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IN THE SUPREME COURT OF CALIFORNIA

RAUL B. FIGUEROA,
Plaintiff and Respondent,

v.

FCA US, LLC,
Defendant and Appellant.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SIX
CASE NO. B306275 C/W B308339

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Miscellaneous

PETITION FOR REVIEW

ISSUES PRESENTED

1. This case raises the same issue that is currently pending before the Court in *Niedermeier v. FCA US LLC* (2020) 56 Cal.App.5th 1052 (*Niedermeier*), review granted February 10, 2021, S266034: Does the statutory restitution remedy under the Song-Beverly Act (Song-Beverly or the Act) (Civ. Code, § 1790 et seq.) necessarily include an offset for a trade-in credit?

2. This case also raises a second recurring issue of statewide importance: Does Song-Beverly's statutory restitution remedy allow plaintiffs to recover auto insurance payments made *before* any duty to provide a replacement vehicle or to repurchase the vehicle has arisen?

INTRODUCTION

The Court of Appeal's published opinion in this case addresses an issue already before this Court in *Niedermeier*. The issue concerns how Song-Beverly's restitution remedy (also known as a "buyback") applies when an owner claims that a manufacturer must repurchase his or her vehicle under the buyback remedy set forth in Civil Code section 1793.2, subdivision (d)(2), but the owner has already sold the vehicle to a third party and cannot return it to the manufacturer.

In *Niedermeier*, *supra*, 56 Cal.App.5th at page 1061, the Court of Appeal held that "the Act's restitution remedy, set at 'an amount equal to the actual price paid or payable' for the vehicle [citation], does not include amounts a plaintiff has already

recovered by trading in the vehicle." The court assumed that a vehicle owner enjoys the right to a repurchase remedy even after trading in or otherwise selling the car, and reasoned that permitting a full purchase price refund from the manufacturer in such a situation, without any credit for the proceeds of the trade-in, "would put [him] in a *better* position than had [he] never purchased the vehicle, a result inconsistent with 'restitution' " that amounts to an "unjustified windfall." (*Id.* at pp. 1061, 1071.)

Niedermeier observed that under such an approach, no reasonable buyer "would ever return a vehicle to the manufacturer rather than obtain the extra proceeds from a resale or trade." (*Niedermeier*, *supra*, 56 Cal.App.5th at p. 1072.) The used car market would therefore be flooded with defective vehicles not subject to the Act's " 'labeling and notification provisions,' " which would otherwise prevent "manufacturers and others from reselling 'used and irrepairable [*sic*] motor vehicles' reacquired under the Act 'without notice to the subsequent purchaser.' " (*Id.* at pp. 1065–1066.)

The Court of Appeal's published decision here, in a relatively cursory discussion, flatly disagrees with *Niedermeier*. (Typed opn. 1–2, 6, 7.) The opinion forthrightly holds, "We decline to follow *Niedermeier*, although in some cases the owner of a vehicle receives a windfall." (Typed opn. 7.) The opinion departs from decades of bedrock law on the meaning of restitution, reasoning that buyers should be made more than whole because making the manufacturer overpay is a suitable punishment for a willful statutory violation. (Typed opn. 5.)

The opinion also dismisses *Niedermeier*'s public policy concerns about undermining Song-Beverly's labeling and notification requirements using reasoning that actually reinforces those concerns. The court concludes that the consumer protection labeling requirements apply only when the manufacturer replaces or repurchases the vehicle, and not when the buyer sells the vehicle to a third party while simultaneously demanding restitution from the manufacturer. (Typed opn. 7.) That is precisely why the opinion's damages analysis encourages buyers to pocket a windfall by selling their vehicles while seeking a repurchase, effectively laundering the vehicles' title and skirting the labeling law.

The issue addressed by the Court of Appeal's opinion is quintessentially one for this Court to decide, as evidenced by the grant of review in *Niedermeier*. This case satisfies both requirements for review under rule 8.500(b)(1) of the California Rules of Court—"to secure uniformity of decision" and "to settle an important question of law." The Court of Appeal's decision creates a conflict in the case law: it directly contradicts the holding of another published decision. And the issue on which there is a conflict is one that potentially arises in the thousands of lemon law cases that are filed each year.

