meaning as they do in the Settlement Agreement. References to "§ __" are to sections in the Settlement Agreement, submitted as Exhibit 1 to the Declaration of Jeffrey S. Goldenberg in Support of Plaintiffs' Motion for Preliminary Approval (the "Goldenberg Decl.") filed concurrently and all Settlement Agreement Exhibits are referred to as "Ex [Letter]."

[2] On November 28, 2023, Plaintiffs Andersen and Burmeister filed the first class action lawsuit against Defendant in the Eastern District of Texas, captioned *Andersen v. Mid-America Pet Food, L.L.C.*, No. 5:23-cv-00140 (E.D. Tex.). Several other actions were subsequently filed in the Eastern District of Texas and consolidated with *Andersen*. Following the successful mediation of this litigation, the *Andersen* action was dismissed without prejudice and those plaintiffs were added to Consolidated Amended Complaint filed in *Filardi* on September 10, 2024 (Dkt. 16).

[3] Defendant initiated three separate recalls – the first on September 3, 2023; the second on October 30, 2023; and the third on November 9, 2023 (the "Recalls"). These recalled products are defined as the "Mid America Pet Food Products" in § 1.17 of the Settlement Agreement and are listed in Exhibit D to the Settlement Agreement.

who purchased Mid America Pet Food Products and provide compensation to those whose pets became sick or died from consuming Mid America Pet Food Products. The Settlement Fund will also pay Court-approved attorneys' fees, attorney expense reimbursements, and service awards.

Plaintiffs also obtained significant non-monetary relief. Specifically, Defendant has represented to Plaintiffs that as a result of the Recalls and this litigation, Defendant implemented a number of food safety-related enhancements. Also, Mid America has represented, and Plaintiffs have confirmed, that the value of the business practice changes and process improvements is approximately $7 million, all of which are designed to avoid future product contamination. *See* Brian T. Fitzpatrick, THE CONSERVATIVE CASE FOR CLASS ACTIONS (2019) at Chapter 8.

As demonstrated below, this Settlement satisfies the relatively low threshold required for preliminary approval. The Settlement was reached when the Parties understood the strengths and weaknesses of their respective positions after engaging in ample informal discovery and arm's length negotiations with the assistance of retired federal Magistrate Judge Diane M. Welsh of JAMS. Goldenberg Decl., ¶ 6. Judge Welsh's involvement in the process speaks volumes about the fairness of this result, and the adversarial and non-collusive nature of the mediation process.[4] The Settlement is also structurally and substantively similar to other recent pet food contamination

[4] Judge Welsh (Ret.) served for twelve (12) years as a United States Magistrate Judge for the Eastern District of Pennsylvania. She is nationally recognized for her work as a neutral and Special Master in complex class actions, mass torts, and multi-district litigations (MDLs). For example, Judge Welsh was appointed Settlement Mediator for the highly publicized multidistrict litigation involving hundreds of consumer lawsuits against Philips for its recall of millions of C-PAP breathing devices, which resulted in Philips agreeing to pay $479M to resolve the claims plus an additional $95M for attorneys' fees.

class action settlements that received preliminary and final court approval.[5]

Accordingly, Plaintiffs respectfully request the Court enter an Order: (1) preliminarily approving the proposed Settlement Agreement, including the exhibits attached thereto; (2) preliminarily certifying a proposed class for settlement purposes only, and appointing Plaintiffs and their Counsel as settlement Class Representatives and Class Counsel; and (3) approving the notice plan and forms of notice to the Class because they meet the requirements of due process and are the best notice practicable under the circumstances pursuant to Fed. R. Civ. P. 23(c)).

FACTUAL AND PROCEDURAL BACKGROUND

I. THE LITIGATION HISTORY AND PLAINTIFFS' ALLEGATIONS

On September 3, 2023, Defendant announced a recall of one lot of "Victor Super Premium Dog Food, Hi-Pro Plus" produced at its Mount Pleasant, Texas production facility because it was potentially contaminated with *salmonella*. The affected product consisted of 644 cases sold in 5-pound bags. Consolidated Amended Complaint ("CAC"), ¶4 (Dkt. 16). On October 30, 2023, Defendant announced that it was issuing a second recall covering three lots of "Victor Super Premium Dog Food, Select Beef Meal & Brown Rice Formula" produced at its Mount Pleasant, Texas production facility. CAC at ¶ 5. According to the FDA announcement published that same day, the second recall was "initiated after a third-party conducted random sampling and product associated with three lots tested positive for Salmonella." *Id*. This second recall was "separate from and unrelated to the Mid-America Pet Food recall for *salmonella* on September 3, 2023." *Id*.

[5] *See In re Midwestern Pet Foods Mktg., Sales Practices, Sales Practices & Product Liability Litig.*, No. 3:21-cv-00007 (S.D. Ind. Aug. 21, 2023) (granting final approval of class action settlement for both pet injury/death and consumer claims based on Aflatoxin and *Salmonella* contamination in pet food); *In Re: Hill's Pet Nutrition, Inc., Dog Food Products Liability Litigation*, No. 2:19-md-02887-JAR-TJJ (D. Kan. Jul. 30, 2021) (Dkt. 133) (granting final approval of class settlement).

