Consumer Watchdog

M E M O R A N D U M

TO: Liaison Counsel
CC: Non-settling Plaintiffs' Counsel
FROM: Counsel for *Krauth* and *Hasper* Plaintiffs
DATE: January 22, 2014
RE: *In Re: Hyundai and Kia Fuel Economy Litigation*, MDL 13-2424-GW (FFMx)

As requested by the Court on January 9, 2014, this memo lists the cases filed by Consumer Watchdog, Cuneo Gilbert & LaDuca, LLP, Cotchett Pitre & McCarthy, LLP, and Dreyer Babich Buccola Wood Campora, LLP against Hyundai/Kia for their misrepresentations regarding fuel economy and violation of advertising requirements, and sets forth our clients' position regarding the Proposed Settlement Agreement ("Proposed Settlement") filed in the MDL on December 23, 2013.

I. CASES FILED BY PLAINTIFFS' COUNSEL: *BIRD, KRAUTH, HASPER*

A. *Louis Bird v. Hyundai Motor America*, Sacramento Superior Court Case No. 34-2012-00127249

- Filed on July 2, 2012; First Amended Complaint filed November 27, 2012
- *Bird* is not included in this MDL
- Class definition: "All California residents who purchased or leased a new Hyundai Elantra for model years 2011, 2012 and 2013." (First Amended Complaint, ¶39.)
- Causes of action:
    1. Consumers Legal Remedies Act, Cal. Civil Code section 1770, subdivisions (a)(9), (a)(7), (a)(16), and (a)(5)
    2. Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. (including violations of Federal Trade Commission regulations 16 C.F.R. §§ 259.2(a)(1)-(2))
    3. False Advertising Law, Cal. Bus. & Prof. Code § 17500 et seq.

B. *Gunther Krauth v. Hyundai Motor America*, C.D. Cal. Case No. 8:12-cv-01935-GW-FFM

- Filed on November 6, 2012
- *Krauth* petitioned for, and is included within, this MDL
- Class definition: "All persons residing in the United States who purchased or leased a new Hyundai Elantra for model years 2011 – 2013. Expressly excluded from the Class are Defendant and their subsidiaries, affiliates, officers, directors, and employees. ('Class')." (Complaint, ¶36.)
- Causes of action:
    1. Consumers Legal Remedies Act, Cal. Civil Code section 1770, subdivisions (a)(9), (a)(7), (a)(16), and (a)(5)
    2. Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq.

(including violations of Federal Trade Commission regulations 16 C.F.R. §§ 259.2(a)(1)-(2))
3. False Advertising Law; Cal. Bus. & Prof. Code § 17500 et seq.
4. Unjust Enrichment

