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3d Civil No. C091902

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

MELISSA A. WILLIAMS, et al.,
Plaintiff and Appellant,

v.

FCA US LLC, et al.,
Defendant and Respondent.

Appeal from Butte County Superior Court
Case No. 17CV02617
Honorable Tamara L. Mosbarger

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Court of Appeal
State of California
Third Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: C091902

Case Name: Williams, et al. v. FCA US LLC, et al.

Please check the applicable box:

[X] There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

[ ] Interested entities or parties are listed below:

Name of Interested Entity	Nature of Interest

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INTRODUCTION

California's lemon law, the Song-Beverly Act ("Act"), compensates purchasers of irreparably defective vehicles. Plaintiffs Melissa and Geoffrey Williams are two such purchasers. Defendant FCA US LLC ("FCA") manufactured plaintiffs' lemon and then, as the jury found, willfully violated its obligation to buy back that vehicle.

The Act provides a straightforward, streamlined procedure for vindicating consumers' rights. As part of that procedure, the Act mandates a *formula* for calculating damages: Damages are the amount paid or payable by the purchaser, excluding non-manufacturer-installed items, and minus a deduction for use prior to its owner first bringing the vehicle in for repair. The text of the Act permits no other exclusions or deductions.

Yet, the trial court modified the special verdict form and permitted FCA to argue for an extra-statutory $29,500 "offset" based on the credit plaintiffs received when they got tired of waiting for FCA to comply with its statutory buyback duty and instead traded in their lemon. The jury applied that improper offset, which then had the further effect of suppressing the civil penalty award. All told, the improper deduction deprived plaintiffs of over $73,000 in damages. Plaintiffs moved for a new trial seeking an additur, which was denied by operation of law.

By improperly modifying the verdict form to permit improper argument on the offset, the trial court prejudicially erred. Further, even without the prejudicially defective verdict

form, reversal is necessary because by applying an improper offset, the jury awarded inadequate damages *as a matter of law*.

Separately, the trial court also erred by shifting costs under Code of Civil Procedure section 998 based on an invalid offer that, at any rate, was not more favorable than plaintiffs' judgment after trial. Indeed, FCA's 998 offer was void and incapable of valuation for multiple reasons:

- FCA made the offer *jointly* with another defendant yet failed to apportion the offer between the two defendants, even though the claims and theories of liability asserted against them were entirely distinct.
- The offer contained no time for payment, despite FCA's demonstrated history of avoiding its section 998 settlement obligations.
- The offer barred entry of judgment—thus depriving plaintiffs of a straightforward means for enforcing any settlement agreement.
- The offer was vague as to the end date for FCA's obligation to pay attorneys' fees—thus leaving plaintiffs in the untenable position of having to *dismiss* their Song-Beverly action (which guaranteed attorney fees) and potentially having to chase payment in a separate breach-of-contract action with no such right to fees.

The court erred by overlooking these fatal infirmities. The court further erred by ruling without analysis that "[p]laintiffs

did not obtain a more favorable judgment at trial." (AA-894.) Plaintiffs obtained a $46,716.54 judgment at trial, which could be easily enforced. And because FCA made the 998 offer jointly with another defendant facing entirely distinct liability, it is impossible determine whether the $46,716.54 judgment against FCA was more or less favorable than the unknowable portion of the $50,000 offer *attributable to FCA*. The erroneous rulings were manifestly prejudicial, cutting off plaintiffs' right to post-offer attorney fees and costs and saddling plaintiffs with FCA's post-offer costs.

The Court should reverse.

STATEMENT OF FACTS

A. FCA's repeated failure to repair plaintiffs' Dodge forces them to trade in their vehicle for a safe car.

Plaintiffs are former owners of a used 2012 Dodge Ram 2500 manufactured and warranted by FCA. (AA-144; 5-RT-450–456.) They purchased their vehicle in 2013 for $37,499. (5-RT-450–456.) They made a $5,000 down payment and financed the remainder. (*Ibid.*)

The vehicle was plagued by engine and electrical issues that FCA was unable to fix, despite plaintiffs providing FCA and its authorized repair facilities, including defendant Chuck Patterson (the dealership), a reasonable number of opportunities to do so. (5-RT-400, 469–488.)

At first, plaintiffs tried to get the dealership to buy back the car in exchange for a new Dodge, but the salesman refused. (5-RT-504–506.) So plaintiffs decided to purchase a new truck from GMC. (5-RT-509.) In connection with their purchase of a new GMC Sierra, the GMC dealer purported to give plaintiffs a trade-in credit for their lemon while paying off their remaining balance on the vehicle. (5-RT-518–520; AA-249.)

B. Plaintiffs file this lawsuit; FCA and the codefendant dealership make a defective offer under Code of Civil Procedure section 998.

After FCA refused to comply with its affirmative duty to provide a buyback promptly, plaintiffs filed suit against FCA and the dealership. (AA-15.)

As to FCA, plaintiffs alleged causes of action for breach of express and implied warranty under the Act and fraudulent concealment. (AA-37–42.) As to the dealership, plaintiffs alleged one cause of action for negligent repair. (AA-42–43.)

Defendants jointly served plaintiffs with an offer to settle the action for $50,000 pursuant to section 998.[1] (AA-53–54.) Although plaintiffs alleged distinct, nonoverlapping causes of action against FCA and the dealership, the joint offer did not

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[1] Statutory citations are to the Code of Civil Procedure unless otherwise specified. FCA had previously submitted a 998 offer in early 2017, but that offer did not specify a dollar amount for settlement. The only relevant offer for the trial court's orders and this Court's analysis is the January 2019 offer.

apportion the $50,000 settlement amount between FCA and the dealership. (AA-54.)

Plaintiffs did not accept the joint section 998 offer and the matter proceeded to trial in late 2019.[2]

C. FCA asks for a jury instruction on impermissible "trade-in credit" damages offset.

Over plaintiffs' objection, FCA elicited evidence regarding the purported $29,500 trade-in value of plaintiffs' Dodge vehicle. (5-RT-518–520; 6-RT-643–650.)

FCA argued it was entitled to an offset for this amount. (AA-60–64.) FCA proposed instructions in the same vein: "To calculate the amount paid by the Plaintiffs for the subject vehicle, do not include the trade-in value for the subject vehicle." (AA-67.) Plaintiffs, in turn, argued that a trade-in offset was impermissible under the Act. (AA-71–78; 6-RT-643–644, 659–664.) They objected to the instruction. (AA-80.)

The trial court rejected FCA's proposed instruction and instead used the standard CACI instruction. (8-RT-881–883.) The court instructed the jury that if it found that FCA failed to repair the Dodge's defects after a reasonable number of attempts, then plaintiffs were "entitled to recover the amounts they prove they paid" for their Dodge, including: "(1) The amount paid to date for the vehicle, including finance charges; (2) Charges for

[2] At the start of trial, plaintiffs voluntarily dismissed the dealership from the case. (AA-57.)

transportation and manufacturer-installed options; [and] (3) Sales tax, use tax, license fees, registration fees, and other financial fees." (AA-125.) The *only* deduction enumerated in that instruction was for "the value of the use of the vehicle before it was brought in for repair," which was calculated using the specific statutory formula set forth in the instruction. (*Ibid.*)

D. The trial court modifies the special verdict form to permit FCA to improperly argue to the jury that it was entitled to a trade in credit offset.

Despite rejecting FCA's requested trade-in offset instruction, and over plaintiffs' objection, the court modified the official Judicial Council verdict form to replace "[t]he purchase price of the vehicle itself"—one of five items of recoverable damages—with "[t]he actual price paid for the [vehicle] by the plaintiffs." (AA-145; 8-RT-881–884; see § I.B, *post*.) Though plaintiffs objected, the court made clear it was doing so to accommodate FCA's legally improper argument that $29,500 should be excluded from plaintiffs' damages. (8-RT-881–884; see also 7-RT-673–685, 745–746.)

Seizing on this, FCA repeatedly argued that to derive the "actual price," the jury had to offset the plaintiffs' damages by the amount of the $29,500 trade-in credit. (See, e.g., 9-RT-1032 ["We know the value of the truck. It was likely $29,500 at the time that they traded it in"], 9-RT-1042 [plaintiffs "are also claiming that they're entitled to the full purchase price of the truck. Well, the problem with that, ladies and gentleman, is they

didn't pay for the full purchase price of the truck. They traded the truck in and GMC paid them $29,500 for it…. The verdict form is clear. It asks you *what was actually paid* by the plaintiffs for the 2012 Dodge Ram 2500. And I have broken down that amount for you. That amount does not include the $29,500, because they didn't actually pay for that amount," italics added].)

FCA's proposed subtotal for restitution damages took the trade-in credit offset into account—indeed, FCA argued for damages totaling $17,895.54, before applying yet more deductions. (9-RT-1037; see AA-279.)

E. The jury's award reflects that it deducted the $29,500 trade-in value as an offset to damages.

The jury found that FCA willfully violated the Act. (AA-147.) But *exactly as FCA requested*, the jury improperly reduced the purchase price of the truck by $29,500, awarding $17,994.82 as the "actual price paid" for the Dodge—just $99.28 more than the subtotal proposed by FCA. (AA-145.) This $99.28 discrepancy can be explained by plaintiffs' payment transaction history detail, which includes a $99.28 "unapplied increase" interest charge.[3] (AA-176.) The jury awarded an additional $554 in consequential and incidental damages and, pursuant to the Act's mandates, reduced the damages award by the statutory mileage deduction—i.e., $2,976.64 reflecting the value of use prior to bringing the vehicle in for repair. (AA-146.)

[3] The $99.28 was credited back eight days later, but the jury apparently did not take that into account. (AA-176.)

The jury awarded $31,114.36 in civil penalties, which was exactly two times the total damages award—i.e., the maximum penalty ratio allowed under the Act. (AA-147; see Civ. Code, § 1794(e)(1).) Thus, the jury's total damages award, inclusive of penalties, was $46,716.54. (AA-148.)

The following table (Table 1) compares plaintiffs' *actual* damages based on the undisputed facts to the jury's award, which incorporated FCA's improper, extra-statutory offset. The prior-use reduction, compensatory damages, and total damages figures in Table 1 are based on the court's erroneously modified verdict form. (See § I.B, *post*.)

