COPY
6252-1
Apldg

**S129220**

# IN THE SUPREME COURT OF CALIFORNIA

**R. THOMAS FAIR,**

*Plaintiff and Appellant,*

*vs.*

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

*Defendants and Respondents.*

**STONESFAIR FINANCIAL CORPORATION,**

*Cross-Complainant and Respondent,*

*vs.*

**R. THOMAS FAIR,**

*Cross-Defendant and Appellant.*

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

## REPLY BRIEF ON THE MERITS

**HORVITZ & LEVY LLP**
ELLIS J. HORVITZ (SB. NO. 22682;
EHORVITZ@HORVITZLEVY.COM)
JON B. EISENBERG (SB. NO. 88278;
JEISENBERG@HORVITZLEVY.COM)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157

**SHARTSIS FRIESE LLP**
ARTHUR J. SHARTSIS
(SB NO. 51549; AJS@SFGLAW.COM)
MARY JO SHARTSIS
(SB NO. 55194;MJS@SFGLAW.COM)
ONE MARITIME PLAZA, 18TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111
(415) 421-6500 • FAX: (415) 421-2922

ATTORNEYS FOR DEFENDANTS AND RESPONDENTS
**KARL E. BAKHTIARI, MARYANN E. FAIR, STONESFAIR MANAGEMENT COMPANY, LLC, STONESFAIR CORPORATION** AND
CROSS-COMPLAINANT AND RESPONDENT
**STONESFAIR FINANCIAL CORPORATION**

DOCKET
APR 2 5 2005

# TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . iii

INTRODUCTION . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1

LEGAL DISCUSSION . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3

I. PLAINTIFF'S FACTUAL ASSERTIONS VIOLATE THE RULES OF APPELLATE REVIEW . . . . . . . . . . . . . . . . . . . . . . . . 3

A. None of the disputed historical facts have been adjudicated . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3

B. The disputed arbitrability facts have been adjudicated in defendants' favor . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 4

II. THE SETTLEMENT TERMS DOCUMENT IS INADMISSIBLE . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 5

A. Evidence Code section 1123, subdivision (b), does not permit a breach of mediation confidentiality, based solely on a gleaning of intent from a settlement terms document *as a whole*, without the express inclusion of *words to the effect* that the document is enforceable or binding . . . . . . . . 5

1. The courts must review the document – as a whole or otherwise – for *words to the effect* that it is enforceable or binding . . . . . . . . . . . . . . . . . . . . . 5

2. The Legislature has rejected plaintiff's argument relying on the common law of contracts . . . . . . . . . . . 7

3. Plaintiff's public policy arguments beg the question . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 8

B. The parties' post-mediation conduct cannot justify a breach of mediation confidentiality . . . . . . . . . . . . . . . . . . . . 9

Page

1. Without words to the effect that the settlement terms document is enforceable or binding, the parties' post-mediation conduct is irrelevant . . . . . . . 9

2. This court is bound by the judge's presumed factual determination that the parties' post-mediation conduct confirmed the absence of a settlement agreement . . . . . . . . . . . . . . . . . . . . . . . . 9

C. The different issue of admissibility under *subdivision (a)* of Evidence Code section 1123 is not before this court . . . 11

1. Plaintiff failed to file a Petition for Rehearing apprising the Court of Appeal that it did not address the subdivision (a) issue . . . . . . . . . . . . . . . 11

2. Plaintiff failed to assert the subdivision (a) issue in his Answer to Petition for Review . . . . . . . . . . . . 11

D. The arbitration clause is not admissible upon its severance from the settlement terms document . . . . . . . . . . 12

E. Evidence Code section 1116 does not restrict the rule of mediation confidentiality prescribed by Evidence Code section 1119 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 13

III. DEFENDANTS NEVER WAIVED MEDIATION CONFIDENTIALITY . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 14

IV. PAROL EVIDENCE OF SUBJECTIVE INTENT IS ADMISSIBLE TO PROVE WHETHER THE PARTIES UNDERSTOOD OR INTENDED A WRITING TO BE BINDING . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 16

CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 17

CERTIFICATE OF WORD COUNT . . . . . . . . . . . . . . . . . . . . . . . . . . . . 19

## TABLE OF AUTHORITIES

Page

### Cases


Alexander v. Codemasters Group Limited
(2002) 104 Cal.App.4th 129 . . . . . . . . . . . . . . . . . . . . . . . . . . . . 16

Banner Entertainment, Inc. v. Superior Court
(1998) 62 Cal.App.4th 348 . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3, 16

Blank v. Kirwan
(1985) 39 Cal.3d 311 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3

Donovan v. RRL Corp.
(2001) 26 Cal.4th 261 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 16

Eisendrath v. Superior Court
(2003) 109 Cal.App.4th 351 . . . . . . . . . . . . . . . . . . . . . . . . . . . . 15

Foreman & Clark Corp. v. Fallon
(1971) 3 Cal.3d 875 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 4

Foxgate Homeowners' Assn. v. Bramalea California, Inc.
(2001) 26 Cal.4th 1 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 8

Halldin v. Usher
(1958) 49 Cal.2d 749 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 16

Provencio v. WMA Securities, Inc.
(2005) 125 Cal.App.4th 1028 . . . . . . . . . . . . . . . . . . . . . . . . . . . 4, 9

Roth v. Malson
(1998) 67 Cal.App.4th 552 . . . . . . . . . . . . . . . . . . . . . . . . . . . . 16

Skirball v. RKO Radio Pictures, Inc.
(1955) 134 Cal.App.2d 843 . . . . . . . . . . . . . . . . . . . . . . . . . . 16, 17

St. Agnes Medical Center v. PacifiCare of California
(2003) 31 Cal.4th 1187 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 14

**Page**

Stockton Newspapers, Inc. v. Redevelopment Agency (1985) 171 Cal.App.3d 95 . . . . . 4

**Statutes**

Code of Civil Procedure, § 1281 . . . . . 13

Evidence Code

§ 912 . . . . . 15

§ 1116, subd. (a) . . . . . 13, 14

§ 1119 . . . . . 13, 14

§ 1119, subd. (a) . . . . . 10

§ 1119, subd. (b) . . . . . 10, 12

§ 1123 . . . . . 13

§ 1123, subd. (a) . . . . . 11, 14

§ 1123, subd. (b) . . . . . 6, 8, 9

**Rules**

Cal. Rules of Court

rule 28(a)(2) . . . . . 11

rule 28(c)(2) . . . . . 11

rule 29(b)(1) . . . . . 14

rule 29(b)(2) . . . . . 11

rule 29.1(c)(1) . . . . . 19

## Miscellaneous

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) 2003 J. Disp. Resol. 135 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 7, 8

S129220

# IN THE SUPREME COURT OF CALIFORNIA

**R. THOMAS FAIR,**

*Plaintiff and Appellant,*

*vs.*

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

*Defendants and Respondents.*

**STONESFAIR FINANCIAL CORPORATION,**

*Cross-Complainant and Respondent,*

*vs.*

**R. THOMAS FAIR,**

*Cross-Defendant and Appellant.*

## REPLY BRIEF ON THE MERITS

### INTRODUCTION

The Answer Brief on the Merits is most notable for what it does *not* assert – that the arbitration clause alone constitutes *words to the effect* that the settlement terms document is enforceable or binding. That was the Court of Appeal's holding – "we find that that provision constitutes 'words to that

effect' under subdivision (b) of section 1123" (opn. p. 10) – and it is the first issue presented for review. (See Opening Brief on the Merits 1 (hereafter OBOM).)

The Answer Brief, however, has abandoned that theory in favor of a new argument – that the document *taken as a whole* demonstrates the parties intended it to be enforceable. (See Answer Brief on the Merits 19 (hereafter ABOM).) The Answer Brief thus concedes the first issue on review and attempts to shift the inquiry to the *entire document* rather than the arbitration provision alone. This Reply Brief explains why that attempt should fail: The entire document still must contain words to the effect that it is enforceable or binding in order to be admissible, and this entire document contains no such language.

