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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FABIOLA COSTA-FLEESON, Plaintiff and Respondent, v. AMERICOR FUNDING, INC., Defendant and Appellant.	G062962 (Super. Ct. No. 30-2023-01305561) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Nathan R. Scott, Judge. Affirmed.

CDF Labor Law, Todd R. Wulffson, Denisha P. McKenzie and Ashley N. Lopeztello for Defendant and Appellant.

Shanberg Stafford, Ross E. Shanberg and Shane C. Stafford for Plaintiff and Respondent.

Defendant Americor Funding, Inc. (Americor) appeals from an order awarding Fabiola Costa-Fleeson attorney fees and costs in the amount of $176,687.96 under Code of Civil Procedure sections 1281.98, subdivision (c)(1)–(2) and 1281.99, subdivision (a) (all undesignated statutory references are to this code). Americor argues Costa-Fleeson did not satisfy her burden of proof to demonstrate Americor materially breached the parties' arbitration agreement (Agreement) under section 1281.98, subdivision (a). It contends the trial court's award of $176,687.96 in attorney fees and costs was unreasonable. It also asserts the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.) preempts sections 1281.98 and 1281.99.[1]

We affirm. We find Americor materially breached the Agreement under section 1281.98, subdivision (a), because it failed to pay, "within 30 days after the due date," the arbitration fees to continue the arbitration. We hold the trial court properly awarded attorney fees and costs under section 1281.98, subdivision (c)(1) and imposed a monetary sanction, in the form of attorney fees and costs, pursuant to section 1281.98, subdivision (c)(2) and section 1281.99, subdivision (a). Lastly, we reject Americor's preemption argument.

FACTUAL AND PROCEDURAL BACKGROUND

When Costa-Fleeson started working for Americor in November 2019, she signed the Agreement which provided in pertinent part: "Employee will be required to pay an arbitration fee to initiate arbitration equal to what Employee would be charged as a first appearance fee in court. The Company will pay the remaining fees and costs of the arbitrator. . . . [¶] This Arbitration Agreement will in all respects be subject to and governed by the substantive law of the State of California but only to the extent such law

[1] Americor also argues it timely paid its "fees or costs to initiate" an arbitration under section 1281.97 and the FAA preempts section 1281.97. (Boldface omitted.) The trial court made no findings regarding section 1281.97. It is not at issue in this case. We therefore decline to address these arguments.

has not been preempted by the Federal Arbitration Act." The parties agreed all arbitrable claims would be "decided by binding arbitration conducted by a neutral arbitrator and administered by JAMS . . . ."

I.

ARBITRATION

In January 2022, Costa-Fleeson filed a demand for arbitration with JAMS. She alleged eight causes of action against Americor relating to her employment.

On September 14, 2022, JAMS served a notice of hearing on the parties via e-mail.[2] It set the arbitration hearing for January 10–12, 2023. It also specified when the fees were due: "If monies are outstanding, enclosed is a deposit request for your share of the fees. All fees are *due upon receipt*."[3] (Italics added.) The September 14, 2022 deposit request billed Americor's counsel for Americor's share of fees: $45,300. In the bottom margin, JAMS explained why that amount was owed and reiterated when the deposit was due: "Invoice total is based on the fee split agreed upon by all parties. . . . Payment is due upon receipt." JAMS provided a hyperlink ("Click here to pay") to make the deposit online and mailing addresses for checks.

The notice also enclosed a general fee schedule, which stated in relevant part: "All fees are due and payable in advance of services rendered and by any applicable due date as stated in a hearing confirmation letter."

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[2] In May 2022, the parties agreed, during a teleconference with the arbitrator, to set the arbitration hearing for January 10, 2022. In June 2022, the parties started the discovery process, during which several disputes arose.

[3] The deposit request is dated September 13, 2022. But because JAMS provided the deposit request to the parties on September 14, 2022, we refer to the deposit request as the September 14, 2022 deposit request.

On the same day, JAMS's billing department e-mailed Americor's counsel, stating when the deposit was due: "Please note that payment is due upon receipt." JAMS attached the September 14, 2022 deposit request.

The parties later agreed to continue the arbitration hearing to March 6–8, 2023. In November 2022, JAMS served a notice of rescheduled hearing on the parties. The notice provided the deposit was "due upon receipt." Enclosed with the notice was the September 14, 2022 deposit request.

On January 4, 2023, JAMS e-mailed the parties, reminding Americor to pay the September 14, 2022 deposit request: "This is a friendly reminder that the attached Deposit Requests are due before [*sic*] [¶] Please find [Americor's] Deposit Request for your reference. A link can be found at the bottom of the attached Deposit Request for making electronic payments." (Italics omitted.)

The next day, Costa-Fleeson's counsel sent an e-mail message to only JAMS: "Please clarify to all parties when the deposit is or was due. It is not specified in your [e-mail] below." In response, JAMS provided the due date of the deposit in an e-mail message addressed to the parties: "Payment is due upon receipt. If payment is not received from all parties by 2/3/2023 (the last day to cancel or continue), the session will be removed from calendar."

