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 SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

The question presented is whether a Lemon Law plaintiff should receive a double recovery when she resells a defective vehicle to an unknowing third party rather than return it to a manufacturer so that it can be rebranded as a "Lemon Law Buyback." As the decision below correctly recognized, the answer is obvious—the Legislature could not possibly have intended such a self-defeating scheme.

Niedermeier's supplemental brief cites two Court of Appeal decisions that expressly disagree with the decision below. In *Figueroa v. FCA US, LLC* ((2022) 84 Cal.App.5th 708 (*Figueroa*)), the court allowed a plaintiff to obtain a double recovery where he resold an unbranded lemon "to CarMax for $17,000." (*Id.* at pp. 711–12.) In *Williams v. FCA US LLC* ((Cal. Ct. App. Feb. 1, 2023), No. C091902, 2023 WL 1430403 (*Williams*)), the court allowed the plaintiffs to obtain a double recovery when they traded in an unbranded lemon for a $29,500 credit towards a new vehicle. (*Id.* at p. **2.)

Neither decision can be reconciled with the Song-Beverly Act's plain text, purpose, or legislative history. And neither decision grappled with the reality that manufacturers already have enormous financial incentives to comply with the law even without a double recovery. Here, for example, FCA paid Niedermeier and her attorneys more than $218,000, an amount that dwarfs the extra $19,000 she recovered by reselling her Jeep.

ARGUMENT

I. *Figueroa* And *Williams* Are Inconsistent With The Plain Text Of The Song-Beverly Act.

A. The Plain Meaning Of "Restitution" Forecloses A Double Recovery.

Section 1793.2(d)(2)(B) characterizes the Lemon Law's refund remedy as "restitution" because the Legislature sought to restore buyers to the same position they would have been in had they not purchased a defective vehicle. (FCA Br. 22–27.) In *Figueroa* and *Williams*, the Court of Appeal insisted that the Legislature departed from the plain and common-sense meaning of "restitution." In *Figueroa*, the court pointed to statutory language requiring a manufacturer to make restitution "in an amount equal to the actual price paid or payable by the buyer." (*Figueroa*, *supra*, 84 Cal.App.5th at p. 712.) *Williams* similarly reasoned that "the phrase 'actual price paid or payable' . . . means the cost to obtain the vehicle *at the time of purchase*." (*Williams*, *supra*, 2023 WL 1430403, at p. **7.)

These statements misunderstand the consequences of reducing a buyer's damages award to account for the proceeds of a resale. Doing so does not give a buyer less than the "amount equal to the actual price paid or payable" for her vehicle. To the contrary, it ensures that her total recovery—not accounting for incidental damages, civil penalties, or attorney's fees—*is* "equal to" to the price she paid. Under *Williams* and *Figueroa*, the buyer recovers *more* than "the actual price paid or payable."

Nor does applying the ordinary meaning of restitution give the manufacturer "cash back." (*Figueroa*, *supra*, 84 Cal.App.5th at p. 712.) Although the manufacturer pays less in restitution to account for the fact it does not receive the vehicle, the buyer still recovers every penny she paid at the time of purchase and need not pay the manufacturer anything.

The Court of Appeal further misread the statute in confusing the equitable concept of an "offset" or "set-off" with the question whether restitution permits a double recovery. (See *Figueroa*, *supra*, 84 Cal.App.5th at p. 714; see also Niedermeier Opening Br. 31–35 [making the same mistake].) This case is not about whether FCA is entitled to equitable compensation—say, to account for the value of Niedermeier's use of the Jeep. (FCA Br. 44–45.) Instead, it is about whether a plaintiff can recover the same money twice.

B. Section 1794(b) Expressly Incorporates Ordinary Damages Principles Into The Measure Of The Buyer's Damages.

The plain text forecloses Niedermeier's attempt to obtain a double recovery in another way that neither *Figueroa* nor *Williams* grappled with. Specifically, Section 1794(b) incorporates Sections 2711 through 2715 of the Commercial Code into "[t]he measure of the buyer's damages" in a Song-Beverly action. (Cal. Civ. Code § 1794(b); FCA Br. 27–33.) Accordingly, the Department of Consumer Affairs recognizes that the Commercial Code "illuminate[s] the meaning of the phrase 'actual price paid or payable by the buyer' in [Section] 1793.23(d)(2)(B)." (9 Niedermeier MJN 2611–12.) "To conclude otherwise ignores the

Act's underpinnings in the Code, and destroys the symmetry between the two sets of remedy provisions." (*Id.* at 2612.)

