S266034

No. S_____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

LISA NIEDERMEIER,

Plaintiff and Respondent,

v.

FCA US LLC,

Defendant and Appellant.

California Court of Appeal, Second District, Division One
Civil No. B293960
Appeal from Los Angeles County Superior Court
Case No. BC638010
Honorable Daniel Murphy

PETITION FOR REVIEW

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ISSUES PRESENTED

If a car manufacturer fails to repair a defective vehicle and willfully fails to provide the consumer with remedies under the Song-Beverly Act (Act), a consumer often gets fed up and trades in her defective vehicle during the pendency of her lawsuit. Under these circumstances, the question becomes whether—and how—to account for that trade in.

The Act defines "restitution" as the "amount equal to the actual price paid or payable by the buyer." (Civ. Code, § 1793.2, subd. (d)(2)(B).) The Act expressly identifies only two permissible offsets to this statutory restitution award.

Here, the Court of Appeal implied an *additional* offset: for the amount of the trade-in credit the consumer received from a third party (during the pendency of the lawsuit) as a result of the manufacturer's willful delay in promptly affording relief as mandated by the Act. The court justified its decision to create a new, unenumerated offset by reasoning that it was not applying an offset, but rather was applying a reduction to the statutory "paid or payable" restitution amount. But the effect is the same: The court reduced the statutorily-delineated restitution amount on a basis found nowhere in the Act—that is, it applied an offset.

The opinion not only creates an implied offset to the statutory restitution award, it may result in a *multiplied*

reduction to a manufacturer's liability for civil penalties. Section 1794 permits an award of civil penalties for willful violation of the Act, capped at two times "actual damages." To the extent that the statutory restitution amount is part of the "actual damages" base for calculating civil penalties, the Court of Appeal's published holding has the inexorable effect of creating an artificially lower cap on civil penalties—notwithstanding the fact that the manufacturer's egregious conduct giving rise to a willful violation remains unchanged.

This petition therefore presents the following first-impression issues of statutory construction, which impact every consumer's lemon law case across California:

1. Does the Act's statutorily defined restitution remedy include an unstated, unenumerated offset for a trade-in credit?

2. If the amount that a consumer has received in a trade-in transaction must be subtracted from the consumer's recovery, should that amount be taken from the Act's statutorily defined restitution remedy or should it instead be subtracted from the consumer's total recovery—that is, so that the calculation of civil penalties (and the policy underlying them), remains unaffected?

INTRODUCTION

After sixteen repair attempts and three unsuccessful requests that FCA US, LLC ("Chrysler") buy back her defective vehicle, Lisa Niedermeier ("Plaintiff") filed her lawsuit, alleging a violation of the Act for breach of her express warranty. During the pendency of that lawsuit, Plaintiff became fed up and traded in her vehicle for one she could rely upon. Plaintiff won at trial, and the jury awarded civil penalties against Chrysler for its willful failure to provide her with a prompt buyback.

Plaintiff petitions for review of the Court of Appeal's published opinion, which holds for the first time that the Act's restitution remedy includes an *unstated* mandatory offset for any trade-in credit a consumer receives when selling a defective vehicle after the manufacturer has violated its statutory duty to promptly repurchase or replace it. Until this opinion, no case has held that a manufacturer was entitled to an unenumerated offset under the Act.

The opinion departs from the Act's plain language and purpose by implying an offset to restitution that appears nowhere in the statute. The opinion holds that when a consumer trades in her defective car *after* the manufacturer has violated its statutory duty to promptly buy back the defective vehicle, the restitution award must be reduced by the trade-in credit—a result that

incentivizes a manufacturer's delay by reducing the restitution that a manufacturer would be obligated to pay.

The Court of Appeal arrived at this result by ignoring prior precedent that rejected injection of common-law considerations into the Act and instead applied a common-law definition of restitution. The court elevated its policy conclusion that denying an offset for trade-in credits might undermine the Act's goal of having manufacturers label vehicles reacquired under the Act as "Lemon Law Buybacks." But it is the *Legislature's* job to declare policy, not the Court of Appeal's. Only this Court can definitively say whether the opinion properly applies section 1793.2 and properly effectuates the Legislature's intent.[1]

The Legislature created the Act's remedies to incentivize manufacturers to promptly buy back inoperative cars and label them as lemons. In the case of a statutory breach of express warranty, the damages under the Act include "rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2." (§ 1794, subd. (b).) Section 1793.2, subd. (d), in turn, provides that "[i]n the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer" (§ 1793.2, subd. (d)(2))—i.e. the price stated on the purchase contract. This fixed amount is

[1] Statutory references are to the Civil Code unless stated.

subject to only two statutory offsets, which account for (1) the buyer's use of the car before it was first brought in for repairs, and (2) non-manufacturer installed options. (§§ 1793.2, subds. (d)(2)(B) & (C).) No other offsets against statutory restitution are permitted under the plain language written by the legislature.

By departing from the Act's plain language to imply an unenumerated deduction to statutory restitution, the opinion creates a conflict among existing published precedent. Prior to the opinion, the Courts of Appeal have *uniformly* recognized that:

- The Act's purpose is to incentive manufacturers to provide *prompt* remedies by *preventing* them from securing any offsets that arise *only after* the manufacturer has failed to comply with its obligations under the Act to promptly fix or buy back the vehicle.
- The possibility that the statutory remedy might create a windfall for consumers yields to the Act's expressed purpose of protecting consumers.
- The Act should not be construed in a manner that lets manufacturers benefit from delays in complying with the Act's requirements.

Contrary to this precedent, the opinion's implied offset rewards manufacturers for their failure to provide consumers

with the Act's prompt remedies even where, as here, the jury found that the manufacturer's non-compliance was willful. The manufacturer's willful failure here to promptly buy back petitioner's vehicle or promptly provide restitution after the repair efforts failed is what forced petitioner a year into her litigation into the self-help remedy of purchasing a new, safe vehicle and trading in the car that defendant refused to buy back. Yet, Chrysler now gets a $19,000 offset as a stand-in for a defective car that Chrysler *admitted* was only worth $12,000 or $13,000 *assuming that it was fully operational*, which it was not.

Even worse, because the Court of Appeal held that Chrysler receives this offset as a reduction to the "paid or payable" statutory restitution remedy, Chrysler may catch an even bigger break by reducing its liability for the civil penalties that it would otherwise be obligated to incur—for no reason other than Chrysler waited for Plaintiff to sell her car. Indeed, section 1794 provides that if a buyer establishes that a manufacturer's failure to provide statutory buyback or replacement remedies was "willful," the judgment may include a civil penalty that does not exceed two times "the amount of actual damages." (§ 1794, subd. (c).) If the offset for the trade-in credit is deducted from the "actual damages" base for calculating the civil penalty cap, then the manufacturer gets a double windfall.

The opinion candidly acknowledges that "prior cases have rejected interpretations of the Act that allow manufacturers to benefit from delays in compliance." (Opn. 24.) But the opinion dismisses all such concerns on the premise that these concerns should be "*outweighed* by the consequences of interpreting the Act in plaintiff's favor, namely actively incentivizing buyers to introduce lemon vehicles into the used-car market without the labeling and notifications required of manufacturers who reacquire vehicles." (*Ibid.*, italics added.) Those "prior cases," however, rested on assessments of the Legislature's intent. By finding their analysis "outweighed" other concerns, the Court of Appeal effectively stepped into the Legislature's shoes and made a policy determination that conflicts with how every court to date has construed the Legislature's intent.

This Court should resolve this conflict and ensure that the Act is properly construed and applied as the Legislature intended. This Court should determine whether a trade-in offset to statutorily-defined restitution is proper based on well-established legislative intent and public policy considerations—and, further, whether such an offset has an effect on the civil penalties that juries may award in instances where, as here, a manufacturer's violations of the Act were *willful*. Even if it is proper for there to be a trade-in offset against a consumer's recovery, that offset should not come out of the statutorily-

defined "restitution" remedy. It should, instead, be deducted from the consumer's total recovery, so that it has no bearing on the amount of the civil penalty that can be assessed for a manufacturer's willful violation of the Act.

The law will remain uncertain, resulting in significant prejudice to consumers in this state unless this Court steps in. Insofar as this Court provided great clarity on damages under the Act in *Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal. 5th 966, the question of damages submitted here is of paramount importance to consumers and manufacturers.

STATEMENT OF THE CASE

A. Factual Background.

1. Petitioner purchases a new Jeep Wrangler for $40,000, which Chrysler supposedly warrants against defects.

Petitioner, plaintiff Lisa Niedermeier, purchased a new Jeep Wrangler in 2011 for approximately $40,000, which Chrysler warranted to be fully operational via an express warranty. (Opn. 3-4.) Niedermeier soon learned that Chrysler could not live up to its warranty and would not live up to its legal obligations.

2. Starting soon after the purchase and continuing for three years, petitioner brings the Jeep to Chrysler *sixteen times* for repairs.

A month after the purchase, Niedermeier had to bring her Jeep for repairs. (2RT/910-911.) This would be the first of sixteen times she sought repairs over the next three years. (3RT/1610.) The Jeep's recurring problems subjected her and those on the road to danger, including stopping accelerating on freeways and busy intersections. (2RT/912-913, 917.)

3. Chrysler cannot repair the Jeep yet denies petitioner's requests for the "prompt" buy-back relief that the Act requires.

The Act requires manufacturers to act promptly once they learn that a vehicle is defective. (§ 1793.2.) A manufacturer must commence repairs in a "reasonable time," and complete them after a "reasonable number of attempts." (§§ 1793.2, subds. (b), (d)(1) .) Manufacturers that are unable to do so have *affirmative* duties to either "promptly replace" the vehicle or "promptly make restitution to the buyer," and to brand any promptly re-acquired vehicle as a lemon. (§§ 1793.2, subd. (d)(2), 1793.22, 1793.23, subds. (c)-(e) ; *Kirzhner, supra,* 9 Cal. 5th at p. 984.) Thus, the consumer has no obligation to call a

manufacturer to request a buyback; a consumer's *only* obligation is to present the vehicle for repair. (*Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 302-303 (*Krotin*)).

Nevertheless, Plaintiff asked Chrysler on multiple occasions to promptly buy back or replace her inoperative car. (2RT/935-947; Opn. 3.) Chrysler refused. (Opn. 3.) Instead, Chrysler offered her $500 to go away and when she persisted, Chrysler offered her $2,000, the amount she incurred for rental car expenses for the 75-days the Jeep was out of service. (2RT/938, 941; 3RT/1510.)

Plaintiff filed suit on October 21, 2016.

4. After Chrysler fails to comply with the Act, petitioner trades in her defective vehicle.

In need of a safe and functioning car, Niedermeier purchased a Yukon from a third-party dealer for the obviously inflated price of $80,000,[2] which the dealer "reduced" to $61,000 by giving a $19,000 trade-in "credit" on the Chrysler vehicle, a car that had broken down multiple times. (See Opn. 3-4.)

