No.: S266034

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LISA NEIDERMEIER,

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

APPLICATION TO FILE AMICUS BRIEF AND AMICUS BRIEF IN SUPPORT OF PETITIONER

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APPLICATION TO FILE AMICUS BRIEF

Pursuant to Rule 29.1(f) of the California Rules of Court, *amicus,* Consumers for Auto Reliability and Safety ("CARS"), respectfully requests leave to file the attached brief of *amicus curia* in support of Petitioner Lisa Niedermeier. This application is timely made within 30 days of the close of the parties' briefing.

I. Interest of CARS in This Matter

As a national non-profit auto safety and consumer advocacy organization based in Sacramento and founded in 1996, CARS' mission is to prevent motor vehicle-related fatalities, injuries, and economic losses. CARS accomplishes this through legislative and regulatory advocacy, public education, outreach, aid to victims, and related activities. For decades, CARS has worked closely with individual consumers, small business owners, and active duty military Servicemembers who own seriously defective "lemon" vehicles, and surviving family members whose relatives were killed by hazardous vehicles with built-in lethal safety defects.

CARS has successfully sponsored legislation in California to expand and improve upon the consumer protections in the Song-Beverly Act (the "Act"). These fortifications of the law include protections for individual entrepreneurs, small business owners, and members of the Armed Forces from defective and unsafe vehicles produced by auto manufacturers which choose not to comply with the Act.

CARS' work is more vital than ever in an environment where manufacturers engage in widespread fraud, deliberately fail to honor their warranties, and fail to make the necessary financial investments to design and produce safe, reliable vehicles, develop diagnostic equipment, train qualified automotive technicians, establish parts distribution systems, and adequately produce essential replacement parts.

II. How the Proposed Brief Will Assist the Court in Deciding the Matter

CARS' expertise and depth of knowledge place it in a unique position to assist the Court. The United States Congress and California Legislature have repeatedly asked the

president of CARS to testify on behalf of the public interest. CARS' president also represented the public interest in an advisory role in regulatory negotiations convened by the Federal Trade Commission regarding auto warranties and state lemon laws, including the Act.

Here, CARS seeks to provide a greater depth of perspective, context, and insight to the parties' briefs as well as describe the real-world consequences of the parties' respective positions.

This brief has been authored by undersigned counsel and no party or counsel for a party in the pending appeal, or other person or entity, made any monetary contribution intended to fund the preparation or submission of the brief, other than CARS, its members, and undersigned counsel.

DATED: December 23, 2021

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BRIEF OF AMICUS CURIA

I. INTRODUCTION

The Song-Beverly Consumer Warranty Act (the "Act") is a comprehensive and intricate statute intended to address the changes to industry, society, and the markets that rendered the common law of warranty outdated. The authors of the Act and California's legislature went beyond addressing only the relationship between the manufacturer and the consumer at the point where prompt repair and replacement under warranty is at issue. A holistic view of the Act requires consideration of, among other things, the extensive obligations for manufacturers to establish and maintain networks of facilities for inspection and repair and the opportunities for manufacturers to create nonjudicial solutions to resolve disputes over application of the Act in each instance.

Although designed to redress issues that came to a head in the 1960's, the Act's provisions remain as vital as ever to Californians today. According to the Consumer Federation of America, despite all the new products and services available today, consumers' primary complaint—across all categories of goods and services—continues to be mistreatment in the advertising, sales, and repair of motor vehicles.[1]

Also, according to Carfax, in early 2021 there were 6.3 million vehicles registered for use on California roads that have been recalled by the auto manufacturers who designed and produced those vehicles, due to serious safety defects. Among the most common defects that lead to safety recalls: faulty brakes; loss of steering; sticking accelerator pedals; catching on fire; axles that break; seat belts that fail in a crash; hoods that fly up in traffic; electronic malfunctions that cause a plethora of serious safety problems such as intermittent stalling or braking suddenly on freeways for no apparent reason; and exploding Takata airbags that propel metal shrapnel into the faces, necks and torsos of drivers and passengers, causing severe or fatal injuries such as blindness and bleeding to death.

[1] "Consumer Complaint Survey Report," Consumer Federation of America (Jul. 26, 2021) available at https://consumerfed.org/reports/2020-consumer-complaint-survey-report/ (last visited Dec. 23, 2021).

The most beneficial course of action for both the "lemon" buyer and for public safety is for vehicle manufacturers to proactively prevent "lemons" from entering the market. This is essentially the highest purpose of the Act. When those efforts are unsuccessful, manufacturers must maintain the necessary diagnostic equipment and trained technicians to identify and repair defects that substantially impair the use, value, or safety to the buyers. If reasonable repair efforts fail, then the Act requires manufacturers to affirmatively and "promptly" offer to replace or repurchase any non-conforming vehicles.

