

No. S129220
(Court of Appeal No. A100240)
(San Mateo County Super. Ct. No. 417058)

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

R. THOMAS FAIR,
Plaintiff and Appellant,

SUPREME COURT
FILED

v.

MAR 16 2005

KARL E. BAKHTIARI, MARYANN E. FAIR, STONESFAIR
FINANCIAL CORPORATION, STONESFAIR MANAGEMENT
COMPANY, LLC, STONESFAIR CORPORATION,
Defendants and Respondents.

Frederick K. Ohlrich Clerk
Deputy

STONESFAIR FINANCIAL CORPORATION,
Defendant, Cross-Complainant and Respondent,

v.

R. THOMAS FAIR,
Plaintiff, Cross-Defendant and Appellant.

After A Decision By The Court of Appeal,
First Appellate District, Division Two

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

On March 21, 2002, after two full days of mediation, the parties to this action and the retired federal judge serving as mediator, signed a Settlement Terms document in which Defendants agreed to pay Plaintiff R. Thomas Fair \$5.4 million to settle his claims that Defendants wrongfully removed him as an officer, director, and employee of the \$200 million real estate business he helped found. The signed Settlement Terms document contains all the material terms of the settlement, including an agreement to arbitrate all future disputes under JAMS arbitration rules.

Twice in April 2002, Defendants and their counsel represented to the trial court that the case had settled, including stating on the record in open court that the parties had “reached a settlement agreement.” The Court of Appeal correctly found that the parties’ agreement and conduct evidenced a binding, enforceable agreement.

Despite the signed, written and repeatedly confirmed settlement, Defendants repudiated the settlement and refused to submit the dispute to arbitration. They seek to excuse their bad faith actions through an expedient and self-serving invocation of mediation confidentiality under Evidence Code Section 1119 (“Section 1119”). They do so even though there is nothing about enforcement of the Settlement Terms document or Plaintiff’s motion to compel arbitration that calls into question the intent, purposes, or policies behind that provision. None of the parties’ mediation-related statements, offers, concessions, or analyses were relied upon by Plaintiff or the Court of Appeal.

Mediation confidentiality is designed to *help achieve* settlements by encouraging candor and negotiation, without fear that one’s admissions, concessions, or analyses will later be used against him. It is not designed to interfere with the strong policies and established processes for recognizing and enforcing settlements. Nor is it designed to have any impact on the type of motion at issue in this case—a motion to compel arbitration. In fact, the mediation chapter was enacted with an express caveat, Evidence Code Section

1116, precluding its interference with motions seeking to compel alternate dispute resolution.

This Court's mediation confidentiality precedents—*Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.*, 26 Cal. 4th 1 (2001), and *Rojas v. Superior Court*, 33 Cal. 4th 407 (2004)—do not require the narrow, technical construction of Evidence Code Section 1123 (“Section 1123”) urged by Defendants. In both *Foxgate* and *Rojas*, this Court held that exceptions to mediation confidentiality must be statutory and may not be judicially created. Here, the Legislature has established a statutory exception so that settlement agreements resulting from mediations are not rendered inadmissible by mediation confidentiality. Unlike *Foxgate*, where permitting a mediator to testify about conduct during mediation threatened the frank expression of viewpoints necessary for effective mediation, and *Rojas*, where admitting photographs prepared for mediation might inhibit the preparation of such materials, Plaintiff's interpretation of Section 1123 does not invade or adversely affect the mediation process. Admitting settlement agreements that evidence the parties' intent to be bound does not require exhuming the negotiations that led to the settlement. Nor does it discourage candor, undermine the mediator's neutrality, or otherwise adversely inhibit the mediation process.

Mediation confidentiality simply does not justify excluding enforceable settlement agreements when the mediation succeeded. Rather, making parties honor their promises and be bound by their representations to California judges discourages the kind of bad faith conduct and settlor's remorse clearly evident here.

Defendants go to great lengths—including stretching the facts and the law—to posture a policy-oriented foundation for their position. They urge a formalistic and mechanistic interpretation of Section 1123(b), which will not only bar the enforcement of the hard-earned settlement of this case, but will certainly cause future results at odds with the intent of other parties in other circumstances. It is easy to foresee parties of widely disparate sophistication using

many different words and operating under circumstances that evidence an intention to settle a case, but simply failing to include in their agreement the magic words or synonyms for the magic words that Defendants list as part of their proposed bright line rule. Defendants' construction encourages settlor's remorse by creating an opportunity—as Defendants have done here—to use Section 1123 as a means to renege on a settlement agreement that was undeniably intended to be binding and enforceable.

As we discuss below, this case presents neither an attractive nor equitable vehicle for applying such a formalistic test. Plaintiff Tom Fair has lost his family, his job, his income, and his \$200 million real estate business through Defendants' actions. Using illegally acquired corporate powers, Defendants Bakhtiari and Maryann Fair, Plaintiff's former wife, conspired to destroy Plaintiff. After Bakhtiari physically assaulted Plaintiff, they unceremoniously barred Fair from the premises of his own businesses, fired him from the positions he created, removed him as a director and officer of the Company he founded, and refused to pay him bonuses and distributions, even for the work already completed and the deals already made. Now, these same Defendants come before this Court seeking an expedient way to renege on the agreement settling these disputes and restoring to Tom Fair a modest portion of what he lost. For the reasons we discuss below, the Court should not and need not give quarter to Defendants' actions by adopting an overly narrow interpretation of Section 1123.

SUMMARY OF ARGUMENT

Plaintiff respectfully requests this Court affirm the Court of Appeal's decision on the following four grounds. *First*, mediation confidentiality under Section 1119 does not render the Settlement Terms document or the agreement to arbitrate inadmissible on a motion to compel arbitration because:

- the Settlement Terms document satisfies Section 1123 by containing words to the effect that it is enforceable and/or

subject to disclosure, especially because of the inclusion of a broad arbitration agreement;

- the arbitration provision embedded in the Settlement Terms document is a severable agreement, enforceable by statute and therefore admissible under Section 1123(b); and
- Evidence Code Section 1116 expressly states that the mediation statutes do not limit a court's authority to order participation in a dispute resolution proceeding such as arbitration.

Admitting the Settlement Terms document and/or arbitration agreement on any or all of the above grounds furthers the important public policies in favor of mediation, arbitration and settlement.

Second, the Settlement Terms document is admissible because Defendants waived their right to assert mediation confidentiality over the document when they voluntarily and without necessity submitted it to both the trial and appellate court.

Third, the Court of Appeal properly found that the relevant, admissible evidence conclusively established the parties' intent to enter into a binding and enforceable agreement to arbitrate and that an agreement to arbitrate exists under Section 1281.2 of the Code of Civil Procedure. The only contradicting evidence, Defendants' statements of their undeclared subjective intent to the contrary, are neither admissible nor relevant to determining mutual consent. Accordingly, the Court of Appeal properly applied *de novo* review.

Fourth, the Court of Appeal did not improperly refuse to defer to the trial court's factual findings because the trial court made no factual findings entitled to appellate deference. Accordingly, the question of whether appellate deference applies to findings based on written declarations is not at issue and not grounds for reversal.

STATEMENT OF FACTS

A. The Parties And Formation Of The Stonesfair Entities.

The underlying action involves a malicious and illegal campaign by Defendants¹ to wrongfully force Plaintiff R. Thomas Fair (“Plaintiff” or “Fair”) out of the real estate investment and management businesses he built and to deny Fair his rightful share of profits and other distributions from those businesses. See Appellant’s Appendix (“AA”) 2–10.

In the early 1990s, Fair conceived of forming a real estate syndication company to act as a general partner and asset management company for apartment investment projects. AA 4 ¶10. Fair approached Bakhtiari (AA 5 ¶¶10–11), and Fair and Bakhtiari formed SFC and SC. AA 2 ¶4; 3 ¶6; 5 ¶11. This arrangement proved successful as SFC acquired fourteen properties, valued at \$200 million. AA 6 ¶13.

As the businesses grew, Fair’s then-wife, Maryann Fair, joined as an administrative assistant. AA 6 ¶14. In 1998, Fair and Maryann Fair divorced. As a result of the divorce, Maryann Fair received one-half of Fair’s stock interest in SFC and SC. AA 2 ¶4; 3 ¶6; 6 ¶15.

B. Bakhtiari And Maryann Fair Push Fair Out Of The Stonesfair Entities.

After the Fairs divorced, Bakhtiari and Maryann Fair undertook a concerted campaign to force Fair out of the business and to deny him his fair share of its income and profits. AA 6–7 ¶¶16–17; 11–12 ¶29; 12–14 ¶34.

¹“Defendants” (“Respondents” on appeal) refers collectively to Defendant Karl E. Bakhtiari (“Bakhtiari”), Defendant Maryann E. Fair (“Maryann Fair”), Defendant/Cross-Complainant Stonesfair Financial Corporation (“SFC”); Defendant Stonesfair Management Company (“SMC”), and Defendant Stonesfair Corporation (“SC”). See AA 2–3. SFC, SMC and SC are collectively referred to as the “Stonesfair Entities.”

Bakhtiari and Maryann Fair formed a third entity, SMC, to manage SFC properties. AA 3 ¶5; 7-8 ¶¶18-19. Bakhtiari and Maryann Fair initially excluded SFC and Fair from any ownership, profits or compensation in SMC (AA 7 ¶18), even though it was a corporate opportunity that they were required to offer to Fair. After Fair protested, Bakhtiari and Maryann Fair extended a take-it-or-leave-it offer of a five-percent share in SMC. *Id.* Having obtained an unfairly large stake in SMC, Bakhtiari and Maryann Fair then used their majority positions in SFC and SMC to improperly transfer key elements of SFC's business and profits to SMC. AA 7-8 ¶19. By increasing the profits of SMC at the expense of SFC, Bakhtiari and Maryann Fair reduced the profits and compensation owed to Fair for his work and investment in SFC, paying him a much smaller distribution based on his five-percent share in SMC. *Id.*

In June 2000, the harassment of Fair escalated when Bakhtiari twice physically assaulted and battered him in the SFC office. AA 8-9 ¶22. Bakhtiari then "suspended" Fair. AA 9 ¶23. After suspending Fair, Bakhtiari stopped holding Board of Director meetings, withheld Fair's portion of SFC's bonus and profits for 2000, and excluded Fair from participating in SFC business. AA 9 ¶23. After Fair invoked his rights as an SFC officer, director and shareholder to review records and participate in decision making, Bakhtiari and Maryann Fair illegally elected Maryann Fair to the SFC Board of Directors and voted 2-1 (over Fair's objection) to terminate Fair's employment with SFC, cutting off his salary and benefits. Later, they voted to remove him as a director. AA 9-10 ¶¶24-26; 11 ¶29; 12-13 ¶34.