Review should also be granted on another Song-Beverly damages issue left open by this Court's decision in *Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th 966, 980–981 (*Kirzhner*): whether incidental damages caused by a manufacturer's failure to promptly repurchase a vehicle include

auto insurance payments made by the buyer *before* the manufacturer's duty to repurchase a vehicle has arisen. *Kirzhner* held that registration renewal and nonoperation fees are recoverable as incidental damages only *after* that date, and logically the same rule should apply to other incidental damages such as insurance payments. But the Court of Appeal declined to apply that limitation, affirming a verdict that necessarily included insurance payments awarded as incidental damages. Review should be granted to clarify whether *Kirzhner*'s analysis applies to automobile insurance payments as well as to registration renewal and nonoperation fees.

STATEMENT OF THE CASE[1]

In January 2014, Raul Figueroa bought a Dodge Ram truck costing $33,824.88, including finance charges. (Exh. 1.)[2] Within the first 1,000 miles of ownership the truck overheated and had to be towed to the dealership, which replaced a defective radiator hose clamp and the engine's head gaskets, which were leaking. (3 RT 626–627; 4 RT 758; exh. 2-2 [repair order].)

Ten months (and about 7,000 miles) after the first visit, Figueroa brought the truck to the dealer for a different problem, complaining of a high-pitched noise from the serpentine belt area. (See exh. 3-2.) Figueroa did not complain of overheating in connection with this dealer visit. (See *ibid.*) The dealership resolved the noise in a single repair attempt by replacing the water pump. (*Ibid.*)

No overheating complaint is mentioned in nearly three years of subsequent repair orders. (See exhs. 3–8.) Figueroa nonetheless testified that on six to eight occasions he took the truck to the dealership complaining of overheating, but that on each visit a dealership employee would return the truck to him after 20 or 30 minutes with the report that it was "fine" or

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[1] In this section, we summarize the material facts supported by the record rather than relying exclusively on the statement of the facts in the Court of Appeal's opinion. As explained in FCA's petition for rehearing and as further discussed below (see pp.19–22, *post*), the opinion does not accurately reflect the record in several respects.

[2] By stipulation, the trial exhibits were lodged in the Court of Appeal.

"normal." (4 RT 762.) There is no evidence FCA had any notice of such complaints, given that they were not reflected in any dealership repair order.

In early 2017, Figueroa took his truck to a different dealership when it overheated on a trip. (4 RT 770; exh. 9-1.) The dealership identified the cause to be a leaky aftermarket thermostat housing, which was not an original part and therefore not covered by Figueroa's warranty. (4 RT 803–806; exhs. 9-1, 14.) Figueroa asked his local dealership to do the work, and that dealership replaced the part at cost with no labor charge. (3 RT 658–659; exh. 10.)

Figueroa has not claimed, and there is no evidence, that the truck ever overheated again. His last visit to the dealership was for a transmission shudder, which the dealer promptly repaired with a software update. (Exh. 11-2.)

At some unspecified point, Figueroa said he was upset with the dealership because of the problems he was having "with them" and because "they didn't buy" the truck from him. (5 RT 968–969.) In 2017, when the truck was more than three years old, the dealership offered "to take it for only $10,000," but Figueroa declined the offer because he believed "the value was higher." (5 RT 969.) Any repurchase remedy would come from FCA, not the dealer, but Figueroa never asked FCA for a repurchase. He asked his nephew to call FCA about the truck, but offered no information about what his nephew told FCA or what response FCA provided. (4 RT 849–850.) The record establishes only that FCA did not repurchase the truck. (*Ibid.*)

Figueroa then sold the truck to CarMax for $17,000. (4 RT 872–873; exh. 12-1 [March 11, 2017 sale agreement].) That amount paid off Figueroa's loan balance and he received back $3,191.93 in cash. (See exhs. 1-1, 12-1; 4 RT 872–873.)

Ten months after selling the truck, Figueroa sued FCA, asserting claims for breach of express and implied warranty. (CT 6–8.) FCA made a Code of Civil Procedure section 998 (section 998) offer in the amount of $30,000, which Figueroa declined. (Supp. CT 561–562.) A year later, the matter went to jury trial.

The jury found for Figueroa on both his claims. (CT 24–25, 27.) On the breach of express warranty claim, the jury awarded $15,069.73 for the car payments Figueroa had made, $5,239.47 for incidental and consequential damages (minus a $155.20 mileage offset), and a $10,000 civil penalty—for a total of $30,154. (CT 25–26.) The jury awarded the same $30,154 on Figueroa's implied warranty claim. (CT 28.) The trial court later awarded Figueroa $143,046.50 in statutory attorney fees for obtaining a result that was only $154 more than FCA had offered more than a year earlier. (CT 43; Fee CT 24; Supp CT 561–562.)

