

No.: S274625

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

EVERARDO RODRIGUEZ et al.

Plaintiffs and Appellants,

vs.

FCA US, LLC,

Defendant and Respondent.

Court of Appeal,
Fourth Appellate District, Division II

No. E073766

Riverside County Superior Court

No. RIC1807727

On Review of a Judgment Granting a Petition for Review

**APPLICATION TO FILE *AMICUS CURIAE* BRIEF;
AMICUS CURIAE BRIEF IN SUPPORT OF EVERARDO RODRIGUEZ**

Erik Whitman, SBN 297397
Alessandro G. Manno, SBN 328746
Lara F. Rogers, SBN 342780
800 Parkview Dr. N, El Segundo, CA 90245
310-442-1410

whitman@nolemon.com

sandro@nolemon.com

lara@nolemon.com

Attorneys for *Amicus Curiae* Consumer Law Experts, P.C.

**CERTIFICATE OF
INTERESTED ENTITIES OR PERSONS**

This is the initial certificate of interested entities or persons submitted on behalf of Amicus curiae for Everardo Rodriguez – Consumer Law Experts in the case number listed above.

The undersigned certifies that there are no interested entities or persons that must be listed in this Certificate under California Rules of Court, rule 8.208.

Dated: June 12, 2023

By: s/ Erik Whitman

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Application for Leave to File *Amicus Curiae* Brief

Pursuant to California Rules of Court, rule 8.520(f), *Amicus Curiae* Consumer Law Experts, P.C. hereby applies for permission to file the attached *Amicus* Brief.

Amicus Curiae Brief

Consumer Law Experts, P.C. requests that the attached amicus brief be submitted in support of plaintiff Everardo Rodriguez. Counsel is familiar with all of the briefings filed in this action to date. The concurrently-filed amicus brief addresses the “similar interest-and motive” prong of Code of Civil Procedure section 1291 as interpreted by the civil cases and the impact of declining the application of the Song-Beverly Consumer Warranty Act, California Civil Code § 1790, et seq. on vehicles sold used with the balance of the new vehicle limited express warranty at the time of sale. No party to this action has provided support in any form with regard to the authorship, production or filing of this brief.

STATEMENT OF INTEREST

Consumer Law Experts, P.C. (“CLE”) is a law firm representing consumers all across the State of California, which was founded in 2009. Its attorneys entirely represent consumers who have claims against automobile manufacturers and/or distributors under the Song-Beverly Consumer Warranty Act (“SBA”), California Civil Code § 1790, et seq. CLE has taken a leading role in advancing and protecting the rights of Californians in the courts.

As a law firm specializing in the representation of consumers against automobile manufacturers and/or distributors as a result of their violation of the SBA, CLE is interested in the significant issues presented by the Court of Appeal’s decision in this case as the prohibition of extending the

protections set forth in the SBA to used vehicles sold with the balance of a new vehicle limited express warranty.

INVOLVEMENT OF OTHER PARTIES AND/OR PERSONS

No party or counsel for any party in the pending appeal authored any portion of this *amicus brief* nor made any monetary contribution intended to fund the preparation or submission of the brief. No person or entity made any monetary contribution intended to fund the preparation or submission of the brief, other than *amicus curiae* and her law firm, Consumer Law Experts, P.C.

THIS BRIEF WILL ASSIST THE COURT

This brief will assist the Court by providing arguments and authorities which were not adequately addressed in the briefings submitted by the parties.

