UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

In re: Midwestern Pet Foods Marketing, Sales Practices and Product Liability Litigation	Case No. 3:21-cv-00007-RLY-MPB

PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiffs Kelleen Reagan, Marcia Berger, Tammy Johnson, Harvey Williams, Jannette Kern, Ashley Lill, Charles Foster, James Buechler, Sue Flynn, Tiffany Carlson, Connor Staponski, Shannon Proulx, Stephanie Romero, Shanda Marshall, Owen Woodall, David Starnes, Chanler Potts, Vollie Griffin, Henry Franco, Jr., Robert Lee, and Crystal Fabela ("Plaintiffs") submit this memorandum in support of their Unopposed Motion for Preliminary Approval of Class Action Settlement.

I. INTRODUCTION

This consolidated action arises from voluntary recalls in December 2020, January 2021, and March 2021 of contaminated pet foods manufactured, marketed, sold, and distributed by Defendants Midwestern Pet Foods ("Midwestern") and Nunn Milling Company ("Nunn") (collectively, "Defendants"). Defendants recalled the pet foods because they were contaminated with excessive levels of aflatoxin and *Salmonella*. Aflatoxin is a toxin created by the mold Aspergillus flavus. At high levels, aflatoxin can result in pet illness and death. *Salmonella* can cause pets to become sick and can result in more serious illness to humans who handled the contaminated pet food. The operative consolidated complaint asserts various tort and consumer fraud claims on behalf of a nationwide class (and state-specific subclasses) of pet food purchasers.

Defendants filed an answer vehemently denying Plaintiffs' allegations and asserting various defenses.

Recognizing the risks and costs of ongoing litigation, Plaintiffs and Defendants first exchanged discovery and thereafter, engaged in extensive arm's-length settlement negotiations with the assistance of a respected third-party mediator, Judge Wayne Andersen (Ret.), on December 21, 2021. The parties were unable to resolve the case at the mediation, but with the aid of the mediator the parties continued to engage in extensive settlement discussions thereafter. The parties met for a second in-person mediation with Judge Anderson on April 5, 2022, and again, did not resolve the case at that time. Their negotiations continued, however. After more than eight months of hard-fought negotiations, the parties finalized an agreement to fully resolve the case. The terms of the proposed settlement are set forth in the Class Action Settlement Agreement ("Settlement Agreement" or "Settlement") attached as Exhibit 1 hereto.

Under the proposed Settlement, Defendants have agreed to create a Settlement Fund[1] in the amount of six million three-hundred-seventy-five thousand U.S. dollars ($6,375,000) to compensate purchasers of the recalled pet food products for Pet Injury Claims[2] and Consumer Food Purchaser Claims.[3] The Settlement Fund will provide valuable monetary relief to Settlement

[1] All capitalized terms have the same meaning as defined in the Settlement Agreement.

[2] Settlement Class members who submit valid Pet Injury Claims for injury or death, screening or treatment of the pet for signs consistent with consumption of aflatoxin or Salmonella as a result of the use or consumption of Midwestern Pet Food Products will be eligible to receive: payments for illness, injuries or death to pets and related losses including payments for the purchase price of deceased pets or replacement pets; payments for medical expenses, including ongoing treatment; payments for funeral/cremation costs; and payments for losses related to injured, sick or dead breeding animals. All such payments shall be paid consistent with the Plan of Allocation, attached as Exhibit D to the Settlement Agreement and Release.

[3] Settlement Class Members who complete the Claim Form and provide valid Proof of Purchase showing their actual purchase(s) of Midwestern Pet Products during the Settlement Class Period and the purchase price of the Midwestern Pet Products purchased shall receive a full refund

Class Members, and will also pay notice and administration costs, attorneys' fees and reimbursement of costs as approved by the Court, service awards to the proposed Class Representatives as approved by the Court, and any payments of residual funds to *Cy Pres* Recipients as approved by the Court. The Settlement Fund is non-reversionary. Under no circumstances will any part of the Settlement Fund revert to Defendants.

The proposed Settlement was reached when the parties understood the strengths and weaknesses of their respective positions, having engaged in ample informal discovery and numerous arm's length negotiations, including months of mediation efforts and discussions under the direction and guidance of JAMS mediator, Judge Wayne R. Andersen (Ret.).

Plaintiffs request that the Court grant preliminary approval of the proposed Settlement so that notice may be provided to the Settlement Class. Given the meaningful benefits available to Settlement Class Members, the risks of certifying a nationwide litigation class, establishing Defendants' liability and proving damages, and the length of time and the costs that would be required to complete the litigation through trial and appeals, Plaintiffs respectfully submit that the proposed Settlement is fair, reasonable, and adequate, and in the best interests of the Settlement Class Members. A proposed Order granting preliminary approval is attached as Exhibit 2 hereto.

II. BACKGROUND

On or around December 30, 2020, Defendants announced a recall of three formulas of dog and cat food products, specifically, Sportmix Energy Plus, Sportmix Premium High Energy and

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of the price of the Midwestern Pet Food Products as set forth on their Proof of Purchase consistent with the Plan of Allocation as approved by the Court. Settlement Class Members who complete the Claim Form and do not provide valid Proof of Purchase showing their actual purchase(s) of Midwestern Pet Food Products during the Settlement Class Period shall receive, consistent with the Plan of Allocation, $25 per bag for up to two bags of Midwestern Pet Food Products claimed to have been purchased.

Sportmix Original Cat. According to Defendants' news announcement, testing indicated that the recalled products contained "levels of Aflatoxin that exceed acceptable limits." On or around the same day, the Food and Drug Administration ("FDA") published news about Defendants' recall and reported that several dogs had fallen ill or died after consuming Defendants' Sportmix products. On or around January 11, 2021, Defendants announced that they were expanding the list of recalled pet foods. According to Defendants' January 11, 2021 news release, the recalled products were made with corn ingredients and were produced at their Chickasha Operations Facility in Oklahoma. The January 11, 2021 recall involved products all expired on or before July 9, 2022 and involved the Pro Pac, Splash Fat Cat, Nunn Better Maintenance, Sportstrail, and Sportmix brands. On or about March 26, 2021, Defendants announced a third recall of certain dog and cat food formulas because of potential Salmonella contamination. Defendants manufactured, distributed, marketed, and sold these products under their CanineX, Earthborn Holistic, Venture, Unrefined, Pro Pac, Pro Pac Ultimates, Sportstrail, Sportmix, and Meridian brands produced at their Monmouth, Illinois Production Facility.

Plaintiffs initiated this consolidated action[4] on behalf of themselves and all other consumers nationwide who bought Defendants' recalled pet food products. Plaintiffs assert claims for breach of express warranty, breach of the implied warranty of merchantability, fraudulent concealment, negligence, negligent misrepresentation, intentional misrepresentation, unjust

[4] This Action is comprised of the following consolidated lawsuits: *Carlson v. Midwestern Pet Foods, Inc*., No. 3:21-CV-00007-RLY-MPB; *Johnson v. Midwestern Pet Foods, Inc*., No. 3:21-cv-00009-RLY-MPB; *Romero v. Midwestern Pet Foods, Inc.*, No. 3:21-cv-00014-RLY-MPB; *Williams v. Midwestern Pet Foods, Inc*., No. 3:21-cv-00022-RLY-MPB; *Foster v. Midwestern Pet Foods, Inc*., No. 1:21-cv-00360-PJH-TAB; and *Marshall v. Midwestern Pet Foods, Inc*., No. 3:21-cv-00050-RLY-MPB.

enrichment, and for violations of state consumer protection statutes.[5] Defendants filed an answer denying liability on September 23, 2021.

