UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

JACKSON COUNTY EMPLOYEES' RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. CARLOS GHOSN, et al., Defendants.	Civil Action No. 3:18-cv-01368 CLASS ACTION Hon. William L. Campbell, Jr. Magistrate Judge Alistair Newbern MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

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SECONDARY AUTHORITIES

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs Jackson County Employees' Retirement System and Providence Employees' Retirement System ("Plaintiffs") respectfully submit this memorandum in support of their motion for: (i) final approval of the proposed settlement of this securities class action; and (ii) approval of the proposed Plan of Allocation.[1]

I. INTRODUCTION

Plaintiffs, through their counsel, have obtained a $36 million cash settlement for the benefit of the Class in exchange for the dismissal and full release of all claims brought against all Defendants in this Litigation. As described below and in the Wood Declaration, the Settlement is a very good result for the Class, providing a significant and certain recovery in a case that presented numerous hurdles and risks. The Settlement is an extremely favorable result when compared to the median securities class action settlement. *See generally* Wood Decl.

Plaintiffs' decision to settle the Litigation was well informed by an extensive investigation, hard-fought litigation by experienced counsel, substantial discovery efforts, and arm's-length settlement negotiations supervised by an experienced mediator. *See id*. While Plaintiffs believe that their claims had merit and that they would prevail at trial, they also recognize that had the Litigation continued, they faced substantial risks to obtaining any recovery for the Class, let alone a recovery greater than that afforded by the Settlement. There was also risk relating to appeal by Defendants, especially in light of the motions for reconsideration which were pending when the Settlement was reached.

[1] Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation of Settlement dated April 22, 2022 (the "Stipulation") (ECF 241) or in the accompanying Declaration of Christopher M. Wood in Support of: (1) Final Approval of Class Action Settlement and Approval of Plan of Allocation; and (2) an Award of Attorneys' Fees and Expenses (the "Wood Declaration" or "Wood Decl."). Unless otherwise noted, all internal citations and quotations have been omitted and emphasis has been added.

In light of these considerations, Plaintiffs and Lead Counsel believe that the $36 million Settlement is eminently fair, reasonable, adequate, easily satisfies the standards of approval under Fed. R. Civ. P. 23, and provides a very favorable result for the Class. The reaction of the Class thus far also supports the Settlement. As discussed below, potential Class Members have been notified of the Settlement in accordance with the Preliminary Approval Order[2] and, to date, not a single Class Member has filed an objection. Nor have any Class Members sought exclusion from the Class. Accordingly, Plaintiffs respectfully request that the Court grant final approval of the Settlement.

Plaintiffs also request that the Court finally certify the Class and approve the proposed Plan of Allocation, which was set forth in the Notice sent to Class Members. This Plan governs how claims will be calculated and, ultimately, how the Net Settlement Fund will be equitably distributed to Authorized Claimants. No objections have been filed to the Plan.

II. FACTUAL AND PROCEDURAL HISTORY

The Wood Declaration is an integral part of this submission, and for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Litigation and Lead Counsel's efforts on behalf of the Class; the negotiations leading to the Settlement; and the risks and uncertainties of continued litigation.

III. THE SETTLEMENT WARRANTS FINAL APPROVAL

A. Legal Standards for Final Approval of Class Action Settlement

Federal Rule of Civil Procedure ("Rule") 23 requires judicial approval for any compromise or settlement of class action claims and states that a class action settlement should be approved if the court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). It is well settled within the Sixth Circuit that "federal policy favor[s] settlement of class actions." *UAW v. GMC*, 497 F.3d 615,

[2] *See* Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Decl."), submitted herewith.

632 (6th Cir. 2007). "'Settlement agreements should therefore be upheld whenever equitable and policy considerations so permit.'" *Robinson v. Shelby Cnty. Bd. of Educ.*, 566 F.3d 642, 648 (6th Cir. 2009).

On December 1, 2018, amendments to Rule 23(e)(2) went into effect that provide the Court with four specific factors to consider when determining whether a proposed settlement is "fair, reasonable, and adequate":

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

Fed. R. Civ. P. 23(e)(2). The Rule 23(e) factors are not intended to "displace" any previously adopted factors, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Advisory Committee Notes to the 2018 Amendments to the Federal Rules of Civil Procedure. "Accordingly, the Court [should] appl[y] the framework set forth in Rule 23, while continuing to draw guidance from the [Sixth] Circuit's factors and relevant precedent." *Hefler v. Wells Fargo & Co.*, 2018 WL 6619983, at *4 (N.D. Cal. Dec. 18, 2018), *aff'd sub nom. Hefler v. Pekoc*, 802 F. App'x 285 (9th Cir. 2020). The Court considered these factors in connection with its consideration of preliminary approval of the Settlement and found that each had been met. *See* ECF 243 at 1-2.

