

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

**In re Navistar MaxxForce Engines
Marketing, Sales Practices and Products
Liability Litigation**

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Master Case No. 1:14-cv-10318

This filing applies to
All Class Cases

Judge Joan B. Gottschall

**PRETRIAL ORDER NO. 29 GRANTING PRELIMINARY
APPROVAL OF CLASS ACTION SETTLEMENT**

Before the Court is Named Plaintiffs’ Unopposed Motion for Preliminary Approval of Settlement (“Motion”). Plaintiffs in this multi-district litigation (“MDL”) allege that defendants Navistar, Inc. and Navistar International, Inc. (collectively “Defendants”) sold or leased 2011-2014 model year vehicles equipped with certain MaxxForce 11- or 13-liter diesel engines equipped with a defective EGR emissions system.

On May 28, 2019, Named Plaintiffs executed a Class Action Settlement Agreement (“Settlement”) with Defendants on behalf of themselves and the Class they seek to certify.¹ Having thoroughly reviewed the Settlement and exhibits and considered the arguments of the Settling Parties, THE COURT HEREBY FINDS, CONCLUDES, AND ORDERS THE FOLLOWING:

1. The Settling Parties have agreed to a nationwide class action settlement of all Released Claims. Plaintiffs seek, and for purposes of settlement only Defendants do not object

¹ Capitalized terms not defined here have the definitions given to them in the Settlement. ECF No. 632-1 § I.

to, certification of a Class with the following definition:

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.

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).

2. For purposes of preliminary approval, this Court assesses this Settlement under Fed. R. Civ. P. 23(e). Under Rule 23(e)(1), the Court “must direct notice” to proposed Class Members—that is, grant preliminary approval to the Settlement—“if giving notice is justified by the Parties’ showing that the court will likely be able to (i) approve the proposal [as fair, reasonable, and adequate] under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal.” Fed. R. Civ. P. 23(e)(1).

Likely Approval as Fair, Reasonable, and Adequate

3. To determine whether the Settlement is fair, reasonable, and adequate, Rule 23(e)(2) directs the Court to consider whether:

(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm’s length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and

appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

4. The Class representatives proposed in the Third Amended Consolidated Class Action Complaint adequately represent the proposed Class: they share the same alleged injury (purchasing or leasing allegedly defective trucks) and the same interest (maximizing their compensation for those same trucks). These representatives have shown their commitment to class-wide recovery by each responding to extensive document requests and sitting for depositions. This Court determined that Co-Lead Class Counsel are adequate when appointing them as Interim Co-Lead Counsel (ECF No. 27), and since then, they have invested substantial time and resources in this case.

5. This Court has overseen the pre-trial litigation of this MDL for over four years, and there is no question that the Settling Parties are at arm's length. The Settlement appears to be the result of extensive, non-collusive, arm's-length negotiations between experienced counsel who were thoroughly informed of the strengths and weaknesses of the case through discovery and motion practice, and whose negotiations were supervised by respected class action mediator Judge Wayne Andersen (Ret.).

6. The Settlement provides adequate relief to the proposed Class. Defendants have agreed to provide \$135 million in value to the proposed Class regardless of the number of claimants. Members of the proposed Class can choose from three forms of relief for each Class Vehicle they own(ed) or lease(d): up to \$2,500 cash or up to \$10,000 rebate on a new Navistar truck with mere proof of ownership/lease, or up to \$15,000 for documented costs relating to the

alleged defect. In light of the costs, risks, and delay of trial and appeal, this compensation is at least adequate for purposes of Rule 23(e)(1). If this Settlement had not been reached, the Settling Parties planned to vigorously contest class certification, and Named Plaintiffs' chances at trial would have been uncertain, as evidenced by the mixed record of prior jury verdicts regarding this same alleged defect.

7. There is no reason to doubt the effectiveness of distributing relief under this Settlement. As further addressed below, the Settling Parties propose a notice plan reasonably calculated to reach nearly all members of the proposed Class, who will be able to submit claims and supporting documentation online or by mail. Claims will be processed by an experienced claims administrator, as further addressed below, and claimants will have the opportunity to appeal any decision once to a neutral decision-maker.

8. This Court will fully assess the request of Co-Lead Class Counsel for attorney's fees and costs after receiving their motion supporting such request. At this stage, the Court finds that the plan to request fees to be paid from the Cash Fund creates no reason not to direct notice to the proposed Class. In particular, should this Court find any aspect of the requested attorneys' fees or costs unsupported or unwarranted, the proposed Class alone will benefit from that determination, as such funds will instead be returned to Class Members, not Defendants.

