

Case No. B220639

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 1**

CHRISTENSEN, GLASER, FINK,
JACOBS, WEIL & SHAPIRO, LLP,
Plaintiff and Respondent,

-vs-

GEORGE GOFF and ESTHER GOFF,
Defendants and Appellants.

Los Angeles Superior Court, Case No. BC 379576
Honorable John A. Kronstadt
Department 30

APPELLANTS' OPENING BRIEF

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GEORGE GOFF and ESTHER GOFF

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GEORGE GOFF and ESTHER GOFF

CERTIFICATE OF INTERESTED ENTITIES OR PARTIES

There are no interested entities or persons that must be listed in this certificate pursuant to CRC 8.208.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 2, 2010 at Los Angeles, California.



Ferran T. Steinman

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continued to represent them. AA 36. After the Goffs had exhausted their funds, and several weeks after having invited the Firm to withdraw, Glaser and the Goffs negotiated a written modification to the fee agreement that was signed and delivered as of April 7, 2006. AA 36, 46, 61-63.

In the DRS arbitration, it was undisputed that the modification agreement (a copy of which is at AA 304) provided as follows: 1) the Goffs acknowledged that as of March 31, 2006, they owed the firm \$391,000, and that additional fees and costs would continue to accrue until the arbitration proceeding had been completed; 2) the Firm was granted an attorney's lien on all proceeds that the Goffs would be entitled to in the Kinkade arbitration or settlement thereof; 3) any moneys recovered in the Kinkade arbitration would first be used by the Goffs to pay the outstanding fees and costs owed to the Firm; and 4) *in the event that the case with Kinkade had not been settled or an award in favor of the Goffs had not been paid by June 15, 2006, after that date the Goffs would remit to the Firm at least 25% of all licensing revenue received by the Goffs from their Kinkade artwork licensing program until the fees and costs due to the Firm were paid in full.* (Emphasis added).

Although the Goffs sought an award of several million dollars in the Kinkade arbitration, they were awarded only \$113,000, all of which was paid to the Firm pursuant to the terms of the modification agreement. AA 63.

The primary dispute in the DRS arbitration was as to the proper interpretation of the modification agreement with respect to the above-emphasized post-June 15, 2006 terms of payment of the outstanding balance of fees and costs. There was a subsidiary dispute as to whether and in what amount the Goffs were entitled to a refund of fees and costs paid by reason of misconduct on the part of Glaser and the Firm, in the event that there was a finding that the parties had not entered into a modification of their fee agreement because of a lack of meeting of

minds. The Goffs contended that the remaining balance of fees and costs was payable *only* by the Goffs' remittance to the Firm of at least 25% of the revenue received by the Goffs from their Kinkade artwork licensing program. AA 63. The Firm contended, and the arbitration panel concluded, that although poorly-drafted, the modification agreement payment provision did not limit the Firm to payment only out of revenues received by the Goffs from their Kinkade artwork licensing program, but entitled the Firm to collect the balance of fees and costs due them from any and all assets of the Goffs. AA 64-67.²

² To demonstrate that there was arguable merit to the Goffs' contention regarding the interpretation of the payment terms of the modification agreement, the Goff's requested permission of the Court to file a Second Supplemental Declaration of George Goff, and a Supplemental Memorandum of Points and Authorities. The Court struck the Supplemental Memorandum as late-filed, permitted the filing of the Second Supplemental Declaration, but struck all of the evidentiary exhibits to the Declaration on the ground that they were not properly authenticated, recognizing, however, that the Goffs had not fabricated the exhibits, but that they were probably largely authenticatable business records. RT (10-2-09) 3:24-4:6, 32:19-26. The fourth question presented in this appeal seeks a determination as to whether the Court below was in error in ruling that the exhibits were not properly authenticated. The authentication issue is minor, because its determination will not affect this Court's decision as to whether the judgment should be reversed. Nonetheless, the documents excluded for lack of authentication are relevant to the contractual interpretation issue that was posed to the arbitration Panel, and will be posed to the Superior Court if this Court rules that the Goffs are entitled to a trial *de novo* below. In that regard, this Court's attention is respectfully invited to Exhibit 5 to the Second Supplemental Declaration of George Goff (AA 288-305) which contains the correspondence between attorney Glaser and the Goffs that documents their negotiation of the payment provision of the fee modification agreement of April 7, 2006.

In summary, the correspondence reflects: 1) the Firm originally proposed that the Goff's pay the entire balance of fees and costs on or before June 1, 2006, and the Goffs declined to accept this proposal because they could not in good faith make a promise they would not be able to perform; 2) the Firm then proposed that the Goffs pay the entire amount at the rate of \$20,000 per month, commencing April 15, 2006, and the Goff declined to accept that proposal for the same reason; 3) the Goffs then counter-proposed in writing that whatever balance was not paid to the Firm from the proceeds of the Kinkade arbitration, would be paid by the Goff's remitting to the Firm at least 25% of all licensing revenue received by them from their Kinkade artwork licensing program, which proposal was made by reason of the fact that at that juncture, the Goffs had exhausted substantially all of their assets except their Kinkade art assets, they were hopeful of being able to exploit those assets in the future, and hence proposed that the revenues therefrom were the only viable source from which they could agree to pay the Firm; and 4) the signed modification agreement of April 7, 2006, contains the exact wording of the Goff's payment proposal.

SUMMARY OF CONTENTIONS AND RULINGS

Pursuant to DRS Rule 39, the arbitration is to proceed as non-binding unless “all parties agree in writing” to binding arbitration. AA 170-171.

In its motion to confirm arbitration award (AA 1, et seq.), the Firm relied upon the analysis in the arbitration Panel’s Statement of Decision: The Goffs elected to proceed by binding arbitration in their initial submission to DRS. The Firm indicated non-binding arbitration in its initial submission, but then changed its position to elect binding arbitration. Thereafter, the Goff’s requested that their binding arbitration election be withdrawn. The Firm objected. The Panel ruled that the Goff’s original election of binding arbitration was an offer that was accepted by the Firm, and could not be revoked once accepted. AA 59-60.

In their opposition to the motion, the Goffs argued that the arbitration panel had exceeded its powers in ruling that the arbitration was binding, because pursuant to the applicable DRS Rules, as explained in an Advisory Opinion, as well as the offer and acceptance rules of contract law, there was no written agreement made by the parties for binding arbitration because once the attorneys rejected the clients’ initial offer of binding arbitration, the offer was terminated such that the offerees could not later purport to accept the offer and thereby create an enforceable contract for binding arbitration. AA 124, et seq.

In the Firm’s reply to the Goff’s opposition, they argued that the Goffs’ had waived their right to contend that the arbitration Panel had exceeded its powers in ruling that the arbitration was binding, by offering a declaration of attorney Green, the Firm’s attorney, in which he stated: *At the inception of the arbitration hearing, in colloquy between the Panel and the Goffs with reference to a motion by the attorneys to continue the arbitration hearing, Panel chairman Reuben asked whether the Goffs would be willing to proceed by way of non-binding arbitration, and they answered in the negative.* AA 143.

The Court below thereupon received additional papers filed by the Goffs in response to the Firm's reply because the reply had injected new evidentiary material upon which the Firm based the legal contention of waiver that was not contained in its initial motion. The Goffs' additional filing included a Supplemental Declaration of George Goff in which he denied that the aforesaid question and answer scenario had occurred during the arbitration. AA 198, 202, 206.

Because of the testimonial conflict between the declarations of attorney Green and George Goff, the Court held an evidentiary hearing which entertained testimony by attorney Green and both of the Goffs, in which Green testified to the occurrence of the aforesaid question and answer, and the Goffs denied the occurrence. RT (9-22-09) 7, 28, 50.

