

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION**

MINERVA MARTINEZ, SANDRA SCOTT,  
CARL GRAHAM, ANNE PARYS, DAVID  
ORTIZ, SEAN CHAMBERS AND  
TIFFANY JAMES, individually, and on  
behalf of a class of similarly situated  
individuals,

Plaintiffs,

v.

NISSAN NORTH AMERICA INC., a  
Delaware corporation,

Defendant.

Case No.: 3:22-cv-00354

District Judge Eli J. Richardson

Courtroom 5C

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF  
MOTION FOR FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT  
WITH DEFENDANT NISSAN NORTH AMERICA INC.**

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## I. INTRODUCTION

Plaintiffs,<sup>1</sup> individually, and on behalf of a settlement class of similarly situated individuals, hereby seek final approval of the Settlement Agreement (ECF No. 22-2) with Defendant Nissan North America, Inc. (“Nissan” or “Defendant”). This class action alleges material defects in the Continuously Variable Transmissions (“CVT”) of model year 2017-2018 Nissan Altima vehicles and model year 2018-2019 Nissan Sentra, Versa, and Versa Note vehicles (collectively, “Class Vehicles”), claims that Nissan disputes and that would be vigorously contested were the litigation to proceed. This Settlement provides valuable and meaningful relief and compensation for the current and former owners and lessees of the Class Vehicles in exchange for narrowly tailored releases that do not include any personal injury claims.

On August 17, 2022, this Court preliminarily approved the Settlement, including the appointment of Plaintiffs as Class Representatives and the undersigned attorneys as Class Counsel. *See* ECF 31. As fully set forth in Plaintiffs’ Motion for Preliminary Approval (ECF No. 21), Plaintiffs’ proposed global settlement with Nissan will provide Settlement Class Members with immediate and valuable relief, primarily in the form of: (1) an extension of the powertrain coverage under the applicable New Vehicle Limited Warranty (“NVLW”) for all Class Vehicles, which will allow Class Members who would otherwise be beyond the time and mileage limits of NVLW to receive free qualifying CVT repairs under the Extended Warranty, (2) full or partial cash reimbursement for costs of parts and labor paid by the Class Member for qualifying repairs to the CVT if the repairs were made after the expiration of the original NVLW warranty but within the durational limits of the new Extended Warranty, and (3) a voucher for qualifying current and

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<sup>1</sup> “Plaintiffs” collectively refers to Minerva Martinez, Sandra Scott, Carl Graham, Anne Parys and David Ortiz (“Altima Plaintiffs”), and Sean Chambers and Tiffany James (“Sentra-Versa Plaintiffs”).

former owners of Class Vehicles toward the purchase or lease of a new Nissan or Infiniti vehicle.

*Id.*

This Settlement is fair, reasonable, and adequate. It provides Class Members with similar, if not superior, remedies to those they could otherwise have expected to receive were the cases successfully tried, but without the delay and risks associated with continued litigation and trial. Notably, Nissan's financial obligations to the Class under the Extended Warranty are not capped, and thus there is no risk as with other settlements of a fixed settlement fund being exhausted. Moreover, the Extended Warranty and "pay-as-you-go" nature of the Settlement alleviates any distribution problems. The Settlement's benefits are particularly impressive in light of the considerable risks faced by Plaintiffs if litigation continued, including the uncertainty of certifying the Class based on the alleged defect, prevailing at trial, and surviving an appeal.

Accordingly, Plaintiffs respectfully request that the Court enter an order (1) granting final approval of the Settlement and overruling any objections, (2) finally certifying the Settlement Class, (3) granting Plaintiffs' Motion for Attorneys' Fees, Costs, and Class Representative Service Awards, and (4) entering the concurrently-filed proposed Final Order and Judgment.

## **II. LITIGATION BACKGROUND AND SUMMARY OF THE SETTLEMENT NEGOTIATIONS**

This class action lawsuit was originally filed on December 29, 2021, in the United States District Court for the Southern District of California (No. 3:21-cv-02146-L-DEB). After meeting and conferring with Nissan's counsel regarding Nissan's current state of incorporation, the initial lawsuit was dismissed without prejudice and refiled in the instant jurisdiction. *See* Weiner Decl. ¶

13.

This case is similar to other CVT lawsuits that have been filed, some of which have been resolved in this district.<sup>2</sup> Both before and after this action was filed, Plaintiffs thoroughly investigated and researched the CVT as implemented and equipped in the Class Vehicles. This investigation enabled Class Counsel to evaluate Plaintiffs' claims regarding the functioning of these CVTs. *See id.* ¶ 11. Plaintiffs also researched materials and information provided by the National Highway Traffic Safety Administration ("NHTSA") concerning consumer complaints about the CVTs in the Class Vehicles. *Id.* They also reviewed and researched consumer complaints and discussions of transmission problems in articles and forums online, in addition to various manuals and technical service bulletins ("TSBs") discussing the alleged defect. *Id.* Furthermore, Plaintiffs obtained and reviewed discovery from Nissan that included spreadsheets with thousands of rows of data, including warranty data, as well as sales data, information about the transmissions in the Class Vehicles and the costs of the necessary repairs for the alleged CVT failures. *Id.*

