4th Civil No. G029586

IN THE COURT OF APPEAL

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

REBECCA A. BURCH, an incompetent person, by Jeffrey N. Burch, her guardian *ad litem*,

Plaintiff and Appellant,

v.

CHILDREN'S HOSPITAL OF ORANGE COUNTY THRIFT STORES, AND CHILDREN'S HOSPITAL OF ORANGE COUNTY,

Defendants and Respondents.

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Appeal from the Orange County Superior Court
Orange County Superior Court Case No. 00CC00620
The Honorable Claude Whitney, Judge

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# RESPONDENTS' BRIEF

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## INTRODUCTION

Plaintiff's opening brief is built on two faulty—and mutually contradictory—premises: (1) That the validity of plaintiff's section 998 settlement offer should be evaluated in hindsight, from the defendants' perspective at the time of the trial; and (2) that the offer is valid if viewed through "real world" lenses. But in the "real world," a defendant can only evaluate an offer based on the information available when the offer is made, and California law recognizes that fact. Because it followed that law, the trial court's decision to deny plaintiff's motion for pre-judgment interest and expert costs makes complete sense in the "real world" of personal injury litigation.

This was a two-vehicle accident case in which plaintiff Rebecca A. Burch ("plaintiff") was the only injured party. On July 26, 2000, ostensibly under the authority of Code of Civil Procedure section 998, plaintiff made a staggering $50 million settlement offer. The lump-sum, unapportioned offer was addressed to four different defendants. Through the time the offer expired, the defendants had only obtained preliminary information about the value and extent of plaintiff's damages. Moreover, the defendants faced differing liability exposure because although the Children's Hospital entities and the individual defendant were agents/principals of one another, the other defendant Westrux was

potentially liable only as the owner/lessor of the vehicle involved and did not have a respondeat superior relationship with the individual or Children's Hospital defendants. Although the complaint set forth a number of different negligence theories, at the time the 998 offer was pending, plaintiff had provided no clear statement as to the ultimate liability theory she would pursue at trial some ten months later.

California law is settled that a joint unapportioned offer to multiple parties is invalid unless all of the parties to whom the offer is made are jointly and severally liable under respondeat superior principles. Likewise, courts uniformly have held that offers to multiple parties that are conditional on all the parties' acceptance are invalid. Because it is undisputed here that plaintiff's 998 offer was unapportioned and conditional on all defendants' acceptance, and, at the time of the offer, all defendants were not jointly and severally liable under respondeat superior principles, the offer plainly was not valid under California law.

As both California and out-of-state courts have explained, in the real world of litigation, an unapportioned, conditional offer to multiple non-vicariously liable defendants puts those defendants in an unfair bind—each defendant cannot determine precisely what it will take for him or her to settle, but instead must either pay the entire amount himself and seek indemnification, or solicit some collective agreement from all the co-

defendants, who face different liability exposures—all within a short period of time. Forcing multiple defendants to navigate this quandary does not further the purposes of sections 998 and 3291—to promote settlement on understood and agreed terms—and that is why California courts have invariably invalidated such offers.

These rules impose no barrier to plaintiffs legitimately interested in seeking settlement. Indeed, in the real world it is quite simple for plaintiffs to make valid offers. For example, plaintiff here could have made a joint, unconditional offer to defendants but apportioned their liability either equally or unequally, or she could have made separate, unconditional offers to each defendant—in fact, the California practice guide for litigators advises just that. But because plaintiff here failed to take either of these simple steps, she now seeks wholesale changes in the law to bail her out, even going so far as to suggest that this Court follow a decision of the Connecticut Supreme Court that interpreted a significantly different cost-shifting statute and openly concluded that plaintiffs should have complete discretion whether to make unapportioned or apportioned, joint or separate, conditional or unconditional, offers to multiple defendants. Of course, plaintiff here would like that to be the law in California, but it isn't and it shouldn't be.

Moreover, there is an even more basic reason why the trial court's order must be affirmed: Since plaintiff failed to present substantial evidence below that the judgment she received was "more favorable" than her settlement offer, as a matter of law the cost-shifting penalties of sections 998 and 3291 were never triggered. California law requires that in determining whether a judgment is more favorable, the present value of future non-economic damages must be used. That was not done here. Although the jury awarded $25,150,831.00 as the "present cash value of future economic damages," they awarded the "undiscounted amount" of $25 million in past and future noneconomic damages. If one takes a present value figure for this jury award for noneconomic damages, the total judgment certainly drops well below $50 million—the amount of plaintiff's 998 offer—and thus under established authority the judgment was not more favorable as a matter of law.

Plaintiff has failed to show the trial court abused its discretion in denying plaintiff's motion, either in the legal world of California law or in the real world of personal injury litigation. Therefore, the judgment must be affirmed.

## STATEMENT OF FACTS

### A. Plaintiff Files Original Complaint Only Against The CHOC Defendants.

On February 3, 1999, plaintiff was driving alone when her car was struck by a truck driven by defendant Eddie Bretado, who was working for the Children's Hospital defendants at the time, causing catastrophic injuries to plaintiff but none to Mr. Bretado. (Clerk's Transcript ("CT") 161; Appellant's Amended Motion to Augment ("App. Amd. Mot."), Ex. 1 at p. 3.) On July 23, 1999, plaintiff filed a Complaint for Personal Injuries against defendants Children's Hospital of Orange County, Children's Hospital of Orange County Thrift Shop, and Eddie Bretado (the "CHOC Defendants"), alleging a single cause of action for negligence. (Respondents' Motion to Augment ("Resp. Mot."), Ex. 1 at pp. 1-4.)[1] The CHOC Defendants filed their answer on August 23, 1999, denying all of plaintiff's allegations and asserting various affirmative defenses. (CT 12-3.)

[1] Concurrent with the filing of this brief, respondents have submitted a Motion to Augment the Record under California Rules of Court Rule 12(a), attaching eight exhibits, including the initial complaint.

### B. Later, Plaintiff Elects To Add Westrux As A Defendant.

Some five months later, plaintiff chose to add Westrux International, Inc. ("Westrux") as a defendant, filing her First Amended Complaint for Personal Injuries on February 3, 2000. (CT 9-12.) The complaint contained a single negligence cause of action but alleged a number of different theories of liability against Westrux and the CHOC Defendants. (*Ibid.*) Specifically, the complaint alleged that "defendants, and each of them, so negligently, carelessly, recklessly, and unlawfully *owned, drove, maintained, operated, entrusted, and controlled their said vehicle* so as to cause it to collide with and crash into the vehicle driven by plaintiff . . . ." (CT 11 (¶7), emphasis added.)

The CHOC Defendants answered the complaint on February 14, 2000 (CT 13-17), while Westrux filed a separate answer on March 31, 2000 (CT 18-22). Children's Hospital of Orange County is the parent company of Children's Hospital of Orange County Thrift Shop, which employed Eddie Bretado to drive the truck. (CT 157 (¶2).) Westrux's only involvement with the CHOC Defendants stemmed from the fact that it had leased the truck to Children's Hospital of Orange County Thrift Shop. (CT 157 (¶¶2,3).)