When the manufacturer's defect detection, communications, and repair responsibilities fail to provide a timely fix, replacement, or compensation for the buyer, the next best solution is to support the buyer by helping to ensure they have a means of protecting their own economic well-being and safety. When consumers' vehicles fail to conform to their warranties, their entire lives may be adversely impacted. In a society where many are living paycheck to paycheck, taking on a second auto loan payment is usually not an option. Knowing this, many manufacturers exploit this vulnerability opportunistically as a strategic advantage in litigation, dragging out the process in hopes of exhausting the resources and morale of consumers and their contingent fee consumer protection attorneys.

CARS believes the trial court got it right and strongly supports the positions presented by Petitioner Lisa Niedermeier. Those arguments are not only in accord with the language and intent of the statute, but will best protect the public safety and the interests of individual consumers, individual entrepreneurs, small business owners, and active duty members of the U.S. Armed Forces stationed in or deployed from California, particularly those most socio-economically disadvantaged.

II. BACKGROUND ON THE HISTORICAL AND PRESENT-DAY CONTEXT OF THE ACT

A. The Historical Underpinnings of the Act

In the aftermath of the 1965 Watts riots—which caused destruction of property and loss of life among the worst of any racially charged uprising the United States had seen to

that point—there was a movement to hear from the "unheard."[2] Governor Pat Brown commissioned studies which uncovered unfair and discriminatory business practices were among the root causes of the resentments, and in response, formed California's Consumer Fraud Unit.[3] Out of this movement emerged modern consumer protection law in California. 1970 saw the enactment of the Consumers Legal Remedies Act, and the Song-Beverly Consumer Warranty Act, which was signed into law by Governor Ronald Reagan, was enacted the following year.[4]

The drafters of the Song-Beverly Act felt that more clarity and formality was necessary in applying its additional remedies to an express warranty.[5] The clear intent of the Act was to go beyond and supplement the equitable and common law options available under fraud, warranty, and contract law and to make effectuating the law more practical for modern consumers by among other things, providing fee shifting. The carrot for the consumers was also crafted as a stick for manufacturers, making damages and penalties available in addition to the repair, replace, or reimbursement remedies.

B. The Present-Day Backdrop to this Dispute

Unfortunately history some times repeats itself. Depending on income level, an automobile remains the among the most expensive purchases most consumers will ever make, and it is the second most expensive purchase the majority of consumers make in this country, second only to a home.[6]

According to the Consumer Federation of America, the number one complaint of consumers last year, as in preceding years, was the "Auto" category-- including auto sales

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[2] "A riot is a language of the unheard." Martin Luther King Jr.
[3] Herschel Elkins, California attorney who helped write Lemon Law, dies at 87, Los Angeles Times, Oct. 23, 2016.
[4] Cal. Civ. Code 1750 *et sec.* and Cal. Civ. Code 1790 *et sec.*
[5] Interview with Richard Thompson, Administrative Assistant to Senator Alfred Song, in Sacramento, California, Jan. 25, 1972.
[6] "The Lemon Index: Which Cars Have the Highest Maintenance Costs?" *Priceonomics* Jun. 8, 2016 available at: https://priceonomics.com/the-lemon-index-which-cars-have-the-highest/ (Last visited: Dec 23, 2021.)

and auto warranties.[7] Owning a defective vehicle that is a liability rather than an asset is a deeply frustrating experience. Millions of Californians depend on their vehicles to get to work or school, receive medical care, or buy their groceries. Even with the availability of the Act, it can be a maddening experience to walk by their defective, often unsafe "lemon" in the driveway each day while having to pay to maintain insurance and make monthly payments during the pendency of litigation. Because in typical cases, unlike the case below, the consumer holds on to the vehicle as evidence in the case, and as their only means of transportation, certain manufacturers exploit this vulnerability as a litigation strategy. They deliberately drag out the case to shackle the consumer to these ongoing expenses, and often the dread of an impending repossession that would cause serious damage to their personal credit history, as well as the fear of being injured or killed or harming others.

C. The Differences In How Manufacturers Presently Address Their Responsibilities Under the Act Lead to Drastically Different Experiences for California's Consumers

Perhaps unsurprisingly, not all manufacturers attend to their responsibilities under the Act in equal measure. The layers of responsibility act as a funnel where a small number of manufacturers account for a vast share of lemon law litigation.

