

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA—WESTERN DIVISION

**HUMBERTO DANIEL KLEE AND
DAVID WALLAK, individually, and on
behalf of a class of similarly situated
individuals,**

Plaintiffs,

v.

NISSAN NORTH AMERICA, INC.,

Defendant.

No. 2:12-cv-08238-BRO-PJW

Hon. Beverly Reid O’Connell

**OPPOSITION TO
PLAINTIFFS’ MOTION FOR
FINAL APPROVAL OF CLASS
ACTION SETTLEMENT**

For the reasons discussed in their October 15 Objection and those stated below, Objectors respectfully urge this Court to disapprove the proposed final settlement or at least postpone final approval until the parties have presented sufficient information to support approval.

1. Insufficient Evidence Due to Limited Discovery Efforts

The motion seeking approval of the settlement makes explicit what could only be inferred before: Plaintiffs’ Counsel negotiated a settlement in the case “prior to production of any discovery” by Nissan. Motion for Final Approval 10.

That's right, Plaintiffs' Counsel sat down to the negotiating table and cut a deal, without knowing a single thing about what cards their opponents held. For all counsel knew—for all they know even today—there are memoranda and reports in Nissan's internal files disclosing that the LEAF's Lithium-Ion battery suffers from a variety of defects, and that Nissan nevertheless decided to go to market with it. If the case settles, these documents may never come to light.

Objectors don't understand how competent lawyers can hope to negotiate a favorable settlement without first discovering what adverse information Nissan's management considered at the time they sold 18,000+ electric vehicles in the United States, and many more abroad.

Plaintiffs' Counsel applaud themselves heartily for the brilliant settlement they supposedly extracted from Nissan, based entirely on the fact that Nissan strenuously denied any liability until it agreed to settle. But defendants always deny liability when faced with a meritorious lawsuit. Merck didn't roll over and play dead when it was first sued over the people it killed while raking in billions selling Vioxx. Merck was brought to heel only when counsel obtained—through discovery—internal documents making it clear that Merck continued hawking a drug that it knew induced heart attacks in unsuspecting patients. See generally In re Vioxx Prods. Liab. Litig., 802 F. Supp. 2d 740 (E.D. La. 2011) (discussing

“extensive discovery” undertaken by various law firms).

There are countless other cases where companies have played possum until they were confronted with internal documents proving them liable. See, e.g., National Association of Attorneys General, Master Settlement Agreement (1998) (multi-state tobacco litigation); Matthew T. Lee, The Ford Pinto Case and the Development of Auto Safety Regulations, 1893–1978, 22 Bus. & Econ. Hist. 390, 399–400 (1998) (Ford Pinto exploding gas tank); Erin Brockovich (Universal Studios 2000) (polluted groundwater in Hinkley, California). The simple fact is, no one knows better the problems with a vehicle or any other product than the company that makes it. It’s their job to know, and it’s the job of the lawyers suing them to find out everything the company knows and hopes to conceal.

Plaintiffs’ Counsel have overlooked their basic responsibility to discover the facts. Nissan has disclosed absolutely nothing about the battery that is at the heart of this lawsuit. See pp. 18–22 infra. Plaintiffs’ Counsel negotiated a confidentiality agreement so they could gain access to Nissan internal documents and this Court approved it. See Dkt. #32. But Plaintiffs’ Counsel did not engage in any discovery by the time they sat down to negotiate. They therefore had no idea what cards Nissan held and they held no cards of their own. They pretty much had to take whatever “settlement” Nissan handed them because they could make no

credible threat that they would go to trial. This Court should not approve the settlement unless and until Plaintiffs' Counsel conduct vigorous discovery and can represent to the Court that there is nothing in Nissan's files supporting any of the bases of liability alleged in the FAC.

Acknowledging the lack of pre-settlement discovery, Plaintiffs' Counsel claim that they engaged in some sort of post-settlement "confirmatory discovery" process. Motion for Final Approval 23. This is plainly inadequate. First, it came too late, as the settlement was already locked. Had Nissan produced post-settlement documents that disclosed a new basis for liability, there is no provision for adjusting the settlement upward. The discovery was designed only to confirm the existing settlement, not to improve on it.

Second, this was hardly what one would call discovery: Nissan provided whatever it wanted, and Plaintiffs' Counsel passively reviewed it. Nissan was under no order to produce anything and plaintiffs were in no position to know whether anything of significance was left out. This was one hand washing the other, not arm-wrestling.

Finally, and perhaps most damning, by the time they were reviewing these documents, Plaintiffs' Counsel had locked plaintiffs into a settlement that guaranteed counsel a \$1.9 million fee. At that point, Plaintiffs' Counsel no longer

had an incentive to look for evidence establishing liability; their incentive was to get the settlement finalized so they could cash in their bounty. Finding a smoking gun was the last thing counsel wanted, as it could call into question their judgment in having settled the case without having conducted discovery.

If the Court has any doubt about the lameness of the post-settlement discovery, it should examine the list of documents Plaintiffs' Counsel claimed to have reviewed. It can be found in a short paragraph at the bottom of page 10 and top of page 11 of the Motion for Final Approval. What does one find there? Customer information; disclosure forms (more on that below); LEAF Owner's Manuals; Warranty Information; customer complaints; sample repair records (selected by Nissan) and sales data. The rest has to do entirely with communications about how the settlement is best implemented.

What is not on the list are any of the kinds of documents disclosed in the Vioxx, Pinto, tobacco and similar cases: No Engineering studies prepared by Nissan in designing and constructing the vehicle; no internal memoranda discussing battery range and longevity; no reports comparing the Nissan Li-Ion battery with that offered by its competitors; no memoranda discussing the pluses and minuses of adopting a passive cooling system rather than an active cooling system, as used by all other competitors; no incident reports discussing problems

encountered in designing the vehicle and corrections made in light of those reports; no internal memoranda among any Nissan management in response to the flood of consumer complaints about the deterioration of the battery; no internal documents disclosing whether Nissan had already decided, prior to the opening of settlement negotiations, to implement the extended warranty that it supposedly adopted because of the settlement.

