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

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

The facts underscore the perverse nature of respondent FCA US, LLC's ("Chrysler") argument.

Petitioner Lisa Niedermeier bought a car from Chrysler that *never* worked properly. After *sixteen* repair attempts (starting one month after purchase), Niedermeier asked Chrysler to repurchase the car, as Chrysler was required to do under the Song-Beverly Act, Civil Code § 1790 *et seq*. ("Lemon Law" or "Act").[1] Yet Chrysler repeatedly refused, forcing Niedermeier to first try to resell the vehicle. But no takers—and for good reason: the Jeep was unfixable, rendering it virtually worthless.

With no other options, Niedermeier sued and traded-in her dangerous, unfixable vehicle to buy a safe vehicle, and the dealership assigned a bogus $19,000 trade-in credit to "reduce" an inflated sticker price.

Then, after Niedermeier won her lawsuit—receiving the car's purchase price, plus a civil penalty (up to two times actual damages) for Chrysler's willful misconduct—Chrysler shamelessly sought to reduce the jury's award by the inflated trade-in value of her worthless lemon. And Chrysler insisted that the trade-in credit be deducted from Niedermeier's recovery *before* the civil penalty was calculated, thereby *triply* rewarding Chrysler for its willful Act violations.

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[1] All further statutory references are to the Civil Code unless indicated.

In short, Chrysler effectively seeks to penalize Niedermeier for "her failure" to let Chrysler buy back her vehicle when Chrysler's repeated refusal to do exactly that is why this case exists. If this sounds absurd, that's because it is. That's reason enough to reject Chrysler's reading of the Lemon Law. (See *Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1394.)

Regardless, the Act's plain text forecloses this absurd result because the Act provides a *statutory*—not common law—restitution standard that only allows pre-repair offsets; no trade-in offsets are permitted. (See Opening Brief ("OB")/32-33.)

This reading of the Lemon Law furthers the Act's labeling goals. Limiting manufacturers to only pre-repair offsets (as the statute specifies) "creates an incentive for the buyer to deliver a car for repairs soon after a nonconformity is discovered," *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1244 (*Jiagbogu*), while incentivizing manufacturers to "promptly" buy-back upon discovering a non-repairable nonconformity, as the Act mandates (§ 1793.2(d)(2) [manufacturers must either "promptly" replace lemon vehicles or "promptly" make restitution to the owner]).

Under Chrysler's version of the Act, in contrast, manufacturers are incentivized to delay repurchasing dangerous lemons in the hope consumers will resort to self-help. And if consumers sue, Chrysler can still deduct any (likely inflated) trade-in value from the damages owed. That result violates the Act's plain language and offends its core purpose of getting

dangerous lemons off the road before they injure or kill someone. It should be rejected.

LEGAL DISCUSSION

I. The Act Uses A Statutory Restitution Standard That Does Not Allow Trade-In Offsets.

Chrysler's strategy is to ignore this case's actual facts—namely that Chrysler's own willful misconduct forced Niedermeier to trade in her lemon. Instead, Chrysler argues that the Act's reference to "restitution" includes the common-law prohibition against "unjust[] enrich[ment]." (Answering Brief ("AB")/23-27.) From this, Chrysler contends the Legislature must have intended to let manufacturers deduct a lemon's trade-in value to prevent buyers like Niedermeier from "get[ing] a double recovery." (AB/26.)

Chrysler is wrong on both the text and the equities.

A. The Act's plain language defeats Chrysler's argument.

Chrysler admits that the Act "contemplates that the manufacturer will refund *the entire purchase price*." (AB/24, italics added.) Even the Court of Appeal agreed that a "literal[]" reading of this language would prohibit any offset for trade-in value. (Opn/18.) Nevertheless, Chrysler insists that Legislature intended to "track[] the common law meaning" of restitution—which, says Chrysler, requires a trade-in offset to prevent "unjust[] enrich[ment]." (AB/24.)

Not only does this argument ignore the restitution provision's actual text (OB/32-34), but the statutory provisions cited by Chrysler to support its "plain language" argument—sections 1793.23(c), (d), (e) (AB/24)—merely specify a manufacturer's obligations *after* it has "reacquired" a lemon vehicle. They don't address what should happen when manufacturers breach their statutory duty to promptly buy back lemons in the first place. When that occurs, section 1793.2, subdivision (d)(2) supplies the standard: The "manufacturer shall make restitution in an amount equal to the actual price paid or payable," minus an offset for the car's pre-repair use. Shall means shall. There are no trade-in offsets.

If common-law restitution applied, the car buyer would have to provide restitution to the manufacturer for the buyer's *entire* benefit from using the vehicle. The Legislature rejected that precept by expressly limiting any use offset to the period preceding the vehicle's delivery for repair. (*Jiagbogu*, *supra*, 118 Cal.App.4th at pp. 1240-1243 [applying plain language to reject manufacturer's attempt to imply a common-law offset for buyer's post-repair-delivery use of the car].) The Legislature, thus, *expressly* rejected common-law restitution, contrary to Chrysler's attempt to add unenumerated offsets to the Act's comprehensive terms.

Chrysler's reliance (AB/25, 28) on *Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th 966 (*Kirzhner*) is equally misplaced. *Kirzhner* merely addressed whether certain fees constitute "incidental damages" or "collateral charges" that

consumers can recover *in addition to* section 1793.2(d)(2)(B)'s restitution remedy. (*Id.* at p. 969.) It says nothing about what should happen when, as here, the buyer is forced to trade-in the car because the seller *refuses* to promptly repurchase it. The question at *that* point is whether manufacturers should be permitted to profit from their misconduct through trade-in offsets. They plainly should not. (OB/32-34.)[2]

B. This case *is* about offsets.

In yet another attempt to avoid the Act's plain text, Chrysler claims this case "is not about offsets" to the Act's restitution remedy. (AB/44-46.) In Chrysler's view, the question is simply "whether 'restitution' includes the $19,000 that [Niedermeier] has already recovered," and thus it's immaterial that the Act doesn't list a trade-in offset. (AB/44.)

This argument erroneously assumes its own conclusion: that the word "restitution," standing alone, necessarily allows a manufacturer to deduct the trade-in value of any lemon vehicle to prevent the owner from being "unjustly enriched." (AB/44-45.)