The parties engaged the Honorable Wayne R. Andersen (Ret.) of JAMS to mediate and oversee settlement negotiations in this action. Declaration of Jeffrey S. Goldenberg in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement ("Goldenberg Decl."), ¶7, attached as Exhibit 3. The parties met with Judge Andersen for two mediation sessions on December 21, 2021 and April 5, 2022. *Id*. Although the case did not resolve at those mediation sessions, the parties continued to discuss potential resolution with Judge Andersen for several months through July 2022. *Id.* With Judge Andersen's assistance, the parties reached an agreement in principle on July 5, 2022, to resolve the action and subsequently memorialized the terms of their settlement in the Settlement Agreement. The parties' negotiations have at all times been at arms-length. *Id.*

III. SUMMARY OF SETTLEMENT TERMS

A. Class Definition

[5] Alabama Deceptive Trade Practices Act, Ala. Code § 8-19-1, *et seq.*; California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq*.; Florida Unfair & Deceptive Trade Practices Act, Fla. Stat. § 501.201, *et seq*.; Georgia's Fair Business Practices Act, Ga. Code Ann. § 10-1-390, *et seq*.; Georgia's Uniform Deceptive Trade Practices Act, Ga. Code Ann. § 10-1-370, *et seq*.; Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq*.; 720 ILCS 295/1a; Indiana Deceptive Consumer Sales Act, Ind. Code § 24-5-0.5-3; Kansas Consumer Protection Act, Kan. Stat. Ann. § 50-623, *et seq*.; Louisiana Unfair Trade Practices and Consumer Protection Law, La. Stat. Ann. § 51:1401, *et seq*.; Maryland Consumer Protection Act, Md. Code Com. Law § 13-101, *et seq*.; Michigan Consumer Protection Act, Mich. Comp. Laws § 445.903, *et seq*.; Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010, *et seq*.; New Mexico Unfair Trade Practices Act, N.M. Stat. Ann. § 57-12-1, *et seq*.; New York General Business Law § 349; N.Y. Gen. Bus. Law § 350; North Carolina Unfair and Deceptive Acts and Practices Act, N.C. Gen. Stat. § 75-1.1, *et seq*.; Oklahoma Consumer Protection Act, Okla. Stat. Tit. 15 § 751, *et seq*.; Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101, *et seq*.; and the Texas Deceptive Trade Practices Act, Tex. Bus. & Com. Code § 17.41, *et seq.*

The "Settlement Class" is defined as all persons and entities residing in the United States who purchased one or more of the Midwestern Pet Food Products. Settlement Agreement ("S.A."), § II, ¶30. "Midwestern Pet Food Products" means the pet foods listed in Exhibit C to the Settlement Agreement, which are the products sold to consumers in the United States that were included in Defendants' recalls announced on December 30, 2020, January 11, 2021, and March 26, 2021. S.A., § II, ¶17. Excluded from this Settlement Class are: the plaintiffs who have their own lawsuit pending in *Simmons v. Midwestern Pet Foods, Inc*., No. 6:21-cv-03012 (W.D. Mo. 2021); persons or entities whose claims are solely based upon the purchase of Midwestern Pet Food Products for resale; corporate officers, members of the board of directors, and senior management of Defendants; Settlement Class Members who previously contacted Defendants prior to and during the pendency of this litigation, signed a release and in exchange, received financial compensation from Defendants; any and all judges and justices assigned to hear or adjudicate any aspect of this case as well as their staff; any members of the Settlement Class that timely opt out; any entity in which Defendants have a controlling interest, and their legal representatives, officers, directors, employees, assigns and successors; and Class Counsel. S.A., § II, ¶30.

B. Settlement Class Benefits

Defendants will create a common fund totaling $6,375,000.00 in total (the "Settlement Fund"). S.A., § II, ¶29.[6] Settlement Class Members shall be eligible to receive monetary relief from the Settlement Fund by submitting a Valid Claim Form. S.A., § VI, ¶1. Settlement Class

[6] Defendants will deposit an initial funding amount of $206,737 within 14 days of entry of the Preliminary Approval Order to cover the initial notice and administration costs. S.A. § V, ¶1. If the initial notice and administration costs exceed the initial funding amount, Defendants agree to pay the additional notice and administration costs in a timely manner. *Id*. Within ten days following the Date of Finality, the Defendants shall pay the remaining amount of the $6,375,000 (net of the notice and initial administration costs already paid) into a qualified settlement fund as directed by Plaintiffs. *Id*. "Date of Finality" means the first date after the Court enters a Final Approval Order and all appellate rights with respect to that order have expired or been exhausted in such a manner as to affirm the order.

Members shall have the opportunity to submit a Pet Injury Claim and/or a Consumer Food Purchase Claim. *Id*. Settlement Class Members may, but are not required to, submit both a Pet Injury Claim and a Consumer 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 aflatoxin or *Salmonella* as a result of consuming Midwestern Pet Food Products. S.A., § VI, ¶3. Acceptable forms of documentation include but are not limited to, the following: 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 replacement costs providing they submit supporting documentation. S.A., § VI, ¶5

The types of documents required to make a valid claim include, but are not limited to, receipts, invoices, contracts, and veterinarian records. *Id.* 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 commercial license or other state or federal permit (if required) that was valid at the time the pet was sick, injured, or deceased. *Id.*

Declarations provided by the pet owner describing the ailments and/or injuries of their pets may be acceptable if substantial detail is provided; however, Pet Injury Claims supported solely by a declaration from the pet owner will be paid at a lower amount as required by the Plan of Allocation. Fully documented Pet Injury Claims will be paid at 100% of approved documented losses, subject to an initial cap of $150,000. Plan of Allocation ("POA"), ¶4a. This initial $150,000 individual claim cap may be adjusted upward if adequate funds are available in the Net Settlement

Fund after each Valid Claim Form is valued at 100% of its approved amount. POA, ¶4. Pet Injury Claims supported only by declaration shall be limited to $75 for pets that became ill but did not die and $150 for pets that died. POA, ¶4b.

Consumer Food Purchase Claims. Each Settlement Class Member may elect to submit either a (i) Consumer Food Purchase Claim with Proof of Purchase; or (ii) Consumer Food Purchase Claim without Proof of Purchase, but may not submit both. *Id*. Settlement Class Members who submit a valid Consumer Food Purchase Claim with Proof of Purchase will be compensated 100% of approved submitted losses supported by documentation (e.g., receipts; invoices; shipping order forms; confirmation emails; proof of payment; etc.) showing the purchase price paid for the Midwestern Pet Food Products. POA, ¶5a. Settlement Class Members who submit a valid Consumer Food Purchase Claim without Proof of Purchase will be limited to $25 for each bag of Midwestern Pet Food Product purchased, with a maximum of two bags purchased. POA, ¶5b. Only one Pet Injury Claim Form and one Consumer Food Purchase Claim Form per Household is eligible. S.A., § VI, ¶14.

