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Court of Appeal, Third Appellate District
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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

APPELLANTS' REPLY BRIEF

WIRTZ LAW APC
*Richard M. Wirtz (SBN 137812)
rwirtz@wirtzlaw.com
Amy R. Rotman (SBN 286128)
arotman@wirtzlaw.com
Jessica R. Underwood (SBN 306481)
junderwood@wirtzlaw.com
4370 La Jolla Village Drive, Suite 800
San Diego, California 92122
(858) 259-5009 / Fax: (858) 259-6008

KNIGHT LAW GROUP LLP
*Roger Kirnos (SBN 283163)
rogerk@knightlaw.com
Deepak Devabose (SBN 298890)
deepakd@knightlaw.com
10250 Constellation Blvd., Suite 2500
Los Angeles, CA 90067
(310) 552-2250 / Fax: (323) 552-7973

[Additional counsel listed on next page]

GREINES, MARTIN, STEIN & RICHLAND LLP
*Cynthia E. Tobisman (SBN 197983)
ctobisman@gmsr.com
Jeffrey Gurrola (SBN 285157)
jgurrola@gmsr.com
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(310) 859-7811 / Fax: (310) 276-5261

Attorneys for Plaintiffs and Appellants MELISSA A. WILLIAMS and GEOFFREY G. WILLIAMS

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INTRODUCTION

This is a case where respondent FCA willfully violated the Song-Beverly Act (Act). It is one of many such cases.[1] And FCA isn't alone. Numerous reported decisions show that other car manufacturers regularly violate the Act.

Yet, without a hint of irony, FCA's position is that manufacturers already have "enormous incentives" to comply with the Act. (Respondent's Brief [RB] 37.) On this basis, FCA argues that courts should create a trade-in offset against a prevailing consumer's damage award, even though that offset is found nowhere in the Act's text.

FCA's proposed offset would let FCA reduce its damages liability in any case where a buyer trades in an unsafe, defective vehicle that FCA was supposed to have bought back and branded as lemon. FCA suggests that notwithstanding its dilatory behavior in willfully failing to repurchase the vehicle, a trade-in offset is consistent with the Act. But FCA already willfully violates the Act in case after case, so why should anyone believe that FCA will comply with the law if granted the ability to offset

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[1] See, e.g., *Reck v. FCA US LLC* (2021) 64 Cal.App.5th 682, 698 ("the trial court endors[ed] the view that FCA's willful failure to comply warranted the imposition of a civil penalty"); *Niedermeier v. FCA US LLC* (2020) 56 Cal.App.5th 1052, 1062, 1065 & fn. 7 (affirming, with modification, jury assessment of civil penalty for willful failure to comply); *Santana v. FCA US, LLC* (2020) 56 Cal.App.5th 334, 346 (affirming "the jury's finding that [FCA] willfully violated the Song-Beverly Act").

its damages liability—often to the tune of tens of thousands of dollars or more—by simply waiting for its injured customers to give up and trade in their vehicles?

FCA is wrong as a matter of law, and it's wrong as a matter of policy. The Act says what it says, and it *doesn't* say that FCA can receive a trade-in offset. Indeed, such an offset would be contrary to the incentive structure erected by the Act—a structure that contemplates manufacturers acting promptly to buy back irreparable vehicles. The offset is also contrary to the language of the Act itself. The funds received from selling the vehicle were actually *paid* to pay off the vehicle loan; it was part of the statutory "*paid* or *payable*." So it just isn't true that without a trade-in offset, a consumer gets a "windfall."

Because the Act did not contemplate any trade-in offset, the jury had no power to apply one. The trial court erred in permitting it to do so and failing to grant a new trial after it did.

The trial court compounded its error by allowing the reduced damages amount to be the base for calculating civil penalties, which the jury awarded in the maximum ratio allowed by the Act (namely, three times that base damages amount). That calculation not only saved FCA the $29,500 received for the truck, but also tens of thousands more in civil penalties if the jury had awarded maximum penalties on the *correct* amount.

Two additional errors flowed from the foregoing. First, the court declined to award prejudgment interest even though there was no dispute in the evidence and compensatory damages are

calculated pursuant to a standard statutory formula. Because the amount of damages was capable of calculation, FCA owes interest on that amount.

Second, the court shifted costs and fees based on an invalid Code of Civil Procedure section 998 offer—an offer that was utterly incapable of valuation.

Each of these errors requires reversal.

ARGUMENT

I. The Trial Court Erred By Permitting FCA To Seek—And The Jury To Apply—A Trade-In Offset Not Allowed By The Song-Beverly Act.

The Song-Beverly Act does not permit the trade-in offset that FCA sought and the jury applied in this case. This very question is currently before the California Supreme Court, and its decision on the matter very well may determine this appeal. (See *Niedermeier v. FCA US* (Cal. 2021) 274 Cal.Rptr.3d 598.) In any event, as we now show, the trial court erred by permitting the jury to apply a trade-in offset in this case.

A. Nothing in the Song-Beverly Act permits, much less requires, the trade-in offset FCA seeks here.

1. The Act's plain language defeats FCA's argument that lemon law plaintiffs' damages are limited to common law restitution.

Civil Code section 1793.2 sets forth the measure of a plaintiff's lemon law damages. The statute makes explicitly clear how damages are calculated. It states expressly what can be deducted or offset from the statutory restitution amount. And yet it does *not* provide for any trade-in offset. (AOB § I.A.1.)

FCA responds that "[t]he Act's use of the term 'restitution' is significant" and that a common law definition of restitution therefore applies. (RB 25–27.)

The problem with FCA's argument is that it ignores the fact that common-law restitution principles have already been rejected from the statutory calculus for restitution under the Act: "[T]he Act is designed to give broader protection to consumers than the common law or UCC provide. Had the Legislature intended this more protective statute to be limited by traditional doctrines," then "it surely would have used language to that effect." (*Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1241.)

FCA makes the same kind of unsuccessful common law arguments that BMW made in *Jiagbogu*, parroting the Second District's misinterpretation of the statute in *Niedermeier*, *supra*, 56 Cal.App.5th 1052. But *Niedermeier*—unlike plaintiffs' cases, such as *Jiagobogu*, *Martinez* and *Lukather*—is under review and "has no binding or precedential effect" but at most "potentially persuasive value only." (Cal. Rules of Court, rule 8.1115(e)(1); see RB 16–17, 25–33; § I.A.3, *post*.) And, the *Niedermeier* court simply got it wrong when it expressly declined "[t]o read" "section 1793.2, subdivision (d)(2)(B)" "literally" (56 Cal.App.5th at p. 1071)—i.e., when it rewrote the statute to include an unexpressed trade-in offset. (See AOB § I.A.1.c.)

Reading the statute according to its plain text is entirely consistent with basic principles of legislative intent: The "omission of other offsets from a set of provisions that thoroughly cover other relevant costs *indicates legislative intent to exclude such offsets*." (*Jiagbogu*, *supra*, 118 Cal.App.4th at pp. 1243–1244, italics added, discussing Civ. Code, § 1793.2,

subd. (d)(2).)[2] FCA concedes its version of the "plain language" of the statute is a slippery slope towards rejecting *Martinez*, since the statute "contemplates return of the vehicle." (RB 31, fn.4.)

FCA's "common law restitution" argument would have teeth if the statute left room for courts to determine what the damages should include or exclude. But the statute doesn't leave that question open. Rather, the Act explicitly lays out inclusions and exclusions from the damages amount: "[T]he manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer, ***including*** any charges for transportation and manufacturer-installed options, ***but excluding*** nonmanufacturer items installed by a dealer or the buyer, ***and including*** any collateral charges such as sales or use tax, license fees, registration fees, and other official fees…." (§ 1793.2, subd. (d)(2)(B), emphasis added.)

The Legislature further rejected a common law definition of restitution when it added yet another offset in subdivision (d)(2)(C), relating to plaintiffs' use of the vehicle before first bringing it in for repair. Common law restitution would require the car buyer to provide restitution to the manufacturer for the buyer's *entire* benefit from using the vehicle. The Legislature rejected that common law precept by expressly limiting any prior-use offset to the period preceding the vehicle's first delivery for repair. (*Jiagbogu*, *supra*, 118 Cal.App.4th at pp. 1240–1243 [applying plain language to reject manufacturer's attempt to

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[2] All undesignated statutory citations are to the Civil Code.

imply a common-law offset for buyer's post-repair-delivery use of the car].)

Those are the *only* offsets provided for by the Act.

FCA argues that a common law definition of restitution must apply because another statute "states in four different places that a defective vehicle is 'accepted for restitution' by the manufacturer." (RB 27, citing § 1793.23, subds. (c)–(e) & *Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th 966.) But that other statute merely specifies a manufacturer's obligations to brand a car *after* it has "reacquired" the lemon vehicle. In any event, as shown, mere use of the word "restitution"—and elsewhere, "reimbursement" (§ 1794, subd. (b))—does not overcome the plain text of section 1793.2, subdivision (d)(2). FCA's other authority, *Kirzhner* (see RB 27), addressed whether certain fees constitute "incidental damages" or "collateral charges" that consumers can recover *in addition to* section 1793.2(d)(2)(B)'s restitution remedy. (*Kirzhner*, at p. 969.)

