

No. S266034

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

LISA NIEDERMEIER,  
Plaintiff and Respondent,

v.

FCA US LLC,  
Defendant and Appellant.

California Court of Appeal, Second District, Division One  
Civil No. B293960  
Appeal from Los Angeles County Superior Court  
Case No. BC638010  
Honorable Daniel Murphy

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**PETITIONER'S MOTION FOR JUDICIAL NOTICE;  
DECLARATION OF CYNTHIA E. TOBISMAN;  
[PROPOSED] ORDER  
[Evidence Code Sections 451, 452, 453, 459]**

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**KNIGHT LAW GROUP LLP**  
Steve Mikhov, SBN 224676  
*stevem@knightlaw.com*  
Roger Kirnos, SBN 283163  
*rogerk@knightlaw.com*  
\*Amy Morse, SBN 290502  
*amym@knightlaw.com*  
10250 Constellation Blvd, Suite 2500  
Los Angeles, California 90067  
(310) 552-2250 / Fax (323) 552-7973

**PUBLIC JUSTICE**  
\*Leslie A. Brueckner, SBN 140968  
*lbrueckner@publicjustice.net*  
475 14th Street, Suite 610  
Oakland, CA 94612  
(510) 622-8205

**HACKLER DAGHIGHIAN  
MARTINO & NOVAK, P.C.**  
\*Sepehr Daghighian, SBN 239349  
*sd@hdmnlaw.com*  
Erik K. Schmitt, SBN 314285  
*eks@hdmnlaw.com*  
433 North Camden Drive, 4th Floor  
Beverly Hills, California 90210  
(310) 887-1333 / Fax (310) 887-1334

**GREINES, MARTIN, STEIN &  
RICHLAND LLP**  
\*Cynthia E. Tobisman, SBN 197983  
*ctobisman@gmsr.com*  
Joseph V. Bui, SBN 293256  
*jbui@gmsr.com*  
5900 Wilshire Boulevard, 12th Floor  
Los Angeles, California 90036  
(310) 859-7811 / Fax (310) 276-5261

Attorneys for Petitioner LISA NIEDERMEIER

## TABLE OF CONTENTS

MOTION FOR JUDICIAL NOTICE	5
MEMORANDUM OF POINTS AND AUTHORITIES	7
I. The Exhibits Are Proper Subjects Of Judicial Notice.	10
A. Legislative history materials provided by the Legislative Intent Service (Exhibits A-D) are proper subjects of judicial notice.	11
B. An official act of a state agency (Exhibit E) is a proper subject of judicial notice.	12
II. The Exhibits Are Relevant To This Appeal.	14
III. Conclusion.	16
DECLARATION OF CYNTHIA E. TOBISMAN	17
PROPOSED ORDER	20
PROOF OF SERVICE	20
SERVICE LIST	21

## TABLE OF AUTHORITIES

### Cases

<i>Arya Group, Inc. v. Cher</i> (2000) 77 Cal.App.4th 610	11
<i>Brownell v. City and County of San Francisco</i> (1954) 126 Cal.App.2d 102	13
<i>Coburn v. Sievert</i> (2005) 133 Cal.App.4th 1483	11
<i>Committee for Green Foothills v. Santa Clara County Bd. Of Supervisors</i> (2010) 48 Cal.4th 32	12
<i>Etcheverry v. Tri-Ag Service, Inc.</i> (2000) 22 Cal.4th 316	13
<i>Galanty v. Paul Revere Life Ins. Co.</i> (2000) 23 Cal.4th 368	12
<i>People v. Ouellette</i> (1969) 271 Cal.App.2d 33	10
<i>People v. Valenzuela</i> (2001) 92 Cal.App.4th 768	12
<i>San Mateo County Coastal Landowners' Assn. v. County of San Mateo</i> (1995) 38 Cal.App.4th 523	13, 14
<i>Scott v. JPMorgan Chase Bank, N.A.</i> (2013) 214 Cal.App.4th 743	13
<i>Soukup v. Law Offices of Herbert Hafif</i> (2006) 39 Cal.4th 260	11, 12

