No. S280598

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OSCAR J. MADRIGAL and AUDREY MADRIGAL,
Plaintiffs and Respondents,

v.

HYUNDAI MOTOR AMERICA,
Defendant and Appellant.

California Court of Appeal, Third District, Civil No. C090463
Appeal from Placer County Superior Court
Case No. SCV0038395
Honorable Michael Jones

PLAINTIFFS' RESPONSE TO AMICUS BRIEFS

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INTRODUCTION

The Court granted review to determine whether Code of Civil Procedure section 998's cost-shifting penalties apply in cases resolved through a pretrial settlement after an unaccepted section 998 offer. Plaintiffs' briefing has explained why section 998 should *not* be interpreted to apply to cases resolved through pretrial settlements—and that the dissents in this case and in *Ayers v. FCA US, LLC* (2024) 99 Cal.App.5th 1280, had it right.

In support of plaintiffs' position, the Consumer Attorneys of California, Consumers for Auto Reliability and Safety, the Housing and Economic Rights Advocates, and the Center for Consumer Law & Economic Justice have filed two amicus briefs highlighting reasons why it is clear that the Legislature did *not* intend section 998 to apply to cases that settle. Those amici have also shown how applying section 998 would undermine the statute's manifest purpose of promoting pretrial settlements.

There are also two amicus briefs by business-interest groups and the automobile industry, arguing that section 998 *does* apply to cases that settle. One of those briefs is by the Civil Justice Association of California, the Alliance for Automotive Innovation, and the California Manufacturers and Technology Association ("CJAC Brief"), and the other is by the United States Chamber of Commerce ("Chamber Brief"). These briefs add very little to the discussion. They primarily repeat points from the Court of Appeal opinion and Hyundai's brief, without grappling with most of plaintiffs' arguments or the *Madrigal* and *Ayers*

dissents as to why those points are wrong—and the very few new points they make are unpersuasive for reasons we discuss below.

The Court should reverse the majority opinion and hold that section 998 doesn't apply to cases that settle before trial.

ARGUMENT

Until the Court of Appeal's decision in this case, no court in section 998's history had ever held that section 998 applies to cases that settle. Yet, CJAC makes the "bold claim" that section 998's text is so clear that the Court should adopt the Court of Appeal's novel expansion of section 998's penalties without even considering the legislative history or public policy. (See *City of Los Angeles v. PriceWaterhouseCoopers, LLP* (Cal. 2024) 553 P.3d 1194, 1206 ["To describe this as the 'plain meaning' of the relevant statutory language is something of a bold claim, given that for decades commentators and courts—this court included—have read the provision differently"].)

The Court should decline that invitation. Neither CJAC nor the Chamber has refuted our showing that in addition to its plain text, section 998's legislative history and public policy support a conclusion that section 998 does not penalize parties who reach a pre-trial settlement—that is, a settlement that avoids the need for a trial or other adjudication of their dispute.

I. The CJAC amicus brief fails to refute plaintiffs' showing, and the dissent's conclusion, that the Legislature did not intend section 998 to apply to cases that settle before trial.

A. CJAC's plain language argument ignores the actual statutory text, relying instead on cases that did not consider section 998's application to settlements.

Statutory interpretation starts with the plain text, as an indicator of what the Legislature intended. (*Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 844.) To this end, CJAC's first argument is that section 998's "plain language" establishes that it "applies whenever a litigant fails to achieve a better result than could have been obtained by accepting a prior settlement offer." (CJAC Brief 12 [heading I.A.]; see also, e.g., *id.* at pp. 19-20 [asserting that section 998's "plain language" applies where a party "fails to obtain a better result," italics omitted].)

There is a glaring flaw in this argument: Section 998 does not use the phrase "fails to achieve a better result"—it uses the phrase "fails to obtain a more favorable *judgment or award*." (Code Civ. Proc., § 998, subd. (c)(1), italics added.)

Plaintiffs' briefing showed that the Legislature's use of the phrase "judgment or award" shows that the Legislature was focused on cases resolved through *adjudication*, not voluntary pretrial settlements. (OBM 27-28; Reply 14-16.) CJAC has no answer. CJAC doesn't explain why the Legislature would have

used the phrase "a more favorable judgment or award" instead of just saying "a better result," if the Legislature had intended to sweep in settlements.

Nor does CJAC address plaintiffs' point—echoed in the *Madrigal* and *Ayers* dissents—that a negotiated settlement is *not* a "fail[ure]" as that word is commonly defined, making section 998's plain text at least ambiguous as to whether it applies to settlements. (OBM 28-29; Reply 16-17; *Madrigal v. Hyundai Motor America* (2023) 90 Cal.App.5th 385, 413-414 [dis. opn. of Robie, J.]; *Ayers v. FCA US, LLC* (2024) 99 Cal.App.5th 1280, 1313 [dis. opn. of Viramontes, J.].)