SUMMARY OF *AMICUS CURIAE* BRIEF

California Civil Code § 1793.2(d)(2) expressly provides that if a manufacturer or its representative in this state is unable to service or repair a new motor vehicle, as defined in paragraph (2) of subdivision (e) of Section 1793.22, to conform it to the applicable express warranties after a reasonable number of attempts, then the manufacturer is required to promptly repurchase or replace the vehicle. *Cal. Civ. Code* § 1793.2(d)(2). Thus, the only definition provided for what vehicles are afforded the protection under the SBA are those defined by California Civil Code Section 1793.22, paragraph (2) of subdivision (e). New motor vehicles are defined as vehicles that are bought or used primarily for personal, family, or household purposes, a dealer-owned vehicle and a “demonstrator” or other motor vehicle sold with a manufacturer’s new car warranty. *Cal. Civ. Code* § 1793.22(e)(2). It is clear from the legislation that vehicles sold with

the manufacturer new vehicle limited warranty were intended to be covered, without distinction as to whether the purchaser is the original owner, or a subsequent owner.

Jensen v. BMW of North America does not distinguish between used vehicles and demonstrator vehicles and focuses solely on vehicles that have the balance of the new vehicle limited warranty. The Court of Appeal decision in this case creates a distinction that is not supported by current SBA precedents. *Jensen* is also consistent with subsequent precedents that have similar issues regarding the sale of used motor vehicles.

DISCUSSION

I. *Jensen* is still valid caselaw that is consistent with subsequent used car cases

A. *Jensen* sufficiently explains that vehicles sold with the balance of the new vehicle limited warranty where repairs are performed under the new vehicle limited warranty are afforded protection by the Song-Beverly Consumer Warranty Act

Jensen v. BMW of North America, Inc. unambiguously concluded that cars sold with a balance of the remaining new motor vehicle warranty are included within the SBA's definition of "new motor vehicle." *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 123.

The court in *Jensen* examined both the plain language and legislative intent regarding the application of the SBA for demonstrators and other motor vehicles and determined that the two categories are intended to be alternative or separate categories of "new motor vehicle" if they are sold with a manufacturer's new car warranty. *Id.*

BMW in *Jensen* argued that the legislature did not intend to grant protection to every used car with a balance remaining on the new car warranty because of the economic impact on consumers, and the difficulty

in tracing multiple owners to determine their use or abuse of the vehicle. *Id.* at 126-127. The court disagreed with BMW and reasoned that the decision to offer a warranty for a specified length of time involves weighing the benefit of increased sales against the cost of providing service and repair for the duration of the warranty and that BMW was free to change the terms of the express warranties it offers. *Id.* at 127. The SBA reflects the legislature's intent to make car manufacturers live up to their express warranties, *whatever the duration of coverage. Id.*

The Court of Appeal ignores the *Jensen* analysis on this point and merely focuses on the one line in the underlying facts where the plaintiff was told they would receive the full warranty after purchasing the vehicle. Thus, the Court of Appeal entirely missed the point of *Jensen* and created new law which is entirely inconsistent with the *Jensen* holding. Thus, this Court should reverse the Court of Appeal's decision, and/or remand for a ruling which is consistent with the well-established precedent of *Jensen*.

Like *Jensen*, repairs were performed on the Subject Vehicle in this case, which were clearly covered by FCA's express warranty, and similarly, the Subject Vehicle is entitled to the protections of the SBA.

B. *Jensen* is consistent with *Dagher* and *Nunez*

FCA argues that the *Rodriguez* decision is in-line with *Dagher v. Ford Motor Co.* and *Nunez v. FCA US LLC* but paints the picture with too broad a brush.

In *Dagher*, the plaintiff purchased the vehicle from a private party and the court expressly stated that the nature of the acquisition and transfer of the warranty is crucial. *Dagher v. Ford Motor Co.* (2015) 238 Cal.App.4th 905, 923. A private party sale is made where the seller is not engaged in the business of selling, while in a situation where a seller that is

engaged in the business of vehicle selling, the SBA provides coverage. *Id.* Unlike *Dagher*, Petitioner did not purchase the vehicle from a private party, but a dealership engaged in the business of selling vehicles. Thus, Petitioner is a retail buyer from a retail seller, of a new consumer good, and the Court of Appeal's decision in this case is both inconsistent with *Jensen* and *Dagher*. *Dagher, supra*, 238 Cal.App.4th at 924.

