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IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION 4

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110 MANAGEMENT, INC.
Defendant and Appellant

vs.

AMY LEE HARTZLER p/k/a AMY LEE/EVANESCENCE
Plaintiff and Respondent

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES
HON. MAUREEN DUFFY-LEWIS • BS171379

RESPONDENT'S BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, Rules 8.208, 8.488)

Interested entities or persons are as follows:

(1) Amy Lee Hartzler p/k/a Amy Lee/Evanescence, Plaintiff and Respondent.

(2) 110 Management, Inc., Defendant and Appellant.

(3) Andrew Lurie, Owner of 110 Management, Inc.

DATED: January 15, 2019

McPHERSON RANE LLP
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By: /s/ *Edwin F. McPherson*
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Attorneys for Plaintiff and Respondent AMY LEE HARTZLER p/k/a AMY LEE/ EVANESCENCE

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I. INTRODUCTION

A. PREFATORY STATEMENT

This case boils down to the following: When an attorney/ personal manager compels a former client to spend well over $1 Million to defend multiple claims for which he ultimately recovers under $5,000.00, there are financial consequences. Yet, the Appellant in this case has done everything – from filing successive briefs with the Arbitrator, to questioning the Arbitrator's health, to questioning the Arbitrator's impartiality (because the Arbitrator's Rabbi daughters attended a Jewish university where one of Respondent's business manager's attorneys taught a class (before they were born)), to filing for Bankruptcy, to opposing a motion for relief from the Automatic Stay, to seeking vacatur from the Superior Court, to filing this appeal, causing Respondent to spend tens of thousands of dollars more – in order to avoid those consequences.

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This Court should not reward such behavior. If this Court reverses the decision of the trial court, and vacates the Arbitrator's award in this case because of the *timing* of the Arbitrator's decision to consider the Appellant's rejection of the 998 offer, then essentially no arbitration order is safe.

B. SUMMARY OF ARGUMENT

Andrew Lurie first acted as an attorney for Respondent Amy Lee Hartzler, p/k/a Amy Lee/Evanescence (hereinafter "Hartzler"). He then became her personal manager, and formed Appellant 110 Management, Inc. (hereinafter "110 Management") for that purpose.

110 Management and Lurie acted as Hartzler's personal manager for nearly ten years, while Lurie continued to perform legal services for her, during which time 110 was paid nearly $5 Million in commissions. A mere twenty days after Hartzler terminated 110 Management's services, 110 Management commenced Arbitration proceedings against Hartzler, claiming

that she owed it well over $1 Million.

After two years of Arbitration proceedings, substantial discovery, seven days of hearing, and three rounds of closing briefs, the Arbitrator, retired Superior Court Judge Eli Chernow (hereinafter the "Arbitrator") issued an Interlocutory Order on April 7, 2017. He ruled that all but one of 110 Management's claims were completely devoid of merit, and therefore designated Hartzler as the prevailing party, indicating that she was entitled to recover attorneys' fees and costs. After the parties briefed the issues of fees and costs, a final Arbitration Award was issued on October 18, 2017, pursuant to which Hartzler was awarded a net recovery of $1,036,773.68.

Although 110 Management subsequently sought to vacate the Arbitration Award, the trial court correctly found that 110 Management did not establish that the Arbitrator's Order was subject to judicial review, because it failed to establish the existence of any of the factors in Code of Civil Procedure Section 1286.2. Accordingly, the trial court correctly held that the

Arbitration Award should be confirmed, and Judgment was entered in favor of Hartzler, and against 110 Management.

Now, in this Appeal, 110 Management has presented the very same arguments that the trial court properly rejected. As demonstrated below, far from establishing that this was the rare case in which this Court should disregard the finality of an arbitration award, 110 Management cannot present a single factor that warrants vacatur – or even a valid basis for judicial review – of the final Arbitration Award.

110 Management's Opening Brief is replete with conclusory and legally-unsupported assertions that the Arbitration Award violates 110 Management's *statutory rights* and/or contravenes *public policy*. However, the Brief does nothing but improperly seek to correct perceived (but erroneous) errors of law or fact, which are not subject to judicial review.

110 Management's primary argument is that the arbitration award violates public policy, and was unfair, because the Arbitrator considered a Section 998 offer that was offered by

Hartzler (and rejected by silence by 110) before the Arbitrator issued his final Order. Notably absent, however, is any authority that supports 110 Management's assertion that considering a Section 998 offer/rejection prior to issuing a final order *violates public policy* under Code of Civil Procedure Section 1286.2, and is therefore sufficient to warrant vacatur of an arbitration award.

Nor has 110 Management presented any authority that supports its argument that the Arbitrator's consideration of the Section 998 offer/rejection was fundamentally unfair, or that it violated the rules of the American Arbitration Association, which, again, would simply be, at worst, an error of law that is not subject to judicial review. In short, the Opening Brief is devoid of any legal authority suggesting that the arbitration award should be vacated because the Arbitrator considered the Section 998 offer/rejection prior to issuing a final order.

Moreover, even assuming that 110 Management's argument was legally supported, this argument still necessarily fails because: (1) 110 Management itself failed to object to

Hartzler's discussion (and the Arbitrator's consideration) of the 998 offer/rejection, instead arguing to the Arbitrator that, under Section 998, 110 should be the prevailing party, thereby waiving any objections to the Arbitrator's allegedly premature consideration of the issue; and (2) 110 Management's rejection of the Section 998 offer was not the primary reason for which the Arbitrator designated Hartzler as the prevailing party. Thus, in addition to lacking any legal support, 110 Management's argument that the Arbitrator's consideration of the Section 998 offer led to an unfair result, is also demonstrably false.

110 Management's remaining two arguments – namely, that it was against public policy for the arbitrator to award attorneys' fees to Hartzler for her payment obligation to her business manager's attorneys because they had previously represented 110 in a prior unrelated matter, and that the Arbitrator improperly refused to rule on the issue of the amount

of "sunset" commissions[1] allegedly owed to 110 Management – fare no better.

Similar to its argument concerning the Section 998 issue, 110 Management fails to present any applicable legal authority to support its argument that an award of attorneys' fees to Hartzler for a law firm that represented 110 Management in a single unrelated transactional matter (years prior to the Arbitration) somehow constitutes a statutory violation sufficient to vacate the arbitration award. Instead, 110 Management relies upon inapposite authorities that utterly fail to support is argument.

