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**IN THE  
SUPREME COURT OF CALIFORNIA**

**R. THOMAS FAIR,**

*Plaintiff and Appellant,*

vs.

**KARL E. BAKHTIARI, MARYANN E. FAIR, STONESFAIR FINANCIAL  
CORPORATION, STONESFAIR MANAGEMENT COMPANY, LLC,  
STONESFAIR CORPORATION,**

*Defendants and Respondents.*

**STONESFAIR FINANCIAL CORPORATION,**

*Cross-Complainant and Respondent,*

vs.

**R. THOMAS FAIR,**

*Cross-Defendant and Appellant.*

AFTER A DECISION BY THE COURT OF APPEAL  
FIRST APPELLATE DISTRICT, DIVISION TWO (CASE NO. A100240)

**OPENING BRIEF ON THE MERITS**

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**STONESFAIR FINANCIAL CORPORATION**

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**OPENING BRIEF ON THE MERITS**

**ISSUES PRESENTED**

1. Where a list of proposed settlement terms drafted during mediation includes a term for arbitration of disputes, does the draft arbitration provision alone constitute “words to [the] effect” that the entire draft is an

enforceable or binding settlement agreement which is admissible and enforceable under Evidence Code section 1123?

2. May parol evidence be considered to prove whether a mediated draft of settlement terms was intended to be an enforceable and binding settlement agreement?

3. Does the rule of appellate deference to a trial court's factual findings apply to rulings based on written declarations?

## INTRODUCTION

What if one of the tentative points in a mediated list of proposed settlement terms provides for arbitration of disputes? Does the arbitration clause alone make the entire list admissible and enforceable as a binding settlement agreement even though the document says nothing of the sort? It is unlikely that anyone has ever thought so, since no plain reading of the arbitration clause alone could automatically turn the entire document into a contract. Yet that is the consequence of the Court of Appeal's approach to this case.

Thomas Fair sued Karl Bakhtiari, Maryann Fair, and three corporate entities, alleging that Bakhtiari and Maryann Fair had wrongfully attempted to force Thomas Fair out of their real estate business. The case went to mediation, and at the end of the second day the mediator procured a signed, one-page document entitled "SETTLEMENT TERMS" which sketched out some points on which the parties had reached a tentative consensus for developing a settlement agreement. The points included a cash payment to Thomas Fair for "all T. Fair's stock & interests." The last point was: "Any &

all disputes subject to JAMS arbitration rules.” Nowhere did the document say that it was “enforceable,” or “binding,” or an “agreement,” or similar words.

Shortly after the mediation, when the parties attempted to prepare a settlement agreement, it became clear that they had never determined and could not agree regarding which of Thomas Fair’s “interests” were included. Thomas Fair wanted to retain or receive additional payment for interests worth some \$500,000, while Bakhtiari and Maryann Fair thought “*all T. Fair’s stock & interests*” (italics added) meant what it said. The parties never came to final terms.

After negotiations became hopelessly stalled, Thomas Fair filed a motion to compel arbitration based on the arbitration clause in the settlement terms document. The trial court denied the motion, ruling that the document, as a writing prepared during mediation, is made inadmissible by the rule of mediation confidentiality prescribed by Evidence Code section 1119. The Court of Appeal reversed, holding that the document is admissible under an exception to mediation confidentiality prescribed by Evidence Code section 1123, subdivision (b), for a mediated settlement agreement that expressly “provides that it is enforceable or binding or words to that effect.” According to the Court of Appeal, the arbitration clause standing alone constitutes “words to that effect.”

The Court of Appeal was wrong on the law, for three reasons. First, as a matter of plain common sense, nobody would ever construe “[a]ny & all disputes subject to JAMS arbitration rules” as words to the effect of “enforceable” or “binding.” Second, the arbitration clause was, and remains, subject to judicial review to determine whether or not it is enforceable; and, if a judge could decide the clause itself is unenforceable, then the clause cannot automatically make the entire document enforceable. Third, the JAMS arbitration rules authorize the arbitrator to decide whether the other provisions

of the document constitute a contract, and the arbitrator could decide they do not. Each of these points independently precludes treatment of the arbitration clause as “words to [the] effect” that the document is enforceable or binding.

The Court of Appeal’s approach is also bad policy. Mediators commonly attempt to get something in writing before a mediation session ends – if not an actual settlement agreement, then at least a document setting forth any points on which the parties have reached a consensus on tentative settlement terms. Documents of the latter sort – commonly called “deal points” memoranda (see Toker, *Cal. Arbitration and Mediation Practice Guide* (2003) ¶ 13.4(e), p. 481 (hereafter Toker)) – often include arbitration clauses. But if arbitration clauses were to make a signed preliminary list of proposed settlement terms automatically enforceable and binding – and therefore admissible under Evidence Code section 1123, subdivision (b) – then mediating parties would be discouraged from including arbitration clauses in such documents for fear of creating a contract that was not yet intended. The result would be avoidance of arbitration provisions – and thus more litigation.

If ever a bright-line rule of law is called for, this is the time. It is so very easy to invoke the statutory exception to mediation confidentiality plainly set forth in Evidence Code section 1123, subdivision (b) – all you have to write is “this agreement is enforceable,” or “this agreement is binding,” or words to that effect, such as “this is a final agreement.” These terms are commonly used by lawyers and easily understood by their clients. Accordingly, the statutory phrase “words to that effect” should be strictly construed. Otherwise, ambiguity will prevail and a party may never know for sure, without litigation, whether an unforeseen twist on language in a writing created during mediation will be used by an adversary to attempt to turn that writing into a contract.

## BACKGROUND

### A. The parties and the lawsuit.

In the early 1990s, Bakhtiari and Thomas Fair created two corporations, Stonesfair Financial Corporation (SFC) and Stonesfair Corporation (SC), as vehicles for acquiring multi-unit rental properties, with the goal of eventually selling the properties for profit. Stonesfair Management Company LLC (SMC) was later created to perform property management. Bakhtiari holds 72.5 percent and Thomas Fair and Maryann Fair (who were formerly married) each hold 13.75 percent of the shares in SFC; Bakhtiari holds 55 percent and Thomas Fair holds five percent of the shares in SMC. (Appellant's Appendix (AA) 2-7, 64.)

In 2002, Thomas Fair sued Bakhtiari, Maryann Fair and the three corporate entities for breach of contract and multiple torts, alleging that Bakhtiari and Maryann Fair had wrongfully attempted to force him out of the business. (AA 6.) SFC cross-complained against Thomas Fair, likewise alleging multiple torts. (AA 63.)

### B. The mediation and the draft settlement document.

On March 20 and 21, 2002, the parties mediated the dispute before a JAMS mediator, Judge Eugene Lynch (ret.). The parties met in an initial joint session on the first day, but then retreated to separate rooms for the remainder of the mediation. (AA 136.) The second day produced a draft document entitled "SETTLEMENT TERMS," handwritten by one of Thomas Fair's attorneys, Gilbert R. Serota, and signed by all parties and Judge Lynch. (AA 233-236, 264.)

