Supreme Court Case No. S200944
2nd Appellate District Civil No. B226665

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

RAYMOND MARTINEZ AND GLORIA MARTINEZ,
Plaintiffs and Respondents,

vs.

BROWNCO CONSTRUCTION COMPANY, INC.,
Defendant, Appellant and Petitioner.

After a decision of the Court of Appeal for the State of California
Second Appellate District, Division One
Case Number B226665
On Appeal from the Superior Court of the County of Los Angeles
The Honorable Elihu Berle, Case No. KC050128

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

The brief filed by respondents Raymond and Gloria Martinez[1] reiterates the legal positions and policy arguments that have been rejected time and again for good reasons by numerous California appellate courts in cases such as *Wilson v. Wal-Mart Stores, Inc.*, 72 Cal.App.4th 382, 392 (1999), *Palmer v. Schindler Elevator Operation*, 108 Cal.App.4th 154, 157 (2003), *One Star, Inc. v. Staar Surgical Co.*, 179 Cal. App.4th 1082 (2009) and *Distefano v. Hall*, 263 Cal.App.2d 380, 385 (1968). Contrary to

[1] It bears repeating that only respondent Gloria Martinez has standing to pursue the costs at issue in connection with this appeal. Respondents tacitly admit this in their brief. [*See, e.g.*, Respondents' Brief ("RB"), p. 5.]

respondents' contention, a rule providing that an initial C.C.P. § 998[2] offer remains effective for cost-shifting purposes despite subsequent statutory offers will not encourage settlements and is thus inconsistent with the primary purpose of § 998. Instead, as discussed in appellant's opening brief, the Court of Appeal's holding in this matter will actually discourage settlements and is inconsistent with the legislative history of § 998. Consequently, appellants respectfully submit that this court should reverse the Court of Appeal's decision and reaffirm the longstanding rule in California, *i.e.,* that when a party elects to serve a series of statutory offers that are not accepted within the statutory 30-day period, each successive offer extinguishes the preceding offer for purposes of the cost-shifting provisions of § 998(c). See *Palmer, supra,* 108 Cal. App.4th at 158.

Respondents have asserted two basic arguments: (1) general contract principles pertaining to offers and acceptances should not apply in situations involving multiple settlement offers under § 998, such that a second statutory offer does not extinguish the initial offer for cost-shifting purposes; and (2) the rule espoused by Browncо Construction Company, Inc. ("Browncо") and cases such as *Palmer, supra, Wilson, supra,* and *Distefano, supra,* will discourage settlement and is thus inconsistent with the purpose of § 998. [*See, e.g.,* Respondents' Brief ("RB"), pp. 17-18 and

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2 All subsequent statutory citations are to the California Code of Civil Procedure unless specifically noted otherwise.

22-24.] Both arguments, as well as the holding of the Court of Appeal in this case, are incorrect.

1. GENERAL CONTRACT PRINCIPLES, INCLUDING THE APPLICATION OF STANDARD MAXIMS OF CONSTRUCTION AND CONSIDERATION OF LEGISLATIVE HISTORY, GOVERN THE OFFER AND ACCEPTANCE PROCESS UNDER SECTION 998 AND COMPEL THE CONCLUSION THAT THE SECOND STATUTORY OFFER EXTINGUISHES THE INITIAL OFFER FOR PURPOSES OF COST-SHIFTING

Respondents assert that § 998 "means exactly what it says" regarding the issue of whether a second statutory offer extinguishes a preceding offer for purposes of cost-shifting [*see* RB, pp. 8 and 22], and that § 998 must be read to allow cost-shifting from the date of the earliest of multiple statutory offers regardless of the sequence of the offers and whether intervening discovery may have revealed salient facts affecting the parties' analysis of liability and damage issues.[3] Respondents' simplistic interpretation of § 998 is based on the erroneous premise that general contract law principles should not apply to the offer and acceptance process

[3] This misguided contention echoes the Court of Appeal's erroneous holding in the present case that "[w]here a party makes two section 998 offers . . . more than 30 days apart, the purpose of section 998 is adequately served by the statute's existing language, which entitles an offeror to cost shifting from the date of the earliest reasonable offer."[3] [*See* exh. 1 to Petition for Review, p. 16.]

under § 998 because those principles are supposedly "designed to address different concerns than section 998." [*See* RB, pp. 10 and 17.]

