CASE #: S243029

IN THE SUPREME C

OF THE STATE OF CALIFORNIA

ALAN HEIMLICH, Petitioner v. SHIRAZ M. SHIVJI, Respondent	Case No.

Sixth Appellate District, Case No. H042641

Santa Clara County Superior Ct. Case No. 112CV231939

PETITION FOR REVIEW
OF DECISION OF THE COURT OF APPEAL
SIXTH APPELLATE DISTRICT

STAY REQUESTED of APPELLATE RULING TO SUPERIOR COURT issued May 31, 2017.

Law Offices of Nicholas D. Heimlich
Nicholas D. Heimlich (SBN 233232)
5595 Winfield Blvd., Suite 110
San Jose, California 95123
Phone (408) 457-9364, Fax (408) 841-7630.
Email nickheimlich@nickheimlichlaw.com

ATTORNEY FOR PETITIONER ALAN HEIMLICH

TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Supreme Court

Cases

Codes

Rules

Other Authorities

PETITION FOR REVIEW

To the Honorable Chief Justice of the California Supreme Court and the Associate Justices of the Supreme Court of California:

Alan Heimlich, Petitioner, respectfully petitions for review of the decision of the Court of Appeal, Sixth Appellate District (per Conrad L. Rushing, P.J.), issued on May 31, 2017. Petition for rehearing (June 15, 2017) and Sur petition for rehearing (June 22, 2017) denied on June 27, 2017.

Petitioner requests a STAY of the Appellate ruling issued May 31, 2017 which directs the Superior Court to take action. The rationale for the stay is to avoid a possible conflicting ruling that may need to be undone later and to avoid wasting court resources.

I. ISSUES PRESENTED FOR REVIEW

This case presents the following issues for review:

1.. Determine if the Sixth District has invalidated the California Supreme Court's ruling in *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870 (*White*).

2. Determine whether the Sixth District erred in holding that CCP 998 offers are not allowed prior to a final Arbitration award for the purpose of preserving the right to post-offer costs.

3. Resolve the split in the Courts of Appeal created by the Sixth District's opinion, regarding when a "timely" request for CCP 998 costs must be made.

4. Determine whether the Sixth District erred in creating a new mandate for a post-final Arbitration order.

II. REASONS FOR GRANTING REVIEW

A. REVIEW SHOULD BE GRANTED BECAUSE THE SIXTH DISTRICT'S OPINION IGNORES THE CALIFORNIA SUPREME COURT'S PRIOR HOLDING IN *WHITE V. WESTERN TITLE INS. CO.* (1985) 40 CAL.3D 870 (*WHITE*) REGARDING THE ADMISSIBILITY OF CCP 998 OFFERS TO COMPROMISE WHICH INTERPRETED 998(B)(2)

In briefing and oral argument, Mr. Heimlich listed several ways in which Mr. Shivji could have reserved the right to have the Arbitrator rule on a CCP 998 motion, including after the close of evidence but before the final order. The Opinion found each of these improper, holding that "we do not believe that such a pre-award request or alert would be consistent with the evidentiary restriction in section 998, subdivision (b)(2)." In doing so, the Opinion erroneously conflated presenting details of a CCP 998 offer with the mere explanation that a CCP 998 offer existed, in direct conflict with *White.*

The *White* court stated "that [the 998(b)(2)] language refers to the trial upon the liability which the offer proposed to compromise" and held that section 998, subdivision (b)(2) "bar[s] the introduction into evidence of an offer to compromise a claim for the purpose of proving liability for that claim," but "permit[s] its introduction to prove some other matter at issue." (Emphasis added.) (*White, supra*, at pp. 888-889.) Accordingly, in this case [*White*], section 998, subdivision (b)(2) barred the introduction of the 998 offer to prove Defendants' liability for malpractice, but permitted its introduction on the issue of costs.

In *White*, the court approved a procedure whereby the trial court bifurcated the trial and admitted the 998 offer into evidence in the second phase of the trial, which did not involve the liability that the 998 offer proposed to compromise. (Id. at p. 889.)