In addition, prior to filing and over the course of litigation, Class Counsel responded to numerous drivers of CVT-equipped Nissan Vehicles who contacted Class Counsel to report problems with their CVTs. Class Counsel also conducted detailed interviews with Class Members regarding their pre-purchase research, purchasing decisions, and repair histories, reviewed repair invoices and other documents and developed a plan for litigation and settlement based in part on Class Members' reported experiences with their Class Vehicles and with Nissan dealers. *Id.*

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<sup>2</sup> The allegations in the instant lawsuit are substantially similar to those in the *Weckwerth* and *Stringer* matters, both of which recently received approval of a settlement by courts in this district. *See Weckwerth* Approval Order; No. 3:18-cv-00588, ECF No. 181; *Stringer* Approval Order, No. 3:21-cv-00099, ECF No. 126; *See also Gann v. Nissan North America, Inc.*, No. 3:18-cv-00966, ECF No. 130; *Norman v. Nissan North America, Inc.*, No. 3:18-cv-00534, ECF No. 123; *Falk v. Nissan North America, Inc.*, No. 4:17-cv-04871 (N.D. Cal.); *Knotts v. Nissan North America, Inc.*, No. 17-cv-05049 (D. Minn.); *Madrid v. Nissan*, No. 3:18-cv-00543 (JDX).

The Parties agreed to an early mediation with Mr. Hunter R. Hughes III, Esq., an experienced mediator, who also mediated the *Gann, Norman, Weckwerth* and *Stringer* matters. *Id.* ¶ 14. In April 2022, Class Counsel traveled to Atlanta, Georgia, to conduct an in-person mediation before Mr. Hughes. In preparation for this mediation, Class Counsel conducted additional research regarding the scope of the alleged defect, the contours of the prospective classes, and research into the claims of the putative Class Representatives and Class Members alike. *Id.* Following a full day, in-person mediation, including hard-fought and arms'-length negotiations, an agreement in principle was reached and a term sheet was signed as an interim step soon thereafter. *Id.* Following the mediation, via telephone and email, the parties continued to engage in settlement discussions related to the terms of the Settlement Agreement, the release(s), and claims administration. *Id.* ¶ 15.

Plaintiffs sought confirmatory discovery from Nissan pursuant to the Settlement. In response, Nissan produced warranty spreadsheets with thousands of rows of warranty data. Nissan also provided documentation and information related to the technical differences in transmissions in the various Nissan models, the number of vehicles for each Nissan model in the settlement, and warranty-related information for each Nissan model, such as the number of warranty claims made, paid, and rejected and amounts paid, aggregated by model and model year, countermeasure evaluations, and other information. Plaintiffs also interviewed a Nissan engineer knowledgeable about the class model transmission and warranty information.

Plaintiffs are satisfied that they obtained the information they needed to make an informed recommendation of the Settlement as fair, reasonable and adequate for the Settlement Class.

In July 2022, the Parties were able to document the formal terms of their Settlement to resolve the litigation. *Id.* All of the terms of the Settlement were (1) the result of extensive good-



faith and hard-fought negotiations between knowledgeable and skilled counsel; (2) entered into after extensive factual investigation and legal analysis; and (3) in the opinion of experienced class counsel, fair, reasonable, and adequate. Class Counsel believes the Settlement Agreement is in the best interests of the Settlement Class Members and should be approved by the Court. *Id.* ¶ 15.

On August 17, 2022, this Court issued an Order preliminarily approving the class action settlement, ordering notice be disseminated to the Settlement Class, and setting a fairness hearing for March 20, 2022. *See* ECF Nos. 31, 36 (continuing the fairness hearing).

### **III. SUMMARY OF TERMS OF THE SETTLEMENT**

The Settlement confers significant and practical benefits to current and former owners and lessees of the Class Vehicles which were sold or leased in the United States. The principal terms of the Settlement are as follows:

#### **A. Extended Warranty**

For all current owners and lessees of Class Vehicles, Nissan agrees to extend the time and mileage durational limits for powertrain coverage under the applicable New Vehicle Limited Warranty for Class Vehicles, to the extent it applies to the transmission assembly and automatic transmission control unit (“ATCU”), by 24 months or 24,000 miles, whichever occurs first (“Extended Warranty”), after the original powertrain coverage in the New Vehicle Limited Warranty (60 months or 60,000 miles, whichever occurs first) has expired. Settlement Agreement ¶ 50. The Extended Warranty will be subject to the terms and conditions of the original Nissan New Vehicle Limited Warranty. *Id.* ¶ 51. Notably, Nissan’s financial obligations to the Class under the Extended Warranty are not capped; how much Nissan will pay for warranty repairs will depend on the extent to which Class Members will experience problems with their CVTs going forward.

