IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

RAFAEL SUAREZ, DAISY GONZALEZ, and RICHARD BYRD, individually and on behalf of all others similarly situated, Plaintiffs, vs. NISSAN NORTH AMERICA, INC., Defendant.	Case No.: 3:21-cv-00393 **Hon. William L. Campbell, Jr.** **CLASS ACTION**

PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF SETTLEMENT AND ENTRY OF FINAL ORDER AND JUDGMENT

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INTRODUCTION

On July 26, 2021, the Court issued an Order granting the Parties' Joint Motion for Preliminary Approval, finding that the nationwide class action Settlement in this action is likely to achieve final approval as being fair, reasonable, and adequate; preliminarily certifying the Settlement Class and appointing Plaintiffs Rafael Suarez, Daisy Gonzalez, and Richard Byrd ("Plaintiffs") to serve as class representatives; and appointing Timothy N. Mathews, Samantha E. Holbrook, Alex M. Kashurba, and Zachary P. Beatty of Chimicles Schwartz Kriner & Donaldson-Smith LLP as Lead Class Counsel, and John Spragens of Spragens Law PC as additional Class Counsel. ECF No. 29. The Court further appointed Kurtzman Carson Consultants, LLC ("KCC") as the Settlement Administrator, and approved and ordered commencement of the Notice Plan. *See id.*

Plaintiffs now submit this memorandum of law in support of the Parties' joint motion for final approval of the Settlement, final certification of the Settlement Class pursuant to Rule 23, reaffirmance of the appointment of the Plaintiffs as class representatives, and reaffirmance of the appointment of Lead Class Counsel and Class Counsel.

The Settlement in this action provides outstanding relief to the Settlement Class Members, who are current or former owners or lessees of 1.43 million 2013-2018 Nissan Altimas manufactured with halogen headlamps, which Plaintiffs allege contain a defect that can cause an internal reflective surface to delaminate due to heat and humidity. The parties agree that the economic value of the Settlement likely exceeds $50 million. (Settlement Agreement ("SA") ¶ 16). Most importantly, however, the Settlement directly addresses the harm caused by the alleged defect, as it: (1) affords all current owners or lessees the opportunity to receive a free set of replacement headlamps, regardless of the age or mileage of their vehicle; (2) provides

reimbursements for Class members who previously paid for headlamp replacements at any time up to the Notice Date, regardless of the age or mileage of their vehicle; and (3) provides a three year warranty extension (for a total of six years) on the headlamps of the Class Vehicles. Moreover, all replacements will be performed with a newly-designed headlamp, manufactured with a Countermeasure adopted by Nissan North America, Inc. ("NNA") to address the alleged defect, and the replacements will also have a one-year parts and labor warranty, even if the six-year extended warranty has expired.

The Settlement merits final approval, which will provide this relief to Class Members far more promptly than would have been possible through continued litigation.

I. LITIGATION HISTORY

A. The Alleged Defect

Plaintiffs' Complaint alleges that halogen headlamps in 2013-2018 model year Altimas contain a design and materials defect that causes the interior reflective surface of the projector cup to "outgas." ECF 1, at ¶¶ 39-41. This outgassing makes the reflective surface dull and deposits outgassed material on the inner lens, resulting in dramatic dimming of the light output.[1] *Id.* at ¶ 41. This result is referred to in the Settlement as "Headlamp Delamination." SA ¶ 40. As a result of this defect, many consumers report difficulty driving at night, and some have even reported being pulled over by the police because their headlights have become too dim. ECF 1, at ¶ 42. Plaintiffs allege that the problem has been known to NNA since 2013, as evidenced by, for example, the numerous complaints made to the National Highway Traffic Safety Administration ("NHTSA") and online by owners on forums that are monitored by NNA. *Id.* at ¶ 49.

[1] Plaintiffs' Complaint includes a further description of the defect and photographs of a typical headlamp assembly, as well as a projector cup, which is internal to the headlamp assembly. *See* ECF No. 1, at ¶¶ 37–38, 41.

Plaintiffs' investigation, including examination of headlamps by their expert and pre-suit discovery of NNA documents, determined that the outgassing is caused by the combined heat of the bulb and ambient temperature and exacerbated by humidity. Mathews P.A. Decl.[2] at ¶ 13.

Further, NNA developed a "Countermeasure" in late-2018 to address delamination, and all replacement parts manufactured after December 2018 are manufactured with the Countermeasure. *See* SA ¶ 5.

B. Procedural History

On May 20, 2019, Plaintiff Rafael Suarez, through Lead Class Counsel, served a pre-suit notice of claims for breach of express and implied warranty and violation of state consumer protection statutes and common law and a demand for relief on behalf of himself and all others similarly situated. *Id.* at ¶ 2. In the subsequent weeks, Lead Class Counsel had several discussions with NNA's counsel, and the parties entered in to a nationwide tolling agreement on July 17, 2019. *Id.* at ¶ 3. On November 13, 2019, additional Plaintiffs Daisy Gonzalez and Richard Byrd, by and through Lead Class Counsel, served NNA with an additional pre-suit notification of claims for breach of express and implied warranty and violation of consumer protection laws and a demand for relief on behalf of themselves and all others similarly situated. *Id.* at ¶ 4.

Between July 2019 and July 2020, the parties engaged in numerous discussions, and NNA produced documents in response to Plaintiffs' requests. Mathews P.A. Decl. at ¶¶ 12-13, 19. Plaintiffs also obtained several samples of delaminated headlamps from consumers and retained an internationally recognized headlight engineering expert to examine the headlamps, review NNA's documents, and consult with Plaintiffs about the defect and Nissan's Countermeasure. *Id.*

[s] References to the "Mathews P.A. Decl." refer to the Declaration of Timothy N. Mathews submitted in conjunction with Plaintiffs' motion for preliminary approval. *See* ECF No. 15-2.

at ¶¶ 12-13. Plaintiffs also received and catalogued information from over 1,200 Altima owners who had contacted Lead Class Counsel by that time. *Id.* at ¶ 12.

The parties exchanged mediation briefs in July 2020 and engaged in three full-day mediation sessions with Judge Welsh on August 3, 2020, September 30, 2020, and November 4, 2020. *Id.* at ¶¶ 15-16. During the course of the ensuing several months, the parties exchanged numerous letters and participated in numerous telephonic discussions with each other and with Judge Welsh. *Id.* at ¶ 17. During the time the mediation was pending, Plaintiffs received additional documents from NNA and conducted a survey of putative Class Members, receiving around 350 responses, which they used for purposes of their investigation and settlement negotiation. *Id.* at ¶¶ 19-20. Subsequently, Lead Class Counsel continued to receive information from Class Members, with the current total exceeding 2,600 Class Members. *See* Declaration of Timothy N. Mathews in Support of the Parties' Joint Motion for Final Approval of Class Action Settlement and Plaintiffs' Motion for Attorneys' Fees, Litigation Expenses, and Service Awards, filed contemporaneously herewith ("Mathews F.A. Decl.") at ¶ 29.

As stated in Judge Welsh's Declaration, "[t]hroughout the mediation process, the parties dealt with each other at arm's length …[and] the negotiations were hard fought by both sides. The parties were each represented by highly experienced, effective and assertive counsel who were well versed in the facts of the case and the applicable law. I was satisfied throughout the negotiations that the parties' positions were thoroughly explored and advanced." Welsh Decl.[3] at ¶ 4. The parties reached agreement on all material terms of the Settlement, aside from attorney's fees, in the afternoon of the final mediation session on November 4, 2020.

[3] References to the "Welsh Decl." refer to the Declaration of the Honorable Diane M. Welsh (Ret.) submitted in conjunction with Plaintiffs' motion for preliminary approval. *see* ECF No. 15-1.

