UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

CHEYNE NORMAN and SOPHIA WESCOTT, individually, and on behalf of a class of similarly situated individuals, PLAINTIFFS, v. NISSAN NORTH AMERICA, INC. DEFENDANT.	**Case No. 3:18-cv-00534** Judge Eli J. Richardson Magistrate Judge Alistair E. Newbern Date: March 6, 2020 Time: 1:30 p.m. Courtroom: 874

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Plaintiffs Cheyne Norman and Sophia Wescott ("Plaintiffs") submit this memorandum in support of their Motion for Final Approval of the Proposed Class Action Settlement on behalf of all current and former owners and lessees of 2013-2017 Nissan Juke vehicles equipped with a type of transmission known as a Continuously Variable Transmission or "CVT" ("Class Vehicles"). The proposed Settlement resolves allegations that the Continuously Variable Transmissions ("CVTs") equipped in the Class Vehicles manufactured by Nissan North America, Inc., ("Nissan") were defectively designed, causing them to shudder, judder, hesitate, fail to accelerate and abruptly decelerate, creating an unreasonable safety risk, and requiring the transmission to be replaced prematurely (these allegations are collectively referred to as the "Alleged CVT Failures"). Nissan denies these allegations.

Plaintiffs' proposed global settlement with Nissan will provide Class Members with immediate and valuable relief, primarily in the form of: (1) a warranty extension on all Class Vehicles providing free CVT repairs, (2) full or partial cash reimbursement for out-of-pocket expenses related to replacement or repair of the CVT transmissions for qualifying Class Members if the repairs are done within the Warranty Extension Period, (3) a voucher for certain former owners toward the purchase or lease of a new Nissan or Infiniti vehicles, and (4) an Expedited Resolution Process through the BBB Auto Line for any future warranty claims related to transmission design, manufacturing or performance which preserves the right to file a lawsuit for those who do not receive vehicle repurchases.

This Settlement is fair, reasonable and adequate. It provides Class Members with similar, if not superior, remedies to what 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 (a) granting final approval of the Settlement and overruling the objections, (b) finally certifying the Settlement Class, (c) granting Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards, and (d) entering the concurrently-filed proposed Final Order and Judgment.

II. FACTS AND PROCEDURE

A. Overview of the Nissan Juke Litigation.

Plaintiffs Cheyne Norman and Sophia Wescott (collectively, "Norman Plaintiffs"), together with Plaintiff Patricia Weckwerth, who is no longer a party to this action[1], filed suit against Nissan North America, Inc., (the United States subsidiary) and Nissan Motor Co., Ltd. (the Japanese parent company) in the Middle District of Tennessee on June 26, 2018 on behalf of themselves and other persons who purchased or leased any 2013-2017 Nissan Versa, Versa Note or Juke equipped with an Xtronic CVT. (Declaration of Cody R. Padgett ["Padgett Decl."] at ¶ 3.) The Parties negotiated a discovery and tolling agreement whereby Nissan Japan agreed to be subject to discovery in exchange for a dismissal without prejudice. *Id.*

After entering into a stipulation setting a briefing schedule and extending the deadline for Defendant to respond, Nissan filed its motion to dismiss Plaintiffs' complaint on August 29, 2018.[2] *Id.* at ¶ 4. The Norman Plaintiffs filed their opposition on September 27, 2018, and Nissan filed its reply on October 18, 2018. *Id.* The motion was under submission when the Parties negotiated this settlement. *Id.*

[1] Plaintiffs Cheyne Norman and Sophia Wescott own Nissan Juke vehicles, and the instant settlement involves only Nissan Juke vehicles. However, initially, Plaintiffs Cheyne Norman and Sophia Wescott brought their action together with another Plaintiff, Patricia Weckwerth, who owned a Nissan Versa, and the Plaintiffs' original complaint included allegations regarding the Nissan Juke and Nissan Versa vehicles (Case No. 3:18-cv-0588). As more fully discussed below and in Plaintiffs' Supplemental Brief regarding Preliminary Approval (see Dkt. 79, July 8, 2019), after the greater group of Nissan CVT actions resolved, the pleadings in the pending Nissan CVT cases were amended to group the Plaintiffs according to the settlements to which they were a party. Accordingly, Ms. Weckwerth was added to the Nissan Sentra and Nissan Versa action (Case No. 3:18-00588), via amended complaint, and Plaintiffs Cheyne Norman and Sophia Wescott were added to the instant action, Case No. 3:18-cv-0534, where the claims pertaining to the 2013-2017 Nissan Juke vehicles are being presented for settlement approval.