Approximately a week later, on November 9, 2023, Defendant announced that it was expanding its October 30, 2023, recall to include Victor Super Premium Dog Foods, Wayne Feeds Dog Food, Eagle Mountain Pet Food, and some Member's Mark varieties. *Id.* at ¶ 6. According to Defendant, the recall was expanded because additional product lots subject to random and targeted sampling had tested positive for *salmonella. Id.* As part of its recall, Defendant offered a full refund to any consumer who submitted proof of purchase and also implemented a program to compensate pet owners for out-of-pocket costs and losses. Goldenberg Decl., ¶ 7. As a result of the recalls, hundreds of thousands of pet food bags were removed from retail stores prior to sale and destroyed. *Id.* at ¶ 17.

On November 28, 2023, Plaintiffs Andersen and Burmeister filed a putative nationwide class action lawsuit against Mid America in the Eastern District of Texas, captioned *Andersen v. Mid-America Pet Food, L.L.C.,* No. 5:23-cv-00140 (E.D. Tex.) (the "*Andersen Action*") asserting claims for negligence, breach of express and implied warranties, fraudulent concealment, unjust enrichment, and violation of several state consumer protection laws. Goldenberg Decl., ¶8. That case was followed by *Jackson v. Mid-America Pet Food, L.L.C.,* No. 5:23-cv-00153 (E.D. Tex.) (the "*Jackson Action*"), and *Barnhill v. Mid-America Pet Food, L.L.C,* No. 5:24-cv-00046 (E.D. Tex.) (the "*Barnhill Action*"), each of which brought similar claims on behalf of a nationwide class and various state classes of consumers. *Id.* at ¶ 9. On December 22, 2023, Plaintiff Filardi filed the instant action, *Filardi v. Mid-America Pet Food, LLC*, No 7:23-cv-11170 (S.D.N.Y.) (the *Filardi* Action"), seeking to certify a class of New York purchasers of Mid America Pet Food and statutory damages for violation of New York General Business Law sections 349 and 350. *Id.* at ¶ 10.

On, January 25, 2024, the *Andersen*, *Jackson*, and *Barnhill* Actions (the "Texas Actions") were consolidated before Judge Robert W. Schroeder, III of U.S. District Court for the Eastern District of Texas, and on February 15, 2024, Plaintiffs filed a consolidated class action complaint

in the *Andersen Action. Id*. at ¶ 11. On April 19, 2024, this Court, and the Court in the *Andersen Action* entered orders staying the litigations pending a decision on Defendant's anticipated motion to dismiss in the *Andersen Action* and the mediation between the Parties. Goldenberg Decl. at ¶ 12. On September 10, 2024 following the mediation, the Parties informed the Court that they had reached a resolution and requested permission to lift the stay and file a consolidated amended complaint and a motion for preliminary approval, which the Court granted. (Dkts. 14 & 15). On the same day, Plaintiffs filed a consolidated amended complaint in the *Filardi* Action to implement the settlement. (Dkt. 16). On September 26, 2024, the Court entered a Stipulation and Order staying the case pending final approval of the Settlement. (Dkt. 22).

The Settlement Agreement resolves the claims asserted in the Consolidated Amended Complaint. Class Counsel worked cooperatively to coordinate the litigation, to save judicial resources, and to lead the case to mediation and an early resolution. Goldenberg Decl. ¶ 15.[6]

II. SETTLEMENT NEGOTIATIONS

The Settlement is the result of extensive arm's-length negotiations between the Parties and counsel. *Id*. at ¶ 14. Class Counsel worked together to thoroughly analyze the legal landscape, including conducting research into the various state consumer protection laws and available remedies, and evaluating matters relating to class certification, in order to fully evaluate the risks and benefits to a potential early resolution. Goldenberg Decl. ¶ 16. Class Counsel also conducted a detailed and extensive analysis of the claims alleged in the Complaints, including applicable

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[6] *See Swetz v. The Clorox Company*, Case No. 22-CV-9374 (S.D.N.Y.) (Tr. Final Approval Hearing) (Judge Halpern stated "I'm delighted that you were able to resolve this. I think very highly of lawyers who actually take on these matters. And I noticed, with the Court's approval, there was a fair amount of self-organization at the beginning of this I think that kind of approach to a District Court Judge is so superior to the other approach which I have run into on occasion, which is the lawyers are fighting and bickering over who should be lead counsel, who should be Class Counsel.").

statutes and regulations concerning labeling, regulatory and scientific guidelines regarding the presence of *salmonella* in pet food products and the scientific research concerning the dangers of *salmonella*. *Id*. at ¶ 17. Likewise, Class Counsel investigated the relevant marketplace to understand the potential scope of this matter, as well as marketing practices and patterns, and sales trends, for the pet food products industry. *Id.* at ¶ 19.

Based on the Parties' exchange of discovery and their respective investigations into the relevant claims and defenses, they agreed to engage in settlement negotiations with Mediator Welsh. *Id. at* ¶ 20. In connection with the mediation and settlement negotiations, Class Counsel obtained significant discovery from Defendant in order to negotiate a settlement on behalf of the Settlement Class that would be fair and reasonable. Importantly, this included Defendant's production of detailed financial, operational, and transactional records and information regarding the financial impact to Defendant of the recalls that are the subject of this litigation. Goldenberg Decl., ¶ 21.[7] Plaintiffs also conducted their own due diligence regarding the measures Defendant put in place after the contamination was discovered. This information was critical to Plaintiffs' determination that the cause of the contamination has been contained and procedures have been implemented to prevent future contamination. *Id*. at ¶ 22.