If the total sum payment amount of all Valid Claim Forms exceeds the amount available in the Net Settlement Fund,[7] then each eligible Settlement Class Member shall have their payment reduced on a pro rata basis (e.g., if the total of all Valid Claim Forms exceeds the Net Settlement Fund by 20%, then the initial proposed payment amount for each Valid Claim Form shall be reduced by 20%). POA, ¶¶ 4c, 5c. Conversely, if the total sum payment amount for all Valid Claim Forms is less than the amount available in the Net Settlement Fund, then each eligible Settlement

[7] "Net Settlement Sum" means the Settlement Fund less all of the following: (i) the reasonable costs incurred for the administration of the settlement, including dissemination of Class Notice and evaluating and processing claims, (ii) Class Counsel's attorneys' fees as approved by the Court, (iii) reimbursement of Class Counsel's litigation expenses as approved by the Court, (iv) the service award payments to the class representatives as approved by the Court, and (v) any federal or state tax owed, if any, on any income earned by the Settlement Amount after it is deposited into the Escrow Account.

Class Member who submitted a valid Fully Documented Pet Injury Claim shall have their initial proposed payment increased up to three-times the initial valuation (e.g., a $1,000 initial proposed payment could be increased up to a $3,000 payment). POA, ¶4d.[8] However, any such increase is limited to an additional $10,000 per claim. So, a Fully Documented Pet Injury Claim initially valued at $5,000 can be increased up to $15,000 (by adding an additional $10,000) – unless the Court approves a higher threshold. POA, ¶4d, and e.

Any funds remaining in the Net Settlement Fund after payment of all valid Pet Injury Claims and Consumer Food Purchase Claims (e.g., remaining funds resulting from stale checks that were not cashed) shall be paid to the *Cy Pres* recipient(s) agreed upon by the Parties and approved by the Court. POA, ¶6. Claims may be submitted by U.S. Mail or online. S.A., §II, ¶2. The period for submitting such claims shall commence upon the Notice Date and continue for no less than 90 days (the "Notice Period"). S.A., § VI, ¶2. The Plan of Allocation also includes an opportunity for Settlement Class Members who submitted a Fully Documented Pet Injury Claim to appeal the valuation assigned to their claim if they disagree with that valuation. POA, ¶7.

C. Release

Plaintiffs and members of the Settlement Class will release all known and unknown claims to the fullest extent permitted by law against the Defendants relating to any alleged claims related to the Defendants' recalls of Midwestern's Pet Food Products due to levels of Aflatoxin and Salmonella exceeding acceptable limits pronounced by the U.S. Food and Drug Administration, as alleged in *In re: Midwestern Pet Foods Marketing, Sales Practices, and Prod. Liab. Litig*., No. 3:21-cv-00007-RLY-MPB (S.D. Ind. July 26, 2021). S.A., § II, ¶25. This Release includes

[8] To the extent adequate funds are available in the Net Settlement Fund to permit a pro rata increase greater than three-times the initial valuation, counsel for the parties will alert the Court and seek approval from the Court to increase the Fully Documented Pet Injury Claim payments above the three-times threshold. *Id*.

equitable, injunctive, and monetary claims within the scope of the Settlement Class definition. *Id.* Claims against Scoular, the company that supplied corn used to manufacture the recalled products, are not released. *Id.*

D. Class Notice, Objections, Opt-Outs, and the Claim Process

The Notice Plan shall include direct mail and email notice to Settlement Class Members whose contact information can be obtained by issuing subpoenas to the top ten retailers of Midwestern Pet Food Products, plus a targeted digital campaign designed to maximize Class Member participation in the Settlement. S.A., § VII, ¶2. Defendants shall provide a list of the top 10 retailers of Defendants' products (e.g., Tractor Supply; Amazon; Chewey.com) to Class Counsel. Class Counsel will then issue subpoenas to those retailers seeking production of the Settlement Class Members' contact information. S.A., § VII, ¶2; Declaration of Cameron R. Azari, Esq. on Notice Plan and Notices ("Azari Decl."), ¶18, attached as Exhibit E to the Settlement Agreement.

The Notice Plan also will include a postcard notice, an email notice, a long form notice, and a settlement website. *Id*. at ¶¶19-23, 37. 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. S.A., § VII, ¶2. Defendants will timely provide the required CAFA notice. S.A., § VII, ¶1. The draft claim form and class notices are attached as Exhibits A and B respectively to the Settlement Agreement. According to the proposed Settlement Administrator:

> [T]he proposed Notice Plan is designed to reach the greatest practicable number of Settlement Class Members. Given our experience with similar notice efforts, we expect that the proposed Notice Plan will reach at least 80% of the Settlement Class with a combination of individual notice (email and physical mail) to the identified Settlement Class Members and a comprehensive, nationwide Media Plan (digital notice, and social media notice). The reach will be further enhanced by internet sponsored search listings, an informational release, and a settlement website, which are not included in the estimated reach calculation. In my experience, the projected reach of the Notice Plan is consistent with other court-approved notice plans, is the best notice practicable under the circumstances of this case, and has been designed to satisfy the requirements of due process, including its "desire to actually inform" requirement.

Azari Decl., ¶12.

Any person or entity who falls within the defined Settlement Class may request exclusion by submitting such request in writing as set forth in the Class Notice. S.A., § VIII, ¶2. Any request for exclusion must be received not later than the date specified in the Preliminary Approval Order, which will be no earlier than sixty days after the Settlement Administrator begins to mail and email notices. S.A., § VIII, ¶3. Any request for exclusion shall (i) state the person or entity's full name and current address, (ii) the case name and case number, and (iii) specifically and clearly state their desire to be excluded from the Settlement and from the Settlement Class. S.A., § VIII, ¶4. Failure to comply with these requirements or to timely submit the request for exclusion will result in the person or entity being bound by the terms of the Settlement Agreement. S.A., § VIII, ¶5. Any person or entity who submits a timely request for exclusion may not file an objection to the Settlement and shall be deemed to have waived any rights or benefits under the Settlement Agreement. S.A., § VIII, ¶6.

Any Settlement Class Members who do not opt-out may comment on or object to the Settlement's terms, the attorneys' fees, expenses, or service awards requested by Class Counsel. S.A., § IX, ¶1. The Settlement Class Member must mail their objection so that it is received no later than the date specified in the Preliminary Approval Order, which shall be no earlier than sixty

days after the Settlement Administrator begins to mail and email notices. S.A., § IX, ¶3. The comment or objection must state (1) the name and case number of this lawsuit, (2) the Settlement Class Member's full name, mailing address, and email address or telephone number; (3) whether the objection or comment applies only to the objector, or to a specific subset of the Class, or to the entire Class; (4) the reasons for the objection or comment and sufficient proof establishing that he or she is a Settlement Class Member; (5) the number of class action settlements the Settlement Class Member or their attorney has objected to or commented on in the last five years; (6) whether the Settlement Class Member intends to personally appear at the Final Approval Hearing; (7) the name and contact information of any and all attorneys representing, advising, or assisting the Settlement Class Member, including any counsel who may be entitled to compensation for any reason related to the objection or comment; (8) whether any attorney will appear on the Settlement Class Member's behalf at the Final Approval Hearing, and if so the identity of that attorney; and (9) the Settlement Class Member's signature. S.A., § IX, ¶3. Any comment or objection that fails to comply with these requirements will be deemed waived. S.A., § IX, ¶2.

