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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

R. THOMAS FAIR, Plaintiff and Appellant, v. KARL E. BAKHTIARI et al., Defendants and Respondents.	A100240 (San Mateo County Super. Ct. No. 417058)
STONESFAIR FINANCIAL CORPORATION, Defendant, Cross-Complainant and Respondent, v. R. THOMAS FAIR, Plaintiff, Cross-Defendant and Appellant.	

Plaintiff R. Thomas Fair appeals the trial court's denial of his motion to compel arbitration. The motion was based on an arbitration clause in a document that was signed at the conclusion of mediation by plaintiff and defendants Karl E. Bakhtiari (Bakhtiari) and Maryann E. Fair (Maryann Fair), as well as by defendants Stonesfair Financial Corporation (SFC), Stonesfair Management Company, LLC (SMC), and Stonesfair Corporation (SC) (collectively Stonesfair entities). Plaintiff contends this document

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of footnote 5 (at pp. 6-7), the second paragraph of part I (at p. 7) and footnote 6 (at pp. 7-8), and part III (at pp. 11-16).

constitutes a valid, admissible settlement agreement between the parties and the trial court erred in ruling to the contrary. We find the trial court erred in denying the motion to compel arbitration because (1) the settlement agreement satisfies a statutory exception to the inadmissibility of written or oral communications made during mediation, and (2) the settlement agreement contains a valid agreement between the parties to arbitrate all disputes. We therefore shall reverse.

BACKGROUND

On March 6, 2002, plaintiff filed a third amended complaint against defendants.[1] The complaint alleged causes of action for breach of contract against Bakhtiari, SFC and SC; breach of fiduciary duty against Bakhtiari and Maryann Fair; corporate waste against Bakhtiari and Maryann Fair; assault against Bakhtiari; battery against Bakhtiari; wrongful and retaliatory termination in violation of public policy against Bakhtiari and SFC; wrongful termination against Bakhtiari and SFC; intentional infliction of emotional distress against Bakhtiari and Maryann Fair; unfair business practices against Bakhtiari, Maryann Fair and SMC; interference with economic relations against all defendants; conversion against Bakhtiari, Maryann Fair and SMC; fraud against Bakhtiari, Maryann Fair and SFC; and constructive fraud against Bakhtiari and Maryann Fair.

On March 20, 2002, SFC filed a cross-complaint against plaintiff, which alleged breach of fiduciary duty, misappropriation of trade secrets (Civ. Code, § 3426 et seq.), misappropriation of property, intentional interference with prospective economic advantage, unfair competition, and conversion.

The parties thereafter stipulated to private mediation and participated in two days of mediation, on March 20 and 21, 2002, before Eugene Lynch, a mediator employed by Judicial Arbitration and Mediation Services (JAMS). On March 21, 2002, all parties and the mediator signed a one-page document, hand-written by plaintiff's counsel, entitled

[1] Plaintiff commenced this action on May 30, 2001. However, because the history of this matter prior to the filing of the third amended complaint is irrelevant to the issues raised on appeal, the earlier factual and procedural details are not included in this opinion.

"Settlement Terms" (settlement terms document), which set forth nine numbered settlement terms, as follows:

"1. Cash payment of $5.4 mm 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 and all disputes subject to JAMS arbitration rules."

Below item nine, the document was dated March 21, 2002, and was signed by plaintiff, Bakhtiari, Maryann Fair, mediator Lynch, Bakhtiari for SFC/SC, and Bakhtiari for SMC.

In early April 2002, the attorneys for the various defendants filed with the trial court Case Management/ADR Conference Questionnaires, in which they stated, "After 2 days of Mediation, the case has settled. The Settlement Agreement is being circulated for approval and a Request for Dismissal with prejudice will be filed."

Counsel for the Stonesfair entities also drafted a 10-page document entitled "Settlement Agreement and General Release," which plaintiff's counsel received on April 4, 2002.

At an April 17, 2002 hearing, counsel for Bakhtiari informed the trial court that "this matter was mediated on March the 20th and 21st. We've reached a settlement agreement. We are now in the process of exchanging settlement agreements. And there are some complicated taxation matters involved." All counsel then requested a 60-day continuance, which the court granted, stating, "If it's settled and there's a dismissal on file, you need not come in." The trial court also granted a request by plaintiff's counsel to continue plaintiff's time to respond to defendants' cross-complaint for 60 days.