On January 18, 2023, JAMS e-mailed the parties another reminder: "This is a friendly reminder that the attached Deposit Request is due before **Friday, 2/3/2023**. The last day to continue or cancel without forfeiting fees is this date as well. [¶] Please find your respective Deposit Request for your reference. A link can be found at the bottom of the attached Deposit Request for making electronic payments." (Italics omitted.) Attached to this e-mail was the September 14, 2022 deposit request.

On January 24, 2023, JAMS e-mailed the parties, reminding Americor again its deposit was due: "I would also like to take this time to remind [Americor's counsel] the attached Deposit Request is due. A link can be found at the bottom of the

attached Deposit Request for making electronic payments." (Italics omitted.) Attached was the September 14, 2022 deposit request.

On January 26, 2023, Costa-Fleeson filed a notice of withdrawal of claim from arbitration with the arbitrator under section 1281.98. She asserted JAMS sent the September 14, 2022 deposit request to Americor several times, the deposit request specified payment was due upon receipt, the Agreement required Americor to pay the cost of the arbitrator, and Americor materially breached the Agreement because it failed to make the deposit to continue the arbitration. She contended she was therefore "entitled to '[w]ithdraw the claim from arbitration and proceed in a court of appropriate jurisdiction,' and pursue monetary and other sanctions, and all other appropriate relief." Americor opposed the notice of withdrawal, and Costa-Fleeson replied to Americor's opposition.

On January 31, 2023, the arbitrator held a telephonic hearing regarding Costa-Fleeson's notice of withdrawal of claim from arbitration. In a written ruling, the arbitrator concluded Costa-Fleeson could withdraw from arbitration and accepted her notice of withdrawal. He explained section 1281.98, subdivision (a)(2) was "clear: '[T]he arbitration provider shall issue all invoices to the parties as due upon receipt.' That is what JAMS did in the instant case. Each invoice which JAMS issued so stated." The arbitrator noted "any inconsistency between what the Arbitrator's case coordinator told [Americor] and the law must be resolved in favor of application of the law."

II.

TRIAL COURT

In February 2023, Costa-Fleeson filed a complaint against Americor with the trial court, alleging the same eight causes of action as her demand for arbitration. Two weeks later, she moved for attorney fees, costs, and sanctions under sections 1281.98 and 1281.99.

In June 2023, the trial court granted in part the motion for attorney fees, costs, and sanctions, and the motion was "continued on one issue to" July 2023. Of relevance here, the trial court found Americor materially breached the Agreement because it failed to pay the September 14, 2022 deposit request within 30 days under section 1281.98. It concluded "[t]he FAA does not preempt the relevant statute." It also invited the parties to file supplemental memoranda on the issue of attorney fees and costs under sections 1281.98, subdivision (c) and section 1281.99, subdivision (a).

In July 2023, the trial court granted Costa-Fleeson's motion for attorney fees. It ordered Americor to pay $176,687.96 in attorney fees and costs to Costa-Fleeson under sections 1281.98, subdivision (c)(1)–(2) and 1281.99, subdivision (a). The trial court reasoned the Legislature authorized the recovery "of all fees 'associated with' the arbitration" pursuant to section 1281.98, subdivision (c)(1), not merely "arbitration-specific fees." The trial court therefore concluded attorney fees and costs "incurred after arbitration was demanded while conducting discovery intended for use at arbitration are 'associated with' the arbitration" under section 1281.98, subdivision (c)(1). It also found certain attorney fees were not "'associated with'" the arbitration, including work performed on the Fair Employment and Housing Act (FEHA) complaint. After indicating it had considered "the billing, declarations, and briefing, and relying on '"its own expertise"' in determining the '"value of legal services performed in a case,"'" the trial court identified by category the specific amounts awarded to Costa-Fleeson.

Americor timely appealed. During the pendency of the appeal, we invited the parties to file supplemental briefing on the appealability of the award of attorney fees and costs under section 1281.98, subdivision (c)(1).

DISCUSSION

I.

TRIAL COURT'S ORDER

We begin by clarifying under which statutes the trial court ordered Americor to pay Costa-Fleeson attorney fees and costs. In its July 2023 minute order, the trial court awarded Costa-Fleeson $176,687.96 in attorney fees and costs under sections 1281.98, subdivision (c)(1)–(2), and 1281.99, subdivision (a). The trial court did not specify whether certain attorney fees were recoverable under a particular subdivision of a statute. But, based on how the trial court categorized the attorney fees in its order, we can infer which attorney fees were awarded under section 1281.98, subdivision (c)(1) or section 1281.98, subdivision (c)(2) and section 1281.99, subdivision (a).

Section 1281.98, subdivision (c)(1) provides in pertinent part: "The employee or consumer may bring a motion, or a separate action, to recover all attorney's fees and all costs *associated with the abandoned arbitration proceeding*." (Italics added.)