C. **Defendants Only Had Preliminary Information Concerning Plaintiff's Damages And Liability Theories Prior To The Expiration Of Plaintiff's 998 Offer.**

Prior to when plaintiff's section 998 offer expired—August 31, 2000—defendants had received only limited information from plaintiff through discovery and had engaged in preliminary settlement discussions, making as high as a $4 million offer to plaintiff. For example, in a September 15, 1999, response to a form interrogatory propounded by the CHOC Defendants regarding incurred medical expenses, plaintiff stated that she had "not yet obtained all medical bills to date. Investigation and discovery are continuing and Plaintiff reserves the right to amend and/or supplement this response." (Resp. Mot., Ex. 2 at p. 10:17-18.) In terms of her future lost earnings damages, plaintiff gave no amount at all. (*Id.* at p. 11:20-25.) On April 26, 2000, in response to the same form interrogatories propounded by Westrux, plaintiff provided the same non-specific and unfinalized answers regarding medical expenses and future lost earnings. (App. Amd. Mot., Ex. 1B at pp. 6,7.) In addition, in Spring 2000, defendants had received some of the medical records regarding plaintiff, and on May 2, 2000, at defendants' request, plaintiff underwent an independent medical examination. (App. Amd. Mot., Ex. 2 at p. 10.)

In July, 2000, the parties participated in settlement conferences/mediations. In a July 12, 2000 Settlement Conference Statement defendants described their minimum and maximum potential exposure as being $820,000.00 and $5 million, respectively, and included a $4 million settlement offer. (Resp. Mot., Ex. 3, at pp. 19(¶3b), 22(¶7).) In defendants' July 12, 2000 Mandatory Settlement Conference Brief, defendants reiterated the $4 million offer they had made to plaintiff and stated that "[d]efendants are admitting for the purposes of the MSC liability" and as "to apportionment, such is not being advanced *at this time*." (Resp. Mot., Ex. 4 at pp. 24:16, 25:24-25, emphasis added.) In plaintiff's Mediation Brief of the same date, plaintiff held to her $100 million offer at the time, but did not submit her life-care planning expert's report because the "report has not yet been received by plaintiff's counsel." (Resp. Mot., Ex. 5 at p. 44:16.)

**D. Ten Months Before Trial Plaintiff Makes A Joint, Unapportioned And Conditional $50 Million Section 998 Offer To Both The CHOC Defendants And Westrux.**

On July 26, 2000, almost 10 months before trial, plaintiff made an unapportioned section 998 settlement offer jointly to all of the defendants in

the amount of $50,000,000, conditional on all the defendants' acceptance.[2] (CT 126-28.) The offer expired on August 31, 2000 (30 days plus 5 for mail service), when the defendants did not accept it by that date.

Thus, as of August 31, 2000, defendants had not received plaintiff's life-care plan, nor received final numbers on medical damages or future lost earnings. In fact, it was not until September 13, 2000, upon defendants' motion to compel, that the trial court ordered plaintiff to sit for her deposition. (CT 26.) All expert discovery, and depositions of treating physicians, plaintiff's parents and other witnesses came after August 31, 2000.

### E. Shortly Before Trial Defendants Stipulate To Joint And Several Liability And Conduct Trial Only As To Damages, Which Jury Verdict Sets At Over $51 Million.

About ten days before trial, on May 3, 2001, the parties stipulated that "Defendants admit liability for the accident . . . [and] do not dispute the nature and extent of injuries suffered by plaintiff . . ." (Resp. Mot., Ex. 6 at

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[2] The Code of Civil Procedure section 998 offer read: "Plaintiff . . . offers to have judgment taken against [the CHOC Defendants and Westrux] and for herself in the above entitled action . . . for the sum of FIFTY MILLION DOLLARS ($50,000,000.00), each party to bear their own costs and attorneys' fees. [¶] If you accept this offer, please file the offer and notice of acceptance . . . prior to trial or within thirty (30) days of service of this offer, whichever occurs first, or it will be deemed withdrawn." (CT 126-27.)

p. 46.) On May 4, 2001, the parties agreed that the "sole issue to be determined by the jury is the nature and extent of damages." (Resp. Mot., Ex. 7 at p. 48.) The trial was called on May 14, 2001 and on May 24, plaintiff obtained a verdict in the total amount of $51,639,192.40 allocated as follows: (a) "Past economic damages" of $1,488,361.40, (b) "The present cash value of future economic damages" of $25,150,831.00, and (c) "The undiscounted amount of past and future noneconomic damages" of $25,000,000.00. (CT 116.) A Judgment Nunc Pro Tunc for said amount was entered on June 1, 2001. (CT 115-118.)

**F. Trial Court Denies Plaintiff's Motion For Over $4 Million In Prejudgment Interest And Expert Costs On The Ground That Her Unapportioned, Conditional 998 Offer Was Invalid.**

On June 5, 2001, plaintiff filed a motion for award of prejudgment interest of $4,272,612.63 under Civil Code section 3291, and expert costs of $68,016.44 under Code of Civil Procedure section 998. (CT 119-124.) Defendants filed opposition on June 15, 2001 (CT 150-158.) to which plaintiff replied on June 21, 2001 (CT 171-190.). In a June 27, 2001 Minute Order, the trial court, exercising its discretion, denied plaintiff's motion, ruling: "Plaintiff made an undifferentiated settlement offer . . . as to

all four defendants, which was not accepted. The offer was invalid as there was not joint and several liability as to all four defendants. The fact that defendants and each of them admitted liability prior to trial and stipulated to joint and several liability at trial is not determinative." (CT 402.)

## STANDARD OF REVIEW

Plaintiff fails to mention that the governing standard of review here is the abuse of discretion standard. "With respect to the validity, or reasonableness, of a section 998 offer, we review the trial court's determination for an abuse of discretion." (*Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co.* (1999) 73 Cal.App.4th 324, 329, citation omitted.)

Thus, to the extent the trial court's ruling here was based on an exercise of discretion, the abuse of discretion standard would apply. "An abuse of discretion may be found ' ... whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered.'" (*Hilliger v. Golden* (1980) 107 Cal.App.3d 394, 397.) "'The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' 'A

judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 136, quoting *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 & 566.)

Of course, to the extent the trial court's order was a legal ruling based on undisputed facts, the de novo review standard would apply. (*Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 797-798.)

## ARGUMENT

## I. SINCE PLAINTIFF HAS NOT CARRIED HER BURDEN OF SHOWING THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING HER UNAPPORTIONED, CONDITIONAL OFFER TO ALL DEFENDANTS WAS INVALID, THE TRIAL COURT'S ORDER DENYING PRE-JUDGMENT INTEREST AND EXPERT COSTS MUST BE AFFIRMED.

### A. In Evaluating Whether Plaintiff Carried Her Burden, The 998 Offer Must Be Viewed From Defendants' Perspective At The Time The Offer Was Pending And Strictly Construed In Defendants' Favor.

#### 1. Plaintiff Has The Burden Of Establishing The Validity Of Her Offer.

"In interpreting section 998, this court has placed squarely on the offering party the burden of demonstrating that the offer is a valid one under section 998." (*Barella v. Exchange Bank*, *supra*, 84 Cal.App.4th at p. 799; *see also Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579, 585.) As the offering party here, plaintiff has the burden of

establishing that the trial court abused its discretion by ruling that her 998 offer was invalid.

### 2. Plaintiff's Section 998 Offer Must Be Strictly Construed In Defendants' Favor.

"Section 998 must be strictly construed in favor of the party sought to be subjected to its operation." (*Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 732-733; *see also Hutchins v. Waters* (1975) 51 Cal.App.3d 69, 72-73; *Barella, supra*, 84 Cal.App.4th at p. 799.) Since plaintiff sought to subject the defendants to the section 998 penalties, this Court, in determining whether the trial court abused its discretion in denying plaintiff's motion, must strictly construe the facts and the law in the defendants' favor.

### 3. The Validity of Plaintiff's 998 Offer Must Be Evaluated Not In Hindsight, But In Light Of The Circumstances At The Time Of The Offer.