E. Attorneys' Fees, Expense Reimbursement, 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 $125,000. S.A., §X, ¶1. Any award of attorneys' fees and expenses that the Court approves will be paid from the Settlement Fund within ten (10) business days following the Date of Finality or the entry of the order awarding fees and litigation expenses, whichever is later, by means of a wire transfer by the Settlement Administrator to an account that Class Counsel designates. S.A., § X, ¶2.

Class Counsel will also file with the Court an application for approval of service awards to each of the Plaintiffs who are serving as class representatives in an amount up to $3,500 per Plaintiff. S.A., § X, ¶4. The Settlement Administrator will pay any such Court-approved service awards no later than ten (10) business days following the Date of Finality or the of the entry of the order awarding the service awards, whichever is later, by mailing via first class United States mail a check in the approved amount payable to the recipient. S.A., § X, ¶5.

IV. ARGUMENT

Class actions were designed as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *General Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 155 (1987) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979)). Any settlement that results in the dismissal of a class action requires court approval. *See* Fed. R. Civ. P. 23(e); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279 (7th Cir. 2002).

The approval process includes two steps. *Burnett v. Conseco Life Ins. Co*., No. 118CV00200JPHDML, 2020 WL 4207787, at *4 (S.D. Ind. July 22, 2020) (citing *Armstrong v. Bd. of School Dirs*., 616 F.2d 305, 314 (7th Cir. 1980), overruled on other grounds by *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998)). First, the court conducts a preliminary review to determine whether the proposed settlement is "within the range of possible approval" and whether there is reason to notify the class members of the proposed settlement and proceed with a fairness hearing. *Id*. If preliminary approval is granted, the class members are notified and given an opportunity to object. *Id*. Second, the court holds a fairness hearing to determine whether the proposed settlement is "fair, reasonable, and adequate." *Id*.; Fed. R. Civ. P. 23(e)(2).

At the preliminary approval stage, the court's task is to "determine whether the proposed settlement is within the range of possible approval." *Armstrong*, 616 F.2d at 314 (internal quotation

omitted). The court's role is not "resolving the merits of the controversy or making a precise determination of the parties' respective legal rights." *E.E.O.C. v. Hiram Walker & Sons*, 768 F.2d 884, 889 (7th Cir. 1985) (collecting cases). At this stage, Plaintiffs need show only that final approval is likely, not that it is certain. *See* Fed. R. Civ. P. 23(e)(1)(B) ("The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal.").

A. Class Certification

"Rule 23 gives the district courts broad discretion to determine whether certification of a class-action lawsuit is appropriate." *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008). A plaintiff seeking class certification must satisfy each requirement of Rule 23(a)—numerosity, commonality, typicality and adequacy of representation—and one subsection of Rule 23(b). *Harper v. Sheriff of Cook Cty.*, 581 F.3d 511, 513 (7th Cir. 2009); *Arreola*, 546 F.3d at 794.[9] "'Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial.'" *Smith v. Sprint Communications Co.*, L.P., 387 F.3d 612, 614 (7th Cir. 2004); (quoting *Amchem Prods.*, 521 U.S. at 620).

1. Rule 23(a) Requirements are Satisfied.

a. Numerosity

[9] In addition, courts have identified two implied prerequisites of Rule 23: (1) that the class definition be sufficiently precise to enable a court to ascertain the identity of class members by reference to objective criteria; and (2) that the named representative be a member of the proposed class. *Alliance to End Repression v. Rochford*, 565 F.2d 975, 977 (7th Cir. 1977). Because the proposed Class is defined using objective criteria and because there is no question that Plaintiffs are members of the proposed Class, both implied requirements are easily satisfied.

Rule 23(a) requires that a class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "While there is no magic number that applies to every case, a forty-member class is often regarded as sufficient to meet the numerosity requirement." *Mulvania v. Sheriff of Rock Island Cty*., 850 F.3d 849, 860 (7th Cir. 2017). *See also Swanson v. American Consumer Industries, Inc.*, 415 F.2d 1326, 1333, n.9 (7th Cir. 1969) (similar); *Savanna Group, Inc. v. Trynex, Inc*., No. 20-cv-7995, 2013 WL 66181, *4 (N.D. Ill. Jan. 4, 2013) (similar).

Here, the proposed Settlement Class generally consists of all persons and entities residing in the United States who purchased one or more of the Midwestern Pet Food Products. Settlement Agreement ("S.A."), § II, ¶30.[10] Plaintiffs estimate that the Class contains approximately 900,000 members. Goldenberg Decl., ¶10. Joinder, therefore, is impracticable, and the class thus easily satisfies the numerosity requirement. *See, e.g., Karpilovsky v. All Web Leads, Inc*., No. 17 C 1307, 2018 WL 3108884, at *6 (N.D. Ill. June 25, 2018) (class of 40 or more is sufficient); *McCabe v. Crawford & Co*., 210 F.R.D. 631, 643 (N.D. Ill. 2002).

b. Commonality

To satisfy the commonality requirement, there must "be one or more common questions of law or fact that are capable of class-wide resolution and are central to the claims' validity." *Beaton v. SpeedyPC Software,* 907 F.3d 1018, 1026 (7th Cir. 2018) (citing *Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 374 (7th Cir. 2015)). Commonality is satisfied where common questions are capable

[10] Excluded from this Settlement Class are: the plaintiffs in *Simmons v. Midwestern Pet Foods, Inc*., Case No. 6:21-cv-03012 (W.D. Mo. 2021); persons or entities whose claims are solely based upon the purchase of Midwestern Pet Food Products for resale; corporate officers, members of the board of directors, and senior management of Defendants; any and all judges and justices, and chambers' staff, assigned to hear or adjudicate any aspect of this litigation; any members of the Settlement Class that opt out prior to the opt out deadline; any entity in which Defendants have a controlling interest, and their legal representatives, officers, directors, employees, assigns and successors; and Class Counsel. S.A., § II, ¶29.

of generating "common answers apt to drive the resolutions of the litigation." *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541, 2551 (2011). The common questions "need not address every aspect of the plaintiffs' claims," but they "must drive the resolution of the litigation." *Phillips v. Sheriff of Cook County*, 828 F.3d 541, 553 (7th Cir. 2016) (internal quotations omitted). "[F]or purposes of Rule 23(a)(2) even a single common question will do." *Dukes*, 131 S. Ct. at 2556.

Here, many questions of law and fact are common to the proposed Settlement Class. These include whether Defendants made affirmative misrepresentations and/or false and misleading statements regarding the Midwestern Pet Food Products; whether Defendants failed to disclose material facts regarding the Midwestern Pet Food Products; whether Defendants knew or should have known that the Midwestern Pet Food Products contained unacceptable levels of aflatoxin that rendered them unsafe and unsuitable for pet consumption; whether Defendants knew or should have known that the Midwestern Pet Food Products were contaminated with *Salmonella* that rendered them unsafe and unsuitable for pet consumption and human handling; whether Defendants failed to employ quality control measures and failed to properly test and/or inspect the Midwestern Pet Food Products before distribution and sale; whether Defendants made negligent misrepresentations in connection with the distribution and sale of the Midwestern Pet Food Products; whether Defendants breached express or implied warranties in connection with the distribution and sale of the Midwestern Pet Food Products; whether Defendants violated the state consumer protection statutes; and the nature of the relief, including damages and equitable relief, to which Plaintiffs and the Settlement Class Members are entitled.

