Civil Case No. S222211



**IN THE SUPREME COURT**

**OF THE STATE OF CALIFORNIA**

---

**Carl Stone, *et al.*,**
Plaintiffs and Petitioners,

*v.*

**Raceway Ford, Inc.,**
Defendant and Respondent

---

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Two
Case Nos. E054517 and E056595

---

# OPENING BRIEF ON THE MERITS

---

**ROSNER, BARRY & BABBITT, LLP**
**Christopher P. Barry, SBN 179308**
**Hallen D. Rosner, SBN 109740**
**Lacee B. Smith, SBN 284168**
**10085 Carroll Canyon Road, Ste.100**
**San Diego, CA 92131**
**(858) 348-1005**

**Attorneys for Plaintiffs and Appellants**

Civil Case No. S222211

**IN THE SUPREME COURT**

**OF THE STATE OF CALIFORNIA**

---

**Carl Stone, *et al.*,**
Plaintiffs and Petitioners,

*v.*

**Raceway Ford, Inc.,**
Defendant and Respondent

---

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Two
Case Nos. E054517 and E056595

---

# OPENING BRIEF ON THE MERITS

---

**ROSNER, BARRY & BABBITT, LLP**
**Christopher P. Barry, SBN 179308**
**Hallen D. Rosner, SBN 109740**
**Lacee B. Smith, SBN 284168**
**10085 Carroll Canyon Road, Ste.100**
**San Diego, CA 92131**
**(858) 348-1005**

**Attorneys for Plaintiffs and Appellants**

## TABLE OF CONTENTS

**Page**

## TABLE OF CONTENTS CONT.

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**CALIFORNIA CASES**

## TABLE OF AUTHORITIES CONT.

**Page(s)**

### CALIFORNIA CASES CONT.



### FEDERAL CASES



### CALIFORNIA STATUTES

**Civil Code**

## TABLE OF AUTHORITIES CONT.

## I.

## Introduction

This case will determine whether the Legislature's mandate to protect unsophisticated motor vehicle purchasers from deceptive financing practices will still be enforced. The Automobile Sales Finance Act (the "Act" or "ASFA") was enacted to provide full and complete disclosures to vehicle purchasers regarding all of the financial terms of their purchases. Items of cost must be separately listed. All of the agreements regarding the items of cost and terms of payment must be in a single contract. In its 51 page Opinion, the Court of Appeal in this case circumvented all the above consumer protections, in effect turning the ASFA into the "Automobile Sellers Fraud Act." The Plaintiffs in this case, on behalf of themselves, the two classes certified by the trial court, and vehicle purchasers across the State, ask this Court to give them back the protections the Legislature guaranteed them.

This case involves one car dealer who engaged in two separate deceptive disclosure practices: (1) charging fraudulent fees; and (2) backdating sales contracts. The fraudulent fees were smog-related fees on diesel vehicles. Backdating involves customers who sign multiple contracts for the same vehicle, with the final contract dated the same date as the first contract, even though they were signed on different dates.

With regard to the fraudulent fees, Defendant Raceway Ford charged 48 customers who purchased diesel vehicles for performing smog checks and obtaining certificates from the State. The only problems were that Raceway Ford did not smog test any of the vehicles, and did not obtain certificates of compliance from the State for any of the vehicles. The Court

of Appeal held that even though the Automobile Sales Finance Act requires truthful disclosures, it does not prohibit dealers from including illegal and improper charges in contracts under the auspices that the amount of the illegal and improper charge is disclosed and accurate. In other words, as long as the dealer puts a fraudulent charge on the contract, it can steal the money.

A statute designed to "protect purchasers against excessive charges" (*Kunert v. Mission Financial Services Corp.* (2003) 110 Cal.App.4th 242, 248) does not protect purchasers against excessive charges if dealers can include any charge they want and then claim the customer agreed to pay it by signing the contract. The Court of Appeal's Opinion conflicts with over 50 years of authority requiring truthful disclosures to consumers. Telling someone exactly how much you stole from them is a truthful disclosure only in the most perverse way. By contrast, being charged for things you don't have to pay for is the very definition of an excessive charge.

This Court needs to determine the scope of honesty required by the Automobile Sales Finance Act. Can consumers contract around the disclosures they are entitled to receive? If fees are <u>not</u> due, is it enough, as the Court of Appeal held, "if the disclosures were made, and are true in the sense of accurately describing the terms of the parties' agreement"? Can consumers "agree" to pay for work that wasn't done? Do the items of cost the Legislature mandated by disclosed mean what they say? Or, can unscrupulous car dealers include any charge they want on a contract, in any amount, and still comply with the Act's disclosure requirements so long as the charge appears somewhere?

If, as numerous courts have held, the Act was passed to protect "the unwary naïve purchaser," (*Hernandez v. Atlantic Finance Co.* (1980) 105

Cal.App.3d 65, 75), are those purchasers protected from unscrupulous dealers who sneak charges past them and onto the face of a contract? If a remedial statute is truly supposed to be "liberally construed so as to suppress the mischief at which it is directed" (*Thompson v. 10,000 RV Sales, Inc.* (2005) 130 Cal.App.4th 950, 976 [citation omitted]), how does the Court of Appeal's Opinion protect against inaccurate disclosures by focusing solely on the amount of the disclosure, instead of the basis for the disclosure?

The Court of Appeal has stood the Automobile Sales Finance Act on its head. Rather than protect vehicle purchasers, the Opinion places the burden on purchasers to not only closely scrutinize their contracts to ensure car dealers are telling the truth and not pulling a fast one, but to perform legal research on the legality of each charge on the contract. If a car dealer can collect for any charge it sneaks onto a contract past a customer, the Act becomes a license to steal and a motivation to dealers to see how many false charges they can include on a contract.

Similarly, the Court of Appeal's Opinion on backdating removes the Act's protections for car buyers. The conditional sale contracts used by California car dealers structure vehicle sale transactions so that the car dealer, as the seller, is also the buyer's creditor should the buyer which to finance the purchase. (Opn., at 5.) [1] The car dealer includes a clause on the back of the contract which gives it a right to cancel the sale if the dealer cannot assign the contract to a financial institution. In what are often referred to as "yo-yo sales," the dealer lets the buyer leave the dealership

[1] All references to the "Opn." are to the *Raceway Ford Cases* Court of Appeal decision, a copy of which is attached to this Opening Brief on the Merits.

with the car and a contract, only to reel the yo-yo back in when the dealer is unable to sell the contract to a financial institution. The dealer tells the buyer they will have to enter into a new contract under terms acceptable to a financial institution if they want to keep the vehicle. (*See, e.g., Mayberry v. Ememessay Inc.* (W.D.Va. 2002) 201 F.Supp.2d 687, 695 (describing yo-yo sales).)

Backdating enters the transaction at the time of the second contract. The dealership, not wanting the consumer to realize they can back out of the deal because the dealership has exercised its right of rescission, has the customer sign a new contract dated the date of the first contract. This creates the impression to the buyer that the deal is still on, was never cancelled, and all the paperwork the customer signed the first time is still in effect and will be carried over with the new contract.

As part of the scheme, the dealership has the customer sign an "Acknowledgment of Rewritten Contract" when they are signing the new contract. By its name, this document suggests not a new contract, but a "rewriting" of the original contract. Tucked into this document, however, is an acknowledgment "the original contract has been rescinded (canceled) such that no obligations shall be owed by either party under the original contract." (Opn., at 5-6.) Thus, the dealer does rescind the first contract and enter into a new and different contract with the buyer, who is misled into thinking they are just "rewriting" the deal, not agreeing anew to purchase the vehicle. Often "yo-yo sales" are used to get more money from the consumer or to charge them a higher interest rate. Car dealers offer terms they know banks won't accept to hook the customer to the vehicle. Once the hook is set, car dealers know purchasers are more likely to agree to less favorable terms. (*See, e.g., Rucker v. Sheehy Alexandria, Inc.* (E.D.Va.

2002) 228 F.Supp.2d 711, 718-719 (explaining how spot delivery works to deceive customers).)

On its face, this may sound like an uncommon occurrence. But at Raceway Ford, during the class period, it was happening most days of the week. The backdating class certified by the trial court included over 1,100 customers from a 4 year period. Vehicle purchasers signed contracts, took their vehicles home, only to get called back to sign new contracts with new terms. In 2010, shortly after the trial of this case, the Court of Appeal for the Fourth Appellate District, Division 1, in *Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, held backdating violated the Automobile Sales Finance Act, the Consumers Legal Remedies Act, and the Unfair Competition Law. The *Nelson* case involved approximately 1,500 vehicle purchasers at that dealership. (*Id.*, at 996.)