Whether a section 998 offer is valid or reasonable must be determined by looking at circumstances known to the offeree (defendants here) when the offer was made. (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 699; *see also Nelson v. Anderson, supra*, 72

Cal.App.4th at p. 135 [same]; *Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692, 698 ["But the [998 offer] must be measured as of the time Sav-On made its statutory offer and without the benefit of hindsight"].)

The reason for this rule is that California courts have recognized that as cases evolve, the parties' evaluation of settlement offers may change dramatically. The only fair way to evaluate a 998 offer and its rejection is to examine it based upon the circumstances existing at the time the 998 offer was pending. "[T]here 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 v. Wal-Mart Stores, Inc.* (1999) 72 Cal.App.4th 382, 390.)

Instead of focusing on the facts known to the defendants at the time of the settlement offer, plaintiff in her opening brief argues the validity of her 998 offer by looking at facts that occurred after her offer expired in August 2000. For example, as the trial court found (CT 402), the fact that defendants stipulated to joint and several liability some ten days before trial (May 3, 2001) has no bearing on whether plaintiff's 998 offer was valid.

(Appellant's Opening Brief ("AOB"), pp. 12, 36.) The only post-August 2000 fact that is relevant to plaintiff's 998 offer is the amount of the judgment, and that is only relevant to determine whether the judgment was more favorable than the 998 offer.

### B. Plaintiff's Joint 998 Offer Was Invalid Because It Was Not Apportioned Among The Multiple Defendants To Which It Was Directed.

#### 1. The Purpose Of Sections 998 And 3291 Is To Promote Pre-Trial Settlement On Understood And Reasonable Conditions.

The Legislature created the sections 998 and 3291 procedures to encourage settlement by providing litigants with sufficient information to decide whether it is in their best interests to settle their cases prior to trial. (*T. M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 280 ["[T]he clear purpose of section 998 . . . is to encourage the settlement of lawsuits prior to trial"]; *see also Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1114.) "Section 998 and Civil Code section 3291 are designed to encourage settlements and penalize those who refuse reasonable settlement offers." (*Hrimnak v. Watkins* (1995) 38 Cal.App.4th 964, 980-981.)

A section 998 offer must be reasonable and clear, and for the purpose of these statutes to be fulfilled, the offeree (here the defendants) must have sufficient information to evaluate the offer.

### 2. Unapportioned Offers To Multiple Defendants Or By Multiple Plaintiffs Are Invalid And Not Enforceable.

In *Taing, supra*, 9 Cal.App.4th 579, the court held that a single, lump sum offer by a plaintiff to multiple defendants which requires them to agree to apportionment among themselves is not valid. (*Id.* at p. 586.) In *Taing*, the plaintiff was injured when he fell from a scaffold while working as a plasterer. (*Id.* at p. 582.) Taing sued the scaffolding company, the general contractor, and the owner of the building being plastered. (*Ibid.*) Taing then served an unapportioned 998 offer to compromise for $249,999.00 on all three defendants, but the offer expired without being accepted. (*Ibid.*) At trial, the jury found the scaffolding company 100 percent negligent and awarded Taing damages of $492,626.00—significantly more than the 998 offer. (*Ibid.*) On Taing's motion, the trial court awarded him expert costs and prejudgment interest as sections 998 and 3291 penalties. (*Ibid.*)

The Court of Appeal reversed, holding that Taing's unapportioned settlement offer was too uncertain to trigger section 998 penalties: "[F]rom the perspective of the offeree, the offer must be sufficiently specific to permit the individual defendant to evaluate it and make a reasoned decision whether to accept without the additional burden of obtaining the acceptance of codefendants or suffering from their refusal to settle . . ." (*Id.* at p. 585.) Since the offer was not specific as to the amount sought from each of the three defendants, the court concluded the defendants were unable to evaluate it and make a reasoned decision whether to accept it. (*Id.* at p. 586.)

In addition, the court noted that, without apportionment, there is no definitive way to determine whether a subsequent judgment against a particular nonsettling defendant is "more favorable" than the offer.[3] (*Id.* at p. 583; *Wickware v. Tanner* (1997) 53 Cal.App.4th 570, 575.)

The present case is on all fours with *Taing*. Here, plaintiff made an unapportioned 998 offer of $50 million to multiple defendants whose liability exposure was different. The CHOC Defendants faced vicarious liability for Mr. Bretado's negligence, because he was employed by the hospital entities at the time of the accident. (CT 157.) Westrux, on the

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[3] The section 998 and 3291 penalties are not triggered unless a party's verdict is deemed to be "more favorable" than the 998 offer. (Code Civ. Proc., § 998(c) & (d); Civ. Code, § 3291.)

other hand, did not employ Mr. Bretado but simply leased the truck to the CHOC Defendants, and thus had more limited liability exposure (*see infra* Section I(B)(3)). (CT 157.) Plaintiff's offer contained no breakdown of the amounts each of the defendants needed to pay to settle. (CT 126-27.) As such, the offer was insufficiently specific to be valid in that it was not precise as to *each* defendants' ultimate obligation in any settlement deal. As the *Taing* court concluded: "[I]f a plaintiff elects to submit a section 998 offer in cases involving multiple defendants, the offer to any defendant against whom the plaintiff seeks to extract penalties for nonacceptance must be sufficiently specific to permit that individual defendant to determine the exact amount plaintiff is seeking from him or her." (*Taing, supra*, 9 Cal.App.4th at p. 586.)

Plaintiff argues in her opening brief that even if her 998 offer was invalid as to Westrux, it remains viable as to the CHOC Defendants. (AOB, pp. 6-7, 31-32.) This argument makes no sense. If a lump-sum, unapportioned 998 offer is invalid as a matter of law because it is too imprecise as to one defendant, how can it suddenly become precise enough as to a co-defendant? To fulfill the purpose of sections 998 and 3291—promoting settlement on understood and agreed terms and ending litigation—if an offer is invalid as a matter of law as to one defendant, it must be invalid as to all defendants. The fact that one defendant may have

much-diminished liability exposure does not eliminate the quandary of the more-exposed defendants of not knowing precisely what their portion of any settlement would be.

In *Gilman v. Beverly California Corp.* (1991) 231 Cal.App.3d 121, the court reversed an award of expert costs and prejudgment interest to plaintiffs, finding that a joint offer by multiple plaintiffs to a single defendant in a wrongful death medical malpractice claim was invalid: "[T]he joint offer to compromise did not afford [defendant] the opportunity to evaluate the separate and distinct loss suffered by each plaintiff as a result of the death . . ." (*Id.* at p. 126.)

The *Gilman* court rejected plaintiffs' argument that there was no confusion because in a wrongful death action they suffered "a single, indivisible injury." (*Id.* at p. 125.) The court found that whether the plaintiffs had to bring a single, rather than separate, wrongful death action was a procedural rule that had nothing to do with whether the 998 offer was valid. (*Ibid.*) Likewise, plaintiff's argument here that her joint offer was valid because she suffered a single, indivisible injury requiring her to bring a single negligence claim against multiple, not similarly-situated defendants is inapposite (AOB, p. 27): The fact that she had to bring a single negligence claim with different theories does not determine whether the unapportioned, joint 998 offer she elected to make was valid.

The *Gilman* court also held the plaintiffs' 998 offer invalid because "[w]ithout an apportionment of the damages among the four plaintiffs, it is impossible to say that any one of them received a judgment more favorable than she would have received under the offer." (*Gilman, supra*, 231 Cal.App.3d at p. 126.)

