S246444

IN THE SUPREME COURT OF CALIFORNIA

ALLEN KIRZHNER,

Plaintiff and Appellant,

vs.

MERCEDES BENZ USA LLC,

Defendant and Respondent.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE
HON. JAMES J. DI CESARE (CASE NUMBER 30-2014-00744604)

OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED FOR REVIEW

(Quoted from the Petition for Review)

California's Consumer Warranty Act (also known as "the lemon law") provides that if a manufacturer of a motor vehicle is unable to repair a vehicle under warranty within a reasonable number of attempts, it must repurchase or replace that consumer's vehicle. (Civ. Code, § 1793.2, subd. (d)(2).)

When the consumer elects to have his lemon vehicle repurchased, the manufacturer must "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, and including **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." (Civ. Code, § 1793.2, subd. (d)(2)(B) [emphasis added].)

Both this Court and the Courts of Appeal have consistently concluded that the Consumer Warranty Act is intended to put the consumer in the same position as if he had never purchased the defective vehicle and should be broadly construed in favor of the consumer. (*Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32, 36 [repurchase remedy is "intended to restore the *status quo ante* as far as is practicable."]; *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 990 [CWA "is manifestly a remedial measure, intended for the protection of the consumer; it should be given a construction calculated to bring its benefits into action.".].)

This case presents this Court with the opportunity to settle two extremely important questions that arise in virtually every single lemon law case.

First, when an automobile manufacturer repurchases a consumer's vehicle, is the manufacturer obligated to reimburse "any . . . registration fees" paid by the consumer, as stated in the plain language of subdivision (d)(2)(B) of Civil Code section 1793.2, or merely the first year's registration fees, as concluded by the Court of Appeal in its published decision? (Typ. Op., p. 2)

Second, when the manufacturer refuses to repurchase or replace the vehicle and a consumer must file a lawsuit, are the "incidental damages to which the buyer is entitled under Section 1794" limited to "cost[s] incurred as a result of a vehicle being defective" as the Court of Appeal concluded, or are incidental damages permitted for expenses incurred as a result of the manufacturer's violation of the statutory command, i.e. its refusal to repurchase or replace the vehicle as required by subdivision (d)(2) of section 1793.2? (Typ. Op., p. 10.)

SUMMARY OF ARGUMENT

When an automobile manufacturer repurchases a consumer's vehicle, the manufacturer must compute the amount due by adding all of the registration fees that were actually paid or payable by the buyer during his ownership of the vehicle under subdivision (d)(2)(B) of section 1793.2. (*See* Part I.E.1 and II.A. of this brief, below.)

Alternatively, when the manufacturer refuses to repurchase or replace a vehicle and a buyer is forced to file a lawsuit, the "incidental damages to which the buyer is entitled under Section 1794" are not limited to "cost[s] incurred as a result of a vehicle being defective" as the Court of Appeal concluded. Rather, incidental damages are permitted for expenses incurred as a result of the manufacturer's violation of the statutory

command, i.e. its refusal to repurchase or replace the vehicle as required by subdivision (d)(2) of section 1793.2. (*See* Part II.B. of this brief, below.)

STATEMENT OF FACTS

A. Defendant violates California law by failing to repurchase or replace a defective vehicle that cannot be repaired after a reasonable number of attempts

On June 16, 2012, Plaintiff Allen Kirzhner leased a 2012 Mercedes-Benz C250 automobile that was distributed by Defendant Mercedes-Benz USA LLC. (Appellant's Appendix, p. 38, ¶ 2 (hereafter "AA ##"); AA 2, ¶ 4.) Under the terms of the lease, Plaintiff made a $1,867.58 down payment and agreed to make 33 payments of $489.98 over the life of the lease. (AA 38, ¶ 2.)

In addition, Plaintiff incurred a legal obligation to register the vehicle with the Department of Motor Vehicles and to renew the registration (or register the vehicle as non-operational) annually until he sold the vehicle. (Veh. Code, § 4150; Veh. Code, § 4601.) In accordance with that legal obligation, the lease agreement included a $101.00 charge for the registration fee covering the period from June 16, 2012, to June 15, 2013. (AA 38, ¶ 2; AA 52, § 5.a.6.)

When he leased the vehicle, Plaintiff received an express written warranty from Defendant. (AA 2, ¶ 5.) After the lease commenced, Plaintiff enjoyed approximately two months of trouble-free use of the vehicle. (AA 59, l. 17-18 [Defendant admits that "Plaintiff first lodged warranty-related complaints on August 3, 2002 [sic: 2012] with 3,947 miles on the odometer"]; AA 70, ll. 12-14.) Thereafter, the vehicle experienced a number of defects that Defendant was unable to repair within a reasonable number of repair attempts. (AA 2, ¶ 6; AA 7, ¶ 30.)

Pursuant to subdivision (d)(2) of Civil Code section 1793.2, Defendant had a legal obligation to repurchase or replace Plaintiff's vehicle, but it refused to comply with that obligation. (AA 7, ¶ 30.)

In June of 2013, Plaintiff paid $356 to renew the vehicle's registration for the period from June 16, 2013, to June 15, 2014. (AA 38, ¶ 7.) In June of 2014, Plaintiff paid $305 to renew the vehicle's registration for the period from June 16, 2014, to June 15, 2015. (*Id.*)

B. Plaintiff sues Defendant alleging several different claims

On September 11, 2014, Plaintiff filed this action against Defendant Mercedes-Benz USA, LLC in the Orange County Superior Court. (AA 1.) Among other things, Plaintiff's Complaint alleged:

1. That Defendant had violated its obligation to promptly repurchase or replace Plaintiff's defective vehicle after a reasonable number of warranty attempts had failed, as it was required to under subdivision (d)(2) of Civil Code section 1793.2. (AA 7, ¶ 30; *See* Part I.D.1. of this brief, below.)

2. That Defendant breached its obligation to correct the defects as required by the terms of the express written warranty that Defendant provided to Plaintiff. (AA 6; *See* Part I.D.2 of this brief, below.)

3. That Defendant breached the implied warranty of merchantability that arose in connection with the vehicle because the vehicle was defective at the time it was sold or within one year thereafter. (AA 2-4; *See* Part I.D.4 of this brief, below.)

On October 8, 2014, instead of complying with its obligation to repurchase or replace Plaintiff's vehicle and instead of admitting that it had breached both its express and the legally implied warranties governing the vehicle, Defendant generally denied all of Plaintiff's claims. (AA 11-15.)

C. Defendant finally agrees to comply with the law and to repurchase Plaintiff's vehicle, but then refuses to comply with the agreement

Defendant litigated the case for approximately six months. However, on March 2, 2015, Defendant finally agreed to comply with its repurchase obligations under subdivision (d)(2) of Civil Code section 1793.2. On that date, Defendant sent an Offer of Judgment allowing Judgment to be entered in Plaintiff's favor. (AA 18-19.)

In relevant part, Defendant's Offer of Judgment provided that "[p]ursuant to California Civil Code § 1793.2(d)(2)(B), in exchange for the subject vehicle, MBUSA offers to make restitution in an amount equal to the actual price **paid or payable** by the Plaintiff . . . including **any** collateral charges such as . . . **registration fees**, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794 . . . all to be determined by court motion if the parties cannot agree." (AA 18:25-19:5 [emphasis added].) Notably, the quoted words (above) are identical to the repurchase remedy afforded to buyers under subdivision (d)(2)(B) of Civil Code section 1793.2. (Civ. Code, § 1793.2, subd. (d)(2)(B).)

Plaintiff accepted the offer on April 2, 2015, filed the Notice of Acceptance on April 21, 2015, and the Superior Court entered Judgment in Plaintiff's favor on all of the claims asserted in the Complaint on May 15, 2015. (AA 16-17; AA 23.)

Unfortunately, Defendant and its counsel were even less diligent about paying what they had agreed to pay than they were about offering to pay it in the first place. (AA 33-37.) As a result of Defendant's counsel's dilatory tactics, Plaintiff would wait another *six months* before receiving the restitution that Defendant was legally obligated to "promptly" offer him

under subdivision (d)(2) of Civil Code section 1793.2. (AA 174-175; AA 163, ¶¶ 1-2.)

For seven weeks after accepting the Offer of Judgment, Plaintiff's counsel repeatedly called and sent multiple emails to Defendant's counsel in an attempt to coordinate payment, but Defendant's counsel refused to cooperate. (AA 33-37.) In total, Plaintiff's counsel made ten telephone calls to Defendant's counsel's office, but none were returned. (AA 33, ¶¶ 5, 6.)

Both before and after accepting Defendant's Offer of Judgment, Plaintiff's counsel sent multiple emails to Defendant's counsel in an attempt to reach agreement on the amounts due. (AA 33-37.) Defendant's counsel ignored most of the emails as well, but when he did respond, he falsely claimed that Plaintiff had "refus[ed] to provide the information" necessary to finish the case. (AA 35, ¶ 16, ¶ 17.) Plaintiff's counsel ultimately became so desperate to get the case finished that he begged Defendant's counsel to simply "send a check immediately for whatever you claim that you owe." (AA 35, ¶ 17.) Like most of Plaintiff's emails, Defendant ignored that one as well. (AA 35, ¶ 18.)