9. No agreements exist between the Parties aside from the Settlement, with the exception of an agreement described generally in the Settlement that allows Defendants and Co-Lead Counsel to terminate the Settlement in certain defined circumstances.

10. The Settlement treats members of the proposed Class equitably relative to each other because all may select from the same three compensation options. Compensation would be based on length of ownership/lease or actual damages. These are equitable terms.

11. Having thoroughly reviewed the Settlement, the supporting exhibits, and the Settling Parties' arguments, this Court finds that the Settlement is fair, reasonable, and adequate, and thus likely to be approved, subject to further consideration at the Fairness Hearing to be conducted as described below.

Likely Certification of Settlement Class

12. The Court assesses the likelihood that it will be able to certify the proposed Class under Rules 23(a) and 23(b)(3) (because this Class seeks damages). Fed. R. Civ. P. 23(a)-(b). The Court makes this assessment for the purposes of Settlement only at this time.

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

14. 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.

15. 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. Typicality under Rule 23(a)(3) is satisfied.

16. 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).

17. 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.

18. 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.

19. For these reasons, pursuant to Rule 23, and for settlement purposes only, the Court finds it will likely certify the Class defined above in paragraph 1 of this Order. The Class definition in this Order hereby supersedes the Class proposed in the Settlement Agreement, by agreement of the parties as set forth in ECF No. 641 at 2–3. This finding is subject to further consideration at the Fairness Hearing to be conducted as described below.

20. The Court hereby preliminarily appoints the Named Plaintiffs as representatives of the Class. Pursuant to Fed. R. Civ. P. 23(g), the Court hereby preliminarily appoints Interim Co-Lead Counsel and Liaison Counsel (*see* ECF No. 27) as Co-Lead Class Counsel for the Class.

21. With the exception of those cases brought by Direct Action Plaintiffs (as defined in ECF No. 644), the Court hereby stays the cases pending in this multi-district litigation, pending final approval of the Settlement. In any final approval order issued after the fairness

hearing, the Court will enjoin all Class Members who do not validly request exclusion from the Class from commencing or prosecuting any Released Claim in any court or before any tribunal.

Approval of the Manner and Form of Notice

22. Having preliminarily approved the Settlement, the Court “must direct notice in a reasonable manner to all class members who would be bound by the proposal.” Fed. R. Civ. P. 23(e)(1). The Parties have submitted three proposed forms of Class Notice: a Summary Notice (including a Claim Form), a Long Form Notice, and an Email Notice, attached to Named Plaintiffs’ Amended Memorandum in Support of their Motion as Exhibits A-2, A-3, and A-4 and a plan for distributing these notices, attached to Named Plaintiffs’ original Motion as Exhibit H. Under the terms of the Settlement and as detailed in these exhibits and the Motion, the Settling Parties propose to send the Email Notice and Summary Notice to each individual Class Member identified through data from the Department of Motor Vehicles of all states and territories or other public records via first-class mail with the United States Postal Service and via email to Class Members for whom an email address can be located. The Parties will direct the Settlement Administrator to create a Settlement Website where the Long Form Notice, Frequently Asked Questions, and Claim Form will be available.

23. Having reviewed these exhibits and the proposed notice plan (included as supplemented in ECF No. 645), the Court finds that the proposed notice plan is the best notice practicable under the circumstances and appears reasonably calculated under the circumstances to apprise interested Class Members of this action, the Settlement terms, Class Members’ rights and options, how to file a claim, opt out, or object, the fees and expenses to be sought by Co-Lead Class Counsel, and the details of the Fairness Hearing. The notice plan satisfies the requirements of Fed. R. Civ. P. 23(c)(2)(B) and Due Process. The Court therefore approves the

notice plan and the notice documents substantially in the form attached as the Exhibits to Named Plaintiffs' Motion.

24. JND Legal Administration Co. ("JND") has been selected to serve as the Settlement Administrator under the terms of the Settlement. The Court hereby appoints JND to serve as the Settlement Administrator, to be supervised jointly by the Settling Parties in taking the actions ordered below and performing any other duties of the Settlement Administrator provided for in the Settlement.

