

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

JACKSON COUNTY EMPLOYEES’ RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated,	)	Civil Action No. 3:18-cv-01368
	)	<u>CLASS ACTION</u>
	)	
Plaintiff,	)	Hon. William L. Campbell, Jr.
	)	Magistrate Judge Alistair Newbern
vs.	)	
	)	DECLARATION OF CHRISTOPHER M.
CARLOS GHOSN, et al.,	)	WOOD IN SUPPORT OF: (1) FINAL
	)	APPROVAL OF CLASS ACTION
Defendants.	)	SETTLEMENT AND APPROVAL OF PLAN
	)	OF ALLOCATION; AND (2) AN AWARD
	)	OF ATTORNEYS’ FEES AND EXPENSES

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I, CHRISTOPHER M. WOOD, declare as follows:

1. I am a member of Robbins Geller Rudman & Dowd LLP (“Robbins Geller” or “Lead Counsel”), Court-appointed Class Counsel for Lead Plaintiff and Class Representatives Jackson County Employees’ Retirement System and Providence Employees’ Retirement System (“Plaintiffs”) in this action. I was actively involved in the prosecution of this action (hereinafter, the “Litigation”), am familiar with its proceedings, and have personal knowledge of the matters set forth herein based upon my supervision of, and participation in, all material aspects of the Litigation.<sup>1</sup>

2. I submit this Declaration in support of Plaintiffs’ application, pursuant to Rule 23 of the Federal Rules of Civil Procedure, for approval of: (a) the Settlement for a cash payment of \$36 million on behalf of the Class; (b) the proposed Plan of Allocation; and (c) the application for attorneys’ fees and expenses.

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<sup>1</sup> Unless otherwise defined herein, capitalized terms have the meaning ascribed to them in the Stipulation of Settlement, dated and filed on April 22, 2022 (ECF 241) (the “Stipulation”).

3. The Class, previously certified by the Court in its order granting Plaintiffs' motion for preliminary approval, is defined as:

All persons who, between May 11, 2014 and November 16, 2018, inclusive, purchased or otherwise acquired Nissan Motor Co., Ltd. ("Nissan" or the "Company") American Depositary Receipts ("ADRs") on the over-the-counter market and all citizens and residents of the United States who, between May 11, 2014 and November 16, 2018, inclusive, purchased or otherwise acquired Nissan common stock (the "Class").

#### **I. SUMMARY OF LITIGATION AND REASONS FOR SETTLEMENT**

4. This action was brought against Carlos Ghosn, Hiroto Saikawa, Greg Kelly, Hiroshi Karube, and Joseph G. Peter (the "Individual Defendants") and Nissan (together with the Individual Defendants, "Defendants"), on behalf of the Class, for violations of §§10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. §§78j(b) and 78t(a)) and Rule 10b-5 promulgated thereunder (17 C.F.R. §240.10b-5) by the U.S. Securities and Exchange Commission ("SEC"), and against Nissan under the Financial Instruments and Exchange Act of Japan (the "FIEA"). This case was vigorously litigated until the proposed settlement agreement was reached on September 21, 2021.

5. The Settlement was not achieved until Plaintiffs, *inter alia*: (a) successfully opposed Defendants' motion to dismiss the Amended Complaint for Violations of the Federal Securities Laws and the Financial Instruments and Exchange Act of Japan, filed on May 6, 2019 (the "Complaint," ECF 58); (b) successfully opposed Nissan's motion for partial reconsideration or certification of interlocutory appeal from the Court's order denying the motion to dismiss the Complaint; (c) successfully opposed Defendant Ghosn's motion requesting certification of interlocutory appeal from the Court's order denying the motion to dismiss the Complaint; (d) successfully opposed Defendant Peter's motion for judgment on the pleadings; (e) opposed Defendant Peter's renewed motion for reconsideration and certification (which motion remained

pending at the time of the Settlement); (f) opposed Defendant Nissan's motion for partial reconsideration or certification for interlocutory appeal (which motion remained pending at the time of the Settlement); (g) initiated discovery, including serving five sets of requests for production of documents directed to the Defendants, totaling 31 requests for production, as well as subpoenas directed to third parties, in response to which Plaintiffs had received more than 40,000 pages of documents produced by Defendants and third parties by the time the Settlement was reached; (h) began responding to discovery directed at Plaintiffs by Defendants, including responding to six sets of requests for production of documents, totaling 166 requests for production, and four sets of interrogatories, totaling 64 interrogatories; (i) engaged translation services to begin translating the more than 12,000 pages of documents that had already been produced in Japanese and other languages; (j) engaged and worked with experts in the fields of Japanese law and business and in financial economics and damages; (k) engaged in settlement negotiations with a nationally recognized mediator; and (l) assessed the risks of prevailing on their claims at trial and the Class's ability to collect on any judgment awarded.

6. Plaintiffs alleged, among other things, 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. As a result, Plaintiffs alleged that Defendants understated Nissan's compensation expenses and overstated its operating income throughout the Class Period. At the same time, Plaintiffs alleged that Defendants also made 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.

7. Plaintiffs contended these actions caused Nissan's publicly traded securities to trade at inflated prices, thereby causing economic harm to Class Members when the truth of Ghosn's concealed compensation was revealed and the other risks and conditions concealed by Defendants' misrepresentations and omissions materialized. Plaintiffs alleged that when Defendants' prior misrepresentations and fraudulent conduct were disclosed and became apparent to the market, it caused the price of Nissan's securities to fall as the prior artificial inflation came out of the stock price. In particular, Plaintiffs alleged that on November 19, 2018, after the markets closed in Tokyo and before the markets opened in the United States, media outlets began reporting that Ghosn and Kelly had been arrested, and were being questioned by Japanese prosecutors. Shortly thereafter, Nissan issued a release entitled, "Regarding serious misconduct by Nissan Chairman and one representative director." The release stated 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. When markets in the United States opened shortly thereafter on November 19, the price of Nissan's ADRs fell, and when markets in Tokyo opened on November 20, the price of Nissan's common stock also declined. Plaintiffs alleged that the decline in the price of Nissan securities was a direct result of the revelation of the nature and extent of Defendants' fraudulent misrepresentations to investors and the market, and the damages suffered by Plaintiffs and the other Class Members was a direct result of Defendants' false and misleading statements and fraudulent scheme to artificially inflate the price of Nissan securities.

8. The settlement of this Litigation was negotiated with the assistance and oversight of the Honorable Layn R. Phillips (Ret.) of Phillips ADR, a respected mediator with substantial experience in mediating claims arising under the federal securities laws. Plaintiffs and Nissan participated in a voluntary mediation session on September 15, 2021. In advance of this mediation, Plaintiffs and Nissan prepared comprehensive mediation briefs, supported by evidentiary materials, and vigorously advanced and thereafter defended their positions at the mediation. After careful and detailed consideration of the parties' positions, Judge Phillips made a mediators' proposal to both sides proposing a settlement of the Litigation in exchange for a cash payment of \$36 million. Plaintiffs and Nissan accepted the mediator's proposal, and on September 21, 2021, Plaintiffs and Nissan executed a Term Sheet memorializing the terms of their agreement. Over several months following the execution of the Term Sheet, Plaintiffs and Nissan expended significant additional time and resources negotiating the Stipulation of Settlement, as well as related documents, and participated in an additional mediation session with Judge Phillips in order to resolve disputes regarding certain terms of the Stipulation of Settlement.

9. The proposed Settlement is the result of hard-fought and contentious litigation pursued by zealous advocates on all sides and takes into consideration the significant risks specific to the case. It was negotiated by experienced counsel for Plaintiffs and Nissan with a solid understanding of both the strengths and weaknesses of their respective positions.