On appeal, FCA asserted that the judgment was contrary to the measure of damages set forth in *Niedermeier* in that it failed to account for the money Figueroa received from selling his truck to CarMax. Instead, the judgment awarded Figueroa a full refund from the manufacturer *on top of* the net profit obtained from selling the truck. In its published decision, the Court of Appeal rejected FCA's argument, stating: "We disagree with *Niedermeier*." (Typed opn. 7.)

FCA also challenged the judgment on the ground that the $5,329.47 that the jury awarded for incidental damages necessarily included automobile insurance payments not caused by FCA's conduct, as those payments were made by Figueroa before FCA's repurchase obligation arose, in conflict with this Court's *Kirzhner* decision. (See *Kirzhner*, *supra*, 9 Cal.5th at p. 983 [holding that fees paid before a repurchase obligation arises are not recoverable as incidental damages "because those [amounts] were not caused by [the manufacturer's] breach or other violation of the Act"].)

The Court of Appeal avoided resolving that issue, reasoning that the jury "awarded a lump sum of damages" and that its "undifferentiated award" precludes determining whether any portion of the damages verdict was improper. (Typed opn. 8.) FCA filed a rehearing petition explaining that, in fact, the verdict form had a separate line item for incidental damages. FCA further explained that the jury's incidental damages award matched, to the penny, the amounts requested by Figueroa's counsel in his closing argument, and there was no substantial evidence of any other cost that could account for the jury's figures, so it was *certain* that the $5,329.47 figure improperly included $855 for insurance payments made before FCA's repurchase obligation arose.

The Court of Appeal summarily denied FCA's petition for rehearing without inviting any response from Figueroa.

LEGAL ARGUMENT

I. Review should be granted because this case presents an issue already before the Court in *Niedermeier v. FCA US LLC*.

A. The Court of Appeal opinion creates a conflict in the law.

This Court granted review in *Niedermeier*, *supra*, 56 Cal.App.5th 1052, leaving the opinion citable as persuasive authority pending review. (*Niedermeier v. FCA US*, review granted Feb. 10, 2021, S266034.) The Court of Appeal's published opinion here addresses the same Song-Beverly measure of damages issue as *Niedermeier*, but reaches a contrary conclusion, stating unequivocally, "We disagree with *Niedermeier*." (Typed opn. 7; see *ibid.* ["We decline to follow *Niedermeier*"].) The opinion thus creates a conflict in the case law requiring resolution by this Court.

Figueroa sought a restitution remedy under Civil Code section 1793.2, subdivision (d)(2), which requires the manufacturer either to replace the vehicle or "make *restitution* to the buyer." (Emphasis added.) Under *Niedermeier*, applying the plain meaning of restitution means that "the Act's restitution remedy, set at 'an amount equal to the actual price paid or payable' for the vehicle [citation], *does not include amounts a plaintiff has already recovered by trading in the vehicle*." (*Niedermeier*, *supra*, 56 Cal.App.5th at p. 1061, emphasis added.)

Granting Figueroa a full refund from FCA "in addition to the proceeds of the trade-in . . . would put [him] in a *better* position than had [he] never purchased the vehicle, a result

inconsistent with 'restitution' " that amounts to an "unjustified windfall." (*Niedermeier*, *supra*, 56 Cal.App.5th at pp. 1061, 1071.) The jury properly did not award Figueroa any sums for the *unpaid* loan balance that was zeroed out with the money he received from CarMax, instead awarding him $15,069.73 for the car payments he actually made. (CT 25.) But its restitution award *did* let Figueroa keep the $3,191.93 in cash he obtained in the resale.

Under the statutory analysis applied in *Niedermeier*, Figueroa received a windfall of $3,191.93. Figueroa's sale of the truck prevented him from returning it to FCA as part of the restitution remedy he sought. Assuming that this did not categorically bar a restitution remedy, the only way to approximate that return would be to credit FCA with the cashback amount Figueroa received from the sale—as explained in *Niedermeier*.

In rejecting *Niedermeier*'s analysis of Song-Beverly's statutory scheme, the Court of Appeal's opinion states that Civil Code section 1793.2, subdivision (d)(2)(B) "establishes the amount of restitution FCA must pay." (Typed opn. 4.) The opinion holds that the language of section 1793.2, subdivision (d)(2)(B) is "clear and unequivocal," and that it nowhere allows "cash back to the manufacturer." (Typed opn. 4.)