D. Plaintiff asks the Court to order Defendant to reimburse his damages

On May 28, 2015, after waiting seven weeks for Defendant to pay what it owed under the Offer of Judgment (or any amount for that matter), Plaintiff filed a motion asking the Superior Court to determine the amount that was due to Plaintiff pursuant to Defendant's Offer of Judgment. (AA 28.)

Among other things, Plaintiff requested that the Superior Court require Defendant to reimburse the registration fees that he paid in 2013 and 2014, and the non-operational fee that Plaintiff paid in June of 2015.

(AA 32; AA 38, ¶ 7 ["In 2013, I paid $356 to renew the vehicle registration. In 2014, I paid $305 for registration on the vehicle. The next registration payment will be due in June of 2015, and I do not yet know the amount that will be due at that time. Because I am no longer driving the vehicle, I plan to obtain a Certificate of Planned Non-Operation instead of renewing the registration and the charge for the CPNO is $19."].)

Plaintiff's motion explained that Plaintiff was entitled to recover registration fees either as part of the amount paid or payable or as incidental damages, both of which were authorized by subdivision (d)(2)(B) of Civil Code section 1794. (AA 32.)

In opposition to the motion, Defendant had the opportunity to request that Plaintiff's damages be offset using a statutory formula. Among other things, the formula assumes that a vehicle's useful lifespan is approximately 120,000 miles and requires the buyer to pay for his use of the vehicle up to the first repair attempt. (Civ. Code, § 1793.2, subd. (d)(2)(C).)

However, Defendant failed to submit any admissible evidence to support the offset, and so the Court was unable to award the Defendant an offset in this case. (AA 166-167 [Tentative ruling states that "Defendant has not proven up the amount of the mileage offset, which is therefore denied."]; AA 173 [Order adopting Tentative Ruling with modifications unrelated to this issue].)

On August 28, 2015 (almost a year after the lawsuit was filed), the Superior Court signed a formal order awarding Plaintiff's damages. (AA 174-175; AA 163, ¶¶ 1-2.) However, even though the Offer of Judgment and subdivision (d)(2)(B) explicitly authorized Plaintiff to recover "**registration fees**," the Superior Court only awarded Plaintiff the **registration fee** that he paid when he purchased the vehicle. (*Id.*)

E. Plaintiff appeals and requests that the Court of Appeal direct the Superior Court to award his registration fees and non-operational fees for 2013, 2014, and 2015

On September 11, 2015, Plaintiff appealed. On appeal, Plaintiff explained that the post-sale registration fees and non-operational fee were recoverable on two theories.

First, under subdivision (d)(2)(B) of Civil Code section 1793.2, the manufacturer was required to "make restitution [... of ...] **any** collateral charges such as . . . **registration fees**." Nothing in that section indicates that "registration fees" are limited to the registration fee paid for the very first year of ownership.

Second, even if the registration fees that Plaintiff paid in 2013, 2014, and 2015 were not recoverable as "registration fees," Plaintiff's brief explained that he was still entitled to recover them pursuant to the Offer of Judgment and subdivision (d)(2)(B) of Civil Code section 1793.2 as "any incidental damages to which the buyer is entitled under Section 1794 . . . ." (AA 18-19, ¶ 1; Civ. Code, § 1793.2, subd. (d)(2)(B).)

F. The Unpublished Decision of the Court of Appeal

On November 27, 2017, the Court of Appeal affirmed the Superior Court's conclusions. Even though the Offer of Judgment and subdivision (d)(2)(B) explicitly authorized Plaintiff to recover "**registration fees**," the Court of Appeal concluded that Plaintiff was only entitled to recover the **registration fee** that he paid when he purchased the vehicle. (Typ. Op., p. 2, ¶ 3 [emphasis added].) Among other things, the Court of Appeal stated that "section 1793.2(b)(2)(B) does not require payment of vehicle registration renewal fees and related costs incurred after the initial purchase or lease." (*Id* [emphasis added].)

The Court of Appeal also concluded that the "incidental damages" authorized by subdivision (d)(2)(B) of section 1793.2 should be limited to "cost[s] incurred as a result of a vehicle being defective," even though nothing in the statute indicates such a limitation and even though the relevant statutes say just the opposite. (Typ. Op., p. 6, 1.)

Although the Court's Opinion was initially unpublished, the Court of Appeal received several letters from attorneys purporting to represent automobile manufacturer interests requesting publication, and on December 13, 2017, the Court of Appeal published the Opinion. (*See* Court of Appeal Docket, entries dated 12/11/2017, 12/12/2017, and 12/13/2017.)

G. This Court grants review on February 21, 2018

On February 21, 2018, this Court granted Appellant's Petition for Review of the Court of Appeal's decision.

As we will explain, the Court of Appeal's Opinion affirming the Superior Court's ruling was error and should be reversed.

DISCUSSION

I.
AN OVERVIEW OF THE SONG-BEVERLY CONSUMER WARRANTY ACT

In 1970, the California Legislature enacted the Song-Beverly Consumer Warranty Act ("the CWA"). (Civ. Code, § 1790.) The CWA was (and remains) one of the strongest and most important consumer protections laws in our nation.

The CWA comprises forty-eight sections, many with multiple subdivisions, that often refer back and forth to one another. (Civ. Code, § 1790 to 1795.8.) An unfortunate consequence of this complexity is that courts sometimes confuse the requirements or damages allowed by one

provision with those allowed or disallowed by others. Indeed, it appears that the Court of Appeal did so in this case.

In order to avoid that confusion, Plaintiff will begin with a brief overview of the CWA as it relates to the claims asserted in this case.

A. The CWA applies to all manner of Consumer Goods and provides additional protections to New Motor Vehicles

Contrary to popular belief, the CWA is not merely an "automobile lemon law." Rather, the CWA provides a comprehensive set of rights and remedies for consumers who buy any kind of "consumer good." (Civ. Code, § 1791, subd. (a) [defining "consumer good"; Civ. Code § 1794, subd. (a) [giving buyer of consumer good the right to sue in various circumstances].)

In addition to the extensive protections for "consumer goods," the Legislature also added a few additional protections for consumers who buy "new motor vehicles." (Civ. Code, § 1793.22, subd. (e)(2) [defining new motor vehicle]; Civ. Code § 1793.2(d)(2) [creating separate repurchase or replace obligation for "new motor vehicles" as compared to the repurchase or replace obligation for "consumer goods" contained in subdivision (d)(1) of that section]; Civ. Code, § 1793.22(a) [creating a separate presumption for consumers whose new motor vehicles cannot be repaired].)

B. The CWA is intended to benefit the consumer and should be construed in accordance with that purpose

The CWA "is manifestly a remedial measure, intended for the protection of the consumer; it should be given a construction calculated to bring its benefits into action." (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 990.) "The Act is a remedial measure intended for the protection of consumers and should be given a construction consistent

with that purpose." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1103.)

C. The CWA's provisions are not waivable, are intended to be more protective than the protections offered by the Commercial Code, and provide remedies that are cumulative to one another

The Legislature's intent regarding the CWA is evidenced by the contents of the first four substantive provisions. Among them, the Legislature provided that (1) any purported waiver of the benefits of the CWA was "contrary to public policy and shall be unenforceable and void" (Civ. Code, § 1790.1), (2) the CWA's provisions do not affect the rights and remedies afforded by the Commercial Code, except that the CWA prevails over any contrary provisions in the Commercial Code (Civ. Code, § 1790.3), and (3) the CWA's remedies are "cumulative" to one another and "shall not be construed as restricting any remedy that is otherwise available" (Civ. Code, § 1790.4.).

D. The CWA creates dozens of potential claims

The centerpiece of the CWA is the provision that authorizes consumers to file lawsuits to enforce its provisions ("CWA Enabling Provision"). Contained at subdivision (a) of Civil Code section 1794, the CWA Enabling Provision provides that:

> Any buyer of consumer goods who is damaged by a failure to comply with [1] any obligation under this chapter or under an [2] implied or [3] express warranty or [4] service contract may bring an action for the recovery of damages and other legal and equitable relief.

(Civ. Code, § 1794, subd. (a) [brackets added and used in discussion below].)

This provision is often misunderstood by persons who are unfamiliar with the CWA, and so it was with the Court of Appeal in this case.[1] The CWA does not create a single claim arising out of a defective vehicle; rather, the CWA Enabling Provision creates dozens of potential claims and creates different remedies depending upon the particular claim that is asserted.

1. [1] [A]ny obligation under this chapter

In the first clause of the CWA Enabling Provision, the Legislature granted buyers the right to sue whenever they were damaged by a violation of "[1] any obligation under this chapter." (Civ. Code, § 1794, subd. (a).) The CWA contains numerous provisions that can be the subject of this type of claim, but the most commonly alleged violations are the claims that appear in Civil Code section 1793.2.