Significantly, Plaintiffs' Counsel did not hire an engineer or technical expert to help evaluate the information obtained from Nissan, or to help them determine whether it supports the significant technical claims in the complaint that are discussed at pp. 16–26 of Objectors' October 15 submission. See Dkt. #50. How is it possible to settle a major consumer case involving cutting-edge technology without ever discussing the claims with an engineer? One can be sure that Nissan's lawyers had armies of engineers and technical experts to consult before reaching settlement. Aren't class members entitled to the same level of expertise on their side?

There is no apparent justification for locking into a binding settlement without taking a hard look at the evidence and obtaining the advice of one or more technical experts. Counsel here not only entered into negotiations blind as to their own hand and that of their opponent, they kept the blindfold firmly in place

throughout the so-called “confirmatory discovery” process. While Objectors are willing to believe that Plaintiffs’ Counsel were not colluding with Nissan (based on their private oral representations), Objectors are not convinced that Plaintiffs’ Counsel acted diligently, or in the best interests of the class. As a result, no one—except Nissan—has any idea whether the settlement is a good deal or a bad deal for the class.

Plaintiffs’ Counsel claim the settlement is a great deal, but this is just a guess, and they have a strong financial incentive to guess that way. This Court has no basis for making that decision for the simple reason that the parties have not provided sufficient information to do so. See pp. 18–22 infra. The Court should postpone approval of any settlement until the parties have provided sufficient documentation on which the Court can make a reasoned judgment as to the adequacy of the settlement.

2. The “At Least Nine Bars” Issue

Plaintiffs’ Counsel work overtime to puff up the settlement by repeatedly claiming the new warranty guarantees “at least nine bars” on the battery’s capacity gauge. Motion for Final Approval 2, 12, 13, 15 (emphasis sometimes in original). It’s unclear what advantage Plaintiffs’ Counsel are seeking to gain from this, but

the term seems to imply that class members will actually get more than a partially patched-up battery.

This is just not true. The settlement agreement only requires Nissan to “cover[] any repairs or replacements needed to return battery capacity to a level of nine remaining bars.” Settlement Agreement 10. The Class Notice, which was approved by this Court, only binds Nissan to provide “coverage against capacity loss below nine bars.” Class Notice 4. The warranty sticker Nissan sent to LEAF owners guarantees the battery against “capacity loss below nine (9) bars.” Nothing binds Nissan to provide its customers with one scintilla more than nine bars of capacity.

Even if the settlement agreement, the class notice and the sticker said Nissan would provide “at least nine bars” or “nine bars or more,” so what? “At least” and “or more” aren’t enforceable legal terms: No LEAF owner subject to this settlement could later complain that Nissan chose to restore his battery to just nine bars even though it could have fully restored it; this Court could certainly not hold Nissan in contempt if it restored class members’ batteries to exactly nine bars. Exactly nine bars is “at least nine bars,” and any consumer who expected more would be out of luck. The Court should disregard counsel’s last-minute attempt to slap lipstick on this porcine settlement.

3. The “Caused-by” Issue

Plaintiffs’ Counsel also struggle hard to give the impression that Nissan is offering the extended warranty as a result of counsel’s deft negotiating skills. First of all, it doesn’t matter: As explained in Objectors’ October 15 submission, Nissan has already implemented the warranty and can’t pull it back, so the class gains nothing (and loses much) if the settlement goes forward. Objection, Dkt. #50, 3–14.

But it’s not true, in any event. Plaintiffs’ Counsel asks the court to draw an inference from the fact that “[p]rior to the filing of this lawsuit, Nissan did not provide any free comprehensive warranty coverage for battery capacity loss to Class Members,” when after the settlement it did. Motion for Final Approval 3. This is the logical fallacy known as “post hoc ergo propter hoc.” Antecedence doesn’t prove causation.

Plaintiffs’ Counsel suggests—without actually saying—that Nissan was unaware of the problems with its battery until Plaintiffs’ Counsel convinced them of it. *Id.* at 6–8. The record is to the contrary. It’s perfectly clear from the materials Plaintiffs’ Counsel have provided that Nissan was deluged by complaints from consumers, which required them to issue a stream of public statements claiming that everything was hunky-dory with the battery: “We don’t have a

battery problem,” Lurie Decl. in support of Motion for Final Approval Ex. B (statement of Nissan Executive Vice President Andy Palmer); “The cars and the battery packs are behaving as we expected,” *id.* at Ex. D (statement of Nissan spokesman Mark Perry); “The Nissan LEAFs inspected in Arizona are operating to specification,” *id.* at Ex. E (statement of Nissan Senior Vice President, Research and Development, Carla Bailo). Nissan obviously was aware of the battery problem and was worried enough about it to issue repeated public denials. But there is no reason to believe those statements were true.

We know for a fact that Nissan lies to its customers. Nissan is, after all, engaging in a huge deception right now by representing to this Court that it is implementing the warranty in order to settle its case, while telling its customers that it’s doing so to “improve our customers’ satisfaction” and “put customer minds at ease.” Lurie Decl. in Support of Motion for Final Approval Ex. G. While we don’t know to whom Nissan is lying—this Court, its customers or both—we know for sure that, if one accepts Plaintiffs’ Counsel’s representations, Nissan is lying to someone as a matter of corporate policy.

Nissan’s past public statements that the LEAF battery has no problems at all must therefore be discounted as just so much corporate posturing. What was going on inside of Nissan is a whole different story—a story about which we can only

guess because Nissan has told us nothing about it and Plaintiffs' Counsel did not engage in discovery. For all we know—and this is very likely—Nissan was desperate to quell consumer complaints and came up with this bogus warranty on its own, then decided to sell it as some great boon to gullible Plaintiffs' Counsel, who snapped it up like a hungry trout.

There's no reason the Court should accept Plaintiffs' Counsel's self-serving narrative. The evidence in the record could just as easily support the following series of events:

- Numerous customers complain about the undisclosed issues with the LEAF's battery capacity and effective range.
- Nissan recognizes that it has a problem on its hands and realizes it must do something to prevent loss of customers to other EV manufacturers such as Tesla, Ford and Honda.
- Nissan decides to offer an extended warranty which it plans to roll out in early 2013. The timing is important to stem the loss of confidence in its product and the exodus of customers to other brands.
- Plaintiffs' Counsel brings this suit, oblivious to Nissan's decision to offer an extended warranty.
- Nissan makes a take-it-or-leave-it offer to settle for the extended warranty it was planning to roll out all along. Nissan throws in \$1.9 million in attorney's fees and \$5,000 for each of the Named Plaintiffs to sweeten the deal.