The Appellate Court's ruling is in direct opposition to and in direct conflict with the California Supreme Court ruling and therefore review is needed of this case.

B. REVIEW SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG COURT OF APPEAL DECISIONS REGARDING WHEN A "TIMELY" REQUEST FOR CCP 998 COSTS MUST BE MADE.

As made clear in *Maaso v. Signer* (2012) 203 Cal.App.4th 362 and Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2015). Paragraph 5:402.13-14 (citing *Maaso*), "[t]he arbitrator **must** be informed, however, of the rejected CCP § 998 offer **prior to making a final award** in order to impose any applicable costs 'penalties' . . . ." (*Ibid, emphases added.*)

Until this Opinion, the Second, Fourth, and even this Sixth District Courts of Appeal (and possibly others) consistently upheld *Maaso*.[1] The Opinion, then, contradicts *Maaso*, and its own prior holdings on this issue, without explanation.

The Opinion suggests that because it was allegedly "not practical" to ask the Arbitrator to issue an interim award, or otherwise reserve the right to bring a 998 motion, Appellant's post-final award request, presented six (6) days after the final award was received by Appellant, was timely. In addition to ignoring the California Supreme Court's position in *White* on the admissibility of CCP 998 offers, and *Maaso*, this holding ignores the amount of time that passed between the presentation of evidence, which concluded on November 13, 2014, the issuance of the final award on March 5, 2015, and the request on March 11, 2015.

---

[1] As these cases are unpublished, they will not be referenced.

In addition to the 90 days between the presentation of evidence and the final award, Appellant let six (6) days lapse before informing the Arbitrator of the CCP 998 offer issue. It is not only practical, but imperative that a party reserve the right to present evidence of the rejected CCP 998 offer prior to the close of evidence, and, in fact, Mr. Shivji had numerous opportunities and methods by which to accomplish this. Appellant simply failed to make any effort at all until six (6) days after a Final Award.

The Opinion concluded, without analysis or reference to the six (6) day lapse between the Final award and request, that "Client timely presented his section 998 claim to the arbitrator." Six (6) days after a final award is clearly not timely. This is akin to a party asking to present new witnesses at trial 6 days after a court's final ruling. Thus, the Opinion is silent on the issue of timeliness, which was discussed heavily in the briefing, and leaves open ended the deadline, if any, by which a post-final award request can be made. In doing so, the Opinion destroys the finality of final arbitration awards, rendering them meaningless, and the proceedings in arbitration indefinite. This hole in the analysis of "timeliness" needs resolution, particularly if post-final award requests for CCP 998 costs are now considered timely in the Sixth District.

C. REVIEW SHOULD BE GRANTED TO PROVIDE GUIDANCE AS TO WHETHER A COURT IS PERMITTED TO CREATE A NEW MANDATE FOR A POST-FINAL ARBITRATION AWARD.

"It is well settled that the scope of judicial review of arbitration awards is extremely narrow." (*California Faculty Assn. v. Superior Court* (1998) 63 Cal.App.4th 935, 943; accord, *City of Palo Alto v. Service*

Employees Internat. Union (1999) 77 Cal.App.4th 327, 333 (*City of Palo Alto*).)

In *Moncharsh v. Heily & Blase,* (1992) 3 Cal.4th, the California Supreme Court "held judicial review of private, binding arbitration awards is generally limited to the statutory grounds for vacating (§ 1286.2) or correcting (§ 1286.6) an award" and "rejected the view that a court may vacate or correct the award because of the arbitrator's legal or factual error, even an error appearing on the face of the award." (*Moshonov v. Walsh* (2000) 22 Cal.4th 771, 775 (*Moshonov*), citing *Moncharsh, supra*, 3 Cal.4th at pp. 8-28.)

In direct contradiction to this, the Opinion second guesses the Arbitrator's decision to deny costs and maintain the "final" status of his award, and asserts that the Arbitrator should have ruled on the 998 motion when presented with it six (6) days *after* the final award was received by Appellant.