Thereafter, the Goffs filed a memorandum of points and authorities on the issue of waiver, arguing that even if the testimony of Green were accepted as true, it did not establish the elements of waiver as contended by the Firm (AA 328); and the Firm filed opposition to that memorandum, stating that although the heading of their prior argument may have stated "waiver," the substance of the argument was based on "estoppel." AA 331.

At the final oral hearing (RT (10-2-09)), the Court entertained oral argument by the parties on the issues of the credibility of the testimony at the previous hearing, and the legal issues of waiver and estoppel (on which the Goffs argued that even if believed, Green's testimony did not establish the elements of waiver or estoppel). The Court thereupon issued an oral statement of decision, in which it ruled as follows:

1. It found Green's oral testimony to be credible, remarking that it was troubling that the Goffs and their attorney contended that attorney Green had lied as to what had occurred at the arbitration hearing, given that it would present an extraordinary risk for a practicing attorney to commit perjury in court. RT (10-2-09) 14:17-22, 16:18-21. The Court further stated that it did not find that the Goffs had intentionally rendered false testimony, but that they appeared to have

failed to remember the question and answer scenario. RT (10-2-09) 16:26-17:9.

2. It is unclear whether the Court based its decision on the doctrines of waiver or estoppel, but it clearly concluded that Green's testimony established the applicability of the doctrine of judicial estoppel, pursuant to which, because the Goffs had declined the "opportunity" to proceed by non-binding arbitration, they were judicially estopped to contend that the arbitration Panel had exceeded its powers in ruling that the arbitration was binding. RT (10-2-09) 17:18-20, 27:15-28:12.

3. The Court ruled that Glaser was not a party to the arbitration, and therefore her written agreement to binding arbitration was not required. RT (10-2-09) 18:10-20:1.

4. Finally, the Court ruled that even if the Goffs had been entitled to contend that the arbitration panel had exceeded its powers in ruling that the arbitration was binding, the Goffs had waived that contention, because by operation of law, the arbitration Award had become binding because the Goffs had not rejected the award and requested a trial *de novo* in the Superior Court within 30 days of being served with a copy of the Award. RT (10-2-09) 17:21-18:4.

STATEMENT OF THE CASE

Appealability and Timeliness

The judgment is appealable pursuant to CCP § 904.1(a)(1). The appeal was timely filed pursuant to CRC 8.104(a), because the judgment was entered on November 3, 2009 (AA 344), and the notice of appeal was filed on November 20, 2009 (AA 346).

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Standard of Review

The first three questions presented on appeal³ are pure issues of law which are subject to the independent standard of review.⁴ *Ghirardo v. Antonioli* (1994) 8 C.4th 791, 799. The fourth issue relates to the admissibility of evidence, which is subject to the abuse of discretion standard. *Gordon v. Nissan Motors Co., Ltd.* (2009) 170 C.A.4th 1103, 1111.

Procedural History⁵

On March 25, 2009, Appellants George Goff and Esther Goff, as co-petitioners, and Patricia Glaser (“Glaser”), one of the partners of Christensen, Glaser, Fink, Jacobs, Weil & Shapiro LLP (“Firm”), and the Firm, as respondents, participated in a mandatory fee dispute arbitration under the Rules of Los Angeles County Bar Association Dispute Resolution Services, Inc. (“DRS”), before a panel of three arbitrators (“Panel”), chaired by attorney Reuben (“Reuben”). AA 1-4. On June 22, 2009, the Panel issued its Statement of Decision and Award, announcing therein that the Award was binding, and awarding in favor of the Firm and against the Goffs \$655,000 in fees and costs, plus 10% simple interest from February 10, 2007, through the date of the award. AA 59.

³ See Questions Presented, below at page 14.

⁴ This appeal is not based on lack of substantial evidence to support a finding of fact. The Court below concluded that the Goffs were judicially estopped from contending that the arbitration panel exceeded its powers in ruling that the arbitration award was binding, based on the Court’s finding of fact, made after a contested evidentiary hearing, that in reply to an oral question by the arbitration Panel at the inception of the arbitration hearing as to whether the Goffs would agree to proceed with the arbitration as non-binding, they responded in the negative. On appeal, the Goffs do not contend that there was no substantial evidence to support that finding. Rather, they contend the Court below erred, because even accepting Green’s testimony as true, it does not support the application of the doctrine of judicial estoppel, equitable estoppel or waiver.

⁵ This section covers the procedural history of the judicial proceedings before the Superior Court. The procedural history of the proceedings in the DRS attorney fee dispute arbitration are set forth under Factual Background, as the arbitration proceeding history forms the factual basis for the determination of the first three questions presented.

On or about July 17, 2009, the Firm filed a petition and motion to confirm the binding arbitration award. AA 1. The Goffs filed opposition to the motion (AA 124), and the Firm filed a reply to the opposition (AA 143), including an evidentiary objection (AA 195). The Goffs' essential argument in opposition to the Firm's petition and motion was that the Panel had exceeded its powers in ruling that the award was binding, and requested that the arbitration award be vacated as a binding award and declared to be non-binding, and that the Goffs thereafter be afforded 30 days in which to file a rejection of the award and request a trial *de novo*.

The Court below held three hearings in the matter, on September 3, September 22, and October 2, 2009, respectively. Reporter's transcripts ("RT") of all three hearings have been filed herein. The first and last hearings were essentially oral argument hearings that consisted of colloquy between counsel and the Court. The hearing on September 22 was essentially an evidentiary hearing in which the Court received oral testimony from both of the Goffs and from attorney Green.

In its reply to the Goffs' opposition to the motion, the Firm filed a declaration by attorney Green, asserting for the first time before the Court below that the Goffs had waived the right to assert that the arbitration was non-binding, because prior to the taking of testimony in the arbitration hearing, the attorneys moved the Panel for a continuance of the arbitration hearing, and during the ensuing colloquy, the Panel purportedly asked the Goffs if they would be willing to proceed with the arbitration as non-binding, and the Goffs allegedly answered in the negative. AA 143.

In response to the aforesaid injection of new evidence and the new contention of waiver based thereon, on September 2, 2009, the Goffs filed a request for permission to file: (1) an evidentiary objection to the declaration of Green, and (2) a supplemental declaration of George Goff in which he contested the veracity of the testimony by attorney Green upon which the Firm

based its waiver contention. AA 198. Concurrently therewith, the Goffs filed the aforesaid evidentiary objection (AA 202) and the supplemental declaration of George Goff (AA 206).

Thereafter, on September 17, 2009, the Goffs filed a request for permission to file: (3) a second supplemental declaration of George Goff, and (4) a supplemental memorandum of points and authorities. AA 214. Concurrently therewith, they filed the aforesaid second supplemental declaration of George Goff (AA 219), and the supplemental memorandum of points and authorities (AA 308). The Firm filed an objection to the Goffs' aforesaid request. AA 324.

On September 22, the Court below received oral testimony from both of the Goffs and from attorney Green as to the transactions and occurrences at the arbitration hearing on March 25, 2009, with respect to the Firm's motion for continuance of the hearing, during which (the Firm contended) the aforesaid purported question by the Panel and answer by the Goffs regarding non-binding arbitration occurred; and the Goffs denied that occurrence. After the testimony was received, on September 22, the Goffs filed a memorandum of points and authorities regarding the issue of waiver. AA 328.⁶

The Firm filed opposition to the waiver memorandum in which it contended that it previously had argued equitable estoppel, not waiver (AA 331); and filed an evidentiary objection to the second supplemental declaration of Goff (AA 335).

