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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)

***HUNTER* AND *BRADY* PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES**

[PUBLIC REDACTED VERSION]
Date: February 26, 2015
Time: 8:30 a.m.
Judge: Hon. George Wu
Courtroom: 10

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I. INTRODUCTION

On behalf of Plaintiffs and Class Representatives in the actions *Hunter v. Hyundai Motor America* and *Brady v. Hyundai Motor America* actions (the *Hunter* and *Brady* Plaintiffs),[1] undersigned Class Counsel ("Moving Class Counsel") requests that the Court approve an award of fees in the amount of $2,700,000 and expense reimbursement in the amount of $250,000, to be paid by Hyundai Motor America and Kia Motors America (collectively, "Hyundai and Kia") in accord with the Amended Settlement Agreement.[2] Several months after executing the December 23, 2014 Settlement Agreement, Moving Class Counsel reached agreement with Hyundai and Kia regarding the amount of attorneys' fees and expenses to be paid. Therefore, Hyundai and Kia do not oppose this Motion nor do they oppose the amount of fees and expenses requested.[3] This Motion does not address fee claims on behalf of the *Espinosa* Plaintiffs, court-appointed Liaison Counsel, or any non-settling Plaintiffs in this case.

Moving Class Counsel have expended a total of 5,512 hours in this case, accumulating a lodestar totaling $1,909,995, and incurred $213,883.58 in total

[1] The *Hunter* and *Brady* class representatives are Nicole Marie Hunter, Kaylene Brady, Travis Brissey, Ronald Burkard, Adam Cloutier, Steven Craig, John Dixson, Erin Fanthorpe, Eric Hadesh, Michael Keeth, John Kirk MacDonald, Michael Mandahl, Nicholas McDaniel, Mary Moran-Spicuzza, Gary Pincas, Brandon Potter, Thomas Purdy, Rocco Renghini, Michelle Singleton, Ken Smiley, Gregory M. Sonstein, Roman Starno, Gayle Stephenson, Andres Villicana, and Richard Williams.

[2] *See* Amended Settlement Agreement (the "Agreement"), Dkt. No. 354, § 12. All capitalized terms shall have the same meanings set forth in the October 14, 2014 Amended Settlement Agreement filed with the Court on October 23, 2014.

[3] *Id.* § 12.2; Declaration of Robert B. Carey in Support of the *Hunter* and *Brady* Plaintiffs' Motion an Award of Attorneys' Fees and Reimbursement of Expenses ("Carey Decl.") ¶ 10. This amount was agreed to increase if Defendants agree to pay a larger amount to counsel in *Espinosa*, but it is not subject to decrease. Carey Decl. ¶ 10.

expenses, for a total case investment of $2,123,878.58.[4] The lodestar and expenses will continue to increase as Moving Class Counsel continue to work in support of Settlement approval and assist with claims administration issues going forward. Moving Class Counsel estimates that remaining responsibilities in the case will require the expenditure of approximately $300,000 in attorneys' fees and $35,000 in expenses. Taking both incurred and anticipated fees and expenses into account, the lodestar multiplier would be a reasonable 1.22 if the Court approves the Motion.

The Settlement justifies these figures. It provides to the class substantial cash and non-monetary benefits valued at over $46 million. The requested award of attorneys' fees and costs is reasonable in light of the risks involved in undertaking this complex matter and the effort required in pursuing the claims, completing discovery, and finalizing a valuable settlement for class members. In the course of the related *Espinosa* action, Hyundai and Kia attacked the sufficiency of the allegations, opposed discovery efforts, contested the certification of a litigation class, and denied liability. Moving class counsel faced considerable risk in litigating this case on a wholly contingent-fee basis. To date, we have not received any compensation in association with the case and have foregone other opportunities and devoted time to this matter instead of others.

II. BACKGROUND

A. The Filing Of *Hunter* And *Brady*

This litigation arises out of misstatements by Defendants Hyundai Motor America ("HMA") and Kia Motors America ("KMA") regarding the

[4] The Carey Declaration, sets forth the breakdown of total attorney hours, fees, and expenses incurred by Moving Class Counsel from inception through December 10, 2014. Relevant billing records accompany the declaration. (Carey Decl. Ex. 11, 14.)

fuel economy of their vehicles in advertisements and Monroney stickers. These misstatements arose from various errors in Defendants' vehicle testing under EPA protocols. (Pl. Mot. for Prelim. Approval, Dkt. No. 185-1 at 5.) In November 2012, after an EPA inquiry, Defendants announced that they were restating the official fuel economy ratings for over 900,000 vehicles sold between 2010 and 2012. (*Id.* at 13.) Plaintiffs in *Hunter* and *Brady* responded by filing the first class actions against Defendants arising out of the faulty testing, alleging nationwide claims under California consumer protection-related theories. (*Hunter* and *Brady* Compls., Dkt. No. 1-5, 1-8.)

At the time of the November 2012 announcement, Hyundai had spent a year actively defending the *Espinosa* case, which alleged false advertising and other claims relating to Defendants' MPG ratings. The Hyundai Defendants moved for dismissal of those claims, which the Court granted and denied in part. The *Espinosa* Plaintiffs had also filed a motion for class certification, which the Hyundai Defendants opposed. Dozens of other suits followed the announcement of the mileage restatement, resulting in a February 5, 2013 MDL order consolidating related actions in this court.

