4th Civ. No. E078783

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT, DIVISION TWO**

SHAHID IVAR and SARAH IVAR,

Plaintiffs and Appellants,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.,
and HOEHN OF TEMECULA, INC.,

Defendants and Respondents.

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Appeal from the Riverside Superior Court
Case No. MCC2001653
Honorable Craig G. Riemer

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# APPELLANTS' OPENING BRIEF

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**Court of Appeal**
**State of California**
**Fourth Appellate District**

## CERTIFICATE OF INTERESTED ENTITIES

Court of Appeal Case No: E078783

Case Name: Ivar v. Volkswagen Group of America, Inc.

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

[ ] Interested entities or parties are listed below:

| Name of Interested Entity or Person | Nature of Interest |
|---|---|
| 1. | |
| 2. | |
| 3. | |

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## INTRODUCTION

Under Code of Civil Procedure section 998, defendants offered to pay plaintiffs "the total sum of **$69,500.00**" to settle their Song Beverly Act (lemon law) case. (AA-14, original boldface.) The 998 offer stated that part of those funds would cover "any lease payoff owed by Plaintiffs," and the remainder was to go directly to plaintiffs. (AA-15.) The term "lease payoff" is neither defined in the 998 offer, nor defined in the lease itself.

Thus, the plain language of the 998 offer made clear that defendants would pay a total of $69,500 in value to plaintiffs, a portion of which would go toward the amounts that plaintiffs still "owed" on the lease at the time the section 998 settlement was executed—namely, the $7,669.62 in outstanding lease payments and the lease-end disposition fee that plaintiffs would be charged at the natural end of the lease term.

But after plaintiffs accepted the offer, defendants newly claimed that they had only agreed to pay $69,500 after that amount was reduced by *nearly half* so that *defendants* could terminate the lease early and purchase the car *for themselves* before the lease's natural end.

The trial court credited defendants' view, denying plaintiffs' motion to enforce the settlement. This was error. The 998 offer's plain text, the context in which the parties' settlement arose, the parties' performance of the settlement agreement, and all other principles of contract interpretation mandate this result.

***The plain text of the settlement agreement.*** The section 998 offer that plaintiffs accepted states that defendants

"will pay Plaintiffs the total sum of **$69,500.00**," literally bolding that number. (AA-14, original boldface.) The offer states that a portion of that sum would be used to cover "any lease payoff owed by Plaintiffs" for the vehicles. (AA-15.) The only reasonable reading of this phrase—"any lease payoff owed by Plaintiffs"—is that it refers to what plaintiffs *necessarily* were obligated to pay under the lease terms when the 998 offer was executed. Thus, it referred to the remaining $7,669.62 that plaintiffs would have "owed" on completion of the lease (namely, the still-outstanding lease payments for the months that plaintiffs had not yet paid).

Nothing in the 998 offer's text supports defendants' contrary reading. The offer does not state that the "lease payoff owed by Plaintiffs" includes the cost *for defendants* to *later* terminate the lease early and to *later* purchase the car *for defendants' benefit* (rather than having it returned to the lessor as people generally do at the end of their lease terms).

Nor does defendants' interpretation make sense. After all, the lease itself didn't even require that plaintiffs purchase the car *for themselves* at the natural end of the lease (AA-84), let alone pay anything for defendants to purchase the car and to terminate the lease early to do so. (See *Crayton v. FCA US LLC* (2021) 63 Cal.App.5th 194, 204-205 (*Crayton*) [holding that plaintiffs may only recover outstanding lease payments—and not the amount to purchase a car under a lease that, like this one, only makes the car's purchase *an option*].) Amounts *for defendants* to terminate the lease early and to buy the car *for defendants* thus cannot comprise the "lease payout *owed by Plaintiffs*."

***The context of the agreement: an accepted 998 offer.*** The context in which the settlement agreement was made buttresses that "any lease payoff owed by Plaintiffs" means only the $7,669.62 that plaintiffs had committed to pay under the lease. As is shown on its face, the settlement agreement arose from plaintiffs' acceptance of a section 998 offer. To be valid, a section 998 offer's value must be *readily ascertainable* to the plaintiffs. Here, the only possible reading of the offer's terms that achieves that end is plaintiffs': The settlement's value to plaintiffs would be $69,500 in that this entire amount would be used *for plaintiffs' benefit*. Some would go directly to them while the remainder would go to paying off the $7,669.62 that they necessarily would have had to pay under the lease anyway—i.e., the balance that appears on the face of the latest lease statement.

Defendants' interpretation, in contrast, prevents the 998 offer from having an even remotely ascertainable value to plaintiffs because its value would be $69,500 minus some *unspecified, unknown* amount that it cost to both pay off the lease *and* exercise an option to purchase the car ahead of the lease's end *for defendants' benefit*—an amount that is neither stated on the face of the section 998 offer, nor apparent from the lease.

In fact, defendants' position is that if plaintiffs wanted to know the amount of the deduction off of the $69,500, they had to call customer service of the leasing company who was neither a defendant nor involved in the 998 offer. An offer that requires the offeree to contact a third party to obtain information to try to divine its value to the offeree is *not* a valid offer under

section 998. Accordingly, in construing the section 998 settlement agreement's meaning here, no court could presume that this was what the parties intended for that provision to mean. The only reasonable construction is the one that makes the section 998 offer's value readily ascertainable to plaintiffs.

***The circumstances under which the settlement was made: a Song-Beverly case.*** That the settlement agreement does not require plaintiffs to buy the car for defendants (or to terminate the lease early to do so) is also dictated by the fact that the agreement resolves a Song-Beverly Act ("Act") case. The Act requires the *manufacturer* to repurchase a lemon vehicle after a case ends. The Act imposes no such obligation on a plaintiff-consumer. There is thus no possible reason to conclude that the parties settling this Song Beverly Act case would ever think that plaintiffs would have to use *their* settlement proceeds to pay for *defendants* to fulfill their statutory repurchase obligations—certainly where, as here, the Section 998 settlement never says that this is the case.

***The performance of the contract.*** The parties' performance of the contract compels the same interpretation, too. Shortly after agreeing to the settlement and in compliance with the agreement's terms, plaintiffs provided defendants with the amount that they understood to be the "lease payoff owed by Plaintiffs": the $7,669.62 they would necessarily have to pay under the lease. Plaintiffs told defendants that this was the amount they understood they needed to pay. Defendants did not object to this amount. Instead, they remained silent.

***Ambiguities must be construed against the drafter.***

The agreement's plain text, the rules governing section 998 settlements, the circumstances under which the settlement agreement was made, and the parties' performance of the contract are all strikingly consistent. Each demonstrates that defendants promised to provide plaintiffs with $69,500 in value—some in cash and the rest to pay off amounts "owed by Plaintiffs," not debts that *defendants* owed for *their own* purchase of the car before the lease's end. But at a minimum, each of these tools of construction indicates that the settlement agreement is reasonably susceptible to plaintiffs' interpretation. And if the agreement is ambiguous, then plaintiffs' interpretation must prevail—even assuming the section 998 settlement was *also* reasonably subject to defendants' reading (it is not). Simply put: Because defendants drafted the agreement, any ambiguities must be construed against them.

Nothing in the trial court's ruling dictates a different result. The one-paragraph ruling rejecting plaintiffs' motion to enforce the settlement does not examine the agreement's plain terms or the context in which the agreement was made. The ruling instead defers to the view of a single defense witness who was not involved in the settlement negotiations, and who simply opined about what a "lease payoff" refers to generally as between *manufacturers and financing entities*. He did not and could not opine regarding how the consumer plaintiff understood the phrase "lease payoff." His statements are inapposite. They

are not substantial evidence supporting the trial court's ruling and thus provide no basis for affirming it.