Nor does CJAC address plaintiffs' point that section 998 penalizes applicable plaintiffs by requiring them to pay the defendant's post-offer costs out of "any damages awarded in favor of the plaintiff"—another indication that the Legislature never intended for section 998's penalties to apply in cases where a plaintiff receives settlement *proceeds* that are *negotiated*. (See OBM 30-31; Reply 18.)

And CJAC does not respond to plaintiffs' argument that the absence of a specific carveout for settlements could mean that the Legislature never even *contemplated* that section 998 would be applied to cases that settle. (Cf. *Niedermeier v. FCA US LLC* (2024) 15 Cal.5th 792, 828 [conc. opn. of Kruger, J.] [absence in Song-Beverly Act of specific exclusion "may simply be because the statute does not anticipate" the scenario that would trigger it].)

Instead of grappling with section 998's actual text, CJAC cites several cases that it says establish that section 998 applies whenever a party fails to achieve a better result than an unaccepted 998 offer. (CJAC Brief 13-15.) But none of the cases considered whether that rule applies where a case ends in *settlement*, much less held that it does:

- In *Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, the court awarded section 998 fees after the defendant won on a nonsuit. (*Id.* at p. 799.) The "sole issue" on appeal was whether an appeal from the underlying judgment automatically stayed enforcement of the fee award. (*Ibid.*) There was no pretrial settlement at issue, and no question about section 998's applicability in that context. CJAC focuses on the opinion's statement that section 998's policy is to encourage settlement by providing a disincentive to a party that "'fails to achieve a better result'" than an unaccepted 998 offer. (CJAC Brief 12-13, italics omitted, quoting *Bank of San Pedro,* at p. 804.) But that was a general observation, related to the Court's analysis of the scope of the automatic stay. The court did not analyze whether the statutory language, legislature history, and purpose signal an intent that section 998 apply to *pretrial settlements*, and its general statement sheds no light on that question. (*People v. Avila* (2006) 38 Cal.4th 491, 566 ["'It is axiomatic that cases are not authority for propositions not considered'"].)

- In *Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014, the plaintiff won a *judgment at trial* that was less favorable than two prior unaccepted section 998 offers. (*Id.* at p.

1018.) The question before the Court was whether the plaintiff could recover expert fees incurred after the first 998 offer but before the second one. (*Ibid.*) Again, that is an entirely different question than the one presented here—there was no pretrial settlement in *Martinez*.

CJAC cites *Martinez* for the proposition that section 998's purpose is to encourage early settlements, which CJAC says necessitates applying it to every case that settles after an unaccepted 998 offer. (CJAC Brief 14.) In particular, CJAC quotes *Martinez*'s statements that section 998 applies "'when a party fails to achieve a better result'" and is designed "'to avoid the time delays and economic waste associated with trials and to reduce the number of meritless lawsuits.'" (CJAC Brief 14, italics omitted.) But as discussed above, the statute doesn't actually say "a better result"; it says "a judgment or award." And the recognition that section 998 is designed to avoid "time delays and economic waste associated with trials" supports *plaintiffs'* position, not CJAC's.

Martinez repeats multiple times that section 998's purpose is to encourage settlements "prior to trial." (56 Cal.4th at pp. 1017, 1019; see also *id.* at p. 1027 [section 998 designed to encourage settlements "before trial"].) *Martinez* held that giving parties flexibility to make multiple section 998 offers as a case develops furthers that purpose. (*Id.* at pp. 1025-1026 ["'[t]he more offers that are made, the more likely the chance for settlement'"].) So does recognizing that section 998 does not apply to cases that settle before trial: As plaintiffs' briefing

argues—and as the *Madrigal* and *Ayers* dissents conclude—applying section 998 to cases that settle would *discourage* settlement by encouraging parties to roll the dice on trial rather than continuing to search for an offramp after there's been an initial unaccepted 998 offer. (OBM 41-56; Reply 27-28; *Madrigal, supra,* 90 Cal.App.5th at pp. 422-424; *Ayers, supra*, 99 Cal.App.5th at pp. 1316-1317.)

- *DeSaulles v. Community Hospital of Monterey Peninsula* (2016) 62 Cal.4th 1140 held that a monetary settlement is a "net monetary recovery" for purposes of determining the prevailing party for purposes of a Code of Civil Procedure section 1032 cost award. (*Id.* at p. 1144.) CAJC cites *DeSaulles'* statement that section 998 settlement agreements result in "judgments," and argues that section 998 should similarly be held to apply after a case settles. (CJAC Brief 14-15.) But there was no 998 offer in section *DeSaulles*, and so no analysis in that case is on point. *DeSaulles* addressed the meaning of the phrase "net monetary *recovery*," a *broad* term that "means 'to gain by legal process' *or* 'to obtain a final judgment in one's favor.'" (*DeSaulles,* at p. 1153, italics added.) The Legislature did *not* use the words "new monetary recovery" in section 998. Instead, the Legislature made section 998 applicable when a party "fails to obtain a more favorable *judgment or award*"—and penalizes plaintiffs for such a failure by awarding defendant's post-offer costs out of "any *damages awarded in favor of the plaintiff*"—narrower terms that are inconsistent with the settlement context in which *proceeds*

(and other terms) are *negotiated*. (Italics added; see OBM 58-61; Reply 14-15.)