The parties did not discuss attorneys' fees until all other material terms of the settlement benefitting the Class had been agreed. *Id.* at ¶ 5. They began discussion of fees at the end of the November 4, 2020 mediation session but did not reach resolution. Negotiation of attorneys' fees spanned several weeks thereafter and was accomplished with the assistance of Judge Welsh through telephonic discussions with the parties. *Id.* at ¶ 5. The parties reached agreement on attorneys' fees, with Judge Welsh's "assistance and recommendation," on December 3, 2020. *Id.* at ¶ 5. Thereafter, Plaintiffs conducted additional confirmatory discovery, receiving several more batches of documents from NNA, which Lead Counsel and their expert reviewed. Mathews P.A. Decl. at ¶ 23.

Plaintiffs filed a joint motion for preliminary approval of the Settlement on May 24, 2021. ECF No. 15.

C. Preliminary Settlement Approval and Implementation of the Court-Approved Notice Plan

On July 26, 2021, the Court preliminarily approved the Settlement as being fair, reasonable and adequate and found that it "otherwise meets the criteria for approval." ECF No. 29. The Court scheduled a final approval hearing for December 20, 2021. In granting preliminary approval of the Settlement, the Court conditionally certified the following Class pursuant to Fed. R. Civ. P. 23(a) and (b)(3):

> All United States residents who are current or former owners or lessees of all model year 2013-2018 Nissan Altimas, except the following excluded vehicles:

Model Years	Trim	Package/Edition (if applicable)
2013-2018	3.5L SL	
2017	3.5L SR	
2016-2017	2.5L SR	with LED Appearance package
2016-2018	2.5L SR	with Tech package
2017	2.5L SR	Midnight Edition

> For clarity, the Settlement Class Vehicles include all 2013-2018 Altimas manufactured with halogen headlamps, and excludes 2013-2018 Altimas manufactured with Xenon or LED headlamps.

SA, at ¶¶ 69-70.

As explained in detail in the Declaration of Lana Lucchesi ("Lucchesi Decl."), filed contemporaneously herewith, the parties began implementing the Court-approved Notice Plan in coordination with KCC. *See, generally*, Lucchesi Decl. As part of the Settlement Agreement, Nissan will pay all costs for notice and administration. SA ¶ 99. Pursuant to the Notice Program, KCC has or will implement the following forms of notice:

- KCC established a Settlement Website as of August 2, 2021, www.AltimaHeadlightSettlement.com, where Class Members could obtain important information about the Settlement and submit/upload Claim Forms electronically. Lucchesi Decl. at ¶ 15.

- KCC also established a toll-free number that Class Members can use to obtain addition information regarding the Settlement. *Id.* at ¶ 16.

- KCC sent notice to the relevant governmental agencies as required by the Class Action Fairness Act. *Id.* at ¶¶ 2-3. As of this date, KCC has received no response to the CAFA notice packet from any of the attorneys general.

- By October 25, 2021, KCC will mail direct notice to approximately 3,249,364 names and mailing addresses on the Class Member List via first-class mail using records obtained from the Department of Motors Vehicles of all fifty states and Puerto Rico. *Id.* at ¶¶ 5-10.

- By October 25, 2021, KCC will publish the Publication Notice in a one-third page ad in People magazine; conduct a digital notice campaign on websites and networks, such as Facebook and Google, sufficient to create not less than 5,000,000 impressions; and issue a PR press release. *Id.* at ¶¶ at 11-14.

- The Out-of-Warranty Notice will also be mailed to Class Members whose Extended Warranties will be expired as of the Effective Date to specifically notify them of the opportunity to receive a free set of replacement headlamps. SA ¶¶ 85-86.

- The Effective Date Notice will also be mailed to Class Members whose Extended Warranty will expire within twenty-one days of the Effective

> Date to ensure that these Class Members know that the Effective Date has occurred and to provide them with a 30-day grace period to obtain replacements from their Authorized Nissan Dealers. SA ¶ 117.

Class Counsel have worked diligently alongside KCC to maximize exposure of Class Members to the Settlement and claims process. Over 2,600 Class Members have contacted Lead Class Counsel about the settlement, and Lead Class Counsel have communicated directly with them to ensure they are aware of the settlement and their opportunities to receive replacement headlamps and submit claims for reimbursement of expenses. *See* Mathews F.A. Decl. at ¶ 29. Class Counsel have also been actively overseeing the notice and claims administration process, including reviewing, testing, and approving the settlement website and online claim form, and reviewing, editing, and approving final versions of the other notices and mailed claim form. *Id.* at ¶ 28.

As noted above, KCC's notice dissemination process will *begin* on September 22, 2021. As of September 17, however, KCC has already received 397 reimbursement claims with a face value of $335,564.86. Lucchesi Decl. at ¶ 17. This number will increase significantly once the notice program begins in earnest. There have only been no objections and no requests for exclusion at this time. *Id.* at ¶¶ 18-19. The deadline to file a reimbursement claim is April 25, 2022, and the deadline to file an objection or opt-out is November 22, 2021.

II. SUMMARY OF THE SETTLEMENT

A. The Settlement Class

The Settlement Class consists of all United States residents who are current or former owners or lessees of the approximately 1.43 million model year 2013–2018 Nissan Altimas manufactured with halogen headlamps.[4] SA ¶ 70. Excluded from the Settlement Class are officers

[4] The Settlement Class does not include Altimas manufactured with xenon or LED headlights. The Settlement identifies the specific Altima years, trims, and packages that are not included.

and directors of NNA or its parents and subsidiaries, the Judge to whom the litigation is assigned, and Settlement Class Members who timely opt out or exclude themselves from the Settlement. *Id.* The Settlement Class is coextensive with the class definition in the Complaint.

Using VIN information provided by Nissan, KCC utilized the services of a third-party vendor, IHS Markit, formerly known as R.L. Polk ("IHS"), to obtain mailing address data for the Settlement Class in preparation for mailing. After de-duplication, over 3.2 million name and address records have been identified as potential Settlement Class Members to whom notice will be mailed. Lucchesi Decl. at ¶ 10.

B. Class Settlement Consideration

By way of overview, the Settlement provides: (a) reimbursements for past repairs; (b) a total of six years of warranty coverage on the headlamps; (c) an opportunity for every class member who has delaminated headlights to get free replacements with the Countermeasure; and (d) reimbursement for replacements obtained between the Notice Date and the Effective Date of the Settlement for those who are currently within the six-year warranty and do not wish to wait. Additional details of those components are as follows.

1. Reimbursement for Qualifying Out-of-Pocket Expenses

The Settlement provides for reimbursement of out-of-pocket costs Class Members incurred to replace Class Vehicle headlamps at any time prior to the Notice Date, regardless of vehicle age. SA ¶¶ 90-97. Reimbursement includes parts, labor, shipping, and other costs.[5] *Id.* at ¶ 61. Multiple replacements are reimbursable. *Id.* at ¶ 95. Reimbursement for amounts paid to NNA dealers is uncapped. *Id.* at ¶ 92. Reimbursement for replacement by independent repair facilities is capped

[5] The Settlement does not cover the cost of light bulbs, however, as dimming occurs due to delamination of a reflective surface in the headlamp assembly and not a bulb defect.

at $1,200 per replacement event, which is well-above the estimated average cost of around $600-$800 per pair and is intended only to ensure that NNA is not liable for extravagant charges. *See id.* at ¶¶ 15, 94-95.