10. Lead Counsel and Plaintiffs believe this Settlement represents an excellent result for the Class. Based upon the evidence obtained in discovery, as well as the independent investigation, research, analysis, and motion practice conducted by Plaintiffs and their counsel, Plaintiffs believed their case had significant merit but also recognized there were significant risks at trial and in recovering any judgment, which had to be carefully evaluated in determining what course (*i.e.*,

whether to settle and on what terms or whether to continue to litigate through trial and an inevitable appellate process) was in the best interest of the Class. As set forth in further detail below, the specific circumstances involved here presented many risks and uncertainties respecting Plaintiffs' ability to survive the various pending and expected pretrial motions and then to prevail if the case proceeded to trial and to collect on any judgment awarded. Even if Plaintiffs were to win at trial, the near-certainty of a years-long appeals process, during which time the Class would be denied any recovery, also had to be taken into account in evaluating the proposed Settlement.

11. Plaintiffs' perseverance through more than three years of litigation and multiple rounds of potentially dispositive motions resulted in the discovery of substantial evidence in support of the alleged claims. Although Plaintiffs had not yet completed discovery, Lead Counsel believed discovery had revealed evidence sufficient to sustain a jury verdict in Plaintiffs' favor, including evidence Plaintiffs believed would demonstrate that: (i) Ghosn was granted the power to unilaterally set his own compensation; (ii) in light of increased transparency requirements in Japan requiring disclosure of director compensation, and a culture that viewed the compensation Ghosn believed he deserved as excessive, Ghosn avoided disclosing some part of the director compensation which he had granted to himself by, among other things, deferring the time of their payment until after his retirement; (iii) as a result, Ghosn's total disclosed amount of compensation was understated in Nissan's financial statements from the fiscal year ended March 2010 to the fiscal year ended March 2018; (iv) other Individual Defendants worked together with Ghosn to develop and implement the plan of agreeing to pay Ghosn additional compensation after retirement without having to disclose it to shareholders; and (v) this failure to disclose Ghosn's true compensation violated the relevant accounting standards and understated Nissan's compensation expenses while overstating its operating income.

12. Despite the strength of the evidence being developed in discovery, there were substantial risks to Plaintiffs' ability to obtain, protect, and ultimately recover on a favorable judgment at trial. The Individual Defendants all vigorously disputed any liability whatsoever. And all Defendants disputed aspects of jurisdiction and planned to continue pursuing their motions for reconsideration and interlocutory appeal respecting jurisdictional issues, and to oppose class certification. At least the Individual Defendants expected to marshal evidence at summary judgment and/or at trial that they hoped would convince the jury that: (i) they were not responsible for any 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 at least Ghosn and Kelly contended were politically motivated. At the time the agreement to settle was reached, there was substantial uncertainty over the outcome of all of these disputes. Additional risks existed regarding Defendants' anticipated motions seeking to exclude evidence necessary to prove Plaintiffs' claims and/or certify the Litigation as a class action, including expert testimony, factual evidence of the findings reached by government investigations, and other categories of evidence.

13. A substantial risk also existed that Plaintiffs' Japanese law claims under the FIEA – which were materially larger than the Exchange Act claims in terms of damages – would be dismissed in their entirety by the Court or by a court on appeal. After the Court denied Defendants' motions to dismiss, rejecting Defendants' argument that the Court could not exercise pendent personal jurisdiction over the FIEA claims, and denied Nissan's motion to reconsider that denial or certify it for interlocutory appeal, the United States Court of Appeals for the Sixth Circuit issued a

decision that Nissan argued required the Court to reverse its prior decision and decline to exercise pendent personal jurisdiction with respect to the FIEA claims. While Lead Counsel believed Plaintiffs had strong arguments that the Sixth Circuit decision should not have changed the outcome of the Court's personal jurisdiction analysis in this case, there was a substantial risk that the Court might agree with Nissan and dismiss the FIEA claims on Nissan's renewed motion for reconsideration, which was pending at the time Plaintiffs and Nissan reached the Settlement, or that an appellate court on review (either interlocutory or from a final judgment) might do so.

14. In addition, there were significant risks regarding the extent of recoverable damages in the event Plaintiffs prevailed on some, but not all, of their alleged claims. If, for example, Plaintiffs succeeded only on their claim under §10(b) of the Exchange Act, on behalf of investors who acquired Nissan ADRs, the potential recoverable damages would have been much smaller than if Plaintiffs also recovered on their claim under Article 21-2(1) of Japan's FIEA on behalf of United States citizens and residents who acquired Nissan common stock. Damages could also have been reduced if the jury found the fraud did not commence until some point after the start of the Class Period such that fewer shares were purchased at inflated prices or the amount of inflation in the shares was less than Plaintiffs' experts estimated, or if the jury found that only a part of the decline in the price of Nissan's common stock and ADRs was related to the statements respecting Ghosn's compensation and Nissan's corporate governance, while the remainder was attributable to unrelated factors.

15. Plaintiffs also anticipated a battle of the experts on these disputed issues at trial. Each side had retained, 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. Even having



retained experienced experts, there could be no guarantee that Plaintiffs would prevail on the issues of their testimony as Defendants had hired (or would have hired) experts to counter Plaintiffs' experts' theories. Indeed, the trial of this case could hinge on the testimony of experts, which presents a substantial risk of a party prevailing not on the merits but because of the jury's impression of one party's expert or experts.

16. There was also significant risk of delay in providing Class Members with compensation for the harm caused by Defendants' alleged fraud. Pre- and post-trial proceedings, including proceedings attendant to the determination of damages, threatened to delay the Class's recovery on any favorable judgment obtained at trial. In addition, as demonstrated by the multiple attempts at interlocutory appeal from the motion to dismiss ruling, Defendants were all but certain to appeal any verdict achieved in Plaintiffs' favor. The appeals process could span years, during which time the Class would receive no recovery. Any appeal would also create the risk of reversal, in which case the Class would receive nothing after having prevailed on the claims at trial.

17. All of these factors, together with the other factors discussed herein, were considered by Plaintiffs and Lead Counsel in concluding that the mediator's proposal to settle the Litigation for \$36 million provided fair, reasonable, and adequate consideration in light of the risks and uncertainties of trial. In reaching the determination to settle, Plaintiffs and their counsel have weighed the documentary evidence, expert analyses, and legal authority that weigh in favor of and against their claims. On balance, considering all the circumstances and risks both sides faced at summary judgment, at trial, and on appeal, in addition to the mediator's recommendation, Plaintiffs concluded that settlement on the agreed terms provided fair, reasonable, and adequate consideration for the claims alleged and was in the best interest of the Class.

18. The Settlement confers a substantial benefit on the Class and eliminates the significant risks inherent at trial and in post-trial proceedings and appeals, the outcome of which was far from certain. It is respectfully submitted that the Settlement should be approved as fair, reasonable, and adequate; that Lead Counsel should be awarded attorneys' fees of one-third of the Settlement Fund and its expenses of \$170,067.83; and that the Plan of Allocation should be approved.

19. Lead Counsel has, as described below, vigorously prosecuted this action on a wholly contingent basis for more than three years and advanced or incurred litigation expenses. Lead Counsel has long borne the risk of an unfavorable result. It has not received any compensation for its substantial efforts, nor has it been paid for its expenses.

20. The fee application for one-third of the Settlement Fund is fair both to the Class and Lead Counsel, has been approved by Plaintiffs, and warrants this Court's approval. This fee request is within the range of fees frequently awarded in these types of actions and is justified in light of the substantial benefits conferred on the Class, the risks undertaken, the quality of representation, and the nature and extent of legal services performed.