In sum: None of the cases CJAC cites as supposedly bolstering its position that section 998's plain language applies to cases that settle actually considered or resolved that issue. The *Madrigal* majority and dissent implicitly recognized as much when they described *Madrigal* as presenting a "novel" question. (90 Cal.App.5th at p. 390 [majority], 410 [dissent].)

The question here is one of first impression for this Court to decide based on indicators of legislative intent—starting with section 998's plain text that signals the Legislature was not thinking of pretrial settlements when it enacted the statute. (OBM 26-31; Reply 13-19.)

B. CJAC fails to prove its assertion that section 998 is designed to encourage *early* settlement, as opposed to *any* pretrial settlement that will unclog court calendars.

A central debate in this appeal is whether the Legislature intended section 998 to encourage the *earliest possible* settlement, or whether the Legislature intended section 998 to encourage *any settlement* that avoids the need for trial. Our briefing cited legislative history establishing that the Legislature was focused on avoiding *trials* and argued that applying section 998 to pretrial settlements would undermine that effort. (OBM 32-41; Reply 27-28.) The *Madrigal* and *Ayers* dissents agreed. (90 Cal.App.5th at pp. 422-424; 99 Cal.App.5th at pp. 1314-1317.)

CJAC nonetheless insists that section 998's goal is to promote the *earliest possible* settlement. (CJAC Brief 15-19.) But the only legislative history CJAC cites is an argument by a proponent of a bill amending Civil Code section 3291, that tying statutory prejudgment interest to a plaintiff's first section 998 offer "'provides a greater incentive for speedy resolution of judgments.'" (CJAC Brief 15, italics omitted, quoting Assem. Off. of Research, 3d reading analysis of Sen. Bill No. 203 (1981-1982 Reg. Sess.) Sept. 8, 1981, p.1, which also appears in *Martinez, supra*, 56 Cal.4th at p. 1024, fn. 8; see also *Ray v. Goodman* (2006) 142 Cal.App.4th 83, 87-88 [describing the section 3291 amendment at issue].)

That comment was about Civil Code section 3921, not the meaning of section 998. Nor does the comment support CJAC's claim that section 998 is focused on *early* settlement, as opposed to any settlement that avoids burdening courts with trials. And CJAC ignores that legislative history over multiple decades has described section 998's goal as avoiding *trials*—a goal that is accomplished by *any pre-trial settlement.* (OBM 32-41; Reply 20-26; see also *Madrigal*, *supra*, 90 Cal.App.5th at pp. 416-417 [dis. opn.], *Ayers*, *supra*, 99 Cal.App.5th at pp. 1314-1316 [dis. opn.].)

Ray v. Goodman, supra, 142 Cal.App.4th 83 (CJAC Brief 16) does not help CJAC either. CJAC invokes *Ray*'s statement that California encourages settlement, and that "one way" section 998 does that is encouraging early settlement offers. (*Ray*, at p. 91.) But *Ray* was yet another case resolved through *judgment after a trial*, not a pretrial settlement. *Ray* held that where the

plaintiff's judgment exceeded *two* of his pretrial section 998 offers, prejudgment interest ran from the first offer, not the last one. (*Id.* at pp. 91-92.) In so concluding, *Ray* sought to incentivize parties to make successive 998 offers, because discouraging successive offers "significantly reduc[es] the chances of pretrial settlement." (*Id.* at p. 92.)

Ray's focus on pretrial settlement reflects California's overarching public policy: "Although settlements achieved earlier rather than later are beneficial to the parties and thus to be encouraged, *our public policy in favor of settlement primarily is intended to reduce the burden on the limited resources of the trial courts.*" (*Wilson v. Wal-Mart Stores, Inc.* (1999) 72 Cal.App.4th 382, 390.) As the *Ayers* dissent concluded, that policy here dictates interpreting section 998's penalties not to apply where parties settle a case before trial. (99 Cal.App.5th at p. 1316 [applying 998's penalty to settlements "would come at the expense of the parties' ability to settle later as the litigation progresses"].)

Nor is applying section 998 to settlements necessary to further the statutory goal of "promot[ing] a sober evaluation of risk against the threat of fees and costs." (CJAC Brief 17.) An early 998 offer sets a benchmark that the opposing party must exceed in any adjudication to avoid section 998's penalties, and the opposing party must seriously consider that benchmark given that there's no guarantee that another settlement opportunity will arise. Plaintiffs' opening brief made that point. (OBM 69-70.) CJAC has no answer.