25. Accordingly, the Court hereby ORDERS as follows:

a. As soon as practicable after the entry of this Order, the Settlement Administrator shall send or cause to be sent by first-class mail with the United States Postal Service a copy of the Summary Notice to every Class Member who can be identified by reasonable efforts acquiring data from Departments of Motor Vehicles and with reasonable cooperation by Defendants.

b. The Settlement Administrator will perform a national change of address search and forward notices that are returned by the U.S. Postal Service with a forwarding address. Following receipt of any returned notices that do not include a forwarding address, the Settlement Administrator shall as soon as practicable (itself or through an appropriate vendor) research such returned mail for more accurate addresses and promptly mail copies of the applicable notice to any more accurate addresses so found.

c. At approximately the same time as the Settlement Administrator mails the Summary Notice, the Settlement Administrator shall email the Email Notice to all Class Members for whom an email address can be located through reasonable efforts and the reasonable cooperation of Defendants.

d. As soon as practicable following the entry of this Order, and no later than the mailing of the Summary Notice, the Settlement Administrator shall establish the Settlement Website and the toll-free telephone number pursuant to the terms of the Settlement. The Settlement Website shall permit Class Members to read the Long Form Notice and FAQ, and to complete, review, and submit a Claim Form online, including the ability to upload and submit supporting documentation. The Settlement Website shall further permit Class Members to download PDF versions of the Settlement Agreement and the Claim Form.

e. Within sixty (60) calendar days after this Order, the Settlement Administrator shall provide a declaration that it has substantially completed initial mailing and e-mail of notice (i.e., excluding remailing ultimately returned mail), including a statement of the number of persons to whom the Summary Notice and Email Notice was mailed and emailed. This shall constitute the “Notice Date” referred to below.

f. At least fifteen (15) days prior to the deadline to file Claim Forms, the Settlement Administrator will again mail and email the Summary Notice or a substantially similar summary notice to remind Class Members of the impending claims and other deadlines.

g. The Settlement Administrator shall receive, evaluate, and either approve or disapprove Claim Forms under the requirements of the Settlement. The Settlement Administrator shall send a notice of claim denial by first-class U.S. mail to each Class Member who submitted a Claim Form that the Settlement Administrator determined not to be a valid claim, which shall apprise the Class Member of any right under the Settlement to re-submit a claim form or supporting documentation or to appeal.

h. The Settlement Administrator shall process Opt Out submissions received from Class Members. The Settlement Administrator shall forward any objections to the Settlement received from Class Members to Co-Lead Class Counsel and Defendants' Counsel.

i. The Settlement Administrator shall provide to Co-Lead Class Counsel and Defendants' Counsel periodic status reports regarding the number of Class Members to whom notice has been sent and the numbers of Class Members who have filed Claim Forms or elected to Opt Out of the Settlement and which compensation option each Class Member has selected. The Settlement Administrator must provide the Opt Out List to the Court, Defendants' Counsel, and Co-Lead Class Counsel no less than twenty-one (21) days before the Fairness Hearing, and no more than sixty-three (63) days after the Notice Date. If the Settlement Administrator receives more timely made Opt-out requests after providing the initial Opt Out List, the Settlement Administrator shall provide an updated Opt Out List to the Court, Defendants' Counsel, and Co-Lead Class Counsel no later than nine (9) days after providing the initial Opt Out List.

j. The Settlement Administrator, through data aggregators or otherwise, is authorized to request and receive contact and vehicle information from the Department of Motor Vehicles for all fifty (50) States, the District of Columbia, Puerto Rico, and any other United States territory or possession for all VINs for Class Vehicles.

Participation in, Exclusion from, or Objection to the Settlement

26. Each form described in this section shall be deemed to be submitted when postmarked or when electronically received by the Settlement Administrator if submitted electronically.

27. Class Members who wish to participate in the Settlement and receive a benefit under the Settlement must complete and submit a Claim Form in accordance with the

instructions contained therein. All Claim Forms must be submitted no later than one hundred and eighty (180) calendar days after the Fairness Hearing.

28. To be valid, a Claim Form must: (i) be properly completed and timely submitted in accordance with the preceding paragraph; (ii) be accompanied by adequate supporting documentation, as required by the Settlement; and (iii) must contain no material deletions or modifications of any of the printed material on the Claim Form.

29. Class Members who wish to exclude themselves from (i.e., opt out of) the Settlement must send a request to opt-out that: (1) includes the Class Member's full name, address, and telephone number; (2) identifies the model, model year, and VIN of the Class Member's Class Vehicle(s); (3) explicitly and unambiguously state his, her, or its desire to be excluded from the Settlement Class in *In re Navistar MaxxForce Engines Marketing, Sales Practices and Products Liability Litigation*; and (4) be individually and personally signed by the Class Member. If the Class Member is an entity and not an individual, the opt-out must be signed by an officer or director of the entity and include an affidavit that attests to that person's ability to act on behalf of that entity. All Opt Outs must be submitted no later than sixty (60) calendar days after the Notice Date, a total of one hundred and twenty (120) calendar days from the date of this Order. Class Members who submit a timely Opt Out will be excluded from the Settlement, will not receive any benefit, and will not release any claims. All Class Members who do not Opt Out in accordance with the terms of this Order, the Settlement, and the instructions set forth in the Settlement and this Order, shall be bound by all determinations and judgments concerning the Settlement.

