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 PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR (i) PRELIMINARY APPROVAL OF SETTLEMENT, (ii) CLASS CERTIFICATION, AND (iii) APPROVAL OF NOTICE TO THE CLASS

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Plaintiffs Jackson County Employees' Retirement System and Providence Employees Retirement System ("Plaintiffs") respectfully submit this memorandum in support of their motion for preliminary approval of the settlement reached in this Litigation (the "Settlement"). This proposed Settlement provides a recovery of $36,000,000 in cash to resolve this securities class action against all Defendants.[1] The Settlement is memorialized in the Stipulation of Settlement dated April 22, 2022 (the "Stipulation"), filed concurrently herewith. Counsel for Plaintiffs has met and conferred with counsel for the Settling Defendant Parties, and the Settling Defendant Parties do not oppose the relief requested herein.

By this motion, Plaintiffs seek entry of an order: (1) granting preliminary approval of the proposed Settlement; (2) approving the form and manner of giving notice of the proposed Settlement to the Class; (3) preliminarily granting class certification for settlement purposes; and (4) setting a hearing date for final approval of the Settlement, approval of the Plan of Allocation of the Net Settlement Fund, Lead Counsel's application for attorneys' fees and expenses, and Plaintiffs' application for an award reflecting their time and expenses (the "Final Approval Hearing"), and a schedule for various deadlines relevant thereto ("Notice Order"). As shown below, the Settlement is a very good result for the Class under the circumstances, is fair, reasonable, and adequate under the governing standards in this Circuit, and warrants preliminary and ultimately final approval of this Court.

I. INTRODUCTION

As set forth in the Stipulation, the Settlement provides for the payment of $36 million in cash to resolve this securities class action against all Defendants. This is a significant recovery for the

[1] Unless otherwise defined herein, all capitalized terms used herein shall have the meanings provided in the Stipulation. Emphasis is added and citations are omitted throughout unless otherwise noted.

Class, and was reached by experienced counsel after arm's-length mediation overseen by a highly experienced mediator, the Hon. Layn R. Phillips (Ret.). The proposed Settlement easily satisfies Rule 23(e)(2), and the Sixth Circuit's standards for settlement approval. The Settlement is fair, reasonable and adequate as it provides for the all-cash recovery without the risks of further litigation.

Plaintiffs and Lead Counsel approve of the Settlement. Each Plaintiff is a sophisticated institutional investor with millions of dollars of assets under management and experience overseeing securities fraud litigation. Lead Counsel Robbins Geller Rudman & Dowd LLP ("Robbins Geller") has substantial securities litigation experience and has litigated hundreds of cases to resolution; its attorneys are recognized as leading experts in the field. Plaintiffs retained Robbins Geller specifically because of its experience and acumen in large complex securities matters like this one, as well as its experience with this Court. In accepting the mediator's proposal, Plaintiffs and Lead Counsel understood that there were serious risks in continued litigation. Although Plaintiffs believe very strongly in the merits of this case, Defendants believe very strongly in their defenses. At trial, Plaintiffs would have had the burden of proving each of the elements of their claims; Defendants have to defeat just one to prevail. Discovery and trial would have been very expensive, especially given the foreign nature of the litigation, an inevitably lengthy claims process and appeal would have taken years, and either side could have prevailed.

At this stage, the Court need only determine that it will "likely" be able to approve the proposal under Rule 23(a)(2) (*see* Fed. R. Civ. P. 23(e)(1)) such that the Class should be notified of the proposed Settlement. In light of the substantial recovery obtained and the risks and expenses posed by a trial of this case, Plaintiffs respectfully request that the Court enter the Notice Order, which will, among other things:

- certify the Class for settlement purposes only;

- approve the form and content of the Notice and Summary Notice attached as Exhibits 1 and 3 to the Notice Order;

- find that the procedures for distribution of the Notice and publication of the Summary Notice in the manner and form set forth in the Notice Order constitute the best notice practicable under the circumstances and comply with the notice requirements of due process, Rule 23 of the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act of 1995; and

- set a schedule and procedures for: disseminating the Notice and publication of the Summary Notice; requesting exclusion from the Class; objecting to the Settlement, the Plan of Allocation or Lead Counsel's application for an award of attorneys' fees and litigation expenses, including awards to the Plaintiffs pursuant to 15 U.S.C. §78u-4(a)(4); submitting papers in support of final approval of the Settlement; and the Final Approval Hearing.

II. THE TERMS OF THE SETTLEMENT

The Settlement set forth in the Stipulation resolves, fully, finally and with prejudice, the claims against Defendants of a class of all Persons who, between May 11, 2014 and November 16, 2018, inclusive, purchased or otherwise acquired Nissan American Depository 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.

Pursuant to the proposed Settlement, Nissan will deposit $36 million (the "Settlement Amount") into an interest bearing escrow account (the "Escrow Account") no later than 17 calendar days from entry of the Notice Order. Interest on the Settlement Amount will accrue for the benefit of the Class and is referred to herein as the Settlement Fund. Notice to the Class and the cost of settlement administration ("Notice and Administration Costs") will be funded by the Settlement Fund. Stipulation, ¶2.9. Plaintiffs propose that a nationally recognized class action settlement administrator, Gilardi & Co. LLC ("Gilardi"), be retained here. The proposed notice plan and plan for claims processing is discussed below in §IV.

