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Supreme Court of California
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S279051

IN THE SUPREME COURT OF CALIFORNIA

MELISSA A. WILLIAMS, et al.,

Plaintiff and Appellant,

v.

FCA US, LLC, et al.,

Defendant and Respondent.

After a Decision by the Court of Appeal,
Third Appellate District
Case No. C091902

ANSWER TO PETITION FOR REVIEW

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SUPREME COURT OF CALIFORNIA

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case No: S279051

Case Name: Figueroa v. FCA US LLC

There are no interested parties.

/s/ Jeffrey Gurrola
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INTRODUCTION

Defendant and respondent FCA US LLC asks the Court to grant review of the Court of Appeal's published opinion (Opinion) addressing the same issue—and coming to the opposite conclusion—as *Niedermeier v. FCA US LLC* (2020) 56 Cal.App.5th 1052, which is currently pending before this Court.

Plaintiff agrees that a grant-and-hold order would be appropriate, albeit solely on the ground that the Opinion expressly disagreed with *Niedermeier*'s creation of a trade-in offset found nowhere in the Song-Beverly Act (the Act). In so doing, the Opinion agreed with and built upon the reasoning of *Figueroa v. FCA US, LLC* (2022) 84 Cal.App.5th 708 (review granted Feb. 1, 2023), likewise rejecting *Niedermeier*. As it did in *Figueroa*, the Court should enter grant-and-hold on this limited ground.

On the other hand, the Court should reject FCA's request to render the Opinion non-citable while *Niedermeier* is pending—just as it rejected FCA's identical request in *Figueroa*. For one, the request is procedurally improper, because depublication requests "*must not* be made as part of a petition for review, but by a separate letter to the Supreme Court not exceeding 10 pages." (Cal. Rules of Court, rule 8.1125(a)(2), italics added.) It fails on the merits, too: The Opinion meets nearly every criterion for publication—including by solidifying a split on an important issue. It should remain citable for its persuasive value while *Niedermeier* is pending.

As it did when petitioning for review of *Figueroa*, FCA openly attempts to use its Petition for Review to supplement its briefing in *Niedermeier*. This Court should reject that tactic here as it did in *Figueroa*. Indeed, FCA's merits arguments aren't just improper; they're wrong. As the Court of Appeal rightly found, the Song-Beverly Act's replacement and reimbursement provisions contain no trade-in offset (*Williams v. FCA US LLC* (2023) 88 Cal.App.5th 44, 775–786) and under the plain language of the statute "[t]he buyer need not own or possess the defective vehicle in order to avail himself, herself, or themselves of these remedies" (*id.* at pp. 776, 783). FCA's arguments all depend on writing words into the statute that simply aren't there.

The *Niedermeier* record also shows that FCA is among "the manufacturers with the highest number of lemons," the "long[est] history of failing to comply with consumer protection and public safety laws," and the most lemon-law cases filed against it. (Consumers for Auto Reliability and Safety's Amicus Brief in Support of Petitioner in *Niedermeier v. FCA US LLC*, review granted Feb. 10, 2021, S266034 ("CARS's Amicus Brief"), 2021 WL 6423932 at pp. 11-12.) FCA cannot build itself a legacy of wronging its customers and then come crying to this Court to depublish the legal embarrassments that flow from its own acts.

Finally, FCA's request for review of the separate issue presented in *Rodriguez v. FCA US, LLC* (2022) 77 Cal.App.5th 209 is meritless. The Opinion never reached the issue, and there is nothing for this Court to review.

The Court should enter a grant-and-hold in light of *Niedermeier* only, leaving the Opinion published and citable.

STATEMENT OF THE CASE

The Opinion properly states the factual background and procedural history, drawing all inferences in favor of the presumptively correct jury verdict. (See *Jameson v. Desta* (2018) 5 Cal.5th 594, 609.)

Plaintiffs and appellants Melissa and Geoffrey Williams purchased a certified pre-owned truck manufactured by respondent FCA. (*Williams v. FCA US LLC* (2023) 88 Cal.App.5th 765, 772.) Plaintiffs "purchased the truck for $54,362.48, providing a $5,000 down payment and financing $39,530.60 at a finance charge of $9,831.88." (*Ibid.*)

The truck developed substantial problems requiring repeated visits to an FCA-affiliated dealership, which failed to correct the issues. (*Williams*, *supra*, 88 Cal.App.5th at pp. 772–773.) When, after repeated failed repair attempts, plaintiffs asked the dealership to buy back the lemon vehicle as a trade-in, the dealership refused. (5-RT-505.) Fed up, plaintiff Geoffrey Williams took the lemon to a nearby GMC dealership, which accepted the vehicle as a trade-in and credited plaintiffs $29,500 toward a new GMC truck. (5-RT-509; see *Williams*, *supra*, 88 Cal.App.5th at p. 773.)