On October 2, 2009, the Court below issued an oral order striking the memorandum regarding the issue of waiver filed by the Goffs on September 22, as well as the items filed by the Goffs on September 17 (second supplemental declaration of George Goff and supplemental memorandum of points and authorities), but then stated that it was not going to strike Mr. Goffs'

⁶ The Goffs did not previously file this memorandum as a matter of strategy. Because they contended that Green's testimony was fabricated, they did not want to disclose their legal contentions about waiver until after he testified so as not to give him the opportunity to tailor his testimony to avoid the negative impact of the Goffs' argument.

declaration. However, the Court granted the Firm's objections on the ground that the exhibits attached to Mr. Goff's second supplemental declaration were not properly authenticated, thereby excluding all those exhibits from evidence. RT (10-2-09) 3:24-4:20.⁷

Thereafter, on October 2, the Court below made an oral statement of decision, granting the Firm's petition and motion to confirm arbitration award, explaining in detail its grounds for doing so. RT (10-2-09) 3-20, 25-30, 35-36. On November 3, 2009, the Court signed an order (AA 341) and judgment (AA 344) to that effect.

On November 20, 2009, the Goffs filed a Notice of Appeal from the judgment. AA 346.

Factual Background

The relevant proceedings in the DRS fee dispute arbitration are summarized below:

On January 15, 2008, the Goffs filed a petition for arbitration with the Los Angeles County Bar Association Dispute Resolution Services, Inc. ("DRS") in which they requested binding arbitration. AA 34. The petition form had a blank for the name of the individual attorney, which the Goffs indicated was Glaser, and a separate blank for the name of the law firm, which they indicated was Christensen, Glaser, Fink, Jacobs, Weil & Shapiro LLP.

On March 10, 2008, DRS sent a letter to Glaser, advising her that if a refund of fees were awarded, the State Bar could place Glaser on temporary inactive status until the refund was paid; that if she believed that she should not be personally responsible for any such refund, she was to notify DRS within 15 days as to the person(s) responsible, that her failure to do so might result in her being held personally responsible for any such refund and subject to the above State Bar sanction (referencing Business and Professions Code § 6203(d)); and that any person so

⁷ Notwithstanding the trial Court's striking of the Goffs' memorandum on the issue of waiver and supplemental memorandum of points and authorities, the Court stated that it had read those papers and referred to the arguments therein in its oral statement of decision rendered on October 2. RT (10-2-09) 20:22-26, 25:17-21.

designated by her would be added as a party to the proceeding. AA 229.⁸

On or about April 7, 2008 (dated April 3, 2008), Glaser *and* the Firm, as respondents in the arbitration, filed a response to the petition for arbitration, in which they declined binding arbitration. AA 20.

On July 16, 2008, Reuben as Chairman of the Panel, wrote a letter asking whether Glaser *and* the Firm would agree to binding arbitration, stating that if so, a stipulation to that effect would follow. AA 47.

On July 31, 2008, attorney Green responded to the July 16 letter, stating that the *Firm* agreed to binding arbitration (but making no response on behalf of Glaser). AA 49.

On August 8, 2008, Reuben sent a letter to the Goffs and attorney Green, confirming that both sides had by then agreed to binding arbitration, and enclosed a blank stipulation for binding arbitration form, requesting that *both sides* sign and return the same to Reuben's office.

Concurrently, Reuben sent a notice of hearing, the caption of which listed Glaser *and* the Firm as separate and distinct respondents (as did the reference line of his correspondence). AA 51-53.

On August 18, 2008, attorney Green mailed to Reuben a copy of the stipulation for binding arbitration as signed by the Firm. AA 54-56. The previously blank stipulation form had been filled in by the Firm, and referred only to the Firm, and not Glaser, as a party respondent in the caption; and the letter of transmittal stated that "Christensen Glaser's" election for binding arbitration was enclosed. However, the reference line in the letter referred to the name of the case as "Goff v. Glaser." AA 54-56.

On September 30, 2008, Mr. Goff sent an e-mail to Reuben stating that he and his wife had decided not to enter into a stipulation for binding arbitration. AA 26.

⁸ This document (which the Goffs attached as an exhibit to their filings below) was excluded by the aforesaid October 2 ruling of the Court.

On September 30, 2008, attorney Green sent an email to Reuben, contending that the Goffs had previously agreed to binding arbitration, stating “we also agreed the arbitration will be binding,” and adamantly objected to the Goffs’ position. AA 253.⁹

On October 1, 2008, Mr. Goff sent a letter to Reuben reviewing the history of the binding vs. non-binding arbitration issue, stating that after respondent’s had rejected the Goffs’ initial offer of binding arbitration, the Goffs had not renewed the offer nor signed a stipulation for binding arbitration, and that if Reuben believed respondent’s current position merited further consideration, Mr. Goff would like an opportunity to more fully brief the issue. AA 251.¹⁰

On December 5, 2008, attorney Green sent a letter to Reuben requesting that the Panel set a hearing immediately to resolve the binding vs. non-binding arbitration issue. AA 28.

On December 11, 2008, Reuben sent a letter on behalf of the Panel ruling that on the basis of Rule 39(d) of the DRS arbitration rules, and based upon the history of the communications from the parties regarding binding and non-binding arbitration, the arbitration would proceed as binding. AA 31.

On March 25, 2009, the arbitration hearing was held. Prior to the receipt of testimony at the hearing, Mr. Green moved for continuance on behalf of his clients. In oral testimony in the instant proceeding on September 22, 2009, Green claimed that during the colloquy regarding his motion for continuance, Reuben asked Mr. Goff if the Goffs would agree to proceed with the arbitration as non-binding, to which Mr. Goff, after conferring with his wife in another room, answered in the negative. RT (9-22-09) 7:19-9:28. At the September 22, 2009 hearing, Mr. and

⁹ This document (which the Goffs attached as an exhibit to their filings below) was excluded by the aforesaid October 2 ruling of the Court.

¹⁰ This document (which the Goffs attached as an exhibit to their filings below) was excluded by the aforesaid October 2 ruling of the Court.

Mrs. Goff both testified that no such question nor answer occurred at the arbitration hearing, nor did they confer in another room about the question. RT (9-22-09) 34:25-35:6; 48:9-14; 51:21-52:15; 54:23-55:3; 55:8-26; 56:7-22.

Based upon the oral testimony of the witnesses at the hearing on September 22, on October 2, the Court below found that the testimony of Green was credible and that the testimony of the Goffs was not; finding, however, that the Goffs had not fabricated, but merely had a failure of memory.¹¹ RT (10-2-09) 14:17-17:20. The Court remarked that it factored into its credibility determination the fact that although attorney Green testified that his client, attorney Wright from the Firm, was present at the arbitration hearing during the motion for continuance colloquy, Green did not offer a declaration by Mr. Wright, nor offer his oral testimony at the September 22 hearing. RT (9-22-09) 14:27-15:1; 21:2-23:12. Notwithstanding this suspicious circumstance, the Court found that Green's testimony was credible. RT (9-22-09) 21:2-23:12. At the conclusion of the October 2 hearing, the Court asked Green why he had not offered the testimony of Mr. Wright, to which Green responded: "It's a memory issue."¹² RT (9-22-09) 28:13-29:3.

¹¹ Respectfully, based on the trial Court's finding that the testimony of Green is credible, its finding that the Goffs' testimony was not fabrication, is not reasonable. Green testified that the Goffs retired to a separate room for several minutes to confer about how to answer Rueben's question, and upon their return, answered the question in the negative. RT (9-22-09) 7:19-9:28. According to Green, this was not a fleeting question and answer, but a well-pondered issue that was considered over a period of several minutes. The Goffs denied that the question was asked, denied that they left to confer about how to answer it, but said if the question had been asked, they would have jumped at the chance to answer it in the affirmative. See above RT references. Under these circumstances, it is hard to imagine that they would have forgotten the scenario described in Green's testimony. Frankly, the reasonable interpretation of the situation is that either the Goffs or Green are lying. The Goffs respectfully submit that they are telling the truth, notwithstanding the contrary finding of the trial Court.