To evaluate the substantive fairness of the settlement, courts in the Sixth Circuit have considered the following factors in determining whether a class action settlement should be approved:

> (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 Lead Counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

UAW, 497 F.3d at 631.

These factors should not be applied in a formalistic fashion. *Whitford v. First Nationwide Bank*, 147 F.R.D. 135, 140 (W.D. Ky. 1992). In considering these factors, the task of the court "is not to decide whether one side is right or even whether one side has the better of these arguments. . . . The question rather is whether the parties are using settlement to resolve a legitimate legal and factual disagreement." *UAW*, 497 F.3d at 632. Courts "'judge the fairness of a proposed compromise,'" "'weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement,'" as opposed to deciding the merits of the case or resolving unsettled legal questions. *Id.* at 631 (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)). Likewise, "[t]he district court enjoys wide discretion in assessing the weight and applicability of these factors." *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205-06 (6th Cir. 1992); *New York State Tchrs.' Ret. Sys. v. GMC*, 315 F.R.D. 226, 236 (E.D. Mich. 2016), *aff'd sub nom. Marro v. New York State Tchrs.' Ret. Sys.*, 2017 WL 6398014 (6th Cir. Nov. 27, 2017).

B. The Rule 23 and Sixth Circuit Factors Support Approval

1. The Class Was Adequately Represented

Rule 23(e)(2)(A) requires the Court to consider whether the "class representatives and class counsel have adequately represented the class." The Sixth Circuit looks at two criteria to determine whether adequacy is met: the representative must (i) "'have common interests with unnamed

members of the class,'" and (ii) be willing to "'vigorously prosecute the interests of the class through qualified counsel.'" *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 543 (6th Cir. 2012).

These requirements have easily been met here. Plaintiffs' claims are typical of and co-extensive with the claims of the Class, and they have no antagonistic interests with respect to the Class as a whole. Plaintiffs have amply demonstrated that they have an interest in obtaining the largest possible recovery in this Litigation, as do the other absent Class Members. *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members."). Additionally, as detailed in their declarations, Plaintiffs were highly involved in each stage of the Litigation and worked closely with Lead Counsel throughout the pendency of this action to achieve the best possible result for themselves and the Class. *See* Declaration of Jackson County Employees' Retirement System Trustee James Shotwell ("Jackson County Decl.") and Declaration of Jeffrey Dana on Behalf of the City of Providence Employees' Retirement System ("Providence Decl."), submitted herewith.

Lead Counsel has also adequately represented the Class. Lead Counsel is highly experienced in securities litigation, with a long and successful track record representing investors in cases in this District, as well as courts throughout the country. *See* Declaration of Christopher M. Wood Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("RGRD Decl."), Ex. D, submitted herewith. Lead Counsel had a strong appreciation of the strengths and weaknesses of the case before agreeing to the Settlement, and believes it is in the best interest of the Class. Here, Lead Counsel incurred over $170,000 in expenses and expended over 3,475 hours during a span of over three years vigorously pursuing the Litigation. RGRD Decl., ¶¶4-11. Accordingly, this factor is easily satisfied and warrants final

approval. *See UAW*, 497 F.3d at 626 (representation was adequate because class counsel "***was willing to, and indeed did, commit substantial 'resources . . . to represent[ ] the class***'").

2. The Absence of Fraud or Collusion Favors Approval

Rule 23(e)(2)(B) and the first *UAW* factor, which analyze whether the Settlement was reached at arm's length and without fraud or collusion, also support approval. "'Courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered.'" *In re Se. Milk Antitrust Litig.*, 2013 WL 2155379, at *6 (E.D. Tenn. May 17, 2013). *See also Karpik v. Huntington Bancshares Inc.*, 2021 WL 757123, at *4 (S.D. Ohio Feb. 18, 2021). "Courts consistently approve class action settlements reached through arms-length negotiations after meaningful discovery." *Id.*

Here, the proposed Settlement was reached after more than three years of litigation, with each side vigorously advocating its respective positions. Indeed, the Settlement was reached only after arm's-length negotiations facilitated by an experienced and well-respected mediator, the Honorable Layn R. Phillips (Ret.). Wood Decl., ¶¶93-98. The Settlement negotiations were extensive, and included the exchange of briefs, mediation sessions, then follow-up discussions. *Id.* Plaintiffs and Nissan ultimately agreed to settle only after Judge Phillips provided a mediator's proposal. As such, the Settlement warrants approval given that the "'participation of an independent mediator . . . [which] virtually insures that the negotiations were conducted at arm's length and without collusion.'" *See Arledge v. Domino's Pizza, Inc.*, 2018 WL 5023950, at *2 (S.D. Ohio Oct. 17, 2018).