Section 1281.98, subdivision (c)(2) sets forth: "The court shall impose sanctions on the drafting party in accordance with Section 1281.99." Section 1281.99, subdivision (a) requires imposing a monetary sanction upon finding a material breach: "The court shall impose a monetary sanction against a drafting party that materially breaches an arbitration agreement . . . , by ordering the drafting party to pay the reasonable expenses, including attorney's fees and costs, incurred by the employee or consumer *as a result of the material breach*." (Italics added.) The "'[d]rafting party'" is "the company or business that included a predispute arbitration provision in a contract with a consumer or employee." (§ 1280, subd. (e).)

In its order, the trial court identified six categories of attorney fees: (1) "[p]reparation of FEHA [c]omplaint/[arbitration] [d]emand/[c]omplaint"; (2) "[a]rbitration related correspondence and communication"; (3) "[a]rbitration procedural matters and pre-hearing preparation"; (4) "[a]rbitration hearing preparation, including

expert witnesses"; (5) "[a]rbitration discovery preparation"; (6) "[p]ost-withdrawal arbitration including fees motion." (Underscoring omitted.) The first five categories of attorney fees are "associated with" the arbitration. Thus, it appears the trial court allowed the recovery of these attorney fees under section 1281.98, subdivision (c)(1). The sixth category concerns $22,700 in attorney fees incurred after Costa-Fleeson withdrew from the arbitration. These fees are not "associated with" the arbitration. (§ 1281.98, subd. (c)(1).) That must mean the trial court awarded these fees as a monetary sanction under section 1281.98, subdivision (c)(2) and section 1281.99, subdivision (a), despite, as Costa-Fleeson recognizes, the trial court not once using the word "'sanctions'" in its order.

In its briefs, Americor mischaracterizes the entire $176,687.96 in attorney fees and costs as only sanctions by relying on a selective reading of section 1281.98, subdivision (c). It ignores section 1281.98, subdivision (c)(1) and quotes only section 1281.98, subdivision (c)(2).

II.

APPEALABILITY

Next, we address the appealability of the trial court's July 2023 minute order. In her supplemental brief, Costa-Fleeson argues the trial court's order is not appealable. We disagree.

A. The Monetary Sanction and the Finding of Material Breach Are Appealable

An appealable order or judgment "'is a jurisdictional prerequisite to an appeal.'" (*Warwick California Corp. v. Applied Underwriters, Inc.* (2020) 44 Cal.App.5th 67, 72.) "The right to appeal is statutory only, and a party may not appeal a trial court's judgment, order or ruling unless such is expressly made appealable by statute." (*People v. Loper* (2015) 60 Cal.4th 1155, 1159.)

"'[S]ection 904.1, subdivision (a), governs the right to appeal in civil actions. It codifies the "one final judgment rule" . . . .'" (*Jackson v. Board of Civil*

Service Commissioners of City of Los Angeles (2024) 99 Cal.App.5th 648, 655.) "[T]he 'one final judgment' rule [is] a fundamental principle of appellate practice that prohibits review of intermediate rulings by appeal until final resolution of the case." (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 697.)

Section 904.1, subdivision (a) enumerates "'appealable orders that stand as exceptions to the general rule.'" (*Ryan v. Rosenfeld* (2017) 3 Cal.5th 124, 134.) Section 904.1, subdivision (a)(12) permits appeals "[f]rom an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000)." Under section 906, when considering an appeal pursuant to section 904.1, we "may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party . . . ."

Here, the trial court imposed a monetary sanction of $22,700 in attorney fees against Americor under section 1281.98, subdivision (c)(2) and section 1281.99, subdivision (a). The monetary sanction is therefore appealable under section 904.1, subdivision (a)(12). And the monetary sanction resulted from the trial court's finding in June 2023 that Americor materially breached the arbitration agreement pursuant to section 1281.98, subdivision (a). (§ 1281.99, subd. (a).) As that ruling necessarily affected the monetary sanction, the finding of material breach is reviewable on appeal from the order. (§ 906.)

B. The Award of Attorney Fees and Costs Pursuant to Section 1281.98, Subdivision (c)(1) is Appealable

At oral argument, Costa-Fleeson conceded the collateral order doctrine applies to the award of attorney fees and costs under section 1281.98, subdivision (c)(1). We agree. Under the collateral order doctrine, an appeal may be taken "'[w]hen a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or

performance of an act.'" (*Last v. Superior Court* (2023) 94 Cal.App.5th 30, 43–44.) "'The interest that is served by the collateral order doctrine is the expeditious completion of appellate review, when that can be accomplished without implicating the merits of the underlying controversy. The collateral order doctrine also preserves appellate review when, without the invocation of this doctrine, appellate review would be foreclosed.'" (*Id.* at p. 44.)

Here, the trial court's order on attorney fees and costs pursuant to section 1281.98, subdivision (c)(1) satisfies the requirements of the collateral order doctrine. First, the issue of attorney fees and costs under this statute is collateral as it is "'distinct and severable' from the" main issue of the underlying litigation. (*Apex LLC v. Korusfood.com* (2013) 222 Cal.App.4th 1010, 1016.) Second, the order was a "final determination" because "'further judicial action is not required on the matters dealt with by the order.'" (*Ibid.*) "Finally, by awarding attorney fees [and costs] . . . , the order directs the payment of money." (*Ibid.*) Therefore, we find jurisdiction to review this appeal.

