EVENT DATE: 03/06/2020 EVENT TIME: 01:30:00 PM DEPT.: C-72

JUDICIAL OFFICER: Timothy Taylor

CASE NO.: 37-2017-00043267-CU-BC-CTL

CASE TITLE: SPITZFADEN VS FCA US LLC [IMAGED]

CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

EVENT TYPE: Motion Hearing (Civil)
CAUSAL DOCUMENT/DATE FILED: Motion for Attorney Fees, 02/05/2020

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**Tentative Ruling on Motion for Attorneys' Fees and Costs**

*Spitzfaden v. Chrysler*, Case No. 2017-43267

Trial was to have started: October 28, 2019, 8:30 a.m., Dept. 72
Motion hearing date: March 6, 2020, 1:30 p.m., Dept. 72

**1. <u>Overview and Procedural Posture</u>.**

This is a Song-Beverly "lemon law" case involving a new 2015 Jeep Grand Cherokee, purchased by plaintiff in late 2014. The complaint was filed in November of 2017. ROA 1. It pled three counts: (1) breach of express warranty under the Song-Beverly Act; (2) breach of implied warranty under the Song-Beverly Act; and (3) fraudulent inducement - concealment. It alleged defects in the Totally Integrated Power Module ("TIPM") in the vehicle. *Id.*, pages 3-18. The case was assigned to Judge Trapp, but plaintiff challenged her and the case was reassigned to Dept. 72. ROA 6, 10, 12. Defendant Chrysler answered in December of 2017. ROA 13. Defendant dealer answered the following month, through the same counsel. ROA 17.

At a due-course CMC, this court set the case for trial in December of 2018. ROA 26-30. So far, so good.

Defendants changed counsel. ROA 33. The parties appeared at the TRC in November of 2018, and announced ready for trial. ROA 36-39. In fact, they were <u>not</u> ready. A few weeks later, plaintiff sought a trial continuance. ROA 41-44. The court was obliged to vacate the trial date in light of what it learned at the November 29, 2018 hearing. ROA 47-48, 51.

The case was re-set for trial in October of 2019. ROA 63-68. In the meanwhile, plaintiff filed a motion for leave to file his first amended complaint ("FAC"). ROA 54-57. He contended the amendments merely change "general allegations against [Chrysler] as a result of new information obtained regarding electrical system architectures used ... in the manufacture of the [vehicle]." Defendants filed opposition to the motion, contending the FAC represented a major theory change. ROA 69. Plaintiff filed reply. ROA 70. The court reviewed the papers, and on March 1, 2019 granted leave to amend. ROA 74.

The FAC alleges the same three counts as the complaint – but with a significant change in the factual

allegations. It alleges plaintiff's 2015 Jeep Grand Cherokee was equipped with a defective Power Net Architecture and its component body control module ("PNA"), and not a TIPM. See ROA 73, FAC, pp. 4-30. In particular, count three in the FAC for fraudulent inducement – concealment alleges: (1) defendants "intentionally concealed and failed to disclose the known electrical architecture defect, which was known only to them"; and (2) defendants "concealed and suppressed material facts to boost confidence in its vehicles ..." *Id*., paragraphs 217-218. Defendants separately answered the FAC. ROA 75-76.

Chrysler and the dealer (FCA US and Jack Powell Chrysler-Dodge) sought summary adjudication of count three of the FAC for fraudulent inducement - concealment and the punitive damages prayer associated with count three. ROA 78. The motion contended: (1) count three fails as there is no evidence that defendants intentionally concealed a known defect from plaintiff with intent to harm plaintiff; (2) count three is barred by the economic loss rule; and (3) there is no clear and convincing evidence of oppression, fraud, or malice to support the prayer for punitive damages. Plaintiff filed opposition countering defendants had not met their burden for summary adjudication and triable issues of material fact exist. ROA 81-88. Defendants filed reply. ROA 88-91. The court reviewed the papers, and following argument on August 16, 2019, granted the motion. ROA 96. This left the lemon law claims for trial.

