No. S266034

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 Appellate District, Division One
No. B293960
Superior Court of Los Angeles County
Hon. Daniel S. Murphy, Judge
No. BC638010

ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Rule 8.208, I certify that the following listed entities have: (1) a financial interest in the subject matter in controversy or in a party to this proceeding; or (2) a non-financial interest that could be substantially affected by the outcome of the proceeding:

1. FCA North America Holdings LLC has a 100% ownership interest in Defendant-Appellant FCA US LLC.

2. FCA Holdco B.V. has a 100% ownership interest in FCA North America Holdings LLC.

3. Stellantis N.V. (f.k.a. Fiat Chrysler Automobiles N.V.) has a 100% ownership interest in FCA Holdco B.V. Stellantis N.V. is a publicly traded company incorporated under the laws of the Netherlands.

Dated: August 2, 2021

/s/ Thomas H. Dupree Jr.
Counsel for Appellant

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ISSUES PRESENTED

1. Whether a buyer's restitution damages under the Song-Beverly Act include the amount the buyer already recovered from a third party when she resold her car.

2. Whether this Court should resolve an issue that no lower court has ever decided and that the Court of Appeal held was expressly waived below: For purposes of imposing a civil penalty under the Song-Beverly Act, do a buyer's "actual damages" include the amount the buyer recovered from a third party when she resold her car?

INTRODUCTION

This case is about the measure of a buyer's damages under the Song-Beverly Act, popularly known as the Lemon Law. Plaintiff Lisa Niedermeier bought a new Jeep Wrangler for about $40,000, and then resold it to a GMC dealership for a $19,000 credit towards a new car. The question presented is whether her restitution damages include the $19,000 that she received through the resale. The answer is self-evident: As the Court of Appeal recognized, when a buyer resells a lemon rather than return it to the manufacturer, her damages do not include the portion of the purchase price that she has already recovered.

The Court of Appeal's decision is supported by the plain text of the statute and common sense. The Song-Beverly Act provides for "restitution," a remedy that is intended to restore a buyer to the same position she would have been in had she not purchased the defective car. (See *Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32, 36 (*Mitchell*) [quoting Cal. Civ. Code § 1793.2(d)(2)].) Here, the way to restore Niedermeier to her position before she bought the Jeep is to ensure that she receives the purchase price back (subject to a modest reduction for her use of the vehicle), plus her incidental and consequential damages. Allowing her to recover $19,000 of the purchase price twice by reselling the lemon rather than returning it would not be restitution because it would leave her far better off than if she had never purchased the Jeep.

This common-sense conclusion is further confirmed by the statute's express incorporation of Commercial Code damages rules

for determining damages in Lemon Law cases. The Legislature specifically directed that Sections 2711 through 2715 of the Commercial Code "shall apply" in determining the "measure of the buyer's damages in an action" under the Lemon Law. (See Cal. Civ. Code § 1794(b); *Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th 966, 977–83 (*Kirzhner*) [looking to Commercial Code §§ 2711–2715 as measure of damages in Lemon Law case].) Under those Commercial Code rules, a buyer's recovery is reduced by the amount of money she obtains by selling the nonconforming goods.

The Court of Appeal's decision fulfills a key purpose of the Lemon Law: protecting consumers who buy used cars. The Act includes a host of consumer-focused protections aimed at ensuring that lemons are labeled and branded so that an unsuspecting consumer does not unknowingly purchase a lemon that has been put back on the market. (See Cal. Civ. Code §§ 1793.22, 1793.23.) Among other things, the Act requires a manufacturer that reacquires a defective car to brand the car's title—and the car itself—with the label "Lemon Law Buyback." (Cal. Civ. Code § 1793.23(c).)

But none of these consumer protections takes effect unless a buyer returns the car to the manufacturer. If this Court were to adopt Niedermeier's interpretation of the Act, no rational plaintiff would *ever* return her defective vehicle to the manufacturer so that it can be branded a "Lemon Law Buyback." Why would they? If they resell their lemon to an unsuspecting third party, they can recover both the full purchase price of their vehicle *and* keep the proceeds from the resale. If they return their vehicle to the

manufacturer, they get only the purchase price. Here, by reselling her vehicle, Niedermeier seeks $19,000 more than she otherwise would have been entitled to.

This is why the Court of Appeal described Niedermeier's interpretation as leading to an "absurd result." (Opn. 26.) It would eviscerate the Legislature's carefully-crafted consumer-protection regime by creating an enormous financial incentive for people to evade the disclosure requirements and flood the used car market with unbranded lemons, transforming Song-Beverly from a statute intended to protect consumers to one that will result in California consumers unwittingly buying cars that should have been branded as lemons.

The Song-Beverly Act has been on the books for more than 50 years. Yet Niedermeier cannot identify a single decision (other than the reversed trial court ruling in this case) that allows a buyer to resell a used car and then recover the same money twice in a Lemon Law action. In fact, even though all 50 states have enacted Lemon Laws, Niedermeier fails to identify any other decision from any other state that would allow the blatant double recovery she demands.

Niedermeier is wrong in arguing that this case involves an "offset" that is not expressly recognized in Song-Beverly. The amount of the resale is not an offset; rather, it goes to the initial measure of restitution damages. And in determining restitution damages, courts are not limited to the items expressly identified in the Act. (*Mitchell*, *supra*, 80 Cal.App.4th at p. 36.) Indeed, the Legislature expressly incorporated ordinary Commercial Code

principles into the measure of a buyer's damages. (See Cal. Civ. Code § 1794(b).)

Niedermeier is also mistaken in arguing that the decision below will reward manufacturers for delays in providing restitution. As the Court of Appeal explained, manufacturers do not benefit from delay: if the buyer ends up reselling her vehicle, the manufacturer may pay a little less in damages, but it does not get the vehicle back, so it obtains no economic benefit. Moreover, any manufacturer that unjustifiably delays paying restitution faces substantial civil penalties (up to twice the amount of restitution) in addition to having to pay the buyer's attorney's fees. Because the amount of a civil penalty and a fee award often dwarf the amount a buyer must pay in restitution, manufacturers are already strongly incentivized to avoid delays.

Niedermeier has waived her second "issue presented." Although she argues that the Court of Appeal erred by excluding the amount of the resale when calculating the maximum civil penalty, the Court of Appeal held that she had expressly waived this argument below. (Opn. 27.) Accordingly, the Court of Appeal left this question for another day, and this Court should too. If for some reason the Court reaches this issue, it should affirm based on the plain language of the statute. Civil penalties may not exceed two times the amount of the buyer's "actual damages." (Cal. Civ. Code § 1794(c).) A buyer's "actual damages" do not include money that a buyer has already recovered through a resale.

Giving Niedermeier a $19,000 windfall is unnecessary "to bring [the Act's] benefits into action." (*Murillo v. Fleetwood Enters., Inc*. (1998) 17 Cal.4th 985, 990.) Niedermeier has already been made whole through recovery of her entire purchase price, plus $5,000 in incidental and consequential damages. She has been awarded a civil penalty of $41,168.29, and she received an additional $163,442.92 in attorney's fees and costs. Thus, Niedermeier has already received far more than necessary to fully compensate her for the injury she suffered from the warranty violation. This point bears repeating: Niedermeier has already recovered more than $218,000 in this lawsuit involving the warranty on a $40,000 Jeep.

The Court of Appeal's unanimous, well-reasoned opinion is faithful to the plain text of the statute and ensures that Lemon Law protections remain available for all California consumers. This Court should affirm.

STATEMENT OF FACTS

I. The Song-Beverly Act

A. The Seller's Obligations

The Song-Beverly Act protects consumers who purchase products with express warranties. Section 1793.2(d) of the Act, "popularly known as '[T]he Lemon Law[,]'" was "[s]pecifically designed to deal with defective cars." (*Jensen v. BMW of N. Am., Inc.* (1995) 35 Cal.App.4th 112, 123 (*Jensen*).)

Under the Lemon Law, "the buyer shall be free to elect restitution in lieu of replacement." (Cal. Civ. Code § 1793.2(d)(2).)

Section 1793.2(d)(2)(B) 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, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer[.]" (Cal. Civ. Code § 1793.2(d)(2)(B).) In addition, the manufacturer must make restitution for "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." (*Id.*)

Subparagraph (C) allows the manufacturer an offset for the buyer's use of her car before she delivered it to the dealer for repairs. (Cal. Civ. Code § 1793.2(d)(2)(C).) The amount of that offset is determined by a formula based on the vehicle's price and the number of miles on the odometer. (*Id.*)

B. The Notice And Title-Branding Provisions

Ordinarily, when a manufacturer makes restitution and refunds the purchase price, the buyer returns the deficient vehicle to the manufacturer. (See Cal. Civ. Code § 1793.23(c), (d), (e) [describing how vehicle is "accepted for restitution" by the manufacturer].) When that happens, before the manufacturer may resell the vehicle, it must disclose the problems with the vehicle to prospective customers. Section 1793.22(f) provides that "no person" may resell a vehicle "transferred by a buyer or lessee

to a manufacturer pursuant to" the Lemon Law unless "the nonconformity experienced by the original buyer . . . is clearly and conspicuously disclosed to the prospective buyer, lessee, or transferee, the nonconformity is corrected, and the manufacturer warrants . . . for a period of one year that the motor vehicle is free of that nonconformity." (Cal Civ. Code § 1793.22(f)(1).) Section 1793.23 separately requires manufacturers and dealers to notify consumers that a vehicle was repurchased because of a defect, and that they "obtain the transferee's written acknowledgement of [that] notice." (*Id.* § 1793.23(d)–(f); see also *id.* § 1793.24.)