C. The Underlying Action.

Assaulted and wrongfully driven out of his own companies, Fair filed a complaint against Bakhtiari, Maryann Fair and the Stonesfair Entities. The operative Third Amended Complaint, filed on March 6, 2002, includes causes of action for breach of contract, breach of fiduciary duty, corporate waste, wrongful and retaliatory

termination in violation of public policy, wrongful termination, intentional infliction of emotional distress, unfair business practices, interference with economic relations, conversion, fraud and constructive fraud. *See* AA 1. Defendant SFC filed a Cross-Complaint against Fair. AA 63.

D. The Parties Settle Their Disputes At Mediation.

On January 16, 2002, the parties stipulated before the trial court to participate in private mediation. RT (1/16/02) 2–4; AA 143 ¶3; 156–58. Prior to the mediation, the parties established parameters to govern its scope so that the parties and their valuation consultants would attend the mediation on a level playing field. AA 250–51. These ground rules excluded from the subject matter of the mediation Fair’s investment interest in the limited partnerships used by SFC to syndicate the sale of the apartment complexes to investors. AA 250–51.²

On March 20 and 21, 2002, the parties, their counsel and valuation consultants participated in a two-day mediation before the Honorable Eugene F. Lynch, United States District Judge (Retired). AA 136 ¶2; 342 ¶2. At the conclusion of the second day, the parties reached an agreement. They entered into a handwritten settlement agreement resolving all causes of action and all other material issues. AA 137 ¶4; 141; 343 ¶4. Although handwritten by Fair’s counsel, all parties, including Defendants, jointly drafted the agreement.³ AA 137 ¶4, AA 211, AA 226, AA 271 ¶3. All parties and Judge Lynch signed the agreement. AA 141; *see* AA 137 ¶4; 343 ¶4.

²Defendants claim in their brief that the Settlement Terms document was incomplete because it did not provide for the sale of Fair’s limited partnership interests. Op. Br. 6–7. This misrepresents the record. In fact, it was agreed among all parties *prior to* the mediation that those interests were not going to be negotiated at the mediation. AA 250–51.

³Defendants continue to wrongly assert that the Settlement Terms document was drafted by Fair alone, contradicting their own pleadings in the trial court. AA 211, AA 226, AA 271 ¶3.

The handwritten document, entitled "Settlement Terms" and dated March 21, 2002, set forth the material terms of the settlement. AA 141. In particular, the written and signed Settlement Terms document provided:

1. Cash payment of \$5.4 m[illion] to T. Fair w/in 60 days.
2. Payment treated as purchase of all T. Fair's stock & interests (as capital gain to Fair).
3. [Defendants] will not look to Fair for reimbursement or indemnification of any phantom income paid by them to date.
4. This provision relates solely to Fair's right to indemnity and does not preclude other rights of the parties. Fair will be indemnified as a former officer, director & employee by SFC/SMC/SC, according to applicable law, against all 3rd party claims, including LPs [limited partners] or IRS, arising from the operation of SFC/SMC. Fair will not make any adverse contacts with IRS [or] LPs re: SFC/SMC, at risk of loss of indemnity and will not suggest, foment or encourage litigation by LPs or any individual against defendants, at risk of loss of indemnity.
5. Maryann Fair disclaims any community prop[erty] interest in settlement proceeds.
6. Parties will sign mutual releases and dismiss with prejudice all claims. Am't of settlement will be confidential with appropriate exceptions.
7. All sides bear their own attorneys fees and costs, including experts.
8. If Fair needs to restructure cash payments for tax purposes, defendants will cooperate (at no additional cost to defendants).
9. Any & all disputes subject to JAMS arbitration rules. (AA 141; see AA 137-38 ¶¶4, 6; 343 ¶5)

The Settlement Terms document contained no provision conditioning its effectiveness on the subsequent drafting of a final definitive settlement agreement. AA 141.

E. Defendants Confirm The Settlement In Writing And Orally To The Trial Court.

The evidence contemporaneous with the settlement is wholly consistent with its enforceability. Defendants confirmed in writing and on the record before the trial court that the case had settled. On April 2, 2002, Defendants' counsel informed the trial court that "the case has settled" in their Case Management/ADR Conference Questionnaires. AA 79 ¶5b; 86 ¶5b; 92 ¶5b; *see* AA 144 ¶6.

On April 17, Bakhtiari's counsel informed the trial court in open court on the record and on behalf of all Defendants that "we've reached a settlement *agreement*" and requested a sixty-day continuance to allow the parties to complete the settlement process. RT (4/17/02) 2:17–24 (emphasis added); AA 144–45 ¶8; 184, 450. The request was consistent with provisions of the Settlement Terms document providing for payment within sixty days of March 21, 2002. AA 119 ¶1; RT (4/17/02) 2:22–24. Defendants neither indicated that the settlement was merely anticipated or contingent on final settlement documents, but told the court that the case "settled."⁴

The trial court relied on the representation that the case had settled, deferring setting a trial date and instead extended the time for Fair to respond to SFC's Cross-Complaint. It also continued the Case Management Conference to June 21, 2002. AA 187, 450; *see* AA 144–45 ¶8.

F. Defendants' Counsel Confirms The Settlement In Writing To Fair's Counsel.

At the same time Defendants' counsel was advising the trial court that the case had settled, they confirmed in writing the settlement and its terms to Fair's counsel. On April 4, Defendants

⁴Defendants' statement in their brief that they told the trial court "that they *anticipated* a settlement" (Op. Br. 8 (emphasis added)) is another instance of Defendants misstating the record. Defendants' record cites to support that statement refer to their own court filings in which they told the trial court that the "the case has settled" and that a dismissal will prejudice *will* be filed. AA 75, 86 ¶5b, 89, 92 ¶5b, 95.

reiterated the same material terms as set out in the Settlement Terms document by sending Fair's counsel a draft document entitled Settlement Agreement And General Release. AA 144 ¶7; 327 ¶3; 331-40.

Consistent with the fact that parties settled all disputes on March 21, 2002, that document recited "[i]t is now the desire and intention of the Parties to settle and resolve, *as of March 21, 2002*, all disputes, differences and claims." AA 331 §1.2 (emphasis added). The draft release provided that (a) the settlement payment of \$5.4 million was to be made "within sixty (60) days after March 21, 2002"; (b) there would be no reimbursement for taxes paid on "phantom income . . . as of March 21, 2002"; and (c) the parties warranted that "as of March 21, 2002" they had not communicated the terms of the parties' "agreement" to any third party other than tax and legal counsel. AA 331 §2.1; 332 §2.4; 334 §4.1. Importantly, Defendants' draft confirmed the parties' agreement to arbitrate "[a]ny dispute regarding any aspect" of the settlement agreement, including "its interpretation, or any act that allegedly has or would violate any provision" of the settlement. AA 337 ¶6.4.

Overall, the draft release document contained all of the terms of the Settlement Terms document. However, it went far beyond the those agreed-upon terms and contained numerous provisions unnecessary to effectuate the parties' more limited need to enter into a post-mediation mutual release of claims as they had agreed. AA 141 ¶6 ("Parties *will* sign mutual releases") (emphasis added).

Even after this attempt to expand the agreement failed, counsel for the Stonesfair Entities confirmed in an April 23rd letter to Fair's counsel that there was an "*agreed settlement* of 5.4 million dollars." AA 146 ¶11 (emphasis added).

G. Respondents Hire New Attorneys And Renege On Settlement Terms Document.

Prior to the April 2002 Case Management Conference, Defendants raised purported issues regarding which stock and other interests Fair was to tender as part of the settlement and on tax

aspects of structuring the settlement payment. AA 145–46 ¶10; 327 ¶4. Defendants were aware of these apparent concerns at the time of the conference, yet still made written and oral representations to the trial court that the case had settled. AA 102, 146–47 ¶¶11–16.

During this time, Defendants never indicated that the Settlement Terms document was not binding. Fair also communicated to Maryann Fair his understanding that the Settlement Terms document was binding, writing that as result of Defendants’ manufactured dispute over the agreement, Defendants were in “breach” of the agreement. AA 239.

Some weeks later, Defendants commenced their effort to renege on the agreement. They manufactured disputes over the Settlement Terms document, but refused to offer any proposed solution or to cooperate in resolving them. AA 146 ¶¶12–14; 327–28 ¶¶4–5. They scuttled efforts of Fair and Judge Lynch to resolve the “dispute,” abruptly canceling a mediation with Judge Lynch and refusing to participate in a telephone conference that Judge Lynch had scheduled to discuss the issues. AA 257.

Soon thereafter, Defendants formally replaced the counsel that represented them in the mediation. *See* AA 146 ¶15; 450; *see* AA 98. Defendants then refused to cooperate in finalizing the settlement (AA 146 ¶12; 327–28 ¶¶4–5), informing the trial court that, despite their prior representations, the case had not settled. AA 102 ¶7c; 147 ¶16.⁵

⁵Defendants claim in their brief that they “spent nearly three months trying to . . . produce an enforceable and binding written settlement agreement.” Op. Br. 6. This is simply false. The record actually shows that Defendants avoided all efforts to resolve any issues, including refusing to mediate, to return calls from the mediator, or to negotiate in good faith.

H. The Trial Court Denies Fair's Motion To Compel Arbitration Of The Parties' Dispute Regarding The Settlement Terms Document.

