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December 5, 2014

Chief Justice Tani G. Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Grant Petition for Review
In *Raceway Ford Cases*
No. S222211

Honorable Chief Justice Cantil-Sakauye and Associate Justices:

On behalf of Consumers for Auto Reliability and Safety (CARS), Consumer Federation of California, CALPIRG, and Consumer Action, I urge the Court to grant the Petition for Review of the decision in *Raceway Ford Cases*, 229 Cal. App. 4th 1119 (2014).

Interest of Amici Curiae

Consumers for Auto Reliability and Safety (CARS), Consumer Federation of California, CALPIRG, and Consumer Action are non-profit consumer organizations that have represented the interests of California new and used car buyers before the Legislature and in the courts for decades. The organizations advocate for and against auto-related legislation in Sacramento, and are widely recognized by legislators and the media as representing the interests of consumers. In addition, they have previously submitted amicus briefs on behalf of the public interest before this Court.

The Court of Appeal Decision

The Automobile Sales Finance Act is one of the cornerstones of California consumer protection law. (Civ. Code, §§ 2981 *et seq.*) The original enactment, in 1945, was among the state's first comprehensive consumer protection acts, and its first for car buyers. (Stats. 1945, c. 1030, § 1, effective Jan. 1, 1946; repealed by Stats. 1961, c. 1626, § 1, effective Jan. 1, 1962.) The Legislature extensively revised the Act in 1961 to

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its modern form, commonly known as the Rees-Levering Act after the authors of the 1961 bill. (Stats. 1961, c. 1626, operative Jan. 1, 1962.)

As an early Court of Appeal decision recognized, the legislative purpose in enacting Rees-Levering was "to provide a more comprehensive protection for the unsophisticated motor vehicle consumer." (*Hernandez v. Atlantic Finance Co.* (1980) 105 Cal. App. 3d 65, 69-70.) This early statement of the overarching purpose of Rees-Levering has stood unchallenged for over 30 years. Historically, the appellate courts have applied Rees-Levering broadly to realize the Legislature's intent to protect car buyers against dealers' excessive charges. (Pet. for Review at pp. 4-5; 12-14; *see also Juarez v. Arcadia Financial, Ltd.* (2007) 152 Cal. App. 4th 889, 904-912.)

The Court of Appeal decision here does not simply turn its back on this long line of appellate authority; it affirmatively paves the way for dealers to charge car buyers whatever the dealers want for fees — even when no fees are due and, when fees are due, more than the legal maximums — and simply to pocket the deceptive collections as additional dealer profit.

The facts are undisputed. Raceway charged buyers of diesel cars for performing smog checks and obtaining state mandated smog certificates when the smog check and certification requirements applied only to gasoline, not diesel cars:

> Raceway concedes that it erroneously charged some of its customers who purchased used diesel vehicles certain fees related to performing a smog check and obtaining state smog certification that should only have been charged to purchasers of used gasoline-powered vehicles. These charges were explicitly disclosed in the contracts that the customers signed; the problem is that the fees should not have been charged at all, and neither Raceway nor the customers involved caught the error at the time of the transaction. Plaintiffs have not disputed that each of these customers has, during the pendency of this litigation, received two checks from Raceway,

> the first of which refunded the fees themselves, and the second of which represented an amount Raceway calculated to represent any finance charges the customers may have incurred on the fees.

(Slip. Op. at pp. 6-7.)

The trial court ruled for Raceway on the smog claims, holding that the refunds were adequate to satisfy Raceway's Rees-Levering obligations. (*Id.* at 41.) Had the ruling stood there, the only question would be of the availability of statutory remedies in cases of subsequent refunds by the dealer. But the ruling did not stand there.

The Court of Appeal declined to affirm the Superior Court based on the refunds. The Court instead held that Civil Code section 2982(a) only requires that the contract list amounts the dealer charges the buyer for a smog check and smog fees, even if Raceway never performed a smog check and did not pay any fees to the state for smog certifications on the diesel cars. The Court ruled that a "disclosure" complies with section 2982, subd. (a), as long as the contract correctly states "the transaction agreed by the parties," even if state law does not authorize the dealer to charge the amount listed or the amount exceeds the amount allowed by state law:

> Here, despite full disclosure of all items of cost, the members of Class Two were charged fees that the parties now agree should not have been charged, so the goal of protecting purchasers from excessive charges was not initially achieved. It does not follow, however, that the "informational purpose of the ASFA [was] not served." (*Nelson, supra*, 186 Cal.App.4th at p. 1005.) *We disagree that a contract can disclose accurately every dollar that is part of a transaction agreed to by the parties, and nevertheless constitute a violation of ASFA disclosure provisions. The members of Class Two received all the information that the ASFA required them to receive; among other things, they were informed, in writing, how much they were being charged for smog related fees. They*

> *just did not act on that information by verifying that all of the listed charges were appropriate prior to signing.*

(Slip Op. at pp. 43-44 (emphasis added).)

