S246444

IN THE SUPREME COURT OF CALIFORNIA

ALLEN KIRZHNER,

Plaintiff and Appellant,

vs.

MERCEDES BENZ USA LLC,

Defendant and Respondent.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE
HON. JAMES J. DI CESARE (CASE NUMBER 30-2014-00744604)

REPLY BRIEF ON THE MERITS

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INTRODUCTION

On May 7, 2018, Plaintiff and Appellant Allen Kirzhner (hereafter "Plaintiff") filed his Opening Brief on the Merits. In the Opening Brief, Plaintiff explained that because subdivision (d)(2)(B) of Civil Code section 1793.2 authorizes a buyer to recover "any . . . registration fees," the Superior Court and the Court of Appeal should have allowed Plaintiff to recover all of the registration fees that he paid while he owned the vehicle that was the subject of this action, and that both Courts erred when they instead concluded that Plaintiff was only entitled to recover the initial registration fee that Plaintiff paid for the use of the vehicle during his first year of ownership.

Plaintiff alternatively explained that the Superior Court and the Court of Appeal also incorrectly concluded that he was not entitled to recover his post-sale registration fees as "incidental damages" under the same subdivision of section 1793.2.

Plaintiff's Opening Brief also explained that because the manufacturer decides *when* it complies with its repurchase obligation and often delays doing so for years, requiring the manufacturer to reimburse all of the registration fees incurred by the buyer furthers the statute's purpose of requiring that the manufacturer act "promptly."

On July 25, 2018, Defendant and Respondent Mercedes-Benz USA, LLC (hereafter "Defendant") filed its Answering Brief on the Merits. In the Answering Brief, Defendant has re-written the issues presented for review, misrepresented the record below, employed *ad hominem* attacks against Plaintiff's counsel (along with the entire plaintiff's lemon law bar), and employed circular reasoning, straw men, and inapposite claims interspersed with faulty legal arguments.

Plaintiff now submits the attached Reply Brief on the Merits. As we will explain, the claims made in Defendant's Answering Brief lack merit.

Accordingly, the decision of the Court of Appeal and the Superior Court should be reversed.

DISCUSSION

I.
DEFENDANT'S IDENTIFICATION OF THE ISSUES PRESENTED FOR REVIEW IS INACCURATE

As required by Rule 8.520(b)(2)(B) of the California Rules of Court, Plaintiff's Opening brief began by "quoting . . . [t]he statement of issues" contained in the Petition for Review. (Plaintiff's Opening Brief on the Merits, p. 10 (hereafter "OBOM ##").)

Defendant's Answering Brief likewise begins with a section purporting to identify the issues upon which review was granted. However, instead of discussing the issues upon which this Court actually granted review, Defendant has re-written the issues in a way that is materially different from the issues that are actually presented by the case.

For example, Defendant begins by incorrectly claiming that the repurchase obligation contained in subdivision (d) of section 1793.2 only applies when the manufacturer is unable to repair defects covered by its written express warranty which "substantially impair the use, value or safety to the consumer buyer" after a reasonable number of attempts. (Respondent's Answering Brief, p. 6, ¶ 2 (hereafter "RAB ##").)

Defendant's claim is incorrect. While substantial impairment is an element of the presumption contained in section 1793.22, it is not part of the repurchase obligation contained in subdivision (d)(2) of section 1793.2. (Civ. Code, § 1793.22, subd. (e)(1) [defining the word "nonconformity" to include substantial impairment element]; Civ. Code, § 1793.22, subd. (b)(1) [using the term "nonconformity" in the presumption]; Civ. Code, § 1793.2, subd. (d)(2) [repurchase obligation does not use the defined term

"nonconformity" but does use other terms defined in subdivision (e)(1) of section 1793.22, such as "new motor vehicle."].)

Defendant also incorrectly claims that "the issues [in this case] are limited to what restitutionary damages Appellant is entitled to under the Act in the context of an offer to compromise issued by MBUSA under section 998 of the California Code of Civil Procedure. Nothing More." (RAB 6, ¶ 2.) That claim is inaccurate.

Defendant's 998 Offer promised to pay Plaintiff the repurchase remedy contained in subdivision (d)(2)(B) of section 1793.2. (AA 18-19; OBOM 14.) As a result, and as Defendant admitted in both the Court of Appeal and here, this case actually presents the Court with the opportunity to interpret the meaning of that remedy. (Respondent's Opening Brief on Appeal, p. 8 ["[b]ecause the terms of MBUSA's 998 Offer mirrored the applicable statutory provisions, Plaintiff's appeal arises from the [trial] court's interpretation of the statute and therefore raises a pure question of law."]; RAB 8, ¶ 1 ["This is really a simple case of statutory construction . . . ."]; OBOM 14; OBOM 53-57.)

Defendant also claims that Plaintiff "seeks a relatively modest sum of only $680" and then, in the very next sentence, claims that Plaintiff is seeking a "broad expansion of damages and liability under the Act." (RAB 6, ¶ 3.) While $680 may well be a modest sum to large corporate entities like Mercedes-Benz, $680 is most assuredly a large sum to most consumers, including the Plaintiff.

Defendant goes on to suggest that the "Plaintiff lemon law bar" and Plaintiff's counsel have now joined forces to "exploit[the Act] for no valid litigation objectives." (RAB 6-7; *See also* RAB 9 [describing Plaintiff's counsel using the words "and only he has some prodigal savant-like insights into its true meaning [that] no other human being can comprehend."])

These *ad hominem* attacks on Plaintiff's counsel and the devoted consumer attorneys who represent consumers against Mercedes-Benz's intentional law-breaking are improper, untrue, and should be disregarded. (*Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1417, 1430 ["*Ad hominem* arguments, of course, constitute one of the most common errors in logic: Trying to win an argument by calling your opponent names ('Jane, you ignorant etcetera ....') only shows the paucity of your own reasoning. (Of course, it happens all the time in real world politics[1].)"]; *Stone v. Foster* (1980) 106 Cal.App.3d 334, 355 ["[p]ersonal attacks on the character or motives of the adverse party, his counsel or his witnesses are misconduct."]; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal. 4th 780, 796 ["Nor may counsel properly make personally insulting or derogatory remarks directed at opposing counsel or impugn counsel's motives or character."].)