This proceeding presents legal issues concerning the admissibility of a mediated deal points memorandum, the admissibility of parol evidence to prove whether the memorandum was intended to be binding, and the application of the rule of appellate deference to factual findings based on written declarations. The Answer Brief, however, sounds a persistent *factual* theme: An innocent plaintiff was victimized by malicious defendants who (1) unlawfully drove the plaintiff from their real estate business into divorce and penury, and then (2) reneged on a settlement agreement. But the record does not support the first claim and the trial judge rejected the second. No court has yet decided who was right and who was wrong in this business dispute. That decision remains to occur – and, until then, no factual assumptions should be made. As for whether defendants reneged on a settlement agreement, that point *has* been adjudicated, with the trial judge denying a motion to compel arbitration for want of any evidence of an agreement on which defendants could have reneged.

Defendants have their own story to tell, but now is not the time. This Reply Brief will address the legal issues without attempting to fan the factual fires.

## LEGAL DISCUSSION

### I.

### PLAINTIFF'S FACTUAL ASSERTIONS VIOLATE THE RULES OF APPELLATE REVIEW.

**A. None of the disputed historical facts have been adjudicated.**

The Answer Brief makes numerous factual claims concerning the underlying dispute – i.e., the historical facts – including assertions regarding the value of the parties' business (supposedly $200 million) and the lawfulness of defendants' conduct (supposedly forcing plaintiff out of the business, withholding his profits, and assaulting him). (See ABOM 1, 3, 5-6.) All those claims are based solely on the allegations in plaintiff's third amended complaint. (Appellant's Appendix 1-22 (hereafter AA).) All are disputed, however, and none has been adjudicated. It is therefore improper for plaintiff to assert them now as if they were true.

On appellate review of an order on a motion to compel arbitration, the proper approach to the historical facts is set forth in *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 352, footnote 1, where the court's opinion states only those facts agreed upon in the parties' pleadings. The only situations where an appellate court will presume the truth of a complaint's allegations are on appeal from a judgment of dismissal after a demurrer is sustained without leave to amend (*Blank v. Kirwan* (1985) 39

Cal.3d 311, 318) and on appeal from a judgment on the pleadings (*Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 99).

Thus, the Answer Brief should have stated only the historical facts that are undisputed. This court should disregard plaintiff's incendiary claims on the disputed historical facts.

### B. The disputed arbitrability facts have been adjudicated in defendants' favor.

In contrast, the rule for stating the facts differs to the extent the trial court resolved factual disputes concerning whether the parties agreed to arbitrate – i.e., the arbitrability facts. With regard to those, "the substantial evidence standard applies," and the appellate courts must "accept the trial court's resolution of disputed facts when supported by substantial evidence; presume the court found every fact and drew every permissible inference necessary to support its order; and defer to its determinations regarding the credibility of witnesses and the weight of the evidence." (*Provencio v. WMA Securities, Inc.* (2005) 125 Cal.App.4th 1028, 1031.)[1/]

The Answer Brief violates the substantial evidence rule in that plaintiff refuses to accept the trial court's resolution of disputed arbitrability facts and instead sets forth only the evidence favoring him. (Cf. *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 [on substantial evidence review, appellant's brief must set forth all material evidence on point].) For example,

---

1/ Thus, for example, plaintiff is wrong to complain of defendants' statement in their Opening Brief on the Merits that they told the trial court they "anticipated" a settlement (see ABOM 9, fn. 4), because that is a reasonable inference from the record, and it is presumed the trial court drew every permissible inference to support its order.

plaintiff asserts that the parties' post-mediation conduct proves they intended the settlement terms document, including the arbitration clause, to be enforceable. (ABOM 11, 22-23.) But the evidence of post-mediation conduct raises factual disputes, all of which the trial court is presumed to have resolved in defendants' favor. On appeal, this court is bound by the judge's resolution of those factual disputes against the plaintiff, as well as by the judge's consequent factual conclusion that the parties' post-mediation conduct did *not* prove they intended the settlement terms document to be enforceable..

The parties and this court must now proceed on the basis that the trial judge resolved all disputed arbitrability issues in defendants' favor and must defer to the judge's findings as supported by substantial evidence.