[2] Concurrent with briefing the Motion to Dismiss, the Parties jointly filed a Proposed Initial Case Management Order (Dkt. 53) setting the case schedule, and an agreed upon protective order (Dkt. 61) setting the parameters of confidential discovery materials. The parties had extensive negotiations regarding, and ultimately agreed upon, an ESI protocol.

The Parties also engaged in discovery prior to reaching a settlement in this action. On September 12, 2018, the Norman Plaintiffs served Plaintiffs' First Request for Production of Documents, to which Defendant Nissan responded on November 12, 2018. Defendant Nissan produced thousands of pages of documents in response, including more than 10,000 pages of confidential documents. *Id.* at ¶ 5

On October 16, 2018, Defendant Nissan propounded its First Set of Interrogatories and First Set of Requests for Production to each of Plaintiff Sophia Wescott, Cheyne Norman and Patricia Weckwerth. Plaintiffs responded to each of these requests on December 7, 2018. *Id.* at ¶ 6.

B. Mediation and Settlement

Following the above motion practice and the exchange of thousands of pages of documents and data, on February 19, 2019, counsel for Plaintiffs and Defendant participated in an all-day mediation before Mr. Hunter R. Hughes III, an experienced mediator, in Atlanta, Georgia, to explore resolution of claims pertaining to the Nissan Juke, Versa, and Sentra vehicles. Pad Mr. Hughes is a "a nationally-respected and experienced class action neutral." *See Al's Pals Pet Care v. Woodforest Nat'l Bank, NA*, 2019 WL 387409, at *1 (S.D. Tex. Jan. 30, 2019); s*ee also, e.g., Moyle v. Liberty Mut. Ret. Benefit Plan,* 2018 WL 1141499, at *7 (S.D. Cal. Mar. 2, 2018); *Bert v. AK Steel Corp.,* 2008 WL 4693747, at *2 (S.D. Ohio Oct. 23, 2008).

Although the Parties did not settle at the first mediation session, the Parties continued their settlement negotiations telephonically with the assistance of the mediator. On April 9, 2019, the Parties conducted a second in-person all-day face-to-face negotiation in Chicago, Illinois. At the close of this second session, the Parties had agreed on the principal terms of the proposed class relief.[3] Later in April, further evolution of the settlement terms took place in conjunction with the negotiations of the related cases concerning Nissan Altima's CVT transmissions before mediator Hughes in Atlanta, Georgia. After the Parties had agreed on the framework and material terms for settlement in Chicago, they began negotiating through telephonic conferences, via email, and with the assistance of Mr. Hughes, and ultimately agreed upon an appropriate request for service awards and Plaintiffs' attorneys' fees and

[3] The Nissan Juke claims were mediated in tandem with the Nissan Sentra, Nissan Versa, and Nissan Altima claims.

expenses. In May 2019, the Parties finally were able to document the formal terms of their agreement to resolve the litigation. All of the terms of the Settlement are the result of extensive, adversarial, and arms' length negotiations between experienced counsel for both sides.

Following negotiations, the Parties to this and several other Nissan CVT actions reached three settlements involving three vehicle and transmission model groups, and there were three actions pending in the Middle District of Tennessee before this Court. The Parties agreed that it was most logical and efficient to amend the pleadings in the three pending cases to group Plaintiffs according to the settlements to which they were a party. Accordingly, the Complaint in the instant case (No. 3:18-cv-00534), originally captioned as *Madrid*, was amended to add Norman and Wescott who, respectively, own and lease Nissan Juke vehicles and seek approval of the Juke settlement. Plaintiff Madrid, a Nissan Altima owner, was added to the Complaint in *Gann*, Case No. 3:18-cv-00966, and is no longer a Plaintiff in the instant case. Likewise, Plaintiff Patricia Weckwerth, a Nissan Versa owner, was added to the complaint in Case No. 3:18-cv-00588, where the claims regarding the Nissan Sentra and Nissan Versa vehicles are being presented for settlement approval. Further details are set forth in the Joint Supplemental Brief In Response to the Court's Order of June 21, 2019, Regarding Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement. *See* Dkt. 79, July 8, 2019.

III. PRINCIPAL 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 in the United States and its territories, including Puerto Rico. 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 ¶¶ 42, 43.) The Extended Warranty will be

subject to the terms and conditions of the original Nissan New Vehicle Limited Warranty. (Settlement Agreement ¶ 56.) 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 experience problems with their CVTs going forward.