C. *Linda Hasper et al. v. Hyundai Motor America and Kia Motors America*, C.D. Cal. Case No. 8:13-cv-00220-GW-FFM

- Filed on February 7, 2013
- *Hasper* is included in this MDL
- Class definition: "All persons residing in the United States who purchased or leased a new Class Vehicle. Expressly excluded from the Class are Defendant and their subsidiaries, affiliates, officers, directors, and employees ('Class')." (Complaint, ¶70.)
- State Sub-Class definitions (Complaint, ¶71):
  - California Sub-Class: "All current and former owners of Class Vehicles who reside in the State of California and/or who purchased or leased Class Vehicles in California. Expressly excluded from the Class are Defendant and their subsidiaries, affiliates, officers, directors, and employees[.]"
  - Florida Sub-Class: "All current and former owners of Class Vehicles who reside in the State of Florida and/or who purchased or leased a Class Vehicle in Florida. Expressly excluded from the Class are Defendant and their subsidiaries, affiliates, officers, directors, and employees[.]"
  - Illinois Sub-Class: "All current and former owners of Class Vehicles who reside in the State of Illinois and/or who purchased or leased a Class Vehicle in Illinois. Expressly excluded from the Class are Defendant and their subsidiaries, affiliates, officers, directors, and employees[.]"
  - Connecticut Sub-Class: "All current and former owners of Class Vehicles who reside in the State of Connecticut and/or who purchased or leased a Class Vehicle in Connecticut. Expressly excluded from the Class are Defendant and their subsidiaries, affiliates, officers, directors, and employees[.]"
  - Texas Sub-Class: "All current and former owners of Class Vehicles who reside in the State of Texas and/or who purchased or leased a Class Vehicle in Texas. Expressly excluded from the Class are Defendant and their subsidiaries, affiliates, officers, directors, and employees[.]"
  - Indiana Sub-Class: "All current and former owners of Class Vehicles who reside in the State of Indiana and/or who purchased or leased a Class Vehicle in Indiana. Expressly excluded from the Class are Defendant and their subsidiaries, affiliates, officers, directors, and employees[.]"
  - Arizona Sub-Class: "All current and former owners of Class Vehicles who reside in the State of Arizona and/or who purchased or leased a Class Vehicle in Arizona. Expressly excluded from the Class are Defendant and their subsidiaries, affiliates, officers, directors, and employees[.]"
- Causes of action:
  1. Consumers Legal Remedies Act, Cal. Civil Code section 1770, subdivisions (a)(9), (a)(7), (a)(16), and (a)(5)

2. Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. (including violations of Federal Trade Commission regulations 16 C.F.R. §§ 259.2(a)(1)-(2))
3. False Advertising Law, Cal. Bus. & Prof. Code § 17500 et seq.
4. Unjust Enrichment
5. Florida Deceptive and Unfair Practices Act, Florida Statute § 501.201, et seq.
6. Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/2
7. Connecticut Unfair Trade Practices Act Conn. Gen Stat. § 42-110b
8. Texas Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code § 17.41, et seq.
9. Indiana Deceptive Consumer Sales Act, Ind. Code § 24-5-0.5-1(b)
10. Arizona Consumer Fraud Act, A.R.S. § 44-1522(A)
11. Fraud
12. Negligent Misrepresentation

II. *KRAUTH & HASPER* PLAINTIFFS' POSITION REGARDING THE PROPOSED SETTLEMENT.

Summary: After careful preliminary analysis, the Plaintiffs represented by the Consumer Watchdog team of firms have identified serious flaws in the Proposed Settlement. It is our clients' view that the Proposed Settlement is inadequate and unfair for the following three reasons:

(1) Claims process: The claims process, which entails an eleven-page notice and a five-page, nine-step claim form, is extremely convoluted, onerous – and ultimately, completely unnecessary. It does not accurately inform Class Members of how to exercise their options under the Proposed Settlement. As proposed, the claims process will discourage and prevent Class Members from obtaining the compensation to which they are entitled.

(2) Compensation: The formula and values behind the proposed lump-sum compensation are not the same as those provided during confirmatory discovery; therefore, it is impossible to assess the basis for the Proposed Settlement. As presently structured, compensation appears to be based on arbitrary distinctions that discriminate against various members of the Class, particularly those who keep their cars for the full ownership term promoted by Defendants. Further, the proposed compensation appears likely to be *less* advantageous than the "Voluntary Reimbursement Program" initiated by Defendants for many members of the Class.

Moreover, the compensation is insufficient because it does not compensate consumers for the diminished value of their vehicles. Nor does it take into account the substantial additional compensation available in some states to victims of intentional wrongdoing.

(3) Defendants keep all unclaimed and expired compensation: When a convoluted claims process is coupled with a provision permitting Defendants to retain unclaimed monies as

proposed here, it is *inevitable* that Defendants will never be required to pay a large portion of the compensation that is owed to the Class.

For these reasons, the Proposed Settlement does not comport with the legal requirement that it be "fair, adequate and reasonable," and *Krauth* and *Hasper* intend to oppose the Proposed Settlement as currently drafted.

However, it is their counsel's belief that, with the active assistance and encouragement of the Court, modifications can be made that will address the proposal's flaws, hopefully rendering formal opposition unnecessary.