C. CJAC's "gamesmanship" concern is unfounded.

CJAC next argues that section 998 must apply to settlements because a contrary rule would "embolden litigants to propose previously rejected, or even lesser, offers on the eve of trial" to claim "prevailing party" status "and seek a windfall of attorney fees and costs." (CJAC Brief 10-11, 19-20.) Plaintiffs have already shown that gamesmanship concerns are unfounded. (OBM 68-69; Reply 34-35.) CJAC's iteration of the argument does not change that.

First, CJAC's argument assumes that section 998 *currently* applies to cases that settle, and that plaintiffs' rule will alter the status quo. (CJAC Brief 20 [arguing that plaintiffs' interpretation will "embolden" litigants].) That is wrong as a historical matter: Section 998 has existed in one form or another for more than 150 years, and all indications are that it was not understood to apply to settlements until the opinion in this case. (Reply 24; *Madrigal*, *supra*, 90 Cal.App.5th at p. 417 [dis. opn.]; *Ayers*, *supra*, 99 Cal.App.5th at pp. 1317-1318 [dis. opn.].) CJAC has not shown any epidemic of gamesmanship during that 150+ year history.

Second, CJAC's gamesmanship concern is specific to cases with statutory one-sided fee-shifting, such as Song-Beverly Act cases. But section 998 applies in *all* civil cases, not just in fee-shifting cases. CJAC cites no evidence that the Legislature intended to use a generally-applicable statute to target a narrow swath of cases. Nor is there any basis for CJAC's president's own

complaints about fee-shifting statutes (CJAC Brief 11) to drive interpretation of a 150+ year old statute.

Third, as explained in plaintiffs' briefing (OBM 68-69; Reply 34-35), plaintiffs' attorneys have plenty of reasons not to continue litigating just to run up fees and then settle on eve of trial. There are serious risks in forging ahead rather than accepting a 998 offer, including that the defendants won't accept a later settlement offer and that the plaintiff won't prevail at trial. (OBM 68-69; Reply 34-35.) Moreover, Code of Civil Procedure section 1033.5 only allows recovery of *reasonable* costs (including fees recoverable by statute), and there is no incentive to unreasonably incur fees and costs that won't be recoverable regardless whether section 998 applies to settlements. (Reply 35.)

Shifting tacks slightly, CJAC also argues that its rule is necessary to protect clients and to promote ethical behavior. (CJAC Brief 22-23.) Specifically, CJAC speculates that if section 998 does not apply to settlements, attorneys will intentionally prolong litigation and will recommend that clients reject fair settlement offers, just to "maximize a fee recovery that helps only the attorney." (CJAC Brief 22.) These are serious accusations, with no foundation. They are antithetical to the assumption that lawyers will abide by their ethical obligations. (*Reynolds v. Ford Motor Co.* (2020) 47 Cal.App.5th 1105, 1117-1118.) And again, even if there was some issue in a given case involving a fee-shifting statute, that would not drive the interpretation of section 998 for *all* civil cases; rather, it would be handled in a

malpractice or disciplinary proceeding or as part of a pitch *to the Legislature* to amend those fee shifting-statutes. It makes no sense to adopt a novel interpretation of section 998 to address policy concerns that may flow from *the legislative determination* that a specific subset of cases warrant fee-shifting.

D. CJAC's attempt to brush off the Legislature's use of the word "judgment" in section 998 is unavailing.

We have argued that the Legislature's use of the phrase "judgment or award" in section 998 signals that the Legislature intended section 998 to apply to adjudicated results, not settlements. (OBM 26-28; Reply 14-16.)

CJAC responds that the Court need not focus on whether a settlement is a judgment, because even if a settlement is not a judgment, a plaintiff who settles for less than a 998 offer has "failed to obtain a more favorable judgment or award" than the offer. (CJAC Brief 23-24.) As CJAC puts it, section 998 "contemplates the non-existence of a judgment in the first instance." (CJAC Brief 24.)

CJAC's response fails for several reasons.

First, it ignores that multiple aspects of section 998's phrasing and legislative history show a focus on adjudicated cases, not on settlement—it's not just the word "judgment." (OBM 25-41; Reply 13-26; *Ayers, supra*, 99 Cal.App.5th at pp. 1312-1316 [dis. opn.]; *Madrigal, supra*, 90 Cal.App.5th at pp. 413-417 [dis. opn.].)

Second, the cases CJAC cites do not support the propositions they are cited for. CJAC cites *Mon Chong Loong Trading Corp. v. Superior Court* (2013) 218 Cal.App.4th 87 for the proposition that section 998 applies if a plaintiff voluntarily dismisses her case "(based on settlement or otherwise)." (CJAC Brief 24.) But there was no settlement in *Mon Chong Loong*. Rather, the plaintiff unilaterally dismissed her case in the face of a motion in limine to preclude expert testimony, and then refiled her case a few months later. (218 Cal.App.4th at pp. 90-91.) The *Mon Chong Loong* court held that the voluntary dismissal triggered section 998 fee-shifting. (*Id.* at p. 90.) The court did not analyze what would have happened if the dismissal had been based on a settlement that, unlike a voluntary dismissal without prejudice, would have definitively *foreclosed* any trial or any further litigation on the claims at issue.