Neither section 1793.23 nor *Kirzhner* addresses the actual issue presented in this appeal and in *Niedermeier*: What happens when manufacturers breach their statutory duty by refusing to promptly buy back lemons in the first place? When that occurs, section 1793.2, subdivision (d)(2) supplies the standard: The "manufacturer shall make restitution in an amount equal to the actual price paid *or* payable"—listing express inclusions and exclusions from that amount—minus an offset for the car's pre-repair use. This formula is mandatory, and it does not include a trade-in offset.

If the Legislature intended common law restitution to be the remedy for Song-Beverly Act violations, then the Legislature would have simply said "the manufacturer shall … promptly make restitution to the buyer," and nothing more. (See § 1793.2, subd. (d)(2).) This is precisely what the Legislature has done in other statutes. (See, e.g., § 1780 [Consumers Legal Remedies Act (CLRA) provides for "[r]estitution of property" without elaboration].) There would be no need for subparagraph (B)'s specific damages formula.

The fact that the "restitution" provided for by Act is not common law restitution is manifest for yet another reason: Plaintiffs need not demonstrate they lack an adequate remedy at law. (Cf. *Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 260 ["equitable relief (such as restitution) will not be given when the plaintiff's remedies at law are adequate"].) That's because the Song-Beverly Act's "restitution" is a form of statutory damages, and the statute explicitly refers to it as such. (See § 1794 [referring repeatedly to the right of "reimbursement as set forth in subdivision (d) of Section 1793.2" as "damages"].) For the same reasons, there are no equitable defenses or mitigation-of-damages requirements under the Song-Beverly Act, because the claims and damages are s*tatutorily defined*, not equitably based. And if any equitable principles are considered, they should tilt in favor of the pro-consumer statute.

FCA argues that courts can, in fact, write unenumerated offsets into the Act. (RB 28–29.) FCA cites *Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32 for the proposition that

"nothing in the Act limits the calculation of restitution damages to the specific items listed in section 1793.2, subdivision (d)." (RB 28.) *Mitchell* does not support FCA's argument at all. Instead, *Mitchell* broadly interprets the Act's express promise of the purchase price to *augment* consumer relief to include finance charges paid and incurred as a debt, consistent with the Act's remedial purposes. FCA attempts to use *Mitchell* to *limit* relief. *Mitchell* never examined whether courts could *imply* unenumerated offsets; rather, it merely held that under section 1793.2(d)(2)(B)'s *express* language, buyers may "recover paid finance charges as part of the 'actual price paid or payable.'" (80 Cal.App.4th at p. 35.) Nor do the cases that *Mitchell* cited for the proposition that section 1793.2 is intended to restore the status quo ante—all of which are *pre*-lemon-law cases that construed the *common-law* meaning of restitution, not the statutory damages formula at issue here. (*Mitchell*, at p. 36.)[3]

When manufacturers like FCA willfully fail to comply with the Act, which has been demonstrated to be the circumstance in one published opinion after another, owners of defective vehicles become more likely to offload their car. The more time passes,

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[3] For instance, *Mitchell* cites *Alder v. Drudis* (1947) 30 Cal.2d 372 as establishing that restitution is meant to restore the status quo ante. (See *Mitchell*, *supra*, 80 Cal.App.4th at p. 36.) But "*Alder* predates the Act by 23 years and applies common law rules of equity." (*Martinez v. Kia Motors America, Inc* (2011) 193 Cal.App.4th 187, 199.) "[T]he Act is designed to give broader protection to consumers than the common law or UCC provide." (*Jiagbogu*, *supra*, 118 Cal.App.4th at p. 1241.)

the more likely it becomes that the car will be sold, repossessed or subject to a car accident (receiving insurance proceeds). There is no justification for FCA's approach, under which time inures to the financial benefit of the stonewalling manufacturer.

2. FCA cannot avoid the plain language of the statute by arguing that the trade-in offset is actually not an offset.

FCA next argues—again, parroting the erroneous *Niedermeier* decision—that the trade-in offset is no offset at all. (RB 27–28.) But this argument rests on the same faulty premise as FCA's plain-language argument: The notion that the statute's use of the word "restitution" somehow overcomes the plain text of the statute that lays out a specific formula for calculating the damages amount. (RB 27, quoting *Niedermeier*, *supra*, 56 Cal.App.5th at p. 1076.) It does not. Instead, the measure of damages is determined by the specific formula laid out in section 1793.2, subdivision (d)(2)(B). (See AOB § I.A.1.a; § I.A.1, *ante*.)

The statute already lists what may be excluded from the "the actual price paid or payable by the buyer." (§ 1793.2, subd. (d)(2)(B); see AOB 31.) In particular, the amount expressly excludes "nonmanufacturer items installed by a dealer or the buyer." (§ 1793.2, subd. (d)(2)(B); see AOB 31.) That amount is further reduced based on the plaintiff's prior use, according to a specific statutory formula. (§ 1793.2, subd. (d)(2)(C); see AOB 31–32.) If the Legislature intended "the actual price paid or payable by the buyer" to exclude or otherwise be reduced by an amount as foreseeable—and foreseeably *significant*—as

the vehicle's trade-in value, then it certainly would have listed this along with the other enumerated offsets. But it didn't.

And even if the trade-in deduction is not construed as an offset, the amount received for the trade-in just shifts the damages from what was pay*able* to what is now *paid*. The statute permits recovery of the amount "paid or payable." If the vehicle in this case had not been sold, then the Williams' damages would be the amount they actually paid *plus* the amount remaining on the loan—and it would be the sum of these two amounts upon which the civil penalty is calculated.

A consumer's damages are not limited to only the amount actually paid, as *Niedermeier* concludes. When Mrs. Williams in this case, or Mrs. Niedermeier in the other case, sold their cars, they did not take that cash and run off with it. Instead, they used that money to pay down the loan on the vehicle, or in other words, the amount that was *payable* under *Mitchell*. (*Mitchell*, *supra*, 80 Cal.App.4th at p. 38 ["the phrase 'actual price paid or payable,' includes all amounts plaintiffs became legally obligated to pay when they agreed to buy the [vehicle]"].) FCA admits the loan was paid down with the trade-in money. (RB 19.) Thus, like a balance or scale, the amount of the "payable" went down, while the amount of the "paid" went up. The plaintiffs still had over $5,000 in "payable" remaining after the trade-in that they had to wrap into loan payments on the vehicle that the dealership put them in. (AA-249.)

FCA concedes multiple times that the Williamses received $29,500. (RB 22-24, 44, 45, 48.) They received this money from

selling the subject vehicle—a chattel that they owned. They used those proceeds to pay down the loan on the vehicle. The situation is the same as if the Williamses had sold other personal property, such as jewelry or furniture or art or other collectibles, and used that money received from a third party to pay down their loan on the car. Surely, the sales of these items and subsequent loan reduction would not result in reducing the Williams' damages. The Act provides no basis for treating the sale of the defective vehicle any differently.

In sum, there is *no windfall to the plaintiffs at all*. Because they used the money from the trade-in to pay down the loan, there is no change to the "paid or payable" at all and, therefore, should be no change to the amount for which FCA is liable. The scales simply tip to a higher amount "paid" and a lower amount remaining still "payable." Put another way, the "paid or payable" is a pie, and the "paid" piece of pie got larger while the "payable" piece of pie got smaller. The total amount remains the same. The Williamses *paid* for the vehicle using their money that they received, as FCA concedes, by selling one item that they owned. That is all that happened here.

3. ***Martinez*, *Jiagbogu*, and *Lukather* are directly on-point.**

FCA bends over backwards in an attempt to distinguish plaintiffs' cases. (See RB 29–33.) The cases speak for themselves.

Martinez. FCA seeks to distinguish *Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187 by claiming that the manufacturer there argued that the plaintiff wasn't entitled to *any* relief under the Act, whereas here, FCA merely seeks an offset. (RB 31–32.) But *Martinez*'s holding is far broader: *Martinez* held unequivocally that "[i]n providing [the Act's restitution] remedies, the Legislature has not required that the consumer maintain possession of the goods at all times. *All that is necessary is that the consumer afford the manufacturer a reasonable number of [repair] attempts*…." (193 Cal.App.4th at p. 191, italics added.) That reasoning applies here. It is undisputed that, as in *Martinez*, plaintiffs "afford[ed] the manufacturer a reasonable number of attempts" to repurchase their lemon vehicle. Under *Martinez*, that's "[a]ll that is necessary." (*Ibid.*)

FCA also tries to distinguish *Martinez* on policy grounds, arguing that the *Martinez* court worried that requiring plaintiffs to retain possession of vehicles to recover under the Act would exert a chilling effect on Song-Beverly suits that doesn't exist here because plaintiffs, unlike the *Martinez* plaintiff, did not have to "continue paying for the derelict vehicle" to bring a claim. (RB 32.) FCA ignores that *Martinez*'s holding rests on the fact that the requirements for recovery come from the Act's plain language: "If the Legislature intended to impose such a requirement, it could have easily included language to that effect. It did not." (193 Cal.App.4th at p. 194.)