¹² The connotation of this answer appears to be that Mr. Wright did not remember the subject question and answer scenario, and therefore could not be offered as a competent witness to that alleged fact. It is hard to imagine that attorney Wright would have forgotten the scenario as testified to by Green, especially since it included the alleged fact that the Goffs had left the arbitration room for several minutes to confer about the question, not answering in the

For all of the reasons stated above, the Goffs continue to contend that Green fabricated his testimony about the subject question and answer at the inception of the arbitration proceeding to form the factual basis of his waiver/estoppel argument. Nonetheless, the Goffs are aware that pursuant to the rules of appellate review of credibility determinations by a trial Court, this Court is bound by the finding of the Court below that the testimony of Green is credible. Nonetheless, the Goffs respectfully submit that the content of Green's testimony does not establish a factual predicate for the application of the doctrines of waiver, equitable estoppel, or judicial estoppel.

QUESTIONS PRESENTED

1. Did the Court below err in ruling that the Goffs were judicially estopped from contending that the arbitration award should be vacated as a binding award and declared to be non-binding?¹³
2. If not judicially estopped to so contend, pursuant to CCP § 1286.2(a)(4), did the arbitration panel exceed its powers by violating the applicable arbitration rules of DRS, and the offer and acceptances rules of contract law, in ruling that the arbitration award was binding, such that the award should be vacated as binding and declared to be non-binding?
 - a. Did the Firm's purported acceptance of binding arbitration after it had initially declined the Goffs' initial offer of binding arbitration form a written agreement between the Firm and the Goffs to binding arbitration; or did the initial declination of binding arbitration by the Firm and Glaser terminate the Goffs' initial offer such that the

negative until their return.

¹³ It is unclear whether the Court below based its decision on the grounds of waiver and equitable estoppel, as well as the ground of judicial estoppel. However, from a reasonable reading of RT (10-2-09) 23:13-28:3, it appears that the Court based its decision solely on the ground of judicial estoppel. But in the event that it based its decision on the grounds of waiver and/or equitable estoppel as well, the Goffs contend that it was in error in doing so, and discuss their reasons for this contention below in Argument IV.

offer could not thereafter be accepted?

b. Assuming that the Goff's initial offer of binding arbitration could be accepted after it was initially declined by the Firm and Glaser, was it required to be thereafter accepted by both the Firm and Glaser, and if so, was it accepted by both, or only by the Firm?

3. Assuming that the arbitration panel exceeded its powers in ruling that the arbitration award was binding, did the award become binding by operation of law pursuant to Business and Professions Code § 6204 and DRS Rule 40, because the Goffs failed to file a rejection of the award and a request for a trial *de novo* in the Court below within 30 days after receiving notice of the award?

4. Were the exhibits to the Second Supplemental Declaration of George Goff properly authenticated?

ARGUMENT

I. JUDICIAL REVIEW IS PROPER TO DETERMINE WHETHER AN ARBITRATION PANEL EXCEEDED ITS POWERS IN RULING THAT A NON-BINDING ARBITRATION WAS BINDING.

Any party to an arbitration in which an award has been made may petition the Court to confirm, correct or vacate the award. CCP § 1285. A response to such a petition may request the Court to dismiss the petition or to confirm, correct or vacate the award. CCP § 1285.2. The Court must vacate the award if it determines that the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted. CCP § 1286.2.

An arbitrator is deemed to have exceeded his powers if he rules that a non-binding arbitration is binding. *Trabuco Highlands Community Association v. Head* (2002) 96 C.A.4th

1183, 1189. In so holding, *Trabuco* stated at 1189-1190:

“In *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 8-12 . . . our Supreme Court examined this statutory limitation [CCP 1286.2] and the policies in favor of arbitration finality and concluded that except for narrow exceptions, an arbitrator’s decision may not be reviewed for factual or legal errors. Nevertheless, the courts do not abandon all scrutiny of awards. When the issue goes to the integrity of the arbitration process itself, appellate courts have mandated de novo review of an arbitrator’s ruling.

“

“Independent judicial review of whether an arbitration is binding is necessary to preserve the integrity of the arbitration process and the judicial system. The notion that a party should be bound by an arbitration award and precluded from substantive judicial review is premised on the assumption the parties have *agreed* to such finality. . . . The binding nature of the arbitration sought to be confirmed is a structural aspect of the arbitration. With respect to such aspects, the Supreme Court observed in *Moncharsh*, ‘A . . . reason . . . we tolerate the risk of an erroneous decision [of fact or law by the arbitrator] is because the Legislature has reduced the risk to the parties of such a decision by providing for judicial review in circumstances involving serious problems with the award itself, or with fairness of the arbitration process.’

“This protection has caused the courts to review carefully whether parties intended to submit to binding arbitration.”

II. THE PANEL’S RULING THAT THE CLIENTS AND THE ATTORNEYS MUTUALLY AGREED TO BINDING ARBITRATION IS ERRONEOUS.

The Panel’s ruling that the arbitration was binding was based on the rules of offer and acceptance in the law of contracts. On pages 1 and 2 of Statement of Decision and Award (AA

59), the Panel held:

“This matter is subject to binding arbitration. The Goffs agreed to binding arbitration in their initial submission to the Los Angeles County Bar Association Dispute Resolution Services. The Firm indicated non-binding arbitration in its initial submission, but then changed its position to elect binding arbitration in agreement with the Goffs. . . . A determination was made on December 11, 2008, ruling that the original election by the Goffs of binding arbitration was an offer that was accepted by the Firm and could not be revoked once accepted.”

The Panel’s ruling is directly refuted by the State Bar Committee on Mandatory Fee Arbitration, Arbitration Advisory 08-01 (AA 137):

“If one party initially chooses binding arbitration when initially submitting the request form but the respondent indicates non-binding on the reply form, the initiator’s offer of binding arbitration is considered effectively rejected by the respondent and the matter will proceed as non-binding arbitration. If the respondent subsequently elects binding arbitration, the arbitration will not become binding unless both parties subsequently agree in writing to accept binding arbitration.”

The Advisory is consistent with well-established rules of contract law:

“It is hornbook law that an unequivocal rejection by an offeree, communicated to the offeror terminates the offer Once this occurs, the offeree cannot later purport to accept the offer and thereby create an enforceable contract.” *Guzman v. Visalia Community Bank* (1999) 71 C.A.4th 1370, 1376.

Pursuant to the above rules, the rejection by Glaser and the Firm of the Goffs’ offer of binding arbitration contained in the Goffs’ petition for arbitration terminated that offer. Thus, the Firm’s subsequent signing of the stipulation to binding arbitration cannot be deemed an

acceptance of the Goffs' terminated original offer.

DRS Rule 39 (AA 157) invokes the law of contracts by using the nomenclature of "agreement" between the parties with regard to the issue of binding arbitration:

"(a) If both parties *agree* in writing that the arbitration shall be binding, no appeal from the award is allowed . . .

"(b) At any time prior to the actual taking of evidence at the hearing, the parties may *agree* in writing to be bound by the award.

"(c) The parties may *agree* to be bound only after the dispute has arisen.

"(d) Once both parties have *agreed* to be bound neither party can withdraw from the arbitration process without written consent from the other side." (Emphasis added.)

The arbitration award referenced contract law in reciting its ruling that the arbitration was binding: "The original election by the clients of binding arbitration was an *offer* that was *accepted* by the lawyers and *could not be revoked once accepted*. Award, 2:5-7. (Emphasis supplied.) AA 59-60.

The vice of the binding arbitration ruling in the Award was its failure to apply the above-quoted hornbook rules of contract law regarding offers and rejections of offers. The Award mentioned that prior to the Firm's purported late acceptance of the Goffs' initial offer of binding arbitration, Glaser and the Firm had rejected that offer. However, the Award erroneously failed to recognize that such rejection terminated the Goffs' offer, thereby vitiating the legal effect of the Firm's later purported acceptance to form an agreement for binding arbitration.

