S280598

IN THE SUPREME COURT OF CALIFORNIA

OSCAR J. MADRIGAL et al.,
Plaintiffs and Respondents,

v.

HYUNDAI MOTOR AMERICA,
Defendant and Appellant.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL, THIRD APPELLATE DISTRICT • CASE NO. C090463
PLACER COUNTY SUPERIOR COURT • MICHAEL JONES, JUDGE • CASE NO. SCV0038395

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, ALLIANCE FOR AUTOMOTIVE INNOVATION, AND CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSOCIATION IN SUPPORT OF APPELLANT HYUNDAI MOTOR AMERICA

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Under California Rules of Court, rule 8.520(f)(1), the Civil Justice Association of California (CJAC), the Alliance for Automotive Innovation (the Alliance), and the California Manufacturers and Technology Association (CMTA), request permission to file the attached amicus curiae brief in support of Defendant and Appellant, Hyundai Motor America.[1] CJAC, the Alliance, and CMTA each have a particular interest in, and welcome the opportunity to address, the issue presented in this case: "Do Code of Civil Procedure section 998's cost-shifting provisions apply if the parties ultimately negotiate a pre-trial settlement?"

CJAC is a nonprofit organization whose members are businesses from a broad cross section of industries. Founded in 1979, CJAC is the only statewide association dedicated solely to improving California's civil liability system, in the legislature, the regulatory arena, and the courts. Its principal purpose is to educate the public about ways to make our civil liability laws more fair, certain, economical, and efficient.

The Alliance is the leading advocacy group for the auto industry, representing dozens of automobile manufacturers and value chain partners who together produce nearly 98 percent of

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[1] No party or counsel for a party authored this proposed brief in whole or in part, and no person or entity other than amici, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

all light-duty vehicles sold in the United States. The Alliance takes a special interest in common law rulings and legislation governing consumer litigation that may adversely affect auto makers' ability to invest in and implement innovations in automobile manufacturing.

CMTA is a statewide trade association dedicated to supporting and enhancing a strong business climate for California's 30,000 manufacturing, processing, and technology-based companies, including all of the major automobile manufacturers in California. For more than a century, CMTA has worked with state government to develop balanced laws, effective regulations, and sound public policies to stimulate economic growth and create new jobs, while safeguarding California's precious environmental resources. Today, CMTA represents 400 businesses from the entire manufacturing community – an economic sector that generates more than $300 billion every year and employs more than 1.2 million Californians.

CJAC, the Alliance, and CMTA regularly file amicus briefs in cases like this one that raise issues of concern to the business community and the automotive industry. CJAC, the Alliance, and CMTA—and their constituent members—are substantially interested in the proper development of clear and consistent rules under California law governing the scope and application of Code of Civil Procedure section 998's cost-shifting provisions when parties in a civil case negotiate a pretrial settlement.

CJAC, the Alliance, and CMTA thus request that this Court accept and file the attached amicus curiae brief.

July 29, 2024

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AMICUS CURIAE BRIEF

INTRODUCTION

Code of Civil Procedure section 998 was designed to encourage, not hinder, the early resolution of civil cases.[2] By shifting postoffer costs to the party who rejects a settlement offer but then fails to obtain a better result, the statute functions as a powerful tool in prompting early, good faith compromises. Section 998 was not designed to promote gamesmanship, nor the kind of arbitrary line-drawing that plaintiffs' theory would require.

This Court should reaffirm that Code of Civil Procedure section 998's cost-shifting provisions apply whenever a party fails to obtain a judgment or award that is better than an opponent's section 998 offer, including in cases that conclude by way of pretrial settlement. That is how the law operates under the similar rule in federal court (Fed. Rules Civ.Proc., rule 68, 28 U.S.C.), under which courts have held that pretrial settlements trigger the cost-shifting provisions. That sensible approach, as applied here, facilitates conciliation and best reflects the letter and spirit of the carrot-and-stick features of section 998 and rule 68.

