RICHARD D. McCUNE, State Bar No. 132124
rdm@mccunewright.com
ELAINE S. KUSEL (*Pro Hac Vice*)
esk@mccunewright.com
JAE (EDDIE) K. KIM, State Bar No. 236805
jkk@mccunewright.com
McCuneWright LLP
2068 Orange Tree Lane, Suite 216
Redlands, California 92374
Telephone: (909) 557-1250
Facsimile: (909) 557-1275

Attorneys for Plaintiffs in *Espinosa, et al. v. Hyundai Motor America, et al.* [Plaintiffs, Lillian E. Levoff, Thomas Ganim, Daniel Baldeschi]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE: HYUNDAI AND KIA FUEL ECONOMY LITIGATION

MDL Case No.: 2:13-ml-2424-GW (FFMx)

Hon. George H. Wu

***ESPINOSA* PLAINTIFFS' COUNSEL McCUNEWRIGHT, LLP'S NOTICE OF MOTION AND MOTION FOR AWARD OF ATTORNEYS FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND SERVICE AWARD TO REPRESENTATIVE PLAINTIFFS**

Date: February 26, 2015
Time: 8:30 a.m.
Courtroom: 10

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 26, 2015, at 8:30 a.m. in the courtroom of Honorable George H. Wu, United States District Court for the Central District of California, Western Division, located at 312 North Spring Street, Courtroom 10, Los

Angeles, California 90012, or at such date and time as the Court may otherwise direct, the *Espinosa* Plaintiffs and their counsel, McCuneWright, LLP, will and hereby do move the Court for an award of attorneys fees, reimbursement of litigation expenses, and service award to representative plaintiffs.

In this motion, Plaintiffs seek an order awarding McCuneWright attorneys fees in the amount of $6,000,000, reimbursement of all litigation expenses, currently in the amount of $93,550.02 – but anticipated to exceed $100,000 by the time of final approval, a service award to Plaintiffs Lillian Levoff and Thomas Ganim in the amount of $5,000 each for their efforts on behalf of the class.

The motion is based on this Notice; the Memorandum of Points and Authorities that follow it; the accompanying Declarations of Lillian E. Levoff, Thomas Ganim, Richard D. McCune, William B. Rubenstein, and the exhibits attached thereto; the pleadings and papers on file; and on such other oral and documentary evidence and/or argument as may be presented at the hearing.

DATED: December 23, 2014.

Respectfully submitted.

MCCUNEWRIGHT LLP

BY: */s/ Richard D. McCune*
Richard D. McCune
Attorneys for Plaintiffs

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MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

Pursuant to the settlement agreement where the Defendants have agreed to pay Class Settlement Counsel reasonable attorney fees and costs, McCuneWright, LLP ("McCuneWright"), respectfully moves the Court for an award of attorneys' fees, reimbursement of its litigation expenses, and service award to the representative Plaintiffs, having successfully obtained substantial monetary relief for the class pursuant to the Settlement Agreement ("Settlement") reached with Hyundai Motor America ("Hyundai") and Kia Motors America ("Kia") (collectively the "Defendants"). Specifically, McCuneWright asks the Court to award the firm: (a) attorneys' fees in the amount of $6,000,000, which amounts to approximately 1.5 percent of the $395 million settlement; and (b) reimbursement of the anticipated $100,000 in litigation expenses that McCuneWright reasonably has and will incur in prosecuting and settling this matter.

As set forth herein, the requested fee is fair, reasonable, and consistent with Ninth Circuit law under both the percentage of recovery and lodestar method of fee calculation. Under either method, the fee is well justified by the circumstances of this litigation, given the substantial benefits that McCuneWright's efforts have generated for class members; the challenges and risks that McCuneWright assumed in pursuing this matter on a contingency basis; and the time and resources that McCuneWright has expended.

The relief achieved by McCuneWright represents a strong result for class members. Under the Settlement, Hyundai and Kia have agreed to provide up to $210 million and $185 million, respectively, in cash and other compensation to the Class. This substantial monetary relief would not have been possible but for the hard work and dedication of McCuneWright.

For the foregoing reasons and the others detailed below, McCuneWright respectfully requests that the Court grant its motion for attorneys' fees and expenses.

A. Background

1. McCuneWright Achieved a Strong Result for the Class

McCuneWright stands alone as the counsel that took the largest risk and faced the greatest challenges in pursing this case. This settlement of almost $400 million represents an impressive resolution of the *Espinosa v. Hyundai* action filed in January 2012, which was the first case filed against either Hyundai or Kia related to the fuel economy of their vehicles.

Upon learning of the complaints of consumers of obtaining far less fuel economy than represented by Hyundai, McCuneWright conducted an extensive investigation into the factual and legal viability of pursuing a claim against Hyundai. That investigation included the representations made by Hyundai in their advertising, the reported fuel economy testing of the Elantra, other consumer experiences, the complicated and difficult legal issues presented by the case, and the likely aggressive and difficult litigation defense that would be mounted by Hyundai. (Declaration of Richard D. McCune ("McCune Decl.") ¶¶ 10-11.)