110 Management's argument that the Arbitrator wrongfully deprived 110 Management of the finality required by the Arbitration rules because the Arbitrator refused to consider

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[1]"Sunset" commissions are commissions that may be contractually owed to a personal manager *after* his/her services have been terminated, typically based upon income that the artist receives subsequent to the termination, from deals that were entered into, or activities that occurred, prior to termination. An example would be income from concerts that were performed, or from an album that was released, prior to termination, but was not received by the artist until after termination.

the issue of sunset commissions that were allegedly owed to 110 Management is also devoid of merit. Indeed, 110 Management's argument here is based on a blatant mischaracterization of the claims at issue.

As demonstrated by the record, the amount of sunset commissions that were allegedly owed to 110 Management were not part of the Arbitration. Among other things, not a shred of testimony was presented by 110 Management (or anyone else) during the Arbitration hearing concerning sunset commissions, and such commissions were not even due as of the date that 110 Management filed its Demand for Arbitration (or as of the date of the 998 offer, for that matter).

Moreover, as recognized by the trial court, 110 Management's argument fails here for the additional reason that lack of "finality" is not among the bases listed in Code of Civil Procedure Section 1286.2 to review an arbitration award.

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In sum, although 110 Management admits that judicial review of an arbitration award is limited, it then either flagrantly disregards the very authority cited in its own brief by arguing that the Arbitrator made errors of law or fact, which are not reviewable, or it makes legally-unsupported arguments that the Arbitrator engaged in conduct that violated public policy.

Because 110 Management has failed to establish the existence of a single factor that warrants a reversal of the trial court's order confirming the arbitrator's award or, in many cases, even a basis upon which the order might be subject to judicial review in the first instance, Hartzler respectfully requests this Court to affirm the trial court's order.

II. FACTUAL BACKGROUND

A. THE PARTIES

Hartzler is a vocalist, songwriter, classically trained pianist, harpist, and composer, who co-founded the band Evanescence. *See* Volume 1 of 110 Management's Appendix

(hereinafter "AA") at 73. Andrew Lurie (hereinafter "Lurie") was initially Hartzler's entertainment transactional attorney. *See* 1 AA at 73-74. In approximately January of 2006, after Hartzler had already become extremely successful, Lurie became Hartzler's personal manager, and formed 110 Management, of which he was the sole principal. 1 AA at 73-74.

B. THE MANAGEMENT AGREEMENT BETWEEN HARTZLER AND 110 MANAGEMENT

110 Management and Hartzler entered into a written management agreement dated as of October 1, 2006. 3 AA at 606-614. The management agreement, at Paragraph 11, contained a mandatory arbitration provision, which provided the following:

> In the event of any dispute under or relating to the terms of this agreement, or the performance, breach, validity, construction, interpretation, execution or legality thereof, it is agreed that the same shall be submitted to arbitration to the American Arbitration Association in Los

> Angeles, California, and in accordance with the rules promulgated by the said association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. In the event of arbitration the prevailing party shall be entitled to recover any and all reasonable attorneys' fees and other costs incurred in the enforcement of the terms of this agreement, or for the breach thereof. This arbitration provision shall remain in full force and effect notwithstanding the nature of any claim or defense hereunder.

3 AA at 612-613.

C. HARTZLER'S TERMINATION OF 110 MANAGEMENT AND 110 MANAGEMENT'S IMMEDIATE DEMAND LETTER

Hartzler terminated 110 Management as her manager on March 31, 2015. Eight days later, Hartzler received a six-page letter from 110 Management's counsel, who had been retained "to recover those monies owed by [Hartzler.]" 3 AA at 619-625. After setting forth four pages of purported unpaid sums that were

supposedly owed to 110 Management, the letter concluded by requesting Hartzler to contact 110 Management's attorney "to arrange payment of the monies 110 Management is owed," in an amount that would "substantially exceed $500,000.00." 3 AA at 623. The letter also stated: "You should note that Your agreement with 110 Management contains both an arbitration provision and an attorney's fees clause which obligates You to pay the attorney's fees my firm incurs in this dispute after the arbitrator issues an award in favor of my client." *Id.*

D. 110 MANAGEMENT'S DEMAND FOR ARBITRATION

Less than three weeks after sending the April 8 letter, 110 Management filed a Demand for Arbitration for "failure to pay personal management fees." 3 AA at 627. Hartzler filed her Answer to the Demand on May 26, 2015. 3 AA at 629.

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E. HARTZLER'S SECTION 998 OFFER TO COMPROMISE

On January 15, 2016, long before the any significant fees were incurred by either side, Hartzler served 110 Management with a Code of Civil Procedure Section 998 offer to compromise of $100,000.00. 3 AA at 632-634. 110 Management did not respond to Hartzler's offer in any manner. 3 AA at 603.

F. THE ARBITRATION HEARING

The Arbitration hearing commenced on May 16, 2016, after considerable discovery, including electronic discovery that was requested by 110, a document production of tens of thousands of documents, and several depositions. Much of that discovery was objected to by Hartzler, but nevertheless was ordered by the Arbitrator. *See* 1 AA 50 and 4 AA at 876-877.

After the scheduled four-day hearing was disrupted because 110 Management demanded (and was allowed to take) a second full day of deposition of Hartzler's business manager, the hearing

proceeded on May 18 and May 19, 2016. *See* 1 AA at 50 and 4 AA at 880. The remaining days of the Arbitration hearing took place on August 3, 4, and 5, 2016, and November 18, 2016. *See id.* At the close of evidence, the Arbitrator ordered the parties to submit closing arguments via written briefs.

G. THE PARTIES' CLOSING BRIEFS

On December 19, 2016, 110 Management submitted its closing argument brief. 3 AA at 636-668. On January 23, 2017, Hartzler submitted her closing argument brief. 3 AA at 670-701. In her closing argument, Hartzler pointed out that the evidence had demonstrated that all of the commissions that 110 Management was seeking had either already been properly paid to 110 or were never owed to 110 under the Agreement. 3 AA at 676-691. The evidence also demonstrated that, at no time during the nine years that 110 received management commissions, which checks were accompanied by accounting statements, did 110 Management ever raise any objections, or claim that it was

entitled to be paid on the items for which it was now suing for commissions. 3 AA at 684.

Additionally, Hartzler argued that she should be deemed the prevailing party because: (1) 110 Management had been paid all of the commissions that it was entitled to receive; and (2) Hartzler had served a Code of Civil Procedure Section 998 offer of $100,000.00 on 110 Management on January 15, 2016, and therefore, even if the Arbitrator were to find that some commissions were owed to 110 Management, but those commissions did not exceed $100,000.00, Hartzler should still be deemed the prevailing party. 3 AA at 692.