FCA further ignores that the principal policy concern articulated in *Martinez*—that "[i]f a manufacturer refuses to comply with its obligations under the Act to repair a defective vehicle, the buyer may have to spend years in litigation pursuing his or her remedies under the Act" (193 Cal.App.4th at p. 195)—exists here, too. FCA's willful refusal to comply with the Act forced plaintiffs to "spend years in litigation" that resulted in a civil penalty verdict.

Jiagbogu. Resting its argument entirely on the Court of Appeal's decision in *Niedermeier*, FCA tries to distinguish *Jiagbogu*, *supra*, 118 Cal.App.4th 1235 on the ground that the offset in this case isn't really an offset. (RB 30.) That argument fails for the reasons already stated, including that, as *Jiagbogu* demonstrates, the Legislature expressly deviated from a common law restitution remedy by cutting off a prior-use reduction as of the date the vehicle is first brought in for repair. (See § I.A.1, *ante*.) As *Jiagbogu* summarized, 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.) Like *Martinez*, *Jiagbogu* is significant because—as even the *Niedermeier* court acknowledged—it "rejected [an] interpretation[] of the Act that allow[s] manufacturers to benefit from delays in compliance." (*Niedermeier*, *supra*, 56 Cal.App.5th at p. 1075.) That *Jiagbogu* did not specifically involve a trade-in offset doesn't eliminate that decision's conclusion that equitable principles do not apply to the Act—and certainly not to the benefit of manufacturers who

willfully violate the law. (*Jiagbogu*, at pp. 1241, 1244.) Nor does the fact that *Jiagbogu* didn't address trade-in offsets diminish the logical basis for *Jiagbogu*'s broad rejection of unenumerated offsets—a broad rejection that this Court should embrace, too.

Lukather. *Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, likewise rejected a manufacturer's attempt to imply unenumerated offsets into section 1793, subdivision (d)(2). (AOB 34.) As in *Jiagbogu* and *Martinez, Lukather* involved a manufacturer that had repeatedly "stalled and frustrated" an owner's attempt to obtain restitution under the Act. (181 Cal.App.4th at p. 1049.) And as in those cases, *Lukather* denied a requested offset (for use of a rental car) because it was contrary to section 1793(d)(2)'s plain language and "would reward [the manufacturer] for its delay…." (*Id*. at p. 1053.)

FCA calls *Lukather* inapposite because denying the offset at issue there would have "'reward[ed] [the manufacturer] for its delay'" in complying with the Act (RB 31, quoting *Lukather*), whereas denying a trade-in offset "would do nothing to pressure the buyer to accept an unreasonable settlement offer or reward a manufacturer for its delay" (*ibid*.). But as shown, that's incorrect: Allowing trade-in offsets certainly would reward manufacturers like FCA for their delay because that delay improves the chances that the manufacturer's financial liability will be reduced when the frustrated consumer gives up on their defective vehicle after years of problems and no relief from the manufacturer. An offset saves FCA from its inaction far more than the civil penalty punishes FCA for its inaction.

Apparently seeking to bolster its point that a trade-in offset should apply, FCA adds: "Both the buyer and the manufacturer end up in the same economic position whether or not the buyer chooses to trade in or otherwise sell the vehicle—the buyer either recovers the full purchase price from the manufacturer and returns the car, or resells the car to a third party and recovers the remainder of the purchase price from the manufacturer." (RB 31.)

This is wrong, too. The manufacturer *doesn't* end up in the same economic position in the second scenario. First, the manufacturer receives a far greater deduction for the dealership-assessed value of the car, than it would recoup if the same car is returned, branded as a lemon, and subsequently sold at auction as such. Second, in the case of civil penalties, after willfully violating the Act, the manufacturer would have its civil penalty liability slashed dramatically. (See § I.D, *post*.) In other words, the manufacturer—which has already profited from the sale of the vehicle (see RB 36)—will have to pay only a fraction of the amount that it should be required under the Act based entirely on the fact that the manufacturer *willfully flouted* the Act by failing to provide the consumer with remedies it was supposed to provide and *kept failing to do so over time*.

That *Lukather* involves a different offset doesn't dilute its relevance. *Jiagbogu*, *Martinez*, *Lukather* make clear that the Act does not allow for unenumerated offsets in any form.

B. Even if the plain language were ambiguous, public policy dictates that courts must not imply a trade-in offset into the Act.

FCA argues that this Court should deviate from the Act's plain text because, in FCA's view, *not* reading an unenumerated trade-in offset into the Act would "frustrate" its "labeling and notification requirements." (RB § I.B.)

FCA can only advance this argument by mis-framing the issues. At issue here is not a manufacturer that abided by its statutory buyback obligations. This case instead involves a manufacturer that breached those obligations when, as the jury found, it *willfully refused* to buy the vehicle back. The Williamses had no way to brand the vehicle; that's on FCA. FCA's failure to properly label the lemon is due solely to its own willful failure to perform its statutory obligations.

Indeed, FCA's arguments and the rationale of *Niedermeier*, both emphasizing the importance of the branding requirement, ignore the longstanding principle that, under *Martinez*, a consumer does not have to keep the defective car to ensure it is branded in the first place. FCA claims, and *Niedermeier* effectively reasons, that disposing of a vehicle should be discouraged, thereby unjustifiably putting the weight of a defective vehicle on a *consumer's* shoulders. It is FCA's affirmative duty to repurchase and brand the vehicle to give notice to future buyers that the car is a lemon and to proceed at their own risk.

To the extent that FCA contends that, without a trade-in offset, the Act doesn't prevent unlabeled lemons from entering the market, that is only because FCA defies the Legislature's mandate to "promptly" repurchase a lemon and brand it as such. That's presumably why the Act extends virtually all of its protections to *used cars* that remain under warranty. (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 123; see § I.F, *post*.) FCA's conjured concern about lemon owners "reselling" lemons to "unsuspecting" buyers ignores reality: Lemons are virtually impossible to resell, and anyone who does so by misrepresenting or concealing the vehicle defects would expose themselves to civil liability. Doing what plaintiffs did—trading in their lemon to a dealer in order to buy a safe vehicle—gets the vehicle off the road and subjects the dealer to statutory used-car warranties. (§§ 1792, 1792.1, 1793,2, 1795.5.)

The Act's plain language thus reflects a reasonable policy choice: The Legislature chose to protect consumers by placing the burden of repurchasing and labeling a lemon that enters the used car market—and that necessarily became defective during the warranty period—*on the manufacturer* who failed to buy back the lemon and label it in the first place. This incentivizes manufacturers to buy back a lemon that the manufacturer can't fix—and to do so *promptly*, *from the first buyer*.

FCA's reading eviscerates section 1793.2(d)(2)'s mandate that manufacturers "promptly" replace lemons or "promptly" make restitution and label the car a lemon at that time. Why would any "rational" manufacturer obey the law if it knows its

delay will be rewarded by a trade-in offset? It won't, resulting in most of these cars *never getting rebranded*. Indeed, why would FCA promptly reacquire the vehicle only to have to brand it as a lemon and wipe out its value to FCA for resale or other purposes? It is perverse for FCA to claim to champion the interests of consumers when FCA's own dilatory conduct, oft-repeated throughout published opinions, is what *forced* plaintiffs to trade in their lemon to obtain a safe car.

In fact, FCA's own conduct puts the lie to its claims that a trade-in offset should apply because "manufacturers have enormous incentives to identify 'lemons' and to promptly offer to repurchase them" (RB 37) and that "[n]o rational manufacturer would risk hundreds of thousands of dollars in civil penalties and attorney fees" in order to "reduc[e] liability for restitution by some relatively slight and unknowable amount" (RB 38). In this very case—and many others—FCA did exactly what it now says no rational manufacturer would do.

Nor was the reduction in FCA's damages amount "relatively slight" or "unknowable," as FCA contends. (RB 38.) As shown in the opening brief and in the table reproduced immediately below, the "actual price paid or payable" was \$47,395.54, yet applying a trade-in offset reduced that amount to \$17,994.82. (AOB 25; see table at p. 29, *post*.) That's a difference of nearly \$30,000. And the difference leaps to over \$73,000 in total reduction after the application of civil penalties. (*Ibid*.) Manufacturers have every incentive to game the system where, as here, doing so will massively drive down their liability.

		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

The best way to address concerns about un-branded lemons is to hold manufacturers accountable when they fail to promptly

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[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.)

buy back a lemon and brand it accordingly. This requires nothing more than applying the Act's plain language literally, rather than writing in an unexpressed trade-in offset. (See § I.A, *ante*.) Reducing damages through trade-in offsets would encourage manufacturers to violate the Act—an inherently absurd result. The plain language must govern.

C. As a matter of policy, any trade-in offset should be categorically unavailable to FCA and others who intentionally violate the Act.