In Lead Class Counsel's survey of 350 putative Class Members, most respondents reported that they first noticed dimming when their vehicles were between thirty-three and fifty-five months old. Mathews P.A. Decl. at ¶ 20. Almost half of respondents reported that they paid for headlamp replacements due to dimming. *Id*. For those who replaced their headlamps, the average vehicle age at the time of replacement was around forty-eight months, which is outside of NNA's standard three-year warranty. *Id*. The typical cost for replacement varies widely, with NNA dealerships often charging more than independent repair facilities. *Id*. Based on Lead Class Counsel's investigation and survey results, the overall average cost of replacement for a pair of headlamps, including parts and labor, is typically around $600-$800, although the cost of often higher through Authorized Nissan Dealers. *Id*. Thus, the reimbursement component of the Settlement, which provides reimbursement for multiple replacements, is valuable.

In order to claim reimbursement, Class Members need only submit a simple claim form and a copy of receipts or other evidence of their out-of-pocket expenditure. SA ¶ 97 and Ex. F (Reimbursement Claim Form). A copy of the Reimbursement Claim Form will be sent by direct mail to every Class Member with the Mailed Notice. SA ¶ 101. The evidence of out-of-pocket cost does not need to reflect a reason for the headlamp replacement so long as the Class Member signs the attestation on the Claim Form stating that the replacement was due to dimming. *Id.* at ¶ 33. Moreover, the Settlement expressly provides that the Settlement Administrator must review the evidence and make determinations based on a "more likely than not" standard, which ensures that the Settlement cannot be applied in an unduly restrictive manner. *Id.* at ¶¶ 97, 119.

Class Members will have six months from the Notice Date to submit reimbursement claims, and can submit claims online at the Settlement website or by mail. *Id.* at ¶¶ 24, 96.

2. Extended Warranty Coverage

The Settlement also provides three years of extended warranty coverage for Headlamp Delamination—on top of the standard three-year warranty—meaning Headlamp Delamination is covered for a total of six years. *Id.* at ¶¶ 73-82. There is no mileage limitation on this warranty, and it is fully transferable and will be subject to the same terms and conditions of the original New Vehicle Limited Warranty applicable to Class Vehicles. *Id.* at ¶¶ 75, 78. The extended warranty covers all costs (including parts, labor, and materials) associated with replacing Headlamp Assemblies. *Id.* at ¶ 76. Moreover, all replacement parts will be manufactured with NNA's Countermeasure. *Id.* at ¶ 66.

The six-year total warranty time period is fair and justified by the facts—99% of respondents in Lead Class Counsel's survey reported that they first noticed dimming within seventy-two months, and the vast majority reported noticing the defect within fifty-five months. Mathews P.A. Decl. at ¶ 20. Accordingly, most Class Members who experience the defect are expected to notice it, if they have not already, within the six-year extended warranty period.

In order to receive free replacement within the six-year period, Settlement Class Members only need to present their Class Vehicles to an Authorized Nissan Dealer; no claim form is required. SA ¶ 74.

3. Out-of-Warranty Window of Opportunity

The Settlement also provides relief for Class Vehicles that will already be outside the six-year warranty period when the Settlement becomes effective. *See id.* at ¶¶ 83-88. Settlement Class Members whose six-year warranties on the Headlamps will already be expired as of the Effective

Date will have a six-month window of opportunity to receive a free set of replacement headlamps manufactured with NNA's Countermeasure. *Id.* at ¶ 83. These Class Members will be identified by NNA and will be mailed a special notice within five days of the Effective Date. *Id.* at ¶ 84. The notice will include a tear off, prepaid postcard "Out-of-Warranty Claim Form," which will be prepopulated with nearly all of the relevant information, including VIN number. *Id.* at ¶ 86. In order to obtain replacement headlamps, these Class Members must return the claim form within sixty-five days. *Id.* This will allow NNA to ensure that its dealers have access to adequate supplies of replacement parts in their geographic area. *See id.* at ¶ 87. The Class Members will then have six months thereafter to complete their replacement at an NNA Dealer. *Id.* at ¶ 88.

4. Coverage for Replacements Prior to the Effective Date

The Settlement also provides an opportunity for Class Members whose vehicles are currently within the six-year period to obtain headlamps *before* the Effective Date and receive 100% reimbursement when the Settlement becomes effective. *Id.* at ¶ 98. Thus, Class Members do not need to wait for the Effective Date if they experience dimness due to delamination between now and then. These Class Members can opt to pay for a replacement from an Authorized Nissan Dealer now and will be entitled to reimbursement of the full cost when the Settlement becomes effective so long as they submit a reimbursement claim form and evidence of the payment within six months of the Notice Date. *Id.*

C. Release

The Settlement release is narrowly tailored to the claims at issue. It releases only claims "relating to the allegations in the Action concerning the alleged delamination defect . . . ." *Id.* at ¶ 162. Moreover, there is no release of personal injury, wrongful death, or claims for damage to property other than Settlement Class Vehicles. *Id*.

D. Attorneys' Fees and Expenses, And Representative Plaintiffs' Incentive Awards

In addition to all other benefits of the settlement, NNA has agreed to pay $2,500,000 for an award of attorneys' fees and expenses. SA at ¶ 136. The award of fees and expenses will not decrease the relief going to the class; NNA will pay these separately and in addition to the settlement consideration described above. Further, the amount was agreed based on the "recommendation" of Hon. Diane M. Welsh (Ret.) and was discussed only after the Parties had agreed upon all other material terms of the Settlement. Welsh Decl. at ¶ 5. NNA also agreed to pay each of the three representative Plaintiffs a $5,000 incentive award, which amount was also negotiated with Judge Welsh's assistance only after all other material terms of the Settlement were agreed and will not reduce the benefits to the Class Members. *Id.*, at ¶ 138, Welsh Decl. at ¶ 5. These are discussed more fully in Plaintiffs' contemporaneously filed Motion for Award of Attorneys' Fees and Expenses, and Plaintiffs' Incentive Awards.

III. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

At the preliminary approval stage, the Court considered the factors set forth in Rule 23(e)(2) and the traditional factors for class action settlement approval in the Sixth Circuit, and concluded that the Settlement is "likely to receive final approval" as being fair, reasonable, and adequate. *See* ECF No. 29. Final approval requires analysis of the same factors that the Court previously considered at the preliminary approval stage. The Court, therefore, should confirm and make final its finding that this Settlement is fair, reasonable, and adequate.

Under Federal Rule of Civil Procedure 23(e)(2), as amended in 2018, requires the Court must find that:

> **(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 any 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)(A)-(D). The 2018 Advisory Committee Notes make clear, however, that these factors do not displace the lists of factors courts have traditionally applied to assess proposed class settlements.

In the Sixth Circuit, the following factors further guide the Court's determination as to whether a class action settlement is fair, reasonable and adequate: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest. *UAW v. GMC*, 497 F.3d 615, 631 (6th Cir. 2007).

Application of both the Rule 23(e)(2) and traditional factors demonstrates that the settlement here is fair, reasonable, and adequate, and is in the best interests of the class.

1. Rule 23(e)(2)(A): The Class Representatives and Class Counsel Have Adequately Represented the Class

Plaintiffs and Lead Counsel "adequately represented the class," as required by Rule 23(e)(2)(A), thereby weighing in favor of approval. Similarly, Plaintiffs and Lead Counsel believe the Settlement results are outstanding, thereby satisfying the fifth traditional factor, which considers "the opinions of class counsel and class representatives." *Day v. AMC Corp.*, 2019 U.S. Dist. LEXIS 143021, at *18 (E.D. Ky. July 26, 2019).[6]

[6] It is premature as of this writing to address the sixth traditional factor, "the reaction of absent class members," because notice has not yet begun in earnest, and the objection and opt-out deadline

As Judge Welsh affirms in her declaration, Lead Counsel are "highly experienced, effective and assertive counsel who were well versed in the facts of the case and the applicable law." Welsh Decl. at ¶ 4. The adequacy of Plaintiffs' and Lead Class Counsel's representation is further demonstrated by the compelling results they achieved here.