However, the American Arbitration Association (AAA) Rules do not provide for such an after-final award. Rule 47(b) provides "In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards.", each of which precede a Final Award, but no "after final" Awards. AAA Rule R-47 (page 28). The categorization of the order as "final award" suggests, by its definition, and mandates that it is the ultimate, conclusive, and last order. If the AAA intended to allow for after-final awards, it would have provided for them in Rule 47.

There is no procedure under the AAA Rules to modify final awards, except "to correct any clerical, typographical, or computational errors in the award." AAA Rule R-50 (page 28-29). Here, the Court has created a new

set of AAA rules that have no cited legal basis, no standards and are entirely arbitrary and capricious.

Under the Court's theory (Opinion p. 20) if the proposed presentation of the Section 998 is not practical, the Court can simply ignore the statute and the AAA rules. The Court fails to cite any legal basis to ignore the clear intent of the legislature and to rewrite the AAA rules to create its new "after final" rule. In doing so, it creates new legal doctrine, without cited legal authority to cancel any law that does not have a practical procedure spelled out within its framework.

The Opinion states that it sees nothing in the Commercial Rules that prevents an Arbitration award from changing or "recharacterizing" (p. 29) from a final to a non-final award. (p. 27), erroneously holding that because the AAA Rules do not expressly prohibit such a thing, that it is permitted. This is a clear logical fallacy. Further, the words of the rules must be given weight, which the Opinion fails to do. Instead the Opinion suggests that Courts can act as a legislature, re-writing the AAA rules, which the Court has no power to do. In doing so, the Opinion fails to cite any authority for its ability to change the AAA rules. The AAA rules do not allow any post-final award; in fact, only interim, interlocutory, or partial rulings, orders, and awards are allowed (Rule 47), each of which can precede a final order The Arbitrator made a clear determination that the Award in this case was final, and this Opinion has cited no authority for this "recharacterization" doctrine. There is nothing in the rules that allow the alchemy of a final award into a Interim or Partial final Award after issuance as the Court claims.

This completely upturns the arbitration system and runs afoul of the method by which rules and statutes have been interpreted and relevant case

law, which in this case are *White*, *Maaso,* and *Moncharsh* ("the parties' expectation of finality from a binding arbitration requires that 'judicial intervention in the arbitration process be minimized.")

The Opinion, then, reaches a flawed conclusion by holding that such an order is possible, and, in fact, mandatory. A change in the AAA Rules cannot and should not come from the Court, but rather from the American Arbitration Association itself, which would be done prior to a proceeding, not after a proceeding is completed, decided, and final.

For the foregoing reasons, review of this case should be undertaken to provide guidance as to whether a Court is permitted to create a new mandate for the AAA for a post-final Arbitration award.

III. STATEMENT OF THE CASE

A. The Civil Case

This case arose over a dispute over attorney's fees owed to Mr. Heimlich for patent work performed for Mr. Shivji pursuant to a legal services agreement dated August 8, 2003. Upon written demand of payment for outstanding fees owed, Mr. Heimlich sent the Mandatory Fee Arbitration letter to Mr. Shivji. Mr. Shivji did not avail himself of this procedure. Mr. Heimlich filed suit on September 10, 2012, for breach of contract, monies owed and common counts (Case No. 112CV231939). The case was litigated extensively in civil court for fourteen (14) months. During that time, Mr. Shivji sent a 998 Offer for $30,000, which was not accepted, and filed a Motion for Summary Judgment in Court, which was denied by the Court. Thereafter, on November 14, 2013, the Court granted Heimlich's Motion for Judgment on the Pleadings.

B. The Arbitration

After seeing that his defenses would not work in civil court, Mr.