The following is a more detailed preliminary discussion.

A. The Claims Process is Convoluted, Onerous and Unnecessary; It Will Preclude and Discourage Class Members from Obtaining Compensation.

The Proposed Settlement would require Class Members to read through an eleven-page notice, then fill out a five-page, nine-step claim form. The forms are convoluted, repetitive, prolix, and yet despite the extensive verbiage, omit information that Class Members must have in order to make an intelligible decision as to how they wish to proceed. Our concern is that the greater the obstacles, the fewer Class Members will participate. Those that do may nevertheless be disqualified for failure to adhere to each of the onerous requirements.

Ultimately, it is our view that *no claim form is necessary*.

However, should the Court determine otherwise, the deficiencies in these documents must be ameliorated.

1. The Claim Form is Unnecessary.

(a) Defendants have the information to issue payments automatically.

Both Hyundai and Kia have Class Member information that would allow claims to be paid automatically: Defendants have extensive contact and vehicle information for all new or used car purchasers through their dealers. Further, Defendants presumably have updated records of valid postal and email addresses for the approximately 69% of Class Members who registered for the Voluntary Reimbursement Program between November 2, 2012 and December 15, 2013, since the consumers were required to provide their mailing addresses to Defendants in order to register. Finally, Defendants have also agreed to directly send the Notice and Claim Form "by first-class mail to every Class Member who is reasonably ascertainable from an available R.L. Polk (or a similar database)." Proposed Settlement, §§ 4.1, 11.1. The same database can be used to query for those who have moved. The Proposed Settlement does not rely upon or require any individualized information not already in Defendants' possession, or readily ascertainable from available sources.

(b) Compensation can be sent to Class Members without a Claim Form.

Defendants have the ability to send Class Members compensation without requiring them to fill out and submit a Claim Form. Defendants can directly send Class Members one payment card that Class Members can either use as cash, a Dealer Service Debit Card, or a New Car Rebate Card.

(c) Those "4 x 40" Class Members entitled to additional compensation should also not be required to fill out a Claim Form.

Current original and former owners of affected Hyundai Elantra, Accent, Velostar and Sonata Hybrid models "who remain[] in the Reimbursement Program may elect to receive" a separate payment of $100. Proposed Settlement, § 3.1.8; Addendum to Settlement Agreement. Current lessees and current fleet owners of these vehicles are entitled to a payment of $50. *Ibid.* Class Members can choose between: a cash debit card, a Dealer Service Debit Card worth 150% of the "4 x 40" payment, or a New Car Rebate Card worth 200% of the "4 x 40" payment. *Ibid.*; Ex. D at 4.

Defendants have the information and ability to send "4 x 40" Class Members compensation without requiring them to fill out and submit a Claim Form. Defendants have the information to issue payments automatically since Class Members must be registered for the Voluntary Program to be entitled to the "4 x 40" payment. Also, Defendants can directly send Class Members one payment card that Class Members can either use as cash, a Dealer Service Debit Card, or a New Car Rebate Card.

2. Claim Form Deficiencies.

A Claim Form is not necessary here. However, if the Court does require a claim form, the proposed Claim Form attached to the Proposed Settlement as Exhibit G is insufficient for the reasons set forth below.

(a) The Claim Form is onerous and contains unnecessary steps.

The following features of the Claim Form are unnecessary because they require Class Members to provide information that Defendants either already have in their possession, or do not need in order to process a claim:

- The Proposed Settlement requires Class Members to write their name and VIN on all five pages of the Claim Form. Proposed Settlement, Ex. D at 5. This is onerous, unnecessary and unfair because Defendants have this information, it does not need to be on every page, there is no line on each page allocated to the information, and the Claim Form itself asks for it in a separate step (Step 10).

- Class Members must identify the make and model of their vehicle on a two-page long checklist of 76 different vehicles (Step 1). Proposed Settlement, Ex. D at 1-2. This is

unnecessary because Defendants have this information and in any event the VIN entry in Step 10 would enable Defendants to identify the exact year, make and model of the vehicle.