A fundamental flaw in respondents' assertion that the statute "means what it says" is that "[t]he plain language of section 998 is . . . ***silent as to the effect of a subsequent statutory offer on a prior statutory offer***." *Wilson, supra,* 72 Cal. App.4th at 389 (emphasis added). As this court noted in *T.M. Cobb Co. v. Superior Court,* 36 Cal.3d 273 (1984), section 998 "addresses some, but not all, of the aspects of the offer and acceptance process." *Id.* at 279. In particular, § 998 "has no provision regarding the revocability of section 998 offers [citation omitted] . . . [***n]or does it address the effect of a subsequent statutory offer on a prior statutory offer. These questions can only be answered by turning to general principles of contract law.***" *Id.* (emphasis added).[4] Moreover, this court in *T.M. Cobb Co.* cited *Distefano v. Hall, supra*, with approval. *T.M. Cobb, supra,* 36 Cal.3d at 279. In turn, the court in *Distefano* noted that "the theory of [the predecessor to § 998] is that the process of settlement and compromise is a contractual one, and the applicable principles are those relating to contracts in general." *Id.* at 385. Accordingly, it is well-

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[4] Respondents' contention that *T.M. Cobb* dealt with a "different section 998 situation" (*see* RB, p. 13) is true so far as it goes – *T.M. Cobb* decided the issue of whether § 998 offers are revocable in general – but conspicuously ignores the fact that *T.M. Cobb* specifically noted that general contract law principles must be applied to resolve the very issue confronted in this appeal, *i.e.,* the issue of the effect, if any, that a subsequent statutory offer has on an earlier offer. See *T.M. Cobb, supra,* 36 Cal.3d at 279.

established that general contract principles of construction ***must*** be applied to resolve the issue presented by this petition.[5]

Similarly, respondents' assertion that general contract law principles were not intended to apply to the offer and acceptance process under § 998 (*see* RB, p. 17) has been rejected by several courts, including this one. In *T.M. Cobb Co., supra,* this court specifically found that "***it is appropriate for contract law principles to govern the offer and acceptance process under section 998***." *Id.* at 280 (emphasis added); see also *id.* at 279 (question of "the effect of a subsequent statutory offer on a prior statutory offer"... "can only be answered by turning to general principles of contract law"). In reaching this conclusion, this court addressed and repudiated the very argument the respondents now advance, *i.e.,* that "under section 998, general contract law has no applicability until after an offer has been made and accepted." *Id.* at 278. Similarly, respondents' core argument was also rejected in *Wilson v. Wal-Mart Stores, Inc.,* 72 Cal. App.4th 382 (1999), where the court noted that "the question of whether a subsequent statutory offer extinguishes a prior offer [is] one that 'can only be answered by turning to general principles of contract law.'" *Id.* at 389

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[5] The respondents claim that *Wilson* "and the other decisions that adopt the subsequent offer rule get there by applying contract law to section 998," and that those decisions, in turn, "rel[ied] upon [*T.M. Cobb*], which applied contract rules applicable to offers and acceptances in a different section 998 situation." [RB, p. 13.] This assertion ignores the fact that *Distefano, supra,* was decided some sixteen years before *T.M. Cobb*. *Distefano* therefore did not rely on *T.M. Cobb,* and it is clear that California courts have correctly applied basic contract law principles to the offer and acceptance process under § 998 and its predecessor for more than forty years.

(quoting *T.M. Cobb, supra,* 36 Cal.3d at 279). Finally, the court in *Distefano v. Hall*, 263 Cal. App.2d 380 (1968), opined that "the theory of [the predecessor to § 998] is that the process of settlement and compromise is a contractual one, and the applicable principles are those relating to contracts in general."[6] *Id.* at 385.

Numerous California courts have held that general contract principles, including secondary principles of interpretation such as maxims of construction and legislative history, ***must*** be employed to determine the effect a subsequent statutory offer has on an earlier offer. Consequently, it is baffling that the Court of Appeal in this case incongruously claimed "the statute's existing language" somehow "entitles an offeror to cost shifting from the date of the earliest reasonable offer" in cases involving multiple statutory offers despite acknowledging earlier in its opinion that "[s]ection 998 is silent as to the effect of a later section 998 offer on an earlier offer." [Exh. 1 to Petition for Review, p. 12.] As the "statute's existing language" does not, in fact, address the issue at hand, general contract principles of construction must be applied.

