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 TO PETITION FOR REVIEW

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INTRODUCTION

The Court of Appeal held—consistent with the statutory text, the Legislature's purpose, and common sense—that a buyer's damages under the Song-Beverly Act do not include the amount the buyer recovers if she resells her vehicle to a third party. That conclusion is correct and does not conflict with any decision of this Court or another court of appeal. The petition for review should therefore be denied.

Lisa Niedermeier bought a new Jeep Wrangler for just under $40,000, and later traded it in to a GM dealership for a $19,000 credit towards a new car. She then sued FCA US LLC, the Jeep's manufacturer, alleging that the Jeep had been a lemon. Niedermeier argues that she is entitled to recover the full purchase price of the Jeep—*including* the $19,000 she already recovered when she traded it in.

The Court of Appeal properly rejected Niedermeier's demand for a windfall and an impermissible double recovery. The court held that "the Act's restitution remedy, set at 'an amount equal to the actual price paid or payable' for the vehicle . . . does not include amounts a plaintiff has already recovered by trading in the vehicle at issue." (Opn. 2 (quoting Cal. Civ. Code § 1793.2(d)(2)(B)).) The court explained that "[g]ranting 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.'" (Opn. 2–3.)

The court emphasized that accepting Niedermeier's argument would "undercut" the consumer-protection provisions of Song-Beverly. (Opn. 3.) Manufacturers must label vehicles reacquired under the Act as "Lemon Law Buybacks" to ensure that defective cars do not enter the used-car market without notice to unsuspecting consumers. Yet, the court explained, "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"—an outcome that "would render the labeling and notification provisions largely meaningless." (*Id.*)

Finally, the court noted that "plaintiff concede[d] that if we reduce plaintiff's award by $19,000 to $20,584.43," to account for the money she received through the trade-in, "her civil penalty cannot exceed $41,168.86" because civil penalties are capped at two times actual damages. (Opn. 27–28 (citing Cal. Civ. Code § 1794(c) (footnote omitted)).) So the court reduced the civil penalty to that amount. (*Id.* at 29.)

There is nothing in the decision below that warrants this Court's review. The Court of Appeal's construction of Song-Beverly's restitution provision is faithful to the text of the statute and furthers the Legislature's purpose of protecting consumers.

Allowing Niedermeier to sell her vehicle to a third party, pocket the profit, and then recover the full purchase price from FCA would not be "restitution," and would undermine the statute's consumer-protection provisions by allowing unbranded lemons to be resold to unsuspecting buyers. Moreover, the decision below does not conflict with decisions of any other court. The Court of Appeal recognized that this case presents "a matter of first impression" (Opn. 2), as does Niedermeier herself (see Pet. 8).

This case involves only a narrow subset of Song-Beverly actions where a buyer resold a vehicle before recovering restitution under the Act. By design, most Song-Beverly cases do not involve this issue, since the Legislature intended that manufacturers themselves would usually repurchase defective vehicles. The decision below leaves that well-settled framework in place. Niedermeier's warning of a "sea change" in the law (Pet. 41) is belied by her inability to cite a single case—anywhere, in any court—allowing a buyer to recover the windfall she seeks here under her novel interpretation of the Act.

Nor is this case an appropriate vehicle for deciding Niedermeier's second question presented: whether the Court of Appeal erred in applying Section 1794(c)'s statutory cap when it reduced her civil penalty to $41,168.86. Niedermeier "concede[d]" that the court *must* reduce her award to that exact amount if she lost on the first issue (Opn. 27–28), so the Court of Appeal was not

presented with, and did not decide, the question she now urges this Court to review in the first instance. (See *id*. at 28 n.8 ("We express no opinion whether the civil penalty cap . . . should be calculated before or after reducing plaintiff's damages.")) This Court "normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal," (Cal. Rule of Court 8.500, subd. (c)(1)), and the Court of Appeal's ruling was correct in any event.

For all these reasons, the petition for review should be denied.

STATEMENT OF THE CASE

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 'The 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*).)