- Class Members must elect whether they want to receive a lump-sum payment or remain in the Voluntary Reimbursement Program (Step 7). If the Court requires a claim form, this step should be eliminated. Class Members electing to remain in the Voluntary Reimbursement Program should not be required to submit a Claim Form or take additional actions beyond what is required for their participation in the Voluntary Reimbursement Program.

- Class Members must indicate whether they want to receive compensation on a Debit Card, Dealer Service Debit Card, and New Card Rebate Card (Step 8). This step should be eliminated for the reasons set forth above in §II.A.1. Defendants can directly send Class Members one payment card that Class Members can either use as cash, a Dealer Service Debit Card, or a New Car Rebate Card.

- Those "4 x 40" Class Members who are entitled to additional compensation must separately indicate whether they want to receive payment on a Debit Card, Dealer Service Debit Card, and New Card Rebate Card (Step 9). This step should be eliminated for the reasons set forth above in §II.A.1. Defendants can directly send "4 x 40" Class Members one payment card that Class Members can either use as cash, a Dealer Service Debit Card, or a New Car Rebate Card.

- The Claim Form requires Class Members to provide a copy of the purchase contract in addition to the registration certificate (Step 11). Imposing this paperwork burden on Class Members is onerous and unnecessary. The Notice can ask recipients to check that the preprinted vehicular and ownership information are correct before utilizing the card.

(b) The Claim Form does not provide clear and prominent information.

The Claim Form presents the compensation options in confusing language and in a way that minimizes relevant information. For example:

- The Claim Form directs current owners and lessees to "[d]etermine the maximum cash value of your Settlement Benefits" (Step 4) by referencing the lump-sum payment chart. The underlined phrase "maximum cash value" inaccurately implies that the amount determined under this step (Step 4) is the total amount a Class Member is entitled to under the Proposed Settlement. Hidden in a paragraph two steps down the page (Step 6) is the information that payments Class Members have already received under the Voluntary Reimbursement Program will be deducted from this "maximum cash value" amount.

- The Claim Form (Step 6) (and the Notice, p. 8) direct Class Members to "enclose a check to repay the money you received under the" Voluntary Reimbursement Program if Class Members want to increase the amount of the Dealer Service Debit Card or New Car Rebate Certificate. The vague language and obscure placement of this provision make it unclear and could result in Class Members paying Defendants for something they did not actually want to receive.

- The Claim Form (and the Notice) do not explain how Class Members who have received payments under the Voluntary Reimbursement Program can find out the amount of those past payments. Most Class Members have received payments under the Voluntary Reimbursement Program. Unless these Class Members maintained their own records, they have no way of knowing (and no way of knowing how to find out) the amount they would receive under the lump-sum payment option. Obviously, this information is highly relevant in deciding the right compensation option and making an informed decision as to whether to remain in the Class. This information could easily be pre-printed on the Claim Form.

- The Claim Form (and the Notice) are highly opaque about how the lump-sum payment is calculated. It is not possible for a Class Member to determine how the lump-sum payment amounts compare to the amounts available under the Voluntary Reimbursement Program.

(c) The Claim Form prevents affected consumers who purchased vehicles after November 2, 2012 from submitting claims.

Only consumers who purchased or leased their vehicle prior to November 2, 2012 may submit a Claim Form (Step 2) and receive benefits under the Proposed Settlement.

The November 2, 2012 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 mileage restatement. Documents produced in discovery show that incorrect Monroney Labels continued to be affixed to vehicles after November 2, 2012.[1]

(d) Procedures for online Claim Form submission should be established.

Claims can be paid to Class Members without requiring a Claim Form. However, if the Court does require a claim form, an online submission option should be utilized to streamline the submission of claims.