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[2] The retail price for a 2021 Yukon is as low as $50,700—i.e. less than what plaintiff paid for the Yukon *even after* accounting for the trade-in. See https://www.edmunds.com/gmc/yukon/

There was no evidence—and no finding—that a Jeep that broke down 16 times in three years was *actually* worth $19,000 or that the "credit" from GMC *actually* reduced the price of the Yukon. Indeed, as the Department of Consumer Affairs has explained, dealers often artificially inflate trade-in credits along with a car's purchase price so that, without giving the purchaser any actual value, they can create the impression that a consumer is getting a large discount on a seemingly expensive car now in their price range. (RB 74-75.)

This case is a perfect example. Chrysler admits that Niedermeier's defective Jeep would have only been worth $12,000 or $13,000 if it had been fully functioning—not the $19,000 it was assigned in a bogus trade-in transaction. (2RT/953.)

B. Procedural History.

1. A jury awards restitution and a civil penalty for Chrysler's willful violation of the Song-Beverly Act.

At trial, after hearing evidence that Niedermeier had traded in the car, the jury found that Chrysler willfully violated the Act. (Opn. 4-5, 9.) It awarded Niedermeier $39,799 for the "purchase price of the vehicle," $5,000 for incidental and consequential damages, and $59,376.65 in civil penalties.

(Opn. 4-5.) Applying section 1793.2(d)(2)(C), the jury found a pre-notice-of-defect mileage offset of $5,214.17. (Opn. 5.)

2. The trial court rejects Chrysler's attempt to disturb the jury's damages determination and enters judgment in petitioner's favor.

In post-trial motions, Chrysler argued it was entitled to an offset for the Jeep's trade-in. (Opn. 4-5.) The trial court denied the motions. (*Ibid.*) "Relying primarily on *Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187 (*Martinez*) and *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235 (*Jiagbogu*), the trial court concluded that reducing the damages and penalty would be 'inconsistent with the proconsumer policy supporting the Act,' and would 'reward defendant for its delay in replacing the car or refunding plaintiff's money when defendant had complete control over the length of that delay, and an affirmative statutory duty to replace or refund promptly.' The trial court stated that "[i]nterpretations that would significantly vitiate a manufacturer's incentive to comply with the Act should be avoided." (Quoting *Jiagbogu*, at p. 1244.)" (Opn. 5.)

3. The Court of Appeal reverses, adopting an implied trade-in credit offset that reduces the judgment and civil penalty.

Chrysler appealed on the grounds that the award should be reduced by the amount of the trade-in credit. (Opn. 6, 17.)

The Court of Appeal agreed, reducing the statutory restitution award to reflect the value received from a third party for the plaintiff's trade-in and also reducing the civil penalty. (Opn. 3.) The opinion holds that the "'amount equal to the actual price paid or payable by the buyer'" under the Act "does not include amounts a plaintiff has already recovered by trading in the vehicle at issue." (Opn 2.) Rather than applying the Act as written (see RB 38-41), the opinion agrees with Chrysler's position that "the concept of restitution contemplates that the buyer is restored to the same economic position she would have been in had she never purchased the vehicle. By obtaining a full refund in addition to the proceeds from the trade-in, plaintiff received 'a windfall that cannot possibly be characterized as 'restitution.'" (Opn. 17.)

Parting company with prior case law rejecting the application of common-law principles to the Act's statutory scheme, the opinion reasons that the Legislature's choice of the word "restitution" indicates the Legislature intended to adopt

a "common law-gloss" on its remedies which would "'restore "the *status quo ante* as far as is practicable."'" (Opn. 18, 23.) The opinion also reasons "that the trial court's decision, if upheld, would effectively nullify the Act's requirement that manufacturers notify subsequent purchasers of reacquired vehicles' defects, because 'no rational consumer would return her defective car' and forego the opportunity to recover additional money by selling it." (*Ibid*.)

The opinion candidly acknowledges "that prior cases have rejected interpretations of the Act that allow manufacturers to benefit from delays in compliance" with the Act's requirements that manufacturers promptly buy back a lemon and label it a lemon. (Opn. 24, citing *Jiagbogu*, *supra*, 118 Cal.App.4th at p. 1244.) But the opinion dismisses all such concerns, believing that those concerns would be "*outweighed by* the consequences of interpreting the Act in plaintiff's favor, namely actively incentivizing buyers to introduce lemon vehicles into the used-car market without the labeling and notifications required of manufacturers who reacquire vehicles." (Opn. 24, italics added.) In so holding, the Court of Appeal ignores the undisputed fact that Chrysler was asked *three times* to repurchase and brand the vehicle before the lawsuit was filed. Moreover, the court never addresses how Plaintiff—or any other consumer—can, as a practical matter, ever bear the burden of ensuring that a vehicle

is branded when, as the trial court recognized, "defendant had complete control over the length of that delay, and an affirmative statutory duty to replace or refund promptly." (See Opn. 5.)

In light of its offset analysis, the Court of Appeal applied a $19,000 offset as the vehicle's trade-in value and then went on to reduce the civil penalty awarded by the jury. (Opn. 27-28.) Although Chrysler's conduct was no less violative of the Act at the time of trial than it was when the case was filed, the Court of Appeal reduced the civil penalty cap simply because Chrysler waited it out and put Niedermeier into a position where she was left with no choice but to get rid of her vehicle.

4. The Court of Appeal denies rehearing.

Plaintiff timely petitioned for rehearing or, alternatively, partial depublication, on the ground that the opinion erroneously indicated that petitioner conceded that the civil penalty should be reduced in light of the trade-in offset—and that the appellate court therefore need not reach the issue. (See Rehearing Pet.; Opn. 28 & fn. 8.)

Plaintiff intended no such concession. At oral argument, Plaintiff clearly averred that "even if you were to take an offset, you take it at the very end. I mean, Chrysler's saying that the offset that they're advocating is a stand-in for a return of the car

right? That's something that would happen at the very end of the litigation. That's not something that would go into the calculation of what are the restitution damages on the front end." (Recording of Oral Argument Transcript, 57:54-58:14.)

Plaintiff requested that the Court of Appeal either decide that issue or depublish that portion of the opinion. The court denied both requests. (See 11/20/2020 Order Denying Pet.)

WHY REVIEW IS NECESSARY

I. The Court Should Grant Review To Resolve An Important Issue Of Statutory Construction Of Statewide Significance: Whether The Song-Beverly Act Provides Manufacturers With An Unenumerated Offset Against Statutory Restitution For A Vehicle's Trade-In That Could Only Arise Because The Manufacturer Failed To Promptly Buy Back The Vehicle.

A. The opinion implies an offset to statutory restitution unsupported by the Act's text.

The Act is clear: "[R]estitution" means the amount "paid or payable" on the vehicle, subject to only two, statutorily-defined offsets. (§ 1794, subd. (b), italics added.) Section 1793.2, subdivision (d)(2) requires manufacturers that are "unable to service or repair a new motor vehicle" after "a reasonable number of attempts" to either "promptly replace the new motor vehicle" or "promptly make restitution to the buyer in accordance with subparagraph B" and then brand it as a lemon at that time. (§§ 1793.2, subd. (d)(2), 1793.22, 1793.23, subds. (c)-(e).)

"Restitution" is defined as the "amount equal to the actual price paid or payable by the buyer." (§ 1793.2, subd. (d)(2)(B).) This is an amount typically fixed at the time of purchase—it is

the price stated in the boxes at the top of the purchase contract. The Act includes specific details as to how to calculate that amount, such as including charges for manufacturer-installed options but excluding non-manufacturer installed options and including certain enumerated collateral charges on the purchase contract such as sales and use taxes, and license and registration fees. (See *ibid.*)

The Act does not reference *any* common-law definition of "restitution"; the Act instead repeatedly refers to the specific *statutory* standard set forth in section 1793.2. (E.g., §§ 1793.2, subd. (d)(2) [manufacturer shall "promptly make restitution to the buyer in accordance with subparagraph (B)"], 1793.22, subd. (d)(5) [manufacturer must "make restitution in accordance with paragraph (2) of subdivision (d) of Section 1793.2"], 1793.23, subd. (c) [referring to vehicle "accepted for restitution... pursuant to paragraph (2) of subdivision (d) of Section 1793.2"], 1793.25, subd. (a) [referring to "restitution to the buyer or lessee pursuant to subparagraph (B) of paragraph (2) of subdivision (d) of Section 1793.2"].)

Under the *statutory* definition of restitution—the "actual price paid or payable"—the only offsets allowed are (1) for the use of the vehicle before it was first brought for repairs, and (2) for manufacturer-installed options. (§ 1793.2, subds. (d)(2)(B) & (C).) These are the only statutorily-permitted reductions to restitution.

(See *Mejia v. Reed* (2003) 31 Cal.4th 657, 666-667 [*expressio unius est exclusio alterius* dictates when legislature manifests its intent to include specific matters, legislature intended to *exclude* other matters]; *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 991 [inclusion of the one means the exclusion of another].) As one appellate court recognized: "This omission of other offsets from a set of provisions that thoroughly cover other relevant costs indicates legislative intent to exclude such offsets." (*Jiagbogu, supra,* 118 Cal. App. 4th at pp. 1243–44.)

In holding that the jury's statutory restitution award had to be reduced by the trade-in credit, the opinion contravenes the Act's plain language. The opinion seeks to explain away its implied offset by reasoning that it was not an offset at all, just part of the calculation of statutory restitution. (Opn. 26.) But as this Court has previously held, an exception to how a statute ordinarily operates *is* an offset. (See *Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731-733 [tax board's attempt to reduce taxpayer's damages based on unpaid taxes was an offset, not a question over the proper measure of damages].) And no matter how it is characterized, the opinion's reduction of the restitution award is embodied nowhere in the Act.

The application of the trade-in reduction—including whether it is proper and when it should be taken—merits this Court's review, since it will affect consumers across the State.

B. The opinion undermines the Act's remedial purpose of incentivizing manufacturers to promptly buy back vehicles and label them lemons.

The Court should also grant review, because the opinion's created-from-thin-air statutory carve-out from restitution will undermine the Act's remedial purposes. The opinion accurately notes that "prior cases have rejected interpretations of the Act that allow manufacturers to benefit from delays in compliance" but the opinion brushes that concern aside by concluding that "[t]o the extent that concern exists here… it is outweighed by the consequences of interpreting the Act in plaintiff's favor, namely actively incentivizing buyers to introduce lemon vehicles into the used-car market without the labeling and notifications required of manufacturers who reacquire vehicles." (Opn. 24.)

That, however, is a policy conclusion for the Legislature to make—and it is one that conflicts with the Act's plain language. The issue is not whether a court can come up with a policy rationale for a trade-in credit offset. It is whether a literal application of the Act's express language—which does *not* allow a trade-in credit offset—would at least marginally serve section 1793.2, subdivision (d)(2)'s purpose.

Review is necessary because it does. (See *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 133 [appellate court

improperly created "a judicially crafted exception to the unambiguous language of the mediation confidentiality statutes in order to accommodate a competing policy concern"; "We and the Courts of Appeal have consistently disallowed such exceptions, even where the equities appeared to favor them"].)

