

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

JAYNE NEWTON and BEATRIZ  
ZAVALA on behalf of themselves and all  
others similarly situated,

Plaintiffs,

vs.

NISSAN NORTH AMERICA, INC.,  
NISSAN MOTOR CO. LTD, and DOES  
1-50, inclusive,

Defendants.

Case No.:

**CLASS ACTION COMPLAINT  
AND JURY DEMAND**

Plaintiffs Jayne Newton and Beatriz Zavala ("Plaintiffs"), on behalf of themselves and all other similarly situated individuals, by their undersigned attorneys, allege the following causes of action against the defendants, as identified below, based on their personal knowledge as to themselves and their own acts, and on information and belief as to all other matters.

## **I. NATURE OF ACTION**

1. Plaintiffs bring a class action against defendants Nissan North America, Inc., and Nissan Motor Co., Ltd. (collectively referred to herein as "Defendants" or "Nissan") and DOES 1 through 50, inclusive, seeking damages for breach of warranty and for unfair and deceptive acts or practices arising from Nissan's design, manufacture, and sale of defective 2011 through present Nissan Rogue vehicles, and all other Nissan vehicles from 2011-present equipped with a Continuously Variable Transmission ("CVT") that are not the subject of a prior class action settlement and release (the "Defective Class Vehicles").<sup>1</sup>

2. The Defective Class Vehicles, which are designed and manufactured by Defendants, including from and within the State of Tennessee, and sold throughout the United States, are plagued by and possess a dangerous design and/or manufacturing defect in their transmission systems associated with their CVT. A CVT, which is engineered by the defendants, is a type of transmission that does not utilize conventional gears to achieve various movements required during normal driving. The CVT uses a segmented steel belt between pulleys that can be adjusted to change the reduction ratios in the transmission, which is supposed to occur smoothly

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<sup>1</sup> The following CVT-equipped Nissan vehicles are the subject of prior class action settlements and specifically excluded from the definition of Defective Class Vehicles: 2013-2016 model year Nissan Altima vehicles; 2013-2017 model year Nissan Sentra vehicles; 2014-2017 model year Nissan Versa Note vehicles; 2013-2014 Nissan Pathfinder vehicles; and 2012-2017 model year Nissan Versa vehicles.

and continuously. While CVT does not use conventional gears, it is electronically controlled by a Transmission Control Module (“TCM”).

3. The CVT system is defective. The defect of the CVT system (the “CVT Defect”), causes drivers to experience a significant and dangerous delay in the Class Vehicles’ response when attempting to accelerate. This is especially dangerous on highways and freeways when merging into traffic, or when passing another vehicle, and when the driver needs to accelerate quickly. Due to the CVT defect, drivers often experience the aforesaid delay accompanied by the revving of the engine as the gas pedal is depressed, albeit with little or no increase in speed. The CVT Defect has also been accompanied by stalling, jerking, lurching, shuddering, and/or shaking when Class Vehicles are operated, and often results in premature transmission failure. The CVT Defect can and does occur without warning while the Class Vehicles are being operated, thereby posing a grave, extreme, and unreasonable safety risk and hazard to drivers, consumers, passengers, pedestrians, and, importantly, to the public at large.

4. The CVT Defect, which can be dangerous and life threatening, directly, materially, and adversely affects Plaintiffs and Class Members' use and enjoyment of the Defective Class Vehicles, their safety, and their value.

5. However, despite knowing about the CVT Defect for several years, and the fact that it poses a significant risk of injury that impacts the public at large, Nissan has been concealing it from owners, purchasers, and lessees of the Defective Class Vehicles in a conscious and deliberate effort to avoid suffering economic losses occasioned by the need for repair of said vehicles at Nissan's own expense, thereby placing profits ahead of the safety of consumers and the public interest.

6. Meanwhile, there are many hundreds of thousands of Defective Class Vehicles being driven on America's roads and highways that have the potential to cause injury – including fatal or serious physical injury – to drivers, passengers, and pedestrians, as well as property damage, arising from the CVT Defect of design and/or manufacture.

7. Plaintiffs and Class Members would not have purchased their vehicles had Nissan disclosed this concealed truth regarding their inherent risk and danger, and certainly would have paid substantially less for said vehicles in any event. Defendants' unfair, deceptive, and fraudulent business practices, and concealment of known, significant defects, has caused Plaintiffs and Class Members who purchased or leased the Defective Class Vehicles to have suffered damages and have otherwise caused them harm, including, but not limited to, ascertainable loss of money or loss of value of the purchased vehicles. Nissan's conduct is not only unfair and deceptive, it is also egregious under the circumstances.

8. As a result, Plaintiffs, on behalf of themselves and similarly situated purchasers of the Defective Class Vehicles, assert the causes of actions and claims as alleged below arising under the consumer protection laws of the States of Nebraska and California, and/or common law, and/or the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* with respect to the Nationwide Consumer Class, and/or the Nebraska and California Consumer Classes, as identified below.

## **II. JURISDICTION AND VENUE**

9. This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. § 1332 of the Class Action Fairness Act of 2005 because: (i) there are 100 or more Class Members, (ii) there is an aggregate amount in controversy exceeding \$5,000,000, exclusive of interest and costs, and (iii) there is minimal diversity because at least one member of the Class and one party Defendant are citizens of different States. This Court also has federal question jurisdiction over

the action under 28 U.S.C. § 1331 because Plaintiffs' claims arise under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* This court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

10. This Court has specific personal jurisdiction because Nissan North America, Inc., is registered to conduct business in Tennessee, and the Nissan Defendants have purposefully availed themselves of the benefits and protections of Tennessee by continuously and systematically conducting substantial business in this judicial district, directing advertising and marketing materials to districts within Tennessee, and intentionally and purposefully placing Defective Class Vehicles into the stream of commerce within the districts of Tennessee and throughout the United States, with the expectation and intent that consumers would purchase them. Personal jurisdiction over Nissan North America also exists in this District because it has its principal place of business in Franklin, Tennessee. Defendants maintain sufficient minimum contacts with Tennessee. Thousands of Class Vehicles have been sold in and from Tennessee and are operated within the State of Tennessee and the Middle District of Tennessee.

11. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 because Nissan transacts business in this District, is subject to personal jurisdiction in this District, maintains executive offices in Franklin, Tennessee, and therefore is deemed to be a citizen of this District. Additionally, there are one or more authorized Nissan dealers within this District, Nissan has advertised in this District, and Nissan has received substantial revenue and profits from its sales and/or leasing of Defective Class Vehicles in this District; therefore, a substantial and material part of the events and/or omissions giving rise to the claims occurred within this District.