Also, in *Hurlbut v. Sonora Community Hospital* (1989) 207 Cal.App.3d 388, the court reversed an award of expert costs, holding that multiple plaintiffs' 998 offer to the defendant in a medical malpractice action was invalid. The court emphasized the inequity of validating the plaintiffs' offer because "[t]o consider plaintiffs' joint settlement offer as valid would deprive defendant of the opportunity to evaluate the likelihood of each party receiving a more favorable verdict at trial." (*Id.* at p. 410.)[4]

The *Taing* court explained the dilemma created by unapportioned 998 offers to multiple defendants: "If a settlement demand to multiple codefendants is apportioned or segregated as to each or any of them, any

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[4] The prohibition against joint offers to multiple parties is not just a pro-defendant rule. In *Randles v. Lowry* (1970) 4 Cal.App.3d 68, 70, the court ruled that a defendant's joint offer to multiple plaintiffs was invalid. The court held that, under former section 997 (the predecessor to section 998), defendant's "offer of compromise was a nullity. The offer was made jointly to all plaintiffs, without designating how it should be divided between them." (*Id.* at p. 74; see also *Meissner v. Paulson* (1989) 212 Cal.App.3d 785, 791 ["To enforce the purpose of section 998, we find as a matter of law only an offer made to a single plaintiff, without need for allocation or acceptance by other plaintiffs, qualifies as a valid offer under section 998"].)

such defendant can accept the demand and seek a good faith settlement determination. . . . [¶] However, the same is not true of an unapportioned offer by a single plaintiff to multiple defendants, since it requires any defendant who wants to accept to obtain the concurrence of his or her codefendants. This places a reasonable defendant at the mercy of codefendants whose refusal to settle may be unreasonable. . . . [¶] it is questionable whether Taing could reasonably have expected appellant to pay the entire settlement figure and then litigate the liability and damage factors with its codefendants. This defeats one of the benefits of section 998 for the defendant: avoidance of the time and expense of litigation." (*Taing, supra*, 9 Cal.App. 4th at pp. 584-85.)

In the present case, plaintiff chose to add Westrux as a defendant and then elected to serve a joint, unapportioned 998 offer on all four defendants. *Taing, Gilman* and *Hurlbut* explain that such an unapportioned offer is invalid because it did not give the CHOC Defendants or Westrux a realistic opportunity either (a) to determine the exact amount plaintiff was seeking from them, or (b) the likelihood that plaintiff would receive a more favorable verdict at trial as to any of them. This is particularly true when plaintiff's 998 offer is viewed from the CHOC Defendants' and Westrux's perspective in August 2000 (rather than with hindsight which is not allowed) because the evidence on plaintiff's damages was only preliminary

and both plaintiff's and defendants' positions on liability were indeterminate and not final.[5]

Hence, plaintiff has not carried her burden of establishing the validity of her 998 offer, even without the requisite construction in the defendants' favor.

### 3. The Vicarious Liability Exception To The Prohibition Against Unapportioned Offers Does Not Apply Here.

Plaintiff's main argument as to why her unapportioned, joint 998 offer is still valid is that *Taing* does not apply if joint defendants are liable because of a principal/agent relationship among them. (AOB, pp. 29-30; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1001, disapproved on another ground in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644.) However, since here there was no

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[5] Plaintiff tries to cloud the issue by asking rhetorically what the "real reason" was defendants failed to accept the 998 offer (AOB, p.14), yet there is no evidence in the record with which to answer that question. Moreover, the question is irrelevant to whether plaintiff's offer met the requisite legal standards. Nonetheless, it was entirely reasonable for defendants here not to accept plaintiff's offer that failed to inform each defendant (with differing liability exposures) what precise amount it would take to settle and forced them to wrangle a collective agreement among all defendants, particularly facing the whopping sum of $50 million and only preliminary information as to plaintiff's damages and her liability theories.

principal/agent relationship between Westrux and the CHOC Defendants, this exception does not apply.

The premise of this exception is that a joint, unapportioned 998 offer is valid where principles of respondeat superior render the multiple defendants jointly and severally liable. (See *Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 959-960 [under doctrine of respondeat superior, principal is liable for torts of its employees, committed while acting within the scope of their employment].) Here, Westrux—whose only involvement in the case was as owner/lessor of the truck—could not be jointly and severally liable under the same theory as the CHOC Defendants because Westrux was not an agent of the CHOC Defendants, nor were the CHOC Defendants agents of Westrux. (CT 157.)

Westrux could not have been sued by plaintiff for how it negligently "drove," "operated" or "controlled" (CT 11 (¶7)) the truck that struck plaintiff's vehicle because the truck driver, defendant Eddie Bretado, was an agent of the other CHOC Defendants, and not of Westrux. (CT 157.)[6] Westrux's liability could only be based on a different negligence

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[6] Plaintiff's boilerplate allegation that all defendants were agents of one another does not change this result. (AOB, pp. 4-5.) Since plaintiff's 998 offer has to be viewed from the CHOC Defendants' and Westrux's perspective at the time they received it, their knowledge of the lack of agency between Westrux and the CHOC Defendants is the prism through which plaintiff's offer must be viewed, not the stock provision alleged by plaintiff without any supporting factual allegations.

theory—regarding how it "maintained," "entrusted" or "owned" the truck. (CT 11 (¶7).)

**a. Westrux's independent liability on theories of negligent entrustment and/or maintenance of the truck was subject to Proposition 51 apportionment.**

Westrux was sued for how it "maintained" or "entrusted" the subject vehicle (CT 11(¶7)) and thus could have been found liable for negligence under the theories of negligent maintenance and/or entrustment of the truck. "[O]ne who negligently entrusts the driving of a car to another, whether the entrustor be owner or original permittee, is liable upon common law principles to one who is injured through negligence of the driver, and that liability is not affected by statutory limit of amount of damages . . . ." (*Jones v. Ayers* (1963) 212 Cal.App.2d 646, 658-659 [negligent entrustment to fifteen year old boy with only an instruction permit]; see also *Fremont Comp. Ins. Co. v. Hartnett* (1993) 19 Cal.App.4th 669, 675-676 [section 17151 statutory limit on liability does not apply to owner's common law negligence].)

But if Westrux were liable for negligent entrustment or maintenance, its *independent* negligence on a different theory than the CHOC Defendants would result in application of comparative fault and consequent apportionment of liability with the CHOC Defendants under Proposition

51. (Civ. Code, § 1431.2 [each defendant is liable for non-economic damages only in proportion to its percentage of fault].)

In her opening brief, plaintiff argues that section 1431.2 (Proposition 51) is inapplicable to Westrux, citing *Marina Emergency Medical Group v. Superior Court* (2000) 84 Cal.App.4th 435, 440. (AOB, p. 19.) Yet, the *Marina* court held: "In cases where a person's liability is derivative (such as the respondeat superior liability of an employer for an employee's acts) or based solely on statute (such as an automobile owner's liability for the driver's negligence), Proposition 51 does not apply (other than as it might require an allocation of liability between the employee and third persons or the driver and third persons). But Dr. Westerband's *liability* for Dr. Solomon's subsequent negligence *is not derivative*. It is *not a creature of statute. It is based on Dr. Westerband's own negligence*, and it exists because "'the law regards the act of the original wrongdoer as a proximate cause of the damages flowing from the subsequent negligent medical treatment and holds [the original tortfeasor] liable therefor.'" (*Id.* at p. 440, emphasis added.)