The Court of Appeal loudly disagreed with *Nelson*. The Court of Appeal improperly concluded backdated contracts were "refinancings" and remanded the matter to the trial court to determine if appropriate disclosures were made for "refinancings." Because the second, backdated contracts never pay off the original contracts, but are new and different sales, they can never legally be "refinancings." The *Nelson* Court's analysis, finding backdating created illegal charges of pre-consummation interest that were not disclosed, should be affirmed by this Court.

The Automobile Sales Finance Act exists to protect consumers. The Court of Appeal's Opinion protects sellers, not consumers. The Court of Appeal believes consumers can be cheated without restriction (e.g., pay fees that are not due, pay interest for time before the contract is signed), as long as such fees are on the face of the contract. Thus, according to the Court of Appeal, car dealers have no obligation to make full and honest

disclosures under the Act. This Court should reverse the Court of Appeal's Opinion, affirm *Nelson*, and affirm the numerous other appellate decisions that apply the Automobile Sales Finance Act to protect consumers, rather than dishonest and unscrupulous dealers.

## II.

## Issues Presented

1. Does the inclusion of inapplicable smog check and smog certification fees in an automobile purchase contract violate the Automobile Sales Finance Act (Civ. Code, § 2981 *et seq.*)?

2. Does backdating a second or subsequent finance agreement to the date of the first finance agreement for purchase of a vehicle violate the Act?

## III.

## Statement of Facts

### A. Fraudulent Fees Class

On August 5, 2003, Plaintiff/Appellant/Petitioner Randal Kidd signed a Retail Installment Sale Contract to purchase a 2000 Ford F-250, VIN: 1FTNW20F5YEB11727 (the "Vehicle"), from Raceway Ford. (3 AA 0595-0598 [Tab 28]; 2 RT 252:2-8; Exh. 5.)[2] The Vehicle was diesel-

[2] All facts in this brief are supported by reference to the Appellants' Appendix, abbreviated as: ([volume] AA [page] (Tab [tab])]; the Reporter's Transcript, abbreviated as: ([volume] RT [page]); and the exhibits identified on the record and/or admitted into evidence in the trial court, abbreviated as (Exh. [number]).

powered. (2 RT 253:19-21.) The Contract included a $50.00 charge for "Smog Fee Paid to Dealer." (3 AA 0595-0598 [Tab 28]; Exh. 5.).) The Contract also included an $8.25 charge for "Smog Certification Fee Paid to State." (*Id.*) Raceway Ford had not performed a smog check on the Vehicle. (3 RT 551:5-12; 4 RT 714:14-715:1.) Because the Vehicle was diesel-powered, a smog certification fee was not due to the State. (3 RT 551:5-8.)

Mr. Kidd returned to Raceway Ford and signed a second contract no later than August 7, 2003. (2 RT 254:7-19.) The second contract also included a $50.00 charge for "Smog Fee Paid to Dealer" and an $8.25 charge for "Smog Certification Paid to State." (3 AA 0610-0613 [Tab 28]; Exh. 7.) Raceway Ford still had not performed a smog check on the Vehicle. (3 RT 551:5-12.) Smog certification fees were still not due to the State. (3 RT 551:5-8.) The fraudulent smog-related charges are then included in the amount financed, and subject to a finance charge over the life of the contract. (3 RT 450:12-451:5.)

Raceway admitted it did not smog any of the vehicles in question. (4 RT 714:14-715:1.) And Raceway's General Manager admitted the vehicles were not required to be smogged and the smog-related fees should not have been charged. (3 RT 551:5-12 ("These fees are improperly charged on Mr. Kidd's contract. There's no question about it.").) Raceway claimed the improper smog fee charges were the result of a computer programming error. (4 RT 625:22-627:2, 627:7-629:24.)

**B. <u>Backdating Class</u>**

California law defines the consummation of a vehicle sale contract to be "when the purchaser of the vehicle has paid the purchase price, or, in lieu thereof, has signed a purchase contract or security agreement, and has

taken physical possession or delivery of the vehicle." (Vehicle Code § 5901(d).)

On June 13, 2004, Carl and Deborah Stone executed a Retail Installment Sale Contract to purchase a new 2004 Ford Expedition with VIN: 1FMRU17W54LB47118 from Raceway and took delivery of the vehicle. (Exh. 1.) Raceway contacted the Stones and told them they needed to come back to the dealership because there were problems with the contract. (2 RT 272:8-19.) On June 16, 2004, the Stones returned to Raceway Ford at Raceway's request and executed an Acknowledgement of Rescinded Contract rescinding their original purchase contract "such that no obligations shall be owed by either party under the original contract." (Exh. 2.) The Stones then executed a new Retail Installment Sale Contract for purchase of the Expedition. (Exh. 3; 2 RT 278:22-27.) Although the new contract was executed on June 16, 2004, Raceway Ford dated the second contract June 13, 2004. (*Id.*; 2 RT 278:22-27.) The new contract had a higher annual percentage rate, and the Stones were not told they could walk away from the deal and not sign the second contract. (2 RT 272:24-273:28.)

As a result of the backdating of their second contract from June 16, 2004, to June 13, 2004, the Stones were charged interest for the time period June 13, 2004, through June 16, 2004, even though the original contract was rescinded. The interest for these three extra days in the second contract is $39.40. The second contract does not disclose that the Stones were charged $39.40 in interest for the time period from June 13, 2004, through June 16, 2004. Because the $39.40 in extra interest is included in the contract, the second contract then charges interest on the undisclosed $39.40 for the remainder of the contract. This "interest on interest" totals

$14.56 over the life of the second contract. (*See* 3 RT 436:19-23, 438:19-439:12, 440:18-441:5, 441:14-27; Exh. 67.)

The date of consummation of the second contract was June 16, 2004, since that was the date the Stones signed the second contract and became obligated to the financial terms in that contract. The second contract does not disclose the date that interest should have begun to be charged, June 16, 2004. (Exh. 3.) The date that interest should have begun to be charged, June 16, 2004, which was the date of consummation, is only determinable from documents other than the second contract.

## IV.

## Procedural History

### A. Proceedings in the Trial Court

#### 1. Class Certification

The trial court certified the Fraudulent Fee Class (identified as Class Two in the Second Amended Complaint) to proceed with a claim under the Automobile Sales Finance Act. (Opn., at 7.) The class was defined as persons who "purchased a diesel vehicle from Raceway Ford for personal use and were charged a smog fee and a smog certification fee." (Opn., at 7.) The Fraudulent Fee Class consisted of 48 consumers. (Opn., at 7.)

The trial court also certified a Backdating Class (identified as Class One in the Second Amended Complaint) to proceed with claims under the Automobile Sales Finance Act, the Consumers Legal Remedies Act, and the Unfair Competition Law. (Opn., at 6.) The class was defined as persons who "(1) purchased a vehicle from Raceway Ford, for personal use, (2) on a later date rescinded their original purchase contract, and (3) signed a

subsequent or second contract for the purchase of the same vehicle, which contract was dated the date of the original purchase contract and involved financing at an annual percentage rate greater than 0.00%." (Opn., at 6.) The Backdating Class consisted of over 1,100 Raceway Ford customers who were brought back to Raceway by the dealership to rescind their first contracts and sign new contracts to purchase the same vehicle. (Opn., at 6.)

**2. Trial**

The case was tried in a bench trial in March 2010. (Opn., at 10.) In April 2010, the trial court issued a statement of decision finding Raceway Ford did not violate any of the statutes by backdating contracts. As to the fraudulent smog fee claim, the trial court found Raceway Ford violated the Automobile Sales Finance Act, but had corrected the violation in compliance with the Act and therefore was not liable to the "fraudulent fees" class. (Opn., at 10-11.)

Raceway Ford submitted a request for entry of judgment, to which Plaintiffs objected. Plaintiffs requested a hearing on the Statement of the Decision, which the trial court denied. The trial court indicated the Statement of Decision would stand as the decision of the court, but did not sign or enter a judgment. (Opn., at 11.)