The Court should reverse.

## STATEMENT OF THE CASE

### I. Factual Background

In January 2020, plaintiffs and appellants Shahid and Sarah Ivar entered a three-year lease for a brand-new 2020 Audi Q5 for $25,419.05—comprised of a $5,750 payment at signing, an additional $19,721.88 in scheduled monthly lease payments and a $495 lease end disposition fee. (AA-9, 84.) The lease did not require that plaintiffs purchase the car at the lease's end. (AA-84.)

Snapshot Of The Lease (AA-84.)

CONSUMER LEASING ACT DISCLOSURES

| 2. Amount Due at Lease Signing or Delivery | 3. Scheduled Payments | 4. Other Charges (not part of your scheduled payment) | 5. Total of Payments |
|---|---|---|---|
| (Itemized in Item 6) | A. Your first monthly payment of $ 547.83 is due on 01/03/20, followed by 35 monthly payments of $ 547.83, due on the 3rd of each month. | A. Disposition fee if you do not purchase the Vehicle and we do not waive the fee under Item 25(II) $ 495.00 | (The amount you will have paid by the end of the Lease) |
| | B. Your single payment of $ N/A is due on N/A. | B. N/A $ N/A | |
| | | C. N/A $ N/A | $ 25419.05 |
| $ 5750.00 | C. The Total of your Scheduled Payments is $ 19721.88 | D. Total $ 495.00 | (2 + 3C + 4D − 5A3 − 6A4 − 6A5) |

Both the manufacturer, defendant Volkswagen Group of America, d/b/a Audi of America, Inc. ("Volkswagen Group") and the dealer, defendant Hoehn of Temecula, Inc., d/b/a Audi Temecula ("Hoehn") provided the Ivars with a warranty on the car that was supposed to assure that it would run without issue. (See AA-9 [discussing the express warranty provided by Volkswagen Group and the implied warranties provided by both defendants].)

But the car proved to be a lemon, facing transmission and electrical issues that left the car struggling to perform basic tasks, such as starting and stopping. (AA-9.)

### A. Plaintiffs sue defendants for Song-Beverly violations for which they stand to recover over $75,000.

Defendants could not fix the car in the three opportunities the Ivars provided to them. And although the Song-Beverly Act requires manufacturers to affirmatively provide consumers with a refund or a replacement for cars they cannot fix, Volkswagen Group refused to do so—even after the Ivars asked. (See AA-9.)

The Ivars sued defendants for Song-Beverly violations on this basis. (See generally AA-7-13.) They stood to recover over $75,000—$25,419.05 for the amount paid or payable on the lease contract for the car and up to $50,838.10 as a civil penalty imposed for willful Act violations, not including any prejudgment or postjudgment interest awarded. (See Civ. Code, §§ 1793.2, subd. (d) [providing prevailing consumers with the price paid or payable on the car], 1794, subd. (c) [for willful Act violations, providing for a civil penalty of up to two times the amount of actual damages]; *Crayton*, *supra*, 63 Cal.App.5th at p. 204 [interpreting the amount paid or payable on a leased car as "'all amounts [the plaintiff] became legally obligated to pay when [he] agreed to [lease] the [vehicle]'"].)

The Ivars also stood to recover the costs, expenses, and fees that they accrued in litigating their case through trial. (Civ. Code, § 1794, subd. (d) ["If the buyer prevails in an action under this section, the buyer shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably

incurred by the buyer in connection with the commencement and prosecution of such action"].)

### B. Defendants serve a section 998 offer to "pay Plaintiffs the total sum of $69,500.00." Some of that amount would go cover amounts "owed by Plaintiffs" under the lease, and the remainder would go directly to plaintiffs.

Facing the prospect of a $75,000-plus judgment, an award covering plaintiffs' costs, expenses, and fees, plus years of litigation, defendants made plaintiffs an offer to compromise "[p]ursuant to Code of Civil Procedure Section 998." (AA-14.)

Defendants promised to "pay Plaintiffs the total sum of **$69,500.00** in satisfaction of all claims for damages and interest (including pre-judgment and post-judgment interest)." (AA-14, original boldface.)

Screenshot of the Section 998 Offer (AA-14.)

1. Defendants, jointly and severally, will pay Plaintiffs the total sum of **$69,500.00** in satisfaction of all claims for damages and interest (including pre-judgment and post-judgment

Part of the $69,500 paid to plaintiffs would cover "any lease payoff owed by Plaintiffs [to VW Credit] for the 2020 Audi Q5 that is the subject of this action." (AA-15.) And the remainder would go directly to plaintiffs. (*Ibid.*)

Screenshot of the 998 Offer (AA-15, highlighting added.)

to the lien holder as detailed in paragraph 6, below, *i.e.*, Defendants' joint and several offer of $69,500.00 is *inclusive* of any lease payoff owed by Plaintiffs for the 2020 Audi Q5 that is the subject of this action (the "Subject Vehicle"). From the above-referenced total sum to be paid to

Within 14 days of accepting Defendants' Offer to Compromise, plaintiffs were to either (a) provide defendants with "information and documents to facilitate payoff of any outstanding lease obligation on the Subject Vehicle, and transfer of title," including the "current payoff amount" and "an executed authorization for lease payoff and release/transfer of title," among other things—or to (b) "confirm in writing" that there was "no lease payoff." (AA-15.)

The Section 998 offer also included certain provisions that apply based on whether or not plaintiffs were still in possession of the vehicle.

"If Plaintiffs ha[d] not [already] sold, traded," or otherwise disposed of the Subject Vehicle, they were to "transfer possession of the Subject Vehicle" to defendant Volkswagen Group or its designee and "w[ould] execute such documents as are legally necessary to transfer possession of and title to the Subject Vehicle to [Volkswagen Group] or its designee." (AA-15-16.)

And if they had sold or otherwise disposed of the car, on notice of that fact, defendants were obligated to provide plaintiffs with the "full payment of the amount set forth in paragraph 1"

(AA-16)—that is, $69,500 less the "lease payoff owed by Plaintiffs" (AA-14-15).

By making a $69,500 section 998 offer, defendants ensured that they would settle the case in its entirety (here just weeks into the litigation) or if rejected, that the offer would protect defendants from paying any costs and attorneys' fees plaintiffs accrued after the offer was made if plaintiffs failed to achieve a more favorable judgment or award at trial. (See Code Civ. Proc., § 998, subd. (c).)

### C. Plaintiffs accept defendants' section 998 offer and tell defendants that they expect to pocket $61,830.38—$69,500 minus $7,174.62 in outstanding monthly lease payments and a $495 lease end disposition fee.

Plaintiffs accepted defendants' section 998 offer. (AA-17.)

In execution of the terms of the resulting section 998 settlement agreement, plaintiffs provided defendants with information to facilitate payment of the lease payoff—including the amount they understood to be "the lease payoff owed by Plaintiffs" in connection with the leased car: the $7,669.62 balance reflected on the lease statement (after accounting for two more recent payments). (See AA-15 [requiring plaintiffs to provide defendants with the "current payoff amount"]; 39, 118 [plaintiffs identifying $7,669.62 as the "lease payoff"].)

Defendants did not contest plaintiffs' interpretation or otherwise respond to plaintiffs' email. (See generally AA-118-120 [including plaintiffs' email to defendants without a response], 39-41, 115-116 [declaration from each party's counsel walking

through correspondence between the parties, without reference to any response to this email].)

Hearing no objections, plaintiffs then transferred possession of the subject vehicle to Volkswagen Group and completed a Vehicle Reassignment and Transfer Form on November 30, 2021, expecting $61,830.38 in return—again, the difference between the $69,500 settlement amount and the $7,669.62 that defendants had apparently not contested as the lease payoff amount. (See AA-39-41, 74.)