Thus, Westrux's independent negligence brings Proposition 51 into play, and from the defendants' perspective, as of August 2000, the CHOC Defendants and Westrux could have faced significantly different liability for damages based on their differing culpability. Plaintiff could well have

decided (some 10 months later at trial) to prosecute Westrux on a theory that it did not properly maintain the truck or that it was negligent to entrust the truck to Mr. Bretado for any variety of reasons—as of August 2000 plaintiff had not disavowed those theories and discovery was still early in its metamorphosis.

**b. Westrux's liability as owner of the truck for Bretado's negligent operation of the truck was limited by statute.**

As to Westrux's liability as "owne[r]" of the truck (CT 11(¶7)), it would have been limited by statute. Under Vehicle Code section 17151, the liability of an owner of a vehicle that is negligently operated by another person (who is not the owner's agent) and causes injury to a third person, is limited to $15,000. (Veh. Code, § 17151, subd. (a); see also *Hartford Casualty Ins. Co. v. Mid-Century Ins. Co.* (1994) 26 Cal.App.4th 1783 [the obligation of a truck owner's liability insurer was satisfied by payment of $15,000 to the injured party]; *Duvall v. T.W.A.* (1950) 98 Cal.App.2d 106, 116 [in a motorist's action for personal injuries sustained in a collision with a gasoline truck, owned by a gas company, where the evidence supported a finding that the driver was not an agent of the gas company at the time of the accident, liability of the gas company was properly limited to $10,000].)

Contrary to plaintiff's spin in her opening brief, defendants did not contend below and do not argue here that Proposition 51 applies to Westrux's statutory section 17151 liability. (AOB, p. 31; see *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851.) The Proposition 51 apportionment only applies to Westrux's liability for negligent entrustment and/or maintenance.

However, either because of the section 17151 liability cap or because of apportionment under the independent negligent entrustment/maintenance theory, Westrux's liability exposure was markedly different than the CHOC Defendants in August 2000 when all defendants had to evaluate plaintiff's unapportioned 998 offer.[7] Therefore, the vicarious liability exception to the prohibition on joint, unapportioned 998 offers does not apply here.

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[7] Plaintiff tries to cover up her failure to make a properly apportioned and unconditional offer by contending that the legislative cost-shifting scheme in sections 998 and 3291 would be eviscerated in multiple defendant cases if the possibility of a partially several judgment against a defendant is enough to invalidate an offer. (AOB, pp. 36-37.) Not true. The offeror (plaintiff here) has complete control of ensuring that her 998 offer is valid, regardless of whether the multiple offerees (defendants here) are ever severally liable: All she has to do is make an unapportioned, unconditional offer, either jointly or separately, to the multiple defendants. (*See infra* Section I(D) on how plaintiff could have done it right.) Plaintiff here failed to do that; and instead she is now trying to blame her predicament on the well-established system of rules.

### 4. Cases That Plaintiff Relies On For Reversal Are Inapposite Because They All Involved Vicarious Liability Among All Defendants—The Offerees.

Plaintiff places primary reliance on *Bihun, Steinfeld* and *Lakin*, but that reliance is misplaced because the cornerstone of those holdings was that all the defendants' potential exposure was governed by principles of vicarious liability. (AOB, pp. 23-24.) As explained above, here there was no vicarious liability between Westrux and the CHOC Defendants at the time of the 998 offer.

In *Bihun, supra*, 13 Cal.App.4th 976, the court concluded that the unapportioned 998 offer at issue was valid because defendant AT&T was jointly liable with its employees on a respondeat superior or vicarious liability theory for the full amount of damages on every cause of action in which it was named as a defendant and was not liable at all on the causes of action in which it was not named as a defendant. (*Id.* at p. 1001.) Because AT&T was jointly and severally liable with its employees on every cause of action in which it was named a defendant, "unlike the scaffolding company in *Taing*, AT&T's principal dilemma was liability *vel non*, not apportionment of damages." (*Ibid.*)

Here, when plaintiff's 998 offer is viewed from defendants' perspective in August 2000 (which California law requires), there was no

vicarious liability between Westrux and the CHOC Defendants and there would be apportionment of damages if Westrux were held liable for negligent entrustment or maintenance. Thus, plaintiff's 998 offer put defendants in the untenable position described in *Taing*, rather than the situation in *Bihun*.

*Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1996) 50 Cal.App.4th 1542, 1548-1549, involved a medical malpractice claim against a doctor and his employer, where both defendants were jointly and severally liable under respondeat superior. The court also emphasized that Proposition 51 apportionment would not apply because the case was filed before the Proposition's enactment. (*Id.* at p. 1549.) Relying on *Bihun* and distinguishing *Taing*, the court concluded that where multiple defendants face joint and several, vicarious liability for the entire judgment, without the prospect of Proposition 51 apportionment, the 998 offer need not be apportioned. (*Id.* at p. 1550.) Here, however Westrux faced independent liability under a completely different theory of negligence (to which Proposition 51 did apply) and could benefit from a statutory liability cap that the CHOC Defendants could not use.

*Lakin v. Watkins Associated Industries*, *supra*, 6 Cal.4th at p. 658, fn. 9, did not really consider the validity of a 998 offer, but only mentioned it in dicta in a footnote. *Lakin* considered whether section 3291 prejudgment

interest is available on punitive damages, and whose burden it is to establish that an award is for personal injuries, the trigger for section 3291's applicability. (*Id.* at p. 649.) Also, contrary to the present case, in *Lakin* there was vicarious/respondeat superior liability between the truck driver and his employer. (*Ibid.*)

The linchpin of *Bihun* and *Steinfeld*'s holdings that the unapportioned offers were valid was that *all* the defendants were jointly and severally liable and the plaintiff's claims were not subject to Proposition 51 apportionment. Plaintiff's attempt to re-sculpt that linchpin as being based upon "adversity" or "lack of unity" among the defendants is clever but unavailing. (AOB, pp. 17-19, 25-27.) It is the potential exposure to differing levels of liability at the time of the 998 offer that makes joint, unapportioned offers unfair (which does not exist in the vicarious liability situation), not whether the defendants for tactical or economic reasons choose a unified or an adverse front against plaintiff.[8]

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[8] Plaintiff tries to make much of the fact that the CHOC Defendants and Westrux were represented by the same counsel. (AOB, pp. 5, 11.) This argument is a classic red herring. Whether co-defendants choose to employ the same attorneys (understanding all conflict issues) for strategic or economic reasons, such as insurance coverage, has nothing to do with the gravamen of the vicarious liability exception to the prohibition on unapportioned joint offers: i.e., whether all the defendants are vicariously liable to each other because of respondeat superior. The fact that the defendants here used the same lawyers does not alter the fact that the CHOC Defendants and Westrux were not jointly and severally liable, at least at the time of plaintiff's 998 offer.

(continued...)

By contrast, the situation here is quite different than *Bihun* and *Steinfeld* as Westrux was not vicariously liable for the CHOC Defendants' conduct and, if Westrux were found liable for negligent entrustment or maintenance, any award would be subject to Proposition 51 apportionment.

### 5. Plaintiff's 998 Offer Fails To Satisfy The Applicable, General Rules Of Contractual Interpretation Because It Was Too Vague And Imprecise.

The California Supreme Court has held: "Since section 998 involves the process of settlement and compromise and since this process is a contractual one, it is appropriate for contract law principles to govern the offer and acceptance process under section 998. . . . [¶] Of course, general contract law 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 p. 280, citation omitted; *see also Wilson v. Wal-Mart Stores, Inc.*, *supra*, 72 Cal.App.4th at p. 389

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[8] (...continued)

Likewise, the fact that defendants here made a joint (non-section 998) settlement offer to plaintiff (AOB, pp. 5, 12) does not somehow rescue plaintiff's invalid 998 offer. Defendants' offer was not made under section 998, but even if it had been it would have been valid because it was directed to a *single* offeree, namely plaintiff. Plaintiff thus did not have to struggle with any issues of apportionment or conditionality in deciding whether to accept defendants' joint offer.

