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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE: HYUNDAI AND KIA FUEL ECONOMY LITIGATION

Case No. 2:13-ml-02424-GW-FFM

***KRAUTH/HASPER* PLAINTIFFS' OPPOSITION TO *BRADY/HUNTER/ESPINOSA* PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL**

Date: June 26, 2014
Time: 9:00 a.m.
Judge: Hon. George H. Wu
Courtroom: 10

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

American consumers purchased over 900,000 Hyundai and Kia vehicles over a three-year period based on the companies' admittedly false representations about their cars' fuel economy. The settlement presented to this Court for preliminary approval last December was the product of a highly unusual process and fails to provide the justice these consumers deserve from the class action system. The facts and circumstances of this case – defendants that concede uniform liability to the class and ongoing governmental investigations – dictate that a direct payment to harmed consumers, unburdened by a claim form, is the only just result.

The Proposed Settlement contains numerous terms that the courts and independent commentators such as the National Consumer Law Center (NCLC) and the National Association of Consumer Advocates (NACA) consider "red flags" that warrant rejection under the specific circumstances here:

- **Unreadable and convoluted notice.** A nearly illegible postcard is the sole manner in which Class Members will receive direct notice of their rights under the Proposed Settlement – virtually guaranteeing that most Class Members will never exercise their rights, even as they will be held to have released their claims.
- **Unnecessary and onerous claims process.** Class Members must comply with a completely unnecessary, confusing and onerous mail and online claims process that will indisputably discourage many Class Members from pursuing their rights under the Proposed Settlement.
- **Defendants administer the settlement.** Hyundai and Kia are responsible for processing Class Members' claims against them – a straightforward conflict of interest that incentivizes errors and improper denials of claims by the very same companies that engaged in the misrepresentations to begin with.

And the clincher:

- **Reversionary settlement.** Hyundai and Kia – the wrongdoers – get to keep all the money that consumers do not claim or use.

Here's the Settling Parties' formula for the Proposed Settlement:
Unreadable Notice +
Onerous Claims Process +
Defendants Administer Claims +
Reversionary Settlement =
Limited Compensation for Class, Windfall For Defendants

The Proposed Settlement fails the "fair, adequate and reasonable" test, especially as it has been applied – with increasing sensitivity – by courts in the Ninth Circuit and elsewhere. If approved, it would erode public confidence in a crucial device for redressing corporate wrongdoing. (By contrast, the modifications proposed in the Conclusion of this brief would transform the Proposed Settlement from an illusory one to one that truly provides benefits to all Class Members.) Therefore, we respectfully urge the Court to reject the Proposed Settlement.

II. BACKGROUND

A. Genesis of the Litigation.

This litigation began with an investigation by Consumer Watchdog, a non-profit charitable organization, into numerous fuel economy complaints it received from consumers about the 2011 and 2012 Hyundai Elantra. (*See Krauth* Complaint at ¶ 29; *Hasper* Complaint at ¶ 65.) In response to these complaints, on November 30, 2011, Consumer Watchdog sent a letter to the EPA requesting "that the EPA re-test the 2011 and 2012 Elantra model in its own facility, to seek an explanation for the MPG disappointments of so many Elantra buyers…." (*Id.*) Consumer Watchdog subsequently sent letters to Hyundai Motor America (December 2011), President Obama and the EPA Administrator (January 2012), Hyundai Motor America's CEO at the time, John Krafcik, and Hyundai Motor Company (Hyundai and Kia's parent company, located in South Korea) CEO, Eok Jo Kim (February 2012) questioning the accuracy of Hyundai's representations about the fuel economy of the Elantra. (*Id.*)

[redacted] Hyundai's denials continued for months:

> Hyundai Motor America ("Hyundai") believes this case has no merit, as our advertising is accurate and in full compliance with applicable laws and regulations. In fact, we've reviewed our ads and think Consumer Watchdog and their client are dead wrong.
>
> Importantly, the U.S. Environmental Protection Agency (EPA) recently confirmed our advertised fuel economy .... The EPA results, generated from testing conducted on January 25, 2012 at the EPA's National Vehicle and Fuel Emissions Laboratory in Ann Arbor, Michigan, are identical to the testing data Hyundai originally submitted to the agency. We are gratified with the EPA results, and are committed to continuing to reduce the fuel consumption of our vehicles in order to provide greater value and efficiency for our customers.

Fred Meier, *Hyundai sued over ads touting Elantra's 40 mpg rating*, USA Today, July 11, 2012.[1] These statements, like Hyundai and Kia's mileage estimates, were false.

B. Litigation Begins.

Receiving no response from Hyundai to its letters questioning the accuracy of Hyundai's representations about the fuel economy of the Elantra, Consumer Watchdog sent Hyundai a demand letter on April 23, 2012, pursuant to the Consumer Legal Remedies Act, Cal. Civ. Code §1750 et seq. ("CLRA").

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[1] Available at http://content.usatoday.com/communities/driveon/post/2012/07/hyundai-sued-over-ads-touting-elantras-40-mpg-rating/1#.U4S1XyhWjHY.