Meanwhile, the parties expressed differing views as to what interests plaintiff was to convey in return for the $5.4 million payment and plaintiff's counsel objected to the inclusion of numerous terms in the draft agreement that had not been agreed to in the settlement terms document. Plaintiff's counsel requested that the parties return to mediation in an effort to resolve these issues. Counsel for defendants subsequently cancelled a mediation session that had been scheduled with mediator Lynch for May 29, 2002.

On June 6, 2002, Bakhtiari and Fair replaced their attorneys with the law firm that had previously represented only the Stonesfair entities. On that same date, the attorney for all defendants filed a "Case Management/ADR Conference Questionnaire," in which he stated that the prior questionnaire submitted in April 2002 "indicated that the dispute settled after mediation. However, the parties were ultimately unable to reach an agreement as to the scope and subject matter of the proposed settlement terms. Accordingly, the case should be resolved through the regular court process."[2]

After defendants rejected plaintiff's request to arbitrate the disputed issues, plaintiff filed a motion to compel arbitration and stay proceedings on June 20, 2002. In

[2] On June 17, 2002, defendants informed the court that a second law firm (which presently represents defendants on appeal) would also represent defendants in this matter.

the motion, he claimed that the settlement terms document was a settlement agreement, that it contained an arbitration clause, and that arbitration was needed due to a dispute that had "arisen between the parties regarding the terms and meaning of the March 21, 2002 settlement agreement."

Following a July 24, 2002 hearing, the trial court filed an order, on September 6, 2002, denying plaintiff's motion to compel arbitration.

On September 10, 2002, plaintiff filed a timely notice of appeal.

DISCUSSION

Plaintiff contends the trial court erred in denying his motion to compel arbitration pursuant to Code of Civil Procedure section 1281.2.[3]

In its order denying plaintiff's motion to compel arbitration, the court first sustained defendants' objections to admission of the settlement terms document into evidence, citing Evidence Code section 1119,[4] and stating that section "1123 has not been satisfied and the exceptions do not apply. There is no waiver." The court also sustained defendants' objection to admission of a paragraph of plaintiff's counsel's declaration, in which he stated the intent of mediator Lynch and all counsel involved in drafting the settlement terms document was for that document to be a binding, enforceable agreement. Finally, the court denied plaintiff's motion to compel arbitration, stating, "There is insufficient demonstration of an arbitration agreement given the inadmissibility of the Term Sheet. [¶] Further, *Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215 [(*Condee*)] is distinguishable as the public policy factors underlying mediation are not involved."

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[3] Code of Civil Procedure section 1281.2 provides in relevant part: "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 . . . ."

[4] All further statutory references are to the Evidence Code unless otherwise indicated.

In deciding whether the trial court should have granted plaintiff's motion to compel arbitration, we must determine, first, whether the settlement terms document satisfies any of section 1123's exceptions to the confidentiality requirements of section 1119 and, if so, whether the arbitration provision in the settlement terms document constitutes a valid agreement to arbitrate disputes.[5]*

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[5]* Plaintiff's chief argument, which we find unnecessary to address at great length, is that an arbitration agreement need not be admissible to "exist" pursuant to Code of Civil Procedure section 1281.2. Thus, even if, as the trial court found, the settlement terms document is not a valid or admissible settlement agreement, it nonetheless still exists for purposes of satisfying Code of Civil Procedure section 1281.2, according to plaintiff. In support of this argument, plaintiff cites *Condee*, *supra*, 88 Cal.App.4th 215, in which the appellate court held that Code of Civil Procedure section 1281.2 "does not require the petitioner to introduce the [arbitration] agreement into evidence. A plain reading of the statute indicates that as a preliminary matter the court is only required to make a finding of the agreement's existence, not an evidentiary determination of its validity." (*Id*. at p. 219.)

Plaintiff's reliance on *Condee* is misplaced. In *Condee*, *supra,* 88 Cal.App.4th 215, the sole question was whether the petitioner was required to authenticate the arbitration agreement in a petition to arbitrate; the existence of the contract was not otherwise in question. The court found it was sufficient to allege the existence of the contract and its terms or to attach a copy of the contract, pursuant to California Rules of Court, rule 371. (*Condee*, at p. 219.) The court noted that, "although no evidence was ever introduced to verify the signature's authenticity, it was never challenged." (*Id*. at p. 218.) Furthermore, as the trial court in this case stated, the public policy factors underlying mediation were not involved in *Condee*.