## II.

## THE SETTLEMENT TERMS DOCUMENT IS INADMISSIBLE.

### A. Evidence Code section 1123, subdivision (b), does not permit a breach of mediation confidentiality, based solely on a gleaning of intent from a settlement terms document *as a whole*, without the express inclusion of *words to the effect* that the document is enforceable or binding.

#### 1. The courts must review the document – as a whole or otherwise – for *words to the effect* that it is enforceable or binding.

The Answer Brief does not argue that the arbitration clause alone, on which the Court of Appeal focused, constitutes *words to the effect* that the

settlement terms document is enforceable or binding. Instead, plaintiff asserts that, notwithstanding the absence of words to that effect, the document should nevertheless be admissible because "[t]aken *as a whole*" it "evidences the parties' intent to enter into an enforceable settlement agreement." (ABOM 19, italics added.) According to plaintiff, that is the situation here because the document purportedly prescribes material terms and is signed by the parties, making it enforceable under the common law of contracts. (ABOM 19-20.)

The issue here, however, is not the document's enforceability but its *admissibility*, which is governed not by the common law of contracts but by the Evidence Code. Certainly it is appropriate to search the document as a whole; the statutorily-prescribed search, however, is not for material terms and signatures, but is for an express provision that the document is "enforceable or binding or words to that effect." (Evid. Code, § 1123, subd. (b).) Any other approach would open a Pandora's Box of lawyers's arguments why intent to be bound should be gleaned from the "whole" of a deal points memorandum even though the document does not expressly state such intent. That would be contrary to the mandate of section 1123 that the parties' intent is to be determined by express language in the document – which, here, is devoid of any words to the effect that it is enforceable or binding and thus is devoid of the required indicia of intent to be bound.

This is not, as plaintiff would have it, a "hypertechnical focus on magic words." (ABOM 17.) It is faithful adherence to statutory language. Nor does this approach present, as plaintiff claims, a danger of "potentially harsh results" (ABOM 31) for the unsophisticated – a class of which plaintiff, represented here by a top law firm, is not a member. To the contrary, this approach protects the unsophisticated from hypertechnical constructs of contract language that, like this arbitration clause, gives no clue to a nonlawyer that it might be taken to make a deal points memorandum enforceable and

binding as a final settlement agreement. Unsophisticated parties will be protected by a strict construction of section 1123, telling them in easily-understood language what is required for admissibility – a simple provision that the document is "enforceable" or "binding" or words clearly to that effect.

**2. The Legislature has rejected plaintiff's argument relying on the common law of contracts.**

Plaintiff wants this court to do something the Legislature did not do – apply the common law of contracts to determine the admissibility of a mediated settlement terms document. Indeed, plaintiff relies on a law review article advocating that approach, by Professor Peter Robinson. (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) 2003 J. Disp. Resol. 135 (hereafter Robinson); see ABOM 33.)

As Professor Robinson acknowledges, however, the California Legislature has made a different policy choice, favoring express language over the common law of contracts. According to Professor Robinson, "California's mediation confidentiality provisions are illustrative of jurisdictions with extremely limited exceptions to mediation confidentiality." (Robinson, *supra*, 2003 J. Disp. Resol. at p. 138.) Among the examples he gives is Evidence Code section 1123, which "specifies the language that needs to be included in the mediated agreement for the mere written agreement to be admissible for enforcement purposes. The result is a mediation confidentiality statutory scheme that makes no provisions for exceptions for contractual enforcement proceedings unless all the parties, including the mediator, waive mediation confidentiality." (*Id.* at pp. 138-139, footnotes omitted.) Professor Robinson

urges a contrary approach, concluding that "[a]n unfettered application of contract law is desirable in proceedings to enforce mediated agreements." (*Id.* at p. 173.) But he understands that the law differs in California, which "requires a strict standard of mediation confidentiality that interferes with the application of contract law in proceedings to enforce mediated agreements." (*Ibid.*)

Further, Professor Robinson observes, "after *Foxgate*, the law in California is a strict mediation confidentiality statute with the Supreme Court of California *forbidding judicially created exceptions*." (Robinson, *supra*, 2003 J. Disp. Resol. at p. 142, italics added.) That is precisely what plaintiff seeks here – a judicially-created exception to mediation confidentiality, based on the common law of contracts, for mediated settlement terms documents that state some essential terms and are signed. Such an exception would be contrary to *Foxgate*. (See *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14 ["a judicially crafted exception to the confidentiality mandated by sections 1119 and 1121 is not necessary either to carry out the legislative intent or to avoid an absurd result"].)