Application of the rules of statutory interpretation to the DRS arbitration rules also supports this result. One of the rules of statutory interpretation provides that a reasonable and common sense interpretation that will result in wise policy rather than mischief or absurdity

should be given to a provision. *Wotton v. Bush* (1953) 41 C.2d 460, 467. The interpretation proffered by the Firm violates this rule. It would be unfair to allow the attorneys to elect binding arbitration after they had been advised of the makeup of the arbitration panel, when the clients were required to make the election in ignorance of this information. Furthermore, under the Firm's interpretation, the attorneys could choose binding arbitration on the eve of the hearing, which would either necessitate the clients' going to a binding arbitration when they prepared for non-binding, or delay the hearing by the client's having to seek a continuance. Moreover, per Rule 33 of the DRS Rules, discovery is only allowed where the arbitration is binding (AA 167); therefore, late acceptance of binding arbitration by the attorneys, if binding on the clients, would deprive the clients of the right to discovery, or necessitate a continuance of the hearing to conduct discovery.

Finally, the Panel's sending out a written stipulation to be signed by Glaser and the Firm, on the one hand, *and* the Goffs, on the other, would have been a useless act if only the attorneys and not the clients were required to sign the stipulation.

III. THE PANEL'S RULING THAT THE ARBITRATION WAS BINDING IS ALSO IN ERROR BECAUSE IT IS IN VIOLATION OF THE APPLICABLE STATUTE AND ARBITRATION RULE THAT REQUIRE THAT *ALL PARTIES* MUST AGREE TO BE BOUND IN WRITING; AND ATTORNEY GLASER (WHO WAS A SEPARATE PARTY TO THE ARBITRATION) DID NOT SO AGREE.

Business and Professions Code § 6204 provides in material part:

“(a) *The parties* may agree in writing to be bound by the award . . . at any time after the dispute over fees, costs, or both, has arisen. In the absence of such an agreement, either party shall be entitled to a trial after arbitration if sought within 30 days”

DRS Rule 39, quoted above, provides in relevant part:

“(b) At any time prior to the actual taking of evidence at the hearing, *the parties* may agree in writing to be bound by the award.”

In referring to “the parties,” the above section clearly implies that *all parties* (i.e., all parties petitioner and all parties respondent) must agree in writing to be bound by the award; otherwise it will be non-binding.

Business and Professions Code § 6203(d) provides in relevant part:

“In any matter arbitrated under this article in which the award is binding . . . if . . . the award, judgment, or agreement reached after mediation includes a refund of fees or costs, or both, to the client and . . . the attorney has not complied with that award, judgment, or agreement the State Bar shall enforce the award, judgment, or agreement by placing the attorney on involuntary inactive status until the refund has been paid.”

Arbitration Advisory 94-04 of the State Bar Committee on Mandatory Fee Arbitration (AA 350) discusses the practical application of section 6203(d):

“[Section 6203(d) provides] that all fee arbitration awards requiring the attorney to refund fees, costs or both, which have become final, may be enforced against the attorney who fails to comply with the award by placing the attorney on temporary inactive status until he or she complies with the award. In most cases which are arbitrated, one individual attorney will have provided the services for which a refund may be ordered and there will be no confusion as to who will be subject to the interim suspension in the event of non-payment. In the case where a law firm provides the services, however, it will be necessary for the arbitrator or panel to determine and specify each attorney who is to be responsible for satisfaction of the award and who may be subject to the enforcement procedures under Section 6302(d) in the event that it is not paid. There is little guidance

in the legislative history of the new law concerning the criteria for identifying the ‘responsible individual attorney’ in a case where a law firm has provided the legal services in question. . . . The following factors thus are suggested for consideration by the arbitrator or panel in designating the individual responsible attorney or attorneys to be specified in the award. . . .”

Included in the list is the criteria of which attorney or attorneys at the firm actually performed the services on the matter in question, or directly caused the refund to be due.

The DRS form arbitration petition requests that the client identify both the name of the individual attorney as well as the name of the law firm. AA 34. In their DRS arbitration petition, the Goffs’ identified Glaser as the individual attorney. AA 34.

On March 10, 2008, DRS sent a letter to Glaser advising her that if a refund of fees were awarded, the State Bar could place Glaser on temporary inactive status until the refund was paid; and if she believed that she should not be personally responsible for any such refund, she was to notify DRS within 15 days as to the person(s) responsible, and that her failure to do so might result in her being held personally responsible for any such refund and subject to the above State Bar sanction, referencing Business and Professions Code § 6203(d); *and that any person so designated by her would be added as a party to the proceeding.* AA 229.¹⁴

Pursuant to the dictates of due process, it is obviously necessary to include the probable “responsible individual attorney(s)” as parties respondent so that the arbitrators can properly issue the award against those attorneys for the purpose of State Bar sanctions should such sanctions become necessary. The aforesaid DRS letter to Glaser was therefore a practical due process step.

¹⁴ This document, which the Goffs submitted as an exhibit in their arbitration filing, was excluded by a ruling of the Court on October 2.

On substantially all of the arbitration pleadings and the reference lines on all of the arbitration correspondence herein, Glaser is included as a party respondent separate and distinct from the Firm. See exhibits to the motion to confirm arbitration award. AA 1, et seq. The only documents on which this practice was broken was in the caption of the stipulation to binding arbitration, filled in and signed by the Firm (AA 55), and the caption of the Statement of Decision and Award (AA 59).

One could speculate that Glaser and the Firm were well aware that in order for the stipulation to be legally effective to create binding arbitration, it was required to be signed by both Glaser and the Firm as separate and distinct parties respondent; and that by excluding Glaser's signature, it provided a chance for the lawyers to claim that the arbitration was non-binding in the event that they did not prevail in the arbitration. One could further speculate that ultimately the Panel realized that Glaser had not signed the stipulation, and that therefore the Award could not properly be ruled to be binding; so the Panel therefore excluded her name from the caption of the Statement of Decision and Award and stated in the first sentence of the Award that the disputing parties were the Goffs and the Firm, making no mention of Glaser as a party respondent. AA 59.

Nonetheless, whether or not the attorneys acted by design in leaving Glaser's signature off of the stipulation, and/or whether the Panel was culpable on the issue, is not relevant to the outcome. Since Glaser's written consent to be bound by the arbitration was necessary, and her consent was not given, the Panel erred in ruling that the arbitration was binding.

Significantly, in its written papers below, the Firm did not argue that Glaser was not a party respondent. Rather, it argued that her written consent was given by virtue of attorney Wright's signing the stipulation to binding arbitration as a partner on behalf of "Christensen, Glaser, et al.," contending that Glaser as an individual respondent was included in the "et al."

AA 324, 326 (lines 3-8). Respectfully, this is a specious argument. Per the above authority, because Glaser, in her role as the “responsible individual attorney,” was included as a party respondent separate from the Firm, due process of law as applied to her rights as a party required that she must indicate her separate consent in writing to be bound by the Award, such that her consent could not be presumed by the signature of another partner on behalf of the Firm.

IV. THE CONTENTION THAT BY REASON OF THEIR CONDUCT DURING THE ARBITRATION HEARING, THE CLIENTS WAIVED THE RIGHT, OR ARE EQUITABLY ESTOPPED OR JUDICIALLY ESTOPPED, TO CLAIM THAT THE ARBITRATION WAS NON-BINDING, IS WITHOUT MERIT.

A. None of the Waiver or Estoppel Grounds Was Discussed in the Arbitration Decision; They Were Late-Presented by the Attorneys; and the Trial Court's Consideration of the Same Was Inconsistent With Its Striking of the Clients' Responsive Late-Presented Evidence and Arguments.

At the outset, it must be noted that the evidence of the purported question by Reuben and answer by the Goffs about non-binding arbitration was not included in the Firm's original moving papers. See AA 1-123. It was not presented until the filing of the Firm's reply to the Goffs' opposition to the Firm's motion to confirm arbitration award. AA 143, 154 (¶¶ 3-4).