Finally, in its re-written statement of the issues (and elsewhere throughout Defendant's brief), Defendant emphasizes that section 1793.2 uses the word "restitution" and then claims that the registration fees that Plaintiff seeks go beyond that which has traditionally been recognized as restitution. (RAB 7, ¶ numbered 1.) Defendant's argument lacks merit because the term "restitution" as used in the Consumer Warranty Act does not mean the same thing as the word "restitution" when used in other contexts.

A non-statutory award of "restitution" requires a party to return that which he has received from another in order to avoid "unjust enrichment." (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370.) In contrast, subdivision (d)(2)(B) of Civil Code section 1793.2 requires the

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[1] And, regrettably, litigation.

manufacturer of a lemon automobile to make "restitution" of numerous items that the manufacturer either *never* received, or received only indirectly, including the down payment and monthly payments made on the vehicle's loan (which are paid to the dealer and/or a lender), sales tax (paid to the dealer and transmitted to the Franchise Tax Board), use tax (paid to the Department of Motor Vehicles and transmitted to the Franchise Tax Board), registration fees (paid to the Department of Motor Vehicles), and other incidental damages (such as repair, towing, and rental car costs). (Civ. Code, § 1793.2, subd. (d)(2)(B).)

Even though none of this money is actually paid to the manufacturer and none of it results in "unjust enrichment" to the manufacturer, the manufacturer is required to make "restitution" of all of it to the consumer under subdivision (d)(2)(B) of section 1793.2. (Civ. Code, § 1793, subd. (d)(2)(B).) And, as explained in more detail in Plaintiff's Opening Brief, once a consumer files a lawsuit, all of these measures are converted to a measure of damages. (OBOM 29, ¶ 4; Civ. Code § 1794, subd. (a) and (b) ["The measure of the buyer's damages in an action under this section shall include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2 . . . ."].)

Defendant's Answering brief repeatedly emphasizes the word "restitution" while blurring the differences between non-statutory restitution and the restitution afforded by subdivision (d)(2)(B) of the Consumer Warranty Act. Defendant's contrary suggestion notwithstanding, "restitution" under the Act is not limited to monies actually received by the manufacturer from the buyer. (Civ. Code, § 1793.2(d)(2)(B).)

For these reasons, Defendant's recitation of the issues presented for review does not accurately reflect the issues that this Court must decide on this appeal.

II.
DEFENDANT'S SUMMARY OF ARGUMENT CONTAINS A NUMBER OF STATEMENTS THAT ARE INACCURATE

Defendant's brief continues with a section entitled "Summary of Argument" which actually contains several arguments that are never repeated elsewhere in its brief. (RAB 8.)

Defendant's summary begins by incorrectly stating that the Act "does not permit anything other than restoring the buyer/lessee to the *status quo ante* in the restitution context." (AB 8, ¶ 2.) That claim is inaccurate. While it is true that one of the purposes of repurchase remedy is to restore the *status quo ante* (OBOM 43), and that requiring the reimbursement of all registration fees furthers that purpose (OBOM 33-51), the Act permits the recovery of items above and beyond restoring the *status quo ante.* (OBOM 53-57; Civ. Code, § 1793.2, subd. (d)(2)(B) [authorizing the recovery of incidental damages]; Civ. Code, § 1794, subd. (b) [authorizing the recovery of various remedies from the Commercial Code]; Civ. Code, § 1794, subd. (c), (d), and (e) [authorizing the recovery of civil penalties, court costs, and attorney fees].)

Defendant's summary also incorrectly states that Plaintiff did not raise many of the arguments contained in his Opening Brief while this case was pending in the Superior Court and the Court of Appeal. (RAB 8, ¶ 4.) That claim is inaccurate. In the Superior Court and in the Court of Appeal, Plaintiff argued that he was entitled to registration fees under subdivision (d)(2)(B) of Civil Code section 1793.2 either as "registration fees" or as "incidental damages." (AA 32, 143-144; Pl. Op. Br. on Appeal, pp. 4-9.) Those same arguments are raised here. (OBOM 33-58.)

It is true that those arguments were *longer* in the Court of Appeal than they were in the Superior Court, and are even longer here, but that is only because, at each step in the proceedings, Plaintiff was required to

respond to the Defendant's arguments and the reasoning of all of the courts below.

The remaining arguments contained in Defendant's "summary of argument" are repeated elsewhere in Defendant's brief, and so Plaintiff will respond to them in more detail below.

III.
DEFENDANT'S STATEMENT OF FACTS CONTAINS NUMEROUS STATEMENTS THAT ARE INACCURATE

Defendant's Answering Brief continues with a Statement of Facts that contains a number of statements that are inaccurate.

For example, Defendant begins by incorrectly characterizing the claims asserted in the Complaint as claims "for breach of express warranty under the Act." (RAB 10, ¶ 3.) As explained in Plaintiff's Opening Brief, that characterization is not accurate. (OBOM 24, ¶ 2 ["We routinely observe litigants and courts incorrectly referring to claims for violation of the CWA Repurchase Obligation contained in subdivision (d) of section 1793.2 as a claim for "breach of express warranty" or "breach of warranty." In fact, however, they are entirely separate claims."]; OBOM 20-23.)

Defendant also incorrectly claims that "[a]lmost immediately after Answering, MBUSA sought very limited discovery to ascertain Appellant's damages, which was ignored." (RAB 10, ¶ 5 [emphasis added].) Defendant cites no evidence[2] to support that claim, and it is untrue. In truth,

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[2] Defendant cites to pages 59 and 60 of Appellant's Appendix to support its false claim. However, pages 59 and 60 consist only of a brief that Defendant submitted to the Superior Court that made a similar, false claim. (AA 148-149.) Neither Defendant's Answering Brief nor the brief appearing at pages 59 through 60 of the Appendix cites to any *evidence* supporting the claim. (*Id.*)

Defendant's counsel explicitly told Plaintiff's counsel *not* to spend the time or resources responding to the discovery, so that they could instead focus on settlement. (AA 151, ¶ 3 [declaration explaining that "[i]n connection with those discussions, [Defendant's counsel] Ms. Ayvazian granted us an open-ended extension of time to respond to Defendant's written discovery."]; AA 148-149.)

