S277547

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

ANSWER TO PETITION FOR REVIEW

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SUPREME COURT OF CALIFORNIA

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case No: S277547

Case Name: Figueroa v. FCA US LLC

Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1. None	
2.	
3.	
4.	

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

TABLE OF AUTHORITIES

INTRODUCTION

Appellant and defendant FCA US LLC asks the Court to grant review on the ground that the Court of Appeal's published opinion ("Opinion") addresses the same issue—and comes to the opposite conclusion—as *Niedermeier v. FCA US LLC* (2020) 56 Cal.App.5th 1052 (*Niedermeier*), which is currently pending before this Court.

Plaintiff agrees that a grant-and-hold order is appropriate, albeit solely on the ground that the Opinion expressly disagreed with *Niedermeier*'s creation of an a trade-in offset—an offset that the Opinion reasoned was contrary to the Song-Beverly Act's mandate that manufacturers are to provide "restitution" to consumers exactly as set forth in Civil Code section 1793.2 (namely, for the price paid or payable, without reference to any resale or trade-in offset). Accordingly, the Court should enter grant-and-hold on this limited ground.

The Court should reject FCA's request to render the Opinion non-citable while *Niedermeier* is pending. The Opinion meets nearly every criterion for publication—including by creating a split on a widely important issue. It should remain citable for its persuasive value while *Niedermeier* is pending.

The Court should decline to consider FCA's thinly-veiled attempts to use its Petition for Review to supplement its briefing in *Niedermeier*. And, to the extent they are relevant at all, FCA's merits arguments aren't just improper; they're wrong. As the Opinion correctly observed, it is manufacturers like "FCA, and

not the vehicle's owner, who [cause the proliferation of Song-Beverly cases and] undercut[] the [A]ct's labeling and notification requirements by refusing to repurchase the vehicle [and label them before reselling them] as required by the [A]ct." (Typed Opn-7.) Consumers like the plaintiff here would have no basis to sue, let alone to resell or trade in a defective vehicle for a safe one, if a manufacturer were to comply with its statutory duty to promptly buy back that defective car in the first place. Yet, some manufacturers take an "unforthright approach and stonewalling of fundamental warranty problems." (*Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 302-303 (*Krotin*).)

FCA complains about how the Opinion characterizes its misconduct. But the Opinion's characterization is fair. As the Opinion observes, the instant case and *Niedermeier* both show FCA to be defying its Song-Beverly Act obligations. Indeed, a jury found that FCA *willfully* violated the Act in *both* cases—in the instant case, after 10 to 12 unsuccessful repair attempts and one buy back request (Typed Opn-2-3), and in *Niedermeier* after 16 unsuccessful repair attempts and three buy-back requests (*Niedermeier v. FCA US LLC*, Opening Brief on the Merits, 2021 WL 2515363 at pp. 22-24).

The record also shows that FCA is among "the manufacturers with the highest number of lemons," the "long[est] history of failing to comply with consumer protection and public safety laws," and the most lemon-law cases filed against it. (Consumers for Auto Reliability and Safety's Amicus Brief in Support of Petitioner in *Niedermeier v. FCA US LLC*, review

granted Feb. 10, 2021, S266034 ("CARS's Amicus Brief"), 2021 WL 6423932 at pp. 11-12.)[1] FCA's embarrassment is no reason to depublish. FCA's complaints about the characterization of these facts, and others, amount to a complaint that the Court of Appeal properly construed the evidence in the light most favorable to the judgment that FCA challenges.

Finally, FCA's request for review of the Court of Appeal's refusal to deduct $3,000 in insurance premiums is meritless. FCA never even tries to identify a court-split that would be resolved by review. And, in fact, the Opinion doesn't even weigh in on whether insurance premiums constitute incidental damages under the Act, citing one of the several independent grounds to affirm without consideration of that question.

The Court should thus enter a grant-and-hold in light of *Niedermeier*. The Court should reject FCA's request that the Court depublish the Opinion. And, the Court should reject FCA's invitation that this Court needlessly weigh in on a non-dipositive question on incidental damages that the Opinion didn't even reach.

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[1] The Court of Appeal took judicial notice of CARS's Amicus Brief, without objection from FCA. This brief is thus part of the record in this case, too. (See Respondent's Second Motion for Judicial Notice (filed April 4, 2022); September 29, 2022 Order Granting Respondent's Motions for Judicial Notice (filed February 22, 2022 and April 4, 2022).)