The Legislature wrote the Act so that a manufacturer's obligations to promptly repair or buy back the car arise as soon as the car is brought in for repair and is not fixed after a reasonable number of attempts. (*Krotin, supra,* 38 Cal.App.4th at pp. 302-303.) The Legislature thus intended to *cut off* a manufacturer's ability to seek any sort of reduction to restitution based on anything that happens *after* that point. Allowing an offset that arises after the manufacturer has failed to buy back the vehicle "would create a disincentive to prompt replacement or restitution by forcing the buyer to bear all or part of the cost of the manufacturer's delay. *Exclusion of such offsets [thus] furthers the Act's purpose*." (*Jiagbogu, supra,* 118 Cal.App.4th at p. 1244, italics added.)

This Court recognized the problem with rewarding delay when it reversed the Court of Appeal's decision in *Kirzhner, supra,* 9 Cal.5th at p. 983 (buyer entitled to recover registration renewal and nonoperation fees incurred on account of Mercedes's alleged delay in promptly repurchasing or replacing defective

vehicle). The Court should step in now to police the proper functioning of the Act in this case, too.

This case is a poster child for manufacturer abuse. Niedermeier brought her Jeep for warranted repairs sixteen times over three years. Chrysler not only never complied with its duty to promptly offer to replace it or repurchase it during her numerous repairs (all of which Chrysler keeps track of in nearly real time in its own warranty databases), Chrysler outright denied her efforts to obtain relief—*despite her repeated requests directly to Chrysler's designated customer service center*. Chrysler shirked its legal obligations and offered her $500 and $2,000 settlement offers to go away. (2RT/938, 941.) And when that didn't work, Chrysler aggressively litigated this case for years—all the way through a verdict where the jury found such conduct was willful and awarded civil penalties of 1.5-times Niedermeier's damages (with no trade-in offset).

Reducing a consumer's restitution award under these circumstances rewards a manufacturer's dilatory conduct. Chrysler was not concerned with the law or with branding a vehicle with sixteen repairs as a lemon. Instead, it attempted to save tens of thousands of dollars if Niedermeier had accepted a low-ball, no-fault settlement offer—and Chrysler has suffered no repercussions for shirking its "affirmative obligation" to provide Niedermeier with the Act's "prompt" remedies. (See *Kirzhner,*

supra, 9 Cal. 5th at p. 984.) Under the opinion, manufacturers like Chrysler will unfairly benefit from a trade-in where, as here, the consumer rejected a bogus settlement and proved her case to a jury two years later—but in the meantime had to dispose of the dangerous and defective vehicle.

The Court of Appeal acknowledged that its decision might undermine the Legislature's intent to incentivize manufacturers to promptly buy back inoperative cars and label them lemons. (Opn. 24.) But it placed greater weight on a purported need to avoid "incentivizing *buyers* to introduce lemon vehicles into the used car market without the labeling and notifications required of manufacturers who reacquire vehicles." (*Ibid.*, italics added.)

Again, however, this is a Legislative determination, not a judicial one. Under the Act, the *manufacturer* is the party with the obligation to brand the vehicle a lemon. (§ 1792.23.) The *manufacturer* must be the party to be disincentivized from letting lemon vehicles remain on roads and placed into the used car market. (See *Kirzhner, supra,* 9 Cal. 5th at p. 984.)

Despite the Act's existing incentives to promptly comply—i.e. civil penalties and attorney fee-shifting—Chrysler and other manufacturers still ignore consumers the way that Niedermeier was wholly ignored here. The opinion further disincentivizes prompt compliance. Why would Chrysler offer a prompt buyback to a consumer with Niedermeier's repair history now, knowing

that such a bad car is likely to be sold and Chrysler's liability is likely to be reduced? And why must Niedermeier individually shoulder the burden to ensure the vehicle is branded as a lemon instead of Chrysler? Before this new regime becomes the law of the land, the Court should grant review.

The need to incentive manufacturers to comply is significant. When a manufacturer refuses to act on its *affirmative duty* to promptly buy back an inoperable car and label it at that time, there is a significant chance that it *will never* be labeled. This is an especially grave concern because, as the Legislature recognized, most consumers lack the resources or fortitude to take on a multi-national car corporation in court, let alone go all the way to trial rather than accepting a no-fault settlement where the car would remain unlabeled. (RB 54-57.)

The Act's language demonstrates that the Legislature chose to protect consumers in the used car market not by making lawsuits a less attractive option for harmed consumers or by giving manufacturers reprieve from meritorious civil penalties, but by aggressively incentivizing manufacturers to promptly buy back and label their cars in the first place and by extending virtually all of its protections to *used* cars subject to express warranties. (See § 1795.5.) This includes the promises that, unless a "conspicuous writing" labels the car "as is" or "with all faults," used cars must be "merchantable," fit for use, and

operating as expressly warranted. (See §§ 1792 [implied warranty of merchantability]; 1792.2 [implied warranty of fitness]; 1792.3-1792.4 [clearly conspicuous "as is" and "with all faults" exception]; 1793.2 [requiring prompt repair, restitution, or replacement in compliance with express warranty].)

The opinion undermines this remedial statutory scheme. It forces buyers to absorb burdens that the manufacturer is supposed to bear. It allows a manufacturer to secure a windfall at a buyer's expense. This petition presents a critical issue of statutory construction worthy of this Court's review.

C. The opinion conflicts with previously uniform precedent construing the Act's remedies.

In addition to resolving the important statutory construction issue, the Court should grant review to harmonize California case law. The opinion is at odds with every prior case analyzing the Act's remedies. Until the opinion, the appellate courts uniformly held that the Act provides *broader* protection for consumers than the common law and that vehicle manufacturers are not entitled to offsets that arise only *after* the clock has started for the manufacturer to promptly buy back and label as a lemon a car it defectively designed. Until the opinion, courts had always prioritized the Act's remedial purposes over manufacturer

complaints about a consumer's potential over-recovery. The opinion parts company with that prior caselaw.

1. The opinion conflicts with *Martinez*

The opinion notes that "*Martinez* held that a 'plaintiff does not need to possess or own the vehicle to avail himself of the Act's remedies." (Opn. 14-15, citing *Martinez, supra,* 193 Cal.App.4th at p. 192.) And, indeed, *Martinez* reasoned that the Act "says nothing about the buyer having to retain the vehicle after the manufacturer fails to comply with its obligations under its warranty and the Act. If the Legislature intended to impose such a requirement, it could have easily included language to that effect. It did not." (*Martinez* at p. 194.) *Martinez* reasoned that "[f]aced with this situation [e.g. "retaining ownership of the unusable vehicle"], many consumers would reasonably do just what plaintiff did here—discontinue the payments and allow the vehicle to be repossessed." (*Id.* at 195.) *Martinez* presented a recurring theme in its holding—finding for the manufacturer "would encourage a manufacturer who has failed to comply with the Act to delay or refuse to provide a replacement vehicle or reimbursement; any delay increases the likelihood that the buyer will be forced to relinquish the car to a lienholder." (*Ibid.*)

Yet, in its discussion of *Martinez*, the opinion here noted—and ignored—that that *Martinez* "rejected the argument 'that the return of the vehicle is "compelled" by the Act's labeling and

notification provisions.'" (Opn. 15, citing *Martinez* at p. 194, fn. 4.) The opinion focused on this labeling and notification requirement in determining that a consumer *should be compelled* to hold onto the vehicle to ensure the requirement is met by the manufacturer. Of note, a car that is repossessed would not be branded since it was not deemed a lemon prior to repossession yet the law recognizes, and allows, for the repossession to occur and still give the consumer the right to relief without punishing her. The opinion turns that principle on its head by punishing Plaintiff, reducing her damages, reducing her civil penalties, and then rewards Chrysler by reducing the damages it must pay, incentivizing delay, and reducing Chrysler's liability for civil penalties.

2. The opinion conflicts with *Jiagbogu*.

In *Jiagbogu, supra*, 118 Cal.App.4th at p. 1242, the Court of Appeal rejected a manufacturer's requested equitable offset for the miles that the buyer-plaintiff drove his vehicle *after* making his buyback request. *Jiagbogu* reasoned that the Act "comprehensively" addresses restitution, spells out the consumer's "incidental damages," and provides a "predelivery offset"—yet lacks "any language authorizing an offset in any [other] situation." (*Id.* at pp. 1243-1244.) The "omission of other offsets from a set of provisions that thoroughly cover other

relevant costs indicate[d] legislative intent to exclude such offsets." (*Id.* at pp. 1243-1244.)

The Court of Appeal examined *Jiagbogu* and noted that the court "was unmoved that a buyer might 'receive a windfall if he is not required to pay for using the car after his buyback request.'" (Opn. 14, citing *Jiagbogu* at p. 1244.) Indeed, *Jiabogu* reasoned that "the Act places an affirmative duty on the buyer to deliver a nonconforming product for repair, and an affirmative duty on the manufacturer to *promptly* replace the product or refund the purchase money if repairs are unsuccessful after a reasonable opportunity to repair." (*Ibid*., italics in original, internal citations omitted.) "The predelivery offset creates an incentive for the buyer to deliver a car for repairs soon after a nonconformity is discovered. An offset for the buyer's use of a car when a manufacturer, already obliged to replace or refund, refuses to do so, would create a disincentive to prompt replacement or restitution by forcing the buyer to bear all or part of the cost of the manufacturer's delay. Exclusion of such offsets furthers the Act's purpose." (*Ibid.*)

The opinion here attempts to distinguish *Jiagbogu* on the basis that, in that case, "rulings in the manufacturer['s] favor would have deprived the plaintiffs of the full purchase price of their vehicles by reducing the refund to reflect use of the vehicle after the buyer requested restitution." (Opn. 20-21.) The opinion

claims that this "concern does not exist here, where plaintiff can recover the full purchase price through a combination of the trade-in and restitution from defendant." (Opn. 21.)

But this conclusion is irreconcilable with *Jiagbogu*'s plain meaning argument—that the Act simply does not allow for any unenumerated offsets and that "to give [the manufacturer] an offset for that would reward it for its delay in replacing the car or refunding [the plaintiff's] money." (118 Cal. App. 4th at pp. 1243–44.) The Act's meaning doesn't change simply because the Court of Appeal here disliked the consequences of applying it.

Despite the opinion's insistence otherwise, the opinion's implied trade-in credit offset *would* deprive consumers of the full amount of the restitution award. The Department of Consumer Affairs has been explicit: trade-in credits are artificially inflated amounts that have no connection with the car's actual value or its value in the trade-in transaction. (See RB 74-75.) Thus, a fake, inflated trade-in amount would reduce Plaintiff's damages by more than the vehicle is worth. The opinion ignores this finding. It further ignores that it was Chrysler's burden to prove *with reasonable certainty* whether—and how much—of an offset it is entitled to receive, and Chrysler never did. (See *Agam v. Gavra* (2015) 236 Cal.App.4th 91, 109-110 & fn. 3.)