This conclusion rests on Chrysler's flawed contention that Section 1793.2(d)(2) incorporates the common-law definition of

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[2] Chrysler also cites *Alder v. Drudis* (1947) 30 Cal.2d 372 as establishing that restitution "is the restoration of the status quo ante as far as is practicable." (AB/24.) But "*Alder* predates the Act by 23 years and applies common law rules of equity." (*Martinez v. Kia Motors America, Inc* (2011) 193 Cal.App.4th 187, 199 (*Martinez*).) "[T]he Act is designed to give broader protection to consumers than the common law or UCC provide." (*Jiagbogu*, *supra*, 118 Cal.App.4th at p. 1241.)

"restitution." That's incorrect for all the reasons previously explained (OB/32-34): first and foremost, the Act's plain language requires manufacturers to "promptly make restitution to the buyer *in accordance with subparagraph (B).*" (§ 1793.2(d)(2), italics added.) The word "restitution" doesn't appear alone in this provision; it's coupled with the reference to "subparagraph (B)," which—along with subparagraph (C)'s limited mileage offset for "[w]hen restitution is made pursuant to subparagraph (B)"—lists the Act's offsets. (See § 1793.2(d)(2)(B), (C) .)

So, Chrysler's attempt to *reduce* the Act's statutory restitution amount has *everything* to do with offsets. And, because trade-in value isn't listed among the enumerated offsets, Chrysler's argument fails at the starting gate, regardless of the case law.

But Chrysler is wrong about the case law too. Chrysler's only authority on this point is *Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32 (*Mitchell*), which it cites for the proposition that "calculating a buyer's restitution award sometimes requires accounting for amounts that are not expressly listed in the statute" (AB/46). As previously explained (OB/41-44), *Mitchell* is distinguishable for various reasons, including that it never examined whether courts could *imply* unenumerated offsets; rather, it merely held that under section 1793.2(d)(2)(B)'s *express* language, buyers may "recover paid finance charges as part of the 'actual price paid or payable.'" (80 Cal.App.4th at p. 35.) *Mitchell* thus broadly interprets the Act's

express promise of the purchase price to *augment* consumer relief, which is consistent with the Act's remedial purposes.

Mitchell never suggested that the Act allows for *unenumerated offsets* so that the manufacturer can *avoid paying* the consumer the purchase price. Nor do the cases that *Mitchell* cited for the proposition that "restitution" *under the Act* is intended to restore the status quo ante—all of which are *pre*-lemon-law cases (such as *Alder*, *supra*, 30 Cal.2d 372; see fn. 2, *ante*) that construed the *common-law* meaning of restitution, not the statutory definition at issue here. (*Mitchell*, at p. 36.)

C. The equities favor Niedermeier, not Chrysler.

Even if section 1793.2(d)(2)(B)'s reference to "restitution" incorporated equitable principles, Chrysler's argument would still fail.

First, Chrysler's reliance on equitable principles is backwards, because Chrysler's *own* willful violations of the Act caused Niedermeier's supposed "enrichment." That alone defeats Chrysler's argument. "No one can take advantage of his own wrong.... Nor can principles of equity be used to avoid a statutory mandate." (*Jiagbogu, supra*, 118 Cal.App.4th at p. 1244, internal quotation marks and citation omitted.)

Chrysler attempts to rebut this argument by saying that it "would *not* be unjustly enriched" if Niedermeier's recovery were reduced by the amount assigned to the trade-in credit because

the company was "deprived of the remaining value of the Jeep, which it could have resold." (AB/26, italics added.)

Even ignoring Chrysler's efforts to *treble* this offset by reducing the civil penalty awarded, the undisputed facts foreclose this argument. Chrysler seeks a $19,000 offset as a substitute for a defective car with virtually no value, as evidenced by Chrysler's estimation of the car's $12,000/$13,000 bluebook value (its value if it worked) and its own refusal to repurchase the Jeep. If, as Chrysler contends, the vehicle was worth $19,000, why not repurchase it to sell for profit? The answer is obvious: Chrysler knew the Jeep was a valueless lemon and hoped Niedermeier would get rid of it.

It thus makes no difference if Niedermeier received a windfall, because the alternative would be *Chrysler* receiving a windfall precisely for refusing her *three* buyback requests and forcing her to trade in her lemon to obtain a safe vehicle. That would "unjustly enrich" Chrysler and at Niedermeier's expense.

Second, Niedermeier wasn't "enriched" by what happened. Quite the opposite. Niedermeier bought a car that *never* worked properly—it struggled with the most basic tasks, such as braking, accelerating, or turning through intersections—and posed a serious danger to herself and others on the road. (OB/22-23.) She tried to repair the Jeep *sixteen* times. She repeatedly asked Chrysler to repurchase the car, and Chrysler repeatedly refused, directly violating the Act. (OB/23-24.) Once sued, Chrysler aggressively defended the lawsuit all the way to jury verdict, arguing (among other things) that Niedermeier caused these

problems herself by once spilling coffee in the Jeep! (OB/26-27.) In crying "unjust enrichment," Chrysler ignores the real damage its own egregious misconduct inflicted on Niedermeier.

Beyond that, the $19,000 trade-in value assigned to Niedermeier's vehicle is suspect. Dealers routinely manipulate trade-in credits so that they neither reflect the car's market value or any amount the consumer actually receives. (OB/24-25, 49.) As the Department of Consumer Affairs (DCA) warns, "the value of [a] trade-in" is not a "'hard' number[]" but instead rests on "factors that are not related to [the used vehicle's] actual value;" dealers then "adjust the purchase price to compensate for" the high value assigned to a trade-in. (9MJN/2606-2607.)[3]

Indeed, Chrysler itself admitted that the Jeep would only have been worth "something like $12,000 or $13,000" at *full* bluebook value at the time it was traded in—that is, if the Jeep *had been fully functioning* (i.e., not a lemon) and debt-free, which it wasn't. (OB/25.) The DCA provides the only reasonable explanation: the dealer inflated the trade-in value *and* price, creating the illusion of a high "resale price" when Niedermeier actually received next-to-nothing for her lemon. (9MJN/2606.)

The trial court correctly found there was no "equitable ground" to award Chrysler a trade-in offset. (AA/127.) Awarding

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[3] Chrysler erroneously couches the DCA's analysis as irrelevant because the DCA was not specifically discussing buyer damages from "reselling" a lemon. (AB/54-55.) The DCA, however, was specifically analyzing trade-in values and its explanation is thus entitled to deference. (OB/49-50, fn. 10.)

