**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| **In re Navistar MaxxForce Engines Marketing, Sales Practices and Products Liability Litigation** | ) ) ) ) ) ) ) ) ) | **Master Case No. 1:14-cv-10318**<br><br>This filing applies to All Class Action Cases<br><br>**Judge Joan B. Gottschall** |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT**

**Dated:** September 10, 2019

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## I. INTRODUCTION

After nearly five years of hard-fought litigation, Plaintiffs and Defendants (Navistar, Inc. and Navistar International Corporation, collectively "Navistar") seek final approval of a proposed nationwide class action settlement ("Settlement").[1] The parties reached the Settlement after multiple mediation sessions and additional, extensive arm's-length negotiations with the substantial assistance of Judge Wayne Andersen (Ret.), an experienced and skilled mediator.

On June 12, 2019, this Court entered an order certifying for settlement purposes the Settlement Class and preliminarily approving the Settlement Agreement. ("Preliminary Approval Order"), Dkt. 648. The Court found that the Settlement satisfies all of the prerequisites for a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. *Id*. at 5-6. The Court also found that the Settlement: (1) provides comprehensive relief and monetary compensation to Plaintiffs and the other Class members; (2) was entered into after non-collusive, arm's-length negotiations by experienced Plaintiffs' counsel; and (3) was fair, reasonable, and adequate. *Id*. at 2-5. The Court also appointed the undersigned counsel as Class Counsel for the Settlement Class and appointed Plaintiffs as the Class Representatives for the Settlement Class. *Id*. at 6. Finally, the Court found that the proposed notice plan "is the best notice practicable under the circumstances" and satisfies Fed. R. Civ. P. 23(c)(2)(B) and due process, and it appointed JND Legal Administration Co. to serve as the Settlement Administrator. *Id*. at 7-8.

Nothing warrants changing those findings now, particularly because this Settlement provides significant benefits to the Settlement Class, including:

- Payment by Navistar of $135 million in non-reversionary funds.

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[1] All capitalized terms have the meaning as defined in the Settlement Agreement.

- Each Class Member has the option to choose from three different forms of relief for each truck that the Class Member owned or leased:
  - Up to $15,000 in reimbursements for documented out-of-pocket expenses for each owner and/or lessee of each truck.
  - A cash payment of $2,500 per truck without documentation of any damages, apportioned among different owners and/or lessees of that truck during the class period.
  - A $10,000 rebate toward the purchase of a new Navistar truck, apportioned among different owners and/or lessees of that truck during the class period.
- State-of-the-art notice, by an independent, Court-appointed notice provider, jointly overseen by the parties.
- State-of-the-art claims administration by an independent, Court-appointed administrator, also jointly overseen by the parties.

This is an outstanding result for the Class, especially in light of the risks and costs of proceeding with litigation, where Navistar intended to vigorously contest all aspects of the case, including class certification. Furthermore, the Settlement has only improved with age, because in the time since preliminary approval, the most significant jury verdict in favor of an individual plaintiff was overturned on appeal. *See Milan Supply Chain Solutions, Inc. v. Navistar, Inc.*, No. 2018-84, 2019 WL 3812483 (Tenn. Ct. App. Aug. 19, 2019). This illustrates the risks of litigation—individual or class—and the real and certain value provided by the Settlement. As further demonstrated below, the Settlement is "fair, reasonable and adequate" under Fed. R. Civ. P. 23(e)(2) and thus warrants final approval. Accordingly, Plaintiffs respectfully ask the Court to: (1) grant final approval to the Settlement; (2) grant final certification of the Settlement Class; (3) find that adequate notice was provided to the Settlement Class Members; and (4) approve Plaintiffs' request for attorneys' fees, expenses, and service awards.[2]

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[2] Plaintiffs are concurrently filling herewith their Motion for an Award of Attorneys' Fees and Expenses and for Class Representative Service Awards.

## II. BACKGROUND

### A. Procedural History

This Court is well-familiar with the underlying facts and procedural history of this case. The Settlement resolves claims against Navistar for allegedly making and selling certain heavy-duty trucks with a defectively designed emissions system. *See, e.g.*, Dkt. 573 at 1 (summarizing Plaintiffs' allegations). Plaintiffs contend that the defect resulted from Navistar's decision to use exhaust gas recirculation ("EGR") emissions technology without also using selective catalytic reduction ("SCR") emissions technology. *Id.*; *see also generally* Third Am. Consol. Class Action Compl, Dkt. 637.