**B. Reimbursement for Out-of-Pocket Costs**

Nissan will reimburse Class Members for either all or a portion of the costs for parts and labor actually paid by the Class Member for replacement of, or repairs to, the transmission assembly or ATCU if the repairs were made after the expiration of the original warranty but within the durational limits of the new Extended Warranty. Parts and labor actually paid by the Class Member will be reimbursed 100% if the repair was performed by an authorized Nissan dealer (Settlement Agreement ¶ 52) and up to a cap of \$5,000 if the repair was performed by a non-Nissan automotive repair facility (*id.*).

To be eligible for reimbursement, Class Members will be required to submit a claim with appropriate documentation, created at or near the time of the qualifying repair or replacement and as part of the same transaction, establishing that they have paid for qualifying repairs and/or replacement of the transmission assembly or ATCU. *Id.* ¶ 13.

The Settlement also provides relief to Class Members who did not pay for a transmission repair within the Warranty Extension Period, but who present to the Settlement Administrator Appropriate Contemporaneous Documentation of a Nissan Diagnosis establishing that a Nissan dealer, within the Warranty Extension Period, diagnosed and recommended a repair to the transmission assembly or ATCU of the Class Vehicle. In this scenario, the Class Member is entitled to reimbursement (subject to the \$5,000 cap mentioned above for repairs by a non-Nissan automotive repair facility) if the Class Member obtains the repair and provides the appropriate documentation that he or she obtained the recommended repair or replacement within 90 days of the Notice Date and prior to the Class Vehicle exceeding 90,000 miles, whichever occurs first. *Id.* ¶ 53.

**C. Voucher Payments**

Current and former owners of Class Vehicles who had two (2) or more replacements or repairs to the transmission assembly (including the valve body and torque converter) or ATCU during their ownership experience (as reflected by NNA warranty records) are eligible for a Voucher in the amount of \$1,000 for either a purchase or lease of a single new Nissan or Infiniti vehicle. *Id.* ¶¶ 12, 55.

No Class Member will be entitled to receive more than 5 vouchers. *Id.* ¶ 57. The voucher must be used within 9 months of the Effective Date and is not transferrable. *Id.* ¶¶ 55, 40. Class Members who are eligible for both reimbursement of out-of-pocket costs and a Voucher for the same Class Vehicle must select the remedy they prefer and may not receive both benefits. *Id.* ¶ 58.

**D. Attorneys' Fees and Costs**

Pursuant to the Settlement Agreement and concurrent with the instant Motion for Final Approval, Class Counsel are filing a separate motion for payment of attorneys' fees and expenses in an amount not to exceed \$3,500,000 (total). *Id.* ¶ 107. Notably, the Parties did not address attorneys' fees or expenses until the Parties had reached an agreement on Class relief. *See* Weiner Decl. ¶ 17. In addition, the attorneys' fees and expenses awarded by the court will be paid directly by NNA and not out of a finite settlement fund, and hence will not reduce or otherwise affect the benefits available to Settlement Class Members.

**E. Class Representative Service Awards**

The proposed Settlement allows Class Counsel to request, and Nissan to pay, service awards to Plaintiffs Minerva Martinez, Sandra Scott, Carl Graham, Anne Parys, David Ortiz, Sean Chambers and Tiffany James of up to \$5,000, each, for their service on behalf of the Settlement Class. Settlement Agreement ¶ 107. Their consent to the Settlement is not conditioned in any manner on the award of a service award or its amount. *Id.*

**F. Release of Claims**

As part of the consideration for this Settlement Agreement, upon Final Approval, it is agreed that the Plaintiffs and all Members of the Class who do not opt out shall be deemed to have released all claims against Nissan and Related Parties based upon or in any way related to transmission design, manufacturing, performance, or repair of Class Vehicles. *Id.* ¶¶ 33, 96-101. Specifically excluded from the release are claims for personal injury, wrongful death, or physical damage to property other than a Class Vehicle or its component parts. *Id.*

The Release will not include future claims for breach of the Nissan New Vehicle Limited Warranty as extended pursuant to this Settlement, provided that the claims are based solely on events that occurred after the Notice Date. *Id.* ¶¶ 16, 20. These “Future Transmission Claims” will be governed exclusively by an Expedited Resolution Process under the auspices of the Better Business Bureau. *Id.* ¶ 99, Ex. A.

The Release is appropriately framed to resolve the claims alleged in the Nissan CVT Litigation during the Class Period and is thus “narrowly tailored” to the facts and allegations at issue. *See Gascho v. Glob. Fitness Holdings, LLC*, No. 2:11-CV-00436, 2014 WL 3543819, at \*6 (S.D. Ohio July 16, 2014), *aff’d*, 822 F.3d 269 (6th Cir. 2016) (“There is no question that the settlement in this case provides a greater recovery and the release is narrowly tailored.”).