Deciding to proceed despite the risks, almost one year before any other action was filed in federal court and six months before any copy-cat lawsuit was filed in state court, the plaintiff in *Espinosa* alleged that Hyundai engaged in a pervasive false advertising campaign by claiming that a number of its vehicles, including the Hyundai Elantra, got at least 40 mpg in highway driving when, in fact, these vehicles achieved far poorer fuel economy. (First Amended Complaint ("FAC") ¶ 4; McCune Decl. ¶ 12.) In addition, in *Espinosa*, McCuneWright alleged that Hyundai's "compliance with the EPA [fuel economy] testing standard itself was questionable." (*See* FAC ¶ 28; JPML Order at 2 and n. 3.) In *Espinosa*, McCuneWright sought certification of a nationwide class of all purchasers of 2010-2012 Hyundai vehicles based on Hyundai's alleged false advertising of the fuel economy of its vehicles. (Order Denying Def. Hyundai's Mot. to Dismiss FAC at 1; FAC ¶¶ 4, 32.) These allegations and class definition closely track the

settlement here because the *Espinosa* action is the foundation upon which this settlement was built.

2. McCuneWright Expended Considerable Time and Resources and Overcame Significant Challenges in Prosecuting This Matter to a Successful Result

As the court is well aware, the *Espinosa* action was a heavily contested and hard fought litigation. First, Hyundai engaged one of the country's foremost and aggressive firms to defend the litigation. From the start, Hyundai vigorously disputed the *Espinosa* plaintiffs' contentions. For example, in its March 2012 motion to dismiss, Hyundai characterized the *Espinosa* case as the "most odious species of consumer class action" which sought to twist Hyundai's unchallenged compliance with federal regulations into an act of deceit under consumer protection laws. (Def. Hyundai's Mot. to Dismiss Complaint at 1:3-6.) In that motion, Hyundai defended its advertising by characterizing the Elantra as "an award winning fuel-efficient vehicle **that achieves 40 mpg/highway under the EPA protocol**" and argued that plaintiffs' claims were pre-empted by federal law. (*Id.* at 15-16 (emphasis added).) Following full briefing, on April 24, 2012, this Court denied Hyundai's motion in part, sustaining claims related to affirmative misrepresentations of fuel economy of the Elantra that went beyond the federally required EPA estimates, but noting that challenges to the accuracy of the EPA estimates themselves were subject to the well taken argument that such challenges were barred by the doctrine of primary jurisdiction. (Order Denying Def. Hyundai's Mot. to Dismiss FAC at 4; McCune Decl. ¶ 13.)

Following that decision, McCuneWright engaged in significant fact discovery. That fact discovery was the only pre-settlement discovery conducted in the case that provided all Plaintiffs, their counsel, and the Court with the background and knowledge that allowed for meaningful settlement discussions. (McCune Decl. ¶14.) McCuneWright reviewed more than 30,000 pages of documents produced by Hyundai, conducted additional factual research to develop the claims in the case, and on August 1,

2012, filed a Second Amended Complaint, which among other things added three proposed class representatives. Specifically, McCuneWright developed the advertising case through contested discovery, including review of thousands of advertisements (web, magazine, television, radio, and banner ads), strategic plans, market research, brand plans, marketing plans, advertisement placements, advertisement and marketing budgets, launch strategies, media plans, sales figures, press releases, Hyundai communications to customers, Hyundai communications to dealers, consumer expectation research, and real world consumer fuel economy. (McCune Decl. ¶14.)

McCuneWright was also the only plaintiff firm to retain experts to address the EPA issues, advertising issues, and damage issues – each of these experts were hired and used while the case was in a contested litigation position. McCuneWright retained exceptional consultants and experts, including an automotive expert who conducted a fuel economy test on a Hyundai Elantra using the EPA protocol, a consumer expectation and marketing expert, and an economics expert on the effect that consumers' expectations about fuel economy has on the purchase price of vehicles. (McCune Decl. ¶15.)

McCuneWright assisted the named Plaintiffs in responding to significant written discovery, and then prepared for and defended the depositions of the proposed class representatives. (McCune Decl. ¶ 16.) On September 14, 2012, McCuneWright, on behalf of the *Espinosa* Plaintiffs, filed a motion for class certification which included 16 pages of factual allegation relying on more than seventy different internal Hyundai documents in support of their claims. Among other things, the class certification brief delineated each of the advertisements Plaintiffs alleged to be misleading, including the "4 x 40 advertisements" which stated that four Hyundai models,—the Elantra, Veloster, Accent, and Sonata Hybrid—"got 40 mpg." (Pl.'s Mot. for Class Certification at 10:7-11:3.) Plaintiffs provided expert reports on the topics of damages and reliance, defended the depositions of these expert witnesses and took the depositions of Defendant Hyundai's expert witnesses – each of which involved travel to take and defend the depositions. (McCune Decl. ¶ 17.)

Hyundai vigorously opposed Plaintiffs' Motion for Class Certification. In its brief, Hyundai contended that it was a "conscientious" company that should not have to defend against a class challenge given that automobile advertisements were immaterial to car buying decisions. (Def. Hyundai's Opp'n to Mot. for Class Certification at 2:5-10.)

