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KLEINER PERKINS CAUFIELD & BYERS, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

ELLEN PAO,

Plaintiff,

v.

KLEINER PERKINS CAUFIELD & BYERS, LLC AND DOES 1-20,

Defendants.

Case No. CGC-12-520719

DEFENDANT KLEINER PERKINS CAUFIELD & BYERS LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE AND TAX DEFENDANT'S COSTS

Date: June 18, 2015
Time: 9:00 a.m.
Dept: 602/604
Judge: Hon. Harold Kahn
Trial Date: February 17, 2015
Date Filed: May 10, 2012
FAC: October 16, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statutes

I. INTRODUCTION

The law provides cost recovery to a prevailing defendant when a plaintiff turns down a reasonable settlement offer, chooses to proceed through a costly trial, and loses. In November of last year, approximately three months before trial, KPCB offered Ellen Pao almost one million dollars to resolve this case so that the parties could move on and avoid the significant expense and time of a lengthy trial. Pao rejected that offer, forced the parties through a six-week highly publicized and expensive trial, and ultimately suffered a complete loss on the merits when a jury soundly rejected all of her claims. She now seeks to avoid the consequences of that decision by recasting KPCB's near million dollar offer as a "token" offer and questioning the costs KPCB was forced to incur to defend itself in the trial she chose. But the Court of Appeal has recognized that the law underlying KPCB's offer, "was designed to create economic incentives on both parties to settle rather than try their lawsuits, and that to further that goal, both sides must face some economic consequences if it turns out they miscalculate and lose."

Pao cannot have it both ways. She ran up KPCB's costs by forcing KPCB to respond to an onslaught of allegations and discovery over the course of three years leading up to trial and is now objecting when she receives the bill. She claims that KPCB's legal costs are unreasonable, but the costs KPCB incurred were "reasonably necessary" to defend itself and are well within the expected range for litigation of this length and scope. In addition, KPCB's costs have been discounted to be as fair as possible to Pao and represent a fraction of the actual costs incurred by KPCB as a result of Pao's claims. Her claim of unreasonableness is particularly nonsensical given her own post-trial demand of KPCB for $2.7 million to cover her fees and costs.

Moreover, Pao's argument that KPCB's claim to recover costs has been invalidated because of a recent California Supreme Court decision is wrong because KPCB made the claim under Code of Civil Procedure section 998, the law governing rejected settlement offers, which is not impacted by the Court's decision. *Williams v. Chino Valley Independent Fire District* has nothing to do with cost recovery under section 998. *Williams* merely held that under the *ordinary* cost recovery statute – section 1032 – defendants must meet a higher burden in FEHA cases. KPCB does not seek costs under section 1032 – so *Williams* is inapplicable.

II. ARGUMENT

A. *Williams* Does Not Apply to Cost Awards Under C.C.P. 998

Pao's argument overstates *Williams v. Chino Valley Independent Fire District*, the recent California Supreme Court case regarding cost recovery in discrimination cases. In *Williams,* the Court found that unsuccessful FEHA plaintiffs, like Pao, should not be ordered to pay *ordinary* costs under Code of Civil Procedure section 1032 unless, "plaintiff brought or continued litigating the action without an objective basis for believing it had potential merit" (also called, "the *Christianburg* standard"). *Williams,* (2015) 61 Cal. 4th 97, 99-100. Nothing in *Williams*, however, addressed the situation that we have here, where a plaintiff failed to accept a reasonable settlement offer, forced the parties to proceed through a costly trial, lost her case, recovered zero damages, and then the prevailing defendant sought post-offer costs pursuant to Code of Civil Procedure section 998. *Williams* does not even directly discuss section 998 (or imply that a 998 offer was made in that case), much less create a higher standard for awarding costs under that statute. In fact, the law cited by Pao states the opposite – that the Court still has discretion to award costs under section 998 (including expert fees) even where the *Christianburg* standard is not met.[1]

In *Holman v. Altana Pharma US, Inc.*, a case relied on by Pao and cited in *Williams*, the First District Court of Appeal expressly addressed whether *Christianburg* applied to cost recovery in FEHA cases where, like here, an unsuccessful plaintiff previously rejected a 998 offer of settlement. (2010) 186 Cal. App. 4th 262. While acknowledging the pre-*Williams* split in authority regarding whether *Christianburg* applied to ordinary costs under section 1032 for FEHA claims, the Court found that – ***even assuming* Christianburg *applied***, "[t]his is not the end of the analysis, however. Even if [Plaintiff's] FEHA claims were not 'frivolous, unreasonable, or groundless,' the trial court was still required to consider [defendant's] request for recovery of its expert witness fees under Code of Civil Procedure section 998." *Id.* at 280.