**IV. RULE 23(c) NOTICE REQUIREMENTS HAVE BEEN SATISFIED**

The Settlement Agreement provides for a robust notice and administration plan, the cost of which is borne by Nissan. Following the Order Granting Preliminary Approval on August 17, 2022 (ECF No. 31), KCC Class Action Services, LLC, (“KCC”), the court-approved Settlement Administrator (“Administrator”), implemented the Settlement’s notice program and claims administration process. *See generally* Declaration of Lana Cooper (“Cooper Decl.”). On December

15, 2022, the Administrator mailed the Class Notice to 1,482,295<sup>3</sup> addresses via USPS First Class mail. *Id.* at ¶ 10. The Administrator also resent 46,887 Class Notices with an updated address. *Id.* at ¶ 12. The notices were mailed to updated addresses obtained from the motor vehicle departments of the various States for the Class Vehicles (with additional procedures if the notices were returned as undeliverable), and the notices successfully reached over 93.7% of the Settlement Class. *Id.* at ¶ 14.

In addition to this direct mail notification, the Administrator created a dedicated website <http://www.altimasentraversacvtsettlement2022.com> (referenced in the Class Notice), providing Class Members with all the relevant settlement documents. *Id.* at ¶ 15. The Administrator also created a toll-free number for Class Members to obtain important information. *Id.* at ¶ 16.

The opt out and objection deadline is February 13, 2023. *See* ECF No. 31. While that deadline is still a month away, as of this filing, of the 2,003,819 Settlement Class Members, only 13 individuals have opted out of the settlement class, and 1 has lodged an “objection” to the Settlement, representing only fractions of a percent of the Settlement Class, respectively. *Id.* at ¶¶ 18, 19. The Parties will address the substance of any objections after the deadline for objections has been reached, pursuant to the schedule set in the Court’s Preliminary Approval order. To date, a total of 2,099 Class Members have submitted claim forms. *Id.* at ¶ 17. The claims deadline is

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<sup>3</sup> While there are 1,002,168 Class Vehicles (*see* Report of Lee Bowron, ACAS, MAAA filed concurrently herewith) with distinct VINs, IHS Markit’s collection of government records show there were 2,003,819 records of ownership of such Class Vehicles (Cooper Decl. at ¶ 6). That is, there can be multiple owners of the same vehicle (*i.e.*, sale of the class vehicle to a new owner). Ultimately there were 1,482,295 notices sent from the 2,003,819 set of records because 471,874 VINs were given notice via 950 notices to fleet owners who each had multiple Class Vehicles; in addition there were other adjustments to the data set that had to be made to identify the actual potential class members. Cooper Decl. at ¶ 7-14.

March 15, 2023, or 30 days after a qualifying transmission repair, whichever is later. Settlement Agreement ¶ 7.

**V. THE COURT SHOULD GRANT FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT**

The Court certified the Settlement Class for settlement purposes at the Preliminary Approval stage of the settlement proceedings, finding that requirements under Rule 23(a) and Rule 23(b)(3) are satisfied. *See* ECF No. 31. Nothing has changed that would affect the Court’s ruling on certification of the Settlement Class. *See Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d 877 (C.D. Cal. 2016) (reconfirming the certification set forth in the preliminary approval order “[b]ecause the circumstances have not changed” since that order). Therefore, the Court should grant final certification of the Settlement Class.

Class settlement approval is committed to the district court’s discretion. *Int’l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.* (“UAW”), 497 F.3d 615, 625 (6th Cir. 2007). To approve a class settlement, the court must conclude that it is “fair, reasonable, and adequate.” *Id.* at 631; Fed. R. Civ. P. 23(e)(1). A number of factors guide that inquiry: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest. *UAW*, 497 F.3d at 631. The court must also determine whether the settlement gives preferential treatment to the named plaintiffs. *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 755 (6th Cir. 2013) (internal quotation marks and citations omitted). The same standard governs the approval of a plan of allocation of a class action settlement fund. *In re Regions Morgan Keegan Sec., Derivative, & ERISA Litig.*, No. 07-2784, 2016 WL 8290089, at \*2 (W.D. Tenn. Aug. 2, 2016).

All of the relevant factors weigh in favor of the Settlement proposed here and demonstrate that the proposed Settlement is fair, adequate, and reasonable. Therefore, this Court should grant this motion for final approval of the class action settlement.

**A. The Settlement Resulted from Arm's Length Negotiations**

“There is a presumption that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion, unless there is evidence to the contrary.” *In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 2:12-CV-4, 2015 WL 13650515, at \*2 (E.D. Tenn. Jan. 16, 2015). Further, it is recognized that the opinion of experienced and informed counsel supporting the settlement is entitled to considerable weight. *Williams v. Vukovich*, 720 F.2d 909, 923 (6th Cir. 1983).

Here, the Parties participated in in-person mediation with Mr. Hunter R. Hughes III, Esq., a respected class action mediator. Mr. Hughes assisted in managing the Parties' expectations and provided a useful, neutral analysis of the issues and risks to both sides. A mediator's participation weighs considerably against any inference of a collusive settlement. *In re Southeastern Milk Antitrust Litig.*, No. 2:07-CV-208, 2012 WL 2236692, at \*4 (E.D. Tenn. June 15, 2012). At all times, the Parties' negotiations were adversarial and non-collusive.

