

Ms. Pao's motion to strike and tax costs is granted in part and denied in part. KPCB is awarded costs in the amount of \$275,966.63.

*Holman v. Altana Pharma US, Inc.* (2010) remains good law that is binding on this court. *Holman* holds that where, as here, a FEHA defendant makes a section 998 offer that is not accepted and the defendant prevails in the case, the defendant may, in the court's discretion, be awarded post-offer costs, including expert fees, even though the plaintiff's lawsuit was not objectively without foundation when brought or the plaintiff continued to litigate after it clearly became so. *Williams v. Chino Valley Independent Fire District* (2015) 61 Cal. 4th 97 does not implicitly overrule or undermine *Holman*, as made clear both by the favorable citation to *Holman* in *Williams* and the discussion of *Chavez v. City of Los Angeles* (2010) 47 Cal. 4th 970 in *Williams*. Ms. Pao's statutory interpretation argument focusing on the word "augmented" lacks merit since that word in the context of section 998 clearly contemplates an "augmentation" or addition to a section 1032 award of zero. When a positive number is added to zero, zero is "augmented" by the positive number.

KPCB's section 998 offer to Ms. Pao was a "good faith," not a "token" or "nominal," offer and, when made, it had a "reasonable prospect of acceptance," as the quoted words and phrases are used in the case law construing section 998. While the offer was only for a relatively modest fraction of the total damages, fees and costs that Ms. Pao could conceivably have been awarded if she succeeded on one or more of her promotion claims, that is not the relevant inquiry. Instead, given the range of possible outcomes -- from a defense verdict to a huge plaintiff verdict and everything in between including a nominal or modest plaintiff verdict with a reduction in fees awarded to plaintiff -- the offer cannot be viewed as anything akin to the "risk-free" essentially valueless offers found to be unreasonable under section 998 case law.

Ms. Pao's argument made in her reply brief that KPCB may only be awarded expert costs under section 998 is contrary to the plain language of that section and is unsupported by any authority.

Per the rationale of *Chavez* and not inconsistent with *Williams* or *Holman*, the award of section 998 costs to a prevailing FEHA defendant is limited by the cost recovery limitations and prohibitions set forth in section 1033.5. Even if case law

did not require adherence to the limitations and prohibitions of section 1033.5, in the exercise of my discretion under section 998, I would be guided by those limitations and prohibitions. Section 1033.5 limits recovery of costs only to those costs that were "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation" and that are "reasonable in amount."

Because Ms. Pao has not argued that the filing and motion fees (\$240), jury food (\$177.56), deposition costs other than the transcribing charges for the depositions of Mr. Saba and Ms. West and travel costs for Dr. Gompers, Dr. Lewin, Mr. Robbins and Mr. Litvak (\$13,802.55), service of process (\$530), exhibit imaging (\$224.21), and court reporter fees (\$7,057.50) in KPCB's amended costs memorandum were not reasonably incurred or are disallowed under 1033.5, all of those costs are awarded to KPCB.

Because section 1033.5 prohibits the recovery of costs for transcripts not ordered by the court and none were ordered, KPCB's request for the cost of trial transcripts is disallowed.

Because KPCB's cost for trial technology equipment rental (\$7,196.30) was reasonably necessary for the trial and reasonable in amount, those costs are awarded to KPCB.

KPCB seeks travel expenses for the trial testimony of Dr. Gompers, Dr. Lewin and Mr. Robbins yet, even after those expenses were specifically contested by Ms. Pao in her moving papers and KPCB was chided for not supporting its request for these costs with any documentation (Pao Memo at 14:14), KPCB did not provide any documentation supporting those expenses, as case law requires. Accordingly, KPCB is awarded a total of \$2700, calculated as \$1050 for three hotel nights and \$1650 for one round trip flight from Boston and two round trip flights from Los Angeles for the trial-related travel of these three gentlemen in accordance with the cost estimates stated in Ms. Pao's moving papers (*Id.* at 9:6-10-2).

For the same reasons, KPCB's request for travel expenses for the depositions of Dr. Gompers, Dr. Lewin, Mr. Robbins and Mr. Litvak is reduced to \$3800, calculated as \$1400 for four hotel nights and \$2400 for one round trip flight from Boston, one

round trip flight from Chicago (which I assumed to be the same cost as a round trip from Boston) and two round trip flights from Los Angeles.

Ms. Pao contested the transcribing charges for the depositions of Mr. Saba (\$3692.31) and Ms. West (\$7899.62) in her reply papers based on the assertion that the lion's share of those amounts was excessive and unnecessary expedited charges. While these costs appear high, Ms. Pao's failure to specifically challenge these costs items in her moving papers relieved KPCB of any obligation to explain or document the charges in its opposition papers and thus, based on the black letter rule that costs stated in a verified costs memorandum are presumptively correct, these charges are allowed.