Importantly, the settlement negotiations were conducted at arm's-length *over a period of several weeks*. *Id*. ¶ 23. On August 16, 2024, the Parties participated in an all-day mediation with Judge Welsh. *Id*. ¶ 25. With Judge Welsh's assistance, the Parties reached an agreement in principle at the mediation session. The Parties continued to pursue settlement discussions for several more weeks, culminating in the attached Settlement Agreement.[8] *Id*. ¶ 25

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[7] The Parties will provide this same financial and operational information to the Court for *in camera* inspection if the Court so requests.

[8] The Parties did not discuss Attorneys' Fees and Costs or any potential Service Award until they first agreed on the substantive terms of this settlement. Goldenberg Decl. ¶ 27.

III. THE TERMS OF THE PROPOSED SETTLEMENT

The Settlement Agreement defines the Settlement Class, describes the Parties' agreed upon exchange of consideration, and proposes a plan for disseminating notice and administering claims for the Settlement Class Members. Goldenberg Decl., Ex 1.

A. The Settlement Class

The Parties agree to certify a nationwide Settlement Class, defined as "all persons and entities residing in the United States who purchased one or more of the Mid America Pet Food Products." Settlement Agreement § I, ¶ 32. Mid America Pet Food Products or "Covered Products" means the pet foods listed in Exhibit D to the Settlement Agreement sold to consumers in the U.S. § I, ¶ 18.

B. Relief for the Settlement Class Members

Defendant will pay or cause to be paid $5,500,000.00 (the "Settlement Fund"). Settlement Agreement ("SA") § I, ¶31. Settlement Class Members shall be eligible to receive monetary relief from the Settlement Fund by submitting a Valid Claim Form. SA § V, ¶1. Settlement Class Members shall have the opportunity to submit a Pet Injury Claim and/or a Food Purchase Claim. *Id*. Settlement Class Members may submit both a Pet Injury Claim and a Food Purchase Claim. *Id*.

Pet Injury Claims. Settlement Class Members submitting Pet Injury Claims shall provide documentation showing injury, death, screening, or treatment of a pet with signs consistent with consumption of *salmonella* as a result of consuming Mid America Pet Food Products. SA § V, ¶5. Acceptable forms of documentation include but are not limited to, veterinary notes and records, test or laboratory reports, letters, emails, or statements from the veterinarian, hospital, or clinic. *Id.* Settlement Class Members are eligible to recover related costs, such as costs for veterinarian care, treatment, screening, burial or cremation costs, or costs for a new pet. SA § V, ¶6.

Settlement Class Members seeking reimbursement for losses related to sick, injured, or deceased pets used for profit (breeding) must also provide business records (e.g., sales records, profit and loss statements, tax records, or similar documentation) and a copy of their relevant commercial license or other state or federal permit (if required). *Id.* Each individual Documented Claim is subject to a $100,000 cap. SA § V, ¶¶ 12(e).[9]

Pet owners that do not have documentation of a Pet Injury Claim may file a claim supported by a declaration describing the ailments and/or injuries of their pets. SA § V, ¶7. Valid Undocumented Pet Injury Claims will be paid at a capped amount as required by the Plan of Allocation (no more than $50 for an injured pet and no more than $100 for a deceased pet). *Id.* Undocumented Pet Injury Claims are limited to one pet per household. *Id.*

Consumer Food Purchase Claims. Each Settlement Class Member may elect to submit either a (i) Consumer Food Purchase Claim with Proof of Purchase (documented claim); or (ii) Consumer Food Purchase Claim without Proof of Purchase (undocumented claim), but may not submit both. SA § V, ¶9. Settlement Class Members who submit a valid Consumer Food Purchase Claim with supporting documentation will be compensated 100% of approved submitted losses (e.g., receipts, invoices, shipping order forms, confirmation emails, proof of payment, etc. showing the purchase price paid for the Mid America Pet Food Products). SA § V, ¶10. Settlement Class Members who submit a valid Consumer Food Purchase Claim without Proof of Purchase will be limited to $20 for each bag of Mid-America Pet Food Product purchased, subject to a two-bag maximum. SA § V, ¶11. Only one Pet Injury Claim Form and one Consumer Food Purchase Claim

[9] The Settlement Agreement sets aside $1.5 million from the Settlement Fund to be used exclusively to pay valid documented Pet Injury Claims and valid Documented Food Purchase Claims. SA § V, ¶12(a). If the value of all valid documented claims is less than $1.5 million, the remaining funds will then be used to pay valid undocumented claims. *Id.*

Form per Household is eligible. SA § V, ¶15. Each documented Claim Form may include multiple bags of Mid America Pet Food Products and multiple pets. *Id*.

Subject to the $1.5 million set aside from the Settlement Fund to be used exclusively to pay valid documented Pet Injury Claims and valid Documented Food Purchase Claims, *see* SA § V, ¶ 12(a), if the total sum payment amount of all Valid Claim Forms exceeds the amount available in the Net Settlement Fund (as defined in SA § I, ¶ 20), then each eligible Settlement Class Member shall have their payment reduced on a pro rata basis. SA § V, ¶ 12(b). Conversely, if the total proposed payment for all Valid Claims Forms does not exceed the amount available in the Net Settlement Fund, then those excess funds shall be paid pro rata to each claimant who submitted a Valid Claim Form. SA § V, ¶ 12(c). All of this ensures that ***no settlement funds*** will revert to Defendant.

