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9  
10 UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA  
11

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12 STATE AUTOMOBILE MUTUAL )  
13 INSURANCE COMPANY; STATE AUTO )  
PROPERTY & CASUALTY INSURANCE )  
14 COMPANY; MILBANK INSURANCE )  
COMPANY; AMERICAN FAMILY )  
15 INSURANCE COMPANY; AMERICAN )  
FAMILY MUTUAL INSURANCE )  
16 COMPANY, S.I.; AMERICAN STANDARD )  
INSURANCE COMPANY OF OHIO; )  
17 AMERICAN STANDARD INSURANCE )  
COMPANY OF WISCONSIN; MAIN )  
18 STREET AMERICA PROTECTION )  
INSURANCE COMPANY; NGM )  
19 INSURANCE COMPANY; OLD )  
DOMINION INSURANCE COMPANY; )  
20 PERMANENT GENERAL ASSURANCE )  
CORPORATION; THE GENERAL )  
21 AUTOMOBILE INSURANCE COMPANY, )  
INC.; CHURCH MUTUAL INSURANCE )  
22 COMPANY, S.I.; ERIE INSURANCE )  
COMPANY; ERIE INSURANCE )  
23 EXCHANGE ; ERIE INSURANCE )  
COMPANY OF NEW YORK; ERIE )  
24 INSURANCE PROPERTY & CASUALTY )  
CO.; FLAGSHIP CITY INSURANCE )  
25 COMPANY; AMERICAN STATES )  
INSURANCE COMPANY; AMERICA )  
26 FIRST INSURANCE COMPANY; )  
AMERICAN ECONOMY INSURANCE )  
27 COMPANY; AMERICAN STATES )  
PREFERRED INSURANCE COMPANY; )  
28 CONSOLIDATED INSURANCE )  
COMPANY; EMPLOYERS INSURANCE )

Case No.: 8:22-ml-03052-JVS-KES

**OBJECTION TO CASE  
MANAGEMENT ORDER (DKT.  
NO. 70), AND APPLICATION OF  
ELLIOTT R. FELDMAN AND  
NATHAN DOOLEY OF COZEN  
O’CONNOR FOR APPOINTMENT  
TO (1) CHAIR A SUBROGATION  
INSURANCE CLASS ACTION  
COMMITTEE, (2) FOR  
REPRESENTATION ON THE  
CONSUMER CLASS ACTION  
LEADERSHIP COMMITTEE (3)  
TO VACATE CASE  
MANAGEMENT DEADLINES  
RELATED TO THE  
SUBROGATION INSURANCE  
CLASS ACTION AND (4) LEAVE  
TO FILE A CONSOLIDATED  
INSURANCE CLASS ACTION  
COMPLAINT**

**DATE: May 15, 2023  
TIME: 1:30 p.m.  
PLACE: 411 West Fourth Street  
Santa Ana, CA 92701  
Court Room 10C**

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1 COMPANY OF WAUSAU; FIRST )  
 NATIONAL INSURANCE COMPANY OF )  
 2 AMERICA; GENERAL INSURANCE )  
 COMPANY OF AMERICA; LIBERTY )  
 3 COUNTY MUTUAL INSURANCE )  
 COMPANY; LIBERTY INSURANCE )  
 4 CORPORATION; LIBERTY MUTUAL )  
 FIRE INSURANCE COMPANY; LIBERTY )  
 5 MUTUAL INSURANCE COMPANY; )  
 LIBERTY MUTUAL MID-ATLANTIC )  
 6 INSURANCE COMPANY; LIBERTY )  
 MUTUAL PERSONAL INSURANCE )  
 7 COMPANY; LIBERTY PERSONAL )  
 INSURANCE COMPANY; LM GENERAL )  
 8 INSURANCE COMPANY; LM )  
 INSURANCE CORPORATION; )  
 9 MONTGOMERY MUTUAL INSURANCE )  
 COMPANY; PEERLESS INDEMNITY )  
 10 INSURANCE COMPANY; SAFECO )  
 INSURANCE COMPANY OF AMERICA; )  
 11 SAFECO INSURANCE COMPANY OF )  
 ILLINOIS; SAFECO INSURANCE )  
 12 COMPANY OF INDIANA; SAFECO )  
 INSURANCE COMPANY OF OREGON; )  
 13 SAFECO NATIONAL INSURANCE )  
 COMPANY; THE FIRST LIBERTY )  
 14 INSURANCE CORPORATION; THE )  
 NETHERLANDS INSURANCE )  
 15 COMPANY; WAUSAU UNDERWRITERS )  
 INSURANCE COMPANY; ALLIED )  
 16 PROPERTY & CASUALTY INSURANCE )  
 COMPANY; AMCO INSURANCE )  
 17 COMPANY; COLONIAL COUNTY )  
 MUTUAL INSURANCE CO.; )  
 18 DEPOSITORS INSURANCE COMPANY; )  
 HARLEYSVILLE INSURANCE )  
 19 COMPANY; HARLEYSVILLE )  
 INSURANCE COMPANY OF NEW )  
 20 JERSEY; HARLEYSVILLE INSURANCE )  
 COMPANY OF NEW YORK; )  
 21 NATIONWIDE AFFINITY INSURANCE )  
 COMPANY OF AMERICA; NATIONWIDE )  
 22 AGRIBUSINESS INSURANCE )  
 COMPANY; NATIONWIDE GENERAL )  
 23 INSURANCE COMPANY; NATIONWIDE )  
 INSURANCE COMPANY OF AMERICA; )  
 24 NATIONWIDE MUTUAL FIRE )  
 INSURANCE COMPANY; NATIONWIDE )  
 25 MUTUAL INSURANCE COMPANY; )  
 NATIONWIDE PROPERTY & CASUALTY )  
 26 INSURANCE COMPANY; TITAN )  
 INSURANCE COMPANY; VICTORIA )  
 27 FIRE & CASUALTY COMPANY; )  
 VICTORIA SELECT INSURANCE )  
 28 COMPANY; NEW JERSEY INDEMNITY )

1 INSURANCE COMPANY; NEW JERSEY )  
2 MANUFACTURERS INSURANCE )  
3 COMPANY; GENERAL CASUALTY )  
4 COMPANY OF WISCONSIN; GENERAL )  
5 CASUALTY INSURANCE COMPANY; )  
6 SOUTHERN PILOT INSURANCE )  
7 COMPANY; and UNIGARD INSURANCE )  
8 COMPANY )

Plaintiffs,

v.