Meanwhile, one of the two firms sponsoring the Proposed Settlement filed *Espinosa v. Hyundai Motor America*, Case No. 2:12-cv-00800-GW-FFM (C.D. Cal.), a case challenging the fuel economy of the Elantra and Sonata. The *Espinosa* complaint expressly relied upon Consumer Watchdog's research and public correspondence. (*See Espinosa* Complaint at ¶ 27.) Receiving no response to the CLRA demand letter, Consumer Watchdog attorneys filed a class action complaint against Hyundai in California state court on July 3, 2012. *Bird v. Hyundai Motor America,* Case No. 34-2012-00127249 (Sacramento Superior Court). The *Espinosa* and *Bird* cases were litigated in traditional fashion following the applicable civil rules until November 2, 2012.

C. The November 2, 2012 Announcement Confirms Hyundai and Kia Inflated MPG; They Initiate the "Voluntary Reimbursement Program."

The course of the litigation changed dramatically on November 2, 2012, when the EPA, Hyundai and Kia jointly announced that the auto manufacturers had in fact overstated the fuel economy of more than a dozen models of vehicles manufactured by Hyundai and Kia between 2010 and 2012 – over 900,000 cars – and that Hyundai and Kia would be adjusting the advertised MPG values of all of these vehicles (hereinafter, "November 2 Announcement").

Simultaneous with the November 2 Announcement, Hyundai and Kia initiated a "Voluntary Reimbursement Program" (hereinafter, "Voluntary Program"). *See generally* www.hyundaimpginfo.com and www.kiampginfo.com. The Voluntary Program purports to compensate current owners (and lessees) by providing a debit card loaded with funds calculated based upon:

1. The number of miles the owner has accumulated on the vehicle in question.
2. The original and revised combined fuel economy ratings of the vehicle in question, in miles per gallon.
3. The 52-week average fuel price for the area in which the owner lives, based on EIA government data.

4. An extra 15 percent above the reimbursement amount as a payment for "inconvenience."

See Hyundai FAQs for Affected Models & Compensation[2] and Kia MPG Information FAQ.[3] In order to receive these payments, owners must periodically visit a Hyundai or Kia dealer to have their mileage verified. *Id.*

D. In the Aftermath of the November 2 Announcement, 54 Lawsuits are Filed; Consumer Watchdog Team Petitions for MDL.

The November 2 Announcement spurred an onslaught of similar class action complaints against Hyundai and Kia in federal courts across the United States. Among them was *Hunter v. Hyundai Motor America,* Case No. 8:12-cv-01909-JVS-JPR (C.D. Cal.), brought by the other plaintiffs' firm sponsoring the Proposed Settlement. Filed on the same day as the November 2 announcement, the *Hunter* complaint also relies on Consumer Watchdog's inquiries to Hyundai, EPA and the White House. (*See Hunter* Complaint at ¶ 49.)

Consumer Watchdog attorneys and associated counsel filed the *Krauth* case before this Court on November 6, 2012. On November 19, 2012, Consumer Watchdog attorneys petitioned the MDL Panel to consolidate all cases to the United States District Court for the Central District of California, Southern Division. By transfer order dated February 5, 2013, the cases were ordered consolidated before this Court.

E. A "Settlement" Is Announced on February 14, 2013.

Prior to the first MDL status conference before this Court, counsel in *Krauth* filed a proposed agenda requesting a briefing schedule for plaintiffs' leadership structure, a consolidated amended complaint, and discovery. However, at the first status conference, on February 14, 2013, two of the 60 firms representing named plaintiffs in this MDL – Hagens Berman Sobol Shapiro LLP and McCune Wright

[2] Available at https://hyundaimpginfo.com/faq#compensation.
[3] Available at https://kiampginfo.com/faq.

LLP (hereinafter, "Settling Plaintiffs"; together with Defendants, "Settling Parties") – informed the Court that they had negotiated a global settlement of the litigation with Hyundai that would bind all affected consumers. Other than those two firms, no other lawyers representing aggrieved plaintiffs participated in the negotiations, which commenced just twelve days after the November 2 EPA announcements. (Carey Decl., ¶ 10). As the Court noted at the first MDL hearing, "it is slightly unusual [for] the settlement [to] have gone this far at the very beginning of the MDL." (*See* May 30, 2014 Decl. of Harvey Rosenfield ("Rosenfield Decl."), Ex. A Transcript of Feb. 14, 2013 hearing at Pages 11:22-12:6.)[4]

Notwithstanding the Settling Parties' announcement that a settlement had been reached, it was not until December 23, 2013 (more than ten months later) that Settling Plaintiffs finally filed the Proposed Settlement as part of the instant motion for preliminary approval.

F. Confirmatory, Rather than Traditional, Discovery Ensued Without the Full Protection of the Federal Rules and Rule 23(g) Leadership Motions.

Based on the representations made by the Settling Parties to this Court in February, 2013, that a settlement had been reached, the traditional procedures applicable to the litigation of class actions were held in abeyance.