C. Non-Monetary Relief

In addition to the monetary relief provided by the Settlement Agreement, Defendant made a number of modifications to its practices and procedures to prevent future contamination. Specifically, Mid America represents and agrees that it has spent approximately $7 million dollars to implement certain business practice changes and capital improvements to its food safety programs including engaging third-party sanitization professionals and food safety and operational consultants, hiring a Chief Supply Chain Officer and Vice President of Manufacturing, Maintenance and Sanitation, and completing numerous facility repairs and capital improvements to improve food safety. SA § IV, ¶ 7. Mid-America agrees that the Recalls and subsequent Litigation were catalysts for those improvements and changes. *Id*. Defendant estimates that monies spent in connection with these business practice changes and improvements total approximately $7 million. *Id*.

D. The Release

Plaintiffs and Settlement Class Members will release all known claims and Unknown Claims to the fullest extent permitted by law against the Defendant related to the Recalls, as alleged in *Filardi, et al. v. Mid-America Pet Food, LLC*, Case No. 23-cv-1170 and the Texas Actions. SA § I, ¶27 (the "Released Claims").[10] This Release includes equitable, injunctive, and monetary claims within the scope of the Settlement Class definition. *Id*. The Release details are set forth more fully in the Settlement Agreement. *See* SA § XII.

E. Attorneys' Fees, Costs, and Service Awards

Class Counsel will file with the Court an application for an award of attorneys' fees in an amount not to exceed 33.33% of the Settlement Fund as well as reimbursement of the reasonable litigation expenses incurred in the prosecution of the Action, not to exceed $35,000. SA §IX, ¶1. Class Counsel will also file with the Court an application for approval of service awards for each Plaintiff who is serving as a class representative. SA § IX, ¶4.

F. Settlement Administration and The Notice Plan

The Settlement Agreement seeks appointment of Angeion Group ("Angeion") as the Settlement Administrator to effectuate and administer the Settlement and to execute the Notice Plan. Before selecting Angeion, Plaintiffs sought multiple bids from claims administrators and vetted Angeion and its proposed notice plan for this Settlement. Goldenberg Decl. ¶ 29. Class Counsel selected Angeion based on its reputation and experience administering similar consumer class actions and its competitive pricing. *Id*. ¶ 29.

The Notice Plan will include a detailed digital notice campaign, an email notice, a long

[10] The Settlement Agreement also releases claims against the Mid America Released Parties defined as "(i) Defendant; (ii) its past, present, and future parents, subsidiaries, affiliates, partners, members, insurers, divisions, predecessors, successors, successors-in-interest, and assigns; and (iii) for each of Defendant and the entities listed in (ii), their respective officers, directors, investors, members, employees, attorneys, controlling persons, advisors, consultants, accountants, auditors, and agents." SA §I, ¶ 19.

form notice and a settlement website that will be designed to accept and process claims electronically. *Id*. at ¶30. The notices shall include, among other information: a description of the material terms of this Settlement; a date by which Settlement Class Members may object to this Settlement; a date by which Settlement Class Members may exclude themselves from this Settlement, the date upon which the Final Approval Hearing shall occur and the address of the Settlement Website at which Settlement Class Members may access this Settlement and other related documents and information and file claims. SA § VI, ¶2. Defendant will timely provide the required notice pursuant to the Class Action Fairness Act, 28 U.S.C § 1715. SA § VI, ¶1. The draft claim form and class notices are attached as Exhibits A and B respectively to the Settlement Agreement.

To effectuate notice, Angeion will analyze the demographic and media usage of potential Settlement Class Members to ensure the notice effectively targets the Settlement Class. *See* Declaration of Steven Weisbrot of Angeion Group Re: The Proposed Notice Plan ("Angeion Decl."), ¶¶ 18-34, filed concurrently. Specifically, Angeion's Notice Plan includes a media campaign that is estimated to reach at least 80% of potential Settlement Class Members. *Id*. ¶¶ 20, 50.; *see* FEDERAL JUDICIAL CENTER, JUDGES' CLASS ACTION NOTICE AND CLAIMS PROCESS CHECKLIST AND PLAIN LANGUAGE GUIDE, at 3 (2010) (explaining a proposed notice plan should "reach between 70-95%" of class members). The media campaign will consist of (i) a digital effort utilizing a form of internet advertising known as Programmatic Display Advertising, which is the leading method of buying digital advertisements in the United States, to provide notice of the Settlement to Class Members and (ii) a campaign on the top social media sites (Facebook and Instagram) and a paid search campaign on Google. Angeion Decl., at ¶¶ 18-34. The Notice Plan, including the digital effort, will drive Settlement Class Members to the Settlement Website where they can access more information and file online claims. *Id*. ¶ 22.

ARGUMENT

A court may approve a class action settlement "only . . . on finding that [the settlement] is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Second Circuit recognizes a "strong judicial policy in favor of settlements, particularly in the class action context." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc*., 396 F.3d 96, 116 (2d Cir. 2005) ("*Visa*")). A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Visa*, 396 F.3d at 116 (quoting MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.42 (1995)). "To grant preliminary approval, the court need only find that there is 'probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." *Manley v. Midan Rest. Inc.*, 2016 WL 1274577, at *8 (S.D.N.Y. Mar. 30, 2016). "If the proposed settlement appears to fall within the range of possible approval, the court should order that the class members receive notice of the settlement." *Id.*

In evaluating a class action settlement, courts in the Second Circuit consider the nine factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) ("*Grinnell*"). The *Grinnell* factors are:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the 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 463.