Because Plaintiffs' claims involve common questions of law and fact, Plaintiffs have satisfied the commonality requirement. *See, e.g., Parker v. Risk Mgmt. Alternatives, Inc*., 206

F.R.D. 211, 213 (N.D. Ill. 2002) ("[A] common nucleus of operative fact is usually enough to satisfy the [commonality] requirement."); *Burnett*, 2020 WL 4207787, at *5-6.

c. Typicality

To satisfy the typicality requirement, "'the claims or defenses of the representative party [must] be typical of the claims or defenses of the class.'" *Muro v. Target Corp*., 580 F.3d 485, 492 (7th Cir. 2009) (quoting *Williams v. Chartwell Fin. Servs., Ltd*., 204 F.3d 748, 760 (7th Cir. 2000)). "A claim is typical if it 'arises from the same event or practice or course of conduct that gives rise to the claims of other class members and ... [the] claims are based on the same legal theory.'" *Oshana v. Coca-Cola Co*., 472 F.3d 506, 514 (7th Cir. 2006) (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)). "Although 'the typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members,' the requirement 'primarily directs the district court to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large.'" *Muro*, 580 F.3d at 492 (quoting *De La Fuente v. Stokely-Van Camp, Inc*., 713 F.2d 225, 232 (7th Cir. 1983)). Put another way, where the defendant engages "in a standardized course of conduct vis-a-vis the class members, and plaintiffs' alleged injury arises out of that conduct," typicality is "generally met." *Hinman v. M and M Rental Center*, 545 F. Supp. 2d 802, 806-07 (N.D. Ill. 2008) (citing, e.g., *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir.1998)).

Here, the claims of Plaintiffs and all Settlement Class Members arise out of the same course of conduct – the marketing and sale of contaminated pet foods – and assert the same theories of liability. Accordingly, typicality is satisfied. *See, e.g*., *Burnett*, 2020 WL 4207787, at *6.

d. Adequacy of Representation

To satisfy the adequacy of representation requirement, the representative parties must "fairly and adequately protect the interests of the class." *Amchem Prods*., 521 U.S. at 625. "This adequate representation inquiry consists of two parts: (1) the adequacy of the named plaintiffs as representatives of the proposed class's myriad members, with their differing and separate interests, and (2) the adequacy of the proposed class counsel." *Gomez v. St. Vincent Health, Inc*., 649 F.3d 583, 592 (7th Cir. 2011) (citing *Retired Chi. Police Ass'n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993)). "A class is not fairly and adequately represented if class members have antagonistic or conflicting claims." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992).

Plaintiffs and proposed Class Counsel here adequately represent the class. There is no conflict between Plaintiffs and the Settlement Class Members. Plaintiffs were allegedly harmed in the same way as all Settlement Class Members when Defendants sold them contaminated pet foods containing *Salmonella* and aflatoxin. In light of this common injury, the named Plaintiffs have every incentive to vigorously pursue the class claims. Each Plaintiff agreed to undertake the responsibilities of serving as a class representative, and each has agreed to act in the Settlement Class Members' best interests. Goldenberg Decl., ¶11. Plaintiffs have actively participated in this litigation by providing documents, reviewing pleadings, remaining in regular contact with counsel, and keeping apprised of the status of this litigation and settlement negotiations throughout the entire case. *Id*. Further, Class Counsel have also invested substantial time and resources in this case by investigating the underlying facts, researching the applicable law, and negotiating a detailed settlement. *Id*., ¶10. Moreover, Class Counsel have decades of combined experience vigorously litigating class actions on behalf of aggrieved consumers, including contaminated pet food class actions, and do not have interests that conflict with the Settlement Class. *Id*. *See also*,

Plaintiffs' Motion to Appoint Counsel Pursuant to Rule 23(g), (Doc. Nos. 24-28). Thus, the requirements of Rule 23(a) are satisfied.

2. Rule 23(b)(3) Requirements are Satisfied

Certification of a class under Rule 23(b)(3) is proper if "the questions of law or fact common to class members predominate over any questions affecting only individual members, and [when] a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This rule requires two findings: predominance of common questions over individual ones and superiority of the class action mechanism. *Id*. In assessing whether those requirements have been met, courts should consider: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." *Id*.

The predominance requirement under Rule 23(b)(3) focuses on the relationship between the common and individual issues in the case, and tests whether the proposed class is sufficiently cohesive to warranty class certification. "There is no mathematical or mechanical test for evaluating predominance." *Howard v. Cook Cnty. Sheriff's Off*., 989 F.3d 587, 607 (7th Cir. 2021) (internal quotes omitted). However, "[e]fficiency is the animating principle." *Id*. "To gauge whether a class action would be more efficient than individual suits, [t]he predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Id*. (internal quotes omitted). "When a proposed class challenges a uniform policy, the validity of that policy tends to be the predominant issue in the litigation." *Nicholson v. UTI Worldwide, Inc*., No. 3:09-cv-722-

JPG-DGW, 2011 WL 1775726, at *7 (S.D. Ill. May 10, 2011) (citation omitted). Notably, when a settlement class is proposed, the manageability criteria of Rule 23(b)(3) do not apply. *Amchem*, 521 U.S. at 620.

Here, for settlement purposes, the central common questions predominate over any questions that may affect individual Settlement Class Members. As previously discussed, the central common questions include whether Defendants sold contaminated pet food; whether Defendants concealed or omitted material information; and whether Defendants' actions and omissions violated applicable state laws. These issues are subject to generalized proof and outweigh those issues that are subject to individualized proof. Accordingly, the Settlement Class meets the predominance requirement for settlement purposes.

Furthermore, here, a class action is vastly "superior to other available methods for fairly and efficiently adjudicating the controversy" for numerous reasons. Fed. R. Civ. P. 23(b)(3). First, the potential class members are both significant in number and geographically dispersed and the 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.

Additionally, a class action is superior here because it will conserve judicial resources and is more efficient for Settlement Class Members, particularly those who lack the resources to bring their claims individually.[11] It will be the most efficient way to resolve Settlement Class Members' claims, especially considering that they would have a difficult and costly task in seeking relatively small damages solely on an individual basis. Employing the class device here will not only achieve economies of scale for Settlement Class Members but will also conserve judicial resources and

[11] Class Counsel is aware of only one other pending action, *Simmons v. Midwestern Pet Foods, Inc*., No. 6:21-cv-03012 (W.D. Mo. 2021), stemming from the recalled pet foods. The *Simmons* case is expressly excluded from the Settlement Class definition and seeks substantial damages for at least one large dog breeder.

preserve public confidence in the integrity of the system by avoiding the waste and delay of repetitive proceedings and preventing inconsistent adjudications. Accordingly, a class action is superior to individual suits. Because the requirements of Rule 23(a) and Rule 23(b)(3) are satisfied, the Court should preliminarily certify the Settlement Class.