[1] KPCB does not dispute that *Williams* applies to the pre-offer costs it previously sought under Code of Civil Procedure section 1032. Accordingly, KPCB includes a revised costs bill excluding all pre-offer costs with this opposition and only seeks post-offer costs under section 998. *See* Declaration of Shannon B. Seekao, Exhibit A (Revised Memorandum of Costs).

Relying on the Supreme Court's opinion in *Murillo v. Fleetwood Enterprises, Inc.*, the *Holman* court held that, "even if the *Christianburg* standard implicitly applies when defendants seek to recover expert witness fees under [FEHA], we conclude that the trial court was authorized to exercise discretion under Code of Civil Procedure section 998 to award expert witness fees here" – despite not meeting the *Christianburg* standard. *Id.* at 282.

The *Williams* court in dictum also distinguished ***discretionary*** costs statutes such as sections 998 and 1033(a)[2] from the ***compulsory*** costs awarded under section 1032. *Williams,* at 107-08. Specifically, the Court held that the Legislature showed its express intent to except FEHA actions from section 1032's cost ***mandate*** by making cost awards ***discretionary*** under FEHA. By contrast, that same intent cannot be implied where, like under section 998 here, expert fee awards are *already* discretionary. The *Williams* court noted this, stating that, "where trial court has discretion under both [FEHA] and Code Civ. Proc., § 998, subd. (c)(1) to award prevailing defendant its expert witness fees, court in determining size of award should consider the policies behind both statutes". *Id.* at 108 (citing *Holman*). This confirms that the *Williams* court did not intend to overturn *Holman* or mandate that the *Christianburg* standard must be met for section 998 recovery as Pao contends. Moreover, there is no mention in *Williams* of section 998's legislative history, intent and purpose or any balancing of such interests with FEHA. Such an analysis would be necessary before determining whether the Legislature intended to create an express exception to section 998 when it implemented FEHA.

In any event, the FEHA policy interests at issue in *Williams* are not undermined by awarding costs pursuant to section 998. In *Williams*, the Court noted that the possibility of chilling the vindication of employees' civil rights under FEHA outweighed the relief offered by section 1032 to a party whose position was vindicated in court. *Id.* at 114-15. Awarding costs under section 998, however, does not provide a similar risk of chilling potentially meritorious FEHA actions. Pursuant to section 998, a plaintiff only risks paying costs where they turn down a *reasonable* settlement offer, proceed on the merits, and don't prevail. By contrast, the public

[2] Providing for discretionary costs where prevailing party recovers judgment that could have been awarded in limited case.

policy supporting awards under section 998 is substantial. Permitting a defendant who prevails in a FEHA suit, "to recover expert fees pursuant to section 998 gives content to the Legislature's expressed intent to encourage settlement, by forcing parties 'to assess realistically their positions prior to trial.'" *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal. 4th 985, 1001. In *Murillo*, the Supreme Court similarly balanced the legislative intent behind section 998 and the Song-Beverly Act (California's "Lemon Law") and held,

> Although the Legislature's purpose in enacting the Song-Beverly Act was admittedly to encourage consumers to enforce their rights under the Act, nothing in [the Act] suggests the legislative purpose should override the Legislature's desire – expressed in section 998—to encourage the settlement of lawsuits.

Id. That same balance applied in the FEHA context, weighs in favor of enforcing section 998 here. As set forth more fully below, KPCB offered Pao a more than reasonable settlement offer of almost one million dollars. Pao chose to reject that offer and proceed to trial, lost and recovered nothing. Awarding KPCB's post-offer costs does not chill future litigants from bringing meritorious claims, but rather encourages parties to realistically assess the merits of their case prior to trial and settle for a reasonable amount.

Finally, although unsupported by the above authority, Pao argues that because *Williams* held that FEHA is an express exception to section 1032, it automatically follows that FEHA is an express exception to section 998. This is because, Pao argues, section 998 "augments" costs under section 1032. Merely because section 998 "augments" cost recovery under section 1032, however, does not mean that recovery under section 998 is contingent upon recovery under section 1032. Section 998 expressly provides recovery for those who may not constitute "prevailing parties" under section 1032 (for example, a defendant who loses), but who otherwise may be entitled to recover costs under section 998 because plaintiff failed to obtain a more favorable award. Therefore, by the express language of the statutes, cost recovery under section 998 is independent from section 1032 and an exception to one statute, does not necessarily create an exception to the other.