In *Hunter* and *Brady*, Moving Class Counsel revised the central theory of the MPG dispute to focus on flawed EPA testing results themselves rather than consumer complaints about fuel economy in general. (*Hunter* Compl., Dkt. No. 1-8, at ¶¶ 32-53; *Brady* Compl., Dkt. No. 1-5 at ¶¶ 61-82.) The new theory greatly simplified proof of misrepresentations because the alleged falsity hinged on the testing errors. It eliminated any need to assess the fuel efficiency of consumers' vehicles as driven in constantly varying weather and traffic conditions or to determine how various factors affecting fuel economy could be handled in the certification process. The theory also weakened Defendants' preemption defenses based upon their asserted entitlement to

advertise federally mandated MPG ratings. (Def. Mot. to Dismiss, *Espinosa v. Hyundai Motor Am.*, No. 12-CV-800, Dkt. No. 17 at 19-21, 26-28 (C.D. Cal. Mar. 12, 2012) (arguing that "states may regulate the disclosure of fuel economy or operating costs 'only if the law or regulation is *identical* to [the federal] requirement'" (quoting, with emphasis, 49 U.S.C. § 32919(b)))). Plaintiffs alleged that Defendants failed to follow EPA testing requirements, and federal law should not preempt claims relating to the advertisement of ratings which depart from federal requirements.

The new theory also provided Plaintiffs with a critical means of classwide proof of liability because Defendants' testing procedures were uniform across the class and did not depend upon individual class members' driving habits. *See Wolin v. Jaguar Land Rover N. Am. LLC*, 617 F.3d 1168, 1174 (9th Cir. 2010) (class certification appropriate on claims of premature tire wear because claims hinged upon mechanical defect in automobile as opposed to individual driving habits). This new framework bolstered the existing false advertising claims in *Espinosa*, which had come under attack on preemption and certification grounds. (*Espinosa v. Hyundai Motor Am.*, No. 12-CV-800, Dkt. Nos. 17, 58 (C.D. Cal. Mar. 12, 2012)). In short, Moving Class Counsel's development and deployment of the *Hunter* and *Brady* theory played a central role in bringing Defendants to the table and obtaining valuable settlement terms.

The *Brady* Plaintiffs further elaborated upon the nature of damages claimed. The *Brady* Plaintiffs alleged that although Defendants established a pay-as-you-go program to reimburse consumers for additional fuel cost, the terms of this program were inadequate because they required consumers to fill out paperwork and make regular visits to the dealer to get paid. (*Brady* Compl., Dkt. No. 1-5 at ¶¶ 8-13.)

In February 2013, Plaintiffs in *Espinosa*, *Hunter*, and *Brady* announced that they had negotiated general terms of settlement with Hyundai. Shortly thereafter, similar settlement terms were reached with Kia. All settlement negotiations were conducted with the supervision and participation of the Honorable Stephen J. Sundvold, retired judge of the Los Angeles County Superior Court. The Settling Parties agreed that Class Counsel's fees would be paid as part of the Settlement, but deferred negotiation over the amount of attorney's fees. (Agreement ¶ 12.2.) At the same time, it was agreed that any payment of fees would not impact or reduce the compensation available to the class. (Agreement ¶ 12.4.)

B. Settlement Discovery

Settling Plaintiffs' counsel proceeded to conduct confirmatory discovery throughout 2013 and in the first months of 2014. Counsel served requests for production and interrogatories, which led to the production of over 18,000 documents totaling more than 157,000 pages beginning in April 2013. (Apr. 24, 2013 and Aug. 13, 2013 Status Reports, Dkt. No. 81, at 2, 128 at 3.) These documents included advertising materials, press releases, communications with dealers and customers, documents about the reimbursement program, product launch and planning documents, quality reports, and documents produced to various federal and state government agencies. (May 22, 2013 Joint Status Report, Dkt. No. 100.) Counsel for the *Hunter* and *Brady* Plaintiffs conducted an extensive review of the documents produced to obtain a more complete understanding of the events that gave rise to the testing mistakes. (Carey Decl. ¶ 7.)

Moving Class Counsel also interviewed key employees of the Defendants. To conduct these interviews, Moving Class Counsel traveled not just in the U.S., but also to Defendants' facilities in South Korea. The

interviews extended from front-line engineers and supervisors to marketing officials to the chief executive of Hyundai Motor America. (Carey Decl. ¶ 8.)