### **III. PARTIES**

#### **A. Plaintiffs**

12. Plaintiff Jayne Newton ("Newton") is a resident of O'Neill, Nebraska. In 2015, Ms. Newton purchased a new 2015 Nissan Rogue from Nissan of Omaha. Ms. Newton's 2015 Rogue was manufactured, advertised, initially sold, and placed into the stream of commerce by Nissan at the time Nissan North America was headquartered in Franklin, Tennessee. Ms. Newton lives several hours from the Nissan dealer. During a trip to Denver, Colorado from O'Neill, Nebraska, Plaintiff experienced the CVT Defect. The 2015 Nissan Rogue failed to accelerate when Plaintiff pressed on the accelerator to speed up the vehicle on a freeway, even though the tachometer showed increased RPM. On several occasions, it felt like the vehicle wanted to move forward, but instead shudders, requiring Ms. Newton to move the gear shift back and forth between drive and neutral to move ahead and stop the shuddering. This has occurred several times.

13. Plaintiff Beatriz Zavala ("Zavala") is a resident of Bloomington, California. In 2013, Ms. Zavala purchased a new 2013 Nissan Rogue from Mission Hills Nissan in Mission Hills, California. Ms. Zavala's 2013 Rogue was manufactured, advertised, initially sold, and placed into the stream of commerce by Nissan at the time Nissan North America was headquartered in Franklin, Tennessee. Ms. Zavala's vehicle began to exhibit the CVT Defect in about 2017 and continues to exhibit the Defect. For example, Ms. Zavala experiences significant hesitation when she slows down and then attempts to accelerate while still in motion. There have also been several instances in which the car has jerked and taken off faster than intended when attempting to accelerate. At times the vehicle loses power and slows down at random. Ms. Zavala purchased her vehicle primarily for personal, family or household purposes.

**B. Defendants**

**1. Nissan Motor Co. Ltd.**

14. Defendant Nissan Motor Co., Ltd ("NML") a Japanese corporation with its principal place of business located in Yokohama, Japan. NML, is the parent corporation and 100% or sole owner of Nissan North America Inc., ("NNA"). NML, through its various entities, and agents, designs, manufactures, markets, distributes, and sells the Defective Class Vehicles automobiles in Tennessee and multiple other locations in the United States and worldwide.

**2. Nissan North America Inc.**

15. Defendant Nissan of North America Inc. ("NNA") is incorporated in California and headquartered in Franklin, Tennessee. Along with NML, NNA sold and distributed the Defective Class Vehicles through a network of dealers who are their agents. Money received from the purchase of a Nissan vehicle from a dealer flows from the dealer to NNA and can be traced to the Nissan Defendants.

16. NNA and NML are collectively referred to in this complaint as "Nissan" or the "Defendants," unless identified as NNA or NML.

17. At all times material, Nissan designed, engineered, developed, manufactured, fabricated, assembled, equipped, tested or failed to test, inspected or failed to inspect, repaired, retrofitted or failed to retrofit, failed to recall, labeled, advertised, promoted, marketed, supplied, distributed, wholesaled, and/or sold the Defective Class Vehicles, including the subject vehicles operated by Plaintiffs.

18. Nissan manufactured, sold, and warranted the Defective Class Vehicles throughout the United States. Nissan and/or its agents, divisions, or subsidiaries designed, manufactured, and installed the defective CVT system on the Defective Class Vehicles.

19. The true names and capacities of the Defendants sued herein as DOES 1 through 50, inclusive, are currently unknown to Plaintiffs, who therefore sues such Defendants by such fictitious names. Each Defendant designated herein as a DOE is legally responsible in some manner for the unlawful acts referred to herein. Plaintiffs will seek leave of Court to amend this Complaint to reflect the true names and capacities of any Defendants designated herein as DOES when such identities become known.

20. Based upon information and belief, Plaintiffs allege that at all times mentioned herein, each and every Defendant was acting as an agent and/or employee of each of the other Defendant, and at all times mentioned was acting within the course and scope of said agency and/or employment with the full knowledge, permission, and consent of each of the other Defendants. In addition, each of the acts and/or omissions of each Defendant alleged herein were made known to, and ratified by, each other Defendant.

#### **IV. FACTUAL BACKGROUND**

##### **A. The CVT Defect of Design and/or Manufacture of the Defective Class Vehicles Exposing Consumers to Risk of Harm.**

21. At all times material, Nissan designed, manufactured, distributed, sold and leased the defective Class Vehicles directly or indirectly through dealers and other retail outlets. Plaintiffs are informed and believe and thereupon allege that hundreds of thousands of such vehicles have been sold nationwide.

22. Plaintiffs and Class Members are intended third-party beneficiaries of contracts between Nissan and its dealerships. Plaintiffs and Class Members are the intended beneficiaries of Nissan's warranties, rather than the dealerships, given that it is the Plaintiffs and Class Members who are intended to be the ultimate consumers of the defective Class Vehicles and the warranty agreements were designed for and intended to benefit them – the ultimate consumers – only.



23. The Defective Class Vehicles have a significant transmission defect of design and/or manufacture causing transmission system malfunction or failure, as alleged above – the CVT Defect.

24. Numerous consumers have reported over the past several years experiencing transmission malfunctions and problems with respect to Defective Class Vehicles, causing problems or failures accelerating, including while on highways and freeways during normal driving conditions. The National Highway Traffic Safety Administration (“NHTSA”) has received hundreds of CVT Defect-related complaints from consumers associated with the Defective Class Vehicles. These include, among various complaints, scores of complaints of transmission malfunction, including in circumstances that could lead to accidents and personal injury. The CVT Defect has the potential to cause serious injury, especially when merging into traffic on a highway or freeway where vehicles are traveling at great speed. The reliable operation of the transmission is crucial to a vehicle's ability to adequately accelerate or safely travel over streets highways and freeways without creating a potential driving hazard for drivers, passengers, or pedestrians.

25. While Nissan has experienced CVT Defect problems and complaints in other vehicle models and has received complaints and become aware of the existing defect in the Defective Class Vehicles, it has purposely excluded the identified Defective Class Vehicles from a safety recall despite the fact that the Defective Class Vehicles are all plagued by the same CVT Defect. The 2014-2016 Nissan Rogue is a high-volume sale vehicle. Nissan elected to expose owners of the Defective Class Vehicles to potential life-threatening transmission malfunction **before** alerting consumers or making the vehicles safe.

26. Plaintiffs are further informed and believe and thereupon allege that despite being on notice of the CVT Defect, Defendants and their authorized agents intentionally refuse to

acknowledge the existence of the CVT Defect so that consumers' five (5) years/60,000 miles New Vehicle Limited Warranty Powertrain Coverage ("Powertrain Warranty") expires, or otherwise require payment to repair the CVT Defect, even when the Defective Class Vehicles remain under warranty.