On June 10, 2002, pursuant to the parties' agreement to arbitrate "any and all disputes" pertaining to the Settlement Terms document (AA 141), Fair requested arbitration in writing. AA 147 ¶17; 196. Defendants rejected Fair's arbitration demand, claiming the Settlement Terms document, including the agreement to arbitrate, was unenforceable. AA 147 ¶18; AA 265-66. In response, Fair filed a motion to compel arbitration under Code of Civil Procedure Section 1281.2 ("Section 1281.2"). See AA 112.⁶

Defendants opposed the motion to compel arbitration on the ground that the Settlement Terms document was inadmissible under Section 1119 and could not be considered by the trial court. AA 210, 215-16, 221-22.⁷ Defendants also argued the Settlement Terms document was too indefinite to be enforceable. AA 210-11, 215, 217-21. Bakhtiari and Maryann Fair submitted declarations stating that they did not intend the Settlement Terms document to be a binding and enforceable agreement. AA 233, 236. Tellingly, Defendants did not submit any declarations from their discharged lawyers who actually negotiated and drafted the Settlement Terms document. AA 136-37 ¶3. The declarations did not claim that Defendants communicated their supposed understanding that the Settlement Terms document was not intended to be binding. AA

⁶Section 1281.2 provides:

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists (CODE CIV. PROC. §1281.2)

⁷Subject to certain relevant exceptions, Section 1119 provides *inter alia* that no writing or other evidence prepared in the course of mediation is admissible and that all communications, negotiations or settlement discussions made in the course of mediation are confidential. EVID. CODE §1119.

232–34, 235–37, 244–47, 270–72. Rather, as Bakhtiari states in his declaration, “[t]o my mind, the Term Sheet was such a non-binding LOI [letter of intent].” AA 233 ¶4 (emphasis added).

In response, Fair argued, *inter alia*, the Settlement Terms document was admissible under Section 1123’s specific exception⁸ to Section 1119 because the document provides that it is enforceable and subject to disclosure or “words to that effect.” AA 295–96. Fair also argued Defendants waived their right to object to the admissibility of the Settlement Terms document by voluntarily filing it with the trial court in opposition to the motion to compel arbitration. AA 308–10. Because the existence of the Settlement Terms document, containing the parties’ agreement to arbitrate, was undisputed, Fair argued the trial court should send the parties to arbitration.

The trial court denied Fair’s motion to compel arbitration. AA 412–13. Stating that Section 1119 barred consideration of the Settlement Terms document and Section 1123 “has not been satisfied and the exceptions do not apply,” the trial court found an “insufficient demonstration” of the existence of an agreement to arbitrate. AA 410, 413. The trial court also found “[t]here is no waiver” of Defendants’ right to assert their objections to the Settlement Terms document. *See* AA 410, 413.

Fair filed a timely appeal from the trial court’s denial of the motion to compel arbitration. *See* AA 414.

⁸Section 1123 permits the admission of a written settlement agreement prepared in the course of mediation that is signed by the parties and provides that it is “admissible” or “enforceable” or “binding” or contains “words to that effect.” EVID. CODE §1123(a)–(b).

I. The Court Of Appeal Reverses The Denial Of The Motion To Compel Arbitration.

The Court of Appeal reversed, finding that the Settlement Terms document was admissible and that an enforceable agreement to arbitrate existed between the parties. Slip op. 16.⁹

The Court of Appeal found the Settlement Terms document contains “words to th[e] effect” that the parties intended to be bound. Slip op. 8–11. Specifically, the Court of Appeal found, the inclusion of the agreement to arbitrate any and all disputes by binding arbitration under JAMS rules to be “consistent *solely* with an intention on the part of the parties for the settlement terms document to be enforceable or binding.” Slip op. 10. The Court of Appeal found Section 1123 “plainly reflects a legislative intent not to make inadmissible settlement agreements that the parties intend to be enforceable” and recognized that excluding the Settlement Terms document would “frustrate that intent.” Slip op. 10–11.

While Defendants contended there was conflicting evidence of the parties’ intent to be bound, the only purported conflicting evidence was their own declarations stating their unexpressed subjective intent. Slip op. 12 n.9. The Court of Appeal applied the well-established rule that consent turns on the parties’ objective outward manifestations of consent and not on undeclared, subjective intent. Slip op. 12–16.

The Court of Appeal recognized that under Section 1123(b), it need only determine whether the Settlement Terms document

⁹After the Court of Appeal issued its original opinion on August 31, 2004 (attached to Defendants’ Petition for Review as Exhibit B), Defendants sought rehearing based on two purported errors in the opinion: (1) that the JAMS rules do not make arbitration agreements binding; and (2) that the de novo review should not have been applied where conflicting evidence exists. The Court of Appeal granted rehearing and issued its final opinion on October 12, 2004 (attached to Petition as Exhibit A). The Court of Appeal modified its final opinion to clarify that de novo review is appropriate where—as here—there is no relevant, admissible conflicting extrinsic evidence. See Slip op. 7.

provides that it is enforceable or binding or uses words to that effect such that it was admissible for purposes of ruling on the motion to compel arbitration. Once the Court of Appeal determined the document contained “words to th[e] effect” that it was enforceable or binding, it needed to find only that an agreement to arbitrate exists in order to compel the parties to arbitration.¹⁰

Ruling in favor of Fair based on Section 1123(b), the Court of Appeal did not reach the other issues raised on appeal. Slip op. 16 n.10.

ARGUMENT

I.

THE SETTLEMENT TERMS DOCUMENT IS ADMISSIBLE.

Mediation confidentiality under Section 1119 is not absolute and does not override the strong policies in favor of settlement and alternative dispute resolution. As we show below, Defendants’ interpretation of Section 1123 negates parties’ legitimate intent to settle disputes and to provide for later resolution of disputed issues in settlement agreements through arbitration. Defendants’ interpretation elevates the inclusion of “magic words” in a settlement agreement over the established role of the courts in interpreting contracts to determine the parties’ intent.

Compliance with Section 1123 should not be limited to formalistic phrasing that gives cover to parties looking to renege on enforceable settlement agreements under the guise of strict statutory compliance. Interpreting Section 1123 to harmonize its legislative

¹⁰In this regard, the modifications to the Court of Appeal opinion on rehearing reflect its recognition that the portion of its original opinion in which it made additional factual conclusions about the nature and the meaning of the Settlement Terms document were unnecessary to its determination of the issue of whether the parties agreed to arbitrate under JAMS rules any and all disputes over the Settlement Terms document.

intent with established rules of contract interpretation does not diminish mediation confidentiality or undermine this Court's decisions in *Foxgate* and *Rojas*. Rather, it serves the purpose of Section 1123, which is to permit enforcement of settlement agreements reached in mediation by exempting them from restrictions imposed by mediation confidentiality.

A. The Settlement Terms Document Satisfies Section 1123(b) As It Evidences The Parties' Intent That It Is An Enforceable Settlement Agreement.

1. The Statutory Language And Legislative Intent Of Section 1123 Clearly Allow A Court To Look At The Entire Settlement Agreement To Ascertain The Parties' Intent.

Mediation confidentiality under Section 1119 is not absolute. *See, e.g., Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.*, 26 Cal. 4th 1, 15 (2001). Under Section 1123, a written settlement agreement prepared in the course of, or pursuant to, a mediation is admissible notwithstanding Section 1119 where it is signed by the parties and "provides that it is enforceable or binding or words to that effect" (EVID. CODE §1123(b)) or "provides that it is admissible or subject to disclosure, or words to that effect" (EVID. CODE §1123(a)).

When interpreting statutory language, courts first "focus[] on the words used by the Legislature, giving them their ordinary meaning," in order to "ascertain the intent of the lawmakers so as to effectuate the purpose of the law." *California Sch. Employees Ass'n v. Governing Bd. of Marin Cmty. Coll. Dist.*, 8 Cal. 4th 333, 338 (1997). Under its plain statutory language, Section 1123 requires only that the agreement provide "words to th[e] effect" that the parties intend the agreement to be enforceable or binding (or, under subdivision (a), "subject to disclosure"). Section 1123 does not require that the parties use magic words, such as "enforceable," "binding," "admissible," or "subject to disclosure." Nor does it require that the agreement contain a separate provision directly addressing enforceability or admissibility.

The California Legislature added the “words to that effect” language in 1997 when it substantially amended and consolidated statutes relating to mediation. *See* 1997 Cal. Stat. ch. 772, §3 (AB 939). Prior to the amendment, Evidence Code Section 1152.5(a)(2) made inadmissible any document prepared for the purpose of mediation “unless the document otherwise provides.” EVID. CODE §1152.5(a)(2) (former section). In replacing Evidence Code Section 1152.5(a)(2), the Legislature crafted a specific exception in order to ensure the admissibility of executed, enforceable settlement agreements.¹¹ The Legislature added subdivision (b), permitting the disclosure of an agreement so long as it provides “words to th[e] effect” that it is enforceable or binding, “due to the likelihood that parties intending to be bound will use words to that effect, rather than saying their agreement is intended to be admissible or subject to disclosure.” EVID. CODE §1123 Law Revision Comm’n comment—1997 Addition.

As the Court of Appeal found, “Section 1123 plainly reflects a legislative intent not to make inadmissible settlement agreements that the parties intended to be enforceable.” Slip. op. 10–11. By including “words to th[e] effect,” the statute focuses the inquiry on the *effect* of the words chosen by the parties, rather than a search for specific *words*. It allows a court to look at a mediated settlement agreement as a whole and use well-established principles of contract interpretation to determine if the parties intended it to be enforceable. Defendants’ strict, hypertechnical focus on magic words, instead of on the parties’ intent, wrongly elevates form over intent in a manner contrary to the text of Section 1123 and its legislative purpose. *Cf.* CIV. CODE §3528.

¹¹Because the present case involves a *statutory* exception to mediation confidentiality, it is clearly distinguishable from *Foxgate* and *Rojas*, in which this Court held that mediation confidentiality precluded *judicially-created* exceptions (at least where constitutional rights were not implicated).

By contrast, when the Legislature intends to impose a technical requirement on parties to mediated settlement agreements, it explicitly does so. Eleven years prior to its passage of Section 1123(b), the Legislature adopted Business and Professions Code Section 467.4 (“Section 467.4”) to govern admissibility and enforceability of settlement agreements reached in mediations conducted in programs operated pursuant to the Dispute Resolution Advisory Council of the Division of Consumer Services of the Department of Consumer Affairs. Under Section 467.4, settlement agreements entered into through such a program are not enforceable or admissible “unless . . . 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.” BUS. & PROF. CODE §467.4 (emphasis added). Unlike Section 1123, Section 467.4 requires a *provision* clearly stating the award is “enforceable” or “admissible.” The Legislature took a different approach in Section 1123, requiring only that the parties provide “words to [the] effect” that they intend their settlement document to be binding or enforceable and did not impose specific requirements on how the parties accomplish this.