This MDL was created in December 17, 2014. *See In re Navistar MaxxForce Engines Mktg., Sales Practices & Prods. Liab. Litig.*, 67 F. Supp. 3d 1382, 1383 (J.P.M.L. 2014). Following Rule 23(g) motion practice, this Court appointed Interim Co-Lead Counsel and Liaison Counsel on March 5, 2015. Dkt. 27. After initial mediation efforts failed, Plaintiffs and Navistar litigated this case for more than four years. Decl. of Jonathan D. Selbin, Dkt. 632-7 ¶ 30. During this time, the parties engaged in extensive discovery, including exchanging and reviewing more than 2.5 million documents, taking and defending more than 60 depositions, and litigating several critical motions before this Court. *Id.* ¶¶ 26, 29. The parties also conducted numerous vehicle inspections. Plaintiffs retained and worked extensively with more than half a dozen consulting and testifying experts, including mechanical engineering and economics experts. *Id.* ¶ 28. In March 2019, Plaintiffs fully drafted their motion for class certification with attendant exhibits, including expert reports. *Id.* ¶ 29.

The parties mediated on and off throughout the case with the assistance of Judge Wayne Andersen, a retired judge in this District and a respected JAMS mediator. *Id.* ¶ 30. After earlier settlement efforts failed, the parties began renewed mediation efforts in June 2018 and continued

for months, including six in-person negotiations in Chicago, dozens of hours on telephone conferences, and hundreds of email exchanges. *Id.* Negotiations were at arm's-length and often contentious. *Id.* On the literal eve of filing Plaintiffs' class certification motion and supporting expert reports in March 2019, the parties reached a tentative agreement in principle. *Id.* ¶ 29. In the ensuing months, they worked to finalize the agreement, and its terms are now embodied in the Settlement Agreement, which the parties executed on May 28, 2019. *Id.*; Dkt. 632-1 ("Settlement Agreement").

Following a May 31, 2019 hearing on Plaintiffs' Unopposed Motion for Preliminary Approval of Proposed Class Action Settlement, the Court directed Plaintiffs to address several matters, including a more detailed comparison of the claims asserted here with other cases brought against Navistar so that the Court could better estimate probable outcomes. Pretrial Order No. 28, Dkt. 640. On June 5, 2019, pursuant to the Court's Pretrial Order No. 28, Plaintiffs submitted a Supplemental Statement, Dkt. 641, in support of their motion for preliminary approval that, among other things, provided additional information—such as how Navistar has prevailed in the majority of individual cases—to assist the Court in making a "ballpark valuation" of the Settlement. The Court then issued its Preliminary Approval Order, on June 12, 2019. Dkt. 648.

**B. The Settlement's Material Terms and Notice Plan**

Plaintiffs seek final approval of the Settlement on behalf of the following Class:

> All entities and natural persons who owned or leased a 2011-2014 model year vehicle equipped with a MaxxForce 11- or 13-liter engine certified to meet EPA 2010 emissions standards without selective catalytic reduction technology, provided that vehicle was purchased or leased in any of the fifty (50) States, the District of Columbia, Puerto Rico, or any other United States territory or possession.

Preliminary Approval Order at 2.[3]

**1. The Settlement offers significant benefits to the Class.**

Navistar will pay $135 million in total non-reversionary compensation to the Class, presumptively divided into two funds: an $85 million Cash Fund and a $50 million Rebate Fund. Settlement Agreement § III. Each Class Member will have the option, for each Class Vehicle owned or leased, to receive either up to $15,000 in documented costs relating to certain repairs from the Cash Fund (the "Prove-Up Option"), a set amount of cash from the Cash Fund without documentation of costs (the "Cash Option"), or a rebate on the purchase of a new Navistar truck from the Rebate Fund without documentation of costs (the "Rebate Option"). *Id.* § III.A.1-3. Plaintiffs' Unopposed Motion for Preliminary Approval of Proposed Class Action Settlement explained in further detail the specific terms of the three compensation options each Class Member may choose for each Class Vehicle they ever owned or leased during the Class Period. Dkt. 632 at 5-9.

Claims will be paid from the two Funds and will be reduced on a *pro rata* basis only if both Funds are oversubscribed (that is, if more valid claims are approved than there are dollars

[3] The class definition also provides that:

> Excluded from the Class are: (1) all federal court judges who have presided over this Litigation and any members of their immediate families; (2) all entities and natural persons that have litigated claims involving Class Vehicles' allegedly defective EGR emissions system against Navistar to final, non-appealable judgment (with respect to those vehicles only); (3) all entities and natural persons who, via a settlement or otherwise, delivered to Navistar releases of their claims involving Class Vehicles' allegedly defective EGR emissions system (with respect to those vehicles only); (4) Defendants' employees, officers, directors, agents, and representatives, and their family members; (5) any Authorized Navistar Dealer of new or used vehicles; (6) any person or entity that purchased a Class Vehicle solely for the purposes of resale (with respect to those vehicles only); (7) any person or entity that was a lessee of a Class Vehicle for fewer than thirty-one (31) days (with respect to those vehicles only); and (8) Idealease and Navistar Leasing Co. (lessees of Class Vehicles for more than thirty (30) days from these entities are part of the Class).