9 HYUNDAI MOTOR AMERICA,  
10 HYUNDAI MOTOR COMPANY, KIA  
11 AMERICA, INC., KIA CORPORATION,

Defendants.

12 Pursuant to the Court’s Case Management Orders in this matter, Dkt. Nos., 2 (noting  
13 the potential need for “specific representation on the Leadership Committee for commercial  
14 interests”) and 50 (noting “[t]he Court will review the leadership structure from time to time  
15 as the docket proceeds, and may make changes or additions as warranted”), Elliott R.  
16 Feldman and Nathan Dooley of Cozen O’Connor respectfully submit the following  
17 Objection to the Case Management Order and Application (“Application”)<sup>1</sup> on behalf of the  
18 insurance carrier class of Plaintiffs (“Insurance Plaintiffs), *see State Auto. Mut. Ins. Co. et*  
19 *al. v. Hyundai Motor Am. et al.*, No. 8:23-cv-00443 (C.D. Cal. Mar. 10, 2023) (“Subrogation  
20 Class Action”), for (1) the creation of a Subrogating Insurance Class Action Committee for  
21 this MDL proceeding (“Subrogation Committee”) and an appointment to co-chair the  
22 Subrogation Committee; and (2) for two seats on the Consumer Class Action Leadership

<sup>1</sup> The *Subrogation Class Action* was transferred to the MDL proceeding by Order dated  
23 March 21, 2023. *See State Automobile Mutual Insurance Company et al v. Hyundai Motor*  
24 *America et al.*, Dkt. No. 16 (C.D. Cal. Mar. 21, 2023). After transfer of the *Subrogation*  
25 *Class Action* to the MDL proceeding, the Executive Committee did not provide Insurance  
26 Plaintiffs with a copy of the Case Management Order. Nevertheless, the Insurance Plaintiffs  
27 first filed its Application on April 3, 2023, but as noted during the April 6, 2023 status  
28 conference, the Insurance Plaintiffs were not able to file any document in the MDL  
proceeding due to a technical error in the Court’s ECF system, and as a result, were forced  
to file their Application in the *Subrogation Class Action. Id.* Dkt. No. 17. On April 10, 2023,  
the Court clerk informed counsel for the Insurance Plaintiffs that the technical problem  
preventing them from filing any documents in the MDL proceeding was resolved, and they  
were granted access to file in the MDL proceeding. This Application follows.

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1 Committee. Separately, as an independent Committee, the Insurance Plaintiffs seek (3) an  
2 order vacating any deadlines applicable to the Insurance Plaintiffs, just as the Court vacated  
3 the case management deadlines applicable to the governmental entities, and leave to file a  
4 Consolidated Insurance Class Action Complaint. *See* Dkt. No. 70 at 3:7–9 (vacating “any  
5 orders affirmatively setting any deadlines for governmental entity actions, including but not  
6 limited to any deadlines set by the Order for a consolidated government entities complaint”).

### 7 INTRODUCTION

8 This Application should be granted in its entirety, particularly in view of the  
9 allegations set forth within the Consolidated Amended Consumer Class Action Complaint  
10 (“Consumer Counsel Complaint”), Dkt. No. 84, filed by members of the Consumer Class  
11 Action Leadership Committee (“Consumer Counsel”) on behalf of the Plaintiffs they  
12 represent (“Consumer Counsel Plaintiffs”), while excluding the Insurance Plaintiffs.  
13 Notably, the Court’s Case Management Order directs Plaintiffs to file a Consolidated  
14 Complaint that “shall synthesize the facts, class definitions, and causes of action alleged in  
15 the actions constituting this MDL.” Dkt. No. 70 at 2:2–5. Consumer Counsel failed to do  
16 that here.

17 The Consumer Counsel Complaint excludes the Insurance Plaintiffs as named  
18 plaintiffs, and excludes salient facts and allegations of the Insurance Plaintiffs’ Complaint.  
19 Yet the Consumer Counsel Complaint claims the losses sustained by the same Insurance  
20 Plaintiffs that have been excluded from the Consumer Counsel Complaint. This is  
21 impermissible overreach that renders the Consumer Counsel Complaint ripe for attack,  
22 jeopardizing the claims for consumers, as well as the Insurance Plaintiffs.

23 Whether by mistake or design, the Consumer Counsel Complaint is infirm as pled,  
24 and susceptible to obvious arguments available to Defendants in a Motion to Dismiss or  
25 Strike. For this reason, this Application must be granted in its entirety. The Complaint, for  
26 example, bizarrely asserts “claim splitting” as a justification for the Consumer Counsel’s  
27 attempt to assert damages sustained by clients they *do not* (and cannot) represent, and did  
28 not even deign to consult, or even name as Plaintiffs in the Consumer Counsel Complaint.

1 Claim splitting, however, is a *defense* that can only be raised by *Defendants* in this action.  
2 This allegation, therefore, is both peculiar and infirm.