Courts should also consider the "four enumerated factors in the new [Federal Rule of Civil Procedure] Rule 23(e)(2), in addition to the nine *Grinnell* factors." *Johnson v. Rausch, Sturm,*

Israel, Enerson & Hornik, LLP, 333 F.R.D. 314, 420 (S.D.N.Y. 2019). The Rule 23(e)(2) factors are whether:

> (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

I. PRELIMINARY APPROVAL OF THE SETTLEMENT IS APPROPRIATE

A. The *Grinnell* Factors

1. The Complexity, Expense, And Likely Duration Of The Litigation

"The greater the 'complexity, expense and likely duration of the litigation,' the stronger the basis for approving a settlement." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 663 (S.D.N.Y. 2015). Consumer class action lawsuits by their very nature are complex, expensive and lengthy. *See*, *e.g., Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010). Should the Court decline to approve the proposed settlement and litigation were to resume, it would be costly, risky, complex and time-consuming.

Although Plaintiffs are confident that they could certify a class, Defendant would require Plaintiffs to expend significant resources to do so and would certainly attempt to decertify the class and/or appeal the class certification ruling. Plaintiffs expect there would be a lengthy and expensive battle of the experts concerning, among other things, consumer expectations, the science of salmonella contamination, and damages. Should Plaintiffs prevail, any final judgment would likely be appealed, adding significant time and resources.

In sum, "[t]he settlement eliminates [the] costs and risks" associated with further litigation. *Meredith Corp.*, 87 F. Supp. 3d at 663. "It also obtains for the class prompt [] compensation for prior [] injuries." *Id.* For these reasons, this factor strongly favors preliminary approval.

2. The Reaction of The Class To The Settlement

It is premature to address the reaction of the Settlement Class. *In re Warner Chilcott Ltd. Sec. Litig.*, 2008 WL 5110904, at *2 (S.D.N.Y. Nov. 20, 2008).

3. The Stage of The Proceedings and The Amount of Discovery Completed

The third *Grinnell* factor considers "whether Class Plaintiffs had sufficient information on the merits of the case to enter into a settlement agreement . . . and whether the Court has sufficient information to evaluate such a settlement." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 224 (E.D.N.Y. 2013). As set forth above, Class Counsel have conducted significant informal discovery related to Plaintiffs' claims, including obtaining extensive sales, distribution, and marketing information regarding the Mid America Pet Food Products, Defendant's pet food testing records during relevant time period, Defendant's historical and current financial condition, and the improvements and protocols put in place by Defendant to prevent future contamination. Goldenberg Decl. ¶ 26. *See D.S. v. New York City Dep't of Educ.*, 255 F.R.D. 59, 77 (E.D.N.Y. 2008) ("The amount of discovery undertaken has provided plaintiffs' counsel 'sufficient information to act intelligently on behalf of the class in reaching a settlement.").

Courts in this District routinely approve class action settlements reached at the early stages of litigation because it allows the class members to recover without the delay that such complex cases usually entail.[11]

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[11] *See Asare v. Change Group N.Y., Inc.*, 2013 U.S. Dist. LEXIS 165935, *55 (S.D.N.Y Nov. 15, 2013) (granting final approval of class action settlement where "Class Counsel's skill and experience was directly responsible for this favorable settlement reached in an efficient manner

4. The Risks of Establishing Liability and Damages

"[I]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *Banyai v. Mazur*, 2007 WL 927583, at *9 (S.D.N.Y. Mar. 27, 2007). In weighing the risks of certifying a class and establishing liability and damages, the court "must only weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub. nom.*, *D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). Plaintiffs recognize that, as with any litigation, uncertainties exist. Defendant continues to deny Plaintiffs' allegations and deny any liability to Plaintiffs, and should this matter proceed, Plaintiffs expect Defendant will vigorously defend itself on the merits, at each stage of litigation and likely on appeal. Most fundamentally, while Plaintiffs allege that Defendant was negligent in failing to prevent *salmonella* contamination in its products and that a reasonable consumer would be misled by the failure to disclose that the Mid America Pet Food Products could potentially contain *salmonella*, a jury might not agree. In addition, Plaintiffs anticipate a zealous "battle of the experts" with respect to the extent of *salmonella* contamination or risk of contamination, the amount of bacteria in each contaminated product (if any), the health effects of exposure to *salmonella* and the calculations of damages. For these reasons, although Plaintiffs are confident in the merits of their case, the risks of establishing liability and damages at trial and on appeal strongly support preliminary approval. Additionally, Defendant will certainly argue that damages in this matter would be extremely limited because only a very minimal amount of the Covered Products were at risk of being contaminated and a significant portion of the potentially

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without great Court intervention at an early stage of litigation."). *See e.g. Swetz v. GSK Consumer Health, Inc.,* 7:20-cv-04731-NSR, 2021 WL 5449932, at *2 (S.D.N.Y Nov. 22, 2021)(Roman, J.)(same).

contaminated products never made it into the hands of consumers. Goldenberg Decl. ¶ 17.