In addition, manufacturers must add "the notation 'Lemon Law Buyback'" to a defective vehicle's title. (Cal. Civ. Code § 1793.23(c).) And they must "affix a decal to the vehicle" indicating that the vehicle was "replaced, [or] accepted for restitution due to the failure of the manufacturer to conform the vehicle to the applicable warranties." (*Id.*; see also Cal. Vehicle Code § 11713.12.)

These interlocking provisions "show the Legislature has systematically attempted to address warranty problems unique to motor vehicles, including transferability and mobility." (*Jensen*, *supra*, 35 Cal.App.4th at p. 124.) But none of the notice obligations, including the requirement that a manufacturer brand a defective car with a "Lemon Law Buyback" sticker and title notation, is triggered unless the manufacturer "reacquires" the car pursuant to the Act or a similar law. (Cal. Civ. Code § 1793.23(c); see also *id.* §§ 1793.22(f)(1), 1793.23(d)–(f).)

C. The Buyer's Legal Remedies

Section 1794 creates a private cause of action. "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under" the Song-Beverly Act may "bring an action for the recovery of damages and other legal and equitable relief." (Cal. Civ. Code § 1794(a).)

Section 1794(b) spells out "[t]he measure of the buyer's damages." It provides:

> (b) The measure of the buyer's damages in an action under this section shall include the rights of replacement 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.

(Cal. Civ. Code 1794(b).)

In addition to damages, an injured buyer may seek civil penalties. Section 1794(c) provides that if a manufacturer's failure to comply with the Act "was willful, the judgment may include . . . a civil penalty which shall not exceed two times the amount of actual damages." (Cal. Civ. Code § 1794(c).)

A manufacturer is also liable for the buyer's attorney's fees "based on actual time expended[.]" (Cal. Civ. Code § 1794(d).) A manufacturer's liability for attorney's fees often vastly exceeds the

amount the manufacturer pays in restitution and civil penalties. (See, e.g., *Goglin v. BMW of N. Am., LLC* (2016) 4 Cal.App.5th 462, 464–65 [affirming award of $185,000 in attorney's fees].)

II. This Lawsuit

A. Niedermeier's Purchase And Resale Of Her Jeep

In January 2011, Niedermeier bought a new Jeep Wrangler for $39,799. (AA69–AA70; 2RT904.) She drove the Jeep for more than three years. During that time, she experienced problems with the vehicle, including irregular engine noises and transmission problems. (2RT912–2RT933.)

Niedermeier brought the Jeep to authorized FCA repair facilities on multiple occasions between June 2012 and April 2015, but she was still unsatisfied with the Jeep's performance. (2RT912–2RT933.) In late 2015, she purchased a new GMC Yukon from a GMC dealership and traded in the Jeep. (2RT949.) In exchange, the dealership gave her a credit of $19,000 towards the Yukon. (See 2RT957.)

B. The Trial Court's Decision

In October 2016, Niedermeier filed this lawsuit alleging that FCA failed to fulfill its obligations under the Song-Beverly Act. Before trial, Niedermeier moved to exclude any evidence or argument concerning the $19,000 credit she received when she resold the Jeep. (AA228.) FCA objected, arguing that this evidence was highly relevant to determining Niedermeier's actual damages. (1RT302–1RT306.) The trial court ruled that the jury would not be told about the credit. Instead, the court explained, it

would make any necessary adjustments to the resulting award after the jury rendered its verdict. (See 1RT303.)

The jury ultimately returned a verdict for Niedermeier. It found that FCA had not complied with its obligation to repair or replace the vehicle after it had been given a reasonable number of opportunities to fix the problems. (AA70.) The jury awarded Niedermeier $39,584.43 in damages—the $39,799 she paid for the Jeep, plus $5,000 in "[i]ncidental and consequential damages," and minus $5,214.57 for her use of the vehicle before she brought it to FCA for repairs. (AA70–AA71.) The jury also found that FCA's violation of the Act was willful, and imposed a civil penalty of $59,376.65. (AA71–AA72.) The trial court entered a total judgment of $98,961.08, without any reduction for the money that Niedermeier obtained by reselling the Jeep. (AA75, AA125.) The court also awarded Niedermeier approximately $160,000 in attorney's fees and costs. FCA MJN 305–07.

After trial, FCA moved the court to reduce Niedermeier's restitution damages by the amount she received when she resold the Jeep, and for a corresponding reduction to the civil penalty. (AA81.) The trial court issued a tentative ruling agreeing with FCA, but then it reversed course and held that Niedermeier's damages include the $19,000 from the resale. (AA125.)

C. The Court Of Appeal's Decision

The Court of Appeal unanimously agreed with FCA that Niedermeier's damages do not include the portion of the purchase price that she recovered when she resold her Jeep, and affirmed a

modified judgment of $61,753.29 in Niedermeier's favor. (Opn. 29.) The award of approximately $160,000 in attorney's fees was not at issue on appeal.

The court explained that "[t]he 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." (Opn. 2.) "Granting plaintiff a full 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.'" (*Id.* at pp. 2–3.) The court rejected Niedermeier's argument that measuring her damages in this way amounted to an "offset." (*Id.* at p. 26.)

The court further explained that allowing a double recovery when a buyer resells her car "would render [the Act's] labeling and notification provisions largely meaningless, a consequence the Legislature could not have intended." (Opn. 3.) "[I]f 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." (*Id.*) The result would be that "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." (*Id.* at p. 19.)

As for the civil penalty, the court held that it should be reduced to $41,168—the maximum permissible penalty under Section 1794(c) after properly calculating Niedermeier's "actual damages." (Opn. 28.) In her brief, Niedermeier had conceded that

if her damages were reduced to account for the resale, then the civil penalty award would also need to be reduced to the extent it "exceeded section 1794's damages cap." (Respondent's Br. 81, *Niedermeier v. FCA US LLC*, Case No. BC638010 (Feb. 6, 2020) ("Niedermeier Court of Appeal Br.").) In light of that concession, the Court of Appeal "express[ed] no opinion" on whether the resale amount should be ignored for purposes of calculating the damages cap. (Opn. 28 n.8.)

STANDARD OF REVIEW

"The interpretation of a statute presents a question of law that this court reviews de novo." (*Smith v. LoanMe, Inc.* (2021) 11 Cal.5th 183, 190.) "A statute must be given a reasonable and common sense interpretation consistent with the apparent purpose and intent of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity." (*DiCampli Mitz v. Cty. of Santa Clara* (2012) 55 Cal.4th 983, 992 [quotation marks omitted].)

ARGUMENT

I. Niedermeier's Damages Do Not Include The Money She Recovered By Reselling The Vehicle.

The statutory text and purpose point to the same common-sense conclusion—a buyer's damages do not include the money she has already received by reselling the vehicle.

A. The Act's Plain Language Does Not Authorize A Double-Recovery Windfall.

Two aspects of the statutory text make clear that Niedermeier cannot claim a double recovery. *First*, Niedermeier elected "restitution"—a remedy that is intended to put the buyer in the same economic position she would have been in had she never purchased the vehicle. *Second*, the statute expressly states that Sections 2711–2715 of the Commercial Code "shall apply" in determining damage awards under the Act. Those sections provide that if a buyer resells nonconforming goods, then her damages are reduced by the amount she obtains from the resale.

1. Restitution Does Not Include Money That A Buyer Has Already Recovered.

Section 1793.2(d)(2)(B) allows a buyer to obtain "restitution" from the manufacturer. The Legislature acted deliberately when it "expressly characterize[d] the refund remedy as 'restitution.'" (*Mitchell*, *supra*, 80 Cal.App.4th at p. 36.) By "call[ing] the Act's refund remedy 'restitution,'" the Legislature "indicat[ed] an intent to restore a plaintiff to the financial position in which she would have been had she not purchased the vehicle." (Opn. 2.) Here, if Niedermeier were allowed to recover the full purchase price from FCA—and also keep the $19,000 she got from reselling the vehicle—she would not be restored to her original position, but would be in a far *better* position than if she had never bought the vehicle in the first place.

Where the Legislature uses a well-known common-law term in a statute, this Court "presume[s] that in enacting [the] statute

the Legislature was familiar with the relevant rules of the common law" and intends to "continue those rules in statutory form." (*People v. Chun* (2009) 45 Cal.4th 1172, 1183–84 [quotation marks and ellipsis omitted]; see also *People v. Newby* (2008) 167 Cal.App.4th 1341, 1345–47 ["[W]here the Legislature uses a term well understood by the common law, [courts] must presume that the Legislature intended the common law meaning."]; 2B Sutherland Statutory Construction § 50:3 (7th ed.).)