Because the Settlement Fund is a "qualified settlement fund" within the meaning of Treas. Reg. §1.468B-1, the income earned on the Settlement Fund is taxable. All Taxes and Tax Expenses shall be paid out of the Settlement Fund.

Plaintiffs intend to request an amount not to exceed $25,000 in the aggregate pursuant to 15 U.S.C. §78u-4(a)(4) in connection with their representation of the Class. Any such amounts the Court awards shall be paid from the Settlement Fund.

Lead Counsel will submit an application with its opening papers in support of final approval of the Settlement for: (a) an award of attorneys' fees in the amount of up to one-third of the Settlement Amount; (b) payment of expenses or charges resulting from the prosecution of the Litigation of as much as $250,000; and (c) any interest on such amounts at the same rate and for the same period as earned by the Settlement Fund. Such fees and expenses shall be paid from the Settlement Fund once the Court executes the Judgment and upon entry of the order awarding such fees and expenses.

Once Notice and Administration Costs, Taxes, Tax Expenses and Court-approved attorneys' fees and expenses and any awards to Plaintiffs pursuant to 15 U.S.C. §78u-4(a)(4) have been paid from the Settlement Fund, the remaining amount (the "Net Settlement Fund") shall be distributed pursuant to the Court-approved Plan of Allocation to Authorized Claimants who are entitled to a distribution of at least $10. The Plan of Allocation treats Class Members equitably, and accounts for the strengths of their particular claims.

The Settling Parties have entered into a Supplemental Agreement providing that, if prior to the Final Approval Hearing, the value of valid claims pursuant to the Plan of Allocation by Persons who would otherwise be Members of the Class, but who request exclusion from the Class exceeds a certain amount, Nissan shall have the option to terminate the Settlement. Stipulation, ¶7.3.

In exchange for the benefits provided under the Stipulation, Class Members will release any and all claims against Defendants arising out of, relating to or in connection with both: (i) the purchase or acquisition of (1) Nissan ADRs on the OTC Market, or (2) Nissan common stock by Class Members who are citizens and residents of the United States during the Class Period; and (ii) the allegations, acts, facts, matters, occurrences, disclosures, filings, representations, statements or omissions that were or could have been alleged by Plaintiffs and all other Class Members in the Litigation. Stipulation, ¶1.21.

The Notice of Proposed Settlement of Class Action ("Notice") explains the terms of the Settlement, including that the Net Settlement Fund will be distributed to eligible Class Members who submit valid and timely Proof of Claim and Release forms ("Proof of Claim") pursuant to the proposed Plan of Allocation included in the Notice and subject to this Court's approval; there will be no reversion to Defendants once the Settlement becomes effective. The Notice also informs Class Members of, among other information, Lead Counsel's application for attorneys' fees and expenses and the proposed Plan of Allocation for distributing the Net Settlement Fund. The Notice further details: (i) the procedures for objecting to the Settlement, the Plan of Allocation, or the request for attorneys' fees and expenses; and (ii) the date, time, and location of the Final Approval Hearing.

If the Court grants preliminary approval, the Claims Administrator will mail the Notice and Proof of Claim (attached as Exhibits A-1 and A-2 to the Stipulation) to Class Members who can be identified with reasonable effort. Additionally, the Claims Administrator will cause the Summary Notice (attached as Exhibit A-3 to the Stipulation) to be published once in *The Wall Street Journal* and once over a national newswire service.

III. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL

Pursuant to Rule 23(e)(1), the issue at preliminary approval is whether the Court "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Rule 23(e)(2) provides:

> (2) ***Approval of the Proposal***. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> > (A) the class representatives and class counsel have adequately represented the class;
> >
> > (B) the proposal was negotiated at arm's length;
> >
> > (C) the relief provided for the class is adequate, taking into account:
> >
> > > (i) the costs, risks, and delay of trial and appeal;
> > >
> > > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> > >
> > > (iii) the terms of the proposed award of attorney's 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).

In addition, "[w]hen determining whether the proposed settlement is fair, adequate, and reasonable," courts in the Sixth Circuit take into account the following factors (several of which overlap with Rule 23(e)(2)):

> (1) the plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in settlement;
>
> (2) the complexity, expense and likely duration of the litigation;
>
> (3) the stage of the proceedings and the amount of discovery completed;
>
> (4) the judgment of experienced trial counsel;

(5) the nature of the negotiations;

(6) the objections raised by the class members; and

(7) the public interest.

In re Telectronics Pacing Sys., Inc., 137 F. Supp. 2d 985, 1009 (S.D. Ohio 2001).

The proposed Settlement for $36 million in cash easily satisfies Rule 23(e), as well as the Sixth Circuit's factors, each of which is addressed below (some together, to the extent they overlap).

