No. S280598

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

HYUNDAI MOTOR AMERICA,
Defendant and Appellant.

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

REPLY IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

Courts and parties have long presumed that Code of Civil Procedure section 998 doesn't penalize parties who settle before trial. Yet, Hyundai casts as unremarkable the Opinion's novel, 2-1 ruling that section 998 penalizes parties who settle before trial if the settlement is less favorable than a prior settlement offer. Nonsense. Hyundai hasn't refuted that review is warranted to decide between the Majority's and the Dissent's diametrically opposed conclusions in an Opinion that abruptly changes how section 998 has operated for over 170 years.

Nor has Hyundai refuted that the Opinion will have immediate widespread consequences. Penalizing parties who reconsider whether to settle will have the effect of pushing all parties *toward trial* instead of settlement. It'll also mean a deluge of complex post-settlement motions on whether a prior settlement offer is as favorable as an accepted offer containing different non-monetary terms.

Review is especially warranted because this is an area of law where certainty is crucial. Hyundai doesn't dispute that leaving section 998's applicability to settlements unresolved will prevent parties from knowing the value—and cost—of settlement. Only review can provide much-needed clarity on this issue that will necessarily impede settlements until it is resolved.

The Opinion also implicates another review-worthy issue: whether section 998 deprives a plaintiff of costs and fees she is

guaranteed under a different statute (and requires that same plaintiff to pay for *the defendant's costs and fees*.[1])

Hyundai claims that this issue was correctly settled when *Duale v. Mercedes-Benz USA, LLC* (2007) 148 Cal.App.4th 718 held that section 998 can deprive a plaintiff of the costs, expenses, and fees the Song-Beverly Act provides.

But *Duale's* correctness is far from clear and, indeed, the Second District reached the *opposite* conclusion in *Regueiro v. FCA US LLC* (Cal.Ct.App., Nov. 19, 2020, No. B301772) 2020 WL 6792378, *3 (*Regueiro*): "The trial court's [refusal] to cut off all fee recovery as of the date of the first section 998 offer by FCA was not error." (MJN Ex. A.) *In re Marriage of Green* (1989) 213 Cal.App.3d 14, 24 (*Green*) reached a similar conclusion.

The Court should grant review to resolve conflicts on the important, disputed questions at issue.

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[1] Because section 998 would also provide *defendants* with their post-offer costs, plaintiffs may *ultimately lose money* despite successfully recovering in a case that the Legislature encouraged her to bring.

DISCUSSION

I. The Court Should Grant Review Of The Opinion's Divided, Novel, And Published Holding That Newly Proclaims That Section 998 Penalizes Parties Who Settle Before Trial.

A. The Majority and Dissent's dueling reasoning highlights that review is necessary.

Hyundai says Petitioners seek review merely for error correction. (Ans.-13-14.) Not so. Review is necessary to resolve the Majority's and Dissent's diametrically opposed conclusions. Without review, lower courts will split on which to follow—and the uncertainty will impede settlements until this Court weighs in. (OBM-26 [merits show split will almost-certainly result].)

1. The Majority creates a new rule with broad implications.

Hyundai casts the Opinion as the obvious extension of existing section 998 jurisprudence. (Ans.-15-21.) Wrong. The Opinion itself acknowledges that it's the first case in section 998's long history to hold that section 998 cost-shifting applies where parties settle before trial. (Opn.-10; Dissent-12.) There was no case law on the issue until now precisely because—consistent with the plain text (§ 2, *post*)—everyone understood that section 998 *does not* apply to a pre-trial settlement. The Opinion thus "dramatically changes" the law. (CAOC Letter-1; Dissent-12; Dreyer Letter-2 ["[U]nder no circumstance has any defendant or

any court even suggested that a pending or expired 998 demand somehow remains active [after] the case settle[s]"].)

Hyundai's cited authorities don't show otherwise. (Ans.-15-16.)

Duale, supra, 148 Cal.App.4th at pp. 727-728 held that section 998 reaches Song-Beverly claims. *Duale* doesn't hold that section 998 penalizes parties who settle before trial. Rather, *Duale* states that section 998 applies where a party "rejects a settlement offer that is greater than the recovery it ultimately obtains *at trial*." (*Id.* at p. 726, italics added.)