[1] Laura Gill, named plaintiff in the *Hasper* action, purchased her vehicle on November 3, 2012 based on inaccurate Monroney Labels that had not been replaced by the dealer. Gill would not be entitled to submit a claim under the Proposed Settlement.

3. Notice Deficiencies.

(a) The Notice is unclear as to the actions Class Members must take to exercise their options under the Proposed Settlement.

The table of "Your Legal Rights and Options in This Settlement" (Proposed Settlement, Ex. G at 1) on the first page of the Notice does not adequately inform Class Members of the actions they must take in order to exercise their options under the Proposed Settlement. The table tells Class Members that they can: "Do Nothing", "Exclude Yourself", "Object", or "Go to a Hearing". Proposed Settlement, Ex. G at 1.

The option in the table to "Do Nothing" states, "To participate in the lump-sum payment program, ***do nothing now and if the settlement is approved, fill out a one-time claim form to receive benefit.***" Proposed Settlement, Ex. G at 1, emphasis added. This language is misleading because it implies that Class Members should "do nothing" upon receipt and review of the Notice and wait until they are informed that the settlement has been approved before filling out and submitting a Claim Form. The Claim Form will be enclosed with the Notice. Proposed Settlement, § 4.1. If a Class Member does nothing upon receipt and review of the Notice and Claim Form, the Class Member will receive nothing under the Proposed Settlement. In order "to participate in the lump-sum payment program," a Class Member definitely must do something: submit a Claim Form within nine months of the last date permitted by the District Court for mailing of the Class Notice. Proposed Settlement, § 4.2.

The table on the first page of the Notice should inform Class Members that if they "Do Nothing" they will "Get no lump-sum payment" under the Proposed Settlement and "Give up rights." Additionally, the table should include a separate row explaining that Class Members must "Submit a Claim Form" in order to receive compensation under the Proposed Settlement.

Similarly, under the headings "If You Do Nothing" and "What happens if I do nothing at all?" the Notice states, "If you do nothing at this time, you will remain in the Class and be eligible for the benefits offered by the Settlement ***as long as you have submitted a timely and valid claim form***, assuming that it is approved by the Court." Proposed Settlement, Ex. G at 12, emphasis added. This language is unclear because it does not explain what happens if Class Members "do nothing at all": they will not receive any benefits under the Proposed Settlement.

(b) The Notice contains inconsistent information regarding fuel price used in the Voluntary Reimbursement Program calculation.

The Notice is inconsistent with Defendants' websites regarding the average fuel price used in the Voluntary Reimbursement Program calculations. The Notice states that the Voluntary Reimbursement Program calculation uses "the 2012 average fuel price for the area in which the owner lives, based on U.S. Energy Information Association data." Proposed Settlement, Ex. G at 5. Kia's Reimbursement Program website states: "Fuel price reimbursement rates will be updated monthly based upon a rolling 12-month average." Kia,

FAQ, https://kiampginfo.com/faq#program (last visited Jan. 14, 2014). Hyundai's Reimbursement Program website states: "the most recent average gas price in your area." Hyundai, Compensation, https://hyundaimpginfo.com/overview/compensation (last visited Jan. 14, 2014).

(c) Class Members should only be required to mail opt-out letters to one address.

The Notice directs Class Members who want to exclude themselves from the Proposed Settlement to mail a letter of their desire to opt-out to *both* counsel for Settling Plaintiffs and Defendants. Proposed Settlement, Ex. G at 9-10. Requiring Class Members to mail a letter to two separate addresses creates an unnecessary hurdle to opting out. The Notice should provide one address to send opt-out letters to, typically a neutral settlement administrator. Alternatively, a simple and clear form for opting out could be included with the Notice and Claim Form. There should also be a process to opt out on line.

4. Miscellaneous Notice Issues.

(a) Inaccurate information in the Notice.

The Notice leaves the impression that it is an official document of the Court because the case caption appears on the first page. The case caption should be deleted. Similarly, the statement that "The Court has asked lawyers from the law firms of Hagens Berman Sobol Shapiro and McCune Wright LLP to represent you and the Class" (Notice, p. 10, Question 16) is incorrect. These firms have presented themselves to the Court and asked to be appointed lead counsel, not vice versa.