Defendant's Statement of Facts goes on to describe "[w]hat occurred next" as "a bizarre course of conduct intended to delay and harass, and outright games playing." (RAB 12, ¶ 1.) Defendant's characterization is correct about the behavior of its own counsel, who repeatedly refused to return telephone calls or to engage in any reasonable effort to reach a resolution, instead forcing Plaintiff to engage in the motion practice that ultimately led the case here. (AA 33-37; AA 151-152.)

Defendant also incorrectly claims that it "vehemently disputed the self-serving alleged summary of events provided by Appellant's counsel via declaration only, including counsel's claim of purported making numerous untraceable and unprovable 'telephone calls' regarding negotiating a settlement." (RAB 12, ¶ 1.)

In fact, Defendant's counsel, Mr. Jonathan Universal, did not dispute that he had received numerous telephone calls and emails from Plaintiff's counsel; rather, he claimed that "Mr. Anderson's claim that he telephoned me numerous times should not be afforded credit since Ms. Ayvazian was primarily handling this case." (AA 137, ¶ 4.) His claim that Ms. Ayvazian was "primarily handling the case" was also inaccurate given that Mr. Universal signed the 998 Offer and repeatedly sent and received emails relating to the settlement. (AA 20 [998 Offer signed by Jon Universal]; AA 33-37; AA 136, ¶ 2 [Mr. Universal declares that he "is the attorney of records for Defendant Mercedes-Benz USA, LLC" in the case]; AA 151, ¶ 3 ["Ms. Ayvazian handled the settlement discussions that occurred *prior* to

Defendant's 998 Offer . . . . Once the 998 Offer was accepted, Ms. Ayvazian told me that Mr. Universal was handling the settlement going forward. Mr. Universal's false claim that he was not involved in the settlement after the 998 Offer was served is proven false by the fact that he signed the 998 Offer and he admits sending several letters and emails relating to the settlement after we accepted it."]; AA 79-97 [various emails and letters sent by Mr. Universal relating to the Offer of Judgment].)

Defendant's claim that Plaintiff "simply demanded, without providing information and documentation supporting any dollar amounts, that MBUSA satisfy the Judgment" is not supported by the record cited and is untrue. (AA 33-37; AA 151-152.) In fact, Defendant admitted that it had the information necessary to compute the correct amount, but it nevertheless refused to negotiate. (AA 82-83 [email from Plaintiff's counsel submitting documentation]; AA 85 [email from Defendant's counsel to Plaintiff's counsel stating "I am in receipt of the financials and **have calculated the repurchase numbers**."].) After weeks of waiting, Plaintiff eventually begged Defendant's counsel to simply write a check for whatever amount it deemed appropriate, but it refused to do that, either. (AA 33-37 [explaining Plaintiff's exhaustive efforts to persuade Defendant to contact him to negotiate].)

Likewise, Defendant's claim that it "had to take an educated guess at attempting to itemize what [Plaintiff] was likely claiming" on the motion is also untrue. (RAB 13.) On page 1 of the moving papers, the motion plainly requested "$54,900.39." (AA 28, l. 26.) The amount was repeated again several times in the points and authorities filed in support of the motion. (AA 31, ll. 16, 22; AA 32, l. 11.) And Plaintiff attached a Declaration to the motion which identified each component of that amount and how it was calculated. (AA 38-39.) Defendant's claim that the

$54,900.39 was more than was claimed in the Complaint is also untrue. (AA 9, ¶1, ¶ 2, ¶ 4, ¶, 5, ¶6, ¶ 7.)

Defendant's Answering Brief also claims that Plaintiff's motion "made no argument [that] MBUSA breached any 'repurchase obligation' the Act might impose . . . ." (RAB 13, ¶ 2.) That's certainly true, but only because Defendant's Offer of Judgment gave Plaintiff the very repurchase remedy he was seeking without requiring him to prove liability. (AA 18:25-19:5.)

Defendant's claim that the Superior Court "noted [that Plaintiff] had failed to itemize his claim" is also inaccurate. (RAB 13, ¶ 3.) To the contrary, the Superior Court acknowledged that "the raw data is in the moving Kirzhner Declaration." (AA 160-161.) The Superior Court's concern was simply one of form: The Superior Court explained that Plaintiff "should have laid out how he arrived at his total" in the memorandum of points and authorities and not merely in the declaration. (AA 160.)

IV.
THE COURT OF APPEAL'S CONCLUSION THAT APPELLANT WAS ONLY ENTITLED TO RECOVER THE INITIAL REGISTRATION FEE THAT HE PAID WHEN HE ACQUIRED THE VEHICLE WAS INCORRECT

In Plaintiff's Opening Brief, Plaintiff explained that he is entitled to recover his post-sale registration fees in addition to the registration fee that he paid when he acquired the vehicle because (1) subdivision (d)(2) of Civil Code section 1793.2 explicitly allows the recovery of "any . . . registration fees" without any limitation to those incurred at the time of the sale and (2) even if the statute contained such a limitation, all of the registration fees that he ultimately paid were legally incurred at the time he acquired the vehicle. (OBOM 33-52.)

In Defendant's Answering Brief, Defendant disputes Plaintiff's argument on point number (1), but it simply ignores Plaintiff's argument on point number (2). As we will explain, Defendant's claims have no merit.

A. The plain language of section 1793.2 permits Plaintiff to recover any registration fees actually paid or which became payable and not merely the first year's registration fee

Plaintiff's Opening Brief explains that the plain language of subdivision (d)(2)(B) of Civil Code section 1793.2 permits him to recover his post-sale registration fees. (OBOM 34-51.) In Respondent's Answering Brief, Defendant makes a number of contrary claims, but none have merit.