110 Management filed a Reply Closing Argument on February 6, 2017, in which, not only did it fail to object to Hartzler's discussion of the 998 offer and rejection, it argued that 110, in fact, was the prevailing party under Section 998. 3 AA at 711-712.

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H. THE ARBITRATOR'S INTERLOCUTORY ORDER DATED APRIL 7, 2017

On April 7, 2017, the Arbitrator issued an Interlocutory Order, in which he ruled against 110 Management and in favor of Hartzler with respect to all except one of 110 Management's claims. 3 AA at 735-755. He also designated Hartzler as the prevailing party, and ruled that she was entitled to recover reasonable attorneys' fees and costs. 3 AA at 754-755.

The Arbitrator then requested Hartzler to file a Motion for Attorneys' Fees by April 24, 2017. However, 110 Management filed for Bankruptcy on April 21, 2017, and an Automatic Stay was immediately imposed. *See* 3 AA 757-789. After Hartzler was compelled to retain Bankruptcy counsel to file a motion for relief from the Automatic Stay, the Bankruptcy Trustee entered an order lifting the stay on June 21, 2017. Hartzler was then able to file her motion for attorneys' fees, obtain a final order from the Arbitrator, and ultimately obtain a Judgment in Superior Court. 4 AA at 871-1029, 3 AA at 847-869, and 4 AA 1117-1118.

I. 110 MANAGEMENT'S POST-AWARD ALLEGATIONS OF PURPORTED "IRREGULARITIES," AND THE AAA'S REJECTION OF THOSE CLAIMS

The first time that 110 Management raised any issues concerning the Arbitrator was on September 22, 2017, over two years after the commencement of the arbitration proceeding. 3 AA at 791-792. After the Stay was lifted in the Bankruptcy case 110 Management's counsel sent a letter to the American Arbitration Association (hereinafter "AAA") requesting another stay – this time of the arbitration, while making a vague request that the Arbitrator update his disclosures. *See id.*

On October 2, 2017, counsel for 110 Management sent another letter to the AAA, this time setting forth the specific conflict that 110 Management claimed to exist, as well as the assertion that recent by-pass surgery rendered the Arbitrator unfit to issue the award. 3 AA at 794-824.

Among other things, 110 Management claimed that the Arbitrator should have disclosed that his daughters, all three Rabbis, attended a Jewish university at which Stan Levy, an attorney who represented Hartzler's business management company briefly in connection with a document production (and also a Rabbi), had taught. 3 AA at 806-807. As it turned out, Levy had taught at the school for half a semester, years before the Arbitrator's daughters were even born. 3 AA at 842-843.

In response, counsel for Hartzler sent a detailed letter to the AAA, which addressed each of 110 Management's newly-founded claims. 3 AA at 840-845.

J. THE FINAL ARBITRATION AWARD DATED OCTOBER 18, 2017

On October 18, 2017, the AAA sent the parties a letter enclosing the final arbitration award issued by the Arbitrator. 3 AA at 847-869. Similar to the Interlocutory Order, this Order addressed each of 110 Management's claims, and found that

Hartzler was the prevailing party. 3 AA at 867. The Award also provided that Hartzler was entitled to recover a net total of $1,036,773.68[2] in fees and costs as the prevailing party in the Arbitration. The Arbitrator did not award all of the fees and costs that were requested.[3] 3 AA at 868.

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[2]On Page 10 of its Opening Brief, 110 Management asks, perhaps rhetorically: "Yet in a routine, simple case . . . the Arbitrator shockingly awarded Hartzler over $1 million in attorney's fees and costs. How could this have happened?" The answer to this query is quite obvious: As demonstrated by the record and this brief, this case became exorbitantly expensive due solely to 110 Management's own conduct. In addition to commencing an arbitration that sought relief for unsubstantiated and newly-manufactured claims (instead of simply conducting an audit) that were never raised during the ten years that 110 Management managed Hartzler, 110 Management propounded excessive discovery, including e-discovery of Hartzler, who keeps only a single laptop in her house with one user, filed numerous motions, insisted on taking the deposition of Hartzler's business manager twice, questioned its own and Hartzler's witnesses for excessive amounts of time in the Arbitration hearing, and then challenged the health and impartiality of the Arbitrator once it was determined that he had ruled in favor of Hartzler. 110 then filed an extensive motion to vacate the award, filed for Bankruptcy, and has now filed this unwarranted appeal.

[3]Hartzler actually requested $1,336,654.09 in fees and costs. 4 AA at 895. The Arbitrator reduced that amount by almost $300,000.00, to $1,036,773.68. 3 AA at 868.

K. THE MOTIONS TO CONFIRM AND VACATE THE ARBITRATION AWARD

On November 3, 2017, Hartzler filed a motion with the trial court to confirm the arbitration award. 1 AA at 45-93. 110 Management filed an Opposition to Hartzler's Motion on November 29, 2017. 1 AA at 94-106.

On November 13, 2017, 110 Management filed a motion to vacate the arbitration award. 2 AA at 473-495. In is Motion, 110 Management argued that the arbitration award should be vacated because: (1) the Arbitrator was not impartial, and a conflict existed, because of Stan Levy's class at the Jewish university at which the Arbitrator's daughters attended (2 AA at 493-494); (2) the Arbitrator should have disqualified himself because he had bypass surgery after the closing briefs had been submitted, but before he issued his award (2 AA at 488-493); (3) the Arbitrator's consideration of Hartzler's Section 998 offer was in violation of California statutory and case law (2 AA at 482-

484); (4) the parties' agreement barred recovery of fees and costs[4] (2 AA at 484-485); (5) the Arbitrator improperly awarded fees for Hartzler's business managers' attorneys' work (2 AA at 485-486); (6) the Arbitrator improperly awarded fees for Hartzler's expert witness (2 AA at 486-487); and (7) the Arbitrator did not make a final ruling on all issues. 2 AA at 487-489.

Hartzler filed an Opposition to the Motion to Vacate on November 29, 2017. 2 AA at 579-600.