(b) Information sources for Class Members.

The Notice should be modified to prominently display at the bottom of each page a phone number, e-mail address, or website where the class can obtain answers to questions.

(c) Website and toll-free service number.

Defendants "shall each establish and maintain a website dedicated to the settlement [] and a toll-free service number that Class Members may call." Proposed Settlement, § 11.2.

This is another responsibility that is properly accorded to an independent settlement administrator.

(d) "Dealer Flyers" are ineffective.

Defendants will "request, in good faith, that their authorized dealers assist Settlement Class Members who visit the dealer for the purpose of requesting a mileage check pursuant to the Voluntary Reimbursement Program, by providing such Settlement Class Members who have not submitted a Claim Form with a flyer substantially in the form of Exhibit E."

Proposed Settlement, § 6.2, Ex. E. The Proposed Settlement states that Defendants have no "authority to direct any authorized Hyundai or Kia dealer to" distribute the flyers. *Id.*, § 6.1.

Without an incentive or a firm order to follow this procedure, dealers are unlikely to distribute the flyers. Also, it is unclear how (and unlikely that) dealers will know whether a customer has submitted a Claim Form for compensation under the Proposed Settlement. The proposed flyer will not effectively reach Class Members.[2]

Additionally, the flyer is vague and confusing. The term "one-time lump sum benefit" is unclear. It is unclear that the phrase "less amounts already received" refers to amounts received *under the Reimbursement Program*. The flyer does not inform Class Members that this "one-time lump sum benefit" automatically terminates their right to continued participation in the Voluntary Reimbursement Program. The wording is so vague that it would be more effective to generally inform Class Members that different compensation options are available as a result of a class action settlement agreement and direct them to the website and toll-free number for more information.

(e) Notice via first-class mail.

Settling parties have not provided the following information regarding the Notice: the percentage of Class Members to receive individual notice via first-class mail; a plan to update outdated addresses before mailing has been established; a plan to re-mail notices that are returned as undeliverable has been established.

(f) Additional methods to supplement the Notice.

The Proposed Settlement does not provide for email notice. Defendants have email addresses for the approximately 69% of Class Members who registered for the Voluntary Reimbursement Program between November 2, 2012 and December 15, 2013. Supplementing the written notice with an email notice would effectively reach a greater percentage of Class Members.

5. Defendants as Settlement Administrators.

The Proposed Settlement contains no provision for an independent settlement administrator. Under the Proposed Settlement, Defendants will fulfill that role, mailing the Notice and the Claim Form, process claims, and provide Class Members with their compensation. Proposed Settlement, § 4.1, 11.1, 4.3.

Defendants have a pecuniary interest in discouraging people from participating in the Proposed Settlement. Thus they have a conflict with the interests of the Class in full compensation. A third party claims administration company should be utilized.

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[2] Settling Plaintiffs' attempt to characterize the Flyer as a "non-monetary benefit[] provided to the Class by the proposed Settlement" is without merit. Motion for Preliminary Approval at 29:6-7.

B. Compensation.

The Proposed Settlement offers to provide certain Class Members with a lump-sum payment as purported compensation for the *additional cost of fuel* they have incurred, and will incur, as a result of the fuel economy misrepresentations. There are significant discrepancies between the information Settling parties provided during the course of the litigation and the Motion for Preliminary Approval as to the calculation of the additional fuel cost. Moreover, no compensation is made available for the diminution in value of the vehicles, nor is any compensation provided to redress the intentional misconduct.