3. Preliminary Appointment of Class Counsel

When certifying a Rule 23 class, the Court is required to appoint class counsel to represent the class members. *See* Fed. R. Civ. P. 23(g)(1). In appointing class counsel, the court must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. Fed R. Civ. P. 23(g)(1)(A).

Plaintiffs are represented by Rosemary M. Rivas of the Gibbs Law Group LLP, Jeffrey S. Goldenberg of Goldenberg Schneider, L.P.A., and Kenneth A. Wexler of Wexler Boley & Elgersma LLP. Each has extensive experience litigating class actions. Goldenberg Decl., at ¶4; Doc Nos. 24-28; 117-121. These attorneys have done substantial work identifying, investigating, prosecuting, and settling Plaintiffs' claims. Goldenberg Decl., at ¶5. They have thoroughly investigated the facts and circumstances surrounding the recalls and alleged contamination of the Midwestern Pet Food Products, researched potential legal claims against Defendants and potential defenses, analyzed industry data, information, and public reports, collaborated with and interviewed consultants and experts, and reviewed and analyzed documents produced by Defendants and third parties. *Id*. Further, they are willing to commit and have already committed the necessary resources to represent the Settlement Class. *Id*., ¶8. Based on their extensive experience representing plaintiffs in similar consumer class actions, proposed Class Counsel

recognize the costs and risk of continued prosecution of the Action and believe that it is in Plaintiffs' and all Settlement Class Members' best interest to resolve this Action. *Id.* at ¶6.

Accordingly, the Court should preliminarily appoints Rosemary M. Rivas, Jeffrey S. Goldenberg, and Kenneth A. Wexler as Class Counsel.

B. The Court Will Likely Be Able to Approve the Settlement as Fair, Reasonable, and Adequate

"Federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *see also Armstrong,* 616 F.2d at 313 ("Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources."). Because the Settlement Agreement would bind all class members, the Court may approve the settlement only after finding that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In making this determination, Federal Rule of Civil Procedure 23(e)(2) requires the Court to consider whether (1) the class representatives and class counsel have adequately represented the class, (2) the proposal was negotiated at arm's length, (3) the relief provided by the settlement 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(4) the proposal treats class members equitably relative to each other. Fed. R Civ. P. 23(e)(2).

Courts also consider the following five factors: (1) the strength of the plaintiffs' case compared to the amount of the defendants' settlement offer; (2) the complexity, length, and expense of continued litigation; (3) the amount of opposition to the settlement; (4) the opinion of experienced counsel; and (5) the stage of the proceedings and the amount of discovery completed.

Burnett, 2020 WL 4207787, at *8 (citing *Synfuel Techs., Inc. v. DHL Express (USA), Inc*., 463 F.3d 646, 653 (7th Cir. 2006)).

1. Plaintiffs and Class Counsel Adequately Represent the Class.

As previously discussed, Plaintiffs and Class Counsel have worked diligently for the benefit of the Settlement Class members. There is nothing to suggest a conflict of interest between Plaintiffs or Class Counsel and the members of the Settlement Class. To the contrary, Plaintiffs' and Class Counsel's interests are perfectly aligned with those of the Settlement Class. Accordingly, the adequacy of representation factor weighs in favor or approving of the Settlement.

2. The Settlement Agreement was Negotiated at Arm's Length.

The proposed Settlement Agreement was negotiated at arm's length. Goldenberg Decl., ¶7. The parties engaged Judge Andersen to mediate and oversee settlement negotiations in this action. *Id*. The parties met with Judge Andersen for two mediation sessions on December 21, 2021 and April 5, 2022. *Id*. While the case did not resolve at those mediation sessions, the parties continued to discuss settlement with Judge Andersen for several months through July 2022. *Id*. With Judge Andersen's assistance, the parties reached an agreement in principle on July 5, 2022, to resolve the Action and subsequently memorialized the terms of their settlement in the Settlement Agreement. *Id*.

"A settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion." 2 McLaughlin on Class Actions, § 6:7 (8th ed. 2011); *see also Steele v. GE Money Bank*, No. 1:08-CIV-1880, 2011 WL 13266350, at *4 (N.D. Ill. May 17, 2011), report and recommendation adopted, No. 1:08-CIV-1880, 2011 WL 13266498 (N.D. Ill. June 1, 2011) ("the involvement of an experienced mediator is a further protection for the class,

preventing potential collusion"); *Wright v. Nationstar Mortgage LLC,* No. 14 C 10457, 2016 WL 4505169, at *11 (N.D. Ill. Aug. 29, 2016) (similar).[12]

Because the parties' negotiations have at all times been at arms-length, this factor too weighs in favor of preliminary approval of the Settlement.

3. The Settlement Treats Class Members Equitably Relative to Each Other.

The proposed Settlement treats Settlement Class Members equitably relative to each other. The Settlement is specifically designed to apportion relief among Settlement Class Members in proportion to the harms they have suffered and the relative strength of their claims. For instance, Settlement Class Members who lost their dogs to aflatoxin 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 those Settlement Class members who merely lost the cost of the contaminated food. POA, ¶4(d). And those Settlement Class members with documentation supporting their claimed damages are entitled to a greater share of the Settlement proceeds. *Id*. at ¶¶4a, 5a.

In the event that payment of all Valid Claim Forms exceeds the amount available in the Net Settlement Fund, each eligible Settlement Class Members will generally have their payment reduced on a pro rata basis. POA, ¶¶ 4c, 5c. Only the small amount of funds remaining in the Net Settlement Fund after the completion of the Pet Injury Claim process and the Consumer Food

[12] *See also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("[A] mediator[ ] helps to ensure that the proceedings were free of collusion and undue pressure."); *Johnson v. Brennan*, No. 10-4712, 2011 WL 1872405, at *1 (S.D.N.Y. May 17, 2011) (participation of an experienced mediator "reinforces that the Settlement agreement is non-collusive."); *Sandoval v. Tharaldson Emp. Mgmt., Inc*., No. 08-482, 2010 WL 2486346, at *6 (C.D. Cal. June 15, 2010) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is noncollusive."); *Milliron v. T-Mobile USA, Inc*., No. 08-4149, 2009 WL 3345762, at *5 (D.N.J. Sept. 14, 2009) ("[T]he participation of an independent mediator in settlement negotiation virtually insures that the negotiations were conducted at arm's length and without collusion between the parties.").

Purchase Claim process (e.g., stale checks that were not cashed) will be paid to the *Cy Pres* recipient(s) agreed upon by the Parties and approved by the Court. POA, ¶6.

4. The relief provided by the Settlement Agreement is Adequate.

To grant preliminary approval, the Court must determine that it is "likely" to approve the settlement. In other words, this Court should determine whether the proposed Settlement falls within the range of possible final approval. Manual for Complex Litigation (Fourth) 21.632 at 320-21. The range of approval "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972); *see also In re Corrugated Container Antitrust Litig*., 659 F.2d 1322, 1325 (5th Cir. 1981) ("[T]he essence of a settlement is compromise. A just result is often no more than an arbitrary point between competing notions of reasonableness.").