If this Court permits a trade-in offset, it should apply the collateral source rule—under which payments from a source wholly independent of the wrongdoer are not deducted from the damages—to bar the offset to manufacturers who *willfully* violate the Act. (AOB § I.A.3.) A willful violator like FCA should be barred from capitalizing on that willful violation.

FCA argues that "the Legislature has already provided a specific punishment for willful violations" in the form of a civil penalty. (RB 39.) Yet implicit in FCA's argument is a request that this Court permit willful violators like FCA to *reduce* that liability by simply continuing to violate the law by delaying until consumer plaintiffs finally give up and trade in their cars. Any trade-in offset will be a creation of the courts, not the statute. This Court should carefully limit any offset in a way that effectuates the statute's purposes. (*Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 184 [courts should not apply civil penalty in a way that undermines its purpose]; see § I.D, *post*.)

In any event, FCA's argument proves too much, because the collateral source rule applies to intentional tortfeasors regardless of their liability for punitive damages. And, as this case demonstrates, manufacturers are still opting to willfully violate the Act despite the threat of civil penalties. FCA asks this court to reduce the threat by reducing civil penalty exposure. This case is a poster child for applying the collateral source rule.

FCA argues that the collateral source rule is grounded in policy reasons that are "absent" here—namely, the desire to ensure that injured victims receive the benefits of decisions to carry insurance and are fully compensated for injuries. (RB 41.) But the collateral source rule is also about ensuring that a "tortfeasor [does] not garner the benefits of his victim's providence." (*Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 10.) The rule applies to prevent damage reductions that would relieve the wrongdoer of having to "pay the full cost of his or her negligence or wrongdoing," thereby "distort[ing] the deterrent function of tort law." (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 560.) That's why authority holds that the rule should apply outside traditional tort contexts where, as here, the defendant willfully breached its warranty. (AOB 44–45; *Parker v. Alexander Marine Co., Ltd.* (9th Cir. 2017) 721 Fed.Appx. at pp. 587–588 [applying collateral source rule to warranty claim].)[13]

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[13] FCA also attacks the collateral source rule in general (RB 41), but it does not deny that the rule is "established California law." (*Smock v. State of California* (2006) 138 Cal.App.4th 883, 888.)

The collateral source rule therefore should apply to willful violators of the Act. FCA should not be rewarded for its willful refusal to repurchase plaintiffs' vehicle, thereby "distort[ing] the [Act's] deterrent function." (*Howell*, *supra*, 52 Cal.4th at p. 560.)

D. Even if an offset were allowed for intentional wrongdoers like FCA, it would have to be applied *after* calculation of civil penalties.

Section 1794, subdivision (c), authorizes a civil penalty of up to twice "the amount of actual damages." FCA argues that "actual damages" necessarily limits the penalty to the amount recoverable as restitution *after* a trade-in offset is applied. (RB § II.) But the Act's language is otherwise.

The "damages" here are statutory. Where a lemon owner seeks the remedy provided by section 1793.2, subdivision (d)(2)(B), damages are the amount "paid or payable" on the vehicle, plus incidental damages, minus the statutory pre-repair-delivery offset. (See § 1794, subd. (b).)

FCA emphasizes that "'[a]ctual damages' is a term synonymous with compensatory damages." (RB 48, some internal quotation marks omitted.) But "compensatory damages" in this statutory context means *the damages the Act awards* for the injury—i.e., for the Act violation. Section 1793.2, subdivision (d)(2), sets that amount. The fact that a manufacturer might claim a trade-in offset that arises only *after* the manufacturer has triggered the buyer's entitlement to that statutory amount doesn't change the amount of those statutory damages.

Whether the plaintiffs were "compensated for [some of their] compensatory damages *before* trial"—rather than "*at* trial"—doesn't change the amount of those damages. (*Fullington v. Equilon Enterprises, LLC* (2012) 210 Cal.App.4th 667, 684–689, original italics.) The offset only "affects the right to *recover damages*, not the *amount of damages suffered*"—i.e., actual damages. (*McMillin Companies, LLC v. American Safety Indemnity Co.* (2015) 233 Cal.App.4th 518, 535 (*McMillin*), original italics.)[14]

This interpretation is consistent with the Act's policy purpose as well. The Act was passed to compel manufacturers to *promptly* honor their warranties at *every* stage—from initial repairs through reimbursement of the purchase price. (AOB § I.A.4.a; *Kirzhner*, *supra*, 9 Cal.5th at p. 979.) The civil penalty was meant to encourage manufacturers to try to fulfill those duties. (*Kwan*, *supra*, 23 Cal.App.4th at p. 184 ["Without such a provision, a seller or manufacturer who knew the consumer was entitled to a refund or replacement might nevertheless be tempted to refuse compliance in the hope the consumer would not persist, secure in the knowledge its liability was limited to refund or replacement"].)

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[14] In fact, courts interpreting "actual damages" routinely hold that when a plaintiff takes nothing after application of a defendant's offset, the plaintiff still has suffered the "actual damages" necessary to bring a claim or to seek punitive damages. (E.g., *McMillin, supra,* 233 Cal.App.4th at pp. 534–536; *Los Angeles Unified School District v. Torres Construction Corp.* (2020) 57 Cal.App.5th 480, 500.)

Although FCA cites a non-Lemon Law case to argue this court should construe the penalty statute narrowly (RB 48), California cases squarely hold that the Act's civil penalty provision should be *broadly* construed to further the Act's deterrence and punishment purposes: "Any interpretation that would significantly vitiate the incentive to comply should be avoided." (*Kwan*, *supra*, 23 Cal.App.4th at p. 184.) Cases also routinely reject interpretations of the Act that would let manufacturers reduce damages by delaying compliance, as FCA seeks to do. (E.g., *Jiagbogu, supra,* 118 Cal.App.4th at p. 1244.)

As plaintiffs' cases show, this is a compelling reason to apply any offset *after* calculating the civil penalty. In *Liquid Air Corp. v. Rogers* (7th Cir. 1987) 834 F.2d 1297, 1310 (AOB 48–49), for instance, the Seventh Circuit held in a RICO case that the cost of property returned to plaintiff following trial was properly subtracted *only after trebling damages* because "setting-off damages *after* trebling is more likely to effectuate the purposes behind RICO." That's no different from the situation here.

Similarly, the United States Supreme Court, in applying the analogous twice-actual-damages provision in the False Claims Act, has held that "the Government's actual damages are to be doubled *before any subtractions are made for compensatory payments* previously received by the Government *from any source*" because the "fortuitous" acts of other parties "should not determine the [defendant's] liability … under the double-damages provision." (*United States v. Bornstein* (1976) 423 U.S. 303, 316, italics added.)

FCA tries to dismiss plaintiffs' authorities wholesale as either involving "settlement payments" or a plaintiff's "*postjudgment* mitigation efforts," which according to FCA means that they only concerned the amount of "*recoverable* damages, not *actual* damages." (RB 49–50 & fn. 13, original italics.) But FCA cannot cite anything from these cases indicating their reasoning is so limited.

These cases all recognize that applying the offset *after* determining a penalty furthers the penalty's deterrence purpose—which is equally true here.

Applying the offset after calculating the penalty also comports with the offset being a substitute for the vehicle's return to the manufacturer at the end of litigation, *post-judgment*. (AOB § I.A.4.c.) Indeed, in arguing that a trade-in offset wouldn't give manufacturers a windfall, FCA claims the offset simply represents the value FCA would receive if it got the car back. (E.g., RB 26–27.) Yet, by asking this Court to apply the offset *before* the penalty is calculated, FCA seeks to effectively treble an offset that's supposed to be a stand-in for the car being returned to FCA postjudgment. (AOB § I.A.4.c.) FCA wants to get three vehicles—in this case, taking the form of a $73,000 damages discount—where it would only receive one.

FCA ignores this argument entirely. Instead, it cites to *Williams Inglis & Sons Baking Co. v. Continental Baking Co., Inc.* (9th Cir. 1992) 981 F.2d 1023. But that case involved deducting the value obtained by selling bakery equipment from the total lost profits damages, because "[i]f the violation had not

occurred, [plaintiff] would have received the profit stream but not had the proceeds of their sale." (*Id.* at p. 1024.) That case had nothing to do with the situation presented here, where the purported offset is—as admitted by FCA (e.g., RB 26–27)—merely a stand-in for FCA receiving the car back postjudgment.

Even crediting FCA's argument that the offset is appropriate as a substitute for return of the vehicle, the offset should apply *after* the civil penalty is calculated to induce compliance with the Act. Even then, FCA still gets the better benefit of an offset for the price of a car purchased at market value or some dealer-assessed value instead of the much lower recoupment of money from selling the lemon-branded vehicle at an auction in another state. If there is any offset at all (there shouldn't be), FCA shouldn't get a deduction for anything more than the average value of a lemon vehicle sold at auction.

E. The trial court doubly erred: First, by permitting FCA to seek a trade-in offset; and then, by failing to grant a new trial.