3 The Consumer Counsel Plaintiffs and their counsel, moreover, do not have the right,  
4 authorization, or standing to bring any claim for damages that is owned by the Insurance  
5 Plaintiffs. For this reason as well, the Consumer Counsel Complaint is invalid to the extent  
6 that it seeks to self-arrogate control over the subrogation claims by unilaterally attempting  
7 to represent numerous members of the insurance industry whose subrogation claims are  
8 outside the scope of the consumer complaint, and which have retained Cozen O'Connor as  
9 their exclusive counsel. Notably, the Insurance Plaintiffs own the lion's share of alleged  
10 damages in this MDL action, with provable liquidated damages capable of calculation down  
11 to the penny, as opposed to the claims of Plaintiffs represented by Consumer Counsel, whose  
12 claims are based on damages that are alleged—in the very same complaint—to be separate  
13 and apart from any insurance claim that was paid out by the Insurance Plaintiffs. *See, e.g.*,  
14 Dkt. No. 84 ¶¶ 36–1206. For example, the Consumer Plaintiffs seek damages for alleged  
15 overpayment for purchase of class vehicles, as well as damages for diminution in value of  
16 vehicles owned by class members which have not yet been stolen. *Id.* Neither of these  
17 claims, nor any of the other damages alleged by Consumer Counsel Plaintiffs, are involved  
18 in the Insurance Plaintiffs' claims. *Id.*

19 Indeed, the Consumer Plaintiffs would have no means of proving damages for the  
20 Insurance Plaintiffs' claims. The Consumer Counsel Complaint makes it clear, moreover,  
21 that the Consumer Counsel may have a non-waivable conflict of interest in view of their  
22 attempt to include representation of the Insurance Plaintiffs' subrogation claims within the  
23 scope of the Consumer Counsel Complaint. Consumer Counsel has repeatedly sued many  
24 of the named Insurance Plaintiffs, who vociferously object to purported representation by  
25 Consumer Counsel. To the extent Insurance Plaintiffs are not made whole, the allegations  
26 set forth within the Consumer Counsel Complaint create a clear conflict of interest between  
27 the Consumer Counsel who authorized the Complaint and the Insurance Plaintiffs,  
28 mandating separate representation. Consumer Counsel did not even consult with counsel

1 representing the Insurance Plaintiffs regarding the Consumer Counsel Complaint. Insurance  
2 Plaintiffs may be forced to pursue their claims in collateral litigation – a result this MDL  
3 proceeding is intended to avoid. For these reasons, among others, it is clear the Insurance  
4 Plaintiffs require representation on the Consumer Class Action Leadership Committee in  
5 addition to a separate track governed by a Subrogation Committee.

6 The named Consumer Counsel Plaintiffs seek damages in the Consumer Counsel  
7 Complaint such as diminution in value of the vehicles, deductible payments (that the  
8 Executive Committee seeks to rely upon the Insurance Plaintiffs to prove), and other  
9 uninsured losses. *See* Dkt. No. 84 ¶¶ 36–1206. Within the allegations describing the harm  
10 to each individual named class member, the Consumer Counsel Complaint fails to mention  
11 *any* amounts paid out by the Insurance Plaintiffs. *See id.* *This is understandable since*  
12 *Consumer Counsel have absolutely no information regarding the Insurance Plaintiffs’*  
13 *subrogation claims.* Yet Consumer Counsel then allege their consumer claims are typical  
14 and give rise to a claim to insurance proceeds paid out by the Insurance Plaintiffs, which  
15 actually are excluded from the Consumer Counsel Complaint. *See id.* ¶ 1534. These  
16 allegations show a fundamental misunderstanding of the nature of, and basis for the  
17 insurance subrogation claims which Cozen O’Connor is handling. The Insurance Plaintiffs’  
18 claims do not include the various diminution in value claims being alleged by the consumer  
19 plaintiffs. It appears the primary goal of including the Insurance Plaintiffs’ damages is to  
20 pad attorneys’ fees to be sought by Consumer Counsel while ignoring the gravamen of those  
21 same claims.

22 The Insurance Plaintiffs, moreover, also own data that is vital to this case. That data  
23 has been informally sought by the Defendants, and Consumer Counsel. Of course, Insurance  
24 Plaintiffs have volunteered to supply their own detailed claim data<sup>2</sup> without a formal  
25 discovery request from Defendants, demonstrating the Insurance Plaintiffs’ willingness to

26 \_\_\_\_\_  
27 <sup>2</sup> Even though this data is vital to the Consumer Counsel Plaintiffs’ claims as pled,  
28 Consumer Counsel has failed to even contact the Insurance Plaintiffs to include this data in  
initial disclosures due this week. For this reason, and to avoid such damages from being  
precluded by subsequent motion practice, Insurance Plaintiffs are serving their own initial  
disclosures this week so that their claims are not further hampered by this peculiar oversight.



1 cooperate, and ability to efficiently provide information vital to the claims and defenses  
2 asserted by all parties to this MDL.

3 **THE INSURANCE PLAINTIFFS**

4 The Insurance Plaintiffs are property and casualty insurers that have paid claims  
5 under policies issued to their policyholders for thefts of certain Hyundai and Kia vehicles.  
6 Ten insurance groups with sixty-eight named member companies have been identified in the  
7 Complaint. As of the date of submission of this Application, six additional insurance groups  
8 have retained Cozen O'Connor to participate as named class members in this Subrogation  
9 Class Action. A significant number and magnitude of additional insurance groups are  
10 expected to participate as named class members. Insurance Plaintiffs seek leave by way of  
11 this Application to file an amended complaint to identify all of these additional named class  
12 members in the Subrogation Class Action.