Unlike *Condee*, the present case concerns a document created during mediation, which defendants argue is inadmissible pursuant to the confidentiality requirements of section 1119, and so cannot be said to exist for purposes of compelling arbitration under Code of Civil Procedure section 1281.2. (See § 1119, subd. (b) [disclosure of a writing prepared "in the course of, or pursuant to, a mediation . . . shall not be compelled, in any arbitration . . ."].) Defendants argue, moreover, that, even if the settlement terms document satisfied one of the exceptions to section 1119 for written settlement agreements (see § 1123), the agreement still does not exist for purposes of compelling arbitration, because the document does not constitute an agreement between the parties. The reasoning in *Condee* is thus inapplicable to the present circumstances.

The same is true of *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312 (*Ericksen*), also relied on by plaintiff, in which the California Supreme Court observed: " 'If participants in the arbitral process begin to assert all possible legal or procedural defenses in court proceedings before the arbitration

I. *Applicable Standard of Review*

The threshold question regarding whether the settlement terms document—assuming it does in fact constitute an agreement between the parties—satisfies any of the exceptions in section 1123 to the inadmissibility of settlement agreements reached during mediation, is subject to de novo review, since reviewing courts "independently determine the proper interpretation of [a] statute." (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) Likewise, interpretation of the language of the settlement terms document is subject to de novo review. (See *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 684.)

*With respect to the secondary question—whether an agreement to arbitrate exists—de novo review is appropriate because the extrinsic evidence is not in conflict (see *Watts v. Crocker-Citizens National Bank* (1982) 132 Cal.App.3d 516, 521, citing *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866), and 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. (See *Mitchell v. American Fair Credit Assn.* (2002) 99 Cal.App.4th 1345, 1350.)[6]*

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itself can go forward, "the arbitral wheels would very soon grind to a halt." ' [Citation.] Referring preliminary issues to the courts can cause ' "serious delay and confusion, thus robbing the arbitration procedure of much of its value to the parties." ' [Citations.] And, we have recently warned against 'procedural gamesmanship' aimed at undermining the advantages of arbitration. [Citation.] A statutory interpretation which would yield such results is not to be preferred." (*Ericksen*, at p. 323.) Our Supreme Court explained in a later case, however, that, in *Ericksen*, it had "explicitly distinguished cases where the party opposing arbitration ' "denied ever agreeing to anything." ' [Citation.]" (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 417, quoting *Ericksen*, *supra*, 35 Cal.3d at p. 323, fn. 8.)

Here, there are preliminary questions regarding admissibility and the existence of an agreement to arbitrate that must be resolved before arbitration can be ordered.

[6]* We are not persuaded by defendants' argument that the substantial evidence standard of review is applicable, particularly since the trial court made no factual findings

II. *Applicability of Section 1123*

Section 1119 provides: "Except as otherwise provided in this chapter:

"(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

"(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

"(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential."

In *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 3-4 (*Foxgate*), the California Supreme Court held that the Court of Appeal had erred in creating a judicial exception to the confidentiality requirements of section 1119 and section 1121 (regarding confidentiality of a mediator's reports and findings). The court observed that "confidentiality is essential to effective mediation, a form of alternative dispute resolution encouraged and, in some cases required by, the Legislature." (*Foxgate*, at p. 14.) Therefore, to encourage mediation by ensuring confidentiality, the statutory scheme (which includes section 1119) "unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception." (*Foxgate*, at p. 15, fn. omitted.)

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in this case. (See *Mitchell v. American Fair Credit Assn.*, *supra*, 99 Cal.App.4th at p. 1350.)

The court in *Foxgate* further stated that because the language of sections 1119 and 1121 is clear and unambiguous, "judicial construction of the statutes is not permitted unless they cannot be applied according to their terms or doing so would lead to absurd results, thereby violating the presumed intent of the Legislature. [Citations.]" (*Foxgate*, *supra*, 26 Cal.4th at p. 14.) The court found, moreover, that a judicially crafted exception to the confidentiality requirements of sections 1119 and 1121 "is not necessary either to carry out the legislative intent or to avoid an absurd result." (*Foxgate*, at p. 14; accord, *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 424 (section 1119's confidentiality requirements are not subject to a "good cause" exception]; *Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351, 362 [rejecting claim of implied waiver of mediation confidentiality rights].)