A. Plaintiffs and Lead Counsel Have Adequately Represented the Class

Plaintiffs and their counsel have adequately represented the Class, satisfying Rule 23(e)(2)(A) (the class representatives and class counsel adequately represented the class), as well as the Sixth Circuit's closely related third factor (the stage of proceedings and the amount of discovery completed), by diligently prosecuting this Litigation on their behalf. This includes, among other things: drafting the operative complaint; opposing Defendants' motions to dismiss; opposing Defendants' several motions for reconsideration or certification or interlocutory appeal and defendant Peter's motion for judgment on the pleadings; conducting fact discovery; and engaging in a mediation process with Judge Phillips. Plaintiffs and Lead Counsel's efforts results in a Settlement of $36 million, which will provide significant relief to the Class.

B. The Settlement Is the Result of a Thorough, Rigorous and Arm's-Length Negotiation Process

After arm's-length negotiations with the assistance of an experienced mediator, Judge Phillips, Plaintiffs and Lead Counsel reached an agreement with Nissan to settle for $36 million in cash. Accordingly, Rule 23(e)(2)(B) (the proposal was negotiated at arm's length) and the Sixth Circuit's overlapping fifth factor (the nature of the negotiations) are clearly satisfied.

Lead Counsel and counsel for Nissan attended a mediation with Judge Phillips on September 15, 2021. Thereafter, Judge Phillips presented these parties with a mediator's proposal, which was

accepted by both parties, and on September 21, 2021, the parties executed a Term Sheet setting forth their agreement.

The negotiations were at arm's length and well informed by, among other things, extensive investigation and litigation by Lead Counsel, including: (i) analysis of publicly available information about Defendants; (ii) contentious and lengthy motion practice seeking dismissal of the claims; and (iii) review and analysis of approximately 40,000 pages of documents produced by Defendants in response to Plaintiffs' discovery requests. Plaintiffs and Lead Counsel were well-informed regarding the strengths and weaknesses of their case. *See Hyland v. HomeServices of Am., Inc.*, 2012 WL 122608, at *2 (W.D. Ky. Jan. 17, 2012) (when determining whether preliminary approval is appropriate, courts should evaluate whether the settlement "'appears to be the product of serious, informed, non-collusive negotiation, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval'"); *see also Miracle v. Bullitt Cnty., Ky.*, 2008 WL 3850477, at *5 (W.D. Ky. Aug. 15, 2008) (evaluating preliminary approval of a settlement based on whether negotiations were at arm's length, whether there was evidence of collusion, and whether there was preferential treatment to segments of the class).

C. The Settlement Also Satisfies Rule 23(e)(2)(C)'s Adequacy Criteria

1. The Settlement Is Adequate in Light of the Costs, Risks and Delay of Trial and Appeal

The proposed Settlement satisfies the Rule 23(e)(2)(C)(i) adequacy standard, taking into account the costs, risks and delay of trial and appeal, which also covers the Sixth Circuit's overlapping second factor (the complexity, expense and likely duration of the litigation). The Settlement also satisfies the Sixth Circuit's first factor (plaintiff's likelihood of ultimate success on the merits balanced against the settlement amount). It provides an immediate and substantial benefit

for the Class – $36 million in cash – which is a substantial proportion of reasonably recoverable damages suffered by Class Members.

Given the complexities of this Litigation, the many issues in contention, the amount in controversy and the substantial risks of continued litigation, including the international nature of the case, Lead Counsel believes the Settlement represents a favorable resolution of this Litigation. Importantly, the Settlement eliminates the risk that Plaintiffs and the Class might recover nothing, or might not recover as much as obtained in the Settlement, if the Litigation were to continue.

While Plaintiffs are confident in the strength of the case, they are aware of the defenses available to Defendants and the inherent risks and delays of litigation. For example, Defendants sought to significantly narrow the Litigation by asserting that the Court lacks jurisdiction over the FIEA claim. Although the Court denied Nissan's motion to dismiss on that ground, in August 2021, the Sixth Circuit Court of Appeals issued an opinion which Nissan contended rejected the concept of "pendent party personal jurisdiction." *See Canaday v. Anthem Cos.*, 9 F.4th 392 (6th Cir. 2021). Nissan's motion for reconsideration was pending when this Settlement was reached.

Likewise, on the merits of the ADR claims, Plaintiffs would have faced significant challenges. As set forth at length in Defendants' motion to dismiss, numerous Defendants challenged whether the alleged misstatements and omissions were material to investors, and whether Plaintiffs had alleged scienter with respect to each Defendant.[2] Lead Counsel was fully informed of the strengths and weaknesses of Plaintiffs' case, including the complicated and nuanced legal issues, as well as pressing discovery in Japan. Given these and other risks faced by the Class, a positive result was far from assured.

[2] The Court granted the motion to dismiss on this ground with respect to defendant Karube.

2. The Method of Distributing Relief Is Effective

The method and effectiveness of the proposed notice and claims administration process also satisfies Rule 23(e)(2)(C)(ii).