In response to plaintiffs' argument that the trial court prejudicially modified the *verdict form* (AOB § I.B), FCA first argues that plaintiffs invited the error by agreeing to a CACI 3421 jury instruction. (RB 42.) But plaintiffs aren't challenging the use of CACI 3241. That instruction does not in any way provide for the trade-in offset requested and applied in this case. (See CACI 3241.) Plaintiffs did not invite the trial court's error on the verdict form by agreeing to a CACI jury instruction.

Turning to plaintiffs' *actual* argument, FCA contends that "[i]t is not error to modify CACI model verdict forms based on the particular facts of the case," and that "the trial court correctly modified CACI No. VF-3203 from 'purchase price' to 'actual price paid' … because of the evidence that the original purchase price on the sales contract was *not* the 'actual price paid' by the plaintiffs by the time of trial." (RB 43–44.) But this argument falls with FCA's statutory interpretation argument, because the modification was permissible only if the underlying trade-in offset is permissible. It is not. (§ I.A, *ante*.)

As plaintiffs explained in their opening brief, the trial court modified the verdict form's itemization of the elements that comprise "the actual price paid or payable." (AOB 50–51.) And it did so for the stated purpose of making room for FCA to argue an impermissible trade-in offset. (AOB 51, citing 8-RT-881–884.) That was error.

The trial court should have salvaged this case from that error by granting plaintiffs' motion for a new trial. FCA's response to this argument effectively concedes that it rises and falls with the merits of the parties' dispute. (See RB 44–45.) Either FCA's interpretation is right, and the jury properly awarded a trade-in offset found nowhere in the act, or plaintiffs are right and the jury *improperly* awarded a trade-in offset found nowhere in the act. Because plaintiffs' plain language interpretation of the statute is the correct one (see § I.A, *ante*), the jury's compensatory damages award was inadequate as a matter of law (see AOB § II.B).

FCA attempts to distinguish plaintiffs' cases on the basis that "none involve a party seeking a new trial or additur to recover damages *they did not incur*." (RB 45.) This characterization again assumes the validity of FCA's underlying argument that plaintiffs' statutory damages should have been offset by $29,500. But plaintiffs had a statutory right to damages in the amount provided for by the Act. The Act provides a formula for determining those damages. That formula does not include a trade-in offset.

Plaintiffs' statutory damages entitlement far exceeded the jury's award. The reduction was made based on a legally erroneous interpretation of the Act—not an evidentiary dispute. This case is thus analogous to those cited in appellants' opening brief in which the damages award fell well below what the undisputed evidence showed. (See AOB 55–58, citing *Price v. McComish* (1937) 22 Cal.App.2d 92, 95, 101 [reversing award that was a fraction of demonstrated medical costs]; *Haskins v. Holmes* (1967) 252 Cal.App.2d 580, 582–583 [$88.63 for undisputed pain and suffering was inadequate as a matter of law]; *Smith v. Moffat* (1977) 73 Cal.App.3d 86, 94 [award of $4,030.66 in general damages was so grossly disproportionate to $168,000 economic loss as to be "inadequate as a matter of law"].)

In fact, this case is even more compelling: While plaintiffs' authorities involved common law damages awards subject to broad factfinder latitude, the damages calculation in this case is a clear-cut question of applying a statutory formula based on

undisputed documentary evidence. Because it was manifestly wrong, the trial court erred in declining to grant a new trial.

F. *Rodriguez*—contrary to the law of this District and under review by the California Supreme Court—does not make the trial court's error harmless.

Based on *Rodriguez v. FCA US, LLC* (2022) 77 Cal.App.5th 209, FCA argues that the trial court's error was harmless because plaintiffs, purchasers of a used car, could never recover more in the event of a retrial.

For starters, *Rodriguez* is not binding on this Court—or any court, for that matter, as it is currently under review by the California Supreme Court. (*Rodriguez v. FCA US* (Cal. 2022) 295 Cal.Rptr.3d 351; see Cal. Rules of Court, rule 8.1115(e)(3).) Instead, this Court's *Jensen* opinion is the only precedential holding on the topic of used cars.

Even more, *Rodriguez*—yet another case involving FCA's failure to either repair or buy back a lemon—got the facts and the law wrong. In fact, *Rodriguez* directly conflicts with this Court's decision in *Jensen*. FCA doesn't mention *Jensen* at all.

Jensen holds: "[C]ars sold with a *balance* remaining on the manufacturer's new motor vehicle warranty are included within its definition of 'new motor vehicle.'" (35 Cal.App.4th at p. (35 Cal.App.4th at p. 123, italics added.) *Rodriguez* reaches the opposite conclusion—that the Act's reference to "other motor vehicles sold with a manufacturer's new car warranty" *only* refers

to vehicles sold with a "*new* or *full* express warranty." (77 Cal.App.5th at p. 222, italics added.) *Rodriguez* reached this faulty conclusion by incorrectly accepting as true that its facts were distinguishable from *Jensen* because the latter involved a demonstrator with a full-balance new-car warranty. As will be fleshed out in the *Rodriguez* briefing to the Supreme Court, the *Jensen* vehicle was actually a used car that came with a remaining balance on the warranty. *Rodriguez* is factually indistinguishable from *Jensen*.

This Court's holding in *Jensen* controls over another court's non-precedential opinion in *Rodriguez*.

II. The Trial Court Erred As A Matter Of Law In Denying Prejudgment Interest.

The compensatory damages in this case were capable of calculation based on available, undisputed evidence prior to judgment. The trial court erred in finding otherwise.

A. Plaintiffs did not forfeit this argument.

The law requires that the record be adequate. It must contain documents required by California Rules of Court, rule 8.122(b)(1) and any other documents "*necessary* for proper consideration of the issues." (See Cal. Rules of Court, rule 8.124(b)(1)(A), (B), italics added.) At the same time, it must *not* contain any "documents or portions of documents filed in superior court that are unnecessary for proper consideration of the issues." (*Id.*, rule 8.124(b)(3)(A).)

Foust v. San Jose Construction Co., Inc. (2011) 198 Cal.App.4th 181, the only case on which FCA relies to argue that including the full briefing was necessary (RB 53), does not support FCA's forfeiture argument. In that case, the appellant argued the evidence did not support the judgment. (*Foust*, at pp. 185–186.) This challenge was subject to substantial evidence review. (*Id.* at p. 189 ["Without a proper record, there is no way for this court to find that the trial court's conclusions were not supported by substantial evidence"].) Yet the appellant provided a paper-thin appellate record devoid of a reporter's transcript and all but a handful of trial court documents. (*Foust*, at p. 186.) In particular, the failure to provide a reporter's transcript was fatal to the appeal. (*Id.* at pp. 186–187.)

That's simply not the case here. For one, this Court does not lack a reporter's transcript of the trial or any other relevant proceedings. (See generally RT.) The Court has the benefit of the order appealed from (AA-893–895) and the transcript of the relevant hearing (10-RT-1094–1107.) And this Court reviews the issue de novo. (*Watson Bowman Acme Corp. v. RGW Construction, Inc.* (2016) 2 Cal.App.5th 279, 296 (*Watson*).)

Plaintiffs offered sufficient record evidence regarding the damages figures and other issues relevant to prejudgment interest. FCA has now offered evidence in response to try to show a conflict and to argue that damages were *not* ascertainable

until judgment. Yet FCA's own evidence confirms that there is *no conflict* and that the damages were readily ascertainable.[15]

B. In light of the undisputed evidence, the trial court's *legal* error in finding damages uncertain must be reversed.

The relevant test for prejudgment interest is "did the defendant actually know the amount owed or from reasonably available information could the defendant have computed that amount." (*Watson*, *supra*, 2 Cal.App.5th at p. 294, internal quotation marks omitted.) "What is critical is not whether the defendant *actually* knows how much it should pay; rather, it is whether the defendant *could have* calculated how much it should pay, *if* it had known how a court would ultimately rule on the legal issues." (*State of California v. Continental Ins. Co.* (2017) 15 Cal.App.5th 1017, 1043, original italics, citing *Olson v. Cory* (1983) 35 Cal.3d 390, 402.)

"Disputes about the amount owed do not automatically create uncertainty. The Supreme Court has 'held that even a dispute as to the *amount* of alleged damages (from an

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[15] To include the full briefing on the parties' motions, when the record already contains the information necessary to determine the issue, risks running afoul of California Rules of Court, rule 8.124(b)(3)(A)'s prohibition on including any material in the appendix that is not *necessary* to properly consider the issues. Nonetheless, in light of FCA's insistence that the full briefing and evidence on the prejudgment interest issues is necessary for this Court's determination, plaintiffs have included that material in a concurrently filed Reply Appendix.

earthquake) did not prevent those damages from 'being made certain by calculation' within the meaning of [Civil Code] section 3287 where the amount of recovery closely approximated plaintiff's claims.' (*Leff v. Gunter* (1983) 33 Cal.3d 508, 520.) In that case, a readily ascertainable value of the plaintiff's share of a development project was established by (1) the difference between (a) an uncontested appraisal of the completed building and (b) the amount of the mortgage against the property (2) divided by the plaintiff's conceded one-sixth share in the original venture. (*Id.* at p. 519.) The court noted, 'Defendants offered no evidence to contradict [the] valuations' of the three components used to calculate damages. (*Id.* at p. 520.) Consequently, the court reversed the trial court's denial of prejudgment interest and remanded the case for the calculation and award of such interest. (*Id.* at pp. 520–521.)" (*Watson*, *supra*, 2 Cal.App.5th at p. 294, original italics.)