**B. Nissan Has Known of the CVT Defect and Concealed it from Purchasers of the Defective Class Vehicle.**

27. Plaintiffs are informed and believe and thereupon allege that the Defendants were acutely aware of the CVT Defect contained in the Class Vehicles throughout the Class Period and have been so aware as early as 2010. Customers have reported the CVT Defect in the Class Vehicles to Defendants directly and through its dealers Nissan is aware of the CVT Defect due to customer complaints and inquiries and its own internal testing, among other things. Despite their knowledge, Defendants actively concealed the existence and nature of the CVT Defect from Plaintiffs and other Class Members at the time of purchase and/or repair, and thereafter. To that end, they failed to disclose and/or actively concealed the CVT Defect, that the Class Vehicles were not in good working order, were defective, and/or were not fit for the intended purpose, and that the Class Vehicles were defective.

28. The Defendants have deprived the Class Members of the benefit of their bargain, exposed them to a dangerous safety defect and have caused them to expend money at its dealerships or other third-party facilities and/or take other remedial measures related to the CVT Defect contained in their Class Vehicles. As part of its continuing concealment and unfair practice, Nissan has not recalled the Class Vehicles or extended their warranties, despite the fact that it is required to and should repair the CVT Defect. Nor have the Defendants offered customers a suitable repair or replacement of parts related to the CVT Defect free of charge, or otherwise

reimbursed Class Vehicles owners and lease holders who incurred cost for repairs associated with the defect.

29. Plaintiffs are informed and believe and thereupon allege that Defendants, at all times material to their placing of the Defective Class Vehicles into the stream of commerce, were aware of the CVT Defect and were able to access such information and become aware of that existing defect in their vehicles through various sources, including those that are independent of, and not available to, the Plaintiffs and Class Members.

30. Defendants became aware of the CVT Defect at all times material by reason of pre-production testing, pre-production design failure mode and analysis data, production design failure mode and analysis data, early consumer complaints made exclusively to Nissan's network of dealers and directly to Nissan, aggregate warranty data compiled from Nissan's network of dealers, testing conducted by Nissan in response to consumer complaints, and repair order and parts data received by Nissan from Nissan's network of dealers, among other sources.

31. Plaintiffs are informed and believe and thereupon allege that the Defendants actively monitor record customer complaints made to Nissan's network of dealers, as well as all service and repair work done related to the CVT Defect at its network of dealers.

32. An important source of field data is the NHTSA's Consumer Complaint Database. This database contains all motor vehicle-related consumer complaints submitted to the NHTSA since January 2000. Consumers submit what is called a "Vehicle Owner Questionnaire" in which they are asked to provide information that includes, the make, model, and model year of the vehicle, the approximate incident date, the mileage at which the incident occurred, whether the incident involved a crash or a fire, whether any persons were injured or killed in the incident, the speed of the vehicle at the time of the incident, and a description of the incident along with a

description of the vehicle components they believe were involved in the incident. The majority of consumer complaints are submitted online at [www.safercar.gov](http://www.safercar.gov), where consumers can input this information directly into the database through their computer. They can also submit complaints by telephone through the Auto Safety Hotline, through submitting a paper Vehicle Owner Questionnaire form, and by mailing consumer letters to the NHTSA. This information is then entered into the NHTSA's ARTEMIS database where it can be searched and reviewed by the general public and vehicle manufacturers by make, model, model year, and component.

33. Plaintiffs are informed and believe and thereby allege that Nissan continuously monitors customer complaints made to the NHTSA. Nissan must remain in close contact with the NHTSA regarding potential auto defects of its vehicles, as required by federal law, which includes imposing a legal requirement upon Defendants compelling the confidential disclosure of defects or related data by auto makers to the NHTSA, including field reports, customer complaints and warranty data. *See Tread Act, Publ. No.*, 106-414, 114 STAT. 1800 (2000). Nissan has had, at all times material, the legal obligation to identify and report emerging safety related defects to the NHTSA under the "Early Warning Report" requirements.

34. There are scores of CVT related complaints that have been lodged with the NHTSA. As a consequence of the foregoing, Nissan knew or should have known of the many complaints about the CVT Defect that have been logged by the NHTSA Office of Defect Investigation. The content, frequency and magnitude of those complaints also alerted Nissan to the CVT Defect. The following are a few exemplars of complaints reported to the NHTSA by affected consumers:

- **NHTSA ID:11096877 Incident Date May 7, 2018:** CVT TRANSMISSION DEFECT. JERKING, SHUDDER, RPM VARY UP TO 3500 RPM WHEN IT SHOULD BE AR 2,000 RPM. SOMETIME IT QUIT IN

TRAFFIC. DOES THE SAME IN CITY, ON HIGHWAY, TRAFFIC HAZARD TO ME AND OTHER MOTORIST.

- **NHTSA ID:11013326 Incident Date August 2, 2017:** TRANSMISSION BEGAN JOLTING AND SHUTTERING THIS PAST WEEK AT ALL SPEEDS. WHEN ACCELERATING IT'S NOT AN ISSUE, HOWEVER, WHEN MAINTAINING SPEED THE RPMS INCREASES AND DECREASES AS THE TRANSMISSION SHIFTS UP AND DOWN. THIS CAUSES THE CAR TO SLOW ON THE FREEWAY AND ROADWAYS. IT FEEL VERY DANGEROUS.

- **NHTSA ID: 11375131, Incident Date: September 19, 2020:** CAR DOES NOT ACCELERATE AFTER STOPPING AND TRYING TO YIELD TO ONCOMING TRAFFIC OR TURN AT A STOP SIGN. EXTREMELY DANGEROUS BECAUSE IT WILL ALL OF A SUDDEN DECIDE TO GO AND THE RPM GOES UP REALLY HIGH.

- **NHTSA ID: 1126587 Incident Date September 26, 2019:** 2015 NISSAN ROGUE, BROUGHT BRAND NEW, HAS 63,000 MILES. HAVING TRANSMISSION ISSUES FOR >9 MONTHS. I HAVE HAD NO PREVIOUS ISSUES UNTIL THEN. I CANNOT DRIVE FOR MORE THAN 30+ MIN BEFORE MY VEHICLE STARTS STALLING AT STOPLIGHTS/STOP SIGNS. WHEN I GO TO ACCELERATE AFTER BRIEFLY STOPPING, THE CAR STUTTERS AND BUCKS UNTIL I PRESS HARDER ON THE ACCELERATION. THE STUTTERING GETS WORSE THE LONGER YOU DRIVE IT. THE SAFETY ISSUE WITH A CAR NOT PROPERLY ACCELERATING WHEN YOU NEED IT TO, IS CONCERNING. I HAVE TAKEN IT TO THE NISSAN DEALERSHIP MULTIPLE TIMES AND THEY CLAIM THEY CANNOT "DUPLICATE" THE ISSUE, WHILE THE TECHNICIAN ADMITTED TO EXPERIENCING MY COMPLAINT WHILE HE DROVE IT A FEW TIMES. THEY SAY NOTHING CAN BE DONE BECAUSE NO CODES ARE RENDERING A PROBLEM AND I HAVE TO WAIT FOR THE "PROBLEM" TO GET WORSE OR ULTIMATELY, UNTIL THE TRANSMISSION "GOES OUT" AS THE NISSAN REP TOLD ME.