available in the Funds to pay those claims). Settlement Agreement § III.C. In the event that only one of the Cash Fund or Rebate Fund is oversubscribed and the other Fund is undersubscribed, the funds remaining in the undersubscribed Fund will go toward paying valid, approved claims in the oversubscribed Fund (although no more than $35 million of the Rebate Fund shall go toward oversubscription of the Cash Fund, for a maximum Cash Fund of $120 million). *Id.* In no event will any of the $135 million revert to Navistar: if there is money remaining in the Cash Fund or rebate value remaining in the Rebate Fund after all valid claims are calculated and any oversubscription of either fund is satisfied, remaining money or rebates will be reallocated to previously-approved, valid claimants. *Id.*

### 2. The notice plan has been implemented and the response has been positive.

The Settlement includes a state-of-the-art notice and claims process, including direct individual notice to Class members for whom contact information can be reasonably acquired from Navistar or through DMV data, plus a user-friendly online claims process that helps Class Members select from among their options. Settlement Agreement § IV.C; *see also generally* Declaration of Jennifer M. Keough Regarding Notice Administration, Dkt. 660. The Settlement Administrator (JND) received from Navistar spreadsheets with Vehicle Identification Numbers ("VINs") and other Class Vehicle information for 66,518 Class Vehicles. Dkt. 660 ¶ 4. JND then worked with data aggregators to acquire Class Member contact information from DMVs and conducted further advanced research to locate at least one valid email address for over 43% of the Class. *Id.* ¶¶ 4-5. Prior to commencing the notice campaign, JND identified 45,224 unique Class Members. *Id.* ¶ 6. In accordance with the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715, JND provided notice of the Settlement and related materials to the Attorneys

General of all U.S. states and territories, as well as to the Attorney General of the United States. *Id.* ¶¶ 7-8.

In June 2019, JND established the Settlement Website, www.maxxforce11and13.com, which hosts copies of important case documents, answers frequently asked questions, provides contact information, and allows Class Members to electronically submit their Claim Forms. *Id.* ¶ 12. As of August 9, 2019, the Settlement Website has tracked 1,510 unique users. *Id.* ¶ 13. In June 2019, JND also established a toll-free number that individuals may call—24 hours a day, seven days a week—to obtain information regarding the Settlement. *Id.* ¶ 14. On August 9, 2019, JND provided direct notice of the Settlement to the 45,222 Class Members with a mailing address. *Id.* ¶ 9. Further, on August 9, 2019, JND provided email notice to each of the 19,674 Class Members who had at least one valid email address. *Id.* ¶ 11. To date, four requests for exclusion and zero objections have been received.[4]

## III. ARGUMENT

In deciding whether to grant final approval to a class action settlement, courts first determine whether to certify the settlement definitively for purposes of settlement under Fed. R. Civ. P. 23(a) and 23(b), and then whether to approve the settlement under Fed. R. Civ. P. 23(e).

### A. Certification of the Settlement Class Is Appropriate.

Plaintiffs respectfully submit that the Court can and should definitively certify the Class for settlement purposes. The general standards for litigation class certification also apply to settlement class certification, except that the court need not consider potential trial management problems. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). In their preliminary

[4] The deadline to request exclusion from or object to the Settlement is October 10, 2019, and Class Counsel will provide updated numbers to the Court before or at the Fairness Hearing, which is scheduled to occur on November 13, 2019 at 10:00 a.m.

approval motion, Plaintiffs explained, in detail, why Rule 23(a)'s and Rule 23(b)(3)'s requirements are readily met here for Settlement purposes. Dkt. 632 at 20-26. For example, Plaintiffs explained how there are numerous questions common to the Class that predominate over any individual issues, including the key elements of Plaintiffs' claims: the existence of a defect, Navistar's knowledge of that defect, the materiality of that defect to reasonable consumers, and the existence and amount of resulting damages. *Id.* at 24; *see also Flynn v. FCA US LLC*, 327 F.R.D. 206, 226 (S.D. Ill. 2018) (for Illinois statutory fraud claim, "whether Defendants knew the vehicles were defective . . . poses a common question that predominates over individual questions that may arise."); *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 361 (7th Cir. 2012) (holding that "[t]he basic question in the litigation—were the [products] defective," predominated).

This Court has already held, as a preliminary matter, that the requirements of Rule 23(a) and Rule 23(b)(3) are met here:

1. **Numerosity**. "The proposed Class is sufficiently numerous under Rule 23(a)(1) because Defendants' data shows over 4600 original purchasers of Class Vehicles in the United States, all of whom would be members of the Class in addition to subsequent purchasers and lessees."

2. **Commonality**. "Resolution of this litigation would depend on the common answers to common questions, such as: whether the Class Vehicles are defective; whether Defendants knew or should have known of the defect prior to sale; whether Defendants' warranties required it to fix the defect; whether the Class Vehicles came with an implied warranty of merchantability; etc."

3. **Typicality**. "The Plaintiffs' claims are typical of the members of the proposed Class because they challenge the same conduct—the design and sale of the same Navistar trucks—and make the same legal arguments."

