

Case No. S243029

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA



ALAN HEIMLICH,
Plaintiff and Respondent,

SUPREME COURT
FILED

v.

OCT 24 2017

SHIRAZ M. SHIVJI,
Defendant and Appellant.

Jorge Navarrete Clerk
Deputy

ANSWER BRIEF ON THE MERITS

After Decision of the Court of Appeal
Sixth Appellate District
Case No. H042641

Superior Court of the County of Santa Clara
Honorable William J. Elfving
Superior Court No. 112CV231939

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	4
I. ISSUE PRESENTED FOR REVIEW	6
II. PURPOSE AND LEGISLATIVE INTENT OF CCP §998	6
III. TIMELINE OF THE CASE.....	8
IV. DISCUSSION	12
A. When Does a Party Request Costs as Provided Under §998? Under CCP §998(b)(2), a Request for CCP §998 Costs Must be Made <i>After</i> an Award on Merits	12
1. Under AAA Rules and Case Law, an Arbitrator Can Issue Supplemental Awards	12
2. <i>White v. Western</i> (1985) 40 Cal.3d 870 is Inapposite	15
3. <i>Maaso v. Signer</i> (2014) 302 Cal.App.4th 362 Failed to Consider the Practical and Legal Restrictions on Presenting a Request for Cost Under CCP §998	17
B. From Whom Does a Party Request Cost as Provided Under §998? A Party in Arbitration Should Request Its CCP §998 Costs from the Arbitrator.....	18
1. The Policy of Arbitration Finality Favors Introduction of §998 Costs to the Arbitrator ..	18
2. Special Circumstances of this	18
C. How Does a Party Request Costs as Provided Under §998? A Request for CCP §998 Costs Should be Made by Motion for Supplemental Award	19
D. Additional Issues Raised by Attorney Heimlich Are Not Addressed in this Brief.....	19

V. CONCLUSION..... 20
Certificate of Compliance 21
Proof of Service..... 22

TABLE OF AUTHORITIES

<u>California Cases</u>	<u>Page(s)</u>
<i>A.M. Classic Construction, Inc. v. Tri-Build Development Co.</i> (1999) 70 Cal.App.4th 1470	14
<i>Bank of San Pedro v. Superior Court</i> (1992) 3 Cal.4th 797	7
<i>Britz, Inc. v. Alfa-Laval Food & Dairy Co.</i> (1995) 34 Cal.App.4th 1085	14
<i>Evans v. CenterStone Development Co.</i> (2005) 134 Cal.App.4th 151	14
<i>Century City Medical Plaza v. Sperling, Isaacs & Eisenberg</i> (2001) 86 Cal.App.4th 865	14
<i>Hightower v. Superior Court</i> (2001) 86 Cal.App.4th 1415	13
<i>Maaso v. Signer</i> (2012) 203 Cal.App. 4th 362	17
<i>Moncharsh v. Heily & Blase</i> (1992) 3 Cal.4th 1	18
<i>Moshonov v. Walsh</i> (2000) 22 Cal.4th 771	18
<i>White v. Western Title Ins. Co.,</i> (1985) 40 Cal.3d 870	7, 15, 16
 <u>Statutory Authority</u>	
Code of Civil Procedure §998.....	<i>passim</i>
Code of Civil Procedure §1286.2.....	12, 18, 19
Code of Civil Procedure §1286.6.....	18

Code of Civil Procedure §1287 18

Evidence Code §1152 6, 7, 15, 16

California Rules of Court

California Rules of Court, Rule 3.1700 19

California Rules of Court, Rule 8.516 19, 20

AAA Commercial Arbitration Rules

Rule 47 12-13

I. ISSUE PRESENTED FOR REVIEW

“This case presents the following issue: When a party to an arbitration proceeding makes an offer of compromise pursuant to Code of Civil Procedure (“CCP”) §998 and obtains a result in the arbitration more favorable to it than that offer, how, when, and from whom does that party request costs as provided under section 998?” (Order, August 23, 2017.) This brief answers the Court’s prompt in the following order: (1) When? (2) From whom? and (3) How?