Restitution unwinds the transaction and restores the parties to their original positions. "The purpose of restitution . . . is the restoration of the *status quo ante* as far as is practicable, and in the absence of qualifying circumstances, the plaintiff must return any consideration he has received in order to obtain specific restitution." (*Alder v. Drudis* (1947) 30 Cal.2d 372, 384 (*Alder*); see also, e.g., *Pineda v. Bank of Am., N.A.* (2010) 50 Cal.4th 1389, 1401 ["With regard to restitution, the goal is to restore plaintiff to the status quo ante."].)

The Act's restitution remedy tracks the common-law meaning. The Act contemplates that the manufacturer will refund the entire purchase price, along with all collateral charges such as taxes and fees, and reasonable repair and towing costs. (See Cal. Civ. Code § 1793.2(d)(2)(B).) But it also contemplates that, in exchange, the buyer will return the car to the manufacturer. This is made clear by Section 1793.23, which states in four different places that a defective vehicle is "accepted for restitution" by the manufacturer. (See Cal. Civ. Code § 1793.23(c), (d), (e).)

In *Kirzhner*, this Court repeatedly recognized that when a seller's duty to provide restitution arises, the buyer typically returns the vehicle to the seller, and that some incidental costs a buyer incurs, such as registration renewal and nonoperation fees, are for "the seller's benefit pending the seller's retrieval of the goods." (See, e.g., *Kirzhner*, *supra*, 9 Cal.5th at pp. 980–81; see also *id.* [once manufacturer's duty to provide restitution arises, "the buyer no longer has the same ownership interest in the vehicle since the manufacturer can (and should) replace or repurchase it at any moment"]; *id*. ["buyers and lessees are legally required to pay, and cannot avoid paying, registration renewal fees incurred prior to the vehicle's transfer back to the manufacturer"].)

Indeed, Niedermeier has conceded throughout this litigation that if she had not resold her Jeep, she would have been legally obligated to return the vehicle to FCA as part of the restitution process. (See, e.g., Opening Br. 69 [admitting that "but for the trade-in, the manufacturer would have recovered the vehicle"]; 1RT308 [agreeing that FCA would "be entitled to the car back" if Niedermeier prevailed and still owned the vehicle]; 3RT1589 [admitting that "If a plaintiff prevails in a Lemon Law case . . . they have to give the car back"].)

Because Niedermeier sold the vehicle to a GMC dealer, she cannot return it to FCA. And under *Martinez v. Kia Motors America, Inc.* ((2011) 193 Cal.App.4th 187, 192 (*Martinez*)), she was not required to return the car in order to obtain restitution. Nonetheless, her choice to resell the vehicle means that her restitution award must be reduced by the payment she received

from the GMC dealer, which reflects the value Niedermeier would otherwise have been required, under Song-Beverly, to convey to FCA in the form of the vehicle itself.[1]

Reducing her restitution award by the amount of the resale restores Niedermeier to her original position, in that she will have recovered the full purchase price of the vehicle. Again, if Niedermeier recovered the full purchase price from FCA *and* kept the money from the resale, she would be in a far *better* position than she would have been had she never purchased the Jeep. She would get a double recovery windfall by recovering $19,000 of her purchase price twice—once when she resold the Jeep, then again in this lawsuit. That is not "restitution" in any sense of the word.

Whereas Niedermeier would be unjustly enriched by the double recovery, FCA would not be unjustly enriched if Niedermeier's recovery were reduced by the amount she received from the resale. That is because FCA was deprived of the remaining value of the Jeep, which it could have resold. Indeed, Niedermeier acknowledges that FCA would have been entitled to the vehicle as part of the restitutionary exchange. Yet she never explains why her resale should extinguish FCA's right to the return of the vehicle or to its monetary value.

Because Niedermeier has sold the Jeep and is therefore unable to return it to FCA, the only way to return both parties to

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[1] The question whether *Martinez* was correctly decided is not before the Court in this case, so the Court can assume without deciding that a buyer is not required to return her defective vehicle to a manufacturer to obtain restitution.

"the *status quo ante* as far as is practicable" is to calculate her restitution payment by taking into account the portion of the purchase price she received through the resale. (*Alder*, *supra*, 30 Cal.2d at p. 384.)

2. Song-Beverly Damages Are Governed By Commercial Code Provisions That Prohibit A Double Recovery.

The statute bars a double recovery in another respect. The Legislature provided that Commercial Code Sections 2711–2715 "shall apply" in determining the "measure of the buyer's damages in an action" under the Lemon Law. (See Cal. Civ. Code § 1794(b).) Those sections provide that a buyer's damages do not include the amount she obtains through a resale.

a. By expressly incorporating these Commercial Code Sections into the measure of damages under the Song-Beverly Act, "[t]he Legislature has made it clear the compensatory damages available to the buyer under the Act are limited to the same categories, *and measured in the same manner*, as those normally available to a buyer for a seller's breach of a contract for sale of goods." (*Kwan v. Mercedes-Benz of N. Am., Inc.* (1994) 23 Cal.App.4th 174, 187 (*Kwan*) [emphasis added].) "The clear mandate of [S]ection 1794 . . . is that the compensatory damages recoverable for breach of the Act are those available to a buyer for a seller's breach of a sales contract" under the general rules applicable to "ordinary commercial contract[s]." (*Id.* at p. 188.) "[T]he Legislature's express reference to damages recoverable in contract actions[] not only clarifies what remedies are available for

the recipient of a warranty, but also defines limits on the kinds and extent of damages that might otherwise be imposed." (*Bishop v. Hyundai Motor Am.* (1996) 44 Cal.App.4th 750, 757 (*Bishop*).)

In *Kirzhner*, this Court looked to Sections 2711–2715 of the Commercial Code as providing the measure of a plaintiff's damages in a Lemon Law case. The Court quoted the statutory language that Sections 2711–2713 "shall apply" where the buyer rejected the goods or justifiably revoked her acceptance, and Sections 2714–2715 "shall apply" where the buyer has accepted the goods. (*Kirzhner*, *supra*, 9 Cal.5th at p. 977 [quoting Cal. Civ. Code § 1793.2(b)]). The Court then proceeded to analyze and apply these Commercial Code sections in determining how to measure the plaintiff's damages. (*Id*. at pp. 977–83.)

To be sure, where there is a direct conflict between the Song-Beverly Act and the Commercial Code, the Song-Beverly Act prevails. (See Cal. Civ. Code § 1790.3.) Thus, a manufacturer cannot invoke the Commercial Code to deny a buyer relief altogether—say, for failing to "reject or revoke acceptance of the vehicle at a reasonable time"—where the Song-Beverly Act would otherwise provide the buyer a remedy. (*Krotin v. Porsche Cars N. Am., Inc.* (1995) 38 Cal.App.4th 294, 301.) There is no conflict here, however, because nothing in the Song-Beverly Act entitles the buyer to a full refund of the purchase price while pocketing the money from a resale. (See *Kwan*, *supra*, 23 Cal.App.4th at p. 192 ["Section 1794 does not conflict with the California Uniform Commercial Code provisions; it incorporates them."].)

None of the cases cited by Niedermeier (Opening Br. 35) supports her argument that Sections 2711 through 2715 of the Commercial Code conflict with the Song-Beverly Act, because none involved those Commercial Code provisions or the Legislature's express incorporation of them into the "measure of the buyer's damages." (See *Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1262–65 [buyer waived argument she was entitled to damages under Sections 2608 and 2719 of the Commercial Code]; *Lukather v. Gen. Motors, LLC* (2010) 181 Cal.App.4th 1041 (*Lukather*) [does not address Commercial Code]; *Mexia v. Rinker Boat Co.* (2009) 174 Cal.App.4th 1297, 1307–08 [discussing "sections 2602 and 2607 of the Uniform Commercial Code"]; *Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 884 n.5, 888–91 (*Ibrahim*) [does not address Sections 2711–2715].)

b. The "measure of [a] buyer's damages" under Sections 2711 through 2715 excludes money that a buyer already recovered when she resold defective goods.[2]

Section 2711(3) of the California Commercial Code provides that:

> On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in

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[2] If the buyer rejects or revokes acceptance of the goods, Sections 2711-2713 apply; if the buyer accepts the goods, Sections 2714-2715 apply. Because the rule is the same under all sections—a buyer's damages do not include the amount of the resale—it makes no difference whether Niedermeier is deemed to have accepted or rejected the Jeep.

> their inspection, receipt, transportation, care and custody and may hold such goods *and resell them in like manner as an aggrieved seller (Section 2706)*.

[Emphasis added.]

Section 2706(1), in turn, provides that:

> [T]he seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover *the difference between the resale price and the contract price* together with any incidental damages allowed under the provisions of this division (Section 2710), but less expenses saved in consequence of the buyer's breach.