The *Nelson* opinion was published July 15, 2010, and found backdating violated all three statutes at issue. Raceway Ford submitted another proposed judgment. Plaintiffs objected again. The trial court elected not to follow *Nelson*, and stayed the case to see if this Court would rule on a request to depublish *Nelson*. On November 17, 2010, this Court denied the request for depublication. Thus, on December 10, 2010, the trial court reluctantly determined it was required to follow *Nelson*, withdrew its previous statement of decision, stated it was finding in favor of Plaintiffs,

and set a hearing to determine the appropriate remedy for the backdating class. (Opn., at 12.)

Raceway Ford responded by filing a petition for writ of mandate requesting the trial court be ordered to enter judgment in conformance with its original Statement of Decision. On March 22, 2011, the Court of Appeal agreed with Raceway Ford and ordered a peremptory writ of mandate issue directing the trial court to enter judgment in favor of Raceway Ford based solely on the trial court's failure to act in a timely manner. (Opn., at 12-13.) The writ was not merits-based, and did not address the merits of the claims at issue at trial.

The trial court responded by vacating its December 10, 2010 order in favor of Plaintiffs and stating it was entering judgment *nunc pro tunc* to June 10, 2010, in favor of Raceway Ford, against both classes, in accordance with the original Statement of Decision. Again, the trial court failed to actually sign and enter a judgment. (Opn., at 12-13.)

Plaintiffs filed a motion for new trial, arguing the trial court was bound to follow the published opinion in *Nelson*, which was binding on all trial courts. Despite having previously acknowledging *Nelson* was binding on it, the trial court denied Plaintiffs' motion in defiance of *Nelson*. Plaintiffs filed a notice of appeal. The Court of Appeal responded by ordering Plaintiffs to file the signed judgment in support of their appeal. As there was no signed judgment, Plaintiffs appeared ex parte before the trial court on October 12, 2011, at which time the trial court finally signed a judgment. (Opn., at 13.)

**B. <u>The Court of Appeal</u>**

Plaintiffs appealed the trial court's judgment in favor of Raceway on September 18, 2011. Plaintiffs appealed the trial court's order awarding

Raceway over $1.5 million in attorney's fees and costs on July 5, 2012. The Court of Appeal consolidated the two cases for oral argument and opinion.

On June 26, 2014, the Court of Appeal issued a tentative opinion. Oral argument was held on September 3, 2014. The Court of Appeal issued its opinion on September 16, 2014. The Opinion addresses three primary issues from the two appeals.

**1. Issue 1 – Fraudulent Fees**

Since its enactment in 1961, courts have interpreted the Automobile Sales Finance Act ("ASFA") to require truthful and accurate disclosures of cost. As explained in *Nelson*, "Unless dealers disclose correct information the disclosure itself is meaningless and the informational purpose of the ASFA is not served." (*Nelson*, 186 Cal.App.4th at 1005.) The Court of Appeal acknowledged Raceway Ford did not disclose correct information to its customers by charging for work it didn't do and for a certificate it didn't obtain. Nevertheless, The Court of Appeal concluded Raceway Ford did not violate the ASFA because the amounts Raceway Ford charged "were accurately and explicitly stated in writing." (Opn., at 41.) According to the Court of Appeal, "if the disclosures are made, and are true in the sense of accurately describing the terms of the parties' agreement," then the contract complies with the Act. (Opn., at 42.) That conclusion directly conflicts with substantial authority interpreting the Act and gives car dealers a license to steal with immunity if the amount being stolen appears in the contract. This statutory interpretation requires this Court's intervention to protect the millions of car buyers in California from this gross distortion of the Act.

### 2. Issue 2 – Backdating

The Court of Appeal reversed in part and affirmed in part the trial court's ruling on backdating. Expressly disagreeing with *Nelson*, the Court of Appeal held backdating does not create an illegal charge of pre-consummation interest. The Court of Appeal ignored the trial court's refusal to follow the binding opinion in *Nelson* (Opn., at 3, n. 2), instead hastily jumping into its own analysis and criticism of *Nelson*. Despite agreeing with *Nelson*'s analysis the second contract required new disclosures under the Automobile Sales Finance Act and Regulation Z, the Court of Appeal concluded the second contract was somehow a "refinancing" instead of a new and different contract. Thus, the Court of Appeal concluded backdating could result in an inaccurate disclosure of the APR in violation of Regulation Z, although there would be no remedy under the Act. (Opn., at 39.) The Court of Appeal rejected *Nelson*'s conclusion interest charges prior to consummation of the contract violate Regulation Z. (Opn., at 33.) Since the Court of Appeal expressly rejected and disagreed with *Nelson*, this Court's intervention is necessary to resolve this critical issue to car buyers across the State.

### 3. Issue 3 – Attorney's Fees[4]

The Court of Appeal's decision on backdating, finding that in some circumstances backdating may violate the ASFA, "undermined" the fee award to Raceway Ford. (Opn., at 4.) Accordingly, the Court of Appeal vacated the fee award and instructed the trial court to determine if the prevailing party was entitled to its attorney's fees and costs after making a

[4] The attorney's fees issue was not part of the petition for review, and is only mentioned as part of the procedural history of the case.

determination on the merits based on the Court's interpretation of backdating.

## V.

## Legal Discussion

### A. Fraudulent Fees

#### 1. The ASFA Requires Truthful Disclosures

The Automobile Sales Finance Act "is a consumer protection law governing the sale of cars in which the buyer finances some, or all, of the car's purchase price." (*Rojas v. Platinum Auto Group, Inc.* (2013) 212 Cal.App.4th 997, 1002.) "The act contains detailed disclosure requirements intended to protect the consuming public ...." (*Id.*, at 1005 (citing Legis. Counsel's Dig., Assem. Bill No. 238 (2011–2012 Reg. Sess.) 9 Stats.2011, Summary Dig., p. 5039).) The "spirit and policy" of the Act is to prevent "fraudulent and deceptive practice(s)." (*Thompson*, 130 Cal.App.4th at 976.) The Act has an "overriding policy of full and fair disclosure [which] presupposes the dealer has honestly disclosed the true value(s) ... as a starting point in the parties' good faith negotiations." (*Id.*, at 975.)

Thus, the Act must be interpreted "consistent with its remedial purpose of protecting consumers from inaccurate and unfair credit practices through full and honest disclosures." (*Id.*, at 978.) "Requiring a meaningful disclosure of credit terms both protects consumers and enhances fair business competition." (*Id.* [citing 15 U.S.C. § 1601(a)].)

In analyzing transactions subject to the Automobile Sales Finance Act, courts are supposed to "look to the substance of the transaction and do not allow mere form to dictate the result." (*Thompson*, 130 Cal.App.4th at

966 (citations omitted).) "The legislative purpose in enacting the [Automobile Sales Finance] Act was to provide more comprehensive protection for the unsophisticated motor vehicle consumer." (*Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 608 (citing Final Report of the Assembly Interim Committee on Finance and Insurance, 15 Assembly Interim Committee Reports No. 24 (1961) quoted in The Rees-Levering Motor Vehicle Sales and Finance Act, 10 UCLA Law Review (1962) 125, 127); *see also 49er Chevrolet v. New Motor Vehicle Bd.* (1978) 84 Cal.App.3d 84, 94 ("The various sections of the act clearly indicate its consumer protection nature." (concurring opinion)).) "California courts have often in the past considered, recognized, and declared illegal, schemes whereby automobile dealers have attempted to evade the provisions of controlling legislation." (*Hernandez*, 105 Cal.App.3d at 78 (citations omitted).)

"The requirement of the statute that such conditional sale contracts contain the statements therein specified necessarily implies that such statements when set forth in the contract shall be true for otherwise the very purpose of the statute would be defeated." (*Bratta v. Caruso Car Company, Inc.* (1958) 166 Cal.App.2d 661, 664 (interpreting prior version of the ASFA); *see also*, *Thompson*, 130 Cal.App.4th at 976 ("remedial statute must be liberally construed so as to suppress the mischief at which it is directed and advance or extend the remedy provided") (citing *Lande v. Jurisich* (1943) 59 Cal.App.2d 613, 617).) In *Nelson*, the Court of Appeal cautioned that "[u]nless dealers disclose correct information the disclosure itself is meaningless and the informational purpose of the ASFA is not served." (*Nelson*, 186 Cal.App.4th at 1005.)