21. Lead Counsel should also be awarded its expenses in the aggregate of \$170,067.83, all of which were reasonably and necessarily incurred in prosecuting the Litigation. This amount includes the fees and expenses for: (a) consultants and experts whose services Lead Counsel required in the successful prosecution, analysis, and resolution of this case; (b) factual research, as well as photocopying, imaging and printing documents; (c) translation of relevant documents from Japanese and other languages; (d) legal research respecting both Japanese law and U.S. federal law; (e) court fees; and (f) mediation fees.

22. As described in detail below, these expenses were reasonably and necessarily incurred to plead Plaintiffs' claims with particularity, respond to Defendants' dispositive motions and motions for reconsideration or for interlocutory appeal, prepare to move for certification of the Class, serve and respond to discovery, and to obtain a settlement on the terms proposed.

## II. FACTUAL BACKGROUND OF LITIGATION

23. The following is a summary of the nature of the Class's claims, the principal events that occurred during the course of this Litigation, and the legal services provided by Lead Counsel.<sup>2</sup>

24. This is a securities class action brought on behalf of purchasers of Nissan securities between May 11, 2014 and November 16, 2018, inclusive (the "Class Period"), against Nissan and certain of its current and former executives and directors seeking to pursue remedies under the Securities Exchange Act of 1934 ("1934 Act" or "Exchange Act") and the FIEA. ¶¶159-183.

25. The Complaint alleges that since at least 2010, Nissan's then-Chief Executive Officer ("CEO"), Carlos Ghosn ("Ghosn"), engaged in an unlawful scheme to secretly increase his own pay by approving billions of yen in deferred compensation, which Nissan would be obligated to pay him at later dates. ¶¶28-55. The Complaint also alleges that Greg Kelly ("Kelly"), a former Nissan Representative Director and Executive Vice President, was responsible for masterminding the scheme, while simultaneously failing to disclose his own excess compensation. ¶¶3, 28-55, 118. Hiroto Saikawa ("Saikawa"), who was later forced out as CEO, is also alleged to have signed off on Ghosn's unlawful compensation agreements. ¶41. And all the individual defendants, including Chief Financial Officer ("CFO") Hiroshi Karube ("Karube") and former CFO Joseph G. Peter ("Peter"), are alleged to have made false and misleading statements and omissions that overstated

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<sup>2</sup> The information in this section is based on the allegations in the Complaint, the evidence produced in discovery, and other sources of information believed to be accurate. However, the undersigned counsel does not have personal knowledge of the conduct of Nissan's business. References to "¶\_\_" are to the Complaint, unless otherwise indicated.

Nissan's reported operating income, understated Nissan's compensation expenses, and misled investors about Nissan's compliance with applicable laws and regulations, its commitment to ethical conduct and transparency, and its internal controls. ¶¶56-110.

26. On November 19, 2018, after the markets closed in Tokyo and before the markets opened in the United States, it was reported that Ghosn and Kelly had been arrested and were being questioned by Japanese prosecutors. ¶¶53-55, 112. Shortly thereafter, Nissan issued a release entitled, "Regarding serious misconduct by Nissan Chairman and one representative director." ¶112. The release stated that for many years, Nissan's Tokyo Stock Exchange reports had underreported Ghosn's compensation and that Ghosn and Kelly would be removed from their positions at Nissan.

27. When markets in the United States opened shortly thereafter on November 19, 2018, the price of Nissan's ADRs fell, opening at \$16.30, a decline of over 9% from their close on Friday, November 16, 2018. ¶114. When markets in Tokyo opened on November 20, 2018, the price of Nissan's common stock also declined over 6% from their close on November 19, 2018. *Id.*

### **III. PROCEDURAL HISTORY**

28. The litigation of this case was highly contentious. Defendants mounted vigorous challenges at the pleading stage, including with respect to jurisdiction and the merits, and were aggressively attempting to seek appellate review of the Court's determinations in Plaintiffs' favor. The parties had also begun to have various disputes over the scope and adequacy of discovery when the Settlement was reached. These efforts, described in more detail below, contributed to the over 3,475 hours of attorney and staff time that were needed to develop Plaintiffs' claims in the manner that led the mediator to propose, and Plaintiffs and Nissan to agree, to the Settlement that is now before the Court for approval.

**A. Lead Plaintiff Is Appointed and Partially Defeats Defendants' Motions to Dismiss**

29. On December 10, 2018, plaintiff Jackson County Employees' Retirement System ("Jackson County") initiated this action by filing a Complaint for Violation of the Federal Securities Laws against Defendants in this District. ECF 1. The initial complaint was based on extensive analysis of the Company's public filings in the U.S. and Japan, public statements, media articles, and government reports regarding the Company. The initial complaint asserted claims arising under §§10(b) and 20(a) of the Exchange Act (15 U.S.C. §§78j(b) and 78t(a)) and Rule 10b-5 promulgated thereunder by the SEC (17 C.F.R. §240.10b-5).

30. On February 26, 2019, this Court appointed Jackson County as Lead Plaintiff and approved its selection of Robbins Geller as Lead Counsel. ECF 38.

31. Following appointment as Lead Plaintiff, Jackson County continued its investigation and analysis. On May 6, 2019, Lead Plaintiff filed an Amended Complaint for Violations of the Federal Securities Laws and the Financial Instruments and Exchange Act of Japan (the "Complaint"). The Complaint reflected significant additional analysis of the Company's public filings and public statements, media reports, and governmental investigations. The Complaint also reflected extensive analysis of the facts and applicable law in consultation with an expert in Japanese law, and as a result of that analysis, it included an additional claim against Nissan for violation of Article 21-2 of the FIEA, on behalf of U.S. citizens and residents who had purchased Nissan common stock on the Tokyo Stock Exchange (under the symbol "7201"), and included Providence Employees' Retirement System ("Providence," and together with Jackson County, "Plaintiffs"), which purchased Nissan common stock on the Tokyo Stock Exchange, as an additional plaintiff.

32. All discovery in the matter was stayed pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA").

33. On August 5, 2019, Defendants filed three separate motions to dismiss the Complaint on numerous grounds, including for lack of jurisdiction, *forum non conveniens*, for failure to adequately plead a material misrepresentation or omission by each Defendant (including because some statements were immaterial puffery and because the individual Defendants did not “make” the statements), and for failure to adequately allege scienter as to Defendants Kelly, Saikawa, and Peter. ECF 63-79.

34. On October 4, 2019, Plaintiffs filed a 65-page Omnibus Opposition to Defendants’ Motions to Dismiss, explaining that the arguments Defendants had raised did not support dismissal. ECF 86. The Opposition was supported by a Declaration of counsel, attaching 40 exhibits and totaling nearly 450 pages. ECF 87.

35. On November 18, 2019, Defendants filed replies in further support of their motions to dismiss. ECF 104-109.

36. On January 13, 2020, Defendant Ghosn filed a supplemental declaration of counsel, explaining that his prior argument that he could not participate in defending this litigation because he was under house arrest in Japan was no longer true because he had escaped from house arrest (in a much-publicized escape involving a musical equipment box, a bullet train, and two private planes), but he was now subject to a travel ban imposed by the government of Lebanon. ECF 112 & 113.

37. On February 11, 2020, Plaintiffs filed a response to the January 13, 2020 supplemental declaration, explaining the significance of Defendant Ghosn’s escape and international fugitive status for Defendants’ jurisdictional and *forum non conveniens* arguments. ECF 117 & 118.