### Statutes

Bus. & Prof. Code, § 472.4	9
Civ. Code, § 1793.2	8, 9
Civ. Code, § 1793.22	9
Civ. Code, § 1793.23	8
Evid. Code, § 451	6, 10, 11

Evid. Code, § 452	6, 10, 13, 14
Evid. Code, § 453	6, 10
Evid. Code, § 459	6, 10

## **Rules**

California Rules of Court, rule 8.252(a)	5
--	---

## **Other Authorities**

Assembly Bill 1381 (1995-1996 Reg Sess.)	5, 9
Assembly Bill 1787 (1981-1982 Reg. Sess.)	9
Assembly Bill 2057 (1987-1988 Reg. Sess.)	5, 9
Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1995 ed.) foll. § 450	12
Senate Bill 272 (1970 Reg. Sess.)	5, 8
Simons, California Evidence Manual (2013) Judicial Notice, § 7:11	14
Stats. 1970, ch. 1333, § 1	5, 8
Stats. 1982, ch. 388, § 1	5, 9
Stats. 1987, ch. 1280, § 2	5, 9
Stats. 1995, ch. 503, § 1	5, 9

## MOTION FOR JUDICIAL NOTICE

Pursuant to California Rules of Court rule 8.252(a), and in conjunction with the concurrently-filed Opening Brief on the Merits, petitioner Lisa Niedermeier hereby moves the Court to take judicial notice of the following documents submitted in the concurrently-filed, consecutively-paginated appendix:

- Exhibit A: Legislative history (provided by Legislative Intent Service) for Senate Bill 272 (1970 Reg. Sess.), Stats. 1970, ch. 1333, § 1, which enacted the Song-Beverly Consumer Warranty Act (the Act).
- Exhibit B: Legislative history (provided by Legislative Intent Service) for Assembly Bill 1787 (1981-1982 Reg. Sess.), Stats. 1982, ch. 388, § 1—a 1982 amendment to the Act.
- Exhibit C: Legislative history (provided by Legislative Intent Service) for Assembly Bill 2057 (1987-1988 Reg. Sess.), Stats. 1987, ch. 1280, § 2—a 1987 amendment to the Act.
- Exhibit D: Legislative history (provided by Legislative Intent Service) for Assembly Bill 1381 (1995-1996 Reg. Sess.), Stats. 1995, ch. 503, § 1—a 1995 amendment to the Act.
- Exhibit E: A July 22, 2019 declaration from Sherrie Moffet-Bell, program Chief for the Arbitration Certification Program of the California Department of Consumer Affairs, confirming that an April 10, 1997

letter attached thereto reflects the Department’s “current position,” along with the attached April 10, 1997 letter memorandum from the Department of Consumer Affairs entitled “‘Negative Equity’ in Arbitrators’ Replacement/ Repurchase Decisions—Margaret Bowers’ February 17, 1997 Letter.”

Good cause exists to judicially notice these documents because, as the attached memorandum explains, the documents are relevant to the parties’ dispute over whether the Act includes an implied offset for any credit a buyer receives when trading in a lemon vehicle to buy a new car.

This Motion is based on Evidence Code sections 451, 452, 453 and 459, the attached memorandum, the attached Declaration of Cynthia E. Tobisman, the concurrently-filed exhibits, and the briefs filed in this appeal.

June 1, 2021

KNIGHT LAW GROUP LLP

Steve Mikhov

Roger Kirnos

Amy Morse

HACKLER DAGHIGHIAN MARTINO &  
NOVAK, P.C.