TABLE 1

		Actual	Jury award[4]
"Actual price paid or payable" § 1792(d)(2)(B)	Down payment	$5000[5]	$5000
	Monthly payments made	$7,541.49[6]	$7,541.49
	Balance of loan obligation actually paid to purchase the Dodge	$34,644.57[7]	$5,144.57 (balance less $29,500 offset)[8]
	Interest adjustment payment	$209.48[9]	$209.48
	Unpaid interest charge (see fn. 6)		$99.28[10]
	Total	$47,395.54	$17,994.82
Incidental/consequential damages		$554[11]	$554
Damages subtotal		$47,949.54	$18,548.82
Prior use reduction § 1792(d)(2)(C)	Actual purchase price multiplied by number of miles driven (19,850)[12]	$940,801,469	$357,197,177
	Number above divided by 120,000	$7,840.01	$2,976.64
Total compensatory damages (subtract prior use reduction from damages subtotal)		$40,109.53	$15,572.18
Civil penalty (at 2 times damages)		$80,219.06	$31,114.36
TOTAL JUDGMENT		$120,328.59	$46,716.54

[4] AA-145–148; AA-279.

[5] 5-RT-450–454.

[6] AA-176.

[7] AA-176.

[8] See argument at AA-166–167; see also AA-249; AA-279.

[9] AA-176.

[10] AA-176, AA-279.

[11] AA-146.

[12] The parties stipulated to the number of miles driven. (See AA-171.)

F. Plaintiffs move for a new trial.

Plaintiffs moved for new trial, seeking an additur on the ground that by adopting FCA's proposed damages amount that used a $29,500 trade-in offset, the jury had improperly deviated from the statutory measure of damages—thereby dramatically reducing both damages and civil penalties. (AA-159–161, 275–289.) Plaintiffs' motion was denied by operation of law.[13] (§ 660(c); see *Dodge v. Superior Court* (2000) 77 Cal.App.4th 513, 517 [applying former 60-day statutory timeframe].)

G. The trial court misapplies section 998 to deprive plaintiffs of attorney fees and costs.

FCA and plaintiffs filed cross-memoranda for fees and costs. (AA-333–334, 748, 779.) Without analysis, the trial court found that "[p]laintiffs did not obtain a more favorable judgment

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[13] Citing various Covid-19 related orders and directives, the trial court found that it retained jurisdiction over the new trial motion notwithstanding section 657, and purported to rule on the motion in a May 26, 2020 order. (AA-874–876.) But the court cited no orders extending section 660's jurisdictional timeframe in which to rule on a new trial motion—only to county-level orders taking all hearings off calendar. (AA-875.) Inability to hold a hearing within the 75-day timeframe does not extend the trial court's jurisdiction. (See *Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 500; cf. *Rowan v. Kirkpatrick* (2020) 54 Cal.App.5th 289, 297 [uncertainty created by Covid-19 did not overcome jurisdictional nature of deadline to notice appeal, which was extended only by an emergency order specifically extending that deadline].) Because the court purported to rule on the new trial motion more than a month outside the 75-day jurisdictional window, the order is "void for lack of jurisdiction." (*Dakota Payphone,* at p. 500.)

at trial than the [joint] statutory offer to compromise presented by Defendant [and the dealership] on January 25, 2019." (AA-894.) Finding that defendants' joint section 998 offer was "reasonable, valid and made in good faith," the court declined to award plaintiffs post-offer attorney fees, taxed $43,056.63 of plaintiffs' post-offer costs, and awarded FCA $17,031.26 in post-offer costs. (AA-894–895.)

STATEMENT OF APPEALABILITY

The trial court entered judgment on January 6, 2020. (AA-143.) The clerk gave notice of entry on January 24, 2020. (AA-149.) Plaintiffs timely gave notice of their intent to move for a new trial 14 days later on February 7, 2020, and filed their supporting memorandum on February 18, 2020.[14] (AA-159, 162; see §§ 659, 659a.) The 75-day jurisdictional timeframe for ruling on the motion lapsed April 8, 2020, denying the motion by operation of law. (§ 660(c); *Dodge*, *supra*,77 Cal.App.4th at p. 517 [applying former 60-day statutory timeframe]; see fn. 13, *ante*.)

The new trial motion extended the time to appeal for all parties to 30 days after denial of the motion by operation of law. (Cal. Rules of Court, rule 8.108(b)(1)(B).) Plaintiffs timely appealed the judgment on May 5, 2020. (AA-800.) The denial of plaintiffs' new trial motion is not separately appealable, but is instead reviewed on appeal from the final judgment. (*Walker v.*

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[14] February 17, 2020, was Presidents' Day.

Los Angeles County Metropolitan Transportation Authority (2005) 35 Cal.4th 15, 18.)

Plaintiffs filed a motion to tax defendants' costs on February 28, 2020. (AA-333–334.) Defendants filed a motion to tax plaintiffs' costs on March 2, 2020. (AA-748.) Plaintiffs filed a motion for attorney fees on March 30, 2020. (AA-779.) The trial court issued an order determining all three motions on May 29, 2020. (AA-893.) Plaintiffs timely appealed on June 9, 2020. (AA-896; Cal. Rules of Court, rule 8.104(a)(1)(A).)

ARGUMENT

I. THE TRIAL COURT PREJUDICALLY ERRED BY MODIFYING THE VERDICT FORM TO LET FCA SEEK—AND OBTAIN—AN IMPERMISSIBLE DAMAGES OFFSET FOR THE TRADE-IN.

The Song-Beverly Act sets forth a statutory measure of damages. That measure does not allow any offset for amounts plaintiffs received for trading-in their lemon. Nonetheless, over plaintiffs' objection, the trial court modified the standard special verdict form and allowed FCA to argue that it could deduct plaintiffs' $29,500 trade-in credit from the "actual price paid or payable"—the statutory measure of plaintiff's damages.

This was prejudicial error. It resulted in the deprivation of over $73,000 of plaintiffs' damages.

A. Nothing in the Song-Beverly Act permits the jury's "offset."

As a threshold matter, there can be no doubt: The Act does not permit an offset for a lemon's trade-in credit. Neither the Act's plain language, nor its public policy supports one.

1. The Act's plain language does not permit an "offset" for a dealer's trade-in credit.

a. Section 1793.2(d)(2) sets forth a ***statutory***, not common law, restitution standard and permits only two specifically stated offsets.

In construing the Act, the Court "'first examine[s] the statutory language, giving it a plain and commonsense meaning.'" (*Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th 966, 972 (*Kirzhner*).)

The Court does not consider the language "in isolation" but instead examines "the entire statute to construe the words in context." (*Ibid.*) "If the language is unambiguous, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.'" (*Ibid.*)

The Court must "keep in mind that the Act is manifestly a remedial measure, intended for the protection of the consumer; it should be given a construction calculated to bring its benefits into action." (*Ibid.*, internal quotation marks omitted; see also *Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 532 ["courts should liberally construe remedial statutes in favor of their protective purpose"].)

As to whether a trade-in offset is allowed, the Act's plain language is clear: it's not. The Act's general damages provision uses the term "reimbursement" and—consistent with the entire

Act—limits that remedy to section 1793.2(d)'s express formula: "The measure of the buyer's damages in an action under this section shall include the rights of replacement *or reimbursement* as set forth *in subdivision (d) of Section 1793.2….*" (Civ. Code, § 1794(b), italics added.)

Section 1793.2(d)(2) sets forth a *statutory* restitution formula for reimbursement of lemon vehicles. Manufacturers must "promptly make restitution to the buyer in *accordance with subparagraph (B).*" (Civ. Code, § 1793.2(d)(2), italics added.) The Act does not reference a common-law definition of "restitution." The word "restitution" never appears by itself in the Act's provisions for lemon vehicles. Rather, "restitution" is *always* expressly linked to the specific *statutory* formula set forth in section 1793.2(d)(2).[15]

Under the Act, "restitution" is defined as the "amount equal to the actual price paid or payable by the buyer" (Civ. Code, § 1793.2(d)(2)(B)), subject to *only two* statutorily-defined offsets:

- An <u>exclusion</u> from the calculation of "the actual price paid or payable" of "nonmanufacturer items installed by a dealer or the buyer" (Civ. Code, § 1793.2(d)(2)(B)); and

[15] See, e.g., Civ Code, §§ 1793.22(d)(5) (manufacturer must "make restitution in accordance with paragraph (2) of subdivision (d) of Section 1793.2"), 1793.23(c) (referring to vehicle "accepted for restitution... pursuant to paragraph (2) of subdivision (d) of Section 1793.2"), 1793.25(a) (referring to "restitution to the buyer or lessee pursuant to subparagraph (B) of paragraph (2) of subdivision (d) of Section 1793.2").

- A <u>reduction</u> of "the actual price paid or payable" for the buyer's use of the vehicle before it was first brought for repairs, calculated by a specific formula laid out in the statute (Civ. Code, § 1793.2(d)(2)(C)).

Thus, the Act expressly states (1) the value of nonmanufacturer items is not included in determining the "actual price paid or payable" (i.e., the reimbursement amount), and (2) after the reimbursement amount is determined, a reduction is applied for prior use. These are the *only* permitted offsets from the reimbursement remedy mandated by the Act. (See *Mejia v. Reed* (2003) 31 Cal.4th 657, 666–667 [under *expressio unius est exclusio alterius*, including specific matters means *excluding* other matters]; *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 991 [inclusion of the one means the exclusion of another].) Damages are measured when the buyback obligation arises—and *not* reduced by subsequent events. This is why the prior-use reduction is measured as of "the time the buyer first delivered the vehicle" for repair of the defect. (Civ. Code, § 1793.2(d)(2)(C).)

As one court explained: "Section 1793.2, subdivision (d)(2)(C), and (d)(2)(A) and (B) to which it refers, comprehensively address replacement and restitution; specified predelivery offset; sales and use taxes; license, registration, or other fees; repair, towing, and rental costs; and other incidental damages. None contains any language authorizing an offset in any situation other than the one specified. This omission of other offsets from a set of provisions that thoroughly cover other relevant costs

indicates legislative intent to exclude such offsets." (*Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1243–1244.)

Reading the Act as implicitly allowing an additional offset for trade-in value violates the Act's plain language. Manifestly, the Act's core purpose was "'to give *broader* protection to consumers than the common law or [UCC] provide,'" not to mirror them. (See *Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187, 198 (*Martinez*), italics added, internal citation omitted.) Under the Act's express terms, buyers cannot waive their rights to the statutory standard set forth in section 1793.2 (Civ. Code, § 1790.1), and those statutory rights prevail to the extent they conflict with the UCC (Civ. Code, § 1790.3). Defenses traditionally available to manufacturers in common law or UCC warranty litigation "have been abrogated or minimized" in actions brought under the Act. (Judge Ronald F. Frank, *Lemon Law* (Nov. 2016) 39 L.A. LAWYER 27, citing cases.)

The Legislature designed the Act to afford consumers *greater* protection than would have been available under the common law or the UCC. Permitting an extra-statutory offset undermines that basic design.

b. Most Courts of Appeal have applied section 1793.2(d)(2)'s plain language to reject manufacturer requests for unenumerated offsets or reductions.

FCA is not the first manufacturer to try to avoid its obligations under section 1793.2(d)(2) based on an *unenumerated*

offset. Virtually every court to consider this tactic has rejected those attempts as contrary to the Act's plain language.