Section 1123 differs significantly from the Minnesota statute relied on by Defendants and construed strictly by the Supreme Court of Minnesota in *Haghighi v. Russian-American Broadcasting Co.*, 577 N.W.2d 927 (Minn. 1998). *See* Op. Br. 22, 27. Like Section 467.4, the Minnesota statute requires “a *provision* stating that [the agreement] is binding.” MINN. STAT. §572.35(1) (emphasis added); *see also Haghighi*, 577 N.W.2d at 929 (“The statute clearly provides that a mediated settlement agreement will not be enforceable unless it contains a *provision* stating that it is binding”) (emphasis added). By not requiring a specific provision like those found in Section 467.4 and the Minnesota statute, the California Legislature placed the emphasis in Section 1123 on giving effect to the parties’ *intent*. Defendants’ strict, narrow construction results in a hypertechnical

rule that contradicts the flexible statutory language of Section 1123 and ignores its legislative purpose.

2. The Settlement Terms Document Satisfies Section 1123(b) Because It Contains All The Indicia Of A Self-Executing Enforceable Agreement.

The Settlement Terms document satisfies Section 1123 because on its face it is—and *was intended to be*—an enforceable settlement agreement. The standard rules of contract interpretation govern the interpretation of settlement agreements. *Weddington Prods., Inc. v. Flick*, 60 Cal. App. 4th 793, 810–11 (1998); *Vaillette v. Fireman's Fund Ins. Co.*, 18 Cal. App. 4th 680, 686 (1993); *see also* CIV. CODE §1635.¹² A contract is enforceable and binding when parties capable of consenting agree on the material terms pertaining to the lawful exchange of consideration. *See generally* CIV. CODE §1550. A party's intent to contract is judged objectively by looking at its outward manifestations of intent.¹³ *See King v. Stanley*, 32 Cal. 2d 584, 591 (1948); *Meyer v. Benko*, 55 Cal. App. 3d 937, 942–43 (1976); *see also* CIV. CODE §1565 (mutual consent must be “[c]ommunicated by each to the other”).

Taken as a whole, the Settlement Terms document evidences the parties' intent to enter into an enforceable settlement agreement. *First*, it sets out all the material terms of the parties' agreement. As the Court of Appeal found:

It states the purchase price (\$5.4 million), the form of payment (cash), and the timing of the payment (within 60 days). It states that the payment will be treated as the purchase of all of plaintiff's stock and interests, provides for the indemnification of plaintiff, and states the

¹²Defendants agree that “it is . . . well settled that settlement agreements are governed by the same principles applicable to any other contractual agreement” Op. Br. 32.

¹³Defendants incorrectly contend that courts may also consider a party's subjective, undeclared intention in ruling on contract formation. *See* Part IV, *infra*.

circumstances in which he would lose that indemnification. The document further provides that Maryann Fair waives any community property interest in the settlement proceeds; that the parties will sign mutual releases and dismiss all claims with prejudice; that the amount of the settlement will be confidential, with exceptions; that each side will bear its own attorneys fees and costs; that defendants will cooperate if plaintiff needs to restructure the cash payments for tax purposes, at no additional cost to defendants; and that all disputes are subject to JAMS arbitration rules. (Slip op. 13)

Second, by signing the Settlement Terms document, the parties clearly evidenced their intent to enter into an enforceable agreement. *See Meyer*, 55 Cal. App. 3d at 943 (“The general rule is that when a person with capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents”); *see also In re Marriage of Assemi*, 7 Cal. 4th 896, 905 (1994); *see generally* Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality*, 35 U.C. DAVIS L. REV. 33, 74–75 (2001) (“A signature . . . marks an agreement as enforceable . . . [and] provides parties to an agreement with a simple way to indicate their intention to be bound”).

The parties’ intent to make the Settlement Term document enforceable is further evidenced by (1) the non-contingent nature of the agreement; (2) its repeated use of the present tense (*see, e.g.*, AA 141 ¶5 (“Maryann Fair disclaims any community property interest”); AA 141 ¶7 (“All sides bear their own attorneys fees and costs . . .”)); (3) the existence of a specified, self-executing enforcement mechanism (AA 141 ¶9 (“Any and all disputes subject to JAMS arbitration rules”)); (4) the contemplation of executing future releases (AA 141 ¶6 (“Parties will sign mutual releases and dismiss with prejudice all claims”)); and (5) the attention to other issues, such as community property, indemnity, and confidentiality.¹⁴

¹⁴Defendants argue that the Settlement Term document’s language should be construed against Fair under the rule that
(continued . . .)

Because the *words* of the Settlement Terms document—including the arbitration provision—convey the material terms and mutual consent necessary to create an enforceable agreement, they are *words to the effect* that the parties intend the agreement to be enforceable.

The Court of Appeal held the inclusion of the agreement to arbitrate sufficient to support its determination that the Settlement Terms document satisfies Section 1123. The Court of Appeal found the parties' inclusion of the agreement to arbitrate any and all disputes under JAMS rules as the final self-executing provision in the signed Settlement Terms document was "consistent *solely* with an intention on the part of the parties for the settlement terms document to be enforceable or binding." Slip. op. 10 (emphasis added). As evidence of "intent," the language of the arbitration provision, combined with the signature of all parties, clearly proved that a resolution had been reached such that any resulting disagreements would be handled through arbitration. The Settlement Terms document does not suggest merely that an arbitration provision *would appear* in a *future* agreement, but rather that it was *immediately applicable*. Defendants themselves *conceded* that "an arbitration provision is commonly understood as a means of selecting the forum and rules for the resolution of a dispute *once a*

(... continued)

ambiguities are generally construed against the drafter. Although Fair's counsel was the scrivener of the Settlement Terms document, the document was jointly drafted by counsel for Plaintiff and Defendants. Defendants admitted in the trial court that the Settlement Terms document was drafted by "counsel *for the parties*" (AA 271 ¶3 (emphasis added)); it is disingenuous of Defendants to disavow their role as co-drafters and claim that the Settlement Terms document should be construed against Plaintiff as sole drafter. *See Indenco, Inc. v. Evans*, 201 Cal. App. 2d 369, 375 (1962) (joint drafter rule inapplicable when the agreement is "arrived at by negotiations between two parties"); *Dunne & Gaston v. Keltner*, 50 Cal. App. 3d 560, 563 (1975) (declining to apply joint drafter rule when contract is between sophisticated parties of equal bargaining power represented by counsel).

final agreement has been reached.” Petition for Review 14 (emphasis added).¹⁵

The Court of Appeal opinion should not be read as establishing a universal rule that any arbitration provision included in any mediated settlement document will always render the settlement agreement admissible under Section 1123. To the contrary, it should only be determinative where, as here, the entire settlement agreement also evidences that the parties intended it to be enforceable.¹⁶

Defendants contend that the arbitration agreement cannot satisfy Section 1123. They attempt to rely upon the agreement in *Hurst v. American Racing Equipment, Inc.*, 981 S.W.2d 458 (Tex. App. 1998), which stated that “this agreement may be enforced as any other contract.” However, this overlooks the crucial similarity between the two agreements and how the *Hurst* court analyzed the enforceability issue. The *Hurst* court did not simply look at the one line of text to find the agreement was enforceable and binding. Rather, the court considered the *entire* document—including the parties’ obligations, the presence of an enforcement mechanism, and the parties’ signatures—to ascertain the parties’ intent. *Id.*

3. The Parties’ Post-Mediation Conduct Confirms The Parties Intended The Settlement Terms Document To Be An Enforceable Agreement.

When determining mutual consent, “[t]he conduct of the parties after execution of the contract and before any controversy has arisen

¹⁵Defendants now contradict their own prior position by attempting to argue that the inclusion of an arbitration provision is “consistent with being one of a number of preliminary terms developed for possible agreement.” Op. Br. 17.

¹⁶Under different facts—for example, where the language of the draft agreement was contingent, where the date of the settlement was not yet agreed upon, and where material terms were missing—a court might find an arbitration clause to be only a provision in a contemplated *future* settlement agreement and not consistent with an intent to be bound. A court must have the ability to ascertain the parties’ intent to be bound and not merely satisfy itself that the magic words exist or are absent.

as to its effects affords the most reliable evidence of the parties' intentions.¹⁷ *Kennecott Corp. v. Union Oil Co.*, 196 Cal. App. 3d 1179, 1189 (1987). Here, Defendants' post-mediation conduct undeniably confirms that the parties intended the Settlement Terms document to be enforceable.

First, Defendants' representations to the trial court in writing and orally that the case "settled" in mediation confirmed their mutual intent that the Settlement Terms document constituted an enforceable agreement. The parties signed the Settlement Terms document on March 21, 2002. Twelve days later, counsel for each Defendant informed the trial court that the case "settled." AA 79 ¶5b; 86 ¶5b; 92 ¶5b; *see* AA 144 ¶6. Two weeks later, Bakhtiari's counsel orally informed the trial court on behalf of all Defendants that the parties "reached a settlement agreement." RT (4/17/02) 2:17-24; AA 144-45 ¶8; 184, 450.

Defendants' statements to the trial court were explicit and unequivocal. At no point did Defendants indicate that the parties had only a nonbinding deal points memorandum or that the settlement was contingent upon the signing of a formal settlement agreement. To the contrary, Defendants represented to the court that the parties "reached a settlement agreement" and the case "settled." The Court of Appeal correctly found "[t]hese statements by the parties, made shortly after the mediation concluded, belie defendants' later claim that no settlement agreement was ever reached and that the

¹⁷The parties agree that under appropriate circumstances a court can consider extrinsic evidence of the parties' conduct. The disagreement is whether the appellate court's refusal to consider Defendants' evidence of their undeclared subjective intent as to the enforceability of the document was proper. The Court of Appeal properly excluded those declarations under the doctrine of judicial estoppel (*see* note 18, *infra*) and because a party's after-the-fact, undeclared intent is not relevant or admissible evidence when analyzing mutual consent under the objective test employed by California courts. Because the declarations were properly excluded, no conflicting evidence exists as to the parties' intent and *de novo* review applied. *See* Part IV, *infra*.

settlement terms document did not encompass the agreement of the parties.” Slip op. 14. The Court of Appeal’s refusal to permit Defendants to take two entirely inconsistent factual positions was proper as a matter of law under the doctrine of judicial estoppel.¹⁸ See *Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics*, 61 Cal. App. 4th 672, 678 (1998).