Sepehr Daghighian

Erik K. Schmitt

PUBLIC JUSTICE

Leslie A. Brueckner

GREINES, MARTIN, STEIN & RICHLAND,  
LLP

Cynthia E. Tobisman

Joseph V. Bui

By s/ Cynthia Tobisman

Attorneys for Petitioner

LISA NIEDERMEIER

## MEMORANDUM OF POINTS AND AUTHORITIES

As petitioner Lisa Niedermeier's accompanying Opening Brief on the Merits explains, as does her petition for review, this appeal concerns whether the Song-Beverly Consumer Warranty Act (the Act) allows manufacturers of lemon vehicles to claim an implied offset for any trade-in credit the buyer receives when the manufacturer's breach of its statutory obligation to promptly buy back a lemon vehicle results in the buyer trading in the lemon to buy a new, safe car. A trade-in offset appears nowhere in the Act's language. Petitioner submits that the Act should be construed according to its unambiguous plain language: No trade-in offset.

However, to the extent this Court decides to consider extrinsic interpretative aids beyond the plain language, such as legislative history, the exhibits provided with this Motion will assist the Court in that endeavor. At a minimum, the exhibits reinforce the Act's strongly pro-consumer purpose and show that the Legislature has consistently amended the Act to foreclose manufacturers of lemon vehicles from exploiting ambiguities or loopholes in the Act's language that could limit buyer remedies.

The exhibits are as follows:

**Exhibits A-D** consist of the following legislative history materials provided by the Legislative Intent Service:

- Exhibit A pertains to Senate Bill 272 (1970 Reg. Sess.), Stats. 1970, ch. 1333, § 1. This bill enacted the Act, which the Legislature adopted to protect buyers of

consumer products against manufacturers who refuse to stand behind their product warranties or provide buyers any effective relief for breaching those warranties.

- Exhibit B pertains to Assembly Bill 1787 (1981-1982 Reg. Sess.), Stats. 1982, ch. 388, § 1. The Legislature enacted this 1982 amendment to the Act, known as the “lemon law” bill, because the Act had proven ineffective to protect buyers of new motor vehicles. The Legislature therefore added new consumer protection provisions just for buyers of new motor vehicles.
- Exhibit C pertains to Assembly Bill 2057 (1987-1988 Reg. Sess.), Stats. 1987, ch. 1280, § 2. The Legislature enacted this 1987 amendment to the Act because the 1982 amendment still failed to sufficiently protect buyers of lemon vehicles. Among other things, the 1987 amendment added Civil Code section 1793.2, subdivision (d)(2), which sets forth comprehensive requirements and specifications regarding manufacturers’ obligations to promptly replace or provide restitution for lemon vehicles. Subdivision (d)(2) is of core importance in this appeal.
- Exhibit D pertains to Assembly Bill 1381 (1995-1996 Reg Sess.), Stats. 1995, ch. 503, § 1. The Legislature enacted this 1995 amendment to the Act to add Civil Code section 1793.23, which imposed new comprehensive requirements on manufacturers for



branding re-acquired lemon vehicles with a “Lemon Law Buyback” notation and for providing notice of the vehicle’s history to prospective buyers or lessees. The Court of Appeal here partially relied on the Act’s branding provisions as a basis for its decision.

**Exhibit E** is comprised of two documents prepared by the California Department of Consumer Affairs (Department), a state agency that the Legislature has charged with implementing the Act’s requirements for alternative dispute resolution processes, including the certification of alternative dispute resolution processes manufacturers develop to resolve disputes with consumers. (See Bus. & Prof. Code, § 472.4; Civ. Code, § 1793.22, subd. (d).)

The first document in Exhibit E is a July 2019 declaration from the current program Chief for the Arbitration Certification Program confirming that the attached April 10, 1997 letter reflects the Department’s “current position.” (Ex. E, p. 1.)

The second document in exhibit E is an April 10, 1997 letter from the then-Chief of the Department’s Arbitration Review Program that responds to a letter from Ford Motor Company regarding how arbitrators should interpret the Act—namely, whether so-called “negative equity” could be deducted from a consumer’s recovery. Ford had argued “that the buyer of a defective vehicle should not be reimbursed for ‘negative equity’” under Civil Code section 1793.2 “in a lemon law arbitration proceeding.” (Ex. E, p. 2.) The Department disagreed. (*Ibid.*) In the letter, the Department describes how dealers and

manufacturers inflate trade-in credits in order to close deals with consumers—that is, the Department made clear that dealer trade-in credits are not intended to approximate the actual value of the traded-in vehicle.