13 The Insurance Plaintiffs, moreover, are in separate negotiations with Defendants, and  
14 are represented exclusively by Cozen O'Connor, without any involvement by Consumer  
15 Counsel, for the purposes of discovery, and settlement. Consumer counsel have made it  
16 clear that they view their claims to be separate and distinct from the Insurance Plaintiffs'  
17 claims, and refuse to provide Cozen O'Connor any information regarding discovery or  
18 settlement. This point is crucial to the efficient management of the MDL proceedings as the  
19 absence of any voice on behalf of the Insurance Plaintiffs can only serve to hinder discovery,  
20 motion practice, trial, or other resolution of this matter.

21 **THE INSURANCE PLAINTIFFS' CURRENT ESTIMATED DAMAGES**

22 Currently, indemnity payments for the losses sustained by named Insurance Plaintiffs  
23 amount to more than One Hundred Ninety Million Dollars (\$190M). Depending upon which  
24 additional companies join the action as named class members, indemnity loss payments for  
25 the named class members likely will approach or exceed the range of Two Hundred Fifty to  
26 Three Hundred Million Dollars (\$250–\$300M). It is difficult to provide a scientific estimate  
27 of aggregate payments for collective thefts of the Class Vehicles which have or will be paid  
28 by the entire insurance industry at this stage, but a preliminary benchmark of approximately

1 Five to Six Hundred Million Dollars (\$500M–\$600M) may be a reasonable estimate of the  
2 total damages to the class, excluding exemplary damages, costs and attorneys’ fees.

### 3 BACKGROUND

4 The background of the Subrogation Class Action is straightforward: the Hyundai and  
5 Kia Defendants violated industry standards, including FMVSS 114, by failing to equip their  
6 vehicles with anti-theft protection. The latest iteration of FMVSS 114 went into effect in  
7 mid-2010. Since that time, every manufacturer of vehicles sold in the U.S.—except Hyundai  
8 and Kia—has utilized immobilizer technology to provide consumers with this mandatory  
9 anti-theft protection. Indeed, Hyundai and Kia utilize immobilizers in many of their  
10 vehicles, including vehicles of the same make, model, and year as the Class Vehicles but  
11 that are sold in Canada, where Canadian regulatory requirements mandate immobilizers in  
12 all vehicles. (This mandate went into effect in Canada on September 1, 2007, and all  
13 manufacturers have complied with this standard for all cars sold in Canada, including  
14 Hyundai and Kia).

15 Immobilizers prevent vehicles from being started and moved forward unless a unique  
16 code is transmitted from the vehicle’s key. Without immobilizers or some comparable anti-  
17 theft protection, cars are easily stolen. Kia and Hyundai have long known this fact but made  
18 no effort to warn customers about the risk presented by their vehicles. The effectiveness of  
19 immobilizers is well documented throughout the industry, but the actions and words of the  
20 defendants may prove to be most compelling: in petitioning NHTSA for relief from  
21 complying with 49 CFR Part 541 relating to marking parts to facilitate tracing stolen  
22 vehicles, Kia and Hyundai stated that vehicles equipped with immobilizers (unlike the Class  
23 Vehicles) are about 70% less likely to be stolen compared to vehicles without immobilizers.  
24 (See Exhibit “A”.) Of course, once it became public knowledge that Class Vehicles lacked  
25 immobilizers, the theft of Kia and Hyundai’s vehicles escalated dramatically.

26 There has been a firestorm of publicity, all very adverse to Kia and Hyundai,  
27 regarding their unique violation of federal law in failing to equip all of their vehicles with  
28 immobilizers. Kia and Hyundai have responded in a number of ways, by offering old



1 fashioned “Clubs” to certain of these vehicle owners to prevent thefts, and providing an  
2 unspecified software upgrade, which may not be implemented for an indeterminate period  
3 of time, to provide some sort of anti-theft protection. The details of this software upgrade  
4 are not clear. If anything, these remedial measures indicate the problem is more widespread  
5 than originally understood. These various upgrades only serve to reinforce the fact that  
6 Defendants violated federal law and industry standards by failing to equip their vehicles with  
7 required anti-theft protection. For purposes of the Subrogation Class Action, the horse truly  
8 is out of the stable; these vehicles have been stolen and resulting claims have been submitted  
9 and paid by the insurance industry, both named and unnamed class members.

10 HLDI data through 2021 establishes that thefts of Class Vehicles occurred at a rate  
11 more than double the reported thefts for other vehicles, and it is expected that the more recent  
12 data will reflect a ratio of approaching quadruple the rate for other vehicles—this for a class  
13 of vehicles that would normally be stolen at a rate much lower than the rate of all other  
14 vehicles. Indeed, the rate has been increasing steadily from 2019 onward, when videos  
15 showcasing the defective nature of the Class Vehicles went viral on social media. These  
16 thefts have created an immediate danger to Hyundai and Kia’s customers, as well as the  
17 general public, as their vehicles have become an attractive target for thieves. Immediate  
18 remedial measures are therefore required by Hyundai and Kia.

### 19 SUBROGATION PRINCIPLES

20 The Insurance Plaintiffs represented by Cozen O’Connor have full ownership and  
21 exclusive interest in their subrogation claims, which have arisen under the contracts of  
22 insurance and by operation of law upon payment of claims to their insureds/policyholders  
23 for the thefts of their Hyundai and Kia vehicles. Exemplar subrogation provisions in certain  
24 of the subject policies are attached collectively as Exhibit “B.” These provisions are  
25 standard in the insurance industry and uniformly appear in automobile insurance policies.