35. Defendants cannot in good faith deny that they were aware of the CVT Defect plaguing the Defective Class Vehicles. The same or a similar transmission defect problem plagued 2008-2010 Rogue models as well as 2003-2010 Murano, 2007-2010 Versa SL, 2007-2010 Sentra, 2007-2010 Altima, 2007-2019 Maxima, and 2009-2010 Cube vehicles designed, manufactured, and sold by Nissan. As a consequence of the same or similar defect with the CVT transmission in

those models, Nissan extended the powertrain warranty coverage while advising consumers that "in the unlikely event that your vehicle's transmission should need repair beyond the extended warranty period, we are working to decrease the cost of repair."<sup>2</sup> In December 2013, Nissan's then-CEO, Carlos Ghosn, announced that Nissan was increasing its oversight of CVT supplier JATCO, Ltd.<sup>3</sup> Continuing customer service issues were cutting into Nissan's profits. But rather than change suppliers or design out the CVT Defect and manufacture a defect-free transmission in their vehicles, Nissan continued to roll ahead while being plagued with continuing CVT issues.

36. Nissan's knowledge of the CVT Defect is further demonstrated by its Technical Service Bulletins ("TSBs"), which it issues to its dealers as well as its dealers. The four-cylinder 2013-2016 Nissan Altima has the same or substantially similar transmission as the 2014-2016 Nissan Rogue. After being forced to do so, Nissan recently extended the 2013-2016 Altima Powertrain Warranty for 5 years/60,000 miles to 7 years/84,000 miles and agreed to reimburse consumers who paid for transmission-related repairs during the Extended Warranty period in connection with a class action settlement. *See Gann, et al. v. Nissan North America, Inc.*, Case No. 3:18-CV-00966 (MD Tenn.).

37. Placing cost cutting strategies ahead of consumer safety, Nissan is still failing to address the need for a prophylactic remediation of the CVT Defect that is occurring in the existing Defective Class Vehicles. Nissan continues to avoid the responsibility and expense of making these vehicles safe to drive.

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<sup>2</sup> See, Customer Satisfaction Program, CVT Program Details available at: <https://web.archive.org/web/20100124032242/http://www.nissanassist.com/ProgramDetails.php?menu=2> (last visited February 23, 2021).

<sup>3</sup> Nissan Presses JATCO, Ltd. to end CVT clinches, alternative news available at: <https://www.autonews.com/article/20131202/OEM10/312029972/nissan-presses-JATCO-2-n-CVT-glitches> (December 2, 2013) (last visited February 23, 2021).

38. Nissan also has had long-standing knowledge of the unreasonable risk to safety and non-compliance with the Federal Motor Vehicle Safety Standards occurring in Defective Class Vehicles. Nissan acquires such knowledge on a real-time basis. Still Nissan has failed to address the problem.

39. Whether it is a defect causing an unreasonable risk to safety or non-compliance with Federal Motor Vehicles Safety Standards, Nissan is given three options: a preventative safety repair; replacing the vehicle with a comparable one, or refunding the price of the vehicle less depreciation. Nissan has not taken these required actions and, instead, continues to expose and allow the unsuspecting public to experience transmission failures, and personal safety risk.

40. In addition, the Defendants' long-standing knowledge of the CVT Defect associated with the Defective Class Vehicles arises from Nissan's monitoring of dealer repair records, warranty claims, testing, internal investigations, so-called quality control, and its interaction with consumers and dealers by its consumer relations department.

**C. Nissan Avoids Honoring its Own Warranty.**

41. Each sale by Nissan of a Defective Class Vehicle comes with a limited warranty. The "Limited New Vehicle Warranty" obligates Nissan to repair reported defects within the expressed years or mileage of warranty.

42. Many owners and lessees have presented Defective Class Vehicles to Nissan-certified dealerships with complaints related to the CVT Defect. However, Nissan has evaded its warranty obligations by (1) failing to tell consumers that the Class Vehicles are defective (2) refusing to honestly acknowledge and perform repairs to correct the CVT Defect, and/or (3) having its agents and dealers charge consumer Class Members for repairing the CVT Defects of their vehicles.

43. There are well over 500,000 vehicles with the CVT Defect, placing the risk of failure on their owners, drivers, passengers, pedestrians, and consumer purchasers of the Defective Class Vehicles.

## **V. CLASS ALLEGATIONS**

### **A. The Nationwide Consumer Class.**

44. Pursuant to Rules 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure, Plaintiffs bring this action on behalf of themselves and a Nationwide Consumer Class, initially defined as follows:

All individuals or entities in the United States who are current or former owners or lessees of Defective Class Vehicles, as defined above.

### **B. The Nebraska Consumer Class.**

45. Pursuant to Rules 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure, Plaintiff Newton brings this action on behalf of herself and a Nebraska Consumer Class, defined as follows:

All individuals or entities in the State of Nebraska who are current or former owners or lessees of Defective Class Vehicles, as defined above.

### **C. The California Consumer Class**

46. Pursuant to Rules 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure, Plaintiff Zavala brings this action on behalf of herself and a California Consumer Class, defined as follows:

All individuals or entities in the State of California who are current or former owners or lessees of Defective Class Vehicles, as defined above.

47. Collectively, the Nationwide Consumer Class, the Nebraska Consumer Class, and the California Consumer Class are referred to hereinafter as the "Class," unless otherwise individually identified.



48. Excluded from the Nationwide Consumer Class, the Nebraska Consumer Class, and the California Class are Defendants, their employees, co-conspirators, officers, directors, legal representatives, heirs, successors, and wholly or partly owned subsidiaries or affiliated companies; class counsel and their employees; and the judicial officers and their immediate family members and associated court staff assigned to this case, and all persons within the third degree of relationship to any such persons. Plaintiffs reserve the right to modify, change, or expand the aforesaid class definitions upon further discovery and investigation.

49. The Nationwide Consumer Class, the Nebraska Consumer Class, and the California Consumer Class pursue claims for violation of the Nebraska Consumer Protection Act (Neb. Rev. Stat. §§ 59-1601, 1602, and 1609); California's Consumer Legal Remedies Act (California Civil Code § 1750 *et seq.*), California's Business & Professions Code (§ 17200 *et. seq.*), and for breach of express warranty; breach of implied warranty of merchantability; violations of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*; and for common law fraudulent concealment and unjust enrichment.

50. Pursuant to Federal Rule of Civil Procedure 23(a)(1), the Nationwide Consumer Class, the Nebraska Consumer Class and the California Consumer Class, are each so numerous that joinder of all members is impracticable. Due to the nature of the trade and commerce involved, the members of each such Class are geographically dispersed throughout the United States. Joinder of all Class Members would be impracticable. While the exact number of the respective Class Members is unknown to Plaintiffs at this time, Plaintiffs believe that there are, at least, over a million members of the Nationwide Consumer Class and many, many thousands of members of the Nebraska and California Consumer Classes.