In *Nunez*, the plaintiff purchased the vehicle used with the balance of the new vehicle limited warranty. *Nunez v. FCA US LLC* (2021) 61 Cal.App.5th 385, 389. The plaintiff lost on a motion for summary judgment, only as to the plaintiff's implied warranty cause of action. *Nunez, supra*, 61 Cal.App.5th at 216. In the appeals decision, the court declined to extend the SBA's protections with respect to the implied warranty cause of action, and only examined whether the jury instruction regarding tolling of the express warranty until after the plaintiff presented the vehicle for repairs, was proper. *Nunez, supra*. 61 Cal.App.5th at 397-398 and 399-400. The court then decided that the jury instruction was improper but made no analysis or conclusion regarding the plaintiff's breach of express warranty cause of action had the express warranty been in effect at the time plaintiff presented the vehicle for the nonconformity. *Nunez, supra*. 61 Cal.App.5th at 397-398. Thus, the *Nunez* decision, with respect to the express warranty cause of action, only discusses whether the express warranty was tolled through when the plaintiff presented the vehicle for repairs after the expiration of the express warranty. Therefore, while Petitioner may not be entitled to the protections of the SBA with respect to implied warranties, there is nothing in the *Nunez* opinion that would support the conclusion that Petitioner is not entitled to bring an SBA cause of action with respect to

express warranties, especially when Petitioner presented the vehicle for repairs during the original powertrain warranty.

Therefore, reversing the appellant court's ruling in this matter, is consistent with the holding in *Nunez* and *Jensen*.

II. FCA's interpretation of *Kiluk* is incorrect and omits relevant information

In *Kiluk v. Mercedes-Benz USA, LLC*, the plaintiff purchased their vehicle from a Mercedes-Benz USA, LLC ("MBUSA") authorized retailer. *Kiluk v. Mercedes-Benz USA, LLC* (2019) 43 Cal.App.5th 334, 336. The court reasoned that the manufacturer "stepped in the role of the retailer" by "partnering with the dealership" to sell used vehicles and offering an express warranty as part of the sales package, allowing for the plaintiff to succeed on a SBA case despite the used vehicle status.

FCA's reply brief discusses footnote no. 4 as support for affirming the *Rodriguez* opinion. They are incorrect. In *Kiluk*, the court did discuss potential problems with the ruling in *Jensen*, however they proposed a solution stating "that purchasers of used vehicles during the period of a transferable new motor vehicle warranty have standing under the Song-Beverly Act because the *original* sale was of a new motor vehicle, and manufacturers have an ongoing duty under the Song-Beverly Act to 'carry out the terms of those warranties.'" *Kiluk, supra*. 43 Cal.App.5th at 340, fn. 4. Moreover, if any term of the warranty is transferable, then the manufacturer's duties under the Song-Beverly Act continue post-transfer. *Id.* FCA has not provided any evidence that the terms of their new vehicle limited warranty are not transferrable.

Moreover, manufacturers and/or distributors keep records of warranty repairs on vehicles that are covered by the new vehicle limited

warranty indicating transferability of the warranty. The authorized repairing facilities submit claims, including the cost of parts and labor, to the manufacturer and/or distributor, which are then approved.

Like *Kiluk*, FCA had an ongoing obligation to honor the terms of the new vehicle limited warranty with respect to the powertrain warranty but failed to do so. FCA honored the warranty and paid for repairs to the transmission, indicating that they were amenable to the warranty being transferable at the time the subject vehicle was sold.

Therefore, *Kiluk* holds that FCA's obligations under the SBA continue with the vehicle until the new vehicle limited warranty has expired.

III. The Court of Appeal Decision for *Rodriguez* fails to distinguish certified pre-owned vehicles, used vehicles sold by the manufacturer's authorized retailers, and vehicles sold by third party retailers and creates bad precedent

The Court of Appeal's decision for this case does not distinguish the different scenarios in which a consumer can acquire a vehicle with the balance of the new vehicle limited warranty when the vehicle is not purchased as "new."