Accordingly, despite the Supreme Court's recent decision in *Williams*, this Court can and should award costs, including expert fees, under section 998 even if the *Christianburg*

standard is not met.[3]

B. KPCB's Nearly One Million Dollar Offer Was More Than Reasonable

Pao's argument that KPCB's offer of almost a million dollars was a "token" offer is absurd.[4] KPCB repeatedly asserted from the moment Pao filed her lawsuit that her claims were meritless and a jury of her peers ultimately agreed. Any reasonable settlement offer necessarily took into account KPCB's assessment of the likelihood of Pao prevailing on each claim – which as the verdict confirmed – was minimal. Moreover, KPCB's offer was made at the close of discovery, a few months before trial, when both parties had sufficient information to reasonably assess the merits of the case. Indeed, at that point, the parties had exchanged hundreds of thousands of pages of documents and conducted at least a dozen depositions. It was clear to KPCB and should have been clear to Pao that many of the facts she alleged were patently false and there was a strong likelihood she would lose her claims at trial. KPCB was therefore entitled to discount Pao's potential damages and fees when determining a reasonable offer of settlement to avoid a costly trial.

Pao's argument that any reasonable offer must cover her full attorneys' fees, costs, and millions of alleged damages misses the point of *settlement* and pre-supposes Pao would prevail on all of her claims.[5] How can it be reasonable for KPCB to offer to pay full damages and attorneys' fees to Pao for a case it believed had no merit and strongly believed it would win? The law does

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[3] While KPCB does not argue here that Pao's lawsuit was brought in "bad faith" under *Christianburg*, it vigorously denies many of the assertions set forth in Pao's motion. For example, KPCB disputes that its failure to file a summary judgment motion was due, in any way, to "strong facts in Ms. Pao's favor". As the trial demonstrated, KPCB strenuously disputed most of the "facts" alleged by Pao in her lawsuit (and that she continues to allege publicly today). Such factual disputes were legally required to be resolved by a jury – not by a judge via summary judgment. Moreover, such factual disputes were ultimately fully resolved by the jury in KPCB's favor.

[4] Similarly, Pao's reliance on cases finding $1 and $2,500 to be "token" offers is unpersuasive. Clearly, there is a huge chasm between a $1 offer and KPCB's offer of almost a million dollars.

[5] Additionally, Pao's obscure reference to unknown evidence regarding "the experience of other female employees" somehow "significantly" favoring her case is wholly unsupported by the facts. As the testimony at trial made clear, the other women at KPCB do *not* feel discriminated against and enjoy working at KPCB. For instance, Trae Vassallo testified that KPCB was an "awesome place" to work. KPCB agrees, however, that this evidence did have a "significant impact" on the trial – it showed Pao's characterization of KPCB as a hostile place for women utterly lacked any merit whatsoever.

not require such a high threshold for an offer to be "reasonable". Rather, as the case law cited by Pao shows, a reasonable offer is a prediction of liability "within a range of reasonably possible results." *Elrod v. Oregon Cummins Diesel, Inc.* (1995) 195 Cal. App. 3d 692, 699. And even a *modest* offer of settlement – which is clearly not the case here – may be in good faith if a defendant reasonably believed there was no liability. *See, e.g., Colbaugh v. Hartline* (1994) 29 Cal. App. 4th 1516, 1529-30 ($100 offer not "token"); *Jones v. Dumrichob* (1998) 63 Cal. App. 4th 1258, 1264 (offer to waive costs not "token"); *see also Carver v. Chevron USA* (2002) 97 Cal. App. 4th 132, 152-54 ($100 offer and waiver of costs and fees made in good faith; awarding almost $2 million in expert fees).

For example, in *Carver*, the Court found a $100 offer to be reasonable, even where defendant's exposure was in the multi-millions. *Id.* The Court noted that defendant's 998 offer included a waiver of costs and fees that was quite valuable, stating, "[h]indsight now shows the value of the proposed waiver of costs and fees was considerable, and it was no secret at any time that [defendant] hired expensive lawyers who were expected to pursue all available avenues of defense." *Id.* Here, as in *Carver*, KPCB not only offered Pao almost one million dollars to settle before trial, but also offered to pay its own costs and fees – which as Pao should have known – were considerable, especially given the discovery she so aggressively pursued. Accordingly, under *Carver*, KPCB's 998 offer was worth almost **TWO million dollars**, including the waiver of the costs KPCB now seeks.