B. Reimbursement for Out-of-Pocket Costs

Nissan will reimburse Class Members for the portion of the costs for parts and labor paid by the Class Member for replacement of, or repairs to, the transmission assembly or ATCU if the repairs were made 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 ¶ 57(A)) and up to a cap of $5,000 if the repair was performed by a non-Nissan automotive repair facility. (Settlement Agreement ¶ 57(B)).

To be eligible for reimbursement, Class Members will be required to submit a claim and appropriate documentation, created at or near the time of the qualifying repair or replacement and as part of the same transaction, establishing that that they have paid for repairs and/or replacement of the transmission assembly or ATCU. (Settlement Agreement ¶ 13, 78.)

The Settlement also provides relief to Class Members who are outside of the Warranty Extension Period and 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 provides the appropriate documentation that he or she obtained the recommended repair or replacement by January 30, 2020, or prior to the Class Vehicle exceeding 90,000 miles, whichever occurs first. (Settlement Agreement ¶ 58.)

C. Voucher Payments

For former owners of Class Vehicles, Nissan will issue a $1,000 voucher toward the purchase or lease of a single new Nissan or Infiniti vehicle per Class Vehicle that had two or more replacements or

repairs to the transmission assembly (including torque converter and/or valve body) and/or ATCU during the period of the Class Member's ownership, as reflected by Nissan warranty records. (Settlement Agreement ¶¶ 12, 60.)

No Class Member will be entitled to receive more than 5 vouchers. The voucher must be used within nine months of the Effective Date and is not transferrable. 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. (Settlement Agreement ¶¶ 62, 63.)

D. Expedited Resolution Process Through the Better Business Bureau for Future Breaches of Warranty Related to Transmission Defects

The Settlement also provides an expedited resolution process through the BBB Auto Line for any future warranty claims related to transmission design, manufacturing or performance based on events that occur after the Notice Date of November 1, 2019, and preserves the right for Class Members to file a lawsuit for those who do not receive repurchases (also known as buybacks). (Settlement Agreement ¶ 20, Ex. A). This free BBB process does not bind any Class Member unless Nissan is required to repurchase their vehicle or Nissan makes a written offer to repurchase the Class Vehicle; however, all BBB decisions will be binding on Nissan, and Nissan will not have a right to appeal.

E. Attorneys' Fees and Costs

Nissan will not oppose any applications for an award of reasonable attorneys' fees and litigation expenses up to $615,000. (Settlement Agreement ¶ 114.) Notably, the Parties did not negotiate attorneys' fees or expenses until the Parties had reached an agreement on Class relief. (Padgett Decl. at ¶ 10, Declaration of Lawrence Deutsch ["Deutsch Decl."] at ¶ 29, Declaration of Gary Mason ["Mason Decl."] at ¶ 29.) In addition, the award of fees and expenses does not reduce or otherwise affect the benefits available to Class Members.

Plaintiffs' request for attorneys' fees and costs will be presented to the Court in Plaintiffs' motion for approval of attorneys' fees and expenses. This motion is being filed concurrently.

F. Class Representative Service Awards

The proposed Settlement allows Class Counsel to request and Nissan to pay service awards to Cheyne Norman and Sophia Wescott of up to $5,000, each, for their service on behalf of the Settlement Class. (Settlement Agreement ¶ 114.) Their consent to the Settlement is not conditioned in any manner on the award of a service award or its amount. (Settlement Agreement ¶ 114.) Each of the Class Representatives has given their time and accepted their responsibilities, participating actively in this litigation as required and in a manner beneficial to the Class generally.

G. 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. (Settlement Agreement ¶¶ 34, 35.) 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.* at ¶ 16).

The release will not include future claims for breach of the Nissan New Vehicle Limited Warranty as extended pursuant to this Settlement, related to transmission design, manufacturing, or performance, provided that the claims are based solely on events that occurred after the Notice Date of November 1, 2019. These "Future Transmission Claims" will be governed exclusively by an Expedited Resolution Process under the auspices of the Better Business Bureau. (*Id.* at ¶¶ 17, 20, 105, and Exhibit A.)

The Release is appropriately framed to resolve the claims alleged in this matter 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.")

H. Rule 23(c) Notice Requirements Have Been Satisfied

The Agreement provides for a robust notice and administration plan, the cost of which is borne by Nissan. Following the Order Granting Preliminary Approval on July 16, 2019 (Dkt. No. 80), KCC Class Action Services, LLC, ("KCC"), the court-approved Settlement Administrator ("Administrator"), implemented the Settlement's notice program and claims administration process. (Declaration of Lana Lucchesi ["Lucchesi Decl."] ¶¶ 1-13.) On November 1, 2019, the Administrator mailed the Class Notice to 230,578 addresses via USPS First Class mail. (*Id*. at ¶ 11.) The Administrator also resent 5,139 Class Notices with an updated address. (*Id.* at ¶¶ 12-13.) 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 94.6% of the Settlement Class.