Where, as here, the plain language of the statute does not address the issue, courts must, as set forth in Browncо's opening brief (p. 9), "turn to secondary rules of interpretation, such as maxims of

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[6] *Distefano* dealt with former C.C.P. § 997, the predecessor to current § 998. As this court observed in *T.M. Cobb, supra,* the theory and purpose of § 998 are the same as former § 997. *See* 36 Cal.3d at 279 n. 6. The discussion of former § 997 in *Distefano* is thus applicable to § 998.

construction" and "the legislative history of the enactment" in order to ascertain the intent of the Legislature so as to effectuate the purpose of the law. *Katz v. Los Gatos-Saratoga Joint Union High Sch. Dist.,* 117 Cal. App.4th 47, 55 (2004); see also *T.M. Cobb, supra,* 36 Cal.3d at 340. In turn, application of "secondary rules of interpretation" compels the conclusion (as detailed in Browncо's opening brief on the merits) that a subsequent offer extinguishes preceding offers for purposes of cost-shifting under § 998. [*See* Petitioner's Opening Brief ("POB"), pp. 9-30.]

In an effort to avoid the application of secondary rules of interpretation, respondents argue that "general contract principles should not be applied in a way that conflicts with or defeats the statute's purpose." [RB, p. 10.] This contention is true so far as it goes – the law has long been that "general contract principles should apply to section 998 offers and acceptances only where such principles neither conflict with the statute nor defeat its purpose." *T.M. Cobb, supra,* 36 Cal.3d at 280 (citing *Distefano v. Hall,* 263 Cal. App.2d 380, 384-85 (1968)).

However, application of general contract principles neither conflicts with the statute nor defeats its purpose in the context presented by the present appeal. As noted above, the statute is silent as to the effect of a subsequent offer on an earlier offer, so nothing about Browncо's position conflicts with § 998. Moreover, Browncо's position is consistent with the general purpose of § 998 to encourage settlements. In this regard, a

"bright-line" rule that a subsequent statutory offer extinguishes an earlier offer for purposes of cost-shifting under § 998 will allow offerees to adequately assess their potential cost exposure if they choose to reject offers or allow them to expire, will encourage parties to make settlement offers based on current factual information and realistic assessments of potential liability and likely exposure, and will reduce the likelihood that offerors will engage in "gamesmanship" by extending multiple statutory offers that have no realistic possibility of acceptance because they know that the long-expired initial offer will continue to control any cost-shifting under § 998.

In short, there is no good reason not to apply basic contract principles to the offer and acceptance process contemplated by § 998. Basic contract principles provide that "any new offer communicated prior to a valid acceptance of a previous offer extinguishes and replaces the prior one." *Distefano, supra,* 263 Cal. App.2d at 385 (citing *Long v. Chronicle Publishing Co.,* 68 Cal. App. 171 (1924)); see also *Wilson, supra,* 72 Cal. App.4th at 390.

The Court of Appeal in this case rationalized its refusal to follow the aforementioned basic principle of contract law by reasoning that Gloria Martinez's initial offer "lapsed" due to the passage of time and thus "ha[d] no enduring contractual effect." [Exh. 1 to Petition for Review, p. 14.] Accordingly, the Court of Appeal concluded that the initial statutory

offer "thereafter retained no contractual significance and thus could not have been revoked or extinguished by the second offer." [*Id.* at p. 15.]

The Court of Appeal did not explain (nor do respondents) how an offer that has "no enduring contractual effect" and "retain[s] no contractual significance" could nonetheless somehow also serve as the basis for cost-shifting in the face of a subsequent statutory offer. In any event, Gloria Martinez's initial offer did not "lapse." On the contrary, it was withdrawn by operation of law. *See* C.C.P. § 998(b)(2). "The withdrawal of an offer differs from the lapse of an offer in that the former requires an affirmative act, while the latter stems from inaction." *Marx v. Department of Commerce,* 220 Mich. App. 66, 80, 558 N.W.2d 460, 467 (1996). The withdrawal of the initial offer by operation of law meant that Browncо no longer had the right to accept it after the expiration of the 30-day period, but the statutorily-imposed benefits and burdens endured. However, these benefits and burdens were extinguished when Gloria Martinez made her second statutory offer.