Section 1793.2(d) requires a manufacturer to provide consumers two options when the manufacturer is unable to make a car conform to its express warranty "after a reasonable number of attempts." (Cal. Civ. Code § 1793.2(d)(2).) The manufacturer must either: (1) "promptly replace the new motor vehicle in

accordance with subparagraph (A)"; or (2) "promptly make restitution to the buyer in accordance with subparagraph (B)." (*Id*.)

This case involves restitution under subparagraph (B). That subparagraph 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*.)

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)(1) provides that "no person shall sell, either at wholesale or retail, lease, or

transfer a motor 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 to these notice requirements, 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 applicable warranties pursuant to" Section 1793.2(d). (*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, are 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).)

B. The Buyer's Remedies

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

Section 1794(b) spells out "[t]he measure of the buyer's damages in an action under this section." (Cal. Civ. Code § 1794(b).) The "measure . . . shall include the rights of replacement and reimbursement as set forth in [Section 1793.2(d)]." (*Id*.) 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).)

II. Trial Proceedings

In January 2011, Niedermeier bought a new Jeep Wrangler for $39,799. (AA69–AA70; 2RT904.) 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. (*Id.*) She therefore purchased a new GMC Yukon from a GMC dealership in late 2015 and traded in the Jeep. (2RT949.) In exchange, the dealership gave her a credit of $19,000 towards the Yukon. (See 2RT957 ("Q. You sold it to a GMC dealership for $19,000; right? A. Right.").)

In October 2016, Niedermeier filed this lawsuit alleging, among other things, 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 damages. (1RT302–1RT306.)

The jury returned a verdict for Niedermeier. It awarded Niedermeier $39,584.43 in damages—the $39,799 she paid for the Jeep, plus $5,000 in "incidental 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. (AA75.)

After trial, FCA moved the court to reduce Niedermeier's 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 reversed course and declined to reduce the damages award. (AA125.)

III. The Court of Appeal's Decision

The Court of Appeal reversed. It held that "[r]estitution under the Act does not include amounts recovered from the trade-in of the defective vehicle." (Opn. 17 (bold omitted).)

The court began by deeming it "significant that the Legislature chose the term 'restitution' to define the Act's refund remedy" in Section 1793.2(d)(2). (Opn. 18, citing *Mitchell v. Blue Bird Body Co*. (2000) 80 Cal.App.4th 32 (*Mitchell*)). The court explained that just as "'restitution' under the Act cannot leave a plaintiff in a worse position than when he or she purchased the vehicle, it similarly would be inimical to the concept of restitution to leave a plaintiff in a better position, rather than merely restoring her to the *status quo ante*." (*Id*.) Yet, the court concluded, that would be the outcome of accepting Niedermeier's position: she would "obtain[ ] not only a full refund from defendant, but also the $19,000 benefit she had already obtained by trading in the Jeep"—"an unjustified windfall." (*Id*.)

The court further recognized that "to permit plaintiff to trade in her vehicle and still receive a full refund from defendant undercuts the Act's labeling and notification provisions." (Opn. 19.) These provisions "are triggered only when a manufacturer reacquires a vehicle," or assists a dealer or lienholder in doing so, and "are not triggered when a buyer resells or trades in the vehicle." (*Id.*) The court then reasoned:

> This limitation makes sense only if, in the usual case, the vehicle is returned to the manufacturer rather than resold or traded in. Otherwise, the labeling and notification provisions would have marginal utility, and the used-car market would be replete with unlabeled lemons resold or traded in by their dissatisfied owners. Yet this would be the outcome if buyers could resell or trade in their vehicles and still receive a full refund of the purchase price under the Act. Under that interpretation, we cannot conceive why a buyer would ever return a vehicle to the manufacturer rather than obtain the extra proceeds from a resale or trade.

(Opn. 19–20.) "In short," the court concluded, "a ruling in plaintiff's favor here would render the labeling and notification provisions largely meaningless," and "would incentivize buyers to reintroduce defective vehicles into the market without the

warnings a manufacturer otherwise would have to provide." (*Id.* at 20.)