None of the claims contained in section 1793.2 are based upon a direct breach of a warranty; rather, each is based upon a statutory obligation that the CWA imposes upon warrantors ("CWA Warranty Derivative Obligations"). The CWA imposes Warranty Derivative Obligations on anyone[2] who issues a warranty on consumer goods sold in California. Among other things:

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[1] A substantial portion of Plaintiff's counsel's time is now spent attempting to protect the CWA by writing depublication letters to Courts of Appeal that incorrectly conflate the elements or remedies available on one of these claims with the elements and/or remedies available on the others.

[2] Subdivision (a) of section 1793.2 uses the word "manufacturer of consumer goods . . . for which the manufacturer has made a warranty." However, section 1795 provides that "[i]f express warranties are made by persons other than the manufacturer of the goods, the obligation of the person making such warranties shall be the same as that imposed on the manufacturer under this chapter." As a result, the word "manufacturer," as

1. The warrantor must maintain (or contract with others to maintain) service and repair facilities reasonably close to where the goods are sold and must provide those facilities with service literature and replacement parts sufficient to make repairs during the express warranty period. (Civ. Code, § 1793.2, subd. (a)(1).)

2. The warrantor must ensure that needed repairs are commenced within a reasonable time and that repairs are completed within 30 days, with certain exceptions. (Civ. Code, § 1793.2, subd. (b).)

3. Where the warrantor cannot repair "consumer goods" (which includes many recreational vehicles, motorcycles, and certain parts of a motor home) under warranty within a reasonable number of repair attempts, the warrantor must repurchase or replace the goods. (Civ. Code, § 1793.2, subd. (d)(1) [hereafter "CWA Non-Vehicle Repurchase Obligation"].) The CWA Non-Vehicle Repurchase Obligation allows the warrantor an offset for the buyer's trouble-free use of the goods, but contains no formula for calculating the offset.

4. Where the warrantor cannot repair a "new motor vehicle" under warranty within a reasonable number of repair attempts, the warrantor must *promptly* repurchase as provided in subdivision (d)(2)(B) or replace it as provided in subdivision (d)(2)(A), at the consumer's option. (Civ. Code, § 1793.2, subd. (d)(2) [hereafter "CWA Motor Vehicle[3] Repurchase Obligation"].) The CWA Motor Vehicle Repurchase Obligation also includes a specific formula that is used to compute the

---

used in 1793.2 (and virtually anywhere in the CWA) essentially means anyone who issues a warranty on consumer goods sold in California.

[3] Importantly, certain portions of motor homes and recreational vehicles are covered by the non-motor vehicle provision. (Civ. Code, § 1793.22, subd. (e)(2) [defining "new motor vehicle"].)

offset for use which is based upon the buyer's trouble-free use of the vehicle. (Civ. Code, § 1793.2, subd. (d)(2)(C).)

These last two provisions (collectively the "CWA Repurchase Obligation") are the most commonly asserted CWA claims, are the subject of the most case law, and are one of the claims at issue in this case.

It is important to remember that the CWA Repurchase Obligation does not give a consumer a right to sue simply because his vehicle contains a defect, or even because the defect is not repaired. Rather, the claim arises only if the manufacturer fails to "promptly" repurchase or replace the vehicle after it is unable to conform the vehicle to the terms of the warranty within a reasonable number of repair attempts. (Civ. Code, § 1793.2, subd. (d)(2) [New Motor Vehicles]; Civ. Code, § 1793.2, subd. (d)(1) [containing similar language with respect to consumer goods, but omitting the word "promptly" and omitting the mileage calculation].)

Although the consumer does have an obligation to seek repairs under the warranty, a consumer seeking the CWA Repurchase Obligation need not demand a repurchase or replacement before filing suit. "[A]s a practical matter, the consumer will likely request replacement or restitution. But the consumer's request is not mandated by any provision in the Act. Rather, the consumer's request for replacement or restitution is often prompted by the manufacturer's unforthright approach and stonewalling of fundamental warranty problems." (*Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 302-303.)

2. Breach of [3] Express Warranty

In addition to allowing consumers to sue for violations of the CWA Derivative Warranty Obligations, the CWA Enabling Provision also allows the buyer to sue for breach of any express warranty. (Civ. Code, § 1794, subd. (a) ["Any buyer of consumer goods who is damaged by a failure to

comply with [1] any obligation under this chapter [including the Warranty Derivative Obligations discussed above] or under an [2] implied or [3] **express warranty** or [4] service contract may bring an action for the recovery of damages and other legal and equitable relief."] [emphasis added].)

The CWA does not borrow from the Commercial Code's definition of "express warranty." Instead, the CWA contains its own definition of the term "express warranty" which is markedly different from the one contained in the Commercial Code. (Civ. Code, § 1791.2.)

The authorization to sue for "breach of warranty" that is separate and apart from CWA Repurchase Obligation is a very common source of confusion. We routinely observe litigants and courts incorrectly referring to claims for violation of the CWA Repurchase Obligation contained in subdivision (d) of section 1793.2 as a claim for "breach of express warranty" or "breach of warranty." In fact, however, they are entirely separate claims.

The CWA Repurchase Obligation is contained at subdivision (d)(2) of section 1793.2. A violation of the CWA Repurchase Obligation requires that the warrantor fail to repurchase or replace a new motor vehicle after it has failed to repair a defect within a reasonable number of attempts. (Civ. Code, § 1793.2, subd. (d)(1) and (2).) It is actionable under subdivision (a) of section 1794 as a "failure to comply with [1] any obligation **under this chapter**" and not as a failure to comply with any obligation "under an [2] implied or [3] express warranty . . . ." (Civ. Code, § 1794, subd. (a).)

In contrast, a claim for "breach of warranty" is directly actionable under subdivision (a) of section 1794 as a "**failure to comply with any obligation** . . . under an [2] implied or [3] **express warranty**" and not as a failure to comply with "[1] any obligation **under this chapter**." A breach of warranty claim merely requires that a warranty exist and that the

warrantor have failed to do something that it was required to do by virtue of the terms of the warranty that it wrote. (*Rose v. Chrysler Motors Corp.* (1963) 212 Cal.App.2d 755, 763 ["Where, as in this case, the express warranty contemplates that the seller's liability for a breach of warranty does not attach until he has had an opportunity to remedy the defects, his failure or refusal to act, where such opportunity is afforded the seller, fixes his liability."].)

Thus, while a failure to repurchase claim under subdivision (d)(2) of Civil Code section 1793.2 may well arise from multiple breaches of an express warranty, the two claims are distinct from one another. (*See also* Civ. Code, § 1790.4 ["The remedies provided by this chapter are cumulative . . . ."].)

3. The Consumer's Obligation in Breach of Warranty and Breach of CWA Derivative Warranty Obligation Claims

The consumer's obligation to seek repairs under an express warranty are defined, first, in the text of the warranty itself. Because each warranty is different, the consumer's precise obligations in any given case depend upon the exact language contained in the written warranty. Generally, most warranties require the consumer to deliver the goods to Defendant's service and repair facility for repairs. (Civ. Code, § 1793.2, subd. (c) [mirroring the warranty requirements and providing for special procedures when "due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, delivery cannot reasonably be accomplished."].)

When a consumer requests repairs, he is not obligated to inform the warrantor of the precise cause of the defect. Rather, "[i]f the operation of such vehicle is mechanically defective and the automobile is returned to the dealer for the purpose of correcting these defects, it is incumbent upon the

dealer to find such defective part or parts and replace them pursuant to the terms of the warranty or to locate the assembly that has been improperly assembled and remedy the defect." (*Rose, supra,* 212 Cal.App.2d at 762–763 ["As is often the case in the purchase of a new automobile, the purchaser on discovering mechanical conditions which do not seem to be normal in the operation of the motor vehicle, will return the automobile to the dealer from whom the purchase was made. The particular defect is usually unknown to the purchaser and it is upon the dealer that he relies for discovery of the defect causing the unusual mechanical functioning of the vehicle. The purchaser of a new automobile does not know the precise cause, and the dealer with his mechanics may, after calling in the factory experts and representatives, take many months to locate the defect. ¶ . . . [I]t would place a tremendous burden upon the purchaser of a new motor vehicle to find the precise part or parts of the vehicle which were defective and direct the dealer to replace them or remedy the defect."] [citations omitted]; *Donlen v. Ford Motor Company* (2013) 217 Cal.App.4th 138, 149 ["[T]he plaintiff is not obligated to identify or prove the cause of the car's defect. Rather, he is required only to prove the car did not conform to the express warranty."]; *Oregel, supra*, 90 Cal.App.4th at 1102, fn. 8.)

In addition, each time that the consumer seeks repairs counts as a repair attempt, even if the warrantor makes no actual effort to remedy the defects that the consumer reports. (*Oregel, supra*, 90 Cal.App.4th at 1103–1104 ["[T]he only affirmative step the Act imposes on consumers is to permit[] the manufacturer a reasonable opportunity to repair the vehicle. Whether or not the manufacturer's agents choose to take advantage of the opportunity, or are unable despite that opportunity to isolate and make an effort to repair the problem, are matters for which the consumer is not responsible."].)