### 3. Plaintiff's public policy arguments beg the question.

Plaintiff proclaims the public policy favoring enforcement of mediated settlement agreements. (See ABOM 30-35.) But this begs the question whether there *was* a settlement agreement here. Absent admissible evidence of a settlement agreement, we must assume there was none. And absent the language required by Evidence Code section 1123, subdivision (b), there is no admissible evidence of any settlement to which the public policy favoring enforcement of settlements could be applied.

### B. The parties' post-mediation conduct cannot justify a breach of mediation confidentiality.

#### 1. Without words to the effect that the settlement terms document is enforceable or binding, the parties' post-mediation conduct is irrelevant.

Next, plaintiff contends the parties' post-mediation conduct confirms they intended the settlement terms document to be binding. (ABOM 22-25.) Again, however, plaintiff makes the mistake of relying on the common law of contracts, which looks to the parties' conduct to determine whether there was *mutual consent.* The Evidence Code, in contrast, makes the document's language, not the parties' conduct, determinative of *admissibility*, requiring *words to the effect* that the document is enforceable or binding. (Evid. Code, § 1123, subd. (b).) The parties' post-mediation conduct is irrelevant to this admissibility determination.

#### 2. This court is bound by the judge's presumed factual determination that the parties' post-mediation conduct confirmed the absence of a settlement agreement.

Even if the parties' post-mediation conduct were relevant to admissibility, all factual disputes in that regard have been resolved against plaintiff. On appeal, it is presumed the trial court found every fact and drew every inference supporting its order, and those findings and inferences are binding on appeal if supported by substantial evidence. (*Provencio v. WMA Securities, Inc., supra,* 125 Cal.App.4th at p. 1031.) That means it is presumed

the trial court found that the parties' post-mediation conduct evidenced *no* settlement agreement. This finding is supported by ample evidence and inferences therefrom, including the parties' post-mediation drafting of conflicting settlement agreements, the parties' disagreement concerning the purchase of Thomas Fair's interests in the limited partnerships,[2/] the defendants' discovery that it would have been unlawful to treat the whole payment to Thomas Fair as a capital gain as contemplated in the settlement terms document, the parties' failure to agree who would make the payment, and Thomas Fair's complaint in his post-mediation letter to Maryann Fair that "[w]e have no agreement done." (See OBOM 7-8.)

To whatever extent the parties' post-mediation conduct might be relevant, the rules of appellate review require deference to the judge's presumed factual findings that the parties' conduct confirms the absence of a settlement agreement, and thus cannot be a basis for breaching mediation confidentiality.

---

2/ Plaintiff claims the parties agreed before the mediation that it would not encompass the limited partnerships (ABOM 7 & fn. 2), but his only record citation is to a *post-mediation* letter by his counsel *arguing* that the scope of the mediation was so limited. (See AA 250-251.) The record contains no evidence of any *pre-mediation* agreement to limit the scope of the mediation – and, indeed, such evidence would be inadmissible as an agreement "made for the purpose of . . . a mediation." (Evid. Code, § 1119, subds. (a) & (b).)

## C. The different issue of admissibility under *subdivision (a)* of Evidence Code section 1123 is not before this court.

### 1. Plaintiff failed to file a Petition for Rehearing apprising the Court of Appeal that it did not address the subdivision (a) issue.

The Answer Brief also raises a different issue not addressed by the Court of Appeal – whether the settlement terms document is admissible under another provision in the Evidence Code allowing admission if the document "provides that it is admissible or *subject to disclosure*, or words to that effect." (Evid. Code, § 1123, subd. (a), italics added; see ABOM 25-26.) Plaintiff argued this issue below, but it is omitted from the Court of Appeal's opinion, and plaintiff did not call the omission to the Court of Appeal's attention in a Petition for Rehearing. That means, as a policy matter, this court will not consider the issue in the normal course of review. (Cal. Rules of Court, rule 28(c)(2).)