STATEMENT OF THE CASE

The Opinion properly states the factual background and procedural history, drawing all inferences in favor of the presumptively correct jury verdict. (See *Jameson v. Desta* (2018) 5 Cal.5th 594, 609.) Yet FCA's petition for review attempts to relitigate the facts anyway. This is improper, especially as FCA never disputed the jury's findings on liability—i.e., that FCA breached its express and implied warranties by failing to promptly buy back the vehicle even after Figueroa provided FCA about a dozen chances to repair it and affirmatively asked FCA for a buy back. (Typed Opn-2-3.)

FCA's characterization of the facts is contrary to the standard of review. As appellant, FCA had "to summarize the facts in the light most favorable to the judgment." (*Oak Valley Hospital District v. State Department of Health Care Services* (2020) 53 Cal.App.5th 212, 237-238 (*Oak*) [deeming argument forfeited where the appellant failed to meet this duty].) FCA instead distorts the record, omits material facts, and cherry picks to create a narrative that, at best, the jury could have but chose not to accept. For example:

FCA indicates that the car's first issue (a coolant leak that caused the vehicle to overheat so much that it had to be towed back to the dealership) was unrelated to the second issue (a high-pitched noise requiring the replacement of the truck's water pump). (Petition-10.) Not so. The record shows that the high-pitched noise occurred because the truck's engine had overheated yet again, this time causing a rubber "seal" barrier to fail, coolant

to slip past the seal onto the water pump bearing and washing bearing lubricant off, resulting in the high-pitched noise. (3RT-640-643.) Replacement of the truck's water pump was thus indicative of "a drastic premature failure." (3RT-643.)

FCA insinuates that Figueroa was lying about the six to eight occasions that he brought the vehicle in for repair thereafter, citing to the absence of any overheating complaints in the repair records kept by their authorized service agents. (See Petition-10-11.) Such credibility attacks are improper, and conflict with the record, too. FCA's *own witness* testified that FCA's service agent, Crown Dodge, "usually" doesn't document instances where it (mistakenly) deems no work necessary based only on a visual inspection (5RT-1005-1006), which is what happened here. The record shows that the car's cylinder heads had hairline cracks that caused coolant to leak and the engine to overheat (3-RT-649-650)—cracks that Crown Dodge missed in its visual inspection because such cracks are seldom visible to the unaided eye (3-RT-640-643).

FCA indicates that an overheating incident in 2017 was caused by "a leaky aftermarket thermostat housing"—and that any issue stemming from that part was not covered by the warranty. (Petition-11.) To the extent that FCA is suggesting that this automotive part is the reason for the car's overheating issues, the record specifically shows otherwise: plaintiff replaced that leaky part (Exh. 10-2)—yet the car continued to be plagued with issues, this time, shuddering in the transmission that respondent's expert "attribute[d] to the overheat[ing]" of the

vehicle (Exh. 11; 3RT-665-666). Crown Dodge did not fix the car this time either. (3RT-665-666).

FCA acknowledges that, at this point, Figueroa charged his nephew with calling FCA (Petition-11) to "let[] Chrysler know that [he] wanted them to repurchase the vehicle" (4RT-849-850)—and that FCA never bought back the car (Petition-11). FCA nevertheless insinuates that there's no evidence that this call took place, once again ignoring the record, which shows that Figueroa *was present* when his nephew called to make the buy-back request (4RT-850)—a request FCA simply refused.

On these facts, the jury found for Figueroa on two distinct claims: breach of express warranty and breach of implied warranty. (Respondent's Brief ("RB")-24-25.)

The jury then awarded Figueroa $30,154 for his express warranty claim, specifically awarding $20,154 in compensatory damages and $10,000 as a civil penalty imposed for FCA's willful violation of the Act. (Typed Opn-3; RB-24-25.) The jury also awarded him $30,154 for compensatory damages on his implied warranty claim in a general verdict form. (RB-24-25.)

Without challenging its underlying liability, FCA aggressively pursued deductions and setoffs, and upon losing (again), now files this petition for review as part of its latest attempt to shave something off of a $30,154 judgment.

LEGAL ARGUMENT

I. The Court Should Enter A Grant-And-Hold On The Offset Issue Because The Opinion Expressly Rejects *Niedermeier*—And Not Because Of FCA's Baseless, Improper Merits Arguments.