The opinion acknowledges *Niedermeier*'s conclusions that such an interpretation of the statute "would disregard the Legislature's choice of the term 'restitution' and provide plaintiff with an 'unjustified windfall,' " and that a court should "not

consider the language of section 1793.2, subdivision (d)(2)(B) in isolation." (Typed opn. 6.) But the opinion then disagrees with *Niedermeier*'s conclusions, stating that when the Legislature "used the term 'restitution,' " it defined what that term meant in Civil Code section 1793.2, subdivision (d)(2)(B), regardless of its common law meaning. (Typed opn. 7.) That statute allows recovery of amounts "paid or payable" by the buyer. (Civ. Code, § 1793.2, subd. (d)(2)(B).) But according to the opinion here, that definition precludes any credit against what the buyer initially paid based on what the buyer later received from selling or trading in the vehicle rather than returning it to the manufacturer as contemplated in a traditional restitution scenario. (Typed opn. 7.) The opinion's analysis concludes: "We decline to follow *Niedermeier*, although in some cases the owner of a vehicle receives a windfall." (*Ibid.*)

Because this Court has already deemed the issue presented in *Niedermeier* to be review-worthy, it should likewise grant review here. This Court can then order action in this matter deferred until it decides the *Niedermeier* case. (Cal. Rules of Court, rule 8.512(d)(2).)

B. The issue presented potentially arises in the thousands of lemon law cases filed each year and involves significant consumer protection concerns.

Nothing in Song-Beverly's statutory language or legislative history suggests that, when creating the Act's repurchase remedy, the Legislature contemplated that a vehicle owner would try to obtain that remedy *after* selling the vehicle, so that it can

no longer be returned to the manufacturer. Song-Beverly has included a repurchase remedy since its enactment in 1970, but it took more than four decades for any court to interpret the Act as authorizing the repurchase remedy even after the buyer no longer owns the vehicle. (See *Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187, 192 [holding that "a plaintiff does not need to possess or own the vehicle to avail himself or herself of the Act's remedies"].)

Despite improvements in the quality and safety of new motor vehicles since Song-Beverly's enactment 50 years ago, the number of lemon law suits has dramatically increased in recent years, with many cases filed after a consumer *rejects* a full refund offer, in hopes of recovering extracompensatory penalties, statutory attorney fees, and a tort recovery including punitive damages. "According to a study by Bowman and Brooke LLP, Song-Beverly Warranty Act cases in California went up from 4,318 in 2015 to 8,620 in 2019." (Vanderford & Bulkina, *Time to end systematic abuse of California's lemon law* (July 27, 2020) Daily J. <https://www.dailyjournal.com/articles/358777> [as of Nov. 28, 2022].) A more recent Bowman and Brooke study shows that figure to have substantially increased in 2021, with over 15,000 new lemon law cases projected to be filed by the end of 2022.[3]

[3] The recent "disparate surge in lemon lawsuits is a cottage industry of plaintiffs['] attorneys who appear to be taking advantage of the fee-shifting provisions of the law to generate large windfalls for themselves" by "run[ning] up hefty legal fees."

The Court of Appeal's decision provides a means by which a buyer can recover *more* than his or her equity interest in a vehicle simply by selling the vehicle, keeping the sale proceeds, and then recovering the full purchase price from the manufacturer. Our free market system operates on the principle that individuals will generally pursue their own economic self-interest; an even further increase in lemon law litigation to obtain such a double recovery is thus the likely result of the Court of Appeal's opinion. As *Niedermeier* observed, "Under that interpretation, we cannot conceive why a buyer would ever return a vehicle to the manufacturer rather than obtain the extra proceeds from a resale or trade." (*Niedermeier*, *supra*, 56 Cal.App.5th at p. 1072.)

Such an incentive would harm used car buyers, who have no way of knowing that the prior owner dumped the vehicle to pocket the cash rather than selling it back to the manufacturer so that proper labeling could occur. *Niedermeier*'s analysis of Song-Beverly's restitution remedy was informed by the Act's extensive provisions aimed at protecting consumers who might later acquire such vehicles. (See Civ. Code, §§ 1793.22, subd. (f)(1), 1793.23, subds. (c)–(e).) These provisions, known as the Act's " 'labeling and notification provisions' " (*Niedermeier*, *supra*, 56 Cal.App.5th at p. 1066), prevent "manufacturers and others from reselling 'used and irrepairable [*sic*] motor vehicles' reacquired under the Act 'without notice to the subsequent purchaser' " (*id.*

(Powell, *Calif. Auto Defect Law Incentivizes Overlitigation* (Apr. 7, 2020) Law360 <https://bit.ly/3oO0sRg> [as of Nov. 28, 2022].)

at p. 1065, quoting § 1793.23, subd. (a)(2).) As *Niedermeier* recognized, Song-Beverly's "labeling and notification provisions are triggered only when a manufacturer reacquires a vehicle or assists a dealer or lienholder in reacquiring a vehicle," and not "when a buyer resells or trades in the vehicle." (*Id.* at p. 1072.)