First, the Rule 23(g) leadership process was not invoked. As a practical matter, however, the two firms representing the Settling Plaintiffs were accorded the privileges of lead counsel. Hyundai and Kia refused to communicate directly with the Consumer Watchdog team of attorneys and others representing Non-

[4] One factor in determining the fairness, adequacy and reasonableness of proposed settlements reached prior to certification is whether "defendants appear to have selected, without court involvement, a negotiator from among a number of plaintiffs' counsel[.]" Federal Judicial Center, Manual for Complex Litigation, § 21.62 at 317 (4th ed. 2004). That is precisely what Hyundai and Kia appear to have done here.

Settling Plaintiffs. Liaison Counsel (Eric Gibbs of Girard Gibbs LLP) was appointed by the Court to act as an intermediary. (The Liaison Counsel now supports the Proposed Settlement.)

Second, repeated requests by Non-Settling Plaintiffs for formal discovery were denied in favor of "confirmatory discovery." (*See, e.g.*, Rosenfield Decl., Ex. B (February 28, 2013 Hearing Transcript at Pages 15-16).) Hyundai and Kia refused to proceed with discovery according to federal discovery rules. Instead, Hyundai and Kia unilaterally dictated which witnesses they would produce for "interviews" – not depositions – and the duration and subject matter of those interviews. (*See* Rosenfield Decl., Ex. C (April 25, 2013 Hearing Transcript at Pages 41-42).) Non-Settling Plaintiffs requested formal depositions pursuant to the Federal Rules of Civil Procedure and to postpone such depositions until after the completion of the limited confirmatory discovery permitted; however, the interviews continued without the benefit of complete discovery.[5]

Hyundai and Kia steadfastly refused to produce proper privilege logs under the Federal Rules; instead they unilaterally elected to produce limited privilege logs only for the electronic discovery of their handpicked interviewees. Following a motion to compel, Hyundai begrudgingly revised its privilege log, but many questions went unanswered.[6] [redacted]

This highly restrictive process is particularly troubling because when the Court ordered Defendants to provide Non-Settling Plaintiffs with all discovery that

[5] Consumer Watchdog attorneys and other counsel for Non-Settling Plaintiffs were permitted to participate in the interviews.

[6] Two discovery disputes, including the dispute regarding Hyundai's privilege log, remain outstanding, as the Court has not yet issued final rulings on these issues. (*See* Civil Minutes, Dec. 9, 2013, Dkt. 182; Civil Minutes, Jan. 10, 2014, Dkt. 201.)

had been provided Settling Plaintiffs, it became apparent that the Settling Plaintiffs had not themselves obtained much, if any, substantive discovery prior to announcing their "settlement" on February 14, 2103.[7]

G. What the Limited Discovery Shows About Hyundai and Kia's Misrepresentation of Their Vehicles' Fuel Economy.

Preliminarily, it is important to note that the MPG values that appear on vehicle MPG stickers (referred to as "Monroney Labels") and in advertising are based on testing *conducted by vehicle manufacturers* pursuant to rigorous specifications promulgated by the EPA; the EPA itself does *not test* the vehicles (but does perform occasional audits of vehicles to confirm MPG accuracy).[8]

[redacted] One major ad campaign – "4x40" – touted four Hyundai vehicles (Elantra, Sonata Hybrid, Accent, Veloster) that Hyundai claimed would achieve 40 mile per gallon highway fuel economy.

The discovery is equally clear that Hyundai and Kia officials were aware of the discrepancies, but failed to take any action. [redacted]

[7] Failure to conduct adequate discovery is another "red flag" warranting rejection of a settlement. *In re General Motors Corp. Pick-Up Truck Fuel Tank* (3d Cir. 1995) 55 F.3d 768, 814; Newberg & Conte, Newberg on Class Actions (3d ed. 1992) § 11.41, p. 92-93.

[8] *See* http://www.epa.gov/otaq/testdata.htm.

[redacted] Despite this and other similar communications [redacted], Hyundai and Kia blamed the overstatements on "honest procedural errors." (*See* Rosenfield Decl., Ex. D (Excerpt of Transcript of Hyundai-Kia MPG Rating Adjustment Teleconference).) Given the severe limitations on discovery summarized above, we do not have even close to a complete picture of the degree of corporate involvement in the testing process, nor of all the actions that were taken once the errors were exposed. However, [redacted]

[redacted]

H. The December 2013 Settlement Motion and Amendments

The Settling Parties finally filed their Motion and accompanying exhibits on December 23, 2013. In response to a request by the Court that all Non-Settling Plaintiffs provide their position on the Proposed Settlement, the Consumer Watchdog team submitted a 14 page single-space summary of flaws and defects in the proposal on behalf of the Krauth and Hasper Plaintiffs. (*See* Rosenfield Decl., Ex. E.) Other Non-Settling Plaintiffs provided their views, which were summarized by Liaison Counsel in a filing on January 30, 2014. (Dkt. 211.)

Subsequently, with this Court's encouragement, Liaison Counsel and the Settling Parties entered into negotiations to alter the proposal to address the criticisms. (Neither the Consumer Watchdog team's lawyers, nor those representing any other Non-Settling Plaintiffs, participated in those negotiations – at least to our knowledge). As a result, the Proposed Settlement has been amended twice. The amendments to the Proposed Settlement essentially make two changes: the form of the notice, and the opportunity for electronic claim submission. Now, Hyundai and Kia will send a postcard instead of a claim form to Class members by mail.