III.

AMERICOR MATERIALLY BREACHED THE AGREEMENT UNDER SECTION 1281.98

Americor argues Costa-Fleeson did not satisfy her burden of proof to show Americor materially breached the Agreement under section 1281.98. We disagree.

A. Standard of Review

"[A] trial court's determination that a party waived the right to arbitrate is subject to substantial evidence review." (*De Leon v. Juanita's Foods* (2022) 85 Cal.App.5th 740, 749 (*De Leon*).)

B. Section 1281.98

The California Arbitration Act (CAA) was enacted in 1961 to safeguard the "the right of private parties to resolve their disputes through the 'efficient, streamlined procedures' of arbitration." (*Gallo v. Wood Ranch USA, Inc.* (2022) 81 Cal.App.5th 621,

633 (*Gallo*).) In 2019, the California Legislature added section 1281.98 to the CAA. (*Id.* at p. 633, fn. 4.) Whereas section 1281.97, subdivision (a), a parallel provision, provides the procedures whereby a drafting party must pay "the fees or costs to *initiate*" an arbitration "within 30 days after the due date," section 1281.98, subdivision (a) specifies the procedures whereby a drafting party must pay "the fees or costs required to *continue*" an arbitration "within 30 days after the due date . . . ." (Italics added.)

Specifically, section 1281.98, subdivision (a)(1) provides: "In an employment or consumer arbitration that requires, either expressly or through application of state or federal law or the rules of the arbitration provider, that the drafting party pay certain fees and costs during the pendency of an arbitration proceeding, if the fees or costs required to continue the arbitration proceeding are not paid within 30 days after the due date, the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel the employee or consumer to proceed with that arbitration as a result of the material breach."

"[T]he statute's language establishes a simple bright-line rule that a drafting party's failure to pay outstanding arbitration fees within 30 days after the due date results in its material breach of the arbitration agreement." (*De Leon*, *supra*, 85 Cal.App.5th at p. 753.) State appellate courts "have strictly enforced the statutory deadlines of 1281.97 and 1281.98. These cases have uniformly rejected invitations to consider discretionary factors, e.g., the intent of the employer or prejudice to the employee, in determining compliance with the statutes or materiality of the breach." (*Doe v. Superior Court* (2023) 95 Cal.App.5th 346, 358 (*Doe*) [summarizing the case law].)

Section 1281.98, subdivision (a)(2) requires the arbitration provider to invoice the parties to the arbitration any required fees and costs for the "proceeding to continue . . . ." The invoice must state the full amount owed and the payment due date, and it "shall be sent to all parties by the same means on the same day." (*Ibid.*) "To avoid delay, absent an express provision in the arbitration agreement stating the number of days

in which the parties to the arbitration must pay any required fees or costs, the arbitration provider shall issue all invoices to the parties as *due upon receipt*." (*Ibid.*, italics added.) "Any extension of time for the due date shall be agreed upon by all parties." (*Ibid.*)

Here, on September 14, 2022, JAMS provided the parties with a deposit request, or invoice, via e-mail. The invoice set the payment deadline for Americor's $45,300 in fees to continue the arbitration: "All fees are due upon receipt." Thus, the payment due date was September 14, 2022. JAMS sent the identical invoice to the parties at least five more times over the course of four months, reminding them payment was due upon receipt. Americor did not pay these fees within 30 days of September 14, 2022, and never paid them. Even if Americor intended to pay the fees, its intent is irrelevant—the statute draws a "bright-line rule" as to the payment deadline. (*De Leon*, *supra*, 85 Cal.App.5th at p. 753.) Given Americor did not pay the $45,300 in fees, it materially breached the Agreement, was in default of the arbitration, and waived its right to compel Costa-Fleeson to proceed with the arbitration.

Americor argues the payment deadline was February 3, 2023. Its argument appears to rely on its recitation of facts in its opening brief, where Americor asserts that, on January 5, 2023, JAMS confirmed "the deadline for all [p]arties to make payment was February 3, 2023" and that, on January 18, 2023, JAMS reiterated "the deposit was due by February 3, 2023." (Boldface omitted.)

This representation of the facts is somewhat inaccurate. In the January 5, 2023, e-mail message, JAMS did not set the due date as February 3, 2023. It reminded the parties the due date was: "Payment is due upon receipt." It explained, "If payment is not received from all parties by 2/3/2023 (the last day to cancel or continue), the session will be removed from calendar."

We recognize JAMS's e-mail message on January 18, 2023, was unclear as to the due date. JAMS wrote, "This is a friendly reminder that the attached Deposit Request is due before **Friday, 2/3/2023**. The last day to continue or cancel without

forfeiting fees is this date as well. [¶] Please find your respective Deposit Request for your reference. A link can be found at the bottom of the attached Deposit Request for making electronic payments." (Italics omitted.) This e-mail message appears to establish the payment due date as February 3, 2023. But, when read in the context of JAMS's previous reminders, it appears JAMS used February 3, 2023, as a separate deadline: if it did not receive the payment by then, it would remove the case from calendar. That deadline was distinct from Americor's statutory obligation to pay the fees upon receipt of the invoice. Notwithstanding the ambiguity of this e-mail message, the September 14, 2022 deposit request, which was attached to this e-mail, specified, "Payment is due upon receipt." Moreover, six days later, on January 24, 2023, JAMS e-mailed the parties, "[T]he attached Deposit Request is due."

