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[Plaintiffs, Lillian E. Levoff, Thomas Ganim, Daniel Baldeschi]
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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
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14 **IN RE: HYUNDAI AND KIA FUEL**
15 **ECONOMY LITIGATION**

MDL Case No.: 2:13-ml-2424-GW (FFMx)
Hon. George H. Wu

**DECLARATION OF RICHARD D.
McCUNE IN SUPPORT OF *ESPINOSA*
PLAINTIFFS' COUNSEL
McCuneWright, LLP'S MOTION
FOR AWARD OF ATTORNEYS FEES,
REIMBURSEMENT OF LITIGATION
EXPENSES, AND SERVICE AWARD
TO REPRESENTATIVE PLAINTIFFS**

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

1 I, Richard D. McCune, hereby declare as follows:

2 **BACKGROUND AND EXPERIENCE**

3 **Richard D. McCune**

4 1. I am the senior partner of McCune Wright, LLP (“McCuneWright”). My
5 firm is a six-attorney firm located in Redlands, California, that represents plaintiffs in
6 consumer fraud class actions, product liability, and other complex class action litigation
7 in California and across the United States. I obtained my J.D. from the University of
8 Southern California in June 1987 and became a member of the California Bar in
9 November 1987. I have more than twenty-five years of litigation and trial experience and
10 am AV rated. Over the last decade, I have focused my practice on representing
11 consumers in class action litigation. Prior to that, I represented Plaintiffs in a variety of
12 complex litigation matters, with particular emphasis in auto product liability actions.

13 2. I have been appointed class counsel in numerous state and federal class
14 actions. In 2010, I served as co-class counsel and co-trial counsel in a consumer fraud
15 class action against Wells Fargo Bank, N.A., on behalf of over one million customers, in
16 which the plaintiffs obtained a \$203 million bench trial verdict. In 2011, I was class and
17 trial class counsel in a consumer class action trial that resulted in a Plaintiffs’ verdict on
18 behalf of a class of California Correct Craft, Inc., boat owners. My firm and I have been
19 appointed class counsel in certified class actions in a number of other consumer fraud
20 class actions, including cases against Gateway Computers, Kaiser Steel Retirees Benefit
21 Trust, Bank of America, N.A., Hewlett-Packard, American Honda Motor Co., Mazda
22 Motors of America, Inc., and JP Morgan Chase Bank, N.A. I have had extensive
23 experience over the last ten years in consumer class action cases against financial
24 institutions, including cases against Wells Fargo Bank, N.A., J.P. Morgan Chase,
25 Wachovia, Bank of America, N.A., as well as a number of other smaller banks and credit
26 unions.

27 3. I currently serve on two MDL executive committees. I was appointed by
28 Central District of California Judge James V. Selna to the Plaintiffs Personal Injury and

1 Wrongful Death Committee *In re: Toyota Motor Corp. Unintended Acceleration*
2 *Marketing, Sales Practices, and Products Liability Litigation* (MDL #2151). I was
3 appointed by Southern District of New York Judge Kenneth M. Karas to the Plaintiffs'
4 Executive Committee in *In re: Ford Fusion and C-Max Fuel Economy Litigation*
5 (MDL#2450).

6 4. My usual hourly fee is \$650 per hour. My hourly rates on individual
7 contingency contracts work out to significantly higher than \$650 an hour.

8 5. The primary attorneys from McCuneWright, LLP, who have worked on this
9 matter besides me are Elaine M. Kusel (Of Counsel), and Jae (Eddie) K. Kim (Senior
10 Associate).

11 **Elaine M. Kusel**

12 6. Ms. Elaine S. Kusel obtained her B.A. from Boston University and her J.D.
13 from George Washington University Law School and was admitted to the New York bar
14 in 1995. She then spent eight years working in the U.S. House of Representatives serving
15 as legislative director and counsel to a member of congress who served on the House
16 Energy and Commerce Committee. She then went to the law firm of Milberg, Weiss,
17 Bershad, & Schulman where over time she became an equity partner. She left Milberg,
18 Weiss and, in 2008, became Of Counsel to McCuneWright.

19 7. Ms. Kusel's usual hourly rate is \$650 per hour.