Mon Chong Loong Trading Corp. v. Superior Court (2013) 218 Cal.App.4th 87, 89-91 (*Mon Chong*), meanwhile, held that a plaintiff's voluntary dismissal "without prejudice"—and *without a settlement*—may trigger section 998 cost shifting. *Mon Chong* reasoned that such plaintiffs haven't achieved section 998's purposes since they "may still bring a "related or even identical" case later on. (*Id.* at p. 94.) That reasoning doesn't extend to pretrial settlements, which necessarily ends all litigation on the settled claims.

The Majority's characterization is accurate: The Opinion breaks new ground.

2. Section 998's plain text supports the Dissent's reading—certainly enough to warrant review.

Section 998 penalizes plaintiffs who "*fail[]* to obtain a more favorable *judgment or award*" by depriving them of post-offer

costs and requiring them to pay "defendant's [post-offer] costs" out of any "*damages* awarded." (Subds. (c)(1), (e), italics added.)

Hyundai hasn't refuted our showing that none of these things is present when a party settles. (Pet.-26-29.)

No "Judgment or Award." We argued that "judgments" and "awards" mean *adjudicatory* results, not settlements—and that section 998 therefore applies only upon the failure to secure a more favorable result at trial, arbitration, or other adjudication. (Pet.-27 [section 998 wouldn't need to refer to a "judgment or award" if one of those terms already captured all case-ending results]; § I.A.3, *post*.)

Rather than grapple with this argument, Hyundai invokes appellate decisions that adopted "'a practical, rather than a literal, definition of judgment.'" (Opn.-14; Ans.-18-19.) But as shown, none of those decisions addressed the issue presented here, and cases aren't authority for propositions not considered. (Depub. Letter-3.)

It makes no difference that in Song-Beverly cases, courts have interpreted "judgment" to refer to any result. (Ans.-20-21.) "[S]imilar language used in different statutes with different purposes" do not have the same meaning. (*Benun v. Superior Court* (2004) 123 Cal.App.4th 113, 117; *Delaney v. Baker* (1999) 20 Cal.4th 23, 42.)

The Song-Beverly Act is a "'remedial measure'" designed to compel manufacturers to promptly repurchase or replace a defective vehicle without the plaintiff needing to ask, let alone

sue. (*Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th 966, 971-972.) Accordingly, when the manufacturer—in contravention of the statute's express purpose—forces a plaintiff to sue, that plaintiff is treated as the prevailing party even where he recovers via settlement. (*Wohlgemuth v. Caterpillar, Inc.* (2012) 207 Cal.App.4th 1252, 1262.)

Section 998, in contrast, is designed to "encourage[s] the settlement of lawsuits *prior to trial*." (*T. M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 280, italics added.) Its penalties must be read in "the narrowest construction" to advance that goal. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 405.) It follows that section 998's penalties apply only where the parties do not settle before trial—not where the parties achieve a pre-trial settlement.

No "Failure." We argued that a plaintiff who settles hasn't "failed" to do anything, since a failure connotes defeat, abandonment, or involuntarily falling short of one's purpose—and parties who settle do none of these things. (Pet.-27-28.) We further explained that section 998 subdivision (f) even characterizes settlements as a "compromise." (Pet.-28.)

Hyundai responds that the plain, unambiguous meaning of "fail to obtain" is "does not obtain"—and that this is so obvious that dictionaries and other authorities are meaningless. (Ans.-22-23.) But of course, a word's plain meaning is informed by legal and general dictionaries, among other sources. (E.g., *People v. Raybon* (2021) 11 Cal.5th 1056, 1066-1067 [collecting dictionary definitions].)

Here, these sources are unanimous: "Failure" connotes the type of defeat, abandonment, or involuntarily falling short of one's purpose not found in *compromise settlements*. (Pet. 27-28.) Hyundai can't hide the ball. The Legislature's choice to use the word "failure" rather than "not attaining" should be given effect.

No "Damages." Section 998, subdivision (e) penalizes plaintiffs who fail to secure a more favorable judgment or award by requiring that they pay the defendants' post-offer costs out of "*any damages awarded*," italics added. We argued that section 998 therefore applies only after *damages* are adjudicated or abandoned, not where the parties settle for *consideration*. (Pet.-28-29.)