### D. Defendants newly claim that the lease payoff actually also includes the amount necessary for defendants to buy and take possession of the leased car—in effect, requiring plaintiffs to buy the car and give it to defendants.

Weeks later, however, defendants wired the Ivars a check for $36,682.46—providing no explanation for why they wired just over half of the $61,830.38 the Ivars had expected to receive. (AA-40, 116.)

The Ivars immediately objected that defendants must have made some mistake. (AA-77.) The Ivars reiterated to defendants what they had been stating for weeks—they were entitled to $61,830.38, the difference between the $69,500 and $7,669.62, the "lease payoff owed by Plaintiffs for the 2020 Audi Q5." (See AA-77 [plaintiffs' letter objecting to wired amount], 39, 118 [plaintiffs' prior communications weeks earlier that the lease payoff was $7,669.62].)

Defendants initially responded with assurances that they were "tracking down the payment information" so they could "sort this out . . . shortly." (AA-80.)

Defendants later insisted, however, that they had wired the correct amount. (AA-91.) They claimed that the lease payoff included the amounts to "pay off the lease *and take title of the vehicle*," which defendants described as a "settlement term[]." (AA-91, italics added.)

Defendants also expressed confusion as to how plaintiffs "could be surprised" that the lease payoff would include the amount necessary for defendants to purchase the leased car (AA-89)—notwithstanding the several communications plaintiffs had sent for weeks expressing just that (AA-39 [outlining communications], 53, 118 [October 21, 2021 emails], 77 [December 3, 2021 letter], 79 [December 10, 2021 email].)

## II. Procedural History

### A. Plaintiffs move to enforce the section 998 settlement, arguing that the "lease payoff" comprises only amounts necessarily "owed by Plaintiffs" under the lease—not amounts to buy the leased car or an early termination fee that would be levied only for defendants' convenience.

The Ivars moved to enforce the parties' settlement agreement, seeking $25,147.92 in unpaid settlement funds and the 10% interest that necessarily accrues on those unpaid funds under section 998. (See AA-34, 36; Civ. Code, § 3289, subd. (b) ["If a contract entered into after January 1, 1986, does not

stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach"].)

The Ivars argued that, under the agreement, the "lease payoff owed by Plaintiffs" refers to the amount necessary to pay off the lease—here, $7,669.69—comprised of yet-to-be-paid monthly lease payments and a lease-end disposition fee. (See AA-32, 40, 84.) They argued that the "lease payoff owed by Plaintiffs" under the section 998 offer did not and could not include amounts for *defendants* to buy a *leased car*, when plaintiffs were under no obligation to buy that car under the lease *for themselves*—let alone *for defendants*. (See AA-15 ["lease payoff owed by Plaintiffs"], 33 ["The 'lease payoff,' that is continuously mentioned in the 998, is just that – the amount to pay off the lease. Plaintiff had no other obligation and specifically no obligation to buy the car"], 135.)

The Ivars added that when plaintiffs had initially provided them with their understanding of the payoff amount—as the settlement required of them—defendants "made no complaints that the amount stated was wrong." (AA-29, 135.)

Moreover, the Ivars argued, their interpretation had to prevail to the extent that any ambiguity existed in the agreement's terms, because defendants had drafted the agreement. (See AA-34-35, 135-136.)

Defendants disputed that the "lease payoff" referred to amounts plaintiffs necessarily owed under the lease. They argued that the "lease payoff" also included an early termination

fee for some unspecified amount—one that apparently changes based on "when the Lease is terminated"—and an unspecified amount *for defendants* to purchase and take title of the leased car. (AA-98, boldface omitted, 101-102; see AA-89 [Defendants' counsel: "It is unclear how you could be surprised by the breakdown of settlement funds as the 998 clearly requires transfer of title"].)

As support, defendants cited to a declaration from Mark Birmingham, a manager for the lessor, VW Credit Leasing, Ltd. ("VCI"), a Volkswagen-affiliate. (AA-100, citing AA-126 [Birmingham Declaration].)

Birmingham stated that if plaintiffs had wanted to know the amount of the lease payoff amount—and not the "Current Balance" (provided to them in VCI's correspondence to them)—plaintiffs needed to call customer service at VCI. (AA-126, ¶ 4.) He stated that "VCI does not (and is required by law not to) share any customer's financial information – such as account balance, payment history or lease/lien payoff quotes – with other[] persons or entities, including VWGoA, without the express written consent of the customer." (AA-126, ¶ 2.) But Birmingham's declaration then proceeded to discuss plaintiffs' financial information, without any indication that Birmingham asked plaintiffs for permission to do so. (See AA-125-126.)

Birmingham went on to declare that in connection with plaintiffs' lease termination, Volkswagen Group of America, Inc. asked VCI to pay off the total balance on vehicle—i.e., the amount for VCI to transfer ownership of the vehicle to

Volkswagen Group of America, Inc. (AA-126, ¶ 3.) He stated that the payoff amount is therefore $32,817.54, which includes the amounts for defendants to immediately buy and take title of the lease vehicle—and not just the "'Current [Lease] Balance,' which is only the amount remaining to be paid by the lessee(s), per the terms of the lease agreement, through the lease termination date." (AA-126, ¶¶ 3, 4.)

Neither Birmingham, nor anyone else at VW has ever even tried to explain how VW came up with this amount.

### B. The trial court denies the motion to enforce the section 998 settlement, and plaintiffs timely appeal.

In a one-paragraph tentative decision, the trial court indicated that it would rule in defendants' favor:

> "This is a motion to enforce a settlement agreement brought by plaintiff. The motion is denied. The terms of the settlement provided a recovery less the 'lease payoff amount.' Defendant has provided admissible evidence that the 'lease payoff amount' was $32,817.54. (See, e.g., Birmingham declaration, p. 3, | 13). There is no contradictory admissible evidence. Motion to Enforce Settlement denied."

(AA-141.)

At the motion hearing that followed, the Ivars urged the court not to rule based on Birmingham's declaration. They argued that Birmingham could not speak to what the lease payoff refers to *in the section 998 settlement* when he was neither a

party to the case, nor a party to the settlement. (1-RT-3.) The Ivars also asked that the court at least provide a statement of decision on the ruling. (1-RT-7.)

The court refused both requests, and on February 3, 2022, it formally ruled that its one-paragraph long tentative would "become the ruling of the court." (AA-141.)

The Ivars filed their Notice of Appeal thereafter, on March 31, 2022. (AA-143.)

## STATEMENT OF APPEALABILITY

The February 3, 2022, "order denying [plaintiffs'] motion to enforce [the] settlement is appealable as a final judgment." (*Wanke, Industrial, Commercial, Residential, Inc. v. Keck* (2012) 209 Cal.App.4th 1151, 1172, fn. 23.) It is also appealable as "an appealable collateral" order. (*United Pacific Ins. Co. v. Hanover Ins. Co.* (1990) 217 Cal.App.3d 925, 931, 940-942 [reaching this conclusion as to an order on motion to compel enforcement of settlement].)

The Ivars' Notice Of Appeal was timely filed on March 31, 2022 (AA-143), within the 60 days allowed by the California Rules of Court (Cal. Rules of Court, rule 8.104(a)).

## STANDARD OF REVIEW

This Court decides the meaning of the section 998 settlement agreement de novo. (See *Cooper Companies v. Transcontinental Ins. Co.* (1995) 31 Cal.App.4th 1094, 1100 [interpretation of a "written instrument[] is primarily a judicial function"; "Unless the interpretation of the instrument turns upon the credibility of conflicting extrinsic evidence, a reviewing court makes an independent determination of the (instrument)'s meaning"]; see also II.F, *post* [no extrinsic evidence relevant to interpretation of parties' section 998 offer].)

