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SUMMARIES

Civil Procedure

Pre-offer fees and costs should have been added to amount of settlement offer to determine whether judgment at trial was more favorable (Ikola, J.)

Martinez v. Eatlite One, Inc.

C.A. 4th; October 3, 2018; G055096

The Fourth Appellate District reversed postjudgment orders and remanded. The court held that the trial court erred in adding plaintiff’s pre-offer fees and costs to the verdict she obtained, but not to defendant’s pretrial settlement offer, in determining that the judgment was more favorable than the offer.

Restaurant worker Samantha Martinez sued former employer Eatlite One, Inc. for employment discrimination and related causes of action. Eatlite made a Code Civ. Proc. §998 settlement offer in the amount of $12,001. Martinez rejected the offer. The case proceeded to trial, and the jury found in favor of Martinez on all claims. The jury awarded her $11,490 in damages.

The trial court granted Martinez’ post-judgment motions for both pre- and post-offer costs and attorney fees, and denied Eatlite’s motion for post-offer costs. The court reasoned that because Eatlite’s §998 offer was silent as to costs and fees, both could be added to the amount of the jury verdict for purposes of decided whether the judgment exceeded the offer.

The court of appeal reversed in part, holding that the trial court erred in awarding Martinez her post-offer costs and fees. Under §998, the costs provision in an offer should be taken into account in determining the amount of the offer for purposes of comparing that amount to the amount of any subsequent judgment. It does not follow, however, that the costs provision in the offer should determine what costs are added to the award of damages in order to arrive at the amount of the judgment for purposes of §998. Here, the trial court correctly considered the jury’s award plus Martinez’s pre-offer costs and fees in determining the value of Martinez’s judgment, but erred in failing to consider whether the same pre-offer costs and fees increased the value of Eatlite’s §998 offer, which was silent as to costs. Under Engle v. Copenbarger & Copenbarger, LLP (2007) 157 Cal.App.4th 165, “a party who secures a recovery by accepting a §998 offer is entitled to costs and fees unless they are excluded by the offer.” Applying this logic, the value of Eatlite’s §998 offer necessarily included the pre-offer costs and fees that Eatlite would have been liable for had Martinez accepted the offer. So calculated, the $11,490 jury award was less than Eatlite’s §998 offer. Because Martinez did not obtain a more favorable judgment after trial, the trial court erred in awarding post-offer costs and fees to Martinez and in denying post-offer costs to Eatlite.

Civil Rights

Allegation of interference with disabled person’s service dog on public sidewalk suffices to state claim for violation of Disabled Persons Act (Kim, J.)

Ruiz v. Musclewood Investment Properties, LLC

C.A. 2nd; October 5, 2018; B280928

The Second Appellate District reversed trial court orders. The court held that an allegation of interference with a disabled person’s service dog, while the disabled person was attempting to use a public sidewalk, sufficed to state a claim for violation of the Disabled Persons Act (DPA).

Oscar Ruiz is legally blind and uses a guide dog. On six occasions in 2013, 2014, and 2015, a guard dog owned by Musclewood Investment Properties, LLC threatened or attacked Ruiz’ dog Carbon as they were walking on the public sidewalk in front of Musclewood’s truck yard. Ruiz repeatedly complained to Musclewood about these incidents, but Musclewood did nothing to control its dog, which was allowed to run loose in the truck yard. Ruiz sued Musclewood for violation of the DPA, asserting claims under Civil Code §§54 and 54.3.

The trial court sustained Musclewood demurrer without leave to amend and also granted Musclewood’s motion to strike the DPA claim in its entirety, finding Ruiz failed to allege a denial of equal access.

The court of appeal reversed, holding that Ruiz stated a valid claim for relief under §54.3. Section 54.3(a) describes a cause of action against: “any person or persons, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities as specified in §§54 and 54.1 or otherwise interferes with the rights of an individual with a disability under §§54, 54.1 and 54.2.” Section 54.3 defines “interfere” to include “preventing or causing the prevention of a guide dog…from carrying out its functions in assisting a disabled person.” Although §54 does not specifically define “public facilities,” §54(a) lists a number of locations to which individuals have the right to full and free use, and that list includes sidewalks. To the extent that §54.3 should be construed to include an intent element, the repeated attacks on Ruiz’ dog, combined with Musclewood’s alleged knowledge of those attacks, permitted a reasonable inference of intent. Ruiz thus alleged facts sufficient to state a claim for relief under §54.3. No allegation of a denial of equal access was required; by its plain language, §54.3 requires only an allegation of interference with admittance to or enjoyment of a public facility, which requirement Ruiz satisfied.
Class Actions

$20 credit offered to class members qualifies as “coupon” for purposes of CAFA (Friedland, J.)

In re EasySaver Rewards Litigation

9th Cir.; October 3, 2018; 16-56307

The court of appeals vacated in part a judgment and otherwise affirmed. The court held that a $20 credit offered to class members qualified as a “coupon” for purposes of the Class Action Fairness Act (CAFA).

Provide Commerce, Inc. operated online businesses selling flowers, chocolates, fruit baskets, and other similar items. Josue Romero and others purchased items from a Provide business. After making their purchases, they were presented with a pop-up advertisement for $15 off another item from the same website. Clicking the pop-up automatically enrolled plaintiffs, without their consent, in Provide’s membership rewards program. After more than two years of litigation, including extensive discovery and mediation, the parties reached a settlement. The proposed settlement provided class members with two forms of relief: monetary reimbursement of membership fees and a $20 credit that could be used to purchase items on defendants’ websites. The settlement provided for up to $8.7 million in attorney fees.

Bryan Perryman objected to the settlement, arguing that the attorney’s fee award did not comply with CAFA’s requirements for settlements awarding coupons. The district court approved the settlement, finding that the $20 credit did not qualify as a coupon for purposes of 28 U.S.C. §1712.

The court of appeal vacated the award of fees and otherwise affirmed, holding that the district court erred in finding the $20 credit did not qualify as a coupon. CAFA imposes restrictions on attorney’s fee awards for class action settlements that provide class members relief in the form of coupons. The court held that a $20 credit offered to class members qualifies as a “coupon” for purposes of §1712. A court should consider, among other things, whether class members have “to hand over more of their own money before they can take advantage of” a credit, and whether the credit is valid only “for select products or services.” Here, class members can only use the credits to purchase items from the limited universe of products offered by defendants. This universe is even smaller if confined to products costing less than $20—defendants only sell “15–25 products” for under $20, and that list does not account for shipping charges, which class members would have to pay themselves. Class members thus cannot take advantage of the credits without handing over their billing information to the same company that allegedly mishandled that information in the first place. Nothing in this record supports the conclusion that class members would view the $20 credit as equivalently useful to $20 in cash.

Consumer Protection

False labeling claim not preempted by FDA regulations (Block, J.)

Hawkins v. The Kroger Company

9th Cir.; October 4, 2018; 16-55532

The court of appeals reversed a district court judgment and remanded. The court held that a consumer’s claim of false food labeling was not preempted by federal regulations.

Shavonda Hawkins filed a putative class action against The Kroger Company for mislabeling its Kroger Bread Crumbs as containing zero trans fats, when the product in fact contained trans fat. Hawkins alleged violation of the Unfair Competition Law (UCL) and other claims. Hawkins sought to represent a class of consumers who were misled by the label (the labeling claims) and had used the dangerous product (the use claims).

The district court granted Kroger’s Rule 12(b)(6) motion to dismiss with prejudice, finding that Hawkins lacked standing to bring these claims. The court further found that Hawkins’ labeling claims were preempted by federal law.

The court of appeals reversed, holding that Hawkins established standing. Hawkins’ allegation that she bought a product she would not have otherwise bought, had known the product was harmful, was sufficient to establish standing as to both her labeling and her use claims. Further, Hawkins’ labeling claims were not preempted. At the time she made her purchases, the relevant federal regulation provided that “if the serving contains less than 0.5 gram, the content shall be expressed as zero” within the Nutrition Facts Panel on the product label. Here, because the trans fat content in a single serving of the Kroger bread crumbs was less than 0.5 grams, Kroger was thus mandated to list the content within the Facts Panel as zero. Under Reid v. Johnson & Johnson, 780 F.3d 952 (9th Cir. 2015), however, Kroger was not permitted to make such a statement elsewhere on its label. The Reid court held that the statement “No Trans Fat” is not allowed outside of the Nutrition Facts Panel where a product actually contains some quantity of trans fat. Such labeling is subject to the rules governing nutrition content claims, including the federal regulatory requirement that the claim not be “false or misleading in any way.” That Kroger’s label allegedly stated
“0g Trans Fat,” as opposed to the “No Trans Fat” label at issue in Reid, was a distinction without a difference. Because FDA regulations did not authorize Kroger’s alleged false statement, Hawkins’ labeling claims were not preempted.

**Employment Litigation**

Compensation program that allows employees to increase rate of pay for any given pay period does not violate wage and hour laws (Irion, J.)

**Certified Tire and Service Centers Wage and Hour Cases**

C.A. 4th; September 18, 2018; D072265

The Fourth Appellate District affirmed a judgment. The court held that a compensation program that allows employees to increase their rate of pay during any given pay period does not violate minimum wage and rest hour requirements.

Certified Tire and Service Centers, Inc. operates automotive service centers. It pays its service technicians an hourly wage for all work performed, but the hourly rate earned by a technician varies from pay period to pay period. A technician’s hourly rate for the applicable pay period is guaranteed to be at least an agreed-upon minimum hourly rate that the technician is assigned at the time of hire, which exceeds the legal minimum wage. The hourly rate paid to a technician during any given pay period may nonetheless be higher than the guaranteed rate based on a formula that rewards the technician based on the quantity of his or her billable hours for that pay period (“production dollars”). Certified Tire employees Oscar Gutierrez and others sued Certified Tire for wage and hour violations, arguing that because Certified Tire technicians earned “no wages” when performing work that did not generate production dollars, Certified Tire’s technician compensation program (TCP) violated minimum wage requirements by failing to provide the required separate compensation for each hour worked. The lawsuits were consolidated and certified as a class action.

The trial court rendered judgment in favor of Certified Tire. The court of appeal affirmed, holding that Certified Tire did not violate applicable minimum wage and rest period requirements. Although the TCP has similarities to a piece-rate system or a commission-based system because technicians are able to increase their earnings by increasing their production, the TCP is not an “activity-based compensation system” as plaintiffs contended. Instead, it is an hourly-rate system in which technicians are paid at a single hourly rate for all hours worked during a pay period. Technicians earn wages for every single work activity that they perform, including waiting for customers and performing tasks that do not have billed labor costs associated with them. Although the hourly rate differs from pay period to pay period, the technicians are always paid on an hourly basis for all hours worked, regardless of the type of activity in which they were engaged during those hours.

**Litigation**

Agreement that resolved pending litigation qualifies as protected activity for purposes of anti-SLAPP statute (Miller, J.)

**Cheveldave v. Tri Palms Unified Owners Association**

C.A. 4th; October 3, 2081; E066461

The Fourth Appellate District reversed a judgment. The court held that an agreement that resolved a pending creditor’s claim in the bankruptcy court qualified as protected activity for purposes of the anti-SLAPP statute.

Tri-Palms Estates is a real estate development consisting of 10 separate housing tracts. The homeowners pay a fee for use of an adjacent recreation facility, which is not part of the development. In 2003, the homeowners, in a recorded “Master Declaration,” formed the Tri Palms Unified Owners Association for the purpose of communicating with the management of the recreation facility and for supervising compliance with each tract’s separate CC&Rs. In 2008, the association sued the owner of the recreation facility for charging fees in excess of those previously agreed upon. The trial court rendered partial judgment in favor of the association; both sides appealed. In 2012, the owner of the facility filed for bankruptcy. The owner arranged to sell the facility. The association, which had filed a creditor’s claim, entered into an agreement to dismiss its claim and allow a fee increase in exchange for the buyer’s maintenance of the facility. The bankruptcy court approved the sale subject to that agreement.

Homeowner Alex Cheveldave sued the association, arguing it lacked the authority to agree to a fee increase. Cheveldave argued that Tri-Palms Estates is not a common interest development and, for that reason, the association lacked authority to enter into an agreement without the members’ approval.

The trial court granted the association’s special motion to strike the complaint as a SLAPP suit, finding the complaint arose out of protected activity and Cheveldave failed to show a probability of prevailing on the merits.

The court of appeal reversed, holding that the trial court properly found that the complaint arose from protected activity, but erred in finding no probability of prevailing on the merits. The agreement led to the settlement of both the association’s creditor claim in the bankruptcy court and the pending appeal and cross-appeal of the 2008 trial court judgment. Because the agreement thereby affected several issues then pending before the courts, the association’s act of entering into the agreement constituted protected activity. Cheveldave nonetheless presented a viable argument that because Tri-Palms had no common
area, it was not a common interest development for purposes of the Davis-Stirling Act, and the association thus lacked standing to enter into the agreement without the approval of its members.

### Trusts and Estates

**Criminal court’s calculation of damages suffered by elder financial abuse victim binding on probate court**

(Lui, P.J.)

**Kerley v. Weber**

C.A. 2nd; October 3, 2018; B282202

The Second Appellate District affirmed in part and reversed in part a judgment. The court held that the probate court properly relied on the restitution ordered in a criminal elder financial abuse case in determining the damages due the victim’s estate under the Probate Code.

In 2010, Marcie Weber was convicted of theft from an elder or dependent adult. She was ordered to pay $700,000 in restitution to the victim. The victim was Philippa Johnston, who died during the trial. Sarah Kerley, Johnston’s conservator and the co-administrator of her estate, obtained a judgment against Weber in the amount of the restitution award. She also obtained an order compelling the sale of Weber’s residence to satisfy that judgment. Kerley also filed a petition under Probate Code §859 for civil damages against Weber. The probate court awarded damages of $1.4 million—twice the amount of the restitution award.

Weber appealed both the sale order and the award of civil damages.

The court of appeal reversed in part, holding that the trial court erred in crediting Weber’s pre-judgment restitution payments against prejudgment interest rather than principal. The court otherwise affirmed, holding that the probate court was not required to hold a new trial on the actual amount of Johnston’s loss, but could properly rely on the criminal court’s findings. Under principles of collateral estoppel, Weber’s conviction under Penal Code §368(d) for elder financial abuse established her civil liability. Further, Weber’s stipulation to the $700,000 restitution award precluded her from arguing that she took less than that amount. As to the probate court’s imposition of double damages under §859, no separate finding of bad faith was required. Under the plain language of the statute, it sufficed that Weber was found to have taken Johnston’s property “through elder or dependent adult abuse.” Finally, the probate court did not err in calculating §859 damages based on the total amount that Weber stole. That she had begun to make restitution payments did not relieve Weber of liability under §859. The court affirmed the probate court judgment and remanded to the trial court to recalculate the amount of restitution actually still owing and to enter judgment accordingly.

### Wrongful Death

**Award of 10 percent attorney fee in complex aviation case constituted abuse of discretion**

(Rothschild, P.J.)

**Schulz v. Jeppesen Sanderson, Inc.**

C.A. 2nd; September 5, 2018; B277493

The Second Appellate District reversed a trial court order and remanded. The court held that the trial court abused its discretion in awarding only a 10 percent attorney fee in an aviation case that required specialized expertise.

Silke Schulz’s husband was killed when the plane he was piloting crashed. She and the couple’s four minor children sued the aircraft manufacturers and others. Legal counsel Herzog, Yuhas, Ehrlich & Ardell, APC negotiated an $18,125,000 settlement. After a trial to determine allocation of the settlement funds among for Schulz, her minor children, the decedent’s two adult daughters, and the airplane’s owner, the trial court the trial court allocated virtually all the settlement proceeds to the minor children.

The court thereafter rejected Herzog’s contingency fee agreement, which called for a 31 to 40 percent contingency fee, depending on when the case was settled, and instead awarded Herzog 10 percent of the children’s funds as attorney fees.

The court of appeal reversed the award of fees and remanded, holding that the trial court abused its discretion in reducing Herzog’s fee to 10 percent. Under Cal. Rules Ct., rule 7.955(a), in the absence of a fee agreement previously approved by the court, “the court must use a reasonable fee standard when approving and allowing the amount of attorney’s fees payable from money or property paid or to be paid for the benefit of a minor.” Rule 7.955 does not dictate a presumptively reasonable percentage or mathematical method of determining the appropriate attorney fees. Nonetheless, the fee must fall within a “reasonable” range, and the 10 percent fee awarded in this case did not. The trial court gave too little consideration both to the terms of Herzog’s representation agreement Schulz at the time it was signed and to the factors listed in rule 7.955(b), which factors include the value of the attorney’s services, the skill required to perform the legal services properly, the attorney’s experience, reputation, and ability, and the time and labor required. All of these factors supported a recovery greater than 10 percent. One of the two attorneys who primarily worked on the case had 47 years of experience in aviation accident cases, and the other had 37 years of experience. Both also had many years of experience as pilots, which undoubtedly gave them insight as to the causes of the crash. Further, both sides agreed that the risk of loss was substantial. The representation agreement thus realistically evaluated the high risk that there could be no recovery at all or one substantially lower than was achieved. These and other factors warranted reconsideration of the fee award.
**FULL TEXT OPINION**

Ninth Circuit Court of Appeals

Cite as 18 C.D.O.S. 9942

**SHAVONDA HAWKINS, on behalf of herself and all others similarly situated,** Plaintiff-Appellant,

**v.**

**THE KROGER COMPANY,** Defendant-Appellee.

No. 16-55532
United States Court of Appeals for the Ninth Circuit
D.C. No. 3:15-cv-02320-JM-BLM
Appeal from the United States District Court for the Southern District of California Jeffrey T. Miller, Senior District Judge, Presiding
Argued and Submitted December 7, 2017
Pasadena, California
Filed October 4, 2018
Before: Marsha S. Berzon and Jacqueline H. Nguyen, Circuit Judges, and Frederic Block,* District Judge.
Opinion by Judge Block

* The Honorable Frederic Block, United States Senior District Judge for the Eastern District of New York, sitting by designation.

**COUNSEL**

Gregory S. Weston (argued) and David Elliot, The Weston Firm, San Diego, California, for Plaintiff-Appellant.

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**OPINION**

**BLOCK, District Judge:**

Trans fat has become increasingly recognized as a dangerous substance and a leading cause of numerous serious ailments, including heart disease and diabetes. Food and Drug Administration (“FDA”) regulations govern the information reported within a food product’s Nutrition Facts Panel on the product’s label.1 As for trans fat, FDA regulations provided, at all relevant times, that if the product contained “less than 0.5 gram” trans fat, as it did in this case, it was required to tell the consumer on the Nutrition Facts Panel that it contained 0 grams trans fat, even though it contained this dangerous food additive.

We are asked to determine, *inter alia*, whether these FDA trans fat regulations governing the contents of the Nutrition Facts Panel preempt California’s unfair competition laws proscribing false or misleading advertising elsewhere on a food product’s label. We hold that they do not; accordingly, the plaintiff can challenge the legitimacy of defendant’s product advertising on the face of the label that it contains “0g Trans Fat per serving.” In doing so, we take the occasion to reinforce and apply our holding in *Reid v. Johnson & Johnson* that “a requirement to state certain facts in the nutrition label is not a license to make that statement elsewhere on the product.” 780 F.3d 952, 960 (9th Cir. 2015) (emphasis added).

I

Hawkins’ complaint alleges the following:2 The Kroger Company (“Kroger”) sells Kroger Bread Crumbs (“KBCs”) in stores in California, including the supermarket chain Ralph’s. Hawkins regularly purchased KBCs at several Ralph’s locations between 2000 and 2015. In making the purchases, she relied on the information contained on the face of the label that the product contained “0g Trans Fat per serving.” In August 2015, she discovered that, contrary to the face of the label, KBCs “contained artificial trans fat, and caused heart disease, diabetes, cancer, and death.”

In October 2015, Hawkins brought a putative class action against Kroger seeking to represent a class of consumers who were misled by the label (“the labeling claims”) and had used the dangerous product (“the use claims”). The complaint alleged violations of the California Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 *et seq.*, False Advertising Law (“FAL”), Cal. Bus. & Prof. Code § 17500 *et seq.*

1. Somewhat confusingly, the FDA regulations refer to the ubiquitous box that contains nutritional facts as “nutrition labeling.” 21 C.F.R. § 101.9, while also referring to the rest of the product’s exterior as labeling. For clarity, and consistent with other decisions of this Court, this decision uses “Nutrition Facts Panel” to refer to the “nutrition labeling;” see, e.g., *Lilly v. ConAgra Foods, Inc.*, 743 F.3d 662, 664 (9th Cir. 2014), and all other references to labels to refer to information outside the Nutrition Facts Panel.

2. We must “accept the complaint’s well-pleaded factual allegations as true, and construe all inferences in the plaintiff’s favor for the purposes of evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).” *Ariz. Students’ Ass’n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016).

3. On June 17, 2015, the FDA had released a Final Determination Regarding PHOs (“2015 Final Determination”), in which it declared: “[T]here is no longer a consensus among qualified experts that partially hydrogenated oils (PHOs), which are the primary dietary source of industrially-produced trans fatty acids (IP-TFA) are generally recognized as safe (GRAS) for any use in human food.” 2015 Final Determination, 80 Fed. Reg. 34650, 34650 (June 17, 2015). However, the 2015 Final Determination did not prohibit use of PHOs in food until June 18, 2018, to allow small businesses time to adjust, minimize market disruptions, and allow growth, harvest, and processing of new crops. *Id.* at 34668–69. On May 21, 2018, the FDA extended this compliance date, providing a range of new compliance dates depending on whether the manufacturer petitioned for a new date and the date on which the food was manufactured. Final Determination Regarding Partially Hydrogenated Oils, 83 Fed. Reg. 23358, 23359 (May 21, 2018) (“2018 Final Determination”).
We turn first to Hawkins’s statutory standing to bring her labeling claims. California law requires plaintiffs alleging UCL and FAL claims to show that they “ha[ve] suffered injury in fact and ha[ve] lost money or property as a result of the unfair competition.” Cal. Bus. & Prof. Code §§ 17204 (UCL); see id. § 17535 (FAL); Hinojos v. Kohl’s Corp., 718 F.3d 1098, 1103 (9th Cir. 2013) (UCL and FAL standing requirement are identical) (citing Kwikset Corp. v. Sup. Ct., 246 P.3d 877, 884 (Cal. 2011)). A plaintiff is required to show “some form of economic injury” as a result of his transactions with the defendant.” Hinojos, 718 F.3d at 1104 (quoting Kwikset, 246 P.3d at 885). However, “the quantum of lost money or property necessary to show standing is only so much as would suffice to establish injury in fact.” Kwikset, 246 P.3d at 886.

California law also requires causation—namely, that the plaintiff relied on the misrepresentation on the label. “A consumer who relies on a product label and challenges a misrepresentation contained therein can satisfy the standing requirement of section 17204 by alleging … that he or she would not have bought the product but for the misrepresentation.” Id. at 890. “That assertion is sufficient to allege causation [and it] is also sufficient to allege economic injury.” Id.; see also Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 965 (9th Cir. 2018).

Hawkins alleges that she relied upon the label and would not have bought the product without the misrepresentation. For example, paragraph 76 of the complaint states: “Plaintiff relied on Defendant’s ‘0g Trans Fat’ claim as a substantial factor in her purchases”; paragraph 101 states: “Plaintiff purchased the Kroger Bread Crumbs believing they had the qualities she sought based on the Products’ deceptive labeling”; and paragraph 107 states: “Plaintiff, on at least one occasion, would not have purchased the Kroger Bread Crumbs absent Defendant’s misrepresentation.”

In holding that Hawkins did not plead reliance, the district court misread Hawkins’s complaint. It interpreted the complaint as alleging that she did not read the “0g Trans Fat per serving” product label until August 2015, fifteen years after she began purchasing the product. However, the paragraph cited by the district court to support its conclusion reads, “Plaintiff first discovered Defendant’s ‘unlawful acts described herein in August 2015, when she learned that Kroger Bread Crumbs contained artificial trans fat …’” Compl. ¶ 74 (emphases added). This paragraph does not allege that she first read the label in August 2015; it alleges she first discovered the label was misleading on that date. The district court did not address the three paragraphs where Hawkins concretely alleged that she relied on the label.

Because Hawkins adequately alleged that she relied on the label’s misrepresentations and would not have purchased the product without those misrepresentations, she has adequately alleged standing for her labeling claim.