For instance, many manufacturers and/or distributors have Certified Pre-Owned ("CPO") programs in which their authorized retailers will inspect and certify that the vehicle is free of defects, which is accompanied by the remainder of the new vehicle limited warranty. These vehicles are used, but the Court of Appeal's decision in this case does not distinguish CPO vehicles, and thus as it stands, the owners of these vehicles would not be entitled to the protection of the SBA.

Moreover, some authorized retailers sell used vehicles that are not CPOs, but they are engaged in the business of selling vehicles as authorized

by their respective manufacturer and/or distributor. These vehicles are also not distinguished in the *Rodriguez* opinion. The only mention that the subject vehicle was sold by a used car dealership, is in the underlying facts, but was not considered in the appellate court's analysis. *Rodriguez v. FCA US LLC*, (2022) 77 Cal.App.5th 209, 214.

Additionally, the conclusion reached by the Court of Appeal creates a chilling effect that would leave consumers with vehicles that should have been repurchased and labeled pursuant to the SBA. If a consumer has a vehicle plagued by a nonconformity, and the manufacturer or distributor declined to repurchase the vehicle pursuant to the SBA, forcing them to sell the vehicle, then the subsequent consumer is left with no recourse. As stated below, the SBA was created with the intention of protecting consumers and enforcing the SBA, which is in line with public policy. By refusing to extend the protections of the SBA to vehicles sold with the balance of the new vehicle limited warranty, then consumers are adversely affected and manufacturers and distributors benefit from inappropriately refusing to comply with their obligations under the SBA.

Therefore, the Court of Appeal's decision for *Rodriguez* goes against public policy and seeks to allow manufacturers and distributors to benefit from their refusal to comply with their obligations under the SBA.

IV. Extant authority demonstrates that the Song-Beverly Consumer Warranty Act is a strongly pro-consumer statute

The SBA is regarded as a strongly pro-consumer statute. In fact, the SBA specifically states that any waiver of rights afforded to consumers is void and unenforceable. *Cal. Civ. Code* §§ 1790.1, 1793.3(c), 1793.6, and 1793.02(f).

Various cases emphasize that manufacturers and/or distributors have affirmative obligations, while consumers are only required to afford the manufacturer/distributor's authorized repair facilities a reasonable number of opportunities to repair the vehicle. *Cal. Civ. Code* §§ 1793.2(c) & 1793.2(d)(1).

Krotin v. Porsche Cars North America, Inc. (1995) 38 Cal.App.4th 294 makes it the manufacturer's and/or distributor's obligation to review the repair orders regardless of whether revocation occurred by the consumer. *Krotin, supra.* 38 Cal.App.4th at 303. This conclusion was affirmed again in *Lukather v. General Motors, LLC*, (2010) 181 Cal.App.4th 1041, stating that the SBA does not require consumers to take any affirmative steps to secure relief for the failure of the manufacturer to service or repair a vehicle to conform to the applicable warranties, only that the consumer must permit the manufacturer a reasonable number of opportunities to repair the vehicle. *Lukather, supra.* 181 Cal.App.4th at 1049.

This Court even specifically affirmed the conclusion that the SBA is not only pro-consumer, but a "strongly pro-consumer" as any waiver of the SBA's provisions shall be deemed contrary to public policy and shall be unenforceable and void, and that the remedies available in the SBA are in addition to those available pursuant to the Commercial Code. *See, Murillo v. Fleetwood Enterprises* (1998) 17 Cal.4th 985, 990 (citing California Civil Code §§ 1790.1 and 1790.3.) Citing to *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal. App.4th 174, 184, this Court reasoned that the SBA "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." *Id.* This conclusion was also reaffirmed subsequently

in *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 801, *Dominguez v. American Suzuki Motor Corp.* (2008) 160 Cal.App.4th 53, and *Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th 966.