Under Sections 2711 and 2714 of the Commercial Code, the measure of the buyer's damages subtracts money that the buyer already recovered by reselling defective goods. (FCA Br. 29–32.) Niedermeier has never seriously disputed that under these provisions her request for a double recovery fails.

II. *Figueroa* And *Williams* Misunderstand The Purpose Of The Lemon Law And Misread Its Legislative History.

A. The Purpose Of The Lemon Law Is To Protect Consumers, Not To Give Plaintiffs A Windfall.

Allowing Lemon Law plaintiffs to recover the same money twice would harm consumers by encouraging buyers to resell unbranded lemons on the used car market. (FCA Br. 34–37.) *Figueroa* and *Williams* took a cramped and simplistic view of the Legislature's purpose—one in which any rule that makes manufacturers pay more is good, despite the real-world consequences for California consumers.

In *Figueroa,* the court reasoned that the Song-Beverly Act's notice-and-branding provisions were *irrelevant* because "[t]he labeling and notification requirements only apply where the manufacturer replaces or repurchases the vehicle, something FCA has refused to do." (*Figueroa*, *supra*, 84 Cal.App.5th at p. 714.) The court acknowledged that under its rule "in some cases the owner of a vehicle receives a windfall," but reasoned that "FCA could have avoided this by complying with the law." (*Id.*)

Nowhere in the court's opinion did it acknowledge the consumer who purchased Figueroa's truck—which Figueroa himself "did not feel safe driving his family in"—without notice that it was a lemon. In *Williams*, the court similarly ignored the consumer who ended up with an unbranded lemon.

Nor does conforming a buyer's restitution award to her actual economic loss somehow "encourage[]" manufacturers to willfully violate their obligations under the Lemon Law. (*Figueroa*, *supra*, 84 Cal.App.5th at p. 714.) Manufacturers are already subject to civil penalties and enormous fee awards that dwarf the amount a buyer could recover through a resale. (FCA Br. 37–39.)

Here, for example, Niedermeier has already recovered more than $218,000. That is more than ten times the additional $19,000 she recovered when she traded in her Jeep. The Court of Appeal insisted that a rule disallowing a double recovery will encourage manufacturers to willfully violate the Lemon Law simply to "use the cash back on trade-value as an offset." (*Figueroa*, *supra*, 84 Cal.App.5th at p. 714.) But under that theory, the manufacturer gets the benefit of the "offset" only after it has litigated—and lost—a Lemon Law action in which the manufacturer will pay hundreds of thousands of dollars in attorney's fees and civil penalties. Why would any economically rational manufacturer want to pay $218,000 to save $19,000?

In contrast, consider the incentives that *Figueroa* and *Williams* create for Lemon Law plaintiffs. As the lower courts and Niedermeier acknowledge, an unbranded lemon can be resold to a

third party for tens of thousands of dollars. (Niedermeier Supp. Br. 9–10 [conceding that lemons are worth more if they are never rebranded].) Thus, under Niedermeier's rule, a plaintiff can recover far more by reselling her lemon to an unwitting dealer or consumer than by returning it to the manufacturer. Why would any economically rational plaintiff forgo the free money?

Figueroa and *Williams* will also complicate manufacturers' efforts to grant buyers' requests for restitution even prior to litigation. The way the statute is supposed to work is that: (1) the buyer makes a demand for restitution, (2) if the vehicle is a lemon, the manufacturer buys it back, and (3) the manufacturer brands the vehicle as a "Lemon Law Buyback." (See Cal. Civ. Code §§ 1793.2(d)(2), 1793.23.) Under *Figueroa* and *Williams*, however, that simple transaction is muddled by the buyer's new incentive to resell the lemon to someone else first and *then* demand from the manufacturer the entire purchase price she originally paid.