The opinion also claims that *Jiagbogu* is distinguishable because its holding "do[es] not incentivize plaintiffs to thwart

other provisions of the Act"—namely, the requirement that manufacturers label lemons accordingly. (Opn. 21.) Under the Act's express terms, however, the burden falls *entirely* on the *manufacturer* to promptly buy back its defectively-manufactured car and label it at that time. It was not the Court of Appeal's place to alter the statutory scheme by shifting this burden onto the plaintiff. Nor do buyers have the ability to force manufacturers to buy back the vehicle. It is entirely rational to assume that the Legislature, in order to protect buyers and incentivize manufacturers to comply with the Act, only intended the offset that it *expressly* designated. (See *Cassel, supra,* 51 Cal.4th at p. 136 [looking at any reasonable reason why the Legislature "could" have or "might" have for its plain terms].)

3. The opinion conflicts with *Lukather* and *Robbins*.

The opinion also conflicts with *Lukather v. Gen. Motors, LLC* (2010) 181 Cal.App.4th 1041 (*Lukather*) and *Robbins v. Hyundai Motor America* (C.D. Cal., Aug. 7, 2014, No. 8:14-cv-5-JLS) 2014 WL 4723505 (*Robbins*). Both recognize that a Song-Beverly plaintiff does not have to mitigate damages to the extent that doing so would allow a manufacturer to receive an offset that resulted only *after* the manufacturer failed to promptly buy back the lemon and label it. This is especially notable since, unlike the labelling requirements *imposed on manufacturers*, a plaintiff

ordinarily does have a duty to mitigate. (See *Krotin, supra,* 38 Cal.App.4th at pp. 302-303 [buyer only needs to present vehicle for repair; every other duty falls on the manufacturer].)

Lukather, like *Jiagbogu*, demonstrates that the Act is more concerned with disincentivizing manufacturer delay than with any supposed danger of consumer over-recovery. In *Lukather*, the manufacturer sought an offset for plaintiff's use of a rental car during litigation, arguing that plaintiff should have accepted its belated offer to purchase the defective car as part of his duty to mitigate damages. (181 Cal.App.4th at pp. 1052-1053.)

Lukather rejected this offset, because it was not mentioned in section 1793.2's "comprehensive[]" terms. (*Id*. at p. 1052 ["None contains any language authorizing an offset in any situation other than the one specified"].) *Lukather* noted the absurdity that would result were a rental-car offset allowed: "[T]he imposition of a requirement that [plaintiff] mitigate his damages so as to avoid rental car expenses—after GM had a duty to respond promptly to [plaintiff's] demand for restitution—would reward GM for its delay." (See *ibid*, internal citation omitted.)

Similarly, in *Robbins*, a manufacturer sought to "condition its offer to repurchase [a] vehicle on a deduction for excess wear and tear." The district court rejected this offset based on the Act's plain language. The "Act requires that manufacturers reimburse the amount 'paid or payable by the buyer,' [§]

1793.2(d)(2)(B), with the exception of 'that amount directly attributable to use by the buyer.' [§] 1793.2(d)(2)(C). Thus, if an amount is part of the price 'paid or payable,' but not an 'amount directly attributable to use by the buyer,' then the manufacturer must pay that amount." (2014 WL 4723505, at *7, fn. 11.)

The same is true where, as here, the plaintiff did not have any burden to retain the car or return it after the manufacturer refused a buyback.

4. The only case the opinion relies on, *Mitchell*, does not support it.

Rather than following the cases directly addressing the unavailability of unenumerated offsets, the opinion relies solely on *Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32: "Just as the *Mitchell* court concluded that 'restitution' under the Act cannot leave a plaintiff in a worse position than when he or she purchased the vehicle, it similarly would be inimical to the concept of restitution to leave a plaintiff in a better position, rather than merely restoring her to the *status quo ante*." (Opn. 18.) The opinion claims its interpretation of the Act is "neutral," as it compensates the plaintiff while protecting the public. (Opn. 24.)

But as *Mitchell* recognizes, the Act is *not* neutral. It is a remedial statute that is interpreted *in favor of the consumer*:

"The act is remedial legislation intended to protect consumers and should be interpreted to implement its beneficial provisions." (80 Cal.App.4th at p. 36.) *Mitchell* inferred language into the statute to *broaden* the recovery of a consumer to include recovery of finance charges, not to limit the recovery or to improve a *defendant's* position. *Mitchell* "conclude[d] plaintiffs are entitled to recover paid finance charges as part of the "actual priced paid or pay*able*." (*Ibid.*) The court reasoned that although "Section 1793.2(d)(2)(B) does not expressly allow recovery of paid finance charges," finding an "implied prohibition" would be contrary to the Act's remedial purpose. (*Id.* at p. 37.) "A more reasonable construction is that the Legislature intended to allow a buyer to recover the entire amount actually expended for a new motor vehicle, including paid finance charges, less any of the expenses *expressly excluded* by the statute." (*Id.* at p. 37, italics added.)

The Act enumerates only two, narrowly circumscribed offsets against restitution. (§§ 1793.2, subds. (d)(2)(B) & (C).) The Legislature did not exclude any other items from the buyer's recovery. *Mitchell*'s consumer-friendly construction does not support implying a pro-manufacturer offset that the Legislature, despite the statute's overall comprehensiveness, never specified.

Permitting recovery of finance charges is consistent with the Act's plain language because a consumer is entitled to recover not only what she actually paid, but also the amount that is

payable—e.g. the loan on the vehicle for which the consumer becomes indebted. If a manufacturer was not obligated to pay this amount, it could reimburse a consumer her monies paid, take back the vehicle, and leave the computer with a loan balance on a defective vehicle she no longer owns. As those finance charges are paid or as interest charges accrue over time, a manufacturer remains liable for paying for that delay to promptly offer relief under the Act. *Mitchell*'s consumer-friendly rationale does not justify rewarding a manufacturer for giving a consumer the runaround for years by implying an offset contrary to the statute's plain language.

Similarly, when a consumer trades in her defective vehicle, she receives value for that vehicle and that value goes to pay down the loan balance on the vehicle—a loan balance that the manufacturer would otherwise have to pay. Thus, a consumer sells her property and uses those proceeds to pay down the loan; if that property was any other personal property (e.g., jewelry), no reasonable defendant would argue for an offset. Here, Niedermeier sold her property, which happens to be the subject vehicle, to pay down the loan so that the defective car was transferred to the third-party dealer free of liens. Regardless of what property was sold to pay for that loan, that sum of money reduces the amount pay*able* and becomes part of the amount that is *paid* by the consumer. Niedermeier sold her vehicle and

instead of putting those proceeds into her pocket, she put those proceeds towards her loan indebtedness. She *paid* for that car with the sale of that car. *Mitchell* should result in the opposite conclusion that the Court of Appeals reached.

To provide clarity to bench and bar on the now-conflicting case law and whether it is proper to deduct a trade-in from the statutory restitution award, the Court should grant review.

II. The Court Should Grant Review To Address Whether Trade-In Amounts Are Subtracted Before Or After Civil Penalties Are Determined.

As just shown, the opinion effectively modifies the Act's text by changing the definition of restitution—restitution is no longer the amount "paid or payable" on the vehicle, subject to two enumerated offsets. Rather, under the opinion, statutory restitution is also subject to a reduction for any trade-in (even though that amount was paid on the vehicle). Whether characterized as an "offset" or as part of the calculation of restitution damages, the opinion's holding is a sea change. Before it becomes the law of the land, the Court should weigh in.

The Court also should grant review because the opinion creates confusion regarding *when* any trade-in deduction should be applied. After holding that the Act requires a reduction to statutory restitution based on the trade-in, the Court of Appeal

reduced the civil penalty that the jury awarded plaintiff under section 1794, subdivision (c), because it "caps the civil penalty at twice actual damages" without actually deciding the issue. (Opn. 27-29.) But the Court of Appeal based its calculation on a purported concession that petitioner never actually made. The court asserted: "Plaintiff concedes that, to the extent defendant is entitled to reduce the damages it owes by the value of her trade-in, the civil penalty cannot exceed twice the reduced damages. Thus, plaintiff concedes that if we reduce plaintiff's award by $19,000 to $20,584.43, her civil penalty cannot exceed $41,168.86." (*Id.* at pp. 27-28.) In light of the purported concession, the opinion expresses "no opinion whether the civil penalty cap under section 1794, subdivision (c) should be calculated *before or after* reducing plaintiff's damages to account for a trade-in or resale." (*Id.* at p. 28, fn. 8, italics added.)

As Plaintiff explained in her unsuccessful rehearing petition, however, she "did *not concede* that a trade-in or resale credit should be subtracted from the base 'actual damages' amount for calculating the cap on civil penalties. Plaintiff has consistently maintained that if a trade-in credit exists at all, it must be taken at the *end*—i.e., against the *total judgment*." (Rehearing Pet. 4, first italics added, second in original.)[3]

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[3] Plaintiff also requested depublication of this portion of the opinion, explaining: "By signaling (without actually deciding)

How to treat a trade-in credit where a jury awards a civil penalty for a manufacturer's willful misconduct is important issue—and one that will be subject to confusion based on the opinion's rationale. Even though the opinion claims not to reach the issue of when a trade-in should be calculated, the opinion confusingly suggests that the trade-in amount must be taken against statutory restitution: "We thus conclude that the requirement in section 1793.2, subdivision (d)(2)(B) that a manufacturer 'make restitution in an amount equal to the actual price paid or payable by the buyer' does not include amounts already recovered by the buyer through trade-in." (Opn. 20.)

This, in turn, raises the question of whether the trade-in must be taken out of the "actual damages" base for calculating the civil penalty cap. Specifically: Section 1794 provides that if a buyer establishes that a manufacturer's failure to provide statutory buyback or replacement remedies was "willful," the judgment may include a civil penalty that does not exceed two times "the amount of actual damages." (§ 1794, subd. (c).) Does

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that civil penalties are calculated after deducting the trade-in credit, the Opinion encourages manufacturers to deny a consumer's pre litigation request for a repurchase, refuse to brand the vehicle and then bank on the substantial likelihood that lengthy litigation will result in a change to the status of possession and, therefore, a corresponding triple reduction of the maximum potential liability." (Rehearing Pet. 18.)

the trade-in reduce this base? The opinion leaves the question unanswered, but contains language bound to spawn confusion.

Whether a trade-in affects the "actual damages" base for calculating the civil penalty cap is an issue of enormous importance. Reducing the base for calculating the cap because of what a third party pays a consumer in a trade-in or resale transaction would create a multiplied reduction of the punishment and allow the manufacturer to benefit from delaying providing prompt remedies. It would put the burden on the consumer to ensure proper branding, rather than placing the burden on the manufacturer, which is where the Act places it.

And, a manufacturer would have a *reduced* incentive to take the car back and brand it early—the manufacturer could wait around and anticipate that the consumer would sell the unbranded car, and then the manufacturer could look forward to reducing its exposure to civil penalties even though the degree of willfulness of its conduct was no different because of that third-party sale; as much as a *triple* reduction based on the trade in amount received. And, of course, the most defective vehicles—where the manufacturer's refusal to repurchase is most egregious—are the vehicles that are most likely to be sold by consumers. Thus, a manufacturer would benefit in reducing its maximum civil penalty exposure by doing nothing more than

waiting around rather than doing something in good faith that would justify a reduced civil penalty.