As we will show, each exhibit is a proper subject of judicial notice and is relevant to this appeal. Judicial notice of these exhibits is therefore proper.

**I. The Exhibits Are Proper Subjects Of Judicial Notice.**

Like trial courts, an appellate court’s power and obligation to take judicial notice is governed by Evidence Code sections 451, 452 and 453. (Evid. Code, § 459; *People v. Ouellette* (1969) 271 Cal.App.2d 33, 36.) Section 451 identifies the materials for which judicial notice “must” be taken, and section 452 identifies the materials for which judicial notice “may” be taken. (Evid. Code, §§ 451, 452.) Under section 453, judicial notice of any matter specified in section 452 is compulsory if a party requests judicial notice and (a) “[g]ives each adverse party sufficient notice of the request . . . to enable such adverse party to prepare to meet the request” and (b) “[f]urnishes the court with sufficient information to enable it to take judicial notice of the matter.” (Evid. Code, § 453, subs. (a), (b).)

The exhibits here are judicially noticeable under all three provisions.

**A. Legislative history materials provided by the Legislative Intent Service (Exhibits A-D) are proper subjects of judicial notice.**

Exhibits A-D are true and correct copies of legislative history materials provided by the Legislative Intent Service. (See Declaration of Cynthia E. Tobisman [“Tobisman Decl.”], ¶ 2.) Legislative history materials are judicially noticeable.

Section 451 requires courts to take judicial notice of “[t]he decisional, constitutional, and public statutory law of this state.” (Evid. Code, § 451.) The requirement that courts take judicial notice of the law extends to a statute’s legislative history. (See Cal. Law Revision Com. com., 29B West’s Ann. Evid. Code (1995 ed.) foll. § 450, p. 93 [“That a court may consider legislative history . . . is inherent in the requirement that it take judicial notice of the law”].) It is well settled that this Court may take judicial notice of legislative history under the Evidence Code. (See, e.g., *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 279, fn. 9 (*Soukop*).)

Courts routinely take judicial notice of legislative history materials assembled by the Legislative Intent Service. (See, e.g., *Coburn v. Sievert* (2005) 133 Cal.App.4th 1483, 1498; *Arya Group, Inc. v. Cher* (2000) 77 Cal.App.4th 610, 614, fn. 3.)

To avoid accusations that petitioner cherry-picked documents or chose to withhold non-favorable materials, petitioner is providing this Court with *all* of the materials that the Legislative Intent Service provided for these statutes.

(Tobisman Decl., ¶ 2; see *People v. Valenzuela* (2001) 92 Cal.App.4th 768, 776, fn. 4 [“W]e are reluctant to sanction defense counsel’s selective presentation of one excerpt from the legislative history obtained from the Legislative Intent Service. The entire legislative history should have been submitted to us.”].)

The Legislative Intent Service materials are comprehensive and may contain some documents that are not the proper subject of judicial notice. In the accompanying Opening Brief on the Merits, petitioner only cites or intends to rely upon legislative history materials that *are* the proper subject of judicial notice, such as committee and bill reports and letters to the governor by the bill sponsors urging signing of the bill. (Tobisman Decl., ¶ 3; see *Soukup, supra*, 39 Cal.4th at p. 279, fn. 9 [taking judicial notice of “various versions of the legislation and committee reports”]; *Galanty v. Paul Revere Life Ins. Co.* (2000) 23 Cal.4th 368, 381, fn. 24 [judicially noticing letter urging governor to sign bill]; *Committee for Green Foothills v. Santa Clara County Bd. Of Supervisors* (2010) 48 Cal.4th 32, 49, fn. 15 [“[W]e have routinely found enrolled bill reports, prepared by a responsible agency contemporaneous with passage and before signing, instructive on matters of legislative intent.”].)