The Plaintiffs served a vital role in achieving these results. Among other things, Plaintiffs: (i) provided important information and assisted in Lead Class Counsel's investigation of the factual basis for the claims; (ii) were involved in the drafting of the Complaint; (iii) regularly consulted with Lead Class Counsel during the course of the mediations; (iv) provided guidance and approved all of the negotiated relief; and (v) reviewed and approved the Settlement. Plaintiffs' Decls.[7] Plaintiffs state that they are "very pleased with the result we were able to achieve for the Class," and believe the Settlement provides "excellent relief to all Class Members." *Id.*

Lead Class Counsel, too, performed commendably, securing a very favorable settlement in a manner that will, with final approval, get relief to Class members quickly. As set forth more fully in the Mathews P.A. Decl. (ECF No. 15-2), for over thirty years, the Chimicles firm has earned a reputation as one of the leading firms of the plaintiffs' class action bar. Timothy Mathews, the partner who headed this case, has nearly two decades of experience leading complex class actions and has been described as "among the most capable and experienced lawyers in the country" in consumer class action litigation. *Chambers v. Whirlpool*, 214 F. Supp. 3d 877, 902 (C.D. Cal. 2016).

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has not yet lapsed. Accordingly, Plaintiffs will discuss this factor in their reply brief in support of final approval once the objection deadline has passed. To date, however, no objections have been received.

[7] "Plaintiffs' Decls." refers to the Plaintiffs Declarations filed in conjunction with Plaintiffs' motion for preliminary approval. *See* ECF Nos. 15-4, 15-5, 15-6.

Here, Lead Class Counsel extensively researched the legal claims and facts in this case; reviewed hundreds of consumer complaints in online forums and the NHTSA's website; performed comprehensive research as to the Class Vehicles and nature of the defect; negotiated a nationwide tolling agreement; received discovery from NNA; communicated with over 2,600 Class Members; collected samples of Class Member headlamps; hired a consulting expert, who examined headlamps and NNA documents; conducted a Class Member survey; prepared mediation briefs; participated in three full-day mediation sessions plus numerous additional telephonic negotiations; and negotiated a nationwide class action settlement that provides robust relief. Mathews P.A. Decl. at ¶¶ 8-25.

This also relates to the third traditional factor ("the amount of discovery"). As noted in Plaintiffs' preliminary approval brief (ECF 15 at 17-18), many courts have recognized the benefits of early settlements based on informal discovery. *See, e.g.*, *Wright v. Premier Courier, Inc.*, 2018 U.S. Dist. LEXIS 140019, at *9 (S.D. Ohio Aug. 17, 2018); *In re Packaged Ice Antitrust Litig.*, 2010 U.S. Dist. LEXIS 77645, at *42 (E.D. Mich. Aug. 2, 2010) ("The overriding theme of our caselaw is that formal discovery is not necessary as long as (1) the interests of the class are not prejudiced by the settlement negotiations and (2) there are substantial factual bases on which to premise the settlement.").

Further, "Class Counsel's ability to negotiate the instant Settlement at the early stages of this litigation demonstrates their high level of skill and efficiency." *Simpson v. Citizens Bank*, 2014 U.S. Dist. LEXIS 205466, at *23 (E.D. Mich. Jan. 31, 2014). As the Third Circuit Task Force recognized in its Report on Court Awarded Attorneys' Fees, a class action attorney's "contribution to a prompt . . . resolution" should be rewarded because doing so "encourage[s] early settlement by providing an incentive that neutralizes an attorney's possible predilection to increase the

number of hours invested in a case for lodestar purposes." Court Awarded Atty. Fees, 1985 U.S. App. LEXIS 31653, at *66-67 (3d Cir. Oct. 8, 1985).

By engaging in pre-litigation, informal discovery and settlement discussions, Lead Class Counsel also avoided the possibility of "copycat" lawsuits, which could have resulted in duplicative litigation, caused delay, and increased the costs and burden on the courts. *See Wright & Miller*, 7B Fed. Prac. & Proc. Civ. § 1798.1 (3d Ed.) ("Clearly, a single nationwide class action seems to be the best means of achieving judicial economy . . . . [C]ompeting and duplicative actions not only generate unnecessary litigation and duplicative fees, but also they may result in delay, pose complicated problems of judicial coordination in some instances, [and] increase the risk of disparate verdicts raising serious questions of fairness . . . .")

In short, Lead Class Counsel placed the interests of Class Members first and acted commendably in securing an early, excellent settlement, without unnecessary expenditure of time or placing undue burden on the court system, even though it meant their own lodestar and fees would be less. Lead Class Counsel believe the relief made available to Class Members through the Settlement is first-rate.

Further, Lead Class Counsel's work will not end when the Settlement is finally approved; they will continue to oversee implementation of the Settlement, supervise the claims administration, and communicate with Class Members, potentially for many years in the future as the Settlement benefits extend into at least 2024 for some Class Members. Lead Class Counsel pride themselves on ensuring that claims administration is properly handled, even after their attorneys' fees have been paid, which is one of the reasons the Settlement includes a provision expressly allowing an audit of the Settlement Administrator's claims review work. SA ¶ 125.

Class Counsel and Plaintiffs adequately represented the class and will continue to do so.

2. Rule 23(e)(2)(B): The Settlement was Negotiated at Arm's Length[8]

The Settlement was negotiated at arm's length, by highly-experienced counsel on both sides, and with the assistance of a renowned class action mediator, Judge Welsh. This too weighs heavily in favor of approval.

"Courts presume the absence of fraud or collusion in class action settlements unless there is evidence to the contrary." *See Peck v. Air Evac EMS, Inc.*, 2019 U.S. Dist. LEXIS 118626, at *19-20 (E.D. Ky. July 17, 2019) (quoting *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521 (E.D. Ky. 2010)). But here, all terms of the Settlement were negotiated with the assistance of Judge Welsh. The negotiations were at arm's length and there was no collusion. Mathews P.A. Decl. at ¶ 18. *See also Applegate-Walton v. Olan Mills, Inc.*, 2010 U.S. Dist. LEXIS 77965, at *5 (M.D. Tenn. Aug. 2, 2010) (there was no risk of fraud or collusion where the settlement was "the result of intensive, arms-length negotiations, including mediation with an experienced third-party neutral"); *Peck*, 2019 U.S. Dist. LEXIS 118626, at *20 (no risk of collusion where the "parties engaged in months of settlement negotiations, discussed the strengths and weaknesses of their claims and defenses, and engaged a well-versed mediator in determining the terms of the settlement").

3. Rule 23(e)(2)(C)(i): The Relief Provided for the Class is Adequate, Taking into Account the Costs, Risks, and Delay of Trial and Appeal, Weighs in Favor of Approval[9]

The Settlement relief is outstanding and easily satisfies the adequacy requirement of Rule 23(e)(2)(C)(i). Further, the notice program is robust, the release is narrow, and the agreed amounts

[8] This factor overlaps with the first traditional factor ("the risk of fraud or collusion").
[9] This subsection subsumes several traditional factors, including the second ("complexity, expense and likely duration of the litigation") and the fourth ("likelihood of success on the merits").

for attorneys' fees, costs, and incentive awards are all fair. Thus, the Settlement is fair, reasonable, and adequate.