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[4]110 Management's argument here, now abandoned, was that, under the management agreement, fees could not be awarded unless they were "incurred," which 110 bizarrely defined as "paid." 2 AA at 484-485. Because Hartzler did not submit copies of actual checks, 110 argued that she did not prove that her fees were "incurred." *Id.*

L. THE TRIAL COURT'S ORDER DENYING 110 MANAGEMENT'S MOTION TO VACATE AND CONFIRMING THE ARBITRATION AWARD, AND THE RESULTING JUDGMENT IN FAVOR OF HARTZLER

On January 19, 2018, the trial court issued an order denying 110 Management's motion to vacate the arbitration award, finding that all five of 110 Management's arguments:

> are precluded under MONCHARSH, and do not fall within the explicit reasons under CCP 1286.2, none are valid to vacate the award.

4 AA at 1111. With respect to 110 Management's argument concerning the lack of purported required disclosures, the trial court found:

> The final argument proffered by [110 Management] regards some type of Jewish conspiracy between [the Arbitrator's] daughters and the daughter of an attorney who was not directly involved with the arbitration (in that he did not represent anyone in the proceedings) and between [the

> Arbitrator's] wife and that same attorney. These assertions have no merit and do not support any claim that [the Arbitrator] could be (or was not) impartial.

4 AA at 1112.

In the same Order, the trial court granted Hartzler's petition to confirm the arbitration award. 4 AA 1112. A Judgment was entered in favor of Hartzler in the amount of $1,077,960.58 on March 21, 2018. 4 AA at 1115-1118.

III. STANDARD OF REVIEW

In determining whether an arbitrator exceeded his powers, the decision of the trial court is reviewed *de novo*, but substantial deference is given to the arbitrator's own assessment of his contractual authority. *Jordan v. Dep't of Motor Vehicles* (2002) 100 Cal. App. 4th 431, 444 (citing *Advanced Micro Devices, Inc. v. Intel Corp*, 9 Cal. 4th at 376 n. 9; *Alexander v. Blue Cross of California* (2001) 88 Cal. App. 4th 1082, 1087).

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"It is well settled that the scope of judicial review of arbitration awards is extremely narrow." *City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal. App. 4th 327, 333 (citing *Moncharsh v. Heily & Blase* (1992) 3 Cal. 4th 1, 9; *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal. 4th 362). An arbitrator's decision cannot be reviewed for errors of law or fact. *Moncharsh, supra*, 3 Cal. 4th at 16. Even an error or law on the face of the award does not provide grounds for judicial review. *Id.* at 15.

Code of Civil Procedure Section 1286.2 sets forth the exclusive grounds for vacating an arbitration award. *Maaso v. Signer* (2012) 203 Cal App. 4th 362, 371. Except on these grounds, arbitration awards are immune from judicial review in proceedings to confirm or challenge the award. *Id.* (citing *A.M. Classic Construction, Inc. v. Tri-Build Development Co.* (1999) 70 Cal. App. 4th 1479, 1475.)

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Although Code of Civil Procedure Section 1286.2 permits the court to vacate an award that exceeds the arbitrator's powers, the deference due to an arbitrator's decision on the merits of the controversy requires a court to refrain from substituting its judgment for the arbitrator's in determining the contractual scope of those powers. *Jordan v. Dep't Motor Vehicles*, 100 Cal. App. 4th at 444 (citing *Advanced Micro Devices Inc. v. Intel Corp., supra*, 9 Cal. 4th at 372).

IV. LEGAL DISCUSSION

A. THE TRIAL COURT CORRECTLY RULED THAT THE ARBITRATION AWARD WAS NOT SUBJECT TO JUDICIAL REVIEW.

110 Management acknowledges that judicial review of an arbitration award is limited, but then argues that review is appropriate in this case because the Arbitrator exceeded his powers. Specifically, 110 Management bases its appeal on Code of Civil Procedure Section 1286.2(a)(4), which provides:

> (a) Subject to Section 1286.4, the court shall vacate the award if . . . (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

See Cal. Civ. Proc. Code §1286.2(a)(4).

As demonstrated below, notably absent in 110's Opening Brief is any authority that demonstrates that the Arbitrator exceeded his powers when he issued the award in favor of Hartzler. Moreover, 110 Management has simply presented the very same issues[5] that the trial court correctly found were precluded by *Moncharsh v. Heily & Blase* (1992) 3 Cal. 4th 1, 16, and therefore, are not subject to judicial review.

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[5]110 Management has apparently decided to abandon its claim that the Arbitrator should have disqualified himself because he had bypass surgery after the Arbitration hearing, and that he could not be impartial because an attorney/Rabbi that was involved in a document production taught a class at the same college that the Arbitrator's Rabbi daughters attended – before they were born. *See* 2 AA 488-494 and 3 AA at 842-843.

B. THE ARBITRATOR'S DETERMINATION OF PREVAILING PARTY AND RESULTANT AWARD TO HARTZLER OF ATTORNEYS' FEES WAS NOT BASED UPON 110 MANAGEMENT'S REJECTION OF THE 998 OFFER.

The Arbitrator's designation of Hartzler as the prevailing party was based upon the failure by 110 Management to prevail on any of its numerous claims save one. 110 Management's rejection of Hartzler's 998 offer very early in the case was simply the proverbial "icing on the cake."

Specifically, the Arbitrator ruled that, because 110 Management was seeking at least $499,000.00[6] in commissions from Hartzler in connection with its numerous claims, and 110 lost all but one of its claims, with an award for that one claim of only $4,863.66, Hartzler was clearly the prevailing party in the

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[6]110 Management was actually seeking well over $1 Million. However, its attorney stated on the American Arbitration Association form that 110 Management was seeking "$499,000," presumably to pay a reduced filing fee. *See* 3 AA at 627.

arbitration. In his Award, the arbitrator stated the following:

> Lurie received a net award in his favor. Therefore, he might be considered the prevailing party in a simple sense. However, Lurie is the only party making affirmative claims for recovery. ***Virtually all of his substantial claims have been denied***. He has recovered only a tiny fraction of the amounts claimed by him . . . ***It is difficult to classify this matter as Lurie prevailing on a claim*** . . . ."

3 AA at 867 (emphasis added). Accordingly, 110 Management's unsupported argument that the arbitration award must be vacated because consideration of the Section 998 offer led to a fundamentally unfair result is demonstrably false.

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C. 110 MANAGEMENT HAS FAILED TO DEMONSTRATE THAT THE ARBITRATOR'S CONSIDERATION OF THE SECTION 998 OFFER PRIOR TO ISSUING THE FINAL AWARD IS A VIOLATION OF PUBLIC POLICY SUBJECT TO REVIEW.

1. 110 Management's "Public Policy" Argument Is Devoid Of Any Supporting Legal Authority.