II

We next turn to whether Hawkins’s state law mislabeling claim challenging the statement “0g Trans Fat per serving” is preempted by federal regulations.

a. Preemption Generally

Preemption is guided by two principles: first, “the purpose of Congress is the ultimate touchstone in every pre-emption case,” and second, “[i]n all pre-emption cases, and particularly in those in which Congress has ‘legislated … in a field which the States have traditionally occupied,’ … we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” Wyeth v. Levine, 555 U.S. 555, 565 (2009) (alterations in original) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).
b. The NLEA

“The Nutritional Labeling and Education Act (‘NLEA’) amended the Food, Drug, and Cosmetic Act (‘FDCA’) to ‘establish[] uniform food labeling requirements, including the familiar and ubiquitous Nutrition Facts Panel found on most food packages.’” Reid, 780 F.3d at 959 (alterations in original) (quoting Lilly, 743 F.3d at 664). “The ‘NLEA also provides that no state may ‘directly or indirectly establish any requirement for the labeling of food that is not identical’ to the federal requirements.’” Id. (quoting Lilly, 743 F.3d at 664–65); see also 21 U.S.C. § 343-1(a)(5).

“The phrase ‘not identical to’ means ‘that the State requirement directly or indirectly imposes obligations or contains provisions concerning the composition or labeling of food that are not imposed by or contained in the applicable federal regulation or differ from those specifically imposed by or contained in the applicable federal regulation.’” Reid, 780 F.3d at 959 (quoting, with alterations, Lilly, 743 F.3d at 665); see also 21 C.F.R. § 101.1(c)(4). However, the NLEA “does not preempt any state law unless the law is ‘expressly preempted.’” Id. (quoting Holk v. Snapple Beverage Corp., 575 F.3d 329, 337–38 (3d Cir. 2009)); nor does it “preempt state law-based causes of action that are identical to the federal labeling requirements,” id. (citing POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228, 2238 (2014)).

Therefore, if FDA regulations expressly permit the claim “0g Trans Fat per serving” on the face of a product’s packaging, any state law claim to the contrary would be preempted.

c. The Nutrition Facts Panel and Nutrient Content Claims

The FDA regulations at issue here can broadly be separated into two categories. First, there are rules, contained in 21 C.F.R. § 101.9, governing what must be stated within the Nutrition Facts Panel, including the amount of various nutrients, such as fat, saturated fat, trans fat, sodium, and carbohydrates. Second, there are rules governing “nutrient content claims” made elsewhere on the product. These are claims that “expressly or implicitly characterize[] the level of a nutrient.” 21 C.F.R. § 101.13(b); they are further subdivided between general and specific rules, 21 C.F.R. §§ 101.13 (general rules), 101.62 (specific rules regarding fat).

Critically, the rules that govern claims made within the Nutrition Facts Panel and the rules that govern nutrition content claims elsewhere on the label are different: “Information that is required or permitted by § 101.9 … and that appears as part of the nutrition label, is not a nutrient content claim … . If such information is declared elsewhere on the label … it is a nutrient content claim and is subject to the requirements for [such] claims.” 21 C.F.R. § 101.13(c).

Without § 101.13(c), this would be a simple case. At the time Hawkins made the purchases, the relevant regulation provided that within the Nutrition Facts Panel, “[i]f the serving contains less than 0.5 gram, the content shall be expressed as zero.” 21 C.F.R. § 101.9(c)(2)(ii) (2015). Therefore, the claim “0g Trans Fat per serving” was not only permitted within the panel, but mandated. However, since, under § 101.13(c), a statement as to the amount of a nutrient mandated inside the Nutrition Facts Panel is not necessarily permitted by the FDCA elsewhere on the packaging, further analysis is required to determine if the FDCA allows the same “0g Trans Fat per serving” claim elsewhere on the label. The district court erred by not performing this analysis.

d. Reid v. Johnson & Johnson

In Reid, we determined that the statement “No Trans Fat” was not allowed outside of the Nutrition Facts Panel since the product did contain trans fat, notwithstanding that the Nutrition Facts Panel reported that it contained 0g trans fat. 780 F.3d at 963. As we wrote:

Though the nutritional label clearly contains information about nutrient content, the claims made in it are not considered “nutrient content claims” for the purposes of FDA regulations. See 21 C.F.R. § 101.13(c). While a required statement inside a nutrition label escapes regulations reserved for nutrient content claims, the identical statement outside of the nutrition label is still considered a nutrient content claim and is therefore subject to section 101.13.

Id. at 960.

“No Trans Fat” was an “expressed” nutrient content claim because it was “[a] direct statement about the level … of [trans fat] in the food.” Id. at 962 (alterations in original) (quoting § 101.13(b)(1)). Therefore, under the regulations, it could only be made if it did “not in any way implicitly characterize the level of the nutrient in the food and [was] not false or misleading in any respect.” 21 C.F.R. § 101.13(i)(3). We held that “No Trans Fat” was misleading because a reasonable consumer might infer that the product did not contain trans fat. Reid, 780 F.3d at 962–63.

We “bolster[ed]” this conclusion in Reid by noting that under §§ 101.62(b)–(c) “the FDA has expressly allowed ‘No Fat’ and ‘No Saturated Fat’ nutrient content claims for products that contain less than 0.5 grams of fat or saturated fat per serving. By contrast, the FDA explicitly decided not to authorize a ‘No Trans Fat’ nutrient content claim in light of a lack of scientific information.” Id. at 962 (citing Food Labeling: Trans Fatty Acids in Nutrition Labeling, Nutrient Content Claims and Health Claims, 68 Fed. Reg. 41434, 41464–65 (July 11, 2003)). Thus, the only interpretation which gave full meaning to each word of the regulations was that the claim “No Trans Fat” was not authorized. Therefore, we rejected the defendant’s argument that, because it was required to state the product had “0 grams trans fat per serving” within the Nutrition Facts Panel, it should be allowed to make an equivalent claim elsewhere on the label. Reid, 780 F.3d at 963.
e. The Present Case

Reid squarely controls here. As in Reid, we have an expressed nutrient content claim that the product does not contain trans fat. Also as in Reid, the manufacturer was required to state that the product had “0g trans fat per serving” within the Nutrition Facts Panel. And, just as in Reid, because of §101.13(c), this requirement did not give the manufacturer license to make the same claim elsewhere on the product, and the rest of the product labeling was subject to the rules governing nutrition content claims, including that the claim not be “false or misleading in any way.” 21 C.F.R. § 101.13(i)(3).

It makes no difference that here the label outside the Nutrition Fact Panel stated that the product had “0g Trans Fat,” whereas in Reid it was “No Trans Fat.” Just as in Reid, a consumer reading the label could be misled into believing that the product was free of trans fat.

Moreover, like in Reid, the regulations also bolster our conclusion in this case. In addition to authorizing “no fat” and “no saturated fat” claims, §§ 101.62(b)–(c) also authorize “zero fat” and “zero saturated fat” claims. But just as the regulations do not authorize a “no trans fat” claim, they also do not authorize a “zero trans fat” claim. And we see no rational difference between “zero” and “0.” Spelling out the number does not change its meaning. To hold otherwise would create an illogical rule where the claim “zero trans fat” is misleading but “0 trans fat” is not.

We are not the first to note that the FDA’s food regulations promulgated under the NLEA are “inconsistent and incomprehensible”: “A regulatory scheme intended to convey accurate and clear information to consumers is instead mind-bogglingly complex and confusing.” Diana R.H. Winters, The Magical Thinking of Food Labeling: The NLEA As A Failed Statute, 89 Tul. L. Rev. 815, 842 (2015). In particular, “the difficult and complex interaction between the preemption requirements” and “the level of specificity at which preemption must be determined” have caused “a large amount of judicial resources [to be] expended in the determination of these preliminary issues.” Id. at 850.

In this case, as we have explained, the “rounding rules” applicable to the Nutrition Facts Panel do not apply to the nutrient content claim on the face of the label. And unlike other products, where the distinction may not be iminimal to the public health, falsely advertising that a food product does not contain trans fat is a health hazard. Because the FDA regulations do not authorize the contested statement, Hawkins’s labeling claims are not preempted.

B. Use Claims

Hawkins also brought a set of claims under the theory that, under California law, it is illegal to include trans fat in products since it is not fit for human consumption and is an unlawful food additive. As noted, these claims were dismissed for lack of standing because the district court viewed the injuries as too speculative. Unlike the labeling claims, the court did not address whether the use claims were preempted.

1. Standing

Hawkins has statutory standing for the same reason she has statutory standing to bring her labeling claims—it is sufficient for a consumer to allege that she bought a product she would not have otherwise bought if she had known the product was harmful. Davidson, 889 F.3d at 965–66.

2. Preemption

Kroger argues, as an alternative ground for dismissal of the use claims, that they are preempted by the FDA’s 2015 Final Determination that PHOs are no longer GRAS because the FDA gave food companies the three-year window before it would begin enforcement of the new determination. 2015 Final Determination, 80 Fed. Reg. at 34651. This three-year window was statutorily embraced in 2016 when, as part of the Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, 129 Stat. 2242 (“2016 CAA”), Congress enacted language stating no PHOs “shall be deemed unsafe … and no food … shall be deemed adulterated … by virtue of bearing or containing a [PHO] until” the three-year window expired. 2016 CAA § 754.

“Generally, we do not consider an issue not passed upon below.” Foti v. City of Menlo Park, 146 F.3d 629, 638 (9th Cir. 1998) (quoting Golden Gate Hotel Ass’n v. City & Cty. of San Francisco, 18 F.3d 1482, 1487 (9th Cir. 1994)). “This

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6. We note the FDA regulations themselves treat “zero” and “0” as equivalent; the rounding rule at issue here instructs to round down to “zero” within the Nutrition Facts Panel. See 21 C.F.R. § 101.9(c)(2)(ii) (2015).

7. The district court relied on Carrea v. Dreyer’s Grand Ice Cream, Inc., 475 F. App’x 113 (9th Cir. 2012), an unpublished memorandum disposition that predates Reid. We are not bound by Carrea, see 9th Cir. R. 36-3(a), and, for the reasons stated in the text, we do not find its reasoning persuasive.

8. The present case is a perfect example of the degree of difficulty in sorting out and tracking down the applicable regulations. Even the current status of the trans fat rounding rules is unclear. On May 27, 2016, the FDA issued a final rule called “Food Labeling: Revision of the Nutrition and Supplemental Facts Labels,” in which it purported to reaffirm the rule that a product containing less than 0.5 grams of trans fat must list the amount as zero grams. 81 Fed. Reg. 33742, 33787–88 (May 27, 2016). However, the actual amendments to the regulation removed subsection 21 C.F.R. § 101.9(c)(2)(ii) entirely. See 81 Fed. Reg. at 33979. The revised version mandates the declaration of “total fat” with similar rounding rules but makes no mention of trans fat.


10. We note that in another recent case brought by Hawkins challenging the use of PHOs in food, a panel of this court “assume[d] without deciding that Hawkins’s claims are not preempted by federal law.” Hawkins v. AdvancePierre Foods, Inc., 733 F. App’x. 906, 906 (Aug. 10, 2018). The panel affirmed the lower court’s dismissal of the case on the merits. Id. at 906–07. We leave it to the district court on remand to assess that non-precedential decision’s persuasive value and relevance to this case.
general rule has exceptions, but invocation of those exceptions is discretionary.” *Id.*

We decline to exercise our discretion here. The preemption issue was not fully briefed on appeal by either party. For example, the analysis may be different as to purchases prior to the 2015 Final Determination, between the 2015 Final Determination and the passage of the 2016 CAA, and after the passage of the 2016 CAA. These distinctions were not addressed.

Thus, we leave it to the district court on remand to decide in the first instance to what extent, if at all, the state law use claims are federally preempted.11

III

Hawkins has established standing for her label and use claims. Her label claims are not preempted. On remand, the district court shall consider whether the use claims are preempted.

REVERSED AND REMANDED.

11. Kroger brings a plethora of other alternative grounds to affirm that were not addressed by the district court. These arguments, many involving factual allegations, are best presented to the district court in the first instance on remand. See *Winter v. United States*, 244 F.3d 1088, 1092 (9th Cir. 2001) (declining to reach issue “not addressed by the district court” which “involves the resolution of disputed factual issues”).
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Wilber H. Boies and Timothy M. Kennedy, McDermott Will & Emery LLP, Chicago, Illinois; Jessica Mariani, McDermott Will & Emery LLP, Los Angeles, California; Robert Kline, McDermott Will & Emery LLP, Miami, Florida; for Amici Curiae National Legal Aid and Defender Association, Association of Pro Bono Counsel, Legal Aid Association of California and 24 of its member organizations, California Bar Foundation, Equal Rights Advocates, Family and Children’s Law Center, Columbia Legal Services, Hawaii Justice Foundation, Legal Aid Center of Southern Nevada, Montana Justice Foundation, Northwest Immigrant Rights Project, Washoe Legal Services, and William E. Morris Institute for Justice.

OPINION

FRIEDLAND, Circuit Judge:

In this appeal, an objecting class member challenges the district court’s approval of a class action settlement resolving claims that Provide Commerce, Inc. and Regent Group, Inc. (collectively, “Defendants”) enrolled consumers in a membership rewards program without their consent and then mishandled their billing information. The settlement makes available $3.5 million to pay settlement administration costs and refund class members’ enrollment fees, with any remaining funds designated for three cy pres beneficiaries. The settlement also provides that each class member will receive a $20 credit that may be used to purchase additional products from Defendants. It further anticipates that class counsel will receive $8.7 million in attorney’s fees. We vacate the fee award because the district court failed to treat the credits as coupons under the Class Action Fairness Act (“CAFA”) when calculating that award.

We otherwise affirm.

I.

Provide Commerce, Inc. (“Provide”) operates online businesses that sell flowers, chocolates, fruit baskets, and other similar items. According to the Complaint, Plaintiff Josue Romero and seven other class representatives (collectively, “Plaintiffs”) purchased items from a Provide business and were then presented with a pop-up advertisement for $15 off another item from the same website.1 Clicking the pop-up directed Plaintiffs to a different website and instructed them to enter their contact information and click “Accept.” This process (irrespective of whether Plaintiffs entered their contact information or clicked “Accept”) enrolled Plaintiffs in Provide’s membership rewards program. Provide then transmitted Plaintiffs’ payment information to a separate company, Regent Group, Inc. (“Regent”), which proceeded to charge Plaintiffs a $1.95 activation fee and a recurring $14.95 monthly membership fee. Plaintiffs did not consent to joining the rewards program or, by extension, to having their data transferred to Regent. Plaintiffs also never received “the promised coupons, gift codes, or any other savings benefits.”

In 2009, Plaintiffs filed a putative class action against Defendants in the Southern District of California, alleging violations of various state laws arising from Defendants’ operation of their membership rewards program. After more than two years of litigation, including extensive discovery and mediation, the parties agreed to settle. The proposed settlement provided class members with two forms of relief: monetary reimbursement of membership fees upon submission of a claim and a $20 credit.

The settlement established a $12.5 million fund from which Defendants would pay up to $8.7 million in attorney’s fees; $80,000 in enhancement awards to the named plaintiffs; and $200,000 in litigation costs. The approximately $3.5 million remaining would be available to fund the settlement’s administration costs and to reimburse class members for their membership fees “on a pro rata basis up to the full amount owed.” To receive such a refund, class members had to submit a claim affirming that they had neither intended to enroll in the program nor used any program benefits other than the initial discount code. After the refunds were issued, any remaining funds were to be distributed as a cy pres award to San Diego State University, the University of California at San Diego, and the University of San Diego School of Law “for a chair, professorship, fellowship, lectureship, seminar series or similar funding, gift, or donation program … regarding internet privacy or internet data security.”

The settlement also directed Defendants to email every class member a $20 credit that could be used to purchase items on Defendants’ websites. Unlike with the refund, class members were not required to submit a claim to receive the credit. The credits would be fully transferable, but they would include a series of restrictions, including that they would expire one year after their distribution date and could not be used in the lead-up to Christmas, Valentine’s Day, or Mother’s Day. The credits also could not be used for same-day orders, nor could they be combined with other promotions.

In June 2012, the district court preliminarily approved the settlement. The parties informed the court that the class contained approximately 1.3 million consumers who had been...

1. We draw the background facts from Plaintiffs’ Complaint. Because the case settled, the truth of Plaintiffs’ allegations is not at issue.
enrolled in the rewards program at some point since August 2005.

Class members were then notified of the settlement and given a 135-day period to request a refund, during which only about 3,000 class members did so. Their submitted claims requested a total of $225,000 in cash refunds, leaving approximately $3 million of the settlement’s cash fund to be distributed to the cy pres beneficiaries.\(^2\) Separately, class counsel moved for $8.7 million in fees and $200,000 in costs.\(^3\)

In January 2013, the district court held a final settlement approval hearing at which class member Brian Perryman (“Objector”) objected to the settlement. He argued that the attorney’s fee award did not comply with CAFA’s requirements for settlements awarding coupons and that the cy pres award was improper. The court rejected these objections and issued a final order approving both the settlement and class counsel’s accompanying fee request. The district court’s order placed the full settlement value at $38 million, including $12.5 million for the cash fund and $25.5 million for the $20 credits to be distributed to the approximately 1.3 million class members. Objector appealed, and we vacated and remanded for further proceedings in light of our decision in In re Online DVD-Rental Antitrust Litigation (In re Online DVD), 779 F.3d 934 (9th Cir. 2015), which addressed CAFA’s coupon settlement provisions.

On remand, the district court determined that, under In re Online DVD, the credits should not be construed as coupons, and that it was therefore unnecessary to apply CAFA’s requirements for coupon settlements. In the court’s view, it was particularly significant that class members had, by virtue of their inclusion in the class, shown “an interest in getting $15.00 off their next purchase” from Defendants. Considering this factor in conjunction with the holding of In re Online DVD, the court concluded that the “settlement was not a coupon settlement subject to the strictures of section 1712.”

Again using $38 million as the total value of the settlement, the court then approved the fee award based on both percentage-of-recovery and lodestar calculations.\(^4\) Under the percentage-of-recovery method, the court concluded that an $8.7 million attorney’s fee award was reasonable because it represented 23% of the settlement value—below the 25% benchmark typically used in our circuit. The court then cross-

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2. The 135-day claims period was later extended, but it appears from the record and briefing before our court that the number of refund requests did not significantly increase.

3. Under the settlement agreement, “class counsel” refers to the four law firms representing Plaintiffs in this case.

4. Under the “percentage-of-recovery method,” a fee award is calculated as a percentage of the settlement fund. In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 942 (9th Cir. 2011). By contrast, the lodestar method entails “multiplying the number of hours the prevailing party reasonably expended on the litigation … by a reasonable hourly rate.” Id. at 941. The lodestar method then allows the court to “adjust [the lodestar fee] upward or downward” based on a range of considerations, chief among them “the benefit obtained for the class.” Id. at 941–42.
or because the coupons are too small to make it worth their while. See In re Sw. Airlines Voucher Litig., 799 F.3d 701, 706 (7th Cir. 2015) (“The potential for abuse is greatest when the coupons have value only if a class member is willing to do business again with the defendant who has injured her in some way, when the coupons have modest value compared to the new purchase for which they must be used, and when the coupons expire soon, are not transferable, and/or cannot be aggregated.”).

CAFA, however, provides no definition of “coupon,” so courts have been left to define that term on their own, informed by § 1712’s animating purpose of preventing settlements that award excessive fees while leaving class members with “nothing more than promotional coupons to purchase more products from the defendants.” In re Online DVD, 779 F.3d at 950 (quoting S. Rep. No. 109-14, at 15). See In re Online DVD, we outlined three factors to guide this inquiry: (1) whether class members have “to hand over more of their own money before they can take advantage of” a credit, (2) whether the credit is valid only “for select products or services,” and (3) how much flexibility the credit provides, including whether it expires or is freely transferrable. In re Online DVD, 779 F.3d at 951. Applying these factors, we held that a $12 gift card to Walmart, awarded as part of a settlement resolving antitrust claims relating to its DVD rentals and sales, did not qualify as a coupon. Id. at 951–52. We first explained that a “class member need not spend any of his or her own money” to use the gift card given Walmart’s extensive inventory of low-cost products. Id. at 951. Relatedly, the gift card provided “not merely the ability to purchase an entire product as opposed to simply reducing the purchase price, but also the ability to purchase one of many different types of products,” including numerous products unrelated to DVDs. Id. at 952. The gift cards also did not expire and were freely transferrable. Id. at 951. Finally, class members could receive $12 in cash instead of the $12 gift card, if they made a request by mail. Id. at 941. In light of all these factors giving class members significantly more flexibility than typical coupons, we held that the gift cards were not coupons within the meaning of CAFA. Id. at 951–52.

Here, the district court relied on an additional factor not present in In re Online DVD. It held that the credits should not be construed as coupons in part because it concluded that this settlement was “stronger than” the settlement in In re Online DVD in terms of how closely the relief matched class members’ alleged injury. In this case, class members failed to receive a promised credit or received a credit but on terms they had not accepted, and the settlement provided a replacement credit without the unwanted enrollment in its rewards program. But the district court’s inclusion of this factor conflated the coupon analysis with whether the settlement was fair and reasonable. Confronting a similar argument in In re Southwest Airlines Voucher Litigation, the Seventh Circuit held that drink vouchers awarded to settle claims that Southwest improperly stopped accepting certain in-flight drink vouchers were coupons under CAFA. 799 F.3d at 704. Even though class members would receive “essentially complete relief” by obtaining the new drink vouchers to replace their invalidated ones, id. at 711, the court explained that this equivalence bore on the fairness of the settlement—not on whether the vouchers were coupons under CAFA, id. at 706.

Thus, even assuming the district court was correct that “this settlement was specifically tailored to the harm suffered by the class members and the interest they had in receiving” a discount off a future purchase from Defendants’ websites, it does not follow that the full face value of all the $20 credits should be used when evaluating the propriety of the fee award. Regardless of the substance of the underlying claim or injury, CAFA prevents settling parties from valuing coupons at face value without accounting for their redemption rate. Accordingly, the district court erred by incorporating an improper factor into its analysis of whether the credit was a coupon under CAFA. See Enyart, 630 F.3d at 1159 (“If the [district] court failed to [identify the correct legal rule], we must conclude it abused its discretion.” (quoting United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc))).

That brings us to the million—here, multi-million—dollar question: whether Defendants’ credits are coupons. We hold that, applying the correct legal standard, the only logical conclusion is that they are. To begin, the credits are categorically different from the Walmart gift cards. Defendants are decidedly not “giant … retailer[s]” in the mold of Walmart or other similar stores, In re Online DVD, 779 F.3d at 951, and class members can only use the credits to purchase items

6. And to the extent the settling parties are correct that class members have a strong interest in receiving these coupons, the coupon redemption rate should reflect that interest.

7. Thus, even if abuse of discretion review rather than de novo review applies, see supra n.5, we must reverse. As explained below, see supra n.8, the district court lacked support for its conclusion that this settlement was comparable to In re Online DVD in terms of how many items class members could purchase. Because that was the only factor the district court identified as supporting its decision that would be relevant under the correct legal standard, and because that factor lacks evidentiary support, there are no factors remaining that might weigh in favor of categorizing the credits as coupons. Accordingly, there is no need to provide the district court an opportunity to reevaluate whether the credits qualify as coupons. See Apache Survival Coalition v. United States, 21 F.3d 895, 906–07 (9th Cir. 1994) (explaining that we need not remand where the district court abused its discretion by applying the incorrect legal standard if there are no underlying factual disputes and it is in the interest of judicial economy to decide the issue on appeal).
from a limited universe of products: flowers, chocolates, and other similar gifts. This universe is even smaller if confined to products that class members can purchase without spending any of their own money—Defendants only claim to sell “15–25 products” for under $20. And that meager list does not even account for shipping charges. When asked in the fairness hearing whether class members could purchase anything from one of Defendants’ websites for $20 or under if shipping charges are included, counsel responded: “If you include shipping, I’m not sure, but the defendants don’t make money off the shipping.” Regardless of whether money spent on shipping benefits Defendants, however, class members who spend money on shipping are required “to hand over more of their own money before they can take advantage of the coupon, ”In re Online DVD, 779 F.3d at 951.

Moreover, in In re Online DVD, Walmart’s extensive inventory was significant in part because class members could use the gift cards without obtaining the product—DVDs—that led to their suit in the first place. See id. at 952. Here, in contrast, class members cannot use these credits without purchasing an item from Defendants. And, to do so, they must hand over their billing information again to the very company that they believe mishandled that information in the first place, at the very least to pay for shipping. Thus, although class members do not have a product-specific complaint, they cannot reap the benefits of the settlement without reengaging in the same purchasing activity that they believe led to their injury.