The Settlement relief directly addresses the alleged defect at issue, as it provides for reimbursements and replacements. Importantly, these benefits are even more valuable because they will be made available to Class Members soon after the Court grants final approval, whereas continued litigation would likely result in years of delay in getting relief to Class Members. Plaintiffs allege that the defect poses a potential safety hazard if the headlamps are not replaced before they become significantly degraded.[10] Thus, the sooner delaminated headlamps are replaced, the better. While some class members have already replaced their delaminated headlamps, some have not. The immediacy and certainty of the relief provided by the Settlement heavily weigh in favor of granting final approval.

"The anticipated complexity, cost, and duration of continued litigation is a significant factor to be considered in assessing the fairness of a settlement, and settlements should represent a compromise taking into account the risks, expense, and delay of further litigation." *In re Skelaxin Metaxalone Antitrust Litig.*, 2015 U.S. Dist. LEXIS 197729, at *5-6 (E.D. Tenn. Jan. 16, 2015). "This is especially true of . . . class action litigation, which is unpredictable." *Id.* at *6. Courts encourage early class settlements, which allow class members to recover without undue delay and preserve judicial resources. *ARO Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976) ("By such agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before over-burdened courts, and to the citizens whose taxes support the latter. An amicable compromise provides the more speedy and reasonable remedy for the dispute.").

[10] Nissan disputes that there is a defect and that it implicates safety.

While Plaintiffs believe their claims are strong and that they would have been successful at trial, litigating this matter through trial and appeal would be lengthy, complex, and costly to all parties and would have entailed significant risk. Prosecuting this matter to final judgment would require substantial motion practice, extensive fact discovery, class certification proceedings, dispositive motions practice, and trial, not to mention a costly battle of experts regarding the existence of the Defect in Class Vehicles. Given the size of the Class and the amount of relief at stake, there would likely be a lengthy appeals process. "Avoiding these unnecessary expenditures of time and resources is beneficial to all the parties and the Court." *Skelaxin*, 2015 U.S. Dist. LEXIS 197729, at *6.

The significance of the immediate recovery by way of compromise in the face of a mere possibility of relief in the future weighs in favor of approval. *See Manjunath A. Gokare, P.C. v. Fed. Express Corp.*, 2013 U.S. Dist. LEXIS 203546, at *17 (W.D. Tenn. Nov. 22, 2013) ("The certainty of recovery and prospective relief makes the Settlement Agreement a better course of action for the Settlement Class than proceeding with the uncertainty of whether the Settlement Class would overcome the potential difficulties in its case."); *Rotuna v. West Customer Mgmt. Group*, 2010 U.S. Dist. LEXIS 58912, at *16 (N.D. Ohio June 15, 2010) ("[G]iven the factual and legal complexity of the case, there is no guarantee that Representative Plaintiff and the Class would prevail at trial. . . . Given the uncertainty surrounding a possible trial in this matter, the certainty and finality that come with settlement also weigh in favor of a ruling approving the agreement."); *Rankin v. Rots*, 2006 U.S. Dist. LEXIS 45706, at *8-9 (E.D. Mich. June 28, 2006) ("[T]he Court should consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation . . . .").

4. Rule 23(e)(2)(C)(ii): The Relief Provided for the Class is Adequate, Taking into Account the Effectiveness of Any Proposed Method of Distributing Relief to the Class, Including the Method of Processing Class-Member Claims

The method of distributing relief and the claims process is also fair, reasonable, and adequate, and "facilitates filing legitimate claims;" it is not "unduly demanding" in any respect. Rule 23(e)(2)(C)(ii); 2018 Adv. Comm. Notes.

No claim is required to receive the benefit of the Extended Warranty—it is automatic, and fully transferable in the same manner as NNA's standard warranty. *See* SA ¶ 74. To receive new headlamps within the six-year warranty period, Class Members need only go to an Authorized Nissan Dealer.

While a claim is required for reimbursement of out-of-pocket costs, the form is simple and straightforward, and Class Members need only submit sufficient documentary evidence to substantiate, under a "more likely than not" standard, their out-of-pocket cost. Requiring claim forms and documentations to receive reimbursement of out-of-pockets costs is standard, and regularly approved. *See, e.g., In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 2016 U.S. Dist. LEXIS 130467, at *43 (N.D. Ohio Sep. 23, 2016) (approving the use of claim forms to pursue a claim for reimbursement of out-of-pocket expenses, reasoning "a minimal proof requirement 'strike[s] a proper balance between, on the one hand, avoiding fraudulent claims and keeping administrative costs low, and on the other hand, allowing as many class members as possible to claim benefits'"); *Simerlein v. Toyota Motor Corp.*, 2019 U.S. Dist. LEXIS 63397, at *28 (D. Conn. Jan. 14, 2019) (approving settlement that included a claim form for class members seeking reimbursement of past out-of-pocket repairs to Toyota vehicles). Moreover, the documentary evidence only needs to show that the Class Member paid money for headlamp replacements; it does not need to specify the *reason* for replacement, so long as the Class Member

signs the certification on the claim form stating that the reason was due to dimming of the headlights. SA ¶ 97.

Finally, Class Members who are already outside the six-year extended warranty as of the Effective Date need only return a tear-off, pre-filled and prepaid postcard notifying NNA that they plan to seek replacement headlamps, and then make an appointment with an Authorized Nissan Dealer within six months thereafter. *Id.* at ¶ 86. This process ensures that NNA will have adequate supply of replacement headlamps manufactured with the Countermeasure in all geographic locations. *See id.* at ¶ 87. A special notice and the tear-off, prepaid claim form will be sent to the relevant Class Members within five days of the Effective Date expressly notifying them that they fall into this category and explaining in simple terms what they need to do to get free replacements. *Id.* at ¶ 85; *see also* SA, at Ex. D (Out-of-Warranty Notice and Claim Form). Class Members can submit any/all of the claim forms and any necessary documentation online or by mail. SA ¶ 107.

Courts routinely hold that similar class action claims processes are fair and adequate. *See, e.g., In re Packaged Ice Antitrust Litig.*, 2017 U.S. Dist. LEXIS 135232, at *61 (E.D. Mich. Aug. 23, 2017) (approving settlement that included direct mailed claim forms with notice); *accord Davis v. Omnicare, Inc.*, 2021 U.S. Dist. LEXIS 63014, at *6 (E.D. Ky. Mar. 30, 2021); *Blasi v. United Debt Servs., LLC*, 2019 U.S. Dist. LEXIS 198201, at *7 (S.D. Ohio Nov. 15, 2019).

The Settlement also merits approval by reference to other automotive settlements that this Court has approved. For example, this Court has approved settlements with Nissan providing a two-year/24,000-mile warranty extension with a 24,000-mileage limit, and reimbursement of out-of-pocket costs incurred within the extended warranty. *See e.g., Gann v. Nissan North America Inc.*, No. 3:18-cv-00966 (M.D. Tenn.); *Weckwerth, et. al. v. Nissan North America Inc.*, No. 3:18-cv-00588 (M.D. Tenn.) (same). Other courts have approved similar settlements. *See also, e.g., In*

re Nissan Radiator, 2013 U.S. Dist. LEXIS 116720 (S.D.N.Y. May 30, 2013) (granting final approval of class action settlement related to cross-contamination of engine coolant and transmission fluid where settlement relief included reimbursement costs for certain class members which were subject to mileage-related restrictions and included a customer co-payment element); *In re Ford Motor Co. Spark Plug & Three Valve Engine Prods. Liab. Litig.*, 2016 U.S. Dist. LEXIS 188074 (N.D. Ohio Jan. 26, 2016) (granting final approval of settlement arising out of an alleged three-valve engine defect in Ford model vehicles that provided a partial percentage reimbursement for out-of-pocket expenses incurred by class members who had to replace their spark plugs but did not include a warranty extension settlement component).