And indeed, the *Madrigal* dissent cited *Mon Chong Loong* as a *contrast* to our case, reasoning that the *Mon Chong Loong* plaintiff's unilateral abandonment of the action is different than a compromise settlement based on the culmination of the parties' negotiations. (*Madrigal, supra*, 90 Cal.App.5th p. 414.)

Equally off-base is CJAC's cite to *Martinez v. Eatlite One, Inc.* (2018) 27 Cal.App.5th 1181 for the proposition that "[t]here is no reason to distinguish" settlements from adjudications. (CJAC Brief 24.) *Martinez* was about whether a *judgment after a jury trial* was more favorable than an unaccepted section 998 award. (27 Cal.App.5th at p. 1182.) The case was not resolved by

settlement, and the opinion did not discuss how section 998 applies in that context.

Finally, contrary to CJAC's argument, the Court *cannot* affirm without addressing whether a settlement is a judgment. If the Court holds that section 998 applies to cases that settle, it would have to decide what happens when a settlement is *more favorable* than the 998 offer—i.e., has the plaintiff failed to achieve a more favorable judgment or award, because a settlement is not a judgment, or has the plaintiff succeeded, which requires interpreting "judgment or award" to include a settlement? CJAC offers no answer.

E. Federal case law on whether Federal Rule of Civil Procedure 68 applies to settlements is irrelevant—and, in any event, is divided.

CJAC's last argument is that the Court should interpret section 998 consistently with federal decisions holding that Federal Rule of Civil Procedure 68's fee cost-shifting provisions apply to cases that settle. (CJAC Brief 25-27.) Again, there are multiple flaws in this argument.

First, Rule 68's language differs from section 998's. Whereas section 998 applies only where a party "*fails* to obtain a more favorable judgment or award," Rule 68 does not make its penalties applicable based on a "failure" to secure a more favorable judgment or award, nor are Rule 68's penalties taken out of "any *damages awarded in favor* of the plaintiff": Rather, Rule 68 applies where "the judgment that the offeree *finally*

obtains is not more favorable than the unaccepted offer . . . ." (§ 998, subds. (c)(1), (e), italics added; Fed. Rules Civ. Proc., rule 68(d), italics added.) The absence of the concept of "failure" in Rule 68 is relevant because, as the *Madrigal* and *Ayers* dissents recognize, section 998's use of "fail[ure]" indicates unilateral action, not a negotiated compromise. (90 Cal.App.5th at pp. 413-414; 99 Cal.App.5th at pp. 1313-1314.) Section 998's requirement that any post-offer costs awarded to the defendant are taken out of any "damages awarded in favor of the plaintiff," meanwhile, indicates that our Legislature presumed that section 998 doesn't penalize a party who achieves a mutually agreeable settlement in which proceeds are *negotiated*, not "awarded in favor" of either party. (See OBM 30-31; Reply 18, italics omitted.)

Second, CJAC does not address whether Rule 68's legislative history signals an intent that it would only apply to adjudicated results, as section 998's history does or how Rule 68 has historically been understood. Nor has CJAC developed any other persuasive showing that Rule 68's interpretation sheds any light on how the California Legislature intended section 998 to work.

Third, CJAC ignores that federal courts are split on Rule 68's applicability to cases that settle, just as the *Madrigal* and *Ayers* panels were each split on section 998's applicability in that context. CJAC highlights a few federal decisions applying Rule 68 to settlements. (CJAC Brief 25-27.) But there are other federal decisions holding that Rule 68 does *not* apply to cases that settle for the same public policy reasons discussed in the

Madrigal and *Ayers* dissents, including that subjecting settlements to cost-shifting penalties once an early offer isn't accepted ultimately discourages pretrial settlements. (E.g., *Vitullo v. Velocity Powerboats, Inc.* (N.D.Ill., Sept. 21, 2001, No. 97 C 8745) 2001 WL 1117307, at *2; *Good Timez v. Phoenix Fire and Marine Ins. Co.* (D.V.I. 1991) 754 F.Supp. 459, 462-463; *Hutchison v. Wells* (S.D.Ind. 1989) 719 F.Supp. 1435, 1443; *E.E.O.C. v. Hamilton Standard Div.* (D.Conn. 1986) 637 F.Supp. 1155, 1158.)