38. Also on February 11, 2020, Plaintiffs filed a notice of supplemental authority advising the Court of relevant recent rulings in two similar cases pending in other Districts. ECF 119.

39. On February 18, 2020, Ghosn filed a motion for leave to file a response to Plaintiffs' response to counsel's January 13, 2020 supplemental declaration. ECF 122.

40. On February 28, 2020, Nissan filed replies to Plaintiffs' notice of supplemental authority and to Plaintiffs' response to Ghosn's counsel's January 13, 2020 supplemental declaration. ECF 123-125.

41. On November 15, 2020, Nissan filed a Notice of Relevant Development, reporting that it had been sued in Japan by additional investors in Nissan common stock, for violations of the FIEA based on the same misrepresentations and omissions that are alleged in this Litigation. ECF 129.

42. On November 20, 2020, Plaintiffs filed a Notice of Supplemental Authority in Support of Plaintiffs' Omnibus Opposition to Defendants' Motions to Dismiss and Response to Nissan's Notice of Relevant Development, asserting that Nissan had conceded liability under the FIEA based on certain of the same misrepresentations alleged in this case, and explaining why the new Japanese securities lawsuit did not support dismissal. ECF 131 & 132.

43. On December 14, 2020, Nissan filed a Response to Plaintiffs' Notice of Supplemental Authority and Supplemental Submission in Support of Nissan's Notice of Relevant Development, asserting that any admission of liability did not support civil liability in this action and that the Japanese securities lawsuit supported dismissal of the FIEA claims. ECF 133-135.

44. On December 29, 2020, the Court issued a Memorandum and Order in which it denied in part the motions to dismiss, holding that Plaintiffs had alleged sufficient facts that collectively stated actionable claims under §§10(b) and 20(a) of the Exchange Act and Article 21-2 of the FIEA, the Court dismissed Plaintiffs' claims against Hiroshi Karube for lack of personal jurisdiction. ECF 136 & 137.

**B. Defendants Repeatedly Try to Overturn Denial of the Motion to Dismiss**

45. On January 12, 2021, Nissan filed a motion for partial reconsideration or certification for interlocutory appeal of the Court's order dated December 29, 2020. ECF 147. Nissan argued that the Court should reconsider its decision to exercise pendent personal jurisdiction over the FIEA claims because it contended that the theory of pendent personal jurisdiction was not supported by controlling precedent and its exercise was particularly inappropriate on the facts of this case. Nissan also argued that the Court should certify its decision to exercise pendent personal jurisdiction for interlocutory appeal. ECF 148.

46. On January 19, 2021, Ghosn filed a motion requesting certification of interlocutory appeal. ECF 151. Ghosn argued that the Court should certify for interlocutory appeal its denial of Ghosn's motion to dismiss for lack of personal jurisdiction because it presented "a matter of first impression regarding the scope of personal jurisdiction over a foreign-domiciled person in the quickly evolving context of Internet usage that, if granted, will materially advance the resolution of this litigation." ECF 152.

47. On February 1, 2021, Plaintiffs filed their response to Nissan's motion. ECF 155. Plaintiffs argued that Nissan's motion should be denied because the recognition and application of pendent personal jurisdiction was neither erroneous nor unjust and because Nissan had waived its arguments against the concept of pendent personal jurisdiction by failing to brief them on its motion to dismiss. Plaintiffs also asserted that certification of interlocutory appeal would cause nothing but further delay in securing relief for injured Nissan investors in the United States.

48. On February 4, 2021, Plaintiffs filed their response to Ghosn's motion. ECF 156. Plaintiffs argued that personal jurisdiction over Ghosn was not a controlling legal question because it would not materially affect the outcome of the action, there was no substantial ground for a



difference of opinion as to the correct legal test for personal jurisdiction, certification as to personal jurisdiction over Ghosn would do nothing to advance the ultimate termination of this action, and this case did not present the exceptional circumstances necessary to justify immediate appeal.

49. On March 5, 2021, Peter moved for judgment on the pleadings. ECF 179. Peter argued the claims against him should be dismissed based on a report issued by the SEC that purported to find that Peter was “misled” by other Defendants. ECF 180.

50. On March 19, 2021, Plaintiffs filed an opposition to Defendant Peter’s motion for judgment on the pleadings. ECF 186-187. Plaintiffs argued that the Court had already rejected Peter’s contention that he was purportedly deceived by Ghosn and Kelly, the SEC’s factual findings were not incorporated by reference to the Complaint, and Peter misstated the governing law on control person liability. ECF 186.

51. On March 26, 2021, Peter filed a reply in further support of his motion for judgment on the pleadings. ECF 188.

52. On June 11, 2021, the Court issued two memorandum opinions and orders. In the first memorandum opinion, the Court denied Nissan’s motion for partial reconsideration or certification for interlocutory appeal and Ghosn’s motion for certification of interlocutory appeal. ECF 203 & 204. In the second memorandum opinion, the Court denied Peter’s motion for judgment on the pleadings. ECF 205 & 206.

53. On June 25, 2021, Peter filed a motion for reconsideration or certification of interlocutory appeal of the Court’s order denying his motion for judgment on the pleadings. ECF 209. Peter argued that the Court should reconsider its decision because the SEC documents are relevant to the scienter analysis and were not being offered for the truth of the matter asserted, or alternatively the Court should certify its decision for interlocutory appeal as to that decision, and the

Court should also reconsider or certify for appeal the question of whether “culpable” participation is required to state a claim for controlling person liability. ECF 210.

54. On July 12, 2021, Plaintiffs filed an opposition to Peter’s motion for reconsideration or certification of interlocutory appeal. ECF 213. Plaintiffs argued that: (i) the Court had applied the correct standards for judicial notice and control person liability, (ii) the denial of judgment on the pleadings did not result in any injustice to Peter, (iii) that immediate appeal as to judicial notice or control person liability would cause nothing but needless delay because neither issue would materially affect the outcome of the action, and (iv) that there was no substantial ground for difference of opinion, and this case did not present exceptional circumstances.

55. On August 30, 2021, Nissan filed a renewed motion for partial reconsideration or certification of interlocutory appeal. ECF 220-221. Nissan argued that, after the Court’s denial of the motion to dismiss and denial of the initial motion for partial reconsideration, new controlling authority had been issued that required the Court to reconsider its initial order and to dismiss the claims under FIEA for lack of personal jurisdiction. In particular, Nissan argued that in light of *Canaday v. Anthem Cos.*, 9 F.4th 392 (6th Cir. 2021), issued on August 17, 2021, the Court was no longer permitted to use the fact that “Jackson County’s Exchange Act claims and Providence’s FIEA claim derive from a common nucleus of operative facts” and that the Court has jurisdiction over Jackson County’s Exchange Act claims, to assert “pendent jurisdiction over Nissan with respect to Providence’s claims under FIEA.” (See ECF 136 at 12). Nissan argued that, because “[t]he FIEA claims and the Exchange Act claims are brought by two different sets of plaintiffs,” the Court had exercised “pendent *party* person jurisdiction” and that that form of pendent personal jurisdiction had been expressly “rejected in *Canady*.” ECF 221 at 5.

56. On September 15, 2021, Plaintiffs filed a response in opposition to Nissan's renewed motion for partial reconsideration or certification of interlocutory appeal. ECF 225. Plaintiffs argued that *Canaday* does not constitute an intervening change in controlling law because it does not apply to federal class actions brought under statutes providing for nationwide service of process and that Nissan had waived its argument that the exercise pendent party personal jurisdiction was impermissible. Plaintiffs also argued that Nissan's request to certify an interlocutory appeal should be denied because the fact-intensive application of pendent personal jurisdiction was not amendable to appellate review, there are no substantial grounds for a difference of opinion on the Court's application of pendent personal jurisdiction, and an appeal solely on the question of pendent personal jurisdiction would not materially advance the termination of this action.