As established by the application of maxims of contractual construction and a review of the legislative history of § 998, once the initial offer was withdrawn by operation of law, it could not serve as the basis for cost-shifting under § 998(d) in the face of a subsequent statutory offer. The existing rule when Gloria Martinez made (and Browncо considered) the second offer was that a subsequent statutory offer extinguished the initial

offer for purposes of cost-shifting. See, e.g., *Wilson, supra,* 72 Cal. App.4th at 392; *Distefano, supra,* 263 Cal. App.2d at 385. Under general rules of statutory construction, it is presumed when a statute is enacted or amended that the Legislature was cognizant of the construction that had been placed on the statute by the courts. *Palos Verdes Faculty Ass'n, et al. v. Palos Verdes Peninsula Unified Sch. Dist.,* 21 Cal.3d 650, 659 (1978). Notably, § 998 was enacted three years after *Distefano* was decided and was amended at least eight times over the years, yet the Legislature never took any action to include language disapproving the interpretation that *Distefano, Wilson* and other courts had placed on § 998.[7] [*See* POB, pp. 19-30.]

The respondents attempt to counter the weight of the legislative history of § 998 by suggesting that following the legislative history would be tantamount to rewriting the statute. [RB, p. 30.] However, nothing could be further from the truth. As noted above, the statute is silent on the issue presented by this appeal. Under these circumstances, utilization of legislative history would not entail "rewriting" § 998.

Respondents also erroneously argue that Browncо's legislative history argument is premised on the Legislature's inaction and silence. [RB, p. 30.] In fact, as noted in Browncо's opening brief, the Legislature specifically

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[7] In stark contrast, the Legislature specifically amended § 998 to overrule a case interpreting § 998 on a different point, *Encinitas Plaza Real v. Knight*, 209 Cal. App.3d 996 (1989). *See* C.C.P. § 998(c)(2)(B); POB, p. 21. If the Legislature believed that *Distefano, Wilson, Palmer, et al.* had wrongly construed § 998, it presumably would have taken similar steps to amend the statute and impose the "initial offer rule" advocated by respondents. The fact that it did not do so speaks volumes.

cited *Distefano, supra,* in connection with another point under § 998, which demonstrates that the Legislature was certainly aware of *Distefano* and its holding. In any event, there is nothing inappropriate about predicating statutory construction on the failure or refusal of the Legislature to amend a statute in the face of decisions in multiple appellate cases establishing a particular "bright-line" interpretation of the statute. As discussed above, when a statute is amended, the Legislature is presumed to have known the construction that courts have placed on a statute. *Palos Verdes Faculty, supra.* Legislative "inaction" in the face of these known facts is a strong suggestion that the Legislature either agrees with the construction or, at the very least, does not disagree with it.[8]

The respondents also acknowledge that when the Legislature replaced former C.C.P. § 997 with § 998, *Distefano, supra,* had already been decided. [RB, p. 31.] Respondents nonetheless make a tortured attempt to distinguish *Distefano*, asserting that it was a "very odd factual case" because it involved a second § 998 offer after appeal and before retrial.

However, there is no suggestion in *Distefano* that the fact the second § 998 offer was made after an appeal and remand had any bearing on the holding of that case. In other words, respondents' attempt to distinguish *Distefano* hinges on a purported distinction that makes no

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[8] Indeed, if the Legislature disagreed with the rule set forth in *Distefano, Palmer* and *Wilson*, it could have amended § 998 as it did after 1989 to overrule *Encinitas Plaza Real v. Knight*, 209 Cal. App.3d 996 (1989). *See* C.C.P. § 998(c)(2)(B).

difference. For purposes of the issues raised by this appeal, there is no material difference between a situation in which a party makes multiple successive § 998 offers before trial and a situation in which a party makes a § 998 offer before trial and another one after appeal and remand. In both cases, the offeror will undoubtedly be influenced by changed circumstances and evaluate whether those circumstances warrant a different offer. In the former example, the circumstances may change before trial – due to information obtained through discovery or investigation, the death or incapacity of a key witness, etc. – while in the latter example the reversal of a judgment and the possible assignment of the case to a different judge, the death or incapacity of a key witness, etc., may constitute the types of changed circumstances warranting a different § 998 offer. In either case, the second offer is informed by facts that likely were not available when the initial offer was made.