The credits at issue here are also far less flexible than those available in In re Online DVD. Although freely transferrable, they expire one year after issuance and have a series of blackout periods, including during the days before Valentine’s Day, Mother’s Day, and other holidays on which consumers most often buy flowers and chocolates. Defendants respond that there is a “reasonable explanation” for those restrictions given their need to preserve their ability to fill and deliver orders in a timely fashion “during peak periods.” Maybe so, but the credits still cannot be used in anywhere near the same way as cash—including because they cannot be used on the dates on which people would be most interested in using them.

Plaintiffs stress that class members here could receive both cash (in the amount needed to refund their membership fees) and a gift card, while class members in In re Online DVD had to choose either a $12 gift card or $12 in cash. See In re Online DVD, 779 F.3d at 952. But the fact that the In re Online DVD plaintiffs had a choice between cash and a gift card worth the same amount made it easier for us to assess the value of the gift cards. Class members who selected gift cards must have valued them at close to face value, because they selected them over essentially the same value in cash.9 See id. at 952 n.11. It was therefore appropriate to treat the In re Online DVD settlement as similar to an all-cash settlement. See id. Here, however, it is impossible to draw the same conclusion—nothing in the record could have given the district court reason to believe that any class member, let alone all class members, would have viewed the $20 credit as equivalently useful to $20 in cash.

For all these reasons, we conclude that the only logical conclusion under the correct legal rule is that these credits are coupons under CAFA.

B.

Because the district court incorporated the full face value of the coupons into both its percentage-of-recovery calculation and lodestar calculus of the attorney’s fee award, this error requires recalculation of the fee award.

When a fee award in a coupon settlement is calculated using the percentage-of-recovery method, CAFA requires that any calculation of the size of the settlement fund—and thus the size of the fee award—be determined using the redemption rate of the coupons. Id. at 949–50; see also 28 U.S.C. § 1712(a) (“If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney’s fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.”).10 Here, the district court approved the settlement under the percentage-of-recovery method on the basis that the $8.7 million award represented only 23% of the total $38 million recovery, which the court viewed as appropriately below the 25% “benchmark” we have generally held to be “reasonable.” In re Bluetooth Headset Prods. Liab. Litig. (In re Bluetooth), 654 F.3d 935, 942 (9th Cir. 2011). But because the $38 million figure did not account for the redemption rate of the credits, it is unclear whether the fee award is in fact a reasonable percentage of the settlement fund. Absent the redemption information, we cannot approve the district court’s percentage-of-recovery evaluation.

The settling parties contend that the award can nevertheless be upheld based on the district court’s lodestar calcula-

8. In light of the undisputed evidence that there were at most 25 and possibly zero products class members could purchase without spending any of their own money, the district court lacked support for its conclusion that this settlement was comparable to the settlement from In re Online DVD with respect to the number of such products. Even putting aside shipping charges, a range of 15–25 products is in a different realm than the enormous number of products that Walmart sells for under $12. Although class members were generally “not limited to [the] purchase of a specific item or set of items,” Defendants’ inventory is simply not comparable to the size or breadth of Walmart’s inventory.

9. The only difference in value between the gift card and the cash award in In re Online DVD was the cost of a stamp. Although a class member could submit a claim for a Walmart gift card online, a claim for cash could only be submitted by regular mail. See In re Online DVD, 779 F.3d at 941.

10. As we have previously, we note that § 1712 did not escape CAFA’s generally “clumsy” and ‘bewildering’ wording.” In re HP Inkjet Printer Litig., 716 F.3d 1173, 1181 (9th Cir. 2013) (quoting Abrego v. Dow Chem. Co., 443 F.3d 676, 681, 686 (9th Cir. 2006)).
tion. Under § 1712(b)(1), which relates to “[o]ther attorney’s fee awards” in settlements involving coupons, if “a portion of the recovery of the coupons is not used to determine the attorney’s fee to be paid to class counsel, any attorney’s fee award shall be based upon the amount of time class counsel reasonably expended working on the action.” Section 1712(b)(2) further provides that “[n]othing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney’s fees.”1 CAFA thus allows courts to use the lodestar approach to determine any portion of attorney’s fees not attributable to coupons in mixed settlements that award both coupons and non-coupon relief.

In In re HP Inkjet Printer Litigation (In re HP), 716 F.3d 1173 (9th Cir. 2013), we explained that CAFA does not, however, permit a district court to approximate “the ultimate value of [a] settlement, and then award[] fees in exchange for obtaining coupon relief without considering the redemption value of the coupons.” Id. at 1186. In particular, in a mixed settlement, a district court may use the lodestar approach provided that it does so without reference to the dollar value of the settlement fund—or, of course, it may reference the dollar value of the settlement fund if it accounts for the redemption rate of the coupons in calculating that dollar value. We held that the district court in In re HP had erred when it set the lodestar fee award in reference to “the ‘ultimate value’ of th[e] settlement”—which, as calculated there, included the face value of the coupons not adjusted by their redemption rate. Id.

Here, the district court similarly went astray when it reverse-engineered the lodestar multiplier using a value of the settlement that included the full face value of all the $20 coupons. The court started with a lodestar fee of $4.3 million, calculated based solely on class counsel’s billing rates and hours worked. But the court then worked backward from class counsel’s proposed $8.7 million fee award, which the court had already deemed appropriate as a percentage of the total dollar value of the settlement fund. To do so, the court applied a multiplier of 2.1 to match the lodestar fee with the

11. Section 1712 contains three subsections that govern the calculation of attorney’s fees. See 28 U.S.C. § 1712(a)–(c). In In re HP Inkjet Printer Litigation, we explained that § 1712(a) “requires that ‘any attorney’s fee’ awarded for obtaining coupon relief be calculated using the redemption value of the coupons” and thus mandates the use of the percentage-of-recovery method for any portion of the attorney’s fees in a class action settlement that are “attributable to” the award of coupons. 716 F.3d at 1183–84 (quoting 28 U.S.C. § 1712(a)). By contrast, we explained that § 1712(b) “come[s] into play when a settlement contains both coupon relief and equitable relief,” and the court uses the lodestar method as any part of its fee calculation. Id. at 1185 (emphasis added). By its terms, § 1712(c) provides further instruction regarding settlements that include “an award of coupons to class members and also provide[] for equitable relief, including injunctive relief.” 28 U.S.C. § 1712(c). Although settlements like this one that award coupons and monetary relief are not expressly mentioned in In re HP, it must be the case that § 1712(b) also encompasses the use of the lodestar method for this type of mixed settlement. Such settlements would otherwise exist in a no-man’s land with no guidance from § 1712.

12. We recognize that “the benefit obtained for the class” is the “[f]oremost” consideration for a district court in assessing whether it should adjust a lodestar fee. In re Bluetooth, 654 F.3d at 942. Likewise, the results obtained may factor into a district court’s assessment of the hours reasonably expended on the litigation. See Hensley v. Eckerhart, 461 U.S. 424, 433–34 (1983); Chalmers v. City of Los Angeles, 796 F.2d 1205, 1211 (9th Cir. 1986), opinion amended on denial of reh’g, 808 F.2d 1373 (9th Cir. 1987). But it may be possible in some cases for a district court to evaluate the reasonableness of the hours expended and whether “the level of success achieved by the plaintiff” warrants an upward or downward departure without considering the award of coupons at all. See id. at 942 (quoting McCown v. City of Fontana, 565 F.3d 1097, 1102 (9th Cir. 2009)). In other words, a district court may be able to determine an appropriate lodestar fee and whether a departure is called for by assessing how fully an individual class member is compensated for his or her injuries, without reference to the size of the class or the size of the settlement fund as a whole. On the other hand, if attorneys argue for or against a lodestar fee or departure based at all on the benefits of the coupons obtained, then the district court must consider the redemption rate when ruling on their request. Of course, because adjustments to the lodestar fee should be “the exception rather than the rule,” Fischel v. Equitable Life Assurance Soc’y of the U.S., 307 F.3d 997, 1007 (9th Cir. 2002) (quoting D’Emmanuele v. Montgomery Ward & Co., 904 F.2d 1379, 1383 (9th Cir. 1990), overruled on other grounds by City of Burlington v. Dague, 505 U.S. 557 (1992)), courts should not need to use a departure at all in most cases.

13. Because the settlement dictates that the $20 credits will not be distributed until after the final settlement approval, it is impossible to calculate their redemption rate while the settlement is still pending. But, as we explained in In re HP, there are ways for the parties to address this challenge. See In re HP, 716 F.3d at 1186 n.19. As one example, “a fees award can be bifurcated or staggered to take into account the speculative nature of at least a portion of a class recovery.” Id. Alternatively, the parties could amend the settlement so that the redemption rate will be ascertainable before the entry of final judgment.
I.

Cy pres provides a mechanism for distributing unclaimed funds “to the ‘next best’ class of beneficiaries.” Nachshin v. AOL, LLC, 663 F.3d 1034, 1036 (9th Cir. 2011). Under the cy pres approach, “class members receive an indirect benefit (usually through defendant donations to a third party) rather than a direct monetary payment.” Lane v. Facebook, Inc., 696 F.3d 811, 819 (9th Cir. 2012). The settlement agreement here provides for any unclaimed funds to be distributed to San Diego State University, the University of California at San Diego, and the University of San Diego School of Law to support scholarship in the area of internet privacy and data security. Objector argues that the approximately $3 million remaining in the settlement fund should have been distributed to the class instead.

We conclude that it was reasonable for the district court to approve the use of a cy pres distribution. The availability of cy pres as a mechanism to distribute unclaimed funds rests on the premise that class action settlements will sometimes have just that—unclaimed funds. A settlement is not fatally flawed solely because class members did not deplete the entirety of the settlement fund. If it were, cy pres would not exist. Objector suggests that the parties should have spent more on supplemental notice and outreach to non-claimants. But that contention could be made about any class action with remaining funds, and Objector has not identified any flaws in the notice procedure used in this case.

Nor was it an abuse of discretion for the district court to reject Objector’s two proposed alternatives for distributing the remaining funds. Objector first suggests that the settlement should have distributed the remaining funds to the existing claimants. But the district court was under no obligation to adopt a distribution approach that might overcompensate claimants, all of whom will already be fully reimbursed for the money they lost through the rewards program.

Objector alternatively suggests that the remaining funds should have been distributed pro rata to non-claimant class members, whom Defendants will have to identify to distribute the coupons. It might be technically feasible to distribute the funds in this manner. But given that the existing fund contains approximately $3 million, and that there are over a million non-claimants, each non-claimant’s recovery would be “de minimis.” Lane, 696 F.3d at 821, particularly once the costs of distribution are deducted. Even if the district court substantially reduces the attorney’s fee award, the amount each non-claimant might receive compared to the administrative costs of distribution prevents Objector from showing that the parties’ resort to cy pres was inappropriate.

2.

The recipients of cy pres funding should be selected in light of “the objectives of the underlying statute(s)” and “the interests of the silent class members.” Nachshin, 663 F.3d at 1039. The court has “broad discretionary powers in shaping” a cy pres award. See Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1307 (9th Cir. 1990). We therefore review the selection of cy pres recipients for an abuse of discretion. Nachshin, 663 F.3d at 1038.

Objector argues that, even if a cy pres distribution was permissible here, these universities were inappropriate recipients because (i) all three are located in San Diego, even though the case involves a nationwide class; and (ii) three of the attorneys working on the case graduated from the University of San Diego School of Law. We disagree on both counts.

i.

Objector’s geographic challenge fails because these beneficiaries have a nationwide reach sufficient to justify their receipt of the cy pres award. Although the universities are all based in San Diego, it was reasonable for the district court to conclude that “the … funded academic programs will have a nation-wide impact.” The award is designed to support scholarship in internet privacy and data security—topics of national scope. That the research will be spearheaded by scholars in San Diego in no way means that its impact will be confined to San Diego. In addition, Objector’s singular focus on geography ignores the touchstone of the inquiry: whether an award bears a “substantial nexus to the interests of the class members.” Lane, 696 F.3d at 821; see also In re Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 36 (1st Cir. 2012) (“It is not the location of the recipient which is key; it is whether the projects funded will provide ‘next best’ relief to the class.”). Because this award funds research that is directly responsive to the issues underlying this litigation, the physical location of the beneficiaries is not an overriding consideration.

Objector’s contrary argument based on Nachshin v. AOL, LLC is unavailing. In that case, which involved a nationwide challenge to AOL’s online advertising practices, the settlement awarded its remaining funds to three cy pres recipients: the Legal Aid Foundation of Los Angeles, the Los Angeles and Santa Monica chapters of the Boys and Girls Club of America, and the Federal Judicial Center Foundation. 663 F.3d at 1037. Reversing the district court’s approval of that settlement, we explained that the missions of the selected organizations had nothing “to do with the objectives of the underlying statutes on which [p]laintiffs base[d] their claims.” Id. at 1040. As a result, the award failed to “account for the nature of the plaintiffs’ lawsuit, the objectives of the underlying statutes, and the interests of the silent class members, including their geographic diversity.” Id. at 1036.

That is not the case here. This award promotes a national dialogue on improving internet privacy and data security practices. It accordingly comports with our suggestion in Nachshin that the parties identify beneficiaries that will “work to protect internet users” from the types of predatory

14. And to the extent the universities host seminars that are only accessible to those in San Diego, the equivalent would be true of any cy pres recipient, national or otherwise, that held in-person events at its headquarters.
behavior underlying the lawsuit. See id. at 1041. As a result, the district court did not abuse its discretion in approving the selection of these institutions.

ii.

Second, the alumni connections of three of the (many) involved attorneys did not impermissibly taint the selection process. In some cases, “the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety.” Id. at 1039. But that specter is far less haunting where, as here, the award is tethered to class members’ interests and underlying claims. See id. Moreover, Objector has not suggested that there is a continuing relationship between the attorneys and their alma mater, nor has he challenged the parties’ descriptions of what those institutions will do to further the interests of the class. Objector’s bare allegation that the institutions were selected for an improper reason is insufficient to show that it was an abuse of discretion for the district court to approve their selection.

D.

Finally, given both the structure of this settlement agreement and the focus of Objector’s challenges, we hold that it is unnecessary to reverse the entire settlement approval in conjunction with our vacatur of the fee award. See Rodriguez v. W. Publ’g Corp., 563 F.3d 948, 969 (9th Cir. 2009) (reversing a fee award but otherwise affirming the settlement approval). The parties’ settlement agreement expressly does not depend on approval of the fee award, and it provides that any decrease in the award “shall only serve to increase” the funds distributed to class members, as well as to the cy pres beneficiaries if necessary. Furthermore, because the claims period is now closed, we know that there are ample funds available to fully satisfy all submitted claims for reimbursement. Changing the size of the fee award would not affect those reimbursements. Class members will similarly receive the $20 coupons regardless of the size of the fee award. From class members’ perspective, the only thing that reducing the fee award would do is to increase the amount ultimately paid to the cy pres recipients. We can therefore be confident that class members would not have made different decisions had they known that the fee award would be recalculated, and also that the district court would not have made a different approval decision as to whether the settlement was fair, reasonable, and adequate.

Moreover, other than the challenges to the cy pres award that we rejected above, Objector cabined his arguments on appeal to attacks on the fee award. We are therefore not presented here with a general challenge to the fairness of the settlement under Federal Rule of Civil Procedure 23(e)(2). Absent an explanation of why the settlement as a whole does not pass muster, we will not assume that we must automatically reverse the settlement in conjunction with vacating the fee award.15

III.

For the foregoing reasons, we VACATE and REMAND the award of attorney’s fees but otherwise AFFIRM approval of the settlement.

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15. In re Bluetooth is not to the contrary. Although there we reversed an entire settlement based on our decision to vacate the fee award, the settlement included a “kicker” provision under which “all fees not awarded would revert to defendants rather than be added to the cy pres fund or otherwise benefit the class.” In re Bluetooth, 654 F.3d 947. As we explained, “the kicker deprives the class of [its] full potential benefit if class counsel negotiates too much for its fees.” Id. at 949. In contrast, any reduction in attorney’s fees in this case will benefit the class. Moreover, the district court’s evaluation of the fee award in In re Bluetooth was far more deficient than that here. As we explained in that decision, “our discomfort” stemmed in part from “the absence of [an] explicit calculation or explanation of the district court’s” attorney’s fee decision; there was no lodestar fee for us to even evaluate. Id. at 943–44. This lack of explanation undermined our confidence in the district court’s settlement approval more generally. See id. at 949. In contrast, although the district court here erred by concluding that the credits did not qualify as coupons—which, to be sure, had a significant impact on the court’s evaluation of the final fee award—it otherwise calculated the fee award in accordance with our caselaw and then justified its approval of that award.
California Courts of Appeal

Cite as 18 C.D.O.S. 9954

SARAH L. KERLEY, as Conservator and Co-administrator, etc., Plaintiff and Respondent,

v.

MARCIE ANN WEBER, Defendant and Appellant.

No. B282202, B283256
In The Court of Appeal of the State of California
Second Appellate District
Division Two
(Los Angeles County Super. Ct. No. YS024039 & BP097749)
APPEALS from a judgment and an order of the Superior Court of Los Angeles County. Stuart M. Rice and William A. MacLaughlin, Judges. Affirmed in part, reversed in part, and remanded with directions.
Filed October 3, 2018

COUNSEL

Haney & Young, Gregory L. Young and Steven H. Haney for Defendant and Appellant.

Hill, Farrer & Burrill, Julia L. Birkel, Dean E. Dennis, and Clayton J. Hix for Plaintiff and Respondent.

OPINION


Weber’s victim was an elderly woman, Philippa Johnston, who died before the end of the criminal trial. Respondent Sarah L. Kerley, Johnston’s conservator and the co-administrator of her estate, filed the two actions underlying this consolidated appeal. In one action (the Probate Action, Superior Court No. BP097749), Kerley filed a petition under Probate Code section 850 et seq. seeking civil damages against Weber. In the other action (the Restitution Action, Superior Court No. YS024039), Kerley obtained a judgment based on the $700,000 restitution award in the Criminal Action (the Restitution Judgment).

In the Probate Action, Weber appeals from the judgment, which awarded damages equal to twice the amount of the restitution award (i.e., $1.4 million) under section 859. In the Restitution Action, Weber appeals from an order for the sale of a residence to satisfy the Restitution Judgment.

Although the two actions are separate, Weber makes duplicative and overlapping arguments in each appeal. She argues that: (1) the trial court in the Probate Action erred in entering judgment based upon estoppel theories without permitting a trial on the actual amount of Johnston’s loss; (2) the court in the Probate Action erred in concluding that double damages were permitted under section 859 based upon Weber’s criminal conviction without a separate finding of bad faith; (3) the double damages award in the Probate Action should have taken account of sums that Weber had already paid in restitution; and (4) restitution payments that Weber made before the restitution award was reduced to a judgment should have been credited to the principal amount of the restitution amount rather than to accumulated prejudgment interest.

We reject all of these arguments except the last. Pursuant to the terms of a stipulation concerning the amount of restitution in the Criminal Action, Weber’s prejudgment restitution payments should have been credited against principal rather than interest. However, even after adjusting the remaining principal on the Restitution Judgment to account for prejudgment payments, Weber apparently still owes a substantial sum.

We therefore remand for the trial court in the Restitution Action to calculate the amount remaining due on the Restitution Judgment. Assuming that calculation confirms that an amount remains due, we affirm the trial court’s order permitting the sale of Weber’s residence to satisfy the remaining judgment amount.

We affirm the judgment in the Probate Action.

BACKGROUND

1. Weber’s Conviction and the Restitution Judgment

After Weber waived jury and agreed to a court trial, she was convicted of one count of theft from an elder or dependent adult under Penal Code section 368, subdivision (d). (Weber, supra, slip opn. at p. 2.) Weber’s victim, Johnston, was an elderly woman with dementia.

Weber was a paralegal trained in probate law who obtained a power of attorney to handle Johnston’s financial affairs. Weber gave herself a “constant stream of gifts.” Although

1. We ordered the appeals consolidated for purposes of oral argument and decision.
2. We therefore refer to Kerley in her representative capacity as the respondent.
3. Subsequent undesignated statutory references are to the Probate Code.

4. We take no position on whether the sale of Weber’s residence may be an appropriate remedy to enforce the judgment in the Probate Action.
5. Facts concerning Weber’s offense are taken from Judge Van Sicklen’s oral findings in announcing his decision in the criminal trial on April 28, 2010.
Weber was a fiduciary, she did not act on Johnston’s behalf “at all.” Weber and her family diverted Johnston’s telephone calls and mail and isolated Johnston from her friends and her sister. Johnston was “completely dependent upon the Webers” who “completely isolated her essentially for three years from any outside contact.”

Judge Van Sicklen did not “try[] to analyze the exact amounts of money” that Weber took. However, by adding the rough amounts of Weber’s distributions “you come up to about 740 or so thousand dollars” from “money controlled by Mrs. Weber.” In addition to finding Weber guilty under Penal Code section 368, subdivision (d), the judge found true that Weber took property exceeding $150,000 for purposes of a sentencing enhancement under former Penal Code section 12022.6, subdivision (a)(2).

Weber was sentenced on October 18, 2010. As part of her sentence, she was ordered to “make restitution to the victim, the estate of Lucille Johnston,” pursuant to Penal Code section 1202.4, subdivision (f), “in an amount to be determined.”

At a restitution hearing on December 3, 2010, the parties informed the court that they had agreed on a restitution amount of $700,000. The parties stated that prior restitution payments that Weber had made would be set off against that amount, leaving a principal balance of $414,545.99.

Kerley subsequently filed the Restitution Action to enforce the restitution award. On July 11, 2012, Kerley obtained an “order for restitution and abstract of judgment” in that action for the $700,000 restitution amount pursuant to Penal Code section 1214 (the Restitution Judgment). The order also awarded 10 percent annual interest from March 15, 2006, the date of the loss.

Weber appealed the award of interest. In Weber, this court held that the interest award was proper. We concluded that interest was mandatory under Penal Code section 1202.4, subdivision (f)(3)(G). (Weber, supra, slip opn. at p. 5.) We further held that the July 2012 Restitution Judgment was a “valid modification of the restitution order.” (Id. at p. 6.)

On April 14, 2017, the trial court issued an order for the sale of a Manhattan Beach residence belonging to Weber to enforce the Restitution Judgment. That order is the subject of this appeal.

2. The Probate Action

Kerley originally filed the Probate Action in 2006, seeking recovery of the money that Weber and family members took from Johnston along with enhanced damages pursuant to section 859. After extensive pretrial proceedings, the action was set for trial.

In ruling on pretrial motions in limine, the trial court decided that the results of the criminal trial and Weber’s stipulation to the amount of restitution essentially resolved all the issues for trial. As a result of that ruling, trial took less than an hour.

The court issued a written decision on April 4, 2017. The court found that Weber’s criminal conviction established all the elements of elder abuse under Welfare & Institutions Code section 15610.30. The court also found that, based on her stipulation to the $700,000 restitution amount, Weber was estopped from claiming that she took less than that amount from Johnston. Based upon Kerley’s agreement that damages could be calculated based upon that amount of loss, the trial court awarded double damages in the amount of $1.4 million under section 859.

The court subsequently issued a judgment in that amount, plus an award of attorney fees and costs. The judgment noted that the compensatory damages awarded against Weber in the Restitution Action “of $700,000.00 plus interest, are not a component of this Judgment and are within the jurisdiction of that court.”

DISCUSSION

1. The Trial Court in the Probate Action Correctly Ruled That Weber Is Estopped From Contesting Liability or the Amount of Johnston’s Loss

The trial court in the Probate Action was correct in deciding that, under principles of collateral estoppel, Weber’s conviction under Penal Code section 368, subdivision (d) established her civil liability for elder financial abuse under Welfare and Institutions Code section 15610.30. Under the doctrine of collateral estoppel, any issue that is “necessarily decided in prior litigation ‘is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action.’” (Teitelbaum Furs, Inc. v. Dominion Ins. Co. (1962) 58 Cal.2d 601, 604, quoting Bernhard v. Bank of America Nat'l Trust & Sav. Asso. (1942) 19 Cal.2d 807, 810.) Because the relevant facts are not in dispute here, we independently review the trial court’s decision to apply collateral estoppel. (Roos v. Red (2005) 130 Cal. App.4th 870, 878 (Roos).)