Plaintiffs sued FCA. Over plaintiffs' objections, the trial court modified the verdict form to allow the parties to argue—and the jury to decide—whether the Song-Beverly Act permitted an

offset for the $29,500 "credit" plaintiffs received for trading in the lemon. (*Williams*, *supra*, 88 Cal.App.5th at pp. 773–774.)

At trial, the jury found that (1) plaintiffs' "truck had defects covered by a written warranty"; (2) "the defects 'substantially impaired the vehicle's use, value, or safety'"; and (3) FCA "'or its authorized repair facility' failed to repair the truck in accordance with the written warranty 'after a reasonable number of opportunities to do so.'" (*Williams*, *supra*, 88 Cal.App.5th at pp. 772–773.) The jury also found that FCA "willfully failed 'to promptly replace or repurchase' the truck" as required by law and awarded civil penalties against FCA. (*Id.* at p. 773.)

Nonetheless, the jury applied FCA's proposed $29,500 offset to plaintiffs' damages and carried that offset over into the civil penalty it awarded as a result of FCA's willful refusal to abide by its Song-Beverly Act obligations. (*Williams*, *supra*, 88 Cal.App.5th at pp. 771, fn. 2, 774, 786.) Because the actual damages were improperly reduced, FCA obtained a multiplied benefit since the jury was limited to the maximum civil penalty it could award to adequately punish and/or deter FCA's willful violation. The trial court entered judgment for plaintiffs in the amount of $46,716.54, which was comprised of $15,572.18 in actual damages and a $31,144.36 penalty. (*Id.* at p. 774.) Plaintiffs moved for a new trial on the basis that the jury impermissibly applied a trade-in offset to plaintiffs' damages, which rendered the damages inadequate as a matter of law. (*Ibid.*)

Plaintiffs appealed, and the Court of Appeal reversed. The court rejected the *Niedermeier* opinion currently under review by this Court and agreed with—and built upon—the *Figueroa* opinion that holds the Act's plain language leaves no room for the application of a trade-in offset. (*Williams*, *supra*, 88 Cal.App.5th at pp. 775–786.) Following FCA's petition for rehearing, the Court of Appeal modified its opinion, and FCA petitioned this Court for review.

ARGUMENT

This Court should grant review pending resolution of the *Niedermeier* case and, in so doing, leave in place the Court of Appeal's thorough and well-reasoned Opinion for its relevance both to the *Niedermeier* issue and to the standards for granting motions for a new trial.

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

A. Entering a grant-and-hold order on the existence of an unenumerated resale or trade-in offset is appropriate, pending this Court's decision in *Niedermeier*.

This Court is set to weigh in on *Niedermeier* soon, as that matter is fully briefed and awaiting argument. The Court of Appeal in this case expressly joined *Figueroa* in disagreeing with *Niedermeier*'s creation of an unenumerated trade-in offset in Song-Beverly cases. Specifically, the Court of Appeal was

"unpersuaded [by] and disagree[d] with the *Niedermeier* court's analysis" because:

- As demonstrated by this Court's opinion in in *Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th 966, 972–975, "the phrase 'actual price paid or payable' in the restitution provision means the cost to obtain the vehicle *at the time of purchase*, whether that cost is paid at the time of purchase or payable thereafter," and, thus, "[t]he subsequent trade-in value (or sale) of a defective vehicle thus cannot form part of the 'actual price paid or payable'";
- The Court of Appeal "ha[d] 'strong reasons to doubt' that the restitution mentioned in the restitution provision 'is the plain vanilla common law kind' rather than the narrower, more specialized concept *expressly defined* in the statute," because "[a]lthough the Legislature used the word 'restitution' in section 1793.2, subdivision (d), it clearly defined *that term* in the restitution provision by stating it is 'an amount equal to the actual price paid or payable by the buyer,' a calculus that includes and excludes specified costs," and courts "only assume that the common law meaning of a word was intended if the term has not otherwise been defined by statute";
- The legislative history associated with the 1987 amendment to add "lemon law" provisions to the Act repeatedly refers to the obligation of the "'manufacturer or its representative to replace the vehicle or make restitution, *as specified*,'" which "indicates the Legislature

wanted to specify *how* restitution awards had to be calculated as to defective vehicles";