First, before the vehicles make it to market, there are significant differences among manufacturers in quality of engineering and construction. Among the questions that arise regarding those differences:

- How many vehicles does the manufacturer produce which fail to conform to their warranted condition?
- Does the manufacturer fail to make the necessary financial investments to design and produce safe, reliable vehicles?
- Does the manufacturer adequately produce essential replacement parts?

[7] "Consumer Complaint Survey Report," Consumer Federation of America (Jul. 26, 2021) available at https://consumerfed.org/reports/2020-consumer-complaint-survey-report/ (last visited Dec. 23, 2021).

After a vehicle is in use, manufacturers exhibit significant differences in their willingness and ability to address nonconformities:

- Does the manufacturer develop adequate diagnostic equipment and train sufficient numbers of qualified automotive technicians?
- Does the manufacturer effectively communicate so as to quickly identify and correct flaws in the production cycle so it produces fewer nonconforming vehicles going forward?
- Does the manufacturer establish and maintain effective parts distribution systems?
- Does the manufacturer successfully engineer and produce "fixes" and roll them out to the consumer?
- Does the manufacturer interpret the scope of its warranties generously or narrowly?

Respondent is well known to be among the manufacturers with the highest number of lemons.[8] Fiat Chrysler also has a long history of failing to comply with consumer protection and public safety laws, both at the federal level and in California. For example, while the Volkswagen "Diesel gate" emissions testing cheat was the first to be discovered and most widely publicized, FCA US, Inc. engaged in similar deceptive and harmful practices, and finally settled its own diesel emissions cheating suit with the State of California and the Environmental Protection Agency in 2019.[9] In addition, in the wake of a longstanding,

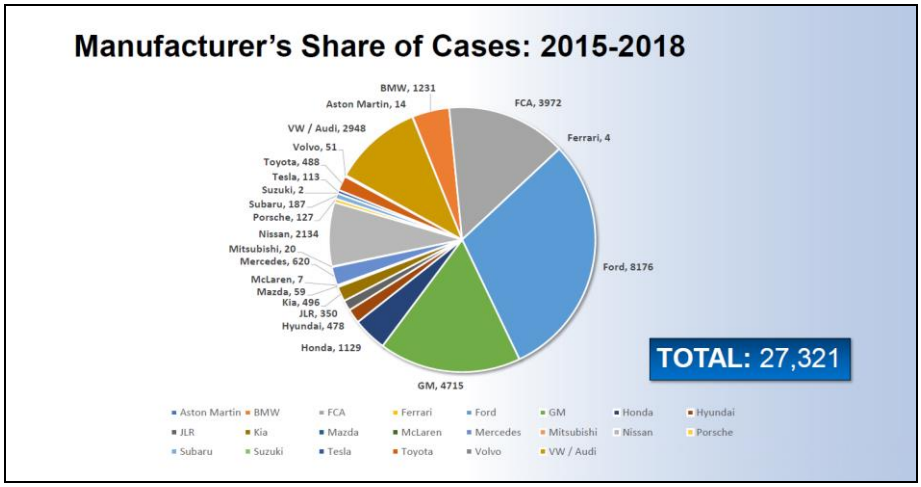
[8] "According to our data, Chrysler's Sebring is the most expensive car to maintain, which is likely one of the reasons why Chrysler revamped it in 2010." The Most and Least Expensive Cars to Maintain. *Your Mechanic*, Jun. 1, 2016 available at: https://www.yourmechanic.com/article/the-most-and-least-expensive-cars-to-maintain-by-maddy-martin (Last visited: Dec 23, 2021.)

[9] In Re: Chrysler-Dodge-Jeep Ecodiesel Marketing, Sales Practices, and Products Liability Litigation Consent Decree Jan. 10, 2019, available on the U.S. Department of Justice website: https://www.justice.gov/enrd/consent-decree/file/1123866/download#Consent%20Decree%20with%20Attachments%20A%20-%20F%C2%A0%C2%A0 (last visited Dec. 21, 2021)[Archived at https://perma.cc/35SY-J5FQ].

repeated pattern of FCA's failing to comply with federal law regarding reporting, identifying, and remedying safety defects, and abject failure to adequately perform mandatory safety recalls on over 11 million dangerously defective vehicles, the National Highway Traffic Safety Administration fined Fiat Chrysler $105 million dollars, and an Independent Monitor was appointed to oversee FCA's safety recall compliance.

After the manufacturers fail to repair a vehicle after a reasonable number of attempts and violate their warranties, there are significant differences in how they proactively provide the remedies required by the Act.