These extensive discovery efforts lasted for several months, until early 2014. They took place under the supervision of the Court and under scrutiny from non-counsel for settling Plaintiffs, including court-appointed Liaison Counsel. (Feb. 28, 2013 Minute Entry, Dkt. No. 9; May 7, 2013 Status Report of Liaison Counsel, Dkt. No. 92.) Counsel for non-settling Plaintiffs also received the opportunity to participate in discovery efforts. (May 21, 2013 and June 5, 2013 Status Reports of Liaison Counsel, Dkt. No. 99 at 5, 111 at 4.) Non-settling Plaintiffs' counsel received access to all documents produced in the Course of settlement negotiations as well as confidential discovery materials produced after the settlement was negotiated. (Apr. 23, 2013 Status Report of Liaison Counsel, Dkt. No. 80, at 2.) Moving Class Counsel pursued discovery aggressively. To the extent Defendants resisted and agreement could not be reached, disputed issues were presented to the Court. (Aug. 14, 2013 Status Report of Liaison Counsel, Dkt. No. 127; June 26, 2014 Tent. Order, Dkt. No. 267 at 23.)

C. Defendants' Reimbursement Program

As noted above, at the time of the November 2012 announcement, Defendants established a pay-as-you-go Reimbursement Program to compensate consumers for additional fuel cost. Payments under the program depend upon vehicle model, miles driven, and average gas prices. They are unlimited in time and amount. A 15% inconvenience payment is added to the reimbursement. The program requires customers to visit their Hyundai or Kia dealer on an ongoing basis to verify mileage and fill out paperwork for delivery of the payment in the form of a debit card.

The *Hunter* and *Brady* Plaintiffs alleged that this program did not go far enough because it required class members to visit their dealerships to receive payments. For many class members, the inconvenience and burden of the program outweighed the value it was supposed to provide. Others have no interest in ongoing contact with the vehicle manufacturer that misled them. Still others might live too far from a dealership to participate. The program originally cut off registration after December 31, 2013, further limiting it.

D. Settlement Terms

Counsel for the *Hunter* and *Brady* Plaintiffs have obtained valuable compensation for current and former owners and lessees of certain 2011-2013 Hyundai and Kia vehicles, for which the Defendants misrepresented EPA fuel economy estimates. The Settlement provides a straightforward, up-front payment to class members who do not wish to deal with the paperwork and dealer visits required under Defendants' Reimbursement Program. This payment reflects a classwide compensation floor that every class member is entitled to receive, including those who would not otherwise benefit (or would benefit only minimally) from the Reimbursement Program.

At the same time, Defendants established their Reimbursement Program under the pressure of litigation. In response to the Settlement, Defendants extended the deadline to register for the Reimbursement Program from December 31, 2013, to July 6, 2015, the end of the claims period for the Settlement class. Because of the Settlement, the Reimbursement Program remains available to those class members, such as high-mileage drivers and drivers in areas with high fuel prices, who might benefit more from it.

The Settlement Agreement makes more than $400 million in cash-equivalent lump-sum payments available to the class. The average payment for original owners who owned Hyundai vehicles on December 23, 2013 is

$353, and the average for Kia is $667. These payments go as high as $715 for Hyundai vehicles and $1420 for Kia vehicles. Class members may also elect to receive their payment in the form of a dealer service credit or new car rebate worth 150% and 200% of the lump-sum amount, respectively. Non-original owners are entitled to half these amounts, and former owners are entitled to reimbursement for their fuel expense, which they may convert into service credits or a new car rebate. Lessees and non-rental fleet owners are also entitled to receive lump-sum payments. Payments are reduced by the amount a class member previously received under the Reimbursement Program.

The Settlement also provides compensation for false advertising claims relating to Defendants' misleading promotion of four vehicles as attaining 40 MPG in their "4 x 40" advertising campaign. Class members who purchased Elantra, Accent, Veloster, or Sonata Hybrid class vehicles can receive $100 (or $50 in the case of lessees and fleet owners) even if they remain in the Reimbursement Program, with the option of converting those payments to larger service and new car credits. Lump sum payments for owners of 4x40 vehicles are correspondingly higher under the Settlement.

While final approval has not yet occurred, the Settlement has earned the support of the vast majority of Non-settling Plaintiffs. Of approximately thirty-five plaintiff groups in this Multidistrict Litigation, only two groups filed briefs opposing the Settlement: The *Krauth/Hasper* Plaintiffs and the *Gentry* Plaintiffs.[5] (Opps. to Settlement Approval, Dkt. No. 234, 236.) The *Krauth/Hasper* Plaintiffs' objections focused on the claims process and rested on numerous misunderstandings. For instance, they complained that unclaimed funds "revert" to the Defendants even though the Settlement

[5] Plaintiff Wilson filed a separate joinder in objections filed by the *Krauth/Hasper* group. (Dkt. No. 238.)

provides variable options rather than a fixed settlement fund. Class members may still prefer and choose to participate in the Reimbursement Program and many have already received compensation under the Reimbursement Program. (*See* Pl. Reply in Support of Prelim. Approval, Dkt. No. 253, at 15-17, 18-21; Suppl. Reply in Support of Prelim. Approval, Dkt. No. 284 at 19.) The Court rejected the *Krauth/Hasper* Plaintiffs' overall concerns about the fairness of the settlement. (June 26, 2014 Minute Entry, Dkt. No. 267 at 21-23.)[6]

The only other opposition group, the *Gentry* Plaintiffs, attacked the certification of a nationwide settlement because they seek to certify separate claims for a buyback remedy under Virginia law, a remedy with little chance of success. (*See* Pl. Reply on Preliminary Approval and Class Certification, Dkt. No. 252 at 10-17.) Finding no genuine prejudice to the rights of Virginians—who remain free to enjoy the fruits of this settlement or opt out to pursue other remedies—the Court has repeatedly rejected the *Gentry* Plaintiffs' challenges to this nationwide Settlement, and the Ninth Circuit has denied their request to appeal under Rule 23(f). (June 26, 2014 Tent. Order, Dkt. No. 267 at 9-10, 11-12; July 24, 2014 Tent. Order at 1-4; Order, *Gentry v. Hyundai Motor Am.*, No. 14-80123 (9th Cir. Nov. 13, 2014).).