4. **Adequacy**. "The proposed Class representatives and Co-Lead Class Counsel are adequate for the reasons stated above when considering whether the Settlement is fair, reasonable, and adequate: the Named Plaintiffs share the same alleged injury and interest with other members of the proposed Class, and their counsel have already been found adequate by this Court (ECF No. 27)."

5. **Predominance**. "At least for purposes of settlement, the common issues in this litigation predominate over individual issues under Rule 23(b)(3). The key elements of Named Plaintiffs' claims are the existence of a defect, Defendants' knowledge of that defect, and the materiality of that defect to reasonable consumers."

6. **Superiority**. "This nationwide Settlement would be superior under Rule 23(b)(3) to many individual actions. The members of the proposed Class who own a small number of Class Vehicles may not have suffered sufficient damages to justify the costs of expensive, expert-heavy litigation. And if the smaller number of members of the proposed Class with higher potential damages won significant verdicts, they might deprive remaining Class Members of compensation. The nationwide Settlement ensures that all Class Members will have the opportunity to be compensated."

Preliminary Approval Order at 5-6. There is no reason to disturb those findings, and the Court should definitively certify the Class for purposes of final approval of the Settlement. *See, e.g.*, *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 490-93 (N.D. Ill. 2015) (finding the requirements for class certification met for purposes of final approval of settlement); *In re Sears, Roebuck & Co. Front-Loading Washer Prods. Liab. Litig.*, No. 06 C 7023, 2016 WL 772785, at *8-9 (N.D. Ill. Feb. 29, 2016) (same because, among other reasons, "the requirements for a settlement class are generally less onerous than those for a trial class").

### B. The Settlement's Notice Plan Satisfies Both Rule 23(e)(1) and Due Process.

When a class is certified through settlement, Rule 23 and due process require that the Court "direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1); *In re Sears*, 2016 WL 772785, at *7. Where, as here, a class is certified under Rule 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) ("[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort"). Nonetheless, neither Rule 23 nor

due process require "actual notice to all class members," which sometimes "might be *impossible*." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 665 (7th Cir. 2015) (emphasis in original); *see also Burns v. Elrod*, 757 F.2d 151, 154 (7th Cir. 1985) (noting that "Rule 23 does not require defendants to exhaust every conceivable method of identification"); *CE Design v. Beaty Const., Inc.*, No. 07 C 3340, 2009 WL 192481, at *10 (N.D. Ill. Jan. 26, 2009) ("The Federal Rules [] require the best notice that is 'practicable' not perfect notice. The word 'practicable' implies that the plaintiff should be afforded some flexibility with respect to providing notice to unknown, potential class members.").

Here, the Notice Plan implemented after preliminary approval satisfies both Rule 23 and due process. Although the Notice Plan initially contemplated the use of postcard notices,[5] due to the Court's concern with such notice in this case, the parties agreed to mail each Class Member a one-page summary notice and claim form. Dkt. 641 at 3-4. The Court then found that the Notice Plan "is the best notice practicable under the circumstances" and "satisfies the requirements of [Rule 23] and Due Process." Preliminary Approval Order at 7-8. As discussed above, *see* Section II.B.2, the Settlement Administrator provided direct notice of the Settlement to the 45,222 Class Members with a mailing address—out of the 45,224 unique Class Members identified by the Settlement Administrator—and also provided email notice to the 19,674 Class Members with at least one valid email address. Dkt. 660 ¶¶ 9, 11. The Long Form Notice includes all information required by Fed. R. Civ. P. 23(c)(2)(B). *See* Dkt. 641-3. Specifically, it provides detailed information concerning: (1) the rights of Class Members, including how and by when to lodge objections or opt out; (2) the nature of the litigation and the claims at issue;

[5] Courts in this District frequently approve postcard notice to class members. *See, e.g., Gupta v. Power Sols. Int'l, Inc.*, No. 1:16-CV-08253, 2019 WL 2135914, at *2 (N.D. Ill. May 13, 2019).

(3) the proposed Settlement; (4) the recovery options available to Class Members; (5) the process for filing a proof of claim; (6) the fees and expenses to be sought by Plaintiffs' counsel; and (7) the date of the fairness hearing. The Settlement Administrator also sent the required CAFA notice, established the Settlement Website, and set up a toll-free number that individuals may call to obtain information about the Settlement. Dkt. 660 ¶¶ 7-8, 12, 14. As of August 9, 2019, the Settlement Website has tracked 1,510 unique users. *Id.* ¶ 13.

In sum, because the Notice Plan provided direct notice to all Settlement Class Members who could be reasonably identified through Navistar's and the various DMVs' records, provided additional email notice, and fully apprised Class Members of their rights, the Notice Plan satisfies the requirements of Rule 23 and due process. *See Eisen*, 417 U.S. at 173; *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 968-69 (N.D. Ill. 2011).