## ARGUMENT

### I. Legal Standard: The Court Must Construe The Section 998 Settlement Agreement To Give Effect To The Parties' Mutual Intentions In Light Of Its Plain Language And The Context In Which The Agreement Was Made.

This appeal turns on the meaning of the phrase "any lease payoff owed by Plaintiffs"—i.e., did that phrase refer to the amounts that the plaintiffs were necessarily required to pay under the lease, or did that phrase instead refer to additional amounts for defendants to purchase the car and to terminate the lease early? This is a classic question of contract interpretation. As such, the usual rules of contract interpretation apply. To wit:

"'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.' (Citation.) 'Such intent is to be inferred, if possible, solely from the written provisions of the contract.' (Citation.) 'If contractual language is clear and explicit, it governs.' (Citations.)" (*County of San Diego v. Ace Property & Casualty Ins. Co.* (2005) 37 Cal.4th 406, 415 (*County of San Diego*).) "[L]anguage in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract." (*Ibid*, internal citation and quotation marks omitted; see also Civ. Code, § 1647 ["A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates"].)

"If an asserted ambiguity is not eliminated by the language and context of the [contract], courts then invoke the principle

that ambiguities are generally construed against the party who caused the uncertainty to exist . . ." (*County of San Diego*, *supra*, 37 Cal.4th at p. 415, internal quotation marks omitted; see also Civ. Code, § 1654 ["In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist"].)

## II. The Section 998 Settlement Agreement Does Not Require Plaintiffs To Use The $69,500 Settlement Proceeds To Buy Defendants The Car.

The face of the settlement agreement requires defendants to pay plaintiffs $69,500 less whatever funds were necessary to pay off amounts that plaintiffs owed on the lease. The agreement did *not* require plaintiffs to use any part of the $69,500 amount to buy the car *for defendants* and to pay an early termination fee so that they could do so before the lease's natural end.

As we now show, in addition to the settlement agreement's plain language, the context in which the settlement agreement was made (i.e., it was an accepted section 998 offer to settle a Song-Beverly Act case) dictates the same result.

### A. The Agreement's Terms Are Clear And Unambiguous: Plaintiffs' $69,500 Settlement Proceeds Would Cover Amounts "Owed By Plaintiffs" Under The Lease—Not Amounts *Owed By Defendants* So That Defendants Could Buy The Car Before The Lease's Natural End.

The agreement plainly states that defendants "will pay *Plaintiffs* the total sum of **$69,500.00**"—even if some of that amount would go to the lessor to relieve plaintiffs of the "lease

payoff owed by Plaintiffs" for the subject vehicle. (AA-14-15, italics added, original boldface [Section 998 Settlement].)

There's only one reasonable way to interpret those terms: as a promise by defendants to pay the Ivars a "total" of "**$69,500.00**" in value—some in cash and the rest to pay off amounts "owed by Plaintiffs" under the lease when they entered the section 998 settlement, namely, any outstanding lease payments and the lease end disposition fee (that would be imposed at the natural end of the lease). (See AA-14-15.)

While the agreement anticipates that defendants would take title "[i]f Plaintiffs have not sold, traded, surrendered pursuant to lease termination, or donated the Subject Vehicle prior to the date Plaintiffs' counsel received Defendants' Offer to Compromise," the only obligation that it *imposes on plaintiffs* is to: (1) provide defendants with "the payoff information detailed in paragraph 4," (2) "transfer possession of the Subject Vehicle to VWGoA or it designee," and (3) "execute such documents as are legally necessary to transfer possession of and title to the Subject Vehicle to VWGoA or its designee." (See AA-15-16, ¶ 5.)

The agreement does not state that the Ivars would have to pay *for defendants* to immediately purchase the car (and to terminate the lease early to do so), using settlement funds that were supposed to go either directly *to plaintiffs* or to pay amounts *"owed by Plaintiffs*." (See AA-14-17, italics added.)

In fact, the agreement could not be read as imposing such an obligation, as it would yield absurd results. (See *Bill Signings*

*Truck, LLC v. Signs Family Limited Partnership* (2007) 157 Cal.App.4th 1515, 1521 ["Interpretation of a contract must be fair and reasonable, not leading to absurd conclusions," internal quotation marks omitted].) This is so because:

- The settlement agreement provides that defendants will pay plaintiffs $69,500 minus the lease payoff owed by plaintiffs, *regardless of whether they had already sold or otherwise disposed of the car before agreeing to the settlement*. (AA-16, ¶ 6.)
- However, the agreement's provisions requiring that plaintiff execute documents to transfer possession and title apply only if plaintiffs have not already "sold, traded, surrendered pursuant to lease termination, or donated the Subject Vehicle prior to the date Plaintiffs' counsel received Defendants' Offer to Compromise." (AA-15-16, ¶ 5.)
- Because their interpretation is based on the provisions requiring that plaintiffs fill out forms to transfer possession and title (AA-102), defendants' interpretation is thus that plaintiffs must use their settlement proceeds *to pay for defendants' purchase of the car* if and only if plaintiffs *had not already sold the car or otherwise disposed of it*.

That's an absurd result. After all, if plaintiffs had resold the car or otherwise disposed of it (after purchasing it, see AA-102, fn. 3), then defendants *would still* have the burden of tracking it down and repurchasing it—even now that this statutory obligation had become far more difficult to satisfy.

Indeed, a manufacturer successfully argued just that to convince the Court of Appeal in *Crayton* to hold that plaintiffs who lease cars are not entitled to the price necessary to purchase the car under the Song-Beverly Act. (See *Crayton*, *supra*, 63 Cal.App.5th at pp. 201, 206-207 [ruling in the manufacturer's favor on this issue after defendant argued "that the title branding and disclosure requirements of the Act did not require plaintiff to acquire title to the vehicle from Ally; instead, it was defendant's obligation to acquire the vehicle by paying the residual value directly to Ally"].)

The settlement agreement's terms are thus perfectly clear: Plaintiffs' obligation is to pay only the amounts *necessarily* "owed by Plaintiffs" under the lease at the time the section 998 settlement was executed. (AA-15.) This means the plaintiffs' outstanding lease payments and the *lease-end* termination fee that would be imposed on the lease's natural end. Plaintiffs were not required to use their settlement proceeds to pay for the amount that would only *later* be owed *after* defendants purchased the car (and terminate the lease early to do so, thereby also incurring an *early* termination fee, see § II.B.3, *post*).

Defendants' contrary interpretation fails. Neither the price to purchase a leased car for *defendants' benefit*, nor an early termination fee imposed only for *defendants' convenience* are amounts that were "owed *by Plaintiffs*" (AA-15, emphasis added)—that is, amounts that plaintiffs were *necessarily* obligated to pay under the lease at the time the parties entered the section 998 settlement. (See Statement of the Case § I.A,

*ante* [total amount owed by the lease encompassing amount due at signing, lease payments, and lease end disposition fee].) In fact, the lease is for a fixed term, so it doesn't even require that *plaintiffs* purchase the car *for themselves*. (AA-84.)

Below, defendants argued that the agreement itself contemplates that plaintiffs will cover (1) early termination, and (2) the purchase of the car. (See AA-101, 102.)

But there is no requirement anywhere on the face of the agreement that plaintiffs terminate the lease early, let alone that plaintiffs incur the cost of early termination—hence why defendants have never even tried to cite to any such contract provision. (Compare AA-101 [stating without explanation that "[t]here is no question that, to comply with their terms of the Settlement, Plaintiffs must have terminated their Lease early"] with AA-14-20 [Section 998 Settlement].)