Finally—where the manufacturer has failed to effectively address non-conformities and the buyer files a civil suit under the Act—there are vast differences in how the various manufacturers litigate those cases. Some take the view that it is better to vigorously contest each case regardless of its merits, hoping to force lemon owners to trade in their defective vehicles at a substantial loss and up-sell them into an even more expensive transaction (perversely making an additional profit by producing and failing to fix a lemon) and dissuade future litigation. Some decide rather than complying with the law, their money is better spent trying to undermine the Act by actively lobbying the legislature, funding measures to amend California's Constitution to limit or deny access to justice, and attempting to convince the Courts to restrict the availability of consumer protections. Others take a more reasonable approach.



III. Trade-In Values Tend to Be Inflated

It is no secret that dealerships use sophisticated sales negotiations techniques to maximize income to the dealership. The salesperson dealing directly with the consumer often plays the role of friend while they negotiate together against a supposedly busy, difficult, and unseen sales manager. The sales techniques generally rely on negotiating multiple numbers simultaneously in some version of the "four square method" which is essentially a way of tricking the buyer into a higher purchase price than they otherwise would have agreed to spend.[10]

The "Four Square"

Trade-In Value	Purchase Price
Down Payment	Monthly Payment

People tend to fixate on their bottom line numbers for the trade-in value and the down payment and monthly payment figures. The consumer may have an emotional attachment to their current vehicle that leads to their own belief in an inflated value, done "Blue Book" research on its trade-in value, or even shopped it around. Knowing this, the dealership is willing to inflate the trade-in numbers just as described by the Petitioner.[11] When they "win" against the sales manager on the trade-in and payments, car buyers tend to be more willing to pay a higher overall price. As Petitioner points out, using the trade-in figure of the "lemon" as a benchmark for calculating the amount of a refund would in most cases result in an inflated offset in favor of the manufacturer, divorced from the actual value of that vehicle and unfairly penalizing the lemon owner.

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[10] *Dealerships Rip You Off With The "Four-Square," Here's How To Beat It,* Consumer Reports, March 7, 2007 https://www.consumerreports.org/consumerist/dealerships-rip-you-off-with-the-four-square-heres-how-to-beat-it/ (last visited Dec. 22, 2021)

[11] "The salesman (and manager) will probably agree to whatever price you want for your trade, within reason." *Id.*

IV. The Court Should Hold the Act Does Not Permit the Offset Respondent Seeks

CARS supports the arguments raised in the briefs filed by Petitioner in this matter. The consumers' duty under the Act consists of presentation to the manufacturer of the non-conforming vehicle and nothing more. It is undisputed that no language within the Act requires an exchange of the vehicle for compensation. Furthermore, California's courts have not read any such requirement into the Act. The legislature sought to tilt the incentives for manufacturers to "promptly" repair or replace lemon vehicles in favor of consumers without the need for a prolonged, formal dispute process. The Court's analysis should end there.

A. The Act Itself Defines "Restitution," Resort to UCC or Common Law Definitions Is Improper

CARS agrees with Ms. Niedermeier that the statutory language specifically defines the compensation to the buyer under the Act. Earlier sections of the statute describe the available range of solutions from "repair" to "replacement" or "restitution," with the latter term being used as defined later within section 1793.2(d)(2)(B). It should be clear the legislature did not intend to merely codify common law restitution. To assert otherwise is to obliterate the phrase "in an amount equal to" from the statute.[12] Instead of relying on common law restitution, the legislature specifically defined that term, which is the language that follows "in an amount equal to."

In *Kirzhner v. Mercedes-Benz* this Court recently examined whether registration fees subsequent to the payment of initial registration at the time of sale were compensable under the statute. In its analysis, the Court correctly noted that the terms "price" and "payable" both refer to the time of the initial purchase or lease. *Kirzhner v. Mercedes-Benz,* (2020) 9 Cal. 5th 966, 974.

The Court held that because registration renewal and nonoperation fees were not part of the price paid or payable they could not be recovered under that section but rather they

[12] "In the case of restitution, the manufacturer shall make restitution *in an amount equal to* . . ." 1793.2(d)(2)(B)

are "recoverable as incidental damages if they were incurred as a result of the manufacturer's failure to promptly provide a replacement vehicle or restitution once its obligation to do so under section 1793.2 subdivision (d)(2) arises." *Kirzhner* at 978.