- *Niedermeier*'s and FCA's reliance on *Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32, is misplaced because *Mitchell* "used the general intent behind common law restitution to bring the Act's pro-consumer remedial 'benefits into action,'" while "[h]ere, in contrast, [FCA] seeks to use the equitable common law doctrine of restitution to *defeat* the plain language of the restitution provision";
- The Act is clear that it does not require that a consumer have a vehicle to return "where, as here, the manufacturer elects not to reacquire the vehicle and the buyer is forced to seek legal intervention";
- Reading a trade-in offset into the restitution provision would do nothing to promote the Act's labeling and notification requirements because "[t]he defective vehicle has already been sold," but would instead allow FCA to "reduc[e] its restitution obligation while obviating the responsibility it would otherwise have if it had reacquired the defective vehicle"; and
- "Crediting the manufacturer with the trade-in value of or sale proceeds received for the defective vehicle to reduce the buyer's remedy under the restitution provision would create a disincentive to reacquire or promptly replace or provide restitution for a defective vehicle," and "[s]uch an

interpretation would, in essence, reward manufacturer for declining or not offering to reacquire the vehicle."

(*Williams*, *supra*, 88 Cal.App.5th at pp. 777–785, original italics.)

Although plaintiffs would naturally prefer finality to their action, plaintiffs recognize the utility of FCA's request for a grant-and-hold—specifically, that the Court should grant review and then defer ordering further action in this matter until after the Court decides *Niedermeier*. The Court need not consider FCA's further arguments for review as a result, many of which are thinly-veiled attempts to supplement its arguments after the close of briefing in *Niedermeier*.

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

FCA acknowledges that "this Court has already twice deemed the issue presented in *Niedermeier* and *Figueroa* to be review-worthy," and that the virtually identical issue here is therefore review-worthy too. (See Petition 16.)

Yet, as it did when petitioning for review in *Figueroa*, FCA spends several pages raising unfounded policy arguments as to why the issues presented by this case are of statewide import. (Petition 17-25.) The Court can and should ignore arguments that plainly have no bearing on the Petition for Review.

FCA's policy arguments must be considered in context—specifically, the context of FCA's documented history of operating its business in open defiance of the Act. FCA "is the one who

undercuts the labeling and notification provisions of the Act when it declines to, refuses to, or does not reacquire the defective vehicle after the buyer complies with his, her, or their obligation under the Act to deliver the defective vehicle to [FCA] or its authorized representative." (*Williams*, *supra*, 88 Cal.App.5th at pp. 784–785.) And it is FCA that "seeks to benefit by receiving a credit against its restitution obligation under the Act rather than reacquiring the vehicle." (*Id.* at p. 785.)

Thus, to the extent FCA is once again raising public policy arguments to supplement its briefing in *Niedermeier*, such an attempt is not just improper; it is baseless. Specifically, FCA speculates that plaintiffs often bring Song-Beverly suits even after the manufacturer has made and the plaintiff has "*reject*[*ed*] a full refund offer" in hopes of recovering more under the Act. (See Petition 17, original italics.) FCA then argues that a trade-in offset would increase litigation—and bypass the Act's labeling requirements—by allowing a plaintiff to "recover *more* than his or her equity interest in a vehicle" after reselling the vehicle while waiting for relief. (See Petition 18.)

FCA is wrong on all counts—even assuming that its public-policy concerns were relevant to interpreting the Act's mandate that manufacturers pay prevailing consumers the price paid or payable on the car. (*Williams*, *supra*, 88 Cal.App.5th at p. 782 [FCA's proposed interpretation would "*defeat* the plain language of the restitution provision," original italics].)

First, the proliferation of Song-Beverly cases is *not* caused by consumers who bring claims even where the manufacturer has

already offered a full refund in hopes to recover even more in a case that they may lose and may take years to resolve. (See Petition 17 [speculating, without citation, that there are "many cases filed after a consumer *rejects* a full refund offer," original italics].)[1] After all, a plaintiff only has a Song-Beverly claim where the manufacturer has *already violated the Act* by failing to "promptly replace the new motor vehicle" or provide restitution—that is, the "price paid or payable" on the car. (Civ. Code, § 1793.2, subd. (d)(2).) No reasonable plaintiff nor the attorneys representing them *on contingency* would file a case with no prospect of recovery or an award of reasonable attorney's fees under the Act.