26 “Subrogation is the insurer’s right to be put in the position of the insured, in order to  
27 recover from third parties who are legally responsible to the insured for a loss paid by the  
28 insurer.” *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1120 (9th Cir. 2010)

1 (cleaned up). The Insurance Plaintiffs, as subrogating insurers, are entitled to proceed  
 2 independently to pursue reimbursement for their subrogation claims. *Id.* at 1117–18; *see*  
 3 *also Pac. Gas & Elec. Co. v. Superior Ct.*, 144 Cal. App. 4th 19, 23 (2006) (“Both the  
 4 subrogee (insurer) and the subrogor (insured) have a right of action against the tortfeasor.”  
 5 (quoting *Basin Constr. Corp. v. Dep’t of Water & Power*, 199 Cal. App. 3d 819, 825 (1988);  
 6 *Deutschmann v. Sears, Roebuck & Co.*, 132 Cal. App. 3d 912, 916 (1982) (holding an insurer  
 7 “has an independent cause of action against the third party for recovery of the amount he  
 8 was obligated to pay to the insured as a result of the liability of the third party”); *Hodge v.*  
 9 *Kirkpatrick Dev., Inc.*, 130 Cal. App. 4th 540, 548 (2005) (same). The insurance subrogation  
 10 class action does *not* include any claim to recover the deductibles or any other uninsured  
 11 losses on the part of Insurance Plaintiffs’ insureds, which instead necessarily are addressed  
 12 in the consumer class action.

13 By way of example, Class Action Settlement Agreements that Kia and Hyundai  
 14 entered into in connection with separate actions arising out of engine fires explicitly carved  
 15 out subrogation claims as falling outside the parameters of the settlement agreements. *See*  
 16 *In re Hyundai & Kia Engine Litig. II (“Engine II”)*, No. 8:18-cv-02223-JLS-JDE (C.D. Cal.  
 17 Dec. 14, 2018), Order 2:24–25, 4:32–5, ECF No. 99 (noting exclusion of subrogation claims  
 18 from settlement).<sup>3</sup> Accordingly, each set of plaintiffs—the Insurance Plaintiffs, the  
 19 Consumer Counsel Plaintiffs representing uninsured consumer claims, and municipality  
 20 plaintiffs—are able to independently prosecute and resolve their claims against the Hyundai  
 21 and Kia defendants, irrespective of the timing of any potential recovery or settlement for  
 22 each class of Plaintiffs.

23  
 24 \_\_\_\_\_  
 25 <sup>3</sup> Subrogation claims were also carved out of the class action settlement agreements in *In re*  
 26 *Hyundai and Kia Engine Litigation (“Engine I”)*, No. 8:17-cv-00838 (C.D. Cal. May 10,  
 27 2017), Notice of Mot. & Mot. 4 n.2, ECF No. 112, and *Zakikhani et al. v. Hyundai Motor*  
 28 *Co.*, No. 8:20-cv-01584-SB-JDE (C.D. Cal. Aug. 25, 2020), Amended Settlement Agmt. 6  
 ¶ 1.15, ECF No. 129-1 (“Excluded from the Hyundai Class are (a) all claims for death,  
 personal injury . . . and subrogation.”) (“ABS Settlement”), among other similar cases. So  
 it seems Consumer Counsel well recognizes that it cannot purport to settle the subrogation  
 claims as those claims were explicitly carved out of settlement agreements where the same  
 counsel represented the class plaintiffs.

1 California courts have long recognized that the “made whole” doctrine has no  
 2 application where, as here, the subrogating insurers are actively prosecuting their claims  
 3 against responsible third parties. *See, e.g., Chandler*, 598 F.3d at 1120. The made whole  
 4 doctrine is further inapplicable, where, as here, there is no limited recovery fund. *Id.*; *21st*  
 5 *Century Ins. Co. v. Superior Ct.*, 47 Cal. 4th 511, 519 (2009) (observing the “made whole”  
 6 rule typically only applies in cases where there is underinsurance that would prevent the  
 7 insured from recovering). In *Chandler*, the Ninth Circuit observed “a carrier may pursue  
 8 reimbursement and has no obligation to make the policyholder ‘whole’ out of reimbursement  
 9 proceeds unless and until the policyholder attempts and fails to recover from the tortfeasor.”  
 10 598 F.3d at 1115 (citation omitted). Moreover, “the made-whole rule does not apply” where,  
 11 as here “the insurer participates in prosecuting the claim against the third-party tortfeasor.”  
 12 *See id.* at 1118 (citations omitted).

### 13 ALLEGATIONS IN THE CONSUMER COUNSEL COMPLAINT

14 The Consumer Counsel Complaint raises claims and issues that the named Plaintiffs  
 15 have no right or standing to assert. In paragraph 1532 of the Consumer Counsel Complaint  
 16 the Consumer Counsel Plaintiffs allege “Typicality” on the grounds that “Plaintiffs and all  
 17 Members of the Classes sustained monetary and economic injuries including, but not limited  
 18 to, ascertainable losses arising out of Defendants’ wrongful conduct.” *See* Dkt. No. 84 ¶  
 19 1532. The only injuries identified by the named Plaintiffs in the Consumer Counsel  
 20 Complaint, however, are damages in the form of diminution of value, paid deductible, and  
 21 other uninsured losses. *See* Dkt. No. 84 ¶¶ 36–1206. This stands in stark contrast to the  
 22 claims and damages alleged by the Insurance Plaintiffs, which are based only on paid claims,  
 23 and projected future claims, capable of calculation to the penny.