The one-page document consisted of nine numbered paragraphs. The first eight paragraphs sketched out some terms on which the parties had reached a tentative consensus, including a \$5.4 million cash payment to Thomas Fair for “all of T. Fair’s stock & interests (as capital gains to Fair).” (AA 264.) The document did not, however, specify what Thomas Fair’s “interests” were. Nor did the document specify when the payment would be due (the agreement said “w/in 60 days” without specifying a trigger date) or how the payment would be structured (the agreement simply allowed Thomas Fair to “restructure cash payments for tax purposes”), or which defendants would pay what amounts. Nor did the document state that it was enforceable or binding, or any similar language, or even that it was an agreement. (AA 264.)

The ninth paragraph stated: “Any & all disputes subject to JAMS arbitration rules.” (AA 264.)

**C. The post-mediation failure to settle.**

After the mediation, the parties and their counsel spent nearly three months trying to fill the gaps in the draft settlement terms document and produce an enforceable and binding written settlement agreement. They did not succeed.

As soon as the mediation ended, counsel on both sides began drafting competing settlement agreements. (AA 271.) On April 4, 2002, counsel for the corporate entities, Anne C. Stromberg, faxed a draft settlement agreement to another of Thomas Fair’s attorneys, Curt Holbreich, which included a proviso that the payment would occur if “prior to payment all parties to the Agreement agree to all terms.” (AA 327, 331.) On April 17, 2002, however, just before a case management conference, Holbreich asked Stromberg

whether the defendants would be interested in purchasing Thomas Fair's interests in certain limited partnerships related to the corporate entities. (AA 272.) Stromberg, Bakhtiari and Maryann Fair had understood that *all* of Thomas Fair's interests, including these limited partnership interests, would be covered by the proposed \$5.4 million payment. (AA 233, 236, 272.)

Within a few days, on April 20, Thomas Fair wrote to Maryann Fair complaining that, despite the passage of a month since the mediation, "[w]e have no agreement done." (AA 239.)

Holbreich wrote a letter to defense counsel on April 30, 2002, claiming that the settlement terms document executed at the mediation called for Thomas Fair to convey only "his stock interests in SFC, SMC and SC and his 'backend' interest in each of the 10 Stonesfair properties" and that "Mr. Fair did not agree to sell his interests in any of the Stonesfair limited partnerships, regardless of how those interests are held." (AA 249.) In that letter, and again in a letter dated May 20, 2002, and once more in a voicemail message on June 12, 2002, Holbreich proposed that the parties return to mediation to resolve the dispute. (AA 251, 255, 268.) In the voicemail message, Holbreich also said the limited partnership interests "probably represent less than 10% of the settlement value of the case" (AA 269) – which meant Thomas Fair was demanding that the proposed settlement payment be increased by some \$500,000.

Additionally, Bakhtiari and Maryann Fair learned from their accountant that it would be unlawful to treat the whole payment to Thomas Fair as a capital gain, as contemplated in the settlement terms document. Much of the payment had to be treated as ordinary income. (AA 233-234, 274.) Holbreich proposed that the parties mediate this dispute as well. (AA 255, 258, 268.)

The parties could not even agree whether the proposed payment would be made by the corporate entities, or by Bakhtiari, or by Maryann Fair, or by some or all of them. (AA 254, 271.)

Ultimately, on June 10, 2002, Holbreich wrote to defense counsel and formally demanded arbitration pursuant to the arbitration clause in the settlement terms document. (AA 262.) Defense counsel rejected the demand, asserting that the document “does not constitute a legally enforceable settlement agreement” and is made inadmissible by the mediation confidentiality provisions of Evidence Code section 1119. (AA 265-266.)

Consequently, although counsel had told the trial judge in early April that they anticipated a settlement and were in the process of preparing a written agreement (AA 75, 86, 89, 92, 95), defense counsel subsequently informed the judge that the anticipated settlement had fallen through. In a case management statement filed June 6, 2002, defense counsel informed the judge that “the parties were ultimately unable to reach an agreement as to the scope and subject matter of the proposed settlement terms. Accordingly, the case should be resolved through the regular court process.” (AA 102.)

**D. The motion to compel arbitration and the parol evidence of intent.**

On June 20, 2002, Thomas Fair filed a motion to compel arbitration based on the arbitration clause in the settlement terms document. (AA 112-119.) The defendants opposed the motion on the ground, among others, that because the document was prepared during a mediation, it is made inadmissible by Evidence Code section 1119, subdivision (b), which provides in pertinent part that “[n]o writing . . . prepared . . . in the course of . . . a

mediation . . . is admissible . . . in any arbitration [or] civil action . . .” (AA 215-217.)

Evidence Code section 1123 prescribes several exceptions to this rule for mediated settlement agreements. One of those exceptions is that a signed settlement agreement is not made inadmissible by section 1119 if “[t]he agreement provides that it is enforceable or binding or *words to that effect.*” (Evid. Code, § 1123, subd. (b), italics added.)<sup>1/</sup> The pivotal issue here is whether the settlement terms document contains *words to the effect* that it is an enforceable or binding agreement. It does not expressly say anything of the sort.

In opposing the motion to compel arbitration, Bakhtiari and Maryann Fair submitted declarations stating that when they signed the settlement terms document “it was my understanding that it did not constitute a final, enforceable settlement agreement.” (AA 233, 236.) Both of them said they had thought the document “constituted the equivalent of a non-binding letter of intent (‘LOI’),” similar to documents they had signed in the past “that merely recited the parties’ general, non-binding, understanding regarding terms of the proposed business relationship,” where “it was always understood that the parties would not be bound by any terms of the LOI unless and until they executed a definitive agreement.” (AA 233, 236.) Defense counsel Stromberg and Ronald F. Garrity likewise declared they had believed that the settlement terms document “did not constitute a final, binding, enforceable settlement

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<sup>1/</sup> Evidence Code section 1123 also prescribes exceptions to the rule of inadmissibility where “[t]he agreement provides that it is admissible or subject to disclosure, or words to that effect” (Evid. Code, § 1123, subd. (a)), where “[a]ll parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure” (Evid. Code, § 1123, subd. (c)), or where “[t]he agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute” (Evid. Code, § 1123, subd. (d)). None of those exceptions apply here.

agreement;” rather, they “understood that the matter would not be settled unless and until the parties agreed upon and executed a formal settlement agreement.” (AA 245, 271.)

Thomas Fair submitted a responsive declaration, but he never directly claimed he had understood the settlement terms document to be enforceable or binding. Instead, he merely asserted that three exhibits attached to Maryann Fair’s declaration (Thomas Fair’s April 20, 2002 letter to her and an email exchange between them) did not prove otherwise. His declaration said only: “The documents attached to Ms. Fair’s declaration do not reflect any understanding or communication by me that [the] March 21, 2002 settlement agreement is not binding or that the parties are not required to arbitrate their dispute over the settlement agreement.” (AA 344.)<sup>2/</sup>

The judge ruled that the settlement terms document is made inadmissible by section 1119 because “Evidence Code Sec. 1123 has not been satisfied and the exceptions do not apply. There is no waiver.” Consequently, the judge denied the motion to compel arbitration, explaining that “[t]here is insufficient demonstration of an arbitration agreement given the inadmissibility of” the settlement terms document. (AA 413.)