E. Settlement Value

A conservative estimate of the settlement value includes: (1) the incremental value of the lump-sum settlement benefits to the class, (2) the estimated reimbursement benefits resulting from the increase that the

[6] While the Court itself raised certain concerns about proposed notice and claims documents, the parties continued to revise those documents in accordance with the Court's guidance, disposing of the *Krauth/Hasper* Plaintiffs' more technical and often misguided objections. (*See*, *e.g.*, Settling Parties' Resp. to *Krauth* Pl. Cmts., Dkt. No. 330.)

Settlement caused in class member participation in the Reimbursement Program, and (3) the costs of notice to the class.

Using Defendants' Reimbursement Program data, expert economist Dwight Duncan evaluated the incremental difference between the benefits of Defendants' Reimbursement Program and the benefits of the lump-sum settlement benefits. [redacted] These valuations total $78 million and do not attempt to account for the option to receive payments in greater amounts in the form of dealer service credits and new car rebates, each of which would provide substantial value to the class. (Carey Decl. Ex. A at 1 n.4, Ex. B at 1 n.3.) Defendants have also committed to provide notice to approximately 900,000 class members by email, regular mail, and flyers distributed to authorized dealerships. At $.49 per mailed notice, this cost, paid for by Defendants, is at least $441,000.[7]

[7] *See Finkel v. Am. Oil & Gas, Inc.*, No. 10-cv-01808-CMA-MEH, 2012 WL 171038, at *2 (D. Colo. Jan. 20, 2012) ("Attorneys' fees may be awarded following class-action settlements where a non-monetary benefit is conferred on the class.").

The litigation and the Settlement have promoted Reimbursement Program participation and have given Hyundai and Kia stronger incentives to attract customers to the Reimbursement Program. Before the Settlement, Defendants compensated class members under the Reimbursement Program or not at all—and non-payment would be the competitive option. Under the Settlement, class members can choose to receive payments even if they do not participate in the program. Defendants' natural incentive is now to include class members in the Program to foster goodwill, public relations, and long-term customer relationships.

Thus, the Settlement has caused Defendants to extend the deadline to register for the Reimbursement Program from December 31, 2013, until July 6, 2015.

The Settlement has also generated publicity for the Reimbursement Program and incentivized Defendants to publicize it further. The online claim form and paper claim form both invite class members to remain in or register for the Reimbursement Program. Through the claims process, the Settlement

directly informs and reminds class about the program and provides an additional channel for their participation.

These estimated benefits to the class exceed $80 million. While estimates will vary and some might disagree with this calculation, even half this amount would represent significant value—as does Defendants' agreement to pay Plaintiffs' attorney's fees and expenses separately and in addition.

F. Attorney's Fees

After the Settlement Agreement was signed, the parties engaged the Honorable Stephen J. Sundvold (Ret.) to mediate an award of attorneys' fees and expenses for Class Counsel. (Carey Decl. ¶ 9.) Section 12.4 of the Settlement Agreement states that the payment of attorney's fees is separate from and in addition to other relief provided to class members. Section 12.2 states that as of December 23, 2013, when the original Settlement Agreement was executed, the parties had not begun fee negotiations.

The parties submitted confidential mediation statements to Judge Sundvold in July 2014, and Class Counsel's submission included billing statements reflecting details of the work performed and their then-current lodestar and expenses and a discussion of the post-settlement efforts that would be required. (Carey Decl. ¶ 9.) The parties then participated in a mediation session in Orange, California, on July 30 and 31, 2014. (Carey Decl. ¶ 9.) After two days of contested mediation, the parties were unable to reach agreement on the amount of fees to be paid. Counsel reported this outcome to the Court on September 3, 2014. The parties continued negotiation efforts over the course of September and eventually came to terms on the amount of fees to be paid in the *Hunter* and *Brady* actions, as reported on October 6, 2014.[9]

[9] As stated at the October 6, 2014 telephonic hearing, counsel in *Hunter* and *Brady* understand that Defendants have not reached agreement on the amount of fees to be paid to counsel in the *Espinosa* action. However, in the event that an agreement is

The agreed-upon award of $2.7 million in fees and $250,000 in expenses represents Class Counsel's expected lodestar total of $2,209,000, a figure that includes case-completion obligations, $213,883.58 in expenses incurred, and expected future expenses of $35,000. (Carey Decl. ¶¶ 11-15.) Though the parties' good-faith estimate of the finish-line lodestar should result in a 1.22 multiplier, in the event the final lodestar is less than projected, the negotiated attorneys' fees is still well within the 3-4 multiplier commonly awarded in the Ninth Circuit and the Central District of California. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995). The $2.95 million award is fair to reward Class Counsel for their hard work and success in achieving a creative and valuable result for the class and expanding class members' options.