If adopted, plaintiffs' contrary interpretation of section 998 would hinder early compromise, and would lead to the kind of brinksmanship that occurred here: after one party makes a fair proposal (here, *double* plaintiffs' compensatory damages) and

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[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

that is rebuffed, the other party may needlessly extend the litigation and avoid the consequences of their decision by making a new offer on the eve of trial to resolve the case on no better terms than the prior offer. Under plaintiffs' reasoning, the recalcitrant party will have managed to unilaterally turn a time-limited offer into an open-ended one, depriving the party who made the first move of the benefits under section 998 that *should* derive from bidding against themselves early in the case.

Plaintiffs' position is particularly problematic where one-way fee-shifting statutes are in play. If plaintiffs' counsel could reject early settlement offers and avoid any postoffer fees cut-off under section 998 by settling on the eve of trial, they would have strong incentives to prolong the litigation to increase their fees recovery, with no additional benefit to their clients. That approach would exacerbate the problem of fee-shifting statutes, further establishing the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.) as "a lucrative playground for a handful of law firms, who have turned consumer protection into a profitable industry at the expense of consumers and our overburdened court system." (Powell, *California's Lemon Law: A sweet deal for lawyers, sour for consumers* (July 17, 2024) L.A. Daily News <https://www.dailynews.com/2024/07/17/californias-lemon-law-a-sweet-deal-for-lawyers-sour-for-consumers> (as of July 23, 2024) [noting that in 2023, 22,655 lemon law cases were filed statewide, "a staggering 52% increase from the previous year"].)

To promote California's policy of early dispute resolution, this Court should give full effect to the plain language of section 998. The Court should hold that rejection of pretrial settlement offers triggers the statute's cost-shifting provisions whenever, as here, the rejecting party has *failed* to obtain a more favorable result.

LEGAL ARGUMENT

I. This Court should reject a strained reading of Code of Civil Procedure section 998 that weakens incentives to *make* early settlement offers, and largely destroys incentives to *accept* them.

A. By its plain language, section 998 promotes early settlement because it applies whenever a litigant fails to achieve a better result than could have been obtained by accepting a prior settlement offer.

As explained in Hyundai's brief on the merits, section 998 provides that a costs recovery is curtailed if the plaintiff obtains the same judgment or obtains no judgment at all. (ABOM 9, 17–18, 20.) It applies whenever a plaintiff "fails to obtain a more favorable judgment or award." (§ 998, subd. (c)(1); see *Ayers v. FCA US, LLC* (2024) 99 Cal.App.5th 1280, 1300 (*Ayers*), review granted May 15, 2024, S284486 ["Where, as here, the plain terms of section 998 do not exclude litigation that ends in settlement, we must apply the statute as written unless doing so would yield absurd results"].)[3]

[3] In *Ayers*, review has been held pending decision in this case.

Unsurprisingly, given the simplicity of the statute's phrasing, this Court has consistently recognized that a party who rejects a valid section 998 offer and obtains no better result despite continuing the litigation must face the consequences of that decision. Section 998 provides "a strong financial disincentive to a party—whether it be a plaintiff or a defendant—*who fails to achieve a better result* than that party could have achieved by accepting his or her opponent's settlement offer." (*Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 804 (*Bank of San Pedro*), superseded by statute on another ground as stated in *Quiles v. Parent* (2017) 10 Cal.App.5th 130, 144, emphasis added.)

In *Bank of San Pedro*, *supra*, 3 Cal.4th at page 804, this Court analyzed whether enforcement of an award of expert fees is automatically stayed pending an appeal from a judgment. The "most important" factor in the Court's analysis was effecting the "plain" policy of section 998. (*Ibid.*) This Court noted that section 998 uses a carrot-and-stick approach to encourage settlements, rewarding parties who make reasonable pretrial settlement offers, and penalizing those who decline them. (*Ibid.*) The key to achieving section 998's salutary purposes is to assess whether the litigant has achieved a "better result" than an opponent's settlement offer. (*Ibid.*) Plaintiffs argue that section 998 has no application unless the parties proceed all the way to judgment. (OBOM 27–28.) But the plain language of the statute and this Court's reasoning in *Bank of San Pedro* belie that strained construction. (See ABOM 11, 17.)