Nor is there any basis to infer such a term. After all, as a section 998 settlement, the settlement agreement necessarily includes all "terms and conditions of the judgment or award." (See Code of Civ. Proc., § 998, subd. (b); § II.B.1, *post* [explaining that section 998's principles necessarily inform the interpretation of the section 998 settlement].) There's no room for defendants to add hidden or implied conditions to the settlement agreement, which defendants only sought to read into the 998 offer months after the Ivars accepted it. (See *Mostafavi Law Group, APC v. Larry Rabineau, APC* (2021) 61 Cal.App.5th 614, 624, fn. 6 ["Rabineau's attempt to introduce additional terms outside of the offer is inconsistent with the plain language of section 998,

subdivision (b), which requires the offer itself to 'contain[] the terms and conditions of the judgment or award'"].)

The plain language of the settlement agreement permits only one reading: The phrase "lease payoff owed by Plaintiffs" refers only to the amount that plaintiffs were legally obligated to pay under the lease when the section 998 settlement was entered, not amounts that would only *later be owed* because *defendants* wanted to purchase the car—something which the lease doesn't even require plaintiffs to buy for themselves.

### B. The Context Of The Settlement Agreement Mandates Plaintiffs' Interpretation Since It That Is The Only Interpretation That Makes The Terms Readily Ascertainable—A Prerequisite For A Valid Section 998 Offer.

#### 1. A valid 998 offer must have terms that make its value to the offeree readily ascertainable. The agreement here must be read against this backdrop.

The context of the parties' settlement agreement mandates plaintiffs' construction, as well. (See § I, *ante* [court must construe contract in light of context in which it was made].) As the face of the settlement makes clear, the agreement arose from *an accepted section 998 offer*. (See AA-14 [providing that defendants made the settlement offer "[p]ursuant to Code of Civil Procedure Section 998"], 17 [providing that plaintiffs accepted the offer "[p]ursuant to Code of Civil Procedure Section 998"].)

In order to be valid, a section 998 offer must have terms that make its value *readily ascertainable* to the offeree. (*Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579, 585 (*Taing*)

["[F]rom the perspective of the offeree, the offer must be sufficiently specific to permit the [offeree] to evaluate it and make a reasoned decision whether to accept . . . . The burden of assuring that the offer complies with section 998 falls on the offeror"]; AA-100 [defendants arguing that their section 998 offer had to have "'be[en] sufficiently specific to allow the recipient to evaluate [its] worth'"].)

The readily-ascertainable-value requirement ensures that section 998 settlements achieve the statute's purposes—i.e., to end litigation via offers that the offeree can quickly assess, not to spawn more litigation on how to interpret the resulting settlement. (See *Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014, 1021 [if a "particular application" of section 998 "would encourage gamesmanship or spawn disputes over the operation of section 998, rejection of the rule is appropriate"].)

Thus, in construing the terms of the agreement here, the Court must infer that its terms were necessarily intended for plaintiffs as the offerees to be able to readily evaluate the offer's worth and to determine whether to accept it.

### 2. Plaintiffs' interpretation renders the section 998 settlement agreement's value readily ascertainable.

Only plaintiffs' interpretation ensures that the agreement has a clearly ascertainable value to them. Specifically, the offer has a value of $69,500 in that the amount either goes directly to plaintiffs or to pay off amounts that plaintiffs would be obligated to pay under the lease anyway—namely, the outstanding lease

payments and the lease-end disposition fee (charged at the lease's natural end). (See AA-84 [identifying the initial payment, the monthly lease payments, and the lease-end disposition fee as the components of plaintiffs' obligations under the lease].)

To the extent relevant, plaintiffs can also readily calculate the amount they must necessarily still pay on the lease. Plaintiffs did just that: taking the balance that appears on the face of the latest lease statement minus payments they made since the statement was issued. (See AA-118-120 [plaintiffs' calculation of lease balance based on latest lease statement plus payments made after the statement was issued].)

Given this meaning, the plaintiffs could reasonably weigh their possible litigation success against an offer with a $69,500 value and decide whether to settle. This interpretation is thus entirely consistent with the parties' intention to agree to a section 998 settlement (rather than an ordinary settlement untethered to section 998's principles).

### 3. Defendants' interpretation of the agreement's terms, which rely on complex and hidden formulas, do not result in a valid section 998 offer.

Defendants—and the trial court's—construction of the settlement agreement runs afoul of the rule that 998 offers must contain terms of ascertainable value. Under defendants and the trial court's interpretation, the value of the offer to plaintiffs would *not* be $69,500. It would instead be $69,500 minus (1) some *unspecified* value assigned to a car that defendants then get to keep so that defendants can fulfill their rebranding

obligations, and (2) some *unspecified* early termination fee incurred for defendants' convenience (so that defendants do not have to make regular, monthly payments to the lease's end). (See *Crayton*, *supra*, 63 Cal.App.5th at pp. 206-207 ["we read the Act as expressly imposing reacquisition, branding, and disclosure requirements solely on manufacturers," not consumers]; *Valentino v. Elliot Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692, 698 ["Evaluated in the light of this condition, the monetary term of the offer is not really $15,000 to settle the causes of action at issue in the instant case. Instead that $15,000 is diluted by the worth of other present and future possible causes of action Ms. Valentino must surrender in order to receive the defendant's cash," italics omitted].)

That the amount of these deductions from the $69,500 was utterly opaque to plaintiffs is borne out by defendants' own position. Defendants have never even tried to explain how they reached the amount they later claimed was necessary to purchase the leased car and terminate the lease early. Defendants have never stated what the purchase price for that transaction was and, on the lease termination fee, they have simply pointed to the face of the lease, which just warned that such a fee "**may be up to several thousand dollars**"—and that the early termination fee may apparently *change* based on "**when the Lease is terminated**": "[**t**]**he earlier you end the Lease, the greater this charge is likely to be**." (AA-98, quoting AA-111 [the lease], original emphasis.)

Thus, defendants have effectively admitted that it is impossible to determine from the face of the 998 offer what it would cost for the plaintiff to purchase the car for defendant before the lease's end.

To the extent that defendants' position boils down to telling a consumer that the lease's terms describe the price that plaintiffs must pay to purchase the car early for defendants, that's no answer at all. The lease's provisions create convoluted formulas which are nowhere in the section 998 offer itself and which are virtually impossible to understand in any event.

Specifically:

- The lease states that the price to purchase the car before the lease's scheduled ending date consists of "the Adjusted Lease Balance (see Item 24), plus the Item 9 Purchase Price minus the Item 7D Residual Value," plus any "Additional Amounts Due," including, for instance, the early termination fee. (AA-131, ¶ 25(e).)
- These components are based on *other* terms in the lease, which themselves, are complex and opaque. For instance, the Adjusted Lease Balance requires plaintiffs to figure out "all depreciation and amortized amounts in the base scheduled payments

that have become due" after applying the "Constant Yield Method." (AA-130-131, ¶ 24.)[1]

- The lease's early termination fee—which, by defendants' admission, *changes* based on the lease's precise termination date (AA-98)—is just as indecipherable. Like the Adjusted Lease Balance, the early termination fee refers to several other definitions in the lease, which themselves are difficult to quantify. This includes "the sum of the