A. Entering A Grant-And-Hold Order On The Existence Of An Unenumerated Resale Or Trade-In Offset Is Appropriate, Pending This Court's Decision In *Niedermeier*.

The Court of Appeal expressly disagreed with *Niedermeier*'s creation of an unenumerated trade-in offset in Song-Beverly cases—a ruling on which this Court is set to weigh in on soon, as *Niedermeier* is fully briefed and awaiting argument. The Court of Appeal explained that it "disagree[s] with *Niedermeier*" because:

- Although the Legislature provides a "restitution" remedy, it expressly "defines what it means by restitution in section 1793.2, subdivision (d)(2)(B)," which "does not include a set-off for the cash received by the vehicle owner on sale of the vehicle or the vehicle's trade-in";
- The creation of an offset for the market value that a *yet-to-be-branded lemon* gets on resale or in a trade-in would encourage manufacturers by giving them *more than* a manufacturer who complied with their duty to promptly buy it back, brand it as a lemon, and repair it in compliance with any applicable warranties *before* reselling it at a "deep discount";

- "[I]t is FCA, and not the vehicle's owner, who undercuts the act's labeling and notification requirements by refusing to repurchase the vehicle as required by the act"; and
- FCA cannot complain about a windfall to the consumer when no such windfall could have resulted "[h]ad FCA fulfilled its duty under the Act to promptly replace or repurchase the [defective car]" in the first place. This is especially true, the Court reasoned, because the windfall here was "the direct result of FCA's *willful* violation of the Song-Beverly Act. . . . We are aware of no public policy that requires FCA be compensated for its own willful violation of the law."

(Typed Opn-5, 7.)

Plaintiff thus takes no issue with FCA's request for a grant-and-hold—specifically, that the Court should grant review and then defer ordering further action in this matter until after the Court decides *Niedermeier*. The Court need not consider FCA's further arguments for review as a result, many of which are thinly-veiled attempts to relitigate the merits in *Niedermeier*.

B. Appellant's Thinly-Veiled Merits Arguments Are Improper, Irrelevant, And Wrong. They Should Have No Bearing On The Court's Basis For Granting Review.

FCA acknowledges that this Court has "already deemed the issue presented in *Niedermeier* to be review-worthy"—presumably for the reasons set forth in Ms. Niedermeier's

petition for review—and that the virtually identical issue here is therefore review-worthy too. (See Petition-16.)

Yet FCA then spends several pages raising unfounded policy arguments as to why the issues in *Niedermeier* and *Figueroa* are of statewide import. (Petition-14-20.) The Court can and should ignore arguments that plainly have no bearing on the Petition for Review.

To the extent FCA is actually raising these public policy arguments to supplement its briefing in *Niedermeier*, such an attempt is not just improper; it is baseless. Specifically, FCA speculates that plaintiffs often bring Song-Beverly suits even after the manufacturer has made "a full refund offer" in hopes of the remedies that the *Act* makes available where, as here, the jury found that the manufacturer had willfully violated its statutory obligations. (See Petition-17.) FCA then argues that a trade-in offset would increase litigation—and bypass the Act's labelling requirements—by allowing a plaintiff to "recover *more* than his or her equity interest in a vehicle" where he re-sells the vehicle while waiting for relief. (See Petition-16-19.)

FCA is wrong on all counts—even assuming that its public-policy concerns were relevant to the interpretation of the Act's "clear and unequivocal" mandate: that manufacturers are to pay prevailing consumers the price paid or payable on the car. (Typed Opn-4 ["We cannot add words to a clear and unequivocal statute," citing *Hudson v. Superior Court* (2017) 7 Cal.App.5th 1165, 1172].)

First, the proliferation of Song-Beverly cases is *not* caused by consumers who bring claims "even where the manufacturer has already offered a full refund" in hopes to recover even more in a case that they may lose and may take years to resolve. (See Petition-17 [speculating, without citation, that there are "many cases filed after a consumer *rejects* a full refund offer," original italics].)[2] After all, a plaintiff only has a Song-Beverly claim where the manufacturer has *failed* to "promptly replace the new motor vehicle" or provide restitution—that is, the "price paid or payable" on the car. (Civ. Code, § 1793.2, subd. (d)(2).) No reasonable plaintiff nor the attorneys representing them *on contingency* would file a case with no prospect of recovery or an award of reasonable attorney's fees under the Act.