This Court's more recent pronouncements have reiterated the policies explicated in *Bank of San Pedro*. For example, in *Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014 (*Martinez*), the Court reaffirmed that section 998 was enacted to encourage early settlements. To achieve that purpose, section 998 provides for "augmentation and withholding of the costs recoverable at trial when a party *fails to achieve a result better than it could have obtained* by accepting an offer of compromise or settlement conforming to statutory requirements." (*Martinez*, at p. 1017, emphasis added.) The statute "aims to avoid the *time delays and economic waste* associated with trials and to reduce the number of meritless lawsuits." (*Id.* at p. 1019, citing *Culbertson v. R.D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 711 (*Culbertson*), emphasis added.)

More recently, this Court addressed the role of settlements in triggering statutory cost-shifting that provides an incentive to resolve disputes *before* significant costs are incurred. *DeSaulles v. Community Hospital of Monterey Peninsula* (2016) 62 Cal.4th 1140, 1153 held that a settlement that is silent as to costs triggers prevailing party cost-shifting under section 1032. "[S]ettlement agreements pursuant to section 664.6 *or section 998* result not only in contractual agreements but also in judgments that conclusively resolve the issues between the parties." (*Ibid.*, citing *California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664, emphasis added.)[4] Whether

[4] Here, the parties recited the terms of their stipulated settlement on the record pursuant to section 664.6. (1 AA 111.)

memorialized in a private contract or a consent judgment, the recovery is "obtained as a means of resolving and terminating a lawsuit." (*Ibid.*) Section 1032 is one mechanism that drives early compromise to guard against the risk of excessive cost-shifting, and section 998 should be construed in parallel fashion to apply as written after a case ends in settlement. (See *id.* at pp. 1153–1154.)

In resolving the present case, this Court should be guided by the same broad characterization of section 998's plain language and underlying legislative purpose that it has applied in past cases. Plaintiffs' argument that the statute contains an unwritten exception for cases that end in settlement is found nowhere in this Court's past jurisprudence.

B. Plaintiffs' interpretation of section 998 would undermine California public policy by eroding parties' incentives to achieve early settlement.

Section 998 does not simply encourage settlements in a general sense. Rather, the aim of the statute is to encourage resolution of a dispute early in the case, before the parties and the courts have expended resources in litigation. (*Martinez*, *supra*, 56 Cal.4th at p. 1024, fn. 8 [section 998's purpose is to "encourage *early* settlement"]; see Assem. Off. of Research, 3d reading analysis of Sen. Bill No. 203 (1981–1982 Reg. Sess.) Sept. 8, 1981, p. 1 [citing proponents' argument that "moving the effective date up to the initial offer of compromise provides a greater incentive for *speedy resolution* of judgments" (emphasis added)]; see also *Culbertson*, *supra*, 190 Cal.App.3d at p. 711 ["It

is clear that the Legislature adopted the statute to encourage *early* settlement of lawsuits to avoid the time delay and economic waste of trial, and to reduce the number of meritless lawsuits by requiring the losing party to pay the costs incurred by the prevailing party" (emphasis added)].)

About 95 percent of all cases settle before trial.[5] But as trial judges well know, the settlements all too often come on the courthouse steps, after a great deal of time and money has been spent on protracted discovery and pretrial motion practice. Brinksmanship often drives parties to see who blinks first as prospective jurors file into the box for voir dire. To fulfill the objective of avoiding this problem and encouraging *early* conciliation, the Legislature has broadly provided that cost-shifting applies whenever a plaintiff who rejects a defendant's section 998 offer subsequently "fails to obtain a more favorable judgment or award." (§ 998, subd. (c)(1).) Indeed, "The earlier reasonable settlement offers are made and accepted, the less the costs incurred." (*Ayers*, *supra*, 99 Cal.App.5th at p. 1301.) As the court put it in *Ray v. Goodman* (2006) 142 Cal.App.4th 83, 91, California's "policy is the encouragement of the settlement of litigation, and one way those two statutes [Code Civ. Proc., § 998