The notice plan is discussed below in §V and includes direct-mail notice to all those who can be identified with reasonable effort, supplemented by the publication of the Summary Notice in *The Wall Street Journal* and over a national newswire service. Gilardi will use time-tested methods to ensure Class Members who hold Nissan securities in their own names, as well as those who hold Nissan securities in street name, will receive a copy of the Notice and the Proof of Claim (collectively, "Claim Package"). First, Gilardi will obtain the names of Class Members who hold Nissan securities in their own names from Nissan's transfer agent. In addition, Gilardi will contact the brokers, banks and other institutions known as Nominee Holders. Based on experience locating class members who hold securities in street name, Gilardi has developed a proprietary list of approximately 250 Nominee Holders, to whom it will send a Claim Package and cover letter.[3] Lastly, Gilardi will establish a case-specific website and post important documents regarding the Settlement, including the Stipulation, Claim Package, and all briefs and declarations in support of approval of the Settlement, and provide a toll-free number that Class Members can call to make inquiries about the Settlement. This notice program has regularly been found to satisfy due process. *See NYS Tchrs' Ret. Sys. v. GMC*, 315 F.R.D. 226, 242 (E.D. Mich. 2016) (finding similar notice program "satisfied Rule 23's notice requirement"), *aff'd sub nom. Marro v. NYS Tchrs' Ret. Sys.*, 2017 WL 6398014 (6th Cir. Nov. 27, 2017).

[3] Gilardi will also send a Claim Package and cover letter to the approximately 4,500 financial institutions registered with the SEC as potential Nominee Holders. In addition, Gilardi will send additional copies of the Claim Package to those Nominee Holders who indicate they will directly send the Claim Package to their clients who may be Class Members.

The claims process is also effective and includes a standard claim form that requests the information necessary to calculate a claimant's claim amount pursuant to the Plan of Allocation. The Plan of Allocation will govern how Class Members' claims will be calculated and, ultimately, how money will be distributed to Authorized Claimants. The Plan of Allocation was prepared by Lead Counsel. A thorough claim review process is explained in the Stipulation and the Notice.

3. Attorneys' Fees and Expenses

Rule 23(e)(2)(C)(iii) addresses the attorneys' fee award Lead Counsel intends to seek. As discussed above in §III, Lead Counsel intends to request fees in the amount of up to one-third of the Settlement Amount and expenses in an amount not to exceed $250,000, plus interest on both amounts. This is in line with similar fee requests granted by courts in the Sixth Circuit. *See, e.g.*, *Grae v. Corrections Corp. of Am., et al.*, No. 3:16-cv-02267, slip op. at ¶3 (M.D. Tenn. Nov. 8, 2021) ("The Court finds that the amount of fees awarded [one-third of $56 million recovery] is fair and reasonable under the 'percentage-of-recovery' method . . . and that the awarded fee is in accord with Sixth Circuit precedent.") (attached as Ex. 1 hereto); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 2014 U.S. Dist. LEXIS 91661, at *5 (E.D. Tenn. June 30, 2014) ("The Court finds that the requested counsel fee of one third [of $73 million recovery] is fair and reasonable and fully justified. The Court finds it is within the range of fees ordinarily awarded."); *In re Se. Milk Antitrust Litig.*, 2013 U.S. Dist. LEXIS 70167, at *15-*16 (E.D. Tenn. May 17, 2013) (holding that "attorneys' fees requested represent one-third of the settlement fund. . . . the percentage requested is certainly within the range of fees often awarded in common fund cases, both nationwide and in the Sixth Circuit"); *The Eshe Fund v. Fifth Third Bancorp*, No. 1:08-cv-00421, slip op. at ¶3 (S.D. Ohio Nov. 20, 2013) (awarding one-third of $16 million recovery) (attached as Ex. 2 hereto). In addition, Lead Counsel will request that any award of fees and expenses be paid at the time the Court makes its award. *See In re Genworth Fin. Sec. Litig.*, 2016 U.S. Dist. LEXIS 132269, at *28 (E.D. Va. Sept. 26, 2016)

(ordering that "attorneys' fees and Litigation Expenses awarded above may be paid to Lead Counsel immediately upon entry of this Order").

Further, Plaintiffs intend to request an amount not to exceed $25,000 in the aggregate pursuant to 15 U.S.C. §78u-4(a)(4) in connection with their representation of the Class.

4. Identification of Agreements

Rule 23(e)(2)(C)(iv) requires that the parties identify any agreements between them. Plaintiffs and Nissan have entered into a standard supplemental agreement providing that if Class Members opt out of the Settlement such that the Recognized Loss under the Plan of Allocation of such opt outs equals or exceeds a certain amount, Nissan shall have the option to terminate the Settlement. Stipulation, ¶7.3.

There are otherwise no agreements requiring identification under Rule 23(e)(3).

D. Class Members Are Treated Equitably

As reflected in the Plan of Allocation (Stipulation, Ex. A-1 at 15-18), the Settlement treats Class Members equitably relative to each other, while taking into account the type of security purchased, the timing of their purchase or acquisition of Nissan securities and their subsequent disposition of such securities, if any, and provides that each Authorized Claimant shall receive his, her or its *pro rata* share of the Net Settlement Fund based on their recognized losses as calculated by the Plan of Allocation. The Plan of Allocation also accounts for the specific risks associated with claims brought under the FIEA. Accordingly, Rule 23(e)(2)(D) is satisfied.