5. The Risk of Maintaining Class Action Status Through Trial

Plaintiffs seek class certification for settlement purposes only. SA § II, ¶1. As discussed above, in addition to the challenges inherent in certifying a potential national class, Plaintiffs must proffer a suitable mechanism for calculating class wide damages. While Plaintiffs believe they could establish the existence of such damages to the Court's satisfaction in the form of a price-premium (*Shaya Eidelman v. Sun Prods. Corp*., 2022 U.S. App. LEXIS 15480, *1 (2d Cir. 2022)), the Settlement eliminates the risk that they cannot. Plaintiffs would also have to overcome Defendant's contention that individual issues related to the injuries to Class Members' pets and the expenses they incurred predominate over common ones.[12]

6. The Ability of Defendant to Withstand Greater Judgment

Under the *Grinnell* analysis, the Court also considers Defendant's ability to withstand a greater judgment. Defendant has produced, and Class Counsel have reviewed, substantial documentation regarding Defendant's financial condition since the Recalls. Goldenberg Decl. at ¶_21.[13] Given Defendant's financial situation there is no assurance that it could withstand a greater judgment, and this factor weighs in favor of preliminary approval. *See Li Zhen Zhu v. Wanrong Trading Corp.,* 2024 U.S. Dist. LEXIS 179236, *32 (E.D.N.Y. Sep. 30, 2024) (finding that the seventh *Grinnell* factor was met because of defendant's distressed financial condition).

7. The Range of Reasonableness of The Settlement in Light of The Best Possible Recovery and In Light of All The Attendant Risks of Litigation

"There is a range of reasonableness with respect to a settlement—a range which recognizes

[12] *See*, *e.g.*, *Mills v. Capital One, N.A.*, 2015 WL 5730008, at *14 (S.D.N.Y. Sept. 30, 2015) ("[V]ictory in a contested suit would have been far from clear as there was case law contrary to plaintiffs' position.").

[13] The Parties will provide this same financial and operational information to the Court for in camera inspection if the Court so requests.

the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Visa*, 396 F.3d at 119. "In other words, the question for the Court is not whether the settlement represents the highest recovery possible. . . but whether it represents a reasonable one in light of the many uncertainties the class faces." *Bodon v. Domino's Pizza, LLC*, 2015 WL 5886656, at *6 (E.D.N.Y. Jan. 16, 2015). Indeed, courts within this Circuit have approved settlements providing a small fraction of the total estimated recovery in light of the risks of litigation.[14]

The relief here is within the range of reasonableness, especially considering all the attendant risks of litigation. Moreover, the cash compensation to which eligible Settlement Class Members will be entitled is significant relative to Plaintiffs' best result at trial. Considering the additional, non-monetary relief ($7 million worth of business practice changes and capital improvements to its production and food safety programs), the Settlement provides substantial relief, strongly supporting preliminary approval. *See* Goldenberg Decl. ¶ 28. Further, the Plan of Allocation in the Settlement Agreement is designed to ensure that Settlement Class Members who submit valid documented claims will receive close to 100% of their documented damages. *Id*. The Settlement is even more reasonable in light of Defendant's financial condition. *See Rodriguez v. CPI Aerostructures, Inc.,* 2023 U.S. Dist. LEXIS 26891, *43 (E.D.N.Y. Feb. 16, 2023).[15]

B. The Rule 23(e)(2) Factors

1. Class Counsel and Plaintiffs Adequately Represented the Class

[14] *See Grice v. Pepsi Bevs*. Co., 363 F. Supp. 3d 401, 408-09 (S.D.N.Y. 2019) (approving 5% of maximum potential recovery)

[15] The amount of the common fund is in line with recent similar pet food salmonella contamination class actions that have been granted final approval. *See e.g. In re Midwestern Pet Foods Mktg., Sales Practices, Sales Practices & Product Liability Litig.*, No. 3:21-cv-00007 (S.D. Ind.) (Dkt. 157, approving $6.375 million common fund settlement).

"Determination of adequacy typically entails inquiry as to whether: (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. 11, 30 (E.D.N.Y. 2019). As discussed below, Plaintiffs and Class Counsel have adequately represented the Class. Argument IV.A.4, *infra*.

2. The Settlement Was Negotiated at Arm's-Length

"If a class settlement is reached through arm's-length negotiations between experienced, capable counsel knowledgeable in complex class litigation, the Settlement will enjoy a presumption of fairness." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 693 (S.D.N.Y. 2019). Here, both Class Counsel and Defendant's Counsel are experienced in class litigation. Goldenberg Decl. ¶¶ 4, 24. Moreover, the Parties participated in a mediation before Judge Welsh and engaged in protracted settlement discussions. *Id*. at ¶¶ 25-26. *Puddu v. 6D Glob. Techs., Inc.*, No. 15-CV-8061 (AJN), 2021 WL 1910656 (S.D.N.Y. May 12, 2021) (explaining there is "a presumption of fairness when a settlement is reached with the assistance of a mediator").

3. The Settlement Provides Adequate Relief to The Class

Whether relief is adequate considers "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C)(i-iv).

As to "the costs, risks, and delay of trial and appeal," this factor "subsumes several *Grinnell* factors . . .including: (i) the complexity, expense and likely duration of the litigation; (ii) the risks of establishing liability; (iii) the risks of establishing damages; and (iv) the risks of maintaining

the class through the trial." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. at 36. The Settlement meets each of these *Grinnell* factors. *See* Argument I.A.