[same]; *Drouin v. Fleetwood Enterprises* (1985) 163 Cal.App.3d 486, 491 ["Unless section 998 requires a different rule, operation of section 998 is governed by principles of classic contract law"].)

Indeed, the prohibition on joint, unapportioned offers to multiple defendants explained in *Taing* makes complete sense as part of the general scheme of holdings that section 998 offers must be strictly construed in favor of the offeree and evaluated from the offeree's perspective at the time of the offer using general rules of contractual interpretation.

To this end, a valid 998 offer must be specific enough to permit the offeree to evaluate what he or she is gaining and giving up by agreeing to the settlement. Thus, in *Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692, a slip-and-fall negligence case, the defendants' 998 offer was deemed too uncertain to trigger the 998 cost-shifting penalties because it was virtually impossible to value the rights surrendered since besides a dollar amount for the negligence claim it also included a release of defendant, its attorneys, and its insurance carrier from "any and all" other claims, including insurance bad faith. (*Id.* at p. 695; see also *Barella*, *supra*, 84 Cal.App.4th at p. 799 [a 998 offer declared invalid because it included non-monetary terms (a confidentiality provision) that made it hard to decide whether there had been a more favorable judgment].)

In particular, to constitute an enforceable contract a 998 offer must be specific as to *each* defendants' ultimate obligation in any settlement deal. (*Taing, supra*, 9 Cal.App.4th at p. 586 ["the offer to any defendant against whom the plaintiff seeks to extract penalties for nonacceptance must be sufficiently specific to permit that individual defendant to determine the exact amount plaintiff is seeking from him or her"].)[9]

Here, plaintiff could not carry the burden of establishing the validity of her 998 offer because it was not enforceable under general contractual principles. Plaintiff's offer did not precisely inform Westrux or the CHOC Defendants the exact apportioned amount they would have to pay to settle the case in August 2000, particularly given the information known to the defendants at this time.

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[9] Our courts have no difficulty applying these general contractual principles to invalidate settlement offers under section 998, even where the specificity of the offer is not at stake. In *Moffett v. Barclay* (1995) 32 Cal.App.4th 980, 983, the court held a 998 offer invalid since it was served on the defendant's insurer rather than the defendant (even though defendant was aware of the offer), because the "general principles of contract law militate against serving a section 998 offer on an insurer."

### 6. California Courts Favor Bright-Line Rules Regarding Section 998 Offers—Unapportioned, Conditional Lump-Sum Offers To Multiple, Non-Vicariously-Liable Defendants Are Invalid.

Contrary to plaintiff's approach of trying to explain away infirmities in her 998 offer, California courts have favored bright-line rules regarding whether certain 998 offers are invalid. "[O]ur Supreme Court has held that the legislative purpose of section 998 is generally better served by 'bright line rules' that can be applied to these statutory settlement offers. . . ." (*Barella, supra*, 84 Cal.App.4th at p. 799; see also *Wilson, supra*, 72 Cal.App.4th at p. 391.)

The bright-line rule here is that, as viewed at the time of the offer, unapportioned, conditional offers to multiple defendants are invalid unless all the defendants are jointly and severally liable under respondeat superior principles. Since that is not the case here, plaintiff's offer is invalid.

## C. Plaintiff's Offer Also Was Invalid Because It Was Conditional—It Was Effective Only If All Defendants Accepted It.

California courts have uniformly held that joint offers that are conditional—requiring that all joint offerees accept rather than allowing

any single offeree to accept—are usually invalid as a matter of law. Thus, in *Hutchins v. Walters*, *supra*, 51 Cal.App.3d 69, the court held "that a defendant will not 'be granted his costs under CCP § 998 when the Offer of Compromise [that] was made was for an aggregate sum with the apportionment between the plaintiffs given but which had to be accepted by both plaintiffs.'" (*Id.* at p. 74 [joint offer to two plaintiffs].)

In *Meissner, supra*, 212 Cal.App.3d 785, the court also invalidated a joint offer to multiple plaintiffs, explaining: "Plaintiffs would be required to second-guess all joint offers to determine whether a failure to reach agreement with coplaintiffs would cause a risk of section 998 costs against them. We believe the Legislature did not intend to place this burden on offerees. To enforce the purpose of section 998, we find as a matter of law only an offer made to a single plaintiff, without need for allocation or acceptance by other plaintiffs, qualifies as a valid offer under section 998." (*Id.* at p. 791.)

This rule has been applied to conditional offers to multiple defendants as well. In *Wickware, supra*, 53 Cal.App.4th 570, the court, citing *Meissner* and *Hutchins*, invalidated a joint, conditional offer to multiple defendants. "[W]e determine that Wickware's second offer to compromise is an invalid conditional offer . . . . Even if a section 998,

subdivision (d) offer is allocated among individual defendants, it may not be conditioned on acceptance by all defendants." (*Id.* at p. 576.)

Even though plaintiff would like to downplay the analogy, her choice to make a conditional 998 offer here put Westrux and the CHOC Defendants in a similar dilemma as in *Hutchins, Meissner* and *Wickware*. Since plaintiff's offer was conditional, the CHOC Defendants and Westrux had to try to reach an agreement among them as to how to share the whopping $50 million 998 offer and in the process second-guess what their respective allocations at trial might be. Or either Westrux or the CHOC Defendants could have chosen to pay the entire settlement offer and then file a new lawsuit to seek indemnification. This dilemma was sharper in August 2000, because the defendants had only preliminary information regarding plaintiff's damages with which to evaluate this enormous settlement offer. Either way, forcing defendants to cipher their way out of this dilemma does not further the statutory purposes of ending litigation and promoting settlement on reasonable, understood and precise terms.[10]

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[10] Indeed, it also would be inequitable to penalize defendants with cost-shifting penalties of over $4 million because plaintiff's offer was unreasonable under the circumstances when it was made. (*See Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821 [defendant's $1 offer found unreasonable because a "good faith requirement must be read into section 998"]; *Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 264, citation omitted ["reasonableness . . . [determined] in light of the circumstances existing at the time of the offer and not by virtue of hindsight"]; *Colbaugh v. Hartline* (1994) 29 Cal.App.4th 1516, 1531[same].) Since at the time of

(continued...)

Given that it is plaintiff's burden to ensure the validity of her 998 offer, it is no wonder that *Hutchins, Meissner, Wickware* and *Taing* all declare such conditional joint offers to be invalid.

### D. Plaintiff Easily Could Have Done It Right By Making Separate Or Apportioned, Unconditional Offers To Westrux And The CHOC Defendants.

In her opening brief, plaintiff repeatedly laments that "in the real world" there is no way she could have or should have satisfied the bright-line rule elucidated in *Taing* and its progeny. (AOB, pp. 2, 7, 15, 39, 47.) Yet, plaintiff only had to look to the very cases she cites and relies upon in her brief to have found a roadmap for how to do it right.