24 The remaining allegations in paragraph 1532 of the Consumer Counsel Complaint  
 25 are vague. Paragraph 1532 also alleges that the Consumer Counsel Plaintiffs “are advancing  
 26 the same claims and legal theories on behalf of themselves and all absent Class members  
 27 and assert claims, if they had insurance, for all monies paid by their insurance company as  
 28 a result of the theft or damage to a Class Vehicle resulting from the manifestation of the

1 Theft Prone Defect, subject to any applicable right of subrogation.” Dkt. No. 84 ¶ 1532.  
2 While admittedly unclear, this allegation appears to lay claim to damages that are  
3 exclusively owned and controlled by, and which can only be claimed and pursued by, the  
4 Insurance Plaintiffs, namely “all monies paid by [the Consumer Counsel Plaintiffs’]  
5 insurance company.” *See id.* To the extent this allegation only intends to set forth claims  
6 by uninsured Consumer Counsel Plaintiffs, the inartful drafting only serves to underscore  
7 the need for Cozen O’Connor to have coequal standing on the Executive Committee, and to  
8 chair the insurance subrogation track. This is doubly important as this matter will progress  
9 shortly into discovery proceedings, and it is unclear whether Consumer Plaintiffs are  
10 prepared, able, or even willing to conduct discovery in support of the Insurance Plaintiffs’  
11 causes of action which are separate and distinct from those being claimed by the Consumer  
12 Plaintiffs.

13 Paragraph 1534 of the Consumer Counsel Complaint is particularly problematic as it  
14 clearly attempts to lay claim to damages that the named Consumer Counsel Plaintiffs *cannot*  
15 assert. Paragraph 1534 is meant to establish “superiority” pursuant to Rule 23(b)(3), but the  
16 named Consumer Counsel Plaintiffs clearly have no cognizable interest as *a matter of law*  
17 in regard to subrogation claims they do not own, thus violating Rule 23(b)(3)(A). Nor can  
18 Consumer Counsel seek to manage claims brought by the Insurance Plaintiffs, since they  
19 know nothing about the basis for or scope of these claims and have sued Insurance Plaintiffs  
20 in other actions. Yet the Consumer Counsel Plaintiffs allege that “allowing insured  
21 consumers to proceed on behalf of themselves *and any insurance company who paid a loss*  
22 *resulting from the Theft Prone Defect is superior to these claims being split and prosecuted*  
23 *by both the injured consumer and their insurance company.”* Dkt. 84 ¶ 1534 (emphasis  
24 added). This allegation is problematic for at least five additional reasons.

25 First, only *Defendants* have standing to raise the *defense* of claim splitting, which is  
26 clearly being invoked here to the detriment of the Insurance Plaintiffs, purportedly on behalf  
27 of the Consumer Counsel Plaintiffs, but *solely* for the benefit of the *counsel* who represent  
28 those consumers. *See, e.g., Ferraro v. S. Cal. Gas Co.*, 102 Cal. App. 3d 33, 43 (1980),

1 *overruled on other grounds in Goodman v. Lozano*, 47 Cal. 4th 1327 (2010) (“The defense  
2 that a plaintiff has split a cause of action is an affirmative defense, which must be pleaded  
3 by a defendant in abatement.”). Here, the Consumer Counsel Complaint sets forth the  
4 *defense* of claim splitting as part of class allegations as part of an attempt to allege  
5 superiority, but this is not Consumer Counsel’s defense to raise. This ham-fisted attempt to  
6 raise *defenses* in a complaint provides further illustration of the need for Insurance Plaintiffs’  
7 Counsel on the Consumer Class Action Leadership Committee, and for the Subrogation  
8 Class claims to proceed on a separate track overseen by Cozen O’Connor. As the *Ferraro*  
9 court has stated, the “[p]rohibition against splitting a cause of action is for the benefit of the  
10 defendant and he may waive or renounce it by agreement.” *Id.* (citations omitted). Whether  
11 defendants will invoke or waive this non-meritorious defense (which has no application to  
12 the subrogation claims being litigated by the Insurance Plaintiffs) is up to them, not  
13 Consumer Counsel.

14         Second, a tortfeasor who is aware of the insurer’s subrogation claim and nonetheless  
15 chooses to settle the insured’s claim independent from the insurer’s claim, cannot invoke the  
16 rule against splitting a cause of action to bar a later action by the insurer: “[S]uch a  
17 settlement, effected with ‘knowledge, actual or constructive’ of the insurer’s subrogation  
18 rights constitutes a ‘fraud on the insurer.’” *See Allstate Ins. Co. v. Mel Rapton, Inc.*, 77 Cal.  
19 App. 4th 901, 912 (2000) (citations omitted); *see also Hodge*, 130 Cal. App. 4th at 553–554  
20 (holding “a settlement between the Hodges and defendants would not bar State Farm’s  
21 recovery from defendants, unless State Farm consented to the settlement”). Thus, there is  
22 nothing to be accomplished by excluding Insurance Plaintiffs from representation in this  
23 action.

24         Third, the Insurance Plaintiffs are entitled to proceed independently to pursue  
25 reimbursement for their subrogation claims. *Chandler*, 598 F.3d at 1117–18; *Pac. Gas &*  
26 *Elec. Co.*, 144 Cal. App. 4th at 23; *Deutschmann*, 132 Cal. App. 3d at 915–16 (“[A]n insurer  
27 who is subrogated to the rights of the insured against the tortfeasor] is not limited to an action  
28 in intervention; he may bring a separate independent action to recover directly from the

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1 third-party tortfeasor. . . . Thus, he has an independent cause of action against the third party  
2 for recovery of the amount he was obligated to pay to the insured . . .”); *see also Hodge*,  
3 130 Cal. App. 4th at 550 (“State Farm has stepped into the Hodges’ shoes and, to the extent  
4 it has made payments under the Policy, has the same rights as the Hodges against the various  
5 defendants and tortfeasors in the construction defect lawsuit.”).