In *Jiagbogu,* a manufacturer relied on offsets generally allowed under common law rescission/restitution principles to argue that the plaintiff's use of the vehicle *after* he made a buyback request entitled the manufacturer to an offset against the jury's damages award. (118 Cal.App.4th at pp. 1239–1240.) *Jiagbogu* disallowed the requested offset, reasoning that the Act "comprehensively" addresses the statutory "replacement and restitution" remedies, spells out the consumer's "incidental damages," and provides a "predelivery offset"—yet lacks "any language authorizing an offset in any [other] situation." (*Id.* at pp. 1243–1244.)

Lukather v. General Motors, LLC (2010) 181 Cal.App.4th 1041, likewise rejected a manufacturer's attempt to imply unenumerated offsets into section 1793.2(d)(2). (*Id*. at pp. 1052–1053.) There, the manufacturer sought "an offset for [plaintiff's] use of a rental car" during litigation, arguing that plaintiff should have mitigated the manufacturer's damages by accepting the manufacturer's belated offer to purchase the defective car instead of incurring an additional $21,000 in rental car expenses. (*Ibid*.) *Lukather*, like *Jiagbogu*, rejected the offset as contrary to section 1793.2(d)(2)'s plain language. It followed *Jiagbogu*'s reasoning that the Act's comprehensive terms contain no authorization for any offset other than for the plaintiff's use of the vehicle before first delivering it for repair. (*Id*. at p. 1052.)

Similarly, in *Robbins v. Hyundai Motor America* (C.D.Cal., Aug. 7, 2014) 2014 WL 4723505, the court rejected a manufacturer's attempt to "condition its offer to repurchase [plaintiff's] vehicle on a deduction for excess wear and tear." (*Id.* at *7.) There again, the court rejected the offset based on the Act's plain language: "[I]f an amount is part of the price 'paid or payable,' but not an 'amount directly attributable to use by the buyer,' then the manufacturer *must pay* that amount." (*Id.* at *7, fn. 11, italics added.) And if an amount is directly attributable to use by the buyer, recovery "may only be accounted for using [the statutory] mileage deduction." (*Id.* at *7.)

These cases teach that the Act means what it says: No offsets except those the Legislature specifically enumerated. There is no enumerated offset for trade-ins.

c. The Second District's recent decision in *Niedermeier*, under review by the Supreme Court, is contrary to law.

The sole appellate decision permitting an unenumerated offset is *Niedermeier v. FCA US LLC* (2020) 56 Cal.App.5th 1052 (*Niedermeier*), where the Second District departed from the statutory text and legislative intent to permit an extra-statutory trade-in offset. Our Supreme Court is reviewing that decision. (See *Niedermeier v. FCA US* (Cal. 2021) 274 Cal.Rptr.3d 598.)

Niedermeier is wrongly decided. Courts have "'no power to rewrite [a] statute so as to make it conform to a presumed intention which is not expressed.'" (*California Teachers Assn. v.*

Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal.4th 627, 633, internal citation omitted.) Had the Legislature intended to give manufacturers an offset for trade-in credits, it would have said so *expressly*. As *Jiagbogu* recognized in rejecting a manufacturer's attempt to imply an unenumerated offset into section 1793.2(d)(2), the "omission of other offsets from a set of provisions that thoroughly cover other relevant costs *indicates legislative intent to exclude such offsets*." (118 Cal.App.4th at pp. 1243–1244, italics added, internal citations omitted.)

Had the Legislature intended for section 1793.2(d), which is a "more protective statute" than the common law, "to be limited by traditional doctrines, or the remedies provided in section 1793.2, subdivision (d) to be treated as recission under common law, it surely would have used language to that effect." (*Jiagbogu*, *supra*, 118 Cal.App.4th at p. 1241; accord *Martinez*, *supra*, 193 Cal.App.4th at p. 194.) That the Legislature chose *not* to use such language should be dispositive. (See *Martinez*, *supra*, 193 Cal.App.4th at p. 199 [rejecting manufacturer's attempt "to insert common law and/or [UCC] provisions into the Act"]; *Jiagbogu*, *supra*, 118 Cal.App.4th at pp. 1241–1242 [rejecting manufacturer's request for an unenumerated common-law offset for plaintiff's use of his car after his buyback request].)

Niedermeier justified its newly minted trade-in offset by reasoning that it was not an offset at all, just part of the calculation of restitution under the Act. (*Niedermeier*, *supra*, 56 Cal.App.5th at p. 1076.) But the Act already contains an explicit exclusion from the calculation of the restitution amount:

nonmanufacturer items. (Civ. Code, § 1793.2(d)(2)(B) ["restitution in an amount equal to the actual price paid or payable by the buyer,… excluding nonmanufacturer items installed by a dealer or the buyer"].) The Legislature's decision not to include a second exclusion from the restitution calculation is the end of the matter. (See I.A.1.a, *ante*.) Yet the *Niedermeier* court impermissibly wrote this second, unenumerated exclusion into the unambiguous statutory calculation language.

Ultimately, it doesn't matter how the *Niedermeier* court chose to justify a calculation that excludes trade-in amounts—whether as an exclusion from the restitution calculation (only allowed for nonmanufacturer items) or as an after-the-fact deduction from the restitution amount (only allowed for the value of the vehicle's prior use). Our Supreme Court has held that an exception as to how a statute ordinarily operates *is* an offset. (See *Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731–733 [tax board's attempt to reduce taxpayer's damages based on unpaid taxes was an offset, not a question over the proper measure of damages].) The *Niedermeier* court's contrary conclusion was wrong.

Because *Niedermeier* impermissibly wrote an unexpressed offset into the Act—which courts may not do (§ I.A.1.a–b, *ante*)—its holding was wrong and cannot justify FCA's extra-statutory trade-in offset here.

2. Although the Act's unambiguous language renders other interpretive aids irrelevant, such aids still show that the Legislature meant what it said: No offset.

Courts may consider other interpretive aids, such as a statute's purpose, public policy, and legislative history *only* when a statute is ambiguous. (*Kirzhner*, *supra*, 9 Cal.5th at p. 972.) Since the Act's plain language is clear, those aids are irrelevant here. (*Ibid.* ["If the language is unambiguous, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs,'" citation omitted].) But even if this Court were to look beyond the Act's plain language, the result is the same: There is no trade-in offset.

a. The legislative history supports a "no offset" finding.

The legislative history likewise supports what the plain language says: No offset.

The Legislature knew that lemons could get traded in. (See, e.g., 4MJN/927 [reference in 1987 amendment materials to vehicles "returned" to "some other dealer" than the one who sold the vehicle].) Yet there is nothing in section 1793.2's legislative history about offsets or deductions for traded-in vehicle—or for *any* offset arising *after* a manufacturer fails to promptly buy back a vehicle. (See 1MJN/1–8MJN/2179.)

Instead, section 1793.2's legislative history shows a persistent effort to protect buyers of lemon vehicles by

eliminating ambiguities and loopholes that manufacturers might exploit. From start to finish, the Legislature has consistently sought to protect and compensate *buyers*—not manufacturers—of lemons: first by adopting new replacement/reimbursement remedies in 1970 for all product buyers; and then, after vehicle manufacturers consistently refused to buy back lemon vehicles, repeatedly amending the Act to impose additional obligations designed to ensure that vehicle manufacturers *promptly* bought back lemons; and then, after manufacturers tried to evade their duties to brand reacquired cars as lemons, making those obligations more comprehensive too. (See 1MJN/1–2MJN/588 [1970 Act]; 3MJN/590-827 [1982 amendments]; 3MJN/828–8MJN/2179 [1987 amendments]; 8MJN/2180–9MJN/2604 [1995 branding amendments].) And all without ever adopting a trade-in offset or imposing any limit on buyer remedies other than requiring buyers to present lemon vehicles for repair.

It is implausible to assume, as FCA does, that the Legislature went through all the trouble to eliminate gaps and ambiguities with the specific formulaic standards set forth in section 1793.2(d)(2), yet at the same time intended to let manufacturers claim *unenumerated* offsets and deductions. The Legislature's focus has always been on curtailing manufacturer misconduct and ensuring manufacturer's prompt compliance with the Act. A trade-in offset that rewards that misconduct and/or delay is irreconcilable with that intent, as discussed below.

b. Allowing a trade-in offset would undermine section 1793.2(d)(2)'s core purpose by vitiating manufacturers' incentives to promptly buy back lemons.

"Any interpretation that would significantly vitiate the [manufacturer's] incentive to comply [with the Act] should be avoided." (*Kwan v. Mercedes–Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 184 (*Kwan*).) Courts must likewise avoid interpretations that would encourage a manufacturer's "unforthright approach and stonewalling of fundamental warranty problems." (*Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 303.)

Interpreting the Act as including a trade-in offset would do both: It would vitiate a manufacturer's incentive to comply with the Act's affirmative obligations and encourage stonewalling.

The Act imposes an "affirmative obligation" on manufacturers to "'*promptly*' repurchase or replace a defective vehicle it is unable to repair." (E.g., *Kirzhner*, *supra*, 9 Cal.5th at p. 971, italics added.)

As a result, the Legislature structured the Act to trigger those affirmative obligations immediately after reasonable attempts to repair the vehicle have failed, even without the buyer requesting a buyback. *At that point*, the seller must re-acquire and brand the lemon and either (at the buyer's election) replace the vehicle or pay the buyer the full price "paid or payable" minus

the statutory mileage offset, which can be waived. (*Ibid.*; *Krotin*, *supra*, 38 Cal.App.4th at pp. 302–303; *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1103 ["the only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable *opportunity* to repair the vehicle," original italics].)

Letting manufacturers claim an offset that necessarily arises only *after* manufacturers have failed to comply with their statutory duty to promptly repurchase vehicles would flip the Act's incentives on its head. It "would create a disincentive to prompt replacement or restitution by forcing the buyer to bear all or part of the cost of the manufacturer's delay. Exclusion of such offsets furthers the Act's purpose." (See *Jiagbogu, supra,* 118 Cal.App.4th at p. 1244; accord, *Lukather*, *supra*, 181 Cal.App.4th at p. 1053 ["the imposition of a requirement that [plaintiff] mitigate his damages so as to avoid rental car expenses—after GM had a duty to respond promptly to [plaintiff's] demand for restitution—would reward GM for its delay"].)

Construing the Act according to its plain language—no trade-in offset—furthers the statutory purpose of encouraging the *prompt* re-acquisition and branding of lemons. In contrast, allowing a trade-in offset would incentivize manufacturers *to delay* buying back lemons in the hopes of inducing a trade-in.