**C. The Settlement Is Fair, Reasonable, and Adequate.**

Before granting final approval of the Settlement, the Court must conduct a hearing to determine whether it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e); *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *Uhl v. Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978, 986 (7th Cir. 2002) (a court's final approval inquiry is "limited to [consideration of] whether the settlement is lawful, fair, reasonable, and adequate").

The Seventh Circuit has articulated five factors for district courts to consider in determining whether to finally approve a class action settlement: (1) the strength of plaintiff's case compared to the terms of the proposed settlement; (2) the likely complexity, length, and expense of continued litigation; (3) the amount of opposition to the settlement among affected parties; (4) the opinion of competent counsel; and (5) the stage of the proceedings and amount of discovery completed. *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (citation and internal quotations omitted); *In re AT & T*, 789 F. Supp. 2d at 958. The

recent amendments to Rule 23(e)(2) require a court to consider several factors relevant to fairness, reasonableness, and adequacy,[6] which largely overlap with the Seventh Circuit's factors. *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-666, 2018 WL 6606079 (S.D. Ill. Dec. 16, 2018). Courts "do not focus on individual components of the settlement[], but rather view them in their entirety in evaluating their fairness." *Isby*, 75 F.3d at 1199. The presence of more creative or traditional alternatives to the Settlement does not preclude approval. *Uhl*, 309 F.3d at 985. The factors articulated by the Seventh Circuit and Rule 23(e)(2) are readily satisfied here, especially because this Court already considered the factors in Rule 23(e)(2) and found "that the Settlement is fair, reasonable, and adequate, and thus likely to be approved." Preliminary Approval Order at 2-5.

**1. The Settlement provides substantial value compared to the strength of Plaintiffs' case.**

"The most important factor relevant to the fairness of a class action settlement is the first one listed: the strength of plaintiff's case on the merits balanced against the amount offered in the settlement." *In re AT&T*, 789 F. Supp. 2d at 958 (quoting *Synfuel*, 463 F.3d at 653) (internal quotations omitted). The strength of a plaintiff's case can be quantified by comparing "the net expected value of continued litigation to the class" to the "range of possible outcomes and ascrib[ing] a probability of each point on the range." *Am. Int'l Grp., Inc. v. Ace Ina Holdings, Inc.*, Nos. 07 CV 2898, 09 C 2026, 2012 WL 651727, at *2 (N.D. Ill. Feb. 28, 2012) (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284-85 (7th Cir. 2002) and *Synfuel*, 463 F.3d at

[6] These factors include: (1) the adequacy of class counsel and class representatives; (2) whether the proposed settlement was negotiated at arm's-length; (3) the adequacy of the relief provided (considering the costs, risks, and delay of trial and/or appeal, the effectiveness of the proposed method of distributing relief, the terms of any proposed award of attorneys' fees, and any agreement required to be identified under Rule 23(e)(3)); and (4) whether class members are treated equitably relative to each other.

653).[7] Of course, "[i]n considering the strength of plaintiffs' case, legal uncertainties at the time of settlement favor approval." *In re Southwest Airlines Voucher Litig.*, No. 11-cv-8176, 2013 WL 4510197, at *7 (N.D. Ill. Aug. 26, 2013).

After the preliminary approval hearing, Plaintiffs submitted a Supplemental Statement, Dkt. 641, that further analyzed the strengths and weaknesses of Plaintiffs' case in response to this Court's order that they do so. Of particular relevance, Navistar had prevailed in the majority of individual cases that generally involve the same factual and legal claims as here. *See id.* at 5-7 (citing two plaintiff-side jury verdicts on appeal, a bench trial in which the court awarded $6,000 per truck that was later settled after Navistar appealed, and six victories by Navistar in whole or part). On August 14, 2019, moreover, one of the two plaintiff-side jury verdicts (in the amount of $30 million) was reversed *with prejudice* on appeal and plaintiff was ordered to pay costs. *See Milan Supply Chain Sols. Inc. v. Navistar Inc.*, No. W201800084COAR3CV, 2019 WL 3812483, at *1–11 (Tenn. Ct. App. Aug. 14, 2019). In particular, the Tennessee appellate court found plaintiff's fraud claims barred by the economic loss doctrine and plaintiff's consumer protection claim without merit because the trucks did not constitute "goods" under the applicable Tennessee statute. *See id*.

Plaintiffs respectfully submit that $135 million is an especially extraordinary result when compared to the many cases in which individual plaintiffs received *nothing* (all but one jury trial), particularly given that class members may prove damages that are more than double those awarded in the one successful bench trial. And obtaining no recovery here was a real possibility,

[7] However, "[t]he Seventh Circuit has recognized that valuing hypothetical continued litigation is necessarily speculative and therefore an inexact science," and courts need only "estimate and come to a ballpark valuation" of the class's claims. *Kolinek*, 311 F.R.D. at 503 (citation and internal quotations omitted).

both at the outset and throughout the case, because the business press speculated plausibly that the financial crisis resulting from the defect would drive Navistar into bankruptcy, depriving the Class (and counsel) of any relief whatsoever. Notably, the Settlement also compares favorably to the lone successful individual jury trial, in which compensatory damages of $13,750[8] were awarded per truck (less than the $15,000 per truck available under this Settlement's Prove-Up Option).