4. Breach of an [2] Implied Warranty

The CWA Enabling Provision also allows the buyer to sue for breach of various implied warranties. (Civ. Code, § 1794, subd. (a) ["Any buyer of consumer goods who is damaged by a failure to comply with [1] any obligation under this chapter or under an [2] **implied** or [3] express **warranty** or [4] service contract may bring an action for the recovery of damages and other legal and equitable relief."].)

The CWA does not rely on the Commercial Code for its definitions of what constitutes an implied warranty. Instead, at Civil Code sections 1792 through 1792.5, the CWA sets forth its own definitions for both the "Implied Warranty of Merchantability" ("IWOM") and "Implied Warranty of Fitness for Particular Purpose" ("IWOF"). (Civ. Code, § 1792 [granting IWOM against both retailer and manufacturer]; Civ. Code, § 1791.1 [defining IWOM]; Civ. Code § 1792.1 and 1792.2 [granting and defining IWOF].)

Unlike the Commercial Code, the CWA's implied warranties eliminate the concept of privity and create virtually identical implied warranties against both the manufacturer and the retailer of any consumer goods. (*Id.*)

Generally speaking, the CWA IWOM is breached and a consumer may sue whenever the vehicle contains a defect during the one-year IWOM period. (*Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 23 [approving jury instruction that "[f]itness for the ordinary purpose of a vehicle means that the vehicle should be in safe condition and substantially free of defects."].)

Also, while the Commercial Code implied warranties can only be breached at the time of the sale, the CWA implied warranties can be breached at the time of the sale or anytime within one year after the sale is

completed. (Civ. Code § 1791.1, subd. (c); *Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1306 [One-year period is not the statute of limitations, or even the period during which the breach must be discovered].)

The CWA also prohibits the disclaimer of any implied warranty except when the vehicle is sold "as is" and "with all faults." (Civ. Code, § 1792.3, 1792.4, 1792.5.) Finally, the CWA grants the retailer a right of indemnity against the manufacturer for IWOM claims. (Civ. Code, § 1792.)

5. The Consumer's Obligation in Breach of Implied Warranty Claims

Because the implied warranties are imposed by operation of law and set a minimum level of quality of consumer goods, the consumer has no obligation to seek repairs of any kind before asserting a claim for breach of the implied warranties. (*Mexia, supra*, 174 Cal. App. 4th at 1307 ["Nor is there any requirement that the buyer allow the seller or manufacturer an opportunity to repair the product prior to bringing an action for breach of the implied warranty of merchantability."]; *Mocek v. Alfa Leisure, Inc.* (2003) 114 Cal.App.4th 402, 404 (2003) [same].)

E. The CWA provides two distinct sets of damages

The remedies available to a consumer who sues for violation of any obligation under the CWA, or for breach of an implied or express warranty, are set forth in subdivision (b) of Civil Code section 1794 (hereafter "CWA Damages Provision").)

> (a) Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal

and equitable relief.

(b) 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 1793.2, and the following:

(1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.

(2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

(Civ. Code, § 1794, subd. (a), (b) [emphasis added].)

Two things are notable about the damages provision. First, although the CWA sometimes speaks in terms of "restitution," when a buyer is forced to bring a lawsuit, the remedies available to the consumer, including the CWA Repurchase Remedy, are damages. (Civ. Code, § 1794, subd. (a) ["The measure of the buyer's **damages** in an action under this section shall include . . ."] [emphasis added] .)

Second, the CWA creates two distinct sets of remedies that can apply, depending upon the claims asserted by the buyer. The first set of remedies applies exclusively to consumers who sue for violation of the CWA's Repurchase Obligation contained in subdivision (d) of section 1793.2. The second set of remedies are available to consumers who assert any claim under the CWA, including a violation of CWA's Repurchase Obligation.

1. The remedies provided in the CWA Repurchase Obligation only apply when consumers allege a violation of that provision

The first paragraph of the CWA Damages Provision specifically refers to the CWA Repurchase Obligation provision contained in subdivision (d) of section 1793.2. It states that:

> (b) 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 1793.2, and the following:

(Civ. Code, § 1794, subd. (b) [emphasis added].)

Although this language would seem to grant "rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2" to any consumer who is suing for any of the violations listed in subdivision (a), this Court has already considered that issue and concluded that the underlined language only applies when a consumer asserts a claim for violation of the CWA Repurchase Obligation. (*Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1262.)

The damages explicitly authorized under the repurchase obligation depend upon whether the product in question is a "consumer good" or a "new motor vehicle." (Civ. Code, § 1793.2, subd. (d)(1) [consumer good] (2) [new motor vehicle].) As relevant to this appeal (which concerns a new motor vehicle), the CWA Repurchase Obligation requires the warrantor to

> 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, and including 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.

(Civ. Code, § 1793.2, subd. (d)(2)(B) [hereafter "CWA Repurchase Remedy"].)

Three things are noteworthy about this language. First, the language describes what the manufacturer must do at the time the repurchase offer is made, and not at the time of sale or any other time. (*Id.*) In that context, the words "*actual* price paid or payable by the buyer" indicate a legislative intent to ensure that the manufacturer pays the consumer what he *actually* paid in connection with the vehicle as of the time the repurchase occurs, rather than merely what he was obliged to pay at the time of contracting. Nothing in the statute limits the recoverable items to those that are incurred in connection with the acquisition of the vehicle.

Second, the statute explicitly allows the recovery of "**registration fees**," and not "**the registration fee**," thus implicitly recognizing that registration fees paid after the initial registration fee should be included in the computation. (Civ. Code, § 1793.2, subd. (d)(2)(B).)

Third, the statute contains no language limiting the buyer's remedy to amounts paid or payable to any specific person or entity, and it contains no limitations on when those amounts need to have been "paid or payable" in order to be recoverable. (*Id.*)

Of course, the buyer does not receive 100% of the amounts allowed under subdivision (d)(2)(B). Rather, the manufacturer may request that the buyer pay for his trouble-free use of the vehicle:

> When restitution is made pursuant to subparagraph (B), the amount to be paid by the manufacturer to the buyer may be reduced by the manufacturer by that amount directly attributable to use by the buyer prior to the time the buyer first delivered the vehicle to the manufacturer or distributor,

> or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity.

(Civ. Code, § 1793.2, subd. (d)(2)(C).)

In the case of an automobile, the Legislature appears to have concluded that a vehicle's useful life is roughly 120,000 miles, and that the buyer should be required to pay for the proportion of his trouble-free use of the vehicle.

> The amount directly attributable to use by the buyer shall be determined by multiplying the actual price of the new motor vehicle paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, by a fraction having as its denominator 120,000 and having as its numerator the number of miles traveled by the new motor vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity.

(Civ. Code, § 1793.2, subd. (d)(2)(C).)

Importantly, when computing the offset, subdivision (d)(2)(C) allows the manufacturer to include only the "actual price of the new motor vehicle paid or payable by the buyer," and "any charges for transportation and manufacturer-installed options," but not collateral charges such as sales tax, use, tax, license fees, or registration fees. (*See* also CACI 3241.)

As we will explain in Part II.A.1.(b). of this brief, below, the Legislature's addition of the words "of the new motor vehicle" and omission of the collateral charges in the mileage offset contained in subdivision (d)(2)(C) combined with its exclusion of the words "of the new motor vehicle" and inclusion of collateral charges in subdivision (d)(2)(B) supports the view that post-sale registration fees are included in the "actual price paid or payable by the buyer" under subdivision (d)(2)(B).

2. The remedies available in all CWA claims

The remedies available in all CWA claims (CWA Warranty Derivative Obligations, breach of implied warranty claims, breach of express warranty claims, etc.), are set forth in subdivisions (b)(1) and (2) of the CWA:

> (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.
>
> (2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

(Civ. Code, § 1794, subd. (b).)

Courts considering this language have uniformly concluded that a buyer asserting CWA claims may choose to revoke acceptance of their product and to sue for a refund of the purchase price of the product, and may also recover the remedies contained in Commercial Code sections 2711, 2712, 2713, 2714, and 2715. (*Mocek v. Alfa Leisure, Inc.*, *supra*, 114 Cal.App.4th at 406; *Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 620.)

II.
THE COURT OF APPEAL ERRED WHEN IT CONCLUDED THAT PLAINTIFF WAS ONLY ENTITLED TO RECOVER THE REGISTRATION FEE THAT PLAINTIFF PAID WHEN HE ACQUIRED THE VEHICLE

The Court of Appeal's conclusion that Plaintiff was only entitled to recover the registration fee that he paid when he acquired the vehicle was incorrect for two independent reasons.

First, under subdivision (d)(2) of Civil Code section 1793.2, Plaintiff was entitled to recover all of the registration fees actually paid or payable in connection with the vehicle. (*See* Part II.A. of this brief, below.)

Second, Plaintiff was entitled to recover his post-sale registration fees as incidental damages authorized by Civil Code section 1794. (*See* Part II.B. of this brief, below).