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<sup>2/</sup> Thomas Fair’s attorney Serota submitted a declaration stating that he, the mediator, and two of the defense attorneys “all intended the agreement to be a binding, enforceable and disclosable agreement.” (AA 137.) But Serota’s declaration said nothing about the *parties’* intent. In any case, the judge excluded this part of Serota’s declaration. (AA 413.) The defendants had objected that it was speculative to the extent it purported to assert what the judge and defense counsel thought and was irrelevant with regard to the parties’ intent. (AA 224.)

**E. The Court of Appeal decision.**

The Court of Appeal reversed with directions to the trial judge to compel arbitration, at which the arbitrator would determine (1) whether the disputed terms of the settlement terms document were ambiguous, (2) the intended meaning of the disputed terms, and (3) whether the disputed terms were unenforceable. (Opn. p. 16.)

The appellate court concluded that the arbitration clause in the settlement terms document – “[a]ny & all disputes subject to JAMS arbitration rules” – constitutes *words to the effect* that the document is enforceable or binding as a matter of law, so that it is made admissible by Evidence Code section 1123. The court said: “The inclusion of this term requiring resolution of all disputes under JAMS arbitration rules shows that the parties contemplated that an arbitrator would, in the event of any disputes related to the settlement terms document, consider and resolve such disputes. In other words, inclusion of the arbitration term demonstrates that the parties *necessarily* intended the settlement terms document to be ‘enforceable or binding.’ (§ 1123, subd. (b).) [¶] Thus, because the inclusion of the arbitration provision is consistent *solely* with an intention on the part of the parties for the settlement terms document to be enforceable or binding, we find that that provision constitutes ‘words to that effect’ under subdivision (b) of section 1123.” (Opn. p. 10, first italics added.)

The court also addressed the issue whether the settlement terms document constitutes a settlement contract. Asserting that “[t]he trial court did not address this question since it found the settlement terms document inadmissible” (opn. p. 12), the appellate court decided the issue independently, on the premise that “de novo review is appropriate because the extrinsic

evidence is not in conflict” (opn. p. 7). (See *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866.)

There was, in fact, conflicting extrinsic evidence on this point, consisting of the declarations of Bakhtiari, Maryann Fair, and defense counsel versus the declaration of Thomas Fair. But the Court of Appeal refused to consider the declarations, asserting that “the parties’ and counsel’s after-the-fact declarations regarding their intent when they signed the settlement terms document are not relevant to our resolution of the question whether the settlement terms document was intended to be a binding settlement agreement.” (Opn. p. 12, fn. 9.)

Disregarding the conflicting extrinsic evidence – as well as the rule requiring appellate deference to the trial court’s implied resolution of this evidentiary conflict in favor of the defendants (see *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479) – the court proceeded to address independently whether the parties intended the settlement terms document to be a binding contract. But the opinion contains mixed messages. On the one hand, at the outset of its discussion the court stated the conclusion “that the parties intended to enter into a binding contract and that the settlement terms document contained a valid agreement to arbitrate disputes.” (Opn. p. 12.) On the other hand, the court also said that the only question before it was “whether the parties knowingly *agreed to arbitrate* disputes” regarding the settlement terms document, and that “[c]hallenges to the validity of the underlying contract . . . are not considered.” (Opn. p. 12, quoting Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2003) ¶ 5:79, p. 5-48, original italics (hereafter Knight et al.)) Then, at the end of the discussion, the court limited its conclusion to a determination “that the settlement terms document is admissible, pursuant to section 1123, and that it contains a valid agreement to arbitrate all disputes,” and further said that the *arbitrator* must

determine the intended meaning and enforceability of the settlement terms. (Opn. p. 16.) Thus, the opinion is internally inconsistent – it determines there is a binding and enforceable contract, yet it also refers to the arbitrator the decision whether the document is binding and enforceable.

The history of the Court of Appeal’s decision explains the court’s mixed messages. The decision was issued after a rehearing. The first opinion had incorrectly stated that “de novo review is appropriate, *even to the extent there is any conflicting extrinsic evidence*” (superseded opn. p. 7, italics added [see Petition For Review, Appendix B]), and included 11 paragraphs of de novo review of the conflicting extrinsic evidence (superseded opn. pp. 16-21). After the petition for rehearing pointed out the court’s error in applying the wrong standard of review (see *In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 746 [substantial evidence rule applies “where extrinsic evidence has been properly admitted as an aid to the interpretation of a contract and the evidence conflicts”]; Petition For Rehearing pp. 5-7), the court granted a rehearing and issued a second opinion which (1) changed the language quoted above to state that “de novo review is appropriate *because the extrinsic evidence is not in conflict*” (opn. p. 7, italics added), (2) deleted the 11 paragraphs of de novo review of the evidence the court had previously said was in conflict, and (3) replaced those paragraphs with a single paragraph stating that the ambiguity, meaning and enforceability of the disputed terms “is for an arbitrator, not this court or the trial court, to decide” (opn. p. 16). The attempted fix did not work, however, because the court left intact the now-inconsistent language stating that the parties intended to enter into a binding contract (opn. p. 12) – which resulted in the mixed messages on the law of ADR.

## LEGAL DISCUSSION

### I.

**AN ARBITRATION CLAUSE IN A DEAL POINTS MEMORANDUM SHOULD NOT MAKE THE DOCUMENT ADMISSIBLE UNDER EVIDENCE CODE SECTION 1123.**

- A. Evidence Code section 1123 does not make the document admissible unless the arbitration clause itself constitutes *words to the effect* that the document is an enforceable or binding settlement agreement.**

“[C]onfidentiality is essential to effective mediation.” (*Foxgate Homeowners’ Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14.) Its purpose is to promote a candid and informal exchange during mediation, which can be achieved only if the participants know that what happens during the mediation cannot be used against them in later court proceedings. (*Ibid.*) Thus, the scheme of mediation confidentiality prescribed by Evidence Code section 1119 and related statutes “unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception.” (*Id.* at p. 15; accord, *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 424.)

One of those exceptions is Evidence Code section 1123, which generally suspends mediation confidentiality for a written settlement agreement that is “prepared in the course of, or pursuant to, a mediation.” But the Legislature narrowly tailored this exception to *preserve* confidentiality where the mediation produces only a written list of terms on which the parties

have tentatively agreed but which is *not yet intended to be enforceable or binding*. Thus, section 1123 prescribes only four situations where an agreement produced and signed during mediation is admissible, one of which is: “The agreement provides that it is enforceable or binding or words to that effect.” (Evid. Code, § 1123, subd. (b); see *ante*, fn. 1.)