E. The Judgment of Experienced Trial Counsel

The Sixth Circuit's fourth factor (judgment of experienced counsel) is also satisfied. Plaintiffs, through their counsel, having carefully considered and evaluated, *inter alia*, the relevant legal authorities and evidence pertaining to the claims asserted against Defendants; the likelihood of prevailing on the claims; the risk, expense, and duration of continued litigation; and any appeals and

subsequent proceedings, have concluded that the Settlement is fair, reasonable and in the best interest of the Class.

Significant weight should be attributed to experienced counsel's evaluation and conclusion that a settlement is in the best interests of the class. *See Williams v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir. 1983) (stating that courts should defer to the judgment of experienced counsel who have evaluated the strength of plaintiff's case); *In re Skelaxin Metaxalone Antitrust Litig.*, 2014 U.S. Dist. LEXIS 60214, at *16 (E.D. Tenn. Apr. 30, 2014) (when a "'settlement is the result of extensive negotiations by experienced counsel, the Court should presume it fair'"); *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.'"). Here, Lead Counsel has significant experience in securities and other complex class action litigation and has negotiated numerous other substantial class action recoveries throughout the country, including in this District and within the Sixth Circuit. *See* www.rgrdlaw.com. Given the experience possessed by Lead Counsel, weight should be given to its determination that, taking into account the strength of the claims alongside the time, expense, complexity of the issues, and uncertainty of trial and any appeals, the Settlement set forth in the Stipulation is a good result that confers substantial, immediate benefits on the Class.

F. The Sixth Circuit's Public Interest Factor Is Satisfied

The public interest factor supports approval of the Settlement. Indeed, as a matter of public policy, settlement is a strongly favored method for resolving disputes, particularly in complex class actions such as this. *See, e.g.*, *UAW v. GMC*, 497 F.3d 615, 632 (6th Cir. 2007) (noting the "federal policy favoring settlement of class actions"); *Franks v. Kroger Co.*, 649 F.2d 1216, 1224 (6th Cir. 1981) ("the law generally favors and encourages the settlement of class actions"), *vacated on other grounds and modified*, 670 F.2d 71 (6th Cir. 1982); *Motter v. O'Brien*, 2014 U.S. Dist. LEXIS

79982, at *2 (S.D. Ohio June 12, 2014) ("The Court further recognizes that 'the law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.'").

The fairness and adequacy of the $36 million recovery are clear. Given the litigation risks involved, it is a great result for the Class. It could not have been achieved without full commitment by Plaintiffs and their counsel. Plaintiffs and Lead Counsel respectfully submit that the Settlement is both fair and adequate such that notice of the Settlement should be sent to the Class. While Plaintiffs and their counsel believe the Settlement merits final approval, the Court need not make that determination at this time. The Court is being asked simply to permit notice of the terms of the Settlement to be sent to the Class and to schedule a hearing, pursuant to Fed. R. Civ. P. 23(e), to consider any expressed views by Class Members of the fairness of the Settlement, the Plan of Allocation, and Lead Counsel's request for an award of fees and expenses, including Plaintiffs' request for an award of its time and expenses incurred in representing the Class. Fed. R. Civ. P. 23(e); *Motter*, 2014 U.S. Dist. LEXIS 79982, at *2.

IV. THE PROPOSED NOTICE PROGRAM IS APPROPRIATE

Rule 23(e) governs notice requirements for settlements or "compromises" in class actions. The Rule provides that a class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. Fed. R. Civ. P. 23(e). In addition, the Rule provides, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B).

The Notice Order will require the Claims Administrator to (i) notify Class Members of the Settlement by mailing a copy of the Notice by First-Class Mail to all Class Members who can be identified with reasonable effort, and (ii) cause a copy of the Summary Notice to be published once

in the national edition of *The Wall Street Journal* and once over a national newswire service. The proposed method of giving notice to Class Members is appropriate because it is calculated to reach Class Members who can be identified with reasonable effort. *Fidel v. Farley*, 534 F.3d 508, 515 (6th Cir. 2008) (notice scheme sufficient because it was "'reasonably calculated to reach interested parties'"); *Williams*, 720 F.2d at 921 (plaintiff class must receive the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort); *Kizer v. Summit Partners, L.P.*, 2012 WL 1598066, at *9 (E.D. Tenn. May 7, 2012) (sufficient notice where mailings were made to last known addresses of class members); Fed. R. Civ. P. 23(e)(1)(B) (courts "must direct notice in a reasonable manner to all class members who would be bound by the propos[ed settlement]").