110 Management's primary argument is that the arbitration award should be vacated because the arbitrator's consideration of the Section 998 offer/rejection prior to issuing a final award violates public policy. However, 110 Management has failed to present any authority whatsoever that supports its position in that regard, particularly to the point of requiring vacatur of the arbitration award.

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110 Management relies completely upon *Heimlich v. Shivji* (2017) 12 Cal. App. 5th 152 to support his argument. However, that case is currently on review by the California Supreme Court, and is therefore, at most, *persuasive* (but not *binding*) authority. Rule of Court 8.1115(e) provides that, when review of a published opinion has been granted, and while review is pending, unless otherwise ordered by the Supreme Court, a published opinion of the Court of Appeal in the matter ***has no binding or precedential effect, and may be cited for potentially persuasive value only.*** *See* Cal. Rules of Court, rule 8.1115(e) (emphasis added).

Moreover, even if *Heimlich* were binding authority, there is nothing in *Heimlich* that supports the assertion that Hartzler's (and, as discussed below, *110 Management's*) discussion of the Section 998 offer in closing briefs, and the Arbitrator's consideration of the same, warrants vacatur of the arbitration award. Rather, this Court in *Heimlich* simply stated, *in dicta*, that "we believe that a party's section 998 request *should* be

deferred until after the arbitration award is made." *Id.* at 174 (emphasis added).

Significantly, the court made this statement in connection with granting relief to a party who had failed to provide evidence of the Section 998 offer to the arbitrator prior to the time that the arbitrator had issued the final award, and was therefore not allowed to recover his costs.[7] The court stated that, if a party makes a Section 998 post award request, an arbitrator *is empowered to* recharacterize the existing award as interim, interlocutory, or partial, and then proceed to resolve the Section 998 issue by a subsequent award. *See id.*

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[7]It is exactly for this reason that Hartzler brought the 998 offer/rejection to the Arbitrator's attention in its closing brief on January 23, 2017 – so that she would not be denied an award of costs, as the prevailing party was in *Heimlich*. Significantly, Hartzler's submission of the closing brief was made several months before *Heimlich* was decided; in fact, the Arbitrator's Interlocutory Order, in which he declared Hartzler to be the prevailing party, was also issued before *Heimlich* was decided.

There is nothing in the holding in *Heimlich* that supports 110 Management's argument that an Arbitrator's consideration of a Section 998 offer prior to the entry of a final order is a violation of public policy, particularly one that warrants vacatur of the award.

The issue before the Supreme Court in *Heimlich* is very simply whether an arbitrator must consider evidence of a rejected 998 offer after he or she has already issued an award.[8] Accordingly, the resolution of *Heimlich* by the California Supreme Court should have no impact whatsoever on this case.

Finally, 110 Management simply ignores the import of the decision in *Maaso v. Signer* (2012) 203 Cal. App. 4th 362, which was the law when Hartzler first advised the Arbitrator of the Section 998 offer/rejection and when the Arbitrator issued his

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[8]Most significantly, *Heimlich* does not involve the possible vacatur of an award because the arbitrator *considered* the Section 998 offer *prior to* issuing the final award; it involves an arbitrator's *refusal* to hear evidence of the 998 offer *after* issuing a final award, and the partial vacatur of the award pursuant to C.C.P. §1286.2 (4) or (5). *Id.* at 177.

award (and arguably is the law now). In *Maaso*, this Court held that a party seeking recovery of costs pursuant to Section 998 must inform the arbitrator of a rejected Section 998 offer before the arbitrator issues a final award, and that the party seeking fees and costs could not subsequently request such fees and costs as the prevailing party from the trial court. *See* *Maaso v. Signer*, *supra*, 203 Cal. App. 4th at 380.

Indeed, in *Maaso*, the court found that the petition to "confirm" the arbitration award was essentially seeking "correction" of the award by asking the court to add costs and interest that had not been awarded by the arbitration panel, and which were in fact inconsistent with the panel's award. *Id.* at 378. Thus, based on *Maaso*, and consistent with what the trial court did in *Heimlich*, Hartzler easily could have been precluded from recovering any fees and costs in the case had she not introduced such 998 evidence before the Arbitrator issued his

final order[9].

In sum, even if the Court of Appeal decision in *Heimlich* were binding on this case, which it is not, there is nothing in that decision that holds that an arbitrator's consideration of a Section 998 offer prior to the issuance of a final order rises to the level of a statutory violation under Code of Civil Procedure Section 1286.2, or otherwise warrants vacatur of the arbitration award.

2. 110 Management Waived Its Right To Object To The Arbitrator's Consideration Of The Section 998 Issue.

110 Management failed to object to the Arbitrator's consideration of the 998 offer/rejection, and proceeded to discuss

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[9]In addition to the *Maaso* decision, a leading California Practice Guide on Alternative Dispute Resolution (citing *Maaso*) provides that an arbitrator *must* be informed of the rejected Section 998 offer prior to making a final award in order to impose any applicable costs or penalties. *See* Chernick et al., California Practice Guide: Alternative Dispute Resolution, §5.402.14 at 5-400 (The Rutter Group 2017) (emphasis added).

the reasons for which 110 should be considered the prevailing party. Specifically, in its Reply closing argument, which was submitted on February 6, 2017, 110 Management argued that, given the amount of commissions that it was purportedly owed, coupled with the attorneys' fees that it had allegedly incurred as of the date of the Section 998 offer, 110 Management should be deemed the prevailing party because the aforementioned amounts exceeded Hartzler's offer.[10] *See* 3 AA at 714-715.

Given 110's failure to object to the Arbitrator's consideration of the 998 issue prior to the entry of the final award, 110 Management has waived its right to argue that it was improper for the Arbitrator to do so.

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[10]This argument never did make any sense. It is not the amount of the *claim* that is relevant to a 998 offer; it is the amount of the *recovery*. In this case, the 998 offer was for $100,000.00, and 110 recovered less than $5,000.00. Had the Arbitrator not already determined that Hartzler was the prevailing party irrespective of the 998 offer (because of the disparity between the original million dollar plus claim and the amount ultimately recovered and the amount of claims on which Hartzler prevailed), such a recovery – substantially less than the $100,000.00 offered – would have entitled Hartzler to her fees and costs.

3. 110 Management's Argument That The Arbitrator Exceeded His Power Under The AAA Rules And Under The Parties' Agreement Is Also Devoid Of Merit.