Even if JAMS's January 18, 2023, e-mail message sowed confusion and even if it was attempting to change the payment deadline, once JAMS established the payment deadline as September 14, 2022—the day it sent the invoice to the parties—"and triggered the 30-day grace period, it had no authority to alter the due date absent the parties' agreement" under section 1281.98, subdivision (a). (*Doe*, *supra*, 95 Cal.App.5th at p. 361.) Nothing in the record indicates the parties agreed to extend the payment due date.

Americor raises several arguments for the first time on appeal. It argues Costa-Fleeson did not provide any evidence showing JAMS sent the $45,300 invoice to both Americor and Costa-Fleeson by the same means on the same day. Americor asserts the invoice did not specify when the payment was due. It contends the invoice was not billed to Americor as the "'drafting party'" but to Americor's counsel. It bases these arguments on a selective quotation and interpretation of section 1281.98, subdivision (a)(2), without acknowledging anywhere in its briefs section 1281.98, subdivision (a)(2) requires JAMS to "issue all invoices to the parties as due upon receipt." We decline to address these arguments because "issues not raised in the trial court cannot be raised for

the first time on appeal." (*Wisner v. Dignity Health* (2022) 85 Cal.App.5th 35, 44 (*Wisner*).)

Moreover, at oral argument, Americor asserted, for the first time on appeal, Costa-Fleeson waived her right to argue Americor materially breached the Agreement under section 1281.98, because she waited from September 2022 to January 2023 to request to withdraw from the arbitration. We need not consider a new argument raised for the first time at oral argument. (*People v. Carrasco* (2014) 59 Cal.4th 924, 990.) The argument is forfeited.

Therefore, we conclude substantial evidence supports the trial court's finding Americor materially breached the Agreement under section 1281.98.

IV.

THE TRIAL COURT PROPERLY AWARDED ATTORNEY FEES AND COSTS

Americor argues it was unreasonable for the trial court to order Americor to pay Costa-Fleeson $176,687.96 in attorney fees and costs under sections 1281.98 and 1281.99, given Costa-Fleeson had not proven any of her claims. It contends the trial court improperly allowed Costa-Fleeson to recover attorney fees and costs related to discovery because the scope of fees and costs must be directly "associated with the abandoned arbitration proceeding." (§ 1281.98, subd. (c)(1).) It also challenges certain billing entries as excessive or duplicative and the hourly rates of Costa-Fleeson's counsel as unreasonable.

We disagree. First, under our interpretation of sections 1281.98, subdivision (c)(1) and 1281.99, subdivision (a), we conclude Costa-Fleeson was not required to prove her claims to be entitled to attorney fees and costs. We also find the trial court properly allowed Costa-Fleeson to recover attorney fees and costs for discovery intended for use at arbitration. Second, we treat Americor's challenge to the billing entries and the hourly rates as forfeited.

A. Standard of Review and Statutory Interpretation

When considering a trial court's determination of a reasonable attorney fee or a monetary sanction, the typical standard of review is abuse of discretion. (See, e.g., *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 697 [abuse of discretion review of an attorney fee award]; *Deck v. Developers Investment Co., Inc.* (2023) 89 Cal.App.5th 808, 823–824 [abuse of discretion review of a monetary sanction for misuse of the discovery process].) But, upon review of a trial court's interpretation and application of statutes, we use the de novo standard of review. (*De Leon*, *supra*, 85 Cal.App.5th at pp. 749–750.)

In interpreting statutes, our "'fundamental task'" is to decipher "'the Legislature's intent so as to effectuate the law's purpose.'" (*De Leon*, *supra*, 85 Cal.App.5th at p. 750.) We first consider "'the statute's words and give them their usual and ordinary meaning.'" (*Williams v. West Coast Hospitals, Inc.* (2022) 86 Cal.App.5th 1054, 1065 (*Williams*).) The statutory language is "'the most reliable indicator of legislative intent. [Citation.] If the statutory language is clear and unambiguous, the plain meaning of the statute governs.'" (*De Leon*, at p. 750.) "'If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.'" (*Williams*, at p. 1065.)

B. Section 1281.98, Subdivision (c)(1)

"If the drafting party materially breaches the arbitration agreement and is in default" the employee may choose to "[w]ithdraw the claim from arbitration and proceed in a court of appropriate jurisdiction." (§ 1281.98, subd. (b)(1).) "If the employee . . . withdraws the claim from arbitration and proceeds in a court of appropriate jurisdiction . . . : [¶] (1) The employee . . . may bring a motion, or a separate action, to recover all attorney's fees and all costs *associated with the abandoned arbitration proceeding*. *The recovery of arbitration fees, interest, and related attorney's fees shall be without regard to*

any findings on the merits in the underlying action or arbitration." (§ 1281.98, subd. (c)(1), italics added.)