Fourth, the United States Supreme Court case that CJAC cites, *Farrar v. Hobby* (1992) 506 U.S. 103, is not about Rule 68's application to settlement, or about penalizing a party who rejects an early settlement offer. *Farrar* held that a civil rights plaintiff qualifies as a prevailing party entitled to attorney fees under 42 U.S.C. § 1988 if he "obtain[s] at least some relief on the merits of his claim," whether through a judgment or a settlement. (*Id.* at p. 111.) CAJC does not explain how that holding has any relevance here, much less how it undercuts plaintiffs' showing that the California Legislature did not intend section 998 to apply to cases that settle.

II. The Chamber Of Commerce Amicus Brief Likewise Fails To Show That The Legislature Intended Section 998 To Apply To Cases That Settle Before Trial.

A. Section 998's goal is to avoid *trials* that clog courts' calendars—and applying section 998 to settlements undermines that goal.

The Chamber begins by extolling the benefit of *early* settlements, as opposed to settlements close to trial. (Chamber Brief 12-14.) The Chamber argues that parties should be encouraged to settle early both to relieve courts from having to deal with discovery and motion practice, and to reduce the "business community['s]" litigation costs. (*Ibid.*)

The Chamber does not tether this argument to any analysis of what we can divine about the Legislature's *intent* in adopting section 998, the touchstone of statutory interpretation. It does not grapple with the plain text or legislative history. Nor does it cite anything showing that section 998 was motivated by a concern for the business community's litigation costs.

Instead, the Chamber cites cases and articles about settlement and litigation costs *generally*, without any showing that they are what the Legislature was focused on when it enacted section 998. (And indeed, the cost of electronic discovery (Chamber Brief 14) *cannot* have been part of the Legislature's motivation, given that section 998 has been on the books since long before the advent of computers.) The Chamber's argument,

thus, is misplaced. What the Chamber thinks would be good public policy is not the touchstone here.

The Chamber's specific arguments also do not withstand scrutiny.

First, the Chamber asserts that unless section 998 applies to settlements, defendants whose initial 998 offers are rejected and who could have settled later on even more favorable terms will instead opt to go to trial to obtain section 998's benefits. (Chamber Brief 12.) Not necessarily. Defendants would still have many reasons to make successive 998 offers. Among other things, to the extent a defendant is very likely to secure a more favorable result at trial, it has leverage in the subsequent settlement negotiations—and can propose an agreement that *contractually* adopts section 998's penalties. Additionally, a defendant cannot know for sure what will happen at trial; only a settlement provides certainty. Nor can a defendant be sure that a trial court will find its initial 998 offer valid and reasonable; serving a second offer is another opportunity to settle or ensure it can benefit from 998 cost-shifting if the case goes forward. Plaintiffs explained all of this in their opening brief. (OBM 70-72.) The Chamber has no answer.

Second, the Chamber cites two cases for the proposition that public policy favors settlement. (Chamber Brief 12-13.) The cases are inapposite: Neither involved section 998 or the legislative intent presented here. (See *Neary v. Regents of University of California* (1992) 3 Cal.4th 273 [considering availability of stipulated reversals; superseded by statute as

recognized in *Hardisty v. Hinson & Alfter* (2004) 124 Cal.App.4th 999]; *Wolstoncroft v. County of Yolo* (2021) 68 Cal.App.5th 327 [considering availability of equitable tolling in reverse validation action].)

What's more, even at a broader level, the *Neary* snippets that the Chamber quotes do not help its argument. The Chamber omits the *context* for *Neary*'s statement that settlement may be most efficient "'the earlier [it] comes in the litigation continuum.'" (Chamber Brief 13.) *Neary* was comparing prejudgment settlements to postjudgment settlements, the earliest possible settlement to a later, still pretrial, settlement. (3 Cal.4th at p. 277.) *Neary*'s very next sentence and the ensuing paragraphs highlight the value and efficiency of even postjudgment settlements. (*Id.* at pp. 277-279.) *Neary*, thus, was not staking out a position that California public policy focuses on pushing the earliest possible settlement.

Third, the Chamber argues that section 998 must apply to settlements because otherwise, plaintiffs will have no incentive to accept an early 998 offer; in the Chamber's telling, plaintiffs would reject reasonable settlement offers with the plan of settling later on the same terms. (Chamber Brief 13-14.) As discussed above, however, plaintiffs already have ample reason to carefully review early 998 offers and to accept them if they are reasonable. (§ I.C, *ante*; OBM 69-70.) There is, thus, no need to penalize parties who reconsider their prior reluctance to settle, just to further encourage parties to consider early settlement offers.

B. The *Madrigal* and *Ayers* dissents are correct that a voluntary settlement is not a "fail[ure]" within the meaning of the statute.

The *Madrigal* and *Ayers* dissents recognize that section 998's trigger—the plaintiff "fail[ing] to obtain a more favorable judgment or award" (§ 998, subd. (c)(1))—does not comfortably describe a negotiated settlement. (90 Cal.App.5th at pp. 413-415; 99 Cal.App.5th at pp. 1312-1314; see also OBM 28-29; Reply 16-17.)