110 Management next argues that the Arbitrator exceeded his power because "there also is nothing in the AAA rules [specifically Rule 47] that permit (sic) the arbitrator to consider the amount of an unaccepted section 998 offer prior to making the award." *See* Opening Brief at 31. This argument also lack merit. First, if 110 truly believed that the AAA rules precluded the consideration of 998 issues by an arbitrator, it should have objected to such consideration with the AAA – or at least with the Arbitrator. Moreover, an arbitrator's purported disregard of AAA rules is, at the very most – and this is a stretch – an error of law, which, again, is not subject to review. *Moncharsh*, *supra*, 3 Cal. 4th at 15.

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Moreover, the sole authority upon which 110 Management bases its argument here is, again, *Heimlich v. Shivji*, 12 Cal. App. 5th 152, which, again, at most, is *persuasive* authority. *See* Cal. Rules of Court, rule 8.1115(e). In addition to the fact that *Heimlich* is not *binding* authority, there is nothing in *Heimlich* that states that the consideration of a Section 998 offer prior to the entry of a final order violates AAA rules, or otherwise violates public policy. In fact, 110 Management itself concedes that this only "*appears*" to be the correct means of handling post-award 998 considerations. *See* Opening Brief at 33.

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4. **The "Practical Considerations" Offered By 110 Management As To Why A Section 998 Offer/Rejection Should Not Be Considered Prior To The Final Award, Albeit Erroneous, Are Certainly Not Among The Bases For Vacatur**.

110 Management also argues that there are important "practical considerations as to why the section 998 offer should not be made (sic) prior to the award." Opening Brief, at 35. One of those "practical considerations," according to 110 Management, is that presenting an arbitrator with a 998 offer/rejection before a final award is issued "may bias an arbitrator who considers a 998 offer to tailor the award to fit either inside or outside of the offer."

This argument might make sense if Judge Chernow had awarded 110 Management $99,999.00, or even $90,000.00 or $80,000.00. However, that Judge Chernow awarded 110 Management $4,863.66, and that the award was made on only one of 110's many claims in the Arbitration, demonstrates the

absurdity of 110's "practical consideration" argument.

More importantly, however, the bottom line on 110 Management's "practical considerations" is that there is nothing in Code of Civil Procedure Section 1286.2 that states that "practical considerations" are among the bases to review an arbitration award. Therefore, 110 Management's argument here, in addition to being erroneous, is improper and should be disregarded.

5. The Statutory Rights Cases Upon Which 110 Management Relies In Seeking Vacatur Are Entirely Inapposite.

110 Management states that: "[t]here are several published cases recognizing that a court must vacate an arbitrator's award when it violates a party's statutory rights or otherwise violates 'an explicit legislative expression of public policy,'" but it does not cite to a single case that is on point.

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Significantly, not one of the cases upon which 110 Management relies holds that an arbitrator's consideration of a Section 998 offer before issuing a final award constitutes a violation of public policy that warrants vacatur of an arbitration award. In fact, none of the cases upon which 110 Management relies involves Section 998 at all. *See* Opening Brief at 37 to 38.

Indeed, even the purportedly key case upon which 110 Management relies, *Ahdout v. Hekmatjah* (2013) 213 Cal. App. 4th 21, is entirely inapposite. At issue in that case was an arbitration award that failed to address whether an unlicensed contractor was required to disgorge payments that he had received. *Id.* at 39-40. The public policy behind California's statute governing unlicensed contractors has nothing to do with the policies behind Section 998[11].

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[11]The policy behind Section 998 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* (1993) 3 Cal. 4th 797, 804.

In short, far from presenting any case law that is even remotely analogous, 110 Management does nothing more than provide general language stating that arbitration awards may be vacated in rare cases, each of which involves vastly different circumstances and different statutes than those involved in this case.

D. SUNSET COMMISSIONS WERE NOT PART OF THE ARBITRATION; AS SUCH, THE 998 OFFER WAS NOT VAGUE, AND THE ARBITRATOR'S FAILURE TO ADDRESS SUNSET COMMISSIONS DID NOT RENDER HIS 998 CALCULATION ERRONEOUS OR HIS AWARD NON-FINAL.

1. Sunset Commissions Were Not Part Of The Arbitration.

110 Management argues that the Arbitrator improperly failed to consider sunset commissions that were allegedly owed by

Hartzler to 110 on post-termination income received by her. 110 argues that the existence of such obligations by Hartzler: (1) rendered her 998 offer vague; (2) rendered the Arbitrator's calculation in connection with the 998 issue erroneous; and (3) rendered the Arbitrator's award non-"final." Opening Brief at 42-45 and 48-50.

However, sunset commissions were not identified in 110 Management's Demand for Arbitration. *See* 3 AA at 627. In fact, sunset commissions were never part of the Arbitration. The Arbitrator could not have made this more clear in his Final Award:

> The agreement contains a "sunset" provision pursuant to which 110 is entitled to receive commissions at the following rates: 15% from March 30,2015 to March 30, 2017; 12% from March 31, 2017 to March 30, 2019; and 10% from March 31, 2019 to March 30, 2021. ***No evidence was presented at the hearing as to any failure on Hartzler's part to make payments when and if they become due.***

3 AA at 865.

In fact, the only testimony that 110 Management presented during the Arbitration hearing concerning the sunset clause was that the management agreement at issue contained such a clause, and the date on which the clause was purportedly triggered (based upon the date of termination). *See* 3 AA at 865. Indeed, even in its own "expert report," which purported to set forth all of the payments that were allegedly owed to 110 Management, there was no mention whatsoever of payments owing pursuant to the sunset clause. 1 AA at 147.

In fact, the first time that 110 Management even raised an argument that it was allegedly not receiving sunset payments was on February 6, 2017, in its Reply Closing Brief, *three months after the close of the Arbitration hearing*. However, even at that time, 110 Management did not present evidence of its claim; rather, it simply produced a declaration from its counsel stating that:

> Based on the payments previously made to Hartzler to 110 Management ***I believe*** that additional sunset payments are

owed.

See 4 AA at 1060-1061. In response, Hartzler objected to 110 Management's post-arbitration claim at that time, and also produced a Declaration from her business manager, which established that, as of February of 2017, no sunset payments were owed to 110. 4 AA at 1071-1073.

2. 110 Management's Argument That The Section 998 Offer Was Impermissibly Vague Is Not Only Erroneous, It Also Raises A Purported Error Of Law That Cannot Be Reviewed.