The narrow tailoring of section 1123 protects mediating parties from misuse of tentative agreements. Mediators strive – sometimes mightily – to produce a signed deal points memorandum<sup>3/</sup> before the end of a mediation session. This is the Golden Rule for mediators: Get something in writing before the parties leave. (See Toker, *supra*, pp. 481-482; Knight et al., *supra*, at ¶3:144; Grossman, *Nobody Can Leave Without Signed, Binding Agreement*, S.F. Daily J. (Nov. 17, 2004) p. 5 (hereafter Grossman).) But these memoranda are not always intended to be enforceable or binding. For example, the parties may have reached agreement on some terms, but not on all terms necessary to constitute a binding settlement contract. (See Bennett & Hermann, *The Art of Mediation* (1996) p. 68 [discussing memoranda that “[d]o not include a resolution of all issues of the dispute,” “[a]re provisional in nature and subject to future change,” “[a]re not binding,” and “[I]ack consequences for failing to follow the agreement”].) That is why one commentator recommends: “If in doubt” about the enforceability of a deal points memorandum, counsel should include language indicating that it “is intended to be an enforceable agreement.” (Deason, *Enforcing Mediated*

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<sup>3/</sup> As an alternative to the phrase *deal points memorandum*, some attorneys use the phrase *term sheet* (see, e.g., Stumpf, *Drafting Settlement Agreements: Ask Yourself These Questions* (1999) 46 Fed. Law. 32, 35) – which is how the parties in the present case referenced the settlement terms document in the trial court and the Court of Appeal.

*Settlement Agreements: Contract Law Collides With Confidentiality* (2001) 35 U.C. Davis L. Rev. 33, 85-86 (hereafter Deason.)

That explains subdivision (b) of section 1123. The statute makes a writing drafted and signed during mediation – such as a deal points memorandum – admissible only if it *expressly states* that it is enforceable or binding. And, in order to ensure against hypertechnical application, the statute makes it sufficient if the writing contains *words to the effect* that it is enforceable or binding. As the Court of Appeal here observed, “the Legislature’s concern was not with the precise words used in a settlement agreement, but with the need for the words to *unambiguously* signify the parties’ intent to be bound.” (Opn. p. 10, italics added.)

The settlement terms document at issue in the present case – a typical deal points memorandum – does not state that it is enforceable or binding. Thus, the document is inadmissible unless it can be said to contain “words to that effect” (Evid. Code, § 1123, subd. (b)) which “unambiguously signify the parties’ intent to be bound” (opn. p. 10).

**B. The arbitration clause cannot constitute *words to the effect* that the document is enforceable or binding.**

**1. “Any & all disputes subject to JAMS arbitration rules” is nothing like the words “enforceable” or “binding.”**

Sometimes common sense is the best guide to interpreting a writing. This is one of those times. No reading of “[a]ny & all disputes subject to JAMS arbitration rules” can equate that phrase with the words “enforceable” or “binding.” Any thesaurus will indicate that words to the effect of *enforce*

include words like “effect,” “implement,” “accomplish,” “carry out,” “execute,” “fulfill,” “compel,” and “force.” (See, e.g., Webster’s Collegiate Thesaurus (1976) p. 285.) The nine words at issue here say nothing like that, either individually or collectively.

What might constitute *words to the effect* that a deal points memorandum produced during mediation is enforceable and binding? Here is an example: “[T]his agreement may be enforced as any other contract.” It is found in a settlement document enforced in *Hurst v. American Racing Equipment, Inc.* (Tex.App. 1998) 981 S.W.2d 458, 462, where the court held this was language “indicating that [the agreement] is fully enforceable.”

Here is another example: “This agreement is not subject to revocation.” It is found in a Texas statute prescribing language essential to enforceability of mediated marital settlement agreements. (Tex. Stats., Family Code, § 6.602, subd. (b).)

Other common-sense examples abound: “This is a final contract.” “This is a complete agreement.” “The parties shall be bound by this document.” “This settlement may be enforced.” Anyone participating in a mediation would understand such plain and unambiguous language.

But one thing that *does not* work is: “Any & all disputes subject to JAMS arbitration rules.” Nothing in those words gives a clue that they make the entire document enforceable and binding. They do not even say there is an agreement. They are not, as the Court of Appeal said, “consistent *solely* with” an intent to be bound by the settlement terms document. (Opn. p. 10, original italics.) They are more consistent with being one of a number of preliminary terms developed for a possible agreement – which is what the arbitration clause was.

**2. The enforceability of both the arbitration clause and the document's other terms is subject to challenge.**

The Court of Appeal concluded that the arbitration clause alone constitutes words to the effect that the settlement terms document is enforceable or binding as a matter of law because the provision "shows that the parties contemplated that an arbitrator would, in the event of any disputes related to the settlement terms document, consider and resolve such disputes." (Opn. p. 10.) But the mere inclusion of an arbitration provision in a deal points memorandum cannot reasonably be treated as expressing words to the effect that the document is an enforceable or binding settlement agreement, because a judge could decide that the arbitration provision is unenforceable; or, if the matter is sent to arbitration, the arbitrator could still decide that the other terms in the document are unenforceable (and thus there was no agreement).

**a. A judge could find the arbitration clause unenforceable.**

It is not reasonable to conclude solely from an arbitration provision that the parties intended a deal points memorandum (or any draft agreement) to be enforceable or binding, because whether the arbitration provision *itself* is enforceable or binding, commonly called *arbitrability*, is always determined by the trial judge on the motion to compel arbitration.

Arbitration is required only if, with exceptions not pertinent here, the court "determines that an agreement to arbitrate exists." (Code Civ. Proc., § 1281.2; see, e.g., *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 356-357.) Since the judge could determine that an

agreement to arbitrate *does not exist* – i.e., that a binding agreement was not reached or that the arbitration provision was not intended to be enforceable or binding – it cannot be said that the deal points memorandum where the arbitration provision is found could only have been intended to be enforceable or binding. (See *Pacific Gas & Electric Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37-44 [contract interpretation requires consideration of the parties' intent].)

If a judge could potentially find the arbitration provision unenforceable, then it cannot reasonably be inferred from the provision alone that the entire deal points memorandum was intended to be enforceable and binding.

**b. An arbitrator could find the document's other terms unenforceable.**

Additionally, as the Court of Appeal concluded, it remains an open question whether this deal points memorandum lacks terms sufficient to constitute a settlement contract and thus whether the document is an enforceable or binding settlement agreement. (See *opn.* p. 16.)

Even if the judge were to determine that an agreement to arbitrate does exist, among the disputes the arbitrator is authorized to resolve under the JAMS arbitration rules are *contract enforceability issues* – i.e., whether the *other* terms in the deal points memorandum constitute an enforceable and binding settlement agreement. Rule 11(c) of the JAMS Comprehensive Arbitration Rules and Procedures provides in pertinent part that “disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought . . . shall be submitted to and ruled on by the Arbitrator.” (AA 395; see <<http://www.jamsadr.com/rules/comprehensive.asp>> [as of Feb.

4, 2005].)<sup>4/</sup> Under this rule, the JAMS arbitrator could determine that the other terms are *not* enforceable.

Of course, if a mediated deal points memorandum *expressly states* that “it is enforceable or binding” (Evid. Code, § 1123, subd. (b)), then it is admissible to prove an arbitration provision within the memorandum as a basis for compelling arbitration. But the arbitration provision alone, severed from the rest of the memorandum, cannot constitute “words to [the] effect” that “it” (*ibid.*) is enforceable or binding, because the “it” here is the entire document. The arbitration provision within that document, standing alone, is not a settlement agreement, and it cannot constitute words to the effect that “it” – *the entire document* – is enforceable or binding, since California law and the JAMS arbitration rules make that an open question.