57. At the time Plaintiffs and Nissan agreed to the Settlement, Nissan and Peter's renewed motions for partial reconsideration or certification of interlocutory appeal remained pending and undecided. In total, at the time Plaintiffs and Nissan agreed on the Settlement, the parties had submitted over two dozen motions, responses, or memoranda respecting Defendants' arguments for dismissal.

### **C. Defendants' Answers to the Complaint**

58. Defendants answered the Complaint on February 11, 2021, except for Defendant Saikawa who sought and obtained an extension and then answered the Complaint on February 19, 2021. ECF 166-169, 177. Ghosn's answer denied the substantive allegations against him, and asserted nineteen separate affirmative defenses. ECF 166. Nissan's answer admitted "that Ghosn caused the Company to file annual securities reports which failed to disclose Ghosn's compensation arrangements in full, and that Nissan has filed corrections to these annual securities reports," but otherwise denied liability and asserted twenty-two separate affirmative defenses. ECF 167. Kelly's answer denied the substantive allegations against him and asserted thirty-three separate affirmative

defenses. ECF 168. Peter's answer denied the substantive allegations against him and asserted eleven separate affirmative defenses. ECF 169. Saikawa's answer denied the substantive allegations against him and asserted twenty-seven separate affirmative defenses. ECF 177. In total, Defendants raised 112 affirmative defenses to Plaintiffs' claims.

#### **D. Fact Discovery**

59. Plaintiffs initiated fact discovery promptly after the Court denied the motions to dismiss and Defendants answered the Complaint, and pursued discovery for nearly six months before Plaintiffs and Nissan reached the Settlement.

60. On January 29, 2021, the parties convened a Rule 26(f) conference to discuss the parameters of discovery. Among other things, the parties discussed the number of depositions to be taken, when discovery should commence in light of the recently filed motions for reconsideration or for certification of interlocutory appeal, the schedule for class certification briefing, and the schedule for dispositive motions.

61. On February 4, 2021, the parties convened a follow-up meet and confer teleconference to further discuss the parties' views as to the proposed case management order. In addition to the issues described above, the parties discussed whether complexities arising from transnational document discovery from Japan precluded a case management order setting a deadline for substantial completion of production of documents.

62. On February 12, 2021, the parties convened another follow-up meet and confer teleconference to further discuss the parties' views as to the proposed case management order, including each of the issues described above.

63. On February 19, 2021, the parties participated in a telephonic initial case management conference with Magistrate Judge Newbern. Issues requiring resolution included the schedule for class certification briefing, the appropriateness of setting a deadline for substantial completion of

production of documents, the number of depositions, and the schedule for filing and briefing of motions for summary judgment. Magistrate Judge Newbern determined that these issues would be addressed at the April 26, 2021 subsequent case management conference.

64. On March 16, 2021, Plaintiffs issued a document subpoena to the United States Securities and Exchange Commission, seeking documents related to the SEC's investigation of Defendants.

65. On March 22, 2021, the parties exchanged initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1).

66. On March 31, 2021, Plaintiffs served requests for production of documents directed to Nissan, Ghosn, Kelly, Saikawa, and Peter. The requests generally sought documents obtained or produced in regulatory and internal investigations of Ghosn's executive compensation and related public disclosures, as well as other documents relevant to the claims, defenses, and affirmative defenses.

67. Also on March 31, 2021, Nissan, Ghosn, Kelly, and Saikawa served requests for production of documents directed to Plaintiffs, and Nissan and Saikawa also served interrogatories directed to Plaintiffs. Nissan, Ghosn, Kelly, and Saikawa also each served requests for production of documents directed to their co-Defendants. Collectively, Defendants directed to Plaintiffs six sets of requests for production of documents, totaling 166 requests for production, and four sets of interrogatories, totaling 64 interrogatories, encompassing many different issues relating to Nissan, the claims and defenses in this action, Plaintiffs' organization and practices, and Plaintiffs' litigation histories, among other things.

68. On April 20, 2021, the parties participated in a meet and confer teleconference regarding the proposed case management order and the parties' views as to the plan for discovery.

Open issues discussed on the teleconference included the schedule for a motion for class certification and related briefing, the schedule for production of documents, the number of depositions, and the schedule for filing and briefing motions for summary judgment.

69. On April 26, 2021, the parties participated in a subsequent case management conference with Magistrate Judge Newbern. Open issues for resolution included the schedule for a motion for class certification and related briefing, the schedule for production of documents, the number of depositions, and the schedule for filing and briefing motions for summary judgment. Later that day, the Court entered a Case Management Order reflecting the parties' discussions and the Court's rulings, providing for documents previously produced to U.S. governmental or regulatory entities to be produced by May 31, 2021, documents previously produced to the Financial Services Agency and to the Securities and Exchange Surveillance Commission in Japan to be produced by June 30, 2021, and documents previously produced to the Tokyo Stock Exchange and Japan's National Tax Agency to be produced by July 31, 2021, class certification motions to be filed by December 2, 2021, parties to meet and confer and, if needed, seek leave of Court for additional depositions beyond the presumptive limits of the Federal Rules of Civil Procedure, fact discovery to be completed by December 9, 2022, dispositive motions to be filed by August 11, 2023, and a target date of February 20, 2024 for commencement of a jury trial that Plaintiffs estimated to last approximately 14 days. ECF 195. On May 3, 2021, the Court set trial for March 26, 2024. ECF 196.

70. On April 30, 2021, Nissan, Ghosn, Kelly, and Peter served responses and objections to Plaintiffs' requests for production of documents, and on May 3, 2021, Saikawa served responses and objections to Plaintiffs' requests for production of documents. Also on April 30, 2021, Plaintiffs

served responses and objections to the 166 requests for production of documents and 64 interrogatories that had been directed to them.

71. On May 20, 2021, the parties engaged in a meet and confer teleconference to discuss open issues respecting the parties' positions as to discovery, including with respect to the proposed protocol for the production of electronically stored information, with respect to whether the protective order should permit parties to designate materials as "Attorneys' Eyes Only," and with respect to the timing of production of documents.

72. On May 24, 2021, the parties attended a case management conference with Magistrate Judge Newbern. The parties identified two issues for resolution at that conference, respecting competing proposals for the protective order governing discovery in the case and competing proposals for the production of documents that defendant Nissan had previously produced to the Tokyo Public Prosecutors Office. Magistrate Judge Newbern accepted Nissan's request that the protective order allow producing parties to designate some documents as "Attorneys' Eyes Only," and directed Nissan to promptly produce the documents it had previously produced to the Tokyo Public Prosecutors Office. Magistrate Judge Newbern also directed counsel to submit by June 23, 2021, a joint statement of their progress regarding the production of discovery previously disclosed to the Tokyo Public Prosecutors Office, including determining the volume of hard-copy documents and ESI to be produced and Nissan's efforts to identify document production made by individuals directly to the TPPO, and their progress in agreeing on ESI search terms, custodians, production format, and production deadlines, and set another case management conference for June 24, 2021. ECF 198.

73. On May 27, 2021, the parties reached agreement on a [Proposed] Electronic Discovery Agreement, which was filed with the Court on May 28, 2021. ECF 202.

74. In June 2021, Plaintiffs produced documents to Defendants in response to the requests for production of documents that had been directed to them, totaling more than 4,000 pages of documents.