II. PURPOSE AND LEGISLATIVE INTENT OF CCP §998

CCP §998 prohibits the introduction of evidence of a rejected §998 offer at arbitration. “If the offer is not accepted prior to trial or arbitration or within 30 days after it is made, whichever occurs first, *it shall be deemed withdrawn, and cannot be given in evidence upon the trial or arbitration.*” CCP §998(b)(2) (emphasis added.)

The California Supreme Court explained that the purpose of excluding evidence of a §998 offer at trial or arbitration is the same in prohibiting the use of settlement offers to prove liability for damages under Evidence Code §1152¹. Namely, “despite their difference in wording §§ 1152 and 998 should receive a parallel construction. Section 1152 states that offers are inadmissible to prove ‘liability for the loss or damage,’ which we have construed to refer to liability for that loss or damage to be

¹ Evidence Code §1152(a) provides: “Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.”

compromised by the offer. Section 998, subdivision (b), states that an offer cannot be ‘given in evidence upon the trial.’” *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 888. “The Law Revision Commission comment to this section [1152] states that ‘[t]he rule excluding offers is based on the public policy in favor of the settlement of disputes without litigation.’” *Id.* at 887.

The goal of CCP §998 is clear: “[t]o encourage settlement by providing a strong financial disincentive to a party – whether it be a plaintiff or 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.

There are also important practical considerations as to why the CCP §998 offer should not be made prior to the award. It has the potential of prejudicing the arbitrator either against the party who made the offer (if the arbitrator believes that the party knew it had a weaker case), or against the party who rejected it (if the arbitrator believes that the rejecting party was unreasonable). The legislature understood the necessity of not informing the trier of fact of a CCP §998 offer prior to the verdict being rendered and specified in clear language that it must be presented after the award.

On September 18, 2013, Defendant/Appellant Shiraz M. Shivji (“Mr. Shivji”) made a statutory settlement offer to Plaintiff/Respondent Alan Heimlich (“Attorney Heimlich”) in the amount of \$30,001 pursuant to CCP §998. (AA: Vol. 1, 16.) That offer was not timely accepted and was deemed withdrawn. Ultimately, approximately a year and a half later, the arbitrator awarded Attorney Heimlich (and Mr. Shivji) nothing. During that year and a half, Attorney Heimlich hyper-aggressively litigated his breach of contract case, filing numerous motions, taking several depositions and petitioning the arbitrator for permission to take numerous more, and

exchanging thousands of pages of discovery. Filing and service fees, court reporter fees, arbitration costs, transcripts, expert witnesses, other miscellaneous costs, and hundreds of thousands of dollars in attorneys' fees incurred by both parties all could have been avoided, had Attorney Heimlich accepted Mr. Shivji's §998 offer.

Because Mr. Shivji's §998 Offer of \$30,001 far exceeds the \$0 awarded to Attorney Heimlich at arbitration, Mr. Shivji is entitled to his post-§998 offer costs pursuant to CCP §998(c)(1).

III. TIMELINE OF THE CASE

This dispute arises out of a 2003 Legal Services Agreement between Attorney Heimlich and Mr. Shivji for intellectual property and corporate services which contained a broadly worded arbitration provision which was to cover "all disputes or claims of any nature whatsoever."

"8. Arbitration. THE CLIENT AND OUR FIRM AGREE THAT ALL DISPUTES OR CLAIMS OF ANY NATURE WHATSOEVER, INCLUDING BUT NOT LIMITED TO THOSE RELATING TO OUR FEES OR THE ADEQUACY OR APPROPRIATENESS OF OUR SERVICES, SHALL BE RESOLVED BY PRIVATE AND FINAL BINDING ARBITRATION BEFORE EITHER JAMS OR THE AMERICAN ARBITRATION ASSOCIATION IN SAN FRANCISCO, CALIFORNIA IN ACCORDANCE WITH THEIR RULES -- THE CLIENT MAY CHOOSE ONE OF THESE TWO PROVIDERS. THE ARBITRATOR MUST DECIDE ALL DISPUTES IN ACCORDANCE WITH CALIFORNIA LAW AND SHALL HAVE POWER TO DECIDE ALL MATTERS, INCLUDING ARBITABILITY. THE ARBITRATOR SHALL ALLOW LIMITED DISCOVERY TO ENABLE THE CLIENT AND OUR FIRM TO PRESENT OUR CASES, BUT SHALL BE MINDFUL OF OUR MUTUAL DESIRE TO AVOID THE EXPENSE OF BROAD DISCOVERY TYPICALLY ALLOWED IN CIVIL LITIGATION. WHEN THE ARBITRATOR HAS ISSUED A DECISION, JUDGMENT ON THAT DECISION MAY BE ENTERED IN ANY COURT HAVING JURISDICTION THEREOF. THE CLIENT AND OUR FIRM

UNDERSTAND THAT WE ARE BOTH WAIVING A TRIAL BY JURY.