1. The "restitution" authorized by the Consumer Warranty Act is not limited to amounts received by the Defendant

Defendant begins its discussion by arguing the black letter law of statutory construction: The Court should examine the plain language of the statute and give it a plain, ordinary, and every day meaning. (RAB 16.) If the words are unclear, the Court may resort to legislative history. (*Id.*) The Court should also avoid absurd results. (*Id.*)

Defendant then quotes the statutory language, claims that it is clear, and that it does not allow the recovery of post-sale registration fees, particularly because of its use of the word "restitution." (RAB 17.)

As explained in Part I of this brief, above, the word "restitution" as used in the Consumer Warranty Act does not have the same meaning as the word restitution does in a non-statutory context. Restitution under the Consumer Warranty Act includes items that are never actually received by the Defendant. (*See* Part I of this brief, p. 10, above; OBOM 30-33.) Nor

is it limited to items that were incurred or paid at the time the vehicle was acquired. (OBOM 28-33.)

2. The *Mitchell* case supports Plaintiff's position

Next, Defendant quotes from *Mitchell v. Bluebird Body Co.* (2000) 80 Cal.App.4th 32. (RAB 17.) Defendant argues that *Mitchell* mandates that post-sale registration fees are not recoverable because restitution is intended to "restore 'the *status quo ante* as far as practicable.'" (RAB 17.) But, Defendant has misunderstood the language it quotes. Restoring the *status quo ante* means "returning [the buyer] to his economic position before he entered the contract." (*Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1145.) Restoring the *status quo ante* requires reimbursing "any . . . registration fees" as the statute explicitly commands. (Civ. Code, § 1793, subd. (d)(2)(B) [". . . the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer . . . including any collateral charges such as . . . registration fees . . ."].) If the registration fees that are paid after the vehicle is acquired are not reimbursed, then the *status quo ante* has not been restored.

Defendant goes on to provide a block quotation from the *Mitchell* case that discussed the recoverability of finance charges, and suggests that parity of reasoning requires that post-sale registration fees are not recoverable. (RAB 17-18.) Among other things, Defendant focuses on the words "new motor vehicle" and suggests that once a vehicle is driven off the lot, it becomes a used vehicle and thus "parity of reasoning" mandates that post-sale registration fees cannot be recovered. Defendant's arguments are incorrect for several reasons.

First, *Mitchell* explicitly concluded that finance charges that are both incurred and paid by the buyer after the sale *are* recoverable. (*Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32, 37.) Post-sale finance

charges are incurred and paid *after* the vehicle is driven off of the lot, i.e., after the vehicle becomes a "used vehicle" under Defendant's argument. Yet, *Mitchell* explicitly allowed the buyer to recover all of the finance charges, including those incurred well-after the vehicle changed from a new vehicle to a used vehicle. (OBOM 43.) Thus, parity of reasoning would allow the recovery of post-sale registration fees as well. (OBOM 43.)

Second, although the Consumer Warranty Act uses the words "new motor vehicle," the Act includes provisions which explicitly extend its coverage to used consumer goods and used motor vehicles as well. (OBOM 19; Civ. Code, § 1795.5 [CWA applies to used goods sold with a warranty].) Nothing in *Mitchell* purported to hinge its decision on whether the vehicle in question was new or used. The words "new motor vehicle" used in *Mitchell* were *dicta*.

Third, as explained in more detail in Plaintiff's Opening Brief, *Mitchell*'s conclusion that finance charges that are both incurred and paid after the sale is completed also supports the conclusion that post-sale registration fees are recoverable, and that is particularly true because "registration fees" are explicitly listed as recoverable in subdivision (d)(2)(B) of section 1793.2, while finance charges are not. (OBOM 43-44.)

3. The Legislature's use of the word "price" does not indicate an intent to limit the remedy to that which Plaintiff paid at the time the vehicle was acquired

Defendant's Answering Brief points out that subdivision (d)(2)(B) of section 1793.2 uses the word "price," and argues that it indicates an intent to limit the remedy to that which the consumer paid at the time of the sale. (RAB 18, ¶ 2.) But, Defendant ignores the other words that appear in the statute (including the word "actual" which appears immediately prior to the word "price") and the context in which those words appear.

The statute begins by explaining that the manufacturer must offer to repurchase or replace a vehicle once it has failed to repair the vehicle within a reasonable number of repair attempts. (Civ. Code, § 1793.2, subd. (d)(2).) The manufacturer is required to take this action only after the vehicle becomes irreparable, and not at the time it is purchased. (*Id.*)

The statute continues by requiring the manufacturer to reimburse the "actual price paid or payable by the buyer." (Civ. Code, § 1793.2, subd. (d)(2)(B) [emphasis added].) Reading this language with the understanding that the repurchase occurs after the vehicle has proven to be irreparable, and not at the time the vehicle was sold, the words "actual price paid or payable" should be interpreted with reference to the price that the buyer has actually paid or which actually remains payable, and not what Plaintiff agreed to pay at the time of the sale. (*Mitchell, supra*, 80 Cal.App.4th at 37 ["A more reasonable construction is that the Legislature intended to allow a buyer to recover the entire amount **actually expended** . . . ."].)

That interpretation is reinforced a few sentences later in the statute, when the Legislature also authorized the recovery of "reasonable repair, towing, and rental car costs **actually incurred** by the buyer." (Civ. Code, § 1793.2, subd. (d)(2)(B) [emphasis added].)