In other words, if the dealer presents the buyer with a contract that includes charges for services that will never be performed (*e.g.*, a smog check on a diesel) or for government fees that are not due and will never be paid (*e.g.*, a state-mandated smog fee), the buyer is at fault for not vetting the charges before "agreeing," and there is no Rees-Levering violation.

This Court Should Grant Review to Protect the Integrity of the Rees-Levering Act

The Court of Appeal opinion pays little attention to the statutory language and context of section 2982. The statutory protection against excessive charges is an empty promise if dealers can insert any amounts they wish in their contracts for statutorily regulated charges, sales taxes, and state mandated fees, and collect these unwarranted amounts without running afoul of the Rees-Levering Act.

Section 2982, subd. (a), states "The contract shall contain the following disclosures, as applicable, which shall be labeled 'itemization of the amount financed': ...." This is followed by eight subparts listing the items that must be disclosed, including:

> (1) *Regulated Document Processing Fees*: The charge to be retained by the seller for document processing authorized pursuant to Section 4456.5[1] of the Vehicle Code (subd. (1)(B))

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[1] "Document processing fees cannot exceed $80 if a dealer has a contractual agreement with the DMV to be a private industry partner pursuant to Vehicle Code § 1685; otherwise the limit is $65. (Veh. Code, § 4456.5, subd. (a)(1).)

(2) *Required Smog Certifications*: The fee charged by the seller for certifying that the motor vehicle complies with applicable pollution control requirements Code (subd. (1)(C))

(3) *Regulated Charges for an Electronic Vehicle Charging Station*: The total amount charged by the seller for an electric vehicle charging station, which may include only the charges for the electric vehicle charging station device, any materials and wiring, and any installation services. The total amount shall be labeled "EV Charging Station." (subd. (1)(F))

(4) *Regulated Sales and Other Taxes*: Taxes imposed on the sale (subd. (1)(G))

(5) *Regulated Electronic Registration Fees*: The charge to electronically register or transfer the vehicle authorized pursuant to Section 4456.5[2] of the Vehicle Code (subd. (1)(H))

(6) *Regulated amounts paid to public officials for vehicle license fees* (subd. (2)(A))

(7) *Regulated amounts paid to public officials for registration, transfer, and titling fees* (subd. (2)(B))

(8) *Regulated amounts paid to public officials for tire fees imposed pursuant to Section 42885[3] of the Public Resources Code* (subd. (2)(C))

(9) *Regulated amounts of the state fee for issuance of a certificate of compliance, noncompliance, exemption, or waiver pursuant to any applicable pollution control statute* (subd. (4)).

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[2] This fee cannot "exceed the actual amount the dealer is charged by a first-line service provider for providing license plate processing, postage, and the fees and services authorized pursuant to subdivisions (a) and (d) of Section 1685." (Veh. Code, § 4456.5, subd. (a)(2).)

[3] "A person who purchases a new tire, as defined in subdivision (g), shall pay a California tire fee of one dollar and seventy-five cents ($1.75) per tire." (Pub. Res. Code, § 42885, subd. (b)(1).

The issue in this case is items (2) and (9) above. Raceway performed no services to "certify[] that the motor vehicle complie[d] with applicable pollution control requirements" and paid no "state fee for issuance of a certificate of compliance, noncompliance, exemption, or waiver pursuant to any applicable pollution control statute."

Section 2982 mandates "*disclosure*," not "agreement." "Disclosure" means "the act of making something known: the act of disclosing something." (Merriam-Webster Online Dictionary, available at http://www.merriam-webster.com/dictionary/disclosure (as of Dec. 1, 2014).) Disclosure requires more than mere assent by the buyer to a number in a contract; it requires the dealer to make the actual mandated fee and tax amounts known to the buyer. Subsection (a) protects the buyer by requiring the dealer to make separately known to the buyer every amount the dealer is charging for regulated charges, taxes, and fees, so the dealer does not undercut the sales price disclosure by collecting unauthorized or excessive charges.