We need not look beyond the statutory language to address Americor's arguments. The statutory language is clear and unambiguous. Section 1281.98, subdivision (c)(1) expressly rejects Americor's argument that Costa-Fleeson's entitlement to attorney fees and costs is predicated on succeeding on the merits. It provides the recovery of attorney fees "shall be without regard to any findings on the merits in the underlying action or arbitration." (§ 1281.98, subd. (c)(1).) Americor neglects to acknowledge this statutory language in its briefs.

Additionally, nothing in the statute bars the trial court from allowing the recovery of discovery-related fees so long as they are "associated with the abandoned arbitration proceeding." (§ 1281.98, subd. (c)(1).) As the trial court appropriately found, "[t]he Legislature did not authorize recovery only of arbitration-specific fees." Rather, it permitted recovery of all attorney fees and costs "associated with the abandoned arbitration proceeding." (§ 1281.98, subd. (c)(1).) The trial court properly concluded, "Fees incurred after arbitration was demanded while conducting discovery intended for use at arbitration are 'associated with' the arbitration."

In support of its argument that section 1281.98 forecloses the recovery of discovery-related attorney fees and costs during arbitration, Americor relies on an unpublished state trial court ruling in a different matter. It does so despite receiving a warning from the trial court below to refrain from citing such cases. In its June 2023 minute order, the trial court admonished the parties, "Please do **NOT** cite to unpublished state trial court rulings." On appeal, though, Americor apparently believes it can cite the same unpublished state trial court ruling it cited below because it includes a footnote in its reply brief quoting California Rules of Court, rule 8.1115(b): "An unpublished opinion may be cited or relied on: [¶] (1) When the opinion is relevant under the doctrine[] of law of the case . . . ."

Americor's reliance on the doctrine of law of the case is misguided. "'"The doctrine of 'law of the case' deals with the effect of the *first appellate decision* on the subsequent *retrial or appeal*: The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case." [Citation.]'" (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1127.) "The doctrine 'precludes a party from obtaining appellate review of the same issue more than once in a single action.'" (*Aghaian v. Minassian* (2021) 64 Cal.App.5th 603, 612.) Americor does not offer any explanation why this state trial court ruling is pertinent under this doctrine. The doctrine plainly does not apply here—the state trial court ruling concerns a different matter with different parties. The citation to the unpublished state trial court ruling violates California Rules of Court, rule 8.1115. We therefore decline to address it or any arguments relying on it.

C. Section 1281.99, Subdivision (a)

Section 1281.99, subdivision (a) provides: "The court shall impose a monetary sanction against a drafting party that materially breaches an arbitration agreement pursuant to . . . subdivision (a) of Section 1281.98, by ordering the drafting party to pay the reasonable expenses, including attorney's fees and costs, incurred by the employee or consumer *as a result of the material breach*." (Italics added.)

The statutory language is clear and unambiguous here as well. Contrary to Americor's argument, the statute does not make the monetary sanction contingent on the employee's success on the merits. Rather, it mandates the drafting party to pay reasonable expenses stemming from the material breach of the arbitration agreement.

D. Forfeited Arguments

In its opening brief, Americor argues Costa-Fleeson billed time that was excessive or duplicative. It points to three categories of billing entries: (1) preparing for a "PMK deposition"; (2) drafting the demand for arbitration and complaint; and (3) a

"'[t]elephone call with [the] arbitrator and OPC re withdrawal.'"[4] Americor also contends the billing rates of Costa-Fleeson's counsel are unreasonable.

Americor fails to "make a 'cognizable argument on appeal as to why the trial court abused its discretion in'" awarding attorney fees and costs pursuant to section 1281.98, subdivision (c)(1) and ordering a monetary sanction under section 1281.99, subdivision (a). (*Hernandez v. First Student, Inc.* (2019) 37 Cal.App.5th 270, 277.) "Mere repetition of the arguments made in [opposition to] the motion in the trial court is not sufficient." (*Ibid.*) We therefore decline to address these arguments on appeal and deem them forfeited.

In addition, Americor raises a couple of arguments for the first time in its reply brief. First, Americor argues sections 1281.98 and 1281.99 are unconstitutional because they impose "one-sided" sanctions on employers in violation of the equal protection clauses of the California and United States Constitutions. In support, it relies on federal district court cases as persuasive authority. Second, it presents a policy argument, asserting section 1281.98 will cause employees to withdraw from arbitration prematurely "based solely on technical timing reasons" so as to claim attorney fees and costs without litigating the underlying dispute.

"[I]ssues not raised in the trial court cannot be raised for the first time on appeal." (*Wisner*, *supra*, 85 Cal.App.5th at p. 44.) Additionally, "we will not consider matters raised for the first time in the reply brief." (*Sachs v. Sachs* (2020) 44 Cal.App.5th 59, 66.) Given Americor did not present these arguments to the trial court

[4] Americor does not appear to recognize the trial court already disallowed $5,190 of the $12,715 sought for drafting the FEHA complaint, demand for arbitration, and complaint.

and raised them for the first time in its reply brief, we decline to address these arguments and consider them forfeited.[5]

V.