Notwithstanding the foregoing, either of us may first submit fee disputes to the Bar Association of San Francisco's Committee on Arbitration of Fee Disputes. If the Bar Association declines to hear a fee dispute, or if either party wishes to reject a decision by the Bar Association on any fee dispute, then said fee dispute shall also be resolved by private arbitration as set forth above. THE CLIENT AND OUR FIRM BOTH UNDERSTAND AND WAIVE THE RULE IN ALTERNATIVE SYSTEMS, INC. V. CAREY, 67 CAL.APP.4TH 1034 (1998) (ATTORNEY AND CLIENT CANNOT AGREE TO ARBITRATE FEE DISPUTES UNTIL DISPUTE HAS ARISEN). IF THAT RULE IS APPLIED TO ANY FEE DISPUTE BETWEEN US, THE REMAINDER OF THIS ARBITRATION CLAUSE WILL REMAIN IN EFFECT.

(emphasis ours)(AA: Vol. 1, 1.)

Despite the arbitration clause of his own Legal Services Agreement, on September 10, 2012, Attorney Heimlich hired his son Nicholas D. Heimlich, Esq., and sued Mr. Shivji personally in Santa Clara County Superior Court (*Alan Heimlich vs. Shiraz M. Shivji*, Case No. 122-CV-231939.) (AA: Vol. 1, 7.) The Complaint alleged breach of contract and common counts causes of action and sought \$125,244.59 in damages for alleged unpaid invoices for services that Attorney Heimlich performed for his client Giotti, Inc. (“Giotti”). *Id.* (AA: Vol. 1, 123, ¶ 2.) Giotti is a company that Mr. Shivji co-founded. It became defunct in 2008 primarily due to Attorney Heimlich depleting the client trust account and not being able to obtain patents that would made the company viable.

Mr. Shivji alleged that Attorney Heimlich’s invoices were replete with double billings, unauthorized flat fees, padded time entries, bogus cost entries, and were unilaterally delayed for up to 2 ½ years. (AA: Vol. 1, 55-58.) Mr. Heimlich provided virtually no benefit to Giotti, since only 1 out of 108 patent claims were allowed by the Patent Office, in spite of Attorney Heimlich being paid a total of \$176,565.22. *Id.*

On September 18, 2013, Mr. Shivji made a statutory settlement offer to Attorney Heimlich in the amount of \$30,001 pursuant to CCP §998. (AA: Vol. 1, 16.) That offer was not timely accepted and was deemed withdrawn.

On November 21, 2013, Mr. Shivji filed a Demand for Arbitration with AAA based on the broad arbitration clause contained in ¶8 of the Legal Services Agreement. Attorney Heimlich demurred/objected to Mr. Shivji's Demand for Arbitration. (AA: Vol. 1, 42.) On May 29, 2014, the civil action was stayed by Superior Court, over Attorney Heimlich's objections, pending arbitration before the AAA. (AA: Vol. 1, 45.)

During the arbitration proceedings, Mr. Shivji did not present evidence of the CCP §998 offer to Arbitrator Renne, pursuant to CCP §998(b)(2), which prohibits introduction of the same.

On Friday, March 6, 2015, after two and a half years of aggressive litigation by Attorney Heimlich, numerous motions, several depositions, thousands of pages of discovery, filing and service fees, court reporter fees, arbitration costs, transcripts, expert witnesses, and other miscellaneous costs, the AAA issued an Arbitration Award stating, in part:

1. All of claimant Shivji's causes of action are denied and he is awarded \$0 on those claims against respondent Heimlich
2. All of respondent Heimlich's counterclaim causes of action are denied and he is awarded \$0 on those claims against Claimant Shivji
3. The administrative fees and expenses of the American Arbitration Association totaling \$9,575.00 shall be borne as incurred and the arbitration compensation totaling \$22,800.00 shall be borne as incurred. Each side will bear their own attorneys' fees and costs.