Within two weeks after filing their opposition brief, Hyundai and Kia issued a joint press release announcing that the reported fuel economy of the Elantra and numerous other models were, *as Plaintiffs had contended*, in fact, inflated and that Defendants were voluntarily lowering the fuel economy ratings for those vehicles. Defendants also discontinued use of the 40 mpg advertisements that Plaintiffs contended were false and misleading. Defendants contended that their decision to lower the fuel economy ratings resulted from an EPA audit which discovered that procedural errors had led to the inflation of fuel economy numbers. (*See* McCune Decl. ¶¶ 18-19, Ex. 1.)

In Plaintiffs' Reply in Support of Class Certification, McCuneWright argued that the November 2, 2012, press release confirmed the *Espinosa* plaintiffs' allegations that, despite Hyundai's prior arguments to the contrary, the Elantra did not achieve 40 mpg under the EPA protocol and Hyundai did not "accurately report fuel efficiency in the precise manner required by federal law." (Pls.' Reply Brief in Support of Mot. for Class Certification at 1, n. 2; FAC ¶ 28.)

Following the November 2, 2012, Press Release, numerous other complaints, including the *Hunter* and *Brady* actions were filed against Hyundai and Kia asserting a variety of claims related to the lowered fuel economy estimates. On November 19, 2012, an MDL transfer motion was filed seeking to include the *Espinosa* action in an MDL action with actions filed after Hyundai's November 2, 2012, announcement.

Oral argument on the *Espinosa* Plaintiffs' Motion for Class Certification was held on November 29, 2012, after which the Court declined to rule on the motion, requesting supplemental briefing. Hyundai filed its supplemental brief on December 13, 2012, and the *Espinosa* plaintiffs filed their supplemental brief on December 21, 2012. On December 28, 2012, the Court issued another tentative ruling, again requesting further

briefing on the class certification motion. Specifically, the Court requested that Plaintiffs inform the Court whether they intended to amend their complaint to reassert allegations that Hyundai had provided erroneous testing data to the EPA, and seeking additional briefing on primary jurisdiction and reliance issues. (McCune Decl. ¶ 20.)

Prior to filing the second round of supplemental class certification briefs, McCuneWright discussed the possibility of a settlement. On January 8, 2013, the *Espinosa* Plaintiffs and Hyundai filed a joint stipulation to continue the briefing schedule for the second supplemental briefs on class certification, notifying the Court that the parties had agreed to engage in formal settlement negotiations which, if successful, would moot the need for further briefing. (McCune Decl. ¶ 21.) Thereafter, McCuneWright participated in face to face settlement negotiations with Hyundai, beginning on January 16, 2013. (*Id.*)

On February 5, 2013, the Judicial Panel on Multidistrict Litigation ("JPML"), consolidated the *Espinosa* action in this Court with a number of other actions against Hyundai and Kia, in *In re: Hyundai and Kia Fuel Economy Litigation*, MDL No. 2424. That decision was significantly influenced by how much work the parties and the Court had already expended in the *Espinosa* case. JPML Order at p 3. (McCune Decl. ¶ 22.)

Settlement negotiations continued after the January 16, 2013, meeting culminating in an all day mediation before the Honorable Judge Stephen J. Sunvold (ret.) on February 12, 2013, following which the *Espinosa*, *Hunter*, and *Brady* Plaintiffs (collectively the "Settling Plaintiffs") reached an agreement in principle with Hyundai which was contingent upon confirmatory discovery. Thereafter there was a mediation with Kia that resulted in a settlement against Kia on the same terms as the Hyundai settlement, except the Kia class members were not eligible to participate in the 4 x 40 additional compensation. The parties informed the Court of the tentative settlement on February 14, 2013. (McCune Decl. ¶ 23.)

Before the parties entered a settlement agreement and sought approval of the settlement, McCuneWright participated in confirmatory discovery which consisted of

review of thousands of additional documents. McCuneWright was responsible for the confirmatory discovery interviews (in lieu of depositions) of half of the key employees of Hyundai, Kia, in the United States and in South Korea. After completion of confirmatory discovery, McCuneWright entered into the settlement agreement and jointly submitted the proposed settlement to the Court for preliminary approval. (McCune Decl. ¶ 24.)

3. The Settlement Benefits and Cash Payments to the Class

The settlement agreement provides for a combination of cash benefits and injunctive relief that enhance the voluntary reimbursement program Hyundai and Kia announced on November 2, 2012. Under the agreement, Hyundai will provide class members with the option of a cash payment at an amount dependent on the particular vehicle model and year, ranging from a minimum payment of $125 (for certain fleet purchasers of Veloster, Elantra, and Tucson models) to a maximum of $710 (for certain Elantra purchasers). (Settlement Agreement, Ex. B.) Kia has agreed to provide direct cash payments in amounts ranging from $50 (for certain 2012 Sportage models) to $1420 (for certain 2013 Soul models). (Settlement Agreement, Ex. C.) All Class members also have the option to instead choose a dealer credit at 150 percent of the cash value amount or a new car rebate at 200 percent of the cash value amount associated with their vehicle. (Settlement Agreement ¶¶ 3.2.2, 3.2.3.)