To the extent that the opinion focuses on restoring the parties to the status quo, that status quo is achieved only if the manufacturer receives a one-time credit for a trade-in, which would be *in lieu of or a substitute* for the returned vehicle. In the usual situation, when a case is settled or goes to judgment, damages are paid, and the vehicle is returned (which a manufacturer then goes on to sell at auction or exports overseas). Neither a settlement nor a jury verdict considers the funds a manufacturer receives from the subsequent sale of that "lemon." Thus, instead of recouping the vehicle itself, a manufacturer would recoup—by way of a deduction—the dollar amount a consumer received from her trade-in as a "stand-in" for the vehicle (which is, of course, far more than the price of a lemon-branded vehicle).

The only way to put both parties in the same position would be to pay total damages, including civil penalties based on the total amount paid or payable for the vehicle (including the amount Plaintiff paid from the proceeds of the trade-in to pay off the loan on the vehicle) and then take a deduction from the total amount as a "stand-in" for the lack of a vehicle to return. If a "neutral" position is to be fashioned, any deduction for amounts received by Niedermeier must be taken off the *total judgment*,

not off of her compensatory damages. This result ensures that no one gets a windfall, and no one receives any perverse incentives. Everyone remains in the status quo.

But presently, there is no guidance in appellate caselaw regarding when a trade-in must be subtracted against a consumer's damages. Thus, review would allow this Court to resolve this important question, too before lower courts are left to decide this novel question entirely on their own.

CONCLUSION

The Court should grant review to ensure that courts and litigants apply the Act as the Legislature intended.

December 9, 2020

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OCTOBER 30, 2020 OPINION

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LISA NIEDERMEIER, Plaintiff and Respondent, v. FCA US LLC, Defendant and Appellant.	B293960 (Los Angeles County Super. Ct. No. BC638010)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel S. Murphy, Judge. Affirmed as modified.

Gibson, Dunn & Crutcher, Thomas H. Dupree, Jr., Matt Gregory, Shaun Mathur; Clark Hill and David L. Brandon for Defendant and Appellant.

Knight Law Group, Steve Mikhov, Amy Morse; Hackler Daghighian Martino & Novak, Sepehr Daghighian, Erik K. Schmitt; Greines, Martin, Stein & Richland, Cynthia E. Tobisman and Joseph V. Bui for Plaintiff and Respondent.

Defendant FCA US LLC, an automobile manufacturer,[1] appeals from a judgment in favor of plaintiff Lisa Niedermeier. Plaintiff brought claims under the Song-Beverly Consumer Warranty Act (Civ. Code,[2] § 1790 et seq.) (the Act), commonly known as the "lemon law." (See *Warren v. Kia Motors America, Inc.* (2018) 30 Cal.App.5th 24, 28.) The jury awarded plaintiff the full purchase price of her defective vehicle, offset by mileage accrued before she first delivered it for repair, plus incidental and consequential damages and a civil penalty.

Following the jury's verdict, the trial court denied defendant's motion to reduce plaintiff's damages by the $19,000 credit plaintiff received towards the purchase price of a new vehicle when she traded in her defective vehicle to a GMC dealer. The trial court ruled that reducing the damages here would reward defendant for its delay in providing prompt restitution as required under the Act. On appeal, defendant challenges that ruling.

As a matter of first impression, we hold that the Act's restitution remedy, set at "an amount equal to the actual price paid or payable" for the vehicle (§ 1793.2, subd. (d)(2)(B)), does not include amounts a plaintiff has already recovered by trading in the vehicle at issue. The Legislature chose to call the Act's refund remedy "restitution," indicating an intent to restore a plaintiff to the financial position in which she would have been had she not purchased the vehicle. Granting plaintiff a full

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[1] Defendant was formerly known as Chrysler Group LLC. It is a wholly owned subsidiary of FCA North America Holdings LLC, which in turn is wholly owned by Fiat Chrysler Automobiles N.V.

[2] Undesignated statutory citations are to the Civil Code.

refund from defendant in addition to the proceeds of the trade-in would put her in a *better* position than had she never purchased the vehicle, a result inconsistent with "restitution."

Allowing plaintiff a full refund also would undercut other parts of the Act. The Act contains extensive provisions requiring manufacturers to label vehicles reacquired under the Act as "Lemon Law Buybacks," and to notify potential purchasers of the reacquired vehicles of that designation as well as the vehicles' history of deficiencies. These provisions apply only when the manufacturer reacquires or assists another in reacquiring the vehicle. Yet if a buyer could trade in a defective vehicle in exchange for a reduction in the price of a new car while still receiving a full refund from the manufacturer, few if any buyers would sacrifice the extra money by returning the vehicle. This would render the labeling and notification provisions largely meaningless, a consequence the Legislature could not have intended.

Accordingly, we reduce the damage award to reflect the value of plaintiff's trade-in, and also reduce the civil penalty, which is capped at twice the amount of actual damages. (§ 1794, subd. (c).) As modified, we affirm the judgment.

FACTUAL BACKGROUND

Plaintiff purchased a new Jeep Wrangler in January 2011 for approximately $40,000. Over the several years she owned the vehicle, plaintiff experienced numerous problems with it and brought it in for repair multiple times.

Around April 2015, plaintiff requested that defendant, the Jeep's manufacturer, buy back the vehicle. Defendant did not do so. Plaintiff then traded in the vehicle to a GMC dealership, in exchange for which she received $19,000 off the purchase price of

a GMC Yukon. Plaintiff's counsel represented to the trial court that the sticker price of the Yukon was $80,000.

PROCEDURAL BACKGROUND

In October 2016, plaintiff filed a lawsuit against defendant alleging, inter alia, causes of action for breach of express and implied warranty under the Act.[3]

In advance of trial, plaintiff filed a motion in limine to exclude "evidence or argument relating to a monetary offset based on plaintiff's sale of the subject vehicle." (Capitalization omitted.) The trial court granted the motion, and stated it would address the issue of an offset after trial if plaintiff prevailed.

At trial, plaintiff testified regarding her failed attempts to sell the car before ultimately trading it in to the GMC dealer. In light of this testimony, the trial court allowed defense counsel to elicit testimony regarding the value of the trade-in. Defense counsel asked plaintiff: "You sold it to a GMC dealership for $19,000; right?" Plaintiff replied, "Right."

Following the close of evidence, defendant requested that the trial court add an offset for the trade-in of the Jeep to the special verdict form. The trial court declined the request, preferring to decide the offset issue itself after trial. Plaintiff agreed with this approach.

The jury found in favor of plaintiff on her cause of action for breach of express warranty. The jury awarded damages of $39,584.43, which included $39,799 for the purchase price of the

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[3] The complaint also alleged causes of action for fraudulent inducement/concealment against defendant and negligent repair against Glendale Dodge. Those causes of action are not at issue in this appeal.

Jeep plus certain specified charges, taxes, and fees; $5,000 in incidental and consequential damages; and a deduction of $5,214.57 reflecting the use plaintiff obtained from the vehicle before first bringing it in for repairs. The jury also awarded a civil penalty of $59,376.65, one-and-a-half times the damages award, for a total award of $98,961.08.[4]

Defendant then filed a motion requesting the trial court reduce the damages by $19,000 to reflect the trade-in of the Jeep. Because the jury had imposed a civil penalty one-and-a-half times the damages, defendant requested the civil penalty be set at one-and-a-half times the reduced damages, for a total award of $51,461.07.

The trial court denied the motion. Relying primarily on *Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187 (*Martinez*) and *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235 (*Jiagbogu*), the trial court concluded that reducing the damages and penalty would be "inconsistent with the proconsumer policy supporting the Act," and would "reward defendant for its delay in replacing the car or refunding plaintiff's money when defendant had complete control over the length of that delay, and an affirmative statutory duty to replace or refund promptly." The trial court stated that " '[i]nterpretations that would significantly vitiate a manufacturer's incentive to comply with the Act should be avoided.' " (Quoting *Jiagbogu*, at p. 1244.)

Defendant filed motions for a new trial and to set aside and vacate the judgment, again arguing that the damages and civil

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[4] The jury found in favor of plaintiff on her implied warranty claim as well, awarding damages of $20,799. Those damages were not added to the final award, presumably because they were duplicative.

penalty should be reduced to reflect the $19,000 trade-in. The trial court denied the motions.

Defendant timely appealed.

STANDARD OF REVIEW

This appeal presents "a question of statutory . . . interpretation subject to our independent review." (*Dignity Health v. Local Initiative Healthcare Authority of Los Angeles County* (2020) 44 Cal.App.5th 144, 154.) "To determine the Legislature's intent in interpreting [the Act], '[w]e first examine the statutory language, giving it a plain and commonsense meaning.' [Citation.] We do not consider statutory language in isolation; instead, we examine the entire statute to construe the words in context. [Citation.] If the language is unambiguous, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.' [Citation.] 'If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.' " (*Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th 966, 972 (*Kirzhner*).) "[W]e may reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results." (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 27 (*Simpson Strong-Tie*).)

"We keep in mind that the Act is ' "manifestly a remedial measure, intended for the protection of the consumer; it should be given a construction calculated to bring its benefits into action." ' " (*Kirzhner*, *supra*, 9 Cal.5th at p. 972.)

DISCUSSION

A. The Song-Beverly Consumer Warranty Act

The Act "provides certain protections and remedies for consumers who purchase consumer goods such as motor vehicles covered by express warranties." (*Martinez*, *supra*, 193 Cal.App.4th at p. 193.) The Act requires that manufacturers of consumer goods covered by express warranties provide "service and repair facilities" in the state "to carry out the terms of those warranties." (§ 1793.2, subd. (a)(1)(A).) "In order to trigger the manufacturer's service and repair obligations, the buyer . . . 'shall deliver nonconforming goods to the manufacturer's service and repair facility within this state. . . .' " (*Martinez*, at p. 193, quoting § 1793.2, subd. (c).)[5] Motor vehicles are nonconforming for purposes of the Act if the nonconformity "substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee." (§ 1793.22, subd. (e)(1).)

If a manufacturer "is unable to service or repair a new motor vehicle . . . to conform to the applicable express warranties after a reasonable number of attempts," the manufacturer must either "promptly replace the new motor vehicle" or "promptly make restitution to the buyer . . . ." (§ 1793.2, subd. (d)(2).) "In the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and

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[5] A buyer need not deliver the nonconforming goods to the manufacturer's service and repair facility if, "due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, delivery cannot reasonably be accomplished." (§ 1793.2, subd. (c).)

manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales or use tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer." (§ 1793.2, subd. (d)(2)(B).)

The Act permits a manufacturer to reduce the restitution "by that amount directly attributable to use by the buyer prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity." (§ 1793.2, subd. (d)(2)(C).) The Act provides a specific formula to calculate this reduction based on the vehicle's mileage prior to the buyer first delivering it for repair.[6] (§ 1793.2, subd. (d)(2)(C).)