This case presents a strikingly similar scenario. The Song-Beverly Act sets forth a straightforward statutory reimbursement formula (akin to the formula in *Leff*) specifically designed to take the guesswork out of reacquiring lemon vehicles. We begin with "the actual price paid or payable by the buyer" with specified inclusions/exclusions (§ 1793.2, subd. (d)(2)(B)) and then apply a mileage offset calculated using a specific formula (*id.*, subd. (d)(2)(C)).[16] The Act is *designed* to make these amounts readily

[16] The formula is: "[M]ultiply[] the actual price of the new motor vehicle paid or payable by the buyer … by a fraction having as its denominator 120,000 and having as its numerator the number of

ascertainable: It's the same formula when manufacturers honor their Song-Beverly Act obligations (by reacquiring the car without litigation) or willfully violate them (like FCA did here, necessitating litigation).

And FCA's own record evidence *confirms* that the damages were readily calculable and not subject to conflicting evidence. Plaintiffs purchased their lemon vehicle for $37,499. (RA-520.) At that time the odometer read 43,888. (*Ibid.*) At the time plaintiffs first brought the vehicle in for repair, the odometer read 63,738. (RA-501.) The total miles driven from purchase "to the time the buyer first delivered the vehicle … for correction of the problem that gave rise to the nonconformity" (§ 1793.2, subd. (d)(2)(C))—as reflected in these undisputed trial exhibits offered by FCA—was 19,850. Unsurprisingly, this is the exact number to which the parties stipulated. (AA-171; 9-RT-1015.)

FCA claims damages were uncertain because "the parties disputed whether FCA was entitled to any mileage offset." (RB 55, citing RA-76–77.) But FCA doesn't point to disputed *facts*. It merely points to plaintiffs' position that FCA shouldn't be able to avail itself of an offset at all—a dispute of *law*. That's not the kind of dispute that precludes prejudgment interest. (See *Olson*, *supra*, 35 Cal.3d at p. 402; *State of California v.*

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miles traveled by the new motor vehicle prior to the time the buyer first delivered the vehicle … for correction of the problem that gave rise to the nonconformity." (§ 1793.2, subd. (d)(2)(C).)

Continental Ins. Co., *supra*, 15 Cal.App.5th at p. 1043; *Watson*, *supra*, 2 Cal.App.5th at p. 294.)

FCA's only other retort is that a stipulation does not make a fact undisputed. (RB 55.) That's true, as far as it goes. But as plaintiffs showed in their opening brief and appendix—and as confirmed by the evidence FCA submitted in its respondent's appendix—the damages figures in this case simply weren't in dispute. (Compare 5-RT-450–456 [$37,499 purchase price] & AA-171 [19,850 miles for offset] with RA-520 [$37,499 purchase price] & RA-501, 520 [19,850 miles driven during offset period].) Plaintiffs provided this Court with the documentary evidence establishing the purchase price, including finance charges. (AOB 60–61, citing AA-166–167; AA-176; AA-248; 9-RT-1014.) FCA has offered not a shred of evidence to suggest these documents were false or to otherwise controvert these figures (as there is none) or to suggest that the relevant number of miles driven for calculating the damages offset was not 19,850.

So FCA is right when it says the stipulation doesn't make these facts undisputed. The lack of a factual dispute does.

As the Supreme Court's decision in *Leff* makes clear, even a dispute about the amount of damages does not preclude prejudgment interest "where the amount of recovery closely approximate[s] plaintiff's claims." (*Leff*, *supra*, 33 Cal.3d at p. 520.) Critically, offsets like the $29,500 trade-in offset applied by the jury here do not create "uncertainty" in damages so as to preclude prejudgment interest. (*Watson*, *supra*, 2 Cal.App.5th at p. 295.)

Here, the appropriate amount of compensatory (i.e., not incidental or consequential) damages claimed by both plaintiffs and FCA was essentially the same when taking into account the disputed $29,500 offset. Plaintiffs requested $43,912.54. (AA-218.)[17] FCA requested $15,074.77. (9-RT-1040.) The difference between these two figures is $28,837.77.

Finally, as FCA points out, plaintiffs did not seek prejudgment interest on their incidental or consequential damages or civil penalty. (RB 56; see Reply Appendix 28.) FCA's citation to *Warren v. Kia Motors America, Inc.* (2018) 30 Cal.App.5th 24, 45, in which the plaintiff requested interest on incidental and consequential damages—"a key component of her $17,455.57 jury award"—is thus unavailing. And unlike *Warren*, this case does not present any factual disputes about amounts actually spent or key dates for determining damages under Civil Code section 1793.2, subdivision (d)(2)(B) and (C). Plaintiffs provided the damages evidence; FCA has offered no conflicting evidence.

The documentary evidence was undisputed. The miles driven were undisputed. There was a basic formula for calculating damages. Plaintiffs were thus entitled to prejudgment interest.

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[17] FCA cites a figure of $47,382.31. (RB 55, citing AA-218.) Yet this figure includes incidental and consequential damages (AA-218), which FCA elsewhere acknowledges was not within the scope of plaintiffs' prejudgment interest request (RB 56).

III. The Trial Court Erred As A Matter Of Law By Shifting Costs Based On FCA And The Dealership's Unallocated Joint Section 998 Offer.

The trial court independently erred in ruling both (1) that FCA's Code of Civil Procedure section 998 offer (the "section 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 shifted all costs and fees as of the January 25, 2019 offer date. (AA-893–895.) This Court should reverse.

A. Plaintiffs did not forfeit this issue.

As with the prejudgment interest issue, this Court has an ample record with which to determine the issues raised by this appeal. The Court has the benefit of the order appealed from (AA-893–895) and other evidence submitted in connection with plaintiffs' and FCA's appendices. The Court also has the reporter's transcript of the relevant proceedings. (Motion to Augment Record, Ex. A; cf. RB 53, citing authority relating to the failure to provide the reporter's transcript on appeal.)[18] Nothing

[18] Plaintiffs designated the reporter's transcript of proceedings from the May 27, 2020 motion hearing. The court reporter initially failed to produce the transcript on appeal for that date. In December 2021, the reporter provided the requested transcript to FCA, which shared the transcript with plaintiffs. (Motion to Augment Record, Ex. B.) However, the transcript does not appear on this Court's docket as having been filed with the Court. Plaintiffs served a notice of the error with the trial court as provided for by California Rules of Court, rule 8.155(b)(1). (Motion to Augment Record, Ex. C.) Because the transcript does not appear to have been "sent to the reviewing court" as required

more is needed in order to determine whether the section 998 offer is void on its face or less favorable than the judgment plaintiffs obtained—questions this Court determines as a matter of law. (See AOB 62–63, 70–71.) FCA's contrary argument (RB 57–58) therefore fails.[19]

Tellingly, FCA cites supposed "conflicting" evidence *only once* in its entire discussion of the section 998 issue—and irrelevant evidence at that. (RB 63, citing RA 366, 371, 381–413 to argue that plaintiffs in *other cases* accepted offers by FCA that contained no term for timing of payment.) That simply has no bearing on whether *this* section 998 offer was valid on its face (an issue of contract interpretation) or whether the value of ***FCA's*** *portion* of the offer exceeds the value of plaintiffs' judgment against FCA.

FCA inexplicably argues that it's not clear from the trial court's order exactly why the trial court refused to award any costs, including attorney fees, after January 25, 2019—i.e., the date of the section 998 offer. (See RB 58.) That's flat wrong. The trial court stated the reason for its ruling: "Plaintiffs did not

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by rule 8.155(b)(1), plaintiffs have provided the transcript to this Court via motion under rule 8.155(a) & (b)(2) filed concurrently with this brief. FCA does not oppose this motion.

[19] Plaintiffs once again dispute FCA's claim that this Court needs the entirety of the parties' numerous submissions in order to decide this question of law. Nonetheless, plaintiffs have provided all of the material highlighted by FCA (RB 57) in their Reply Appendix to allay FCA's concerns that this Court lacks an adequate record. (See fn. 15, *ante*.)

obtain a more favorable judgment at trial than the statutory offer to compromise presented by Defendant on January 25, 2019. Therefore, the Court taxes all post-offer costs." (AA-894; see Code Civ. Proc., § 1033.5, subd. (a)(10)(B) [statutory attorney fees are an item of costs].) The court rejected plaintiffs' argument that the offer was invalid. (*Ibid.*) Building on those findings, the court awarded plaintiffs "[a]ll fees incurred up to and including January 25, 2019" litigating against FCA, as well as fees on their fee motion. (AA-895.)[20] The court awarded zero other post-January 25, 2019 fees. (*Ibid.*)

"[T]he determination of whether the trial court *selected* the proper legal standards in making its fee determination is reviewed de novo and, although the trial court has broad authority in determining the amount of reasonable legal fees, the award can be reversed for an abuse of discretion when it employed the wrong legal standard in making its determination." (*Etcheson v. FCA US LLC* (2018) 30 Cal.App.5th 831, 841, internal citation and quotation marks omitted, original italics; *id.* at pp. 845–846 [where court based its drastic reduction of plaintiffs' fee request on its view that continuing to litigate the case following FCA's defective settlement offer was unnecessary, the court "cannot indulge an inference that the trial court's order … was based on a legitimate lodestar assessment of

[20] The trial court omitted a small amount of pre-January 25, 2019 fees as relating to litigation against the dealership alone and not subject to fee-shifting. (AA-895.)

the overall reasonableness of counsel's fees based on rates, duplication of effort, or complexity"].)