It's entirely possible Plaintiffs' Counsel were snookered in just this way.

But why speculate? Nissan is a party to this case. If Nissan was, in fact, induced to offer the warranty extension as a result of this lawsuit, it can file a declaration saying so. This Court shouldn't just accept Plaintiffs' Counsel's self-interested speculation as to why Nissan extended the LEAF warranty.

4. The “Very Difficult Case” Issue

Plaintiffs' Counsel congratulate themselves for having settled a case that is fraught with risk, delay and difficulty. But counsel offers nothing more than generalities to support this self-serving assertion. They cite no facts and they cite no law supporting their claimed difficulties. This is not surprising, as they did no discovery before plunging into a settlement, and they seem to have done no legal research or analysis as to any of the significant issues in the complaint. Even on this paltry record, however, it seems perfectly clear that plaintiffs have an excellent case as to some of their claims—one that has a significant chance of success with only a modicum of diligence and zealousness on the part of counsel. (As to the other claims, serious discovery would have to be done to determine their viability.)

The FAC makes a claim for violation of the Magnuson-Moss Warranty Act, First Amended Complaint ¶¶ 122–29, as well as various other consumer protection laws. *Id.* ¶¶ 79–121, 130–46. There is a significant body of law interpreting the

Magnuson-Moss Act, and it can be summarized as follows: Warranties must be “clear and concise.” All material terms must be disclosed to consumers in “simple language in the warranty itself, and [] the warranty must consist of a single, understandable document made available prior to sale to the consumer.”

Cunningham v. Fleetwood Homes of Georgia, Inc., 253 F.3d 611, 620–22 (11th Cir. 2001); see also 15 U.S.C. § 2302. It is well established that warranty terms must be in plain English, must be construed as would a reasonable consumer and must be construed against the warrantor. See Wilbur v. Toyota Motor Sales, U.S.A., Inc., 86 F.3d 23 (2d Cir. 1996); see also 15 U.S.C. § 2310(c)(2).

The Nissan LEAF was sold with a warranty for the entire car for 3 years or 36,000 miles and a separate warranty covering the battery for a term of 8 years or 100,000 miles. Objectors do not dispute that Nissan disclosed, at the time it sold the 2011 and 2012 LEAF, that the battery capacity, and hence the car’s driving range, would deteriorate over time. The question is, what disclosures did Nissan make about the rate of deterioration, the causes of deterioration and the usable range of the electric vehicle?

A great deal of information could be obtained on these points by scouring the Internet, but it’s unnecessary. Why? Because, with the sale of every LEAF, Nissan provided a lengthy disclosure document dealing with the Li-Ion battery,

which it required every buyer to read and sign. One of these Objectors (to whom the other delegated this responsibility) signed it, but not before reading it carefully and committing key parts of it to memory. A copy of this document is attached as Exhibit A; Objectors believe that a similar or identical document was signed by every buyer or lessor of 2011 and 2012 LEAFs.

This document, which Objectors will refer to as the Battery Attrition Disclosure (BAD), contains a significant number of disclosures and warnings—it goes on for 4 single-spaced pages in 10-point type, including such things as preferred charging methods, warnings about the use of certain medical devices and the fact that “as the battery ages, capacity and range decline.” Ex. A at 2 (emphasis added). The BAD states that “the battery is expected to maintain approximately 80% of its initial capacity after 5 years of normal operation and recommended care,” id. at 3, and it warns that “[q]uick charging the vehicle more than once per day” is one of the factors that “will affect and may hasten the rate of capacity loss.” Id.

A reasonable consumer would assume that the BAD document contains all disclosures and warnings relevant to the use of the Lithium-Ion battery. That is certainly what Objectors assumed, and they consider themselves to be reasonable, educated people.

In fact, however, two highly significant facts that bear directly and materially on the deterioration of battery capacity are omitted from the BAD document. First, the BAD says nothing at all about the fact that the Li-Ion battery deteriorates as a function of how many miles the car is driven and, consequently, how often the battery is re-charged.

Second, and equally significant, the BAD says nothing about the precipitous loss in battery capacity from charging the battery fully. That's right: In the midst of several pages of disclosures and warnings, largely focused on battery capacity, range and deterioration thereof, there is no mention of the fact that charging the battery to its full capacity on a daily basis dramatically reduces the battery's life. Nissan has made this very clear in its more recent public disclosures: "Other factors that will affect and may hasten the rate of capacity loss include . . . sustained high battery state of charge (caused, for example, by frequently charging to 100% state of charge and/or leaving the battery above 80% state of charge for long periods of time)." See <http://goo.gl/ozjhwS> (statement of Andy Palmer, Nissan Executive Vice President, on December 27, 2012). Obviously, this is a fact that was well known and documented in the industry, but Nissan said nothing about it in the BAD document that it forced every buyer to read and sign at the time it sold its vehicles.

Both of these omitted facts are of immense significance to the use and value of the LEAF vehicle to a potential owner. The fact that the battery cannot regularly be charged above 80% capacity without hastening its deterioration drastically reduces the usefulness of the vehicle. Plaintiffs' Counsel makes light of this fact, suggesting it is only a recommendation, which consumers are free to ignore. Motion for Final Approval 15. But they can't deny that this is the kind of fact a reasonable consumer would want to know before plunking down in excess of \$40,000 on an experimental vehicle already suffering from severe range and use limitations. Can anyone doubt that a reasonable jury could easily conclude that failure to disclose this fact violates the Magnuson-Moss Warranty Act, and is deceptive under the various other consumer fraud theories averred in the complaint? The matter is so clear-cut, a skilled plaintiffs' lawyer might win it on summary judgment.