Here, there is a three-year warranty extension (for a total of six years) without mileage restriction. Replacements made at any time prior to October 25, 2021 are reimbursable, regardless of age or mileage. And, there is an opportunity for a one-time replacement for all vehicles regardless of age of mileage. The relief provided is excellent and merits final approval.

5. Rule 23(e)(2)(C)(iii): The Relief Provided for the Class is Adequate, Taking into Account the Terms of Any Proposed Award of Attorney's Fees, Including Timing of Payment

As set forth fully in Plaintiffs' Motion for Award of Attorneys' Fees, filed contemporaneously herewith, the terms of the proposed award of attorney's fees, including timing of payment, are also fair, reasonable, and adequate. Rule 23(e)(2)(C)(ii). Here, the parties negotiated attorneys' fees and expenses at arm's length with the close involvement of Judge Welsh, and only after all other material terms of the Settlement were agreed. *See* Welsh Decl. at ¶¶ 3-5. The parties reached agreement on the amount of fees with Judge Welsh's "assistance and recommendation." *Id.*

The fees will not diminish the benefits to the class in any respect. Further, the Settlement is not conditioned on the Court's approval of the payment of the attorneys' fees, which are to be considered by the Court separately from the Court's consideration of the fairness, reasonableness, and adequacy of the Settlement. SA ¶ 139. Finally, the Settlement provides that fees approved by the Court will be paid after the Effective Date of the Settlement. *Id.* at ¶ 137. Consistent with best practices, Lead Counsel files contemporaneously herewith a motion for an award of attorneys' fees and expenses prior to the deadline for objections, which will afford Class Members the opportunity to object to the fee request if they wish. *Id.* at ¶¶ 137, 147-152.

All of these terms are routinely found reasonable and adequate by courts in class action settlements. *See, e.g., Macy v. Gc Servs.*, 2020 U.S. Dist. LEXIS 105473, at *8 (W.D. Ky. May 28, 2020) (granting approval of settlement that provided for payment of attorneys' fees separate and apart from the settlement fund); *Manners v. Am. Gen. Life Ins. Co.*, 1999 U.S. Dist. LEXIS 22880, at *84 (M.D. Tenn. Aug. 10, 1999) ("The Court finds that the fee and expense negotiations were conducted at arm's length, only after the parties had reached agreement on all terms of the Settlement. There is no evidence in this case that the Settlement, or the fee and expense agreement, was in any way collusive. Under these circumstances, the Court gives great weight to the negotiated fee in considering the fee and expense request.")

Moreover, as explained in the contemporaneously-filed motion for award of attorneys' fees, the agreed fee amount represents a small fraction of the estimated value of the Settlement and is a less than a 2.12 multiple of counsel's lodestar, which is easily within the range typically held to be reasonable. *See, e.g., In re Oral Sodium Phosphate Sol.-Based Prods. Liab. Action*, 2010 U.S. Dist. LEXIS 128371, at *24 (N.D. Ohio Dec. 6, 2010) ("The Sixth Circuit Court of Appeals has endorsed the use of multipliers…'"); *see also id.* at *27 n.28 (citing Stuart J. Logan, Dr. Jack

Moshman, & Beverly C. Moore, Jr., *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Reports (March-April 2003)) (finding an average multiplier of 3.89 across 1,120 fee awards entered by state and federal courts); *City of Plantation Police Officers' Emples. Ret. Sys. v. Jeffries*, 2014 U.S. Dist. LEXIS 178280, at *48 (S.D. Ohio Dec. 29, 2014) (awarding a lodestar multiplier of 3).

6. Rule 23(e)(2)(C)(iv): There are No Side Agreements Required to be Identified Under Rule 23(e)(3)

Rule 23(e)(3) requires settling parties to "file a statement identifying any agreement made in connection with the proposal." Here, there are no "side agreements" concerning this settlement.

7. Rule 23(e)(2)(D): The Proposal Treats Class Members Equitably Relative to Each Other

The Settlement also treats all Class Members equitably relative to one another. FED. R. CIV. P. 23(e)(2)(D). "For this factor, '[m]atters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief.'" *Fitzgerald v. P.L. Mktg.*, 2020 U.S. Dist. LEXIS 25672, at *32-33 (W.D. Tenn. Feb. 13, 2020) (citing Fed. R. Civ. P. 23(e)(2), 2018 Advisory Committee Notes).

Here, all Class Members who are experiencing headlamp delamination are entitled to a free set of replacement headlamps manufactured with the Countermeasure. Likewise, all Class Members are entitled to reimbursement of prior replacement costs. The Settlement also provides all Class Members the extended six-year warranty coverage, and while some Class Members will already be outside that period as of the Effective Date, the Settlement ensures that they, too, can receive free replacements with the Countermeasure, which in turn will benefit from a one-year parts and labor warranty. These common-sense distinctions among Class Members are reasonable

and appropriate, and courts routinely approve such relief. *See e.g.*, *Fulton-Green*, 2019 U.S. Dist. LEXIS 164375, at *22 (E.D. Pa. Sept. 23, 2019) (approving settlement where "the settlement treats each class member individually" because "[e]ach and every class member can receive a reimbursement specific to their losses"); *In re Nexus 6P Prods. Liab. Litig.*, 2019 U.S. Dist. LEXIS 197733, at *28-29 (N.D. Cal. Nov. 12, 2019) (approving settlement plan that "divides claimants into different groups based on the relative size of their potential claims and distributes funds based on these groups"); *Burrow v. Forjas Taurus S.A.*, 2019 U.S. Dist. LEXIS 151734, at *29 (S.D. Fla. Sep. 6, 2019) (the court found that the settlement treated class members equitably where settlement class members received the benefit of an enhanced warranty service automatically). This factor supports final approval of the Settlement.

8. The Public Interest is Served by this Settlement

Finally, "[t]here is a strong policy favoring settlement in class actions. The public interest weighs in favor of resolving matters fairly and expeditiously." *Peck*, 2019 U.S. Dist. LEXIS 118626, at *22 (citation omitted). Here, that policy is even stronger because dim headlamps pose a potential safety hazard, and the Settlement aims to get safe replacement headlamps into Class Vehicles that experienced delaminated headlamps at no expense to Class Members. *See Smith v. Ohio Dep't of Rehab. & Corr.*, 2012 U.S. Dist. LEXIS 58634, at *71 (S.D. Ohio Apr. 26, 2012). (noting that "creating a safer environment . . . serves the public interest").

Thus, all applicable fairness factors weigh in favor of approval. Respectfully, the Court should approve the Settlement as fair, reasonable, and adequate.

IV. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

The Court preliminarily certified the Class for settlement purposes pursuant to Rules 23(a) and (b)(3). Now, the Court should order final certification for purposes of the Settlement. Class

certification under Rule 23 has two primary components. First, the party seeking class certification must first establish the four requirements of Rule 23(a): (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interest of the class. *In re Auto. Parts Antitrust Litig.*, 2019 U.S. Dist. LEXIS 234448, at *247 (E.D. Mich. Dec. 29, 2019). Second, the Court must find that the class fits within one of the three categories of class actions set forth in Rule 23(b). Certification under Rule 23(b)(3) is appropriate where common issues predominate such that the proposed class is "sufficiently cohesive to warrant certification." *Id.* at *250.