Chrysler an offset for an inflated $19,000 trade-in credit would be icing on the unjust-enrichment cake—especially since Niedermeier never had the opportunity to prove the Jeep was worth far less (because the trial court rejected Chrysler's offset request). (OB/25-26, fn. 7.)

II. Section 1794's Reference To Commercial Code Provisions Does Not Transform The Statutory Restitution Remedy Into A Common-Law Remedy, Nor Provides A Trade-in Offset.

Tacitly recognizing the flaws in its restitution argument, Chrysler now emphasizes an argument that the Court of Appeal expressly did *not* reach (Opn/17-18): that section 1794's incorporation of certain Commercial Code provisions supports an unenumerated trade-in offset (AB/27-33).

But the Act's text, legislative history, regulations, and case law are clear: Manufacturers must *always* pay Song-Beverly consumers the car's purchase price—even if consumers can invoke the Commercial Code to *add* to that recovery.

A. The Act incorporates Commercial Code sections 2711-2715 only to the extent they provide remedies *beyond* restitution "as set forth in subdivision (d) of Section 1793.2."

1. Chrysler's interpretation conflicts with section 1794's plain terms.

Chrysler argues that section 1794 provides 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 Act. (AB/12, 18, 23, 27-28, 33.) From this, Chrysler argues that Commercial Code sections 2711-2715 define the Act's restitution remedy. (AB/27.)

But section 1794 *doesn't* say that the Commercial Code "shall apply" in Song-Beverly cases. That's what a *prior, superseded version* of section 1794 had suggested. (See FCA MJN/72; *People v. Delgado* (2013) 214 Cal.App.4th 914, 918 [differences in earlier version of statute reflect legislative rejection].) Section 1794 *now provides* that: A buyer's remedies "*shall include the rights* of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, *and*" Commercial Code sections 2711-2715's various remedies. (§ 1794, subd. (b), italics added.)

The use of "include" plus the conjunctive "and" are critical to understanding section 1794. The comma before "and" indicates that a buyer's damages "shall include" restitution

exactly as "set forth in subdivision (d) of Section 1793.2" and—*as distinct remedies*—those available under Commercial Code sections 2711-2715. This is no different than stating that HBO's fall line-up shall include Game of Thrones, Succession, and Lovecraft Country—each is a distinct show a viewer can choose to watch. That's how the U.S. Supreme Court reads similarly structured statutes. (*U.S. v. Ron Pair Enterprises, Inc.* (1989) 489 U.S. 235, 241-242 [since "'interest on such claim' is set aside by commas," it must "stand[] independent of the language that follows"].) California courts interpreting section 1794 do so too—citing section 1794's "conjunctive language" in holding that the statute provides Song-Beverly consumers with "an *additional* measure of damages *beyond replacement or reimbursement*." (*Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 302 (*Krotin*), italics added.)

This interpretation makes sense. Unlike the Act's other provisions, section 1794 reaches *Song-Beverly cases and non-Song-Beverly cases*. That's why section 1794, subdivision (a) states that a "buyer of consumer goods who is damaged" can bring a claim either "under this chapter"—i.e., the Act—"or under an implied or express warranty or service contract." (*Parker v. Alexander Marine Co., Ltd.* (9th Cir. 2017) 721 Fed.Appx. 585, 587 (*Parker*).)

Thus, when section 1794 lists the various remedies available to a "buyer of consumer goods," it lists each remedy that a "buyer of consumer goods" *could choose to* pursue, either when suing "'under this chapter" (the Act) or for a non-Song-Beverly

claim for breach of "an implied or express warranty or service contract.'" (§ 1794(a).) It is not defining how restitution would work *only under the Act*.

No textual basis exists to conclude that—by "includ[ing]" restitution "as set forth in subdivision (d) of Section 1793.2, *and*" Commercial Code sections 2711-2715 among a consumer's available remedies (§ 1794, subd. (b), italics added)—the Legislature intended for sections 2711-2715 to *displace or subtract* from 1793.2's distinct restitution remedy. To the contrary, the Act plainly states, "where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods…the provisions of this chapter shall prevail." (§ 1790.3.) And, as shown below, Chrysler's interpretation of section 1794 would create several such conflicts.

2. Chrysler's interpretation conflicts with the Act's other provisions.

Chrysler concedes, as it must, that the Act provides that "where there is a direct conflict between the Song-Beverly Act and the Commercial Code, the Song-Beverly Act prevails." (AB/28; see § 1790.3.) This means that the Commercial Code can only add to the Act's remedies, not take from them. (See also § 1790.4 [Act does not "restrict[] any remedy that is otherwise available"].) Chrysler's interpretation of section 1794, however, would allow the Commercial Code to prevail over the Act's key terms—and therefore also fails considering section 1794's "statutory context." (*Catlin v. Superior Court* (2011) 51 Cal.4th 300, 304.)

First, the Act repeatedly states that manufacturers shall make restitution as set forth in section 1793.2, subdivision (d). (E.g., §§ 1793.22, subd. (d)(5), 1793.25, subd. (a) , 1794, subd. (b).) Section 1793.2, in turn, provides that "manufacturer[s] shall make restitution in an amount equal to the actual price paid or payable by the buyer ... *plus* any incidental damages to which the buyer is entitled under section 1794," which then references Commercial Code sections 2711-2715. (§ 1793.2, subd. (d)(2)(B), italics added.) Thus, the Act provides buyers the car's purchase price and allows them *to add* to that recovery by pursuing "incidental damages" under Commercial Code sections 2711-2715. Chrysler's interpretation, however, would define restitution as set forth in section 1794 (and not section 1793.2) and let Commercial Code sections 2711-2715 *subtract from* section 1793.2's promise of the purchase price.

Second, section 1793.2, subdivision (d)(2), provides that a plaintiff need *only* give the manufacturer a reasonable number of attempts to fix the car to trigger a manufacturer's "affirmative" obligation to make prompt restitution under section 1793.2 for the price paid or payable. (*Krotin, supra,* 38 Cal.App.4th at pp. 302-302.) Yet Chrysler's interpretation would *add* unidentified requirements to that statute. For instance, showing that a buyer "justifiably revoked acceptance" under Commercial Code section 2711, subdivision (3), "requires more and different actions of the buyer than is required under section 1793.2(d)." (*Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1263-1264 (*Gavaldon*).) One example: "Revocation of acceptance must be

done before 'any substantial change in condition of the goods' (Com. Code, § 2608, subd. (2)), whereas section 1793.2(d) has no such requirement." (*Ibid.*)

Chrysler admits that the Commercial Code would impose requirements that could be used to deny a buyer relief—"say, for failing to 'reject or revoke acceptance of the vehicle at a reasonable time'"—but simply claims these requirements are inapplicable. (AB/28.) But this Court cited that exact reason in holding that section 1793.2 and Commercial Code sections 2711-2715 are *distinct* remedies that must be *separately invoked*. (*Gavaldon, supra,* 32 Cal.4th at pp. 1250-1251, 1263-1264.)