The parties answered ready at the second TRC. ROA 115, 120-122. They also answered ready at the trial call on October 25, 2019. Plaintiff filed 14 motions *in limine*. ROA 97-111. Chrysler filed six. ROA 123-131. Opposition papers were also filed. ROA 133-146; 149-155. The court reviewed the papers, and prepared written tentative rulings. ROA 169. The parties then settled the case, subject to a motion for attorneys' fees and costs by plaintiff's counsel. *Ibid.* The motion was calendared by plaintiff for December 6, 2019. ROA 168. Then it was re-calendared by plaintiff for January 24, 2020. ROA 171-172. Then it was re-calendared by plaintiff for today. ROA 173-174. The court is unaware of the reasons for the several reschedulings.

Plaintiff seeks an award of over $183,000.00 in attorneys' fees and costs (*i.e*., attorneys' fees of $148,826.25, which includes a 0.5 multiplier of $49,608.75, and costs of $34,517.86). ROA 174-179. Defendants filed opposition suggesting the court apply an 80% downward multiplier to the lodestar fees sought by plaintiff and deny plaintiff's request for an upward multiplier. ROA 181-183. The opposition does not address plaintiff's costs. Plaintiff filed reply. ROA 185-189. The court has reviewed the papers.

Defendants have calendared a motion to tax plaintiff's memorandum of costs scheduled for May 1, 2020. ROA 184. The moving papers were filed February 26, 2020. *Ibid*. This is not a typo: there is a motion set for May 2020, in a case that was "settled" in October 2019.

**2. <u>Applicable Standards</u>.**

**A.** A buyer of consumer goods who is damaged by breach of the express or implied warranties may bring an action to recover damages pursuant to the Song-Beverly Act (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 121), which is designed to give consumers broader protection for breach of warranty than buyers would have under the common law or the California Uniform Commercial Code (*Jiagbogu v. Mercedes–Benz USA* (2004) 118 Cal.App.4th 1235, 1241).

As the court was sternly reminded in late 2018 in another Chrysler attorneys' fee case, the Song-Beverly Act is a *remedial* statute designed to protect consumers who have purchased products covered by an express warranty. *Jensen v. BMW of North America, Inc., supra,* at 121. It requires a manufacturer to replace "consumer goods" or reimburse the buyer if the manufacturer or its representative is unable to repair the consumer good after a reasonable number of attempts. Civil Code § 1793.2(d)(1). The Act similarly provides that if a manufacturer or its representative in this state fails to repair a "new motor vehicle" to conform to any express warranty after a reasonable number of attempts to repair, the manufacturer must replace the vehicle or pay restitution. Civil Code § 1793.2(d)(2).

A plaintiff pursuing an action under the Act has the burden to prove that (1) the product had a nonconformity covered by the express warranty that substantially impaired the use, value or safety of the product; (2) the product was presented to an authorized representative of the manufacturer for repair; and (3) the manufacturer or its representative did not repair the nonconformity after a reasonable number of repair attempts. *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1101. "The reasonableness of the number of repair attempts is a question of fact to be determined in light of the circumstances, but at a minimum there must be more than one opportunity to fix the nonconformity. [Citation.]" *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 799. For new motor vehicles there is a *presumption* of failure to conform to warranty within a reasonable number of attempts after four repairs of the same nonconformity and notification to the manufacturer of the need for repair. Civil Code § 1793.22(b)(2).

Damages for breach of an express warranty on a new automobile is governed by Civil Code section 1793.2. If the manufacturer is unable to service or repair a vehicle to conform to an express warranty after a reasonable number of attempts, the buyer may seek replacement or restitution. Civil Code § 1793.2(d)(2). Restitution shall be "in an amount equal to the actual price paid or payable by the buyer...." *Id.,* subd.(d)(2)(B). The "actual price paid or payable" may be reduced by any amount attributable to the buyer's use prior to the first time the buyer brought the car in for repair. *Id.,* subd.(d)(2)(C) (formula for calculating the "amount directly attributable to use by the buyer"). In addition, the buyer is entitled to incidental or consequential damages as defined in California Uniform Commercial Code section 2715. Civil Code § 1794; *Kwan v. Mercedes–Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 187-188.