FCA's argument about the trial court's exercise of discretion (RB 58–59) is thus a red herring: Plaintiffs do not appeal the trial court's *discretionary* determination of reasonable fees or costs prior to January 25, 2019. Instead, plaintiffs appeal the trial court's cost-shifting and refusal to award any fees whatsoever after January 25, 2019 based on the trial court's explicit and legally erroneous determination the joint section 998 offer was "valid" and that "[p]laintiffs did not obtain a more favorable judgment at trial than the statutory offer to compromise presented by [FCA and the dealership] on January 25, 2019." (AA-894.) The record plaintiffs provided in this regard is more than adequate.

Assuming that the trial court found *sub silentio* that all post-offer fees were unreasonable *even if* the section 998 offer were invalid, as FCA seemingly argues (RB 58), that would be reversible error. *McKenzie v. Ford Motor Co.* (2015) 238 Cal.App.4th 695 is on point. In *McKenzie*, the trial court declined to award fees after the date of an "effectively unacceptable" (i.e., defective) section 998 offer on the basis that any fees after this date were unreasonable. (*Id.* at pp. 704–705.) The Court of Appeal held that was an abuse of discretion: "The court awarded McKenzie 100 percent of the fees he requested for the period before Ford's initial offer, but found the entirety of 'the subsequent billing was unreasonable' and excised *that specific portion of the fees* from McKenzie's award. When the court states

its reasons explicitly, we cannot infer its exercise of discretion rested on a wholly different basis." (*Ibid.*; see also *Etcheson*, *supra*, 30 Cal.App.5th at pp. 845–846.)

The trial court did the same thing here as in *McKenzie* when it awarded plaintiffs *all* of their pre-January 25, 2019 attorney fees incurred litigating against FCA and *none* of their fees after that date (except for the fee motion). Because the trial court erred in determining that the section 998 offer was valid and more favorable than the judgment, as we now show, the refusal to award fees after that date was reversible error any way FCA tries to spin it.

B. The section 998 offer was invalid on its face.

This Court looks at the plain text of the written section 998 offer to determine de novo whether the offer was valid. (*Duff v. Jaguar Land Rover North America, LLC* (2022) 74 Cal.App.5th 491, 499 ["'We independently review whether respondent's 998 settlement offer was valid'"]; *Oakes v. Progressive Transportation Services, Inc.* (2021) 71 Cal.App.5th 486, 497 ["Whether an offer is sufficiently specific and certain under section 998 is an issue we review de novo"].)

The Court does "not evaluate the validity of a statutory offer to compromise after trial concludes. Rather, [it] must evaluate the offer at the time the offeree receives it and determine whether he or she is able to clearly evaluate the worth of the offer." (*Duff*, *supra*, 74 Cal.App.5th at p. 500; see also *Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692,

698 ["the value" of a section 998 offer "must be measured as of the time [the party] made its statutory offer and *without the benefit of hindsight*," italics added].) And: "Section 998 must be strictly construed in favor of the party sought to be subjected to its operation"—i.e., plaintiffs. (*Oakes*, *supra*, 71 Cal.App.5th at p. 501, internal quotation marks omitted.)

Here, the undifferentiated joint offer was incapable of valuation when made. "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, 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.)

In the instant case, FCA made its offer jointly with the Chuck Patterson dealership. (See AA-54; AOB 63–66.) FCA and the dealership jointly offered $50,000 to settle, in one fell swoop, the three causes of action against FCA (for breach of express and implied warranties and fraudulent concealment) and the one cause of action against the dealership (for negligent repair). (AA-54 [998 offer]; see AA-37–43 [nonoverlapping causes of action].) 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.

FCA argues there's no problem, because plaintiffs dismissed the cause of action against the dealership about a year later and then obtained a judgment less than $50,000 against FCA at trial.[21] (RB 65–67.) But FCA conflates two entirely distinct concepts:

- Whether the offer is valid—the issue here—which is determined by looking at the face of the offer at the time it is made (see AOB § IV.A); and
- Whether the offeree's later judgment exceeds the offer (see AOB § IV.B).

FCA argues the latter issue only. (See RB 66, citing *Kahn v. The Dewey Group* (2015) 240 Cal.App.4th 227, 242 [value of

[21] The common law negligent repair claim against the dealership was not subject to fee shifting (AA-895), and thus the fact that plaintiffs dismissed the dealership from the action on the eve of trial says—at *most*—that they valued their claim against the dealership lower than the cost of litigating it to judgment.

defendants' joint offer compared against value of total judgments against offering defendants].)[22]

This says nothing about—and does nothing to cure—the fatal flaw on the face of the section 998 offer: By making a joint offer to resolve distinct and nonoverlapping claims, with only a dismissal rather than a joint and several judgment, FCA and the dealership made it ***impossible to assess the value of their respective offers at the time they were jointly made.*** (See *Persson*, *supra*, 125 Cal.App.4th at p. 1170.)

Indeed, the cases cited by FCA where appellate courts have held that certain defendants' joint offers are valid underscore why the joint offer here was not. In *Kahn*, the offer was valid because plaintiffs alleged that the jointly-offering defendants were *jointly and severally liable.* (See 240 Cal.App.4th at p. 233 ["In the present case, the joint section 998 offer was valid and enforceable because Kahn alleged all defendants were jointly and severally liable"].) In *Persson*, the joint offer was valid because it provided for the entry of a *joint and several* judgment against both defendants. (125 Cal.App.4th at pp. 1170–1172.) Because *each* defendant would be legally responsible for the full amount of the joint and several section 998 judgment, the full value of the offer could be compared to the recovery at trial against the offering defendants. (*Id.* at p. 1170; see AOB 64–65, discussing why *Persson* demonstrates the voidness of defendants' offer here.)

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[22] FCA is wrong on that count as well. (See § III.C, *post*.)

Neither of those foundational considerations that made the joint offers valid in *Kahn* and *Persson* exists here: Instead, plaintiffs alleged distinct claims against each defendant, and submitted their offers jointly, yet conditioned on a dismissal rather than a joint and several judgment.

This is why—contrary to FCA's attempt to distinguish the case on the superficial basis that it involved offers by plaintiffs rather than defendants (RB 66–67)—*Gonzalez v. Lew* (2018) 20 Cal.App.5th 155, 169 compels a finding that the joint offer is invalid. FCA's argument that plaintiffs should be treated more harshly in determining the validity of a section 998 offer has no basis in the text of the statute. Nor is this specious distinction relevant: There's no reason why a joint offer by different plaintiffs with distinct claims would be invalid, but a joint offer by different defendants to distinct, nonoverlapping causes of action would be acceptable or somehow more capable of valuation under the circumstances presented here.

A hypothetical proves why FCA and the dealership made it impossible to evaluate the likelihood of each receiving a more favorable verdict at trial—as the law requires—when they submitted their offers jointly without allocating between them. (*Persson*, *supra*, 125 Cal.App.4th at p. 1170.) Suppose this were a conversion case: FCA, acting alone, stole $5 Widget A from plaintiffs; the dealership, acting alone, stole identical $5 Widget B. FCA and the dealership make a joint, unallocated offer of $10 in exchange for dismissal of both claims. A year later, on the eve

of trial, plaintiffs dismiss the dealership from the action. They proceed to trial against FCA, obtaining a judgment of $9.

FCA would unquestionably argue that plaintiffs failed to receive a more favorable judgment. Yet when FCA and the dealership made their joint, unallocated offer a year earlier, plaintiffs would have needed to determine the value of the offer from each offeror. Plaintiffs reasonably would have valued the offer relating to the identical widgets identically at $5 each. So which is it? The uncertainty created by that joint, unallocated offer must be construed against FCA.[23] (*Oakes*, *supra*, 71 Cal.App.5th at p. 501.)

Indeed, this is precisely the kind of uncertainty that *Gonzalez* found would render an offer void: A "$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, original italics.)

Here, the unallocated joint offer of $50,000 in exchange for dismissal rather than a joint and several judgment, prevented plaintiffs from evaluating—at the time of the offer—

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[23] If defendants here had made a section 998 offer of a joint and several judgment, the answer would be simpler: FCA would be on the hook for $10 under the section 998 offer, meaning its individual offer had a discernible value of the full $10. (See *Persson*, *supra*, 125 Cal.App.4th at pp. 1170–1172.)

the likelihood of FCA and the dealership each obtaining a more favorable judgment at trial than whatever unknown share of the $50,000 represented each one's liability.