3. The Relief Provided to the Class Is Adequate

Under Rule 23(e)(2)(C), the Court must consider whether the relief provided for the class is adequate, taking into account "the costs, risks, and delay of trial and appeal" and other factors. This factor essentially incorporates the second and fourth *UAW* factors: (i) the complexity, expense, and

likely duration of the litigation; and (ii) the likelihood of success on the merits. Each of these factors supports approval.

a. The Complexity, Expense, and Likely Duration of the Litigation

"Courts have consistently held that the expense and possible duration of litigation are major factors to be considered in evaluating the reasonableness of a settlement." *In re Delphi Corp. Sec., Derivative & ERISA Litig.*, 248 F.R.D. 483, 497 (E.D. Mich. 2008). Most class actions are "'inherently complex'" and "'[s]ettlement avoids the costs, delays, and multitude of other problems associated with them.'" *In re Prandin Direct Purchaser Antitrust Litig.*, 2015 WL 1396473, at *2 (E.D. Mich. Jan. 20, 2015). Indeed, courts have consistently recognized that "'[s]ecurities class actions are often "difficult and . . . uncertain."'" *See, e.g.*, *New England Health Care Emps. Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 631 (W.D. Ky. 2006), *aff'd sub nom. Fidel v. Farley*, 534 F.3d 508 (6th Cir. 2008).

There is no doubt that this Litigation involves complex issues relating to jurisdiction, application of Japanese law, falsity, materiality, scienter, loss causation, and damages.

This Litigation was filed four years ago. Discovery was underway, but much more was left to do. Many of the documents produced were in Japanese, requiring expensive translation services. Deposition would likely take place in Japan or other countries. This Settlement avoids the risks of a lengthy trial, and the certain appeal by the non-prevailing party.[3] "As the Settlement provides an

[3] *See Olden v. Gardner*, 294 F. App'x 210, 217 (6th Cir. 2008) (affirming settlement and noting that, among other factors in favor of settlement, "[f]ollowing the trial, there would most likely have been an appeal that would have required an additional investment of substantial resources and time"); *Se. Milk*, 2013 WL 2155379, at *5 ("[T]he likelihood of an appeal was great . . . [and] [t]he Court agrees with plaintiffs that the immediate recovery of substantial monetary and structural relief provided by the settlement far outweighs the risk and commitment of time inherent in further litigation of this complex matter, especially in view of the risks, expenses and delays noted above."); *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, 2010 WL 3341200, at *4 (W.D.

immediate, significant, and certain recovery for Class members, this factor favors the Court's approval of the Settlement." *See GMC*, 315 F.R.D. at 236.

b. The Likelihood of Success on the Merits

"'The most important of the factors to be considered in reviewing a settlement is the probability of success on the merits. The likelihood of success, in turn, provides a gauge from which the benefits of the settlement must be measured.'" *Karpik*, 2021 WL 757123, at *5 (quoting *Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235, 245 (6th Cir. 2011)). In other words, when considering this factor, the Court must balance the likelihood of success on the merits against the relief offered in the Settlement. *UAW*, 497 F.3d at 631.

Plaintiffs believe that the evidence establishes that: Defendants participated in a fraudulent scheme in which Nissan's then-CEO and Chairman, Carlos Ghosn, conspired with the other Individual Defendants to increase his own pay by approving billions of yen in deferred compensation, which Nissan would be obligated to pay him at later dates, but concealed that compensation from Nissan's financial reports, which had the effect of understating Nissan's compensation expenses and overstating its operating income throughout the Class Period. Wood Decl., ¶6. Plaintiffs also believe that the evidence establishes that Defendants made materially false and misleading statements regarding Nissan's corporate governance and internal controls, compliance with applicable laws, and commitment to ethical conduct in Nissan's other mandatory disclosure documents. *Id.* Plaintiffs believe they would establish that Defendants' fraudulent scheme caused Nissan's ADRs and common stock to trade at inflated prices, thereby causing harm to Class Members when the risks and conditions concealed by Defendants' misrepresentations and omissions, or the economic consequences thereof, materialized. *Id.*, ¶7.

Ky. Aug. 23, 2010) ("Even if litigation is successful for the plaintiff class, appeals are likely to delay any sort of meaningful relief. In contrast, the settlement provides recovery without delay.").

Plaintiffs alleged that Defendants' misrepresentations concealed material risks to the Company's business, which were revealed through public disclosures on November 19, 2018, after the markets closed in Tokyo and before the markets opened in the United States, when media outlets began reporting that Ghosn and Kelly had been arrested, and were being questioned by Japanese prosecutors. *Id.* Shortly, thereafter, Nissan released a statement which reported that for many years, Nissan's Tokyo Stock Exchange reports had underreported Ghosn's compensation, that other improprieties by Ghosn and Kelly had been uncovered, and that Ghosn and Kelly would be removed from their positions at Nissan. *Id.* Nevertheless, Plaintiffs are also cognizant of the fact that there was no guarantee that they would prevail at trial. Indeed, "[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy." *In re Xcel Energy, Inc., Sec., Derivative & ERISA Litig.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005).[4]