Even falling back to rely on the common law of remedies, Respondent's position fails. "[T]he historic purpose of restitution in equity — to preclude unjust enrichment and, with disgorgement, is a favored remedy that is necessary to protect the public and carry out public policy."[13]

B. If the Court Were to Determine that the Act Requires Third Party Compensation to Be Offset In Manufacturers' Favor, Any Offset Should Be Applied Only Against Incidental Damages

Respondent's argument that the Commercial Code Provisions referenced in Cal. Civ. Code section 1794 could be used to *reduce* the amount of a buyer's recovery of anything beyond her incidental damages runs contrary to the plain language and structure of the Act and misses the plain language of that section.[14]

First, in navigating the Act, one would look to the statutory restitution provision of section 1793.2(d)(2)(B)[15] and only then continue to section 1794 to evaluate *additional* compensation to the buyer in the form of statutory damages. To find any notion of support in the language for the offset, Respondent then goes further downstream from section 1794 into the Uniform Commercial Code sections 2711-2715. But there is no support within the statute or elsewhere delineating the availability of incidental damages through the UCC sections that would justify an offset to those damages which may then flow back upstream through section 1794 to reduce the damages specifically provided in section 1793.2.

Further, the conjunctive design of section 1794(b) prohibits Respondent's interpretation. "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

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[13] *Cortez v. Purolator Air Filtration Prods. Co.*, (2000) 23 Cal.4th 163, 527.
[14] Answer Brief on the Merits at 27-33.
[15] Specifically, this language: "plus any incidental damages to which the buyer is entitled under Section 1794" 1793.2(d)(2)(B)

1793.2, *and* the following:" (emphasis added.) The language makes clear that the buyer's damages "shall include . . . reimbursement as set forth in [1793.2(d)]." And "the following" [categories of incidental damages]. The buyer's recovery from 1793.2 is not to be reduced by any provision within section 1794 or of the code sections it references.

Finally, implicit in Respondent's argument is that the nature of the transaction in a buyer's trade-in or sale of the lemon subsequent to presentation of the vehicle for repairs pursuant to the manufacturer's warranty is of "cover" described in the UCC sections. Needing reliable transportation to get to work, school, or to obtain medical care, provide for children, or obtain food and other necessities of life, the buyer may seek trade-in credit or compensation through sale of the "lemon." Their doing so is essentially a mitigation of damages which is beneficial and should be encouraged, particularly when it means they are not endangering themselves and others who share the roads by driving what is often a dangerously defective vehicle. Although the vehicle's title may or may not be "branded" at that point at least the buyer isn't driving it.[16] This kind of "self-help" by the buyer should be encouraged.

Respondent heralds the title branding provision of the Act. In practice, there are many ways manufacturers avoid branding and it is a difficult provision to enforce. *See Johnson v. Ford Motor Co.,* (2005) 35 Cal. App. 4th 1191 (Evaluating constitutionality of $10 million punitive damage award against manufacturer for non compliance with the branding provision. In its analysis this Court relied on a case in a similar vein, *BMW of N. Amer., Inc v. Gore,* (1995) 517 US 559 (evaluating Constitutionality of punitive damage award against manufacturer for nationwide policy of failing to disclose pre delivery damage to dealerships or consumers).

As stated at length, CARS does not believe any offset is proper. However, if an offset to the consumer's damages were read into the Act by the Court, the most reasonable

[16] According to the California Department of Motor Vehicles, the manufacturer does not need to hold title to the vehicle to brand the title as a "Lemon Law Buyback," pursuant to the Act.

location to find that would be within the Act's provision for compensating incidental damages. Compensation the buyer received in the sale of the vehicle would be applied as an offset to "cover" as here Niedermeier traded-in the "lemon" for her cover vehicle. It would be difficult to argue against the fact this was necessitated by Respondent's failure to comply with its obligations under the Act after Niedermeier held on to the vehicle through 16 repair attempts over four years prior to availing herself of the option of cover.

V. CONCLUSION

The Act is a remedial statute providing vital protection to California's consumers, individual entrepreneurs, small business owners, and active duty members of the U.S. Armed Forces, and others who share the roads. There is no provision for reducing the buyer's recovery as a result of her sale or trade-in of the seriously defective "lemon" in either the plain language of the Act or the legislative history, and there are compelling public safety and public policy reasons not to provide the reduction in recovery that Respondent seeks.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.504(d)(1), (d)(3), I certify that this Petitioner's Opening Brief on the Merits contains 3,757 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: December 23, 2021 */s/ Daniel T. LeBel*

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I am over the age of 18 and not a party to the within action; my business address is Consumer Law Practice, PO Box 720286, San Francisco, CA 94172.

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/s/ Daniel T. LeBel

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Office of the Clerk

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Case Number: BC638010

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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Case Number: **S266034**
Lower Court Case Number: **B293960**

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/s/Daniel LeBel

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LeBel, Daniel (246169)

Last Name, First Name (PNum)

Consumer Law Practice

Law Firm