Under the Proposed Settlement, Class Members[9] can choose to register for, or remain in, the Voluntary Program, receive one or more non-transferable "Cash

[9] According to the Proposed Settlement, only consumers who purchased or leased their vehicle on or before November 2, 2012 may seek compensation. (Proposed Settlement, § 1.4.) This arbitrary time limitation precludes otherwise valid claims from consumers who purchased vehicles after November 2, 2012 based on incorrect Monroney Labels that had not been replaced by the dealers following the EPA announcement. For example, Laura Gill, one of the named plaintiffs in *Hasper*, purchased her vehicle on November 3, 2012 based on inaccurate Monroney Labels that had not been replaced by the dealer following the November

Debit Cards" that expire within one year – the lump sum payment option (see table),[10] a "Dealer Service Debit Card" or a "New Card Rebate Certificate."

Proposed $ Compensation to Class Members (Excluding "Fleet Vehicles")

Class Members	Debit Card Amount	Additional "4x40"Debit Card*
Current Original Owner Opting for "Lump-sum" Payment	HMA Average: $458.45 KIA Average: $533.67	$0
Current Original Owner Opting for Voluntary Program	Same as Voluntary Program	$100
Current Non-Original Owner (Purchased Used)	HMA Average: $22.23 KIA Average: $266.84	$0
Former Owner	Same as Voluntary Program	$100
Current Lessee Opting for "Lump-sum" Payment	HMA Average: $232.65 KIA Average: $299.00	$0
Current Lessee Opting for Voluntary Program	Same as Voluntary Program	$50
Former Lessee	Same as Voluntary Program	$0

***for owners of Elantra, Accent, Veloster, Sonata Hybrid**

III. THE PROPOSED SETTLEMENT IS UNFAIR, INADEQUATE AND UNREASONABLE.

Courts are increasingly sensitive to protecting the rights of absent class members, to whom the court owes a duty to carefully scrutinize proposed settlements to ensure that they are "fundamentally fair, adequate, and reasonable." Fed. R. of Civ. P. 23(e). "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (citations omitted); *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003).

A particularly high level of scrutiny is necessary here: "[S]ettlement approval that takes place prior to formal class certification requires a higher standard of fairness." *Hanlon v. Chrysler Corp.*, *supra,* 1026. "[A] district court

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2 Announcement. (*Hasper* Complaint, ¶¶ 27, 28.) Gill would not be entitled to submit a claim under the Proposed Settlement.

[10] While the Proposed Settlement specifies that the Debit Card will be free of "issuer fees" (Proposed Settlement, § 3.2.1), Settling Parties have not revealed whether other fees or restrictions will apply.

may not simply rubber stamp stipulated settlements." *In re Zoran Corp. Derivative Litigation* 2008 WL 941897 at *2 (N.D. Cal.), citing *Staton v. Boeing Co.*, 327 F.3d 938, 959-60 (9th Cir. 2003); *see also In re Bluetooth Headset Products Liability Litigation (Bluetooth),* 654 F.3d 935, 946 quoting *Staton* ("court's role is to police the 'inherent tensions among class representation, defendant's interests in minimizing the cost of the total settlement package, and class counsel's interest in fees'").

When the Proposed Settlement is taken as a whole, the number of "red flags" renders it unfair, unreasonable and inadequate under the Federal Rules of Civil Procedure, case law and the best practices for class action settlements as promulgated by recognized authorities (NCLC, Consumer Class Actions (8th ed. 2013) (hereinafter, "NCLC Guide"); NACA, Standards and Guidelines for Litigating and Settling Consumer Class Actions, 255 F.R.D. 215 (2009) (hereinafter, "NACA Guidelines"); Federal Judicial Center, Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide (2010) (hereinafter, "FJC Notice Guide"); Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges (3rd Ed. 2010) (hereinafter, "Guide for Judges").[11]

A. The Settlement Should Not Be Approved Because Hyundai and Kia Retain Unclaimed and Expired Funds.

The serious flaws in the proposed notice, claims and administration procedures, discussed below, must be viewed in the context of the most deleterious aspect of the Proposed Settlement: Hyundai and Kia get to keep any funds not claimed by the class. (*See* Proposed Settlement, §§ 4.3, 3.2.4.) The proposed notice and claims process virtually guarantee that most Class Members will receive no compensation at the same time they are being required to release their rights

[11] Excerpts of these best practice guides are attached as Exs. F, G and H to Rosenfield Decl.

against Hyundai and Kia. As the NACA Guidelines explain at 248: "The amount of such reverting funds is likely to be higher where claim forms are required before class members receive their distribution."

Moreover, the compensation to Class Members is to be provided in the form of debit cards, which expire within one to three years of issue, depending on the form of compensation the Class Member elects to receive. (Proposed Settlement, §§ 3.21, 3.22, 3.23.) According to the Proposed Settlement, the compensation on the debit cards "shall remain the property of [Defendants], unless and until it is expended by the Settlement Class Member" and, upon the expiration date, "any unexpended funds shall become the permanent property of" Defendants. (Proposed Settlement, § 3.2.4.) It is clear these unused funds will not be used for the benefit of the Class.