Section 1123, which is relevant here, provides: "A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:

"(a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.

"(b) The agreement provides that it is enforceable or binding or words to that effect.

"(c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.

"(d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute."

Both section 1119 and section 1123 were enacted in 1997. They took the place of former section 1152.5, and section 1123 essentially restates several of former section 1152.5's terms, except that section 1123, subdivision (b), is new. The Law Revision Commission Comments to section 1123 explain that this subdivision was added "due to the likelihood that parties intending to be bound will use words to that effect [i.e., to the effect that the agreement is "enforceable or binding"], rather than saying their agreement

is intended to be admissible or subject to disclosure [under subdivision (a)]." (Cal. Law Revision Com. com., 29B pt. 3 West's Ann. Evid. Code (2004 supp.) foll. § 1123, p. 157.) This comment, as well as the language of subdivisions (a) and (b) of section 1123 itself, shows that 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.

Based on this commonsense reading of the statute, we find that the exception specified in section 1123, subdivision (b), to section 1119's confidentiality requirements, is applicable to the present case. While it is true that the settlement terms document does not contain the words "enforceable" or "binding," there is language in the document, i.e., "words to that effect," that makes plain the parties' intent to be bound. (§ 1123, subd. (b).)

The final provision of the settlement terms document states: "Any and all disputes subject to JAMS arbitration rules." The "JAMS Comprehensive Arbitration Rules and Procedures" govern, inter alia, "binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules." The inclusion of this term requiring resolution of all disputes under JAMS arbitration rules shows that the parties contemplated that an arbitrator would, in the event of any disputes related to the settlement terms document, consider and resolve such disputes. In other words, inclusion of the arbitration term demonstrates that the parties necessarily intended the settlement terms document to be "enforceable or binding." (§ 1123, subd. (b).)

Thus, because inclusion of the arbitration provision is consistent *solely* with an intention on the part of the parties for the settlement terms document to be enforceable or binding, we find that that provision constitutes "words to that effect" under subdivision (b) of section 1123. Section 1123 plainly reflects a legislative intent not to

make inadmissible settlement agreements that the parties intend to be enforceable. To find section 1123 inapplicable in the present case would frustrate that intent.[7]

Consequently, we conclude the trial court erred in finding that the exceptions to confidentiality specified in section 1123 were inapplicable and that the settlement terms document was inadmissible for that reason.

III. *Existence of a Settlement Agreement**

Defendants claim that even if the settlement terms document "is not made inadmissible, or protected from disclosure," pursuant to section 1123, it nevertheless does not "exist" for purposes of ordering arbitration under Code of Civil Procedure section 1281.2, because the document does not constitute an agreement between the parties.[8] Plaintiff argues to the contrary. (See *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 356 ["It follows, of course, that if there was no valid contract

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[7] We note that the majority of states that have enacted statutes regarding mediation confidentiality require only that a settlement agreement be in writing and signed by the parties to be admissible, without the added requirement that the parties expressly provide for its admissibility or enforceability. (See, e.g., Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality* (Nov. 2001) 35 U.C. Davis L.Rev. 33, 46-47 & fn. 33 [citing cases].)

Similarly, the Uniform Mediation Act (Act), drafted by the National Conference of Commissioners on Uniform State Laws, which approved and recommended the Act for enactment in all states in 2001, provides that there is no privilege for a mediation communication that is in a written agreement (including a handwritten agreement), and is signed by all parties to the agreement. (Act § 6(a)(1); 22 N.Ill.U. L.Rev. (Spring 2002) 165, 210, 213.) The Reporter's Notes to section 6 of the Act explains that "[t]he exceptions in Section 6(a) apply regardless of the need for the evidence because society's interest in the information contained in the mediation communications may be said to categorically outweigh its interest in the confidentiality of mediation communications." (22 N.Ill.U. L.Rev., *supra*, at p. 212.)