The Chamber argues that "one definition of 'fail' is 'to fall short of achieving something expected or hoped for,'" and that accepting a settlement less favorable than an earlier 998 offer signifies that the plaintiff has fallen short of his prior hopes. (Chamber Brief 15.) This argument fails for two reasons.

First, the Chamber's argument ignores that settlements often result because the parties have *changed their goals*—from a judgment for some set sum to a settlement that may very well include non-monetary terms that the parties *could not* have secured at trial. (See OBM 67.) Changing goals—such as when a premed student decides to apply to law school instead—isn't a "failure."

Second, the Chamber's argument ignores the *Madrigal* dissent's much more robust analysis of the term "fails"—namely, the *Madrigal* dissent's point that "fails" signals unilateral action rather than a joint compromise—a distinction that separates our situation from the unilateral voluntary dismissal in *Mon Chong*

Loong, *supra*, 218 Cal.App.4th 87, as discussed in the dissent and above. (90 Cal.App.5th at pp. 413-415; § I.D, ante.)

C. The Chamber's effort to brush off the word "judgment" is as unavailing as CJAC's effort.

Echoing a point in CJAC's brief, the Chamber disputes that section 998's reference to a more favorable "*judgment* or award" signals a focus on avoiding adjudicated results. (Chamber Brief 16-17.) The Chamber makes essentially the same argument as CJAC—namely, that "[i]t is *only* when a party achieves a more favorable judgment or award that [section 998's cost-shifting penalty] no longer applies" and that a settlement necessarily constitutes the failure to achieve a more favorable judgment or award. (*Ibid.*) The Chamber's argument fails for the reasons already discussed. (§ I.D, *ante*.)

The only difference is that unlike CJAC, the Chamber acknowledges that its theory runs into some difficulty when a party obtains a settlement that *beats* an unaccepted 998 offer: "does such a settlement constitute a more favorable 'judgment or award' that prevents cost-shifting?" (Chamber Brief 16-17.)

The Chamber suggests sidestepping this problem by converting a settlement into a stipulated judgment. (Chamber Brief 17.) But the Chamber does not explain why section 998's applicability should hinge on whether a settlement is formally converted into a stipulated judgment. Nor does the Chamber address whether it is even permissible to enter a judgment in the many cases where the settlement *expressly bars* entry of any

judgment and instead requires the plaintiff to simply dismiss his claims without reference to any settlement whatsoever. The Chamber doesn't grapple with the inequities that would flow from a rule, the applicability of which hinges on whether the parties went to the ministerial effort of entering a settlement as a judgment.

Nor does any of this change the fact that multiple aspects of section 998's phrasing, and the legislative history, demonstrate a focus on adjudicated results.

D. The Legislature has consistently described section 998's purpose as avoiding trials—in legislative history before, during, and after amending section 998 to apply to arbitration awards as well.

In response to plaintiffs' showing that the Legislature has long described section 998's purpose as conserving court resources by avoiding trials, the Chamber points out that section 998 also applies to arbitration awards. (Chamber Brief 17-18.) That is of no moment.

The Legislature amended section 998 to cover arbitration awards in 1997. (OBM 38-39.) By then, legislative history dating back decades earlier had already made clear that section 998 was focused on relieving crowded *trial* calendars. (OBM 35-38 [describing 1969 and 1971 comments].) Comments about the 1997 amendment continue this focus, explaining that section 998 applies where a party "fails to do better *at trial*." (OBM 38; MJN-

336, italics added; see also *Madrigal, supra,* 90 Cal.App.5th at p. 417; *Ayers, supra*, 99 Cal.App.5th at p. 1316 [dissenting opinions pointing to this 1997 legislative history].) Comments from when section 998 was amended again in 1999, 2001, and 2015 repeat the same theme, repeatedly describing section 998 as applying where a party fails to do better *at trial*, and even expressly explaining that section 998's purpose "is to encourage parties to settle their disputes *prior to trial*." (OBM 39-40; MJN-664, italics added.)

Like Hyundai, the Chamber has not pointed to any contrary legislative history—that is, any history indicating that the Legislature intended, or understood, section 998 to apply when cases settle *before trial*. The legislative record, thus, has consistently portrayed section 998 as designed to avoid *trials*.

The 1997 decision to expand section 998 to cover arbitration awards as well as judgments does not negate these indicators of how the Legislature has long understood section 998, or in any way signal that the Legislature intended section 998 to apply to cases that *settle*, an entirely different type of disposition than adjudications and arbitrations. If anything, the amendment supports *plaintiffs'* position: As noted in the Opening Brief, adding "award" to the statute would have been unnecessary if the Legislature already understood section 998 to apply when a party fails to secure a more favorable "judgment" through *any* result. (OBM 38.)

E. The Chamber has not refuted that the majority opinion represents a change to the historical understanding of section 998.