Hyundai and Kia – admitted wrongdoers here – should not be permitted to structure a class action settlement so that they retain any of the compensation they ostensibly have agreed to pay the class. This is particularly true where, as here, the basis for the class action lawsuit is a consumer protection statute whose objectives include deterrence as well as disgorgement. In such cases, "it would contradict these goals to permit the defendant to retain unclaimed funds." *Six (6) Mexican Workers v. Ariz. Citrus Growers,* 904 F.2d 1301, 1308 (9th Cir. 1990). "[R]eversion is not appropriate where deterrence is a statutory goal and is not otherwise required by the circumstances." *Harris v. Vector Mktg. Corp.*, 2011 U.S. Dist. LEXIS 48878 at 37-38.

Precisely for these reasons, courts disfavor settlements like the instant proposal that permit the defendant to retain unclaimed funds. "A reversion clause creates perverse incentives for a defendant to impose restrictive eligibility conditions and for class counsel and defendants to use the artificially inflated settlement amount as a basis for attorney fees." Guide for Judges at 20. *See also Bluetooth,* 654 F.3d 935, 947 (9th Cir. 2011); *Fraley v. Facebook, Inc.*, C 11-1726

RS, 2012 WL 5838198 (N.D. Cal. Aug. 17, 2012); *Tarlecki v. Bebe Stores, Inc.* 2009 WL 1364340.

In *Kakani v. Oracle Corp.* 2007 WL 179377 (N.D. Cal.), the district court denied preliminary approval of a claims-made, reversionary settlement, finding it unfair because "such a scheme would be a bonanza for the [defendant] company … plaintiffs' counsel … [and] the named representatives[,]" while "the main losers" were "those absent class members who wind up not submitting a timely claim and/or who never receive a notice letter in the first place." *Id.* at *5.

Like the settlement in *Kakani*, the Proposed Settlement does not create a common fund. Instead, Hyundai and Kia retain unclaimed and expired amounts to which Defendants concede Class Members are entitled. (*See* Proposed Settlement, § 3.2.4); *see also Dennis v. Kellogg Co.,* 697 F.3d 858, 866 (9th Cir. 2011) (reversing preliminary approval of settlement as abuse of discretion where defendant established "constructive common fund," balance of unclaimed funds was to be distributed through cy pres in the form of food); *Bluetooth*, 654 F.3d at 943 (discussing constructive common fund analysis).

The Court should reject Hyundai and Kia's attempt to evade full accountability to the class as a whole for the economic injuries they incurred as a result of the two companies' MPG misrepresentations. All Class Members should be compensated pursuant to the Proposed Settlement, and Hyundai and Kia should not be allowed to keep their ill-gotten gains. Unclaimed or expired funds should be distributed pro rata to Class Members, with cy pres to take place once it is no longer economically feasible to distribute further funds to Class Members.

B. Hyundai and Kia Should Not Be Permitted to Administer the Settlement.

"Where the settlement provides that each qualifying class member receive a specified payment, either a flat sum or an amount to be determined by a formula, settling defendants may have an interest in maximizing the extent to which class

members are disqualified or have their claims reduced." Federal Judicial Center, Manual for Complex Litigation ("MCL 4th"), § 21.66 at 331 (4th ed. 2004). That is why, when reviewing settlements reached before a decision on class certification, the "court should determine whether the persons chosen to administer the procedure are disinterested and free from conflicts arising from representing individual claimants." *Id.*, § 21.612 at 315.

Under the Proposed Settlement, however, Hyundai and Kia are permitted to administer the claims process. They will send notice to class members, attempt to locate class members no longer at their original address, provide claim forms via a website, operate toll-free help lines, review, approve and pay claims and oversee appeals processes for denied claims. (Proposed Settlement, § 4.1, 11.1, 4.3; Second Addendum, §§ 2.1-2.8.)

This is particularly improper given the specific facts of this case: Hyundai and Kia misled the EPA and consumers about the fuel economy of their vehicles. The fruits of that wrongdoing were an unspecified financial windfall for Hyundai and Kia, at the expense of their customers, their competitors, and more generally the environment.[12] The Defendants have little incentive to administer the settlement in a scrupulously proper and transparent manner. To the contrary, they have an obvious pecuniary interest in discouraging Class Members from participating in the Proposed Settlement – an interest that is reflected in the severe deficiencies in the notice and claims procedures.

Moreover, the Proposed Settlement permits the Defendants to evade any accountability for their conduct in administering the claims process. It provides

[redacted]

that Hyundai and Kia will report claims rate data only to Settling Plaintiffs' counsel, and only at the latter's request. (Second Addendum, § 2.6.) This conflict of interest cannot be remediated; it undermines the interests of Class Members.