Hyundai's only response is to state ipse dixit that subdivision (e) doesn't apply where the plaintiff reaches a settlement.[2] (Ans.-23-24.) But why would other sections apply then? Rather, it makes far more sense to conclude that *none* of section 998's penalty provisions apply. After all, subdivision (e) makes plaintiffs pay defendants' post-offer costs out of "any damages awarded" to ensure that where a plaintiff recovers, defendants can immediately recover any post-offer costs they are entitled to, without draining more judicial resources. This concern is no less compelling in settlements. Had the Legislature intended for section 998 to penalize settling parties, section 998

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[2] If the Opinion stands, Hyundai will almost certainly argue that a plaintiff would have to *take from her settlement proceeds* to cover its post-offer costs. Hyundai has already argued elsewhere that this is how section 998 is supposed to work. (Ans.-28-29.)

subdivision (e) would have referred to any "proceeds the *plaintiff recovers*" rather than referring narrowly to "any *damages awarded*."

3. Section 998's legislative history supports the Dissent's reading—certainly enough to warrant review.

Hyundai argues its plain-meaning analysis makes "stray remarks" in the legislative history irrelevant. (Ans.-21-22.) The Court should reject Hyundai's invitation to ignore the legislative history. Indeed, that history demonstrates the need for review.

First, unlike our reading, Hyundai's turns solely on what constitutes a "judgment." But because a judgment can be used in a broad sense or in a narrow, "literal" sense (Opn-14) at best, the Opinion's reading is *one potential interpretation* of section 998's language. (But see § I.A.2, *ante* [discussing other, dispositive defects].) Legislative materials shed light on *which* potential interpretation the legislature intended.

Second, contrary to Hyundai's characterization, the legislative materials we cited—an amicus brief from a 998 amendment co-sponsor, an explanation of how section 998's predecessor operated, and descriptions in materials regarding amending subdivision (c)(1) of section 998 as applying where a result after trial is less favorable than a settlement offer before trial—are not "stray remarks." (Pet.-29-30.) They're the types of materials that this Court has found persuasive. (Dissent-10-11; *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 54, fn. 17.)

The legislative history supports the Dissent's reading—certainly enough to warrant this Court's review.

4. Section 998's policy goals support the Dissent's reading—certainly enough to warrant review.

This Court has recognized that section 998 is supposed to (1) "'encourage the settlement of lawsuits prior to trial'" and (2) fairly "compensat[e] the injured party—(3) without inject[ing] uncertainty into the section 998 process." (*Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014, 1091-1021.) We showed that the Opinion's reading undermines these goals. (Pet.-30-34.) Hyundai doesn't show otherwise.

a. Encouraging the settlement of lawsuits prior to trial.

Hyundai disputes that the Opinion's holding will deprive parties of the "'flexibility to adjust their settlement demands'" as the case develops—something this Court has declared important. (Ans.-31; Dissent-18, quoting *Martinez, supra,* 56 Cal.4th at p. 1026.) Hyundai claims that parties can still "bargain for different treatment of costs in negotiating a settlement." (Ans.-32.) But that observation only reinforces our point. To settle after rejecting an initial offer, a plaintiff would have to either accept 998's penalties or some other settlement term that's just as punitive, making trial substantially more attractive.

Section 998 isn't supposed to discourage parties from reassessing their settlement position in light of new discovery,

new appellate authority, or other changed circumstances. Although early settlement is *one* goal, section 998's *primary* goal is to avoid the "time delays and economic waste associated with trials," as accomplished *through any settlement.* (*Martinez, supra,* 56 Cal.4th at pp. 1017, 1019; *Wilson v. Wal-Mart Stores, Inc.* (1999) 72 Cal.App.4th 382, 390-391.) This goal is accomplished when parties logically reassess the possibility of settlement as their case progresses—as plaintiffs did here following adverse rulings on certain damages claims (Ans.-9-10).

Hyundai argues that under the Dissent's view, the plaintiff would "reap an undeserved windfall in fees" for litigating the case after the first settlement offer. (Ans.-27.) Wrong again. If section 998 is inapplicable to pretrial settlements, then cost and fees are still awarded only where "reasonably expended." (*Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 489.) The potential for gamesmanship that Hyundai cites (Ans.-17) is non-existent since the court still acts as a gatekeeper by denying fees deemed unreasonable—as was done here (Ans.-10-12).