### 2. Plaintiff failed to assert the subdivision (a) issue in his Answer to Petition for Review.

Similarly, plaintiff failed to assert this issue in his Answer to Petition for Review as an additional issue if review was granted. (See Cal. Rules of Court, rule 28(a)(2).) That means this court will address the issue only in its discretion after giving the parties "reasonable notice and opportunity to brief and argue it." (Cal. Rules of Court, rule 29(b)(2).)

Defendants stand ready to brief this issue upon notice by this court to do so. But no such notice should be issued, because plaintiff's argument is

meritless. Plaintiff contends that a clause in the settlement terms document stating "[a]m't of settlement will be confidential with appropriate exceptions" (AA 264) makes all of the document *other* than the amount of settlement "subject to disclosure" under subdivison (a) of section 1123. This clause, however, does not say anything like that. It does not provide that any part of the settlement terms document "is admissible or subject to disclosure, or words to that effect" as prescribed by subdivision (a). It is just a routine *nondisclosure* clause, and it merely states *in the future tense* that the amount of the proposed settlement "*will be* confidential." (AA 264, italics added.) The clause refers only to the future written settlement agreement that the parties hoped to negotiate after the mediation. It does not say, as plaintiff claims, that the proposed settlement amount "is the only provision" *in the settlement terms document* that is not subject to disclosure. (ABOM 25.)[3/]

## D. The arbitration clause is not admissible upon its severance from the settlement terms document.

The Answer Brief proposes a novel scheme for evading mediation confidentiality – sever the arbitration clause from the rest of the settlement terms document and admit it independent of the document. (ABOM 26-29.) There are two insurmountable problems here. First, the rules of mediation

---

3/ Plaintiff's reliance on subdivision (a) also suffers from the Pandora's Box problem inherent in his assertion that the settlement terms document "as a whole" (ABOM 19) creates admissibility under subdivision (b). (See *ante*, p. 6.) Subdivisions (a) and (b) share a parallel "words to that effect" structure. Thus, if subdivision (b) were broadly construed as plaintiff proposes, then subdivision (a) must likewise be broadly construed, so that it, too, would be subject to a bevy of arguments why, taken "as a whole," a document should be treated as making itself "subject to disclosure" within the meaning of subdivision (a).

confidentiality extend to any writing "prepared . . . in the course of . . . a mediation." (Evid. Code, § 1119, subd. (b).) The arbitration clause, like the rest of the settlement terms document, was prepared in the course of a mediation. That makes it, like the rest of the document, subject to mediation confidentiality. Second, the exceptions to mediation confidentiality apply only to a "written settlement agreement." (Evid. Code, § 1123.) A severed arbitration clause is not a settlement agreement; thus it cannot be admissible under those exceptions.

Plaintiff correctly observes that an arbitration agreement is "valid, enforceable and irrevocable." (Code Civ. Proc., § 1281; see ABOM 28.) But such an agreement is not *admissible* if it is a writing prepared during a mediation, unless some statutory exception to confidentiality applies, which is not the case here. Plaintiff seeks a judicially-created exception to mediation confidentiality for arbitration agreements – which, again, would be contrary to *Foxgate*. (See *ante*, p. 8.)

**E. Evidence Code section 1116 does not restrict the rule of mediation confidentiality prescribed by Evidence Code section 1119.**

Plaintiff's final argument against mediation confidentiality is as follows: Because Evidence Code section 1116 provides that "[n]othing in this chapter expands or limits a court's authority to order participation in a dispute resolution proceeding" (Evid. Code, § 1116, subd. (a)), a court exercising such authority may disregard the rule of mediation confidentiality prescribed by Evidence Code section 1119. (ABOM 29-30.)

But section 1116 says nothing of the sort. It refers only to the court's "authority" to order participation in ADR, saying that none of the statutory

rules of mediation confidentiality expand or limit that authority. (Evid. Code, § 1116, subd. (a).) Section 1119 has nothing to do with, and does not purport to expand or limit, judicial authority to order parties to ADR. Section 1119 addresses the *admissibility of evidence*, not the scope of ADR authority. There is nothing inconsistent or contradictory with the Legislature authorizing courts to order parties to arbitration but precluding the admission of mediated writings as a basis for doing so. Each rule has its own policy justification.