Furthermore, although the Award recited the Panel's opinion as to how the arbitration became binding, it made no mention of this evidence whatsoever, nor did it rely upon it as an alternative reason to support its binding arbitration ruling. AA 59-60 (pp. 1-2 of the Award). Nevertheless, that evidence and the contentions of waiver, equitable estoppel and/or judicial estoppel based upon it, were the primary focus in the trial Court's oral statement of decision in favor of the Firm.

RT (10-2-09) 23:2-28:3.

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Respectfully, the trial Court's reliance on this late-presented evidence by the Firm was inconsistent with its ruling striking the late-presented evidence by the Goffs. RT (10-2-09) 4:7-20; 6:15-7:18; 10:11-14:10. A notice of motion must state in the first paragraph exactly what relief is sought and why (what grounds). CCP § 1010; CRC 3.110(a); see *People vs. American Sur. Ins. Co.* (1999) 75 C.A.4th 719, 726. A court cannot grant different relief, or relief on different grounds, than stated in the notice of motion. *Ibid.*

In first presenting the purported non-binding question and answer evidence and the waiver/estoppel argument in its reply to the opposition to its motion (AA 143, 154), the Firm failed to comply with the statutory notice of motion rules. Thus, the trial Court's granting relief to the Firm on the basis of the late-filed evidence and contentions was improper. However, even if the trial Court were to expressly grant permission to the Firm to raise this issue late, respectfully, it would appear to be a discriminatory abuse of discretion to disallow the same grace to the Goffs; but instead, to strike the Goffs' late-presented evidence and arguments. This is especially true since it is apparent that it was the Firm's late injection of the waiver/estoppel evidence and argument, as well as its late attack on the Goffs' bona fides in the underlying litigation, that required the Goffs to file additional papers to counter the waiver/estoppel contention, and to bolster their overall opposition. See Goffs' late-filed papers. AA 214, 219, 308.

The vice of the Firm's late-presented evidence and argument was further compounded, because at the time that it presented attorney Green's declaration regarding the purported non-binding arbitration question and answer (AA 143, 154 (¶¶ 3-4)), the Firm argued that the Goffs' answer constituted a "waiver" of their right to claim that the arbitration was non-binding. AA 143, 150-151. After the Goffs filed a memorandum of points and authorities demonstrating that the evidence testified to by Green did not establish all essential elements of a waiver (AA 328),

the Firm waffled, claiming that although their prior written argument referred to “waiver,” it really meant “equitable estoppel.” AA 331-333.

The Goffs believe that ultimately, the Court below did not rely on either the Firm’s waiver or equitable estoppel arguments in granting the motion to confirm the award as binding. Rather, it ruled *sua sponte* that the Goffs were “judicially estopped” from contending that the Panel was in error in ruling that the arbitration was binding. RT (10-2-09) 23:13-28:3.¹⁵

B. Application of the Doctrines of Waiver, Equitable Estoppel and/or Judicial Estoppel Constitutes a Violation of the Statutory Requirement That a Fee Dispute Arbitration Award is Non-Binding Unless the Parties “Agree in Writing” to be Bound.

Business & Professions Code § 6204 provides in material part:

“(a) The parties may *agree in writing* to be bound by the award . . . at any time after the dispute over fees, costs, or both, has arisen. In the absence of such an agreement, either party shall be entitled to a trial after arbitration if sought within 30 days”

DRS Rule 39 provides in relevant part (AA 157):

“(a) If both parties *agree in writing* the arbitration shall be binding, no appeal from the award is allowed . . .

“(b) At any time prior to the actual taking of evidence at the hearing, the parties may *agree in writing* to be bound by the award.” (Emphasis supplied).

The trial Court’s application of the doctrines of waiver, equitable estoppel and/or judicial estoppel as a basis for a judicial conclusion that the Award was binding effectively abrogated the

¹⁵ As noted above in Questions Presented, it is unclear whether the Court below based its decision on the grounds of waiver and equitable estoppel, as well as the ground of judicial estoppel. However, from a reasonable reading of RT (10-2-09) 23:13-28:3, it appears that the Court based its decision solely on the ground of judicial estoppel.

above statute and DRS rule by permitting the Award to be binding without an agreement in writing by the parties to that effect. Also, it eliminated the certainty of written evidence in the form of a written contract as mandated by the statute and rule; and in its place, required the Court below to determine the credibility of oral testimony to decide whether the Award should be deemed binding. Moreover, it did so in the context of significant uncertainty in the evidence, in that when questioned by the Court as to why attorney Green did not proffer the arguably superior evidence of testimony by his client, attorney Wright, Green replied, "It's a memory issue," (RT (10-2-09) 29:2-3), connoting that Wright did not remember the purported subject question and answer scenario. Respectfully, the Goffs contend that Wright did not remember the scenario because it did not occur.

Finally, the trial Court's ruling constituted an unconstitutional impairment of the obligation of the contract of the parties to proceed by non-binding arbitration. U.S. Const., Art. I, § 10 provides that no state shall pass a "law impairing the obligation of contracts." The California Constitution has a similar provision. Cal Const., Art. I, § 9. Although the provision in the U.S. Constitution proscribes legislative enactments only, it has been held that pursuant to the California Constitution provision, neither the Legislature by an enactment nor the Courts by judicial ruling may impair the obligation of a valid contract. *Bradley vs. Superior Court* (1957) 408 C.2d 509, 519; accord, *Colony Hill v. Ghamaty* (2006) 143 C.A.4th 1156, 1169-1170.

C. The Waiver Contention Lacks Merit.

"Waiver is an intentional relinquishment of a known right after knowledge of the facts. It may be either express or implied. . . . The doctrine operates defensively. In other words, it protects a party from unfair advantage sought by another. It is not designed to permit a person, offensively, to thereby obtain unfair advantage." *Supervalu, Inc. vs. Wexford Underwriting Managers, Inc.* (2009) 175 C.A.4th 64, 76-77.

“Waiver is the intentional relinquishment of a known right. It cannot be established without a clear showing of intent to give up such right.” *Lekse v. Municipal Court of Ventura County, Civil Division (Greenwood and Snyder)* (1982) 138 C.A.3d 188, 192.

“Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts.’ . . . The burden, moreover, is on the party claiming a waiver of the right to prove it by *clear and convincing evidence that does not leave the matter to speculation, and ‘doubtful cases will be decided against the waiver.’*” *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 C.A.4th 1306, 1320. (Emphasis added).

“[O]ne cannot impliedly waive a right before such right exists.” *Maltby v. Conklin* (1920) 50 C.A. 201, 204.

Pursuant to the above rules, the evidence in this case is insufficient to establish that the Goffs intentionally waived a known right to have the fee dispute resolved by non-binding arbitration. Reuben’s purported question to Mr. Goff as to whether he would agree to non-binding arbitration establishes that at that moment, the dispute was subject to resolution by binding arbitration. Otherwise, there would have been no need for Reuben’s question. Therefore, at the time the question was asked, the Goffs did not have an existing right to non-binding arbitration. Because waiver is the intentional relinquishment of a known right, and one cannot impliedly waive a right before it exists, at the time the Goffs purportedly answered the question in the negative, they could not be deemed to have waived the nonexistent right to non-binding arbitration.

D. The Equitable Estoppel Contention Lacks Merit.

The doctrine of equitable estoppel is codified in Evidence Code § 623: “Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such

statement or conduct, permitted to contradict it.” The separate elements of equitable estoppel are enunciated in *Estate of Bonanno v. Connolly* (2008) 165 C.A.4th 7, 22: “Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be [sic] acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.” None of these elements exists in this case.

The only evidence on which the doctrine of equitable estoppel is premised herein was the testimony of attorney Green. That evidence failed to establish any of the required elements. Assuming *arguendo* that Green’s testimony were true, when answering Reuben’s question in the negative, the Goffs did not make a false statement of fact, nor did they make any statement for the purpose of deliberately misleading the attorneys.