In *Hilliger v. Golden* (1980) 107 Cal.App.3d 394, the plaintiff made a $14,999.99 offer to one defendant and a later $9,999.99 offer to the other defendant. After obtaining a $15,000.00 verdict plaintiff sought expert

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[10] (...continued)
plaintiff's 998 offer in August, 2000, the defendants knew little about the value and extent of plaintiff's damages and had no clear statement as to the plaintiff's liability theory, the exposure they believed they faced was no more than $5 million (as had been relayed to plaintiff in settlement briefs). Given these circumstances, plaintiff's gargantuan $50 million offer was unreasonable because it was not made with "some reasonable prospect of acceptance" (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 698), but rather only "to make [plaintiff] eligible for the recovery of large [prejudgment interest awards and] expert witness fees at no real risk" (*Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal.App.3d 53, 63).

witness fees under section 998, which the trial court denied on the ground that the two separate offers had to be added together. (*Id.* at p. 396.) The appellate court reversed, finding an abuse of discretion: "Thus, it may be said that the offers made in this case were single, separate offers to both defendants, at different times. . . . [¶] Under the circumstances of this case, we conclude that there was an abuse of discretion by the trial judge in not allowing the costs herein contended for by the plaintiff." (*Id.* at p. 401.)

The plaintiff in *Hilliger* got it right: She made separate offers to both defendants proportionate to their respective potential liabilities, and neither offer was conditional on acceptance of the other. Here, plaintiff did not do either of those things.

Similarly, *Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, involved a 998 offer by a defendant to three plaintiffs proposing that any one of the them could settle their claims for $100,000. The *Santantonio* court pointed out that "a section 998 offer made to multiple parties is valid only if it is expressly apportioned among them and not conditioned on acceptance by all of them. A single, lump sum offer to multiple plaintiffs which requires them to agree to apportionment among themselves is not valid. Likewise, a lump sum offer by a plaintiff to multiple defendants may be invalid for the same reasons." (*Id.* at p. 112, citations omitted.) The court distinguished defendant's divided offers to

the plaintiffs: "The instant case does not involve a lump sum or unapportioned offer. Rather, since defendants expressly offered $100,000 to each plaintiff, the plaintiffs did not have to agree among themselves as to how the offer would be apportioned." (*Ibid.*) The court also found the offer distinguishable because it was not conditional—any of the plaintiffs could accept without the assent of the others. (*Id.* at p. 113.)

Here, plaintiff's offer was doubly improper—it was unapportioned and conditional. What could plaintiff have done? Plaintiff could have:

- Made a single, unconditional offer to all defendants and explicitly apportioned the $50 million between Westrux and the CHOC Defendants (each of the CHOC Defendants were vicariously liable to one another),
- Made two separate offers, neither conditional on the other, each for $50 million to Westrux and the CHOC Defendants, or
- Made separate, unconditional offers to Westrux and the CHOC Defendants for differing amounts (presumably totaling $50 million).

The California Practice Guide for Civil Procedure Before Trial provides this "Practice Pointer" for litigators in the "real world" (that oft-intoned mantra of plaintiff's opening brief): "Avoid the uncertainty. Serve *separate* demands on *each* defendant." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2001) ¶ 12:611.3 p.

12(11)-18, emphasis in original.) Thus, in the "real world" or in the legal world, plaintiff's 998 offer's was invalid because it was conditional and unapportioned.

### E. The Trial Court's Order Also Was Correct Because Plaintiff's Offer Was Not "More Favorable" Since The Court Must Use The Present Value, Not Future Value Of The Future Non-Economic Damages of $25 Million.[11]

The judgment entered for plaintiff included $1,488,361.40 for *past* economic damages, $25,150,831.00 for the "*present cash value* of future economic damages," and $25 million for the "*undiscounted amount* of past and future noneconomic damages." (CT 116, emphasis added.)

In *Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, the court affirmed the trial court's conclusion that plaintiff was not entitled to

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[11] This argument was not made by the defendants below. "As a general rule issues not raised in the trial court cannot be raised for the first time on appeal. However, appellate courts have made exceptions to this rule . . . where the issue raised a pure question of law, such as the interpretation and applicability of a statute . . . (*Bihun, supra*, 13 Cal.App.4th at pp. 998-999, citations omitted.) Here, the relevant facts on this issue are undisputed—the jury awarded $1,488,361.40 for past economic damages, $25,150,831.00 for the present value of future economic damages and $25 million for the undiscounted value of past and future noneconomic damages, and that was compared to the plaintiff's $50 million 998 offer. (CT 116, 126-127.) Thus, as in *Bihun*, "the case raises a pure question of law involving the interpretation and applicability of Civil Code section 3291 and Code of Civil Procedure section 998." (*Bihun, supra*, 13 Cal.App.4th at p. 999.)

prejudgment interest under section 3291 or expert costs under section 998, since he had not received a "more favorable judgment"—even though his gross recovery exceeded his 998 offer—because the proper comparison was between the present value of his future non-economic damages and the lump sum settlement offer. "The trial court properly denied Atkinses' request for prejudgment interest as to Owren. In order to determine whether Owren received a more favorable judgment, his settlement offer, which was for a lump sum, must be compared to the present lump sum monetary equivalent of what he was awarded at trial." (*Id.* at p. 1399.)

Similarly, in *Hurlbut, supra*, 207 Cal.App.3d 388, the court held a 998 offer was not more favorable because there was no evidence as to the present value of periodic future monthly payments in the offer and the judgment, which included a monthly annuity of $11,500 until the child plaintiff's death. (*Id.* at p. 409.) "There are no citations to the record indicating evidence was presented or findings made as to the present value of the [offer]. Absent such findings, it is impossible to determine whether plaintiffs achieved a more favorable judgment at trial, making the Code of Civil Procedure section 998 offer unenforceable." (*Ibid.*)

The court found that plaintiffs failed to carry their burden of establishing the present value: "Plaintiffs offered no evidence of the present value of their offer in seeking costs and clearly had the burden of

showing a more favorable judgment had been reached. Having failed to present evidence sufficient to establish the present value of the structured settlement offer, plaintiffs may not take advantage of the benefits offered under Code of Civil Procedure section 998." (*Id.* at p. 409, citation omitted.)

Likewise, in the present case plaintiff never offered any evidence as to what the present cash value of the $25 million non-economic damages award is, and the jury was never instructed to make such a finding. Thus, it was impossible for plaintiff to establish she obtained a more favorable judgment under section 998. Presumably, however, given that the parties stipulated and the jury was instructed at trial that plaintiff's life expectancy was 58.6 years (RT 998), and using plaintiff's expert's discount rate of 5.9% (RT 567, 943), the present value of $25 million is approximately $6,979,512.[12] If one adds that present value figure ($6,979,512) to the present value amount awarded by the jury for economic damages ($25,150,831), and the amount for past economic damages ($1,488,361.40), the total is $33,618,704.40—significantly less than the $50 million 998

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[12] The plaintiff may argue that the jury's non-economic damage award was for both past and future damages and California law requires taking the present value of only future non-economic damages. However, it is undisputed that the trial took place a little over 3 years after the accident and that the plaintiff had a life expectancy from the trial of 58.6 years. Thus, at worst the future non-economic damages constituted approximately a fraction of 58/61 of $25 million.

offer. Since plaintiff's recovery was not "more favorable," as a matter of law the cost-shifting penalties in Sections 998 and 3291 were not triggered.

The necessity for using a present value figure for future non-economic damages is evidenced by BAJI No. 14.13, which was requested by defendants in the present case in its full version (although the trial judge did not read the sentence quoted below) (Resp. Mot., Ex. 8 at pp. 51-52; RT 996-997): "If you conclude that the plaintiff is entitled to recover compensation for future non-economic damages, you must determine that amount in current dollars, that is, the amount paid at the time of judgment that will compensate a plaintiff for future pain and suffering."