In addition to this direct mail notification, the Administrator created a dedicated website http://www.jukecvtsettlement.com (referenced in the Class Notice), providing Class Members with all the relevant settlement documents. (*Id.* at ¶ 14.) The Administrator also created a toll-free number for Class Members to obtain important information. (*Id*. at ¶ 15.)

The opt out and objection deadline is February 7, 2020. As of today, a total of 6 individuals have opted out of the settlement class, and 3 have lodged objections to the Settlement, representing only 0.0025% and 0.0013% of the Settlement Class, respectively. (*Id.* at ¶¶ 8, 17.) To date, a total of 441 Class Members have submitted claim forms. (*Id.* at ¶ 16.) The claims deadline is January 30, 2020 (or 30 days after a qualifying transmission repair, whichever is later).

I. Class Certification Requirements Are Met

The Court certified the 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* Dkt. No. 80.) Nothing has changed that would affect the Court's ruling on class 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.

J. The Court Should Grant Final Approval of the Class Settlement

Class settlement approval is committed to the district court's discretion. *UAW v. Gen. Motors Corp.*, 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 v. Gen. Motors*, 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 indicate that the proposed Settlement is fair, adequate, and reasonable. Therefore, this Court should grant this motion for final approval of the class action settlement.

1. The Settlement is the Result of Serious, Arm's-Length, Informed 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).

Here, the Parties participated in mediation with Mr. Hunter R. Hughes III, a respected class action mediator. Mr. Hughes helped to manage 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) ("Another factor which supports the Court's conclusion on this point is

that the negotiations which led to this settlement have included the participation of the Court appointed mediator[.]”). 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. Plaintiffs were represented by Whitfield, Bryson & Mason, LLP; Berger & Montague; and Capstone Law APC. Plaintiffs’ Counsel employ seasoned class action attorneys who regularly litigate automotive defect cases through certification and on the merits and have considerable experience litigating and resolving such cases. (*See* Padgett Decl., Deutsch Decl., and Mason Decl.) Nissan was represented by Drinker Biddle & Reath LLP, a nationally respected defense firm and other prominent counsel experienced in class action litigation.

Where, as here, the proposed settlement is the result of serious, arms’-length negotiations between the Parties after meaningful discovery and investigation, the settlement is entitled to a presumption of fairness. *See also* Manual for Complex Litigation, Third, § 30.42 (“A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm’s-length negotiations between experienced, capable counsel after meaningful discovery.”).

2. Adequate Representation by Class Representatives and Class Counsel

The adequacy inquiry “assures that the named plaintiffs’ claims are not antagonistic to the class and that the attorneys for the class representatives are experienced and qualified to prosecute the claims on behalf of the entire class” and will vigorously represent the class. *See Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2006). 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 Prod., Inc.*, 521 U.S. at 625. The Plaintiffs have no antagonistic interests. They each have sought out counsel, participated in the action, provided documents and assisted counsel and represented the class. Class Counsel have investigated the action, pursued discovery, received and reviewed significant discovery, and then negotiated the Settlement. Moreover, Class Counsel are experienced auto defect class action practitioners. As such, the Court should deem the representation to be adequate at the final approval stage.

3. Plaintiffs Engaged in Extensive Investigation and Discovery

Both before and after this action was filed, Plaintiffs thoroughly investigated and researched their claims, which allowed Plaintiffs' Counsel to better evaluate Plaintiffs' claims regarding Nissan's alleged representations and omissions concerning the functioning of the CVTs. (*See, generally,* Padgett Decl., Deutsch Decl., and Mason Decl.) 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 National Highway Traffic Safety Administration ("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 documents and technical service bulletins ("TSBs") discussing the alleged defect. *Id.* In addition, they conducted research into the various causes of action and other similar automotive actions. *Id.*

Additionally, Plaintiffs propounded forty-six Requests for Production, to which Nissan responded and produced over 10,000 pages of documents. Further, over the course of litigation, Plaintiffs responded to Class Members who contacted Plaintiffs' Counsel to report problems with their Class Vehicles and seek relief. Plaintiffs' 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.*

4. The Proposed Settlement Relief Treats Class Members Equitably and There Are No Obvious Deficiencies with 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.