Any doubt on this issue is resolved by the Legislature's use of the words "and including any collateral charges such as sales or use tax, license fees, registration fees, and other official fees . . . ." (Civ. Code, § 1793.2, subd. (d)(2)(B).) This language was presumably added to make clear that the "actual price paid or payable" was not limited to what the buyer paid for the vehicle itself, but included other things, i.e., sales or use tax, license fees, other official fees, and registration fees. (*Id.*)

And as explained in more detail in Plaintiff's Opening Brief, there are some portions of the statute where the Legislature chose not to include sales tax/use/tax/registration fees/etc. when discussing the price of the

vehicle. However, in those instances, the Legislature both omitted the "and including any collateral charges" language and also added the words "of the new motor vehicle" within the words "actual price paid or payable." (OBOM 37-39; Civ. Code, § 1793.2, subd. (d)(2)(C) [mileage offset is based upon "actual price of the new motor vehicle paid or payable" and does not take into account collateral charges such as registration fees, sales tax, and use tax].)

Further support for this interpretation is found in the provisions authorizing the buyer to elect to receive a replacement vehicle instead of restitution. When a buyer does so, the manufacturer must only pay "the amount of any sales or use tax, license fees, registration fees, and other official fees which the buyer is obligated to pay in connection with the replacement." (Civ. Code, § 1793.2, subd. (d)(2)(A) [emphasis added].) If the Legislature had intended to limit the remedy in the case of a repurchase to amounts "paid in connection with the initial purchase," the Legislature would have included that language in subdivision (d)(2)(B). Its failure to do so demonstrates that it did not intend the remedy in subdivision (d)(2)(B) to be so limited.

All of these textual differences demonstrate that the Legislature's intention was to allow the buyer to recover, at the time the vehicle is repurchased, the actual price that he has paid or which remains payable, and not merely that which he agreed to pay when he purchased the vehicle. (*See also* POB, pp. 33-51.)

B. Plaintiff's reference to the Legislative History in the Opening Brief is appropriate and it supports his position

In Plaintiff's Opening Brief, Plaintiff explained that the legislative history supports his position that the Consumer Warranty Act permits the

recovery of registration fees without limitation to the first year. (OBOM 45-48.)

In Defendant's Answering Brief, Defendant incorrectly claims that Plaintiff made no claim in the Superior Court that he was entitled to post-sale registration fees. (RAB 18, last ¶.) That claim is patently untrue: Plaintiff most certainly did claim that the statute permitted him to recover post-sale registration fees in the Superior Court. (AA 143-144; AA 41.)

Defendant also claims that it is inappropriate to refer to the Legislative History to support his claims because Plaintiff failed to cite to the Legislative History in the Court of Appeal. (RAB 18-19.) Defendant is mistaken because Plaintiff is entitled to bolster the arguments he made in the Superior Court and the Court of Appeal with additional authority, including Legislative History, now that the case has arrived here. (*Giraldo*, *supra*, 168 Cal.App.4th at 251 ["We are aware of no prohibition against citation of new authority in support of an issue that was in fact raised below . . . ."]; *Schmidt*, *supra*, 223 Cal.App.4th at 1505, fn. 11.)

Defendant also claims that there is no need to resort to Legislative history because the language of the statute is clear and it supports Defendant's position. Plaintiff also believes that the statute is clear, but that it supports his position. It may well be that the statute is not clear, and that the Court must resort to Legislative history. Only this Court can say for sure. If the Court concludes that the statute is ambiguous, the Legislative History is now available for the Court's consideration.

Defendant also claims that the Legislative history supports its position, and contains no indication that post-sale registration fees are recoverable. That claim is not accurate for the reasons explained in Plaintiff's Opening Brief. (OBOM 45-48.) As explained there, every reference in the Legislative History confirms that when the Legislature used the plural words "registration fees" in the statute, it meant to allow recovery

of the plural "registration fees," and not merely the first year's "registration fee." (*Id.*)

C. Plaintiff's argument that damages are payable at the time the vehicle is repurchased is correct

In Plaintiff's Opening Brief (and on page 19 of this brief, above), Plaintiff explained that the repurchase remedy should be interpreted with reference to the time that the remedy is paid, i.e., at the time the vehicle is repurchased rather than at the time the vehicle was initially sold. (OBOM 31-47.) Defendant's Answering Brief responds by claiming that the use of the word "price" forecloses any claim that the Legislature intended to look at the amount paid from the perspective of the time of the repurchase. (RAB 19-20.) Defendant's argument is a repetition of the argument that Defendant made on pages 18-19 of the Answering Brief. (RAB 18-19.) That claim has no merit for the reasons discussed above, on page 19 of this brief.

In Plaintiff's Opening Brief, Plaintiff explained that, among other things, the Legislature must have intended to allow the recovery of registration fees beyond the first year's registration fee because the statute explicitly allows for recovery of the plural "registration **fees**," rather than the "initial registration **fee**." (OBOM 36.)

In Defendant's Answering Brief, Defendant claims that Plaintiff is mistaken because "his interpretation is plainly inconsistent with the statutory intent [sic:to allow recovery?] of what is paid at the time of [sic: the?] initial sale or lease." (RAB 21, ¶ 1.) Defendant's argument is a classic example of the logical fallacy called "begging the question" or "circular reasoning." By assuming that the "statutory intent" is to limit recovery to "what is paid at the time of initial sale or lease," Defendant is incorrectly assuming that which it has set out to prove.

In fact, as explained above and in Plaintiff's Opening Brief, section 1793.2 does not indicate a statutory intent to limit the buyer's recovery to the amount he paid at the time the vehicle was initially sold. (OBOM 30-32, 35-51; *See* page 19, above.)

Defendant goes on to argue that the words "registration fees" were probably written in the plural because the Legislature intended to combine "a number of separate fees, including a vehicle registration fee, license fee, weight fee, special plate fee, county/district fees and owner responsibility fee." (RAB 21.) That argument lacks merit, however, because the Legislature explicitly allowed for the recovery of those separate fees as "license fees" and "other official fees" in addition to allowing the recovery of the plural "registration fees." (Civ. Code, § 1793.2, subd. (d)(2)(B) ["including any collateral charges such as sales or use tax, **license fees, registration fees, and other official fees** . . . ."] [emphasis added].)[3]

Defendant also incorrectly claims that Plaintiff's lease agreement uses the word "Registration Fees," but that claim is inaccurate. (RAB 21.) Rather, the lease combines the Registration Fee and Titling Fee into a single entry, i.e. "Registration/Titling Fees." (AA 52-53, ¶ 5(a)(6).) Also, because the lease was drafted by Mercedes-Benz's captive finance company, and not the California Legislature, its use of terminology is not relevant to the proper construction of the Consumer Warranty Act. (AA 52, upper right hand corner ["Mercedes-Benz Financial Services"].)