Applying collateral estoppel to establish liability in a civil case based upon a prior felony conviction is appropriate when the prior criminal case established all the elements of the civil claims. (Miller v. Superior Court (1985) 168 Cal.App.3d 376, 381–382.) Here, in finding Weber guilty under Penal Code section 368, subdivision (d) the trial court necessarily found all the elements of financial abuse of an elder under Welfare and Institutions Code section 15610.30.

Civil liability for financial abuse of an elder may be established by proof that a person “[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder . . .

6. We noted that, in stating that the restitution amount was $700,000, the Restitution Judgment was “intended to summarize the total amount of restitution awarded” and did not “purport to abrogate the stipulation with respect to the offset.” (Weber, supra, slip opn. at p. 9, fn. 4.)

7. On December 14, 2017, the court issued a second amended judgment that included attorney fees in the amount of $978,698.41 and costs of $162,381.25. We grant Kerley’s request to take judicial notice of this judgment.
for a wrongful use or with intent to defraud, or both.” (Welf. & Inst. Code, § 15610.30, subd. (a)(1).) An elder is any California resident over 65 years old. (Welf. & Inst. Code, § 15610.27.) In finding Weber guilty, the trial court necessarily found that Weber committed “theft, embezzlement, forgery, or fraud,” with respect to the property of an elder (which Penal Code section 368, subdivision (g) also defines as a person over 65). (Pen. Code, § 368, subd. (d).) Thus, Weber’s criminal conviction established all the elements for liability under Welfare and Institutions Code section 15610.30.

The trial court also correctly ruled that collateral estoppel precluded Weber from arguing that she took less than $700,000 from Johnston. Johnston admitted that she took at least that amount by stipulating to the restitution award.

Weber argues that the restitution amount was not a “sum adjudicated” but was simply “a sum that . . . Weber settled upon to pay in the criminal case.” This ignores that the stipulated restitution amount was reduced to an order that was equivalent to a judgment. (See Pen. Code, § 1202.4, subd. (i) “[A restitution order imposed pursuant to subdivision (f) shall be enforceable as if the order were a civil judgment”]; Pen. Code, § 1214, subd. (b) “[the order to pay restitution . . . is deemed a money judgment if the defendant . . . stipulated to the amount of the restitution ordered”].) Findings on issues that are “actually and necessarily included” in a judgment may be given collateral estoppel effect, regardless of whether the judgment is the result of a stipulation. (Code Civ. Proc., § 1911; Wittman v. Chrysler Corp. (1988) 199 Cal.App.3d 586, 591–592.) The stipulated Restitution Judgment in this case necessarily decided that Weber stole at least $700,000 from Johnston.

The trial court also properly applied the doctrine of judicial estoppel to establish that Weber stole at least $700,000. The doctrine of judicial estoppel “prohibits a party from asserting a position in a legal proceeding that is contrary to a position he or she successfully asserted in the same or some earlier proceeding.” (Owens v. County of Los Angeles (2013) 220 Cal.App.4th 107, 121 (Owens).)

The elements of judicial estoppel are: “(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.” (Owens, supra, 220 Cal.App.4th at p. 121, quoting Jackson v. County of Los Angeles (1997) 60 Cal.App.4th 121.) If these elements are met, a trial court has discretion in whether to apply the doctrine. (Owens, at p. 121.)

An appellate court reviews the findings of fact on which the application of judicial estoppel is based under the substantial evidence test. (Owens, supra, 220 Cal.App.4th at p. 121.) If the relevant facts are undisputed, the appellate court independently reviews whether the elements of judicial estoppel are met. (Ibid.) The trial court’s discretionary decision whether to apply the doctrine is of course reviewed for abuse of that discretion. (Ibid.)

All the elements of judicial estoppel are met here. Weber’s stipulation to the amount of restitution was a litigation position that Weber adopted concerning the amount of Johnston’s loss. Weber was successful in asserting that position when the trial court in the Criminal Action accepted the stipulation. And, as the trial court in the Probate Action pointed out, Weber obtained a benefit from that position, because the evidence in the Criminal Action could have supported a larger restitution award based on the money that Weber took from Johnston. Finally, Weber’s stipulation that she took $700,000 from Johnston was totally inconsistent with her position in the Probate Action that the amount she stole was less. We find no error in the trial court’s decision that the elements of judicial estoppel are present here, and no abuse of discretion in the court’s decision to apply judicial estoppel based upon these facts.

Weber argues that the trial court’s ruling precluding her from contesting liability and damages erroneously deprived her of her right to a jury trial in the Probate Action. We reject that argument on several grounds.

First, Weber was not denied a jury trial on the issue of liability. Weber had a right to a jury trial in the Criminal Action, which she waived. (Weber, supra, slip opn. at p. 2.) Applying the results of that trial to the Probate Action under principles of collateral estoppel simply precludes her from relitigating an issue that she already had a full and fair opportunity to contest in a jury trial if she had chosen to do so.

Second, if the elements of collateral estoppel are met, judicial rulings from prior proceedings in criminal actions may be given preclusive effect in a subsequent civil case without violating the jury trial right. As a general rule, “notwithstanding the state constitutional jury trial guarantee, the lack of a jury trial on contested factual issues in one proceeding does not preclude application of collateral estoppel in a subsequent proceeding.” (See Roos, supra, 130 Cal.App.4th at p. 881, citing People v. Sims (1982) 32 Cal.3d 468, 484, fn. 13.) In McGowan v. City of San Diego (1989) 208 Cal.App.3d 890, the court held that collateral estoppel may be applied in a civil action to determine issues that were decided in a prior judicial ruling on a motion to suppress in a criminal case. (Id. at p. 895.) Citing Parklane Hosiery Co., Inc. v. Shore (1979) 439 U.S. 322, 337, the court rejected the claim that

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8. The Penal Code provision under which the trial court ordered restitution authorizes restitution for losses beyond money that is actually taken from the victim. (Pen. Code, § 1202.4, subd. (f)(3)(A)–(K).) However, that provision also directs a trial court to identify, to the extent possible, each loss to which the restitution order pertains. (Pen. Code, § 1202.4, subd. (f)(3).) The trial court did so here in its order for restitution and abstract of judgment entered on July 11, 2012. The only loss identified in that order was for the “value of property stolen or damaged.”

9. As mentioned, the trial court in the Criminal Action identified losses of about $740,000.
arguments concerning monetary damages could not be col-
laterally estopped by such a ruling because doing so would
deny the estopped party’s jury trial right. (McGowan, at p.
897.) Similarly, here, a prior stipulated judicial order on
the amount of loss in the Criminal Action, later reduced to
a judgment, may be given collateral estoppel effect despite
Weber’s jury trial right in the Probate Action.

Third, as discussed above, the doctrine of judicial estop-
pel applies to positions taken in any prior judicial or quasi-
judicial administrative proceeding. (Owens, supra, 220 Cal.
App.4th at p. 121.) The doctrine is intended to “maintain the
integrity of the courts and to protect the parties from unfair
strategies.” (Ibid.) That principle applies whether or not the
first proceeding included a jury trial right.

Weber also argues that the court’s decision to preclude her
under estoppel principles from trying the amount of John-
ston’s loss was erroneous because the decision conflicted
with a prior ruling by another judge on summary judgment.
There was no error. A trial court has inherent authority to re-
visit its rulings on a summary judgment motion and to reach a
different conclusion in subsequent proceedings. (Le Francois
v. Goel (2005) 35 Cal.4th 1094, 1107.)

Weber’s argument that Kerley’s success in obtaining the
Restitution Judgment precluded her from pursuing the Pro-
bate Action is similarly meritless. Weber claims that separate
judgments for the restitution award and for damages in the
Probate Action violate the general rule against multiple judg-
ments concerning the same obligation. Weber cites Vigilant
the proposition that a victim of a crime must elect whether to ac-
cept a judgment for criminal restitution or pursue a separate
civil action for damages.

Weber misreads Vigilant. That case actually holds that a
victim has a right to both restitution and a separate civil judg-
ment. (See Vigilant, supra, 175 Cal.App.4th at p. 445 “[Since
restitution orders and civil judgments are issued for different
purposes, a victim suffering from economic losses as a result of
a criminal act has a right to both”].) Vigilant recognized that a
duplicate recovery for the same losses would be im-
proper. (See id. at p. 446, citing Pen. Code, § 1202.4, subd.
(j).) But duplicate recovery is not an issue here, as the judg-
ment in the Probate Action specifically excluded the amount
awarded in restitution.

2. No Separate Bad Faith Finding Was
Necessary Here for Double Damages
Under Section 859

Weber argues that the trial court erred in not permitting a
trial on the issue of whether she acted in bad faith. We reject
the argument based upon the language of section 859.

Section 859 provides, in relevant part, that: “[i]f a court
finds that a person has in bad faith wrongfully taken, con-
cealed, or disposed of property belonging to a conservatee,
a minor, an elder, a dependent adult, a trust, or the estate of
a decedent, or has taken, concealed, or disposed of the prop-
erty by the use of undue influence in bad faith or through the
commission of elder or dependent adult financial abuse, as
defined in Section 15610.30 of the Welfare and Institu-
tions Code, the person shall be liable for twice the value of
the property recovered by an action under this part . . . The rem-
edies provided in this section shall be in addition to any other
remedies available in law to a person authorized to bring an
action pursuant to this part.” (Italics added.)

Thus, section 859 uses three different clauses separated by
the conjunction “or” to describe three different categories of
conduct that can support double damages: (1) taking property
in bad faith; (2) taking property by the use of undue influence
in bad faith; and (3) taking property through elder or depen-
dent adult abuse as defined in Welfare and Institutions Code
section 15610.30. Because the third clause applied here, no
separate finding of bad faith was necessary. (See Hill v. Su-
perior Court (2016) 244 Cal.App.4th 1281, 1287 (“the last
alternative of section 859 allows for double damages without
any requirement that petitioners show any aggravated mis-
conduct—only financial elder abuse”].)

As discussed above, Weber’s prior criminal conviction
established all the elements of liability under Welfare and
Institutions Code section 15610.30. The trial court there-
fore properly awarded damages equal to twice the $700,000
that Weber stipulated she took from Johnston. (See Estate
of Kraus (2010) 184 Cal.App.4th 103, 106 [affirming judg-
ment ordering the return of $197,402 to an estate as well as
statutory double damages of $394,804].) 10

3. The Trial Court Did Not Err in
Calculating Damages Under Section 859
Based on the Total Amount of Money That
Weber Stole

Weber argues that the trial court should have deducted
some or all of the money that she paid in restitution before
calculating double damages under section 859. We disagree.

Weber cites no support for an interpretation of section 859
that would permit a wrongdoer to avoid the statutory penalty
of double damages by beginning to make restitution after a
criminal conviction. The payments that Weber made were
hardly voluntary; restitution was required after her convic-

10. Section 859 authorizes damages of “twice the value of the
property recovered by an action under this part [i.e., sections 850–
859].” (§ 859, italics added.) Thus, the trial court was not quite ac-
curate in stating in its written decision that section 859 authorizes statu-
tory damages “for twice the value of the property taken.” However, in
the context of this case the difference between the amount of “property
taken” and the “value of the property recovered by an action under
this part” is immaterial. (Ibid.) Kerley initially sought to recover John-
ston’s actual loss under section 850 along with double that amount un-
der section 859. The trial court’s decision in the Probate Action clear-
ly determined that Kerley was entitled to recover the $700,000 that
Weber took from Johnston. That amount of actual loss was excluded
from the final judgment in the Probate Action only to avoid a double
recovery, as the restitution judgment already gave Kerley the right to
recover the $700,000. In light of this procedural history and the trial
court’s decision, the stipulated $700,000 restitution sum amounted to
“property recovered by an action under this part.” (§ 859.)
The interpretation that she suggests would be inconsistent with the purpose of section 859 to punish and deter the wrongdoer. (Estate of Young (2008) 160 Cal.App.4th 62, 88.)

4. Restitution Payments That Weber Made Before the Restitution Judgment Should Have Been Credited Against Principal Rather Than Prejudgment Interest

The trial court in the Restitution Action rejected Weber’s argument that her residence should not be sold to satisfy the Restitution Judgment because the judgment had already been fully satisfied. The court found that Weber’s payment calculations “fail to account for payments that must be applied to interest but instead credits all pre-2012 payments against the principal.”

Weber argues that the payments she made before the Restitution Judgment was entered should have been applied to principal rather than prejudgment interest. Weber claims that, if those payments are credited against principal, she has already paid the amount of the judgment.

Kerley argues that the prejudgment payments were properly applied to prejudgment interest, not principal, but that even if those payments are credited to principal Weber still owes money on the judgment. Kerley claims that Code of Civil Procedure section 695.220, subdivision (b) requires that Weber’s payments be applied first against prejudgment interest and then to the principal amount owing. Because this is a legal issue, we review it de novo. (Lozada v. City and County of San Francisco (2006) 145 Cal.App.4th 1139, 1149.)

Code of Civil Procedure section 695.220 provides that “[m]oney received in satisfaction of a money judgment” should first be applied to fees and accumulated interest. (Code Civ. Proc. § 695.220, subds. (a)–(c).) Thereafter, “[a]ny remaining money is to be credited against the principal amount of the judgment remaining unsatisfied.” (Code Civ. Proc., § 695.220, subd. (d).)

Payments made before a judgment is entered may be payments on an existing debt, but they cannot be payments “in satisfaction” of a judgment that does not yet exist. In Roden v. AmerisourceBergen Corp. (2010) 186 Cal.App.4th 620 (Roden), the court held that Code of Civil Procedure section 695.220 did not control the application of payments made before a judgment was entered. (Id. at pp. 661–662.) Rather, the issue of whether those payments should be applied against interest or principal was governed by Civil Code section 1479, which applies “[w]here a debtor under several obligations to another, does an act, by way of performance, in whole or in part, which is equally applicable to two or more of such obligations.” (Ibid.)

Civil Code section 1479 provides that a debtor may specify how his or her “performance” should be credited by communicating his or her intention to the creditor at the time of performance. In the absence of such a specification, the creditor may choose to apply a payment to any obligation then due. Only if “neither party makes such application within the time prescribed herein” do default rules apply which require payments to be credited first against interest due and then to principal. (Ibid.)

In Roden, the court applied these rules in holding that a prejudgment payment made by a party should be credited against principal and interest in the fashion that the party specified when it made the payment. (Roden, supra, 186 Cal. App.4th at p. 662.) That same principle applies here.

The record in the case reflects the parties’ agreement that Weber’s payments prior to the Restitution Judgment should be credited against principal. In informing the court at the December 3, 2010 hearing that the parties had agreed to the restitution amount of $700,000, the parties explained that Weber “is entitled to off set for the cashier’s check she’s already tendered in the total amount of $285,454.01, leaving a balance due of $414,545.99.” The parties also stated on the record that the lawyer for Johnston’s estate had agreed to that amount. The court’s minute order confirms that “[t]he parties agree that there is an off set for the money previously paid in the amount of $285,454.01 . . . leaving a balance of $414,545.99.”

The parties’ agreement to the set off is consistent with the fact that, until the July 2012 Restitution Judgment was entered, the restitution award did not include interest. (Weber, supra, slip opn. at p. 4.) The Restitution Judgment in fact was a “modification of the restitution order” reflecting the statutory requirement for an award of interest. (Id. at p. 6.) Because no obligation had yet been imposed for prejudgment interest at the time of Weber’s prejudgment payments, the parties obviously understood that those payments would be credited against the principal amount of the restitution award.

The parties’ stipulation that Weber’s prejudgment payments should be set off against principal reflects the understanding of both debtor and creditor concerning how Weber’s “performance should be applied” under Civil Code section 1479. We therefore conclude that, pursuant to that section, Weber’s prejudgment payments should be credited against principal rather than interest.

The parties dispute the effect of this ruling. As mentioned, Weber claims that, if her prejudgment payments are credited against principal, she has already satisfied the judgment. Kerley claims that “Weber’s calculations omit prejudgment interest entirely.”11 Kerley submits a calculation as an exhibit to her brief determining the amount remaining on the judgment as of October 5, 2016 (the date the writ of execution was issued).

Assuming that the payment dates and amounts and accumulated interest calculations on Kerley’s exhibit are correct, the exhibit appears to be methodologically sound. However, in light of the factual dispute between the parties on the effect

11. Kerley is correct in arguing that Weber is precluded from arguing that prejudgment interest from the date of loss is improper. That issue was decided against Weber in this court’s prior opinion in Weber, supra, B244008.
on the amount owed of crediting prejudgment payments to principal, we leave to the trial court to determine whether a sum remains owing on the Restitution Judgment and, if so, the amount of that sum.

DISPOSITION

1. The judgment in the Probate Action, Los Angeles Superior Court No. BP097749, is affirmed.

2. The trial court’s April 14, 2017 order for the sale of a dwelling in the Restitution Action, Los Angeles Superior Court No. YS024039, is reversed with respect to the trial court’s ruling that Weber’s restitution payments prior to the entry of the Restitution Judgment on July 11, 2012, should be credited against prejudgment interest. The case is remanded to the trial court with directions to calculate the amount remaining on the Restitution Judgment after crediting Weber’s payments prior to July 11, 2012, to the principal amount of the restitution obligation. If that calculation confirms that money remains owing on the Restitution Judgment, Kerley may proceed with the sale of Weber’s residence. In all other respects the trial court’s order is affirmed.

The parties are responsible for their own costs on appeal.

CERTIFIED FOR PUBLICATION.

LUI, P. J.

We concur: ASHMANN-GERST, J., CHAVEZ, J.

COUNSEL

Barbosa Group and Patricia Barbosa for Plaintiff and Appellant.

Everett L. Skillman; Bremer, Whyte, Brown & O’Meara, John V. O’Meara, Arash S. Arabi, and Lital Rebecca Ruimy for Defendants and Respondents.

OPINION

I. INTRODUCTION

Plaintiff Oscar Ruiz is a disabled person who uses a guide dog. He alleged that defendants Edward Lopez and Musclewood Investment Properties, LLC (Musclewood)1 violated his rights under the Disabled Persons Act (Civ. Code, § 54 et seq.) (DPA),2 by allowing their guard dog to interfere with and attack his guide dog. Plaintiff contends the trial court erred by sustaining a demurrer to his cause of action under the DPA without leave to amend. We agree and reverse. We also reverse the order granting the motion to strike.

II. BACKGROUND

A. Procedural History Prior to First Amended Complaint

On October 14, 2015, plaintiff filed a complaint against defendants for violation of the DPA, the Bane Act, and common law and per se negligence.3 Defendants demurred, and the trial court sustained the demurrer as to the first and second causes of action with leave to amend.

1. Musclewood’s correct name is “Musclewood Property Investments, LLC.”

2. Further statutory references are to the Civil Code unless otherwise indicated. “Part 2.5 of division 1 of the Civil Code, currently consisting of sections 54 to 55.3, is commonly referred to as the ‘Disabled Persons Act,’ although it has no official title.” (Munson v. Del Taco, Inc. (2009) 46 Cal.4th 661, 674, fn. 8.)

3. Nicole Bautista was also a plaintiff in the action below, but does not appeal.
B. First Amended Complaint

On June 3, 2016, plaintiff filed his first amended complaint, asserting causes of action for violation of the DPA and common law and per se negligence only. According to the factual allegations in the first amended complaint, which we accept as true (Evans v. City of Berkeley (2006) 38 Cal.4th 1, 6), plaintiff has been legally blind since the age of eight. Plaintiff used a guide dog named Carbon. Lopez was the owner of Musclewood, a business located in Bell Gardens, California. Defendants operated a truck hauling business that required trucks to enter and exit the property through a large metal gate. Defendants had a guard dog that they permitted to be loose on the property.

Defendants also contended that in order to state a claim unalleging that defendants maintained a policy or structure that denied a disabled person equal access. That defendants maintained a policy or structure that denied a disabled person equal access.

Defendants argued that since plaintiff failed to state a DPA cause of action without leave to amend. The trial court also dismissed the DPA cause of action with prejudice. The dismissal was entered the same day. Plaintiff appeals from the order sustaining the partial demurrer.

On June 21, 2016, defendants demurred to the DPA cause of action. Defendants asserted that plaintiff had failed to allege that defendants’ policies, of allowing their guard dog to roam unleashed and opening the property gate without controlling their guard dog, interfered with plaintiff’s rights. Finally, plaintiff asserted that a violation under the DPA does not require any discriminatory intent by defendants.

On June 21, 2016, defendants moved to strike portions of plaintiff’s first amended complaint, including: the first cause of action for violation of the DPA; prayer for injunctive relief; prayer for treble damages; and prayer for attorney fees. Defendants argued that since plaintiff failed to state a DPA cause of action, the injunctive relief, treble damages, and attorney fees requested should be stricken as these remedies are not available for a negligence cause of action.

On September 13, 2016, the trial court conducted a hearing on the demurrer and motion to strike. The court, citing plaintiff’s original complaint, found plaintiff had failed to allege that he was denied equal access because of his disability. The trial court thus sustained the partial demurrer to the DPA cause of action without leave to amend. The trial court also granted the motion to strike in its entirety.

On December 22, 2016, plaintiff moved to dismiss the action with prejudice. The dismissal was entered the same day. Plaintiff appeals from the order sustaining the partial demurrer.

III. DISCUSSION

A. Standard of Review

“On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (Zelig v. County of Los Angeles (2002) 27 Cal.4th 1112, 1126 [Zelig].) Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. (Ibid.; Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 966-967 (Aubry).) When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. (Zelig, supra, 27 Cal.4th at p. 1126.)” (City of Dinuba v. County of Tulare (2007) 41 Cal.4th 859, 865.)

“In ruling on a demurrer, the court may “take judicial notice of a party’s earlier pleadings . . .” [Citations.]” (Wilkinson v. Zelen (2008) 167 Cal.App.4th 37, 43.) “The judgment must be affirmed ‘if any one of the several grounds of demurrer is well taken. [Citations.]’” (Aubry, supra, 2 Cal.4th at p. 967.)

Plaintiff responded that he was not pursuing a claim based on section 54.1, but instead alleged violations of sections 54 and 54.3. Alternatively, and even assuming it was necessary to allege a denial of equal access, plaintiff argued his allegations were sufficient because blind people are less able than others to defend themselves from dog attacks. Plaintiff also argued that he had sufficiently alleged that defendants’ policies, of allowing their guard dog to roam unleashed and opening the property gate without controlling their guard dog, interfered with plaintiff’s rights. Finally, plaintiff asserted that a violation under the DPA does not require any discriminatory intent by defendants.

On June 21, 2016, defendants moved to strike portions of plaintiff’s first amended complaint, including: the first cause of action for violation of the DPA; prayer for injunctive relief; prayer for treble damages; and prayer for attorney fees. Defendants argued that since plaintiff failed to state a DPA cause of action, the injunctive relief, treble damages, and attorney fees requested should be stricken as these remedies are not available for a negligence cause of action.

On September 13, 2016, the trial court conducted a hearing on the demurrer and motion to strike. The court, citing plaintiff’s original complaint, found plaintiff had failed to allege that he was denied equal access because of his disability. The trial court thus sustained the partial demurrer to the DPA cause of action without leave to amend. The trial court also granted the motion to strike in its entirety.

On December 22, 2016, plaintiff moved to dismiss the action with prejudice. The dismissal was entered the same day. Plaintiff appeals from the order sustaining the partial demurrer.

4. The prior pleadings are not included in the record on appeal.
B. Rules of Statutory Construction

We review questions of law and statutory interpretation de novo. (People v. Kurtenbach (2012) 204 Cal.App.4th 1264, 1276.) “Under settled canons of statutory construction, in construing a statute we ascertain the Legislature’s intent in order to effectuate the law’s purpose. [Citation.] We must look to the statute’s words and give them their usual and ordinary meaning. [Citation.]” (People v. Robinson (2010) 47 Cal.4th 1104, 1138.) “In doing so, however, we do not consider the statutory language ‘in isolation.’ [Citation.] Rather, we look to ‘the entire substance of the statute . . . in order to determine the scope and purpose of the provision . . . .’ [Citation.] . . . We must harmonize ‘the various parts of a statutory enactment . . . by considering the particular clause or section in the context of the statutory framework as a whole.’” (People v. Mendoza (2000) 23 Cal.4th 896, 907-908.) “The statute’s plain meaning controls the court’s interpretation unless its words are ambiguous.” (People v. Robinson, supra, 47 Cal.4th at p. 1138.)