A. Plaintiff was entitled to recover all of his registration fees pursuant to Defendant's Offer of Judgment and subdivision (d)(2)(B) of Civil Code section 1793.2 because both authorized Plaintiff to recover the "actual price paid or payable by the buyer," and "including any collateral charges such as . . . registration fees"

Even though subdivision (d)(2)(B) of section 1793.2 explicitly authorizes recovery of "registration fees," the Court of Appeal concluded that Plaintiff was only entitled to recover the initial registration fee that he paid when he acquired the vehicle, and not the registration fees and non-operational fee that he paid thereafter. (Typ. Op., p. 2.) The Court of Appeal reasoned that the CWA's Repurchase Remedy "does not require payment of vehicle registration renewal fees and related costs incurred after the initial purchase or lease." (Typ. Op., p. 2 [emphasis added].)

The Court of Appeal's conclusion that subdivision (d)(2)(B) did not permit Plaintiff to recover post-sale registration fees was wrong for two reasons.

First, as explained in more detail in Part II.A.1. of this brief, the plain language of the statute permits a buyer to recover the "**actual price paid or payable** by the buyer," and "including any collateral charges such as . . . **registration fees**." (Civ. Code, § 1793.2, subd. (d)(2).) Nothing in the statute limits the buyer's recovery to items that were "incurred" in connection with the vehicle's acquisition.

Second, and alternatively, as explained in Part II.A.2. of this brief, even if the words "payable by the buyer" are limited to items that are incurred at the time the vehicle was acquired, a person who acquires a motor vehicle incurs a legal obligation at the time the vehicle is acquired to register his vehicle with the Department of Motor Vehicles and to renew that registration annually until he disposes of it. Thus, even though the registration fees are only paid annually, the legal obligation to register the vehicle is incurred at the time of the sale and thus "any . . . registration fees" paid in connection with the vehicle are recoverable.

1. The remedies available to the buyer under the CWA Repurchase Remedy are not limited to those incurred at the time the vehicle is acquired

Under the terms of the Defendant's Offer of Judgment, Plaintiff was entitled to recover the CWA Repurchase Remedy described in Part I.E.1. of this brief, above. (AA 18-19, ¶ 1 [Defendant's Offer of Judgment under quotes from CWA Repurchase Remedy]; Civ. Code, § 1793.2, subd. (d)(2)(B) and (C) [setting forth the Repurchase Remedy].)

The CWA Repurchase Remedy consists of two subdivisions of Civil Code section 1793.2. Subdivision (d)(2)(B) defines the vehicle-related items that are and are not recoverable and subdivision (d)(2)(C) grants the manufacturer an offset based upon the buyer's trouble free use of the vehicle.

In relevant part, subdivision (d)(2)(B) provides as follows:

> (B) In 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, and including **any collateral charges such as** sales or

use tax, license fees, **registration fees, and other official fees** . . . .

(Civ. Code, § 1793.2, subd. (d)(2)(B) [emphasis added].)

Several aspects of this language are worthy of note. First, the CWA Repurchase Remedy describes the remedy that the manufacturer must offer at the time that it repurchases a defective vehicle. The words "actual price paid or payable by the buyer" refers to the price that the buyer has actually paid and the price that remains actually payable at the time the vehicle is repurchased, and not the price that the buyer agreed to pay at the time he purchased it.

Second, the CWA repurchase remedy explicitly authorizes the recovery of "registration fees," and not merely "the registration fee." The use of the plural "fees" is an explicit recognition that the remedy is not limited to the registration fee paid during the first year of ownership. If the legislature had intended to limit the buyer to recovering a single registration fee, it would have used the singular ("fee") rather than the plural ("fees"), as it did when authorizing recovery of "use tax" and "sales tax" rather than "use taxes" and "sales taxes." (Civ. Code, § 1793.2(d)(2)(B) ["and including any collateral charges such as sales or use **tax**, license **fees**, registration **fees**, and other official **fees** . . . ."].)

Third, the statute contains no language limiting the buyer's remedy to amounts paid or payable to any specific person or entity, and it contains no limitations on when those amounts need to have been "paid or payable" in order to be recoverable. (*Id.*) The relevant language also contains no language specifically limiting the words "actual price paid or payable by the buyer" to the amounts paid or payable "for the new motor vehicle," even though other sections of the CWA do use such language. (*See* Part II.A.1.(b). of this brief, below.)

(a). The Court of Appeal's contrary conclusion was incorrect

Despite the plain statutory language, the Court of Appeal incorrectly concluded that subdivision (d)(2)(B) only permitted Plaintiff to recover the registration fee that was "incurred" in connection with the vehicle's acquisition. (Typ. Op., p. 2, ¶ 3.) The Court of Appeal's conclusion that the remedies afforded to buyers are limited to those "incurred" at the time the vehicle is acquired is incompatible with the plain language of the statute as discussed above, is incompatible with several related statutory provisions, is incompatible with all of the existing CWA case law, and is incompatible with the CWA's legislative history.

(b). The mileage offset demonstrates a legislative intent to allow the buyer to recover registration fees that are paid after the vehicle is acquired

In order to alleviate the potential unfairness of allowing a buyer to recover everything that he paid in connection with the vehicle under subdivision (d)(2)(B) of the CWA Repurchase Remedy, subdivision (d)(2)(C) grants the manufacturer a mileage offset. Under subdivision (d)(2)(C), the manufacturer may request[4] that the buyer to pay for his use of the vehicle based upon the period of trouble-free use that he made of the vehicle:

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[4] In the Superior Court, the Defendant failed to meet its burden of proof regarding the mileage offset permitted under subdivision (d)(2)(C) of section 1793.2. (AA 166-167.) Because Defendant failed to meet its burden of proof regarding the deduction in this case, Plaintiff was entitled to recover all of the registration fees that he paid while he owned the vehicle.

> When restitution is made pursuant to subparagraph (B), the amount to be paid by the manufacturer to the buyer may be reduced by the manufacturer by that amount directly attributable to use by the buyer prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity.

(Civ. Code, § 1793.2, subd. (d)(2)(C).)

In the case of an automobile, the Legislature appears to have concluded that a vehicle's useful life is roughly 120,000 miles, and that the buyer should be required to pay for his use based upon the miles driven prior to the first repair attempt:

> The amount directly attributable to use by the buyer shall be determined by multiplying the actual price of the new motor vehicle paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, by a fraction having as its denominator 120,000 and having as its numerator the number of miles traveled by the new motor vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity.

(Civ. Code, § 1793.2, subd. (d)(2)(C).)

Importantly, subdivision (d)(2)(C) does not allow the manufacturer to include collateral charges such as sales tax, use tax, or registration fees when computing the offset. While subdivision (d)(2)(B) allows the buyer to recover the "actual price paid or payable by the buyer" including transportation fees, collateral charges, and incidental damages, subdivision (d)(2)(B) is more restrictive: It computes the offset using only "the actual price of the new motor vehicle paid or payable by the buyer" and includes only transportation charges. (*Id*; *See also* CACI 3241, final ¶.)

The mileage offset demonstrates a legislative intent that the buyer be allowed to recover all registration fees incurred in connection with the vehicle, for two reasons.

First, the language in the mileage offset demonstrates that the Legislature intended the words "actual price paid or payable by the buyer" in subdivision (d)(2)(B) to have a different meaning than the words "actual price **of the new motor vehicle** paid or payable by the buyer" contained in subdivision (d)(2)(C).

The Legislature's inclusion of the words "of the new motor vehicle" in subdivision (d)(2)(C) coupled with that subdivision's exclusion of collateral charges such as registration fees, sales tax, etc., indicates that subdivision (d)(2)(B)'s remedy, which omits the words "of the new motor vehicle" but allows the recovery of collateral charges such as registration fees, was intended to allow the recovery of the "actual price paid or payable by the buyer" of things *other than* "the new motor vehicle." Thus, the collateral charges included in subdivision (d)(2)(B) are not limited to those paid at the time of the sale.

Second, in the offset calculation, the Legislature specifically stated that the buyer's obligation to pay for his use of the vehicle ends at "the time the buyer first delivere[s] the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem." (Civ. Code, § 1793.2, subd. (d)(2)(C).) This demonstrates a legislative conclusion that buyers who are stuck with lemon vehicles should only be required to pay for their use of the vehicle prior to the first repair attempt. The Legislature presumably took into account the fact that once the vehicle has an unrepaired defect, the buyer is no longer receiving the benefit of the bargain. Interpreting the CWA to allow a buyer to recover post-sale registration fees is consistent with the legislative conclusion that consumers should not be required to bear vehicle related costs after the defects arise.

(c). The inclusion of "use tax" among the items recoverable as collateral charges evidences an intent to allow buyers to recover items that are incurred after vehicle's acquisition

The Legislature's intent to allow a buyer to recover items *actually* paid or payable relating to the vehicle, even after its acquisition, is also supported by the Legislature's inclusion of "use tax" alongside "registration fees" in the list of items that are recoverable as "collateral charges." (Civ. Code, § 1793.2, subd. (d)(2)(B)["and including any collateral charges such as sales or **use tax**, license fees, registration fees, and other official fees . . ."].) Unlike the sales tax, which is a tax on the privilege of selling goods in California and which arises at the time of the sale, "use tax" is a tax paid by the buyer directly to the State of California for the privilege of storing or using a good in California. (Cal. Rev. & Tax. Code, § 6201.)