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[3] Defendant's claims are also hindered by the fact that **it** uses the *singular* "registration fee" when it intends to refer to a single registration fees. (*See* RAB p., 21 ["The amount actually paid as 'registration fees' in fact appears to be a combination of a number of separate fees, including a vehicle **registration fee**, license fee, weight fee, special plate fee, county/district fees and owner responsibility fee."].)

In Plaintiff's Opening Brief, Plaintiff explained that there were material differences between the language used by the Legislature in discussing how the repurchase price was calculated and how the mileage offset was calculated, and that these differences also supported the view that the amounts recoverable under the Act are not limited to those that are actually paid at the time of the sale. (OBOM 37-39.) Defendant's Answering Brief responds by correctly noting that the argument is complicated, which it is, but it is apparent that Defendant understood it. (RAB 22.)

Defendant contends that Plaintiff's argument "evaporates," but only apparently by looking at the CACI jury instruction. (RAB 22 [citing only the CACI jury instruction].) Because the law is actually contained in the relevant statutes, and not the jury instructions (which is a simplified version of the law that may need modification in complicated cases), the Court should reject Defendant's claims.

Defendant concludes by arguing that if the Legislature intended to allow **post-sale registration fees**, rather than only the first year's **registration fee**, it could have done so in a "much less-strained and convoluted way." (RAB 22.) Indeed, it did. As explained in Plaintiff's Opening Brief, the statute explicitly allows for the recovery of "**any** collateral charges such as sales or use tax, license fees, **registration fees**, and other official fees." (Civ. Code, § 1793.2, subd. (d)(2)(B).) It is hard to image clearer language than that.

The only reason that Plaintiff has been required to file a lengthy brief discussing the *other* parts of the Consumer Warranty Act is to rebut Defendant's incorrect claim that when the Legislature wrote the plural "**registration fees**," it actually meant the "first year's **registration fee**."

D. The Legislature's authorization for the recovery of use tax supports Plaintiff's position

In Plaintiff's Opening Brief, Plaintiff explained that the Legislature must have intended to allow the recovery of items that were incurred and paid *after* the vehicle was purchased or leased, because it expressly authorized the recovery of "use tax" in addition to "registration fees." (OBOM 40-41.)

Unlike sales tax, use tax is a tax that is paid by the buyer after the sale is completed. (OBOM 40-41.) It is often paid by the buyer at the Department of Motor Vehicles when he takes the title in to request that the vehicle be registered, well after the sale has occurred. (Cal. Veh. Code, § 4300.5 [Department of Motor Vehicles collects use tax directly from buyer].)

In Defendant's Answering Brief, Defendant admits that use tax is incurred and paid after the sale is completed. (RAB 23 [admitting that use tax can be paid in monthly installments in the case of a lease].)

Registration fees are listed right along-side the authorization for recovery of "use tax" in subdivision (d)(2)(B) of section 1793.2. (Civ. Code, § 1793.2, subd. (d)(2)(B) ["and including any collateral charges such as sales or **use tax**, license fees, **registration fees**, and other official fees . . . ." [emphasis added].) Defendant's admission that "use tax" is recoverable even though it is incurred and paid after the sale is completed compels the conclusion that registration fees paid after the sale is completed are also recoverable. (OBOM 40-41.)

Defendant's citation to *Mitchell* does not support its position. (RAB 23.) As explained in Plaintiff's Opening Brief, the *Mitchell* decision concluded that finance charges incurred and paid after the sale is completed *are recoverable*, and thus it bolsters Plaintiff's position that registration fees paid after the vehicle is acquired are also recoverable. (OBOM 43.)

E. The Legislature's authorization for the recovery of sales tax supports Plaintiff's position

In Plaintiff's Opening Brief, Plaintiff explained that the Legislature's inclusion of "sales tax" alongside "registration fees" in the list of items that are recoverable as "collateral charges" rebuts the Court of Appeal's conclusion that the amounts "paid or payable" are limited to items that are legally "incurred" by the buyer at the same of the vehicle's acquisition. (OBOM 41.) The Opening Brief goes on to explain that sales tax is a tax on the seller for the privilege of engaging in sales in California, and thus the buyer never "incurs" sales tax. (*Id.*)

In Defendant's Answering Brief, Defendant refers to this as a "semantic" distinction, because "in the modern world motor vehicle buyers are always charged this significant tax at the time they purchase a vehicle." (RAB 24.) Defendant's argument is incorrect for a number of reasons.

First, because the law is made up entirely of words, legal arguments regarding their meaning are never *merely* semantic.

Second, while it is certainly true that most motor vehicle dealers choose to pass the sales tax on to the buyer, that practical aspect has no legal significance. In this case, the relevant issue is the Court of Appeal's incorrect conclusion that the Consumer Warranty Act only allows the buyer to recover for items that he "incurred" when he acquired the vehicle. (OBOM 2, ¶ 4.) The Legislature's inclusion of sales tax among the items that are recoverable demonstrates that the Court of Appeal's conclusion was wrong. (OBOM 41.)

Third, even if the pragmatic aspects were relevant, the lemon law applies to all consumer goods, including mattresses, carpet, and even school supplies. (OBOM § I(A).) All of those items are sold during certain times of the year without the dealer passing the sales tax on to the

consumer.[4] Thus, it is simply not accurate to claim that sales tax is always passed on to the consumer in every case subject to the Act, and it is improper to construe the act based upon that assumption.