Shivji decided to switch forums to Arbitration after 14 months of litigation. Mr. Shivji then filed a claim seeking $176,000 in affirmative relief with American Arbitration Association (AAA) on November 18, 2013. The Superior Court ordered the parties to arbitration on May 29, 2014. The case was arbitrated and the Arbitrator entered a Final Award denying both Mr. Shivji's ($176,000) and Mr. Heimlich's ($125,000) claims, explicitly stating that "EACH SIDE WILL BEAR THEIR OWN ATTORNEY'S FEES AND COSTS." The final award also stated, "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." This became the Final Judgment of the Case.

C. Confirmation of the Arbitration Award

Mr. Shivji did not present his 998 costs claims to the Arbitrator until six (6) days after the Final Award was already issued. The arbitrator responded by e-mail the next day. "Counsel, once I issued [m]y Final Award I no longer have jurisdiction to take any further action in this matter. As discussed in the Award, whatever may have been the costs, fees, etc. associated with the Santa Clara litigation were to be borne by the parties . . ."

Mr. Shivji moved to confirm the arbitration award. On May 25, 2015, the Superior Court confirmed the Arbitration Award and entered Judgment of the Arbitration Final Award.

D. Motion to Tax Costs

After the Final Arbitration Award and Entry of Judgment, Shivji filed a Memorandum of Costs on April 24, 2015 seeking Shivji's 998 costs in Court. Then, Mr. Heimlich filed a Motion to Tax Costs on May 4, 2015. On June 16, 2015, the Superior Court denied the untimely request for CCP

998 costs, which were stricken and taxed to zero.

E. Appeal to Sixth District Court of Appeals

Mr. Shivji appealed the denial of his 998 Costs to the Sixth District Court of Appeals. The Opinion, dated May 31, 2017, and attached hereto as **Exhibit A**, reversed the trial court's ruling (and that of the Arbitrator), and partially vacated the award and ordered a hearing on the request for CCP 998 costs.

F. Request for Rehearing

Pursuant to California Court Rule 8.268(a), Respondent Alan Heimlich petitioned the Court of Appeal for rehearing of the Opinion filed May 31, 2017. The Petition for Rehearing was filed on June 15, 2017 and a Sur Petition filed on June 22, 2017 (after Heimlich located this Court's ruling in *White v. Western Title Ins. Co.* (1985) 40 Cal. 3d 870). The Court of Appeal declined rehearing on June 27, 2017.

IV. ARGUMENT

The Sixth District Appellate Court's Opinion creates a split in the Courts of Appeal that runs counter to the California Supreme Court's prior holding in *White v. Western Title Ins. Co.* (1985) 40 Cal. 3d 870 (*White*), superseded by statute on another ground as stated in *Lee v. Fidelity National Title Ins. Co.* (2010) 188 Cal.App.4th 583, 596 and creates an immediate and extreme need for resolution by the California Supreme Court, in that it leaves wide open the question of when a "timely" request for CCP 998 costs must be made, as discussed in detail below.

Without immediate instruction from the California Supreme Court, each district, and each individual arbitrator, will be forced to "pick a side"

in determining whether to attempt to reserve the right to CCP 998 costs during arbitration, as clearly articulated in *Maaso v. Signer* (2012) 203 Cal.App.4th 362 (*Maaso*), and permitted in *White*, or wait until after a final ruling in arbitration, risking the loss of an award of CCP 998 costs in an effort to follow the Sixth District's flawed instructions articulated in this case.

This case merits review because, given the scope and potential impact of the Appellate Court's central holding, the Opinion threatens to produce unintended and harmful consequences for Appellant, and the entire arbitration system. Ultimately, the Opinion obliterates the finality of a final award in arbitration and runs contrary to established California Supreme Court precedent.

The Appellate Court's Opinion creates a hole in arbitration finality so large a truck could be driven through any arbitration award. One not happy with an arbitration award must merely raise something six (6), or more, days after a final award and any Arbitrator can simply "recharacterize" (the Opinion's language) its final award as not final. The Appellate Court's decision clearly ignores the California Supreme Court's prior holding in *White*, and the AAA rules, rewriting them with an arbitrary and capricious standard that allows changes to final awards without any legal basis stated for such changes.