There's simply no reason for section 998 to deprive parties of the flexibility needed to settle after initial talks fail.

b. Compensating the injured party.

Hyundai doesn't dispute that section 998 aims to compensate injured parties and that penalizing parties who settle would subvert that goal by forcing a plaintiff to use *her settlement*

proceeds to cover the defendant's costs, even if those costs wipe out the settlement proceeds. (Pet.-32.)

Hyundai instead repeats its claims that, to encourage early settlement, this is how section 998 is *supposed to work* (Ans.-28-29). But again, section 998's "stick" isn't meant to be employed indiscriminately. The penalty provision is narrowly read only to achieve 998's overarching purpose: to promote *settlements in general*—not just early ones. (§ I.A.4.a, *ante*, citing *Hale, supra,* 22 Cal.3d at p. 405.)

Hyundai further argues that penalizing plaintiffs who accept a pretrial settlement is no different than penalizing plaintiffs who fail to secure more in a subsequent adjudication. (Ans.-30.) Not so. Penalizing a party who *never* settles serves section 998's purposes by encouraging plaintiffs to *perpetually and repeatedly reconsider* whether to go forward with a time-consuming trial in which she may not receive *any* compensation for her injuries. In contrast, penalizing a party merely for not accepting an *initial* offer would *stop* her from trying to settle thereafter, even if new developments make trial more risky or otherwise less attractive. Section 998 would thus be penalizing the plaintiff not for her refusal to settle, but for continuing to reevaluate her litigation position—and appetite for trial—as discovery progressed, new case law was decided, or other non-litigation factors arose (for example, an illness).

Hyundai counters that section 998 requires that plaintiffs are able to evaluate the value of a 998 offer based on "'information the offeror knew or reasonably should have known'"

at the time made. (Ans.-30.) But that proves our point. A plaintiff plainly cannot know subsequent events that may later make trial less attractive. A plaintiff would thus be penalized merely for not knowing *when* to settle.

c. Spawning complex disputes in countless cases.

We argued that most cases settle before trial, and that the Opinion will therefore inundate courts with complex motions on whether an earlier settlement offer is more favorable than an accepted one with different non-monetary terms. (Pet.-32-34.)

Hyundai responds that there are some cases where no 998 offer is made and others where the settlement spells out how costs/fees will be resolved. (Ans.-33.) So what? That doesn't change that the Opinion's reading of section 998 will flood courts with complex motions in the many cases where the parties settle after the rejection of an early 998 offer—the deluge will be real.

Hyundai argues that even if section 998 penalizes parties who settle, parties might still file fee motions. (Ans.-33-34.) But again, so what? Courts would now *also* have to determine whether a 998 offer is more favorable than an accepted settlement offer that contains different terms. This will be a difficult task, requiring courts to place a value on confidentiality provisions, terms that ensure immediate payment, or terms transferring property that may primarily have sentimental value.

5. Section 998's incorporation of contract principles supports the Dissent's reading, too.

We argued that under the implied-revocation doctrine, Hyundai's acceptance of the settlement offer foreclosed it from invoking section 998's penalties. (Pet.-34-35.) Hyundai claims that the doctrine is inapposite because *Varney v. Entertainment Group, Inc. v. Avon Plastics, Inc.* (2021) 61 Cal.App.5th 222, 234-236 (*Varney*) found implied revocation only where, before the terms of the first offer expires, the defendant makes a second settlement offer with different terms. (Ans.-24-25.)

But *Varney* doesn't set out the only circumstance in which the implied-revocation doctrine applies. As relevant here, that doctrine considers whether Hyundai acted in *any way* that's inconsistent with an intent to pursue 998 remedies pursuant to a prior offer. And Hyundai surely did by reaching a settlement that lets plaintiffs seeks costs and fees, *without any limitation as to costs and fees that accrued after the first 998 offer was made*. (Dissent-17.)

Requiring plaintiffs to insist on a term that expressly barred section 998 cost- and fee-shifting makes no sense. Because the contract already provided plaintiffs with the ability to seek costs and fees without any limitation, the onus was on Hyundai to negotiate for an exclusion—and it never did. Under these circumstances, the implied-revocation doctrine bars Hyundai from blindsiding plaintiff with arguments that plaintiffs

could actually only seek costs and fees accrued before a 998 offer that the settlement never references.