Both the *Madrigal* majority and the *Madrigal* dissent recognized that section 998's applicability to settlements is a "novel" issue. (90 Cal.App.5th at pp. 390, 410.) Both the *Madrigal* and *Ayers* dissents concluded this reflects a general historical understanding that section 998 doesn't apply to settlements, given that the issue would otherwise have arisen earlier given that a version of section 998 has existed for at least 170 years and that most civil cases settle. (99 Cal.App.5th at pp. 1317-1318; 90 Cal.App.5th at pp. 417-418.) That conclusion is consistent with the practitioner amicus letters submitted in support of review and depublication. (Consumer Attorneys of California Letter ISO Review at 1; Dreyer Babich Letter ISO Review at 2; Wirtz Law Letter ISO Review at 1.)

In the face of this showing, the Chamber cites three Court of Appeal decisions that reviewed rulings on section 998 cost-shifting requests in cases that settled. (Chamber Brief 11, 18-19.) None of those decisions analyzed whether section 998 applies at all to settled cases. Instead, they simply addressed issues about section 998's application to the facts before each of those cases. (*Chen v. BMW of North American, LLC* (2022) 87 Cal.App.5th 957 [issue: whether the initial 998 offer's terms were valid]; *Reck v. FCA US LLC* (2021) 64 Cal.App.5th 682 [issue: whether trial court can reduce or deny post-offer attorney fees and costs based on plaintiff having rejected a reasonable offer to

compromise, where the plaintiff's recovery is superior to the rejected offer]; *McKenzie v. Ford Motor Co.* (2015) 238 Cal.App.4th 695 [issue: whether plaintiff reasonably rejected an initial 998 offer].)[1]

In any event, given the huge number of civil cases that settle every year, three isolated cases in section 998's long history in no way refute plaintiffs' showing, and the *Madrigal* and *Ayers* dissenters' conclusion, that section 998 generally wasn't understood to apply to settlements until the *Madrigal* decision below. Accordingly, to the extent that the Legislature had truly thought that the vast majority of courts have wrongly been applying section 998 only in cases which end in *adjudication*—a mass of cases as to which the Legislature was surely aware—the Legislature almost certainly would have amended section 998 to correct any such widespread misunderstanding. (See Reply 23-26.) The Legislature's choice *not* to amend section 998 to dramatically expand its application should be respected.

III. If The Court Is Interested In The Fee-Shifting Issue Raised By The Housing And Economic Rights Advocates Amicus Brief, It Should Request Supplemental Briefing.

The Housing and Economic Rights Advocates and the Center for Consumer Law & Economic Justice amicus brief

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[1] The Chamber also cites *Mon Chong Loong, supra*, 218 Cal.App.4th 87 (Chamber Brief 11)—but that case did not involve a settlement. (§ I.D, *ante*.)

("HERA Brief") urges that, if the Court holds that section 998 applies to settlements generally, the Court reach the additional question of whether section 998 applies in cases subject to mandatory one-way-fee-shifting statutes. (HERA Brief 2-3, 27-49.) The Court did not grant review on that fee-shifting statute issue, despite it having been proposed in plaintiffs' petition for review. (See August 30, 2023 Order Granting Review.) Accordingly, the parties have not briefed it. We maintain that section 998 *does not apply* to cases with mandatory one-way-fee-shifting statutes, or at least in Song-Beverly cases. Should the Court now be interested in reaching that issue, the Court should direct the parties to provide supplemental briefs addressing it.

CONCLUSION

Nothing in the amicus briefing supporting Hyundai supports a conclusion that the Legislature intended to punish parties who settle prior to trial. Where the parties settle, no one has "failed" to do anything; to the contrary, there's a negotiated settlement that permits both parties to declare victory and go home. That's precisely the goal the Legislature sought to promote: preventing needless trials. Applying section 998's penalties in that circumstance would dissuade settlements after an earlier settlement efforts have failed. Such a result is contrary to section 998's plain language, legislative history, and public policy.

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.520(c)(1), I certify that this **PLAINTIFFS' RESPONSE TO AMICUS BRIEFS** contains 6,408 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: September 30, 2024 *\/s\/ Cynthia E. Tobisman*
Cynthia E. Tobisman

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business and email addresses are 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048, chsu@gmsr.com.

On September 30, 2024, I hereby certify that I electronically served the foregoing **PLAINTIFFS' RESPONSE TO AMICUS BRIEFS** through the Court's electronic filing system, TrueFiling. I certify that all participants in the case who are registered TrueFiling users and appear on its electronic service list will be served pursuant to California Rules of Court, rule 8.70. The filing of this document through e-Filing will also satisfy the requirements for service on the Court of Appeal rule 8.212(c)(2):

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[Case No. SCV0038395]

Executed on September 30, 2024 at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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Oscar J. Madrigal, et al. v. Hyundai Motor America

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