The entire labeling and notification scheme "makes sense only if, in the usual case, the vehicle is returned to the manufacturer rather than resold or traded in." (*Niedermeier*, *supra*, 56 Cal.App.5th at p. 1072.) Otherwise, "the used-car market would be[come] replete with unlabeled lemons resold or traded in by their dissatisfied owners." (*Ibid.*) Yet that would be the result if "buyers could resell or trade in their vehicles and still receive a full refund of the purchase price under the Act." (*Ibid.*) Encouraging "buyers to reintroduce defective vehicles into the market without the warnings a manufacturer otherwise would have to provide . . . cannot have been the Legislature's intent." (*Ibid.*)

The Court of Appeal here dismissed *Niedermeier*'s lemon labeling concerns out of hand. In the Court of Appeal's view, "it is FCA, and not the vehicle's owner, who undercuts the [A]ct's labeling and notification requirements by refusing to repurchase the vehicle as required by the [A]ct." (Typed opn. 7.) Those requirements apply only "where the manufacturer replaces or repurchases the vehicle, something FCA has refused to do." (*Ibid.*) But that rationale does nothing to protect consumers from owners who reject manufacturers' reasonable repurchase offers in favor of maximizing their litigation recovery by selling their

defective vehicles to third parties while continuing to seek a repurchase remedy.

In short, the Court of Appeal's interpretation of Song-Beverly's repurchase remedy is likely to further increase lemon law litigation while at the same time undermining important consumer protection aspects of the statutory scheme. The wisdom of the Court of Appeal's approach is an issue requiring this Court's examination.

C. The Court of Appeal opinion should not remain citable pending review.

A grant of review does not *automatically* depublish a Court of Appeal decision—after review is granted an appellate decision "may be cited for potentially persuasive value" unless this Court orders otherwise. (Cal. Rules of Court, rule 8.1115(e)(1).) And regardless of whether review is sought or granted, this Court "may order that an opinion certified for publication is not to be published." (Cal. Rules of Court, rule 8.1105(e)(2).) For the reasons explained below, this Court should order that the *Figueroa* decision not be citable as persuasive authority pending review or, if review is denied, this Court should depublish the decision.

Courts are justly critical of ad hominem attacks by one party on another. Courts themselves should be held to no lesser standard. (See Cal. Code Jud. Ethics, canon 2(A) [judges "shall act at all times in a manner that promotes public confidence in the integrity[ ] and impartiality[ ] of the judiciary"].) Moreover, appellate courts should not base holdings on speculation as to

facts outside the record. (See, e.g., *People v. Tillis* (1998) 18 Cal.4th 284, 292 ["Appellate courts should not engage in speculation about witnesses"; reversing appellate decision that "unwarrantedly inferred" motives beyond those necessarily supported by the record]; *Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283, 1303 [noting that courts should not engage in unreasonable speculation about facts that might exist but are not in the record].)

Here, the opinion's ad hominem attacks on FCA go far beyond the record, and in fact are contrary to the evidence at trial:

> As this case and *Niedermeier* show, *FCA operates in open defiance of the Song-Beverly Act*. It considers promptly repurchasing, repairing, labeling as a lemon and selling the vehicle at a deep discount with a one-year warranty, a losing proposition. It would much rather force the owner of a defective vehicle to sell it on the open market, or trade it in without a label or warning, and use the cash back on trade-value as an offset.

(Typed opn. 7, emphasis added.)

These broad accusations in a published opinion are unjust. Figueroa did not assert, much less prove, any broad practice by FCA as to other consumers, much less a practice in "open defiance" of the Song-Beverly Act. Figueroa introduced no evidence FCA actually knew of any repairs that had not succeeded on the first try in addressing the malfunctions he experienced, and FCA's legal positions are well supported by case law, including *Niedermeier* and *Kirzhner*. Nor is this a class

action in which there were multiple cases involving common proof of any policy by FCA to "force the owner[s] of . . . defective vehicle[s] to sell [them] on the open market" to reduce FCA's ultimate liability exposure. (Typed opn. 7.)

