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

REPLY 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

REPLY 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

TABLE OF AUTHORITIES

Page(s)

CALIFORNIA CASES

TABLE OF AUTHORITIES CONT.

Page(s)

CALIFORNIA CASES CONT.

FEDERAL CASES

CALIFORNIA STATUTES

Civil Code

Code of Civil Procedure

Vehicle Code

TABLE OF AUTHORITIES CONT.

Page(s)

MISCELLANEOUS

I.

Introduction

Raceway Ford's Answer Brief asks this Court to gut the Automobile Sales Finance Act. No longer should the Act's disclosure requirements be mandatory, and no longer should the Act require full and honest disclosures to consumers. Raceway Ford seeks permission for car dealers across the State to charge customers for whatever they want on a purchase contract, and for courts to enforce those contracts if customers sign them. The Legislature's requirements regarding the formation of vehicle sale contracts, and the protections afforded to consumers against deceptive business practices and excessive charges, should be thrown out in favor of a buyer beware system. As noted by the Court of Appeal in *Thompson v. 10,000 RV Sales, Inc.* (2005) 150 Cal.App.4th 950, 976 (citation omitted), "There is no duty resting upon a citizen to suspect the honesty of those with whom he [or she] transacts business. Laws are made to protect the trusting as well as the suspicious. [T]he rule of caveat emptor should not be relied upon to reward fraud and deception." The Automobile Sales Finance Act is a remedial statute for the protection of consumers. Petitioners ask this Court to restore the Act to its proper place, protect consumers from false and misleading disclosures, and reverse the Court of Appeal's opinion.

Raceway Ford does not dispute it sold over 1,100 vehicles using purchase contracts that were backdated. Raceway Ford does not dispute that backdating contracts means putting false information on the contract. Backdating is about making money by bringing customers back to the dealership under the impression their deal needed a tweak. The reality is deals need to be tweaked because Raceway Ford sold cars to customers under terms it knew it couldn't sell to banks. Then, once the customer was

committed to the deal, Raceway Ford brought them back to change the terms and keep the sale. "Rewritten contract" is a euphemism for new contract with worse terms for the buyer. The process was about keeping the truth from buyers. The Court of Appeal in *Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983 saw the practice for what it was and held backdating created illegal, undisclosed charges in a contract. The trial court and Court of Appeal in this case did not. If the Automobile Sales Finance Act is really a consumer protection statute, then backdating violates the Act because the process creates an illegal finance charge that is not disclosed to the buyer.

Raceway Ford also does not dispute it charged purchasers of diesel vehicles for work Raceway Ford did not perform and for government certificates that were never issued. Disclosing to buyers charges that do not apply to their transaction, and then hoping they don't catch the charges, does not protect consumers from deceptive business practices and excessive charges, which is what the Automobile Sales Finance Act is supposed to do. The Legislature required disclosure of all applicable charges. Including inapplicable charges, regardless of whether they are listed on the contract, is not an honest business practice. The Act requires full and honest disclosures, and Raceway Ford's charges for smog-related fees were not honest, and therefore violated the Act.

Enforcing the disclosure requirements of the Automobile Sales Finance Act will not result in a windfall to members of the two classes of vehicle purchasers in this case. Rather, enforcement of the Act's disclosure requirements will prevent Raceway Ford and car dealers across the State from reaping a windfall from selling vehicles without making the disclosures the Legislature required them to make.

II.