The Parties were represented by experienced class action counsel throughout the negotiations resulting in this Settlement. Class Counsel are seasoned class action attorneys who regularly litigate automotive defect cases, through certification and on the merits, and have considerable experience settling such cases. *See* Declarations of Class Counsel filed concurrently herewith (“Class Counsel Decls.”) at ¶ 2. Nissan was represented by Faegre Drinker Biddle & Reath LLP, a nationally respected defense firm in class action litigation.

The negotiations necessitated numerous conferences and written exchanges between counsel, during which they finalized the terms of the Settlement and memorialized such terms in

the final Settlement Agreement. Weiner Decl. ¶¶ 14, 15, 19. In engaging in these settlement discussions, Class Counsel were focused on obtaining the best possible result for the Settlement Class. *Id.*

These protracted arm's length settlement negotiations demonstrate such negotiations are collusion free and, as such, support Settlement approval. *See, e.g., Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 904 (S.D. Ohio 2001); *see also* 2 Newberg on Class Actions § 11.41 at 11-88. Moreover, the fact that the negotiations occurred over several months and were subject to confirmatory discovery, indicate that Plaintiffs worked to achieve the best possible result on behalf of the Settlement Class. *Id.*

**B. The Class Representatives and Class Counsel Have Adequately Represented the Settlement Class**

One of the purposes of assessing adequate representation is to “uncover conflicts of interest between named parties and the class they seek to represent.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Here, the proposed Class Representatives have and will continue to represent the interests of the class. Each proposed Representative is familiar with the facts and understands the duties and responsibilities required for overseeing the litigation. They each have sought out counsel, participated in the action, provided documents, assisted Class Counsel, and represented the Settlement Class. Each has been willing to discharge their duties and pursue justice on a class-wide basis. None have sought preferential treatment, and each has agreed to the proposed Settlement and its terms. And none has conditioned their consent to the Settlement on receiving an incentive payment.

Class Counsel is likewise adequate to represent the Settlement Class. Plaintiffs and the Settlement Class are represented by experienced and reputable counsel. While “the adequacy of class counsel is presumed” absent contrary evidence, here Class Counsel have submitted



declarations in support of the motion for approval of class action settlement identifying their experience handling class actions, product liability cases, and complex litigation (including auto defect cases). *Sanchez-Knutson v. Ford Motor Co.*, 310 F.R.D. 529, 540 (S.D. Fla. 2015) (quoting *In re Seitel, Inc. Securities*, 245 F.R.D. 263, 271 (S.D. Tex. 2007)); *see, generally*, ECF Nos. 22-26. Class Counsel have vigorously and competently represented the Settlement Class Members' interests in this action and will continue to fulfill their duties to the Settlement Class. There are no conflicts of interest between absent Settlement Class Members, named Plaintiffs, and Class Counsel.

As such, the Court should deem the representation to be adequate at the final approval stage.

**C. Plaintiffs Engaged in Extensive Investigation and Confirmatory Discovery**

Both before and after this action was filed, Plaintiffs thoroughly investigated and researched their claims, which allowed Class Counsel to better evaluate Plaintiffs' claims regarding the functioning of the CVTs. *See* Weiner Decl. at ¶ 11. Among other tasks, Plaintiffs fielded inquiries from putative Class Members and investigated many of their reported claims. *Id.* Plaintiffs also researched publicly available materials and information provided by the NHTSA concerning consumer complaints about the CVTs. *Id.* They reviewed and researched consumer complaints and discussions of transmission problems in articles and forums online, in addition to various manuals and technical service bulletins discussing the alleged defect. *Id.* Finally, they conducted research into the various causes of action and other similar automotive actions. *Id.*

Furthermore, Plaintiffs sought confirmatory discovery from Nissan pursuant to the Settlement. In response, Nissan produced warranty spreadsheets with thousands of rows of warranty data. Nissan also provided documentation and information related to the technical differences in transmissions in the various Nissan models, the number of vehicles for each Nissan

model in the settlement, and warranty-related information for each Nissan model, such as the number of warranty claims made, paid, and rejected and amounts paid, aggregated by model and model year, countermeasure evaluations and other information. Plaintiffs also interviewed a Nissan engineer knowledgeable about the class model transmission and warranty information. *Id.*

Plaintiffs obtained adequate information to reach an informed decision to recommend the proposed Settlement as fair, reasonable and adequate for the Settlement Class.