In truth, Song-Beverly cases proliferate because certain manufacturers have taken the "view that it is better to vigorously contest each case regardless of its merit, hoping to force lemon owners to trade in their defective vehicles at a substantial loss and up-sell them into an even more expensive transaction

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[2] Plaintiffs only cite a piece by Hyundai Motor America's counsel that repeats one defense firm's claim that the number of Song-Beverly cases has increased since 2018. (See Petition at p. 17, citing Vanderford & Bulkina, *Time to end systematic abuse of California's lemon law*, Daily J. (July 27, 2020).) FCA unsurprisingly attributes this rise to attorney's fees that the statute awards without mentioning that such fees are only awarded where a jury has found that FCA, Hyundai, or some other manufacturer has violated the Act in the first place. (See Civ. Code, § 1794, subd. (d) [awarding attorney's fees "[i]f the buyer *prevails*," italics added].)

(perversely making an additional profit by producing and failing to fix a lemon) and dissuade future litigation." (CARS's Amicus Brief, *supra*, 2021 WL 6423932 at pp. 11-12; see Typed Opn-7 ["As this case and *Niedermeier* show, FCA operates in open defiance of the Song Beverly Act"]; *Krotin*, *supra*, 38 Cal.App.4th at p. 303 ["[T]he consumer's request is not mandated by any provision in the Act. Rather, the consumer's request for replacement or restitution is often prompted by the manufacturer's unforthright approach and stonewalling of fundamental warranty problems"]; *Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1050 [same as *Krotin*].)

That FCA and other manufacturers aggressively litigate even obviously meritorious, low-value cases is apparent from the facts of this case—where FCA appealed the trial court's denial of several aggressive deductions, including $600 supposedly awarded for registration renewal fees and $3,420 supposedly awarded for insurance premiums. (Typed Opn-7-8.)

That is why the vast majority of Song-Beverly suits are litigated against just a handful of manufacturers, including FCA, which counts among "the manufacturers with the highest number of lemons," the "long[est] history of failing to comply with consumer protection and public safety laws," and the most lemon law cases filed against it. (CARS's Amicus Brief, *supra,* 2021 WL 6423932 at pp. 11-12.)

Second, the absence of a trade-in or resale offset is what would actually *increase* Song-Beverly litigation, undermine the Act's labelling requirements, and cause an unjustified windfall.

After all, when a manufacturer complies with the Act by promptly buying back a lemon, it can only re-sell it (if at all) at a "deep discount" after (1) "labeling [it] as a lemon" and (2) repairing it so that it complies with any applicable warranties. (Typed Opn-7; see Civ. Code, § 1793.23, subd. (c) [requiring "[a]ny manufacturer who reacquires or assists a dealer or lienholder to reacquire" a lemon to brand it as such].) Gifting manufacturers with a resale or trade-in offset for the higher resale or trade-in value that a vehicle *can only yield if it is not branded as a lemon* would have the effect of rewarding manufacturers precisely for their failure to promptly buy back that lemon and brand it as a lemon at that time—and cause consumers to turn to the courts for relief as a result.

Third, even if this were not the case, whether the trade-in or resale offset encourages more plaintiffs to bring suit or to sell their cars while waiting for relief that had been owed by manufacturers "promptly" makes no difference. After all, the Legislature sought to limit the number of cases filed by making litigation *less attractive to manufacturers*—not to consumers, who the Legislature in fact sought to *encourage* to bring suit. That's why the Act requires a losing manufacturer to pay a prevailing consumer's attorney's fees and costs and expenses in the first place. (See *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 994 ["By permitting prevailing buyers to recover their attorney fees in addition to costs and expenses, our Legislature has provided injured consumers strong

encouragement to seek legal redress in a situation in which a lawsuit might not otherwise have been economically feasible"].)