110 Management claims that the Section 998 offer was impermissibly vague because it did not state whether the offer included the post-offer sunset commissions. *See* Opening Brief at 42. As the trial court indicated, an arbitrator's recognition of a vague offer would be, at most, an error of law, and therefore not

subject to judicial review[12]. *See* 4 A at 1111; *Moncharsh, supra*, 3 Cal. 4th at 16.

Moreover, in addition to the fact that the Arbitrator's determination concerning the validity of Hartzler's Section 998 offer is not even subject to review, 110 Management's argument here makes no sense. The sunset clause payments that Hartzler was obligated to make to 110 Management, once again, were never part of the Arbitration; nor were they even due at the time that the 998 offer was made. *See* 3 AA at 865. Accordingly, the Section 998 offer necessarily did not encompass, and *could not have* encompassed, 110 Management's claims for sunset clause payments.

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[12]Even if this issue were a proper subject on appeal, it is clear that Hartzler's offer of compromise did, in fact, comply with the requirements of Section 998. A 998 offer must satisfy three principal conditions: (1) it must be contained in a writing; (2) it must state the terms and conditions of the proposed judgment or award; and (3) it must contain a provision allowing the offeree to accept the offer by signing a statement to that effect. *See* Cal. Civ. Proc. Code § 998(b). All such conditions were satisfied.

3. 110 Management's Argument That The Arbitrator Did Not Properly Give Weight To Pre-Offer Fees and Post-Offer Sunset Commissions Raises Legal And/Or Factual Issues That Are Also Not Subject To Review.

110 Management next argues that the Arbitrator ignored evidence of the amount of pre-offer attorneys' fees and costs that were allegedly expended by 110 Management, as well as post-offer sunset commission payments that Hartzler made (*see* Opening Brief at 43-44). Once again, sunset commissions were not part of the arbitration.

Perhaps more importantly, however, this is nothing but an attack on a perceived error of law and/or fact, and is therefore not the proper basis for an appeal. *See* *Moncharsh*, *supra*, 3 Cal. 4th at 16.

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In sum, 110 Management's legally-unsupported argument that the Arbitrator's consideration of Hartzler's Section 998 offer prior to the time that he entered the Interlocutory and Final Award somehow tainted the award, and therefore warrants vacatur of the award, is wholly without merit.

E. THE AWARD OF FEES TO HARTZLER FOR AMOUNTS THAT SHE PAID ATTORNEYS FOR HER BUSINESS MANAGER DID NOT VIOLATE PUBLIC POLICY.

110 Management argues that awarding Hartzler fees that she had to pay to Manatt Phelps & Philips (hereinafter "Manatt"), which represented Hartzler's business management company in the arbitration "contravenes public policy" solely because of an alleged conflict of interest by Manatt. This argument, once again, is devoid of any legal support whatsoever.[13]

[13]As the prevailing party, Hartzler was entitled to recover the fees that she was required to pay to the attorneys who represented

110 Management argues that Manatt had previously acted as 110's counsel in connection with one of the agreements from which Hartzler was to derive commissionable revenue. 110 argues further that the California Rules of Professional Conduct prohibit Manatt from collecting fees for representing a party in litigation that is adverse to 110 Management. *See* Opening Brief at 47.

As an initial matter, Manatt did not represent a party to the Arbitration who was adverse to 110 Management. In fact, it did not represent a *party* at all. 110 represented Hartzler's *business management company*, which was never a party to the arbitration. *See* 4 AA at 918. Moreover, the Arbitrator did not award fees to *Manatt* in any case; he awarded fees to Hartzler because she had to pay Manatt for its services in representing her

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her business management company in the Arbitration. 3 AA at 613. 110 Management does not contest the award of the fees, except to the extent that it claims that there is a statutory violation that warrants vacatur because of the supposed "conflict of interest." *See* Opening Brief at 46-48.

business manager in connection with the Arbitration. *See* 3 AA at 868.

An argument that an arbitration award should be vacated because of some perceived violation of the Rules of Professional Conduct has already been rejected by the California Supreme Court, and therefore does not remotely support vacatur of the award in this case. *See* *Moncharsh*, 3 Cal. 4th at 9.

In *Moncharsh*, which involved an agreement between an attorney and his former law firm, the attorney sought to vacate an arbitration award that had been issued against him, arguing that a paragraph in the fee agreement was illegal and violated public policy because, inter alia, it violated former rules 2-107 [prohibiting unconscionable fees], 2-108 [prohibiting certain types of fee splitting arrangements], and 2-109 [prohibiting agreements restricting an attorney's right to practice], of the Rules of Professional Conduct. *Id.* at 9.

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The California Supreme Court, however, ruled that there is nothing in the Rules of Professional Conduct that suggests that the resolution by an arbitrator of what was essentially an ordinary fee dispute would be inappropriate, or would fail to serve the public interest. Accordingly, judicial review of the arbitrator's decision was denied. *Id.* at 33.

110 Management also relies on *Sheppard Mullin Richter & Hampton, LLP v. J. M. Manufacturing Co., Inc.* (2018) 6 Cal. 5th 59 for the proposition that the Rules of Professional Conduct may serve as a public-policy exception to the rule that arbitration awards are not judicially reviewable. However, the *Sheppard Mullin* case does no better to save 110's argument. In that case, it was held that the failure of a law firm to divulge a conflict of interest prior to obtaining a waiver in a retainer agreement rendered *an entire agreement to arbitrate* void – as between the lawyer an a client. *Id.* at 73-74.

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In contrast, in the present case, there is no issue between a lawyer and a client (other than Hartzler and Lurie), and there is no issue whether an arbitration agreement itself is void due to some violation of the Rules of Professional Conduct. Thus, 110 Management has failed to cite any authority, or even present any cogent argument, demonstrating why the award of fees for Manatt's work warrants vacatur of the arbitration award.

F. NOT ONLY DID THE ARBITRATOR'S FAILURE TO CONSIDER SUNSET COMMISSIONS NOT VIOLATE THE "FINALITY" REQUIREMENT, LACK OF "FINALITY" IS NOT AMONG THE BASES TO REVIEW AN ARBITRATION AWARD.

110 Management also argues that the Arbitrator's refusal to consider Hartzler's sunset commission payment obligations violated the finality mandated by the California Arbitration Act. However, both the Arbitrator and the trial court correctly ruled

that the issue of sunset commissions was not part of the Arbitration; as such, the Arbitrator's failure to consider the issue is not, an could not be, violative of any finality requirement.

Moreover, as correctly noted by the trial court, "'finality' is not one of the specific grounds named under CCP 1286.2." *See* 4 AA at 1111. Therefore, 110 Management's argument of "lack of finality" with regard to sunset commissions is not a valid basis upon which to vacate the arbitration award.