By its nature, the use tax only arises when the sales tax does not, and only after the goods are actually "stored, used, or consumed in California." (*City of South San Francisco v. Board of Equalization* (2014) 232 Cal.App.4th 707, 713 ["California imposes a use tax on tangible personal property that is (1) purchased from a retailer, (2) stored, used, or consumed in this state, and (3) for which no California sales tax was paid at the time of purchase."].)

Because the use tax only taxes "use" and "storage," the use tax necessarily is incurred, becomes payable, and is actually paid *after* the sale is completed and the use or storage in California actually happens. (*Id*; 18 C.C.R. § 1620(b).)

If the Legislature had intended to limit "collateral charges" to items that were incurred at the time of the sale, it would not have listed "use tax" in that category. Because "sales or use tax, license fees, registration fees, and other official fees" are all categorized as "collateral charges," it follows

that the Legislature must have intended to allow the recovery of items "paid or payable" after the sale was completed as a legal consequence of owning the vehicle.

(d). The inclusion of "sales tax" among the items recoverable as collateral charges evidences an intent to allow buyers to recover items that are paid even though they are not "incurred" in connection with vehicle's acquisition

The Legislature's inclusion of "sales tax" alongside "registration fees" in the list of items that are recoverable as "collateral charges" also rebuts any claim that the Legislature intended to limit the amounts "paid or payable" to items that are legally "incurred" by the buyer at the time of the sale. (Civ. Code, § 1793.2, subd. (d)(2)(B)["and including any collateral charges such as sales or use tax, license fees, registration fees, and other official fees . . . ."].)

Contrary to popular belief, sales tax is not a tax that is "incurred" by the buyer. Rather, sales tax is a tax *on the seller* for the privilege of conducting business in California. "[U]nder California's sales tax law, the taxpayer is the retailer, not the consumer." (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1103.)

While it is true that sellers often choose to pass the sales tax on to buyers, the buyer does not incur a legal obligation to do so at the time of the sale, or at any other time. The Legislature's inclusion of "sales tax" in the list of collateral charges thus demonstrates a legislative intent to allow buyers to recover payments made *in connection with the vehicle*, and not only, as the Court of Appeal concluded, items that are "incurred" at the time the vehicle is acquired.

(e). If the Legislature had intended to restrict the repurchase remedy, it would have used language similar to that which appears in the replacement remedy

In addition to the CWA Repurchase Remedy at issue on this appeal, the Legislature created a separate remedy that is available to consumers who preferred to receive a replacement vehicle in subdivision (d)(2)(A) of section 1793.2. In that remedy, the Legislature included language limiting recovery of collateral items to those incurred in connection with the replacement vehicle. (Civ. Code, § 1793.2, subd. (d)(2)(A) ["[t]he manufacturer also shall pay for, or to, the buyer the amount of any sales or use tax, license fees, registration fees, and other official fees **which the buyer is obligated to pay in connection with the replacement** . . . ." (Civ. Code, § 1793.2, subd. (d)(2)(A) [emphasis added].)

The Legislature's use of limiting language in subdivision (d)(2)(A) (with respect to replaced vehicles), combined with its exclusion from subdivision (d)(2)(B) (with respect to repurchased vehicles), confirms that the Legislature did not intend to impose such limitations on collateral items when a buyer chooses restitution rather than replacement.

(f). Case law interpreting the CWA supports Plaintiff's proposed interpretation

The Court of Appeal's narrow construction of the CWA is also incompatible with all of the other published cases that have interpreted the CWA.

For example, this Court has declared that the CWA "is manifestly a remedial measure, intended for the protection of the consumer; it should be given a construction calculated to bring its benefits into action." (*Murillo*, *supra*, 17 Cal.4th at 990.) The Court of Appeal's decision to re-write the statute so that it only allows recovery of items that are "incurred" when the

vehicle was acquired is the opposite of giving the statute a broad construction that favors consumers.

Likewise, in *Mitchell, supra*, 80 Cal.App.4th at 36, the Court of Appeal explained that the CWA Repurchase Remedy "is intended to restore the *status quo ante* as far as is practicable . . . ." (*Id.*) Allowing buyers to recover all of the registration fees that are paid or payable in connection with the vehicle furthers that purpose.

Furthermore, in *Mitchell*, the Court of Appeal addressed the question of whether finance charges were recoverable as part of the "actual price paid or payable." Like registration fees, finance charges are paid over time by the buyer. Finance charges are the fee for the privilege of borrowing money, and not part of the vehicle's purchase price. Like registration fees (which can be avoided by selling the vehicle or registering it as "non-operational"), finance charges are completely avoidable by the buyer if he simply pays off the loan early. However, unlike registration fees, finance charges are not explicitly listed as a recoverable damage. (Civ. Code, § 1793.2, subd. (d)(2)(B).)

Nevertheless, the Court of Appeal concluded that all finance charges actually paid were recoverable as part of the "actual price paid or payable by the buyer" because "[a] more reasonable construction is that the Legislature intended to allow a buyer to recover **the entire amount actually expended for a new motor vehicle**, including paid finance charges, less any of the expenses expressly excluded by the statute." (*Mitchell, supra*, 80 Cal.App.4th at 37 [emphasis added].)

Plaintiff agrees with the *Mitchell* Court that a buyer should be allowed to recover the entire amount actually expended for a new motor vehicle, and not merely those items which are legally incurred at the time of the sale. Because registration fees are explicitly listed as recoverable, all of the reasons that *Mitchell* listed for allowing the recovery of post-sale

finance charges (which are not listed as recoverable damages) apply with even greater force to the recovery of registration fees.

In addition, the Courts of Appeal have consistently interpreted the CWA in keeping with its command that manufacturers act "promptly" when repurchasing defective vehicles that cannot be repaired under subdivision (d)(2) of section 1793.2.

For example, in *Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1053, the Court of Appeal rejected a defense argument that the buyer has a duty to mitigate his damages. The Court explained that "the imposition of a requirement that Lukather mitigate his damages so as to avoid rental car expenses—after GM had a duty to respond promptly to Lukather's demand for restitution—would reward GM for its delay in refunding Lukather's money." (*Id.*)

Similarly, in *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1244, the Court of Appeal rejected a defense argument that the CWA should be construed to allow it an equitable offset for use beyond that permitted by the formula contained in subdivision (d)(2)(C). The Court of Appeal concluded that "[a]n offset for the buyer's use of a car when a manufacturer, already obliged to replace or refund, refuses to do so, would create a disincentive to prompt replacement or restitution by forcing the buyer to bear all or part of the cost of the manufacturer's delay. Exclusion of such offsets furthers the Act's purpose." (*Jiagbogu, supra,* 118 Cal.App.4th at 1244.)

The plain purpose of the CWA Repurchase Obligation is to require manufacturers to "promptly" offer to repurchase or replace motor vehicles that cannot be repaired. (Civ. Code, § 1793.2, subd. (d)(2).) Interpreting the statute to allow buyers to recover "registration fees" that are incurred as time passes will encourage warrantors to act "promptly." On the other hand, requiring buyers to bear the additional registration fees that accrue as

time passes "would create a disincentive to prompt replacement or restitution by forcing the buyer to bear all or part of the cost of the manufacturer's delay." (*Jiagbogu, supra*, 118 Cal.App.4th at 1244.)

(g). The Court of Appeal's conclusions are inconsistent with the legislative history

The statutory language at issue on this appeal became part of the CWA in 1987, as part of Assembly Bill 2057. (App. Req. for Judicial Notice, p. 8 (hereafter "RJN ##").)

Accompanying the Legislative History for AB 2057 are a number of reports from various committees and governmental agencies. To the extent that each of them references the recovery of "registration fees," each of them does so without any indication that registration fees are limited to the registration fee paid incurred in connection with the vehicle's acquisition. (RJN 58, §4)a) ["In case of restitution, the manufacturer must pay the actual price paid including any charges for transportation and manufacturer-installed options, sales tax, license fees, and registration fees plus incidental damages."]; RJN 61, § 2 ["Ensures that owners of 'lemon' cars will be reimbursed for sales tax and license fees when manufacturer buys back the vehicle."]; RJN 75 ["The bill also expands and clarifies some of the provisions of the lemon law. For example . . . the bill establishes a formula for determining the buyer's obligation to the manufacturer for the use of the vehicle prior to discovery of the defect. The bill also provides for reimbursement of sales tax, official fees, and incidental damages . . . ."]; RJN 76 ["The bill more clearly specifies what must be done if the manufacturer replaces a vehicle and provides a description of items of cost which must be refunded to a buyer if a refund is ordered."]; RJN 83, § 3.d) [Same as RJN 58]; RJN 98 [same]; RJN 122 [same]; RJN 126 [same]; RJN 134, ¶ 2 ["The Bill has two main goals: ¶ First, it will make sure that

owners of 'lemon' cars will receive full refunds."], RJN 134, ¶ 3 ["Briefly, AB 2057 does the following: ¶ . . . ¶ Require the manufacturer to reimburse the owner of a 'lemon' for sales tax, license and registration fees and incidental costs . . . ."]; RJN 135 ["I believe that the Bill will result in better treatment of the consumer, ensure that owners of 'lemons' get a fair hearing, and provide them with full refunds when they are sold a 'lemon' . . . ."].)