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[5] See Baker, *Managed Cooperation in a Post-Sago Mine Disaster World* (2013) 33 Pace L.Rev. 491, 514 ["[N]inety-five percent of cases filed in the California state judicial system eventually settle before trial"]; Eisenberg & Lanvers, *What is the Settlement Rate and Why Should We Care?* (2009) 6 J. Empirical Legal Stud. 111, 112; see also Barkai et al., *A Profile of Settlement* (2006) 42 Court Rev. 22, 34 <https://digitalcommons.unl.edu/ajacourtreview/22> (as of July 23, 2024).

and Civ. Code § 3291] do that is to encourage the parties to make reasonable settlement offers as early as possible in personal injury litigation."

In *hindsight*, one settling party or the other may have regrets, precisely because both sides face uncertainties that drive the compromise, and later developments may undermine an assumption animating the offer and acceptance. (See OBOM 42–45; RBOM 29–30.) But contrary to plaintiffs' argument, that is a feature, not a flaw, in the carrot-and-stick methodology under section 998. The legislature enacted section 998 to encourage the settlement of lawsuits prior to trial and penalize litigants who failed to accept what, in retrospect, is determined to have been a reasonable settlement offer. (See *Bank of San Pedro*, *supra*, 3 Cal.4th at p. 804; see also *T.M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 280.) As the court in *Ayers* recognized, it would be undesirable "to deprive a defendant of the benefits of having made an early, reasonable settlement offer if the case later resolves by settlement." (*Ayers*, *supra*, 99 Cal.App.5th at p. 1303.) "Doing so would encourage defendants to go to trial rather than settle because only by litigation could they qualify for statutory benefits they sought in making the unaccepted section 998 offer." (*Ibid.*)

Indeed, the hallmark of Code of Civil Procedure section 998 is to promote a sober evaluation of risk against the threat of fees and costs. This is neither novel, nor shocking. Early risk assessment is an inherent, beneficial, characteristic of pretrial settlement offers, designed to promote fastidious assessment and

the best interests of the client. (See e.g., *Marek v. Chesny* (1985) 473 U.S. 1, 11 [105 S.Ct. 3012, 87 L.Ed.2d 1] (*Marek*) ["To be sure, application of [Federal] Rule [of Civil Procedure] 68 will require plaintiffs to 'think very hard' about whether continued litigation is worthwhile; that is precisely what Rule 68 contemplates"].)

Amici curiae in support of plaintiffs argue that "The *Madrigal* rule demands an impossible level of divination at the time an early offer is made." (See Consumer Attorneys of California and Consumers for Auto Reliability and Safety Amicus Brief (Consumers ACB) 7.) But to the extent plaintiffs are concerned that some settlement proposals may be so early in the process that no reasonable risk assessment can be made, the law already provides for that. Unduly premature offers are not valid under section 998. (*Covert v. FCA USA, LLC* (2022) 73 Cal.App.5th 821, 842–844.) In many cases, including lemon law cases like this one, a plaintiff and their experienced counsel who have litigated hundreds of cases against the same defendant already possess *more* information than the defendant has regarding the basis for their claims and evidence supporting a damages award by the time they file the complaint. Even so, if a trial court finds a prompt offer was so early as to give rise to no reasonable expectation that it might be accepted before discovery takes place, the plaintiff who rejects the offer need not fear cost-shifting under section 998. (E.g., *Westamerica Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 129 (*Westamerica Bank*) ["The courts have uniformly rejected an interpretation of

section 998 that would allow offering parties to ' "game the system." ' [Citation.] A section 998 offer must be made in good faith."]; accord, *Licudine v. Cedars-Sinai Medical Center* (2019) 30 Cal.App.5th 918, 924 ["if a section 998 offer has 'no reasonable prospect of acceptance,' an offeree will reject the offer no matter what and applying section 998's punitive 'stick' will do nothing to encourage settlement"].)