In addition to the general benefits outlined above, the Settlement agreement provides enhanced benefits for the false advertising claims at the heart of the *Espinosa* action. In *Espinosa*, Plaintiffs contentions focused on Hyundai's advertising which stated that 4 Hyundai models—the Accent, Elantra, Sonata Hybrid and Veloster— "got 40 mpg" was false and misleading. (Pl.'s Mot. for Class Certification at 10:7-11:3.) Pursuant to the settlement, Hyundai will provide additional cash compensation to owners and lessees of the 4 x 40 vehicles. Specifically, the settlement provides $100 to current original owners of the 4 x40 vehicles, $50 to current lessees and fleet owners, and $100 to original owners who sold their vehicles before December 13, 2013, whether or not the

class members elect the settlement or choose to remain in the reimbursement program. (Settlement Agreement ¶ 3.1.8.)

Hyundai provided co-counsel for the Class, including McCuneWright, with a spreadsheet setting forth the number of vehicles sold and leased during the relevant time period. That document showed that with respect to the 4 x 40 vehicles, Hyundai had retail sales of 370,069 vehicles, fleet sales of 5,237 vehicles, and 69,801 vehicle leases. (McCune Decl. ¶ 25.)

Using these sales and lease figures, the additional compensation portion of the settlement provides $37,006,900 attributable to the $100 available to purchasers of 4 x 40 vehicles (370,069 x $100), and $3,751,900 derived from the $50 for leases and fleet sales (5,237+69,801) x $50). Thus, the settlement provides a total amount of $40,758,800 in additional compensation to 4 x 40 customers. That number could be significantly higher, as these class members could elect to take their additional compensation in the form of dealer credit which would increase their additional compensation by 50 percent or rebates which would increase their additional compensation by 100 percent. (McCune Decl., ¶ 26.)

Given the fact that class members can choose either cash, dealer credits, or rebates, the total value of the settlement is difficult to determine, however, Hyundai has valued its portion of the settlement at $210 million and Kia has valued its portion at $185 million. (*See* McCune Decl. ¶¶ 27-28, Ex. 2.)

II

ARGUMENT

A. The Requested Fee Award Is Fair, Reasonable, and Justified

In deciding whether the requested fee amount here is appropriate, the Court's role is to determine whether such amount is "fundamentally fair, adequate and reasonable." *Staton v. Boeing*, 327 F.3d 938, 963 (9th Cir. 2003) (quoting Fed. R. Civ. P. 23(e)); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1294-95, n.2 (9th Cir. 1994) (overriding principle is that the fee award be "reasonable under the circumstances"). The

fee requested here is reasonable, appropriate, and well justified under applicable law and the circumstances of this litigation.

Courts have discretion to apply either the percentage of recovery method or lodestar method of calculating a reasonable fee depending upon the circumstances. *In re Bluetooth Headset Product Liability Litig.* 654 F.3d 935, 941 (9th Cir. 2011). The percentage of recovery method is favored in common fund cases, while the lodestar method is appropriate in class actions where the relief sought and obtained is often primarily injunctive in nature and thus not easily monetized, but where the legislature has authorized the award of fees to ensure compensation to counsel undertaking socially beneficial litigation. *Id.* at 941.

Here, while Plaintiffs' counsel has created settlement funds for the class, it is not a pure "common fund" case inasmuch as attorneys' fees will not be paid from a common settlement fund. But it is also not a situation where Plaintiffs have simply obtained primarily injunctive relief for the class where a request for fees is based on a statutory claim. In this case, Defendants have agreed to pay settling counsel a "reasonable fee" in addition to the settlement amount, and based on the facts of the case, reasonable fees would encompass a percentage approach.

McCune Wright has retained Professor William B. Rubenstein, the author of the leading class action treatise, *Newberg on Class Actions*, and one of the foremost scholars on the subject of attorneys' fees jurisprudence, to evaluate the firm's fee request under both percentage and lodestar methodology. California law endorses expert testimony as to what would be a reasonable fee for class counsel's services which necessarily includes the reasonableness of their time spent and hourly rate. *Winterrod v. American Gen. Annuity Ins. Co.*, 556 F.3d 815, 827 (9th Cir. 2009). As set forth in the accompanying Declaration, Professor Rubenstein has determined that the requested fee is a reasonable one under either approach.

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Specifically, Professor Rubenstein has concluded after performing a comprehensive analysis that an award of $6,000,000 in attorney fees is reasonable both in this type of case and in this case specifically, because:

- McCuneWright's lodestar reflects a reasonable billing rate based on the market for attorneys in this community;
- That McCuneWright's lodestar reflects a reasonable quantity of hours for the work done in this matter;
- McCuneWright is entitled to a fee enhancement because of the risk the firm undertook and the results that it achieved for the class and that the risk assumed and results achieved on a contingency fee case supports a 3 multiplier; and
- McCuneWright's requested fee, when cross-checked as a percentage of the class's recovery, fits easily within the Ninth Circuit's 25 percent benchmark.