C. In any event, the trial court erred in ruling that plaintiffs' judgment for damages was not more favorable than FCA's portion of the joint section 998 offer.

Even if the unallocated joint settlement offer were *not* invalid on its face, the value of FCA's portion of the offer did not exceed that of plaintiffs' $46,716.54 judgment for a number of reasons.

***First*: 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*.** For much the same reason that the unallocated joint offer is void on its face (§ III.B, *ante*), the offer precludes any "more favorable judgment" determination.

The *Gonzalez* court observed that a "more favorable verdict" determination cannot be made under circumstances like those here. (*Gonzalez*, *supra*, 20 Cal.App.5th at p. 169.) The *Gonzalez* court gave the hypothetical of a $1 million joint offer made by two plaintiffs who suffered discrete injuries. The court found that, if one of the plaintiffs obtained $800,000 at trial, "it would be impossible to know whether she fared better

under the verdict or under the unallocated joint offer of $1 million." (*Ibid.*)

This case is the same as *Gonzalez*'s impossible situation: FCA cannot prove that the $46,716.54 judgment is not more favorable than the unknown proportion of the $50,000 settlement attributable to FCA. (See *ibid.*; *People ex rel. Lockyer v. Fremont General Corp.* (2001) 89 Cal.App.4th 1260, 1267 [FCA bears burden of proof].) FCA's contrary cases do not compel a different result, because they expressly turned on factors not present here. (See *Kahn*, *supra*, 240 Cal.App.4th at p. 233 [joint offer valid where alleged liability is joint and several]; *Persson*, *supra*, 125 Cal.App.4th at pp. 1170–1172 [joint offer to take joint and several judgment is valid]; see § III.B, *ante*.)

***Second*: Plaintiffs' judgment against FCA is inherently more valuable than a dismissal with prejudice.** FCA notes that plaintiffs "argue that FCA's section 998 offer was invalid because it called for a dismissal with prejudice instead of entry of judgment," then proceeds to try to refute this argument. (RB 64.) But plaintiffs never argued that conditioning a section 998 offer on dismissal renders the offer per se invalid. (See AOB 74, fn. 20 [acknowledging that "a 998 offer that demands dismissal instead of judgment" is not invalid under *Goodstein v. Bank of San Pedro* (1994) 27 Cal.App.4th 899].)

Rather, plaintiffs set forth the reasons that having an enforceable judgment in hand is *more valuable* to plaintiffs than merely dismissing their lawsuit in exchange for a lump sum. In particular, the judgment establishes FCA's liability for a sum

certain. (See AOB 74–75.) It automatically provides for postjudgment interest at 10 percent annually; establishes a time for payment; and is subject to ready enforcement under California law. (See §§ 685.010, 699.010, et seq.; AOB 75–76.) These are matters of valuation, not validity.

FCA parrots *Covert v. FCA US, LLC* (2022) 73 Cal.App.5th 821, arguing "[t]he 'asserted benefits of a judgment over a dismissal are only valuable if FCA fails to pay the judgment,' but to avoid that risk, plaintiff 'can simply not dismiss the lawsuit until FCA pays.'" (RB 65, quoting *Covert*, *supra*, 73 Cal.App.5th at p. 842, fn. 12.) What comfort is that? If FCA fails to pay, then FCA retains its $50,000 in the bank and plaintiffs are stuck with a lawsuit in limbo. Who covers the cost of their attorney fees seeking to compel FCA to pay up? Or what if plaintiffs press ahead with the lawsuit after a considerable amount of time passes with no payment by FCA—only to have FCA finally pay (or not)? Who pays for plaintiffs' post-acceptance, pre-dismissal attorney fees incurred solely as a result of FCA's unreasonable delay? Indeed, FCA concedes plaintiffs' point that the mechanism for enforcing the settlement agreement if FCA materially breaches would be to *file a breach of contract action.* (RB 68, quoting *Hagan Engineering, Inc. v. Mills* (2003) 115 Cal.App.4th 1004, 1011 [where party "cannot use the simple enforcement mechanism provided by section 664.6," he can "file a new action for breach of the settlement agreement"].) The availability of a breach-of-contract action for which the plaintiff will not have any shot at fee-shifting is cold comfort, indeed.

Covert's statement, cited by FCA, that "valu[ing] a judgment at a significantly higher amount than a dismissal" "would cast doubt on all section 998 offers predicated on a dismissal without a judgment," and thereby undermine *Goodstein* (73 Cal.App.5th at p. 842, fn. 12) gets it backwards. *Goodstein* says that dismissal is a cognizable "judgment" under section 998, but *Goodstein* says nothing about a dismissal's *value* as compared to an actual judgment of liability and damages. As plaintiffs showed in their opening brief and above, the nonmonetary aspects of a dismissal lower its value vis-à-vis a judgment of liability. (AOB 74–76.) It would be absurd to declare this less true in service of preserving the integrity of a Court of Appeal decision that never considered or decided the issue.

Finally, FCA cites *Ajaxo, Inc. v. E*Trade Financial Corporation* (2020) 48 Cal.App.5th 129, 180—a case that has nothing to do with valuing a section 998 offer—to argue that this Court should affirm in any event because the trial court did not abuse its discretion. Yet this Court's review of the section 998 offer's value is de novo. (AOB 70–71, citing *Fassberg*, *supra*, 152 Cal.App.4th at p. 765 & *Martinez v. Eatlite One, Inc.* (2018) 27 Cal.App.5th 1181, 1184 [applying de novo review to favorableness determination].) No deference is owed to the trial court's determination.

***Third*: The ambiguous attorney fee provision lowers the value of the joint section 998 offer.** The offer of attorney fees "pursuant to Civil Code section 1794(d)" is fatally ambiguous, because it's unclear whether "the buyer prevails in

an action under" section 1794—as required for entitlement to fees under that section—when the buyer dismisses the action with prejudice. (See § 1794, subd. (d).) It's also unclear whether attorney fees incurred in connection with fee motion practice pursuant to the parties' settlement agreement's fee provision would be "incurred by the buyer in connection with the commencement and prosecution of [a section 1794] action." (*Ibid.*)

FCA's argument that the latter consideration is irrelevant under section 998, subdivision (c)(2)(A) (see RB 61), is meritless. That provision merely precludes adding actual postoffer costs to the value of the judgment in determining whether it is more favorable than the offer. (See, e.g., *Hersey v. Vopava* (2019) 38 Cal.App.5th 792, 798.) It does not preclude consideration of nonmonetary terms, like those challenged here, that tend to lower the face value of the offer.

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For the reasons stated, this Court should independently review the section 998 offer, with that offer's uncertain nonmonetary terms, and determine that the value of *FCA's portion* of the undifferentiated joint settlement offer did not exceed the value of plaintiffs' judgment against FCA.

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: September 6, 2022

WIRTZ LAW APC
Richard M. Wirtz
Amy R. Rotman
Jessica R. Underwood

KNIGHT LAW LLP
Roger Kirnos
Deepak Devabose

GREINES, MARTIN, STEIN & RICHLAND LLP
Cynthia E. Tobisman
Jeffrey Gurrola

By: */s/ Jeffrey Gurrola*

Attorneys for Appellants MELISSA A. WILLIAMS and GEOFFREY G. WILLIAMS

CERTIFICATION OF WORD COUNT

Undersigned counsel hereby certifies that pursuant to 8.204(c) of the California Rules of Court, the **Appellants' Reply Brief** uses a proportionately spaced Century Schoolbook 13-point typeface, including footnotes and contains **12,837 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: September 6, 2022

/s/ Jeffrey Gurrola

Jeffrey Gurrola

PROOF OF SERVICE

I am employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within action. My business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036, my email address is vworrell@gmsr.com.

On September 6, 2022, I served the foregoing document(s) described as: **APPELLANTS' REPLY BRIEF** on the interested party(ies) in this action, addressed as follows:

NIXON PEABODY LLP
Kristi J. Livedalen (SBN 155207)
klivedalen@nixonpeabody.com
300 South Grand Ave., Suite 4100
Los Angeles, CA 90071-3151
(213) 629-6000 / Fax: (213) 629-6001

NIXON PEABODY LLP
Jennifer A. Kuenster (SBN 104607)
jkuenster@nixonpeabody.com
Leon V. Roubinian (SBN 226893)
lroubinian@nixonpeabody.com
One Embarcadero Ctr, 32nd Floor
San Francisco, CA 94111-3600
(415) 984-8200 / Fax: (415) 984-8300

HORVITZ & LEVY LLP
Lisa Perrochet (SBN 132858)
lperrochet@horvitzlevy.com
Shane H. McKenzie (SBN 228978)
smckenzie@horvitzlevy.com
3601 West Olive Avenue, 8th Floor
(818) 995-0800 / Fax: (844) 497-6592

Attorneys for Respondent FCA US LLC

(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.

Executed on September 6, 2022, at Los Angeles, California.

(X) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Valerie Worrell
____
Valerie Worrell