Manufacturers know that their refusal to buy back a lemon makes a trade-in likely because it leaves the buyer stuck with an unsafe, unreliable vehicle with continuing expenses like finance payments, insurance, and registration fees. Faced with owning a

lemon indefinitely, reasonable consumers would do what plaintiffs did here: trade in the lemon for a non-defective replacement vehicle. In such cases, manufacturers would reap the best benefit from delaying and violating their affirmative statutory obligation to promptly buy back lemon vehicles. Willful violators of the Act can seek lowball settlements, push a case to trial instead of buying back the vehicle, and then—if the buyer fights to the end—reduce any restitution award by an inflated trade-in credit. The more egregious the vehicle's defects and repair history, the greater the potential benefit to the manufacturer in delaying until the buyer trades in the lemon. This Court should not countenance such a perverse result.

Martinez acknowledged the flaw in such a regime when it examined the repossession of lemon vehicles. *Martinez* recognized that reasonable consumers would choose repossession over making payments on an unusable car during years-long litigation. Letting manufacturers leverage repossessions to avoid paying the full purchase price "would encourage a manufacturer who has failed to comply with the Act to delay or refuse to provide a replacement vehicle or reimbursement" because "any delay increases the likelihood that the buyer will be forced to relinquish the car to a lienholder." (*Martinez, supra,* 193 Cal.App.4th at pp. 194–195.)

The same is true of a trade-in offset.

c. The offset allows FCA to return only a fraction of the benefit it received for the lemon.

Unduly focusing on a supposed "windfall" to plaintiffs would have the effect of ignoring the reality that FCA was paid *in full* at the time of purchase through the loan taken out by plaintiffs. (AA-249.) FCA has thus received the full value of the vehicle, yet in light of the judicially-created trade-in offset, must pay back only roughly a third of that amount as statutory restitution. FCA, the wrongdoer, is the party receiving a windfall. This result defies both the Act's definition of "restitution" and its underlying consumer-oriented policy purpose. (See *Kirzhner*, *supra*, 9 Cal.5th at p. 972.)

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Section 1793.2(d)(2)'s language, legislative history, and policy purpose, compel that there can be no trade-in offset.

3. If the Court decides a trade-in offset can be implied into the Act, then it should limit offsets to manufacturers that acted in good faith.

If the Court disagrees and reads the Act as allowing an implied trade-in offset, then the Court should apply the collateral

source rule to bar offsets to manufacturers, such as FCA here, who *willfully* violate their statutory buyback obligations.[16]

Under the collateral source rule, a plaintiff's receipt "of payment for his loss from a source wholly independent of the wrongdoer" does *not* reduce the amount of damages owed by the defendant. (*Anheuser-Busch, Inc. v. Starley* (1946) 28 Cal.2d 347, 349.) It makes no difference whether the payment is gratuitous or arises from an obligation. (*Smock v. State of California* (2006) 138 Cal.App.4th 883, 887–888.)

The collateral source rule generally applies to claims, including those based on contract, where, as here, the "breach has a tortious *or wilful flavor*." (*City of Salinas v. Souza & McCue Constr. Co., Inc.* (1967) 66 Cal.2d 217, 227 (*City of Salinas*), italics added, disapproved on another ground in *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 14; accord *Patent Scaffolding Co. v. William Simpson Constr. Co.* (1967) 256 Cal.App.2d 506, 511 [citing *City of Salinas* with approval].)

"California appellate courts have long noted that the collateral source rule has been applied to breach of contract actions with a 'tortious or willful flavor.'" (*San Joaquin Valley Insurance Authority v. Gallagher Benefit Services, Inc.* (E.D.Cal. 2020) 437 F.Supp.3d 761, 771; see also *Parker v. Alexander Marine Co.* (9th Cir. 2017) 721 Fed.Appx. 585, 587–588 [applying collateral source rule to warranty claim, citing *City of Salinas*,

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[16] The jury found that FCA willfully violated the Act and therefore awarded a civil penalty. (See AA-147.)

where jury found breach was willful imposed civil penalty under section 1794].)

The Legislature has already determined that manufacturers who willfully violate the Act's buyback obligations must pay *more* than the consumer's actual loss. (See Civ. Code, § 1794(c) [civil penalty].) This is because those manufacturers have not merely breached warranties; they have intentionally violated *statutory* and *public-policy* obligations by engaging in oppressive conduct toward vulnerable consumers.

A manufacturer's failure to honor warranties after a reasonable number of repair attempts is "oppressive, especially considering the harm caused to new car purchasers from the inconvenience, aggravation, loss of time, possible loss of earnings, and physical hazard from possible safety defects." (5MJN/1403.)

That fact counsels in favor of applying the collateral source rule to bar willful violators like FCA from claiming a trade-in offset, thereby limiting any such offset to manufacturers that acted in good faith.

4. Even assuming such an "offset" is permissible, any offset must be made *after* a civil penalty is calculated.

If, contrary to the Act's plain language, policy purpose, and legislative history, this Court lets willful violators seek a trade-in offset, then the Court should at least make clear that the offset must be applied to the buyer's total recovery *after* the calculation of the civil penalty under section 1794. Any other approach

would potentially grant wrongdoers a *triple* offset for a trade-in credit—frustrating the Legislature's intent and further incentivizing manufacturers to breach their affirmative obligation to promptly buy back lemons.

a. Applying a trade-in offset prior to calculating the civil penalty would undermine the penalty's purpose of deterring and punishing willful violators of the Act.

If a buyer establishes that a manufacturer's "failure to comply was willful," the judgment may include "a civil penalty which shall not exceed two times the amount of actual damages." (Civ. Code, § 1794(c).)

The Act's civil penalty, "like other civil penalties, is imposed as punishment or deterrence of the defendant, rather than to compensate the plaintiff. In this, it is akin to punitive damages." (*Kwan, supra,* 23 Cal.App.4th at p. 184.) If an offset is applied, it must be *after* the calculation of the civil penalty, or the deterrent and punitive purpose will be lost.

The penalty must serve as an adequate deterrent. Applying an offset *before* a jury calculates the civil penalty would *triple* manufacturers' windfall, first reducing the damages base and thereby reducing the civil penalty cap.

Far from deterring noncompliance, this would incentivize manufacturers of the most unsafe lemons to delay until the car is traded in. If a trade-in offset is to be allowed, the Court must

protect the penalty's deterrence purpose by holding the offset applies after the civil penalty is determined.

The penalty must adequately punish willful wrongdoers. The civil penalty is meant to penalize the manufacturer for its intentional wrongdoing. (AA-147.) Letting a manufacturer reduce its penalty based on *its own dilatory conduct* rewards, rather than punishes, that wrongful conduct. And it reduces the manufacturer's civil penalty exposure based on a *third party's* conduct: a dealer's trade-in credit on the purchase of a new vehicle.

The present case demonstrates the problem. Because the trial court allowed the offset to be taken from the base damage amount, the $29,500 trade-in resulted in a $73,612.05 reduction to the damages that FCA was liable to pay.[17] FCA multiplied its windfall simply by waiting plaintiffs out.

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[17] See Table 1, *ante*. The reason the trade-in offset does not simply produce a flat $29,500 difference in damages using the trial court's erroneously modified verdict form is that, by reducing the "actual price paid or payable," it also reduces the value of prior use to be deducted. (See Civ. Code, § 1793.2(d)(2)(B)–(C); but see § I.B, *post* [reduction must be based on purchase price and manufacturer options alone].)

b. Overwhelming precedent supports applying a trade-in offset after calculating the civil penalty.

Courts have held in numerous analogous situations that a third party's payments to a plaintiff should *not* affect the calculation of statutory civil penalties owed by a defendant.

In *Newby v. Vroman* (1992) 11 Cal.App.4th 283, 288–289, for example, the Court of Appeal rejected an argument that prejudgment interest should be calculated on a judgment amount *after* deducting settlement amounts that joint tortfeasors paid plaintiff. It analogized the situation to the settled rule for calculating treble damages in antitrust cases: "[W]here a plaintiff in an antitrust suit sues multiple defendants for treble damages, settles with one, and then prevails at trial against the remaining defendants. . . .[, *w*]*ithout exception*, the courts have held that settlement payments should be deducted *after trebling* so that the plaintiffs can receive full satisfaction of their claim." (*Id*. at p. 289, italics added, citing *Burlington Industries v. Milliken & Co*. (4th Cir. 1982) 690 F.2d 380, 391–395; *Hydrolevel Corp. v. American Society of Mechanical Engineers* (2d Cir. 1980) 635 F.2d 118, 130; and *Flintkote Company v. Lysfjord* (9th Cir. 1957) 246 F.2d 368, 398.)

Courts have applied this same rule to myriad other state and federal statutory civil penalties in order to give full deterrent effect. (See, e.g., *Liquid Air Corp. v. Rogers* (7th Cir. 1987) 834 F.2d 1297, 1310 [RICO claim, offset for property's return to plaintiff after litigation: "[S]etting-off damages *after* trebling is

more likely to effectuate the purposes behind RICO," original italics]; *Morley v. Cohen* (4th Cir. 1989) 888 F.2d 1006, 1013 [RICO treble damage claim, offset for settlement payment]; *U.S. v. Hult* (9th Cir. 1963) 319 F.2d 47, 48 [civil penalty for trespass on timber land calculated before court applies any offset for timber's salvage value]; *Stewart Title Guar. Co. v. Sterling* (Tex. 1991) 822 S.W.2d 1, 9 ["The [Texas] Insurance Code provides for the trebling of actual damages, not for the trebling of recoverable damages. Therefore, by allowing a post-trebling credit, the punitive nature of the trebling provision is given full effect …."], disagreed with on other grounds by *Tony Gullo Motors I, L.P. v. Chapa* (Tex. 2006) 212 S.W.3d 299, 313.)

To effectuate the penalty's purpose, a benefit from a third party (e.g., a trade-in credit) should be applied only *after* the calculation of the civil penalty. The "actual damages" base for calculating the civil penalty under section 1794 should equal the full paid or payable amount (without trade-in offset) minus the prior use reduction, plus incidental and consequential damages.

c. Applying the offset after the calculation of the penalty comports with the offset being a substitute for the vehicle's return to the manufacturer.

When lemon lawsuits go to judgment with the buyer still possessing the vehicle, there is no statutory requirement that the consumer return the vehicle to the manufacturer. (*Martinez*, *supra*, 193 Cal.App.4th at p. 196 ["Statutorily, California has no

such requirement" that in order to obtain "restitution, the consumer must return the vehicle"].) Even assuming the car were returned post-judgment, however, a jury verdict does not take into account any funds the manufacturer might receive from any subsequent sale. Thus, applying the trade-in offset *after* calculation of the civil penalty gives the manufacturer a deduction for the amount of the trade-in in lieu of recouping the vehicle itself.