Plaintiffs' Supplemental Statement (Dkt. 641) also discussed why the Settlement compares favorably to other metrics, namely that the $2,500 cash, $10,000 rebate, and $15,000 prove-up options compare favorably with how Plaintiffs' damages experts valued the claims here ($3,764 for downtime loss and $9,354 for lost value). Dkt. 641 at 10-11. The Settlement is also materially superior to a recent similar nationwide settlement regarding diesel engines with an allegedly defective emission system that was approved by the District of New Jersey, *In re: Caterpillar, Inc. C13 and C15 Engine Products Liability Litigation*, MDL No. 2540 (D.N.J.), which settled for a fund of $60 million, rather than the $135 million here. *See* https://www.enginesettlement.com/Home/FAQ#faq7 (last accessed September 4, 2019).[9]

Ultimately, because a settlement is a compromise, "courts need not—and indeed should not—'reject a settlement solely because it does not provide a complete victory to the plaintiffs.'" *In re Capital One Telephone Consumer Protection Act Litig.*, 80 F. Supp. 3d 781, 790 (N.D. Ill.

[8] *Dutch Maid Logistics, Inc. v. Navistar Inc.*, No. 15CV0129 (Ohio Com.Pl.) ($275,000 in compensatory damages for 20 trucks).

[9] Like this Settlement, class members there (owners/lessees of certain Caterpillar engines) could choose from compensation options for each engine owned: $500 cash without documentation of repairs (versus up to $2,500 here), or up to $5,000, $10,000, or $15,000 in eligible losses depending on the number of defect-related repairs. *Id.* Here, Class Members can prove up to $15,000 in losses, regardless of the number of repairs their trucks required, plus they have the option of choosing up to a $10,000 rebate, which was unavailable in the *Caterpillar* settlement.

2015) (quoting *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010)). The parties to a settlement "benefit by immediately resolving the litigation and receiving some measure of vindication for [their] position[s] while foregoing the opportunity to achieve an unmitigated victory." *In re AT&T*, 270 F.R.D. at 347 (internal quotation omitted). Although Plaintiffs here believe that their claims against Navistar are strong, they recognize that Navistar's liability is far from certain. Plaintiffs undertook this litigation knowing that they would face staunch opposition from Defendants with substantial resources, strong legal defenses, and a willingness to litigate. Plaintiffs, nonetheless, successfully negotiated a large, non-reversionary Settlement in the amount of $135 million. Therefore, this Seventh Circuit factor (the most important one) favors granting final approval. A comparison of the Settlement's substantial value with the other similar cases also satisfies the Rule 23(e)(2)(C) factor regarding the adequacy of the relief provided, particularly because of the very real costs, risks, and delay of trial and/or appeal.[10]

#### 2. Continued litigation would increase the complexity, length, and expense of the case.

Under the Seventh Circuit's second factor, final approval is favored where "[s]ettlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation." *Schulte*, 805 F. Supp. 2d at 586; *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d

[10] The other considerations under the Rule 23(e)(2)(C) factor also support final approval. As discussed in Section II.B.2, the Notice Plan has been implemented to reasonably reach nearly all Class Members, who will be able to submit claims and supporting documentation online or by mail. *See also* Dkt. 632 at 17-18 (describing the Settlement's state-of-the-art claims processing and pre-populated information on the Settlement Website). The terms of any proposed award of attorneys' fees are addressed in Plaintiffs' Motion for an Award of Attorneys' Fees and Expenses and for Class Representative Service Awards, which is being concurrently filed herewith. Finally, there are no agreements between the parties aside from the Settlement, except an agreement described generally in the Settlement that allows Defendants and Class Counsel to terminate the Settlement in certain defined circumstances. Preliminary Approval Order at 4.

1002, 1019 (N.D. Ill. 2000) (finding that settlement is favored where "continued litigation would require resolution of complex issues at considerable expense and would absorb many days of trial time."). The Settlement is a significantly better outcome than would be likely with additional litigation. *See* Fed. R. Civ. P. 23(e)(2)(C)(i). If Plaintiffs risked pursuing the prospect of greater relief through further litigation, "all that is certain is that plaintiffs would have spent a large amount of time, money and effort." *Seiden v. Nicholson*, 72 F.R.D. 201, 208 (N.D. Ill. 1976).