1. McCuneWright's Fee Request Is Reasonable Under the Percentage Method

The fairest and most efficient way to calculate a reasonable fee in a contingency fee litigation which produces a common fund is by awarding class counsel a percentage of the total fund. *See, Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (common fund fee is generally "calculated as a percentage of the recovery"). By assessing the amount of the fee in terms of the amount of the benefit conferred on the class, the percentage method "more accurately reflects the economics of litigation practice" which "given the uncertainties and hazards of litigation, must necessarily be result-oriented." *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1268 (D.C. Cir. 1993). Moreover, it most effectively aligns the incentives of the class members and their counsel, encouraging counsel to focus on maximizing the relief available to the class. *Vizcaino*, 290 F.3d at 1050 n.5; *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1375 (N.D. Cal. 1989).

2. McCuneWright's Requested Fee Is Far Below the Ninth Circuit's "Benchmark" of 25 Percent of the Settlement Fund

Twenty-five percent is the "benchmark" in the Ninth Circuit for a fee award calculated by the percentage approach. *Vizcaino*, 290 F.3d at 1047; *Wash. Pub. Power*, 19 F.3d at 1297. Moreover, courts in the Ninth Circuit frequently award fees greater than the benchmark. *See, e.g., Vizcaino*, 290 F.3d at 1048-50; *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000).

Under the percentage-of-the-fund approach, courts consider a number of factors to determine whether to depart from the benchmark fee percentage, including: (1) the results achieved; (2) the contingent nature of the fee; and (3) the complexities of the case and skill required of counsel. *See Vizcaino*, 290 F.3d at 1048-50. *Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1117 (C.D. Cal. 2008). Here, these factors would support a fee at benchmark and, without question, strongly support the requested fee which is far below the benchmark.

a. McCuneWright Achieved a Strong Result for the Class

The results obtained for the class are generally considered to be the most important factor in determining the appropriate fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 435-36 (1983); *Vizcaino*, 290 F.3d at 1049; *In re Omnivision Technologies*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008); *see also* Federal Judicial Center, Manual for Complex Litigation, (4th ed. 2004) § 27.71, p.336 (the "fundamental focus is on the result actually achieved for class members"). The significant monetary relief achieved here, in the form of a $319,000,000 settlement under which all class members are eligible to receive significant cash payments ranging from $50 to $1,420 would justify a fee at the benchmark.

This is a strong result, particularly given the risks of ongoing litigation. Liability and damages remain disputed in this case. Among other arguments and defenses that Hyundai has asserted and/or indicated it would assert are: (a) all claims related to the accuracy of fuel economy estimates approved by the EPA were subject to primary

jurisdiction and preempted; (b) plaintiffs cannot demonstrate that they were misled by Hyundai and Kia's statements as to fuel economy; (c) plaintiffs cannot establish that class members relied on such representations; (d) plaintiffs cannot establish class damages; and (e) a class trial would not be manageable. *Omnivision*, 559 F. Supp. 2d at 1046-47 ("The risk that further litigation might result in Plaintiffs not recovering at all, particularly a case involving complicated legal issues, is a significant factor in the award of fees."). These defenses, though not insurmountable, are indicative of the risks and hurdles that Plaintiffs and the class would have faced if this matter proceeded to trial and, if Plaintiffs prevailed at trial, on an inevitable appeal. The Settlement allows for substantial payments to class members without the risks and additional delay of further litigation.

Further, it should be noted that although McCuneWright initiated the first consumer fraud case against Hyundai or Kia alleging that the companies misstated their vehicles' fuel economy, it was the only firm to engage in the extensive adversarial litigation in this matter, and was appointed co-counsel for the Class. McCuneWright's fee request is far less than one half of the 25 percent benchmark here. Twenty-five percent of the $395 million gross settlement would be approximately $98,750,000. McCuneWright's requested fee of $6 million represents less than 8 percent of the 25 percent benchmark. The fact that the entire settlement fund may not be paid out to class members is no bar to calculating the percentage award based on the gross settlement amount. *See Williams v. MGM-Pathe Communs. Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, at 480-81, 100 S. Ct. 745, 62 L. Ed. 2d 676).

Moreover, McCuneWright's requested fee represents less than 25 percent of the portion of the settlement directly related to the false advertising claims that were asserted and litigated in the *Espinosa* case alone. The proposed settlement provides approximately $40,700,000 in additional compensation for purchasers and lessees of the 4 x 40 vehicles. (Settlement Agreement ¶ 3.1.8; McCune Decl. at ¶ 26.) Even if that amount represented the entire value of the settlement—which it clearly does not as that

amount is exclusive of the cash values set forth for Hyundai and Kia vehicles at Exhibit B and C to the Settlement Agreement (applying the 25 percent benchmark)—a $10 Million fee would be reasonable. Here, McCuneWright's requested $6 million fee is only 15 percent of the value of the advertising component alone.

While McCuneWright is the only firm to have engaged in adversarial litigation of claims that Hyundai inflated the fuel economy of its vehicles, it is not the only counsel in the action. After nearly a year of litigation, the *Espinosa* case became part of an MDL, which included numerous other counsel who had filed cases after Hyundai and Kia's November 2, 2012, announcement.