The court thus reduced the restitution award by $19,000, resulting in a revised restitution award of $20,584.43. (Opn. 27.) Because Niedermeier conceded that the civil penalty could not exceed twice the revised amount of her restitution damages, the court reduced the civil penalty to $41,168.86—the maximum permitted by statute. (Opn. 27–28; Cal. Civ. Code § 1794(c) (capping civil penalty at twice the plaintiff's "actual damages").)

ARGUMENT

I. Niedermeier's First Issue Does Not Warrant Review.

The first issue presented—whether the Court of Appeal erred in reducing Niedermeier's restitution award by the amount of her trade-in—does not satisfy this Court's criteria for review. There is no need to "settle an important question of law" or "secure uniformity of decision." (Cal. Rule of Court 8.500, subd. (b)(1).) The Court of Appeal's interpretation of Song-Beverly is correct and the decision does not conflict with the decisions of any other court.

A. The Court Of Appeal's Decision Is Correct.

The Court of Appeal gave the statute "a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise

policy rather than mischief or absurdity." (*DiCampli-Mintz v. Cty. of Santa Clara* (2012) 55 Cal.4th 983, 992 (quotation marks omitted).) Niedermeier's arguments to the contrary (Pet. 23–31) are misplaced.

1. The plain language of the damages provision does not authorize the double-recovery windfall Niedermeier demands. Section 1794(b) of the Civil Code provides that the "measure of damages shall include the rights" the buyer has under Section 1793.2(d). Relevant here is the right of "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. Ordering the seller to refund the purchase price plus all taxes and fees—while allowing the buyer to resell the vehicle to a third party and pocket the proceeds—would give the buyer an "unjustified windfall" (Opn. 18) that cannot possibly be characterized as "restitution."

As the Court of Appeal explained (Opn. 18), restitution "is intended to restore 'the *status quo ante* as far as is practicable.'" (*Mitchell*, *supra*, 80 Cal.App.4th at p. 36 (quoting *Alder v. Drudis* (1947) 30 Cal.2d 372, 384).) It aims to put the buyer in the same position she would have been had she not purchased the defective vehicle. This means that the manufacturer must refund the 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 restitution also means that the buyer typically returns the deficient vehicle 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, i.e., that in exchange for refunding the purchase price and reimbursing the buyer for all charges and fees, the buyer returns the vehicle itself as part of "restitution" under Section 1793.2(d)(2). (See Cal. Civ. Code § 1793.23(c), (d), (e).) Indeed, Niedermeier's counsel repeatedly acknowledged in court that when a buyer prevails under the Song-Beverly Act, and the manufacturer is ordered to make restitution, the buyer must return the vehicle to the seller. (1RT308; 3RT1589.)

In its recent decision in *Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th 966, this Court repeatedly recognized that when a manufacturer's duty to provide restitution arises, the buyer essentially holds the vehicle in trust pending its return to the manufacturer. (See, e.g., *id*. at 980 ("Once the manufacturer's duty to [provide replacement or 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.").) This Court's statements make sense only if the buyer

is obligated to return the vehicle to the manufacturer as part of the restitutionary exchange.

Here, Niedermeier sold the vehicle to a GMC dealer, so she cannot return it to FCA. But that means her restitutionary 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. Reducing Niedermeier's recovery achieves restitution by putting her in the same financial position she would have been in had she never purchased the Jeep. That means she is entitled to the price she paid for the Jeep minus the $19,000 she recovered when she resold it (plus incidental and consequential damages, and minus the statutory mileage reduction for her use of the Jeep). Otherwise, Niedermeier would be in a better position than she would have been had she never purchased the Jeep in the first place, in that she would recover $19,000 of her purchase price twice—once when she resold the Jeep, then again in this lawsuit. As the Court of Appeal explained, it "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.)