51. Pursuant to Federal Rule of Civil Procedure 23(a)(3), Plaintiffs' claims are typical of the claims of the other members of the Nationwide Consumer Class and Nebraska and California Consumer Classes. Plaintiffs and other Class Members were subject to the same standardized warranties, and nondisclosures about the safety and quality of Defective Class Vehicles, which suffer from the CVT Defect. Nissan's acts of concealment were made pursuant to a standardized policy and procedure implemented by Nissan. Plaintiffs and Class Members purchased or leased Defective Class Vehicles that they would not have purchased or leased at all, or for as much as they paid, had they known the truth regarding the CVT Defect. Plaintiffs and the Class Members have all sustained injury in that they overpaid for their Defective Class Vehicles due to Defendants' wrongful conduct.

52. Pursuant to Rules 23(a)(4) and (g)(1) of the Federal Rules of Civil Procedure, Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel competent experienced in class action and consumer fraud litigation.

53. Pursuant to Federal Rule of Civil Procedure 23(b)(2), Nissan has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to each class as a whole. In particular, Nissan has failed to properly repair the Defective Class Vehicles and has failed to adequately implement a prophylactic or otherwise full brake repair for said vehicles.

54. Pursuant to Rules 23(a)(2) and (b)(3) of the Federal Rules of Civil Procedure, common questions of law and fact exist as to all members of Class and predominate over any questions solely affecting individual members thereof. Among the common questions of law and fact are as follows:

- a. Whether Nissan had knowledge of the CVT Defect;
- b. Whether Nissan concealed the CVT Defect affecting Defective Class

- Vehicles;
- c. Whether Nissan violated the Magnuson-Moss Warranty Act;
  - d. Whether Nissan's omissions regarding the vehicles were likely to deceive a reasonable person in violation of the Nebraska Consumer Protection Act, California's Legal Remedies Act and the UCL;
  - e. Whether Nissan violated the Nebraska Consumer Protection Act;
  - f. Whether Nissan violated California's Legal Remedies Act;
  - g. Whether Nissan violated California Business & Professions Code § 17200 *et seq*;
  - h. Whether Nissan's omissions regarding the safety of its vehicles were likely to deceive a reasonable person;
  - i. Whether Nissan's business practices, including the design, manufacture, and sale of vehicles with a CVT Defect that Defendants failed to adequately disclose and remedy, offend established public policy and cause harm to consumers that greatly outweighs any benefits associated with those practices;
  - j. Whether Nissan breached its express warranties regarding the safety and quality of its vehicles;
  - k. Whether Nissan breached the implied warranty of merchantability because its vehicles were not fit for their ordinary purpose due to their CVT Defect;
  - l. Whether Nissan was unjustly enriched at the expense of Plaintiff, the Nationwide Consumer Class and the Nebraska and California Consumer Classes;
  - m. Whether Plaintiff and class members are entitled to damages, restitution, restitutionary disgorgement, equitable relief, and/or other relief; and
  - n. The amount and nature of such relief to be awarded to Plaintiffs and the respective classes as asserted and defined herein.

55. Pursuant to Federal Rule of Civil Procedure 23(b)(3), a class action is superior to other available methods for the fair and efficient adjudication of this controversy because joinder of all class members is impracticable. The prosecution of separate actions by individual members of the Nationwide Consumer Class and/or the Nebraska and California Consumer Classes would impose heavy burdens upon the courts and Defendants and would create a risk of inconsistent or varying adjudications of the questions of law and fact common to those classes. A class action would achieve substantial economies of time, effort and expense, and would assure uniformity of decision as to persons similarly situated without sacrificing procedural fairness.

## **VI. TOLLING OF STATUTES OF LIMITATIONS**

56. Nissan's knowing and active concealment and denial of the facts alleged herein act to toll any applicable statute(s) of limitations. Plaintiffs and other Class Members could not have reasonably discovered the true, latent nature of the Nissan CVT Defect until shortly before commencing this class-action litigation.

57. In addition, even after Class Members contacted Nissan and/or its authorized dealers to repair the Nissan CVT Defect, Nissan and/or its dealers repeatedly and consistently told them the Defective Class Vehicles were not defective.

58. Nissan has had, and continues to have, a duty to disclose to Plaintiffs and the other Class Members the true character, quality, and nature of the Defective Class Vehicles, including the facts that the Defective Class Vehicles require costly repairs, pose safety concerns, and have a diminished resale value. As a result of Nissan's active concealment, any and all applicable statutes of limitations otherwise applicable to the allegations herein have been tolled.

## **VII. CAUSES OF ACTION**

### **COUNT I VIOLATION OF MAGNUSON-MOSS WARRANTY ACT (15 U.S.C. § 2301, *et seq.*)**

59. Each of the preceding paragraphs is incorporated by reference as though fully set forth at length herein.

60. Plaintiffs assert this Count on behalf of the Nationwide Consumer Class.

61. Plaintiffs are "consumer(s)" within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(3).

62. Nissan is a "supplier" and "warrantor" within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(4)-(5).

63. The Class Vehicles are "consumer products" within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(1).

64. 15 U.S.C. § 2310(d)(1) provides a cause of action for any consumer who is damaged by the failure of a warrantor to comply with a written or implied warranty. Nissan's express warranties are written warranties within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(6). The Defective Class Vehicles' implied warranties are covered under 15 U.S.C. § 2301(7). At all times material, Nissan designed, manufactured, distributed, sold, and leased the defective Class Vehicles directly or indirectly through dealers and other retail outlets. Plaintiffs are informed and believe and thereupon alleges that hundreds of thousands of such vehicles have been sold nationwide.

65. Nissan breached these warranties, as described in more detail above, but generally by not repairing or adjusting the Defective Class Vehicles' materials and workmanship defects; providing Defective Class Vehicles not in merchantable condition and which present an unreasonable risk of CVT Defect related transmission malfunction and/or failure and not fit for the ordinary purpose for which vehicles are used; providing Defective Class Vehicles that were not fully operational, safe, or reliable; and not curing defects and nonconformities once they were identified.

66. Plaintiffs and Class Members have had sufficient direct dealings with either the Defendants or their agents (dealerships) to establish privity of contract between Plaintiffs and the Class Members. Notwithstanding this, privity is not required in this case because Plaintiffs and Class Members are intended third-party beneficiaries of contracts between Nissan and its dealers; specifically, they are the intended beneficiaries of Nissan's implied warranties. The dealers were not intended to be the ultimate consumers of the Defective Class Vehicles and have no rights under

the warranty agreements provided with the Defective Class Vehicles. The warranty agreements were designed for and intended to benefit the ultimate consumers only. Finally, privity is also not required because Plaintiffs' and Class Members' Defective Class Vehicles are dangerous instrumentalities due to the aforementioned defects and nonconformities.