C. Plaintiff Stated a Valid Claim for Relief under Section 54.3

Section 54.3, subdivision (a) describes a cause of action against: “[a]ny person or persons, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities as specified in [s]ections 54 and 54.1 or otherwise interferes with the rights of an individual with a disability under [s]ections 54, 54.1 and 54.2[,]” Plaintiff sufficiently alleged a cause of action under section 54.3.

1. Disability

“‘Disability’ means any mental or physical disability as defined in [s]ection 12926 of the Government Code.” (§ 54, subd. (b)(1).) Plaintiff alleged that he was legally blind, thus satisfying this element. (Gov. Code, § 12926, subd. (m)(1).)

2. Denial or interference

Section 54.3 defines “[i]nterference” to include “preventing or causing the prevention of a guide dog . . . from carrying out its functions in assisting a disabled person.” The complaint described a guide dog’s functions: “Guide dogs are given to blind persons by non-profit organizations that specifically breed and train dogs to work as guide dogs, and are certified by the state and licensed to pair guide dogs with disabled persons . . . . These guide dogs are trained to be under the tight control of their handler/blind person, and ignore distractions, including any other dogs, children, and provide minimal protection by alerting a blind person[.] of perceived danger. Guide dogs are specifically trained not to react aggressively in any situation, as this would disqualify the dog from being able to stay with a blind person if the guide dog is being aggressive . . . . Any guide dogs who are distracted in public, or act aggressively in any situation may result in the dog being retired as a guide dog.” Plaintiff further alleged that as a result of defendants’ guard dog’s attacks, plaintiff’s guide dog was “now nervous and afraid around other dogs and [did] not properly follow commands.” Thus, plaintiff sufficiently alleged interference.

3. Enjoyment of public facility

The plain meaning of “enjoyment,” is “possession and use.” (Black’s Law Dict. (10th ed. 2014) p. 647, col. 1.) Although section 54 does not specifically define “public facilities,” it lists a number of locations to which individuals have the right to full and free use, and that list includes sidewalks. (§ 54, subd. (a).) Here, plaintiff alleged that he and his dog had been attacked six times by defendants’ dog, while walking on the sidewalk. He further alleged that as a result, he no longer walked on that portion of the sidewalk. Plaintiff sufficiently alleged a deprivation of his enjoyment of the sidewalk.

4. Intent

We need not decide for purposes of resolving plaintiff’s appeal from the demurrer ruling here whether section 54.3 should be construed to include an intent element, i.e., that liability may only attach where a plaintiff alleges not only interference with admittance to or enjoyment of public facilities, but also an intent to so interfere. Defendants’ guard dog’s repeated attacks on plaintiff’s guide dog and defendants’ alleged knowledge of those attacks permits a reasonable inference of intent here.

5. Unequal access

Defendants contend that plaintiff failed to allege he was denied “equal access” to the sidewalk. Section 54.3, however, unlike section 54.1, does not require an allegation of unequal access. “We may not insert words into a statute under the guise of interpretation . . . .” (Schroeder v. Irvine City Council (2002) 97 Cal.App.4th 174, 194; accord, Kovacevic v. Avalon at Eagles’ Crossing Homeowners Assn. (2010) 189 Cal.App.4th 677, 685; see Code Civ. Proc., § 1858 [when construing statute, judge is not to insert what has been omitted].) Because we find plaintiff sufficiently alleged a violation of section 54.3 for interference with admittance to or enjoyment of a public facility, we need not discuss the parties’ other contentions. (See Shaw v. County of Santa Cruz, supra, 170 Cal.App.4th at p. 259.)

D. Plaintiff Sufficiently Alleged Standing for Damages

Defendants next assert plaintiff lacks standing to recover damages under section 54.3. Defendants cite the following language from Reycraft v. Lee (2009) 177 Cal.App.4th 1211, 1218:}

5. Defendants contend plaintiff could not state a cause of action for violating section 54.1. Plaintiff, however, stated in his opposition to the demurrer and reiterates on appeal that he does not seek to pursue a violation of section 54.1. Thus, we need not discuss whether plaintiff stated a cause of action under that section. (See Shaw v. County of Santa Cruz (2008) 170 Cal.App.4th 229, 259.)
1224 (Reycraft), in support: “Standing under section 54.3 of the DPA is established where a disabled [person] can show he or she actually presented himself or herself to a business or public place with the intent of purchasing its products or utilizing its services in the manner in which those products and/or services are typically offered to the public and was actually denied equal access on a particular occasion.” There is no dispute that plaintiff never sought defendants’ services as a truck hauling business. Defendants’ position is nonetheless unavailing.

In Reycraft, a disabled plaintiff sued a mobile home park, alleging it had denied her full and equal access to a swimming pool that did not have a lift or other device to help her get into or out of the pool. (177 Cal.App.4th at p. 1216.) The plaintiff’s sister-in-law was a tenant of the mobile home park. (Id. at p. 1215.) The mobile home park’s rules required that guests register and pay a $10 fee to use the pool. (Id. at p. 1215.) The plaintiff neither registered nor paid the guest fee. (Id. at p. 1216.) The court noted that “the Park does not fall outside section 54.1 simply because an individual who went there did not pay the rent or fees and/or did not follow the rules. However, any such facts could be relevant to determining whether and to what extent a particular disabled individual suffered recoverable damages as a result of a violation of section 54.1.” (Id. at p. 1218.) The court continued, “Standing under section 54.3 of the DPA is established where a disabled plaintiff can show he or she actually presented himself or herself to a business or public place with the intent of purchasing its products or utilizing its services in the manner in which those products and/or services are typically offered to the public and was actually denied equal access on a particular occasion.” (Id. at p. 1224.)

Based on these facts, the trial court concluded that the plaintiff did not have standing to sue for damages because she had not sufficiently demonstrated “an actual denial or interference with access on a particular occasion, as opposed to merely becoming aware of discriminatory conditions in the pool area of the [mobile home park].” (Id. at p. 1225.) The court cited Urhausen v. Long’s Drug Stores California, Inc. (2007) 155 Cal.App.4th 254 (Urhausen) in support. (Reycraft, supra, 177 Cal.App.4th at pp. 1222-1223.) The plaintiff in Urhausen had sought damages against the owner and operator of a drug store for an alleged violation of section 54.1, namely, a denial of her full and equal access to the drugstore. (Urhausen, supra, 155 Cal.App.4th at p. 261.)

We do not read Reycraft and Urhausen for the proposition that plaintiffs may not sue someone other than the owner or operator of the public facility described in section 54, for violating a plaintiff’s rights under the DPA. A defendant’s ability to control a particular location may ultimately be relevant to the question of liability, that is, whether defendant interfered with plaintiff’s admission to or enjoyment of a public facility. But nothing in the language of section 54.3 suggests that damages may not be recovered against non-owners or operators. To the contrary, section 54.3 broadly and plainly provides: “[a]ny person or persons, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities as specified in sections 54 and 54.1 or otherwise interferes with the rights of an individual with a disability under sections 54, 54.1 and 54.2 is liable for . . . actual damages . . . .”

“Under California law, a plaintiff generally has standing if he or she is able to allege some invasion of a legally protected interest.” (Reycraft, supra, 177 Cal.App.4th at p. 1220.) In our view, Reycraft does not require that a plaintiff who sues for interference of his rights must present himself to defendant’s business, with the intent to utilize defendant’s services. Instead, a plaintiff who seeks damages for a violation of section 54.3 must establish that he “presented himself” to a “public place” with the intent of “utilizing its services in the manner in which those . . . services are typically offered to the public and was actually denied” admission or enjoyment (or had his admission or enjoyment interfered with) on a particular occasion. (Reycraft, supra, 177 Cal.App.4th at p. 1224.) Here, as alleged, plaintiff presented himself at a public place (the sidewalk) with the intent of using it in the manner it is typically offered to the public (walking on it for travel), and actually had his enjoyment interfered with on six occasions. Plaintiff therefore has standing to sue for damages.

E. Motion to Strike

We review an order granting a motion to strike for abuse of discretion. (Cal-Western Business Services, Inc. v. Corning Capital Group (2013) 221 Cal.App.4th 304, 309.) “However, the proper interpretation of a statute, and its application to undisputed facts, presents a question of law subject to de novo review.” (Ibid.) Because plaintiff stated a cause of action for violation of the DPA, the trial court committed reversible error by striking the first cause of action, the prayer for damages (including treble damages), and the prayer for attorney fees. (§ 54.3, subd. (a).) Plaintiff has failed to argue how the trial court erred in striking the prayer for injunctive relief, which is not available under section 54.3. We thus treat the point as waived. (Cahill v. San Diego Gas & Electric Co. (2011) 194 Cal.App.4th 939, 956; Kelly v. CB&I Constructors, Inc. (2009) 179 Cal.App.4th 442, 451-452.)

IV. DISPOSITION

The orders sustaining the demurrers and granting the motion to strike are reversed. This matter is remanded for further proceedings consistent with this opinion. Plaintiff is entitled to recover his costs on appeal from defendants.

KIM, J.

We concur: BAKER, Acting P.J., MOOR, J.
October 9, 2018

COUNSEL

Herzog, Yuhas, Ehrlich & Ardell, Ian Herzog, Thomas F. Yuhas, and Evan D. Marshall for Appellant Herzog, Yuhas, Ehrlich & Ardell, APC.

Nelson & Franekel and Gretchen M. Nelson for Amici Curiae Consumer Attorneys of California on behalf of Appellant Herzog, Yuhas, Ehrlich & Ardell, APC.

Kiesel Law and Paul R. Kiesel for Amici Curiae Kiesel Law and Paul R. Kiesel on behalf of Appellant Herzog, Yuhas, Ehrlich & Ardell, APC.

Buchalter, Harry W.R. Chamberlain II; Glickman & Glickman and Steven C. Glickman for Plaintiffs and Respondents Nicolas Schulz, Tristan Schulz, Florian Schulz, and Lukas Schulz, Minors, by Silke Schulz, their guardian ad litem.

ORDER

THE COURT:

The opinion in the above-entitled matter filed on September 5, 2018, was not certified for publication in the Official Reports. For good cause, it now appears that the opinion should be published in the Official Reports and it is so ordered.

ROTHSCHILD, P. J., JOHNSON, J., BENDIX, J.

OPINION

This case arises out of a wrongful death lawsuit, in which appellant Herzog, Yuhas, Ehrlich & Ardell, APC (Herzog) represented plaintiffs and respondents Silke Schulz and her four young children.1 Silke’s husband Rainer died when the plane he was piloting crashed just before landing at an airport in Germany. Herzog obtained a settlement of $18,125,000 from the manufacturers of the aircraft and from the providers of some of the aircraft’s systems, maps, and charts, all of whose negligence allegedly contributed to the crash. After a trial to determine the allocation of the settlement funds among Silke, her four young children with Rainer, Rainer’s two adult daughters from a previous marriage, and Asia Today, the trial court allocated virtually all the settlement proceeds to the minor children. The court awarded Herzog 10 percent of the children’s funds as attorney fees, rather than the 40 percent called for in the contingency fee agreement or the 31 percent requested by Herzog. Herzog contends that the trial court abused its discretion by reducing its fee to 10 percent. We agree and reverse.

FACTS AND PROCEEDINGS BELOW

At the time of his death, Rainer was the president and coowner with Silke of Asia Today. Silke had previously worked alongside Rainer at Asia Today, but she left the business in 2010 when her first son Lukas was born. In 2011, the family expanded to add triplets. The triplets were born prematurely, and two suffered serious, permanent disabilities. At the time of his death, Rainer was primarily responsible for the financial support of Silke and the four children. Rainer also had two adult daughters from a prior marriage, both of whom had been receiving financial support from him at the time of his death.

On March 1, 2012, Rainer was piloting a small Cessna jet aircraft owned by Asia Today with a co-pilot and three other passengers onboard on their way to Egelsbach airport near Frankfurt, Germany. As the plane began its final approach, it struck a grove of trees on a hilltop approximately two miles from the runway, crashing and killing everyone on board.

Before hiring Herzog, Silke consulted with aviation experts to determine the cause of the crash. Two experts consulted the preliminary report from the BFU, the German government agency responsible for investigating air accidents, and concluded that pilot error was the primary cause of the crash.2 The experts concluded that Rainer disregarded standardized operating procedures and failed to fly a stabilized approach, with the result that the plane flew too fast too close to the airport, and when difficulty arose, he and his co-pilot

1. Herzog also represented Rainer Schulz’s company, Asia Today, which claimed indemnity based on its settlement with the estate of Rainer’s co-pilot, who also died in the crash. The primary plaintiff in the case, Steven Spector, was appointed to act as administrator of Rainer’s estate. Spector is not a party to this appeal. Throughout this opinion, we refer to Rainer and Silke Schulz by their first names in order to distinguish them. No disrespect is intended.

2. The BFU report itself did not reach a conclusion regarding the cause of the crash. The record includes one expert report, but it does not specify whether the report came from Silke’s experts or from those hired by the estate of the aircraft’s co-pilot, whose representatives sued Asia Today and ultimately settled their claims in a separate case.
did not have the situational awareness or time to recover. Attorneys for the estate of Rainer’s co-pilot also attributed insufficient visibility as another potential cause of the crash. The Egelsbach airport lacks the technology to allow pilots to land relying solely on instruments, meaning that they must maintain visual contact with the runway in order to land. At the time of the accident, cloud cover may have been as low as 400 to 800 feet.

Herzog agreed to represent Silke, her sons, and Asia Today on a contingency basis. Herzog hypothesized that the Cessna’s enhanced ground proximity warning system was not functioning properly, and that as a result, a “[p]ull-up” warning sounded only two seconds before impact. Herzog believed that if the warning system had been functioning properly, it would have begun sounding alarms 14 seconds before impact, which would have allowed enough time for Rainer to avoid crashing. Herzog also suspected that the aviation charts on which Rainer relied, which did not fully describe the hills nor chart the crash site elevation, may have contributed to the crash.

Silke, together with Klaus Hoffman, the chief executive officer of Asia Today, negotiated the terms of Herzog’s representation, with the participation of Asia Today’s corporate attorneys. According to Herzog, Silke and Hoffman considered several attorneys to represent them in the case; they had the resources to pay for legal representation on an hourly basis, but chose a contingency arrangement because of, among other reasons, the risk that the plaintiffs might not be able to recover enough to warrant the expense of hourly fees. According to Herzog, the other attorneys Silke spoke with would not take the case on a contingency basis. In addition to the causation risk, Silke was aware that the defendants might attempt to remove the case to Germany. Rainer and Silke were German nationals, the chart manufacturer was a German entity, and the accident had occurred in Germany. According to Herzog, removal to Germany would likely reduce the potential value of the case to the plaintiffs, as damages awards in Germany are typically smaller than in United States courts. Respondents do not challenge this assertion.

The fee agreement that Herzog negotiated with Hoffman and Silke called for Herzog to receive 31 percent of any settlement funds if the case settled at least 30 days before trial, and 40 percent if it settled later. In discovery, plaintiffs learned that the chart manufacturer had surveyed the area where the crash took place a few months before the accident, but had not revised its charts until after the crash. Herzog also discovered that the manufacturer of the plane’s guidance software had released a software update shortly after the sale of the aircraft, but the update was never installed on Asia Today’s plane. The Cessna service bulletin listed the software update as “[o]ptional” rather than “[r]ecommended or “[m]andatory,” and did not describe the safety enhancements in the update. Herzog’s experts claimed that, if the update had been installed, the guidance system would have issued visual and audio warnings 16 seconds before the crash, allowing Rainer time to abort the landing. Flight records indicated that the guidance system did not issue any such warnings until two seconds before the crash.

After approximately 18 months of litigation, and a few days before trial was scheduled to begin, the parties agreed to settle the case for an unallocated $18,125,000. In the case of any wrongful death award, including one obtained through settlement, the trial court must apportion the award among the claimants. (Code of Civ. Proc., § 377.61; Corder v. Corder (2007) 41 Cal.4th 644, 653-654.) In any case in which settlement proceeds are paid to a minor, the court must approve the attorney fees paid out of the minor’s share. (See Prob. Code, §§ 3600-3601.)

Herzog proposed that the court allocate 65 percent of the proceeds, or $11,781,250, to Silke and Asia Today, and divide the remaining 35 percent, or $6,343,750, equally among the four children. Herzog requested 31 percent of the amount allocated to the children as attorney fees, and informed the court that it would collect attorney fees from Silke of approximately 30 percent of the amount allocated to her. Herzog proposed that Rainer’s two adult children from a prior marriage receive no money. Silke had previously purchased their interests in Rainer’s estate, and she incorrectly believed this included their right to recover from the wrongful death lawsuit.

The daughters did not know about the wrongful death suit until the case was well underway. They did not contest the settlement, but did disagree with their exclusion from the allocation of the proceeds. Silke reached a settlement with the daughters for their claims, which the court accepted. The court ultimately rejected Herzog’s proposed allocation and, in April 2016, issued a statement of decision apportioning all of the settlement proceeds to the four children, less one dollar, which the court allocated to Silke. The court rejected Herzog’s claim for 31 percent of the children’s share of the settlement and instead awarded Herzog 10 percent. The court acknowledged that Herzog had done “a good job in investigating [the] case” and realized “a substantial sum.” On the other hand, the court noted that the case did not have to be tried and faulted Herzog for failing to notify the adult daughters of the case earlier. The court concluded that this “was either negligent or a highly questionable tactical decision, which caused much unnecessary litigation and delays.”

After the trial court issued its statement of decision, Herzog withdrew from representation of Silke and her children due to the conflict of interest regarding the fee. Herzog moved for a new trial on the issue of attorney fees, alleging that the court had not made adequate findings to support the reduction in its attorney’s fees. Silke and the children opposed the motion, arguing that Herzog had forfeited this argument by

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3. The proposed settlement does not specify the percentage to be paid to Asia Today, as opposed to Silke.
failing to object to the statement of decision. The trial court denied the motion.

DISCUSSION

Herzog contends that the trial court abused its discretion when it awarded attorney fees of only 10 percent of the total value of the settlement and asks that we order the trial court to award it 31 percent of the children’s portion, rather than remanding the case to the trial court to reconsider its ruling. We agree that the trial court abused its discretion but we decline to determine in the first instance what fee would be appropriate under California Rules of Court, rule 7.955. Rather, that is a matter in the first instance for the trial court to exercise its discretion.

I. Background on Approving a Settlement Involving Minors

In any case in which a trial court approves a settlement involving the payment of funds to a minor, the court must make an order for the payment of reasonable attorney fees. (See Prob. Code, §§ 3600-3601.) Rule 7.955 of the California Rules of Court establishes the procedure the court must follow and factors it may consider in determining whether an attorney’s proposed fee is reasonable. We review the trial court’s decision regarding attorney fees for abuse of discretion. (Thayer v. Wells Fargo Bank (2001) 92 Cal.App.4th 819, 832-833.) This is a deferential standard of review, but “reversal is required where there is no reasonable basis for the ruling or when the trial court has applied the wrong test to determine if the statutory requirements were satisfied.” (Flannery v. California Highway Patrol (1998) 61 Cal. App.4th 629, 634.)

California Rules of Court, rule 7.955(a) provides that, in the absence of a fee agreement previously approved by the court, “the court must use a reasonable fee standard when approving and allowing the amount of attorney’s fees payable from money or property paid or to be paid for the benefit of a minor.” (Cal. Rules of Court, rule 7.955(a)(1).) In determining whether a proposed fee is reasonable, “[t]he court must give consideration to the terms of any representation agreement made between the attorney and the representative of the minor . . . and must evaluate the agreement based on the facts and circumstances existing at the time the agreement was made.” (Cal. Rules of Court, rule 7.955(a)(2).)

Rule 7.955(b) of the California Rules of Court also provides a “nonexclusive” list of factors the court may consider in determining a reasonable attorney’s fee. The first of these factors is “[t]he fact that a minor . . . is involved and the circumstances of that minor.” (Cal. Rules of Court, rule 7.955(b)(1).) The remaining factors pertain mostly to the nature of the legal work involved. Thus, a court may consider “[t]he amount of the fee in proportion to the value of the services performed” (Cal. Rules of Court, rule 7.955(b)(2)), “[t]he novelty and difficulty of the questions involved and the skill required to perform the legal services properly” (Cal. Rules of Court, rule 7.955(b)(3)), and “[t]he amount involved and the results obtained” (Cal. Rules of Court, rule 7.955(b)(4)). Other factors pertain to other aspects of the representation, including “[t]he time limitations or constraints imposed by the representative of the minor . . . or by the circumstances” (Cal. Rules of Court, rule 7.955(b)(5)); “[t]he nature and length of the professional relationship between the attorney and the representative of the minor” (Cal. Rules of Court, rule 7.955(b)(6)); “[t]he experience, reputation, and ability of the attorney or attorneys performing the legal services” (Cal. Rules of Court, rule 7.955(b)(7)); and “[t]he time and labor required” (Cal. Rules of Court, rule 7.955(b)(8)). In addition, the court may consider factors relating to the minor’s representative, including “[t]he informed consent of the representative of the minor” (Cal. Rules of Court, rule 7.955(b)(9)); “[t]he relative sophistication of the attorney and the representative of the minor” (Cal. Rules of Court, rule 7.955(b)(10)); and “[t]he likelihood, if apparent to the representative of the minor . . . when the representation agreement was made, that the attorney’s acceptance of the particular employment would preclude other employment” (Cal. Rules of Court, rule 7.955(b)(11)). The court may also consider “[w]hether the fee is fixed, hourly, or contingent” (Cal. Rules of Court, rule 7.955(b)(12)) and, if contingent, the court may consider “(A) [t]he risk of loss borne by the attorney; [¶] (B) [t]he amount of costs advanced by the attorney; and [¶] (C) [t]he delay in payment of fees and reimbursement of costs paid by the attorney” (Cal. Rules of Court, rule 7.955(b)(13)(A)(C)). Finally, the court may consider “[s]tatutory requirements for representation agreements applicable to particular cases or claims.” (Cal. Rules of Court, rule 7.955(b)(14).)

II. APPLICATION TO THIS CASE

California Rules of Court, rule 7.955 does not dictate a presumptively reasonable percentage or mathematical method of determining the appropriate attorney fees under a contingency agreement. Indeed, in adopting the rule, the Judicial Council explicitly preempted local rules regarding attorney fees for minors, many of which had established a baseline recovery of 25 percent.4 The parties do not provide any argument to suggest that any particular percentage is appropriate for all cases. We acknowledge that what is reasonable in applying the factors in California Rules of Court, rule 7.955 in any particular case may comprise a range of percentages. Under the facts of this case, however, 10 percent was not within that reasonable range. Although the trial court would be acting within its discretion to award less than 31 percent, we note that 31 percent is not out of line with awards in class actions, which, like this case, involve attorney fees to be paid by a protected class and that require court approval.

Thus, our Supreme Court has upheld a decision to approve a class action settlement providing that plaintiff receive one-third of a $19 million settlement. (See Laffitte v. Robert Half

4. Even if there is no benchmark starting point for attorney fees in cases under California Rules of Court, rule 7.955, a court may of course reasonably determine that 25 percent is an appropriate percentage in a given case.
The Ninth Circuit deems 25 percent of the total recovery pool its standard starting point for attorney fees in class-action settlements. (See In re Bluetooth Headset Products Liability (9th Cir. 2011) 654 F.3d 935, 942.) Some California courts have also found this guideline reasonable in class actions. (See, e.g., Consumer Privacy Cases (2009) 175 Cal.App.4th 545, 557, fn. 13; Lealao v. Beneficial California, Inc. (2000) 82 Cal. App.4th 19, 24, fn. 1.)

Here the trial court’s full statement on the matter is as follows: “Turning to the issue of attorney’s fees, the Court is not bound by a contingency agreement when considering the best interests of the minors. Attorney fees must be carefully scrutinized and adjusted if warranted. Here, the attorneys hired by Silke did a good job in investigating this case. And, with the tremendous assistance of a settlement judge, a substantial sum was realized. On the other hand, the case did not have to be tried. Moreover, the attorneys’ failure to notify [the adult daughters] of their claims until the eve of trial—some 18 months after the case was filed—was either negligent or a highly questionable tactical decision, which caused much unnecessary litigation and delays. The Court concludes that a 10% award of contingency fees is fair and proper.” The court went on to suggest that Silke was free to pay Herzog “whatever sum she feels is reasonable. But paying these attorneys their requested $5 million in fees out of the settlement proceeds would be excessive, to the substantial detriment of Rainer’s sons and contrary to this Court’s duty [to] assure that no injustice is done to them.”