Respondents also assert that "the Fourth District . . . found *Distefano* to be factually inapposite" in *Gallagher v. Heritage,* 144 Cal. App.3d 546 (1983). [RB, p. 31.] However, as respondents acknowledge [*see* RB, p. 31], *Gallagher* was specifically disapproved by this court in *T.M. Cobb, supra*, 36 Cal.3d at 279 and 280 n. 8 to the extent it suggested that a statutory offer could not be revoked. Moreover, the point on which the *Gallagher* court purported to distinguish *Distefano* offers no support to respondents. The issue in *Gallagher* was whether a subsequent <u>oral</u> offer

revoked a prior statutory offer, a factual scenario unlike the present case. The *Gallagher* court declined to follow *Distefano* because the latter case had involved two statutory offers (see *Gallagher, supra,* 144 Cal. App.3d at 549), which is precisely the fact pattern presented by this case. Finally, *Gallagher* contains dicta actually supporting Browncо's position. Specifically, the *Gallagher* court noted that if the subsequent oral settlement offer had been replaced by a statutory offer, "it would [have] clothe[d] the offeror with the benefits and expose[d] the offeree to the burdens, triggered by a different verdict amount." *Id.* at 550. In other words, the *Gallagher* court suggested, consistent with *Distefano*, that the second statutory offer would serve as the baseline for cost-shifting under § 998.

Respondents also argue that there is "no reason in contract law" why an unaccepted initial statutory offer should not be deemed valid "for section 998 purposes," claiming that "[t]here is no surprise or unintended consequence to be avoided . . .." [RB, p. 17] This contention ignores a fundamental truth about litigation as observed by the court in *Wilson, supra*:

> There is an evolutionary aspect to lawsuits and the law, in fairness, must allow the parties the opportunity to review their respective positions as the lawsuit matures. The litigants should be given a chance to

> learn the facts that underlie the dispute and consider how the law applies before they are asked to make a decision that, if made incorrectly, could add significantly to their costs of trial.

Wilson, supra, 72 Cal. App.4th at 390.

Respondents' position not only ignores this "evolutionary aspect" of lawsuits, it would also place a recipient of multiple statutory offers in a position of uncertainty concerning its total potential exposure if it refuses to accept any of the subsequent offers.

2. THE EXISTING RULE THAT A SUBSEQUENT STATUTORY OFFER EXTINGUISHES A PRIOR STATUTORY OFFER FOR PURPOSES OF COST-SHIFTING IS CONSISTENT WITH THE PURPOSE OF SECTION 998

Contrary to respondents' assertion, affirmation of the bright-line rule that a subsequent statutory offer extinguishes a prior offer for cost-shifting purposes (*see Palmer, supra,* 108 Cal. App.4th at 158) would not discourage settlement. [RB, pp. 18.] On the contrary, the rule espoused by *Palmer, Wilson* and *Distefano* encourages settlement because it is a "bright line" policy under which all of the parties would know the baseline by which the judgment and any potential cost-shifting would be measured. *See Wilson, supra,* 72 Cal. App.4th at 391. In contrast, a recipient of multiple statutory offers under respondents' interpretation of § 998 will not

have any idea and could only speculate about the ramifications (at least from a cost-shifting standpoint) of failing to accept any of the subsequent offers.

The existing rule also avoids the "potential for mischief" and "confusion" that would be fostered by adoption of the reasoning employed by the respondents and the Court of Appeal in this case. *Id.* As the court in *Wilson* noted:

> 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. . . . While [plaintiff] contends that the interpretation she urges [*i.e.*, that the initial offer should control for purposes of cost-shifting under § 998] would support the public policy in favor of settlement, in some cases it might not. [¶] . . . ***A plaintiff might be encouraged to maintain a higher settlement demand on the eve of trial and refuse to settle a case that should otherwise be settled if the plaintiff finds comfort in the knowledge that, even if the plaintiff receives an award less than his or her last demand, the plaintiff might still enjoy the cost***

> ***reimbursement benefits of section 998 so long as the award exceeded a lower demand made by the plaintiff sometime during the course of the litigation***. . . .
>
> "Rolling the dice" then becomes somewhat less risky and we note that lawsuits are not often settled by *reducing* the risk of trial."

Wilson, supra, 72 Cal. App.4th at 390-91 (initial emphasis added).

In response, respondents make the incredible argument (without citing any supporting authority) that "[i]f at times that reduces the risks of trial and causes a case to be tried that might not otherwise be tried, then that is the natural consequence of having a section 998 procedure." [RB, pp. 26-27.] In other words, the respondents have made it clear they want to proverbially "have their cake and eat it too" – they want both the reduced risk associated with multiple statutory offers and the "insurance" that the initial offer will control for purposes of cost-shifting. However, this is precisely what the court in *Wilson* criticized and concluded would discourage settlements because cases are less apt to be settled when the risks of trial are reduced.