Despite Plaintiffs' confidence in the strength of their case, uncertainty—both on a number of legal issues and at trial—significantly impacts the likely outcome of this litigation. Class certification would have been hotly disputed, in large part because Navistar has in the past and would likely again argue that Class Members' varying maintenance and use patterns impact performance in individualized ways. If Plaintiffs prevailed on certification, Navistar almost certainly would have sought Rule 23(f) review, further delaying proceedings (and adding risk). Proving liability and damages might be especially difficult for Class Members who purchased their trucks in later years, after concerns with these trucks' performance became widely known. As discussed in the preceding section, these potential challenges are not hypothetical. Individual plaintiffs filed numerous state court actions against Navistar, and all but two have resulted in defense-side victories. Indeed, even the initially favorable plaintiff's jury verdict in the *Milan* case was recently reversed on appeal.

If the Court does not approve the Settlement, the parties will incur significant additional expenses, including additional expert costs, filing and defending more pre-trial motions (notably including class certification), and the enormous expenses involved in conducting a class action trial (with dozens of Class Representatives). If anything, "this drawn-out, complex, and costly

litigation process . . . would provide [Settlement] Class Members with either no in-court recovery or some recovery many years from now . . . ." *In re AT & T*, 789 F. Supp. 2d at 964. Instead, the Settlement avoids the uncertainty of continued motion practice, trial, and lengthy appeals and presently provides valuable relief to the Settlement Class Members. *See Reynolds*, 288 F.3d at 284 ("To most people, a dollar today is worth a great deal more than a dollar ten years from now."). Therefore, the second factor weighs in favor of final approval.

**3. Class Members' support for the Settlement reinforces final approval.**

Little to no opposition to a settlement is "strong circumstantial evidence favoring settlement." *See In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d at 1020-21 (finding that a settlement where "99.9% of class members have neither opted out nor filed objections . . . is strong circumstantial evidence in favor of the settlement"); *In re AT & T*, 789 F. Supp. 2d at 965 (finding that an exclusion or objection rate of 0.01% of class members was "remarkably low" and supported approval of the settlement); *In re Sears*, 2016 WL 772785, at *11 (the "small number of class members who objected or opted out further supports the fairness and reasonableness of the settlement"). Here, four requests for exclusion and zero objections have been received to date. *See* Declaration of Adam J. Levitt in Support of Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards, ¶ 19, filed concurrently herewith. And hundreds of Class Members have contacted Co-Lead Class Counsel seeking information about how to make a claim.

Support for the Settlement is unsurprising not only because the total result compares so favorably to the likely outcome of continued litigation (discussed above), but because it treats Class Members equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(D). All Class Members may select from the same three options for relief; two are based solely on length of ownership, and the third allows any Class Member to prove actual damages. The nationwide Settlement

treats Class Members far more equitably than individual trials, which have already resulted in individual entities receiving favorable jury verdicts including punitive damages, while others received nothing at all. The service awards being requested for the Class Representatives ($25,000 each) are commonly awarded in class actions, are well-justified under the circumstances here, and are appropriate in amount given precedent and the Class Representatives' extensive commitment in both time and effort throughout the course of this litigation. For these reasons, the third factor supports final approval of the Settlement.

#### 4. The opinion of Court-appointed, well-qualified counsel favors final approval.

"The opinion of competent counsel is relevant to the question whether a settlement is fair, reasonable, and adequate under Rule 23." *Schulte*, 805 F. Supp. 2d at 586. Courts are allowed to rely on the opinion of competent counsel, especially where counsel are qualified, discovery has taken place, and the settlement is the product of arm's-length negotiations, such that there is no indication of collusion. *See Isby*, 75 F.3d at 1200; *Hispanics United v. Vill. of Addison*, 988 F. Supp. 1130, 1150 n.6 (N.D. Ill. 1997) (noting a "strong initial presumption of fairness attaches" where a settlement is "the result of arm's length negotiations," and where counsel are "experienced and have engaged in adequate discovery.").

Class Counsel have expressed their support for the Settlement and believe, based on their extensive class action experience and exhaustive pursuit of Plaintiffs' claims, that the Settlement is an outstanding result for the Class Members. Class Counsel are capable of assessing the strengths and weaknesses of the parties' respective positions in this litigation due to Class Counsel's extensive experience as members of the class action bar who have litigated numerous class actions similar to this one. *See generally* Dkt. 632-7. Class Counsel and their firms have

been appointed as class counsel in numerous complex class actions, including many similar class actions involving motor vehicles, in state and federal courts across the country. *Id*.

Class Counsel's extensive, relevant experience has also allowed them to accurately weigh the merits of Class Members' claims, along with the risks and potential rewards of continued litigation through trial and appeals compared to the benefits provided under the Settlement. Class Counsel believe that the Settlement provides substantial relief for Class Members who may otherwise be left without a remedy due to the time, expense, and risks inherent in further litigation. That, in addition to the fact that the Settlement was reached following often contentious discovery and arm's-length negotiations, strongly favors final approval.