The replacement/restitution remedy is available only for breach of an express warranty. *Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1262. Damages for breach of an implied warranty is governed by Civil Code section 1791.1(d) which provides, "Any buyer of consumer goods injured by a breach of the implied warranty of merchantability ... has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the [California Uniform] Commercial Code, and, in any action brought under such provisions, Section 1794 of this chapter shall apply." When the buyer accepts the goods, damages for breach of the implied warranty include damages available under California Uniform Commercial Code sections 2714 and 2715. Civil Code § 1794(b)(2).

Under California Uniform Commercial Code section 2714, subdivision (2), the measure of damages for breach of warranty where the buyer has accepted goods, "is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." *See Isip v. Mercedes–Benz USA, LLC* (2007) 155 Cal.App.4th 19, 25.

The jury instructions are in CACI series 3200.

**B.** California follows the "American rule," under which each party to a lawsuit ordinarily must pay his, her or its own attorney fees. *Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 237; *Trope v. Katz* (1995) 11 Cal.4th 274, 278; *Gray v. Don Miller & Associates, Inc*. (1984) 35 Cal.3d 498, 504. Code of Civil Procedure section 1021 codifies the rule, providing that the measure and mode of attorney compensation is left to the agreement of the parties "[e]xcept as attorney's fees are specifically provided for by statute." One such statute is Civil Code section 1794(d) (for the Song-Beverly Consumer Warranty Act claim).

A trial court ordinarily has broad discretion in determining a reasonable amount of attorney fees. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095. "[T]he fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. . . . The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citation.] Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's

services, ensuring that the amount awarded is not arbitrary." Id.

Generally, a trial court is not required to provide a detailed explanation of how it arrived at a fee award. *See, e.g., Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1294-1295; *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 65-67. California courts have explicitly departed from federal law requiring district courts to explain their fee awards with particularity. *See, e.g., Gorman v. Tassajara Development Corp.*, *supra*, at 66-67; *Californians for Responsible Toxics Management v. Kizer* (1989) 211 Cal.App.3d 961, 970.

Case law makes clear that prevailing plaintiffs are entitled to fees for pursuit of fee claims. *Graham v. Daimler Chrysler* (2004) 34 Cal.4th 553, 580; *Ketchum v. Moses* (2001) 24 Cal.4th 122, 133-34.

The parties' Settlement Agreement provides that plaintiff may bring this motion for attorneys' fees and costs pursuant to Civil Code section 1794(d). *See* ROA 178, Mikhov supporting declaration, paragraph 20.

**C.** A trilogy of recent published cases from two divisions of the 4th DCA and from the 2d DCA Division 7 served as reminders of what trial court may not do in addressing fee applications in lemon law cases. In *Warren v. Kia Motors* (2018) 30 Cal.App.5th 24, 39, the court held that trial courts may not make fee awards which reduce lodestars in an effort to make the award "roughly proportional" to the damages awarded. In *Etcheson v. Chrysler* (2018) 30 Cal.App.5th 831, the court held a trial court may not consider a technically invalid Code of Civil Procedure section 998 offer in determining the reasonableness of attorneys' fees incurred following the making of that offer. *Id*. at 846. And in *Hanna v. Mercedes Benz* (2019) 36 Cal.App.5th 493, the court held the trial court had erred in reducing plaintiff's counsel's fee demand from $259,000 to $60,000 based on a contingent fee agreement the lawyers had signed with their client: "While the trial court has broad discretion to increase or reduce the proposed lodestar amount based on the various factors identified in case law, including the complexity of the case and the results achieved, the court's analysis must begin with the 'actual time expended, determined by the court to have been reasonably incurred.' '[I]t is inappropriate and an abuse of a trial court's discretion to tie an attorney fee award to the amount of the prevailing buyer/plaintiff's damages or recovery in a Song-Beverly Act action.'" 36 Cal.App.5th at 510.

**D.** Even more recent, and perhaps swinging the pendulum back the other way slightly, was *Morris v. Hyundai Motor America* (2019) 41 Cal.App.5th 24. There, the 2d DCA Division 7 held that trial court's refusal to award fees for six of the 11 attorneys working on case was an appropriate remedy for overstaffing; and that the plaintiff failed to establish that trial court lacked a reasonable basis for reducing hourly rates. The plaintiff's trial counsel in *Morris* was the Knight Law Group, one of the moving counsel in the present case.