The court in *Palmer, supra,* also focused on a significant analytical flaw in the position advanced by respondents and adopted by the Court of Appeal in this case, noting that "a plaintiff could make multiple valid and invalid offers to single or multiple parties, then sit back and

decide after the fact which offer is the most advantageous for purposes of enhanced costs and prejudgment interest." *Palmer, supra,* 108 Cal. App.4th at 158. In the present case and under respondents' construction of § 998, Gloria Martinez would have had the incentive to make multiple statutory offers at various times in the litigation, despite the discovery of facts tending to undermine her claims, simply because she could count on her initial offer providing a baseline for cost-shifting even if that offer no longer reflected a realistic assessment of the case. Courts should strive to encourage parties to realistically and consistently analyze the relative merits of their claims, not give them a sense of security premised on an outmoded settlement evaluation at the outset of litigation.

Moreover, as discussed in Browncо's opening brief (*see* POB, pp. 5-6, 34 and 40), a rule that an initial offer is not extinguished by a second offer would not have encouraged settlement in the present case in any event because Gloria Martinez's offer was coupled with her husband's offer – their two offers totaled $5 million. Whether Browncо accepted Gloria Martinez's offer or not, the case would have proceeded. Similarly, the case undoubtedly would have proceeded to trial even if Browncо had accepted Gloria Martinez's initial statutory offer because the case principally revolved around her husband's claims. Thus, there would have been the same burdens to the court and the same litigation expenses.

Respondents contend that if Brownco had settled Gloria Martinez's claims in 2007 in response to her initial $250,000 statutory offer, her claims would not have gone to trial and this appeal would not have resulted. [RB, p. 29.] While this is true as far as it goes, it conveniently ignores the fact that Ms. Martinez made her initial offer only three months after the complaint was filed and before any details were known about her husband's accident or the nature of her claims. As the *Wilson* court noted, there is an evolutionary aspect to lawsuits such that the law, in fairness, must allow the parties the opportunity to review their respective positions as the lawsuit matures, learn the facts underlying the dispute, and consider the ramifications of those facts before being forced to make a premature decision which could significantly add to their exposure. *Wilson, supra,* 72 Cal. App.4th at 390. Respondents' argument in this regard completely ignores this aspect of *Wilson* and universal aspect of litigation.

It must also logically be assumed that a party will make a second statutory offer even when faced with the prospect of losing the possibility of recovering earlier incurred costs if that party, in reevaluating its case (as the court in *Wilson* indicated parties should do), believes it will not be able to equal or beat the earlier offer and wants to retain any prospect

for recovery of enhanced costs.[9] [RB, pp. 12-13.] Respondents grudgingly acknowledge this truth but halfheartedly respond that "more often than not a party cannot predict the final outcome" and may still be interested in using § 998's mechanism as leverage to force a late settlement. [RB, p. 13.] However, as the court in *Wilson* noted, it is this element of risk, *i.e.,* the fact that litigants cannot predict the outcome of trials with certainty, which promotes settlements. *Wilson, supra,* 72 Cal. App.4th at 391. Instead, respondents want Gloria Martinez to have the "best of both worlds", *i.e.,* to be able to serve multiple statutory offers, without regard to a realistic assessment of the merits of the case, while having her initial offer serve as the cost-shifting paradigm. Martinez admittedly wants to be able to "make that second offer without being penalized" (*see* RB, p. 18) when, in fact, she made a second offer to reduce the very risk of trial which helps settle cases.

Apparently realizing that the case authority overwhelmingly rejects their position, the respondents attempt to rely on *One Star, Inc. v. Staar Surgical Co.,* 179 Cal. App.4th 1082 (2009). [RB, pp. 18-20.] However, the respondents overlook the fact that the court in *One Star* specifically espoused and created a "bright-line" rule under which "***a party's last section 998 offer is effective unless expressly revoked***; if the

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[9] This is clearly what Gloria Martinez did in the present case, as she decreased her demand from $250,000 to $100,000 in her successive statutory offers.

last offer is revoked, the prior offer is the relevant offer for purposes of section 998's cost-shifting rules." *Id.* at 1094-95 (emphasis added). As Gloria Martinez's second statutory offer was not revoked by her before it was withdrawn pursuant to statute, that offer (and only that offer) was the "effective" offer for purposes of cost-shifting under § 998 under the "bright line" rule enunciated in *One Star*.[10]