If the Legislature had intended to limit the buyer's recovery to the registration fee incurred in connection with the sale, one of these reports surely would have mentioned that fact.

Instead, the Department of Consumer Affairs explained in an Enrolled Bill Report that:

> the present law also does not specify what costs are included when awarding restitution or replacement. Restitution or replacement awards under current practice often do not make the buyer "whole" (i.e., compensate him or her for expenses such as sales tax, license and registration fees, and towing or rental car costs).

(RJN 152, ¶ 6.)

> The bill would give the buyer the option to elect restitution instead of replacement of a "lemon." The manufacturer would be required to reimburse sales or use tax, license and registration fees and incidental damages . . . .

(RJN 154, ¶ 5.)

In September of 1987, the author of AB 2057 wrote a letter to then Governor Deukmejian urging him to sign the bill. (RJN 139.) Among other things, Assemblyperson Tanner explained that her concern was not with the first year's registration; rather, it was with the fact that under existing law, a buyer would not even receive the unused portion of the final year's registration:

> [T]he original legislation did not give adequate direction on the refunds that consumers should be given when they are sold automobiles so defective that they cannot be repaired after a reasonable number of attempts. Because of this, owners of "lemons" now **do not receive a refund on** sales tax and **the unused portion of the license and vehicle registration fees** – an amount that is often in excess of $1,000 or more – when an auto manufacturer buys back a defective product. **AB 2057 establishes a reasonable method for fairly compensating "lemon" car owners.**

(RJN 139, ¶ 2 [emphasis added].)

The Court of Appeal's conclusion that the CWA only permits a buyer to recover the first year's registration fee undid what Assemblyperson Tanner explicitly set out to do, i.e. to establish a reasonable method for fairly compensating lemon car owners that ensured that they would receive, at a minimum, the unused portion of their most recent registration fees.

As we explain, above, the CWA allows the buyer to recover all of the registration fees paid in connection with their ownership of the vehicle. (*See* Parts II.A., and I.E.1. of this brief, above.) As Assemblyperson Tanner explained in her letter, authorizing the buyer to recover "registration fees," rather than "the registration fee," was "a reasonable method for fairly compensating 'lemon' car owners." (RJN 139, ¶ 2.)

Instead, the Court of Appeal concluded that the buyer would only receive a portion of the first year's registration fee, even if it had been entirely used by the time the vehicle was repurchased, as was the case here. As a result, under the Court of Appeal's conclusion, any buyer who owns the vehicle longer than one-year (i.e., almost all of them[5]) would never

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[5] It is the rare lemon that is identified and repurchased during the first year of ownership.

receive the unused portion of their most recent registration fees back as Assemblyperson Tanner intended.

For the reasons explained above, the Court of Appeal's conclusion was inconsistent with the language in the CWA and the intent of Assemblyperson Tanner.

> (h). The manufacturer chooses when and how it complies with its obligation to repurchase or replace a new motor vehicle as required by subdivision (d)(2) of Civil Code section 1793.2

By its nature, subdivision (d)(2) of Civil Code section 1793.2 imposes an obligation on automobile manufacturers to promptly repurchase or replace any vehicle that that is not repaired within a reasonable number of attempts. Specifically,

> [i]f the manufacturer or its representative in this state is unable to service or repair a new motor vehicle, as that term is defined in paragraph (2) of subdivision (e) of Section 1793.22, to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle in accordance with subparagraph (A) or promptly make restitution to the buyer in accordance with subparagraph (B).

(Civ. Code, § 1793.2, subd. (d)(2).)

Stated another way, "the Act places an affirmative duty on the buyer to deliver a nonconforming product for repair, and an affirmative duty on the manufacturer to promptly replace the product or refund the purchase money if repairs are unsuccessful after a reasonable opportunity to repair." (*Jiagbogu, supra*, 118 Cal.App.4th at 1244.)

Inherent in the statutory procedure is that the buyer must make a reasonable number of attempts, which necessarily requires the passage of

time and the obligation to pay additional registration fees as that time passes.

Furthermore, it is no secret that manufacturers routinely ignore the obligation to "promptly" repurchase or replace, and then delay is as long as possible:

> In reality, as indicated by the facts alleged at trial by the Krotins, the manufacturer seldom on its own initiative offers the consumer the options available under the Act: a replacement vehicle or restitution. Therefore, as a practical matter, the consumer will likely request replacement or restitution. But the consumer's request is not mandated by any provision in the Act. Rather, the consumer's request for replacement or restitution is often prompted by the manufacturer's unforthright approach and stonewalling of fundamental warranty problems.

(*Krotin*, *supra*, 38 Cal.App.4th at 303.)

Manufacturer efforts to delay and blame the buyer are well-known in the process of performing repairs, as well:

> The record demonstrates that Honda made no serious attempt to discover the cause of Schreidel's complaints. Rather the record shows that Honda tended to attribute ulterior motives to Schreidel and failed to diagnose the problems even though Schreidel brought the car into a Honda dealership for repair over an eleven month period on six separate occasions. In late September 1980, the service manager at the dealership advised Schreidel that the matter was out of his hands and that a field representative would contact her. Despite repeated calls and letters, no representative contacted her or examined the car until May 1991, two days before an arbitration hearing Schreidel had instituted to obtain a replacement. Then the representative asked to look at the car in order to fix it, not to replace it. The customer relations department characterized her complaint as a customer problem and closed its file when the dealership could not duplicate her complaints. No procedure was ever instituted to replace her car.

(*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1254.)

Indeed, Defendant's efforts to delay were even evident in this case, where it responded to the lawsuit by stalling for six months before making a settlement offer, and then by refusing to pay and causing another six month delay. (*See* Statement of Facts, above, §§ B, C, and D.)

The consequence of this delay is obvious: "[P]urchasers of unsatisfactory vehicles may be compelled to continue using them due to the financial burden to securing alternative means of transport for a substantial period of time." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 897–898.)

The added burden of renewing the registration compounds the injuries that the buyers suffer as a result of manufacturer delays. A recent study publicly revealed that the average consumer does not have $500 in emergency funds available. Yet, the cost to renew vehicle registration in California is often in excess of $400.00.

Ultimately, the question presented by this case is: Who should pay the registration fees while the manufacturer either ignores, or stonewalls, its obligation to repair and then to repurchase or replace a vehicle as required by subdivision (d)(2) of Civil Code section 1793.2?

Because it is the manufacturer who ultimately determines when and under what conditions the vehicle is repurchased, and because the manufacturers are notorious for failing to do so "promptly," there is nothing unfair about requiring the manufacturer to reimburse buyers for any registration fees that they pay in connection with their ownership of the vehicle. (*See also* Cal. Comm. Code § 2510(2) [post-rescission risk of loss also assigned to the seller, and not the buyer].)

2. All registration fees that are paid in connection with the ownership of a vehicle are incurred at the time a vehicle is acquired

Alternatively, even if the Court of Appeal was correct, and even if the Legislature only intended to permit a buyer to recover the registration fee that was "incurred" at the time of the sale, the Court of Appeal was mistaken when it concluded that renewal registration fees are not incurred at the time of the sale.

Once a vehicle is acquired, the owner incurs a legal obligation to register it with the Department of Motor Vehicles and to renew the registration annually until he disposes of it, or in the case of a lemon, until it is repurchased by the manufacturer. (Veh. Code, § 4150 ["Application for the original or renewal registration of a vehicle of a type required to be registered under this code shall be made by the owner . . . ."]; Veh. Code, § 4601 ["every vehicle registration and registration card expires at midnight on the expiration date designated by the director pursuant to Section 1651.5, and shall be renewed prior to the expiration of the registration year."].) As demonstrated by this case, a buyer can satisfy that obligation either by paying the full license fees, or by registering the vehicle with the DMV as "non-operational." (AA 38 [Plaintiff did both at various times].) Indeed, under the terms of the lease signed by Plaintiff, he was obliged to pay "registration fees . . . over the term of your lease." (AA 54, § 12.)

In this regard, payment of registration fees should be regarded as no different than monthly loan payments. When a buyer purchases a vehicle on credit, he may either make payments over time or voluntarily pay the loan off early and avoid those finance charges. He legally "incurs" finance charges for the privilege of borrowing the money to buy the vehicle only if he chooses not to pay the loan off early, but those finance charges are nevertheless recoverable as part of the amount paid or payable. (*Mitchell*,

supra, 80 Cal.App.4th 32, 35 [amount "paid or payable" includes finance charges that are incurred as a result of making payments over time because "the Legislature intended to allow a buyer to recover the entire amount actually expended for a new motor vehicle, including paid finance charges, less any of the expenses expressly excluded by the statute."].)