The ASFA requires that certain disclosures be made in all conditional sale contracts in the "Itemization of the Amount Financed." (Civil Code § 2982.) One required disclosure is "[t]he fee charged by the seller for certifying that the motor vehicle complies with applicable pollution control requirements." (Civil Code § 2982(a)(1)(C).) A second required disclosure is "[t]he amount of the state fee for issuance of a certificate of compliance, noncompliance, exemption, or waiver pursuant to any applicable pollution control statute." (Civil Code § 2982(a)(4).) Implicit in the Act's disclosure requirements is (a) if there is a fee charged by the seller for certifying the vehicle, then the vehicle was actually certified, and (b) if there is a fee for issuance of a certificate, then the certificate was actually issued. If a seller violates the disclosure requirements of Civil Code § 2982(a), the buyer can recover their monies paid and elect to rescind the contract. (Civil Code §§ 2983 and 2983.1.)

**2. The Trial Court Got It Half-Right**

The trial court held that Raceway Ford's charges for work they didn't do and for a certificate that was not issued violated the ASFA. (1 AA 083.) Thus, the trial court got this part of the analysis correct.

The trial court erred when it held Raceway Ford had corrected the contracts in compliance with the ASFA: "The court finds it to have been a bona fide error corrected with full refunds plus interest within a reasonable time under the Automobile Sales Finance Act." (1 AA 083.) The trial court's error is two-fold. The trial court improperly (1) broadened the standard for making errors, (2) broadened the standard and time for corrections under the Act, and (3) created a new remedy under the Act.

First, the Automobile Sales Finance Act only excuses an "accidental or bona fide error *in computation*." (Civil Code § 2983 (emphasis added).)

A computer ***programming*** error to automatically charge fees, which is how Raceway explained the charges (4 RT 625:22-627:2, 627:7-629:24), is not a bona fide error in ***computation***. Raceway did not make a computation error; Raceway made an error in identifying which transactions would include the fees.

"[T]he Legislature is presumed to be aware of existing laws and judicial decisions and to have enacted or amended statutes in light of this knowledge." (*Nelson*, 186 Cal.App.4th at 1008 (citations omitted).) In the ASFA, the Legislature explicitly used the phrase "bona fide error in computation" as the defense to a disclosure in violation of Civil Code Section 2982(a). ***This defense is unique to claims under the ASFA***! Numerous other statutes in the Civil Code, including another section of the ASFA (Civil Code Section 2982.10), use the broader "bona fide error" standard. But no other statutes use the more limited "bona fide error *in computation*" standard. (*See* California Rental-Purchase Act, Civil Code Section 1812.637 (defining "bona fide error" to include computation error, among other types of errors); Vehicle Leasing Act, Civil Code Sections 2987 (defining "bona fide error" to include computation error, among other types of errors) and 2988.5 (creating affirmative defense for "bona fide errors"); Civil Code Section 2965 (creating affirmative defense for "bona fide errors"); CLRA, Civil Code Section 1784 (same); Civil Code Sections 1725 (same), 1747.08 (same), 2924e (same), 2924i (same), 3159 (same), 3162 (same), and 8538 (same).)

A "bona fide error" is a broader defense than the Legislature authorized to a seller for a disclosure violation in the ASFA. The ASFA only excuses a "bona fide error *in* computation." Whereas a programming error would be permissible under a "bona fide error" standard, a

programming error is not permissible under a "bona fide error in computation" standard. By applying the broader standard instead of the Legislatively-mandated narrower standard, the trial court erred.

The trial court's second error was its interpretation and application of Civil Code § 2984, which it mis-applied in multiple ways. The Automobile Sales Finance Act gives holders (not sellers like Raceway) 30 days to correct willful violations that appear on the face of a contract. (Civil Code § 2984.) If the provides written notice of a violation, a correction must be made within 10 days of notice. (*Id.*) The Act does not, as the trial court held, give "sellers" an undefined "reasonable time" to correct errors. Raceway admitted at trial it was not the "holder" of Appellants' contracts. (1 RT 112:21-24.) As only the "holder" can correct a contract, the trial court erred by finding Raceway complied with Civil Code Section 2984. (*See Munoz v. Express Auto Sales* (2014) 222 Cal.App.4th Supp. 1, 11 (buyer cannot waive notice provisions in Civil Code Section 2984).)

Second, any violation appearing on the face of the contract, whether willful or not, must be corrected "within 30 days of the execution of the contract or within 20 days of its sale, assignment or pledge, whichever is later ...." (Civil Code § 2984.) The smog fee and smog certificate fees appear on the face of the contract. (*See, e.g.*, 3 AA 0610 (lines 1C and 4 of the Itemization of the Amount Financed) [Tab 28].) Raceway presented no evidence that it corrected Appellants' contracts within the requisite time. The initial refunds were issued in January 2005, more than 30 days after the execution of any of the contracts in the class. (4 RT 633:27-635:21.) Additional refunds, allegedly representing finance charges on the fraudulent fees, were issued nine months later. (3 RT 555:13-27.) In fact, when Raceway sought a judicial determination it complied with the correction

procedures of the CLRA, the trial court held "refunding the overcharges is not an appropriate remedy [under the CLRA] unless interest is paid for the period between the payment of the overcharge and the refund of that payment. That interest was not paid within 30 days. No evidence was presented that, within that same 30-day period, the defendant agreed to pay interest." (2 AA 0491 [Tab 20].)

Third, Raceway admits the original refunds were issued more than ten days after receiving written notice and the full refunds issue far more than ten days after receiving written notice. (3 RT 555:13-27; 4 RT 623:21-624:3, 633:27-635:21; *see also* 1 AA 0193 (¶ 4) (admitting interest checks were sent in October 2005) [Tab 11].)

Finally, the trial court ignored that the "correction" attempted by Raceway was not in compliance with Civil Code § 2984: "The correction shall be made by mailing or delivering a corrected copy of the contract to the buyer." Raceway presented no evidence it mailed or delivered corrected contracts to Appellants or any class members. Instead, it sent class members two checks, nine months apart, and both outside the Act's deadline to correct contracts.

The trial court's third error was creating a new remedy under the Act. When Civil Code § 2982(a) is violated, the "the buyer may recover from the seller the total amount paid, pursuant to the terms of the contract, by the buyer to the seller or his or her assignee." (Civil Code § 2983.) Additionally, the buyer can elect to rescind the contract. (Civil Code § 2983.1.) The Act does not provide that refunds are a remedy. (*See Rojas*, 212 Cal.App.4th at 1005 (actual harm is not needed for remedy under the ASFA, and only remedy under the Act for disclosure violations is rescission).)

In the Statement of Decision, the trial court created a "reasonable time" standard under the ASFA for corrections, which the trial court held included sending the interest. (4 AA 0959 [Tab 44].) The trial court also created a new manner by which Raceway could correct the contract that did not comply with the Act's requirements. Thus, while the trial court correctly held Raceway's charging of smog-related fees to the Smog Fee Class violated the Act, the trial court erred in finding Raceway complied with Civil Code § 2984.

### 3. The Court of Appeal Disregarded the ASFA

The Court of Appeal held that charging for work not done (performing a smog test) or a certificate not obtained did not violate the disclosure requirements of the ASFA:

> There are no hidden, undisclosed costs in the contracts entered into by the members of Class Two; the amounts charged for smog-related fees were accurately and explicitly stated in writing, and the terms of the deal, including the smog fees, were accepted by the customers when they signed their contracts. The only purported "inaccuracy" is that, the parties agree, if they had more closely considered the provisions regarding smog-related fees at the time of the transaction, the contract they agreed to enter into would have been different.

(Opn., at 41-42; *see also* Opn., at 42 ("the contracts between Raceway and the members of Class Two accurately disclose the economics of the transaction agreed to by the parties in all respects.").)

The Court of Appeal misread the Act by basing its analysis on the following misperception: "If the disclosures are made, and are true in the

sense of accurately describing the terms of the parties' agreement, then the contract comports with the requirements for the 'formalities' of conditional sale contracts." (Opn., at 42.) The Court of Appeal effectively held consumers can agree to be cheated and pay for work the seller did not do.

Sixty-six years ago, this Court analyzed a previous version of the Automobile Sales Finance Act in *Carter v. Seaboard Finance Co.* (1949) 33 Cal.2d 564. There, the Court determined the Act's disclosure requirements were mandatory on a seller:

> The obvious purpose of the statute is to protect purchasers of motor vehicles against excessive charges by requiring full disclosure of all items of cost. If the statute be construed as mandatory the contract was unenforceable with respect to the Sterling and Fruehauf, for the reason that it was in violation of the statute. This is so notwithstanding the fact that the statute does not expressly pronounce it so.
>
> Whether the statute was meant to be mandatory or directory may not be determined merely from the fact that it provided that certain formalities 'shall' be followed. The word 'shall' in a statute may sometimes be directory only, whereas the word 'may,' seemingly much less forceful, may be mandatory. The entire statute may be resorted to in order to ascertain its proper meaning. If to construe it as directory would render it ineffective and meaningless it should not receive that construction. To to [*sic*] construe it would indicate that the prescribed form and requisites are merely desirable matter which the seller could include or would not be bound to include, at his option. Such a construction

> certainly would not afford the protection to purchasers which was intended. The form and requisites must therefore be held to be required and the statute in these respects to be mandatory.