Here, as detailed in the Wood Declaration, there were numerous potential defenses available to Defendants that could reduce, or preclude entirely, any recovery by the Class. While Nissan stated that it made misleading statements concerning Ghosn's compensation, all Defendants vigorously contested jurisdiction and planned to continue pursuing the motions for reconsideration

[4] *See, e.g.*, *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408 (7th Cir. 2015) (vacating $2.46 billion PSLRA judgment against securities fraud defendants and remanding for a new trial on limited issues); *Robbins v. Koger Props. Inc.*, 116 F.3d 1441, 1448-49 (11th Cir. 1997) (reversal on loss causation grounds of $81 million jury verdict in favor of plaintiffs against an accounting firm and judgment entered for defendant); *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512 (S.D.N.Y. 2011) (declining to enter judgment on jury verdict in favor of plaintiffs and modifying class definition after intervening change in Supreme Court precedent), *aff'd*, 838 F.3d 223 (2d Cir. 2016); *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011) (setting aside jury verdict in favor of plaintiffs and granting securities defendants' post-trial motion for judgment as a matter of law), *aff'd sub nom. Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012); *Erica P. John Fund, Inc. v. Halliburton Co.*, 2015 WL 10714013, at *3 (5th Cir. Nov. 4, 2015) (granting a "third interlocutory appeal in a [securities] case that has remained in the class certification stage for thirteen years," with two successive appeals to the U.S. Supreme Court).

and interlocutory appeal concerning jurisdictional issues, to oppose class certification, and at least the Individual Defendants expected to marshal evidence at summary judgment and/or trial that they hoped would convince the jury that: (i) they were not responsible for the misleading statements; (ii) their statements were true to the best of their knowledge; (iii) any inaccuracy in their statements was immaterial to the value and earnings of Nissan as a whole and thus immaterial to any reasonable investor; and (iv) Class Members' losses were instead the result of the market's response to Defendant Ghosn's ouster as CEO and arrest by Japanese authorities, which the Individual Defendants contended were politically motivated and all Defendants contended caused a larger decline in stock price than was merited by the compensation disclosures themselves.[5] Defendants also argued that a decision issued by the Sixth Circuit concerning pendent personal jurisdiction after this Court denied Defendants' motions to dismiss on jurisdictional grounds compelled a reversal of the motion to dismiss order with respect to Plaintiffs' FIEA claims. Wood Decl., ¶13. Nissan's renewed motion for reconsideration was pending at the time the Settlement was reached.

Lead Counsel was fully informed of the strengths and weaknesses of Plaintiffs' case, including the many complicated and nuanced legal issues that would have to be resolved in Plaintiffs' favor in order to achieve a successful result. In short, continued litigation would be hard fought, and expensive, and a positive result was far from assured. *See Bartell v. LTF Club Operations Co.*, 2020 WL 7062834, at *4 (S.D. Ohio Aug. 7, 2020) ("In summary, continued litigation in the face of strong opposition and the 'substantial ground for disagreement' that exists as

[5] The parties also anticipated a battle of experts at trial on the disputed issues. Wood Decl., ¶15. Each side had or would retain experts who were expected to offer opposing testimony about: (i) the requirement to disclose executive compensation; (ii) the meaning and significance of Nissan's statements respecting corporate governance; and (iii) loss causation and damages. *Id.* There is no guarantee that the jury would accept Plaintiffs' experts' testimony over Defendants.

to the merits of Plaintiff's claims creates substantial risk to the Class. When balanced against the substantial benefits provided, this factor weighs in favor of approving the proposed Settlement.").

Despite these risks, Plaintiffs obtained a very favorable recovery. The Settlement far exceeds the $21 million average recovery in securities class action settlements in 2021 according to data from NERA. *See, e.g.*, Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2021 Full-Year Review*, at 17, Figure 17 (NERA Jan. 25, 2022). Accordingly, the proposed Settlement is a very good result for the Class and is certainly within the range of what would be determined to be fair, reasonable, and adequate.

4. The Stage of Proceedings and Amount of Discovery Engaged in by the Parties Supports Approval

"The relevant inquiry with respect to this factor is whether the Plaintiff has obtained a sufficient understanding of the case to gauge the strengths and weaknesses of the claims and the adequacy of the settlement." *GMC*, 315 F.R.D. at 236. Here, Lead Counsel undoubtedly had a thorough understanding of the strengths and weaknesses of Plaintiffs' claims. During the Litigation, Lead Counsel had, among other things:

- researched and drafted the Complaint;
- successfully opposed Defendants' motion to dismiss the Complaint;
- successfully opposed Nissan's motion for potential reconsideration or certification of interlocutory appeal from the Court's order denying the motion to dismiss;
- successfully opposed Defendant Ghosn's motion requesting certification of interlocutory appeal from the Court's order denying the motion to dismiss;
- successfully opposed Defendant Peter's motion for judgment on the pleadings;
- opposed Defendant Peter's renewed motion for reconsideration and certification (which motion remained pending at the time of the Settlement);
- opposed Defendant Nissan's motion for partial reconsideration or certification for interlocutory appeal (which motion remained pending at the time of the Settlement);

- requested, negotiated for, and reviewed and analyzed tens of thousands of pages of documentary evidence produced by Defendants and third parties;
- responded to discovery propounded by Defendants;
- engaged and begun translation services to translate the more than 12,000 pages of documents produced in Japanese and other languages;
- retained experts in the fields of Japanese law and business and in financial economics and damages;
- engaged in settlement negotiations with a nationally recognized mediator; and
- assessed the risks of prevailing on Plaintiffs' claims at trial.

