ASCDC
Association of Southern California Defense Counsel

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April 17, 2020

Presiding Justice Frances Rothschild
Associate Justice Victoria Gerrard Chaney
Judge Elizabeth A. White
Second Appellate District, Division One
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, California 90013

Re: ***Mikhaeilpoor v. BMW of North America, LLC***
Court of Appeal Case No. B293987
Request for Publication; Opinion filed April 1, 2020

Dear Presiding Justice Rothschild, Associate Justice Chaney, and Judge White:

Pursuant to California Rules of Court, rule 8.1120(a), the Association of Southern California Defense Counsel (ASCDC) requests that this court publish its April 1, 2020, opinion in *Mikhaeilpoor v. BMW of North America, LLC*.

ASCDC is the nation's largest and preeminent regional organization of lawyers primarily devoted to defending civil actions in Southern and Central California. ASCDC has approximately 1,100 attorney members, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. ASCDC is actively involved in assisting courts on issues of interest to its members, the judiciary, the bar as a whole, and the public. It is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice. ASCDC is also actively engaged in assisting courts by appearing as amicus curiae. Many of ASCDC's members specialize in defending cases brought under the Song-Beverly Act or other cases in which attorney fees are sought by a party and, thus, the organization has an interest in the publication of this opinion.

The ASCDC seeks publication of the court's opinion because it provides needed guidance to trial courts faced with analyzing excessive fee awards. Division Seven's recent opinion in *Morris v. Hyundai Motor America* (2019) 41 Cal.App.5th 24 (*Morris*), cited by this court, adds clarity to the law, but it involved unusual facts. In *Morris*, the trial court entirely struck the time of six of the ten attorneys who worked on the plaintiff's case. (*Id.* at p. 39.) This case involves the more usual circumstance in which the trial court simply reduced each attorney's time to eliminate inefficiency and duplication. This court's opinion therefore has broader application than *Morris*. Furthermore, the reductions here were made in a context that has become increasingly frequent, where a trial firm specializing in an area of law, or indeed in a single product, recycles pleadings and discovery responses from case to case without accounting for the resulting efficiency through reduced time entries. The court's opinion offers a useful template for analyzing fee reductions in that context.

The opinion also adds weight to principles of law that are likely to be challenged in future cases, as they were here. There is a split in authority about how much detail trial courts must include in orders reducing fee awards from the claimed lodestar amount. In *Warren v. Kia Motors America, Inc.* (2018) 30 Cal.App.5th 24, 37, 41 and *Kerkeles v. City of San Jose* (2015) 243 Cal.App.4th 88, 102, 104 (*Kerkeles*), the courts held that large cuts in fees were subject to heightened scrutiny by appellate courts and trial courts accordingly must provide detailed case-specific reasons for their deductions. *Morris* rejects that conclusion, citing precedent that holds trial courts have " 'no sua sponte duty to make specific factual findings explaining its calculation of the fee award.' " (*Morris*, *supra*, 41 Cal.App.5th at p. 37, fn. 6, quoting *California Common Cause v. Duffy* (1987) 200 Cal.App.3d 730, 754.) Mikhaeilpoor argued that *Morris* was not controlling " '[b]ecause there is no "horizontal stare decisis" within the Court of Appeal.' " (ARB 4.) He argued this court should instead follow *Warren* and *Kerkeles* and find that the trial court erred by failing to explain how it arrived at each of its deductions and explain "what entries it had reduced or denied entirely." (AOB 16, 20, 22.) This court held it was sufficient for the trial court to explain the *basis* for reducing the fee requests—double billing, excessive time to modify boiler plate pleadings, and so forth—without explaining each deduction. That holding tracks Justice Kagan's reasoning in *Fox v. Vice* (2011) 563 U.S. 826, 838 [131 S.Ct. 2205, 180 L.Ed.2d 45]:

> [T]rial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may

> take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time. And appellate courts must give substantial deference to these determinations, in light of "the district court's superior understanding of the litigation."

(Accord, *Serrano v. Unruh* (1982) 32 Cal.3d 621, 642 [" 'We do not want "a [trial] court, in setting an attorney's fee, [to] become enmeshed in a meticulous analysis of every detailed facet of the professional representation" ' "].)

The court's opinion, if published, will reduce future disputes about the line of authority courts should follow: *Morris* or *Kerkeles*. The opinion adds weight to the holding in *Morris* that deep cuts do not demand detailed explanation because this case involved a larger fee reduction than *Morris* and provides concrete examples of the types of explanations by trial court orders that pass muster.

The opinion also makes clear that the doctrine of implied findings applies not only to the trial court's calculation of the lodestar but also to its determination of the multiplier. In *Mountjoy v. Bank of America, N.A.* (2016) 245 Cal.App.4th 266, 277, cited in the court's opinion, the Court of Appeal held that, in reviewing a trial court's calculation of the lodestar figure—the number of hours worked multiplied by a reasonable hourly rate—appellate courts presume the trial court considered all relevant factors, even if the court's ruling mentions only some of those factors. This court held the same principle applies to rulings about the proper size of the multiplier. (Typed opn. 18 ["even though the trial court did not specifically mention other factors open to consideration when a multiplier is under consideration, this court must presume that the trial court considered all factors in reaching its decision, 'even though the court may not have mentioned or discussed them in its written ruling' "].)

Finally, this court's opinion provides needed guidance on when a multiplier is appropriate in cases specifically arising under the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.). It is increasingly common for lemon law attorneys professing expertise sufficient to justify high hourly rates to also seek multipliers on the ground that each case is complex and uncertain in its outcome. But the rationale for a multiplier is to ensure an adequate pool of lawyers is available to take cases for which clients otherwise might not be able to find representation. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-1133; *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1172.) There is no shortage of attorneys willing to work on lemon law cases, nor do they ordinarily involve the type of uncertainty that justifies a multiplier. As the Court of Appeal explained in *Weeks*, at pages 1174-1175, a multiplier is not justified simply because of the risk "inherent in any contingency fee

case [that] is managed by the decision of the attorney to take the case and the steps taken in pursuing it." This court's decision provides helpful additional guidance that whether a multiplier is justified involves these factors and others, such as the " ' "novelty and difficulty of the questions involved" ' "—not just whether counsel has litigated the case efficiently. (Typed opn. 8, 18.)

California Rules of Court, rule 8.1105(c) provides that an opinion "*should* be certified for publication . . . if the opinion: [¶] . . . [¶] (3) [m]odifies, explains, or criticizes with reasons given, an existing rule of law" or "(5) [a]ddresses or creates an apparent conflict in the law." (Emphasis added.) This court's opinion satisfies both of those criteria. Accordingly, ASCDC asks this court to order publication of the opinion.

Respectfully submitted,

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By: _____
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cc: See attached Proof of Service

PROOF OF SERVICE

Mikhaeilpoor v. BMW of North America, LLC
Case No. B293987

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On April 17, 2020, I served true copies of the following document(s) described as **REQUEST FOR PUBLICATION** on the interested parties in this action as follows:

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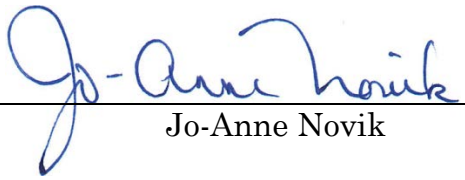
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 17, 2020, at Burbank, California.



Jo-Anne Novik

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Case No. B293987

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