**COUNT II**  
**VIOLATION OF THE NEBRASKA CONSUMER PROTECTION ACT**  
**(NEB. REV. STAT § 59-1601, 1602, and 1609)**

67. Each of the preceding paragraphs is incorporated by reference as though fully set forth at length herein.

68. Plaintiff asserts this claim on behalf of Class Members that purchased or leased a Defective Class Vehicle from Nissan or a Nissan dealership.

69. The Nebraska Consumer Protection Act, Neb. Rev. Stat. § 59-1602 specifically prohibits any "unfair or deceptive acts or practices in the conduct of any trade or commerce." Defendants have engaged in unlawful, fraudulent, and unfair business acts and practices in violation of said statute.

70. The CVT Defect presents and constitutes a safety issue that Nissan has a duty to disclose.

71. Defendants violated the NCPA because they have engaged in business acts or practices that are unlawful because they violate the National Traffic and Motor Vehicle Safety Act of 1996 (the "Safety Act"), codified at 49 U.S.C. § 30101, *et seq.*, and the regulations promulgated thereunder.

72. Defendants have violated the NCPA because the omissions regarding the safety and reliability of their vehicles, as set forth in this Complaint, were likely to deceive a reasonable consumer, and the information would be material to a reasonable consumer.

73. Defendants have violated the NCPA because the acts and practices set forth in the Complaint, including the manufacture and sale of vehicles with the CVT Defect and Defendants' failure to adequately investigate, disclose, and remedy that defect, offend established public policy, and because the harm they cause to consumers greatly outweighs any benefits associated with those practices. Defendants' conduct has also impaired competition within the automotive vehicles market and has prevented Plaintiff and Class Members from making fully informed decisions about whether to purchase or lease the Class Vehicles and/or the price to be paid to purchase or lease Class Vehicles.

74. Plaintiff has suffered an injury in fact, including the loss of money or property, as a result of Defendants' unfair, unlawful, and/or deceptive practices. In purchasing their vehicles, Plaintiff have relied on the omissions of Nissan with respect of the safety and reliability of the vehicle. Nissan's representations turned out not to be true because the Defective Class Vehicles had a defective and dangerous CVT system.

75. Had Plaintiff known this, she would not have purchased her Defective Class Vehicle and/or paid as much for it.

76. All of the wrongful conduct alleged herein occurred, and continues to occur, in the conduct of Defendants' business. Defendants' wrongful conduct is part of a pattern or generalized course of conduct that is still perpetuated and repeated, both in the State of Nebraska and nationwide.

77. Plaintiff requests that this Court enter such orders or judgments as may be necessary to enjoin Defendants from continuing their unfair, unlawful, and/or deceptive practices and to restore to Plaintiff and members of the Class any money Nissan acquired by unfair competition, including restitution and/or restitutionary disgorgement, and for such other relief set forth below.

**COUNT III**  
**VIOLATION OF CALIFORNIA'S CONSUMERS LEGAL REMEDIES ACT**  
**(CALIFORNIA CIVIL CODE § 1750 et. seq.)**

78. Each of the preceding paragraphs is incorporated by reference as though fully set forth at length herein.

79. Plaintiff Zavala asserts this claim on behalf of Class Members that purchased or leased a Defective Class Vehicle from Nissan or a Nissan dealership.

80. The California Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1770 specifically prohibits any "unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer." Defendants have engaged in unlawful, fraudulent, and unfair business acts and practices in violation of said statute.

81. The CVT Defect presents and constitutes a safety issue that Nissan has a duty to disclose.

82. Nissan is a "person" as defined by California Civil Code § 1761(c).

83. Plaintiff and the other Class Members are "consumers" within the meaning of California Civil Code § 1761(d).

84. By failing to disclose and concealing the defective nature of the Class Vehicles' continuously variable transmission from Plaintiff and prospective Class Members, Defendants violated California Civil Code § 1770(a), as they represented that the Class Vehicles had characteristics and benefits that they do not have, represented that the Class Vehicles were of a particular standard, quality, or grade when they were of another, and advertised the Class Vehicles with the intent not to sell them as advertised. *See* Cal. Civ. Code §§ 1770(a)(5), (7) & (9).



85. Defendants violated the CLRA because they have engaged in business acts or practices that are unlawful because they violate the National Traffic and Motor Vehicle Safety Act of 1996 (the "Safety Act"), codified at 49 U.S.C. § 30101, *et seq.*, and the regulations promulgated thereunder.

86. Defendants have violated the CLRA because the omissions regarding the safety and reliability of their vehicles, as set forth in this Complaint, were likely to deceive a reasonable consumer, and the information would be material to a reasonable consumer.

87. Defendants have violated the CLRA because the acts and practices set forth in the Complaint, including the manufacture and sale of vehicles with the CVT Defect and Defendants' failure to adequately investigate, disclose, and remedy that defect, offend established public policy, and because the harm they cause to consumers greatly outweighs any benefits associated with those practices. Defendants' conduct has also impaired competition within the automotive vehicles market and has prevented Plaintiff and Class Members from making fully informed decisions about whether to purchase or lease the Class Vehicles and/or the price to be paid to purchase or lease Class Vehicles.

88. Defendants' unfair and deceptive acts or practices occurred repeatedly in Defendants' trade or business, were capable of deceiving a substantial portion of the purchasing public, and imposed a serious safety risk on the public.

89. Defendants were under a duty to Plaintiff and the Class Members to disclose the defective nature of the Class Vehicles' continuously variable transmissions and/or the associated repair costs because:

- a. Defendants were in a superior position to know the true state of facts about the safety defect contained in the Class Vehicles' CVTs;

- b. Plaintiff and the Class Members could not reasonably have been expected to learn or discover that their continuously variable transmissions have a dangerous safety defect until after they purchased the Class Vehicles;
- c. Defendants knew that Plaintiff and the Class Members could not reasonably have been expected to learn about or discover the CVT Defect; and
- d. Defendants actively concealed the defective nature of the Class Vehicles' CVTs from Plaintiff and Class Members at the time of sale and thereafter

90. Plaintiff has suffered an injury in fact, including the loss of money or property, as a result of Defendants' unfair, unlawful, and/or deceptive practices. In purchasing their vehicles, Plaintiff has relied on the omissions of Nissan with respect of the safety and reliability of the vehicle. Nissan's representations turned out not to be true because the Defective Class Vehicles had a defective and dangerous CVT system.

91. Had Plaintiff known this, she would not have purchased her Defective Class Vehicle and/or paid as much for it.

92. All of the wrongful conduct alleged herein occurred, and continues to occur, in the conduct of Defendants' business. Defendants' wrongful conduct is part of a pattern or generalized course of conduct that is still perpetuated and repeated, both in the State of California and nationwide.

93. By a letter dated October 23, 2020, and sent via certified mail, Plaintiff provided Defendants with notice of their alleged violations of the CLRA pursuant to California Civil Code Section 1782(a) and demanded that Defendants rectify the problems associated with the behavior detailed above. As of the filing of this Class Action Complaint, Defendants have failed to agree to Plaintiffs' demands and have failed to give notice to all affected consumers, as required by California Civil Code Section 1782.