Charging For Work You Did Not Do, And For Smog Certificates You Did Not Obtain, Violates The Automobile Sales Finance Act (Whether Or Not You Disclose The Charges)

A. The Act Requires Truthful Disclosure Of Applicable Charges

Raceway Ford argues that because it disclosed on the contracts of the Fraudulent Fees Class the amount of the improper fees, it did not violate the Automobile Sales Finance Act. Raceway Ford ignores the language of the Act: "The contract shall contain the following disclosures, ***as applicable***, ..." (Civil Code Section 2982(a) (emphasis added).) If charges are not applicable to a sale, then the charges should not be listed in the Itemization of the Amount Financed. Raceway Ford's conclusion the Act "is a ban on hidden charges, not disclosed but erroneously included ones" is contrary to the express language of the Act. (Answer Brief, at 43.) Only applicable charges are to be included in a contract. When a car dealer does not certify the vehicle complies with the applicable pollution control requirements, then there is no fee to disclose. (Civil Code Section 2982(a)(1)(C).) When the State is not going to issue a certificate pursuant to any applicable pollution control statute, then there is no fee to disclose. (Civil Code Section 2982(a)(4).)

The Automobile Sales Finance Act does not include an "intent" component, making Raceway Ford's alleged lack of scienter irrelevant. The Act does not require car dealers intend to defraud consumers with improper disclosures. It does not require car purchasers to suffer monetary harm as a result of the improper disclosures. (*Rojas v. Platinum Auto Group, Inc.* (2013) 212 Cal.App.4th 997, 1005 ("a car buyer need not suffer economic

damage to rescind a sales contract that does not comply with Rees–Levering.").)

The Act does not place an onerous burden on car dealers –truthfully disclose all items of cost that apply to the sale; don't disclose any charges that don't apply to the sale. Simple and easy to follow. Raceway Ford admits it did not follow the requirements of the Act because it charged for work it didn't do and a certificate that wasn't issued. Despite this straightforward language and undisputed facts, the Court of Appeal nonetheless concluded Raceway Ford did not violate the Act.

Raceway Ford does not make much of an effort to justify the Court of Appeal's analysis. (*See* Answer Brief on the Merits, at 46-47.) After concluding "the goal of protecting purchasers from excessive charges was not initially achieved" because of the fraudulent charges on the contracts, the Court of Appeal nonetheless found the consumers at fault because they "did not act on that information by verifying that all of the listed charges were appropriate prior to signing." (Opinion, at 44.) That ruling cannot be reconciled with the consumer protection nature of the Automobile Sales Finance Act.

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*, (2013) 212 Cal.App.4th at 1002 (citations omitted).) "The California Legislature enacted the ASFA to protect motor vehicle purchasers from abusive selling practices and excessive charges by requiring full disclosure of all items of cost." (*Thompson v. 10,000 RV Sales, Inc.* (2005) 130 Cal.App.4th 950, 966 (citation omitted).) Raceway Ford argues the Legislative intent in passing the ASFA is irrelevant because it wants this Court to bless the Court of Appeal's anti-consumer opinion

that does not protect consumers and allows Raceway Ford and other dealers to include excessive charges in their contracts.

Are consumers protected if dealers can list whatever charges they want on a contract and collect the money from the consumer, regardless of whether the charges apply to the sale? Is it an abusive selling practice to include charges on a contract that do not apply to the sale? Is it an excessive charge to charge someone for work you didn't do and a certificate you didn't get? The Court of Appeal disregarded the ASFA's intent to protect consumers by holding the smog-related charges did not violate the Act. This Court should reverse that holding.

B. Raceway Ford Did Not Commit An Accidental Or Bona Fide Error In Computation

While the ASFA does not require intent for a consumer to rescind a contract, the Act does include a built-in affirmative defense that if the violation of the Act was "the result of an accidental or bona fide error in computation," then the contract remains enforceable. (Civil Code Section 2983(a).) As an affirmative defense, Raceway Ford was required to plead the defense "in order to introduce evidence on this issue." (*Cobain v. Ordonez* (1980) 163 Cal.Rptr. 126, 129 (citations omitted).) Raceway Ford did not plead this affirmative defense. (*See* AA, Vol. III, at 562 (limiting bona fide error affirmative defense to claims under the Consumers Legal Remedies Act).) The failure to plead an affirmative or equitable defense waives the defense. (C.C.P. § 430.80; *Jetty v. Craco* (1954) 123 Cal.App.2d 876, 880.) At trial, a defendant may not rely on defenses not pleaded in its answer. (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731-32; *Interstate Group Administrators* (1985) 174 Cal.App.3d 700, 706-

07.) This is true even if evidence is introduced at trial on the issue without objection. (*SFVCC v. Thomas* (1954) 123 Cal.App.2d 348, 350-351.)