A. The Settlement Class Is Numerous and Ascertainable

The Settlement Class of current and former owners and lessees of 1.43 million Altimas easily meets the requirement of Rule 23(a)(1) that the class is "so numerous that joinder of all members is impracticable." *Garner Props. & Mgmt., LLC v. City of Inkster*, 333 F.R.D. 614, 622 (E.D. Mich. 2020) (quoting *Davidson v. Henkel*, 302 F.R.D. 427, 436 (E.D. Mich. 2014) ("[I]t generally is accepted that a class of 40 or more members is sufficient to satisfy the numerosity requirement.")).

The Class is also readily ascertainable.[11] For a class to be ascertainable, the class definition must enable the Court "to resolve the question of whether class members are included or excluded from the class by reference to objective criteria." *Rikos v. P&G*, 799 F.3d 497, 525 (6th Cir. 2015) (quoting *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 539 (6th Cir. 2012)). Class Members

[11] Although Rule 23(a) has no express ascertainability requirement, some courts hold that it is an implicit requirement of class certification. *See Cole v. City of Memphis*, 839 F.3d 530, 541 (6th Cir. 2016).

here can readily identify themselves by objective criteria, and virtually all Class Members can be identified from state motor vehicle registration records.

B. There Are Common Questions of Law and Fact

The Settlement Class also easily satisfies the second requirement of Rule 23(a)(2), that "there are questions of law or fact common to the class." *Garden City Emples. Ret. Sys. v. Psychiatric Sols., Inc.*, 2012 U.S. Dist. LEXIS 44445, at *92 (M.D. Tenn. Mar. 29, 2012) (citing Fed. R. Civ. P. 23(a)(2)). "The commonality test requires only a single issue common to all class members." *Id.* "A class meets the commonality requirement even if questions peculiar to individual class members remain after a determination of defendant's liability." *Id.*; *see also Sprague v. General Motors Corp.*, 133 F.3d 388, 398 (6th Cir. 1998) (noting that the test is whether there is a "common issue the resolution of which will advance the litigation").

In cases alleging defects in automobiles, the issue of whether a defect exists is usually sufficient to meet the commonality requirement. *See, e.g., Gann v. Nissan North America, Inc.*, No. 18-cv-00966 (M.D. Tenn. Mar. 10, 2020), at ECF No. 130 (certifying settlement class where common questions existed "regarding the reliability, design and performance of the type of Continuously Variable Transmission in the Class Vehicles at issue"); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006) (affirming district court's decision that commonality was satisfied by the same alleged vehicle defect); *Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 524 (C.D. Cal. 2012) (alleged defect was common issue); *Alin v. Honda Motor Co.*, 2012 U.S. Dist. LEXIS 188223, at *13 (D.N.J. Apr. 13, 2012) (alleged defect was "a common thread among all class members . . . sufficient to satisfy the commonality requirement").

Here, in addition to many other common questions that are described below under the predominance inquiry, the alleged defect is a common issue.

C. Plaintiffs' Claims Are Typical of The Class

The Plaintiffs' claims are also typical of the Class, satisfying the Rule 23(a)(3) requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Typicality is satisfied where class "representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 542 (6th Cir. 2012); *Daffin*, 458 F.3d at 552 ("Daffin is typical because her car has the same defective throttle body assembly as the other class members."). "[A] plaintiff's burden to establish typicality is not onerous." *Campbell v. Hope Cmty. Credit Union*, 2012 U.S. Dist. LEXIS 87697, at *14 (W.D. Tenn. June 25, 2012).

Plaintiffs' claims here are typical of the Class. All Plaintiffs' and Class Members' claims arise out of the purchase or lease of a Class Vehicle equipped with allegedly defective headlamp assemblies, and their claims are based upon the same legal theories. Moreover, while not a requirement, it is worth noting that the Plaintiffs are residents of different geographic regions—Florida, Ohio, and California—ensuring that they are representative of Class Members across the country. Plaintiffs are typical of the Class they represent.

D. Plaintiffs and Class Counsel Have Fairly and Adequately Protected The Interests Of The Class

In addition, "the representative parties will fairly and adequately protect the interest of the class," as required by Rule 23(a)(4). "To establish adequacy of representation, plaintiffs must satisfy two elements." *Connectivity Sys. Inc. v. Nat'l City Bank*, 2011 U.S. Dist. LEXIS 7829, at *24 (S.D. Ohio Jan. 25, 2011). "First, the representative must have interests common with the unnamed members of the class. Second, it must be shown that the representatives—through qualified counsel—will vigorously prosecute the interests of the class." *Id*. (internal citations

omitted). The adequacy inquiry under Rule 23(a)(4) "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 429 (6th Cir. 2012) (*quoting Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)). "Although significant conflicts make a plaintiff an inadequate class representative, differently weighted interests are not detrimental." *Id.*

Here, each of the Plaintiffs purchased a Class Vehicle, and each suffered loss of headlamp brightness due to delamination. *See* Plaintiffs' Decls., at ¶ 3. They are each aware of their duties as Class Representatives and have agreed to abide by those responsibilities. *Id*. at ¶ 4. There is no conflict between Plaintiffs and other Class Members. Plaintiffs have also vigorously represented the Class. They worked with Lead Class Counsel to serve NNA with pre-suit notification of claims and demand for relief, assisted in drafting and reviewing the Complaint, communicated and advised across the settlement negotiations, and understand their duties as Class Representatives. *Id.* at ¶¶ 4-10.

Further, Plaintiffs retained highly-experienced counsel to represent them and the Class. *See generally,* Mathews P.A. Decl. Lead Class Counsel devoted substantial resources to the case and negotiated a very strong settlement. The representation they provided easily meets the adequacy standard. *See, e.g., Blasi v. United Debt Servs., LLC,* 2019 U.S. Dist. LEXIS 198201, at *13 (S.D. Ohio Nov. 15, 2019) (finding adequacy satisfied where class counsel were "experienced class action practitioners"); *In re Skechers Toning Shoe Prods. Liab. Litig.*, 2012 U.S. Dist. LEXIS 113641, at *13 (W.D. Ky. Aug. 13, 2012) (citing *Smith v. Ajax Magnethermic Corp.*, 2007 U.S. Dist. LEXIS 85551, at *10 (N.D. Ohio Nov. 7, 2007) ("Courts have previously approved class counsel with experience in conducting class actions as adequate.")); *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, 2009 U.S. Dist. LEXIS 119870, at *23 (W.D. Ky. Dec. 22,

2009) (finding adequacy satisfied where class counsel "assert extensive experience in class litigation").

E. The Requirements Of Rule 23(b)(3) Are Met

Certification is also warranted under Rule 23(b)(3) because "questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently" settling the controversy.

1. Common Issues Predominate for Settlement Purposes

The class action device achieves economies over individual litigation where, as here, common issues predominate. *Ham v. Swift Transp. Co.*, 275 F.R.D. 475, 483 (W.D. Tenn. 2011) (citing *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 448 (6th Cir. 2002)). "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." *Id.* "This requirement is satisfied when the questions common to the class are at the heart of the litigation." *Powers v. Hamilton Cnty. Public Defender Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007).

In automotive defect cases, courts routinely find a predominance of common issues that are capable of resolution by common evidence and would be resolved for all Class Members on a class-wide basis. *See e.g.*, *Daffin*, 458 F.3d at 554 ("The issues that predominate include: (1) whether the throttle body assembly is defective, (2) whether the defect reduces the value of the car, and (3) whether Ford's express 'repair or replace' warranty covers the latent defect at issue in this case."); *Asghari v. Volkswagen Grp. of Am., Inc.*, 2015 U.S. Dist. LEXIS 188824, at *38 (C.D. Cal. May 29, 2015) (collecting cases and holding: "Indeed, courts faced with motions for class

certification in automobile design defect cases routinely find that common questions such as those present here suffice to satisfy the predominance requirement.").