C. The Claims Process is Unnecessary.

Given that the Defendants here have conceded liability and are readily able to distribute compensation to Class Members directly, requiring Class Members to request the compensation to which they are entitled under the Proposed settlement is unfair and unreasonable. *See* Alba Conte & Herbert Newberg, Newberg on Class Actions § 8:35, at 272 n.3 (4th ed. 2002) ("Whenever there is an option available to distribute fairly a class recovery without requiring a proof of claim by class members as a precondition to sharing in that recovery, the automatic distribution of the class recovery to eligible class members is the preferable option and is more consistent with the objectives of the class action rule."). In assessing fairness, courts must "consider whether a claims process is necessary at all." Guide for Judges at 30. The NACA Guidelines advise, "[I]n 'opt-out' class actions, claims forms should be avoided[.]" NACA Guidelines at 263. This is because "claims made" settlements result in reduced compensation to the class as a whole, while releasing their rights: "Class claim forms and procedures can reduce the number of class members who receive recovery and the amount paid by the defendants. … [yet] [c]lass members who fail to act by returning a claim form may be bound by a general release of claims and defenses." NCLC Guide at 211, quoting NACA Guidelines at 263. "Claim forms may be necessary only (i) when class members cannot be adequately identified from the defendant's records; or (ii) when class members must provide information to establish eligibility for relief or to ascertain the scope of the damages and the information is not available in the defendant's records or otherwise available from third parties." NCLC Guide at 211.

Defendants all too often insist on a claims-made settlement as a deliberate strategy to minimize having to pay what they owe the class because they know that

many class members will not take the time to complete and submit a claim form. As the FJC Notice Guide explains: "In too many cases, the parties may negotiate a claims process which serves as a choke on the total amount paid to class members." FJC Notice Guide at 6. This risk becomes most serious when – as here – the Settling Parties not only structure the settlement as a claims-made settlement, but they add layer upon layer of complexity and steps to the process that harmed consumers must follow.

No claim form is necessary here. As automobile manufacturers, Hyundai and Kia are particularly capable of sending Class Members their compensation automatically. Defendants have contact information for all new and used car purchasers and lessees made through their dealers, as well for those obtaining maintenance and repair services. Moreover, Defendants possess updated records of valid postal and email addresses for the [redacted][13] Additionally, Hyundai and Kia have agreed to utilize "an available R.L. Polk (or a similar database)" if necessary to obtain other Class Members' contact information. (Proposed Settlement, §§ 4.1, 11.1; Second Addendum, § 1.1.)

Using the contact information they possess, Hyundai and Kia can simply send Class Members a cash payment for the lump sum (if current, original or non-original owners or lessees) or Voluntary Program amounts (if former owners or lessees) they are entitled to, as the default option. The class notice (discussed *infra*) can inform Class Members that they will automatically receive cash compensation unless they state a preference for one of the other options, in which case a simple

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[13] [redacted] Hyundai and Kia have valid postal address and email addresses for all of these consumers.

claim form would suffice.

The Settling Parties offer no evidence that a claim form is required under the present circumstances – Defendants have accurate data at their disposal and uniform misstatements and damages to Class Members. That Class Members are offered various compensation options under the Proposed Settlement (cash compensation, enrollment in the Voluntary Program, "4x40" payment, a Dealer Service Debit Card, or a New Car Rebate Card) does not justify the use of a claim form.

Similarly, the Settling Parties offer no justification for requiring class members who are entitled to the special "4x40" payment to clear an additional hurdle in order to receive the additional compensation. Those Class Members must separately elect to receive the "4x40" payment during the online claims process or on the paper claim form. (*See* Proposed Settlement, § 3.1.8; First Addendum.)[14]

D. The Class Notice is Inadequate.

Under Fed. R. of Civ. Pro. 23(c)(2)(B), class members must receive "the best notice that is practicable under the circumstances." To satisfy due process, the notice must reflect a "desire to actually inform." Guide for Judges at 27-28, citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). A class action settlement notice "is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Rodriguez v. W. Pub. Corp.*, 563 F.3d 948, 962 (9th Cir.2009) (quoting *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir.2004). The "notice must clearly and concisely state in plain, easily understood language" details of the settlement. Fed. R. of Civ. Pro. 23(c)(2)(B).

[14] Nor have the Settling Plaintiffs presented any reason for restricting the 4x40 relief to those Class Members who register for, or opt to remain in, the Reimbursement Program.

When a settlement imposes a claims requirement, as this one does, the class notice plays an additional, extremely important role: it is the first step in the claims process.

Initially, the Settling Parties proposed to notify the class by sending a 13-page letter (and five-page claim form) to Class Members via First Class mail, supplemented by a four-sentence flyer available at Hyundai and Kia dealers (the "Dealer Flyer"). (Proposed Settlement §§ 4.1, 6.2, 11.1, Exs. D, E, G.) After criticisms by the Consumer Watchdog legal team and lawyers for other Non-Settling Plaintiffs, Settling Parties amended the notice and claims process. (*See* Liaison Counsel's Report Listing Non-Settling Plaintiffs' Cases and Positions Regarding Proposed Settlement, Jan. 30, 2014, Dkt. 211; First Addendum; Second Addendum.)

Now, to obtain any form of compensation under the newly amended terms of the Proposed Settlement, a Class Member must first grasp the significance and details of the contents of a four by six inch postcard.