Equally material is the disclosure about the relationship between miles driven and the deterioration of battery capacity. On reading the BAD document, which speaks only about deterioration of the battery as it ages, Objectors inferred that the best strategy for deriving maximum value from their investment was to rack up the miles early in the life of the battery, before the battery started losing capacity on account of age.

Consistent with this strategy, Objectors have now logged almost 40,000 miles on the vehicle odometer, only to learn that what deteriorates the battery is actually the number of miles driven. A reasonable jury could easily conclude that Nissan's knowing failure to disclose the relationship between miles driven and battery capacity loss constitutes the concealment of a material fact, in violation of the Magnuson-Moss Act and the sundry other consumer protection statutes alleged in the FAC.

Winning this case on the merits is not, as Plaintiffs' Counsel claim, a task requiring the skills of Clarence Darrow or Abe Lincoln. What it does take is Plaintiffs' Counsel who are committed to winning meaningful relief for the class, rather than just easy money for themselves. With \$1.9 million in fees hanging out there for Plaintiffs' Counsel, they have every incentive to make it sound like winning this case is very difficult and chancy. The Court should not be taken in by this; winning the case would be relatively easy, if only counsel had an incentive to do so. The Court should give counsel that incentive by disapproving the settlement and the attorney's fees, until and unless counsel actually win the case or come up with a settlement that provides the class some meaningful relief.

5. The Proffered Valuation of the Settlement is Bogus

Plaintiffs' Counsel claims that they have obtained a settlement worth "conservatively" \$38 million and as much as \$200 million. Motion for Final Approval 22. Say what?! It is obvious that the \$200 million "estimate" is worthless as it is based on the assumption that every single one of the 18,000+ Nissan LEAFs will have their battery replaced by a new battery. Johns Decl. ¶ 16. Counsel should be ashamed to even mention this number.

The \$38 million estimate is also a pipe dream for four separate reasons: First, this valuation assumes that defective batteries will be replaced rather than repaired. But the settlement provides that batteries that fall below 9 bars will be repaired to bring them up to 9 bars; batteries will be replaced only "if necessary." Settlement Agreement 4–5. No one explains why or when it would become "necessary" to replace the battery; the decision, in any event, is left entirely to Nissan, as the settlement expressly denies LEAF owners the right to a new battery. Id. Given the settlement's insistence that the battery will only be brought up to 9 bars, it's clear that, in the ordinary case, the battery will only be repaired, so the assumption that they would all be replaced is false. Plaintiffs' valuation expert candidly admits that he doesn't know what it would cost to repair a degraded Li-Ion battery because Nissan has not provided this information, Johns Decl. ¶ 11,

so he bases his “valuation” on the counter-factual assumption that all degraded batteries will be replaced by new batteries.

Second, Plaintiffs’ valuation expert assumes that when batteries are replaced, they will be replaced by new batteries, and he uses what he believes to be the cost of new batteries in his valuations. Johns Decl. ¶¶ 13–15. But the settlement expressly gives Nissan the right to use refurbished batteries when replacement is “necessary.” Settlement Agreement 4–5. The expert hazards no guess as to the cost of refurbished batteries; he uses, instead, the supposed cost of new batteries. What reason is there to believe that Nissan will use new batteries when the settlement gives it the right to use cheaper refurbished batteries?

Third, even the cost of the new batteries is guesswork because Nissan has provided “[n]o information . . . with respect to the cost of the Lithium-ion batteries that are the subject of this new warranty coverage.” Johns Decl. ¶ 11. The expert, instead, uses figures he derives from “an article published by cleantechnica.com in June 2013, citing a study by Deutsche Bank.” Id. ¶ 12 n.2 The article is not included and there is no hyperlink provided to pinpoint where it appears on the cleantechnica website. There is no explanation as to how Deutsche Bank got its information or why it should be believed. The \$9,600 figure Johns uses as the core of his valuation is entirely speculative and unfounded.

Finally, and perhaps most significant, the expert bases his valuation on an assumption about the rate at which batteries will deteriorate sufficiently to trigger rights under the new warranty. Specifically, he assumes that 25% of the vehicles in certain hot-weather states (like California and Arizona) will fall below 9 bars within the warranty period, and 5% of those in cold-weather states. Id. ¶ 22. But how does the valuation expert come up with 25% and 5%? He does not say. As best one can tell, he pulls those figures out of his ear. But Johns is an expert in valuation, not electrical engineering. He claims no expertise as to the rate at which Lithium-Ion batteries deteriorate, so he has no way of knowing or even making an educated guess. Instead, he engages in pure guesswork, or what he calls assumptions. A change in the assumptions from 25% to 3% and from 5% to 1% would dramatically change the value of the settlement even if all else remained the same.

Ultimately, the problem with the valuation is precisely the same as with the rest of the settlement: Plaintiffs' Counsel have not done their homework. They did not obtain the technical information necessary for their valuation expert to make a reasoned estimate of the value of the settlement. They did not obtain from Nissan the cost of repair, or hire an engineer to provide a reasoned estimate as to what it would cost to repair a degraded battery. They did not provide any

information as to how often and under what circumstances it will be “necessary” to replace a degraded battery rather than repairing it. They did not obtain from Nissan the cost of a refurbished battery (or new battery for that matter). They did not obtain any technical information on which to make a reasoned judgment as to how many of the 18,000+ vehicles out there are likely to be entitled to service under the new warranty. Objectors respectfully suggest that it’s an insult to this Court for Plaintiffs’ Counsel to present such an obviously worthless valuation.

And where is Nissan in all this? Nissan, after all, is a party to the settlement and presumably wishes it to be approved. It has all the facts and figures a valuation expert would need to make a reasoned judgment. It knows how much new and refurbished batteries will cost; it knows how much labor it takes to install them; it knows the likely cost to repair a degraded battery; it knows under what circumstances and how often it will be “necessary” to replace (rather than repair) a battery; it has the service experience and technical data to estimate with a fair degree of accuracy how many of the 18,000 vehicles out there are likely to be entitled to warranty service.