Wood Decl., ¶5.

There can be no question that by the time the Settlement was reached, Plaintiffs and Lead Counsel "had sufficient information to evaluate the strengths and weaknesses of the case and the merits of the Settlement," *GMC*, 315 F.R.D. at 237, and reached the well-informed decision to enter into this Settlement. Accordingly, this factor supports approval of the Settlement.

5. Lead Counsel and Plaintiffs Endorse the Settlement

In assessing the fairness of a proposed settlement, courts consider counsel's endorsement of the settlement, which "is entitled to significant deference." *Id.* at 238; *accord IUE-CWA v. GMC*, 238 F.R.D. 583, 597 (E.D. Mich. 2006) ("The judgment of the parties' counsel that the settlement is in the best interest of the settling parties 'is entitled to significant weight, and supports the fairness of the class settlement.'"). This is especially true where, as here, the stage of the proceedings indicates that counsel and the court are fully capable of evaluating the merits of Plaintiffs' case and the probable course of future litigation. *See Armstrong v. Gallia Metro. Hous. Auth.*, 2001 WL 1842452, at *3-*4 (S.D. Ohio Apr. 23, 2001).

Here, as a result of the settlement evaluation process, Lead Counsel carefully considered and evaluated the relevant legal authorities and evidence gathered to support the claims asserted against

Defendants; the likelihood of prevailing on these claims; and the risk, expense, and duration of continued litigation. Based on these considerations, Lead Counsel concluded that the Settlement is not only fair and reasonable but is a highly favorable result for the Class. Wood Decl., ¶¶10-18; *Karpik*, 2021 WL 757123, at *6. Likewise, Plaintiffs approve the Settlement. *See* Jackson County Decl., ¶4; Providence Decl., ¶4. "Their support also favors approval." *Karpik*, 2021 WL 757123, at *6. Accordingly, this factor supports final approval.

6. The Reaction of the Class Supports Final Approval

To further support approval of a settlement, courts have also looked to the reaction of the class. *Poplar Creek*, 636 F.3d at 244; *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 906 (S.D. Ohio 2001). "The lack of objections by class members in relation to the size of the class highlights the fairness of the settlements to unnamed class members and supports approval of the settlements." *Se. Milk*, 2013 WL 2155379, at *6. Here, as detailed *infra*, Section VI, as of August 15, 2022, the Claims Administrator has disseminated over 73,900 Notices to potential Class Members and nominees. To date not one Class Member has objected to any aspect of the Settlement.[6] Nor have any Class Members requested exclusion from the Class. Thus, this factor favors approval of the Settlement.

7. Public Interest Favors Approval of the Settlement

The Supreme Court has repeatedly recognized "that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007), and "'there is a strong public interest in encouraging settlement of complex litigation and class action suits because they are "notoriously difficult and unpredictable" and settlement conserves judicial

[6] As set forth in the Notice, the deadline to provide counsel with objections is August 29, 2022.

resources.'" *GMC*, 315 F.R.D. at 241-42. As discussed herein, the Settlement provides $36 million in cash, plus interest. The Settlement puts an end to this four-year-old Litigation, which, absent settlement would have continued in this Court and in the Sixth Circuit. Thus, the Settlement also furthers public policy by conserving judicial resources. *See In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 376 (S.D. Ohio 2006) ("[T]here is certainly a public interest in settlement of disputed cases that require substantial federal judicial resources to supervise and resolve.").

8. Other Rule 23(e)(2) Factors Support Final Approval

Rule 23(e)(2), as amended, also considers: (i) the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-members' claims; (ii) the terms of any proposed award of attorneys' fees, including timing of payment; (iii) any agreement made in connection with the proposed settlement; and (iv) the equitable treatment of class members. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii), (iii), & (iv); Fed. R. Civ. P. 23(e)(2)(D). Each of these additional considerations also supports final approval of the Settlement.

First, the method for processing Class Members' claims and distributing relief to eligible claimants are well-established and effective. Here, the Court-appointed Claims Administrator will review and process the claims under the guidance of Lead Counsel, allow claimants an opportunity to cure any deficiencies in their claims or request the Court review a denial of their claims, and, lastly, mail or wire Authorized Claimants their *pro rata* share of the Net Settlement Fund (per the proposed Plan of Allocation), *see infra* Section IV. *See, e.g.*, *GMC*, 315 F.R.D. at 233-34, 245 (approving settlement with a nearly identical distribution process).

