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

SUPPLEMENTAL BRIEF ON NEW AUTHORITY

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INTRODUCTION

Pursuant to Rules of Court, Rule 8.520(d), petitioner Lisa Niedermeier submits this supplemental brief to alert the Court regarding new, published caselaw that adopts and builds on the arguments that she has raised in this case regarding whether there can be an offset against a plaintiff's damages recovery under the Song-Beverly Act, for a plaintiff's trade in of a lemon vehicle.

Specifically, in both *Figueroa v. FCA US, LLC* (2022) 84 Cal.App.5th 708 (*Figueroa*) (Gilbert, P. J.) and *Williams v. FCA US LLC* (Cal. Ct. App., Feb. 1, 2023, No. C091902) ___ Cal.App.5th ___, 2023 WL 1430403 (*Williams*), two different Courts of Appeal held that the Song-Beverly Act *does not* provide manufacturers with a credit for amounts that plaintiffs received when they re-sold a lemon. In so holding, both the Second District, Division Six and the Third District expressly disagreed with the Court of Appeal's decision in *Niedermeier v. FCA US LLC* (2020) 56 Cal.App.5th 1052 (*Niedermeier*), review granted February 10, 2021, S266034. (*Figueroa,* at pp. 710, 712–714; *Williams*, at pp. *2, *5–7, *9–10.)

Both *Figueroa* and *Williams* held that the *Niedermeier* court had misinterpreted the Act's plain text. As the *Figueroa* court put it: "[T]he Legislature used the term 'restitution," the Legislature expressly "defines what it means by restitution in section 1793.2, subdivision (d)(2)(B)," which "does not include a set-off for the cash received by the vehicle owner on sale of the vehicle or the vehicle's trade-in value." (*Figueroa, supra*, 84

Cal.App.5th at pp. 710, 712–714.) The *Williams* court therefore "disagree[d] with the *Niedermeier* court's reasoning that the Legislature's use of the word 'restitution' in the Act indicates an intent to import the common law meaning of restitution into the statute, overriding a literal reading of the restitution provision." (2023 WL 1430403, at p. *7 ["We have 'strong reasons to doubt' that the restitution mentioned in the restitution provision 'is the plain vanilla common law kind' rather than the narrower, more specialized concept *expressly defined* in the statute"].)

Figueroa held that the *Niedermeier* court's interpretation does harm to the Act's remedial purposes. *Figueroa* reasoned that FCA and other manufacturers "consider[] promptly repurchasing, repairing, labeling as a lemon and selling the vehicle at a deep discount with a one-year warranty, a losing proposition"—and that a resale or trade-in offset "encourages" those manufacturers to "force the owner of a defective vehicle to sell it on the open market, or trade it in without a label or warning, and use the cash back on [the higher] trade-value as an offset." (*Figueroa*, *supra*, 84 Cal.App.5th at p. 714.)

Williams expressly agreed with *Figueroa*'s reasoning. (*Williams*, *supra*, 2023 WL 1430403, at p. *9.)

Both cases held that FCA's concerns about a consumer receiving a windfall were disingenuous, reasoning that "FCA cannot complain that the vehicle's owner has received an unjustified windfall when it could have avoided such a result by complying with the Song-Beverly Act." (*Figueroa, supra*, 84 Cal.App.5th at p. 714; see *Williams*, *supra*, 2023 WL 1430403, at

pp. *9–10.) Instead, both courts reasoned that having *willfully* violated the Act, FCA cannot now seek "compensat[ion] for its own willful violation of the law"—the necessary effect of giving FCA the offset it sought. (*Figueroa*, at p. 713; see *Williams*, at p. *9.)

This Court should adopt both cases' reasoning here, where FCA also seeks a $19,000 trade-in credit in place of a car that would have been virtually worthless had FCA complied with its statutory duties to promptly repurchase it and label it as a lemon before resale.

DISCUSSION

Figueroa and *Williams* expressly disagreed with *Niedermeier*'s creation of an unenumerated trade-in credit. Both *Figueroa* and *Williams* effectively adopted the same arguments that petitioner has raised in this Court—namely, that neither the Song-Beverly Act's plain text, nor its remedial purposes, nor any public policy permits any trade-in or resale offset. *Figueroa*'s analysis is cogent and persuasive. *Williams* expressly adopts and builds upon that analysis, providing a deep dive into the legislative history. Like those cases, this Court should give effect to the statute's plain text and purpose.