[Emphasis added.]

As a leading UCC treatise explains, "When the buyer resells the goods after the seller wrongfully refuses to recognize the buyer's revocation of acceptance, the buyer must give the seller credit for the amount received upon resale." (4A Part I Anderson U.C.C. § 2-711:43 (3d ed.).)

Many courts around the country have applied these Commercial Code sections in holding that a buyer's damages do not include money the buyer received when she resold goods to a third party. "[B]ecause California's Uniform Commercial Code was adopted verbatim from the Uniform Commercial Code, [this Court] may look to the Uniform Commercial Code's official comments, as well as to how other courts have interpreted the Uniform Commercial Code, for guidance." (*Kirzhner*, *supra*, 9 Cal.5th at p. 977.) For example, the Seventh Circuit held that under Section 2-711 a buyer who "does not return the defective goods, . . . must explain why (that it sold them, or that they were unsalable, or whatever), to scotch any inference that it is seeking

a double recovery." (*Northrop Corp. v. Litronic Indus.* (7th Cir. 1994) 29 F.3d 1173, 1176–77 (Posner, J.).) "For suppose [a buyer] had resold the [goods] at a price equal to what it had paid for them. Then it would not be entitled to any damages, for it would not have sustained any loss." (*Id.* at p. 1177.)

Likewise, under Uniform Commercial Code Section 2-714, the buyer's damages for "breach of warranty" must be reduced by the amount she receives from a resale of the goods. (*Gast v. Rogers-Dingus Chevrolet* (Miss. 1991) 585 So.2d 725, 730-31 (*Gast*) [applying Miss. Code Ann. § 75-2-714].) As under Section 2-711, "[w]hen the buyer resells the goods . . . the buyer must give the seller credit for the amount received upon the resale." (4A Part II Anderson U.C.C. § 2-715:196.)

California courts have applied the same common-sense rule in cases involving "ordinary commercial contract[s]." (*Kwan*, *supra*, 23 Cal.App.4th at p. 188.) In *Pann v. Fay Fruit Co.* ((1930) 110 Cal.App. 726, 730), the court modified a trial court's damages award where the trial court had "failed to deduct from the purchase price" of a carload of oranges the sum recouped by the buyer when it resold the fruit at an auction. Similarly, in *McAnulty v. Lema* ((1962) 200 Cal.App.2d 126, 136), the court held that a buyer's damages for a shipment of unsatisfactory Christmas trees intended for resale did not include the amount the buyer received "for the trees actually sold." (See also *Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 624 [affirming jury award in Song-Beverly case where plaintiff's damages request

included a $7,000 "deduction for sale proceeds" of the piano she had purchased from defendants].)

Other courts have applied these same principles in the specific context of a buyer's resale of a defective car, and have repeatedly held that the buyer's damages do not include the amount she recovered through the resale. (See, e.g., *Gast*, *supra*, 585 So.2d at pp. 730–31; *Roneker v. Kenworth Truck Co.* (W.D.N.Y. 1997) 977 F.Supp. 237, 242; *Hibbs v. Jeep Corp.* (Mo. Ct. App. 1984) 666 S.W.2d 792, 797–98; *Sanborn v. Aranosian* (1979) 119 N.H. 969, 970 (*Sanborn*).) In *Sanborn*, for example, the New Hampshire Supreme Court held that a buyer's damages were "the price paid," "allowing for the deduction of the resale price of the" defective vehicle. (119 N.H. at p. 970.)

c. Niedermeier has never disputed that under these Commercial Code sections, a buyer's recovery must be reduced by the amount of the resale. In fact, she has yet to identify a single case, under the Uniform Commercial Code or otherwise, allowing a buyer to sell her vehicle, keep the proceeds of the resale, and then recover the entire purchase price from the manufacturer without returning the car.

Instead, Niedermeier has argued that Section 1794(b)'s incorporation of the Commercial Code should be *ignored* because the Legislature provided that a "buyer's damages . . . shall include the rights of replacement or reimbursement as set forth in [Section 1793.2(d)]" in addition to Sections 2711 through 2715 of the Commercial Code. (Niedermeier Court of Appeal Br. 47.) In her view, this means she can claim the right of replacement or

reimbursement, and jettison the specific reference to the Commercial Code.

Niedermeier misreads the statute. Section 1794(b) says that "*[t]he measure* of the buyer's damages" includes replacement or reimbursement as calculated under Section 1793.2(d) "and" Sections 2711 through 2715 of the Commercial Code. (Cal. Civ. Code § 1794(b) [emphasis added].) Thus, the Legislature made clear that Sections 2711 through 2715 of the Commercial Code cannot simply be ignored when a court calculates a buyer's damages—to the contrary, they "shall apply." (*Id.*) Shall means shall. The Legislature's incorporation of these Commercial Code provisions makes perfect sense given that Section 1793.2(d) could not be expected to specifically address every one of the infinite variety of Lemon Law claims that courts would be asked to adjudicate.

In sum, the "measure of the buyer's damages" must consider both Section 1793.2(d) "and" the relevant provisions of the Commercial Code. These are not merely alternative measures of damages. If they were, the Legislature would have used "or" rather than "and."

B. A Double Recovery Would Undermine The Statutory Purpose And Contravene The Legislature's Intent.

The Song-Beverly 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 [quotation marks omitted].) Here, Niedermeier's interpretation would *harm* consumers by

encouraging buyers to resell unbranded lemons on the used car market. Her interpretation is unnecessary to incentivize manufacturers to provde prompt remedies. And it is inconsistent with the Act's legislative history, which confirms that the Legislature did not intend that a buyer's restitution damages include the portion of the purchase price she has already recovered.

1. Niedermeier's Interpretation Undermines The Act's Protections For Consumers Who Purchase Used Cars.

As the Court of Appeal recognized, Niedermeier's interpretation would harm consumers by "incentiviz[ing] buyers to reintroduce defective vehicles into the market without the warnings a manufacturer otherwise would have to provide." (Opn. 20; see also *id.* at pp. 19–22, 25–26.) Specifically, Niedermeier's interpretation, if adopted, would undermine Sections 1793.22 and 1793.23, both of which protect consumers in the used car market by preventing lemons from being resold without notice to unsuspecting buyers. Niedermeier's rule would eviscerate these protections by encouraging buyers to resell unbranded lemons on the used car market.

Section 1793.22 requires manufacturers to "clearly and conspicuously disclose[]" the "nature of the nonconformity experienced by the original buyer," correct the problem, and provide the new buyer a one-year warranty "that the motor vehicle is free of that nonconformity." (Cal. Civ. Code § 1793.22(f)(1); see also *id.* § 1793.23(d)–(f); *id.* § 1793.24.)

In addition, Section 1793.23 requires manufacturers to brand both a vehicle and its title with the label "Lemon Law Buyback." (Cal. Civ. Code § 1793.23; see also Cal. Vehicle Code § 11713.12 ["Lemon Law Buyback" decal must be "affixed to the left front doorframe of the vehicle"].) The Legislature declared "[t]hat these notices serve the interests of consumers who have a right to information relevant to their buying decisions." (Cal. Civ. Code § 1793.23(a)(4).)

But these consumer protections are effectively nullified if the buyer resells a defective car herself rather than return it to the manufacturer. Section 1793.22's notice requirement applies only to vehicles that were "transferred by a buyer or lessee to a manufacturer pursuant to [Section 1793.2(d)(2)]." (Cal. Civ. Code § 1793.22(f)(1).) Likewise, Section 1793.23's notice requirements apply only if a manufacturer "reacquire[s]" a car. (*Id.* § 1793.23(d); see also *id.* § 1793.2(e).) And a vehicle will never be branded with the "Lemon Law Buyback" sticker unless it is "reacquire[d]" by the manufacturer, dealer, or lienholder under Section 1793.2(d)(2) or a similar law. (*Id.* § 1793.23(c).)

Under Niedermeier's interpretation, no rational owner would return her defective car to the manufacturer. That is because owners could recover far more money by reselling their lemons to unsuspecting used car buyers or dealerships unaffiliated with the manufacturer.

Here, for example, Niedermeier's interpretation would give her an extra $19,000 because she resold "her dangerous lemon" (Opening Br. 10) to an unaffiliated dealer rather than return it to

FCA. Niedermeier's rule would create a strong financial incentive for buyers to resell their defective cars rather than return them, which as a practical matter would render the branding and notice requirements in Sections 1793.22 and 1793.23 inoperative. Indeed, "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." (Opn. 3; *id*. at p. 20 ("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").) Although that outcome might redound to the financial benefit of individual plaintiffs like Niedermeier, it would be devastating for consumers as a whole—especially those unsuspecting consumers who will end up buying used lemons with titles that have effectively been laundered.