The proposed class notice does not meet the requirements of Fed. R. of Civ. Pro. 23(c)(2)(B) for the following reasons:

- **The Postcard is visually illegible**. The Settling Parties submitted the *text* of the Postcard Notice to the Court, but not the actual document itself. (*See* Second Addendum, Ex. A.) This is improper. FJC Notice Guide at 2 ("Draft forms of the notices should be developed, in the shape, size, and form in which they will actually be disseminated … before authorizing notice to the class"). *Scaled to actual postcard size, the Postcard is nearly unreadable.* (*See* Rosenfield Decl., Ex. I (scaled Postcard Notice).) The estimated 9.5-point font is too small to deliver information about how to learn more about the settlement in any effective manner.

- **The Postcard text is inadequate.** Notice should "prominently explain to class members both the benefits of returning claims forms and the consequences of not returning them." NACA Guidelines at 264. It should be "in an attention getting and understandable format." Guide for Judges at 28. None of the text on the Postcard Notice – including the critical information about how to file a claim – is in bold or "prominently" stands out in any

way. There is room – white space – on the address side of the postcard to flag its importance with a teaser, but the proposal does not take advantage of that opportunity. Moreover, the text is poorly drafted and replete with legalese.

- **The Postcard Notice is not appropriate in the context of the Proposed Settlement.** Under the circumstances here, where the Class Notice serves not only to notify a Class Member of the litigation, but also is the principal method of communicating claims and compensation information, postcard notice cannot as a practical matter properly inform class members of the steps they need to take to obtain compensation.

- **The Dealer Flyer is inadequate**. The Dealer Flyer, which is written in vague and confusing language, is unlikely to ever reach Class Members. (*See* Rosenfield Decl., Ex. E; Proposed Settlement, §§ 6.1, 6.2).

- **The proposed notices fail to disclose to Class Members the amount of fees that the attorneys for Settling Plaintiffs will receive.** Such information must be presented to class members within the class notice. *See* NACA Guidelines at 261.

- **The Proposed Settlement does not utilize email notice.** A notice sent via email is appropriate when class members are likely to have access to email. *See Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012) (approving notice when the principal method was to send an email to the class members and included a notice of the settlement in the "Updates" section of members' personal Facebook accounts); NACA Guideline at 261 ("there is rarely a reason why … email … should not … be undertaken and utilized in addition to the traditional forms" of notice). [redacted] See fn. 14, *supra*.[15]

[15] Defendants utilized email communication for the Voluntary Program. Indeed, the Class Notice proposed here is not nearly as extensive as the notice of compensation through the Voluntary Program, where consumers received emails, direct mail notice, public announcements from Hyundai and Kia and communications from dealers and the media announcing the Voluntary Program. Ironically, Settling Plaintiffs "filed their class action lawsuit to rectify deficiencies in the [Voluntary] Program." (Mot. for Class Cert. at 2:24-25.) But in terms of notice, the Proposed Settlement is deficient by comparison. Courts have rejected notice programs where, like here, a company has initiated its own voluntary program to refund consumers for a faulty product and the voluntary program provides for more extensive notice than the class action settlement. *Webb v.*

- **The Settling Parties Have Failed to Provide the Long Form Notice.** It is impossible to fully assess the adequacy of notice to the class without the Long Form Notice. The Settling Parties have not submitted the Long Form Notice to the Court or Non-Settling Plaintiffs. This information must be submitted prior to the hearing on preliminary approval.[16]

E. The Claims Process is Onerous, Convoluted and Will Discourage Class Members from Obtaining Compensation.

"Class counsel should do everything possible to minimize the class members' burden in completing and returning claims forms," according to the NACA Guidelines at 264. The Guide for Judges states, "avoid imposing unnecessary hurdles on potential claimants[.]" *Id.* at 30; *accord* FJC Notice Guide at 6 (the claims process should avoid "onerous features that reduce claims by making claiming more inconvenient"). Additionally, opting out should be as convenient as remaining a part of the class. "There should be no unnecessary hurdles that make it difficult for class members to exercise their rights to opt out, object, submit a claim, or make an appearance." FJC Notice Guide at 1. When a claim form is necessary, it should be as simple as possible. *See Walter v. Hughes Commc'ns, Inc.*, 2011 WL 2650711 at *14-15 (N.D. Cal. July 6, 2011) (rejecting proposed claim form as too complicated and too vague); Guide for Judges at 30.

As presently structured, the Postcard informs Class Members that there are two methods of filing a claim for compensation: online, and through an online/mail hybrid. The proposed claims process is onerous and convoluted:

- **To file a claim online, the Class Member must jump through several hoops:** (1) go to the online claims website, (2) review the Long Form Notice,

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Carter's Inc., 272 F.R.D. 489, 504 (C.D. Cal. 2011); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 622 (W.D.Wash. 2003); *In re ConAgra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 700–01 (N.D.Ga. 2008).

[16] To the extent that the Settling Parties propose to adopt a printed notice (and claim form) similar to the one included in their original motion, we urge the Court to reject the printed notice for the reasons discussed in the analysis submitted by the Consumer Watchdog on January 22, 2014, attached as Ex. E to the Rosenfield Decl.