**B. An official act of a state agency (Exhibit E) is a proper subject of judicial notice.**

Exhibit E is a true and correct copy of (1) a letter written by the California Department of Consumer Affairs (“Department”) that interprets the provisions of the Act at issue

in this dispute, and (2) a declaration from the Department’s program Chief for the Arbitration Certification Program confirming that the letter reflects the Department’s position. (See Tobisman Decl., ¶ 4.) These materials are judicially noticeable under Evidence Code section 452, subdivision (c).

Section 452, subdivision (c), allows courts to take judicial notice of the “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (Evid. Code, § 452, subd. (c).) This provision is construed “expansive[ly]” so that “courts in California [can] take notice of a wide variety of official acts.” (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 752-753 [quoting Simons, California Evidence Manual (2013) Judicial Notice, § 7:11, p. 558 (Simons)].) For example, it is well-settled that “‘executive’ acts” include “those performed by administrative agencies.” (*Ibid.* [quoting Simons, *supra*, § 7:11, p. 558].)

Accordingly, appellate courts routinely take notice of “legal opinion” letters from state agencies as official acts of the “executive.” (See, e.g., *San Mateo County Coastal Landowners’ Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 552-553 (*San Mateo*) [legal opinion letter from the Secretary of Resources]; *Brownell v. City and County of San Francisco* (1954) 126 Cal.App.2d 102, 108, fn. 2 [legal opinion letter from the Secretary of State to the Attorney General].) This Court has endorsed these decisions. (See *Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 331 [citing the decision to judicially notice

the legal opinion letter in *San Mateo* as an example of what is judicially noticeable under section 452].)

Thus, Exhibit E is judicially noticeable as a state agency legal opinion letter and a declaration that the opinion retains vitality.

The Court of Appeal in this case already recognized that Exhibit E is a proper subject of judicial notice, as are legislative history materials pertaining to the relevant statutes. Ms. Niedermeier filed a motion for judicial notice in the Court of Appeal, which requested judicial notice of Exhibit E and also four documents that can be found within the legislative history set forth in Exhibits A-D. (See Tobisman Decl., ¶ 5.) The Court of Appeal granted the request. (*Ibid.*)

## **II. The Exhibits Are Relevant To This Appeal.**

As the Court of Appeal recognized in granting judicial notice below, the exhibits accompanying this motion—Exhibits A-E in the concurrently-filed appendix—are relevant to the parties’ dispute as to whether the Act contains an implied offset for any trade-in credit that a buyer may receive when trading in a lemon vehicle to purchase a safe car.

Exhibits A-D provide the relevant legislative history for the statutes at issue. Petitioner submits that the Act’s plain language unambiguously shows there is no trade-in offset, because such an offset appears nowhere in the Act despite its detailed, comprehensive provisions for lemon vehicles. But if this Court nonetheless decides to consider interpretative aids beyond

the plain language, this legislative history will assist the Court. The legislative history confirms that the Legislature meant what the plain language says: No trade-in offset. Among other things, the legislative history confirms the Act's strongly pro-consumer purpose and shows that the Legislature repeatedly amended the Act to foreclose manufacturers of lemon vehicles from exploiting ambiguities or loopholes to avoid their affirmative statutory obligations to promptly buy back and label lemon vehicles.

In addition, Exhibit E is relevant because it sheds light on the true nature of trade-in credits and explains that they generally do not reflect the true value of the vehicle being traded in. The nature of trade-in credits is relevant to whether a trade-in offset for a lemon vehicle would benefit manufacturers of lemon vehicles and detrimentally impact the remedies available to buyers of lemon vehicles after manufacturers breach their affirmative statutory obligations to promptly buy-back and label lemons.

### III. Conclusion.

As the accompanying Opening Brief on the Merits explains, petitioner Lisa Niedermeier submits that the Act's plain language conclusively establishes that the Act does not contain a trade-in offset. To the extent this Court nonetheless decides to consider extrinsic interpretive aids, the materials submitted with this Motion will aid the Court's analysis.