75. On June 23, 2021, the parties filed a joint statement of issues for the June 24, 2021 case management conference, reporting the progress that had been made regarding the production of discovery previously disclosed to the Tokyo Public Prosecutors Office, including efforts to determine the volume of hard-copy documents and ESI, to identify document productions made by individuals directly to the TPPO, and to reach agreement on ESI search terms, custodians, production format, and production deadlines. ECF 207. Although the parties expressed differing views with respect to efforts to identify and produce documents previously disclosed to the Tokyo Public Prosecutors Office, the parties agreed that negotiations regarding the parameters of ESI production (including custodians, date ranges, and search terms) should continue and did not then require Court intervention.

76. On June 24, 2021, the parties attended a case management conference with Magistrate Judge Newbern. Following discussion, the Court determined that no issue was yet ripe for decision, and set a subsequent teleconference for August 24, 2021, with the parties to file by August 20, 2021 a joint statement of any issues to be discussed.

77. Over the course of July and August 2021, counsel for Plaintiffs engaged in numerous meet and confer communications regarding document discovery, both separately with each of the Defendants and collectively with all Defendants. This included numerous exchanges of written correspondence and at least nine separate meet and confer teleconferences. Topics discussed included the scope of each Defendant's responses to the discovery requests that were served upon each of them and resolution of Defendant's objections to the discovery requests, where possible, and



also included the parameters to be used for the collection, review, and production of electronically stored information by each of them.

78. On August 20, 2021, the parties filed a joint statement of issues for the August 24, 2021 case management conference. ECF 218. The parties identified a dispute that had arisen with respect to the production of Nissan custodians' electronically stored information. The parties had agreed upon 15 Nissan custodians, but Plaintiffs, Ghosn, and Kelly contended that documents from 12 additional Nissan custodians were relevant and proportional to the needs of the case, and should be produced. Plaintiffs also contended that Nissan had been impeding the parties' negotiation of search terms by declining to provide hit reports or similar breakdown of hits associated with search term proposals that had been proposed by Plaintiffs or by Ghosn and Kelly.

79. On August 24, 2021, the parties attended another case management conference with Magistrate Judge Newbern. Following argument at the August 24, 2021 conference, Magistrate Judge Newbern gave guidance as to discovery parameters and instructed the parties to confer further. In particular, Magistrate Judge Newbern directed Plaintiffs' counsel and Ghosn and Kelly's counsel to identify a subset of key additional ESI custodians, taking into account which custodians are most likely to yield useful data in initial searches and which are most likely to raise extensive attorney-client and work-product privilege issues, and directed Nissan to produce hit reports using the most-recently-agreed-upon search terms for these custodians and the 15 custodians already identified and provide those reports to counsel for all parties, and then directed counsel to meet and confer to refine search terms and custodians for the substantial completion of ESI production. Magistrate Judge Newbern set a follow-up discovery conference for September 29, 2021, with counsel to file by September 27, 2021 a joint statement of progress and issues to be discussed at the conference.

80. Plaintiffs' counsel then coordinated with counsel for Ghosn and Kelly to provide to Nissan a list of six additional custodians whose electronically stored information should be collected, reviewed, and produced, and to reiterate the request that Nissan provide hit reports for those six custodians and the 15 existing custodians using the search terms that counsel for Plaintiffs, Ghosn, and Kelly had previously proposed.

81. On September 10, 2021, a joint discovery dispute statement was filed respecting a dispute between Kelly and Nissan, respecting a subpoena that Kelly had issued to Nissan's counsel, Latham & Watkins LLP. ECF 223.

82. Although the time for substantial completion of document production had not yet arrived by the time that Plaintiffs and Nissan agreed to the Settlement, Plaintiffs had, following months of negotiations, received nearly 40,000 pages of documents from Defendants, including the documents produced by Nissan to governmental or regulatory entities in the U.S. and Japan (including the SEC, the Tokyo Public Prosecutor's Office, and others). Lead Counsel expended significant time reviewing, organizing, and analyzing those documents, which had been created in multiple languages, in preparation for depositions, expert reports, summary judgment, and trial, and to assess the strengths and weaknesses of the Class's claims.

#### **E. Experts and Consultants Assisting the Litigation**

83. Lead Counsel used the services of expert witnesses and other consultants to assist Plaintiffs in the prosecution of the Litigation. These consultants assisted Lead Counsel with issues related to Japanese law, Japanese business culture, the manner in which Nissan operated its business, the information available to Company insiders, and to confirm information obtained from other sources. This information also assisted in drafting the Complaint. Analyses by expert witnesses assisted Lead Counsel in pursuing discovery and beginning to refine Plaintiffs' claims for trial. The work performed by these experts and consultants provided valuable insight to Plaintiffs and Lead

Counsel in preparing their case for trial and in evaluating the mediator's proposal and other prospects for settlement during the course of the Litigation.

84. Plaintiffs retained the services of Japan-America Consulting, LLC and its founder, Andrew Pardieck, to consult regarding various issues in the case. Amongst other services, Mr. Pardieck (i) researched and drafted a declaration concerning Japanese law which was submitted in connection with Plaintiffs' opposition to Defendants' motions to dismiss (ECF 87-8); (ii) consulted with Plaintiffs regarding Japanese law and the Japanese legal system; (iii) conducted research regarding ongoing criminal and civil litigation in Japan related to this action; and (iv) consulted with Plaintiffs regarding search methodologies, including Japanese language search terms, to be used in the course of the discovery process.

85. Plaintiffs also retained the services of economic consulting firm Cain Advisory Services, LLC and its founder, Matthew D. Cain, Ph.D., concerning market efficiency and damages in connection with Plaintiffs' anticipated motion for class certification. At the time Plaintiffs and Nissan reached an agreement to resolve the case, Mr. Cain had begun the process of drafting expert reports which would have been used by Plaintiffs in their anticipated motion for class certification.

86. In addition, Plaintiffs consulted with ValueEdge Advisors, LLC respecting potential corporate governance issues at Nissan in connection with mediation and economic consulting firm Tasta Group (dba Caliber Advisors, Inc.) respecting damages associated with Plaintiffs' claims under the Exchange Act and Japanese law.

#### **IV. STRENGTHS AND WEAKNESSES OF CASE**

87. At the time of the settlement, Lead Counsel had a thorough understanding of the issues and risks present in this case. While there was substantial evidence to support a jury verdict in favor of the Class, there were considerable risks and uncertainties if the case had proceeded to trial

and judgment. Plaintiffs, in consultation with Lead Counsel, carefully considered these risks throughout the Litigation and in deciding to settle this matter.

88. At the time the Settlement was reached, numerous issues critical to Plaintiffs' ability to survive the pending motions for reconsideration or interlocutory appeal, survive any motions for summary judgment, and obtain a verdict in the Class's favor at trial and recover any judgment remained outstanding.