In truth, Song-Beverly cases proliferate because certain manufacturers have taken the "view that it is better to vigorously contest each case regardless of its merit, hoping to force lemon owners to trade in their defective vehicles at a substantial loss and up-sell them into an even more expensive transaction (perversely making an additional profit by producing and failing to fix a lemon) and dissuade future litigation." (CARS's Amicus Brief, *supra*, 2021 WL 6423932 at pp. 11-12.)

FCA is at the head of the pack, among "the manufacturers with the highest number of lemons," the "long[est] history of

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[1] Plaintiffs cite only a piece by Hyundai Motor America's counsel that repeats one defense firm's claim that the number of Song-Beverly cases has increased since 2015. (See Petition 17, citing Vanderford & Bulkina, *Time to end systematic abuse of California's lemon law*, Daily J. (July 27, 2020).)

failing to comply with consumer protection and public safety laws," and the most lemon law cases filed against it. (CARS's Amicus Brief, *supra,* 2021 WL 6423932 at pp. 11-12.) "FCA operates in open defiance of the Song-Beverly Act. It considers promptly repurchasing, repairing, labeling as a lemon and selling the vehicle at a deep discount with a one-year warranty, a losing proposition." (*Figueroa*, *supra*, 84 Cal.App.5th at p. 714.)

Second, allowing an extra-statutory damages offset would *increase* Song-Beverly litigation, undermine the Act's labeling requirements, and gift FCA an unjustified windfall. After all, when a manufacturer complies with the Act by promptly buying back a lemon, it can only re-sell it (if at all) at a "deep discount" after (1) "labeling [it] as a lemon" and (2) repairing it so that it complies with any applicable warranties. (*Figueroa*, *supra*, 84 Cal.App.5th at p. 714; see Civ. Code, § 1793.23, subd. (c) [Act's rebranding provisions].) Letting manufacturers reduce their exposure by simply waiting out the consumers who bought their lemon vehicles would both incentivize them to defy the Act and reward them for doing so—compelling consumers to turn to the courts for relief as a result.

As long as FCA keeps manufacturing and selling lemon vehicles, the only thing it can do to avoid the obvious and logical result—lemon law actions—is to change course and begin abiding by the Act's requirement that it promptly repurchase and rebrand those lemons. Unless and until it does so, it cannot cry foul at the fact that the customers it has wronged keep suing it—and winning. The Court of Appeal's Opinion, like *Figueroa* before

it, applies the plain language of the Act in furtherance of its central policy purpose.

C. FCA's depublication request is procedurally defective and, at any rate, wholly without merit.

FCA asks the Court to order the Opinion to be depublished, and therefore non-citable, while *Niedermeier* is pending. (Petition 20.) The Court should reject this request.

First, the request is procedurally defective. Under the rule governing requests for depublication of published opinions, any "request *must not be made as part of a petition for review*, but by a separate letter to the Supreme Court not exceeding 10 pages." (Cal. Rules of Court, rule 8.1125(a)(2), italics added; see Eisenberg et al., Cal. Practice Guide Civil Appeals & Writs (The Rutter Group 2022) ¶ 11:180.4 ["The request *cannot be made as part of a petition for review*," original italics].)[2] FCA did not file any such letter, but instead argued for depublication in its petition for review, contrary to the express terms of rule 8.1125(a)(2). (Petition § I.C.) Reading the rules to permit FCA's request "destroys the mandatory force of the word 'must'" (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1055) and renders rule 8.1125(a)(2) meaningless.

Additionally, because "[t]he request must be delivered to the Supreme Court within 30 days after the decision is final in the Court of Appeal" (Rule 8.1125(a)(4)), and the February 1,

[2] All rule citations are to the California Rules of Court.

2023 Opinion became final on March 3, 2023 (rule 8.264(b)(1)), the time in which to request depublication has now passed.

In any event, the Opinion should remain published and citable. The courts of appeal should have the benefit of the Opinion's thoughtful analysis of why the *Niedermeier* court got it wrong.

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

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

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

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

Finally, the Opinion should stay citable for its application to a statutory scheme totally unrelated to the Act and to the

Niedermeier issue: Code of Civil Procedure section 657, subdivision (5), empowering a trial court to order a new trial on grounds of "inadequate damages." The Opinion reaches the commonsense—yet rarely stated—conclusion that the failure to follow a statutory damages formula renders damages inadequate as a matter of law. (*Williams*, *supra*, 88 Cal.App.5th at p. 786.) It thereby "reaffirms a principle of law not applied in a recently reported decision." (Rule 8.1105(c)(8).)