G. THE TRIAL COURT'S DECISION SHOULD BE AFFIRMED BASED ON THE ABSENCE OF A REPORTER'S TRANSCRIPT OR SUITABLE SUBSTITUTE.

110 Management has failed to provide the reporter's transcript of the Arbitration hearing itself. 110 Management also has failed to provide a transcript of the Superior Court hearing on the Motion to Vacate/Confirm. A strong basis therefore exists to affirm the trial court's order based upon the inadequacy of the

record.

As discussed in *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal. App. 4th 181:

> Generally, appellants in ordinary civil appeals *must* provide a reporter's transcript at their own expense. In lieu of a reporter's transcript, an appellant may submit an agreed or settled statement.

Id. at 186 (citing *City of Rohnert Park v. Superior Court* (1983) 146 Cal. App. 3d 420, 430-431; and *Leslie v. Roe* (1974) 41 Cal. App. 3d 104).

In fact:

> [i]n numerous situations, appellate courts have refused to reach the merits of an appellant's claims because no reporter's transcript of a pertinent proceeding or a suitable substitute was provided.

Foust, supra, 198 Cal. App. 4th at 186 (citing *Maria P. v. Riles* (1987) 43 Cal. 3d 1281, 1295-1296; *Ballard v. Uribe* (1986) 41 Cal. 3d 564, 574-575; *In re Kathy P.* (1979) 25 Cal. 3d 91, 102; *Vo. v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal. App. 4th 440,

447; *Estate of Fain* (1999) 75 Cal. App. 4th 973, 992).

> The reason for this follows from the cardinal rule of appellate review that **a judgment or order of the trial court is presumed correct and prejudicial error must be affirmatively shown**.

Foust, supra, 198 Cal. App. 4th at 187 (citing *Denham v. Superior Court* (1970) 2 Cal. 3d 557, 564) (emphasis added).

> In the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court. "[I]f any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented.

Foust, supra, 198 Cal. App. 4th at 187 (quoting *Bennett v. McCall* (1993) 19 Cal. App. 4th 122, 127).

> This general principle of appellate practice is an aspect of the constitutional doctrine of reversible error. [citation omitted]. "A necessary corollary to this rule is that ***if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.***" [citation omitted]. Consequently, [appellant] has the burden of providing an adequate

> record. ***Failure to provide an adequate record on an issue requires that the issue be resolved against [appellant]***.

Foust, supra, 198 Cal. App. 4th at 187 (emphasis added) (citing *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal. App. 4th 600, 610; and quoting *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal. App. 4th 1412, 1416; and *Hernandez v. California Hospital Medical Center* (2000) 78 Cal. App. 4th 498, 502) (emphasis added).

In the present case, although Hartzler paid for a court reporter to transcribe the entire Arbitration hearing, 110 Management inexplicably failed to provide this Court with any of the transcripts from the hearing.[14] Then, 110 Management also failed to have a court reporter present at the Superior Court

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[14]The only portions of the transcript that appear in the appendix are 12 pages of the transcript that were attached to the Declaration of Tracy B. Rane filed in opposition to the motion to vacate (AA 1030-1033) and one substantive page (AA 469) that was attached to 110 Management's counsel's declaration in support of the motion – out of 1,482 pages of transcripts.

hearing of the Petition to Vacate/Confirm, despite knowing the high likelihood that its Petition to Vacate would be denied, and no doubt already anticipating an appeal of that denial. This is evidenced by the fact that 110 requested a Statement of Decision from the trial court. AA at 1106.

In addition to 110 Management's failure to provide any of the transcripts of the Arbitration hearing and its failure to have a court reporter present at the Superior Court hearing, entirely absent from 110's Opening Brief is *any* discussion as to why it did not submit a suitable substitute for the hearings, *i.e.*, an agreed or settled statement *See* Cal. Rules of Court, rules 8.134 and 8.137.

Finally, although 110 Management correctly asserts that this Court is to review the trial court's decision "de novo," 110 then incorrectly states that the trial court's decision should be "reviewed anew with no deference to the trial court's ruling" because the facts with respect to the issues on appeal are undisputed. *See* Opening Brief at 26.

Significantly, the facts with respect to the issues on appeal are not undisputed. For example, although 110 Management bases almost its entire appeal on the purportedly undisputed fact that its right to sunset commissions was part of the arbitration, Hartzler denies that the recovery of sunset commissions was part of the arbitration.[15]

In sum, although Hartzler cannot honestly maintain that 110 Management's failure to provide a transcript of the Superior Court hearing prejudices Hartzler in any way, or otherwise should be dispositive of the appeal, the combination of 110 Management's failure to provide the Superior Court transcript and the Arbitration hearing transcript is not only telling, it

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[15]One would imagine that, if one's entire appeal were based upon whether or not sunset commissions were discussed and adjudicated in an arbitration hearing, and there was no mention of those commissions in the Demand for Arbitration, and, in particular, the Arbitrator himself indicated that no such commissions were being adjudicated, one would attach the 1,482 pages of the transcript of the hearing if there were any substantive discussions of sunset commissions during the hearing.

should be the basis of affirmance.

V. CONCLUSION

The trial court correctly ruled that 110 Management failed to establish the existence of any of the grounds set forth in Code of Civil Procedure Section 1286.2 that warranted judicial review and vacatur of the arbitration award. Hartzler therefore respectfully requests this Court to enter an Order affirming the Judgment that was entered in favor of Hartzler, and awarding costs of appeal, including reasonable attorneys' fees.

Dated: January 15, 2019

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CERTIFICATION OF WORD COUNT

(Cal. Rules of Court, Rule 8.204)

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that the text of this brief contains 9,020 words, including footnotes. In making this certification, I have relied on the word count of Corel WordPerfect version X8 word processing program used to prepare the brief.

Dated: January 15, 2019

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18, and not a party to the within action. My address is 1801 Century Park East, 24th Floor, Los Angeles, CA 90067.

On January 15, 2019, I served the foregoing document described as:

RESPONDENT'S BRIEF

on the interested parties in this action by placing a true and correct copy thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

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I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that, on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing.

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I caused such documents(s) to be transmitted by electronic filing directly to the person(s) being served and the name(s) and electronic mail address(es) of the person(s) served as set forth on the service list.

Executed on this January 15, 2019, at Los Angeles, California.

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

/s/ Raffaella Cesana

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