Moreover, it is disingenuous for Pao to argue that KPCB's offer was unreasonable given her own expert's lost compensation analysis. First, assume for the sake of argument that Pao prevailed on her claim that KPCB retaliated against her when it terminated her employment and the jury found that she fully mitigated her future lost income upon obtaining employment at reddit in January 2013.[6] According to Carl Saba's analysis, Pao's damages would be $43,964 ($143,964 in lost wages minus her $100,000 severance). *See Seekao Decl.*, Ex. B (Saba Report, Pl.'s Ex. 131). One million dollars greatly exceeds this potential outcome – *even if* Pao prevailed on this claim. Further, KPCB's offer exceeded Pao's alleged damages even assuming the jury found she

[6] The termination retaliation claim is the *only* claim on which the jury reached a 9-3 verdict.

did not fully mitigate upon working at reddit, but rather was entitled to two years of future lost income – the scenario Saba believed to be the most likely. Under that scenario, Saba testified that the damages attributed to her termination were $689,000 (two years of future lost income). *See Seekao Decl.*, Ex. C (Saba Report w/ Liburt Edits, Def.'s Ex. 1601) and Ex. D (Tr. 2787:8-11; 2791:27-2792:7). This too is less than KPCB's near million dollar offer. Finally, assume that Pao also prevailed in showing KPCB discriminated and/or retaliated against her by not promoting her – despite the jury finding otherwise in a 10-2 vote. Even under this extremely unlikely scenario, Saba's analysis showed only about $2.6 million in damages. Clearly an offer of 37% of her total damages – assuming a total win – cannot be unreasonable. *See Santantonio v. Westinghouse Broadcasting Co., Inc.* (1994) 25 Cal. App. 4th 102, 118 (998 offer of 35% of projected losses by expert found reasonable). In addition, Saba's analysis did not take into account the millions in stock options Pao received from reddit – which would necessarily be deducted from the above damages amounts and further bolster KPCB's offer.[7]

Finally, Pao's argument that KPCB "had no reasonable expectation of acceptance" of its offer is meritless given that Pao *never even made a demand prior to trial*. How could KPCB know what Pao would or would not accept if she never even asked for a specific amount?

For all of these reasons, the Court should enforce KPCB's near million dollar offer of settlement and award it post-offer costs.

C. KPCB's Post-Offer Costs Were Reasonable and Recoverable

Despite waiting seven years to bring her claims, alleging hundreds of discriminatory and retaliatory events against dozens of alleged bad actors, producing hundreds of thousands of pages of documents in discovery, and deposing dozens of witnesses – Pao now scoffs at the "exorbitant" costs KPCB was forced to incur to defend itself against those claims in a six-week trial when she chose to reject its settlement offer. She cannot have it both ways. Pao cannot run up KPCB's costs through an onslaught of allegations and discovery, and then object when she

[7] Although Pao will likely argue that this analysis doesn't take into account future carried interest, it has always been KPCB's position that Pao cannot seek carried interest from KPCB and such amounts are far too speculative to be properly awarded in any event. Similarly, KPCB is entitled to fully discount Pao's claim for punitive damages as unsupported by the record in this case. Accordingly, KPCB does not have to include such amounts in its offer for it to be reasonable.

receives the bill. KPCB incurred costs that were "reasonably necessary" to defend itself after Pao rejected its offer of settlement and should be able to recover those costs as a result.

Expert Travel Costs: The travel costs for KPCB's experts to attend their depositions and trial are not unreasonable. Two of KPCB's experts travelled from the east coast on short notice and around existing work schedules (meaning they would need to travel at preferred times – not necessarily whenever is cheapest, such as a red eye). Moreover, it is not unreasonable for experts to stay two nights so that they can prepare before testifying or stay an additional night if they weren't called at trial on the day anticipated. This is particularly true here where Pao and her counsel repeatedly changed their minds about when witnesses would be called to testify. Also, just because an expert could have flown round trip in a single day – does not mean it's unreasonable for the expert to stay a single night in a hotel the night prior to testifying early the following day. Travel expenses also do not merely include flights and hotel, but also transportation and meals – again, these are not unusual costs. Finally, Pao makes much of the fact that KPCB did not include travel receipts with its costs bill despite the fact that receipts are not required by law. KPCB's counsel attested on the bottom of the costs memorandum to the accuracy of the costs. If Pao needs further proof, however, that these costs were incurred – KPCB is obviously willing to provide such documentation to the Court.