2. The Court should not depublish the opinion based on FCA's novel—and baseless—argument that in section 1793.2, subdivision (d)(2)(B) statutory restitution provision somehow "incorporates" the Commercial Code.

Apparently electing to use each new petition for review to advance novel arguments against reversal in *Niedermeier*, FCA argues that the Court should depublish because—even though section 1793.2 explicitly lays out the only statutory restitution formula applicable to cases like this one—*other statutes* within the Song-Beverly Act refer to the Commercial Code. (Petition 20–21.)

As the Court of Appeal laid out in detail, the plain language of the Act, together with the Legislative history, make abundantly clear that the "restitution" in cases like this one is restitution "as specified" in section 1793.2, subdivision (d)(2)(B). That subdivision makes no reference whatsoever to the Commercial Code. The damages provision in section 1794 expressly provides that the measure of damages shall include

both "the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2" *and* damages as provided in certain provisions of the Commercial Code. (Civ. Code, § 1794, subd. (b); see § 1790.4 ["The remedies provided by this chapter are cumulative"].)[3] The provisions of the Commercial Code cannot be used to rewrite and undercut the reimbursement provisions of section 1793.2, subdivision (d)(2)(B), because the Act prevails over any conflicting provision of the Commercial Code. (§ 1790.3; see *Williams*, *supra*, 88 Cal.App.5th at p. 786, fn. 9 [applying the plain language of section 1793.2, subdivision (d)(2)(B) and declining to consider FCA's argument, raised for the first time in its petition for rehearing and found nowhere in the Act, that the Commercial Code should apply where a buyer cannot return the lemon vehicle].)

3. The Court should not depublish the Opinion based on the conclusion—likewise reached in the still-published *Figueroa* case—that a buyer need not still possess the vehicle in order to obtain the restitution remedy.

FCA then devotes several pages to arguing that the Court of Appeal was "erroneous" in stating that "'[t]he buyer need not own or possess the defective vehicle in order to avail himself, herself, or themselves of these [replacement or restitution]

[3] All undesignated statutory references are to the Civil Code.

remedies.'" (Petition 24, quoting *Williams*, *supra*, 88 Cal.App.5th at p. 776, FCA's brackets.)[4]

In FCA's view, buyers can avail themselves of the Act's replacement or reimbursement remedies as set forth in section 1793.2, subdivision (d) *only if* the buyer still possesses the defective lemon vehicle—even though retaining possession is *not* required by that subdivision *or any other part of the Act*. On the other hand, the notion that a wronged buyer need not remain in possession of the lemon vehicle is indispensable not only to the Opinion in this case, but also to *Figueroa* and to Ms. Niedermeier's argument now pending before this Court.

In *Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187, 190 the manufacturer argued that the buyer "was not entitled to any of the remedies provided by the Act because she no longer possessed the vehicle." Notably here, when the trial court reached the opposite conclusion—that the buyers *need not* possess the vehicle to avail themselves of the Act's replacement or restitution remedies—FCA called it "erroneous." (Petition 24.)

Here, the jury found that plaintiffs "afford[ed] the manufacturer a reasonable number of attempts" to repurchase

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[4] In connection with this argument, FCA cites the motion for judicial notice and related exhibits that it submitted to the Court of Appeal when petitioning for rehearing. (See Petition 23.) The Court of Appeal denied that motion, and FCA has not sought judicial notice in this Court. The Court should disregard FCA's reference to this material, of which it never sought judicial notice until *after* the Court of Appeal issued its opinion.

her lemon vehicle. (*Martinez*, *supra*, 193 Cal.App.4th at p. 191; see *Williams*, *supra*, 88 Cal.App.5th at pp. 772–773.) Under *Martinez*, no more "is necessary." (*Martinez*, at p. 191.) Not only is *Martinez*'s holding in line with the plain language of the Act, it's also consistent with the policy purpose, discussed in section I.B above, of compelling manufacturers like FCA to meet their obligations instead of mistreating their customers.

By its argument, FCA inherently seeks to take the *Niedermeier* offset and convert it into a 100 percent reduction of damages liability—a get-out-of-jail-free card for FCA and other manufacturers when a consumer can no longer rely on her vehicle while being ignored by FCA. FCA cannot escape that this is the logical and necessary result of the interpretation it advances.