30. Class Members who wish to object to any aspect of this Settlement, including the certification of the Class, the approval of the Settlement as fair, reasonable, and adequate, the

appointment of Co-Lead Class Counsel, or the amount of fees and expenses that Co-Lead Class Counsel may apply for, shall be made in writing and filed with the Clerk of this Court and mailed to both Co-Lead Class Counsel and Defendants' Counsel no later than sixty (60) calendar days after the Notice Date, a total of one hundred and twenty (120) calendar days from the date of this Order. Any objection to the Settlement Agreement must be individually and personally signed by the member of the Settlement Class submitting it. If the member of the Settlement Class is an entity and not an individual, the objection must be signed by an officer or director of the entity and include an affidavit that attests to that person's ability to act on behalf of that entity. If the member of the Settlement Class is represented by counsel, the objection must also be signed by such counsel. Any objection must include:

- a. the objecting member of the Settlement Class's full name, address, and telephone number;
- b. the model, model year, and VIN of the objecting member of the Settlement Class's Class Vehicle(s), along with Proof of Membership in the Class;
- c. a written statement of all grounds for the objection, accompanied by any legal support for the objection;
- d. copies of any papers, briefs, or other documents upon which the objection is based;
- e. the name, address, email address, and telephone number of every attorney representing or assisting the objector; and
- f. a statement indicating whether the objector and/or his or her counsel intends to appear at the Fairness Hearing and, if so, a list of all persons, if any, who will argue or testify in support of the objection. The Court will not hear from any

persons at the Fairness Hearing, besides Co-Lead Class Counsel and Defendants' Counsel, who did not follow this procedure.

Any Class Member who does not make an objection in the manner and by the date described here shall be deemed to have waived such objection. By objecting, or otherwise requesting to be heard at the Fairness Hearing as described below, a person shall be deemed to have submitted to the jurisdiction of this Court with respect to the objection or request to be heard and the subject matter of the Settlement.

31. Class Members may not both object and Opt Out. If a Class Member submits both an Opt Out and an objection, the Opt Out shall be controlling.

The Fairness Hearing and Related Deadlines

32. This Court will hold a Fairness Hearing approximately one hundred and forty-two (142) calendar days from the date of this order, on November 13, 2019, at 10 a.m., in the United States District Court for the Northern District of Illinois, Courtroom 2325, 219 South Dearborn Street Chicago, IL 60604. The purposes of the Fairness Hearing will be to: (i) determine whether to grant final approval to the Settlement as fair, reasonable, and adequate; (ii) to determine whether to grant final certification of the Settlement Class; (iii) to rule on any application for attorneys' fees and expenses and/or service awards; (iv) to consider any properly filed objections to the Settlement; (v) to consider any other matters necessary in connection with the final approval of the Settlement.

33. The Court reserves the right to adjourn the Fairness Hearing without further notice to Class Members, or to approve the Settlement with modification without further notice to Class Members. The Court will adjourn the Fairness Hearing if necessary such that it occurs

no less than three weeks after the deadline for submission of Claim Forms, Opt Outs, and objections, and no less than one week after the deadline for submission of Co-Lead Class Counsel's papers in support of final approval of the Settlement.

34. Any Class Member may appear at the Fairness Hearing and show cause why the proposed Settlement should or should not be approved as fair, reasonable, and adequate, if that Class Member follows the procedure outlined in paragraph thirty of this Order. The Court will hear argument only from Class Members who follow that procedure.

35. Co-Lead Class Counsel's papers in support of any application for attorneys' fees and expenses and/or service awards shall be filed ninety (90) calendar days from the date of this Order.

36. Co-Lead Class Counsel's papers in support of final approval of the Settlement shall be filed no later than ninety (90) days from the date of this Order. If any reply papers are necessary, they shall be filed no later than seven (7) days prior to the Fairness Hearing.

Effects of this Order

37. If for any reason the Settlement fails to become effective in accordance with its terms, or if the judgment is not entered or is reversed, vacated, or materially modified on appeal (and, in the event of material modification, if either party elects to terminate the Settlement), this Order shall be null and void, the Settlement Agreement shall be deemed terminated (except for any paragraphs that, pursuant to the terms of the Settlement, survive termination of the Settlement), and the Settling Parties shall return to their positions without prejudice in any way, as provided for in the Settlement.

38. As set forth in the Settlement, the fact and terms of this Order and the Settlement, all negotiations, discussions, drafts, and proceedings in connection with this Order and the