The better interpretation—which renders no language superfluous—is spelled out in section 1793.2: prevailing Song-Beverly plaintiffs are always entitled to the car's purchase price but can *add to* that recovery with incidental damages under the Commercial Code if applicable requirements are satisfied.

B. The legislative history supports Niedermeier.

Because the Act's language is unambiguous, legislative history is irrelevant. (*Krotin, supra,* 38 Cal.App.4th at p. 302 & fn. 5 [refusing to consider section 1794's legislative history in ruling on interplay between the Act and Commercial Code sections 2711-2715].)

Regardless, as Niedermeier's opening brief explained, the Act's legislative history supports her construction. Although the Act initially focused on consumer goods in general, the

Legislature later enacted detailed formulaic provisions specific to lemon vehicles—the provisions at issue here—to promote prompt buy-backs and provide adequate direction on buyer refunds and damages. (OB/13-18.) Chrysler cursorily dismisses Niedermeier's recited legislative history as a "grab-bag" of irrelevant "snippets" (AB/43) and claims the legislative history "confirms that the Legislature did not intend a buyer's damages to include the portion of the purchase price she has already recovered" (AB/39). Wrong.

In discussing the 1970 Act, Chrysler relies entirely on *post-enactment* remarks, including a legislative aid letter and legislative counsel statement. (AB/39-40.) These comments don't address the issue before this Court, nor are they valid legislative history. "[P]ost-enactment legislative history 'is not a legitimate tool of statutory interpretation' because 'by definition [it] "could have had no effect on the [legislative] vote…."'" (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 221; *Haworth v. Lira* (1991) 232 Cal.App.3d 1362, 1369 ["a post-enactment statement by a person who was not even a member of the Legislature…, apart from its inadmissibility, is entitled to virtually no weight"].)

Next, Chrysler emphasizes that in 1982 the Legislature repealed and replaced former section 1794 to, among other things, reference the Commercial Code; Chrysler cites snippets about section 1794 making the Code's breach of contract standard a measure of damages and bringing Code cases into play. (AB/40-41.) The history shows, however, that section 1794 was merely a "housekeeping statute" so that "all the existing remedies for the

breach of a consumer warranty" could be located into "a single section" since those remedies had previously been "found in four separate areas:" "the Commercial Code, general contract law, and the federal Magnuson-Moss Act, as well as in the Song-Beverly Consumer Warranty Act." (FCA MJN/11-12, 40.) Section 1794 was not enacted to "add to nor subtract from remedies under existing law." (FCA MJN/34.) Thus, the Legislature did not intend for section 1794 to undermine section 1793.2's already-existing replacement or purchase-price reimbursement provision. (OB/13-14; 1MJN/30.)

Chrysler further ignores that, in 1987, the Legislature stepped in again to rectify two continuing problems with lemon vehicles. Because the Act was not protecting buyers of lemon vehicles adequately, the Legislature amended section 1793.2 to add the detailed, formulaic provisions at issue here. (OB/13-19.) It also amended section 1794 to bolster the section 1793.2 remedy and to eliminate an argument by vehicle manufacturers that plaintiffs were not entitled to 1793.2's promise of the car's full purchase price and instead could only recover under the Commercial Code. (FCA MJN/89-90.) As the Legislature explained: "The misinterpretation problem comes about because Section 1794 does not specifically include the refund/replacement remedy provided to the buyer by Section 1793.2," or the "other remedies provided for in the Song-Beverly Act." (FCA MJN/89-90.)

The Legislature found the manufacturers' interpretation "ludicrous since[,] were it to be accepted, it would drastically

reduce any incentive for the manufacturer to offer a refund before a lawsuit, and cause them to argue the refund is an unavailable remedy in a lawsuit. (They argue the buyer only has the right to obtain the difference in value between what the defective car is worth and what it would have been worth without the defects)"—i.e., what Commercial Code section 2714 provides. (FCA MJN/90, original emphasis.)

So, to prevent manufacturers from arguing that a Song-Beverly plaintiff's recovery is limited to the Commercial Code's *lesser remedies* (FCA MJN/90)—much like Chrysler argues here—the Legislature amended section 1794 to state expressly that a consumer's remedies include the rights of replacement and restitution "as set forth in subdivision (d) of Section 1793.2, *and*" the Commercial Code's *distinct* remedies. (FCA MJN/72, 90, 92-93.)

The Legislature thereby ensured that section 1794's text reflected what it had been intended to do all along: create one section that included the *distinct* remedies that a wronged consumer could pursue: (1) restitution "as set forth in Section 1793.2, subdivision (d), and" (2) those available under Commercial Code sections 2711-2715. (See FCA MJN/72, 87-88.) The 1987 amendment to section 1794 made clear that the Commercial Code was never meant to displace or subtract from section 1793.2's restitution remedy. The Commercial Code is merely among the remedies that a buyer *could choose to invoke*—

either instead of *or,* as section 1793.2 makes explicit, to *add to* section 1793.2's restitution remedy.[4]

C. Case law repudiates Chrysler's Commercial Code argument.

Case law confirms that Commercial Code sections 2711-2715 can only *add to* section 1793.2's distinct purchase-price restitution remedy.

In *Krotin*, the trial court instructed the jury that the plaintiffs, to recover under the Act, must show they "reject[ed] or revoke[d] acceptance of [the car]" in "a reasonable time" after learning it was defective—a Commercial Code section 2711 requirement. (38 Cal.App.4th at pp. 300-301.) *Krotin* deemed this instruction erroneous since "the conjunctive language in Civil Code section 1794"—which provides for restitution "'as set forth in subdivision (d) of Section 1793.2, *and*'" Commercial Code sections 2711-2715 among plaintiff's potential remedies—"indicates[] the statute itself provides an *additional* measure of damages beyond replacement or reimbursement." (*Id.* at p. 302 & fn. 4, italics added.)