Nevertheless, Raceway Ford argues the phrase "accidental or bona fide error in computation" should mean more than the plain language of the Act. The Act requires the disclosure of various items of cost in an Itemization of the Amount Financed section of the contract. (Civil Code Section 2982(a).) Some of those disclosures involve adding together other disclosures. (*See, e.g.*, Sections 2982(a)(1)(M) and 2982(a)(6)(G).) But Raceway Ford asks the Court to interpret "computation" errors to include programming errors. An error in computation is one involving "mathematical calculations." (*See Lopes v. Millsap* (1992) 6 Cal.App.4th 1679, 1686; *see also Alton v. Rogers* (1954) 127 Cal.App.2d 667, 675 (describing mathematical error as an error in computation); *Erickson v. Stockton & T.C.R. Co.* (1905) 148 Cal. 206, 207 (describing a $54 math error in a judgment as "a mere error in computation"); Black's Law Dictionary 288, 6th ed. (1990) (defining "computation" to mean "the act of computing, numbering, reckoning, or estimating").)

The following mathematical error regarding placement of a decimal point is a typical "error in computation:"

> Most points out that the trial court made an error of computation ... One of the items in the column was $16.96. Apparently this item was struck on the adding machine as $1,696.00, thereby causing an error of $1,679.04 in the total.

(*Chazan v. Most* (1962) 209 Cal.App.2d 519, 521.) Similarly, as a treatise discussing this specific affirmative defense describes, an example of a bona

fide error in computation could be "when typing the contract, defendant's secretary inadvertently transposed the numbers constituting the finance charge." (*See* Masterson, Baron, & LaMothe, California Civil Practice Business Litigation, § 58:65.)

There were no errors in computation on the Fraudulent Fees Class Contracts – there were simply charges on the contracts that did not belong. While Raceway Ford criticizes Petitioners for not citing any authority for the proposition "computation" should mean a mathematical calculation (Answer Brief, at 44), Raceway Ford offers no authority for broadening the definition of "computation" to include programming errors. (*Id.*, at 44-45.) Raceway Ford asks the Court to expand the definition of "computation" to benefit car dealers to the detriment of consumers, despite the Act's consumer protection purpose. Doing so defeats the purpose of protecting consumers from excessive charges.

C. Raceway Ford's Charging Improper Fees Is Not Like A Misprinted Price In An Advertisement

Raceway Ford argues this Court's opinion in *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261 should be used to overrule the express language of the Automobile Sales Finance Act because it is "inequitable" to enforce the Act. (Answer Brief, at 45.) In *Donovan*, the Court found a car dealer's unilateral mistake of fact in advertising the price of a car was a basis for rescinding a contract to sell the car formed when a buyer tendered the amount of the advertised price. *Donovan* stands for the proposition that a contract can be rescinded due to a unilateral mistake by one of the parties. Raceway Ford's problem is it wants to enforce its contracts despite its alleged unilateral mistake.

In *Donovan*, a consumer attempted to purchase a car for a price listed in a newspaper advertisement. When he arrived at the dealership and offered the money, the car dealer said the advertisement was a mistake. The car dealer introduced evidence that a different vehicle was supposed to be included with the particular price listed in the newspaper advertisement, and the newspaper at issue admitted it made the mistake. (*Id.*, at 268-269.) The correct advertisement including the correct vehicle ran in other newspapers. (*Id.*) While Vehicle Code Section 11713.1(e) required a car dealer to sell a vehicle at the advertised price, the Court held "there is no indication in the statutory scheme that the Legislature intended to impose such an absolute contractual obligation upon automobile dealers who make an honest mistake. Therefore, absent evidence of bad faith, the violation of any obligation imposed by this statute does not constitute the neglect of a legal duty that precludes rescission for unilateral mistake of fact." (*Id.*, at 288-289.)