89. The most significant risks to recovery for the Class include the following:

(a) the risk that the Court or an appellate court on review would determine that the Court lacked jurisdiction over some or all of the claims at issue. Indeed, as discussed above, at the time the Settlement was reached, Nissan's renewed motion for partial reconsideration or certification of interlocutory appeal based on the recent, purportedly controlling, decision in *Canaday* was pending. If that motion were granted or if the denial of Nissan's motion to dismiss the FIEA claim for lack of personal jurisdiction were reversed on appeal, it would have a substantial impact on the value of the Class's claims and the size of the Class, given that the estimated amount of damages for the FIEA claim was materially larger than for the Exchange Act claim;

(b) the risk that the Court would not certify the Litigation as a class action, or would certify only part of the Litigation as a class action, or that an appellate court on review would overturn an order certifying the Litigation as a class action. Indeed, a decision in another securities action brought under the Exchange Act and the FIEA involving another Japanese company for which ADRs were traded over the counter in the United States exemplifies this risk. In *Stoyas v. Toshiba Corp.*, 2022 WL 220920 (C.D. Cal. Jan. 25, 2022), the United States District Court for the Central District of California denied class certification with respect to Exchange Act claims on the grounds that the plaintiffs had not purchased ADRs "in a domestic transaction" and therefore could not

satisfy the typicality requirement. The court also denied class certification, without prejudice, on the FIEA claims based on several open issues regarding whether the plaintiffs needed to be “direct owners” of shares to have standing to sue under the FIEA and regarding the potential measures of damages to be asserted;

(c) a risk that some or all of the Defendants would be found at summary judgment or trial not to have materially misled investors or engaged in a fraudulent scheme;

(d) the risks inherent in establishing some or all of the Defendants’ scienter, including the risks to proving that Defendants were reckless or had actual knowledge as to Ghosn’s undisclosed deferred compensation or the inaccuracy of Nissan’s statements respecting its corporate governance. Indeed, while Plaintiffs’ complaint had cited the characterization of Kelly, in Nissan’s report on its internal investigation, as the “mastermind” of Defendants’ scheme, and described his anticipated criminal trial, subsequent events again exemplify this risk. In March 2022, the Tokyo District Court found Kelly not guilty of wrongdoing on most charges against him, finding him guilty of helping Ghosn violate Japanese disclosure laws only in connection with Nissan’s financial report for the fiscal year ending March 2018, which represents just a fraction of Plaintiffs’ proposed class period here;

(e) the risk that damages would not be awarded or would be limited based on Defendants’ arguments that other causes resulted in the decline in the prices of Nissan’s securities or that the decline in the prices of Nissan’s securities was not a reasonably foreseeable consequence of the disclosure of Ghosn’s previously undisclosed compensation;

(f) the risks that expert testimony or important factual evidence would be limited or excluded; and

(g) the risk that the Class would not be able to recover any damages awarded.

90. In summary, while Plaintiffs had developed strong evidence supported by expert opinion, and expected to continue developing such evidence through discovery and at trial, they faced both factual and legal challenges in presenting this matter to a jury and potentially on appeal. These risks were carefully considered by Lead Counsel and Plaintiffs before the mediator's proposal was accepted.

## **V. NATURE AND ADEQUACY OF SETTLEMENT**

91. The proposed Settlement was the result of arm's-length negotiations between zealous advocates on both sides and could not have been reached without the substantial participation and assistance of a strong mediator with extensive experience in negotiating the resolution of actions of this type. In the estimation of Lead Counsel, the compromise embodied in the Stipulation represents a successful resolution of a complex and risky class action. We believe our reputation as attorneys who will zealously prosecute a meritorious case through the trial and appellate levels, as well as our aggressive litigation of this case, put us in a strong position in settlement negotiations.

92. Set forth below is a description of the discussions leading up to the mediator's proposal and a description of the significant terms of the Settlement.

### **A. History of Settlement Negotiations**

93. Plaintiffs and Nissan engaged in extensive settlement negotiations, including those set forth below.

94. Plaintiffs and Nissan attended a formal mediation with Judge Phillips that occurred on September 15, 2021. Before the mediation with Judge Phillips, the parties exchanged detailed mediation statements, accompanied by substantial evidentiary support, explaining their positions to the mediator and each other.

95. Plaintiffs and Nissan also had numerous less-formal settlement communications, including communications between counsel (both in person and by phone and e-mail), as well as communications with and through the mediator.

96. The settlement discussions were led by Darren J. Robbins and the undersigned counsel, both of whom have substantial experience litigating and resolving complex securities class actions such as this one. Members of Plaintiffs' trial team, including other Robbins Geller attorneys and in-house and outside experts in accounting and damages, participated in or were consulted about settlement discussions, bringing substantial additional experience and insight to understanding the risks of litigation and the adequacy of defense proposals to resolve the case. The lead negotiators on the defense side had similar substantial experience in complex litigation and included Peter Wald of Latham & Watkins LLP.

97. Through Plaintiffs and Nissan's settlement communications, including the mediation, as well as during the prosecution and defense of this case, each party obtained a solid understanding of its opponent's case and, as a result, gained a better appreciation of the strengths and weaknesses of its own case.

98. Following the mediation, Judge Phillips issued a "mediator's proposal" to settle the case for a cash payment of \$36 million in exchange for a mutual release of claims and other terms. A mediator's proposal is an amount between the two parties' respective positions that the mediator views as a fair and reasonable settlement amount. Both parties accepted the proposal.

99. The Court was immediately notified of the proposed Settlement, whereupon it struck the trial date and stayed proceedings. ECF 227.

100. Over the ensuing months, Plaintiffs and Nissan, with further assistance from the mediator as to certain disputed terms, drafted, negotiated, and signed the formal settlement

agreement detailing the terms of the proposed Settlement. The Stipulation of Settlement was submitted to the Court with the Motion for Preliminary Approval of Settlement, filed on April 22, 2022. ECF 239-241.

**B. The Settlement Is in the Best Interests of the Class and Warrants Approval**

101. On May 26, 2022, the Court granted preliminary approval of the Settlement, as well as of the form and manner of notice of the Settlement to the Class. ECF 243. Plaintiffs believe they could have prevailed on the merits of the case. Defendants were similarly confident that the claims would fail. There was a very real risk, as discussed in detail above, that the Class would not prevail at trial. Had Plaintiffs' case reached trial, the Class faced the risk that a jury would find Defendants' statements not to be actionable or would not be convinced that Defendants engaged in a scheme to defraud or acted with the requisite scienter. There were also the risks that the jury would reduce the damages awarded or Plaintiffs would not be able to recover any judgment. Furthermore, even if Plaintiffs prevailed at trial and Defendants had the monies to fund a judgment, there was a significant risk that any recovery would be delayed by post-trial proceedings and appeals.

102. Having considered the foregoing, and evaluating Defendants' likely defenses at trial, it is my informed judgment, after consultation with my fellow Lead Counsel and Plaintiffs, based upon the litigation of this action to date and the extensive experience of Lead Counsel in litigating shareholder class actions, that the proposed Settlement of this matter, including all the terms set forth in the Stipulation, provides fair, reasonable, and adequate consideration and is in the best interest of the Class.



## VI. PLAN OF ALLOCATION<sup>3</sup>

103. The Plan of Allocation is intended to fairly apportion the net proceeds of the Settlement based on the portion of the decline attributable to the alleged fraud as of the date of a Class Member's purchases or acquisitions and sales of Nissan securities.

104. The Plan of Allocation estimates the amount of alleged artificial inflation in the prices of Nissan securities that was allegedly proximately caused by Defendants' alleged materially false and misleading statements and omissions. In calculating the estimated artificial inflation allegedly caused by those misrepresentations and omissions, Plaintiffs' counsel considered price changes in Nissan securities in reaction to the public disclosure that allegedly corrected the respective alleged misrepresentations and omissions, and adjusted the price change for factors that were attributable to market or industry forces, and for non-fraud related Nissan-specific information, if any. Counsel also considered specific risks associated with personal jurisdiction as it related to claims on behalf of common stock purchasers.