For the reasons set forth above, the court has grounds to review the Sixth District's Opinion under California Rule of Court 8.500(b)(1), as it is necessary to secure uniformity of decision and settle an important question of law.

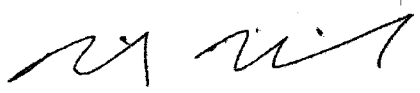
V. CONCLUSION

Based upon the foregoing, Appellant respectfully requests that Court Grant Respondent's Petition for Review to (1) resolve a conflict split in the California district courts of appeal and (2) preserve the independence and finality of the arbitration process.

Respectfully submitted,

Dated: July 10, 2017

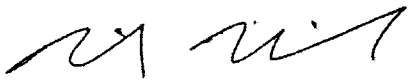
Law Offices of Nicholas D. Heimlich



Nick Heimlich
Attorney for Appellant

CERTIFICATION OF WORD COUNT

I, Nick Heimlich, Attorney for Respondent hereby certify that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed brief of Respondent is produced using 13 point Roman type including footnotes and contains exactly _3206_ words, as calculated by the computer program which produced said brief, which Counsel relies upon to determine the word count in this brief.



_____ Date: 07/10/2017

Nicholas D. Heimlich
Attorney for Petitioner, Alan Heimlich

CERTIFICATE OF SERVICE

I, the undersigned, under penalty of perjury, certify and declare: That I am a citizen of the United States, over 18 years of age, a resident of or employed in the County where the herein described mailing took place, and not a party to the within action.

That my business address is 5595 Winfield Blvd., Suite 110, San Jose, CA 95123. That on behalf of the Law Offices of Nicholas D. Heimlich, I served the foregoing document(s) described as: Petition for Review, on July 10, 2017, on the following persons in this action, by placing a true and accurate copy thereof addressed as follows, in the ordinary course of business at Law Offices of Nicholas D. Heimlich, placed in that designated area is picked up that same day for delivery the following business day:

Via Electronic Filing and Mail Service:
California Court of Appeal
Sixth Appellate District
333 W. Santa Clara Street, Suite 1060
San Jose, CA 95113

Via Mail Service, Electronic Service and Email:
Omair Farooqui
Ellahie & Farooqui LLP
12 South First Street, Suite 600
San Jose, CA 95113

Via Mail Service and Court Filing:
Superior Court of California
Clerk, for Dept. 3, Judge Elfving
191 North First Street
San Jose, CA 95113

Via Electronic Filing and 2 copies via Express Mail:
Supreme Court of California
350 McAllister, Room 1295
San Francisco, CA 94102-4797

I declare that the above service was made at the direction of a member of the bar of this Court.

Executed on July 10, 2017, at San Jose, California.

Nick Heimlich

Exhibit A

Exhibit A

Exhibit A

Filed 5/31/17

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ALAN HEIMLICH, Plaintiff and Respondent, v. SHIRAZ M. SHIVJI, Defendant and Appellant.	H042641 (Santa Clara County Super. Ct. No. 112CV 231939)

I. INTRODUCTION

The issue presented by this appeal is the recoverability of costs available under Code of Civil Procedure section 998 following an American Arbitration Association ("AAA") award that denied requests by both sides for damages, costs, and attorney fees.[1]

Attorney Alan Heimlich (Attorney) filed this action seeking payment of unpaid fees from his client Shiraz M. Shivji (Client). Client filed an answer and, one year later, asked for arbitration pursuant to his retainer agreement with Attorney. The trial court compelled contractual arbitration that resulted in no recovery by either side. Six days after the arbitration award, Client asked the arbitrator to award him costs under section 998 because Attorney's recovery was less favorable than a section 998 offer that Client made two months before

[1] Unspecified section references are to the Code of Civil Procedure.

demanding arbitration. When the arbitrator responded that he no longer had jurisdiction to take further action, Client asked the trial court to confirm the arbitration award and to award him section 998 costs as well. The court confirmed the arbitration award but, relying on *Maaso v. Signer* (2012) 203 Cal.App.4th 362 (*Maaso*), determined that Client failed to make a timely section 998 claim to the arbitrator and denied Client's request for section 998 costs. Client has appealed from this order after judgment.