June 1, 2021

KNIGHT LAW GROUP LLP

Steve Mikhov

Roger Kirnos

Amy Morse

HACKLER DAGHIGHIAN MARTINO &  
NOVAK, P.C.

Sepehr Daghighian

Erik K. Schmitt

PUBLIC JUSTICE

Leslie A. Brueckner

GREINES, MARTIN, STEIN &  
RICHLAND, LLP

Cynthia E. Tobisman

Joseph V. Bui

By           /s/ Cynthia Tobisman          

Attorneys for Petitioner

LISA NIEDERMEIER



## DECLARATION OF CYNTHIA E. TOBISMAN

I, Cynthia E. Tobisman, declare as follows:

1. I am an attorney licensed to practice law in the State of California and am a partner in the law firm of Greines, Martin, Stein & Richland LLP (“GMSR”), which specializes exclusively in appellate practice. GMSR is appellate counsel of record for petitioner Lisa Niedermeier, along with Leslie A. Brueckner of Public Justice. I am the GMSR partner with primary responsibility for this appeal. I had primary responsibility in the Court of Appeal also.

2. Exhibits A-D in the accompanying Motion for Judicial Notice exhibit appendix are true and correct copies of legislative history materials that the Legislative Intent Service provided to my firm. To avoid accusations of cherry-picking, we have provided the entire Legislative Intent Service files as given to us. The only alteration we made to what we received was to consecutively paginate the exhibits with “MJN” numbers for ease of reference in the parties’ briefs.

3. In the accompanying Opening Brief on the Merits, petitioner only cites to or relies upon portions of the Legislative Intent Service materials that are proper subjects of judicial notice, such as committee reports and letters to the governor by bill sponsors urging signing of the bill. We do not intend to rely upon any materials that fall outside the scope of proper judicial notice.

4. Exhibit E in the accompanying Motion for Judicial Notice exhibit appendix consists of true and correct copies of (a) a memorandum letter promulgated by the California Department of Consumer Affairs on April 10, 1997, entitled “Negative Equity’ in Arbitrators’ Replacement/Repurchase Decisions – Margaret Bowers’ February 17, 1997 Letter”; and (b) a July 2019 declaration from the Department’s current program Chief for the Department’s Arbitration Certification Program confirming that the April 10, 1997 letter reflects the Department’s current position.

5. Ms. Niedermeier filed a motion for judicial notice in the Court of Appeal in this same case, which requested judicial notice of this same Exhibit E, as well as four documents that can be found within the legislative history set forth in Exhibits A-D. The Court of Appeal granted the request for judicial notice, in a February 27, 2020 order.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed on June 1, 2021, at Los Angeles, California.

/s/ Cynthia E. Tobisman

Cynthia E. Tobisman

No. S266034

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

LISA NIEDERMEIER,  
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v.

FCA US LLC,  
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California Court of Appeal, Second District, Division One  
Civil No. B293960  
Appeal from Los Angeles County Superior Court  
Case No. BC638010  
Honorable Daniel Murphy

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**[PROPOSED] ORDER**

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IT IS HEREBY ORDERED that, pursuant to Evidence Code sections 451, 452, 453 and 459, and rule 8.252(a) of the California Rules of Court, judicial notice is taken of Exhibits A-E submitted with petitioner Lisa Niedermeier's motion for judicial notice.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Presiding Justice

## **PROOF OF SERVICE**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On June 1, 2021, I served the foregoing document described as: on the parties in this action by serving:

### **SEE ATTACHED SERVICE LIST**

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Executed on June 1, 2021, at Los Angeles, California.