Here, common questions of law and fact abound, including: the existence and nature of the Defect in Class Vehicles, NNA's knowledge of the alleged Defect, including the timing of NNA's knowledge; whether the alleged Defect presents a safety issue; whether the alleged Defect violated express and implied warranties; whether NNA failed to disclose the alleged defect; whether and the extent to which the alleged defect affected the value of the Class Vehicles; and numerous other issues that would ultimately be tried on a class wide basis.[12] ECF No. 1 at ¶ 66.

2. A Class Action Is A Superior Means of Resolving This Controversy

"The superiority requirement of Rule 23(b)(3) requires a court to balance the merits of a class action in terms of fairness and efficiency." *Kimber Baldwin Designs*, 2016 U.S. Dist. LEXIS 173481, at *16-17. "Rule 23(b)(3) superiority factors to be considered in determining the superiority of proceeding as a class action compared to individual methods of adjudication include: (1) the interests of the members of the class in individually controlling the prosecution of separate actions; (2) the extent and nature of other pending litigation about the controversy by members of the class; (3) the desirability of concentrating the litigation in a particular forum; and (4) the difficulties likely to be encountered in management of the class action. *In re Auto. Parts*, 2019 U.S. Dist. LEXIS 234448, at *251 (citing FED. R. CIV. P. 23(b)(3)). "The fourth superiority factor is not relevant when a court is asked to certify a settlement only class because the difficulties in managing trial are extinguished by the settlement." *Id.*

[12] Common issues can predominant, and class certification can be appropriate, even if there might be some individual issues that cannot be resolved on a class wide basis. *See e.g.*, *Kimber Baldwin Designs, LLC v. Silv Communs., Inc*., 2016 U.S. Dist. LEXIS 173481, at *13 (S.D. Ohio Dec. 15, 2016) ("individual damage determinations… are no bar to class certification, even where some class members suffered no harm at all.").

Here, the Settlement provides certain, prompt relief and avoids the substantial judicial burdens and risk of inconsistent rulings inherent in adjudicating the same issues in individual actions. Further, because the individual recoveries are relatively low when compared with the costs of litigation, it is unlikely that Class Members would file individual actions. Requiring Class Members to litigate their claims individually "is a vastly inferior method of adjudication" in a case like this. *See Daffin*, 458 F.3d at 554. The Settlement provides "an efficient and cost-free means" for class members to advance their individual claims for out-of-pocket reimbursement related to the Defect. *Manners v. Am. Gen. Life Ins. Co.*, 1999 U.S. Dist. LEXIS 22880, at *52 (M.D. Tenn. Aug. 10, 1999). Accordingly, a class action is the superior method to fairly and efficiently adjudicate the Class Members' claims against NNA.

For these reasons, the Court should certify the Settlement Class in this case.

V. THE BEST PRACTICABLE NOTICE WAS PROVIDED

Settlement Class Members have also been provided the best practicable notice. *See* FED. R. CIV. P. 23(c)(2)(B). The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Both the content and the means of dissemination of the notice must satisfy the "best practicable notice" standard.

Foremost here, the Mailed Notice and a reimbursement claim form will be sent via first class mail directly to over 3.2 million Class Members that were identified through state motor vehicle registration records. *See* Lucchesi Decl. at ¶ 10. Direct mail notice alone typically satisfies due process. *UAW v. GMC*, No. 05-CV-73991-DT, 2006 U.S. Dist. LEXIS 14890, at *103 (E.D.

Mich. Mar. 31, 2006) ("Notice by direct mail satisfies due process, even when it is not combined with publication notice…").

In addition, however, the notice program here includes publication in People magazine, a PR Newswire press release, and a digital media campaign that will generate over 5.7 million impressions. Lucchesi Decl. at ¶¶ 13-14. Notice is also provided on the Settlement website and Lead Class Counsel's website. *Id.* at ¶ 15. And, Lead Class Counsel have communicated directly with over 2,600 Class Members. *See* Mathews F.A. Decl. at ¶ 29. Further, an Out-of-Warranty Notice will be mailed to Class Members whose Extended Warranties will already be expired as of the Effective Date to specifically notify them of the opportunity to receive a free set of replacement headlamps, and an Effective Date Notice will also be mailed to Class Members whose Extended Warranty will expire within twenty-one days of the Effective Date to ensure that these Class Members know that the Effective Date has occurred and to provide them with a 30-day grace period to obtain replacements from their Authorized Nissan Dealers. SA ¶ 117.

Taken together, the notice satisfies Due Process and provides the "best notice that is practicable under the circumstances . . . ." FED. R. CIV. P. 23(c)(2)(B); *see also, e.g.*, *Pelzer v. Vassale*, 655 F. App'x 352, 368 (6th Cir. 2016) ("Class notice [must] be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" and must "fairly apprise the prospective members of the class of the terms of the proposed settlement so that class members may comet o their own conclusions about whether the settlement serves their interests"). The notice plan provided the best notice practicable under the circumstances, and includes all content required by Rule 23 and comports with due process.

VI. THE COURT SHOULD APPOINT CHIMICLES SCHWARTZ KRINER & DONALDSON-SMITH AS LEAD CLASS COUNSEL AND SPRAGENS LAW PLC AS ADDITIONAL CLASS COUNSEL

The Court should also reaffirm the appointment, set forth its preliminary approval Order (ECF 29, at ¶ 6), of Timothy N. Mathews, Samantha E. Holbrook, Alex M. Kashurba, and Zachary P. Beatty of the law firm of Chimicles Schwartz Kriner & Donaldson-Smith LLP as Lead Class Counsel and John Spragens of Spragens Law PLC as additional Class Counsel.

Under Rule 23(g), the Court considered:

> (i) the work counsel has done in identifying or investigating potential claims in the action;
> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
> (iii) counsel's knowledge of the applicable law; and
> (iv) the resources that counsel will commit to representing the class . . . .

Proposed Lead Class Counsel devoted substantial time, effort, and expense identifying and investigating the claims in this action since July 2018. To their knowledge, no other attorneys ever pursued the claims at issue here. Thus, absent their efforts, the class members may never have received any relief.

Moreover, Lead Class Counsel have considerable experience in litigating complex class actions, and they have a thorough knowledge and understanding of the laws applicable to Plaintiffs' claims for relief. Lead Class Counsel have also devoted considerable resources to pursuing and settling the action and achieved an excellent result for Class Members. *See* Mathews P.A. Decl. at ¶¶ 8-25.

Accordingly, the Rule 23(g) factors weigh in favor of reaffirming the appointment of Timothy Mathews, Samantha Holbrook, Alex Kashurba, and Zachary Beatty as Lead Class Counsel for the Settlement Class. *See, e.g.*, *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, 2009 U.S. Dist. LEXIS 119870, at *28-29 (W.D. Ky. Dec. 22, 2009) (considering plaintiffs' counsel's class action experience and nearly five months of arm's length negotiations

to reach a settlement agreement in finding plaintiffs' counsel would fairly and adequately represent the interests of the class as co-lead counsel for the settlement class).

John Spragens is local counsel for Plaintiffs and is likewise an experienced class action practitioner and has provided able assistance to the Class members via his knowledge of local practice and procedure.

CONCLUSION

Plaintiffs respectfully request that the Court enter the proposed Final Order and Judgment.

DATED: September 20, 2021

Respectfully submitted,

/s/ Timothy N. Mathews
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Additional Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2021, I electronically filed the foregoing PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF SETTLEMENT AND ENTRY OF FINAL ORDER AND JUDGMENT with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

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/s/ Timothy N. Mathews
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Attorney for Plaintiffs