We reject Attorney's suggestion that Client should have presented his section 998 request for costs to an arbitrator before the arbitration award was rendered, because an offer which is not accepted "cannot be given in evidence upon the trial or arbitration." (§ 998, subd. (b)(2).) Further, we find that in the course of his request to confirm the arbitration award Client established that the arbitrator had refused to hear any evidence of Attorney's rejection of Client's section 998 offer. Thus, we conclude that Client timely presented his section 998 claim to the arbitrator, the arbitrator should have reached the merits of that claim, and the arbitrator's refusal to hear evidence of the section 998 offer warranted partially vacating the arbitration award.

Therefore, we will reverse the order confirming the arbitration award and direct that an order be entered partially vacating the arbitration award to allow a determination of the section 998 request by the arbitrator or, if that avenue is not availing, by the court.

II. EVIDENCE ON MOTION

A. THE ARBITRATION AGREEMENT

In August 2003, Client retained Attorney to protect Client's intellectual property. The retainer agreement included the following arbitration provision.

"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 arbitrability. . . ." (Capitalization omitted.)

B. COMMENCEMENT OF THIS LAWSUIT

For a number of years after being retained, Attorney assisted Client with filing patent applications and forming a corporation, Giotti, Inc., to hold the patents. A dispute arose over Attorney's fees. Notwithstanding the above arbitration provision, Attorney filed a form complaint in the Santa Clara County Superior Court on September 10, 2012 seeking recovery for unpaid invoices.[2] The complaint alleged a breach of contract and a common count for services rendered and an open book account. Attorney prayed for damages of $125,244.59, interest on the damages, and costs of suit, but not attorney fees. Client filed a form answer to the complaint that alleged 21 affirmative defenses. Client prayed for costs of suit and reasonable attorney fees, despite the fact that the retainer agreement did not provide for the prevailing party in any dispute to recover attorney fees or costs.[3]

On September 18, 2013, Client sent Attorney an offer to compromise the action by allowing a judgment providing that Client pay "the amount of thirty

---

[2] Attorney's brief asserts that, before filing suit, he sent Client a "Mandatory Fee Arbitration letter" and Client "did not avail himself of this procedure." This assertion lacks support in the appellate appendices provided by the parties. Attorney is presumably referring to the Mandatory Fee Arbitration Act set out at Business and Professions Code section 6200 et seq., under which "whereas a client cannot be forced . . . to arbitrate a dispute concerning legal fees, at the client's election an unwilling attorney can be forced to do so." (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 984.)

[3] No cross-complaint appears in the appendices that constitute the record on appeal.

thousand and one ($30,001.00) dollars, including all taxable costs of suit to date of acceptance," with each party to bear its own attorney fees and costs.

On November 1, 2013, the trial court denied Client's motion for summary judgment. On November 14, 2013, the court denied Attorney's motion for judgment on the pleadings, except as to affirmative defenses 7 through 12, 14, 17, 18, 20, and 21. The trial court also vacated a December 2013 trial date. On January 31, 2014, Attorney filed a first amended complaint that added two causes of action for fraud and another for declaratory relief.

C. THE ARBITRATION PROCEEDINGS

One year after Client filed his answer, on November 18, 2013, he demanded arbitration of the dispute on an AAA form entitled "Commercial Arbitration Rules."[4] Attorney objected to Client's demand.

On April 4, 2014, in response to Attorney's objection, an AAA arbitrator decided that it was up to the trial court to determine whether Client had waived arbitration by participating in this action. On May 29, 2014, the trial court granted Client's motion to compel arbitration and stay this action pending arbitration.