Niedermeier argues that although Section 1793.2(d)(2) identifies certain specified items and offsets that may go into determining the amount of a restitution award, it does not expressly say that a buyer's recovery must be reduced by the

amount she obtains if she resells the vehicle. (Pet. 24–25.) But courts have recognized that the itemized list in Section 1793.2(d)(2) is not exhaustive—and that additional items may need to be taken into account to ensure fairness and accuracy in calculating a restitution award. For example, in *Mitchell*, the court held that a buyer may recover finance charges as "restitution" under Section 1793.2(d) even though the statute "does not expressly list finance charges as an item of recovery." (*Mitchell*, *supra*, 80 Cal.App.4th at p. 36.) The court rejected the argument that a buyer's damages are determined solely by items "expressly list[ed]" in Section 1793.2(d)(2)(B) for exclusion or inclusion—e.g., "charges for transportation and manufacturer-installed options." (*Id*. at pp. 35–37.) An "implied prohibition" on other costs a buyer incurred would have been inconsistent with the Legislature's "description of the refund remedy as restitution" (*id*. at p. 37), since the buyer would not have incurred the finance charges had he not bought the defective car.

The same reasoning applies here. Failing to reduce Niedermeier's damages to reflect the money she recovered when she resold the Jeep would be inconsistent with a remedy of restitution.[1]

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[1] Although the Court of Appeal did not need to reach the argument (Opn. 17–18), there is additional statutory language

2. The Court of Appeal also correctly concluded that adopting Niedermeier's interpretation would undermine the extensive protections the Legislature provided California consumers to ensure that they do not unknowingly buy used cars that have been branded as lemons. Courts "do not consider statutory language in isolation," and must "examine the entire statute to construe the words in context." (*Kirzhner*, *supra*, 9 Cal.5th at p. 972). Relevant here, when the Legislature enacted Song-Beverly, it included consumer protections that go well beyond the remedies afforded to the individual purchaser: it "systematically attempted to address warranty problems unique to motor vehicles, including transferability and mobility." (*Jensen*, *supra*, 35 Cal.App.4th at p. 124.)

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that bars a double recovery. Section 1794(b) provides that Commercial Code Sections 2711–2715 "shall apply" in determining a buyer's damages. These sections exclude from the measure of a buyer's damages the money she already recovered from reselling defective goods. Under Section 2711, if a "buyer does not return the defective goods, it 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.).) Similarly, under Uniform Commercial Code Section 2714, the buyer's damages for "breach of warranty" must be reduced by the amount she receives from a sale of the goods. (*Gast v. Rogers-Dingus Chevrolet* (Miss. 1991) 585 So.2d 725, 730-31 (applying Miss. Code § 75-2-714).)

As the Court of Appeal recognized, accepting Niedermeier's argument would undermine Sections 1793.22 and 1793.23, which protect consumers by preventing lemons from entering the used-car market without notice to unsuspecting buyers. 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).) Section 1793.23 similarly requires sellers to notify prospective buyers that a vehicle was repurchased because it did not conform to its warranty and to obtain the buyer's "written acknowledgement" of the notice. (*Id*. § 1793.23(d)–(f); see also *id*. § 1793.24 (describing the contents of the required notice).) In addition, Section 1793.23 requires manufacturers to brand both a vehicle and its title with the label "Lemon Law Buyback." (*Id*. § 1793.23; see also Cal. Vehicle Code § 11713.12(a) ("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 as the Court of Appeal explained, it would amount to "a near nullification of the labelling and notification provisions" if the buyer resells a defective car herself rather than return it to the manufacturer. (Opn. 20.) 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 "reacquires" a car. (*Id.* § 1793.23(d); see also *id.* § 1793.23(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).)

If Niedermeier's view prevailed, one "cannot conceive why a buyer would ever return a vehicle to the manufacturer." (Opn. 20.) That is because consumers could recover far more money by reselling their cars to unsuspecting consumers or to dealerships unaffiliated with the manufacturer, eviscerating the Legislature's protections for downstream consumers in the used-car market. 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 end up buying used cars that should have been branded as lemons.

In response, Niedermeier argues that reducing her restitution award by the amount she has already recovered will encourage manufacturers to violate the Song-Beverly Act and reward them for unreasonable delays. (Pet. 28–31.) But ensuring that Niedermeier's restitution matches her actual economic loss

will not encourage manufacturers to violate the Act, for at least two reasons.