The accurate amount to make known to the diesel car buyers for smog certification and smog fee charges was zero: no check or certification was needed, and no smog-related charges were due on diesel cars. By charging for a smog check and smog certification that it never provided, Raceway collected excessive charges. Raceway effectively increased the vehicle purchase price without complying with the purchase price disclosure requirement (§2982(a)(1)(A)) by hiding a portion of the higher purchase price in the fine print of government requirements and fees.

The Court of Appeal conflates the dealer's statutory duty of disclosure with "the amount due pursuant to the transaction agreed to by the parties" (Slip Op. at 41), which could be any amount. The amount stated in a contract may be in excess and in complete disregard of the maximum statutorily regulated amounts the Legislature permits the dealer to charge for document processing fees, electronic vehicle charging station amounts, and electronic registration fees (item nos. (1), (3), (5)). The amount stated may

be more than the actual sales taxes, license fees, registration and transfer fees, tire fees, smog fees, and other fees dealers must actually pay to the state (item nos. (4), (6), (7), (8), (9)). The amount may, as here, be regardless of whether the dealers ever actually pay them to the state. The amount may be even be for a service that is not legally required and the dealer never performs (item no. (2)).

Nevertheless, there is statutory compliance and adequate "disclosure," the Court of Appeal holds, as long as the contract shows "the amount due pursuant to the transaction agreed to by the parties", that is, the dealer lists some amount in the contract and the buyer signs it. This is a far cry from providing "comprehensive protection for the unsophisticated motor vehicle consumer."

Unsophisticated motor vehicle purchasers have little choice but to accept dealers' statements about the sales tax, licensing fees, and smog and other fees the state requires to be paid; even sophisticated purchasers do. A dealer in the business of selling cars to the public has experience and expertise in the legal requirements for completing the sale; purchasers, both unsophisticated and sophisticated, are no match for that. Seated in the dealer's showroom after psychologically committing to buy a car, they accept the dealer's documents listing the charges they are legally required to pay as true in order to complete their purchase and go home.

Unlike the price of the car, the key deal point the dealer and buyer openly discuss and negotiate, fees are typically presented for the first time after the deal has been struck, and are widely perceived to be non-negotiable. The dealer usually types the fee amounts into the contract before presenting it to the buyer. Fees are presented as routine, obligatory amounts that are required to be charged. They first come up after the consumer has already made a "sunk investment" of time and energy in the sale process, having already investigated various different brands and models and usually test-driven at least some of them, selected a car, haggled over the purchase price, and then made multiple complex decisions about financing options, plus whether to purchase various

add-ons. Once the buyer has psychologically committed to buy a certain car from a certain dealer, his or her resistance is low, and he or she is unlikely to question or contest charges the dealer springs at the last minute when the contract is presented for signature.

The full context of section 2982(a) reveals the heavy burden of the Court's decision. By requiring nine separate items to be disclosed, all either amounts regulated by statute or other laws (nos. (1)-(8), above), or for a service necessary to comply with the smog certification law (no. 9), the Legislature intended dealers to specify the actual fees and taxes that are due. The Legislature did not intend to allow dealers to charge whatever they wish, regardless of the amounts the dealers themselves actually have to pay to the state. The Legislature did not, in an act of supreme irony, intend section 2982(a) to be another dealer profit center.

The Court Should Grant Review to Prevent the Industry from Circumventing the Legislature

Statutory caps on dealer charges have been hard won and hard defended.

In 2005, Governor Schwarzenegger vetoed Assembly Bill 1001, issuing this veto message:

> I am returning Assembly Bill 1001 without my signature. This bill would increase the maximum document fee paid by car buyers from $45 to $55. Such fees are not usually discussed with the car buyer until the purchase price has been agreed upon and a disclosure is made on the conditional sales contract. I recently signed the Car Buyer Bill of Rights and AB 1001 runs contrary to that bill's worthy goal to improve consumer protection. I do not believe that California consumers should be saddled with another hidden fee and therefore cannot support this measure.
>
> Sincerely, Arnold Schwarzenegger, GOVERNOR.

(Governor's Veto Message, September 30, 2005, available at http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1001-1050/ab_1001_cfa_20060207_094811_asm_floor.html [as of December 1, 2014].)