B. By modifying Question 6 to accommodate FCA's offset argument, the trial court prejudicially erred.

As shown, trade-in offsets are not permitted by the Act. Accordingly, to the extent the special verdict form permitted the jury to apply such an offset, that verdict form was defective as a matter of law. (See *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1242 [appellate court "analyze[s] the special verdict form de novo as a matter of law"].)

In particular: Over plaintiffs' objections, the trial court modified the official Judicial Council verdict form, VF-3203, to accommodate FCA's argument for a trade-in offset. (See 8-RT-881–884.)

VF-3203 enumerates the items that may be considered in determining the "actual price paid or payable," i.e., the restitution component of Song-Beverly damages:

- "The purchase price of the vehicle itself";

- "Charges for transportation and manufacturer-installed options";
- "Finance charges actually paid by" plaintiffs; and
- "Sales tax, license fees, registration fees, and other official fees."

(Attachment A, Question 6.a–6.d.) These items derive from Civil Code section 1793.2(d)(2)(B), and together they comprise the "actual price paid or payable."[18]

In lieu of item "a," "[t]he purchase price of the vehicle itself", the trial court substituted "[t]he actual price paid for the [vehicle] by the plaintiffs" (AA-145). The court did so to allow the parties to offer dueling arguments on whether the "actual price" should exclude the trade-in credit. (See 8-RT-881–884.)

Thus, the trial court modified VF-3203's language to create an ambiguity that would allow FCA to argue the $29,500 *should not* factor into the "actual price paid." (8-RT-881–884.) But the Act does not permit that argument. (See § I.A, *ante*.)

VF-3203 enumerates the specific items that together comprise the "actual price paid or payable" under the Act, and creates no room for applying any trade-in offset. (Attachment A.)

By rewriting the verdict form and permitting FCA's legally incorrect argument, the trial court created confusion that demonstrably led to the jury subtracting $29,500 from the "actual price paid or payable." Indeed, the defective special verdict form

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[18] Question 6.e relates to incidental and consequential damages.

was far from harmless, given the impermissible deduction. (*See Taylor*, *supra*, 222 Cal.App.4th at pp. 1244–1245 [use of defective special verdict form subject to harmless error review]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [under harmless error review, court's judgment may be overturned if "it is reasonably probable that a result more favorable to the [appellant] would have been reached in the absence of the error"].)

No other instructions cured the problem; there was no instruction expressly *prohibiting* an offset. FCA capitalized on this state of affairs, arguing from the improperly modified verdict form that the jury had to apply the improper offset. Thus, even assuming for the sake of argument that a court could in some other case replace Questions 6.a–6.d with the trial court's revised Question 6.a, doing so in *this* case for the explicit purpose of facilitating FCA's ability to make a legally incorrect argument was prejudicial. (Cf. *Sandoval v. Bank of America* (2002) 94 Cal.App.4th 1378, 1386–1389 [prejudicial error despite facially correct verdict form where jury was misled on applicable law].)

FCA got the chance to argue an incorrect interpretation of the Act, and the jury imposed an offset in accordance with that incorrect interpretation. The numbers tell the tale. (See Statement of Facts (SOF) § E & Table 1, *ante*.) Had the trial court used VF-3203 as drafted, the jury never could have applied the $29,500 offset.[19]

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[19] Another result of the defective verdict form was that the jury included interest and finance charges in item "a." (See SOF § E,

Use of a prejudicially improper jury form itself mandates reversal. But there's another, independent reason for reversal: Because the jury arguments and award clearly disclose that the jury imposed the improper trade-in offset that the FCA advocated, the court was required to grant plaintiffs' request for an additur or, alternatively, a conditional new trial on the amount of damages. Thus, even without the verdict form error, reversal is required, as we show.

II. BECAUSE THE JURY'S VERDICT WAS CONTRARY TO LAW, THE TRIAL COURT ERRED BY FAILING TO GRANT PLAINTIFFS' NEW TRIAL MOTION.

Where, as here, there is no evidentiary dispute and damages are inadequate as a matter of law, trial courts *must* grant new trial motions. That didn't happen. The trial court's failure to grant plaintiffs' new trial motion was prejudicial, depriving plaintiffs of the full measure of damages to which they are entitled under the Act. Because the court abused its discretion in failing to grant plaintiffs' motion, this Court must reverse with directions for an additur or a new trial on damages.

A. Standard of review governing the trial court's denial of new trial motion seeking additur.

Appellate courts generally review denials of new trial motions for an abuse of discretion. (*Wall Street Network, Ltd. v.*

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ante.) In turn, those amounts improperly carried over into the prior use reduction, which is meant to be based on vehicle price and manufacturer-installed options alone. (Attachment A.)

New York Times Co. (2008) 164 Cal.App.4th 1171, 1176 (*Wall Street Network*).) An appellate court "must determine whether the [trial] court abused its discretion by examining the entire record and making an independent assessment of whether there were grounds for granting the motion." (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.)

To the extent that denial of a new trial motion relies on a legal determination, the appellate court reviews that de novo. (*Wall Street Network*, *supra*, 164 Cal.App.4th at p. 1176; see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859 ["any determination underlying any order is scrutinized under the test appropriate to such determination"].)

Where "the appropriate remedy" in a case turns on statutory construction, "it is a question of law … review[able] de novo." (*Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881, 899.)

Appellate courts reverse denial of a new trial motion on the grounds of inadequate damages "where the evidence demonstrates that the award is insufficient as a matter of law." (*Haskins v. Holmes* (1967) 252 Cal.App.2d 580, 584–585 (*Haskins*); see also *Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1415–1416 [denial was abuse of discretion where "there is no substantial conflict in the evidence and the evidence compels the conclusion that the motion should have been granted"].)

B. The trial court erred as a matter of law in failing to grant a new trial where the jury indisputably applied an offset not permitted under the Song-Beverly Act.

As shown, the jury impermissibly reduced plaintiffs' damages by the amount of the trade-in "credit." (See § I, *ante*.) Thus, the trial court was required—but failed—to grant a new trial on the ground that damages were inadequate as a matter of law. This failure is reversible error "where the evidence demonstrates that the award is insufficient as a matter of law." (*Haskins*, *supra*, 252 Cal.App.2d at pp. 584–585, citations omitted.)

As also shown, the measure of damages under the Act is a creature of statute, and the statute *does not* provide for any kind of trade-in "offset." And there can be no doubt the jury applied a trade-in offset to both the base damages amount and to the calculation of the civil penalty. (See SOF § E, *ante*.) Thus, the jury deviated from the statute in its verdict. The trial court erred in failing to grant plaintiffs' motion for a new trial on damages.

In situations like this, "a judgment will be reversed because the award disregards specific items of pecuniary loss established by the evidence." (6 Witkin, Summary of Cal. Law (11th Ed. 2021) Torts § 1935, citing *Price v. McComish* (1937) 22 Cal.App.2d 92. (*Price*).)

Price is instructive. There, defendant attacked plaintiff unprovoked, causing him severe personal injuries requiring

medical care costing a total of $721.22. After trial, the trial court declared in its findings of fact: "That all the allegations of the complaint are true, except that the court finds that the plaintiff was damaged in the sum of $200." (*Price*, *supra*, 22 Cal.App.2d at p. 93.) The only question for the Court of Appeal was whether, "in view of the evidence that was adduced on the trial of the action and the findings of fact that were made thereon by the trial court, the judgment that was rendered in [plaintiff's] favor for the sum of $200 lacked legal support." (*Ibid*.)

The appellate court reversed, ordering a new trial on damages on the basis that in the absence of any contradictory evidence on the subject, the judgment of "$200 would represent nothing more than a small fraction of the damages which were sustained by plaintiff. The actual expenses for hospitalization, doctor's and nurse's services, and necessary incidentals, for which plaintiff expended money, amounted to more than three times the amount of the judgment …." (*Id.* at pp. 95, 101.)

This case presents substantially the same situation as *Price* because, deviating from the Act's clear statutory measure of damages, the jury improperly awarded compensatory damages in an amount less than that established by uncontroverted evidence.

Other cases compel the same result. In *Haskins*, *supra*, 252 Cal.App.2d 580, defendant attacked plaintiff, "causing severe personal injuries to his head and face requiring medical care and surgical attention." (*Id.* at p. 582.) The uncontroverted evidence showed "severe personal injuries" and medical expenses totaling $911.37. (*Id.* at pp. 582–583.) After a bench trial, the trial court

found "that plaintiff suffered general and special damages and personal injuries" and awarded a total of $1,000—meaning, in light of the proven medical expenses, "the trial judge necessarily awarded but $88.63 for personal injuries and general damages." (*Id.* at p. 583.) "Plaintiff's motion for new trial on the ground that as a matter of law the damages awarded were grossly inadequate was denied …." (*Id.* at p. 582.)

The Court of Appeal reversed. Observing that there was no conflict in the evidence and no finding of contributory negligence justifying a lesser verdict, the court held "that the nominal award of $88.63 in effect allows nothing for the pain, suffering and inconvenience which inevitably accompany the type of injuries and surgery involved." (*Haskins*, *supra*, 252 Cal.App.2d at p. 587.) Since general damages were apparent from the record, the appellate court could "only conclude as a matter of law that the award is inadequate, and the denial of a new trial on the issue of damages was an abuse of the trial court's discretion." (*Ibid.*; see also *Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 933–938 [failure to award general damages where there was no conflict in the evidence rendered damages "inadequate as a matter of law" so "the denial of a new trial on the issue of damages was an abuse of the trial court's discretion"]; *Gallentine v. Richardson* (1967) 248 Cal.App.2d 152, 153–155 [same].)

In *Smith v. Moffat* (1977) 73 Cal.App.3d 86, the uncontradicted evidence established "the present value of the economic loss which would be sustained by plaintiff from the date of his mother's death until he attained the age of 18 was

$168,000." (*Id.* at p. 94.) Nonetheless, the jury awarded $4,030.66 for general damages. (*Ibid.*) The Court of Appeal reversed the judgment, finding "the award was so grossly disproportionate to the economic loss sustained by the child, not to mention the loss of the society and comfort of his mother, that it must be held to be inadequate as a matter of law." (*Ibid.*)

The lesson from each of these cases is that a new trial must be granted in cases where damages are awarded in an amount less than that established by the uncontroverted evidence. And here, the uncontroverted evidence establishes the measure of plaintiffs' damages as it *must* be calculated under the Act. (See SOF § E & Table 1, *ante*.) There was no subjectivity or fact-finding involved. Thus, the jury had *less* latitude in calculating damages than in the cases above. Yet the jury's award was tens of thousands of dollars less than required by statute. Just like in *Price*, plaintiffs' proven economic damages were *reduced* in an amount not permitted by law. Under the uncontroverted evidence, the "jury clearly should have reached a different verdict." (§ 657.)