Our Legislature has made a different choice in requiring further confirmation that the parties intended a settlement agreement prepared during a mediation to be admissible and/or enforceable. It is not for us to second-guess the wisdom of the California requirements, but merely to determine their applicability to the present situation.

[8] As previously stated, when a party files a motion to compel arbitration under Code of Civil Procedure section 1281.2, the court shall order the parties to arbitrate the controversy "if it determines that an agreement to arbitrate the controversy exists . . . ."

to arbitrate, the petition must be denied. [Citation.]"].) The trial court did not address this question since it found the settlement terms document inadmissible.

"A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts. [Citation.]" (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810-811.) "Every contract requires the mutual assent or consent of the parties. (Civ. Code, §§ 1550, 1565.) The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe. [Citation.] Accordingly, the primary focus in determining the existence of mutual consent is upon the acts of the parties involved." (*Meyer v. Benko* (1976) 55 Cal.App.3d 937, 942-943; see also *King v. Stanley* (1948) 32 Cal.2d 584, 591.)[9]

Furthermore, to determine whether a valid agreement to arbitrate exists, "[c]ourts do *not* look to the contract as a whole to determine arbitrability. Challenges to the validity of the underlying contract (i.e., ambiguous, unclear, lack of consideration) 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." (Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2003), ¶ 5:79, p. 5-48 (Knight), citing *Prima Paint Corp. v. Flood & Conklin* (1967) 388 U.S. 395, 403-404.)

In the present case, defendants argue that the settlement terms document itself, as well as other relevant circumstances, show that the parties did not intend that document to be a binding contract. We disagree. Use of the objective test for determining whether mutual consent existed shows that the parties intended to enter into a binding contract and that the settlement terms document contained a valid agreement to arbitrate disputes.

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[9] Hence, in the present case, the parties' and counsel's after-the-fact declarations regarding their intent when they signed the settlement terms document are not relevant to our resolution of the question whether the settlement terms document was intended to be a binding settlement agreement.

(See *King v. Stanley*, *supra*, 32 Cal.2d at p. 591; *Meyer v. Benko*, *supra*, 55 Cal.App.3d at pp. 942-943.)

First, the settlement terms document sets forth all of the material terms of the settlement. 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 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.

Second, the settlement terms document was signed by all of the parties. As the appellate court in *Meyer v. Benko*, *supra*, 55 Cal.App.3d at page 943, explained: "The fact that this document was signed by *both* parties indicates that the parties entered into an enforceable agreement. . . . 'The general rule is that when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents . . . .' [Citation.]"

Third, the conduct of the parties shortly after signing the settlement terms document reflects an understanding that the terms of the settlement had been agreed to. For example, both plaintiff's and defendants' counsel filed with the trial court Case Management/ADR Conference Questionnaires in early April 2002, in which they stated that the case had settled after mediation, a settlement agreement was being circulated for approval, and a request for dismissal with prejudice would be filed. In addition, at an April 17, 2002 hearing in the trial court, then-counsel for Bakhtiari informed the court that "this matter was mediated on March the 20th and 21st. We've reached a settlement agreement. We are now in the process of exchanging settlement agreements. And there are some complicated taxation matters involved." The court then granted a 60-day

continuance to give the parties time to finalize the settlement. These statements by the parties, made shortly after the mediation concluded, belie defendants' later claim that no settlement was ever reached and that the settlement terms document did not encompass the agreement of the parties.

Also belying this claim is the fact that, shortly after execution of the settlement terms document, defendants' counsel prepared and circulated a formal 10-page draft Settlement Agreement and General Release (draft agreement), which included virtually all of the terms of the settlement terms document nearly verbatim, including section 6.4, which provided that any disputes regarding the agreement would be submitted to arbitration before a licensed arbitrator "selected in accordance with the Arbitration Rules of JAMS . . . . ." The draft agreement also contained the following factual recital: "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 which Fair may have against Defendants and Defendants may have against Fair." (Italics added.) This provision reflects an understanding that the parties entered into a settlement agreement on March 21, 2002, when they signed the settlement terms document.