Even if McCuneWright's request represented a third of the total fee request, such that the total fee request was $18 million, this fee would fall far below the benchmark. Accordingly, the substantial monetary relief achieved by McCuneWright, particularly under the circumstances, militates in favor of the requested fee.

b. McCuneWright Assumed Significant Risk in Litigating on a Purely Contingent Basis

Courts have long recognized that the public interest is served by rewarding attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing at all for their work. *See Wash. Pub. Power*, 19 F.3d at 1299 ("Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose."); *Vizcaino*, 290 F.3d at 1051 (courts reward successful plaintiffs' counsel in contingency case "by paying them a premium over their normal hourly rates").

McCuneWright prosecuted this matter on a purely contingent basis, agreeing to advance all necessary expenses and to only receive a fee if there was a recovery. McCuneWright's outlay of resources in this case has been considerable: currently $1,836,210, and clearly will be at least $2,000,000, and likely will be more than

$2,250,000, in attorney time, (McCune Decl. ¶¶ 32-33); and currently $93,550.02, and likely will be more than $100,000, in expenses, (McCune Decl., ¶ 36).

McCuneWright expended these significant resources despite the very real risk that they may never be compensated at all. For nearly a year, McCuneWright was alone in litigating this action, supporting the assertion that other counsel considered the case too risky. Moreover, the risk assumed was magnified in this case, given the fact that McCuneWright dedicated a significant portion of the firm's overall resources to advancing a novel theory against an adversary that is notoriously difficult to litigate against that had hired one of the most sophisticated, experienced, and successful counsel to defend the case. McCuneWright's "substantial outlay, when there is a risk that that none of it will be recovered, further supports the award of the requested fees" here. *Omnivision*, 559 F. Supp. 2d at 1047. Further, McCuneWright has had to turn down opportunities to work on other cases in order to devote the appropriate amount of time and resources necessary to handle this matter. (McCune Decl., ¶ 30.) McCuneWright's willingness to assume the risk and commit considerable resources to this matter in lieu of other opportunities further supports the requested fee award here. *See Vizcaino*, 290 F.3d at 1050; *In re Heritage Bond Litig.*, 2005 WL 1594403, *19 (C.D. Cal. Jun. 10, 2005).

c. Successfully Prosecuting This Matter Required Significant Skill and Effort on the Part of McCuneWright

The "prosecution and management of a complex national class action requires unique legal skills and abilities" that are to be considered when determining a reasonable fee. *Omnivision*, 559 F. Supp. 2d at 1047 (citation omitted); *see also Vizcaino*, 290 F.3d at 1048 (the complexity of the issues involved and skill and effort displayed by plaintiff's counsel are additional factors used in determining the proper fee under the percentage-of-the-fund approach).

McCuneWright is a firm of experienced litigators who have successfully prosecuted and settled numerous large consumer class actions and other complex matters. McCuneWright's skill and relevant experience were important to achieving a strong

result for the class in this matter. Moreover, successfully prosecuting this action required considerable commitments of time and resources by McCuneWright. Hyundai vigorously litigated this matter. Overcoming Hyundai's formidable defenses and other challenges required hard work, perseverance, and skill in litigating the case. Among other important tasks, McCuneWright:

- conducted extensive factual investigation and legal research;
- propounded written discovery requests and drafted responses to written discovery requests;
- defended Plaintiff depositions;
- found and retained highly qualified experts;
- took and Defended expert depositions;
- reviewed more than 30,000 pages of documents produced by Hyundai during merits discovery and tens of thousands more documents produced by Hyundai in confirmatory discovery;
- litigated multiple important motions, including Hyundai's motion to dismiss, Plaintiffs' motion for class certification, opposition to intervenor's motion, and motion to transfer venue to MDL;
- prepared for and participated in mediation sessions and other settlement efforts; and
- negotiated the proposed Settlement and the exhibits thereto.

(McCune Decl. ¶ 30.)

The skill and effort displayed by McCuneWright here would justify a benchmark fee, and certainly supports a $6 million fee which represents a mere fraction of the settlement.

3. Lodestar-Multiplier Cross-Check Confirms the Reasonableness of the Fee Requested

A court applying the percentage-of-the-fund method may use the lodestar-multiplier method as a "cross-check on the reasonableness of a percentage figure."

Vizcaino, 290 F.3d at 1050 & n.5. The cross-check is optional. *See id*. ("while the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award"). As discussed further below, a lodestar- multiplier cross-check here confirms that the requested $6 million fee is reasonable.

The first step in the lodestar-multiplier method is to multiply the number of hours counsel reasonably expended by a reasonable hourly rate. *Hanlon v Chrysler Corp*., 150 F.3d 1011, 1029 (9th Cir. 1998). Once this raw lodestar figure is determined, the court may then adjust that figure based upon its consideration of many of the same "enhancement" factors considered in the percentage-of-the-fund analysis, such as: (1) the results obtained; (2) whether the fee is fixed or contingent; (3) the complexity of the issues involved; (4) the preclusion of other employment due to acceptance of the case; and (5) the experience, reputation, and ability of the attorneys. *See Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).

a. McCuneWright's Hourly Rates Are Reasonable

The accompanying declaration of Richard McCune sets forth the billing rates used to calculate the lodestar, and summarizes the experience of the attorney timekeepers who worked on this litigation. (*See* McCune Decl. ¶¶ 1-9, 34.) In assessing the reasonableness of an attorney's hourly rate, courts consider whether the claimed rate is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S.886, 895-96, n.11 (1984). Courts apply each biller's current rates for all hours of work performed, regardless of when the work was performed, as a means of compensating for the delay in payment. *Wash. Pub. Power*, 19 F.3d at 1305. The attorneys of McCuneWright are experienced, highly regarded members of the bar. They have brought to this case extensive experience in the area of consumer class actions and complex litigation.