Second, Defendants’ counsel prepared and circulated a draft Settlement Agreement and General Release that set forth all the material terms in the Settlement Terms document, including the parties’ agreement to submit any dispute regarding the agreement to arbitration in accordance with JAMS arbitration rules. AA 331–40. Importantly, the draft stated: “It is now the desire and intention of the Parties to settle and resolve, *as of and effective March 21, 2002*, all disputes, differences and claims” between the parties. AA 331 §1.2 (emphasis added). As the Court of Appeal recognized: “This provision reflects an understanding that the parties entered into a

¹⁸Having represented to the trial court that the parties had “reached a settlement agreement” and the case had “settled,” the Court of Appeal properly estopped Defendants from denying the existence of the settlement agreement and from taking the entirely inconsistent position that “the matter would not be settled until the parties agreed upon and executed a formal . . . settlement agreement.” AA 271 ¶3; see *Law Offices of Ian Herzog*, 61 Cal. App. 4th at 678–79 (refusing to allow a party to take two “entirely inconsistent” positions, explaining that courts will not recognize or tolerate such tactics” and that a “party cannot thus ‘blow hot and cold’”) (quoting *Alexander v. Hammarberg*, 103 Cal. App. 2d 872, 879 (1951)); see also *Avina v. Cigna Healthplans of California*, 211 Cal. App. 3d 1, 3 (1989) (finding party estopped from denying existence of contractual obligation to arbitrate). Because Defendants were estopped from taking the entirely inconsistent position that the case had not settled in mediation, there was no conflicting factual evidence on this point and *de novo* review applied. See *Mitchell v. American Fair Credit Ass’n, Inc.*, 99 Cal. App. 4th 1345, 1350 (2002) (*de novo* review proper in absence of conflicting evidence); *City of San Diego v. Dunkl*, 86 Cal. App. 4th 384, 395 (2001); see generally 5 CAL. JUR. 3D *Appellate Review* §625, at 192 (1998).

settlement agreement on March 21, 2002, when they signed the settlement terms document.” Slip op. 14 (emphasis added).¹⁹

Third, counsel for the Stonesfair Entities independently confirmed the “agreed settlement of 5.4 million dollars” in a letter to Plaintiff’s counsel on April 23, 2002. AA 146 ¶11. Again, this representation of an “agreed settlement” confirms the parties fully intended the Settlement Terms document to be an enforceable agreement.

B. The Settlement Terms Document Satisfies Section 1123(a) As It Provides That, Except For The Settlement Amount, Its Terms Are Subject To Disclosure.

The Settlement Terms document also independently satisfies Section 1123(a) by providing that it is “admissible” or “subject to disclosure” or “words to that effect.” The Settlement Terms document provides that the agreement, including the arbitration provision, is subject to disclosure. It does so by expressly and specifically stating that the amount of the settlement is the only provision that shall remain confidential. AA 141 ¶6.

By providing that the settlement amount alone shall be confidential,²⁰ the Settlement Terms document clearly expresses the

¹⁹The Court of Appeal properly found that the circulation of the draft formal agreement did not render the Settlement Terms document unenforceable. See Slip op. 15; see also *King v. Stanley*, 32 Cal. 2d 584, 591 (1948) (intent to reduce informal writing to formal writing does not “prevent a binding obligation from arising . . . unless it . . . appear[s] that the parties agreed or intended not to be bound until a formal written contract was executed”). In *Eisendrath v. Superior Court*, 109 Cal. App. 4th 351 (2003), the court also recognized that a written settlement may be reached in mediation that terminates the mediation, but still requires the parties to “further refine the content of the agreement.” *Id.* at 358 (quoting EVID. CODE §1125 Law Revision Comm’n comment—1997 Addition).

²⁰The Settlement Terms document permits disclosure of even the settlement amount when “appropriate exceptions” exist. AA 141 ¶6. Defendants recognize that an appropriate exception exists when disclosure is “required by law.” AA 334 §4.2. The Settlement Terms
(continued . . .)

parties' intent that the remainder of the agreement, including the arbitration provision, is subject to disclosure. If this were not so, then the express confidentiality provision for the settlement amount would be unnecessary.

Courts construe contracts as a whole so as to avoid rendering contractual language a nullity. *See* CIV. CODE §1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable . . ."); *Dyna-Med, Inc. v. Fair Employment & Housing Comm'n*, 43 Cal. 3d 1379, 1387 (1987) ("A construction making some words surplusage is to be avoided"); *see also* CODE CIV. PROC. §1858; *see generally* 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §686, at 619 (1987).

Furthermore, under the doctrine of *expressio unius est exclusio alterius*, a provision that a particular term is confidential permits the reasonable inference that the remaining provisions are not confidential and hence subject to disclosure. *See, e.g., Grupe Dev. Co. v. Superior Court*, 4 Cal. 4th 911, 921-22 (1993). Thus, the Settlement Terms document satisfies Section 1123(a) by providing that, except for the settlement amount, the Settlement Terms document is subject to disclosure.

C. The Arbitration Provision Embedded In The Settlement Terms Document Is A Severable, Separately Enforceable Agreement That Is Independently Admissible Under Section 1123(b).

The motion before the trial court was to compel arbitration, not to enforce the terms of the Settlement Terms document. Because of the important public policy in favor of arbitration, a party seeking an order compelling arbitration must only establish that "an agreement to arbitrate the controversy exists." CODE CIV. PROC. §1281.2; *Coast Plaza Doctors Hosp. v. Blue Cross of California*, 83 Cal. App.

(. . . continued)

document contemplates its full disclosure since Rule of Court 371 requires a party seeking arbitration to submit the agreement to arbitrate to the court.

4th 677, 678 (2000) (“[I]f a court determines that an agreement to arbitrate a controversy exists then it shall order the petitioner and the respondent to arbitrate the controversy . . .”) (internal quotation marks omitted). “Doubts as to whether an arbitration clause applies are to be resolved in favor of sending the parties to arbitration.”²¹ *Vianna v. Doctors’ Mgmt. Co.*, 27 Cal. App. 4th 1186, 1189 (1994) (citation omitted).

Although arbitration agreements are virtually always embedded as provisions in other agreements, the existence and enforceability of an agreement to arbitrate exists *independently* from the contract as a whole.

Courts do *not* look to the contract as a whole to determine arbitrability. Challenges to the validity of the underlying contract . . . are not considered. The only question is whether the parties knowingly *agreed to arbitrate* disputes under the contract. If they did, the arbitration clause is deemed *separable* from the balance of the contract and is enforced despite defenses to the underlying contract. (WARREN KNIGHT ET AL., CALIFORNIA PRACTICE GUIDE: ALTERNATIVE DISPUTE RESOLUTION ¶5:79 (2002) (emphases added))

See also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (recognizing arbitration agreements are generally separable and enforceable even against claim that larger contract was fraudulently induced); *Ericksen, Arbuthnot, McCarthy*,

²¹This is particularly true where the arbitration clause incorporates rules giving the arbitrator the authority to determine the enforceability and scope of the parties’ arbitration agreement. See, e.g., *Dream Theater, Inc. v. Dream Theater*, 124 Cal. App. 4th 547, 552–53 (2004) (finding arbitrator determines scope of arbitration agreement where parties agreed to arbitrate according to AAA rules, which provide the arbitrator determines scope of arbitration agreement). JAMS Rule 11(c) provides that “arbitrability disputes” including “disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought” are to be submitted to and ruled on by the arbitrator. JAMS COMPREHENSIVE ARBITRATION RULES AND PROCEDURES RULE 11(c) (reprinted at AA 395). Once the court ascertains the existence of an arbitration agreement, it need not inquire into the enforceability of the agreement generally.

Kearney & Walsh, Inc. v. 100 Oak St., 35 Cal. 3d 312, 323 (1983) (adopting *Prima Paint*); *Green v. Mt. Diablo Hosp. Dist.*, 207 Cal. App. 3d 63, 70 (1989) (“[A]rbitration clauses are generally severable from the contract . . .”).

Under California law, a written arbitration agreement is “valid, enforceable and irrevocable.” CODE CIV. PROC. §1281; *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 98 (2000). As a result, the parties’ agreement to arbitrate any and all disputes pertaining to the settlement under JAMS rules satisfies Section 1123 as a matter of law and without any magic words or close synonyms. This means the trial court should have enforced the agreement to arbitrate irrespective of any dispute over the enforceability of the rest of the agreement. That issue would be left for the arbitrators.

Defendants argue that the arbitration clause cannot satisfy Section 1123 because it doesn’t “include words like ‘effect,’ ‘implement,’ ‘accomplish,’ ‘carry out,’ ‘execute,’ ‘fulfill,’ ‘compel,’ and ‘force.’” Op. Br. 17. This, however, ignores the fact that a written arbitration agreement is “valid, *enforceable* and irrevocable” as a matter of law. CODE CIV. PROC. §1281 (emphasis added).

Defendants also argue the arbitration clause does not satisfy Section 1123 “because a judge could decide that the arbitration provision is not enforceable; or, if the matter is sent to arbitration, the arbitrator could still decide that the other terms in the document are unenforceable.” Op. Br. 18–19. Defendants’ argument conflates admissibility with enforceability, arguing that if the Settlement Terms document *might* be unenforceable it cannot be admissible under Section 1123. Certainly there are circumstances in which the language and intent of the parties renders the agreement *admissible* under Section 1123(b), but it is later determined that the material terms or necessary parties were missing such that the agreement was *unenforceable*.²² Section 1123 requires only that the agreement

²²Defendants’ subsidiary argument that the agreement to arbitrate
(continued . . .)

provide words to the effect that it is intended to be enforceable. Whether the parties actually succeed in creating an enforceable agreement is a separate issue not necessary to decide the issue of admissibility.