The Act permits the buyer to recover sales tax despite the fact that the buyer does not incur a legal obligation to pay it. Defendant's Answering Brief acknowledges that sales tax is recoverable even though it is neither owed by the buyer nor paid directly to the manufacturer. (RAB 24.) That admission supports the view that the Act's damages are not limited to items which are "incurred" by the buyer at the time of the sale, and rebuts the Court of Appeal's contrary conclusion. (*See* POB, pp. 41-42.)

F. Case law supports Plaintiff's position

In Plaintiff's Opening Brief, Plaintiff explained that a wide variety of published case law both from this Court and the Courts of Appeal support his position. (OBOM 42-45.)

In Defendant's Answering Brief, Defendant purports to distinguish some (but not all) of the cases cited, but Defendant's purported distinctions are inapposite. For example, with respect to the *Mitchell* decision, Defendant focuses on the words "new motor vehicle," and contends that post-sale registration fees do not quality because once the vehicle is driven off of the lot, it becomes a used vehicle. (RAB 24-25.)

As explained in Part IV(A)(2) of this brief, above, Defendant's claim that finance charges and registration fees that are incurred after the vehicle becomes a "used vehicle" is contrary to both to the actual holding of

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[4] Mattress and carpet sellers routinely choose not to pass along sales tax around the Fourth of July Holiday. Retailers of school supplies sometimes do the same before public schools resume in the fall.

Mitchell (which held that post-sale finance charges *are recoverable* even though incurred and paid after the vehicle is driven off the lot) and to the Consumer Warranty Act's explicit provisions covering both new and used products. (*See also* OBOM 43.)

Defendant also attempts to distinguish *Lukather* and *Jiagbogu* by pointing out that each concerned claims for other types of damages, and not for the specific damages at issue here. (RAB 25.) But, Plaintiff only cited *Lukather* and *Jiagbogu* for the general proposition that Courts of Appeal have interpreted the Consumer Warranty Act "in keeping with its command that manufacturers act 'promptly'." (OBOM 44-45.) The fact that those cases involved other types says nothing about the general proposition for which Plaintiff cited them. (*Id.*)

V.
DEFENDANT'S CLAIM THAT PLAINTIFF IS ENGAGED IN A SUBTLE ATTEMPT TO EXPAND LIABILITY IS INACCURATE

In a separate section of Defendant's Answering Brief, Defendant urges the Court to reject what it calls Plaintiff's "subtle attempt to expand Act liability." (RAB 26-27.) It gives a varied set of reasons why the Court should "summarily" reject Plaintiff's claims. None have merit.

First, even assuming that subtlety is somehow impermissible in the Supreme Court, Plaintiff is not engaged in any "attempt to expand Act liability." Rather, Plaintiff merely seeks to recover that which the Legislature specifically said that the Defendant was required to pay him at the time that it repurchased the vehicle, i.e. "the actual price paid or payable by the buyer . . . and including any collateral charges such as . . . registration fees." (Civ. Code, § 1793.2, subd. (d)(2)(B).)

Second, Defendant's claim that Plaintiff "now asserts for the very first time the suggestion that a motor vehicle manufacturer is responsible

for **all vehicle costs** a consumer buyer incurs *after* what he now coins a statutory 'Repurchase Obligation' occurs" is both untrue and a classic example of the straw man fallacy.[5] (RAB 26 [emphasis added].)

Defendant's Answering Brief gives no citation to any portion of Plaintiff's Opening Brief in which Plaintiff makes such an argument. The closest thing that Plaintiff can find to such an argument is the discussion at pages 55 through 57 of the Opening Brief. That discussion explained that certain types of damages that are incurred after a refusal to repurchase can constitute incidental damages. Contrary to Defendant's claim, that very same argument was raised in the Court of Appeal. (*See* App. Op. Br. on Appeal, pp. 7, ¶ 3 to p. 8.)

Defendant goes on to claim that "none of the disputed issues in this case concerned or otherwise determined 'if and when' MBUSA should have repurchased the vehicle." (RAB 26.) In this regard, Defendant is incorrect. Plaintiff's Complaint raised the issue, and Defendant's Answer clearly disputed it. (AA 7-8 [Alleging that Defendant breached its obligation to repurchase or replace the vehicle as required by subdivision (d)(2) of Civil Code section 1793.2]; AA 11 [Defendant generally denied all of the allegations in Plaintiff's Complaint].)

It is true that the issue was never "determined" by the Court, and that "[t]here is little or no factual record with respect to it, and Appellant did not focus on it in the courts below." (RAB 26.) But that is only true because Defendant's Offer of Judgment eliminated the need to litigate the issue by

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[5] A straw man is a common form of argument and is an informal fallacy based on giving the impression of refuting an opponent's argument, while actually refuting an argument that was not presented by that opponent. One who engages in this fallacy is said to be "attacking a straw man."

allowing Plaintiff to receive a Judgment awarding him all of the restitution damages that the Act afforded him without doing so. (AA 18-19.)

Defendant cannot seriously claim that Plaintiff has lost his right to recover the very damages that it offered to pay simply because the offer also eliminated the need to litigate the merits.

Next, Defendant points out that Defendant's 998 Offer did not include any civil penalty, and then Defendant claims that by accepting the offer, Plaintiff admitted that he was not entitled to one. (RAB 27.) While the first part is certainly true, it does not follow that Plaintiff's acceptance of the offer is an admission that he was not entitled to a penalty. To the contrary, the most favorable interpretation of Plaintiff's acceptance of the 998 Offer is that Plaintiff was willing to settle the case without one. Regardless, Defendant never makes clear why the civil penalty issue has any bearing at all on the resolution of this appeal.

Defendant goes on to claim that the 998 Offer and the acceptance "shall be deemed a compromise settlement." Again, that's true, in that subdivision (f) uses those words, but Defendant never explains why that matters here.

Defendant next claims that Plaintiff is attempting to impose some kind of additional penalty on the Defendant. (RAB. 27-28.) This is yet another straw man argument. Plaintiff has never urged the Court to punish Defendant by requiring it to pay his registration fees. Rather, Plaintiff has simply pointed out that the statute has always been construed to encourage prompt compliance, and that a construction that allows the recovery of post-sale registration fees is consistent with that purpose. (OBOM 42-45.)