**3. Evidentiary Objections.**

Included with the opposition (ROA 181) are 53 evidentiary objections to portions of the Mikhov and Wirtz supporting declarations and certain exhibits attached to the declarations. These objections are precisely what the Supreme Court criticized in *Reid v. Google, Inc*. (2010) 50 Cal.4th 512, 532, and the Court of Appeal "declined to reward" in *Cohen v. Kabbalah Centre, Intl.* (2019) 35 Cal.App.5th 13, 21 ("When opposing a motion, objecting to every single thing with no display of professional judgment or restraint is an abusive practice"). These blunderbuss, boilerplate objections are overruled.

Included with the reply (ROA 187) are 2 evidentiary objections to the attorney Fisher opposition declaration. A proposed order is not provided for the evidentiary objections. *See* CRC 3.1354(c) (proposed order requirement in summary judgment context). Plaintiff filed a response (ROA 188) to defendants' evidentiary objections. A response to evidentiary objections is not contemplated by the Rules of Court. Plaintiff's evidentiary objections are overruled.

Also, trial court rulings on motions for attorneys' fees in other unrelated cases (evidentiary objections,

nos. 2-48) are not binding precedent. *E.g.*, *Schachter v. Citigroup, Inc.* (2005) 126 Cal.App.4th 726, 738.

**4. Discussion and Ruling.**

**A.** The plaintiff seeks $148,826.25 in fees, plus costs of $34,517.86. The accepted settlement offer was $110,000.00, and the car cost about $32,000.00 new, not including finance charges and extras. The fees sought are clearly out of proportion to the results obtained. If the court were free to reduce the fees to bring them in line with the value of the case, the court would do so. But the Courts of Appeal have made plain that the court lacks authority to do so. Instead, the rule appears to be that as long as plaintiff's counsel can articulate some valid "reason" for incurring the fee, the trial court must award it. While this trial judge accepts, as it must, these appellate court expositions as reflective of the current state of the law, the court would be remiss in failing to add that it nevertheless considers this to be bad policy for our state, for several interrelated reasons.

It has long been held that the "experienced trial judge is the best judge of the value of professional services rendered in his [or her] court, and while his [or her] judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong." *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 148; *see also 569 East County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 433. Yet the Courts in *Warren, Hanna* and *Etcheson* reversed the trial courts because the Justices interpreted Civil Code section 1794(d) as forbidding consideration of the legitimate needs of the case or the proportionality of the fee request to the result obtained in the litigation. The Legislature should step in to address this.

Lemon law cases are commodity cases; rarely are "cutting edge" legal principles involved.* Ordinarily, these cases seek to remedy the problems experienced by a single consumer with a single vehicle. Yet because of the current wording of section 1794(d) as interpreted by the Courts of Appeal, some in the lemon law plaintiff's bar has been emboldened to over-litigate cases the manufacturers regularly seek to settle, with no benefit to the injured consumer. Indeed, the over-litigation for purposes of padding the fee application can actually injure the consumer, by delaying resolution of the case and the buy-back of the vehicle while the lawyers argue over fees. As this court has previously observed, the fee shifting provisions of the "lemon law" statutes have been twisted from the purpose contemplated by the Legislature into something the well-intentioned drafters of the statutory framework would scarcely recognize. When a statutory scheme becomes a vehicle for lawyers to create unnecessary conflict for no other reason than running up the fees, that statute needs to be re-examined. When lawyers put their own fee-driven interests ahead of the interests of their clients, the integrity of the legal profession is threatened. When court time that could be more beneficially used in other areas is instead used in resolving bloated fee disputes, the courts and the litigants suffer.

The court has expressed these views before, and has urged the Legislature to amend Civil Code section 1794(d) by adding the following language: "In determining whether fees were reasonably incurred, the court may consider, among other factors, the legitimate needs of the case, the reasonableness of the parties' efforts to settle the case, and the proportionality of the fee request to the result obtained in the litigation for the injured consumer."

Unless and until this suggestion gains traction in the Legislature, the court considers its hands largely tied in this matter. But not entirely tied.