No trial court could properly permit an expert to generalize—based solely on two data points—that FCA operates in open defiance of the Song-Beverly Act. The Court of Appeal's opinion should not be used in trial courts for that purpose either. But if the opinion remains citable pending review, this passage will likely be cited by counsel for plaintiffs in every future FCA case, and by counsel leveling similar charges against other manufacturers as well.

In addition, the Court of Appeal's opinion contains multiple factual errors that may unfairly sway trial courts to apply its analysis rather than *Niedermeier*'s. FCA called the following inaccuracies to the Court of Appeal's attention in its petition for rehearing, with proposed corrections, but the court declined to modify its opinion in any respect.

"The engine continued to overheat and after a few thousand miles the water pump failed." (Typed opn. 2, boldface added.) This sentence was drawn from the respondent's brief, which states: "Figueroa's pickup continued to overheat. After a few thousand miles more, the water pump failed." (RB 21.) The respondent's brief cited only to exhibit 3-2, a repair record that contains no complaint of overheating or of water pump failure, but only a "noise . . . coming from the water pump." The dealer eliminated the noise by replacing the water pump.

(*Ibid.*) FCA proposed that the Court of Appeal delete the bolded sentence or, at minimum, modify it to state:

> After a few thousand miles, Figueroa took the truck back to the dealership because of a high-pitched noise from the serpentine belt area. The noise was resolved in the first attempt by replacement of the water pump.

(PFRH 14.)

"In desperation, Figueroa took his truck to a different dealership." (Typed opn. 2, boldface added.) This sentence quoted the respondent's brief, which stated, "In desperation Figueroa took the pickup to a different Dodge dealership." (RB 22.) But the record citation in the respondent's brief does not support the statement that Figueroa went to a different dealership out of "desperation" because of previous dealership visits. Rather, Figueroa testified that he was driving "from Los Angeles" with his "brother and his family" when his truck overheated and the different dealership was "the closest place we found." (4 RT 770; see *ibid.* ["Q. And you took it there because that was close? [¶] A. Yes."].) To accurately reflect the record, the Court of Appeal should have deleted the bolded sentence or at least it modified to state:

> Figueroa took his truck to a different dealership when it overheated during a trip from Los Angeles.

(PFRH 15.)

"The dealership refused to repair it under warranty." (Typed opn. 2, boldface added.) The aftermarket thermostat housing was not an original part and therefore was

not covered by the warranty. (See exh. 14; 4 RT 803–806.) The opinion's statement that the dealer "refused to repair it under warranty" raises an unfair inference that the part was, in fact, covered under the truck's warranty. The Court of Appeal should have deleted the bolded statement or modified it to state:

> The after-market part was not covered by Figueroa's warranty.

(PFRH 15.)

"The engine still overheated." (Typed opn. 2, boldface added.) The respondent's brief properly did *not* contend that after the thermostat replacement, the truck continued to overheat. (See RB 22–23.) Figueroa testified that after the thermostat repair he believed the truck was fixed but in retrospect believed that it was "[n]ot completely" fixed. (4 RT 838.) As explained in Figueroa's respondent's brief, the problems he continued to have were transmission shuddering issues, not overheating. (RB 23 [FCA repaired the thermostat but "never fixed the shuddering issues"]; see RB 67 [arguing that the shuddering was a symptom of *prior* overheating].) The Court of Appeal should have deleted the bolded sentence entirely, as there is no record support that the truck's "engine still overheated" after the thermostat replacement.

"But the dealership offered only $10,000 as a trade-in because of its poor condition." (Typed opn. 2, boldface added.) This statement is a paraphrase of the respondent's brief: "But Crown Dodge offered him only $10,000 for the truck *as a trade-in* (not to be branded), citing its poor condition." (RB 23.) But the cited portions of the record contain no testimony that the

dealership cited the truck's "poor condition" in connection with its trade-in offer. In fact, Figueroa offered his own take on the dealer's motivation, that "they wanted to take . . . only $10,000, which they knew the value was higher." (5 RT 969.) FCA's expert, who located and inspected the truck after Figueroa sold it to CarMax, testified: "The vehicle presented itself as a nice truck. You know, I drove it. It didn't make any squeaks or rattles. It was a nice driving truck." (5 RT 1044.) The Court of Appeal should have deleted the phrase "because of its poor condition," which falsely suggested the truck had unrepaired malfunctions.