This part of the instruction was added following the California Supreme Court's decision in *Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629, 646-647. And although the use note to the BAJI instruction says that this new portion is for use in medical malpractice cases, the holding in *Salgado* was not so limited: "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount *in current dollars paid at the time of judgment* that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards

of future damages will be considered to be stated in terms of their present or current value." (*Ibid.*)

Here, "the record clearly [does] establish otherwise" because the jury expressly awarded an *undiscounted* sum for non-economic damages. (CT 116.) In seeking to establish that plaintiff's judgment was more favorable than her $50 million offer, plaintiff had to show what the present value of the $25 million non-economic damages award is. She failed to do so—and therefore the motion was properly denied.

### F. Plaintiff's Last-Ditch Reliance On A Connecticut Decision Is Misplaced.

Apparently realizing that California law does not support her position, plaintiff lashes her hopes to *Blakeslee Arpaia Chapman, Inc. v. EI Constructors, Inc.* (1997 Conn.Sup.Ct.) 239 Conn. 708. Yet, even plaintiff's opening brief shows this decision is in the clear minority among jurisdictions and is inapplicable and contrary to California law and the policies behind sections 998 and 3291.

### 1. Most Other Jurisdictions Cited By Plaintiff Follow The *Taing* Rule, Not The Construction Plaintiff Floats Here.

In *Yada v. Simpson* (1996 Nev. Supreme Ct.) 112 Nev. 254, the Nevada Supreme Court "concluded that 'the better rule is to hold all unapportioned joint offers of judgment invalid regardless of the outcome of the trial on the merits.' . . . [¶] Such an [unapportioned joint] offer of judgment does not serve to encourage settlement since the individual defendants are unable to determine their share of a joint offer and make a meaningful choice between accepting the offer or continuing to litigate." (*Id.* at pp. 257-258; see also *Morgan v. Demille* (1990 Nev.Sup.Ct.) 106 Nev. 671, 674 [multiple plaintiffs' joint offer to single defendant invalid, citing *Hurlbut, supra*].)

In *True v. T & W Textile Machinery, Inc.* (1993 N.C. App. Ct.) 112 N.C.App. 358, the court held that plaintiffs' unapportioned joint offer to defendants was invalid in an automobile accident where plaintiffs sued the defendant driver and employer for personal injury and loss of consortium.

In *Taylor v. Clark* (1994 Colo.App.) 883 P.2d 569, the court held an unapportioned offer invalid: "Thus, an unapportioned offer to multiple parties takes away the individual offeree's ability to make a meaningful choice between accepting the offer or continuing with the litigation, and

application of the statute under these circumstances does not comport with the policy of encouraging the settlement of lawsuits." (*Id.* at p. 571 [joint offer by defendants to two plaintiffs in personal injury claim], citing *Hutchins, supra.*)

Finally, in *Ritt v. Dental Care Associates, S.C.* (1995 Wisc.App.) 199 Wis.2d 48, plaintiff's joint offer was declared invalid: "The standard for determining the validity of an offer of settlement under [the statute] is whether it allows the offeree to fully and fairly evaluate the offer from his or her own independent perspective. Where the offeree is a defendant, a full and fair evaluation entails the ability to analyze the offer with respect to the offeree's exposure. It is the obligation of the party making the offer to do so in clear and unambiguous terms, and any ambiguity in the offer is construed against the drafter." (*Id.* at pp. 75-76, citations omitted.) "A single offer of one aggregate settlement figure to multiple defendant tortfeasors is not valid under [the statute] because it does not permit each defendant to evaluate the offer from the perspective of that defendant's assessment of his or her own exposure." (*Id.* at p. 76.)

Thus, most jurisdictions recognize, as California does, that conditional, unapportioned offers to multiple defendants do not further the aims of promoting settlement, because they do not allow an individual

defendant to assess its exposure and evaluate whether to accept the offer, particularly when all the defendants are not vicariously liable.

### 2. The Connecticut Decision Is Inequitable And Contrary To The Policies Behind Sections 998 And 3291.

It is not surprising that plaintiff places so much reliance on the majority's analysis in *Blakeslee*, because that court openly admitted that it accorded plaintiffs absolute discretion as to whether to make joint or separate offers. "We assume that if a plaintiff makes an offer of judgment, the plaintiff does so in order to encourage the settlement of the case and not as an exercise in futility. Allowing the plaintiff the flexibility to determine whether to submit a unified offer or individual offers will further [statute's] overriding purpose of promoting pretrial settlements." (*Blakeslee Arpaia Chapman, Inc. v. EI Constructors, Inc.*, *supra*, 239 Conn. at p. 748.) "We conclude that, when making an offer of judgment under [statute], it is within the plaintiff's discretion whether to file a unified offer of judgment for multiple defendants or separate offers of judgment for each defendant." (*Id.* at p. 749.)

Not only does *Blakeslee* run counter to the holdings in most jurisdictions, including California, but the subject Connecticut statute only

applies to contract actions or actions for money, not personal injury claims as here. (*Id.* at p. 739, fn. 34.)

Indeed, the dissenting opinion confirmed what we already know: "No court, however, has read its jurisdiction's statute, as the majority has in the present case, to leave solely in the hands of plaintiff, or the plaintiffs, the choice as to whether to make a unified offer or individualized offers of judgment." (*Id.* at p. 766.) By contrast, the dissent's "interpretation is consistent with the cases in other jurisdictions that have considered the issue under their offer of judgment statutes." (*Id.* at p. 765.)

The dissent observed: "Under the majority's statutory regime, however, not only must a defendant who is faced with an offer of judgment calculate, within a thirty day period, the likelihood of the damage award against him and, in a case in which compensatory prejudgment interest may be awarded, the likelihood and amount of such an award, but the defendant must now make that calculation, based not solely on its own interests and exposures, but also based on a calculation that is inextricably linked to those of its codefendants. This, in my view, transforms a statutory penalty scheme into a statutory bludgeon, and goes beyond a sound interpretation of that scheme." (*Id.* at p. 768.)

Contrary to plaintiff's shrill cry here for this Court to put on its "real-world" lenses, the *Blakeslee* dissent noted that plaintiff's proposed

new rule on conditional, unapportioned offers would create great inequity in the "real world": "From the defendants' points of view, however, it is difficult to regard such an offer as 'a sum certain' because it requires each defendant, within thirty days of the offer, either to accept the offer and thereby leave all the other codefendants free of any liability or, as is more likely to be the case in the real world of litigation, to attempt to secure some unspecified contribution from all or some of those codefendants. Thus, as a practical matter, no one defendant, faced with a unified offer of judgment, can realistically evaluate its own exposure created by that offer – namely, the potential for a substantial interest penalty – without that exposure being compared to that of the other defendants and to their own calculations of their own exposures." (*Id.* at p. 761, fn. omitted.)

## CONCLUSION

Plaintiff urges this Court to sanction penalizing defendants to the tune of $4,340,629.07 for not agreeing to a facially invalid, conditional, unapportioned offer to multiple, non-similarly situated defendants, even though plaintiff easily could have done it right and followed the dictates of well-settled California law in drafting her offer. Plaintiff made a choice to tender an imprecise and improper 998 offer and now wants to be richly rewarded for that bad choice. Yet, plaintiff's protestations of real-world

injustice cannot save her invalid offer. California law clearly invalidates conditional, unapportioned offers to multiple, non-vicariously liable defendants, and the law should not be changed here. In any event, plaintiff did not and cannot show the judgment she received at trial was "more favorable" than her offer. The trial court's decision should be affirmed as it did not abuse its discretion in denying plaintiff's motion for pre-judgment interest and expert costs.

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