In *Gavaldon*, this Court held that a plaintiff who only sued under section 1793.2 cannot recover under Commercial Code sections 2711-2715, which this Court described as a "different"

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[4] The DCA recognizes this too. Its regulations provide that buyers are *always* entitled to "restitution in accordance with Civil Code Sections 1793.2(d)(2)(A), (B), and (C)" and, additionally, "incidental damages" under "Commercial Code [§§] 2711 to 2715." (Cal. Code Regs., tit. 16, § 3398.11.)

theory of liability that "requires more and different actions of the buyer than is required under section 1793.2(d)." (32 Cal.4th at pp. 1250-1251, 1263-1264.)

Chrysler's cited authorities (AB/27-28) do not hold otherwise. Each merely clarifies what plaintiffs can recover "*in addition* to the refund-or-replace remedy of section 1793.2." (*Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 188-189, italics added [no additional emotional damages]; *Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 755-757 [no additional loss-of-use damages]; *Kirzhner, supra,* 9 Cal.5th at p. 969 [consumers entitled to "choose either a replacement vehicle or restitution 'in an amount equal to the actual price paid or payable by the buyer'"; the question was whether "[t]he manufacturer must *also pay*" for "vehicle registration renewal and nonoperation fees," italics added].)

Chrysler's authorities thus comport with the Act's text, legislative history, and remedial purposes: that manufacturers shall *always* provide restitution for the car's purchase price in an express warranty case under the Act; the Commercial Code's distinct remedies can only add to the Act's restitution amount. (Compare *Mitchell, supra,* 80 Cal.App.4th at p. 37 ["[A]n 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."], with *Jiagbogu, supra,* 118 Cal.App.4th at p. 1243-1244 [rejecting unenumerated post-repair-attempt mileage offset].)

D. Under no circumstance would Chrysler ever be entitled to an $19,000 offset.

Even if the Commercial Code somehow applied, Chrysler still could not claim a $19,000 offset. As the party challenging the judgment (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608-609) and seeking an offset (*Rashidi v. Moser* (2004) 60 Cal.4th 718, 723, fn. 4), Chrysler would have the burden to prove entitlement to a $19,000 offset. Chrysler never has. On appeal, Chrysler simply argued that the credit is binding, and the Court of Appeal agreed (Opn/27), improperly dodging *a fact question* that no factfinder resolved.

Chrysler never even tries to explain which Commercial Code provision entitles it to a resale offset. It instead superficially asserts that "the rule is the same under all sections—a buyer's damages do not include the amount of the resale." (AB/29, fn. 2.) But that's false because sections 2712-2715 don't reference recovery for a resale. Only section 2711 does, and Chrysler has never established that section applies.

Nor could Chrysler ever do so. A defendant must put forth *non-speculative* evidence establishing any resale offset amount with reasonable certainty, without unproven assumptions. (See *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773-774.) Here, as shown, trade-in math is inherently artificial. This case is therefore nothing like Chrysler's largely out-of-state authorities, which concern genuine resale prices for cash. (AB/31-32.) Chrysler isn't asking Niedermeier to hand over cash from a resale; it's relying on an

artificial trade-in credit. Chrysler simply isn't entitled to an offset for a $19,000 trade-in credit that it cannot show Niedermeier actually received.

III. Chrysler's Other Arguments Fail.

A. Niedermeier's interpretation would reinforce—not "undermine"—the Legislature's intent.

Chrysler argues that Niedermeier's interpretation would defeat the Lemon Law's goal of ensuring that lemons are "branded" as such. (AB/12.) According to Chrysler (and the Court of Appeal, Opn/18), disallowing a trade-in offset would mean that "no rational owner would return her defective car to the manufacturer" because "owners could recover far more money by reselling their lemons to unsuspecting used car buyers or [unaffiliated] dealerships," thereby flooding the market with unlabeled lemons. (AB/35.)

To the extent Chrysler seriously complains that *the Legislature's* approach doesn't prevent unlabeled lemons from entering the market, that is only because Chrysler chooses to ignore the Legislature's prescriptions to "promptly" repurchase a lemon and brand it as a lemon. That's presumably why the Act extends virtually all of its protections to *used cars* also, including the foregoing requirements. (§ 1795.5.) Chrysler's conjured concern about a stampede of lemon owners "reselling" lemons to "unsuspecting" buyers ignores reality: Lemons are virtually impossible to re-sell, as Niedermeier's situation demonstrates.

Doing what Niedermeier did—trading in the lemon to a dealer in order to buy a safe vehicle—gets the vehicle off the road and subjects the dealer to statutory used car warranties. (§§ 1792, 1792.1, 1795.5.)

The Act's plain language thus reflects a reasonable policy choice: The Legislature chose to protect consumers by placing the burden of repurchasing and labeling a lemon that enter the used car market—and that necessarily became defective during the warranty period—on the manufacturer who failed to buy back the lemon and label it in the first place. This incentivizes manufacturers to promptly buy back a lemon it can't fix *promptly*, *from the first buyer*.

In contrast, as Niedermeier has explained (OB/45-49), Chrysler's reading of the Act would create an incentive for manufacturers to just wait for an inevitable discount once the car is traded in. This would consequently gut section 1793.2(d)(2)'s mandate that manufacturers "promptly" replace lemon vehicles or "promptly" make restitution and label the car a lemon at that time. Why would any "rational" manufacturer bother to obey the law if it knows its delay will be rewarded by a trade-in offset? It won't, resulting in most of these cars *never getting rebranded*. (See OB/56-57.) It's perverse for Chrysler to claim to champion the interests of consumers when Chrysler's own dilatory conduct is what *forced* Niedermeier to trade in her lemon to obtain a safe car.

Chrysler's only response is that the Act's attorney's fee and civil penalty provisions are sufficient to ensure that "[n]o rational

manufacturer" would ever delay repurchasing a lemon vehicle. (AB/38.) Really? Chrysler's own conduct here belies that contention, as does the number of Lemon-Law cases in California. Chrysler certainly thought it was "rational" to refuse her multiple buy-back requests after sixteen repair attempts—hoping she would accept Chrysler's paltry $500 or $2,000 settlement offers to go away. (OB/24.) Chrysler's argument that manufacturers have "no incentive to delay" repurchase is demonstrably nonsense. (AB/38.) Unlike consumers stuck with unsafe lemons, who face severe pressure to settle, manufacturers can readily afford Lemon-Law lawsuits in those instances where—as here—a consumer has the fortitude to fight to the end.