As the Court of Appeal recognized, the Lemon Law should not be interpreted in a way that "would render the labeling and notification provisions largely meaningless, a result contrary to the rules of statutory construction." (Opn. 20 [citing *Aleman v. AirTouch Cellular* (2012) 209 Cal.App.4th 556, 568].) The Legislature could not possibly have intended the restitution remedy to effectively nullify all of the Lemon Law's detailed provisions designed to protect California consumers considering a purchase of a used car.

Niedermeier contends that the Court of Appeal's decision will require buyers to retain their vehicles while litigation is pending and prohibit buyers from reselling their vehicles.

(Opening Br. 55–56.) None of that is true. The Court of Appeal did not hold that Niedermeier forfeited her Lemon Law claim by trading in the Jeep. To the contrary, Niedermeier received $61,753.27 in restitution, incidental damages, and civil penalties (plus $160,000 in attorney's fees). (Opn. 29; FCA MJN 305–07.) That is far more than she paid for the Jeep in the first place. Under the Court of Appeal's rule, buyers retain the choice to resell their lemons or to return them to the manufacturer. Either way, the buyers will be made whole by recovering their full purchase price. But under Niedermeier's rule, buyers would be *encouraged* and *incentivized* to resell unbranded lemons into the stream of commerce to make extra money, despite the obvious harm such a rule would impose on unwitting downstream consumers.

2. Manufacturers Have Enormous Incentives To Promptly Replace Lemons Or Pay Restitution.

Niedermeier argues that limiting her recovery to her actual loss will encourage manufacturers to violate the Song-Beverly Act by rewarding them for unreasonable delays. (Opening Br. 57–62.) This argument is meritless. It is Niedermeier's interpretation, not the Court of Appeal's, that creates incentives that will thwart the Act's consumer protections.

Under the Court of Appeal's decision, neither the manufacturer nor the buyer gains anything from the resale of a lemon. If the buyer returns the car to the manufacturer, the manufacturer is liable to the buyer for the entire purchase price, but gets the car back. If the buyer sells the car to someone else, the manufacturer pays a little less in damages but does not get the

car back. From the manufacturer's perspective, there is no economic difference between the two scenarios. Therefore, the manufacturer has no incentive to delay.

Moreover, manufacturers already have ample incentive not to delay because they are subject to massive attorney's fee awards and civil penalties for willful violations of the Act. These potential liabilities, which often vastly exceed the amount of a restitution award, provide a hammer that prevents manufacturers from being rewarded for unreasonable delays in complying with their warranty obligations. No rational manufacturer would risk hundreds of thousands of dollars in civil penalties and attorney's fees—not to mention the loss of its right to reacquire and resell the vehicle—all in the hope of reducing its liability for restitution by some relatively slight and unknowable amount.

Finally, in arguing that the Lemon Law's restitution provision should be construed to punish and deter manufacturers from delaying, Niedermeier ignores this Court's warning that "[r]estitution is not a punitive remedy." (*Clark v. Superior Court* (2010) 50 Cal.4th 606, 614 (*Clark*).) "[I]n the absence of a measurable loss," restitution "does not allow the imposition of a monetary sanction merely to achieve . . . deterrent effect." (*Tucker v. Pac. Bell Mobile Servs.* (2012) 208 Cal.App.4th 201, 229 [quotation marks omitted] [interpreting restitution remedy in Cal. Bus. & Prof. Code § 17203].) Distorting the plain meaning of restitution to punish manufacturers would be especially unwarranted because the Legislature, in Section 1794(c), has already specified the appropriate penalty in cases where the

manufacturer has willfully violated its warranty obligations through unreasonable delay.

3. The Legislative History Confirms That Niedermeier Is Not Entitled To A Double Recovery.

The legislative history of the Song-Beverly Act—and Section 1794(b) in particular—confirms that the Legislature did not intend a buyer's damages to include the portion of the purchase price she has already recovered.

a. The Song-Beverly Act was enacted in 1970. Senator Song explained that the Act was "based upon the Commercial Code" and that the amount a buyer could recover in an action under Section 1794 would be "based on his actual loss." (1 Niedermeier MJN 120–21.) In 1971, the Legislative Counsel responded to a question from Senator Cologne on the Act's application in situations where a buyer is unable to return defective goods to a seller—i.e., a situation like this case. (*Id.* at pp. 51, 57–59.) The Legislative Counsel concluded "that, as a general rule, the buyer must return the defective goods as a condition to receiving the relief provided by the act." (*Id.* at p. 59 [footnote and underlining omitted].) In situations "in which it would be impossible for the buyer to return the goods," "traditional contract rules" would apply. (*Id.*)

In a subsequent letter to Senator Song, the Legislative Counsel opined that although the Act did not "establish the measure of 'actual damages,'" "the pertinent provisions of the Commercial Code are to be applied in measuring 'actual damages'

for the purposes of the treble damages provisions of Section 1794." (1 Niedermeier MJN 67, 80–81.)

Thus, from the moment Song-Beverly was enacted, the Legislature understood that to receive a refund buyers would ordinarily be required to return defective goods to the manufacturer, and that in the unusual circumstance where that was impossible (perhaps where the vehicle had been stolen or totaled in an accident), ordinary contract rules would apply. Similarly, the Legislature intended that a buyer's damages were intended to restore her "actual loss."

b. In 1982, the Legislature amended the Act to add Section 1794(b)(1) and (2), for the specific purpose of confirming that the "measure of the buyer's damages" in Song-Beverly cases includes ordinary damages principles under the Commercial Code. The Senate Judiciary Committee report on the amendments that added Section 1794(b)(1) and (2) stated that "[t]his bill would adopt the contract measure of damages, as provided in Commercial Code Sections 2711 through 2715, for awards under Song-Beverly." (FCA MJN 13.)

The Department of Consumer Affairs, which sponsored the amendments, similarly stated that "the contract measure of damages, as set forth in §§ 2711–2715 of the California Commercial Code, would apply in all actions under the Song-Beverly Act." (FCA MJN 21.) "By cross-referencing to and incorporating the Commercial Code provisions on buyer remedies, the bill also brings into play the thousands of court decisions under the Commercial Code, and its predecessors, that have articulated

principles of construction and application to the wide range of circumstances and situations that have been presented to the courts in the past." (*Id.*)

In short, the Legislature's incorporation of Commercial Code Sections 2711 through 2715 into the measure of damages in a Lemon Law case was intended to aid courts in cases like this one by bringing in caselaw applying ordinary commercial-law damages principles. (See *Bishop*, *supra*, 44 Cal.App.4th at p. 757.) As explained above, those Commercial Code sections and relevant caselaw hold that when a buyer resells a defective vehicle she cannot recover the same money twice.

c. In 1987, the Legislature amended Song-Beverly to expressly give buyers the alternative remedy of "restitution" under Section 1793.2(d) in lieu of replacement. The purpose of restitution was to "make the buyer 'whole'" by ensuring the buyer recovered her purchase price as well as "expenses such as sales tax, license and registration fees, and towing or rental car costs" attributable to the manufacturer's statutory violation. (8 Niedermeier MJN 2069.)

The 1987 amendment also incorporated the replacement and restitution remedies into the "measure of the buyer's damages" under Section 1794(b). These changes were made to fix a "misinterpretation" that had arisen in "at least one pending consumer auto 'lemon' case." (FCA MJN 216.) Specifically, an attorney had argued that although Section 1793.2(d) allowed buyers to seek a refund prior to litigation, "the refund is an unavailable remedy in a lawsuit." (*Id.* at p. 217.) Accordingly, the

Legislature added language to Section 1794(b) "clearly specify[ing] that the refund/replacement remedy provided by Section 1793.2 is available to a buyer in a lawsuit brought against a warrantor for defective products." (*Id.*; see also, e.g., *id.* at pp. 87–88, 96, 141 [same].) Nothing in the legislative history suggests that the amendments to Section 1794(b) sought to displace Commercial Code rules from the measure of the buyer's damages, or do anything other than make clear that buyers could obtain restitution in an action under Section 1794.

Other changes made by the 1987 amendments further confirm that the Legislature did not intend buyers to receive a double recovery if they resell their lemons to third parties. The amendments added new language providing that "[n]o person shall sell or lease a motor vehicle transferred by a buyer or lessee to a manufacturer pursuant to [Section 1793.2(d)] unless the nature of the nonconformity experienced by the original buyer or lessee is clearly and conspicuously disclosed" and the nonconformity is corrected. (4 Niedermeier MJN 913–14.) In other words, the Legislature sought to prevent a lemon from "being resold as a used car unless the nature of the car's problems are disclosed," which would occur only if the car was "repurchased by a manufacturer." (*Id.* at p. 924.) The Legislature that enacted that change could hardly have intended to undermine these important consumer protections, in the very same bill, by silently creating a massive financial incentive for buyers to resell their used lemons to unwitting consumers.

d. Niedermeier's discussion of the legislative history is inaccurate and misleading. She cites a grab-bag of legislative hearings, letters, and reports that she says show that the Legislature intended a double recovery in situations like this. (Opening Br. 13–21, 59–60.) For example, she cites snippets from the history of various bills that purportedly demonstrate that the enumeration of specific categories of damages and the offset for a buyer's use of the vehicle were meant to forbid courts from considering anything else. (*Id.* at pp. 15–20, 59.) But none of the materials she cites says that the Legislature wanted courts to ignore the plain meaning of restitution, ordinary damages rules under Sections 2711 through 2715, the impact on the Act's protection for used car buyers, or common sense. Instead, as explained above, the legislative history makes clear that the Legislature sought to make buyers whole and to apply ordinary damages rules in situations where the Act is silent.