Second, as discussed in the accompanying fee and expense memorandum, Lead Counsel is applying for an award of one-third of the common fund fee award as compensation for the services it rendered on behalf of the Class, as well as payment of litigation costs and expenses. The proposed attorneys' fees are reasonable in light of the work performed and the results obtained, and a one-third

award is consistent with attorneys' fee percentages that courts have approved in similar cases. *See, e.g.*, *Grae v. Corrections Corp. of America*, 2021 WL 5234966, at *1 (M.D. Tenn. Nov. 8, 2021) (awarding one-third of a $56 million recovery); *Indiana State District Council of Laborers and Hod Carriers Pension & Welfare Fund v. Omnicare, Inc., et al.*, 2019 WL 7483663, at * 1 (E.D. Ky. June 27, 2019) (awarding 33% of a $20 million recovery).[7] Notably, approval of the requested fees is separate from consideration of approval of the Settlement, and the Settlement may not be terminated based on any ruling on attorneys' fees. *See* Stipulation, ECF 241, ¶6.4.

Third, Plaintiffs and Nissan entered into a confidential agreement establishing conditions under which Nissan may terminate the Settlement if a certain threshold of Class Members exclude themselves. Stipulation, *Id.*, ¶7.3. This type of agreement is a standard provision in securities class action settlements and has no negative impact on the fairness of the Settlement. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 2018 WL 1942227, at *5 (N.D. Tex. Apr. 25, 2018) (approving settlement with similar confidential agreement).

Fourth, under the proposed Plan of Allocation, each Authorized Claimant will receive his, her, or its *pro rata* share of the Net Settlement Fund based on their Recognized Claim as calculated by the Plan of Allocation.

Accordingly, each relevant factor supports final approval of the Settlement.

IV. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

Approval of the Plan of Allocation requires that it is fair, reasonable, and adequate. *See, e.g.*, *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *15 (E.D. Mich. Dec. 13, 2011).

[7] Additional jurisprudence supporting this award is included in the Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses, submitted herewith.

"""Courts generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable."""" *Id.*

Here, the proposed Plan of Allocation is fair, reasonable and adequate. The Plan of Allocation provides for the distribution of the Net Settlement Fund among Authorized Claimants on a *pro rata* basis based on their recognized loss, and takes into account specific risks associated with personal jurisdiction as it related to claims on behalf of common stock purchasers. Wood Decl., ¶¶103-106. The Plan of Allocation ensures that the Net Settlement Fund will be fairly and equitably distributed to those who have suffered losses. Moreover, the Plan of Allocation was disclosed in the Notice mailed to potential Class Members and nominees and, to date, there have been no objections to the Plan of Allocation. *See* Murray Decl., Ex. A. Thus, the Plan of Allocation is fair and reasonable.

V. THE COURT SHOULD CERTIFY THE CLASS

The Court is hearing the proposed Settlement prior to any hearing or ruling on class certification, making it necessary for the Court to certify a class pursuant to Rule 23 prior to approving the proposed Settlement. In certifying a class for purposes of settlement, courts are afforded broad discretion. *In re Am. Med. Sys. Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996). Here, all the requirements for class certification are met.[8]

Each of the four Rule 23(a) prerequisites to class certification – (a) numerosity; (b) commonality; (c) typicality; and (d) adequacy of representation is satisfied. First, numerosity is satisfied in cases involving nationally traded securities such as Nissan ADRs and common stock. *In*

[8] The Court preliminarily certified the Class in connection with its consideration of preliminary approval of the Settlement. ECF 243 at ¶2. Nothing has changed since that time which would require a different result here, and Plaintiffs respectfully incorporate herein their arguments in support of class certification in the Memorandum of Law in Support of Motion for (i) Preliminary Approval of Settlement, (ii) Class Certification, and (iii) Approval of Notice to the Class. ECF 240 at §V.

re Accredo Health, Inc., 2006 U.S. Dist. LEXIS 97621, at *17 (W.D. Tenn. Mar. 7, 2006). Second, commonality exists where, as here, all Members of the Class purchased Nissan ADRs or common stock subject to the same alleged misrepresentations and omissions. *Ross v. Abercrombie & Fitch, Co.*, 257 F.R.D. 435, 442 (S.D. Ohio 2009). Third, typicality is satisfied by Plaintiffs having suffered losses following the disclosures, as the other Class Members did. *Am. Med. Sys.*, 75 F.3d at 1082. Fourth, Plaintiffs are adequate representatives because they have no conflicts with the other Class Members, and have been actively involved in the case, maintaining communication with Lead Counsel, who are qualified, experienced, and able to conduct the Litigation. *Id.* at 1083; *In re Direct Gen. Corp. Sec. Litig.*, 2006 U.S. Dist. LEXIS 56128, at *14 (M.D. Tenn. Aug. 8, 2006).