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Hyundai has no compelling response to our merits arguments—certainly none that come anywhere close to establishing that the Dissent is so obviously incorrect that this Court's review is unnecessary.

B. Review is warranted because the issue potentially impacts any civil case where one party makes an unaccepted section 998 offer.

Hyundai doesn't dispute that the question presented in the Petition is an important one with widespread implications. Nor could it. The Opinion is the first case to hold that section 998 penalizes parties who settle. It is binding on all state trial courts. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455-456.) It will thus *immediately* impact every case where a party serves a 998 offer—both by discouraging settlements and by spawning complex post-settlement disputes over section 998's operation should the parties somehow settle. (§ I.A.4.c, *ante*.)

The Majority and Dissent's diverging views will also have another immediate impact: The very real possibility that another *appellate* panel will adopt the Dissent's well-reasoned position creates great uncertainty as to what interpretation of section 998 will be adopted in any given case. That uncertainty makes it

impossible for plaintiffs to determine how much a settlement is worth, and will therefore impede settlements until this Court weighs in with a definitive ruling on how section 998 operates.

The Court should review the Opinion to provide certainty on a hugely important issue that will impede settlements until resolved.

II. The Court Should Also Grant Review Of A Related Question: Whether Section 998 Deprives A Party Of Costs And Fees That Are Guaranteed Under Another Statute.

We also sought review of a related question: whether section 998 can deprive a party of fees guaranteed under a different statute. We argued that the Opinion contributed to a conflict in authority on this issue by following *Duale, supra*, 148 Cal.App.4th at p. 727, rather than contrary reasoning in other decisions, and that this issue is widely important. (Pet.-39-43.)

Hyundai doesn't dispute the issue's significance. Hyundai insists only that the issue is correctly settled. It isn't.

A. Hyundai has not shown that *Duale*'s reasoning is so sound that resolving its conflict with the reasoning in other cases is unnecessary.

Hyundai argues at-length that *Duale* is correctly decided, citing the one other case that has followed *Duale*. (Ans.-36-43, discussing *Covert v. FCA USA, LLC* (2022) 73 Cal.App.5th 821.)

But given the split-in-authority the Petition raises (Pet.-39-43), whether *Duale* is correct is only relevant at this stage to the extent that it is so *obviously* correct that no future court or litigants would even question whether to follow *Duale* or the competing authorities. Hyundai hasn't made that showing.

Duale held that section 998 defeats plaintiffs' Song-Beverly Act right to fees and costs for prevailing at trial, if the judgment is less favorable than a pre-trial 998 offer. (148 Cal.App.4th at pp. 724-728.) Hyundai argues that *Duale* correctly held that there is no conflict between the Act and section 998. (Ans.-36-37.) But the conflict appears *on the face* of both statutes:

The Act entitles plaintiffs who prevail at trial to reasonably incurred costs/expenses/fees based on "actual time expended." (Civ. Code, § 1794, subd. (d).)

Section 998, in contrast, *deprives* a plaintiff of fees based *solely* on the value of the ultimate judgment or award relative to the value of a rejected 998 offer. (§ 998, subds. (c)(1), (e).)

Hyundai's contention that *Duale* flows from *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985 is just as baseless. (Ans.-38-39.) *Murillo* held that section 998's penalties apply when a defendant prevails in a Song-Beverly action. For good reason: Section 998 only withholds or augments "cost allowed under Sections 1031 and 1032" of the Code of Civil Procedure—and a prevailing Song-Beverly defendant's cost entitlement is based on section 1032, not on Song-Beverly itself. (*Murillo, supra,* 17 Cal.4th at p. 992.) *Murillo* recognized that

the situation is completely different from prevailing *Song-Beverly plaintiffs,* whose entitlement is based on *the Act*, not sections 1031 and 1032. (*Ibid.* ["[I]f a buyer should prevail in an action under the Act, he or she is entitled to costs, expenses, and attorney fees as set forth in Civil Code section 1794(d). On the other hand, if a seller should prevail in an action brought under the Act, it is entitled to costs under section 1032(b)"].)