We conclude the trial court gave too little consideration to California Rules of Court, rule 7.955(a)(2), which required it to take into account the terms of Herzog’s representation agreement with Silke from the perspective of when the agreement was signed. In addition, the court did not acknowledge the factors listed in California Rules of Court, rule 7.955(b). Although these factors are not mandatory, they provide a guide to the considerations relevant to determining whether a fee protects the interests of a minor while allowing an attorney to obtain a fair recovery. Instead of balancing the relevant factors, the court gave overwhelming weight to a single concern, the expense of the children’s extensive medical needs.

California Rules of Court, rule 7.955 requires a trial court, in determining reasonable attorney fees, to balance an attorney’s interest in fair compensation with the protection of the interests of a minor client. Thus, a trial court “must give consideration to the terms of any representation agreement made between the attorney and the representative of the minor or person with a disability and must evaluate the agreement based on the facts and circumstances existing at the time the agreement was made.” (Cal. Rules of Court, rule 7.955(a)(2), italics added.) Among the considerations is the length of the attorney’s delay in receiving payment and risk of obtaining nothing at all. (See Cal. Rules of Court, rule 7.955(b)(13)). In addition, the rule states that “the value of the services” (Cal. Rules of Court, rule 7.955(b)(2)), “the skill required to perform the legal services properly” (Cal. Rules of Court, rule 7.955(b)(3)), the attorney’s “experience, reputation, and ability” (Cal. Rules of Court, rule 7.955(b)(7)), and “[t]he time and labor required” (Cal. Rules of Court, rule 7.955(b)(8)) are all relevant factors.

All of these factors support a recovery greater than 10 percent. One of the two attorneys who primarily worked on the case, Ian Herzog, had 47 years of experience in aviation accident cases, and the other, Thomas Yuhas, had 37 years of experience. Both attorneys also have many years of experience as pilots, which undoubtedly gave them insight as to the causes of the crash. In this case, both sides agree that the risk of loss was substantial. When viewed from the perspective of the time it was signed, the representation agreement thus realistically evaluated the high risk that there could be no recovery at all or one substantially lower than was achieved.

Herzog increased its risk by advancing more than $300,000 in costs in the case. Silke and Asia Today reimbursed some of those expenses many months later, but Herzog incurred at least $83,829.53 in expenses for which the firm was not entitled to reimbursement if it did not win a recovery. And very importantly, all parties agree that Herzog obtained a very good recovery for its clients considering the circumstances of the case.

California Rules of Court, rule 7.955 also contains protections to ensure that attorneys do not take advantage of their minor clients. A court considering attorney fees may take into consideration “[t]he informed consent of the representative of the minor” (Cal. Rules of Court, rule 7.955(b)(9)) and “[t]he relative sophistication of the attorney and the representative of the minor or person with a disability” (Cal. Rules of Court, rule 7.955(b)(10)). The record demonstrates that Silke, who after Rainer’s death took a major role in the management of Asia Today, was sophisticated. She also was assisted by corporate counsel and the chief executive officer of Asia Today in negotiations with Herzog. She had options other than using a contingent fee lawyer because she had sufficient resources to hire attorneys by the hour. According to Herzog, the clients elected to hire an attorney on a contingency basis because of the significant risk involved in the case, and because they wanted an attorney who had “skin in the game.”

As important and relevant to the factors in California Rules of Court, rule 7.955, no other attorneys Silke had contacted would take the case on a contingency basis. Moreover, the fee percentages were within the range commonly accepted at the time for adult plaintiffs.

As justification for reducing Herzog’s fee, the trial court cited the needs of Silke’s children, in particular those suffering from severe disabilities. Thus, the court noted that according to one expert, the children would likely incur medical expenses totaling $76 million over the course of their lives, and that the total value of the settlement would not be sufficient to cover all these expenses. The court concluded that it
“must assiduously protect these minors to the extent possible given the amount of settlement proceeds to be allocated.”

We accept that a child’s needs are a relevant and important factor in determining a reasonable attorney fee—California Rules of Court, rule 7.955(b)(1) states that the court may consider “[t]he fact that a minor . . . is involved and the circumstances of that minor.” This single factor, however, cannot overwhelm all other considerations. Indeed, an overly strong emphasis on the client’s medical needs when determining attorney fees could have the perverse effect of reducing access to the courts to the neediest. If attorneys know that courts are likely to drastically reduce their contingency fee awards irrespective of the other considerations in California Rules of Court, rule 7.955, it will be difficult or impossible for those most in need to find qualified attorneys to handle their cases.

The court’s only criticism of Herzog’s representation was that the firm failed to notify Rainer’s adult daughters about the existence of the lawsuit until a relatively late stage, which may have contributed to the animosity between the daughters and Silke and led to more drawn out litigation regarding the settlement distribution. But even accepting that as a valid criticism, it did not justify so low an award when so many other considerations suggested a significantly higher fee award.

The arbitrariness of the trial court’s award of only 10 percent for attorney fees was compounded by the court’s apportionment of the proceeds between Silke and the children directly affected Herzog’s recovery because the court has authority to reduce attorney fees only with respect to those portions of an award payable to a minor. In this case, if the trial court had apportioned even one-fifth of the settlement funds to Silke—an amount that would not seem unreasonable—it would have meant about $750,000 in additional fees to Herzog under the retainer agreement with Silke.

Finally, Herzog contends that, rather than remand the case to the trial court for further proceedings, we should decide for ourselves whether Herzog’s requested fee was reasonable. We decline to do so. We recognize that “[t]he experienced trial judge is the best judge of the value of professional services rendered in his court” (Thayer v. Wells Fargo Bank, supra, 92 Cal.App.4th at p. 832) and it is not our role, even upon reversal, to decide in the first instance what that fee should be.

III. FORFEITURE

Silke, as guardian ad litem, contends that Herzog forfeited its objection to the distribution of settlement proceeds by failing to file an objection to the statement of decision. In support of this position, Silke cites In re Marriage of Arceneaux (1990) 51 Cal.3d 1130 (Arceneaux), in which our Supreme Court stated that after the trial court issues a statement of decision, a “party must state any objection to the statement in order to avoid an implied finding on appeal in favor of the prevailing party.” (Id. at p. 1133.) According to Silke, because Herzog failed to object to the trial court’s failure to take into account relevant factors regarding attorney fees, the firm may not now raise those contentions on appeal. We are not persuaded.

The Court’s decision in Arceneaux was based on its interpretation of Code of Civil Procedure sections 632 and 634. As the Court explained, “When the court announces its tentative decision, a party may, under section 632, request the court to issue a statement of decision explaining the basis of its determination, and shall specify the issues on which the party is requesting the statement; following such a request, the party may make proposals relating to the contents of the statement. Thereafter, under section 634, the party must state any objection to the statement in order to avoid an implied finding on appeal in favor of the prevailing party.” (Arceneaux, supra, 51 Cal.3d at p. 1133, fn. omitted.) Under the terms of the statute, however, an implied finding applies only “[w]hen a statement of decision does not resolve a controverted issue, or if the statement is ambiguous.” (Code Civ. Proc., § 634; accord, Arceneaux, supra, 51 Cal.3d at p. 1136 [“if the statement fails to resolve a controverted issue or is ambiguous[,] the defects must be brought to the court’s attention to avoid presumptions in favor of the judgment”].)

In this case, the trial court did resolve the issues of attorney fees and stated its reasoning clearly. Herzog’s objections are not about the court’s factual findings, but rather about the court’s exercise of its discretion in reducing Herzog’s award. The only inference to be drawn from the court’s failure to discuss the factors of California Rules of Court, rule 7.955 in its statement of decision is that the court found those factors unimportant in this case. Neither Arceneaux nor Code of Civil Procedure section 634 requires a party to file an objection to a statement of decision reiterating every rejected argument in order to preserve those arguments on appeal.

DISPOSITION

The judgment of the trial court is reversed. Appellant is awarded its costs on appeal.

ROTHSCHILD, P. J.

We concur: JOHNSON, J., BENDIX, J.
Cite as 18 C.D.O.S. 9968

CERTIFIED TIRE AND SERVICE CENTERS WAGE AND HOUR CASES

No. D072265
In The Court of Appeal of the State of California
Fourth Appellate District
Division One
(San Diego County No. JCCP4762; San Diego County
No. 37-2013-000381-CU-OE-CTL; Riverside County No.
RIC1307773)
Appeal from a judgment of the Superior Court of San Diego
County, Joel R. Wohlfeil, Judge. Affirmed.
Filed September 18, 2018
Certified for Publication October 4, 2018

COUNSEL
Law Offices of Kevin T. Barnes, Kevin T. Barnes, Greg
Lander; Scott Cole & Associates, Jeremy A. Graham;
Righetti Glugoski, Matthew Righetti, John Glugoski, and
Michael C. Riguetti for Plaintiffs and Appellants.
Carothers DiSante & Freudenberger, Timothy M.
Freudenberger, Robin E. Largent, and Garrett V. Jensen for
Defendants and Respondents.

ORDER CERTIFYING OPINION FOR
PUBLICATION

THE COURT:
The opinion in this case filed September 18, 2018 was
not certified for publication. It appearing the opinion meets
the standards for publication specified in California Rules
of Court, rule 8.1105(c), the request pursuant to California
Rules of Court, rule 8.1120(a) for publication is GRANTED.
IT IS HEREBY CERTIFIED that the opinion meets the
standards for publication specified in California Rules of
Court, rule 8.1105(c); and
ORDERED that the words “Not to be Published in the Of-
official Reports” appearing on page 1 of said opinion be deleted
and the opinion herein be published in the Official Reports.

HUFFMAN, Acting P. J.

Copies to: All parties

OPINION

This is an appeal in a certified wage and hour class ac-
tion following a judgment after a bench trial in favor of de-
fendants Certified Tire and Services Centers, Inc. (Certified
Tire) and Barrett Business Services, Inc. (collectively de-
fendants). Plaintiffs contend that Certified Tire violated the
applicable minimum wage and rest period requirements by
implementing a compensation program, which guaranteed
its automotive technicians a specific hourly wage above the
minimum wage for all hours worked during each pay period
but also gave them the possibility of earning a higher hourly
wage for all hours worked during each pay period based on
certain productivity measures.

As we will explain, we conclude that the plaintiffs’ argu-
ments lack merit, and we accordingly affirm the judgment.

I. FACTUAL AND PROCEDURAL
BACKGROUND

A. Certified Tire’s Compensation Program for
Automotive Technicians

Certified Tire is a business that sells tires and performs
automotive repairs for the general public through its 40 stores
in California. Certified Tire employs automotive technicians
to diagnose and repair customer vehicles.

Throughout the relevant timeframe, technicians at Certi-
fied Tire were compensated through the Technician Com-
pensation Program (the TCP). Under the TCP, a technician
is paid an hourly wage for all work performed, but the hourly
rate earned by a technician varies from pay period to pay pe-
riod. A technician’s hourly rate for the applicable pay period
is guaranteed to be at least an agreed-upon minimum hourly
rate that the technician is assigned at the time of hire, which
in all cases exceeds the legal minimum wage.1 Under the
TCP, the hourly rate paid to a technician during any given pay
period may be higher than the guaranteed minimum hourly
rate based on a formula that rewards the technician for work
that is billed to the customer by Certified Tire as a separate
labor charge.

Under the formula, each billed dollar of labor charged to
a customer as a result of the technician’s work during the pay
period is referred to as the technician’s “production dollars.”2
Certified Tire applies the formula by multiplying the tech-
nician’s production dollars by 95 percent, multiplying that
amount by a fixed “tech rate” assigned to the technician de-

1. At trial, Certified Tire’s president testified that for much of the
class period, the lowest guaranteed minimum hourly rate assigned to
a technician upon hiring was $10 per hour in Southern California and
$11 per hour in Northern California, but those rates had been raised
as of January 2016 to $11 per hour and $12 per hour respectively.
Depending on experience and qualifications, certain technicians are
assigned a greater guaranteed minimum hourly rate at the time of hire,
with some assigned a rate as high as $18 per hour.

2. A technician may perform certain tasks that are billed at a pre-
determined labor cost to the customer. For example, a document as-
associated with one technician from 2013 shows that a brake fluid ex-
change was billed to the customer at a predetermined labor cost of
$47, and a transmission fluid exchange was billed to the customer at
a predetermined labor cost of $58. In addition, technicians perform a
variety of tasks that are not assigned a predetermined labor cost but for
which the customer is billed at a specific hourly labor rate based on the
labor time expected to complete the task, identified on Certified Tire’s
reports as “shop labor.” A technician’s production dollars are based
on all of the labor charges billed to a customer for the technician’s
services during the pay period.
pending on experience and qualifications, and then dividing by the total hours worked by the technician during the pay period. By applying this formula, Certified Tire determines the technician’s “base hourly rate” for the pay period. If the base hourly rate exceeds the technician’s guaranteed minimum hourly rate, the technician is paid the base hourly rate for all time worked during the pay period. If the guaranteed minimum hourly rate is higher than the base hourly rate, the technician is paid the guaranteed minimum hourly rate for all time worked during the pay period. Overtime hours are paid at one and a half the hourly rate that applies during the pay period.

Technicians at Certified Tire are required to be clocked in during all work hours, except for their lunch period, and they are paid at an hourly rate for all hours on the clock. The hours during which technicians are clocked in at work are reflected in time keeping reports. Technicians take rest breaks as required by law, and they do not clock out while doing so.

Certified Tire’s president testified that he designed the TCP to incentivize technicians “to hustle” to get things done, and to make Certified Tire a more competitive employer in the industry by allowing technicians to significantly increase their hourly compensation based on their efficiency without any cap on the amount of compensation. According to Certified Tire’s president, some technicians achieve a base hourly rate of up to $70 per hour during a pay period.

Some work activities that the technicians are required to perform do not directly generate production dollars, as those activities are not associated with labor costs charged to a customer. These activities include certain automotive services, including some oil changes and some tire rotations, as well as time spent cleaning or attending meetings. Although technicians do not have the opportunity to increase their base hourly rate by participating in activities that do not generate production dollars, those activities are always compensated because technicians get paid an hourly rate for that work, all of which is performed while they are clocked in.

B. The Lawsuit

The instant appeal is based on multiple wage and hour class action lawsuits filed against Certified Tire and Barrett Business Services, Inc. in superior court in Riverside County and San Diego County by plaintiffs Oscar Gutierrez, Pascal Jeandebien, and Michael Rehse. After the lawsuits were coordinated in San Diego County Superior Court, a first amended coordinated complaint was filed. On December 22, 2015, the trial court certified the class action with respect to several defined classes, two of which are relevant here: (1) “All Technicians employed by Defendant from March 6, 2009, to the present to whom Defendant failed to pay a separate minimum wage for non-productive time;” and (2) “All Technicians employed by Defendant from March 6, 2009, to the present to whom Defendant failed to pay for off duty rest periods.” The trial court also found that Gutierrez, Jeandebien and Rehse (plaintiffs) would adequately represent the class.

The trial court conducted a bench trial in December 2016. In their joint trial readiness conference report, the parties agreed that “[t]he only issue for resolution in Phase I is the legality of [the TCP]. Any other liability and injunctive/damages issues, if necessary, are deferred until after a ruling on Phase I.” The parties identified the issue to be determined by the trial court as: “Have Plaintiffs met their burden to show that Certified Tire’s Technician Compensation Program violates California law?”

The parties also entered into stipulations concerning the applicable legal standards. Specifically, the parties stipulated that Certified Tire is “governed by the California Labor Code and Wage Order 4[-2001].” (Cal. Code Regs., tit. 8, § 11040.) (Wage Order 4) The parties agreed that under Wage Order 4, “Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.” (Cal. Code Regs., tit. 8, § 11040, subd. 4.B.) The parties identified the applicable alleged liability of Barrett Business Services, Inc.

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6. The order granting the petition to coordinate was not included in the Appellants’ Appendix. In response to an argument raised in the respondents’ brief, plaintiffs have requested that we take judicial notice of an order granting the petition to coordinate dated November 7, 2013. We hereby grant the unopposed request to take judicial notice.

7. Among other things, the first amended coordinated complaint alleged causes of action under (1) the Private Attorneys General Act of 2004, Labor Code § 2699, subdivision (a), which provides that a civil penalty assessed by statute for a violation of the Labor Code may be recovered in a civil action brought by aggrieved employees; and (2) Business and Professions Code section 17200 through 17208, alleging unlawful and fraudulent business practices based on violations of Labor Code provisions.

8. In California, “wage and hour claims are today governed by two complementary and occasionally overlapping sources of authority: the provisions of the Labor Code, enacted by the Legislature, and a series of 18 wage orders, adopted by the [Industrial Welfare Commission (IWC)].” (Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1026.) Here, the parties agree that Wage Order 4 applies, as it pertains to “all persons employed in professional, technical, clerical, mechanical, and similar occupations . . . .” (Cal. Code Regs., tit. 8, § 11040, subd. (1)) “Mechanics” are included by definition under the scope of persons employed in those occupations. (Id., subd. (2)(O).)
minimum wage as “not less than nine dollars ($9.00) per hour for all hours worked, effective July 1, 2014, and not less than ten dollars ($10.00) per hour for all hours worked, effective January 1, 2016.” In addition, the parties agreed that Wage Order 4 provides for rest period as follows: “Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. . . . Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.” (Cal. Code Regs., tit. 8, § 11040, subd. 12(A).)

The trial court held a bench trial at which several witnesses testified, including the plaintiffs, other technicians formerly or currently employed by Certified Tire, supervisors from Certified Tire, a Certified Tire employee in charge of payroll, and Certified Tire’s president. The evidence regarding the details of the TCP was largely undisputed, and it was also undisputed that technicians at Certified Tire were required to clock in for all hours while at work, and they took their required rest breaks while clocked in during the work day.

Plaintiffs’ counsel argued in closing that Certified Tire was not in compliance with the minimum wage and rest period requirements set forth in Wage Order 4. Relying on case law that prohibits averaging the amount an employee receives during a pay period for non-paid and paid work hours to comply with the minimum wage requirements (see, e.g., Armenta v. Osmose, Inc. (2005) 135 Cal.App.4th 314 (Armenta)), plaintiffs’ counsel argued that because of the TCP, Certified Tire was “secretly paying the lower wage—nothing for those non-billed hours—while purporting, making it look like through their averaging, that they’re paying at least minimum wage for the non-billed time when, in fact, they’re paying nothing for the non-billed time.” Plaintiffs’ counsel argued that under the TCP, because a technician could not increase the base hourly wage when working on activities that did not generate production dollars those hours are all uncompensated, as “[n]ot a penny hits their pocket when they do an oil change, when they attend a meeting, when they do any cleaning.” As similarly argued in plaintiffs’ trial brief filed at the close of the bench trial, “Technicians earn no wages for time spent on tasks that do not generate labor dollars for [Certified Tire] (i.e., oil changes, tire rotations, cleaning, meetings, Preventative Maintenance Analysis (PMA), running errands and waiting for customer cars to work on) since those tasks do not add to ’Production Dollars’ under [Certified Tire’s] formula.” (Italics added). Also referring to the fact that technicians do not have the opportunity to increase their production dollars during a rest break because they are not generating labor charged to the customer, plaintiffs’ counsel argued that Certified Tire was in violation of the rest period requirement in Wage Order 4. Counsel argued, “I think it’s undisputed here that when technicians are on a rest break, they cannot add to their wages during those rest breaks. The wages stay the same.” According to plaintiffs, “When Technicians are paid as a percentage of Production Dollars they receive no separate wages for . . . statutorily mandated rest breaks.”

The trial court issued a statement of decision in favor of Certified Tire. After extensively setting forth the testimony and evidence presented at trial and the governing case law, the trial court explained that plaintiffs had not established any violation of the wage and hour laws. The trial court stated,

“First, the parties agree that this is not an ‘off-the-clock’ case. [Certified Tire’s] ‘Technician’s Timekeeping Reports’ accurately reflect the times and hours worked by that Technician during the corresponding time period. . . .

“Second, contrary to the Court’s concern in Armenta, [Certified Tire] has not ‘averaged’ the technicians’ hours to calculate their wages; instead, [Certified Tire] applies the higher base rate, if any, to all of the hours worked—billed and non-billed labor—by the technicians. The Court recognizes that the technicians’ production may vary from one day to the next throughout the two week pay period which, as calculated at the end of two weeks, may be different than a snapshot of the technicians’ production on any given day. However, it appears to the Court that, to the extent the technicians are entitled to be paid a higher base rate, the averaging, if any, only adds to (as opposed to subtracts from) the technicians’ wages. Ultimately, the calculation of the technicians’ wages, under this formula, is much more about the technicians’ wage ‘ceiling’ rather than wage ‘floor.’

“Third, the Court finds that, based on this record, the technicians have been paid, at all times, a guaranteed minimum wage for all of their hours worked -- billed and non-billed labor. In other words, even during pay periods where the technicians have been wholly unproductive, they have been paid minimum wages which comply with the California wage and hour laws at issue in this case.”

The trial court entered judgment in favor of Certified Tire on April 12, 2017. On May 9, 2017, a notice of appeal was filed. 9

9. The notice of appeal form, as completed by class counsel and filed on May 9, 2017, stated that plaintiff Gutierrez was the party filing the appeal and did not mention the other two plaintiffs. However, as early as the filing of the motion for relief from default in this court on June 27, 2017, and the filing of the Civil Case Information Statement in this court on July 7, 2017, the court filings by plaintiffs have identified all three plaintiffs as the appealing parties, and, consistently, the opening appellate brief states that it is filed on behalf of all three plaintiffs. Accordingly, the omission of the names of the other two plaintiffs in the notice of appeal appears to have been an oversight or a typographical error. In a footnote, the respondents’ brief seize on the content of the notice of appeal and points out that it identified only
II. DISCUSSION

A. Standard of Review

“In reviewing a judgment based upon a statement of decision following a bench trial, we review questions of law de novo. [Citation.] We apply a substantial evidence standard of review to the trial court’s findings of fact.” (Thompson v. Asimos (2016) 6 Cal.App.5th 970, 981.) When the facts are undisputed, “[a] reviewing court determines the meaning of a wage order de novo.” (Gonzalez v. Downtown LA Motors, LP (2013) 215 Cal.App.4th 36, 44 (Gonzalez).)

Here, plaintiffs state that the evidence is undisputed concerning the details and application of the TCP. However, they contend that the trial court erred in concluding, based on those undisputed facts, that the TCP does not violate the requirement that Certified Tire pay the minimum wage and provide paid rest periods as set forth in Wage Order 4. Accordingly, we apply a de novo standard of review to the legal questions presented here.

B. Applicable Case Law Regarding Plaintiffs’ Minimum Wage and Rest Period Argument

Plaintiffs’ contention that Certified Tire fails to comply with the minimum wage and rest period requirements in Wage Order 4 is based on case law that has developed since Armenta, supra, 135 Cal.App.4th 314, was decided in 2005. Plaintiffs contend that, based on that case law, Certified Tire is violating the rule that “an employer utilizing an activity-based compensation scheme (like Certified Tire’s TCP), must separately compensate employees for both: (1) time working on tasks which generate no wages; and (2) rest breaks.” Based on the same case law, plaintiffs also contend that Certified Tire is impermissibly attempting to establish minimum wage compliance despite its failure to pay for each hour worked by using “an average hourly rate for each hour worked.” To understand and evaluate plaintiffs’ argument we first review the case law upon which Plaintiffs rely.

In Armenta, workers who maintained utility poles in the field were paid an hourly wage, which was above the minimum wage, but the employer refused to pay an hourly wage for time spent driving to the job sites or processing paperwork. (Armenta, supra, 135 Cal.App.4th at pp. 317-319.) The employer argued that this practice did not violate the minimum wage requirement for the hours that were uncompensated because “when an employer pays a higher hourly rate, . . . it should be entitled to divide the total number of hours worked into the amount the employee was paid to arrive at an average hourly wage and then determine whether the employee’s compensation complied with the minimum wage law,” which was the approach followed by federal courts applying the federal Fair Labor Standards Act of 1938 (FLSA; 29 U.S.C. § 201 et seq.). (Armenta, at pp. 321-322, italics added.) Interpreting Wage Order 4 in light of its language and the surrounding statutory provisions, Armenta concluded that “the FLSA model of averaging all hours worked ‘in any work week’ to compute an employer’s minimum wage obligation under California law is inappropriate. The minimum wage standard applies to each hour worked by respondents for which they were not paid. The trial court, therefore, correctly determined that appellant violated [the minimum wage requirement] by failing or refusing to pay for driving time and time spent by foremen processing paperwork.” (Id. at p. 324.) Accordingly, under Armenta, when using an hourly-based compensation system, an employer is required to pay at least the minimum wage for each hour worked and may not meet that requirement by showing that the employee was effectively paid more than the minimum wage for all time on the job by dividing the amount of the employee’s total compensation for the pay period by the total hours worked, even though some time was not separately compensated by an hourly wage.