The $6,375,000 Settlement Fund provided by the Settlement is a substantial recovery. Depending on the number of claims received and documentation provided, Settlement Class members could receive compensation for up to 100% of their out-of-pocket losses. Even those Settlement Class members who lack documentation proving their out-of-pocket losses are entitled to self-certify losses up to $75 for sick pets, up to $50 for pet food purchases, and up to $150 for deceased pets. POA, ¶¶4b, 5b.

Rule 23(e)(2)(c) provides four considerations that must be taken into account when determining whether the relief being provided under the Settlement is adequate: (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). Each factor supports approval.

a. The costs, risks, and delay of trial and appeal.

Although Plaintiffs and Class Counsel believe that the claims asserted in the action are meritorious and that Plaintiffs and the Settlement Class would ultimately prevail at trial, continued litigation against Defendants poses significant risks that make any eventual recovery for the Settlement Class uncertain. The fairness and adequacy of the Settlement is underscored by consideration of the obstacles that the Settlement Class would face in ultimately succeeding on the merits, as well as the expense and likely duration of the litigation. If the litigation were to continue, Plaintiffs would face several significant risks before trial that could limit, or even eliminate, their claims, including a possible negative ruling on a motion for class certification, or a summary judgment ruling in favor of Defendants. Despite these real and significant risks, the Settlement Class Members will receive meaningful benefits under the Settlement.

When considering the Settlement, Plaintiffs weighed the certainty of an immediate recovery for the Settlement Class against the significant legal challenges Plaintiffs faced. Under these circumstances, the proposed Settlement is fair, reasonable, and adequate.

b. The effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims.

Because the Midwestern Pet Food Products at issue were sold by third party retailers rather than by Defendants themselves, Defendants do not have contact information for the Settlement Class members. However, the parties in conjunction with the Settlement Administrator, have devised a Notice Plan tailored to reach as many Settlement Class Members as possible through the use of (1) third party subpoenas of Defendants' top ten retailers to obtain customer contact information; (2) direct notice through U.S. Mail and email to Settlement Class members whose contact information is known; (3) a digital campaign to reach Settlement Class members whose contact information is not known, and(4) and a settlement website and toll-free telephone number

for Settlement Class members to obtain additional information about the Settlement. This Notice Plan satisfies the requirements of due process as well as Rule 23. Azari Decl.,¶45. As part of the Notice, Settlement Class Members are provided a simple Claim Form attached to the postcard notice that allows them to select a payment up to $50 for certain Consumer Food Purchase Claims. Class Members seeking other settlement benefits can filed their claims and supporting documentation directly on the settlement website or by US mail. The claim process is designed to be simple and straight forward. Settlement Class Members will also have the opportunity to appeal claim valuations. POA, ¶7. Lastly, if a Settlement Class Member has any questions, they can call a toll-free number to get more information.

c. The terms of any proposed award of attorney's fees, including timing of payment.

The Settlement Agreement permits Class Counsel to seek an award of fees up to 33.33% of the Settlement Fund ($2,124,787.50). This amount falls squarely in line with other approved class settlements in the Seventh Circuit. *E.g., Kolinek v. Walgreen Co*., 311 F.R.D. 483, 501 (N.D. Ill. 2015) (awarding 36% of net settlement fund in class settlement); *Martin v. JTH Tax, Inc*., No. 13- cv-6923, Dkt. 85 (N.D. Ill. Sept. 16, 2015) (awarding 38 % of net settlement fund in class settlement); *Kusinski v. Macneil Auto. Prod. Ltd*., No. 17-CV-3618, 2018 WL 3814303, at *1 (N.D. Ill. Aug. 9, 2018) ("The Court authorizes 1/3 of the Gross Settlement Fund"); *In re Herff Jones Data Breach Litig*., S.D. Ind. No. 1:21-cv-1329-TWP-DLP, Doc. No. 73 (awarding 35% of settlement fund for attorneys' fees as reasonable). Plaintiffs will also seek reimbursement of the reasonable litigation expenses incurred in the prosecution of the litigation which are anticipated not to exceed $125,000. Plaintiffs will also file with the Court an application for approval of service awards to each of the Plaintiffs who are serving as class representatives in an amount up to $3,500 per Plaintiff. The service awards will also be paid from the Settlement Fund. Class

Counsel's application for attorneys' fees, expense reimbursement, and service awards for the Class Representatives will be filed and posted on the settlement website no later than 21 days prior to the objection deadline. And any fees and expenses awarded by the Court will be paid ten days after the Date of Finality. S.A., §X, ¶2. These provisions in the Settlement Agreement support preliminary approval because they do not create a preference that favors Class Counsel or the named Plaintiffs.

d. Any agreement required to be identified under Rule 23(e)(3).

Rule 23(e)(3) requires parties seeking approval to "file a statement identifying any agreement made in connection with the proposal." This section requires disclosure of any side agreements that may not be set clearly forth in the settlement agreement. The parties have included all details of their settlement within the Settlement Agreement and supporting documents such as the Plan of Allocation. There are no additional agreements.

5. The Strength of Plaintiffs' Case Compared Against the Amount of Settlement.

Perhaps the most important settlement-approval factor is "'the strength of plaintiff's case on the merits balanced against the amount offered in the settlement.'" *Synfuel Techs*., 463 F.3d at 653 (quoting *In re Gen. Motors Corp. Engine Interchange Litig*., 594 F.2d 1106, 1132 (7th Cir. 1979)). Here, continued litigation with Defendants presents significant risks and costs—the most obvious risk is that Plaintiffs will not be successful on their claims. Plaintiffs and Class Counsel believe their claims are strong and are optimistic that they could obtain certification of a contested class and succeed on the merits. However, significant expense and risk attend the continued prosecution of the claims through trial and any appeals. Furthermore, "[e]ven if Plaintiffs were to succeed on the merits at some future date, a future victory is not as valuable as a present victory. Continued litigation carries with it a decrease in the time value of money, for '[t]o most people, a

dollar today is worth a great deal more than a dollar ten years from now.'" *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010) (quoting *Reynolds*, 288 F.3d at 284). In negotiating and evaluating the Settlement, Plaintiff and Class Counsel have taken these costs and uncertainties into account, as well as the risks and delays inherent in complex class action litigation.

Moreover, the consideration to be paid by Defendants is $6.375 million in cash, and no unclaimed funds will revert to Defendants. Furthermore, each Settlement Class Member will be able to self-certify a claim for at least $50 and each has the opportunity to recover 100% of documented losses.[13] Accordingly, the strength of Plaintiffs' case compared to settlement amount weighs in favor of the fairness, reasonableness, and adequacy of the proposed Settlement Agreement.

6. Likely Complexity, Length, and Expense of Continued Litigation.

The likely complexity, length, and expense of trial factor likewise weighs heavily in favor of the fairness, reasonableness, and adequacy of the proposed Settlement Agreement. Continuing to litigate this case will require vast expense and a great deal of time, on top of that already expended. At issue are dozens of different types of recalled dog food likely containing varying amounts of aflatoxin and salmonella, sold through numerous retailers, to hundreds of thousands of purchasers across the country. To certify a nationwide class and succeed on the merits would be a long, complex, and costly endeavor, requiring the use of multiple expert witnesses and time-consuming discovery. This factor too weighs in favor of granting preliminary approval.