The remaining costs, and by far the largest amounts sought by KPCB, are the expert fees of KPCB's five experts. Ms. Pao contends that, if I award any fees for these experts, the amounts awarded should be informed by and comparable to the amounts incurred by Ms. Pao for her own experts. I agree, but the principal reason I am reducing the fees of four of KPCB's five experts to the fees of Ms. Pao's experts is not that the fees of KPCB's experts were unreasonable as asserted by Ms. Pao, but rather in the exercise of my discretion under section 998 in compliance with the discussion in *Holman* about the "scaling" of expert fee awards to a FEHA defendant.

*Holman* states that "in assessing whether an expert fee award is reasonable in amount, at least in the FEHA context ...the court **must** not only look to whether the expense was reasonably incurred, but **must** also consider the economic resources of the offeree. 'Thus, when two competing parties possess vastly disparate economic resources, this **may** require the trial courts'" to "scale" the expert fees awarded to the FEHA defendant "to the parties' respective resources" to further the policies enunciated in *Christianburg*. (Emphasis added; internal quotations from *Seever v. Copley Press* (2006) 141 Cal. App. 4<sup>th</sup> 1550, 1562). This portion of *Holman* not only remains good law after *Williams*, but is fully supported by the incorporation of *Christianburg* policies by *Williams* into FEHA costs awards under section 12965 and, in my view, must inform the exercise of my discretion in ruling on KPCB's request for expert fees.

There is no doubt that KPCB has “vastly” greater economic resources than Ms. Pao. Nor is there any doubt that Ms. Pao is not indigent. While both her current employment and the likely continuing remuneration in the form of carried interests from her former employment at KPCB show that Ms. Pao has significant economic resources, it is also undoubtedly true that the \$864,680.25 that KPCB seeks in expert fees is a material amount in the context of Ms. Pao’s resources. On the other hand, this amount is not a material amount in the context of KPCB’s resources. While I recognize that the foregoing statements are very rough approximations of the party’s resources, concerns for the parties’ privacy and avoidance of delving into the minutia of the parties’ finances persuade me that this “rough cut” comparative resource analysis suffices to permit me to properly exercise my discretion in accordance with *Holman*.

Based on the rough cut analysis, I find that scaling of the expert fees is appropriate and that the most reasonable way to do that scaling as to the four KPCB damages and human resources experts who had roughly comparable subject areas to the two experts that Ms. Pao’s counsel retained is to award to KPCB the amounts of the fees of Ms. Pao’s experts. The amounts that Ms. Pao spent on her experts are a telling indicator of the “scale” that Ms. Pao was willing to and felt she could pay for expert testimony in this case. Thus, in the exercise of my discretion, I award expert fees of \$97,725 for the work of Dr. Lewin and Mr. Litvak and \$65,221.58 for the work of Ms. Young and Mr. Robbins.

An award for the work of Dr. Gompers is a more difficult issue since Ms. Pao did not retain an expert in the subject areas covered by Dr. Gompers. It would contravene the policies underlying section 998 if KPCB were not awarded some amount for Dr. Gompers’ work, yet to award the full amount it seeks of over \$275,000 (including the work of the consulting firm that assisted Dr. Gompers) would be out of scale to the parties’ resources. Given the absence of any benchmark such as what Ms. Pao incurred for similar work, the selection of the appropriate amount to award to KPCB is not obvious. After much consideration, however, I believe that \$65,700, half of the billings by Dr. Gompers himself, reflects a reasoned exercise of my discretion. \$65,700 for the expert work of Dr. Gompers is in line with what I perceive to be an amount that Ms. Pao might have spent for an expert on the venture capital industry if she and her counsel chose to

retain such an expert. (Compare this to the \$65,221.58 Ms. Pao has incurred for the work of her human resources expert).

Without making or intending any criticism, express or implied, of the work of KPCB's five experts or the reasonableness of their billing rates, an additional, albeit subsidiary, reason for the awards of expert fees discussed in the previous two paragraphs, is my view that an award of \$228,646.58 in expert fees is commensurate with the limitation in section 1033.5 that only those costs that are "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation" are recoverable. Although KPCB had the right to spend whatever it wished on experts, the section 998 procedure does not convert Ms. Pao into an indemnitor of all of the KPCB's expert costs. Rather, the allowable amount of those costs is limited to the work that was reasonably needed to respond to Ms. Pao's claims, and not for all the work that KPCB, its counsel, the experts or those working with them thought might in some way be helpful to KPCB's position in this lawsuit. Using this standard, an award of \$228,646.58 is a fair approximation of the expert fees that KPCB incurred that were central to the resolution of this lawsuit.

The parties are urged to check my math.