As required by Fed. R. Civ. P. 23(c)(2) and the PSLRA (15 U.S.C. §78u-4(a)(7)), the Notice describes in plain English the nature of the Litigation; sets forth the definition of the Class; states the Class' claims; and discloses the right of Class Members to exclude themselves from the Class, as well as the deadline and procedure for doing so, and warns of the binding effect of settlement approval proceedings on Class Members who do not exclude themselves. In addition, the Notice describes the Settlement; the Settlement Amount, both in the aggregate and on an average per-share distribution basis; explains the Plan of Allocation; sets out the amount of attorneys' fees and expenses that Lead Counsel intends to seek in connection with final settlement approval, including the amount of the requested fees and expenses determined on an average per-share basis and the amount sought by Plaintiffs for their time and expenses; provides contact information for Lead Counsel, including a toll-free telephone number; and summarizes the reasons the parties are proposing the Settlement. The Notice also discloses the date, time, and place of the formal fairness hearing, and the procedures for appearing at the hearing and objecting to the Settlement. Lead

Counsel believes that the Notice will fairly apprise Class Members of their rights with respect to the Settlement, that it is the best notice practicable under the circumstances, and that it should be approved.

V. THE COURT SHOULD PRELIMINARILY CERTIFY THE CLASS

As part of the Settlement, the parties request that the Court certify the following Class:

> all Persons who, between May 11, 2014 and November 16, 2018, inclusive, purchased or otherwise acquired Nissan American Depository Receipts on the over-the-counter market ("OTC 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. Excluded from the Class are Nissan, Carlos Ghosn, Greg Kelly, Hiroto Saikawa, Hiroshi Karube, and Joseph G. Peter, current and former officers of Nissan, members of their immediate families and their legal representatives, heirs, successors or assigns, agents, and any entity in which any Defendant, an immediate family member or a nominee has or had a controlling interest. Also excluded from the Class is any Person who would otherwise be a Member of the Class but who validly and timely requests exclusion in accordance with the requirements set by the Court.

Stipulation, ¶1.4.

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). Moreover, courts within this Circuit overwhelmingly find securities fraud actions appropriate for class treatment. *See, e.g.*, *Garden City Emps. Ret. Sys. v. Psychiatric Sols., Inc.*, 2012 U.S. Dist. LEXIS 44445 (M.D. Tenn. Mar. 29, 2012); *Beach v. Healthways, Inc.*, 2010 U.S. Dist. LEXIS 33765 (M.D. Tenn. Apr. 2, 2010). As demonstrated below, for settlement purposes only, the requirements of Fed. R. Civ. P. 23(a): numerosity, commonality, typicality, and adequacy, and (b)(3): predominance of common questions of fact or law and superiority of the class action as the method of adjudication, are readily satisfied here.

A. The Class Meets the Requirements of Rule 23(a)

1. Numerosity

Rule 23(a)(1) requires that the proposed class be so numerous that joinder of all members is impracticable. As the Sixth Circuit has held, "[n]umerosity is not measured by a strict numerical test." *Randleman v. Fid. Nat'l Title Ins. Co.*, 247 F.R.D. 528, 534 (N.D. Ohio 2008) (citing *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006)). Rather, a "substantial" number of members usually satisfies the requirement. *Id*.

Courts have regularly recognized that the numerosity requirement can be assumed in class action suits that involve "'nationally traded securities,'" such as this one. *Ross v. Abercrombie & Fitch Co.*, 257 F.R.D. 435, 442 (S.D. Ohio 2009); *see also In re Accredo Health, Inc.*, 2006 U.S. Dist. LEXIS 97621, at *17 (W.D. Tenn. Mar. 7, 2006) (in cases involving a nationally traded security, "'the prerequisite expressed in Rule 23(a)(1) [numerosity] is generally assumed to have been met'"); *In re Direct Gen. Corp. Sec. Litig.*, 2006 U.S. Dist. LEXIS 56128, at *8 (M.D. Tenn. Aug. 8, 2006) (citing *Am. Med. Sys.*, 75 F.3d at 1079) (certifying similar class).

The numerosity requirement is satisfied here because during the Class Period there were over three billion shares of Nissan common stock outstanding, and over 50 million ADSs available for trading, which were owned by thousands of individuals and entities.

2. Commonality

Rule 23(a)(2) requires the existence of "'questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality does not mandate that all class members make identical claims and arguments. *Ross*, 257 F.R.D. at 442 ("The claims of the potential class members need not be factually identical."). Rather, "'the commonality requirement will be satisfied as long as the members of the class have allegedly been affected by a general policy of the Defendant and the general policy is the focus of the litigation.'" *Id*. (quoting *Putnam v. Davies*, 169 F.R.D. 89, 93

(S.D. Ohio 1996)). In fact, "[t]he commonality test requires only a single issue common to all class members." *Psychiatric Sols.*, 2012 U.S. Dist. LEXIS 44445, at *93.

Here, the Complaint alleges that Defendants issued materially false and misleading financial reports during the Class Period because defendant Ghosn's actual compensation during the relevant fiscal years, and therefore Nissan's operating income, was not reported accurately in Nissan's consolidated annual financial statements. Plaintiffs also alleged that statements in Nissan's financial reports regarding Nissan's compliance, ethical conduct, transparency and internal controls were materially false and misleading because defendants Ghosn and Kelly were able to conceal their unlawful conduct. Questions of:

> whether the alleged misstatements and omissions are materially false or misleading and whether Defendants' alleged acts violated federal law – do arise from a single course of conduct by Defendants. The alleged misstatements and omissions were the same as relates to all potential class members. Determination of their truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke. . . . If those misstatements and omissions violated federal law, they violated federal law as to all potential class members. Therefore, answering those questions will generate common, class-wide answers concerning liability. The Court finds that the commonality requirement is satisfied.