McCuneWright's customary rates of $650 per hour for Richard D. McCune and Elaine Kusel and $450 per hour for Jae (Eddie) K. Kim, which were used in calculating the lodestar here, are in line with prevailing rates within this District, have been approved by courts both within and outside of this District, and are paid by hourly-paying clients. (Rubenstein Decl., ¶¶ 28-31.) The most relevant test of the reasonableness of the rates, are what the rates are for counsel litigating the case for the defense on an hourly basis. As outlined in fee application declarations by Quinn Emanuel Urquhart & Sullivan, and as listed by the National Law Journal, Quinn Emanuel's partner hourly fees range from $810 to $1,075, with an average of $915 per hour, and associate rates range from $320 to $675, with an average of $410 per hour. (McCune Decl. ¶¶ 38-42.)

The conclusion that McCuneWright's hourly rates are reasonable is also supported by the analysis of Professor Rubenstein, who generated a scatter plot reflecting how McCuneWright's submitted rates compare with the prevailing rates in Southern California and concluded that the McCuneWright's rates are at or below the standard rates for attorneys of similar experience. (*See* Rubenstein Decl. ¶ 29, Graph 1.) Professor Rubenstein also applied another test of the "blended lodestar" – meaning the weighted hourly rate when the total lodestar for all timekeepers is divided by the aggregate hours in the case, or approximately $600 per hour. (*See* Rubenstein Decl. ¶ 30, Graph 2; *see also* McCune Decl. ¶ 32.) Again, Professor Rubenstein's conclusion was that the blended lodestar was consistent with the prevailing blended rates applied in other class actions in the District. (Rubinstein Decl. ¶ 24.) Finally, Professor Rubenstein compared McCuneWright's rates to those charged by the Hyundai's own counsel, Quinn Emmanuel, in similar circumstances and found that Quinn Emmanuel's rates were higher than those approved by courts in the Central District and the rates that McCuneWright seeks from Defendants in this matter. (Rubinstein Decl. ¶ 32 Graph 3.)

b. The Number of Hours That McCuneWright Worked Is Reasonable

The accompanying declaration of Richard McCune sets forth the number of hours that McCuneWright's attorneys and staff worked in this litigation. As described therein,

McCuneWright's counsel and staff have devoted a total of 3,029.40 hours to this litigation (through November 5, 2014), and have a total unadjusted lodestar through November 5, 2014, of $1,836,210. (McCune Decl. ¶¶ 32, 34.)

The number of hours that McCuneWright has billed is reasonable. *See Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1028 (9th Cir. 2000) (counsel entitled to recover for all hours reasonably expended); (Rubenstein Decl. ¶¶ 33-34). Compared to the usual case where there are a high number of hours for the result obtained, here, McCuneWright has been efficient and has a low number of hours for the results obtained. However, the time expended was significant. In order to be in a position to vigorously pursue this matter and evaluate and negotiate the proposed Settlement, McCuneWright attorneys and staff were required to spend considerable time investigating the factual issues involved, researching and analyzing applicable law and potential legal claims, and speaking with class members about their experiences. These efforts continued throughout the course of the litigation. McCuneWright also engaged in extensive discovery practice, reviewing more than 30,000 pages of documents and litigating multiple motions that raised challenging issues, including defending against multiple motions to dismiss, and a motion for class certification. Further, McCuneWright committed considerable time and resources to preparing for settlement negotiations, including reviewing pertinent documents and information and negotiating and finalizing the settlement papers.

To summarize, among other important tasks, McCuneWright spent substantial time in this litigation: conducting factual investigation; speaking with class members about their experiences; conducting legal research; developing case strategy and discovery strategy; drafting complaints; drafting briefs and other pleadings; propounding written discovery; responding to written discovery; taking and defending depositions; reviewing and analyzing numerous documents produced by Hyundai and Kia in preparing for and participating in settlement negotiations; and drafting the settlement papers. (McCune Decl. ¶ 29.)