Here, the Automobile Sales Finance Act requires car dealers to disclose applicable charges. (Civil Code Section 2982(a).) The Act provides a defense if a dealer violates the Act by an "accidental or bona fide error in computation." (Civil Code Section 2983(a).) Raceway Ford did not make an accidental or bona fide error in computation. In contrast with the dealership in *Donovan*, Raceway Ford is not seeking to rescind the contracts because it charged its customers for work it did not do and for a certificate it did not obtain. Rather, Raceway Ford seeks the opposite – it wants to enforce the contracts where it included fraudulent charges. Accordingly, *Donovan* does not stand for the proposition Raceway Ford wants it to, and should not be used to overrule the disclosure requirements,

and remedies for failure to comply with those requirements, set out in the Automobile Sales Finance Act.

D. Raceway Ford Did Not Correct The Contracts With The Fraudulent Charges

Finally, it is unclear whether Raceway Ford is arguing it corrected the contracts at issue pursuant to Civil Code Section 2984. (*See* Answer Brief, at 46 ("The record also contains undisputable evidence that Raceway subsequently corrected its mistake as soon as Raceway discovered it.").)[1] Civil Code Section 2984 allows the holder of a conditional sale contract to correct a non-willful violation on the face of the contract within 30 days of execution of the contract. As discussed in Petitioners' Opening Brief, Raceway Ford, which assigned the class member contracts to financial institutions, admitted it was not the holder. Nor did Raceway Ford claim it corrected the contracts within 30 days of their execution or 10 days of notice. Raceway Ford did not correct the contracts at issue in compliance with the Act.

III.

Backdating Results In False Disclosures

A. Backdating Results In Disclosures That Are Not Truthful And Honest

Tucked on Page 29 of Raceway Ford's Answer Brief is the flaw in Raceway Ford's argument why backdating retail installment sale contracts does not violate the Automobile Sales Finance Act:

---

[1] Although Raceway Ford's Table of Authorities lists Civil Code Section 2984, Petitioners are unable to find a citation to Civil Code Section 2984 in Raceway Ford's Answer Brief.

> the Class 1 Plaintiffs herein ... had ***constantly valid contracts*** with Raceway, and the interest disclosed and charged between the first and second contract was not "pre-consummation" or in any way wrongful.

(Answer Brief, at 29 (emphasis added).)

While Raceway Ford included copies of various clauses from the contract in its Answer Brief, it did not include the language of the Acknowledgment of Re-written Contract Form. (*Compare* Answer Brief, at 7-11 (copying clauses from contract) with Answer Brief, at 11-12 (no copy of Acknowledgment language).) The Acknowledgment of Re-written Contract Form stated "the original contract has been rescinded (canceled) such that no obligations shall be owed by either party under the original contract."

Civil Code § 1688 states "A contract is extinguished by its rescission." "Rescission not only terminates further liability but restores the parties to their former position by requiring each to return whatever he received as consideration under the contract, or, where specific restoration cannot be had, its value." (Witkin, Summary of California Law, Contracts, § 869.) "'A contract is extinguished by its rescission.' 'Generally speaking, the effect of rescission is to extinguish the contract. The contract is annihilated so effectually that in contemplation of law it has never had any existence, even for the purpose of being broken'." (*Boomer v. Muir* (1933) 24 P.2d 570 (internal citations omitted).) "The effect of a rescission is to void the contract ab initio." (*Long v. Newlin* (1956) 144 Cal.App.2d 509, 512.) "An agreement is said to be 'void ab initio' if it has at no time had any legal validity." (Black's Law Dictionary 1573, 6th ed. (1990).)