I. *Figueroa* and *Williams* Correctly Hold That The Act's Plain Language Does Not Permit An Unenumerated Resale Or Trade-In Offset.

Petitioner has argued that the Act's statutory definition does not allow for a trade-in offset, let alone require one, as the

Court of Appeal held in *Niedermeier, supra,* 56 Cal.App.5th at p. 1072. (See Opening Brief ("OB")/32-44; Reply Brief ("Reply")/10-12; *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 367 [The "right to setoff is not absolute"]; AA/127 [trial court rejecting offset on "equitable ground[s]"].)

Figueroa and *Williams* agreed. For good reason. As *Figueroa* notes, section 1793.2, subdivision (d)(2)(B) "establishes the amount of restitution FCA must pay." (*Figueroa, supra,* 84 Cal.App.5th at p. 712, citing § 1793.2, subd. (d)(2)(B).) The statute is explicit: "'[T]he manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer ….' [Citation.] The statute is clear and unequivocal. Nowhere in section 1793.2[,] subdivision (d)(2)(B), or elsewhere in the Song-Beverly Act, is there a provision allowing cash back to the manufacturer. We cannot add words to a clear and unequivocal statute." (*Ibid.*)

In so holding, both cases rejected the plain-meaning argument that FCA raised there and in this case: that "the word 'restitution' in section 1793.2, subdivision (d)(2) requires Figueroa to return the benefit he received from the transaction, in this case, the cash he received from the truck's sale." (*Figueroa, supra,* 84 Cal.App.5th at p. 713; *Williams*, *supra*, 2023 WL 1430403, at p. *5; see Answering Brief ("AB")/23-27.)

Figueroa reasoned that "the Legislature used the term 'restitution,' but it defines what it means by restitution in section 1793.2, subdivision (d)(2)(B). The definition does not include a set-off for the cash received by the vehicle owner on sale of the

vehicle or the vehicle's trade-in value." (*Figueroa, supra,* 84 Cal.App.5th at p. 714.) *Williams* echoed this plain language interpretation. (*Williams*, *supra*, 2023 WL 1430403, at p. *7.)

Like *Figueroa* and *Williams*, the Court should interpret the Act's statutory definition of restitution *as written*, which does not permit a trade-in offset. (See OB/32-44; Reply/10-12 [the Act's statutory restitution remedy does not allow for a trade-in offset].)

II. *Figueroa* and *Williams* Correctly Hold That A Resale Or Trade-In Offset Undermines The Act's Remedial Purposes By Rewarding Manufacturers For Their Own Act Violations.

As the Court has undoubtably noted, FCA is the defendant in this case, in *Figueroa*, and in *Williams*. FCA is among "the manufacturers with the highest number of lemons," the "long[est] history of failing to comply with consumer protection and public safety laws," and the most lemon law cases, apparently having taken the "view that it is better to vigorously contest each case regardless of its merit." (Consumers for Auto Reliability and Safety's Amicus Brief In Support Of Petitioner, pp. 11–12.)

In this case, petitioner has argued that the *Niedermeier* court's creation of an unenumerated trade-in credit only further encourages manufacturers like FCA to shirk their statutory obligation to promptly repurchase lemons and label them by "'forcing the buyer to bear all or part of the cost of the manufacturer's delay.'" (OB/45-53, quoting *Jiagbogu v. Mercedes-Benz USA, LLC* (2004) 118 Cal.App.4th 1235, 1244 (*Jiagbogu*).)

Petitioner has explained that requiring buyers to pay for a new, safe vehicle would create inordinate pressure for plaintiffs with meritorious claims to walk away from suits—and that if a buyer manages to litigate through trial and win, the manufacturer could still reduce its restitution obligation with an artificially inflated trade-in credit that far exceeds the vehicle's *de minimis* value to the manufacturer after it is returned at the case's end, after it is deemed to be a lemon. (OB/48; Reply/29-31.)

Both *Figueroa* and *Williams* have agreed with and built on petitioner's arguments here.

Figueroa specifically held that a trade-in or resale offset would undermine the Act's remedial purposes by giving manufacturers a windfall even where the consumer has won *and* received real value for the car—there, by selling it on CarMax. The *Figueroa* court reasoned: "this case and *Niedermeier* show [that] FCA" *already* "operates in open defiance of the Song-Beverly Act['s]" prompt buy back requirements—and that a resale or trade-in offset would encourage FCA and manufacturers like it to shirk their affirmative, statutory duties to promptly buy back lemons. (*Figueroa, supra,* 84 Cal.App.5th at p. 714.)