6 In *Hodge*, for example, the Court allowed the insurance carrier to intervene because  
7 it had a “direct pecuniary interest in the Hodges’ action against the allegedly responsible  
8 third parties.” 130 Cal. App. 4th at 550. “The insured can sue the responsible party for any  
9 loss not fully compensated by insurance, and the insurer can sue the responsible party for  
10 the insurer’s loss in the amount on the insurance policy.” *Id.* at 551. Where, as here, claim  
11 splitting *may impede* the Insurance Plaintiffs’ rights, intervention must be allowed. As the  
12 *Hodge* court observed,

A subrogated insurer’s right to intervene should not depend on  
a predetermination whether the defense of splitting a cause of  
action will succeed; it is enough the defense is available in a  
second lawsuit and may, in the statute’s words, “as a practical  
matter impair or impede the subrogated insurer’s ability to  
protect its rights.”

16 *Id.* (quoting Cal. Code Civ. Proc. § 387(b)).

17 Fourth, the defense of claim splitting is obviated by intervention. *See Hodge* 130 Cal.  
18 App. 4th at 550–551. Insurance Plaintiffs respectfully submit that formal intervention  
19 should not be required as they have already joined this MDL proceeding and are able to form  
20 a separate Subrogation Committee to pursue their own claims. This point renders the  
21 defense of claim-splitting inapplicable here. *See id.*

22 Fifth, Consumer Counsel erroneously assert that “subrogation rights can be dealt with  
23 in the claims processing part of the case.” Dkt. No. 84 ¶ 1534. The *Hodge* court squarely  
24 holds, however, that “recouping payments directly from the insured’s recovery—also would,  
25 as a practical matter, impair or impede the insurer’s ability to protect its subrogation rights.”  
26 *See* 130 Cal. App. 4th at 550–553 (holding that at a minimum that alternative “would impair  
27 or impede State Farm’s ability to protect its interest”). “[A]bsent intervention, the insurer is  
28



1 to a large extent at the mercy of its insured's efforts and success in recovering from the  
2 responsible third party." *Id.* at 553. There also may be a conflict of interest between  
3 representation of the diminution in value claims of the Consumer Plaintiffs and the paid  
4 indemnity losses of the Insurance Plaintiffs which requires separate representation for the  
5 Insurance Plaintiffs pursuant to their engagement of Cozen O'Connor for this purpose.

6 Finally, the same counsel who drafted the Consumer Counsel Complaint expressly  
7 *carved out* any subrogation claims from the settlement classes in at least three class actions  
8 brought against the same Defendants. *See Engine I, Engine II, and the ABS Settlement.*  
9 Thus, even Consumer Counsel appears to have recognized in other class action litigation  
10 against the same Defendants that they have no real right or ability to prosecute subrogation  
11 claims on behalf of the Insurance Plaintiffs. Perhaps for this reason, there have been separate  
12 mediation sessions with Defendants by the Consumer Plaintiffs, and by the Insurance  
13 Plaintiffs.

#### 14 **RELEVANT EXPERIENCE**

15 Elliott R. Feldman has been a practicing attorney since 1980. (*See Feldman Bio,*  
16 *attached as Exhibit "C."*) Since 1982, his practice has been exclusively focused upon  
17 representing insurers in connection with subrogation claims. Feldman has chaired or co-  
18 chaired Cozen O'Connor's subrogation and recovery department for the past twenty years,  
19 and in this capacity, has established himself as one of the most highly regarded subrogation  
20 attorneys in the country. Cozen O'Connor is the leading subrogation law firm in the country,  
21 and has held this distinction for many decades. (*See Cozen O'Connor Subrogation*  
22 *Department Profile, attached as Exhibit "D."*)

23 Cozen O'Connor employs approximately one hundred subrogation attorneys who  
24 represent hundreds of insurers in connection with thousands of subrogation claims filed in  
25 jurisdictions throughout North America. Feldman also oversees a wholly-owned subsidiary  
26 of Cozen O'Connor, National Subrogation Services, which has over one hundred employees  
27 engaged in pursuing subrogation claims on behalf of the insurance industry involving,  
28 annually, hundreds of thousands of automobile and property damage claims. Feldman has

1 served as the previous president of the National Association of Subrogation Professionals  
2 (“NASP”), and also has served on the NASP Board of Directors. Feldman has represented  
3 numerous insurers in hundreds of complex subrogation matters in state and federal courts  
4 throughout the country, and is admitted, *inter alia*, to the bars of the United States Supreme  
5 Court, the United States Court of Appeals for the Third Circuit, and the United States District  
6 Court for the Eastern District of Pennsylvania.

7 Together with co-counsel, Nathan Dooley, Feldman acted as the principal client  
8 liaison in the subrogation industry class action filed by Cozen O’Connor in *Homesite*  
9 *Insurance Company of the Midwest v. Gree USA, Inc.*, which was filed in this Court. *See*  
10 No. 2:16 cv-06769-ODW-JC (C.D. Cal. May 24, 2017). As here, *Homesite* involved a  
11 putative subrogation industry class action in which Cozen O’Connor represented insurers  
12 which had paid for hundreds of property damage claims resulting from the defective  
13 condition of dehumidifiers made and sold by the *Gree* defendants. *Id.* at \*2–3.

14 In addition, Cozen O’Connor has served as one of the recognized lead counsel in  
15 numerous mass tort wildfire actions filed against California utilities, seeking and obtaining  
16 recoveries of hundreds of millions of dollars as a result of subrogation property damage  
17 losses caused by the violation of civil duties by these utilities. These subrogation mass tort  
18 claims were brought at the same time as consumer class actions brought on behalf of  
19 consumers with uninsured losses, and were resolved separate and apart from the consumer  
20 class actions arising from the same underlying tortious acts. Our experience in representing  
21 dozens of insurers in connection with thousands of claim payments arising out of these  
22 catastrophic wildfire events further demonstrates the firm’s qualifications to lead an  
23 Insurance Subrogation Sub-Committee in this MDL. Due to the complexity of aggregating  
24 and managing these claims, which are necessarily separate and apart from the pure consumer  
25 class action claims, the creation of a Subrogation Subcommittee is necessary.