**B.** The request for a 0.5 multiplier is denied. Fee enhancements by means of multipliers or otherwise are well recognized in California. *E.g., Serrano v. Priest* (1977) 20 Cal.3d 25 ("*Serrano III*"); *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407; *City of Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78; *Kern River Public Access Com. v. City of Bakersfield* (1985) 170 Cal.App.3d 1205. Under California law, the trial court begins by fixing the "lodestar" or "touchstone" reflecting a compilation of the time spent and reasonable hourly compensation of each attorney or legal professional involved in the presentation of the case. The court then adjusts this figure in light of a number of factors that militate in favor of *augmentation or diminution*. *Serrano III*, 20 Cal.3d at 48-49 (emphasis by this court). The court

must consider such factors as the nature and complexity of the case, the results obtained, the amount of work involved, the available resources, the nature of the issues and the burden of discovery, the skill required and the time consumed, the court's own knowledge and experience, the time spent, and rates charged in the community for similar work. *See Contractors Labor Pool, Inc. v. Westway Contractors* (1997) 53 Cal.App.4th 152, 168; *see also Ghirardo v. Antonioli* (1993) 14 Cal.App.4th 215, 219.

The purpose of a fee enhancement is not to reward attorneys for litigating certain kinds of cases, but to fix a reasonable fee in a particular action. The Civil Code authorizes an award of *reasonable* attorney fees, not an award of reasonable fees plus an enhancement. Nonetheless, the courts recognize that some form of fee enhancement may be appropriate and necessary to attract competent representation in cases meriting legal assistance. In *Press v. Lucky Stores, Inc*. (1983) 34 Cal.3d 311, 322, our Supreme Court implicitly found that it would be appropriate to enhance an award by means of a multiplier " 'to reflect the broad public impact of the results obtained and to compensate for the high quality of work performed and the contingencies involved in undertaking this litigation.'" This does not mean, however, that the trial courts should enhance the lodestar figure in every case of uncertain outcome or where the work performed was of high quality. The challenge for the trial courts is to make an award that provides fair compensation to the attorneys involved in the litigation at hand and encourages litigation of claims that in the public interest and merit litigation, without encouraging the unnecessary litigation of claims of little public value.

The classic situation justifying an upward adjustment of the lodestar figure was seen in the *Serrano* cases [*Serrano v. Priest* (1971) 5 Cal.3d 584 ("*Serrano I*"), *Serrano* v. *Priest* (1976) 18 Cal.3d 728 ("*Serrano II*"), and *Serrano III*, *supra*, 20 Cal.3d 25]. The litigation there revolved around California's system for financing public schools. The plaintiffs succeeded in overturning the existing system, obtaining an order that it be replaced by a system designed to provide an equitable distribution of state funds between all public schools. The litigation resulted in no fund of money from which attorney fees might be paid, nor did it result in any monetary recovery by the plaintiffs. The plaintiffs were under no obligation to pay their attorneys for their efforts. It appears that the attorneys did, however, receive some funding from charities or public sources for the purposes of prosecuting cases of the character involved in that action--a factor the court found to be relevant in determining the size of an award of fees. *Serrano III*, *supra*, 20 Cal.3d at p. 49, fn. 24. Finally, an award of fees was uncertain not only because of the complexity and difficulty of the legal issues involved, but because there was no clear statutory authority for shifting attorney fees to the defendant.

The court in *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, contrasted that case with the situation in *Serrano III*: "the present case is in essence a personal injury action, brought by a single plaintiff to recover her own economic damages. Weeks and her attorneys had a fee agreement by which her attorneys were assured of a portion of any recovery. In addition, because of the availability of attorney fees under the FEHA, the attorneys had reason to assume that the amount of Weeks's recovery would not limit the amount of fees they ultimately received. Thus, the risk that Weeks's attorneys would not be compensated for their work was no greater than the risk of loss inherent in any contingency fee case; however, because of the availability of statutory fees the possibility of receiving full compensation for litigating the case was greater than that inherent in most contingency fee actions." 63 Cal.App.4th at 1174.

This case is a lot more like *Weeks* than *Serrano*. The action was neither novel nor complex. It was a garden variety lemon law case prosecuted by two law firms that specialize in lemon law litigation. The action did not make new law or confer a benefit on anyone other than Mr. Spitzfaden. The nature of the case did not preclude plaintiff's counsel from handling other cases. The declarations of plaintiff's counsel make no such assertion. *See* ROA 178-179. No multiplier is appropriate in this case, as there was always a 100% chance of a fee recovery if the claims were meritorious. This is not a close call.