Respondents attempt to capitalize on the fact that the court in *One Star* held that when a second statutory offer is expressly revoked before it is either accepted or the 30-day statutory period has expired, the offeror's right to cost-shifting under § 998 is determined by the initial statutory offer that was either rejected or withdrawn by operation of law. However, this holding is actually consistent with general contractual principles that offers are susceptible to revocation by the offeror anytime before acceptance. *See* Cal. Civil Code § 1586. In contrast, Gloria Martinez did not expressly revoke her second statutory offer. Instead, that offer extinguished her initial statutory offer for purposes of cost-shifting under § 998 and became the new baseline for determining her right to costs under that statute.

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[10] *One Star* dealt with the related but distinct issue of whether a party's affirmative act of expressly revoking a statutory offer before the 30-day expiration revived the initial expired offer for purposes of cost-shifting. In the present case, Gloria Martinez did not expressly revoke her second statutory offer before the 30-day period expired. *One Star* is thus factually inapposite.

Respondents also attempt to invoke *Ray v. Goodman*, 142 Cal. App.4th 83 (2006), to support their position. [RB, pp. 20-22.] However, as respondents acknowledge (*see* RB, p. 21), *Ray* is inapposite because it dealt with the issue of whether prejudgment interest governed by Civil Code § 3291 begins to run from the date of an initial unaccepted statutory offer in situations involving multiple successive unaccepted C.C.P. § 998 offers, and Civil Code § 3291 (unlike § 998) explicitly provides that prejudgment interest runs from the date of the first offer. *Ray* actually supports Browncо's contentions because it underscores the fact that if the Legislature wanted to ensure that an initial statutory offer would serve as the baseline for cost-shifting under § 998 even in the face of subsequent offers, it could have included language to that effect as it did in Civil Code § 3291.

> *Ray* also expressly supports Browncо's position as follows:
>
> In our view, both the "bright line rule" postulated by *Wilson* and the principle that basic rules of contract law apply are ***correct*** as long as the pertinent issue or issues – both there and in *Cobb* and *Distefano* – necessarily involve either contract law or the purpose and function of section 998, e.g.,: (1) ***Does a second section 998 offer from a plaintiff revoke an earlier***

such offer from the same plaintiff for purposes of that statute? (Answer: yes, per all of those cases.)

Ray, supra, 142 Cal. App.4th at 91 (emphases added).

Ray drew a sharp distinction between § 998 and Civil Code § 3291 in the context of cases involving multiple statutory offers by the same party. *Ray* also ***agreed*** with the holdings of *Wilson, Cobb* and *Distefano* in the context of successive § 998 offers. As the *Ray* court held, "when the issue is whether the benefits of section 998 are available to a plaintiff, the 'bright line rule' of *Wilson* controls." *Id. Ray* thus offers no support to respondent Gloria Martinez's position here.

Finally, respondents argue that the rule adopted by *Wilson, Palmer, T.M. Cobb,* and *Distefano* "punishes a party for making more than one offer to compromise, thereby reducing the incentive to make the offers and reducing the prospects of settlement." [RB, p. 8.] This is wrong – the longstanding rule does not punish parties for making multiple offers or discourage statutory settlement offers in general. Parties such as the respondents are free to make as many offers as they want – they simply cannot rely on the earlier offers as cost-shifting mechanisms when they make multiple offers. This is out of fairness to all parties, who must be allowed a reasonable opportunity to evaluate cases as they evolve. *Wilson, supra,* 72 Cal. App.4th at 390. Moreover, the affirmation of the current "bright line" rule (in accordance with general contract principles) that a

subsequent offer revokes an initial offer for purposes of cost-shifting under the statute best serves the statutory purpose of encouraging settlements "by providing offerees with clear direction as to what offers must be accepted on pain of enhanced fees and prejudgment interest." *Palmer, supra,* 108 Cal. App.4th at 158.