B. By following *Duale*, the Opinion conflicts with *Regueiro* and *Green*.

On its face, section 998 is only supposed to cut off a plaintiff's entitlement to costs under sections 1031 or 1032 of the Code of Civil Procedure. (Pet.-39, citing (§ 998, subd. (a).) Accordingly, as the Petition explained, *Regueiro, supra,* 2020 WL 6792378 and *Green, supra,* 213 Cal.App.3d at p. 24 both held—contrary to *Duale*—that section 998 does not cut off a party's entitlement to costs and fees under *another* one-way fee-shifting statute. (Pet.-39-41.)

Hyundai insists that there is no conflict. (Ans.-41-45.) It first argues that *Regueiro* only ruled on the trial court's discretion to award fees under Code of Civil Procedure section 1794. (Ans.-41-42.) Not so. The manufacturer there argued that section 998 cut off the plaintiff's entitlement to all post-offer costs and fees. (MJN Ex. A [*Regueiro, supra,* 2020 WL 6792378 at *1].) *Regueiro* rejected that argument, holding that section 998 *did not cut off a Song-Beverly plaintiff's entitlement to fees* because "section 998 does not on its face mandate the cessation of fees in the same manner as costs." (MJN Ex. A [*Regueiro, supra,* 2020

WL 6792378 at *3, italics omitted].) Stated differently, *Regueiro* only turned on whether the trial court acted within its discretion to award costs and fees under the Act *because the Court had already deemed that section 998 did not cut off the plaintiff's entitlement to Song-Beverly Act fees.*

Thus, by following *Duale*, the Opinion deepens *Duale's* conflict with *Regueiro.*

Hyundai stresses that *Regueiro* is unpublished and thus not a basis to grant review. (Ans.-42-43.) Wrong again. This Court routinely grants petitions for review even from unpublished opinions. (See *People v. Birkett* (1999) 21 Cal.4th 226, 239-240 [discussing examples]; Eisenberg & Hepler, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2022) ¶ 13:18.) That makes sense. When *any* appellate courts disagree, there's likely also tension between the reasoning in published cases too that have adopted the same reasoning.

That's this case. *Duale* also conflicts, for instance, with *Green's* reasoning that section 998 does not cut off a party's entitlement to costs and fees where another statute specifically provides how costs and fees are to be awarded. (*Green, supra,* 213 Cal.App.3d at p. 24.) This reasoning is just as applicable to Song-Beverly Act cases, where a plaintiff's entitlement to costs/fees is supposed to turn *entirely* on the trial court's determination that those costs and fees were reasonably incurred. (Civ. Code, § 1794, subd. (d).)

For *Green* and *Regueiro's* reasoning to be right, *Duale* and the Opinion's reasoning must be wrong. The Court should grant review to decide this conflict.

C. By following *Duale*, the Opinion conflicts with *Reynolds, Hanna, Warren, Goglin, Etcheson,* and *McKenzie*.

We cited several other cases with which the Opinion conflicts, too. (Pet.-41-43.) Hyundai responds by arguing that these were about the reasonableness of Song-Beverly fees rather than entitlement under section 998. (See Ans.-43, fn. 6.)

But our argument was that *Duale's* holding conflicts with the *reasoning* in these other cases. Our cited authorities recognize that the Act "*guarantees a fee award to plaintiffs* who recover *regardless of the magnitude of the plaintiff's compensatory award*…" (Pet.-42-43, italics added, citing *Reynolds v. Ford Motor Company* (2020) 47 Cal.App.5th 1105, 1112; *Hanna v. Mercedes-Benz USA, LLC* (2019) 36 Cal.App.5th 493, 510; *Warren v. Kia Motors America, Inc.* (2018) 30 Cal.App.5th 24, 37].) That guarantee directly conflicts with section 998, which can *bar* a fee award precisely based on the size of the plaintiff's compensatory award. *Duale*'s conclusion that there is no conflict between the Act and section 998, thus, conflicts with cases recognizing that Act guarantees a fee award regardless of the size of plaintiff's recovery.

Review is warranted to resolve the resulting conflict.

CONCLUSION

The Court should grant review to resolve two widely important, related questions on section 998's application that require certainty.

Date: August 17, 2023

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.504(d)(1), I certify that this **REPLY IN SUPPORT OF PETITION FOR REVIEW** contains 4,199 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: August 17, 2023

/s/ Joseph V. Bui
Joseph V. Bui

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048.

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

Executed on August 17, 2023, at Los Angeles, California.

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