The best way to address concerns about un-branded lemons is to punish manufacturers when they fail to promptly buy back a lemon and brand it accordingly. Reducing damages with trade-in offsets would encourage manufacturers to violate the Act. Thus, enforcing the statute according to its plain language—no offset—is not "absurd" as Chrysler claims. Just the opposite: It's a wise policy choice. The plain language must govern.

B. *Martinez*, *Jiagbogu*, and *Lukather* are directly on-point.

Chrysler's attempts to distinguish Niedermeier's principal supporting cases (AB/47-50) miss the mark.

1. Chrysler seeks to distinguish *Martinez* by claiming the manufacturer argued the plaintiff wasn't entitled to *any* relief under the Act, whereas here, Chrysler merely seeks an offset.

(AB/48.) But *Martinez*'s holding is far broader: the court held, in sweeping and unequivocal terms, that "[i]n providing [the Act's restitution] remedies, the Legislature has not required that the consumer maintain possession of the goods at all times. *All that is necessary is that the consumer afford the manufacturer a reasonable number of [repair] attempts*..." (193 Cal.App.4th at p. 191, italics added.) That reasoning applies here. It's undisputed that, as in *Martinez*, Niedermeier "afford[ed] the manufacturer a reasonable number of attempts" to repurchase her lemon vehicle. Under *Martinez*, no more "is necessary." (*Ibid.*)

If anything, Niedermeier's case is more factually compelling than *Martinez*. Niedermeier asked Chrysler to repurchase her car *three times* before trading it in and it *still* refused to do so, whereas in *Martinez,* a lienholder had repossessed the car after just one buyback request—and yet the manufacturer was still liable for the Act's restitution remedy. (193 Cal.App.4th at pp. 194-195, 198.)

Chrysler also tries to distinguish *Martinez* on policy grounds, arguing that the *Martinez* court worried that requiring plaintiffs to retain possession of vehicles to recover under the Act would exert a "chilling effect" on Song-Beverly suits that doesn't exist here because Niedermeier, unlike the *Martinez* plaintiff, did not have to "keep making payments on a derelict vehicle to bring a claim." (AB/48.) Chrysler ignores that *Martinez*'s holding rests on the Act's plain language: "If the Legislature intended to impose such a requirement, it could have easily included language to that effect. It did not." (193 Cal.App.4th at p. 194.)

Chrysler further ignores that the principal policy concern articulated in *Martinez*—that "if a manufacturer refuses to comply with its obligations under the Act to repair a defective vehicle, the buyer may have to spend years in litigation pursuing his or her remedies under the Act" (193 Cal.App.4th at p. 195)—exists here too. Chrysler's stonewalling forced Niedermeier to go to extreme lengths to bring Chrysler to justice.

2. Chrysler tries to distinguish *Jiagbogu* on the ground that "[h]ere, unlike an 'offset' for a buyer's use of a defective car" after requesting a buy back (the issue in *Jiagbogu*), "the question of how to calculate a buyer's damages when she resells the car is not specifically addressed in Section 1793.2(d)." (AB/49.) But there's no need to specifically discuss trade-ins in a statute that makes clear that no unenumerated offsets exist. As *Jiagbogu* summarized, the "omission of other offsets from a set of provisions that thoroughly cover other relevant costs indicates legislative intent to exclude such offsets." (118 Cal.App.4th at pp. 1243-1244.) Like *Martinez*, *Jiagbogu* is significant because—as even the Court of Appeal acknowledged here—it "rejected [an] interpretation[] of the Act that allow[s] manufacturers to benefit from delays in compliance." (Opn/24.) That *Jiagbogu* did not involve a trade-in offset doesn't eliminate its persuasive value. (OB/37-39.)

3. *Lukather* v. *General Motors, LLC* (2010) 181 Cal.App.4th 1041, likewise rejected a manufacturer's attempt to imply unenumerated offsets into section 1793(d)(2). (OB/39-40.) As in *Jiagbogu* and *Martinez, Lukather* involved a manufacturer

that had repeatedly "stalled and frustrated" an owner's attempt to obtain restitution under the Act. (181 Cal.App.4th at p. 1049.) And as in those cases, *Lukather* denied a requested offset (for use of a rental car) because it was contrary to section 1793(d)(2)'s plain language and "would reward [the manufacturer] for its delay…." (*Id.* at p. 1053.)

Chrysler labels *Lukather* "even further afield" than *Jiagbogu* because denying the offset at issue there would have "'rewarded [the manufacturer] for its delay'" in complying with the Act (AB/49), whereas denying an offset for resale proceeds "would not pressure the buyer to accept an unreasonable settlement offer or reward a manufacturer for its delay." (AB/49-50.) As shown, that's incorrect. Allowing trade-in offsets *would* pressure consumers into accepting lowball settlement offers—here, for the $2,000 Niedermeier incurred *in rental car fees* (OB/24)—because otherwise the consumer could pursue the time and expense of litigation only to have damages slashed by a trade-in credit that doesn't approximate the car's value. That *Lukather* involves a different offset doesn't dilute its relevance. Rather, taken with *Jiagbogu* and *Martinez*, *Lukather* makes clear that the Act does not allow for unenumerated offsets of whatever variety, period.

IV. If The Court Allows A Trade-In Offset, It Should Limit The Offset To Manufacturers Who Acted In Good Faith.

As previously explained, if this Court permits a trade-in offset, it should apply the collateral source rule—under which

payments from a source wholly independent of the wrongdoer are not deducted from the damages—to bar the offset to manufacturers who *willfully* violate the Act. (OB/61-63.)

Chrysler argues that "Niedermeier's far-fetched collateral source theory" fails because it "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." (AB/51.) That argument incorrectly assumes that the Commercial Code overrides the Lemon Law's restitution provision. It doesn't. (§ 1790.3.) Nor do the Commercial Code cases touted by Chrysler involve defendants who *willfully violated a consumer-protection statute*.

Chrysler also argues that the collateral source rule is grounded in policy reasons that are "absent here"—the desire to ensure injured victims receive the benefits of decisions to carry insurance and are fully compensated for injuries. (AB/51.) But the collateral source rule is also about ensuring that a "tortfeasor [does] not garner the benefits of his victim's providence." (*Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 10.) The rule applies to prevent damage reductions that would relieve the wrongdoer of having to "pay the full cost of his or her negligence or wrongdoing," thereby "distort[ing] the deterrent function of tort law." (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 560 (*Howell*).) That's why authority holds that the rule should apply outside traditional tort contexts where, as here, the defendant's wrongdoing for willful breaches of warranty

under section 1794. (OB/61-62; *Parker, supra,* 721 Fed.Appx. at pp. 587-588.)