For the reasons set forth herein, Plaintiffs respectfully submit that their agreed-upon award of $2.95 million in attorneys' fees and expenses is reasonable under Ninth Circuit case law and should be awarded in full.

III. ARGUMENT

A. Fee Award Legal Standards

In class settlements such as this that do not involve a common fund, "[t]his circuit requires a district court to calculate an award of attorneys' fees by first calculating the 'lodestar.'" *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1028 (9th Cir. 2000). The lodestar method yields a fee that is presumptively reasonable. *See Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551-53 (2010). The first step in the lodestar method is to take the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013). The lodestar may be

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reached, and the agreed amount exceeds the fees agreed upon in *Hunter* and *Brady*, Defendants have agreed to pay the same amount to counsel in *Hunter* and *Brady*.

adjusted up or down to account for other factors which are not subsumed within it.[10] *Id.* at 1209. The Court should use the lodestar method with a multiplier to award what Defendants agreed to pay.

B. Under the Lodestar Method, Class Counsels' Attorneys' Fee Request Is Reasonable

1. Class Counsel's Hourly Rates Are Reasonable

Under the lodestar method, reasonable hourly rates are determined by "prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). These rates are in line with those commanded by lawyers of reasonably comparable skill, experience, and reputation. *Id.* at 895 n.11. "[T]he relevant community is the forum in which the district court sits." *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008).

Affidavits of the plaintiffs' attorney regarding prevailing fees in the community and rate determinations in other cases "are satisfactory evidence of the prevailing market rate." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990). The district court may consider evidence of counsel's customary hourly rate. *See People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 90 F.3d 1307, 1310 (7th Cir. 1996) (holding that an attorney's actual billing rate for similar work is presumptively appropriate).

Here, the hourly rates submitted by Class Counsel reflect their actual billing rates. (Carey Decl. ¶ 11.) Class Counsel are members of the bar with extensive experience in prosecuting complex litigation, including consumer

[10] The factors include "(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases." *Gonzalez*, 729 F.3d at 1209 n.11 (quoting *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996)).

class actions. (Carey Decl. at ¶ 2.) Defendants are represented by well-respected national law firms, and plaintiffs' counsel must possess a similarly high level of experience for success. Class Counsel's rates are appropriate for complex, nationwide litigation, with a range of $325 to $900; their legal assistants' rates range from $150 to $190. (Carey Decl. ¶ 11.)

Class Counsel's hourly rates are comparable to those approved in this District, which range from $450 to $1,000 for attorneys and $160 to $250 for paralegals/law clerks. *See, e.g., Pierce v. County of Orange*, 905 F. Supp. 2d 1017, 1035-36 (C.D. Cal. 2012); *Housing Rights Ctr. v. Sterling*, No. CV 03-859 DSF, 2005 WL 3320738, at *2 (C.D. Cal. Nov. 1, 2005). Additionally, the National Law Journal ("NLJ") issues an annual survey of prevailing hourly rates in the nation's largest law firms, and courts rely on this survey as evidence of prevailing hourly rates. *See, e.g., Perdue*, 559 U.S. at 570-71 (Breyer, J., concurring in part, dissenting in part); *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1172 (C.D. Cal. 2010). According to the NLJ's 2012 Law Firm Billing Survey, Class Counsel's rates are comparable to the rates of California law firms including Hyundai's counsel, Hogan Lovells.[11] Finally, Plaintiffs submit a sworn declaration by their counsel, attesting to their hourly rates and total hours devoted to the case, their experience, and describing their efforts to prosecute this case. (Carey Decl. ¶ 2, 11.) Class Counsel's rates are reasonable, and when multiplied by the number of hours expended by Class Counsel, the result is a reasonable estimated lodestar of $2,209,000 for the entire case. (Carey Decl. ¶ 11.)

[11] *See The 2012 Law Firm Billing Survey*, NATIONAL LAW JOURNAL, Dec. 17, 2012 (stating Hogan Lovells' hourly rates are $545-1,200 for partners and $310-655 for associates).

2. The Number of Hours that Class Counsel Worked Is Reasonable

The number of hours worked by Class Counsel to date and the estimated time to conclude the Litigation is reasonable. Class Counsel's cumulative lodestar through December 10, 2014 consists of 5,512 hours expended. (Carey Decl. ¶ 11.) The final approval hearing is scheduled for June 11, 2015, and Class Counsel estimates they will need to be prepared to perform approximately 975 additional hours to respond to Class Members' inquiries and objections, assist class members with the online (or paper) claims process, submit declarations from Class Members discussing their reactions to the proposed settlement, and file a brief in response to any objections by Class Members that also summarizes the administration of the Settlement to bring the Settlement before the Court for final approval. (*Id*. ¶ 15.) Class Counsel estimates that their total hours will eventually be close to 6,487 for a total cumulative lodestar of approximately $2,209,000. (*Id*. ¶ 11.)