Adoption of respondents' position would also encourage gamesmanship like that which occurred in *Palmer, supra.* In that case, the plaintiff made a second statutory offer only 19 days after making her initial offer, and thus the defendants in that case did not have the full 30 days to accept or reject the first offer. "Under these circumstances, the plaintiff 'deprive[d] [the defendant] of the principal benefit and protection afforded to the offeree by the statute, *e.g.,* the legislatively prescribed period to weigh the risks and select between the two options.'" *One Star, supra,* 179 Cal. App.4th at 1095 (quoting *Marcey v. Romero*, 148 Cal. App.4th 1211, 1216 (2007)). If the *Palmer* court had held that the plaintiff was nevertheless entitled to use her first statutory offer as the baseline for purposes of determining cost-shifting, "the plaintiff would have reaped the full benefits afforded by section 998 even after diminishing the benefits afforded to the defendants under the statute." *One Star, supra,* 179 Cal. App.4th at 1095.

Similarly, adopting respondents' position here would allow parties to make multiple statutory offers within a 30-day period while enjoying the

advantage of weighing any eventual recovery against the first offer but depriving the offerees of the protection of the 30-day statutory period prescribed by § 998. As significant legal costs are frequently incurred quickly, *e.g.*, where the depositions of numerous expert witnesses are taken shortly before trial, it would be unfair to force offerees to choose between multiple statutory offers without a clear idea of the cost-related ramifications of allowing the 30-day acceptance period to expire as to each offer. Instead, litigants need a "bright-line" rule that precludes such gamesmanship – a rule providing that a subsequent statutory offer that is not accepted or rejected within the 30-day period supersedes an earlier such offer for purposes of cost-shifting under § 998.[11]

3. CONCLUSION

Respondents' legal positions are inconsistent with the purpose of § 998 and ignore its legislative history, and are also contrary to the holdings of several cases directly on point. Affirming the Court of Appeal's erroneous decision in this case will discourage, rather than promote, settlements because parties, such as Gloria Martinez, will be free to convey numerous statutory offers without the accompanying risk that making those offers may reduce their recoverable costs if they prevail at

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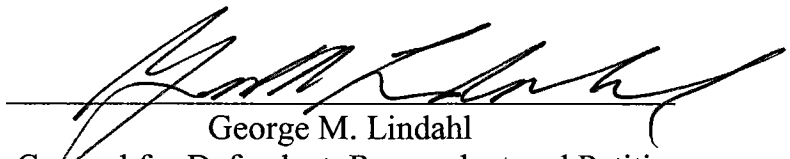
[11] This rule would not apply, of course, where the subsequent offer is expressly revoked by the offeror before the expiration of the 30-day period. See *T.M. Cobb, supra,* 36 Cal.3d at 283 n. 13; *One Star, supra,* 179 Cal. App.4th at 1095; *Marina Glencoe, L.P. v. Neue Sentimental Film AG,* 168 Cal. App.4th 874, 880 (2008).

trial. Petitioner submits that this Court should instead reaffirm the "bright-line" rule that has been enunciated in numerous appellate court decisions and has been the law in California since at least 1968.

Petitioner Browncо therefore respectfully reiterates its request that this Court reverse the Court of Appeal's decision below and construe § 998 to provide that where successive statutory offers are made, the earlier offer is extinguished by service of the subsequent offer for purposes of cost-shifting under that statute.

Dated: July 17, 2012

Respectfully submitted,



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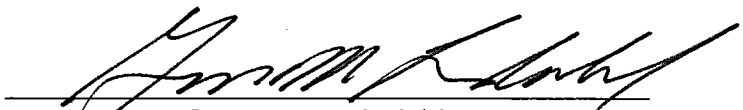
I certify that this brief contains 6,033 words, including footnotes. I have relied on the word count feature in the Microsoft Word program used to generate this brief.



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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 address is 660 South Figueroa Street, Suite 1500, Los Angeles, California 90017-3457.

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Sheila R. Estep

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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Albro L. Lundy, III, Esq. Norman Coe, Esq. Baker, Burton & Lundy 515 Pier Avenue Hermosa Beach, CA 90254 Tel: (310) 376.9893 Fax: (310) 376.7483 Victor George, Esq. 20355 Hawthorne Blvd., Second Floor Torrance, CA 90503 Tel: (310) 856-5410 Fax: (310) 856-5420 Attorneys for Plaintiffs Raymond Martinez and Gloria Martinez	Los Angeles Superior Court Central Civil West Courthouse Clerk of the Court for The Honorable Elihu M. Berle 600 South Commonwealth Avenue Los Angeles, CA 90005 [1 copy] Court of Appeal Clerk of the Court Second Appellate District, Division 1 300 South Spring Street, Suite 2217 Los Angeles, CA 90013 [1 copy]

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