7. Opposition to the Settlement Agreement.

[13] If the total sum of all Valid Claim Forms does not exceed the value of the Net Settlement Fund, then the value of each Pet Injury Claim supported by documentation will be increased consistent with the Plan of Allocation. POA, ¶4d.

Next, while no opposition to the Settlement is currently known, this factor is better examined after notice has been issued to the Settlement Class. Thus, this factor does not weigh either for or against preliminary approval of the Settlement.

8. The Opinion of Experienced Counsel.

The opinion of counsel weighs heavily in favor of the fairness, reasonableness, and adequacy of the proposed Settlement Agreement. Courts are "'entitled to rely heavily on the opinion of competent counsel,' " *Gautreaux v. Pierce*, 690 F.2d 616, 634 (7th Cir. 1982) (quoting *Armstrong*, 616 F.2d at 325). As previously explained, Class Counsel are experienced and highly competent class action litigators. Goldenberg Decl., ¶4; Doc. Nos. 24-28; 117-121. There is not an iota of evidence suggesting a conflict of interest or that the proposed Settlement Agreement is the result of collusion. *See Isby*, 75 F.3d at 1200. Accordingly, this factor weighs in favor of granting preliminary approval.

9. The Stage of the Proceedings and the Amount of Discovery Completed.

"The stage of the proceedings at which settlement is reached is important because it indicates how fully the district court and counsel are able to evaluate the merits of plaintiffs' claims." *Armstrong*, 616 F.2d at 325. The proposed Settlement was developed after nearly two years of litigation and many months of extensive mediation efforts. Extensive informal discovery has been completed, which informed the Settlement negotiations. Goldenberg Decl., ¶5. This discovery included Defendants' production of insurance claim files, communications from consumers whose pets were injured or died, third-party information obtained by public records requests, and Class Counsel's visits to the several sites in Texas and Oklahoma where the unsold Midwestern Pet Food Products were being stored. *Id*. "While there is more discovery that could be done, there is no indication that additional discovery would further assist the parties in reaching

a settlement agreement that is fair to the Class." *Burnett*, 2020 WL 4207787, at *10. "Accordingly, this factor weighs in favor of the fairness, reasonableness, and adequacy of the Proposed Settlement Agreement." *Id*.

C. The Proposed Class Notice Should Be Approved.

Under Fed. R. Civ. P. 23(c)(2)(B), a notice must provide "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language: (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 will exclude from the class any member who requests exclusion; (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). Further, when presented with a proposed class settlement, a court "must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). "The contents of a Rule 23(e) notice are sufficient if they inform the class members of the nature of the pending action, the general terms of the settlement, that complete and detailed information is available from the court files, and that any class member may appear and be heard at the hearing." 3 Newberg on Class Actions § 8:32 (4th ed. 2010).

The proposed notice here satisfies Rule 23 and puts Settlement Class members on notice of the proposed Settlement Agreement. The Notice Plan, constructed with the input of an experienced Settlement Administrator, requires the Defendants to provide Class Counsel a list of their top ten retailers, and that Class Counsel will issue subpoenas to these retailers requesting the direct contact information of Settlement Class Members. Then, class notice will be provided by

U.S. mail and email to all Settlement Class members for whom such information can be obtained. A targeted digital campaign will supplement the direct notice. Notice will also be published on a website established by the Settlement Administrator. The Settlement Administrator will maintain a toll-free hotline to answer questions regarding the proposed Settlement Agreement. Azari Decl., ¶ 38.

Moreover, the proposed notice plan is appropriate and adequate because it describes the terms of settlement, informs the Settlement Class about the allocations of attorney's fees and expenses, explains how Settlement Class members may opt-out or object to the Settlement, and provides specific information regarding the date, time, and place of the fairness hearing. *See Air Lines Stewards & Stewardesses Assoc. v. Am. Airlines, Inc*., 455 F.2d 101, 108 (7th Cir. 1972) (notice that provided summary of proceedings to date, notified of significance of judicial approval of settlement and informed of opportunity to object at hearing satisfied due process). The Notice Plan provided for here more than satisfies this standard.

D. Preliminary Appointment of Settlement Administrator.

Plaintiffs request that the Court appoint Epiq to serve as the Settlement Administrator. Epiq specializes in claims administration and has substantial experience administering nationwide consumer settlements such as this. Azari Decl., ¶¶ 1-8. Epiq was selected following a competitive request for proposal process involving six different settlement administration providers. As demonstrated by the Cameron Azari's Declaration, Epiq is qualified to serve as the Settlement Administrator. Therefore, the Court should preliminarily appoint Epiq as Settlement Administrator.

V. PROPOSED SCHEDULE TO IMPLEMENT SETTLEMENT

Class Counsel proposed the following schedule to implement this Settlement:

EVENT	TIMING
Defendant to Provide Class Counsel with list of top 10 Retailers	10 days after the entry of order granting preliminary approval
Class Counsel to Issue Subpoenas to Retailers	30 days after the entry of order granting preliminary approval
Retailers to Provide Information in Response to Subpoenas	75 days after the entry of order granting preliminary approval
Class Notice to Issue	Begin to issue notice within 90 days of entry of order granting preliminary approval ("Notice Date"); Complete issuing class notice no later than 135 days after entry of order granting preliminary approval
Reminder Notice to Issue	At least 30 days before the Claims Deadline
Claim Deadline	90 days after the Notice Date
Last day to file motion for award of attorneys' fees, reimbursement of expenses, and service awards	No later than 21 days prior to the objection deadline
Last day to request exclusion from the Settlement	90 days after the Notice Date
Last day to file objections to the Settlement, the request for attorneys' fees, reimbursement of expenses, or service awards	90 days after the Notice Date
Last day to file motion for final approval	14 days prior to the Final Fairness Hearing
Last day to file response to any objections to the Settlement, the request for attorneys' fees, reimbursement of expenses, or service awards	14 days prior to the Final Fairness Hearing
Final Fairness Hearing	Date to be selected by Court (no earlier than August 14, 2023)[14]

[14] The August 14th date is based upon Class Counsel's assumption that the Court grants preliminary approval prior to January 20, 2023.

VI. CONCLUSION

For the reasons described above, Plaintiffs respectfully request that the Court enter the draft Preliminary Approval Order attached as Exhibit 2, which (1) appoints Plaintiffs as the named Class representatives to represent the Class; (2) appoints Rosemary Rivas, Jeffrey Goldenberg, and Kenneth A. Wexler as Class Counsel; (3) schedules a fairness hearing on the question of whether the proposed class action Settlement should be approved as fair, reasonable, and adequate; (4) approves the form and content of the proposed Notice to the Settlement Class; (5) approves the form and content of the proposed Claim Form; (6) approves the proposed method of objecting to and requesting exclusion from the Settlement; (7) directs Notice to be carried out as described in the Settlement Agreement; (8) preliminarily approves the Settlement; (9) appoints Epiq as the Settlement Administrator; and (10) preliminarily certifies the Settlement Class for purposes of settlement only.

Dated: January 9, 2023

Respectfully submitted,

/s/ Jeffrey S. Goldenberg

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CERTFICIATE OF SERVICE

I hereby certify that on January 9, 2023, a copy of the foregoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the court's electronic filing system. Parties may access this filing through the court's system.

/s/ Jeffrey S. Goldenberg