The rule established by Armenta—that employees must be separately compensated at minimum wage or above for all time worked—was subsequently applied by California courts to “piece-rate” compensation programs, in which employees do not receive an hourly wage but are paid based on the tasks they perform. In Gonzalez, supra, 215 Cal.App.4th 36, automobile service technicians were paid on a piece-rate basis for their work. Specifically, technicians were “paid a flat rate ranging from $17 to $32, depending on the technician’s experience, for each ‘flag hour’ a technician accrues.” (Id. at p. 41.) Flag hours were assigned to every task that a technician performs and were intended to correspond to the actual amount of time a technician would need to perform the task. (Ibid.) A technician who completed a repair task accrued the number of flag hours assigned to that task, regardless of how long the technician actually took to complete the task. (Ibid.) A technician’s pay for each 80-hour period was based on the number of flag hours accrued during that pay period multiplied by the technician’s applicable flat rate. (Ibid.) The technicians accrued no flag hours for performing non-repair tasks, such as cleaning, obtaining parts and participating in training. (Id. at p. 42.) Thus, the employees were not directly compensated for non-repair time.

In an attempt to comply with minimum wage requirements, the employer kept track of all the time a technician spent at the work site, whether or not the technician was working on a repair order, and it divided the employee’s to-
that effective January 1, 2016, the Legislature enacted Labor Code, section 226.2, which codified the holdings of Gonzalez and Bluford, providing for separate payment for nonproductive work time and for rest periods when employees are compensated on a piece-rate basis, but creating certain safe harbors for employers. (See Fowler Packing Company, Inc. v. Lanier (9th Cir. 2016) 844 F.3d 809, 812-813 [describing Lab. Code, § 226.2].)

The principle established in Armenta has also been applied to the issue of how rest periods are compensated in a commission-based compensation system. In Vaquero v. Stoneledge Furniture LLC (2017) 9 Cal.App.5th 98, 102 (Vaquero), furniture store employees were compensated on a commission basis, but the system “did not include any component that directly compensated sales associates for rest periods.” (Id. at p. 114.) Vaquero concluded that an employer was required “to separately compensate employees for rest periods if an employer’s compensation plan does not already include a minimum hourly wage for such time.” (Id. at p. 110.)

C. The Case Law Cited by Plaintiffs Does Not Establish That Certified Tire Violated Minimum Wage or Rest Period Requirements

As the centerpiece of their argument that Certified Tire’s TCP violates the minimum wage and rest period requirements, plaintiffs rely on Armenta, Gonzalez, Bluford and Vaquero for the principle that “an employer utilizing an activity-based compensation scheme . . . must separately compensate employees for both: (1) time working on tasks which generate no wages; and (2) rest breaks.” Plaintiffs contend that the TCP violates these principles because, according to them, technicians earn “no wages” when performing work that does not generate production dollars, and therefore “the TCP violates the minimum wage requirements by failing to provide the required separate compensation” for each hour worked. As we will explain, plaintiffs’ argument that the technicians are not “separately” paid for non-productive work in an “activity-based compensation system” suffers from two central flaws, which we discuss in turn.

First, although TCP has similarities to a piece-rate system or a commission-based system because technicians are able to increase their earnings by increasing their production, the TCP is not an “activity-based compensation system” as plaintiffs contend. Instead, it is an hourly-rate system in which technicians are paid at a single hourly rate for all hours worked during a pay period. Armenta, Gonzalez, Bluford and Vaquero are not applicable, as those cases involved either (1) an hourly compensation system including off-the-clock

10. Gonzalez pointed out that several federal district court decisions had applied Armenta’s holding to piece-rate compensation programs. (Gonzalez, supra, 215 Cal.App.4th at p. 49.) Here, plaintiffs cite and rely on federal district court decisions reaching the same conclusion regarding piece-rate compensation programs as Gonzalez. (Cardenas v. McLane FoodServices, Inc. (C.D.Cal. 2011) 796 F.Supp.2d 1246, 1252 [in a case involving truck driver compensation, the court concluded that “a piece-rate formula that does not compensate directly for rest periods does not comply with California minimum wage law.” (Id. at p. 872.)] Bluford held that “under the rule of Armenta . . . rest periods must be separately compensated in a piece-rate system. . . . Thus, . . . a piece-rate compensation formula that does not separate compensation for rest periods does not comply with California minimum wage law.” (Id. at p. 872.)

11. In addition to Bluford, plaintiffs cite federal district court cases that follow Bluford in recognizing that rest periods must be separately compensated when employees are compensated on a piece-rate basis. (Villalpando, supra, 161 F.Supp.3d at p. 889; Perez v. Sun Pacific Farming Co-op, Inc. (E.D.Cal., June 8, 2015, No. 1:15-CV-00259-KJM-SKO), 2015 WL 3604165.)

12. Similarly, in Balasanyan v. Nordstrom, Inc (S.D.Cal. 2012) 913 F.Supp.2d 1001, 1007, a federal district court applied Armenta to conclude that department store employees who worked on commission were required to be directly compensated at no less than minimum wage for all activities that did not allow them to earn a commission.
work; (2) a piece-rate system; or (3) a commission-based system. In contrast, Certified Tire applies an hourly based system that compensates technicians for all the time that they are at work. Technicians earn wages for every single work activity that they perform, including waiting for customers and performing tasks that do not have billed labor costs associated with them. Although the hourly rate differs from pay period to pay period because technicians have the opportunity to increase their guaranteed minimum hourly rate based on the generation of production dollars, the technicians are always paid on an hourly basis for all hours worked at a rate above minimum wage regardless of their productivity, and regardless of the type of activity in which they were engaged during those hours.

Second, plaintiffs’ argument depends on their premise that technicians are paid no wages for hours that do not generate production dollars. Plaintiffs contend that, as in Armenta, Gonzalez, Bluford and Vaquero, the technicians were not separately compensated for the time they spent at work performing “non-productive” tasks. To support this argument plaintiffs ask us to compare the wages that would be earned by two hypothetical technicians at Certified Tire. In an attempt to illustrate plaintiffs’ point, we turn to the following scenario: assume one technician generates $2,000 of production dollars in a 30-hour pay period working solely on tasks that generate production dollars. A second technician generates $2,000 of production dollars in a 40-hour pay period, devoting 10 hours of the 40 hours to tasks that do not generate production dollars. Further assume both technicians have a “tech rate” of 30 percent. The base hourly rate for the first technician is $19 per hour ($2000 x .95 x .30 ÷ 30 = $19). The base hourly rate for the second technician is $14.25 per hour ($2000 x .95 x .30 ÷ 40 = $14.25). For 30 hours of work the first technician gets paid $570 during the pay period ($19 x 30 = $570). For 40 hours of work the second technician also gets paid $570 during the pay period ($14.25 x 40 = $570).13

According to plaintiffs, a hypothetical such as this illustrates that because both technicians are taking home the same amount in their paychecks (i.e., $570) even though the second technician worked 10 hours more than the first technician while involved in tasks that did not generate production dollars, the second technician is not compensated at all for the last 10 hours of the pay period. We disagree.

In the scenario set forth above, the second technician is paid at an hourly rate that is above the minimum wage for all hours work regardless of the type of work involved. The technician also receives paid rest breaks at above minimum wage for all the time on the clock, even if no production dollars are being generated during the rest period. Put simply, all time on the clock is directly and expressly compensated by Certified Tire at an hourly rate that exceeds the minimum wage. As we find no merit to plaintiffs’ contention that the second technician is receiving no wages at all for the time spent on tasks that do not generate production dollars, we reject the plaintiffs’ argument that Certified Tire must make a separate additional payment to the technician to comply with the minimum wage and rest period requirements.

Further, contrary to plaintiffs’ contention, because technicians are paid at an hourly rate that is above minimum wage for each hour on the clock, this case does not involve averaging of an employee’s hourly rate to show compliance with minimum wage requirements. In Armenta and Gonzalez, the employers unsuccessfully argued that they should be able to divide the amount they paid their employees by the total hours worked to establish they had complied with minimum wage requirements for that pay period. (Armenta, supra, 135 Cal.App.4th at pp. 321-322; Gonzalez, supra, 215 Cal.App.4th at pp. 41-42.) Here, Certified Tire does not need to show compliance with minimum wage requirements by dividing the total amount paid during a pay period by the total hours worked. Instead, Certified Tire directly establishes compliance with minimum wage requirements by paying technicians at a rate above the minimum wage hourly rate for all hours on the clock.

In sum, Certified Tire makes payments to its technicians on an hourly basis at an hourly rate above the minimum wage for all hours worked, and it provides paid rest periods on the clock as required by law. Thus, based on the undisputed facts regarding the manner in which technicians are compensated under Certified Tire’s TCP, plaintiffs have not established that Certified Tire is in violation of the minimum wage requirement and rest period requirement in Wage Order 4.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR: HUFFMAN, Acting P. J., NARES, J.

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13. The hypothetical situation assumes no overtime hours were worked by either technician during the pay period.
FACTUAL AND PROCEDURAL HISTORY

A. PROPERTY

Tri-Palms Estates was a real estate development consisting of 10 separate housing tracts. Each housing tract had its own set of covenants, conditions, and restrictions (CC&Rs). There was a recreation facility adjacent to the housing tracts, which was a separately owned facility. Tri-Palms Estates’ various CC&Rs required homeowners to pay fees for the recreation facility.

The recreation facility had been in continuous operation since the early 1960s and consisted of an 18-hole regulation golf course, a nine-hole executive golf course, a 15,000-square-foot clubhouse, a public restaurant, three large swimming pools, two spas, tennis courts, a shuffleboard complex, a pro shop, banquet facilities, a 1,000-square-foot arts and crafts building, and offices. Throughout the years, there have been various owners of the recreation facility. In 2003, in a recorded “Master Declaration,” property owners within Tri-Palms Estates formed the Association for the purpose of communicating with the management of the recreation facility and for supervising compliance with the CC&Rs.

B. PRIOR TRIAL COURT CASE

In 2008, the recreation facility was owned by The Club at Shenandoah Springs Village, Inc. (Shenandoah). The Association and Karla Wilson, a homeowner within the Association, brought a class action against Shenandoah. The Association and Wilson alleged that Shenandoah received $3,700,000 per year in fees from members of the Association. The Association and Wilson accused Shenandoah of (1) allowing the general public to use the recreation facility for additional fees, thus depriving the homeowners of their exclusive use of the recreation facility; (2) charging homeowners unauthorized use and cleaning fees— in addition to the monthly fees already being paid; and (3) mismanaging the fees received from homeowners.

On June 18, 2012, following a trial, the Riverside County Superior Court found Shenandoah breached the governing documents by not maintaining the recreation facility in a reasonable manner and by charging fees in excess of those permitted by the governing documents. The court also found that the homeowners had a nonexclusive easement for the use and enjoyment of the recreation facility, and therefore, Shenandoah could permit the public to use the recreation facility.

The trial court issued a permanent injunction requiring Shenandoah to maintain the recreation facility in a reasonable manner and to hire and retain a professional management company to operate the recreation facility. The injunction prohibited Shenandoah from charging homeowners a greater amount of fees than those provided for in the governing documents. The trial court awarded the Association approximately $365,648.88 plus interest for attorneys’ fees.
C. BANKRUPTCY CASE

In May 2007, Shenandoah borrowed $15,000,000 from General Electric; the loan was secured by the recreation facility. On November 28, 2012, General Electric recorded a notice of default and election to sell under deed of trust against the recreation facility, alleging at least $11,486,181 was owed. A receiver was to be appointed on December 4. On December 3, Shenandoah filed a petition for Chapter 11 bankruptcy in the United States Bankruptcy Court, Central District of California, Riverside Division. The Association filed a claim as a secured creditor.

Shenandoah sought to increase the fees paid by homeowners. The CC&Rs permitted the fees to be recalculated based upon the consumer price index; however, such an increase had not occurred “for years.” The Association opposed Shenandoah’s recalculation of the fees. In January 2014, the Association and Shenandoah participated in a mediation concerning the increased fees, but the issue was not resolved. The Association then filed a demand for arbitration against Shenandoah.

In March 2014 Shenandoah sought the bankruptcy court’s permission to sell Shenandoah’s assets. Shenandoah hoped to sell the recreation facility to Inspire Communities for $15,000,000 with $850,000 used exclusively for improvements and repairs on the recreation facility. The Association was worried that the bankruptcy court would soon grant Shenandoah’s motion to sell the recreation facility, and therefore entered into a settlement agreement (the Agreement) with Inspire Communities. The Agreement required the Association to (1) withdraw its arbitration case, and (2) permit Shenandoah’s suggested fee increase, in exchange for Inspire Communities agreeing to (a) maintain the recreation facility as required by the state trial court’s 2012 injunction, and (b) not having the increased fees be retroactive to an earlier date.

In May, the bankruptcy court held a hearing on Shenandoah’s motion for authorization to sell the recreation facility. The Association was at the hearing. The bankruptcy court granted the motion. The court approved K&S as the successful bidder and explained that K&S substituted into the Agreement for Inspire Communities. In the bankruptcy court’s order it wrote, “The Court approved K&S as the successful bidder at the hearing on the Motion in lieu of Inspire Communities, in part, based upon the consumer price index; however, such an increase can only occur upon a vote to amend the CC&Rs.

Plaintiffs sought a declaration that (1) Tri-Palms Estates is not a common interest development; (2) the fee increase is a breach of the CC&Rs; and (3) “that [the] bankruptcy settlement agreement is void.”

2. ANTI-SLAPP MOTION

The Association filed an anti-SLAPP motion. (§ 425.16.) The Association asserted Plaintiffs’ complaint arose from protected activity because it concerns the settlement agreement that resulted from an arbitration proceeding, which was connected to bankruptcy proceedings. The Association asserted that the Agreement concerned the Association’s right to petition in a judicial proceeding. (§ 425.16, subd. (e)(1).)

The Association contended Plaintiffs did not have a probability of prevailing because the bankruptcy court’s judgment was final. The Association argued that the state trial court “lacks subject matter jurisdiction to adjudicate the claims and causes of action in Plaintiffs’ Complaint.” The Association further asserted that principles of res judicata caused Plaintiffs to be estopped from obtaining relief. The Association contended that Plaintiffs, as members of the Association, were in privity with the Association, and thus bound by the terms of the Agreement.

3. OPPOSITION

Plaintiffs opposed the Association’s anti-SLAPP motion. Plaintiffs asserted, “This lawsuit is a collateral attack on a void judgment because it excluded indispensable parties, i.e. the plaintiffs.” Plaintiffs contended, “If what [the Association] says is true, then in every case in which [a] plaintiff is seeking to collaterally attack a judgment, that collateral attack would be subject to a SLAPP motion. That is ridiculous.” Plaintiffs contended their complaint did not concern a public issue and did not concern the Association’s right to petition; rather, it concerned the Association unilaterally agreeing that homeowners’ fees could be raised.

Plaintiffs contended they had a probability of succeeding on the merits because the bankruptcy court’s judgment was open to collateral attack due to the bankruptcy court lacking jurisdiction or exceeding its jurisdiction. Plaintiffs argued res judicata did not apply because the bankruptcy court’s judgment is void. Additionally, Plaintiffs disputed that they were in privity with the Association. Plaintiffs contended the Association’s priority in the bankruptcy proceedings was receiving the payment for its attorneys’ fee award from the 2012 case. In order to secure its payment, the Association “sold the owners of the individual properties down the road.”
4. HEARING ON THE ANTI-SLAPP MOTION

The trial court held a hearing on the Association’s anti-SLAPP motion. The court asked Plaintiffs if their lawsuit arose out of a protected activity. Plaintiffs responded, “It does. But what we have here is . . . basically a motion to undo a judgment . . . .” The trial court asked why Plaintiffs did not intervene in the bankruptcy case. Plaintiffs explained the bankruptcy case was closed by the time they learned of it.

In regard to the probability of prevailing, the Association said, “And I would argue that because this settlement was approved in bankruptcy court, that they don’t even have standing to object to it here in this court. Their remedy would be to go to Judge Houle in bankruptcy court and argue before him.”

Alternatively, the Association asserted that it had standing to represent the members of the Association in the Agreement, without naming the members or giving notice to the members. Plaintiffs argued that the Association did not have standing to represent them because Tri-Palms Estates is not a common interest development in that there is no common property. The Association contended common property is not a requirement for a common interest development, and that reciprocal easements are sufficient for a common interest development. The Association contended there were easements for the homeowners to use the recreation facility.

5. ORDER

The trial court granted the anti-SLAPP motion. The trial court found that plaintiffs’ complaint “obviously arises out of constitutionally protected activity. The complaint specifically references the settlement agreement made in the bankruptcy proceedings and seeks to challenge it.”

In regard to the probability of prevailing, the trial court explained that plaintiffs failed to address the reciprocal easement issue, i.e., that a common interest development can be based upon reciprocal easements. The court found that plaintiffs’ failure to address this issue meant that the Association had “the statutory authority to sue in its own name without joining all of its members (including plaintiffs) and the settlement agreement is not void for lack of naming plaintiffs as parties to the underlying litigation. [¶] Because the Court finds that plaintiffs have not and cannot meet their burden under the second prong of the analysis, it need not address the additional contention by [the Association] that any challenge to the settlement agreement may only be made in the bankruptcy court.” The trial court awarded the Association attorneys’ fees in the amount of $33,720.50 and costs in the amount of $1,505.77 for a total award of $35,225.77.

6. MOTION FOR RECONSIDERATION

Plaintiffs filed a motion for reconsideration. As to the first prong of the analysis, plaintiffs asserted a new case was published after the hearing on the anti-SLAPP motion, which required the trial court to consider the act underlying the cause of action. Plaintiffs argued the act at issue in this case was the raising of the homeowners’ fees; it did not concern speech. Plaintiffs explained, “In our case, the cause of action is to set aside a void judgment, not to silence [the Association] in any way. It is also not a matter of public concern, it is dispute between some homeowners and a HOA.”

As to the second prong, plaintiffs contended there were no reciprocal easements. Plaintiffs explained that homeowners have an easement to use the recreation facility, but the easement is not reciprocal because there is no right for the owner of the recreation facility to enter the homeowners’ properties.

7. HEARING ON THE MOTION FOR RECONSIDERATION

The trial court held a hearing on plaintiffs’ motion for reconsideration. The trial court said that plaintiffs’ argument concerning the lack of reciprocal easements was not a new fact. Plaintiffs responded, “If the Court can look at that—again, there is just no easement—Your Honor, there is just no easements, there is nothing, there is no common property.”

Plaintiffs asserted that a reciprocal or mutual easement does not mean all the homeowners had access to the recreation facility; it meant the homeowners had access to the recreation facility and the owners of the recreation facility had access to the homeowners’ properties. The trial court said it was not persuaded by plaintiffs’ easement argument.

In regard to the first prong, plaintiffs asserted their lawsuit was about increased fees; it was not about petitioning activity. The trial court explained that plaintiffs framed their case as being about the Association’s lack of standing to enter into the Agreement, which arose from litigation, and therefore, plaintiffs’ case concerned petitioning activity. The trial court denied the motion for reconsideration.

DISCUSSION

I. ANTI-SLAPP MOTION

A. CONTENTION

Cheveldave contends the trial court erred by granting the anti-SLAPP motion.3 (§ 425.16.)

B. LAW AND STANDARD OF REVIEW

The anti-SLAPP statute is designed to “encourage continued participation in matters of public significance” by stopping lawsuits that would otherwise chill a person’s public participation due to abuse of the judicial process. (§ 425.16, subd. (a).) There are two steps to determining if a lawsuit is designed to curtail the defendant’s participation in matters of public significance.

The first step is examining the causes of action to determine if they arise from any act in furtherance of the defendant’s “right of petition or free speech under the United States Constitution or the California Constitution in connec-

3. Davis requested the appeal be dismissed only as to him. This court granted Davis’s request. Thus, Cheveldave is the sole appellant.
tion with a public issue.” (§ 425.16, subd. (b).) The second step is determining whether the plaintiff has a probability of prevailing on his claims. (§ 425.16, subd. (b).) If a cause of action arises from an act in furtherance of the defendant’s right of petition or free speech and the plaintiff does not have a probability of prevailing, then the cause of action will be stricken. (§ 425.16, subd. (b).) We apply the de novo standard of review. (Park v. Board of Trustees of California State University System (2017) 2 Cal.5th 1057, 1067.)

C. PROTECTED ACTIVITY

An “‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue’ includes . . . any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body, or any other official proceeding authorized by law.” (§ 425.16, subd. (e)(2).)

“In deciding whether the initial ‘arising from’ requirement is met, a court considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’” (§ 425.16, subd. (b).)” (Navellier v. Sletten (2002) 29 Cal.4th 82, 89.) “The mere fact that an action was filed after protected activity took place does not make the action arose from that activity for the purposes of the anti-SLAPP statute. . . . In the anti-SLAPP context, the critical consideration is whether the cause of action is based on the defendant’s protected free speech or petitioning activity.” (In re Episcopal Church Cases (2009) 45 Cal.4th 467, 477.)

The act complained of in Cheveldave’s complaint is the Association’s entering into the Agreement, which resulted in increased fees for homeowners. Cheveldave asserts the Association did not have authority to agree to the fee increase, and he requests the fee increase be declared void and the Agreement be declared void as to the homeowners in the Tri-Palms Estate unit three development.

The fee increase clause of the Agreement provides, in relevant part, “Pursuant to the Fee Schedule attached hereto as Exhibit 2, and in order to resolve that Lawsuit, the Parties agree that K&S may charge increased Usage and Maintenance Fees for each Lot Owner (as defined in the Declaration) within each Tract.” The “Lawsuit” refers to the state trial court case for which a judgment was entered in 2012. At the time of the Agreement, an appeal and cross-appeal from the 2012 judgment were pending in this court. (Tri Palms Unified Owners Association, Inc. et al. v. The Club at Shenandoah Springs Village, Inc. (E056546) [dismissal order July 28, 2014].)

The Agreement further provides, “[The Association] shall file a Request for Dismissal with prejudice of its Cross-Appeal in its entirety as to all parties and claims with each Party bearing its own fees and costs within 15 business days after date of the Close of Escrow pursuant to the Purchase Agreement. [The Association’s] obligation to file a Request for Dismissal with prejudice of its Cross-Appeal is contingent upon the dismissal, with prejudice, of the appeal filed by the Debtor.”

The Agreement also provides, “[The Association] asserts certain claims against Debtor, and filed a proof of claim as a secured creditor in the Bankruptcy Action for the amount of $382,478.75 plus interest. . . . After a trial on June 8, 2012, a judgment was entered against Debtor in the amount of $365,648.88 plus interest and for a permanent injunction. Debtor then filed an appeal from the Judgment and [the Association] filed a cross appeal on July 31, 2012.”

The Agreement continues, “K&S shall not object to [the Association’s] secured claim of Three Hundred Eighty Two Thousand Four Hundred Seventy Eight and 75/100ths Dollars ($382,478.75) plus interest, being deemed an allowed claim, which shall be paid from proceeds of the Sale Motion, and [the Association] covenants not to file another claim in the Debtor's bankruptcy case. [The Association] shall cooperate in and support K&S’s purchase of the Purchased Assets pursuant to the Purchase Agreement and Sale Motion.”

In other words, the Association had a claim for $382,478.75 as a result of a judgment entered in the state trial court, and the Association hoped to have its claim paid within the bankruptcy proceedings. In connection with that $382,478.75 judgment, an appeal and cross-appeal were pending. Additionally, the Association had made a demand for arbitration against Shenandoah, in relation to the fee increase. In the Agreement, the Association agreed to (1) dismiss its cross-appeal, (2) dismiss its demand for arbitration, and (3) permit the fee increase, in exchange for (A) dismissal of Shenandoah’s appeal, and (B) an agreement that the $382,478.75 judgment would be paid.