The Legislature also already has a mechanism for limiting the number of vehicles that go unbranded: *incentivizing the manufacturer* to repurchase those vehicles *and then* to brand them *before resale.* (See Burdine, *Consumer Protection; "Lemon Law Buyback"—Requirements Regarding the Return and Resale of Vehicles* (1996) 27 Pacific L.J. 508, 517-518 [explaining that the Legislature enacted the labeling requirements *on manufacturers*, who had previously laundered unbranded lemons as good cars and sold them to unwitting consumers at "prices higher than would have been possible if the vehicles were stamped as lemons," citing Assembly Committee on Consumer Protection, *Governmental Efficiency and Economic Development, Bitter Fruit: How Consumers Unknowingly Buy Lemon Vehicles* (1994) p. 7].) Because the Act aims to make litigation *easier to bring,* the consumer's only obligation is to "permit[] the manufacturer a reasonable opportunity to repair the vehicle." (See *Krotin*, *supra*, 38 Cal.App.4th at pp. 302-303.)

FCA's complaints about the Act's mechanisms (1) to limit the number of Song-Beverly cases without discouraging consumers to sue, and (2) to ensure that *manufacturers* label defective cars as lemons *before they resell those cars,* are irrelevant here. If FCA has concerns about the statute's structure, the proper place to lodge those concerns is with the Legislature that designed it.

Whatever its relevance on a request for a grant-and-hold, the Opinion's holding that the Act does not permit a trade-in or resale offset plainly has statewide import, albeit not for the reasons that FCA advances. Rewarding manufacturers who violate the Act with a *market-value trade-in or resale offset* for a car that would have been worth virtually nothing had that manufacturer complied with the Act by (1) promptly buying it back, (2) repairing it so it complied with any applicable warranties, and (3) labelling it as a lemon before resale, is what will cause an increase in Song-Beverly cases. Any rise in cases is not caused by consumers who can only recover damages and reasonably incurred attorney's fees where they have prevailed.

C. There Is No Basis To Depublish The Opinion, Rendering It Non-Citable, Pending This Court's Decision In *Niedermeier*.

FCA accuses the Court of Appeal of levying "ad hominem attacks" on FCA and making other factual representations that FCA claims to be beyond the record. (Petition-20-21.) FCA ask the Court to order the Opinion to be depublished, and therefore non-citable, while *Niedermeier* is pending. (*Ibid.*) The Court should reject this request. While *Niedermeier* is pending, it is appropriate for the Opinion to remain published and citable. Indeed, the courts of appeal should have the benefit of the Opinion's thoughtful analysis of why the appellate court got it wrong in *Niedermeier*.

1. The Opinion should remain published, as it meets nearly every criterion weighing in favor of publication.

The Rules of Court set forth nine independent reasons why a court should publish an opinion. The Opinion meets nearly all of them.

The Opinion "(1) [e]stablishes a new rule of law[,]" "(3) . . . criticizes with reasons given, an existing rule of law[,]" "(4) [a]dvances a new interpretation, clarification, criticism, or construction of a provision of a . . . statute[,]" and "(5) [a]ddresses or creates an apparent conflict in the law" as the first case to disagree with *Niedermeier* in holding that a manufacturer is not entitled to an unenumerated resale or trade-in offset. (See Cal. Rules of Court, rule 8.1105(c); § I.A *ante*.)

The Opinion "(8) [i]nvokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision"—namely, *Niedermeier*—in holding that "FCA cannot complain that the vehicle's owner has received an unjustified windfall when it could have avoided such a result by complying with the Song-Beverly Act," rather than willfully violating it. (Compare Typed Opn-7; *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1244 [rejecting manufacturer offset in Song-Beverly case because "'[n]o one can take advantage of his own wrong'"] with *Niedermeier*, *supra*, 56 Cal.App.5th at p. 1075 [holding that any windfall manufacturers receive from an offset irrelevant by apparently making its own public policy

judgment that such concerns are "outweighed by the consequences of interpreting the Act in plaintiff's favor"].)

The Opinion also "(6) [i]nvolves a legal issue of continuing public interest" (Cal. Rules of Court, rule 8.1105(c)(6)), which the Court and all parties have already recognized, even if FCA's reasons for that conclusion are misguided. (See § I.B, *ante*.)

2. The Court should not depublish an opinion that creates a case-split based on meritless quibbles over the Opinion's description of well-supported facts.

Despite the fact that the Opinion satisfies nearly every basis for publication, FCA insists that the Court depublish the Court of Appeal's opinion. FCA accuses the appellate court of ethical violations for supposedly levying "ad hominem attacks" against it and by making other factual conclusions that are supposedly unsupported by the record. (Petition-20, citing Cal. Code Jud. Ethics, canon 2(A).) But as discussed below (§§ I.C.2.a-b, *post*), there is ample support in the record for the Court of Appeal's characterization of FCA's misconduct.