20 **Eddie (Jae) K. Kim**

21 8. Jae K. Kim obtained his B.A. from University of California, Berkeley, in
22 2001 before attending and graduating from Cornell Law School in 2004. Since 2004, Mr.
23 Kim has worked at McCuneWright (or its predecessor firm Welebir & McCune). His
24 practice has been exclusively representing plaintiffs in complex litigation matters, with
25 primary emphasis in consumer class action cases. Mr. Kim has had extensive experience
26 in all aspects of financial consumer class cases ranging from drafting pleadings to trial
27 work.

28 9. Mr. Kim's usual hourly fee is \$450 per hour.

1 **McCUNEWRIGHT’S WORK IN THIS LITIGATION**

2 10. McCuneWright first involvement in this case came in the fourth quarter of
3 2011, when it was contacted by Hyundai Elantra owners who contended they had
4 purchased their vehicles with the promise that they would get 40 mpg, and they were, in
5 fact, receiving far less than 40 mpg. McCuneWright then began to investigate the
6 representations made by Hyundai related to the fuel economy of these vehicles, as well as
7 reviews and other consumer experiences. McCuneWright also spent significant time
8 researching other lawsuits against Hyundai on this issue, other lawsuits against other
9 manufacturers for misrepresentation of the mpg on their vehicles, and the complicated
10 and difficult law in bringing a claim of this type – primarily related to federal preemption.
11 Following that investigation, McCuneWright decided to commit the significant resources
12 that would be needed to litigate this claim.

13 11. I was aware and believed that this would be a heavily contested action with
14 an unpredictable outcome. Hyundai had a reputation for litigating rather than settling
15 cases, and that was consistent with my experience with Hyundai. McCuneWright had
16 litigated a prior case against Hyundai, where we represented a paralyzed client in a case
17 where the allegation was that there was a defect in the vehicle that caused her paralysis.
18 That case was heavily contested by Hyundai and, in a case that would have settled against
19 other manufacturers early on for an amount greater than ultimately what the case settled
20 for, did not settle until the eve of trial after we spent over \$400,000 in costs and
21 thousands of hours in working on the case, and after Hyundai had exhausted law and
22 motion and expert discovery. So I knew going into this case that the high stakes for
23 Hyundai on the high-selling Elantra, combined with Hyundai’s litigation philosophy,
24 would make this a very risky and uncertain case in which we were likely going to spend
25 significant firm resources (money and labor) in order to have a chance to obtain a
26 successful outcome.

27 12. Following the investigation and the decision to accept the high risk,
28 McCuneWright filed the *Espinosa* complaint in federal court, in January 2012, almost

1 one year before any other action was filed, alleging that Hyundai engaged in a pervasive
2 false advertising campaign by claiming that a number of its vehicles, including the
3 Hyundai Elantra, got at least 40 mpg in highway driving when, in fact, these vehicles
4 achieved far poorer fuel economy.

5 13. The *Espinosa* case was heavily contested. First, Hyundai retained one of the
6 country's foremost litigation firms to defend the action. This firm has a history and
7 reputation of being one of the most aggressive firms in defending or prosecuting a case.
8 Consistent with that reputation and history, Hyundai vigorously disputed Plaintiffs'
9 contentions and filed its Motion to Dismiss the complaint in March 2012. Following full
10 briefing on the motion to dismiss, on April 24, 2012, this Court denied Hyundai's motion
11 in part, sustaining claims related to affirmative misrepresentations of fuel economy of the
12 Elantra that went beyond the federally required EPA estimates, but noting that challenges
13 to the accuracy of the EPA estimates themselves were subject to the well taken argument
14 that such challenges were barred by the doctrine of primary jurisdiction.

15 14. Following that decision, McCuneWright engaged in significant fact
16 discovery. That fact discovery was the only pre-settlement discovery conducted in the
17 case that provided all Plaintiffs, their counsel, and the Court with the background and
18 knowledge that allowed for meaningful settlement discussions. McCuneWright reviewed
19 more than 30,000 pages of documents produced by Hyundai, conducted additional factual
20 research to develop the claims in the case, and on August 1, 2012, filed a Second
21 Amended Complaint, which among other things added three proposed class
22 representatives. Specifically, McCuneWright developed the advertising case through
23 contested discovery, including review of thousands of advertisements (web, magazine,
24 television, radio, and banner ads), strategic plans, market research, brand plans,
25 marketing plans, advertisement placements, advertisement and marketing budgets, launch
26 strategies, media plans, sales figures, press releases, Hyundai communications to
27 customers, Hyundai communications to dealers, consumer expectation research, and real
28 world consumer fuel economy.