Allowing the *Rodriguez* decision to stand would undoubtedly go counter to the exercise of consumer rights and would defeat what this Court's own acknowledgement that the Act specifically enacted for the protection of the consumer. For a vehicle to lose the protections of the SBA merely because of a change in ownership would have detrimental effect specifically on low to middle-income individuals and families in California. The loss of protection would mean that the subsequent owners would have to risk the possibility that their vehicle cannot be repaired by an authorized repair facility and have no recourse against the manufacturer or distributor, except for the woefully inadequate remedies afforded by the California Commercial Code. *Cal. Comm. Code* §§ 2714-2715. Express warranties are already limited in coverage by miles and/or time, however, the court in *Rodriguez* unilaterally attempts to further limit the consumer's protection by adding the change in ownership to the list of limitations.

Forcing consumers to pursue the applicable remedies, per the California Commercial Code, would eviscerate the protections of the SBA, resulting in consumers being responsible for their attorney's fees and costs in pursuing the action, as well as potentially the defendant's attorney's fees and costs should they not prevail, as the California Commercial Code sections the *Rodriguez* court referenced in their decision, do not allow for attorney's fees and costs as being recoverable by the consumer. *Cal. Comm. Code* §§ 2714-2715. *Brown v. West Covina Toyota* (1994) 26 Cal.App.4th 555, is analogous to this situation as the court was faced

resolving an issue involving two conflicting acts. In *Brown*, plaintiffs purchased a defective used vehicle. *Brown, supra.* 26 Cal.App.4th at 557. However, because the vehicle was bought with a conditional sales contract, the purchase was governed by the Rees-Levering Act (“RLA”). While the RLA allows for the prevailing party to recover costs and attorney’s fees, the SBA has a one-sided fee-shifting provision. In order to reconcile the inconsistent acts, the *Brown* court concluded that if a prevailing defendant would be allowed to recover costs and attorney’s fees under the RLA, it “would effectively nullify the one-sided fee-shifting under Song-Beverly whenever plaintiff sues to enforce a breach of warranty claim under Song-Beverly but happens to have purchased the automobile under a conditional sales contract.” *Brown, supra.* 26 Cal.App.4th at 565.

Same will be true if *Rodriguez* is allowed to stand. It would nullify the SBA and a consumer’s right for recourse against a manufacturer when the defective vehicle is still under express warranty according to milage and time but had a change in ownership. The manufacturer’s express warranty must follow the vehicle and not be abridged depending on who is driving the vehicle.

Thus, the legislature intended that consumers be protected by the SBA, and any interpretation of the SBA is intended to be in the consumers’ favor.

V. The SBA clearly intended to treat used vehicles with the balance of the New Vehicle Limited Warranty as “New Motor Vehicle(s)”

It has long been recognized that it was the Legislator’s intent to protect the average consumer from powerful manufacturers, which is why the SBA includes a fee-shifting provision and potential recovery of treble damages. This intent of consumer protection, as enacted by the

Legislator in 1970 and later strengthened through amendments to the SBA, must extend to all consumers of a defective vehicle as long as said vehicle is under warranty protection by miles and time.

A. Civil Code § 1793.22 defines “New Motor Vehicle,” intending to include used vehicles with the balance of the New Vehicle Limited Warranty.

FCA’s position that the Act excludes used vehicles with portions of a new-car warranty is nonsensical. Section 1793.22 expressly provides that a “new motor vehicle” includes a “motor vehicle sold with a manufacturer's new car warranty.” If the Act did not intend to include used vehicles with new-car warranties to be covered, it would not have the additional verbiage of “new car warranty;” rather, the Legislature could have written the Act to read, a “other motor vehicle being sold for the first time.” Instead, the Legislature’s use of the plain language “sold with a manufacturer’s new car warranty” supports the position that the Legislature purposely accounted for used vehicles being sold with existing new-car warranties. That is the plain meaning of the statute, and so it should be construed.