First, under FCA's interpretation, 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 recovers some of the purchase price by selling the car to someone else, the manufacturer pays a little less in damages but does not get the car back.

Under Niedermeier's interpretation, however, buyers would be in a far *better* position if they resell their lemons. A buyer would *always* have a strong financial incentive to resell or trade in her lemon, no matter how fast the manufacturer responds to her Lemon Law claim. And as explained above, the practical effect of rewarding buyers for reselling their lemons rather than returning them to manufacturers would be to introduce into the used-car market vehicles that should be branded as lemons but are not. Thus, it is Niedermeier's interpretation, not FCA's, that creates incentives that will thwart the Act's consumer protections.

Second, the Act's civil-penalty and attorneys'-fee provisions already require manufacturers to pay far more than the purchase price of a defective vehicle, which provides an overwhelming financial incentive for manufacturers to comply with the Act. The Legislature expressly limited civil penalties to "two times the

amount of *actual* damages." (Cal. Civ. Code § 1794(c) (emphasis added).) That specific civil-penalty provision, and its limitation of civil penalties to a multiple of "actual" damages, strongly counsels against inflating a plaintiff's restitution award on deterrence grounds. (See FCA Br. 34–36.) Moreover, in all Lemon Law cases manufacturers are liable for "attorney's fees based on actual time expended" (Cal. Civ. Code § 1794(d)) which in practice leads to fee awards that dwarf the purchase price of a defective vehicle. (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).) Here, for example, FCA was liable for more than $160,000 in attorneys' fees—more than four times the purchase price of the Jeep.

For these reasons, Niedermeier's assertion that the decision below will incentivize manufacturers to intentionally violate the Act is absurd. No manufacturer would risk hundreds of thousands of dollars in civil penalties and attorneys' 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 small and unknowable amount.

B. There Is No Split In The Lower Courts.

The Court of Appeal decided the question of restitution damages "[a]s a matter of first impression." (Opn. 2.) Niedermeier identifies no other court that has decided this issue other than the

court below, and concedes that her petition "presents . . . first-impression issues of statutory construction." (Pet. 8.) Thus, contrary to Niedermeier's suggestion (*id.* at 31–41), there is no split in the lower courts that might warrant resolution by this Court. In fact, Niedermeier fails to identify a single case—in California or anywhere else—allowing a buyer to resell a defective vehicle to a third party and then recover the entire purchase price from the manufacturer.

Niedermeier attempts to construct a conflict on the basis that different courts have reached different outcomes on different issues arising under the Song-Beverly Act in the course of weighing the Song-Beverly Act's "remedial purposes" against concerns "about a consumer's potential over-recovery." (Pet. at 31–32.) It should go without saying that this is not a "conflict" in any sense because none of the courts was addressing the questions presented by this case. (See Pet. 31–38 (discussing *Martinez v. Kia Motors Am., Inc*. (2011) 193 Cal.App.4th 187 (*Martinez*); *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235 (*Jiagbogu*); *Robbins v. Hyundai Motor Am.* (C.D. Cal. Aug. 7, 2014) 2014 WL 4723505 (*Robbins*); and *Lukather v. Gen. Motors, LLC* (2010) 181 Cal.App.4th 1041 (*Lukather*)).)

As the Court of Appeal recognized, *Jiagbogu* and *Martinez* "presented decidedly different circumstances." (Opn. 20.) *Martinez* simply held that a plaintiff need not "possess or own the

vehicle" to sue under the Song-Beverly Act. (*Martinez*, *supra*, 193 Cal.App.4th at p. 192.) The appeal was "limited to [that] question." (*Id*.) And *Jiagbogu* 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, 1244.)

Neither *Martinez* nor *Jiagbogu* addresses how to measure a buyer's restitution damages in the wake of a resale, and thus neither conflicts with the decision below. Moreover, as the Court of Appeal explained, in both cases, "rulings in the manufacturers' favor would have deprived the plaintiffs of the full purchase price of their vehicles," whereas here, "plaintiff can recover the full purchase price through a combination of the trade-in and restitution from defendant." (Opn. 20–21.) And both cases "are further distinguishable in that their holdings do not incentivize plaintiffs to thwart other provisions of the Act." (*Id*. at 21.)