**C. The statutory phrase *words to that effect* should be strictly construed in favor of a bright-line rule.**

**1. Strict construction avoids the sort of ambiguity that the Legislature intended to eliminate from the rule of mediation confidentiality.**

The foregoing discussion demonstrates why, as a matter of law, the Court of Appeal was wrong to construe the arbitration clause as words to the effect that the settlement terms document was intended to be binding. There

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<sup>4/</sup> This is typical of arbitration rules adopted by private ADR providers. Rule R-7 of the American Arbitration Association’s Commercial Arbitration Rules and Mediation Procedures similarly authorizes the arbitrator “to determine the existence or validity of a contract of which an arbitration clause forms a part.” (See <<http://www.adr.org>> [as of Feb. 4, 2005].) Rule 7 of ADR Services’s Arbitration Rules contains an identical provision. (See <<http://www.adrservices.org/pdf>> [as of Feb. 4, 2005].)

are also compelling policy reasons for a bright-line rule of strict statutory construction here.

Evidence Code section 1123 is a product of the Legislature's 1997 overhaul of the rules of mediation confidentiality pursuant to a recommendation of the California Law Revision Commission. (See *Rojas v. Superior Court, supra*, 33 Cal.4th at p. 418.) "In making its 1997 recommendation, the Commission explained that the then existing 'statutory scheme' regarding mediation confidentiality 'ha[d] ambiguities that cause[d] confusion. [Citation.] The changes the Commission recommended, which the Legislature adopted, were designed to eliminate[] these ambiguities in order '[t]o further the effective use of mediation by ensuring the 'candor' that is crucial to [its] success.' [Citation.]" (*Id.* at p. 422, bracketed material in original.)

The problematic ambiguity that led to subdivision (b) of section 1123 was in former Evidence Code section 1152.5, subdivision (a)(2), which stated that "unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence or subject to discovery, and disclosure of such a document shall not be compelled . . . ." (Stats. 1994, ch. 1269, § 8, p. 6582.) According to the Commission, subdivision (b) of section 1123 "was added due to the likelihood that parties intending to bound will use words to that effect, rather than saying their agreement is intended to be admissible or subject to disclosure." (Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (2005 ed.) foll. § 1123, p. 190.)

Subdivision (a) of section 1123 retains some of the former statutory language, prescribing an exception to mediation confidentiality where the document "provides that it is admissible or subject to disclosure, or words to that effect." Subdivision (b) eliminates ambiguity by prescribing another

exception where the document “provides that it is enforceable or binding or words to that effect,” pursuant to the Commission’s observation that parties intending to be bound will likely say so in that specific sort of language.

Subdivision (b) has statutory analogues in two other states – Minnesota and Texas. The Minnesota statute provides, in pertinent part: “A mediated settlement agreement is not binding unless: (1) it contains a provision stating that it is binding . . . ; or (2) the parties were otherwise advised of the conditions in clause (1).” (Minn. Stats., § 572.35, subd. (1).) The Texas statute provides, in pertinent part, that a mediated marital settlement agreement “is binding on the parties if the agreement . . . provides . . . that the agreement is not subject to revocation . . . .” (Tex. Stats., Family Code, § 6.602, subd. (b).) These are what some call “magic words” statutes, specifying the precise language (“is binding,” “is not subject to revocation”) that is required to make a mediated settlement agreement binding. If those precise words are not in the document, it is not binding.

Thus, in *Haghighi v. Russian-American Broadcasting Co.* (Minn. 1998) 577 N.W.2d 927, the Minnesota Supreme Court held that a handwritten document prepared by counsel at the conclusion of a mediation session was not an enforceable settlement agreement because it did not say it was binding: “The statute clearly provides that a mediated settlement agreement will not be enforceable unless it contains a provision stating that it is binding. The handwritten document prepared by the parties did not contain such a provision. Given a strict, plain language reading, the statute precludes enforcement of the document.” (*Id.* at p. 929.)

Minnesota’s “magic words” statute has been criticized as being overly formalistic – an echo of the antiquated practice of requiring a seal on a contract in order to make it enforceable. (See Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private*

*Facilitative Process and the Reality of Public Adversarial Justice* (2004) 19 Ohio St. J. Disp. Resol. 509, 540-547 (hereafter Thompson); Coben & Thompson, *The Haghghi Trilogy and the Minnesota Civil Mediation Act: Exposing a Phantom Menace Casting a Pall Over the Development of ADR in Minnesota* (1999) 20 Hamline J. Pub. L. & Policy 299, 304-307, 314.) In California, however, subdivision (b) of Evidence Code section 1123 avoids that criticism with the use of the language “words to that effect” – which, as the Court of Appeal here observed, demonstrates legislative concern “not with the precise words” in a document “but with the need for the words to unambiguously signify the parties’ intent to be bound.” (Opn. p. 10.)<sup>5/</sup>

But the Court of Appeal’s construction of subdivision (b) is overly expansive, for it would return California to the sort of ambiguity that the 1997 legislation was intended to eliminate. Broad statutory construction would open the door to all sorts of creative arguments why various terms in a deal points memorandum – not just an arbitration clause – might be deemed “words to the effect” that the document is enforceable or binding.

For example, in negotiations between residents of different states, parties commonly employ a forum-selection clause, choosing the state law and venue that will apply in any disputes between them. Would the clause “any & all disputes subject to California law & courts” in a mediated deal points

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<sup>5/</sup> Another California statute, Business and Professions Code section 467.4, provides that an agreement entered into with the assistance of an ADR program funded by the Department of Consumer Affairs is not enforceable or admissible “unless the consent of the parties or the agreement includes a provision that clearly states the intention of the parties that the agreement or any resulting award shall be so enforceable or admissible as evidence.” This statute’s requirement of a clear statement of the parties “intention,” rather than a literal statement of enforceability or admissibility, similarly militates against its construction as a “magic words” statute. But the statute’s requirement of a clear statement of intent, like that in subdivision (b) of Evidence Code section 1123, also precludes attempts to *divine* the parties’ intent, which must be clearly indicated in the document.

memorandum – or in a non-binding “letter of intent” reciting the terms of a proposed business relationship – turn the document into a binding contract? The Court of Appeal’s broad construction of the phrase “words to that effect” in subdivision (b) would encourage litigation advancing such an argument.