FCA's argument is further undermined by the Court of Appeal's modification of the Opinion upon denial of rehearing. While at one point the Opinion stated broadly that "the subdivisions impose no affirmative obligation on the buyer to return the vehicle" (Typed Op. 17, italics omitted), the Court of Appeal removed that language. The Opinion now holds simply that no longer owning or possessing a vehicle will not bar recovery under the Act—not, as FCA claims, that under no circumstances will a successful plaintiff ever need to return a vehicle in their possession.

Again, both *Figueroa* and now this Opinion have found, this is a situation of FCA's own making. If FCA acts promptly to satisfy its obligations under the Act, then logically a buyer will never be out of possession of the vehicle. A buyer who offloads

the vehicle before any buyback obligation arises won't have recourse under the Act. On the other hand, if FCA promptly offers to reimburse the buyer, it's unlikely any jury will find FCA liable for violating its obligations. It is only FCA's *unlawful delay* that exposes it to Song-Beverly Act liability and the risk that it won't receive the lemon back in return.

FCA alone is responsible for its calculated, widespread refusal to honor its legal obligations—and FCA alone must bear the risk that, because of its delay, it will not receive a vehicle after it loses at trial.

II. The Court Should Deny Review On The Question Presented In The *Rodriguez* Case Because The Court Of Appeal Never Reached The Issue And There Is Thus Nothing To Review.

Finally, FCA argues this Court should likewise grant review of the Opinion based on the Court's pending review of *Rodriguez v. FCA US, LLC* (2022) 77 Cal.App.5th 209, in which the Court of Appeal found that the Act does not apply to previously owned vehicles under a manufacturer's warranty (e.g., certified pre-owned vehicles) notwithstanding language in the Act stating that it does.

Together, *Niedermeier* and *Rodriguez* illuminate FCA's coordinated, two-pronged (at least) effort to gut the Song-Beverly Act:

- **First**, in *Niedermeier*, FCA asks this Court to permit a trade-in offset that would allow FCA and other manufacturers to (1) out-wait their customers until those customers trade in their lemon vehicles and then (2) apply an offset to reduce damages by any amount received for the lemon, and then receive a multiplied benefit in the event of a reduced cap on civil penalties. FCA benefits from its willful defiance of its statutory obligations both by reducing its damages and avoiding the need to accept and rebrand lemons.

- **Second**, in *Rodriguez*, FCA asks this court to ensure that after FCA gets the liability discounts on those *Niedermeier* lemons that are sold or traded in without being rebranded, FCA categorically will never be liable under the Song-Beverly Act when those unbranded lemons are sold to unsuspecting customers—even as certified pre-owned vehicles under warranty.

Insofar as FCA may groan about the possibility it may be liable twice on the same car, that potentiality is eliminated if FCA would simply adhere to the Act's clearly established affirmative duty by promptly making a legally compliant offer and would stop acting in "open defiance" of the Act.[5] FCA argued

[5] Although FCA makes claims about litigation after it makes a repurchase offer, FCA fails to mention that its so-called repurchase offers often cheat the consumer out of their damages by attempting to exact deductions that are not legally permitted —a practice evidenced by FCA's conduct in the case and its arguments made on appeal.

at the Court of Appeal that *Rodriguez* establishes that plaintiffs suffered no prejudice. (*Williams*, *supra*, 88 Cal.App.5th at p. 786.) The Court of Appeal expressly declined to reach the *Rodriguez* issue on the ground that, under rule 8.1115(e)(1), *Rodriguez* has no binding or precedential effect. (*Ibid.*) Because the Opinion did not reach the *Rodriguez* issue, review is not "necessary to secure uniformity of decision or to settle an important question of law" or for any other recognized ground. (Rule 8.500(b).) This Court should not grant review of this matter in connection with *Rodriguez*.

CONCLUSION

The Court should enter a grant-and-hold order on the offset issue only, and defer any further action until after the Court decides *Niedermeier*. In the meantime, the Opinion should remain published and citable.

Date: April 14, 2023

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this Answer to Petition for Review contains **4,669 words**, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: April 14, 2023 *\/s\/ Jeffrey Gurrola*

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048.

On **April 14, 2023**, I served the foregoing document described as: **Answer to Petition for Review** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

BY E-SERVICE VIA TRUEFILING: All participants in this case who are registered TrueFiling users will be served by the TrueFiling system.

BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on **April 14, 2023**, at Los Angeles, California.

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

Chris Hsu

Chris Hsu

SERVICE LIST

By E-service via Truefiling:

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