A proposed class action must also satisfy one of the tests of Rule 23(b). Plaintiffs bring this Litigation under Rule 23(b)(3): predominance of common questions of fact or law and superiority of the class action device as the method of adjudication. Each is readily satisfied here.

The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623 (1997). The predominance requirement is "readily met" in securities class actions. *Id.* at 625. Here, common questions of law and fact predominate over individual questions because the alleged misstatements and omissions affected all Members of the Class in the same manner (*i.e.*, through public statements to the market). *Bouce v. Coopers & Lybrand*, 216 F.R.D. 596, 607 (S.D. Ohio 2003) (noting when fraud-on-the market theory is invoked, courts agree that legal and factual issues common to all members of class predominate). Additionally, the class action mechanism is the best method of resolving all the individual claims aggregated in this matter because the controversy for each Class Member is identical and will result in the adjudication of all claims in one suit and one forum. *Amchem*, 521 U.S. at 615.

In short, because the class action device is far superior to any other means available to this Court, the requirements of Rule 23(b)(3) are met.

VI. THE NOTICE OF SETTLEMENT SATISFIES RULE 23 AND DUE PROCESS REQUIREMENTS

Rule 23(e)(1)(B) requires that notice of the proposed settlement be given "in a reasonable manner to all class members who would be bound by the proposal." Rule 23(c)(2)(B) further requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." In addition to the requirements of Rule 23, the Constitution's Due Process Clause also guarantees unnamed class members the right to notice of certification or settlement. In securities class actions, the notice must contain the information outlined in Rule 23(c)(2)(B) and the PSLRA. *See* 15 U.S.C. §78u-4(a)(7). A notice of settlement satisfies due process when it is "'reasonably calculated to reach interested parties.'" *Fidel v. Farley*, 534 F.3d 508, 514 (6th Cir. 2008). The notice program utilized here, as set forth in the Preliminary Approval Order, easily meets these requirements.

In accordance with the Preliminary Approval Order, the Claims Administrator has disseminated over 73,900 copies of the Notice and Proof of Claim and Release via First-Class Mail to potential Class Members and nominees. *See* Murray Decl., ¶¶4-11. The Claims Administrator also caused the Summary Notice to be published in *The Wall Street Journal* and transmitted over the *Business Wire*. *Id.*, ¶12. In addition, a dedicated toll-free telephone number and website were established to assist potential Class Members with inquiries regarding the Litigation, the Settlement, and the claims process. *Id.*, ¶¶13-14.

The Notice provides Class Members, among other things, (i) an explanation of the nature of the Litigation and the claims asserted; (ii) the definition of the Class; (iii) the basic terms of the Settlement, including the amount and releases; (iv) the Plan of Allocation and estimated average

recovery; (v) dates and deadlines for certain Settlement-related events; (vi) the reasons the parties are proposing the Settlement; (vii) the maximum amount of attorneys' fees and expenses that will be sought; (viii) a description of Class Members' right to request exclusion or to object to the Settlement, the Plan of Allocation, and/or the maximum attorneys' fees or expenses; (ix) notice of the binding effect of a judgment on Class Members; and (x) a way of obtaining additional information about the Litigation, by contacting Lead Counsel or the Claims Administrator, or visiting the Settlement website. *See* Fed. R. Civ. P. 23(c)(2)(B); 15 U.S.C. §78u-4(a)(7). The Notice also provides recipients with information on how to submit a Proof of Claim and Release. *See* Murray Decl., Ex. A.

Plaintiffs and their counsel have satisfied all of the elements of the notice plan approved by the Court. *See generally* Murray Decl. Accordingly, the notice program implemented in this Litigation constitutes "the best notice . . . practicable under the circumstances" and satisfies the requirements of due process, Rule 23, and the PSLRA. *See* Fed. R. Civ. P. 23(c)(2)(B); *see also GMC*, 315 F.R.D. at 242 (finding similar notice program "satisfied Rule 23's notice requirement"); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 WL 11669877, at *3 (E.D. Tenn. Apr. 30, 2014) (finding that dissemination of notice by first class mail and posting on a hosted website satisfied the requirements of Rule 23).

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court: (i) approve the Settlement as fair, reasonable, and adequate; (ii) approve the Plan of Allocation as fair and reasonable pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3); and (iii) certify the Class for settlement purposes.