Niedermeier argues that the decision below conflicts with what she calls *Martinez*'s "theme" of not encouraging manufacturers to delay providing a replacement vehicle and effectively forcing the buyer to trade in or resell the defective vehicle. (Pet. 32–33.) But as explained above, the Court of Appeal's ruling does not encourage delay.

Niedermeier also contends that the decision below conflicts with what she describes as *Jiagbogu*'s "argument" that Song-

Beverly "does not allow for *any*" unenumerated equitable offsets. (Pet. 35 (emphasis added).) But as the Court of Appeal explained, "[o]ur conclusion that plaintiff is not entitled to a double recovery is not premised on a discretionary offset under the trial court's equitable power." (Opn. 26.) Rather, it is "based on an interpretation of the Act's provisions, from which we conclude 'restitution' under the Act cannot include amounts the buyer has already obtained by trading in the vehicle." (*Id*.) Thus, the premise on which Niedermeier rests this purported conflict with *Jiagbogu*—that the Court of Appeal impermissibly recognized an equitable offset—is false.

Moreover, Niedermeier overstates *Jiagbogu*'s modest holding: it merely disallowed one particular type of offset—for vehicle use after a buyback request—because the statute expressly allowed an offset for vehicle use *prior to* a buyback request. (See 118 Cal.App.4th at pp. 1242, 1244.) The court was careful to clarify that its reasoning might not apply to "[o]ther hypothetical situations." (*Id*. at p. 1244.) Here, in contrast, Section 1793.2(d) does not specifically address how to calculate a buyer's damages when she resells the car before bringing suit. Thus, any negative implication from Section 1793.2(d)'s text is much weaker than it was in *Jiagbogu*. Indeed, the court in *Mitchell* allowed recovery for items that were not expressly identified in the statutory text. (*Mitchell*, *supra*, 80 Cal.App.4th at pp. 36–37.)

Niedermeier is wrong in asserting a conflict with *Lukather* and *Robbins*. (Pet. 36–38.) Neither of those decisions involved the measure of restitution damages in the wake of a trade-in. In *Lukather*, 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. (181 Cal.App.4th at pp. 1051–53.) And in *Robbins*, the court explained that any deduction for excess wear-and-tear would be encompassed within the mileage deduction. (See 2014 WL 4723505, at *7 (citing Cal. Civ. Code § 1793.2(d)(2)(C)).) Neither ruling conflicts with the decision below.

Finally, Niedermeier argues that the Court of Appeal erred in following *Mitchell*. (Pet. 38–41.) But *Mitchell* strongly supports its decision. The *Mitchell* court emphasized that the Legislature made a deliberate choice in describing its remedy as "restitution," and underscored that restitution is aimed at restoring the status quo ante. (*Mitchell*, *supra*, 80 Cal.App.4th at p. 36.) Here, the Court of Appeal faithfully followed *Mitchell* by adopting a "neutral" interpretation that "fully compensates plaintiff" while "disallow[ing] her a double recovery." (Opn. 24.)

Niedermeier contends that *Mitchell* actually supports her double recovery here because, she says, she used the money she recovered from her resale of the Jeep to pay off her loan, and *Mitchell* somehow would have otherwise obligated FCA to pay that

amount. (Pet. 40–41.) Niedermeier appears to believe that, under *Mitchell*, FCA was obligated to pay off the outstanding principal on her auto loan plus the entire purchase price of her Jeep. Of course that is incorrect. *Mitchell* involved a plaintiff's right to recover "finance charges"—that is, interest on an auto loan—not the principal payments that go towards a vehicle's purchase price. (*Mitchell*, *supra*, 80 Cal.App.4th at p. 36.) Unlike finance charges, principal payments are already subsumed within the purchase price of a car, and therefore were already included in Niedermeier's restitution award as part of the "price . . . payable." (Cal. Civ. Code § 1793.2(d)(2)(B).)[2]

II. Niedermeier's Second Issue Does Not Warrant Review.

The Court of Appeal reduced the civil penalty to $41,168.86—twice Niedermeier's actual damages—based on her concession that the civil penalty must be reduced to that exact amount if she lost on the trade-in issue. (Opn. 27–28.)