In the arbitration proceedings, Client filed a 21-page statement of claims. Client alleged that Attorney had achieved approval of only one of Client's 108 patent claims. Client paid Attorney $16,867.78 between September 3, 2003 and August 27, 2004. In September 2005, Client incorporated Giotti and, between November 26, 2005 and May 22, 2009, Giotti paid Attorney $159,697.44 for his services. Client accused Attorney of unauthorized flat fee billing, double billing, unilateral fee increases, delayed billing, and inflated billing. Client alleged breaches of contract, fiduciary duty, and the duty of good faith and fair dealing,

---

[4] In requested supplemental briefs, the parties have essentially stipulated that their arbitration was conducted under the AAA's Commercial Arbitration Rules effective on October 1, 2013 and that this court can take judicial notice of those Rules.

and also alleged unlawful business practices. Client requested restitution for unjust enrichment, a refund of amounts paid, punitive damages, and "all costs of suit incurred herein." There is no indication that Client specifically claimed entitlement to costs under section 998 either in his statement of claims or any other pleading preceding the arbitrator's decision.

Attorney filed an 18-page "Counterclaim" in arbitration that restated the five causes of action in his amended civil complaint and added claims for indemnification and comparative fault. Attorney sought to recover for unpaid invoices, attorney fees, "Costs of this Arbitration and the Lawsuit in Santa Clara County . . . per Civil Code Section 3300, and [Attorney's] costs of the lawsuit and this arbitration per California Code of Civil Procedure Section 1032."

After hearing six days of evidence, the AAA arbitrator issued an eight-page decision on March 5, 2015. The award was titled as from a "Commercial Arbitration Tribunal." The arbitrator determined that Attorney helped Client form a corporation, Giotti, Inc., to which Client transferred his interest in four patents. After late November 2005, an attorney-client relationship was created between Attorney and Giotti. Attorney was awarded nothing on his counterclaims against Client because "[t]he legal services provided by [Attorney] from late November, 2005 through May, 2007 were performed for the benefit of Giotti, Inc. and the obligation to pay for those services rested with Giotti, Inc.," which Attorney had not named as a party in his complaint or his counterclaim.

The arbitrator awarded Client $0 on his claims against Attorney. As to arbitration expenses, "[t]he administrative fees and expenses of the [AAA] 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." (Capitalization omitted.) As to prearbitration expenses, the arbitrator ruled that, while Attorney had breached the arbitration agreement by filing this lawsuit, Client could have remedied the breach by raising the issue immediately. "Accordingly, both parties are at fault for any expenses incurred in

that litigation." The award also stated, "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."

Six days after the award, on March 11, 2015, Client sent an e-mail to the arbitrator stating in part, "There is one open matter that has to do with the award of costs pursuant to CCP § 998 and the procedure to follow regarding the same." "Our understanding is that the demand for an award for recovery of these costs should be submitted to the Arbitrator rather than directly to the Court. Your confirmation of this procedure will be appreciated."

The arbitrator responded by e-mail the following day. "Counsel, once I issued [m]y Final Award I no longer have jurisdiction to take any further action in this matter. As discussed in the Award, whatever may have been the costs, fees, etc. associated with the Santa Clara litigation were to be borne by the parties . . . ."

D. MOTION SEEKING COSTS AND CONFIRMATION OF AWARD

On April 24, 2015, Client filed a motion asking the court to resume jurisdiction in the case, confirm the arbitration award, and "Grant Interest and Costs Pursuant to CCP §998." Client's motion explained that the arbitrator had rejected his request to award costs under section 998 due to a lack of jurisdiction. Client submitted a memorandum of costs totaling $76,684.02, which included witness fees of $26,668.01, AAA fees of $23,550.00, and deposition costs of $11,485.82.[5] Attorney opposed this request and moved to strike or tax costs. Client filed a reply.

By order dated May 27, 2015, the court confirmed the arbitration award, "notwithstanding consideration of any motions pursuant to California Code of Civil Procedure § 998."

---

[5] It appears that Client's request for costs was limited to costs through the arbitration proceedings, not including the subsequent court proceedings.