94. Plaintiff requests that this Court enter such orders or judgments as may be necessary to enjoin Defendants from continuing their unfair, unlawful, and/or deceptive practices and to restore to Plaintiff and members of the Class any money Nissan acquired by unfair competition.

95. Plaintiff additionally seeks actual damages, restitution, statutory and punitive damages, attorneys' fees and costs, and any other relief that the Court deems proper under Section 1780(a) of the CLRA pursuant to Civil Code Section 1782(d), due to Defendants' failure to rectify or agree to adequately rectify its violations as detailed above.

**COUNT IV**  
**VIOLATION OF UNFAIR COMPETITION LAW**  
**(CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200 *et seq.*)**

96. Each of the preceding paragraphs is incorporated by reference as though fully set forth at length herein.

97. Plaintiff Zavala asserts this claim on behalf of Class Members that purchased or leased a Defective Class Vehicle from Nissan or a Nissan dealership.

98. California Business & Professions Code Section 17200 ("UCL") prohibits acts of "unfair competition," including any "unlawful, unfair or fraudulent business act or practice" and "unfair, deceptive, untrue or misleading advertising."

99. The CVT Defect presents and constitutes a safety issue that Nissan has a duty to disclose.

100. Defendants have violated the UCL because the omissions regarding the safety and reliability of their vehicles, as set forth in this Complaint, were likely to deceive a reasonable consumer, and the information would be material to a reasonable consumer, thereby engaging in a fraudulent business act or practice within the meaning of the UCL.

101. Defendants have violated the UCL because the acts and practices set forth in the Complaint, including the manufacture and sale of vehicles with the CVT Defect and Defendants' failure to adequately investigate, disclose, and remedy that defect, offend established public policy, and because the harm they cause to consumers greatly outweighs any benefits associated with those practices. Defendants' conduct has also impaired competition within the automotive vehicles market and has prevented Plaintiff and Class Members from making fully informed decisions about whether to purchase or lease the Class Vehicles and/or the price to be paid to purchase or lease Class Vehicles.

102. Defendants were under a duty to Plaintiff and the Class Members to disclose the defective nature of the Class Vehicles' continuously variable transmissions and/or the associated repair costs because:

- a. Defendants were in a superior position to know the true state of facts about the safety defect contained in the Class Vehicles' CVTs;
- b. Plaintiff and the Class Members could not reasonably have been expected to learn or discover that their continuously variable transmissions have a dangerous safety defect until after they purchased the Class Vehicles;
- c. Defendants knew that Plaintiff and the Class Members could not reasonably have been expected to learn about or discover the CVT Defect; and
- d. Defendants actively concealed the defective nature of the Class Vehicles' CVTs from Plaintiff and Class Members at the time of sale and thereafter

103. Plaintiff has suffered an injury in fact, including the loss of money or property, as a result of Defendants' unfair, unlawful, and/or deceptive practices. In purchasing their vehicles, Plaintiff has relied on the omissions of Nissan with respect of the safety and reliability of the vehicle. Nissan's representations turned out not to be true because the Defective Class Vehicles had a defective and dangerous CVT system.

104. Had Plaintiff known this, she would not have purchased her Defective Class Vehicle and/or paid as much for it.

105. All of the wrongful conduct alleged herein occurred, and continues to occur, in the conduct of Defendants' business. Defendants' wrongful conduct is part of a pattern or generalized course of conduct that is still perpetuated and repeated, both in the State of California and nationwide.

106. As a direct and proximate result of Defendants' unfair and deceptive practices, Plaintiff and Class Members have suffered and will continue to suffer actual damages.

107. Defendants have been unjustly enriched and should be required to make restitution to Plaintiff and Class Members pursuant to sections 17203 and 17204 of the Business & Professions Code.

#### **COUNT V BREACH OF EXPRESS WARRANTY**

108. Each of the preceding paragraphs is incorporated by reference as though fully set forth at length herein.

109. This Count is asserted on behalf of the Class under Nebraska, Tennessee, and/or California law based on Defendants' conduct.

110. Nissan provided all purchasers and lessees of the Defective Class Vehicles with the express warranties described herein, which became part of the basis of the parties' bargain. Accordingly, Nissan's warranties are express warranties under state law.

111. Nissan distributed the defective parts causing the CVT Defect in the Defective Class Vehicles, and said parts are covered by Nissan's warranties granted to all Defective Class Vehicle purchasers and lessors.

112. Nissan breached these warranties by selling and leasing Defective Class Vehicles with the CVT Defect, requiring repair or replacement within the applicable warranty periods, and

failing or refusing to honor the warranties by offering or providing free repairs or replacements during the applicable warranty periods.

113. Plaintiffs were not required to give notice because affording Nissan a reasonable opportunity to cure its breaches would have been futile. Indeed, they were futile. Nissan also knew about the CVT Defect but chose instead to conceal it as a means of avoiding compliance with its warranty obligations and save money thereby placing profits over the public safety and interests.

114. As a direct and proximate cause of Nissan's breach, Plaintiffs and the other Class Members bought or leased Defective Class Vehicles they otherwise would not have, overpaid for their vehicles, did not receive the benefit of their bargain, and their Defective Class Vehicles suffered a diminution in value. Plaintiffs and the Class Members have incurred, and will continue to incur, costs related to the CVT Defect's diagnosis and repair.

115. Any attempt to disclaim or limit these express warranties vis-à-vis consumers is unconscionable and unenforceable under the circumstances here.

116. Specifically, Nissan's warranty limitations are unenforceable because it knowingly sold a defective product without giving notice to Plaintiffs or Class Members.

117. The time limits contained in Nissan's warranty period were also unconscionable and inadequate to protect Plaintiffs and Class Members. Among other things, Plaintiffs and Class Members had no meaningful choice in determining these time limitations, the terms of which unreasonably favored Nissan. A gross disparity in bargaining power existed between Nissan and the Class Members because Nissan knew or should have known that the Class Vehicles were defective at the time of sale and would fail well before their useful lives.

118. Plaintiffs and Class Members have complied with all obligations under the warranty, or otherwise have been excused from performance of said obligations as a result of Nissan's conduct.

119. Nissan's breach of the express warranties has deprived Plaintiffs and the other Class Members of the benefit of their bargain.

120. The amount in controversy of Plaintiffs' and each Class Member's individual claim meets or exceeds the sum or value of \$25.00. In addition, the amount in controversy meets or exceeds the sum or value of \$50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit.

121. Nissan has been given reasonable opportunity to cure its breach of the written warranties. Alternatively, Plaintiffs and the other Class Members are not required to do so because affording Nissan a reasonable opportunity to cure its breach of written warranties was, and is, futile. Nissan has long been on notice of the alleged defect from the complaints and service requests it received from Class Members, as well as from their own warranty claims, customer complaint data, and/or parts sales data, and has made clear from its actions it has no intention of resolving the defect.