As to "the effectiveness of any proposed method of distributing relief to the class," the Notice Plan outlined below was proposed by experienced and competent counsel and designed by an experienced settlement administrator and ensures "the equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 695; *see also* Argument III.

As to "the terms of any proposed award of attorneys' fees," in the Second Circuit, an award of attorneys' fees is based on "the total funds made available, whether claimed or not" because "[t]he entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class." *Masters v. Wilhelmina Model Agency*, 473 F.3d 423, 437 (2nd Cir. 2007). "Courts evaluating the fairness, reasonableness, and adequacy of a proposed settlement must consider the four factors outlined in Rule 23(e)(2) holistically, taking into account - among other substantive considerations stated in the rule - the proposed attorneys' fees and incentive awards." *Moses v. N.Y. Times Co*., 79 F.4th 235, 243 (2d Cir. 2023). Plaintiffs' Counsel plans to apply for attorneys' fees in the amount of one-third of the Settlement Fund. Goldenberg Decl. ¶ 27. This Court has approved fees of one-third of the settlement fund in cases that have settled in a similar procedural posture.[16] In addition, courts have recently approved comparable attorneys' fees requests in similar product contamination cases, including, including pet food.[17]

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[16] *See Patora v. Tarte, Inc*., Case No. 18-cv-11760-KMK (S.D.N.Y.)(awarding a third of settlement fund for attorneys' fees and costs in a consumer fraud case); *Swetz v. GSK Consumer Health, Inc.,* 7:20-cv-04731-NSR (S.D.N.Y Nov. 22, 2021)(Dkt. 71)(Roman, J.)(approving counsel's motion for attorneys' fees equal to 33 1/3% of total settlement fund).

[17] *See In re Midwestern Pet Foods Mktg., Sales Practices, Sales Practices & Product Liability Litig.*, No. 3:21-cv-00007 (S.D. Ind. Aug. 21, 2023) (same); *In Re: Hill's Pet Nutrition, Inc., Dog Food Products Liability Litigation*, No. 2:19-md-02887-JAR-TJJ (D. Kan.)(approving fee award of 32% of common fund).

As to "any agreement required to be identified by Rule 23(e)(3)" or "any agreement made in connection with the proposal," *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 696, no such agreement exists in this case other than the Settlement Agreement. Goldenberg Decl., at ¶27.

4. The Settlement Treats All Class Members Equally

This Rule 23(e)(2) factor discusses "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. at 47.

The proposed Settlement treats Settlement Class Members equitably relative to each other and is specifically designed to apportion relief among Settlement Class Members relative to the harms they have suffered and the respective strength of their claims. For instance, Settlement Class Members who lost their dogs to *salmonella* poisoning or incurred hefty out-of-pocket expenses seeking medical treatment for their dogs' illnesses are entitled to a greater share of Settlement proceeds than Settlement Class members who discarded recalled pet food. SA §V, ¶¶5-12. And those Settlement Class members with documentation supporting their claimed damages are entitled to a greater share of the Settlement proceeds than those with undocumented claims. *Id.*

II. THE COURT SHOULD PRELIMINARILY CERTIFY THE SETTLEMENT CLASS

As Plaintiffs set forth below, and although Defendant reserves all its arguments to the contrary should this Settlement not be approved, the proposed Settlement Class satisfies all of the requirements of Rule 23(a) and Rule 23(b)(3).

A. The Settlement Class Meets All Prerequisites of Rule 23(a) Of The Federal Rules Of Civil Procedure

The Settlement Class meets each prerequisite of Rule 23(a) which include: (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequate representation. Fed. R. Civ. P. 23(a).

1. Numerosity

Under Rule 23(a)(1), plaintiffs must show that the proposed class is "so numerous that joinder of all [its] members is impracticable." Fed. R. Civ. P. 23(a)(1). Here, there is no dispute that hundreds of thousands, if not millions, of consumers nationwide purchased the Mid America Pet Food Products that were the subject of the Recalls. Numerosity is easily satisfied. *See Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997).

2. Commonality

Under Fed. R. Civ. P. 23(a)(2), plaintiffs must show that "questions of law or fact common to the [proposed] class" exist. Commonality requires that the proposed class members' claims all centrally "depend upon a common contention," which "must be of such a nature that it is capable of class wide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "[F]or purposes of Rule 23(a)(2) even a single common question will do." *Id.* at 359. Here, common questions include whether Defendant knew or should have known that the Mid America Pet Food Products were contaminated with *salmonella*; whether Defendant failed to employ quality control measures and failed to properly manufacture, test and/or inspect the Mid America Pet Food Products before distribution; and whether Defendant failed to disclose material facts regarding the Mid America Pet Food Products. Resolving these common questions would require evaluating the question's merits under a single objective standard, i.e., the "reasonable consumer" test. *Hart v. BHH, LLC*, 2017 WL 2912519, at *6 (S.D.N.Y. July 7, 2017) Thus, commonality is satisfied.

3. Typicality

Fed. R. Civ. P. 23(a)(3) requires that the proposed class representatives' claims "are typical of the [class's] claims." Plaintiffs must show that "the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented." *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993). "[D]ifferences in the degree of harm suffered, or even in the

ability to prove damages, do not vitiate the typicality of a representative's claims." *In re Nissan Radiator/Transmission Cooler Litig.*, 2013 WL 4080946, at *19 (S.D.N.Y. May 30, 2013). Here, typicality is met because the same allegedly unlawful conduct was directed at, or affected, Plaintiffs and Settlement Class Members. *Robidoux*, 987 F.2d at 936-37.