Expert Fees: Pao takes issue with KPCB's allegedly "staggering" expert witness fees for several reasons, KPCB responds to each below.[8]

First, Pao challenges KPCB's hiring of two experts to testify regarding Pao's damages on the grounds that Pao had a single damages expert. But KPCB's damages experts provided more opinions than Pao's expert. Given Pao's alleged damages through the year 2022, it was imperative that KPCB defend itself with a labor economist, Dr. Lewin, to opine on Pao's lack of efforts to mitigate and an appropriate cut off for damages if she had properly mitigated in the relevant job market. Just because Pao chose not to engage a mitigation expert does not mean that

[8] Again, Pao questions KPCB's lack of documentation it was not required to provide. Putting aside the fact that Pao has much of the supporting documentation in the form of expert invoices (and made extensive use of it at trial) – if the attestation by KPCB's counsel is insufficient – KPCB is willing to provide any remaining invoices to the Court.

KPCB should be penalized for doing so. Additionally, given the complicated valuation work needed to value Pao's alleged carried interest damages (involving valuation of underlying funds that include many private companies) and the valuation of her reddit stock options (also a private company), it was imperative that KPCB engage a valuation expert to accurately assess Pao's claimed losses. KPCB was not required to simply accept Pao's valuation without the ability to challenge her expert's assertions. Accordingly, KPCB's retention of both Dr. Lewin and Mr. Litvak was reasonable.[9]

Second, Pao challenges the hourly rates charged by KPCB's experts merely because they exceeded the hourly rates of her experts. Just because Pao chose less costly experts, however, does not alone make KPCB's expert costs unreasonable. KPCB was not required to select experts whose hourly rates matched or were lower than Pao's (and, in fact, KPCB had no knowledge of the amounts charged by Pao's experts at the time it selected its experts). KPCB hired qualified experts for their expertise – not for how much they charged. KPCB paid each expert's ordinary and customary hourly billing rate for services the expert performed in preparation for testifying at their depositions and at trial.

Third, Pao challenges costs for the consultants who supported KPCB's testifying experts from FTI Consulting and Cornerstone, but fees of employees and staff that assist experts in preparing for trial *are* recoverable. *See Santantonio*, 25 Cal. App. 4th at 124. Pao's assertion that KPCB "concedes" the consultant costs were unreasonable because it discounted the costs by 50% is baseless. As Pao well knows, her counsel questioned KPCB's in house and outside counsel about the bills at trial. At that time, KPCB's counsel was unable to determine (without further information) which entries were in support of the experts versus privileged work at the direction of counsel. KPCB is now informed and believes, however, that the vast majority of the charges on each bill were in support of the testifying experts. To ensure only entries for work in support of the expert were included on the costs bill, however, KPCB over-discounted each bill by 50% to make sure the costs bill was as conservative as possible. Accordingly, KPCB is not actually

[9] Additionally, the mere fact that Litvak did not ultimately testify does not make his retention unreasonable. *See Santantonio,* 25 Cal. App. 4th at 124 (also holding that costs for fees of *two economists* properly recoverable).

seeking the full amount of recoverable costs – to Pao's benefit.

Fourth, Pao improperly dismisses the opinion of Professor Gompers and support work by Cornerstone as "grossly excessive" and unnecessary. Professor Gompers' opinion, however, was critical for KPCB's defense. Venture capital is not an industry that every lay person understands. In order to accurately evaluate Pao's performance, career progression, compensation, damages, and the alleged gender disparities at KPCB – it was necessary for the jury to have a deeper understanding of how venture capital works, what it takes to be a strong performing venture capitalist, the expected length and progress of a venture capitalist's career, and the gender makeup of the venture capital industry overall. For instance, Pao consistently tried to show that KPCB failed to hire and promote women by discounting the number of women working at KPCB. When those numbers were put in context with the industry, however, Professor Gompers showed that KPCB had more women investing partners than any other venture capital firm. Additionally, Pao argued that she was entitled to a General Partner promotion and that she would have worked at KPCB for the next 18 years. Professor Gompers testified, however, that promotions are actually rare in the venture capital industry and that most venture capitalists move on after about three years. These opinions, and more, were critical for the jury to understand the full context of Pao's allegations. This is confirmed by the many questions from the jury regarding the venture capital industry, including the key issue regarding the number of women in it. Moreover, it was not enough for Professor Gompers to opine on the venture capital industry in general, he also needed to analyze documents and testimony to understand how KPCB functioned and compared to his understanding of the industry. Finally, contrary to Pao's unsupported assertions, KPCB did not finance Professor Gompers' research for or the writing of his paper on gender effects in venture capital (much of which was completed prior to his retention by KPCB). The fees associated with Professor Gompers' opinion include only work performed in support of his testimony at trial.