The prejudice is manifest. Plaintiffs were entitled under the undisputed facts and governing law to over $70,000 more than they received. The trial court thus prejudicially erred in failing to grant the new trial motion. "Where, as here, the legal error strikes at the heart of the motion for new trial, [courts] are compelled to reverse." (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 581.)

C. This Court should order an additur, or, in the alternative, a new trial on damages.

Because the Act establishes the measure of damages, and because the jury deviated from that measure, resulting in an award of $73,612.05 less, the judgment is inadequate as a matter of law. (See, e.g., *Price*, *supra*, 22 Cal.App.2d 92.)

Because damages are inadequate and the correct amount can be ascertained from the evidence, additur is an appropriate remedy to cure that defect and to avoid the necessity of a new trial. (See *Pearl v. City of Los Angeles* (2019) 36 Cal.App.5th 475, 486–487.) In determining the amount of the additur, the Court may deduce from the evidence and the verdict the correct amount to award. (*Id.* at p. 487.) Indeed, a court may infer from a jury's math that a jury premised an award amount on improper information. (See, e.g., *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 505 ["Since the verdict was exactly the total of these two estimates, it is reasonable to assume that the jury accepted the amount proposed by [plaintiff's] counsel for each item"].)

Here, it is clear the jury intended to award the maximum civil penalty—indeed, it applied the maximum civil penalty ratio. Thus, the Court should direct an additur of $73,612.05.

If, alternatively, the Court directs entry of an order granting a conditional new trial subject to an additur, then the Court should make clear that the only possible new trial would be limited to the amount of *damages*. (See *Ryan v. Crown Castle*

NG Networks, Inc. (2016) 6 Cal.App.5th 775, 790 [damages-only retrial saves resources where liability is not in question].) The liability verdict is final—the jury found FCA willfully failed to meet its obligations, and FCA did not appeal. Further, in the event of a retrial of damages, this Court should direct the trial court to use VF-3203. (Attachment A; see § I.B, *ante*.)

III. THE TRIAL COURT ERRED IN DENYING PREJUDGMENT INTEREST.

The trial court likewise erred in denying prejudgment interest on the basis that the "damages were not certain, or capable of being rendered certain, prior to entry of the jury's verdict." (AA-776–777.)

"Where the facts are not in dispute or, alternatively, have been established by findings … supported by substantial evidence, appellate courts independently review whether and when the plaintiff's damages were made certain or capable of being made certain by calculation." (*Watson Bowman Acme Corp. v. RGW Construction, Inc.* (2016) 2 Cal.App.5th 279, 296.)

There was no *factual* dispute regarding damages in this case, making it unlike *Duale v. Mercedes-Benz USA, LLC* (2007) 148 Cal.App.4th 718 and its progeny. The parties agreed on: (1) the $5,000 down payment; (2) the $7,541.49 in monthly payments toward plaintiffs' loan; (3) the $34,644.57 remaining loan balance at the time of trade-in; (4) the $209.48 interest charge; and even (5) the amount of the $29,500 trade-in credit. (See Table 1, *ante*; AA-166–167; AA-176; AA-248; 9-RT-1014.)

The $554 DMV fees awarded as incidental or consequential damages were also based on uncontroverted evidence. (AA-964.) And the parties even stipulated to the date and the vehicle's mileage when the buyback obligation arose. (See AA-171; 9-RT-1015.) The mileage was even pre-filled on the verdict form. (8-RT-884.)

What was disputed was the *legal* question whether that $29,500 be deducted from the "actual price paid or payable." But "a legal uncertainty concerning the measure of damages rather than a factual uncertainty … does not prevent damages from being ascertainable." (*Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 152.)

Accordingly, the trial court erred as a matter of law in denying prejudgment interest.

IV. SECTION 998 DOES NOT OPERATE TO SHIFT POST-OFFER COSTS AND FEES IN FCA'S FAVOR.

The trial court independently erred in ruling (1) that FCA's 998 offer was valid, and (2) that plaintiffs did not obtain a more favorable judgment against FCA. As a result of these errors, the court denied plaintiffs' post-offer attorney fees, taxed plaintiffs' post-offer costs, and saddled plaintiffs with defendants' post-offer costs. Again, the Court should reverse.

A. Defendants' 998 offer was invalid and therefore of no legal effect.

Defendants' 998 offer was invalid for multiple reasons, including because it was a *joint offer* that did not allocate

settlement amounts between defendants and because it contained onerous and improper terms. The trial court erred in applying the penalty of section 998 based on this invalid offer.

1. Standard of review: Because the facts are undisputed, the Court reviews the validity of FCA's 998 offer de novo.

Appellate courts examine the validity of a 998 offer independently, "interpret[ing] any ambiguity in the offer against its proponent"—here, FCA and the dealership. (*Ignacio v. Caracciolo* (2016) 2 Cal.App.5th 81, 86.)

Because the relevant facts—the offer's terms and the circumstances under which the offer was made—are not in dispute, this Court reviews the validity of the 998 offer de novo. (E.g., *Burchell v. Faculty Physicians & Surgeons of Loma Linda University School of Medicine* (2020) 54 Cal.App.5th 515, 533 (*Burchell*).)

The burden was on FCA as the offering party "to demonstrate that the offer is valid under section 998." (*Ignacio*, *supra*, 2 Cal.App.5th at p. 86; see *Burchell*, *supra*, 54 Cal.App.5th at p. 533 ["offeror[] has the burden of demonstrating that his section 998 offer complied with the statutory content requirements, and we are required to construe the offer strictly in favor of the offeree"].)

"[F]rom the perspective of the offeree, the offer must be sufficiently specific to permit the recipient meaningfully to evaluate it and make a reasoned decision whether to accept it, or

reject it and bear the risk he may have to shoulder his opponent's litigation costs and expenses. Thus, the offeree must be able to clearly evaluate the worth of the extended offer." (*MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, 1050 (*MacQuiddy*), internal quotations and citation omitted.)

The nonmonetary terms or conditions "must be sufficiently certain and capable of valuation to allow the court to determine whether the judgment is more favorable than the offer." (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 764 (*Fassberg*).) Those terms "may render it difficult to accurately value the monetary term of the offer so the court cannot fairly determine whether the damage award is 'more favorable' or less favorable than the statutory offer." (*Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692, 698 (*Valentino*).)

2. Defendants' 998 offer was invalid as a matter of law for multiple reasons.

Here, several aspects of the joint offer left it fatally undefined, subjective, and incapable of valuation.

First, the offer was not made by FCA alone, but instead *jointly* by FCA and the dealership. (See AA-54.) Defendants jointly offered $50,000 to settle four causes of action, three of which were asserted against FCA alone and one against the dealership alone. Even though no cause of action was asserted against both FCA and the dealership, and thus there was no potential for overlapping liability between the two defendants,

defendants did nothing in their offer to explain what portion of the $50,000 represented FCA's liability and what portion represented the dealership's liability. This left plaintiffs in the impossible position of guessing at the value of *FCA's* offer of settlement as compared to the value of the *dealership's* offer.

"An offer of settlement must be certain, and when an offer is made jointly, the offeree must be able to evaluate the likelihood of *each offeror* receiving a more favorable verdict at trial." (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1170 (*Persson*), italics added.) "When multiple defendants have jointly made a settlement offer to a single plaintiff without indicating how the offer is to be allocated among them, it has been held too uncertain to result in section 998 penalties, because it cannot be determined whether any individual plaintiff's recovery at trial was more favorable than the offer." (*Arno v. Helinet Corp.* (2005) 130 Cal.App.4th 1019, 1026, citing cases.)

Persson demonstrates why defendants' joint offer in this case is fatally defective. Though, as here, the offering defendants faced distinct liability arising from different causes of action, the *Persson* defendants "made a joint offer, under which they would allow judgment to be taken against them, jointly and severally." (125 Cal.App.4th at p. 1170.) The Court of Appeal held that in cases where defendants face distinct liability, an unapportioned joint offer by defendants is not void where the offer is for joint and several judgment against all defendants. (*Id.* at pp. 1171–1172.) Because the offer was for a joint and several judgment—meaning each defendant is legally responsible for the full

amount—the entire value of the offer could be compared to the recovery at trial against the offering defendants, satisfying the requirement that "the offeree must be able to evaluate the likelihood of *each offeror* receiving a more favorable verdict at trial." (*Id.* at p. 1170, italics added.)

This case, however, presents the exact opposite situation. Far from being an offer to enter a judgment of joint and several liability against FCA and the dealership, the defective 998 offer made clear that no judgment would be entered at all. Plaintiffs were thus left with an offer from which they could *not* place a value on each offeror's share of the settlement *and* which would *not* provide plaintiffs with any enforceable judgment in return.

Indeed, while courts have rejected a mechanical rule invalidating joint 998 offers, this case falls into the prototypical example of an offer that does not pass muster. In *Gonzalez v. Lew* (2018) 20 Cal.App.5th 155, 160, the Court of Appeal described a situation in which the unallocated joint offer would be impossible for a plaintiff to evaluate—a situation completely analogous to this case. Discussing another case, *Gonzalez* observed: "In *Fortman* [*v. Hemco, Inc.* (1989) 211 Cal.App.3d 241], for example, the $1 million joint offer from the plaintiffs *could* have made it impossible for one of the plaintiffs to prove she obtained a more favorable verdict. Had the toddler received $800,000 at trial [against a single defendant], for example, it would be impossible to know whether she fared better under the verdict or under the unallocated joint offer of $1 million." (*Gonzalez*, *supra*, 20 Cal.App.5th at p. 169.)

That is the exact morass that defendants created for plaintiffs here by making an unallocated joint offer contemplating dismissal rather than a joint and several judgment. Just as in the *Gonzalez* hypothetical, defendants made it impossible to know whether (in strictly monetary terms) plaintiffs fared better against FCA by obtaining a $46,716.54 judgment at trial versus the unknown and unknowable proportion of the $50,000 section 998 offer that is attributable to FCA. (See § IV.B, *post*.)

Second, the offer told plaintiffs nothing about when FCA would pay the settlement funds. (AA-54.) The offer contained no payment-timing or sequence-of-events terms. Plaintiffs had no guarantee regarding when they would receive their money. This omission was material, since plaintiffs had every reason to distrust FCA—after all, FCA had already *willfully ignored* its statutory obligation to buy back the defective vehicle.

What's more, FCA has a demonstrated history of failing to perform settlements without further legal proceedings compelling it to do so. Plaintiffs' counsel provided uncontradicted evidence that FCA regularly fails to pay financial obligations to Song-Beverly plaintiffs, causing plaintiffs have to chase payment through the courts. (AA-866, ¶ 3.) In the two years preceding the motion practice below, plaintiffs' counsel had been forced to file such motions/petitions in nearly 100 cases. (*Ibid.*) Plaintiffs reasonably had cause to worry about the absence of any payment-timing or sequence terms.