In sum, adopting plaintiffs' interpretation of section 998 would undermine section 998's strong policy of encouraging early settlement.

C. Plaintiffs' interpretation of section 998 promotes gamesmanship, not conciliation.

As this Court stated in *Martinez*, "If a proposed rule would encourage gamesmanship or spawn disputes over the operation of section 998, rejection of the rule is appropriate." (*Martinez*, *supra*, 56 Cal.4th at p. 1021, citing *Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266, 272; see *One Star, Inc. v. STAAR Surgical Co.* (2009) 179 Cal.App.4th 1082, 1095; *Westamerica Bank*, *supra*, 158 Cal.App.4th at p. 129 ["courts have uniformly rejected an interpretation of section 998 that would allow offering parties to ' "game the system" ' "].)

Apparently recognizing the potential for gamesmanship under their interpretation of the law, an amicus brief in support of plaintiffs argues the Legislature, not the courts, should address gamesmanship concerns. (See Consumers ACB 4–6.) But *the Legislature has done exactly that* by drafting plain language that puts the burden of cost shifting on a rejecting party who

later *fails* to obtain a better result. Moreover, courts of course *do* have a role in guarding against gamesmanship if laws are subject to differing interpretations. Courts thus frequently construe laws to avoid creating counterproductive incentives—which is just what plaintiffs' interpretation would do.

Indeed, if plaintiffs' interpretation were to prevail, it would embolden litigants to propose previously rejected, or even lesser, offers on the eve of trial—after protracted litigation—in order to claim "prevailing party" status and seek a windfall of attorney fees and costs. Imposing an arbitrary constraint that excludes such second-chance settlements from the cost-shifting calculus would thus perversely *discourage* good faith first-chance settlement offers in cases where fee-shifting is available.

In their merits briefing, plaintiffs argue that their interpretation promotes better-late-than-never settlements, asserting that "settling becomes easier as litigation progresses and parties become better able to assess their claims and reassess their willingness to settle." (RBOM 29, citing Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2023) ¶ 4:1378.)

But even putting aside the implicit logical fallacy that late settlements are somehow better than early ones, empirical research shows that plaintiffs' assertion is, in fact, contrary to litigants' behavior. Any seasoned mediator knows that settlements are driven by *uncertainty*. In an experiment regarding the effects of cost-shifting and bargaining under the threat of trial, it was noted that "differences in expectations can

account for the increase in settlement rates observed under asymmetric information." (Inglis et al., *Experiments on the Effects of Cost Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims* (2005) 33 Fla. St. U. L.Rev. 89, 110, emphasis added.)

In short, the perceived risks present at the early stages of litigation have been found to *encourage* resolution, not discourage it. And while extended litigation could afford some litigants with greater knowledge to assess their claims, delaying settlement as facts and theories evolve would inspire offerees to roll the dice at trial, given the "sunk costs" spent on litigating the case. Plaintiffs offer no solid rationale for a blanket rule that, on balance, would ultimately encourage a swelling accumulation of attorney fees and costs.

True, plaintiffs' gambit of rejecting an early settlement only to come back with the same or similar terms years later *can* result in a belated settlement when the defendant is faced with the hammer of statutory fee-shifting. Outside that context, a defendant might figure, "in for a penny, in for a pound," and decide to proceed to trial having failed to head off the litigation expenses by making the prior rejected offer. But in cases like this one, the prospect of having to pay a six-figure fee award inflated by trial proceedings creates enormous pressure on the defendant to compromise even when the plaintiff has a very weak case on the merits. (See *Ayers*, *supra*, 99 Cal.App.5th at p. 1303 ["In negotiating settlements after an earlier section 998 offer goes unaccepted, parties can and must account for the impact the

unaccepted section 998 offer has on their prospects in litigation and thus what constitute reasonable settlement terms"].) Plaintiffs' approach, relieving parties of the consequences of their decision to reject a reasonable offer, is thus plainly unfair in cases like this one, in addition to being contrary to section 998's plain language and California's policy of promoting early resolution of cases.