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

The next factor requires the Court to consider whether "the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C). The proposed Settlement in this case is well within the range of reasonableness that would merit judicial approval. *See Manners v. Am. Gen. Life Ins. Co.*, No. CIV.A. 3-98-0266, 1999 WL 33581944, at *20 (M.D. Tenn. Aug. 11, 1999) ("This valuable relief falls well within the "range of reasonableness" required for settlement approval."); *In re Media Cent., Inc.*, 190 B.R. 316, 321 (E.D. Tenn. 1994) (the court "should canvass the issues and determine whether the proposed settlement falls within the range of reasonableness in the case, but without trying the case or otherwise deciding the issues of law and fact presented."). Indeed, this settlement provides to class members remedies similar to what they could otherwise expect to receive if they succeeded at trial but without the risk of delay or risks associated with trial or any subsequent appeal.

The benefits of extended warranties as settlement consideration have been recognized by numerous courts. *See Klee v. Nissan N. Am., Inc.*, 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.*, 2014 WL 43900, 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).

Moreover, as more fully discussed in the concurrently-filed Motion for Attorneys' Fees, Costs, and Incentive Awards, the extended warranty portion of the result achieved on behalf of the Class has been conservatively valued at between $17,081,000 and $22,841,000 by Plaintiffs' expert, Lee M. Bowron, ACAS, MAAA, an actuary who specializes in pricing and valuing extended service contracts and warranty extensions.

Thus, an objective evaluation confirms that the benefits negotiated for the class are within the range of reasonableness. The relief offered by the Settlement is even more attractive when viewed against the recent 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 a class may be 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 another automotive defect settlement involving Nissan vehicles equipped with CVT transmissions that was approved in the United States District Court, Southern District of Florida. *See Batista v. Nissan North America, 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 Class Members' claims, as well as the named Plaintiffs' ability to obtain class relief. Nissan denies that it engaged in any wrongful conduct. In addition, Nissan has interposed several defenses to the claims asserted, including that the CVTs are not defective and that the level of problems experienced is small compared to the approximately 140,000 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 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 tens of thousands of vehicles—here, approximately 140,000—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 need to provide expert testimony to address the question of whether the alleged defect presents safety concerns, an expert to answer whether Class Vehicles' CVT components are more likely to malfunction than other comparable parts, an expert on consumer expectations, and a damages expert—resulting in significant additional expenses.

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 America, Inc.*, 34 A.3d 1 (PA. 2011) (nearly 12 years after the commencement of the action—following, among other things, a contested motion for class certification, trial, post-trial motions, and appeal to the Superior Court—the Supreme Court of Pennsylvania ultimately affirmed an award of $600 for brake repairs for each Class Member which was based on the class vehicle having a useful life of 100,000 miles).

Throughout the course of settlement negotiations, the Parties considered factors such as the past and ongoing cost of the contentious 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 Court should reach the same conclusion, certify the Settlement Class, and grant final approval to the Settlement.

6. 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 litigation expenses of up to $615,000. 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 Plaintiffs' 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.

7. Class Members are Treated Equitably in the Settlement.

Consideration of the next Rule 23(e)(2) factor, that class members are treated equitably, "could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. As set forth above, the plan for distribution is fair and Class Members are being treated equitably.

8. The Reaction of Class Members to the Proposed Settlement Supports Approval[4]

The objection and opt-out deadline is on February 7, 2020. Per the Court's Order, Plaintiffs will submit a supplemental brief advising the Court of the final figures and responding to objections. To date, only 6 of the 237,099 Class Members, or 0.0025 percent, have chosen to opt out, and only 3 or 0.0013% have submitted objections. (Lucchesi Decl. ¶ 8, 17.)

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.*, 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.,* 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 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.*, 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*

[4] There is no governmental participant in this case, and so this factor is neutral.

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 v. Porsche Cars N. Am.*, No. 11-09405-CAS, 2014 U.S. Dist. LEXIS 14301, *15 (C.D. Cal. Jan. 30, 2014) ("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.*, No. 09-05418-RS, 2012 U.S. Dist. LEXIS 189782, *25 (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. 09-06750-MMM, 2010 U.S. Dist. LEXIS 14575, *49 (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).

K. 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., Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007) (noting "the federal policy favoring settlement of class actions"); *In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 2:12-CV-4, 2015 WL 13650515, at *3 (E.D. Tenn. Jan. 16, 2015) ("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.,* 2010 WL 11520634 (E.D. Tenn. Nov. 15, 2010) (same).

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IV. 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 24, 2020

Respectfully submitted,

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