Here is another example, drawn from the present case. One of the paragraphs in the settlement terms document states: “Am’t [amount] of settlement will be confidential with appropriate exceptions.” (AA 264.) Does that clause make the settlement terms document admissible under subdivision (a) of Evidence Code section 1123, which makes a writing prepared during mediation admissible if “[t]he agreement provides that it is admissible or subject to disclosure, or words to that effect”? Thomas Fair made that exact argument below, asserting that the phrase “appropriate exceptions” makes all of the settlement terms document, other than the amount of the settlement, subject to disclosure and thus excepted from mediation confidentiality by subdivision (a). (AA 295; Appellant’s Opening Brief [in the Court of Appeal] p. 32.) The superior court and Court of Appeal ignored the argument – and for good reason. The provision for confidentiality of the proposed settlement amount does not plainly make the entire document subject to disclosure,<sup>6/</sup> just as the arbitration clause does not plainly make the document enforceable or binding. And defense counsel certainly never saw it that way; the draft settlement agreement Stromberg circulated on April 4, 2002, provided for complete confidentiality of the entire agreement. (AA 334.) But a broad statutory construction of section 1123 would encourage intrepid lawyers to make such creative arguments – and others we cannot yet even guess at – in future cases. The result would be a proliferation of disputes over whether deal

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<sup>6/</sup> It is common practice for parties to agree that settlement amounts will remain confidential, but that exceptions will be made as necessary for counsel and accountants to learn the amount for legal and taxation purposes.

points memoranda constitute enforceable and binding agreements without actually saying so.

The Court of Appeal's broad construction of section 1123's exceptions to mediation confidentiality would have the same effect as a narrow construction of section 1119's general rule of confidentiality, which this court rejected in *Rojas* because it would "significantly undercut the Legislature's efforts to ensure the confidentiality necessary to effective mediation." (*Rojas v. Superior Court, supra*, 33 Cal.4th at p. 422.) The court should likewise reject a broad construction of section 1123. Both a narrow construction of section 1119 and a broad construction of section 1123 would perpetuate ambiguity and thus endanger mediation confidentiality.

And the damage would extend to the other major form of ADR – arbitration. If an arbitration clause in a mediated deal points agreement – and, indeed, in any non-binding "letter of intent" outside the mediation context – were to turn the document into a binding contract, negotiating parties would be discouraged from including arbitration clauses in such documents, for fear of making them binding even though that was not intended. The result would be more litigation.

The solution here is to follow the *Rojas* rule of broad statutory construction of section 1119's rule of confidentiality by narrowly construing the exceptions to that rule. Just as in *Rojas* this court safeguarded mediation confidentiality by broadly construing section 1119, in the present case the court should shore up that safeguard by strictly construing the exceptions prescribed in section 1123, with a bright-line rule that eschews ambiguity and makes plain what is required to overcome the confidentiality protection afforded by section 1119. As one commentator concludes, "mediation confidentiality should be protected with a 'bright-line' requirement for written and signed agreements that would preclude parties from exposing mediation

communications to prove a settlement.” (Deason, *supra*, at p. 42.) No burden is imposed by requiring plain and direct language that is commonly used and understood by lawyers and clients alike.

**2. A bright-line rule is best suited to the dynamics of mediation and the paramount importance of mediation confidentiality in promoting candor.**

A bright-line rule of admissibility under subdivision (b) of section 1123 is compatible with the way mediation actually works and is essential to the atmosphere of candor that enables mediation to succeed.

Here is how one treatise describes the skeletal structure of most mediations: “Classic mediation generally commences in a joint session with all parties and counsel present.” (Knight et al., *supra*, at ¶ 3:127.) “After each side has set forth its position, . . . the mediator *may* caucus with each side separately.” (*Id.* at ¶ 3:132, original italics.) “The mediator then begins a process of risk analysis within the caucus setting.” (*Id.* at ¶ 3:140.) “The mediator may shuttle back and forth in private sessions with each side and then bring the parties together for joint meetings at appropriate intervals.” (*Id.* at ¶ 3:143.) “If settlement is reached or appears likely, the mediator brings the parties together in a joint meeting to wrap up the settlement.” (*Ibid.*)

The reality of mediation is more complex. The process is informal and often highly charged, and can be fraught with mixed or hidden messages, posturing by counsel, and ill-will between the participants. The “caucus” format can mean that the parties never negotiate face-to-face after the initial joint session – which is precisely what happened here. The parties met in an initial joint session on March 20, but they caucused in separate rooms for the rest of March 20 and all of March 21. (AA 136.) They never got back to

meeting face-to-face, and never came to complete terms. The mediation ended, as many do, with just a tentative consensus on incomplete terms – that is, with uncertainty. The oft-ambiguous nature of this communicative process is why Evidence Code section 1123 requires clarity for a document produced during mediation to be admissible.

Mediation is far more art than science. That is why the process is commonly called “the dance.” And the dance can be rough-and-tumble. That is why mediation confidentiality is so critical to the success of a process that might not end with a final and binding resolution. Confidentiality neutralizes the fear that a candid disclosure, or staking out a particular settlement posture, or a cathartic outburst – or a handwritten list of incomplete deal points that was never intended to be a final settlement agreement – could come back to haunt you later.

As this court explained in *Rojas*: “[C]onfidentiality is essential to effective mediation’ because it ‘promote[s] “a candid and informal exchange regarding events in the past. . . . This frank exchange is achieved only if participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.” [Citations.]” (*Rojas v. Superior Court, supra*, 33 Cal.4th at pp. 415-416, quoting *Foxgate Homeowners’ Assn. v. Bramalea California, Inc., supra*, 26 Cal.4th at p. 15.) That protection must include *writings* generated during the mediation if candor is to be preserved. As the Minnesota Supreme Court observed in *Haghighi*, statutes like Evidence Code section 1123 “encourage parties to participate fully in a mediation session without the concern that anything written down could later be used against them.” (*Haghighi v. Russian-American Broadcasting Co., supra*, 577 N.W.2d at p. 930.) Strict construction of section 1123, subdivision (b), via a bright-line rule, will allay that concern.

Strict statutory construction here is consistent with the judicial “hands off” approach to mediation so valued by its practitioners and honored by the courts. (See, e.g., Thompson, *supra*, at p. 513.) Above all else, mediation is a *voluntary* process. “Mediation is based upon the principles of self-determination by the parties, and relies on the parties to reach a voluntary, consensual agreement.” (Cal. Dispute Resolution Council, Standards of Practice For California Mediators, § 1, <<http://www.cdrc.net/pg2.cfm>> [as of Feb. 4, 2005].) Judicial intervention should be avoided, for it is inconsistent with the voluntary nature of mediation and the notion that a voluntary settlement is better than a judicially-imposed one. That is a very good reason to require an unequivocal statement, in plain and commonly-used language, that a deal points memorandum is enforceable or binding if it is to be admissible as a settlement agreement.

### 3. A bright-line rule is easy to follow.

One of the benefits of a bright-line rule here is that it is so easy to follow. All you have to do is say what you mean.

As one commentator observes, “this is very easy to do. Before the parties write down any of the deal points, all they need to do is write something like this as a preface: ‘This document is a binding and enforceable agreement . . . .’ That’s it.” (Grossman, *supra*, at p. 5.)

Others say the same: “Make sure the settlement agreement includes language indicating the agreement is ‘admissible,’ ‘enforceable’ or ‘subject to disclosure.’” (Knight et al., *supra*, at ¶ 3:144.2.) “If in doubt, parties can safeguard their agreement by including language indicating that the settlement is intended to be an enforceable agreement.” (Deason, *supra*, at pp. 85-86.)