Petitioners and Raceway Ford agree the Backdating Class members all signed a first contract, and those contracts were consummated on the date they were signed. Raceway Ford then concedes all of the class members rescinded their original contracts by signing the Acknowledgment of Re-Written Contract. At that point in time, the original contracts were void *ab initio*, and were not "constantly valid." New contracts were entered into between Raceway Ford and the Backdating Class members. They were not "re-written" contracts, because there was nothing to "re-write" once the first contract was rescinded. There was simply a new deal to consummate. Thus, the fact the original contracts were consummated on the date they were signed is not "devastating to the appellants' case," as Raceway Ford claims. (Answer Brief, at 25.) The consummation date of the first contract is irrelevant because the first contracts were rescinded. It is the consummation dates of the second contracts, the operative contracts between Raceway Ford and the Backdating Class members, that impacts whether full and honest disclosures were made on the second contracts.

Because the second contracts were new contracts, a fact the Court of Appeal in *Nelson* recognized, the consummation date of the second contract was the date the second contract was signed. (*Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1001.) The second contract, by being backdated, begins charging interest as of the date on the contract, which the *Nelson* court referred to as "pre-consummation interest." (*Id.*, at 1002.) It was the failure to disclose the "pre-consummation interest," an item of cost and "an illegal finance charge," that resulted in the violation of Civil Code Section 2982(a). (*Id.*, at 1003.) "[T]he disclosure requirements of the ASFA protect against 'inaccurate and unfair credit practices.'" (*Id.* (citing *Thompson v. 10,000 RV Sales, Inc.* (2005) 130 Cal.App.4th 950, 979.)

Raceway Ford's argument that changing the numbers and dates does not violate the ASFA was rejected not only in *Nelson*, but also in *Thompson* and two more recent cases involving the disclosure of deferred down payments. In *Nelson*, in addition to backdating contracts, the dealership sold Mr. Nelson insurance. Rather than separately disclose the cost of insurance, the dealership listed the cost on a Due Bill and inflated the cash price of the Mr. Nelson's car by the cost of the insurance. (*Nelson*, 186 Cal.App.4th at 1005-1006.) The dealership admitted the practice and that the manner in which it disclosed the insurance caused Mr. Nelson to pay additional sales tax. (*Id.*, at 1006.) The *Nelson* court rejected the dealership's argument it "substantially complied" with the statute by hiding the cost of the insurance in the cash price of the car because the disclosure "subverts the information purpose of the ASFA." (*Id.*)

In *Thompson*, the dealership inflated both the cash price of an RV and the value of the consumer's trade-in by $24,000. (*Thompson*, 130 Cal.App.4th at 958.) On the surface, this should have no net impact on the deal because both the cost and the payment are increasing by the same amount. As it turned out, raising the price of the RV caused the consumer to pay additional sales tax. (*Id.*, at 961.) The Court of Appeal held the dealership's disclosure practice violated the ASFA, in part, because "cost items that comprised the amount financed were inaccurate and violated the ASFA's disclosure provisions and Regulation Z." (*Id.*, at 973.)

In *Rojas v. Platinum Auto Group* (2013) 212 Cal.App.4th 997, the Court of Appeal analyzed whether labeling a deferred down payment as a cash down payment violated the ASFA. Mr. Rojas purchased a vehicle and put no money down. Instead, he agreed to pay $2,000 in four payments over three months. (*Id.*, at 999.) His contract showed a $2,000 cash down

payment, and no deferred down payment. (*Id.*, at 1000.) There was no dispute Mr. Rojas was making a total down payment of $2,000, the only issue was the manner of disclosing how the down payment was being made. The Court of Appeal held that "In enacting Rees–Levering, the Legislature created separate categories for cash put down at the time of sale and for a deferred down payment. Because the Legislature drew the distinction, we cannot conflate the two types of down payments as if they are one and the same." (*Id.*, at 1002-1003.)

Similarly, in *Munoz v. Express Auto Sales* (2014) 166 Cal.Rptr.3d 921, the consumers made a $1,500 cash down payment, received $1,000 for their trade-in, and agreed to make two $250 payments within a month. (*Id.*, 166 Cal.Rptr.3d at 924.) There was no dispute the total amount of the down payment was $3,000. The seller put on the contract the consumers made a $3,000 cash down payment, with no trade in and no deferred down payments. (*Id.*) The appellate court held the contract "violated the ASFA by failing to properly itemize the sources of the down payment." (*Id.*, at 926.)