These tasks were performed for the benefit of the class, and contributed to the success achieved. Moreover, the time spent on these tasks was reasonable, and the number of hours on a case of this magnitude demonstrates that McCuneWright was effectively and efficiently using its time in prosecuting the case.

c. The Fee Requested Represents a Reasonable Multiplier on McCuneWright's Lodestar

McCuneWright's requested $6 million fee represents a fraction of the Ninth Circuit's 25 percent benchmark under any analysis. It also represents a multiplier of approximately three on McCuneWright's total, aggregate anticipated lodestar of $2 million. (McCune Decl. ¶ 33.) This multiplier is well within the range of multipliers that courts in the Ninth Circuit and elsewhere regularly approve. *See, e.g.*, *Steiner v. Am. Broad. Co.*, 248 Fed. Appx. 780, 783 (9th Cir. 2007) (finding 6.85 multiplier to be "well within the range of multipliers that courts have allowed" in common fund cases); *Vizcaino*, 290 F.3d at 1051 and Appendix (approving multiplier of 3.65 and citing cases with multipliers ranging from 0.6 to 19.6, with most of the cases ranging from 1.0 to 4.0); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 298-99 (N.D. Cal. 1995) (multiplier of 3.6 was "well within the acceptable range for fee awards in complicated class action litigation"); (Rubenstein Decl. ¶¶ 36-37).

Moreover, the circumstances here fully support the fee requested—the strong result achieved for the class; the fact that the fee requested is less than the "benchmark" 25 percent of the estimated gross settlement fund achieved; the contingent nature of the fee; the challenges McCuneWright faced; the complexity of the issues involved; and the skill and effort demonstrated by McCuneWright. *Kerr*, 526 F.2d at 70; *see also Wash. Pub. Power*, 19 F.3d at 1300 ("[C]ourts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases.").

However, the greatest justification for the multiplier is the significant risk assumed in pursuing the case. McCuneWright understands that this was a very risky case because of the complicated legal issues that could result in the case being lost either on class

certification, on federal preemption, or on the merits after significant time and money were invested in the case. That risk was compounded by the fact that because the stakes were high for Hyundai combined with Hyundai's aggressive litigation philosophy, it was likely that Hyundai aggressively would defend against the claim. As a result, settlement of the claim was not going to be likely without significant victories on both the factual and legal issues.

B. McCuneWright's Reasonable Litigation Expenses Are Recoverable

"Reasonable costs and expenses incurred by an attorney who creates a common fund are reimbursed proportionally by those class members who benefit from the settlement." *In re MediaVision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996); (citing *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970)); *see also, e.g., Garner v. State Farm Mutual Automobile Ins. Co.*, 2010 WL 1687829, *1-2 (awarding reasonable litigation expenses in addition to percentage fee award); *In re Countrywide Fin. Corp. Secs. Litig*, 2011 U.S. Dist. LEXIS 126721, at *16-17 (C.D. Cal. Mar. 4, 2011) (same).

To date, McCuneWright has incurred $93,550.02 in out-of-pocket litigation expenses. It is anticipated that between conference calls, filing fees, shipping and delivery fees, research, and travel expenses, that following the attorney fee hearing and final approval the total costs will exceed $100,000 and it is that figure that it requests for reimbursement. (McCune Decl. ¶ 36.) The expenses for which McCuneWright seek reimbursement were reasonably necessary for the continued prosecution and resolution of this litigation, and were incurred by McCuneWright for the benefit of the class with no guarantee that they would be reimbursed. They are reasonable in amount and should be reimbursed.

C. The Requested Service Award for Plaintiffs Is Reasonable and Justified

As the Ninth Circuit has recognized, "named plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments." *Staton*, 327 F.3d at 977; *Rodriguez v. West Publishing Corp.*, 563 F.3d 948,

958 (9th Cir. 2009) (service awards "are fairly typical in class action cases"). Such awards are "intended to compensate class representatives for work done on behalf of the class [and] make up for financial or reputational risk undertaken in bringing the action." *Id.*; *see also Van Vranken*, 901 F. Supp. at 299-300.

The requested service award here is well justified. In addition to lending their names to this matter, and thus subjecting themselves to public attention, Ms. Levoff and Mr. Ganim were actively engaged in the litigation. Among other things, Ms. Levoff and Mr. Ganim responded to multiple sets of discovery and were deposed. They gathered and provided documents and information, reviewed the Complaint and other pleadings and documents in the case, communicated with counsel, stayed updated about the litigation, and reviewed and approved the proposed Settlement. (McCune Decl.¶¶ 43-44.) Moreover, the $5,000 award to each Plaintiff requested here is within the range of service awards that courts have granted under similar circumstances. *See, e.g.*, *In re Mego Fin. Corp.*, 213 F.3d 454, 457, 463 (9th Cir. 2000) (approving service awards of $5,000); *Gould v. Rosetta Stone, Ltd.*, 2013 WL 5402120, * 6(N.D. Cal. Sep. 26, 2013) (approving service awards of $5,000 and stating that "[i]n this district, a $5,000 payment is presumptively reasonable") (citing cases).

III

CONCLUSION

For the foregoing reasons, McCuneWright respectfully requests that the Court enter an Order: (a) awarding McCuneWright attorneys fees in the amount of $6,000,000 and reimbursement of all litigation expenses, currently in the amount of $93,550.02 – but

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anticipated to exceed $100,000 by the time of final approval; and (b) awarding Plaintiffs Lillian Levoff and Thomas Ganim service awards in the amount of $5,000 each for their efforts on behalf of the class.

DATED: December 23, 2014.

Respectfully submitted.

MCCUNEWRIGHT LLP

BY: */s/ Richard D. McCune*
Richard D. McCune
Attorneys for Plaintiffs