1 15. McCuneWright was the only firm that retained experts to address the EPA
2 issues, advertising issues, and damage issues – each of these experts were hired and used
3 while the case was in a contested litigation position. McCuneWright retained exceptional
4 consultants and experts, including an automotive expert who conducted a fuel economy
5 test on a Hyundai Elantra using the EPA protocol, a consumer expectation and marketing
6 expert, and an economics expert on the effect that consumers’ expectations about fuel
7 economy has on the purchase price of vehicles.

8 16. McCuneWright assisted the named Plaintiffs in responding to significant
9 written discovery, and then prepared and defended the depositions of the named
10 Plaintiffs.

11 17. On September 14, 2012, McCuneWright, on behalf of the *Espinosa*
12 Plaintiffs, filed a motion for class certification which included 16 pages of factual
13 allegation relying on more than seventy internal Hyundai documents in support of their
14 claims. Among other things, the class certification brief delineated each of the
15 advertisements Plaintiffs alleged to be misleading, including the “4 x 40 advertisements”
16 which stated that four Hyundai models—Elantra, Veloster, Accent, and Sonata Hybrid—
17 “got 40 mpg.” Plaintiffs provided expert reports on the topics of damages and reliance,
18 defended the depositions of these expert witnesses and took the depositions of Defendant
19 Hyundai’s expert witnesses, each of which involved travel to take and defend the
20 depositions.

21 18. Within two weeks after the filing of Hyundai’s opposition brief to Plaintiffs’
22 class certification motion, Hyundai and Kia issued a joint press release announcing that
23 the reported fuel economy of the Elantra and numerous other models were, in fact,
24 inflated and that Defendants were voluntarily lowering the fuel economy ratings for those
25 vehicles.

26 19. Attached hereto as Exhibit 1 is a true and correct copy of Hyundai’s News
27 and Updates Press Release dated November 2, 2012 titled “Voluntary Fuel Economy
28 Adjustment”.

1 20. Oral argument on the *Espinosa* Plaintiffs’ Motion for Class Certification was
2 held on November 29, 2012, after which the Court declined to rule on the motion,
3 requesting supplemental briefing. Hyundai filed its supplemental brief on December 13,
4 2012, and the *Espinosa* Plaintiffs filed their supplemental brief on December 21, 2012.
5 On December 28, 2012, the Court issued another tentative ruling, again requesting further
6 briefing on the class certification motion.

7 21. Prior to filing the second round of supplemental class certification briefs,
8 McCuneWright began discussing the possibility of a settlement. On January 8, 2013, the
9 *Espinosa* Plaintiffs and Hyundai filed a joint stipulation to continue the briefing schedule
10 for the second supplemental briefs on class certification, notifying the Court that the
11 parties had agreed to engage in formal settlement negotiations which, if successful, would
12 moot the need for further briefing. Thereafter, McCuneWright participated in face to
13 face settlement negotiations with Hyundai, beginning on January 16, 2013.

14 22. On February 5, 2013, the Judicial Panel on Multidistrict Litigation (“JPML”)
15 consolidated the *Espinosa* action in this Court with a number of other actions against
16 Hyundai and Kia, in *In re: Hyundai and Kia Fuel Economy Litigation*, MDL No. 2424.

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

26 24. McCuneWright participated in confirmatory discovery which consisted of
27 reviewing thousands of additional documents. McCuneWright was responsible for the
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1 confirmatory discovery interviews (in lieu of depositions) of half of the key employees of
2 Hyundai and Kia, in the United States and in South Korea.

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

7 26. Using these sales and lease figures, the additional cash compensation portion
8 of the settlement provides \$37,006,900 attributable to the \$100 available to purchasers of
9 4 x 40 vehicles (370,069 x \$100), and \$3,751,900 derived from the \$50 for leases and
10 fleet sales ((5,237+69,801) x \$50). Thus, the settlement provides a total amount of
11 \$40,758,800 in additional available cash compensation to 4 x 40 customers. That number
12 could be significantly higher, as these class members could elect to take their additional
13 compensation in the form of dealer credit which would increase their additional
14 compensation by 50 percent or rebates which would increase their additional
15 compensation by 100 percent.