Moreover, there is no evidence that the attorneys relied on any statement of the Goffs to their detriment, nor that they suffered any injury as a result of the Goffs’ purported conduct. There is no evidence that the attorneys ever were asked during the arbitration proceeding whether they were willing to proceed by non-binding arbitration. There is no evidence that the attorneys would have been willing to proceed by non-binding arbitration even if the Goffs, *arguendo*, had answered the purported question in the affirmative. The stated reason why Green sought the continuance of the arbitration hearing was to give the attorneys time to engage an expert witness on the issue of whether the attorneys’ conduct in the underlying Goff-Kinkade arbitration negligently ran up the cost thereof, thereby entitling the Goffs to a refund of fees paid to the attorneys. RT (9-22-09) 23:10-24:3. It is undisputed that at the end of the day’s testimony at the arbitration hearing, the Panel gave the attorneys the opportunity to in effect get the benefit of their requested continuance by ruling that within a reasonable time thereafter, they could submit

an offer of proof as to what their expert witness would testify, and if the Panel felt that evidence was relevant, it would reconvene the hearing so that the attorneys could present that testimony. RT (9-22-09) 23:10-24:3; 38:20-39:12. Because the attorneys effectively obtained what they requested in their motion for continuance, they could not be deemed to have suffered any injury by reason of the Goffs' alleged negative answer to Reuben's purported question.

For the above reasons, the evidence was insufficient to support application of the doctrine of equitable estoppel.

E. The Judicial Estoppel Contention Lacks Merit.

The purpose and elements of judicial estoppel are set forth in *Aguilar vs. Lerner* (2004) 32 C.4th 974, 986-987:

“Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations]. The doctrine's dual goals are to maintain the integrity of the judicial system and protect parties from opponents' unfair strategies. [Citation.] Application of the doctrine is discretionary.’ [Citations]. The doctrine applies when ‘(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) *the party was successful in asserting the first position* (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) *the first position was not taken as a result of ignorance, fraud, or mistake.*’ [Citations].” (Emphasis supplied).

Capital Corp. v. Berglass (2005) 138 C.A.4th 825, 832, further elaborated on the principles of the doctrine:

“The courts invoke judicial estoppel to prevent judicial fraud from a litigant's deceitful assertion of a position completely inconsistent with one previously asserted,

thus compromising the integrity of the administration of justice by creating a risk of conflicting judicial determinations. . . . As a general rule, a court should apply the doctrine only when the party's taking an inconsistent position succeeded in inducing a court to adopt the earlier position or to accept it as true. If the party did not succeed, then a later inconsistent position poses no risk of inconsistent judicial determinations and consequently introduces 'little threat to judicial integrity.'"

"Judicial estoppel is applied with caution to avoid impinging on the truth-seeking function of the court" *Jogani v. Jogani* (2006) 141 C.A.4th 158, 175. "***Because of its harsh consequences the doctrine is to be applied with caution and limited to egregious circumstances.***" *Gottlieb v. Kest* (2006) 141 C.A.4th 110, 132. (Emphasis supplied).

Because one of the requisite elements for application of the doctrine is that the inconsistent position was previously asserted successfully by the party to be estopped, where that element is lacking, the doctrine will not be applied. See *Gottlieb v. Kest, supra* at 137-138; *People v. Felix* (2008) 169 C.A.4th 607, 614-615.

In addition to the foregoing elements, the inconsistent position asserted generally must be factual, rather than legal, in nature. *Capital Corp. v. Berglass* (2005) 138 C.A.4th 825, 832; *California Amplifier, Inc. v. RLI Insurance Co.* (2001) 94 C.A.4th 102, 118.

"[Because judicial estoppel] should be invoked only in egregious cases . . . it is usually limited to cases where a party misrepresents or conceals material facts [Citation]. Appellants' changing legal arguments, which resulted from their different positions in the two lawsuits, is a reasonable litigation tactic and does not undermine the integrity of the judicial process." *California Amplifier, Inc. v. RLI Insurance Co., supra* at 118.

In the instant case, at a minimum, there is insufficient evidence as to the third and fifth elements of judicial estoppel.

1. Insufficient Evidence of Third Element: Success

As to the third element, the Goffs' purported answer to Reuben's alleged question did not change the binding versus non-binding aspect of the arbitration. Thus, there is a lack of proof that the Goffs' purported answer achieved anything that can be deemed to constitute success.

In the trial Court's oral statement of decision, it stated that at the arbitration hearing, "there was an opportunity to have a non-binding arbitration, which the Goffs declined." RT (10-2-09) 17:18-20. Respectfully, this was a mischaracterization of the evidence. No evidence was adduced as to what would have happened if the Goffs had responded in the affirmative to Reuben's purported hypothetical question regarding non-binding arbitration. There was no evidence that the Firm would have agreed to proceed with non-binding arbitration. In the absence of such evidence, it is a mischaracterization of the evidence to find that the Goffs had the "opportunity" to proceed by non-binding arbitration, which they declined.

In summary, the evidence was insufficient to establish the element of success by the Goffs by reason of their purported answer to Reuben's alleged hypothetical question, because the purported question and answer changed nothing.

2. Insufficient Evidence of Fifth Element: Absence of Ignorance or Mistake

Assuming *arguendo* that the Goffs actually had the opportunity to proceed by non-binding arbitration on the day of the arbitration hearing, and declined to do so, judicial estoppel would nonetheless be inapplicable because of the absence of proof that the Goffs' purported answer to Reuben's alleged question was not the result of ignorance or mistake.

At the time that the Goffs purportedly made the declination, it is evident that they did not appreciate the fact that Glaser was a separate and distinct party respondent from the Firm, that therefore Glaser's written consent to binding arbitration was separately required, and that she had not given such consent. Thus, if the Goffs had chosen to proceed by binding arbitration, they

could not have achieved their goal, because if they had prevailed in the arbitration, Glaser could have vitiated their victory by asserting after the fact that she had not consented in writing to be bound by the award. However, if the attorneys had prevailed in the arbitration (which they did), they could have remained silent about Glaser's non-consent to binding arbitration and thereby confirmed their victory (which they did). Therefore, if the Goffs had known about the fact and relevance of Glaser's non-consent at the relevant time, it would have been fool-hardy for them to insist on binding arbitration, as they are purported to have done.

3. Appellants' Purported Position Was Legal Rather Than Factual In Nature.

As mentioned above, for application of judicial estoppel, the inconsistent positions asserted generally must be factual rather than legal in nature. The Goffs' purported answer to Reuben's alleged question constituted the assertion of a procedural position, and thus was legal rather than factual in nature.

4. The Instant Case Does Not Present an Egregious Circumstance in Which the Court is Required to Prevent Judicial Fraud From a Litigant's Deceitful Assertion of a Position Completely Inconsistent With the One Previously Asserted.

The Goffs are bound by the trial Court's finding that the testimony of Green regarding the purported question and answer is credible. Similarly, the Firm is bound by the Court's finding that the Goffs' denial of the occurrence of the question and answer was not perjurious, but resulted from their lack of memory regarding the event. Based on this finding, the egregious circumstance/judicial fraud/litigant's deceitful assertion rationale for the application of the doctrine of judicial estoppel is not present in this case. Therefore, it was improper for the Court below to apply the doctrine.

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V. THE TRIAL COURT'S CONCLUSION THAT, EVEN ASSUMING THE PANEL IMPROPERLY RULED THAT THE AWARD WAS BINDING, IT BECAME BINDING BY THE CLIENTS' FAILURE TO FILE A REJECTION OF THE AWARD AND REQUEST FOR TRIAL *DE NOVO* WITHIN 30 DAYS AFTER SERVICE OF THE AWARD, IS WITHOUT MERIT.