4. Adequacy

Under Fed. R. Civ. P. 23(a)(4), Plaintiffs must show that the proposed class representatives will "fairly and adequately protect the interests of the class." Plaintiffs must demonstrate that: (1) the class representatives do not have conflicting interests with other class members; and (2) class counsel is "qualified, experienced and generally able to conduct the litigation." *Marisol A.*, 126 F.3d at 378.

Here, Plaintiffs possess the same interests as the proposed Settlement Class Members because Plaintiffs and the Settlement Class Members were all allegedly injured in the same manner based on the same allegedly conduct. *See Charron v. Wiener*, 731 F.2d 241,249 (2nd Cir. 2013). Moreover, Class Counsel are qualified and have substantial experience in class action litigation, including pet food contamination cases. *See* Goldenberg Decl. ¶ 4.

B. The Settlement Class Meets the Requirements of Rule 23(b)

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997). Plaintiffs seek certification under Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

1. Common Legal and Factual Questions Predominate In This Action

The Second Circuit has held that "to meet the predominance requirement . . . a plaintiff

must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof." *Augustin v. Jablonsky (In re Nassau County Strip Search Cases)*, 461 F.3d 219, 227-28 (2d Cir. 2006). In the context of a request for settlement-only class certification, concerns about whether individual issues "would present intractable management problems" at trial drop out because "the proposal is that there be no trial." *Id.* at 620. As a result, "the predominance inquiry will sometimes be easier to satisfy in the settlement context." *Tart v. Lions Gate Ent. Corp.*, 2015 WL 5945846, at *4 (S.D.N.Y, Oct. 13, 2015).

Here, for settlement purposes, the central common questions predominate over any questions that may affect individual Settlement Class Members. A common nucleus of facts will govern all of Plaintiffs' and the Settlement Class Members' claims, including: whether Defendant implemented and followed required practices for manufacturing and processing the Mid America Pet Food Products; whether Defendant sold the Mid America Pet Food Products containing *salmonella* and whether Defendant knew or should have known about the risks that it created such that appropriate warnings or disclosures should have been made. These issues are subject to "generalized proof" and "outweigh those issues that are subject to individualized proof." *In re Nassau Cty. Strip Search Cases*, 461 F.3d at 227–28.

2. A Class Action Is the Superior Means to Adjudicate Plaintiffs' Claims

Here, the class action mechanism is superior to individual actions for numerous reasons. First, "[t]he potential class members are both significant in number and geographically dispersed" and "[t]he interest of the class as a whole in litigating the many common questions substantially outweighs any interest by individual members in bringing and prosecuting separate actions." *Meredith Corp.*, 87 F. Supp. 3d at 661. Second, a class action is superior because the "small recoveries" at stake here likely "do not provide the incentive for any individual to bring a solo

action prosecuting his or her rights." *Tart*, 2015 WL 5945846, at *5. Finally, a class action will conserve judicial resources because it will resolve all claims at once. *Id*. For all the foregoing reasons, a class action is superior to individual suits.

III. THE COURT SHOULD APPROVE THE PROPOSED NOTICE PLAN

"Rule 23(e)(1)(B) requires the court to 'direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise' regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.312 (2004). "The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Visa*, 396 F.3d at 113.

Here, the robust proposed Notice Plan satisfies due process and the Federal Rules of Civil Procedure. Angeion Decl., ¶ 52. The proposed methods Plaintiffs identified above for providing notice to the Settlement Class Members are reasonable, designed to reach 80% of the Settlement Class, and utilize the best practicable and economically efficient means available. *Id*., ¶¶ 20, 50.[18] A website and toll-free number will be established to inform consumers of the Settlement, and a carefully designed digital advertising campaign targeting Settlement Class Members will be used to drive them to the Settlement Website. *Id.* ¶¶ 22-45. In addition, direct mail and email notice will be issued to those for whom such information is reasonably available. *Id.* at ¶¶ 35-42.

Substantively, Rule 23(c)(2)(B) requires, and the Notice of Settlement provides, information, written in easy-to-understand plain language, regarding: "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court

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[18] *See* JUDGES' CLASS ACTION NOTICE AND CLAIMS PROCESS CHECKLIST AND PLAIN LANGUAGE GUIDE, at 3 (2010) ("It is reasonable to reach between 70-95%.").

will exclude from the class any member who request exclusions; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B). Here, the Notices defines the Settlement Class; explain all Settlement Class Members' rights and procedures for participating in the settlement, as well as the monetary relief of the Settlement and its allocation among all participating parties. Goldenberg Decl., ¶¶ 30-31; *see also* Exs. A & B to the Settlement Agreement.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court: (1) certify the Settlement Class and appoint the named Plaintiffs as the class representatives and their counsel as Class Counsel; (2) preliminarily approve the Settlement Agreement; (3) approve the Notice Plan; and (4) set a date and time for the Final Approval Hearing. [19]

Dated: November 20, 2024

Respectfully submitted,

By: */s/ Jeffrey S. Goldenberg*

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[19] A proposed Schedule to implement the settlement is included in the proposed Order Granting Preliminary Approval. Exhibit E to the Settlement Agreement. Class Counsel recommend the Court set the Fairness Hearing date no earlier than April 8, 2025.

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