THE FAA DOES NOT PREEMPT SECTIONS 1281.98 AND 1281.99

Americor argues the trial court erred by finding the FAA does not preempt sections 1281.98 and 1281.99.[6] It contends the statutes violate the FAA's equal-treatment principle. The FAA "requires courts to place arbitration agreements 'on equal footing with all other contracts.'" (*Kindred Nursing Centers L.P. v. Clark* (2017) 581 U.S. 246, 248.) Under the equal-treatment principle, "[a] court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" (*Id.* at p. 251.) That is, a legal rule cannot single "out arbitration agreements for disfavored treatment." (*Id.* at p. 248.)

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[5] We note several state appellate cases detail the legislative history and policy reasons underlying section 1281.98. (See, e.g., *De Leon*, *supra*, 85 Cal.App.5th at p. 756 ["To be sure, the legislative findings in support of the law emphasize that a 'company's failure to pay the fees of an arbitration service provider in accordance with its obligations . . . hinders the efficient resolution of disputes and contravenes public policy,' and that a 'company's strategic non-payment of fees and costs severely prejudices the ability of employees or consumers to vindicate their rights,' a particularly unfair result 'when the party failing or refusing to pay those fees and costs is the party that imposed the obligation to arbitrate disputes'"].)

[6] Throughout its opening brief, Americor makes certain preemption arguments pertaining to section 1281.97. As noted earlier, section 1281.97 is not at issue in this case. Where possible, we treat Americor's section 1281.97 preemption arguments as section 1281.98 preemption arguments, as the preemption analysis as to both statutes is practically identical. (See *Gallo*, *supra*, 81 Cal.App.5th 621 at p. 633, fn. 4 [section 1281.97 analysis "applies with equal force to the parallel provisions of section 1281.98"].)

Americor's preemption argument is unavailing. This argument was rejected in *Gallo*, *supra*, 81 Cal.App.5th at pp. 641–643 and subsequent appellate decisions (*Keeton v. Tesla, Inc.* (2024) 103 Cal.App.5th 26, 37–41; *Hohenshelt v. Superior Court* (2024) 99 Cal.App.5th 1319, 1325–1326, review granted June 12, 2024, S284498 (*Hohenshelt*); *Suarez v. Superior Court* (2024) 99 Cal.App.5th 32, 41–43; *Espinoza v. Superior Court* (2022) 83 Cal.App.5th 761, 783–785 (*Espinoza*); but see *Hernandez v. Sohnen Enterprises, Inc.* (2024) 102 Cal.App.5th 222, 243 [holding in the alternative, though dicta, section 1281.97 is preempted by the FAA]).[7]

A. Standard of Review

"Because 'federal preemption presents a pure question of law,' our review is de novo." (*Espinoza*, *supra*, 83 Cal.App.5th at p. 778.)

B. Gallo

Gallo held the FAA does not preempt sections 1281.97, 1281.98, and 1281.99 "because the procedures they prescribe *further*—rather than *frustrate*—the objectives of the FAA to honor the parties' intent to arbitrate and to preserve arbitration as a speedy and effective alternative forum for resolving disputes." (*Gallo*, *supra*, 81 Cal.App.5th at p. 630.) Although *Gallo* involved sections 1281.97 and 1281.99, it explained its analysis applied "with equal force to the parallel provisions of section 1281.98." (*Id.* at p. 633, fn. 4.) It expounded the FAA preempts a state law that either prohibits or discourages the "formation or enforcement" of arbitration agreements. (*Gallo*, *supra*, 81 Cal.App.5th at pp. 637–638.) But "a state law will not be preempted by the FAA *merely because* it is arbitration specific." (*Id.* at p. 638.)

Gallo found sections 1281.97 and 1281.99 do not prohibit or discourage arbitration agreements. (*Gallo*, *supra*, 81 Cal.App.5th at p. 641.) Rather, they delineate

[7] Several weeks after the present case was submitted, Americor moved to stay the appeal until the California Supreme Court issued its decision in *Hohenshelt*. To the extent the motion was properly filed, we deny it.

the procedures governing the due date for the payment of arbitration fees and costs by the drafting party "and specify the consequences of untimely payment." (*Ibid.*, italics omitted.) They "do not disfavor arbitration because the consequences of blowing the payment limitations period they erect do not necessarily end the nascent arbitration: Section 1281.97 gives the employee or consumer the *option* of continuing in arbitration or returning to a judicial forum." (*Id.* at p. 642.)

These statutes also do not obstruct the accomplishment of two objectives of the FAA: (1) to honor the parties' mutual intent to arbitrate, and (2) to protect arbitration's "'speed and efficiency.'" (*Gallo*, *supra*, 81 Cal.App.5th at pp. 640–642.) First, because the parties in *Gallo* incorporated the CAA in their arbitration agreement, sections 1281.97 and 1281.99 did not "interfere with the FAA's first goal of honoring the parties' intent." (*Id.* at p. 642.) Moreover, these statutes were "fully consistent with the parties' more general intent to arbitrate because the parties' agreement was to arbitrate the dispute, not let it die on the vine and languish in limbo while the party who demanded arbitration thereafter stalls it by not paying the necessary costs in a timely fashion." (*Id.* at p. 643.) Second, these statutes "*facilitate* arbitration by preventing parties from insisting that a dispute be resolved through arbitration and then sabotaging that arbitration by refusing to pay the fees necessary to move forward in arbitration." (*Ibid.*)

We agree with *Gallo*'s preemption analysis and conclude the FAA does not preempt sections 1281.98 and 1281.99.