Here, Raceway Ford argues that the disclosures on the contract are the same regardless of when the contract is dated, so long as the term remains the same. (Answer Brief, at 17-19.) But Raceway Ford, like the dealers in *Nelson*, *Thompson*, *Rojas*, and *Munoz*, misses the point – manipulating the numbers is not permissible when it results in hidden parts of the transaction. When the date on a contract is prior to the consummation date, a new charge is created – the interest prior to consummation. While the sum of the pre-consummation interest and post-consummation interest from a backdated contract may equal the post-consummation interest from a non-backdated contract, the total now consists of two parts instead of one. As explained in *Nelson*,

> 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.)

The consumer does not know, in a backdated contract, how much pre-consummation interest they are paying because it is not separately disclosed. The consumer does not realize they are paying interest for a period of time when no contract was in effect. A cost is hidden from the consumer when the Legislature required "full and honest disclosures." (*Thompson*, 130 Cal.App.4th at 978.)

B. The APR Tolerances Permitted By Regulation Z Are Irrelevant

Raceway Ford argues Petitioners failed to present evidence that any of the APRs on the backdated contracts varied from the disclosed APRs by more than 0.125%, and therefore Raceway Ford prevails under Regulation Z. (Answer Brief, at 20.) The issue is irrelevant. First, Petitioners did not state a separate claim for violation of Regulation Z. (*See* AA, Vol., III, Tab 23 (Second Amended Complaint).) Moreover, as explained in *Nelson*, a violation of Regulation Z does not render a contract unenforceable under the Automobile Sales Finance Act. (*Nelson*, 186 Cal.App.4th at 1001.) Only if one of the Civil Code Sections identified in Civil Code Sections 2983 is violated is a contract unenforceable under the ASFA. (*Id.*) Since Petitioners sued for a violation of the disclosure

requirements of the ASFA, and the charging of and failure to disclose the charge for pre-consummation violates Civil Code Section 2982(a), it is irrelevant for purposes of this lawsuit whether the APRs were accurate within the tolerances permitted by Regulation Z.

C. Irregular First Payment Periods Are Also Irrelevant

Raceway Ford argues it has yet another defense based on the use of irregular first payment periods permitted by Regulation Z. Again, Petitioners did not sue for a separate violation of Regulation Z. Petitioners alleged their contracts included "pre-consummation interest" that was not disclosed on their contracts, in violation of the disclosure requirements found in Civil Code Section 2982(a). Whether an APR was accurate under Regulation Z has no bearing on whether an illegal finance charge was not disclosed on the Backdating Class members' contracts.

D. *Nelson* Should Be Affirmed As A Proper Statement Of California Law Regarding Backdating

Raceway Ford argues the differences between California law and Virginia law led to an improper result in *Nelson* that should be disapproved of by this Court. Raceway Ford is wrong.

Raceway Ford starts by pointing out that in *Rucker v. Sheehy Alexandria, Inc.* (E.D. Va. 2002) 228 F.Supp.2d 711, the contract at issue automatically became null and void by its own terms if it was not assigned within five days. (Answer Brief, at 26.) But Raceway Ford ignores the impact of its Acknowledgment of Re-Written Contract form that rescinded the original contracts. It wasn't the terms of Raceway Ford's first contracts that caused them to become null and void, it was Raceway Ford's express written agreement the first contracts were rescinded.

Because Raceway Ford agreed to rescind the original contracts, it "was impossible ... for the second contract to have been a novation of the first, because a novation, by definition, is the substitution of a new obligation *for an existing one, not for a voided one.*" (Answer Brief, at 27-28 (citation omitted) (emphasis added).) When Raceway Ford argues "the first contract did not lapse or become void before the Class 1 Plaintiffs mutually decided with Raceway to substitute with their re-written contracts" (Answer Brief, at 28), the facts do not support Raceway Ford's argument. The fact Raceway Ford ignores –the plain language of the Acknowledgment of Re-Written Contract form rescinding the first contract- guts Raceway Ford's argument.