[2] Niedermeier's closing argument at trial made clear how the math worked. Her trial 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 eventually led to a total purchase price of "39,799." (2RT909, 4RT1847–48; AA39–41.) The jury accepted that argument, and calculated the purchase price for the Jeep as $39,799. (AA70.)

Niedermeier now asks this Court to decide whether "the amount that a consumer has received in a trade-in transaction" should "be taken from the Act's statutorily defined restitution remedy" or "instead be subtracted from the consumer's total recovery." (Pet. 8.) There is no reason for this Court to grant review to examine an argument that was waived below, that the Court of Appeal did not consider, that does not implicate a split in the lower courts, and that is meritless in any event.

A. Niedermeier's Concession Waived The Argument And The Court Of Appeal Did Not Address It.

Niedermeier waived the argument she now asks this Court to decide. As the Court of Appeal stated, Niedermeier "concede[d] 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 only affect her restitution damages and not the civil penalty. Accordingly, she waived the argument she now advances. (See Cal. Rule of Court 8.500, subd. (c)(1) ("[T]he Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal.").)

Because of Niedermeier's concession and waiver, the Court of Appeal did not address the question of when the cap on civil penalties should be calculated. It stated: "Given plaintiff's

concession, we express no opinion whether the civil penalty cap under section 1794, subdivision (c) should be calculated before or after reducing plaintiff's damages to account for a trade-in or resale." (Opn. 28 n.8.)[3]

This Court's review is not warranted to consider a question that was conceded below and not decided by the Court of Appeal. The court's ruling left the question open for future courts to decide and obviously does not create a conflict. Indeed, Niedermeier argued on rehearing that because the Court of Appeal's ruling was based on her concession, that portion of the opinion "provides no guidance to future courts addressing the issue." (Pet. for Rh'g 19.) There is no need for this Court to waste its scarce resources to decide a question in the first instance, without the benefit of any lower court having considered it on the merits after briefing and argument.

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[3] Niedermeier strives mightily to walk back her concession. (Pet. 42.) But she expressly conceded in her response brief that it would be appropriate to reduce the civil penalty if "it exceeded the twice actual damages cap." (RB 80.) And even her excerpted snippet from oral argument—that a damages reduction is "not something that would go into the calculation of what are the restitution damages on the front end" (Pet. 22 (quotation marks omitted))—does not say anything about civil penalties and is not the argument she advances in her petition for review. And in any event, the fact-bound question whether the Court of Appeal correctly concluded that she waived this issue does not warrant this Court's review.

B. Niedermeier's "Actual Damages" Do Not Include The Money She Recovered Through The Trade-In.

Even if Niedermeier had contested this issue below rather than conceding it, the result reached by the Court of Appeal was plainly correct.

Song-Beverly 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 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).) As the court explained in *Hypertouch, Inc. v. ValueClick, Inc*. (2011) 192 Cal.App.4th 805, 841, "actual damages" are "compensatory" damages.

Here, Niedermeier's "actual damages"—that is, the amount required to compensate her for her actual loss—plainly do not include the $19,000 she had already recovered before she filed this lawsuit. Instead, her actual loss was 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, Niedermeier was correct when she conceded that the maximum

permissible civil penalty under Section 1794(c) was $41,168.86 (twice her actual damages). And the Court of Appeal was correct to reduce the civil penalty to that amount. (See Cal. Code Civ. P. § 43 ("The Supreme Court, and the courts of appeal, may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered.").)

CONCLUSION

The Court should deny the petition for review.

Dated: December 29, 2020

Respectfully submitted,

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Pursuant to Rule 8.504(d) of the California Rules of Court, the undersigned hereby certifies that the foregoing brief contains 6,384 words, including footnotes, according to the word count generated by the computer program used to produce the brief.

Dated: December 29, 2020

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