Here, the Court of Appeal explicitly concluded that the amount "payable" included monthly loan payments because they were "incurred" at the time of the sale, even though they were payable later. (Typ. Op., p. 5 ["If the phrase 'or payable' was not included in the statute" buyers who financed "would only receive restitution for the amount already paid, leaving them liable for all future financing payments. Such a result would be contrary to the statute's remedial purpose."].)

The Court of Appeal's decision to treat post-sale Registration Fees differently from finance charges simply because they were paid to the DMV after the sale was concluded was error, because, once a person becomes the owner of a motor vehicle, he incurs a statutory obligation to register the vehicle until he no longer owns it. (Veh. Code, §§ 4000, 4150, and 4601.)

Accordingly, even if recovery of amounts "paid or payable" is limited to items that were "incurred" in connection with the acquisition of the vehicle, the registration fees that Plaintiff became obliged to pay when he leased the vehicle and which he actually did pay in 2013 and 2014, and the non-operational fee paid in 2015, should have been reimbursed as part of the amount "paid or payable by the buyer."

B. Plaintiff was entitled to recover post-sale registration fees pursuant to the terms of Defendant's Offer of Judgment and subdivision (d)(2)(B) of Civil Code section 1793.2 because both authorized Plaintiff to recover "any incidental damages to which the buyer is entitled under Section 1794 . . . ." and those incidental damages include registration fees

Even if Plaintiff was not entitled to recover all of his registration fees as part the amount "paid or payable," Plaintiff was also entitled to recover the registration fees that he paid in 2013, 2014, and 2015 under another provision of the Offer of Judgment. Specifically, both the Offer of Judgment and subdivision (d)(2)(B) of section 1794 permitted Plaintiff to recover "any incidental damages to which the buyer is entitled under Section 1794 . . . ." (AA 18-19, ¶ 1; Civ. Code, § 1793.2, subd. (d)(2)(B).) As we will explain, the authorization to recover incidental damages under Civil Code section 1794 encompassed the post-sale registration fees that Plaintiff claimed.

1. Under the plain language of the relevant statutes, post-sale registration fees are recoverable as incidental damages

Both the Offer of Judgment and subdivision (d)(2)(B) permit the buyer to recover "any incidental damages to which the buyer is entitled under Section 1794 . . . ." (AA 18-19, ¶ 1; Civ. Code, § 1793.2, subd. (d)(2)(B).) Subdivision (b) of Civil Code section 1794 provides, among other things, that a buyer may recover damages pursuant to Commercial Code section 2715. (Civ. Code, § 1794, subd. (b).) And section 2715 of the Commercial Code defines "incidental damages" to include:

> [E]xpenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(Comm. Code, § 2715(1).)

Because annual registration fees (or non-operational fees) are legally required to be paid under California law, those fees are necessarily "reasonably incurred" in connection with the "care and custody" of the vehicle. (Veh. Code, §§ 4000, 4150, and 4601.)

They are also a "reasonable expense incident to the delay or other breach." In this case, the "delay" was in Defendant's failure to repurchase or replace the vehicle as required by the CWA Repurchase Obligation. (*See* Part I.D.1 of this brief, above; AA 7-8 [Complaint alleges violation of CWA Repurchase Obligation].) The "other breach" refers to Plaintiff's allegation that Defendant breached the implied warranty of merchantability, which by necessity arose either at the time of the sale or within one year thereafter. (AA 2-4 [Complaint alleges violation of IWOM]; *See* Part I.D.4. of this brief, above [IWOM arises at the time of the sale and continues for one-year thereafter].)

The registration fees incurred at the conclusion of the first year of Plaintiff's ownership and thereafter were thus recoverable as "expenses reasonably incurred in . . . care and custody of goods rightfully rejected" and/or an "other reasonable expense incident to the delay or other breach."

Accordingly, Plaintiff was entitled to recover his post-sale registration fees as incidental damages allowed by the terms of the offer, by the terms of Civil Code section 1794, and by the terms of Commercial Code section 2715.

2. The Court of Appeal's reasons for concluding that post-sale registration fees are not recoverable as incidental damages were wrong

The Court of Appeal rejected Plaintiff's claim that post-sale registration fees were recoverable as "incidental damages" by pointing to the words "including, but not limited to, reasonable repair, towing, and

rental car costs actually incurred by the buyer," and then interpreting those words as meaning that all incidental damages must be limited to those that are caused by the defects in the vehicle. (Typ. Op., pp. 4-5.) In doing so, the Court of Appeal erred, for a number of reasons.

First, in making this interpretation the Court of Appeal effectively re-wrote the words of the statute. The plain meaning of the words "including, but not limited to" are that the words that follow do not limit the applicability of the words prior to it. By allowing the words that follow to limit the words that preceded it, the Court of Appeal has re-written the statute so that it now reads "including, *and limited to damages of a similar nature* as the following:"

Second, the Court of Appeal's conclusion that reasonable repair, towing, and rental car charges incurred by the buyer evidence a legislative intent to limit all damages to those caused by defects is simply wrong. As explained in Part I of this brief, the CWA imposes a whole host of obligations upon manufacturers, including implied warranty obligations, express warranty obligations, and warranty derivative obligations (including the CWA Repurchase Obligation). (*Id.*)

The incidental damages that are recoverable should be defined by the relevant claim asserted by the buyer and by the text of the relevant statutes themselves. If the words "including, but not limited to" were supposed to impose a limit on the incidental damages that are recoverable under the CWA, the limitation should be to damages that were caused by the particular violation(s) at issue in the case.

Because the damages awarded were under the CWA Repurchase Obligation, one of the violations at issue is the Defendant's failure to promptly offer to repurchase or replace the vehicle. (*Gavaldon, supra*, 32 Cal.4th 1246, 1262 [CWA Repurchase Obligation damages are *only* available when a buyer prevails on a claim for violation of the CWA

Repurchase Obligation].) Accordingly, if any judicial limitation upon damages was needed, it should allow damages based upon Defendant's delay in repurchasing the vehicle, and not merely the damages caused by the defects.

Third, the Court of Appeal's conclusion that a limitation on "incidental damages" is necessary to prevent abusive claims (such as those for gasoline and car washes) was wrong, because the relevant statutes themselves already contain appropriate limitations. Civil Code section 1793.2(d)(2)(B) authorizes "any incidental damages to which the buyer is entitled under Section 1794 . . . ." Section 1794(b) then refers to the provisions of Commercial Code section 2715. (Civ. Code, § 1794, subd. (b)(2).) And Commercial Code section 2715 provides that:

> Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(Com. Code § 2715 [emphasis added].)

The words "seller's breach" and "any other reasonable expense incident to the delay of other breach" necessarily require that damages be evaluated by and tied to the particular claims alleged.

In this case, the claims alleged included a breach of the implied warranty of merchantability (which had a duration of only one year), a breach of the obligation to repair under the express written warranty, and the failure to offer to repurchase the vehicle after a reasonable number of repair attempts had failed. (AA 2-4 [Alleging breach of IWOM], 6 [Alleging Breach of Express Warranty], 7-8 [Alleging violation of CWA Repurchase Obligation]; *See* Part I of this brief, above, discussing each of those claims and their respective elements.)

The post-sales registration fees incurred by Plaintiff all easily qualify as "resulting from" or "incident to" the alleged breaches for the reasons we discussed above. However, neither gasoline nor car washes would, at least in this case.

To be sure, there are cases where a buyer might justifiably claim fuel costs or car washes as incidental damages. If the car comes with a special type of paint and requires an expensive monthly wash to protect it, the car wash might well be recoverable as an incidental damage caused by the manufacturer's delay in repurchasing the vehicle, even if the defect was with some other component. And some lemon law cases involve allegations of defects that directly impact fuel economy. In those cases, a buyer might well claim the additional fuel used during transportation as a form of incidental damage.

However, nothing about Plaintiff's argument would compel the recovery of fuel and car washes in every case. The Court of Appeal's concern that allowing the recovery of post-sale registration fees as incidental damages would open the floodgates to claims of gasoline and car washes was unwarranted.

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CONCLUSION

The Court of Appeal's Opinion should be reversed, and the Court of Appeal should be directed to enter a new Opinion reversing the Superior Court's Order, and directing the Superior Court to award Plaintiff the registration fees and non-operational fee that he paid in 2013, 2014, and 2015.

DATED: May 2, 2018

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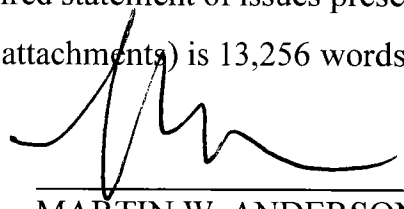
CERTIFICATE OF WORD COUNT

I, Martin W. Anderson, hereby certify as follows:

I am appellate counsel for Plaintiff and Appellant Allen Kirzhner. According to the word processing program I used to prepare this brief, the brief (excluding tables, the required statement of issues presented for review, this certificate, and any attachments) is 13,256 words long.

DATED: May 2, 2018



MARTIN W. ANDERSON

PROOF OF SERVICE (CCP § 1013A(3))

STATE OF CALIFORNIA, COUNTY OF ORANGE

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