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[1] "The Adjusted Lease Balance equals the difference between: (1) The Item 7C Adjusted Capitalized Cost; and (2) all depreciation and amoritized amounts in the base scheduled payments that have become due. Each Item 7I Base Schedule Payment consist of a rent charge portion; and a portion allocable to depreciation and any amortized amounts. Although the amount of your Item 7I Base Scheduled Payment does not change, different portions of each Base Scheduled Payment are allocated to rent charge; and depreciation and any amortized amounts. The portion of a Base Scheduled Payment minus the rent charge for that month. We use the Constant Yield Method to figure the rent charge for each Base Scheduled Payment. Under the 'Constant Yield Method,' the rent charge for each scheduled period is earned in advance by multiplying the constant rate implicit in this Lease times the Balance subject to Rent Charge as it declines during the Lease term. At any given time during the Lease term, the 'Balance Subject to Rent Charge' is the difference between the Item 7C Adjusted Capitalized Cost and the sum of: (i) all depreciation and amortized amounts accrued during the previous periods, and (ii) any Base Scheduled Payments paid at Lease signing or delivery. The scheduled rent charge calculations are based on the assumption that we will receive your scheduled payments on their exact due dates and that the Lease goes to its full term." (AA-131)

following: (i) the Remaining Depreciation (see definition below)[2]; plus (ii) the Item 4A Disposition Fee unless this fee is waived under Item 25; minus (iii) the amount, if any, by which the Vehicle's Fair Market Wholesale Value (see definition on page 4)[3] exceeds the item's 7D Residual Value (the 'Surplus'). If there is no Surplus, then you will also owe the lesser of: the total of an excess wear charge (see item 25(c)); and an excess mileage charge for any miles in excess of the permitted mileage during the scheduled lease term at the rate per mile shown in Item 8 or the amount, if any, by which the Item 7D Residual Value exceeds the Vehicle's Fair Market Wholesale Value." (AA-130, ¶ 24.)

- Worse yet, the above calculation is based on *choices* that defendants apparently made with the lessor when purchasing the car—and that defendants never disclosed in their section 998 offer (or in their court

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[2] "The Remaining Depreciation is the total of the depreciation and amoritized amounts in the base scheduled payments that have not yet become due on the date this Lease ends is figured as follows: The Adjusted Lease Balance (see definition on page 4); minus the Item 7D Residual Value." (AA-130, ¶ 24; see fn. 1, *ante* [defining Adjusted Lease Balance].)

[3] "Unless you exercise your independent appraisal right (see below), the Fair Market Wholesale Value of the Vehicle is . . . the higher of (1) the price we receive for the Vehicle at disposition or (2) the amount you and we agree in writing." (AA-131, ¶ 24.)

> filings for that matter). For instance, the lease states that the early-termination fee turns, in part, on the Vehicle's Fair Market Value. The lease then defines the "Vehicle's Fair Market Value" *either* as (a) the amount it appraised for, *assuming that right was invoked* or, if that right was not invoked, (b) "the higher of (1) the price we receive for the Vehicle at disposition" or (2) the amount *agreed on with the lienholder*. (See AA-131, ¶ 24 [reprinted in full at fn. 3, *ante*].) But the settlement agreement never identifies whether the car was appraised and, if not, whether defendants had reached some other agreement with the lienholder as to its value.

So, under defendants' interpretation, the value of the section 998 settlement to plaintiffs is $69,500 minus a series of *unspecified, indecipherable* amounts.

That defendants' construction renders the section 998 offer's value to plaintiffs essentially unknowable means that it cannot be that offer's meaning. Indeed, the agreement cannot be read to require plaintiffs to use their settlement proceeds to by the car for defendants ahead of the lease's end, as such a requirement would make the value of the settlement to plaintiffs "impractical if not impossible to accurately and fairly evaluate" (See *Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 800-801 [a section 998 offer may not include terms that "'make[] it *impractical* if not impossible to accurately and fairly evaluate the offer,'" italics added].)

Below, defendants responded by arguing that plaintiffs could simply call the lienholder to determine the amounts that make up the "lease payoff owed by Plaintiffs." (See 1-RT-6 [Defendants' counsel: "At that time, plaintiffs had a lease account with a third party lienholder. They could have requested the lease payoff amount at that time before they accepted it, as Your Honor has just said. They could have requested a lease payoff quote after they accepted it. But that is not something that the defendants in this case are able to do. They do not have access to lease account information for any customers until they are authorized to do so. So the lease payoff necessarily requires an evaluation of the lease agreement and a determination by the lienholder"].)

But that's the antithesis of a readily ascertainable value. Offerees must be able to evaluate the value of a section 998 offer based on information that is "known or reasonably should have been known" to them at the time the offer is made. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 135 [requiring that section 998 offer allows plaintiff to evaluate the value of the offer relative to the results at trial based on information that is "known or reasonably should have been known" to the offeree].)

An offeree cannot be expected to *call a third party* to decipher the value of a section 998 offer—let alone blindly accept that third party's word on the amount *that the third party is to be paid* for defendants to purchase the car from them.

That's all the more true here given that the 998 offer settlement *itself* suggests that the lease payoff amount must be

reasonably knowable to the plaintiffs—stating that *the plaintiffs* will provide the information necessarily to facilitate the lease payoff. (AA-15, ¶ 4 ["Plaintiffs will provide to Defendants' counsel the following information and documents to facilitate payoff of any outstanding lease obligation . . ."].) In other words, the payoff is based on numbers that *the plaintiffs* necessarily have in *their* possession, not numbers hidden behind customer service and complex formulas that only the lienholder supposedly knows how to apply.

Construing the settlement as the parties intended, i.e., construing it as a settlement arising *under section 998*, plaintiffs' construction is the only reasonable one. Indeed, plaintiff's reading is the only one that allows for the section 998 offer to have a readily ascertainable value to plaintiffs—namely, of $69,500, some in cash and the remainder to pay only the amounts that plaintiffs were necessarily obligated to pay on the lease.

### C. Plaintiffs' Interpretation Is The Only One That Is Consistent With The Song-Beverly Act.

As shown, courts must interpret a contract's terms in light of the circumstances in which it was made. (See § I, *ante*.) Here, part of the relevant context for construing the terms of the settlement agreement is that the parties were settling a Song-Beverly Act claim. As a result, the Court must look to the Song-Beverly Act to illuminate what the parties' reasonable expectations were when they agreed to settle their claims.

As to that Song-Beverly context, there's no requirement under the Act that a plaintiff even be in possession of the vehicle,

let alone to return that vehicle to defendants, to obtain remedies under the Act, "'manifestly a remedial measure intended for the protection of the consumer.'" (*Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187, 195.)

To the contrary, the Act makes it the *manufacturer's* obligation to repurchase the car and label it a lemon before selling it or leasing it again. (*Crayton*, *supra*, 63 Cal.App.5th at pp. 206-207 ["[T]here is no provision in the Act that required plaintiff to acquire ownership of the vehicle in order to obtain restitution. If the Legislature had intended to impose such a burden on lessees seeking restitution, it would have included language expressly requiring them to purchase the vehicle prior to obtaining restitution. . . . [I]nstead, we read the Act as expressly imposing reacquisition, branding, and disclosure requirements solely on manufacturers who cannot repair a vehicle after a reasonable number of attempts"].)

That's why, in *Crayton*, the appellate court held that plaintiffs are *not* entitled to amounts to purchase the car; that's an obligation that, by law, falls exclusively on the manufacturer. (See 63 Cal.App.5th at p. 206-207.)

Given this fact, there is no way that the plaintiffs here would ever think that they would have to use their $69,500 proceeds to buy the car and terminate the lease early so that *defendants* could fulfill *their* statutory duty to repurchase it, brand it as a lemon, and either lease or sell it to another consumer—certainly in the absence of a term that "specific[ally]" provides otherwise. (See *Goldman v. Ecco-Phoenix Elec. Corp.*

(1964) 62 Cal.2d 40, 44 ["In view of the general rule that an implied indemnity does not reach to protect the indemnitee from a loss to which his negligence has contributed . . . [i]f one intends to do more than merely the incorporate the general rule into the written document, he will be required to fix the greater obligation in specific terms"].)