The result of this ruling is that the starting point is now the lodestar of $99,217.50.** The opposition papers suggest the fee award should be reduced further by an 80% downward multiplier. So the court proceeds to analyze the rates charged and the time spent.

**C.** The court cannot say that Mr. Mikhov's hourly rate of $550/hr. is outside the range of reasonableness for lawyers of approximately 17 years' experience with his credentials. ROA 178, Mikhov supporting declaration, paragraphs 24-25. The court cannot say that the hourly rates of the senior level attorneys and associate attorneys at Knight Law Group, ranging from $225-$400/hr., are outside the range of reasonableness for lawyers with similar experience. *Ibid*., paragraphs 26-34. The court cannot say that Mr. Wirtz's hourly rate of $650/hr. is outside the range of reasonableness for lawyers of approximately 32 years' experience with his credentials. ROA 179, Wirtz supporting declaration, paragraphs 3-4. The court cannot say that the hourly rates of the senior level attorneys and associate attorneys at Wirtz Law, ranging from $400-$450/hr., are outside the range of reasonableness for lawyers with similar experience. *Ibid*., paragraphs 5-8.

In July of last year, in *Allen v. Jaguar Land Rover*, Case No. 2017-42273, the court addressed the request for $500/hr. by a Los Angeles lemon law lawyer in practice since 2003. The court reduced the hourly rate to $450/hr. Mr. Mikhov has also been an attorney since 2003, and Mr. Wirtz (licensed in California since 1988) has more experience than the *Allen* lawyer. This confirms that their design rates are perhaps at the high end of, but still within, the appropriate range. The Mikhov/Wirtz rates are the high water marks for their respective firms; the subordinate rates claimed are all well below these partner/supervisor rates. As such, the billing rates of plaintiffs' attorneys are at the high edge of reasonable.

**D.** The court finds this case was gravely overstaffed. Plaintiff seeks fees for a total of 17 billers (senior lawyers, associate attorneys and legal assistants/paralegals), one of whom billed as few as 2.8 hours on the file. This case merited no more than one partner, one associate and one paralegal from each of the two firms involved. Even this staffing, a total of six billers, would be considered unreasonable by many clients if those clients were actually directing the activities of their counsel (clearly Mr. Spitzfaden was not).

The court starts by excising the truly transitory billers:

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|---|---|---|
| Donnelly | 2.8 hours at $400/hr. | $1120.00 |
| Inscore | 4.4 hours at $400/hr. | 1760.00 |
| Hernandez | 8.0 hours at $375/hr. | 3000.00 |
| Martinez | 7.6 hours at $275/hr. | 2090.00 |
| | | $7970.00 |

Transitory billers on a file are indicative of inefficiency. No client who is paying attention would willingly pay for a non-supervisory biller*** to "get up to speed" on the facts, background and procedural posture of a case only to spend just a few hours undertaking tasks that just as easily could have been carried out by billers who already understand the needs of the case. And if no client aware of the facts would pay, in the court's view there is no basis for an order requiring the opposing party to pay. Another way of saying this: the fees of transitory billers are not reasonable.

The court makes the foregoing observations having run cases and supervised associates and sent out bills and successfully pursued attorneys' fees applications while in practice in San Diego prior to 2005, and having ruled on hundreds of attorneys' fees applications in a variety of settings in the 15 years since. "[T]he trial court is in the best position to value the services rendered by the attorneys in his or her courtroom ... the court may rely on its own knowledge and familiarity with the legal market, as well as the experience, skill, and reputation of the attorney requesting fees." *See 569 East County Boulevard, LLC* v. *Backcountry Against the Dump, Inc., supra,* 6 Cal.App.5th at 436-437.

The court now turns to an examination of whether, as among the 13 remaining (non-transitory) billers, there was unnecessary duplication of effort justifying further reductions and/or unnecessary and unreasonable billing. Defendants claim there was: (1) unnecessary and unreasonable fees (totaling $2530.00) in ascertaining the proper defective component (2) unnecessary and unreasonable fees

($8360.00) associated with defending defendants' successful motion for summary of count three of the FAC for fraudulent inducement - concealment and prayer for punitive damages prayer associated with the count; (3) excessive travel expenses at inflated billing (approximately $23,090.00); and (4) duplicative billing (no total sum stated).