Finally, Defendant's Answering Brief claims that "MBUSA vigorously disputes [Plaintiff's] claim that it was remiss in not repurchasing Appellant's vehicle sooner . . . ." (RAB 28.) But, that claim makes no sense. Surely, Defendant could have proceeded to trial and claimed that it

had no obligation to repurchase or replace the vehicle at all. However, if it does have such an obligation (as the 998 Offer states), the statute sets a clear deadline: Defendant must do so "promptly." (Civ. Code, § 1793., subd. (d)(2) ["If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle . . . to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either **promptly** replace the new motor vehicle in accordance with subparagraph (A) or **promptly** make restitution to the buyer in accordance with subparagraph (B)."].)

Plaintiff leased the vehicle that is the subject of this action on June 16, 2012. (AA 2, ¶ 4.) Plaintiff filed this lawsuit on September 11, 2014. (AA 1.) Defendant did not repurchase the vehicle until after the Superior Court determined the amount of his damages on August 28, 2015, almost a year later. (AA 174-175.) Defendant simply cannot claim to have acted *promptly* in this case.

But, of course, none of that matters. Because Defendant explicitly offered Plaintiff the entire remedy under subdivisions (d)(2) of Civil Code section 1793.2, this Court must assume that Plaintiff is entitled to the remedy and must determine what the words contained in the statute actually mean. (AA 18:25-19:5 [998 Offer]; Civ. Code, § 1793.2, subd. (d)(2)(B).)

VI.
THE COURT OF APPEAL'S CONCLUSION THAT POST-SALE REGISTRATION FEES ARE NOT RECOVERABLE AS INCIDENTAL DAMAGES WAS INCORRECT

In Plaintiff's Opening Brief, Plaintiff explained that the Consumer Warranty Act also permits Plaintiff to recover his post-sale registration fees as "incidental damages" and that the Court of Appeal's contrary conclusions were incorrect for several reasons. (OBOM 53-57.)

In Defendant's Answering Brief, Defendant repeatedly claims otherwise, including by using the buzzwords "clearly and unambiguously" and "summarily" and even the more harsh words "utter nonsense," but Defendant cites no authority and nothing in the record to support any of the claims that it makes. (RAB 28-30.) To the extent that Defendant makes arguments without supporting them, this Court should disregard them. (*People v. Taylor* (2004) 119 Cal.App.4th 628, 643 ["A legal proposition asserted without apposite authority necessarily fails."].)

A. The Court of Appeal did re-write the statute

In Plaintiff's Opening Brief, Plaintiff explained that the Court of Appeal essentially re-wrote the words "including, but not limited to" by concluding that the words that followed the words "not limited to" in Civil Code section 1793.2(d)(2)(B) actually did impose a limit on the types of items that were recoverable as incidental damages. (OBOM 54-55.)

Defendant responds to Plaintiff's argument with an irrelevancy: It points out that the three types of damages listed after the words "including, but not limited to" are not of a similar nature to each other. (RAB 29.) But, that fact has no relevance to the Court of Appeal's decision or Plaintiff's arguments as to why the Court of Appeal was incorrect. (OBOM 54-55.)

Plaintiff's Opening Brief also explains that the Court of Appeal erred in concluding that the incidental damages authorized by the Act are limited to those which are caused by the vehicle's defects, explaining "the incidental damages that are recoverable should be defined by the relevant claims asserted by the buyer and by the text of the relevant statutes themselves." (OBOM 55.)

Defendant responds by claiming that this argument is inapposite because this case merely involves an Offer of Judgment issued pursuant to

Code of Civil Procedure section 998 and not a Judgment in Plaintiff's favor under the Consumer Warranty Act. (RAB 29, last ¶.)

Defendant's claims lack merit, however, because Defendant's 998 Offer uses the very same language as contained in subdivision (d)(2)(B) of Civil Code section 1793.2. (AA 18-19.) As a result, both the Court of Appeal and the Superior Court interpreted Defendant's 998 Offer consistent with the meaning of the statutory language. (Op. Ct. App., pp. 4-5.) In ruling on this appeal, the Court must take into account the claims asserted in order to determine the damages that are recoverable as incidental damages. (OBOM 54, 18-33.)

B. Plaintiff is not attempting to expand liability

Finally, Defendant's brief repeats several of its prior claims that Plaintiff is attempting to "expand liability" and that the Court should "summarily dismiss[]" it. (RAB 30.)

Defendant's claims have no merit. Plaintiff is not seeking to expand liability. He is not seeking to punish the Defendant. He merely seeks to recover the incidental damages that he incurred as a result of Defendant's failure to *promptly* offer to repurchase or replace his vehicle. Because Defendant's 998 Offer tracks the language of subdivision (d)(2)(B) of section 1793.2, and because Plaintiff is entitled to recover his registration fees under the language contained in that statute, the Superior Court's and the Court of Appeal's refusal to award him his post-sale registration fees was incorrect and should be reversed.

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CONCLUSION

The Court of Appeal's Opinion should be reversed, and the Court of Appeal should be directed to enter a new Opinion reversing the Superior Court's Order, and directing the Superior Court to award Plaintiff the registration fees and non-operational fee that he paid.

DATED: August 16, 2018

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CERTIFICATE OF WORD COUNT

I, Martin W. Anderson, hereby certify as follows:

I am appellate counsel for Plaintiff and Appellant Allen Kirzhner. According to the word processing program I used to prepare this brief, the brief (excluding tables, the required statement of issues presented for review, this certificate, and any attachments) is 8,058 words long.

DATED: August 16, 2018

MARTIN W. ANDERSON

PROOF OF SERVICE (CCP § 1013A(3))

STATE OF CALIFORNIA, COUNTY OF ORANGE

I, Martin Anderson, am employed in the county of Orange, State of California. I am over the age of 18, and not a party to this action. My business address is 2070 North Tustin Avenue, Santa Ana, California 92705.

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Date Proof of Service Signed: August 16, 2018

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