Regardless, FCA doesn't argue that any of its claimed discrepancies would have made any material difference in the case's logic or outcome. (See Petition-20-25.) Nor are FCA's complaints even relevant to the reasons why courts publish opinions in any case: to provide guidance on a novel, important issue that will almost certainly reoccur. (See generally Cal. Rules

of Court, rule 8.1105(c).) Again, that the losing party is embarrassed by its poor conduct is not a factor. (See *ibid.*)

FCA's (meritless) quibbles about facts that it doesn't even claim to be dispositive are simply not a reason to depublish.

a. The appellate record shows that FCA acts in open defiance of the Song-Beverly Act.

To the extent relevant, FCA's complaints about the Opinion's descriptions of FCA's conduct lack merit. Specifically, FCA complains that there's no record support for the Opinion's observation that: "'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.'" (Petition-21, quoting Typed Opn-7.)

In fact, there is ample evidence of FCA's open defiance of the Act. Juries in this case and in *Niedermeier* both found that FCA *willfully* shirked its statutory duty under the Act to promptly repurchase cars that manufacturers cannot fix after a reasonable number of attempts—here after 10 to 12 unsuccessful repair attempts and one buy back request (Typed Opn-2-3), and in *Niedermeier* after 16 unsuccessful repair attempts and three

buy back requests (*Niedermeier v. FCA US LLC*, Opening Brief on the Merits, 2021 WL 2515363 at pp. 22-24).

FCA *does not dispute these findings*. (See generally Petition for Review [only seeking grant-and-hold in light of *Niedermeier* and review of incidental damages question].)

The Court of Appeal was thus entirely correct: the instant case and *Niedermeier* reflect that FCA acts in open defiance of its Act obligations.

Other evidence, too, supports the Opinion's characterization of FCA's open defiance of the Act's mandates. An amicus brief from Consumers for Auto Reliability and Safety ("CARS")—which the Court of Appeal took judicial notice of, without objection from FCA (see fn. 1, *ante*)—says the same thing: FCA is among "the manufacturers with the highest number of lemons," the "long[est] history of failing to comply with consumer protection and public safety laws," and the most lemon law cases, having apparently taken the "view that it is better to vigorously contest each case regardless of its merit, hoping to force lemon owners to trade in their defective vehicles at a substantial loss and up-sell them into an even more expensive transaction (perversely making an additional profit by producing and failing to fix a lemon) and dissuade future litigation." (CARS's Amicus Brief, *supra*, 2021 WL 6423932 at pp. 11-12.)

FCA ignores all of these authorities and instead argues that there's no evidence that "FCA actually knew of any repairs

that had not succeeded on the first try in addressing the malfunctions he experienced." (See Petition 21-22.)

This is a red herring. The Court of Appeal is permitted to consider authorities outside of the facts—such as published cases and amicus briefs—*in explaining the bases for its interpretation of the law*: here, that the Act does not and could not be construed to encourage FCA and manufacturers like FCA by giving them a *market value offset* for a car that such manufacturers could only re-sell at a "deep discount" after repairing the vehicle to conform with all applicable warranties. (See Typed Opn-7.)

FCA's characterization of the facts is also contradicted by the record, when construed in the light most favorable to the judgment. That record shows that Figueroa brought the car about a dozen times to an FCA service facility—that is, one of FCA's authorized agents; that FCA also had *personal knowledge* of at least four warranted overheating-related repair attempts; and that FCA was on notice that these attempts could not and did not work, certainly by the point that Figueroa *asked FCA to buy it back*. (See *O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 288 [imputing "the actual knowledge of the agent . . . to the principal"]; RB-61-68.)

There was thus ample support for the Court of Appeal's conclusion that FCA acts in open defiance of its Song-Beverly obligations. There is nothing inaccurate about the Opinion.

b. The appellate record supports the Opinion's other conclusions, too, certainly when interpreted in the light most favorable to the judgment.

FCA argues that there was no evidence indicating that, after the first or second repair attempt, the car continued to overheat. (See Petition-22-23, citing RB-21, which discusses the first attempt to discuss overheating before observing that this issue continued.) The record shows otherwise, including evidence of the six to eight additional times that plaintiff brought the vehicle in for repair due to overheating. (See RB-21-23.)