The easiest approach, of course, is to use the magic words “enforceable” or “binding.” But *words to that effect* will suffice. They just don’t appear here.

**D. This deal points memorandum should be construed against its drafter.**

Finally, it bears repeating that Thomas Fair’s counsel drafted this deal points memorandum. (See AA 137 [statement in Serota’s declaration that “[t]he agreement was drafted by me in hand on legal paper.”].) It is well settled that ambiguities in a writing are to be construed against the party who drafted it. (Civ. Code, § 1654; *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 745.)

If Thomas Fair and his counsel really thought the settlement terms document was an enforceable and binding settlement agreement, all they had to do was write that simple language into the document. They did not. Indeed, the drafter did not even call the document an agreement.

**E. Conclusion: The rule of mediation confidentiality makes this deal points memorandum inadmissible.**

Turning back to Evidence Code section 1123, we return to the question whether the settlement terms document “provides that it is enforceable or binding or words to that effect.” (Evid. Code, § 1123, subd. (b).) The answer is “no.” The document says nothing like that. Thus, it is not made admissible by subdivision (b) of section 1123. That means it is made inadmissible by the rule of mediation confidentiality set forth in Evidence Code section 1119.

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Such inadmissibility moots the second and third issues presented here, regarding the parol evidence of the parties' intent and the rule of appellate deference to rulings based on written declarations. Those issues, however, are nevertheless properly addressed by this court as being of continuing public importance (as the court recognized in granting review on all issues presented). (E.g., *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1086.) We therefore proceed to discuss them.

## II.

### **PAROL EVIDENCE SHOULD BE ADMISSIBLE TO PROVE WHETHER A MEDIATED SETTLEMENT TERMS DOCUMENT WAS INTENDED TO BE BINDING.**

#### **A. Parol evidence is admissible to prove whether *any* draft of settlement terms was intended to be binding.**

Even if the settlement terms document were admissible, that would not resolve the question of its enforceability as a binding contract. The document would merely be admissible as evidence on the issue whether the parties intended to enter into a binding settlement agreement. That evidence would not be conclusive, but could be rebutted by contrary extrinsic evidence. Parol evidence is always admissible “for the purpose of ascertaining whether a document claimed to be a contract was not intended by the parties to have that effect.” (*Halldin v. Usher* (1958) 49 Cal.2d 749, 752; accord, *Banner Entertainment, Inc. v. Superior Court*, *supra*, 62 Cal.App.4th at p. 358 [“Evidence as to the parties’ understanding and intent in taking what actions

they did is admissible to ascertain when or whether a binding agreement was ever reached.”].)

Here, the parties presented conflicting extrinsic evidence of their intent. On the one hand, Bakhtiari, Maryann Fair, and their attorneys Stromberg and Garrity stated in declarations that they did not intend the settlement terms document to be enforceable or binding and there would be no binding settlement until execution of a subsequent definitive settlement agreement. (AA 233, 236, 245, 271.) Consistent with this testimony, there was also undisputed evidence that the parties in fact attempted to prepare a definitive settlement agreement after the mediation. On the other hand, Thomas Fair responded in his declaration that the exhibits attached to Maryann Fair’s declaration did not prove he had understood the settlement terms document not to be binding (AA 344) – which, apparently, was an indirect way, via a double negative, of implying he had intended the document to be binding.

In such instances (and assuming the underlying settlement terms document is admissible), resolution of the evidentiary conflict is vested in the trial court, and on appeal the substantial evidence standard of review applies. “[W]here extrinsic evidence has been properly admitted as an aid to the interpretation of a contract and the evidence conflicts, a reasonable construction of the agreement by the trial court which is supported by substantial evidence will be upheld.” (*In re Marriage of Fonstein, supra*, 17 Cal.3d at pp. 746-747; see generally *Parsons v. Bristol Development Co., supra*, 62 Cal.2d at pp. 865-866.)

The Court of Appeal, however, applied the *de novo* standard of review – and found a binding contract (opn. p. 12) – on the premise that “*de novo* review is appropriate because the extrinsic evidence is not in conflict.” (Opn. p. 7.) But there *was* conflicting extrinsic evidence of the parties’ intent, consisting of the declarations by Bakhtiari, Maryann Fair, and defense counsel

versus the contrary declaration by Thomas Fair. The Court of Appeal refused to acknowledge that evidence, asserting that “the parties’ and counsel’s after-the-fact declarations regarding their intent when they signed the settlement terms document are *not relevant* to our resolution of the question whether the settlement terms document was intended to be a binding settlement agreement.” (Opn. p. 12, fn. 9, italics added.) It is well settled, however, that parol evidence is admissible to prove whether the parties to a writing understood and intended it to be a binding contract. (*Halldin v. Usher, supra*, 49 Cal.2d at p. 752; *Banner Entertainment, Inc. v. Superior Court, supra*, 62 Cal.App.4th at p. 358.) And it is equally well settled that settlement agreements are governed by the same principles applicable to any other contractual agreement, including the parol evidence doctrine. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.)

This rule should apply equally to a purported settlement agreement that is *mediated*. That means the declarations submitted by Bakhtiari, Maryann Fair, and defense counsel were indeed relevant and admissible; and, because they conflicted with the extrinsic evidence in Thomas Fair’s declaration, the applicable standard of review is substantial evidence, not de novo. (See *In re Marriage of Fonstein, supra*, 17 Cal.3d at p. 746.)

Thomas Fair’s answer to the petition for review cites *Winet v. Price, supra*, 4 Cal.App.4th at page 1166, footnote 3, for the proposition that evidence of “unexpressed subjective intent” is inadmissible “on the meaning of the Settlement Terms agreement.” (Answer To Petition For Review (APFR) p. 15.) This argument confuses two discrete rules – the rule for interpreting contract language, and the rule for determining whether a contract was intended. The rule for *contract interpretation* is indeed that “evidence of the undisclosed subjective intent of the parties is irrelevant to determining the meaning of contractual language.” (*Winet v. Price, supra*, 4 Cal.App.4th at p.

1166, fn. 3.) But the rule is different for determining whether the parties intended a writing to be a *binding contract*: Parol evidence of the parties' subjective intent is always admissible to ascertain whether a binding agreement was ever reached. (*Halldin v. Usher, supra*, 49 Cal.2d at p. 752; *Banner Entertainment, Inc. v. Superior Court, supra*, 62 Cal.App.4th at p. 358.) The latter rule applies here.

The trial court's resolution of the evidentiary conflict against Thomas Fair is hardly surprising. His evidence was weak, couched as it was in the form of a double-negative challenge to the defendants' proof, and it conflicted with the admission in his letter of April 20, 2002 that "[w]e have no agreement." (AA 239.) To his credit, Thomas Fair, who is an attorney (AA 2), never directly said what he evidently could not truthfully say – that he had intended the settlement terms document to be an enforceable and binding settlement agreement.

In contrast, Bakhtiari and Maryann Fair directly disclaimed any such intent. They backed up that disclaimer with their explanation that, based on prior business experience, they had thought the document was similar to a non-binding "letter of intent" reciting the terms of a proposed business relationship. (AA 233, 236.) And their position is confirmed by the proviso in Stromberg's draft settlement agreement of April 4, 2002, requiring that the parties "agree to all terms" prior to payment (AA 331).