Because the parties' agreement to arbitrate any and all disputes subject to JAMS rules is a self-executing severable agreement, *enforceable as a matter of law*, the agreement to arbitrate satisfies Section 1123(b). Therefore, it should have been admitted for purposes of the motion to compel arbitration.

D. Evidence Code Section 1116 Independently Prohibits Mediation Confidentiality Under Section 1119 From Limiting A Court's Authority To Compel Arbitration.

A ruling on compliance with Section 1123 is unnecessary to compel arbitration. Evidence Code Section 1116 ("Section 1116") separately prohibits Section 1119 from limiting a court's authority to order the parties to arbitration for failure to comply with Section 1123.

Section 1116, titled "Effect of chapter," provides: "Nothing in this chapter expands or *limits a court's authority to order participation in a dispute resolution proceeding.*" EVID. CODE §1116 (emphasis added). Section 1116 applies to Section 1119 because Chapter Two encompasses Evidence Code Sections 1115 through 1128. Although the chapter does not define "dispute resolution proceeding," the term clearly includes arbitration proceedings. *See* BUS. & PROF. CODE §466(a) (defining dispute resolution as including arbitration); CIV. CODE §1369.510(a) (defining "[a]lternative dispute resolution" as "mediation, arbitration, conciliation, or other nonjudicial procedure that involves a neutral party in the

(... continued)

is not a settlement agreement within the meaning of Section 1123 (Op. Br. 20) also fails because an arbitration provision providing any and all disputes are subject to arbitration (rather than litigation) is a form of settlement agreement in which the parties agree to arbitrate, rather than litigate, their disputes. *See* EVID. CODE §1125(b)(1) (recognizing mediation can "partially resolve[] [a] dispute").

decisionmaking process”); CIV. CODE §1354 (former section) (encouraging parties to submit disputes to “a form of alternative dispute resolution such as mediation or arbitration”); CODE CIV. PROC. §1775 (describing “dispute resolution methods” as including “judicial arbitration and mediation”); PENAL CODE §14151 (authorizing “alternative dispute resolution (ADR) services, such as mediation, arbitration, or a combination of both mediation and arbitration”); *see also* GOV’T CODE §77202(b)(5); LAB. CODE §§3201.5, 3201.7; CODE CIV. PROC. §1280.1 (former section).

Section 1116’s limitation requires that the mediation statutes not be used to block participation in ADR and undermine the strong public policies in favor of ADR. The plain language of Section 1116 is inconsistent with Defendants’ attempt to rely on Section 1119 to defeat a motion to compel arbitration.

E. Finding The Settlement Terms Document Or Its Agreement To Arbitrate Admissible Properly Balances The Important Public Policies Regarding Mediation, Arbitration And Settlement.

1. Giving Effect To The Parties’ Intent Furthers The Legislative Purpose Of Section 1123.

Construing Section 1123 to permit a court to apply well-established principles of contract interpretation to determine whether the words in a mediated settlement agreement sufficiently evidence the parties’ intent that the agreement be enforceable furthers the legislative purpose of giving effect to the parties’ intent. *See* EVID. CODE §1123 Law Revision Comm’n comment—1997 Addition (addition of “words to that effect” language in Section 1123(b) “due to the likelihood that parties intending to be bound will use words to that effect, rather than saying their agreement is intended to be admissible or subject to disclosure”). As the Court of Appeal 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.” Slip op. 10.

This approach does not create ambiguity and “open the door to all sorts of creative arguments” as Defendants suggest. Op. Br. 23.

Rather, courts would be guided by venerable, well-established and broadly understood rules of contract formation. In this case, the Court of Appeal capably analyzed the enforceability of the Settlement Terms document by applying basic rules of contract formation and without inquiring into the parties' mediation communications.

Defendants' mechanical test requiring specific magic words (or their close synonyms) elevates simplicity over effectuating party intent. It ignores the wide spectrum of disputes involving persons (and mediators) at different levels of sophistication and the potentially harsh results that would follow from applying such a strict rule to a wide variety of disputes and parties (including unrepresented parties) in mediations over a wide range of issues, including truancy (EDUC. CODE §48263), juvenile problems (WELF. & INST. CODE §350), special education disputes (EDUC. CODE §56500.3), and gang crisis situations (PENAL CODE §13826.6). *See generally* Scott H. Hughes, *The Uniform Mediation Act: To The Spoiled Go The Privileges*, 85 MARQ. L. REV. 9, 17 & nn.24–27 (2001) (listing forty-two California statutes relating to mediation). Defendants' bright-line test may seem "easy" to apply to certain parties, but more difficult to explain to others why their mediated settlement agreement cannot be enforced because it does not "use the magic words 'enforceable' or 'binding.'" Op. Br. 29; *see* Peter N. Thompson, *Enforcing Rights Generated In Court-Connected Mediation* ("Thompson, *Enforcing Rights*"), 19 OHIO ST. J. ON DISP. RESOL. 509, 542 (2004) (technical, formal rules "can frustrate the reasonable expectations of parties").²³

²³Defendants suggest that Professor Deason, an authority on mediation confidentiality, supports Defendants' bright-line "magic words" requirement. *See* Op. Br. 25–26. To the contrary, Professor Deason advocates a "bright-line rule that permits evidence of mediated settlements only in the form of written, signed settlement agreements or a modern equivalent" and prohibits "testimony that explores a mediation to prove that the parties reached a settlement." Deason, *Enforcing Mediated Settlement Agreements*, *supra*, 35 U.C. DAVIS L. (continued . . .)

2. Giving Effect To The Parties' Intent Furthers The Important Public Policy In Favor Of Mediation And Is Consistent With The Purpose Of Mediation Confidentiality.

As an alternative dispute resolution procedure, a goal of mediation is to “resolve the dispute and agree on a settlement.” Deason, *Enforcing Mediated Settlement Agreements*, *supra*, 35 U.C. DAVIS L. REV. at 37. When a court enforces a mediated settlement agreement that the parties intended to be enforceable, it “affirm[s] the effectiveness of mediation as a settlement process and reenforce[s] parties’ incentives to mediate.” *Id.* Enforcement also “encourage[s] parties in the future to take mediations seriously, to understand that they represent real opportunities to reach closure and avoid trial, and to attend carefully to terms of agreements proposed in mediations.” *Id.* (quoting *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1137 (N.D. Cal. 1999)).

Construing Section 1123(b) so that settlement agreements intended to be enforceable are not rendered inadmissible by the absence of certain “magic words” or their synonyms furthers the settlement goal of mediation and strengthens the mediation process. Conversely, permitting a party to later ignore its settlement obligations and its express representations to a court under the guise of mediation confidentiality creates “disincentives to mediate” and undermines the integrity of court proceedings.²⁴ *Id.*; see Aaron J.

(... continued)

REV. at 86; see also *id.* at 77 (“The parties’ need for certainty in their expectation of confidentiality is best served by the formality of a bright-line rule requiring a writing”). Professor Deason does *not* advocate any magic word requirement. She recognizes that “when the agreement can be demonstrated by an executed document, *the effort to enforce it does not by itself threaten confidentiality . . .*” *Id.* at 93 (emphasis added).

²⁴Adherence to technical requirements over the reasonable expectations and intent of parties also undermines other recognized goals of mediation: “Technical formality . . . appears totally inconsistent with mediation’s stated goals of flexibility and self-determination.” Thompson, *Enforcing Rights*, *supra*, 19 OH. ST. J. ON DISP. RESOL. at 541.

Lodge, *Legislation Protecting Confidentiality in Mediation: Armor of Steel or Eggshells?*, 41 SANTA CLARA L. REV. 1093, 1119 (2001) (“It is futile to go to great extents to protect the mediation process, but then deny the parties a right to enforce the produced agreement”).

Enforcement of a written settlement agreement can and should proceed without interfering with the policy behind Section 1119. Mediation confidentiality promotes candor between the parties in order to encourage settlement by assuring them that anything they say in mediation will not be used to undermine their position should the mediation fail to settle. *See Foxgate*, 26 Cal. 4th at 14 (mediation confidentiality “promote[s] ‘a candid and informal exchange regarding events in the past’”); *see also Ryan v. Garcia*, 27 Cal. App. 4th 1006, 1010 (1994) (mediation confidentiality assures parties that mediation communications “cannot be used against them should the mediation fail”). While mediation confidentiality under Section 1119 provides assurances to parties that anything that they reveal during mediation cannot be used against them *should the mediation fail*; Section 1123 provides a means to enforce settlement agreements *when the mediation is successful*. As one commentator explained: “[T]he interest in protecting mediation confidentiality is diminished in the context of enforcing a mediated agreement [because] [t]he primary fear that statements in the mediation would be used against the speaker if the case failed to settle is absent.” Peter Robinson, *Centuries of Contract Common Law Can’t Be All Wrong: Why the UMA’s Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened*, 2003 J. DISP. RESOL. 135, 169 (2003).

The facts in this case are illustrative of this point. In establishing the existence of an agreement, Plaintiff relied on the Settlement Terms document and post-mediation statements and conduct. Exposing the mediation process itself simply was not necessary. Defendants fail to explain how rendering settlement agreements inadmissible for technical reasons furthers candor in mediation.

3. Admitting A Settlement Agreement With An Enforceable Arbitration Clause Serves The Important Public Policy In Favor Of Arbitration.

Construing Section 1123 to admit the Settlement Terms document, or at least the arbitration clause embedded within the Settlement Terms document, advances California's public policy in favor of arbitration. California has a "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution." *Ericksen*, 35 Cal. 3d at 322.