Additionally, the offer told plaintiffs nothing about whether FCA would pay the settlement funds before or after plaintiffs dismissed their complaint with prejudice. Again, this sequence of events matters greatly to a plaintiff, especially with FCA's offer insisting on the dismissal of the action, *with no readily enforceable judgment*.

FCA's silence on this point was a critical omission on a material term.

Third, the offer was illusory and incapable of enforcement. The offer was not signed by any officer or director of FCA, and thus enabled FCA to argue that its attorney lacked authority to sign the offer. Given FCA's history of avoiding paying settlements, this is an entirely reasonable concern.

There are two procedural mechanisms by which to enforce a settlement agreement: section 998 and section 664.6. Defendants' offer effectively forecloses both of those paths. An agreement that cannot be judicially enforced—either as a judgment entered pursuant to section 998 or as an agreement made enforceable by a court under section 664.6—is illusory.

Because the 998 offer requires dismissal rather than judgment, plaintiffs could be forced to file a separate action for breach of the settlement agreement to enforce the offer. But section 998 is meant to promote judicial efficiency—not create new lawsuits. (See *Goodstein v. Bank of San Pedro* (1994) 27 Cal.App.4th 899, 908 (*Goodstein*) ["the underlying purpose of section 998 is to promote judicial economy …"].) Such a breach-

of-contract action would be so prohibitively expensive that it would risk wiping out all of Plaintiffs' recovery.

To place a value on the 998 offer at issue, plaintiffs would have to account for FCA's likely default on its settlement obligations—which plaintiffs' evidence shows happens in case after case (AA-866, ¶ 3)—and the cost to plaintiffs of obtaining a judgment in a subsequent action for FCA's breach. This is an impossible task. The 998 offer was invalid. (See *Valentino*, *supra*, 201 Cal.App.3d at p. 698 [nonmonetary terms "may render it difficult to accurately value the monetary term of the offer"].)

Furthermore, contract law and principles would apply to the settlement agreement. (*Belasco v. Wells* (2015) 234 Cal.App.4th 409, 420.) While an attorney *with authority* may sign a settlement agreement and bind his or her client thereto, an attorney without authority may not. (*In re Horton* (1991) 54 Cal.3d 82, 94 ["the attorney cannot without authorization settle the suit…"].) Here, by having its attorney sign the 998 offer rather than signing itself, FCA could *choose* whether to treat the settlement agreement as enforceable or not—simply by claiming its attorney did or did not have authority.

Nor would section 664.6 be of any use to plaintiffs. First, section 664.6 requires an explicit, pre-dismissal joint request by the parties for the court to retain jurisdiction over enforcement of the settlement. (§ 664.6(a); see *Mesa RHF Partners, L.P. v. City of Los Angeles* (2019) 33 Cal.App.5th 913, 917.) But FCA's 998 offer contains no term stating it will stipulate to retained jurisdiction. (AA-54.) Second, prior to January 1, 2021, section

664.6 did *not* extend to settlement agreements signed by attorneys—only by parties themselves. (See *Levy v. Superior Court* (1995) 10 Cal.4th 578, 586 ["the term 'parties' as used in section 664.6 … means the litigants themselves, and does not include their attorneys of record"].) FCA's 2019 section 998 offer was signed by its attorney, meaning section 664.6 wasn't even available to retain jurisdiction to enforce a settlement.

Fourth, the offer was vague as to the end date for FCA's commitment to pay plaintiffs' attorney fees—after which plaintiffs would have to "bear [their] own attorneys' fees and costs of suit." (AA-54.) The Song-Beverly Act's attorney fee provision is indispensable, because it ensures that consumers can obtain experienced counsel to prosecute claims against well-funded automobile manufacturers. (*Murillo, supra,* 17 Cal.4th at p. 994 ["attorney's fees based on actual time expended" are "the primary financial benefit the Song-Beverly Act offers to consumers who sue thereunder"]; *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 820 [the Act awards fees "so that pursuit of consumer warranty cases would be economically feasible"].)

FCA offered *only* to pay the reasonable fees to be determined by motion; FCA failed to promise any further fees to cover subsequent enforcement efforts. (See AA-54.) And significantly, the offer expressly *barred* entry of judgment (*ibid.*), depriving plaintiffs the straightforward enforcement mechanism of simply executing on the judgment. Instead, if FCA reneged on the deal, plaintiffs would have had to file a new action for breach

of contract—an action for which the Act would not provide them an attorney. (See p. 65, *ante*.) Instead, plaintiffs would have to pay out of pocket to ensure that FCA makes good on its settlement obligations.

All told, the many critical "undefined" elements, including the offer's joint nature, rendered FCA's offers invalid as a matter of law. (See *MacQuiddy*, *supra*, 233 Cal.App.4th at p. 1050.)

B. In any event, the trial court erred in holding plaintiffs' judgment for damages was not more favorable than a dismissal with prejudice.

Even if defendants' unapportioned joint offer validly triggered section 998, plaintiffs did not fail to obtain a more favorable judgment at trial with respect to FCA. (See § 998(c)(1); *Kirzhner*, *supra*, 9 Cal.5th at p. 970, fn. 2.)

Indeed, whatever *Goodstein* says about a voluntary dismissal qualifying as a "judgment" under section 998, it says *nothing* regarding whether such a voluntary dismissal is more or less favorable than a subsequent judgment for damages at trial. (Cf. *JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1525–1526 & fn. 5 [judgment finality and favorableness are distinct inquiries].)

Ascertaining the value of a section 998 offer is a question involving the interpretation of a writing, which this Court reviews de novo. (*Fassberg*, *supra*, 152 Cal.App.4th at p. 765.) In determining whether the judgment is or is not "more favorable" than the section 998 offer, "[t]he interpretation and

application of section 998 to undisputed facts is a question of law subject to de novo review." (*Martinez v. Eatlite One, Inc.* (2018) 27 Cal.App.5th 1181, 1184 [applying de novo review to favorableness determination].)

To determine whether plaintiffs' trial result was more favorable than FCA's part of the 998 offer, this Court considers the offers' monetary *and* non-monetary terms. (See, e.g., *Valentino*, *supra*, 201 Cal.App.3d at pp. 697–698.) The nonmonetary terms of a 998 offer "may effectively negate the monetary term of the offer" or "may reduce the actual value of the monetary term so that a damage award in a lesser sum actually would be 'more favorable' not less favorable than the statutory offer the defendant made." (*Ibid.*) Thus, the law is clear that section 998 does not "'authorize cost-shifting every time the *monetary* value of the damage award is less than the *monetary* "term" of the defendant's statutory offer.'" (*Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 800, quoting *Valentino*, at p. 697, italics in *Valentino*.)

For several reasons, the trial court erred in determining that plaintiffs failed to obtain a more favorable result as to FCA at trial than it would have obtained against FCA by accepting the $50,000 joint offer to settle and dismiss the action.

1. FCA's joint offer makes it impossible to determine whether plaintiffs' $46,716.54 judgment against FCA is more or less favorable than the unknown portion of the $50,000 joint 998 offer *attributable to FCA.* California does not have any mechanical rule against joint section 998 offers, but

instead permits such offers where they are reasonably capable of valuation as to "each offeror." (*Persson*, *supra*, 125 Cal.App.4th at p. 1170.) The offer in this case did not permit plaintiffs to prospectively "evaluate the likelihood of *each offeror* receiving a more favorable verdict at trial." (*Ibid.*, italics added; see pp. 61–64, *ante*.) For much the same reasons, the offer does not permit an after-the-fact determination that the damages judgment against FCA was not "more favorable" than the unknown portion of the $50,000 settlement attributable to the claims against FCA.

FCA is responsible for the fact it cannot demonstrate that plaintiffs failed to obtain a more favorable judgment at trial. FCA created uncertainty around the 998 offer by making the offer jointly with the dealership, without apportioning the $50,000 between the two defendants, even though the causes of action against each defendant were distinct and nonoverlapping. In so doing, FCA has created the very situation in which California courts have found it would be "impossible" to determine whether the portion of a joint section 998 offer attributable to a given defendant is more or less favorable than the ensuing judgment for damages against that defendant. (*Gonzalez*, *supra*, 20 Cal.App.5th at p. 169.)

Gonzalez's "impossible" situation was a hypothetical based on *Fortman*, *supra*, 211 Cal.App.3d 241. In that case, two plaintiffs (mother and daughter) made a joint unallocated $1 million offer to the defendant, which the defendant rejected. (*Id.* at pp. 262.) The mother later dismissed her claim and the case went to trial on the daughter's claim. (*Id.* at p. 263.) The

Court of Appeal rejected defendant-appellant's argument that the unallocated joint offer was per se invalid, holding that the daughter's $23 million recovery permitted no doubt that the judgment was more favorable than the statutory offer. (*Ibid.*)

The *Gonzalez* court observed, however, that a closer call would render a "more favorable judgment" determination impossible. "In *Fortman*, for example, the $1 million joint offer from the plaintiffs *could* have made it impossible for one of the plaintiffs to prove she obtained a more favorable verdict. Had the toddler received $800,000 at trial, for example, it would be impossible to know whether she fared better under the verdict or under the unallocated joint offer of $1 million." (*Gonzalez*, *supra*, 20 Cal.App.5th at p. 169.) Here, for the same reasons, the $46,716.54 judgment against FCA makes it impossible to establish with certainty—which FCA, as offeror, must do to invoke section 998 (see *People ex rel. Lockyer v. Fremont General Corp.* (2001) 89 Cal.App.4th 1260, 1267)—that plaintiffs did not obtain a more favorable judgment as compared to the proportion of the $50,000 settlement attributable to FCA.

FCA chose not to apportion the $50,000 amount between itself and the dealership. FCA chose to demand dismissal with prejudice rather than entry of a joint and several judgment, as in *Persson*. Courts must discourage "the injection of uncertainty into the 998 process—a result certain to encourage gamesmanship and other actions incompatible with the goal of resolving, rather than creating, legal disputes." (*Gonzalez*, *supra*, 20 Cal.App.5th at p. 172.)

FCA—not plaintiffs—must bear the burden of the uncertainty it created.

2. The Judgment establishes FCA's liability.

The Judgment is clearly better than the joint 998 offer, which expressly *precluded* any entry of judgment. Despite the fact that even section 998 contemplates that a defendant will offer "to allow judgment to be taken," FCA and the dealership's 998 offer stated that "a judgment will not be entered. Rather, the Complaint will be dismissed with prejudice." (AA-54 [also noting FCA would not admit liability], citing *Goodstein*, *supra*, 27 Cal.App.4th 899.)[20]

FCA insisted that a "judgment will not be entered" in order to avoid the entry of a clearly denominated "Judgment" establishing FCA's liability. FCA's own premium on avoiding this result—indeed, it was a nonnegotiable term of FCA's offer—supports the conclusion that plaintiffs' trial win constituted a "more favorable judgment" than the illusory non-judgment FCA offered. (§ 998(c)(1).)