Also relevant here is the Rule 23(e)(2)(A) factor concerning whether the class representatives and class counsel have adequately represented the class. This means that courts consider: (1) whether class representatives are "part of the class and possess the same interest and suffer the same injury as the class members;" (2) if class representatives "have some commitment to the case, so that the 'representative' in a class action is not a fictive concept;" and (3) "the 'competency and conflicts of class counsel.'" *In re AT&T*, 270 F.R.D. at 343 (quotation omitted). Class Representatives and Class Counsel have demonstrated through four years of litigation that they have adequately represented the Class, because: (1) the Class Representatives have the same alleged injury and interest as all other Class Members—they purchased or leased the same allegedly defective trucks, they share the Class's interest of maximizing their recovery from the same set of alleged vehicle defects, and all Class Members have the same recovery options; (2) every Class Representative responded to extensive discovery requests and sat for their depositions; and (3) this Court has already found Class Counsel to be adequate (Dkt. 27). Therefore, the Class Representatives and Class Counsel have also satisfied Rule 23(e)(2)(A).

### 5. The stage of proceedings and the amount of discovery also support final approval.

The Seventh Circuit's final factor generally favors approval of a settlement where "discovery and investigation conducted by class counsel prior to entering into settlement negotiations was extensive and thorough." *Isby*, 75 F.3d at 1200 (citation and internal quotations omitted). As discussed above, *see* Section II.A, after initial mediation efforts failed, Plaintiffs and Navistar litigated this case for more than four years. Dkt. 632-7 ¶ 30. During this time, the parties engaged in extensive discovery, including exchanging and reviewing more than 2.5 million documents, taking and defending more than 60 depositions, and litigating several critical motions before this Court. *Id.* ¶¶ 26, 29. Plaintiffs retained and worked extensively with more than half a dozen consulting and testifying experts, including mechanical engineering and economics experts. *Id.* ¶ 28. By March 2019, Plaintiffs had fully drafted their class certification motion with attendant exhibits, including expert reports. *Id*. ¶ 29. The parties engaged in mediation with the assistance of Judge Wayne Andersen, a retired judge in this District and a respected JAMS mediator. *Id.* ¶ 30. Renewed mediation efforts began in June 2018 and continued for months, including six in-person negotiations in Chicago, dozens of hours on telephone conferences, and many dozens of email exchanges. *Id.* Negotiations were at arm's-length and often contentious. *Id.* On the literal eve of filing Plaintiffs' class certification motion and supporting expert reports in March 2019, the parties reached a tentative agreement in principle. *Id.* ¶ 29. In the months since, they have worked hard to finalize the agreement. *Id.*

Clearly, the Settlement followed extensive discovery and investigation, and there can be no doubt that Plaintiffs' dogged pursuit of critical discovery strengthened their case. The all-encompassing discovery process informed Plaintiffs' arguments as to class certification and their positions during settlement negotiations, which were essential to achieving the Settlement.

These realities also support the Rule 23(e)(2)(B) factor (whether the parties negotiated the settlement at arm's length), which cannot be reasonably disputed. *See Hale*, 2018 WL 6606079, at *3 (failure of initial mediation can be a sign of arm's length negotiation). Therefore, these factors also weigh in favor of final approval.

## IV. CONCLUSION

For all of the above reasons, Plaintiffs respectfully ask the Court to: (1) grant final approval to the Settlement; (2) grant final certification of the Settlement Class; (3) find that adequate notice was provided to the Settlement Class Members; and (4) approve Plaintiffs' request for attorneys' fees, expenses, and service awards.

Dated: September 10, 2019

Respectfully submitted,

*/s/ Adam J. Levitt*
Adam J. Levitt
alevitt@dicellolevitt.com
DICELLO LEVITT GUTZLER, LLC
Ten North Dearborn Street, Eleventh Floor
Chicago, Illinois 60602
Telephone: (312) 214-7900

*Co-Lead Class Counsel*

*/s/ Jonathan D. Selbin*
Jonathan D. Selbin
jselbin@lchb.com
LIEFF CABRASER HEIMANN & BERNSTEIN
250 Hudson Street, 8th Floor
New York, New York 10013
Telephone: (212) 355-9500

*Co-Lead Class Counsel*

*/s/ William M. Audet*
William M. Audet
waudet@audetlaw.com
AUDET & PARTNERS, LLP
221 Main Street, Suite 1460
San Francisco, California 94105
Telephone: (415) 568-2555
Facsimile: (415) 568-2556

*Co-Lead Class Counsel*

*/s/ Laurel G. Bellows*
Laurel G. Bellows
lbellows@bellowslaw.com
THE BELLOWS LAW GROUP, P.C.
209 South LaSalle Street, #800
Chicago, Illinois 60604
Telephone: (312) 332-3340

*Liaison Counsel*

**CERTIFICATE OF SERVICE**

I, Adam J. Levitt, hereby certify that on September 10, 2019 a copy of the foregoing document was filed electronically using the CM/ECF system, which will send notification of such filing to all counsel of record.

*/s/ Adam J. Levitt*
Adam J. Levitt