After all, the *Figueroa* court explained, when a manufacturer complies with the Act by promptly buying back a lemon, it can only re-sell it (if at all) at a "deep discount" after (1) "labeling [it] as a lemon" and (2) repairing it so that it complies with any applicable warranties. (*Figueroa, supra*, 84 Cal.App.5th at p. 714; see Civ. Code, § 1793.23, subd. (c)

[requiring "any manufacturer who reacquires or assists a dealer or lienholder to reacquire" a lemon to brand it as such].)

Williams "agree[d] with the *Figueroa* court's assessment that [FCA] is the one who undercuts the labeling and notification provisions of the Act when it declines to, refuses to, or does not reacquire the defective vehicle after the buyer complies with his, her, or their obligation under the Act to deliver the defective vehicle to manufacturer or its authorized representative. We further agree that [FCA] seeks to benefit by receiving a credit against its restitution obligation under the Act rather than reacquiring the vehicle." (*Williams*, *supra*, 2023 WL 1430403, at p. *9.)

Figueroa and *Williams* thus held that the *Niedermeier* court's creation of an unenumerated resale or trade-in offset would "encourage" manufacturers to "force the owner of a defective vehicle to sell [a defective car] on the open market, or trade it in *without a label or warning*, and use the cash back on [the higher] trade-value [for a car not branded as a lemon] as an offset." (*Figueroa, supra,* 84 Cal.App.5th at p. 714; *Williams*, *supra*, 2023 WL 1430403, at p. *9 [FCA's "interpretation would, in essence, reward [it] for declining or not offering to reacquire the vehicle. We decline to interpret the Act in that manner"].)

In so holding, *Figueroa* and *Williams* also rejected FCA's argument that the absence of a resale or trade-in offset would encourage consumers to trade their cars in while waiting for relief and thus undercut the Act's labelling and notification requirements. (*Figueroa, supra,* 84 Cal.App.5th at p. 714;

Williams, *supra*, 2023 WL 1430403, at pp. *8–9.) Both courts had a good basis for rejecting FCA's arguments.

Specifically, the Legislature requires manufacturers to brand a vehicle as a lemon only after "the manufacturer replaces or repurchases the vehicle" in the first place (*Figueroa, supra,* 84 Cal.App.5th at p. 714) to stop *manufacturers* from cancelling out the cost to repurchase the car (and reaping a windfall via reduced or nonexistent damages) by selling that defective car at "prices higher than would have been possible if the vehicles were stamped as lemons" (Angela M. Burdine, *Consumer Protection; "Lemon Law Buyback"—Requirements Regarding the Return and Resale of Vehicles* (1996) 27 Pacific L.J. 508, 517–518, discussing Assembly Committee on Consumer Protection, *Governmental Efficiency and Economic Development, Bitter Fruit: How Consumers Unknowingly Buy Lemon Vehicles* (1994), p. 7; Plaintiff's Second Motion for Judicial Notice.)

Accordingly, *Figueroa* and *Williams* correctly held that a consumer has not and cannot undercut provisions requiring manufacturers to brand lemons that the Legislature made applicable only *after* the manufacturer has replaced or repurchased the car. (*Figueroa, supra,* 84 Cal.App.5th at p. 714; *Williams*, *supra*, 2023 WL 1430403, at pp. *8–9.)

Figueroa and *Williams* were correct in holding that a resale or trade-in credit would undermine the Act's prompt buy back and labelling requirements. The Court should adopt those cases' cogent approach and avoid rewarding manufacturers for their own Act violations by giving manufacturers a *market value*

offset—and here, even more than that—for a car that would have sold at a discount (if sellable at all) had the manufacturer *complied with the Act* by promptly repurchasing it and branding it as a lemon before resale. (See OB/24-25, Reply/15-16 [discussing FCA's request for an artificially inflated $19,000 trade-in credit assigned to a car that only had a $12,000–$13,000 *non-branded* bluebook value].)

III. *Figueroa* and *Williams* Correctly Hold That FCA Cannot Complain About A Potential Windfall Caused By Its Own Act Violations.