Moreover, plaintiffs' position, if endorsed, would run the risk of compromising an attorney's ethical responsibility to avoid delays in litigation. (See Rules Prof. Conduct, rule 3.2 ["In representing a client, a lawyer shall not use means that have no substantial* purpose other than to delay or prolong the proceeding or to cause needless expense" (footnote omitted)].) By contrast, honoring the carrot-and-stick mechanism of section 998 in cases resolved by settlement provides an incentive for plaintiffs' counsel to put their clients' interests first, by removing the incentive to recommend rejecting a fair settlement on the assumption that a similar outcome for the client can be achieved much later, after counsel has managed to maximize a fee recovery that helps only the attorney. (See Rules Prof. Conduct, rule 1.4.1 [duty of communication of settlement offers].) An interpretation that fosters ethical conduct is especially beneficial in light of authority disclaiming any role for trial courts to take into account potentially unethical fee agreement terms when assessing fees—such as contracts that allow counsel to obtain both a contingency cut of their clients' recovery as well as all the statutory fees awarded in court. (See *Reynolds v. Ford Motor*

Company (2020) 47 Cal.App.5th 1105, 1117–1118 [disavowing any obligation by trial courts awarding statutory attorney fees "to evaluate the contingency fee agreement to ensure that the statutory fee would result in 'an unreasonable' fee," and holding that instead " 'the Court should *assume* that the plaintiff's lawyer has abided by his ethical obligations and avoided the temptation to place his own interest ahead of his client's' " (emphasis added)].)

D. The assessment of whether a "settlement" qualifies as a "judgment" is irrelevant.

While the Court of Appeal correctly concluded that the term "judgment" may be interpreted broadly for purposes of what constitutes a valid section 998 offer, this Court need not reach that question to affirm.

Section 998's cost-shifting provisions apply when a litigant has failed to obtain a more favorable judgment. That is the situation here, where the litigant has settled for no more than a prior rejected offer. Whatever the reasoning behind plaintiffs' litigation decision, there is no escaping the fact that, by accepting the settlement, plaintiffs failed to obtain a more favorable judgment or award than Hyundai's final section 998 offer. Section 998's terms do not provide for different outcomes depending on *why* a plaintiff failed to obtain a more favorable judgment or award. (*Ayers*, *supra*, 99 Cal.App.5th at p. 1300 ["We think a plain reading of section 998, subdivision (c)(1) compels the conclusion that it applies to *any* litigation that terminates with the plaintiff getting less than he would have if he had accepted

the defendant's earlier section 998 offer" (emphasis added)]; see *Rosenberg-Wohl v. State Farm Fire and Casualty Company* (July 18, 2024, S281510) ___ Cal.5th ___ [2024 WL 3449266, at p. *6].) ["we do not limit our review to any particular word or phrase appearing in a statute, but instead consider the language of the statute as a whole"].)

Thus, if a plaintiff voluntarily dismisses her case (based on a settlement or otherwise), the statute precludes her from recovering postoffer costs. (*Mon Chong Loong Trading Corp. v. Superior Court* (2013) 218 Cal.App.4th 87, 93–94.) There is no reason to distinguish parties in that situation from those who proceed to trial or arbitration and obtain a judgment or award that is less favorable than the defendant's pretrial offer. (E.g., *Martinez v. Eatlite One, Inc.* (2018) 27 Cal.App.5th 1181, 1185.)