In addition, over the course of litigation, Plaintiffs responded to Class Members who contacted Class Counsel to report problems with their Class Vehicles to seek relief. Class Counsel also conducted detailed interviews with Class Members regarding their pre-purchase research, their purchasing decisions, and their repair histories, and developed a plan for litigation and settlement based in part on Class Members' reported experiences with their Class Vehicles and with Nissan dealers. *Id.*

**D. The Relief Provided by the Settlement is Reasonable and Adequate in View of the Complexity, Risks, Expense, and Likely Duration of the Litigation**

The fairness, reasonableness, and adequacy of the Settlement is also supported by the relief obtained on behalf of the Settlement Class, including a valuable warranty extension and monetary relief. This is a significant recovery on behalf of the Settlement Class. The Settlement will provide all Settlement Class Members with significant benefits—*i.e.*, the extended warranty, reimbursement for qualifying out-of-pocket expenses related to replacement of, or repairs to, the allegedly defective CVTs in Class Vehicles for those who qualify, and vouchers toward the purchase or lease of new Nissan or Infiniti vehicles that will be made available to those who qualify.

The terms of the Settlement will automatically provide all current owners and lessees of Class Vehicles with the benefit of the extended warranty on their Class Vehicles, with no need for

Settlement Class Members to submit a claim. Further, Settlement Class Members may submit claims for reimbursement of amounts they paid out-of-pocket for parts or labor for qualifying repairs to their transmissions; this relief extends to former owners and lessees who paid for qualifying transmission repairs while they owned or leased the Class Vehicles. As such, the Settlement treats Settlement Class Members equitably relative to each other. Additionally, the Settlement does not require Settlement Class Members to submit any individualized proof or a claim form to receive the extended warranty. All Settlement Class Members that do not opt to be excluded will be automatically credited with the extended warranty for their Class Vehicles, guaranteeing 100% participation after settlement administration.

Prior to entering into the Settlement, Plaintiffs and Class Counsel conducted extensive investigation and analysis of the relevant facts. Weiner Decl. ¶¶ 11-12. Class Counsel further considered the stage of the proceedings, the strength of Plaintiffs' claims and Nissan's defenses, and the substantial benefits that the Settlement will provide to the Settlement Class. *Id.* Indeed, this settlement provides remedies similar to what Settlement Class Members could otherwise expect to receive if they succeeded at trial, but without the risks associated with delay, trial, or any subsequent appeal.

Furthermore, an extended warranty is a particularly fair form of compensation because it is scaled to the actual scope of the problem. *See* Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards filed concurrently herewith. Nissan has argued that the percentage of Class Vehicles affected by problems with their CVTs is very small considering the number of Class Vehicles in service. Assuming, *arguendo*, Nissan is correct, it will pay relatively little under the extended warranty. If, by contrast, a larger percentage of Class Vehicles require repair, then Nissan will pay an amount commensurately greater. This outcome precludes the risk of substantial

overcompensation or under compensation and is just for both Parties. It ensures that any customer whose Class Vehicle requires a qualifying repair to the transmission assembly and/or ATCU within the extended warranty period will receive the repair free of charge. Indeed, unlike a settlement with only monetary relief, Nissan's repair obligations under the extended warranty are unlimited. The benefits of extended warranties as settlement consideration have been recognized by numerous courts. *See Klee v. Nissan N. Am., Inc.*, No. CV 12-08238 AWT (PJWx), 2015 WL 4538426, at \*8 (C.D. Cal. July 7, 2015) (extended warranty was fair settlement consideration because it was directed at repairing the alleged harm and noting that other courts had approved extended warranties with age and mileage restrictions as settlement considerations); *Eisen v. Porsche Cars N. Am., Inc.*, No. 2:11-cv-09405-CAS-FFMx, 2014 WL 439006, at \*8 (C.D. Cal. Jan. 30, 2014) (approving settlement agreement with an extended warranty and noting that "it is significant that the Settlement Agreement provides extended warranty coverage that exceeded the warranties provided" at the time of purchase); *see also Weckwerth v. Nissan North America, Inc. and Nissan Motor Co., Ltd.*, No. 3:18-cv-00588; *Gann v. Nissan North America, Inc.*, No. 3:18-cv-00966; *Norman v. Nissan North America, Inc.*, No. 3:18-cv-00534.

Thus, an objective evaluation confirms that the benefits negotiated for the Settlement Class are within the range of reasonableness. The relief offered by the Settlement is even more attractive when viewed against difficulties by consumers pursuing automotive defect cases. For example, there is always a risk that a court would not find this action suitable for certification as a nationwide class or a multi-state class, and, even if class certification were granted in the litigation context, class certification can always be reviewed or modified before trial and decertified at any time. *See, e.g., Marcus v. BMW of N. Am., LLC*, 687 F.3d 583 (3d Cir. 2012) (Third Circuit reversed

certification of consumer class action case involving BMW vehicles equipped with allegedly defective run flat tires).