This Award is intended to be a complete disposition of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

(AA: Vol. 1, 118.)

Upon receipt of the Arbitration Award, on Wednesday, March 11, 2015², Mr. Shivji's counsel requested that the arbitrator advise as to how he would like the request for costs pursuant to CCP §998 be made. (AA: Vol. 1, 160.) On March 12, 2015, the arbitrator responded: "Counsel, once I issued my Final Award I no longer have jurisdiction to take any further action in this matter." *Id.*

Because the arbitrator's position was that he lacked jurisdiction to award costs pursuant to CCP §998, and because Mr. Shivji could not have made a CCP §998 request before a decision was rendered, Mr. Shivji moved the Court to award CCP §998 costs. (AA: Vol. 1, 136.)

On April 24, 2015, Mr. Shivji filed his Memorandum of Costs and, separately, a Motion Requesting the Court Resume Jurisdiction and Grant Interest and Costs Pursuant to CCP §998. (AA: Vol. 1, 126, 136.) On May 4, 2015, Attorney Heimlich filed his Motion to Strike and/or Tax Costs. (AA: Vol. 1, 176.) He separately opposed Mr. Shivji's motion for costs on the same date. (AA: Vol. 1, 164.)

On June 16, 2015, the Superior Court denied Mr. Shivji's Memorandum of Costs stating, "[e]ach party shall bear their own costs and attorneys' fees as set forth in the Arbitration Award." (AA: Vol. 2, 489.) Separately, on June 16, 2015, the Superior Court ruled on Attorney Heimlich's Motion to Strike and/or Tax Costs stating, "[n]either party is entitled to the recovery of costs. Defendant's Memorandum of Costs filed April 24, 2015, is stricken or taxed to zero." (AA: Vol. 2, 491.)

² The Opinion in *Heimlich v. Shivji* (2017) 12 Cal.App.5th 152, 155 states that Mr. Shivji informed the arbitrator of his 998 offer *six* days after the award. This correspondence to the arbitrator actually occurred *five* days after the award, two days of which fell on the weekend.

On July 30, 2015, Mr. Shivji filed his notice of appeal of the June 16, 2015 Orders. (AA: Vol 2, 493.) The Sixth District reversed the trial court's Orders, deciding that Mr. Shivji could not have presented his request for costs under §998 to the arbitrator before the award was rendered due to the restrictions of CCP §998(b)(2). Further, the Sixth District found that the arbitrator refused to hear material evidence, warranting a partial vacation of the arbitration award under CCP §1286.2. *Heimlich, supra*, 12 Cal.App.5th 152 at 156.

IV. DISCUSSION

A. When does a party request costs under §998?

Under CCP §998(b)(2), a Request for CCP §998 Costs Must be Made After an Award on Merits

1. **Under AAA Rules and Case Law an Arbitrator Can Issue Supplemental Awards**

Evidence of a rejected §998 offer cannot be admitted into evidence. (*See* CCP §998(b)(2).) Requiring a party to present the arbitrator with information or evidence regarding a §998 offer that was rejected, prior to the arbitrator rendering a final award, is a violation of the CCP. There are solutions to this issue that do not require parties to inform the arbitrator of a rejected §998 offer before the arbitrator issues his award.

Due to the restriction of CCP §998(b)(2), Mr. Shivji presented evidence of his §998 offer and requested his §998 costs five days after the issuance of the award. The arbitrator responded by stating that he lacked jurisdiction to make such an award. However, the arbitrator, pursuant to AAA Commercial Arbitration Rule R-47 was not so limited, and indeed had the authority to, "in addition to a final award," make other supplemental "rulings, orders and awards" concerning "expenses" as he determines appropriate.

Commercial Arbitration Rule R-47, Scope of Award, states:

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53 [Administrative Fees], R-54 [Expenses], and R-55 [Neutral Arbitrator's Compensation]. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include: i. interest at such rate and from such date as the arbitrator(s) may deem appropriate; and ii. an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement. (Emphasis added.)