Niedermeier also fails to grapple with the fact that the Legislature had multiple purposes, and sought to balance multiple competing interests, when it enacted Song-Beverly. The Legislature wanted to fully compensate buyers and to encourage manufacturers to provide prompt remedies, so it created a robust cause of action that includes, among other things, restitution, civil penalties, and fee awards. (See Cal. Civ. Code §§ 1793.2(d)(2), 1794.) But the Legislature *also* wanted to protect unknowing consumers from defective vehicles entering the used car market. So it required manufacturers to provide notice of a vehicle's defect and brand its title as a Lemon Law Buyback after reacquiring it

pursuant to the Lemon Law. (*Id.* § 1793.23.) Niedermeier's interpretation of the Act would do violence to the Legislature's intent by undermining those consumer-protection provisions. "To the extent [Niedermeier] contends the playing field should be tilted even more in favor of [Lemon Law plaintiffs], that argument is more properly addressed to the Legislature." (*Murillo*, *supra*, 17 Cal.4th at p. 994.)

C. Niedermeier's Arguments Are Misplaced.

Niedermeier presents several arguments challenging the Court of Appeal's common-sense conclusion. None has merit.

1. This Case Is About The Initial Measure Of Damages, Not An Offset.

Niedermeier argues that because Section 1793.2(d) identifies two "offsets"—one for nonmanufacturer items installed by a dealer, the other for the buyer's use of the vehicle before it was first brought in for repairs—there is no basis for recognizing an "unenumerated offset" for resale value. (Opening Br. 31–35.)

a. This case is not about offsets, as the Court of Appeal explained. (Opn. 26.) The question for this Court is not, for example, how much FCA is entitled to be reimbursed for Niedermeier's use of the Jeep, or the fair-market value of the Jeep that she would have returned to FCA had she not resold it to the GMC dealer, or how to account for a settlement payment from another defendant. (*See id.*) Instead, the question is simply whether "restitution" includes the $19,000 that she has already recovered.

Niedermeier cites *Title Insurance Co. v. State Board of Equalization* ((1992) 4 Cal.4th 715, 731–33) for the idea that "an exception as to how a statute ordinarily operates *is* an offset." (Opening Br. 37.) Nothing in *Title Insurance Co.* says that. There, the plaintiffs sought a tax refund and the government argued that the refund should be offset by a separate and unrelated amount that the plaintiffs allegedly owed in taxes on insurance premiums. (4 Cal.4th at p. 729.) Because the government had "failed to raise the setoff defense in its pleadings," this Court held that the issue "was never properly before the superior court." (*Id.* at p. 733.) That holding has nothing to do with whether Niedermeier's restitution damages include the portion of the purchase price she recovered when she resold her Jeep. Nor is applying the plain meaning of "restitution" or the express incorporation of the Commercial Code into the measure of the buyer's damages an exception to how the statute operates. To the contrary, the Court of Appeal's common-sense holding that a buyer's damages do not include money she has already recovered is exactly how the statute operates.

b. Because this case does not involve an offset, Niedermeier's "no unenumerated offsets" argument is completely beside the point. But even if the reduction or credit to bring the buyer's recovery in line with her actual damages were an "offset" of some kind, nothing in the Act limits the calculation of restitution damages to the specific items listed in Section 1793.2(d). Niedermeier "advances the rule of statutory construction that the inclusion of the one is the exclusion of the other." (*Murillo*, *supra*,

17 Cal.4th at p. 991; Opening Br. 33.) But "[t]his rule of statutory construction . . . is no more than a rule of reasonable inference and cannot control over the plain meaning of the statutory language." (*Murillo*, *supra*, 17 Cal.4th at p. 991.) Here, as explained above, the plain meaning of "restitution" establishes that Niedermeier is not entitled to a double recovery.

Courts have recognized that to fulfill the Legislature's goal of making buyers whole, calculating a buyer's restitution award sometimes requires accounting for amounts that are not expressly listed in the statute. In *Mitchell*, for example, the court acknowledged that the statute "does not expressly allow recovery of paid finance charges," but recognized that an "implied prohibition" on accounting for costs a buyer incurred, but that are not expressly authorized elements of recovery, would have been inconsistent with the Legislature's "description of the refund remedy as restitution." (*Mitchell*, *supra*, 80 Cal.App.4th at p. 37).

The same reasoning applies here. By providing for a remedy that courts would understand is meant to restore the status quo ante, the Legislature ensured that buyers would receive neither more nor less than necessary to ensure a full refund, even in one of the innumerable situations that the Legislature did not cover expressly in the statute. Just as "'restitution' under the Act cannot leave the 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.) Failing to reduce Niedermeier's damages to reflect the money she recovered

when she resold the Jeep would give her far more than necessary to refund the purchase price and restore her loss, and therefore would be inconsistent with a remedy of restitution.

2. No Case Supports Niedermeier's Interpretation Of The Act.

Other than the trial court in this case, no court has ever interpreted Song-Beverly to allow a buyer to resell a defective car and then recover her proceeds from the resale a second time as "restitution" under Section 1793.2(d). Even though Song-Beverly has been on the books for more than 50 years, the restitution provision has never been understood to allow a car buyer to resell the lemon herself and pocket the money. None of Niedermeier's authorities remotely supports making such a radical change to the state's Lemon Law.

Niedermeier relies primarily on three lower-court cases, none of which involved the question presented here. (See Opening Br. 34–39, 42–44 [citing *Martinez*, *supra*, 193 Cal.App.4th 187; *Jiagbogu v. Mercedes Benz USA* (2004) 118 Cal.App.4th 1235 (*Jiagbogu*); *Lukather*, *supra*, 181 Cal.App.4th 1041].) Each of these cases is inapposite.

a. In *Martinez*, the Court of Appeal held that a plaintiff need not "possess or own the vehicle" to sue under the Lemon Law. (*Martinez*, *supra*, 193 Cal.App.4th at p. 192.) The appeal was "limited to [that] question," so the court had no occasion to address the proper measure of the plaintiff's damages under Section 1794. (*Id.*) The court reasoned that a consumer who financed the purchase of her car might be unable "to continue paying for the

derelict vehicle, as well as any replacement vehicle," while a manufacturer dragged its feet in complying with the Act. (*Id.* at p. 195.) A contrary interpretation—that a buyer must keep making payments on a derelict vehicle to bring a claim—would have had a "chilling effect on the availability of the Act's remedies." (*Id.*)

Here, unlike in *Martinez*, FCA is not arguing that Niedermeier's resale of the Jeep forecloses her from seeking relief. Rather, the question presented in this case is simply how to calculate Niedermeier's damages in light of the fact that she has already recovered $19,000 of the purchase price. *Martinez* does not address *that* issue. And measuring damages based on the consumer's actual economic loss will not have a chilling effect on the remedies afforded by Song-Beverly, because the consumer can still receive the rest of the money (plus civil penalties and attorney's fees) by bringing an action under Section 1794(b).

b. In *Jiagbogu*, the court held that a manufacturer was not entitled to an "equitable offset" for the buyer's use of a defective car *after* he requested that the manufacturer buy it back. (*Jiagbogu*, *supra*, 118 Cal.App.4th at pp. 1242, 1242–44.) Allowing that offset would have been inconsistent with the express statutory provision that limits the usage offset to the mileage driven *before* the car is presented for repairs. Not only was the manufacturer's position contrary to an express statutory term; it also rested on Civil Code "section 1692 regarding contract rescission and offsets" and "Commercial Code section 1103," neither of which is incorporated into the "measure of the buyer's damages" by Section

1794(b). (*Id.* at p. 1242.) The court was careful to clarify, however, that its holding was limited to "equitable offset[s]" for a buyer's use of a vehicle, noting that "[o]ther hypothetical situations," like "insurance subrogation, may well justify a defense to the buyer's claim." (*Id.* at p. 1244.)[3]

Here, unlike an "offset" for a buyer's use of a defective car, the question of how to calculate a buyer's damages when she resells the car is not specifically addressed in Section 1793.2(d). Thus, the negative implication from Section 1793.2(d)'s text is absent. Moreover, allowing the buyer to receive both the resale proceeds *and* the purchase price would be a double recovery similar to "insurance subrogation," the hypothetical situation that the court in *Jiagbogu* went out of its way to distinguish. (See *Jiagbogu*, *supra*, 118 Cal.App.4th at p. 1244.)

c. *Lukather* is even further afield. There, the court rejected an argument that a buyer should have mitigated damages by buying a new car or accepting the manufacturer's settlement offer rather than incurring expenses for a rental car. (*Lukather*, *supra*, 181 Cal.App.4th at pp. 1051–53.) Denying the buyer rental-car expenses would have "reward[ed] GM for its delay in refunding Lukather's money," and therefore would have been contrary to the Act's purpose. (*Id.* at p. 1053.) Here, excluding the resale proceeds from a buyer's damages would not pressure the buyer to accept an

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[3] In *Robbins v. Hyundai Motor Am.* ((C.D. Cal. Aug. 7, 2014), No. 8:14-cv-5, 2014 WL 4723505, at p. *7–8), the defendant similarly sought an offset "for excess wear and tear" on the buyer's vehicle.

unreasonable settlement offer or reward a manufacturer for its delay. That is because, unlike denying a buyer rental-car expenses, here both the buyer and the manufacturer end up in the same economic position with or without the resale—the buyer either recovers the full purchase price from the manufacturer and returns the car, or resells the car to a third party and recovers the remainder of the purchase price from the manufacturer.