And why distinguish between a “dealer-owned vehicle” and a “demonstrator” if the Legislature had no consideration of used motor vehicles with the balance of an existing new-car warranty? (Section 1793.22(e)(2)). The Legislature included a “dealer-owned vehicle and a “demonstrator” right before including “other motor vehicle sold with a manufacturer's new car warranty” because it was aware of how often consumers resell their vehicles.

B. California Civil Code § 1795.5 provides that used cars are entitled to the protections of the Song-Beverly Consumer Warranty Act

Subsequent additions in the SBA specifically make reference and distinguish between the remedies available under the SBA for used vehicles versus new vehicles.

For example, California Civil Code § 1795.5 specifically addresses the differences for the sale of used vehicles that have the balance of the new vehicle limited warranty, stating “the obligation of a distributor or retail seller of used consumer goods in a sale in which an express warranty is given shall be the *same* as that imposed on manufacturers under this chapter” and provides several exceptions to the rule. *Cal. Civ. Code* § 1795.5 [emphasis added.] Subsections (a) and (b) go on to state the obligations and exceptions for used vehicles, and explicitly only states that Section 1793.5 does not apply to the sale of used consumer goods sold in California. *Cal. Civ. Code* § 1795.5(a)-(b).

If the legislation intended to exclude “used vehicles” from the protections of the SBA, then the statute would have expressly stated so as it did in Civil Code § 1795.5(b).

Thus, at minimum, vehicles that are sold with the balance of the new vehicle limited warranty by the manufacturer and/or distributor’s authorized retailers, should be covered by the SBA, as stated per California Civil Code § 1795.5.

C. The Legislature continues to expand the rights of consumers in the SBA

Since its enactment, the SBA has continued to undergo amendments where the legislation has expanded the rights of consumers in California, not limiting or removing their rights.

As recently as 2022, the Legislature passed Assembly Bill No. 2912, which goes into effect on July 1, 2023. Assembly Bill No. 2912 states that express warranties can only begin on the date of delivery, not the date of sale, which further demonstrates that the intent of the SBA is to expand the rights of consumers, not limit them. Song-Beverly Consumer Warranty Act, A.B. 2912, § 1793.01 (2022).

CONCLUSION

The Court of Appeal’s Opinion regarding *Rodriguez* is incorrect. The *Rodriguez* opinion inappropriately attempts to remove the rights of consumers by interpreting “other motor vehicle sold with a manufacturer’s new car warranty” to exclude used vehicles sold with the balance of the “new car warranty” which is neither supported by the SBA, *Jensen* (or subsequent caselaw), and later amendments to the SBA. The Court of Appeal does not understand the conflict in law that has been created, which is unsupported by the SBA on its face. Thus, this Court should reverse the decision.

Dated: June 12, 2023

CONSUMER LAW EXPERTS

By: s/ Erik Whitman
Erik Whitman
Alessandro G. Manno
Lara F. Rogers
Amicus Curiae

CERTIFICATE OF WORD COUNT

I, Erik Whitman, hereby certify as follows:

I am submitting this brief as *Amicus Curiae*. According to the word processing program I used to prepare this brief, the brief (excluding tables, this certificate, and any attachments) is 3,781 words long.

Dated: June 12, 2023

s/ Erik Whitman
Erik Whitman

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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US**