After Defendants' November 2012 announcement, Moving Class Counsel expeditiously developed and pursued a case theory that decisively moved this case forward. Before the filing of *Hunter* and *Brady*, Defendants had vigorously opposed claims arising out of the fuel efficiency of the class vehicles, obtaining partial dismissal of the *Espinosa* complaint and opposing class certification on numerous grounds. The *Hunter* and *Brady* complaints rearticulated Defendants' liability—and the possibility of class certification—in terms of uniform misrepresentations regarding EPA testing protocols instead of the fuel economy of class vehicles in general. As a result of these filings, Defendants entered into settlement negotiations with counsel in both *Espinosa* and *Hunter* and *Brady*.

Once the parties agreed to attempt to resolve the Litigation, Class Counsel worked for several months and had multiple meetings with

Defendants to negotiate the terms of the settlement at arms' length and draft the Settlement Agreement and Class Notice, together with preparing the proposed preliminary and final approval orders, and the preliminary approval and settlement Class motions and memoranda. (Carey Decl. ¶ 6.) As detailed above, Class Counsel conducted extensive, contested discovery efforts regarding the factual basis for the settlement. And Class Counsel participated in numerous rounds of briefings and hearings on objections from the non-settling plaintiffs in the *Krauth/Hasper* actions and *Gentry* actions. The Court rejected the *Krauth/Hasper* plaintiffs' substantive objections to the settlement, and the Settling Parties worked closely to finalize settlement notice and claim documents in accordance with the Court's suggestions.

Class Counsel will also have to expend significant time leading up to the final approval hearing and after the Settlement is approved and implemented. In another similar case between Class Counsel and HMA regarding subframe corrosion of certain Hyundai vehicles,[12] Class Counsel spent approximately 100 post-settlement-approval hours dealing with class member issues. The *Cirulli* settlement offered a simple repair to class members. If the subframe repair exceeded the fair-market value of the vehicle, the class member was eligible for a buyback remedy. Because of the nature of the defect, only a few class members partook of that remedy, and achieving resolution through communication and exchange of documents with those class members and counsel for HMA took several hours for each person. (Carey Decl. ¶ 20.)

This Settlement involves questions of compensation for erroneous fuel efficiency ratings. It entails complexity because it requires class members to make a choice between up-front lump sum payments (with options to receive

[12] *See Cirulli v. Hyundai Motor America*, United States District Court for the Central District of California (No. SACV08-00854 AG (MLGx)).

those payments in the form of larger service credits and new car rebates), and continuing or registering for participation in the Reimbursement Program. Lump-sum payments vary depending upon when the class member bought and sold the vehicle. The Settlement also provides for separate payments for 4x40 class members who choose the Reimbursement Program. (Carey Decl. ¶ 20.)

When Class Members contact Class Counsel about the different options available, Class Counsel will have to verify detailed information about the Class Member's ownership history and any past participation in the Reimbursement Program. Counsel will then have to explain the specific options available to that particular class member according to their eligibility. Based on extensive class action experience, Class Counsel believes that there will be a high rate of Class-Member inquiries about the claim process, each of which will require substantial time. (Carey Decl. ¶ 20.) Based on the briefing that will take place before Final Approval, as well as the post-Settlement issues that are likely to arise, Class Counsel estimates it will expend 975 hours to complete this Litigation. (Carey Decl. ¶ 11.)

This estimate is in line with the final lodestars in similar cases in this District. *See, e.g., Common Cause v. Jones*, 235 F. Supp. 2d 1076, 1078-79 (C.D. Cal. 2002) (3,345.8 attorney and staff hours generating a $971,578.50 lodestar); Order, *Marsikian v. Mercedes-Benz USA, LLC*, No. 08-cv-04876, Dkt. 124 at 2 (C.D. Cal. May 17, 2010) (2,900 hours generating a $1,227,484 lodestar) (Carey Decl. ¶ 13 Ex. C); *Parkinson*, 796 F. Supp. 2d at 1173 (8,771 hours over four years of litigation generating final lodestar calculation of $3,719,282.30). The hours that Class Counsel devoted to this case were reasonable and necessary to further the Litigation and adequately represent the interests of the Class. Class counsel developed the central theory of liability and pursued hard-

fought settlement negotiations with Defendants, followed by intensive discovery and refinements to a complex settlement claims process.

3. Class Counsel's Fees are Reasonable Pursuant to the *Kerr* Factors Subsumed in the Lodestar Analysis

In considering the reasonableness of attorneys' fees and any requested multiplier, courts consider the novelty and complexity of the litigation, counsel's skill and experience, the quality of representation, the results obtained, and the contingent nature of the fee agreement. *See Morales*, 96 F.3d at 364 n.9.

(1) Novelty and Complexity of the Litigation

The Complaint filed by Plaintiffs and Moving Class Counsel in *Hunter v. Hyundai Motor America* on November 2, 2012, was the first lawsuit specifically addressing the flaws in Defendants' fuel economy testing and resulting MPG misstatements on Monroney stickers. Four days later, Plaintiffs in *Brady v. Hyundai Motor America* filed a class action complaint alleging similar claims, with additional allegations about the deficiencies in Defendants' Reimbursement Program. These suits followed on the heels of Defendants' November 2012 announcement. The announcement shined a light on Defendants' conduct and specific remedial efforts Defendants undertook, namely, restatements of MPG ratings for class vehicles and the establishment of the Reimbursement Program.