While *Nelson* may have been tried on stipulated facts, and this case tried over multiple days with numerous witnesses, the core fact of both cases is the same: the dealership backdated purchase contracts. Raceway Ford does not dispute the facts of backdating. Rather, Raceway Ford disputes the legal impact and significance of backdating. *Nelson*, not the Court of Appeal in this case, analyzed the facts in conjunction with the language of the Automobile Sales Finance Act, applying the purpose of the Act to effectuate its purposes, and concluded backdating resulted in an illegal charge of pre-consummation interest that was not disclosed on the contracts. Here, the Court of Appeal disagreed with the parties and the trial court to reach its own convoluted theory on when and how backdating might violate the Automobile Sales Finance Act. As demonstrated in Petitioners' Opening Brief, that analysis does not withstand scrutiny. *Nelson* does. *Nelson* should be affirmed.

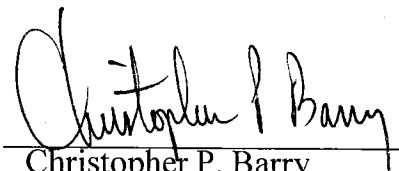
IV.

Conclusion

The Court of Appeal's Opinion in this case is contrary to the stated purposes of the Automobile Sales Finance Act. Rather than protect consumers from fraudulent business practices and excessive charges, the Court of Appeal gave its blessing to two business practices that violated the disclosure requirements of the Automobile Sales Finance Act. *Nelson*, *Thompson*, *Munoz*, and *Rojas* all applied the Act to protect consumers and found violations when a dealership's disclosures were not full and honest. Petitioners respectfully request this Court (1) find the disclosure practices at issue violated the Act, (2) overrule the Court of Appeal's Opinion and reverse it, and (3) remand this case to the trial court with instructions to find Raceway Ford liable to the over 1,100 members of the two classes of consumers defrauded by Raceway Ford's deceptive disclosure practices.

DATED: August 19, 2015

Respectfully submitted,
ROSNER, BARRY & BABBITT, LLP

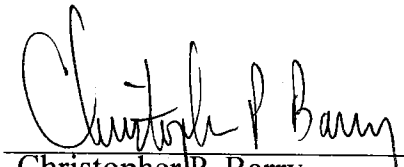
By: 
Christopher P. Barry
Attorneys for Plaintiffs and Appellants

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.520(c)(1) of the California Rules of Court, the foregoing REPLY BRIEF ON THE MERITS is produced using 13-point Times New Roman type and contains approximately 4,772 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: August 19, 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 **August 19, 2015**, I served the foregoing document(s) described as:

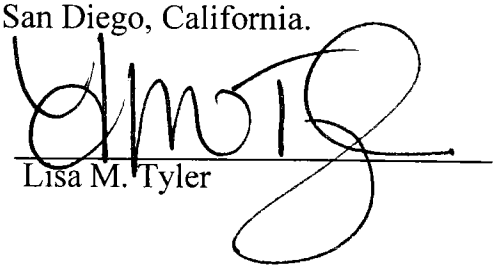
REPLY BRIEF ON THE MERITS

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 **August 19, 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

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

Attorneys for Defendant *RACEWAY FORD, INC.*

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

Attorney for Defendant *RACEWAY FORD, INC.*

4TH DISTRICT COURT OF APPEAL
Division 2
3389 Twelfth Street
Riverside, CA 92501

SUPERIOR COURT OF CALIFORNIA
County of Riverside
4050 Main Street
Riverside, CA 92501

OFFICE OF THE DISTRICT ATTORNEY
Riverside County
3960 Orange Street
Riverside, CA 92501

Service Pursuant to Business & Professions Code § 17209

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

Service Pursuant to Business & Professions Code § 17209