1. Errors or Flaws in Calculation of Additional Fuel Costs.

The settling parties appear to have used the following four factors to determine a single lump-sum amount: (1) the discrepancy between the fuel economy derived from the proper EPA test versus the fuel economy derived from the false information provided by Hyundai and Kia to the EPA; (2) the number of miles driven; (3) the cost of fuel; and (4) the period of ownership of the vehicle. *See* Motion for Preliminary Approval at 30:15-19; Proposed Settlement, Ex. D at 4 (the "[l]ump-sum [payments] are calculated based upon several factors, including extra fuel cost for the average time of vehicle ownership"). However, it appears that the Proposed Settlement is *not* based on the values provided during confirmatory discovery. It is unclear what formula the settling parties ultimately used to calculate the amounts presented in the Proposed Settlement. Moreover, there are obvious errors and flaws in the application of at least one of the four factors.

(a) Calculation of Annual Mileage.

It is unclear what mileage data was used to calculate the proposed lump-sum payment amounts. Settling Plaintiffs represented during the litigation that they used the 15,000 annual mileage figure listed on the Monroney Labels of the Class vehicles to calculate how much in fuel cost compensation each Class Member would receive. *See* April 25, 2013 Hearing Transcript at 13:2-4 ("the number of miles driven by each car, we took right off the Monroney sticker"). This is inconsistent with Settling Plaintiffs' statement that they used "the Class members' actual mileage or their mileage in the aggregate" as part of their evaluation of damage here. Motion for Preliminary Approval at 30:17-18. However, there is no indication in the Proposed Settlement of a methodology for calculating "actual mileage"; nor is "mileage in the aggregate" defined or explained.

More information is manifestly necessary before the Proposed Settlement can be properly reviewed.

(b) Calculation of Fuel Costs.

It is unclear what fuel cost values were used to calculate the lump-sum payment amounts.

Settling Plaintiffs state that in general they utilized information that is "publicly

available from NHTSA and the Department of Transportation" and that they looked at "fuel costs by region" in calculating the compensation. Motion for Preliminary Approval at 30:17-22.

First, it is unclear how the proposed lump-sum payments, which do not vary by region, could be based on fuel costs by region. Using fuel costs by region – information that is readily available – would result in far more accurate compensation for Class Members than using a national average fuel cost.[3]

Second, the settling parties represented during the April 25, 2013 status conference that they used the national per-gallon *projections* of fuel prices listed on the Monroney Labels of the vehicles. (The Monroney labels present an average per-gallon dollar amount calculated by EPA "based on projections from the U.S. Energy Information Administration ["EIA"] for the applicable model year." https://www.fueleconomy.gov/feg/label/learn-more-gasoline-label.shtml#details-in-fine-print.)

More information is manifestly necessary before the Proposed Settlement can be properly reviewed.

(c) Length of ownership

The calculation of this figure is essential to determining the amount of economic damage sustained by Class Members. However, there is substantial uncertainty as to how this figure will be determined and applied for compensation purposes. It appears that the Proposed Settlement substantially underestimates the average length of ownership of the vehicles – and is certainly far lower than Defendants' public representations concerning their vehicles.

During the April 25, 2013 status conference, counsel for the Settling Plaintiffs, Rob Carey, stated that the average length of ownership component of the calculation (presumably for current original owners) was "just under five years." *See* April 25, 2013 Hearing Transcript at 15:16. Mr. Carey went on to represent to the Court that "[i]t can be backed out mathematically." *Id.* at 15:17.

The source of this data is apparently R.L. Polk, a widely acknowledged reliable source for vehicle data. According to a study on its website, R.L. Polk concluded that "[c]ombined, new and used vehicle owners are holding on to their vehicles for an average 57 months." *See* https://www.polk.com/company/news/u.s._consumers_hold_on_to_new_vehicles_nearly_six_years_an_all_time_high. This equates to 4.75 years—roughly the figure apparently relied upon by settling parties in determining the lump-sum payment amounts now reflected in the

[3] The Voluntary Reimbursement Program uses regional gas prices to calculate additional fuel costs. *See* Hyundai, Compensation, https://hyundaimpginfo.com/overview/compensation (last visited Jan. 14, 2014) ("the most recent average gas price in your area"); Kia, FAQ, https://kiampginfo.com/faq#program (last visited Jan. 14, 2014) ("Fuel price reimbursement rates will be updated monthly based upon a rolling 12-month average").