DATED: August 15, 2022

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
JERRY E. MARTIN, #20193
CHRISTOPHER M. WOOD, #032977
CHRISTOPHER H. LYONS, #034853

s/ Christopher M. Wood
CHRISTOPHER M. WOOD

414 Union Street, Suite 900
Nashville, TN 37219
Telephone: 615/244-2203
615/252-3798 (fax)
jmartin@rgrdlaw.com
cwood@rgrdlaw.com
clyons@rgrdlaw.com

ROBBINS GELLER RUDMAN
& DOWD LLP
DARREN J. ROBBINS
ELLEN GUSIKOFF STEWART
ERIC I. NIEHAUS
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)
darrenr@rgrdlaw.com
elleng@rgrdlaw.com
ericn@rgrdlaw.com

Lead Counsel for Lead Plaintiff

VANOVERBEKE, MICHAUD &
TIMMONY, P.C.
THOMAS C. MICHAUD
79 Alfred Street
Detroit, MI 48201
Telephone: 313/578-1200
313/578-1201 (fax)
tmichaud@vmtlaw.com

Additional Counsel for Lead Plaintiff

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on August 15, 2022, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

s/ Christopher M. Wood

CHRISTOPHER M. WOOD

ROBBINS GELLER RUDMAN
& DOWD LLP
414 Union Street, Suite 900
Nashville, TN 37219
Telephone: 615/244-2203
615/252-3798 (fax)
cwood@rgrdlaw.com

Mailing Information for a Case 3:18-cv-01368 Jackson County Employees' Retirement System v. Ghosn et al

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Ameya S. Ananth**
  aananth@paulweiss.com
- **Mary K. Blasy**
  mblasy@rgrdlaw.com
- **L. Webb Campbell , II**
  wcampbell@srvhlaw.com,Bparrish@srvhlaw.com
- **Joseph B. Crace , Jr**
  jcrace@bassberry.com,llewis@bassberry.com,birving@bassberry.com
- **Israel David**
  Israel.David@friedfrank.com
- **John L. Farringer , IV**
  jfarringer@srvhlaw.com,ycantrell@srvhlaw.com
- **Michael E. Gertzman**
  mgertzman@paulweiss.com
- **Elizabeth O. Gonser**
  egonser@rjfirm.com,nnguyen@rjfirm.com
- **John S. Hicks**
  jhicks@bakerdonelson.com,lkroll@bakerdonelson.com,mbarrass@bakerdonelson.com,khuskey@bakerdonelson.com
- **Elizabeth J. Kalanchoe**
  Elizabeth.LoPresti@friedfrank.com,managingattorneysdepartment@friedfrank.com
- **Brad S. Karp**
  bkarp@paulweiss.com
- **Michael L. Kichline**
  michael.kichline@morganlewis.com
- **Zachary A. Kisber**
  zkisber@bakerdonelson.com,dhardin@bakerdonelson.com
- **Michael A. Kleinman**
  Michael.Kleinman@friedfrank.com
- **Alexia D. Korberg**
  akorberg@paulweiss.com
- **Christopher Hamp Lyons**
  clyons@rgrdlaw.com,e_file_sd@rgrdlaw.com,clyons@ecf.courtdrive.com
- **Michael A. Malone**
  mmalone@polsinelli.com,aedwards@polsinelli.com,manelson@polsinelli.com,NashvilleDocketing@Polsinelli.com
- **Jerry E. Martin**
  jmartin@barrettjohnston.com,jkarsten@barrettjohnston.com,elusnak@barrettjohnston.com,jmartin@rgrdlaw.com
- **Laura Hughes McNally**
  laura.mcnally@morganlewis.com
- **Eric I. Niehaus**
  ericn@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Matthew J. Peters**
  matthew.peters@lw.com
- **John W. Peterson**
  john.peterson@polsinelli.com,ncassidy@polsinelli.com,mknoop@polsinelli.com,aedwards@polsinelli.com,Rberg@polsinelli.com,ehodge@polsinelli.com,nashvilledo
- **Darren J. Robbins**
  darrenr@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Samuel H. Rudman**
  srudman@rgrdlaw.com
- **Jacobus J. Schutte**
  jschutte@paulweiss.com
- **Melissa Arbus Sherry**
  melissa.sherry@lw.com

- **Audra J. Soloway**
  asoloway@paulweiss.com
- **Ellen Gusikoff Stewart**
  elleng@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Overton Thompson , III**
  othompson@bassberry.com,allison.acker@bassberry.com,lbilbrey@bassberry.com
- **Christopher E. Thorsen**
  cthorsen@bakerdonelson.com,mbarrass@bakerdonelson.com
- **Christopher S. Turner**
  christopher.turner@lw.com,sflitigationservices@lw.com,christopher-turner-6162@ecf.pacerpro.com
- **Peter A. Wald**
  peter.wald@lw.com,sflitigationservices@lw.com,peter-wald-7073@ecf.pacerpro.com
- **James D. Wareham**
  James.Wareham@friedfrank.com
- **Christopher M. Wood**
  cwood@rgrdlaw.com,agonzales@ecf.courtdrive.com,CWood@ecf.courtdrive.com,agonzales@rgrdlaw.coom,e_file_sd@rgrdlaw.com,kwoods@rgrdlaw.com

Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

Hiroshi Karube
,