If *de novo* review were to apply here, Thomas Fair should still lose. But the substantial evidence rule applies – which means the trial court's resolution of the evidentiary conflict against Thomas Fair must be upheld.

**B. The trial court made an implied finding, entitled to appellate deference, that this settlement terms document was not intended to be binding.**

According to the Court of Appeal, the trial court “did not address” the factual issue presented by the conflicting declarations because the judge “found the settlement terms document inadmissible.” (Opn. p. 12.)

But the trial court never disavowed a determination of the parties’ intent. The judge did say “[t]here is no waiver.” (AA 413.) This statement can mean either of the following: (1) the judge found no waiver of mediation confidentiality because the parties did not intend the settlement terms document to be binding, or (2) the judge found no waiver because the document did not contain words to the effect that it was enforceable or binding, in which case the record is silent as to how the judge resolved the issue of intent.

In either case, on appeal it must be inferred the judge found that the parties did not intend the settlement terms document to be binding. “A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.” (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) This rule applies even as to matters on which the record is silent. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Thus, whether the judge’s statement that “[t]here is no waiver” speaks to the parties’ intent, or whether the record is silent on that point, the Court of Appeal was required to infer that the judge resolved the evidentiary conflict in favor of the defendants.

Thomas Fair’s answer to the petition for review suggests a third meaning of the court’s statement that “[t]here is no waiver” – purportedly the court was merely responding to his unsuccessful argument below that the

defendants had waived mediation confidentiality by also filing a copy of the settlement terms document with their papers opposing the motion to compel arbitration, which had already included the document. (APFR p. 16; see AA 119, 308.) But if that is true, it only means the record is silent as to the trial judge's resolution of the intent issue – which, again, invokes the presumption that the judge found the parties did not intend the settlement terms document to be binding.

The trial court's finding on the issue of intent – whether express or implied – is binding on appeal. “[A]n appellate court should defer to the factual determinations made by the trial court when the evidence is in conflict. This is true whether the trial court's ruling is based on oral testimony or declarations.” (*Shamblin v. Brattain, supra*, 44 Cal.3d at p. 479.) Thus, the Court of Appeal acted incorrectly in making independent findings as to whether the parties intended the settlement terms document to be a binding contract (as well as inconsistently in referring the enforceability issues to the arbitrator).

### III.

#### THE RULE OF APPELLATE DEFERENCE TO TRIAL COURT FINDINGS SHOULD APPLY TO RULINGS BASED ON WRITTEN DECLARATIONS.

The Court of Appeal's erroneous refusal to consider the conflicting declarations (see opn. p. 12, fn. 9) implicates the third issue presented: whether the rule of appellate deference to trial court findings on conflicting evidence applies not only to rulings on oral testimony, but also to rulings on written declarations, such as occurred here.

This court answered that question affirmatively in *Shamblin v. Brattain*, *supra*, 44 Cal.3d at page 478, holding that the rule of deference applies “whether the trial court’s ruling is based on oral testimony or declarations.” *Shamblin* disapproved “[a]ny contrary implication” in *Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019. (See *Shamblin v. Brattain*, *supra*, 44 Cal.3d at p. 478, fn. 4.) *Hurtado* had implied that substantial evidence review does not apply where a ruling is based on declarations, observing: “Some courts have suggested that where the factual record consists of affidavits and declarations rather than live testimony, the trial court is in no better position than the appellate court to resolve disputed facts.” (*Hurtado v. Statewide Home Loan Co.*, *supra*, 167 Cal.App.3d at p. 1026, fn. 5.) That suggestion had its origins in *Estate of Shannon* (1965) 231 Cal.App.2d 886, 890, which said the trial judge is in no better position than the appellate court to assess evidence that consists “only of writings, without *oral* testimony.” (Original italics.) Plainly, *Shamblin* sounded the death knell for *Shannon* as well as *Hurtado*.

Some subsequent Court of Appeal decisions have followed *Shamblin*. (See *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1127 [Third Dist., opn. by Sims, J. – “Under the conflicting evidence rule, we resolve all conflicts in favor of the judgment. . . . This standard applies regardless of whether the trial court’s decision is based on oral testimony or declarations.”]; *Hiott v. Superior Court* (1993) 16 Cal.App.4th 712, 717 [Second Dist., Div. Seven, opn. by Woods, J. – quoting *Shamblin*]; *Khan v. Superior Court* (1988) 204 Cal.App.3d 1168, 1171, fn. 1 [First Dist., Div. Four, opn. by Poché, J. – citing *Shamblin* for proposition that principles of substantial evidence review “also govern review of orders decided on declarations”].)

But not all have followed *Shamblin*. Another line of cases has reverted to the pre-*Shamblin* rule, holding that a rule of de novo review, rather than appellate deference to trial court findings, applies where conflicting evidence “consists entirely of written declarations.” (*Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 89 [First Dist., Div. Three, opn. by Parrilli, J.]; accord, *Patterson v. ITT Consumer Fin. Corp.* (1993) 14 Cal.App.4th 1659, 1663 [First Dist., Div. Four, opn. by Poché, J. – de novo review where “the conflicting evidence is entirely written”]; *Milazo v. Gulf Ins. Co.* (1990) 224 Cal.App.3d 1528, 1534 [Second Dist., Div. Three, opn. by Croskey, J. – de novo review “where the conflicting evidence is of a written nature only”].) In each of these cases, their citations trace back to *Shannon* – *Marcus & Millichap* cited *Patterson*, which cited *Milazo*, which cited *Shannon*.

*Shamblin* was right and should be reiterated. It is beside the point if, as *Hurtado* and *Shannon* said, the trial court is in no better position than the appellate court to assess written evidence. What is important is the “essential distinction between the trial and the appellate court . . . that it is the province of the trial court to decide questions of fact and of the appellate court to decide questions of law . . . .” (*In re Zeth S.* (2003) 31 Cal.4th 396, 405, quoting *Tupman v. Haberkern* (1929) 208 Cal. 256, 262-263.) Appellate courts should not decide factual issues, or the line between appellate and trial courts will be blurred and the substantial evidence rule will be weakened.

## CONCLUSION

This case is the third in a series of actions before this court – *Foxgate*, *Rojas*, and now *Fair* – affording the opportunity to fully safeguard the rule of confidentiality so essential to the success of mediation. For the foregoing reasons, the Court of Appeal’s judgment should be reversed.

Dated: February 11, 2005

Respectfully submitted,

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**CERTIFICATE OF WORD COUNT**

**(Cal. Rules of Court, rule 29.1(c)(1).)**

The text of this brief consists of 10,247 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

DATED: February 11, 2005

  
Jon B. Eisenberg

PROOF OF SERVICE [C.C.P. § 1013a]

I, **Millie Gandola**, declare as follows:

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Horvitz & Levy LLP, and my business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436. I am readily familiar with the practice of Horvitz & Levy LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. On **February 11, 2005**, I served the within document entitled:

**OPENING BRIEF ON THE MERITS**

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Millie Gandola