Pursuant to Commercial Arbitration Rule R-47, AAA arbitrators have the authority to deem the existing award to be partial, interlocutory, or interim, rather than final. If and when a party makes a §998 post-award request, the arbitrator is empowered to characterize the existing award as interim, interlocutory, or partial and proceed to resolve the §998 request by a subsequent award.

Further, it is well established that arbitrators may base their decision upon broad principles of justice and equity, and in doing so may make incremental awards. (See *Hightower v. Superior Court* (2001) 86 Cal.App.4th 1415, 1419.) As noted by the Sixth District, “[c]ourts have recognized an arbitrator’s authority to make supplemental awards, either by

generally awarding attorney fees with the amount to be determined later in a supplemental award (*Britz, Inc. v. Alfa-Laval Food & Dairy Co.* (1995) 34 Cal.App.4th 1085, 1105–1106, 40 Cal.Rptr.2d 700), or by awarding fees and reserving jurisdiction to calculate the amount (*Evans v. CenterStone Development Co.* (2005) 134 Cal.App.4th 151, 159–160, 35 Cal.Rptr.3d 745).” *Heimlich, supra*, 12 Cal.App.5th at 170.

Arbitrators may also make supplemental awards to correct a ruling on one or more submitted issues. *Century City Medical Plaza v. Sperling, Isaacs & Eisenberg* (2001) 86 Cal.App.4th 865. Arbitrators have 30 days from the date of the award to make the correction, under CCP §1284. *Id.* at 881. The court in *Century City Medical Plaza* relied upon the decision in *A.M. Classic Construction, Inc. v. Tri-Build Development Co.* (1999) 70 Cal.App.4th 1470, which held that an arbitrator can employ a supplemental award to supplement an issue that the parties were entitled to a decision but was omitted due to arbitrator’s mistake if the supplemental award is (1) requested within the time allowed for correct either by statute or controlling rules of arbitration, (2) prior to confirmation of the original award, (3) not inconsistent with other findings, and (4) does not cause demonstrable prejudice. *Century City Medical Plaza v. Sperling, Isaacs & Eisenberg* (2001) 86 Cal.App.4th 865, 881.

Given arbitrators’ powers to make incremental awards, supplemental awards for attorney fees, and supplemental awards to correct mistakes, it follows that it ought to be within the scope of an arbitrator’s power to make a supplemental award on the issue of §998 costs. This does not conflict with the public policy favoring finality in private arbitration.

2. *White v. Western Title Insurance Co.* (1985) 40 Cal.3d 870, is Inapposite

Attorney Heimlich argues that an arbitrator must be informed of a rejected §998 offer prior to his decision on the merits, citing to *White v. Western Title Insurance Company* (1985) 40 Cal.3d 870. However, *White* does not support this position.

In *White*, Plaintiffs were purchasers of real property who sued the title insurance company in relation to the company's preparation of preliminary title insurance reports that failed to mention recorded water easements. *Id.* at 878. Plaintiffs' complaint originally contained two causes of action: (1) breach of the insurance contract and (2) negligence.

During litigation, the defendant title insurance company made an informal settlement offer and subsequently a §998 offer. *Id.* at 879. Plaintiffs rejected the offers, and, based upon the offers, amended their complaint to state a third cause of action for breach of the covenant of good faith and fair dealing. *Id.* at 879.

The *White* Court determined that §998 and Evidence Code §1152 should "receive a parallel construction." *Id.* at 888. The trial court permitted plaintiff to introduce evidence of a rejected §998 offer as proof of the instrumentality of the insurance company's tort of breach of covenant of good faith and fair dealing (though only after bifurcating the trial to first prove liability). By affording CCP §998 the same statutory construction as Evidence Code §1152, the *White* Court adopted for CCP §998 the same narrow exception of Evidence Code §1152(b) – that an offer to compromise may be admitted in an action for breach of covenant of good faith and fair dealing.