Moreover, the relief provided is substantially similar to other automotive defect settlements involving Nissan vehicles equipped with CVTs that were approved by this Court and by the United States District Court, Southern District of Florida. *See Weckwerth v. Nissan North America, Inc.*, No. 3:18-cv-00588; *Stringer v. Nissan North America, Inc.*, No. 3:21-cv-00099; *Gann v. Nissan North America, Inc.*, No. 3:18-cv-00966; *Norman v. Nissan North America, Inc.*, No. 3:18-cv-00534; Final Approval Order, Dkt. No. 191, *Batista v. Nissan North Am., Inc.*, No. 1:14-cv-24728-RNS (S.D. Fla. June 29, 2019) (the district court found that the “benefits to the Settlement Class constitute fair value given in exchange for the release of the claims of the Settlement Class . . . [and that] the consideration to be provided under the Settlement is reasonable considering the facts and circumstances of [the] case, the types of claims and defenses asserted in the lawsuit, and the risks associated with the continued litigation of these claims.”).

Particularly relevant to the reasonableness of the relief under the proposed Settlement is that Nissan, absent the Settlement, would continue to vigorously contest the merits of Settlement Class Members’ claims, as well as the named Plaintiffs’ ability to obtain class-wide relief. Nissan denies that it engaged in any wrongful conduct. In addition, Nissan has raised several defenses to the claims asserted including that the CVTs are not defective and that the level of problems experienced is small compared to number of Class Vehicles on the road; that Nissan had no knowledge of any alleged defect prior to sale and no intent to deceive its consumers; and that the Settlement Class Members suffered no compensable damages. Numerous legal issues would necessarily be subject to novel and extensive litigation, and certainly to appeal by one side or the other. Other defenses are fact-based and would be determined by the trier of fact if the case

proceeded to trial. There is, in short, no guarantee that Plaintiffs would ultimately prevail on these legal and factual issues.

Thus, the risk of losing must be considered in evaluating the adequacy of a proposed settlement. The reality is that any case against a major automotive manufacturer alleging a defect in hundreds of thousands of vehicles—here, over 1 million—has the potential to take up significant amounts of the Court’s and the parties’ resources. In addition, if the case were to proceed, Plaintiffs would provide expert testimony to address the question of whether the alleged defect presents safety concerns, an expert to answer whether Class Vehicles’ CVTs are more likely to malfunction than other comparable parts, an expert on consumer expectations, and a damages expert—resulting in significant additional expenses to the Settlement Class. And Nissan would, of course, have experts of its own on each of these issues.

Finally, if Plaintiffs had litigated this action through trial and ultimately obtained a judgment against Nissan, there is no guarantee that the judgment would be superior to the settlement obtained here. *See, e.g., Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1 (PA. 2011).

Throughout the course of settlement negotiations, the Parties considered multiple factors, including the past and ongoing cost of the litigation, the scope of relief that was being sought and that might be provided, the cost and benefit of such relief, the potential damages at issue, the risks of trying the matter, and the possibility of appeals of any judgment in the trial court—adding to the expense, delay and uncertainty of litigation. The Parties believe that the settlement is fair, reasonable, and adequate given the uncertainties of continued litigation and the value of the consideration given to current and former owners and lessees of Class Vehicles.

The Settlement thus constitutes a tremendous result, falls well within the range of possible approval, and should be granted final approval by the Court.

**E. Class Members are Treated Equitably in the Settlement**

The Settlement will provide all Class Members with significant benefits—*i.e.*, the extended warranty, full or partial reimbursement for certain out-of-pocket expenses related to replacement of, or repairs to, the allegedly defective CVT transmissions in Class Vehicles for those who qualify, and vouchers toward the purchase or lease of a new Nissan or Infiniti vehicle that will be made available to those who qualify.

The terms of the Settlement will automatically provide all current owners and lessees of Class Vehicles with the benefit of the extended warranty on their Class Vehicles. Further, Class Members may submit claims for full or partial reimbursement of parts and labor charges actually paid for qualifying repairs to their transmissions, and this relief extends to former owners and lessees who paid for qualifying transmission repairs while they owned or leased the Class Vehicles. As such, the Settlement treats Class Members equitably relative to each other. Significantly, the Settlement does not require Class Members to submit any individualized proof or a claim form to receive the extended warranty—all Class Members that do not opt to be excluded will be automatically credited with the extended warranty for their Class Vehicles, guaranteeing 100% participation after settlement administration. As Nissan's commitment under the extended warranty is not subject to a financial cap, the amount Nissan will pay will depend on the extent Class Members experience problems with their CVTs going forward, assuring that the remedy is scaled to the scope of the problems.

**F. Attorneys' Fees Are Reasonable**

The next factor for the Court to consider is the reasonableness of any attorneys' fee award. Class Counsel will seek approval from the Court of their attorneys' fees and expenses not to exceed \$3.5 million. This request is manifestly reasonable in light of the facts and circumstances of the cases, including, among other things, the results achieved, the skill and quality of work, the

contingent nature of the fee, awards made in similar cases, and Class Counsel’s combined lodestar and costs and appropriate multiplier for contingent risk. Plaintiffs’ attorneys’ fees and their reasonableness are discussed in detail in Plaintiffs’ Motion for Attorneys’ Fees, Costs, and Class Representative Service Awards, which is being filed concurrently.