These results flow from—and are dictated by—the statutory language itself. Indeed, by its own terms, section 998 contemplates the non-existence of a judgment in the first instance. As the Court of Appeal correctly held here, "the only question asked by subdivision (c)(1) [of section 998] is whether the plaintiff who rejected the offer obtained, or failed to obtain, a 'more favorable judgment' through continued litigation." (*Madrigal v. Hyundai Motor America* (2023) 90 Cal.App.5th 385, 397, review granted Aug. 30, 2023, S280598.) The answer here is yes. Plaintiffs failed to obtain a more favorable judgment than Hyundai's second section 998 offer, and thus section 998 should cut off his entitlement to costs and fees as of the date of that offer.

II. Cases interpreting Federal Rule of Civil Procedure 68 reinforce that cost-shifting should apply to litigation that ends in settlement.

Federal cases involving an analogous cost-shifting provision provide guidance on section 998's application in the context of negotiated pretrial settlements.

Though different in terminology, Rule 68 of the Federal Rules of Civil Procedure (28 U.S.C.) is comparable in operation to Code of Civil Procedure section 998. The federal rule provides that if a timely pretrial offer of settlement is not accepted, and the judgment "finally obtain[ed] [by the offeree] is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." (Fed. Rules Civ.Proc., rule 68(d), 28 U.S.C.) Similar to section 998, "The purpose of Rule 68 is to 'facilitat[e] the *early* resolution of marginal suits in which the defendant perceives the claim to be without merit, and the plaintiff recognizes its speculative nature." (*Marek*, *supra*, 473 U.S. at pp. 12–13 (conc. opn. of Powell, J.), emphasis added.)

Even though Federal Rule of Civil Procedure 68 (unlike Code of Civil Procedure section 998) expressly requires comparing the unaccepted offer with "the judgment that the offeree finally obtains," the Ninth Circuit has nonetheless held that rule 68's cost-shifting mechanism applies when the case ends through settlement rather than after a trial on the merits. In *Lang v. Gates* (9th Cir. 1994) 36 F.3d 73, the Ninth Circuit confronted the question of whether a plaintiff who first rejects a settlement offer under rule 68 may recover postoffer attorney's fees when he later accepts the same offer. Just as plaintiffs argue

here regarding section 998, the plaintiff in *Lang* claimed that the term "judgment" in rule 68 requires a disposition by "trial on the merits," and that the rule has "no bearing" on cases resolved by a subsequent settlement. (*Lang*, at pp. 75–76.) The Ninth Circuit rejected the argument, noting that because rule 68's main purpose is to "encourage settlements," the rule should be construed with that objective in mind. (*Id.* at p. 76.) To the extent the rule might require a judgment before rule 68 comes into play, the Ninth Circuit held that rule 68's cost-shifting mechanism applied because the settlement resulted in an order of dismissal with prejudice, which functioned as a judgment for defendants "in substance." (*Ibid.*)

Other federal courts have similarly held that Federal Rule of Civil Procedure 68's cost-shifting provisions apply when a party rejects an offer of judgment and later agrees to a less favorable settlement. (See *Boorstein v. City of New York* (S.D.N.Y. 1985) 107 F.R.D. 31, 34 ["Payment of costs happens only after the close of the suit through judgment *or settlement*" (emphasis added)]; *Mannick v. Kaiser Foundation Health Plan, Inc.* (N.D.Cal. Sept. 28, 2007, No. C 03-5905 PJH) 2007 WL 2892647, at p. *9 [Rule 68's provisions "include[ ] judgments obtained through summary judgment [citation], and also include[ ] orders terminating litigation as a result of settlement"]; *Rice v. Union Pacific R. Co.* (E.D.Ark. July 6, 2012, No. 4:12-cv-00108-SWW) 2012 WL 2675474, at p. *5 ["The Court rejects Union Pacific's argument that Rule 68 does not apply to settlements"]; *Alcan Elec. & Engineering Co., Inc. v. U.S.* (Fed.Cl.