While the announcement advanced the factual development of the case, the case remained complex and not without risks. Moving Class Counsel still faced defenses relating to theories of preemption, falsity, the outer limits of EPA fuel economy testing protocols, and the difficulty of certifying a nationwide class. Moving Class Counsel developed and deployed a novel theory of liability to address these defenses. Yet the path to victory was by no means certain, given the difficulties of pursuing class litigation on a

nationwide or state-by-state basis and the likely defenses Defendants would continue to raise.

The announcement also expanded the universe of vehicles at issue far beyond the four 4x40 vehicles at issue in *Espinosa*, or the single vehicle model at issue in *Krauth* (*Krauth* Compl., Dkt. No. 1-4). This expansion brought a corresponding increase in the burden on counsel to investigate the facts and conduct discovery, whether or not settlement occurred.

The establishment of the Reimbursement Program added an additional dimension of complexity. Instead of negotiating class payments on a blank slate, counsel contended with and investigated many unknowns regarding the scope and efficacy of that program. Negotiations required additional care and ingenuity to ensure that the terms of Settlement adequately addressed the interests of class members relative to their rights under the Reimbursement Program. Indeed, taking up a case where Defendants had already offered 115% compensation to class members, Class Counsel convinced Defendants that more relief was needed to treat class members fairly.

The Reimbursement Program also complicated the Settling Parties' efforts to establish an effective claims process. Because many class members were already participating in the program (or might elect to do so), direct mailing of settlement payments was not appropriate in this case. Instead, the Settling Parties devised a comprehensive claim form to enable class members to elect the particular compensation available to their situation. This claim form was revised and simplified in close consultation with the Court over a series of hearings in July, August, and September 2014. To reduce the burden of class members even further, Class Counsel negotiated for the use of a settlement mailer and website, which would provide an automated (and deeply simplified) process for class members to claim relief. These additional

measures reflected the complexity and novelty of the Settlement and underlying claims.

(2) Skill and Experience of Class Counsel and Quality of Representation

The "prosecution and management of a complex national class action requires unique legal skills and abilities." *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *19 (C.D. Cal. June 10, 2005) (quoting *Edmonds v. U.S.*, 658 F. Supp. 1126, 1137 (D.S.C. 1987)). The courts consider counsel's skill alongside the quality of work performed by counsel. *See In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008).

In this case, success required experienced and skilled class-action attorneys. Class Counsel are members of the bar with vast experience in consumer class-action litigation, which they utilized to obtain the best recovery for the Class. (Carey Decl. ¶ 2.) This case is factually complex and involved numerous legal questions involving federal preemption and the feasibility of certifying a nationwide class. Yet even after Defendants obtained partial dismissal of the claims in *Espinosa*, Class Counsel strengthened the theory of the case and negotiated a beneficial settlement for the Class.

The Court should consider the quality of opposing counsel in evaluating the quality of Class Counsel's work. *In re Heritage Bond Litig.*, 2005 WL 1594403, at *20. Class Counsel faced firms including Quinn Emanuel Urquhart & Sullivan, Hogen Lovells, and Dykema Gossett, highly skilled counsel with well-deserved reputations for vigorous advocacy in defense of their clients. *See id.*

(3) Class Counsel Obtained a Favorable Result for the Settlement Class

Class Counsel negotiated a favorable settlement for a large Class. *See Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 578 (2004). The substantial

benefit doctrine applies when "a concrete and significant benefit, although nonmonetary in nature, has nonetheless been conferred on an ascertainable class." *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Mkts., Inc.*, 127 Cal. App. 4th 387, 397 (2005)).

This settlement will confer both nonmonetary and monetary benefits on 900,000 Hyundai and Kia owners and lessees. The Settlement makes available (1) lump-sum payments reflecting the lifetime fuel cost for a typical vehicle owner; (2) options to receive service credits and new car rebates at 150% and 200% of the lump-sum, respectively; (3) additional compensation for 4x40 owners as part of the lump-sum, or as a separate payment if they choose to participate in the Reimbursement Program. Though it is not a formal term of the Settlement, Class Members retain the right to register or continue participation in Defendants' Reimbursement Program, as reflected in the claim documents and website, which provide a separate channel to enroll.

(4) The Contingent Nature of the Litigation

In conducting an inquiry into whether counsel's hours were reasonably expended in this litigation, the Court may consider the contingent nature of the fee agreement. *Montoya v. Creditors Interchange Receivable Mgmt., LLC*, No. CV 10-3037 PSG (Ex), 2011 WL 2437474, at *2 (C.D. Cal. June 17, 2011). Class Counsel pursued this case on a contingency basis. (Carey Decl. ¶ 21.) Class Counsel have expended many hours working on this case and born all expenses and risks of the litigation—the Class Representatives and Class Members are not responsible for any fees or costs. (Carey Decl. ¶ 21.) The contingent nature of this litigation supports the reasonableness of the hours expended by Class Counsel.