Why then is Plaintiffs’ Expert having to rely on obscure articles referencing a study by Deutsche Bank? Why must he make guesses that far exceed his expertise? Why does he have to rely on newspaper reports? Why must he make

false assumptions that degraded batteries will be replaced with new ones when the front of all this information is a party to this lawsuit and perfectly capable of providing the necessary data? Why is Nissan playing hide-and-seek with the Court? If Nissan wishes to have the settlement approved, it should come forward with hard evidence that would convince a reasonable person of the settlement's value.

Objectors urge this Court to reject the Johns valuation as worthless and deny approval of the settlement until the parties come up with a reasoned estimate of value based on facts rather than guesswork.

6. The “Few Objectors” Issue.

Plaintiffs' Counsel makes much of the small percentage of class members who objected or opted out. Motion for Final Approval 25–26. But a low number of objections and opt-outs isn't unusual. People seldom object; doing so is a complicated process that requires understanding complex technical and legal issues and investing significant time and effort. Most class members have no idea of the legal consequences of opting out and fear losing a valuable benefit. The Class Notice helped bolster this fear by falsely advising class members that they would lose the benefit of the warranty if they opted out. Class Notice 1. Given the

obfuscation and deception the parties have engaged in, the 134 class members who opted out or objected actually represent a tidal wave of opposition to the settlement.

It is very likely that many more people would have objected, had they had the knowledge and legal wherewithal to evaluate the settlement, as do Objectors. But Plaintiffs' Counsel did nothing to bring those issues to the attention of the class members—their own clients. Indeed, they drafted a notice that affirmatively misled class members as to the consequences of opting out by falsely representing that if they do so they would lose the extended warranty. Id. If Nissan is prepared to withdraw its unilateral and unconditional warranty extension from class members who opted out, it should say so to the Court. More importantly, it should have said so when it notified its customers by mail that they were entitled to a new extended warranty. Having failed to do so, it is highly doubtful that Nissan could now legally withdraw the warranty extension, even if it wanted to.

The Class Notice does direct class members seeking further information to the Settlement Administrator's website. Id. at 8. But the Settlement Administrator has seen fit to stock the website only with materials that favor approval of the settlement and to exclude any documents that would actually inform class members of some of the true consequences of opting out or objecting: The

Preliminary Approval Order, the Settlement Agreement, the Proposed Order Granting Final Approval, the Motion for Attorneys' Fees, the Complaint and declarations from Plaintiffs' Counsel, Nissan's Director of Dealer Support and the valuation expert—and all of these are buried on the website under a link misleadingly labeled as “Court Documents.” See <http://goo.gl/BYZeyI>. A class member visiting the site would assume that these are all relevant court documents; they would be given no hint that objections have been filed and that those objections raise serious doubts about the fairness of the settlement.

At the very least, the fact that the class was misled as to the consequences of opting out—i.e., that there would be no consequence whatsoever—is grounds to require Plaintiffs' Counsel to issue a new notice to the class and provide an additional opportunity to opt out. One can reasonably expect that this would result in a substantial increase in the number who choose to do so.

6. The Settlement is Worthless — Or Worse

Plaintiffs' Counsel put forth minimal effort in preparing for negotiations and unsurprisingly walked away with a “deal” that gives class members nothing of value. Counsel commissioned no studies, conducted no discovery, engaged no experts and performed no analysis of the legal issues they raised in their complaint.

Counsel—and by extension class members—have no idea what internal Nissan documents might be available to bolster their case. Plaintiffs’ Counsel don’t even know what it will cost to provide the battery repairs. Counsel claims this is a great deal, but they’ve got 1.9×10^6 reasons for saying so.

The only two people in this lawsuit who could possibly be in a position to make an objective judgment about the value of the proposed settlement, Humberto Klee and David Wallak, have little incentive to do so because they get to walk away with the new warranty plus \$5,000 to boot. That’s a materially different deal from every other class member, and it strips Klee and Wallak of any ability to judge the fairness of the settlement as to rank-and-file class members. If the Court wants to know what Klee and Wallak really think of the value of the so-called extended warranty, it should deny them the \$5,000 (which they did nothing to earn) and ask them if they still think the settlement is such a swell deal.

An objective Named Plaintiff, one who didn’t get a \$5,000 sweetener, could easily recognize that the settlement provides no meaningful benefit to the class. Nissan has consistently told LEAF owners that the Li-Ion battery would retain 70% capacity after ten years. It’s what Nissan Senior Vice President Carla Bailo said publicly as recently as September 2012, just weeks before Plaintiffs’ Counsel sat down to negotiate with Nissan: “LEAF batteries will generally have 80 percent

of their capacity under normal use after 5 years and 70 percent after 10 years.”

Lurie Decl. in Support of Motion for Final Approval Ex. A; see also Ex. A 3.

The “excellent result,” Motion for Final Approval 12, Plaintiffs’ Counsel supposedly negotiated guarantees class members that after five years they’ll have a battery with the capacity level Nissan has consistently said should be available at ten years. Worse, they’ve added a severe mileage limitation, even though Nissan has never before disclosed that battery capacity can be reduced by mileage. The combination of the mileage limitation and the absurdly low 70% capacity warranty ensures that most class members will never see any benefit from the settlement and, indeed, Nissan has said as much on its website: “It is expected the great majority of owners will never have to use this enhanced warranty.”

<http://goo.gl/ozjhwS> (letter from Nissan Executive Vice President Andy Palmer) (emphasis added).

The simple fact is that Plaintiffs’ Counsel are in no position to assess the value of the settlement to class members. Aside from their vested interest in making the settlement seem more valuable than it is, they simply have no idea what rank-and-file class members think of the settlement because they are likely not themselves LEAF owners and have never discussed the matter with any LEAF owners, except perhaps Klee and Wallak, whose objectivity is compromised by the

fact that they will receive \$5,000 each. Nor, as noted, have they hired any technical experts, obtained any technical data from Nissan or otherwise educated themselves about the point of view of class members who will have to live with this lousy deal while their lawyers are free to use the \$1.9 million fee from the LEAF settlement to buy themselves Teslas.