"FCA refused to repurchase the truck." (Typed opn. 3, boldface added.) There is no evidence in the record that FCA refused any prelitigation request by Figueroa to repurchase his truck. Figueroa never asked for a repurchase. He "was there" when his *nephew* called FCA—he did not testify regarding what his nephew said to FCA or what response his nephew received. (4 RT 850.) And there is no evidence FCA actually knew of the claimed overheating problems that might have suggested the need for a repurchase. The record establishes only that FCA did not in fact repurchase the truck, for unknown reasons (*ibid.*), a point already covered in the opinion's next paragraph (typed opn. 3). The Court of Appeal should have deleted the bolded language.

In light of these factual errors and the opinion's unwarranted and unsupported attack on FCA, this Court should order that the Court of Appeal's opinion not remain citable while review is pending.

II. Review should be granted to determine when auto insurance payments are recoverable as incidental damages in connection with Song-Beverly's restitution remedy.

Figueroa was permitted to recover incidental damages for auto insurance payments indisputably made before FCA's duty to repurchase his truck could have arisen. This Court should grant review to determine whether the causation analysis in this Court's *Kirzhner* decision logically extends beyond incidental damages for registration renewal and nonoperation fees, and includes all other types of incidental damages, including the auto insurance payments Figueroa recovered here.

In *Kirzhner*, *supra*, 9 Cal.5th at page 983, this Court held that registration renewal and nonoperation fees may be recovered as incidental damages on a Song-Beverly claim only when they *result from* the manufacturer's breach of its repurchase obligation. This Court reasoned that, once a manufacturer has undertaken a reasonable number of repair attempts without success, the buyer has a "lessened ownership interest" in the vehicle because the buyer is effectively waiting until a repurchase occurs. (*Ibid.*) Payment of registration or nonoperation fees after that time "benefits the manufacturer," ensuring proper licensing until such time as the vehicle is "back in the manufacturer's ownership and possession." (*Ibid.*; see *id.* at pp. 979–980 [costs paid "after the manufacturer fails to comply with its duty to promptly repurchase or replace a defective vehicle" are recoverable where they are in the nature of "preservation and maintenance" costs that are "reasonably

incurred in the care and custody of nonconforming goods pending their return to the seller"].) Registration renewal and nonoperation fees incurred *before* the date that an obligation to repurchase arose are not recoverable "because those [amounts] were not caused by [the manufacturer's] breach or other violation of the Act." (*Id.* at p. 983.)

Logically, the same analysis would apply to insurance premiums (at least those premiums incurred to protect the car for the manufacturer's benefit, which would not include liability insurance). Premiums paid before the buyer could properly have requested a repurchase are a "standard cost of ownership" (*Kirzhner*, *supra*, 9 Cal.5th at p. 980), and should not be recoverable (cf. *Crayton v. FCA US LLC* (2021) 63 Cal.App.5th 194, 208–209 [applying *Kirzhner*'s reasoning to hold that insurance premiums incurred " 'incident to' " a manufacturer's breach of its restitution duty could be sufficiently analogous to registration renewal fees to be recoverable]).

FCA's repurchase obligation here could not have arisen before his second visit to the dealership in December 2014 (see exh. 3-2), because at least two repair attempts for the same nonconformity are required before the repurchase duty can arise. (*Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 799; accord, *Silvio v. Ford Motor Co.* (2003) 109 Cal.App.4th 1205, 1208–1209 [statute uses plural " 'attempts' "].) But the jury's award for incidental and consequential damages included Figueroa's first nine monthly insurance payments (totaling $855) preceding that date.

That the incidental damages award improperly included that amount is indisputable. The jury awarded $5,239.47 for incidental and consequential damages—the exact amount Figueroa's counsel asked the jury to award (adjusted to eliminate his double counting of the $720 in alleged coolant costs):

Insurance ($95/mo. for 3 years)	$3,420.00
Registration fees ($300/yr. for 3 years)	$900.00
Out-of-pocket repair	$199.47
Coolant ($30/mo. for 24 mos.)	$720.00
TOTAL	$5,239.47

(6 RT 1141; see Supp. CT 32.)[4] The $3,420 in insurance payments included all insurance payments made by Figueroa