(*Id.*, at 573 (internal citations omitted).)

This Court also eliminated the possibility a consumer could opt out of the disclosures required by the Act: "A member of the class for whose protection the statute was enacted is ordinarily not considered *in pari delicto* with those who violate the statute." (*Id.*, at 574 (citations omitted); *see also Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 153 ("It is true that when the Legislature enacts a statute forbidding certain conduct for the purpose of protecting one class of persons from the activities of another, a member of the protected class may maintain an action notwithstanding the fact that he has shared in the illegal transaction. The protective purpose of the legislation is realized by allowing the plaintiff to maintain his action against a defendant within the class primarily to be deterred. In this situation it is said that the plaintiff is not in pari delicto.") (citations omitted) (interpreting contractor's licensing statute).)

Nevertheless, the Court of Appeal put the burden of compliance with the ASFA on consumers. The Court of Appeal held "The members of Class Two received all the information that the ASFA required them to receive; among other things, they were informed, in writing, how much they were being charged for smog-related fees. ***They just did not act on that information by verifying that all of the listed charges were appropriate prior to signing***." (Opn., at 43-44 (emphasis added).) In a footnote, the Court of Appeal tries to claim it didn't put the burden of compliance with the Act on the consumer: "This is not to say that blame for the improper

charges should be placed on the consumer. Of course, Raceway erred by charging inappropriate fees, and that error is ultimately Raceway's responsibility. Nevertheless, both Raceway and the members of Class Two missed an opportunity to catch the errors in the first instance, by carefully reviewing all items of cost listed in the contract prior to signing." (Opn., at 44, n. 24.)

The Court of Appeal's disregard for the ASFA is perhaps best illustrated by its comment that Raceway's charging for work not done and a certificate that wasn't issued meant "the goal of protecting purchasers from excessive charges was not initially achieved." (Opn., at 43.) But, tellingly, the Court of Appeal fails to state how the goal of protecting purchasers from excessive charges was ***ever, if at all,*** achieved by Raceway. The Court of Appeal states the "informational purpose" of the Act was achieved because class members were told how much they were improperly charged (for services that were not actually performed). (Opn., at 43-44.) But being told how much you are being ripped off for services you did not know were not performed doesn't mean you weren't ripped off. It doesn't mean you were protected from the excessive charge. The charge is there and it shouldn't be. Fraudulent Fees class members were ***never*** protected from the excessive charges in their contracts. And that is why the Court of Appeal's opinion is wrong.

### 4. The Inclusion of Inapplicable Smog Check and Smog Certification Fees in an Automobile Purchase Contract Violates the Automobile Sales Finance Act

The ASFA is a mandatory disclosure statute. Therefore, the Act must be interpreted in a manner to further its purpose and protect consumers. (*Thompson*, 130 Cal.App.4th at 976.) Consumers rely on car

dealers to prepare accurate contracts without hidden or excessive charges. The ASFA requires car dealers to disclose the items of cost. The Court of Appeal, by ruling consumers could contract away the disclosure requirements by "agreeing" to pay excessive charges, put the onus on consumers to monitor car dealer compliance with the Act. That is not how consumer protection statutes are intended to work. Car dealers are required to make accurate disclosures. If a fee isn't due, or work wasn't done, then there should not be a cost included on the contract for that fee or work. Inclusion of such fees means the disclosures on the contract are not accurate. If a contract can include costs or fees that are not due, then the consumer has no way of separating fact from fiction on their contract.

The Opinion creates open season on consumers, and means no contract can ever violate the Automobile Sales Finance Act again. Here, Raceway Ford charged Plaintiffs for work that wasn't done and a certificate that was not obtained. The Court of Appeal held the disclosed costs on Plaintiffs' contracts were accurate because Raceway Ford accurately disclosed how much they were improperly charging Plaintiffs. Under this line of thinking, every charge on every car contract in California is now accurate if the car buyer signs the contract. Pick any of the required disclosures in Civil Code § 2982(a). The Opinion allows dealers to manipulate any of those numbers under the guise the disclosure is accurate because the customer signed the contract and agreed to pay the disclosed amount. Thus, under the Opinion, overcharging for the vehicle, charging for products or services not provided, and overstating tax or license fees would permissible if the buyer signs the contract because the buyer agreed to pay the disclosed amount by signing the contract. The Act was meant to protect the unwary and unsophisticated. Every published opinion under the

Act has interpreted the Act to provide that protection. (*See, e.g., Thompson*, 130 Cal.App.4th at 966; *Hernandez*, 105 Cal.App.3d at 78; *Kunert*, 110 Cal.App.4th at 257-58; *Cerra*, 172 Cal.App.3d at 608; *49er Chevrolet*, 84 Cal.App.3d at 94; *Nelson*, 186 Cal.App.4th at 999; *Lafferty v. Wells Fargo Bank* (2013) 213 Cal.App.4th 545, 562-63 (citations omitted); *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 150 (citation omitted).) The only way the Act can serve its purpose of protecting consumers and preventing car dealers from engaging in massive fraud is to reverse the Opinion and preserve the protections the Legislature created for car buyers.

## B. Backdating

### 1. The ASFA Requires Truthful Disclosures

As discussed above in connection with the charging of smog-related fees, the ASFA requires truthful disclosures. That same analysis applies in the context of backdating purchase contracts. Plaintiffs also alleged backdating violated the Act's "single document rule," which requires all of the agreements between the parties "with respect to the total cost and the terms of payment for the motor vehicle" be contained in a single document, the contract. (Civil Code § 2981.9.) A violation of the "single document rule" also entitles a buyer to recover their payments and rescind the contract. (Civil Code §§ 2983 and 2983.1.)

### 2. The Trial Court Tried to Do the Right Thing, But Then Inexplicably Changed Its Mind

In its initial Statement of Decision, the trial court concluded backdating did not violate the ASFA. (1 AA 081-083.) After the publication of *Nelson*, the trial court found the case indistinguishable from this case:

My statement of decision decided that the date of consummation for purposes of the ASFA and CLRA was the date on which the transfer of possession of the car was consummated as provided by the California Vehicle Code. However, the court in *Nelson* says the date of consummation was the date when the financing was consummated, not the date of transfer and possession.

Whether that makes practical sense is no longer the issue, because a division of our Court of Appeal has determined that issue. If some other division of our Court of Appeal chooses to disagree with *Nelson*, they can do so as a court of equal dignity. As a trial court, I cannot, under the authority cited.

. . .

*Nelson versus Pearson Ford*, 186 Cal.App.4th 983, 2010, held it's a violation of our consumer protection statutes to issue a second finance agreement backdated to the date of the first transaction, because that imposes a finance charge while there's no contract in effect, and because such a revised contract does not specifically disclose this, quote, "preconsummation," end of quote, charge as a separate item.

The *Nelson* court interpreted the word, quote, "consummation," end of quote, to refer to the date of the finance agreement itself, rather than to the consummation of sale as provided in the Vehicle Code as this Court had done in its statement of decision. I'm stuck with that.

> The *Nelson* court also concluded that such a practice violates the single document rule, because a third party would be unable to determine the true nature of the agreement, without reviewing the customers acknowledgment.
>
> So these conclusions are inconsistent with this Court's interpretation of the statutes, because there's been a change in the law, after the Court issued its statement of decision, but before judgment, the appropriate procedure is to withdraw the statement of decision.

(5 RT 841:15-27 (emphasis added), 847:8-28.)

Raceway Ford challenged the trial court's right to change the Statement of Decision, and the Court of Appeal issued a writ directing the trial court to enter judgment in favor of Raceway Ford. (Opn., at 12-13.) The writ was based on the trial judge's procedural error, and not on the merits of Plaintiffs' claims.

Plaintiffs then moved the trial court for to vacate and enter different judgment. (Opn., at 13.) Despite having stated "It would be a fool's error if I decided for me to try and distinguish it on the facts," (5 RT 842:11-12), the trial court refused to follow *Nelson*: "Further, since this court finds no incorrect conclusions of law in its Statement of Decision, plaintiffs' motion to vacate the judgment pursuant to CCP Section 663 is also denied." (9 AA 2108 [Tab 80].)