The court is of the opinion that the staffing method chosen by plaintiff's counsel is designed to increase fee requests at the expense of efficiency. This is consistent with the fears expressed in section 4A above. That said, not all the time expended by the remaining billers was perforce unnecessary and unreasonable. In the reply papers, plaintiff justifies many of the charges, including the time for travel. *See* ROA, 185, reply memorandum, pp. 5:20-8:20. The fact that the staffing method is inefficient does not necessarily result in duplication of billing (although there were a large number of billers). And in this regard, plaintiff states attorney time "was saved by" counsel's "use of a number of task-specialized attorneys." *Ibid*., p. 5:17-18. Also, the time expended in drafting the fee motion and anticipated time in making reply and attending the hearing (about 12 hours) is reasonable.

However, defendants should not be charged with paying for plaintiff's fees ($8360.00) in opposing the successful motion for summary adjudication. The fraudulent inducement - concealment claim, along with the attendant claim for punitive damages, lacked merit from the moment it was added. The court also reduces the fees by $5000.00 for the unnecessary duplication of effort arising from two TRCs and plaintiff's tardy recognition of the proper defective component. The court agrees with defense counsel that, if the case was properly staffed with attentive counsel with a 10,000 foot level view of the facts of the case (instead of with lawyers in the interrogatory silo and lawyers in the document request silo and lawyers in the expert designation silo and lawyers in the deposition silo and lawyers in the motion *in limine* silo, etc.), plaintiff would have recognized much earlier than he did that his factual theory (PNA vs. TIPM) was all wrong.

**E.** Turning finally to the request for costs in the amount of $34,517.86: A ruling on costs is deferred to May 1, 2020, when defendants' motion to tax plaintiff's memorandum of costs is scheduled to be heard. ROA 184. The moving papers have been filed. *Ibid*.

In his reply (ROA 185, p. 10:18-21), plaintiff states the court should disregard the motion to tax costs and award costs to plaintiff since the motion to tax costs was served and filed one day late. The court at this point expresses no opinion on the timeliness or the merits of the motion to tax costs.****

In light of the foregoing, the court awards attorney's fees of $77,887.50, and directs plaintiff's counsel to forthwith submit a form of judgment accordingly. The ultimate cost award is deferred to the May 1, 2020 hearing on defendants' motion to tax plaintiff's costs.

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* In a non-commodity, high risk case involving defective automobiles (*Lockabey v. American Honda*, No. 2010-087755), this court awarded very substantial attorneys' fees several years ago. The efforts of counsel in that case (which included some of the non-affiliated lawyers Mr. Mikhov used as exemplars in paragraph 37 of his declaration) conferred a benefit on a great number of consumers. Not so here.
**The attorneys' fees represent $43,502.50 sought by Knight Law (ROA 178, Mikhov supporting declaration, paragraph 2, Ex. A) and $55,715.00 sought by Wirtz Law (ROA 179, Wirtz supporting declaration, paragraph 11, Ex. A), which includes attorneys' fees in making this motion.
***Mr. Mikhov only spent 5.2 hours on the file; maybe he should have spent more time. In any event, his was supervisory time and thus not excised.
****A motion to tax or strike costs must be served and filed within 15 days after service of the memorandum of costs. *See* CRC Rule 3.1700(b)(1). However, the deadline can be extended as follows: (1) the parties may agree in writing to extend the time for service and filing of a motion to strike or tax costs (*see* CRC Rule 3.1700(b)(3)); (2) the court may extend the deadline for up to 30 days. (*see* CRC Rule 3.1700(b)(3)); and (3) if the memorandum of costs was served by mail within California, the deadline for filing the motion to tax or strike costs is extended for five days as provided in Code of Civil

Procedure section 1013(a) (*see* CRC 3.1700(b)(1); *see also Nevis Homes LLC v. CW Roofing, Inc.* (2013) 216 Cal.App.4th 353, 356). Plaintiff's memorandum of costs was filed and served by US mail within California on defendants on February 5, 2020. ROA 177. Defendants' motion to tax plaintiff's memorandum of costs was filed February 26, 2020. ROA 184.