Case Number: **S274625**

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Person Served	Email Address	Type	Date / Time
Georges Haddad Clark Hill LLP	ghaddad@clarkhill.com	e-Serve	6/12/2023 6:57:32 PM
Joseph Bui Greines, Martin, Stein & Richland LLP 293256	jbui@gmsr.com	e-Serve	6/12/2023 6:57:32 PM
Mark Skanes RoseWaldorf LLP 322072	mskanes@rosewaldorf.com	e-Serve	6/12/2023 6:57:32 PM
Sharon Arkin The Arkin Law Firm 154858	sarkin@arkinlawfirm.com	e-Serve	6/12/2023 6:57:32 PM
Cynthia Tobisman Greines Martin Stein & Richland LLP 197983	ctobisman@gmsr.com	e-Serve	6/12/2023 6:57:32 PM
Payam Shahian Strategic Legal Practices, A Professional Corporation 228406	lwageman@slpattorney.com	e-Serve	6/12/2023 6:57:32 PM
Alana Rotter Greines, Martin, Stein & Richland LLP 236666	arotter@gmsr.com	e-Serve	6/12/2023 6:57:32 PM
David Brandon Clark Hill LLP 105505	dbrandon@clarkhill.com	e-Serve	6/12/2023 6:57:32 PM
Radomir Kirnos Knight Law Group, LLP	rogerk@knightlaw.com	e-Serve	6/12/2023 6:57:32 PM

283163			
Joseph Kaufman Joseph A. Kaufman & Associates, Inc. 228319	joe@lemonlawaid.com	e-Serve	6/12/2023 6:57:32 PM
Pro Per Attorney Nationwide Legal, LLC 162637	sfcourt@nationwideasap.com	e-Serve	6/12/2023 6:57:32 PM
Martin Anderson Anderson Law Firm 178422	firm@andersonlaw.net	e-Serve	6/12/2023 6:57:32 PM
Maureen Allen Greines, Martin, Stein & Richland LLP	mallen@gmsr.com	e-Serve	6/12/2023 6:57:32 PM
Arlyn Escalante Rosner, Barry & Babbitt, LLP 272645	arlyn@rbblawgroup.com	e-Serve	6/12/2023 6:57:32 PM
Shane Mckenzie Horvitz & Levy, LLP 228978	smckenzie@horvitzlevy.com	e-Serve	6/12/2023 6:57:32 PM
Hallen Rosner Rosner, Barry & Babbitt, LLP 109740	hal@rbblawgroup.com	e-Serve	6/12/2023 6:57:32 PM
Julian Senior SJL Law. P.C 219098	admin@sjllegal.com	e-Serve	6/12/2023 6:57:32 PM
Lisa Perrochet Horvitz & Levy LLP 132858	lperrochet@horvitzlevy.com	e-Serve	6/12/2023 6:57:32 PM
Rebecca Nieto Greines Martin Stein & Richland LLP	rnieto@gmsr.com	e-Serve	6/12/2023 6:57:32 PM
Richard Wirtz Wirtz Law APC 137812	rwirtz@wirtzlaw.com	e-Serve	6/12/2023 6:57:32 PM
Daniel Lebel Consumer Law Practice of Daniel T. LeBel 246169	danlebel@consumerlawpractice.com	e-Serve	6/12/2023 6:57:32 PM
Chris Hsu Greines Martin Stein & Richland LLP	chsu@gmsr.com	e-Serve	6/12/2023 6:57:32 PM
Martin Anderson Anderson Law APC	martin@andersonlaw.net	e-Serve	6/12/2023 6:57:32 PM
Katherine Kopp Orrick, Herrington & Sutcliffe LLP	kkopp@orrick.com	e-Serve	6/12/2023 6:57:32 PM
Max Carter-Oberstone Orrick, Herrington & Sutcliffe LLP 304752	mcarter-oberstone@orrick.com	e-Serve	6/12/2023 6:57:32 PM
Payam Shahian Strategic Legal Practices, APC 228406	pshahian@slpattorney.com	e-Serve	6/12/2023 6:57:32 PM
Joseph Kaufman Lemon Law Aid, Inc.	dulce@lemonlawaid.com	e-Serve	6/12/2023 6:57:32 PM
John Taylor	jtaylor@horvitzlevy.com	e-	6/12/2023

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

6/12/2023

Date

/s/Robert Aguilar

Signature

Aguilar, Robert (Other)

Last Name, First Name (PNum)

Consumer Law Experts, PC

Law Firm