It is unclear how the trial court, having found *Nelson* directly on point and contrary to its Statement of Decision, denied Plaintiffs motion on the basis there were no "incorrect conclusions of law in its Statement of Decision." No explanation was given by the trial court for this change in course. As the trial court acknowledged, *Nelson* was binding on it before it

entered judgment. Nothing changed to distinguish *Nelson* post-judgment. But after initially stating it would do the right thing and follow *Nelson*, the trial court failed to do so.

### 3. The Court of Appeal Should Not Have Reached *Nelson*, Much Less Have Disagreed with It

#### a. The Court of Appeal Should Not Have Reached the Merits of *Nelson*

When Plaintiffs filed their post-trial motions, the trial court was duty-bound to follow *Nelson*, a published opinion directly on point. Thus, one of the issues raised by Plaintiffs on appeal was whether the trial court erred in refusing to follow a published opinion directly on point. The trial court's refusal to follow *Nelson* was improper:

> It is simply not appropriate for the trial court to state its disagreement and rule contrary to the appellate opinion. Second, the trial court should make a record articulating why it believes the binding opinion is erroneous and should be revisited by the appellate court which is free to either disagree with or overrule the opinion.

(*Cuccia v. Superior Court* (2007) 153 Cal.App.4th 347, 354 (citations omitted).)

The trial court was required to follow *Nelson* provided "the relevant point in the appellate decision must not have been disapproved by the California Supreme Court and must not be in conflict with another appellate decision." (*Sarti v. Salt Creek Ltd.* (2008) 167 Cal.App.4th 1187, 1193.) Here, the Supreme Court was not asked to review *Nelson*, and there are not any appellate decisions in conflict. There was no excuse for the trial court's refusal to follow *Nelson*.

The Court of Appeal did not need to reach the issue of whether it agreed with *Nelson*. The first issue presented to it was whether the trial court should have granted Plaintiffs' post-trial motions. Procedurally, in order to protect the integrity of appellate opinions, the proper course of action should have been for the Court of Appeal to have sent the case back to the trial court with instructions to follow *Nelson* in ruling on the post-trial motions. Once a judgment was entered in Plaintiffs' favor based on *Nelson*, the parties could have decided whether they wanted to appeal the judgment. Perhaps neither party would have challenged the judgment. Instead, after rigorously applying the Rules of Court to require the trial court to enter judgment in Raceway's favor because of the delay (Opn., at 12-13), the Court of Appeal abandoned its commitment to proper procedure and rejected Plaintiffs' appeal of the post-trial motions. (Opn., at 2-3, fn, 2.) The Court of Appeal should not have been picking and choosing while procedural rules the trial court was bound to follow.

**b. The Court of Appeal Erred in Disagreeing with *Nelson***

*Nelson* found backdating violates Civil Code Sections 2981.9 and 2982(a) of the ASFA. As to the disclosure requirements of Civil Code Section 2982(a), the *Nelson* court concluded

> Pearson Ford's act of backdating the second contract resulted in Nelson paying a finance charge before consummation of the contract. (*See* Regulation Z; Veh. Code, § 5901, subd. (d).) Accordingly, the backdating of the second contract caused Nelson to pay interest on a contract that did not exist. We consider this pre-

> consummation interest to be an illegal finance charge.

(*Nelson*, 186 Cal.App.4th at 1003.)

Similarly, *Nelson* concluded backdating, including the use of Acknowledgement of Rewritten Contract forms like Raceway used, violated the "single document" rule in Civil Code § 2981.9:

> The only way to determine the date the parties consummated the transaction, the correct APR, and that Nelson improperly paid a finance charge when no contract existed is to review the three documents and perform some calculations. Accordingly, the second contract violated the single document rule because it did not contain "all of the agreements of the buyer and seller with respect to the total cost and the terms of payment for the motor vehicle ... ." (§ 2981.9.) Pearson Ford's violation of the single document rule rendered the contract unenforceable under section 2983.

(*Id.*, at 1004.)

Plaintiffs' complaint included these same allegations that backdating violates both Civil Code Sections 2981.9 and 2982(a). (3 AA 0536 (¶¶ 254-255) [Tab 23].) Appellants alleged they were charged an illegal pre-consummation charge, and one must resort to multiple documents to determine Appellants paid an illegal finance charge when no contract existed. (*Id.*) Appellants' expert, Mr. Ross, testified at trial how to make

these calculations. (3 RT 436:19-441:27, 463:4-466:22; *see also* Exh. 61-67 and 83 (Ross's calculations for the classes).)

In the Statement of Decision, the trial court noted "[t]he key to plaintiffs' damage claims is the assertion that the car deal could not have been legally consummated until the execution of the second contract." (4 AA 0958 [Tab 44].) The trial court "disagree[d]" with Plaintiffs, holding "a rewritten contract does not generate a new consummation date under either federal or state law, so there was no incorrectly overcharged interest." (*Id.*, at 0959.) The *Nelson* Court, however, agreed with Plaintiffs, not the trial court:

> The term of the transaction begins on the date of its consummation ... ." (12 C.F.R. § 226, appen. J(B)(2) (2010).) "Consummation means the time that a consumer becomes contractually obligated on a credit transaction." (*12 C.F.R. § 226.2(a)(13) (2010); see Veh. Code, § 5901, subd. (d)* ["A sale is deemed completed and consummated when the purchaser of the vehicle has paid the purchase price, or, in lieu thereof, has signed a purchase contract or security agreement, and has taken physical possession or delivery of the vehicle."].) Thus, Regulation Z requires that the APR be calculated from the date the consumer becomes obligated, not the date the consumer makes the downpayment and drives the car away. (*Rucker I*, supra, 228 F.Supp.2d at p. 717.)

(*Nelson*, 186 Cal.App.4th at 1001.) The *Nelson* Court therefore concluded the date of the first contract is the "improper consummation date" and the date the second contract is signed is the "correct consummation date" because the date of the second contract was the date the consumer became obligated to the final transaction. (*Id.*)

The *Nelson* Court's opinion was based on an extensive analysis of both the federal Truth in Lending Act and the Automobile Sales Finance Act, including California and federal cases interpreting the statutes. (*Id.*, at 997-1002.) Of particular significance was *Thompson*, where, even though the contract technically contained all of the disclosures required by Civil Code § 2982(a), "the contract violated the ASFA because the dealer had manipulated the numbers that the ASFA required it to disclose in a manner that hid negative equity and deceived the consumer. (*Thompson, supra, 130 Cal.App.4th at pp.973, 977 & 979, fn. 21.*)" (*Nelson*, 186 Cal.App.,4th at 1002.)

Whereas the trial court asked the question "what was Raceway to do?" when "Raceway and its customer have a meeting of the minds to decide to enter into a second contract for the same vehicle the customer is already driving (and has agreed to pay for)", (4 AA 0957 [Tab 44]), the *Nelson* Court made clear backdating the second contract was not the correct answer:

> Nelson's consent to the backdating of the second contract does not protect Pearson Ford because it hid from Nelson the costs associated with backdating the second contract. While it may have been logical for Pearson Ford to backdate the contract because Nelson used the

> car for six days before consummating the transaction, there were other methods it could use in the event an original contract is voided due to the failure to obtain financing.

(*Nelson*, 186 Cal.App.4th at 1003.)

In the instant case, the Court of Appeal expressly disagreed with its sister court in the Fourth District on whether the practice of backdating results in disclosures that violate the Act. (*See* Opn., at 23 ("we find good reason to disagree with *Nelson* [*v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983]'s analysis, and decline to follow it in some respects."); Opn., at 24 ("*Nelson* stretches an already thin thread of authority beyond the breaking point."); Opn., at 27 ("We conclude that *Nelson* misreads *Krenisky* and *Rucker*, as well as TILA and Regulation Z, when it declares 'preconsummation interest to be an illegal finance charge.'"); and Opn., at 28 ("We disagree with *Nelson*'s analysis, and decline to follow it.").) Again, the Opinion is based on the premise that if the consumer signed the contract, then the consumer agreed to the terms in the contract, regardless of whether they are hidden or illegal. With the practice of backdating, that results in what the *Nelson* Court called "paying interest for a time period that no contract existed." (*Nelson,* 186 Cal.App. 4th at 994.)