105. Using the determinations of the amount of inflation in the price of the relevant Nissan securities during the Class Period, the Plan of Allocation apportions damages to Class Members based on the lesser of (a) the inflation per share at the time of purchase, and (b) the difference between the purchase price and \$16.90 for ADR claims (the closing price on November 19, 2018) and \$8.44 for common share claims (the closing price on November 20, 2018), with no damages apportioned to securities that were sold before November 17, 2018. Only Class Members who had a net loss, after all profits from the Class Member's transactions in Nissan ADRs or common stock

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<sup>3</sup> The summary of the Plan of Allocation provided herein is intended only to explain the basis on which the plan was developed in order to assist the Court in evaluating the fairness, reasonableness, and adequacy of the proposed Settlement. Nothing set forth herein is intended to, or does, modify or affect the interpretation of the Plan of Allocation, which is set forth in full in the Notice sent to Class Members and will be applied by the Claims Administrator according to its express terms.

during the Class Period are subtracted from all losses incurred on the Class Member's transactions in the same security during the Class Period, will be entitled to recovery.

106. Based on Lead Counsel's experience in this and other securities actions and its understanding of the factual circumstances giving rise to this action and the risks at trial, including the risks to both liability and damages, Lead Counsel believes the Plan of Allocation set forth in the Notice provides a fair, reasonable, and adequate method of compensating Class Members for the economic harm they suffered as a result of the fraud alleged in the Litigation.

#### **VII. LEAD COUNSEL'S APPLICATION FOR ATTORNEYS' FEES AND EXPENSES IS REASONABLE**

107. The successful prosecution of this action required Lead Counsel and its paraprofessionals to perform over 3,475 hours of work and incur \$170,067.83 in expenses, as detailed in the accompanying declarations in support of the application for an award of fees and expenses. Based on the extensive efforts on behalf of the Class, as described above, Lead Counsel is applying for compensation from the Settlement Fund on a percentage basis and has requested a fee in the amount of one-third of the Settlement Fund.

108. The percentage method is the appropriate method of fee recovery because, *inter alia*, it aligns the lawyers' interest in being paid a fair fee with the interest of the Class in achieving the maximum recovery in the shortest amount of time required under the circumstances. As set forth in the accompanying memorandum in support of Lead Counsel's application for an award of attorneys' fees and expenses ("Fee Memorandum"), courts throughout the Sixth Circuit have applied the percentage-of-recovery method in awarding fees. The percentage sought is merited in this case in light of the effort required and the results obtained.

**A. The Requested Fee Is Reasonable**

109. In light of the nature and extent of the Litigation, the diligent prosecution of the action, the complexity of the factual and legal issues presented, and the other factors described above, and as stated in the accompanying Fee Memorandum, Lead Counsel believes the requested fee of one-third of the Settlement Fund is fair and reasonable.

110. A one-third fee award is consistent with percentages awarded by courts in this District and is justified by the specific facts and circumstances in this case and the substantial risks Plaintiffs had to overcome at the pleadings stage and to prepare to overcome at the class certification, discovery, summary judgment, trial, and appeal phases of the Litigation, as set forth herein.

**B. The Requested Fee Is Supported by Plaintiffs**

111. Plaintiffs actively monitored the Litigation and consulted with Lead Counsel regarding settlement negotiations. Plaintiffs spent considerable time and effort fulfilling their duties and responsibilities in this case, including reviewing briefs, answering discovery requests, producing documents, and consulting with Lead Counsel concerning the merits of the Litigation. As a result, Plaintiffs developed a detailed understanding of the strengths and weaknesses of this case, the risks to continued litigation, and the nature and extent of Lead Counsel's efforts on behalf of the Class.

112. As reflected in the accompanying Declaration of Jackson County Employees' Retirement System Trustee James Shotwell and Declaration of Jeffrey Dana on Behalf of the City of Providence Employees' Retirement System, Plaintiffs reviewed and approved the fee request before it was submitted to the Court, believe the requested fee is fair and reasonable in light of the result achieved, and support the award of Lead Counsel's requested fee.

**C. The Requested Fee Is Supported by the Effort Expended and Results Achieved**

113. As set forth herein, the \$36 million cash settlement was achieved as a result of extensive and creative prosecutorial and investigative efforts, contentious and complicated motion practice, years of hard-fought litigation, analysis of voluminous evidence, and preparation of the case for trial, as detailed herein.

114. As discussed in greater detail above, this case was fraught with significant risk factors concerning liability and damages. Plaintiffs' success was by no means assured. Defendants disputed whether the alleged false statements were even actionable, disputed that investors were misled and sought to attribute any harm suffered to non-fraud factors. Were this settlement not achieved, and even if Plaintiffs prevailed at class certification, summary judgment, and trial, Plaintiffs and the Class potentially faced years of costly and risky appellate litigation against Defendants with ultimate success far from certain. It is also possible that a jury could have found no liability or no damages.

115. As a result of this Settlement, Class Members will benefit and receive compensation for their losses and avoid the very substantial risk of no recovery in the absence of a settlement. These risk factors also support Lead Counsel's request for one-third of the Settlement Fund.

**D. The Risk of Contingent Class Action Litigation Supports the Requested Fee Award**

116. As set forth in the accompanying Fee Memorandum, a determination of a fair fee should include consideration of the contingent nature of the fee, the financial burden carried by Lead Counsel, and the difficulties that were overcome in obtaining the Settlement.

117. This action was prosecuted by Lead Counsel on an "at-risk" contingent fee basis. Lead Counsel fully assumed the risk of an unsuccessful result. Lead Counsel has received no compensation for its services during the course of this Litigation and have incurred significant

expenses in litigating for the benefit of the Class. Any fees or expenses awarded to Lead Counsel have always been at risk and are completely contingent on the result achieved. Because the fee to be awarded in this matter is entirely contingent, the only certainties from the outset was that there would be no fee without a successful result and that such a result would be realized only after a lengthy and difficult effort.

118. Lead Counsel's efforts were performed on a wholly contingent basis despite significant risk and in the face of determined opposition with no governmental assistance. Under these circumstances, Lead Counsel is justly entitled to the award of a reasonable percentage fee based on the benefit conferred and the common fund obtained. Under all the circumstances present here, a one-third fee plus expenses is fair and reasonable.

119. There are numerous cases, including many handled by our firm, where class counsel in contingent fee cases such as this, after expenditure of thousands of hours of time and incurring significant out-of-pocket costs, have received no compensation whatsoever. Class counsel who litigate cases in good faith and receive no fees whatsoever are often the most diligent members of the plaintiffs' bar. The fact that Defendants and their counsel know that the leading members of the plaintiffs' bar are able to, and will, go to trial even in high-risk cases like this one gives rise to meaningful settlements in actions such as this. The losses suffered by class counsel in other actions where insubstantial settlement offers were rejected, and where class counsel ultimately receives little or no fee, should not be ignored. Lead Counsel knows from personal experience that, despite the most vigorous and competent of efforts, attorneys' success in contingent litigation is never assured.

120. Lawsuits such as this are expensive to litigate. Those unfamiliar with the efforts required to litigate class actions often focus on the aggregate fees awarded but ignore the fact that those fees fund enormous overhead expenses incurred during the course of many years of litigation,

are taxed by federal and state authorities, are used to fund the expenses of other contingent cases prosecuted by counsel and help pay the monthly salaries of the firms' attorneys and staff.

### **VIII. CONCLUSION**

121. For all of the foregoing reasons, Lead Counsel respectfully requests the Court to approve the Settlement and Plan of Allocation, and approve the fee and expense request and award Lead Counsel one-third of the Settlement Fund plus \$170,067.83 in expenses, as well as the interest earned on both amounts at the same rate and for the same period as that earned on the Settlement Fund until paid.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of August, 2022, at Nashville, Tennessee.

s/Christopher M. Wood  
\_\_\_\_\_  
CHRISTOPHER M. WOOD

## 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

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

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