Whether the title insurance company's settlement and §998 offers were fair and reasonable were at issue in Plaintiffs' allegation of breach of the covenant of good faith and fair dealing. Denying the introduction of

evidence of the settlement offers would prevent Plaintiffs from accurately “show[ing] that defendant was not evaluating and seeking to resolve their claim fairly and in good faith.” *Id.* at 888. But the *White* Court faced a competing consideration: it construed Evidence Code §1152 and CCP §998 as “serv[ing] the same purpose” to prevent introduction of offers into evidence to prove “liability for the loss or damage . . . but to permit its introduction to prove some other matter at issue.” *Id.* at 888-89.

To accommodate the competing considerations, the *White* trial court bifurcated trial. It first allowed the parties to present evidence on the claims for breach of contract and negligence. Then, and only with liability already established, the trial court admitted the offers into evidence on the issue of breach of the covenant of good faith and fair dealing, reasoning that the duty of good faith and fair dealing continued after plaintiffs filed their lawsuit. *Id.* at 889. Accordingly, the offers “were inadmissible to prove liability on plaintiffs’ original causes of action, but were admissible to prove liability for breach of the covenant.” *Id.* at 889. Emphasis ours.

The present action is distinguishable. Here, liability was not established, and the premature introduction of Mr. Shivji’s §998 offer, as the Appellate decision acknowledges, violates CCP §998(b)(2). The *White* Court did not hold that a request for §998 cost “may be introduced for the limited purpose of reserving the right to make a request for CCP §998 costs,” as Attorney Heimlich misleadingly states in his Opening Brief on the Merits. (OBM, p. 11.)

Attorney Heimlich’s position is contrary to the spirit of *White*, which carefully bifurcated issues of liability and evidence of a §998 offer to prevent bias relating to the trier-of-fact’s determination of liability. *White*’s bifurcation mirrors the two-step methodology prescribed by the *Heimlich* Appellate Court: “the arbitrator should have reached the merits of Client’s

post-award section 998 request by recharacterizing his final decision as an interim or partial final decision.” *Heimlich, supra*, 12 Cal.App.5th at 177.

3. *Maaso v. Signer* (2012) 203 Cal.App.4th 362 Failed to Consider the Practical and Legal Restrictions on Presenting a Request for Costs Under §998

Attorney Heimlich argues that a party seeking recovery of §998 costs must inform the arbitrator of a rejected §998 offer *before* an award, citing to *Maaso v. Signer* (2012) 203 Cal.App.4th 362. However, the Sixth District correctly points out, *Maaso* conflicts with the evidentiary restrictions of CCP §998(b)(2). *Maaso* does not address the practical and legal restrictions on presenting a request for costs under §998. *Maaso* merely cites §998(b)(2) but does not discuss *how* a party presents the §998 cost request to the arbitrator, given that parties are precluded from introducing such evidence.

Attorney Heimlich suggests that the party seeking §998 costs should notify the arbitrator with a ‘pre-award request or alert’ “without saying who made the offer or the details.” (OBM, p. 12.) This proposal is unworkable. Under Attorney Heimlich’s pre-award or alert scheme, it would be obvious to any arbitrator that a §998 offer was made and rejected and that in all likelihood the party alerting the arbitrator made the offer.

Attorney Heimlich’s pre-award request or alert is unnecessary, given the mechanisms in place of interim, interlocutory, partial, (see Comm. Arb. Rules, Rule 47) and supplemental awards to avoid violating CCP §998(b)(2). *Heimlich, supra*, 12 Cal.App.5th at 170-174.

B. From whom does a party request costs under §998?

A Party in Arbitration Should Request Its CCP §998 Costs from the Arbitrator

1. The Policy of Arbitration Finality Favors Introduction of §998 Costs to the Arbitrator

This matter came before a AAA arbitrator because the parties bargained for final and binding arbitration in Attorney Heimlich's Legal Services Agreement. When the parties agree to submit all issues to arbitration, then the arbitrator should hear *all issues*, including a request for costs under §998. Such a requirement serves "the principle of arbitral finality. . . ." *Moshonov v. Walsh* (2000) 22 Cal.4th 771. "It is within the 'powers' of the arbitrator to resolve the entire 'merits' of the 'controversy submitted' by the parties. (§ 1286.2, subd. (d); § 1286.6, subd. (b), (c).) Obviously, the 'merits' include all the contested issues of law and fact submitted to the arbitrator for decision. The arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement." *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 28.

