IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

TERRY CARVER, Plaintiff and Appellant, v. VOLKSWAGEN GROUP OF AMERICA, INC., and GALPIN VOLKSWAGEN, LLC, Defendants and Respondents	B331076 (Los Angeles County Case No. 22BBCV00368 Hon. John Kralik) Appeal from judgment entered May 9, 2023

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF and BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA AS AMICUS CURIAE SUPPORTING RESPONDENTS

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Application for Permission to File Amicus Brief

The Civil Justice Association of California (CJAC) applies for permission to file an amicus brief pursuant to California Rules of Court, rule 8.200(c), supporting Respondents.

CJAC is a nonprofit organization whose members are businesses from a broad cross section of industries. CJAC's principal purpose is to educate the public and its governing bodies about how to make laws determining who gets paid, how much, and by whom when the conduct of some causes harm to others – more fair, certain, and economical. Toward this end, CJAC regularly appears as amicus curiae in numerous cases of interest to its members, including those that concern raise issues of concern to the business community and the automotive industry. CJAC and its members are substantially interested in the proper development of clear and consistent rules regarding application of California's Lemon Law.

CJAC's amicus brief will assist the Court by providing a broader perspective on the issue before the Court than that provided by the individual defendants involved in the pending appeal.

No party to this appeal nor any counsel for a party authored CJAC's proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief.

No person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than CJAC and its members.

Amicus Brief

The "Lemon Law" provisions of the Song-Beverly Act are designed to protect consumers who buy new motor vehicles for personal use. It requires motor vehicle manufacturers to make whole consumers who buy defective vehicles that cannot be repaired after a reasonable number of repair attempts. The consumer is entitled to a replacement vehicle or to have the defective vehicle repurchased. (Civ. Code, § 1793.2, subd. (d).) If a lawsuit is necessary to enforce those obligations, the consumer is entitled to attorney fees and costs, and, in some cases, to a civil penalty. (Civ. Code, § 1794.) As a result, a manufacturer confronted with a demand for restitution under the Lemon Law faces many thousands of dollars of liability if its attempt to comply with its statutory obligations is later deemed to be insufficient.

In this case, the provisions governing the terms of an offer to repurchase are at issue. California courts should interpret those terms in a consistent, common-sense way, so that manufacturers' attempts to satisfy their obligations are not subject to second-guessing during litigation.

A. The Song-Beverly Act's repurchase obligation is set forth in plain and simple terms.

If a manufacturer is unable to repair a defective vehicle after a reasonable number of attempts, it must either "promptly replace" the vehicle or "promptly make restitution." (Civ Code, § 1793.2, subd. (d)(2).) The Song-Beverly Act uses the term "restitution" to describe what the courts and counsel commonly refer to as "repurchase." (See, for example, *Rheinhart v. Nissan*

North America, Inc. (2023) 92 Cal.App.5th 1016, 1025-1026.) The Act explains restitution as follows:

> In the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales or use tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.

(Civ. Code, § 1793.2.) The manufacturer may reduce the restitution amount to account for the buyer's usage. (Civ. Code, § 1793.2, subd. (d)(2)(C).)[1]

The obligation to make restitution arises when the buyer makes an "unequivocal request" to repurchase. (92 Cal.App.5th at p. 1026.) A manufacturer need not make restitution immediately upon receipt of a request. It is enough to act expeditiously, without stalling or frustrating a buyer's attempts

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[1] The subdivision provides: "The amount directly attributable to use by the buyer shall be determined by multiplying the actual price of the new motor vehicle paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, by a fraction having as its denominator 120,000 and having as its numerator the number of miles traveled by the new motor vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity."

to obtain restitution. (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1049.)

Although the Lemon Law imposes some limitations on the terms that may be included in the offer of restitution, it expressly permits manufacturers to include a confidentiality clause "regarding the financial terms of the reacquisition of the vehicle." (Civ. Code, § 1793.26, subd. (c).) So long as the manufacturer's offer of restitution correctly states the financial terms and does not purport to bar the buyer from discussing the problems with the vehicle or the *non*financial terms of the offer, it is valid.

B. Volkswagen's restitution offer satisfied the obligations imposed by the Song-Beverly Act.

Volkswagen's April 28, 2022, offer of restitution provided for all the elements set out in section 1793.2. It offered the price paid less an adjustment for usage, and it offered to pay for any incidental damages that the buyer may have incurred. [2 CT 507-508] The buyer's attorney never provided any information about incidental damages. [2 CT 494-500] The only dispute that the buyer expressed regarding the restitution terms had to do with the financial confidentiality clause.

C. Adopting the plaintiff's interpretation of the provisions at issue would reduce clarity and make it more difficult for manufacturers to ensure that they are complying with the Act.

The plaintiff in this case asks the Court to interpret the Act in ways that would make it more difficult for manufacturers to make sure that they have complied with its provisions.

First, although the statute and case law has made clear that the manufacturer's duty to make restitution only arises after

there have been a reasonable number of attempts to repair after a request from the buyer, the plaintiff would like the Court to rule that the duty arises as soon as the manufacturer becomes aware of a warrantable defect. Such a rule would eviscerate the statutory provision allowing a reasonable number of attempts, and create uncertainty about when the restitution obligation arises.

Second, although the Act expressly excludes financial confidentiality from the confidentiality prohibition in section 1793.26, subdivision (a), the plaintiff is asking the Court to prohibit financial confidentiality clauses as a matter of judicial interpretation. That would disrupt the common understanding that such clauses are permitted in offers of restitution.

Conclusion

Because defending a lawsuit brought under the Song-Beverly Act carries great financial risk, it is important that manufacturers who are subject to the Act be able to rely on clearly stated principles regarding compliance. The Court should advance that principle by affirming the trial court's grant of summary judgment in this case.

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Certificate of Compliance

Counsel of Record hereby certifies that, pursuant to Rule 8.204 (c)(1) of the California Rules of Court, the enclosed Amicus brief is produced using 13-point Roman type including footnotes and contains approximately 1,500 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

s/ Calvin House