Objectors are in a far better position to assess the value of the settlement as they have nothing to gain from it, aside from what it provides on its face. Of course, as repeatedly noted, Objectors get nothing at all because the 9-bars 5 years/60,000 miles has already been provided to them by Nissan without any need for settlement approval. But, even assuming that they were to derive the warranty from the settlement, it is virtually certain Objectors will never get to use it. Having been exceedingly careful and conservative in their driving habits—almost never charging the battery to 100% and avoiding the new 420V fast-chargers like the bubonic plague—they have now logged close to 40,000 miles with the loss of only a single capacity bar.

It is a virtual certainty that they will lose, at most, another one or two bars by the time they reach 60,000 miles—long before they reach 10 years or even 5 years of ownership. And, unless the battery drops below 9 bars before the odometer clocks 60,000 miles, Objectors will get zero benefit from the new “warranty.”

Even if they drop to 8 bars—which is highly unlikely—Nissan is only required to bring the battery back up to a paltry 9 bars, which itself will have to be charged to only 80%, giving Objectors about half of the range that Nissan promised when it sold the vehicle. In short, this is a very, very bad deal.

But it could be even worse than that: The settlement purports to modify the existing 8 year/100,000 mile warranty by addressing the problem of capacity loss. In so doing, the revised warranty seems to cut back on existing rights to have the battery replaced if defective for 8 years or 100,000 miles by giving Nissan the right to claim that a battery that holds fewer than 9 bars of battery capacity is not defective and thus need not be replaced under the original warranty. Plaintiffs' Counsel did not even take the basic precaution of including in the Settlement Agreement a term that the new warranty does not diminish existing rights under the 8 year/100,000 mile warranty.

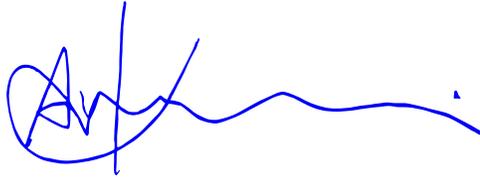
* * *

Objectors respectfully request that this Court deny the proposed settlement in full and order expedited discovery and a trial. Alternatively, Objectors ask (1) that the false advertising and Magnuson-Moss claims be stripped out of the settlement so that LEAF owners may bring such claims in a future class action; (2)

that the Court remove the mileage limitation from the warranty and modify the settlement to state that it does not diminish any rights under the existing warranties; (3) that the Court require Nissan to explain under oath whether this lawsuit actually caused them to offer the warranty extension that they've publicly claimed was offered solely as a benefit to loyal customers; and (4) that the Court require Nissan to state under oath whether it will, in fact, withdraw the extended warranty coverage from those who have opted out of this settlement.

In either event, Objectors request that the Court (1) order the Settlement Administrator to immediately place copies of all the filed documents appearing on the docket on the Administrator's website at: <http://www.nissanleafsettlement.com>, (2) provide the class members with an accurate statement as to what they will lose if they choose to opt out of the settlement and (3) reopen the opt-out period and objection period so that other class members have no less than 60 days to become aware of the problems with the settlement, as detailed in the Objections, and make a fully informed decision whether to opt out or object.

We declare under penalty of perjury that the facts set forth above as personally known to us are true.



Alex Kozinski



Marcy Tiffany

November 10, 2013

EXHIBIT A



NEW VEHICLE SALES DEPARTMENT
 (Review with 2011 LEAF Customer)
2011 LEAF CUSTOMER DISCLOSURE FORM
For use with 2011 LEAF

IMPORTANT Customer Information
2011 LEAF

Congratulations on your decision to purchase a new 2011 LEAF and joining others in reducing tailpipe emissions and oil dependence. The 2011 LEAF has very unique capabilities but also has unique requirements for normal operation that are different from other vehicles you may have owned or operated in the past. Owning a 2011 LEAF therefore requires additional and special consideration and understanding regarding the driving and operation characteristics, charging, service and maintenance requirements. This document and our website will provide valuable information for your consideration.

I. Unique Characteristics Of An All Electric Vehicle. The 2011 LEAF may not meet all of your driving needs, and not all markets may be ready for the 2011 LEAF. There are elements of ownership to consider both common with internal combustion engine vehicles and unique to electric vehicles, such as: driving needs – cargo, personnel, commuting distance, availability of workplace and/or public charging infrastructure, local incentives and permitting policies, and driving style. In many cases it will be an ideal 'primary car.' But some people will continue to need a second, internal combustion engine car for long distance drives, or will want a second car with more carrying capacity or performance. This form will alert you to several factors to consider. THE 2011 LEAF WEBSITE (www.nissanusa.com/leaf) CONTAINS ESSENTIAL INFORMATION WHEN MAKING A DECISION ON WHETHER AN ALL ELECTRIC VEHICLE IS RIGHT FOR YOU. Call us if you have any questions (1-877-NO GAS EV, 1-877-664-2738).

II. Electric Vehicle Operation. Because the 2011 LEAF is an electric vehicle, some of the vehicle's systems operate differently and exhibit different characteristics than internal combustion engine vehicles.

Before operating your vehicle or contacting your dealership with concerns regarding your vehicle's operations, please carefully read your *Owner's Manual*, *2011 LEAF Warranty Information Booklet*, and the *Service and Maintenance Guide* for necessary additional information concerning the proper operation, operational characteristics (including charging, time to charge, normal battery capacity loss over time, effects on autonomy range), service and maintenance requirements and the terms and conditions of the applicable New Vehicle Limited Warranty.

It is important to conserve power (electricity) and plan your charging needs when you drive. The 2011 LEAF is powered by electricity and does not require, nor is it capable of using, gasoline like a vehicle powered by a traditional internal combustion engine. In order for the vehicle to operate, the vehicle battery must be charged with electricity in advance. The battery pack is the sole source of power to operate the vehicle. The 2011 LEAF will use electricity stored in the vehicle battery as it operates, gradually decreasing the battery's state of charge. If the vehicle battery becomes completely discharged, the vehicle will not operate until it is re-charged, a process which can take anywhere from 30 minutes to 21 hours as described more fully below.

A. **Methods Of Charging The Vehicle (3 types with 240V recommended):**

(1) **Standard Charge.** Nissan highly recommends a home charger be installed on a dedicated 240V circuit by a professional electrician using an SAE J1772 compliant charging dock. Nissan has contracted with AeroVironment to assist you in purchasing and installing a charger. If you are enrolled in the U.S. government's EV Project in select markets, ECOtality is the responsible party for the charger and installation.