A buyer "who is damaged by a failure to comply with any obligation under [the Act] . . . may bring an action for the recovery of damages and other legal and equitable relief." (§ 1794, subd. (a).) "The measure of the buyer's damages in an action under this section shall include the rights of replacement

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[6] "The amount directly attributable to use by the buyer shall be determined by multiplying the actual price of the new motor vehicle paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, by a fraction having as its denominator 120,000 and having as its numerator the number of miles traveled by the new motor vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity." (§ 1793.2, subd. (d)(2)(C).)

or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following: [¶] (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply. [¶] (2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform." (§ 1794, subd. (b).)

Upon a showing that a manufacturer's noncompliance with the Act was "willful," the Act allows "a civil penalty which shall not exceed two times the amount of actual damages." (§ 1794, subd. (c).)[7] A prevailing buyer may also recover reasonable attorney's fees and costs. (*Id.*, subds. (d), (e)(1).)

The Act also contains provisions preventing manufacturers and others from reselling "used and irrepairable motor vehicles" reacquired under the Act "without notice to the subsequent purchaser." (§ 1793.23, subd. (a)(2).) When a manufacturer "reacquires" a vehicle, or "assists a dealer or lienholder to reacquire" a vehicle, and knows or should know that the manufacturer must replace or "accept[the vehicle] for restitution" under section 1793.2, subdivision (d)(2), the manufacturer may not sell, lease, or transfer the vehicle to another party without first retitling the vehicle in the name of the manufacturer, requesting that the Department of Motor Vehicles "inscribe the ownership certificate with the notation 'Lemon Law Buyback,' " and "affix[ing] a decal to the vehicle"

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[7] Subdivision (e) of section 1794 provides circumstances in which a buyer may obtain a civil penalty without proving willful noncompliance. That subdivision is not at issue in this case.

indicating that it has been designated a "Lemon Law Buyback." (Civ. Code, § 1793.23, subd. (c); Veh. Code, § 11713.12, subd. (a).)

In addition, a "manufacturer who reacquires or assists a dealer or lienholder to reacquire a motor vehicle in response to a request by the buyer or lessee that the vehicle be either replaced or accepted for restitution because the vehicle did not conform to express warranties" may not sell, lease, or transfer the vehicle without providing written notice to the transferee of, inter alia, the "Lemon Law Buyback" notation on the vehicle's title, the nonconformities reported by the original buyer or lessee, and any repairs attempted to correct the nonconformities. (§§ 1793.23, subd. (d), 1793.24, subd. (a)(2)–(4).) These notice requirements also apply to "[a]ny person, including any dealer" who acquires the vehicle for resale knowing the manufacturer had reacquired it for replacement or restitution under the Act. (§ 1793.23, subd. (e).)

Similarly, the Act prohibits the sale, lease or transfer of a vehicle "transferred by a buyer or lessee to a manufacturer pursuant to [section 1793.2, subdivision (d)] or a similar statute of any other state" absent disclosure of the vehicle's nonconformities, correction of those nonconformities, and a one-year manufacturer warranty that the vehicle is free of the nonconformities. (§ 1793.22, subd. (f)(1).)

We refer to sections 1793.22, subdivision (f)(1) and 1793.23, subdivisions (c) through (e) as the Act's "labeling and notification provisions."

B. Relevant case law

There are three cases interpreting the Act that are of particular relevance to the issues in this appeal. In its decision below, the trial court relied on two of them, *Martinez* and

Jiagbogu, as does plaintiff on appeal. Defendant relies on the third case, *Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32 (*Mitchell*). We discuss the cases in chronological order.

1. *Mitchell*

Mitchell held that the restitution remedy under section 1793.2, subdivision (d)(2) includes the finance charges paid by a buyer who purchases a new motor vehicle on credit, even though those charges are not listed as an item of recovery in that subdivision. (*Mitchell*, *supra*, 80 Cal.App.4th at pp. 34, 36.)

The court concluded that "the mere absence of a reference" to finance charges in section 1793.2, subdivision (d)(2)(B) "is not, by itself, controlling." (*Mitchell*, *supra*, 80 Cal.App.4th at p. 36.) The court quoted section 1790.4 of the Act, stating " '[t]he remedies provided by [the Act] are cumulative and shall not be construed as restricting any remedy that is otherwise available . . . .' " The court then cited cases for the proposition that "the [A]ct is remedial legislation intended to protect consumers and should be interpreted to implement its beneficial provisions." (*Ibid.*) "In addition," the court stated, "section 1793.2(d)(2) expressly characterizes the refund remedy as 'restitution.' [Citation.] This remedy is intended to restore 'the *status quo ante* as far as is practicable . . . .' " (*Mitchell*, at p. 36, quoting *Alder v. Drudis* (1947) 30 Cal.2d 372, 384 (*Alder*).)

The court rejected the argument that, because section 1793.2, subdivision (d)(2)(B) "does not expressly allow recovery of paid finance charges," it therefore impliedly prohibits recovery of those charges. (*Mitchell*, *supra*, 80 Cal.App.4th at p. 37.) "[F]inding an implied prohibition on recovery of finance charges would be contrary to both the . . . Act's remedial purpose and section 1793.2(d)(2)(B)'s description of the refund remedy as

restitution. A more reasonable construction is that the Legislature intended to allow a buyer to recover the entire amount actually expended for a new motor vehicle, including paid finance charges, less any of the expenses expressly excluded by the statute." (*Mitchell*, at p. 37.)

2. *Jiagbogu*

In *Jiagbogu*, our colleagues in Division Four rejected a defendant manufacturer's arguments that common law and statutory principles of rescission and equitable offset limit the remedies under the Act. The manufacturer argued that a request for restitution under section 1793.2, subdivision (d)(2) constituted a rescission, and therefore a buyer who continued to use the vehicle after requesting restitution could waive his right to that remedy. (*Jiagbogu*, *supra*, 118 Cal.App.4th at p. 1240.)

Relatedly, the manufacturer argued that it could receive a statutory offset for the continued use of the vehicle under section 1692, a provision of the Civil Code, separate from the Act, that allows for offsets in rescission actions. (*Jiagbogu*, *supra*, 118 Cal.App.4th at pp. 1240, 1242; § 1692 [providing, in relevant part, "If in an action or proceeding a party seeks relief based upon rescission, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require and may otherwise in its judgment adjust the equities between the parties"].)

The court disagreed, noting that "section 1793.2 does not refer to rescission or any portion of the Commercial Code that discusses rescission," nor does the Act "requir[e] formal rescission to obtain relief." (*Jiagbogu*, *supra*, 118 Cal.App.4th at p. 1240.) Moreover, "the Act is designed to give broader protection to consumers than the common law or [Uniform Commercial Code]

provide. [Citation.] Had the Legislature intended this more protective statute to be limited by traditional doctrines, or the remedies provided in section 1793.2, subdivision (d) to be treated as a rescission under common law, it surely would have used language to that effect. We may not rewrite the section to conform to that unexpressed, supposed intent." (*Jiagbogu*, at p. 1241.) Thus, principles of "waiver of right to rescind or . . . statutory offsets for postrescission use" under section 1692 were not applicable to "request[s] for replacement or refund under the Act." (*Jiagbogu*, at p. 1242.)

The court also rejected the manufacturer's argument that it was entitled to an offset for continued use of the vehicle as a matter of equity. (*Jiagbogu*, *supra*, 118 Cal.App.4th at pp. 1242, 1244.) The court recognized that, under section 1790.3, the Act did not supplant the provisions of the Commercial Code unless the provisions conflicted with those of the Act. (*Jiagbogu*, at p. 1242.) Moreover, "Commercial Code section 1103 provides that in general, 'principles of law and equity . . . shall supplement [the Commercial Code's] provisions.' " (*Jiagbogu*, at p. 1242.) Thus, the manufacturer "could be entitled to an equitable offset," but "only if the offset does not conflict with provisions of the Act." (*Ibid.*)

Having laid out these principles, the court concluded that an offset for continued use of a vehicle after requesting replacement or restitution would conflict with the provisions of the Act. (See *Jiagbogu*, *supra*, 118 Cal.App.4th at pp. 1243–1244.) The court noted that section 1793.2, subdivision (d)(2) expressly provides for an offset for use of the vehicle *prior* to the buyer first delivering the vehicle for repair, and otherwise "comprehensively addresses" the relief to which a buyer is

entitled, including replacement and restitution, specified taxes, fees, and costs, and other incidental damages. (*Jiagbogu*, at p. 1243.) "This omission of other offsets from a set of provisions that thoroughly cover other relevant costs indicates legislative intent to exclude such offsets." (*Id.* at pp. 1243–1244.)

The court further concluded that excluding an offset for continued use after a request for replacement or restitution "is in keeping with the Act's overall purpose" to "protect consumers." (*Jiagbogu*, *supra*, 118 Cal.App.4th at p. 1244.) "The predelivery offset creates an incentive for the buyer to deliver a car for repairs soon after a nonconformity is discovered. An offset for the buyer's use of a car when a manufacturer, already obliged to replace or refund, refuses to do so, would create a disincentive to prompt replacement or restitution by forcing the buyer to bear all or part of the cost of the manufacturer's delay." (*Ibid.*) "Interpretations that would significantly vitiate a manufacturer's incentive to comply with the Act should be avoided." (*Ibid.*)

The court was unmoved that a buyer might "receive a windfall if he is not required to pay for using the car after his buyback request." (*Jiagbogu*, *supra*, 118 Cal.App.4th at p. 1244.) "[T]o give [the manufacturer] an offset for that use would reward it for its delay in replacing the car or refunding [the plaintiff's] money when it had complete control over the length of that delay, and an affirmative statutory duty to replace or refund promptly. 'No one can take advantage of his own wrong.' (§ 3517.) Nor can principles of equity be used to avoid a statutory mandate." (*Jiagbogu*, at p. 1244.)

3. *Martinez*

Martinez held that a "plaintiff does not need to possess or own the vehicle to avail himself or herself of the Act's remedies."

(*Martinez*, *supra*, 193 Cal.App.4th at p. 192.) Therefore the trial court erred in granting summary judgment against a plaintiff whose lien holder had repossessed and sold her vehicle. (*Id.* at p. 190.)

The court in *Martinez* began with the "plain language" of the Act, which "says nothing about the buyer having to retain the vehicle after the manufacturer fails to comply with its obligations under its warranty and the Act. If the Legislature intended to impose such a requirement, it could have easily included language to that effect. It did not." (*Martinez*, *supra*, 193 Cal.App.4th at p. 194.)

The court distinguished cases from other states relied on by the defendant, noting that the " 'lemon law[s]' " of those jurisdictions had specific provisions requiring the buyer to return the vehicle in order to receive restitution. (*Martinez*, *supra*, 193 Cal.App.4th at p. 196.) "The absence of a similar express statutory requirement in California's 'lemon law' is significant. In line with the legislative intent and purpose, there is simply no requirement that California consumers be able to tender the allegedly defective car for purposes of availing themselves of the remedies provided by the Act." (*Id.* at p. 197.)