C. Americor's Arguments

Americor contests this preemption analysis by presenting several arguments without substantively engaging with *Gallo* and its progeny.

First, Americor argues the trial court's reasoning lacks merit because of "applicable precedent" concerning the FAA's application. But the trial court properly relied on "applicable precedent." In finding the FAA does not preempt sections 1281.98 and 1281.99, the trial court cited *Espinoza*. *Espinoza* applied *Gallo*'s preemption

analysis and held the FAA does not preempt section 1281.97, a statute neighboring section 1281.98 with nearly identical procedural provisions. (*Espinoza*, *supra*, 83 Cal.App.5th at pp. 783–785.)

Second, Americor contends sections 1281.98 and 1281.99 single out arbitration agreements because they apply only to employment or consumer arbitration agreements. But, as *Gallo* makes clear, the FAA does not preempt state laws, such as CAA's procedural rules in sections 1281.98 and 1281.99, "*merely because*" they are "arbitration specific." (*Gallo*, *supra*, 81 Cal.App.5th at p. 638.) "'There is no federal policy favoring arbitration under a certain set of procedural rules' [citation], so 'the FAA leaves room for states to enact some rules affecting arbitration' that the parties may choose to adopt [citation]. Those state laws will, by definition, be arbitration specific. If such state laws were preempted merely because they singled out arbitration for differential treatment, states would never be able to enact rules defining the procedures for arbitration unless the procedures mirrored those for every other case handled in a judicial forum (as that would render them no longer 'arbitration specific'), yet requiring such parity would utterly defeat the very purpose of arbitration in the first place—namely, to create an alternative, more 'efficient and speedy dispute resolution' mechanism." (*Id.* at p. 639.)

Third, Americor asserts section 1281.98 "impermissibly presumes that a material breach has occurred," and does not allow contract defenses or arguments that the failure of timely payment was excusable. *Gallo* addressed such an argument and rejected it. Undoubtedly, section 1281.98, subdivision (a) "declares any payment that exceeds the arbitration provider's deadline *and a statutorily granted 30-day grace period* to be a material breach as a matter of law." (*Gallo*, *supra*, 81 Cal.App.5th at p. 644.) It "departs from the usual rule" of material breach, which typically "leav[es] materiality as an issue of fact for the trier of fact to determine." (*Ibid.*) But "the mere fact an arbitration-specific rule alters the rights the parties would have in ordinary litigation does not

necessarily mean the rule conflicts with the FAA's equal treatment principle. As *Gallo* explained, courts have upheld the CAA's limitations on judicial review of arbitration awards, despite those rules depriving the parties of their full appellate rights. (*Gallo*, *supra*, 81 Cal.App.5th at pp. 644–645.)" (*Espinoza*, *supra*, 83 Cal.App.5th at p. 784.) Likewise, section 1281.98, "for the sake of ensuring expeditious resolution of disputes, limits the arguments a drafting party may raise when it fails timely to pay its required fees, for example barring arguments that the failure was excusable or nonprejudicial. We agree with *Gallo* that this limitation does not violate the FAA." (*Ibid.*)

Fourth, Americor argues the Agreement does not specify any of the procedural rules found in sections 1281.98 and 1281.99, and these statutes mandate different procedures to which the parties agreed. It invokes the Agreement, which provides the "Agreement will in all respects be subject to and governed by the substantive law of the State of California but only to the extent such law has not been preempted by the Federal Arbitration Act." While the Agreement does not expressly incorporate CAA's procedural provisions, "it also does not expressly incorporate the procedural provisions of another jurisdiction. Given the absence of contrary language, therefore, the parties implicitly consented to application of the CAA's procedural provisions, as much as had they expressly incorporated those provisions into their arbitration agreement." (*Espinoza*, *supra*, 83 Cal.App.5th at p. 786.) "'[T]he procedural provisions of the CAA apply in California courts by default.'" (*Ibid.*) Thus, the "application of the provisions does not conflict with the FAA's goal of honoring the parties' intent." (*Ibid.*)

In sum, we conclude substantial evidence supports the finding that Americor materially breached the Agreement under section 1281.98, subdivision (a). Due to Americor's material breach, the trial court properly awarded attorney fees and costs under section 1281.98, subdivision (c)(1), and was required to impose a monetary

sanction undersection 1281.98, subdivision (c)(2) and section 1281.99, subdivision (a). We find Americor's preemption argument unpersuasive.

DISPOSITION

The trial court's order is affirmed. Respondent is entitled to costs on appeal.

MOTOIKE, J.

WE CONCUR:

GOETHALS, ACTING P. J.

SANCHEZ, J.