FCA argues that there was no evidence that Figueroa was "in desperation" to fix the car's overheating issues. (See Petition-23.) Yet again, the record shows otherwise, certainly when drawing all reasonable inferences in respondent's favor. In particular, the evidence shows (1) that when the car overheated on road trips, plaintiff would typically have to "pull over to the side of the road" and "wait two hours before [he] c[ould] drive again," (2) that this would happen "[a]lmost all of the time," (3) that he had taken it to Crown Dodge, one of FCA's authorized dealers, "several times and they kept saying it's fine," and (4) that when the car overheated yet again, he took it to Shaver Automotive, "the closest place [he] found." (4RT-768-771.) It is reasonable to infer that the plaintiff was in desperation when bringing the car to Shaver Automotive under these circumstances.

FCA argues that there was no evidence that "the dealership offered only $10,000 as a trade-in because of its poor condition." (Petition-24.) Not so. On this, the record is quite explicit: the dealer told plaintiff "that 10,000 is the most they would give" for the car after asking him "why didn't [he] leave it because it was a pickup that had a lot of problems." (4RT-765.)

FCA argues that there is no evidence that "FCA refused to repurchase the truck." (Petition-25.) Wrong again. The record shows both that Figueroa had his nephew call FCA to buy the car back and that, as FCA concedes, "FCA did not in fact repurchase the truck." (*Ibid*.) It follows that FCA refused Figueroa's request (via his nephew) for FCA to re-purchase the truck.

In short, FCA's complaints about the Opinion's recitation of the facts are, at best, actually complaints that the Court of Appeal *correctly* ignored the evidence that FCA improperly cherry-picks and that the Court of Appeal, instead, *correctly* drew all reasonable inferences in favor of the jury verdict against FCA. (See *Oak*, *supra*, 53 Cal.App.5th at p. 238 ["We conclude [appellant] has not met its burden to summarize the facts in the light most favorable to the judgment. Therefore, this argument is forfeited"].)

FCA's embarrassment at what the record shows, as construed in favor of the judgment, is simply not a reason to depublish a thoughtful opinion that creates a split in authority.

II. The Court Should Deny Review On The Incidental-Damages Question. There Is No Court-Split To Resolve, Nor Any Occasion To Rule On That Question, Which The Opinion Had No Occasion To Reach Either.

Under Rule of Court 8.500(b), the Court "may order review of a Court of Appeal decision" under four circumstances. (Cal. Rules of Court, rule 8.500(b)(1)-(4).) Tellingly, FCA does not even reference this rule in seeking review of the incidental-damages issue, let alone explain how the Opinion meets any of the criteria for granting review in this regard. (See Petition-20-25.) That's presumably because it doesn't. Three criteria don't apply on their face. (See Cal. Rules of Court, rule 8.500(b)(2)-(4) [review may be granted where the Court of Appeal lacked jurisdiction, the concurrence of sufficient qualified justices, or to transfer the matter to the Court of Appeal for such proceedings as the Supreme Court may order].) The fourth one—that review is "necessary to secure uniformity of decision or to settle an important question of law"—doesn't apply either, even assuming that a case resolving one category of damages, among the countless that are recoverable as incidental damages, were sufficiently important. (Cal. Rules of Court, rule 8.500(b)(1).)

As an initial matter, there's nothing to unify or "settle." In fact, FCA doesn't even try to identify a split in authority that it is asking the Court to "settle." (See Petition-26-30.) FCA can't. There is no split as to whether auto insurance payments are

recoverable as incidental damages in connection with section 1793.2's restitution remedy. (See Petition-26-30.)

Indeed, the *Court of Appeal in this case* did not even decide that question, having no occasion to do so, given "FCA's failure to seek a jury verdict form segregating the elements of damages foreclosed any challenge to a portion of the damages as improperly awarded"—here, damages that they speculate to comprise of auto insurance payments. (Typed Opn-8.)

Even if there were conflict in authority to "settle," review would not necessarily result in a ruling as to whether insurance payments constitute are recoverable under the Act's restitution remedy under section 1793.2. This is because there are *several independent bases* for the incidental-damages judgment, regardless of the answer to this question.