16 27. Under the Settlement, Hyundai and Kia have agreed to provide up to \$210
17 million and \$185 million, respectively, in cash and other compensation to the Class
18 subject to an offset for the money already received from the reimbursement program.

19 28. Attached as Exhibit 2 is a true and correct copy of Hyundai's Press Release
20 dated December 23, 2013, titled "Hyundai Motor America Resolves Litigation Following
21 Restatement of Fuel Economy Ratings".

22 29. In summary, McCuneWright's involvement in this litigation consisted of the
23 following:

- 24 • conducted extensive factual investigation and legal research;
- 25 • propounded written discovery requests and drafted responses to
26 written discovery requests;
- 27 • defended Plaintiff depositions;
- 28 • found and retained highly qualified experts;

- 1 • took and Defended expert depositions;
- 2 • reviewed more than 30,000 pages of documents produced by Hyundai
- 3 during merits discovery and tens of thousands more documents produced by Hyundai in
- 4 confirmatory discovery;
- 5 • litigated multiple important motions, including Hyundai's motion to
- 6 dismiss, Plaintiffs' motion for class certification, opposition to intervenor's motion, and
- 7 motion to transfer venue to MDL;
- 8 • prepared for and participated in mediation sessions and other
- 9 settlement efforts; and
- 10 • negotiated the proposed Settlement and the exhibits thereto.

11 **McCUNEWRIGHT'S TIME AND EXPENSES**

12 30. During the time that this litigation has been pending, McCuneWright has

13 spent considerable time working on this litigation that could have been spent on other

14 matters. Throughout the litigation, the active prosecution of this matter has consumed a

15 significant percentage of my billable time that could otherwise have been spent on other

16 fee-generating work. In addition to a substantial percentage of my time, this litigation

17 has also required considerable work by other lawyers, paralegals, and staff at

18 McCuneWright that could have otherwise been spent on other fee-generating work.

19 31. The time that McCuneWright has spent on this litigation has been

20 completely contingent on the outcome. McCuneWright has not been paid for any of its

21 time spent on this litigation, nor has it been reimbursed for any of its expenses incurred in

22 this litigation.

23 32. In connection with this litigation, the attorneys at McCuneWright have spent

24 more than 3,029.40 hours (through November 5, 2014), for a total lodestar of more than

25 \$1,836,210. This information is derived directly from McCuneWright's time records,

26 which are prepared contemporaneously and maintained by McCuneWright in the

27 ordinary course of business.

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1 33. The aforementioned totals do not include the lodestar for the preparation and
2 filing of the fee motion, preparation and attendance at the hearing on the motion, review
3 of the notice and claims process, the filing of the final approval hearing, preparing for
4 and attending the final approval hearing, and overseeing the payment of claims process.
5 Further, it does not account for the lodestar for opposing any objections and appeals of
6 the settlement, as certain counsel have signaled that they intend to file. I anticipate the
7 lodestar will be over \$2.25 million by the time any attorney fees are paid, but in order to
8 provide the class notice of the attorneys fees sought and to avoid additional supplemental
9 filing that would require additional notice, we have used \$2 million as the anticipated
10 lodestar figure.

11 34. The following is the summary listing each lawyer for which McCuneWright
12 is seeking compensation for legal services in connection with this litigation, the hours
13 each individual has expended as of November 5, 2014, and the hourly rate at which
14 compensation is sought for each individual. The hourly rate is the current hourly rate for
15 each lawyer and staff:

Attorney	Hours	Rate	Lodestar
Richard D. McCune	985.9	\$650	\$640,835
Elaine S. Kusel	1,445.25	\$650	\$939,412.50
Jae (Eddie) K. Kim	545.22	\$450	\$245,362.50
Ann M. Smith	53	\$200	\$10,600
Total	3,029.4		\$1,836,210

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25 35. If the Court requires a detailed lodestar, McCuneWright will of course file it
26 with the Court, but request that it be filed under seal as it contains attorney client and
27 other confidential information.
28