122. As a direct and proximate cause of Nissan's breach of the written warranties, Plaintiffs and the other Class Members sustained damages and other losses in an amount to be determined at trial. Nissan's conduct damaged Plaintiffs and the other Class Members, who are entitled to recover actual damages, consequential damages, specific performance, diminution in value, costs, including statutory attorney fees, and/or other relief as deemed appropriate.

**COUNT VI  
BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY**

123. Each of the preceding paragraphs is incorporated by reference as though fully set forth at length herein.

124. This Count is asserted on behalf of the Class under Nebraska, Tennessee, and/or California law based on Defendants' conduct.

125. Nissan was, at all relevant times, the manufacturer, distributor, warrantor, and/or seller of the Defective Class Vehicles. Nissan knew or had reason to know of the specific use for which the Defective Class Vehicles were purchased.

126. Nissan provided Plaintiffs and Class Members with an implied warranty that the Defective Class Vehicles and any parts thereof are merchantable and fit for the ordinary purposes for which they were sold. However, the Defective Class Vehicles are not fit for their ordinary purpose of providing reasonably reliable and safe transportation at the time of sale or thereafter because, *inter alia*, the Defective Class Vehicles suffered from a defect in the brake system at the time of sale. Therefore, the Defective Class Vehicles are not fit for their particular purpose of providing safe and reliable transportation.

127. Nissan impliedly warranted that the Defective Class Vehicles were of merchantable quality and fit for such use. This implied warranty included, among other things: (i) a warranty that the Defective Class Vehicles and their brake systems manufactured, supplied, distributed, and/or sold by Nissan were safe and reliable for the purpose for which they were installed; and (ii) a warranty that the Defective Class Vehicles would be fit for their intended use.

128. Contrary to the applicable implied warranties, the Defective Class Vehicles at the time of sale and thereafter were not fit for their ordinary and intended purpose of providing Plaintiffs and the other Class Members with reliable, durable, and safe transportation.



129. Instead, the Defective Class Vehicles suffer from a defective design(s) and/or manufacturing defect(s).

130. Nissan's actions, as complained of herein, breached the implied warranty that the Defective Class Vehicles were of merchantable quality and fit for such use.

## **COUNT VII FRAUD BY CONCEALMENT**

131. Each of the preceding paragraphs is incorporated by reference as though fully set forth at length herein.

132. This Count is asserted on behalf of the Class under Nebraska, Tennessee, and/or California law based on Defendants' conduct.

133. The Defendants made material omissions concerning a presently existing or past fact in that, for example, Defendants did not fully and truthfully disclose to its customers the true nature of the CVT Defect which was not readily discoverable by Plaintiffs or Class Members until many years after purchase or lease of the Class Vehicles. These facts, and other facts as set forth above, were material because reasonable people attach importance to the existence or nonexistence of the CVT Defect in deciding which vehicle to purchase.

134. Defendants were under a duty to disclose these omitted facts, because where one does speak one must speak the whole truth and not conceal any facts which materially qualify those facts stated. One who volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud.

135. In addition, Defendants had a duty to disclose these omitted material facts because they were known and/or accessible only to Defendants who have superior knowledge and access to the facts, and Defendants knew they were not known to or reasonably discoverable by Plaintiffs

and the Class. These omitted facts were material because they directly impact the safety of the Defective Class Vehicles.

136. Defendants possessed exclusive knowledge of the defects rendering Defective Class Vehicles inherently more dangerous and unreliable than similar vehicles.

137. Defendants actively concealed and/or suppressed these material facts, in whole or in part, with the intent to induce Plaintiffs and the Class to purchase the Defective Class Vehicles at a higher price for the vehicles, which did not match the vehicles' true value.

138. Plaintiffs and the Class were unaware of these omitted material facts and would not have acted as they did if they had known of the concealed and/or suppressed facts. The actions of Plaintiffs and the Class were justified. Defendants were in exclusive control of the material facts and such facts were not known to the public or the Class.

139. As a result of the concealment and/or suppression of the facts, Plaintiffs and the Class sustained damage. For those Class Members who elect to affirm the sale, these damages include the difference between the actual value of that which Plaintiffs and the Class paid and the actual value of that which they received, together with additional damages arising from the sales transaction, amounts expended in reliance upon the fraud, compensation for loss of use and enjoyment of the property, and/or lost profits. For those who want to rescind the purchase, they are entitled to restitution and consequential damages. Defendants' acts were done maliciously, oppressively, deliberately, with intent to defraud, and in reckless disregard of the rights and well-being of Plaintiffs and the Class in order to enrich Defendants. Defendants' conduct warrants an assessment of punitive damages in an amount sufficient to deter such conduct in the future, which amount is to be determined according to proof.

**COUNT VIII  
UNJUST ENRICHMENT**

140. Each of the preceding paragraphs is incorporated by reference as though fully set forth at length herein.

141. This Count is asserted by the Class for restitution under Nebraska, Tennessee, and California law based on Defendants' unjust enrichment.

142. As a result of their wrongful and fraudulent acts and omissions, as set forth above, pertaining to the design defect of their vehicles and the concealment of the defect, Defendants charged a higher price for their vehicles than the vehicles' true value and Defendants obtained monies which rightfully belong to Plaintiffs and other Class Members.

143. Defendants enjoyed the benefit of increased financial gains, to the detriment of Plaintiffs and other Class Members, who paid a higher price for vehicles which actually had lower values. It would be inequitable and unjust for Defendants to retain these wrongfully obtained profits.

144. Plaintiffs, therefore, seek an order establishing Defendants as constructive trustees of the profits unjustly obtained, plus interest.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs, on behalf of themselves and members of the respective classes, as appropriate, respectfully requests that this Court:

(a) determine that the claims alleged herein may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, and issue an order certifying the Class as defined above;

(b) appoint Plaintiffs as representatives of the Class and their counsel as Class Counsel;

(c) award all actual, general, special, incidental, statutory, punitive, and consequential damages and restitution to which Plaintiffs and members of the Class are entitled under the claims and causes of action as alleged above, at this time;

(d) award pre-judgment and post-judgment interest on any monetary relief;

(e) grant appropriate injunctive and/or declaratory relief, including, without limitation, an order that requires Nissan to repair, recall, and/or replace the Class vehicles and to extend the applicable warranties to a reasonable period of time, or, at a minimum, to provide Plaintiffs and Class Members with appropriate curative notice regarding the existence and cause of the Defect;

(f) award reasonable attorneys' fees and costs, including but not limited to fees and costs awardable to Plaintiff under and pursuant to Neb. Rev. Stat. §59-1609, California Civil Code § 1750 *et seq.*, California Business & Professions Code § 17200 *et seq.*; and

(g) grant such further relief that this Court deems appropriate.

Dated: March 1, 2021

Respectfully submitted,

/s/ J. Gerard Stranch, IV

J. Gerard Stranch, IV (BPR #20345)

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*\*Pro Hac Vice to be submitted*

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