Business and Professions Code § 6204(a) provides in material part:

“The parties may agree in writing to be bound by the award In the absence of such an agreement, either party shall be entitled to a trial after arbitration if sought within 30 days”

Rule 40 of the DRS Rules provides in relevant part:

“When any dispute is submitted to mandatory arbitration under these Rules and all parties have not agreed in writing to be bound, the award shall nevertheless become final and binding on the parties, with the same effect as if the parties had originally agreed in writing to be bound, unless within 30 days after service of the award, a party . . . files a rejection of arbitration award and request for trial after arbitration”

The undisputed evidence demonstrates that the Goffs properly followed the written instructions contained in the Notice of Rights After Fee Arbitration attached to the Statement of Decision and Award as served upon the Goffs. AA 59, 70-76.

The Notice of Rights After Fee Arbitration provided:

Page 1: “This notice will explain the rights you may have now that the arbitration is completed. **To understand your rights, you must first determine whether the award is binding or non-binding, which should be stated in the award.**”

Page 4: “**If the award is binding, you must abide by it. There is no appeal from or new trial after a binding award. Even so, a binding award can be corrected**

or “vacated” (overturned) by a court, but only on limited grounds as set forth in Code of Civil Procedure section 1286.2 (see attached excerpts of the statute).”

(Emphasis added.)

The above Notice instructed the Goffs that they must first determine if the Award was binding or non-binding, and that said fact would be set forth within the Award. The subject Award expressly declared itself to be binding. AA 59 (at line 28). Therefore, pursuant to the aforesaid Notice, the Goffs understood that they were not entitled to a new trial following the binding award, but were entitled only to have it corrected or vacated on the limited grounds provided in CCP § 1286.2. The Goffs dutifully followed those instructions by not requesting a new trial, which they had been advised was a remedy available only when an Award declared itself to be non-binding. Rather, they sought to have the Award vacated in the instant proceeding pursuant to the ground set forth in CCP § 1286.2(a)(4).

It would be abusive to rule that by the Goffs’ compliance with the DRS instructions, the non-binding award became binding. Respectfully, under these circumstances, such a ruling would deny the Goffs due process and pervert substantial justice.

VI. THE COURT BELOW ERRED IN RULING THAT THE EXHIBITS TO THE SECOND SUPPLEMENTAL DECLARATION OF GEORGE GOFF WERE NOT PROPERLY AUTHENTICATED.

The Second Supplemental Declaration of George Goff sought to adduce in evidence two categories of documents: (1) various arbitration documents filed and/or served in the fee dispute arbitration proceeding, and various pieces of correspondence circulated amongst two or more of the following persons or entities: the arbitration petitioners; the arbitration respondents; DRS; the arbitration respondents’ attorneys; the arbitration Panel; and Reuben, the chairman of the Panel (AA 219-220); and (2) relevant documentary evidence that was presented to the arbitration Panel

during the fee dispute arbitration (AA 222), consisting of correspondence between George Goff and Patricia Glaser reflecting their negotiation of the terms of the attorney fee modification agreement of April 7, 2006.

The Goffs' authentication of the first category of documentary evidence was based upon the following Declaration testimony: "The documentary evidence relevant to the arbitration proceeding that gives rise to the instant petition to confirm arbitration award consists of various arbitration documents filed and/or served in the arbitration proceeding, and various pieces of correspondence circulated amongst two or more of the following persons or entities [followed by a listing of the subject persons and entities]. . . . [A]ll of the relevant documents are attached hereto collectively as Exhibit 4 in chronological order [thereby followed by a descriptive list of the documents, whether an arbitration document or a letter, showing the date of the filing of each arbitration document, and the identity of the sender and recipient, and date of each letter]. Most of the documents identified were already submitted by the Firm as exhibits to its previous filing in support of its motion to confirm arbitration award. See AA 1, et seq. and AA 3, et seq.

The second category of documents was authenticated pursuant to the following Declaration testimony: "The relevant documentary evidence that was presented to the arbitration Panel persuasively demonstrates that the Award's interpretation of the modification agreement is erroneous, such that the Award should properly have been in favor of the clients" The documents are a series of correspondence collectively attached as Exhibit 5 to the Supplemental Declaration, listing the sender, recipient, and date of each such piece of correspondence, including the signed modification agreement as the last of the documents. The second category of documents was clearly delineated as exhibits that had been presented to the arbitration Panel.

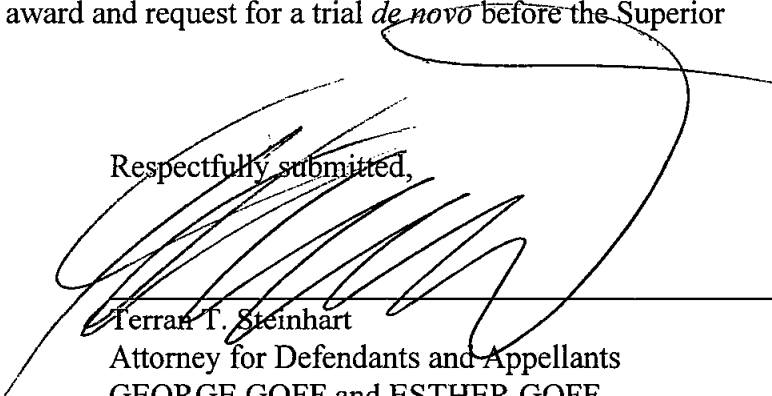
Although one could hypothesize the use of different language to authenticate the two above categories of documents, the Goffs respectfully submit that the language used by them

constituted satisfactory authentication.

CONCLUSION

For all of the reasons set forth above, the judgment appealed from should be reversed with instructions that the Court below should enter a new judgment to the effect that the arbitration Panel exceeded its powers in ruling that the arbitration Award was binding, that the arbitration Award was non-binding, and grant the Goffs 30 days from notice of the new judgment to file a rejection of the non-binding award and request for a trial *de novo* before the Superior Court.

Respectfully submitted,

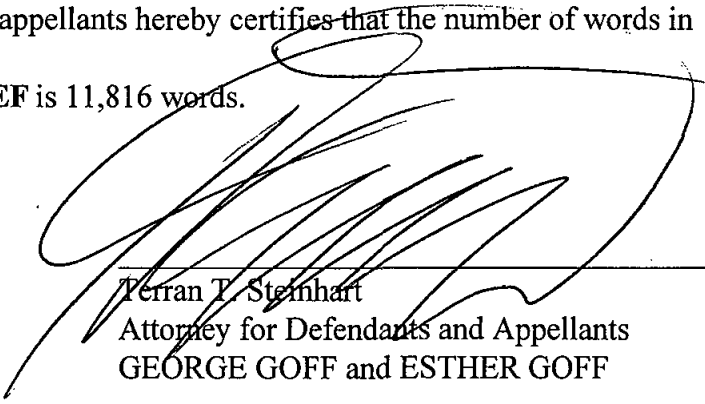


Terran T. Steinhart
Attorney for Defendants and Appellants
GEORGE GOFF and ESTHER GOFF

ATTORNEY'S CERTIFICATE OF COMPLIANCE WITH CRC 8.204(c)(1)

Counsel for defendants and appellants hereby certifies that the number of words in
APPELLANTS' OPENING BRIEF is 11,816 words.

Date: April 2, 2010



Terran T. Steinhart
Attorney for Defendants and Appellants
GEORGE GOFF and ESTHER GOFF

PROOF OF SERVICE BY MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 4311 Wilshire Boulevard, Suite 520, Los Angeles, California 90010-3717, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On the date set forth below, at the aforesaid place of business, one copy each of the document described as **APPELLANTS' OPENING BRIEF** was placed for deposit in the United States Postal Service in a sealed envelope, with postage fully pre-paid, addressed as set forth in the attached Service List to opposing counsel and the Superior Court judge care of the court clerk, and four copies to the California Supreme Court per said Service List; and said envelopes were placed for collection and mailing on said date following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 2, 2010 at Los Angeles, California.



Ferran F. Steinbart

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926\Appellants' Opening Brief