## III.

## DEFENDANTS NEVER WAIVED MEDIATION CONFIDENTIALITY.

Plaintiff contends defendants waived mediation confidentiality by attaching the settlement terms document to their papers opposing plaintiff's motion to compel arbitration, *after* plaintiff had already attached the document to his motion.[4/] (ABOM 36-38.) But "the determination of waiver is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court." (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196.) If, as plaintiff argues,

---

4/ This argument, like plaintiff's argument for admissibility under subdivision (a) of Evidence Code section 1123 (see *ante*, pp. 11-12), was not raised by plaintiff in a Petition for Rehearing or asserted as an additional issue in his Answer to Petition for Review. At least arguably, however, the waiver issue might properly be addressed now as being "fairly included in" the first issue presented in the Petition for Review (Cal. Rules of Court, rule 29(b)(1)), on the theory that plaintiff is urging a waiver of the requirements of subdivision (b) of section 1123, which is the subject of the first issue presented in the Petition. In contrast, the *subdivision (a)* issue urged by plaintiff cannot possibly be viewed as being fairly included in any of the issues presented in the Petition.

the judge's determination that "[t]here is no waiver" pertains to defendants' attachment (ABOM 41), then the implied factual finding that defendants did not thereby intend to waive mediation confidentiality cannot now be disturbed.

Moreover, plaintiff's waiver argument is rebutted by *Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351. The court in *Eisendrath* held that the statutory doctrine of implied waiver of a privilege by disclosure or consent to someone else's disclosure (see Evid. Code, § 912) is limited to the privileges prescribed in Evidence Code sections 930 through 1060 and does not apply to the mediation confidentiality rights prescribed in Evidence Code sections 1116 et seq. (*Eisendrath v. Superior Court, supra,* 109 Cal.App.4th at pp. 362-363.) Thus, as a matter of law, no waiver can be implied from the inclusion of the settlement terms document in defendants' opposition to the motion to compel arbitration.

Far from consenting to plaintiff's disclosure, defendants *expressly objected* to it and disclaimed any waiver, stating in their opposition that the document was "an inadmissible confidential mediation document" and defendants "do not waive their objections to the consideration of the Plaintiff's declarations [one of which included the document] to the extent those declarations reflect events that occurred at, or in relation to, the mediation." (AA 211.) It would be absurd to extract a waiver from these circumstances, where plaintiff had already disclosed the document over defendants' objection and defendants merely included the document in their opposition papers for the court's convenience.

## IV.

## PAROL EVIDENCE OF SUBJECTIVE INTENT IS ADMISSIBLE TO PROVE WHETHER THE PARTIES UNDERSTOOD OR INTENDED A WRITING TO BE BINDING.

Lastly, we address plaintiff's claim that parol evidence of subjective intent is inadmissible to prove whether the parties intended a writing to be binding. (ABOM 38-39.) Plaintiff is wrong. The cases he cites (see ABOM 38) held only that evidence of subjective intent is inadmissible to prove whether there was an *offer and acceptance* for purposes of contract formation. (See, e.g., *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 271 ["the existence of an offer depends upon an objective interpretation of defendant's assent"]; *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141 ["manifestation of mutual assent . . . through the process of offer and acceptance" is "determined under an objective standard"]; *Roth v. Malson* (1998) 67 Cal.App.4th 552, 557 [contract formation by offer and acceptance "is governed by objective manifestations, not subjective intent"].)

In contrast, evidence of subjective intent *is* admissible to prove whether a writing, despite an apparent offer and acceptance, was intended to be *binding*. (See OBOM 32.) As this court explained in *Halldin v. Usher* (1958) 49 Cal.2d 749, 752: "Evidence is admissible, at least in equity, to show that a writing which apparently constituted a contract was not intended or understood by either party to be *binding* as such." (Italics added; accord, *Banner Entertainment, Inc. v. Superior Court, supra,* 62 Cal.App.4th at p. 358.)