(2) **Trickle Charge.** Although not recommended for regular use, a dedicated 120V outlet may be used with the supplied charging cord or an SAE J1772 complaint cord. Charging by this method will take much longer than 240V charging. Warning: to protect against electrical hazard, serious personal injury or death: (1) Do not plug in the charging cord until it is inspected by a licensed electrician to confirm that the electrical circuit can accept a continuous 12 amp draw and (2) Do not use this charging cord in structures more than 40 years old, or structures using fuse-based circuit protection, and use only with an electrical circuit protected by a dedicated circuit breaker. See your owner's manual for additional warnings.

(3) **Quick Charge.** Nissan is encouraging the development of public charging infrastructure and compatibility between public charging stations and vehicle charging ports but we cannot ensure this will occur. DC Fast Charge or Quick Charge is being developed by others commercially and if available, will provide a 440V charge. Nissan cannot assure you that public charging stations will be available in locations where you operate the vehicle, nor can Nissan predict the period of time it may take for public charging infrastructure to be developed. A 2011 LEAF equipped with a Quick Charge port will be compatible with most, if not all, CHAdeMo (Japanese industry standard) connectors on the charging stations. Charging stations using this industry standard connector will be UL certified and safe to

use in the US. While supported by Nissan, this connector may not become the US SAE standard. If you attempt to charge from a non-compatible charging station, you may not receive a complete charge or may not be able to charge at all due to hardware and software differences.

- A Quick Charge port (440V) is not standard equipment and is an option on the SL model. If necessary for you, it must be ordered initially and installed during manufacture. It cannot be added or retrofitted later.

- Time to Charge varies, based on state of charge of the battery, condition and age of the battery, ambient temperature and condition of the power source connected to the vehicle. The following are estimates only; your actual experience may vary.

- Standard Charge. Empty lamp ~ 100%: ~7 hours
- Trickle Charge. Empty lamp ~ 100%: ~21 hours
- Quick Charge. Empty lamp ~ 80%: ~30 minutes with battery temperature at 77 °F. (Quick Charging more than once per day not recommended)

WARNING: If you use any medical electric devices, such as an implantable cardiac pacemaker or an implantable cardiovascular defibrillator, check with the electric medical device manufacturer concerning the effects that charging may have on implanted devices before starting the charge operation. Charging may affect the operation of electric medical devices and result in serious personal injury or death.

B. Range. The distance you can drive (range) varies considerably depending on, for example: state of charge, weather, temperature, usage, age, topography, and manner of driving.

- **Range Estimates:** The range is dependent on a number of factors. Some of the factors affecting range are ambient temperature, weight - number of passengers and payload, air conditioning/heater usage, high speed or stop-and-go driving, topography, battery capacity, etc. When the battery is new, it is estimated that vehicle range with a fully charged battery under normal operation and various driving conditions will vary between 138 and 62 miles for the majority of people. These are estimates based on analysis and testing. Your individual style and location will dictate your individual range, which will vary initially. Also as the battery ages, capacity and range decline. There are an infinite number of range scenarios*, based on many variables. Here are just a few. (*The following scenarios are based on new battery life. Estimated range is based on specific variables studied through computer simulations. Individual mileage outside of estimated range scenarios will occur).

Ideal driving conditions: 138 miles

Speed: Constant 38 mph
 Temperature: 68 degrees
 Climate control: Off

Driving on a flat road at a constant 38 mph means less air resistance, and therefore less energy use. And at 68 degrees, there's no need for climate control, extending the range even further. The result: a range boost up to 138 miles.

Suburban driving on a nice day: 105 miles

Speed: Average 24 mph
 Temperature: 72 degrees
 Climate control: Off

The average speed in this scenario is 24 mph; common when commuting and running errands. The ambient temperature is 72 degrees and the climate control is off. Not using the air conditioner and driving at slower speeds mean less energy use and a little extra range.

Highway driving in the summer: 70 miles

Speed: Average 55 mph
 Temperature: 95 degrees
 Climate control: On

Averaging 55 mph on the highway, in 95 degree weather, with the air conditioning on high may produce range figures like this. Higher speeds require more energy to overcome air resistance. Running the air conditioner means energy that could be used to increase range instead goes to cooling the car.

Cross-town commute on a hot day: 68 miles

Speed: Average 49 mph
 Temperature: 110 degrees
 Climate control: On

Driving from a rural area into the city at an average 49 mph with the air conditioning on high may produce this range. Under these conditions, climate control combined with higher-speed driving produces increased energy consumption, hence the effect on range.

Winter, urban stop-and-go, traffic jam: 62 miles

Speed: Average 15 mph

Temperature: 14 degrees

Climate control: On

Though the average speed is only 15 mph with stop-and-go traffic, the 14-degree temperature means the heater is doing a lot of work so you spend considerable time and energy heating your car rather than moving forward. Despite these conditions, it would still take more than 4 hours to run out of charge!

Based on five-cycle tests using varying driving conditions and climate controls, the EPA has rated the 2011 LEAF with an MPG equivalent of 106 city, 92 highway for a combined 99 MPGe and a driving range of 73 miles. The driving range on the 2011 LEAF, as with all vehicles, will vary with real-world driving conditions.

- Gradual loss of battery capacity. Like all lithium ion batteries, the 2011 LEAF battery will experience a reduction in the amount of electricity or charge it can hold over time, resulting in a reduction in the vehicle's range. This is normal and expected. The rate of reduction cannot be assured, however, the battery is expected to maintain approximately 80% of its initial capacity after 5 years of normal operation and recommended care, but this is not guaranteed. This number may be higher or lower depending upon usage and care. Factors that will affect and may hasten the rate of capacity loss include, but are not limited to: exposure to very high ambient temperatures for extended periods of time, driving habits, vehicle usage, and charging habits (Quick Charging the vehicle more than once per day).