[4] Where an aggregate sum is included in a verdict, the appellant may challenge subelements of the award by providing indications from the record that the award necessarily includes factually or legally improper sums. (See, e.g., *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 927 & fn. 11 [even though the jury "was supplied with and returned an undifferentiated verdict form," "[t]he record in fact provides a reasonable basis" for discerning the amounts included in the form]; *Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 543 [where "jury awarded the exact figure calculated by [defendant's] expert," "logic and common sense tells us that the jury accepted the expert's analysis and calculations"]; *Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 747–748 [erroneous component of damages award could be determined "with reasonable certainty" where court's mathematical calculation showed how jury must have reached total award]; *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 17–18 [compensatory damages figure used for calculating punitive damages could be determined from "the jury's special verdict figure," which matched "to the penny" with an exhibit containing "an itemized

from the inception of his ownership of the truck. (4 RT 849 [Figueroa's testimony that he paid "95-and-some every month" for insurance "[a]ll the time when I had the pickup"]; 6 RT 1141 [closing argument: "remember Mr. Figueroa testified about $95 a month for insurance and so that . . . calculation is for three years, which totals [$]3,420"].) Figueroa's first nine monthly insurance payments, totaling $855, preceded FCA's second repair attempt in December 2014, the earliest date its repurchase duty could have arisen. Under the rationale applied in *Kirzhner*, those amounts were improperly included in the judgment.

This $855 component of the judgment is significant because in its absence, Figueroa did not obtain a judgment more favorable than FCA's $30,000 section 998 offer. The judgment totaled $30,154 (CT 43), which was just $154 more than FCA's settlement offer a year earlier (Supp. CT 561–562 [FCA's section 998 offer]). If the jury improperly awarded Figueroa incidental damages for insurance payments made before FCA's repurchase

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list of nine categories of economic damages"]; *Housley v. City of Poway* (1993) 20 Cal.App.4th 801, 811 [concluding that jury must have used a " 'cost-of-repair' " rather than a " 'fair market value' " figure in calculating damages where "it is not mere coincidence that the 'cost-of-repair' figure . . . matches, to the dollar, the sum of the jury's award" against the two defendants]; *Fidler v. Hollywood Park Operating Co.* (1990) 223 Cal.App.3d 483, 488 [comparing jury's award against matching figure urged by plaintiff's expert to infer basis for award]; see also *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 505 ["Since the verdict was exactly the total of these two estimates [provided by plaintiff's counsel in argument], it is reasonable to assume that the jury accepted the amount proposed by counsel for each item"].)

obligation arose, then the trial court's attorney fees award of $143,046.50 (Fee CT 24) should not have included fees incurred after the date of FCA's section 998 offer. (See *Covert v. FCA USA, LLC* (2022) 73 Cal.App.5th 821, 837 ["a valid and reasonable [Code of Civil Procedure] section 998 offer by the seller, where the buyer recovers less than the offer, precludes recovery by the buyer of postoffer attorneys' fees and costs under Civil Code section 1794, subdivision (d)"]; accord, *Duale v. Mercedes-Benz USA, LLC* (2007) 148 Cal.App.4th 718, 726.)

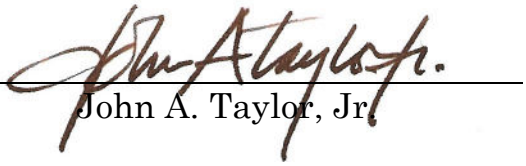
To provide further guidance to trial courts on the insurance premium issue left open in *Kirzhner*, this Court's grant of review should include the additional issue of whether, consistent with *Kirzhner*, insurance payments are recoverable as incidental damages on a Song-Beverly claim only if they are incurred after the manufacturer's repurchase obligation has arisen.

CONCLUSION

For the reasons explained above, this Court should grant review on both issues presented and should reverse the Court of Appeal's judgment. At minimum, the Court should issue a grant-and-hold order on the first issue presented, deferring further action until the Court decides the *Niedermeier* case. In all events, the Court should order that the Court of Appeal's decision not remain citable while review is pending.

December 1, 2022

HORVITZ & LEVY LLP
LISA PERROCHET
JOHN A. TAYLOR, JR.

By: 
John A. Taylor, Jr.

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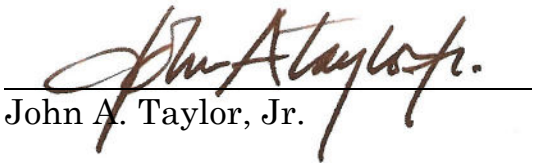
FCA US, LLC

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 6,091words as counted by the program used to generate the petition.

Dated: December 1, 2022



John A. Taylor, Jr.

PROOF OF SERVICE

Figueroa v. FCA US LLC
Case No.: B306275 (C/W B308339)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On December 1, 2022, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list.

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. 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 fully prepaid.

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

Executed on December 1, 2022, at Burbank, California.

Millie Cowley

Millie Cowley

SERVICE LIST
Figueroa v. FCA US LLC
Case No.: B306275 (C/W B308339)

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Trial Judge • Case No. 56-2018-00507038-CU-BC-VTA

Via U.S. Mail