The collateral source rule therefore should apply to willful violators of the Act. Chrysler should not be rewarded for its willful refusal to repurchase Niedermeier's vehicle, thereby "distort[ing] the [Act's] deterrent function." (*Howell*, *supra*, 52 Cal.4th at p. 560.) Chrysler argues there's no need to apply the rule here because the Legislature already imposed a civil penalty for willful violations. (AB/52.) That argument proves too much, because the rule applies to intentional tortfeasors despite their liability for punitive damages. And, as this case demonstrates, manufacturers are still opting to willfully violate the Act despite the threat of civil penalties.

V. Any Trade-In Offset Should Apply Only *After* The Jury Calculates The Civil Penalty For A Manufacturer's Willful Misconduct.

A. This issue is properly before the Court.

Chrysler tries to dodge the issue of *when* a trade-in offset should be applied, by claiming the Court of Appeal deemed Niedermeier to have waived the argument and asking this Court to ignore it too. (AB/55-57.)

The issue, however, *was* properly raised. (See COA-Respondent's Brief/80 [arguing the sole reason to reduce civil penalties is if the jury awarded more than the two-times "actual damages" permitted by statute]; Pet/21-22, citing Oral Arg. Transcript, 57:54-58:14 [Niedermeier arguing that if a trade-in

credit existed, it would have to be applied *after* calculating civil penalties].) Niedermeier's position was that trade-ins *should have no effect* on the civil penalty. That preserves the issue. (*Clark v. Optical Coating Laboratory, Inc.* (2008) 165 Cal.App.4th 150, 172, fn. 17.)

Regardless, this Court's "purpose is to decide important questions and maintain statewide harmony and uniformity of decision"; the Court's focus is "*not* on correction of error by the court of appeal in a specific case." (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2021) ¶ 13:1.) Accordingly, this Court "*independently* reviews the appellate court's decision" (*id.*, ¶13:6) and has the power to decide "any issues that are raised or fairly included in the petition or answer"—even when not raised below (*People v. Braxton* (2004) 34 Cal.4th 798, 809 (*Braxton*); *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 6 (*Cedars-Sinai*)). If a trade-in offset exists, *when* it should be applied is a critically important question of statewide importance. Delaying a ruling on this fully briefed, question of law until "some future case" "would be extremely wasteful of the resources of both courts and parties." (*Cedars-Sinai,* at p. 6.) And it would result in widespread confusion and disagreement in settlements until that "future case." In fact, it already has.

B. Section 1794's plain language supports applying the trade-in offset after calculating the civil penalty.

Section 1794, subdivision (c), authorizes a civil penalty of up to twice "the amount of actual damages." Chrysler argues that "actual damages" necessarily limits the penalty to the amount recoverable as restitution *after* a trade-in offset is applied. (AB/57-61.) But the statutory language is otherwise.

The "damages" here are statutory. Where a lemon owner seeks the remedy provided by section 1793.2(d)(2)(B)—the amount "paid or payable" on the vehicle, plus incidental damages under the Commercial Code, minus the statutory pre-repair-delivery offset—section 1794, subdivision (b), makes that amount "the measure of the buyer's damages." (§ 1794, subd. (b).)

Chrysler emphasizes that "'[a]ctual damages' is a term synonymous with compensatory damages.'" (AB/58, citation omitted.) But "compensatory damages" in this statutory context means *the damages the Act awards* for the injury—i.e., for the Act violation. Section 1793.2, subdivision (d)(2), sets that amount, and whether a manufacturer might claim a trade-in offset that arises only *after* the manufacturer has triggered the buyer's entitlement to that statutory amount doesn't change the amount of those statutory damages. Whether the plaintiff "was compensated for [some of] h[er] compensatory damages *before* trial" (here via an illusory trade-in credit)—rather than "*at* trial"—doesn't change the amount of those damages. (*Fullington v. Equilon Enterprises, LLC* (2012) 210 Cal.App.4th 667, 684-689

(*Fullington*), italics added.) The offset only "affects the right to *recover damages*, not the *amount of damages suffered*"—i.e., actual damages. (*McMillin Companies, LLC v. American Safety Indemnity Co.* (2015) 233 Cal.App.4th 518, 535 (*McMillin*), original italics.)[5]

C. The statutory context also defeats Chrysler's interpretation.

Chrysler's argument also fails when "construed in context" and against "provisions relating to the same subject matter." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 (*Lungren*).)

The Act was passed to compel manufacturers to *promptly* honor their warranties at *every* stage—from initial repairs through reimbursement of the purchase price. (OB/21; *Kirzhner*, *supra*, 9 Cal.5th at p. 989.) The civil penalty was meant to encourage manufacturers to try to fulfill those duties. (*Kwan, supra,* 23 Cal.App.4th at p. 184.) Although Chrysler cites non-Lemon Law cases as narrowly construing penalty clauses (AB/58), California cases hold that the Act's civil penalty provision should be *broadly* construed to further the Act's deterrence and punishment purposes: "Any interpretation that would significantly vitiate the incentive to comply should be

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[5] In fact, courts interpreting "actual damages" routinely hold that when a plaintiff takes nothing after application of a defendant's offset, the plaintiff still has suffered the "actual damages" necessary to bring a claim or to seek punitive damages. (E.g., *McMillin, supra,* 233 Cal.App.4th at pp. 534-536; *Los Angeles Unified School District v. Torres Construction Corp.* (2020) 57 Cal.App.5th 480, 500.)

avoided." (*Kwan*, at p. 184.) Cases also routinely reject interpretations of the Act that would let manufacturers reduce damages by delaying compliance, as Chrysler seeks to do. (E.g., *Jiagbogu, supra,* 118 Cal.App.4th at p. 1244.)

The Legislature reached the same conclusion—rejecting an interpretation of the Act that "would drastically reduce any incentive for the manufacturer to offer a refund before a lawsuit" by lowering a manufacturer's damages should its delay require a lawsuit. (FCA MJN/90, original emphasis.)