A deeper analysis of the Court of Appeal's Opinion shows it was not justified in disagreeing with *Nelson*. The Court of Appeal's first problem was that it incorrectly framed the question. The Court of Appeal stated "The matter at issue ... is whether the disclosures that were included in the second and subsequent contracts complied with the requirements of the Regulation Z, as incorporated into the ASFA." (Opn., at 21, n. 13.) That was not the question in this case. As *Nelson* explained, a violation of

Regulation Z does not render a contract unenforceable under the ASFA. (*Nelson*, 186 Cal.App.4th at 1001.) Plaintiffs sued for a violation of Civil Code § 2982, which requires contracts to include both the disclosures required by Regulation Z and the disclosure requirements mandated by the ASFA in § 2982(a). Thus, by focusing solely on whether the contracts violated Regulation Z, the Court of Appeal missed the issue at play in this case.

The Court of Appeal went further astray by analyzing when a "refinancing" occurs under Regulation Z. (Opn., at 21.) The Opinion holds that "[n]ew disclosures may have been required with respect to those second or subsequent contracts, if they constituted a refinancing in the meaning of Regulation Z." (*Id.*, at 27.) The Court of Appeal's analysis of "refinancing," and its application to the backdating of retail installment sale contracts and the Automobile Sales Finance Act, is wrong.

The facts in this case are: (1) Plaintiffs and Backdating class members signed an initial contract; (2) they then signed a document rescinding the initial contract so that "no obligations shall be owed by either party under the original contract;" and (3) they signed a new contract with new terms that was backdated to the date of the original contract. (*See, e.g.*, 2 RT 254:7-10, 256:3-16, Exhs. 5, 7-8; 2 RT 269:22-28, 272:20-273:9, Exhs. 1-3, 2 RT 367:22-368:2, 370:12-371:24, Exhs. 28-30.)

Regulation Z defines a "refinancing" to be "when an existing obligation that was subject to this subpart is satisfied and replaced by a new obligation undertaken by the same consumer." (12 C.F.R. § 226.20(a).) The Official Staff Interpretations state "[w]hether a refinancing has occurred is determined by reference to whether the original obligation has been satisfied or extinguished and replaced by a new obligation, based on the

parties' contract and applicable law." (12 C.F.R. § 226, Supplement I, Official Staff Commentary, Section 226.20(a)(1).)

Thus, in order for there to be a refinancing, the new contract must pay off (satisfy or extinguish) the first contract. That is not what happened at Raceway Ford. In the instant case, the original contracts were rescinded, making them null and void. Next, new and different contracts to purchase the same vehicles were signed. The new contracts did not pay off the now non-existent original contracts – they were entirely new contracts made without reference to the rescinded original contracts. Therefore, the Court of Appeal's entire analysis, premised on the second contracts being "refinancings," is legally wrong.

The issue, therefore, is not what disclosures are required in a "refinancing," but what disclosures are required in any closed end credit sale contract. When the Court of Appeal remanded for a determination whether the APR on the second contract was within the 1/8 of 1 percentage point of what should have been disclosed, the Court of Appeal only got it half right under Regulation Z. (Opn., at 22.) Not only does the disclosed APR have to be accurate, the finance charge has to be accurately disclosed. (12 C.F.R. § 226.18(d)(2).) By only noting one of the two required accuracies, the Court of Appeal further demonstrated its lack of understanding of how Regulation Z works.

Next, the Court of Appeal stated "nothing in Regulation Z forbids interest on consumer credit contracts to be calculated as accruing from a date prior to consummation of the contract, if the parties agree among themselves to such a calculation." (Opn., at 23-24.) Even if one accepts as true the premise that parties can contract around the disclosure

requirements of Regulation Z, the Court of Appeal still reached the wrong result under the ASFA.

The ASFA requires the dealer to disclose in the contract "all of the agreements of the buyer and seller with respect to the total cost ...." (Civil Code § 2981.9.) Accepting the Court of Appeal's reasoning that the parties can agree to include interest from a date prior to consummation, that agreement creates a new charge – the interest prior to consummation – that was not present in the first contracts. It is a new and different calculation – how much interest is there for the pre-consummation period? This creates the ASFA violation – it is an item of cost that must be separately disclosed. (*See* Civil Code §§ 2982 and 2982(a) [allowing itemization greater than that set forth in the statute].) To protect the unsophisticated and unwary consumer from excessive charges, the new charge that was not present in the original contract (pre-consummation interest) must be separately disclosed. Thus, even under its own reasoning, the Court of Appeal reached the wrong conclusion under the ASFA.

Moreover, the Court of Appeal's conclusion parties could agree in their contract to separate preconsummation interest does not comport with the requirements of Regulation Z. Regulation Z defines a "finance charge" as charges not incurred in a cash deal. (12 C.F.R. § 226.4.) A backdated contract includes preconsummation interest. Preconsummation interest is not included in cash deals. Nor is preconsummation interest included in the original contract of a financed deal. Preconsummation interest is only charged when a customer cancels their original contract and signs a second, backdated contract. Therefore, preconsummation interest becomes a "finance charge" that has to be disclosed in accordance with Regulation Z.

The preconsummation interest cannot, however, be part of the "finance charge." A finance charge is calculated using the equation "Finance Charge = Rate x Principle x Time." If the finance charge starts prior to the term, the calculation cannot be made because the term is no longer what is disclosed on the contract, it is something different. That is because the term for purposes of calculating the APR has to begin on the consummation date. (12 C.F.R. § 226, Appen. J(b)(3).) Time intervals have to begin on the date a finance charge begins to be earned. (*Id.*) If the term for the finance charge begins on one day, and the term for the APR begins on another day, then the finance charge cannot be calculated.

The final problem with the Court of Appeal's holding the parties can contract to include preconsummation interest is that once the original contract was rescinded, the buyer had no obligation to pay any amount on the first contract and accrued interest is waived. Therefore, there is no way to agree to pay that interest now as part of the finance charge in the second, backdated contract: any amounts due and owing to the existence of the original contract became void when the parties agreed to rescind the original contract.

**4. Backdating a Second or Subsequent Purchase Contract to the Date of the First Purchase Contract for Purchase of a Vehicle Violates the Act**

This Court is faced with the decision to follow *Nelson* or the Court of Appeal's Opinion. There should be no question the proper course is to follow *Nelson*.

The *Nelson* Court began its analysis by looking at TILA and the ASFA and what they are meant to do:

> The purpose of the TILA is to assure consumers a meaningful disclosure of credit provisions, enabling the consumer to compare more readily various available credit terms and to avoid the uninformed use of credit.

(*Nelson*, 186 Cal.App.4th at 997 (citation omitted).) The *Nelson* Court continued:

> The ASFA serves to protect motor vehicle purchasers from abusive selling practices and excessive charges by requiring full disclosure of all items of cost.

(*Id.*, at 999-1000 (citation omitted).)

Rather than putting the onus on consumers to protect themselves from improper disclosures, as the Court of Appeal's Opinion does, the *Nelson* Court's correct analysis was driven by a proper motivation to enforce the ASFA in a manner consistent with the purpose of both TILA and the ASFA. Thus, the *Nelson* court concluded

> Pearson Ford's act of backdating the second contract resulted in Nelson paying a finance charge before consummation of the contract. (See Regulation Z; Veh. Code, § 5901, subd. (d).) Accordingly, the backdating of the second contract caused Nelson to pay interest on a contract that did not exist. We consider this preconsummation interest to be an illegal finance charge.

(*Id.*, at 1003.)

Because the first contract was rescinded (*see, e.g.*, Exhs. 2, 4, 8), it no longer existed. But by dating the second contract the same date as the first contract, the interest charge started to accrue as of the date of the first contract. That interest that accrued between the dates of the two contracts is

a unique charge to a customer who signs more than one contract. When the second contract is backdated, it creates an obligation for a time prior to the consummation of the contract. It is not an "informed" use of credit. It does not protect the consumer from abusive selling practices and excessive charges. Instead, it creates an illegal, hidden obligation. If the purpose of the ASFA is to promote full disclosure and prevent abuse (and there should be no doubt that is the purpose of the ASFA), then that purpose is not served by permitting dealers to backdate contracts and charge interest for a time period prior to the consumer being obligated to the final credit transaction.