The outcome will be devastating to the judicial system and consumers. Even before *Figueroa* and *Williams*, one Los Angeles judge estimated that 10 percent of the civil case docket consisted of Lemon Law litigation. (See Fruin, *Nudge Statutes and Demurrer Filings at Stanley Mosk Courthouse* (Jan. 8, 2019) Daily Journal.) A 2020 analysis found that "auto reliability has increased over the years," but Lemon Law litigation in Los Angeles County courts counterintuitively "doubled between 2015 to 2019." (Powell, *Calif. Auto Defect Law Incentivizes Overlitigation* (Apr. 7, 2020) Law 360, https://www.law360.com/articles/1259186/calif-auto-defect-law-incentivizes-overlitigation.)

Moreover, even for cases that settle, *Figueroa* and *Williams* create precisely the perverse incentives that the Court of Appeal purported to avoid. Faced with a plaintiff's demand for extra compensation in exchange for the return of her vehicle, few manufacturers will agree to pay the plaintiff the entire purchase price of a defective vehicle *plus* whatever the plaintiff might be able to obtain by reselling the unbranded vehicle to a third party. For both parties, the economically rational compromise will be to allow the plaintiff to keep the vehicle and resell it herself—precisely what the statute is supposed to prevent.

B. The Legislature Intended To Make Buyers Whole Through Ordinary Damages Principles, Not To Encourage Plaintiffs To Resell Unbranded Lemons.

The legislative history confirms that the Legislature did not intend to give buyers a double recovery when they resell used lemons to third parties. (FCA Br. 39–44.) The Court of Appeal's conclusion to the contrary in *Williams* was based on an incomplete picture of the legislative history—for example, the court did not consider history showing that the Legislature incorporated the Commercial Code into the "measure of the buyer's damages" for the specific purpose of ensuring that ordinary damages principles would apply. (FCA Br. 40–41.)[1]

[1] Niedermeier's assertion that the Court of Appeal did a "deep dive into the legislative history" (Niedermeier Supp. Br. 6) is misleading. Neither party briefed the legislative history in *Williams* (the court had denied the plaintiff's motion for judicial notice), and the parties did not even submit all of the relevant legislative materials.

In *Williams*, the court concluded that the Legislature did not intend to authorize "plain vanilla" restitution. (*Williams*, *supra*, 2023 WL 1430403, at pp. **7–8.) The main evidence the court gave was various reports stating that Assembly Bill 2057, which added the replacement and restitution remedies to Section 1793.2(d)(2), would require the manufacturer to "'make restitution, *as specified*[.]'" (*Id.* at p. **7 [emphasis added in *Williams*].) But that boilerplate language was ubiquitous in the legislative materials as a shorthand reference to the bill's text. (See, e.g., 3 Niedermeier MJN 839 [creating a program for certifying "third party dispute resolution processes pursuant to regulations adopted by the New Motor Vehicle Board, *as specified*"] [emphasis added]; *id.* [describing certain fees to be "collected by the New Motor Vehicle Board, *as specified*"] [emphasis added].) A *different* formulation was used to convey mechanical calculations mandated by the bill's text to the exclusion of any other possible method. (See, e.g., 3 Niedermeier MJN 596 [noting that a presumption would apply after "20 days *to be calculated* as specified"] [emphasis added].)

Nothing in the various passages cited by the Court of Appeal indicates that the Legislature sought to depart from the "plain vanilla" meaning of the statute. And other legislative history makes clear that the Legislature used restitution in its ordinary sense—that is, as a remedy intended to "make the buyer 'whole.'" (8 Niedermeier MJN 2069.) The new provisions in Section 1793.2(d) were "Clean-Up Changes" to clarify that the buyer had "the option to select restitution instead of replacement of a

'lemon.'" (8 Niedermeier MJN 2071.) The Legislature continued to assume that defective vehicles would be "bought back" by the manufacturer if a buyer elected restitution. (8 Niedermeier MJN 2072.)