1 36. The following are the out of pocket litigation costs that McCuneWright has
2 incurred on behalf of the class. It is anticipated that between conference calls, filing fees,
3 shipping and delivery fees, research, and travel expenses, that following the attorney fee
4 hearing and the final approval (and anticipated appeals) the total costs will exceed
5 \$100,000:

6	Task Code	Costs
7	Conference Calls	\$53.29
8	Court Fees	\$1,421.70
9	Deposition Costs	\$4,596.42
10	Expert Fees	\$27,066.33
11	Fed Ex	\$1,053.89
12	Filing Service Fee	\$1,243.07
13	Parking	\$352.50
14	Printing Costs	\$400
15	Research Access Costs	\$490.84
16	Subpoena Fee	\$43
17	Travel	\$56,828.98
18	TOTAL:	\$93,550.02
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21 37. Should the Court require a detailed cost accounting, McCuneWright will of
22 course file it, but request that it be filed under seal as it contains confidential information.

23 **EVIDENCE OF MARKET RATES FOR CLASS COUNSEL IN THIS CASE**

24 38. In the matter of *In re: Lehman Brothers Holdings, Inc. et. al.*, Case No. 09-
25 13555 (JMP) (Bankr. S.D.N.Y.) Quinn Emanuel Urquhart & Sullivan, LLP filed a Fee
26 Application Declaration on October 21, 2008. A true and correct copy of pages 2-14 of
27 said declaration is attached hereto as Exhibit 3. In this Fee Application Declaration, the
28 declarant, a partner at Quinn Emanuel Urquhart & Sullivan, LLP, stated in paragraph 41

1 that “Currently hourly rates of partners for Quinn Emanuel range from \$660 to \$950.
2 Other attorneys’ hourly rates, including counsel positions, range from \$380 to \$950. The
3 hourly rates charged for Quinn Emanuel’s legal assistants range from \$250 to \$280.”

4 39. In *Apple Inc. v. Samsung Electronics Co., Ltd.*, Case No. 11-cv-01846-LHK
5 (PSG) (N.D. Cal.), Quinn Emanuel Urquhart & Sullivan, LLP filed a Fee Application
6 Declaration on July 22, 2012. A true and correct copy of this Declaration is attached
7 hereto as Exhibit 4. In this Fee Application Declaration, the declarant, a partner at Quinn
8 Emanuel Urquhart & Sullivan, LLP, stated in paragraph 43 that the median rate for
9 partners was \$821 and for associates \$448. In that same paragraph, the Declarant stated
10 that their rates should be considered reasonable as they were consistent with the rates
11 charged by opposing counsel in that case.

12 40. In *Four-in-One, Co., et. al v. SK Foods, et. al.*, Case No. 08-cv-3017 KJM
13 EFB (E.D. Cal.), Quinn Emanuel Urquhart & Sullivan, LLP filed a Fee Application
14 Declaration on March 10, 2014. A true and correct copy of this declaration is attached as
15 Exhibit 5. In this Fee Application Declaration, the declarant, a partner at Quinn Emanuel
16 Urquhart & Sullivan, LLP, stated in paragraph 17 that the hourly rates in Exhibit 1 were
17 “the usual and customer rates for particular partners, attorneys” The current rates
18 submitted in Exhibit 1 for partners were from \$660 - \$1120. The current rates for
19 associates were from \$320 - \$740.

20 41. In *Marchbanks Truck Service, Inc. v. Comdata Network, Inc.* Case No. 07-
21 1078-JKG (E.D. Pa.), Quinn Emanuel Urquhart & Sullivan, LLP filed a Fee Application
22 Declaration on March 5, 2014. A true and correct of this declaration is attached hereto as
23 Exhibit 6. In this Fee Application Declaration, the declarant, a partner at Quinn Emanuel
24 Urquhart & Sullivan, LLP, stated in paragraph 5 that the hourly rates in Exhibit 1 “are the
25 usual and customer standard hourly charged by Quinn Emanuel to clients for these
26 services in non-contingent matters.” The current rates submitted in Exhibit 1 for partners
27 were from \$875 - \$1,075. The current rates for associates were from \$320 - \$645.

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