Burges v. Bancorpsouth, Inc., 2017 WL 2772122, at *3 (M.D. Tenn. June 26, 2017). Other courts have likewise found the commonality requirement satisfied under similar circumstances. *See Psychiatric Sols.*, 2012 U.S. Dist. LEXIS 44445, at *92-*97; *Direct Gen.*, 2006 U.S. Dist. LEXIS 56128, at *10. Thus, because Plaintiffs' claims arise from the same set of facts, are based on common legal arguments, and arise from the same course of fraudulent conduct, Rule 23's commonality requirement is satisfied.

3. Typicality

Rule 23(a)(3) requires a showing that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "'The requirement of typicality is not onerous.'" *Cates v. Cooper Tire & Rubber Co.*, 253 F.R.D. 422, 429 (N.D. Ohio

2008). So long as the claims and defenses of a proposed class representative arise "'from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory,'" they are typical. *Am. Med. Sys.*, 75 F.3d at 1082; *Direct Gen.*, 2006 U.S. Dist. LEXIS 56128, at *11. In other words, typicality exists where, as here, a "'sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct.'" *Sprague v. GMC*, 133 F.3d 388, 399 (6th Cir. 1998).

Here, neither the facts nor the legal theories on which this action is based (violations of §§10(b) and 20(a) of the Exchange Act and the Financial Instruments and Exchange Act of Japan) are unique to Plaintiffs because all Class Members' claims arise from their investment in Nissan securities during the Class Period. Plaintiffs and all other Class Members also allege that their purchase of artificially-inflated Nissan securities was a result of Defendants' material misrepresentations and omissions as described in the Complaint. Plaintiffs' claims satisfy the typicality requirement.

4. Adequacy of Class Representatives

The Sixth Circuit's criteria for determining the adequacy requirements in Rule 23(a) provide that: (i) "'the representative must have common interests with unnamed members of the class'"; and (ii) "'it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel.'" *Am. Med. Sys.*, 75 F.3d at 1083; *see also Stout v. J.D. Byrider*, 228 F.3d 709, 717 (6th Cir. 2000) ("The court reviews the adequacy of class representation to determine whether class counsel are qualified, experienced and generally able to conduct the litigation, and to consider whether the class members have interests that are not antagonistic to one another."). The first of these two requirements overlaps with the commonality and typicality prerequisites and merely acts to ensure that the representatives have interests coextensive with, rather than

antagonistic to, the interests of the unnamed class members. *See Direct Gen.*, 2006 U.S. Dist. LEXIS 56128, at *14. The second factor requires that the representatives have sufficient financial and personal involvement to encourage them to prosecute the action vigorously and that they have adequate resources and legal representation to meet the demands of maintaining the action. *Id.* Plaintiffs satisfy both prongs of Rule 23(a)(4)'s adequacy test.

Plaintiffs' interests are neither antagonistic to nor in conflict with the interests of the other Class Members. To the contrary, Plaintiffs acquired Nissan securities during the Class Period and sustained damages as a result of the same alleged material misrepresentations and omissions as other Class Members. In prosecuting their claims, Plaintiffs have also vigorously prosecuted the claims of other Class Members. Plaintiffs actively participated in the prosecution of this Litigation.

Moreover, Lead Counsel are highly qualified attorneys experienced in the successful prosecution of class actions, satisfying the second prong of Fed. R. Civ. P. 23(a)(4). *See* www.rgrdlaw.com. Lead Counsel has been commended by this Court in this District and across the country for the quality of its representation in class action lawsuits. *See, e.g.*, *Schuh v. HCA Holdings, Inc.*, 2014 WL 4716231, at *10 (M.D. Tenn. Sept. 22, 2014) (affirming that Robbins Geller will "vigorously prosecute" the litigation); *Psychiatric Sols.*, 2012 U.S. Dist. LEXIS 44445, at *104 (finding Robbins Geller "experienced and will protect the interests of the class"); *Winslow v. BancorpSouth, Inc.*, No. 3:10-cv-00463, slip op. at ¶3 (M.D. Tenn. Oct. 31, 2012) (finding Robbins Geller "diligent" in its prosecution on behalf of the class) (attached as Ex. 3 hereto); *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (recognizing that the representation provided by Robbins Geller, under its former name, was "superb" and "demonstrated by the substantial benefit achieved for the Class and the efficient, effective prosecution and resolution" of the action).