And because the manufacturer must repurchase the car even if the plaintiffs are no longer in possession of it, there was no reason for defendants to effectively penalize plaintiffs with a lower settlement amount for keeping the car in their possession and making it easier for defendants to fulfill defendants' repurchase obligations under the Act.

There is no reason to think that *any* of the parties settling this Song Beverly Act case would ever think that plaintiffs would be required to pay from their settlement an amount necessary to buy the car for the defendants. That's not a reasonable construction of the agreement, given that it settles a case under the Song-Beverly Act, which requires *manufacturers* to repurchase defective cars, not the innocent consumer.

### D. The Parties' Performance Of The Contract Supports Plaintiffs' Interpretation, Too: That The Lease Payoff Refers To The Amounts Necessary To Pay Off The Lease.

Below, defendants cited an excerpt of the lease statement indicating that the "[c]urrent balance is not a payoff" as proof that the lease payoff could not amount to just the lease's "[c]urrent balance"—that is, the $7,669 plaintiffs would have to pay by the lease's end. (AA-99, emphasis omitted.) Indeed, an

early termination of the lease to "pay off" the lease is accounted for in the lease itself in paragraph 24 which contains convoluted calculations. But at a minimum, those calculations specifically *exclude* the amount to buy the car. Thus, even using the lease's own calculation for an early termination, defendants can *never* get to a number that includes buying the car.

Further, the operative question in this case is not how *a third party* might interpret the "payoff amount," generally. It's what *the parties to the settlement agreement* understood the "lease payoff" to mean in agreeing to the section 998 settlement. Accordingly, the lease statement's description of what the "payoff amount" is, matters only to the extent that the parties agreed and adopted that interpretation—and even then, only to the extent that the terms are ambiguous (which they aren't). (See *Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 755, fn. 18 ["[T]he documents are not relevant because they are not expressions of intent communicated between the persons who adopted the Bylaws. Thus, the documents are not relevant to the *mutual* intent of the parties at the time the Bylaws were approved."]; II.A, *ante* [explaining why plain text supports plaintiffs' position].)

Yet defendants have never cited to any evidence that *the parties* adopted the definition of "lease payoff" that is reflected in the lease statement. Nor can they.

Defendants only had access to that excerpt of the lease statement because, in performance of the settlement terms, plaintiffs provided it to them to inform them that plaintiffs

understood the lease payoff to be the *same* as the $7,669.62 "balance." (See AA-118-120; *Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 851 ["[C]onduct of the parties with knowledge of its terms, and before any controversy has arisen as to its meaning, is admissible on the issue of the parties' intent. . . . [T]his rule is not limited to the joint conduct of the parties in the course of performance of the contract"].) Defendants tellingly never objected or otherwise responded to that email at any point before the dispute arose, presumably because they agreed. (See Statement of the Case, I.C, *ante*.) In fact, it took defendants over two months to manufacture the alternative interpretation they ultimately sold to the trial court (i.e., that a section 998 settlement requires plaintiffs to buy defendants a car using the "$69,500" that is supposed to be paid to plaintiffs). (See AA-118 [plaintiffs' October 21, 2021, email identifying the $7,669.62 balance as the payoff]; AA-89 [defendants' December 23, 2021, email, newly arguing that the settlement required plaintiffs to use their settlement proceeds to purchase the car for defendants].)

Thus, the parties' performance of the contract—including plaintiffs' *rejection* of the idea that the lease payoff is not synonymous with the balance owed—reveals the same thing as the agreement's text and context: that the "lease payoff owed by Plaintiffs" refers to the $7,669.62 that plaintiffs would necessarily have to pay by the lease's end.

### E. At A Minimum, The Section 998 Settlement Is Reasonably Subject To Plaintiffs' Interpretation. Accordingly, Plaintiffs' Interpretation Controls As A Matter Of Law.

As shown, the text of the agreement, the context of the settlement (it arose from an accepted 998 offer to settle a Song-Beverly Act case), and the parties' actual performance support only one conclusion: The agreement dictates that the lease payoff owed by plaintiffs doesn't include amounts to purchase the car for defendants before the lease's end.

But at the very least, the section 998 settlement is reasonably subject to plaintiffs' interpretation: that the lease payoff includes only the amounts that plaintiffs would have *already* been obligated to pay on the Lease at the time the parties executed the settlement. Under Supreme Court precedent, the Ivars' interpretation wins as a result—even assuming that defendants' interpretation was also reasonable (when it is not). (See *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 747 (*Victoria*) ["The ambiguity in [contract] language must be interpreted against the drafter"]; Rest.2d Contracts § 206 ["In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds"].)

That is especially true here because the defendants did not merely draft an ordinary agreement—which itself requires that ambiguities are interpreted against them. (See *Victoria*, *supra*, 40 Cal.3d at p. 747; Rest.2d Contracts § 206.) Defendants drafted

a section 998 offer, the value of which must be clear "from the perspective of the offeree." (See *Taing*, *supra*, 9 Cal.App.4th at p. 585; *Burchell v. Faculty Physicians & Surgeons of Loma Linda University School of Medicine* (2020) 54 Cal.App.5th 515, 533 ["Burchell, as offeror, has the burden of demonstrating that his section 998 offer complied with the statutory content requirements, and we are required to construe the offer strictly in favor of the offeree"].)

Allowing *defendants* interpretation to win out—despite ambiguity they are responsible for—would effectively reward them for their failure to craft a clear, 998 offer while also undermining section 998's purposes by spawning additional litigation.

This case is a perfect example. If plaintiffs had gone to trial and recovered just shy of $69,500, there can be no reasonable doubt that defendants would have argued that plaintiffs had failed to secure a more favorable judgment or award on the premise that the value was worth $69,500, based on the premise that all funds were used for plaintiffs' benefit.

Indeed, defendants have already demonstrated a penchant for taking different positions when convenient. For instance, defendants took the position below that if plaintiff wanted to know what portion of the $69,500 face value of the 998 offer was secretly going to be used to buy the car for defendant, then plaintiff needed to call the lienholder's customer service line since defendants had no access to that information—even providing a declaration from Matthew Birmingham that states that the

lessor, an affiliate of defendants, would be violated the law if it shared plaintiffs' "financial information . . . with other[] persons or entities . . . without the express written consent of the customer." (AA-126, ¶ 2; see AA-101.) But then, in the next breath, defendants supported their opposition to plaintiffs' motion to enforce the settlement by submitting a declaration from Birmingham *in which he shares plaintiffs' financial information vis-à-vis* the lease *in a public filing*—without any indication that he had sought their permission to use their financial information for that purpose. (AA-126, ¶ 3.) In other words, after claiming that it would be *illegal* to secure this information to protect plaintiffs' privacy, the manufacturer was happy to have the lessor readily share this information with the public when it served their purposes.

This type of gamesmanship is precisely why neither section 998 nor general principles of contract interpretation allow defendants to create and exploit ambiguities they are responsible for—or to require courts to resolve those ambiguities.

Rather, to the extent defendants, as the offering parties, failed to clearly draft the 998 offer, any resulting ambiguity must be resolved in plaintiffs' favor. (See Comment a, Rest.2d Contracts § 206 ["Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. *Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what*

*meaning to assert*. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party," italics added.)

Plaintiffs must therefore prevail on this appeal because it is at least reasonably conceivable—if not required by the contract's plain terms and several other tools of contract interpretation—that the "lease payoff owed by Plaintiffs" refers only to amounts that plaintiffs must necessarily pay off under the lease.