26 Nathan Dooley has more than a decade of experience in managing complex litigation,  
27 including class actions as lead counsel. (*See* Dooley Bio, attached as Exhibit “E”.) He was  
28 lead counsel in a prior subrogation class action, *Homesite Insurance Company of the*

1 *Midwest v. Gree USA, Inc.*, as discussed above, and currently advises a publicly traded  
2 company in active class action litigation. His experience includes the representation of  
3 Maersk, among other terminal operators, as lead counsel in a series of class actions brought  
4 against terminal operators by industry groups. See *Elkay Plastics Co. v. APM Terminals N.*  
5 *Am., Inc.*, No. 2:16-cv-00272-SJO-KS (C.D. Cal. Jan. 13, 2016); *Optima Steel Int'l, LLC v.*  
6 *APM Terminals Pac., LLC*, No. NC060343 (Cal. Super. Ct. L.A. Cnty. Nov. 3, 2015). He  
7 has also represented defendants as lead counsel in consumer class actions. See, e.g.,  
8 *Mollicone v. Universal Handicraft*, No. 2:16-cv-07322-CAS-MRW (C.D. Cal. Sept. 29,  
9 2016), *transferred* No. 1:17-cv-21468-RNS (S.D. Fla. Apr. 20, 2017). Cozen O'Connor's  
10 class action practice group currently includes fifty-seven attorneys spread across offices  
11 around the country with extensive experience managing class actions on behalf of plaintiffs  
12 and defendants in a variety of industries.

### 13 CRITERIA

14 The Court set forth the following criteria for evaluating petitions related to MDL  
15 subcommittees: (1) knowledge and experience prosecuting complex litigation, including  
16 class actions; (2) willingness and ability to commit to a time-consuming process; (3) ability  
17 to work cooperatively with other individuals; and (4) access to sufficient resources. See *In*  
18 *re Apple Device Performance Litig.*, No. 18-md-02827-EJD, at \*22–23 (N.D. Cal. May 15,  
19 2018). Cozen O'Connor easily satisfies these factors with respect to the proposed  
20 Subrogation Subcommittee.

21 Cozen O'Connor has a distinguished history of leadership in significant mass tort  
22 lawsuits and class actions. On September 11, 2003, for example, Feldman, together with  
23 Stephen A. Cozen, founder of Cozen O'Connor, as lead counsel, filed an action on behalf of  
24 prominent members of the property and casualty insurance industry against the Kingdom of  
25 Saudi Arabia, and other sovereign states, commercial entities and individuals, all of whom  
26 were asserted to have provided material support to the 9/11 terrorists. See *In re Terrorist*  
27 *Attacks*, No. 03 MDL 1570 (GBD) (FM) (S.D.N.Y. Jan. 13, 2021). Feldman has served as  
28 co-chair, together with another Cozen O'Connor attorney, of the commercial executive

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1 committee for the 9/11 anti-terrorism claims in this MDL. The commercial claims  
2 essentially are comprised of subrogation claims. Cozen O'Connor's clients incurred losses  
3 in excess of Eleven Billion Dollars (\$11B). Cozen O'Connor also took a leadership role in  
4 the management and settlement of the California wildfire cases on behalf of the subrogating  
5 insurance industry.

6 Cozen O'Connor is the exclusive law firm representing long-time clients as the  
7 Insurance Plaintiffs in the subrogation class action. As a large law firm with a commitment  
8 to the interests of its insurance industry clients, there can be no question that Cozen  
9 O'Connor is willing and able to commit to this important process. As counsel for the  
10 Insurance Plaintiffs, undersigned counsel have already met with the Executive Committee  
11 appointed by the Court in this MDL proceeding, as well as counsel for Kia and Hyundai,  
12 and are working cooperatively toward the effective management of this matter.

13 As a large, multi-national law firm with separate practice groups dedicated to class  
14 actions and subrogation, there can be no question that Cozen O'Connor has sufficient  
15 resources to manage a Subrogation Subcommittee. Indeed, as the leading subrogation firm  
16 in the country, Cozen O'Connor is uniquely situated to leverage its decades-long relationship  
17 with insurance carriers across the country to help manage this case on behalf of the Insurance  
18 Plaintiffs. Given the sheer number of claims, Cozen O'Connor is also well situated to lead  
19 a Subrogation Subcommittee given its past experience in managing similar mass tort claims,  
20 including the wildfire actions, and can bring that experience to bear in effectively managing  
21 and aggregating claims data, and consolidating issues for discovery.

22 The necessity of a Subrogation Subcommittee is easily demonstrated by the fact that  
23 the current Plaintiffs cannot purport to bring any claims on behalf of the Insurance Plaintiffs,  
24 and have, indeed, carved out subrogation claims from similar class actions brought against  
25 these same Defendants. *See Engine II*. Many of the factual and legal issues presented by  
26 Insurance Plaintiffs are unique to that class of Plaintiffs and require management, as well as  
27 leadership, which is separate and apart from the existing subcommittees, including the  
28 subcommittee established for complaints brought by municipalities such as the City of

1 Seattle. The legal issues presented by the Insurance Plaintiffs’ claims, moreover, are best  
2 handled by counsel with extensive experience with subrogation law. As such, it is  
3 appropriate for purposes of judicial economy and necessary for the protection of Insurance  
4 Plaintiffs’ interests for the creation of an Insurance Subrogation Class Action Subcommittee  
5 and the appointment of Elliott Feldman and Nathan Dooley to be appointed co-chairs of the  
6 Insurance Subrogation Class Action Subcommittee.

7 Dated: April 12, 2023

8 **COZEN O’CONNOR**

9  
10 By: /s/ Nathan Dooley

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