In 2008, the Legislature rejected Assembly Bill 1939, an attempt by the auto dealers to amend Civil Code section 2985.8 to raise the statutory cap on the document processing fees dealers could charge auto lessees an additional $10, from $45 to $55.[4] CARS spearheaded efforts to defeat the measure. The bill failed passage in the California Senate Transportation Committee, where it was held without a vote, at the request of the author. (*See* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml [as of December 1, 2014].)

In 2010, the Legislative rejected an attempt by Senator Padilla to increase the document processing fees from $55 to $75 on sales, and $45 to $75 on leases, via a budget "trailer bill." (*See* Los Angeles Times, "Plan to hike auto fees dies," Oct. 9, 2010, available at http://articles.latimes.com/2010/oct/09/business/la-fi-1009-autos-fees-20101009 [as of December 1, 2014].)

Subsequently, in 2011, CARS negotiated a legislative compromise that was adopted in AB 1215 (Blumenfield), that allowed dealers to charge up to $80 in document processing fees in exchange for a requirement that all California car dealers must check the National Motor Vehicle Title Information System, established by the U.S. Department of Justice, for each used vehicle they offer for sale in the state; if a vehicle has been reported to NMVTIS as a total loss, or has a branded title (such as "lemon law buyback," "salvage," or "flood"), the dealer must post a specifically-worded prominent red warning sticker on the car. (*See*

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[4] Section 2985.8 is a provision of the Vehicle Leasing Act, which regulates auto leases, as opposed to financed sales. (Civil Code, §§ 2985.7 *et seq.*)

http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB1215&search_keywords= [as of December 1, 2014].)

The Court of Appeal decision thus subverts a long-standing legislative process by allowing dealers to charge and collect smog fees, document fees, and other charges above what the Legislature has allowed. Allowing Rees-Levering its full protective compass protects not only consumers, but degradation of the legislative process against rogue dealers who, unable to succeed openly in the halls of the Capitol, would make their gains covertly in their own showrooms.

The decision of the Court penalizes responsible dealers. It is unfair to dealerships that comply with the law, and gives unfair competitive advantage to dealerships that engage in falsely advertising and promoting lower prices, knowing they can more than compensate by effectively increasing their prices though last-minute fees (such as the smog check and certification fees here).

The Attorneys General of 31 States, including California, highlighted this anti-competitive impact in their formal comments to the Federal Trade Commission regarding deceptive practices by car dealers:

> A minority of states directly regulate [document] fees by capping them and otherwise regulating them. Where not banned or regulated, the fees often come as complete surprises to consumers, and are not disclosed until well after the dealer and consumer agree on a sales price for the vehicle. Some dealers deceive consumers by misrepresenting the fees, directly or implicitly, as government-imposed fees. Nearly all dealers who charge the fee require the customer to pay the fee, unless state law mandates that the fee be optional. Most dealers use purchase agreements that include the fee pre-printed on the contract.
>
> In addition to being deceptive, the separate imposition of these fees is anticompetitive. Dealers who advertise higher prices may, ultimately,

> charge lower prices than those of competitors whose advertising shows lower purchase prices for the same year, make and model vehicles but which fail to include a several-hundred-dollar documentary fee in the advertised price.

(Report of Attorneys General, "The FTC's Increased Role in Regulating Auto Advertising, Sales and Lease Practices," 2011, available at http://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no.p104811-00112/00112-82927.pdf [as of Dec. 1, 2014].)

Conclusion

For the foregoing reasons, the above-listed non-profit consumer organizations respectfully request that this Court grant review. Thank you for your consideration of their views.

Respectfully submitted,

Arthur D. Levy

Arthur D. Levy (SBN 95659)

Attorney for Consumers for Auto Reliability and Safety (CARS), Consumer Federation of California, CALPIRG, and Consumer Action

ADL:jtl
cc: Attached service list

DECLARATION OF PROOF OF SERVICE

I, Joshua T. Le, state:

I am a citizen of the United States. My business address is 445 Bush Street, Sixth Floor, San Francisco, CA 94108. I am employed in the city and county of San Francisco where this mailing occurs. I am over the age of eighteen and not a party to this action.

On the date set for the below, I served the foregoing letter by placing a true copy thereof, enclosed in a sealed envelope with first-class postage thereon fully prepaid, in the United States mail at San Francisco, California on the following persons:

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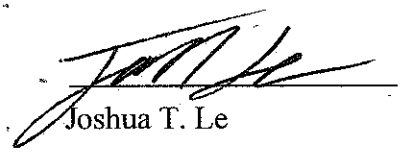
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December 5, 2014 at San Francisco, California.



Joshua T. Le