4. The Factors Not Subsumed in the Lodestar Analysis Support Any Multiplier Needed to Approve this Fee Request

The factors that are not subsumed in the lodestar analysis may support a multiplier. *Cunningham v. Cnty. of Los Angeles*, 879 F.2d 481, 487 (9th Cir. 1988). These factors include the time and labor required, the preclusion of other employment by the attorney due to acceptance of the case, the customary fee, time limitations imposed by the client or the circumstances, the nature and length of the professional relationship with the client, and awards in similar cases. *See Morales*, 96 F.3d at 363 n.8, 364 n.9. These factors weigh in favor of any multiplier necessary to award Class Counsel the agreed-upon fee amount.

The time and labor required to bring this Litigation to a reasonable settlement was substantial. Class Counsel have expended 5,512 hours during the course of the suit and the months-long settlement negotiations. (Carey Decl. ¶ 11.) As a result of Class Counsel's perseverance in seeking relief for all class members impacted by the flawed MPG testing, the type and availability of relief was vastly expanded to consumers throughout the United States.

The work involved in successfully litigating this action over several years caused Class Counsel to forego the pursuit of other employment. (Carey Decl. ¶ 22.) Class Counsel is a nationwide firm specializing in class actions, and it must allocate its resources carefully to investigate and initiate suits it believes are worthwhile. (Carey Decl. ¶ 22.) This Litigation resulted in a significant expenditure of time and money—an expenditure that limited Class Counsel's pursuit of other cases. (Carey Decl. ¶ 22.)

The Court should therefore grant an award in the amount of Class Counsel's lodestar plus expected costs of completion, with a reasonable multiplier of 1.22. *See supra* Parts III.A. and III.B. Awards granted in similar

cases support Class Counsel's request for its modest multiplier of the lodestar to grant the fee award. *See Common Cause*, 235 F. Supp. 2d at 1081-82 (award of $1,063,087.29 for 3,345.8 hours); *Van Vranken*, 901 F. Supp. At 298 (3-4 is typical range for multipliers). *See also supra* Parts I. and III.B.2.

C. Class Counsel Seeks Reimbursement of Litigation Costs and Expenses Not to Exceed $250,000

Class Counsel has incurred expenses in the amount of $213,883.58. These expenses are detailed in Class Counsel's declaration submitted concurrently herewith. (Carey Decl. ¶ 14.) Class Counsel expects to spend approximately $35,000 more in costs in this litigation. (Carey Decl. ¶ 15.)

All expenses that are typically billed by attorneys to paying clients in the marketplace are compensable. *See Missouri v. Jenkins ex rel. Agyei*, 491 U.S. 274, 286 (1989); *accord Grove v. Wells Fargo Fin. Cal., Inc.*, 606 F.3d 577, 580 (9th Cir. 2010). *See also Omnivision*, 559 F. Supp. 2d at 1048 ("[a]ttorneys may recover their reasonable expenses that would typically be billed to paying clients in noncontingency matters").

Plaintiffs incurred substantial costs on motion practice, travel, computer research, photocopies, postage, filing fees, and telephone charges. (Carey Decl. ¶ 14.) There were multiple settlement meetings—including the mediation—for which Class Counsel had to travel, and charges for computerized factual and legal research included online legal services such as LEXIS/Nexis. (Carey Decl. ¶¶ 14.) The scope of discovery in this case also required the use of a dedicated document management system at considerable expense. These costs were necessarily and reasonably incurred to bring this case to a successful outcome, and reflect market rates. (Carey Decl. at ¶ 14.)

D. Negotiated Attorneys' Fee Agreements Are Favored in Class Action Settlements

Federal courts encourage litigants to resolve fee issues by agreement whenever possible. "A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee."[13] *Hensley v. Eckerhart*, 461 U.S. 425, 437 (1983). A fee negotiated by the parties at arm's-length is essentially a market-set price. Defendants have an interest in minimizing the fee; plaintiffs have an interest in maximizing it; and the negotiations are informed by the parties' knowledge of the work done and result achieved, and their views on what the court might otherwise award. In *In re Cont'l Ill. Secs. Litig.*, Judge Posner endorsed a market-based approach to evaluating fee requests, stating that the function of judges in fee litigation "is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order." *In re Cont'l Ill. Secs. Litig.*, 962 F.2d 566, 568 (7th Cir. 1992).

Here, an arms'-length negotiation was conducted, and HMA agreed to a payment of $2.7 million in fees and $250,000 in costs. Moreover, an experienced mediator oversaw the negotiations and the final terms of the Settlement, further demonstrating the reasonableness of Plaintiffs' request.

IV. CONCLUSION

For the foregoing reasons, the Court should approve the fee application and award Plaintiffs' Class Counsel $2.7 million in fees and $213,883.58 in litigation expenses already incurred, with a maximum expense award of $250,000. A proposed order is submitted herewith.

[13] *See also In re M.D.C. Holdings Sec. Litig.*, No. CV89-0090 E (M), 1990 WL 454747, at *4 (S.D. Cal. Aug. 30, 1990) ("the parties should be encouraged to settle all their disputes as part of the settlement…including the amount of the fee…[and] it should be approved as part of the negotiated settlement").

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