B. The Class Meets the Requirements of Rule 23(b)

"'The predominance test is not a numerical test and does not require the court to add up the common issues and the individual issues and determine which is greater.'" *Bovee v. Coopers & Lybrand*, 216 F.R.D. 596, 605 (S.D. Ohio 2003) (quoting *Deutschman v. Beneficial Corp.*, 132 F.R.D. 359, 375 (D. Del. 1990)). "'Rather, the court must determine whether the members of the class seek a remedy to a common legal grievance and whether the common questions of law and fact central to the litigation are common to all class members.'" *Id.* As the U.S. Supreme Court noted, "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

"Predominance is usually decided on the question of liability, so that if the liability issue is common to the class, common questions are held to predominate over individual ones." *Weinberg v. Insituform Techs.*, 1995 U.S. Dist. LEXIS 5124, at *20 (W.D. Tenn. Apr. 10, 1995). Here, it is clear that common questions of law and fact predominate over individual questions because Defendants' liability turns on issues which are common to all the Class Members, *i.e.*, whether the Defendants made material misrepresentations and/or omissions with the requisite scienter.

Where, as here, a plaintiff alleges a continuous course of conduct on the part of defendants, and attempts to prove that alleged activity with evidence common to the class, the predominance test is met. *See Bovee*, 216 F.R.D. at 607 (noting when fraud-on-the-market theory is invoked, courts agree that legal and factual issues common to all members of class predominate).

The superiority analysis of Rule 23(b) requires that the Court examine whether a class action is superior to other methods of adjudication, such as joinder. Fed. R. Civ. P. 23(b)(3). This provision is intended to permit class actions that would "'achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Amchem*, 521 U.S. at 615. The

Court must consider four factors to ensure that superiority is met: (1) the interests of members of the class in individually controlling the prosecution of separate actions; (2) whether other litigation has already commenced; (3) the desirability or undesirability of concentrating claims in one forum; and (4) the difficulties likely to be encountered in management of a class action. *Id*. at 616. Courts have found the superiority requirement met where, as alleged here: (1) many of the class investors likely have suffered only small losses, making it improbable that they can afford to proceed with their claims as individuals; (2) use of the class action vehicle will achieve judicial economy, as well as prevent inconsistent judgments; (3) there are no other actions against the company involving the same claims; and (4) the court foresees no particular difficulties with adjudicating the class action. *Weinberg*, 1995 U.S. Dist. LEXIS 5124, at *22-*23.

There is no indication that a substantial number of absent Class Members would prefer to control the prosecution of their claims individually. In any event, any Class Member who desires to do so will have the opportunity to opt-out of the Class. Additionally, Lead Counsel is unaware of any other litigation in the United States by investors against Defendants asserting the claims involved in this Litigation.[4] Further, concentration of the Litigation in one forum is desirable to avoid potentially inconsistent adjudications and promote fairness and efficiency. Finally, this case presents no unusual difficulties in maintaining the class action or providing notice to the Class.

Not only is the class action device the superior method for adjudicating the claims alleged in the instant case, it is the only practical method of obtaining a fair and efficient disposition of these claims. *See Bovee*, 216 F.R.D. at 607 ("Given that the proposed class consists of thousands of members and that the legal claims are narrowed to whether defendants committed securities

[4] Lead Counsel is aware of claims brought against Nissan in the Tokyo District Court which arise from the same subject matter as the Action. Any class members who wish to pursue such claims can opt-out of this settlement should they so choose.

violations, a class action will be the most fair and efficient way to resolve this dispute."). The alternative to a class action either leaves potentially thousands of investors without recourse, or requires a multiplicity of suits throughout the United States resulting in the inefficient administration of justice. *See Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 1996 WL 739170, at *9 (W.D. Mich. Sept. 27, 1996) (Stating, "[i]f this Court does not certify this class, hundreds of small shareholders . . . will be effectively barred from seeking legal redress of their claims. Furthermore, because the potential class members 'seek a determination on essentially the same issues, . . . a class action would enhance judicial economy and efficiency.'"). This is precisely "the evil that Rule 23 was designed to prevent." *Califano v. Yamasaki*, 442 U.S. 682, 690 (1979).

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. PROPOSED SCHEDULE OF EVENTS

In connection with preliminary approval of the Settlement, the Court must set a Final Approval Hearing date, dates for mailing the Notice and publishing the Summary Notice, and deadlines for objecting to the Settlement, opting out of the Class, and filing papers in support of the Settlement. The parties propose the following schedule:

Notice and Proof of Claim mailed to the Class (the "Notice Date")	21 calendar days after the Notice Order is signed and entered
Summary Notice published	10 calendar days from the Notice Date
Deadline for filing Proofs of Claim	90 calendar days from the Notice Date
Deadline for filing papers in support of the Settlement, Plan of Allocation, Lead Counsel's request for an award of attorneys' fees and expenses, and Plaintiffs' award of time and expenses	35 calendar days prior to the Final Approval Hearing

Deadline for objecting to the Settlement, Plan of Allocation or attorneys' fees and expenses and for opting out of the Class	21 calendar days prior to the Final Approval Hearing
Deadline for filing reply papers in support of the Settlement, Plan of Allocation, and request for an award of attorneys' fees and expenses	7 calendar days before the Final Approval Hearing
Final Approval Hearing	At the Court's convenience, at least 100 calendar days after the entry of the Notice Order

VII. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court (i) preliminarily certify the proposed Class for settlement purposes; and (ii) preliminarily approve the proposed Settlement, including the dissemination of the proposed Notice and Summary Notice.

DATED: April 22, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on April 22, 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 e-mail 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
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