As part of this strong public policy, Code of Civil Procedure Section 1281.2 requires a court to order parties to arbitration if it establishes an agreement to arbitrate the controversy exists. Once a court makes the preliminary determination that an arbitration agreement exists, courts generally refuse to involve themselves in any further aspect of the parties' dispute, even where the party resisting arbitration alleges that the contract containing the arbitration clause was procured by fraud. *See Prima Paint*, 388 U.S. at 403-04. As this Court has explained:

If participants in the arbitral process begin to assert all possible legal or procedural defenses in court proceedings before the arbitration itself can go forward, the arbitral wheels would soon grind to a halt. . . . [W]e have recently warned against procedural gamesmanship aimed at undermining the advantages of arbitration. A statutory construction which would yield such results is not to be preferred. (*Ericksen*, 35 Cal. 3d at 323 (citations and internal quotation marks omitted))

Under Section 1281.2, courts must ascertain whether an agreement to arbitrate exists and if so, whether the parties' controversy is within the scope of their agreement.²⁵ Because the court can easily determine whether a written agreement to arbitrate exists by reference to the Settlement Terms document without needing to resort to

²⁵Where, as here, the parties' arbitration agreement provides that the arbitrator determines arbitrability, the court need only determine whether an agreement to arbitrate exists, leaving questions about the scope of the arbitration agreement and the enforceability of the Settlement Terms document to the arbitrator.

other mediation communications, admitting the Settlement Terms document (or the agreement to arbitrate as a severable enforceable contract) does not undermine the public policy in favor of mediation confidentiality.

4. Admitting Enforceable Settlement Agreements Serves The Important Public Policies In Favor Of Settlements.

Compelling arbitration under these circumstances also would further California's strong policy in favor of enforcing settlement agreements generally. *See, e.g., Phelps v. Kozakar*, 146 Cal. App. 3d 1078, 1082 (1983) ("Public policy supports both pretrial settlement of lawsuits and enforcement of judicially supervised settlements); *Hamilton v. Oakland Sch. Dist.*, 219 Cal. 322, 329 (1933) ("[I]t is the policy of the law to discourage litigation and to favor compromises of doubtful rights and controversies, made either in or out of court"). In *Phelps*, for example, the court judicially enforced the terms of the parties' settlement agreement when one of the parties repudiated the settlement agreement after his counsel had confirmed the agreement to the court. 146 Cal. App. 3d at 1082; *see also Kohn v. Jaymar-Ruby, Inc.*, 23 Cal. App. 4th 1530, 1534 (1994) (enforcing oral in-court stipulation of settlement after party refused to sign final written agreement).

As the Court of Appeal properly found, the parties to this case intended to enter into an enforceable and binding settlement agreement at the conclusion of their two-day mediation. Defendants confirmed the settlement in writing and orally in the trial court, before undergoing "settlor's remorse," hiring new counsel and repudiating the settlement agreement. Defendants assert mediation confidentiality under Section 1119 in order to avoid their obligations under the Settlement Terms document. While a settlement agreement that satisfies Section 1123 ultimately may not necessarily be *enforceable*, construing Section 1123 so as to render an agreement intended to be enforceable *inadmissible* undermines the public policy in favor of settlements.

II.

DEFENDANTS WAIVED THEIR RIGHT TO ASSERT MEDIATION CONFIDENTIALITY OVER THE SETTLEMENT TERMS DOCUMENT WHERE THEY VOLUNTARILY SUBMITTED THE DOCUMENT TWICE TO THE COURT.

A. A Party Who Voluntarily Discloses A Particular Communication Waives Mediation Confidentiality Protection As To That Communication.

Section 1119 does not bar a court from considering a mediated settlement agreement where the party invoking Section 1119 voluntarily submits the agreement to the court. Mediation confidentiality under Section 1119, while strong, is not absolute and may be waived.

“The doctrine of waiver is generally applicable to all the rights and privileges to which a person is legally entitled, including those conferred by statute unless prohibited by specific statutory provisions.” *Bickel v. City of Piedmont*, 16 Cal. 4th 1040, 1048 (1997) (quoting *Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30, 41 (1975)); *see also* CIV. CODE §3513 (“Any one may waive the advantage of a law intended solely for his benefit”). When a party with a statutory right to keep a particular piece of information confidential voluntarily discloses the information, courts generally find that the party has waived its right to assert confidentiality, at least over that particular information. *See People v. Bauer*, 241 Cal. App. 2d 632, 639–40 (1966) (counsel’s request that statements be admitted waives objections to the admissibility of those statements); *cf.* EVID. CODE §912; *Samuels v. Mix*, 22 Cal. 4th 1, 21 n.5 (1999) (finding party “who exposes any significant part of a communication in making his own case waives the privilege with respect to the communication’s contents”). Professor Wigmore explained the rationale behind the waiver doctrine: “[T]here is always also the objective consideration that when [a party’s] conduct touches on a certain point of disclosure, fairness requires that his privilege shall cease whether he intended the result or not.” 8 JOHN H. WIGMORE,

EVIDENCE IN TRIALS AT COMMON LAW §2327, at 636 (J. McNaughton rev. 1961). Mediation confidentiality is not exempt from this rule. *Regents of the Univ. of California v. Sumner*, 42 Cal. App. 4th 1209, 1213 (1996) (finding voluntary disclosure of mediation communication waives right to assert mediation confidentiality).

B. The Settlement Terms Document Is Admissible Because Defendants Voluntarily Disclosed It To The Courts.

Defendants expressly waived the right to assert mediation confidentiality over the Settlement Terms document because they voluntarily disclosed the Settlement Terms document to the trial and appellate courts. Defendants' opposition to Plaintiff's motion to compel arbitration included a declaration containing the Settlement Terms document.²⁶ See AA 244, 264. Defendants then voluntarily and knowingly submitted the entire Settlement Terms document to the Court of Appeal in support of their failed motion to dismiss the appeal. See Declaration of Erick C. Howard In Support of Respondents' Motion to Dismiss Appellant's Appeal, filed in the Court of Appeal on Jan. 14, 2003, Ex. A. Defendants' disclosure of the Settlement Terms document constitutes an express written waiver of their right to assert mediation confidentiality over the Settlement Terms document.

Defendants' submission is nearly identical to the waiver found in *Sumner*. There, appellants objected to the court's consideration of a transcript of their dictated oral settlement which they contended was protected by mediation confidentiality under former Evidence Code Section 1152.5. The Court of Appeal found that appellants had waived the point by "introduc[ing] the transcript of the dictated settlement into evidence" and by the time the trial court raised the issue of confidentiality, appellants had waived their right to assert confidentiality. *Sumner*, 42 Cal. App. 4th at 1213; see also *Foxgate*,

²⁶In addition to the Settlement Terms document, Defendants also submitted other confidential mediation statements. See AA 236 ¶6.

26 Cal. 4th at 10 n.7 (endorsing *Sumner*'s holding that the "[f]ailure to object to admission of evidence of events occurring during a prior mediation has been held to constitute a waiver").²⁷

III.

THERE IS NO RELEVANT EXTRINSIC EVIDENCE THAT SUPPORTS DEFENDANTS' POSITION.

A. Defendants' Self-Serving Declaration Statements Of Their Unexpressed, Subjective Intent Are Inadmissible To Prove That The Settlement Terms Document Was Not Intended To Be Binding.

Defendants could not be more wrong in arguing that the declarations of unexpressed subjective intent by the individual Defendants are admissible. *Objective* manifestations of a party's intent and *not* his or her *unexpressed subjective intent* are relevant to determine whether the parties entered into a binding contract. See *Donovan v. RRL Corp.*, 26 Cal. 4th 261, 271 (2001); *Alexander v. Codemasters Group Ltd.*, 104 Cal. App. 4th 129, 141 (2002); *Roth v. Malson*, 67 Cal. App. 4th 552, 557 (1998); *Beck v. American Health Group Int'l, Inc.*, 211 Cal. App. 3d 1555, 1562 (1989); *Edwards v. Comstock Ins. Co.*, 205 Cal. App. 3d 1164, 1169 (1988); *Meyer v. Benko*, 55 Cal. App. 3d 937, 942-43 (1976); see also RESTATEMENT (SECOND) OF CONTRACTS §17 cmt. c (1981) ("The parties to most contracts give

²⁷The Second District's *Eisendrath v. Superior Court*, 109 Cal. App. 4th 351 (2003), decision does not control. It held that a party did not waive mediation confidentiality as to all mediation communications by raising a claim challenging the mediated agreement. *Id.* at 360. *Eisendrath* did not address whether a party who voluntarily submits a particular mediation communication can later assert mediation confidentiality over that very same communication. Because the scope of the waiver extends only to the particular communication voluntarily submitted by Defendants, the present case is analogous to *Sumner* and distinguishable from *Eisendrath*. By voluntarily submitting the Settlement Terms document to the trial court and independently to the Court of Appeal, Defendants expressly waived their right to assert mediation confidentiality over the Settlement Terms document rendering the Settlement Terms document admissible.

actual as well as apparent assent, but it is clear that a mental reservation of a party to a bargain does not impair the obligation he purports to undertake"); *id.* §21 ("Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract . . ."). Evidence of a party's unexpressed subjective intent is irrelevant whether the court is interpreting an agreement or deciding whether parties intended to enter into a binding agreement in the first place.

The cases cited by Defendants do not stand for a different rule and are misstated and misconstrued by Defendants. *See* Op. Br. 30, 32–33 (citing *Halldin v. Usher*, 49 Cal. 2d 749, 752 (1958); *Banner Entm't, Inc. v. Superior Court*, 62 Cal. App. 4th 348, 358 (1998)). In neither case did the court consider evidence of a party's unexpressed subjective intent. Rather, the courts considered admissible extrinsic evidence of the parties' *outward* manifestations of their intent in determining whether a binding contract existed. This evidence included declarations showing the parties' actions and their oral and written statements. *See Halldin*, 49 Cal. 2d at 751 (admitting parol evidence to determine parties' intent "consisted in the main of testimony by Mrs. Erickson concerning conversations with her then husband" as to the effect of the document in question); *Banner*, 62 Cal. App. at 4th at 359–60 (reciting a long list of evidence court considered, including statements, actions, and written and oral communications made by the parties). In neither case is there any indication the parties submitted or the court considered favorably evidence of the parties' unexpressed subjective intent.

B. The Court Of Appeal Properly Considered Relevant Extrinsic Evidence In Ascertaining The Existence And Interpreting The Language Of The Settlement Terms Document.

The Court of Appeal correctly considered only the relevant and admissible extrinsic evidence in interpreting the Settlement Terms document. In so doing, the Court of Appeal applied well-settled principles of contract interpretation in ruling that the Settlement

Terms document contains an enforceable agreement to arbitrate. Slip op. 12–16. This analysis included careful consideration of the undisputed terms of the Settlement Terms document and the parties’ post-mediation conduct without delving into the conduct or statements of the parties during the mediation.