Thus, for example, in *Skirball v. RKO Radio Pictures, Inc.* (1955) 134 Cal.App.2d 843, the court rejected challenges to the sufficiency and admissibility of testimony by two witnesses "to the effect that they 'felt' or

'understood' the parties were 'bound' or 'committed' when they said they had a deal and then shook hands." (*Id.* at p. 858.) The appellant argued that "the unexpressed subjective intent of the parties was immaterial" (*ibid.*), but the appellate court disagreed, concluding that the trial court's finding of a binding contract was "supported by the evidence" (*id.* at p. 862) and the admission of evidence of subjective intent to enter into a binding contract "was not error" (*id.* at p. 864).

As previously noted (see OBOM 30), this issue will become moot if this court concludes that the settlement terms document is inadmissible. If, however, the court does address the issue, the court should restate the *Halldin* rule that evidence is admissible to show whether a writing was intended or understood to be binding.

## CONCLUSION

For the foregoing reasons as well as those set forth in the Opening Brief on the Merits, this court should continue on the *Foxgate/Rojas* path of safeguarding mediation confidentiality and reverse the Court of Appeal's judgment.

Dated: April 22, 2005

Respectfully submitted,

**HORVITZ & LEVY LLP**
ELLIS J. HORVITZ
JON B. EISENBERG

**SHARTSIS FRIESE LLP**
ARTHUR J. SHARTSIS
MARY JO SHARTSIS

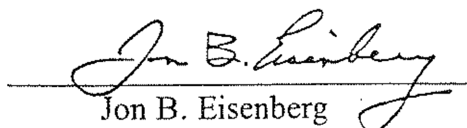
Attorneys for Defendants and Respondents **KARL E. BAKHTIARI, MARYANN E. FAIR, STONESFAIR MANAGEMENT COMPANY, LLC, STONESFAIR CORPORATION** And Cross-Complainant and Respondent **STONESFAIR FINANCIAL CORPORATION**

**CERTIFICATE OF WORD COUNT**

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

The text of this brief consists of 4,199 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

DATED: April 22, 2005



Jon B. Eisenberg

PROOF OF SERVICE [C.C.P. § 1013a]

I, **Caryn Ames**, declare as follows:

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Horvitz & Levy LLP, and my business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436. I am readily familiar with the practice of Horvitz & Levy LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. On **April 22, 2005**, I served the within document entitled:

**REPLY BRIEF ON THE MERITS**

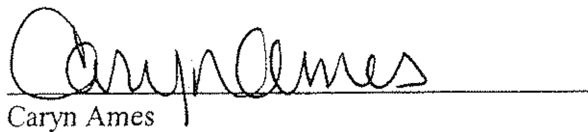
on the parties in the action by placing a true copy thereof in an envelope addressed as follows:

Parties Served:

| | |
|---|---|
| Gilbert R. Serota, Esq.<br>Curt Holbreich, Esq.<br>Howard, Rice, Nemerovski, Canady, Falk & Rabkin<br>Three Embarcadero Center, 7th Floor<br>San Francisco, CA 94111-4065 | Attorneys for R. Thomas Fair |
| Ronald F. Garrity, Esq.<br>Simpson, Garrity & Innes, P.C.<br>651 Gateway Blvd., Suite 1050<br>South San Francisco, CA 94080 | Attorneys for Karl E. Bakhtiari, Maryann E. Fair, Stonesfair Financial Corporation, Stonesfair Management Company LLC, and Stonesfair Corporation |
| Hon. George A. Miram<br>San Mateo County Superior Court<br>400 County Center<br>Redwood City, CA 94063 | Case No. 417058 |
| Clerk of the Court<br>California Court of Appeal<br>First Appellate District, Div. 2<br>350 McAllister Street<br>San Francisco, CA 94102 | Case No. A100240 |

and, following ordinary business practices of Horvitz & Levy LLP, by sealing said envelope and depositing the envelope for collection and mailing on the aforesaid date by placement for deposit on the same day in the United States Postal Service at 15760 Ventura Boulevard, Encino, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **April 22, 2005**, at Encino, California.



Caryn Ames