Defendants argue, nonetheless, that the circulation of the formal draft agreement, as well as the parties' dispute regarding some terms of that agreement, demonstrates that essential elements were left for future agreement and that the settlement terms document was intended to be an agreement to agree, rather than an agreement. Defendants are incorrect. (See *Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 624, fn. 3 (*Ersa Grae*).) The circulation of the draft agreement merely reflects the parties' desire, ascertainable from the settlement terms document, to flesh out some of the details, including, for example, more specific provisions regarding mutual release and confidentiality. While it is true that the draft agreement is considerably longer than the settlement terms document, the settlement terms document contained, albeit in a minimalist way, all of the crucial elements of the agreement, every one of which was incorporated into the draft agreement. Contemplation of a formal signed agreement thus

is entirely consistent with mutual assent to and intent to be bound by the material terms of the settlement terms document.

As the appellate court in *Ersa Grae* explained: "The fact that an agreement contemplates subsequent documentation does not invalidate the agreement if the parties have agreed to its existing terms. [Citation.] [' "Any other rule would always permit a party who has entered into a contract like this . . . to violate it, whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule the contract would never be completed in cases where, by changes in the market, or other events occurring subsequent to the written negotiations, it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business." ']; [citation.]" (*Ersa Grae, supra,* 1 Cal.App.4th at p. 624, fn. 3; see also *King v. Stanley*, *supra*, 32 Cal.2d at p. 591 [existence of intent to reduce informal writing to a formal written contract "would not necessarily prevent a binding obligation from arising, notwithstanding the contemplated written or formal contract was never executed [citations], unless it also appeared that the parties agreed or intended not to be bound until a formal written contract was executed [citation]"]; cf. *Kohn v. Jaymar-Ruby, Inc.* (1994) 23 Cal.App.4th 1530, 1534 [" ' "When parties orally agree upon all the terms and conditions of an agreement with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is to be prepared and signed does not alter the binding validity of the oral agreement" ' "].)

Finally, that the settlement terms document contained an enforcement mechanism, i.e., disputes are to be resolved pursuant JAMS arbitration rules, further demonstrates that the settlement terms document was intended to be a binding agreement (see pt. II, *ante*), with any disagreements subject to binding arbitration.

Defendants also claim that three of the issues plaintiff seeks to arbitrate involve material, unresolved terms, and the dispute as to those issues demonstrates that the parties never agreed on the final terms of the agreement. Those issues include the specific interests plaintiff is to convey as consideration for the $5.4 million; when the payment is

to be made, i.e., within 60 days of what date; and how the payment should be structured for tax purposes. Whether some terms of the agreement may be ambiguous and require further inquiry as to their intended meaning, or may even require that those terms be found unenforceable (see *Okun v. Morton* (1988) 203 Cal.App.3d 805, 817), is for an arbitrator, not this court or the trial court, to decide. We have found that the parties "knowingly *agreed to arbitrate* disputes" under the settlement terms document. (See Knight, *supra*, ¶ 5:79, p. 5-48.) Hence, the arbitration provision is " ' "separable" ' " from other allegedly ambiguous portions of the agreement. (*Rosenthal v. Great Western Fin. Securities Corp.*, *supra*, 14 Cal.4th at p. 416, quoting *Prima Paint Corp. v. Flood & Conklin*, *supra*, 388 U.S. at p. 402; accord, Knight, *supra*, ¶ 5:79. p. 5-48.)

We have determined, as a matter of law, both that the settlement terms document is admissible, pursuant to section 1123, and that it contains a valid agreement to arbitrate all disputes. Accordingly, because an agreement to arbitrate exists for purposes of Code of Civil Procedure section 1281.2, plaintiff's motion to compel arbitration should have been granted. (See *Banner Entertainment, Inc. v. Superior Court*, *supra*, 62 Cal.App.4th at p. 356; Code Civ. Proc., § 1281.2.)[10]

DISPOSITION

The order denying plaintiff's motion to compel arbitration is reversed. The matter is remanded to the trial court with directions to vacate its order denying plaintiff's motion to compel arbitration, and to enter an order granting that motion. Costs on appeal are awarded to plaintiff.

[10] In light of our conclusion, we need not address plaintiff's additional arguments, including whether the trial court erred in refusing to consider the agreement to arbitrate independent of the settlement agreement and whether defendants waived the confidentiality provisions of section 1119.

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Kline, P.J.

We concur:

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Haerle, J.

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Ruvolo, J.

Trial Court:	San Mateo County Superior Court
Trial Judge:	Honorable George A. Miram
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