Proposed Settlement. *See* April 25, 2013 Hearing Transcript at 15:16. The settling parties indicate that they will use R.L. Polk as a source for Class Member data for the purpose of mailing the Notice and Claim Form. Proposed Settlement, § 11.1.

However, 4.75 years is not appropriate as a means of calculating compensation for current original owners here: it *averages* the length of ownership of *new* and *used* vehicles. The new vehicle ownership period is 71.4 months, or 5.95 years. *See* https://www.polk.com/company/news/u.s._consumers_hold_on_to_new_vehicles_nearly_six_years_an_all_time_high. As a result, the Proposed Settlement substantially shortchanges Class Members.

In addition to current original owners, a lump-sum payment is also offered to current non-original owners, current lessees, and current fleet owners under the Proposed Settlement. It is unclear what ownership period values were used to determine the lump-sum payment amounts for current non-original owners, current lessees, and current fleet owners.

Moreover, in advertising their vehicles to the American public, Defendants have consistently focused on longevity, and the promise implicit behind the greatly emphasized "100,000 mile warranty" is that if a consumer purchased the vehicle, it would last a long time. *See* Hyundai, America's Best Warranty, https://www.hyundaiusa.com/assurance/america-best-warranty.aspx#1 (last visited Jan. 20, 2014); Kia, Kia Quality and Value with a 10 year or 100,000 mile Warranty, http://www.kia.com/us/en/content/why-kia/quality/warranty (last visited Jan. 20, 2014).

Finally, the length of ownership factor is of penultimate importance to the Class, because, assuming it is correctly understood by Class Members, it could be determinative of a Class Member's decision whether to stay in the Voluntary Reimbursement Program initiated by Defendants in November, 2012, or to receive the lump-sum payment offered by the Proposed Settlement of this civil litigation. Unlike the Proposed Settlement, the Voluntary Reimbursement Program provides compensation for additional fuel costs for the entire time a Class Member owns or leases the vehicle.

2. Diminution in value.

The Proposed Settlement does not take into consideration the diminution in value of the vehicles caused by the restatement of fuel economy. The omission of such compensation is startling, given that it is one of the most widely recognized elements of economic loss sustained by those who purchased major products based on grave misrepresentations as to a key feature – in this case, fuel economy. For example, in the recently-settled Toyota Brake/Acceleration MDL, $250 million was allocated to pay consumers for the diminished value of their vehicles. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig.*, 2013 WL 3224585 (C.D. Cal. June 17, 2013). The Settling Firms, at least, are aware of the Toyota case – the Hagens Berman firm was one of the litigants.

3. Intentional misrepresentation.

The Proposed Settlement does not take intentional misrepresentation into account. Even with the limited information provided through the confirmatory discovery process, it is apparent that Defendants knew or should have known about the fuel economy misrepresentations long before Consumer Watchdog and many consumers first complained about them. Pursuant to the laws of multiple states, the facts here give rise to the imposition of additional compensation stemming from the intentional nature of Defendants' conduct.

C. Unclaimed and Expired Funds Kept by Defendants.

The preceding discussion regarding serious flaws in the proposed Notice and claims process must be viewed in the context of one of the most deleterious aspects of the Proposed Settlement: Hyundai and Kia get to keep any unclaimed funds. *See* Proposed Settlement, §§ 4.3, 3.2.4. Moreover, the compensation is proposed to be provided in the form of debit cards, which expire within one and three years of issue, depending on the form of compensation the Class Member elects to receive. The compensation "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. It is equally clear that the more confusing and onerous the claims process, the less likely it is that Class Members will obtain the compensation they are ostensibly entitled to under the Proposed Settlement – and the more Defendants will be permitted to evade full compensation to the Class. That is why such settlements are increasingly disfavored by the courts (and consumers).