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

s/ Chris Hsu  
\_\_\_\_\_

## SERVICE LIST

### *Via TrueFiling:*

CLARK HILL LLP  
David L. Brandon, Esq.  
*dbrandon@clarkhill.com*  
1055 West Seventh Street  
Los Angeles, CA 90017

GIBSON, DUNN & CRUTCHER LLP  
Thomas H. Dupree Jr. (pro hac vice)  
*tdupree@gibsondunn.com*  
Matt Gregory (pro hac vice)  
Shaun Mathur, Esq.  
1050 Connecticut Avenue NW  
Washington, DC 20036

*Attorneys for Defendant and Appellant  
FCA US LLC*

Office of the Clerk  
CALIFORNIA COURT OF APPEAL  
[Electronic Service under Rule 8.212(c)(2)]

### *Via U.S. Mail:*

Clerk of the Superior Court  
Department 32, Honorable Daniel S. Murphy  
111 North Hill Street  
Los Angeles, CA 90012  
**Case Number: BC638010**

**STATE OF CALIFORNIA**  
Supreme Court of California

**PROOF OF SERVICE**

**STATE OF CALIFORNIA**  
Supreme Court of California

Case Name: **NIEDERMEIER v. FCA US**

Case Number: **S266034**

Lower Court Case Number: **B293960**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
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ADDITIONAL DOCUMENTS	Exhibits to Motion for Judicial Notice Volume 1 of 9
ADDITIONAL DOCUMENTS	Exhibits to Motion for Judicial Notice Volume 2 of 9
ADDITIONAL DOCUMENTS	Exhibits to Motion for Judicial Notice Volume 3 of 9
ADDITIONAL DOCUMENTS	Exhibits to Motion for Judicial Notice Volume 4 of 9
ADDITIONAL DOCUMENTS	Exhibits to Motion for Judicial Notice Volume 5 of 9
ADDITIONAL DOCUMENTS	Exhibits to Motion for Judicial Notice Volume 6 of 9
ADDITIONAL DOCUMENTS	Exhibits to Motion for Judicial Notice Volume 7 of 9
ADDITIONAL DOCUMENTS	Exhibits to Motion for Judicial Notice Volume 8 of 9
ADDITIONAL DOCUMENTS	Exhibits to Motion for Judicial Notice Volume 9 of 9
BRIEF	Opening Brief on the Merits

Service Recipients:

<b>Person Served</b>	<b>Email Address</b>	<b>Type</b>	<b>Date / Time</b>
Joseph Bui Greines, Martin, Stein & Richland LLP 293256	jbui@gmsr.com	e-Serve	6/1/2021 10:17:46 PM
Sepehr Daghighian Hackler Daghighian Martino & Novak P.C. 239349	sd@hdmnlaw.com	e-Serve	6/1/2021 10:17:46 PM
Cynthia Tobisman Greines Martin Stein & Richland LLP 197983	ctobisman@gmsr.com	e-Serve	6/1/2021 10:17:46 PM
David L. Brandon Clark Hill LLP 105505	dbrandon@clarkhill.com	e-Serve	6/1/2021 10:17:46 PM
Thomas Dupree Gibson Dunn & Crutcher LLP	tdupree@gibsondunn.com	e-Serve	6/1/2021 10:17:46 PM
Amy-Lyn Morse Knight Law Group, LLP 290502	amym@knightlaw.com	e-Serve	6/1/2021 10:17:46 PM
Rebecca Nieto Greines Martin Stein & Richland LLP	rnieto@gmsr.com	e-Serve	6/1/2021 10:17:46 PM

Shaun Mathur Gibson Dunn & Crutcher 311029	smathur@gibsondunn.com	e-Serve	6/1/2021 10:17:46 PM
Richard Wirtz Wirtz Law APC 137812	rwirtz@wirtzlaw.com	e-Serve	6/1/2021 10:17:46 PM
Chris Hsu Greines Martin Stein & Richland LLP	chsu@gmsr.com	e-Serve	6/1/2021 10:17:46 PM
Leslie Brueckner Public Justice 140968	lbrueckner@publicjustice.net	e-Serve	6/1/2021 10:17:46 PM

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.

6/1/2021

Date

/s/Chris Hsu

Signature

Tobisman, Cynthia (197983)

Last Name, First Name (PNum)

Greines Martin Stein & Richland LLP

Law Firm