Thus, the Association’s act of agreeing to the fee increase resulted in the dismissal of an appeal and cross-appeal that were pending before this court, and the resolution of the Association’s creditor claim that was pending before the bankruptcy court. When the bankruptcy court issued its order, it wrote, “The Court approved K&S as the successful bidder at the hearing on the Motion in lieu of Inspire Communities, in part, based on K&S’ agreement on the record in open court to the terms and conditions of the Inspire Settlement Agreement.” Thus, the terms of the Agreement were part of the bankruptcy court’s decision to select K&S as the successful bidder.

In sum, the Agreement led to the settlement of the Association’s creditor claim in the bankruptcy court and the appeal and cross-appeal in the state appellate court. The Agreement was also used by the bankruptcy court as a reason to select K&S as the successful bidder after the terms of the Agreement were discussed in open court.

Given that the Agreement affected a number of issues before the courts, the Agreement constitutes a “written . . . statement . . . made in connection with an issue under consideration or review by a . . . judicial body.” (§ 425.16, subd. }
(e)(2).) Accordingly, the Association’s act of entering into the Agreement is a protected activity.

Cheveldave contends the Association’s act of entering into the fee increase portion of the Agreement is not a protected activity because the Association did not have authority to enter into that section of the Agreement. Cheveldave’s argument pertains to the merits of the case, i.e., whether the Association had the authority to enter into the fee increase portion of the Agreement. Cheveldave does not cite to the anti-SLAPP statute and explain how an alleged lack of authority means the statement was not made in connection with an issue pending before a court. (§ 425.16, subd. (e)(2)). Accordingly, because Cheveldave’s argument appears to pertain to the merits of his complaint, we find his contention to be unpersuasive.

D. PROBABILITY OF PREVAILING

1. Law

If a cause of action arises from the defendant’s protected activity then the plaintiff must show he has a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); Navellier v. Sletten, supra, 29 Cal.4th at p. 95.) The plaintiff must establish that his case has “minimal merit” by presenting a “prima facie showing of [evidence] to sustain a favorable judgment if the evidence submitted by the plaintiff is credible.” (Navellier, at pp. 88-89, 93.)

2. Davis-Stirling Act

When a development contains a common area, then the Davis-Stirling Act applies. (Civ. Code, § 4201.) The Davis-Stirling Act confers standing on a homeowners’ association to pursue legal claims in its own name without joining the individual members. (Pinnacle Museum Tower Asn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 241; Civ. Code, § 5980.) A “common area may consist of mutual or reciprocal easement rights appurtenant to the separate interests.” (Civ. Code, § 4095, subd. (b).) A reciprocal easement arises when adjoining landowners impose corresponding restrictions or rights upon each of their properties. (Whelan v. Rosseter (1905) 1 Cal.App. 701, 704; see also Redevelopment Agency v. Tobriner (1989) 215 Cal.App.3d 1087, 1091, fn. 1.)

An example of a reciprocal easement is a small condominium building with a common driveway. Each condominium owner may grant a reciprocal easement to the other condominium owners that allows each owner to drive anywhere on the driveway and preventing any owner from erecting a barrier. (See Hill v. San Jose Family Housing Partners, LLC (2011) 198 Cal.App.4th 764, 775-776; see also Howeth v. Coffelt (2017) 18 Cal.App.5th 126, 129; see also Baccouche v. Blakenship (2007) 154 Cal.App.4th 1151, 1555; see also Redevelopment Agency v. Tobriner, supra, 153 Cal.App.3d at pp. 370-371; see also Fobbs v. Smith (1962) 202 Cal.App.2d 209, 211; see also Civ. Code, § 4505, subd. (a).)

The 2003 Master Declaration provides, “Every Member of the Association shall have a non-exclusive easement for use and enjoyment of the Recreational Facilities and any improvements thereon or open space areas therein, which shall be appurtenant to and pass with title to each Lot, subject to all of the easements, covenants, conditions, restrictions and other provisions contained in the Declarations and this Master Declaration.”

The Master Declaration does not create a reciprocal easement because there is not a shared burden. The members’ properties are not burdened by an easement—only the recreation facility is burdened by an easement. Based upon the current evidence, there is not a shared burden, and therefore, there are not reciprocal easements.

A mutual easement has the same meaning as a reciprocal easement: “[A] general plan of real estate development can give rise to mutual equitable servitudes only when both the grantor and grantee intend that the land conveyed is to be restricted pursuant to a general plan, that intent appears in the deed, the parties’ agreement shows that the parcel conveyed is subject to restrictions in accordance with the plan for the benefit of all the other parcels in the subdivision and such other parcels are subject to like restriction for its benefit.” (Terry v. Jones (1977) 72 Cal.App.3d 438, 442.) Thus, mutual easements are defined by a “mutuality of obligation.” (Welsch v. Goswick (1982) 130 Cal.App.3d 398, 405.)

As explained ante, there is not a mutuality of obligation. Rather, there is a single obligation. The recreation facility, alone, bears the burden of an easement. The homeowners’ properties do not have the burden of a mutual obligation. As a result, based upon the current evidence, there is not a mutual easement. Because the evidence reflects there is not a reciprocal easement or a mutual easement, Cheveldave has established minimal merit regarding his allegation that there is not a common area, and thus that there is not standing pursuant to the Davis-Stirling Act.

The Association contends the unit three declaration created easements on homeowners’ lots for the installation and maintenance of drainage facilities, and thus, there is a common area. The “Declaration of Restrictions and Charges for Tri-Palm Estates Unit Three” provides that Mobilife of California, Inc. created easements on the homeowners’ lots. Specifically, the unit three declaration provides, “Easements for the installation and maintenance of utilities and drainage facilities are reserved, as shown on the recorded map or plat, over the rear and side of each lot and parcel of land. Within these easement areas, no structure, planting or other material shall be placed or permitted to remain which may damage or interfere with the installation and maintenance of utilities. The easement areas of each lot and parcel of land, and all improvement in it, shall be maintained continuously by the owner of said lot and parcel of land.”

The foregoing easement is not mutual or reciprocal because the easement runs in only one direction—the burden is only on the homeowner. There is not a shared burden. The
utility companies have not granted an easement to the homeowners, such that the utility companies are burdened. Accordingly, because the easements are not reciprocal or mutual, we are not persuaded that the easements create a common area.

The Association contends it owns an office, and the office constitutes a common area. In support of this contention, the Association cites to Cheveldave’s attorney’s argument in the opposition to the anti-SLAPP motion. Because the Association (1) does not provide evidence of its ownership of the office; and (2) does not provide an explanation as to how owning the office constitutes a common area for homeowners, we find the Association’s contention to be unpersuasive. (Central Valley Gas Storage LLC v. Southam (2017) 11 Cal. App.5th 686, 694-695 [provide relevant analysis].)

3. Master Declaration

The Association contends that if, under the current evidence, the Davis-Stirling Act could be found to be inapplicable, then the Association had standing to authorize the fee increase pursuant to the recorded 2003 Master Declaration.

The Master Declaration provides, “The Association may do all other acts and things that nonprofit mutual benefit corporations are empowered to do, which may be necessary, convenient or desirable in the administration of its affairs and in order to carry out the powers and duties described in this Master Declaration, including those powers described in Section 374 of the California Code of Civil Procedure and (to the extent not inconsistent herewith) those powers described in Section 1350 et seq. of the California Civil Code, as those sections may be amended from time to time.”

The Master Declaration was executed in 2003. In 2003, section 374 provided that a minor under 12 years of age, accompanied by a guardian ad litem, “shall be permitted to appear in court without counsel for the limited purpose of requesting or opposing a request for” a protective order or an injunction to stop harassment or violence. The fee increase did not arise from a case involving a protective order or an injunction related to harassment or violence. Accordingly, we do not rely upon section 374.

In 2003, Civil Code section 1350 et seq. was the Davis-Stirling Act. (Former Civ. Code, § 1350.) The Master Declaration provides, “The Association may do all other acts and things that nonprofit mutual benefit corporations are empowered to do . . . including . . . (to the extent not inconsistent herewith) those powers described in Section 1350 et seq. of [the] California Civil Code, as those sections may be amended from time to time.”

As explained ante, the Davis-Stirling Act applies when there is a common area. (Civ. Code, § 4201.) The law specifically provides that the Davis-Stirling Act does not “apply to a real property development that does not contain [a] common area.” (Civ. Code, § 4201.) Arguably, it would be inconsistent to apply the Davis-Stirling Act to the Association because there is evidence reflecting Tri-Palms Estates does not have a common area. Because it is arguably inconsistent, one could reasonably argue that, under the Master Declaration, the authority granted by the Davis-Stirling Act does not apply in this case. The argument would be as follows: the Master Declaration allows the authority of the Davis-Stirling Act to be exercised by the Association “to the extent not inconsistent herewith,” but it is inconsistent in this case because there is no common area, and thus, no authority may be exercised under the Davis-Stirling Act. Because such an argument can reasonably be made, we conclude there is minimal merit to Cheveldave’s case.

4. Proper Fees

The Association contends that even if it lacked authority to agree to the fee increase, the increase itself was proper. In other words, the Association’s lack of authority is harmless in that K&S could have increased the fees in the same manner, without any agreement by the Association, because there is no error in K&S’s fee calculation.

It may be that the result of Cheveldave’s lawsuit is that the Agreement is declared void and then nothing of substance changes because the fee increase was properly calculated and could have been unilaterally imposed by K&S. If it is declared that the Association did not have the authority to enter into the Agreement, then that declaration could affect similar issues in the future between the Association and the homeowners. This lawsuit may ultimately be more about procedure, than a decrease in fees, but it could clarify the rights between the Association and the homeowners. Therefore, there is minimal merit to Cheveldave’s case.

5. Deference

The Association contends Cheveldave’s case does not have minimal merit because deference is given to decisions made by the governing board of a community association. The Association relies upon the following quote: “ ‘Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development’s governing documents, and comply with public policy.’ ” (Lamden v. La Jolla Shores Clubdominium Homeowners Assn. (1999) 21 Cal.4th 249, 264.)

If Cheveldave’s complaint concerned the merits of the fee increase, then the foregoing rule might be applicable. However, Cheveldave is disputing the Association’s authority to enter into the Agreement. The quote that the Association relies upon is not relevant to determining whether the Association had the authority to enter into the Agreement; rather, it would be relevant if we were examining if it were a good decision to enter into the fee increase portion of the Agreement. Accordingly, we find the Association’s argument to be unpersuasive.
6. Collateral Estoppel

a. Law

“The doctrine of collateral estoppel is one aspect of the concept of res judicata.” (Lucido v. Superior Court (1990) 51 Cal.3d 335, 341, fn. 3.) “Collateral estoppel, or issue preclusion, ‘precludes relitigation of issues argued and decided in prior proceedings.’ ” (Myoclegen Corp. v. Monsanto Co. (2002) 28 Cal.4th 888, 896.)

Collateral estoppel has five requirements: “First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.” (Lucido v. Superior Court, supra, 51 Cal.3d at p. 341.) We apply the de novo standard of review. (Johnson v. GlaxoSmithKline, Inc. (2008) 166 Cal. App.4th 1497, 1507.)

b. Bankruptcy Court

The Association contends the bankruptcy court’s order was final and on the merits, and therefore Cheveldave’s case is barred by collateral estoppel. The issue before the bankruptcy court was Shenandoah’s debts. There is nothing in the record indicating that the bankruptcy court decided whether the Association had the authority to agree to a fee increase. Because the issue raised in Cheveldave’s case is not identical to the issue raised in the bankruptcy court, collateral estoppel does not apply.

c. The Agreement

The Association contends the Agreement is a final decision on the merits and therefore Cheveldave’s case is barred by collateral estoppel. The Association relies upon Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Assn. (1998) 60 Cal.App.4th 1053, 1065, which provides, “The settlement agreement, as incorporated into the judgments in the Kelly and federal court actions, meets the first requirement of res judicata that there was a final decision on the merits.”

The bankruptcy court did not incorporate the Agreement into its order. In its order, the bankruptcy court wrote, “The Court approved K&S as the successful bidder at the hearing on the Motion in lieu of Inspire Communities, in part, based on K&S’ agreement on the record in open court to the terms and conditions of the Inspire Settlement Agreement.” The Agreement was a reason for the bankruptcy court selecting K&S as the successful bidder, but the court did not order K&S to comply with the terms of the Agreement. Because the terms of the Agreement are not part of the bankruptcy court’s order, the Agreement does not constitute a final decision on the merits. Therefore, Cheveldave’s case is not barred by collateral estoppel.

d. Small Claims

The Association contends that Davis, who is no longer a party to this appeal, is barred by collateral estoppel from pursuing this case because he previously litigated the same issues in small claims court. Because Davis is no longer a party to this appeal, we deem this issue to be moot. (Schoshinski v. City of Los Angeles (2017) 9 Cal.App.5th 780, 791 [an issue is moot when the court cannot provide further relief].)

E. CONCLUSION

Cheveldave has established that his case has minimal merit. Accordingly, the trial court erred by granting the anti-SLAPP motion.

II. ATTORNEYS’ FEES

The Association contends it should be awarded attorneys’ fees on appeal if this court affirms the trial court’s order. We deny the Association’s request because we are reversing the trial court’s order. Further, because the Association is not the prevailing party on the anti-SLAPP motion, the trial court’s award of attorneys’ fees must be reversed. (§ 425.16, subd. (e)(1).)

We note that Cheveldave’s notice of appeal did not expressly include the award of attorneys’ fees. In the trial court’s May 18 order granting the anti-SLAPP motion, the trial court explained that the Association was the prevailing party and cited to the subdivision mandating an award of attorneys’ fees (§ 425.16, subd. (e)). The exact amount of attorneys’ fees was awarded on May 26. Cheveldave’s notice of appeal reflects he is appealing from the May 18 order and the July 11 denial of his motion for reconsideration. Because the trial court’s May 18 anti-SLAPP order included a citation to the law for a mandatory award of attorneys’ fees, and Cheveldave is appealing from the May 18 order, we conclude the issue is within our jurisdiction. (Grant v. List & Lathrop (1992) 2 Cal.App.4th 993, 997; Chodos v. Cole (2012) 210 Cal.App.4th 692, 697-698, 706.)

III. MOTION TO DISMISS

The Association filed a motion to dismiss Cheveldave’s appeal due to Cheveldave no longer residing within Tri Palms Estates. The Association explains that Cheveldave’s home was foreclosed upon, and in March 2018 ownership of Cheveldave’s home was transferred to the Association. The Association was listed as the creditor in the foreclosure. The Association asserts that because Cheveldave is no longer a homeowner within Tri Palms Estates, he lacks standing to pursue the instant appeal.

4. The Association requests this court take judicial notice of the “Sheriff’s Deed County of Riverside, State of California Under Writ of Execution,” that was recorded by the Riverside County Clerk-Recorder, against Cheveldave’s property. This court grants the request as required by law. (Evid. Code, §§ 452, subd. (c), 453; Evans v. California Trailer Court, Inc. (1994) 28 Cal.App.4th 540, 549.)
“Any party aggrieved may appeal.” (§ 902.) “[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs.” (§ 425.16, subd. (c)(1).)

Because the Association was the prevailing party on the anti-SLAPP motion, the trial court awarded the Association attorneys’ fees in the amount of $33,720.50 and costs in the amount of $1,505.77, for a total award of $35,225.77. Because Cheveldave was required to pay an award of $35,225.77, he was aggrieved. Because attorneys’ fees are required for a prevailing defendant on anti-SLAPP motion, the only means of addressing the attorneys’ fee award on appeal was to argue that the trial court erred in granting the anti-SLAPP motion. Accordingly, because Cheveldave was aggrieved by the trial court’s order, he could properly appeal. (§ 902.) Therefore, we deny the Association’s motion to dismiss.

DISPOSITION

The judgment of dismissal is reversed. The orders granting the anti-SLAPP motion and awarding attorney’s fees are reversed. Cheveldave is awarded his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

CERTIFIED FOR PUBLICATION

MILLER J.

We concur: McKINSTER Acting P. J., CODRINGTON J.

COUNSEL

Law Offices of Mark B. Plummer and Mark Brennan
Plummer for Defendant and Appellant.

Paul M. Hittelman for Plaintiff and Respondent.

OPINION

Plaintiff Samantha Martinez sued defendant Eatlite One, Inc., for employment discrimination among other things. A jury found in favor of plaintiff on all of her claims and awarded $11,490 in damages. After the court entered judgment, both parties submitted competing memoranda of costs, and plaintiff filed a motion for attorney fees. The court awarded costs and attorney fees to plaintiff. Defendant contends the court erred because plaintiff did not obtain a judgment more favorable than defendant’s offer to compromise under Code of Civil Procedure section 998 (998 offer). We agree and reverse the portions of the postjudgment orders awarding post-offer costs and attorney fees to plaintiff.

FACTS

Plaintiff worked as a sandwich maker and cashier at a Subway store owned by defendant. Defendant terminated plaintiff’s employment while she was pregnant. Plaintiff then brought an action alleging claims for: (1) employment discrimination in violation of public policy; (2) employment discrimination based on gender and pregnancy; (3) failure to provide reasonable accommodations at the workplace; (4) employment discrimination in violation of the California Constitution; and (5) negligent supervision and retention.

5. The trial court calculated the total award as $35,225.77. However, it appears the total amount should be $35,226.27.

1. All statutory references are to the Code of Civil Procedure.
In March 2015, defendant made a 998 offer in the amount of $12,001. The offer provided: “Defendant … offers to allow judgment to be taken in favor of Plaintiff … and against … Defendant in the amount of $12,001.00 pursuant to Code of Civil Procedure Section 998.” The offer further stated: “If this offer is not accepted within thirty (30) days, or prior to trial, whichever occurs first, it shall be deemed withdrawn and cannot be given as evidence upon the trial. In the event Plaintiff fails to obtain a more favorable judgment than that offered, the Plaintiff shall be awarded no costs or fees and will be liable for the Defendant’s costs from the date of this offer. In addition, at the Court’s discretion, Plaintiff may be required to pay a reasonable sum to cover costs of the services of expert witnesses.” Plaintiff never responded, and the 998 offer expired.

The case proceeded to trial, and the jury found in favor of plaintiff on all claims. The jury awarded $11,490 in damages to plaintiff, and the court entered judgment in July 2016. From October 2016 through January 2017, the parties filed competing memoranda of costs and motions to strike or tax each other’s costs. Plaintiff also filed a motion for attorney fees, which defendant opposed.

In April 2017, the court granted plaintiff’s motion to strike defendant’s costs and denied defendant’s motion to strike or tax plaintiff’s costs. The court also granted plaintiff’s motion for attorney fees and awarded $4,095.07 in costs and $60,000 in pre-offer and post-offer attorney fees to plaintiff. In determining plaintiff was entitled to all of her costs and fees, the court added plaintiff’s pre-offer costs and fees to the jury’s award and compared the total to the 998 offer. The court reasoned the 998 offer “was silent as to excluding costs or attorneys’ fees[ so] pre-offer costs, including attorneys’ fees are added to the amount of the verdict for the purposes of deciding whether the ‘judgment’ was greater than the … 998 offer.” In May 2017, the court entered an amended judgment including the costs and attorney fees awarded to plaintiff.

**DISCUSSION**

Defendant argues the court erred by adding plaintiff’s pre-offer costs and attorney fees to the jury’s award and comparing that amount to the 998 offer. Instead, defendant claims the court should have compared the 998 offer directly with the jury’s award because the 998 offer was silent as to costs and attorney fees. We agree the court erred, but arrive at that conclusion with a different rationale.

The interpretation and application of section 998 to undisputed facts is a question of law subject to de novo review. (Bodell Construction Co. v. Trustees of Cal. State University (1998) 62 Cal.App.4th 1508, 1515.) Section 998, subdivision (c)(1) provides: “If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant’s costs from the time of the offer. In addition, … the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover postoffer costs of the services of expert witnesses … .” To determine “whether the plaintiff obtains a more favorable judgment, the court … shall exclude the postoffer costs.” (Id., subd. (c)(2)(A).)

Citing Heritage Engineering Construction Inc. v. City of Industry (1998) 65 Cal.App.4th 1435, defendant argues that, for purposes of comparing the 998 offer to plaintiff’s judgment, the plaintiff’s pre-offer costs and attorney fees may not be added to the jury’s award unless the 998 offer specifically includes costs and fees. We disagree with the rationale, but not with the result. By specifying post-offer costs are excluded for purposes of determining whether plaintiff obtained a more favorable judgment, the statute necessarily implies pre-offer costs are included. (§ 998, subd. (c)(2)(A).) The Heritage court was not called upon to decide the issue here, i.e., whether pre-offer costs must be added to the jury’s award for purposes of comparison where the 998 offer is silent regarding the treatment of costs. Thus, the Heritage opinion is inapt authority for our issue. We note that a prevailing plaintiff is always entitled to an award of costs. (§ 1032, subd. (b).) The cost shifting provisions of section 998 apply only to post-offer costs. As the court stated in Stallman v. Bell (1991) 235 Cal.App.3d 740: “We agree that, under section 998, the costs provision in an offer should be taken into account to determine the amount of the offer for purposes of comparing that amount to the amount of the judgment. It does not follow, however, that the costs provision in the offer should determine what costs are added to the award of damages in order to arrive at the amount of the judgment for purposes of section 998.” (Id. at p. 750.)

Here, the court correctly considered the jury’s award plus plaintiff’s pre-offer costs and fees in determining the value of plaintiff’s judgment, but failed to consider whether the same pre-offer costs and fees increased the value of the 998 offer which was not expressly inclusive of costs. In Engle v. Copenbarger & Copenbarger, LLP (2007) 157 Cal.App.4th 165, we held “a party who secures a recovery by accepting a section 998 offer is entitled to costs and fees unless they are excluded by the offer.” (Id. at p. 169.) Applying the logic in Engle, the value of defendant’s 998 offer, which was silent on costs, necessarily included $12,001 plus plaintiff’s pre-offer costs and fees defendant would have been liable for if plaintiff had accepted the offer. This is consistent with the purpose of section 998, which “is to encourage settlement by providing a strong financial disincentive to a party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting his or her opponent’s settlement offer.” (Bank of San Pedro v. Superior Court (1992) 3 Cal.4th 797, 804, italics added.) While plaintiff contends her pre-offer costs and attorney fees “must be added to the $11,490 damage award,” she does not cite judgment and for purposes of determining whether plaintiff obtained a more favorable judgment, the statute necessarily implies pre-offer costs are included. (§ 998, subd. (c)(2)(A).) The Heritage court was not called upon to decide the issue here, i.e., whether pre-offer costs must be added to the jury’s award for purposes of comparison where the 998 offer is silent regarding the treatment of costs. Thus, the Heritage opinion is inapt authority for our issue. We note that a prevailing plaintiff is always entitled to an award of costs. (§ 1032, subd. (b).) The cost shifting provisions of section 998 apply only to post-offer costs. As the court stated in Stallman v. Bell (1991) 235 Cal.App.3d 740: “We agree that, under section 998, the costs provision in an offer should be taken into account to determine the amount of the offer for purposes of comparing that amount to the amount of the judgment. It does not follow, however, that the costs provision in the offer should determine what costs are added to the award of damages in order to arrive at the amount of the judgment for purposes of section 998.” (Id. at p. 750.)

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any authority, and we are aware of none, suggesting the same costs and fees should be excluded from the 998 offer, which was silent on costs. Thus, we conclude the court should have compared the jury’s award plus plaintiff’s pre-offer costs and fees with the amount of the 998 offer plus plaintiff’s pre-offer costs and fees. Because, for comparison purposes, the pre-offer costs and fees are added to both the jury award and the (silent on costs) 998 offer, we may simply compare the jury award with the 998 offer. Thus, the $11,490 jury award is less than the 998 offer. Plaintiff did not obtain a “more favorable judgment.”

Because plaintiff did not obtain a “more favorable judgment” when comparing the correct numbers, we reverse the portions of the postjudgment orders awarding post-offer costs and attorney fees to plaintiff and denying post-offer costs to defendant. Having reached this disposition, we nonetheless believe the bench and bar would be well served if the Legislature amended section 998 to clarify how costs and fees should be addressed in a 998 offer.

**DISPOSITION**

We reverse the portions of the postjudgment orders awarding post-offer costs and attorney fees to plaintiff and denying post-offer costs to defendant. On remand, the court is instructed to enter an amended postjudgment order awarding only pre-offer costs and attorney fees to plaintiff, post-offer costs to defendant, and any expert witness fees the court determines to award in its discretion to defendant. Defendant is entitled to its costs on appeal.

IKOLA, J.

WE CONCUR: ARONSON, ACTING P. J., FYBEL, J.