- Driving/Operating. Driving the vehicle at constant speed and with smooth pedal modulation improves vehicle range. Nissan also recommends heating or cooling the cabin while charging just prior to driving. Vehicle range will be reduced by: (1) high speed driving (55+ mph), (2) aggressive driving (frequent or rapid acceleration) (3), severe conditions including heavy passenger/cargo load, uphill driving at a steep incline for extended periods of time, and (4) electrical use, especially heater or air conditioner use.

- Power Limitation Mode. This mode protects the health and operation of the vehicle's battery. This mode is triggered in certain extreme conditions (heat, cold, low state of charge). Power available to vehicle systems, including its electric motor, will be limited resulting in limited performance, acceleration and top speed. Charging may be automatically terminated, especially with repeated quick charging.

III. Vehicle Features.

A. The Solar Panel Spoiler on SL trim level supplies minimal charge to vehicle's 12V battery to support operation of features (for example: charging a cell phone, operating the vehicle's clock) and does not charge the vehicle's lithium-ion battery nor extend range.

B. Data Recorders. The 2011 LEAF is equipped with several data recorders: (1) a data recorder for diagnosing repairs, (2) an Event Data Recorder ("EDR") that records data in crash or near crash situations, such as an air bag deployment or hitting a road obstacle. The EDR records data related to vehicle dynamics and safety systems for a short period of time, typically 30 seconds or less; and (3) Telematics and recorded vehicle data for features, analysis, and research. The 2011 LEAF records data concerning various vehicle systems, location, driving performance, and operating conditions. Some of this data is transmitted to Nissan through the vehicle onboard CARWINGS (telematics) system. This data is used for the provision of CARWINGS services, as well as for analysis and research by Nissan designed to, among other things, optimize performance of future electric vehicles including improvements in future battery life. Certain state laws restrict access to such data without the consent of the vehicle owner. Without your consent, the vehicle will de-activate the vehicle telematics system in your vehicle, and certain features, including all telematics, of your vehicle will not operate as intended.

C. Cellular Network. The CARWINGS system communicates through the AT&T cellular network which may not be available in all areas. Certain remote functions require a compatible smartphone, not included or supplied.

D. Roadside Assistance and CARWINGS Telematics Features (see III.C. above) are included through a subscription service which is standard in the price of the vehicle for the first 36 months. After that time, a subscription service can be purchased.

IV. Vehicle Maintenance & Warranty.

As an all electric vehicle, the 2011 LEAF has unique features, service requirements, and safety risks that require specially trained technicians and some specialized equipment.

A. Warranty: All warranty repairs may only be completed at a certified Nissan LEAF dealership. Not all Nissan dealers may be certified. The closest certified Nissan LEAF dealership may be located farther away than you would prefer. In addition to warranty service, Nissan highly recommends that all maintenance and repair services be performed by a Nissan Certified LEAF dealer, listed on www.nissanusa.com/leaf.

B. Mileage at Delivery: Your 2011 LEAF's proper operation will be tested by Nissan after production and your vehicle will therefore be delivered with some mileage reflected on the odometer and some battery use with minimal capacity loss.

C. Lithium-Ion Battery Maintenance: Vehicle maintenance, including maintenance of the lithium-ion battery, is required as a condition of Nissan's New Vehicle Limited Warranty. Battery maintenance includes completion of an annual lithium-ion battery usage report. These include reports at 12 mos., 24 mos., 36 mos., 48 mos., 60 mos., 72 mos., and 84 mos., which can be performed by a Nissan Certified LEAF dealer or any qualified repair facility. The 12 and 24 month reports will be performed at no charge to you, provided the work is done at a Nissan Certified LEAF dealer. Damage or failure resulting from a failure to have these required services performed, or that could have been avoided had these services been performed, is not covered under the Nissan New Vehicle Limited Warranty. (See your Nissan dealer and read the actual limited warranty for complete details).

D. Battery Replacement Cost: As your vehicle battery ages, you may decide to replace the battery due to gradual capacity loss and its effect on vehicle range. Future replacement cost is unknown at this time, but the cost to you may be significant, and may be greater than replacing a gas vehicle's power train. Nissan anticipates reductions in replacement battery cost as battery technology improves. Individual modules inside the battery pack may be replaced at a certified Nissan LEAF dealership, at much less cost than replacing the entire battery pack.

E. Repairs: BODY SHOP WARNING: In the event of a significant accident, the vehicle should be delivered to a certified Nissan LEAF dealer to have the battery pack and high voltage parts such as the inverter, including the wiring harness, removed prior to painting. Battery packs exposed to heat in the paint booth will experience capacity loss. Damaged battery packs may also pose safety risks to untrained mechanics and repair personnel.

F. Exclusions and Limitations to Nissan New Vehicle Limited Warranty: Your 2011 LEAF comes with a Nissan LEAF New Vehicle Limited Warranty. The warranty includes a number of specific conditions, exclusions and limitations. The lithium-ion battery (EV battery), like all lithium-ion batteries, will experience gradual capacity loss with time and use. Loss of battery capacity due to or resulting from gradual capacity loss is NOT covered under the Nissan New Vehicle Limited Warranty. See your Owner's Manual for important tips on how to maximize the life and capacity of the "Lithium-ion battery." (See your Nissan dealer and read the actual limited warranty for complete details).

V. Federal and State Tax Credit Eligibility.

Federal and state tax or other incentives may or may not apply to the purchase of a 2011 LEAF. Consult your tax advisor.

Time of Order or Sale Acknowledgment

I, A. Kozlowski, hereby acknowledge that I
(CUSTOMER'S NAME)
have carefully read and understand all of the written information contained in this document concerning the 2011 LEAF prior to my purchase.

Reviewed by:
[Signature]
(Dealership Sales Executive & Date)

Acknowledged by:
[Signature]
(Customer Signature & Date)

Time of Vehicle Delivery

Reviewed by:
[Signature]
(Dealership Sales Executive & Date)

Acknowledged by:
[Signature]
(Customer Signature & Date)

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that on November 10, 2013, I served OPPOSITION TO PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT on the parties by serving its counsel of record electronically, having verified on the court's CM/ECF website that such counsel is currently on the list to receive emails for this case, and that there are no attorneys on the manual notice list.

Dated: November 10, 2013

/s/ Marcy Tiffany