1992) 27 Fed.Cl. 327, 328–329 [Rule 68 does not distinguish between judgments obtained by settlement and those obtained after trial].) Commentators agree. (E,g., Sherman & Fairman, *Interplay Between Mediation and Offer of Judgment Rule Sanctions* (2011) 26 Ohio St. J. on Disp. Resol. 327, 346–347 ["To encourage defendants to make realistic offers of judgment, and to make plaintiffs seriously contemplate such offers, Federal Rule [of Civil Procedure] 68 should apply where a settlement is later made on less favorable terms than those in a rejected Federal offer"]; 12 Wright & Miller, Fed. Practice and Procedure (3d. ed. 2024) Provisional and Final Remedies and Special Proceedings, § 3006 ["the fact that the case ends by settlement should not preclude application of Rule 68"]; see also *Farrar v. Hobby* (1992) 506 U.S. 103, 111 [113 S.Ct. 566, 121 L.Ed.2d 494] [a plaintiff "must obtain an enforceable judgment against the defendant from whom fees are sought [citation], or comparable relief through a consent *decree or settlement*" (emphasis added)].)

Code of Civil Procedure section 998 should be construed consistent with Federal Rule of Civil Procedure 68, not only because the same public policy animates both provisions, but to avoid the encouragement of forum-shopping in lemon law litigation with a resulting increased burden on California courts.

CONCLUSION

To further the policy of encouraging early resolution, this Court should affirm the Court of Appeal's decision. Pretrial settlements should not erase the consequences of section 998's

cost-shifting mechanism as applied to a party who rejects an earlier, more favorable, proposal.

July 29, 2024

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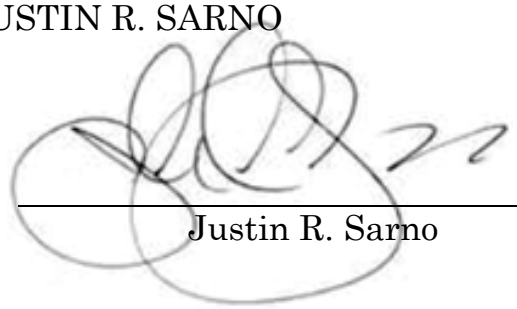

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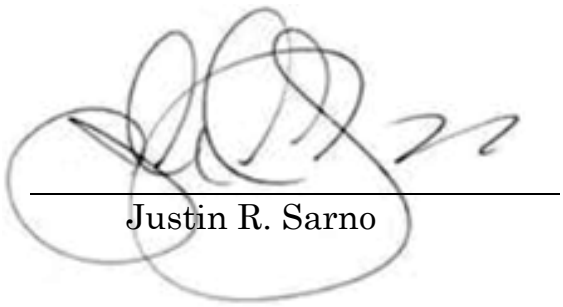
Dated: July 29, 2024



Justin R. Sarno

PROOF OF SERVICE

Madrigal et al. v. Hyundai Motor America
Case No. S280598

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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On July 29, 2024, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, ALLIANCE FOR AUTOMOTIVE INNOVATION, AND CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSOCIATION IN SUPPORT OF APPELLANT HYUNDAI MOTOR AMERICA** on the interested parties in this action as follows:

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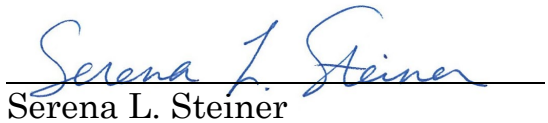

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California Court of Appeal Third Appellate District 914 Capitol Mall, 4th Floor Sacramento, CA 95814 (916) 654-0209	Case No. C090463 ***[Via TrueFiling]***
Office of the Clerk Hon. Michael W. Jones Placer County Superior Court Hon. Howard G. Gibson Courthouse 10820 Justice Center Drive Roseville, CA 95678 (916) 408-6000	Trial Court Judge Case No. SCV0038395 ***[Via U.S. Mail]***

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

Case Name: **MADRIGAL v. HYUNDAI MOTOR AMERICA**
Case Number: **S280598**
Lower Court Case Number: **C090463**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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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.

7/29/2024

Date

/s/Justin Sarno

Signature

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