Applying the offset after calculating the penalty also comports with the offset being a substitute for the vehicle's return to the manufacturer at the end of litigation, *post-judgment*. (OB/69.) Indeed, in arguing that a trade-in offset wouldn't give manufacturers a windfall, Chrysler claims the offset simply represents the value Chrysler would receive if Chrysler got the car back. (AB/26, 37-38.) Yet, by asking this Court to apply the offset *before* the penalty is calculated, Chrysler seeks to effectively treble an offset that's supposed to be a stand-in for the car being returned to Chrysler at the end. (OB/68-69.)

Chrysler never disputes this. It instead doubles down on a plain-meaning approach this Court has rejected: the reliance on a single term—here, "actual damages"—read in isolation, without considering the Act's purposes or other provisions. (Compare *Lungren, supra,* 45 Cal.3d at p. 735 ["The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context" and "harmonized" with related provisions], with AB/59 ["Niedermeier complains that a smaller

civil penalty reduces its deterrent effect…. But the Legislature made the deliberate choice to link civil penalties to a buyer's 'actual damages'"].) Chrysler's citations rely on the same superficial reasoning this Court has rejected. (E.g., *Paolitto v. John Brown E. & C., Inc.* (2d Cir. 1998) 151 F.3d 60, 66-68; *Smith v. Baldwin* (Tex. 1980) 611 S.W.2d 611, 617.)

Applying the offset before calculating the civil penalty would give *Chrysler* a windfall. That's dispositive. There's no reasonable way to square Chrysler's interpretation with the Act's purpose of ensuring prompt buy-backs. The Act does not allow Chrysler to be rewarded for refusing three requests to buy back a vehicle with sixteen warranted-repair attempts.

D. Case law confirms Niedermeier's interpretation.

Although numerous cases support applying the offset *after* calculating the civil penalty (OB/66-68), Chrysler tries to dismiss them wholesale as either involving "settlement payments" or "a plaintiff's *post-judgment* mitigation of damages," which according to Chrysler means that they only concerned the amount of "*recoverable* damages, not *actual damages*." (AB/60-61, original italics.) But Chrysler cannot cite anything from these cases indicating their reasoning is so limited. The cases all recognize that applying the offset *after* determining a penalty furthers the penalty's deterrence purpose—which is equally true here.

The so-called "post-judgment mitigation of damages" cases are directly on point. In *Liquid Air Corp v. Rogers* (7th Cir. 1987)

834 F.2d 1297, 1301 (OB/67), for example, the Seventh Circuit held in a RICO case that the cost of property returned to plaintiff following trial was properly subtracted *only after trebling damages* because "setting-off damages *after* trebling is more likely to effectuate the purposes behind RICO." That's no different from the situation here. If a trade-in credit is a substitute for the car's return to the manufacturer, that offset should come at the very end. (See *U.S. v. Hult* (9th Cir. 1963) 319 F.2d 47, 48 (OB/67) [applying offset for timber's salvage value *after* calculating penalty].)

The "settlement payment" cases are germane, too. California courts hold that offsets for prior settlement payments only concern the amount of *recoverable* damages, not actual damages, because *when* those damages were paid—"*before* trial" or "*at* trial"—doesn't impact the amount compensating plaintiff for the injury. (*Fullington, supra,* 210 Cal.App.4th at p. 689.) As shown (Legal Discussion, § V.B, *ante*), that reasoning applies here too.

Chrysler also errs in arguing, based on one case only, that "'the norm is net trebling.'" (AB/59, quoting *United States v. Anchor Mortg. Corp.* (7th Cir. 2013) 711 F.3d 745, 750.) That case is wrong—both as to the norm generally and the False Claims Act case before it. (See *ibid.*) U.S. Supreme Court precedent is directly on point. That Court, in applying the twice-actual-damages provision in the False Claims Act, has held that "the Government's actual damages are to be doubled *before any subtractions are made for compensatory payments* previously

received by the Government *from any source*" because the "fortuitous" acts of other parties "should not determine the [defendant's] liability … under the double-damages provision." (*United States v. Bornstein* (1976) 423 U.S. 303, 316, italics added.)

Bornstein recognized that applying a payment offset before calculating the penalty could undermine the statutory purpose by letting defendants avoid the full civil penalty, and that the penalty therefore must be calculated "before any deduction is made for payments previously received from any source in mitigation of those damages." (423 U.S. at p. 316.) That reasoning applies equally here.

Chrysler also briefly discusses a handful of cases where an offset from actual damages is taken *before* those damages are trebled. (AB 60 & fn. 6.) Those cases are inapposite. Unlike here, the offset in those cases was taken to ensure plaintiff's total recovery matched the *total amount* she was entitled to *for a violation*—not an offset designed only to limit *what amount of that total recovery the defendant had to pay*. (See *Cox v. Kia Motors America, Inc.* (N.D. Cal., Sept. 30, 2020, No. 20-CV-02380-BLF) 2020 WL 5814518, at *3 [Song-Beverly's pre-repair attempt mileage offset]; *Williams Inglis & Sons Baking Co. v. Continental Baking Co., Inc.* (9th Cir. 1992) 981 F.2d 1023, 1024 [plaintiff's "net damage is the difference between the lost profit stream and the proceeds it did receive," because "[i]f the violation had not occurred, [plaintiff] would have received the profit stream but not had the proceeds of their sale"]; *Hammond v. Northland*

Counseling Center, Inc. (8th Cir. 2000) 218 F.3d 886, 892 [offset to ensure plaintiffs received amount making employee whole]; *Los Angeles Memorial Coliseum Com'n v. NFL* (9th Cir. 1986) 791 F.2d 1356, 137 [offset to rectify simultaneous recovery of duplicative lost profits and "value of the business" damages].)

Here, the Act entitles Niedermeier to the price paid or payable on the car (excluding non-manufacturer installed options), minus a mileage offset for pre-repair use, plus incidental damages. The penalty should apply to that statutory amount before Chrysler can reduce its payment by an offset for credits/payments Niedermeier received from a third party.

CONCLUSION

Whether this Court merely applies the Act's plain language or considers other interpretive aids, the result is the same. The Legislature meant what the plain language says: No offset.

But even if the Court disagrees, it should reverse. It should bar willful violators from claiming any offset or at least hold that the offset must be applied after a jury calculates the civil penalty.

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.504(d)(1), I certify that this Petitioner's Reply Brief on the Merits contains 8,378 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: November 22, 2021 */s/ Leslie A. Brueckner*

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/s/Chris Hsu

Signature

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