Niedermeier's supplemental brief adds a new legislative-history argument that seeks to further downplay the notice-and-branding provisions.[2] She now argues that the 1995 amendments were meant "to stop *manufacturers* from cancelling out the cost to repurchase the car . . . by selling that defective car at prices higher than would have been possible if the vehicles were stamped as lemons." (Niedermeier Supp. Br. 11 [quotation marks omitted; emphasis in original].) Accordingly, she insists, "a consumer has not and cannot undercut [those] provisions." (*Id.*)

This argument is difficult to follow. The Legislature was unambiguous in its view that Lemon Law notices "serve the interests of consumers who have a right to information relevant to their buying decisions." (Cal. Civ. Code § 1793.23(a)(4).) *Any* consumer buying a used vehicle deserves to know whether it is a lemon. Niedermeier has never even attempted to explain why

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[2] The report attached to Niedermeier's Second Motion for Judicial Notice and cited in her supplemental brief was already included in her original Motion for Judicial Notice. (See 8 Niedermeier MJN 2289–2302.) The report is not discussed in either *Williams* or *Figueroa*, and it is not a proper subject of a supplemental brief on new authority. (See Rule 8.520(d).) To avoid confusion, this brief cites to the report as it appears in Niedermeier's original Motion for Judicial Notice. FCA takes no position on Niedermeier's "Motion To Construe Second Motion For Judicial Notice As Motion To Supplement First Motion For Judicial Notice."

some of them should take a back seat so she can obtain a double recovery.

Nothing in the "Bitter Fruit" Committee report cited by Niedermeier suggests otherwise. To the contrary, the "bottom line" of the report was that consumers "cannot rely on an examination of the vehicle's title to prove the vehicle was bought back by the manufacturer," in part because manufacturers were *not* always obtaining title to repurchased lemons. (8 Niedermeier MJN 2292.) The entire premise of the 1995 changes was that restitution goes hand-in-hand with a plaintiff returning her vehicle to the manufacturer. Hence, the Senate Judiciary Committee described restitution and replacement as "the basic lemon buy-back requirement." (8 Niedermeier MJN 2325.)

III. FCA Takes Its Lemon Law Obligations Seriously And Makes Every Effort To Comply.

In *Figueroa*, the Court of Appeal stated that "FCA operates in open defiance of the Song-Beverly Act." (*Figueroa*, *supra*, 84 Cal.App.5th at p. 714.) *Williams* then block-quoted this statement from *Figueroa*. (*Williams*, *supra*, 2023 WL 1430403, at p. **9.)

Neither decision cited anything in the record to support such a serious charge, nor could they have—the plaintiffs in *Figueroa* and *Williams* did not seek to prove any broad company practice of "defying" the Song-Beverly Act. Thus, the Court of Appeal had nothing before it that could have allowed a judicial finding that FCA "operates in open defiance" of California law. (See *People v. Tillis* (1998) 18 Cal.4th 284, 292 [reversing decision that

"unwarrantedly inferred" motives beyond those supported by the record].)

The only possible basis for the court's statement was three cases in which FCA was found liable under the Lemon Law after the plaintiff resold or traded in her vehicle: this case, and *Figueroa* and *Williams* themselves. FCA sells millions of vehicles every year and, like all major auto manufacturers, is subject to claims under California's Lemon Law. FCA makes every effort to comply with its obligations under the Lemon Law and frequently resolves claims directly with consumers, without judicial intervention, and without the consumer reselling her vehicle to a third party.

In the three cases at issue, FCA believed that the plaintiffs' vehicles were *not* lemons and vigorously disputed the plaintiffs' allegations that FCA willfully violated the statute. FCA's exercise of its right to defend itself in court is plainly not a basis for concluding that it has a corporate policy of openly flouting the Lemon Law.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: March 8, 2023 Respectfully submitted,

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Pursuant to Rule 8.520(d)(1) of the California Rules of Court, I certify that the foregoing brief is in 13-point New Century Schoolbook font and contains 2,651 words, including footnotes, according to the word count generated by the computer program used to produce the brief.

Dated: March 8, 2023

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

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I, Matt Gregory, declare as follows:

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/s/Thomas Dupree, Jr.

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