Supportive of its ultimate finding of enforceability was the Court of Appeal’s conclusion that “the settlement terms document sets forth all of the material terms of the settlement.” Slip op. 13. These “material terms” included the purchase price, form of payment, timing of payment, the purchase of Fair’s stock and interests, indemnification, loss of indemnification, treatment of any community property claims, mutual releases, dismissal of all claims with prejudice, limited confidentiality, responsibility for attorneys’ fees and costs, cooperation on tax issues and lastly arbitration of disputes under JAMS rules. *Id.* The fact that the document was signed by all parties is consistent with the parties’ intent to be bound. *Id.* (quoting *Meyer v. Benko*, 55 Cal. App. 3d at 943.

The evidence also included Defendants’ written and oral statements to the trial court that the case had settled at mediation and requests for dismissal would be filed. Slip op. 13–14. The Court of Appeal noted that the purported draft settlement agreement circulated by Defendants after the mediation included nearly verbatim all of the terms in the Settlement Terms document, including the arbitration clause, and that it expressly recited that the parties settled their dispute on March 21, 2002—the same date the parties signed the Settlement Terms document. Slip op. 14.

Defendants complain that the Court of Appeal did not consider the purported conflicting parol evidence they submitted in the form of Defendants’ after-the-fact declarations as to their own unexpressed subjective intent on the meaning of the Settlement Terms document. It is well established, however, that such statements of subjective intent are not competent evidence and need not be considered by the court. *See Parsons v. Bristol Dev. Co.*, 62 Cal. 2d 861, 865 (1965) (appellate court not bound by construction based solely

on the terms of the written instrument where a determination below was based on incompetent evidence).

Defendants' argument that the Court of Appeal wrongly applied a *de novo* standard of review in ruling on the issue of the enforcement of the parties' agreement to arbitrate is based on a misreading of the trial court's statement that "[t]here is no waiver." Contrary to Defendants' argument the record does not support a conclusion that the statement constitutes an implicit factual finding by the trial court as to the parties' intent in entering into the Settlement Terms document.

The trial court's reference to waiver pertains to the argument Plaintiff raised in the trial court that "Defendants have *waived* any claim of confidentiality because they voluntarily made public by filing in this action a copy of the March 21, 2002 settlement agreement along with substantial portions of numerous communications occurring throughout the mediation . . ." AA 308 (emphasis added). That was the *only* waiver issue raised in the trial court, and Defendants misstate the trial court proceedings to argue otherwise. The reference to waiver in the trial court's opinion has nothing to do with any factual ruling on the parties' intent at the time of signing the Settlement Terms document. As the Court of Appeal correctly found, the trial court ruled the Settlement Terms document inadmissible under Section 1123(b) and never reached the issue of its enforceability. Slip op. 7. Since the trial court made no factual findings as to the enforceability of the arbitration provision in the Settlement Terms document, the Court of Appeal properly reviewed the question *de novo*. See *Donovan*, 26 Cal. 4th at 271 (stating that because the lower court "did not make any factual findings relevant to the issue whether defendant's advertisement constituted an offer[,] . . . we shall review the question *de novo*").

Defendants offer no basis in the record on which to conclude otherwise. Defendants cannot credibly argue that once the Court of Appeal determined the trial court improperly excluded the Settlement Terms document, it should have deferred to any pur-

ported findings by the trial court—actual or implied—on the issue of the existence of an agreement to arbitrate or the enforceability of the Settlement Terms document when any such finding would have been made without considering the most important piece of evidence.

C. There Is No Extrinsic Evidence In Support Of Defendants' Argument That The Parties Did Not Intend The Settlement Terms Document To Be Enforceable.

For all the outrage Defendants raise about the alleged failure of the Court of Appeal to properly consider their extrinsic evidence, the only evidence Defendants cite are the statements in the declarations of Bakhtiari, Maryann Fair and two of Defendants' attorneys that they did not understand the Settlement Terms document to be binding.

For the reasons stated above, this evidence of the parties' unexpressed subject intent is inadmissible. Defendants contradict their own position by claiming that the declarations by attorneys Garrity and Stromberg—who were not even involved in the actual negotiations of the Settlement Terms document—offering their private thoughts that they did not intend the Settlement Terms document to be binding are admissible. Before the trial court, Defendants successfully objected to statements in the declaration of Plaintiff's attorney, Gilbert R. Serota, that all the attorneys who actually negotiated the agreement understood the document to be binding. AA 413 ¶2.

Moreover, contrary to Defendants' selective discussion of Fair's declaration statements and correspondence with Maryann Fair, Fair did express his understanding that the Settlement Terms document was binding at the time he signed it. AA 343 ¶4. Consistent with that understanding, a month after the parties signed the Settlement Terms document, Fair advised Maryann Fair that Defendants were in breach of the agreement. AA 239. Of course, if Fair did not understand the Settlement Terms document to be bind-

ing, there would have been no basis at that time for him to claim Defendants breached it.

IV.

WHETHER APPELLATE DEFERENCE APPLIES TO FINDINGS BASED ON WRITTEN DECLARATIONS IS NOT AT ISSUE IN THIS CASE BECAUSE THE TRIAL COURT MADE NO FACTUAL FINDING ENTITLED TO APPELLATE DEFERENCE.

Because the trial court made no factual finding entitled to appellate deference and the *admissible* evidence as to the parties' intent in entering into the Settlement Terms document is not in dispute, the question of whether factual findings based on declarations are entitled to appellate deference when the extrinsic evidence is in dispute is not at issue in this case.

As a result, the Court of Appeal did not address the question of what standard of review generally should apply in reviewing factual findings made by trial courts based on written declarations. Rather, as the Court of Appeal correctly determined, "because the trial court never resolved any factual disputes relating to the existence of an arbitration agreement, since it found it was precluded by Section 1119 from determining whether the settlement terms document constituted an agreement," the *de novo* standard of review applies. See Slip op. 7; *Donovan*, 26 Cal. 4th at 271; *Mitchell v. American Fair Credit Ass'n, Inc.*, 99 Cal. App. 4th 1345, 1350 (2002). In this case, whether the evidence of that is supplied by declaration is irrelevant to the Court of Appeal's application of the *de novo* standard of review and presents no grounds on which to conclude deference to any findings by the trial court—actual or implied—is required.

CONCLUSION

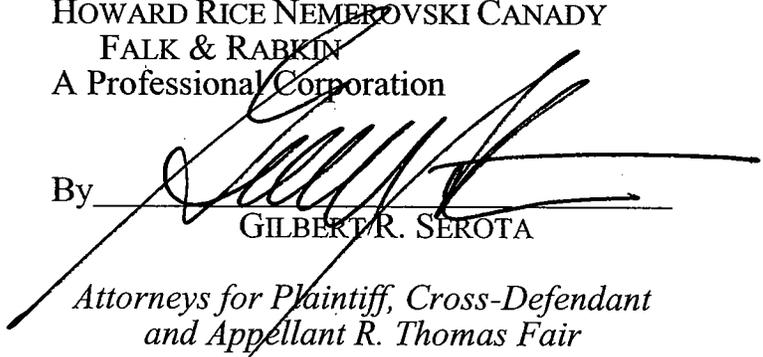
For the foregoing reasons, Plaintiff Fair respectfully requests this Court affirm the decision of the Court of Appeal.

DATED: March 16, 2005.

Respectfully,

GILBERT R. SEROTA
CURT HOLBREICH
CHANDRA MILLER FIENEN
HOWARD RICE NEMEROVSKI CANADY
FALK & RABKIN
A Professional Corporation

By



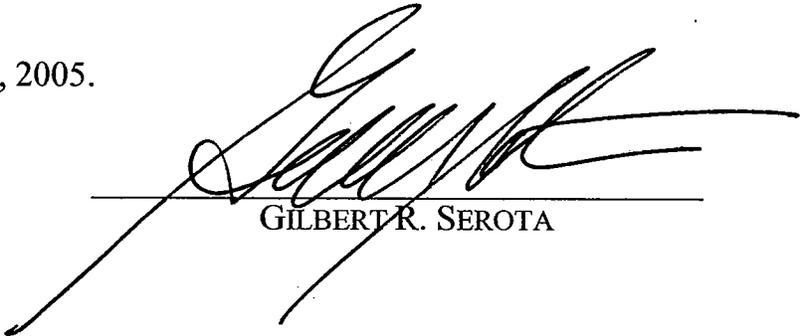
GILBERT R. SEROTA

*Attorneys for Plaintiff, Cross-Defendant
and Appellant R. Thomas Fair*

**CERTIFICATE OF COMPLIANCE
PURSUANT TO CAL. R. CT. 29.1(c)(1)**

Pursuant to California Rule of Court 29.1(c)(1), and in reliance on the word count feature of the software used to prepare this document, I certify that the foregoing Answer Brief on the Merits contains 13,707 words, excluding those items identified in Rule 29.1(c)(3).

DATED: March 16, 2005.



A handwritten signature in black ink, appearing to read 'G. Serota', is written over a horizontal line. The signature is fluid and cursive.

GILBERT R. SEROTA

**PROOF OF SERVICE BY HAND DELIVERY
AND FEDERAL EXPRESS**

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is Three Embarcadero Center, 7th Floor, San Francisco, California 94111-4024.

On March 16, 2005, I served the following document described as **ANSWER BRIEF ON THE MERITS** on the parties listed below by causing it to be delivered by hand to:

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I am readily familiar with the practice for collection and processing of documents for delivery by overnight service by Federal Express of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, and that practice is that the documents are deposited with a regularly maintained Federal Express facility in an envelope or package designated by Federal Express fully prepaid the same day as the day of collection in the ordinary course of business.

On March 16, 2005, I served by Federal Express the following documents described as **ANSWER BRIEF ON THE MERITS** on the persons listed below by placing the documents for deposit with Federal Express through the regular collection process at the law offices of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, located at Three Embarcadero Center, 7th Floor, San Francisco, California, to be served by overnight Federal Express delivery addressed as follows:

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County of San Mateo
400 County Center
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Hon. George A. Miram
Superior Court of California,
County of San Mateo
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Clerk of Court
California Court of Appeal
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I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on March 16, 2005.



JANET BEVERLY