In a footnote, the court rejected the argument "that return of the vehicle is 'compelled' " by the Act's labeling and notification provisions under sections 1793.22, subdivision (f) and 1793.23, subdivisions (d) and (e). (*Martinez*, *supra*, 193 Cal.App.4th at p. 194, fn. 4.) "Because defendant did not 'reacquire' the present vehicle, the [notification] statutes are simply inapplicable and do not assist our interpretation of the relevant provisions." (*Ibid.*)

The court further was concerned that "[t]o read into the statute an unexpressed requirement that the consumer possess

or own the vehicle as a condition to obtaining relief would have a chilling effect on the availability of the Act's remedies." (*Martinez*, *supra*, 193 Cal.App.4th at p. 195.) The court surmised that many consumers, faced with continuing payments for a "derelict vehicle" while pursuing the Act's remedies in court, "would reasonably do just what plaintiff did here—discontinue the payments and allow the vehicle to be repossessed." (*Ibid.*) To preclude those consumers from the Act's remedies "[n]ot only is . . . inconsistent with the proconsumer policy supporting the Act, but . . . would encourage a manufacturer who has failed to comply with the Act to delay or refuse to provide a replacement vehicle or reimbursement; any delay increases the likelihood that the buyer will be forced to relinquish the car to a lienholder." (*Ibid.*) "Defendant's construction of the statute is calculated to allow the manufacturer to sidestep the protections afforded the consumer by the Act and encourage 'the manufacturer's unforthright approach and stonewalling of fundamental warranty problems.' " (*Ibid.*)

Citing *Jiagbogu*, the court also concluded that the Act was not subject to common law and Commercial Code requirements that "a party seeking to rescind a contract must generally return any consideration received." (*Martinez*, *supra*, 193 Cal.App.4th at pp. 197–198.) The court was not persuaded by the defendant's reliance on the discussion of restitution in *Mitchell* and *Alder*: *Mitchell*, concerned with whether restitution under section 1793.2, subdivision (d)(2) included finance charges, "has no application to the issues in this case and *Alder* predates the Act by 23 years and applies common law rules of equity." (*Martinez*, at p. 199.)

C. Analysis

1. Restitution under the Act does not include amounts recovered from the trade-in of the defective vehicle

Defendant does not challenge the holding of *Martinez* or the principle that a buyer need not return the vehicle to the manufacturer to receive restitution under the Act. Instead, defendant contends that if a buyer recovers some of the purchase price of the vehicle through a trade-in to a third party dealer, rather than returning it to the manufacturer, the Act requires that the buyer's restitution be reduced accordingly.

Defendant raises three arguments in favor of its position. First, defendant argues that the concept of restitution contemplates that the buyer is restored to the same economic position she would have been in had she never purchased the vehicle. By obtaining a full refund in addition to the proceeds from the trade-in, plaintiff received "a windfall that cannot possibly be characterized as 'restitution.' "

Second, defendant argues that the Commercial Code sections expressly incorporated into section 1794 of the Act "recognize that a buyer's warranty recovery is reduced by the amount she obtains by reselling the nonconforming goods."

Third, defendant contends that the trial court's decision, if upheld, would effectively nullify the Act's requirement that manufacturers notify subsequent purchasers of reacquired vehicles' defects, because "no rational consumer would return her defective car" and forego the opportunity to recover additional money by selling it. This would undermine "the Legislature's protections for downstream consumers in the used-car market."

We agree with the first and third arguments and therefore do not address defendant's second argument under the Commercial Code.

Like the court in *Mitchell*, we think it significant that the Legislature chose the term "restitution" to define the Act's refund remedy in section 1793.2, subdivision (d)(2). The *Mitchell* court interpreted that choice to mean that the Legislature intended that remedy "to restore 'the *status quo ante* as far as is practicable . . . .' "—in other words, to place the buyer in the position he or she would have been in had he or she not purchased the defective vehicle. (*Mitchell*, *supra*, 80 Cal.App.4th at p. 36.) Relying on this principle, the *Mitchell* court interpreted section 1793.2, subdivision (d)(2) to permit the recovery of costs beyond those expressly listed there, in that case the interest payments on the vehicle loan, in order to make the plaintiff whole. (*Mitchell*, at p. 37).

Just as the *Mitchell* court concluded that "restitution" under the Act cannot leave a plaintiff in a worse position than when he or she purchased the vehicle, it similarly would be inimical to the concept of restitution to leave a plaintiff in a better position, rather than merely restoring her to the *status quo ante*. Yet that is the outcome of the trial court's ruling here—plaintiff obtains not only a full refund from defendant, but also the $19,000 benefit she had already obtained by trading in the Jeep. It is true that section 1793.2, subdivision (d)(2)(B) sets the amount of restitution at "the actual price paid or payable." To read this literally, however, to permit plaintiff to recover far more from defendant than her actual economic loss disregards the Legislature's choice of the term "restitution," and leads to an unjustified windfall.

Further, "[w]e do not consider statutory language in isolation," and must "examine the entire statute to construe the words in context." (*Kirzhner*, *supra*, 9 Cal.5th at p. 972.) Applying those principles of statutory construction, we agree with defendant that to interpret section 1793.2, subdivision (d)(2)(B) to permit plaintiff to trade in her vehicle and still receive a full refund from defendant undercuts the Act's labeling and notification provisions, which require manufacturers to label vehicles reacquired under the Act as "lemons" and to notify subsequent buyers of that fact. (§§ 1793.22, subd. (f); 1793.23, subds. (c)–(e).)

Importantly, the labeling and notification provisions are triggered only when a manufacturer reacquires a vehicle or assists a dealer or lienholder in reacquiring a vehicle. (See § 1793.22, subd. (f) [applying to persons transferring vehicles previously transferred to a manufacturer under § 1793.2, subd. (d)(2)]; § 1793.23, subds. (c)–(d) [applying to manufacturers who reacquire or assist a dealer or lienholder in reacquiring a vehicle]; *id.*, subd. (e) [applying to persons who acquire vehicles for resale knowing the vehicles were reacquired by the manufacturer].) Accordingly, they are not triggered when a buyer resells or trades in the vehicle, as plaintiff did in this case.

This limitation makes sense only if, in the usual case, the vehicle is returned to the manufacturer rather than resold or traded in. Otherwise, the labeling and notification provisions would have marginal utility, and the used-car market would be replete with unlabeled lemons resold or traded in by their dissatisfied owners. Yet this would be the outcome if buyers could resell or trade in their vehicles and still receive a full refund of the purchase price under the Act. Under that

interpretation, we cannot conceive why a buyer would ever return a vehicle to the manufacturer rather than obtain the extra proceeds from a resale or trade. Return of the vehicle to the manufacturer would be the rare exception rather than the rule.

In short, a ruling in plaintiff's favor here would render the labeling and notification provisions largely meaningless, a result contrary to the rules of statutory construction. (*Aleman v. Airtouch Cellular* (2012) 209 Cal.App.4th 556, 568 ["We seek to avoid any interpretation that renders part of the statute ' "meaningless or inoperative" ' "].) Worse, it would incentivize buyers to reintroduce defective vehicles into the market without the warnings a manufacturer otherwise would have to provide. This cannot have been the Legislature's intent.

We thus conclude that the requirement in section 1793.2, subdivision (d)(2)(B) that a manufacturer "make restitution in an amount equal to the actual price paid or payable by the buyer" does not include amounts already recovered by the buyer through trade-in. To conclude otherwise would be "contrary to the legislative intent apparent in the statute" and "would lead to absurd results" (*Simpson Strong-Tie*, *supra*, 49 Cal.4th at p. 27), including a near nullification of the labelling and notification provisions.

Jiagbogu and Martinez, the cases relied upon by the trial court, presented decidedly different circumstances. In those cases, rulings in the manufacturers' favor would have deprived the plaintiffs of the full purchase price of their vehicles—in *Jiagbogu*, by reducing the refund to reflect use of the vehicle after the buyer requested restitution (*Jiagbogu*, *supra*, 118 Cal.App.4th at p. 1240), and in *Martinez* by barring recovery at all after the vehicle was repossessed (*Martinez*, *supra*, 193

Cal.App.4th at p. 190). That concern does not exist here, where plaintiff can recover the full purchase price through a combination of the trade-in and restitution from defendant. Plaintiff is not "bear[ing] all or part of the cost of the manufacturer's delay." (*Jiagbogu*, at p. 1244.)

Jiagbogu and *Martinez* are further distinguishable in that their holdings do not incentivize plaintiffs to thwart other provisions of the Act. It is true the repossessed vehicle in *Martinez*, like the traded-in vehicle here, presumably would evade the Act's labeling and notification provisions. The holding in *Martinez* did not financially reward the plaintiff for this result; it merely relieved her of the burden of shouldering payments for a derelict vehicle in order to seek remedies under the Act.

Here, in contrast, plaintiff received a $19,000 discount on the price of a new vehicle that, according to plaintiff's counsel, cost twice the purchase price of the Jeep she traded in. Allowing plaintiff also to receive a full refund from defendant would not relieve a financial burden, as was the case in *Martinez*. Instead, it would give plaintiff a windfall and incentivize future plaintiffs to seek that same windfall. Neither *Jiagbogu* nor *Martinez* confronted that possibility. *Martinez*, moreover, did not address the question before us, that is, what impact not returning the vehicle would have on the amount of a plaintiff's restitution under the Act.

Plaintiff raises a number of arguments challenging defendant's interpretation of the Act. Plaintiff argues, in line with *Jiagbogu*, that section 1793.2, subdivision (d)(2)'s single express offset—for use of the vehicle before it is first brought in for repairs—indicates legislative intent not to permit other offsets. (*Jiagbogu*, *supra*, 118 Cal.App.4th at pp. 1243–1244.)

We have no quarrel with this principle to the extent it is consistent with the notion that a buyer is entitled to recover the full purchase price of the vehicle, with no deductions for wear-and-tear apart from that which is expressly permitted. It does not follow that the Legislature intended a buyer to recover *more* than the full purchase price of the vehicle, which would be inconsistent with the Legislature's chosen term "restitution," and would undercut the Act's labeling and notification provisions.

Plaintiff contends that buyers trading in their vehicles is "predictable, and "[t]here is no reason to assume that the Legislature did not fully anticipate the very situation presented here." Thus, plaintiff argues, the "omission of any offset for trade-in credits must be read as a *deliberate* decision, not an oversight or an invitation for courts to imply provisions."

Our interpretation does not assume an oversight on the part of the Legislature. Our interpretation harmonizes express provisions of the Act, including the term "restitution" and the extensive labeling and notification provisions for reacquired vehicles, which indicate a legislative expectation that, in the usual case, buyers will return their defective vehicles to the manufacturer. This is not consistent with the regime advocated by plaintiff that would permit buyers to recover the full purchase price in addition to amounts obtained from trade-in or resale, thus incentivizing them not to return defective vehicles to the manufacturer.