Mr. Shivji was correct in submitting his request for CCP §998 costs to the arbitrator. (AA: Vol. 1, 160.)

2. Special Circumstances of This Case Require that the Court Determine the §998 Cost Issue

Here, because the arbitrator refused to hear evidence of the §998 cost issue, Mr. Shivji filed a Motion Requesting the Court Resume Jurisdiction and Grant Interest and Costs Pursuant to CCP §998. The Superior Court granted Mr. Shivji's motion in part, resuming jurisdiction on June 16, 2015.

CCP §1287 provides in part, "[i]f the award is vacated on the grounds set forth in paragraph. . . (5) of subdivision (a) of §1286.2, the court with the consent of the parties to the court proceeding may order a

rehearing before the original arbitrators.” The Sixth District properly found that the arbitration award should be partially vacated under paragraph 5 of CCP §1286.2. Accordingly, the Sixth District’s instruction that “if the parties in this case do not consent to a hearing by the original arbitrator, the trial court is required under *Pilimai* to decide [Mr. Shivji]’s §998 request” was proper. *Heimlich, supra*, 12 Cal.App.5th at 177.

C. How does a party request costs under §998?

A Request for CCP §998 Costs Should be Made by Motion for Supplemental Award

After the arbitrator issues the award, the party seeking §998 costs must notify the arbitrator within a reasonable time. In judicial proceedings, a memorandum of costs must be served and filed within 15 days after the date of service of the notice of entry of judgment. . . by the clerk.” California Rules of Court (“CRC”), Rule 3.1700. Once the arbitrator is notified, the arbitrator can set a supplemental briefing schedule.

Here, Mr. Shivji notified the arbitrator within three business days. Under any standard, this was a reasonable time to assert his rights under CCP §998.

D. Additional Issues Raised by Attorney Heimlich Are Not Addressed in this Brief

As set forth above, the Supreme Court specified the issues to be briefed and argued in this matter to: “how, when, and from whom does that party request costs as provided under section 998.”

Unless otherwise ordered by the Court, the parties’ briefs on the merits and oral argument must be confined to the specified issues and “any issues fairly included in them.” CRC 8.516(a)(1). Despite this, Attorney Heimlich’s Opening Brief on the Merits also argues whether the Sixth District “exceeded its authority in vacating the arbitration award.” Due to

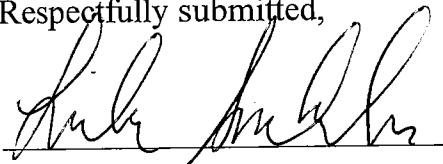
the limitation of CRC 8.516(a)(1), this topic is not addressed herein. Should the Court consider whether the Sixth District exceeded its authority, Mr. Shivji requests the opportunity to brief and argue this issue.

V. CONCLUSION

The strong public policy favoring settlement is supported by CCP §998(b)(2)'s exclusion of evidence of a rejected §998 offer until after an arbitration award is issued.

Dated: October 23, 2017

Respectfully submitted,

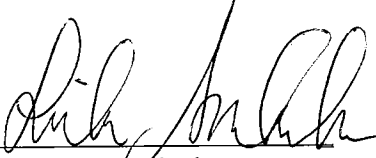
A handwritten signature in black ink, appearing to read "Javed I. Ellahie", written over a horizontal line.

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RULE 8.204 CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I, Leila N. Sockolov, attorney for Shiraz M. Shivji, certify that this brief uses proportionately spaced Times New Roman 13-point typeface, and that the text of the brief consists of **4,346 words**. I have relied on the word count of the computer program I used to prepare the brief to calculate the number of words.

Dated: October 23, 2017


Leila N. Sockolov

PROOF OF SERVICE

I am employed in the County of Santa Clara, California. I am over the age of eighteen years and not a party to the within action. My business address is 12 South First Street, Suite 600, San Jose, CA 95113. On this date, I served:

ANSWER BRIEF ON THE MERITS

on all parties in this action by mailing a copy in separate envelopes as addressed as follows:

VIA U.S. MAIL

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San Jose, CA 95123


VIA FedEx Overnight

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I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at San Jose, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this day at San Jose, California.

Dated: October 23, 2017



Omair M. Farooqui