3. The Collateral Source Rule Does Not Apply Here.

Although Niedermeier failed to include this issue in her petition for review (see Cal. R. Ct. 8.516), her opening brief invokes the collateral source rule. (Opening Br. 61–63.) The rule provides that, in certain limited circumstances, a payment from "a source wholly independent of [a] tortfeasor" is not deducted from the damages that the plaintiff would otherwise collect. (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 551 (*Howell*) [quoting *Helfend v. S. Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6 (*Helfend*)].) The rule typically applies when a plaintiff's loss was insured and she has recovered some or all of the loss from her insurance company. (See *id.*; *Parker v. Alexander Marine Co.* (9th Cir. 2017) 721 F.App'x 585, 587–88.) California courts have extended the collateral source rule to several narrow contexts where "the victim receives a gratuitous payment or benefit" or "the benefit or payment arises from some obligation" to compensate the plaintiff for her injury. (*Smock v. California* (2006) 138 Cal.App.4th 883, 886–87.)

Here, the GMC dealer who gave Niedermeier a $19,000 trade-in credit for the Jeep was not a collateral source providing gratuitous benefits, nor paying "compensation for [her] injuries" (*Howell*, *supra*, 52 Cal.4th at p. 551 [quotation marks omitted]) because of a pre-existing obligation to insure or indemnify. Rather, Niedermeier persuaded the dealer to pay her $19,000 in exchange for the Jeep, as part of an arm's-length transaction to purchase a brand-new Yukon. Niedermeier's far-fetched collateral source theory would vitiate the entire body of Commercial Code law regarding the measure of damages discussed above, under which the buyer's recovery is reduced by the amount of a resale to a third party. It is unsurprising, therefore, that she fails to cite a single case where the collateral source rule was applied to a buyer's resale of defective goods, let alone in a Song-Beverly case.

Moreover, the policy reasons that have led courts to apply the collateral source rule in other contexts are absent here. The rule is motivated by "a policy judgment in favor of encouraging citizens to purchase and maintain insurance." (*Howell*, *supra*, 52 Cal.4th at pp. 346–47.) But that concern is not implicated here. Similarly, courts have applied the collateral source rule as a way of ensuring that the plaintiff is fully compensated when the governing statute does not allow the recovery of attorney's fees. (*Id.* at 349 [citing *Helfend*, *supra*, 2 Cal.3d at p. 12].) Here, too, that concern is absent, as Song-Beverly allows a plaintiff to recover her attorney's fees, often with a multiplier.

Niedermeier argues that this Court should craft a new collateral source rule for Song-Beverly actions where a

manufacturer "willfully violate[s] the Act's buy-back obligations." (Opening Br. 62.) But the Legislature has already provided a specific punishment for willful violations—a civil penalty of up to two times a buyer's "actual damages." (Cal. Civ. Code § 1794(c).) Invoking a tortured application of the collateral source rule to layer on an additional, judicially-crafted penalty on top of the Legislature's specified punishment makes no sense.

4. Niedermeier Received $19,000 For The Jeep.

Niedermeier resists the evidence that her restitution award should be reduced by $19,000—the amount of the trade-in credit she received from the GMC dealer. (Opening Br. 49.) But as the Court of Appeal pointed out, Niedermeier "testified that she sold the Jeep to the GMC dealer for $19,000," and there is nothing wrong or unfair about holding her to the bargain she struck and reducing her award by the amount of money she admitted accepting in exchange for the Jeep. (Opn. 27.)

Niedermeier's argument that lemons have no value is irreconcilable with the undisputed evidence that the GMC dealer considered it to be worth $19,000. It is also irreconcilable with evidence that FCA offered, but was excluded, that Niedermeier had previously listed the Jeep for sale on Facebook for $25,000. (2RT952–53.)[4] Moreover, the rebranding and disclosure requirements discussed above reflect the Legislature's

[4] FCA was precluded from introducing this evidence at trial because the trial court had previously concluded that the parties should address Niedermeier's double recovery only in post-trial arguments. (See 2RT 952–53.)

understanding that lemons *will* be resold—which necessarily means that they have value. Finally, if lemons were valueless, they would all be returned to the manufacturer, and no trade-ins or third party resales would ever occur. Niedermeier's assertion that she had no choice but to sell the Jeep to pay for a new car (Opening Br. 24) contradicts her argument that the Jeep had no economic value.

Niedermeier complains that the $19,000 credit she received from the GMC dealer was too *good* a deal, in that it exceeded the Jeep's true market value. (Opening Br. 49.) But the question here is not how much the Jeep might have been worth in the abstract, but how much of the original purchase price Niedermeier has already recovered through the resale.

Niedermeier suggests that, had she not resold the Jeep, FCA would have been obligated to pay off the outstanding principal on her auto loan *plus* the entire purchase price of her Jeep. (See Opening Br. 54.) Of course that is incorrect. The principal payments on a buyer's loan are already subsumed within the purchase price of a car, and therefore are already included in a buyer's restitution award as part of the "price paid or payable." (Cal. Civ. Code § 1793.2(d)(2)(B).)[5]

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[5] Niedermeier's closing argument made clear how the math worked. Her counsel explained that when Niedermeier purchased the Jeep, she made a $4,000 down payment and became obligated to pay $500 a month for the life of her auto loan (72 months), which led to a total purchase price of "39,799" that included both the money Niedermeier actually paid and all of the debt she incurred, including all of the debt that was still

(Cont'd on next page)

Nor would it make any difference if, as Niedermeier speculates, the GMC dealer paid her an overly generous amount for the Jeep as part of a ploy to trick her into overpaying for a new Yukon. The issue here is how much FCA owes Niedermeier for the Jeep, not whether the GMC dealer gave her a good deal on the Yukon. Niedermeier's assertion that the price she paid for her new Yukon—$80,000—was "inflated" (Opening Br. 49) also lacks any factual support. In fact, the website on which she relies contradicts her assertion that $80,000 is an unthinkable price for a Yukon. (Opening Br. 25 n.6 [citing edmunds.com for the proposition that "the retail price for a 2021 Yukon is as low as $50,700"].) It says that a buyer should expect to pay "$81,996" for the "Most Popular" model of a new Yukon (the Denali model), even without accounting for extra add-ons. (See 2021 Yukon, Edmunds.com, https://www.edmunds.com/gmc/yukon/ [last visited Aug. 2, 2021] [choose "Select a trim" to see suggested pricing for different models].)

Finally, in a footnote, Niedermeier points to a Department of Consumer Affairs letter responding to a question about the "negative equity" (i.e., the balance remaining on a loan that exceeds a trade-in's current value) that dealers sometimes roll over in a way that increases the cost of a replacement vehicle. (Opening Br. 49 n.10.) The letter has nothing to do with the measure of Song-Beverly damages in this case, which does not involve

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outstanding when she resold the Jeep. (2RT909, 4RT1847–48; AA39–41.) The jury accepted that argument, and calculated the purchase price for the Jeep as $39,799. (AA70.)

negative equity, and the letter does not address whether a buyer's damages include money that the buyer has already recovered by reselling a defective car. (See *People ex rel. Lundgren v. Superior Court* (1996) 14 Cal.4th 294, 308–11 (*Lundgren*) [no deference warranted to ex parte letter where the letter did not take a "definitive position" on the specific question at issue in the case].) If anything, the letter supports the Court of Appeal's interpretation of the statute in that the Department recognized that "it is helpful to look to the [Commercial] Code"—and Section 2711 in particular—to "illuminate the meaning of the phrase 'actual price paid or payable by the buyer' in CC § 1793.2(d)(2)(B)." (9 Niedermeier MJN 2611–12.)

II. For Purposes Of Calculating The Maximum Civil Penalty, "Actual Damages" Do Not Include Money A Buyer Received By Reselling A Lemon.

Niedermeier's argument that the Court of Appeal should have calculated civil penalties first, and then subtracted the amount she received from the resale, is both waived and wrong. The Court of Appeal held that Niedermeier waived this argument when she conceded the issue in her brief, and the court therefore did not address it. And Niedermeier's argument is mistaken in any event.