Fifth, Pao again challenges KPCB's decision to hire two experts where she hired one – this time, in the area of human resources. KPCB is entitled, however, to choose the experts it believes to be most qualified to opine on topics necessary for its defense. KPCB hired Mr.

Robbins to opine on the adequacy of Mr. Hirschfeld's investigation (attacked by Pao) and Ms. Young to opine on the reasonableness of KPCB's policies and practices in preventing discrimination (in direct response to one of Pao's claims). It is not unusual for parties to engage separate experts for separate areas of opinion and, just because Pao chose to engage a predominantly investigations expert to also opine on human resources issues – does not similarly limit KPCB or make KPCB's choice to engage separate experts on each topic unreasonable.

Trial Technology: Models and blowups of exhibits that are "reasonably helpful to aid the trier of fact" are recoverable costs. C.C.P. § 1033.5 (13); *see also Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal. App. 4th 72, 90-91. This includes rental of trial technology equipment, such as an overhead projector. *Ripley v. Pappadopoulos* (1994) 23 Cal. App. 4th 1616, 1623. Expenses for computerized forms of blowups, such as imaging documents are likewise recoverable. *See American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal. App. 4th 1017, 1057; *El Dorado Meat Co. v. Yosemite Meat & Locker Service, Inc.* (2007) 150 Cal. App. 4th 612, 618-19. Here, *both* parties made extensive use at trial of the underlying technology to aid the jury with reviewing exhibits during testimony and deliberations. Pao cannot now argue that the use of such technology was unreasonable.

Trial Transcripts: Both parties, recognizing the need for a transcript in a trial with so many issues and witnesses, agreed at the outset of trial to jointly share costs for a court reporter and negotiated a reduced rate for transcripts that was acceptable to both parties. Pao cannot now claim that these costs were unreasonable. The trial transcripts were necessary, not only for impeachment of witnesses, but also helped the jury in deliberations as confirmed by the multiple read backs requested. Moreover, contrary to Pao's assertion, KPCB did not include any costs for expedited transcripts. The court reporter's invoice broke out charges for transcript costs and expedited charges. KPCB only included the regular transcript fees in its memorandum of costs.

D. Pao's Significant Economic Status Does Not Support "Scaling" of Expert Fees

In *Holman,* the Court of Appeal "recognized that Code of Civil Procedure section 998 was designed to create economic incentives on both parties to settle rather than try their lawsuits, and that to further that goal, both sides must face some economic consequences if it turns out they

miscalculate and lose." 186 Cal. App. 4th at 283-84. That said, however, the Court noted it could be appropriate to "scale" down expert fee awards in FEHA cases for low-income plaintiffs. *Id.* The "court must not only look to whether the expense was reasonably incurred, but must also consider the economic resources of the offeree." *Id.* at 284 (citations omitted).

Here, public policy clearly does not support reducing the expert fee award because of a low-income plaintiff. At the time Pao left KPCB she made $400,000 annually and regularly received annual bonuses over $100,000. She also received and continues to receive substantial sums in carried interest from KPCB funds. Pao is currently interim Chief Executive Officer at reddit where she makes over $200,000 annually and has millions of dollars in stock options. Pao and her husband own multiple residences. Given her substantial economic resources,[10] a full award of KPCB's post-offer costs would be appropriate to achieve the "economic consequences" intended by section 998 for turning down a reasonable offer.

III. CONCLUSION

For these reasons, KPCB respectfully requests that the Court deny Pao's Motion to Tax Costs and award the costs requested in KPCB's amended Memorandum of Costs without discount.

Dated: June 5, 2015

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[10] Given Pao's strenuous objections at trial that her husband's dire economic straits have no bearing on this lawsuit and/or her financial well-being (due in part to their prenuptial agreement), she should be precluded from introducing any such evidence at this stage to support a reduction in an award to KPCB.