Plaintiff claims that the legislative history of amendments to the Act demonstrates a concern that manufacturers exploited ambiguities in the Act's original language to claim offsets that "unfairly reduc[ed] a consumer's restitution," such as offsets for sales tax, license and registration fees, and rental car use.

Plaintiff contends the Legislature thus enacted the "comprehensive damages provision" in order to remove those ambiguities and provide a straightforward formula to calculate damages in the consumer's favor. Accepting arguendo plaintiff's characterization of the legislative history, it merely reinforces the principle that the Act is intended to make buyers whole. Our interpretation of the Act, which allows plaintiff to recover the full purchase price of the vehicle through a combination of the trade-in and damages from defendant, does not conflict with this principle.

Plaintiff disputes that *Mitchell* supports our interpretation of the term "restitution," because "*Mitchell* held that the Act had to be expansively construed to provide remedies *for consumers*," not manufacturers. The significance of *Mitchell* is its emphasis that the Legislature chose the term "restitution" for a reason, indicating an intent that buyers of defective vehicles be restored to the *status quo ante*. (*Mitchell*, *supra*, 80 Cal.App.4th at p. 36.) Nothing in our holding conflicts with this principle—plaintiff receives the full purchase price of her vehicle, as intended by the Legislature. It is granting her more than the purchase price that conflicts with the Legislature's choice of the term "restitution."

To the extent *Martinez* took issue with *Mitchell*'s applying a common-law gloss to the Act's use of the term "restitution," *Martinez* did so in the context of preserving the plaintiff's right to recover under the Act despite not returning the vehicle. (*Martinez*, *supra*, 193 Cal.App.4th at p. 199.) As we have noted above, *Martinez* did not confront the situation presented here, in which plaintiff would be financially rewarded for not returning the vehicle. *Martinez* therefore is not instructive on whether the term "restitution" may be interpreted to allow that result.

Plaintiff's argument under *Mitchell* also relies on the false premise that to disallow her a double recovery would be anti-consumer. Our interpretation is neutral. It fully compensates plaintiff while implementing the protective measures in the labeling and notification provisions in the Act, which benefit the consuming public.

Plaintiff contends that interpreting the Act as we have effectively rewards defendant for failing to provide the prompt restitution required by the Act. Plaintiff characterizes a reduction in damages along with a lowered amount of allowable civil penalty as a "windfall." Plaintiff argues this will incentivize similar dilatory conduct from manufacturers hoping buyers will trade in their vehicles in frustration, rendering "superfluous" the Act's requirement that manufacturers provide prompt restitution.

It is true that prior cases have rejected interpretations of the Act that allow manufacturers to benefit from delays in compliance. (See, e.g., *Jiagbogu*, *supra*, 118 Cal.App.4th at p. 1244 [rejecting restitution offset that "would reward [the manufacturer] for its delay in replacing the car or refunding [the buyer's] money when it had complete control over the length of that delay, and an affirmative statutory duty to replace or refund promptly"].) To the extent that concern exists here, however, it is outweighed by the consequences of interpreting the Act in plaintiff's favor, namely actively incentivizing buyers to introduce lemon vehicles into the used-car market without the labeling and notifications required of manufacturers who reacquire vehicles. Neither *Jiagbogu* nor any other case we have found confronts a circumstance in which a ruling against the manufacturer would have such negative consequences. We further note that the Act's

provisions of a civil penalty and attorney fees to a successful plaintiff serve to encourage prompt compliance, even if the manufacturer may reduce a plaintiff's restitution by the trade-in value of the vehicle.

Plaintiff disputes the concern that buyers trading in their vehicles rather than returning them to the manufacturer will lead to "un-branded lemons entering the stream of commerce." Plaintiff argues that a dealer who accepts a trade-in is capable of determining whether the vehicle is defective. Plaintiff further contends that the Act contains sufficient protections for buyers of used vehicles, including implied warranties of fitness and merchantability, as well as any protections available under an express warranty.

The fact that a dealer may on its own discover the deficiencies in a traded-in vehicle, or that a buyer upon discovering those deficiencies may seek various warranty remedies, is hardly a substitute for informing a purchaser up front that the vehicle is a reacquired lemon and providing the vehicle's history of nonconformities and repairs. Indeed, in enacting the robust labeling and notification provisions in sections 1793.22 and 1793.23, the Legislature clearly indicated an intent to provide greater protections for potential buyers of known lemons than would be available to buyers of other used cars. As we have already discussed, accepting plaintiff's interpretation of the Act would severely undercut if not nullify those protections.

Plaintiff argues that statutory damages may exceed actual damages, and thus it is appropriate for her to recover full restitution from defendant despite the $19,000 trade-in. Notably, plaintiff's cited authorities, none of which is a California case, do

not apply this principle in the context of restitution. (See *Parchman v. SLM Corp.* (6th Cir. 2018) 896 F.3d 728; *Universal Underwriters Insurance Company v. Lou Fusz Automotive Network, Inc.* (8th Cir. 2005) 401 F.3d 876.) Regardless, to apply that principle here would incentivize buyers not to return their vehicles.

Plaintiff raises additional arguments premised on the notion that what defendant seeks here is an "equitable offset." Plaintiff argues an equitable offset is an affirmative defense that defendant did not plead in its answer and therefore forfeited. Plaintiff further contends that trial courts have discretion to grant or deny equitable offsets, and the court did not abuse its discretion denying one here. Finally, plaintiff argues that if defendant is entitled to an equitable offset, it would be "for the value of a vehicle that was not returned," and therefore a bench trial is necessary to determine that value. In making this last argument, plaintiff asserts that the trade-in credit for the Jeep is not an accurate measure of its market value.

Our conclusion that plaintiff is not entitled to a double recovery is not premised on a discretionary offset under the trial court's equitable power. Our conclusion is based on an interpretation of the Act's provisions, from which we conclude "restitution" under the Act cannot include amounts the buyer has already obtained by trading in the vehicle. The issue is not that defendant has been deprived of the value of the traded-in vehicle; it is that plaintiff's double recovery defies the definition of "restitution" and will incentivize buyers to undercut the Act's labeling and notification provisions. The interpretation that avoids that absurd result is one in which plaintiff's damages are reduced by the amount of her trade-in. To the extent this

constitutes an "offset," it is inherent in the Act, not principles of equity. Plaintiff's arguments based on equitable offset therefore fail.

Plaintiff's briefing suggests that the $19,000 does not even reflect the value plaintiff herself received, and therefore should not be the basis of an offset. Plaintiff states that dealers sometimes assign an artificially high value to a trade-in, then raise the purchase price to compensate. Plaintiff argues there was no evidence that the trade-in credit "*actually* reduced the price of the Yukon."

We reject this argument. Plaintiff testified that she sold the Jeep to the GMC dealer for $19,000, which, in the context of a trade-in, means she received a $19,000 reduction in the price she agreed to pay for the Yukon. The fact that the dealer may have inflated the price of the Yukon or the value of the trade-in is immaterial; what matters is what plaintiff bargained for and received. We hold her to that bargain and reduce her restitution award accordingly.

2. It is appropriate to preserve as much of the civil penalty as the Act allows because the jury already factored in the trade-in proceeds plaintiff received

The jury awarded plaintiff a civil penalty of $59,376.65 on damages of $39,584.43. As discussed, section 1794, subdivision (c) caps the civil penalty at twice actual damages. Plaintiff concedes that, to the extent defendant is entitled to reduce the damages it owes by the value of her trade-in, the civil penalty cannot exceed twice the reduced damages. Thus, plaintiff

concedes that if we reduce plaintiff's award by $19,000 to $20,584.43, her civil penalty cannot exceed $41,168.86.[8]

Defendant argues that, because the jury imposed a civil penalty one-and-a-half times the amount of the original damages award, that same proportion should apply to the reduced award here, resulting in a penalty of $30,876.65. Defendant claims the "verdict makes clear that the jury did not intend to impose the maximum penalty. Instead, the excessive penalty resulted from the erroneous inflation of [plaintiff's] compensatory damages."

Plaintiff disagrees, arguing that it "would infringe on [her] right to a jury trial if the Court were to reduce the amount a jury decided any more than necessary to ensure the award does not exceed the legal maximum."

Courts have expressed concern that "if the jury is not informed about the mitigation of plaintiff's actual losses, there is a strong likelihood that the jury will return an inflated award of punitive damages." (*Krusi v. Bear, Stearns & Co.* (1983) 144 Cal.App.3d 664, 681, italics omitted.) In such a circumstance, it may be appropriate for the trial court, after determining any offsets to a compensatory damages award, to "consider whether there should be a reduction in the amount of punitive damages." (*Ibid.*; but see *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 537 [appellate court's reduction of compensatory damages did not require reduction of punitive damages award when it was "not so disproportionate as to render it 'suspect' "].)

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[8] Given plaintiff's concession, we express no opinion whether the civil penalty cap under section 1794, subdivision (c) should be calculated before or after reducing plaintiff's damages to account for a trade-in or resale.

Accepting arguendo that a court may reduce a punitive damage award when the jury was unaware that the plaintiff mitigated her losses, that principle would not apply here. In the instant case, the jury was aware of the mitigation of plaintiff's losses, because the jury heard plaintiff testify that she traded in the Jeep for $19,000. We may assume the jury's civil penalty award factored in that information. We therefore see no reason not to preserve as much of the jury's civil penalty award as is permitted under section 1794, that is, twice plaintiff's reduced damages. Given that conclusion, we do not reach plaintiff's argument regarding her right to a jury trial.

DISPOSITION

The award to plaintiff is reduced to $61,753.29, reflecting damages of $20,584.43 and a civil penalty of $41,168.86. As modified, the judgment is affirmed. Defendant is awarded its costs on appeal.

CERTIFIED FOR PUBLICATION.

BENDIX, J.

We concur:

ROTHSCHILD, P. J. CHANEY, J.

CERTIFICATION

Pursuant to California Rules of Court, rule 8.504(d)(1), (d)(3), I certify that this **PETITION FOR REVIEW** contains **8,400** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: December 9, 2020 s/ Cynthia E. Tobisman

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On December 9, 2020, I served the foregoing document described as: **PETITION FOR REVIEW** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

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By Mail: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on December 9, 2020, at Los Angeles, California.

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

s/ Chris Hsu

SERVICE LIST

Via TrueFiling:

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Office of the Clerk
CALIFORNIA COURT OF APPEAL
[Electronic Service under Rule 8.212(c)(2)]

Via U.S. Mail:

Clerk of the Superior Court
Department 32, Honorable Daniel S. Murphy
111 North Hill Street
Los Angeles, CA 90012
Case Number: BC638010

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **Niedermeier v. FCA US LLC**
Case Number: **TEMP-Z819E6K6**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **ctobisman@gmsr.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
ISI_CASE_INIT_FORM_DT	Case Initiation Form
PETITION FOR REVIEW	Petition for Review

Service Recipients:

Person Served	Email Address	Type	Date / Time
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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.

12/9/2020

Date

/s/Chris Hsu

Signature

Tobisman, Cynthia (197983)

Last Name, First Name (PNum)

Greines Martin Stein & Richland LLP

Law Firm