A. Niedermeier Waived This Issue In The Court Of Appeal.

To reverse the Court of Appeal's ruling on the civil penalty, this Court would first have to overturn the Court of Appeal's holding that Niedermeier waived the argument. As the Court of

Appeal explained, Niedermeier conceded "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." (Opn. 27.) Niedermeier did *not* argue that the damages reduction should have no impact on the civil penalty. "Given plaintiff's concession," the Court of Appeal explained, "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." (Opn. 28 n.8.)

This Court "normally do[es] not consider any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal," (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 591 (*Flannery*); Cal. Rule of Court 8.500, subd. (c)(1).), and there is no reason to do so here. That is especially so because Niedermeier not only failed to raise the new argument she makes in this Court, she affirmatively *encouraged* the Court of Appeal to reduce her civil penalty award to "section 1794's damages cap" if it reduced her damages award. (Opening Br. 81.) That argument is the opposite of the argument she now makes in this Court—that the award should *not* be reduced to the damages cap because the damages cap should have been higher.

Niedermeier makes no meaningful attempt to argue that the Court of Appeal's holding that she conceded this issue should be reversed. (Opening Br. 63–70.) Instead, the only mention of the concession in her brief is in the facts section. (*Id.* at pp. 29–30.) There, she includes a conclusory characterization of the Court of

Appeal's holding as "erroneous," and quotes from her petition for rehearing, which in turn relied on an excerpted snippet from oral argument. (*Id.*) But her attorney's passing reference to "tak[ing] it at the very end" (*id.* at 30) did not preserve the issue because "point[s] made for the first time at oral argument, . . . will be deemed waived." (*People v. Pena* (2004) 32 Cal.4th 389, 403 [quotation marks omitted]; *Flannery*, *supra*, 26 Cal.4th at p. 591 [issue must be raised "in the briefs filed in the Court of Appeal" to be preserved].) Moreover, the excerpted snippet—that a damages reduction should occur "at the very end" (Opening Br. 30)—does not say anything about civil penalties and is not even the argument she advances in her opening brief to this Court. In fact, to FCA's knowledge no party had made this argument to *any* court in *any* case prior to Niedermeier's filing her opening brief in this Court. This Court should follow its usual practice and decline to consider as a matter of first impression an argument that was waived below.

B. Money That A Buyer Recovered Through A Resale Is Not "Actual Damages."

Niedermeier's new argument is wrong in any event. The $19,000 she recovered by reselling the Jeep does not constitute "actual damages" and therefore cannot be used to artificially increase the amount of the maximum civil penalty.

The Song-Beverly Act ties the amount of a civil penalty to the buyer's "actual damages." The Act provides that a "judgment may include . . . a civil penalty which shall not exceed two times the amount of actual damages." (Cal. Civ. Code § 1794(c).)

"'[A]ctual damages' is a term synonymous with compensatory damages." (*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1544 [quoting *Weaver v. Bank of Am., N.A.* (1963) 59 Cal.2d 428, 437] [quotation marks omitted].) It is a legal term of art that means "[a]n amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses." (Black's Law Dictionary (11th ed. 2019).)

Because civil penalties are penal in nature, courts must "adopt the narrowest construction of [a] penalty clause to which it is reasonably susceptible in the light of its legislative purpose." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 405; see also *Lundgren*, *supra*, 14 Cal.4th at p. 314 [explaining that *Hale* construed "a portion of the statute that was concerned solely with the manner of calculating the amount of penalty"].) Thus, "actual damages" must be construed narrowly to favor defendants who may be subject to a civil penalty.

Here, Niedermeier's "actual damages"—that is, the amount required to compensate her for her actual loss—do not include the portion of the purchase price that she had already recovered before she obtained the judgment here. Instead, her "actual damages" are the price she paid for the Jeep ($39,799), plus the $5,000 in incidental and consequential damages, minus the $19,000 she received when she traded in the vehicle, and minus the value of her use of the vehicle before she brought it in for repair ($5,214.57), for a total of $20,584.43. Thus, the maximum permissible civil penalty under Section 1794(c) was $41,168.86 (twice her actual damages). (See Cal. Civ. Code § 1794(c).)

Niedermeier complains that a smaller civil penalty reduces its deterrent effect. (Opening Br. 63–66.) But the Legislature made the deliberate choice to link civil penalties to a buyer's "actual damages." That the maximum permissible punishment is reduced where the compensatory damage award is reduced is "inevitable in a statutory scheme that ties punitive damages to a plaintiff's loss." (*Paolitto v. John Brown E. & C., Inc.* (2d Cir. 1998) 151 F.3d 60, 68.) "The solution that [Niedermeier] seeks to this perceived problem must, therefore, come from [the California Legislature], not this court." (*Id.*) Moreover, manufacturers already have enormous financial incentives to comply with the Song-Beverly Act, so there is no need to artificially inflate a buyer's "actual damages" simply to increase the maximum amount of a civil penalty. (*Supra* at pp. 37–39.)

In similar contexts, courts determine a plaintiff's actual damages—including any necessary subtractions—before applying a statutory multiplier imposing double or treble damages. "Basing damages on [a plaintiff's] net loss is the norm in civil litigation." (*United States v. Anchor Mortg. Corp.* (7th Cir. 2013) 711 F.3d 745, 749.) Thus, when a statute triples a plaintiff's damages, "the norm is *net* trebling." (*Id.* [emphasis added] [subtracting amount United States recovered by selling property before calculating treble damages under the False Claims Act].) "In order to treble only a single measure of compensatory relief, [a] double recovery must be corrected before trebling; to do otherwise would in effect treble an

incorrect measure of relief." (*Los Angeles Mem'l Coliseum Comm'n v. NFL* (9th Cir. 1986) 791 F.2d 1356, 1375 (*Memorial Coliseum*).)[6]

Even if Niedermeier were correct that accounting for the $19,000 she received in the resale were an "offset" meant to be "a stand in . . . for the vehicle being returned to the manufacturer" (Opening Br. 69), such an offset would still apply before calculating a maximum civil penalty, not after. As the Texas Supreme Court has explained, "[a]llowable setoffs will necessarily reduce the actual damages and hence the sum subject to trebling." (*Smith v. Baldwin* (Tex. 1980) 611 S.W.2d 611, 617.) And courts have taken the same approach in Song-Beverly cases, applying the statutory offset for a buyer's use of her vehicle *before* calculating the maximum civil penalty. (See, e.g., *Cox v. Kia Motors Am., Inc.* (N.D. Cal. Sept. 30, 2020) No. 1:20-cv-2380, 2020 WL 5814518, at *4.)

Niedermeier cites cases holding that a court may deduct settlement payments after multiplying a plaintiff's actual damages. These cases are inapposite. Settlement payments

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[6] (See also *William Inglis & Sons Baking Co. v. Cont'l Baking Co.* (9th Cir. 1992) 981 F.2d 1023, 1024 [subtracting amount plaintiff received by selling "bakery fixtures and equipment" *before* calculating treble-damage award under Sherman Act]; *Hammond v. Northland Counseling Ctr., Inc.* (8th Cir. 2000) 218 F.3d 886, 891–92 [subtracting pay plaintiff received from her new employer before calculating double damages under the False Claims Act's anti-retaliation provision]; *Com. Union Assurance Co. v. Milken* (2d Cir. 1994) 17 F.3d 608, 612–13 [subtracting amount plaintiffs recouped prior to calculating treble damages under civil RICO statute].)

involve *recoverable* damages, not *actual* damages. (*Stewart Title Guaranty Co. v. Sterling* (Tex. 1991) 822 S.W.2d 1, 8–9 [explaining the difference between actual and recoverable damages].) In *William Inglis*, the Ninth Circuit illustrated the difference by subtracting the amount a plaintiff had received from reselling property *before* the court trebled damages under the Sherman Act. (981 F.2d at p. 1024.) Then, the court subtracted a settlement payment *after* it trebled damages. (*Id.*) Niedermeier also relies on *Liquid Air Corp. v. Rogers* ((7th Cir. 1987) 834 F.2d 1297, 1310) and *United States v. Hult* ((9th Cir. 1963) 319 F.2d 47, 48 [per curiam]). But those cases involve a plaintiff's *post-judgment* mitigation of damages, which occurs after a plaintiff's actual economic loss has already been calculated, and therefore, like a settlement payment, reduces *recoverable* damages, not actual damages.

Niedermeier received $19,000 of the purchase price of her Jeep by reselling it to a GMC dealer in exchange for a credit towards a new car. She cannot receive that money again in this lawsuit, either as restitution, "actual damages," or through an artificially inflated civil penalty.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: August 2, 2021

Respectfully submitted,

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Pursuant to Rule 8.520(c) of the California Rules of Court, the undersigned hereby certifies that the foregoing brief is in 14-point New Century Schoolbook font and contains 13,040 words, including footnotes, according to the word count generated by the computer program used to produce the brief.

Dated: August 2, 2021

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I, Matt Gregory, declare as follows:

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