### F. The Trial Court's Stated Rationale For Its Interpretation Of The Settlement Agreement—Adoption Of One Irrelevant Witness's Opinion—Does Not Support The Court's Order.

In ruling that the phrase "lease payoff" meant that plaintiffs had to buy the car and give it to defendants, the trial court simply deferred to a statement made in a declaration by Matthew Birmingham, a manager at a Volkswagen affiliate who had nothing to do with the settlement agreement's negotiation. (See AA-141, citing AA-126 [denying motion to enforce settlement on basis that Birmingham provided unrebutted evidence that "the 'lease payoff amount' was $32,817.54"].) But Birmingham's testimony was inapposite. It could shed no light on the parties' understanding of what "lease payoff" amount.

Birmingham stated, in essence, that:

- The lease agreement for the vehicle was between Audi Temecula (as lessor) and plaintiffs (as lessees).
- That lease was subsequently assigned from Audi Temecula to VCI, so that VCI became the lessor of

the vehicle (until it was later purchased from VCI by Volkswagen Group of America, Inc.).

- In connection with plaintiffs' lease termination, Volkswagen Group of America, Inc. asked VCI the amount required to pay off the total balance on the vehicle—i.e., the amount for VCI to transfer ownership of the vehicle to Volkswagen Group of America, Inc.
- That the "lease payoff" is higher than the "'Current [Lease] Balance'"—which he sees as "the amount remaining to be paid by the lessee(s), per the terms of the lease agreement, through the lease termination date"—in light of Volkswagen Group of America, Inc.'s intent to purchase the car (and terminate the lease early so it can do so immediately).
- If a lessee wants to know the precise amount of "a payoff," he or she must call customer service.

(AA-125-126.)

Thus, Birmingham described a payoff transaction between a manufacturer and a financing entity (Volkswagen Group of America, Inc. and VCI.). As shown below, he did not—and could not—opine on the term's meaning in the settlement agreement between plaintiffs and defendants. His testimony is substantial evidence of nothing.

What the "lease payoff owed by Plaintiffs" means in the parties' agreement is a legal question solely for the *court* to

decide. It is not a question upon which the court could simply defer to an opinion by a witness—especially a witness who had nothing to do with the negotiation of the agreement. (See *Legendary Investors Group No. 1, LLC v. Niemann* (2014) 224 Cal.App.4th 1407, 1413 (*Legendary Investors*) ["The opinion of the bank's custodian of records on the meaning of the phrase 'unpaid indebtedness' is irrelevant since contract interpretation is a legal question for the court"].)

Indeed, as this Court has held, a declarant's legal opinion is not "substantial evidence" that establishes that opinion as fact. (See *Daniell v. Riverside Partners I, L.P.* (2012) 206 Cal.App.4th 1292, 1296, fn. 1 ["even though there was no objection to it, we cannot consider it" as substantial evidence of that legal conclusion].) Other courts have reached the same conclusion—even as to witnesses who, unlike Birmingham, are lawyers or experts. (*Legendary Investors*, *supra*, 224 Cal.App.4th at p. 1413 ["The opinion of the bank's custodian of records on the meaning of the phrase 'unpaid indebtedness' is irrelevant since contract interpretation is a legal question for the court"].) The trial court thus erred in simply deferring to Birmingham on the *legal* question of what the settlement agreement's terms meant.

Nor was Birmingham's declaration even relevant to the trial court's interpretation of the contract's terms. Birmingham described how *financing companies and manufacturers* treat lease payoffs. He said nothing about how *the parties* in this case understood that phrase. Nor could he. Birmingham was not involved in negotiations of the settlement agreement in this case

and none of the settlement agreement, the correspondence *between the parties*, nor any other evidence indicates that *the parties* adopted Birmingham's understanding of what the "lease payoff owed by Plaintiffs" refers too.

In fact, the *only evidence* in the record confirms that the parties *did not adopt* Birmingham's understanding: In performance of the settlement terms, the Ivars informed defendants that they understood the "lease payoff" to be the *same* as the $7,669.62 "balance," which didn't elicit a single objection from defendants. (See Statement of the Case, § I.C, *ante*.)

What's more, the trial court never even purported to go through the steps of determining whether the parties' settlement agreement was reasonably susceptible to Birmingham's interpretation. The court simply treated his testimony as declaring the contract's meaning as a matter of law. This, too, was error.

*Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co*. (1968) 69 Cal.2d 33 (*Pacific Gas*) delineates the rules for considering extrinsic evidence of a contract's meaning: Courts can only consider any "evidence" the parties provided to determine if there is a latent ambiguity—i.e., where a contract term is subject to more than one potential meaning—and then, if such an ambiguity exists, to interpret the agreement. (See *id*. at pp. 37-39.) For example, extrinsic evidence of trade usage can reveal latent ambiguities in the meaning of terms that are otherwise unambiguous on their face—such as that the word "ton" in a lease meant 2,240 pounds, rather than the statutory

2,000 pounds. (*Id*. at p. 39, fn. 6.) But parol evidence, including expert evidence of custom and usage, is *not* admissible "'to flatly contradict the express terms' of an agreement." (*Supervalu, Inc. v. Wexford Underwriting Managers, Inc*. (2009) 175 Cal.App.4th 64, 75, citing *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1167.)

Here, Birmingham's declaration doesn't identify or interpret an ambiguous term, even assuming that the settlement agreement left room for any ambiguity (it does not, see § II.A, *ante*). Birmingham didn't opine about the terms of the agreement at all. Rather, he described how Volkswagen Group of America, Inc. and VCI transfer title *as between themselves*. He merely explained how VCI and Volkswagen Group of America, Inc. account internally for transferring a vehicle's title as between those two entities. Thus, Birmingham's testimony was inapposite to the question before the trial court (and this Court), which depends on the meeting of the minds between plaintiffs and defendants to settle this case. (See *Smith*, *supra*, 182 Cal.App.4th at p. 755, fn. 18 ["Smith's counsel cites documents from 2004 as extrinsic evidence of intent. We conclude the documents are not relevant because they are not expressions of intent communicated between the persons who adopted the Bylaws. Thus, the documents are not relevant to the *mutual* intent of the parties at the time the Bylaws were approved."].)

In sum, the Birmingham declaration is evidence of nothing. He could not opine on the legal question of what the contract meant. And there is no place for custom or trade-usage testimony in this case, which involved a layman consumer, not a

dispute between a financing company and the manufacturer. Moreover, the trial court never even purported to go through the steps required by *Pacific Gas*, *supra*, 69 Cal.2d 33, to determine whether Birmingham's interpretation was one to which the language of the settlement agreement was reasonably susceptible. And again, *Pacific Gas* provides no basis to consider Birmingham's declaration where, as here, he did not and could not speak to *what the parties* understood the terms to mean under the section 998 settlement in any case. Simply put: his testimony is not substantial evidence of anything. It cannot support the trial court's ruling.

## CONCLUSION

The settlement agreement provides that defendants would pay plaintiffs a total of $69,500, some in cash and some toward "any lease payoff owed by Plaintiffs." The only interpretation of this term that comports with its plain meaning and the context in which the agreement was made is plaintiffs' construction—namely, that the "lease payoff owed by Plaintiffs" means simply the amount remaining on plaintiffs' lease. In other words, the provision refers only to amounts that plaintiffs necessarily owed at the time the parties executed the settlement, not to amounts that *would be owed* for defendants to purchase the vehicle before the lease's end. The Court should reverse with directions to grant plaintiffs' motion to enforce the settlement agreement.

Date: November 7, 2022

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## CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **Appellants' Opening Brief** contains 10.963 **words**, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: November 7, 2022 /s/ *Joseph V. Bui*

Joseph V. Bui

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