First, the jury awarded plaintiff the same amount of damages on his *distinct claims* for breach of express warranty and breach of implied warranty. Accordingly, to establish entitlement to a reversal of the judgment, FCA had to challenge *both* verdicts in its opening brief, which FCA failed to do. Instead, every argument in FCA's opening brief was directed *only* to the express warranty claim. (Motion to Strike-5-11.)

Specifically, in the Court of Appeal, FCA's opening brief argued that FCA is entitled to:

- A $3,191.93 resale offset under section 1793.2, subdivision (d) (AOB-19-29)—a provision that, by its plain terms, applies only to claims for breach of "*express*

warrant[y]" (see Civ. Code, § 1793.2, subd. (d)(2), italics added; *Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1262);

- A reduction for the $10,000 civil penalty awarded (AOB-37) *that Figueroa only sought* on the *express* warranty claim and that the jury could and did *only award* on the *express* warranty claim (Civ. Code § 1794(c) ["This subdivision shall not apply . . . with respect to a claim based solely on a breach of an implied warranty"]; 1CT-28 [awarding $30,154 as restitution on implied warranty claim]); and
- A reduction in $4,020 awarded as incidental damages under section 1793.2's *express warranty provisions* (AOB-30-31).[3]

These arguments, which by their own terms only pertain to the express-warranty verdict, were not and could not have been directed at the verdict on the implied warranty claim, which is governed by different statutory provisions of the Act. (See *Mocek v. Alfa Leisure, Inc.* (2003) 114 Cal.App.4th 402, 406-407 [holding that section 1793.2, by its express terms, apply to express warranty claims and that implied warranty claims are governed by other, different provisions].)

[3] FCA then argued, based on these requested reductions only, that the Court of Appeal should remand so the trial court could reevaluate its determination of attorney's fees and costs. (See AOB-44-45.)

Second, FCA failed to present a proper appellate record supporting the error that FCA actually does claim. (RB-31-34.) Specifically, FCA argued in its opening brief that various components of the jury's award on the express warranty claim are unsupported by the record. (AOB-19, 29-30, 38-39, 44.) But to show that the jury improperly awarded certain elements of damages under the express warranty claim, FCA had to provide the jury instructions on that claim. (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1535.) FCA's failure to include the jury instructions in the appellate record and to argue error *in light of those instructions* is another independent basis for affirmance *in full*, regardless of the merits.

Third, as it continues to do in this Court, FCA shirked its duty as appellant (when before Court of Appeal) to present the facts in the light most favorable to the judgment, which is supposed to be *presumptively correct*. Instead, FCA improperly cherry picks disputed evidence that the jury necessarily rejected, warranting affirmance. (Compare RB-19-23 with Opening Brief-11-16.) Yet again, this is an independent ground for affirmance that doesn't depend on merits. (RB-19-20, 66-68; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881-882 [Appellants "are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence.* Unless this is done the error is deemed to be waived," original italics].)

Fourth, as the Court of Appeal correctly observed, "FCA's failure to seek a jury verdict form segregating the elements of damages foreclosed any challenge to a portion of the damages as

improperly awarded." (Typed Opn-8, citing *English v. Lin* (1994) 26 Cal.App.4th 1358, 1369.)

FCA suggests in a footnote that this makes no difference to the extent that it can show that the "the award necessarily includes factually or legally improper sums." (Petition-28-29, fn. 4.) Even if this were true, FCA never made that showing in its opening brief—certainly not as to the implied warranty claim, which, unlike the express warranty claim, awarded $30,154 as a lump sum comprised entirely of compensatory damages, without identifying what amounts, if any, were awarded as incidental or consequential damages. (See pp. 29-30, *ante*.)

There is no good reason for the Court to grant review on a question for which there is no split—especially in light of the *several, independent bases for affirmance*.

CONCLUSION

The Court should enter a grant-and-hold order on the offset issue and defer any further action until after the Court decides *Niedermeier*. In the meantime, the Opinion should remain published and citable. Finally, the Court should deny review on whether insurance payments are recoverable as incidental damages—a question that has not resulted in a court-split and

that is, in any event, beside the point, in light of the presence of multiple other independent bases to affirm.

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this Answer to Petition for Review contains **6,128 words**, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: January 11, 2023 /s/ Joseph Bui

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 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048.

On **January 11, 2023**, I served the foregoing document described as: **Answer to Petition for Review** on the parties in this action by serving:

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Executed on **January 11, 2023**, 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/ Maureen Allen
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