**G. The Reaction of Class Members to the Proposed Settlement Supports Approval<sup>4</sup>**

The objection and opt-out deadline is February 13, 2023. Plaintiffs may submit a supplemental brief advising the Court of the final figures of any objections and opt outs while responding to such objections. Although more objections and exclusion requests may be received before the deadline, to date, only 13 of the 2,003,819 Class Members, or 0.00065% percent, have chosen to opt out and only 1 has submitted a purported objection. Cooper Decl. ¶¶ 18, 19.

The small number of objections and opt outs, particularly in a Settlement Class of this size, itself demonstrates the fairness, adequacy, and reasonableness of the Settlement. *Whitford v. First Nationwide Bank*, 147 F.R.D. 135, 141 (W.D. Ky. 1992) (“[t]he small number of objectors is a good indication of the fairness of the settlement”) (citing *Laskey v. Int’l Union*, 638 F.2d 954 (6th Cir. 1981)); *McGee v. Continental Tire N. Am., Inc.*, No. 06–6234 (GEB), 2009 WL 539893 (D.N.J. Mar. 4, 2009) (75 opt outs from a class of 285,998 shows that “the Class [ ] strongly favors approval of the Settlement”); *Yaeger v. Subaru of America*, No. 14-4490-JBS, 2016 WL 4541861, at \*14 (D.N.J. Aug. 31, 2016) (finding favorable class reaction where 28 class members objected out of 665,730 class notices or 0.005% and 2,328 individuals (or 0.35%) opted out); *McLennan v. LG Electronics USA, Inc.*, No. 2:10–cv–03604 (WJM), 2012 WL 686020, at \*6 (D.N.J. Mar. 2, 2012) (107 opt-outs out from a class of 418,411 favored approval of settlement); *Skeen v. BMW of North America*, No. 13-1531-WHW, 2016 WL 4033969, at \*8 (D.N.J. July 26, 2016) (finding

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<sup>4</sup> There is no governmental participant in this case, and so this factor is neutral.



favorable class reaction when 123 out of 186,031 recipients of class notices opted out, and 23 submitted objections).

Indeed, “[a] certain number of ... objections [and opt-outs] are to be expected in a class action.... If only a small number are received, the fact can be viewed as indicative of the adequacy of the settlement,” and “[a] court should not withhold approval of a settlement merely because some class members object.” *In re Skechers Toning Shoe Prods. Liab Litig.*, MDL No. 2308, 2013 WL 2010702, at \*7 (W.D. Ky. May 13, 2013) (citations omitted). Here, “[t]hat the overwhelming majority of class members have elected to remain in the Settlement Class, without objection, constitutes the ‘reaction of the class,’ as a whole, and demonstrates that the Settlement is ‘fair, reasonable, and adequate.’” *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 527 (E.D. Mich. 2003) (citation omitted).

The reaction also compares favorably to class member reactions to other automotive settlements approved by federal courts. *See, e.g., Eisen*, 2014 WL 439006, at \*5 (“Although 235,152 class notices were sent, 243 class members have asked to be excluded, and only 53 have filed objections to the settlement.”); *Milligan v. Toyota Motor Sales, U.S.A., Inc.*, No. C 09-05418 RS, 2012 WL 10277179, at \*7 (N.D. Cal. Jan. 6, 2012) (finding favorable reaction where 364 individuals opted out [0.06%] and 67 filed objections [0.01%] following a mailing of 613,960 notices); *Browne v. Am. Honda Motor Co.*, No. CV 09-06750 MMM DTBX, 2010 WL 9499072, at \*14 (C.D. Cal. July 29, 2010) (finding favorable class reaction where, following a mailing of 740,000 class notices, 480 (0.065%) opted out and 117 (0.016%) objected).

#### **H. Public Policy Favors Settlement**

Public policy favors compromise and settlement of class actions, particularly in situations like this one where the action is complex and large-scale, and, absent settlement, the resources of the Parties and the Courts would be taxed for years. *See, e.g., UAW*, 497 F.3d at 632 (noting “the

federal policy favoring settlement of class actions”); *In re Skelaxin*, 2015 WL 13650515, at \*3 (“The public has a strong interest in settling disputes without litigation, especially class action litigation where the parties will expend substantial resources that could otherwise be conserved through settlement”); *Carroll v. Blumaq Corp.*, No. 3:09-CV-216 (SHIRLEY), 2010 WL 11520634 (E.D. Tenn. Nov. 15, 2010) (same).

## VI. CONCLUSION

Based on the foregoing, the proposed Settlement is fair, adequate, and reasonable, and satisfies the standard for final approval. Accordingly, Plaintiffs respectfully move the Court to enter the Final Order and Judgment granting final approval of the Settlement Agreement and grant such other and additional relief as the Court may deem appropriate.

Dated: January 12, 2023

Respectfully submitted,

/s/ Gregory F. Coleman

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**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that he caused a copy of the foregoing to be served upon the following counsel of record by the Court's ECF system, this PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT WITH DEFENDANT NISSAN NORTH AMERICA INC., on the 12th day of January, 2023.

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