(3) verify that he or she is a class member by inputting both his or her full VIN number and Unique ID listed on the Postcard Notice, (4) fill out and submit the online claim form, (5) print the confirmation page after submission of the claim form, (6) "attach proof of [class members'] current address, such as a utility bill[,]" and, if the class member is a former owner or lessee, documentation showing the mileage when the class member bought and sold the vehicle, and (7) "mail, fax or email" the document packet to Hyundai or Kia. (Second Addendum, Ex. B.)[17]

- **There is no reason to require class members to print out and mail their online claim submission.** Hyundai and Kia should process online claims as long as they are submitted with an electronic signature. *See* FJC Notice Guide at 6 ("Technology allows … an electronic signature"). It is far too burdensome to require a consumer to take additional steps beyond submitting the online claim form to obtain compensation.

- **The online claim form makes it burdensome for Class Members to opt out.** Class Members must (1) go to the online claims website, (2) download the Long Form Notice, which as of the date of this brief has not been presented by the Settling Parties but presumably will contain instructions on how to request exclusion, and (3) additionally, mail Settling Plaintiffs' counsel the request to opt out. (Proposed Settlement, § 11.5; Second Addendum, ¶ 1.11.) A Class Members should not be required to jump through such hurdles to opt out.

- **The online claim form does not clearly explain the consequences of not filing a claim form.** (*See* Second Addendum, Ex. A.) The NACA Guidelines at 264 state that "[i]n opt-out class action settlements, if claims are being released by the settlement, the claim form should explain in plain language the claims that will be released, whether or not the class member submits the claim form, unless the class member opts out of the settlement." The proposed claim form contains no language to this effect.

- **Deadlines and phone numbers for questions are not listed on the online claim form**. On claim forms, "The deadlines and phone numbers for questions should be prominent." FJC Notice Guide at 6. The online claim form does not display – let alone prominently – any deadlines for opt out

[17] Links to the downloadable Long Form Settlement Notice, Claim Forms and FAQ sheet appear in the left margin of the sample claim form website distributed as Ex. B to the Second Addendum, but Settling Parties have not yet submitted these documents to the Court or Non-settling Plaintiffs.

requests or submission of the confirmation page and additional documentation regarding proof of address or proof of mileage, nor phone numbers where Class Members can obtain information.

- **The online claim form does not clearly explain compensation options.** The online claim form does not clearly inform current, original owners that any amounts they have previously received under the Voluntary Program are deducted from any lump-sum payment received under the Proposed Settlement. Also, the online claim form does not clearly inform current, original "4x40" owners and lessees that they are not entitled to a "4x40" payment if they elect the lump sum option instead of remaining in, or registering for, the Voluntary Program. Nor does the online form clearly inform former owners and lessees that they are only entitled to the compensation that they would have received under the Voluntary Program, and that they are not entitled to the lump-sum payment option.

- **The proposed mail-based claims process is needlessly onerous and convoluted.** Class Members who choose not to pursue the online claims process discussed above must call an 800 number operated by Hyundai and Kia to obtain a printed claim form by mail. (*See* Proposed Settlement, § 4.1, 4.2; Second Addendum, § 1.2, Ex. A.) *See* fn. 17, *supra*.

- **Settling Plaintiffs provide no estimates on how many Class Members are eligible for the lump sum and "4x40" payments**; nor do they provide any estimates on what percentages of those eligible Class Members will claim the lump-sum or "4x40" payments.

IV. CONCLUSION AND RECOMMENDATIONS

The Court should **deny** the Motion for Preliminary Approval on the grounds stated above unless the following changes are made:

1. Class Members should receive the cash compensation to which they are entitled automatically, unless they request one of the other forms of compensation (i.e., dealer service or new car discount).
2. Unclaimed or unexpired funds should be distributed pro rata to Class Members and for there to be cy pres distribution when it becomes uneconomical to make further pro rata distributions to the Class Members.
3. An independent and neutral third party should be appointed to administer the settlement.

4. Class notice must be in the form of a letter – not a postcard – that is revised to contain clear and prominent information, including the proposed attorneys fees. [18]
5. The Settling Parties must submit the Long Form Notice for review and approval by the Court; it should be revised to contain clear, prominent and required information.
6. Reporting and Transparency: (A) Hyundai and Kia should be required to file quarterly public reports with the Court documenting the number and amount of claims, both successful and rejected, for each of the three groups of class members, as well as the claims rate, until the date on which all claims have been processed; and (B) All fee distributions to or by the attorneys for Settling Plaintiffs, direct or indirect, should be filed with the Court and made public.

On behalf of plaintiffs Krauth and Hasper, the Consumer Watchdog legal team is prepared to work with the Settling Parties, or present directly to the Court, more consumer-friendly versions of documents discussed above.

[18] Alternatively, the Court should consider appointing an independent claims and notice expert to assist the Court in revising the process. See FJC Notice Guide at 1; *Kaufman v. Am. Express Travel Related Servs.*, 283 F.R.D. 404 (N.D. Ill. 2012) (appointing an independent expert to assist the court in developing notice plan that comports with FJC Notice Guide).

Respectfully submitted,

Dated: May 30, 2014

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