Petitioner argues that even assuming that consumers might receive a windfall from a trade-in credit *with no relation to the car's actual value*, FCA's complaints that consumers might receive a windfall should fall on deaf ears. She argues that the alternative would be for FCA to receive a windfall for their own wrongdoing, which makes no sense, especially given the Act's pro-consumer purposes. (See OB/51-58; Reply/14-17.)

Figueroa and *Williams* agree with her here, too. The *Figueroa* court has reasoned that "FCA cannot complain that the vehicle's owner has received an unjustified windfall when it could have avoided such a result by complying with the Song-Beverly Act." (*Figueroa, supra,* 84 Cal.App.5th at p. 714.) *Williams* echoed the point. (*Williams*, *supra*, 2023 WL 1430403, at p. *9.)

The *Figueroa* court indicated this is all the more true because, as here, FCA *willfully* violated its Act obligations—there after 10 to 12 unsuccessful repair attempts and one buy back

request (see *Figueroa, supra,* 84 Cal.App.5th at p. 711), and here after 16 unsuccessful repair attempts and three buy back requests (see OB/22-24). (See also *Williams*, *supra*, 2023 WL 1430403, at p. *3 [jury found that FCA *willfully* violated the Act].) There is simply "no public policy that requires FCA [to] be compensated for its own willful violation of the law." (*Figueroa, supra,* 84 Cal.App.5th at p. 713; OB/61-63; Reply/34-36 [discussing why, at a minimum, FCA is not entitled to an offset due to its willful Act violations].)

Again, these courts' analyses are rigorous and correct. The Court should adopt their reasoning here.

IV. *Williams* Builds Upon *Figueroa*, Holding In Addition That The Legislative History Belies FCA's Argument.

The *Williams* court confirmed its plain-language reading of the Act with an examination of the legislative history, concluding that it "supports our conclusion that 'restitution' in section 1793.2, subdivision (d) is not the plain vanilla common law kind." (*Williams*, *supra*, 2023 WL 1430403, at p. *7.) When the Legislature added the restitution provision in 1987, "the Legislative Counsel's Digest in the introduced version of the bill, each subsequent amendment, and the chaptered version of the bill stated the 'bill would revise the provisions relating to warranties on new motor vehicles to require the manufacturer or its representative to replace the vehicle or make restitution, *as specified*, if unable to conform the vehicle to the applicable express warranties after a reasonable number of attempts.'"

(*Ibid.*, original italics.) "The same 'as specified' language was used in two committee reports and the summary digest to describe the proposed remedies in the bill." (*Id.* at p. *8.)

Thus, *Williams* concluded, "[t]he legislative history indicates the Legislature wanted to specify how restitution awards had to be calculated as to defective vehicles." (*Williams*, *supra*, 2023 WL 1430403, at p. *8.) None of the statutory provisions setting forth the restitution remedy "'contains any language authorizing an offset in any situation other than the one specified. This omission of other offsets from a set of provisions that thoroughly cover other relevant costs indicates legislative intent to exclude such offsets.'" (*Ibid.*, quoting *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1243–1244.)

"Nothing in the Act or its legislative history indicates the Legislature would have hidden such an important financial difference between the two remedies in the words 'actual amount paid or payable' in the restitution provision. 'The Legislature "does not, one might say, hide elephants in mouseholes."'" (*Williams*, *supra*, 2023 WL 1430403, at p. *10, quoting *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1171.)

CONCLUSION

Both *Figueroa* and *Williams* held that the *Niedermeier* court wrongly created an unenumerated trade-in or resale offset. Those courts correctly reasoned that:

- The Legislature "defines what it means by restitution in section 1793.2, subdivision (d)(2)(B)," which "does not include a set-off for the cash received by the vehicle owner on sale of the vehicle or the vehicle's trade-in";
- The creation of such an offset would encourage manufacturers to continue to "operate[] in open defiance" of their affirmative statutory duties to promptly repurchase lemons and label them at that time;
- FCA cannot complain about a windfall when none would exist "[h]ad FCA fulfilled its duty under the Act to promptly replace or repurchase the [defective car]" in the first place.

(*Figueroa, supra,* 84 Cal.App.5th at p. 714; see *Williams*, *supra*, 2023 WL 1430403, at p. *9.)

The Court should reject the *Niedermeier* court's creation of an unenumerated trade-in offset that would reward manufacturers for dragging their feet on the same basis.

February 22, 2023

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Pursuant to California Rules of Court, rule 8.504(d)(1), I certify that this Supplemental Brief contains **2,796** (2,800 limit) words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

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