Here, it was the Court of Appeal's hostility to consumers that led it to conclude backdating was permissible. The Court of Appeal held "nothing in Regulation Z forbids interest on consumer credit contracts to be calculated as accruing from a date prior to consummation of the contract, if the parties agree among themselves to such a calculation." (Opn., at 23-24.) Much like with its analysis of the smog fees, the Court of Appeal focused on what the consumer allegedly agreed to, instead of what the Legislature mandated the car dealer disclose. Whereas the *Nelson* court was properly concerned with the car dealer disclosing "correct information," lest the disclosure be "meaningless," (*Nelson*, 186 Cal.App.4th at 1005), the Court of Appeal erroneously focused on what the parties "agreed" to. *Nelson* harkens back to *Carter*, holding that even though Mr. Nelson agreed to the backdating of his contract, this did not protect the dealer because it still hid information from the consumer. (*Id.*, at 1003.)

Like with the smog-related disclosures, the issue is whether the Automobile Sales Finance Act exists to protect consumers and require meaningful and truthful disclosures, or whether its mandates can be

avoided by unscrupulous car dealers who are able to get car buyers to sign contracts with improper disclosures and "agree" to pay for things they were not provided and the dealer could not legally charge for. The clear answer is backdating, by charging interest prior to consummation and hiding the true terms of a transaction from a consumer, violates the Act.

**5. Backdating also Violates the Consumers Legal Remedies Act and the Unfair Competition Law**

**a. Backdating Violates the Consumers Legal Remedies Act**

In *Nelson*, the Court of Appeal concluded backdating violated Civil Code Section 1770(a)(14):

> As to the backdating class, Nelson claims the second contract (1) misrepresented his obligations to pay finance charges; and (2) included the representation that he was obligated to pay a finance charge effective October 2, that was prohibited by law. We agree the first act did not violate subdivision (a)(14) of section 1770, but conclude the second act did.
>
> . . . Pearson Ford violated the CLRA because the second contract represented it had a legal right to collect finance charges effective October 2, an obligation prohibited by Regulation Z. (*See, ante*, pt. II.A.2.a.) Nelson relied on the representation by paying finance charges effective October 2. Accordingly, Pearson Ford violated subdivision (a)(14) of section 1770 by misrepresenting an obligation that was prohibited by law.

> In summary, the trial court . . . erred when it found Pearson Ford not liable to the backdating class under the CLRA.

(*Nelson*, 186 Cal.App.4th at 1023.)

Here, the Court of Appeal "disagree[d] with *Nelson*'s conclusion 'preconsummation interest' constitutes an 'obligation prohibited by Regulation Z.'" (Opn., at 37.) As discussed above, the Court of Appeal misread both *Nelson* and Regulation Z. Accordingly, its conclusion backdating did not violate the CLRA was errorneous and should be reversed.

**b. Backdating Violates the Unfair Competition Law**

Finally, the *Nelson* court concluded backdating violated the UCL:

> Here, the trial court impliedly found that Pearson Ford had violated the UCL as to both classes through its violations of the ASFA, and we have affirmed that Pearson Ford is liable for its violations of the ASFA. . . .
>
> The failure of Pearson Ford to comply with the ASFA caused Nelson to suffer an injury and lose money as to both classes because he paid preconsummation interest (the backdating class) . . . . Unlike *Troyk*, these illegal charges violated the UCL and Pearson Ford improperly collected additional funds from Nelson. UCL causation exists because Nelson would not have paid preconsummation interest . . . had Pearson Ford complied with the ASFA. Because Nelson had standing to pursue claims under the UCL, we reject Pearson Ford's argument that the judgment in favor of both

classes should be vacated to the extent it grants relief under the UCL.

(*Nelson*, 186 Cal.App.4th at 1014-1015.)

Again, here, the Court of Appeal rejected *Nelson*'s conclusions about pre-consummation interest. Accordingly, its affirming the trial court's judgment in favor of Raceway under the UCL on the basis Plaintiffs failed to demonstrate standing should be reversed.

## VI.

## Conclusion

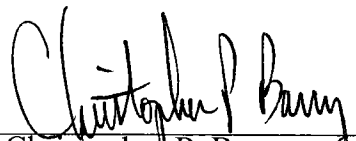
The Automobile Sales Finance Act should be returned to its status as a consumer protection statute. In regard to the Fraudulent Fees Class, charging fees that are not due violates the Act. There was not, as the trial court concluded, a lawful correction. The claim of the Fraudulent Fees class should be remanded to the trial court for judgment in favor of the class, with the court to provide remedies consistent with Civil Code §§ 2983 and 2983.1.

In regard to the Backdating Class, this Court should reverse the *Raceway Ford Cases* Court of Appeal decision and affirm *Nelson*'s holding that backdating violates the Automobile Sales Finance Act, the Consumers Legal Remedies Act, and the Unfair Competition Law. The Court should enter judgment for the class and affirm *Nelson*'s holding that class members can elect to rescind their contracts for Raceway's violation of the Automobile Sales Finance Act and for appropriate remedies consistent with Civil Code §§ 2983 and 2983.1. Finally, the case should be remanded for a determination whether injunctive relief under the Consumers Legal

Remedies Act or the Unfair Competition Law is appropriate regarding the practice of backdating.

DATED: March 17, 2015

Respectfully submitted,
ROSNER, BARRY & BABBITT, LLP

By: 
Christopher P. Barry
Attorneys for Plaintiffs and Appellants

## CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.520(c)(1) of the California Rules of Court, the foregoing OPENING BRIEF ON THE MERITS is produced using 13-point Times New Roman type and contains approximately 11,350 words, including footnotes, which is less than the 14,000 words permitted by rule. Counsel relies on the word count of the computer program used to prepare this Brief.

DATED: March 17, 2015

Respectfully submitted,
ROSNER, BARRY & BABBITT, LLP

By: _____
Christopher P. Barry
Attorneys for Plaintiffs and Appellants

**PROOF OF SERVICE**
(Sections 1013a, 2015.5 C.C.P.)

***RACEWAY FORD CASES***
**Supreme Court Case No.: S222211**
**Court of Appeal, 4th District, Division Two, Case No.: E056595**
**Riverside Superior Court Case No.: JCCP4476**

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is: 10085 Carroll Canyon Road, Suite 100, San Diego, California 92131.

On **March 17, 2015**, I served the foregoing document(s) described as:

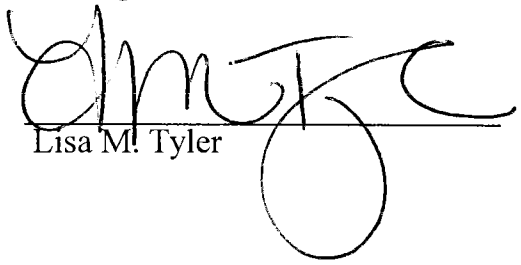
**OPENING BRIEF ON THE MERITS**

on the interested parties in this action at San Diego, California:

[X] **BY U.S. MAIL:** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed on the attached list and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the business's practice for collecting and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage thereon fully prepaid, at San Diego, California. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on **March 17, 2015,** at San Diego, California.



Lisa M. Tyler

***RACEWAY FORD CASES***
**Supreme Court Case No.: S222211**
**Court of Appeal, 4th District, Division Two, Case No.: E056595**
**Riverside Superior Court Case No.: JCCP4476**

## SERVICE LIST OF INTERESTED PARTIES

*VIA US MAIL*

Kellie S. Christianson, Esq. [1] Copy
ATKINSON, ANDELSON, LOYA,
RUDD & ROMO
20 Pacifica, Suite 1100
Irvine, California 92618

**Attorneys for Defendant *RACEWAY FORD, INC.***

*VIA US MAIL*

Michael S. Geller, Esq. [1] Copy
LAW OFFICE OF MICHAEL GELLER, INC.
1130 Palmyrita Avenue, Suite 330A
Riverside, CA 92507

**Attorney for Defendant *RACEWAY FORD, INC.***

*VIA US MAIL*

4TH DISTRICT COURT OF APPEAL [1] Copy
Division 2
3389 Twelfth Street
Riverside, CA 92501

*VIA US MAIL*

SUPERIOR COURT OF CALIFORNIA [1] Copy
County of Riverside
4050 Main Street
Riverside, CA 92501

*VIA US MAIL*

OFFICE OF THE DISTRICT ATTORNEY [1] Copy
Riverside County
3960 Orange Street
Riverside, CA 92501

*Service Pursuant to Business & Professions Code § 17209*

*VIA US MAIL*

Appellate Coordinator [1] Copy
OFFICE OF THE ATTORNEY GENERAL
Consumer Law Section
300 S. Spring Street
Los Angeles, CA 90013-1230

*Service Pursuant to Business & Professions Code § 17209*