Under FCA's proposed terms, this voluntary dismissal (the relevant "judgment" for section 998 purposes under *Goodstein*) would not actually require FCA to pay a single dollar.

---

[20] While *Goodstein* may not render *invalid* a 998 offer that demands dismissal instead of judgment, that does not mean that a bar on entry of judgment is not an *unfavorable* term—especially where accepting that term removes a consumer from a fee-shifting Song-Beverly regime and forces any enforcement efforts to be pursued in a new lawsuit outside without any fee-shifting statute.

Instead, any payment by FCA would be pursuant to a collateral private settlement agreement that would not even be enforceable under section 664.6. (See pp. 65–67, *ante*.)

In contrast, plaintiffs' trial win secured what FCA fought to avoid: a public, recorded judgment for damages on a jury verdict finding that FCA willfully violated the Act. Under any circumstances, the $46,716.54 judgment was "more favorable" than a zero-dollar dismissal with prejudice.

3. The Judgment establishes the time for payment and plaintiffs' right to post-judgment interest. Code of Civil Procedure section 685.010 guarantees plaintiffs post-judgment interest at 10 percent per year from the date of entry until paid. The application of section 685.010 makes plaintiffs' Judgment more favorable than FCA's offers in two ways: (1) setting a date certain for FCA's obligation to pay, unlike FCA's offer (see pp. 64–65, *ante*), and (2) entitling plaintiffs to substantial interest thereafter, unlike FCA's offer (AA-54). Today, the $46,716.54 judgment, with post-judgment interest at ten percent per annum, exceeds FCA's 998 offer by thousands of dollars.

4. The Judgment affords plaintiffs a ready means of enforcement. California law supplies predictable enforcement mechanisms to the holder of a formal judgment, including via levying officers. (§ 699.010 *et seq*.) Defendants' joint 998 offer denied plaintiffs this valuable certainty. Instead, if faced with delay and recalcitrance by FCA—a risk that was well-documented under oath by plaintiffs' counsel based on his own lengthy experience litigating against FCA (AA-866, ¶ 3)—

plaintiffs would have had to seek enforcement of a vague settlement deal via an entirely new lawsuit for breach of contract, all on a contract not even signed by FCA. (See pp. 65–67, *ante*.) The easily enforced Judgment negated these risks and ensured that FCA will pay plaintiffs what it owes them without any further litigation.

5. FCA's offer would have created a risk that plaintiffs would have to pay out of pocket for a lawyer to enforce the settlement, rendering the face amount of the offer less than it appears. Relatedly, in the likely event FCA failed to perform, plaintiffs ran the risk of having to pay out of pocket for their attorney to pursue enforcement. This is because FCA's offers stated that defendants would only pay attorney's fees "pursuant to Civil Code section 1794(d)" and "each party shall bear its own attorneys' fees and costs of suit." (AA-54.) Under section 1794(d), a party is only entitled to attorney's fees incurred "in connection with the commencement and prosecution of [a Song-Beverly] action." Acceptance of FCA's offer would have resulted in plaintiffs' dismissal of the Song-Beverly action, but no judgment. If FCA failed to perform the settlement agreement, plaintiffs would need to file a *new* action for breach of contract. This new action would be *outside* of the Song-Beverly regime, and thus outside of the fee-shifting protection in section 1794(d). Plaintiffs' attorney fees in the enforcement action could easily wipe out the settlement value.

In fact, FCA's joint 998 offer, as worded, provides no certainty to plaintiffs that they would be able to recover *any*

attorney fees following acceptance—including fees necessarily incurred in connection with the fee motion contemplated by the offer. By providing only for fees "pursuant to Civil Code section 1794(d)" (AA-54), the offer gives plaintiffs no assurance they can recover post-acceptance fees for fee-related motion practice. Plaintiffs have every reason to believe FCA would argue those fees would arise out of the *settlement agreement*—not "the commencement or prosecution of a [Song-Beverly] action." (Civ. Code., § 1794(d).) After *trial*, the trial court awarded $5,400 in fee motion-related fees. (AA-895.) FCA's offer provided no assurance those fees would have been recoverable.

Whether fee-motion-related fees are incurred "pursuant to" the settlement agreement and not Civil Code section 1794(d) is a further ambiguity that must be construed against FCA. (*Burchell*, *supra*, 54 Cal.App.5th at p. 533.) Doing so, the $5,400 in motion-related fees fall *outside* the value of the section 998 offer and should thus be added to plaintiffs' $46,716.54 recovery for a total of $52,116.54—an amount plainly in excess of the joint $50,000 section 998 offer.

*****

Despite its lower face amount, the recorded, enforceable, interest-bearing Judgment that plaintiffs obtained—free of the prospect that they would have to bear their own attorney fees to ensure enforcement—was more favorable than the joint settlement offer. (See *McKenzie v. Ford Motor Co.* (2015) 238 Cal.App.4th 695, 705–708 [abuse of discretion to deny Song-Beverly plaintiff fees incurred between his rejection of

defendant's section 998 offer containing onerous nonfinancial terms, and final settlement for the same face amount].)

CONCLUSION

The Court should reverse with directions to conduct a new trial on damages or, alternatively, for FCA to accept an additur in the amount of the improper trade-in offset, plus the amount by which that improper offset depressed the civil penalty award.

At the least, the Court should vacate the order on plaintiffs' attorney fee motion and the cross-motions to tax costs, directing the trial court to enter a new order that FCA's joint 998 offer was invalid or, in the alternative, that plaintiffs' damages judgment was more favorable than the 998 offer.

Date: October 12, 2021

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CERTIFICATION OF WORD COUNT

Undersigned counsel hereby certifies that pursuant to 8.204(c) of the California Rules of Court, the **Appellants' Opening Brief** uses a proportionately spaced Century Schoolbook 13-point typeface, including footnotes and contains **14,000 words**, exclusive of the caption page, tables, the Certificate of Interested Entities and this Certification of Word Count. Undersigned counsel relies on the word count of the Microsoft Word computer program used to prepare this petition.

Date: October 12, 2021

/s/ Jeffrey Gurrola

ATTACHMENT A

(See Cal. Rules of Court, rule 8.204(d).)

Judicial Council of California Civil Jury Instructions

CACI*

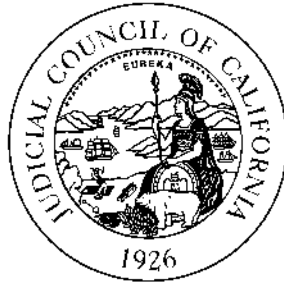
* Pronounced "Casey"

As approved at the
Judicial Council May 2020 Meeting
and Judicial Council Rules Committee April 2020 Meeting

1

Judicial Council of California

Series 100–2500



Judicial Council of California
Advisory Committee on Civil Jury Instructions

Hon. Martin J. Tangeman, Chair

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VF-3203. Breach of Express Warranty—New Motor Vehicle—Civil Penalty Sought

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] [buy/lease] [a/an] [*new motor vehicle*] [from/distributed by/manufactured by] [*name of defendant*]?**

   ______ Yes ______ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] give [*name of plaintiff*] a written warranty?**

   ______ Yes ______ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did the vehicle have a defect covered by the warranty that substantially impaired the vehicle's use, value, or safety to a reasonable [buyer/lessee] in [*name of plaintiff*]'s situation?**

   ______ Yes ______ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of defendant*] or its authorized repair facility fail to repair the vehicle to match the written warranty after a reasonable number of opportunities to do so?**

   ______ Yes ______ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [*name of defendant*] fail to promptly replace or repurchase the vehicle?**

   ______ Yes ______ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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6. What are [*name of plaintiff*]'s damages? Calculate as follows:

Add the following amounts:

a. The purchase price of the vehicle itself: $________

b. Charges for transportation and manufacturer-installed options: $________

c. Finance charges actually paid by [*name of plaintiff*]: $________

d. Sales tax, license fees, registration fees, and other official fees: $________

e. Incidental and consequential damages: $________

[SUBTOTAL/TOTAL DAMAGES:] $________

[Calculate the value of the use of the vehicle before it was [brought in/submitted] for repair as follows:

1. Add dollar amounts listed in lines a and b above: $________

2. Multiply the result in step 1 by the number of miles the vehicle was driven before it was [brought in/submitted] for repair: $________

3. Divide the dollar amount in step 2 by 120,000 and insert result in VALUE OF USE below:

VALUE OF USE: $________

Subtract the VALUE OF USE from the SUBTOTAL above and insert result in TOTAL DAMAGES below:

TOTAL DAMAGES: $________]

[What is the number of miles that the vehicle was driven between the time when [*name of plaintiff*] took possession of the vehicle and the time when [he/she/*nonbinary pronoun*/it] first delivered the vehicle to [*name of defendant*] or its authorized repair facility to fix the problem?

Answer: ______ miles]

Answer question 7.

7. Did [*name of defendant*] willfully fail to repurchase or replace the [*new motor vehicle*]?

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______ Yes ______ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What amount, if any, do you impose as a penalty? [You may not exceed two times the "TOTAL DAMAGES" that you entered in question 6.] $_______

PENALTY: $_______

Signed: _________________________
Presiding Juror

Dated: ___________

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised February 2005, June 2005, December 2005, February 2007, December 2010

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. Items of damages that do not apply to the facts of the case may be omitted.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This verdict form is based on CACI No. 3201, *Failure to Promptly Repurchase or Replace New Motor Vehicle After Reasonable Number of Repair Opportunities—Essential Factual Elements*, CACI No. 3241, *Restitution From Manufacturer—New Motor Vehicle*, and CACI No. 3244, *Civil Penalty—Willful Violation*. See CACI No. VF-3201 for additional questions in the event the plaintiff is claiming consequential damages.

If plaintiff was unable to deliver the vehicle, modify question 4 as in element 4 of CACI No. 3201. In question number 6, users have the option of either allowing the jury to calculate the deduction for value of use or asking the jury for the relevant mileage number only. The bracketed sentence in question 8 is intended to be given only if the jury has been asked to calculate the deduction for value of use.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On October 12, 2021, I served the foregoing document described as: **APPELLANTS' OPENING BRIEF** on the parties in this action by serving:

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(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

Butte County Superior Court
c/o Hon. Tamara L. Mosbarger, Dept. 1
1775 Concord Avenue
Chico, California 95928
(530) 532-7009

(X) By Mail: By placing a true copy thereof enclosed in sealed envelopes addressed as above and placing the envelopes for collection and mailing following our ordinary business practices. I am readily familiar with this business'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

Executed on October 12, 2021, at Los Angeles, California.

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

/s/ Valerie Worrell

Valerie Worrell